
Justice Robert F. Utter

TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Introduction</td>
<td>421</td>
</tr>
<tr>
<td>Chapter 1:</td>
<td>Triggering the Fourth Amendment and Article I, Section 7: Defining Searches and Seizures</td>
<td>422</td>
</tr>
<tr>
<td>1.0</td>
<td>Defining &quot;Search&quot; pre-\textit{Katz}: &quot;Constitutionally Protected Areas&quot;</td>
<td>423</td>
</tr>
<tr>
<td>1.1</td>
<td>Defining &quot;Search&quot; post-\textit{Katz}: The &quot;Reasonable Expectation of Privacy&quot;</td>
<td>424</td>
</tr>
<tr>
<td>1.2</td>
<td>Defining &quot;Search&quot; post-\textit{Katz}: Continuing Vitality of &quot;Constitutionally Protected Areas&quot;</td>
<td>426</td>
</tr>
<tr>
<td>1.3</td>
<td>Specific Applications of Post-\textit{Katz} Analysis</td>
<td>427</td>
</tr>
<tr>
<td>1.3(a)</td>
<td>Residential Premises</td>
<td>427</td>
</tr>
<tr>
<td>1.3(b)</td>
<td>Related Structures: The Curtilage</td>
<td>429</td>
</tr>
<tr>
<td>1.3(c)</td>
<td>Adjoining Lands and &quot;Open Fields&quot;</td>
<td>431</td>
</tr>
<tr>
<td>1.3(d)</td>
<td>Business and Commercial Premises</td>
<td>434</td>
</tr>
<tr>
<td>1.3(e)</td>
<td>Automobiles and Other Motor Vehicles</td>
<td>436</td>
</tr>
<tr>
<td>1.3(f)</td>
<td>Personal Characteristics</td>
<td>437</td>
</tr>
<tr>
<td>1.3(g)</td>
<td>Personal Effects and Papers</td>
<td>438</td>
</tr>
<tr>
<td>1.3(h)</td>
<td>Special Environments: Prisons, Schools, and Borders</td>
<td>441</td>
</tr>
<tr>
<td>1.4</td>
<td>Defining Seizures of the Person</td>
<td>442</td>
</tr>
<tr>
<td>1.4(a)</td>
<td>Consentual Encounters</td>
<td>443</td>
</tr>
<tr>
<td>1.4(b)</td>
<td>Seizures in Vehicles</td>
<td>444</td>
</tr>
<tr>
<td>1.4(c)</td>
<td>Seizures in Homes</td>
<td>444</td>
</tr>
<tr>
<td>1.4(d)</td>
<td>Civil Offenses</td>
<td>445</td>
</tr>
<tr>
<td>1.5</td>
<td>Defining Seizures of Property</td>
<td>445</td>
</tr>
</tbody>
</table>
1.6 Standing to Raise Search and Seizure Claims ......................................................... 445

Chapter 2: Standards of Proof ................................................................. 449

2.0 Nature of Probable Cause: Introduction ................................................................. 449

2.1 Probable Cause Standard: Arrest Versus Search .......................................................... 450

2.2 Probable Cause Standard: Characteristics................................................................. 450

2.2(a) Objective Test ........................................................................................................ 450

2.2(b) Probability ............................................................................................................... 451

2.2(c) Individualized Suspicion .......................................................................................... 452

2.3 Information Considered: In General .......................................................... 453

2.3(a) Hearsay ................................................................................................................. 454

2.3(b) Prior Arrests, Prior Convictions, and Reputation ...................................................... 455

2.3(c) Increased Power Consumption .............................................................................. 455

2.4 First-hand Observation .............................................................................................. 456

2.4(a) Particular Crimes: Stolen Property ........................................................................ 456

2.4(b) Particular Crimes: Illegal Substances .................................................................... 456

2.4(c) Association: Persons and Places ............................................................................ 457

2.4(d) Furtive Gestures and Flight ..................................................................................... 458

2.4(e) Response to Questioning ....................................................................................... 459

2.5 Information from an Informant: In General ............................................................... 460

2.5(a) Satisfying “Basis of Knowledge” Prong by Personal Knowledge ......................... 461

2.5(b) Satisfying “Veracity” Prong by Past Performance .................................................. 462

2.5(c) Satisfying “Veracity” Prong by Admissions Against Interest and by Motive .......... 463

2.6 Citizen Informants—Victim/Witness Informants: In General .................................... 464

2.6(a) Satisfying the “Basis of Knowledge” Prong ........................................................... 464

2.6(b) Satisfying the “Veracity” Prong by Partial Corroboration of
Informant's Tip and by Self-Verifying Detail ................. 465
2.6(c) Sufficiency of Information Supplied .................... 466
2.7 Police as Informants .................................. 467
  2.7(a) Satisfying "Veracity" and "Basis of Knowledge" Prongs .... 467
  2.7(b) Multiple Hearsay ................................ 468
2.8 Information from Anonymous or Unknown Informants: Satisfying "Veracity" Prong ......................... 469
2.9 Special Searches and Seizures Requiring Greater or Lesser Levels of Proof .......... 469
  2.9(a) Administrative Searches ............................. 469
  2.9(b) Terry Stops and Frisks ............................... 470
  2.9(c) Intrusions Into the Body ............................. 471
  2.9(d) Special Environments: Schools, Prisons, and Borders ........ 472

Chapter 3: Search Warrants ........................................ 472
3.0 Introduction: Fourth Amendment Requirements for Search Warrants .... 472
3.1 Types of Items That May Be Searched and Seized ................ 472
3.2 Who May Issue Warrants: Neutral and Detached Magistrate Requirements .... 473
  3.2(a) Qualifications of a "Magistrate" ....................... 473
  3.2(b) Neutrality ........................................... 474
  3.2(c) Burden of Proof ..................................... 476
3.3 Content of the Warrant ..................................... 476
  3.3(a) Oath or Affirmation; Multiple Affidavits ................. 476
  3.3(b) Information Considered ............................... 476
  3.3(c) Oral Testimony and Oral Warrants ........................ 478
  3.3(d) Administrative Warrants ............................... 478
3.4 Particular Description of Place to be Searched ................ 478
  3.4(a) General Considerations ............................... 478
  3.4(b) Particular Searches: Places ............................ 480
  3.4(c) Particular Searches: Persons ......................... 481
3.5 Particular Description of Things to be Seized ................ 482
3.5(a) General Rules
3.5(b) Circumstances Requiring Greater Scrutiny

3.6 Execution of the Warrant: Time of Execution

3.7 Entry Without Notice or by Force: "Knock and Announce" Requirements
3.7(a) Types of Entry Requiring Notice
3.7(b) Compliance with Requirements
3.7(c) Exceptions

3.8 Search and Detention of Persons on Premises Being Searched
3.8(a) Search of Persons on Premises Being Searched
3.8(b) Detention of Persons on Premises Being Searched

3.9 Permissible Scope and Intensity of Search
3.9(a) Area
3.9(b) Personal Effects
3.9(c) Vehicles

3.10 Seizure of Unnamed Items: Requirements in General

3.11 Delivering Warrant and Inventory: Requirements for Execution of Warrants

3.12 Challenging the Content of an Affidavit
3.12(a) Informant's Identity
3.12(b) Misrepresentations and Omissions in the Affidavit

3.13 Special Situations
3.13(a) First Amendment Limitations
3.13(b) Intrusions Into the Body
3.13(c) Warrants Directed at Non-Suspects

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

4.0 Arrest: Introduction
4.1 Arrests Without Warrants: Public versus Home Arrests ............... 506
4.2 Arrests Without Warrants: Felony versus Misdemeanor Arrests .... 508
  4.2(a) Felony Arrest .................. 508
  4.2(b) Misdemeanor Arrest .......... 508
4.3 Arrest with Warrants .......... 509
4.4 Arrests: Miscellaneous Requirements .......... 510
  4.4(a) Use of Force .................. 510
  4.4(b) Significance of Booking and Crime Charged: Pretextual Arrests ................. 511
  4.4(c) Judicial Review ................ 512
  4.4(d) Custodial Arrests for Minor Offenses .......... 512
4.5 Stop-and-Frisk: Introduction ................. 514
4.6 Satisfying the Reasonable Suspicion Standard ............................. 515
  4.6(a) Factual Basis and Individualized Suspicion ............... 515
  4.6(b) Particular Applications: Informants ............... 516
  4.6(c) Particular Applications: Nature of Offense ............... 518
  4.6(d) Examples of Satisfying or Failing to Satisfy the Reasonable Suspicion Standard 518
4.7 Dimensions of a Permissible Stop .................. 520
  4.7(a) Time, Place, and Method ............... 520
  4.7(b) Detention of Persons in Proximity to Suspect .......... 522
4.8 Constitutional Limitations on Compelled Responses to Investigatory Questions ............... 523
4.9 Grounds for Initiating a Frisk .................. 523
  4.9(a) Scope of a Permissible Frisk ............... 525
  4.9(b) Frisks of Persons in Proximity to Suspect ............... 527
  4.9(c) Other Protective Measures Besides Frisks .......... 527
  4.9(d) Search of Area Measures Besides Frisks .......... 528
Chapter 5: Warrantless Searches and Seizures: The Exceptions to the Warrant Requirement

5.0 Introduction ........................................ 528

5.1 Search Incident to Arrest ........................... 529
  5.1(a) Lawful Arrest .................................. 530
  5.1(b) "Immediate Control" ............................ 531

5.2 "Immediate Control" or Permissible Scope: Particular Applications ..................... 533
  5.2(a) The Defendant .................................. 533
  5.2(b) Vehicles and Containers ....................... 534

5.3 Pre-Arrest Search ..................................... 536

5.4 Post-Detention Searches: Search Incident to Arrest and Inventory Search ......................... 537
  5.4(a) Post-Detention Search Incident to Arrest .............. 537
  5.4(b) Post-Detention Inventory Search ....................... 538

5.5 Searches Conducted in Good Faith and Without Purpose of Finding Evidence .......... 538

5.6 The Plain View Doctrine: Distinction Between "Plain View" and "Open View" ............... 540

5.7 Criteria for Falling Within the "Plain View" Exception ........................................ 542
  5.7(a) Discovery of Object in Plain View Following Entry Into Constitutionally Protected Area ........................................ 542
  5.7(b) Seizure of Object from Protected Area After Observing Object from Non-Protected Area ........................................ 547

5.8 Plain view: Aiding the Sense With Enhancement Devices .................................... 548

5.9 Extensions of the Plain View Doctrine ........................................ 550
  5.9(a) Plain Hearing .................................... 550
  5.9(b) Plain Smell ...................................... 550

5.10 Consent Searches: Introduction ........................................ 551

5.11 Voluntariness of Consent: Burden of Proof ........................................ 551

5.12 Factors Considered in Determining Voluntariness ........................................ 551
5.12(a) Police Claim of Authority to Search .......................... 552
5.12(b) Coercive Surroundings .......................... 552
5.12(c) Awareness of the Constitutional Right to
Withhold Consent .......................... 553
5.12(d) Prior Illegal Police Action .......................... 554
5.12(e) Maturity, Sophistication,
Mental or Emotional State ......... 555
5.12(f) Prior Cooperation or Refusal to Cooperate ............. 555
5.12(g) Police Deception as to Identity or Purpose ............. 555

5.13 Scope of Consent ....................................... 556
5.14 Consent by a Third Party .............................. 558
5.14(a) Defendant's Spouse .................................. 558
5.14(b) Defendant's Parents .................................. 559
5.14(c) Defendant's Child .................................. 559
5.14(d) Co-tenant or Joint Occupant ......................... 559
5.14(e) Landlord, Lessor, or Manager ....................... 560
5.14(f) Bailee ............................................. 561
5.14(g) Employee and Employer ............................. 561
5.14(h) Hotel Employee ..................................... 561
5.14(i) Host and Guest ..................................... 562

5.15 Statutory Implied Consent ................................ 562
5.16 Exigent Circumstances: Introduction ..................... 562
5.17 Exigent Circumstances Justifying
Warrantless Entry Into the Home ......................... 563
5.17(a) Hot Pursuit ...................................... 563
5.17(b) Imminent Arrest ................................... 565
5.18 Exigent Circumstances Justifying
Warrantless Search and Seizure of the Person .............. 566
5.18(a) Warrantless Searches Involving
Intrusion Into the Body ................................ 567
5.18(b) Warrantless Searches and
Seizures of Persons Located on
Premises Being Searched ............................ 567
5.19 Exigent Circumstances Justifying
Entry into the Home or Search of the Person: Absence of Less Intrusive
Alternatives ........................................... 568
5.20 Exigent Circumstances Justifying
Warrantless Search and Seizure of Containers .................................. 569

5.21 Warrantless Searches and Seizures of Motor Vehicles ....................... 570

5.22 Searches and Seizures of Vehicles under the Fourth Amendment .......... 571
  5.22(a) Probable Cause to Search a Vehicle: The Carroll Rule .............. 571
  5.22(b) Application of Carroll When Actual Exigency Removed ............. 572
  5.22(c) Permissible Scope of Search or Seizure under Carroll: The Vehicle Itself and Containers within the Vehicle ................. 572

5.23 Searches and Seizures of Vehicles Under Article I, Section 7 ................. 573

5.24 Warrantless Vehicle Searches Based on Generalized Suspicion: Spot Checks of Motorists ................................................................. 574

5.25 Warrantless Searches of Suspected Stolen Vehicles ............................ 575

5.26 Forfeiture or Levy ................................................................. 575

5.27 Impoundment ................................................................. 576

5.28 Inventory Searches of Impounded Vehicles ....................................... 578

5.29 Warrantless Vehicle Searches: Medical Emergencies .......................... 579

5.30 Warrantless Searches in Special Environments .................................. 579

5.31 Warrantless Searches and Seizures of Objects in the Public and Private Mails ................................................................. 580

Chapter 6: Special Environments ..................................................... 581

6.0 Special Environments and Purposes: Searches and Seizures at Schools, Prisons, and Borders; Administrative Searches and Seizures ......................... 581

6.1 Schools ................................................................. 581

6.2 Prisons, Custodial Detention, and Post-Conviction Alternatives to Prison ..... 582
  6.2(a) Reasonable Expectation of Privacy ........................................ 582
6.2(b) Levels of Proof .................................. 583
6.2(c) Warrantless Searches and Seizures ......................... 583
6.2(d) Strip and Body Cavity Searches Following Custodial Arrests for Minor Offenses ......................... 583

6.3 Borders ............................................. 584
6.3(a) Permanent Checkpoints: Illegal Aliens ...................... 585
6.3(b) Roving Patrols: Illegal Aliens ............................. 585
6.3(c) Smuggling ........................................ 585

6.4 Administrative Searches .................................... 586
6.4(a) Reasonable Expectation of Privacy ......................... 586
6.4(b) Warrant Requirements .................................. 587
6.4(c) Level of Proof Requirements .............................. 589

Chapter 7: Administration of the Exclusionary Rule ........ 590
7.0 Introduction .......................................... 590
7.1 Criticisms of the Rule .................................. 592
7.2 Limitations in the Application of the Rule ................... 593
7.2(a) Unlawful Searches and Seizures Conducted in Good Faith .............................. 593
7.2(b) Non-Substantive Use of Illegally Seized Evidence ........... 594

7.3 Applications of the Rule in Criminal Proceedings Other Than Trial ........ 594
7.3(a) Grand Jury Testimony ................................ 594
7.3(b) Indictment ......................................... 595
7.3(c) Probable Cause Hearing ................................. 595
7.3(d) Bail Hearing ..................................... 595
7.3(e) Sentencing ......................................... 595
7.3(f) Revocation of Conditional Release ......................... 596
7.3(g) Federal Habeas Corpus Proceeding ......................... 596
7.3(h) Perjury ............................................. 596

7.4 Application of the Rule in Quasi-Criminal, Civil, and Administrative Proceedings ......................... 597
7.4(a) Juvenile Delinquency Proceedings .......................... 597
7.4(b) Narcotics Addict Commitment Proceedings .................................. 597
7.4(c) Civil Tax Proceedings ......................................................... 597
7.4(d) Administrative Proceedings ................................................. 597
7.4(e) Legislative Hearings .......................................................... 598
7.4(f) Private Litigation ............................................................... 598

7.5 Application of the Rule to Searches by Private Individuals: General Principle . 599

7.6 Searches by Private Individuals:
Particular Applications ................................................................. 600
7.6(a) Agency Theory ................................................................. 601
7.6(b) Joint Endeavor Theory ....................................................... 601
7.6(c) Public Function Theory ....................................................... 602
7.6(d) Ratified Intent and Judicial Action Theory ................................. 603

7.7 Fruit of the Poisonous Tree: General Rule ........................................ 603
7.7(a) Attenuation Test ............................................................... 604
7.7(b) Independent Source Test .................................................... 605
7.7(c) Inevitable Discovery Test .................................................... 605

7.8 Particular Applications of the Fruit of the Poisonous Tree Doctrine ........ 606
7.8(a) Confession as Fruit of Illegal Arrest ....................................... 606
7.8(b) Confession as Fruit of Illegal Search ...................................... 607
7.8(c) Search as Fruit of Illegal Arrest or Detention ............................ 607
7.8(d) Search as Fruit of Illegal Search .......................................... 608
7.8(e) Arrest as Fruit of Illegal Search ........................................... 608
7.8(f) Identification of Suspect as Fruit of Illegal Arrest ....................... 609
7.8(g) Identification of Property as Fruit of Illegal Search .................... 611
7.8(h) Testimony of Witness as Fruit of Illegal Search ........................ 611
7.8(i) Crime Committed in Response to Illegal Arrest or Search ............... 612

7.9 Waiver or Forfeiture of Objection ............................................. 612
7.9(a) Failure to Make Timely Objection .......................................... 612
INTRODUCTION

This is a revision of the original Search and Seizure Survey published in The University of Puget Sound Law Review volume 9, number 1 (Fall 1985). That work was the culmination of my efforts, successive law clerks, legal externs, and the members of the University of Puget Sound Law Review. In the years before that volume was published it was apparent there was no single source that the Washington lawyer, judge, or law enforcement officer could turn to as a common beginning point for research on the Washington law of search and seizure. As a result, well-intentioned participants in the criminal justice process were making mistakes that could have been avoided with such research.

Hopefully, the initial volume served in a small way the purposes for which it was intended. Continual revision of the law and new cases interpreting the Washington State Constitution and the United States Constitution have made an update imperative. The editorial staff of the University of Puget Sound Law Review, its members, and Professors George Nock and John Strait have all given much time and effort to update the case comments and statutory references, which are current through May 1988. In addition, all references to W. LaFave, Search and Seizure: A Treatise on the Fourth Amendment have been updated.

Significant changes in the law of search and seizure have occurred during the three years since the original work was published in 1985. The most important of these changes are in the area of the Washington State Supreme Court's interpretation of the Washington Constitution. The court has continued to recognize that the language in our constitution can provide broader protection to individuals than that provided in the
United States Constitution. An example is Washington Constitution article I, section 7, which provides that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." A series of cases since 1985 continue to recognize that this language provides greater protection to individual privacy interest than the fourth amendment. See, e.g., State v. Gunwall, 106 Wash. 2d 54, 720 P.2d 808 (1986); State v. Stroud, 106 Wash. 2d 144, 720 P.2d 436 (1986).

In Gunwall, the court developed nonexclusive criteria to use as interpreting principles of our state constitution. In addition to the textual language itself, the court identified the history of the state constitution and common law as important interpretive aids. In addition, the court recognized Washington's laws, including statutes, as a source to identify issues of interest to Washington citizens. Matters of particular state or local concern were also noted as aids to the courts in determining whether there is a need for national uniformity or whether that need is outweighed by state policy considerations. Moreover, Gunwall recognized that the differences in the text of the Washington State and the federal constitutional provisions could indicate that the state founders intended a meaning different from that of the federal bill of rights. In State v. Wethered, 110 Wash. 2d 466, — P.2d — (1988), the court indicated that in matters where the court was urged to examine state constitutional grounds failure to discuss at a minimum the six criteria mentioned in Gunwall would result in the court's refusal to do so, inasmuch as it would consider the issue insufficiently argued by the parties.

This Survey, as did the first Survey, summarizes the predominant treatment of search and seizure issues under the fourth amendment and under article I, section 7 to the extent that this 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.

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

This chapter addresses three questions: (1) "What is a search?"; (2) "What is a seizure of the person?"; and (3) "What is a seizure of property?"
These questions represent the threshold inquiry in any search or seizure problem. Unless a true search or seizure has occurred within the meaning of the federal and state constitutions, constitutional protections are not triggered. This chapter will first discuss when a search has occurred, be it in the form of entry into a home or the taking a blood sample. The chapter will then discuss when a seizure of the person has occurred, be it an arrest or investigatory stop. The chapter will conclude with a discussion of when, for constitutional purposes, personal property has been seized.

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

Prior to 1967, the United States Supreme Court defined the applicability of fourth amendment protections in terms of "constitutionally protected areas." *Katz v. United States*, 389 U.S. 347, 19 L. Ed. 2d 576, 88 S. Ct. 507 (1967). The fourth amendment 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 & SEIZURE: A TREATISE ON THE FOURTH AMENDMENT, § 2.1(a), at 302-03 (2d ed. 1987) [hereinafter LAFAVE, SEARCH & SEIZURE]; 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 vital-
ity of the old "constitutionally protected areas" test will be 
examined in the following sections. See 1 LAFAVE, SEARCH & 
SEIZURE, § 2.1(b), at 303.

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

In a concurring opinion in Katz, which has since come to 
be accepted as the Katz test, Justice Harlan explained that the 
Katz holding extends search and seizure protections to all situa-
tions 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 1 LAFAVE, SEARCH & SEIZURE, 
§ 3.2(b), at 567. A reasonable expectation of privacy is mea-
sured by a "twofold requirement, first that a person have 
exhibited an actual (subjective) expectation of privacy and, sec-
ond, that the expectation be one that society is prepared to rec-
ognize as 'reasonable.'" 389 U.S. at 361, 19 L. Ed. 2d at 588, 88 
S. Ct. at 516 (Harlan, J., concurring).

Although "a man's home is, for most purposes, a place 
where he expects privacy, . . . objects, activities, or statements 
that he exposes to the 'plain view' of outsiders are not 'pro-
tected' because no intention to keep them to himself has been 
P.2d 631, 633 (citation omitted) (legitimate expectation of pri-
vacy means more than subjective expectation of not being dis-
covered; defendants' claimed privacy expectation in home not 
reasonable when defendants positioned themselves in front of 
picture window with lights on and drapes open), review 
denied, 101 Wash. 2d 1013 (1984); see also Smith v. Maryland, 
442 U.S. 735, 740, 61 L. Ed. 2d 220, 226, 99 S. Ct. 2577, 2580 
(1979). The reasonable expectation of privacy has also been 
analyzed by questioning 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 must also be one "which the 
law recognizes as 'legitimate.'" Rakas v. Illinois, 439 U.S. 128, 

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), review 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. 1979), cert. denied, 444 U.S. 825 (1979). In addition, the fourth amendment provides no protection against a government agent recording a person's conversation with the agent. United States v. Caceres, 440 U.S. 741, 59 L. Ed. 2d 733, 99 S. Ct. 1465 (1979).

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 has also 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), overruled on other grounds, United States v. Salvucci, 448 U.S. 83, 65 L. Ed. 2d 619, 100 S. Ct. 20 (1980), 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 Walinksi & Tucker, Expectations of Privacy: Fourth Amendment Legitimacy Through State Law, 16 HARV. C.R.-C.L. L. REV. 1 (1981).
1.2 Defining “Search” post-Katz: Continuing Vitality of “Constitutionally Protected Areas”

Although the concept of “constitutionally protected areas” does not “serve as a talismanic solution to every Fourth Amendment problem,” Katz, 389 U.S. at 351 n.9, 19 L. Ed. 2d at 582, 88 S. Ct. at 511, 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 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. (emphasis in original).

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, 5 L. Ed. 2d 734, 81 S. Ct. 679 (1961). In terms that apply equally to seizures of property and seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house.

Id. Houses, then, are “constitutionally protected areas”
because, as under the pre-\textit{Katz} analysis, "houses" are specifically enumerated within the fourth amendment. The \textit{Rakas/\textit{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 \textit{Silverman v. United States}, cited in \textit{Payton}, was decided during the heart of the pre-\textit{Katz} era of "constitutionally protected areas" analysis. \textit{See also State v. Holeman}, 103 Wash. 2d 426, 429, 693 P.2d 89, 91 (1985); \textit{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 \textit{State v. Brown}, 9 Wash. App. 937, 942, 515 P.2d 1008, 1012 (1973), \textit{Jordan} was distinguished by greater expectation of privacy in home as compared with motel or place of business.).

\subsection*{1.3 \textit{Specific Applications of Post-Katz Analysis}}

\subsubsection*{1.3(a) Residential Premises}

As described above, an individual has a privacy interest in the interior of his or her home. \textit{See Payton v. New York}, 445 U.S. 583, 589-90, 63 L. Ed. 2d 639, 652-53, 100 S. Ct. 1371, 1381-82 (1980); 1 \textsc{LaFave, Search & Seizure}, § 2.3(b), at 386. A search of a home can occur even when the government officers do not themselves enter the home. If the officers are able to monitor persons, objects, or activities within the home that would not be observable in ordinary circumstances, a search has occurred. \textit{See United States v. Karo}, 468 U.S. 705, 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); \textit{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 did 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 (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), review denied, 101 Wash. 2d 1012 (1984). 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). However, persons may waive their right to privacy by willingly admitting a visitor, e.g., an undercover police officer, into the premises to conduct an illegal transaction. State v. Dalton, 43 Wash. App. 279, 284-285, 716 P.2d 940, 944 (Student-invited officer into a college dormitory to conduct an illegal drug transaction. The warrantless entry was upheld as non-intrusive since the police were invited in and took nothing except what would have been taken by a willing purchaser.), review denied, 106 Wash. 2d 1010 (1986).

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 do they 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), cert. denied, 465 U.S. 1100 (1984).

Ed. 2d 220, 99 S. Ct. 2577 (1979)). The Gunwall court found that a home telephone customer's privacy rights under article I, section 7 were violated when the police, without valid legal process, obtained by means of pen register or other device, a record of the local and long distance telephone numbers dialed on the customer's telephone. The court also considered whether the police may obtain telephone toll records. The court held that toll records could only be secured under "authority of law" which includes legal process such as a search warrant or subpoena. Gunwall, 106 Wash. 2d at 69, 720 P.2d at 816.

Courts in some jurisdictions have held that common hallways of multiple-dwelling buildings that are accessible to the public are not protected areas. 1 LAFAVE, SEARCH & SEIZURE, § 2.3(b), at 388. When the building is secure and not accessible to the public, the courts are split. Compare United States v. Carriger, 541 F.2d 545 (6th Cir. 1976) (A federal agent may not slip into a locked apartment building that can only be opened by a key or security device by holding the door when workers exit. While a tenant may permit entrance to other tenants and guests, she does not expect, and probably will not permit, trespassers.) with United States v. Eisler, 567 F.2d 814 (8th Cir. 1977) (fact that officer was a technical trespasser was of no consequence since defendant had no reasonable expectation of privacy in hallways). See 1 LAFAVE, SEARCH & SEIZURE, § 2.3(b), at 386-90.

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). Thus, 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 the controlling standard of an individual's privacy interest: structures within the curtilage were protected and structures outside the curtilage were not. *See* 1 LAFAVE, SEARCH & SEIZURE, § 2.3(d), at 403-04. 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 a reasonable expectation of privacy in such areas. *See id. § 2.3(d), at 404 n.20.

The Supreme Court has recently identified four factors that should be reviewed in determining the extent of a residence's curtilage: "[T]he proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by." *United States v. Dunn*, — U.S. —, 94 L. Ed. 2d 326, 334-35, 107 S. Ct. 1134, 1139 (1987). The *Dunn* Court expressly declined to adopt a "bright-line rule" that the curtilage extend no further than the nearest fence surrounding a fenced house. Rather, the court is to use the factors identified above as a tool in determining whether the area in question is so intimately tied to the home as to fall within "the home's 'umbrella' of Fourth Amendment protection." *Id. at —*, 94 L. Ed. 2d at 335, 107 S. Ct. at 1139.

There is no greater expectation of privacy in structures located and viewed from outside the curtilage, however, than those viewed from a public place. *United States v. Dunn*, — U.S. —, 94 L. Ed. 2d 326, 107 S. Ct. 1134 (1987). In *Dunn*, the Court held that police officers standing in an open field could look into the defendant's barn, even if the defendant had a reasonable expectation of privacy in the barn. *See also* 1 LAFAVE, SEARCH & SEIZURE, § 2.3(d), at 403.

Washington courts have not recognized a privacy interest in those areas of the curtilage that are impliedly open to the public. *See State v. Seagull*, 95 Wash. 2d 898, 902, 632 P.2d 44, 47 (1981) (usual access routes to a house); *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), *cert. denied*, 450 U.S. 958 (1981); *see supra § 1.3(a)*. The court will, however, consider a combination of factors including the prox-
imity of the area to the residence, whether it is set off by physical features and whether it is for the exclusive use of the resident. *State v. Niedergang*, 43 Wash. App. 656, 719 P.2d 576 (1986) (car parked in cul-de-sac not within curtilage).

1.3(c) Adjoining Lands and "Open Fields"

Certain lands adjacent to a dwelling fall within the privacy protection surrounding the residence. "The protection afforded by the fourth amendment, insofar as houses are concerned, has never been restricted to the interior of the house, but has been extended to open areas immediately adjacent thereto." *Wattenburg v. United States*, 388 F.2d 853 (9th Cir. 1968) (reasonable expectation of privacy extends to backyard of lodge); see also *Oliver v. United States*, 466 U.S. 170, 178, 80 L. Ed. 2d 214, 224, 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 & SEIZURE, § 2.3(f), at 410-11.


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

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, or open waters. *See 1 LAFAVE, SEARCH & SEIZURE*, § 2.4(a), at 426.

The "open fields" doctrine has been reaffirmed under the *Katz* analysis on the grounds that an expectation of privacy in open fields is unreasonable. *Oliver v. United States*, 466 U.S. 170, 179, 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 falling within the purview of the open fields doctrine cannot create a legitimate expectation of privacy in the area by taking steps to conceal activities such as posting no trespassing signs or erecting fences around the secluded areas. *Id.* at 182, 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 also Doe v. Dring*, 2 M. & S. 448 (1814) (discussing prior cases); 2 Blackstone, *Commentaries* 16, 384-85.

Even land within the curtilage may only be protected from certain types of surveillance. Thus, aerial surveillance is not precluded merely because precautions have been taken against ground surveillance. *California v. Ciraolo*, 476 U.S. 207, 90 L. Ed. 2d 210, 106 S. Ct. 1809 (1986) (aerial surveillance of marijuana growing in fenced backyard does not implicate fourth amendment; officer's observations merely from public vantage point). If highly sophisticated equipment is used in conducting the surveillance, however, the fourth amendment may be

In addition, the fact that police commit a common law trespass while observing an object or activity in open fields does not render the intrusion a search under the federal constitution. Oliver. 466 U.S. at 183, 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 177, 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; rather, the appropriate inquiry is whether "the State unreasonably intruded into the defendant's 'private affairs'." Myrick, 102 Wash. 2d at 510, 688 P.2d at 1205 (1980); see also State v. Cockrell, 102 Wash. 2d 561, 689 P.2d 32 (1984); 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 may nevertheless constitute a search. "[M]erely because it is generally known that the technology exists to enable police to view private activities from an otherwise nonintrusive vantage point, it does not follow that these activities are without protection." Id. (dictum). The focus is on "those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental tres-
pass absent a warrant." \textit{Id.} at 511, 688 P.2d at 154. See State \textit{v. Cord}, 103 Wash. 2d 361, 365, 693 P.2d 81, 84 (1985); see also State \textit{v. Seagull}, 95 Wash. 2d 898, 903, 632 P.2d 44, 47 (1981). Note that in both \textit{Cord} and \textit{Myrick} the police used no visual enhancement devices; in addition, their vantage points for observing the contraband were lawful. \textit{Cord}, 103 Wash. 2d at 365, 693 P.2d at 84; \textit{Myrick}, 102 Wash. 2d at 514, 688 P.2d at 155. Cf. Oliver \textit{v. United States}, 466 U.S. at 183, 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 \textit{Myrick}, 102 Wash. 2d at 511, 688 P.2d at 154. See generally Amsterdam, \textit{Perspectives on the Fourth Amendment}, 58 MINN. L. REV. 349 (1979); Comment, \textit{Aerial Surveillance: A Plane View of the Fourth Amendment}, 18 GONZ. L. REV. 307 (1982-83).

Although article I, section 7 of the Washington State Constitution generally provides greater protection against governmental intrusion than the fourth amendment, it will not protect against a lawful intrusion into an open field that was not posted by the owners. \textit{State \textit{v. Hanson}}, 42 Wash. App. 755, 714 P.2d 309 (search warrant for marijuana fields obtained by use of photos and testimony of officer taken from a "plain view" vantage point), \textit{aff'd}, 107 Wash. 2d 331, 728 P.2d 593 (1986). Similarly, "storage areas" that are visible to the naked eye will not be protected by either state or federal provisions against search and seizure. \textit{State \textit{v. Jeffries}}, 105 Wash. 2d 398, 717 P.2d 722 (1986), \textit{cert. denied}, — U.S. —, 107 S. Ct. 328 (1986); \textit{United States \textit{v. Pruitt}}, 464 F.2d 494 (9th Cir. 1972) (police search of boxes hidden in trees covered with underbrush; defendant could not reasonably expect to keep anybody who discovered boxes from looking into them).

1.3(d) Business and Commercial Premises

office shared with other union officials); see also See v. City of Seattle, 387 U.S. 541, 545-546, 18 L. Ed. 2d 943, 87 S. Ct. 1737, 1740-41 (1967) (safety violations). Unlike private homes, however, the legislature may authorize warrantless administrative searches of commercial property without violating the fourth amendment. If the legislative authorization does not contain rules governing the procedure the inspectors must follow, however, then general fourth amendment restrictions will apply. Donovan v. Dewey, 452 U.S. 594, 598-99. 69 L. Ed. 2d 262, 268-69, 101 S. Ct. 2534, 2538 (1981). A few businesses, however, such as those dealing with liquor and firearms, historically have been so extensively regulated that there is no need for a warrant. Barlow's, 436 U.S. at 313, 56 L. Ed. 2d at 312, 98 S. Ct. at 1821.

The nature of the place as either a personal residence or business may also affect the determination of whether an area is curtilage or open field. Dow Chemical Co. v. United States, 478 U.S. 227, 90 L. Ed. 2d 226, 106 S. Ct. 1819 (1986). Those portions 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 or restaurant for the purpose of serving an administrative subpoena is permitted although the "administrative subpoena itself [does] not authorize either entry or inspection of [the] premises . . . ." Donovan v. Lone Steer, Inc., 464 U.S. 408, 413, 78 L. Ed. 2d 567, 572, 104 S. Ct. 769, 772-73 (1984) (An employer may not insist upon judicial warrant as condition precedent to valid administrative subpoena unless government inspectors seek nonconsensual entry "into area not open to the public.").

Courts have generally upheld police investigative entries into bus terminals, pool halls, bars, restaurants, and general stores such as furniture stores and variety stores. 1 LAFAVE, SEARCH & SEIZURE, § 2.4(b), at 430. But "[t]he 'implied invitation for customers to come in,' . . . extends only to those times when the premises are in fact 'open to the public'; the mere fact that certain premises are open to the public at certain
times does not justify entry by the police on other occasions.” Id.

Although a reasonable expectation of privacy exists in commercial premises, the warrant requirements for administrative searches of commercial premises may differ from those for searches in general. See infra § 6.4(b). See also 1 LAFAVE, SEARCH & SEIZURE, § 2.4(b), at 431.

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. 386, 85 L. Ed. 2d 406, 105 S. Ct. 2066 (1985). Although a citizen’s reasonable expectation of privacy may be less in an automobile than in a residence, “[a] citizen does not surrender all the protections of the fourth amendment by entering an automobile.” New York v. Class, 475 U.S. 106, 89 L. Ed. 2d 81, 106 S. Ct. 960 (1986).

Even when a vehicle is used as a home, however, its owner has a lesser expectation of privacy in the vehicle if the vehicle is readily mobile and licensed to operate on public streets. Carney, 471 U.S. at 393, 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,
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.

*United States v. Dionisio*, 410 U.S. 1, 14, 35 L. Ed. 2d 67, 79, 93 S. Ct. 764, 771 (1973) (subpoena of voice exemplars infringes no fourth amendment interest); *People v. Whitaker*, 64 N.Y.2d 347, 486 N.Y.S.2d 895, 476 N.E.2d 294 (no expectation of privacy in facial features, thus no violation when defendant who is held for another crime is placed in a lineup and identified as the perpetrator of another crime), *cert. denied*, 474 U.S. 830 (1985).

In contrast to the seizure of voice exemplars and facial characteristics, the taking of a blood sample is a search within the meaning of the fourth amendment. *Schmerber v. California*, 384 U.S. 757, 767, 16 L. Ed. 2d 980, 918, 86 S. Ct. 1826, 1834 (1966); *State v. Wetherell*, 82 Wash. 2d 865, 871, 514 P.2d 1069,
1073 (1973); State v. Osborne, 18 Wash. App. 318, 321, 569 P.2d 1176, 1180 (1977). The police have probable cause to believe that a person's blood sample will provide evidence of criminal activity justifying the seizure if the facts and circumstances known to the officers warrant their belief that the person is intoxicated and has committed a crime of which intoxication is an element. State v. Komoto, 40 Wash. App. 200, 697 P.2d 1025, cert. denied, 474 U.S. 1021 (1985). See 1 LAFAVE, SEARCH & SEIZURE, § 2.6(a), at 459-63. Similarly, constitutional protections apply when officers take scrapings from an individual's fingernails, Cupp v. Murphy, 412 U.S. 291, 295, 36 L. Ed. 2d 900, 905, 93 S. Ct. 2000, 2003 (1973), or take an individual's fingerprints, Hayes v. Florida, 470 U.S. 811, 814, 84 L. Ed. 2d 705, 709, 105 S. Ct. 1643, 1648 (1985). The line drawn between facial characteristics and voice exemplars, on the one hand, and blood samples or fingerprint scrapings, on the other, may be explained by the fact that the evidentiary value of the former is immediately perceivable. 1 LAFAVE, SEARCH & SEIZURE, § 2.6(a), at 462. 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 (1987). 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 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 . . . ." 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 (1975); United States v. Howell, 466 F. Supp. 835, 838 (D. Or. 1979), the fourth amendment can act as an additional bar because of the protection accorded "papers" and "effects." LaFave and other commentators have argued that even when the seizure and use
of private papers is consistent with the fifth amendment, the fourth amendment poses an absolute bar against the use of the highly private content of such papers. 1 LaFave, Search & Seizure, § 2.6(d), at 494-95; 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 protected even after the government is in lawful possession of the film. Walter, 447 U.S. at 654, 65 L. Ed. 2d at 416, 100 S. 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, 472 U.S. 463, 469, 86 L. Ed. 2d 370, 377, 105 S. Ct. 2778, 2782 (1985) ("The officer's action in entering the bookstore and examining the wares that were intentionally exposed to all . . . did not infringe a legitimate expectation of privacy."). 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, 447 U.S. 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 of privacy in the invaded place. United States v. Oswald, 783 F.2d 663 (6th Cir. 1986) (defendant's flight from scene of burning automobile, without any visible effort to retrieve the car or its contents in reasonable time, established that the defendant's expectation of privacy was unreasonable). See also 1 LaFave, Search & Seizure, § 2.6(b), at 466-67. 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. App. 1975). For a detailed discussion of the case law on the expectation of privacy in abandoned personal effects, see 1 LAFAVE, SEARCH & SEIZURE, § 2.6(b).

The Supreme Court has recently held that the fourth amendment does not preclude the warrantless search and seizure of garbage left for collection outside the curtilage of a residence. *California v. Greenwood*, — U.S. —, — L. Ed. 2d —, 108 S. Ct. 1625 (1988). See also 1 LAFAVE, SEARCH & SEIZURE, § 2.6(c). At least one state has held on state constitutional grounds, however, that police inspection of trash is a search. *State v. Tanaka*, 67 Haw. 658, 662, 701 P.2d 1274, 1276-1277 (1985):

People reasonably believe that police will not indiscriminately rummage through their trash bags to discover their personal effects. Business records, bills, correspondence, magazines, tax records, and other telltale refuse can reveal much about a person's activities, associations and beliefs. If we were to hold otherwise, police could search everyone's trash bags and on their property without any reason and thereby learn of their activities, associations and beliefs.

This issue has not yet been reviewed under the Washington State Constitution.


Placing a beeper inside an object does not in and of itself constitute a search. *United States v. Karo*, 468 U.S. 705, 82 L. Ed. 2d 530, 539-40, 104 S. Ct. 3296, 3301-02 (1984). Monitoring the beeper and thereby tracking the object may constitute a search of the *location* but not of the object. *Id.* at 722, 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).

A person does not have a reasonable expectation of privacy in items in plain view. Thus, in United States v. Falcon, 766 F.2d 1469 (10th Cir. 1985), the court held that it was proper for the agents to play plaintiff’s audio tape that was in plain view. Although the defendant had marked the tape "confidential, do not play," his expectation that the tape was safe from (consensual) inspection was unreasonable because the tape was not locked away, hidden, or sealed. Once the agents were justified in seizing the tape, no additional authority was needed to play it. Id. at 1476. The Supreme Court, however, has held that an officer may not take action unrelated to the objectives of an authorized intrusion to "expose to view concealed portions of the object." Thus, there is a distinction between "'looking' at a suspicious object in plain view and 'moving' it even a few inches." Arizona v. Hicks, — U.S. —, 94 L. Ed. 2d 347, 354, 107 S. Ct. 1140, 1152 (1987). The court's ruling in Falcon may be questionable in light of Hicks.

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

The court will use an objective, "reasonable man" standard, rather than a subjective standard, to determine whether a person's expectation of privacy in special environments is reasonable and thus protected. State v. Berber, 48 Wash. App. 583, 740 P.2d 863, review denied, 109 Wash. 2d 1014 (1987). In Berber, the Washington Supreme Court applied the federal test for determining whether a legitimate expectation of privacy is violated. Id. at 588, 740 P.2d at 867. The federal test is first, whether there is a subjective expectation of privacy and, second, whether society recognizes the expectation as legitimate. Under the first prong, the court found that the defendant had a subjective expectation of privacy in the use of public urinal facilities. The court found that under the second prong, however, the defendant's expectation of privacy was not one which
society was prepared to recognize as legitimate. In Berber, the
location of the toilet in a public place, its lack of any real
enclosure, the openness of the view from the general restroom,
and its use for an illegal purpose contributed to a diminished
expectation of privacy. Id. at 591, 740 P.2d at 869. See 1
LAFAVE, SEARCH & SEIZURE, § 2.4(c), at 438-39.

Prisoners are not accorded the same expectations of pri-
vacy in their cells and effects as citizens generally enjoy in
their homes and effects. Hudson v. Palmer, 468 U.S. 517, 82 L.
Ed. 2d 393, 104 S. Ct. 3194 (1984) (5-4 decision). Students in
public schools and persons at or near borders may also 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 589, 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,

The test for a seizure is an objective one: a seizure occurs
when law enforcement officers give "a show of official author-
ity 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); see also Michigan v. Chesternut, — U.S. —,
— L. Ed. 2d —, 108 S. Ct. 1975 (1988) (police did not seize flee-
ing individual by catching up and driving alongside him for
short distance without any show of authority or command to
stop). An officer's request for identification, or other infor-
manation relating to one's identity, is unlikely to be viewed as an
unlawful seizure unless additional circumstances are present.
See I.N.S. v. Delgado, 466 U.S. 210, 80 L. Ed. 2d 247, 104 S. Ct.
(1984); State v. Crespo Aranguren, 42 Wash. App. 452, 711 P.2d
1096 (1985) (police acted properly in stopping the defendants to
ask if they had come from the area of reported vandalism, and
used "permissive" language in requesting that they talk with
him). The fact that a person is unconscious, however, does not
mean that he or she is not seized. See Seattle v. Sage, 11 Wash.
1.4(a) Consensual Encounters

A consensual encounter with an officer does not trigger the fourth amendment, even when the individual has been approached by, and is aware of the officer’s identity as, an officer. *Florida v. Royer*, 460 U.S. 491, 497, 75 L. Ed. 2d 299, 236, 103 S. Ct. 1319, 1324 (1982); 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). Factors reviewed by the court in determining whether the scope of a Terry stop, infra 2.9(b), has been exceeded, and whether an arrest has occurred, are the degree to which the physical intrusion restrains the suspect’s liberty, the duration of the detention, and whether the detention was related to the initial stop. *State v. Williams*, 102 Wash. 2d 733, 740, 689 P.2d 1065, 1069 (1984).

The degree of intrusion must also be appropriate with regard to the type of crime under investigation, and the probable dangerousness of the suspect. *State v. Wheeler*, 108 Wash. 2d 230, 235, 737 P.2d 1005, 1007 (1987). In *Williams*, the court specifically overruled *State v. Byers*, 88 Wash. 2d 1, 559 P.2d 1334 (1977), which held that “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.” *Byers*, 88 Wash. 2d at 6 n.5, 559 P.2d at 1136. Thus, the *Williams* court held that neither the fourth amendment nor article I, section 7 was implicated by the suspect being handcuffed and placed in a patrol car. The “free to go” standard has not been abandoned under federal law. *Michigan v. Chestnut*, — U.S. —, — L. Ed. 2d —, 108 S. Ct. 1975 (1988). In *I.N.S. v. Delgado*, 466 U.S. 210, 80 L. Ed. 2d 247, 104 S.Ct. 1758 (1984), the Supreme Court held that questioning by law enforcement officers remains consensual until a reasonable person would believe that he or she could not leave the presence of the officers or until he or she refuses to respond to their inquiries and the police take further action. Id. at 216, 80 L. Ed. 2d at 255, 104 S. Ct. at 1763 (1984) (INS agents moving systematically through factory inquiring about workers’ citi-
zenship while other INS agents stationed at exits did not constitute seizure either of workforce or of individual workers). See also Florida v. Rodriguez, 469 U.S. 1, 83 L. Ed. 2d 165, 105 S. Ct. 308 (1984). See generally infra § 5.10 (discussing what constitutes consent).

Police action does not exceed the proper purpose and scope of a Terry stop (see supra § 1.4, infra § 2.9(b)) when the purpose of the stop is directly related to detaining and investigating the defendant in connection with a robbery. State v. Thornton, 41 Wash. App. 506, 705 P.2d 271 (1985), review denied, 104 Wash. 2d 1022 (1985). While an unfounded hunch is insufficient to justify a stop, the police may reasonably act on circumstances that appear incriminating to the officer based on his past experience. State v. Samsel, 39 Wash. App. 564, 694 P.2d 670 (1985). For post-Terry analysis, see generally 3 LAFAVE, SEARCH & SEIZURE, § 8.1(c).

1.4(b) Seizures in Vehicles


The use of roadblocks to detect crime or apprehend violators may require more evidence that a crime has occurred than when a particular vehicle is stopped. Conversely, the courts will generally require less evidence of probable cause to show that a particular vehicle was properly stopped pursuant to the roadblock. See 3 LAFAVE, SEARCH & SEIZURE, § 9.5(c). See also supra 1.3(e), and infra 5.21.

1.4(c) Seizures in Homes

The fourth amendment is triggered even though a person is detained in his or her own home. Michigan v. Summers, 452
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. Holeman, 103 Wash. 2d 426, 693 P.2d 89 (1985). See also supra § 1.3(a).

1.5 Defining Seizures of Property

The fourth amendment protects a person's possessor interest in effects as well as his or her privacy interest. See United States v. Place, 462 U.S. 696, 707, 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 possessor interests in that property." United States v. Jacobsen, 466 U.S. 109, 113, 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 120, 80 L. Ed. 2d at 99, 104 S. Ct. at 1660. Impoundment of a room thus constitutes a seizure under the fourth amendment. State v. Ng, 104 Wash. 2d 763, 713 P.2d 63 (1985) (citing Segura v. United States, 468 U.S. 796, 82 L. Ed. 2d 595, 104 S. Ct. 3380 (1984)).

In some circumstances interference with an individual's possessory interests may also implicate an individual's liberty interests. Place, 462 U.S. at 708, 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 & 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 & Seizure, § 11.3, at 280.
The Supreme Court created an exception to this rule for a defendant charged with an offense involving 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 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, 99 S. Ct. at 431; *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 (D.C. Cal. 1979). See generally Comment, Possession and Presumptions: The Plight of the Passenger Under the Fourth Amendment, 48 FORD. L. REV. 1027 (1980). An employee who maintains a separate office secured by a locked door may assert a privacy interest in that office. Ortega v. O’Connor, 764 F.2d 703 (9th Cir. 1985), rev’d on other grounds, — U.S. —, 107 S. Ct. 1492 (1987). In Ortega, the Ninth Circuit Court of Appeals relied on the absence of a general inspection policy permitting access by other employees to the defendant’s office to distinguish other decisions in which the court found no expectation of privacy in the workplace. Ortega, 764 F.2d at 706. On appeal, the Supreme Court upheld the Ninth Circuit’s privacy analysis, but applied a reasonableness standard, rather than a probable cause standard for public employees. Ortega, 107 S. Ct. at 1499.

In merging standing into privacy analysis, the Court abandoned the concept of automatic standing. United States v. Salvucci, 448 U.S. 83, 65 L. Ed. 2d 619, 100 S. Ct. 2547 (1980). Hence, although the fourth amendment no longer governs searches of stolen goods, it does apply to searches of legally possessed items discovered in the search of stolen goods. For example, there is a protected privacy interest in closed boxes contained in a stolen car. See People v. Dalton, 24 Cal. 3d 850, 855, 598 P.2d 467, 470, 157 Cal. Rptr. 497, 500 (1979), cert. denied, 445 U.S. 946 (1980). Similarly, defendants who claimed that a stolen footlocker belonged to their brother established a possessory interest as bailees sufficient to have standing under Rakas. State v. Grundy, 25 Wash. App. 411, 416, 607 P.2d 1235, 1237 (1980). But a defendant may not claim an expectation of

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. Belieu, 50 Wash. App. 834, 751 P.2d 321 (1988); State v. Johnson, 38 Wash. App. 793, 690 P.2d 591 (1984). Thus, although "automatic standing" is no longer recognized under the fourth amendment, it has retained its validity under the state constitution. In order to invoke this exception to the general standing requirements, however, two requirements must be met. First, possession must be an "essential" element of the offense for which the defendant is charged, and second, the defendant must be in possession of the seized property at the time of the contested search. Simpson, 95 Wash. 2d at 181, 622 P.2d at 1206-07; Belieu, 50 Wash. App. at 838, 751 P.2d at 323.


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. 224, 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. The chapter concludes with a discussion of the types of 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 & SEIZURE, § 3.1, at 542-43.

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).

The probable cause requirement may be satisfied even when police make a reasonable mistake of fact. State v. Seagull, 95 Wash. 2d 898, 908, 632 P.2d 44, 50 (1981) (warrant valid even though officer misidentified tomato plant as marijuana). But when police make a mistake of law and incorrectly believe that certain conduct is unlawful, a search or seizure based upon that belief is invalid. State v. Melrose, 2 Wash. App. 824, 828, 470 P.2d 552, 555 (1970).
For an extensive analysis of the nature of probable cause, see 1 LAFAVE, SEARCH & SEIZURE, §§ 3.1-3.2.

2.1 Probable Cause Standard: Arrest Versus Search

The probable cause test requires the same amount of evidence for both arrests and searches. Probable cause for a search, however, does not necessarily justify an arrest; conversely, 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 the offense. 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 suspect's automobile had been seen leaving scene of burglary sufficient to establish probable cause for arrest).

2.2 Probable Cause Standard: Characteristics

2.2(a) Objective Test

The probable cause standard is an objective one. Beck v. Ohio, 379 U.S. 89, 96, 13 L. Ed. 2d 142, 147, 85 S. Ct. 223, 228 (1964). An officer's good faith is not enough, and an officer's belief that probable cause was not present is also not determinative. See State v. Vanzant, 14 Wash. App. 679, 681, 544 P.2d 786, 788 (1975); cf. State v. Cottrell, 86 Wash. 2d 130, 542 P.2d 771 (1975); State v. Todd, 78 Wash. 2d 362, 474 P.2d 542 (1970) (officer must have real belief).

The probable cause standard is determined with reference to a reasonable person with the expertise and experience of the officer in question. See United States v. Ortiz, 422 U.S. 891, 897-88, 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 (ability to identify marijuana), cert. denied, 449 U.S. 873 (1980); 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 & SEIZURE, § 3.2(d). See generally infra §§ 2.4, 2.5, and 2.7.

The affidavit establishing probable cause for a search warrant must set forth sufficient facts to lead a reasonable person to conclude that there is a probability that the defendant is involved in criminal activity. State v. Cord, 103 Wash. 2d 361, 365-66, 693 P.2d 81, 85 (1985) (police officer with 13 years substantial drug identification experience). There must, therefore, be "reasonable grounds for suspicion supported by circumstances sufficiently strong to warrant a man of ordinary caution to believe evidence of a crime can be found on the premises to be searched." State v. Hansen, 42 Wash. App. 755, 760, 714 P.2d 309, 313 (probable cause established where affiant had been a law officer for 27 years, had recently graduated from the Drug Enforcement Administration's marijuana eradication school, and had arrested people for possession of marijuana while the marijuana was in the plant stage and in dried or processed seed and stems stage), aff'd, 107 Wash. 2d 331, 728 P.2d 593 (1986). See LAFAVE, SEARCH AND SEIZURE, § 3.2(b).

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 disinterested person in believing that the suspect is guilty. State v. Scott, 93 Wash. 2d 7, 11-12, 604 P.2d 943, 944 (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), cert. denied, 446 U.S. 920 (1980); 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 & SEIZURE, § 3.2(e), at 590-92; 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 50 percent probability should suffice to justify the search of a particular place or the seizure of a particular object, see 1 LAFAVE, SEARCH & SEIZURE, § 3.2(e).

2.2(c) Individualized Suspicion

Police have probable cause to arrest an individual only if they possess reasonable grounds to believe that 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). See also State v. Ranglitsch, 40 Wash. App. 771, 780, 700 P.2d 382, 388 (1985) (police officer's personal belief that habitual drug users keep drugs and paraphernalia in their residence insufficient to establish probable cause to search known user's residence). 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. Individualized suspicion is not a prerequisite to a constitutional seizure if the seizure is carried out pursuant to a plan embodying neutral criteria that circumscribes the conduct of individual police officers. State v. Marchand, 104 Wash. 2d 434, 706 P.2d 225 (1985); Seattle v. Messiani, 110 Wash. 2d 454, 458-59, — P.2d —, — (1988). A warrantless search without individualized suspicion may also be upheld if the officers reasonably believe a felony has recently been committed. State v. Silvernail, 25 Wash. App. 185, 190-91, 605 P.2d 1279, 1283 (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), cert. denied, 449 U.S. 843 (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


Affidavits for search warrants must be tested in a common sense, rather than a hypertechnical manner, as long as the basic Aguilar/Spinelli requirements are met. See infra § 2.5; State v. Chasengnouv, 43 Wash. App. 379, 385, 717 P.2d 288, 292 (1986) (presence of opium in a private residence raises a legitimate inference that opium may be present throughout the premises; that persons probably use opium on the premises; that paraphernalia for use might be present on the premises; and that packaging materials might be found on the premises that would indicate opium receipt methods). "The support for issuance of a search warrant is thus sufficient if, on reading the affidavits, an ordinary person would understand that a violation existed and was continuing at the time of the application." State v. Fisher, 96 Wash. 2d 962, 965, 639 P.2d 743, 745 (quoting State v. Clay, 7 Wash. App. 631, 637, 501 P.2d 603, 607 (1972)), cert. denied, 457 U.S. 1137 (1982). See also State v. Freeman, 47 Wash. App. 870, 873, 737 P.2d 704, 707 (discussing standard of review), review denied, 108 Wash. 2d 1032 (1987).
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 (1978) (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 if there is a substantial basis for crediting it. *State v. Luellen*, 17 Wash. App. 91, 562 P.2d 253 (1977); *see generally infra § 2.5.* Thus, in making a probable cause determination for issuance of a search warrant, a magistrate may rely upon a police officer's affidavit or other testimony that relays hearsay information based on a fellow officer's personal knowledge. *State v. Lodge*, 42 Wash. App. 380, 386, 711 P.2d 1078, 1083 (1985), *review denied*, 105 Wash. 2d 1021 (1986).

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 & SEIZURE, § 3.2(d), at 580 n.100.

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 (1960) (probable cause for narcotics arrest found on basis of cumulative facts, including defendant's previous four- to five-year narcotics use), cert. denied, 385 U.S. 96 (1966); State v. Sterling, 43 Wash. App. 846, 851, 719 P.2d 1357, 1359 (occupant's prior conviction for narcotics violations on two separate occasions can be factor in determining probable cause for a search warrant), review denied, 106 Wash. 2d 1017 (1986). Without additional evidence, a prior record of the same type of criminal conduct is insufficient to establish probable cause. Beck v. Ohio, 379 U.S. 89, 97, 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 a 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 & SEIZURE, § 3.2(d), at 581.

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, 733, 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 & SEIZURE, § 3.2(d).

2.3(c) Increased Power Consumption

Standing alone, an increase in power use does not constitute sufficient probable cause to issue a search warrant. State v. McPherson, 40 Wash. App. 298, 301, 698 P.2d 563, 564 (1985) (200 to 300 percent increase in power consumption not sufficient to establish probable cause). When the increase in power
consumption is combined with other factors, however, the increase may be considered in determining whether probable cause exists. *State v. Sterling*, 43 Wash. App. 846, 851-52, 719 P.2d 1357, 1360 (400 to 500 percent increase in power usage combined with other suspicious facts that gave credence to an anonymous tip sufficient to determine that probable cause existed for search warrant), *review denied*, 106 Wash. 2d 1017 (1986). *See also State v. Huft*, 106 Wash. 2d 206, 211, 720 P.2d 838, 840 (1986) ("[T]here are too many possible reasons for increased electrical use to allow a search warrant to be issued based on increased consumption.").

2.4 First-hand Observation

Because the existence of probable cause depends on particular facts, it is impossible to broadly define when an officer's observations amount to probable cause. Nevertheless, several common fact patterns permit 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, 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 2 LAFAVE, SEARCH & SEIZURE, § 3.6(a).*

2.4(b) Particular Crimes: Illegal Substances

(officer who recognized smell of marijuana emanating from properly stopped car had probable cause to search suspect for controlled substances). A view of what is suspected to be contraband but may also be an innocent substance will not amount to probable cause absent additional suspicious circumstances. See, e.g., State v. Hunt, 15 Or. App. 76, 79, 514 P.2d 1363, 1365 (1973).

An officer who relies on sight or odor must have a sufficient basis, grounded in expertise and experience, for believing that the substance is contraband. See State v. Cord, 103 Wash. 2d 361, 692 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).


A search violative of article I, section 7 or the fourth amendment does not occur when a canine sniffs an object from an area in which the defendant does not have a reasonable expectation of privacy. The canine sniff must be minimally intrusive. State v. Boyce, 44 Wash. App. 724, 730, 723 P.2d 28, 31 (1986) (a canine sniff of the air outside a safety deposit box was not a search when the officers had permission to be in the vault area and the sniff was minimally intrusive).

If article I, section 7 or the fourth amendment is implicated, however, odor may establish probable cause justifying a search. See, e.g., United States v. Lopez, 777 F.2d 543, 551 (10th Cir. 1985) (officer's identification of an ether-like odor, which officer associated with the transport of bulk cocaine, was sufficient to cause a prudent and trained officer to reasonably believe that a crime was being committed). See 2 LAFAVE, SEARCH & SEIZURE, § 3.6(b).

2.4(c) Association: Persons and Places

Mere association with a person whom the police have

However, when 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 2 LAFAVE, SEARCH & SEIZURE, § 3.6(c).

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 2 LAFAVE, SEARCH & SEIZURE, § 3.6(g).

2.4(d) Furtive Gestures and Flight

A suspect's furtive gestures or flight, taken alone, cannot establish probable cause; they may, however, be a factor in determining whether probable cause exists. 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.); State v. Lampman, 45 Wash. App. 228, 235, 724 P.2d 1092, 1096 (1986) (probable cause existed when probationer fled from probation officer, and probation officer knew of probationer’s drug problem, and prohibition against possession or use of drugs was a condition of probation); cf. State v. Bockman, 37 Wash. App. 474, 682 P.2d 925 (1984) (suspect’s subsequent retreat did not defeat proper arrest begun in public place). The action must be reasonably interpreted as either furtive or 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 2 LaFave, Search & Seizure, § 3.6(d) and (e).

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 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) (in establishing probable cause for arrest, officer entitled to consider defendant’s nervous admissions, and defendant’s close proximity in time and place to crime).

A suspect’s failure or refusal to answer an officer’s questions, however, may not be taken into account. State v. White, 97 Wash. 2d 92, 106, 640 P.2d 1061, 1069 (1982). Brown v. Texas, 443 U.S. 47, 53 n.3, 61 L. Ed. 2d 357, 363, 99 S. Ct. 2637, 2641 (1979); see generally 2 LaFave, Search & Seizure, § 3.6(f). Similarly, a suspect’s silence after Miranda warnings have been given may not be considered in determining probable cause, Doyle v. Ohio, 426 U.S. 610, 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 be considered, United States v. DiRe, 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 case law 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 the two-prong Aguilar-Spinelli test. Spinelli v. United States, 393 U.S. 410, 415-16, 21 L. Ed. 2d 637, 643, 89 S. Ct. 584, 589 (1969); Aguilar v. Texas, 378 U.S. 108, 114, 12 L. Ed. 2d 723, 729, 84 S. Ct. 1509, 1514 (1964). See LaFave, Search and Seizure, § 3.3.

Under the “basis of knowledge” prong of the test, facts must be revealed that enable the person making the probable cause determination to decide whether the informant had a basis for the allegation of criminal conduct. Under the “veracity” prong, facts must be presented so that the magistrate can determine either the inherent credibility of the informant or the reliability of the informant on the particular occasion. Spinelli v. United States, 393 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, 986 (7th Cir. 1973) State v. Morehouse, 41 Wash. App. 334, 336, 704 P.2d 168, 169, review denied, 104 Wash. 2d 1020 (1985); cf. State v. Luellen, 17 Wash. App. 91, 92, 562 P.2d 253, 256 (1977).


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

The best way to satisfy the "basis of knowledge" prong is to show that the informant based his or her information on personal knowledge. Aguilar v. Texas, 378 U.S. 108, 114, 12 L. Ed. 2d 723, 729, 84 S. Ct. 1509, 1514 (1964); State v. Wolken, 103 Wash. 2d 823, 827, 700 P.2d 319, 321 (1985); State v. Jackson, 102 Wash. 2d 432, 437, 688 P.2d 136, 140 (1984). For example, an informant's statement that he had observed the defendant selling narcotics will satisfy the basis of knowledge prong. McCray v. Illinois, 386 U.S. 300, 304, 18 L. Ed. 2d 62, 66, 87 S. Ct. 1056, 1059 (1967). But see 1 LAFAVE, SEARCH & SEIZURE, § 3.3(a), at 613-15 (criticizing McCray for failing to require a showing that the informant knew the substance was a narcotic). The basis of an informant's knowledge may also be established by hearsay. See Jackson, 102 Wash. 2d at 437, 688 P.2d at 140 (dictum).

Similarly, an informant's statement from which the court may infer the informant's first-hand knowledge of criminal activity will satisfy this prong. State v. Anderson, 41 Wash. App. 85, 95, 702 P.2d 481, 489 (1985), rev'd on other grounds, 107 Wash. 2d 745, 733 P.2d 517 (1987). Innocuous facts indicating that the informant has personal knowledge of the defendant, however, are insufficient to satisfy this prong, without allegations establishing the informant's personal knowledge of the criminal act. State v. Huft, 106 Wash. 2d 206, 211, 720 P.2d 838, 840 (1986).

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. 574, 577, 694 P.2d 676, 678 (1985). Thus, the credibility of an informant may be established by police verification of the informant's statement of detailed criminal activity not generally known or readily available to the casual inquirer. State v. Anderson, 41 Wash. App. 85, 94-95, 702 P.2d 481, 489 (1985), rev'd on other grounds, 107 Wash. 2d 745, 733 P.2d 517 (1987). The corroborated information must itself suggest criminal activity. "Merely verifying

2.5(b) Satisfying “Veracity” Prong by Past Performance

The veracity prong of the Aguilar-Spinelli test may be met if the affidavit supporting the search warrant contains sufficient facts from which a magistrate can independently determine the veracity of the informant. State v. Paradiso, 43 Wash. App. 1, 6, 714 P.2d 1193, 1196, review denied, 105 Wash. 2d 1023 (1986); State v. Anderson, 41 Wash. App. 85, 95, 702 P.2d 481, 489 (1985) (in determining the credibility of an informant for purposes of securing a search warrant, the recitation that the informant passed a polygraph test does not presumptively validate the search warrant), rev’d on other grounds, 107 Wash. 2d 745, 733 P.2d 517 (1987). A mere conclusion that the informant is a “credible person” is insufficient; reasons for believing the informant to be credible must be presented. Aguilar v. Texas, 378 U.S. at 112, 12 L. Ed. 2d at 727, 84 S. Ct. at 1512; State v. Jackson, 102 Wash. 2d 432, 688 P.2d 136 (1984).

The fact that an informant’s past information has led to convictions is a sufficient showing of reliability. E.g., United States ex rel. Hurley v. Delaware, 365 F. Supp. 282, 286 (D. Del. 1973); State v. Freeman, 47 Wash. App. 870, 873, 737 P.2d 704, 707 (affidavit alleged that informant had previously provided information which led to subsequent arrest), review denied, 108 Wash. 2d 1032 (1987); State v. Adame, 37 Wash. App. 94, 678 P.2d 1299 (1984). An informant’s reliability may also be established if the informant has previously provided information that while not resulting in a conviction, was proven to be reliable. State v. Wolken, 103 Wash. 2d 823, 827, 700 P.2d 319, 321 (1985) (affidavit alleged that informant provided reliable information in another jurisdiction); State v. Fisher, 96 Wash. 2d 962, 965, 639 P.2d 743, 746 (informant used successfully on prior occasion to make a controlled purchase of narcotics), cert. denied, 457 U.S. 1137 (1982); State v. Harris, 44 Wash. App. 401, 406, 722 P.2d 867, 870 (1986); State v. Frye, 26 Wash. App. 276, 279, 613 P.2d 152, 155 (1980) (court upheld a warrant based on
an affidavit that merely stated that the informants had previously supplied information leading to arrests and recovery of contraband). But see Fisher, 96 Wash. 2d at 968, 639 P.2d at 747 (Utter, J., dissenting). See generally 1 LAFAVE, SEARCH & SEIZURE, § 3.3(b).

Courts have held that an informant who assists in an arrest is credible. The arrest does not need to be lawful, and the facts learned following the arrest do not have to verify the informant’s tip. Some courts have read Aguilar to hold that general statements alleging past reliability of the defendant are sufficient. See 1 LAFAVE, SEARCH & SEIZURE, § 3.3(b), at 628-29 (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(b).

2.5(c) Satisfying the “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 (1971); State v. Lair, 95 Wash. 2d 706, 711, 630 P.2d 427, 430-31 (1981). See 1 LAFAVE, SEARCH & SEIZURE, § 3.3(c), at 644 n.140. The declaration must be made without knowledge that the information is being conveyed to a police officer; under such circumstances there is no motive to lie. State v. Gunwall, 106 Wash. 2d 54, 72, 720 P.2d 808, 818 (1986) (informant sold cocaine to undercover police officer and disclosed source). 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 may also 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 partly 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, 647-48, 694 P.2d 660, 663 (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), review denied, 103 Wash. 2d 1034 (1985); 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 & SEIZURE, § 3.3(c).

2.6 Citizen Informants—Victim/Witness Informants: In General

The Aguilar-Spinelli test also applies to the use of information from a citizen informant, such as a victim or witness. Again, multiple hearsay is acceptable, 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) (A 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; the American Express report was considered reliable for reasons analogous to the business records exception to the hearsay rule.). See generally 1 LAFAVE, SEARCH & SEIZURE, § 3.4.

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. However, when 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 must be demonstrated. See 1 LAFAVE, SEARCH & SEIZURE, § 3.4(b), at 730-31.
In other jurisdictions, the veracity of a citizen informant is presumed, and corroboration of the information held unnecessary. See, e.g., Allison v. State, 62 Wis. 2d 14, 21, 214 N.W.2d 437, 441-42, cert. denied, 419 U.S. 1071 (1974). Commentators favor this view if the witnesses had no motive to falsify. See 1 LAFAVE, SEARCH & SEIZURE, § 3.4(a), at 721.

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.) (questioned, People v. Lopez, 163 Cal. App. 3d 602, 209 Cal. Rptr. 575 (1985)). If the burden is not met, the requirements for criminal informants must be shown. See generally 1 LAFAVE, SEARCH & SEIZURE, § 3.4(a).


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 rea-

When a citizen-informant is fully identified to the magistrate, 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." \textit{State v. Northness}, 20 Wash. App. 551, 557, 582 P.2d 546, 549 (1978) (informant gave details of location of marijuana in her own apartment but belonging to a roommate; details sufficient to establish reliability). \textit{See also State v. Stock}, 44 Wash. App. 467, 470, 722 P.2d 1330, 1332 (1986). Consequently, when an affidavit that 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." \textit{Northness}, 20 Wash. App. at 557-58, 582 P.2d at 550 (citations omitted).

Finally, the veracity prong may require a lesser 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." \textit{Northness}, 20 Wash. App. at 555, 582 P.2d at 548 (citations omitted). \textit{See 1 LAFAVE, SEARCH & SEIZURE, § 3.3(e)}, at 674-75.

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. \textit{See 1 LAFAVE, SEARCH & SEIZURE, § 3.4(c)}, at 739-40.

When a citizen can identify a suspect by name or by photograph, the information is sufficient to establish probable cause. The use of photo identification, however, is subject to challenge on certain deficiencies. \textit{Simmons v. United States}, 390 U.S. 377, 384-86, 19 L. Ed. 2d 1247, 1253-54, 88 S. Ct. 967, 971-72
1988] *1988 Search and Seizure* 467

(1968) (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 (finding probable cause for arrest 45 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), *cert. denied*, 393 U.S. 954 (1968); *State v. Kohler*, 70 Wash. 2d 599, 605, 424 P.2d 656, 660 (1967) (finding probable cause when two witnesses provided police with descriptions of vehicle, clothing, and build of suspects, and when probability of two similar cars traveling within limited area of Seattle at 12:30 a.m. was slight), *cert. denied*, 389 U.S. 1038 (1968); *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 robbery victims described suspects, patterns of two crimes similar, and anonymous caller identified vehicle used in narcotic sales by year, color, make, and license number and gave description of suspects), *cert. denied*, 384 U.S. 1013 (1966); *State v. Johnson*, 64 Wash. 2d 613, 615, 393 P.2d 284, 285-86 (1964) (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 sites of crime), *cert. denied*, 370 U.S. 945 (1962); *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 the "Veracity" and "Basis of Knowledge" Prongs**

As with citizen-informants under federal law, 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 difficult, 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, 469 U.S. 221, 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)); but see Commonwealth v. Antobenedetto, 366 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 2 LAFAVE, SEARCH & SEIZURE, § 3.5(b), at 5.

Although determining probable cause on the basis of collective information in an agency is generally 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 2 LAFAVE, SEARCH & SEIZURE, § 3.5(c).
2.8 Information from Anonymous or Unknown Informants: Satisfying the "Veracity" Prong

Information from an anonymous informant may not, by itself, support probable cause. Bantam v. Washington, 163 Wash. 598, 601 P.2d 861, 862 (1981). A named but unknown informant is not presumed reliable. See State v. Stierle, 95 Wash. 2d 43, 48, 621 P.2d 1272, 1275 (1980) (reliability of named but unknown telephone informant not significantly different from anonymous telephone informant). 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." Chatmon, 9 Wash. App. at 748 n.4, 515 P.2d at 535. See generally 1 LAFAVE, SEARCH & SEIZURE, § 3.4(a), at 722-23. An affiant's assertion that an unnamed informant is an "upstanding citizen with no criminal record," however, may not establish probable cause. State v. Franklin, 49 Wash. App. 106, 109, 741 P.2d 83, 85-86 (1987). In Franklin, the officers' opinion and generic recitation was insufficient to raise the requisite inference of credibility.

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. An otherwise proper administrative inspection is not unconstitutional because the ultimate purpose of the regulatory statute pursuant to which the search is done—the deterrent of criminal behavior—is the same as that of penal laws, with the result that the inspection may disclose violations not only of the regulatory statute but also of the penal statutes. New York v. Burger, — U.S. —, 86 L. Ed. 2d 601, 107 S. Ct. 2636 (1987).

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, 226 (1985). See also Seattle v. Mestani, 110 Wash. 2d 1154, — P.2d — (1988).

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, 95 S. Ct. 2574, 2580 (1975). The standard requires that "the police officer . . . be able to point to specific and articulable facts" supporting the suspicion or belief. Terry, 392 U.S. at 21, 20 L. Ed. 2d at 906, 88 S. Ct. at 1880. See also State v. Kennedy, 107 Wash. 2d 1, 726 P.2d 445 (1986).

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 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).

A police officer may seize a weapon observed in the suspect's property when stopping and detaining a suspect to investigate a crime if circumstances give rise to reasonable grounds for believing that the suspect is dangerous and that he may gain access to the weapon. An overt threatening gesture is not a condition precedent to seizure. State v. Perez, 41 Wash. App. 481, 486, 704 P.2d 625, 628 (1985).

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, 86 S. Ct. 1826, 1835 (1966). In addition to establishing probable cause, police must show that the desired evidence will clearly be discovered by the intrusion and that the evidence is important to the government's case. See Winston v. Lee, 470 U.S. 753, 761-62, 84 L. Ed. 2d 662, 670-71, 105 S. Ct. 1611, 1617 (1985); Schmerber, 384 U.S. at 770, 15 L. Ed. 2d at 919, 86 S. Ct. at 1835. Thus, if the facts and circumstances taken together are sufficient to "warrant a man of reasonable caution" to believe the suspect had been drinking, probable cause to suspect that a person's blood sample will provide evidence of criminal activity is established. State v. Komoto, 40 Wash. App. 200, 210, 697 P.2d 1025, 1037, cert. denied, 474 U.S. 1021 (1985).

Even when these requirements have been satisfied, reasonable medical means and equipment must be used. Schmer-
ber, 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 ch. 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 focuses on the interpretation of the fourth amendment's requirements for a valid search warrant and its execution.

Searches and seizures must generally be made pursuant to a warrant. See, e.g., United States v. Ventresca, 380 U.S. 102, 106, 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 insufficient. See infra §§ 3.3(a)-(d). 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 the state seeks a warrant for evidence, it must show cause to believe that the evidence will aid in apprehending or convicting the suspect. Warden, Maryland Penitentiary v. Hayden, 387 U.S. 294, 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, 473, 49 L. Ed. 2d 627, 638, 96 S. Ct. 2737, 2745 (1976).

3.2 Who May Issue Warrants: Neutral and Detached Magistrate Requirements

One aspect of the protection provided by a warrant is the determination of probable cause by a neutral and detached magistrate instead of by a police officer. Johnson v. United States, 333 U.S. 10, 13-14, 92 L. Ed. 436, 440, 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.

In criminal matters, a district court’s territorial jurisdiction is the boundaries of the county. WASH. REV. CODE § 3.66.060 (1987). Thus, upon probable cause, a district court judge may issue a warrant for the search and seizure of controlled substances outside the court’s district, but within the county, without the approval of the prosecutor. State v. Uhthoff, 45 Wash. App. 261, 724 P.2d 1103 (1986); WASH. REV. CODE § 69.50.509 (1987).

A district court may issue a warrant relating to the case even after an information is filed in superior court. State v. Stock, 44 Wash. App. 467, 722 P.2d 1330 (1986); WASH. REV. CODE § 69.50.509 (1987). See generally 2 LAFAVE, SEARCH & SEIZURE, §§ 4.2(a)-(f).

3.2(a) Qualifications of a “Magistrate”

Constitutional provisions, statutes, and court rules identify the requirements for qualification 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 see 2 LAFAVE, SEARCH & SEIZURE, § 4.2(c), at 36 (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, WASH. REV. CODE § 2.20.010 (1987), identified as supreme court, court of appeals, superior court, and district court judges, as well as "all municipal officers authorized to exercise the powers and perform the duties of district judges." WASH. REV. CODE § 2.20.020 (1987). Case law has specifically included court commissioners. See Porter, 88 Wash. 2d at 514, 563 P.2d at 830; but see 2 LAFAVE, SEARCH & SEIZURE, § 4.2(c).

3.2(b) Neutrality

A magistrate who is capable of determining probable cause may nevertheless be disqualified from issuing a warrant for failing to meet the "neutral" requirement. Thus, a state officer who acts as prosecutor or investigator in a case is automatically disqualified from acting as a magistrate in the same case. Coolidge v. New Hampshire, 403 U.S. 443, 450, 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). Similarly, the magistrate's involvement in the execution of a 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, 683, 564 P.2d 841, 943 (1977). 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 & SEIZURE*, § 4.2(b), at 156 n.31 (questioning the reasoning in *Smith*).

Washington has also refused to apply the Coolidge rule of per se disqualification to a judge who issued a search warrant in a case that was before him on special inquiry. *State v. Neslund*, 103 Wash. 2d 79, 88, 690 P.2d 1153, 1158-59 (1984). In Neslund, the judge had been appointed to investigate 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, but based its holding in part on the fact that the warrants were not issued in subsequent court proceedings "arising" from the inquiry. *Id.* at 82-83, 690 P.2d at 1156. *Cf.* WASH. REV. CODE § 10.27.180 (1987) (special inquiry judges disqualified from participating in subsequent court proceedings arising from special inquiry).

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

3.2(c) Burden of Proof

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

3.3 Content of the Warrant

3.3(a) Oath or Affirmation; Multiple Affidavits

The oath or affirmation clause of the fourth amendment requires that the person presenting the supporting affidavit swear to the information the affidavit contains. U.S. CONST. amend. IV. The Washington Supreme Court has upheld a warrant, however, when the affidavit was not sworn to, but was signed in the presence of the magistrate. State v. Douglas, 71 Wash. 2d 303, 309-310, 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 & 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); see also State v. Petty, 48 Wash. App. 615, 740 P.2d 879 (1987); State v. Anderson, 41 Wash. App. 85, 702 P.2d 481 (1985) (evidence must be sufficient to support magistrate's decision that evidence sought is still on the person or premises to be searched), rev'd on other grounds, 107 Wash. 2d 745, 733 P.2d 517 (1987); 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 alleged comprehensive inspection program but failed 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, 367, 693 P.2d 81, 85 (1985). In Cord, the court held that although an affidavit in support of a search warrant failed to state the altitude at which the officer allegedly observed marijuana plants, the affidavit otherwise provided a sufficient basis for the issuing judge to conclude that a crime probably had been committed. But see Cord, 103 Wash. 2d at 371, 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 can thus 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; 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,

[a]ffidavits 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 a person would understand that a violation existed and was continuing at the time of the application.’

Evidence from a prior warrantless search under an exception to general search and seizure rules may be used by the issuing magistrate in determining probable cause. A magistrate may also rely on hearsay statements from a police officer's affidavits. *State v. Chasengnou*, 43 Wash. App. 379, 717 P.2d 288 (1986). See supra § 2.7(b).

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 & SEIZURE, § 4.3(b).

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), overruled on other grounds, *State v. Stroud*, 106 Wash. 2d 144, 720 P.2d 436 (1986). For a discussion of various objections to this procedure, see 2 LAFAVE, SEARCH & SEIZURE, § 4.3(c).

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 a search will be conducted in the wrong location, 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, 694 P.2d 660, 664 (1984), review
denied, 103 Wash. 2d 1034 (1985); State v. Cockrell, 102 Wash. 2d 561, 570, 689 P.2d 32, 37 (1984). Carelessness on the part of the officers executing the warrant does not render the warrant insufficient. Id. at 570, 689 P.2d at 37 (area search revealed marijuana gardens and officers executed the warrant improperly even though defendant’s property was included in the affidavit because officers spotted marijuana growing there). See also State v. Fisher, 96 Wash. 2d 962, 639 P.2d 743, cert. denied, 457 U.S. 1137 (1982).

If a warrant is invalid for failure to specifically describe 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. State v. Halverson, 21 Wash. App. 35, 37, 584 P.2d 408, 409 (1978); see 2 LaFave, Search & Seizure, § 4.6(f).

The initial determination of whether a description is adequate is made with reference 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 attached affidavit; (2) information based on the officer’s personal knowledge of the location or its occupants; and (3) the officer’s personal observations at the time of execution. 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 & SEIZURE, §§ 4.5(a)-(e). 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 are usually identified by a street address. The address is unnecessary, however, if other facts make it clear that a particular place is intended. State v. Trasvina, 16 Wash. App. 519, 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 a legal description of the property. See State v. Cohen, 19 Wash. App. 600, 603, 576 P.2d 933, 935 (1978).

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), review denied, 103 Wash. 2d 1034 (1985).

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, 173 Colo. 315, 478 P.2d 310 (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. *Chisholm*, 7 Wash. App. at 272, 499 P.2d at 81. Another exception, the "community living unit" rule, will generally apply where several people occupy the entire premises in common, but have separate bedrooms. Under the "community living unit" rule, a single warrant describing the entire premises is valid and justifies a search of the entire premises. *State v. Alexander*, 41 Wash. App. 152, 704 P.2d 618 (1985). Additional exceptions to the general rule are outlined in *United States v. Whitten*, 706 F.2d 1000 (9th Cir. 1983). Thus, 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 single entity, if the defendant was in control of the whole premises, or if the entire premises are suspect. *Id.* at 1008. See 2 *LAFAVE, SEARCH & SEIZURE*, § 4.5(b).

Although search warrants for vehicles are uncommon because of the many exceptions allowing warrantless searches, see *infra* § 5.21, such warrants are governed by the same principles discussed above. See *State v. Cohen*, 19 Wash. App. at 604, 576 P.2d at 936; 2 *LAFAVE, SEARCH & SEIZURE*, § 4.5(b).

3.4(c) Particular Searches: Persons

Search warrants may be issued for persons, as well as for places, if there is probable cause to believe that a specific individual has evidence on his or her person. When a search warrant is issued for a person, the general rule requiring particularity applies. *State v. Rollie M.*, 41 Wash. App. 55, 701 P.2d 1123 (1985) (warrant insufficient authorizing search of person found in a general vicinity); *State v. Douglas S.*, 42 Wash. App. 138, 709 P.2d 817 (1985) (warrant insufficient if it does not have a description of person to be searched). See 2 *LAFAVE, SEARCH & SEIZURE*, § 4.5(e).

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 present, 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 sufficient particularity is generally determined without reference to the fact patterns of 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 general 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. United States, 275 U.S. 192, 72 L. Ed. 231, 48 S. Ct. 74 (1927). 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), cert. denied, 466 U.S. 977 (1984); see State v. Weaver, 38 Wash. App. 17, 22, 683 P.2d 1136, 1139 (1984) (although cardboard box bearing defendant's name would not generally be considered "paper," police could seize box because 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 (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). See generally 2 LAFAVE, SEARCH & SEIZURE, §§ 4.6(a)-(f).

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 satisf[ies] 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 mistaken seizure of articles is substantial as, for example, when the articles are personal papers. 2 *LaFave*, SEARCH & SEIZURE, § 4.6(a), at 238-41.

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 & SEIZURE*, § 4.6(d), at 251-54 (*Andresen* should not be read as approval for loose descriptions because the Court was influenced by the fact that the description was as specific as possible.). When a search is for particular contents of documents, the invasion of privacy can be minimized by impounding the documents and then imposing conditions on a further search. See 2 *LAFAVE, SEARCH & SEIZURE*, § 4.6(d), at 253 n.85.

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, 85 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 provide 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).

Circumstances indicating that an individual has taken precautions to ensure privacy, may cause greater scrutiny. In *State v. Butterworth*, 48 Wash. App. 152, 737 P.2d 1297 (1987), the police located the defendant’s residence by requesting his address from the telephone company. The court noted that the listing was unpublished, indicating that the defendant specifi-
cally requested privacy regarding his address and phone number. Since the defendant had taken precautions regarding his privacy, the police were required to obtain a warrant or subpoena prior to seizing the information.

3.6 Execution of the Warrant: Time of Execution

Washington is one of several states that by court rule require that warrants are to 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 (1987) (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 & SEIZURE, § 4.7(a).

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, 461, 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 & SEIZURE, § 4.7(b), at 266-67 nn. 32-34 (constitutionality of a nighttime search depends 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 (3d Cir. 1973) (presence of occupant while search warrant is being executed is neither a common law nor constitutional requirement), cert. denied, 414 U.S. 864 (1973); see also 2 LAFAVE, SEARCH & SEIZURE, § 4.7(c).

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

Absent exigent circumstances, officers executing a warrant must give notice of their authority and purpose prior to 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. 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. Id. 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 enclosure, if, after notice of his office and purpose, he be refused admittance.” Wash. Rev. Code § 10.31.040 (1987). 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 as follows: (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 (1974); State v. Dugger, 12 Wash. App. 74, 78, 528 P.2d 274, 276 (1974). 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 the individual case. See, e.g., Ker v. California, 374 U.S. at 33, 10 L. Ed. 2d at 738, 83 S. Ct. at 1629-30; State v. Myers, 102 Wash. 2d 548, 689 P.2d 38 (1984); see also State v. Lehman, 40 Wash. App. 400, 698 P.2d 606 (1985); see generally 2 LaFave, Search & Seizure, § 4.8(a).

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 & SEIZURE, § 4.8(b), at 274 n.24, 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 evolution 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).

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

Washington 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), and *State v. Huckaby*, 15 Wash. App. 280, 290, 549 P.2d 35, 37 (1976) (when undercover officers gain entry into suspect's home with suspect's consent and for apparent purpose of drug transaction, knock and announce statute inapplicable). *Cf. Lewis v. United States*, 385 U.S. 206, 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). *But see State v. Collier*, 270 So. 2d 451, 453-54 (Fla. Dist. Ct. App. 1972) (undercover officer who leaves gathering at defendants' home that appears to be "pot party" may not return and re-enter home in order to execute search warrant without first providing "due notice of his authority and purpose" within meaning of Florida knock and announce statute, *Fla. Stat. Ann.* § 933.09 (West 1971)). Subsequent to the court's decision in *Collier*, the Florida courts have permitted re-entry without "knock and announce" if there is an implied invitation to return. *See State v. Stephani,*

The Washington knock and announce statute requires notice prior to entry through inner as well as outer doors. WASH. REV. CODE § 10.31.040 (1987); but see 2 LAFAVE, SEARCH & SEIZURE, § 4.8(b) (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) ("In light of the information concerning the number of people at the party, danger of violence, the concern for destruction of the evidence, and the deputy's testimony that someone inside the clubhouse saw [the officers] long before they reached the door," a three or four second wait
after the officers announced their identify 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); *State v. Berlin*, 46 Wash. App. 587, 594, 731 P.2d 548, 552 (1987) (When the wife of the defendant answered the officers' knock but failed to open the door, the officers were justified in opening the door after a 30 second wait, entering and restating their identity and purpose. The fact that the police had been told that the defendant had weapons and a history of violence was not enough to waive compliance with the knock and announce rule, but did bear upon the reasonableness of the length of time that the police waited after announcing themselves.).

Circumstances must reasonably indicate that the occupant has consented to the officer's entry. *State v. Sturgeon*, 46 Wash. App. 181, 730 P.2d 93 (1986) (court held that the knock and announce statute was violated when the police knocked, the defendant shouted "yeah," and the police entered the apartment). In *State v. Lehman*, 40 Wash. App. 400, 698 P.2d 606 (1985), the court rejected the contention that the officers' failure to wait long enough to permit the occupants a reasonable opportunity to grant or deny admission violated the knock and announce rule. The plain clothes officers knocked and a defendant opened the door approximately 12 inches. The officers displayed their badges and advised the defendant that they had a warrant to search the house. One officer looked through the open door, and saw two men sitting in the living room. Without waiting for the defendant to grant or deny permission to enter, the officers entered the house and conducted the search. The Lehman court distinguished *State v. Coyle* by noting that unlike Coyle, there was an announcement by the police. It was not necessary that all occupants be aware of the

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).


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 & SEIZE, § 4.8(f).

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.

Police need not comply with the knock and announce requirement but may instead enter immediately and with force

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 be easily destroyed is insufficient; 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 strictly 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 type of exigent circumstance. State v. Reid, 38 Wash. App. 203, 687 P.2d 861 (1984); State v. Carson, 21 Wash. App. 318, 322, 584 P.2d 990, 992 (1978). A mere good faith concern for safety, however, is not sufficient; police must know from prior information or from direct observation that the suspect both keeps weapons and has a propensity to use them. State v. Jeter, 30 Wash. App. 360, 363, 634 P.2d 312, 314 (1981) (no exigent circumstances when officer had prior knowledge only of defendant's possession of gun and not of any propensity to use it to resist arrest); see State v. Allun, 40 Wash. App. 27, 696 P.2d 45 (1985) (police knew from undercover agent that
defendant had several firearms in his dwelling and had a strong propensity to use them; hence, the police were justified in executing a search warrant without complying with the knock and announce rule); Dugger, 12 Wash. App. at 71, 528 P.2d at 278 (1974); People v. Dumas, 9 Cal. 3d 871, 879, 512 P.2d 1208, 1214, 109 Cal. Rptr. 304, 310 (1973) (information that defendant habitually answered door armed with firearm constituted exigent circumstances); 2 LAFAVE, SEARCH & SEIZURE, § 4.8(e).

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

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

Police officers are not required to comply with the knock and announce rule if they have obtained written consent from an owner or lessee to enter and search the premises. State v. Chichester, 48 Wash. App. 257, 738 P.2d 329 (1987). Since the resulting search is warrantless, however, the police have the burden of establishing the validity of the warrantless search based upon consent. In Chichester, the officer “burst in with gun drawn” raising the concern of violence. Id. at 260, 738 P.2d at 331. The court felt that because the defendant did not himself consent to the search, and because the officer failed to “knock and announce,” the state must prove exigent circumstances to justify the manner in which the officers entered the house. In Chichester, the defendant’s wife had told the police to expect a fight and the officer had heard a noise and movement inside after the knock. Danger to the arresting officer is an exigent circumstance, thus justifying the entry. See generally 2 LAFAVE, SEARCH & SEIZURE, §§ 4.8(d)-(g).
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. See State v. Douglas S., 42 Wash. App. 138, 709 P.2d 817 (1985) (frisk of juvenile entering residence not justified when there were no reasonable grounds to believe that the juvenile was armed, and there was no showing that the juvenile had dominion and control over the objects specified in warrant since the father had admitted that the marijuana plants found on the premises were his). See 2 LAFAVE, SEARCH & SEIZURE, § 4.9(b).

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, 636 (1978). Second, a search may be conducted incident to an arrest. State v. Cottrell, 86 Wash. 2d 130, 542 P.2d 771 (1975); see infra § 5.1. In Cottrell, the warrant authorized a search of defendant's residence or "person ... 'if found thereon.'" Id. at 131, 542 P.2d at 772. The court upheld the search of defendant's person once the officer had probable cause to place defendant under control as defendant exited a car parked in front of the residence. Id.

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 person in two situations. First, a person not named in the warrant but present on the premises may be searched if the police "have reasonable cause to believe [that the person] has
the articles for which the search is instituted upon his person." \( \text{State v. Halverson, 21 Wash. App. 35, 38, 584 P.2d 408, 410 (1978)} \) (citations omitted). "Reasonable cause" requires that the person engage in some type of suspicious activity. \( \text{Id.} \) 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. \( \text{Id.} \) But police were not justified in searching an occupant's purse when the occupant gave no evidence of suspicious behavior. \( \text{State v. Worth, 37 Wash. App. 889, 893, 683 P.2d 622, 624 (1984). See generally 2 LAFAVE, SEARCH & SEIZURE, § 4.9(c), at 143-47.} \)

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. \( \text{See 2 LAFAVE, SEARCH & SEIZURE, § 4.9(c), at 295. 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. \( \text{Id.} \) at 295 n.29.} \)

Second, police may conduct a limited search for weapons to protect themselves during the execution of the warrant. \( \text{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 408, 410 (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 must, however, have a reasonable suspicion that the person searched is armed. \( \text{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 "after satisfying himself that the 'bulge' [wallet] was not a weapon"). Cf. \( \text{Terry v. Ohio, 392 U.S. 1, 10, 20 L. Ed. 2d 889, 899, 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 as compared with \( \text{Terry} \) stops because the encounter in the search situation is} \)

more lengthy than that in a Terry stop. See 2 LAFAVE, SEARCH & SEIZURE, § 4.9(d).

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 & SEIZURE, §§ 4.9(d)-(e).

3.9 Permissible Scope and Intensity of Search

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

The permissible intensity of a search is governed by the nature of the items to be seized. 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). See State v. Anderson, 41 Wash. App. 85, 702 P.2d 481 (1985) (evidence was admissible where the warrant was to search for clothing used in a robbery, thus extending to the entire residence where clothing might be found—including inside a garbage can sized commercial vacuum cleaner), rev'd on other grounds, 107 Wash. 2d 745, 733 P.2d 517 (1987). 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), cert. denied, 393 U.S. 1102 (1969).

For a discussion of the scope of a warrantless police search following a private search by a private party, see infra § 7.5, and following an administrative search see infra § 6.4(c).

3.9(a) Area

A search may extend to the entire area covered by the warrant’s description. See generally State v. Cottrell, 12 Wash. App. 640, 644, 532 P.2d 644, 647 (1975), rev’d on other grounds, 86 Wash. 2d 130, 542 P.2d 771 (1985). Police may enter areas not explicitly named in the warrant when such entry is necessary to execute the warrant. Dalia v. United States, 441 U.S. 238, 257, 60 L. Ed. 2d 177, 193, 99 S. Ct. 1682, 1693 (1979) (warrant explicitly authorizing planting hidden microphone implicitly authorized covert entry onto premises).

On the other hand, authority to search a vehicle does not include authority to break into a garage where the vehicle was parked when the officers knew at the time they applied for the warrant that the vehicle was in the garage, and they could have included the garage in the warrant. People v. Sciacca, 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 & SEIZURE, § 4.10(a), at 136.

3.9(b) Personal Effects

Personal effects found on the premises and belonging to the occupant may be searched if the effects can reasonably be expected to contain the described items. State v. Worth, 37 Wash. App. 889, 892, 683 P.2d 622, 624 (1984). Those effects that the police know belong to other occupants, however, may
not ordinarily 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. Id.; cf. State v. Biggs, 16 Wash. App. 221, 556 P.2d 247 (1976). “A narrow focus on whether a person is holding or wearing a personal item would tend to undercut the purpose of the Fourth Amendment and leave vulnerable readily recognizable effects, such as [a] purse, which an individual has under his control and seeks to preserve as private.” Worth, 37 Wash. App. at 893, 683 P.2d at 625; cf. 2 LAFAVE, SEARCH & SEIZURE, § 4.10(b), at 318-22 (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).

For a case involving abandoned personal effects, see United States v. Oswald, 783 F.2d 663 (6th Cir. 1986) (The defendant abandoned briefcase containing cocaine in locked trunk of automobile and made no effort to recover it or notify authorities. Held, such abandonment carries no expectation of privacy and it makes no difference that the defendant may have had some hope of regaining possession in the future.). See 1 LAFAVE, SEARCH & SEIZURE, § 2.6(b).

The Supreme Court has recently held that there is no expectation of privacy in garbage left beyond the curtilage of the home. California v. Greenwood, — U.S. — L. Ed. 2d —, 108 S. Ct. 1625 (1988). See also United States v. De La Esperilla, 781 F.2d 1432 (9th Cir. 1986) (trash container placed for curbside collection); Cooks v. State, 699 P.2d 653 (Okla. Ct.
App. 1985) (trash can at front curb). See LAFAVE, SEARCH & SEIZURE, § 2.6(c). See also infra § 1.3(g).

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 & SEIZURE, § 4.10(c) (suggesting that doctrine at least should be limited to vehicles belonging to the occupant); cf. infra § 5.1 (search incident to arrest); People v. Sciaccia, 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.

The plain view doctrine requires that (1) the officers have prior justification for the intrusion, (2) the incriminating evidence be discovered inadvertently, and (3) the officers must know immediately that they have incriminating evidence before them. State v. Anderson, 41 Wash. App. 85, 702 P.2d 481 (1985), rev'd on other grounds, 107 Wash. 2d 745, 733 P.2d 517 (1987); see also State v. Terrovona, 105 Wash. 2d 652, 716 P.2d 295 (1986) (evidence was in plain view, and significance of the material to the investigation was readily apparent). The officers need not be certain that the material is incriminating—it is sufficient if the officers have probable cause to believe the material is incriminating. State v. Gonzales, 46 Wash. App. 388, 731 P.2d 1101 (1986) (incriminating nature of pill bottles sufficient). When the elements of the plain view doctrine are met, there is no additional requirement of exigent circumstances to justify a warrantless seizure. State v. Bell, 43 Wash. App. 319, 716 P.2d 973 (1986), aff'd, 108 Wash. 2d 193, 737 P.2d 254 (1987).

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. The requirement is satisfied by the presence of another police officer. *State v. Wraspur*, 20 Wash. App. 626, 628, 581 P.2d 182, 184 (1978).

Washington follows the majority rule that defects relating to the return of a search warrant are ministerial and do not compel invalidation of the warrant, absent a showing of prejudice. *State v. Smith*, 15 Wash. App. 716, 719, 552 P.2d 1059, 1062 (1976); but see 2 LAFAVE, SEARCH & SEIZURE, § 4.12(c) (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 is generally entitled to examine an affidavit in order to challenge whether the warrant was issued on probable cause, the court may excise portions of the affidavit that identify a confidential or unnamed informant to protect the state's interest in maintaining the confidentiality of such informants. *Franks v. Delaware*, 438 U.S. 154, 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, review denied, 94 Wash. 2d 1025 (1980), *cert. denied*, 451 U.S. 914 (1981). On the other hand, "fundamental fairness" may require the disclosure of an informant's identity when the informant's potential testimony

When a defendant makes allegations that identify a secret informant and cast reasonable doubt on the veracity of a material representation included in the affidavit used to obtain a search warrant, and probable cause to search is not otherwise established, the trial court should conduct an in camera hearing to determine whether the defendant's identification of the informant is correct and whether the affiant truthfully reported the facts stated by the informant. State v. Casal, 103 Wash. 2d 812, 699 P.2d 1234 (1985). See also State v. Wolken, 103 Wash. 2d 823, 700 P.2d 319 (1985) (defendant must make a threshold substantial showing of falsehood). It is within the sound discretion of the trial court to order an in camera hearing. Casal, 103 Wash. 2d at 820, 699 P.2d at 1239.

To determine whether an accused's interest in learning the identity of an informant outweighs the public interest in protecting the informant's anonymity and the flow of information, a court should consider all the particular circumstances of each case, including the crime charged, the possible defenses, and the materiality of the informant's testimony as to guilt or innocence at an in camera hearing. The disclosure decision is within the trial court's discretion. State v. Uhthoff, 45 Wash. App. 261, 724 P.2d 1103, review denied, 107 Wash. 2d 1017 (1986). If a trial court's questioning of a secret informant at an in camera hearing does not refute the existence of probable cause to search, but does give rise to a threshold substantial showing that material information set forth in the affidavit was false, the court should hold an evidentiary hearing at which the informant's identity should be disclosed to determine the veracity of the information. Casal, 103 Wash. 2d at 822, 699 P.2d at 1240. See also Wolken, 103 Wash. 2d at 828-29, 700 P.2d at 322. Cf. State v. Fredrick, 45 Wash. App. 916, 729 P.2d 56 (1986) (in camera hearing not required when defendant's reasons for seeking an informant's testimony are speculative).
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 must first make a substantial showing that a false statement in the affidavit (1) was either made 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 rather than conclusory assertions.

A criminal defendant may not undertake discovery to enable him to challenge statements set forth in an affidavit in support of a facially valid search warrant, before making a preliminary showing that the affiant, knowingly, intentionally, or with reckless disregard for the truth included in his affidavit a false statement that was necessary to the probable cause determination. State v. Blackshear, 44 Wash. App. 587, 723 P.2d 15 (1986). Once the defendant has made this preliminary showing, he or she is entitled to a full hearing on the issue. State v. Thetford, 109 Wash. 2d 392, 745 P.2d 496 (1987) (court must hold an evidentiary hearing to determine the veracity of the statements even when the statements are made by a known informant who is so involved with and controlled by the police that he acquires the status of a de facto police officer).

There is no right to an evidentiary hearing if the unchallenged affidavit information is sufficient to establish probable cause. State v. Lodge, 42 Wash. App. 380, 385, 711 P.2d 1078, 1082 (1985). 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, the misrepresentations must be stricken from the affidavit; if in the absence of the stricken statements probable cause does not exist, the warrant is void. Id.; State v. Coates, 107 Wash. 2d 882, 735 P.2d 64 (1987); State v. Ludvik, 40 Wash. App. 257, 698 P.2d 1064 (1985). 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 made either intentionally or with reckless disregard and that the omitted information would have negated probable cause. Cord, 103 Wash. 2d at 367, 693 P.2d at 87; 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. Id. at 483, 37 L. Ed. 2d at 734, 93 S. Ct. at 2795.

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), cert. denied, 416 U.S. 939 (1974). Cf. Maryland v. Macon, 472 U.S. 463, 472-77, 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 469, 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). See 2 LAFAVE, SEARCH & SEIZURE, § 4.1(c).

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, 96 L. Ed. 183, 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 secur-
ity of such magnitude that the intrusion may be unreasonable even if likely to produce evidence of a crime.” Winston v. Lee, 470 U.S. 753, 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 rather than 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.

Id. at 712, 675 P.2d at 223 (citation omitted). See also State v. Komoto, 40 Wash. App. 200, 208, 697 P.2d 1025, 1031 (probable cause established if person appears intoxicated and intoxication is an element of the crime for which the suspect is arrested), review denied, 104 Wash. 2d 1009, cert. denied, 474 U.S. 1021 (1985). Washington has upheld mandatory blood tests of putative fathers if full adversary hearings have first 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) and 5.18(a) (warrantless intrusions into the body). Rochin’s “shocks the conscience” standard to exclude evidence obtained by pumping a suspect’s stomach has been called into doubt by the Seventh Circuit. In Lester v. City of Chicago, 830 F.2d 706 (7th Cir. 1987), the court rejected the use of the due process “shocks the conscience” standard of Rochin’s in a case involving excessive force in arrest. Instead, the court held that
the fourth amendment's objective reasonableness standard should apply.

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. 531, 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 16 hour confinement). See generally infra §§ 6.2 (prisons), 6.3 (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 & SEIZURE, § 4.1(d); see also Winston v. Lee, 470 U.S. at 763, 84 L. Ed. 2d at 670-71, 105 S. Ct. at 1618.

3.13(c) Warrants Directed at Non-Suspects

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

4.0 Arrest: Introduction

This chapter deals with principles that are unique to seizures of the person. Related issues are discussed infra § 5.1 (search incident to arrest); supra ch. 2 (probable cause); and supra § 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, the admissibility of evidence derived from the arrest, and the consequent search. 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 2 LAFAVE, SEARCH & SEIZURE, § 5.1(b), at 225-33. When a warrantless arrest has occurred, however, the defendant is entitled to a prompt judicial determination of probable cause. Gerstein v. Pugh, 420 U.S. 103, 107, 43 L. Ed. 2d 54, 95 S. Ct. 854 (1975); see infra § 4.4(c).


Under the fourth amendment, police who make a warrantless arrest outside an arrestee's home may then accompany the arrestee into his or her home even if the arrestee, with the
officer's consent, enters the home for a purpose such as obtaining identification. See Washington v. Chrisman, 455 U.S. 1, 6-7, 70 L. Ed. 2d 778, 102 S. Ct. 812, 817 (1982) (risk of danger to officer and possibility of confederates' escape justified police officer accompanying arrested person into 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 may, in all circumstances, 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 escape is a strong possibility. Id. at 821-22, 676 P.2d at 424 (officer's entry into 11th floor dormitory room of student arrested for misdemeanor unlawful when circumstances indicated no likelihood of escape, destruction of evidence, or danger to officer). A police officer may accompany an arrestee into his or her residence without a warrant if the officer knows of specific, articulable facts that indicate a threat to the officer's safety. State v. Wood, 45 Wash. App. 299, 308, 725 P.2d 435, 440 (officer executing an arrest warrant for a felony parole violation had sufficient reason to accompany the arrestee into residence for security purposes), review denied, 107 Wash. 2d 1017 (1986); State v. Nelson, 47 Wash. App. 157, 161, 734 P.2d 516, 518-19 (1987) (fact that the arrestee was a suspected drug dealer, and that police officer's experience indicated that drug dealers frequently carried weapons, and that officers serving warrant were warned to be cautious, presented sufficient facts to reasonably justify officers' accompaniment of arrestee into his home because of concern for their safety, despite fact that the arrest was made for a different and minor violation).

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

4.2 Arrests Without Warrants: Felony versus Misdemeanor Arrests

4.2(a) Felony Arrest


4.2(b) Misdemeanor Arrest

The common law rule for misdemeanor arrests requires that a warrant be procured unless a breach of peace is committed in the officer’s presence. 2 *LaFave, Search & Seizure*, § 5.1(b), at 396; *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 states that require misdemeanor warrants have held that a statutory—as opposed to constitutional—violation is not grounds for the suppression of evidence obtained as a result of the arrest. *See, e.g.*, *State v. Eubanks*, 283 N.C. 556, 560, 196 S.E.2d 706, 708 (1973).

Washington law permits an officer to make a warrantless misdemeanor arrest only when the offense (1) is committed in the officers presence, (2) involves physical harm or the threat of physical harm to persons or property, (3) is for possession of marijuana, or (4) is for one of a number of specified traffic offenses. *Wash. Rev. Code* § 10.31.100 (1987). *Cf. 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; 645-55, 577 P.2d 147, 149-50 (1978) (officer may make lawful misdemeanor arrest for
offense committed four hours earlier when offense involves physical harm to property).

The "in the presence" requirement of WASH. REV. CODE § 10.31.100 (1987) 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). The misdemeanor offense of possessing or consuming alcohol by a person under 21 years of age (WASH. REV. CODE § 66.44.270) is not committed in the police officer's presence if the officer does not witness the person's ingestion of the alcohol, but only senses symptoms indicating that the person has alcohol or other drugs in his system. State v. Hornaday, 105 Wash. 2d 120, 128-29, 713 P.2d 71, 76-77 (1986) (the terms "consumed" and "possession" in WASH. REV. CODE § 66.44.270 should be strictly interpreted in light of the exception in WASH. REV. CODE § 10.31.100(1) allowing the warrantless arrest for a misdemeanor involving the "use" or "possession" of cannabis). See also United States v. Miller, 589 F.2d 1117, 1128 (1st Cir. 1978), cert. denied, 440 U.S. 958 (1979); State v. Greene, 75 Wash. 2d 519, 521, 451 P.2d 926, 928 (1969). See generally 2 LAFAVE, SEARCH & SEIZURE, § 5.1(c).

4.3 Arrest with Warrants

The principles governing the procurement and execution of search warrants also apply to arrest warrants. See supra ch. 3; CRR 2.2; WASH. REV. CODE §§ 10.31.030-040 (1987). Thus, an invalid warrant will not support an arrest. Whitely v. Warden, 401 U.S. 560, 568-69, 28 L. Ed. 2d 306, 313, 91 S. Ct. 1031, 1037 (1971); see 2 LAFAVE, SEARCH & SEIZURE, § 5.1(g).
A seizure is lawful if police have reasonably articulable grounds to believe that the suspect is the intended arrestee named in the warrant. If doubt arises as to the identity, the officer is expected to immediately take reasonable steps to confirm or deny whether the warrant was applicable to the person held. The initial arrest, however, must be based on more than the individuals similarity to the general physical description set forth in the warrant. State v. Smith, 102 Wash. 2d 449, 688 P.2d 146 (1985) (applying test articulated in Sanders v. United States, 339 A.2d 373, 379 (D.C. App. 1975), court found seizure of "chako sticks" to be unlawful). See 2 LAFAVE, SEARCH & SEIZURE, § 5.1(a).

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. 1, 11, 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 (1987) ("If after notice of the intention to arrest the defendant, he either flee or forcibly resist (sic), the officer may use all necessary means to effect the arrest."); WASH. REV. CODE § 9A.16.040 (1987). In a Washington case decided before Tennessee v. Garner, the court upheld the use of a chokehold to prevent destruction of evidence even though the officers did not fear harm to themselves or to the public. 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 of fourth amendment rights; defendant was capable of breathing when chokehold was applied). Cf. infra §§ 5.2(a) and 5.18(a). In a recent amendment to WASH. REV. CODE § 9A.16.040 (1987), the legis-
lature specifically limited the use of deadly force under WASH. REV. CODE § 9A.16.040 (1)(c) to instances in which the officer has "probable cause to believe that the suspect, if not apprehended, poses a threat of serious physical harm to the officer . . . or others." WASH. REV. CODE § 9A.16.040(2) (1987). The use of deadly force by a public officer is justified "when necessary . . . to overcome actual resistance to the execution of the legal process . . . or in the discharge of a legal duty." WASH. REV. CODE § 9A.16.040(b) (1987). In addition, deadly force is justified when either a public officer or a

person acting under his command and in the officers aid . . .

[t]o arrest or apprehend a person who the officer reasonably believes has committed, has attempted to commit, is committing, or is attempting to commit a felony; or . . . [t]o prevent the escape . . . [or to] retak[e] a person who escapes from a [federal or state correctional] facility; or . . . [t]o prevent the escape of a person from county or city jail . . . if the person has been arrested for, charged with, or convicted of a felony; or to lawfully suppress a riot if the actor is armed with a deadly weapon.

WASH. REV. CODE § 9A.16.040(1)(c) (1987). In construing a prior statute, the Washington Supreme Court held that deadly force may be used even when a felony has not in fact occurred 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), cert. denied, 414 U.S. 832 (1973). In Reese, the court stated that "[g]reat caution must be exercised by an officer in the use of deadly force and it must be resorted to by an officer only when all other reasonable efforts to apprehend a person fleeing from a lawful arrest for a felony have failed." Id. at 382-83, 503 P.2d at 71 (emphasis original). In light of Tennessee v. Garner, and recent amendments to WASH. REV. CODE § 10.31.050 (1987), the officer will now be required to show probable, rather than merely reasonable, cause.

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 another. See generally 2 LAFAVE, SEARCH & SEIZURE, § 5.1(e).

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), cert. denied, 370 U.S. 945 (1962).

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 & 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. 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 & SEIZURE, § 5.1(h).

When civil as opposed to criminal proceedings are involved, custodial arrests may be improper. The Washington Supreme Court has held unconstitutional a statute authorizing the custodial arrest of any person against whom a paternity complaint is filed. 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 & SEIZURE, § 5.1(h), at 434-35.

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 627, 528 (1978); see WASH. REV. CODE § 46.64.015 (1987); cf. 2 LAFAVE, SEARCH & SEIZURE, § 5.2(e). 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 (1987) (police may detain suspect who refuses to sign a promise to appear in court).

A police officer may make a custodial arrest for a traffic violation when the violation is a crime, rather than merely a traffic infraction, or when the circumstances surrounding the arrest dictate transferring the violator to another location for completion of the arrest process. State v. LaTourette, 49 Wash. App. 119, 125, 741 P.2d 1033, 1036, review denied, 109 Wash. 2d 1025 (1988) (officers' decision to move arrestee to another location to complete defendants' arrest for reckless driving was proper when hostile crowd gathered in crowded parking lot). See also Welsh v. Wisconsin, 466 U.S. 740, 756-64, 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); State v. McIntosh, 42 Wash. App. 579, 586, 712 P.2d 319, 321
(fact that arrestee for misdemeanor traffic violation had no identification, did not claim to own the vehicle he was driving, and related a suspicious account of his activities, justified a reasonable assumption that arrestee would not respond to a citation if issued), review denied, 105 Wash. 2d 1015 (1986).

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 § 2.9(b).

Once an officer possesses a reasonable suspicion, he or she may forcibly stop the suspect, but the stop must be a more limited intrusion than an arrest. 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 regardless of how substantial the public's interest is. 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. 531, 87 L. Ed. 2d 381, 105 S. Ct. 3304 (1985) (special governmental interest in detaining smugglers at bor-
der justifies holding suspect 16 hours based on reasonable sus-
picion of transporting contraband); see infra § 6.3.

Reasonable suspicion justifying an investigatory stop may
ripen into probable cause to arrest if the totality of the circum-
stances would lead a reasonably cautious and prudent police
officer with the arresting officer's experience to believe that
the suspect had committed a crime. State v. McIntosh, 42 Wash.
App. 579, 583-84, 712 P.2d 323, 325 (suspects' inability to give
rational account of appearance and presence in a high burglary
area late at night, absence of identification, and presence of
what appeared to be burglar's tools gave rise to probable cause
to arrest), review denied, 105 Wash. 2d 1015 (1986). A temp-
orary seizure of a suspect that falls short of an arrest does not
require that the officer give the suspect Miranda warnings
until the police officer's suspicion of criminal activity ripens
769, 777, 727 P.2d 676, 682 (1986); see also State v. Marshall, 47
Wash. App. 322, 324-25, 737 P.2d 265, 267 (1987); State v. Cam-
Terry stops are permitted both to prevent ongoing or
future criminal activity and to investigate completed crimes.
United States v. Hensley, 469 U.S. 221, 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 & SEIZURE,
§§ 9.1(a)-(e).

4.6 Satisfying the Reasonable Suspicion Standard

4.6(a) Factual Basis and Individualized Suspicion

The reasonable suspicion standard requires that the
officer's belief be based on objective facts. Brown v. Texas, 443
U.S. 47, 51, 61 L. Ed. 2d 357, 362, 99 S. Ct. 2637, 2641 (1979);
The facts must be both "specific and articulable." An "inartic-
ulate hunch" is insufficient. Terry v. Ohio, 392 U.S. 1, 21-22, 20
L. Ed. 2d 889, 906, 88 S. Ct. 1868, 1880 (1968); State v. Thomp-
son, 93 Wash. 2d 838, 842, 613 P.2d 525, 527 (1980). See Florida
v. Rodriguez, 469 U.S. 1, 83 L. Ed. 2d 165, 105 S. Ct. 308 (1984);
United States v. Cortez, 449 U.S. 411, 422, 66 L. Ed. 2d 621, 629,
101 S. Ct. 690, 695 (1980). An officer's ability, as a result of his
or her experience, to receive meaning in what, to the ordinary citizen, would appear innocent conduct may make a suspicion reasonable. See United States v. Brignoni-Ponce, 422 U.S. 873, 884-85, 45 L. Ed. 2d 607, 619, 95 S. Ct. 2574, 2582 (1975).

Individualized suspicion is generally required for a Terry stop. Brown v. Texas, 443 U.S. 47, 51, 61 L. Ed. 2d 357, 362, 99 S. Ct. 2637, 2640-41, (1979); State v. Kennedy, 38 Wash. App. 41, 684 P.2d 1326 (1984), aff'd, 107 Wash. 2d 1, 726 P.2d 445 (1986). However, several exceptions exist. Thus, 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. When individualized suspicion is lacking, however, 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); Seattle v. Messiani, 110 Wash. 2d 454, — P.2d — (1988). 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). See generally 3 LAFAVE, SEARCH & SEIZURE, § 9.3(c).

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 "indicia of reliability." Adams, 407 U.S. at 147, 32 L. Ed. 2d at 617, 92 S. Ct. at 1924 (informant was known personally to officer and had provided information in past). See also State v. Kennedy, 107 Wash. 2d 1, 7, 726 P.2d 445, 449 (1986) (prior reliability of informant, plus officer's observation corroborating parts of informant's tip, i.e., that suspect drove car of certain color and regularly bought drugs at certain residence, were sufficient indicia of reliability to justify investigative stop). Potential danger to the public is a factor that bears on the reasonableness of a police officer's temporary investiga-
tory detention of the suspect. State v. Franklin, 41 Wash. App. 409, 413, 704 P.2d 666, 669 (1985) (an anonymous informant’s observation of a person displaying a gun in a public restroom, together with the police officer’s verification of the informant’s report of the person’s attire and location justified an investigatory stop of the person). For a summary of cases interpreting Adams, see 3 LaFave, Search & Seizure, § 9.3(e).

Police may make a Terry stop on the basis of information provided by other divisions or agencies. United States v. Hensley, 469 U.S. 221, 83 L. Ed. 2d 604, 105 S. Ct. 675 (1985). Thus, an investigatory stop may be based on information regarding a completed crime that was provided by other police agencies so long as the length and the intrusiveness of the detention do not exceed that which would have been effected by the police agency providing the information. State v. Dorsey, 40 Wash. App. 459, 470, 698 P.2d 1109, 1115-16, review denied, 104 Wash. 2d 1010 (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. Hensley, 469 U.S. at 231, 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, 1275 (1980). No reliability may be inferred from an anonymous informant or from a named but unknown telephone informant, nor may the basis for the informant’s knowledge be inferred from conclusory allegations. Id. 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, cert. denied, 423 U.S. 891 (1975). See also State v. Kennedy, 38 Wash. App. 41, 684 P.2d 1326 (1984), aff’d, 107 Wash. 2d 1, 726 P.2d 445 (1986); State v. Sykes, 27 Wash. App. 111, 115-16, 615 P.2d 1345, 1347-48 (1980); State v. McCord, 19 Wash. App. 250, 254, 576 P.2d 892, 895 (1978).

An informant’s tip may be sufficiently reliable to support a stop even when it would not support an arrest. See 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 because circumstances do not indicate probable cause the subsequent search is invalidated).

The Washington Supreme Court has suggested that less reliability is required for a stop when the tip involves a serious crime, than that required in other circumstances. State v. Lesnick, 84 Wash. 2d 940, 944-45, 530 P.2d 243, 246 (1975), cert. denied, 423 U.S. 891 (1975); see also Sieler, 95 Wash. 2d at 50, 621 P.2d at 1276. See 3 LAFAVE, SEARCH & SEIZURE, § 9.3(e), at 486, 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. 221, 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 should be limited to investigations of serious offenses, see Adams v. Williams, 407 U.S. at 151-53, 32 L. Ed. 2d at 620-21, 92 S. Ct. at 1926-27 (Brennan, J., dissenting); 3 LAFAVE, SEARCH & SEIZURE, § 9.2(c); 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

The mere fact that a suspect is in a high crime area will not justify a stop. Brown v. Texas, 443 U.S. 47, 52, 61 L. Ed. 2d 357, 362-63, 99 S. Ct. 2637, 2641 (1979); State v. Larson, 93 Wash. 2d 638, 641, 611 P.2d 771, 774 (1980). Cf. State v. Belanger, 36 Wash. App. 818, 819-21, 677 P.2d 781, 782-83 (1984) (officer acquired a well-founded suspicion of criminal conduct when he observed individual walking in high crime area in early morning, the individual gave unsatisfactory responses to the officer's questions after voluntarily engaging in conversation with the officer, and the officer observed guns, including one with a
pawnshop tag). A person leaving a crime scene when police arrive is not the proper subject of a stop in the absence of other circumstances. Brown, 443 U.S. at 51, 61 L. Ed. 2d at 360, 99 S. Ct. at 2639; State v. Thompson, 93 Wash. 2d 838, 841-42, 613 P.2d 525, 527 (1980). Similarly, officers may not stop an individual because the individual is in proximity to others who are suspected of criminal activity. Thompson, 93 Wash. 2d at 841, 613 P.2d at 517; Larson, 93 Wash. 2d at 642, 611 P.2d at 774; see infra § 4.7(b). But cf. Michigan v. Summers, 452 U.S. 692, 705, 69 L. Ed. 2d 340, 351, 101 S. Ct. 2587, 2595-96 (1981) (valid search warrant for residence allows detention of occupants during search). See generally 3 LAFAVE, SEARCH & SEIZURE, §§ 9.3 (c), (d), and (f) (discussing and evaluating state and federal case law on the common Terry stop situations).

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).

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).

A valid stop must be limited as to length, movement of the suspect, and investigative techniques employed. See Florida v. Royer, 460 U.S. 491, 500, 75 L. Ed. 2d 299, 238, 103 S. Ct. 1319, 1325 (1983); State v. Williams, 102 Wash. 2d 733, 689 P.2d 1065 (1984). See generally 3 LAFAVE, SEARCH & SEIZURE, § 9.2(f). Generally, the level of suspicion required for an investigative stop of a pedestrian is the same as that required for an investigatory stop of a vehicle. State v. Kennedy, 107 Wash. 2d 1, 6, 726 P.2d 445, 448 (1986).

The Supreme Court has declined to set an absolute limit on the permissible duration of a Terry stop in terms of minutes or hours. The duration of a stop is evaluated in terms of whether "the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the [suspect]." United States v. Sharpe, 470 U.S. 675, 677, 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 . . ."). Detainment of a suspect to preserve the "status quo" while police investigate suspicious circumstances justifying an investigatory stop, may not exceed the scope of a Terry stop. State v. Mercer, 45 Wash. App. 769, 776-77, 727 P.2d 676, 681-82 (1986) (when officer's suspicion was not dispelled by initial answers, officer had suspect wait 20 minutes in front of officer's car headlights until a more
experienced officer arrived); *State v. Moon*, 45 Wash. App. 692, 695, 726 P.2d 1263, 1265 (1986) (following consensual entry into suspect’s motel room, officer detained suspect in room approximately 20 minutes while robbery victim was brought to room for identification). 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 677, 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 in all respects, not merely duration. See *Dunaway v. New York*, 442 U.S. 200, 60 L. Ed. 2d 824, 99 S. Ct. 2248 (1979). Thus, for example, police may not transport a nonconsenting suspect in a patrol car to the police station and subject the suspect to custodial interrogation based only on a reasonable suspicion. *Id.* at 212, 60 L. Ed. 2d at 836, 99 S. Ct. at 2256; see *Hayes v. Florida*, 470 U.S. 811, 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), cert. denied, — U.S. —, 107 S. Ct. 119 (1986); *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); *State v. Gonzales*, 46 Wash. App. 388, 396, 731 P.2d 1101, 1107 (1986) (handcuffing and transporting suspect to a police station before probable cause to arrest arises, i.e., before police have knowledge that a crime has been committed, may constitute an illegal arrest under the fourth amendment and article I, section 7 of the Washington Constitution). But when, as a result of a radio call summoning the investigating officers to an apparently unrelated crime scene, a reasonable suspicion was sufficient to justify the officers transportation of the suspect with them. *State v. Sweet*, 36 Wash. App. 337, 675 P.2d 1236 (1984), review denied, 107 Wash. 2d 1001 (1986). Cf. *State v. Byers*, 85 Wash. 2d 783, 787, 539 P.2d 833, 836 (1975) (transportation to crime scene).

The transportation of a suspect for a short distance to obtain identification, is within the permissible scope of a *Terry* stop when the police have knowledge of a reported crime. The search may not be proper when there is a mere observation of

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. 783, 690 P.2d 591 (1984).

Other Washington cases involving Terry stops include: *State v. Thornton*, 41 Wash. App. 506, 512, 705 P.2d 271, 275 (officer who had reasonable suspicion that suspects were fleeing an armed robbery could properly stop suspects and order them out of car at gunpoint without having probable cause for arrest), review denied, 104 Wash. 2d 1022 (1985); *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

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, 89 S. Ct. 1394, 1397 (1969), cert. denied, 409 U.S. 855 (1972); *State v. White*, 97 Wash. 2d 92, 105-06, 640 P.2d 1061, 1069 (1982). Furthermore, a suspect's refusal to answer the investigating officer's questions cannot provide the basis for an arrest. *Id.* 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); see also *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., id. 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. See generally 3 LaFave, Search & Seizure, § 9.2(f). 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, 30 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 may then be undertaken if the officer reasonably believes that the suspect "may be armed and presently dangerous" to the officer or others, and if nothing in the course of an initial investigation dispels that fear. *Id.* at 30, 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 & SEIZURE, § 9.4(a).*

Washington requires that the officer have an individualized suspicion that the suspect is presently dangerous. *State v. Hobart*, 94 Wash. 2d 437, 446, 617 P.2d 429, 433 (1980); *State v. Smith*, 102 Wash. 2d 449, 452-53, 688 P.2d 146, 148 (1984) (fact that detention occurs in high crime district is not in itself sufficient to justify search); *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). An overt threatening gesture is not a condition precedent to seizure. *State v. Perez*, 41 Wash. App. 481, 483, 704 P.2d 625, 628 (1985) (officer's observation of gun on the floor of suspect's car, at 1:30 a.m. driver's bloodshot eyes and smell of alcohol constituted reasonable grounds to believe that the suspect
was armed and might gain access to weapon). Frisks have been permitted in State v. Guzman-Cuellar, 47 Wash. App. 326, 332, 734 P.2d 966, 970 (officer's recognition that suspect matched description of murder suspect justified initiating a frisk), review denied, 108 Wash. 2d 1027 (1987); see State v. Sweet, 44 Wash. App. 226, 232-33, 721 P.2d 560, 565 (suspect's flight from a high crime area when he saw officers, and the fact that he dropped a ski mask when apprehended, justified reasonable suspicion he was armed and dangerous), cert. denied, 107 Wash. 2d 1001 (1986); 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). But see State v. Harvey, 41 Wash. App. 870, 875, 707 P.2d 146, 149 (1985) (officer was justified in making a protective search of a burglary suspect on the ground that it is well known that burglars often carry weapons).

Under certain circumstances a search may be conducted pursuant to a Terry stop, even in the absence of grounds for believing that the suspect is armed and dangerous. A police officer may seize property from a suspect if the suspect's actions give rise to a reasonable suspicion that evidence of crime is in danger of being destroyed or lost. State v. Dorsey, 40 Wash. App. 459, 472, 698 P.2d 1109, 1117 (officer detaining suspect for questioning about credit card theft observed suspect shaking his coat so as to apparently dislodge an envelope which could have contained credit cards from coat pocket), review denied, 104 Wash. 2d 1010 (1985).

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, 20, 20 L. Ed. 2d 889, 911, 88 S. Ct. 1868, 1884 (1968). Cf. infra § 5.1 (search incident to arrest). Pat-down searches are
permitted if the police officer has reasonable grounds to believe a suspect is armed and presently dangerous. *State v. Broadnax*, 98 Wash. 2d 289, 293-94, 654 P.2d 96, 101 (1982); *State v. Hobart*, 94 Wash. 2d 437, 617 P.2d 429 (1980); *State v. Samsel*, 39 Wash. App. 564, 573, 694 P.2d 670, 676 (1985) (frisk reasonable when officers stopped taxicab that suspects were observed entering in close special and temporal proximity to robbery, suspects matched the victim's description of the robbers, and, after stopping the taxicab, officers observed marijuana and a gun holster on the floor of the passenger compartment). A frisk need not conform to the conventional pat-down. *See Adams v. Williams*, 407 U.S. 143, 147, 322 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 also 3 LAFAVE, SEARCH & SEIZURE, § 9.4(b), at 517; infra § 4.9(c)-(d).

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 also justifies the interference. *Id.*

While the scope of the search should be sufficient to assure the officer's safety, the scope of the search should also be strictly limited to the purpose for which it is permitted. *State v. Franklin*, 41 Wash. App. 409, 414, 704 P.2d 666, 670 (1985) (search of suspect's totebag is allowed when unidentified person informed officer that suspect had a gun, officer immediately accosted the suspect, and suspect told officer that a weapon was in the totebag). 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 & SEIZURE, § 9.4(c).

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, 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 vehicle’s passenger when the driver is stopped on the basis of a traffic violation, absent a reasonable suspicion that the passenger is involved in criminal conduct. See State v. Larson, 93 Wash. 2d 638, 642, 611 P.2d 771, 774 (1980). When an officer makes a lawful investigative stop, and has objective reasons for believing that there may be a weapon in the vehicle, the officer may make a limited search of the passenger compartment for weapons within the area of control of both the suspect and any other passenger in the vehicle. State v. Kennedy, 107 Wash. 2d 1, 12, 726 P.2d 445, 451 (1986). Thus, a passenger in a vehicle stopped for a traffic offense committed by the driver may be frisked if there are reasonable grounds to believe that he is armed and dangerous. State v. McIntosh, 42 Wash. App. 579, 582-83, 712 P.2d 323, 325 (investigating officer noticed driver was armed with knife and saw a weapon-like object under front seat of car), review denied, 105 Wash. 2d 1015 (1986). State v. Coahran, 27 Wash. App. 664, 620 P.2d 116 (1980) (when the driver is lawfully stopped for reasons pertaining to handgun possession and threats of violence, however, a protective frisk of a passenger is permitted). One commentator suggests that the appropriate inquiry is whether the officer is under a reasonable apprehension of danger, a determination that 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 & SEIZURE, § 9.4(a).

4.9(c) Other Protective Measures Besides Frisks

An officer may take self-protective measures 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 offense under investigation is a serious one. Pennsylvania v. Mimms, 434 U.S. 106, 111, 54 L. Ed. 2d 331, 335, 98 S. Ct. 330, 333 (1977) (intrusion de minimus, and risks confronting officer substantial); see also State v. Kennedy, 107 Wash. 2d 1, 726 P.2d 445 (1986). Lower courts have not agreed on whether Mimms extends to passengers. See 2 LAFAVE, SEARCH & SEIZURE, § 5.2, at 467-69.

4.9(d) Search of Area Measures Besides Frisks

Officers may extend a Terry search for weapons to the passenger compartment of a detained person's vehicle when the police have a reasonable belief that the suspect is both dangerous and within easy access of a weapon in the vehicle. Michigan v. Long, 463 U.S. 1032, 77 L. Ed. 2d 1201, 103 S. Ct. 3469 (1983); State v. Kennedy, 107 Wash. 2d 1, 12, 726 P.2d 445, 451 (1986) (when stopping suspect's vehicle for investigation of possible drug buy, officer observed suspect leaning forward as though to place something under seat); State v. McIntosh, 42 Wash. App. 579, 582, 712 P.2d 323, 325 (driver of vehicle armed with knife, and weapon-like object visibly protruded from under passenger seat), review denied, 105 Wash. 2d 1015 (1986). See also State v. Perez, 41 Wash. App. 481, 485, 704 P.2d 625, 629 (1985). A police officer may search a container carried by a suspect who is detained for questioning if the officer reasonably believes that the suspect possesses a weapon, and that the suspect has told the officer that a weapon is in the container. State v. Franklin, 41 Wash. App. 409, 415, 704 P.2d 666, 670 (1985) (backpack). The related issue of whether an officer may search items carried by a suspect is analyzed in great detail in 3 LAFAVE, SEARCH & SEIZURE, § 9.4(e).

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

5.0 Introduction

"[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable . . . subject only to a few specifically established and well-delineated exceptions." Katz v. United States, 389 U.S. 347, 357, 19 L. Ed. 2d 576, 585, 88 S. Ct. 507, 514 (1967) (footnotes omitted); see Coolidge v. New Hampshire, 403 U.S. 443, 29 L. Ed. 2d 564,
1988 | 1988 Search and Seizure


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 or sexual activity invalid; officers’ determination that obscene photographs violated first amendment), cert. denied, 437 U.S. 909 (1978).

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 be well endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee’s person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary items 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 is subject to a different analysis under the Washington Constitution than under the fourth amendment.

5.1(a) Lawful Arrest

The criteria for a lawful arrest are discussed in Chapter 4. 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). When an arrest is not merely a pretext for conducting a search for evidence of another offense, property seized incident to a lawful arrest may be used to prosecute the arrested person for a crime other than the one for which the person was initially arrested. State v. White, 44 Wash. App. 276, 278, 722 P.2d 118, 119 (following arrest for driving while intoxicated, officer found a cosmetic case in defendant’s pocket containing cocaine, a razor blade, and a straw), review denied, 107 Wash. 2d 1006 (1986). 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).

If the arrest is valid, then a search incident to arrest is permissible. State v. Stroud, 106 Wash. 2d 144, 164, 720 P.2d 436, 440-41 (1986). 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 at 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); supra § 4.2(b). In order to invoke the doctrine
of search incident to arrest, the officer must have the requisite authority. Under Washington law, an officer does not have this authority when he or she has only witnessed a minor traffic infraction. WASH. REV. CODE § 46.63.020 (1987). If the officer has witnessed a misdemeanor, however, then he or she will have authority to make a lawful arrest, WASH. REV. CODE § 10.31.100 (1987), and the search is lawful. A police officer's exercise of discretion in making a custodial arrest for a misdemeanor traffic violation (see supra § 4.4(d)) may make a search of the arrestee's person incident to the lawful arrest reasonable. No additional justification is required. State v. McIntosh, 42 Wash. App. 573, 712 P.2d 319 (following arrest for operating a motor vehicle without a driver's license, a search of defendant's person yielded jewelry providing evidence of a burglary), review denied, 105 Wash. 2d 1015 (1986). See also State v. Jordan, 50 Wash. App. 170, 175, 747 P.2d 1095, 1098-99 (1987) (search for drugs did not exceed permissible scope of search incident to minor traffic violation.) Both McIntosh and Jordan were decided on the basis of federal constitutional analysis. It is unclear whether article I, section 7 of the Washington State Constitution might provide greater protection.

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), cert. denied, 419 U.S. 831 (1974); 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 & SEIZURE, § 5.2(h).

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, cert. denied, 419 U.S. 1026 (1974). Factors that have been considered include: (1) whether the arrestee was physically restrained; (2) the position of the
officer in relation to the defendant and the place searched; (3) the difficulty of gaining access into the container or enclosure searched; and (4) the number of officers present as compared with the number of arrestees or other persons. See 2 LAFAVE, SEARCH & SEIZURE, § 6.3(c), at 630; 3 LAFAVE, SEARCH & SEIZURE, § 7.1(b), at 6.

Article I, section 7 of the Washington Constitution provides a more protective standard than that provided by the fourth amendment. For example, under article I, section 7, "[d]uring the arrest process, including the time immediately subsequent to the suspect's being arrested, handcuffed, and placed in a patrol car, officers should be allowed to search the passenger compartment of a vehicle for weapons or destructible evidence. However, if the officers encounter a locked container or locked glove compartment, they may not unlock and search either container without obtaining a warrant." State v. Stroud, 106 Wash. 2d 144, 152, 720 P.2d 436, 441 (1986) (overruling State v. Ringer, 100 Wash. 2d 686, 674 P.2d 1240 (1983) (limiting permissible search to area with arrestee's immediate control)). In contrast, under the fourth amendment, both the passenger compartment of an automobile and any 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 & SEIZURE, § 6.4(a). Courts have also permitted police to search premises to determine whether accomplices who could aid the arrestee are present, id. § 6.4(b), and to conduct a protective sweep of premises when the officers fear that third parties may offer resistance, id. § 6.4(c).

The Washington Constitution places greater restraints on the police than the fourth amendment 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). See 2 LAFAVE, SEARCH AND SEIZURE, §§ 6.3(c) and 6.4(a)-(c), at 636-651 and 7.1(b), at 5-12.

5.2 Immediate Control or Permissible Scope: Particular Applications

5.2(a) The Defendant

Under the fourth amendment, an officer may search an arrestee who has been taken into custody even when the officer does not believe that the arrestee is armed or in possession of evidence of the crime for which the suspect was arrested. United States v. Robinson, 414 U.S. 218, 235, 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 need not have a 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 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); see supra § 5.1(a).

Under article I, section 7 of the Washington Constitution, an arrestee has a diminished expectation of privacy that permits an officer to search the arrestee’s personal possessions that are closely associated with his or her clothing, e.g., a wallet or cigarette pack. State v. White, 44 Wash. App. 276, 278, 722 P.2d 118, 120 (police lawfully examined contents of cosmetic case found in arrestee’s coat pocket), review denied, 107 Wash. 2d 1006 (1986). Possessions that are not closely related to the person’s clothing, however, such as “purses, briefcases or luggage” have a greater expectation of privacy and additional reasons justifying the search must be present. Id. at 279, 722 P.2d at 120. Evidence seized pursuant to such a search does not need to relate to the crime for which the defendant was arrested, nor must the grounds for the initial search encompass the evidence seized. State v. LaTourette, 49 Wash. App. 119, 129, 741 P.2d 1033, 1037 (1987) (court permitted cocaine found
in a pocket admitted into evidence, even though the officer's rationale for initiating the search incident to arrest was a concern for weapons), review denied, 109 Wash. 2d 1025 (1988).

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 (1966). Such intrusions may be justified, however, by the exigent circumstances exception. Id. at 770-71, 16 L. Ed. 2d at 919-20, 86 S. Ct. at 1835-36. See generally infra § 5.18(a) and supra § 3.13(b); 2 LAFAVE, SEARCH & SEIZURE, § 5.3(c).

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, however, 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 (1952); 25 A.L.R.2d 1396 (1952). See generally 2 LAFAVE, SEARCH & SEIZURE, § 5.2(i). For a brief discussion of post-detention body searches, see infra § 6.2.

5.2(b) Vehicles and Containers

Under both article I, section 7 and 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 (1980); State v. Stroud, 106 Wash. 2d 144, 152, 720 P.2d 436, 441 (1986). Under the fourth amendment, the compartment is considered within the arrestee's immediate control even after the arrestee has been placed in police custody. Belton, 453 U.S. at 459, 69 L. Ed. 2d at 774, 101 S. Ct. at 2864. Under article I, section 7, however, such a search may only be proper "immediately subsequent" to the suspect's arrest and placement in the police car. Stroud, 106 Wash. 2d at 152, 720 P.2d at 441. When a suspect has stepped out of a vehicle, subject to a lawful investigative stop, the officer may make a limited search of the passenger
compartment for weapons within the area of control of the suspect and any other passenger in the vehicle, if the police officer has objective reasons for believing that there may be a weapon in the vehicle. *State v. Kennedy*, 107 Wash. 2d 1, 12-13, 726 P.2d 445, 451-52 (1986).

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. An occupant does not have a legitimate expectation of privacy in property visible thorough a vehicle window, and such objects may fall within the "plain view" or "open view" exception. *State v. Gonzales*, 46 Wash. App. 388, 397, 731 P.2d 1101, 1107 (1986); *State v. Perez*, 41 Wash. App. 481, 484, 704 P.2d 625, 628 (1985); *State v. White*, 40 Wash. App. 490, 494-95, 699 P.2d 239, 243 (1985).

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). The "single purpose container" rule of *Arkansas v. Sanders* has been upheld under article I, section 7. Under this doctrine, the police do not need to obtain a warrant to open a container that an officer is virtually certain contains contraband because of its distinctive shape, odor, or other characteristic. Under the fourth amendment, the traditional rule has been modified, and law enforcement officers may now 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." *Belton*, 453 U.S. at 460, 69 L. Ed. 2d at 775, 101 S. Ct. at 2864 (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 United States 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*, 469 U.S. 979, 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 & SEIZURE, § 5.5(a), at 529-30.

In order to provide the necessary added protection guaranteed by article I, section 7, however, the court will require "virtual certainty that the container, in the circumstances viewed, holds contraband, as if transparent." State v. Courcy, 48 Wash. App. 326, 332, 739 P.2d 98, 102 (during lawful Terry stop officer viewed precisely folded paper "bindle," commonly used to package cocaine, in suspect's identification folder; officer was justified in seizing the "bindle" and opening it), review denied, 109 Wash. 2d 1017 (1987). See 3 LAFAVE, SEARCH & SEIZURE, § 7.2(d). See also id. §§ 5.5 (a)-(d).

5.3 Pre-Arrest Search


Under limited circumstances, pre-arrest searches are permitted even when the arrest does not closely follow the search. 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 & SEIZURE, § 5.4(b); 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). Pre-arrest searches are Terry searches and should be
subject to the same standard applied and discussed *supra* §§ 4.5-4.9.

5.4 Post-Detention Searches: 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 & SEIZURE, § 5.3(a).

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* 2 LAFAVE, SEARCH & SEIZURE, § 5.3(d).

Even when an arrestee is searched upon booking, officers may later conduct a warrantless "second look" into the arrestee's belongings. *United States v. Edwards*, 415 U.S. 800, 805, 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 & SEIZURE, § 5.3(b), at 487-88 (*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). *See 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).

Under Washington law, probable cause is still required for a "second look." When the actions of the person detained give rise to a reasonable suspicion by an officer that the person is attempting to destroy or rid himself of evidence, seizure of that evidence is permissible. *State v. Dorsey*, 40 Wash. App. 459, 472, 698 P.2d 1109, 116-17 (officers observed detainee's attempt to rid himself of an envelope that protruded from detainee's coat pocket), *review denied*, 104 Wash. 2d 1010 (1985); *see also 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). See also 2 *LaFave, Search and Seizure*, § 5.3(a)-(d).

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 of the items 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, 97 S. Ct. 2476, 2482-83 (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 can thus 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). Lower courts have reached differing results as to whether police may conduct an item-by-item inventory of contents. See generally 2 *LaFave, Search & Seizure*, § 5.5(b).

5.5 *Searches Conducted in Good Faith and Without Purposes 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 *LaFave, Search & Seizure*, §§ 5.4(c)-(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 such a threat. 2 LaFave, Search & Seizure, § 6.5(d).

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 totebag for identification improper when defendant regained consciousness prior to search); see also Thompson v. Louisiana, 469 U.S. 17, 83 L. Ed. 2d 246, 105 S. Ct. 409 (1984); 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 may also make a quick check of the area to see if the perpetrator or other victims are present. See Thompson, 469 U.S. at 22, 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 a warrantless search 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). But see Loewen, 97 Wash. 2d at 568, 647 P.2d at 493 (necessity must exist at time of search).

Similarly, police may make a warrantless entry to protect property, and may seize evidence within their plain view. State v. Bakke, 44 Wash. App. 830, 723 P.2d 534 (1986) (police may make a warrantless entry into a private residence in response to a reported burglary, and may seize contraband within their plain view), review denied, 107 Wash. 2d 1033 (1987); State v. Campbell, 15 Wash. App. 98, 100, 547 P.2d 295, 297 (1976)

Police officers may enter a private residence without a warrant when officials of another government agency have validly entered the residence and discovered contraband. The police may not, however, exceed the scope of the prior intrusion. *State v. Bell*, 108 Wash. 2d 193, 201, 737 P.2d 254, 259 (1987) (marijuana growing operation discovered in plain view by firemen after fire was extinguished). Seizure of immediately recognizable contraband by firefighters is valid if it is inadvertently discovered while they are engaged in their fire fighting activities. *Id*. at 197, 737 P.2d at 257. Exigent circumstances are not required to justify such a seizure. Police officers then step into the firefighters' shoes, and may subsequently enter a residence without a warrant and seize the contraband as long as they do not exceed the scope of the prior intrusion. *Id*. at 201, 737 P.2d at 259.

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

This section discusses the warrantless seizure of objects based on the plain view exception to the warrant requirement. Courts have used the term "plain view" to describe three types of searches: (1) when an officer observes an item that is exposed to public view in a public place or in a location that is not constitutionally protected; (2) when an officer intrudes into a constitutionally protected area—either lawfully or unlawfully—and there observes a clearly exposed object; and (3) when an officer, standing in a 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 (1978); 1 *LaFave*, *Search & Seizure*, § 2.2(a).

These three situations are distinguished by the nature of
the defendant's expectation of privacy in the object. In the first situation—the discovery of an object in a public place or in a location that is not constitutionally protected—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]eizing 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).

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. If no additional search is conducted in order to seize the object, however, then seizure is permissible. Thus, when in accord with the "single purpose container" doctrine an officer is virtually certain that a container holds contraband, as if it were transparent, the suspect does not have a reasonable expectation of privacy that would prevent opening the container or field testing its contents. "Because of the appearance of the container itself, the contents [are] in effect in open view." State v. Courcy, 48 Wash. App. 326, 330, 739 P.2d 98, 101 (paper "bindle" containing cocaine observed by officer in suspect's identification folder during lawful investigative stop), review denied, 109 Wash. 2d 1017 (1987).

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


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), cert. denied, 450 U.S. 958 (1981); see State v. Kennedy, 107 Wash. 2d 1, 726 P.2d 445 (1986); State v. Lesnick, 84 Wash. 2d 940, 942, 530 P.2d 243, 245, cert. denied,

(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, 455 U.S. 1, 9, 70 L. Ed. 2d 778, 786-87, 102 S. Ct. 812, 818 (1982), on remand, 100 Wash. 2d 14, 676 P.2d 419 (1984); 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. Chrisman, 455 U.S. at 9, 70 L. Ed. 2d at 786-87, 102 S. Ct. at 818 (fourth amendment permits officer to accompany arrestee wherever arrestee goes), on remand, 100 Wash. 2d at 822, 676 P.2d at 424 (article I, section 7 prohibits officer from entering misdemeanor arrestee's home unless officer can demonstrate threat to officer's safety, possibility of destruction of evidence of misdemeanor charged, or strong likelihood of escape).

(2) Inadvertent Discovery

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). The Supreme Court has recently held that the plain view doctrine is violated when the officer moves an object belonging to the defendant in order to obtain a better view. Arizona v. Hicks, — U.S. — , 94 L. Ed. 2d 347, 107 S. Ct. 1149 (1987) (officer "exposed to view concealed portions of stereo in
order to obtain serial number”). Thus, there is a distinction between “looking at a suspicious object in plain view and moving it even a few inches.” Id. at —, 94 L. Ed. 2d at 354, 107 S. Ct. at 1152.

One Washington court, however, 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, 107 Wash. 2d 1, 726 P.2d 445 (1986) (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). Similarly, a police officer’s change of position, so as to see more clearly into a suspect’s vehicle, does not violate the inadvertent discovery component of the plain view doctrine. State v. Perez, 41 Wash. App. 481, 484-85, 704 P.2d 625, 628 (1985) (officer moved from passenger side to driver’s side of vehicle, where driver had exited vehicle and saw what appeared to be a rifle on the floorboard). Thus, the change in position of the officer and that of the object should be distinguished; while the former may be permissible, the latter is not.

Courts have generally 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 & SEIZURE, § 4.11(d). 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 & SEIZURE, § 4.11(e).

(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), cert. denied, 421 U.S. 1004 (1975); see also Arizona v. Hicks, — U.S. — , 94 L. Ed. 2d 347, 107 S. Ct. 1149 (1987); but see 2 LAFAVE, SEARCH & SEIZURE, § 4.11(c).

The officer's knowledge need not be certain; it is sufficient that the officer has probable cause to believe that the substance constitutes incriminating evidence. Thus, in State v. Gonzales, 46 Wash. App. 388, 400-01, 731 P.2d 1101, 1108-09 (1986), a clear vial of capsules and pills, in context of other items of drug paraphernalia, was properly seized although consent was only given to search for jewelry and other items. However, a closed brown paper bag containing marijuana, was
improperly seized since its weight immediately indicated that it could not contain items within the scope of consent, and the marijuana was clearly not within plain view. *Id.* at 400, 731 P.2d at 1109. See also *State v. Anderson*, 41 Wash. App. 85, 96, 702 P.2d 481, 490 (1985) (although warrant was limited to a search for clothing, the police properly seized weapons and weapon components discovered within the allowable area of the search, which were probable instrumentalities of the crime under investigation), *rev'd on other grounds*, 107 Wash. 2d 745 (1987); *State v. Terrovona*, 105 Wash. 2d 632, 649, 716 P.2d 295, 303 (1986) (grocery store receipts, not mentioned in search warrant, which did mention sales slips for weapons, immediately recognized as capable of substantiating or undermining the suspect's alibi).

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. *But cf. Arizona v. Hicks*, — U.S. —, 94 L. Ed. 2d 347, 107 S. Ct. 1149 (1987); see also 2 LAFAVE, *SEARCH & SEIZURE*, § 4.11(b) & (c) (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

The officer's knowledge is relevant to a determination of the legality of an object. 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 to immediately recognize the incriminating nature of a baggie even when its contents are not observed. State v. Kennedy, 107 Wash. 2d 1, 726 P.2d 445 (1986).

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), cert. denied, 471 U.S. 1094 (1985); see also 1 LAFAVE, SEARCH & SEIZURE, § 2.2(a), at 322-23; State v. O'Herron, 153 N.J. Super. 570, 575, 380 A.2d 728, 730 (1977), cert. denied, 439 U.S. 1032 (1978).

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.

Plain 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) (emphasis original). See also
Taylor v. United States, 286 U.S. 1, 5-6, 76 L. Ed. 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 & SEIZURE, § 2.2(a), at 323-25; see State v.
Drumhiller, 36 Wash. App. 592, 675 P.2d 631 (1984); see gener-
ally O'Herron, 153 N.J. Super. at 576-81, 380 A.2d at 730-34.
For example, the warrantless entry into the defendant's vege-
table garden to seize lawfully observed marijuana plants was
unconstitutional because the officer could not show exigent cir-
cumstances or any other warrant requirement exception.
O'Herron, 153 N.J. Super. 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, pro-
vided that the observations could have taken place in daylight
without flashlights. State v. Young, 28 Wash. App. 412, 417, 624
P.2d 725, 729 (tools suspected of being used in robbery were
properly seized when officer observed tools after shining flash-
light on front seat of car with door left open), review denied,
95 Wash. 2d 1024 (1981). See 1 LAFAVE, SEARCH & SEIZURE,
§ 2.2(b); 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,
130 (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 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 & SEIZURE, § 2.2(c); see e.g., United States v. Minton, 488 F.2d 37, 38 (4th Cir. 1973), cert. denied, 416 U.S. 936 (1974); United States v. Loudmannz, 472 F.2d 1376, 1379 (D.C. Cir. 1972), cert. denied, 410 U.S. 957 (1973). 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 Haw. 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").

As to defendant's reasonable expectation of privacy requiring a warrant before use of enhancement devices, see supra § 1.3(c); Dow Chem. Co. v. United States, 476 U.S. 227, 234-35, 90 L. Ed. 2d 226, 231-32, 106 S. Ct. 1819, 1826-27 (1986).
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.), 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). Use of hearing enhancement devices may "raise very different and far more serious questions" from visual enhancement devices when determining the defendants reasonable expectation of privacy requiring a warrant. *Dow Chem. Co. v. United States*, 476 U.S. 227, 234-35, 90 L. Ed. 2d 226, 231-32, 106 S. Ct. 1819, 1827 (1986). This distinction may also be applicable to the plain hearing doctrine, where the use of binoculars is appropriate with regard to the plain view doctrine but similar enhancement may not be permitted for hearing devices.

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 (1987). 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

There is disagreement on whether the plain view doctrine applies to odors and permits the warrantless seizure of an object based on its smell. See, e.g., *United States v. Johns*, 707 F.2d 1093 (9th Cir. 1983), rev'd on other grounds, 469 U.S. 478, 83 L. Ed. 2d 890, 105 S. Ct. 881 (1985); *United States v. Haley*,
1988] 1988 Search and Seizure


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, 243-45, 427 P.2d 705, 708 (1967). See generally 3 LAFAVE, SEARCH & SEIZURE, § 8.1.

5.11 Voluntariness of Consent: Burden of Proof

The state has the burden of proving that consent to a search was given voluntarily. Shoemaker, 85 Wash. 2d at 210, 533 P.2d at 125. The level of proof required is "clear and positive evidence." State v. Rodriguez, 20 Wash. App. 876, 878, 582 P.2d 904, 906 (1978). See also State v. Johnson, 16 Wash. App. 899, 903, 559 P.2d 1380, 1383, review denied, 89 Wash. 2d 1002 (1977).

For a discussion of the distinctions between voluntariness of consent and waiver of constitutional rights, see 2 LAFAVE, SEARCH & SEIZURE, § 8.1(a).

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. But cf. State v. Wethered, 110 Wash. 2d 466, — P.2d — (1988) (consent to search distinguished from testimonial admissions since the prior is consistent with innocence). Thus, the issue of whether "consent to 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 circum-
stances.” *Schneckloth v. Bustamonte*, 412 U.S. 218, 229, 36 L. Ed. 2d 854, 862-63, 93 S. Ct. 2041, 2047-48 (1973); see *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.” *Id.* 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 3 LAFAVE, SEARCH & SEIZURE, § 8.2(a).

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 (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 and that to do so would prejudice defendant); see generally 3 LAFAVE, SEARCH & SEIZURE, § 8.2(c).

5.12(b) Coercive Surroundings

If the police make a show of force at the time the consent is sought, or if the surroundings are coercive in another respect, the consent will generally not be considered voluntary. See *McNear v. Rhay*, 65 Wash. 2d 530, 537, 398 P.2d 732, 737
(1965); *State v. 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 previously, defendant did not voluntarily consent to search of her home even if she verbalized consent), *review denied*, 90 Wash. 2d 1010 (1977); see also *State v. Dresker*, 39 Wash. App. 136, 692 P.2d 846 (1984); cf. *INS v. Delgado*, 466 U.S. 210, 80 L. Ed. 2d 247, 105 S. Ct. 1758 (1984) (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); see supra § 1.4(a); see generally 3 LAFAVE, SEARCH & SEIZURE, § 8.2(b).

On the other hand, the fact that a defendant is in custody when he or she consents to a search does not by itself establish coercion or involuntariness of consent. *United States v. Watson*, 423 U.S. 411, 424, 46 L. Ed. 2d 598, 609, 96 S. Ct. 820, 828 (1976); *McNear v. Rhay*, 65 Wash. 2d 530, 538, 398 P.2d 732, 737-38 (1962). Consent was held to be voluntary and uncoerced when defendant, arrested on the porch of his home in mid-winter wearing only pants and a t-shirt, consented to officers accompanying him into his home. *State v. Nelson*, 47 Wash. App. 159, 163-64, 734 P.2d 516, 519-20 (1987). Arresting officers had given the defendant the alternative of proceeding to the police station as he was, but indicated that if he returned inside, they would have to accompany him. Defendant's fear that his behavior might appear "crazy" if he accepted arrest without his jacket and keys, was not considered equal to coercion. *Id.* at 163, 734 P.2d at 519-20. Custodial restraint, is, however, a significant factor in assessing voluntariness. See *State v. Werth*, 18 Wash. App. 530, 535, 571 P.2d 941, 943-44 (1977); *State v. Rodriguez*, 20 Wash. App. 876, 881, 582 P.2d 904, 907 (1978).

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

Although an individual's knowledge of the right to refuse a search is taken into account in determining whether consent to a search was voluntary, the state may prove that consent was voluntary without establishing such knowledge. *Schneckloth v. Bustamonte*, 412 U.S. 218, 227, 36 L. Ed. 2d 854,


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 was coercion."); see generally 3 LAFAVE, SEARCH & SEIZURE, § 8.2(d). Thus, a prior illegal search or arrest may taint the subsequent consent and thereby render the consent invalid. 3 LAFAVE, SEARCH & SEIZURE, § 8.2(a). See generally infra ch. 7.

The state has the burden of proving that a consent to search was not obtained by the exploitation of a prior illegal search. A court determines whether the subsequent consent was tainted by the earlier illegality by considering, among other factors, the period of time between the illegal search and the subsequent consent, the presence of intervening circumstances, the purpose and flagrancy of the prior official misconduct, and whether the person who consented to the search received Miranda warnings. No single factor is dispositive. State v. Jensen, 44 Wash. App. 485, 489-90, 723 P.2d 443, 445-46 (1986) (although only two hours intervened between the illegal search and the consent, the consent was valid since in the intervening period the defendant was advised of his right to refuse consent, verbally consented twice, was allowed to call his sister, and there was no evidence that police did anything to frighten or intimidate defendant), review denied, 107 Wash. 2d 1012 (1986); see also State v. Gonzales, 46 Wash. App. 388,
1988 Search and Seizure 397-98, 731 P.2d 1101, 1107 (1986) (prior illegal arrest did not render a subsequent consent to search involuntary when prior police misconduct was not flagrant, no attempt was made to exploit the prior illegal arrest, defendant was advised of right to withhold consent, and consent was spontaneously volunteered).

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 3 LAFAVE, SEARCH & SEIZURE, § 8.2(e).

5.12(f) Prior Cooperation or Refusal to Cooperate

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

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. Police may use a ruse to gain entry to a residence to conduct a criminal investigation if they have a justifiable and reasonable basis to suspect criminal activity within the residence. State v. Hashman, 46 Wash. App. 211, 216, 729 P.2d 651, 655 (1986) (a police officer disguised as a building contractor gained entry
into a residence after another officer, who had lawfully been within the residence, reported evidence of a marijuana growing operation), review denied, 108 Wash. 2d 1021 (1987). See also 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. Williamson, 42 Wash. App. 208, 212-13, 710 P.2d 205, 207-08 (1985) (fact that officers concealed their identity and intent to effect an arrest did not abrogate validity of consent), review denied, 105 Wash. 2d 1012 (1986); State v. Huckaby, 15 Wash. App. 280, 285-88, 549 P.2d 35, 38-41 (1976), review denied, 87 Wash. 2d 1006 (1976); 3 LAFAVE, SEARCH & SEIZURE, §§ 8.2(m)-(n).

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 inspection of television serial numbers not in plain view); State v. Johnson, 71 Wash. 2d 530, 538, 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. App. 501, 505, 585 P.2d 485, 488 (1978) (defendant’s consent to officer looking in his car did not authorize officer rummaging through suitcase discovered in back seat and containing defendant’s personal belongings). See generally 3 LAFAVE, SEARCH & SEIZURE, § 8.1(c). Although an object may be outside the limits of a valid consent, items that are immediately apparent as contraband may be seized by a police officer. The officer’s knowledge need not be certain; it is sufficient if the officer has probable cause to believe that the substance constitutes incriminating evidence. State v. Gonzales, 46 Wash. App. 388, 731 P.2d 1101 (1986) (although consent was given to search for jewelry and other items stolen in recent burglaries, a clear vial of capsules and pills, surrounded by other items of drug paraphernalia,
was properly seized; however, a closed brown paper bag containing marijuana, was improperly seized since its weight immediately indicated it could not contain items within the scope of the consent).

Whether a consent to search applies to a later search depends on the time elapsed between the searches and whether the second search has the same objectives and is conducted by the same officers as the first search. *State v. Koepke*, 47 Wash. App. 897, 738 P.2d 295 (1987) (Sheriff obtained valid third-party consent to search a room, looked quickly within and decided to obtain a warrant. Although the warrant was defective, it was unnecessary since the second search, conducted by the same officer within 24 hours and with the same objectives as the first search, was validated by the original consent.).

A general and unqualified consent to search an area for a particular type of material permits a search of personal property within the area in which the material could be concealed. In *State v. Jensen*, 44 Wash. App. 485, 723 P.2d 443, review denied, 107 Wash. 2d 1012 (1986), the defendant consented to a “complete” search of his vehicle for materials of any evidentiary value. Officers conducting the search found cocaine in the pocket of a jacket found in the backseat of the defendant’s car. The court held that the officers did not exceed the scope of consent since the defendant had consented to the search for evidence of the size and nature that could reasonably be in the jacket pocket, and he never expressly or implicitly withheld consent to search his personal belongings in the car. *See also State v. Anderson*, 41 Wash. App. 85, 702 P.2d 481 (1985) (warrant granting authority for search of clothing justified search of garbage can sized commercial vacuum cleaner in which clothing could be hidden), rev’d on other grounds, 107 Wash. 2d 745, 733 P.2d 517 (1987). A consensual search is not invalidated if it results in the discovery of evidence that the consenting party did not expect to be discovered. Thus, in *State v. Johnson*, 40 Wash. App. 371, 699 P.2d 221 (1985), the court admitted evidence of the suspect’s involvement in murder after the suspect signed a voluntary consent form permitting officers to search his vehicle. Although the suspect claimed that he limited the search to marijuana, the record did not support his claim.
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 other, more general considerations. The general considerations include: (1) antagonism between the defendant and the third party, see 3 LAFAVE, SEARCH & SEIZURE, § 8.3(b); (2) specific instructions that the defendant may have given to the third party, see 3 LAFAVE, SEARCH & SEIZURE, § 8.3(c); and (3) objection by the defendant, when he or she was present at the time the third party authorized the search, see 3 LAFAVE, SEARCH & SEIZURE, § 8.3(d). Note that in some cases the defendant's contemporaneous objections do not invalidate the third party's consent. 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 3 LAFAVE, SEARCH & SEIZURE, § 8.3(g).

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

5.14(a) Defendant's Spouse

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), review denied, 89 Wash. 2d 1019 (1978); State v. Hartnell, 15 Wash. App. 410, 417, 550 P.2d 63, 68 (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), review denied, 87 Wash. 2d 1010 (1976); see generally 3 LAFAVE, SEARCH & SEIZURE, § 8.4(a). But see State v. Chichester, 48 Wash. App. 257, 738 P.2d 329 (1987) (exigent circumstances needed to justify noncompliance with knock and announce rule). See supra § 3.7.
5.14(b) Defendant's Parents

A parent may consent to a search, whether or not the child is a minor, if 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), review denied, 89 Wash. 2d 1018 (1978). See also State v. Mak, 105 Wash. 2d 692, 718 P.2d 407 (1986).

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 3 LAFAVE, SEARCH & SEIZURE, § 8.4(c).

5.14(d) Co-tenant or Joint Occupant

A co-tenant or other joint occupant of the defendant's dwelling who "possess[es] common authority over or other sufficient relationship to the premises or effects sought to be inspected" may give valid consent to a search of these 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. When a person with common authority over premises gives consent to search, but is absent when the search is to take place, the "knock and announce rule" applies. State v.
Chichester, 48 Wash. App. 257, 738 P.2d 329 (1987) (Upon arrival of officers who announced their presence and immediately burst into home to search premises, defendant's wife who had consented to the search, abandoned the premises leaving the defendant in sole possession. Exigent circumstances, however, abrogated knock and announce rule requirements.):

The common authority rule applies to apartments and to more limited rental arrangements such as those found in motels, boarding homes, and room rentals. Mathe, 102 Wash. 2d at 544, 688 P.2d at 863. See also State v. Bellows, 72 Wash. 2d 264, 268, 432 P.2d 654, 657 (1967) (co-occupants of premises, may each grant consent to search); State v. Porter, 5 Wash. App. 460, 463, 488 P.2d 773, 775 (1971) (tenant who believes that her roommate was trafficking in drugs may let police into the apartment during drug transaction); State v. Koepke, 47 Wash. App. 897, 738 P.2d 295 (1987) (tenant of an apartment consented to search of room in which defendant was residing as a guest for a period of two to three weeks, the door was unlocked, defendant paid no rent, the tenant stored property in defendant's living area, and there was no indication of when defendant would return); see also State v. Jeffries, 105 Wash. 2d 398, 717 P.2d 722 (1986) (common authority rule applicable to validate consent to search a "hobo" camp, located outside the city of Wenatchee), cert. denied, — U.S. —, 107 S. Ct. 328 (1986); see generally 3 LAFAVE, SEARCH & SEIZURE, § 8.5(c).

5.14(e) Landlord, Lessor, or Manager

The lessor or manager of an apartment building may consent to a search of an area that is not within the 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 could lawfully search grounds with consent of building manager).

A landlord, however, may generally 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 Annotation, Admissibility of Evidence Discovered in Warrantless Search
of Rental Property Authorized by Lessor of Such Property-State Cases, 2 A.L.R.4th 1173, 1208 (1980).

For an example of a tenant abandoning his interest in a property and indicating no actual expectation of privacy, see State v. Christian, 95 Wash. 2d 655, 659, 628 P.2d 806, 808 (1981); see generally 3 LAFAVE, SEARCH & SEIZURE, § 8.5(a). For discussion of consent by a lessee, see 3 LAFAVE, SEARCH & SEIZURE, § 8.5(b).

5.14(f) Bailee

A bailee may consent to a search of the bailor's belongings when the bailee has a sufficient relationship to or degree of control over the chattel. See 3 LAFAVE, SEARCH & SEIZURE, § 8.6(a); 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 (1977). For a discussion of consent by a bailor, see 3 LAFAVE, SEARCH & SEIZURE, § 8.6(b).

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. Thus, under the common authority rule analysis, see supra § 5.14(d), an employer may validly consent to a search of that portion of the employer's premises used by an employee for personal purposes. State v. Kendrick, 47 Wash. App. 620, 736 P.2d 1079 (defendant leased a "crash pad" on premises owned by his employer—employer controlled guard dogs on the premises, stored personal and business items there, had keys to the area, and the area was used by other employees), review denied (1987). For a discussion of the rules governing consent within the employer-employee relationship, see 3 LAFAVE, SEARCH & SEIZURE, §§ 8.6(c)-8.6(d). For a discussion of consent by an educational institution (or officer thereof) to a search affecting a student's belongings, see 3 LAFAVE, SEARCH & SEIZURE, § 8.6(e).

5.14(h) Hotel Employee

A hotel employee may not grant valid consent to a search

5.14(i) Host and Guest

For a discussion of consent by a host, see 3 *LaFave, Search & Seizure*, § 8.5(d), and for a discussion of consent by a guest, see 3 *LaFave, Search & Seizure*, § 8.5(e). *See also* common authority rule, *supra* § 5.14(d).

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) (1987); *cf. State v. Rogers*, 37 Wash. App. 728, 683 P.2d 608, review denied, 102 Wash. 2d 1013 (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 generally* 2 *LaFave, Search & Seizure*, § 4.1. *See also* *State v. Stroud*, 106 Wash. 2d 144, 147, 720 P.2d 436, 438 (1986). Exigent circumstances, however, are not created whenever a serious offense has been committed. *Thompson v. Louisiana*, 469 U.S. 17, 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 (1966), or entry into 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.

Article I, section 7 of the Washington Constitution is not as broad, however, and the scope of the permissible search incident to arrest is limited to the passenger compartment and any unlocked compartments or containers. The search is only permissible during the arrest process and immediately subsequent to the suspect's arrest and placement in the patrol car. State v. Stroud, 106 Wash. 2d 144, 152, 720 P.2d 436, 441 (1986).

The requirement that exigent circumstances precede a warrantless entry by police to make an arrest, does not apply when the crime is committed in the officer's presence after being admitted into the residence. Thus, in State v. Dalton, 43 Wash. App. 279, 716 P.2d 940, review denied, 106 Wash. 2d 1010 (1986), an officer who had obtained entry into a student's college dormitory room, under the pretense of making a drug buy, but with the intent of effecting an arrest, could make a warrantless arrest under WASH. REV. CODE § 10.31.100, which provides for an arrest without a warrant where the police officer has reasonable cause to believe a felony has been, or is being committed.

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's escape, 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. Bustamonte-Gamez, 488 F.2d 4, 8-9 (9th Cir. 1973) (destruction of evidence); see also United States v. Santana, 427 U.S. 38, 44, 49 L. Ed. 2d 300, 306, 96 S. Ct. 2406, 2409 (1976) (White, J., concurring); Warden, Maryland Penitentiary v. Hayden, 387 U.S. 294, 298, 18 L. Ed. 2d 782, 787, 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 prem-
is, the scope of the intrusion is limited to its purpose; if the purpose is to prevent escape or harm, for example, the search is limited to finding the suspect or weapons that could be used against the police. *Hayden*, 387 U.S. at 299, 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.*

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, 753, 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*, 466 U.S. at 763-64, 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 promptness 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 supplied);

(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.*;

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

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

(6) *the arrest decision was made in the course of an ongoing investigation or in the field, and the exigency of entry into*
the house was not foreseen at the time of the decision. See United States v. Calhoun, 542 F.2d 1094, 1102-03 (9th Cir. 1976) (entry into the defendant's home without warrant not justified because entry was foreseeable consequence of planned investigation and prior police activities), cert. denied, Stephenson v. United States, 429 U.S. 1064 (1977); see also Chimel v. California, 395 U.S. 752, 753, 23 L. Ed. 2d 685, 694, 89 S. Ct. 2034, 2040 (1969); Coolidge v. New Hampshire, 403 U.S. 443, 464, 29 L. Ed. 2d 564, 581, 91 S. Ct. 2022, 2037 (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, 831 (1979); Welsh v. Wisconsin, 466 U.S. 740, 752-53, 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 more intrusive the search, the greater the level of proof required for each element of the hot pursuit exception. Dorman, 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.), cert. denied, 439 U.S. 836 (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


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, cert. denied, 434 U.S. 876 (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. Schmerber, 384 U.S. at 771-72, 16 L. Ed. 2d at 920, 86 S. Ct. at 1836. 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), review denied, 87 Wash. 2d 1012 (1976), cert. denied, 431 U.S. 931 (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). Where a serious crime involving intoxication is at issue, the natural dissipation of alcohol in the blood of a suspect is an exigent circumstance justifying a warrantless and non-consensual entry into a residence to arrest the person and seize a blood sample. State v. Komoto, 40 Wash. App. 200, 697 P.2d 1025 (1985) (officer used passkey to enter apartment and arrest suspect following felony hit and run), review denied, 104 Wash. 2d 1009, cert. denied, 474 U.S. 1021 (1985). But see State v. Wetherell, 82 Wash. 2d 865, 870-71, 514 P.2d 1069, 1073 (1973) (warrantless blood test not permitted absent consent).

The fact that evidence is likely to be destroyed will not automatically justify an intrusive medical procedure even when a warrant is obtained; the evidence must be essential to a conviction. See Winston v. Lee, 470 U.S. 753, 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. Halver-son, 21 Wash. App. 35, 589 P.2d 408 (1978) (warrant authorizing search of home and its owner did not permit officers to search
person found in home at time of search when magistrate had made no prior determination of probable cause to search that person and person did not act suspiciously). For a more complete discussion of when occupants may be searched during the execution of a search warrant for premises, see 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), review 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 to immediately enter house in order to detain occupants, provided the officers refrained from searching the house until the search warrant was issued); State v. Peele, 10 Wash. App. 58, 516 P.2d 788 (1973) (search warrant necessary when the suspect was not fleeing but might be expected to hide out on premises until morning); 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 Or. App. 633, 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 3 LAFAVE, SEARCH & SEIZURE, §§ 6.5(a)-(e) (cordonning-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), cert. denied, 429 U.S. 1051 (1977); United States v.
Roselli, 506 F.2d 627 (7th Cir. 1974) (police failure to apply for warrant unlawful when police could have stationed officer with informant to prevent informant from calling and warning defendant of imminent search); State v. Lewis, 19 Wash. App. 35, 573 P.2d 1347 (1978). Police may use methods not involving any searching activity to secure premises in which they are legally present while awaiting the issuance of a search warrant. State v. Terrovona, 105 Wash. 2d 632, 716 P.2d 295 (1986) (prior warrantless entry and arrest of defendant in his residence was justified by exigent circumstances; nothing observed by police officers contributed to the issuance of the search warrant, nor was anything in "plain view" used as evidence).

A suspect attempting to swallow evidence may create an exigent circumstance justifying efforts to prevent the swallowing even when the evidence could be expected to pass through the digestive system and be recovered. State v. Taplin, 36 Wash. App. 664, 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 313 (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 a search of the vehicle as a whole or for more than just the container. United States v. Johns, 469 U.S. 478, 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 & SEIZURE, § 5.5; see 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, 123, 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 compromise any legitimate interest in privacy); Accord State v. Bishop, 43 Wash. App. 17, 714 P.2d 1199 (1986) (subjecting suspicious substance to chemical analysis to determine identity does not invade privacy interests). Thus, a canine sniff does not constitute a search. United States v. Place, 462 U.S. 696, 707, 77 L. Ed. 2d 110, 121, 103 S. Ct. 2637, 2644-49 (1983) (trained narcotics dog sniffing exterior of luggage does not constitute a search); State v. Boyce, 44 Wash. App. 724, 723 P.2d 28 (1987) (canine sniff of air outside suspect’s bank safe deposit box); see generally supra § 1.6.


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. 386, 393, 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 393, 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).

This section focuses on the warrantless search or seizure
of a vehicle and its contents when police have probable cause to believe the vehicle contains evidence of crime. Vehicles may also be the subject of a warrantless search when the circumstances of the search are consistent with other exceptions to the warrant requirement, such as the search incident to arrest or Terry stop and frisk exceptions. See supra §§ 5.2(b) and 4.7-4.9, respectively.

The search of a motor vehicle and its contents is treated differently under the fourth amendment than under article I, section 7 of the Washington Constitution. See State v. Stroud, 106 Wash. 2d 144, 720 P.2d 436 (1986). This section will first set forth federal law governing the search and seizure of automobiles and their contents and will then discuss state law. This section will conclude with the general principles governing impoundment and inventory searches.

5.22 Searches and Seizures of Vehicles under the Fourth Amendment

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

Under the fourth amendment, police may conduct a warrantless search of an automobile when there is probable cause to believe that the vehicle contains contraband or evidence. Chambers v. Maroney, 399 U.S. 42, 51, 26 L. Ed. 2d 419, 428, 90 S. Ct. 1975, 1981 (1970); State v. Glasper, 84 Wash. 2d 17, 21, 523 P.2d 937, 941-42 (1974); State v. Parker, 79 Wash. 2d 326, 328-29, 485 P.2d 60, 61-62 (1971). A warrantless search is permissible because an automobile's mobility creates an exigency: the contraband or evidence could be transported out of the jurisdiction while officers are applying for a warrant. Carroll, 267 U.S. at 153, 69 L. Ed. at 551, 45 S. Ct. at 285.

The special treatment of automobiles has been extended to permit the warrantless search of a vehicle's trunk when police reasonably believe that the trunk contains weapons and the vehicle is vulnerable to vandalism. Cady v. Dombrowski, 413 U.S. 433, 448, 37 L. Ed. 2d 706, 718, 93 S. Ct. 2523, 2531 (1973). Similarly, police may make a warrantless search of a trunk when they reasonably believe a suspect may be hiding in it. State v. Silvernail, 25 Wash. App. 185, 191, 605 P.2d 1279, 1283 (1980), cert. denied, 449 U.S. 843 (1980).
5.22(b) Application of the Carroll Rule When Actual Exigency Removed

The Carroll rule permits a warrantless search even after a vehicle has been taken into police custody and is in no danger of removal or of disturbance of its contents. *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. 380, 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*, 469 U.S. at 484, 83 L. Ed. 2d at 897, 105 S. Ct. at 885. The vehicle, however, has to have been initially mobile or readily mobile for the Carroll rule to apply. *Coolidge v. New Hampshire*, 403 U.S. 443, 460-62, 29 L. Ed. 2d 564, 579-81, 91 S. Ct. 2022, 2034-36 (1971) (warrant was required when defendant had already been arrested, his car was located in his driveway, no other individual was available to move the car, and police already had established probable cause to search the car); see *California v. Carney*, 471 U.S. 386, 390-91, 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*, 469 U.S. at 484-88, 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 488, 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 (1979-80).

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*, 469 U.S. at 483, 83 L. Ed. 2d at 896, 105 S. Ct. at 885 (citing *United States v. Ross*, 456 U.S. 798, 821, 72 L. Ed. 2d 572, 591, 102 S. Ct. 2157, 2170 (1982)).
Thus, when the exact location of the contraband within the vehicle is not known, police may conduct a warrantless search not only of the vehicle itself but also of any of its contents, including containers. *Ross*, 456 U.S. at 825, 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. Ct. 2476 (1977); *see also Arkansas v. Sanders*, 442 U.S. 753, 765, 61 L. Ed. 2d 235, 246, 99 S. Ct. 2586, 2594 (1979). Moreover, when a warrant would traditionally be required for a search of a container as, for example, when the container consists of personal luggage, the placement of the container inside the vehicle does not trigger the *Carroll* rule; although no warrant may be required for the seizure of the container, a warrant is required for a search of its contents. *Chadwick*, 433 U.S. at 12, 53 L. Ed. 2d at 549, 97 S. Ct. at 2484 (the expectation of privacy in containers is not undermined by simply placing the containers in a vehicle).

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 incident to arrest are limited so that immediately following the arrest of the occupant of a vehicle, the police may conduct a warrantless search of the passenger compartment of a vehicle, including any unlocked containers or glove compartments within the passenger compartment. Before searching any locked glove compartment or other locked container, however, the police must obtain a search warrant. *State v. Stroud*, 106 Wash. 2d 144, 720 P.2d 436 (1986). In *Stroud*, the court attempted to provide a clearer rule to guide officers' conduct than that previously enunciated in *State v. Ringer*, 100 Wash. 2d 686, 674 P.2d 1246 (1983), thus relieving the police of the burden of determining from the totality of the circumstances whether actual exigencies exist or not. Although the *Stroud* rule allows greater scope to an officer's warrantless search than did the *Ringer* rule, it is still intended to be more protective of an arrestee's rights than that permissible under the fourth amendment.
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 also Seattle v. Mesiani, 110 Wash. 2d 454, 459, — P.2d — (1988); (Seattle's sobriety checkpoint program "gave police officers unbridled discretion to conduct intrusive searches."); see generally infra § 6.4(c). The validity of a road block program under the fourth amendment depends on the balancing of the effectiveness of the road block program against the degree of intrusion on the cumulative interests invaded, rather than merely with one individual's interest in freedom from intrusion. Mesiani, 110 Wash. 2d at 458-59, — P.2d at — (checkpoint program involved no statutory constraints and involved extensive invasion of privacy such as smelling of suspect's breath, visual check of automobile for open containers, and physical tests designed to elicit evidence of dexterity).

In Mesiani, the Washington Supreme Court held a sobriety checkpoint program unconstitutional under both article I, section 7, and the fourth amendment. Relying on article I, section 7's explicit recognition of the privacy rights of the state's citizens, and requirement that all searches be conducted under "authority of law," the court dismissed the City's argument that the stops fell within an exception to the warrant requirements. Id. at 457-58, — P.2d at —. In one of the cases relied upon by the City, State v. Silvernail, 25 Wash. App. 185, 190, 605 P.2d 1279, 1283 (1980), the court permitted a warrantless search when there was information that a serious felony had recently been committed. The Mesiani court distinguished Silvernail, stating that "[notice that a felony had recently been committed] is far different from an inference from statistics
that there are inebriated drivers in the area." Mesiani, 110 Wash. 2d at 458 n.1, — P.2d at — (1988). But see Ingersoll v. Palmer, 43 Cal. 3d 1321, 743 P.2d 1299, 241 Cal. Rptr. 42 (1987) (A majority of the California Supreme Court used the "administrative search" doctrine to decide that sobriety checkpoints pass constitutional muster so long as they are properly designed and operated. Such checkpoints are intended primarily to deter intoxicated motorists from taking to the road, not to discover evidence of crimes, and, therefore, may be characterized as administrative searches that require no individualized suspicion of illegal conduct.).

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 owner 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. 3 LAFAVE, SEARCH & SEIZURE, § 7.3(b); see General Motors 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). In Lowry v. Nelson, 43 Wash. App. 747, 719 P.2d 594 (1986), review denied, 106 Wash. 2d 1013 (1986), appeal dismissed, 107 S. Ct. 864 (1986), it was held that under the fourth amendment, the police are not required to obtain a search warrant before exercising the authority granted by WASH. REV. CODE § 69.50.505(a)(4) (Uniform Controlled Substances Act) to seize a vehicle used to transport a controlled substance. No analysis of these issues was made under article I, section 7 because petitioner failed to raise any state constitutional arguments.
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.


Recent cases concerning impoundment of a vehicle include:

(1) as evidence of a crime, State v. Terrovona, 105 Wash. 2d 632, 716 P.2d 295 (1986) (police properly impounded a vehicle that they had probable cause to believe was used in commission of a felony, since defendant lured the victim to the murder site by telephoning and requesting victim to bring gasoline to his empty vehicle);

(2) as part of the community caretaking function, State v. Sweet, 44 Wash. App. 226, 721 P.2d 560 (impoundment of vehicle was proper under the community caretaking function when the arrestee was unconscious, items of value were visible inside the vehicle, and the vehicle was in a high crime area), review denied, 107 Wash. 2d 1001 (1986); and


The “community caretaking function” permits impoundment when the vehicle has been abandoned, impedes traffic, poses a threat to public safety and convenience, or is itself threatened by vandalism or theft of its contents. South Dakota v. Opperman, 428 U.S. 364, 368-69, 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. See generally 3 LAFAVE, SEARCH & SEIZURE, §§ 7.4(a)-(g).

Officers are permitted to impound a vehicle only when constitutionally reasonable and necessary to effect the purpose of the statute, namely, the prevention of a continuing violation of specified motor vehicle statute. Impoundment is unreasonable and improper when the owner of the vehicle, or a passenger in the vehicle, is available to transport it, and the driver, although under arrest, requests the officer to follow one of these less intrusive alternatives. State v. Reynoso, 41 Wash. App. at 118, 702 P.2d at 1224-25. When impoundment would be permitted as part of the police community caretaking function, police must first make an inquiry as to the availability of the owner or the owner's spouse or friends to move the vehicle. State v. Williams, 102 Wash. 2d 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 must also 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 specifically authorized impoundment. See State v. Simpson, 95 Wash. 2d 170, 189, 622 P.2d 1199, 1211 (1980); State v. Singleton, 9 Wash. App. 327, 332-33, 511 P.2d 1396, 1400 (1973). A vehicle
lawfully parked at one's home or even on a public street, however, may not be impounded simply because its owner has been arrested. United States v. Squires, 456 F.2d 967, 970 (2d Cir. 1972). Similarly, impoundment is improper when the arrestee's release is imminent and the vehicle does not pose a safety hazard. State v. Bales, 15 Wash. App. 834, 836, 552 P.2d 688, 690 (1976); State v. Beriram, 18 Ariz. App. 579, 582, 504 P.2d 520, 522 (1972).

Officers may also make a warrantless detention of a vehicle by deflating its tires during the time when officers are in pursuit of a suspect. State v. Burgess, 43 Wash. App. 253, 716 P.2d 948, review denied, 106 Wash. 2d 1004 (1986). In Burgess, the court held that since the detention was unaccompanied by an exploratory search, the detention was reasonably restricted in time and place and was necessary to prevent the suspect's flight from the scene. Id.

5.28 Inventory Searches of Impounded Vehicles

Courts generally uphold inventory searches of vehicles when the initial impoundment 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 the search was closely related to the reason defendant was arrested, reason for impounding car, and reason car was 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, the owner's consent must be obtained before police may conduct an inventory search of a vehicle impounded pursuant to the community caretaking function. State v. Williams, 102 Wash. 2d 733, 689 P.2d 1065 (1984) (dictum). 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 not first given the opportunity 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). An inventory search of a vehicle impounded pursuant to the community caretaking function made without the owner's consent has been held valid when an owner was unconscious and thus unable to either give or withhold his consent. There was also no evidence suggesting that the search was conducted in bad faith or that it was a mere pretext for an investigatory search. State v. Sweet, 44 Wash. App. 226, 721 P.2d 560, review denied, 107 Wash. 2d 1001 (1986).

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**

Police may enter a vehicle to aid a person in distress or to seek information about a person in distress. United States v. Haley, 581 F.2d 723, 726 (8th Cir. 1978), cert. denied, 439 U.S. 1005 (1978). Cf. supra § 5.5.

5.30 **Warrantless Searches in Special Environments**

Warrantless searches have been permitted in special environments when the danger to the public is severe and the degree of intrusion small. Thus, warrantless magnetometer (metal detector) searches are permitted at airports to prevent hijackings and bombings. United States v. Skipwith, 482 F.2d 1272 (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 package contains 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, 121, 80 L. Ed. 2d 85, 99, 104 S. Ct. 1652, 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 only disclose the presence of contraband. *Jacobsen*, 466 U.S. at 121, 80 L. Ed. 2d at 99, 104 S. Ct. at 1660-61; see *State v. Morgan*, 32 Wash. App. 764, 650 P.2d 228 (1982); *State v. Wolohan*, 23 Wash. App. 813, 598 P.2d 421 (1979), *review denied*, 93 Wash. 2d 1008 (1980). The constitutionality of a canine sniff to determine the presence of contraband, requires a separate analysis under the state and federal constitutions. See *State v Gunwall*, 106 Wash. 2d 54, 720 P.2d 808 (1986), for a discussion of the relationship of the state and federal constitutions and the factors involved in determining whether article I, section 7 offers, in the context at issue, more or less protection than the fourth amendment. See also *State v. Boyce*, 44 Wash. App. 724, 723 P.2d 28 (1986) (the canine sniff of suspect’s safe deposit box not a search under article I, section 7).
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, burdens of proof, and warrant requirements in 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 of 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. 325, 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 objective of the intrusion is the discovery of evidence of violation of a school rule and not the prevention of physical harm. Id. at 341, 83 L. Ed. 2d at 734, 105 S. Ct. at 743.

The protection afforded students against searches by school officials under article I, section 7 of the Washington Constitution is no greater than that provided under the fourth amendment. State v. Brooks, 43 Wash. App. 560, 568, 718 P.2d 837, 841 (1986). 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). See also *State v. Brooks*, 43 Wash. App. 560, 567-68, 718 P.2d 837, 841 (1986) (finding that the search of a student’s school locker, and locked container therein, was reasonable in light of the factors expounded in *State v. McKinnon*).

Although the reduced standard of proof of reasonable suspicion will justify the search of a student or his or her belongings, the school must still possess particularized suspicion with respect to each individual searched. A statistical probability that some students possess contraband will not justify a search. *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 342, 83 L. Ed. 2d at 735, 105 S. Ct. at 744 (dicta) (individualized suspicion may not be required). See generally 4 LAFAVE, SEARCH & SEIZURE, § 10.11(b).

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. See generally 4 LAFAVE, SEARCH & SEIZURE, §§ 10.9(a)-(d).

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 cells. See *Block v. Rutherford*, 468 U.S. 576, 589-91, 82 L. Ed. 2d 438, 449-50, 104 S. Ct. 3227, 3234 (1984); *Bell v. Wolfish*, 441 U.S. 520, 555-57, 60 L. Ed. 2d 447, 479-80, 99 S. Ct. 1861, 1882-84 (1979).


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 only on 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

Warrants are not required for the search of a prisoner or pretrial detainees. See Block v. Rutherford, 468 U.S. 576, 82 L. Ed. 2d 438, 104 S. Ct. 3227 (1984).


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). The test of reasonableness requires a balancing of the need for the particular search against the invasion of any personal rights that the search entails. Bell v. Wolfish, 441 U.S. 520, 555, 60 L. Ed. 2d 447, 481, 99 S. Ct. 1861, 1884 (1979) (Officials must have a reasonable suspicion that the arrestee is concealing weapons or other con-
traband based on the crimes charged, particular characteristics of the arrestee, or the circumstances of arrest; a policy of conducting a strip-body cavity search of an arrestee charged with a misdemeanor or minor offense is precluded by the fourth amendment.); Weber v. Dell, 804 F.2d 796 (2d Cir. 1986), cert. denied, 107 S. Ct. 3263 (1987); Cruz v. Finney, 656 F. Supp. 1001 (D. Kan. 1987).

In Washington, routine strip searches are governed in part by statute and administrative regulation. See WASH. REV. CODE §§ 10.79.060-.170 (1987); WASH. ADMIN. CODE 289-02-020; 289-16-100; 289-16-200 (1986). Probable cause and a warrant are 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 289-16-100, -200 (1986). 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 required for ordinary searches and seizures. This section will briefly describe some of the situations in which traditional proof and warrant requirements have been relaxed.

A border search need not be conducted at the border. United States v. Cardona, 769 F.2d 625, 629 (9th Cir. 1985) (court upheld the search of a package placed with courier service for shipment 24 hours before its scheduled border crossing and 3,000 miles from the border when it was all but certain the parcel’s condition would remain unchanged until it crossed the United States border); United States v. Caminos, 770 F.2d 361,
365 (3d Cir. 1985) (border searches allowed at point of destination rather than point of entry when there is no evidence the package has been materially changed and when the package's transportation to its stated final destination has been under a customs board). See generally 3 LAFAVE, SEARCH & SEIZURE, §§ 10.5(a)-(k).

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, 566-57, 49 L. Ed. 2d 1116, 1133, 96 S. Ct. 3074, 3087 (1976). No warrant is required for such stops. See id. See also 3 LAFAVE, SEARCH & SEIZURE, § 10.5(i).

6.3(b) Roving Patrols: Illegal Aliens

Officers conducting roving patrols near international borders must have a reasonable suspicion, based on "specific articulable facts," that a vehicle contains illegal aliens before stopping 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 must have probable cause. Almeida-Sanchez v. United States, 413 U.S. 266, 269-70, 37 L. Ed. 2d 596, 600-01, 93 S. Ct. 2535, 2537-38 (1973). See 3 LAFAVE, SEARCH & SEIZURE, § 10.5(h).

6.3(c) Smuggling

The scope of a Terry stop at the border may be relatively intrusive when smuggling of narcotics is suspected. See United States v. Montoya de Hernandez, 473 U.S. 531, 544, 87 L. Ed. 2d 381, 393, 105 S. Ct. 3304, 3312-13 (1985) (individual fitting courier profile of alimentary canal smuggler may be detained for 16 hours pending bowel movement; reasonable suspicion standard adopted); cf. United States v. Sharpe, 470 U.S. 675, 686-88, 84 L. Ed. 2d 605, 615-17, 105 S. Ct. 1568, 1574-75 (1985) (twenty minute detention of suspect based only on reasonable suspicion held permissible; Terry stop is unconstitutional in duration only when police do not act with due diligence, not at expiration of any particular time period); but cf. Florida v. Royer, 460 U.S. 491, 502-503, 75 L. Ed. 2d 229, 239-240, 103 S. Ct.
1319, 1326-27 (1983) (officers having only reasonable suspicion that airport traveler was smuggling narcotics could not detain traveler 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) (90 minute detention of luggage at international airport unreasonable when law enforcement officers only had reasonable suspicion of smuggling).

6.4 Administrative Searches

Whether or not criminal prosecution is anticipated, searches conducted for administrative purposes are governed by the fourth amendment. See, e.g., Michigan v. Clifford, 464 U.S. 287, 293-94, 78 L. Ed. 2d 477, 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 was to determine fire's origin, and no criminal conduct was 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, 534, 18 L. Ed. 2d 930, 938, 87 S. Ct. 1727, 1733 (1967) (search of home for housing code violations); See v. City of Seattle, 387 U.S. 541, 546, 18 L. Ed. 2d 943, 948, 87 S. Ct. 1737, 1741 (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, where no reasonable expectation of privacy exists, the fourth amendment protects against unreasonable administrative searches of commercial premises); see also Michigan v. Clifford, 464 U.S. 287, 293-94, 78 L. Ed. 2d 477, 483-84, 104 S. Ct. 641, 646-47 (1984); Michigan v. Tyler, 436 U.S. 499, 56 L. Ed. 2d 486, 98 S. Ct. 1942 (1978).

The right to challenge a warrantless investigation of fire-damaged property by the state fire marshall depends on
whether the individual making the challenge had an expectation of privacy in the property that was subject to the search. The test for an expectation of privacy in such premises is objective—that is, whether the expectation of privacy under the circumstances is reasonable, whether the property is the challenger's home and continues as such, the extent of the fire damage, and whether the challenger has attempted to secure or safeguard the premises. *State v. Carey*, 42 Wash. App. 840, 854, 714 P.2d 708, 715 (defendant had no expectation of privacy when he had moved out of his motor home, which was partially fire-damaged, and had made no effort to secure the premises although he had the opportunity to do so), review denied, 106 Wash. 2d 1003 (1986).

6.4(b) Warrant Requirements

Warrants are generally required for administrative searches of both private and commercial premises. *Camara v. Municipal Court*, 387 U.S. 523, 532-33, 18 L. Ed. 2d 930, 937-38, 87 S. Ct. 1727, 1732-33 (1967); *See v. City of Seattle*, 387 U.S. 541, 545-46, 18 L. Ed. 2d 943, 947-48, 87 S. Ct. 1737, 1740-41 (1967). When the traditional exceptions to the warrant requirement apply, however, a warrant is unnecessary. *Michigan v. Clifford*, 464 U.S. 287, 293-94, 78 L. Ed. 2d 477, 483-84, 104 S. Ct. 641, 646-47 (1984) (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.
A warrantless inspection of a commercial premise of a pervasively regulated business is deemed reasonable only if the following criteria are met: first, a substantial governmental interest must form the regulatory scheme; second, warrantless inspections must be necessary to fulfill the regulatory scheme; and third, the inspection program, in terms of certainty and regularity of application, must provide a constitutionally adequate substitute for a warrant. *New York v. Burger*, — U.S. —, 96 L. Ed. 2d 601, —, 107 S. Ct. 2636, 2643-44 (1987). Even a business person in a pervasively regulated industry, however, should not be subjected to unreasonable searches based on the theory that consent is a condition of licensing by the state. Rather, there must be a balancing of the need to search against the invasion that the search entails. *State v. Rome*, 47 Wash. App. 666, 669, 736 P.2d 709, 711 (1987) (a warrantless inspection of fish conducted in a reasonable manner by Department of Fisheries personnel aboard a commercial fishing boat to obtain biological and statistical information does not violate the fisherman’s constitutional rights; the state’s interest in preserving a natural resource, and the limitation in the purpose, place, and scope of the inspection rendered the inspection reasonable), review denied, 109 Wash. 2d 1025 (1988). See 3 LAFAVE, SEARCH & SEIZURE, § 10.2(c). Thus, a warrantless search of an automobile junkyard, conducted pursuant to a statute authorizing such a search, falls within the exception to the warrant requirement for administrative inspections of pervasively regulated industries, despite the fact that the inspections are conducted by police officers and that the ultimate purpose of the regulatory statute pursuant to which the search is done is the same as that of penal laws. *New York v. Burger*, — U.S. —, 96 L. Ed. 2d 601, 107 S. Ct. 2636 (1987). The Ninth Circuit has recently declined to extend the *Burger* test to searches of the person. *Railway Labor Executives’ Ass’n v. Burnlay*, 839 F.2d 575 (9th Cir. 1988) (urinalysis).

Ed. 2d 660, 673-74, 99 S.Ct. 1391, 1401, (1979), 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). See also supra § 5.24.

Police officers may enter a private residence without a warrant when officials of another governmental agency have validly entered the residence and validly discovered contraband. The police may not, however, exceed the scope of the prior intrusion. State v. Bell, 108 Wash. 2d 193, 201, 737 P.2d 254, 259 (1987) (firefighters, after entering premises to extinguish a fire, discovered a marijuana growing operation in plain view, and requested police assistance in seizing the contraband).

6.4(c) Level of Proof Requirements

To obtain an administrative warrant to search commercial or residential premises, law enforcement officers must either offer specific proof of a violation or show that "reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment]." Marshall 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. 287, 294, 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
CHAPTER 7: ADMINISTRATION OF THE EXCLUSIONARY RULE

7.0 Introduction

The exclusionary rule has traditionally provided that if a search or seizure violates a person's fourth amendment rights, any evidence found as a result of the search or seizure must be suppressed in the criminal trial of that defendant. When physical evidence must be suppressed, testimony regarding that physical evidence must also be suppressed if such testimony is the fruit of the unlawful search or seizure. 4 LAFAVE, SEARCH

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 the 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 to serve as a method of demonstrating judicial integrity. United States v. Leon, 468 U.S. 897, 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); see 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 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. 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. White, 97 Wash. 2d at 109-12, 640 P.2d at 1071-72. See United States v. Leon, 468 U.S. at 916, 82 L. Ed. 2d at 694, 104 S. Ct. at 3418 (1984) (sole purpose of exclusionary rule is to deter police misconduct).

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, 96 S. Ct. 3037, 3047-48, (1976); see generally 1 LAFAVE, SEARCH & SEIZURE, § 1.2(a)-(f). 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 & SEIZURE, § 1.2(a). For citations to studies on the effects of the exclusionary rule on felony prosecutions, see United States v. Leon, 468 U.S. at 907-908 n.6, 82 L. Ed. 2d at 688, 104 S. Ct. at 3413.

(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. 465, 492, 49 L. Ed. 2d 1067, 1086-87, 96 S. Ct. 3037, 3051 (1976).

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. See generally 1 LAFAVE, SEARCH & SEIZURE, § 1.2(a)-(f). See also 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 and seizure, see infra §§ 7.5, 7.6; and, (3) the nexus between the unlawful search or seizure and the evidence sought to be suppressed, 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. 897, 919-921, 82 L. Ed. 2d 677, 696-97, 104 S. Ct. 3405, 3419 (1984). “[T]he marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion.” Id. at 922, 82 L. Ed. 2d at 698, 104 S. Ct. at 3420.

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. 981, 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 990-91, 82 L. Ed. 2d at 745, 104 S. Ct. at 3429.

Federal courts may also admit evidence obtained during a search incident to an unlawful arrest when the arrest is made in good faith reliance on an ordinance subsequently declared unconstitutional. Michigan v. DeFillippo, 443 U.S. 31, 40, 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 obtained as a result of the arrest is nevertheless 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. *State v. White*, 97 Wash. 2d 92, 109-12, 640 P.2d 1061, 1070-72 (1982). 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 will 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 are also subject to impeachment by illegally obtained evidence that is inadmissible as substantive evidence of guilt. *United States v. Havens*, 446 U.S. 620, 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. *Giordenello 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 v. Superior Court*, 252 A.2d 300 (Del.), *cert. denied*, 396 U.S. 880 (1969); *State v. Tucker*, 101 N.J. Super. 380, 244 A.2d 353 (1968). The questioned has not yet been presented to the Washington Supreme Court.

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), *cert. denied*, 401 U.S. 983 (1971); *Verdugo v. United States*, 402 F.2d 599 (9th Cir. 1968), *cert. denied*, 402 U.S. 961 (1971).
There is a split of authority as to whether the exclusionary rule extends to parole or probation revocation hearings. Compare United States v. Vandemark, 522 F.2d 1019, 1022 (9th Cir. 1975) (exclusionary rule does not apply to probation revocation proceedings when officers conducting search did not know, and had no reason to believe, suspect was probationer) 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 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).

Article I, section 7 of the Washington Constitution must be applied in parole revocation hearings. A parolee, however, has a diminished right to privacy under article I, section 7, and a warrantless search of the parolee may be made by a law enforcement officer with a well-founded suspicion that a probation violation has occurred. State v. Lampman, 45 Wash. App. 228, 235, 724 P.2d 1092, 1096 (1986) (fact of parolee's flight, in light of officer's knowledge, created a well-founded suspicion that a parole violation had occurred). See supra § 6.2(a).

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).

Illegally seized evidence may be used to support a perjury conviction. See United States v. Raftery, 534 F.2d 854, 857 (9th Cir.), cert. denied, 429 U.S. 862 (1976); United States v. Turk, 526 F.2d 654 (5th Cir.) (cautioning against per se admissibility,
suggestions that exclusion may sometimes have deterrent effect), cert. denied, 429 U.S. 823 (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

The exclusionary rule has generally 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 has been 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.) (tax assessment invalid if based substantially on illegally obtained evidence), cert. denied, 396 U.S. 986 (1969); see generally 1 LAFAVE, SEARCH & SEIZURE, § 1.5(a)-(g).

7.4(d) Administrative Proceedings

Most courts apply the rule in administrative hearings when the disposition is relatively significant and when application of the rule is likely to deter unlawful searches and seizures. See, 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 proceeding 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 suits between private parties. Honeycutt v. Aetna Ins. Co., 510 F.2d 340, 348 (7th Cir.) (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), cert. denied, 421 U.S. 1011 (1975); Sackler v. Sackler, 15 N.Y.2d 40, 44, 203 N.E.2d 481, 482, 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: since the state is not a party to the proceeding,
it 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). The issue has not been reviewed under the Washington State Constitution.

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

Because the fourth amendment is a limitation on the government only, federal courts do not exclude the fruits of a private search. *Burdeau v. McDowell*, 256 U.S. 465, 475, 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, 117, 80 L. Ed. 2d 85, 96, 104 S. Ct. 1652, 1658 (1984) (A private freight carrier notified government agents that damaged package contained white powdery substance; information held admissible, for "when an individual reveals private information to another, he assumes the risk that his confidant will reveal that information to the authorities, and if that occurs the Fourth Amendment does not prohibit governmental use of that information.").

The Washington Constitution, article I, section 7 does not apply to searches by private citizens acting on their own initiative. *State v. Clark*, 48 Wash. App. 850, 855, 743 P.2d 822, 826, review denied, 109 Wash. 2d 1015 (1987). The protection from private searches afforded by article I, section 7 is, thus, co-extensive with the protection afforded by the fourth amendment. *State v. Dold*, 44 Wash. App. 519, 524, 722 P.2d 1353, 1357 (1986). The fact that the person conducting the search may be a public employee does not lend an element of state action to the search if the search is not related to the employee's official

When a private party acting independently of the government conducts a search and delivers the material to the police, neither the fourth amendment, nor article I, section 7 require the police to obtain a search warrant before examining the material so long as the government search does not exceed the scope of that previously conducted by the private party. *State v. Bishop*, 43 Wash. App. 17, 20, 714 P.2d 1199, 1200 (1986) (police re-opened packets found by private security personnel in the mouthpiece of defendant's telephone in his hospital room, and had the substance in the packets chemically analyzed); *State v. Dold*, 44 Wash. App. 519, 522, 722 P.2d 1353, 1355 (1986) (police investigation of defendant based on receipt of a letter addressed to defendant, but delivered to a private party who forwarded it to police); *cf. Kuehn v. Renton School District*, 103 Wash. 2d 594, 600, 694 P.2d 1078, 1081 (1985) (when private person acts under authority of state, fourth amendment applies; thus, lawfulness of school search of students' luggage is not dependent upon whether person conducting search is band director, principal, or parent).

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 may also be considered a state search when the party conducting the search acts on behalf of the public or with the purpose of aiding the government. *See, e.g., 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). A criminal defendant has the burden of proving that a private citizen search was conducted as an agent or instrumentality of the state. No agency relationship exists unless the state actively encourages or instigates the citizen's actions. Factors to be considered include the state's knowledge of and acquiescence in the search, and whether the citizen's intent was to assist law enforcement efforts or to further his own
ends. *State v. Clark*, 48 Wash. App. 850, 856, 743 P.2d 822, 826 (1987) (friend of defendant who had entered into an immunity agreement in return for testimony was not acting as agent of state when he turned over incriminating evidence belonging to defendant to police).


### 7.6(a) Agency Theory

Under agency theory, a search is not private if ordered or requested by a government officer. Thus, evidence is admissible when obtained as a consequence of postal authorities’ opening of a package to see if the proper postage rate was paid, but is inadmissible when the postal authorities open the package upon the request of a police officer seeking evidence. *United States v. Valen*, 479 F.2d 467 (3rd Cir. 1973), cert. denied, 419 U.S. 901 (1974); *Thacker v. Commonwealth*, 310 Ky. 702, 221 S.W.2d 682 (1949); *State v. Blackshear*, 14 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. 325, 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

Under a joint endeavor theory, when the police accompany a citizen on a search, it becomes a government search. *State v. Scrotisky*, 39 N.J. 410, 415, 189 A.2d 23, 25-26 (1963). It is imma-

A search is private, however, if it is undertaken in direct contravention to police instructions. *United States v. Maxwell*, 484 F.2d 1350, 1352 (5th Cir. 1973). And even if the police are summoned before the search begins and are present as it occurs, the search may still be considered private if a private purpose is served. *United States v. Lamar*, 545 F.2d 488, 490 (5th Cir. 1977) (heroin discovered by airline agent who opened unclaimed bag to determine its owner is admissible even when officer was present during search), *cert. denied*, 430 U.S. 959 (1977); *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 admissible), *cert. denied*, 445 U.S. 927 (1980); *cf. Corngold v. United States*, 367 F.2d 1, 5-6 (9th Cir. 1966) (contraband discovered by airline agents inadmissible when government agents joined actively in search).

7.6(c) Public Function Theory


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 Staple-
ton v. Superior Court, 70 Cal. 2d 97, 100, 447 P.2d 967, 970, 73 Cal. Rptr. 575, 578 (1968) (police participation in planning car search that was conducted by credit card agent obtained subsequent actions of agent with imprimatur of state action); Commonwealth v. Eshelman, 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. Mekjian, 505 F.2d 1320, 1327-28 (5th Cir. 1975) (copies of fraudulent claims allowed into evidence because defendant failed to prove that federal investigators knew nurse had illegally copied records for government use).

7.7 Fruit of the Poisonous Tree: General Rule

The extent to which evidence related to an illegal search or seizure may be suppressed depends on the extent to which the evidence derives from exploitation of the illegality. Wong Sun v. United States, 371 U.S. 471, 488, 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 Wash. 2d 1, 10, 559 P.2d 1334, 1338 (1977), overruled on other grounds, State v. Williams, 102 Wash. 2d 733, 741 n.5, 689 P.2d 1065, 1070 (1984). The following sections discuss three tests that have been used to determine whether a given piece of evidence constitutes "fruit of the poisonous tree" that should be suppressed. See generally Comment, Custodial "Seizures" and the Poison Tree Doctrine: Dunaway v. New York and Its Aftermath, 13 MARQ. L. REV. 733 (1980).
7.7(a) Attenuation Test

The attenuation test suggests that at some point the taint of evidence becomes so dissipated as to preclude suppression. That point arises when the detrimental consequences of the illegal police action becomes so attenuated that the deterrent effect 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, the police stopped the defendant’s car and arrested him shortly after he left his apartment building. 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 was 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.” Reid, 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 utilized in the manner of a divining rod to locate [the defendant’s] apartment but rather to facilitate access to [the] residence and to confirm from which door the defendant had exited.”).

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

(1) 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 also came by the evidence unlawfully does not make it suppressible. *Nix v. Williams*, 467 U.S. 431, 444, 81 L. Ed. 2d 377, 387-388, 104 S. Ct. 2501, 2509 (1984); *State v. O'Bremski*, 70 Wash. 2d 425, 429-30, 423 P.2d 530, 533 (1967) (when missing child found during unlawful search of apartment, child's testimony admissible because she was not discovered solely as result of unlawful search; witness had informed police he knew where child was).

The case for admitting the evidence is stronger when the independent source is known prior to the police illegality. *United States v. Barrow*, 363 F.2d 62, 66 (3d Cir. 1966) (testimony of witness found on premises of gambling casino during illegal search admissible when witness' identity as casino patron was previously learned from observation by federal agents), *cert. denied*, 385 U.S. 1001 (1967); see also *United States v. Giglio*, 263 F.2d 410, 413 (2d Cir.), *cert. denied*, 361 U.S. 820 (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. 1971); *United States v. Bacall*, 443 F.2d 1050, 1056-57 (9th Cir.) (even when evidence can be traced to leads resulting from illegal search, evidence admissible if government in fact learned of evidence from independent source), *cert. denied*, 404 U.S. 1004 (1971).

7.7(c) Inevitable Discovery Test

Evidence obtained as a result of unlawful police action

The inevitable discovery test applies even when the state cannot show that the police acted in good faith in accelerating the discovery of the evidence. *Id.* at 445, 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 Maguire, *How to Unpoison the Fruit—The Fourth Amendment and the Exclusionary Rule*, 55 J. CRIM. L.C. & P.S. 307, 315 (1964). The Washington Supreme Court has not yet adopted the inevitable discovery test, however.

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 must also 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 the causality between the illegality and the confession;
(2) the temporal proximity of the arrest and the confession;

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 unless intervening factors such as a valid arrest occur between the illegal arrest and the search. *United States v. Walker*, 535 F.2d 896, 898 (5th Cir.), cert. denied, 429 U.S. 982 (1976).
A search following an illegal arrest may be purged of the taint by voluntary consent to the search; the voluntariness of the consent may be determined by reference to the Brown factors. 4 LaFave, Search & Seizure, § 11.4(d); 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. 796, 814, 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 is 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 (1978); United States v. Dimuro, 540 F.2d 503, 515 (1st Cir. 1976), cert. denied, 429 U.S. 1038 (1977); United States v. Nelson, 459 F.2d 884, 889 (6th Cir. 1972).

7.8(e) Arrest as Fruit of Illegal Search

If an arrest is based solely on information derived from an illegal search, the arrest is tainted and void. United States v. Marchand, 564 F.2d 983, 1002 (2d Cir. 1977), cert. denied, 434
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 have also examined the purpose and flagrancy of the official misconduct. See generally 4 LAFAVE, SEARCH & SEIZURE, § 11.4(a)-(j).

2. At-trial identification. When both the police officer's knowledge of the accused's identity and the victim's independent recollection of the accused antedate the unlawful arrest, an in-court identification of the accused by the victim is untainted by either the arrest or the 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, 546-47, 688 P.2d 859, 864 (1984). Other factors to be considered in determining whether the at-trial identification is admissible include:

(a) the witness' prior opportunity to observe the alleged criminal act;

(b) the existence of any discrepancy between any pre-line-up description and the defendant's actual description;

(c) any identification of another person as the perpetrator prior to the line-up;
(d) the identification of the defendant by picture prior to the line-up;
(e) the failure to identify the defendant on a prior occasion; and

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 originally arrested 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 (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 (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 photo taken after illegal arrest for different offense).

(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 that
he or she was arrested for. *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, 187, 123 Cal. Rptr. 155, 159 (1975).

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

Testimony and physical evidence are treated differently for purposes of the exclusionary rule. *United States v. Ceccolini*, 435 U.S. 268, 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, 529-30, 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); and

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

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 failure to make a timely objection, defendant's testimony at trial about the evidence, and 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 defendant's failure to object at the omnibus hearing may constitute a waiver of the error if the party had knowledge of the illegality of the search or seizure prior to the hearing. WASH. R. CR. P. 4.5. The defendant's failure to object at trial will constitute a waiver unless the illegality is of such a flagrant or

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 may make the admission of the illegal evidence harmless error. See *Peele*, 10 Wash. App. at 66, 516 P.2d at 793; See also *LaRue v. State*, 137 Ga. App. 762, 224 S.E.2d 837 (1976); *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 *Tollett 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 Annotation, *Plea of Guilty as Waiver of Claim of Unlawful Search and Seizure*, 20 A.L.R.3d 724, 732-35 (1968).

7.10 Harmless Error

Even when illegally seized evidence has been improperly

CONCLUSION

Search and seizure law in Washington State continues to undergo both minor modifications and major revisions. The Washington Supreme Court's action in State v. Gunwall, 106 Wash. 2d 54, 120 P.2d 808 (1986), set forth the minimum matters that must be considered in making arguments under article I, section 7 of the Washington Constitution. The court's refusal to consider arguments that at a minimum do not address the Grunwall factors discussed in State v. Wethered, 110 Wash. 2d 466, — P.2d — (1988), stress the court's continuing insistence on quality legal thought, briefing, and argument by the lawyers appearing before the court.

Particulars of search and seizure law may change, but types of issues raised and considered are likely to remain much the same. While the Survey is not comprehensive and will require continuous updating, it will hopefully be a useful tool for lawyers and judges who must assess the scope of protection Washington affords against unlawful searches and seizures.
**TABLE OF CASES**

*A Quantity of Books vs. Kansas*, 378 U.S. 205, 12 L. Ed. 2d 809, 84 S. Ct. 1723 (1964) § 3.13(a)

*Adams v. Williams*, 407 U.S. 143, 32 L. Ed. 2d 612, 92 S. Ct. 1921 (1972) §§ 4.6(b), 4.6(c), 4.9(a)

*Aguilar v. Texas*, 378 U.S. 108, 12 L. Ed. 2d 723, 84 S. Ct. 1509 (1964) §§ 2.3, 2.5, 2.5(a), 2.5(b), 3.2(a)

*Air Pollution Variance Board v. Western Alfalfa Corp.*, 416 U.S. 861, 40 L. Ed. 2d 607, 94 S. Ct. 2114 (1974) § 1.3(c)

*Albrecht v. United States*, 273 U.S. 1, 71 L. Ed. 505, 47 S. Ct. 250 (1927) § 3.3(b)

*Allison v. State*, 62 Wis. 2d 14, 214 N.W. 2d 347 (1974) §§ 2.6(b)

*Alderman v. United States*, 394 U.S. 165, 22 L. Ed. 2d 176, 89 S. Ct. 891 (1969) § 1.6

*Almeida-Sanchez v. United States*, 413 U.S. 266, 37 L. Ed. 2d 596, 93 S. Ct. 2535 (1973) § 6.3(b)

*Andresen v. Maryland*, 427 U.S. 463, 49 L. Ed. 2d 627, 96 S. Ct. 2737 (1975) §§ 1.3(g), 3.1, 3.5(b), 3.10, 5.7(a)

*Arizona v. Hicks*, — U.S. —, 94 L. Ed. 2d 347, 107 S. Ct. 1140 (1987) §§ 1.3(g), 5.7(a)

*Arkansas v. Sanders*, 442 U.S. 753, 61 L. Ed. 2d 235, 99 S. Ct. 2586 (1979) §§ 1.3(e), 5.0, 5.2(b), 5.5, 5.22(c)


*Beck v. Ohio*, 379 U.S. 89, 13 L. Ed. 2d 142, 85 S. Ct. 223 (1964) §§ 2.2(a), 2.3(b)

*Bell v. Wolfish*, 441 U.S. 520, 60 L. Ed. 2d 447, 99 S. Ct. 1861 (1979) §§ 3.13(b), 6.2(a), 6.2(b), 6.2(d)


*Bickar v. Gray*, 380 F. Supp 804 (N.D. Ohio 1974) § 1.3(c)


*Boyd v. United States*, 116 U.S. 616, 29 L. Ed. 746, 6 S. Ct. 524 (1886) § 3.0

*Brinegar v. United States*, 338 U.S. 160, 93 L. Ed. 1879, 69 S. Ct. 1302 (1949) §§ 2.0, 2.2(b), 2.3, 2.3(b), 2.4(c)

*Brown v. Illinois*, 422 U.S. 590, 45 L. Ed. 2d 416, 95 S. Ct. 2254 (1975) §§ 7.7(a), 7.8(a)

*Brown v. Texas*, 443 U.S. 47, 61 L. Ed. 2d 357, 99 S. Ct. 2637 (1979) §§ 1.4, 1.5, 2.4(c), 2.4(e), 4.5, 4.6(a), 4.6(d), 4.8

Burdeau v. McDowell, 256 U.S. 465, 65 L. Ed. 1048, 41 S. Ct. 574 (1921) § 7.4(f)


Cady v. Dombrowski, 413 U.S. 433, 37 L. Ed. 2d 706, 93 S. Ct. 2523 (1973) §§ 5.22(a), 5.27, 5.28

California v. Carney, 471 U.S. 386, 85 L. Ed. 2d 406, 105 S. Ct. 2066 (1985) §§ 1.3(a), 1.3(e), 5.21, 5.22(b)

California v. Ciraolo, 476 U.S. 207, 90 L. Ed. 2d 210, 106 S. Ct. 1809 (1986) § 1.3(c)

California v. Greenwood, — U.S. —, L. Ed. 2d —, 108 S. Ct. 1625 (1988) §§ 1.3(g), 3.9(b)

California v. Minjares, 24 Cal. 3d 410, 591 P.2d 514, 153 Cal. Rptr. 224 (1979), cert. denied, 444 U.S. 887 (1979) § 5.27

Camara v. Municipal Court, 387 U.S. 523, 18 L. Ed. 2d 930, 87 S. Ct. 1727 (1967) §§ 1.3(a), 2.9(a), 6.1, 6.4(a), 6.4(b), 6.4(c)

Carroll v. United States, 267 U.S. 132, 69 L. Ed 543, 45 S. Ct. 280 (1925) §§ 1.3(d), 5.22(a)

Chambers v. Maroney, 399 U.S. 42, 26 L. Ed. 2d 419, 90 S. Ct. 1975 (1970) §§ 5.16, 5.21, 5.22(a), 5.22(b)

Chavis v. Wainwright, 488 F.2d 1077 (5th Cir. 1973) § 5.5

Chimel v. California, 395 U.S. 752, 23 L. Ed. 2d 685, 89 S. Ct. 2034 (1969) §§ 5.1, 5.17(a)

Clinton v. Virginia, 377 U.S. 158, 12 L. Ed. 2d 213, 84 S. Ct. 1186 (1964) § 1.3(a)

Clough v. State, 92 Nev. 603, 555 P.2d 840 (1976) § 7.7(c)

Coleman v. Reilly, 8 Wash. App. 684, 508 P.2d 1035 (1973) § 3.7(c)

Colorado v. Bannister, 449 U.S. 1, 66 L. Ed. 2d 1, 101 S. Ct. 42 (1980) § 5.22(a)

Combs v. United States, 408 U.S. 224, 33 L. Ed. 2d 308, 92 S. Ct. 2284 (1972) § 1.4

Commonwealth v. Antobenedetto, 366 Mass. 1225, 315 N.E.2d 530 (1974) § 2.7(b)

Commonwealth v. Dembo, 451 Pa. 1, 301 A.2d 689 (1973) § 7.6(a)


Commonwealth v. Garvin, 448 Pa. 258, 293 A.2d 33 (1972) § 7.8(f)

Connally v. Georgia, 429 U.S. 245, 50 L. Ed. 2d 444, 97 S. Ct. 546 (1977) § 3.2(b)
Cooks v. State, 699 P.2d 653 (Okl. Cir. App. 1985) § 3.9(b)
Coolidge v. New Hampshire, 403 U.S. 443, 29 L. Ed. 2d 564, 91 S. Ct. 2022 (1971) §§ 3.2(b), 5.0, 5.7(a), 5.7(b), 5.17(a), 5.22(b), 7.5
Cooper v. California, 386 U.S. 58, 17 L. Ed. 2d 730, 87 S. Ct. 788 (1967) § 5.28
Corngold v. United States, 367 F.2d 1 (9th Cir. 1966) § 7.6(b)
Couch v. United States, 409 U.S. 322, 34 L. Ed. 2d 730, 87 S. Ct. 788 (1967) § 3.9(b)
Cupp v. Murphy, 412 U.S. 291, 36 L. Ed. 2d 900, 93 S. Ct. 2000 (1973) §§ 1.3(f), 5.3
Dalia v. United States, 441 U.S. 238, 60 L. Ed. 2d 177, 99 S. Ct. 1682 (1979) §§ 3.7(c), 3.9(a)
Davis v. Mississippi, 394 U.S. 721, 22 L. Ed. 2d 676, 89 S. Ct. 1394 (1969) §§ 4.8, 7.8(f)
Doe v. Dring, 2 M. & S. 448 (1814) § 1.3(c)
Dorman v. United States, 435 F.2d 385 (D.C. Cir. 1970) § 5.17(a)
Dow Chemical Co. v. United States, 476 U.S. 227, 90 L. Ed. 2d 226, 106 S. Ct. 1819 (1986) §§ 1.3(c), 1.3(d), 5.8, 5.9
Downing v. Kunzig, 454 F.2d 1230 (6th Cir. 1972) § 5.30
Doyle v. Ohio, 426 U.S. 610, 49 L. Ed. 2d 91, 96 S. Ct. 2240 (1976) § 2.4(e)
Dufrin v. Spreen, 712 F.2d 1084 (6th Cir. 1983) § 6.2(d)
Dunaway v. New York, 442 U.S. 200, 60 L. Ed. 2d 824, 99 S. Ct. 2248 (1979) §§ 4.5, 4.7, 4.7(a), 7.8(a)
Fixel v. Wainwright, 492 F.2d 480 (5th Cir. 1974) § 1.3(c)
Florida v. Meyers, 466 U.S. 380, 80 L. Ed. 2d 381, 104 S. Ct. 1852 (1984) § 5.22(b)
Florida v. Rodriguez, 469 U.S. 1, 83 L. Ed. 2d 165, 105 S. Ct. 308 (1984) §§ 1.4(a), 4.6(a), 5.12(c)
Florida v. Royer, 460 U.S. 491, 75 L. Ed. 2d 229, 103 S. Ct. 1319 (1983), §§ 1.4, 1.4(a), 4.7(a), 6.3(c)
G. I. Distrib. Inc. vs. Murphy, 490 F.2d 1167 (2d Cir. 1973) § 3.13(a)
G. M. Leasing Corp. v. United States, 429 U.S. 338, 50 L. Ed. 2d 530, 97 S. Ct. 619 (1977) § 5.2
Franks v. Delaware, 438 U.S. 154, 57 L. Ed. 2d 667, 98 S. Ct. 1503, 78 S. Ct. 1245 (1958) § 7.3(c)
Gustafson v. Florida, 414 U.S. 260, 38 L. Ed. 2d 456, 94 S. Ct. 488 (1973) § 5.2(a)
Hayes v. Florida, 470 U. S. 811, 84 L. Ed. 2d 705, 105 S. Ct. 1643 (1985) §§ 1.3(f), 4.7(a)
Heller v. New York, 413 U.S. 483, 37 L. Ed. 2d 745, 93 S. Ct. 2789 (1973) § 3.13(a)
Henry v. United States, 361 U.S. 98, 4 L. Ed. 2d 134, 80 S. Ct. 168 (1959) § 2.4(a)
Hester v. United States, 265 U.S. 57, 68 L. Ed. 898, 44 S. Ct. 445 (1924) § 1.3(c)
Hocker v. Woody, 95 Wash. 2d 822, 631 P.2d 372 (1981) § 3.2(b)
Hudson v. Palmer, 468 U.S. 517, 82 L. Ed. 2d 393, 104 S. Ct. 3194 (1984) §§ 1.3(h), 6.2(a), 6.2(c)
In re Gault, 387 U.S. 1, 18 L. Ed. 2d 527, 87 S. Ct. 1428 (1967) § 7.4(a)
In re Marsh, 40 Ill. 2d 53, 237 N.E.2d 529 (1968) § 7.4(a)
In re T., 8 Cal.App.3d 990, 88 Cal. Rptr. 37 (1970) §§ 7.4(a), 7.6
INS. v. Delgado, 466, U.S. 210, 80 L. Ed. 2d 247, 104 S. Ct. 1758 (1984) §§ 1.4, 1.4(a), 1.5(a), 5.12(b)
Jaben v. United States, 381 U.S. 214, 14 L. Ed. 2d 345, 85 S. Ct. 1365 (1965) § 2.7(a)
Jackson v. Metropolitan Edison Co., 419 U.S. 345, 42 L. Ed. 2d 477, 95 S. Ct. 449 (1974) § 7.6(c)
Johnson v. Louisiana, 406 U.S. 356, 32 L. Ed. 2d 152, 92 S. Ct. 1620 (1972) § 7.8(f)
Johnson v. State, 496 S.W.2d 72 (Tex. Crim. 1973) § 7.8(f)
Johnson v. United States, 333 U.S. 10, 92 L.Ed. 436, 68 S. Ct. 367 (1948) § 3.2
Jones v. State, 484 S.W.2d 745 (Tex. Crim. 1970) § 7.10
Jones v. United States, 362 U.S. 257, 4 L. Ed. 2d 697, 80 S. Ct. 725 (1960) §§ 1.1, 1.6, 2.3(a)
Katz v. United States, 389 U.S. 347, 19 L. Ed. 2d 576, 88 S. Ct. 507 (1967) §§ 1.0, 1.1, 1.2, 5.0, 5.6
Ker v. California, 374 U.S. 23, 10 L. Ed. 2d 726, 83 S. Ct. 1623 (1963) §§ 2.4(c), 3.7, 3.7(a), 3.7(c)
Kolender v. Lawson, 461 U.S. 352, 75 L. Ed. 2d 903, 103 S. Ct. 1855 (1983) § 4.8
Lawn v. United States, 355 U.S. 339, 2 L. Ed. 2d 321, 78 S. Ct. 311 (1958) § 7.3(b)
Lester v. City of Chicago, 830 F.2d 706 (7th Cir. 1987) § 3.13(b)
Lewis v. United States, 385 U.S. 206, 17 L. Ed. 2d 312, 87 S. Ct. 424 (1966) rehearing denied, 386 U.S. 939 (1967) § 3.7(a)
Little v. Rhay, 68 Wash. 2d 353, 413 P.2d 15, appeal dismissed, 385 U.S. 96 (1960) §§ 2.3(b), 2.5(e)
Lo-Ji Sales, Inc. v. New York, 442 U.S. 319, 60 L. Ed. 2d 920, 99 S. Ct. 2319 (1979) §§ 3.2(b), 3.5(b)
Lustig v. United States, 338 U.S. 74, 93 L. Ed. 1819, 69 S. Ct. 1372 (1949) § 7.6(b)
McCray v. Illinois, 386 U.S. 300, 18 L. Ed. 2d 62, 87 S. Ct. 1056 (1967) §§ 2.5(a), 3.12(a)
McNear v. Rhay, 65 Wash. 2d 530, 398 P.2d 732 (1965) §§ 5.12(b), 5.13
Mancusi v. DeForte, 392 U.S. 364, 20 L. Ed. 2d 1154, 88 S. Ct. 2120 (1976) § 1.3(d)
Mapp v. Ohio, 367 U.S. 643, 6 L. Ed. 2d 1081, 81 S. Ct. 1684 (1961) § 7.0
Marron v. United States, 275 U.S. 192, 72 L.Ed. 231, 48 S. Ct. 74 (1927) § 3.5
Marsh v. Alabama, 326 U.S. 501, 90 L. Ed. 265, 66 S. Ct. 276 (1946) § 7.6(c)
Marshall v. Barlow's Inc., 436 U.S. 307, 56 L. Ed. 2d 305, 98 S. Ct. 1816 (1978) §§ 1.3(d), 2.9(a), 3.3(d), 6.4(a), 6.4(c)
Marshall v. United States, 422 F.2d 185 (5th Cir. 1970) § 5.8
Maryland v. Macon, 472 U.S. 463, 86 L. Ed. 2d 370, 105 S. Ct. 2778 (1985) §§ 1.3(g), 3.13(a)
Metzger v. Pearcy, 393 F.2d 202 (7th Cir. 1968) § 3.13(a)
Michaud v. State, 505 P.2d 1399 (Okla. Crim. 1973) § 7.3(f)
Michigan v. Defillippo, 443 U.S. 31, 61 L. Ed. 2d 343, 99 S. Ct. 2627 (1979) §§ 7.2(a), 7.8(c)
Michigan v. Summers, 452 U.S. 692, 69 L. Ed. 2d 340, 101 S. Ct. 2587 (1981) §§ 1.4(c), 2.9(b), 3.8(b), 4.6(d), 5.18(b)
Mincey v. Arizona, 437 U.S. 385, 57 L. Ed. 2d 290, 98 S. Ct. 2408 (1978) § 5.16
New Jersey v. T.L.O., 469 U.S. 325, 83 L. Ed. 2d 720, 105 S. Ct. 733 (1985) §§ 6.1, 6.4(c), 7.6(a)
New York v. Class, 475 U.S. 106, 89 L. Ed. 2d 81, 106 S. Ct. 960 (1986) § 1.3(e)
Norman v. State, 134 Ga. App. 767, 216 S.E.2d 644 (1975) § 1.3(c)
O’Connor v. Johnson, 287 N.W.2d 400 (Minn. 1979) § 3.13(c)
Oklahoma v. Castleberry, 469 U.S. 979, 85 L. Ed. 2d 112, 105 S. Ct. 1859 (1985) §§ 5.2(b), 5.5
Oliver v. United States, 466 U.S. 170, 80 L. Ed. 2d 214, 104 S. Ct. 1735 (1984) § 1.3(c)
Ortega v. O’Connor, 764 F.2d 703 (9th Cir. 1985) § 1.6
Payton v. New York, 445 U.S. 573, 63 L. Ed. 2d 639, 100 S. Ct. 1371 (1980) §§ 1.1, 1.2, 1.3(a), 4.1
People v. Avery, 173 Colo. 315, 478 P.2d 310 (1970) § 3.4(b)
People v. Bradley, 1 Cal. 3d 60, 460 P.2d 129, 81 Cal. Rptr. 457 (1969) § 1.3(c)
People v. Cantor, 36 N.Y.2d 106, 324 N.E.2d 872, 365 N.Y.S.2d 509 (1975) § 7.8(i)
People v. Clark, 65 Ill. 2d 169, 357 N.E.2d 798 (1976) § 5.28
People v. Dowdy, 50 Cal. App. 3d 180, 123 Cal. Rptr. 155 (1975) § 7.8(g)

People v. Dumas, 9 Cal. 3d 871, 512 P.2d 1208, 109 Cal. Rptr. 304 (1973) § 3.7 (c)

People v. Escudero, 23 Cal. 3d 800, 592 P.2d 312 153 Cal. Rptr. 825 (1979) § 5.17(a)

People v. Herdan, 42 Cal. App. 3d 300, 116 Cal. Rptr. 641 (1978) § 2.6(b)

People v. Lopez, 163 Cal. App. 3d 602, 209 Cal. Rptr. 575 (1985) § 2.6(b)

People v. McInnis, 6 Cal. 3d 821, 494 P.2d 690, 100 Cal. Rptr. 618 (1972), cert. denied 409 U.S. 1061 (1972) § 7.8(f)

People v. Martin, 382 Ill. 192, 46 N.E.2d 997 (1942) § 7.8(h)

People v. Moore, 69 Cal. 2d 674, 446 P.2d 800 72 Cal. Rptr. 800 (1968) § 7.4(b)

People v. Pettis, 12 Ill. App. 3d 123, 298 N.E.2d 372 (1973) § 7.8(f)

People v. Puglisi, 380 N.Y.S.2d 221, 51 App. Div. 2d 695 (1976) § 7.8 (i)

People v. Robbins, 54 Ill. App. 3d 298, 369 N.E.2d 577 (1977) § 7.8(b)

People v. Sciacca, 45 N.Y.2d 122, 379 N.E. 2d 1153 408 N.Y.S.2d 22 (1978) §§ 3.9(a), 3.9(c)

People v. Shuey, 13 Cal. 3d 835, 533 P.2d 211, 120 Cal. Rptr. 83 (1975) § 7.8(c)

People v. Superior Court, 3 Cal. 3d 807, 478 P.2d 449, 91 Cal. Rptr. 729 (1970) § 2.4(d)

People v. Vogel, 58 Ill. App. 3d 910, 374 N.E.2d 1152 (1978) § 5.19

People v. Wachter, 58 Cal. App. 3d 911, 130 Cal. Rptr. 279 (1976) § 7.6 (c)

People v. Weisenberger, 183 Colo. 353, 516 P.2d 1128 (1973) § 1.3(b)

People v. Whalen, 390 Mich. 672, 213 N.W.2d 116 (1973) § 5.8

People v. Whitaker, 64 N.Y.S.2d 347, 486 N.Y.2d 895, 476 N.E.2d 294 (1985) § 1.3(f)

People v. Williams, 57 Ill. 2d 239, 311 N.E.2d 681 (1974) § 5.1(b)

People v. Zimmerman, 44 Ill. App. 3d 601, 358 N.E.2d 715 (1976) § 7.4

Pizzarello v. United States, 408 F.2d 579 (2d Cir. 1969) § 7.4(c)

Plancich v. Williamson, 57 Wash. 2d 367, 357 P.2d 693 (1960) § 4.1
Railway Labor Executives' Ass'n v. Burnlay, 839 F.2d 575 (9th Cir. 1988) § 6.4(b)
Rawlings v. Kentucky, 448 U.S. 98, 65 L. Ed. 2d 633, 100 S. Ct. 2556 (1980) §§ 1.6, 5.3, 7.8(a)
Reese v. Seattle, 81 Wash. 2d 374, 503 P.2d 64 (1972), cert. denied, 414 U.S. 832 (1973) § 4.4(a)
Reid v. Georgia, 448 U.S. 438, 65 L. Ed. 2d 890, 100 S. Ct. 2752 (1980), § 4.6(d)
Rios v. United States, 364 U.S. 253, 4 L. Ed. 2d 1688, 80 S. Ct. 1431 (1960) § 1.3(g)
Rochin v. California, 342 U.S. 165, 96 L.Ed. 183, 72 S. Ct. 205 (1952) §§ 3.13(b), 5.2(a), 5.18(a)
Sackler v. Sackler, 15 N.Y.2d 40, 203 N.E.2d 481, 255 N.Y.S.2d 83 (1964) §§ 7.4(f), 7.6(d)
Sanders v. Craven, 488 F.2d 478 (9th Cir. 1973) § 7.10
Schmerber v. California, 384 U.S. 757, 16 L. Ed. 2d 908, 86 S. Ct. 1826 (1966) §§ 1.3(f), 2.9(c), 3.13(b), 5.2(a), 5.16, 5.18, 5.18(a)
Schneckloth v. Bustamonte, 412 U.S. 218, 36 L. Ed. 2d 854, 93 S. Ct. 2041 (1973) §§ 5.12, 5.12(c), 5.12(e)
Seattle v. Leach, 29 Wash. App. 81, 627 P.2d 159 (1981) §§ 3.3(b), 3.3(d)
Seattle v. Mesiani, 110 Wash. 2d 454, — P.2d — (1988) § 1.4(b), 2.2(c), 2.9(a), 5.24, 6.4(c)
See v. Seattle, 387 U.S. 541, 18 L. Ed. 2d 943, 87 S. Ct. 1737 (1967) §§ 1.3(d), 6.4(a), 6.4(b), 6.4(c)
Shadwick v. City of Tampa, 407 U.S. 345, 32 L. Ed. 2d 783, 92 S. Ct. 2119 (1972) § 3.2(a)
Sheff v. State, 329 So. 2d 270 (Fla. 1976) § 7.8(d)
Sibron v. New York, 392 U.S. 41, 20 L. Ed. 2d 917, 88 S. Ct. 1889 (1968) § 2.4(d)
Silverman v. United States, 365 U.S. 505, 5 L. Ed. 2d 734, 81 S. Ct. 679 (1961) § 1.2
Simmons v. United States, 390 U.S. 377, 19 L. Ed. 2d 1247, 88 S. Ct. 967 (1968) § 2.6(c)
Smith v. Maryland, 442 U.S. 735, 61 L. Ed. 2d 220, 99 S. Ct. 2577 (1979) §§ 1.1, 1.3(a)
Somer v. United States, 138 F.2d 790 (2d Cir. 1943) § 7.7(c)
South Dakota v. Opperman, 428 U.S. 364, 49 L. Ed. 2d 1000, 96 S. Ct. 3092 (1976) §§ 5.4(b), 5.27, 5.28
Spinelli v. United States, 393 U.S. 410, 21 L. Ed. 2d 637, 89 S. Ct. 584 (1969) §§ 2.3(b), 2.5, 2.6(b)
Stanford v. Texas, 379 U.S. 476, 13 L. Ed. 2d 431, 85 S. Ct. 506 (1965) § 3.5(b)
Stanley v. Georgia, 394 U.S. 557, 22 L. Ed. 2d 542, 89 S. Ct. 1243 (1969) § 3.10(b), 5.7(a)
Stapleton v. Superior Court, 70 Cal. 2d 97, 447 P.2d 967, 73 Cal. Rptr. 575 (1968) § 7.6(c)
State v. Agee, 89 Wash. 2d 416, 573 P.2d 355 (1977) § 2.5(e)
State v. Alexander, 41 Wash. App. 152, 704 P.2d 618 (1985) §§ 1.3(a), 3.4(b)
State v. Allen, 93 Wash. 2d 170, 606 P.2d 1235 (1980) §§ 3.8(a), 4.9(a)
State v. Allun, 40 Wash. App. 27, 696 P.2d 45 (1985) § 3.7(c)
State v. Alston, 88 N.J. 211, 440 A.2d 1311 (1981) § 1.4
State v. Anderson, 41 Wash. App. 85, 702 P.2d 481 (1985) §§ 2.5(a), 3.2(b), 3.9, 3.9(c), 5.7(a), 5.13
State v. Andrich, 135 Wash. 609, 238 P. 638 (1925) § 3.4(a)
State v. Baker, 68 Wash. 2d 517, 413 P.2d 965 (1966) § 2.6(c)
State v. Bantam, 163 Wash. 598, 1 P.2d 861 (1931) § 2.6(b)
State v. Baxter, 68 Wash. 2d 416, 413 P.2d 638 (1966) §§ 2.2(b), 2.4(d)
State v. Bean, 89 Wash. 2d 467, 572 P.2d 1102 (1978) §§ 2.5(b), 2.5(c)
State v. Becich, 13 Or. App. 415, 509 P.2d 1232 (1973) § 7.6(b)
State v. Bell, 108 Wash. 2d 193, 737 P.2d 254 (1987) §§ 3.10, 5.5, 6.4(b)
State v. Bellows, 72 Wash. 2d 264, 432 P.2d 654 (1967) §§ 5.12(a), 5.14(d)
State v. Berlin, 46 Wash. App. 587, 731 P.2d 548 (1987) § 3.7(b)
State v. Bertram, 18 Ariz. App. 579, 504 P.2d 520 (1972) § 5.27
State v. Biggs, 16 Wash. App. 221, 556 P.2d 247 (1976) § 3.9(b)
State v. Bishop, 43 Wash. App. 17, 714 P.2d 1199 (1986) §§ 1.3(g), 5.20, 7.5
State v. Blackshear, 14 Or. App. 247, 511 P.2d 1272 (1973) § 7.6(a)
State v. Boyce, 44 Wash. App. 724, 723 P.2d 28 (1986) § 2.4(b), 5.20, 5.31
State v. Broadnax, 98 Wash. App. 289, 654 P.2d 96 (1982) §§ 2.2(c), 4.9(a)
State v. Bullock, 71 Wash. 2d 886, 431 P.2d 195 (1967) § 1.3(f)
State v. Byers, 85 Wash. 2d 783, 539 P.2d 833 (1975) § 4.7(a)
State v. Byers, 88 Wash. 2d 1, 559 P.2d 1334 (1977) §§ 1.4(a), 1.5(a), 7.7, 7.8(a)
State v. Callahan, 31 Wash. App. 710, 644 P.2d 735 (1982) § 5.7(a)
State v. Campbell, 103 Wash. 2d 1, 691 P.2d 929 (1984) §§ 5.7(b), 6.2(c)
State v. Campbell, 103 Wash. App. 2d 1, 691 P.2d 929 (1984) §§ 6.2(a), 6.2(c)
State v. Campbell, 15 Wash. App. 98, 547 P.2d 295 (1976) §§ 5.5, 5.7(b)
State v. Carson, 21 Wash. App. 318, 584 P.2d 990 (1978) § 3.7(c)
State v. Casal, 103 Wash. 2d 812, 699 P.2d 1234 (1984) § 3.12(a)
State v. Chatmon, 9 Wash. App. 741, 515 P.2d 530 (1973) §§ 2.6(b), 2.8, 4.6(b)
State v. Chisholm, 7 Wash. App. 279, 499 P.2d 81 (1972) § 3.4(b)
State v. Chrisman, 100 Wash. 2d 814, 676 P.2d 419 (1984) §§ 4.1, 5.1(b)
State v. Clark, 13 Wash. App. 21, 533 P.2d 387 (1975) § 4.6(d)
State v. Coates, 107 Wash. 2d 882, 735 P.2d 64 (1987) § 3.12(b)
State v. Coburne, 10 Wash. App. 298, 518 P.2d 747 (1973) § 1.3(c)
State v. Cockrell, 102 Wash. 2d 561, 689 P.2d 32 (1984) § 1.3(c), 3.4(a)
State v. Collier, 270 So.2d 451 (Fla. Dist. Ct. App. 1972) § 3.7(a)
State v. Compton, 13 Wash. App. 863, 538 P.2d 861 (1975) §§ 2.2(a), 2.4(b), 5.9(b)
State v. Corbett, 15 Or. App. 470, 516 P.2d 487 (1973) § 1.3(c)
State v. Cord, 103 Wash. 2d 361, 693 P.2d 81 (1985) §§ 1.3(c), 2.2(a), 2.4(b), 3.3(b), 3.12(b)
State v. Cottrell, 86 Wash. 2d 130, 542 P.2d 771 (1975) §§ 2.2(a), 3.8(a), 3.9, 3.9(a)
State v. Counts, 99 Wash. 2d 54, 659 P.2d 1087 (1983) §§ 4.1, 5.16, 5.17(a)
State v. Courcey, 48 Wash. App. 326, 739 P.2d 98 (1987) §§ 5.2(b), 5.6, 5.20
State v. Cowles, 14 Wash. App. 14, 538 P.2d 840 (1975) § 3.5(a)
State v. Coyle, 95 Wash. 2d 1, 621 P.2d 1256 (1980) §§ 3.7(a), 3.7(c)
State v. Crespo Aranguren, 42 Wash. App. 452, 711 P.2d 1096 (1985) § 1.4
State v. Crossen, 21 Or. App. 835, 536 P.2d 1263 (1975) § 7.7(c)
State v. Dalton, 43 Wash. App. 279, 716 P.2d 940 (1986) §§ 1.3(a), 5.16
State v. Daugherty, 94 Wash. 2d 263, 616 P.2d 649 (1980) §§ 1.3(b), 1.3(c), 5.7(a)
State v. Davis, 165 Wash. 2d 652, 5 P.2d 1035 (1931) § 3.4(a)
State v. Day, 50 Ohio App. 2d 315, 362 N.E.2d 1253 (1976) § 5.9(a)
State v. Dearinger, 73 Wash. 2d 563, 439 P.2d 971 (1968), cert. denied, 393 U.S. 1102 (1969) § 3.9
State v. Dorsey, 40 Wash. App. 459, 698 P.2d 1109 (1985) §§ 4.6(b), 4.9, 5.4(a)
State v. Douglas, 71 Wash. 2d 303, 428 P.2d 535 (1967) § 3.3(a)
State v. Drumhiller, 36 Wash. App. 592, 675 P.2d 631 (1984) §§ 1.1, 1.3(a), 5.7(b), 5.17(b)
State v. Dugger, 12 Wash. App. 74, 528 P.2d 274 (1974) §§ 3.7, 3.7(b), 3.7(c)
State v. Dumas, 9 Cal.3d 871, 512 P.2d 1208 109 Cal. Rptr. 304 (1973) § 3.7(c)
State v. Dunlap, 395 A.2d 821 (Me. 1978) § 5.20
State v. Dunn, 22 Wash. App. 362, 591 P.2d 782 (1979) § 4.6(d)
State v. Edwards, 20 Wash. App. 648, 581 P.2d 154 (1978) § 3.7(c)
State v. Ellis, 21 Wash. App. 123, 584 P.2d 428 (1978) §§ 3.7(a), 3.7(b), 3.7(c)
State v. Eubanks, 283 N.C. 556, 196 S.E.2d 706 (1973) § 4.2(b)
State v. Fenin, 154 N.J. Super. 282, 381 A.2d 364 (1977) § 7.8(c)
State v. Ferguson, 3 Wash. App. 898, 479 P.2d 114 (1970) § 4.6(d)
State v. Fields, 85 Wash. 2d 126, 530 P.2d 284 (1975) § 3.0
State v. Fisher, 96 Wash. 2d 962, 639 P.2d 743, cert. denied, 457 U.S. 1137, (1982) §§ 2.3, 2.5(b), 2.6(b), 3.4(b)
State v. Fortier, 113 Ariz. 332, 553 P.2d 1206 (1976) § 7.8(c)
State v. Franklin, 41 Wash. App. 409, 704 P.2d 666 (1985) §§ 4.6(b), 4.9(a), 4.9(d)
State v. Fredrick, 45 Wash. App. 916, 729 P.2d 56 (1986) § 3.12(a)
State v. Freeman, 47 Wash. App. 870, 737 P.2d 704 (1987) §§ 2.3, 2.5(b)
State v. Fricks, 91 Wash. 2d 391, 588 P.2d 1328 (1979) §§ 2.4(e), 7.11
State v. Frye, 26 Wash. App. 276, 613 P.2d 152 (1980) § 2.5(b)
State v. Galloway, 14 Wash. App. 200, 540 P.2d 444 (1975) §§ 3.8(a), 3.8(b), 4.9
State v. Garcia, 605 F.2d 349 (7th Cir. 1979), cert. denied, 446 U.S. 984 (1980) § 5.5
State v. Glasper, 84 Wash. 2d 17, 523 P.2d 937 (1974) §§ 2.4(a), 5.22(a)
State v. Gluck, 83 Wash. 2d 424, 518 P.2d 703 (1974) §§ 2.1, 4.6(a), 5.27
State v. Gonzales, 46 Wash. App. 388, 731 P.2d 1101 (1986) §§ 3.10, 4.7(a), 5.7(a), 5.12(d), 5.13
State v. Greene, 75 Wash. 2d 519, 451 P.2d 926 (1969) § 4.2(b)
State v. Gunwall, 106 Wash. 2d 54, 120 P.2d 808 (1986) §§ intro, 1.3(a), 2.5(c), 5.31
State v. Hackett, 4 Wash. App. 360, 481 P.2d 466 (1971) § 5.17(a)
State v. Haggarty, 20 Wash. App. 335, 579 P.2d 1031 (1979) § 3.7(b)
State v. Halverson, 21 Wash. App. 35, 584 P.2d 408 (1978) §§ 3.4(a), 3.8(a), 5.9(b), 5.18(b)
State v. Hammond, 24 Wash. App. 596, 603 P.2d 377 (1979) §§ 2.2(b), 5.9(b)
State v. Hansen, 42 Wash. App. 755, 714 P.2d 309 (1986) § 1.3(c), 2.29(a)
State v. Harker, 5 Wash. App. 381, 486 P.2d 1162 (1971) § 2.5(e)
State v. Harris, 12 Wash. App. 481, 530 P.2d 646 (1975) § 3.7(c)
State v. Harris, 44 Wash. App. 401, 722 P.2d 867 (1986) § 2.5(b)
State v. Hashman, 46 Wash. App. 211, 729 P.2d 651 (1986) §§ 3.7(a), 5.12(g)
State v. Hehman, 90 Wash. 2d 45, 578 P.2d 627 (1978) §§ 4.4(d), 5.1(a), 5.2(a)
State v. Helmka, 86 Wash. 2d 91, 542 P.2d 115 (1975) §§ 3.5, 3.10
State v. Hill, 17 Wash. App. 678, 564 P.2d 841 (1977) §§ 3.2(b), 3.2(c)
State v. Hobart, 94 Wash. 2d 437, 617 P.2d 429 (1980) §§ 2.3(b), 4.9, 4.9(a)
State v. Holeman, 103 Wash. 2d 426, 693 P.2d 89 (1985) §§ 1.2, 1.3(a), 1.4, 4.1, 5.17(a)
State v. Hornaday, 105 Wash. 2d 120, 713 P.2d 71 (1986) § 4.2(b)
State v. Houser, 95 Wash. 2d 143, 622 P.2d 1218 (1980) §§ 5.0, 5.27, 5.28
State v. Hucksby, 15 Wash. App. 280, 549 P.2d 35 §§ 2.4(b), 3.7(a), 3.7(b), 5.9(b), 5.12(g)
State v. Huft, 106 Wash. 2d 206, 720 P.2d 838 (1986) §§ 2.3(c), 2.5, 2.5(a), 2.6(b)
State v. Hunt, 15 Or. App. 76, 514 P.2d 1363 (1973) § 2.4(b)
State v. Hutton, 19 Ariz. App. 95, 505 P.2d 263 (1973) opinion vacated by 110 Ariz. 339, 519 P.2d 38 (1974) § 2.5(b), 2.6(c)
State v. Hutton, 7 Wash. App. 726, 502 P.2d 1037 (1972) § 2.6(c)
State v. Jackson, 102 Wash. 2d 432, 688 P.2d 136 (1984) §§ 2.5, 2.5(a), 2.5(b)
State v. Jansen, 15 Wash. App. 348, 549 P.2d 32 (1976) § 3.3(a)
State v. Jeffries, 105 Wash. 2d 398, 717 P.2d 722 (1986) §§ 1.3(c), 5.14(d)
State v. Jeter, 30 Wash. App. 360, 634 P.2d 312 (1981) §§ 3.7(c), 5.17(b)
State v. Jewell, 338 So. 2d 633 (La. 1976) § 5.28
State v. Johnson, 12 Wash. App. 309, 529 P.2d 873 (1974) § 2.7(b)
State v. Johnson, 64 Wash. 2d 613, 393 P.2d 284 (1964) § 2.6(c)
State v. Johnston, 38 Wash. App. 783, 690 P.2d 591 (1984) §§ 4.7(a), 7.8(c)
State v. Jones, 15 Wash. App. 165, 547 P.2d 906 (1976) § 3.7(b)
State v. Jones, 22 Wash. App. 447, 591 P.2d 796 (1979) § 5.14(c)
State v. Judge, 100 Wash. 2d 706, 675 P.2d 219 (1984) §§ 1.3(f), 3.13(b), 5.15
State v. Keefe, 13 Wash. App. 829, 537 P.2d 795 (1975) § 5.7(a)
State v. Kender, 60 Hawaii 301, 588 P.2d 447 (1978) § 5.8
State v. Kennedy, 107 Wash. 2d 1, 726 P.2d 445 (1986) §§ 4.6(a), 4.6(b), 4.7(a), 4.9(b), 4.9(c), 4.9(d), 5.2(b), 5.7(a)
State v. Klinker, 85 Wash. 2d 509, 537 P.2d 268 (1975) §§ 1.4(d), 3.2(a), 3.3(b), 4.4(d)
State v. Kohler, 70 Wash. 2d 599, 424 P.2d 656 (1967), cert. denied, 389 U.S. 1038 (1968) § 2.6(c)
State v. Komoto, 40 Wash. App. 200, 697 P.2d 1025 (1985) §§ 1.3(f), 2.9(c), 3.13(b), 5.18(a)
State v. Kreck, 86 Wash. 2d 112, 542 P.2d 782 (1975) § 5.14(e)
State v. Kuhn, 81 Wash. 2d 648, 503 P.2d 1061 (1972) § 7.3(f)
State v. Lair, 95 Wash. 2d 706, 630 P.2d 427 (1981) §§ 2.5(c), 5.7(a)
State v. Lampman, 45 Wash. App. 228, 724 P.2d 1092 (1986) §§ 2.4(d), 6.2(a), 7.3(f)
State v. Larson, 93 Wash. 2d 638, 611 P.2d 771 (1980) §§ 2.2(c), 2.4(c), 4.6(d), 4.9(b), 4.8(b), 4.8(c), 7.7
State v. LaTourette, 49 Wash. App. 119, 741 P.2d 1033 (1988) §§ 4.4(d), 5.2(a)
State v. Laursen, 14 Wash. App. 692, 544 P.2d 127 (1975) § 2.3(a)
State v. Legas, 20 Wash. App. 535, 581 P.2d 172 (1978) § 3.5(b),
State v. Lehman, 40 Wash. App. 400, 698 P.2d 606 (1985) §§ 3.7, 3.7(b)
State v. Lesnick, 84 Wash. 2d 940, 530 P.2d 243, cert. denied, 423 U.S. 891 (1975) §§ 4.6(b), 5.7(a), 7.4
State v. Lodge, 42 Wash. App. 380, 711 P.2d 1078 (1985) §§ 2.3(a), 3.12(b)
State v. Loewen, 97 Wash. 2d 562, 647 P.2d 489 (1982) § 5.5
State v. Lowrie, 12 Wash. App. 155, 528 P.2d 1010 (1974) § 3.7(b)
State v. Luellen, 17 Wash. App. 91, 562 P.2d 253 (1977) §§ 2.3(a), 2.5, 2.6(b), 4.1
State v. Lyons, 76 Wash. 2d 343, 458 P.2d 30 (1969) § 5.12(c)
State v. Mak, 105 Wash. 2d 692, 718 P.2d 407 (1986) § 5.14(b)
State v. McClung, 66 Wash. 2d 654, 404 P.2d 460 (1965), cert. denied, 384 U.S. 1013 (1966) § 2.6(c)
State v. McIntosh, 42 Wash. App. 579, 712 P.2d 319 (1986) §§ 4.4(d), 4.5, 4.9(b), 4.9(d), 5.1(a)
State v. Mercer, 45 Wash. App. 769, 727 P.2d 676 (1986) §§ 4.5, 4.6(d), 4.7(a)
State v. Moon, 45 Wash. App. 692, 726 P.2d 1263 (1986) § 4.7(a)
State v. Mangold, 82 N.J. 575, 414 A.2d 1312 (1980) § 5.28
State v. Marchand, 104 Wash. 2d 434, 706 P.2d 225 (1985) §§ 1.4(b), 2.2(c), 2.9(a), 4.6(a), 5.24, 6.4(b), 6.4(c), 7.8(d), 7.8(e)
State v. Mathe, 102 Wash. 2d 537, 688 P.2d 859 (1984) §§ 1.6, 5.14(d), 5.14(e), 7.8(f)
review denied, 94 Wash. 2d 1025, cert. denied, 451 U.S. 914 (1981) § 3.12(a)
denied, 90 Wash. 2d 1013 (1978) §§ 2.3, 4.6(b)
State v. McCrea, 22 Wash. App. 526, 590 P.2d 367 (1979) § 5.7(a)
State v. McKinnon, 88 Wash. 2d 75, 558 P.2d 781 (1977) § 6.1
State v. McMahan, 116 Ariz. 129, 568 P.2d 1027 (1977) § 7.8(f)
State v. Meacham, 93 Wash. 2d 735, 612 P.2d 795 (1980)
§ 3.13(b)
State v. Melin, 27 Wash. App. 589, 618 P.2d 1324 (1980) § 3.8(b)
State v. Michaels, 60 Wash. 2d 638 374 P.2d 989 (1962) § 7.0
State v. Miller, 7 Wash. App. 414, 499 P.2d 241 (1972) § 3.7(a)
denied, 91 Wash. 2d 1014 (1979) §§ 4.6(b), 4.6(c), 4.7(a)
§§ 1.3(g), 5.30
denied, 421 U.S. 1004 (1975) §§ 1.3(a), 5.7(a), 5.12(a), 5.13
State v. Myers, 102 Wash. 2d 548, 689 P.2d 38 (1984) §§ 3.7,
3.7(a), 3.7(b), 3.7(c), 5.12(g)
State v. Myrick, 102 Wash. 2d 506, 688 P.2d 151 (1984) § 1.3(c)
State v. Neff, 10 Wash. App. 713, 519 P.2d 1328 (1974) § 3.7(c)
State v. Neslund, 103 Wash. 2d 79, 690 P.2d 1153 (1984) § 3.2(b)
State v. Ng, 104 Wash. 2d 763, 713 P.2d 63 (1985) § 1.5
§§ 1.3(b), 1.3(c)
§ 2.6(b)
State v. O'Bremski, 70 Wash. 2d 425, 423 P.2d 530 (1967) 7.7(b),
7.8(h)
denied, 439 U.S. 1032 (1978) §§ 5.6, 5.7(b)
State v. O'Neill, 103 Wash. 2d 853, 700 P.2d 711 (1985) § 7.3(c)
State v. Orcutt, 22 Wash. App. 730, 591 P.2d 872 (1979) § 5.28
State v. Osborne, 18 Wash. App. 318, 569 P.2d 1176 (1977),
review denied, 89 Wash. 2d 1016 (1978) §§ 1.3(f), 2.3
1.5(b), 7.8(i)
State v. Palmer, 73 Wash. 2d 462, 438 P.2d 876 (1968), cert. denied, 393 U.S. 954 (1968) § 2.6(c)
State v. Paradiso, 43 Wash. App. 1, 714 P.2d 1193 (1986) § 2.5(b)
State v. Parker, 79 Wash. 2d 326, 485 P.2d 60 (1971) § 5.22(a)
State v. Patterson, 8 Wash. App. 177, 504 P.2d 1197 (1973) § 5.27
State v. Patterson, 83 Wash. 2d 49, 515 P.2d 496 (1973) §§ 2.3, 2.5
State v. Peele, 10 Wash. App. 58, 516 P.2d 788 (1973) §§ 5.19, 7.10
State v. Perez, 41 Wash. App. 481, 704 P.2d 625 (1985) § 2.9(b), 4.9, 4.9(d), 5.2(b), 5.7(a)
State v. Petty, 48 Wash. App. 615, 740 P.2d 879 (1987) § 3.2(b)
State v. Porter, 88 Wash. 2d 512, 563 P.2d 829 (1977) § 3.2(a)
State v. Powell, 428 U.S. 465, 49 L. Ed. 2d 1067, 96 S. Ct. 3037 (1976) § 7.3(G)
State v. Randall, 116 Ariz. 371, 569 P.2d 313 (1977) § 5.20
State v. Ranglitsch, 40 Wash. App. 771, 700 P.2d 382 (1985) § 2.2(c)
State v. Reid, 38 Wash. App. 203, 687 P.2d 861 (1984) §§ 3.5, 3.7(b), 5.7(a), 5.17(b), 5.23, 7.7(a), 7.7(c)
State v. Reynoso, 41 Wash. App. 113, 702 P.2d 1222 (1985) § 5.27
State v. Ringer, 100 Wash. 2d 686, 674 P.2d 1240 (1983) §§ 3.9(c), 3.10, 5.1(a), 5.2(b), 5.16, 5.21, 5.23
State v. Robinson, 58 Ohio St. 2d 478, 391 N.E. 2d 317, cert. denied, 444 U.S. 942 (1979) § 5.12(c)
State v. Rodriguez, 20 Wash. App. 876, 582 P.2d 904 (1978) §§ 5.11, 5.12(b), 5.12(c)
State v. Rogers, 27 Ohio Op. 2d 105, 198 N.E.2d 796 (1963) § 7.8(h)
State v. Rollie M., 41 Wash. App. 55, 701 P.2d 1123 (1985) § 3.4(c)
State v. Rood, 18 Wash. App. 740, 573 P.2d 1325 (1977) § 3.4(a)
State v. Sainz, 23 Wash. App. 532, 596 P.2d 1090 (1979) § 3.7(b)
State v. Salinas, 18 Wash. App. 455, 569 P.2d 75 (1977) § 3.5(a)
State v. Sanders, 8 Wash. App. 306, 506 P.2d 892 (1973) §§ 5.5, 5.16
State v. Scott, 21 Wash. App. 113, 584 P.2d 423 (1978) § 3.9(b)
State v. Scott, 93 Wash. 2d 7, 604 P.2d 943 (1980), cert. denied, 446 U.S. 920 (1980) § 2.2(b)
State v. Scrotsky, 39 N.J. 410, 189 A.2d 23 (1963) § 7.6(b)
State v. Seagull, 95 Wash. 2d 898, 632 P.2d 44 (1981) §§ 1.3(b), 2.0, 3.10, 3.12(b), 5.6
State v. Serrano, 14 Wash. App. 462, 544 P.2d 892 (1973) §§ 4.6(d), 4.7(b), 4.9(a)
State v. Shoemaker, 85 Wash. 2d 207, 533 P.2d 123 (1975) §§ 5.10, 5.11, 5.12, 5.12(c), 5.12(e), 7.8(c)
State v. Stiefer, 95 Wash. 2d 43, 621 P.2d 1272 (1980) §§ 2.6(a), 2.8, 4.6(b)
State v. Silverman, 48 Wash. 2d 198, 292 P.2d 868 (1956) § 4.2(b)
State v. Simms, 10 Wash. App. 75, 516 P.2d 1088 (1973) § 6.2(c)
State v. Simpson, 95 Wash. 2d 170, 622 P.2d 1199 (1980) §§ intro, 1.3(c), 1.6, 5.0, 5.4(a), 5.27, 7.2(b), 7.9(a)
State v. Sinclair, 11 Wash. App. 523, 523 P.2d 1209 (1974) §§ 2.4(a), 4.6(d), 4.7(a)
State v. Smith, 102 Wash. 2d 449, 688 P.2d 146 (1985) §§ 1.4, 2.2(c), 4.9
State v. Smith, 16 Wash. App. 425, 558 P.2d 265 (1976) §§ 3.2(b), 3.3(b), 3.5(b)
State v. Smith, 88 Wash. 2d 127, 559 P.2d 970 cert. denied, 434 U.S. 876 (1977) §§ 5.1, 5.3, 5.14(f), 5.18, 5.20
State v. Smith, 9 Wash. App. 279, 511 P.2d 1032 (1973) §§ 4.6(d), 4.7(a)
State v. Sterling, 43 Wash. App. 846, 719 P.2d 1357 (1986) §§ 2.3(b), 2.4(f)
1988]  


*State v. Stone*, 294 A.2d 683 (Me. 1972) § 5.8


*State v. Stroud*, 106 Wash. 2d 144, 720 P.2d 436 (1986) §§ intro, 1.4(b), 5.1(a), 5.1(b), 5.2(b), 5.16, 5.21, 5.23

*State v. Sturges*, 46 Wash. App. 181, 730 P.2d 93 (1986) § 3.7(b)


*State v. Tanaka*, 67 Haw. 658, 701 P.2d 1274 (1985) § 1.3(g)


*State v. Taras*, 19 Ariz. App. 7, 504 P.2d 548 (1972) § 5.28

*State v. Terravona*, 105 Wash. 2d 632, 716 P.2d 295 (1986) §§ 3.9(c), 5.7(), 5.19, 5.27


*State v. Thetford*, 109 Wash. 2d 392, 745 P.2d 496 (1987) § 3.12(b)


*State v. Thompson*, 58 Wash. 2d 598, 364 P.2d 527 (1961), cert. denied, 370 U.S. 945, rehearing denied, 371 U.S. 855 (1962) §§ 2.6(c), 4.4(b)

*State v. Thompson*, 93 Wash. 2d 838, 613 P.2d 525 (1980) §§ 2.4(c), 4.6(a), 4.6(d), 4.7(b)

*State v. Thornton*, 41 Wash. App. 506, 705 P.2d 271 (1985) §§ 1.4(a), 4.7(a)

*State v. Todd*, 78 Wash. 2d 362, 474 P.2d 542 (1970) § 2.2(a)

*State v. Trasvina*, 16 Wash. App. 519, 557 P.2d 368 (1976) § 3.4(b)

*State v. Tucker*, 101 N.J. Super. 380, 244 A.2d 353 (1968) § 7.3(d)

*State v. Turner*, 18 Wash. App. 727, 571 P.2d 955 (1977) § 5.7(a)


*State v. Van Auken*, 77 Wash. 2d 136, 460 P.2d 277 (1969) § 7.10

*State v. Vangen*, 72 Wash. 2d 548, 433 P.2d 691 (1967) § 4.4(b)
State v. Vanzant, 14 Wash. App. 679, 544 P.2d 786 ((1975)) §§ 2.2(a), 2.3(a), 2.5(b), 2.7(a)
State v. Vidor, 75 Wash. 2d 607, 452 P.2d 961 (1969) § 5.14
State v. Walker, 119 Ariz. 121, 579 P.2d 1091 (1978) § 5.27
State v. Walker, 24 Wash. App. 823, 604 P.2d 514 (1979) §§ 4.6(d), 4.7(a)
State v. Werth, 18 Wash. App. 530, 571 P.2d 941, review denied, 90 Wash. 2d 1010 (1977) §§ 5.12(b), 5.12(c), 5.12(d), 5.19
State v. Wetherell, 82 Wash. 2d 865, 514 P.2d 1069 (1973) §§ 1.3(f), 5.18(a)
State v. Whatcom County, 92 Wash. 2d 35, 593 P.2d 546 (1979) § 4.2(b)
State v. White, 10 Wash. App. 273, 518 P.2d 245 (1973) review denied, 83 Wash. 2d 1009 (1973) §§ 2.5(a), 2.5(e)
State v. White, 40 Wash. App. 490, 699 P.2d 239 (1985) § 5.2(b)
State v. White, 44 Wash. App. 276, 722 P.2d 118 (1986) §§ 5.1(a), 5.2(a)
State v. White, 97 Wash. 2d 92, 640 P.2d 1061 (1982) §§ 2.4(e), 4.8, 7.0, 7.2(a), 7.8(b), 7.8(c)
State v. Williams, 102 Wash. 2d 733, 689 P.2d 1065 (1984) §§ 1.4(a), 4.7(a), 4.9, 5.27, 5.28
State v. Williams, 16 Wash. App. 868, 560 P.2d 1160 (1977) § 5.2(a)
State v. Williams, 90 Wash. 2d 245, 580 P.2d 635 (1978) § 3.8(a)
State v. Williams, 94 Wash. 2d 531, 617 P.2d 1012 (1980) §§ 1.6, 5.9(a), 7.0
State v. Williamson, 42 Wash. App. 208, 710 P.2d 205 (1985) §§ 3.7(a), 5.12(g)
State v. Withers, 8 Wash. App. 123, 504 P.2d 1151 (1972) § 3.5(a)
State v. Wolken, 103 Wash. 2d 823, 700 P.2d 319 (1985) §§ 2.5(a), 2.5(b), 3.12(a)
State v. Wolohan, 23 Wash. App. 813, 598 P.2d 421 (1979), review denied, 93 Wash. 2d 1008 (1980) §§ 1.1, 2.4(b), 5.9(b), 5.31
State v. Woodall, 32 Wash. App. 407, 647 P.2d 1051 (1982) rev’d on other grounds, 100 Wash. 2d 74, 666 P.2d 364 (1983) §§ 2.6(b), 3.7(b)
State v. Worth, 37 Wash. App. 889, 683 P.2d 662 (1984) §§ 3.8(a), 3.9, 3.9(b), 5.18(b)
State v. Young, 15 Wash. App. 581, 550 P.2d 689, review denied, 87 Wash. 2d 1012 (1976), cert. denied, 431 U.S. 931 (1977) § 5.18(a)
State v. Young, 28 Wash. App. 412, 624 P.2d 725, review denied, 95 Wash. 2d 1024 (1981) §§ 4.6(d), 5.8
State v. Young, 76 Wash. 2d 212, 455 P.2d 595 (1969) § 3.7(c)
Steagald v. United States, 451 U.S. 204, 68 L. Ed. 2d 38, 101 S. Ct. 1642 (1981) § 1.3(a)
Steele v. United States, 267 U.S. 498, 69 L. Ed. 757, 45 S. Ct. 414 (1925) § 3.4(a)
Steigler v. Superior Court, 252 A.2d 300 (Del. 1969), cert. denied, 396 U.S. 880 (1969) § 7.3(d)
Stone v. Powell, 428 U.S. 465, 49 L. Ed. 2d 1067, 96 S. Ct. 3037 (1976) §§ 7.1, 7.3(g)
Stoner v. California, 376 U.S. 483, 11 L. Ed. 2d 856, 84 S. Ct. 889 (1964) §§ 1.3(a), 5.14(h)
Tacoma v. Harris, 73 Wash. 2d 123, 436 P.2d 770 (1968) § 4.2(b)
Tate v. Simms, 10 Wash. App. 75, 516 P.2d 1088 (1973) § 6.2(c)
Taylor v. United States, 286 U.S. 1, 76 L. Ed. 2d 951, 52 S. Ct. 466 (1932) § 5.7(b)
Tennessee v. Garner, 471 U.S. 1, 85 L. Ed. 2d 1, 105 S. Ct. 1694 (1985) § 4.4(a)
Terry v. Ohio, 392 U.S. 1, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968) §§ 1.4, 2.9(b), 3.8(a), 4.5, 4.6(a), 4.7, 4.8, 4.9, 4.9(a), 5.7(a), 5.18(b)
Thacker v. Commonwealth, 310 Ky. 702, 221 S.W.2d 682 (1949) § 7.6(a)
Thompson v. Louisiana, 469 U.S. 17, 83 L. Ed. 2d 246, 105 S. Ct. 409 (1984) §§ 5.5, 5.16
Tyler v. United States, 302 A.2d 748 (D.C. 1973) § 5.8
United States v. Bacall, 443 F.2d 1050 (9th Cir. 1971), cert. denied, 404 U.S. 1004 (1971) § 7.7(b)

United States v. Barrow, 363 F.2d 62 (3d Cir. 1966), cert. denied, 385 U.S. 1001 (1967) § 7.7(b)

United States v. Berrett, 513 F.2d 154 (1st Cir. 1975) § 1.3(d)

United States v. Bloomfield, 594 F.2d 1200 (8th Cir. 1979) § 5.28

United States v. Booker, 461 F.2d 990 (6th Cir. 1972) § 5.8

United States v. Boswell, 347 A.2d 270 (D.C. App. 1975) § 1.3(g)

United States v. Brignoni-Ponce, 422 U.S. 873, 45 L. Ed. 2d 607, 95 S. Ct. 2574 (1975) §§ 2.9(b), 4.6(a), 6.3(b)


United States v. Caceres, 440 U.S. 741, 59 L. Ed. 2d 733, 99 S. Ct. 1465 (1979) § 1.1

United States v. Calandra, 414 U.S. 338, 38 L. Ed. 2d 561, 94 S. Ct. 613 (1974) §§ 7.0, 7.3(a)

United States v. Calhoun, 542 F.2d 1094 (9th Cir. 1976) § 5.17(a)

United States v. Caminos, 770 F.2d 361 (3d Cir. 1985) § 6.3

United States v. Cardona, 769 F.2d 625 (9th Cir. 1985) § 6.3

United States v. Carmichael, 489 F.2d 983 (7th Cir. 1973) § 2.5

United States v. Carriger, 541 F.2d 545 (6th Cir. 1976) § 1.3(a)

United States v. Ceccolini, 435 U.S. 268, 55 L. Ed. 2d 268, 98 S. Ct. 1054 (1978) § 7.8(h)

United States v. Chadwick, 433 U.S. 1, 53 L. Ed. 2d 538, 97 S. Ct. 2476 (1977) §§ 1.1, 1.3(e), 1.3(g), 5.4(b), 5.20, 5.22(c)

United States v. Cortez, 449 U.S. 411, 66 L. Ed. 2d 621, 101 S. Ct. 690 (1981) § 4.6(a)

United States v. Cortina, 630 F.2d 1207 (7th Cir. 1980) § 7.6(d)

United States v. Crews, 445 U.S. 463, 63 L. Ed. 2d 537, 100 S. Ct. 1244 (1980) § 7.8(f)

United States v. Davis, 346 F. Supp. 435 (S.D. Ill. 1972) § 3.2(b)

United States v. Davis, 496 F.2d 1026 (5th Cir. 1974) § 5.27

United States v. De La Esperilla, 781 F.2d 1432 (9th Cir. 1986) § 3.9(b)

United States v. DeHernandez, (1985) §§ 3.13(b), 6.3(c)

United States v. Di Re, 332 U.S. 581, 92 L. Ed. 210, 68 S. Ct. 222 (1948) §§ 2.4(c), 2.4(e)

United States v. Dimuro, 40 F.2d 503 (1st Cir. 1976), cert. denied, 429 U.S. 1038 (1977) § 7.8(d)

United States v. Dionisio, 410 U.S. 1, 35 L. Ed. 2d 67, 93 S. Ct. 764 (1973) § 1.3(f)

United States v. Dunn, — U.S. —, 94 L. Ed. 2d 326, 107 S. Ct. 1134 (1987) § 1.3(b)
United States v. Dunavan, 485 F.2d 201 (6th Cir. 1973) § 5.5
United States v. Edmons, 432 F.2d 577 (2d Cir. 1970) § 7.8(f)
United States v. Eisler, 567 F.2d 814 (8th Cir. 1977) § 1.3(a)
United States v. Euge, 444 U.S. 707, 63 L. Ed. 2d 141, 100 S. Ct. 874, rehearing denied, 446 U.S. 913 (1980) § 1.3(f)
United States v. Falcon, 766 F.2d 1469 (1985) § 1.3(g)
United States v. Fisch, 474 F.2d 1071 (9th Cir. 1973) cert. denied, 412 U.S. 921 (1973) § 5.9(a)
United States v. Flickinger, 573 F.2d 1349 (9th Cir. 1978), cert. denied, 439 U.S. 836 (1978) §§ 5.17(b), 5.19
United States v. Frick, 490 F.2d 666 (5th Cir. 1973), cert. denied, 419 U.S. 831 §§ 5.1(a), 5.23
United States v. Friedland, 441 F.2d 855 (2d Cir. 1977), cert. denied, 404 U.S. 867 § 7.7(b)
United States v. Garcia, 605 F.2d 349 (7th Cir. 1979) § 5.2(b)
United States v. Gervato, 474 F.2d 40 (3d Cir. 1973), cert. denied, 414 U.S. 864 (1973) § 3.6
United States v. Giglio, 263 F.2d 410 (2d Cir. 1959), cert. denied, 361 U.S. 820 (1959) § 7.7(b)
United States v. Gomez-Soto, 723 F.2d 649 (9th Cir. 1984), cert. denied, 104 S. Ct. 2360 (1984) § 3.5
United States v. Green, 523 F.2d 968 (9th Cir. 1975) §§ 5.14(d), 7.8(b)
United States v. Grummel, 542 F.2d 789 (9th Cir. 1976), cert. denied, 429 U.S. 1051 (1977) § 5.19
United States v. Haley, 581 F.2d 723 (8th Cir. 1978), cert. denied, 439 U.S. 1005 (1978) § 5.29
United States v. Haley, 669 F.2d 201 (4th Cir. 1982), cert. denied, 457 U.S. 1117 (1982) § 5.9(b)
United States v. Harris, 378 U.S. 108 12 L. Ed. 2d 723, 84 S. Ct. 1509 (1964) § 2.5(c)
United States v. Harris, 403 U.S. 573, 29 L. Ed. 2d 723, 91 S. Ct. 2075 (1971) §§ 2.3(b), 2.5(c)
United States v. Havens, 446 U.S. 620, 64 L. Ed. 2d 559, 100 S. Ct. 1912 (1980), rehearing denied, 448 U.S. 911 (1980) §§ 7.2(b), 7.9(a)
United States v. Hensley, 469 U.S. 221, 83 L. Ed. 2d 604, 105 S. Ct. 675 (1985) § 1.4(b), 2.7(b), 4.5, 4.6(b), 4.6(c)
United States v. Howell, 466 F. Supp. 835 (D. Or. 1979) § 1.3(g)
United States v. Jacobsen, 466 U.S. 109, 80 L. Ed. 2d 85, 104 S. Ct. 1652 (1984) §§ 1.3(g), 1.5, 3.7(c), 5.20, 5.31, 7.5
United States v. Janis, 428 U.S. 433, 49 L. Ed. 2d 1046, 96 S. Ct. 3021 (1976) § 7.4(c)

United States v. Johns, 469 U.S. 478, 83 L. Ed. 2d 890, 105 S. Ct. 881 (1985) §§ 5.20, 5.22(a), 5.22(b), 5.22(c)

United States v. Johns, 707 F.2d 1093 (9th Cir. 1983), rev’d on other grounds, 469 U.S. 478, 105 S. Ct. 881, 83 L. Ed. 2d 890 (1985) § 5.9(b)

United States v. Karathanos, 531 F.2d 26, cert. denied, 428 U.S. 910 (1976) (2d Cir. 1976) § 7.8(g)

United States v. Kato, 468 U.S. 705, 82 L. Ed. 2d 530, 104 S. Ct. 3296 (1984) §§ 1.3(a), 1.3(e), 1.3(g), 2.4(b)


United States v. Knotts, 460 U.S. 276, 75 L. Ed. 2d 55, 103 S. Ct. 1081 (1983) §§ 1.3(e), 1.3(g)

United States v. Luna, 545 F.2d 488 (5th Cir. 1977), cert. denied, § 7.6(b)

United States v. Leon, 468 U.S. 897, 82 L. Ed. 2d 677, 104 S. Ct. 3405 (1984) §§ 2.3, 7.0, 7.1, 7.2(a)

United States v. Libert, 616 F.2d 34 (2d Cir. 1980), cert. denied, 446 U.S. 952 (1980) § 7.7(c)

United States v. Lima, 424 A.2d 113 (D.C. Ct. App. 1980) § 7.6(c)

United States v. Lopez, 474 F. Supp. 943 (D.C. Cal. 1979) § 1.6

United States v. Lopez, 777 F.2d 543 (10th Cir. 1985) § 2.4(b)

United States v. Loundmannz, 472 F.2d 1376 (D.C. Cir. 1972), cert. denied, 410 U.S. 957 (1973) § 5.8

United States v. Lyons, 706 F.2d 321 (D.C. Cir. 1983) §§ 5.26, 5.27

United States v. Magana, 512 F.2d 1169 (9th Cir. 1975), cert. denied, 423 U.S. 826 (1975) § 1.3(c)

United States v. Marchand, 564 F.2d 983 (2d Cir. 1977), cert. denied, 434 U.S. 1015 (1978) §§ 7.8(d), 7.8(e)

United States v. Martin, 615 F.2d 318 (5th Cir. 1980) § 3.12(b)

United States v. Martinez-Fuerte, 428 U.S. 543, 49 L. Ed. 2d 1116, 96 S. Ct. 3074 (1976) § 6.3(a)


United States v. Maxwell, 484 F.2d 1350 (5th Cir. 1973) § 7.6(b)

United States v. McKjian, 505 F.2d 1320 (5th Cir. 1975) § 7.6(d)

United States v. McLaughlin, 525 F.2d 517 (9th Cir. 1975), cert. denied, 427 U.S. 904 (1976) § 1.3(g)

United States v. McSureley, 473 F.2d 1178 (D.C. Cir. 1972) § 7.4(e)
United States v. Mendenhall, 446 U.S. 544, 64 L. Ed. 2d 497, 100 S. Ct. 1870 (1980) § 5.12(e)

United States v. Miller, 589 F.2d 1117, cert. denied, 440 U.S. 958 (1979) (1st Cir. 1978) § 4.2(b)


United States v. Nelson, 459 F.2d 884 (6th Cir. 1972) § 7.8(e)


United States v. Ortiz, 422 U.S. 891, 45 L. Ed. 2d 623, 95 S. Ct. 2585 (1975) §§ 2.2(a), 2.4(e)

United States v. Oswald, 783 F.2d 663 (6th Cir. 1986) §§ 1.3(g), 3.9(b)

United States v. Pacheco-Ruiz, 549 F.2d 1204 (9th Cir. 1976) § 5.19

United States v. Pagan, 395 F. Supp. 1052 (D.P.R. 1975), aff’d, 537 F.2d 554 (1st Cir. 1976) § 5.9(a)

United States v. Park, 531 F.2d 754 (5th Cir. 1976) § 3.12(b)

United States v. Payner, 447 U.S. 727, 65 L. Ed. 2d 468, 100 S. Ct. 2439 (1980) §§ 1.6, 7.6(d)


United States v. Place, 462 U.S. 696, 77 L. Ed. 2d 110, 103 S. Ct. 2637 (1983) §§ 1.1, 1.5, 6.3(c)

United States v. Potts, 297 F.2d 68 (6th Cir. 1961) § 1.3(b)

United States v. Pruitt, 464 F.2d 494 (9th Cir. 1972) § 1.3(c)

United States v. Raftery, 534 F.2d 854 (9th Cir. 1976), cert. denied, 429 U.S. 862 (1976) § 7.3(h)

United States v. Robinson, 414 U.S. 218, 38 L. Ed. 2d 427, 94 S. Ct. 467 (1973) §§ 5.1(a), 5.2(a)

United States v. Ross, 456 U.S. 798, 72 L. Ed. 2d 572, 102 S. Ct. 2157 (1982) §§ 5.20, 5.22(c)

United States v. Rosselli, 506 F.2d 627 (7th Cir. 1974) § 5.19

United States v. Rubin, 474 F.2d 262, cert. denied, 414 U.S. 833 (1973) (3d Cir. 1973) § 5.17(b)

United States v. Salvucci, 448 U.S. 83, 65 L. Ed. 2d 619, 100 S. Ct. 2047 (1980) §§ 1.1, 1.6, 2.3(a)

United States v. Santana, 427 U.S. 38, 49 L. Ed. 2d 300, 96 S. Ct. 2406 (1976) §§ 4.1, 5.17(a)

United States v. Savides, 658 F. Supp. 1399 (Nd Ill. 1987) § 3.2(b)
United States v. Schipani, 435 F.2d 26 (2d Cir. 1970), cert. denied, 401 U.S. 983 (1971) § 7.3(e)

United States v. Sharpe, 470 U.S. 675, 84 L. Ed. 2d 605, 105 S. Ct. 1568 (1985) §§ 4.7(a), 6.3(c)

United States v. Sherwin, 539 F.2d 1 (9th Cir. 1976) § 7.6(b)

United States v. Sherwin, 572 F.2d 196, cert. denied, 437 U.S. 909 (1978) (9th Cir. 1977) § 5.0

United States v. Skipwith, 482 F.2d 1272 (5th Cir. 1973) § 5.30

United States v. Smith, 293 A.2d 856 (D.C. 1972) § 1.3(g)

United States v. Squires, 456 F.2d 967 (2d Cir. 1972) § 5.27

United States v. Taborda, 635 F.2d 131 (2nd Cir. 1980) § 1.1

United States v. Tranquillo, 330 F. Supp. 871 (M.D. Fla. 1971) § 5.7(a)

United States v. Trevino, 62 F.R.D. 74 (S.D. Tex. 1974) § 7.8(b)

United States v. Turk, 526 F.2d 654 (5th Cir. 1976), cert. denied, 429 U.S. 823 (1976) § 7.3(h)

United States v. Valen, 479 F.2d 467 (3d Cir. 1973), cert. denied, 419 U.S. 901 (1974) § 7.6(a)

United States v. Van Leeuwen, 397 U.S. 249, 25 L. Ed. 2d 282, 90 S. Ct. 1029 (1970) §§ 1.3(g), 1.6, 5.20, 5.31

United States v. Vandemark, 522 F.2d 1019 (9th Cir. 1975) § 7.3(f)

United States v. Various Gambling Devices, 478 F.2d 1194 (5th Cir. 1973) § 2.7(a)

United States v. Venizelos, 495 F. Supp. 1277 (S.D.N.Y. 1980) §§ 5.2(b), 5.4(a), 5.5

United States v. Ventresca, 380 U.S. 102, 13 L. Ed. 2d 684, 85 S. Ct. 741 (1965) §§ 2.7(a), 3.0

United States v. Wade, 388 U.S. 218, 18 L. Ed. 2d 1149, 87 S. Ct. 1926 (1967) § 7.8(f)

United States v. Walker, 535 F.2d 896 (5th Cir. 1976), cert. denied, 429 U.S. 982 (1976) § 7.8(c)

United States v. Walther, 652 F.2d 788 (9th Cir. 1981) § 7.5

United States v. Watson, 423 U.S. 411, 46 L. Ed. 2d 598, 96 S. Ct. 820, rehearing denied, 424 U.S. 979 (1976) §§ 4.1, 4.2(a), 4.2(b), 5.12(b)

United States v. Weaklem, 517 F.2d 70 (9th Cir. 1975) § 5.17(a)

United States v. Whitten, 706 F.2d 1000 (9th Cir. 1983) §§ 1.3(a), 3.4(b)

United States v. Wilson, 479 F.2d 936 (7th Cir. 1973) § 2.6

United States v. Workman, 585 F.2d 1205 (4th Cir. 1978) § 7.3(f)

Weber v. Dell, 804 F.2d 796 (2nd Cir. 1986) § 6.2(d)
Verdugo v. United States, 402 F.2d 599 (9th Cir. 1968) § 7.3(e)
Walder v. United States, 347 U.S. 62, 98 L. Ed. 2d 503, 74 S. Ct. 354 (1954) §§ 7.2(b), 7.9(a)
Walter v. United States, 447 U.S. 649, 65 L. Ed. 2d 410, 100 S. Ct. 2395 (1980) § 1.3(g)
Warden, Maryland Penitentiary v. Hayden, 387 U.S. 294, 18 L. Ed. 2d 782, 87 S. Ct. 1642 (1967) §§ 3.1, 5.17(a), 5.17(b)
Washington v. Chrisman, 455 U.S. 1, 70 L. Ed. 2d 778, 102 S. Ct. 812 (1982) §§ 4.1, 5.1(b), 5.7(a), 5.10
Watkins v. United States, 354 U.S. 178, 1 L. Ed. 2d 1273, 77 S. Ct. 1173 (1957) § 7.4(e)
Wattenburg v. United States, 388 F.2d 853 (9th Cir. 1968) § 1.3(c)
Watts v. United States, 328 A.2d 770 (D.C. App. 1974) § 5.1(a)
Welsh v. Wisconsin, 466 U.S. 740, 80 L. Ed. 2d 732, 104 S. Ct. 2091 (1984) §§ 4.4(d), 5.17(a)
Whiteley v. Warden, 401 U.S. 560, 28 L. Ed. 2d 306, 91 S. Ct. 1031 (1971) §§ 2.7(b), 3.3(b), 4.3
Williams v. State, 264 Ind. 664, 348 N.E.2d 623 (1976) § 4.4(c)
Winston v. Lee, 470 U.S. 753, 84 L. Ed. 2d 662, 105 S. Ct. 1611 (1985) §§ 2.9(c), 3.13(b), 5.18(a)
Wong Sun v. United States, 371 U.S. 471, 9 L. Ed. 2d 441, 83 S. Ct. 407 (1963) §§ 2.0, 2.2(c), 2.3, 7.7, 7.8(a)
Ybarra v. Illinois, 444 U.S. 85, 62 L. Ed. 2d 238, 100 S. Ct. 338 (1979) §§ 2.2(c), 2.4(c), 2.9(b), 3.8(a), 4.9(b), 5.18
### TABLE OF STATUTES

<table>
<thead>
<tr>
<th>Revised Code of Washington</th>
<th>Utter, Search &amp; Seizure</th>
</tr>
</thead>
<tbody>
<tr>
<td>RCW 2.20.010</td>
<td>3.2(a)</td>
</tr>
<tr>
<td>RCW 2.20.020</td>
<td>3.2(a)</td>
</tr>
<tr>
<td>RCW 3.66.060</td>
<td>3.2</td>
</tr>
<tr>
<td>RCW ch. 9.73</td>
<td>5.9(a)</td>
</tr>
<tr>
<td>RCW 9.73.030</td>
<td>1.6</td>
</tr>
<tr>
<td>RCW 9A.16.040</td>
<td>4.4(a)</td>
</tr>
<tr>
<td>RCW 10.27.180</td>
<td>3.2(b)</td>
</tr>
<tr>
<td>RCW 10.31.010</td>
<td>4.3, 5.1(a)</td>
</tr>
<tr>
<td>RCW 10.31.020</td>
<td>4.3</td>
</tr>
<tr>
<td>RCW 10.31.030</td>
<td>4.3</td>
</tr>
<tr>
<td>RCW 10.31.040</td>
<td>3.7, 3.7(a), 3.7(b), 4.3</td>
</tr>
<tr>
<td>RCW 10.31.050</td>
<td>4.4(a)</td>
</tr>
<tr>
<td>RCW 10.31.100</td>
<td>4.2(a), 4.2(b), 5.1(a), 5.16</td>
</tr>
<tr>
<td>RCW 10.79.060-.170</td>
<td>6.2(d)</td>
</tr>
<tr>
<td>RCW 46.20.308</td>
<td>1.3(f), 5.15</td>
</tr>
<tr>
<td>RCW 46.20.435</td>
<td>5.27</td>
</tr>
<tr>
<td>RCW 46.64.015</td>
<td>4.4(d)</td>
</tr>
<tr>
<td>RCW 46.64.017</td>
<td>4.2(b)</td>
</tr>
<tr>
<td>RCW 46.63.020</td>
<td>5.1(a)</td>
</tr>
<tr>
<td>RCW 66.44.270</td>
<td>4.2(b)</td>
</tr>
<tr>
<td>RCW 69.50.509</td>
<td>3.2, 3.6</td>
</tr>
</tbody>
</table>

### TABLE OF COURT RULES

<table>
<thead>
<tr>
<th>Washington Court Rules</th>
<th>Utter, Search &amp; Seizure</th>
</tr>
</thead>
<tbody>
<tr>
<td>CrR 2.2</td>
<td>4.3</td>
</tr>
<tr>
<td>CrR 2.3</td>
<td>3.3(c)</td>
</tr>
<tr>
<td>CrR 2.3(b)</td>
<td>3.1, 3.3(c), 3.6</td>
</tr>
<tr>
<td>CrR 2.3(c)</td>
<td>3.3(c), 3.6</td>
</tr>
<tr>
<td>CrR 2.3(d)</td>
<td>3.11</td>
</tr>
<tr>
<td>CrR 4.5</td>
<td>7.9(a)</td>
</tr>
<tr>
<td>JCrR 2.10</td>
<td>3.3(c)</td>
</tr>
<tr>
<td>JCrR 2.10(c)</td>
<td>3.3(c)</td>
</tr>
</tbody>
</table>
INDEX

ABANDONED PERSONAL EFFECTS
Discarded in a public place, 1.3(g)
Expectation of privacy and, 1.3(g)

ADJOINING LANDS
See: Premises

ADMINISTRATIVE SEARCHES
See also: Warrantless Searches; Inspection of Fire Scenes
Automobile spot check, 1.4(b), 5.24, 6.4(b), 6.4(c)
Expectation of privacy, 6.4(a)
Generally, 6.4
Level of proof, 2.8(a), 6.4(c)
Warrant requirements, 6.4(b)

ADMISSIONS AGAINST INTEREST
Consent to search compared, 5.12
Informants, 2.5(c)

AERIAL SURVEILLANCE
Open fields, 1.3(c)

AFFIDAVIT FOR SEARCH WARRANT
Administrative warrants, 3.3(d)
Disclosing informant’s identity as challenge to, 3.12(a)
Information supplied to magistrate, 3.3(b)
Misrepresentations and omissions as basis for challenge, 3.12(b)

Oral search warrants, 3.3(c)
Oral testimony, 3.3(c)
Swearing, 3.3(a)

AFFIRMATION
Affidavit for Search Warrant, 3.3(a)

AIRPORTS
Searches at, 5.30

APARTMENTS
Expectation of privacy, 1.3(a)
Personal privacy interests, 1.4
Warrant requirements, description, 3.4(b)

APPEAL
See: Harmless Error

ARREST
Booking and, 4.4(b)
Distinguished from Terry stop, 4.5, 4.7(a)
Force, use of, in making, 4.4(a)
In the presence requirement, 4.2(b)
Judicial review of, 4.4(c)
Minor offenses, 4.4(d)
Warrantless for felony, 4.2(a)
Warrantless for misdemeanor, 4.2(b)
With warrant, 4.3
Without warrant, 4.1

ARREST RECORD
Probable cause, 2.3(b)

ARREST WARRANT
Standards for issuance of, 2.0
AUTOMATIC STANDING  
See: Standing

AUTOMOBILES  
See: Vehicles

BAIL HEARING  
Exclusionary rule, applicability, 7.3(d)

BASIS OF KNOWLEDGE  
Informants, 2.5(a)  
Self-verifying detail, 2.5(d)

BINOCULARS  
As aid to observation, 5.8

BLOOD SAMPLE  
Expectation of privacy in, 1.3(f)  
Implied consent to test of, 5.15  
Search incident to arrest, 5.2(a)  
Taking sample of, 3.13(b)

BODILY INTRUSIONS  
Conducted within prisons or jails, 3.13(b), 6.2(d)  
Exigent circumstances, 5.18(a), 5.19  
Level of proof necessary, 2.8(c)  
Search incident to arrest, 5.2(a)

BRIEF DETENTION  
See: Stop and Frisk

BUSINESS  
See: Premises

BUSINESS AND COMMERCIAL PREMISES  
Administrative searches of, 6.4  
Expectation of privacy in, 1.3(d)

CHILD  
Consent to search by, 5.14(c)

CIVIL OFFENSES  
See: Administrative Searches  
Arrest, 1.4(d)

CO- TENANT  
Consent to search by, 5.14(d)

COMMERCIAL PREMISES  
See: Inspection of Businesses

CONSENT  
Affecting whether an arrest has occurred, 1.4(a)

CONSENT SEARCHES  
Criteria for, 5.10  
Factors bearing upon,  
Awareness of right to refuse, 5.12(c)  
Claim of authority, 5.12(a)  
Coercive surroundings, 5.12(b)  
Deception as to identity or purpose, 5.12(g)  
Generally, 5.12  
Maturity, sophistication, mental or emotional state, 5.12(e)  
Prior cooperation or refusal to cooperate, 5.12(f)  
Prior illegal police action, 5.12(d)  
Scope of consent, 5.13  
Statutorily implied consent, 5.15  
Third party consent, Bailee, 5.14(f)
Child, 5.14(c)
Co-tenant or joint occupant, 5.14(d)
Employee, 5.14(g)
Hosts and guests, 5.14(i)
Hotel employees, 5.14(h)
Lessor or manager, 5.14(e)
Parent, 5.14(b)
Spouse, 5.14(a)
Validity of, factors affecting, 5.14
Voluntariness, 5.11

CONSTITUTIONALLY PROTECTED AREAS
See: Protected Areas and Interests
Enumerated, 1.0
Hallways as, 1.3(a)
Open fields as, 1.3(c)
Property interests as, 1.2

CONTAINERS
Exigent circumstances warranting search, 5.20
Inventory, 5.2(b)
Search during execution of warrant, 3.9(b)
Search incident to arrest, 5.2(b)
Warrantless searches, 5.5
Search of, within vehicle, 5.22(c)

CONTRABAND
Plain view of, as probable cause, 2.4(b)

CORROBORATION
Of informant's information, by officer, as probable cause, 2.5(e)

COURTHOUSES
Searches at, 5.30

CRIMINAL RECORD
Probable cause as arising from, 2.3(b)

CURTILAGE
See: Premises

CUSTODIAL ARREST
See: Search Incident to Arrest

DEFENSE TESTIMONY RE FRUITS
Waiver of objection, 7.10

DERIVATIVE EVIDENCE
See: Fruit of the Poisonous Tree

DERIVATIVE STANDING
See: Standing

DETENTION
Investigatory, 4.7, 4.7(a)
Persons on premises being searched, 3.8(b), 5.18(b)
Persons in proximity to suspect, 4.7(b)

DRUG TESTING
As intrusion in body, 2.9(c), 3.13(b)

EFFECTS
Expectation of privacy in, 1.3(g)

ELECTRONIC SURVEILLANCE DEVICE
Installation of, as triggering fourth amendment, 1.3(a), 1.3(e), 1.3(g)

EMPLOYEE
Consent to search by, 5.14(g)

ENHANCEMENT DEVICES
See: Electronic
Surveillance Device;
Aerial Surveillance
Plain hearing, 5.9(a)
Plain view, 5.8

ENTRY OF PREMISES
See: Premises; Execution of Search Warrants

EXCLUSIONARY RULE
See: Fruit of the Poisonous Tree
Applicability,
Administrative hearings, 7.4(d)
Bail hearing, 7.3(d)
Civil tax proceedings, 7.4(c)
Federal habeas corpus proceedings, 7.3(g)
Grand jury testimony, 7.3(a)
Indictment, 7.3(b)
Juvenile delinquency proceedings, 7.4(a)
Legislative hearings, 7.4(e)
Narcotic addictment commitment proceedings, 7.4(b)
Parole revocation, 7.3(f)
Private litigation, 7.4(f)
Probable cause hearing, 7.3(c)
Quasi-criminal cases, 7.4
Sentencing, 7.3(e)

Criticism of and
alternatives to, 7.1
Generally, 7.0
Impeachment, 7.9(a)
Limitations in application of rule, 7.2
Perjury prosecution, 7.9(b)
Private Searches,

Agency theory, 7.6(a)
Defined, 7.6
Generally, 7.5
Joint endeavor theory, 7.6(b)
Public function theory, 7.6(c)
Ratified intent and judicial action theory, 7.6(d)

EXECUTION OF SEARCH WARRANTS
Detention of persons, 3.8(b)
Entry by deception, 3.7(a)
Notice requirement, 3.7
Compliance, 3.7(b)
Exceptions, 3.7(c)
Statement of, 3.7(a)
Scope of search,
Description of area, 3.9(a)
For named items, 3.9
Intensity and duration, 3.9
Personal effects, 3.9(b)
Vehicles, 3.9(c)
Search of persons, 3.8(a)
Seizure of unnamed items,
Generally, 3.10
Receipt and inventory of property, 3.11
Types of entry requiring notice, 3.7(a)

EXIGENT CIRCUMSTANCES
Bodily intrusions, 5.18(a)
Burden of proof, 5.16
Container, warrantless search and seizure of,
5.20
Destruction or removal of evidence, 5.17(b)
Generally, 5.16
1988 Search and Seizure

Hot pursuit,
Determining validity of, 5.17(a)
Generally, 5.17(a)
Washington cases, 5.17(a)
Premises search,
Destruction of evidence, 5.17(b)
Search of person on
premises being searched, 5.18(b)
Warrantless entry to search
or arrest, 5.17(b)

EXPECTATION OF PRIVACY
Adjoining lands and, 1.3(c)
Apartments, 1.3(a)
Curtilage structures and,
1.3(b)
Fourth amendment and,
1.3(c)
Hotel rooms, 1.3(a)
Legitimate, 1.1
Open beaches, reservoirs,
1.3(c)
Open fields, wooded areas,
deserts and 1.3(c)
Position in room as affecting, 1.3(a)
Possession of, requirements for, 1.1
Prisoners or pre-trial
detainees, 6.2(a)
Telephone use and, 1.3(a)

EXPERTISE OF OFFICER
Plain view, smell and
hearing, 2.4(b)

FELLOW OFFICER RULE
See: Police, Probable Cause, Directive to Arrest

FILMS
Search warrant for, 3.5(b)

FINGERNAIL SCRAPING
Expectation of privacy in, 1.3(f)

FINGERPRINTS
Expectation of privacy in, 1.3(f)

FIRE SCENES
See: Inspection of Fire Scenes

FLASHLIGHT
As aid to observation, 5.8

FRISK
See: Stop and Frisk

FRUIT OF THE POISONOUS TREE
See: Exclusionary Rule
Arrest as fruit of illegal search, 7.8(d)
Attenuation test, 7.7(a)
Confession as fruit of illegal arrest, 7.8(a)
Confession as fruit of illegal search, 7.8(b)
Crime committed in response to illegal arrest, as fruit, 7.8(i)
Evidence of, as affecting probable cause, 2.3(b)
Generally, 7.7
Identification of person as fruit of illegal arrest, 7.8(f)
Identification of property as fruit of illegal search, 7.8(g)
Independent source test, 7.7(b)
Inevitable discovery test, 7.7(c)
Search as fruit of illegal arrest or detention, 7.8(c)
Search as fruit of prior illegal search, 7.8(e)
Testimony as a fruit, 7.8(h)
Use of illegally seized evidence at trial, 7.9

FURTIVE GESTURES
Observation of, as probable cause, 2.4(d)

GOOD FAITH
Exclusionary rule, 7.2(a)
Warrantless searches, 5.5, 5.29

HARMLESS ERROR
On appeal, 7.11

HEARING
See: Plain View, Smell, and Hearing

HEARSAY
Informant's information establishing probable cause, 2.5
Information establishing probable cause, 2.3(a)
Police officer, multiple, 2.7(b)

HOMOSEXUAL ACTIVITY
Expectation of privacy and, 1.1

HOT PURSUIT
See: Exigent Circumstances

HOTEL ROOM
Expectation of privacy in, 1.3(a)

HOUSES
See: Premises

IMMEDIATE CONTROL STANDARD
Search incident to arrest, 5.1(b)

IMPOUNDMENT
Vehicles, 5.26

INDIVIDUALIZED SUSPICION
Administrative searches, 6.4(b), 6.4(c)
Prisons, 6.2(b)
Probable cause, 2.2(c)
School searches, 6.1
Special environments, 5.30
Vehicle searches, 6.4(c)

IN THE PRESENCE REQUIREMENT
See: Arrest

INEVITABLE DISCOVERY TEST
Fruit of the poisonous tree, 7.7(c)

INFORMANTS
Admissions against interest, 2.5(c)
Aguilar-Spinelli test, 2.5
Basis for knowledge, 2.5(a)
Citizens as, 2.6
Partial corroboration, 2.5(e)
Police as, 2.7
Self-verifying detail, 2.5(d)
Veracity, 2.5(b), 2.5(c)

INSPECTION OF FIRE SCENES
Level of proof requirement, 6.4(c)
Search warrant, requirement for, 1.3(a), 6.4
INTOXICATION
Detention in cases of, 4.4(d)

INVENTORY
Containers, secured by warrantless search, 5.2(b)
Impounded vehicles, 5.27

JOINT OCCUPANT
Consent to search by, 5.14(d)

JUVENILE DELINQUENCY PROCEEDINGS
Exclusionary rule, applicability, 7.4(a)

KATZ TEST
See: Expectation of Privacy; Constitutionally Protected Areas

KNOCK AND ANNOUNCE REQUIREMENT
See: Execution of Search Warrants

KNOCK AND WAIT RULE
See: Execution of Search Warrants

LANDLORD
Consent to search by, 5.14(e)

LEGITIMATE EXPECTATION OF PRIVACY
See: Expectation of Privacy

MAILS
Expectation of privacy in, 1.3(g)
Warrantless searches, 5.31

MOTION TO SUPPRESS
Probable cause as subject to, 2.0

NEUTRAL AND DETACHED MAGISTRATE
Burden of proof as to neutrality, 3.2(c)
Magistrate-shopping, 3.2(b)
Neutrality, 3.2(b)
Nonlawyer, 3.2(a)
Potential witness as, 3.2(b)
Prosecutor as, 3.2(b)
Qualifications for, 3.2(a)

NEWS-GATHERING ORGANIZATION
Description of evidence in search warrant for, 3.5(b)

NONLAWYER
As magistrate, 3.2(a)

NONSUSPECT
Warrants directed at, 3.13(c)

OATH
See: Affidavit for Search Warrant

OBSCENE MATERIALS
Public availability of, as affecting privacy expectation, 1.3(g)

ODOR
See: Plain View, Smell, and Hearing

OPEN FIELDS
Expectation of privacy in, 1.3(c)

OPEN VIEW
Plain View, Smell and Hearing

OUTBUILDINGS
Expectation of privacy in, 1.3(b)
PAPERS
See: Private papers
Expectation of privacy in, 1.3(g)
Special warrant requirements for, 3.5(b), 3.13(a)
PAROLE REVOCATION
Exclusionary rule, applicability, 7.3(f)
PARTIAL
CORROBORATION
Informants, 2.5(e)
PARTICULARITY
See: Search Warrants
PAST PERFORMANCE
Informants, 2.5(b)
PAT-DOWN
See: Stop and Frisk
PERSON
Consensual encounter as, 1.5(a)
For civil offenses, 1.5(d)
In automobile, 1.5(b)
In home, 1.5(c)
What constitutes, 1.5
PERSONAL
CHARACTERISTICS
Expectation of privacy in,
Face, 1.3(f)
Fingernails, 1.3(f)
Voice, 1.3(f)
PERSONAL PRIVACY
INTEREST
Banking documents, 1.4
Evidence seized from third party as having, 1.4
Generally, 1.4
Interior of purse as, 1.4
Motor vehicle and, 1.4
Personal Possessions, 5.2(a)
Sealed container in stolen car as, 1.4
Search and seizure as challenged by, 1.4
PLAIN HEARING
See: Plain View, Smell, and Hearing
PLAIN SMELL
See: Plain View, Smell, and Hearing
PLAIN VIEW, SMELL, AND HEARING
Binoculars and telescopes, 5.8
Contraband, sight of, as probable cause, 2.4(b)
Exigent circumstances as to plain view, 5.7(b)
Expertise of officer, 2.4(b)
Flashlights, 5.8
Hearing generally, 5.9(a)
Immediate knowledge of incriminating character, 5.7(a)
Observation by officer of object in a protected area, 5.7(b)
Odor as probable cause, 2.4(b)
Open view as distinguished, 5.6
Plain smell, generally, 5.9(b)
Plain view, generally, 5.6
Prior justification for intrusion, 5.7(a)
Requirements as to plain view, 5.7(a)
Seizure of unnamed items, 3.10
POISONOUS TREE
See: Fruit of the Poisonous Tree

POLICE
Probable cause,
Directive to arrest, 2.7(b)
Facts known by other officer, 2.7(b)
Reliability of officer, 2.7(a)

PRE-TRIAL DETAINES
See: Prisoners or Pre-Trial Detainees

PREMISES
See: Business and Commercial Premises, Inspection of Fire Scenes
Adjoining lands,
Access area used as, 1.3(c)
Driveways, and parking lots, 1.3(c)
Open fields, 1.3(c)
Walkways, 1.3(c)
Apartments, personal privacy interest in, 1.4
Arrest entry requiring warrant, 1.3(a)
Buildings in curtilage,
Entry by police of, 1.3(b)
Expectation of privacy in, 1.3(b)
Porches, 1.3(c)
Pre-Katz, 1.3(b)
Structures outside of, 1.3(b)
Homes,
Administrative Searches in, 6.4
Arrest in, 4.1
Expectation of Privacy in, 1.3(a)

 Generally, 1.2
Knock and Announce Requirements, 3.7
Warrant requirement, entry into, 4.1, 5.17(a), 5.17(b), 5.19

PRISONERS OR PRE-TRIAL DETAINEE
Expectation of privacy, 6.2(a)
Level of proof necessary for search of, 6.2(b)
Warrantless searches or seizures, 6.2(c)

PRIVACY
See: Expectation of Privacy

PRIVATE PAPERS
Right against self-incrimination and, 1.3(f)
Seizure of, 1.3(g), 3.13(a)

PROBABLE CAUSE
See: Informants
Administrative searches, 2.8(a)
Border Searches, 6.3(b)
Criminal reputation, 2.3(b)
Custodial detention, 2.8(b)
Determination of, as judicially considered, 2.0
Evidence of, 2.1
First-hand observation,
Association with another person, 2.4(c)
Association with place, 2.4(c)
Furtive gestures and flight, 2.4(d)
Illegal substance possession, 2.4(b)
Nature of area, 2.4(c)
Response to questioning, 2.4(e)
Stolen property, 2.4(a)
For arrest without warrant, 2.2(b)
Generally, 2.0
Hearsay, 2.3(a)
Individualized suspicion, reasonable grounds for, 2.2(c)
Informant's information, Admissions against interest, 2.5(c)
Basis of knowledge, 2.5, 2.5(a)
Corroborated by officer, 2.5(e)
Generally, 2.5
Partial corroboration, 2.5(e)
Past performance, 2.5(b)
Self-verifying detail, 2.5(d)
Veracity, 2.5, 2.5(b)
Informant, reliability of, 2.3(a)
Information considered, Admissibility at trial, as to, 2.3(a)
Basis of facts, 2.3
Basis of knowledge, 2.3
Increased Power Consumption, 2.3(c)
Prior arrests and convictions, 2.3(b)
More probable than not, 2.2(b)
Objective test, 2.2(a)
Police information, Directive to arrest, 2.7(b)
Facts known by other officer, 2.7(b)
Reliability of officer, 2.7(a)
Prior arrests and convictions establishing, 2.3(b)
Probability, degree of, 2.2(b), 2.2(c)
Reputation establishing, 2.3(b)
Stale information, 2.3
Totality of circumstances standard, 2.5
Victim-witness information, Anonymously given, 2.6(b)
Basis of knowledge, 2.6(a)
Generally, 2.6
 Sufficiency of, 2.6(c)
Veracity, 2.6(b)
Warrantless actions, 2.0

PROPERTY THEORY
Expectation of privacy and, 1.1

PROTECTED AREAS AND INTERESTS
Commercial property, 1.3(d)
Garbage, 1.3(g)
Home, 1.2
Mail use, 1.3(g)

PROTECTIVE SEARCHES
See: Stop and Frisk

QUESTIONING
Responses and probable cause, 2.4(e)

REASONABLE BELIEF
See: Stop and Frisk

REASONABLE EXPECTATION OF PRIVACY
See: Expectation of Privacy
RESIDENCE
   See: Premises

SAFETY INSPECTIONS
   See: Inspection of Businesses

SCHOOLS
   Searches in, 6.1

SEARCH
   See: Protected Areas and Interests; Warrantless Searches.

SEARCH INCIDENT TO ARREST
   Bodily intrusions, 5.2(a)
   Criteria for coming within rule, 5.1
   Immediate control standard, 5.1(b)
   Lawful arrest, as predicating, 5.1(a)
   Person, As a result of lawful arrest, 5.2(a)
   Use of force, 5.2(a)
   Strip search for minor offense, 6.2(d)
   Vehicles, immediate control test, 5.2(b)

SEARCH WARRANTS
   See: Affidavit for Search Warrant; Execution of Search Warrants; Neutral and Detached Magistrate
   Bodily intrusions, 3.13(b)
   Description of place, 3.4(a)
   Multiple occupancy building, 3.4(b)
   Rural areas, 3.4(b)
   Urban areas, 3.4(b)
   First amendment implications, 3.13(a)

Generally, 3.0
Marital privilege, 2.3(a)
Media in miscellaneous forms, 3.5(b)
Mere evidence as object, 3.1
News-gathering organization, 3.5(b)
Nighttime, 3.6
Nonsuspects searched, 3.13(c)
Persons, 3.4(b)
Sufficient information, 3.4(a)
Targets to be seized, 3.4(a)
Description, 3.5, 3.5(a)
Documents, telephone conversations, 3.5(b)
Timeliness of execution, 3.6
Vehicles, 3.4(b)

SECONDARY EVIDENCE
   See: Fruit of the Poisonous Tree

SEIZURE
   See: Protected Areas and Interests; Warrantless Searches
   For civil offenses, of person, 1.4(d)
   In automobile, of person, 1.4(b)
   In home, of person, 1.4(c)
   Person, what constitutes, 1.4
   Possessory interest as affecting liberty interest, 1.5
   Possessory interest of person as affected by, 1.5

SELF-VERIFYING DETAIL
   Basis of knowledge, 2.5(d)
SMELL
See: Plain View, Smell, and Hearing

STALE INFORMATION
Probable cause, 2.3

STANDING
Automatic, 1.6
Generally, 1.6
Injury in fact as prerequisite to, 1.6

STOLEN PROPERTY POSSESSION
Standing, 1.6
Probable cause, 2.4(a)

STOP AND FRISK
Balancing test, 4.5
Frisk,
During execution of search warrant, 3.8(a)
Permissible dimensions, 4.8(a)
Post pat-down search, 4.8(a)
Protective search beyond suspect, 4.8(b), 4.9(c)
Search of area within suspect’s control, 4.8(d)
Standards generally, 4.8
Generally, 4.5
Grounds for permissible stop,
Factual basis and individualized suspicion requirements, 4.6(a)
Illegal aliens, 6.3(a)
Information from an informant, 4.6(b)
Miscellaneous situations, 4.6(d)
Reasonable suspicion that vehicle contains illegal aliens, 6.3(b)
Standards generally, 2.8(b)
Reasonable belief or suspicion standard 4.5, 4.6(a), 4.6(b), 4.6(c)
Stop dimensions,
Generally, 4.7
Nature of offense, 4.6(c)
Other persons in proximity to suspect, 4.7(b)
Time, place and method, 4.7(a)

STORE
See: Premises

STREET ENCOUNTERS
See: Stop and Frisk

STRIP SEARCH
See: Bodily Intrusions

SUPRESSION MOTION
See: Motion to Suppress

SUPPRESSION OF CONFESSIONS AND ADMISSIONS
See: Exclusionary Rule

TELESCOPE
As aid to observation, 5.8

TERRY STOP
See: Stop and Frisk

TRAFFIC VIOLATIONS
Arrest for, 4.4(d)

USELESS GESTURE EXCEPTION
See: Execution of Search Warrants, Notice Requirement, Exceptions

VEHICLES
Administrative searches of, 2.8(a)
Examination of container based on probable cause, 5.23(c)
Exigent circumstances search of, based on probable cause, 5.22(a)
Expectation of privacy in, 1.3(c)
Homes, as distinguished from, 1.3(e)
Impoundment of, 5.26
Inventory searches, 5.27
Warrantless search after, 5.22(b)
Scope of warrantless search, 5.22(c)
Search of, generally, 1.3(e)
Seizure of person, 1.5(b)
Spot checks, 5.24, 6.4(b), 6.4(c)
Warrantless search based on generalized suspicion, 5.24
Warrantless search during medical emergency, 5.29
Warrantless searches, See Generally, 5.2(b), 5.21, 5.23
Weapons, papers and suspects, 5.28
Warrantless seizure as evidence, 5.26
Warrantless seizure for forfeiture or levy, 5.25

**VICTIM-WITNESS INFORMATION**

Probable cause,
Anonymously given, 2.6(b)
Basis of knowledge, 2.6(a)
Generally, 2.6

Sufficiency of, 2.6(c)
Veracity, 2.6(b)

**VIEW**

*See: Plain View, Smell, and Hearing*

**WAIVER OF OBJECTION**

Guilty plea, 7.10
No timely objection, 7.10
Testimony by defendant re fruits, 7.10

**WARRANTLESS ARREST**

When permissible, 4.1

**WARRANTLESS SEARCHES**

*See: Consent Searches; Stop and Frisk*

Administrative searches, 6.4
Aid to person in distress, 5.5
Borders, 6.3, 6.3(c)
Containers, 5.5
Inventory, 5.2(b)
Mail inspections, 5.31
Post-detention search, 5.4(a)
Prior to arrest, 5.3
Requirements generally, 5.0
Schools, 6.1
Search incident to arrest, 5.2(b)
Special situations, 5.5, 5.30

**WARRANTS**

*See: Arrest Warrants; Search Warrants*

**WITNESS-VICTIM INFORMATION**

*See: Victim-Witness Information*