Survey of Washington Search and Seizure Law

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INTRODUCTION

This Survey is designed to assist lawyers and judges who must argue and resolve search and seizure issues in Washington State. The Survey summarizes the controlling state and federal cases on search and seizure law and uses as an additional reference W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT (1978) [hereinafter cited as LAFAVE, SEARCH AND SEIZURE.]

Washington courts are likely to analyze future search and seizure issues under both the fourth amendment and Washington Constitution article I, section 7. The difference in wording between the two provisions is substantial, suggesting different degrees or types of privacy protection.

U.S. Const. amend. IV: Security from unwarrantable search and seizure. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Wash. Const. art. 1, § 7: Invasion of private affairs or home prohibited. No person shall be disturbed in his private affairs, or his home invaded, without authority of law.


In applying the state constitution, the court has invalidated searches and seizures that were lawful under the fourth amendment. “The substantial difference in language (between the state and federal provisions) allows us to provide heightened protec-
This language has thus formed the basis for our refusal to follow United States Supreme Court decisions defining the extent of the freedom from unreasonable searches and seizures.” *State v. Chrisman*, 100 Wash. 2d 814, 818, 676 P.2d 419, 422 (1984).

This Survey summarizes the predominant treatment of search and seizure issues under the fourth amendment and under article I, section 7 to the extent that the state provision is interpreted differently from the federal. The Survey focuses primarily on substantive search and seizure law in the criminal context; it omits discussion of many procedural issues such as retroactivity and preserving state constitutional claims for appeal, see, e.g., *In re Sauve*, 103 Wash. 2d 322, 692 P.2d 818 (1985) (retroactivity), *State v. Donohoe*, 39 Wash. App. 778, 695 P.2d 150 (appeal), *rev. denied*, 103 Wash. 2d 1032 (1985), and it does not generally address civil actions brought under the search and seizure provisions, see, e.g., *Guffey v. State*, 103 Wash. 2d 144, 690 P.2d 1163 (1984).

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

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

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

1.0 Defining “Search” Pre-Katz: “Constitutionally Protected Areas”

Prior to 1967, the United States Supreme Court defined the applicability of fourth amendment protections in terms of “constitutionally protected areas.” *Katz v. United States*, 389 U.S. 347, 19 L. Ed. 2d 576, 88 S. Ct. 507 (1967). The fourth amend-
ment 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 LaFAVE, SEARCH AND SEIZURE § 2.1(9a), at 223-24; Amsterdam, Perspectives on the Fourth Amendment, 58 MINN. L. REV. 349 (1974).

In Katz, the Court rejected the rigid "constitutionally protected area" test.

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

389 U.S. at 350-52, 19 L. Ed. 2d at 581-82, 88 S. Ct. at 510-11 (citations omitted). Katz thus defined the scope of search protections as the individual's "reasonable expectation of privacy." The nature of this new test and the degree of continued vitality of the old "constitutionally protected areas" test will be examined in the following sections.

1.1 Defining "Search" after Katz: The "Reasonable Expectation of Privacy"

In a concurring opinion in Katz, which has since come to be accepted as the Katz test, Justice Harlan explained that the Katz holding extends search and seizure protections to all situations in which a defendant has a "reasonable expectation of privacy." 389 U.S. at 360, 19 L. Ed. 2d at 587, 88 S. Ct. at 516 (Harlan, J., concurring); see generally LaFAVE, SEARCH AND SEIZURE § 3.2(a), at 97-99. A reasonable expectation of privacy is measured by a "twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" 389 U.S. at 361, 19 L. Ed. 2d at 588, 88 S. Ct. at 516 (Harlan, J., concurring).

Thus, for example, although "a man's home is, for most pur-
poses, a place where he expects privacy, . . . objects, activities, or statements that he exposes to the 'plain view' of outsiders are not 'protected' because no intention to keep them to himself has been exhibited." State v. Drumhiller, 36 Wash. App. 592, 595, 675 P.2d 631, 633 (1984) (citation omitted) (legitimate expectation of privacy means more than subjective expectation of not being discovered; defendants' claimed privacy expectation in home not reasonable when defendants positioned themselves in front of picture window with lights on and drapes open); see, e.g., Smith v. Maryland, 442 U.S. 735, 740, 61 L. Ed. 2d 220, 99 S. Ct. 2577 (1979). The reasonable expectation of privacy also has been analyzed by whether the incriminating evidence was seen or heard from a place accessible to people who are not unusually inquisitive. United States v. Taborda, 635 F.2d 131 (2d Cir. 1980) (ascertainment of which objects or activities in defendant's apartment could have been seen by naked eye from adjacent apartment is necessary to determine reasonable expectation of privacy in objects or activities).

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

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

Id.

Consequently, when a police investigative device is capable of detecting only the presence of unlawful articles, the use of the device does not constitute a search. United States v. Place, 462 U.S. 696, 707, 77 L. Ed. 2d 110, 121, 103 S. Ct. 2637, 2644-45 (1983) (a canine sniff of luggage, when the canine is trained to detect only contraband, is not a search within meaning of fourth amendment); see also State v. Wolohan, 23 Wash. App. 813, 818, 598 P.2d 421, 424 (1979), rev. denied, 93 Wash. 2d 1008 (1980).

Similarly, unlawful sexual activity in a public toilet stall, even though the stall door is closed, carries no legitimate expectation of privacy. Hartman v. Virginia, 48 U.S.L.W. 3078 (Va.

In determining whether an expectation of privacy is reasonable, the United States Supreme Court has looked to the intention of the Framers of the fourth amendment. See, e.g., United States v. Chadwick, 433 U.S. 1, 7-8, 53 L. Ed. 2d 538, 546-47, 97 S. Ct. 2476, 2481-82 (1977). The Court also has considered "an individual's possessory interest in the place searched" and "the uses to which the individual has put a location," see, e.g., Jones v. United States, 362 U.S. 257, 265, 4 L. Ed. 2d 697, 704-05, 80 S. Ct. 725, 733 (1960), as well as our societal understanding that certain areas deserve the most scrupulous protection from government invasion," see, e.g., Payton v. New York, 445 U.S. 573, 63 L. Ed. 2d 639, 100 S. Ct. 1371 (1980) (homes especially protected). See generally Walinski & Tucker, Expectations of Privacy: Fourth Amendment Legitimacy Through State Law, 16 HARV. C.R.-C.L.L. REV. 1 (1981).

1.2 Defining Search after Katz: Continuing Vitality of "Constitutionally Protected Areas"

Although the concept of "constitutionally protected areas" does not "serve as a talismanic solution to every Fourth Amendment problem," Katz, 389 U.S. at 351 n.9, 19 L. Ed. 2d at 582 n.9, 88 S. Ct. at 511 n.9, the concept retains considerable authority. A. AMSTERDAM, B. SEGAL, & M. MILLER, TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES 1-219 (3d ed. 1971) [hereinafter cited as TRIAL MANUAL].

Katz's new focus upon protection of "people, not places" . . . and of justifiable expectations of privacy . . . apparently expands but does not exhaust the Fourth Amendment's protection, for . . . [the fourth amendment] protects certain kinds of property interests—reflected in the constitutional phrases houses, papers, and effects,—independently of any relation that these may have to the privacy of their owner's "person"

. . . .

Id.

The United States Supreme Court has referred to "constitutionally protected areas" since Katz and has given special deference to the areas specifically enumerated within the fourth
amendment. For example, the fourth amendment prohibits police from making a warrantless and nonconsensual entry into a suspect’s home, absent exigent circumstances, to effect a routine felony arrest. Payton v. New York, 445 U.S. 573, 63 L. Ed. 2d 639, 100 S. Ct. 1371 (1980).

The Fourth Amendment protects the individual’s privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual’s home—a zone that finds its roots in clear and specific constitutional terms: “The right of the people to be secure in their . . . houses . . . shall not be violated.” That language unequivocally establishes the proposition that “[a]t the very core [of the fourth amendment] stands the right of a man to retreat into his own home and there be free from unreasonable Government intrusion.” Silverman v. United States, 365 U.S. 505, 511. In terms that apply equally to seizures of property and seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house.

Id. Houses, then, are “constitutionally protected areas” because, as under the pre-Katz analysis, “houses” are specifically enumerated within the fourth amendment. The Rakas/Katz analysis of “legitimate expectation of privacy” supplements but does not weaken the enhanced protection given the home as a “constitutionally protected area.” Note that Silverman v. United States, 365 U.S. 505, 5 L. Ed. 2d 734, 81 S. Ct. 679 (1961), cited in Payton, was decided in the heart of the pre-Katz era of “constitutionally protected areas” analysis. See also State v. Holeman, 103 Wash. 2d 426, 429, 693 P.2d 89, 91 (1985); State v. Jordan, 29 Wash. App. 924, 928-29, 631 P.2d 989, 991-92 (1981) (police observation of drugs through section of window that inadvertently was left uncovered constituted search requiring warrant; although similar “search” of hotel room had been upheld in State v. Brown, 9 Wash. App. 937, 942, 515 P.2d 1008, 1012 (1973), instant case distinguished by greater expectation of privacy in home as compared with motel or place of business).

1.3 Specific Applications of the Post-Katz Analysis

1.3(a) Residential Premises

As described above, an individual has a privacy interest in the interior of his or her home. See Payton v. New York, 445 U.S. 573, 589-90, 63 L. Ed. 2d 639, 652-53, 100A S. Ct. 1371,
1381-82 (1980); 1 LaFave, Search and Seizure § 2.3(b), at 298. A search of a home can occur even when government officers do not themselves enter the home, if they are able to monitor persons, objects, or activities within the home that would not be observable in ordinary circumstances. See United States v. Karo, 468 U.S. 502, 82 L. Ed. 2d 530, 104 S. Ct. 3296 (1984) (search occurs, triggering the fourth amendment, when the government monitors an electronic device to determine whether a particular article or person is in an individual’s home at a particular time); Clinton v. Virginia, 377 U.S. 158, 12 L. Ed. 2d 213, 84 S. Ct. 1186, (1964) (fourth amendment implicated when microphone simply “stuck in” partition wall of apartment adjoining defendant’s apartment even when microphone does not physically intrude into defendant’s apartment).


A person may relinquish the privacy interest in an activity or object in the home by making the activity or object observable to persons outside. State v. Drumhiller, 36 Wash. App. 592, 675 P.2d 631 (1984) (defendants had no reasonable privacy interest in their activity in home when they positioned themselves in front of picture window with lights on and drapes open). But a person does not relinquish his or her privacy interests in the home by opening the door in response to a police officer’s knock. State v. Holeman, 103 Wash. 2d 426, 429, 693 P.2d 89, 91 (1985). And the expectation of privacy in residential premises may persist even when a home is fire-damaged and arson is suspected. Michigan v. Clifford, 464 U.S. 287, 292, 78 L. Ed. 2d 477, 486, 104 S. Ct. 641, 648 (1984).

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

Lower courts in some jurisdictions have held that common hallways of multiple-dwelling buildings accessible to the public
are not protected areas. 1 LAFAVE, SEARCH AND SEIZURE § 2.3(b), at 299.

Finally, the privacy interest in one’s home extends to situations in which the occupant is not a criminal suspect. The fourth amendment is triggered when an officer enters a person’s home to search for someone who does not live there. See Steagald v. United States, 451 U.S. 204, 213-14, 68 L. Ed. 2d 38, 46, 101 S. Ct. 1642, 1648 (1981). And the fourth amendment is triggered when a housing inspector enters to conduct an administrative search. See Camara v. Municipal Court, 387 U.S. 523, 18 L. Ed. 2d 930, 87 S. Ct. 1727 (1967).

1.3(b) Related Structures: The Curtilage

The “curtilage” of residential premises consists of “all buildings in close proximity to a dwelling which are continually used for carrying on domestic employment; or such place as is necessary and convenient to a dwelling, and is habitually used for family purposes.” United States v. Potts, 297 F.2d 68, 69 (6th Cir. 1961). Prior to Katz, the curtilage served as a controlling standard of an individual’s privacy interest: structures within the curtilage were protected and structures outside the curtilage were not. See 1 LAFAVE, SEARCH AND SEIZURE § 2.3(d), at 313-14.

In the aftermath of Katz, lower courts and commentators have favored constitutional protection for structures located within the curtilage on the grounds that residents have an expectation of privacy in such areas. See Id. at 315 n.112.

When a case involves a structure outside the curtilage, the reviewing court must examine whether the defendant did in fact have a reasonable expectation of privacy in the area. People v. Weisenberger, 183 Colo. 353, 355, 516 P.2d 1128, 1129 (1973) (whether or not defendant’s chicken house considered “outside the curtilage,” defendant had reasonable expectation of privacy as to its contents); see also 1 LAFAVE, SEARCH AND SEIZURE § 2.3(d), at 315-16.

Washington courts have recognized no privacy interest in those areas of the curtilage that are impliedly open to the public, such as usual access routes to a house. See State v. Seagull, 95 Wash. 2d 898, 902, 632 P.2d 44, 47 (1981); see also State v. Daugherty, 94 Wash. 2d 263, 268, 616 P.2d 649, 651 (1980) (no reasonable expectation of privacy in driveway that is exposed to view from street and is conventional means of access to house);
supra § 1.3(a).

1.3(c) Adjoining Lands and “Open Fields”

Certain lands adjacent to a dwelling fall within the privacy protection surrounding the residence. “The protection afforded by the fourth amendment, insofar as houses are concerned, has never been restricted to the interior of the house, but has extended to open areas immediately adjacent thereto.” *Wattenburg v. United States*, 388 F.2d 853 (9th Cir. 1968) (reasonable expectation of privacy extends to backyard of lodge); see also *Oliver v. United States*, 466 U.S. 170, 80 L. Ed. 2d 214, 222, 104 S. Ct. 1735, 1741 (1984) (individual may have legitimate expectation of privacy in “area immediately surrounding the home”). The applicability of federal search and seizure protections to areas immediately surrounding the home is determined by the *Katz* test of reasonable expectation of privacy. 1 LaFave, *Search and Seizure* § 2.3(f), at 321-22.

Adjoining lands that are used as normal access routes by the general public are only “semi-private” and therefore do not always enjoy the protection of the fourth amendment. *Air Pollution Variance Board v. Western Alfalfa Corp.*, 416 U.S. 861, 865, 40 L. Ed. 2d 607, 611, 94 S. Ct. 2114, 2115-16 (1974); *United States v. Magana*, 512 F.2d 1169, 1171 (9th Cir. 1975); *State v. Corbett*, 15 Or. App. 470, 475, 516 P.2d 487, 490 (1973). Thus, fourth amendment protections will not apply to a police investigation that is restricted to places where visitors could be expected to go. E.g., *State v. Daugherty*, 94 Wash. 2d 263, 268, 616 P.2d 649, 651 (1980) (public portions of driveway); *State v. Coburne*, 10 Wash. App. 298, 314, 518 P.2d 747, 757 (1973) (apartment building common parking lot); see also *United States v. Magana*, 512 F.2d at 1171 (public portions of driveway); *Bicar v. Gray*, 380 F. Supp. 804, 806 (N.D. Ohio 1974) (porches); *People v. Bradley*, 1 Cal. 2d 80, 84-85, 460 P.2d 129, 131, 81 Cal. Rptr. 457, 459 (1969) (walkways).

On the other hand, when the police enter onto adjoining lands that are not used as an access area by the general public, the fourth amendment guarantees do apply. See, e.g., *Fixel v. Wainwright*, 492 F.2d 480, 484 (5th Cir. 1974) (backyard behind four-unit apartment building, not used as common passageway by tenants, is protected); *Norman v. State*, 134 Ga. App. 767, 768, 216 S.E.2d 644, 645 (1975) (truck located under trees in small meadow behind house and not on farm access route con-
sidered within curtilage).

Under the old "constitutionally protected areas" analysis, the privacy protections of the fourth amendment did not apply at all to "open fields." *Hester v. United States*, 265 U.S. 57, 59, 68 L. Ed. 898, 900, 44 S. Ct. 445, 446 (1924). Consequently, a defendant could not invoke constitutional privacy protections with respect to police intrusions onto open fields, wooded areas, vacant lots in urban areas, open beaches, reservoirs, and open waters. See 1 *LaFave, Search and Seizure* § 2.4(a), at 332.

The open fields doctrine has been reaffirmed under the *Katz* analysis on the grounds that an expectation of privacy in open fields is not reasonable. *Oliver v. United States*, 466 U.S. 170, 80 L. Ed. 2d 214, 224, 104 S. Ct. 1735, 1741 (1984) ("open 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 cannot create a legitimate expectation of privacy by taking steps to conceal activities such as posting no trespassing signs and erecting fences around secluded areas. *Id.* at ___, 80 L. Ed 2d at 227, 104 S. Ct. at 1743 (issue is whether "government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment"). See generally *Doe v. Dring*, 2 M. & S. 448 (1814) (discussing prior cases); 2 *Blackstone, Commentaries* 16, 384-85. But compare *California v. Ciraolo*, 161 Cal. App. 3d 1081, 208 Cal. Rptr. 93 (1984) (reasonable expectation of privacy exists when a residential backyard is surrounded by a high fence; thus, aerial surveillance and photographing of backyard constitutes search), *cert. granted, ___ U.S. ____, 86 L. Ed. 2d 691, 105 S. Ct. 3496 (1985), with *Dow Chemical Co. v. United States*, 749 F.2d 307, 313 (6th Cir. 1984) (no reasonable expectation of privacy in "outdoor spaces" of factory; plant "is much more like 'open fields' than it is a home or office."), *cert. granted, ___ U.S. ____, 86 L. Ed. 2d 716, 105 S. Ct. 2700 (1985).

In addition, the fact that police commit a common-law trespass while observing an object or activity in open fields does not render the intrusion a search under the federal constitution. *Oliver* at ___, 80 L. Ed. 2d at 227-28, 104 S. Ct. at 1743-44. Thus, an intrusion may be onto the land itself as well as by aerial surveillance and still not be considered a search. See *id.* at ___, 80 L. Ed. 2d at 224-25, 104 S. Ct. at 1741.

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

The relevant inquiry under article I, section 7, however, is not whether the observed object was in a "protected place" or whether the defendant had a legitimate and subjective expectation of privacy in the observed location, but whether "the State unreasonably intruded into the defendant's 'private affairs'." *Myrick*, 102 Wash. 2d at 510, 688 P.2d at 154. See also *State v. Simpson*, 95 Wash. 2d 170, 178, 622 P.2d 1199, 1205 (1980); *Nock, Seizing Opportunity, Searching for Theory: Article I, Section 7, 8 U. Puget Sound L. Rev. 331, 334 (1985).* 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 Wash. 2d at 513, 688 P.2d at 155.

Moreover, the Washington Supreme Court has suggested that even when an individual has no subjective expectation of privacy, an intrusion nevertheless may constitute a search. "[M]erely because it is generally known that the technology exists to enable police to view private activities from an otherwise nonintrusive vantage point, it does not follow that these activities are without protection." *Id.* (dictum). The focus is on "those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant." *Id.* at 511, 688 P.2d at 154. See also *State v. Cord*, 103 Wash. 2d 361, 365, 693 P.2d 81, 84 (1985). See also *State v. Seagull*, 95 Wash. 2d 898, 903, 632 P.2d 44, 47 (1981). Note that in both *Cord* and *Myrick* the police used no visual enhancement devices; in addition, their vantage points for observing the contraband were lawful. *Cord*, at 365, 693 P.2d at 84; *Myrick*, 102 Wash. 2d at 514, 688 P.2d at 155. Cf. *Oliver v. United States*, 466 U.S. at —, 80 L. Ed. 2d at 227, 104 S. Ct. at 1743-44 (police committed common-law trespass to view defendant's property). For citations to aerial surveillance cases in other jurisdictions, see *Myrick* 102 Wash. 2d at 511, 688 P.2d at 154. See
generally Amsterdam, Perspectives on the Fourth Amendment, 58 Minn. L. Rev. 349 (1979); Comment, Aerial Surveillance: A Plane View of the Fourth Amendment, 18 Gonz. L. Rev. 307 (1982-83).

1.3(d) Business and Commercial Premises

The fourth amendment privacy protections extend to most business and commercial premises. Marshall v. Barlow’s, Inc., 436 U.S. 307, 56 L. Ed. 2d 305, 98 S. Ct. 1816 (1978) (OSHA inspector’s entry into nonpublic working areas of electrical and plumbing business constitutes search); Mancusi v. DeForté, 392 U.S. 364, 367-70, 20 L. Ed. 2d 1154, 1158-60, 88 S. Ct. 2120, 2124 (1976) (union official has reasonable expectation of privacy in office, even when office shared with other union officials); see also See v. City of Seattle, 387 U.S. 541, 545-546 18 L. Ed. 2d 943, 947-48, 87 S. Ct. 1737, 1740-41 (1967) (for safety violations); Dow Chemical Co. v. United States, 749 F.2d 307 (6th Cir. 1984), cert. granted, ___ U.S. ___, 86 L. Ed. 2d 716, 105 S. Ct. 2700 (1985). A few businesses, such as those dealing with liquor and firearms, historically have been so extensively regulated, however, as to afford their owners no reasonable expectation of privacy. Barlow’s, 436 U.S. at 313, 56 L. Ed. 2d at 312, 98 S. Ct. at 1821.

The parts of business and commercial premises that are open to the public for inspection of wares, however, are not as private as nonpublic premises. “[A]s an ordinary matter law enforcement officials may accept a general public invitation to enter commercial premises for purposes not related to the trade conducted thereupon . . . .” United States v. Berrett, 513 F.2d 154, 156 (1st Cir. 1975). Thus, the warrantless entry into the public lobby of a motel and 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., ___ U.S. ___, 78 L. Ed. 2d 567, 572, 104 S. Ct. 769, 772-73 (1984) (employer may not insist upon judicial warrant as condition precedent to valid administrative subpoena unless government inspectors seek non consensual entry “into areas not open to the public.”)

Courts generally have upheld police investigative entries into bus terminals, pool halls, bars, restaurants, and general stores such as furniture stores and variety stores. 1 LaFave,
SEARCH AND SEIZURE § 2.4(b), at 338-39. But “[t]he ‘implied invitation for customers to come in’ . . . extends only to those times when the premises are in fact ‘open to the public;’ the mere fact that certain premises are open to the public at certain times does not justify entry by the police on other occasions.” Id. at 339.

Although a reasonable expectation of privacy exists in commercial premises, the warrant requirements for administrative searches of commercial premises may differ from those for searches in general. See § 6.4(b), infra.

1.3(e) Automobiles and Other Motor Vehicles


At the same time, “the configuration, use, and regulation of automobiles often may dilute the reasonable expectation of privacy that exists with respect to differently situated property.” Arkansas v. Sanders, 442 U.S. 753, 761, 61 L. Ed. 2d 235, 243, 99 S. Ct. 2586, 2591 (1979) (citations omitted). Thus, a person does not have as great an expectation of privacy in a vehicle as in a home. California v. Carney, 471 U.S. ——, 85 L. Ed. 2d 406, 105 S. Ct. 2066 (1985). Even when a vehicle is used as a home, its owner has a lesser expectation of privacy in the vehicle if the vehicle is readily mobile and licensed to operate on public streets. Id. at ——, 85 L. Ed. 2d at 413-14, 105 S. Ct. at 2069-70 (mobile home in public lot treated as vehicle).

The lesser expectation of privacy in a vehicle does not automatically extend to closed containers within the vehicle. Chadwick, 433 U.S. at 12-13, 53 L. Ed. 2d at 549, 97 S. Ct. at 2484. On the other hand, when an electronic beeper is placed within a container and officers use a radio transmitter to monitor the container’s movement, no reasonable expectation of privacy is invaded to the extent that the container is transported in a vehicle on public roads. United States v. Knotts, 460 U.S. 276, 75 L. Ed. 2d 55, 103 S. Ct. 1081 (1983). Cf. United States v. Karo, 468 U.S. ——, 82 L. Ed. 2d 530, 104 S. Ct. 3296 (1984) (monitoring
electronic beeper while object containing beeper is inside home violates privacy interests in home).

1.3(f) Personal Characteristics

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

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

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


scrapings, on the other, may be explained by the fact that the evidentiary value of the former is immediately perceivable. 1 LAFAVE, SEARCH AND SEIZURE, § 2.6(a), at 366. Cf. United States v. Euge, 444 U.S. 707, 63 L. Ed. 2d 141, 100 S. Ct. 874 (1980) (handwriting exemplars not protected).

It should be noted that although drawing blood constitutes a seizure, the defendant unknowingly may have consented to the procedure. For example, a person who drives a motor vehicle may give implied consent to the administration of blood tests in certain circumstances. WASH. REV. CODE § 46.20.308 (1969). See State v. Judge, 100 Wash. 2d 706, 710, 675 P.2d 219, 224 (1984) (driver gives implied consent to blood testing when arrested for negligent homicide or when unconscious and while being arrested for driving while intoxicated).

1.3(g) Personal Effects and Papers

The fourth amendment expressly protects the right of privacy in “papers . . . and effects . . . .” U.S. CONST. amend. IV.

Although litigation concerning the search, seizure and use of the content of private papers frequently centers on the fifth amendment bar against self-incrimination, see, e.g., Andresen v. Maryland, 427 U.S. 463, 473, 49 L. Ed. 2d 627, 638, 96 S. Ct. 2737, 2745 (1976); United States v. Howell, 466 F. Supp. 835, 838 (D. Or. 1979), the fourth amendment can act as an additional bar because of the protection accorded “papers” and “effects.” LaFave and other commentators have argued that even when the seizure and use of private papers is consistent with the fifth amendment, the fourth amendment poses an absolute bar against the use of any highly private content in such papers. E.g., 1 LAFAVE, SEARCH AND SEIZURE, § 2.6(d), at 395-99; Note, Formalism, Legal Realism, and Constitutionally Protected Privacy Under the Fourth and Fifth Amendments, 90 HARV. L. REV. 945, 989 (1977); see Couch v. United States, 409 U.S. 322, 350, 34 L. Ed. 2d 548, 566, 93 S. Ct. 611, 626 (1973) (Marshall, J., dissenting) (“Diaries and personal letters that record only their author’s personal thoughts lie at the heart of our sense of privacy.”); see also Walter v. United States, 447 U.S. 649, 65 L. Ed. 2d 410, 100 S. Ct. 2395 (1980).

Papers and effects are protected even when they are not in the home. United States v. Chadwick, 433 U.S. 1, 8, 53 L. Ed. 2d 538, 546, 97 S. Ct. 2476, 2482 (1977). For example, the contents of a film not released to the public continue to be pro-
tected even after the government is in lawful possession of the film. *Walter* at 654, 65 L. Ed. 2d at 416, 100 St. Ct. at 2400. On the other hand, the legitimate expectation of privacy disappears when papers and effects are made available to the public. *Maryland v. Macon*, ___ U.S. ___, 86 L. Ed. 2d 370, 377, 105 S. Ct. 2778, 2782 (1985) ("[T]he officer's action in entering the book-store and examining the wares that were intentionally exposed to all . . . did not infringe a legitimate expectation of privacy."). Thus, the contents of a film are protected even when the government is in lawful possession of the film, but only provided the film has not been made available to the public. *Walter* at 654, 65 L. Ed. 2d at 416, 100 S. Ct. at 2400.

A reasonable expectation of privacy does not continue in personal effects if the individual's relinquishment of the effects occurred under circumstances indicating that the individual retained no reasonable expectation that the effects would remain unobserved. 1 *LAFAVE, SEARCH AND SEIZURE* § 2.6(b), at 369-70. For example, the fourth amendment guarantees do not apply to an object thrown from a moving car, *United States v. McLaughlin*, 525 F.2d 517 (9th Cir. 1975), *cert. denied*, 427 U.S. 904 (1976), or to any object left behind in a place accessible to the general public. *United States v. Smith*, 293 A.2d 856 (D.C. 1972). But the guarantees do apply when a taxicab passenger drops an object to the floor of the cab, *Rios v. United States*, 364 U.S. 253, 4 L. Ed. 2d 1688, 80 S. Ct. 1431 (1960), or when an individual carries an object covered with a blanket into the hallway of a building and sets the object down while he makes a telephone call at a phone located twenty to thirty feet away. *United States v. Boswell*, 347 A.2d 270 (D.C. 1975). For a detailed discussion of the caselaw on the expectation of privacy in abandoned personal effects, see 1 *LAFAVE, SEARCH AND SEIZURE* § 2.6(b), at 366-75. For a discussion of the specific issue of privacy expectation in garbage, see 1 *LAFAVE, SEARCH AND SEIZURE* § 2.6(c), at 375-86.


Placing a beeper inside an object does not in and of itself constitute a search. *United States v. Karo*, 468 U.S. ___, 82 L.
Monitoring the beeper and thereby tracking the object may constitute a search of the location but not of the object. Id. at __, 82 L.Ed. 2d at 549, 104 S.Ct. at 3307 (tracking of ether container into home infringes privacy interest in home); cf. United States v. Knotts, 460 U.S. 276, 75 L.Ed. 2d 55, 103 S.Ct. 1081 (1983) (monitoring beeper in chloroform container invaded no reasonable expectation of privacy because monitoring occurred only while container was taken from store and transported in automobile on public highways and did not occur when container was moved into residence).

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

Prisoners are not accorded the same expectations of privacy in their cells and effects as citizens generally enjoy in their homes and effects. Hudson v. Palmer, 468 U.S. ___, 82 L.Ed. 2d 393, 104 S.Ct. 3194 (1984) (5-4 decision). Students in public schools and persons at or near borders also may have reduced expectations of privacy. See generally infra § 6.1 (schools), 6.2(a) (prisons), and 6.3 (borders).

1.4 Defining Seizures of the Person

A person may be “seized” for purposes of the fourth amendment even when he or she is not arrested. Terry v. Ohio, 392 U.S. 1, 20 L.Ed. 2d 889, 88 S.Ct. 1868 (1968). A seizure occurs "whenever a police officer accosts an individual and restrains his freedom to walk away . . . ." Id. at 16, 20 L.Ed. 2d at 903, 88 S.Ct. at 1877; see Brown v. Texas, 443 U.S. 47, 50, 61 L.Ed. 2d 357, 361, 99 S.Ct. 2637, 2640 (1978).

The test for a seizure is an objective one: a seizure occurs when law enforcement officers give "a show of official authority such that 'a reasonable person would have believed he was not free to leave.'" Florida v. Royer, 460 U.S. 491, 502, 75 L.Ed. 2d 229, 239, 103 S.Ct. 1319, 1326 (1983) (plurality opinion) (citation omitted). The fact that a person is unconscious, however, does not mean that he or she is not seized. See Seattle v. Sage, 11 Wash. App. 481, 484-85, 523 P.2d 942, 945 (1974). See generally 2 LaFave, Search and Seizure § 5.1(a), at 215-22.

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).
1.4(a) Consensual Encounters

A consensual encounter with an officer does not trigger the fourth amendment, even when the individual has been approached by, and is aware of the officer's identity as, an officer. *Florida v. Royer*, 460 U.S. at 497, 75 L. Ed. 2d at 236, 103 S. Ct. at 1324; see *State v. Bockman*, 37 Wash. App. 474, 682 P.2d 925 (1984); *State v. Belanger*, 36 Wash. App. 818, 677 P.2d 781 (1984). The amendment is triggered, however, when an individual is not free to leave an officer's presence and is aware that his or her liberty is restrained, even when the officer couches the forcible stop in terms of a "request." *State v. Byers*, 88 Wash. 2d 1, 6, 559 P.2d 1334, 1336 (1977). Thus, questioning by law enforcement officers remains consensual until a reasonable person would believe that he or she could not leave the presence of the officers or until he or she refuses to respond to their inquiries and the police take further action. *INS v. Delgado*, ___ U.S. ___, 80 L. Ed. 2d 247, 255, 104 S. Ct. 1758, 1763 (1984) (INS agents moving systematically through factory inquiring about workers' citizenship while other INS agents stationed at exits did not constitute seizure either of workforce or of individual workers). See also *Florida v. Rodriguez*, ___ U.S. ___, 83 L. Ed. 2d 165, 105 S. Ct. 308 (1984). See generally infra § 5.10 (discussing what constitutes consent).

1.4(b) Seizures in Vehicles


1.4(c) Seizures in Homes

The fourth amendment is triggered even though a person is detained in his or her own home. *Michigan v. Summers*, 452 U.S. 692, 696, 69 L. Ed. 2d 340, 345, 101 S. Ct. 2587, 2590-91
1.4(d) Civil Offenses

The fourth amendment is triggered by a seizure of the person even though seizure pertains to civil, and not criminal, offenses. See State v. Klinker, 85 Wash. 2d 509, 514-15, 537 P.2d 268, 274 (1975).

1.5 Defining Seizures of Property

The fourth amendment protects a person's possessory interest in effects as well as his or her privacy interest. See United States v. Place, 462 U.S. 696, 77 L. Ed. 2d 110, 120, 103 S. Ct. 2637, 2644 (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, 80 L. Ed. 2d 85, 94, 104 S. Ct. 1652, 1656 (1984). Put differently, an object is seized for purposes of the fourth amendment when government agents exercise "dominion and control" over the object. Id. at ___, 80 L. Ed. 2d at 99, 104 S. Ct. at 1660.

Interference with an individual's possessory interests in some circumstances may implicate an individual's liberty interests. United States v. Place, 462 U.S. at ___, 77 L. Ed. 2d at 122, 103 S. Ct. at 2645 (seizure of luggage at airport "can effectively restrain the person since he is subjected to the possible disruption of his travel plans in order to remain with his luggage or to arrange for its return"); see also 3 LaFave, Search and Seizure § 9.6, at 61.

1.6 Standing to Raise Search and Seizure Claims

Traditionally, a criminal defendant alleging an infringement of fourth amendment rights first had to show "standing" to raise the claim. The defendant's burden was to demonstrate that the interest in the outcome of the controversy stemmed from a violation of his or her rights rather than from the violation of the rights of some third party. 3 LaFave, Search and Seizure § 11.3, at 543-44.

The Court created an exception to this rule for a defendant charged with an offense having possession of property as an element when the defendant challenged the search or seizure of the property. Jones v. United States, 362 U.S. 257, 4 L. Ed. 2d 697,
80 S. Ct. 725 (1960). The defendant in such a case has "automatic standing." *Id.*

In 1978, the United States Supreme Court merged the concept of standing into fourth amendment privacy analysis. *Rakas v. Illinois*, 439 U.S. 128, 138-40, 58 L. Ed. 2d 387, 397-99, 99 S. Ct. 421, 427-29 (1978). Under the new analysis, a defendant may challenge a search or seizure only when he or she possesses a personal privacy interest in the area searched or the property seized. *United States v. Salvucci*, 448 U.S. 83, 85, 65 L. Ed. 2d 619, 623-24, 100 S. Ct. 2547, 2549 (1980); *see State v. Hayden*, 28 Wash. App. 935, 938-41, 627 P.2d 973, 975-77 (1981) (search and seizure of stolen purse upheld after defendant permitted officers to view purse in glove compartment of automobile because defendant had no personal privacy interest in stolen purse). For example, when an individual has no expectation of privacy in "checks and deposit slips retained by [the] bank," he or she may not object to their seizure. *United States v. Payner*, 447 U.S. 727, 732, 65 L. Ed. 2d 468, 474, 100 S. Ct. 2439, 2444 (1980). A defendant may not object to the admission of evidence, as a violation of the fourth amendment, when the evidence "was seized unlawfully from a third party not before the court." *Payner*, 447 U.S. at 735, 65 L. Ed. 2d at 476, 100 S. Ct. at 2446.

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

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

*Salvucci*, 448 U.S. at 91-92, 65 L. Ed. 2d at 628, 100 S. Ct. at 2553 (unlawful possession of stolen goods stored in apartment of another does not confer on thieves a reasonable expectation of
privacy as to interior of apartment).

A person who resides in an apartment with the permission of the lessee and who has a key to the apartment may assert a privacy interest in the interior of the apartment. See Rakas, 439 U.S. at 141-42, 58 L. Ed. 2d at 399-400, 99 S. Ct. at 429-30 (citing Jones v. United States 362 U.S. 257, 4 L. Ed. 2d 697, 80 S. Ct. 725 (1960)).

A mere passenger in a motor vehicle may not assert a personal privacy interest in the interior of the vehicle, Rakas, 439 U.S. at 148-50, 58 L. Ed. 2d at 404-05, 99 S. Ct. at 433-34, whereas a person who is driving the vehicle with the owner's permission may. United States v. Lopez, 474 F. Supp. 943, 946 (C.D. Cal. 1979). See generally Comment, Possession and Presumptions: The Plight of the Passenger Under the Fourth Amendment, 48 Ford. L. Rev. 1027 (1980).


Unlike the fourth amendment, article I, section 7 of the Washington Constitution invests a defendant with automatic standing to seek the suppression of contraband when the possession of the contraband is an element of the offense charged. See State v. Simpson, 95 Wash. 2d 170, 179, 622 P.2d 1199, 1206 (1980) (four justices upholding the rule on basis of state constitution). See also State v. Johnson, 38 Wash. App. 793, 690 P.2d

The state may not raise the issue of lack of standing for the first time on its appeal of a suppression order. State v. Grundy, 25 Wash. App. at 415, 607 P.2d at 1237 (1980) (distinguishing Combs v. United States, 408 U.S. 22, 33 L. Ed. 2d 308, 92 S. Ct. 2284 (1972), when standing was raised on appeal by the government as respondent).

CHAPTER 2: STANDARDS OF PROOF

2.0 Nature of Probable Cause: Introduction

This chapter examines the concept of probable cause as it relates to searches and seizures conducted with or without a warrant. The first part of the chapter discusses the nature of the standard; subsequent sections discuss specific types of information considered in determining whether probable cause has been shown; and the chapter concludes with a discussion of the special searches and seizures for which probable cause is not the standard employed.

The fourth amendment provides that “no warrants shall issue, but upon probable cause . . . .” U.S. Const. amend. IV. The probable cause requirement is a compromise between the competing interests of enforcing the law and protecting the individual’s right to privacy. Brinegar v. United States, 338 U.S. 160, 176, 93 L. Ed. 1879, 1890-91, 69 S. Ct. 1302, 1311 (1949). Police officers must have probable cause even for searches and seizures in which no warrant is required. In the case of a valid warrantless search or seizure, police may make the initial determination of whether probable cause exists. The grounds for the search or seizure, however, must be strong enough to obtain a warrant. Wong Sun v. United States, 371 U.S. 471, 479-81, 9 L. Ed. 2d 441, 450-51, 83 S. Ct. 407, 413-14 (1963). For a warrant to be issued, a magistrate must make the probable cause determination. See 1 LaFave, Search and Seizure § 3.1, at 438-39.
Both an officer's decision and a magistrate's warrant authorization are subject to judicial review. In addition, when a suspect is arrested without a warrant, he or she may not be detained for an extended period of time without a judicial determination of probable cause. *Gerstein v. Pugh*, 420 U.S. 103, 124-25, 43 L. Ed. 2d 54, 71, 95 S. Ct. 854, 868-69 (1975).


For an extensive analysis of the nature of probable cause, see 1 LAFAVE, SEARCH AND SEIZURE §§ 3.1-3.2, at 437-99.

### 2.1 Probable Cause Standard: Arrest Versus Search

In terms of quantum of evidence, the probable cause test is the same for arrests and searches. Probable cause for a search, however, does not necessarily justify an arrest; probable cause for an arrest does not necessarily justify a search. For a search, the officer must have probable cause to believe that the items sought are connected with criminal activity and will be found in the place to be searched. For an arrest, the officer must have probable cause to believe that an offense has been or is being committed and that the person to be arrested committed it. See, e.g., *State v. Gluck*, 83 Wash. 2d 424, 426-27, 518 P.2d 703, 706 (1974) (police officers' knowledge that burglary had been committed and that suspects' automobile had been seen leaving scene of burglary sufficient probable cause for arrest).

### 2.2 Probable Cause Standard: Characteristics

#### 2.2(a) Objective Test

(officer must have real belief).

The probable cause standard is based on the reasonable person with the expertise and experience of the officer in question. See United States v. Ortiz, 422 U.S. 891, 897-98, 45 L. Ed. 2d 623, 629, 95 S. Ct. 2585, 2589 (1975) (border patrol officers are entitled to draw inferences in light of their prior experience with aliens and smugglers). Thus, an officer’s particular expertise is critical. See State v. Smith, 93 Wash. 2d 329, 352, 610 P.2d 869, 883 (1980) (ability to identify marijuana); State v. Compton, 13 Wash. App. 863, 866, 538 P.2d 861, 862 (1975) (ability to smell and recognize marijuana). The basis of the officer’s knowledge and the relevance of the knowledge to the particular case must be articulated so that the magistrate may make an independent determination of probable cause. See 1 LAFAVE, SEARCH AND SEIZURE § 3.2(d), at 461-65; see generally infra §§ 2.4, 2.5, and 2.7.

2.2(b) Probability

Probable cause is a quantum of evidence “less than . . . would justify . . . conviction,” yet “more than bare suspicion.” Brinegar v. United States, 338 U.S. 160, 175, 93 L. Ed. 1879, 1890, 69 S. Ct. 1302, 1310-11 (1949). To make an arrest, the officer need not have facts sufficient to establish guilt beyond a reasonable doubt but only reasonable grounds for suspicion, coupled with evidence of circumstances sufficiently strong in themselves to warrant a cautious and distinterested person believing that the suspect is guilty. State v. Scott, 93 Wash. 2d 7, 11-12, 604 P.2d 943, 944 (1980) (officers possessing description of car used in robbery and license number of similar car used in robbery involving similar modus operandi had probable cause to arrest persons at address where car parked); see State v. Baxter, 68 Wash. 2d 416, 420-21, 413 P.2d 638, 641 (1966) (officers who observed appellant at 4:00 a.m. walking near store had probable cause to arrest when they observed him notice the officers, drop things he was carrying, and quickly run away).

One commentator has suggested that a “more probable than not” standard is unnecessary when the police know that a crime has been committed but have more than one suspect, yet necessary when the police have a suspect but are unsure whether a crime has been committed. 1 LAFAVE, SEARCH AND SEIZURE § 3.2(e), at 479-81; see State v. Hammond, 24 Wash. App. 596, 600, 603 P.2d 377, 379 (1979) (officer smelling marijuana on bus
containing more than one person does not have probable cause to arrest any individual). For a suggestion of when less than fifty percent probability should suffice to justify the search of a particular place or the seizure of a particular object, see LAFAVE, SEARCH AND SEIZURE § 3.2(e), at 476-93.

2.2(c) Individualized Suspicion

Police have probable cause to arrest an individual only if they possess reasonable grounds to believe that that particular individual has committed the crime. Ybarra v. Illinois, 444 U.S. 85, 62 L. Ed. 2d 238, 100 S. Ct. 338 (1979); State v. Smith, 102 Wash. 2d 449, 454, 688 P.2d 146, 149 (1984) ("The mere fact that petitioner fit the description of a brown-haired, white male, 5 feet 10 inches tall, weighing 145 pounds, is insufficient to meet the Sanders test of reasonable, articulable grounds to believe that the suspect is the intended arrestee.") (citing Sanders v. United States, 339 A.2d 373, 379 (D.C. App. 1975)); State v. Broadnax, 98 Wash. 2d 289, 293-94, 654 P.2d 96, 100-01 (1982); see State v. Larson, 93 Wash. 2d 638, 645, 611 P.2d 771, 774 (1980). If the police are unable to single out the suspect, probable cause may not be present. See Wong Sun v. United States, 371 U.S. 471, 480, 9 L. Ed. 2d 441, 451, 83 S. Ct. 407, 414 (1963).

Several exceptions, however, exist. For example, a roadblock in which police stopped all cars exiting a ferry was upheld when the police had probable cause to believe that persons suspected of committing a violent felony were on board. State v. Silvervain, 25 Wash. App. 185, 190-91, 605 P.2d 1279, 1283, cert. denied, 449 U.S. 843, 66 L. Ed. 2d 51, 101 S. Ct. 124 (1980). Individualized suspicion is not required for some administrative searches as well. See generally infra § 6.4(b),(c).

2.3 Information Considered: In General

A court reviewing a probable cause determination considers only the information that was available to the magistrate at the time that the warrant was issued or to the officer at the time of arrest or search. See Wong Sun v. United States, 371 U.S. 471, 481-82, 9 L. Ed. 2d 441, 451, 83 S. Ct. 407, 414 (1963). Probable cause must be based on facts and not on mere conclusions. Aguilar v. Texas, 378 U.S. 108, 112-13, 12 L. Ed. 2d 723, 727, 84 S. Ct. 1509, 1512-13 (1964). In addition, probable cause must exist at the actual time of arrest or search; it may not be stale. See
United States v. Leon, 468 U.S. ----, 82 L. Ed. 2d 677, 686, 104 S. Ct. 3405, 3411 (1984); State v. Higby, 26 Wash. App. 457, 461, 613 P.2d 1192, 1195 (1980) (information about sale of marijuana occurring two weeks earlier could not support present search); cf. State v. Smith, 39 Wash. App. 642, 694 P.2d 660, 665-66 (1984) (evidence of 100-150 three-to-four foot marijuana plants and extensive marijuana-growing operation on defendant’s property not stale after one month). The state has the burden of establishing the factual basis for the search or arrest and must present sufficient facts to enable the court to make an independent determination of probable cause. State v. McCord, 19 Wash. App. 250, 254-55, 576 P.2d 892, 895 (1977) (no probable cause when officers stopped vehicle without factual basis, even though officers found illegally transported cedar wood in back of truck when driver consented to search); see also State v. Patterson, 83 Wash. 2d 49, 69, 515 P.2d 496, 508 (1973) (Utter, J., dissenting) (affidavit supporting the search warrant was based entirely on reports of unidentified informants and hearsay, and therefore the magistrate issuing the warrant had no basis on which to independently determine probable cause).


2.3(a) Hearsay

Hearsay may be considered when there is a substantial basis for crediting it. United States v. Salvucci, 448 U.S. 83, 65 L. Ed. 2d 619, 100 S. Ct. 2547 (1980); Jones v. United States, 362 U.S. 257, 271, 4 L. Ed. 2d 697, 708, 80 S. Ct. 725, 736 (1960); State v. Luellen, 17 Wash. App. 91, 562 P.2d 253 (1977); see generally infra § 2.5.

Although the Washington Supreme Court has not addressed the question of multiple hearsay, a court of appeals decision indicates that multiple hearsay may be considered if the requirements are met for each person in the chain of information. State v. Laursen, 14 Wash. App. 692, 695, 544 P.2d 127, 129 (1975); see State v. Vanzant, 14 Wash. App. 679, 683, 544 P.2d 786, 789
(1975) (information passed to second detective by detective with personal knowledge of informant’s reliability sufficient to establish probable cause for arrest); see generally 1 LAFAVE, SEARCH AND SEIZURE § 3.2(d), at 470 n.83.

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

A magistrate or police officer making a probable cause determination may consider prior arrests and convictions that have probative value to the specific probable cause inquiry. Brinegar, 338 U.S. at 172, 93 L. Ed. at 1888-89, 69 S. Ct. at 1309; Little v. Rhay, 68 Wash. 2d 353, 357, 413 P.2d 15, 18 (1966) (probable cause for narcotics arrest found on basis of cumulative facts, including defendant’s previous four- to five-year narcotics use). A prior record of the same type of criminal conduct is insufficient to establish probable cause. Beck v. Ohio, 379 U.S. 89, 97, 13 L. Ed. 2d 142, 147, 85 S. Ct. 223, 228 (1964); State v. Hobart, 94 Wash. 2d 437, 446, 617 P.2d 429, 434 (1980) (prior arrest for narcotics possession not sufficient basis for probable cause to search without warrant). But prior acts may establish probable cause when the modus operandi is similar and distinctive. See 1 LAFAVE, SEARCH AND SEIZURE § 3.2(d), at 471.

A general assertion of criminal reputation has been considered insufficient to establish probable cause, Spinelli v. United States, 393 U.S. 410, 416, 21 L. Ed. 2d 637, 644, 89 S. Ct. 584, 589 (1969); but see United States v. Harris, 403 U.S. 573, 583, 29 L. Ed. 2d 723, 91 S. Ct. 2075, 2081-82 (1971) (plurality opinion). Specific facts leading to a conclusion that a suspect has a bad reputation may be considered. See 1 LAFAVE, SEARCH AND SEIZURE § 3.2(d), at 470-76.

2.4 First-hand Observation

Because the existence of probable cause depends on particular facts, it is impossible to define broadly when an officer’s observations amount to probable cause. Nevertheless, several common fact patterns enable some generalization.

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, and drive away, and later return and repeat their conduct, the
officers did not have probable cause to believe that the cartons contained stolen property. *Henry v. United States*, 361 U.S. 98, 103, 4 L. Ed. 2d 134, 139, 80 S. Ct. 168, 171-72 (1959).

In a Washington case, officers stopped a vehicle after learning that its owner had an outstanding warrant for a traffic violation. The police then saw an unpadded, unsecured television in the open trunk. A passenger in the car claimed ownership of the set, but was unable to identify the brand. The court held that the police had reasonable cause to believe the television was stolen. *State v. Glasper*, 84 Wash. 2d 17, 21, 523 P.2d 937, 940 (1974); *See also State v. Sinclair*, 11 Wash. App. 523, 532, 523 P.2d 1209, 1215 (1974). *See generally 1 LAFAVE, SEARCH AND SEIZURE § 3.6(a), at 643-47.*

2.4(b) Particular Crimes: Illegal Substances


An officer who relies on sight or odor must have a sufficient basis, grounded in expertise and experience, for believing that the substance was contraband. *See State v. Cord*, 103 Wash. 2d 361, 693 P.2d 81 (1985); *State v. Pristell*, 3 Wash. App. 962, 965, 478 P.2d 743, 745 (1970) (narcotics officer observing vial containing beige-white powder had probable cause to arrest suspect for possession of heroin). The officer's expertise and experience must appear in the record. *State v. Matlock*, 27 Wash. App. 152, 156, 616 P.2d 684, 687 (1980) (affidavit that stated marijuana plants were observed will establish probable cause if affidavit also avers that affiant had skill to identify such plants on sight).

2.4(c) Association: Persons and Places


When, however, a person is continually present at a place where criminal activity is openly and repeatedly conducted, there may be probable cause to arrest. Ker v. California, 374 U.S. 23, 37, 10 L. Ed. 2d 726, 740, 83 S. Ct. 1623, 1631-32 (1963) (probable cause existed to arrest wife of narcotics dealer when couple's apartment had been used as base for drug operations); cf. State v. Cabigas, 3 Wash. App. 740, 744, 477 P.2d 648, 649 (1970) (affidavit failed to establish connection between defendant and drugs). Various hypothetical situations are presented in 1 LaFave, Search and Seizure § 3.6(c), at 657-65.

A high crime rate in a particular area may be considered in determining the existence of probable cause. See Brinegar v. United States, 338 U.S. 160, 177, 93 L. Ed. 1879, 1891, 69 S. Ct. 1302, 1311 (1949) (probable cause exists to stop known bootlegger in area of his usual operations). But an individual's presence in a high crime area is not sufficient by itself. See Brown v. Texas, 443 U.S. 47, 61 L. Ed. 2d 357, 99 S. Ct. 2637 (1979); State v. Larson, 93 Wash. 2d 638, 642, 611 P.2d 771, 774 (1980) (police must have independent cause to question passengers of a car stopped for a traffic violation in a high crime area). See generally 1 LaFave, Search and Seizure § 3.6(g), at 676-80.

2.4(d) Furtive Gestures and Flight

A suspect's furtive gestures or flight, taken alone, cannot establish probable cause; they may, however, be considered. See Sibron v. New York, 392 U.S. 41, 66, 20 L. Ed. 2d 917, 937, 88 S.
Ct. 1889, 1904 (1968) (probable cause existed when strangers tiptoed from apartment and fled from police officer); *State v. Baxter*, 68 Wash. 2d 416, 421, 413 P.2d 638, 642 (1966) (probable cause existed when defendant dropped his possessions and ran from police after emerging from a business at 4:00 a.m.); cf. *State v. Bockman*, 37 Wash. App. 474, 682 P.2d 925 (1984). The action must be reasonably interpreted as furtive or in flight. See *People v. Superior Court*, 3 Cal. 3d 807, 478 P.2d 449, 91 Cal. Rptr. 729 (1970). For an extensive analysis of furtive gestures by occupants of stopped vehicles, see 1 *LaFave, Search and Seizure* § 3.6(d) and (e), at 665-71.

2.4(e) Response to Questioning

When combined with other circumstances, a suspect’s response to police questioning can give rise to probable cause. *United States v. Ortiz*, 422 U.S. 891, 897, 45 L. Ed. 2d 623, 629, 95 S. Ct. 2585, 2589 (1975) (dicta) (border patrol may consider defendant’s responses to questioning as part of facts and circumstances in their determination of probable cause); *State v. Fricks*, 91 Wash. 2d 391, 399, 588 P.2d 1328, 1333 (1979) (defendant’s co-conspirators’ dubious alibis properly considered when officer had independent cause to suspect co-conspirators); *State v. Byrd*, 25 Wash. App. 282, 286, 607 P.2d 321, 324 (1980) (officer entitled to consider defendant’s nervous admissions, defendant’s resemblance to witness’ description of suspect, and defendant’s close proximity in time and place to crime to form probable cause for arrest).


Silence after *Miranda* warnings have been given may not be considered in determining probable cause, *Doyle v. Ohio*, 426 U.S. 610, 618, 49 L. Ed. 2d 91, 98, 96 S. Ct. 2240, 2245 (1976), nor may the suspect’s failure to challenge the officer’s actions. *United States v. Di Re*, 332 U.S. 581, 594, 92 L. Ed. 210, 219, 68 S. Ct. 222, 228 (1948) (officers could not infer probable cause from suspect’s failure to protest arrest or to proclaim innocence).
2.5 Information from an Informant: In General

An enormous quantity of caselaw exists on the question of when information from a police informant—often a criminal—may be used as a basis for probable cause. In the past, information from an informant could establish probable cause only when the facts available to the police satisfied a two-prong test. Aguilar v. Texas, 378 U.S. 108, 114, 12 L. Ed. 2d 723, 729, 84 S. Ct. 1509, 1514 (1964).

Under the “basis of knowledge” prong of the test, facts must be revealed that enable the person making the probable cause determination to decide whether the informant had a basis for the allegation of criminal conduct. Under the “veracity” prong, facts must be presented so that the magistrate can determine either the inherent credibility of the informant or the reliability of the informant on this particular occasion. Id.; see also Spinelli v. United States, 394 U.S. 410, 415-16, 21 L. Ed. 2d 637, 643, 89 S. Ct. 584, 589 (1969); State v. Jackson, 102 Wash. 2d 432, 435, 688 P.2d 136, 138-39 (1984). So long as each link in the chain of information satisfies the two-prong test, multiple hearsay may be considered. United States v. Carmichael, 489 F.2d 983 (7th Cir. 1973); cf. State v. Luellen, 17 Wash. App. 91, 92, 562 P.2d 253, 256 (1977).

2.5(a) Satisfying "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. *Aguilar v. Texas*, 378 U.S. 108, 114, 12 L. Ed. 2d 723, 729, 84 S. Ct. 1509, 1514 (1964); *State v. Jackson*, 102 Wash. 2d 432, 688 P.2d 136 (1984). For example, an informant's statement that he had observed the defendant selling narcotics will satisfy the prong. *McCray v. Illinois*, 396 U.S. 300, 304, 18 L. Ed. 2d 62, 66, 87 S. Ct. 1056, 1059 (1967). But cf. 1 LAFAVE, SEARCH AND SEIZURE § 3.3, at 539-40 & n.164 (criticizing *McCray* for failing to require a showing that the informant knew the substance was a narcotic). Hearsay, however, also may establish the basis of an informant's knowledge. See *State v. Jackson*, 102 Wash. 2d 432, 437-38, 688 P.2d 136, 140 (1984) (dictum).

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 [element] . . . ." *Id.* at 438, 688 P.2d at 140; see also *State v. Adame*, 39 Wash. App. 577, 694 P.2d 678 (1985). The corroborated information, however, must itself suggest criminal activity. "Merely verifying 'innocuous details', commonly known facts or easily predictable events should not suffice to remedy [the] deficiency . . . ." *Jackson*, 102 Wash. 2d at 438, 688 P.2d at 140. (citations omitted). See also *State v. Chatmon*, 9 Wash. App. 741, 745-46, 515 P.2d 530, 534 (1973) (dicta). See generally 1 LAFAVE, SEARCH AND SEIZURE § 3.3(f), at 564.

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

Police may establish the veracity prong by demonstrating the informant's general credibility. A mere conclusion that the informant is a "credible person" is insufficient; reasons for believing the informant to be credible are required. *Aguilar v. Texas*, 378 U.S. 108, 112, 12 L. Ed. 2d 723, 727, 84 S. Ct. 1509, 1512 (1964); *State v. Jackson*, 102 Wash. 2d 432, 688 P.2d 136 (1984).

An informant’s reliability may also be established when the informant was used successfully on a prior occasion to make a controlled purchase of narcotics. *State v. Fisher*, 96 Wash. 2d 962, 965, 639 P.2d 743, 746 (1982), *cert. denied*, 457 U.S. 1137, 73 L. Ed. 2d 1355, 102 S. Ct. 2967 (1982). *But see id.* at 968, 639 P.2d at 747 (Utter, J., dissenting). *See generally 1 LAFAVE, SEARCH AND SEIZURE § 3.3(b)*, at 511-15.

The Washington Court of Appeals upheld a warrant based on an affidavit which merely stated that the informants previously had supplied information leading to arrests and recovery of contraband. *State v. Frye*, 26 Wash. App. 276, 279, 613 P.2d 152, 155 (1980). Courts have held that an informant who assists in an arrest is credible. The arrest does not need to be lawful, and the facts learned following the arrest do not have to verify the informant’s tip. *E.g.*, *State v. Hutton*, 19 Ariz. App. 95, 99, 505 P.2d 263, 267 (1973). Some courts have read *Aguilar* to hold that general statements alleging past reliability of the defendant are sufficient. *See 1 LAFAVE, SEARCH AND SEIZURE § 3.3(b)*, at 508-22 (criticizing such decisions for relying on allegations too general to show credibility).

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

2.5(c) Satisfying “Veracity” Prong by Admissions Against Interest and by Motive

When an informant cannot be shown to be generally credible, police may establish the informant’s reliability on the particular occasion. For example, an admission against penal interest may indicate truthfulness. *United States v. Harris*, 403 U.S. 573, 583-84, 29 L. Ed. 2d 723, 733-34, 91 S. Ct. 2075, 2081-82, (1975); *State v. Lair*, 95 Wash. 2d 706, 711, 630 P.2d 427, 430-31 (1981). *See generally 1 LAFAVE, SEARCH AND SEIZURE § 3.3(c)*, at 523 n.100. A statement against penal interest made to a citizen is considered just as reliable, if not more so, than one made to the police. *Lair*, 95 Wash. 2d at 711, 630 P.2d at 430.

Reliability also may be established by showing that the informant had a strong motive to assist the police. *See State v. Bean*, 89 Wash. 2d 467, 572 P.2d 1102 (1978). In *Bean*, the informant had been arrested on a drug offense and cooperated
with police in return for a favorable recommendation at sentencing. The informant set up an illegal drug purchase; the police accompanied the informant to the arranged purchase, but arrested the defendant before the purchase occurred. The informant’s tip was held to be reliable in part because of his strong motive to help the police. Id. at 471, 572 P.2d at 1104; see State v. Smith, 39 Wash. App. 642, 694 P.2d 660 (1984) (veracity prong satisfied by informant’s strong motive to provide accurate information: officials offered informant reduction in charge from felony to misdemeanor in unrelated matter); see also United States v. Harris, 403 U.S. 573, 600, 29 L. Ed. 2d 723, 743, 91 S. Ct. 2075, 2090 (1971) (Harlan, J., dissenting); 1 LAFAVE, SEARCH AND SEIZURE § 3.3(c), at 522-35 (1978); id., at 200-206 (Supp. 1985) (person in position of an informant would “not lightly undertake to divert the police down blind alleys”).

2.6 Citizen Informants—Victim/Witness Informants: In General

The Aguilar “basis of knowledge” and “veracity” tests apply to the use of information from a citizen informant, such as a victim or witness. Again, multiple hearsay is acceptable so long as each instance meets the two-prong test. See, e.g., United States v. Wilson, 479 F.2d 936, 940-41 (7th Cir. 1973) (service station employee notified police after learning through telephone call to American Express office that defendant was attempting to use a stolen credit card; the hearsay report from the citizen-informant was considered reliable because it was not likely to be colored by self-interest and was volunteered by an identified party, and the American Express report was reliable for reasons analogous to the business records exception to the hearsay rule).

2.6(a) Satisfying the “Basis of Knowledge” Prong

The basis of the “citizen-informant’s” knowledge must be established. See State v. Sieler, 95 Wash. 2d 43, 47-48, 621 P.2d 1272, 1275 (1980). In most cases no issue is presented because the citizen is an eyewitness. When, however, the facts have come from someone who is not an eyewitness or when the information given required some expertise, such as the ability to identify the odor of marijuana, the basis of the informant’s knowledge requires demonstration. See generally 1 LAFAVE, SEARCH AND SEIZURE § 3.4(b), at 602-06.
2.6(b) Satisfying “Veracity” Prong by Partial Corroboration of Informant’s Tip and by Self-Verifying Detail

In other jurisdictions, the veracity of citizen informants has been presumed, and corroboration of their information held unnecessary. See 1 LAFAVE, SEARCH AND SEIZURE § 3.4(b); see, e.g., Allison v. State, 62 Wis. 2d 14, 21, 214 N.W.2d 437, 441-442 (1974). Commentators favor this view if the witnesses had no motive to falsify. See 1 LAFAVE, SEARCH AND SEIZURE § 3.4(b), at 587-602.

The presumption of reliability attaches only to the citizen-informant, and some courts have indicated that the state has the burden of showing that an informant deserves citizen status. See, e.g., People v. Herdan, 42 Cal. App. 3d 300, 305-06, 116 Cal. Rptr. 641, 644 (1978) (informant provided police officers with prearranged signal that narcotics were present within the defendant’s vehicle, but because the state failed to distinguish the informant as a citizen-informant rather than as paid informant, reliability could not be inferred, and information given to police officers did not constitute probable cause.) If the burden is not met, the requirements for criminal informants must be shown. See generally 1 LAFAVE, SEARCH AND SEIZURE § 3.4(a), at 587-602.

Washington courts, however, require a showing of reliability for citizen-informants. See State v. Woodall, 100 Wash. 2d 74, 77, 666 P.2d 364, 366 (1983); State v. Fisher, 96 Wash. 2d 962, 965, 639 P.2d 743, 745, cert. denied, 457 U.S. 1137, 73 L. Ed. 2d 1355, 102 S. Ct. 2967 (1982). Although details provided by an informant may establish the requisite basis of the informant’s knowledge, Spinelli v. United States, 393 U.S. 410, 21 L. Ed. 2d 637, 89 S. Ct. 584 (1969), they will not establish the informant’s veracity when the details are consistent with innocent or lawful behavior. State v. Chatmon, 9 Wash. App. 741, 746-47, 515 P.2d 530, 535 (1973). Thus, when an anonymous informant told police that a person of the defendant’s description, riding in a car of a particular description and license number, was carrying marijuana, police corroboration that such a person was in such a car did not establish the informant’s reliability. Id. at 746-47, 515 P.2d at 535. The corroborated details must themselves create a reasonable inference that the law is being violated. Id. (citation omitted). Cf. State v. Luellen, 17 Wash. App. 91, 562 P.2d 253 (1977).

When a citizen-informant is fully identified to the magis-
trate, however, "intrinsic indicia of the informant's reliability may be found in his detailed description of the underlying circumstances of the crime observed or about which he had knowledge." *State v. Northness*, 20 Wash. App. 551, 557, 582 P.2d 546 (1978) (informant gave details of location of marijuana in her own apartment but belonging to a roommate; details sufficient to establish reliability). Consequently, when an affidavit contains the name and address of a citizen-informant, states that the informant had personally witnessed a crime, and describes the underlying circumstances with specificity, "no independent corroboration is required." *Id.* at 557-58, 582 P.2d at 550 (citations omitted).

Finally, the veracity prong may require less of a showing in exigent situations. "Where eyewitnesses to crime summon the police, and the exigencies are such (as in the case of violent crime and the imminent possibility of escape) that ascertainment of the identity and background of the informants would be unreasonable, the 'reliability' requirement might be further relaxed." *Northness*, 20 Wash. App. at 555, 582 P.2d at 548 (citations omitted). See generally 1 *LaFave, Search and Seizure* § 3.3(e), at 548.

### 2.6(c) Sufficiency of Information Supplied

Factors that have been considered in determining whether sufficient information has been provided include: (1) the particularity of the description of the offender or the vehicle; (2) the size of the area in which the perpetrator might be found; (3) the number of persons in the area; (4) the direction of flight; (5) the activity or condition of the person arrested; and (6) the knowledge that the person or his vehicle has been involved in other similar criminal activity. See 1 *LaFave, Search and Seizure* § 3.4(c), at 611-18.

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

Washington cases discussing particular fact patterns include: *State v. Palmer*, 73 Wash. 2d 462, 464, 438 P.2d 876, 878 (1968) (finding probable cause for arrest forty-five minutes
after robbery victim identified automobile by make, year, color, dirty white top, and clothes hanging in rear, and described suspect by hair color and attire); *State v. Kohler*, 70 Wash. 2d 599, 605, 424 P.2d 656, 660 (1967) (finding probable cause when two witnesses provided police with descriptions of vehicle, clothing, and build of suspects, and when probability of two like cars traveling within limited area of Seattle at 12:30 a.m. was slight); *State v. Baker*, 68 Wash. 2d 517, 520, 413 P.2d 965, 967-68 (1966) (finding probable cause when robbery victims identified make, color, and license number of suspect vehicle); *State v. McClung*, 66 Wash. 2d 654, 656-57, 660, 404 P.2d 460, 461-62 (1965) (finding probable cause when citizen gave detailed description of defendants and direction of flight); *State v. Thompson*, 58 Wash. 2d 598, 601-03, 364 P.2d 527, 528-30 (1961) (finding probable cause when citizen gave description of defendant’s appearance and physical condition and when defendant was found in close proximity to situs of crime); *State v. Hutton*, 7 Wash. App. 726, 734-35, 502 P.2d 1037, 1042-43 (1972) (officer’s mere knowledge of defendant’s prior charge for possession of marijuana insufficient to establish probable cause).

2.7 Police as Informants

2.7(a) Satisfying “Veracity” and “Basis of Knowledge” Prongs

As with citizen-informants, the veracity of police informants may be presumed. See *United States v. Ventresca*, 380 U.S. 102, 110, 13 L. Ed. 2d 684, 691, 85 S. Ct. 741, 747 (1965); see also, *United States v. Various Gambling Devices*, 478 F.2d 1194, 1200 (5th Cir. 1973) (FBI agent’s personal observations assumed to be reliable). But see *State v. Vanzant*, 14 Wash. App. 679, 681, 544 P.2d 786, 788 (1975) (“[P]robable cause may rest upon hearsay received from an informant if a reasonable person could conclude that, first, the present information is reliable; and second, the informant himself is reliable.”).

Generally, there must be a showing that the officer had a basis for his or her knowledge. In limited, complex situations, however, when setting forth the grounds for belief would be dif-
ficult, conclusory allegations will suffice. *Jaben v. United States*, 381 U.S. 214, 224-25, 14 L. Ed. 2d 345, 353, 85 S. Ct. 1365, 1371 (1965) (in tax evasion case, affidavit need not independently document or spell out every factual allegation because reconstruction of taxpayer’s income from various sources could not be alleged concisely in complaint).

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, 28 L. Ed. 2d 306, 313, 91 S. Ct. 1031, 1035 (1971) ("fellow officer rule"). The validity of an arrest, however, will depend on whether probable cause in fact existed. *Id.* at 568-69, 28 L. Ed. 2d at 313, 91 S. Ct. at 1036; cf. *United States v. Hensley*, ___ U.S. ____, 83 L. Ed. 2d 604, 105 S. Ct. 675 (1985) (officer making *Terry* stop may rely on information provided by neighboring police department; "effective law enforcement cannot be conducted unless police officers can act on directions and information transmitted by one officer to another[,] and . . . officers, who must often act swiftly, cannot be expected to cross-examine their fellow officers about the foundation for the transmitted information.") (quoting *United States v. Robinson*, 536 F.2d 1298, 1299 (9th Cir. 1976)); *Commonwealth v. Antobenedetto*, 74 Mass. 1225, 315 N.E.2d 530 (1974) (police may not assume that officer issuing radio communication had reliable information). For a discussion of the application of *Whiteley*, see 1 LaFAVE, SEARCH AND SEIZURE § 3.5(b), at 622-31.

Although determining probable cause on the basis of collective information in an agency generally is permissible, the chain of communication from one officer to another must be shown. See *State v. Johnson*, 12 Wash. App. 309, 310, 529 P.2d 873, 874 (1974); see generally 1 LaFAVE, SEARCH AND SEIZURE § 3.5(c), at 631-34.

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

Search and Seizure Survey

Wash. 2d 43, 48, 621 P.2d 1272, 1275 (1980) (reliability of named but unknown telephone informant not significantly different from anonymous telephone informant). Some courts examine why the police do not know the citizen’s identity and look for other circumstances that may indicate veracity. See, e.g., State v. Chatmon, 9 Wash. App. 741, 748, 515 P.2d 530, 535 (1973) (reliability of a citizen informant may be established by an interview with police if the informant satisfies an officer that he or she is a “prudent” person and has no motive to falsify). Thus, “[w]here eyewitnesses to crime summon police, and the exigencies are such . . . that ascertainment of the identity and background of the informants would be unreasonable, the ‘reliability’ requirement might be further relaxed.” 9 Wash. App. at 748 n.4, 515 P.2d at 535 n.4. See generally 1 LAFAVE, SEARCH AND SEIZURE § 3.4(a), at 596-97.

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

2.9(a) Administrative Searches

When a search is conducted for administrative, regulatory, or other purposes for which criminal prosecution is not the principal goal, a level of proof other than individualized probable cause may be used. See Camara v. Municipal Court, 387 U.S. 523, 18 L. Ed. 2d 930, 87 S. Ct. 1727 (1967). Two levels or types of proof will satisfy the requirements for an administrative warrant: (1) specific evidence providing reasonable grounds for believing that an administrative violation exists, Marshall v. Barlow’s, Inc., 436 U.S. 307, 320, 56 L. Ed. 2d 305, 316, 98 S. Ct. 1816, 1824 (1978); or (2) “reasonable legislative or administrative standards for conducting an area inspection [that] are satisfied with respect to a particular dwelling.” Camara, 387 U.S. at 538, 18 L. Ed. 2d at 941, 87 S. Ct. at 1736. Administrative standards for housing code inspections, for example, may be based on factors such as “the passage of time, the nature of the building[,] . . . or the condition of the entire area, but . . . will not necessarily depend upon specific knowledge of the condition of [a] particular dwelling.” Id.

The Washington Supreme Court has required administrative search programs, such as spot checks of automobiles for registration or vehicle violations, to be based on more than the purpose of detecting offenders; the government must furnish
evidence "that indicates that the [program] is a sufficiently productive mechanism to justify the intrusion." State v. Marchand, 104 Wash. 2d 434, 437, 706 P.2d 225 (1985).

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

2.9(b) Terry Stops and Frisks

A search or seizure that is relatively nonintrusive, such as a brief investigatory stop or patdown for weapons, may be based on less than probable cause. Terry v. Ohio, 392 U.S. 1, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968). The level of proof required for such intrusion is a "reasonable suspicion" of criminal activity. United States v. Brignoni-Ponce, 422 U.S. 873, 881, 45 L. Ed. 2d 607, 616-17, 95A S. Ct. 2574, 2580 (1975). The standard requires that "the police officer . . . be able to point to specific and articulable facts" supporting the suspicions or belief. Terry, 392 U.S. at 21, 20 L. Ed. 2d at 906, 88 S. Ct. at 1880.

For an officer to frisk a suspect who has been stopped as a result of a reasonable suspicion of criminal activity, the officer must have

reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime. The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger.

Terry, 392 U.S. at 27, 20 L. Ed. 2d at 909, 88 S. Ct. at 1883.

For a further discussion of Terry stops and frisks, see infra § 4.5.

A suspect may be detained in his or her home on less than probable cause when police are executing a search warrant at the home for contraband. Michigan v. Summers, 452 U.S. 692, 705, 69 L. Ed. 2d 340, 351, 101 S. Ct. 2587, 2595 (1981). Similarly, police may frisk a person present at the execution of a search warrant if they have a reasonable belief that the person is armed. Ybarra v. Illinois, 444 U.S. 85, 92-93, 62 L. Ed. 2d 238, 246, 100 S. Ct. 338, 343 (1979). See infra § 5.18(b).

2.9(c) Intrusions Into the Body

Probable cause alone is not sufficient to permit police to
conduct a search involving an intrusion into a suspect’s body. Schmerber v. California, 384 U.S. 757, 770, 16 L. Ed. 2d 908, 919, 86A S. Ct. 1826, 1835 (1966). In addition to establishing probable cause, police must show that the desired evidence clearly will be discovered by the intrusion and that the evidence is important to the government’s case. See Winston v. Lee, —— U.S. ———, 84 L. Ed. 2d 662, 670-71, 105 S. Ct. 1611, 1618 (1985); Schmerber, 384 U.S. at 770, 15 L. Ed. 2d at 919, 86 S. Ct. at 1835.

Even when these requirements have been satisfied, reasonable medical means and equipment must be used. Schmerber, 384 U.S. at 771, 16 L. Ed. 2d at 920, 86 S. Ct. at 1836. See generally infra § 3.13(b).

2.9(d) Special Environments: Schools, Prisons, and Borders

The levels of proof required for searches and seizures in schools, in detention facilities, and at borders are discussed infra § 6.

Chapter 3: Search Warrants

3.0 Introduction: Fourth Amendment Requirements for Search Warrants

The fourth amendment provides that

no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const., amend. IV. This provision was enacted partly in response to the evils of the use of general warrants in England and writs of assistance in the colonies. See Boyd v. United States, 116 U.S. 616, 626-27, 29 L. Ed. 746, 749-50, 6 S. Ct. 524, 530 (1886); State v. Fields, 85 Wash. 2d 126, 128, 530 P.2d 284, 288 (1975). This chapter is concerned with the interpretation of the fourth amendment’s requirements for a valid search warrant and its execution.

Searches and seizures generally must be made pursuant to a warrant. See, e.g., United States v. Ventresca, 380 U.S. 102, 106, 13 L. Ed. 2d 684, 687, 85 S. Ct. 741, 744 (1965). There are, however, a number of situations when searches and seizures may be made without warrants—even when it would be feasible to obtain them—and some circumstances when warrants alone are not sufficient. Warrantless searches and seizures are discussed
separately in Chapter 5, and circumstances in which warrants are not sufficient are discussed in sections 3.13(a),(b). For the most part, the standards discussed below apply to arrest as well as search warrants. Issues pertaining specifically to arrests are discussed in Chapter 4.

3.1 Types of Items That May Be Searched and Seized

Warrants may be issued not only for contraband or instrumentalities of crime, but also for "mere evidence." When it seeks a warrant for evidence, the state must show cause to believe that the evidence will aid in apprehending or convicting. Warden, Maryland Penitentiary v. Hayden, 387 U.S. 294, 18 L. Ed. 2d 782, 87 S. Ct. 1642 (1967). See CrR 2.3(b); JCrR 2.10(b). Warrants may be issued for evidence containing incriminating statements; the fifth amendment protects a person only from producing evidence, not from its production by others. Andresen v. Maryland, 427 U.S. 463, 49 L. Ed. 627, 96 S. Ct. 2737, 2745 (1976).

3.2 Who May Issue Warrants: Neutral and Detached Magistrate Requirements

Part of the protection that a warrant provides is the determination of probable cause by a neutral and detached magistrate instead of by a police officer. Johnson v. United States, 333 U.S. 10, 68 S. Ct. 367, 369 (1948) ("The point of the Fourth Amendment . . . is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime."). See generally 2 LAFAVE, SEARCH AND SEIZURE § 4.2 (a)(f), at 29-41.

3.2(a) Qualifications of a "Magistrate"

Constitutional provisions, statutes, and court rules define who qualifies as a magistrate. The fourth amendment does not require that a magistrate be a lawyer so long as he or she is capable of determining whether probable cause exists. Shadwick v. City of Tampa, 407 U.S. 345, 32 L. Ed. 2d 783, 92 S. Ct. 2119 (1972) (nonlawyer municipal court clerk permitted to issue
arrest warrants); State v. Porter, 88 Wash. 2d 512, 515, 563 P.2d 829, 830-31 (1977); but c.f. 2 LaFAVE, SEARCH AND SEIZURE § 4.2(c), at 34-37 (because search warrants are more complex than arrest warrants, the use of nonlawyers to issue search warrants should be constitutionally suspect).

Even when the person issuing the warrant is a magistrate in title, he or she must make an independent probable cause determination and may not simply rubber-stamp warrants. Aguilar v. Texas, 378 U.S. 108, 114, 12 L. Ed. 2d 723, 728-29, 84 S. Ct. 1509, 1514 (1964); State v. Klinker, 85 Wash. 2d 509, 537 P.2d 268 (1975).

States may impose more stringent requirements than the fourth amendment. Washington limits the power to issue warrants to magistrates, including justices of the peace, see Wash. Rev. Code §§ 2.20.010 and .020, and to court commissioners, see State v. Porter, 88 Wash. 2d at 514, 563 P.2d at 830.

3.2(b) Neutrality

A magistrate who is capable of determining probable cause nevertheless may be disqualified from issuing a warrant for failing to meet the “neutral” requirement. Thus, a state officer who acts as prosecutor and investigator in a case is automatically disqualified from acting as a magistrate in that case. Coolidge v. New Hampshire, 403 U.S. 443, 450, 29 L. Ed. 2d 564, 573, 91 S. Ct. 2022, 2029 (1971). An unsalaried magistrate who receives a fee for each search warrant issued is not considered neutral. Connally v. Georgia, 429 U.S. 245, 250, 50 L. Ed. 2d 444, 448, 97 S. Ct. 546, 548 (1977) (pecuniary interest in issuing warrants compared with denying them renders magistrate not neutral and not detached). An administrative “warrant” signed by the parole officer conducting the search is invalid. Hocker v. Woody, 95 Wash. 2d 822, 825-26, 631 P.2d 372, 375 (1981). Finally, the magistrate’s involvement in the execution of the warrant may constitute non-neutrality. Lo-Ji Sales, Inc. v. New York, 442 U.S. 319, 326-27, 60 L. Ed. 2d 920, 928-29, 99 S. Ct. 2319, 2324 (1979) (judge who accompanied police on raid of pornographic bookstore was not neutral and detached when he added new materials observed there to previously signed search warrant).

On the other hand, the per se rule of Coolidge was held not to apply to a case in which the pro tempore judge issuing the warrant was also a prosecutor but was not involved in the prosecution of that particular case. State v. Hill, 17 Wash. App. 678,
A search warrant has been upheld, however, although the issuing judicial officer was aware from the affidavit that he might be a witness against the defendant. State v. Smith, 16 Wash. App. 425, 428, 558 P.2d 265, 268 (1976). But see 2 LAFAVE, SEARCH AND SEIZURE § 4.2 (b), at 33 n.25 (questioning the reasoning in Smith).

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

Magistrate-shopping to obtain a warrant after one has been denied by another magistrate has been condemned. See, e.g., United States v. Davis, 346 F. Supp. 435 (S.D. Ill. 1972); but see 2 LAFAVE, SEARCH AND SEIZURE § 4.2(e), at 39.

3.2(c) Burden of Proof

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

3.3 Content of the Warrant

3.3(a) Oath or Affirmation: Multiple Affidavits

The oath or affirmation clause of the fourth amendment requires that the person presenting the supporting affidavit swear to the information the affidavit contains. U.S. CONST. amend. IV. A Washington court has upheld a warrant, however,
when the affidavit was not sworn to but was signed in the presence of the magistrate. State v. Douglas, 71 Wash. 2d 303, 309-310, 428 P.2d 535, 539 (1967). Lower courts have split on the question of whether a fictitious name affidavit is defective. See 2 LaFave, Search and Seizure § 4.3(f), at 53-99.

3.3(b) Information Considered

The information establishing probable cause may not be stale at the time it is presented to the judge. "It is not enough . . . to set forth that criminal activity occurred at some prior time. The facts or circumstances must support the reasonable probability that the criminal activity was occurring at or about the time the warrant was issued." State v. Higby, 26 Wash. App. 457, 460, 613 P.2d 1192, 1194 (1980) (one sale of small amount of marijuana did not provide probable cause to search two weeks later); cf. supra § 2.3.

The fact that a valid warrant could have been obtained had the affiant provided sufficient information to the magistrate will not validate a warrant issued in the absence of that information. Thus, an otherwise insufficient affidavit cannot be rehabilitated by a later production of information that the affiant had possessed but did not disclose to the magistrate when seeking the warrant. Whiteley v. Warden, 401 U.S. 560, 565-66, 28 L. Ed. 2d 306, 311-12, 91 S. Ct. 1031, 1035-36 (1971); cf. Seattle v. Leach, 29 Wash. App. 81, 627 P.2d 159 (1981) (affidavit in support of administrative warrant not sufficient when it alleges comprehensive inspection program but fails to describe program). But see State v. Smith, 16 Wash. App. 425, 428, 558 P.2d 265, 268 (1976) (warrant valid so long as it could have been properly issued).

On the other hand, the Washington Supreme Court has ruled that when a warrant is facially valid and an omission is neither intentional nor made with a reckless disregard for the truth, the warrant can be valid even though it is based upon an affidavit containing an omission. State v. Cord, 103 Wash. 2d 361, 693 P.2d 81 (1985). Thus, although an affidavit in support of a search warrant failed to state the altitude at which the officer allegedly observed marijuana plants, the affidavit otherwise provided a sufficient basis for the issuing judge to conclude that a crime probably had been committed. But cf. Cord, 103 Wash. 2d at 369, 693 P.2d at 87 (Williams, C.J., dissenting) (when aerial views are means utilized to show probable cause, affidavit must reveal altitude from which identification made;
court thus can guard against issuance of warrants following unreasonably low, intrusive searches and make sure officers do not engage in unreasonably high views of questionable reliability).

An affidavit must set forth the underlying facts; a conclusory information, sworn to by the prosecutor, cannot establish probable cause. See Albrecht v. United States, 273 U.S. 1, 5, 71 L. Ed. 505, 47 S. Ct. 250 (1927); cf. State v. Klinker, 85 Wash. 2d 509, 537 P.2d 268 (1975). At the same time, however,

[affidavits for search warrants must be tested in a common-sense manner rather than hypertechnically as long as the basic Aguilar/Spinelli requirements are met . . . . “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.”


3.3(c) Oral Testimony and Oral Warrants

In Washington, a search warrant may be based on a single affidavit, several affidavits, or oral testimony. CRR 2.3(c); JCRR 2.10(c). The judge must record a summary of any additional evidence upon which the warrant is based. CRR 2.3(c); see 2 LAFAVE, SEARCH AND SEIZURE § 4.3 (b), at 45-46.

Some states, including Washington, permit oral search warrants in which an affiant makes a sworn telephonic statement to a judge. CRR 2.3(c); JCRR 2.10(c). See State v. Ringer, 100 Wash. 2d 686, 701, 674 P.2d 1240, 1249 (1983). For a discussion of various objections to this procedure, see 2 LAFAVE, SEARCH AND SEIZURE § 4.3(c), at 47-49.

3.3(d) Administrative Warrants

3.4 Particular Description of Place to be Searched

3.4(a) General Considerations

By requiring a particular description of the place to be searched, the fourth amendment furthers two purposes: (1) it limits the risk that the wrong place will be searched; and (2) it helps in determining whether probable cause is present. The description must be such that the officer executing the warrant can, with reasonable effort, ascertain and identify the place intended. Steele v. United States, 267 U.S. 498, 503, 69 L. Ed. 757, 760, 45 S. Ct. 414, 416 (1925); State v. Smith, 39 Wash. App. 642, 648-49, 694 P.2d 660, 664 (1984).

If a warrant is invalid for failure to describe specifically the place to be searched, the search cannot be upheld on the ground that there was a probable cause determination by a magistrate; the evidence seized, however, may sometimes be admissible. See generally infra § 7.2. Furthermore, if a warrant separately and distinctly describes two targets and it thereafter is determined that probable cause existed for issuance of the warrant as to one but not to the other, the warrant may be treated as severable and upheld as to the one target only. State v. Halverson, 21 Wash. App. 35, 37, 584 P.2d 408, 409 (1978); see 2 LaFave, Search and Seizure § 4.6(f), at 111-113.

In determining initially whether a description is adequate, reference is made to the warrant itself. The affidavit and other incorporated documents may be considered if they are attached to the warrant. A description may appear adequate on its face, but upon execution be found to be ambiguous or to contain errors. Whether such a warrant will be deemed sufficient depends on whether other information is available that permits the officer to identify the intended premises. See State v. Rood, 18 Wash. App. 740, 744-45, 573 P.2d 1325, 1327-28 (1977).

Three types of information may be considered in determining a warrant's adequacy: (1) other physical descriptions of the premises contained in the warrant or the affidavit; (2) information based on the officer's personal knowledge of the location or its occupants; and (3) personal observations of the officers at the time of execution. Id. at 744-45, 573 P.2d at 1328. See also State v. Smith, 39 Wash. App. 642, 649, 694 P.2d 660, 664 (1984) (search warrant identifying place to be searched as 2415 Carl Road, Sumas, Washington, rather than correct address of 2415 Carl Road, Everson, Washington, was such that police officer
could, with reasonable effort, ascertain and identify place intended); *State v. Cohen*, 19 Wash. App. 600, 604, 576 P.2d 933, 936 (1978) (requiring only reasonable particularity); *see generally* 2 LAFAVE, *SEARCH AND SEIZURE* § 4.5, at 72-77. Earlier Washington cases include *State v. Andrich*, 135 Wash. 609, 612, 238 P. 638, 639 (1925) (warrant's error in house number immaterial when officer knew where accused lived and searched correct house), and *State v. Davis*, 165 Wash. 652, 654, 5 P.2d 1035, 1036 (1931) (warrant sufficient although incorrect street name given; name given was popularly known, and no one could have been misled).

3.4(b) Particular Searches: Places

In urban areas, places usually are identified by street address, but the address is unnecessary when other facts make it clear that a particular place is intended. *State v. Traswina*, 16 Wash. App. 519, 523, 557 P.2d 368, 370 (1976) (warrant describing premises as two-story, white frame house located directly behind particular address sufficient when no evidence presented that more than one house met description or that premises failed to conform to description except for incorrect address); *see State v. Chisholm*, 7 Wash. App. 279, 283, 499 P.2d 81, 84 (1972) (warrant that failed to specify street location was sufficiently clear when officers could identify premises with reasonable certainty and when reason for failure to specify street was included in affidavit for warrant). Rural areas may be described by legal description of the property. *See State v. Cohen*, 19 Wash. App. at 603, 576 P.2d at 935.

When a warrant contains errors, the burden is upon the party challenging the warrant to show that the errors could have resulted in a search of the wrong premises. *State v. Fisher*, 96 Wash. 2d 962, 967, 639 P.2d 743, 746 (1982); *see State v. Smith*, 39 Wash. App. 642, 649, 694 P.2d 660, 664 (1984) (although town wrongly identified in warrant, search upheld when defendant made no showing that similar address existed that could have been mistakenly searched or even that street of the same name existed in wrongly identified town).

Generally, unless there is probable cause to search all living units of a multiple occupancy building, the description must single out a particular sub-unit. *People v. Avery*, 478 P.2d 310 (Colo. 1970). But if the building looks like a single occupancy structure from the outside, and the officers have no reason to
know that it is a multiple unit structure, the warrant is not
defective for failing to specify a sub-unit. State v. Chisholm, 7
Wash. App. at 282, 499 P.2d at 81. Additional exceptions to the
general rule are outlined in United States v. Whitten, 706 F.2d
1000 (9th Cir. 1983). A warrant may authorize a search of an
entire street address while reciting probable cause as to only a
portion of the premises if the premises are occupied in common
rather than individually, if a multi-unit building is used as a sin-
gle entity, if the defendant was in control of the whole premises,
or if the entire premises are suspect. Id. at 1008. See generally 2
LAFAVE, SEARCH AND SEIZURE § 4.5(b), at 78-82.

Although search warrants for vehicles are uncommon
because of the many exceptions allowing warrantless searches,
see infra § 5.21, such warrants are governed by the same principe
papers discussed above. See State v. Cohen, 19 Wash. App. at 604,
576 P.2d at 936.

3.4(c) Particular Searches: Persons

Search warrants may be issued for persons, as well as for
places, if there is probable cause to believe that a specific indi-
vidual has evidence on his or her person. When a search warrant
is issued for a person, the general rule requiring particularity
applies. See 2 LAFAVE, SEARCH AND SEIZURE § 4.5(e), at 88-94.

For a discussion of when a search warrant for premises
authorizes the search of persons not named in the warrant, see
infra § 3.8(a). Frequently, when a search warrant for premises is
executed, the police have probable cause to arrest persons pre-
sent, and a warrantless search is justified as incident to the
arrest. See infra § 5.1.

3.5 Particular Description of Things to be Seized

Because the facts in each case differ greatly, the issue of
whether a warrant describes the things to be seized with suffi-
cient particularity generally is determined without reference to
the fact patterns in prior cases. See State v. Helmka, 86 Wash.
2d 91, 542 P.2d 115 (1975). Instead, courts look to the purposes
of the “particular description” requirement: (1) to prevent gen-
eral exploratory searches; (2) to protect against seizure of objects
on the mistaken assumption that they fall within the warrant;
and (3) to ensure that probable cause is present. See Marron v.
Although the description need not be detailed, a search warrant must so circumscribe an officer’s actions that the reviewing court is able to determine that the search was based on probable cause and particular descriptions. *United States v. Gomez-Soto*, 723 F.2d 649 (9th Cir. 1984); see *State v. Weaver*, 38 Wash. App. 17, 22, 683 P.2d 1136, 1139 (1984) (although cardboard box bearing defendant’s name generally would not be considered “paper,” police could seize box because obvious purpose of warrant was seizure not only of controlled substances but also of evidence enabling state to demonstrate defendant’s dominion and control over premises). See also *State v. Reid*, 38 Wash. App. 203, 212, 687 P.2d 861, 867 (1984) (phrase “any other evidence of homicide” specifically limited the warrant to the crime under investigation; specific items listed, such as shotgun and shotgun shells, provided additional guidelines for the officers conducting search); *State v. Lingo*, 32 Wash. App. 638, 641, 649 P.2d 130, 132 (1982) (warrant not constitutionally defective when it limits the officer’s discretion on the items to be seized); but see *Weaver*, 38 Wash. App. at 24, 683 P.2d at 1140 (1984) (Ringold, J., dissenting) (because the box with defendant’s name was not seized to show dominion and control but solely to carry contraband that had been uncovered during the warrant search, majority’s “dominion and control” argument is merely post hoc attempt to justify seizure, and cocaine later found in the box should have been suppressed).

3.5(a) General Rules

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

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

(2) A more general description will suffice when the nature of the items is such that they do not have more specific characteristics.

(3) A less precise description is adequate for controlled substances. *State v. Cowles*, 14 Wash. App. 14, 19, 538 P.2d 840, 844 (1975) (when affidavit states that narcotics and, specifically, marijuana was observed, search warrant authorizing seizure of “controlled substances” is “reasonable and practical under the
circumstances and thus satisfies the constitutional requirement of ‘particularity.’”).

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

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

(6) Greater care is required when the property sought is generally in lawful use.

(7) A more specific description is required when other, similar objects are likely to be found at the particular place.

(8) More care is required when the consequences of a seizure of articles by mistake are substantial as, for example, where the articles are personal papers. 2 LAFAVE, SEARCH AND SEIZURE § 4.6(a), at 95-101.

3.5(b) Circumstances Requiring Greater Scrutiny

Search warrants for documents and for telephone conversations require greater scrutiny because of the potential for intrusion into personal privacy. Andresen v. Maryland, 427 U.S. 463, 49 L. Ed. 2d 627, 96 S. Ct. 2737 (1976). At the same time, the Court has upheld a search warrant that listed specific documents pertaining to a particular crime but then added the catch-all phrase, “together with other fruits, instrumentalities, and evidence of crime.” Id. at 479, 49 L. Ed. 2d at 642, 96 S. Ct. at 2748. The search was constitutional because the catch-all phrase was to be read as authorizing a search only for evidence relating to the defined crime. Id. at 480-82, 49 L. Ed. 2d at 642-43, 96 S. Ct. at 2748-49. See State v. Legas, 20 Wash. App. 535, 541, 581 P.2d 172, 175 (1978) (dicta) (citing Andresen as authority for proposition that each item seized need not have been specified in the warrant as long as it related to the crime charged); cf. State v. Smith, 16 Wash. App. 425, 428, 558 P.2d 265, 268 (1976) (warrants upheld for search of defendant’s home and office for documents, cancelled checks, bank statements, and correspondence relating to guardianship accounts when defendant charged with grand larceny by misappropriation of guardianship funds). But see 2 LAFAVE, SEARCH AND SEIZURE § 4.6(d), at 104-09 (Andresen should not be read as approval for loose descriptions because the Court was influenced by the fact that the descript-
tion was as specific as possible). When a search is for particular contents of documents, the invasion of privacy can be minimized by impounding the documents and then imposing conditions on a further search. See 2 LAFAVE, SEARCH AND SEIZURE § 4.6(d), at 108 n.68.

Evidence must be described with greater particularity when the search is of a news-gathering organization. See Zurcher v. Stanford Daily, 436 U.S. 547, 564, 56 L. Ed. 2d 525, 541, 98 S. Ct. 1970, 1981 (1978). Warrants for books, pictures, films, or recordings require "scrupulous exactitude" because of the first amendment interests involved. Stanford v. Texas, 379 U.S. 476, 485, 13 L. Ed. 2d 431, 437, 86 S. Ct. 506, 511 (1965). In addition, the officers executing the search warrant are constitutionally prohibited from using their own discretion to determine whether materials are unlawful. Lo-Ji Sales, Inc. v. New York, 442 U.S. 319, 325, 60 L. Ed. 2d 920, 927-28, 99 S. Ct. 2319, 2324 (1979). These strict requirements, however, do not apply to papers that are seized for reasons other than their unlawful content. For example, when a warrant authorizes a search for papers that will prove dominion or control over premises, the warrant need not specify particular papers. State v. Legas, 20 Wash. App. 535, 540-41, 581 P.2d 172, 175 (1978).

3.6 Execution of the Warrant: Time of Execution

Washington is one of several states that requires by court rule that warrants be executed within a certain time period. The warrant "shall command the officer to search, within a specified period of time not to exceed 10 days . . . ." CrR 2.3(c). Cf. WASH. REV. CODE § 69.50.509 (1983) (three day limit for execution of search warrant for controlled substances). A delay in execution may render a warrant invalid if probable cause no longer exists at the time the warrant is executed. State v. Higby, 26 Wash. App. 457, 460, 613 P.2d 1192, 1194 (1980). See generally 2 LAFAVE, SEARCH AND SEIZURE § 4.7(a), at 113-16.

Unlike other states, Washington does not restrict the execution of warrants to daytime hours. CrR 2.3(c) (warrant may be served at any time of day). See State v. Smith, 15 Wash. App. 716, 719-20, 552 P.2d 1059, 1062 (1976) (nighttime search is not unreasonable). The United States Supreme Court has not decided whether the fourth amendment requires additional justification for nighttime search warrants. But see Gooding v. United States, 416 U.S. 430, 460, 40 L. Ed. 2d 250, 276, 94 S. Ct.
1780, 1795 (1974) (Marshall, J., dissenting) ("The purpose of the restriction upon nighttime searches was to limit such intrusions to those instances where there is 'some justification for it'"). See 2 LaFave, Search and Seizure § 4.7(b), at 119 n.28 (suggesting that the constitutionality of a nighttime search depend upon whether it was necessary to make the search at that time).

A search warrant may be executed even when the occupants are not present. See, e.g., United States v. Gervato, 474 F.2d 40, 44 (3rd Cir. 1973) (presence of occupant while search warrant being executed is neither common law nor constitutional requirement); see also 2 LaFave, Search and Seizure, § 4.7(c).

3.7 Entry without Notice or by Force: "Knock and Announce" Requirements

Absent exigent circumstances, officers executing a warrant must give notice of their authority and purpose prior to entry onto private premises. See Ker v. California, 374 U.S. 23, 40, 10 L. Ed. 2d 726, 742, 83 S. Ct. 1623, 1633 (1963). This "knock and announce" or "knock and wait" requirement applies to the execution of both arrest and search warrants. See, e.g., id.; State v. Myers, 102 Wash. 2d 548, 689 P.2d 38 (1984). The Supreme Court has not decided whether the Constitution compels the requirement, although the requirement is a long-established common-law rule. See Myers, supra. See infra §§ 5.16-5.19 for a discussion of exigent circumstances.

Many states, including Washington, have codified the knock and announce requirement. Washington law provides: "To make an arrest in criminal actions, the officer may break open any outer or inner door, or windows of a dwelling house or other building or any other inclosure, if, after notice of his office and purpose, he be refused admittance." Wash. Rev. Code § 10.31.040 (1983). Although the statute expressly refers to arrests, it applies to the execution of search warrants as well. State v. Young, 76 Wash. 2d 212, 217, 455 P.2d 595, 598 (1969).

The purposes of the knock and announce rule are: (1) to reduce the potential for violence; (2) to prevent the physical destruction of property; and (3) to protect privacy. See United States v. Bustamante-Gamez, 488 F.2d 4, 9 (9th Cir. 1970), cert. denied, 416 U.S. 970, 40 L. Ed. 2d 559, 94 S. Ct. 1993 (1974); State v. Dugger, 12 Wash. App. 74, 78, 528 P.2d 274, 276 (1974). Thus, for example, the presence of an undercover officer inside the premises does not excuse compliance with the rule because
the purposes of the knock and announce requirement are not served by an officer whose authority to arrest is unknown to the occupant. Dugger, 12 Wash. App. at 77, 528 P.2d at 276. An officer's actions are judged by a standard of reasonableness, in light of the purposes supporting the knock and announce rule and the particular facts and circumstances of each individual case. See, e.g., Ker v. California, 375 U.S. 23, 33, 10 L. Ed. 2d 726, 738, 83 S. Ct. 1623, 1629-30 (1963); State v. Myers, 102 Wash. 2d 548, 689 P.2d 38 (1984). See generally 2 LAFAVE, SEARCH AND SEIZURE, § 4.8(a), at 122-25.

3.7(a) Types of Entry Requiring Notice

The phrase "break open" in the Washington knock and announce statute refers to all nonconsensual entries and not simply to those involving forcible breaking. See State v. Coyle, 95 Wash. 2d 1, 5-6, 621 P.2d 1256, 1258 (1980) (knock and wait statute was violated when officers grabbed occupant who had opened door just as police were about to knock and officers then entered through open door without alerting other occupants); State v. Miller, 7 Wash. App. 414, 419, 499 P.2d 241, 244 (1972) (execution of search warrant unlawful when police entered through partially opened door without knocking or announcing purpose). A consensual entry, however, is not a "breaking open." State v. Hartnell, 15 Wash. App. 410, 418, 550 P.2d 63, 69 (1976) (defendant's wife invited unidentified officer into house; thus entry was consensual and announcement of purpose not required).

Notice is required for entry by use of a pass key, Ker v. California, 374 U.S. 23, 37-41, 10 L. Ed. 2d 726, 740-42, 83 S. Ct. 1623, 1631-34 (1963), and for entry through a closed but unlocked door, State v. Miller, 7 Wash. App. 414, 416, 499 P.2d 241, 243 (1972). Although courts in other jurisdictions are divided on the question of whether passage through an open door requires notice, see 2 LAFAVE, SEARCH AND SEIZURE § 4.8(b), at 126-127, Washington courts require notice in such situations. See Miller, 7 Wash. App. at 416, 499 P.2d at 243 (fourth amendment and Wash. Rev. Code § 10.31.040 prohibit an officer executing a search warrant from entering a house without providing notice of office and purpose, even though door through which the officer entered was open far enough to permit passage); see also State v. Talley, 14 Wash. App. 484, 490-91, 543 P.2d 348, 352-53 (1975) (officer entering dwelling must give "notice of his
office and purpose” even though door to apartment partially open).

The Washington Supreme Court has held that consent to enter that has been obtained by deception is effective consent. Thus an officer who deceives a suspect into allowing him or her to enter need not announce office and purpose. State v. Myers, 102 Wash. 2d 548, 553, 689 P.2d 38, 42 (1984). In Myers, the police had been aware that the doors and windows to the defendant’s house were covered by iron bars, and they had been told by an informant that the defendant kept a handgun within reach whenever he opened the door. The police prepared a fictitious warrant for the defendant’s arrest for a traffic offense, knowing that the defendant had no outstanding traffic violations. Upon being permitted to enter his house to execute the arrest warrant, the police executed the search warrant. The court held that even though the officers failed to announce their office and purpose, the occupant of the house had granted “valid permission” for them to enter. Id. at 552, 689 P.2d at 42; see State v. Coyle, 95 Wash. 2d, 1, 5, 621 P.2d 1256, 1259 (1980). Because an occupant may not deny entry to police in possession of a valid search warrant, his or her right to privacy is not infringed by the fact that permission to enter was obtained by ruse. Myers, 102 Wash. 2d at 555, 689 P.2d at 43. See also id. at 560, 689 P.2d at 45-46 (Dimmick, J., concurring in result) (execution of search warrants requires case-by-case evaluation of tactics used to reduce violence and prevent destruction of property; prohibiting use of ruse may result in police having to approach houses massively armed and with weapons drawn, or to destroy building entrance).

Washington Court of Appeals cases involving entry by deception include State v. Ellis, 21 Wash. App. 123, 129, 584 P.2d 428, 432 (1978) (when officer unable to gain entry through use of false name, subsequent forcible entry absent exigent circumstances unlawful without compliance with knock and wait statute); State v. Huckaby, 15 Wash. App. 280, 290, 549 P.2d 35, 37-42 (1976) (when undercover officers gain entry into suspect’s home with suspect’s consent and for apparent purpose of drug transaction, knock and announce statute inapplicable); cf. Lewis v. United States, 385 U.S. 206, 17 L. Ed. 2d 312, 87 S. Ct. 424 (1966) (entry lawful when undercover officer telephoned suspect and misrepresented his identity in order to gain invitation in to suspect’s home), reh’g denied, 386 U.S. 939, 17 L. Ed. 2d 811, 87

The Washington knock and announce statute requires notice prior to entry through inner as well as outer doors. Wash. Rev. Code § 10.31.040 (1983); cf. 2 LaFave, Search and Seizure § 4.8(b), at 126-27 (federal rule does not require separate notice for different rooms in one house).

3.7(b) Compliance with Requirements

The police must identify themselves as police officers and indicate to the person in apparent control of the premises that they are present to execute the warrant. It is not sufficient to make this announcement simultaneously with a forcible entry. State v. Ellis, 21 Wash. App. 123, 129, 584 P.2d 428, 432 (1978); State v. Lowrie, 12 Wash. App. 155, 157, 528 P.2d 1010, 1012 (1974) ("Announcing your identity as you kick in the door is not compliance with the general [knock and wait] rule."). Police are not required, however, to give a detailed or completely accurate description of their purpose, as long as they comply with the statute. Cf. State v. Myers, 102 Wash. 2d 548, 689 P.2d 38 (1984) (use by police of fictitious arrest warrant to gain entry into defendant's house in order to execute valid search warrant did not violate knock and announce requirements because officers announced identity and stated that purpose was to execute warrant); State v. Reid, 38 Wash. App. 203, 687 P.2d 861 (1984).

After giving notice, officers must allow the occupants an opportunity to "refuse admittance" before entering, but the officers need not wait until the occupants affirmatively deny their entry. State v. Jones, 15 Wash. App. 165, 167, 547 P.2d 906, 908 (1976) (officers' entry after ten second wait with no affirmative refusal held reasonable). What constitutes refusal is "a factual determination to be made primarily by the trial court." Id.; see State v. Woodall, 32 Wash. App. 407, 411, 647 P.2d 1051, 1054 (1982) ("[i]n light of the information concerning the number of people at the party, danger of violence, the con-
cern for destruction of the evidence, and the deputy's testimony that someone inside the clubhouse saw [the officers] long before they reached the door, a three or four second wait after the officers announced their identity and purpose made entry reasonable), rev'd on other grounds, 100 Wash. 2d 74, 75, 666 P.2d 364, 365 (1983); State v. Haggarty, 20 Wash. App. 335, 337-38, 579 P.2d 1031, 1033 (1978) (when officers knocked on door and announced office and purpose, and when door opened after thirty second wait, officers were justified in believing door opened in response to announcement and did not need to repeat office and purpose); State v. Lowrie, 12 Wash. App. 155, 157, 528 P.2d 1010, 1012 (1974) ("failure to answer a knock at the door within 15 seconds and then merely walking away from door is insufficient" refusal when officers have not announced their identity and purpose nor explicitly demanded entry, even if occupant might have recognized one of the officers). Jones is questioned in 2 LAFAVE, SEARCH AND SEIZURE § 4.8(c), at 130.

The announcement of office and purpose may be made to the person answering the door even when he or she is not in possession of the premises. See State v. Sainz, 23 Wash. App. 532, 538-39, 596 P.2d 1090, 1095 (1979).

Unnecessary roughness in executing a warrant "does not rise to constitutional magnitude . . . or negate prior compliance with [WASH. REV. CODE] § 10.31.040." Id.

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

An entry is in conformity with the knock and announce statute when compliance is substantial. See State v. Reid, 38 Wash. App. 203, 687 P.2d 861 (1984).

3.7(c) Exceptions

Under the "useless gesture" exception, compliance is excused if the authority and purpose of the police are already known to those within the premises. Ker v. California, 374 U.S. 23, 60, 10 L. Ed. 2d 726, 753, 83 S. Ct. 1623, 1643 (1963) (Brennan, J., dissenting in part). Washington has required that officers be "virtually certain" that occupants of a dwelling are aware of the officers' presence. State v. Coyle, 95 Wash. 2d 1, 11, 621 P.2d 1256, 1262 (1980). See generally 2 LAFAVE, SEARCH AND SEIZURE § 4.8(f), at 137-38.
The useless gesture exception has been applied by implication to justify a police officer's forcible entry when the officer identified himself but was unable to state his purpose before the suspect tried to close the door. State v. Neff, 10 Wash. App. 713, 716, 519 P.2d 1328, 1330 (1974). But closing a door upon an officer not in uniform, under ambiguous circumstances, will not excuse the officer from complying with the knock and announce rule. State v. Ellis, 21 Wash. App. 123, 127, 584 P.2d 428, 431 (1978); see also Coyle, 95 Wash. 2d at 13, 621 P.2d at 1262.


A police officer's reasonable belief that the items identified in the search warrant will be destroyed or removed constitutes one type of exigent circumstance. The fact that the items could easily be destroyed is not sufficient; the police must possess specific information indicating that the items are in actual imminent danger of destruction or removal. See State v. Young, 76 Wash. 2d 212, 215, 455 P.2d 595, 597 (1969) (belief of exigent circumstances cannot be based upon vague suspicion or ambiguous acts); Coleman v. Reilly, 8 Wash. App. 684, 687, 508 P.2d 1035, 1038 (1973) ("[T]here must be more than mere suspicion on behalf of the police officers that evidence will be destroyed before [the police] are justified in making an unannounced entry."); see also State v. Harris, 12 Wash. App. 481, 492-94, 530 P.2d 646, 653-54 (1975) (police justified in not complying with knock and announce requirements when they had reliable information that suspect kept heroin in condoms and would swallow them if confronted by police).


A police officer's reasonable belief that announcing office and purpose would jeopardize police or public safety is a second
3.8 Search and Detention of Persons on Premises Being Searched

3.8(a) Search of Persons on Premises Being Searched

Generally, a search warrant for premises “justifies a search of personal effects of the owner found therein which are plausible repositories for the objects specified in the warrant.” State v. Worth, 37 Wash. App. 889, 892, 683 P.2d 622, 624 (1984). But a search warrant for premises or for the person and premises of one occupant does not authorize a search of other occupants or visitors who happen to be on the premises while the search is taking place, nor does it automatically justify a search of personal effects belonging to such other occupants or visitors. Id.; see 2 LAFAVE, SEARCH AND SEIZURE § 4.9(b), at 142-43.
There are several circumstances, however, in which persons on the premises may be searched. First, a warrant may describe a person to be searched. See supra § 3.4(c). Because warrants are to be interpreted with common sense, a warrant stating that there is probable cause to believe that there is evidence concealed on a person allows a search of that person even though the command portion of the warrant mentions only “places and premises.” State v. Williams, 90 Wash. 2d 245, 246, 580 P.2d 635 (1978); cf. State v. Cottrell, 12 Wash. App. 640, 643-44, 532 P.2d 644, 646-47 (1975) (when warrant authorized search of premises and persons “found thereon,” police may not search person in vehicle outside premises). Second, a search also may be made incident to an arrest. See infra § 5.1-5.1(c).

When the warrant itself gives no express or implied authorization to search persons on the premises and the police do not have probable cause to arrest them, officers may search such persons in two situations. First, a person not named in the warrant but present on the premises may be searched if the police “have reasonable cause to believe [that that person] has the articles for which the search is instituted upon his person.” State v. Halverson, 21 Wash. App. 35, 38, 584 P.2d 408, 410 (1978) (citations omitted). “Reasonable cause” requires that the person engage in some type of suspicious activity. Id. Thus, in the execution of a search warrant for narcotics, police were justified in searching an occupant’s fists when at the time of the officers’ entry the occupant was observed kneeling in front of a weighing scale and then rising with his fists clenched. Id. But police were not justified in searching an occupant’s purse when the occupant gave no evidence of suspicious behavior. State v. Worth, 37 Wash. App. at 893, 683 P.2d at 624. See generally 2 LaFave, Search and Seizure § 4.9(c), at 143-47.

Courts are divided over whether persons who enter a place being searched may be legally searched without a warrant if they had no opportunity to conceal the named items. See 2 LaFave, Search and Seizure § 4.9, at 145-46. In each of these situations, the scope of the search of a bystander is limited to that necessary for detecting the items sought; thus, police may not search a person if the search warrant is for a television set. Id.

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, 62 L. Ed. 2d 238, 100 S. Ct. 338 (1979); State v. Halverson, 21 Wash. App. 35, 38, 584 P.2d 405, 410
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(1978); *State v. Galloway*, 14 Wash. App. 200, 202, 540 P.2d 444, 446 (1975); see also *State v. Worth*, 37 Wash. App. 889, 683 P.2d 622 (1984). The police, however, must have a reasonable suspicion that the person searched is armed. *Ybarra*, 444 U.S. at 92-94, 62 L. Ed. 2d at 246-47, 100 S. Ct. at 343. Moreover, the search must be limited to ascertaining whether the individual is armed. *State v. Allen*, 93 Wash. 2d 170, 172, 606 P.2d 1235, 1236 (1980) (officer conducting patdown of individual who knocked on door of residence being searched may not examine contents of wallet found on individual “[a]fter satisfying himself that the ‘bulge’ [wallet] was not a weapon”). Cf. *Terry v. Ohio*, 392 U.S. 1, 10, 20 L. Ed. 2d 899, 889, 88 S. Ct. 1868, 1874 (1968) (police may conduct limited weapons search to protect themselves during lawful investigatory stop). Slightly different considerations may control search situations compared with *Terry* stops because the encounter in the search situation is more lengthy than in a *Terry* stop. 2 LaFave, Search and Seizure § 4.9(d) at 147-51.

3.8(b) Detention of Persons on Premises Being Searched

A “warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted.” *Michigan v. Summers*, 452 U.S. 692, 705, 69 L. Ed. 2d 340, 351, 101 S. Ct. 2587, 2595 (1981) (footnotes omitted).

A brief detention is permissible even when the police do not have probable cause to believe that the objects of the search are on the person detained; in addition, the police may ascertain whether any individual arriving on the scene might interfere with the search and determine what business, if any, the individual has at the premises. *State v. Galloway*, 14 Wash. App. 200, 201, 540 P.2d 444, 446 (1975). Such a limited stop, however, is not a license to detain and frisk all persons approaching within 100 feet of the location of the search. *State v. Melin*, 27 Wash. App. 589, 592, 618 P.2d 1324, 1325 (1980); see also 2 LaFave, Search and Seizure § 4.9(d), at 147.

3.9 Permissible Scope and Intensity of Search

Assuming that a search warrant describes the area and items with the requisite particularity, the remaining question is the permissible scope and intensity of the search. “As a general
rule search warrants must be strictly construed and their execution must be within the specificity of the warrant.” *State v. Cot

The permissible intensity of a search is governed by the nature of the items to be seized. Once the purpose of the warrant has been carried out, the authority to search ends. *See State v. Legas*, 20 Wash. App. 535, 541, 581 P.2d 172, 176 (1978) (warrant permitting search of bedroom for papers linking defendant to premises did not justify search of small box after such papers discovered). Thus, a search is unlawful when a warrant names one item and the officer begins searching for another, even though the omission of the latter item was a mistake. *State v. Eisele*, 9 Wash. App. 174, 176, 511 P.2d 1368, 1370 (1973); *cf. State v. Dearinger*, 73 Wash. 2d 563, 567, 439 P.2d 971, 973 (1968) (when officers had reason to believe that during search occupant threw sack into adjoining yard, sack and contents found in adjoining yard within ambit of warrant).

**3.9(a) Area**


On the other hand, authority to search a vehicle does not include authority to break into the garage where the vehicle is parked when the officers knew at the time they applied for the warrant that the vehicle was in the garage, and they could have included the garage in the warrant. *People v. Sciacca*, 45 N.Y.2d 122, 127, 379 N.E.2d 1153, 1155, 408 N.Y.S. 2d 22, 25 (1978). It has been suggested that police may enter adjacent areas if they reasonably fear for their safety. *See 2 LaFave, Search and Seizure § 4.10(a)*, at 153-54.

**3.9(b) Personal Effects**

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

It is worth noting that the court of appeals in *Worth* rejected a distinction between personal effects worn on or held by the person and those effects nearby at the time of the search. *Worth*, 37 Wash. App. at 893, 683 P.2d at 625; cf. *State v. Biggs*, 16 Wash. App. 221, 556 P.2d 247 (1976). "A narrow focus on whether a person is holding or wearing a personal item would tend to undercut the purpose of the Fourth Amendment and leave vulnerable readily recognizable personal effects, such as [a] purse, which an individual has under his control and seeks to preserve as private." *Worth*, 37 Wash. App. at 893, 683 P.2d at 625. Cf. 2 *LaFave, Search and Seizure* § 4.10(b), at 154-58 (suggesting that proper test in case involving visitors is whether police have reasonable belief that items described would be concealed in visitor's belongings); *State v. Scott*, 21 Wash. App. 113, 117, 584 P.2d 423, 425 (1978) (warrant authorizing search of business records of "spa" to uncover evidence of prostitution did not permit search of employees' purses for names of customers).

One court has attempted to avoid the problem by holding that one has no privacy interest in items left at another's house. *State v. Biggs*, 16 Wash. App. 221, 556 P.2d 247 (1976) (visitor who had departed without his jacket no longer had expectation of privacy in jacket and thus jacket could be searched).

3.9(c) Vehicles

Some courts have held that a warrant authorizing a search of "premises" permits a search of vehicles found thereon. 2 *LaFave, Search and Seizure* § 4.10(c), at 158-60 (suggesting that doctrine at least should be limited to vehicles belonging to the occupant); cf. *infra* § 5.1 (search incident to arrest); *People v. Sciacca*, 45 N.Y. 2d 122, 379 N.E. 2d 1153, 408 N.Y.S. 2d 22 (1978).
3.10 Seizure of Unnamed Items: Requirements in General

Items not listed in the search warrant may be seized when the seizure falls within one of the general exceptions to the warrant requirement. See, e.g., State v. Ringer, 100 Wash. 2d 686, 674 P.2d 1240 (1983) (search incident to arrest); State v. Seagull, 95 Wash. 2d 898, 632 P.2d 44 (1981) (open view); State v. Helmka, 86 Wash. 2d 91, 542 P.2d 115 (1975) (plain view). See generally infra Ch. 5.

3.11 Delivering Warrant and Inventory: Requirements for Execution of Warrants

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

The peace officer taking property under the warrant shall give to the person from whom or from whose premises the property is taken a copy of the warrant and a receipt for the property taken. If no such person is present, the officer may post a copy of the search warrant and receipt. The return shall be made promptly and shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the person from whose possession or premises the property is taken, or in the presence of at least one person other than the officer. The judge shall upon request deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

CRR 2.3(d). The requirement that an inventory be made in the presence of another person is designed to prevent error in the inventory, and the requirement is satisfied by the presence of another police officer. State v. Wraspir, 20 Wash. App. 626, 628, 581 P.2d 182, 184 (1978).

Washington follows the majority rule that defects related to the return of a search warrant are ministerial and do not compel invalidation of the warrant, absent a showing of prejudice. State v. Smith, 15 Wash. App. 716, 719, 552 P.2d 1059, 1062 (1976); cf. 2 LAFAVE, SEARCH AND SEIZURE § 4.12(d), at 187-88 (contending that the complete absence of any return should render the search unconstitutional).
3.12 Challenging the Content of an Affidavit

3.12(a) Informant's Identity

Although a defendant generally is entitled to examine an affidavit to challenge whether the warrant was issued on probable cause, the court may excise portions of the affidavit identifying a confidential or unnamed informant to protect the state's interest in maintaining the confidentiality of such informants. Franks v. Delaware, 438 U.S. 154, 57 L. Ed. 2d 667, 98 S. Ct. 2674 (1978); McCray v. Illinois, 386 U.S. 300, 18 L. Ed. 2d 62, 87 S. Ct. 1056 (1967); State v. Mathiesen, 27 Wash. App. 257, 260, 616 P.2d 1255, 1257 (1980), rev. denied, 94 Wash. 2d 1025, (1980), cert. denied, 451 U.S. 914, 68 L. Ed. 2d 305, 101 S. Ct. 1990 (1981). On the other hand, "fundamental fairness" may require the disclosure of an informant's identity when the informant's potential testimony at trial would be relevant to the determination of the defendant's innocence. See State v. Casal, 38 Wash. App. 310, 313, n.1 684 P.2d 1375, 1378 n.1 (1984) (citations omitted).

A defendant seeking an in camera hearing on the applicability of the informant's privilege must: (1) allege deliberate falsehood or reckless disregard for the truth; (2) furnish a detailed offer of proof that challenges the affiant's—not the informant's—veracity; and (3) demonstrate that the false portions of the affidavit are necessary to a determination of probable cause. State v. Casal, 38 Wash. App. 310, 316, 684 P.2d 1375, 1380 (1984).

3.12(b) Misrepresentations and Omissions in the Affidavit

A defendant may challenge the validity of a warrant based on a misrepresentation of fact in the supporting affidavit. Franks v. Delaware, 438 U.S. 154, 57 L. Ed. 2d 667, 98 S. Ct. 2674 (1978). The defendant first must make a substantial showing that a false statement in the affidavit (1) was made either intentionally or in reckless disregard for the truth, and (2) was necessary, or material, to the finding of probable cause. Id. at 155-56, 57 L. Ed. 2d at 672, 98 S. Ct. at 2676. The showing must be based on specific facts and offers of proof and not conclusory assertions. Once the defendant has made this preliminary showing, he or she is entitled to a full hearing on the issue. At the hearing the defendant must prove the truth of his or her allegations by a preponderance of the evidence. Id. If the defendant is
successful, then the misrepresentations must be stricken from the affidavit; if in the absence of the stricken statements probable cause does not exist, then the warrant is void. Id.; cf. United States v. Park, 531 F.2d 754, 758-59 (5th Cir. 1976) (if misrepresentation made with intent to deceive magistrate, then warrant void, regardless of materiality). Washington has extended the Franks rule to cover material omissions of fact. State v. Cord, 103 Wash. 2d 361, 367, 693 P.2d 81, 85 (1985); cf. United States v. Martin, 615 F.2d 318, 328 (5th Cir. 1980); United States v. Park, 531 F.2d 754, 758-59 (5th Cir. 1976). Again, the defendant must prove both that the omission was intentional or made with reckless disregard and that the omitted information would have negated probable cause. Cord, 103 Wash. 2d at 365, 693 P.2d at 85; cf. State v. Seagull, 95 Wash. 2d 898, 906-07, 632 P.2d 44, 46 (1981) (officer's innocent but inaccurate identification of tomato plant as marijuana plant did not invalidate warrant).

3.13 Special Situations

3.13(a) First Amendment Limitations

A film may be seized pursuant to a warrant only if a prompt judicial determination is available. Heller v. New York, 413 U.S. 483, 489, 37 L.Ed.2d 745, 752, 93 S. Ct. 2789, 2793 (1973). If the film is a single copy, however, the court should permit copying the film to allow showings to continue. Heller, 413 U.S. at 483, 37 L.Ed.2d at 734, 93 S. Ct. at 2795. See generally 2 LaFave, Search and Seizure § 4.1(c), at 8-10.

When seizure of a large quantity of allegedly obscene books is contemplated, the usual warrant requirements are insufficient to ensure constitutionality. Such planned seizures call for a prior judicial determination of obscenity in an adversary proceeding. A Quantity of Copies of Books v. Kansas, 378 U.S. 205, 210, 12 L. Ed. 2d 809, 812, 84 S. Ct. 1723, 1725 (1964); see also G.I. Distrib. Inc. v. Murphy, 490 F.2d 1167, 1169 (2d Cir. 1973). Cf. Maryland v. Macon, ___ U.S. ___, 86 L. Ed. 2d 370, 378-82, 105 S. Ct. 2778, 2783-86 (1985) (Brennan, J., dissenting) (first amendment implicated when officer purchased magazine in bookstore and magazine was later introduced into evidence to convict seller on obscenity charges). But cf. id. at ___, 86 L. Ed. 2d at 377, 105 S. Ct. at 2782 (police did not commit unreasonable seizure of property when, without warrant, they bought magazine later used as evidence to convict seller on obscenity
charges; sale cannot be considered seizure within fourth amendment).

3.13(b) Intrusions into the Body

Even when a warrant has been obtained, a physical intrusion into a person's body will violate due process if the intrusion "shocks the conscience." *Rochin v. California*, 342 U.S. 165, 172, 76 L. Ed. 182, 190, 72 S. Ct. 205, 209 (1952). Thus, for example, "[a] compelled surgical intrusion into an individual's body for evidence implicates expectations of privacy and security of such magnitude that the intrusion may be unreasonable even if likely to produce evidence of a crime." *Winston v. Lee*, ___ U.S. ___, 84 L. Ed. 2d 662, 105 S. Ct. 1611 (1985); *Schmerber v. California*, 384 U.S. 757, 770-72, 16 L. Ed. 2d 908, 919-20, 86 S. Ct. 1826, 1835-36 (1966). An intrusion that does not 'shock the conscience' and is reasonable is one in which:

1. There is a clear indication, rather than a mere chance, that the intrusion will produce the desired evidence;

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

3. The intrusive procedure is performed in a reasonable manner as, for example, a blood test performed by medical personnel as opposed to by officers at the station house. *Id.*

Thus, for example, taking a blood sample from a defendant charged with negligent homicide in several automobile deaths is reasonable when the police have probable cause to believe the defendant is intoxicated. *State v. Judge*, 100 Wash. 2d 706, 675 P.2d 219 (1984).

Extraction of blood samples for testing is a highly effective means of determining the degree to which a person is under the influence of alcohol. Such tests are a commonplace in these days of periodic physical examinations and experience with them teaches that the quantity of blood extracted is minimal, and that for most people the procedure involves virtually no risk, trauma, or pain.

100 Wash. 2d at 712, 675 P.2d at 223 (citation omitted). Washington has upheld mandatory blood tests of putative fathers if full adversary hearings first have been instituted. *State v. Meacham*, 93 Wash. 2d 735, 738-39, 612 P.2d 795, 798 (1980). See generally infra §§ 4.4(a) (use of force during arrest); 5.18(a)
(warrantless intrusions into the body).

More intrusive procedures may be permitted in special environments such as at prisons and jails, see Bell v. Wolfish, 441 U.S. 520, 60 L. Ed. 2d 447, 99 S. Ct. 1861 (1979) (full body cavity searches of prison inmates following contact visits not unreasonable, even when searches routine and not based on probable cause), and at borders, see United States v. Montoya de Hernandez, 473 U.S. —, 87 L. Ed. 2d 381, 105 S. Ct. 3304 (1985) (suspect fitting profile for alimentary canal drug smuggler may be subjected to rectal cavity search when warrant based on profile plus suspect’s unwillingness to eat, drink, or defecate during sixteen-hour confinement). See generally infra §§ 6.2 (prisons); 6.3 et.seq. (borders).

Other factors considered include the necessity of the search for a fair determination of the charges and whether opportunities for an adversary hearing and interlocutory appellate review are provided. See 2 LaFave, Search and Seizure § 4.1(d), at 12-20; see also Winston v. Lee, — U.S. at —, 84 L. Ed. 2d at 670-71, 105 S. Ct. at 1618.

3.13(c) Warrants Directed at Nonsuspects


Chapter 4: Seizures of the Person: Arrests and Stop-and-Frisks

4.0 Arrest: Introduction

This section deals with the principles that are unique to seizures of the person. Related issues are discussed in other sec-
tions. See infra § 5.1 (search incident to arrest); supra §§ 2.1-2.7 (probable cause); § 3.7 (knock and announce).

An illegal arrest is not a defense to prosecution. The legality of the arrest, however, affects the legality of searches and confessions taking place subsequent to the arrest and the admissibility of evidence derived from the arrest. See generally infra Ch. 7.

4.1 Arrests Without Warrants: Public Versus Home Arrests

Arrests are not subject to the same strict warrant requirements as searches, and an officer may make a warrantless felony arrest in a public place even though he or she had time to obtain a warrant. United States v. Watson, 423 U.S. 411, 423, 46 L. Ed. 2d 598, 609, 96 S. Ct. 820, 828 (1976); State v. Luellen, 17 Wash. App. 91, 93, 562 P.2d 253, 255 (1977). See generally 2 LaFave, Search and Seizure § 5.1 (b), at 225-33. When a warrantless arrest has occurred, however, a prompt post-arrest judicial determination of probable cause is required. Gerstein v. Pugh, 420 U.S. 103, 43 L. Ed. 2d 54, 95 S. Ct. 854 (1975); see infra § 4.4(c).

Although an arrest in public may be made without a warrant, police may not make an arrest after a nonconsensual entry into a suspect's home without a warrant, absent exigent circumstances. Payton v. New York, 445 U.S. 573, 589-90, 63 L. Ed. 2d 639, 652-53, 100 S. Ct. 1371, 1381 (1980). Fact patterns constituting exigent circumstances are described in some detail infra § 5.16. See generally Donnino & Girese, Exigent Circumstances for a Warrantless Home Arrest, 45 Alb. L. Rev. 90 (1980).

Under the fourth amendment, police who make a warrantless arrest outside an arrestee's home may then accompany the arrestee into his or her home even if the arrestee enters the home with the officer's consent for a purpose such as obtaining identification. See Washington v. Chrisman, 455 U.S. 1, 6-7, 70 L. Ed. 2d 778, 785, 102 S. Ct. 812, 817 (1982) (risk of danger to officer and possibility of confederates' escape justify police officer accompanying arrested person into his dwelling; police need no affirmative indication of likelihood of danger or escape); United States v. Santana, 427 U.S. 38, 42, 49 L. Ed. 2d 300, 305, 96 S. Ct. 2406, 2409 (1976).

Washington, however, has rejected the bright line rule that an officer in all circumstances may accompany an arrestee into the arrestee's home. State v. Chrisman, 100 Wash. 2d 814, 676 P.2d 419 (1984). Under article I, section 7 of the Washington
Constitution, 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 the likelihood of escape is strong. 100 Wash. 2d at 821-22, 676 P.2d at 424 (officer's entry into 11th floor dormitory room unlawful when student arrested for misdemeanor offered no likelihood of escape, destruction of evidence of crime for which arrested, or danger to officer).

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. Holeman, 103 Wash. 2d 426, 429, 693 P.2d 89, 91 (1985). For fourth amendment purposes, the location of the suspect and not the location of the officer is material to the issue of whether an arrest occurs in the home. Id. at 429, 693 P.2d at 91. An arrest of a suspect who is located on a front porch, as opposed to in the doorway, is considered a public arrest. State v. Bockman, 37 Wash. App. 474, 682 P.2d 925 (1984). The Payton prohibition on a warrantless nonconsensual entry of a suspect's home is applied to three sets of facts in State v. Counts, 99 Wash. 2d 54, 659 P.2d 1087 (1983). See also State v. Hendricks, 25 Wash. App. 775, 779-80, 610 P.2d 940, 943 (1980).

4.2 Arrests Without Warrants: Felony Versus Misdemeanor Arrests

4.2(a) Felony Arrest

This section discusses differences in the warrant requirements for felony and misdemeanor arrests. For a discussion of custodial arrests for misdemeanor offenses, see infra § 4.4(d). Under the common-law standard and the fourth amendment, an officer's authority to make an arrest in public without a warrant generally applies only to felonies. See United State v. Watson, 423 U.S. 411, 423, 46 L. Ed. 2d 598, 609, 96 S. Ct. 820, 828 (1976). Some states have placed restrictions on warrantless felony arrests; Washington, however, has codified the common-law rule. Wash. Rev. Code Ann. § 10.31.100 (Supp. 1985-86).

4.2(b) Misdemeanor Arrest

For misdemeanors, the common-law rule requires that a warrant be procured except for a breach of peace committed in the officer's presence. 2 LAFAVE, SEARCH AND SEIZURE § 5.1(b), at
223; contra Tacoma v. Harris, 73 Wash. 2d 123, 126, 436 P.2d 770, 772 (1968). The common-law misdemeanor rule has not been held to be constitutionally required, and many states have enacted statutes applying the felony rule to misdemeanors. See United States v. Watson, 423 U.S. 411, 418, 46 L.Ed.2d 598, 606, 96 S. Ct. 820, 825 (1976). Some of those states that do require misdemeanor warrants have held that a statutory—as opposed to constitutional—violation is not grounds for the suppression of evidence derived from the arrest. E.g., State v. Eubanks, 283 N.C. 556, 560, 196 S.E.2d 706, 708 (1973).

Washington law provides that an officer may make a warrantless misdemeanor arrest when the offense is committed in his or her presence or involves physical harm or the threat of physical harm to persons or property, possession of marijuana, or one of a number of specified traffic offenses. Wash. Rev. Code Ann. § 10.31.100 (Supp. 1985-86). See also Wash. Rev. Code Ann. § 46.64.017 (1983) (permitting warrantless arrest at scene of accident); State v. Whatcom County, 92 Wash. 2d 35, 38, 593 P.2d 546, 547 (1979) (officer may not make arrest at location other than accident scene); State v. Teuber, 19 Wash. App. 651, 654-55, 577 P.2d 147, 149-50 (1978) (officer may make lawful misdemeanor arrest for offense committed four hours earlier when offense involves physical harm to property).

The “in the presence” requirement of § 10.31.100 is satisfied whenever the officer directly perceives facts permitting a reasonable inference that a misdemeanor is being committed. Snohomish v. Swoboda, 1 Wash. App. 292, 295, 461 P.2d 546, 548-49 (1969). Questions arise as to whether the officer must view all the elements of a crime and as to what types of information may be used to fill in “gaps.” Id. (“in the presence” requirement was satisfied when from 150 feet away police officers, as part of “sting” operation, observed person handing an object to another; even though police could not positively identify the object, the nature of the operation permitted a reasonable inference the object was contraband). State v. Silverman, 48 Wash. 2d 198, 202-03, 292 P.2d 868, 870 (1956) (when officer enters establishment as member of public and views “peep shows,” arrest of person operating establishment is valid; elements of possession of obscene pictures with intent to show them committed in officer’s presence). See also United States v. Miller, 589 F.2d 1117, 1128 (1st Cir. 1978); State v. Greene, 75 Wash. 2d 519, 521, 451 P.2d 926, 928 (1969). See generally 2 LAFAVE, SEARCH
AND SEIZURE § 5.1(c), at 233-38.

4.3 Arrests with Warrants


4.4 Arrests: Miscellaneous Requirements

4.4(a) Use of Force

Under traditional common law, an officer was permitted to use reasonable force to make an arrest, and the officer could use deadly force if such force reasonably appeared necessary to prevent a suspect's escape from a felony arrest. The common-law rule has been restricted, however, and an arresting officer may use deadly force only when he or she "has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others." *Tennessee v. Garner*, 471 U.S. ___, 85 L. Ed. 2d 1, 4, 105 S. Ct. 1694, 1696 (1985) (police not permitted to shoot unarmed, fleeing burglary suspect).

In Washington, the amount of force an officer may use is governed by statute to the extent that the statute is consistent with *Tennessee v. Garner*. See, e.g., WASH. REV. CODE § 10.31.050 (1983) ("If after notice of the intention to arrest the defendant, he either flee or forcibly resist, the officer may use all necessary means to effect the arrest."); WASH. REV. CODE § 9A.16.040 (1983). Deadly force is justifiable when committed by a public officer or person acting under his command and in his aid . . . when necessary to overcome actual resistance to the execution of the legal process . . . or in the discharge of a legal duty [or] when necessary in retaking an escaped or rescued prisoner who has been committed [for], arrested for, or convicted of a felony . . . or in lawfully suppressing a riot or preserving the peace.

*Id.* In a Washington case decided before *Tennessee v. Garner*, the court upheld the use of a chokehold aimed at recovering evidence because the officers did not fear harm to themselves or to
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the public. *State v. Taplin*, 36 Wash. App. 664, 676 P.2d 504 (1984) (chokehold used to prevent defendant from swallowing balloons suspected of containing heroin did not violate due process rights because defendant still was able to breathe while chokehold was applied). Cf. *infra* §§ 5.2(a), 5.18(a). In constructing a prior but similar statute, the Washington Supreme Court held that deadly force may be used even when a felony has not in fact occurred as long as the officer reasonably believes that a felony has been committed. *Reese v. Seattle*, 81 Wash. 2d 374, 379-80, 503 P.2d 64, 69-70 (1972). "[G]reat caution must be exercised by an officer in the use of deadly force and it must be resorted to by an officer only when all other reasonable efforts to apprehend a person fleeing from a lawful arrest for a felony have failed." *Id.* at 382-83, 503 P.2d at 71.

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

Courts differ as to the significance of a suspect being booked for one offense yet formally charged with another. Conflicting considerations underlie the decisions. On the one hand, if the booking and formal charges need not be similar, police can use an arrest as a pretext for detaining a suspect for questioning about an unrelated crime for which the police lack probable cause. On the other hand, at the time police first establish probable cause for one crime, they may not possess sufficient information to establish probable cause for other crimes. See generally 2 *LaFave, Search and Seizure* § 5.1(e), at 240-44.

In Washington, the formal charge may differ from the booking charge. *State v. Teuber*, 19 Wash. App. 651, 656, 577 P.2d 147, 150 (1978). The booking charge has no significance after a formal charge has been lodged, and booking "for investigation" is permissible, provided probable cause for an arrest on any charge is present. See *State v. Thompson*, 58 Wash. 2d 598, 606-07, 364 P.2d 527, 532 (1961).

When a suspect is arrested for a misdemeanor not committed in the officer's presence, the arrest is not illegal if the arresting officer has knowledge of a felony for which the suspect could have been arrested. *State v. Vangen*, 72 Wash. 2d 548, 553, 433 P.2d 691, 694 (1967).
4.4(c) Judicial Review

A person arrested without a warrant is entitled to a post-arrest probable cause determination. *Gerstein v. Pugh*, 420 U.S. 103, 114, 43 L. Ed. 2d 54, 65, 95 S. Ct. 854, 863 (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. *Id.* at 119-23, 43 L. Ed. 2d at 68-71, 95 S. Ct. 865-68.

The issue of whether a violation of the *Gerstein* rule requires suppression of evidence seized after the arrest has not been resolved. See 2 *LaFave, Search and Seizure* § 5.1(f), at 244-52; see also *Williams v. State*, 264 Ind. 664, 668, 348 N.E. 2d 623, 627 (1976) (defendant's voluntary confession suppressed when, following probable cause arrest, defendant was held for eight days without judicial determination of probable cause and confession was made during that detention).

4.4(d) Custodial Arrests for Minor Offenses

The United States Supreme Court has not yet addressed whether probable cause always justifies an arrest. Recent lower court decisions, however, have held that for certain offenses an arrest is unconstitutional in the absence of a special need for custody. See generally 2 *LaFave, Search and Seizure* § 5.1(h), at 256-60.

When civil as opposed to criminal proceedings are involved, custodial arrests may be improper. The Washington Supreme Court has held unconstitutional a statute authorizing the custodial arrest of any person against whom a paternity complaint is filed. *State v. Klinker*, 85 Wash. 2d 509, 537 P.2d 268 (1975). Thus, in the absence of a contrary showing, the usual summons and complaint procedure for civil cases is deemed adequate for securing the defendant’s presence at trial. *Id.* at 522, 537 P.2d at 278. Criminal cases are treated differently because the public interest in restraining the defendant is greater. *Id.* at 520, 537 P.2d at 277; see 2 *LaFave, Search and Seizure* § 5.1(h), at 259-60.

Although traffic infractions may fall within the criminal code, under Washington law "as a matter of public policy . . . custodial arrest for minor traffic violations is unjustified, unwarranted, and impermissible if the defendant signs [a] promise to
appear . . . [in court] . . . ." State v. Hehman, 90 Wash. 2d 45, 47, 578 P.2d 527, 528 (1978); see WASH. REV. CODE § 46.64.015; cf. 2 LaFave, Search and Seizure § 5.2(e), at 281-87. A custodial arrest is not inappropriate, however, merely because the offense is traffic-related. State v. Carner, 28 Wash. App. 439, 443, 624 P.2d 204, 207 (1981) (arrest proper when minor tried to evade police on his motorcycle); cf. WASH. REV. CODE § 46.64.015 (Supp. 1985) (police may detain suspect who refuses to sign a promise to appear in court); Welsh v. Wisconsin, 466 U.S. 740, 80 L. Ed. 2d 732, 747-52, 104 S. Ct. 2091, 2101-104 (1984) (White, J., dissenting) (state acted within its proper police power in dealing with perceived seriousness of drunk-driving when it enacted a statute that permitted a warrantless arrest for the misdemeanor).

4.5 Stop and Frisk: Introduction

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

The standard of proof that must be satisfied for a lawful investigatory stop is a "reasonable suspicion, based on objective facts, that the individual is involved in criminal activity." Brown v. Texas, 443 U.S. 47, 51, 61 L. Ed. 2d 357, 362, 99 S. Ct. 2637, 2641 (1979). The mere subjective good faith of the investigating officer is insufficient. Terry, 392 U.S. at 22, 20 L. Ed. 2d at 906, 88 S. Ct. at 1880 (citation omitted). See generally supra § 2.8(b).

Once an officer possesses a reasonable suspicion, he or she may forcibly stop the suspect, but the stop must be a more limited intrusion than an arrest. Dunaway v. New York, 442 U.S. 200, 209, 60 L. Ed. 2d 824, 833, 99 S. Ct. 2248, 2255 (1979). An investigatory stop will be held "reasonable" when "the limited violation of individual privacy" is outweighed by the public's "interests in crime prevention and detection. . . ." Id. Although
a balancing test determines the permissible scope of a stop, once an intrusion is substantial enough to constitute an arrest, probable cause is necessary no matter how substantial the public's interest. See id. at 212-216, 60 L.Ed.2d at 835-38, 99 S. Ct. at 2256-58 (custodial detention, even when charges not filed and suspect is not told that he is under arrest, requires probable cause). But cf. United States v. Montoya de Hernandez, 473 U.S. _____, 87 L. Ed. 2d 381, 105 S. Ct. 3304 (1985) (special governmental interest in detecting smugglers at border justifies holding suspect 16 hours based on reasonable suspicion of transporting contraband); infra § 6.3.

Terry stops are permitted both to prevent ongoing or future criminal activity and to investigate completed crimes. United States v. Hensley, 469 U.S. _____, 83 L. Ed. 2d 604, 105 S. Ct. 675 (1985). For a discussion of the use of the reasonable suspicion standard in special environments, see infra §§ 6.1 (schools) and 6.3 (border). See also Preiser, Confrontations Initiated by Police on Less Than Probable Cause, 45 ALB. L. REV. 57, 58 (1980); see generally 3 LAFAVE, SEARCH AND SEIZURE § 9.1, at 2-18.

4.6 Satisfying the Reasonable Suspicion Standard

4.6(a) Factual Basis and Individualized Suspicion


41, 684 P.2d 1326 (1984), rev. granted, 102 Wash. 2d 1015 (1984). Several exceptions, however, exist. In some circumstances, a stop may be based on less than individualized suspicion when "carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers." Brown v. Texas, 443 U.S. 47, 51, 61 L. Ed. 2d 357, 362, 99 S. Ct. 2637, 2640-41 (1979). Border checkpoints may constitute such a circumstance. See infra § 6.3. But when individualized suspicion is lacking, officer discretion must be limited; thus, for example, police officers stopping vehicles for driver's license and vehicle registration checks may not select the vehicles at random. Delaware v. Prouse, 440 U.S. 648, 663, 59 L.Ed.2d 660, 673-74, 99 S. Ct. 1391, 1401 (1979); see also State v. Marchand, 104 Wash. 2d 434, 706 P.2d 225 (1985). For a discussion of stops requiring no individualized suspicion, see infra §§ 6.3 (stops at or near borders) and 6.4(c) (vehicle spot checks); cf. id. (individualized suspicion not required in administrative searches that nevertheless are based on probable cause). See generally 3 LaFave, Search & Seizure § 9.3(g), at 62-70 (Supp. 1985).

4.6(b) Particular Applications: Informants

When stops have been based on information provided by informants, the information does not have to meet the same criteria required for probable cause. See, e.g., Adams v. Williams, 407 U.S. 143, 147, 32 L. Ed. 2d 612, 617, 92 S. Ct. 1921, 1924 (1972). See generally supra § 2.5. The information must, however, carry "indications of reliability." Adams, 407 U.S. at 147, 32 L. Ed. 2d at 617, 92 S. Ct. at 1924 (informant known personally to officer and had provided information in past). For a summary of cases interpreting Adams, see 3 LaFave, Search and Seizure § 9.3(e), at 94-104.

Police may make a Terry stop on the basis of information provided by other police. United States v. Hensley, 469 U.S. —, 83 L. Ed. 2d 604, 105 S. Ct. 675 (1985). If, however, the officer who was the source of the information did not possess facts supporting a reasonable suspicion, the stop would be unlawful. Id. at —, 83 L. Ed. 2d at 614, 105 S. Ct. at 682-83.

In Washington, police must have some reason to believe that an informant is reliable and possess "[s]ome underlying factual justification for the informant's conclusion" that a crime is being committed. State v. Sieler, 95 Wash. 2d 43, 48, 621 P.2d 1272 (1980). No reliability may be inferred from an anonymous
informant or from a named but unknown telephone informant, id., nor may the basis for the informant’s knowledge be inferred from conclusory allegations. Id. But conclusory allegations may be sufficient when independent police observations corroborate the presence of criminal activity or the reliability of the manner in which the information was obtained. Id.; State v. Lesnick, 84 Wash. 2d 940, 944, 530 P.2d 243, 246 (1975). See also State v. Kennedy, 38 Wash. App. 41, 684 P.2d 1326 (1984), rev. granted, 102 Wash. 2d 1015 (1984); State v. Sykes, 27 Wash. App. 111, 115-16, 615 P.2d 1345, 1347-48 (1980); State v. McCord, 19 Wash. App. 250, 254, 576 P.2d 892, 895 (1978).

An informant’s tip may be sufficiently reliable to support a stop even when it would not support an arrest. See State v. Moreno, 21 Wash. App. 430, 436, 585 P.2d 481, 483 (1978) (officer had cause to stop but not arrest when defendant arrived on flight specified by anonymous informant); State v. Chatmon, 9 Wash. App. 741, 748, 515 P.2d 530, 535 (1973) (officer’s failure to establish reliability of anonymous informant by obtaining description of informant and by learning both informant’s purpose for being at scene of crime and reason for informant’s desire to remain anonymous does not invalidate investigative stop, but does invalidate subsequent search for lack of probable cause).

The Washington Supreme Court has suggested that a tip may support a stop when a serious crime is involved even if the tip is not reliable enough to support stops in other circumstances. State v. Lesnick, 84 Wash. 2d 940, 944-45, 530 P.2d 243, 246 (1980); see also Sieler, 95 Wash. 2d at 50, 621 P.2d at 1276. See 3 LAFAVE, SEARCH AND SEIZURE § 9.3(e), at 103, for a discussion of State v. Lesnick and the argument that lesser indicia of reliability should be necessary for serious crimes.

4.6(c) Particular Applications: Nature of Offense

Terry stops have been upheld for offenses ranging from aggravated robbery, United States v. Hensley, 469 U.S. ___, 83 L. Ed. 2d 604, 105 S. Ct. 675 (1985), to possession of narcotics, Adams v. Williams, 407 U.S. 143, 32 L. Ed. 2d 612, 92 S. Ct. 1921 (1972). For arguments that Terry stops be limited to investigations of serious offenses, see Adams v. Williams at 151-53, 32 L. Ed. 2d at 620-21, 92 S. Ct. at 1926-27 (Brennan, J., dissenting); 3 LAFAVE, SEARCH AND SEIZURE § 9.2(c), at 24-28; cf. State v. Moreno, 21 Wash. App. 430, 434, 585 P.2d 481, 483 (1978)
(possession of narcotics characterized as "serious" offense).

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


juvenile occupants were in car with broken window, and fact that car did not "fit" neighborhood justified temporary detention to inquire into suspicious activity); State v. Clark, 13 Wash. App. 21, 23, 533 P.2d 387, 389 (1975) (silent alarm signalling forcible entry, in conjunction with defendant's appearance, conduct, and presence in vicinity, justified stop); State v. Sinclair, 11 Wash. App. 523, 530-31, 523 P.2d 1209, 1214 (1974) (police officers' suspicion that defendant had outstanding traffic warrant, in conjunction with defendant using modus operandi common for type of crime in question, justified stop); State v. Smith, 9 Wash. App. 279, 281, 511 P.2d 1032, 1034 (1973) (description of two black men—one short, one tall—possibly driving green or blue, older model automobile justified detaining green 1966 automobile containing two black persons within appropriate driving distance from scene of crime); State v. Ferguson, 3 Wash. App. 898, 902, 479 P.2d 114, 117 (1970) (while checking records police may stop, request identification, and briefly detain suspects stopped near scene of robbery in car fitting description of getaway vehicle).

4.7 Dimensions of a Permissible Stop

4.7(a) Time, Place, and Method

An investigatory stop may be based on less than probable cause because the intrusion on individual freedom is relatively minor. Terry v. Ohio, 392 U.S. 1, 20, 20 L. Ed. 2d 889, 905, 88 S. Ct. 1868, 1879 (1968). When an investigatory stop becomes as intrusive as an arrest, the stop is considered an arrest and requires probable cause. Dunaway v. New York, 442 U.S. 200, 214-16, 60 L. Ed. 2d 824, 836-38, 99 S. Ct. 2248, 2257-59 (1979).


The Court has declined to set an absolute limit on the permissible duration of a Terry stop in terms of minutes or hours; the duration of a stop is evaluated in terms of whether "the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the [suspect]." United States v.
Sharpe, 470 U.S. ____ , 84 L. Ed. 2d 605, 616, 105 S. Ct. 1568, 1575 (1985); see Royer, 460 U.S. at 500, 75 L. Ed. 2d at 238; 103 S. Ct. at 1325 (stop may "last no longer than is necessary to effectuate [its] purpose. . . ."). The means of investigation need not be the least intrusive available, provided the police do not act unreasonably "in failing to recognize or to pursue" a less intrusive alternative. Sharpe, 470 U.S. at ____, 84 L. Ed. 2d at 616, 105 S. Ct. at 1576.

The investigative methods employed in a Terry stop must be less intrusive than those employed in arrests not only with respect to duration. See Dunaway v. New York, 442 U.S. 200, 60 L. Ed. 2d 824, 99 S. Ct. 2248 (1979). Thus, for example, police many not transport a nonconsenting suspect in a patrol car to the police station and subject the suspect to custodial interrogation based only on a reasonable suspicion. Id. at 212, 60 L. Ed. 2d at 836, 99 S. Ct. at 2256; see Hayes v. Florida, 470 U.S. ____ , 84 L. Ed. 2d 705, 105 S. Ct. 1643 (1985) (police may not transport suspect to police station for fingerprinting absent probable cause, although based on reasonable suspicion, police may take fingerprints while stopping and questioning suspect); Florida v. Royer, 460 U.S. at 496, 75 L. Ed. 2d at 235, 103 S. Ct. at 1323 (seizing suspect's luggage at airport and directing suspect to small room for interrogation constituted arrest). But when, as a result of a radio call summoning the investigating officers to an apparently unrelated crime scene, the officers transported the suspect with them, a reasonable suspicion was sufficient. State v. Sweet, 36 Wash. App. 337, 675 P.2d 1236 (1984). Cf. State v. Byers, 85 Wash. 2d 783, 787, 539 P.2d 833, 836 (1975).

A Washington court has held that an officer did not use the least intrusive means reasonably available to confirm or dispel his suspicion that a house was being burglarized when he ordered three juveniles out of the house at gunpoint. State v. Johnston, 38 Wash. App. 793, 690 P.2d 591 (1984). Other Washington cases involving Terry stops include: State v. Walker, 24 Wash. App. 823, 828, 604 P.2d 514, 517 (1979) (detention in police car for eight minutes so victim could arrive and identify suspect was proper); State v. Davis, 12 Wash. App. 32, 35, 527 P.2d 1131, 1133 (1974) (officer who reasonably suspected that an automobile was stolen could request identification from each occupant); State v. Sinclair, 11 Wash. App. 523, 530-31, 523 P.2d 1209, 1214-15 (1974) (officers with well-founded suspicion that defendant had an outstanding traffic warrant were justified
in detaining defendant pending radio check); State v. Smith, 9 Wash. App. 279, 281, 511 P.2d 1032, 1034 (1973) (investigatory stop justified by officer's knowledge that defendants and defendants' car matched description from robbery witness and by proximity of stop, in time and location, to robbery); see also State v. Moreno, 21 Wash. App. 430, 434, 585 P.2d 481, 483 (1978) (officer may not proceed with specific questions designed to elicit incriminating information during investigatory stop without making formal arrest and giving Miranda warnings).

4.7(b) Detention of Persons in Proximity to Suspect

The Washington Supreme Court has held that under the fourth amendment the mere fact of an individual's proximity to one independently suspected of criminal activity is insufficient to justify a stop. State v. Thompson, 93 Wash. 2d 838, 841, 613 P.2d 525, 527 (1980); see State v. Larson, 93 Wash. 2d 638, 642, 611 P.2d 771, 774 (1980) (stop based on parking violation by driver does not reasonably provide grounds to require identification of passengers in absence of independent cause to question passengers). See generally 3 LaFave, Search & Seizure § 9.2(b), at 22-24. See also id. § 9.3(c), at 77; cf. State v. Serrano, 14 Wash. App. 462, 466-68, 544 P.2d 101, 104-05 (1975).

4.8 Constitutional Limitations on Compelled Responses to Investigatory Questions

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

A number of states, including Washington, have enacted stop-and-identify statutes or other legislation designed in part to facilitate police investigation of ongoing or imminent crimes.
See, e.g., State v. White, 97 Wash. 2d 92, 640 P.2d 1061 (1982); Kolender v. Lawson, 461 U.S. 352, 75 L. Ed. 2d 903, 103 S. Ct. 1855 (1983). Some of these statutes have been struck down as unconstitutionally vague. See, e.g., Kolender, supra. The statutes can be challenged on a number of grounds: for implicating the first amendment free speech right, the fifth amendment right against self-incrimination, and the fourteenth amendment due process right, in addition to the fourth amendment right. White, 97 Wash. 2d at 97 nn. 1 & 2, 640 P.2d at 1064 nn. 1 & 2. See generally id.; 3 LAFAVE, SEARCH AND SEIZURE, § 9.2(f), at 35-45. Thus, a Terry stop that survives a fourth amendment challenge may collapse under a challenge brought under another amendment.

4.9 Grounds for Initiating a Frisk

An officer conducting a Terry stop may conduct a limited search for weapons in order to protect himself or herself or persons nearby from physical harm. Terry v. Ohio, 392 U.S. 1, 30, 20 L. Ed. 2d 889, 911, 88 S. Ct. 1868, 1884 (1968). Even such a limited intrusion, however, is a “search” within the fourth amendment. Id. at 29, 20 L. Ed. 2d at 910, 88 S. Ct. at 1884.

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

Lower federal courts have read Terry to mean that for certain crimes in which the offender is likely to be armed, the right to conduct a protective search is “automatic”; for other crimes, such as possession of marijuana, additional circumstances must be present. See 3 LAFAVE, SEARCH AND SEIZURE § 9.4(a), at 109-18.

Washington requires that the officer have reason to believe that the suspect is presently dangerous. State v. Hobart, 94
Wash. 2d 437, 446, 617 P.2d 429, 433 (1980); see State v. Harper, 33 Wash. App. 507, 511, 655 P.2d 1199, 1201 (1982) (officer must have “sufficient basis” to believe that an individual is armed in order to conduct a self-protective search). Thus, police may not take intrusive protective measures when they cannot articulate a reason for believing that a suspect is dangerous other than that the suspect was seen leaving in his car from the scene of a possible burglary. State v. Williams, 102 Wash. 2d 733, 689 P.2d 1065 (1984). Frisks have been permitted in State v. Galloway, 14 Wash. App. 200, 202, 540 P.2d 444, 446 (1975) (defendant entered apartment during execution of search warrant and suspiciously kept hand in overcoat pocket during police questioning); see also State v. Howard, 7 Wash. App. 668, 674, 502 P.2d 1043, 1046-47 (1972) (defendant parked car near residence being searched, and officer had prior knowledge that defendant carried concealed knife); State v. Brooks, 3 Wash. App. 769, 775, 479 P.2d 544, 548 (1970) (defendant matched description of suspect who had fired shots at other officers moments before stop).

4.9(a) Scope of a Permissible Frisk

A frisk must be justified not only in its inception but also in its scope. The scope of a valid frisk is strictly limited to what is necessary for the discovery of weapons which might be used to harm the officer or others nearby. Terry v. Ohio, 392 U.S. 1, 29, 20 L. Ed. 2d 889, 911, 88 S. Ct. 1868, 1884 (1968). Cf. infra § 5.1 (search incident to arrest). A frisk need not, however, conform to the conventional pat-down. See Adams v. Williams, 407 U.S. 143, 147, 32 L. Ed. 2d 612, 617-18, 92 S. Ct. 1921, 1923-24 (1972) (when officer received information that narcotics suspect was seated in nearby car and carried gun in his waistband, and when the suspect refused to comply with officer’s request to step out of the car, officer was justified in reaching through window and removing revolver from suspect’s waistband). See 3 LaFAVE, SEARCH AND SEIZURE § 9.4(b), at 125.

A Washington court has upheld an officer’s grab at a suspect’s hand when the suspect had furtively withdrawn his hand from his pocket and thrust it behind his back. State v. Serrano, 14 Wash. App. 462, 469, 544 P.2d 101, 106 (1975). Although the court reasoned that the officer’s reflexive action was not actually a search, the Terry principle that officers may act to protect themselves justified the interference. Id. at 469, 544 P.2d at 106.
When in the course of a frisk an officer feels what may be a weapon, the officer may take only such action as is necessary to examine the object. See Terry v. Ohio, 392 U.S. 1, 30, 20 L. Ed. 2d 889, 911, 88 S. Ct. 1868, 1884-85 (1968) (officer merely reached into coat and removed gun). Once the police ascertain that no weapon is involved, their authority to conduct even a limited search ends. State v. Keyser, 29 Wash. App. 120, 124, 627 P.2d 978, 980 (1981) (when officer removes bag from under car seat and determines from touching it that bag contains no weapons, officer not justified in further examining contents of bag); see also State v. Hobart, 94 Wash. 2d 437, 446, 617 P.2d 429, 433 (1980); State v. Allen, 93 Wash. 2d 170, 173, 606 P.2d 1235, 1236 (1980). See generally 3 LaFave, Search and Seizure § 9.4(c), at 128-31.

4.9(b) Frisks of Persons in Proximity to Suspect

Police may not frisk persons present on the premises of a place lawfully being searched, absent a reasonable suspicion that such persons are armed. See Ybarra v. Illinois, 444 U.S. 85, 87, 62 L. Ed. 2d 238, 100 S. Ct. 338 (1979); supra § 3.8(a). Similarly, police may not take protective measures such as searching the purse of a passenger in a vehicle when the driver is stopped on the basis of a traffic violation, absent a reasonable suspicion that the passenger is involved in criminal conduct. See State v. Larson, 98 Wash. 2d 638, 642, 611 P.2d 771, 774 (1980). When the driver is lawfully stopped for reasons pertaining to handgun possession and threats of violence, however, a protective frisk of a passenger is permitted. State v. Coahran, 27 Wash. App. 664, 620 P.2d 116 (1980). One commentator suggests that the appropriate inquiry is whether the officer is under a reasonable apprehension of danger, a determination that would depend 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. 3 LaFave, Search and Seizure § 9.4(a), at 120.

4.9(c) Other Protective Measures Besides Frisks

An officer may take measures for self-protection other than a frisk. 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

4.9(d) Search of Area Within Suspect’s Control

Officers may extend a *Terry* search for weapons to the passenger compartment of a detained person’s vehicle when the police have a reasonable belief that the suspect both is dangerous and can gain access to a weapon in the vehicle. *Michigan v. Long*, 463 U.S. 1032, 77 L. Ed. 2d 1201, 103 S. Ct. 3469 (1983). The related issue of whether an officer may search items carried by a suspect is analyzed in 3 *LaFave, Search and Seizure* § 9.4(e), at 133-37.

**Chapter 5: Warrantless Searches and Seizures—The Exceptions to the Warrant Requirement**

5.0 Introduction


The following sections examine the various “jealously and carefully drawn” exceptions to the warrant requirement. *See Arkansas v. Sanders*, 442 U.S. 753, 759-60, 61 L. Ed. 2d 235, 241-42, 99 S. Ct. 2586, 2590-91 (1979). Note that even when a search or seizure falls within one of the exceptions to the warrant requirement, it may be invalid if other rights are infringed. *See, e.g., United States v. Sherwin*, 572 F.2d 196, 200 (9th Cir. 1977) (plain view seizure of photographs of sexual activity invalid; officers’ determination that photographs obscene violated
5.1 Search Incident to Arrest

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

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

There is no comparable justification, however, for routinely searching any room other than that in which an arrest occurs—or, for that matter, for searching through all the desk drawers or other closed or concealed areas in that room itself. Such searches, in the absence of well-recognized exceptions, may be made only under the authority of a search warrant.


The "search incident to arrest" exception to the warrant requirement applies only when: (1) the arrest was valid, and (2) the search incident to the arrest was "restricted in time and place in relation to the arrestee and the arrest" as opposed to "wide-ranging, exploratory, rummaging, [and] ransacking . . . ." State v. Smith, 88 Wash. 2d 127, 135, 559 P.2d 970, 974, cert. denied, 434 U.S. 876 (1977).

As the following section will demonstrate, the search incident to arrest exception to the warrant requirement has been analyzed differently under the Washington Constitution compared with under the fourth amendment.

5.1(a) Lawful Arrest

The criteria for a lawful arrest are discussed in Chapter 4. If
the arrest is invalid, then the search incident to the arrest is invalid. State v. Hehman, 90 Wash. 2d 45, 50, 578 P.2d 527, 529 (1978). Even when an arrest is valid, however, a search is not properly “incident” to the arrest if the arrest was merely a pretext for conducting the search for evidence of another offense. State v. Johnson, 71 Wash. 2d 239, 242-43, 427 P.2d 705, 707 (1967). Cf. State v. Carner, 28 Wash. App. 439, 445, 624 P.2d 204, 208 (1981) (second body-search made after decision to release defendant and in retaliation for his remarks held invalid, even when arrest and initial search were valid).

The search incident to arrest exception requires a custodial arrest. See Hehman, 90 Wash. 2d at 50, 578 P.2d at 529. Washington prohibits custodial arrests for minor traffic violations when the arrestee signs a promise to appear in court; thus, a search incident to a custodial arrest for a minor traffic violation would be unlawful. Id. at 47, 578 P.2d 528; see also Watts v. United States, 328 A.2d 770 (D.C. App. 1972). Cf. United States v. Robinson, 414 U.S. 218, 38 L. Ed. 2d 427, 94 S. Ct. 467 (1973).

One judge has suggested that when police safety is a concern, police could protect themselves by closing and locking car doors and windows while processing the arrest or citation rather than by searching the car. See United States v. Frick, 490 F.2d 666, 673 (5th Cir. 1973) (Goldberg, J., concurring in part and dissenting in part); cf. Pennsylvania v. Mimms, 434 U.S. 106, 54 L. Ed. 2d 331, 98 S. Ct. 330 (1977) (police may direct driver out of car while issuing citation for motor vehicle violation). For a suggestion that in the noncustodial arrest situation a search should be limited to the scope of a Terry frisk unless there is an evidentiary basis for a full search, see 2 LaFave, Search and Seizure § 5.2(h), at 291-96.

5.1(b) “Immediate Control”

In determining whether, under the fourth amendment, the area searched or the object seized was within the “immediate control” of the defendant, courts have recognized that “there can be no hard and fast rule . . . .” People v. Williams, 57 Ill. 2d 239, 246, 311 N.E.2d 681, 685 (1974). Factors that have been considered include: (a) whether the arrestee was physically restrained; (b) the position of the officer in relation to the defendant and the place searched; (c) the difficulty of gaining access into the container or enclosure searched; and (d) the number of officers present as compared with the number of arrestees or
other persons. See 2 LAFAVE, SEARCH AND SEIZURE § 6.3(c), at 413-19; 7.1(b), at 499-506.

Article I, section 7 of the Washington Constitution prohibits an arresting officer from searching beyond the area of an arrestee's actual immediate control. Thus, for example, once a defendant is arrested and placed in a patrol car, the justification for a warrantless search of the defendant's vehicle disappears. State v. Ringer, 100 Wash. 2d 686, 699, 674 P.2d 1240, 1248 (1983). The search must be strictly tied to its purpose: to remove weapons that an arrestee might use to resist arrest or effect an escape, or to prevent the destruction of evidence. Id. In contrast, under the fourth amendment, the passenger compartment of an automobile and containers found therein are within the scope of a search incident to arrest even when the suspect has been removed from the vehicle and taken into police custody. New York v. Belton, 453 U.S. 454, 69 L. Ed. 2d 768, 101 S. Ct. 2860 (1981) (police may search jacket found on back seat of automobile after driver and passengers have left vehicle). See infra § 5.2(b).

Under the fourth amendment, some courts have permitted police in certain limited situations to extend a search incident to an arrest 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 2 LAFAVE, SEARCH AND SEIZURE § 6.4, at 420-24. Courts also have permitted police to search premises to determine whether accomplices who could aid the arrestee are present, id. at 424-27, and to conduct a protective sweep of premises when the officers fear that third parties may offer resistance, id. at 427-43.

The Washington Constitution places greater restraints on the police than the fourth amendment does when the arrestee is in his or her home; entry into other rooms requires a reasonable fear for police safety or a belief that the arrestee is likely to escape or destroy evidence. See State v. Chrisman, 100 Wash. 2d 814, 676 P.2d 419 (1984); supra § 4.1; cf. Washington v. Chrisman, 455 U.S. 1, 70 L. Ed. 2d 778, 102 S. Ct. 812 (1982).
5.2 "Immediate Control" or Permissible Scope: Particular Applications

5.2(a) The Defendant

Under the fourth amendment, an officer may search an arrestee who has been taken into custody even when the officer does not believe that the arrestee is armed or in possession of evidence of the crime for which he or she was arrested. United States v. Robinson, 414 U.S. 218, 235, 38 L. Ed. 2d 427, 440-41, 94 S. Ct. 467, 477 (1973). It is the lawful arrest that establishes the authority to search the arrestee; the arresting officer may have no subjective fear that an arrestee is armed or that evidence will be destroyed. Gustafson v. Florida, 414 U.S. 260, 263-64, 38 L. Ed. 2d 456, 460, 94 S. Ct. 488, 491 (1973). Thus, the rule applies even when the custodial arrest is for a minor traffic violation unless, as in Washington, such an arrest would be illegal. Robinson, 414 U.S. at 235, 38 L. Ed. 2d at 440-41, 94 S. Ct. at 477; see State v. Hehman, 90 Wash. 2d 45, 578 P.2d 527 (1978).

An intrusion into a suspect's body, such as drawing blood samples, is not justifiable under the search-incident-to-arrest exception to the warrant requirement. Schmerber v. California, 384 U.S. 757, 16 L. Ed. 2d 908, 86 S. Ct. 1826, 1835 (1966). Such intrusions may be justified, however, by the exigent circumstances exception. 384 U.S. at 770-71, 16 L. Ed. 2d at 919-20, 86 S. Ct. at 1835-36. See generally infra § 5.18(a); supra § 3.13(b); 2 LAFAVE, SEARCH AND SEIZURE § 5.3(c), at 321-30.

The Schmerber rules do not apply, however, to less intrusive physical intrusions such as a chokehold intended to prevent a suspect from swallowing apparent contraband. See State v. Taplin, 36 Wash. App. 664, 676 P.2d 504 (1984); State v. Williams, 16 Wash. App. 868, 560 P.2d 1160 (1977). Officers attempting to prevent a suspect from swallowing evidence may not prevent the suspect from breathing or obstruct the suspect's blood supply to the head, although they may pinch his or her nose shut. Williams, 16 Wash. App. at 872, 560 P.2d at 1163. More aggressive conduct, such as jumping on the suspect, is likely to violate due process rights. Id. at 870, 560 P.2d at 1162; see Rochin v. California, 342 U.S. 165, 96 L. Ed. 183, 72 S. Ct. 205, 25 A.L.R.2d 1396 (1952). See generally 2 LAFAVE, SEARCH AND SEIZURE § 5.2(i), at 296.

For a brief discussion of post-detention body searches, see
infra § 6.2.

5.2(b) Vehicles and Containers

Under the fourth amendment, police may search the passenger compartment of a vehicle as a search incident to the arrest of the driver. New York v. Belton, 453 U.S. 454, 69 L. Ed. 2d 768, 101 S. Ct. 2860 (1981). The compartment is considered within the arrestee's immediate control even after the arrestee has been placed in police custody. Id. at 459, 69 L. Ed. 2d at 774, 101 S. Ct. at 2864.

Under article I, section 7 of the Washington Constitution, "immediate control" is construed more literally. Once the driver has been removed from the vehicle and no longer can obtain access to it, the passenger compartment falls outside the area of immediate control, and the search incident to arrest exception will not apply. State v. Ringer, 100 Wash. 2d 686, 674 P.2d 1240 (1983). But cf. State v. Donohoe, 39 Wash. App. 779, 783, 695 P.2d 150, 153 (1985).

When police have probable cause to believe an automobile contains contraband or evidence, whether or not they have probable cause to arrest the vehicle's occupants they may have authority to search the vehicle without a warrant pursuant to other exceptions to the warrant requirement. See generally infra §§ 5.21-5.23. Traditionally, sealed containers taken from an arrestee and in the exclusive control of the police could not be searched without a warrant as incident to the arrest. Arkansas v. Sanders, 442 U.S. 753, 762, 61 L. Ed. 2d 235, 243-44, 99 S. Ct. 2586, 2592 (1979). Under the fourth amendment, the traditional rule has been modified, and law enforcement officers now may search pursuant to a lawful arrest "any containers found within the passenger compartment, for if the passenger compartment is within reach of the arrestee, so also will the containers in it be within his reach." New York v. Belton, 453 U.S. 454, 460, 69 L. Ed. 2d 768, 775, 101 S. Ct. 2860, 2864 (1981) (permitting search of jacket found on back seat of automobile when driver and passengers not in vehicle); see United States v. Venizelos, 495 F. Supp. 1277, 1279 (S.D.N.Y. 1980) (search of arrestee's purse lawful when purse within immediate control of arrestee); see also State v. Garcia, 605 F.2d 349, 354 (7th Cir. 1979) (search of hand-carried suitcases lawful because arrestee could have quickly opened suitcases and gained access to weapons or evidence). But see Oklahoma v. Castleberry, ___ U.S. ____, 83 L.
Ed. 2d 315, 105 S. Ct. 1859 (1985) (4-4 decision) (affirming state court decision holding unconstitutional warrantless search of suitcase in car trunk when police had probable cause to arrest driver but not to believe suitcase contained drugs); State v. Cole, 31 Wash. App. 501, 510, 643 P.2d 675, 680 (1982) (zone of control under Belton does not include luggage contained in hatchback area of car); 2 LAFAVE, SEARCH AND SEIZURE § 5.5(a), at 349-50.

5.3 Pre-Arrest Search


Under limited circumstances, pre-arrest searches are permitted even when the arrest does not follow closely. Police may conduct a search incident to the arrest of a suspect when they have probable cause, when they believe the suspect is in the process of destroying highly evanescent evidence, and when they can preserve the evidence by a limited search. Cupp v. Murphy, 412 U.S. 291, 296, 36 L. Ed. 2d 900, 906, 93 S. Ct. 2000, 2004 (1973). See 2 LAFAVE, SEARCH AND SEIZURE § 5.4(b), at 338-45; State v. Smith, 88 Wash. 2d 127, 137-38, 559 P.2d 970, 975 (1977) (upholding officer's seizure of evidence prior to arrest because of exigent circumstance of its possible destruction).

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

5.4(a) Post-Detention Search Incident to Arrest

The search incident to arrest exception can apply both to a search at the place of detention as well as to a search at the place of arrest. See generally 2 LAFAVE, SEARCH AND SEIZURE § 5.3 (a), at 303-11.

Any post-arrest search is unlawful, however, if probable
cause to arrest dissipates by the time the suspect is taken into custody. A more difficult question arises when a suspect is detained only because the police have failed to comply with laws allowing release. See generally LaFave, Search and Seizure § 5.3(d), at 330-35.

Even when an arrestee is searched upon booking, officers later may conduct a warrantless "second look" into the arrestee's belongings. United States v. Edwards, 415 U.S. 800, 805, 39 L. Ed. 2d 771, 777, 94 S. Ct. 1234, 1238 (1974) (search of defendant's personal belongings long after defendant had been searched and placed in jail cell was permissible search incident to arrest; police did no more than they were entitled to do incident to an arrest). See 2 LaFave, Search and Seizure § 5.3(b), at 311-21 (Edwards requires that (1) the object come into plain view at the time of arrival at the place of detention, (2) later investigation establishes that the object has evidentiary value, and (3) the object remains in custody as part of arrestee's inventoried property). Compare United States v. Venizelos, 495 F. Supp. 1277, 1280 (S.D.N.Y. 1980) (arrestee's purse may be searched either at place of arrest or anytime during detention) with State v. Simpson, 95 Wash. 2d 170, 194, 622 P.2d 1199, 1214 (1980) (Utter, J., concurring) (probable cause required for detailed, post-booking search through arrestee's personal belongings stored in police property box).

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

5.4(b) Post-Detention Inventory Search

Police officers may search containers or packages as part of an inventory of the arrestee's possessions prior to storage for safekeeping. Illinois v. Lafayette, 462 U.S. 640, 643, 77 L. Ed. 2d 65, 69-70, 103 S. Ct. 2605, 2608 (1983); South Dakota v. Opperman, 428 U.S. 364, 369, 49 L. Ed. 2d 1000, 1005, 96 S. Ct. 3092, 3097 (1976). The police need not have probable cause to believe that the containers conceal evidence of crime, nor must they fear concealed weapons. United States v. Chadwick, 433 U.S. 1, 10 n.5, 53 L. Ed. 2d 538, 547 n.5, 97 S. Ct. 2476, 2482-83 n.5 (1977). The police have some obligation, however, to safeguard the container and its contents when they seize it. Id. at 19, 53 L. Ed. 2d at 553, 97 S. Ct. at 2487. Whether the defendant is arrested
in a private or a public place thus can be significant. *Id.* (when a person is arrested in a public place, it is reasonable for police to take custody of the arrestee’s property rather than to leave the property in the public place while a warrant is obtained). *See generally* 2 LAFAYE, SEARCH AND SEIZURE § 5.5(b), at 356-58.

Lower courts have reached differing results as to whether police may conduct an item-by-item inventory of contents. *See* 2 LAFAYE, SEARCH AND SEIZURE § 5.5(b), at 359-61.

5.5 Searches Conducted in Good Faith and Without Purpose of Finding Evidence

If officers undertake a search in good faith for a reason other than investigating crime—for example, to aid someone who has been injured—any evidence they discover may be admissible. 2 LAFAYE, SEARCH AND SEIZURE §§ 5.4(c), at 345-47; 5.5(d), at 370-71. Thus, even when police lack probable cause to believe a crime has been committed, they may conduct a warrantless search of premises when the premises contain persons in imminent danger of death or harm, objects likely to burn, explode or otherwise cause harm, or information that will disclose the location of a threatened victim or the existence of a threat. 2 LAFAYE, SEARCH AND SEIZURE § 6.5, at 456-57.

For an officer’s actions to come within the medical emergency exception to the warrant requirement, the officer must honestly and reasonably believe that aid or assistance is necessary. *State v. McAlpin*, 36 Wash. App. 707, 677 P.2d 185 (1984); *see State v. Loewen*, 97 Wash. 2d 562, 568, 647 P.2d 489, 493 (1982) (search of defendant’s tote bag for identification improper when defendant regained consciousness prior to search); *see also* Thompson *v. Louisiana*, 469 U.S. _____, 83 L. Ed. 2d 246, 105 S. Ct. 409 (1984); *see also* State *v. Sanders*, 8 Wash. App. 306, 308, 506 P.2d 892, 895-96 (1973) (entry proper when police informed by telephone operator of problem at residence, when no one answered officer’s knock at door, and when police observed through a window a person swaying back and forth, in apparent need of assistance).

When the medical emergency is a homicide, the officer may not only enter to aid the victim, but also may make a quick check of the area to see if the perpetrator or other victims are present. *See Thompson*, 469 U.S. at _____, 83 L. Ed. 2d at 251, 105 S. Ct. at 412. Such a search must be brief; a general exploratory search lasting several hours is not permissible. *Id. Cf. supra*
§ 5.1(b).

In the course of rendering aid, police may conduct warrantless searches of a victim's personal effects. See, e.g., Chavis v. Wainwright, 488 F.2d 1077, 1078 (5th Cir. 1973) (police justified in making inventory search of defendant's clothing and effects when clothing and effects were removed in hospital during defendant's treatment for possibly fatal stab wounds, and when police were required to keep clothing and effects as evidence of possible homicide); United States v. Dunavan, 485 F.2d 201, 203 (6th Cir. 1973) (when taking person to hospital, police may search his or her briefcase for purpose of establishing identity).

Similarly, police may make a warrantless entry to protect property. State v. Campbell, 15 Wash. App. 98, 100, 547 P.2d 295, 297 (1976) (police entry to investigate alleged burglary permissible). Firefighters may enter a house to extinguish a fire and immediately thereafter conduct a limited warrantless investigation to determine the fire's cause. Michigan v. Tyler, 436 U.S. 499, 510, 56 L. Ed. 2d 486, 498, 98 S. Ct. 1942, 1950 (1978). But once a fire has been extinguished, a warrant is required for arson investigators to search the premises to discover a possible criminal cause of the fire. Id. at 511, 56 L. Ed. 2d at 500, 98 S. Ct. at 1951; Michigan v. Clifford, ___ U.S. ___, 78 L. Ed. 2d 477, 486, 104 S. Ct. 641, 649 (1984).

5.6 The Plain View Doctrine: Distinction Between “Plain View” and “Open View”

This section discusses the warrantless seizure of objects based on the plain view exception to the warrant requirement. Courts have used the term “plain view” to describe three types of searches: (1) when an officer observes an item that is exposed to public view in a public place or in a location which is not constitutionally protected; (2) when an officer intrudes into a constitutionally protected area—either lawfully or unlawfully—and there observes a clearly exposed object; and (3) when an officer, standing in a non-protected area, observes an object that is located inside a constitutionally protected area. See generally State v. O'Herron, 153 N.J. Super. 570, 574, 380 A.2d 728, 729-30 (1977), cert. denied, 439 U.S. 1032, 58 L. Ed. 2d 695, 99 S. Ct. 637 (1978); 1 LAFAVE, SEARCH AND SEIZURE § 2.2(a), at 240-45.

These three situations are distinguished by the nature of the defendant's expectation of privacy in the object. In the first
situation—the discovery of an object in a public place or in a location which is not constitutionally protected—there is no true search, for the defendant has no reasonable expectation of privacy in an object that is exposed to public view. O'Herron, 153 N.J. Super. at 574, 380 A.2d at 730. Generally, “[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of fourth amendment protection.” Katz v. United States, 389 U.S. 347, 351, 19 L. Ed. 2d 576, 582, 88 S. Ct. 507, 511 (1967); see generally supra §§ 1.1-1.3. Thus, the first situation is more accurately referred to as “open view” and not “plain view.” State v. Seagull, 95 Wash. 2d 898, 632 P.2d 44 (1981).

For the same reason, the mere observation of an object located in a protected area from a vantage point in a non-protected area does not constitute a search. Privacy rights are implicated, however, when police enter the constitutionally protected area to seize the object. “[S]eeing something in open view does not . . . dispose, ipso facto, of the problem of crossing constitutionally protected thresholds . . . . Light waves cross thresholds with a constitutional impunity not permitted arms and legs. Wherever the eye may go, the body of the policeman may not necessarily follow.” Moylan, The Plain View Doctrine: Unexpected Child of the Great “Search Incident” Geography Battle, 26 Mercer L. Rev. 1047, 1096 (1975). Thus, although the open view doctrine may justify observing an object located in a constitutionally protected area, it will not justify seizing the object; the search is in the entry, not the inspection.

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

5.7 Criteria for Falling Within the “Plain View” Exception

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

The most common plain view situation occurs when the officer lawfully enters a constitutionally protected area and unexpectedly discovers incriminating evidence. See, e.g., State v.

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


For a warrantless seizure to fall within the plain view exception, three requirements must be met: (1) the police must have a prior justification for the intrusion into the constitutionally protected area; (2) the discovery of the incriminating evidence must be inadvertent; and (3) the police must immediately realize that the object they observe is evidence—that is, the incriminating character of the evidence must be immediately apparent. State v. Daugherty, 94 Wash. 2d 263, 267, 616 P.2d 649, 651 (1980); see State v. Lesnick, 84 Wash. 2d 940, 942, 530 P.2d 243, 245 (1975); State v. Murray, 84 Wash. 2d 527, 534, 527 P.2d 1303, 1307 (1974); State v. Kennedy, 38 Wash. App. 41, 684 P.2d 1326 (1984), rev. granted, 102 Wash. 2d 1015 (1984).

(1) Prior Justification for Intrusion

The plain view doctrine applies only when the police are justified in occupying the position from which they observe the illegal object or activity. Thus, when the initial stop of a vehicle is unlawful, and as a consequence the police have no right to be in a position to observe the vehicle's interior, the observation of contraband within the vehicle constitutes an unlawful search. State v. Lesnick, 84 Wash. 2d 940, 942-43, 530 P.2d 243, 245 (1975); see also Washington v. Chrisman, 45 U.S. 1, 9, 70 L. Ed. 2d 778, 786-87, 102 S. Ct. 812, 818 (1982); State v. Daugherty, 94 Wash. 2d 263, 269, 616 P.2d, 649, 652 (1980); State v. McCrea, 22 Wash. App. 526, 529, 590 P.2d 367, 369 (1979). Because the plain view exception to the warrant requirement
rests on the lawfulness of the officer’s presence, plain view cases will have different outcomes under the federal and state constitutions when the two constitutions differ as to that lawfulness. For example, when an officer has accompanied an arrestee to the arrestee’s dormitory room and follows the arrestee into the room, the inspection of objects within the room may be lawful under the fourth amendment and unlawful under article I, section 7. *Washington v. Chrisman*, 45 U.S. 1, 9, 70 L. Ed. 2d 778, 786-87, 102 S. Ct. 812, 818 (1982) (fourth amendment permits officer to accompany arrestee wherever arrestee goes), *on remand*, 100 Wash. 2d 814, 822, 676 P.2d 419, 424 (1984) (article I, section 7 prohibits officer from entering misdemeanor arrestee’s home unless officer can demonstrate threat to officer’s safety, possibility of destruction of evidence of misdemeanor charged, or strong likelihood of escape).

(2) Inadvertent Discovery

The plain view exception does not apply when an officer expects to find the incriminating object; the officer must discover the object inadvertently. *Coolidge v. New Hampshire*, 403 U.S. 443, 471, 29 L. Ed. 2d 564, 586, 91 S. Ct. 2022, 2040-41 (1971).

Thus courts generally have held that when police have sufficient grounds to name an item in a warrant, they may not seize it on the basis of plain view. See 2 LaFave, Search and Seizure § 4.11(d), at 178-83. The limitation may apply only to items that are “not contraband nor stolen nor dangerous in themselves.” *Coolidge*, 403 U.S. at 471, 29 L. Ed. 2d at 586, 91 S. Ct. at 2041. One Washington court, however, has upheld the seizure of objects not mentioned in a search warrant because they could have been seized under the plain view exception during a prior lawful intrusion. *State v. McAlpin*, 36 Wash. App. 707, 714-15, 677 P.2d 185, 190 (1984) (police observed contraband in plain view during lawful intrusion based on medical emergency in defendant’s home; officer’s subsequent failure to list contraband in affidavit in support of search warrant did not invalidate seizure of contraband during execution of warrant because evidence previously had been in plain view). When the discovery of an object in the course of a search for another object is in fact inadvertent, its seizure may fall within the exception. *State v. Lair*, 95 Wash. 2d 706, 717, 630 P.2d 427, 433-34 (1981) (discovery of drug other than marijuana during “wide open” search for marijuana was, for plain view purposes, inadvertent); *State v. 
Johnson, 17 Wash. App. 153, 561 P.2d 701 (1977) (stolen property from prior burglary may be seized under plain view doctrine during execution of search warrant based on subsequent burglary, provided police did not have probable cause to believe that the property from prior burglary was present on the premises at time they applied for warrant); but see Lair, 95 Wash. 2d at 721, 630 P.2d at 436 (Dolliver, J., dissenting) ("wide open search for all controlled substances" renders impossible any inadvertent discovery of drugs). Cf. State v. Callahan, 31 Wash. App. 710, 712-13, 644 P.2d 735, 736 (1982).

Some courts have bolstered the inadvertent discovery rule by requiring that a search warrant be executed in good faith. See, e.g., United States v. Tranquillo, 330 F. Supp. 871, 876 (M.D. Fla. 1971) (bringing along vice squad officers to look for narcotics while other officers executed search warrant for stolen clothing deemed "bad faith"); see generally 2 LAFAVE, SEARCH AND SEIZURE § 4.11(e), at 183-84.

One Washington court has held the discovery of an object inadvertent when the officer looked in a location where he expected to find evidence; the officer, however, had not taken "unreasonable steps" to be in a position to observe the object. State v. Kennedy, 38 Wash. App. 41, 49, 684 P.2d 1326, 1331 (1984) (officer lawfully stopping vehicle observed driver reaching under seat of car; officer justified in removing partially visible plastic bag from under seat as plain view seizure), rev. granted, 102 Wash. 2d 1015 (1984).

(3) Immediate Knowledge: Incriminating Character Immediately Apparent

The plain view exception applies only when the police immediately recognize the incriminating nature of the object. Coolidge v. New Hampshire, 403 U.S. 443, 466, 29 L. Ed. 2d 564, 583, 91 S. Ct. 2022, 2038 (1971). For example, the discovery of a contraband television set inside the defendant's apartment did not come within the plain view doctrine, despite the validity of the entry into the apartment, because the officers did not realize that the television was contraband until they had copied down the serial number and checked with police headquarters. State v. Murray, 84 Wash. 2d 527, 534, 527 P.2d 1303, 1307 (1974); but see 2 LAFAVE, SEARCH AND SEIZURE § 4.11(c), at 175-76.

The United States Supreme Court has not indicated what is meant by "immediately apparent" and to what extent officers may examine an object to determine whether it is incriminating.
2 LaFave, Search and Seizure, § 4.11(b), (c), at 167-78 (suggesting that in order for officers to inspect items, they must be aware of facts that justify a reasonable suspicion that the items are incriminating; for officers to seize the items, they must have probable cause).

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

For the objects seized to be incriminating, they must be fruits, instrumentalities, or evidence of crime. Evidence of crime includes objects having a "sufficient nexus" with the crime under investigation. State v. Reid, 38 Wash. App. 203, 213, 687 P.2d 861, 868 (1984); State v. Turner, 18 Wash. App. 727, 729, 571 P.2d 955, 957 (1977). Evidence also may be seized if it will aid in the apprehension of a suspect. Turner, 18 Wash. App. at 729, 571 P.2d at 957.

The officer's knowledge is relevant to a determination of the legality of items. Andresen v. Maryland, 427 U.S. 463, 483, 49 L. Ed. 2d 627, 644, 96 S. Ct. 2737, 2749 (1976). Thus, an officer's experience and knowledge that plastic baggies are common receptacles for marijuana will enable the officer immediately to recognize the incriminating nature of a baggie even when its contents are not observed. State v. Kennedy, 38 Wash. App. 41, 48-49, 684 P.2d 1326, 1331 (1984), rev. granted, 102 Wash. 2d 1015 (1984).
5.7(b) Seizure of Object from Protected Area After Observing Object from Non-Protected Area

In those cases in which the police officer is in a public or non-protected area at the time he or she observes contraband within a constitutionally protected area, the officer’s mere visual observation—without physical intrusion—does not constitute a “search”. See State v. Campbell, 103 Wash. 2d 1, 23, 691 P.2d 929, 942 (1984) (when an officer peered into defendant’s car on public street and saw blood on door handle and jewelry similar to that observed at homicide scene, his observation fell within the open view doctrine of Seagull); see also 1 LAFAVE, SEARCH AND SEIZURE § 2.2(a), at 242-43; State v. O’Herron, 153 N.J. Super. 570, 575, 380 A.2d 728, 730 (1977).

When an officer enters a constitutionally protected area to seize an object observed from outside the area, the plain view doctrine will not justify the absence of a warrant.

[P]lain view alone is never enough to justify the warrantless seizure of evidence. This is simply a corollary of the familiar principle . . . that no amount of probable cause can justify a warrantless search or seizure absent “exigent circumstances.” Incontrovertible testimony of the senses that an incriminating object is on premises belonging to a criminal suspect may establish the fullest possible measure of probable cause. But even where the object is contraband, this court has repeatedly stated and enforced the basic rule that the police may not enter and make a warrantless seizure.

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

Thus, a police officer who lawfully observes contraband within a constitutionally protected area may enter the area without a warrant only if the officer can justify the entry by one of the other exceptions to the warrant requirement. 1 LAFAVE, SEARCH AND SEIZURE § 2.2(a), at 243-45; see State v. Drumhiller, 36 Wash. App. 592, 675 P.2d 631 (1984); see generally State v. O’Herron, 153 N.J. Super. 570, 576-81, 380 A.2d 728, 730-34 (1977). For example, the warrantless entry into the defendant’s
vegetable garden to seize lawfully observed marijuana plants was unconstitutional because the officer could not show exigent circumstances or any other warrant requirement exception. O'Herron at 582, 380 A.2d at 733-34.

5.8 Plain View: Aiding the Senses with Enhancement Devices

The Washington Court of Appeals and lower courts in other jurisdictions have applied the plain view doctrine when police officers used flashlights to aid their observations, provided that the observations could have taken place in daylight without flashlights. State v. Young, 28 Wash. App. 412, 417, 624 P.2d 725, 729 (1981) (tools suspected of being used in robbery were properly seized when officer observed tools after shining flashlight on front seat of car with door left open), rev. denied, 95 Wash. 2d 1024 (1981). See 1 LAFAVE, SEARCH AND SEIZURE § 2.2(b), at 248-56; see also United States v. Booker, 461 F.2d 990, 992 (6th Cir. 1972); Marshall v. United States, 422 F.2d 185 (5th Cir. 1970); People v. Whalen, 390 Mich. 672, 678-79, 213 N.W.2d 116, 120 (1973) (proper to use flashlight to observe interior of car and occupants).

The decisions permitting the use of enhancement devices are based on the theory that the object has been “knowingly exposed to public view” even though “artificial illumination, specifically directed, might be required to render the property visible.” State v. Stone, 294 A.2d 683, 688-89 (Me. 1972). Consistent with traditional plain view requirements, the flashlight-enhanced observation must be from a location where the officer has a right to be. See, e.g., Tyler v. United States, 302 A.2d 748, 751 (D.C. 1973) (search invalid when officer improperly opened car door before using flashlight to observe gun in interior of vehicle; officer did not have “a right to be in the position to have that view”).

The rule governing magnification is similar to the one governing the use of flashlights. Police officers may use binoculars and telescopes to observe that which is in the open and subject to some scrutiny by the naked eye from the same location, or to observe that which they lawfully could have observed from a closer location. 1 LAFAVE, SEARCH AND SEIZURE § 2.2(c), at 256-62; see, e.g., United States v. Minton, 488 F.2d 37, 38 (4th Cir. 1973); United States v. Loundmannz, 472 F.2d 1376, 1379 (D.C. Cir. 1972). The binocular/telescope rule does not permit enhanced observations that enable the officer to observe objects
or activities that could not be observed by the naked eye; in these circumstances, the defendant may have a legitimate expectation of privacy in the objects or activities. See, e.g., United States v. Kim, 415 F. Supp. 1252, 1256 (D. Haw. 1976) (plain view exception does not apply to FBI agents’ use of 800 millimeter telescope to observe activities in defendant’s apartment from building one-fourth of one mile away, when no observation possible from closer locations); State v. Kender, 60 Hawaii 301, 305-06, 588 P.2d 447, 450-51 (1979) (plain view exception inapplicable when officer climbed up fence on neighboring property and used a telescope to observe marijuana plants in defendant’s backyard that otherwise would have been concealed by a fence and heavy foliage). But see Commonwealth v. Hernley, 216 Pa. Super. 177, 181-82, 263 A.2d 904, 906 (1970) (applying plain view exception to binocular observation, from atop a four-foot ladder, of activity that could not have been seen with the naked eye). Cf. supra § 1.3(c) (reasonable expectation of privacy in “open fields”); see generally 1 LAFAVE, SEARCH AND SEIZURE § 2.2(c), at 259-61.

5.9 Extensions of the Plain View Doctrine

5.9(a) Plain Hearing

Courts in other jurisdictions have recognized a “plain hearing” analogue to the plain view doctrine. For example, officers did not need a warrant in order to obtain a motel room next to the suspects’ room and to listen at the connecting door. United States v. Fisch, 474 F.2d 1071, 1077 (9th Cir. 1973), cert. denied, 412 U.S. 921 (1973). See also United States v. Pagan, 395 F. Supp. 1052, 1060-61 (D.P.R. 1975) (eavesdropping on hotel room conversation permitted), aff’d., 537 F.2d 554 (3d Cir. 1976); State v. Day, 50 Ohio App. 2d 315, 322, 362 N.E.2d 1253, 1257-58 (1976).

In Washington, eavesdropping by means of an electronic device or the interception of private telephone, telegraph, radio, or other electronic communications is governed by the Washington Violating Right of Privacy Act, WASH. REV. CODE ch. 9.73 (1983). Even tape recordings made by federal agents pursuant to the federal wiretap statute are inadmissible in state courts when the recordings are made in violation of the Washington statute. State v. Williams, 94 Wash. 2d 531, 541, 617 P.2d 1012, 1018 (1980). Police testimony about such recorded conversations is
also inadmissible. *Id.* at 543, 617 P.2d at 1019. *Cf. infra* § 7.3(c) (use of illegally obtained evidence at probable cause hearings).

5.9(b) Plain Smell


5.10 Consent Searches: Introduction

A warrantless search is constitutional when valid consent is granted. *Washington v. Chrisman*, 455 U.S. 1, 9-10, 70 L. Ed. 2d 778, 787, 102 S. Ct. 812, 818 (1982). A valid consent search requires that: (1) the consent be “voluntary”; (2) the consent be granted by a party having the authority to consent; *State v. Shoemaker*, 85 Wash. 2d 207, 210-12, 533 P.2d 123, 125 (1975), and (3) the search be limited to the scope of the consent granted. *State v. Johnson*, 71 Wash. 2d 239, 243-44, 427 P.2d 705, 708 (1967). *See generally* 2 LAFAVE, SEARCH AND SEIZURE § 8.1, at 610-35.

5.11 Voluntariness of Consent: Burden of Proof

For discussion of the distinctions between voluntariness of consent and waiver of constitutional rights, see 2 LaFave, Search and Seizure § 8.1, at 612-20.

5.12 Factors Considered in Determining Voluntariness

The validity or voluntariness of a consent to search is analyzed in a similar manner as the voluntariness of a confession. Thus, the issue of whether "consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances." Schneckloth v. Bustamonte, 412 U.S. 218, 229, 36 L. Ed. 2d 854, 862-63, 93 S. Ct. 2041, 2047-48 (1973); see State v. Shoemaker, 85 Wash. 2d at 211-12, 533 P.2d at 125. Unlike the confession situation, however, an individual's knowledge of the right to refuse consent is only one factor bearing on voluntariness; such knowledge is not essential to an effective consent. Schneckloth, 412 U.S. at 229, 36 L. Ed. 2d at 862-63, 93 S. Ct. at 2047-48. But when examining the totality of the circumstances, "account must be taken of subtly coercive police questions, as well as the possibly vulnerable subjective state of the person who consents." 412 U.S. at 229, 36 L. Ed. 2d at 864, 93 S. Ct. at 2049. Factors generally considered as bearing on the voluntariness of consent include: (1) whether Miranda warnings were given prior to obtaining the consent; (2) the degree of education and intelligence of the consenting party; and (3) whether the consenting party had been advised of the right not to consent. Shoemaker, 85 Wash. 2d at 212, 533 P.2d at 125; see State v. Johnson, 17 Wash. App. 153, 561 P.2d 701 (1977). These and other factors are discussed in the following sections.

5.12(a) Police Claim of Authority to Search

An express or implied claim by the police that they will proceed immediately to conduct the search even without the individual's consent is likely to indicate that the subsequent consent was involuntary. See Bumper v. North Carolina, 391 U.S. 543, 550, 20 L. Ed. 2d 797, 803, 88 S. Ct. 1788, 1792 (1968). See generally 2 LaFave, Search and Seizure § 8.2(a), at 638-42.

A threat to seek a search warrant if the person refuses to allow a search, however, does not invalidate a consent. See State v. Murray, 84 Wash. 2d 527, 534, 527 P.2d 1303, 1307 (1974), cert. denied, 421 U.S. 1004, 44 L. Ed. 2d 673, 95 S. Ct. 2407
(1975); State v. Bellows, 72 Wash. 2d 264, 268, 432 P.2d 654, 656 (1967) (defendant not coerced into signing statement giving consent to search hotel room when officer had stated he could obtain search warrant by waking judge in early morning hours but had not stated that to do so would prejudice defendant); see generally 2 LaFave, Search and Seizure § 8.2(c), at 645-49.

5.12(b) Coercive Surroundings

If the police make a show of force at the time the consent is sought, or if the surroundings are coercive in other respects, the consent probably will not be considered voluntary. See McNear v. Rhay, 65 Wash. 2d 530, 537, 398 P.2d 732, 737 (1965); State v. Werth, 18 Wash. App. 530, 535, 571 P.2d 941, 943 (1977) (when defendant placed under physical restraint and not informed of right to refuse consent to search, and when police had searched her home illegally without consent two days previous, defendant did not voluntarily consent to search of her home even if she verbalized consent), rev. denied, 90 Wash. 2d 1010 (1977); see also State v. Dresker, 39 Wash. App. 136, 692 P.2d 846 (1984); cf. INS v. Delgado, ___ U.S. ___, 80 L. Ed. 2d 247, 105 S. Ct. 1758 (1985) (INS agents moving systematically through factory asking workers about their citizenship while other INS agents were stationed at the factory exits did not render workers' responses nonconsensual); supra § 1.4(a); see generally 2 LaFave, Search and Seizure § 8.2(b), at 642-43.


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

Although an individual's knowledge of the right to refuse a search is taken into account in determining whether consent to a search was voluntary, the state may prove that consent was voluntary without establishing such knowledge. Schneckloth v.

5.12(d) Prior Illegal Police Action

A prior illegal act by the police may suggest that the defendant's consent was involuntary. See, e.g., State v. Werth, 18 Wash. App. 530, 535, 571 P.2d 941, 943-44 (1977) (“In view of the additional circumstance that 2 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 2 LAFAVE, SEARCH AND SEIZURE § 8.2(d), at 649-55. Thus, a prior illegal search or arrest may taint the subsequent consent and thereby render the consent invalid. 2 LAFAVE, SEARCH AND SEIZURE § 8.2(a), at 649-55; see generally infra Ch. 7.

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

The sophistication and emotional state of the defendant are always considered in assessing the voluntariness of the consent. Schneckloth v. Bustamonte, 412 U.S. 218, 248, 36 L. Ed. 2d 854, 875, 93 S. Ct. 2041, 2058 (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 Wash. 2d 207, 212, 533 P.2d 123, 125 (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, 64 L. Ed. 2d 497, 100 S. Ct. 1870 (1980). See generally 2 LAFAVE, SEARCH AND SEIZURE § 8.2(c), at 655-58.
5.12(f) Prior Cooperation or Refusal to Cooperate

A prior voluntary confession or other type of cooperation with the police will weigh in favor of a finding that the consent to search was voluntary. See generally 2 LAFAVE, SEARCH AND SEIZURE § 8.2, at 659-67. A prior refusal to consent to a search will suggest that a subsequent consent was not voluntary. See generally 2 LAFAVE, SEARCH AND SEIZURE § 8.2(g), at 658-59.

A suspect’s behavior may indicate consent even when verbal consent is withheld. See State v. Sabbot, 16 Wash. App. 929, 938, 561 P.2d 212, 218-19 (1977) (although undercover investigator followed defendant into defendant’s home after defendant had told him to wait outside, investigator’s presence in house was with defendant’s tacit acquiescence).

5.12(g) Police Deception as to Identity or Purpose

The use of deception by a police officer does not necessarily affect the voluntariness of a consent to search. See State v. Myers, 102 Wash. 2d 548, 689 P.2d 38 (1984) (police use of fictitious arrest warrant to gain entry into defendant’s house in order to execute valid search warrant did not invalidate defendant’s consent to entry or defendant’s subsequent cooperation in search); State v. Huckaby, 15 Wash. App. 280, 285-88, 549 P.2d 35, 38-41 (1976), rev. denied, 87 Wash. 2d 1006 (1976); 2 LAFAVE, SEARCH AND SEIZURE §§ 8.2(m), (n), at 677-90.

5.13 Scope of Consent

A consensual search must be limited to the area covered by the defendant’s consent; consequently, any search exceeding the scope of consent is invalid. See, e.g., State v. Murray, 84 Wash. 2d 527, 534, 527 P.2d 1303, 1307 (1974) (when defendant consented to search by officers who said they were looking only for office and video equipment, search could not include inspecting television serial numbers not in plain view); State v. Johnson, 71 Wash. 2d 239, 243, 427 P.2d 705, 708 (1967) (consent limited to search of contents of trunk; thus, search of other areas of vehicle invalid); McNear v. Rhay, 65 Wash. 2d 530, 398 P.2d 732, 738 (1965) (when police request for consent to search was “predicated solely upon a belief that stolen property, in the nature of ‘shoplifted’ articles, would be found,” and when defendant “signed the consent with that understanding[,]” the scope of the consent to search was so limited); State v. Cuzick, 21 Wash.

5.14 Consent by a Third Party


The validity of a third-party consent is affected both by the relationship between the defendant and the third party and by some general considerations. The general considerations include:

(1) Antagonism between the defendant and the third party, see 2 LAFAVE, SEARCH AND SEIZURE § 8.3(b), at 698-701;

(2) Specific instructions that the defendant may have given to the third party, see 2 LAFAVE, SEARCH AND SEIZURE § 8.3(c), at 701-03;

(3) Objection by the defendant, when he or she was present at the time the third party authorized the search, see 2 LAFAVE, SEARCH AND SEIZURE § 8.3, at 704-09. Note that in some cases the contemporaneous objections by the defendant do not invalidate the consent given by a third party. E.g., People v. Cosme, 48 N.Y.2d 286, 397 N.E.2d 1319, 422 N.Y.S. 2d 652 (1979).

For a discussion of the significance of a police officer's reasonable mistake that the third party had authority over the place searched, see 2 LAFAVE, SEARCH AND SEIZURE § 8.3, at 716-25.

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

5.14(a) Defendant's Spouse

The defendant's spouse having equal use of the object or equal right to occupation of the premises may consent to a search of the object or premises. See, e.g., State v. Gillespie, 18 Wash. App. 313, 316, 569 P.2d 1174, 1176 (1977), rev. denied, 89
Wash. 2d 1019 (1978); State v. Hartnell, 15 Wash. App. 410, 417, 550 P.2d 63, 68 (1976) (wife’s invitation to police officer to enter defendant’s house in response to officer’s request was consensual entry requiring no notice of authority or purpose as ordinarily required under knock and announce statute or applicable constitutional provisions), rev. denied, 87 Wash. 2d 1010 (1976); see generally 2 LaFave, Search and Seizure § 8.4(a), at 726-31.

5.14(b) Defendant’s Parents

A parent may consent to a search, whether or not the child is a minor, when the child is living with the parent. See, e.g., State v. Thompson, 17 Wash. App. 639, 644, 564 P.2d 820, 823 (1977) (when defendant’s mother consented to search of home in which she and defendant were living knowing that defendant was to be placed under arrest, and when there was no evidence of coercion, consent was valid), rev. denied, 89 Wash. 2d 1018 (1978).

5.14(c) Defendant’s Child

The defendant’s child, in appropriate circumstances, may consent to a search of the parent’s home. See, e.g., State v. Jones, 22 Wash. App. 447, 451-52, 591 P.2d 796, 799 (1979) (thirteen-year-old child’s invitation to enter apartment in which child resided was legally sufficient consent, absent any evidence that opening of door and invitation were unusual, unexpected, or unauthorized acts, or that child was too young or immature to consent). For a general discussion of the scope and limitations of a child’s consent to a search of the parent’s house, see 2 LaFave, Search and Seizure § 8.4(c), at 736-38.

5.14(d) Co-Tenant or Joint Occupant

A co-tenant or other joint occupant of the defendant’s dwelling who “possess[e]s common authority over or other sufficient relationship to the premises or effects sought to be inspected” may give valid consent to a search of those premises or effects. United States v. Matlock, 415 U.S. 164, 171, 39 L. Ed. 2d 242, 250, 94 S. Ct. 988, 993 (1974); see also United States v. Green, 523 F.2d 968, 972 (9th Cir. 1975). Washington has adopted the “common authority” standard of Matlock for determining the validity of third party consent under article I, section 7 of the state constitution. State v. Mathe, 102 Wash. 2d 537,
543, 688 P.2d 859, 863 (1984). The common authority rule requires first, that the consenting party possess the authority to permit the search in his or her own right, and second, that it is reasonable to infer that the defendant assumed the risk that the co-occupant might permit a search. Id. at 543-44, 688 P.2d at 863.

The common authority rule applies to apartments and to more limited rental arrangements such as those found in motels, boarding houses, and room rentals. Mathe at 544, 688 P.2d at 863. See also State v. Bellows, 72 Wash. 2d 264, 268, 432 P.2d 654, 657 (1967) (when co-occupants of motel room have equal right to use and occupancy of premises, either may grant consent to search); State v. Porter, 5 Wash. App. 460, 463, 488 P.2d 773, 775 (1971) (tenant who believes that her roommate is trafficking in drugs may let police into the apartment during drug transaction). See generally 2 LAFAVE, SEARCH AND SEIZURE § 8.5(c), at 748-53.

5.14(e) Landlord, Lessor, or Manager

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

A landlord, however, generally may not authorize a search of premises that are within the lessee's exclusive possession. Mathe, 102 Wash. 2d at 544, 688 P.2d at 863. See Annot., 2 A.L.R.4th 1173, 1208 (1980).

For an example of a tenant abandoning his interest in a property and showing no actual expectation of privacy, see State v. Christian, 95 Wash. 2d 655, 659, 628 P.2d 806, 808 (1981); see generally 2 LAFAVE, SEARCH AND SEIZURE § 8.5(a), at 738-47. For discussion of consent by a lessee, see 2 LAFAVE, SEARCH AND SEIZURE § 8.5(b), at 747-48.
5.14(f) Bailee

A bailee may consent to a search of the bailor's belongings when the bailee has a sufficient relationship to or degree of control over the chattel. See 2 LAFAVE, SEARCH AND SEIZURE § 8.6(a), at 760-65; see also State v. Smith, 88 Wash. 2d 127, 139-40, 559 P.2d 970, 976 (1977) (when hospital had joint control over patient-defendant's clothing, hospital ward clerk could consent to police seizure of the clothing), cert. denied, 434 U.S. 876, 54 L. Ed. 2d 155, 98 S. Ct. 226 (1977). For a discussion of consent by a bailor, see 2 LAFAVE, SEARCH AND SEIZURE § 8.6, at 765-66.

5.14(g) Employee and Employer

Under some circumstances, an employee may give consent to a search of the employer's premises, and an employer may consent to a search of the place of employment even when the belongings of an employee would be affected. For a discussion of the rules governing consent within the employer-employee relationship, see 2 LAFAVE, SEARCH AND SEIZURE §§ 8.6(c)—8.6(d), at 767-74. For a discussion of consent by an educational institution (or officer thereof) to a search affecting a student's belongings, see 2 LAFAVE, SEARCH AND SEIZURE § 8.6(e), at 774-78.

5.14(h) Hotel Employee

A hotel employee may not grant valid consent to a search of a guest's room. Stoner v. California, 376 U.S. 483, 490, 11 L. Ed. 2d 856, 861, 84 S. Ct. 889, 893 (1964).

5.14(i) Host and Guest

For a discussion of consent by a host, see 2 LAFAVE, SEARCH AND SEIZURE § 8.5(d), at 753-57, and for a discussion of consent by a guest, see 2 LAFAVE, SEARCH AND SEIZURE § 8.5(e), at 757-59.

5.15 Statutory Implied Consent

A statute may establish that particular conduct constitutes implied consent to a search. Thus, for example, a person driving a motor vehicle in Washington gives implied consent to a blood test if he or she is arrested for vehicular homicide. State v. Judge, 100 Wash. 2d 706, 675 P.2d 219 (1984); WASH. REV. CODE § 46.20.308(1); cf. State v. Rogers, 37 Wash. App. 728, 683 P.2d 608 (1984).
5.16 Exigent Circumstances: Introduction

The exigent circumstances exception to the warrant requirement applies when police have established probable cause but do not obtain a warrant because of the need for an immediate search or seizure. The reasoning underlying the exception is that the delay involved in obtaining a warrant could result in the loss of evidence, the escape of the suspect, or harm to the public or the police. See 2 LAFAVE SEARCH AND SEIZURE § 4.1. See also State v. Ringer, 100 Wash. 2d 686, 701, 674 P.2d 1240, 1248 (1983). Exigent circumstances, however, are not created whenever a serious offense has been committed. Thompson v. Louisiana, 469 U.S. ___, 83 L. Ed. 2d 246, 105 S. Ct. 409 (1984); Mincey v. Arizona, 437 U.S. 385, 57 L. Ed. 2d 290, 98 S. Ct. 2408 (1978); State v. Counts, 99 Wash. 2d 54, 58, 659 P.2d 1087, 1089 (1983).

The exigent circumstances exception has been narrowly construed when the search requires intrusion into the human body, Schmerber v. California, 384 U.S. 757, 770, 16 L. Ed. 2d 908, 919, 86 S. Ct. 1826, 1835 (1960), or entry onto private premises, Vale v. Louisiana, 399 U.S. 30, 34, 26 L. Ed. 2d 409, 413, 90 S. Ct. 1969, 1972 (1970). At the same time, under the fourth amendment, the exception broadly encompasses searches of vehicles; thus, police may make a warrantless search of a vehicle even though the vehicle and its owner are in police custody. Chambers v. Maroney, 399 U.S. 42, 52, 26 L. Ed. 2d 419, 428-29, 90 S. Ct. 1975, 1981 (1970); see infra § 5.22.

The Washington Constitution does not recognize a general "automobile exception" to the warrant requirement; rather, it requires that the search of a vehicle be justified by an actual exigency. State v. Ringer, 100 Wash. 2d 868, 700-03, 674 P.2d 1240, 1248-49 (1983). Consequently, in determining whether exigent circumstances exist, Washington courts examine facts such as the amount of time necessary to obtain a warrant by traditional means and the availability of a telephone warrant. Id. at 701, 674 P.2d at 1249.

5.17 Exigent Circumstances Justifying Warrantless Entry into the Home

5.17(a) Hot Pursuit

An arrest on the street does not create an exigent circumstance justifying a warrantless search of the arrestee's house.
Vale v. Louisiana, 399 U.S. 30, 26 L. Ed. 2d 409, 90 S. Ct. 1969 (1970). But police may make a warrantless entry into a home when they attempt to arrest the suspect in a public place, the suspect retreats into the home, and the police reasonably fear that delay will result in the suspect escaping, injury to the officers or the public, or the destruction of evidence. See Dorman v. United States, 435 F.2d 385, 393 (D.C. Cir. 1970) (escape); 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) (destruction of evidence); see also United States v. Santana, 427 U.S. 38, 43, 49 L. Ed. 2d 300, 306, 96 S. Ct. 2406, 2409 (1976); Warden, Maryland Penitentiary v. Hayden, 387 U.S. 294, 298, 18 L. Ed. 2d 782, 87 S. Ct. 1642, 1645-46 (1967); State v. Gallo, 20 Wash. App. 717, 722, 582 P.2d 558, 562 (1978). While the police are on the premises, the scope of the intrusion is limited to its purpose; if the purpose is to prevent escape or harm, for example, the search is limited to finding the suspect or weapons which could be used against the police. Hayden, 387 U.S. at 299, 18 L. Ed. 2d at 787-88, 87 S. Ct. at 1646.

For purposes of determining whether an arrest takes place in a home, the location of the arrestee and not the officer is the critical factor. State v. Holeman, 103 Wash. 2d 426, 429, 693 P.2d 89, 91 (1985). Thus, absent exigent circumstances, an officer may not arrest a suspect without a warrant when the suspect is standing in the doorway to his or her home, even when the officer is outside the home. Id. at 429, 693 P.2d at 91.

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

(1) the offense was serious or one of violence. Dorman v. United States, 435 F.2d 385, 392 (D.C. Cir. 1970); Welsh v. Wisconsin, 466 U.S. 740, 80 L. Ed. 2d 732, 745, 104 S. Ct. 2091, 2099 (1984) (warrantless arrest in defendant’s bedroom for noncriminal traffic offense not justified as necessary to preserve evidence of individual’s blood-alcohol level, even assuming that underlying facts would have supported finding of that exigent circumstance, because state had chosen to classify offense as noncriminal, civil forfeiture offense for which no imprisonment possible). But see Welsh at ____ , 80 L. Ed. 2d at 752, 104 S. Ct. at 2105 (White, J., dissenting) (because suspect could cast substantial doubt on validity of blood or breath test by consuming additional alcohol after arriving home, and in light of prompt-
ness with which officers reached suspect’s home, need to prevent imminent and ongoing destruction of evidence of serious violation of Wisconsin’s traffic laws provided exigent circumstance justifying warrantless in-home arrest) (emphasis added);

(2) the suspect was armed. Dorman, 435 F.2d at 393;
(3) there was a clear and strong showing of probable cause to believe the suspect committed the crime. Id. at 393;
(4) there were reasonable grounds to believe that the suspect was on the premises. Id. at 393;
(5) the police identified themselves and provided an opportunity for surrender prior to their entry. Id.;
(6) the arrest decision was made in the course of an ongoing investigation or in the field, and the exigency of entry into the house was not foreseen at the time of the decision. See United States v. Calhoun, 542 F.2d 1094, 1102-03 (9th Cir. 1976) (entry into defendant’s home without warrant not justified because entry was foreseeable consequence of planned investigation and prior police activities; see also Chimel v. California, 395 U.S. 752, 763, 89 S. Ct. 2034, 2040, 23 L. Ed. 2d 685, 694 (1969); Coolidge v. New Hampshire, 403 U.S. 443, 464, 91 S. Ct. 2022, 2037, 29 L. Ed. 2d 564, 581 (1970);
(7) pursuit was substantially continuous and afforded police no reasonable opportunity to obtain a warrant. People v. Escudero, 23 Cal. 3d 800, 847, 592 P.2d 312, 318, 153 Cal. Rptr. 825 (1979); Welsh v. Wisconsin, 466 U.S. 740, 80 L. Ed. 2d 732, 745, 104 S. Ct. 2091, 2099 (1984) (warrantless arrest in home not justified by hot pursuit when police did not engage in immediate or continuous pursuit of defendant from scene of crime); State v. Counts, 99 Wash. 2d 54, 59, 659 P.2d 1087, 1089 (1983) (no hot pursuit when police stood outside defendant’s home for one hour after defendant retreated therein).

The hot pursuit exception requires a greater level of proof for each of the elements of the exception the more intrusive the search. Dorman v. United States, 435 F.2d at 393 n.19.


5.17(b) Imminent Arrest

Even when a suspect has not been arrested, police may
make a warrantless entry into a home when they reasonably believe that the suspect has been alerted to his or her imminent arrest and is likely to destroy evidence or escape. See United States v. Flickinger, 573 F.2d 1349, 1356 (9th Cir. 1978). The exception also applies when the police reasonably believe that the suspect is armed or the crime for which he or she is to be arrested is one of violence. Warden, Maryland Penitentiary v. Hayden, 387 U.S. 294, 298-99, 18 L. Ed. 2d 782, 787, 87 S. Ct. 1642, 1647 (1967); Flickinger, 573 F.2d at 1355-56.

In addition, police may make a warrantless entry when they believe an accomplice has been alerted to the arrest of another accomplice and the crime was one of violence. State v. Reid, 38 Wash. 2d 203, 209-10, 687 P.2d 861, 866 (1984).


Probable cause to believe a home contains contraband does not constitute an exigent circumstance justifying the absence of a warrant; police must have reason to believe the contraband will be destroyed before a warrant could be obtained. See United States v. Rubin, 474 F.2d 262 (3d Cir. 1973); cf. State v. Jeter, 30 Wash. App. 360, 362, 634 P.2d 312, 314 (1981) (presence of easily disposable contraband does not of itself constitute exigent circumstance justifying noncompliance with "knock and announce" statute).

5.18 Exigent Circumstances Justifying Warrantless Search and Seizure of the Person

Warrantless searches and seizures of persons may be justified by the exigent circumstances exception when police reasonably fear injury to themselves or others, flight, or the destruction of evidence. See, e.g., Ybarra v. Illinois, 444 U.S. 85, 62 L. Ed. 2d 238, 100 S. Ct. 338 (1979); Schmerber v. California, 384 U.S. 757, 770-71, 16 L. Ed. 2d 908, 919-20, 86 S. Ct. 1826, 1835-36 (1966); State v. Smith, 88 Wash. 2d 127, 138-39, 559 P.2d 970, 975-76 (1977), cert. denied, 434 U.S. 876, 54 L. Ed. 2d 155, 98 S. Ct. 226 (1977). The issue generally does not arise with respect to
an arrestee because the warrantless search of an arrestee may be justified as incident to the arrest. See supra § 5.1. Exigent circumstances are used to justify two other kinds of warrantless searches of persons: searches that penetrate the body, such as blood tests and other invasive medical procedures, and searches of persons located on premises being searched.

5.18(a) Warrantless Searches Involving Intrusion Into the Body

For a medical procedure to be performed without a warrant and justified by exigent circumstances, the test selected to obtain the evidence and the medical procedures employed must be reasonable. Schmerber v. California, 384 U.S. 757, 16 L. Ed. 2d 908, 86 S. Ct. 1826 (1966); see supra § 3.13(b). In addition, there must be a clear indication that the desired evidence will be found; that is, the state must show more than probable cause because of the severity of the search. Id. at 771-72, 16 L. Ed. 2d at 920, 86 S. Ct. at 1836. But see State v. Wetherell, 82 Wash. 2d 865, 870-71, 514 P.2d 1069, 1073 (1973) (warrantless blood test not permitted absent consent). Compare State v. Young, 15 Wash. App. 581, 585, 550 P.2d 689, 691 (1976) (police may use reasonable force to constrict throat to prevent swallowing), rev. denied, 87 Wash. 2d 1012 (1976), cert. denied, 431 U.S. 931, 53 L. Ed. 2d 246, 75 S. Ct. 2635 (1977), with Rochin v. California, 342 U.S. 165, 172, 96 L. Ed. 183, 190, 72 S. Ct. 205, 209-10 (1952) (capsules may not be forcefully extracted from suspect’s mouth).

The fact that evidence is likely to be destroyed will not automatically justify an intrusive medical procedure even when a warrant is obtained; the evidence may have to be essential to a conviction. See Winston v. Lee, 470 U.S. _____, 84 L. Ed. 2d 662, 105 S. Ct. 1611 (1985).

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

When a search warrant for premises is being executed, police may conduct a warrantless search of a person located on the premises when they have “reasonable cause” to believe that the person is concealing evidence sought and immediate seizure is necessary to prevent its destruction. State v. Halverson, 21 Wash. App. 35, 584 P.2d 408 (1978); cf. State v. Worth, 37 Wash. App. 889, 683 P.2d 662 (1984) (warrant authorizing search
of home and its owner did not permit officers to search person found in home at time of search when magistrate had made no prior determination of probable cause to search that person and person did not act suspiciously). For a more complete discussion of when occupants may be searched during the execution of a search warrant for premises, see supra § 3.8(a).

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

A number of courts have held warrantless entries of homes illegal when police could have kept the residence under surveillance until a warrant was obtained. State v. Werth, 18 Wash. App. 530, 537, 571 P.2d 941, 944-45 (1977), rev. denied, 90 Wash. 2d 1010 (1978); see United States v. Pacheco-Ruiz, 549 F.2d 1204, 1207 (9th Cir. 1976); see also United States v. Flickinger, 573 F.2d 1349, 1355 (9th Cir. 1978) (dictum). Cf. State v. McKenzie, 12 Wash. App. 88, 528 P.2d 269 (1974) (when police officers watched defendant's house while other officers applied for search warrant, and when defendant drove car out of garage, was approached by police, and then sounded his horn, the officers were permitted immediately to enter house in order to detain occupants, provided the officers refrained from searching the house until the search warrant was issued); State v. Peele, 10 Wash. App. 58, 516 P.2d 788 (1973) (when the suspect was not fleeing but might be expected to hide out on premises until morning, search warrant necessary); People v. Vogel, 58 Ill. App. 3d 910, 374 N.E.2d 1152 (1978) (when threat of destruction of evidence in locker minimal or nonexistent and could be thwarted by stationing officer at locker while warrant obtained, warrantless search not justified); State v. Allen, 12 Ore. App. 603, 508 P.2d 472 (1973) (when no one who could dispose of contraband remains on premises, police should secure premises by stationing guard while search warrant is obtained). See generally 2 LaFAVE, SEARCH AND SEIZURE § 6.5, at 454-55 (cordon-off should be required when it constitutes lesser intrusion than a warrantless search and does not jeopardize life).

Similarly, the police may be required to keep occupants under surveillance or give them the option of leaving the premises—instead of searching them—until a warrant is procured. See, e.g., United States v. Grummel, 542 F.2d 789 (9th Cir. 1976); United States v. Roselli, 506 F.2d 627 (7th Cir. 1974) (when police could have stationed officer with informant to pre-
vent informant from calling defendant to warn of imminent search, police failure to apply for warrant unlawful); State v. Lewis, 19 Wash. App. 35, 573 P.2d 1347 (1978). A suspect attempting to swallow evidence may create an exigent circumstance justifying efforts to prevent the swallowing even when the evidence could be expected to pass through the digestive system and be recovered. State v. Taplin, 36 Wash. App. 664, 676 P.2d 504 (1984).

5.20 Exigent Circumstances Justifying Warrantless Search and Seizure of Containers

Generally, a container may be seized without a warrant when there is probable cause to believe it is evidence of a crime; the container's mobility is the exigent circumstance permitting the warrantless seizure. See, e.g., United States v. Chadwick, 433 U.S. 1, 53 L. Ed. 2d 538, 97 S. Ct. 2476 (1977). A warrantless search of its contents, however, is permissible only if delay would diminish the evidentiary value of the contents or prevent the apprehension of suspects. Id.; State v. Smith, 88 Wash. 2d 127, 559 P.2d 970 (1977); State v. Randall, 116 Ariz. 371, 569 P.2d 313 (1977); State v. Dunlap, 395 A.2d 821 (Me. 1978); State v. Wolfe, 5 Wash. App. 153, 486 P.2d 1143 (1971). Once the container is within the exclusive control of the police, there is no danger of removal justifying a warrantless search of the contents. United States v. Van Leeuwen, 397 U.S. 249, 25 L. Ed. 2d 282, 90 S. Ct. 1029 (1970); State v. Shoemaker, 28 Wash. App. 787, 626 P.2d 538 (1981).

Under the fourth amendment, at least, the rule requiring a warrant for the search of a container's contents does not apply when the container is located inside an automobile and probable cause exists for the vehicle as a whole or for more than just the container. United States v. Johns, 469 U.S. ——, 83 L. Ed. 2d 890, 105 S. Ct. 881 (1985); United States v. Ross, 456 U.S. 798, 72 L. Ed. 2d 572, 102 S. Ct. 2157 (1982); see generally 2 LaFAVE, Search AND Seizure, § 5.5, at 347-71; infra § 5.22.

Note that a warrantless inspection or testing of a container's contents is not always considered a "search." When the only fact that can be gleaned from an inspection or test is whether the contents are contraband, the fourth amendment is not implicated. United States v. Jacobsen, 466 U.S. 109, 80 L. Ed. 2d 85, 100, 104 S. Ct. 1652, 1662 (1984) ("chemical test that merely discloses whether or not a particular substance is cocaine does not

5.21 Warrantless Searches and Seizures of Motor Vehicles

Automobiles and other motor vehicles are treated as a special category in search and seizure law for two reasons: first, the reasonable expectation of privacy in a vehicle is less than that in a home or person; and second, the mobility of a vehicle may make obtaining a warrant prior to a search or seizure impracticable. See California v. Carney, 471 U.S. _____, 85 L. Ed. 2d 406, 414, 105 S. Ct. 2066, 2070 (1985) (privacy expectation in vehicles is less than in homes because of pervasive government regulation of driving and roads); Chambers v. Maroney, 399 U.S. 42, 49, 26 L. Ed. 2d 419, 427, 90 S. Ct. 1975, 1980 (1970). For purposes of the fourth amendment, at least, a motor home is treated like a vehicle when it is mobile and “so situated that an objective observer would conclude that it was being used not as a residence, but as a vehicle.” Carney, 471 U.S. at _____, 85 L. Ed. 2d at 414, 105 S. Ct. at 2070. The reasonable expectation of privacy in motor vehicles is discussed supra § 1.3(e).

The search of a motor vehicle and its contents is treated very differently under the fourth amendment than under article I, section 7 of the Washington Constitution. See State v. Ringer, 100 Wash. 2d 686, 674 P.2d 1240 (1983). This section first will set forth federal law governing the search and seizure of automobiles and their contents and then will discuss state law. The section will conclude with the general principles governing impoundment and inventory searches. The section focuses on the warrantless search or seizure of a vehicle and its contents when police have probable cause to believe the vehicle contains evidence of crime. Vehicles also may be searched without a warrant when the circumstances of the search are consistent with the other exceptions to the warrant requirement, such as the search incident to arrest or Terry stop and frisk exceptions. See supra §§ 5.2(b) and 4.8, respectively.
5.22 Searches and Seizures of Vehicles Under the Fourth Amendment

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


5.22(b) Application of Carroll When Actual Exigency Removed

The Carroll rule permits a warrantless search even after a vehicle has been taken into police custody and is in no danger of removal or of disturbance of its contents. Chambers v. Maroney, 399 U.S. at 51-52, 26 L. Ed. 2d at 428-29, 90 S. Ct. at 1981; Florida v. Meyers, 466 U.S. ____., 80 L. Ed. 2d 381, 104 S. Ct. 1852 (1984) (per curiam) (actual exigent circumstances not necessary to justify warrantless probable cause search). The rationale is that the initial justification for the warrantless search does not disappear after impoundment. United States v. Johns, 471 U.S. at ____., 83 L. Ed. 2d at 897, 105 S. Ct. at 885. The vehicle, how-
ever, has to have been initially mobile or readily mobile for Carroll to apply. Coolidge v. New Hampshire, 403 U.S. 443, 460-62, 29 L. Ed. 2d 564, 579-81, 91 S. Ct. 2022, 2034-36 (1971) (when defendant already had been arrested, his car was located in his driveway, no other individual was available to move the car, and police already had established probable cause to search the car, warrant was required); see California v. Carney, 471 U.S. ____ , 85 L. Ed. 2d 406, 412-13, 105 S. Ct. 2066, 2068-69 (1985).

The constitutional limits on the number of warrantless searches and the length of time that may elapse before police are required to obtain a warrant has not been clarified. See United States v. Johns, 471 U.S. at ____, 83 L. Ed. 2d at 897-99, 105 S. Ct. at 886-87. The Court has upheld the warrantless search of containers in a vehicle under the Carroll rule when the containers were stored in a government warehouse for three days prior to the search. Id. at ____, 83 L. Ed. 2d at 899, 105 S. Ct. at 887. See generally Note, The Automobile Exception to the Warrant Requirement: Speeding Away from the Fourth Amendment, 82 W. Va. L. Rev. 637 (1979-1980).

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

When police have probable cause to believe that a vehicle contains contraband, they may conduct a warrantless search "of the same scope as could be authorized by a magistrate." United States v. Johns, 471 U.S. at ____, 83 L. Ed. 2d at 896, 105 S. Ct. at 885 (quoting United States v. Ross, 456 U.S. 798, 823, 72 L. Ed. 2d 572, 593, 102 S. Ct. 2157, 2172 (1982)). Generally, "[a] warrant to search a vehicle would support a search of every part of the vehicle that might contain the object of the search." Johns, 471 U.S. at ____, 83 L. Ed. 2d at 896, 105 S. Ct. at 885 (quoting Ross, 456 U.S. at 821, 72 L. Ed. 2d at 591, 102 S. Ct. at 2170).

Thus, when the exact location of the contraband within the vehicle is not known, police may conduct a warrantless search not only of the vehicle itself but also of any of its contents, including containers. Ross, 456 U.S. at 825, 72 L. Ed. 2d at 594, 102 S. Ct. at 2173. When, however, police have probable cause to believe that the contraband is hidden within a particular container, and the container is placed inside a vehicle, probable cause does not automatically extend to the entire vehicle. See United States v. Chadwick, 433 U.S. 1, 53 L. Ed. 2d 538, 97 S.
5.23 Searches and Seizures of Vehicles Under Article I, Section 7

The Washington Constitution does not permit a blanket exception to the warrant requirement for automobiles; warrantless vehicle searches must be justified by actual exigent circumstances, including the impracticability of obtaining a warrant by telephone. State v. Ringer, 100 Wash. 2d 686, 703, 674 P.2d 1240, 1248 (1983) (seizure of drugs from van following driver's arrest was unlawful when driver was in custody and police did not fear destruction of evidence, escape, or harm to themselves or others); see State v. Reid, 38 Wash. App. 203, 687 P.2d 861 (1984). Thus, the lawfulness of a warrantless search and seizure under the Washington Constitution is determined by reference to the actual mobility of the vehicle, to whether the vehicle hinders traffic or endangers other travellers, and to the availability of a telephone warrant. See id. at 703, 674 P.2d at 1248-49.

The warrantless search and seizure of containers found within an automobile also must be justified by actual exigent circumstances. See Ringer, 100 Wash. 2d at 688, 702-03, 674 P.2d at 1248.

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

In the absence of a valid spot check program, police officers may stop a motor vehicle to check for valid registration or possible automobile violations only when they have a reasonable suspicion of unlawful activity. Delaware v. Prouse, 440 U.S. 648, 59 L. Ed. 2d 660, 99 S. Ct. 1391 (1979); State v. Marchand, 104 Wash. 2d 434, 706 P.2d 225 (1985) (decided under the fourth
amendment). For police to institute general spot check procedures, the procedures must constitute "a sufficiently productive mechanism to justify the intrusion." Id. at 437-38, 706 P.2d at 226-27. In addition, the spot check procedures must be such that "the exercise of discretion by law enforcement officials [is] sufficiently constrained." Id. at 438, 706 P.2d at 227. See generally infra § 6.4(c).

For a brief discussion of border vehicle stops to check for illegal aliens and contraband, see infra §§ 6.3(a)-(c).

5.25 Warrantless Searches of Suspected Stolen Vehicles

Police may search a vehicle without a warrant in any place where registration papers might be kept if the driver has fled the vehicle and police reasonably believe that the vehicle might be stolen. State v. Orcutt, 22 Wash. App. 730, 734-35, 591 P.2d 872, 875 (1979). Cf. State v. Taras, 19 Ariz. App. 7, 11, 504 P.2d 548, 552 (1972) (warrantless search for registration papers may be made when occupant is arrested and refuses to identify ownership of the vehicle).

5.26 Forfeiture or Levy

Courts differ as to whether a vehicle that was used to transport contraband may be seized without a warrant. 2 LaFave, Search and Seizure § 7.3, at 550; see G.M. Leasing Corp. v. United States, 429 U.S. 338, 352, 50 L. Ed. 2d 530, 543, 97 S. Ct. 619, 628 (1977) (IRS may impound car parked on public street for levy or forfeiture purposes without obtaining warrant when no legitimate privacy interest is invaded; when car is on private property, a warrant may be required).

5.27 Impoundment

A vehicle may be impounded without a warrant in several circumstances:

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

The "community caretaking function" permits impoundment when the vehicle has been abandoned, impedes traffic, poses a threat to public safety and convenience, or itself is threatened by vandalism or theft of its contents. **South Dakota v. Opperman**, 428 U.S. 364, 368-69, 49 L. Ed. 2d 1000, 1005, 96 S. Ct. 3092, 3097 (1976); **Cady v. Dombrowski**, 413 U.S. 433, 441, 37 L. Ed. 2d 706, 715, 93 S. Ct. 2523, 2528 (1973). In such cases, the police may have no reason to believe that the vehicle is connected with criminal activity.

When, however, police conduct warrantless impoundments and subsequent inventory searches, see infra § 5.28, the searches may not be a pretext for a search that the police otherwise could not have made. **See State v. Simpson**, 95 Wash. 2d 170, 188-89, 622 P.2d 1199, 1212 (1980); **State v. Gluck**, 83 Wash. 2d 424, 428-29, 518 P.2d 703, 706-07 (1974). One of the justifications for warrantless inventory searches is that the searches are undertaken without an intent to find evidence. 2 LAFAVE, SEARCH AND SEIZURE § 7.4, at 563-89.

When impoundment would be permitted as part of the police community caretaking function, police first must make an inquiry as to the availability of the owner or the owner's spouse or friends to move the vehicle. **State v. Williams**, 102 Wash. 2d at 743, 689 P.2d at 1071. **See State v. Houser**, 95 Wash. 2d 143, 153, 622 P.2d 1218, 1224-25 (1980); **State v. Simpson**, 95 Wash. 2d 170, 189, 622 P.2d 1199, 1211 (1980); **State v. Bales**, 15 Wash. App. 834, 836-37, 552 P.2d 688, 690 (1976); **State v. Singleton**, 9 Wash. App. 327, 333, 511 P.2d 1396, 1400 (1973). See also **State v. Alexander**, 33 Wash. App. 271, 274-75, 653 P.2d 1367, 1369 (1982) (basis for "community caretaking function" is need to protect owner's property while it remains in police custody, to protect police against claims or disputes over lost or stolen property, and to protect police from potential danger). Police also must consider the alternative of parking and locking the car. **Williams**, 102 Wash. 2d at 743, 689 P.2d at 1071.

A vehicle may be impounded as part of the police function of enforcing traffic regulations when the driver has committed one of the traffic offenses for which the legislature has specifi-

5.28 Inventory Searches of Impounded Vehicles

Courts generally uphold inventory searches when the initial impounding of the vehicle was lawful and the search was pursuant to a promulgated set of procedures or guidelines. See, e.g., South Dakota v. Opperman, 428 U.S. 364, 371-72, 49 L. Ed. 2d 1000, 1006-07, 96 S. Ct. 3092, 3098-99 (1976); Cooper v. California, 386 U.S. 58, 61, 17 L. Ed. 2d 730, 733-34, 87 S. Ct. 788, 790-91 (1967) (permitting warrantless search of car seized pursuant to state statute authorizing retention of car used to transport narcotics; search reasonable even though statute authorized only seizure because search closely related to reason defendant arrested, reason for impounding car, and reason car retained); cf. Dyke v. Taylor Implement Mfg. Co., 391 U.S. 216, 221, 20 L. Ed. 2d 538, 543, 88 S. Ct. 1472, 1475 (1968) (car search illegal when police had not intended to impound car but had parked it near courthouse for convenience of owner).

In Washington, police lawfully impounding a vehicle pursuant to the community caretaking function may conduct an inventory search only after they obtain the owner's consent. State v. Williams, 102 Wash. 2d 733, 689 P.2d 1065 (1984) (diction). Compare State v. Jewell, 338 So. 2d 633, 635 (La. 1976) (search unlawful when police removed sleeping defendant from car and subsequently searched car for incriminating evidence), and State v. Mangold, 82 N.J. 575, 577, 414 A.2d 1312, 1317-18 (1980) (although impoundment lawful, inventory search of vehicle's contents unlawful when vehicle occupants were denied opportunity first to safeguard their property), with People v. Clark, 65 Ill. 2d 169, 174, 357 N.E.2d 798, 800 (1976) (inventory search was lawful when arrest was for unlawfully transporting alcohol, car was stalled and blocking traffic, and inventory searches were customary when vehicles had to be towed).
The scope of an inventory search is limited. For example, police may not open and examine a locked trunk "absent a manifest necessity for conducting such a search." *State v. Houser*, 95 Wash. 2d at 156, 622 P.2d at 1226 (1980). Moreover, police may not open luggage located in an impounded vehicle absent consent or exigent circumstances. *Id.* at 158, 622 P.2d at 1227-28; see also *United States v. Bloomfield*, 594 F.2d 1200, 1203 (8th Cir. 1979) (barring search of knapsack within car).

5.29 Warrantless Vehicle Searches: Medical Emergencies


5.30 Warrantless Searches in Special Environments

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

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

For a discussion of warrantless searches in other special environments, see infra § 6.1 (schools); § 6.2 (prisons and jails); § 6.3 (borders).

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

First-class mail and packages transported by private carrier
may be seized without a warrant when law enforcement officers have probable cause to believe that the mail or packages contain contraband. United States v. Van Leeuwen, 397 U.S. 249, 251, 25 L. Ed. 2d 282, 90 S. Ct. 1029 (1970); see also United States v. Jacobsen, 466 U.S. 109, 80 L. Ed. 2d 282, 1029 S. Ct. 1661 (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 disclose only the presence of contraband. Jacobsen at —, 80 L. Ed. 2d at 99, 104 S. Ct. at 1660-61; see State v. Morgan, 32 Wash. App. 228 (1982); State v. Wolohan, 23 Wash. App. 813, 598 P.2d 421 (1979), rev. denied, 93 Wash. 2d 1008 (1980).

CHAPTER 6: SPECIAL ENVIRONMENTS

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

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

For a brief discussion of warrantless searches in airports, courthouses, and public concerts, see supra § 5.30.

6.1 Schools

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

The reasonable suspicion standard and the balancing approach in Terry have been used to justify the warrantless search of a student's purse by a school official. New Jersey v. T.L.O., 469 U.S. —, 83 L. Ed. 2d 720, 105 S. Ct. 733 (1985). The special problem of school discipline and the special environment of the school permit a standard of proof of less than probable cause. This is true even when the intrusion is more substantial than a frisk and the object of the intrusion is the discovery of evidence of violation of a school rule and not the prevention of physical harm. Id. at —, 83 L. Ed. 2d at 734, 105 S. Ct. at
Washington has recognized the school as a special environment and consequently permits a search of a student's person based on less than probable cause. *State v. McKinnon*, 88 Wash. 2d 75, 81, 558 P.2d 781, 784 (1977). Using the *Terry* reasonable suspicion standard and the balancing test articulated in *Camara v. Municipal Court*, 387 U.S. 523, 18 L. Ed. 2d 930, 87 S. Ct. 1727 (1967), the *McKinnon* court set forth several factors for determining the reasonableness of a search: "the child's age, history, and school record, the prevalence and seriousness of the problem in the school to which the search was directed, the exigency to make the search without delay, and the probative value and reliability of the information used as a justification for the search." *McKinnon*, 88 Wash. 2d at 81, 558 P.2d at 784 (citations omitted).

Although the reduced standard of proof of reasonable suspicion will justify the search of a student or his or her belongings, the school still must possess particularized suspicion with respect to each individual searched. *Kuehn v. Renton School District*, 103 Wash. 2d 594, 599, 694 P.2d 1078, 1081 (1985). But cf. *New Jersey v. T.L.O.*, 469 U.S. at — n.8, 83 L. Ed. 2d at 735 n.8, 105 S. Ct. at 744 n.8 (dicta) (individualized suspicion may not be required). See generally 2 LAFAVE, SEARCH AND SEIZURE § 10.11 (b), at 456.

### 6.2 Prisons, Custodial Detention, and Post-Conviction Alternatives to Prison

Incarceration affects all aspects of an individual's search and seizure protections: the reasonable expectation of privacy, the levels of proof required for intrusions, and the warrant requirements. This section will provide a sampling of some of the ways incarceration or even conviction alone alters search and seizure protections.

#### 6.2(a) Reasonable Expectation of Privacy


Pre-trial detainees, on the other hand, appear to have a reasonable expectation of privacy in their cells, for the government must show legitimate reasons for instituting searches of their
6.2(b) Levels of Proof


A parolee does not have the same search and seizure protections as an ordinary citizen, and thus police may search a parolee's vehicle based on only a "well founded" suspicion of criminal activity. State v. Coahran, 27 Wash. App. 664, 666, 620 P.2d 116, 118 (1980).

6.2(c) Warrantless Searches and Seizures


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

Recent litigation has focused on routine strip and body cavity searches of persons arrested for minor offenses who are detained pending posting bond. See, e.g., Giles v. Ackerman, 746 F.2d 614 (9th Cir. 1984); cf. Durfin v. Spreen, 712 F.2d 1084 (6th Cir. 1983) (felony offense).

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required for strip and body cavity searches conducted prior to a detainee's first court appearance 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 possess a reasonable suspicion that the detainee is concealing on his or her person contraband, weapons, or fruits or instrumentalities of crime. Wash. Admin. Code R. 289-16-100, -200. Cf. State v. Brown, 33 Wash. App. 843, 848, 658 P.2d 44, 47-48 (1983) (strip search of prisoner permitted after prisoner had contact with visitor); State v. Hartzog, 26 Wash. App. 576, 583-84, 615 P.2d 480, 484-85, (1980) (visual and body cavity searches of prisoners leaving penal institution for court appearance are permissible, but second search at courthouse impermissible unless hearing conducted to determine if second search necessary).

6.3 Borders

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

6.3(a) Permanent Checkpoints: Illegal Aliens

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

6.3(b) Roving Patrols: Illegal Aliens

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

For a roving patrol to search a vehicle, reasonable suspicion that the vehicle contains illegal aliens is insufficient; the officers

6.3(c) Smuggling

The scope of a Terry stop at the border may be relatively intrusive when smuggling of narcotics is suspected. See *United States v. Montoya de Hernandez*, 473 U.S. 351, 105 S. Ct. 3304 (1985) (individual fitting courier profile of alimentary canal smuggler may be detained for 16 hours pending bowel movement); *Florida v. Royer*, 460 U.S. 491, 75 L. Ed. 2d 381, 103 S. Ct. 1319, 1326-27 (1983) (officers having only reasonable suspicion that airport traveler was smuggling narcotics could not detain traveller in special room and seize his tickets and luggage); *United States v. Place*, 462 U.S. 696, 709-10, 77 L. Ed. 2d 110, 122, 103 S. Ct. 2637, 2645 (1983) (ninety minute detention of luggage at international airport unreasonable when law enforcement officers only had reasonable suspicion of smuggling); *but cf. United States v. Sharpe*, 470 U.S. 631, 84 L. Ed. 2d 605, 615-17, 105 S. Ct. 1568, 1574-75 (1985) (twenty minute detention of suspect based only on reasonable suspicion is permissible; Terry stop is unconstitutional in duration only when police do not act with due diligence, not at expiration of any particular time period).

6.4 Administrative Searches

Searches conducted for administrative purposes, whether or not criminal prosecution is anticipated, are governed by the fourth amendment. See, e.g., *Michigan v. Clifford*, 464 U.S. 287, 78 L. Ed. 2d 479, 483-84, 104 S. Ct. 641, 646-47 (1984) (fourth amendment applies to inspection of home that was partially damaged by fire, even when purpose of inspection is to determine fire’s origin, and no criminal conduct is suspected).

6.4(a) Reasonable Expectation of Privacy

The fact that a search is part of an administrative or regulatory program or has a purpose other than criminal prosecution does not affect an individual’s reasonable expectation of privacy in the premises being searched. See *Camara v. Municipal Court*, 387 U.S. 523, 18 L. Ed. 2d 930, 87 S. Ct. 1727 (1967) (search of home for housing code violations); *See v. City of Seattle*, 387
U.S. 541, 18 L. Ed. 2d 943, 87 S. Ct. 1737 (1967) (search of commercial premises for fire code violations). Although a few pervasively regulated industries are permitted no reasonable expectations of privacy, the general rule is that the fourth amendment protections apply to civil as well as criminal searches and to commercial as well as residential premises. Marshall v. Barlow's, Inc., 436 U.S. 307, 312-13, 56 L. Ed. 2d 305, 311-12, 98 S. Ct. 1816, 1820-21 (1978) (except for particular industries such as those involving liquor and firearms, when no reasonable expectation of privacy exists, fourth amendment protects against unreasonable administrative searches of commercial premises); see also Michigan v. Clifford, 464 U.S. at —, 78 L. Ed. 2d at 483-84 104 S. Ct. at 646-47; Michigan v. Tyler, 436 U.S. 499, 56 L. Ed. 2d 486, 98 S. Ct. 1942 (1978).

6.4(b) Warrant Requirements

Warrants generally are required for administrative searches of both private and commercial premises. Camara v. Municipal Court, 387 U.S. at 532-33, 18 L. Ed. 2d at 937-38, 87 S. Ct. at 1732-33; See v. City of Seattle, 387 U.S. at 545-46, 18 L. Ed. 2d at 947-48, 87 S. Ct. at 1740-41. When the traditional exceptions to the warrant requirement apply, however, a warrant is unnecessary. Michigan v. Clifford, 464 U.S. at —, 78 L. Ed. 2d at 483-84, 104 S. Ct. at 646-47 (warrant not required for entry onto premises when consent given or exigent circumstances present: "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 searches are made pursuant to comprehensive and predictable legislative schemes. Donovan v. Dewey, 452 U.S. 594, 69 L. Ed. 2d 262, 101 S. Ct. 2534 (1981). Such situations are characterized by a substantial federal interest in inspection, as in the case of hazardous industries, and by the necessity of a warrantless inspection to enforce the legislative purpose. Id. at 598-99, 69 L. Ed. 2d at 269, 101 S. Ct. at 2537-38 (congressional scheme authorizing warrantless inspections of mines found constitutional). In addition, the scheme must prove to be an adequate substitute for a warrant by imposing certainty and regularity in the inspections and by accommodating special privacy concerns. Id. at 600-01, 69 L. Ed. 2d at 270, 101 S. Ct. at 2539.

Warrants also may not be required for license, registration,
and equipment spot checks of vehicles. See Delaware v. Prouse, 440 U.S. 648, 59 L. Ed. 2d 660, 99 S. Ct. 1391 (1979). Cf. State v. Marchand, 104 Wash. 2d 434, 706 P.2d 225 (1985). Although vehicle spot checks have not been approved except when conducted near international borders, see supra § 6.3, the minimum requirements of such checks have been discussed in dicta by both the United States and Washington Supreme Courts and are set out infra § 6.4(c).

6.4(c) Level of Proof Requirements

To obtain an administrative warrant to search commercial or residential premises, law enforcement officers either 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, 56 L. Ed. 2d 305, 316, 98 S. Ct. 1816, 1824 (1978) (brackets in original) (citation omitted).

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

When an administrative warrant is sought to determine the cause of a recent 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. ——, 78 L. Ed. 2d 477, 484, 104 S. Ct. 641, 647 (1984).

The constitutionality of vehicle spot checks depends in part upon two factors: whether the purpose is satisfied by the procedure—that is, whether spot checks are “a sufficiently productive mechanism to justify the intrusion”—and whether the checks “do not involve the unconstrained exercise of discretion” by officers conducting the stops. Delaware v. Prouse, 440 U.S. 648, 659, 59 L. Ed. 2d 660, 671, 99 S. Ct. 1391, 1399 (1979); see State v. Marchand, 104 Wash. 2d 434, 437, 706 P.2d 225, 226 (1985).

As with the “area” warrants that authorize housing and fire code inspections, see Camara v. Municipal Court, 387 U.S. 523, 18 L. Ed. 2d 930, 87 S. Ct. 1727 (1967); See v. City of Seattle,
387 U.S. 541, 18 L. Ed. 2d 943, 87 S. Ct. 1737 (1967), individualized suspicion is not necessarily required for spot checks. See Prouse, 440 U.S. at 663, 59 L. Ed. 2d at 673-74, 99 S. Ct. at 1401 (dicta). It is unclear, however, whether any spot check procedure would be constitutional under article I, section 7 of the Washington Constitution. See State v. Marchand, 104 Wash. 2d at 441, 706 P.2d at 228; cf. supra § 6.3 (border checkpoints).

CHAPTER 7: ADMINISTRATION OF THE EXCLUSIONARY RULE

7.0 Introduction

The exclusionary rule traditionally has provided that if a search or seizure violates a person's fourth amendment rights, any evidence that derives from the search or seizure must be suppressed in the criminal trial of that defendant. When physical evidence must be suppressed, testimony regarding that physical evidence also must be suppressed if such testimony is the fruit of the unlawful search or seizure. 3 LaFave, Search and Seizure § 11.6, at 699-718. Note that to invoke the exclusionary rule, a defendant must make a timely objection and have standing to object. State v. Michaels, 60 Wash. 2d 638, 374 P.2d 989 (1962). The rule applies both to federal and state violations of the fourth amendment. Mapp v. Ohio, 367 U.S. 643, 6 L. Ed. 2d 1081, 81 S. Ct. 1684 (1961).

Historically, the exclusionary rule has had several purposes: (1) to deter unreasonable searches and seizures, id. at 656, 6 L. Ed. 2d at 1090-91, 81 S. Ct. at 1692; (2) to preserve judicial integrity—that is, to prevent courts from becoming accomplices to willful disobedience of the constitution, id. at 659, 6 L. Ed. 2d at 1092, 81 S. Ct. at 1694; and (3) to sustain the public's belief that government will not profit from lawless behavior, United States v. Calandra, 414 U.S. 338, 357, 38 L. Ed. 2d 561, 576-77, 94 S. Ct. 613, 624 (1974) (Brennan, J., dissenting). In a 1984 case, the United States Supreme Court identified deterrence of police misconduct as the principal justification for the rule; the Court declined to employ the rule to deter magistrates from improper probable cause determinations or as a method of demonstrating judicial integrity. United States v. Leon, 468 U.S. ———, 82 L. Ed. 2d 677, 104 S. Ct. 3405 (1984).

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

The difference in wording and intent between article I, section 7 of the Washington Constitution and the fourth amendment has led to a difference in exclusionary rules. See, e.g., *State v. White*, 97 Wash. 2d 92, 110-12, 640 P.2d 1061, 1071-72 (1982) (Washington provision places emphasis on protecting individual rights, not on curbing governmental action). For example, the Washington Supreme Court has recognized deterrence of legislative misconduct as a legitimate purpose for excluding illegally obtained evidence. *Id.* at 112, 640 P.2d at 1072; *cf.* *United States v. Leon*, 468 U.S. at ____, 82 L. Ed. 2d at 694, 104 S. Ct. at 3418 (deterring police misconduct sole purpose of exclusionary rule). Under the fourth amendment the application of the rule will depend largely on whether the exclusion of evidence will deter future police misconduct; under article I, section 7, however, the application of the rule may be automatic. See *White*, 97 Wash. 2d at 109-12, 640 P.2d at 1071-72.

7.1 Criticisms of the Rule

A number of judges and legal scholars have opposed a broad-reaching exclusionary rule. See *Stone v. Powell*, 428 U.S. 465, 484 n.21, 49 L. Ed. 2d 1067, 1082 n.21, 96 S. Ct. 3037, 3047-48 n.21 (1976); *LaFave, Search and Seizure* § ____, (bibliography). The reasons include the following:

(1) *The rule handcuffs the police, handicapping the detection and prosecution of crime.* Counterargument: The fourth amendment itself, not the rule, has that effect. When the amendment was adopted, that very argument was rejected. See 1 *LaFave, Search and Seizure* § 1.2, at 22-23. For citations to studies on the effects of the exclusionary rule on felony prosecutions, see *United States v. Leon*, 468 U.S. ____, 82 L. Ed. 2d 677, 688 n.6, 104 S. Ct. 3405, 3413 n.6 (1984).

(2) *The rule aids only the guilty.* Counterargument: Because of the rule’s deterrent effect, innocent persons are spared unreasonable searches and seizures.

(3) *The rule does not deter.* Counterargument: After
creation of the rule, there was a dramatic increase in the number of warrant applications and in 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. at 492, 49 L. Ed. 2d at 1086-87, 96 S. Ct. at 3051.

Suggested alternatives to the exclusionary rule include providing civil damages as the sole remedy, limiting the rule to knowing or substantial violations, or limiting the rule to minor crimes. 1 LAFAVE, SEARCH AND SEIZURE § 1.2, at 20-39. See generally Gottlieb, Feedback from the Fourth Amendment: Is the Exclusionary Rule an Albatross Around the Judicial Neck?, 67 Ky. L.J. 1007 (1979) (suggesting remedy solely in tort, with damages paid either through insurance or governmental reimbursement).

7.2 Limitations in the Application of the Rule

7.2(a) Unlawful Searches and Seizures Conducted in Good Faith

This section discusses two general categories of exceptions to the exclusionary rule: exceptions based on the good faith of the police and exceptions based on nonsubstantive use of the illegally obtained evidence. Subsequent sections will discuss additional limitations on the application of the rule. The limitations pertain to: (1) the type of judicial proceeding, see infra §§ 7.3, 7.4; (2) the public or private status of the party conducting the unlawful search or seizure, see infra §§ 7.5, 7.6; (3) the nexus between the unlawful search or seizure and the evidence sought to be suppressed, see infra §§ 7.7, 7.8; and (4) procedural requirements, see infra §§ 7.9, 7.10.

The exclusionary rule does not apply, in federal courts at least, when evidence is seized in reasonable, good-faith reliance on a search warrant that is later found to be unsupported by probable cause. United States v. Leon, 468 U.S. ——, 82 L. Ed. 2d 677, 698, 104 S. Ct. 3405, 3421 (1984). "[T]he marginal 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 ——, 82 L. Ed. 2d at 698, 104 S. Ct. at 3421.

Similarly, evidence seized under the authority of a technically invalid warrant may be admitted when the police reasonably believed that the search they conducted was authorized by a valid warrant. Massachusetts v. Sheppard, 468 U.S. ——, 82 L.
Ed. 2d 737, 104 S. Ct. 3424 (1984). "Suppressing evidence because the judge failed to make all the necessary clerical corrections despite his assurances that such changes would be made will not serve the deterrent function that the exclusionary rule was designed to achieve." Id. at ___, 82 L. Ed. 2d at 745, 104 S. Ct. at 3429-30.

Federal courts also may admit evidence obtained during a search incident to an unlawful arrest when the arrest is made in good faith reliance on an ordinance subsequently declared unconstitutional. Michigan v. DeFillippo, 443 U.S. 31, 40, 61 L. Ed. 2d 343, 351, 99 S. Ct. 2627, 2633 (1979). This good faith exception has its own exception: the evidence is inadmissible when the ordinance at issue is so similar to an ordinance or statute that previously was declared unconstitutional and as a consequence is "so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws." Id. at 38, 61 L. Ed. 2d at 350, 99 S. Ct. at 2632.

When an unlawful arrest was based partly on a provision of a statute that had not yet been construed and as a result was presumptively valid at the time of the arrest evidence deriving from the arrest nevertheless is inadmissible if the valid section of the statute could not be enforced without incorporating the "grossly and flagrantly unconstitutional" section. State v. White, 97 Wash. 2d 92, 104, 640 P.2d 1061, 1067-68, (1982).

The DeFillippo good faith exception to the exclusionary rule is inapplicable to claims brought under article I, section 7 of the Washington Constitution. White, 97 Wash. 2d at 109-12, 640 P.2d at 1070-72. Thus, when an arrest is made pursuant to an unlawful statute, the good faith of the police and the presumptive validity of the statute at the time of arrest do not render the fruits of the arrest admissible. Id. (automatic application of exclusionary rule "will add stability to the rights of individual citizens, discourage the Legislature from passing provisions akin to [the unlawful statute], and will make law enforcement more predictable").

7.2(b) Non-Substantive Use of Illegally Seized Evidence

Illegally obtained evidence may be used to impeach a defendant's direct testimony at trial even when the evidence is inadmissible in the government's case-in-chief. Walder v. United States, 347 U.S. 62, 98 L.Ed.503, 74 S. Ct. 354 (1954). A defendant's statements made in response to proper cross-examination
also are subject to impeachment by illegally obtained evidence that is inadmissible as substantive evidence of guilt. *United States v. Havens*, 446 U.S. 620, 64 L. Ed. 2d 559, 100 S. Ct. 1912 (1980); see also *State v. Simpson*, 95 Wash. 2d 170, 179-80, 622 P.2d 1199, 1206 (1980).

7.3 Applications of the Rule in Criminal Proceedings Other than Trial

7.3(a) Grand Jury Testimony

A person testifying before a grand jury may not refuse to answer questions on the ground that the questions are based on evidence derived from an illegal search. *United States v. Calandra*, 414 U.S. 338, 38 L. Ed. 2d 561, 94 S. Ct. 613 (1974). The exclusionary rule is not applied to grand jury proceedings because its application would have only a marginal deterrent effect. In determining whether to employ the rule, the court weighs the deterrent value of applying the rule against the costs of excluding the type of evidence in question. *Id.* at 351, 38 L. Ed. 2d at 573, 94 S. Ct. at 621.

7.3(b) Indictment

The rule does not apply to indictments based on illegally obtained evidence. *Lawn v. United States*, 355 U.S. 339, 2 L. Ed. 2d 321, 78 S. Ct. 311 (1958). Again, the rationale is that excluding the evidence, even if it means dismissing an indictment, would have only marginal deterrent value.

7.3(c) Probable Cause Hearing

Illegally seized evidence may be considered in determining whether there is probable cause to believe that the accused committed the crime charged. *Giordinello v. United States*, 357 U.S. 480, 2 L. Ed. 2d 1503, 78 S. Ct. 1245 (1958); *State v. O'Neill*, 103 Wash. 2d 853, 867-72, 700 P.2d 711, 719-21 (1985) (recordings by federal agents made in a manner inconsistent with state law and thus inadmissible at trial nevertheless may be used to furnish probable cause for court-ordered search).

7.3(d) Bail Hearing

Several cases in other jurisdictions suggest that illegally seized evidence may be suppressed at bail hearings. See *Steigler*

7.3(e) Sentencing

The exclusionary rule has been applied in sentencing hearings only when the illegal search was conducted "for the express purpose of improperly influencing the sentencing judge." United States v. Schipani, 435 F.2d 26, 28 (2d Cir. 1970); Verdugo v. United States, 402 F.2d 599 (9th Cir. 1968).

7.3(f) Revocation of Conditional Release

There is a split of authority as to whether the rule extends to hearings to revoke parole or probation. Compare United States v. Vandemark, 522 F.2d 1019 (9th Cir. 1975) (exclusionary rule does not apply to probation revocation proceedings when officers conducting search did not know and had no reason to believe suspect was probationer) and State v. Kuhn, 81 Wash. 2d 648, 503 P.2d 1061 (1971) (rule does not apply to revocation proceedings), with United States v. Workman, 585 F.2d 1205 (4th Cir. 1978) (rule applies to probation revocation) and Michaud v. State, 505 P.2d 1399 (Okla. Crim. 1973) (rule applies to suspended sentence revocations).

Some courts have suggested that the exclusionary rule should apply when the arresting officer knows that the victim is on conditional release; otherwise a zealous officer would have less of an incentive to obey the Constitution, knowing that illegally seizing the evidence could send the parolee back to prison. See generally United States v. Workman, 585 F.2d 1205 (4th Cir. 1978); United States v. Vandemark, 522 F.2d 1019 (9th Cir. 1975).

7.3(g) Federal Habeas Corpus Proceedings

The exclusionary rule does not require habeas corpus relief when the state granted the defendant a full and fair opportunity to litigate all fourth amendment claims. Stone v. Powell, 428 U.S. 465, 49 L. Ed. 2d 1067, 96 S. Ct. 3037 (1976).

7.3(h) Perjury

Illegally seized evidence may be used to support a perjury conviction. See United State v. Raftery, 534 F.2d 854 (9th Cir.
1976); United States v. Turk, 526 F.2d 654 (5th Cir. 1976) (cautioning against per se admissibility, suggesting that exclusion may sometimes have deterrent effect), cert. denied, 429 U.S. 823, 50 L. Ed. 2d 84, 97 S. Ct. 74 (1976).

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

The exclusionary rule has been applied in forfeiture proceedings, requiring the suppression of any illegally seized evidence used to prove the criminal violation justifying the forfeiture. One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 14 L. Ed. 2d 170, 85 S. Ct. 1246 (1965); accord, People v. Zimmerman, 44 Ill. App. 3d 601, 358 N.E.2d 715 (1976).

7.4(a) Juvenile Delinquency Proceedings

Generally, the exclusionary rule has been applied in juvenile delinquency proceedings. See, e.g., Hyde v. Robert T., 8 Cal. App. 3d 990, 993, 88 Cal. Rptr. 37, 38 (1970); In re Marsh, 40 Ill. 2d 53, 55, 237 N.E. 2d 529, 531 (1968); see also In re Gault, 387 U.S. 1, 30-31, 18 L. Ed. 2d 527, 548, 87 S. Ct. 1428, 1445 (1967).

7.4(b) Narcotics Addict Commitment Proceedings

The exclusionary rule is applied in narcotics addict commitment proceedings. See People v. Moore, 69 Cal. 2d 674, 682, 446 P.2d 800, 805, 72 Cal. Rptr. 800, 805 (1968).

7.4(c) Civil Tax Proceedings

The exclusionary rule is not applied in civil tax proceedings when state officials turn over illegally seized tax records to the IRS. United States v. Janis, 428 U.S. 433, 458, 49 L. Ed. 2d 1046, 1063, 96 S. Ct. 3021, 3034 (1976). But see Pizarello v. United States, 408 F.2d 579, 586 (2d Cir. 1969) (tax assessment invalid if based substantially on illegally obtained evidence); 1 La Fave, Search and Seizure § 1.5, at 83-109 (extent of deterrence afforded by applying rule outweighs cost of excluding evidence).

7.4(d) Administrative Hearings

Most courts apply the rule in administrative hearings when the disposition is relatively significant and when the application
of the rule is likely to deter unlawful searches and seizures. See, e.g., *Governing Board of Mountain View School District v. Metcalf*, 36 Cal. App. 3d 546, 549-51, 111 Cal. Rptr. 724, 727-28 (1974) (recognizing rule may be applied in administrative hearings, but holding that rule is not applicable in teacher dismissal proceeding based on immoral conduct because primary purpose of proceedings is to protect school children); *New Brunswick v. Speights*, 157 N.J. Super. 9, 20-21, 384 A.2d 225, 231 (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); cf. *Thanhauser v. Milprint, Inc.*, 9 A.D.2d 833, 833, 192 N.Y.S.2d 911, 912 (1959) (claimant’s statement, taken while claimant under sedation and in severe pain, admissible in workman’s compensation hearing).

7.4(e) Legislative Hearings

Whether the rule applies in a legislative hearing depends on whether the evidence was seized with the intent to use it at the hearing; if it was, then application of the rule will have some significant deterrent value. *United States v. McSurely*, 473 F.2d 1178, 1194 (D.C. Cir. 1972) (when defendant prosecuted for contempt of Congress, court must exclude evidence derived from unlawful search and seizure by congressional committee investigator); see also *Watkins v. United States*, 354 U.S. 178, 205, 1 L. Ed. 2d 1273, 1294, 77 S. Ct. 1173, 1188 (1957) (protective freedoms should not be placed in danger in absence of clear determination by House or Senate that particular inquiry is justified by specific legislative need).

7.4(f) Private Litigation

The exclusionary rule is not applied in private litigation. *Honeycutt v. Aetna Ins. Co.*, 510 F.2d 340, 348 (7th Cir. 1975) (fourth and fourteenth amendments do not require exclusion of evidence obtained illegally by state police when private parties seek to introduce evidence in civil proceeding); *Sackler v. Sackler*, 15 N.Y.2d 40, 44, 203 N.E.2d 481, 483, 255 N.Y.S.2d 83, 84 (1964) (evidence of wife’s adultery obtained by illegal entry into wife’s home by husband and private investigators admissible in divorce action). Evidence illegally seized by the government may be introduced into a private proceeding because the
rule would have little deterrent value: the state, not being a party to the proceeding, would have nothing to gain from a fourth amendment violation. *Honeycutt*, 510 F.2d at 348.

States, however, may rely on their own laws to bar the use of illegally seized evidence in private litigation and thereby promote the following policies: (1) depriving transgressors of the fruits of their wrongs; (2) deterring lawless behavior; and (3) discouraging violence. See *Kassner v. Frement Mutual Ins. Co.*, 47 Mich. App. 264, 266, 209 N.W.2d 490, 492 (1973) (unlawful search of premises destroyed by fire represents significant invasion of privacy; thus, evidence seized as result of search not admissible in civil case); Badde, *Illegally Obtained Evidence in Criminal and Civil Cases: A Comparative Study of a Classic Mismatch*, 51 Tex. L. Rev. 1325, 1353 (1973).

7.5 Application of the Rule to Searches by Private Individuals: General Principle

Because the fourth amendment is a limitation on the government only, federal courts do not exclude the fruits of a private search. *Burdeau v. McDowell*, 256 U.S. 465, 475, 65 L. Ed. 1048, 1051, 41 S. Ct. 574, 576 (1921) (papers obtained through theft by private individual and delivered to federal prosecutors admissible against defendant); see *United States v. Jacobsen*, 466 U.S. 109, 80 L. Ed. 2d 85, 96, 104 S. Ct. 1652, 1658 (1984) (private freight carrier notified government agents that damaged package contained white powdery substance; information held admissible, for “when an individual reveals private information to another, he assumes the risk that his confidant will reveal that information to the authorities, and if that occurs the fourth amendment does not prohibit governmental use of that information.”).

At least one state, however, has applied the exclusionary rule to searches by private parties in the same manner as the rule is applied to searches by governmental officials. *State v. Hyem*, 630 P.2d 202, 206 (Mont. 1981). The court concluded that the increasing presence of private police, coupled with a citizen’s authority to arrest, militate in favor of subjecting private parties to the same standard of conduct as public officials. *Id.* at 206; *Coolidge v. New Hampshire*, 403 U.S. 443, 29 L. Ed. 2d 564, 91 S. Ct. 2022 (1971); *United States v. Walther*, 652 F.2d 788 (9th Cir. 1981); cf. *Kuehn v. Renton School District*, 103 Wash. 2d 594, 694 P.2d 1078 (1985) (when private person acts under
authority of state, fourth amendment applies; thus, lawfulness of school search of students' luggage is not dependent upon whether person conducting search is band director, principal, or parent).

7.6 Searches by Private Individuals: Particular Applications

A private search becomes a state search if the private party acts as an agent for the government or the two are engaged in a joint endeavor. A private search also may be considered a state search when the party conducting the search acts on behalf of the public or with the purpose to aid the government. See, e.g., Hyde v. Robert T., 8 Cal. App. 3d 990, 88 Cal. Rptr. 37 (1970) (entry by deceit considered government action when landlord introduced plainclothes officer as companion in order to gain access to apartment to search for stolen goods).


7.6(a) Agency Theory

Under an agency theory, a search is not private if ordered or requested by a government officer. Thus, evidence is admissible when obtained as a consequence of postal authorities opening a package to see if the proper postage rate was paid, but is inadmissible when the postal authorities open the package upon the request of a police officer seeking evidence. United States v. Valen, 479 F.2d 467 (3rd Cir. 1973); Thacker v. Commonwealth, 310 Ky. 702, 221 S.W.2d 682 (1949); State v. Blackshear, 140 Or. App. 247, 511 P.2d 1272 (1973); Commonwealth v. Dembo, 451 Pa. 1, 301 A.2d 689 (1973); see United States v. Jacobsen, 466 U.S. 109, 80 L. Ed. 2d 85, 104 S. Ct. 1652 (1984) (DEA agent's removal of plastic bags from rubber tubing inside damaged package and agent's visual inspection of contents enabled him to learn nothing more than had been learned from private search conducted earlier by private courier employees who called DEA after observing white powdery substance). See generally New Jersey v. T.L.O., 469 U.S. 965, 83 L. Ed. 2d 720, 105 S. Ct. 733
(1985) (school officials act as representatives of the state, not as surrogates for parents, and they cannot claim the parents' immunity from fourth amendment strictures).

7.6(b) Joint Endeavor Theory


A search is private, however, if it is undertaken in direct contravention of police instructions. *United States v. Maxwell*, 484 F.2d 1350, 1352 (5th Cir. 1973). And a search may be a private search if a private purpose is being served even when the police are summoned before the search begins and are present as it occurs. *United States v. Lamar*, 545 F.2d 488, 490 (5th Cir. 1977) (heroin discovered by airline agent who opened unclaimed bag to determine its owner is admissible even when officer was present during search); see also *United States v. Sherwin*, 539 F.2d 1 (9th Cir. 1976) (allegedly obscene books discovered by shipping manager and delivered to FBI admissible); *Berger v. State*, 150 Ga. App. 166, 169, 257 S.E.2d 8, 10 (1979) (contraband discovered in briefcase by hotel manager and security personnel admissible because purpose of search was to determine owner of lost or misplaced property); cf. *Corngold v. United States*, 367 F.2d 1, 5 (9th Cir. 1966) (contraband discovered by airline agent admissible when government agents participate, regardless of whether search conducted at request of agents or solely for airline's own purposes).

7.6(c) Public Function Theory

Evidence obtained by store detectives, security officers, and insurance investigators generally is admissible. See *United States v. Lima*, 424 A.2d 113, 118 (D.C. Cir. 1980); Annot., 36 A.L.R.3d 553, 567-71 (1971). 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

But when a private party acts as a police officer, has a strong interest in obtaining convictions, and is familiar with search and seizure law, the purposes of the exclusionary rule are served by suppression, and the rule will apply. See Stapleton v. Superior Court, 70 Cal.2d 97, 100, 447 P.2d 967, 970, 73 Cal. Rptr. 575, 578 (1969) (police participation in planning car search that was conducted by credit card agent tainted subsequent actions of agent with imprimatur of state action); Commonwealth v. Eschelman, 477 Pa. 93, 100-01, 383 A.2d 838, 842 (1978) (off-duty police officer considered acting as government agent when he trespassed, seized suspicious looking package from car, and handed package over to police).


7.6(d) Ratified Intent and Judicial Action Theory

A majority of jurisdictions have decided that when evidence is seized to aid the government and when the government had prior knowledge that the seizure would occur, the taint of the illegal action is transferred to the government. See United States v. McKjian, 505 F.2d 1320, 1327-28 (5th Cir. 1975) (copies of fraudulent claims allowed into evidence because defendant failed to prove that federal investigators knew nurse had illegally copied records for government use).

7.7 Fruit of the Poisonous Tree: General Rule

The extent to which evidence related to an illegal search or seizure may be suppressed depends on the extent to which the evidence derives from exploitation of the illegality. Wong Sun v. United States, 371 U.S. 471, 488, 9 L. Ed. 2d 441, 455, 83 S. Ct. 407, 417 (1963); Silverthorne Lumber Co. v. United States, 251 U.S. 385, 64 L. Ed. 319, 40 S. Ct. 182 (1920) (when police unlawfully seized documents, made copies of the documents, and returned the originals, copies inadmissible); State v. Byers, 88
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Wash. 2d 1, 10, 559 P.2d 1334, 1338 (1977). The following sections discuss three tests that have been used to determine whether a given piece of evidence constitutes “fruit of the poisonous tree” and therefore should be suppressed. See generally Comment, Custodial “Seizures” and the Poison Tree Doctrine: Dunaway v. New York and Its Aftermath, 13 J. MAR. L. REV. 733 (1980).

7.7(a) Attenuation Test

The attenuation test suggests that at some point the taint of the evidence becomes so dissipated as to preclude suppression. That point arises when the detrimental consequences of the illegal police action 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, 45 L. Ed. 2d 416, 430-31, 95 S. Ct. 2254, 2264-65 (1975) (Powell, J., concurring); State v. Reid, 38 Wash. App. 203, 213, 687 P.2d 861, 868 (1984). For example, in Reid, police arrested the defendant after he left his apartment building and stepped into his car. 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. The police then entered the apartment, observed evidence in plain view, and later returned and seized the evidence pursuant to a warrant. The court reasoned that even if the initial seizure of the keys were unlawful, the evidence taken from the apartment would be admissible; the seizure of the evidence “was so attenuated that the taint of the seizure of the keys had dissipated.” 38 Wash. App. at 205-09, 687 P.2d at 864-66 (moreover, “bystanders had identified the door through which the defendant had often entered and existed. [Thus,] [t]he keys were not utilitized in the manner of a divining rod to locate [the defendant’s] apartment but rather to facilitate access to [the] residence and to confirm from which door the defendant had exited.”)

One commentator has suggested the following criteria for establishing that the fruit of the unlawful search or seizure is too attenuated to be suppressible:

(1) When “the chain between the challenged evidence and the primary illegality is long or the linkage can be shown only by ‘sophisticated argument’. . . . In such a case it is highly unlikely that the police officers foresaw the challenged evidence as a probable product of their illegality; thus [the discovery of
the evidence would] not have been a motivating force behind [the search].” Consequently, the threat of exclusion would not operate as a deterrent.

(2) When the evidence “is used for some relatively insignificant or highly unusual purpose. Under these circumstances it is unlikely that, at the time the primary illegality was contemplated, the police foresaw or were motivated by the potential use of the evidence and the threat of exclusion would, therefore, effect no deterrence.”

(3) When the unlawful police conduct is minimally offensive. Because “the purpose of the exclusionary rule is to deter undesirable police conduct, where that conduct is particularly offensive the deterrence ought to be greater and . . . the scope of exclusion broader.” Comment, Fruit of the Poisonous Tree—A Plea For Relevant Criteria, 115 U. Pa. L. Rev. 1136, 1148-51 (1967).

7.7(b) Independent Source Test

When evidence has been obtained lawfully, the fact that police additionally came by the evidence unlawfully does not make it suppressible. Nix v. Williams, ___ U.S. ___, 81 L. Ed. 2d 377, 104 S. Ct. 2501, 2509 (1984); State v. O'Brienki, 70 Wash. 2d 425, 429-30, 423 P.2d 530, 533 (1967) (when missing child found during unlawful search of apartment, child’s testimony admissible because she was not discovered solely as result of unlawful search; witness had informed police he knew where child was).

The case for admitting the evidence is stronger when the independent source is known prior to the police illegality. United States v. Barrow, 363 F.2d 62, 66 (3d Cir. 1966) (testimony of witness found on premises of gambling casino during illegal search admissible when witness’ identity as casino patron was learned previously from observation by federal agents); see also United States v. Giglio, 263 F.2d 410, 413 (2d Cir. 1959).

Finally, when the unlawful search or seizure results only in the police “focusing” their investigation on a particular individual, subsequently obtained evidence is not suppressible even if police would not have been able to focus the investigation but for the illegality. United States v. Friedland, 441 F.2d 855, 859 (2d Cir. 1977); United States v. Bacall, 443 F.2d 1050, 1056-57 (9th Cir. 1971) (even when evidence can be traced to leads resulting from illegal search, evidence admissible if government
in fact learned of evidence from independent source).

7.7(c) Inevitable Discovery Test

Evidence obtained as a result of unlawful police action nevertheless is admissible when the police inevitably would have obtained the evidence lawfully. *Nix v. Williams,* — U.S. —, 81 L. Ed. 2d 377, 104 S. Ct. 2501, 2509 (1984); *see also State v. Reid,* 38 Wash. App. 203, 209 n.6, 687 P.2d 861, 866 n.6 (1984); *Somer v. United States,* 138 F.2d 790, 792 (2d Cir. 1943); *Clough v. State,* 92 Nev. 603, 555 P.2d 861, 866 n.6 (1976); *State v. Crossin,* 21 Or. App. 835, 536 P.2d 1263 (1975).

The burden of proof is on the state on the issue of the inevitability of a lawful discovery. *Nix v. Williams,* — U.S. at —, 81 L. Ed. 2d at 387, 104 S. Ct. at 2509. The state must prove the inevitability by a preponderance of the evidence. *Id.*

The inevitable discovery test applies even when the state cannot show the police acted in good faith in accelerating the discovery of the evidence. *Williams* at —, 81 L. Ed. 2d at 388, 104 S. Ct. at 2510 (under inevitable or ultimate discovery exception to exclusionary rule, prosecution not required to prove absence of bad faith). *But see generally Maguire, How to Unpoison the Fruit—The Fourth Amendment and the Exclusionary Rule,* 55 J. Crim. L.C. & P.S. 307, 315 (1964).

7.8 Particular Applications of the Fruit of the Poisonous Tree Doctrine

7.8(a) Confession as Fruit of Illegal Arrest

Generally, a court may admit a defendant's confession into evidence consistent with the fifth amendment when the defendant confessed voluntarily. When a confession is the fruit of an illegal search or seizure, however, the court also must ensure that the distinct policies of the fourth amendment are satisfied. *Brown v. Illinois,* 422 U.S. 590, 600-03, 45 L. Ed. 2d 416, 425-27, 95 S. Ct. 2254, 2260-61 (1975). 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, 9 L. Ed. 2d 441, 83 S. Ct. 407 (1963).

The factors dissipating the taint of a confession are the following:
(1) the giving of _Miranda_ warnings, although the warnings taken alone do not constitute a _per se_ break in causality between the illegality and the confession;

(2) the temporal proximity of the arrest and the confession;

(3) the presence of intervening circumstances; and


When a person is detained but not formally arrested and the detention is unlawful because probable cause is lacking, his or her confession, if causally connected to the detention, is not admissible, even though the person was first given _Miranda_ warnings. _Dunaway v. New York_, 442 U.S. 200, 218, 60 L. Ed. 2d 824, 839-40, 99 S. Ct. 2248, 2259 (1979).

7.8(b) Confession as Fruit of Illegal Search

Dissipation of the taint and the _Brown_ factors do not apply to a confession following an unlawful search as opposed to one following an unlawful arrest because a suspect is more likely to confess as a result of a search. _People v. Robbins_, 54 Ill. App. 3d 298, 305, 369 N.E.2d 577, 581 (1977). Thus, a confession is suppressible if it would not have been made but for the illegal search. See _State v. White_, 97 Wash. 2d 92, 102-04, 640 P.2d 1061, 1067-68 (1982). _But cf. United States v. Green_, 523 F.2d 968, 972 (9th Cir. 1975) (defendant's admission allowed into evidence when admission followed government agents' confronting defendant with both legally and illegally seized products of search); _United States v. Trevino_, 62 F.R.D. 74, 77 (S.D. Tex. 1974) (defendant's admissions allowed into evidence even though they were result of an illegal search; defendant testified at pre-trial hearing that he "probably would have" made admissions even in absence of search).

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

When a search is incident to an illegal arrest, the fruits of the search are suppressible absent intervening factors such as a

A search following an illegal arrest may be purged of the taint by voluntary consent to the search; the voluntariness of the consent may be determined by reference to the Brown factors. 3 LAFAVE, SEARCH AND SEIZURE § 11.4, at 644; see State v. Fortier, 113 Ariz. 332, 335, 553 P.2d 1206, 1209 (1976); see also State v. Shoemaker, 85 Wash. 2d 207, 212, 533 P.2d 123, 125 (1975); cf. supra § 5.12.

Some courts have held that when the execution of a search warrant has been preceded by an illegal arrest of the person who lives at the place searched, the evidence derived from the illegal arrest is automatically excluded. See, e.g., People v. Shuey, 13 Cal. 3d 835, 850, 533 P.2d 211, 222, 120 Cal. Rptr. 83, 94 (1975). But see State v. Fenin, 154 N.J. Super. 282, 381 A.2d 364 (1977) (evidence of possession and of possession with intent to distribute controlled substance is admissible although preceded by illegal search because evidence was obtained pursuant to valid warrant and not as result of illegal search).

7.8(d) Search as Fruit of Illegal Search

When the issuance of a search warrant is based upon untainted evidence, the fact that an illegal search took place prior to securing the warrant will not invalidate the execution of the warrant, and evidence seized during the execution will be admissible. Segura v. United States, 468 U.S. —, 82 L. Ed. 2d 599, 614-15, 104 S. Ct. 3380, 3391 (1984) (second search of home not tainted by prior illegal entry).

Generally, warrants are considered valid if they could have been issued based upon the untainted information in the affidavit. See United States v. Marchand, 564 F.2d 983, 1001-02, (2d Cir. 1977) (when lawfully obtained evidence sufficient to justify issuance of warrant, fact that officer might not have sought warrant but for receipt of illegally obtained evidence does not require suppression of fruits of search made pursuant to warrant), cert. denied, 434 U.S. 1015, 54 L. Ed. 2d 760, 98 S. Ct. 732 (1978); United States v. Dimuro, 540 F.2d 503, 515 (1st Cir. 1976); United States v. Nelson, 459 F.2d 884, 889 (6th Cir. 1972).
7.8(e) Arrest as Fruit of Illegal Search

If an arrest is based solely on information derived from an illegal search, that arrest is tainted and void. *United States v. Marchand*, 564 F.2d 983, 1002 (2d Cir. 1977); see *Sheff v. State*, 329 So. 2d 270, 272 (Fla. 1976).

7.8(f) Identification of Suspect as Fruit of Illegal Arrest

Courts differ as to whether to exclude suspect identifications made as a result of an illegal arrest.


Some courts have used the Brown factors in determining whether such identifications are admissible. See *Johnson v. Louisiana*, 406 U.S. 356, 365, 32 L. Ed. 2d 152, 161, 92 S. Ct. 1620, 1626 (1972) (defendant may consent to line-up and, hence, break taint); *State v. McMahon*, 116 Ariz. 129, 133, 568 P.2d 1027, 1031 (1977) (post-arrest discovery of information connecting defendant with another crime dissipates taint of illegal line-up if new information comes to light before line-up occurs and illegal arrest is not made with intent to obtain line-up evidence). Courts also have examined the purpose and flagrancy of the official misconduct. See 3 LAFAVE, SEARCH AND SEIZURE § 11.4, at 612-80.

(2) At-trial identification.—When both the police officer's knowledge of the accused's identity and the victim's independent recollection of the accused antedate the unlawful arrest, an in-court identification of the accused by the victim is untainted by either the arrest or the pre-trial identification arising therefrom. *United States v. Crews*, 445 U.S. 463, 474, 63 L. Ed. 2d 537, 547-48, 100 S. Ct. 1244, 1251 (1980); *State v. Mathe*, 102 Wash. 2d 537, 688 P.2d 859 (1984). Other factors to be considered in determining whether the at-trial identification is admissible include:

(a) the witness' prior opportunity to observe the alleged criminal act;
(b) the existence of any discrepancy between any
pre-line-up description and the defendant's actual description;
   (c) any identification of another person as the perpetrator prior to the line-up;
   (d) the identification of the defendant by picture prior to the line-up;
   (e) the failure to identify the defendant on a prior occasion; and
   (f) the length of time between the alleged act and the line-up identification.


When police have made flagrantly illegal arrests for the purpose of securing identifications that otherwise could not have been obtained, the identifications are inadmissible. United States v. Edmons, 432 F.2d 577, 584-85 (2d Cir. 1970).


Courts have allowed photos taken during illegal arrests to be used on subsequent occasions to connect suspects with additional, unrelated crimes when the suspects were not arrested originally for the sole purpose of acquiring the photo. See People v. McInnis, 6 Cal. 3d 821, 826, 494 P.2d 690, 693, 100 Cal. Rptr. 618, 621, (1972) (use of photo identification permitted when illegal arrest by law enforcement agency was not related to crime with which defendant ultimately was charged by another agency), cert. denied, 409 U.S. 106, 34 L. Ed. 2d 513, 93 S. Ct. 562 (1972); cf. People v. Pettis, 12 Ill. App. 3d 123, 127-28, 298 N.E.2d 372, 376 (1973) (testimony identifying defendant as perpetrator of offense admissible when testimony resulted from
(4) Fingerprints.—Fingerprints may be suppressed when the unlawful arrest was for the purpose of obtaining and using the fingerprints for prosecuting the suspect for the crime for which he or she was arrested. Davis v. Mississippi, 394 U.S. 721, 727, 22 L. Ed. 2d 676, 681, 89 S. Ct. 1394, 1397-98 (1969); see Paulson v. State, 257 So. 2d 303, 305 (Fla. Dist. Ct. App. 1972) (because police did not arrest defendant for sole purpose of obtaining fingerprints, fingerprints obtained from arrest for public drunkenness not suppressible at trial for grand larceny).

7.8(g) Identification of Property as Fruit of Illegal Search

Testimony concerning an object seized during an illegal search is inadmissible when the identification of the object has no basis independent of the illegal search. People v. Dowdy, 50 Cal. App. 3d 180, 123 Cal. Rptr. 155, 159 (1975).

7.8(h) Testimony of Witness as Fruit of Illegal Search

Testimony and physical evidence are treated differently for purposes of the exclusionary rule. United States v. Ceccolini, 435 U.S. 268, 280, 55 L. Ed. 2d 268, 279, 98 S. Ct. 1054, 1062 (1978). Verbal testimony carries with it an exercise of free will, and the costs of excluding the evidence are great. Consequently, the suppressibility of derivative witness testimony depends on several of the following factors:

(1) Whether the witness testified freely.—See United States v. Karathanos, 531 F.2d 26, 35 (2d Cir. 1976) (testimony by illegal aliens obtained as result of illegal search inadmissible because testimony was prompted by government statements concerning future prosecution);

(2) Whether the physical fruits of the illegal search were used in questioning the witness.—See State v. Rogers, 27 Ohio Op.2d 105, 114, 198 N.E.2d 796, 806 (1963) (testimony about gun suppressed because witness would not have been questioned about gun but for unlawful search);

(3) Whether the search and testimony were close in time;

(4) Whether the witness’ identity and location were known before the search.—See State v. O’Bremski, 70 Wash. 2d 425, 429-30, 423 P.2d 530, 533 (1967) (when parents had sought help from police, police questioned boy, and boy stated girl was
in apartment, girl’s testimony admissible although girl found in apartment during illegal search);

(5) Whether the search was made with the intent to find witnesses.—See Karathanos, 531 F.2d at 35; see also People v. Martin, 382 Ill. 192, 202-03, 46 N.E.2d 997, 1002 (1942) (testimony of witnesses suppressed when witness’ names obtained from papers found during illegal search of defendant’s premises). See generally Ceccolini, 435 U.S. at 273-79, 55 L. Ed. 2d at 275-79, 98 S. Ct. at 1059-062.

7.8(i) Crime Committed in Response to Illegal Arrest or Search


The rationale for admitting the evidence is that acts of free will purge the taint; application of the exclusionary rule would only marginally further deterrence. In addition, exclusion would permit persons unlawfully arrested to assault officers without risk of criminal liability. Aydelotte, 35 Wash. App. at 132-33, 665 P.2d at 447-48. The evidence would be inadmissible, however, if it were the product of police exploitation. See People v. Cantor, 36 N.Y.2d 106, 324 N.E.2d 872, 365 N.Y.S.2d 509 (1975) (when, without identifying themselves, officers encircled defendant, evidence of defendant pulling gun inadmissible).

7.9 Waiver or Forfeiture of Objection

A defendant may waive or forfeit his or her constitutional objection and thus render the objectionable evidence admissible. A waiver can be made in several ways, including by failure to make a timely objection, by the defendant testifying at trial about the evidence, and by the entry of a guilty plea.

7.9(a) Failure to Make Timely Objection

Jurisdictions have their own rules for what constitutes a timely objection. Washington court rules provide that a defen-
dant's failure to object at the omnibus hearing may constitute a waiver of the error if the party had knowledge of the illegality of the search or seizure prior to the hearing. Wash. Ct. Civ. R. 4.5. The defendant's failure to object at trial will constitute a waiver unless the illegality is of such a flagrant or prejudicial nature that curative measures would have been futile. State v. Van Auken, 77 Wash. 2d 136, 143, 460 P.2d 277, 282 (1969); State v. Allman, 19 Wash. App. 169, 172, 573 P.2d 1329, 1331 (1977).

7.9(b) Testimony by Defendant Concerning Suppressed Evidence

A defendant may not raise a fourth amendment claim on appeal challenging the admission of evidence, notwithstanding a timely objection, if the defendant gave testimony at trial admitting the possession of that evidence. State v. Peele, 10 Wash. App. 58, 67, 516 P.2d 788, 793 (1973); Jones v. State, 484 S.W.2d 745 (Tex. Crim. 1970). A claim may be raised, however, if the defendant's testimony was induced by the erroneous admission of the evidence. See Harrison v. United States, 392 U.S. 219, 225, 20 L. Ed. 2d 1047, 1053, 88 S. Ct. 2008, 2011 (1968); Peele, 10 Wash. App. at 67-68, 516 P.2d at 794. The rationale for the general rule is that the testimony makes the admission of the illegal evidence harmless error. See Peele, 10 Wash. App. at 66, 516 P.2d at 793; Cadle v. State, 136 Ga. App. 232, 221 S.E.2d 59 (1975); infra § 7.10.

7.9(c) Guilty Plea

A defendant who has knowingly and voluntarily entered a guilty plea may not thereafter obtain post-conviction relief on fourth amendment grounds even though he or she made a timely motion to suppress in advance of the plea. Sanders v. Craven, 488 F.2d 478, 479 (9th Cir. 1973); see Tolett v. Henderson, 411 U.S. 258, 267, 36 L. Ed. 2d 235, 243, 93 S. Ct. 1602, 1608 (1973). Because the conviction is based on the plea, the defendant cannot directly challenge the evidence. Sanders, 488 F.2d at 479. But if the plea itself can be characterized as the fruit of illegally obtained evidence and consequently should have been suppressed upon the defendant's timely motion, then the plea was not entered voluntarily or knowingly. The defendant in such a case is permitted to go to trial and, if convicted, to appeal the admission of the evidence. See Annot., 20 A.L.R.3d 724, 732-35
7.10 Harmless Error

Even when illegally seized evidence has been improperly admitted at trial, a conviction will not be reversed if the defendant would have been convicted without its admission. See State v. Smith, 93 Wash. 2d 329, 352-53, 610 P.2d 869, 883 (1980); State v. Fricks, 91 Wash. 2d 391, 396, 588 P.2d 1328, 1332 (1979).

CONCLUSION

Search and seizure law is continually undergoing both minor modifications and major revisions. This is particularly true in light of the Washington Supreme Court’s recent reliance on article I, section 7 of the Washington Constitution. The reader thus should be aware that this Survey is not comprehensive and will require continuous updating.

Although the particulars of search and seizure law may change, the types of issues raised and considered are likely to remain much the same. This survey should be a useful tool for lawyers and judges who must assess the scope of protection Washington affords against unlawful searches and seizures.
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