ADMINISTRATIVE OFFICE OF THE COURTS BENCH BOOK SERIES

TRAFFIC STOPS IN WASHINGTON

A Judge's Bench Book

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Foreward

Purpose

These materials were intended to be included as a chapter on traffic stops in the 2013 version of the DUI Bench Book. As the length of these materials grew, it became apparent that a separate traffic stop bench book would better serve judges.

Traffic stop issues in Washington are complex. This comprehensive reference book for judicial officers seeks to thoroughly examine the legal and practical aspects of litigation concerning DUI and other traffic stop-related cases.

Published May 2013

This bench book is published by the Washington Administrative Office of the Courts.

About Using This Document

The electronic publication of this bench book contains easy-to-use hot links (underlined and colored blue) to the laws, court rules, and cases that shape traffic stop litigation. These links will work when the reader is using the document with access to the internet. Internal links (also underlined and colored blue) allow the reader to find related information contained in different sections and will work even when the reader is not on line. In Microsoft Word, a reader may use the document map to navigate this bench book with ease. The document map is an option under the “view” menu.

If the reader prefers to print this reference, an Adobe PDF file is available for optimal printed results. The PDF file does not contain working hot links or the document map, but will produce a document suitable for a binder that could be used for quick reference.

Acknowledgements

The author sincerely appreciates the efforts of those who generously volunteered their professional expertise, time, energy and ideas to the development of this bench book. Those persons are:

Honorable Linda S. Portnoy−Lake Forest Park Municipal Court

Jennifer (J) Amanda Krebs−Legal Services Senior Analyst, AOC

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Jeffrey J. Jahns was appointed to the Kitsap County District Court in 2009, and elected to a four-year term in 2010.

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Judge Jahns was a criminal defense attorney in private practice from 1981 to 1994. He joined the Kitsap County Prosecutor's Office in 1995 as a chief deputy prosecutor where he served as the head of the district and municipal court division until his appointment to the bench.

Judge Jahns received the 2004 Washington State Bar Association Professionalism Award for his work as a prosecutor. He received the 1995 Kitsap County Bar Association Professionalism Award for his work as a criminal defense attorney. Judge Jahns was named a "Super Lawyer" several times by WASHINGTON LAW & POLITICS during his tenure in the prosecutor's office.

Judge Jahns has authored many professional articles and publications. His prosecutorial ethics and professionalism treatise, THE QUEST FOR JUSTICE (3rd ed. 2008), continues to be a resource for criminal law practitioners and judges.

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Chapter One

Suppression Procedure

A. A Party Seeking Suppression of Physical, Oral or Identification Evidence Shall Comply with CrRLJ 3.6 or CrR 3.6

A party seeking suppression of physical, oral or identification evidence must comply with three prerequisites prior to the court considering a suppression motion on the merits. CrRLJ 3.6(a) and CrR 3.6(a) require:

1. The motion shall be in writing;

2. The motion shall be supported by an affidavit or document; and

3. The motion shall set forth the facts the moving party anticipates will be elicited at a hearing.

CrR 3.6(a), in addition to the above requirements, also requires a memorandum of authorities in support of the motion.

CrR 3.6(a) also authorizes the court to order opposing counsel to serve and file a memorandum of authorities in opposition to the motion.

B. The Court Shall Determine Whether an Evidentiary Hearing is Required

1. CrRLJ 3.6

After the moving party complies with the prerequisites listed in CrRLJ 3.6(a), the court must determine whether an evidentiary hearing is required. CrRLJ 3.6(a) says in pertinent part:

> If there are no disputed facts, the court shall determine whether an evidentiary hearing is required. If the court determines that no evidentiary hearing is required, the court shall set forth its reasons for not conducting an evidentiary hearing.

2. CrR 3.6

After the moving party complies with the prerequisites listed in CrR 3.6(a), the court must determine whether an evidentiary hearing is required. If no evidentiary hearing is required, the court shall enter a written order explaining why no evidentiary hearing will be held. CrR 3.6(a) says in pertinent part:

> The court shall determine whether an evidentiary hearing is required based upon the moving papers. If the court determines that no evidentiary hearing is required, the court shall enter a written order setting forth its reasons.

C. The Rules of Evidence Need Not Apply to Suppression Hearings

The rules of evidence applicable in criminal trials have historically been held to not operate at hearings before a judge to determine the admissibility of evidence. Brinegar v. United States, 338 U.S. 160, 69 S. Ct. 1302, 1309-10, 93 L. Ed. 1879 (1949) (hearsay permitted at a hearing challenging the admissibility of evidence seized when vehicle was searched); State v. McLaughlin, 74 Wn.2d 301, 303 444 P.2d 699 (1968) (trial court's reliance on affidavits and other proof appropriate when hearing a motion to suppress evidence).

Consistent with these historical roots, ER 104(a) provides that the rules of evidence do not apply at hearings to suppress evidence, except the rules concerning privileges. The rule says:

> **Rule 104. Preliminary Questions.**
>
> **(a) Questions of Admissibility Generally.** Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of section (b). In making its determination it is not bound by the rules of evidence except those with respect to privilege.

ER 1101 essentially repeats the same language of ER 104(a). ER 1101(c)(1) says: "The rules (other than with respect to privileges) need not be applied in the following situations: The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under rule 104(a)."

D. The Court Shall Enter Findings of Fact and Conclusions of Law

If an evidentiary hearing is held in superior court, "at its conclusion the court shall enter written findings of fact and conclusions of law." CrR 3.6(b).

When rendering a decision on the merits in a court of limited jurisdiction, the court "shall state findings of fact and conclusions of law." CrRLJ 3.6(b).

Unlike CrR 3.6(b)'s requirement of written findings of fact and conclusions of law, CrRLJ 3.6(b) permits a trial court to render an oral opinion on the record. State v. Anderson, 51 Wn.App. 775, 778 n.1, 755 P.2d 191 (1988) (district court's oral opinion and the record provide a sufficient basis for appellate review).

E. An Untimely Motion to Suppress May Waive the Motion

1. A Motion to Suppress Must be Made Within a Reasonable Time Before Trial

"A defendant must move for suppression within a reasonable time before the case is called for trial." State v. Radka, 120 Wn.App. 43, 47, 83 P.3d 1038 (2004) (defendant's failure to file written motion to suppress held harmless because the motion was heard in a reasonable time before trial and the prosecution did not allege on appeal that the form of the motion prejudiced its ability to address the issue).

> While it is true that both our state and federal constitutions protect us from unreasonable searches and seizures, it is also true that, in order to preserve these rights, persons claiming benefits thereunder must seasonably object.

State v. Baxter, 68 Wn.2d 416, 423-24, 413 P.2d 638 (1966).

Although a party may waive a motion to suppress by failing to bring the motion in a reasonable time, a trial court may allow such a motion at any time before the case is called for trial. The purpose of the timeliness rule is to allow the trial court an opportunity to fully consider the motion. State v. Baldwin, 109 Wn.App. 516, 522, 37 P.2d 1220 (2001), *review denied*, 147 Wn.2d 1020 (2002).

2. Failure to Move to Suppress Physical Evidence Until After the Prosecution Rests is a Waiver of the Motion

A motion to suppress physical evidence is untimely and is waived, even if a constitutional right is asserted, when made after the prosecution offers the evidence at trial. *See* State v. Burnley, 80 Wn.App. 571, 572, 910 P.2d 1294 (1996) (defense failure to object to admissibility of cocaine until after prosecution rested was a waiver of the objection).

Chapter Two

Preliminary Suppression Burdens of Production and Persuasion

In addition to the CrRLJ 3.6(a) or CrR 3.6(a) prerequisites discussed in Chapter One, the defense has the preliminary burden of producing legal authority based upon the alleged facts justifying the court's suppression of the contested evidence. The burdens of production and persuasion initially rest upon the moving party in a suppression hearing. State v. Trasvina, 16 Wn.App. 519, 523, 557 P.2d 368 (1976), *review denied*, 88 Wn.2d 1017 (1977); State v. Smith,50 Wn.2d 408, 412, 314 P.2d 1024, 312 P.2d 652 (1957); State v. Ditmar,132 Wash. 501, 507, 232 P. 321 (1925).

In order to meet this burden, the defense must prove (1) the defendant has standing to challenge the police conduct , and (2) that the police conduct is contrary to constitutional protections and guarantees, i.e. that a seizure occurred. State v. Shuffelen, 150 Wn.App. 244, 208 P.3d 1167, *review denied*, 167 Wn.2d 1008 (2009) (citing 12 Royce A. Ferguson, Jr., Washington Practice: Criminal Practice and Procedure § 2402 (3d ed.2004)).

Chapter Three

Standing to Challenge Police Conduct

A. A Person Lawfully in Possession of a Vehicle has Standing to Challenge a Seizure of the Vehicle

Standing to challenge a search or seizure under the Fourth Amendment and Const. art. I, § 7 ordinarily requires a defendant to have a legitimate expectation of privacy in the place searched or the thing seized. State v. Libero, 168 Wn.App. 612, ¶12, 277 P.3d 708 (2012).

A person lawfully in possession of a vehicle has a legitimate expectation of privacy in the vehicle under the Fourth Amendment and Const. art. I, § 7. State v. Stroud, 106 Wn.2d 144, 152, 720 P.2d 436 (1986), *overruled in part by* State v. Valdez, 167 Wn.2d 761, ¶32, 224 P.3d 751 (2009); State v. Simpson, 95 Wn.2d 170, 187-188, 622 P.2d 1199 (1980).

Assuming a defendant was lawfully in possession of the vehicle he or she was driving, a defendant meets the burden of proving standing to challenge a seizure of the vehicle because the defendant was in possession of the vehicle and had a legitimate expectation of privacy in the vehicle.

B. A Defendant/Passenger Lacks Standing to Challenge an Officer's Questioning of the Driver

In State v. Shuffelen, 150 Wn.App. 244, 208 P.3d 1167, *review denied*, 167 Wn.2d 1008 (2009), a woman was driving a vehicle stopped for a traffic violation. The passenger, whose name was Donald, matched the physical description of the respondent in a court order who was prohibited from having contact with the driver. The passenger was subsequently contacted and arrested for violation of the court order.

The Shuffelen Court held that the defendant lacked standing to challenge the officer's alleged unconstitutional questioning of the driver about the identity of the defendant. State v. Shuffelen, 150 Wn.App. at ¶21.

C. A Defendant/Driver Lacks Standing to Challenge an Officer's Questioning of a Passenger

In State v. Pettit, 160 Wn.App. 716, 251 P.3d 896, *review denied*, 171 Wn.2d 1034 (2011), the defendant was driving his car and stopped for a traffic infraction. A record check disclosed that the defendant was named in a court order issued for the protection of a 16 year old girl. The front female passenger appeared to be about 16 years old. After questioning the passenger, the officer ultimately determined that the passenger was the protected party and thereafter arrested the defendant for violation of the order.

The Pettit Court held that the defendant lacked standing to challenge the questioning of the passenger, citing to State v. Shuffelen, 150 Wn.App. 244, 208 P.3d 1167, *review denied*, 167 Wn.2d 1008 (2009) with approval. State v. Pettit, 160 Wn.App. at ¶10.

The Pettit Court also distinguished its decision suppressing evidence in State v. Allen, 138 Wn.App. 463, 157 P.3d 893 (2007), because the holding in Allen concerned the unlawful questioning of the defendant who was a passenger in the vehicle. State v. Pettit, 160 Wn.App. at ¶10.

Chapter Four

A Seizure Must Occur to Trigger Constitutional Protections

A. Definition of Seizure

For constitutional purposes, a "seizure" occurs when there is some meaningful interference with an individual's possessory interest in property and a government official exercises dominion and control over the property. Washington courts consider a person "seized" when an officer, by physical force or show of authority, restrains the person's freedom of movement and a reasonable person would not believe that he or she is (1) free to leave given all the circumstances, or (2) free to otherwise decline an officer's request and terminate the encounter. State v. O'Neill, 148 Wn.2d 564, 574, 62 P.2d 489 (2003).

B. The Defense Must Prove a Seizure Occurred

A defendant has the burden of proving that a seizure occurred in violation of the constitution. State v. O'Neill, 148 Wn.2d 564, 574, 62 P.2d 489 (2003).

C. The Right to be Free from Unreasonable Governmental Intrusion Encompasses Automobiles and Their Contents

Const. art. I, § 7 recognizes a person's right to privacy with no express limitations. "The right to be free from unreasonable governmental intrusion into one's private affairs encompasses automobiles and their contents." State v. O'Neill, 148 Wn.2d 564, 584, 62 P.2d 489 (2003).

D. A Seizure Occurs Where an Officer Commands a Person to Halt or Demands Information

When an officer commands a person to halt or demands information from the person, a seizure occurs. United States v. Mendenhall, 446 U.S. 544, 554, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980); State v. O'Neill, 148 Wn.2d 564, 577, 62 P.2d 489 (2003).

See Chapter 5 (Social and Consensual Contacts) and Chapter 6 (Community Caretaking Function Contacts).

E. A Seizure Occurs Where an Officer Activates a Police Vehicle's Emergency Lights

The activation of a patrol vehicle's emergency lights constitutes a display of authority requiring the driver to submit to that authority. Accordingly, a seizure occurs. State v. Gantt, 163 Wn.App. 133, ¶25, 257 P.3d 682 (2011), *review denied*, 173 Wn.2d 1011 (2012).

F. An Officer's Subjective Beliefs are Irrelevant to the Question Whether a Seizure Occurred

Whether a seizure occurs does not turn upon an officer's subjective suspicions. Rather, whether a person has been "seized" by an officer must be determined by an objective analysis based upon the actions of the officer and his or her interaction with the person. An officer's subjective suspicion is generally irrelevant to the question whether a seizure has occurred. State v. O'Neill, 148 Wn.2d 564, 575, 62 P.2d 489 (2003); State v. Barnes, 96 Wn.App. 217, 224, 978 P.2d 1131 (1999) (An officer's subjective belief that the defendant was free to walk away is immaterial on the issue of whether a reasonable person would feel free to leave unless the officer communicated that information to the defendant. It is also irrelevant that an officer subjectively intended to detain the defendant with or without his consent, except to the extent this was communicated.)

G. An Officer's Subjective Beliefs are Relevant in Deciding Whether a Seizure was Constitutionally Valid

Once a seizure is found to have occurred, however, the reasonableness of the officer's subjective suspicions and the factual basis for them are relevant in deciding whether a seizure is valid under the state constitution. State v. O'Neill, 148 Wn.2d 564, 576-77, 62 P.2d 489 (2003); State v. Ladson, 138 Wn.2d 343, 979 P.2d 833 (1999) (Pretextual traffic stops are prohibited by Const. art. I, § 7. In determining whether a given stop is pretextual, a court should consider the totality of the circumstances, including both the subjective intent of the officer as well as the objective reasonableness of the officer's behavior.)

See Chapter 18 (Pretextual Warrantless Terry Stops).

Chapter Five

Social and Consensual Contacts

A. Not Every Encounter Between a Person and the Police is a Seizure

Not every encounter between a person and a police officer is a seizure triggering constitutional protection. An officer does not seize a person by simply striking up a conversation or asking questions. United States v. Mendenhall, 446 U.S. 544, 100 S. Ct. 1870, 1877, 64 L. Ed. 2d 497 (1980) (Fourth Amendment); State v. Mennegar, 114 Wn.2d 304, 310, 787 P.2d 1347 (1990); *overruled on other grounds by* State v. Hill, 123 Wn.2d 641, 645, 870 P.2d 313 (1994); State v. Young, 135 Wn.2d 498, 511, 957 P.2d 681 (1998) (Const. art. I, § 7).

The Supreme Court in Mendenhall stressed that the purpose of the Fourth Amendment was not to eliminate all contact between police and the public. The Supreme Court said:

> We adhere to the view that a person is "seized" only when, by means of physical force or a show of authority, his freedom of movement is restrained. Only when such restraint is imposed is there any foundation whatever for invoking constitutional safeguards. The purpose of the Fourth Amendment is not to eliminate all contact between the police and the citizenry, but "to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals." As long as the person to whom questions are put remains free to disregard the questions and walk away, there has been no intrusion upon that person's liberty or privacy as would under the Constitution require some particularized and objective justification.
>
> Moreover, characterizing every street encounter between a citizen and the police as a "seizure," while not enhancing any interest secured by the Fourth Amendment, would impose wholly unrealistic restrictions upon a wide variety of legitimate law enforcement practices. The Court has on other occasions referred to the acknowledged need for police questioning as a tool in the effective enforcement of the criminal laws. "Without such investigation, those who were innocent might be falsely accused, those

> who were guilty might wholly escape prosecution, and many crimes would go unsolved. In short, the security of all would be diminished.

United States v. Mendenhall, 446 U.S. 544, 100 S. Ct. 1870, 1877, 64 L. Ed. 2d 497 (1980) (citations omitted).

B. Definition of Social Contact

"Washington courts have not set in stone a definition for so-called social contact. It occupies an amorphous area in our jurisprudence, resting someplace between an officer's saying "hello" to a stranger on the street and, at the other end of the spectrum, an investigative detention (i.e., Terry stop)." State v. Harrington, 167 Wn.2d 656, ¶14, 222 P.3d 92 (2009):

> The phrase's plain meaning seems somewhat misplaced. "Social contact" suggests idle conversation about, presumably, the weather or last night's ball game—trivial niceties that have no likelihood of triggering an officer's suspicion of criminality. The term "social contact" does not suggest an investigative component.
>
> However its application in the field—and in this court—appears different. For example we have categorized interactions where officers ask for an individual's identification as social contact. "Article I, section 7 does not forbid social contacts between police and citizens: '[A] police officer's conduct in engaging a defendant in conversation in a public place and asking for identification does not, alone, raise the encounter to an investigative detention.'" In [State v. Young, 135 Wn.2d 498, 957 P.2d 681 (1998)] we found effective law enforcement techniques not only require passive police observation, but also necessitate interaction with citizens on the streets.

State v. Harrington, 167 Wn.2d at ¶¶14-15 (citations omitted).

C. A Constitutionally Valid Social Contact May Escalate into a Seizure Where an Officer's Progressive Intrusions are Not Customary in Social Interactions

Although a social contact between a person and an officer may be valid at its inception, an officer's subsequent actions may escalate the contact into a seizure because a reasonable person would not thereafter feel free to terminate the encounter. State v. Harrington, 167 Wn.2d 656, 222 P.3d 92 (2009) is

Washington's seminal case discussing an officer's progressive intrusions from social contact to unlawful warrantless seizure.

The initial contact in Harrington was a valid social contact because a reasonable person would have felt free to terminate the encounter. The officer initially parked his patrol vehicle in a driveway which did not block a sidewalk. The officer exited his vehicle. The vehicle's emergency lights and siren were not activated. The officer moved to a grassy area near the sidewalk, and asked the defendant who was passing by to speak with the officer. The defendant agreed to speak with the officer without duress or compulsion. The officer did not block the defendant's egress from the sidewalk. Under this set of facts, the Harrington Court held that "a reasonable person at the beginning of the conversation would not have thought [the officer] restrained that person's freedom of movement." State v. Harrington, 167 Wn.2d at ¶16.

"Subsequent events quickly dispelled the social contact, however, and escalated the encounter to a seizure." State v. Harrington, 167 Wn.2d at ¶17. A second officer arrived a few minutes after the encounter. "A second officer's sudden arrival at the scene would cause a reasonable person to think twice about the turn of events and, for this reason, [the second officer's] presence contributed to the eventual seizure" of the defendant. State v. Harrington, 167 Wn.2d at ¶19.

While an officer's request to keep hands out of one's pockets does not independently rise to the level of a seizure, "asking a person to perform an act such as removing hands from pockets adds to the officer's progressive intrusion and moves the interaction further from the ambit of valid social contact, particularly if the officer uses a tone of voice not customary in social interactions." State v. Harrington, 167 Wn.2d at ¶¶20-21.

A nonconsensual "protective frisk for weapons" is warranted when a "reasonable safety concern exists." The officer must be able to point to "specific and articulable facts" which create an objectively reasonable belief that a suspect is "armed and presently dangerous." State v. Collins, 121 Wn.2d 168, 173, 847 P.2d 919 (1993) (*quoting* Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 1883, 20 L. Ed. 2d 889 (1968).

In Harrington, the officer asked for and received consent to frisk the defendant. The officer did not, however, have any specific and articulable facts that would create an objectively reasonable belief that the defendant was armed and presently dangerous.

> Requesting to frisk is inconsistent with a mere social contact. If [the officer] felt jittery about the bulges in [the defendant's] pockets, he should have terminated the counter—which [the officer] initiated—and walked back to his patrol car. Instead, [the officer] requested a frisk.

State v. Harrington, 167 Wn.2d at ¶26.

When the officer requested Harrington's consent to conduct a frisk, "the officers' series of actions matured into a progressive intrusion substantial enough to seize [the defendant]. A reasonable person would not have felt free to leave due to the officers' display of authority." State v. Harrington, 167 Wn.2d at ¶27.

D. Courts Should Carefully Scrutinize Assertions of Social Contact

In State v. Harrington, 167 Wn.2d 656, 222 P.3d 92 (2009), the Court advised courts to carefully scrutinize assertions of social contact because such contacts may escalate into unconstitutional warrantless seizures.

> We note this progressive intrusion, culminating in seizure, runs afoul of the language, purpose, and protections of article I, section 7. Our constitution protects against disturbance of private affairs—a broad concept that encapsulates searches and seizures. Article I, section 7 demands a different approach than does the Fourth Amendment; we look for the forest amongst the trees. As Judge Sweeney wrote, "We do a disservice to the public and to police by moving the so-called 'social contact' into just another form of seizure, albeit without any cause or suspicion of crime or danger to the public or the police." [State v. Harrington, 144 Wn.App. 558, 564, 183 P.3d 352 (2008)] (Sweeney, J., dissenting).

State v. Harrington, 167 Wn.2d 656, ¶28, 222 P.3d 92 (2009).

E. An Occupant of a Parked Vehicle is Free to Refuse an Officer's Request to Open the Window or Engage in Conversation During a Social Contact

An occupant of a vehicle has the right to refuse to roll down a window or engage in conversation with an officer during a social contact. In State v. O'Neill, 148 Wn.2d 564, 579, 62 P.3d 489 (2003), the court said:

> The occupant is free, of course, to refuse an officer's request to open the window, and is under no obligation to engage in conversation with the officer. By the same token, the occupant is just as free to open a window and engage in conversation. The officer's approach and conversation with

> O'Neill did not, because O'Neill was inside a vehicle, rise to the level of an unconstitutional intrusion into private affairs.

F. Cases Discussing a Constitutionally Valid Social Contact

State v. Bailey, 154 Wn.App. 295, 224 P.3d 852, *review denied*, 169 Wn.2d 1004 (2010) (*distinguishing* State v. Harrington, 167 Wn.2d 656, 222 P.3d 92 (2009)) (An officer on foot asking a person in a public place (1) if the person had a moment to speak, (2) where the person was going, and (3) for the person's identification is a constitutionally valid social contact. The defendant volunteered that he had an outstanding warrant when he gave his identification to the officer, giving the officer a valid reason for thereafter seizing the defendant.)

State v. O'Neill, 148 Wn.2d 564, 578-581, 62 P.3d 489 (2003) (No seizure occurs where a uniformed officer (1) shines a spotlight on a vehicle, or (2) approaches a parked vehicle and asks questions while the officer carries a holstered weapon and approaches from an official vehicle, or (3) asks the occupant of a parked vehicle to roll down the window.)

State v. Hansen, 99 Wn.App. 575, 576, 994 P.2d 855, *review denied*, 141 Wn.2d 1022 (2000) (A seizure did not result where an officer handed the suspect's identification to a second officer who recorded the suspect's name and birth date and returned the license to the suspect before conducting a warrants check.)

State v. Young, 135 Wn.2d 498, 511, 514 n.8, 957 P.2d 681 (1998) (The use of a flashlight to illuminate at night what is plainly visible during the day is not an unconstitutional intrusion into a citizen's privacy interests. Additionally, an officer may ask for an individual's identification in the course of a casual contact.)

State v. Nettles, 70 Wn.App. 706, 710 n.6, 855 P.2d 699 (1993) (cited with approval in State v. Harrington, 167 Wn.2d 656, ¶20, 222 P.3d 92 (2009)) (An officer's request to keep hands out of one's pockets does not independently rise to the level of a seizure. Asking a person to remove his hands from his pockets is no more intrusive than asking for identification. A person who does not comply, however, is seized when the officer grabs the person's hands.)

United States v. Mendenhall, 446 U.S. 544, 100 S. Ct. 1870, 1877, 64 L. Ed. 2d 497 (1980) (*quoting* Mendenhall with approval in State v. Young, 135 Wn.2d 498, 512, 957 P.2d 681 (1998)) (citations omitted):

> Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical

touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled. In the absence of some such evidence, otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person."

G. Cases Rejecting an Assertion of Social Contact

State v. Guevara, 172 Wn.App. 184, ¶14, 288 P.3d 1167 (2012) (An officer contacted the defendant, who was in the company of other boys, told them that he suspected they were using drugs and skipping school. The officer asked them to turn their pockets inside out. Held that this is inconsistent with the tenets of a "social contact" because the defendant would hardly have felt free to simply walk away. "The request to search alone is inconsistent with a social contact." Conviction reversed.).

State v. Young, 167 Wn.App. 922, 275 P.3d 1150 (2012) (Two officers "cornering" a woman with her back against a wall seized the woman because a reasonable person would not have felt free to walk away without answering the officers' questions.)

State v. Gantt, 163 Wn.App. 133, ¶¶25-29, 257 P.3d 682 (2011), *review denied*, 173 Wn.2d 1011 (2012) (The activation of a patrol car's emergency lights constitutes a display of authority resulting in a seizure. A reasonable person would not believe that he or she was free to leave.)

State v. Harrington, 167 Wn.2d 656, ¶¶19,26, 222 P.3d 92 (2009) (Requesting a frisk is inconsistent with a mere social contact. An officer should terminate the encounter and return to the patrol vehicle if the officer has officer safety concerns during a social contact. Additionally, a second officer's sudden arrival at the scene would cause a reasonable person to think twice about the turn of events.)

State v. Rankin, 151 Wn.2d 689, 692, 92 P.3d 202 (2004) (An officer unlawfully seizes a passenger in a lawfully stopped vehicle when the officer requests identification from the passenger, absent an independent basis for making the request. Under Const. art. I, § 7, it is irrelevant whether the officer asks the passenger for identification, or demands identification.)

State v. Crane, 105 Wn.App. 301, 19 P.3d 1100 (2001), *overruled on other grounds by* State v. O'Neill, 148 Wn.2d 564, 62 P.3d 489 (2003) (A seizure occurs where an officer retains a person's identification while running a records check because the person is immobilized and thus not free to leave.)

State v. Thomas, 91 Wn.App. 195, 200-1, 955 P.2d 420, *review denied*, 136 Wn.2d 1030 (1998) (An officer seized the defendant where, while holding the defendant's identification, the officer took three steps back to conduct a warrants check on a hand-held radio.)

State v. Ellwood, 52 Wn.App. 70, 73, 757 P.2d 547 (1988) ("Wait right here" is coercive and constitutes a seizure.)

Chapter Six

Community Caretaking Function Contacts

A. Law Enforcement Has Many Responsibilities, Including Rendering Emergency Aid and Conducting Routine Checks on Health and Safety

Law enforcement has many responsibilities, only one of which is enforcement of the criminal law. Many members of the public look to police to assist them in a variety of circumstances, "including delivering emergency messages, giving directions, searching for lost children, assisting stranded motorists, and rendering first aid." State v. Acrey, 148 Wn.2d 738, 748, 64 P.3d 594 (2003) (*quoting* State v. Kinzy, 141 Wn.2d 373, 387, 5 P.3d 668 (2000) with approval).

The community caretaking doctrine normally applies to police encounters involving emergency aid and routine checks on health and safety. State v. Kinzy, 141 Wn.2d 373, 394-95, 5 P.2d 668 (2000), *cert. denied*, 531 U.S. 1104, 121 S.Ct. 843, 148 L.Ed.2d 723 (2001).

> Where an encounter involves a routine check on health and safety, its reasonableness depends upon a balancing of a citizen's privacy interest in freedom from police intrusion against the public's interest in having police perform a "community caretaking function."

B. A Community Caretaking Analysis Requires the Balancing of Competing Interests

When law enforcement is engaged in noncriminal, noninvestigative "community caretaking functions," whether a particular police action is reasonable "depends not on the presence of probable cause or reasonable suspicion, but rather on a balancing of the competing interests involved in light of all the surrounding facts and circumstances." State v. Acrey, 148 Wn.2d 738, 748-49, 64 P.3d 594 (2003) (*quoting* State v. Chisholm, 39 Wn.App. 864, 867, 696 P.2d 41 (1985) with approval).

The community caretaking function exception to the Fourth Amendment warrant requirement was first announced in Cady v. Dombrowski, 413 U.S. 433, 93 S. Ct.

2523, 2528, 37 L. Ed. 2d 706 (1973). In explaining the community caretaking function, the Supreme Court said:

> Local police officers, unlike federal officers, frequently investigate vehicle accidents in which there is no claim of criminal liability and engage in what, for want of a better term, may be described as community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.

C. The Community Caretaking Function is Totally Divorced from a Criminal Investigation

As noted in Cady v. Dombrowski, 413 U.S. 433, 93 S. Ct. 2523, 2528, 37 L. Ed. 2d 706 (1973), the community caretaking function is totally divorced from a criminal investigation. State v. Houser, 95 Wn.2d 143, 151, 622 P.2d 1218 (1980) (vehicle impoundment).

D. Emergency Aid Situations Involve Greater Urgency Than Routine Checks on Health and Safety

In assessing the reasonableness of an officer's actions during a community caretaking analysis, a distinction is drawn between a routine check on health and safety and situations involving emergency aid.

> Subsequent Washington cases [after State v. Houser] have expanded the community caretaking function exception to encompass not only the 'search and seizure' of automobiles, but also situations involving either emergency aid or routine checks on health and safety. Both situations may require police officers to render aid or assistance. But compared with routine checks on health and safety, the emergency aid function involves circumstances of greater urgency and searches resulting in greater intrusion. It applies when '(1) the officer subjectively believed that someone likely needed assistance for health or safety reasons; (2) a reasonable person in the same situation would similarly believe that there was a need for assistance; and (3) there was a reasonable basis to associate the need for assistance with the place searched.'

State v. Kinzy, 141 Wn.2d 373, 386, 5 P.3d 668 (2000), *cert. denied*, 531 U.S. 1104, 121 S.Ct. 843, 148 L.Ed.2d 723 (2001) (footnotes omitted).

The emergency aid doctrine is different from the "exigent circumstances" exception to the warrant requirement. Both involve situations in which law

enforcement must act immediately, but for different purposes. The emergency aid doctrine does not involve an officer investigating a crime but arises from an officer's community caretaking responsibility to come to the aid of persons believed to be in danger of death or physical harm. The exigent circumstances exception, however, exists in situations where it may be impractical to obtain a search warrant during a criminal investigation, as in cases of hot pursuit. State v. Leupp, 96 Wn.App. 324, 330, 980 P.2d 765 (1999), *review denied*, 139 Wn.2d 1018 (2000).

E. Police Activity During a Community Caretaking Action are Usually Favored Where a Person Has Not Been Seized

Where a person has not been seized during a community caretaking contact with police, balancing the interests usually favors the action by police. Police officers must be able to approach citizens and permissively inquire whether they will answer questions. This intrusion is minimal and reasonable in light of citizens' expectations that police will assist them in a variety of circumstances. State v. Kinzy, 141 Wn.2d 373, 394-95, 5 P.3d 668 (2000), *cert. denied*, 531 U.S. 1104, 121 S.Ct. 843, 148 L.Ed.2d 723 (2001) ("Petitioner's privacy interest in being free from police intrusion was minimal as long as there was no 'seizure.' Rendering aid or assistance through a health or safety check is a hallmark of the community caretaking function exception.")

F. The Intrusion No Longer Remains Minimal Where a Person is Seized During a Community Caretaking Action

A person's interest in freedom from police intrusion increases when a community caretaking encounter is elevated to the level of a "seizure." When a person is seized, the intrusion no longer remains minimal.

> Balancing the interests will not necessarily favor action by police. When in doubt, the balance should be struck on the side of privacy because the policy of the Fourth Amendment is to minimize governmental intrusion into the lives of citizens.

State v. Kinzy, 141 Wn.2d 373, 395, 5 P.3d 668 (2000), *cert. denied*, 531 U.S. 1104, 121 S.Ct. 843, 148 L.Ed.2d 723 (2001).

G. Courts Must Cautiously Apply the Community Caretaking Function Where a Seizure Occurs Because of the Real Risk of Abuse

When weighing the public's interest in a community caretaking action when a seizure occurs, the court "must cautiously apply" the community caretaking function exception because of "a real risk of abuse in allowing even well-intentioned stops to assist." State v. Kinzy, 141 Wn.2d 373, 388, 5 P.3d 668 (2000), *cert. denied*, 531 U.S. 1104, 121 S.Ct. 843, 148 L.Ed.2d 723 (2001) (*quoting* State v. DeArman, 54 Wn.App. 621, 626, 774 P.2d 1247 (1989)); State v. Acrey, 148 Wn.2d 738, 750, 64 P.3d 594 (2003)..

H. The Community Caretaking Function May Not be Used as a Pretext for a Criminal Investigation

"The community caretaking function exception may not be used as a pretext for a criminal investigation." State v. Kinzy, 141 Wn.2d 373, 394, 5 P.3d 668 (2000), *cert. denied*, 531 U.S. 1104, 121 S.Ct. 843, 148 L.Ed.2d 723 (2001).

Police may conduct a noncriminal investigation so long as it is necessary and strictly relevant to performance of the community caretaking function. State v. Acrey, 148 Wn.2d 738, 750, 64 P.3d 594 (2003). "The noncriminal investigation must end when reasons for initiating [a community caretaking] encounter have been fully dispelled." State v. Kinzy, 141 Wn.2d 373, 388, 5 P.3d 668 (2000), *cert. denied*, 531 U.S. 1104, 121 S.Ct. 843, 148 L.Ed.2d 723 (2001).

I. Cases Discussing a Constitutionally Valid Community Caretaking Action

State v. Moore, 129 Wn.App. 870, 120 P.3d 635 (2005), *review denied*, 157 Wn.2d 1007 (2006) (An officer stopped a vehicle that was registered to an owner who as reported "missing/endangered." The officer was unable to determine whether anyone inside the vehicle was the person reported as missing/endangered. The defendant, one of the occupants in the vehicle, gave the officer an alias which indicated he had an outstanding felony warrant. Following verification of his identity and distinctive tattoos on his arms, the defendant was arrested. Narcotics were found. The court affirmed the conviction, holding that the initial stop and subsequent actions were during the performance of a valid community caretaking function.)

State v. Acrey, 148 Wn.2d 738, 64 P.3d 594 (2003) (The detention of a 12 year old minor was held to be initially proper where the child was found after midnight in a commercial area on a city street in response to an emergency telephone call

regarding juveniles fighting in the area. Once police determined the child was not involved in criminal activity, the community caretaking detention was proper so the child's mother could be called. Once the mother requested the officers to bring the child home, the officers acted properly under the community caretaking doctrine in conducting a pat-down search before placing the child into a patrol vehicle.)

Hudson v. City of Wenatchee, 94 Wn.App. 990, 995-96, 974 P.2d 342 (1999) (City policy which allowed officers to assist citizens locked out of their cars is part of the community caretaking function. In carrying out the policy, officers are assisting citizens and promoting a fundamental government purpose. Summary judgment against operators of locksmith business affirmed.)

State v. Knox, 86 Wn.App. 831, 839-40, 939 P.2d 710 (1997), *overruled on other grounds by* State v. O'Neill, 148 Wn.2d 564, 571, 62 P.3d 489 (2003) (Knox was asleep behind the wheel of his truck while it was parked on the deck of a ferry, and it appeared that a ferry employee could not awaken him. Knox's vehicle blocked the disembarkation of other vehicles in his row. A trooper approached to determine the problem and to help. Because of concerns about the effort it took to awaken Knox, Knox's apparently disoriented state upon awaking, and the physical signs of intoxication, the trooper wanted to verify that Knox was in a safe condition to drive. Consequently, he requested that Knox roll down the window. The trooper then asked Knox whether he was okay. After observing further unusual behavior, the trooper asked Knox how much he had to drink. Held no seizure occurred because Knox was free to refuse to answer.)

State v. Lynch, 84 Wn.App. 467, 477-78, 929 P.2d 460 (1996) (An eyewitness observed what appeared to be a vehicle prowling of Lynch's van. In investigating that report, an officer looked inside the van for evidence indicating the vehicle had been disturbed. He found pull tabs spread in disarray over the back seat and floor. The officer's reaction that the owner should be notified held to be reasonable, as was his reaching for the checkbook, an obvious source for identifying the owner. Warrantless search held to be a proper community caretaking action.)

State v. Kealey, 80 Wn.App. 162, 174-75, 907 P.2d 319 (1995), *review denied*, 129 Wn.2d 1021 (1996) (police search of lost or misplaced property for the identity of the owner is valid community caretaking action).

State v. Lowrimore, 67 Wn.App. 949, 841 P.2d 779 (1992) (detention of mentally unstable juvenile who had threatened suicide and search of purse for knives held proper under community caretaking doctrine).

State v. Mennegar, 114 Wn.2d 304, 787 P.2d 1347 (1990), *overruled on other grounds by* State v. Hill, 123 Wn.2d 641, 870 P.2d 313 (1994) (An officer validly stopped a driver for speeding and believed him to be too intoxicated to drive. Under the community caretaking function, the officer properly asked a passenger if the passenger wished to drive the vehicle. Upon the passenger's consent, the officer asked the passenger to wait in the vehicle while the officer checked to see if the passenger had a valid driver's license. An arrest warrant was discovered, and drugs were found on the passenger incident to arrest on the warrant. Held that the passenger was not seized.)

State v. Hutchison, 56 Wn.App. 863, 865-66, 785 P.2d 1154 (1990) (Defendant was lying on his back in a parking lot, apparently unconscious. He was roused by an officer. The defendant staggered in a stupor, and was seated in the patrol vehicle. The officer did not believe the defendant needed medical attention. Looking for identification, the officer found a wallet in the defendant's pants, along with drugs. Held a proper community caretaking action.)

State v. Sweet, 44 Wn.Ap. 226, 236, 721 P.2d 560, *review denied*, 107 Wn.2d 1001 (1986) (Officers were unable to arouse the suspect either to have him sign a waiver of liability or to give alternative instructions for disposition of the vehicle. Officers were able to look through the windows of the truck canopy and observe numerous items of potential value, including tools, in the truck bed. Even if officers had locked the canopy, the potential for theft remained. Impoundment of a vehicle as part of the police community caretaking function is proper if the vehicle is threatened by theft of its contents and neither the defendant nor acquaintances are available to move the vehicle.)

State v. Chisholm, 39 Wn.App. 864, 696 P.2d 41 (1985) (An officer stopped a truck to warn its occupants that a hat was about to blow out of the truck bed. Upon approaching the truck, the officer observed beer between the two occupants he knew to be minors. Conducting a search incident to arrest, marijuana was discovered. The court held that the initial stop was a valid community caretaking function.)

Cady v. Dombrowski, 413 U.S. 433, 93 S. Ct. 2523, 37 L. Ed. 2d 706 (1973) (The Supreme Court held that the warrantless search of the trunk of a Chicago police officer arrested for DUI in Wisconsin was constitutionally reasonable because it was incident to the community caretaking function of the arresting officers to protect the safety of the general public who might be endangered if an intruder removed the arrestee's service revolver from the trunk of his vehicle.)

J. Cases Rejecting an Assertion of Community Caretaking

State v. Guevara, 172 Wn.App. 184, ¶18, 288 P.3d 1167 (2012) (An officer contacted the defendant, who was in the company of other boys, told them that he suspected they were using drugs and skipping school. The officer asked them to turn their pockets inside out. Conviction reversed.).

> Here Officer Graves did not detain Mr. Ibarra Guevara and take him back to school as authorized by RCW 28A.225.010. He asked about illegal drug use and then asked him to empty his pockets. We conclude this is not community caretaking but rather an unwarranted intrusion into Mr. Ibarra Guevara's private affairs, an intrusion prohibited by our state constitution. Const. art. I, § 7.

State v. Gantt, 163 Wn.App. 133, 257 P.3d 682 (2011), *review denied*, 173 Wn.2d 1011 (2012) (An officer saw a van stopped on a street, and a few minutes later saw that the same van had moved to an area in front of a nearby residential driveway. A man was seen walking towards a residence. The officer activated his vehicle's emergency equipment and the man returned to the van. No traffic infraction or other criminal activity was observed. The officer approached and asked what the man was doing. The officer did not ask whether the man was lost or needed assistance, or whether the man would answer questions. The court held that there was no objective evidence that the officer was performing a community caretaking function when he stopped the man. Evidence held suppressed.)

State v. Kinzy, 141 Wn.2d 373, 5 P.2d 668 (2000), *cert. denied*, 531 U.S. 1104, 121 S.Ct. 843, 148 L.Ed.2d 723 (2001) (Police stopped a 16 year old girl walking in downtown Seattle at 10:00 PM on a weeknight with an adult male the officer knew from prior contacts was involved with narcotics. As the officers approached and hailed the girl, she continued to walk away. The girl was then restrained and asked her age and name. The officers did not believe her claim she was 16 years old due to her youthful appearance. The girl acted nervously and kept putting her hands into her coat. She was patted down for weapons, and narcotics were found. The court suppressed the narcotics, holding that the officer's legitimate reason for stopping the girl pursuant to the community caretaking doctrine ended once it was determined that she was not in distress, in need of medical aid or other assistance.)

State v. DeArman, 54 Wn.App. 621, 774 P.2d 1247 (1989) (At 2:00 AM, an officer observed a vehicle motionless at a stop sign for 45 to 60 seconds. The vehicle's brake lights were on, but the officer could not tell if the headlights were on or the

engine was running. There was no other traffic, and the officer thought the vehicle might be disabled. The officer approached the vehicle and activated his emergency lights. The vehicle then moved through the intersection, and pulled over to the side of the road. The officer realized that the vehicle was not disabled, but became suspicious. The officer obtained the defendant's identification, discovered outstanding warrants, and arrested the driver. Narcotics were found during an inventory search. The narcotics were suppressed due to an invalid community caretaking detention. Although the officer may reasonably have had legitimate questions about whether the defendant needed assistance, those questions were resolved when the vehicle drove away.)

Chapter Seven

Protective Custody Contacts

Washington law authorizes and in some cases requires law enforcement to take individuals into protective custody under certain circumstances.

A. Intoxicated Persons

1. Persons Incapacitated or Gravely Disabled by Alcohol or Drugs

A person who appears to be incapacitated or gravely disabled by alcohol or drugs, and who is in a public place, or who has threatened, attempted or inflicted physical harm on himself, herself or another, shall be taken into protective custody by a peace officer or staff designated by the county. RCW 70.96A.120(2) says:

> Except for a person who may be apprehended for possible violation of laws not relating to alcoholism, drug addiction, or intoxication and except for a person who may be apprehended for possible violation of laws relating to driving or being in physical control of a vehicle while under the influence of intoxicating liquor or any drug and except for a person who may wish to avail himself or herself of the provisions of RCW 46.20.308, a person who appears to be incapacitated or gravely disabled by alcohol or other drugs and who is in a public place or who has threatened, attempted, or inflicted physical harm on himself, herself, or another, shall be taken into protective custody by a peace officer or staff designated by the county and as soon as practicable, but in no event beyond eight hours brought to an approved treatment program for treatment. If no approved treatment program is readily available he or she shall be taken to an emergency medical service customarily used for incapacitated persons. The peace officer or staff designated by the county, in detaining the person and in taking him or her to an approved treatment program, is taking him or her into protective custody and shall make every reasonable effort to protect his or her health and safety. In taking the person into protective custody, the detaining peace officer or staff designated by the county may take reasonable steps including reasonable force if necessary to protect himself or herself or effect the custody. A taking into protective

> custody under this section is not an arrest. No entry or other record shall be made to indicate that the person has been arrested or charged with a crime.

Mere intoxication does not trigger the requirements of RCW 70.96A.120(2). The statute involves a "significant deprivation of liberty because it allows an officer to take a person into protective custody against the person's will. Therefore, RCW 70.96A.120(2) must be strictly construed. It should not be loosely read to include all persons who exhibit signs of intoxication." Weaver v. Spokane County, 168 Wn.App. 127, ¶30, 275 P.3d 1184, *review denied*, 175 Wn.2d 1011 (2012).

See RCW 70.96A.020 for definitions of terms used in RCW 70.96A.120(2).

2. Intoxicated Pedestrians

A law enforcement officer may offer to transport an intoxicated pedestrian to a safe place or release the pedestrian to a competent person. RCW 46.61.266 says:

> A law enforcement officer may offer to transport a pedestrian who appears to be under the influence of alcohol or any drug and who is walking or moving along or within the right-of-way of a public roadway, unless the pedestrian is to be taken into protective custody under RCW 70.96A.120.
>
> The law enforcement officer offering to transport an intoxicated pedestrian under this section shall:
>
> (1) Transport the intoxicated pedestrian to a safe place; or
>
> (2) Release the intoxicated pedestrian to a competent person.
>
> The law enforcement officer shall take no action if the pedestrian refuses this assistance. No suit or action may be commenced or prosecuted against the law enforcement officer, law enforcement agency, the state of Washington, or any political subdivision of the state for any act resulting from the refusal of the pedestrian to accept this assistance.

3. Intoxicated Cyclists

A law enforcement officer may offer to transport an intoxicated bicycle rider to a safe place or release the person to a competent person. RCW 46.61.790 says:

> (1) A law enforcement officer may offer to transport a bicycle rider who appears to be under the influence of alcohol or any drug and who is

walking or moving along or within the right-of-way of a public roadway, unless the bicycle rider is to be taken into protective custody under RCW 70.96A.120. The law enforcement officer offering to transport an intoxicated bicycle rider under this section shall:

(a) Transport the intoxicated bicycle rider to a safe place; or

(b) Release the intoxicated bicycle rider to a competent person.

(2) The law enforcement officer shall not provide the assistance offered if the bicycle rider refuses to accept it. No suit or action may be commenced or prosecuted against the law enforcement officer, law enforcement agency, the state of Washington, or any political subdivision of the state for any act resulting from the refusal of the bicycle rider to accept this assistance.

(3) The law enforcement officer may impound the bicycle operated by an intoxicated bicycle rider if the officer determines that impoundment is necessary to reduce a threat to public safety, and there are no reasonable alternatives to impoundment. The bicyclist will be given a written notice of when and where the impounded bicycle may be reclaimed. The bicycle may be reclaimed by the bicycle rider when the bicycle rider no longer appears to be intoxicated, or by an individual who can establish ownership of the bicycle. The bicycle must be returned without payment of a fee. If the bicycle is not reclaimed within thirty days, it will be subject to sale or disposal consistent with agency procedures.

B. Children

1. At-Risk Youth

An officer shall take an at-risk youth into protective custody under several situations pursuant to the Family Reconciliation Act (chapter 13.32A RCW). RCW 13.32A.050 says:

(1) A law enforcement officer shall take a child into custody:

(a) If a law enforcement agency has been contacted by the parent of the child that the child is absent from parental custody without consent; or

(b) If a law enforcement officer reasonably believes, considering the child's age, the location, and the time of day, that a child is in circumstances which constitute a danger to the child's safety or that a child is violating a local curfew ordinance; or

(c) If an agency legally charged with the supervision of a child has notified a law enforcement agency that the child has run away from placement; or

(d) If a law enforcement agency has been notified by the juvenile court that the court finds probable cause exists to believe that the child has violated a court placement order issued under this chapter or chapter 13.34 RCW or that the court has issued an order for law enforcement pick-up of the child under this chapter or chapter 13.34 RCW.

(2) Law enforcement custody shall not extend beyond the amount of time reasonably necessary to transport the child to a destination authorized by law and to place the child at that destination. Law enforcement custody continues until the law enforcement officer transfers custody to a person, agency, or other authorized entity under this chapter, or releases the child because no placement is available. Transfer of custody is not complete unless the person, agency, or entity to whom the child is released agrees to accept custody.

(3) If a law enforcement officer takes a child into custody pursuant to either subsection (1)(a) or (b) of this section and transports the child to a crisis residential center, the officer shall, within twenty-four hours of delivering the child to the center, provide to the center a written report detailing the reasons the officer took the child into custody. The center shall provide the department with a copy of the officer's report.

(4) If the law enforcement officer who initially takes the juvenile into custody or the staff of the crisis residential center have reasonable cause to believe that the child is absent from home because he or she is abused or neglected, a report shall be made immediately to the department.

(5) Nothing in this section affects the authority of any political subdivision to make regulations concerning the conduct of minors in public places by ordinance or other local law.

(6) If a law enforcement officer has a reasonable suspicion that a child is being unlawfully harbored in violation of RCW 13.32A.080, the officer shall remove the child from the custody of the person harboring the child and shall transport the child to one of the locations specified in RCW 13.32A.060.

(7) No child may be placed in a secure facility except as provided in this chapter.

The Supreme Court rejected reliance on the Family Reconciliation Act (chapter 13.32A RCW) under the facts presented in State v. Kinzy, 141 Wn.2d 373, 389, 5 P.2d 668 (2000), *cert. denied*, 531 U.S. 1104, 121 S.Ct. 843, 148 L.Ed.2d 723 (2001) (Police stopped a 16 year old girl walking in downtown Seattle at 10:00 PM on a weeknight with an adult male the officer knew from prior contacts was involved with narcotics. As the officers approached and hailed the girl, she continued to walk away. The girl was then restrained and asked her age and name. The officers did not believe her claim she was 16 years old due to her youthful appearance. The girl acted nervously and kept putting her hands into her coat. She was patted down for weapons, and narcotics were found. The court suppressed the narcotics, holding that the officer's legitimate reason for stopping the girl pursuant to the community caretaking doctrine ended once it was determined that she was not in distress, in need of medical aid or other assistance.)

But see State v. Acrey, 148 Wn.2d 738, 64 P.3d 594 (2003) (The detention of a 12 year old minor was held to be initially proper where the child was found after midnight in a commercial area on a city street in response to an emergency telephone call regarding juveniles fighting in the area. Once police determined the child was not involved in criminal activity, the community caretaking detention was proper so the child's mother could be called. Once the mother requested the officers to bring the child home, the officers acted properly under the community caretaking doctrine in conducting a pat-down search before placing the child into a patrol vehicle.)

2. Abused or Neglected Children

A law enforcement officer may take a child into custody if there is probable cause to believe that the child is abused or neglected and where the child would be injured or could not be taken into protective custody if the decision was delayed to obtain a court order. RCW 26.44.050 says:

> Except as provided in RCW 26.44.030(11), upon the receipt of a report concerning the possible occurrence of abuse or neglect, the law enforcement agency or the department of social and health services must investigate and provide the protective services section with a report in accordance with chapter 74.13 RCW, and where necessary to refer such report to the court.
>
> A law enforcement officer may take, or cause to be taken, a child into custody without a court order if there is probable cause to believe that the child is abused or neglected and that the child would be injured or could

> not be taken into custody if it were necessary to first obtain a court order pursuant to RCW 13.34.050. The law enforcement agency or the department of social and health services investigating such a report is hereby authorized to photograph such a child for the purpose of providing documentary evidence of the physical condition of the child.

See RCW 26.44.020 for definitions of terms used in RCW 26.44.050.

C. Mental Disability

A peace officer may take a person into custody for immediate delivery to an appropriate medical or mental health facility where the officer has reasonable cause to believe the person is suffering from a mental disorder and presents an imminent likelihood of serious harm or is in imminent danger because of being gravely disabled. RCW 71.05.153 says:

> (1) When a designated mental health professional receives information alleging that a person, as the result of a mental disorder, presents an imminent likelihood of serious harm, or is in imminent danger because of being gravely disabled, after investigation and evaluation of the specific facts alleged and of the reliability and credibility of the person or persons providing the information if any, the designated mental health professional may take such person, or cause by oral or written order such person to be taken into emergency custody in an evaluation and treatment facility for not more than seventy-two hours as described in RCW 71.05.180.
>
> (2) A peace officer may take or cause such person to be taken into custody and immediately delivered to a triage facility, crisis stabilization unit, evaluation and treatment facility, or the emergency department of a local hospital under the following circumstances:
>
> (a) Pursuant to subsection (1) of this section; or
>
> (b) When he or she has reasonable cause to believe that such person is suffering from a mental disorder and presents an imminent likelihood of serious harm or is in imminent danger because of being gravely disabled.
>
> (3) Persons delivered to a crisis stabilization unit, evaluation and treatment facility, emergency department of a local hospital, or triage facility that has elected to operate as an involuntary facility by peace officers pursuant to subsection (2) of this section may be held by the facility for a period of up to twelve hours.

> (4) Within three hours of arrival, the person must be examined by a mental health professional. Within twelve hours of arrival, the designated mental health professional must determine whether the individual meets detention criteria. If the individual is detained, the designated mental health professional shall file a petition for detention or a supplemental petition as appropriate and commence service on the designated attorney for the detained person. If the individual is released to the community, the mental health provider shall inform the peace officer of the release within a reasonable period of time after the release if the peace officer has specifically requested notification and provided contact information to the provider.

The initial detention of a person for mental health purposes and a subsequent search were held proper pursuant to chapter 71.05 RCW where the officer knew of the person's past suicide attempts and the person had threatened suicide and had made superficial cuts on his wrist with a knife. State v. Mason, 56 Wn.App. 93, 782 P.2d 572 (1989), *review denied*, 114 Wn.2d 1010 (1990).

See RCW 71.05.020 for definitions of terms used in RCW 71.05.153.

D. Jail Booking Not Required for Certain Non-Felony Arrestees Who Suffer From Mental Illness

A police officer with probable cause to arrest an individual for certain non-felony crimes may take the individual to a medical or mental health facility rather than jail where the individual is known to suffer from a mental disorder. RCW 10.31.100 says:

> (1) When a police officer has reasonable cause to believe that the individual has committed acts constituting a nonfelony crime that is not a serious offense as identified in RCW 10.77.092 and the individual is known by history or consultation with the regional support network to suffer from a mental disorder, the arresting officer may:
>
> (a) Take the individual to a crisis stabilization unit as defined in RCW 71.05.020(6). Individuals delivered to a crisis stabilization unit pursuant to this section may be held by the facility for a period of up to twelve hours. The individual must be examined by a mental health professional within three hours of arrival;
>
> (b) Take the individual to a triage facility as defined in RCW 71.05.020. An individual delivered to a triage facility which has elected to operate as an

involuntary facility may be held up to a period of twelve hours. The individual must be examined by a mental health professional within three hours of arrival;

(c) Refer the individual to a mental health professional for evaluation for initial detention and proceeding under chapter 71.05 RCW; or

(d) Release the individual upon agreement to voluntary participation in outpatient treatment.

(2) If the individual is released to the community, the mental health provider shall inform the arresting officer of the release within a reasonable period of time after the release if the arresting officer has specifically requested notification and provided contact information to the provider.

(3) In deciding whether to refer the individual to treatment under this section, the police officer shall be guided by standards mutually agreed upon with the prosecuting authority, which address, at a minimum, the length, seriousness, and recency of the known criminal history of the individual, the mental health history of the individual, where available, and the circumstances surrounding the commission of the alleged offense.

(4) Any agreement to participate in treatment shall not require individuals to stipulate to any of the alleged facts regarding the criminal activity as a prerequisite to participation in a mental health treatment alternative. The agreement is inadmissible in any criminal or civil proceeding. The agreement does not create immunity from prosecution for the alleged criminal activity.

(5) If an individual violates such agreement and the mental health treatment alternative is no longer appropriate:

(a) The mental health provider shall inform the referring law enforcement agency of the violation; and

(b) The original charges may be filed or referred to the prosecutor, as appropriate, and the matter may proceed accordingly.

(6) The police officer is immune from liability for any good faith conduct under this section.

RCW 10.77.092 defines a “serious offense” as follows:

(1) For purposes of determining whether a court may authorize involuntary medication for the purpose of competency restoration pursuant to RCW 10.77.084, a pending charge involving any one or more of the following crimes is a serious offense per se in the context of competency restoration:

(a) Any violent offense, sex offense, serious traffic offense, and most serious offense, as those terms are defined in RCW 9.94A.030;

(b) Any offense, except nonfelony counterfeiting offenses, included in crimes against persons in RCW 9.94A.411;

(c) Any offense contained in chapter 9.41 RCW (firearms and dangerous weapons);

(d) Any offense listed as domestic violence in RCW 10.99.020;

(e) Any offense listed as a harassment offense in chapter 9A.46 RCW;

(f) Any violation of chapter 69.50 RCW that is a class B felony; or

(g) Any city or county ordinance or statute that is equivalent to an offense referenced in this subsection.

(2)(a) In a particular case, a court may determine that a pending charge not otherwise defined as serious by state or federal law or by a city or county ordinance is, nevertheless, a serious offense within the context of competency restoration treatment when the conduct in the charged offense falls within the standards established in (b) of this subsection.

(b) To determine that the particular case is a serious offense within the context of competency restoration, the court must consider the following factors and determine that one or more of the following factors creates a situation in which the offense is serious:

(i) The charge includes an allegation that the defendant actually inflicted bodily or emotional harm on another person or that the defendant created a reasonable apprehension of bodily or emotional harm to another;

(ii) The extent of the impact of the alleged offense on the basic human need for security of the citizens within the jurisdiction;

(iii) The number and nature of related charges pending against the defendant;

(iv) The length of potential confinement if the defendant is convicted; and

(v) The number of potential and actual victims or persons impacted by the defendant's alleged acts.

Chapter Eight

Warrantless Searches and Seizures are Per Se Unreasonable

A. The Fourth Amendment of the United States Constitution

The Fourth Amendment to the United States Constitution reads:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourth Amendment protects against unlawful search and seizure. State v. Doughty, 170 Wn.2d 57, ¶6, 239 P.3d 573 (2010).

B. Const. Art. I, §7 of the Washington Constitution

Const. art. I, §7 of the Washington Constitution reads:

> **SECTION 7 INVASION OF PRIVATE AFFAIRS OR HOME PROHIBITED**. No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

Const. art. I, §7 protects against unwarranted government intrusions into private affairs. State v. Doughty, 170 Wn.2d 57, ¶6, 239 P.3d 573 (2010).

C. Warrantless Searches and Seizures are Per Se Unreasonable

Warrantless disturbances of private affairs are subject to a high degree of scrutiny because Const. art. I, §7 protects "those privacy interests which the citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant." State v. Ladson, 138 Wn.2d 343, 349, 979 P.2d 833 (1999) (citation omitted).

Thus, if the right to privacy is implicated, a warrantless search or seizure is per se unreasonable and presumed to violate Const. art. I, §7 unless the prosecution

shows that the search or seizure falls "within certain narrowly and jealously drawn exceptions to the warrant requirement." State v. Day, 161 Wn.2d 889, 894, 168 P.3d 1265 (2007) (citation omitted). *See also* State v. Snapp, 174 Wn.2d 177, ¶39, 275 P.3d 289 (2012) ("Recognized exceptions to the warrant [requirement] constitute authority of law ... but only as carefully drawn and narrowly applied."); State v. Garcia-Salgado, 170 Wn.2d 176, ¶13, 240 P.3d 153 (2010); State v. Tibbles, 169 Wn.2d 364, 368-69, 236 P.3d 885 (2010) (although odor of marijuana may provide probable cause to arrest, probable cause to arrest is not an exception to the requirement to obtain a warrant prior to the search of a vehicle); and Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971) (Fourth Amendment).

These carefully drawn exceptions to the warrant requirement exist in those cases where the societal costs of obtaining a warrant outweigh the reasons for prior recourse to a neutral magistrate. State v. Houser, 95 Wn.2d 143, 149, 622 P.2d 1218 (1980) (*quoting* Arkansas v .Sanders, 442 U.S. 753, 99 S.Ct. 2586, 2590, 61 L.Ed.2d 235 (1979)).

D. Narrowly and Jealously Drawn Exceptions to the Warrant Requirement

The categories of "narrowly and jealously drawn" exceptions to the warrant requirement recognized by the Washington Supreme Court include consent, exigent circumstances, searches incident to a valid arrest, inventory searches, plain view searches, and investigative stops. State v. Duncan, 146 Wn.2d 166, 171-72, 43 P.3d 513 (2002); State v. Arreola, 176 Wn.2d 284, ¶13, 290 P.3d 983 (2012).

E. Const. Art. I, §7 Recognizes a Privacy Interest in Vehicles and Their Contents

A privacy interest in vehicles and their contents is recognized under Const. art. I, §7. State v. Afana, 169 Wn.2d 169, 176, 233 P.3d 879 (2010); State v. Patton, 167 Wn.2d 379, 385, 219 P.3d 651 (2009).

F. Burden of Proof for Establishing the Constitutional Validity of a Warrantless Search or Seizure

The prosecution bears the burden of establishing by clear and convincing evidence that an exception to the warrant requirement applies. State v. Snapp, 174 Wn.2d 177, ¶23, 275 P.3d 289 (2012); State v. Doughty, 170 Wn.2d 57, ¶7, 239 P.3d 573 (2010).

Chapter Nine

Warrantless Terry Stops–Generally

A. Legal Standard for a Warrantless Terry Stop

1. Terry v. Ohio

In Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 1880-81, 20 L.Ed.2d 889 (1968), an experienced police officer saw two men repeatedly take turns walking 300 to 400 feet down a sidewalk past a store, peering into the store window, and then turning around and peering in the window again on the way back. After one would complete his turn, the two would confer before the other would start his turn. They repeated this ritual for 10 to 12 minutes before following a third man down the street. Based on his experience, the officer suspected the men were casing the store for a robbery. He stopped them, asked them for identification, and frisked two of them for weapons, finding two illegally concealed firearms.

The Supreme Court upheld the stop and the frisk. The Court determined that the officer's suspicion was reasonable. The officer never saw a weapon prior to the seizure, nor did he rely on any informant tips. Instead, the Court noted that the officer "had observed [the suspects] go through a series of acts, each of them perhaps innocent in itself, but which taken together warranted further investigation."

2. A Warrantless Terry Stop and Detention Must be Reasonable; Probable Cause is Not Required.

Although brief Terry detentions fall within the scope of the Fourth Amendment because the person is seized, the public interest in crime detection and the relative nonintrusiveness of the stop permit a lower standard of proof. Terry v. Ohio, 88 S.Ct. at 1879-83.

Thus, a Terry investigatory stop is tested against the Fourth Amendment's general prohibition against unreasonable searches and seizures rather than the Fourth Amendment's probable cause requirement. Terry v. Ohio, 88 S.Ct. at 1879.

Accordingly, probable cause is not required for a Terry stop because the stop is significantly less intrusive than an arrest. Brown v. Texas, 443 U.S. 47, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979).

3. A Warrantless Terry Stop is a Recognized Exception to the Warrant Requirement

The categories of "narrowly and jealously drawn" exceptions to the warrant requirement recognized by the Washington Supreme Court include consent, exigent circumstances, searches incident to a valid arrest, inventory searches, plain view searches, and investigative stops. State v. Duncan, 146 Wn.2d 166, 171-72, 43 P.3d 513 (2002); State v. Arreola, 176 Wn.2d 284, ¶13, 290 P.3d 983 (2012).

The Terry stop, a brief investigatory seizure, is one exception to the warrant requirement. State v. Doughty, 170 Wn.2d 57, ¶6, 239 P.3d 573 (2010). A Terry stop requires a well-founded suspicion that the defendant engaged in criminal conduct. State v. Garvin, 166 Wn.2d 242, 250, 207 P.3d 1266 (2009).

B. Warrantless Terry Stops−The Fourth Amendment vs. Const. Art. I, §7

Our Supreme Court summarized the differences between the Fourth Amendment and Const. art. I, §7 concerning warrantless Terry stops.

> A Terry investigative stop only authorizes police officers to briefly detain a person for questioning without grounds for arrest if they reasonably suspect, based on "specific, objective facts" that the person detained is engaged in criminal activity or a traffic violation. The Terry investigative stop exception was first adopted under the Fourth Amendment to the United States Constitution, which forbids "unreasonable" searches and seizures, implicitly recognizing the State's police power to conduct "reasonable" ones. It was later (largely) accepted as an exception under article I, section 7 of the Washington Constitution.
>
> Article I, section 7, does not use the words "reasonable" or "unreasonable." Instead, it requires "authority of law" before the State may pry into the private affairs of individuals. Washington's adoption of the Terry investigative stop exception is grounded upon the expectation of privacy. Our constitution protects legitimate expectations of privacy, "those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant."

> Whether the Fourth Amendment or article I, section 7 of the Washington Constitution is in issue, a detaining officer must have "a reasonable, articulable suspicion, based on specific objective facts, that the person seized has committed or is about to commit a crime." Under the Fourth Amendment, whether the officer had grounds for a Terry stop and search is tested against an objective standard. See also Whren v. United States, 517 U.S. 806, 813-16, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996) (pretextual traffic stops do not violate the Fourth Amendment). By contrast, under article I, section 7, we consider the totality of the circumstances, including the officer's subjective belief. Our constitution does not tolerate pretextual stops.

State v. Day, 161 Wn.2d 889, ¶¶10-11, 168 P.3d 1265 (2007) (citations omitted).

C. Evidence Must be Suppressed if a Warrantless Terry Stop is Not Justified

If a warrantless Terry stop is unlawful, the fruits obtained as a result must be suppressed. State v. Doughty, 170 Wn.2d 57, ¶17, 239 P.3d 573 (2010). "The exclusionary rule mandates the suppression of evidence gathered through unconstitutional means." State v. Duncan, 146 Wn.2d 166, 176, 43 P.3d 513 (2002); Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

See Chapter 32 (The Exclusionary Rule).

D. A Warrantless Terry Stop Requires Individualized Suspicion, Based Upon Specific and Articulable Facts

To justify a Terry stop under the Fourth Amendment and Const. art. I, §7, a police officer must be able to "point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." State v. Mendez, 137 Wn.2d 208, 223, 970 P.2d 722 (1999); Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 1880, 20 L.Ed.2d 889 (1968).

The officer must have individualized suspicion that the person detained pursuant to a warrantless Terry stop was engaged in criminal activity or a traffic violation.

> A Terry investigative stop only authorizes police officers to briefly detain a person for questioning without grounds for arrest if they reasonably suspect, based on "specific, objective facts" that the person detained is engaged in criminal activity or a traffic violation.

State v. Day, 161 Wn.2d 889, ¶10, 168 P.3d 1265 (2007) (citations omitted).

E. An Officer's "Hunch" is Insufficient to Justify a Warrantless Terry Stop

An officer's reliance on a mere hunch is insufficient to justify a Terry stop.

> And in determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience.

Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 1883, 20 L.Ed.2d 889 (1968) (citation omitted); United States v. Arvizu, 534 U.S. 266, 122 S.Ct. 744, 751, 151 L.Ed.2d 740 (2002).

The warrantless Terry stop threshold was created to stop police from interfering with people's everyday lives based upon mere hunches. State v. Doughty, 170 Wn.2d 57, ¶10, 239 P.3d 573 (2010) (traffic stop based upon observation of defendant visiting a suspected drug house for two minutes held to be an unreasonable Terry stop based upon a hunch). "Anything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this Court has consistently refused to sanction." Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 1880, 20 L.Ed.2d 889 (1968).

F. An Officer's Subjective Belief and Warrantless Terry Pretext Stops

Under the Fourth Amendment, reasonable suspicion is not based on the officer's subjective belief, but on an objective view of all of the facts. Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 1880, 20 L.Ed.2d 889 (1968).

Under Const. art. I, §7, reasonable suspicion requires a consideration of the totality of the circumstances as presented to the investigating officer, including the officer's subjective belief. State v. Doughty, 170 Wn.2d 57, ¶7, 239 P.3d 573 (2010); State v. Ladson, 138 Wn.2d 343, 358-59, 979 P.2d 833 (1999).

Our constitution "does not tolerate pretextual stops." State v. Day, 161 Wn.2d 889, ¶11, 168 P.3d 1265 (2007) (citations omitted).

See Chapter 18 (Pretextual Warrantless Terry Stops).

G. Racial Incongruity is Never a Valid Basis for a Warrantless Terry Stop

Washington law does not permit "racial incongruity" to support a finding of reasonable suspicion justifying a Terry investigative detention. "Racial incongruity" is defined as a person of any race being allegedly "out of place" in a particular geographic area. "Distinctions between citizens solely because of their ancestry are odious to a free people whose institutions are founded upon the doctrine of equality." State v. Barber, 118 Wn.2d 335, 346-47, 823 P.2d 1068 (1992).

Law enforcement agencies shall adopt written policies "designed to condemn and prevent racial profiling." RCW 43.101.410(1).

H. An Individual's Startled Reaction to Police, Walking Away from Police, or Presence in a High Crime Area, Standing Alone, is Insufficient to Justify a Warrantless Terry Stop

A Terry investigative detention is improper where a person exhibits a startled reaction to police, even where the person swiftly departs the area. A startled reaction to police does not amount to reasonable suspicion of criminal activity. State v. Gatewood, 163 Wn.2d 534, ¶12, 182 P.3d 426 (2008) (defendant did not flee police by simply walking away from their location).

An individual's presence in a high crime area, standing alone, is not enough to support a reasonable, particularized suspicion that a person is committing a crime. Illinois v. Wardlow, 528 U.S. 119, 120 S.Ct. 673, 676, 145 L.Ed.2d 570 (2000) (Although an individual's presence in a high crime area, standing alone, is not enough to support a reasonable, particularized suspicion that a person is committing a crime, officers are not required to ignore the relevant characteristics of location.)

I. An Officer Need Not Rule Out All Possibilities of Innocent Behavior Prior to Conducting a Warrantless Terry Stop

A Terry stop is not rendered unreasonable and thus unconstitutional solely because the officer did not rule out all possibilities of innocent behavior before initiating the Terry seizure. Under the totality circumstances test for Terry investigatory stops, an officer may rely on a combination of otherwise innocent observations to detain a person.

> When discussing how reviewing courts should make reasonable-suspicion determinations, we have said repeatedly that they must look at the 'totality of the circumstances' of each case to see whether the detaining officer has a 'particularized and objective basis' for suspecting legal wrongdoing. This process allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that 'might well elude an untrained person.' Although an officer's reliance on a mere 'hunch' is insufficient to justify a stop, the likelihood of criminal activity need not rise to the level required for probable cause, and it falls considerably short of satisfying a preponderance of the evidence standard…
>
> * * *
>
> We think that the approach taken by the Court of Appeals here departs sharply from the teachings of these cases. The court's evaluation and rejection of seven of the listed factors in isolation from each other does not take into account the 'totality of the circumstances,' as our cases have understood that phrase. The court appeared to believe that each observation by [the border patrol agent] that was by itself readily susceptible to an innocent explanation was entitled to 'no weight.' Terry, however, precludes this sort of divide-and-conquer analysis. The officer in Terry observed the petitioner and his companions repeatedly walk back and forth, look into a store window, and confer with one another. Although each of the series of acts was 'perhaps innocent in itself,' we held that, taken together, they 'warranted further investigation.'

United States v. Arvizu, 534 U.S. 266, 122 S.Ct. 744, 750-751, 151 L.Ed.2d 740 (2002) (citations omitted).

An officer need not rule out every innocent explanation for the suspicious behavior before initiating a Terry stop, so long as the behavior is more consistent with criminal than with innocent conduct. State v. Kennedy, 107 Wn.2d 1, 8, 726 P.2d 445 (1986).

J. Flight from Police

Unprovoked flight upon noticing the police is a pertinent factor in determining whether an officer had reasonable suspicion of criminal activity.

> Headlong flight--wherever it occurs--is the consummate act of evasion: It is not necessarily indicative of wrongdoing, but it is certainly suggestive of

> such. In reviewing the propriety of an officer's conduct, courts do not have available empirical studies dealing with inferences drawn from suspicious behavior, and we cannot reasonably demand scientific certainty from judges or law enforcement officers where none exists. Thus, the determination of reasonable suspicion must be based on commonsense judgments and inferences about human behavior.
>
> * * *
>
> But unprovoked flight is simply not a mere refusal to cooperate. Flight, by its very nature, is not 'going about one's business'; in fact, it is just the opposite. Allowing officers confronted with such flight to stop the fugitive and investigate further is quite consistent with the individual's right to go about his business or to stay put and remain silent in the face of police questioning.
>
> Respondent and amici also argue that there are innocent reasons for flight from police and that, therefore, flight is not necessarily indicative of ongoing criminal activity. This fact is undoubtedly true, but does not establish a violation of the Fourth Amendment. Even in Terry, the conduct justifying the stop was ambiguous and susceptible of an innocent explanation. The officer observed two individuals pacing back and forth in front of a store, peering into the window and periodically conferring. All of this conduct was by itself lawful, but it also suggested that the individuals were casing the store for a planned robbery. Terry recognized that the officers could detain the individuals to resolve the ambiguity.
>
> In allowing such detentions, Terry accepts the risk that officers may stop innocent people. Indeed, the Fourth Amendment accepts that risk in connection with more drastic police action; persons arrested and detained on probable cause to believe they have committed a crime may turn out to be innocent. The Terry stop is a far more minimal intrusion, simply allowing the officer to briefly investigate further. If the officer does not learn facts rising to the level of probable cause, the individual must be allowed to go on his way. But in this case the officers found respondent in possession of a handgun, and arrested him for violation of an Illinois firearms statute. No question of the propriety of the arrest itself is before us.

Illinois v. Wardlow, 528 U.S. 119, 120 S.Ct. 673, 676-77, 145 L.Ed.2d 570 (2000) (citations omitted).

State v. Little, 116 Wn.2d 488, 496, 806 P.2d 749 (1991) (Officers were dispatched to an apartment complex to investigate a report of a group of juveniles loitering on the grounds. Several juveniles were observed in the area milling around. Upon seeing the officers, the juveniles fled. Held that officers had a reasonable suspicion of criminal trespass to justify a Terry investigative detention. The juveniles refusal to stop and flight from the officers constituted obstruction of a public servant.)

K. Miranda Warnings are Not Required During Terry Investigative Questioning

1. Miranda Warnings and Terry Investigative Questioning Generally

Miranda warnings [Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)] were developed to protect a defendant's constitutional right not to make incriminating confessions or admissions to police while in the coercive environment of police custody. State v. Heritage, 152 Wn.2d 210, 214, 95 P.3d 345 (2004).

In Miranda, the United States Supreme Court defined custodial interrogation as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." State v. Heritage, 152 Wn.2d 210, 217, 95 P.3d 345 (2004) (*quoting* Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 1612, 16 L.Ed.2d 694 (1966)).

In Berkemer v. McCarty, 468 U.S. 420, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984), the United States Supreme Court refined the definition of "custody." The court developed an objective test−whether a reasonable person in a suspect's position would have felt that his or her freedom was curtailed to the degree associated with a formal arrest. Washington has adopted this test. State v. Heritage, 152 Wn.2d 210, 218, 95 P.3d 345 (2004).

Miranda warnings must be given when a suspect endures (1) custodial (2) interrogation (3) by an agent of the State. State v. Sargent, 111 Wn.2d 641, 647, 762 P.2d 1127 (1988).

Without Miranda warnings, a suspect's statements during custodial interrogation are presumed involuntary. State v. Heritage, 152 Wn.2d 210, 214, 95 P.3d 345 (2004).

Washington courts agree with the United States Supreme Court's Fourth Amendment analysis holding that a routine Terry stop is not custodial for the

purposes of Miranda. Thus, Miranda warnings are not required in Washington during a Terry investigative detention.

> In Berkemer [Berkemer v. McCarty, 468 U.S. 420, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984)], the United States Supreme Court also held that a brief Fourth Amendment seizure of a suspect, either in the context of a routine, on-the-street Terry stop or a comparable traffic stop, does not rise to the level of 'custody' for the purposes of Miranda. Because a routine traffic stop curtails the freedom of a motorist such that a reasonable person would not feel free to leave the scene, a routine traffic stop, like a Terry stop, is a seizure for the purposes of the Fourth Amendment. However, the court recognized that because both traffic stops and routine Terry stops are brief, and they occur in public, they are substantially less 'police dominated' than the police interrogations contemplated by Miranda. Thus, a detaining officer may ask a moderate number of questions during a Terry stop to determine the identity of the suspect and to confirm or dispel the officer's suspicions without rendering the suspect 'in custody' for the purposes of Miranda. Washington courts agree that a routine Terry stop is not custodial for the purposes of Miranda.

State v. Heritage, 152 Wn.2d 210, 218, 95 P.3d 345 (2004) (citations omitted).

2. Consideration of an Officer's Subjective Intent

In State v. Ustimenko, 137 Wn.App. 109, 151 P.3d 256 (2007), law enforcement investigated a drunken assault on a pedestrian, a hit and run collision and DUI. The defendant was ultimately met walking towards the police at the bottom of a long driveway determined to be the vehicle's registered owner's residence. The defendant smelled of alcohol, had slurred speech, was swaying, and had fresh injuries on his hands and head. The officers asked the defendant to sit down, and asked him questions. As the officers began handcuffing him and reading Miranda warnings, the defendant admitted driving. The defendant thereafter provided breath samples which showed he was intoxicated.

The trial court suppressed the defendant's statements because the officers testified that they believed they had probable cause to arrest when they confronted the defendant but chose not to provide Miranda warnings prior to questioning.

The Court of Appeals, reversing the trial court's suppression of the defendant's statements, held that a reasonable person in the defendant's position would not

believe he was in police custody with a loss of freedom associated with formal arrest during the initial questioning.

> Here, the trial court concluded that Mr. Ustimenko was in custody as soon as the police approached and asked him to sit down. The court based this conclusion on the fact that the officers testified that they already thought they had probable cause to arrest Mr. Ustimenko when they encountered him.
>
> But a police officer's subjective intent has no relevance to the determination of custody. Not only is it irrelevant whether Mr. Ustimenko was the focus of the police investigation, but it is also irrelevant whether he was in a coercive environment when he was questioned. The only relevant question is whether a reasonable person in his position would believe his freedom of action was curtailed.

State v. Ustimenko, 137 Wn.App. 109, ¶11, 151 P.3d 256 (2007) (citations omitted).

3. A Terry Investigative Detention Can Ripen Into a Custodial Arrest Requiring Miranda Warnings

In State v. France, 129 Wn.App. 907, 120 P.3d 654 (2005), police detained the defendant to investigate an assault and no contact order violation. The police told the defendant he was not free to leave until the matter was cleared up but declined to give Miranda warnings.

The appellate court held that the initial Terry investigative detention ripened into a custodial arrest requiring Miranda warnings under the facts presented. State v. Heritage, 152 Wn.2d 210, 95 P.3d 345 (2004) was distinguished.

L. Miranda Warnings are Not Required During DUI Roadside Questioning and Field Sobriety Tests

In Berkemer v. McCarty, 468 U.S. 420, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984) (held that Miranda warnings are not required during DUI roadside questioning and field sobriety tests because the motorist was not under arrest), the United States Supreme Court refined the definition of “custody.” The court developed an objective test−whether a reasonable person in a suspect's position would have felt that his or her freedom was curtailed to the degree associated with a formal arrest. Washington has adopted this test. State v. Heritage, 152 Wn.2d 210, 218, 95 P.3d 345 (2004).

Agreeing with the Supreme Court's analysis in Berkemer v. McCarty, 468 U.S. 420, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984), our Supreme Court held that law enforcement is not required to give Miranda warnings before administering roadside field sobriety tests during a DUI investigation. In Heinemann v. Whitman County, 105 Wn.2d 796, 808, 718 P.2d 789 (1986), the court said:

> As previously indicated, in past decisions we have expressed our concern that not only must the pre-Miranda questioning be done in a noncoercive manner, but it must also be done for nondeceptive purposes. In the field sobriety test situation, the possibility for deception is decreased due to the fact that those specific tests are usable only for a sobriety determination and anyone asked to perform them would know immediately what the officer's suspicions were. Even where the detaining officer has probable cause to believe the suspect is guilty of driving while under the influence and requests the sobriety tests to double check his beliefs, the suspect cannot be deceived into believing the tests were for anything but the probable cause crime. The field sobriety tests are always used for the determination of sobriety, regardless of whether probable cause or reasonable suspicion of intoxication exists. Therefore, the situation in which the officer investigates the probable cause crime while pretending to investigate a different crime does not arise and the concerns which would trigger a finding of custody for Miranda purposes also do not arise.
>
> In sum, our concerns for the coercive and deceptive aspects of a detention are lessened in the situation of field sobriety testing. We, therefore, hold that custody does not exist so as to require the traditional Miranda warnings.

Chapter Ten

Warrantless Terry Stops–Examples

A. Random Roadblock Sobriety Checkpoints Violate Const. Art. I, §7

Random roadblock sobriety checkpoints violate Const. art. I, §7 because the checkpoints lack particularized and individualized suspicion of criminal activity. City of Seattle v. Mesiani, 110 Wn.2d 454, 457-58, 755 P.2d 775 (1988); In re Nichols, 171 Wn.2d 370, ¶ 16, 256 P.3d 1131 (2011).

> This court takes judicial notice 'there is no denying the fact that there is a very strong societal interest in dealing effectively with the problem of drunken driving.' Nevertheless, the City has offered little assistance in balancing interests because it attempts to weigh the national carnage of drunk driving year round against the minimal intrusion on Seattle drivers for a few seconds each. 'The easiest and most common fallacy in 'balancing' is to place on one side the entire, cumulated 'interest' represented by the state's policy and compare it with one individual's interest in freedom from the specific intrusion on the other side ...' A fairer balance would weigh the actual expected alleviation of the social ill against the cumulated interests invaded. Moreover, the City has failed to demonstrate the need for sobriety checkpoints or that less intrusive alternatives could not achieve most of the constitutionally permissible benefits sought, such as the addition of more officers to its special enforcement unit.

City of Seattle v. Mesiani, 110 Wn.2d 454, 459, 755 P.2d 775 (1988) (citations omitted).

B. A Warrantless Terry Stop at a Military Gate Checkpoint

A military gate checkpoint is a reasonable warrantless Terry stop under the Fourth Amendment.

> This is an important interest that is clearly advanced by a checkpoint for authorized access. The intrusion upon the individual motorist is minimal because every motorist is stopped, allowing the gatekeeper no discretion,

> and the duration of the stop and extent of the search are very limited. Thus, the interest in stopping vehicles at the gate outweighs the limited intrusion upon the motorists stopped there and the checkpoint does not violate the Fourth Amendment.

State v. Williams, 85 Wn.App. 271, 279, 932 P.2d 665 (1997) (Williams was stopped at the gate of McChord Air Force Base in a routine check of every vehicle for the proper identification for entry. After stopping Williams, the sentry at the gate noted the smell of alcohol on Williams's breath and called for an Air Force security officer. Officer Perry, upon arriving at the gate, asked Williams to step out of his car. Officer Perry observed that Williams had difficulty walking, slurred speech, and bloodshot eyes. Officer Perry administered several field sobriety tests, all of which Williams failed. Officer Perry placed Williams under arrest. License revocation due to driver's refusal to submit to breath test affirmed.)

C. A Person Does Not Commit a Crime by Refusing to Provide His or Her Name During a Warrantless Terry Detention

When a person is being investigated for a traffic infraction, RCW 46.61.021(3) provides:

> Any person requested to identify himself or herself to a law enforcement officer pursuant to an investigation of a traffic infraction has a duty to identify himself or herself and give his or her current address.

Violation of RCW 46.61.021(3) is a misdemeanor. RCW 46.61.022.

In State v. Moore, 161 Wn.2d 880, 169 P.3d 469 (2007), the court held that the defendant/passenger who was not wearing a seatbelt could not be arrested for refusing to identify himself pursuant to RCW 46.61.021(3) because the officer did not investigate the seatbelt traffic infraction when the defendant provided a false name. The officer's investigation instead focused on the defendant's possession of a dangerous dog (pit bull) outside an enclosure in alleged violation of a city ordinance. The court rejected the prosecution's reliance on RCW 46.61.021(3).

> The record does not support the State's argument that Officer French conducted an 'investigation' of the seatbelt violation. The crime of failing to correctly identify one's self under RCW 46.61.021(3) requires more than the mere observation of a traffic infraction and an unrelated request for identification. Rather, the officer must ask the individual for identification pursuant to an investigation of a traffic infraction. Officer French did not

> cite any passengers for the seatbelt violation and only mentioned her observation that the passengers were not wearing seatbelts in a supplemental report. Officer French also clarified at a subsequent hearing that she did not ask Moore for his name pursuant to an investigation of the seatbelt infraction.
>
> Based on the objective fact that Officer French was not investigating the seatbelt infraction, a reasonable officer would not have concluded that Moore violated former RCW 46.61.021(3) by failing to correctly identify himself pursuant to an investigation of a traffic infraction. Accordingly, we conclude that probable cause does not support Moore's arrest.

State v. Moore, 161 Wn.2d 880, ¶10, 169 P.3d 469 (2007).

Left unanswered by the holding in State v. Moore is whether a detainee's refusal to provide his or her name during a warrantless Terry investigation for a traffic infraction can constitutionally be a criminal act as codified in RCW 46.61.021(3) and 46.61.022.

In State v. White, 97 Wn.2d 92, 640 P.2d 1061 (1982), *called into question on other grounds by* State v. Afana, 169 Wn.2d 169, 182 n.8, 233 P.3d 879 (2010), our Supreme Court invalidated Washington's stop-and-identify obstructing statute in part due to a concern that criminalizing a person's refusal to identify himself or herself during a warrantless Terry detention would implicate the Bill of Rights.

> Although White had answered untruthfully, we held the statute unconstitutional and White's arrest unlawful. We found subsections (1) and (2) of former RCW 9A.76.020 unconstitutionally vague, but vagueness was not our only concern. We noted that such statutes can 'result in disturbing intrusions into an individual's right to privacy and can implicate other rights specifically enumerated in the Bill of Rights.'
>
> Discussing both the Fourth Amendment's protection from unreasonable search and our state constitution's article I, section 7, we held that, in addition to being vague, the statute 'encourages arbitrary and erratic stops and arrests.'
>
> We were also concerned that the stop and identify statute was an unwarranted extension of the 'Terry Stop,' which required the officer to provide specific and articulable facts that gave rise to a reasonable suspicion that there was criminal activity afoot.

> We applied the exclusionary rule to the evidence obtained following White's arrest, saying, '[i]f we were to permit the use of evidence obtained incident to an arrest under this statute, we would allow the Legislature to make an 'end run' around the Fourth Amendment.'

State v. Williams, 171 Wn.2d 474, ¶11, 251 P.3d 877 (2011) ("In order to avoid constitutional infirmities, we require some conduct in addition to making false statements to support a conviction for obstructing an officer. We vacate Williams' conviction for obstructing a law enforcement officer." State v. Williams, 171 Wn.2d at ¶20) (citations omitted) (footnote omitted). *But see* RCW 9A.76.175, which specifically prohibits "knowingly mak[ing] a false or misleading material statement to a public servant."

D. A Warrantless Terry Investigation for DUI Based Upon Odor of Alcohol or Drugs

"A police officer may make an investigatory stop for suspected drunk driving, but before doing so he must first possess a well-founded suspicion based on articulable facts that such a violation has been committed or is presently being committed." Campbell v. State of Wash. Dept. of Licensing, 31 Wn.App. 833, 835, 644 P.2d 1219 (1982) (warrantless Terry stop for DUI unlawful when based upon anonymous tip of drunk driving where the officer observed no conduct indicative of DUI).

An officer has sufficient grounds to detain a driver for a warrantless Terry investigation of DUI based upon the smell of alcohol on a driver's breath. "The smell of alcohol on a driver's breath is a specific fact that raises a substantial possibility that the driver is in violation of drunk driving laws." State v. Williams, 85 Wn.App. 271, 279, 932 P.2d 665 (1997) (license revocation due to driver's refusal to submit to breath test affirmed).

Note, however, that individualized suspicion is necessary where an officer considers odor. *Cf.* State v. Grande, 164 Wn.2d 135, ¶21, 187 P.3d 248 (2008) (To support probable cause for arrest and avoid an unconstitutional invasion of an individual's right to privacy, an odor of marijuana must be individually linked to the suspect rather than a general odor in a vehicle containing multiple people.)

E. Motorcycle Profiling is Not a Valid Basis for a Warrantless Terry Stop

Law enforcement agencies shall add a statement to existing polices "condemning motorcycle profiling." RCW 43.101.419(2).

Motorcycle profiling means "the illegal use of the fact that a person rides a motorcycle or wears motorcycle-related paraphernalia as a factor in deciding to stop and question, take enforcement action, arrest, or search a person or vehicle with or without a legal basis under the United States Constitution or Washington state Constitution." RCW 43.101.419(3).

Chapter Eleven

Warrantless Terry Stops–Scope Generally

A. Three Factors When Analyzing the Scope of a Warrantless Terry Stop and Detention

Courts look to three factors when analyzing whether the scope of a warrantless Terry stop and detention is reasonable, or alternatively, whether the intrusion is so substantial that it must be supported by probable cause:

(1) The purpose of the stop,

(2) The amount of physical intrusion on the suspect's liberty, and

(3) The length of time the suspect is detained.

See State v. Williams, 102 Wn.2d 733,740, 689 P.2d 1065 (1984); State v. Belieu, 112 Wn.2d 587, 596, 773 P.2d 46 (1989).

B. Enlargement and Termination of Warrantless Terry Detentions

1. Scope May be Enlarged When Unrelated Suspicions Arise During Detention

The lawful scope of a Terry stop may be enlarged or prolonged as needed to investigate unrelated suspicions that arise during the detention. State v. Smith, 115 Wn.2d 775, 785, 801 P.2d 975 (1990). The officer may " 'maintain the status quo momentarily while obtaining more information.' " State v. Williams, 102 Wn.2d 733, 737, 689 P.2d 1065 (1984) (citation omitted).

2. Detention Must be Promptly Terminate When the Suspect is Excluded from Suspicion

To detain a suspect beyond what the initial stop and detention demands, the officer must be able to articulate specific facts from which it could reasonably be suspected that the person was engaged in criminal activity.

Once an officer has information sufficient to exclude the detainee from suspicion, the officer must promptly terminate the detention.

Washington caselaw discussing this topic follows.

In State v. Veltri, 136 Wn.App. 818, 150 P.3d 1178 (2007), an officer stopped the driver to investigate mismatched license plates and a possibly a stolen truck. The rear license plate was determined to be valid. The vehicle had not been reported stolen. The officer decided not to issue an infraction. The officer thereafter obtained consent to search, and discovered narcotics. In upholding the trial court's suppression of evidence, the appellate court held that an impermissible general exploratory search occurred during the unlawful continued detention and questioning.

In State v. Santacruz, 132 Wn.App. 615, 133 P.3d 484 (2006) an officer pulled the driver over for driving with an expired vehicle registration. The driver admitted he had no driver's license. The officer noticed that the driver's pupils were unusually dilated, but the officer did not smell any odor of alcohol. He asked the driver if he had recently "taken any type of drugs." The driver said he had used methamphetamine earlier in the day, and consented to a search. Methamphetamine was found. The appellate court held that the officer's actions were reasonable, reversing the trial court's suppression of evidence.

> The officer performed a lawful seizure based on an articulable suspicion of a traffic infraction. During that investigation, the officer learned that the driver had no operator's license. Eventually, he did write Mr. Santacruz a ticket. In [State v. Tijerina, 61 Wn.App. 626, 629, 811 P.2d 241 (1991)], the officer asked about guns or drugs in the vehicle based solely on ethnicity and motel soap. Here, an officer investigating vehicle registration irregularities observed that the driver's pupils were unusually dilated. This aroused his suspicion that the driver was under the influence of drugs of some kind. This broadened the scope of the stop. It was a reasonable extension, not an unreasonable intrusion.
>
> The drug investigation here was within the expanded scope of the original lawful stop. We therefore reverse the suppression order.

State v. Santacruz, 132 Wn.App. 615, ¶¶18-19, 133 P.3d 484 (2006) (citation omitted).

In State v. Penfield, 160 Wn.App. 157, 22 P.3d 293 (2001), the officer conducted a traffic stop on a vehicle whose registered owner, a woman, had a suspended license. As the officer approached the vehicle, the officer discovered that the driver was a man. Although the officer knew the driver could not be the registered owner, he nevertheless asked for the man's driver's license. The driver told the

officer that his license was suspended. The driver was arrested and methamphetamine was seized in a subsequent vehicle search.

The appellate court held that once the officer determined the driver was not the registered owner of the vehicle, the officer had no other articulable suspicion of criminal activity justifying the request for the male's driver's license.

> Here, Officer Vaughn's only articulable suspicion of criminal activity was information that the driver's license of the vehicle's owner was suspended. He had no other reason to ask Mr. Penfield for his driver's license after he realized Mr. Penfield was not the registered owner. Other facts may exist to create a suspicion that the driver may not have the owner's permission to use the automobile or that the driver is engaged in some other criminal activity. Officer Vaughn had none to offer here. Officer Vaughn violated Mr. Penfield's Fourth Amendment right to be free of unreasonable searches and seizures when he asked Mr. Penfield to produce his driver's license.

State v. Penfield, 160 Wn.App. 157, 162-63, 22 P.3d 293 (2001). *Contra* State v. Phillips, 126 Wn.App. 584, 588, 109 P.3d 470 (2005), *review denied*, 156 Wn.2d 1012 (2006) (The Penfield holding is “an exception.” Normally, an officer is allowed to dispel his suspicion that a registered owner of a vehicle with a suspended license is operating their vehicle by identifying the driver of that vehicle. RCW 46.20.349 specifically allows an officer to request the driver's license of any person operating a vehicle that is registered to a person with a suspended license.)

In State v. Armenta, 134 Wn.2d 1, 948 P.2d 1280 (1997), two men asked a uniformed officer for help with their car. The officer became suspicious because the men had large amounts of cash and gave only sketchy accounts of their recent whereabouts. The court held that an unlawful seizure occurred when the officer put their money in his patrol car because the possession of large amounts of cash by a couple of Hispanic men was not, by itself, a reason to detain them. Their subsequent consent to be searched was vitiated by the unlawful seizure.

In State v. Henry, 80 Wn.App. 544, 910 P.2d 1290 (1995), the defendant was stopped for the infractions of failure to stop and to signal. The driver had glassy eyes, moved slowly, and acted “kind of like he was in some type of a daze” when pulled over for a traffic infraction. Based on this, the officer asked if the vehicle had been used in recent burglaries or drug transactions in the area. The driver said, “No.” The deputy nonetheless asked for consent to search the vehicle. The officer could not point to a specific articulable basis for his suspicion connecting

the driver with burglaries or drug transactions. The driver's appearance had no connection with burglaries or drug transactions. The court held that the consent to search was unlawful because officer had no articulated basis to detain the driver beyond the initial reason for the stop.

> [P]olice officers may not use routine traffic stops as a basis for generalized, investigative detentions or searches.

State v. Henry, 80 Wn.App. 544, 553, 910 P.2d 1290 (1995) (citations omitted).

In State v. Tijerina, 61 Wn.App. 626, 629, 811 P.2d 241 (1991), the driver was stopped for crossing the fog line two times. The officer decided not to issue an infraction, but had noticed several small bars of soap when the registration was retrieved out of the glove box. The officer concluded that the soap was likely obtained from a motel, and testified that Hispanics are known for selling narcotics in motel rooms.

> Here, there were no intervening circumstances between the illegal detention and the consent to search. The purpose of the stop was satisfied when the Sergeant decided not to issue a citation and his subsequent conduct was based on unjustified suspicion. Further, Miranda warnings were not given prior to obtaining the consent. But for the illegal detention, the consent would not have been obtained. Thus, the evidence should have been suppressed.

State v. Tijerina, 61 Wn.App. 626, 630, 811 P.2d 241 (1991).

Chapter Twelve

Warrantless Terry Scope Factor 1–Purpose of the Stop

Courts look to three factors when analyzing whether the scope of a warrantless Terry stop and detention is reasonable, or alternatively, whether the intrusion is so substantial that it must be supported by probable cause:

> (1) The purpose of the stop,
>
> (2) The amount of physical intrusion on the suspect's liberty, and
>
> (3) The length of time the suspect is detained.

See State v. Williams, 102 Wn.2d 733,740, 689 P.2d 1065 (1984); State v. Belieu, 112 Wn.2d 587, 596, 773 P.2d 46 (1989).

This chapter focuses on the first factor.

A determination of the reasonableness of an officer's intrusion during a Terry warrantless stop depends to some degree on the seriousness of the suspected crime. An officer may do far more if the suspected misconduct endangers life or personal safety than if it does not. State v. McCord, 19 Wn.App. 250, 253, 576 P.2d 892, *review denied*, 90 Wn.2d 1013 (1978); State v. Thierry, 60 Wn.App. 445, 448, 803 P.2d 844 (1991).

> Evaluating the reasonableness of the police action and the extent of the intrusion, each case must be considered in light of the particular circumstances facing the law enforcement officer. In this case, the suspected crime was a gross misdemeanor. It posed no threat of physical violence or harm to society or the officers. Indeed it involved only an activity which was so openly tolerated in some areas that taxes were collected on the business of persons such as the defendant. This is quite a different matter from the hypothetical tips involving murder or threatened school bombings which were used by the state in its argument to illustrate the purported result of the holding of the Court of Appeals. While we are obviously not passing upon such matters, we do emphasize that if and

> when other cases arise they will necessarily be judged in light of their particular facts, which is the very clear, basic premise of [Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)]...

State v. Lesnick, 84 Wn.2d 940, 944-45, 530 P.2d 243, *cert. denied*, 423 U.S. 891, 96 S.Ct. 187, 46 L.Ed.2d 122 (1975) (warrantless Terry stop based upon anonymous tip accurately describing the defendant's vehicle for possession of gambling devices held unreasonable) (citation omitted).

Chapter Thirteen

Warrantless Terry Scope Factor 2–Terry Frisks and Physical Intrusion on Suspect's Liberty

Courts look to three factors when analyzing whether the scope of a warrantless Terry stop and detention is reasonable, or alternatively, whether the intrusion is so substantial that it must be supported by probable cause:

(1) The purpose of the stop,

(2) The amount of physical intrusion on the suspect's liberty, and

(3) The length of time the suspect is detained.

See State v. Williams, 102 Wn.2d 733,740, 689 P.2d 1065 (1984); State v. Belieu, 112 Wn.2d 587, 596, 773 P.2d 46 (1989).

This chapter focuses on the second factor.

The Supreme Court in Terry held that a brief investigative seizure falling short of an arrest may be based on proof less than probable cause. Probable cause is not required for a Terry stop because the stop is significantly less intrusive than an arrest. Brown v. Texas, 443 U.S. 47, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979).

The amount of physical intrusion on a Terry detainee's liberty must be limited to the purpose of a warrantless Terry detention. Police actions not permitted at the initiation of a Terry stop may be reasonable as the Terry investigation proceeds. Contrarily, police intrusion on a suspect's liberty may become so substantial that the intrusive police action will convert a warrantless Terry detention into a warrantless arrest which must then be supported by probable cause.

Extensive appellate caselaw exists concerning whether and when an officer's actions during a warrantless Terry detention become unreasonable resulting in a warrantless arrest requiring probable cause. Examples are provided below:

A. Warrantless Search for Evidence or Contraband Strictly Prohibited During Terry Frisk

Law enforcement are strictly prohibited from searching for evidence or contraband during a warrantless Terry pat-down frisk for weapons. The purpose of the limited warrantless Terry pat-down search is not to discover evidence of a crime, but to allow an officer to pursue a Terry investigation without fear. Adams v. Williams, 407 U.S. 143, 92 S.Ct. 1921, 1922-23, 32 L.Ed.2d 612 (1972).

> According to his report and testimony, Officer Cobb immediately ascertained there was no weapon in Garvin's coin pocket but continued squeezing the contents, first determining there was a plastic baggy inside and then manipulating the substance in the bag. We hold it is unlawful for officers to continue squeezing−whether in one slow motion or several−after they have determined a suspect does not have a weapon, to find whether the suspect is carrying drugs or other contraband. If that were permissible, there would be little to distinguish a frisk incident to a Terry stop from a general search for contraband, and we strongly disapprove of such legal fiction. Indeed, one of the narrowly drawn exceptions to the warrant requirement would swallow the rule.

State v. Garvin, 166 Wn.2d 242, ¶24, 207 P.3d 1266 (2009).

B. Terry Frisks

1. Terry Frisk of Suspect for Weapons Generally

State v. Garvin, 166 Wn.2d 242, ¶12, 207 P.3d 1266 (2009) (an officer may briefly frisk a Terry detainee for weapons if the officer reasonably believes the officer's safety or that of others is endangered).

"A 'generalized suspicion' is insufficient to justify a frisk." State v. Xiong, 164 Wn.2d 506, ¶12, 191 P.3d 1278 (2008) (second pat-down frisk improper where first frisk revealed no weapons, and suspect was handcuffed, cooperative and made no dangerous movements prior to second frisk) (citations omitted).

> To justify a frisk without probable cause to arrest, an officer must have a reasonable belief, based on objective facts, that the suspect is armed and presently dangerous. Reasonable belief that the suspect is armed and presently dangerous means, ' some basis from which the court can determine that the detention was not arbitrary or harassing.'

* * *

> Surely officers may protect themselves when the situation reasonably appears dangerous, but a frisk is a narrow exception to the rule that searches require warrants. The courts must be jealous guardians of the exception in order to protect the rights of citizens. The justification for the frisk here was simply not sufficient.

State v. Setterstrom, 163 Wn.2d 621, ¶¶16,19, 183 P.3d 1075 (2008) (Officers must have some basis beyond nervousness and lying to justify an investigatory frisk. Held that lawful presence in a public area filling out a DSHS benefits form, absent threatening gestures or words, did not justify a patdown. This was not "a situation where the officers encountered Setterstrom in a dark alley in a crime-ridden area." Setterstrom, 163 Wn.2d at ¶18.) (citations omitted).

Officers must have individualized suspicion that the person to be frisked was armed and presently dangerous.

> Where the propriety of the initial detention of [the co-suspect] is established, law enforcement officers may perform, as they did here, a protective frisk in the nature of a pat-down in order to ascertain if the suspect is carrying a weapon or weapons. The scope of the frisk, however, must be limited to protective purposes. If an officer cannot point to specific articulable facts that create an "objectively" reasonable belief that a suspect is armed and "presently" dangerous, then no further intrusion is justified. Here, as the dissenting judge at the Court of Appeals correctly observed, there were no specific facts to support a reasonable belief that [the co-suspect] was armed and presently dangerous. Indeed, as the dissenter pointed out, [the co-suspect] was cooperative with the police, he made no effort to flee, and he did not make any moves that suggested he could reach into his pants pocket.
>
> Furthermore, he was handcuffed at all times and he identified himself from the start. Although the officers who confronted [the co-suspect] may legitimately have had some generalized concerns about safety, none were specific to [the co-suspect] and, thus, the officers had no basis for searching his pants pocket. It follows that the subsequent arrest of Xiong was unlawful as was the search of the minivan that followed the arrest.

State v. Xiong, 164 Wn.2d 506, ¶17, 191 P.3d 1278 (2008) (citations omitted).

> While Terry does not authorize a search for evidence of a crime, officers are allowed to make a brief, nonintrusive search for weapons if, after a lawful Terry stop, 'a reasonable safety concern exists to justify the

> protective frisk for weapons' so long as the search goes no further than necessary for protective purposes. This brief, nonintrusive search is often referred to as a 'Terry frisk.' If the initial stop is not lawful or if the search exceeds its proper bounds or if the officer's professed belief that the suspect was dangerous was not objectively believable, then the fruits of the search may not be admitted in court.

State v. Day, 161 Wn.2d 889, 895, 168 P.3d 1265 (2007) (citations omitted) (footnote omitted),

2. Terry Frisk of Suspect for Weapons−Scope of Pat-Down Search

A Terry frisk is strictly limited in its scope.

> A search pursuant to a Terry stop must be justified not only in its inception, but also in its scope. A valid weapons frisk is strictly limited in its scope to a search of the outer clothing; a patdown to discover weapons which might be used to assault the officer.
>
> There are, however, cases where the patdown is inconclusive, in which case reaching into the clothing is the only reasonable course of action for the police officer to follow. If the officer feels an item of questionable identity that has the size and density such that it might or might not be a weapon, the officer may only take such action as is necessary to examine such object.
>
> '[O]nce it is ascertained that no weapon is involved, the government's limited authority to invade the individual's right to be free of police intrusion is spent' and any continuing search without probable cause becomes an unreasonable intrusion into the individual's private affairs.
>
> Illustrative is Hobart [State v. Hobart, 94 Wn.2d 437, 440, 617 P.2d 429 (1980)] where a police officer felt spongy objects in the suspect's pockets during a weapons patdown. Although the officer had no fear that the objects were weapons, the officer squeezed them and determined that they were balloons containing narcotics. The court held that once the officer had ascertained that the objects were not weapons, the permissible scope of the search had ended and any further search required probable cause. The court warned that '[t]o approve the use of evidence of some offense unrelated to weapons would be to invite the use of weapons' searches as a pretext for unwarranted searches'.

State v. Hudson, 124 Wn.2d 107, 112-13, 874 P.2d 160 (1994) (citations omitted).

An officer may withdraw an object if it feels like it might be a weapon, but may not open a cigarette pack to determine if a razor blade or other weapon might be inside. State v. Horton, 136 Wn.App. 29, ¶29, 146 P.3d 1227 (2007), *review denied*, 162 Wn.2d 1014 (2008) (court rejects state's argument that a cigarette pack could contain razor blades or other small objects that conceivably could be used as weapons, holding that the justification for the intrusion ended once the officer reasonably should have determined that a cigarette pack was not a weapon):

> Nothing in the particular circumstances here suggested that Mr. Horton's weapon of choice was likely to be a razor blade or paper clip. And the deputy could certainly have protected himself (the object of a Terry search) from miniature weapons by tossing the pack out of reach.

3. Terry Frisk of Suspect for Weapons−Plain Feel

An officer may seize an item not a weapon felt during a warrantless Terry frisk only where it is immediately apparent to the officer that the item, although not a weapon, was contraband or evidence. Objects are immediately apparent when, considering the surrounding circumstances, the police can reasonably conclude that the substance before them is incriminating evidence. State v. Hudson, 124 Wn.2d 107, 118, 874 P.2d 160 (1994).

An officer may not manipulate an item which cannot contain a weapon in order to determine whether the item contains contraband or evidence. State v. Garvin, 166 Wn.2d 242, ¶24, 207 P.3d 1266 (2009).

4. Terry Frisk of Vehicle for Weapons

A driver's or passenger's furtive movement as if placing a weapon under a seat justifies a warrantless Terry search for weapons in the area of the furtive movement. In State v. Kennedy, 107 Wn.2d 1, 726 P.2d 445 (1986), the court determined that, after Kennedy was signaled to pull over, his movement in "lean[ing] forward as if to put something under the seat" was "sufficient to give [the officer] an objective suspicion that Kennedy was secreting something under the front seat of the car." The court additionally noted that the officer "had no way of knowing what Kennedy was hiding." Kennedy, 107 Wn.2d at 3, 11. The court observed that the officer "could have" frisked Kennedy (who was not under arrest but only under investigation) "had he suspected Kennedy might be armed." *Id.* at 11. However, because the officer inferred from Kennedy's movement that a

weapon had possibly been concealed under Kennedy's seat, the court held that the officer permissibly directed his limited, protective search to that area.

"Under the Washington Constitution, a valid Terry stop may include a search of the interior of the suspect's vehicle when the search is necessary to officer safety. A protective search for weapons must be objectively reasonable, though based on the officer's subjective perception of events." State v. Larson, 88 Wn.App. 849, 853-54, 946 P.2d 1212 (1997) (footnote omitted).

Based on objectively reasonable safety concerns, an officer may conduct a limited search of a vehicle for weapons without regard to whether the driver or the passenger remains in the vehicle. A "'protective search for weapons must be objectively reasonable, though based on the officer's subjective perception of events.'" State v. Glossbrener, 146 Wn.2d 670, 681, 49 P.3d 128 (2002) (citation omitted).

In determining whether the search was reasonably based on officer safety concerns, a court must "evaluate the entire circumstances of the traffic stop." State v. Glossbrener, 146 Wn.2d 670, 679, 49 P.3d 128 (2002). In Glossbrener, an officer stopped Glossbrener for driving with a defective headlight. While pulling the car over, the officer noticed Glossbrener reaching down toward the passenger side of the car for several seconds before coming to a complete stop. After asking Glossbrener to explain the movements he observed, the officer allowed Glossbrener to remain in the car while the officer returned to his patrol car to check for warrants. When the officer returned, he patted down Glossbrener for weapons and performed field sobriety tests. The officer allowed Glossbrener to stand next to the car while calling for backup and then conducted a search of the vehicle.

After evaluating the circumstances of the traffic stop, the court held that "although [the officer] may have had a reasonable belief that Glossbrener was armed and dangerous when he first observed the furtive movement, any such belief was no longer objectively reasonable at the time he actually conducted the search because of the intervening actions of both [the officer] and Glossbrener." State v. Glossbrener, 146 Wn.2d at 681. As the court pointed out, allowing Glossbrener to sit in the car while the officer checked for warrants suggested the officer was not "truly concerned" for his safety. State v. Glossbrener, 146 Wn.2d at 682.

It is unclear what if any impact the holding in Arizona v. Gant, 556 U.S. 332, 129 S.Ct. 1710, 1724, 173 L.Ed.2d 485 (2009) (a warrantless search of a vehicle incident to the arrest of the driver is unreasonable where the driver is in handcuffs and no showing is made of another exception to the warrant

requirement) has on the issue of a warrantless Terry frisk of a vehicle for weapons. Justice Scalia noted in his concurring opinion:

> It must be borne in mind that we are speaking here only of a rule automatically permitting a search when the driver or an occupant is arrested. Where no arrest is made, we have held that officers may search the car if they reasonably believe "the suspect is dangerous and ... may gain immediate control of weapons." Michigan v. Long, 463 U.S. 1032, 1049, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983). In the no-arrest case, the possibility of access to weapons in the vehicle always exists, since the driver or passenger will be allowed to return to the vehicle when the interrogation is completed. The rule of Michigan v. Long is not at issue here.

5. Terry Frisk of Passenger for Weapons

Where an officer has a lawful basis to stop a vehicle for a traffic infraction, the officer may, incident to such stop, "take whatever steps necessary to control the scene, including ordering the driver to stay in the vehicle or exit it, as circumstances warrant. This is a *de minimis* intrusion upon the driver's privacy under art. I, § 7." State v. Mendez, 137 Wn.2d 208, 220, 970 P.2d 722 (1999), *overruled on other grounds by* Brendlin v. California, 551 U.S. 249, 127 S.Ct. 2400, 168 L.Ed.2d 132 (2007).

Const. art. I, §7 does not similarly extend to passengers in vehicles lawfully stopped. With regard to passengers, to satisfy Const. art. I, §7, the officer must be able to "articulate an objective rationale predicated specifically on safety concerns ... for ordering a passenger to stay in the vehicle or to exit the vehicle..." State v. Mendez, 137 Wn.2d at 220.

Unlike for drivers, the Mendez Court declined to adopt a bright line, categorical rule permitting an officer to control passenger movement.

> A police officer should be able to control the scene and ensure his or her own safety, but this must be done with due regard to the privacy interests of the passenger, who was not stopped on the basis of probable cause by the police. An officer must therefore be able to articulate an objective rationale predicated specifically on safety concerns, for officers, vehicle occupants, or other citizens, for ordering a passenger to stay in the vehicle or to exit the vehicle to satisfy art. I, § 7. This articulated objective rationale prevents groundless police intrusions on passenger privacy. But to the extent such an objective rationale exists, the intrusion on the

> passenger is *de minimis* in light of the larger need to protect officers and to prevent the scene of a traffic stop from descending into a chaotic and dangerous situation for the officer, the vehicle occupants, and nearby citizens.
>
> To satisfy this objective rationale, we do not mean that an officer must meet Terry 's standard of reasonable suspicion of criminal activity. Terry must be met if the purpose of the officer's interaction with the passenger is investigatory. For purposes of controlling the scene of the traffic stop and to preserve safety there, we apply the standard of an objective rationale.

State v. Mendez, 137 Wn.2d at 220.

The Mendez Court provided a list of non-exclusive factors warranting an officer's restraint of a passenger.

> Factors warranting an officer's direction to a passenger at a traffic stop may include the following: the number of officers, the number of vehicle occupants, the behavior of the occupants, the time of day, the location of the stop, traffic at the scene, affected citizens, or officer knowledge of the occupants. These factors are not meant to be exclusive; nor do we hold that any one factor, taken alone, automatically justifies an officer's direction to a passenger at a traffic stop. The inquiry into the presence or absence of an objective rationale requires consideration of the circumstances present at the scene of the traffic stop.

State v. Mendez, 137 Wn.2d at 220-21 (footnote omitted).

Mendez' convictions for obstructing a law enforcement officer and use of drug paraphernalia were reversed because the officers did not meet the objective rationale test justifying seizing Mendez as he attempted to walk away from the stopped vehicle.

> We hold the trial court erred in finding the stop of Mendez satisfied Terry. We further hold the officers did not meet the objective rationale test under art. I, § 7 we have articulated in this case that would allow them to order Mendez back into the vehicle.
>
> Officer Hartman testified he had no suspicions Mendez had engaged or was about to engage in criminal conduct. Neither officer testified that Mendez's actions in reaching inside his clothing aroused any suspicion. Besides, Mendez did not reach inside his clothing until after he had been seized by Officer Hensley's command to return to the car.

State v. Mendez, 137 Wn.2d at 224.

In the traffic stop context, the arrest of one or more vehicle occupants does not, without more, justify a warrantless search of other, nonarrested passengers. State v. Grande, 164 Wn.2d 135, 143, 187 P.3d 248 (2008). Absent a reasonable, articulable, and individualized suspicion that a passenger "is armed and dangerous or independently connected to illegal activity, the search of a passenger incident to the arrest of the driver is invalid under article I, section 7." State v. Jones, 146 Wn.2d 328, 336, 45 P.3d 1062 (2002).

Upon stopping a vehicle for a traffic violation, a police officer may order passengers into or out of the vehicle only if the officer is "able to articulate an objective rationale predicated specifically on safety concerns." State v. Reynolds, 144 Wn.2d 282, 288, 27 P.3d 200 (2001) (citing State v. Mendez, 137 Wn.2d 208, 220, 970 P.2d 722 (1999)).

Under Const. art. I, §7, an officer must have individualized reasonable, articulable suspicion that a passenger is armed and dangerous or independently connected to unlawful activity before a pat-down frisk for weapons is authorized. State v. Abuan, 161 Wn.App. 135, 257 P.3d 1 (2011) (Abuan was not suspected of being armed or engaged in criminal activity. He was cooperative and cordial, and did not make any furtive movements. Drive-by shooting and second degree assault convictions reversed.)

> We reverse all of Abuan's convictions because the officers' pat down of Abuan, a vehicle passenger, without reasonable, articulable, and individualized suspicion that he was armed and dangerous or independently connected to illegal activity, and the search of the car violated article I, section 7 of the Washington constitution.

State v. Abuan, 161 Wn.App. 135, ¶53, 257 P.3d 1 (2011).

Finally, in State v. Horrace, 144 Wn.2d 386, 397, 28 P.3d 753 (2001), the court upheld a passenger pat-down frisk where the officer believed a weapon was transferred to the passenger's jacket by the driver's unexplained movements towards the passenger during an early morning, isolated vehicle stop. The passenger's lack of movement did not immunize the passenger from suspicion of being armed.

> Citizens of this state do not expect to surrender their article I, section 7, privacy guaranty when they step into an automobile with others, for as E.B. White put it, 'Everything in life is somewhere else, and you get there in a car.' Any intrusion upon the constitutionally protected privacy interest

> of vehicle passengers must meet the requirements we have previously set forth.
>
> Only where a police officer is able to articulate an objective rationale based specifically on officer safety concerns, may the officer, as a means of controlling the scene, direct passengers to remain in or exit a vehicle stopped for a traffic infraction.
>
> Where an officer's purpose is to investigate a passenger, the higher Terry standard must be met. The frisk of a vehicle passenger will be justifiable only where the officer is able to point to specific, articulable facts giving rise to an objectively reasonable belief that the passenger could be armed and dangerous. Where the suspicion that an individual may be armed is based in part on the observable actions of others in a particular context, the officer must point to specific, articulable facts tying those observable movements and their circumstances directly and immediately to the individual to be frisked. In those cases where the Terry requirements are met, it necessarily becomes "unreasonable to limit an officer's ability to assure his own safety."

State v. Horrace, 144 Wn.2d 386, 399, 28 P.3d 753 (2001).

C. Firearm Drawn by Police

No hard and fast rule governs the display of weapons in a warrantless Terry investigatory stop. Drawn guns and handcuffs are generally permissible only where the police have a legitimate fear of danger. State v. Williams, 102 Wn.2d 733, 740 n.2, 689 P.2d 1065 (1984) (drawn guns permissible when approaching car with three people in it who police believed were armed).

> It is not practical to prescribe an objective formula for police conduct to determine when an investigative stop becomes an arrest. There are only two places pertinent to this case for drawing a firm line where force will convert a stop into an arrest: (1) when a weapon is drawn by police; or, (2) when a weapon is pointed at a suspect by police. Courts generally have not drawn such lines, preferring to make fact-specific determinations of the reasonableness of force on a case-by-case basis.
>
> No hard and fast rule governs the display of weapons in an investigatory stop. Rather, the court must look at the nature of the crime under investigation, the degree of suspicion, the location of the stop, the time of

day and the reaction of the suspect to the police, all of which bear on the issue of reasonableness.

State v. Belieu, 112 Wn.2d 587, 600, 773 P.2d 46 (1989) (the officers had sufficient specific information about the suspects upon which to base reasonable fears for their own safety that justified the use of drawn weapons in accomplishing the initial phase of an investigative stop) (citations omitted).

D. Removing Suspect from Vehicle

State v. O'Neill, 148 Wn.2d 564, 582, 62 P.3d 489 (2003) ("Once a driver has been validly stopped, a police officer may order him or her to get out of the vehicle, "regardless of whether the driver is suspected of being armed or dangerous or whether the offense under investigation is a serious one." Such an intrusion is de minimis." (citations omitted)).

State v. Mackey, 117 Wn.App. 135, 138-39, 69 P.3d 375 (2003), *review denied*, 151 Wn.2d 1034 (2004) (Driver stopped for traffic infraction. Officer smelled alcohol and asked driver to exit vehicle to investigate possible DUI. Held that removing the driver from the vehicle was reasonable during a Terry investigation for DUI.).

State v. Mendez, 137 Wn.2d 208, 220, 970 P.2d 722 (1999), *overruled on other grounds by* Brendlin v. California, 551 U.S. 249, 127 S.Ct. 2400, 168 L.Ed.2d 132 (2007) (during traffic infraction stop, "the officer may, incident to such stop, take whatever steps necessary to control the scene, including ordering the driver to stay in the vehicle or exit it, as circumstances warrant. This is a de minimis intrusion upon the driver's privacy under art. I, § 7.")

E. Requiring Suspect to Stand in Front of Police Vehicle's Headlights

State v. Mercer, 45 Wn.App. 769, 776, 727 P.2d 676 (1986) (police may require a suspect to stand in front of a police vehicle's headlights during a Terry detention).

F. Field Sobriety Tests

Heinemann v. Whitman County District Court, 105 Wn.2d 796, 808-9, 718 P.2d 789 (1986) ("[A] request for the performance of field sobriety tests during a routine traffic stop does not alone indicate that a motorist would feel subjected to coercive restraints comparable to those associated with a formal arrest." Held that the defense "failed to prove any basis for the suppression of the field sobriety test results in this case.")

> In the field sobriety test situation, the possibility for deception is decreased due to the fact that those specific tests are usable only for a sobriety determination and anyone asked to perform them would know immediately what the officer's suspicions were. Even where the detaining officer has probable cause to believe the suspect is guilty of driving while under the influence and requests the sobriety tests to double check his beliefs, the suspect cannot be deceived into believing the tests were for anything but the probable cause crime. The field sobriety tests are always used for the determination of sobriety, regardless of whether probable cause or reasonable suspicion of intoxication exists. Therefore, the situation in which the officer investigates the probable cause crime while pretending to investigate a different crime does not arise and the concerns which would trigger a finding of custody for Miranda purposes also do not arise.
>
> In sum, our concerns for the coercive and deceptive aspects of a detention are lessened in the situation of field sobriety testing. We, therefore, hold that custody does not exist so as to require the traditional Miranda warnings.

G. Check for Warrants

State v. Chelly, 94 Wn.App. 254, 261, 970 P.2d 376, *review denied,* 138 Wn.2d 1009 (1999) ("Checking for outstanding warrants during a valid criminal investigatory stop is a reasonable routine police practice and warrant checks are permissible as long as the duration of the check does not unreasonably extend the initially valid contact.").

RCW 46.61.021(2) ("Whenever any person is stopped for a traffic infraction, the officer may detain that person for a reasonable period of time necessary to identify the person, check for outstanding warrants, check the status of the person's license, insurance identification card, and the vehicle's registration, and complete and issue a notice of traffic infraction.")

H. Handcuffing Suspect

In State v. Wakeley, 29 Wn.App. 238, 243 n.1, 628 P.2d 835, *review denied*, 95 Wn.2d 1032 (1981) (citation omitted), the court noted:

> Although, normally, handcuffing an individual is not within the scope of an investigative stop and Terry frisk, in appropriate cases handcuffing may be 'reasonable, as a corollary of the lawful stop.' Here, in view of the potential seriousness of the suspected activity, as well as the fact that the

> encounter took place at night, the handcuffing was reasonably related to ensuring the officers' and the suspects' safety.

State v. Wheeler, 108 Wn.2d 230, 235, 737 P.2d 1005 (1987) (Officers had been informed that a burglary was in progress and were given a description which matched the suspect. The officers asked no questions of the suspect except his name, told him he was being held in custody on suspicion of burglary, frisked him and found nothing, handcuffed him, placed him in a patrol car, and transported him to the scene of the crime. Although finding that this physical intrusion was "significant", it "was not excessive and was permissible under a Terry stop.")

I. Detaining Suspect for Show Up Identification

State v. Moon, 48 Wn.App. 647, 649, 739 P.2d 1157, *review denied*, 108 Wn.2d 1029 (1987) ("In the instant matter, the investigating officers were justified under the facts and circumstances known to them to hold Moon while the victim of the mini mart robbery was brought to the scene.")

J. Transporting Suspect to a Nearby Location

A Terry detainee may be moved from the location of a Terry stop under certain circumstances.

> The fact that a Terry stop must be limited as to place does not mean that police can never move a detainee any distance for any purpose. Thus, 'it seems clear that some movement of the suspect in the general vicinity of the stop is permissible without converting what would otherwise be a temporary seizure into an arrest.' Such movement can be for reasons of safety and security, or even for convenience when otherwise reasonable under the circumstances. Terry also permits police to move a detainee so that a crime witness can make an identification, provided that the distance is short and the police have both "knowledge" that a crime has been committed and articulable suspicion that the detainee committed it.

State v. Lund, 70 Wn.App. 437, 447-48, 853 P.2d 1379 (1993), *review denied*, 123 Wn.2d 1023 (1994) (citations omitted) (footnote omitted).

K. Transporting Suspect to a Police Station

Transporting a Terry detainee to a police station always transforms the Terry detention to an arrest requiring probable cause.

> A Terry stop must be limited as to place. Dunaway v. New York, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979); Hayes v. Florida, 470 U.S. 811, 105 S.Ct. 1643, 84 L.Ed.2d 705 (1985); [State v. Wheeler, 108 Wn.2d 230, 235, 737 P.2d 1005 (1987)]. Thus, Terry does not allow police, based only on articulable suspicion, to seize a citizen and then transport him or her to the police station for questioning or fingerprinting. Dunaway v. New York, *supra* (questioning); Hayes v. Florida, *supra* (fingerprinting). Nor does Terry allow police, based only on articulable suspicion, to take what begins "as a consensual inquiry in a public place" and escalate it "into an investigatory procedure in a police interrogation room."

State v. Lund, 70 Wn.App. 437, 446-47, 853 P.2d 1379 (1993), *review denied*, 123 Wn.2d 1023 (1994) (citation omitted).

Chapter Fourteen

Warrantless Terry Scope Factor 3–Duration of the Detention

Courts look to three factors when analyzing whether the scope of a warrantless Terry stop and detention is reasonable, or alternatively, whether the intrusion is so substantial that it must be supported by probable cause:

> (1) The purpose of the stop,
>
> (2) The amount of physical intrusion on the suspect's liberty, and
>
> (3) The length of time the suspect is detained.

See State v. Williams, 102 Wn.2d 733,740, 689 P.2d 1065 (1984); State v. Belieu, 112 Wn.2d 587, 596, 773 P.2d 46 (1989).

This chapter focuses on the third factor.

A Terry detention must be limited in duration.

> [T]he brevity of the invasion of the individual's Fourth Amendment interests is an important factor in determining whether the seizure is so minimally intrusive as to be justifiable on reasonable suspicion. Moreover, in assessing the effect of the length of the detention, we take into account whether the police diligently pursue their investigation.

United States v. Place, 462 U.S. 696, 103 S.Ct. 2637, 2645, 77 L.Ed.2d 110 (1983).

Although there is no bright-line rule, a 90 minute Terry detention is too long. United States v. Place, 462 U.S. 696, 103 S.Ct. 2637, 2646, 77 L.Ed.2d 110 (1983) ("Thus, although we decline to adopt any outside time limitation for a permissible Terry stop, we have never approved a seizure of the person for the prolonged 90-minute period involved here and cannot do so on the facts presented by this case.") (footnote omitted).

Washington courts have looked for guidance to the American Law Institute Model Code of Pre-Arraignment Procedure recommending a maximum of 20 minutes for a Terry detention. State v. Gardner, 28 Wn.App. 721, 727, 626 P.2d 56, *review denied*, 95 Wn.2d 1027 (1981). The United States Supreme Court has questioned the wisdom of a rigid time limitation.

> FN10. Cf. ALI, Model Code of Pre-Arraignment Procedure § 110.2(1) (1975) (recommending a maximum of 20 minutes for a Terry stop). We understand the desirability of providing law enforcement authorities with a clear rule to guide their conduct. Nevertheless, we question the wisdom of a rigid time limitation. Such a limit would undermine the equally important need to allow authorities to graduate their responses to the demands of any particular situation.

United States v. Place, 462 U.S. 696, 103 S.Ct. 2637, 2646, 77 L.Ed.2d 110 (1983).

Even a 20 minute detention can be unreasonable where officers do not diligently pursue an investigation to confirm or dispel suspicions of criminal activity. Liberal v. Estrada, 632 F.3d 1064, 1081 (9th Cir. 2011) (officers not entitled to qualified immunity in motorist's Fourth Amendment civil action pursuant to 42 U.S.C. § 1983).

> Plaintiff contends that he was detained not as part of an investigative stop, but for an 'attitude adjustment.' The facts, seen in the light most favorable to him, support that conclusion. The prolonged detention was not for a valid investigatory purpose. The officers were not waiting for backup. They were not waiting for investigatory checks to be run or asking Plaintiff questions that would confirm or dispel their suspicions quickly (or at all). The officers knew everything that they needed to know within five to ten minutes of the stop's initiation.
>
> Construing the facts in the light most favorable to Plaintiff, the delay occurred because, as Officer Estrada stated, he did not want to 'let three little punks walk all over [him].' Officer Estrada told Plaintiff that he wanted to 'let [Plaintiff] know that I'm the one in charge here, not you.' Prolonging a detention merely to engage in an 'exaggerated display[ ] of authority' is unreasonable and unconstitutional..

Several Washington cases discussing the proper duration for a warrantless Terry detention follow:

State v. Bray, 143 Wn.App. 148, ¶17, 177 P.3d 154 (2008) (30 minutes held reasonable where the officers' continued their investigation to check the suspect's criminal history and determine whether other storage units had been broken into).

State v. Lund, 70 Wn.App. 437, 446, 853 P.2d 1379 (1993), *review denied*, 123 Wn.2d 1023 (1994) (4 minute detention reasonable)

State v. Moon, 48 Wn.App. 647, 649, 739 P.2d 1157, *review denied*, 108 Wn.2d 1029 (1987) (less than 20 minutes to transport robbery victim to the suspect's location for a show up identification was reasonable and not excessive).

State v. Mercer, 45 Wn.App. 769, 776, 727 P.2d 676 (1986) (approximate 20 minute detention reasonable where trooper contacted city police to investigate due to trooper's inexperience with the alleged crime).

State v. Samsel, 39 Wn.App. 564, 573, 694 P.2d 670 (1985) ("Although the length of time for the stop was not calculated, the testimony reflects defendants were apprehended within a short time after the robbery, the victim arrived within 10 to 12 minutes after being summoned to identify the defendants, and, within a short time thereafter, defendants were formally arrested. In light of these facts, we find the scope of the investigation to be reasonable.").

Chapter Fifteen

Warrantless Terry Stops–Periodic Issues

A. A Warrantless Terry Stop Based Upon an Officer's Mistake of Fact or Law

Washington case law has not specifically ruled concerning the issue of the validity of an officer's Terry stop based upon the officer's mistake of a fact and/or mistake of law.

1. Officer's Mistake of Fact

In State v. Snapp, 174 Wn.2d 177, ¶50, 275 P.3d 289 (2012), a Terry traffic stop was upheld where the officer stopped a vehicle without its headlights on 24 minutes after sunset in alleged violation of RCW 46.37.020, which provides that headlights must be on beginning one-half hour after sunset.

In upholding the stop despite the stop occurring 6 minutes before the headlight statute was satisfied, the court concluded that it was reasonable for the officer to believe that the driver should have had his headlights on even though the officer did not actually know the exact time of sunset based on the officer's testimony that it was dark, cold and icy when the stop occurred.

Arguably, State v. Snapp stands for the proposition that a Terry stop to investigate a traffic infraction is reasonable and valid when based upon a mistake of fact (officer incorrectly thought it was 30 minutes or later after sunset because it was dark, cold and icy).

2. Officer's Mistake of Law–Failure to Transfer Title

In State v. Green, 150 Wn.2d 740, 82 P.3d 239 (2004), the court held that the misdemeanor offense of failure to transfer title within 45 days of purchase, former RCW 46.12.101(6)(d), was not a continuing offense. The court concluded that the misdemeanor is committed only when 45 days have passed since the date of delivery of the vehicle, and that the offense is completed at that point.

In State v. Walker, 129 Wn.App. 572, 119 P.3d 399 (Div. 3 2005), *review denied*, 156 Wn.2d 1036 (2006), an officer stopped a vehicle to investigate a violation of

former RCW 46.12.101(6)(d). The officer had information that the vehicle had been sold four months earlier, but title had not yet been transferred. Based upon the holding in State v. Green, the Walker Court held that the officer's Terry stop of the defendant was unreasonable and thus improper:

> The problem with applying the Terry stop standard here is that the misdemeanor of failure to transfer title is not one of the offenses an officer can investigate. There was simply nothing to investigate. Before stopping Ms. Walker's car, Officer Meyer was already aware the car had been sold more than four months earlier and title to it had not been transferred. This knowledge eliminated the possibility the officer stopped the car to investigate the offense.

State v. Walker, 129 Wn.App. 572, ¶12, 119 P.3d 399 (Div. 3 2005), *review denied*, 156 Wn.2d 1036 (2006).

The holding in Walker appears to be that an officer's mistake of law (that a violation of former RCW 46.12.101(6)(d) could be a crime more than 45 days after the vehicle was purchased) is not a reasonable basis to conduct a Terry investigative stop.

Note that the holdings in State v. Green and State v. Walker that RCW 46.12.101(6)(d) was not a continuing offense were abrogated by the Legislature. *See* Laws of 2008, ch. 316, recodified as RCW 46.12.650 pursuant to Laws of 2010, ch. 161, §1211, effective July 1, 2011.

RCW 46.12.650(7) currently provides:

> Penalty for late transfer. A person who has recently acquired a motor vehicle by purchase, exchange, gift, lease, inheritance, or legal action who does not apply for a new certificate of title within fifteen calendar days of delivery of the vehicle is charged a penalty, as described in RCW 46.17.140, when applying for a new certificate of title. It is a misdemeanor to fail or neglect to apply for a transfer of ownership within forty-five days after delivery of the vehicle. The misdemeanor is a single continuing offense for each day that passes regardless of the number of days that have elapsed following the forty-five day time period.

See State v. Bonds, 2013 WL 1755369, ___ Wn.App. ___, ___ P.2d ___ (Apr. 23, 2013) (Unlike the earlier version of the statute relied on by the Green court, the 2008 version of RCW 46.12.101(6) contained language expressly stating that failure to transfer title is a continuing offense. Thus, the warrantless traffic stop of the vehicle in which the defendant was a passenger is justified because failure to

transfer title is a continuing misdemeanor offense occurring in the officer's presence.).

3. Officer's Mistake of Law−Lane Travel and Weaving

In State v. Prado, 145 Wn.App. 646, 186 P.3d 1186 (2008), an officer stopped a vehicle exiting Interstate 5 at James Street in Seattle for crossing an 8-inch white lane divider by approximately two tire widths for one second. The driver was subsequently arrested for and convicted of DUI. RCW 46.61.140(1), Washington's lane travel statute, requires vehicles to be driven "as nearly as practicable" entirely within a single lane.

The court held that the defendant's driving did not as a matter of law violate RCW 46.61.140(1) because the statute did not impose "strict liability." State v. Prado, 145 Wn.App. at ¶1. The court reasoned the language "as nearly as practicable" demonstrated a legislative recognition that brief incursions over the lane lines will happen. Accordingly, the officer's stop of the defendant's vehicle was unlawful. State v. Prado, 145 Wn.App. at ¶7.

The holding in Prado appears to be that an officer's mistake of law (that crossing a white lane divider by two tire widths for one second could be a violation of RCW 46.61.140(1)) is not a reasonable basis to conduct a Terry stop.

4. Other Jurisdictions

A Terry traffic stop based upon a mistake of fact does not defeat an officer's reasonable suspicion to stop a vehicle. In United States v. Dorais, 241 F.3d 1124 (9th Cir. 2001), the defendant rented a car that was due two days later. Under Hawaii law, a person who keeps a rental car for more than 48 hours after it is due commits a misdemeanor. A rental car employee mistakenly notified police that the car was overdue even though 48 hours had not elapsed as required by statute. Based on the employee's complaint, a police officer stopped the defendant's car. The defendant signed a consent for the officer to search her purse, and the search yielded crystal methamphetamine.

In affirming the district court's denial of the defendant's motion to suppress, the court held the police officer had reasonable suspicion to stop the defendant's car even though the rental car return statute had not in fact been violated.

> [T]he officers here stopped [the defendant] not because of a mistaken understanding of the law, but because of a mistake of fact. The officers correctly understood that Hawaii law criminalizes the possession of a rental car more than 48 hours beyond its return time; the officers simply

> made a mistake of fact as to how long overdue the car was. That mistake of fact does not defeat the officers' reasonable suspicion

United States v. Dorais, 241 F.3d 1124, 1131 (9th Cir. 2001).

A mistake in law, however, will invalidate the initial stop. In United States v. Twilley, 222 F.3d 1092 (9th Cir. 2000), a police officer stopped the defendant based on the officer's mistaken belief that the defendant was violating California law by displaying only one Michigan license plate. In actuality, California law required the defendant to display only one license plate because Michigan law only required one plate. The court held that the officer lacked reasonable suspicion to stop the defendant because a reasonable suspicion cannot be premised on a mistaken understanding of the law.

> But in this circuit, a belief based on a mistaken understanding of the law cannot constitute the reasonable suspicion required for a constitutional traffic stop…A suspicion based on such a mistaken view of the law cannot be the reasonable suspicion required for the Fourth Amendment, because "the legal justification [for a traffic stop] must be objectively grounded." In other words, if an officer makes a traffic stop based on a mistake of law, the stop violates the Fourth Amendment.

United States v. Twilley, 222 F.3d 1092, 1096 (9th Cir. 2000) (citations omitted).

Accord other circuits which have held that a police officer's mistake of law can never be objectively reasonable.

United States v. McDonald, 453 F.3d 958, 961-62 (7th Cir. 2006) ("We agree with the majority of circuits to have considered the issue that a police officer's mistake of law cannot support probable cause to conduct a stop.")

United States v. Tibbetts, 396 F.3d 1132, 1138 (10th Cir. 2005) ("We have consistently held that an officer's mistake of fact, as distinguished from a mistake of law, may support probable cause or reasonable suspicion necessary to justify a traffic stop. But we have also held that failure to understand the law by the very person charged with enforcing it is not objectively reasonable.") (citations omitted).

United States v. Chanthasouxat, 342 F.3d 1271, 1279 (11th Cir. 2003) ("Nonetheless, the government argument is misguided because it proposes that we ask the wrong question: i.e., whether Officer Carter's mistake of law was reasonable under the circumstances. We would answer that question in the affirmative. However, the correct question is whether a mistake of law, no matter

how reasonable or understandable, can provide the objectively reasonable grounds for reasonable suspicion or probable cause. And to that question we join the Fifth and Ninth Circuits in holding that a mistake of law cannot provide reasonable suspicion or probable cause to justify a traffic stop.")

United States v. Miller, 146 F.3d 274, 279 (5th Cir. 1998) (where officer was mistaken about law "no objective basis for probable cause justified the stop").

Contra United States v. Washington, 455 F.3d 824, 827 (8th Cir. 2006) ("In our circuit, if an officer makes a traffic stop based on a mistake of law, the legal determination of whether probable cause or reasonable suspicion existed for the stop is judged by whether the mistake of law was an 'objectively reasonable one.'") (citation and footnote omitted).

B. A Warrantless Terry Stop to Investigate Past Criminal Conduct

1. Fourth Amendment

In United States v. Hensley, 469 U.S. 221, 105 S.Ct. 675, 83 L.Ed.2d 604 (1985), the court address the situation where an officer stopped and detained an individual based on a wanted flyer issued following an armed robbery. Acknowledging the differences between investigating past criminal conduct and detecting ongoing or imminent crime, the Supreme Court recognized that the exigencies involved in crime prevention are attenuated in the context of completed past crimes.

> A stop to investigate an already completed crime does not necessarily promote the interest of crime prevention as directly as a stop to investigate suspected ongoing criminal activity. Similarly, the exigent circumstances which require a police officer to step in before a crime is committed or completed are not necessarily as pressing long afterwards. Public safety may be less threatened by a suspect in a past crime who now appears to be going about his lawful business than it is by a suspect who is currently in the process of violating the law. Finally, officers making a stop to investigate past crimes may have a wider range of opportunity to choose the time and circumstances of the stop.

United States v. Hensley, 469 U.S. 221, 105 S.Ct. 675, 680, 83 L.Ed.2d 604 (1985).

Despite these differences between ongoing crime and completed criminal activity with respect to a warrantless Terry stop, based upon the facts presented to the court, the Hensley Court held that law enforcement's ability to briefly stop a

suspect without a warrant and ask questions or check identification in the absence of probable cause promoted "the strong government interest in solving crimes and bringing offenders to justice." United States v. Hensley, 105 S.Ct. at 680.

The Hensley Court stressed, however, that under the Fourth Amendment a strong government interest in solving crimes and bringing offenders to justice is promoted when balancing a brief stop in the absence of probable cause to allow law enforcement to ask questions or check identification. "Particularly in the context of felonies or crimes involving a threat to public safety, it is the public interest that the crime be solved and the suspect detained as promptly as possibly." United States v. Hensley, 105 S.Ct. at 680.

The Hensley Court specifically noted that its holding was limited to a warrantless Terry stop and detention for a completed felony.

> We need not and do not decide today whether Terry stops to investigate all past crimes, however serious, are permitted. It is enough to say that, if police have a reasonable suspicion, grounded in specific and articulable facts, that a person they encounter was involved in or is wanted in connection with a completed felony, then a Terry stop may be made to investigate that suspicion. The automatic barrier to such stops erected by the Court of Appeals accordingly cannot stand.

Federal courts are divided on the issue of whether the Fourth Amendment per se prohibits police from stopping a vehicle without a warrant based only on reasonable suspicion of a completed misdemeanor or civil infraction.

Gaddis ex rel. Gaddis v. Redford Twp., 364 F.3d 763, 771 n.6 (6th Cir. 2004) ("Police may ... make a stop when they have reasonable suspicion of a completed felony, though not of a mere completed misdemeanor.").

The Eighth, Ninth and Tenth Circuits refused to adopt the Sixth Circuit's per se prohibition of warrantless Terry stops for completed misdemeanors. These circuits instead apply a balancing test wherein the individual's interest is weighed against the governmental interest on a case-by-case basis.

United States v. Grigg, 498 F.3d 1070, 1081 (9th Cir. 2007) (holding that, in reviewing the reasonableness of a stop to investigate a completed misdemeanor, a court "must consider the nature of the misdemeanor offense in question, with particular attention to the potential for ongoing or repeated danger ... and any risk of escalation").

United States v. Moran, 503 F.3d 1135, 1141-42, *cert. denied*, 553 U.S. 1035, 128 S.Ct. 2424, 171 L.Ed.2d 234 (10th Cir. 2007).

> Following the Supreme Court's approach in Hensley, we determine the constitutionality of an investigatory stop by balancing "the nature and quality of the intrusion on personal security against the importance of the governmental interests alleged to justify the intrusion." We first evaluate the governmental interests involved in the officers' stop of Mr. Moran. In Hensley, the Court explained that the governmental interest in crime prevention and detection, necessarily implicated in a stop to investigate ongoing or imminent criminal conduct, may not be present when officers are investigating past criminal conduct. A stop to investigate past criminal activity may, however, serve the governmental interest in "solving crimes and bringing offenders to justice." This interest is particularly strong when the criminal activity involves a threat to public safety.

(citations omitted) (footnote omitted).

United States v. Hughes, 517 F.3d 1013, 1017-18 (8th Cir. 2008) ("Like the Ninth and Tenth Circuits, this court declines to adopt a per se rule that police may never stop an individual to investigate a completed misdemeanor. To determine whether a stop is constitutional, this court must balance the 'nature and quality of the intrusion on personal security against the importance of the governmental interests alleged to justify the intrusion.' ") (citation omitted).

However, even those courts that apply a balancing test often find reasonable suspicion of a completed misdemeanor to be insufficient to justify a warrantless Terry stop under the Fourth Amendment.

See, *e.g.*, United States v. Hughes, 517 F.3d at 1018 (concluding reasonable suspicion of completed trespass-a misdemeanor under state law-insufficient to justify a warrantless Terry stop); and United States v. Grigg, 498 F.3d at 1081-82 (holding unreasonable a warrantless Terry traffic stop based on a complaint that the driver had been playing his stereo at an excessive volume earlier in the day).

Contra United States v. Moran, 503 F.3d at 1143 ("To be clear, we stress the limited and fact-dependent nature of our holding. We do not suggest that all investigatory stops based on completed misdemeanors are reasonable or even that any stop based on a completed criminal trespass is per se reasonable." Warrantless Terry stop held justified where multiple reports of same individual trespassing on the same day, the individual was likely armed as he was trespassing to reach hunting grounds, there were previous confrontations

between the trespasser and the property owner, and the trespasser had threatened other local property owners.)

In State v. Quezadas-Gomez, 165 Wn.App. 593, 267 P.3d 1036 (2011), *review denied*, 173 Wn.2d 1034 (2012), an officer conducted a warrantless traffic stop of a driver to identify him because the driver was believed to have been involved in a prior drug transaction nine days earlier. The driver identified himself and his address, and was permitted to drive away. Additional drug buys were conducted and a search warrant obtained for the suspect's residence and vehicle. The majority held that the warrantless stop was valid because the officer had probable cause to arrest the suspect at that time of the stop.

Although the criminal activity involved a felony drug transaction, the dissent would not have upheld the warrantless traffic stop under the Fourth Amendment, citing concerns raised in United States v. Hensley. State v. Quezadas-Gomez, 165 Wn.App. 593, ¶32, 267 P.3d 1036 (2011), *review denied*, 173 Wn.2d 1034 (2012), ("[T]he [warrantless] stop was not intended to prevent additional criminal activity but, rather, to broaden the scope of Officer Demmon's investigation. Not only do these facts distinguish this case from Hensley, but they weigh against allowing such investigatory stops under the test in Hensley.") (Johanson, J., dissenting).

2. Const. Art. I, §7

Washington caselaw has not been developed concerning whether a warrantless Terry stop and detention for a completed non-felony offense is consistent with the privacy protections of const. art. I, §7.

The case of State v. Walker, 129 Wn.App. 572, *review denied*, 156 Wn.2d 1036 (2005) dealt with a warrantless Terry stop and detention for a completed misdemeanor, but lacks clarity whether the holding is based upon statutory or constitutional grounds. In Walker, the defendant was stopped for failure to transfer title in alleged violation of former RCW 46.12.101(6), a misdemeanor. The defendant was searched incident to arrest, and methamphetamine was found. In State v. Green, 150 Wn.2d 740, 82 P.3d 239 (2004), our Supreme Court had previously held that the misdemeanor of failure to transfer title was not a continuing offense because the offense was committed only when 45 days had elapsed since the delivery of the vehicle to the purchaser.

Following State v. Green, the Walker Court held that the initial warrantless Terry stop of the defendant was invalid because the officer had nothing to investigate. The vehicle had been sold more than four months earlier and title had not been

transferred within 45 days of the sale. “This knowledge eliminated the possibility the officer stopped the car to investigate the offense.” State v. Walker, 129 Wn.App. at ¶¶12, 16.

The Walker Court continued that the seizure of the defendant was also unlawful because the warrantless Terry stop for the failure to transfer title misdemeanor offense did not occur in the officer’s presence as required by RCW 10.31.100.

The underlying rationale of Walker is somewhat unclear because any constitutional analysis concerning whether a warrantless Terry stop was valid under const. art. I, §7 involves the “scope of constitutional protections, not statutory interpretation.” State v. Day, 161 Wn.2d 889, ¶13, 168 P.3d 1265 (2007). The officer’s compliance with RCW 10.31.100 would be irrelevant to a constitutional analysis under Const. art. I, §7.

The Walker holding cites to several warrantless Terry stop cases, including State v. Kennedy, 107 Wn.2d 1, 726 P.2d 445 (1986), State v. Ladson, 138 Wn.2d 343, 979 P.2d 833 (1999), and Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). Walker fails, however, to cite to Const. art. I, §7 or other constitutional provisions.

Walker could be read as holding that a warrantless Terry stop for a completed misdemeanor is never valid because there is nothing for the officer to investigate. *Contra* State v. Quezadas-Gomez, 165 Wn.App. 593, 267 P.3d 1036 (2011), *review denied*, 173 Wn.2d 1034 (2012) discussed above, at least for warrantless stops for completed felony offenses under the Fourth Amendment.

Walker could also be read as permitting a warrantless Terry stop for a completed misdemeanor if the offense is one where an arrest based on probable cause is permitted by RCW 10.31.100.

Given these concerns, Walker cannot be read as “authority of law” under a Const. art. I, §7 analysis concerning whether our state constitution authorizes or prohibits a warrantless Terry stop for a completed non-felony offense.

Additional briefing and caselaw will be necessary to resolve the question whether Const. art. I, §7 authorizes a warrantless Terry stop and detention for a completed non-felony offense.

C. Questioning Unrelated to the Reason for a Warrantless Terry Stop

Under the Fourth Amendment, a traffic stop does not become an unlawful seizure simply because the officer inquires into matters unrelated to the justification for the stop, so long as those inquiries "do not measurably extend the duration of the stop". Arizona v. Johnson, 555 U.S. 323, 129 S.Ct. 781, 788, 172 L.Ed.2d 694 (2009):

> A lawful roadside stop begins when a vehicle is pulled over for investigation of a traffic violation. The temporary seizure of driver and passengers ordinarily continues, and remains reasonable, for the duration of the stop. Normally, the stop ends when the police have no further need to control the scene, and inform the driver and passengers they are free to leave. An officer's inquiries into matters unrelated to the justification for the traffic stop, this Court has made plain, do not convert the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop.

(citations omitted).

Analysis under Const. art. I, §7 is less developed concerning the parameters of an officer's questioning of a driver unrelated to the reason for a warrantless Terry stop.

In State v. Allen, 138 Wn.App. 463, 157 P.3d 893 (2007), a female driver was pulled over for a non-working license plate light. The driver was asked for her driver's license and vehicle registration, which she provided. A passenger (the defendant Allen) was observed. The officer returned to his patrol vehicle and checked the driver's information. The officer learned that the driver was a petitioner in a protection order, and that it applied to "Allen." The officer assumed the "Allen" was a male, but he did not know the gender or obtain a description of the restrained party.

The officer asked for the name of the passenger, believing that he was the "Allen" in the court order. Both the driver and defendant gave a false name. A second computer check revealed no record for the false name provided. The officer returned to the vehicle, and asked the driver to exit the vehicle, which she did. The two walked to the rear of the vehicle. Ultimately, the officer obtained the passenger's true name and the defendant was arrested. A search incident to arrest revealed methamphetamine under the front passenger seat. The defendant was convicted of possession of a controlled substance and violation of the court order.

The Allen Court reversed the convictions, holding that the defendant/passenger was unlawfully seized because the officer lacked a reasonable suspicion to question the passenger about the court order.

The Allen Court also held that the officer's questioning of the driver about the identification of the passenger was not within the scope of the original traffic violation, and was thus unlawful. "This is essentially the fishing expedition that the exclusionary rule seeks to prohibit." State v. Allen, 138 Wn.App. 463, ¶23, 157 P.3d 893 (2007).

The Allen Court cited to State v. Rankin, 151 Wn.2d 689, 699, 92 P.3d 202 (2004). Rankin held that Const. art. I, §7 prohibits officers from requesting identification for investigative purposes from passengers in vehicles stopped by law enforcement after a show of authority unless an independent reason justifies the request. Rankin emphasized that passengers do not "have the realistic alternative of leaving the scene as does a pedestrian," and cited with approval, State v. O'Neill, 148 Wn.2d 564, 62 P.3d 489 (2003). O'Neill establishes that Const. art. I, §7 permits officers to engage in conversation and request identification from occupants in cars parked in public places because such occupants are like pedestrians.

Discussing State v. Rankin further, the Allen Court said:

> FN4. Although the dissent correctly notes that our Supreme Court has not yet addressed the legality of a police officer questioning a driver about a passenger after a traffic stop, the Rankin holding provides guidance. In Rankin, "a police officer asked a passenger for identification for the sole purpose of conducting a criminal investigation, notwithstanding the fact that the officer lacked any articulable suspicion of criminal activity."
>
> The notion that an officer could question a driver in a traffic stop about a passenger for the sole purpose of conducting a criminal investigation with no articulable suspicion of criminal activity runs contrary to the Rankin holding that protects a passenger's private affairs under article I, section 7. Without this protection, police could have a backdoor route into conducting a criminal investigation that Rankin prohibits.

State v. Allen, 138 Wn.App. 463, ¶17 n.4, 157 P.3d 893 (2007) (citation omitted).

Concerning the issue of standing, *see* State v. Shuffelen, 150 Wn.App. 244, ¶21, 208 P.3d 1167, *review denied*, 167 Wn.2d 1008 (2009) (Passenger/defendant lacked standing to challenge the officer's questioning of the driver about the passenger's identity. Domestic violence court order conviction affirmed. State v.

Allen is distinguished because the Allen Court expressly stated it did not address standing under Const. art. I, §7.) *See also* State v. Pettit, 160 Wn.App. 716, ¶10, 251 P.3d 896, *review denied*, 171 Wn.2d 1034 (2011) (Driver/defendant lacked standing to challenge officer's questioning of passenger. Domestic violence court order conviction affirmed. State v. Allen distinguished.)

See Chapter 18 (Pretextual Warrantless Terry Stops).

Chapter Sixteen

Warrantless Terry Stops–Infractions Generally

A. Probable Cause is Not Required for a Warrantless Traffic Infraction Stop

Many arrests occur arising out of a warrantless traffic infraction stop. A traffic infraction stop is a "seizure" for the purpose of constitutional analysis, no matter how brief. State v. Ladson, 138 Wn.2d 343, 350, 979 P.2d 833 (1999).

The Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 1880, 20 L.Ed.2d 889 (1968) reasonable suspicion standard has been extended to apply to stops based upon traffic violations. State v. Duncan, 146 Wn.2d 166, 175, 43 P.3d 513 (2002); State v. Ladson, 138 Wn.2d 343, 350-51, 979 P.2d 833 (1999).

Terry v. Ohio's "reasonable, articulable suspicion" standard applies to traffic infractions. Probable cause is the "wrong standard." State v. Snapp, 174 Wn.2d 177, ¶47, 275 P.3d 289 (2012).

The holding in Snapp rejects *sub silentio* a number of older cases requiring probable cause before an officer may stop a vehicle to investigate a traffic infraction. *See* State v. Chelly, 94 Wn.App. 254, 259, 970 P.2d 376, *review denied*, 138 Wn.2d 1009 (1999); State v. Cole, 73 Wn.App. 844, 849, 871 P.2d 656, *review denied*, 125 Wn.2d 1003 (1994).

Warrantless traffic stops are constitutional under Const. art. I, §7 as Terry investigative stops, but only if based upon at least a reasonable articulable suspicion of either criminal activity or a traffic infraction, and only if reasonably limited in scope. State v. Arreola, 176 Wn.2d 284, ¶14, 290 P.3d 983 (2012).

> The narrow exception to the warrant requirement for investigative stops has been extended beyond criminal activity to the investigation of traffic infractions because of 'the law enforcement exigency created by the ready mobility of vehicles and governmental interests in ensuring safe travel, as evidenced in the broad regulation of most forms of transportation.' [State

> v. Day, 161 Wn.2d 889, 897, 168 P.3d 1265 (2007)] (*quoting* State v. Johnson, 128 Wn.2d 431, 454, 909 P.2d 293 (1996)); [State v. Duncan, 146 Wn.2d 166, 174, 43 P.3d 513 (2002)].

State v. Arreola, 176 Wn.2d 284, ¶14, 290 P.3d 983 (2012).

One's privacy interest within a vehicle, however, remains substantial. For this reason, the "use of traffic stops must remain limited and must not encroach upon the right to privacy except as is reasonably necessary to promote traffic safety and to protect the general welfare through the enforcement of traffic regulations and criminal laws." State v. Arreola, 176 Wn.2d 284, ¶16, 290 P.3d 983 (2012).

> Although traffic stops are legally authorized for the investigation of traffic infractions or criminal activity, each such investigative stop must be justified at its inception and must be reasonably limited in scope based on whatever reasonable suspicions legally justified the stop in the first place.

State v. Arreola, 176 Wn.2d 284, ¶16, 290 P.3d 983 (2012).

In reviewing the propriety of a traffic infraction stop, as with other Terry stops, a court evaluates the totality of the circumstances. State v. Snapp, 174 Wn.2d 177, ¶47, 275 P.3d 289 (2012).

B. Probable Cause is Required to Issue a Traffic Infraction

Although an officer does not have to have probable cause to stop a vehicle to investigate a traffic infraction, an infraction may only be issued where an officer or prosecuting authority certifies that he or she "has probable cause to believe, and does believe, that the person has committed an infraction contrary to law…" IRLJ 2.2(b).

The infraction need not have been committed in the officer's presence, except as provided by statute. IRLJ 2.2(b)(1); RCW 46.63.030(1).

C. The Validity of a Warrantless Terry Traffic Infraction Stop Does Not Depend on Whether a Traffic Infraction was in Fact Committed

The validity of an officer's decision to stop a vehicle for a traffic infraction does not depend on the driver's "actually having violated the statute." Rather, the stop is justified if the officer had a reasonable suspicion that the driver was violating a traffic statute. State v. Snapp, 174 Wn.2d 177, ¶48, 275 P.3d 289 (2012).

In Snapp, the defendant was stopped 24 minutes after sunset for driving without his vehicle's headlights on in alleged violation of RCW 46.37.020 which provides

that headlights must be on beginning one-half hour after sunset. The court upheld the traffic infraction stop.

> We conclude that Officer Gregorio could rationally believe that a traffic infraction was being committed. It was very near the time when headlights were required to be turned on regardless of conditions. It was dark, cold, and icy, and therefore reasonable for Gregorio to believe that Wright [a consolidated defendant] should have had his headlights on without actually knowing the exact time of sunset and then mentally adding 30 minutes. As mentioned, an actual violation is not necessary for a valid stop. Moreover, the headlight statute also provides that headlights must be on "at any other time when, due to insufficient light or unfavorable atmospheric conditions, persons and vehicles on the highway are not clearly discernible at a distance of one thousand feet ahead." RCW 46.37.020.

State v. Snapp, 174 Wn.2d 177, ¶50, 275 P.3d 289 (2012).

See also Clement v. Department of Licensing, 109 Wn.App. 371, 35 P.3d 1171 (2001), *review denied*, 146 Wn.2d 1017 (2002) (warrantless Terry traffic infraction stop for speeding based upon radar reading valid even though no foundational evidence presented to support the radar reading).

D. An Officer's Check for Identification, License, Registration, Insurance and Outstanding Warrants is Statutorily Authorized

Washington law authorizes an officer to detain a person lawfully stopped for a traffic infraction for a reasonable time to conduct various checks. RCW 46.61.021 says:

> (1) Any person requested or signaled to stop by a law enforcement officer for a traffic infraction has a duty to stop.
>
> (2) Whenever any person is stopped for a traffic infraction, the officer may detain that person for a reasonable period of time necessary to identify the person, check for outstanding warrants, check the status of the person's license, insurance identification card, and the vehicle's registration, and complete and issue a notice of traffic infraction.
>
> (3) Any person requested to identify himself or herself to a law enforcement officer pursuant to an investigation of a traffic infraction has a duty to identify himself or herself and give his or her current address.

In State v. Rife, 133 Wn.2d 140, 150-51, 943 P.2d 266 (1997), the court held that an officer lacked authority pursuant to RCW 46.61.021 to run a warrant check after stopping a pedestrian for "jaywalking" because the person was not a driver. The Legislature abrogated the holding in Rife by amending RCW 46.61.021 to permit a check for warrants. State v. Barnes, 96 Wn.App. 217, n.2, 978 P.2d 1131 (1999).

E. A Warrantless Terry Stop is Not Permitted for Investigation of a Civil Non-Traffic Infraction or a Parking Infraction

A Terry detention is not permitted to investigate a civil non-traffic infraction. State v. Duncan, 146 Wn.2d 166, 177-78, 43 P.3d 513 (2002) (officers' suspicion that defendant was in possession of an open container of alcohol in public, a civil non-traffic infraction, did not justify seizure of the defendant to investigate the infraction).

The reasons underlying extending Terry's reasonable suspicion standard to traffic violations "simply lose force in the parking context." A Terry detention to investigate a parking infraction in not reasonable. State v. Day, 161 Wn.2d 889, ¶12, 168 P.3d 1265 (2007) (Terry frisk while investigating a parking infraction held improper).

F. Traffic Infractions Occurring on Private Property

Washington's traffic infraction statutes in Title 46 RCW generally only apply to actions occurring on public roads because most traffic infraction statutes include either the term "roadway" or "highway." RCW 46.04.500 defines "roadway" as a portion of a "highway:"

> "Roadway" means that portion of a highway improved, designed, or ordinarily used for vehicular travel, exclusive of the sidewalk or shoulder even though such sidewalk or shoulder is used by persons riding bicycles. In the event a highway includes two or more separated roadways, the term "roadway" shall refer to any such roadway separately but shall not refer to all such roadways collectively.

RCW 46.04.197 defines "highway" as a publicly maintained area:

> Highway means the entire width between the boundary lines of every way publicly maintained when any part thereof is open to the use of the public for purposes of vehicular travel.

See State v. Brown, 119 Wn.App. 473, 81 P.3d 916 (2003) (Defendant failed to signal when exiting a 7-11 store. Cocaine was found. Held that RCW 46.61.305(1)'s requirement to signal before turning does not apply to actions on private property. Conviction reversed.)

See also RCW 46.61.005:

> The provisions of this chapter relating to the operation of vehicles refer exclusively to the operation of vehicles upon highways except:
>
> (1) Where a different place is specifically referred to in a given section.
>
> (2) The provisions of RCW 46.52.010 through 46.52.090, 46.61.500 through 46.61.525, and 46.61.5249 shall apply upon highways and elsewhere throughout the state.

A few Title 46 RCW traffic infractions occurring on private property may be cited.

1. Failure to Stop Prior to Driving On Sidewalk When Exiting Private Property

RCW 46.61.365 requires a driver to stop immediately prior to driving on a sidewalk or sidewalk area extending across an alley or driveway.

> The driver of a vehicle within a business or residence district emerging from an alley, driveway or building shall stop such vehicle immediately prior to driving onto a sidewalk or onto the sidewalk area extending across any alleyway or driveway, and shall yield the right-of-way to any pedestrian as may be necessary to avoid collision, and upon entering the roadway shall yield the right-of-way to all vehicles approaching on said roadway.

RCW 46.04.540 defines "sidewalk:"

> "Sidewalk" means that property between the curb lines or the lateral lines of a roadway and the adjacent property, set aside and intended for the use of pedestrians or such portion of private property parallel and in proximity to a public highway and dedicated to use by pedestrians.

2. Special Parking Privileges for Persons With Disabilities

RCW 46.19.050 sets forth several parking infractions concerning persons with disabilities. RCW 46.19.050 reads in pertinent part:

(2) **Unauthorized use**. Any unauthorized use of the special placard, special license [plate], or identification card issued under this chapter is a parking infraction with a monetary penalty of two hundred fifty dollars. In addition to any penalty or fine imposed under this subsection, two hundred dollars must be assessed.

(3) **Inaccessible access**. It is a parking infraction, with a monetary penalty of two hundred fifty dollars, for a person to park in, block, or otherwise make inaccessible the access aisle located next to a space reserved for persons with physical disabilities. In addition to any penalty or fine imposed under this subsection, two hundred dollars must be assessed. The clerk of the court shall report all violations related to this subsection to the department.

(4) **Parking without placard/plate**. It is a parking infraction, with a monetary penalty of two hundred fifty dollars, for any person to park a vehicle in a parking place provided on private property without charge or on public property reserved for persons with physical disabilities without a placard or special license plate issued under this chapter. In addition to any penalty or fine imposed under this subsection, two hundred dollars must be assessed. If a person is charged with a violation, the person will not be determined to have committed an infraction if the person produces in court or before the court appearance the placard or special license plate issued under this chapter as required under this chapter. A local jurisdiction providing nonmetered, on-street parking places reserved for persons with physical disabilities may impose by ordinance time restrictions of no less than four hours on the use of these parking places.

(5) **Time restrictions**. A local jurisdiction may impose by ordinance time restrictions of no less than four hours on the use of nonreserved, on-street parking spaces by vehicles displaying the special parking placards or special license plates issued under this chapter. All time restrictions must be clearly posted.

3. Homeowners Associations and Speeding

RCW 46.61.419 authorizes law enforcement to enforce speeding violations on private roads within a community organized as a homeowners' association when approved by the association and the chief law enforcement official of the jurisdiction.

G. Washington Model Traffic Ordinance

A municipal court has exclusive original jurisdiction over traffic infractions and violations arising under city ordinances. *See* RCW 3.46, 3.50, 35.20.

The legislature has authorized creation of a model traffic ordinance which permits local jurisdictions to adopt one ordinance which includes all state traffic statutes included in the model ordinance. RCW 46.90.005 sets forth the purpose of this model ordinance:

> The purpose of this chapter is to encourage highway safety and uniform traffic laws by authorizing the department of licensing to adopt a comprehensive compilation of sound, uniform traffic laws to serve as a guide which local authorities may adopt by reference or any part thereof, including all future amendments or additions thereto. Any local authority which adopts that body of rules by reference may at any time exclude any section or sections of those rules that it does not desire to include in its local traffic ordinance. The rules are not intended to deny any local authority its legislative power, but rather to enhance safe and efficient movement of traffic throughout the state by having current, uniform traffic laws available.

Once a local jurisdiction adopts the model ordinance, any future amendment or repeal of a state statute automatically amends the local jurisdiction's model ordinance. RCW 46.90.010 provides:

> In consultation with the chief of the Washington state patrol and the traffic safety commission, the director shall adopt in accordance with chapter 34.05 RCW a model traffic ordinance for use by any city, town, or county. The addition of any new section to, or amendment or repeal of any section in, the model traffic ordinance is deemed to amend any city, town, or county, ordinance which has adopted by reference the model traffic ordinance or any part thereof, and it shall not be necessary for the legislative authority of any city, town, or county to take any action with respect to such addition, amendment, or repeal notwithstanding the provisions of RCW 35.21.180, 35A.12.140, 35A.13.180, and 36.32.120(7).

The Washington Model Traffic Ordinance is codified in WAC 308-330.

Chapter Seventeen

Warrantless Terry Stops–Frequently Utilized Traffic Infractions Which Ripen Into Arrests

Many vehicles stopped for investigation of a traffic infraction result in the arrest of the vehicle's occupants for criminal behavior discovered during the warrantless Terry traffic infraction investigation. The following is a non-exclusive list of traffic infraction statutes frequently cited to a court in support of the initial warrantless seizure of the vehicle and its occupants.

A. Cell Phone to Ear While Driving

RCW 46.61.667 concerns cell phone usage while driving:

> (1) [**Holding Cell Phone to Ear**]. Except as provided in subsections (2) and (3) of this section, a person operating a moving motor vehicle while holding a wireless communications device to his or her ear is guilty of a traffic infraction.
>
> (2) [**Exceptions**]. Subsection (1) of this section does not apply to a person operating:
>
> (a) [**Emergency or Tow Vehicle**]. An authorized emergency vehicle, or a tow truck responding to a disabled vehicle;
>
> (b) [**Hands-Free Wireless Device**]. A moving motor vehicle using a wireless communications device in hands-free mode;
>
> (c) [**Authorized for Special Purposes**]. A moving motor vehicle using a hand-held wireless communications device to:
>
> (i) Report illegal activity;
>
> (ii) Summon medical or other emergency help;
>
> (iii) Prevent injury to a person or property; or

(iv) Relay information that is time sensitive between a transit or for-hire operator and that operator's dispatcher, in which the device is permanently affixed to the vehicle;

(d) A moving motor vehicle while using a hearing aid.

(3) [**Amateur Radio Operator**]. Subsection (1) of this section does not restrict the operation of an amateur radio station by a person who holds a valid amateur radio operator license issued by the federal communications commission.

(4) [**Definition of "Hands-Free**]. For purposes of this section, "hands-free mode" means the use of a wireless communications device with a speaker phone, headset, or earpiece.

(5) [**State Preempts Field**]. The state preempts the field of regulating the use of wireless communications devices in motor vehicles, and this section supersedes any local laws, ordinances, orders, rules, or regulations enacted by a political subdivision or municipality to regulate the use of wireless communications devices by the operator of a motor vehicle.

(6) [**Infraction Not Part of Driver's Record; Not Available to Insurance Companies or Employers**]. Infractions that result from the use of a wireless communications device while operating a motor vehicle under this section shall not become part of the driver's record under RCW 46.52.101 and 46.52.120. Additionally, a finding that a person has committed a traffic infraction under this section shall not be made available to insurance companies or employers.

B. Embracing While Driving

RCW 46.61.665 concerns embracing while driving:

> It shall be unlawful for any person to operate a motor vehicle upon the highways of this state when such person has in his or her embrace another person which prevents the free and unhampered operation of such vehicle. Operation of a motor vehicle in violation of this section is prima facie evidence of reckless driving.

C. Equipment Violations

1. License Plates

RCW 46.16A.200 generally discusses license plates. RCW 46.16A.200(5)(a) sets forth license plate display requirements:

> (5)(a) Display. License plates must be:
>
> (i) [**Attached Conspicuously at Front and Rear if Two Plates Required**]. Attached conspicuously at the front and rear of each vehicle if two license plates have been issued;
>
> (ii) [**Attached to Rear if One Plate Required**]. Attached to the rear of the vehicle if one license plate has been issued;
>
> (iii) [**Clean and Plainly Seen**]. Kept clean and be able to be plainly seen and read at all times; and
>
> (iv) [**Horizontal Not More Than 4 Feet From Ground**]. Attached in a horizontal position at a distance of not more than four feet from the ground.
>
> (b) [**WSP May Grant Exceptions if Compliance Impossible**]. The Washington state patrol may grant exceptions to this subsection if the body construction of the vehicle makes compliance with this section impossible.

WAC 308-56A-500(12) defines “impossible” as used in RCW 46.16A.200(5)(b) as follows:

> (12) [**Nothing Made by Manufacturer to Allow Plate to be Affixed as Required**]. "Impossible" as used in RCW 46.16A.200, means that there was nothing made by the manufacturer (to include, but not limited to, a bracket or the bumper of the vehicle) for the originally manufactured vehicle which would allow the license plate to be affixed to the vehicle in the manner prescribed in RCW 46.16A.200.

As of February 13, 2013, the Washington State Patrol has only exempted the following vehicles from having a front license plate pursuant to RCW 46.16A.200(5)(b):

- 1965 Ford Shelby Cobra (2004 built replica)
- 1967 Ford Cobra

- 1984 Ferrari 512 BBI
- 1986 Lamborghini Countach 5000
- 1987 Lamborghini Countach
- 1995 Westfield
- 2010 Lamborghini Murcielago LP 670-4 Super Veloche

2. License Plates−Unlawful Acts

RCW 46.16A.200(7) concerns unlawful acts concerning license plates:

> (7) Unlawful acts. It is unlawful to:
>
> (a) [**Plate Not Issued by DOL**]. Display a license plate or plates on the front or rear of any vehicle that were not issued by the director for the vehicle;
>
> (b) [**Altered, Illegible Plate**]. Display a license plate or plates on any vehicle that have been changed, altered, or disfigured, or have become illegible;
>
> (c) [**Frame Making Plate or Tab Illegible; Plate Must be Plainly Seen and Read at All Times**]. Use holders, frames, or other materials that change, alter, or make a license plate or plates illegible. License plate frames may be used on license plates only if the frames do not obscure license tabs or identifying letters or numbers on the plates and the license plates can be plainly seen and read at all times;
>
> (d) [**Operate Vehicle Unless Plate Properly Attached**]. Operate a vehicle unless a valid license plate or plates are attached as required under this section;
>
> (e) [**Transfer Plate**]. Transfer a license plate or plates issued under this chapter between two or more vehicles without first making application to transfer the license plates. A violation of this subsection (7)(e) is a traffic infraction subject to a fine not to exceed five hundred dollars. Any law enforcement agency that determines that a license plate or plates have been transferred between two or more vehicles shall confiscate the license plate or plates and return them to the department for nullification along with full details of the reasons for confiscation. Each vehicle identified in the transfer will be issued a new license plate or plates upon application by the owner or owners and the payment of full fees and taxes; or

(f) [**Fail to Sign Registration**]. Fail, neglect, or refuse to endorse the registration certificate and deliver the license plate or plates to the purchaser or transferee of the vehicle, except as authorized under this section.

3. Lighting−Color of Lights

RCW 46.37.100 concerns the color of vehicle lighting:

(1) [**Front Marker Lamps Amber**]. Front clearance lamps and those marker lamps and reflectors mounted on the front or on the side near the front of a vehicle shall display or reflect an amber color.

(2) [**Rear Marker Lamps Red**]. Rear clearance lamps and those marker lamps and reflectors mounted on the rear or on the sides near the rear of a vehicle shall display or reflect a red color.

(3) [**Rear Mounted Lights**]. All lighting devices and reflectors mounted on the rear of any vehicle shall display or reflect a red color, except the stop lamp or other signal device, which may be red, amber, or yellow, and except that on any vehicle forty or more years old, or on any motorcycle regardless of age, the taillight may also contain a blue or purple insert of not more than one inch in diameter, and except that the light illuminating the license plate shall be white and the light emitted by a back-up lamp shall be white or amber.

4. Lighting−Headlights−Requirements

RCW 46.37.040 concerns head lamp requirements:

(1) [**Two Head Lamps Required**]. Every motor vehicle shall be equipped with at least two head lamps with at least one on each side of the front of the motor vehicle, which head lamps shall comply with the requirements and limitations set forth in this chapter.

(2) [**24 Inches to 54 Inches in Height**]. Every head lamp upon every motor vehicle shall be located at a height measured from the center of the head lamp of not more than fifty-four inches nor less than twenty-four inches to be measured as set forth in RCW 46.37.030(2).

RCW 46.37.220 concerns the proper aiming of head lamps:

Except as hereinafter provided, the head lamps or the auxiliary driving lamp or the auxiliary passing lamp or combination thereof on motor

> vehicles shall be so arranged that the driver may select at will between distributions of light projected to different elevations, and such lamps may be so arranged that such selection can be made automatically subject to the following limitations:
>
> (1) [**Uppermost Distribution of Light**]. There shall be an uppermost distribution of light, or composite beam, so aimed and of such intensity as to reveal persons and vehicles at a distance of four hundred fifty feet ahead for all conditions of loading;
>
> (2) [**Lowermost Distribution of Light**]. There shall be a lowermost distribution of light, or composite beam, so aimed and of sufficient intensity to reveal persons and vehicles at a distance of one hundred fifty feet ahead; and on a straight level road under any conditions of loading none of the high intensity portion of the beam shall be directed to strike the eyes of an approaching driver;
>
> (3) [**Beam Indicator Required**]. Every new motor vehicle registered in this state after January 1, 1948, which has multiple-beam road-lighting equipment shall be equipped with a beam indicator, which shall be lighted whenever the uppermost distribution of light from the head lamps is in use, and shall not otherwise be lighted. Said indicator shall be so designed and located that when lighted it will be readily visible without glare to the driver of the vehicle so equipped.

5. Lighting−Headlights−Usage Requirements

RCW 46.37.020 concerns the display of vehicle lighting:

> Every vehicle upon a highway within this state at any time from a half hour after sunset to a half hour before sunrise and at any other time when, due to insufficient light or unfavorable atmospheric conditions, persons and vehicles on the highway are not clearly discernible at a distance of one thousand feet ahead shall display lighted headlights, other lights, and illuminating devices as hereinafter respectively required for different classes of vehicles, subject to exceptions with respect to parked vehicles, and such stop lights, turn signals, and other signaling devices shall be lighted as prescribed for the use of such devices.

In State v. Snapp, 174 Wn.2d 177, 275 P.3d 289 (2012), the defendant was stopped 24 minutes after sunset for driving without his vehicle's headlights on in alleged violation of RCW 46.37.020 which provides that headlights must be on

beginning one-half hour after sunset. The court upheld the warrantless Terry traffic infraction stop.

> We conclude that Officer Gregorio could rationally believe that a traffic infraction was being committed. It was very near the time when headlights were required to be turned on regardless of conditions. It was dark, cold, and icy, and therefore reasonable for Gregorio to believe that Wright [a consolidated defendant] should have had his headlights on without actually knowing the exact time of sunset and then mentally adding 30 minutes. As mentioned, an actual violation is not necessary for a valid stop. Moreover, the headlight statute also provides that headlights must be on "at any other time when, due to insufficient light or unfavorable atmospheric conditions, persons and vehicles on the highway are not clearly discernible at a distance of one thousand feet ahead." RCW 46.37.020.

State v. Snapp, 174 Wn.2d 177, ¶48, 275 P.3d 289 (2012).

6. Lighting−Headlights−Usage Requirements−Failure to Dim

RCW 46.37.230 concerns the failure to dim headlights:

> (1) [**Headlights Must be Used to Reveal Persons and Vehicles at a Safe Distance**]. Whenever a motor vehicle is being operated on a roadway or shoulder adjacent thereto during the times specified in RCW 46.37.020, the driver shall use a distribution of light, or composite beam, directed high enough and of sufficient intensity to reveal persons and vehicles at a safe distance in advance of the vehicle, subject to the following requirements and limitations:
>
> (2) [**Oncoming Vehicle Within 500 Feet**]. Whenever a driver of a vehicle approaches an oncoming vehicle within five hundred feet, such driver shall use a distribution of light, or composite beam, so aimed that the glaring rays are not projected into the eyes of the oncoming driver. The lowermost distribution of light, or composite beam, specified in RCW 46.37.220(2) shall be deemed to avoid glare at all times, regardless of road contour and loading.
>
> (3) [**Approach Vehicle From Rear Within 300 Feet**]. Whenever the driver of a vehicle approaches another vehicle from the rear within three hundred feet such driver shall use a distribution of light permissible under this chapter other than the uppermost distribution of light specified in RCW 46.37.220(1).

7. Lighting−Taillights and License Plate Light

RCW 46.37.050 concerns tail lamps:

> (1) [**Tail Lamps**]. After January 1, 1964, every motor vehicle, trailer, semitrailer, and pole trailer, and any other vehicle which is being drawn at the end of a combination of vehicles, shall be equipped with at least two tail lamps mounted on the rear, which, when lighted as required in RCW 46.37.020, shall emit a red light plainly visible from a distance of one thousand feet to the rear, except that passenger cars manufactured or assembled prior to January 1, 1939, shall have at least one tail lamp. On a combination of vehicles only the tail lamps on the rearmost vehicle need actually be seen from the distance specified. On vehicles equipped with more than one tail lamp, the lamps shall be mounted on the same level and as widely spaced laterally as practicable.
>
> (2) [**Located 15 Inches to 72 Inches**]. Every tail lamp upon every vehicle shall be located at a height of not more than seventy-two inches nor less than fifteen inches.
>
> (3) [**License Plate Light**]. Either a tail lamp or a separate lamp shall be so constructed and placed as to illuminate with a white light the rear registration plate and render it clearly legible from a distance of fifty feet to the rear. Any tail lamp or tail lamps, together with any separate lamp or lamps for illuminating the rear registration plate, shall be so wired as to be lighted whenever the head lamps or auxiliary driving lamps are lighted.

8. Lowering Vehicle

RCW 46.61.680 concerns lowering a vehicle.

> It is unlawful to operate any passenger motor vehicle which has been modified from the original design so that any portion of such passenger vehicle other than the wheels has less clearance from the surface of a level roadway than the clearance between the roadway and the lowermost portion of any rim of any wheel the tire on which is in contact with such roadway.
>
> Violation of the provisions of this section is a traffic infraction.

9. Mud Flaps and Fenders

RCW 46.37.500 concerns fenders, covers, flaps and splash aprons:

(1) [**Fenders and/or Mud Flaps Required as Wide as Tires and Must Extend At Least to Center of Axle**]. Except as authorized under subsection (2) of this section, no person may operate any motor vehicle, trailer, or semitrailer that is not equipped with fenders, covers, flaps, or splash aprons adequate for minimizing the spray or splash of water or mud from the roadway to the rear of the vehicle. All such devices shall be as wide as the tires behind which they are mounted and extend downward at least to the center of the axle.

(2) [**Exceptions**]. A motor vehicle that is not less than forty years old or a street rod vehicle that is owned and operated primarily as a collector's item need not be equipped with fenders when the vehicle is used and driven during fair weather on well-maintained, hard-surfaced roads.

10. Mufflers

RCW 46.37.390 concerns mufflers:

(1) [**Defective Muffler**]. Every motor vehicle shall at all times be equipped with a muffler in good working order and in constant operation to prevent excessive or unusual noise, and no person shall use a muffler cut-out, bypass, or similar device upon a motor vehicle on a highway.

(2)(a) [**Muffler Contaminants I**]. No motor vehicle first sold and registered as a new motor vehicle on or after January 1, 1971, shall discharge into the atmosphere at elevations of less than three thousand feet any air contaminant for a period of more than ten seconds which is:

(i) As dark as or darker than the shade designated as No. 1 on the Ringelmann chart, as published by the United States bureau of mines; or

(ii) Of such opacity as to obscure an observer's view to a degree equal to or greater than does smoke described in subsection (a)(i) above.

(b) [**Muffler Contaminants II**]. No motor vehicle first sold and registered prior to January 1, 1971, shall discharge into the atmosphere at elevations of less than three thousand feet any air contaminant for a period of more than ten seconds which is:

(i) As dark as or darker than the shade designated as No. 2 on the Ringelmann chart, as published by the United States bureau of mines; or

(ii) Of such opacity as to obscure an observer's view to a degree equal to or greater than does smoke described in subsection (b)(i) above.

(c) [**Definitions**]. For the purposes of this subsection the following definitions shall apply:

(i) "Opacity" means the degree to which an emission reduces the transmission of light and obscures the view of an object in the background;

(ii) "Ringelmann chart" means the Ringelmann smoke chart with instructions for use as published by the United States bureau of mines in May 1967 and as thereafter amended, information circular 7718.

(3) [**Modified Muffler**]. No person shall modify the exhaust system of a motor vehicle in a manner which will amplify or increase the noise emitted by the engine of such vehicle above that emitted by the muffler originally installed on the vehicle, and it shall be unlawful for any person to operate a motor vehicle not equipped as required by this subsection, or which has been amplified as prohibited by this subsection. A court may dismiss an infraction notice for a violation of this subsection if there is reasonable grounds to believe that the vehicle was not operated in violation of this subsection.

[**Modified Muffler−Exceptions**]. This subsection (3) does not apply to vehicles twenty-five or more years old or to passenger vehicles being operated off the highways in an organized racing or competitive event conducted by a recognized sanctioning body.

11. Windshields & Wipers

RCW 46.37.410 concerns windshields and wipers:

(1) [**Windshields Required; Exceptions**]. All motor vehicles operated on the public highways of this state shall be equipped with a front windshield manufactured of safety glazing materials for use in motor vehicles in accordance with RCW 46.37.430, except, however, on such vehicles not so equipped or where windshields are not in use, the operators of such vehicles shall wear glasses, goggles, or face shields pursuant to RCW 46.37.530(1)(b).

(2) [**Materials Placed Upon Windshield Obstructing View**]. No person shall drive any motor vehicle with any sign, poster, or other nontransparent material upon the front windshield, side wings, or side or rear windows of such vehicle which obstructs the driver's clear view of the highway or any intersecting highway.

> (3) [**Windshield Wipers**]. The windshield on every motor vehicle shall be equipped with a device for cleaning rain, snow, or other moisture from the windshield, which device shall be so constructed as to be controlled or operated by the driver of the vehicle. After January 1, 1938, it shall be unlawful for any person to operate a new motor vehicle first sold or delivered after that date which is not equipped with such device or devices in good working order capable of cleaning the windshield thereof over two separate arcs, one each on the left and right side of the windshield, each capable of cleaning a surface of not less than one hundred twenty square inches, or other device or devices capable of accomplishing substantially the same result.
>
> (4) [**Windshield Wipers Must Work**]. Every windshield wiper upon a motor vehicle shall be maintained in good working order.

12. Windshields & Wipers−Cracked Windshield

RCW 46.37.410(2) is often cited for a cracked windshield. RCW 46.37.410(2) does not apply to a cracked windshield.

> The trial court based its decision on reading RCW 46.37.410(2) in conjunction with RCW 46.37.010(1). However, RCW 46.37.410(2) deals with materials placed "upon" a windshield. Because the crack is a defect in the windshield itself, RCW 46.37.410(2) does not apply.

State v. Burks, 114 Wn.App. 109, 112 n.1, 56 P.3d 598 (2002).

RCW 46.37.010(1)(a) makes it a traffic infraction "for any person to drive or move, or for a vehicle owner to cause or knowingly permit to be driven or moved, on any highway any vehicle or combination of vehicles that: (a) Is in such unsafe condition as to endanger any person."

> [RCW 46.37.010(1)(a) authorizes] an officer to stop the driver of a vehicle whose windshield is in such an unsafe condition as to endanger any person.

State v. Burks, 114 Wn.App. 109, 112, 56 P.3d 598 (2002) (Officer stopped vehicle because it had a "severely cracked windshield." Warrantless Terry traffic infraction stop upheld.)

13. Window Tinting

RCW 46.37.430 concerns window tinting. The statute is lengthy and complex. The statute should be carefully reviewed when a court is confronted with a warrantless Terry stop based upon allegations of unlawful window tinting.

D. Failure to Signal

RCW 46.61.305 concerns signaling:

> (1) [**Signaling Require**d]. No person shall turn a vehicle or move right or left upon a roadway unless and until such movement can be made with reasonable safety nor without giving an appropriate signal in the manner hereinafter provided.
>
> (2) [**Continuous Signal at Least 100 Feet Before Turn**]. A signal of intention to turn or move right or left when required shall be given continuously during not less than the last one hundred feet traveled by the vehicle before turning.
>
> (3) [**Sudden Stop or Speed Decrease**]. No person shall stop or suddenly decrease the speed of a vehicle without first giving an appropriate signal in the manner provided herein to the driver of any vehicle immediately to the rear when there is opportunity to give such signal.
>
> (4) [**Special Signal Requirements**]. The signals provided for in RCW 46.61.310 subsection (2), shall not be flashed on one side only on a disabled vehicle, flashed as a courtesy or "do pass" signal to operators of other vehicles approaching from the rear, nor be flashed on one side only of a parked vehicle except as may be necessary for compliance with this section.

A vehicle may be stopped for failure to signal a lane change in alleged violation of RCW 46.61.305(1).

> Paraphrased in the affirmative, RCW 46.61.305(1) plainly means that the driver must make a lane change safely and with an appropriate signal. RCW 46.61.305(2) clearly requires a signal for at least 100 feet before the lane change.

State v. Lemus, 103 Wn.App. 94, 99-100, 11 P.3d 326 (2000).

E. Failure to Yield to Emergency Vehicle

RCW 46.61.210 concerns yielding to emergency vehicles:

> (1) Upon the immediate approach of an authorized emergency vehicle making use of audible and visual signals meeting the requirements of RCW 46.37.190, or of a police vehicle properly and lawfully making use of an audible signal only the driver of every other vehicle shall yield the right-of-way and shall immediately drive to a position parallel to, and as close as possible to, the right-hand edge or curb of the roadway clear of any intersection and shall stop and remain in such position until the authorized emergency vehicle has passed, except when otherwise directed by a police officer.
>
> (2) This section shall not operate to relieve the driver of an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons using the highway.

See RCW 46.63.110(2) (penalty for RCW 46.61.210 violation).

RCW 46.61.210 is not violated where an officer attempts to pull over the driver. The emergency vehicle must attempt to pass the vehicle for the statute to be violated.

> The plain language of RCW 46.61.210(1) clearly requires drivers to pull to the right and yield when an emergency vehicle is operating emergency equipment and is attempting to pass. Only after the emergency vehicle has passed is it then lawful for the driver to return to the roadway. RCW 46.61.210(1)…Instead, RCW 46.61.021(1) governs [making it a misdemeanor for a driver to fail to stop whenever signaled to do so by a police officer].

State v. Weaver, 161 Wn.App. 58, ¶11, 248 P.3d 1116 (2011).

F. Ferry Traffic

RCW 46.61.735 concerns ferry traffic.

> (1) [**A Driver Shall Not…**]. It is a traffic infraction for a driver of a motor vehicle intending to board a Washington state ferry, to: (a) [**Block Residential Driveway**] Block a residential driveway while waiting to board the ferry; or (b) [**Cut in Front of Another Vehicle**] move in front of another vehicle in a queue already waiting to board the ferry, without the

authorization of a state ferry system employee. Vehicles qualifying for preferential loading privileges under rules adopted by the department of transportation are exempt from this section. In addition to any other penalty imposed for a violation of this section, the driver will be directed to immediately move the motor vehicle to the end of the queue of vehicles waiting to board the ferry. Violations of this section are not part of the vehicle driver's driving record under RCW 46.52.101 and 46.52.120.

(2) [**Keller Ferry on SR 21**]. Subsection (1) of this section does not apply to a driver of a motor vehicle intending to board the Keller Ferry on state route No. 21.

G. Following Too Closely

RCW 46.61.145 concerns following another vehicle:

(1) [**Following Too Closely**]. The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon and the condition of the highway.

(2) [**Drawing Another Vehicle**]. The driver of any motor truck or motor vehicle drawing another vehicle when traveling upon a roadway outside of a business or residence district and which is following another motor truck or motor vehicle drawing another vehicle shall, whenever conditions permit, leave sufficient space so that an overtaking vehicle may enter and occupy such space without danger, except that this shall not prevent a motor truck or motor vehicle drawing another vehicle from overtaking and passing any like vehicle or other vehicle.

(3) [**Caravan or Motorcade**]. Motor vehicles being driven upon any roadway outside of a business or residence district in a caravan or motorcade whether or not towing other vehicles shall be so operated as to allow sufficient space between each such vehicle or combination of vehicles so as to enable any other vehicle to enter and occupy such space without danger. This provision shall not apply to funeral processions.

H. HOV Lanes

RCW 46.61.165(1) concerns high occupancy vehicle lane usage:

(1) [**HOV Lanes**] The state department of transportation and the local authorities are authorized to reserve all or any portion of any highway

under their respective jurisdictions, including any designated lane or ramp, for the exclusive or preferential use of one or more of the following: (a) Public transportation vehicles; (b) private motor vehicles carrying no fewer than a specified number of passengers; or (c) the following private transportation provider vehicles if the vehicle has the capacity to carry eight or more passengers, regardless of the number of passengers in the vehicle, and if such use does not interfere with the efficiency, reliability, and safety of public transportation operations: (i) Auto transportation company vehicles regulated under chapter 81.68 RCW; (ii) passenger charter carrier vehicles regulated under chapter 81.70 RCW, except marked or unmarked stretch limousines and stretch sport utility vehicles as defined under department of licensing rules; (iii) private nonprofit transportation provider vehicles regulated under chapter 81.66 RCW; and (iv) private employer transportation service vehicles, when such limitation will increase the efficient utilization of the highway or will aid in the conservation of energy resources.

* * *

(4) [**Penalty**]. Regulations authorizing such exclusive or preferential use of a highway facility may be declared to be effective at all times or at specified times of day or on specified days. Violation of a restriction of highway usage prescribed by the appropriate authority under this section is a traffic infraction.

I. Lane Travel

1. Weaving

RCW 46.61.140, Driving on Roadways Laned for Traffic, discusses lane travel requirements for Washington drivers. The statute says:

Whenever any roadway has been divided into two or more clearly marked lanes for traffic the following rules in addition to all others consistent herewith shall apply:

(1) A vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety.

(2) Upon a roadway which is divided into three lanes and provides for two-way movement of traffic, a vehicle shall not be driven in the center lane except when overtaking and passing another vehicle traveling in the same

> direction when such center lane is clear of traffic within a safe distance, or in preparation for making a left turn or where such center lane is at the time allocated exclusively to traffic moving in the same direction that the vehicle is proceeding and such allocation is designated by official traffic-control devices.
>
> (3) Official traffic-control devices may be erected directing slow moving or other specified traffic to use a designated lane or designating those lanes to be used by traffic moving in a particular direction regardless of the center of the roadway and drivers of vehicles shall obey the directions of every such device.
>
> (4) Official traffic-control devices may be installed prohibiting the changing of lanes on sections of roadway and drivers of vehicles shall obey the directions of every such device.

(emphasis added).

2. Weaving-State v. Prado

In State v. Prado, 145 Wn.App. 646, 186 P.3d 1186 (2008), an officer stopped a vehicle exiting Interstate 5 at James Street in Seattle for crossing an 8-inch white lane divider by approximately two tire widths for one second. The driver was subsequently arrested for and convicted of DUI. RCW 46.61.140(1), Washington's lane travel statute, requires vehicles to be driven "as nearly as practicable" entirely within a single lane.

The court held that the defendant's driving did not as a matter of law violate RCW 46.61.140(1) because the statute did not impose "strict liability." State v. Prado, 145 Wn.App. at ¶1. The court reasoned the language "as nearly as practicable" demonstrated a legislative recognition that brief incursions over the lane lines will happen. Accordingly, the officer's stop of the defendant's vehicle was unlawful. State v. Prado, 145 Wn.App. at ¶7.

> A vehicle crossing over a lane once for one second by two tire widths does not, without more, constitute a traffic violation justifying a stop by a police officer.

State v. Prado, 145 Wn.App. at ¶1.

The court ended its decision by mentioning that Prado's driving did not pose a danger to others.

> A vehicle crossing over the line for one second by two tire widths on an exit lane does not justify a belief that the vehicle was operated unlawfully. This stop was unlawful and thus we need not undertake a review of whether the search was reasonable. This is particularly so as the officer testified that there was no other traffic present and no danger posed to other vehicles.

State v. Prado, 145 Wn.App. at ¶7. (footnote omitted.)

The holding in Prado appears to be that an officer's mistake of law (that crossing a white lane divider by two tire widths for one second could be a violation of RCW 46.61.140(1)) is not a reasonable basis to conduct a Terry stop. *See* Chapter 15(A) (Warrantless Terry Stops-Periodic Issues-A Warrantless Terry Stop Based Upon an Officer's Mistake of Fact or Law).

3. Weaving-Other Jurisdictions

The holding in State v. Prado, 145 Wn.App. 646, 186 P.3d 1186 (2008) is clear, but is limited to its facts. A vehicle crossing over a white lane divider for one second by two tire widths does not, "without more," establish a lawful basis for an officer to conduct a Terry stop to investigate the alleged infraction.

The Prado Court's "without more" phrase and comment the "officer testified that there was no other traffic present and no danger posed to other vehicles" implies that additional evidence might result in a contrary result upholding a stop based upon RCW 46.61.140(1).

The Prado Court cited to decisions in Texas, Ohio, and Arizona in support of its holding. Other jurisdictions have also discussed the issue, and appear to consider several factors, including weaving within a lane, crossing a right side fog line, crossing a left side center line into oncoming traffic, and an officer's testimony linking the observed driving to indications of impaired driving based upon the officer's training and experience. A few cases discussing these issues are provided below.

United States v. Fernandez-Castillo, 324 F.3d 1114, *cert. denied*, 540 U.S. 959, 124 S.Ct. 418, 157 L.Ed.2d 299 (9th Cir. 2003) (weaving within lane by a driver who is sitting close to the steering wheel sufficient to support a Terry stop where officer testified why sitting very close to the steering wheel and swerving in one's lane may indicate impairment).

United States v. Colin, 314 F.3d 439 (9th Cir. 2002) (insufficient grounds existed for stopping a vehicle that touched, but did not cross the lines twice for approximately 10 seconds before making safe lane changes).

Rowe v. State, 363 Md. 424. 769 A.2d 879 (2001) (observing a vehicle in the early hours of the morning crossing, by about 8 inches, the white edge-line separating the shoulder from the traveled portion of the highway, returning to the traveled portion, and a short time later, touching the white edge line did not provide the officer with sufficient grounds to make an investigatory stop).

State v. Van Kirk, 306 Mont. 215, 32 P.3d 735 (2001) (driver's traveling at 7 to 10 m.p.h. in a 25 m.p.h. zone, and shifting vehicle from the edge of the roadway to the mid-point and across it several times in a manner that would have impeded any oncoming traffic provided sufficient grounds to make an investigatory stop).

State v. Edwards, 143 Md. App. 155, 792 A.2d 1197 (2002) (crossing the center line of an undivided, two lane road by as much as a foot and traveling in that manner for approximately 1/4 mile provided a legally sufficient basis to justify a traffic stop).

State v. Laferty, 291 Mont. 157, 967 P.2d 363 (1998), *abrogated on other grounds by* State v. Flynn, 359 Mont. 376, 251 P.3d 143 (2011) (driver's minor crossings of fog line on far right of right lane of travel were insufficient to create particularized suspicion that driver was intoxicated or to authorize investigatory stop).

4. Driving With Wheels Off Roadway

RCW 46.61.670 prohibits driving with one or more wheels off the roadway and on the shoulder. The statute says:

> It shall be unlawful to operate or drive any vehicle or combination of vehicles over or along any pavement or gravel or crushed rock surface on a public highway with one wheel or all of the wheels off the roadway thereof, except as permitted by RCW 46.61.428 or for the purpose of stopping off such roadway, or having stopped thereat, for proceeding back onto the pavement, gravel or crushed rock surface thereof.

(emphasis added.)

Roadway is defined in RCW 46.04.500, and means "that portion of a highway improved, designed, or ordinarily used for vehicular travel, exclusive of the sidewalk or shoulder even though such sidewalk or shoulder is used by persons

riding bicycles. In the event a highway includes two or more separated roadways, the term "roadway" shall refer to any such roadway separately but shall not refer to all such roadways collectively." (emphasis added.)

J. Passing

1. Keep Right Except to Pass

RCW 46.61.100 requires driving on the right half of the roadway with some exceptions:

> (1) [**Keep Right Except**]. Upon all roadways of sufficient width a vehicle shall be driven upon the right half of the roadway, except as follows:
>
> (a) [**Passing Generally**]. When overtaking and passing another vehicle proceeding in the same direction under the rules governing such movement;
>
> (b) [**Obstruction in Roadway**]. When an obstruction exists making it necessary to drive to the left of the center of the highway; provided, any person so doing shall yield the right-of-way to all vehicles traveling in the proper direction upon the unobstructed portion of the highway within such distance as to constitute an immediate hazard;
>
> (c) [**Middle Turn Lane**] Upon a roadway divided into three marked lanes and providing for two-way movement traffic under the rules applicable thereon;
>
> (d) [**One Way Traffic**]. Upon a street or highway restricted to one-way traffic; or
>
> (e) [**Emergency or Tow Vehicle**]. Upon a highway having three lanes or less, when approaching a stationary authorized emergency vehicle, tow truck or other vehicle providing roadside assistance while operating warning lights with three hundred sixty degree visibility, or police vehicle as described under *RCW 46.61.212(2).
>
> (2) [**Two or More Lanes in Same Direction−Keep Right Except**]. Upon all roadways having two or more lanes for traffic moving in the same direction, all vehicles shall be driven in the right-hand lane then available for traffic, except
>
> (a) [**Passing**]. when overtaking and passing another vehicle proceeding in the same direction,

(b) [**Speed Greater Than Traffic Flow**]. when traveling at a speed greater than the traffic flow,

(c) [**Allowing Merging Traffic**]. when moving left to allow traffic to merge, or

(d) [**Left Turn**]. when preparing for a left turn at an intersection, exit, or into a private road or driveway when such left turn is legally permitted.

On any such roadway, a vehicle or combination over ten thousand pounds shall be driven only in the right-hand lane except under the conditions enumerated in (a) through (d) of this subsection.

(3) [**Three or More Lanes−Towing a Trailer or Semi**]. No vehicle towing a trailer or no vehicle or combination over ten thousand pounds may be driven in the left-hand lane of a limited access roadway having three or more lanes for traffic moving in one direction except when preparing for a left turn at an intersection, exit, or into a private road or driveway when a left turn is legally permitted. This subsection does not apply to a vehicle using a high occupancy vehicle lane. A high occupancy vehicle lane is not considered the left-hand lane of a roadway. The department of transportation, in consultation with the Washington state patrol, shall adopt rules specifying (a) those circumstances where it is permissible for other vehicles to use the left lane in case of emergency or to facilitate the orderly flow of traffic, and (b) those segments of limited access roadway to be exempt from this subsection due to the operational characteristics of the roadway.

(4) [**Left Lane Camping in Multilane Roadway**]. It is a traffic infraction to drive continuously in the left lane of a multilane roadway when it impedes the flow of other traffic.

(5) [**Left of Center Line Where Four or More Lanes With Two-Way Movement**]. Upon any roadway having four or more lanes for moving traffic and providing for two-way movement of traffic, a vehicle shall not be driven to the left of the center line of the roadway except when authorized by official traffic control devices designating certain lanes to the left side of the center of the roadway for use by traffic not otherwise permitted to use such lanes, or except as permitted under subsection (1)(b) of this section. However, this subsection shall not be construed as prohibiting the crossing of the center line in making a left turn into or from an alley, private road or driveway.

2. Passing On Left Into Oncoming Lane on Two Lane Road

RCW 46.61.425(1) concerns passing a slow moving vehicle on the left on highways having one lane of traffic in each direction:

> (1) [**Exceeding Speed Limit to Pass Slow Moving Vehicle**]. No person shall drive a motor vehicle at such a slow speed as to impede the normal and reasonable movement of traffic except when reduced speed is necessary for safe operation or in compliance with law: PROVIDED, That a person following a vehicle driving at less than the legal maximum speed and desiring to pass such vehicle may exceed the speed limit, subject to the provisions of RCW 46.61.120 on highways having only one lane of traffic in each direction, at only such a speed and for only such a distance as is necessary to complete the pass with a reasonable margin of safety.

There are limitations on passing a slow moving vehicle on the left pursuant to RCW 46.61.425(1). RCW 46.61.120 says:

> No vehicle shall be driven to the left side of the center of the roadway in overtaking and passing other traffic proceeding in the same direction unless authorized by the provisions of RCW 46.61.100 through 46.61.160 and 46.61.212 and unless such left side is clearly visible and is free of oncoming traffic for a sufficient distance ahead to permit such overtaking and passing to be completely made without interfering with the operation of any traffic approaching from the opposite direction or any traffic overtaken. In every event the overtaking vehicle must return to an authorized lane of travel as soon as practicable and in the event the passing movement involves the use of a lane authorized for vehicles approaching from the opposite direction, before coming within two hundred feet of any approaching traffic.

3. Passing On Right and Driving on Shoulder

RCW 46.61.115(1) concerns passing on the right:

> (1) [**Pass On Right Only**]. The driver of a vehicle may overtake and pass upon the right of another vehicle only under the following conditions:
>
> (a) [**Passed Vehicle Turning Left**]. When the vehicle overtaken is making or about to make a left turn;
>
> (b) [**Unobstructed Pavement of Sufficient Width**]. Upon a roadway with unobstructed pavement of sufficient width for two or more lines of

> vehicles moving lawfully in the direction being traveled by the overtaking vehicle.
>
> (2) [**Driving Off Roadway On Sidewalk or Shoulder Prohibited**]. The driver of a vehicle may overtake and pass another vehicle upon the right only under conditions permitting such movement in safety. Such movement shall not be made by driving off the roadway.

Roadway does not include a sidewalk or shoulder. RCW 46.04.500 (Roadway "means that portion of a highway improved, designed, or ordinarily used for vehicular travel, exclusive of the sidewalk or shoulder even though such sidewalk or shoulder is used by persons riding bicycles. In the event a highway includes two or more separated roadways, the term "roadway" shall refer to any such roadway separately but shall not refer to all such roadways collectively.")

RCW 46.61.428(2) and (3) authorize a slow moving vehicle to drive on a shoulder in a "driving-on-shoulder zone:"

> (2) Where signs are in place to define a driving-on-shoulder zone as set forth in subsection (1) of this section, the driver of a slow-moving vehicle may drive onto and along the shoulder within the zone but only for the purpose of allowing overtaking vehicles to pass and then shall return to the roadway.
>
> (3) Signs erected to define a driving-on-shoulder zone take precedence over pavement markings for the purpose of allowing the movements described in subsection (2) of this section.

4. Passing Stopped School Bus

RCW 46.61.370 concerns passing a stopped school bus:

> (1) [**Stopped School Bus with Visual Signal**]. The driver of a vehicle upon overtaking or meeting from either direction any school bus which has stopped on the roadway for the purpose of receiving or discharging any school children shall stop the vehicle before reaching such school bus when there is in operation on said school bus a visual signal as specified in RCW 46.37.190 and said driver shall not proceed until such school bus resumes motion or the visual signals are no longer activated.
>
> (2) [**Divided Roadway−Separate Roadways−Opposite Direction**]. The driver of a vehicle upon a highway divided into separate roadways as provided in RCW 46.61.150 need not stop upon meeting a school bus

which is proceeding in the opposite direction and is stopped for the purpose of receiving or discharging school children.

(3) [**Three or More Marked Lanes−Opposite Direction**]. The driver of a vehicle upon a highway with three or more marked traffic lanes need not stop upon meeting a school bus which is proceeding in the opposite direction and is stopped for the purpose of receiving or discharging school children.

(4) [**Bus Driver Duty I**]. The driver of a school bus shall actuate the visual signals required by RCW 46.37.190 only when such bus is stopped on the roadway for the purpose of receiving or discharging school children.

(5) [**Bus Driver Duty II**]. The driver of a school bus may stop completely off the roadway for the purpose of receiving or discharging school children only when the school children do not have to cross the roadway. The school bus driver shall actuate the hazard warning lamps as defined in RCW 46.37.215 before loading or unloading school children at such stops.

(6) [**Penalty**]. Except as provided in subsection (7) of this section, a person found to have committed an infraction of subsection (1) of this section shall be assessed a monetary penalty equal to twice the total penalty assessed under RCW 46.63.110. This penalty may not be waived, reduced, or suspended. Fifty percent of the money so collected shall be deposited into the school zone safety account in the custody of the state treasurer and disbursed in accordance with RCW 46.61.440(5).

(7) [**Automated School Bus Safety Camera**]. An infraction of subsection (1) of this section detected through the use of an automated school bus safety camera under RCW 46.63.180 is not a part of the registered owner's driving record under RCW 46.52.101 and 46.52.120, and must be processed in the same manner as parking infractions, including for the purposes of RCW 3.50.100, 35.20.220, 46.16A.120, and 46.20.270(3). However, the amount of the fine issued for a violation of this section detected through the use of an automated school bus safety camera shall not exceed twice the monetary penalty for a violation of this section as provided under RCW 46.63.110.

K. Seat Belt

1. Generally

RCW 46.61.688 concerns seat belt usage:

> (1) [**Definition of Motor Vehicle**]. For the purposes of this section, "motor vehicle" includes:
>
> (a) "Buses," meaning motor vehicles with motive power, except trailers, designed to carry more than ten passengers;
>
> (b) "Medium-speed electric vehicle" meaning a self-propelled, electrically powered four-wheeled motor vehicle, equipped with a roll cage or crush-proof body design, whose speed attainable in one mile is more than thirty miles per hour but not more than thirty-five miles per hour and otherwise meets or exceeds the federal regulations set forth in 49 C.F.R. Sec. 571.500;
>
> (c) "Motorcycle," meaning a three-wheeled motor vehicle that is designed (i) so that the driver rides on a seat in a partially or completely enclosed seating area that is equipped with safety belts and (ii) to be steered with a steering wheel;
>
> (d) "Multipurpose passenger vehicles," meaning motor vehicles with motive power, except trailers, designed to carry ten persons or less that are constructed either on a truck chassis or with special features for occasional off-road operation;
>
> (e) "Neighborhood electric vehicle," meaning a self-propelled, electrically powered four-wheeled motor vehicle whose speed attainable in one mile is more than twenty miles per hour and not more than twenty-five miles per hour and conforms to federal regulations under 49 C.F.R. Sec. 571.500;
>
> (f) "Passenger cars," meaning motor vehicles with motive power, except multipurpose passenger vehicles, motorcycles, or trailers, designed for carrying ten passengers or less; and
>
> (g) "Trucks," meaning motor vehicles with motive power, except trailers, designed primarily for the transportation of property.
>
> (2)(a) [**Section only applies to**]. This section only applies to:

(i) Motor vehicles that meet the manual seat belt safety standards as set forth in 49 C.F.R. Sec. 571.208;

(ii) Motorcycles, when equipped with safety belts that meet the standards set forth in 49 C.F.R. Part 571; and

(iii) Neighborhood electric vehicles and medium-speed electric vehicles that meet the seat belt standards as set forth in 49 C.F.R. Sec. 571.500.

(b) This section does not apply to a vehicle occupant for whom no safety belt is available when all designated seating positions as required under 49 C.F.R. Part 571 are occupied.

(3) [**Seat Belt Required When 16 or Older**]. Every person sixteen years of age or older operating or riding in a motor vehicle shall wear the safety belt assembly in a properly adjusted and securely fastened manner.

(4) [**Driver Required to Seat Belt/Child Restraint Children Under 16**]. No person may operate a motor vehicle unless all child passengers under the age of sixteen years are either: (a) Wearing a safety belt assembly or (b) are securely fastened into an approved child restraint device.

(5) [**Violations Not Available to Insurance Companies**]. A person violating this section shall be issued a notice of traffic infraction under chapter 46.63 RCW. A finding that a person has committed a traffic infraction under this section shall be contained in the driver's abstract but shall not be available to insurance companies or employers.

(6) [**Not Evidence of Negligence**]. Failure to comply with the requirements of this section does not constitute negligence, nor may failure to wear a safety belt assembly be admissible as evidence of negligence in any civil action.

(7) [**Licensed Physician May Waive**]. This section does not apply to an operator or passenger who possesses written verification from a licensed physician that the operator or passenger is unable to wear a safety belt for physical or medical reasons.

(8) [**State Patrol Rules**]. The state patrol may adopt rules exempting operators or occupants of farm vehicles, construction equipment, and vehicles that are required to make frequent stops from the requirement of wearing safety belts.

Upon observing that defendant, who was a passenger in a lawfully stopped vehicle, was not wearing his seatbelt, the officer had authority to request the defendant's identification due to the seat belt violation. State v. Chapin, 75 Wn.App. 460, 464, 879 P.2d 300 (1994), *review denied*, 125 Wn.2d 1024 (1995), *overruled on other grounds by* State v. Ladson, 138 Wn.2d 343, 359, 979 P.2d 833 (1999).

2. Restraint of Child

RCW 46.61.687 concerns child restraint requirements:

> (1) [**Child Less Than 16**]. Whenever a child who is less than sixteen years of age is being transported in a motor vehicle that is in operation and that is required by RCW 46.37.510 to be equipped with a safety belt system in a passenger seating position, or is being transported in a neighborhood electric vehicle or medium-speed electric vehicle that is in operation, the driver of the vehicle shall keep the child properly restrained as follows:
>
> (a) [**Child Under 8 or Under 4 Feet 9 Inches Tall**]. A child must be restrained in a child restraint system, if the passenger seating position equipped with a safety belt system allows sufficient space for installation, until the child is eight years old, unless the child is four feet nine inches or taller. The child restraint system must comply with standards of the United States department of transportation and must be secured in the vehicle in accordance with instructions of the vehicle manufacturer and the child restraint system manufacturer.
>
> (b) [**Child 8 or Older or 4 Feet 9 Inches or Taller**]. A child who is eight years of age or older or four feet nine inches or taller shall be properly restrained with the motor vehicle's safety belt properly adjusted and fastened around the child's body or an appropriately fitting child restraint system.
>
> (c) [**Child Under 13**]. The driver of a vehicle transporting a child who is under thirteen years old shall transport the child in the back seat positions in the vehicle where it is practical to do so.
>
> (2) [**Enforcement; Child Under 13**]. Enforcement of subsection (1) of this section is subject to a visual inspection by law enforcement to determine if the child restraint system in use is appropriate for the child's individual height, weight, and age. The visual inspection for usage of a child restraint system must ensure that the child restraint system is being used in

accordance with the instruction of the vehicle and the child restraint system manufacturers. The driver of a vehicle transporting a child who is under thirteen years old shall transport the child in the back seat positions in the vehicle where it is practical to do so.

(3) [**Proof of Child Restraint System within 7 Days of Infraction**]. A person violating subsection (1) of this section may be issued a notice of traffic infraction under chapter 46.63 RCW. If the person to whom the notice was issued presents proof of acquisition of an approved child passenger restraint system or a child booster seat, as appropriate, within seven days to the jurisdiction issuing the notice and the person has not previously had a violation of this section dismissed, the jurisdiction shall dismiss the notice of traffic infraction.

(4) [**Not Evidence of Negligence**]. Failure to comply with the requirements of this section shall not constitute negligence by a parent or legal guardian. Failure to use a child restraint system shall not be admissible as evidence of negligence in any civil action.

(5) [**Section Does Not Apply**]. This section does not apply to: (a) For hire vehicles, (b) vehicles designed to transport sixteen or less passengers, including the driver, operated by auto transportation companies, as defined in RCW 81.68.010, (c) vehicles providing customer shuttle service between parking, convention, and hotel facilities, and airport terminals, and (d) school buses.

(6) [**Definition of Child Restraint System**]. As used in this section, "child restraint system" means a child passenger restraint system that meets the Federal Motor Vehicle Safety Standards set forth in 49 C.F.R. 571.213.

(7) [**Only Lap Belt and Child Weighs More Than 40 Pounds**]. The requirements of subsection (1) of this section do not apply in any seating position where there is only a lap belt available and the child weighs more than forty pounds.

(8)(a) [**Civil Liability**]. Except as provided in (b) of this subsection, a person who has a current national certification as a child passenger safety technician and who in good faith provides inspection, adjustment, or educational services regarding child passenger restraint systems is not liable for civil damages resulting from any act or omission in providing the services, other than acts or omissions constituting gross negligence or willful or wanton misconduct.

(b) The immunity provided in this subsection does not apply to a certified child passenger safety technician who is employed by a retailer of child passenger restraint systems and who, during his or her hours of employment and while being compensated, provides inspection, adjustment, or educational services regarding child passenger restraint systems.

Query the meaning of the RCW 46.61.687(3) undefined phrase requiring a driver or passenger to wear the safety belt assembly "in a properly adjusted and securely fastened manner"?

L. Speeding

1. Generally

RCW 46.61.400 provides the basic rule concerning vehicular speed:

(1) [**Speed Too Fast for Conditions**]. No person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing. In every event speed shall be so controlled as may be necessary to avoid colliding with any person, vehicle or other conveyance on or entering the highway in compliance with legal requirements and the duty of all persons to use due care.

(2) [**Speed Limits**]. Except when a special hazard exists that requires lower speed for compliance with subsection (1) of this section, the limits specified in this section or established as hereinafter authorized shall be maximum lawful speeds, and no person shall drive a vehicle on a highway at a speed in excess of such maximum limits.

(a) Twenty-five miles per hour on city and town streets;

(b) Fifty miles per hour on county roads;

(c) Sixty miles per hour on state highways.

The maximum speed limits set forth in this section may be altered as authorized in RCW 46.61.405, 46.61.410, and 46.61.415.

(3) [**Intersections, Railway Crossings, Hill Crest, Narrow or Winding Roadway, Pedestrians, Weather**]. The driver of every vehicle shall, consistent with the requirements of subsection (1) of this section, drive at an appropriate reduced speed when approaching and crossing an

> intersection or railway grade crossing, when approaching and going around a curve, when approaching a hill crest, when traveling upon any narrow or winding roadway, and when special hazard exists with respect to pedestrians or other traffic or by reason of weather or highway conditions.

A warrantless Terry traffic infraction stop for speeding based upon a radar reading is valid even though no foundational evidence was presented to support the radar reading. Clement v. Department of Licensing, 109 Wn.App. 371, 35 P.3d 1171 (2001), *review denied*, 146 Wn.2d 1017 (2002).

2. Construction Zones

RCW 46.61.527 concerns speeding in a construction zone:

> (1) [**Traffic Control Devices**]. The secretary of transportation shall adopt standards and specifications for the use of traffic control devices in roadway construction zones on state highways. A roadway construction zone is an area where construction, repair, or maintenance work is being conducted by public employees or private contractors, on or adjacent to any public roadway. For the purpose of the pilot program referenced in section 218(2), chapter 470, Laws of 2009, during the 2009-2011 fiscal biennium, a roadway construction zone includes areas where public employees or private contractors are not present but where a driving condition exists that would make it unsafe to drive at higher speeds, such as, when the department is redirecting or realigning lanes on or adjacent to any public roadway pursuant to ongoing construction.
>
> (2) [**Speed No More Than Traffic Control Device**]. No person may drive a vehicle in a roadway construction zone at a speed greater than that allowed by traffic control devices.
>
> (3) [**Penalty**]. A person found to have committed any infraction relating to speed restrictions in a roadway construction zone shall be assessed a monetary penalty equal to twice the penalty assessed under RCW 46.63.110. This penalty may not be waived, reduced, or suspended.
>
> (4) [**Reckless Endangerment of Roadway Workers**]. A person who drives a vehicle in a roadway construction zone in such a manner as to endanger or be likely to endanger any persons or property, or who removes, evades, or intentionally strikes a traffic safety or control device is guilty of reckless endangerment of roadway workers. A violation of this

subsection is a gross misdemeanor punishable under chapter 9A.20 RCW.

(5) [**Driver's License Suspension**]. The department shall suspend for sixty days the license or permit to drive or a nonresident driving privilege of a person convicted of reckless endangerment of roadway workers.

3. Emergency Zones

RCW 46.61.212 concerns speeding in an emergency zone:

(1) [**Emergency Zone**]. The driver of any motor vehicle, upon approaching an emergency zone, which is defined as the adjacent lanes of the roadway two hundred feet before and after (a) a stationary authorized emergency vehicle that is making use of audible and/or visual signals meeting the requirements of RCW 46.37.190, (b) a tow truck that is making use of visual red lights meeting the requirements of RCW 46.37.196, (c) other vehicles providing roadside assistance that are making use of warning lights with three hundred sixty degree visibility, or (d) a police vehicle properly and lawfully displaying a flashing, blinking, or alternating emergency light or lights, shall:

(i) [**Four or More Lanes**]. On a highway having four or more lanes, at least two of which are intended for traffic proceeding in the same direction as the approaching vehicle, proceed with caution and, if reasonable, with due regard for safety and traffic conditions, yield the right-of-way by making a lane change or moving away from the lane or shoulder occupied by the stationary authorized emergency vehicle or police vehicle;

(ii) [**Less Than Four Lanes**]. On a highway having less than four lanes, proceed with caution, reduce the speed of the vehicle, and, if reasonable, with due regard for safety and traffic conditions, and under the rules of this chapter, yield the right-of-way by passing to the left at a safe distance and simultaneously yield the right-of-way to all vehicles traveling in the proper direction upon the highway; or

(iii) [**Due Caution and Reduce Speed If Lane Change Unsafe**]. If changing lanes or moving away would be unreasonable or unsafe, proceed with due caution and reduce the speed of the vehicle.

(2) [**Speeding in Emergency Zone**] A person may not drive a vehicle in an emergency zone at a speed greater than the posted speed limit.

(3) [**Penalty**]. A person found to be in violation of this section, or any infraction relating to speed restrictions in an emergency zone, must be assessed a monetary penalty equal to twice the penalty assessed under RCW 46.63.110. This penalty may not be waived, reduced, or suspended.

(4) [**Reckless Endangerment of Emergency Zone Workers**]. A person who drives a vehicle in an emergency zone in such a manner as to endanger or be likely to endanger any emergency zone worker or property is guilty of reckless endangerment of emergency zone workers. A violation of this subsection is a gross misdemeanor punishable under chapter 9A.20 RCW.

(5) [**Driver's License Suspension**]. The department shall suspend for sixty days the driver's license, permit to drive, or nonresident driving privilege of a person convicted of reckless endangerment of emergency zone workers.

4. School or Playground Zones

RCW 46.61.440 concerns speeding in a school zone:

(1) [**Speeding in School or Playground Zone**]. Subject to RCW 46.61.400(1), and except in those instances where a lower maximum lawful speed is provided by this chapter or otherwise, it shall be unlawful for the operator of any vehicle to operate the same at a speed in excess of twenty miles per hour when operating any vehicle upon a highway either inside or outside an incorporated city or town when passing any marked school or playground crosswalk when such marked crosswalk is fully posted with standard school speed limit signs or standard playground speed limit signs. The speed zone at the crosswalk shall extend three hundred feet in either direction from the marked crosswalk.

(2) [**Local School or Playground Zone Requirements**]. A county or incorporated city or town may create a school or playground speed zone on a highway bordering a marked school or playground, in which zone it is unlawful for a person to operate a vehicle at a speed in excess of twenty miles per hour. The school or playground speed zone may extend three hundred feet from the border of the school or playground property; however, the speed zone may only include area consistent with active school or playground use.

(3) [**Penalty**]. A person found to have committed any infraction relating to speed restrictions within a school or playground speed zone shall be

assessed a monetary penalty equal to twice the penalty assessed under RCW 46.63.110. This penalty may not be waived, reduced, or suspended.

(4) [**School District Signage**]. School districts may erect signs that comply with the uniform state standards adopted and designated by the department of transportation under RCW 47.36.030, informing motorists of the increased monetary penalties assessed for violations of RCW 46.61.235, 46.61.245, or 46.61.261 within a school, playground, or crosswalk speed zone created under subsection (1) or (2) of this section.

(5) [**School Zone Safety Account**]. The school zone safety account is created in the custody of the state treasurer. Fifty percent of the moneys collected under subsection (3) of this section and the moneys collected under RCW 46.61.235(5), 46.61.245(2), or 46.61.261(2) shall be deposited into the account. Expenditures from the account may be used only by the Washington traffic safety commission solely to fund projects in local communities to improve school zone safety, pupil transportation safety, and student safety in school bus loading and unloading areas. Only the director of the traffic safety commission or the director's designee may authorize expenditures from the account. The account is subject to allotment procedures under chapter 43.88 RCW, but no appropriation is required for expenditures until July 1, 1999, after which date moneys in the account may be spent only after appropriation.

5. Speed Traps−Generally

Speed traps are generally prohibited in Washington. RCW 46.61.470(1) says:

(1) No evidence as to the speed of any vehicle operated upon a public highway by any person arrested for violation of any of the laws of this state regarding speed or of any orders, rules, or regulations of any city or town or other political subdivision relating thereto shall be admitted in evidence in any court at a subsequent trial of such person in case such evidence relates to or is based upon the maintenance or use of a speed trap except as provided in subsection (2) of this section. A "speed trap," within the meaning of this section, is a particular section of or distance on any public highway, the length of which has been or is measured off or otherwise designated or determined, and the limits of which are within the vision of any officer or officers who calculate the speed of a vehicle passing through such speed trap by using the lapsed time during which such vehicle travels between the entrance and exit of such speed trap.

6. Speed Traps−Aircraft or Device Capable of Recording Speed

Aircraft speed traps are permitted under specific circumstances. RCW 46.61.470(2) and (3):

> (2) [**Speed Evidence Admissible When Determined by Particular Distance Where…**]. Evidence shall be admissible against any person arrested or issued a notice of a traffic infraction for violation of any of the laws of this state or of any orders, rules, or regulations of any city or town or other political subdivision regarding speed if the same is determined by a particular section of or distance on a public highway, the length of which has been accurately measured off or otherwise designated or determined and either: (a) [**Limits Controlled by Device Capable of Recording Speed Within Limits, or…**] The limits of which are controlled by a mechanical, electrical, or other device capable of measuring or recording the speed of a vehicle passing within such limits; or (b) [**Aircraft Timing Device**] a timing device is operated from an aircraft, which timing device when used to measure the elapsed time of a vehicle passing over such a particular section of or distance upon a public highway indicates the speed of a vehicle.
>
> (3) [**Device Maximum Error Not to Exceed 5% and Limits Not Closer than 1/4 Mile**]. The exceptions of subsection (2) of this section are limited to devices or observations with a maximum error of not to exceed five percent using the lapsed time during which such vehicle travels between such limits, and such limits shall not be closer than one-fourth mile.

M. Texting While Operating a Moving Motor Vehicle

RCW 46.61.668 concerns texting while driving:

> (1) [**Texting by Driver Prohibited in Moving Motor Vehicle**]. Except as provided in subsection (2) of this section, a person operating a moving motor vehicle who, by means of an electronic wireless communications device, sends, reads, or writes a text message, is guilty of a traffic infraction. A person does not send, read, or write a text message when he or she reads, selects, or enters a phone number or name in a wireless communications device for the purpose of making a phone call.
>
> (2) [**Authorized for Special Purposes**]. Subsection (1) of this section does not apply to a person operating:
>
> (a) An authorized emergency vehicle;

(b) A voice-operated global positioning or navigation system that is affixed to the vehicle and that allows the user to send or receive messages without diverting visual attention from the road or engaging the use of either hand; or

(c) A moving motor vehicle while using an electronic wireless communications device to:

(i) Report illegal activity;

(ii) Summon medical or other emergency help;

(iii) Prevent injury to a person or property; or

(iv) Relay information that is time sensitive between a transit or for-hire operator and that operator's dispatcher, in which the device is permanently affixed to the vehicle.

(3) [**Infraction Not Part of Driver's Record; Not Available to Insurance Companies or Employers**]. Infractions under this section shall not become part of the driver's record under RCW 46.52.101 and 46.52.120. Additionally, a finding that a person has committed a traffic infraction under this section shall not be made available to insurance companies or employers.

Query whether texting in a stopped or parked vehicle violates RCW 46.61.668(1) which prohibits a person from operating a "moving" motor vehicle?

N. Traffic Control Devices

1. Definition of "Stop"

RCW 46.04.565 defines stop:

"Stop" when required means complete cessation from movement.

2. Definition of "Stop or Stopping"

RCW 46.04.566 defines stop or stopping:

"Stop or stopping" when prohibited means any halting even momentarily of a vehicle, whether occupied or not, except when necessary to avoid conflict with other traffic or in compliance with the directions of a police officer or traffic control sign or signal.

3. Definition of "Traffic Control Device"

RCW 46.04.611 defines traffic control device:

> Official traffic-control devices means all signs, signals, markings and devices not inconsistent with Title 46 RCW placed or erected by authority of a public body or official having jurisdiction, for the purpose of regulating, warning or guiding traffic.

4. Definition of "Traffic Control Signal"

RCW 46.04.600 defines traffic control signal:

> "Traffic control signal" means any traffic device, whether manually, electrically, or mechanically operated, by which traffic alternately is directed to stop or proceed or otherwise controlled.

5. Flashing Signals

RCW 46.61.065 concerns flashing signals:

> (1) Whenever an illuminated flashing red or yellow signal is used in a traffic sign or signal it shall require obedience by vehicular traffic as follows:
>
> (a) **Flashing Red (Stop Signal)**. When a red lens is illuminated with rapid intermittent flashes, drivers of vehicles shall stop at a clearly marked stop line, but if none, before entering a marked crosswalk on the near side of the intersection, or, if none, then at the point nearest the intersecting roadway where the driver has a view of approaching traffic on the intersecting roadway before entering the intersection, and the right to proceed shall be subject to the rules applicable after making a stop at a stop sign.
>
> (b) **Flashing Yellow (Caution Signal)**. When a yellow lens is illuminated with rapid intermittent flashes, drivers of vehicles may proceed through the intersection or past such signal only with caution.

6. Lane Direction Control Signals

RCW 46.61.070 concerns lane direction control signals:

> When lane-direction-control signals are placed over the individual lanes of a street or highway, vehicular traffic may travel in any lane over which a

green signal is shown, but shall not enter or travel in any lane over which a red signal is shown

7. Obedience to Traffic Control Devices

RCW 46.61.050 concerns obedience to traffic control devices:

> (1) [**Obedience to Traffic Control Devices**]. The driver of any vehicle, every bicyclist, and every pedestrian shall obey the instructions of any official traffic control device applicable thereto placed in accordance with the provisions of this chapter, unless otherwise directed by a traffic or police officer, subject to the exception granted the driver of an authorized emergency vehicle in this chapter.
>
> (2) [**When Device Not in Proper Position, Legible or Visible**]. No provision of this chapter for which official traffic control devices are required shall be enforced against an alleged violator if at the time and place of the alleged violation an official device is not in proper position and sufficiently legible or visible to be seen by an ordinarily observant person. Whenever a particular section does not state that official traffic control devices are required, such section shall be effective even though no devices are erected or in place.
>
> (3) [**Devices Presumed to be Placed by Lawful Authority**]. Whenever official traffic control devices are placed in position approximately conforming to the requirements of this chapter, such devices shall be presumed to have been so placed by the official act or direction of lawful authority, unless the contrary shall be established by competent evidence.
>
> (4) [**Devices Presumed to Comply with Statutory Requirements**]. Any official traffic control device placed pursuant to the provisions of this chapter and purporting to conform to the lawful requirements pertaining to such devices shall be presumed to comply with the requirements of this chapter, unless the contrary shall be established by competent evidence.

8. Special Traffic Control Signals

RCW 46.61.072 concerns special traffic control signals:

> Whenever special traffic control signals exhibit a downward green arrow, a yellow X, or a red X indication, such signal indication shall have the following meaning:

(1) [**Steady Green**]. A steady downward green arrow means that a driver is permitted to drive in the lane over which the arrow signal is located.

(2) [**Steady Yellow or Flashing Red**]. A steady yellow X or flashing red X means that a driver should prepare to vacate, in a safe manner, the lane over which the signal is located because a lane control change is being made, and to avoid occupying that lane when a steady red X is displayed.

(3) [**Flashing Yellow**]. A flashing yellow X means that a driver is permitted to use a lane over which the signal is located for a left turn, using proper caution.

(4) [**Steady Red]**. A steady red X means that a driver shall not drive in the lane over which the signal is located, and that this indication shall modify accordingly the meaning of all other traffic controls present. The driver shall obey all other traffic controls and follow normal safe driving practices.

9. Traffic Signals

RCW 46.61.055 concerns traffic control signals:

Whenever traffic is controlled by traffic control signals exhibiting different colored lights, or colored lighted arrows, successively one at a time or in combination, only the colors green, red and yellow shall be used, except for special pedestrian signals carrying a word or legend, and said lights shall indicate and apply to drivers of vehicles and pedestrians as follows:

(1) [**Green Light or Arrow**]. Green indication

(a) Vehicle operators facing a circular green signal may proceed straight through or turn right or left unless a sign at such place prohibits either such turn. Vehicle operators turning right or left shall stop to allow other vehicles lawfully within the intersection control area to complete their movements. Vehicle operators turning right or left shall also stop for pedestrians who are lawfully within the intersection control area as required by RCW 46.61.235(1).

(b) Vehicle operators facing a green arrow signal, shown alone or in combination with another indication, may enter the intersection control area only to make the movement indicated by such arrow, or such other movement as is permitted by other indications shown at the same time. Vehicle operators shall stop to allow other vehicles lawfully within the intersection control area to complete their movements. Vehicle operators

shall also stop for pedestrians who are lawfully within the intersection control area as required by RCW 46.61.235(1).

(c) Unless otherwise directed by a pedestrian control signal, as provided in RCW 46.61.060 as now or hereafter amended, pedestrians facing any green signal, except when the sole green signal is a turn arrow, may proceed across the roadway within any marked or unmarked crosswalk.

(2) [**Yellow Light or Arrow**]. Steady yellow indication

(a) Vehicle operators facing a steady circular yellow or yellow arrow signal are thereby warned that the related green movement is being terminated or that a red indication will be exhibited immediately thereafter when vehicular traffic shall not enter the intersection. Vehicle operators shall stop for pedestrians who are lawfully within the intersection control area as required by RCW 46.61.235(1).

(b) Pedestrians facing a steady circular yellow or yellow arrow signal, unless otherwise directed by a pedestrian control signal as provided in RCW 46.61.060 shall not enter the roadway.

(3) [**Red Light**]. Steady red indication

(a) Vehicle operators facing a steady circular red signal alone shall stop at a clearly marked stop line, but if none, before entering the crosswalk on the near side of the intersection or, if none, then before entering the intersection control area and shall remain standing until an indication to proceed is shown. However, the vehicle operators facing a steady circular red signal may, after stopping proceed to make a right turn from a one-way or two-way street into a two-way street or into a one-way street carrying traffic in the direction of the right turn; or a left turn from a one-way or two-way street into a one-way street carrying traffic in the direction of the left turn; unless a sign posted by competent authority prohibits such movement. Vehicle operators planning to make such turns shall remain stopped to allow other vehicles lawfully within or approaching the intersection control area to complete their movements. Vehicle operators planning to make such turns shall also remain stopped for pedestrians who are lawfully within the intersection control area as required by RCW 46.61.235(1).

(b) Unless otherwise directed by a pedestrian control signal as provided in RCW 46.61.060 as now or hereafter amended, pedestrians facing a steady circular red signal alone shall not enter the roadway.

(c) Vehicle operators facing a steady red arrow indication may not enter the intersection control area to make the movement indicated by such arrow, and unless entering the intersection control area to make such other movement as is permitted by other indications shown at the same time, shall stop at a clearly marked stop line, but if none, before entering a crosswalk on the near side of the intersection control area, or if none, then before entering the intersection control area and shall remain standing until an indication to make the movement indicated by such arrow is shown. However, the vehicle operators facing a steady red arrow indication may, after stopping proceed to make a right turn from a one-way or two-way street into a two-way street or into a one-way street carrying traffic in the direction of the right turn; or a left turn from a one-way street or two-way street into a one-way street carrying traffic in the direction of the left turn; unless a sign posted by competent authority prohibits such movement. Vehicle operators planning to make such turns shall remain stopped to allow other vehicles lawfully within or approaching the intersection control area to complete their movements. Vehicle operators planning to make such turns shall also remain stopped for pedestrians who are lawfully within the intersection control area as required by RCW 46.61.235(1).

(d) Unless otherwise directed by a pedestrian signal, pedestrians facing a steady red arrow signal indication shall not enter the roadway.

(4) [**Traffic Control Signal Not at Intersection**]. If an official traffic control signal is erected and maintained at a place other than an intersection, the provisions of this section shall be applicable except as to those provisions which by their nature can have no application. Any stop required shall be made at a sign or marking on the pavement indicating where the stop shall be made, but in the absence of any such sign or marking the stop shall be made at the signal.

O. U-Turns

RCW 46.61.295 concerns u-turns:

(1) [**Safely Without Interfering with Traffic**]. The driver of any vehicle shall not turn such vehicle so as to proceed in the opposite direction

unless such movement can be made in safety and without interfering with other traffic.

(2) [**Prohibited on Curves, Crests of Grade, Cannot be Seen within 500 Feet**]. No vehicle shall be turned so as to proceed in the opposite direction upon any curve, or upon the approach to or near the crest of a grade, where such vehicle cannot be seen by the driver of any other vehicle approaching from either direction within five hundred feet.

P. Yield Right of Way−Driveway, Alley, Building

RCW 46.61.295 concerns emerging from an alley, driveway or building:

> The driver of a vehicle within a business or residence district emerging from an alley, driveway or building shall stop such vehicle immediately prior to driving onto a sidewalk or onto the sidewalk area extending across any alleyway or driveway, and shall yield the right-of-way to any pedestrian as may be necessary to avoid collision, and upon entering the roadway shall yield the right-of-way to all vehicles approaching on said roadway.

Chapter Eighteen

Pretextual Warrantless Terry Stops

A. The Fourth Amendment Permits Pretextual Warrantless Terry Stops

The United States Supreme Court has long held that under the Fourth Amendment, an officer's reasonable suspicion to justify a warrantless Terry stop is not based on the officer's subjective belief but instead is based upon an objective view of all of the facts. Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 1880, 20 L.Ed.2d 889 (1968).

Accordingly, an officer's pretextual warrantless traffic stop to conduct a criminal investigation unrelated to driving does not run afoul of the Fourth Amendment where the officer stops a vehicle for an observed traffic violation.

> We think these cases foreclose any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved. We of course agree with petitioners that the Constitution prohibits selective enforcement of the law based on considerations such as race. But the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment. Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.

Whren v. United States, 517 U.S. 806, 116 S.Ct. 1769, 1774, 135 L.Ed.,2d 89 (1996).

B. Const. Art. I, §7 Does Not Tolerate Pretextual Warrantless Terry Stops

The essence of every pretextual warrantless Terry traffic stop is that "the police are pulling over a citizen, not to enforce the traffic code, but to conduct a criminal investigation unrelated to the driving." State v. Ladson, 138 Wn.2d 343, 349, 979 P.2d 833 (1999) (Lacey officer and sheriff detective on proactive gang patrol. While on gang patrol, the officers selectively enforced traffic violations in order to initiate contact and questioning. Ladson was a passenger in a vehicle stopped for

5 day old expired vehicle tabs. The driver was arrested for a suspended driver's license. Ladson was searched. A stolen handgun and several baggies of marijuana were found. Held that stop was an unconstitutional warrantless pretext. Held that evidence suppressed.)

Const. art. I, §7 does not tolerate pretextual warrantless Terry traffic stops because the pretext is an attempt to "dispense with [a] warrant when the true reason for the seizure is not exempt from the warrant requirement." State v. Ladson, 138 Wn.2d 343, 358, 979 P.2d 833 (1999); State v. Day, 161 Wn.2d 889, 897, 168 P.3d 1265 (2007).

When determining whether a warrantless Terry traffic stop is pretextual, the court should consider the totality of the circumstances, including both the subject intent of the officer and the objective reasonableness of the officer's actions. State v. Ladson, 138 Wn.2d 343, 358, 979 P.2d 833 (1999).

C. Mixed Motive Warrantless Terry Traffic Stops

A mixed motive warrantless Terry traffic stop occurs where an officer makes a warrantless traffic stop based on both legitimate and illegitimate grounds. State v. Arreola, 176 Wn.2d 284, ¶23, 290 P.3d 983 (2012) (Officer received anonymous tip of possible DUI. Officer located vehicle and followed it for half a mile. No signs of DUI were observed by the officer. The officer observed an altered exhaust in possible violation of RCW 46.37.390 and stopped the vehicle. Held that DUI and first degree driving while license revoked convictions affirmed.)

A warrantless Terry traffic stop is not pretextual if the officer makes an independent and conscious determination that a traffic stop to address a traffic infraction is reasonably necessary to further traffic safety.

> A mixed-motive stop does not violate article I, section 7 so long as the police officer making the stop exercises discretion appropriately. Thus, if a police officer makes an independent and conscious determination that a traffic stop to address a suspected traffic infraction is reasonably necessary in furtherance of traffic safety and the general welfare, the stop is not pretextual. That remains true even if the legitimate reason for the stop is secondary and the officer is motivated primarily by a hunch or some other reason that is insufficient to justify a stop.
>
> In such a case, the legitimate ground is an independent cause of the stop, and privacy is justifiably disturbed due to the need to enforce traffic regulations, as determined by an appropriate exercise of police discretion.

> Any additional reason or motivation of the officer does not affect privacy in such a case, nor does it interfere with the underlying exercise of police discretion, because the officer would have stopped the vehicle regardless.

State v. Arreola, 176 Wn.2d 284, ¶24, 290 P.3d 983 (2012).

A trial court should consider the officer's illegitimate reason or motivation when determining whether the officer actually stopped the vehicle for a legitimate purpose.

> The trial court should consider the presence of an illegitimate reason or motivation when determining whether the officer really stopped the vehicle for a legitimate and independent reason (and thus would have conducted the traffic stop regardless). But a police officer cannot and should not be expected to simply ignore the fact that an appropriate and reasonably necessary traffic stop might also advance a related and more important police investigation. In such a case, an officer's motivation to remain observant and potentially advance a related investigation does not taint the legitimate basis for the stop, so long as discretion is appropriately exercised and the scope of the stop remains reasonably limited based on its lawful justification.

State v. Arreola, 176 Wn.2d 284, ¶24, 290 P.3d 983 (2012).

A trial court's consideration of an alleged mixed motive pretextual warrantless Terry traffic stop should remain direct and straightforward.

> A trial court's consideration of a challenge to an allegedly pretextual traffic stop should remain direct and straightforward. The trial court should consider both subjective intent and objective circumstances in order to determine whether the police officer actually exercised discretion appropriately. The trial court's inquiry should be limited to whether investigation of criminal activity or a traffic infraction (or multiple infractions), for which the officer had a reasonable articulable suspicion, was an actual, conscious, and independent cause of the traffic stop. The presence of illegitimate reasons for the stop often will be relevant to that inquiry, but the focus must remain on the alleged legitimate reason for the stop and whether it was an actual, conscious, and independent cause.

State v. Arreola, 176 Wn.2d 284, ¶25, 290 P.3d 983 (2012).

Justices Chambers and Stephens dissented to the Arreola holding. saying:

> In the present case, an officer admitted his primary reason for stopping a car was to conduct a speculative criminal investigation−that is, to check for intoxication despite having no constitutionally permissible basis for doing so. The officer noticed, after following the car he wished to stop for a half mile or so, that its exhaust system was not in compliance with traffic regulations. The officer claims at that point he made a conscious and independent decision to pull the vehicle over for the tailpipe violation. It is uncontested that the officer's primary reason for the stop was unconstitutional. He does not deny the primary reason for pulling the vehicle over was to conduct an investigation without authority of law. But the majority asserts this primary motivation does not matter as long as there was an independent secondary justification for the stop. This reasoning is for all practical purposes indistinguishable from the reasoning this court rejected in Ladson.
>
> Going forward, police officers in Washington will be free to stop citizens *primarily* to conduct an unconstitutional speculative investigation as long as they can claim there was an independent secondary reason for the seizure. I do not believe such a result comports with our holding in Ladson or with article I, section 7's command that "[n]o person shall be disturbed in his private affairs ... without authority of law." I respectfully dissent.

State v. Arreola, 176 Wn.2d 284, ¶¶29-30, 290 P.3d 983 (2012) (Chambers, J., dissenting, joined by Stephens , J.) (citation omitted) (footnote omitted) (italics in original).

D. Pretext Analysis Does Not Apply if a Warrant Exists

Washington courts "decline to apply a pretext analysis to searches pursuant to a valid warrant" because the pretext result reached in State v. Ladson, 138 Wn.2d 343, 358, 979 P.2d 833 (1999) concerned actions taken by law enforcement without a warrant. State v. Lansden, 144 Wn.2d 654, 662, 30 P.3d 483 (2001).

Chapter Nineteen

Warrantless Terry Stops Based Upon Driver's Status

A. Vehicle's Registered Owner has a Suspended Driver's License

An officer may conduct a warrantless Terry stop of a vehicle registered to a person whose driver's license has been suspended, and may ask to see the person's driver's license. RCW 46.20.349 says:

> Any police officer who has received notice of the suspension or revocation of a driver's license from the department of licensing may, during the reported period of such suspension or revocation, stop any motor vehicle identified by its vehicle license number as being registered to the person whose driver's license has been suspended or revoked. The driver of such vehicle shall display his or her driver's license upon request of the police officer.

A report from the Department of Licensing that a registered owner's driver's license has been suspended supports "articulable suspicion of criminal conduct sufficient to justify a brief [warrantless Terry] investigatory stop." State v. Phillips, 126 Wn.App. 584, ¶7, 109 P.3d 470 (2005), *review denied*, 156 Wn.2d 1012 (2006).

> The DOL's disclosure of licensing records violates neither a subjective nor objective expectation of privacy. State v. McKinney, 148 Wn.2d 20, 32, 60 P.3d 46 (2002). Indeed, vehicle registration numbers must be displayed front and back to enable law enforcement to obtain DOL information and to act on a reasonable suspicion arising from that information.

State v. Phillips, 126 Wn.App. 584, ¶9, 109 P.3d 470 (2005), *review denied*, 156 Wn.2d 1012 (2006).

The law encourages officers to conduct a warrantless Terry stop "on the reasonable suspicion that the registered owner of a vehicle is driving, absent some manifest reason to believe otherwise." State v. Phillips, 126 Wn.App. 584, ¶12, 109 P.3d 470 (2005), *review denied*, 156 Wn.2d 1012 (2006).

Contra State v. Penfield, 106 Wn.App. 157, 22 P.3d 293 (2001) (The driver and registered owner were of the opposite sex, which the officer determined after stopping the vehicle but before contacting the driver. Held that an officer may not, without additional grounds for suspicion, proceed with a warrantless Terry stop based on a registration check once it is manifestly clear that the driver of the vehicle is not the registered owner.). *See* State v. Phillips, 126 Wn.App. 584, ¶11, 109 P.3d 470 (2005), *review denied*, 156 Wn.2d 1012 (2006) ("Our decision in Penfield is an exception.")

B. Vehicle's Registered Owner has an Outstanding Warrant

Police officers may conduct a warrantless Terry stop of a vehicle to verify the identity of the driver where there is an arrest warrant for the vehicle's registered owner. This type of warrantless stop is constitutionally permissible because the officer has an articulable suspicion of criminal conduct.

> When [the officer] stopped the van, (1) he knew there were outstanding arrest warrants for the van's registered owner, Bliss; (2) he knew that the van's registered owner, Bliss, was a white woman with blond hair; and (3) he had observed that the van's driver was a white or light-skinned female with light-colored hair, which fit the physical description accompanying Bliss's vehicle registration. These facts were sufficient to create a substantial possibility that it was Bliss driving the van and to justify an initial brief detention to verify her identity. After verifying that the van's driver was Bliss, Chapman acted lawfully in arresting her on the outstanding warrants.

State v. Bliss, 153 Wn.App. 197, ¶15, 222 P.3d 107 (2009) (footnote omitted).

C. Officer Recognizes Driver Knowing the Driver's License is Suspended

An officer may conduct a warrantless Terry stop of a vehicle based upon the officer's recognition of the driver as someone whose driver's license is suspended.

> Mr. Marcum argues that he might have obtained a driver's license during the four days since his last contact with Officer Meyer. Again, under recent case law, this does not negate otherwise reasonable suspicion. In State v. Perea, a license check seven days before the stop was sufficient, not only for articulable suspicion of driving without a license, but also for probable cause to arrest. State v. Perea, 85 Wn.App. 339, 343, 932 P.2d 1258

(1997). Here, four-day-old information was fresh enough to provide a reasonable suspicion for a brief stop to find out how things stood. The court correctly concluded that the factual basis for the stop was a reasonable suspicion based on articulable facts and ruled that the factual basis was met.

State v. Marcum, 116 Wn.App. 526, 531-32, 66 P.3d 690 (2003) (Warrantless Terry stop valid where officer had stopped driver four days earlier and determined defendant's driver's license was suspended).

Chapter Twenty

Warrantless Terry Stops Based Upon Informant Tips

A. Warrantless Terry Stops Based Upon Informant Tips Generally

An officer's reasonable suspicion justifying a warrantless Terry stop may be based on information supplied by an informant based upon the totality of the circumstances. State v. Kennedy, 107 Wn.2d 1, 7-8, 726 P.2d 445 (1986).

But "[a]n informant's tip cannot constitutionally provide police with such a suspicion unless it possesses sufficient 'indicia of reliability.' " State v. Sieler, 95 Wn.2d 43, 47, 621 P.2d 1272 (1980) (*quoting* Adams v. Williams, 407 U.S. 143, 147, 92 S.Ct. 1921, 1924, 32 L.Ed.2d 612 (1972)).

When deciding whether this "indicia of reliability" exists, courts will generally consider several factors, primarily (1) whether the informant is reliable, (2) whether the information was obtained in a reliable fashion, and (3) whether the officers can corroborate any details of the informant's tip. State v. Sieler, 95 Wn.2d 43, 47, 621 P.2d 1272 (1980); State v. Lesnick, 84 Wn.2d 940, 944, 530 P.2d 243, *cert. denied*, 423 U.S. 891, 96 S.Ct. 187, 46 L.Ed.2d 122 (1975).

A citizen-witness's credibility is enhanced when he or she purports to be an eyewitness to the events described. State v. Lee, 147 Wn.App. 912, ¶8, 199 P.3d 445 (2008), *review denied*, 166 Wn.2d 1016 (2009).

> Indeed, 'victim-witness cases usually require a very prompt police response in an effort to find the perpetrator, so that a leisurely investigation of the report is seldom feasible.' Moreover, courts should not treat information from ordinary citizens who have been the victim of or witness to criminal conduct the same as information from compensated informants from the criminal subculture.
>
> > [A]n ordinary citizen who reports a crime which has been committed in his presence ... stands on much different ground than a police informer. He is a witness to criminal activity who acts with an intent

> to aid the police in law enforcement because of his concern for society or for his own safety.
>
> Thus, the police are entitled to give greater credence to a report from a citizen crime victim than to a report from a criminal associate of the suspect. Indeed, there is no constitutional requirement that police distrust ordinary citizens who present themselves as crime victims and '[c]ourts are not required to sever the relationships that citizens and local police forces have forged to protect their communities from crime.'

State v. Lee, 147 Wn.App. 912, ¶14, 199 P.3d 445 (2008), *review denied*, 166 Wn.2d 1016 (2009) (citations omitted).

In order to establish probable cause based on informant information, the Fourth Amendment requires that the facts and circumstances provided by law enforcement must satisfy both the reliability veracity) and basis of knowledge of criminal activity prongs of the Aguilar-Spinelli test. Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 1513-14, 12 L.Ed.2d 723 (1964); Spinelli v. United States, 393 U.S. 410, 89 S.Ct. 584, 588-89, 21 L.Ed.2d 637 (1969).

The Aguilar-Spinelli test for establishing probable cause is not the appropriate test under Const. art. I, §7 for a warrantless investigatory stop based partly or wholly on an informant's tip. State v. Lee, 147 Wn.App. 912, ¶¶15-20, 199 P.3d 445 (2008), *review denied*, 166 Wn.2d 1016 (2009).

B. Washington DUI Cases Involving Informant Tips

In Campbell v. State of Wash. Dept. of Licensing, 31 Wn.App. 833, 835, 644 P.2d 1219 (1982) (DOL driver's license revocation for breath test refusal reversed), a passing motorist yelled to a trooper that a drunk driver was headed southbound, and gave a description of the vehicle. The trooper made a U-turn and followed the vehicle to a stop light where the vehicle made a normal stop. When the light turned green the vehicle proceeded normally. The trooper stopped the vehicle on the other side of the intersection, and upon contact determined that the driver was DUI. The trooper did not observe any conduct indicative of DUI prior to the warrantless Terry stop.

The Campbell Court held that the officer was not authorized to conduct a warrantless Terry stop of the vehicle for DUI on the sole basis that an unknown citizen informant pointed to the vehicle and announced it was being driven by a drunk driver in the absence of any corroborative information or observation.

> A police officer may make an investigatory stop for suspected drunk driving, but before doing so he must first possess a well-founded suspicion based on articulable facts that such a violation has been committed or is presently being committed.
>
> Further, where, as here, an informant's uncorroborated tip constitutes the sole justification for the officer's initial detention of the suspect, the tip must possess an "indicia of reliability". State v. Sieler, 95 Wn.2d 43, 47, 621 P.2d 1272 (1980); State v. Wakeley, 29 Wn.App. 238, 241, 628 P.2d 835 (1981).
>
> An uncorroborated tip possesses sufficient "indicia of reliability" where (1) the source of the information is reliable [FN1] and (2) the report contains enough objective facts to justify the pursuit and detention of the suspect. State v. Wakeley.
>
> > FN1. Since the report in this case came from a citizen informant, we will assume that the officer could properly conclude that the source of the information was reliable. State v. Wakeley, 29 Wn.App. 238, 241, 628 P.2d 835 (1981).

Campbell v. State of Wash. Dept. of Licensing, 31 Wn.App. 833, 835, 644 P.2d 1219 (1982) (citations omitted).

In State v. Anderson, 51 Wn.App. 775, 755 P.2d 191 (1988), a probation and parole officer known to a trooper waived at the trooper as if something was wrong. The probation and parole officer pointed out the window at a Volkswagen ahead of him and gestured "like a snake ... going back and forth." The trooper followed the Volkswagen for about one-quarter of a mile, observed the driver weave within her own lane, then stopped her. Before the trooper approached the Volkswagen, he talked to the probation and parole officer who had pulled in behind the trooper. He told the trooper that the Volkswagen had been over the center line and had been weaving considerably.

The Anderson Court distinguished the holding in Campbell, and upheld the warrantless Terry stop.

> The situation here is distinguishable from Campbell. Unlike the informant in Campbell, Mr. Ristau made more than a conclusory statement. His tip was that the driver of the indicated vehicle was operating it in a manner that caused him concern, and he provided an underlying factual justification for his tip by gesturing that he had observed the vehicle weaving. Even without supplementation by the trooper's own observations

> or Mr. Ristau's later statements, this communication gave rise to a well-founded articulable suspicion that the driver's operation of the vehicle posed a danger to herself or others using the roadway. That suspicion was sufficient to warrant the trooper's investigatory stop.

State v. Anderson, 51 Wn.App. 775, 779, 755 P.2d 191 (1988).

In State v. Jones, 85 Wn.App. 797, 934 P.2d 1224, *review denied*, 133 Wn.2d 1012 (1997), a driver of a passing truck indicated with hand signals to an officer that the car in front of him was weaving on the road. The officer immediately pulled in behind the car and followed. The car did not weave or move erratically. The officer stopped the vehicle anyway because it was approaching an intersection with pedestrian traffic.

The Jones Court distinguished the holding in Anderson, and reversed the DUI conviction finding that the warrantless Terry stop was improper.

> The only basis for establishing the reliability of the informant here was a company name on the side of the truck. A name written on the side of a truck, without more, is not qualitatively different from an anonymous but named telephone caller. To establish the reliability of the source, more information is required.

State v. Jones, 85 Wn.App. 797, 800, 934 P.2d 1224, *review denied*, 133 Wn.2d 1012 (1997).

Chapter Twenty-One

Warrantless Terry Stops Outside an Officer's Jurisdiction

A. Washington Law Enforcement Authority Generally

Washington law enforcement derive their authority by statute.

1. Washington State Patrol

The Washington State Patrol is authorized to exercise police powers throughout the state. RCW 43.43.030 says:

> The chief and other officers of the Washington state patrol shall have and exercise, throughout the state, such police powers and duties as are vested in sheriffs and peace officers generally, and such other powers and duties as are prescribed by law.

2. County Sheriff and Deputies

A county sheriff is conservator of the peace through the county. RCW 36.28.010 says:

> The sheriff is the chief executive officer and conservator of the peace of the county. In the execution of his or her office, he or she and his or her deputies:
>
> (1) Shall arrest and commit to prison all persons who break the peace, or attempt to break it, and all persons guilty of public offenses;
>
> (2) Shall defend the county against those who, by riot or otherwise, endanger the public peace or safety;
>
> (3) Shall execute the process and orders of the courts of justice or judicial officers, when delivered for that purpose, according to law;
>
> (4) Shall execute all warrants delivered for that purpose by other public officers, according to the provisions of particular statutes;

> (5) Shall attend the sessions of the courts of record held within the county, and obey their lawful orders or directions;
>
> (6) Shall keep and preserve the peace in their respective counties, and quiet and suppress all affrays, riots, unlawful assemblies and insurrections, for which purpose, and for the service of process in civil or criminal cases, and in apprehending or securing any person for felony or breach of the peace, they may call to their aid such persons, or power of their county as they may deem necessary.

Sheriff deputies have power as authorized by the sheriff. RCW 36.28.020 says:

> Every deputy sheriff shall possess all the power, and may perform any of the duties, prescribed by law to be performed by the sheriff, and shall serve or execute, according to law, all process, writs, precepts, and orders, issued by lawful authority.
>
> Persons may also be deputed by the sheriff in writing to do particular acts; including the service of process in civil or criminal cases, and the sheriff shall be responsible on his or her official bond for their default or misconduct.

3. Police

Const. art. XI, §11 authorizes any county, city, town or township to "make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws." Local ordinances should be reviewed for additional information concerning police powers of municipal law enforcement.

City police have authority to arrest violators of city ordinances. RCW 35.23.161 says:

> The department of police in a city of the second class shall be under the direction and control of the chief of police subject to the direction of the mayor. Any police officer may pursue and arrest violators of city ordinances beyond the city limits.
>
> Every citizen shall lend the police chief aid, when required, for the arrest of offenders and maintenance of public order. With the concurrence of the mayor, the police chief may appoint additional police officers to serve for one day only under orders of the chief in the preservation of public order.
>
> The police chief shall have the same authority as that conferred upon sheriffs for the suppression of any riot, public tumult, disturbance of the

> peace, or resistance against the laws or the public authorities in the lawful exercise of their functions and shall be entitled to the same protection.
>
> The police chief shall perform such other services as may be required by statute or ordinances of the city.

Town police have authority to arrest violators of town ordinances. RCW 35.27.240 says:

> The department of police in a town shall be under the direction and control of the marshal subject to the direction of the mayor. He or she may pursue and arrest violators of town ordinances beyond the town limits.
>
> The marshal's lawful orders shall be promptly executed by deputies, police officers and watchpersons. Every citizen shall lend him or her aid, when required, for the arrest of offenders and maintenance of public order. He or she may appoint, subject to the approval of the mayor, one or more deputies, for whose acts he and his or her bondspersons shall be responsible, whose compensation shall be fixed by the council. With the concurrence of the mayor, the marshal may appoint additional police officers for one day only when necessary for the preservation of public order.
>
> The marshal shall have the same authority as that conferred upon sheriffs for the suppression of any riot, public tumult, disturbance of the peace, or resistance against the laws or public authorities in the lawful exercise of their functions and shall be entitled to the same protection.
>
> The marshal shall execute and return all process issued and directed to him or her by any legal authority and for his or her services shall receive the same fees as are paid to constables. The marshal shall perform such other services as the council by ordinance may require.

B. Officer Outside of Jurisdiction Generally

Under the common law, “a peace officer has no official power to arrest beyond the territorial boundary of the state, city, county, or bailiwick for which he is elected or appointed.” Irwin v. Dept. of Motor Vehicles, 10 Wn.App. 369, 371, 517 P.2d 619 (1974) (WSU police officer lacked authority to enforce laws outside of the WSU campus).

The Fourth Amendment and Const. art. I, §7 require a police officer to act under lawful authority. City of Wenatchee v. Durham, 43 Wn.App. 547, 549-50, 718

P.2d 819 (1986). A warrantless arrest made beyond an arresting officer's jurisdiction is equivalent to an arrest without probable cause. State v. Rasmussen, 70 Wn.App. 853, 855, 855 P.2d 1206 (1993).

In 1985, the legislature enacted the Washington Mutual Aid Peace Officers Powers Act in chapter 10.93 RCW to modify common law restrictions on police authority outside their jurisdiction.

> These statutes [RCW 10.93.070(6) and RCW 10.93.120] are part of the Washington Mutual Aid Peace Officers Powers Act, RCW ch. 10.93, enacted in 1985 to expand common law restrictions on limited territorial enforcement and to remove artificial barriers to mutual aid and cooperative law enforcement. RCW 10.93.001.

City of Tacoma v. Durham, 95 Wn.App. 876, 879, 978 P.2d 514 (1999). *See also* State v. Plaggemeier, 93 Wn.App. 472, 476-77, 969 P.2d 519, *review denied*, 137 Wn.2d 1036 (1999).

RCW 10.93.070 expands the common law by authorizing Washington law enforcement to enforce traffic and criminal laws beyond their jurisdiction under several circumstances. RCW 10.93.070 provides:

> In addition to any other powers vested by law, a general authority Washington peace officer who possesses a certificate of basic law enforcement training or a certificate of equivalency or has been exempted from the requirement therefor by the Washington state criminal justice training commission may enforce the traffic or criminal laws of this state throughout the territorial bounds of this state, under the following enumerated circumstances:
>
> (1) [**Written Consent of Sheriff or Police Chief**]. Upon the prior written consent of the sheriff or chief of police in whose primary territorial jurisdiction the exercise of the powers occurs;
>
> (2) [**Emergency**]. In response to an emergency involving an immediate threat to human life or property;
>
> (3) [**Mutual Law Enforcement Assistance Agreement**]. In response to a request for assistance pursuant to a mutual law enforcement assistance agreement with the agency of primary territorial jurisdiction or in response to the request of a peace officer with enforcement authority;
>
> (4) [**Transporting Prisoner**]. When the officer is transporting a prisoner;

(5) [**Executing Warrant**]. When the officer is executing an arrest warrant or search warrant; or

(6) [**Fresh Pursuit**]. When the officer is in fresh pursuit, as defined in RCW 10.93.120.

C. Written Consent of Sheriff or Police Chief Authorizes Officer Actions Outside of Jurisdiction

RCW 10.93.070(1) authorizes law enforcement to enforce traffic and criminal laws beyond their jurisdiction without a warrant upon the "prior written consent of the sheriff or chief of police" of the jurisdiction in question.

In State v. Plaggemeier, 93 Wn.App. 472, 969 P.2d 519, *review denied*, 137 Wn.2d 1036 (1999), at 12:30 AM, a Poulsbo police officer conducted a warrantless Terry traffic infraction stop of a vehicle being driven without its headlights on in Port Orchard. The driver was ultimately arrested for DUI. The Poulsbo officer was acting pursuant to a mutual aid agreement between Kitsap County's four municipal police chiefs and the Kitsap County Sheriff.

RCW 10.93.130 provides:

> Under the interlocal cooperation act, chapter 39.34 RCW, any law enforcement agency referred to by this chapter may contract with any other such agency and may also contract with any law enforcement agency of another state, or such state's political subdivision, to provide mutual law enforcement assistance.

The defense successfully argued before the trial court that the agreement was invalid under RCW 10.93.130, which incorporated the Interlocal Cooperation Act, RCW 39.34, because the agreement had not been ratified by the local legislative bodies and filed with the county auditor as required by RCW 39.34.

The Court of Appeals reversed the trial court, holding that agreements between law enforcement agencies under RCW 10.93.070(1) are valid without satisfying the legislative ratification and filing requirements of RCW 39.34 because RCW 10.93.070(1) authorizes law enforcement agencies to independently consent to such agreements.

> Because the consent portion of the Agreement independently authorized the arrest of Plaggemeier pursuant to RCW 10.93.070(1), notwithstanding the invalidity of the balance of the Agreement under RCW 39.34, we reverse and remand for trial.

State v. Plaggemeier, 93 Wn.App. 472, 483-84, 969 P.2d 519, *review denied*, 137 Wn.2d 1036 (1999).

D. Emergency Involving Immediate Threat Authorizes Officer Actions Outside of Jurisdiction

RCW 10.93.070(2) authorizes law enforcement to enforce traffic and criminal laws beyond their jurisdiction without a warrant "in response to an emergency involving an immediate threat to human life or property."

In a case of first impression concerning RCW 10.93.070(2), our Supreme Court held that the specific facts of the case must be examined rather than the statutory definition of the alleged crime to determine whether an emergency existed involving immediate threat to human life or property.

> Unlike [City of Tacoma v. Durham, 95 Wn.App. 876, 978 P.2d 514 (1999)], King did not nearly hit another car, nor run a light, nor weave across traffic lanes. He did not pop a wheelie, cut off another car, nor, for that matter, drive in reverse along the shoulder. At most, King glared at the driver of the large truck, stood on his foot pegs for three to five seconds, and accelerated at high speed past the truck. As aforementioned, Starks could not verify that King accelerated away at what he thought was 100 m.p.h. Even so, the officer testified King slowed down as he approached other traffic and pulled over immediately when Starks signaled him to do so. King may have exceeded the speed limit by a considerable margin, but his driving was not anywhere near as dangerous as that of the intoxicated defendant in Durham, 95 Wn.App. 876. Moreover, there was no eyewitness account here indicating an immediate threat, unlike Durham where the transit supervisor reported he was almost hit. The record shows King's actions did not constitute an immediate threat to life or property as required under RCW 10.93.070(2). We choose not to broaden or water down the meaning of this emergency exception to include speeding such as King's. Furthermore, we note that police officers are still authorized to effect extraterritorial arrests in circumstances where a valid interlocal agreement between jurisdictions exists or where the fresh pursuit exception applies.

State v. King, 167 Wn.2d 324, 335, 219 P.3d 642 (2009) (Reckless driving allegation justifying officer's actions beyond his jurisdiction was insufficient to find an emergency existed involving an immediate threat to human life or property under facts presented. Reckless driving conviction reversed.)

E. Fresh Pursuit Authorizes Officer Actions Outside of Jurisdiction

An exception to the common law rule prohibiting law enforcement action outside their jurisdiction existed where the officer was in "fresh pursuit" of one who had committed a felony. The exception would not be applicable, however, where the offense was a misdemeanor. State v. Barker, 143 Wn.2d 915, 921, 25 P.3d 423 (2001) (Oregon officer who pursued suspected DUI driver into Washington based upon probable cause lacked statutory or common law authority to seize driver pursuant to Const. art. I, §7).

RCW 10.93.070(1) authorizes law enforcement to enforce traffic and criminal laws beyond their jurisdiction without a warrant when "the officer is in fresh pursuit, as defined in RCW 10.93.120."

RCW 10.93.120 defines "fresh pursuit" as follows:

> (1) Any peace officer who has authority under Washington law to make an arrest may proceed in fresh pursuit of a person (a) who is reasonably believed to have committed a violation of traffic or criminal laws, or (b) for whom such officer holds a warrant of arrest, and such peace officer shall have the authority to arrest and to hold such person in custody anywhere in the state.
>
> (2) The term "fresh pursuit," as used in this chapter, includes, without limitation, fresh pursuit as defined by the common law. Fresh pursuit does not necessarily imply immediate pursuit, but pursuit without unreasonable delay.

Under RCW 10.93.120, "courts are not limited by the common law definition, but may consider the Legislature's overall intent to use practical considerations in deciding whether a particular arrest across jurisdictional lines was reasonable." City of Tacoma v. Durham, 95 Wn.App. 876, 881, 978 P.2d 514 (1999) (where police observed driver weaving and running a red light in south Tacoma, out-of-jurisdiction warrantless stop and arrest in Lakewood was lawful under RCW 10.93.070(6) and RCW 10.93.120, and in response to an emergency under RCW 10.93.070(2)).

During a warrantless fresh pursuit, the driver "need not know he is being pursued." Given the inherent mobility of a driving offense, the fresh pursuit doctrine is a necessary means of cooperatively enforcing traffic laws to ensure public safety. City of Tacoma v. Durham, 95 Wn.App. 876, 881, 978 P.2d 514 (1999).

An officer may pursue a speeding driver over a jurisdictional boundary without a warrant when in fresh pursuant as defined by RCW 10.93.120.

> Police officers are allowed to enforce traffic laws throughout the "territorial bounds of the state," RCW 10.93.070, provided the officer is in "fresh pursuit" as defined by RCW 10.93.120(2)…
>
> Vance contends his stop does not meet the requirements of fresh pursuit. He argues that the common law definition necessitates, among other criteria, "that the individual sought must be attempting to escape to avoid arrest or at least know he is being pursued." *See* City of Wenatchee v. Durham, 43 Wn.App. 547, 550-52, 718 P.2d 819 (1986) (illegal arrest where there was no evidence that suspect was attempting to flee the jurisdiction to avoid arrest or that he knew he was being pursued). But RCW 10.93, which took effect after Wenatchee, does not limit fresh pursuit to the common law definition…
>
> * * *
>
> Vance was speeding. Police therefore had a reasonable belief that he posed a public danger. The King County Sheriff's deputy pursued Vance's vehicle, without unreasonable delay, across a jurisdictional boundary within an urban area. Vance's stop occurred as a result of fresh pursuit and was lawful.

Vance v. Dept. of Licensing, 116 Wn.App. 412, 415-16, 65 P.3d 668, *review denied*, 150 Wn.2d 1004 (2003).

F. Warrantless Seizures Occurring in Washington by Idaho or Oregon Officers in Fresh Pursuit

The Uniform Act on Fresh Pursuit is codified in chapter 10.89 RCW. RCW 10.89.010 authorizes officers from other states to pursue persons into this state in fresh pursuit when the pursued person is believed to have committed a felony, DUI or reckless driving. The DUI and reckless driving language was added to the statute in 1998.

> Any member of a duly organized state, county or municipal peace unit of another state of the United States who enters this state in fresh pursuit, and continues within this state in such fresh pursuit, of a person in order to arrest the person on the ground that he or she is believed to have committed a felony in such other state or a violation of the laws of such other state relating to driving while intoxicated, driving under the influence

> of drugs or alcohol, driving while impaired, or reckless driving shall have the same authority to arrest and hold such person in custody as has any member of any duly organized state, county or municipal peace unit of this state, to arrest and hold in custody a person on the ground that he or she is believed to have committed a felony or a violation of the laws of such other state relating to driving while intoxicated, driving under the influence of drugs or alcohol, driving while impaired, or reckless driving in this state.

RCW 10.89.050 defines “fresh pursuit” as follows:

> The term "fresh pursuit" as used in this chapter, shall include fresh pursuit as defined by the common law, and also the pursuit of a person who has committed a felony or who reasonably is suspected of having committed a felony or a violation of such other state relating to driving while intoxicated, driving under the influence of drugs or alcohol, driving while impaired, or reckless driving. It shall also include the pursuit of a person suspected of having committed a supposed felony, or a supposed violation of the laws relating to driving while intoxicated, driving under the influence of drugs or alcohol, driving while impaired, or reckless driving, though no felony or violation of the laws relating to driving while intoxicated, driving under the influence of drugs or alcohol, driving while impaired, or reckless driving actually has been committed, if there is reasonable ground for believing that a felony or a violation of the laws relating to driving while intoxicated, driving under the influence of drugs or alcohol, driving while impaired, or reckless driving has been committed.
>
> Fresh pursuit as used herein shall not necessarily imply instant pursuit, but pursuit without unreasonable delay.

The current version of RCW 10.89.010 “clearly” authorizes an out-of-state officer in fresh pursuit to conduct a warrantless stop of a suspected DUI driver in Washington. State v. Barker, 143 Wn.2d 915, n.1, 921, 25 P.3d 423 (2001) (Former RCW 10.89.010 authorized fresh pursuit into Washington by out-of-state officers only for felony offenses. Under former statute, an Oregon officer who pursued a suspected DUI driver into Washington in 1996 lacked statutory or common law authority to seize the driver in violation of Const. art. I, §7.).

Washington's Uniform Act on Fresh Pursuit is inapplicable to arrests made in other states. In re Richie, 127 Wn.App. 935, ¶10, 113 P.3d 1045 (2005).

G. Warrantless Seizures by Washington Officers in Idaho or Oregon While in Fresh Pursuit from Washington

Washington cases look to the law in Idaho or Oregon to determine the validity of a Washington officer's actions where a Washington officer acting in fresh pursuit follows a suspect into Idaho or Oregon and seizes the suspect in that state.

1. Idaho

Idaho's Uniform Act on Fresh Pursuit is codified in IC § 19-701 to 19-707. IC § 19-701 authorizes officers from other states to pursue persons into Idaho in fresh pursuit when the pursued person is believed to have committed a felony. The statute says:

> Any member of a duly organized state, county, or municipal peace unit of another state of the United States who enters this state in fresh pursuit and continues within this state in such fresh pursuit, of a person in order to arrest him on the ground that he is believed to have committed a felony in such other state, shall have the same authority to arrest and hold such person in custody, as has any member of any duly organized state, county or municipal peace unit of this state, to arrest and hold in custody a person on the ground that he is believed to have committed a felony in this state.

IC § 19-705 defines "fresh pursuit" as follows:

> The term "fresh pursuit" as used in this act shall include fresh pursuit as defined by the common law, and also the pursuit of a person who has committed a felony or who is reasonably suspected of having committed a felony. It shall also include the pursuit of a person suspected of having committed a supposed felony, though no felony has actually been committed, if there is reasonable ground for believing that a felony has been committed. Fresh pursuit as used herein shall not necessarily imply instant pursuit, but pursuit without unreasonable delay.

2. Oregon

Oregon's Uniform Act on Fresh Pursuit is codified in O.R.S. § 133.410-440. O.R.S. § 133.430 authorizes officers from other states to pursue persons into Oregon in fresh pursuit when the pursued person is believed to have committed a felony. The statute says:

> (1) Any member of a duly organized state, county or municipal peace unit of another state of the United States who enters this state in fresh pursuit,

> and continues within this state in such fresh pursuit, of a person in order to arrest the person on the ground that the person is believed to have committed a felony in the other state has the same authority to arrest and hold such person in custody as has any member of any duly organized state, county or municipal peace unit of this state to arrest and hold in custody a person on the ground that the person is believed to have committed a felony in this state.
>
> (2) This section shall not be construed to make unlawful any arrest in this state which otherwise would be lawful.

O.R.S. § 133.420(1) defines "fresh pursuit" as follows:

> (1) "Fresh pursuit" includes fresh pursuit as defined by the common law; the pursuit of a person who has committed a felony or who reasonably is suspected of having committed a felony; and the pursuit of a person suspected of having committed a felony, though no felony actually has been committed, if there is reasonable ground for believing that a felony has been committed. It does not necessarily imply instant pursuit, but pursuit without unreasonable delay.

A Washington officer had authority under Oregon's Uniform Act on Fresh Pursuit to arrest an unconscious suspect in an Oregon hospital where the officer followed the suspect into Oregon as soon as he was able to leave scene of accident involving the suspect, smelled odor of intoxicants on the suspect's person in a hospital emergency room, and had probable cause to believe the person committed vehicular homicide in Washington. Blood samples taken from the unconscious suspect were held to be admissible. State v. Steinbrunn, 54 Wn.App. 506, 774 P.2d 55, *review denied*, 113 Wn.2d 1015 (1989) (vehicular homicide conviction affirmed).

Chapter Twenty-Two

Tribal Issues

A Native American tribe recognized by the United States government generally possesses tribal sovereignty. This "dependent sovereign nation" status with the United States is similar to the status of states in some situations, and to the status of nations in others. Depending on the historical circumstances of recognition and subsequent Congressional action, the degree of tribal self-governance and sovereignty varies from one Tribal Nation to another.

Tribal authority has been the subject of intense and complex litigation among state, federal and Tribal officials. This chapter deals only with tribal issues from a traffic stop perspective.

Given the complexity, judges confronted with tribal issues are encouraged to seek thorough briefing from the parties focusing on the specific issues germane to their litigation.

A. Warrantless Traffic Stops−On Reservation by Tribal Officer of Non-Tribal Member

In State v. Schmuck, 121 Wn.2d 373, 850 P.2d 1332, *cert. denied*, 510 U.S. 931, 114 S.Ct. 343, 126 L.Ed.2d 308 (1993) (DUI conviction affirmed), a Suquamish Reservation tribal officer within the reservation conducted a warrantless stop of a vehicle for speeding and running a stop sign. The driver was determined not be a Suquamish member, but appeared to be impaired by alcohol. The tribal officer contacted a trooper and detained Schmuck until the trooper arrived. The trooper ultimately arrested the driver for DUI.

Our Supreme Court held that a tribe's inherent authority allowed a tribal officer to conduct a warrantless stop of a non-Indian driver on a public road within a reservation and detain the driver until state officers arrive.

> We conclude an Indian tribal officer has inherent authority to stop and detain a non-Indian who has allegedly violated state and tribal law while on the reservation until he or she can be turned over to state authorities for charging and prosecution. We hold Tribal Officer Bailey, as a police

> officer employed by the Suquamish Indian Tribe, had authority to stop and detain Schmuck, who was allegedly driving while intoxicated on the Reservation, until he could be turned over to the Washington State Patrol for charging and prosecution.

State v. Schmuck, 121 Wn.2d 373, 392, 850 P.2d 1332, *cert. denied*, 510 U.S. 931, 114 S.Ct. 343, 126 L.Ed.2d 308 (1993).

The court reasoned that the tribe's inherent authority included the ability to stop the driver:

> Only by stopping the vehicle could [the tribal officer] determine whether the driver was a tribal member, subject to the jurisdiction of the Tribe's traffic code. The alternative would put tribal officers in the impossible position of being unable to stop any driver for fear they would make an unlawful stop of a non-Indian. Such a result would seriously undercut the Tribe's ability to enforce tribal law and would render the traffic code virtually meaningless. It would also run contrary to the "well-established federal policy of furthering Indian self-government."

State v. Schmuck, 121 Wn.2d 373, 383, 850 P.2d 1332, *cert. denied*, 510 U.S. 931, 114 S.Ct. 343, 126 L.Ed.2d 308 (1993) (citation omitted).

B. Warrantless Traffic Stops−On Reservation by Non-Tribal Officer

The State has criminal and civil jurisdiction over Indians and Indian territory for the operation of motor vehicles on public streets, alleys, roads and highways. RCW 37.12.080(8); Confederated Tribes of Colville Reservation v. Washington, 938 F.2d 146, 147 n.1 (9th Cir. 1991), *cert. denied*, 503 U.S. 997, 112 S.Ct. 1704, 118 L.Ed.2d 412 (1992).

RCW 37.12.010(8) provides:

> The state of Washington hereby obligates and binds itself to assume criminal and civil jurisdiction over Indians and Indian territory, reservations, country, and lands within this state in accordance with the consent of the United States given by the act of August 15, 1953 (Public Law 280, 83rd Congress, 1st Session), but such assumption of jurisdiction shall not apply to Indians when on their tribal lands or allotted lands within an established Indian reservation and held in trust by the United States or subject to a restriction against alienation imposed by the United States, unless the provisions of RCW 37.12.021 have been invoked, except for the following:

> (8) Operation of motor vehicles upon the public streets, alleys, roads and highways…

In State v. Abrahamson, 157 Wn.App. 672, 238 P.3d 533 (2010), a Snohomish County detective was trying to locate the defendant to arrest him on outstanding warrants. While on the Tulalip Indian Reservation, the detective was speaking with a Tulalip tribal officer when the defendant drove by. The detective and tribal officer followed in pursuant. The defendant attempted to elude the officers, driving 75 MPH in a 35 MPH zone. The defendant ultimately crashed his vehicle, and was arrested. A blood alcohol test showed a 0.09 alcohol concentration. The defendant was convicted of eluding a police officer, DUI and driving while license suspended.

The defendant, a member of the Spokane Indian Tribe, asserted that RCW 37.12.010 did not apply to criminal traffic offenses committed by tribal members on tribal lands.

The appellate court rejected the defendant's argument, and affirmed the convictions.

> [U]nder the plain language of RCW 37.12.010, the State assumed full criminal jurisdiction over Indians and Indian land with respect to the eight specified areas of law, including the "[o]peration of motor vehicles on the public streets, alleys, roads and highways."

State v. Abrahamson, 157 Wn.App. 672, ¶24, 238 P.3d 533 (2010).

In State v. Pink, 144 Wn.App. 945, 185 P.3d 634 (2008), the defendant was a passenger in a vehicle stopped for a traffic violation within the boundaries of the Quinault Indian Reservation. The defendant was arrested on an outstanding warrant. The State charged the defendant with unlawful possession of a firearm discovered during a search of the vehicle incident to arrest.

The court of appeals held that the State did not have jurisdiction over a tribal member on an Indian Reservation for the unlawful possession of a firearm since the crime did not involve the operation of a motor vehicle as required by RCW 37.12.010(8).

> Similarly, here, Pink's alleged firearms violation did not concern the operation of a vehicle. As discussed above, RCW 37.12.010 specifically provides for the State's assumption of jurisdiction over tribal members on reservations for matters involving the "[o]peration of motor vehicles upon the public streets, alleys, roads and highways." RCW 37.12.010(8).

> But here, Pink was not operating a motor vehicle. He was a passenger in a motor vehicle when the deputies arrested him. Thus, the exception of RCW 37.12.010(8), which gives the State jurisdiction over crimes concerning the operation of motor vehicles, does not apply.

State v. Pink, 144 Wn.App. 945, ¶30, 185 P.3d 634 (2008) (footnotes omitted).

In State v. Yallup, 160 Wn.App. 500, 248 P.3d 1095 (2011), a Yakama tribal member was observed driving his car off the road and into a canal located on the Yakama Indian Reservation. He was convicted of felony DUI, driving without an interlock and driving while license suspended.

The defendant argued that the State could not enforce the implied consent laws against a tribal member driving on state highways on the reservation.

The court of appeals affirmed the felony DUI conviction.

> Our courts have previously recognized that Washington has validly asserted jurisdiction over criminal driving offenses falling within the purview of RCW 37.12.010(8). State v. Abrahamson, 157 Wn.App. 672, 238 P.3d 533 (2010) (attempting to elude, driving while under the influence, and driving while license revoked in the first degree); [State v. Pink, 144 Wn.App. 955-56, 185 P.3d 634 (2008)] (a passenger's unlawful possession of a firearm did not constitute a driving offense).
>
> Washington's implied consent statute falls within the criminal jurisdiction of RCW 37.12.010(8).

State v. Yallup, 160 Wn.App. 500, ¶17, 248 P.3d 1095 (2011).

C. Warrantless Traffic Stops−Off Reservation by Tribal Officer of Non-Tribal Member

Our Supreme Court has struggled with the issue of a tribal officer's authority off reservation to conduct a warrantless Terry traffic infraction stop of a non-tribal member where the alleged offense was committed on the reservation.

1. State v. Erickson Facts

In State v. Erickson, at 1:30 AM, a Lummi Nation Reservation tribal officer within the reservation observed an approaching vehicle with its high beams activated in violation of Lummi Nation law. The officer flashed his high beams to notify the driver but the driver failed to dim her headlights. The officer turned around and activated his overhead lights. The vehicle stopped at a gas station located off the

reservation. The driver was determined not be a Lummi Nation member, but appeared to be impaired by alcohol. The tribal officer contacted a county deputy, and detained the driver until the deputy arrived. The deputy ultimately arrested the driver for DUI.

2. State v. Erickson (2009) Withdrawn

In 2009, the Supreme Court affirmed Eriksen's DUI conviction. State v. Eriksen, 166 Wn.2d 953, 216 P.3d 382 (2009). Eriksen moved for reconsideration, and the State joined the motion with regard to the court's statutory analysis. The Supreme Court granted reconsideration and withdrew the 2009 opinion.

3. State v. Erickson (2010) Withdrawn

In 2010, the court again affirmed Eriksen's DUI conviction. State v. Eriksen, 170 Wn.2d 209, 241 P.3d 399 (2010). Erickson moved to reconsider a second time. The Supreme Court granted reconsideration and withdrew the second opinion.

4. State v. Erickson (2011) Reverses DUI Conviction by 5-4 Majority

In State v. Eriksen, 172 Wn.2d 506, 259 P.3d 1079 (2011), a 5-4 Supreme Court reversed the DUI conviction, holding that a tribe's inherent sovereign powers do not include the authority to conduct a warrantless stop and detention outside the tribe's territorial jurisdiction for a traffic infraction.

The court held that the inherent sovereign power identified in State v. Schmuck, 121 Wn.2d 373, 850 P.2d 1332, *cert. denied*, 510 U.S. 931, 114 S.Ct. 343, 126 L.Ed.2d 308 (1993) did not extend beyond reservation boundaries.

> The inherent sovereign power identified in Schmuck does not logically extend beyond reservation boundaries. The State is correct that preventing tribal police from stopping and detaining drivers off the reservation would "undercut the Tribe's ability to enforce tribal law" by encouraging drivers to race for the reservation border and escape detention. While this is troubling on a policy level, the concept of territorial jurisdiction necessarily limits any sovereign's ability to fully enforce its laws.
>
> For example, Oregon's ability to enforce its traffic code was undercut when we held that an Oregon officer could not stop and detain an offender who crossed the state border. [State v. Barker, 143 Wn.2d 915, 25 P.3d 423 (2001)]. That impediment to enforcement alone did not mean that Oregon's sovereignty was compromised. Rather, the limitation on

> Oregon's authority to enforce its laws flowed necessarily from Oregon's own geographic boundaries.

State v. Eriksen, 172 Wn.2d 506, ¶14, 259 P.3d 1079 (2011).

The court noted the tribe's serious policy concerns that the court's holding could encourage DUI offenders to race for the reservation border. The solution, however, involves the use of political and legislative tools to deal with this fresh pursuit situation.

> The Lummi Nation stresses the limited nature of the power to stop and detain offenders off-reservation until State authorities arrive, describing this power as merely 'assisting the State in asserting its regulatory and adjudicatory authority.' This characterization ignores the fact that Washington recently established certain training and liability requirements for tribal officers to become general authority Washington peace officers, with the power to arrest in fresh pursuit on Washington land. See RCW 10.92.010; RCW 10.93.070(6), .120.
>
> Creating a doctrine of fresh pursuit based only on a tribe's inherent authority would effectively abrogate this statutory scheme, undermining Washington's sovereign authority to regulate arrests in the state. Certainly, Washington's sovereignty cannot extinguish the Lummi Nation's sovereign powers. Rather, we simply note that the unwarranted extension of the Lummi Nation's powers would not be an enhancement of Washington's sovereign rights, but an impingement of them.
>
> While the territorial limits on the Lummi Nation's sovereignty create serious policy problems, such as the incentive for intoxicated drivers to race for the reservation border, the solution does not lie in judicial distortion of the doctrine of inherent sovereignty.
>
> Instead, these issues must be addressed by use of political and legislative tools, such as cross-deputization or mutual aid pacts, to ensure that all law enforcement officers have adequate authority to protect citizens' health and safety in border areas. We urge the Lummi Nation and Whatcom County to work together to solve the problems made evident by this case; but if they can or will not do so, we will not manipulate the law to achieve a desirable policy result.

State v. Eriksen, 172 Wn.2d 506, ¶¶18-19, 259 P.3d 1079 (2011) (citation to briefing omitted) (footnote omitted).

Chapter Twenty-Three

Warrantless Custodial Arrests

A. A Warrantless Custodial Arrest Must be Supported by Probable Cause

Not every encounter between a citizen and the police constitutes a seizure of the person. Thus, police do not necessarily effect the seizure of a person because they engage the person in conversation, State v. Mennegar, 114 Wn.2d 304, 310, 787 P.2d 1347 (1990), or because they identify themselves as officers, Florida v. Royer, 460 U.S. 491, 103 S.Ct. 1319, 1324, 75 L.Ed.2d 229 (1983).

However, police do effect the seizure of a person when they objectively manifest that they are restraining the person's movement, and "a reasonable person would have believed that he [or she] was not free to leave." Michigan v. Chesternut, 486 U.S. 567, 108 S.Ct. 1975, 1979, 100 L.Ed.2d 565 (1988).

When this test is met, a seizure may be only a limited detention for issuing a traffic citation, *see* State v. Hehman, 90 Wn.2d 45, 578 P.2d 527 (1978), or for conducting a brief investigation of possible criminal activity, as in a Terry stop, *see* Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 1877-79, 20 L.Ed.2d 889 (1968).

Such seizures are distinct from an actual "custodial arrest" to detain a person for the purpose of later charging and trial. State v. Lund, 70 Wn.App. 437, 444, 853 P.2d 1379 (1993), *review denied*, 123 Wn.2d 1023 (1994); United States v. Robinson, 414 U.S. 218, 94 S.Ct. 467, 473, 38 L.Ed.2d 427 (1973).

A custodial arrest must be supported by probable cause to believe that a crime has been committed by the arrestee. State v. Lund, 70 Wn.App. 437, 444, 853 P.2d 1379 (1993), *review denied*, 123 Wn.2d 1023 (1994).

> [P]robable cause exists where the facts and circumstances within the arresting officers' knowledge, and of which they had reasonably trustworthy information are sufficient to warrant a person of reasonable caution to believe that a crime has been committed.

State v. Lund, 70 Wn.App. 437, 444-45, 853 P.2d 1379 (1993), *review denied*, 123 Wn.2d 1023 (1994) (*quoting* Brinegar v. United States, 338 U.S. 160, 69 S.Ct. 1302, 1311, 93 L.Ed. 1879 (1949)).

B. Definition of Arrest

An arrest takes place when a duly authorized law enforcement officer manifests an intent to take a person into custody and actually seizes or detains the person. The existence of an arrest depends in each case upon an objective evaluation of all the surrounding circumstances. State v. Patton, 167 Wn.2d 379, 387, 219 P.3d 651 (2009).

In Patton, a police officer pulled his vehicle into a driveway behind the defendant's parked car with his lights activated. The officer immediately approached the defendant and told him he was under arrest and to put his hands behind his back. "Under an objective evaluation of all the surrounding circumstances, an arrest occurred." State v. Patton, 167 Wn.2d 379, 387, 219 P.3d 651 (2009).

C. Definition of Custody

The relevant inquiry to determine whether a person is in custody is "whether a reasonable person in the suspect's position at the time would have thought so." State v. Rivard, 131 Wn.2d 63, 75, 929 P.2d 413 (1997).

The test is objective. State v. Reichenbach, 153 Wn.2d 126, 135, 101 P.3d 80 (2004). It is not dependent on the subjective intent of the officer making the detention. Rather, it hinges upon the manifestation of the arresting officer's intent. State v. Radka, 120 Wn.App. 43, 49, 83 P.3d 1038 (2004).

> Typical manifestations of intent indicating custodial arrest are the handcuffing of the suspect and placement of the suspect in a patrol vehicle, presumably for transport.

State v. Radka, 120 Wn.App. 43, 49, 83 P.3d 1038 (2004).

An officer who informs a person that he or she is under arrest is an important factor in determining whether the person is under arrest.

> The Court of Appeals suggested that, when an arresting officer has explicitly informed the suspect he is under arrest, consideration of the other factors indicating arrest is "superfluous." Whether an officer informs

> the defendant he is under arrest is only one of all of the surrounding circumstances, albeit an important one.

State v. Patton, 167 Wn.2d 379, 387 n.6, 219 P.3d 651 (2009).

If the record is silent concerning whether a suspect was directly told he or she was under arrest, courts look to other indicators of custodial arrest.

> After tracking Salinas to where he lay in his sleeping bag, the officers identified themselves as police, shined a flashlight in his face, and ordered him to show his hands. Seeing his face, they recognized that he matched the description given by the [rape] victim.
>
> When Salinas ran away toward the waterfront, police chased him down and ordered him to lie on the ground. The canine officer allowed the dog to bite Salinas to make him comply with their order. The officers handcuffed Salinas as he was lying on the ground.
>
> A reasonable person in this situation would have thought he was being arrested and taken into custody, not merely being detained for a brief investigation.

State v. Salinas, 169 Wn.App. 210, ¶18, 279 P.3d 917 (2012), *review denied*, 176 Wn.2d 1002 (2013) (lawful custodial arrest found).

D. Warrantless Custodial Arrests−Fourth Amendment

In a long line of cases, the United States Supreme Court has held that the Fourth Amendment permits an officer with probable cause to conduct a warrantless arrest of a person believed to have committed even a minor crime in the officer's presence. Virginia v. Moore, 553 U.S. 164, 128 S.Ct. 1598, 1604, 170 L.Ed.2d 559 (2008).

Although states are free to adopt more restrictive search and seizure laws, such laws do not alter Fourth Amendment protections and analysis.

> In California v. Greenwood, 486 U.S. 35, 108 S.Ct. 1625, 100 L.Ed.2d 30 (1988), we held that search of an individual's garbage forbidden by California's Constitution was not forbidden by the Fourth Amendment. '[W]hether or not a search is reasonable within the meaning of the Fourth Amendment," we said, has never "depend[ed] on the law of the particular State in which the search occurs.' While '[i]ndividual States may surely construe their own constitutions as imposing more stringent constraints on

> police conduct than does the Federal Constitution,' state law did not alter the content of the Fourth Amendment.

Virginia v. Moore, 553 U.S. 164, 128 S.Ct. 1598, 1604, 170 L.Ed.2d 559 (2008) (Fourth Amendment not violated where officers conducted a warrantless stop and arrest of defendant knowing his driver's license was suspended, even though Virginia law required the officers to issue the defendant a summons to appear because driving while license suspended was not an arrestable offense) (citation omitted).

E. Warrantless Custodial Arrests−Minor vs. Nonminor Traffic Offenses in Washington

In State v. Hehman, 90 Wn.2d 45, 578 P.2d 527 (1978), a vehicle was observed with a defective taillight. The driver parked in a driveway, and was approached by an officer. The officer determined that the driver's license was suspended. The driver was arrested, and suspected illegal drugs were found during a search incident to the arrest.

The Supreme Court held that as a matter of public policy, custodial arrests for minor traffic violations were prohibited in Washington unless the officer had other reasonable grounds to arrest apart from the minor traffic violation itself.

> With respect to whether a custodial arrest was justified under the circumstances, it will be initially conceded that such an arrest would be proper under traditional rules of law. An officer generally has the authority to arrest for a misdemeanor committed in his presence.
>
> We hold as a matter of public policy that custodial arrest for minor traffic violations is unjustified, unwarranted, and impermissible if the defendant signs the promise to appear as provided in RCW 46.64.015. We note that RCW 46.64.017, which applies when there has been an accident, prohibits a law enforcement officer from holding a person 'for a period of time longer than is reasonably necessary to issue and serve a citation and notice,' except in two carefully defined instances: (1) when the person is driving the motor vehicle while under the influence of intoxicating liquor, controlled substances, or drugs in violation of applicable laws, or (2) when the person refuses to sign a written promise to appear in court as required by RCW 46.64.015.

State v. Hehman, 90 Wn.2d 45, 47, 578 P.2d 527 (1978) (citations omitted).

The year after Hehman was decided, the Legislature decriminalized most traffic offenses and amended RCW 46.64.015 and RCW 10.31.100. State v. Reding, 119 Wn.2d 685, 688-89, 835 P.2d 1019 (1992).

The intent of the Legislature in making these amendments was to codify the court's ruling in Hehman. State v. Reding, 119 Wn.2d 685, 690, 835 P.2d 1019 (1992).

The decision in Hehman was not based upon Const. art. I, §7, but rather on public policy.

> Our decision in Hehman, however, was not based on the state constitution. Our holding was based on "public policy". We cited existing statutes, model codes, and scholarly commentary extensively to support the policy basis for our decision. We did not cite the state constitution. Because Hehman was not decided on constitutional grounds, the Legislature was and still is free to modify or codify the law we set forth in Hehman.

State v. Reding, 119 Wn.2d 685, 690, 695-96, 835 P.2d 1019 (1992) (although police officers do not have authority to arrest drivers for minor traffic offenses, reckless driving is not a minor traffic offense and, therefore, an officer may make a custodial arrest pursuant to RCW 10.31.100 and RCW 46.64.015) (citation omitted).

All of the traffic offenses listed in RCW 10.31.100(3) are nonminor offenses. An officer needs nothing more than probable cause to arrest a person for nonminor offenses, regardless of whether the offense is denominated as a misdemeanor or gross misdemeanor. State v. Pulfrey, 154 Wn.2d 517, ¶21, 111 P.3d 1162 (2005).

F. Warrantless Custodial Arrests−RCW 10.31.100 and RCW 46.64.015

1. Washington is More Restrictive Than the Fourth Amendment Concerning Warrantless Custodial Arrests for Traffic Offenses

Washington has adopted more restrictive laws concerning the validity of warrantless custodial arrests for traffic offenses than required by the Fourth Amendment. *See* the above discussion concerning minor and nonminor traffic offenses, State v. Hehman, 90 Wn.2d 45, 578 P.2d 527 (1978) and its progeny.

RCW 46.64.015 and RCW 10.31.100 now control when law enforcement may make warrantless custodial arrests for misdemeanor or gross misdemeanor

traffic offenses. State v. Terrasas, 71 Wn.App. 873, 876, 863 P.2d 75, *review denied*, 123 Wn.2d 1028 (1993). *See also* State v. Pulfrey, 154 Wn.2d 517, ¶21, 111 P.3d 1162 (2005) and State v. Gaddy, 152 Wn.2d 64, 70, 93 P.3d 872 (2004).

2. RCW 46.64.015

RCW 46.64.015 says:

> Whenever any person is arrested for any violation of the traffic laws or regulations which is punishable as a misdemeanor or by imposition of a fine, the arresting officer may serve upon him or her a traffic citation and notice to appear in court. Such citation and notice shall conform to the requirements of RCW 46.64.010, and in addition, shall include spaces for the name and address of the person arrested, the license number of the vehicle involved, the driver's license number of such person, if any, the offense or violation charged, and the time and place where such person shall appear in court. Such spaces shall be filled with the appropriate information by the arresting officer.
>
> An officer may not serve or issue any traffic citation or notice for any offense or violation except either when the offense or violation is committed in his or her presence or when a person may be arrested pursuant to RCW 10.31.100, as now or hereafter amended.
>
> The detention arising from an arrest under this section may not be for a period of time longer than is reasonably necessary to issue and serve a citation and notice, except that the time limitation does not apply under any of the following circumstances:
>
> (1) Where the arresting officer has probable cause to believe that the arrested person has committed any of the offenses enumerated in RCW 10.31.100(3);
>
> (2) When the arrested person is a nonresident and is being detained for a hearing under RCW 46.64.035.

3. RCW 10.31.100

RCW 10.31.100 says:

> [**General Rule**]. A police officer having probable cause to believe that a person has committed or is committing a felony shall have the authority to arrest the person without a warrant. A police officer may arrest a person

without a warrant for committing a misdemeanor or gross misdemeanor only when the offense is committed in the presence of the officer, except as provided in subsections (1) through (10) of this section.

(1) [**Physical Harm, Threats, Cannabis, Alcohol Under 21, Trespass**]. Any police officer having probable cause to believe that a person has committed or is committing a misdemeanor or gross misdemeanor, involving physical harm or threats of harm to any person or property or the unlawful taking of property or involving the use or possession of cannabis, or involving the acquisition, possession, or consumption of alcohol by a person under the age of twenty-one years under RCW 66.44.270, or involving criminal trespass under RCW 9A.52.070 or 9A.52.080, shall have the authority to arrest the person.

(2) [**Mandatory Arrest for Some Offenses**]. A police officer shall arrest and take into custody, pending release on bail, personal recognizance, or court order, a person without a warrant when the officer has probable cause to believe that:

(a) [**Violation of Court Orders**]. An order has been issued of which the person has knowledge under RCW 26.44.063, or chapter 7.90, 10.99, 26.09, 26.10, 26.26, 26.50, or 74.34 RCW restraining the person and the person has violated the terms of the order restraining the person from acts or threats of violence, or restraining the person from going onto the grounds of or entering a residence, workplace, school, or day care, or prohibiting the person from knowingly coming within, or knowingly remaining within, a specified distance of a location or, in the case of an order issued under RCW 26.44.063, imposing any other restrictions or conditions upon the person; or

(b) [**Violation of Foreign Protection Orders**]. A foreign protection order, as defined in RCW 26.52.010, has been issued of which the person under restraint has knowledge and the person under restraint has violated a provision of the foreign protection order prohibiting the person under restraint from contacting or communicating with another person, or excluding the person under restraint from a residence, workplace, school, or day care, or prohibiting the person from knowingly coming within, or knowingly remaining within, a specified distance of a location, or a violation of any provision for which the foreign protection order specifically indicates that a violation will be a crime; or

(c) [**Assault Family or Household Member Within Preceding 4 Hours**]. The person is sixteen years or older and within the preceding four hours has assaulted a family or household member as defined in RCW 10.99.020 and the officer believes: (i) A felonious assault has occurred; (ii) an assault has occurred which has resulted in bodily injury to the victim, whether the injury is observable by the responding officer or not; or (iii) that any physical action has occurred which was intended to cause another person reasonably to fear imminent serious bodily injury or death. Bodily injury means physical pain, illness, or an impairment of physical condition. When the officer has probable cause to believe that family or household members have assaulted each other, the officer is not required to arrest both persons. The officer shall arrest the person whom the officer believes to be the primary physical aggressor. In making this determination, the officer shall make every reasonable effort to consider: (i) The intent to protect victims of domestic violence under RCW 10.99.010; (ii) the comparative extent of injuries inflicted or serious threats creating fear of physical injury; and (iii) the history of domestic violence of each person involved, including whether the conduct was part of an ongoing pattern of abuse.

(3) [**Nonminor Traffic Offenses**]. Any police officer having probable cause to believe that a person has committed or is committing a violation of any of the following traffic laws shall have the authority to arrest the person:

(a) [**Hit and Run−Unattended Vehicle or Property**]. RCW 46.52.010, relating to duty on striking an unattended car or other property;

(b) [**Hit and Run−Injury, Death, Attended Vehicle**]. RCW 46.52.020, relating to duty in case of injury to or death of a person or damage to an attended vehicle;

(c) [**Reckless Driving**]. RCW 46.61.500 or 46.61.530, relating to reckless driving or racing of vehicles;

(d) [**DUI and Physical Control**]. RCW 46.61.502 or 46.61.504, relating to persons under the influence of intoxicating liquor or drugs;

(e) [**Driving While License Suspended or Revoked**]. RCW 46.20.342, relating to driving a motor vehicle while operator's license is suspended or revoked;

(f) [**Negligent Driving in the First Degree**]. RCW 46.61.5249, relating to operating a motor vehicle in a negligent manner.

(4) [**Motor Vehicle Accident**]. A law enforcement officer investigating at the scene of a motor vehicle accident may arrest the driver of a motor vehicle involved in the accident if the officer has probable cause to believe that the driver has committed in connection with the accident a violation of any traffic law or regulation.

(5) [**Operation of Vessel−Intoxicated, Reckless Manner**]. Any police officer having probable cause to believe that a person has committed or is committing a violation of RCW 79A.60.040 shall have the authority to arrest the person.

(6) [**Traffic Infraction and Fellow Officer Rule**]. An officer may act upon the request of a law enforcement officer in whose presence a traffic infraction was committed, to stop, detain, arrest, or issue a notice of traffic infraction to the driver who is believed to have committed the infraction. The request by the witnessing officer shall give an officer the authority to take appropriate action under the laws of the state of Washington.

(7) [**Indecent Exposure**]. Any police officer having probable cause to believe that a person has committed or is committing any act of indecent exposure, as defined in RCW 9A.88.010, may arrest the person.

(8) [**Violation of Civil Anti-Harassment Order**]. A police officer may arrest and take into custody, pending release on bail, personal recognizance, or court order, a person without a warrant when the officer has probable cause to believe that an order has been issued of which the person has knowledge under chapter 10.14 RCW and the person has violated the terms of that order.

(9) [**Interference with Health Care Facility**]. Any police officer having probable cause to believe that a person has, within twenty-four hours of the alleged violation, committed a violation of RCW 9A.50.020 may arrest such person.

(10) [**Firearms, Weapons at Schools**]. A police officer having probable cause to believe that a person illegally possesses or illegally has possessed a firearm or other dangerous weapon on private or public elementary or secondary school premises shall have the authority to arrest the person.

For purposes of this subsection, the term "firearm" has the meaning defined in RCW 9.41.010 and the term "dangerous weapon" has the meaning defined in RCW 9.41.250 and 9.41.280(1) (c) through (e).

(11) [**Title 46 Powers of Arrest**]. Except as specifically provided in subsections (2), (3), (4), and (6) of this section, nothing in this section extends or otherwise affects the powers of arrest prescribed in Title 46 RCW.

(12) [**Immunity**]. No police officer may be held criminally or civilly liable for making an arrest pursuant to subsection (2) or (8) of this section if the police officer acts in good faith and without malice.

4. Washington's "Presence" Rule for Non-Felony Offenses

For felony offenses, RCW 10.31.100 authorizes an officer having probable cause to make a warrantless arrest of any person who has committed or is committing a felony.

Generally for misdemeanor or gross misdemeanor offenses, RCW 10.13.100 authorizes an officer to make a warrantless arrest only when the offense is committed in the officer's presence. The statute is similar to "the common law rule that a police officer, even with probable cause, may not arrest a person for a misdemeanor committed outside the presence of the officer, unless the officer has a warrant." State v. Hornaday, 105 Wn.2d 120, 123, 713 P.2d 71 (1986) (*citing* State v. Bonds, 98 Wn.2d 1, 9-10, 653 P.2d 1024 (1982), *cert. denied*, 464 U.S. 831, 104 S.Ct. 111, 78 L.Ed.2d 112 (1983)); State v. Ortega, ___ Wn.2d ___, ¶10, 297 P.3d 57 (Mar. 21, 2013).

Thus, "an arrest for a misdemeanor committed outside the presence of the officer ordinarily cannot lawfully be made even if the probable cause needed for a warrant is in the officer's hands and it appears that the failure to make an immediate arrest will result in further damage or in the successful flight of the suspect.'' State v. Hornaday, 105 Wn.2d 120, 123-24, 713 P.2d 71 (*quoting* Wayne R. LaFave, Arrest: The Decision to Take a Suspect into Custody 18 (1965)).

The "presence" rule was a balance of "'accommodating the public need for the most certain and immediate arrest of criminal suspects with the requirement of magisterial oversight to protect against mistaken insults to privacy' with the result that 'only in the most serious of cases could the warrant be dispensed with.'" State v. Walker, 157 Wn.2d 307, 316, 138 P.3d 113 (2006) (*quoting* United States v. Watson, 423 U.S. 411, 96 S.Ct. 820, 836, 46 L.Ed.2d 598 (1976)

(Marshall, J., dissenting)); *see also* Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280, 286, 69 L.Ed. 543 (1925) ("[T]he reason for arrest without warrant on a reliable report of a felony [at common law] was because the public safety and the due apprehension of criminals charged with heinous offenses required that such arrests should be made at once without warrant.").

The "presence" requirement under RCW 10.31.100 is unambiguous and remains Washington law.

> If the time has come to allow a misdemeanor arrest by an officer who did not personally witness any misconduct, that development must start with the legislature. The legislature has already shown its willingness to adapt the presence requirement to meet modern circumstances by adding exceptions to the presence requirement to "address social problems either not recognized or not present during common law...." [State v. Walker, 157 Wn.2d 307, 316-17, 138 P.3d 113 (2006)].
>
> For example, after we found in State v. Hornaday, 105 Wn.2d 120, 713 P.2d 71 (1986), that an officer could not validly arrest an intoxicated minor for possessing or consuming alcohol when the misdemeanor conduct did not occur in the officer's presence, the legislature responded by amending RCW 10.31.100(1) to explicitly include the minor in possession statute.
>
> We are now confronted by the similar question of whether the reliability of modern police law enforcement methods justifies expanding the presence requirement beyond the terms of RCW 10.31.100. We find that this question is appropriate for the legislature.

State v. Ortega, ___ Wn.2d ___, ¶15, 297 P.3d 57 (Mar. 21, 2013) (citations omitted).

"The fellow officer rule, also known as the police team rule, allows a court to consider the cumulative knowledge of police officers in determining whether there was probable cause to arrest a suspect." State v. Ortega, ___ Wn.2d ___, ¶16, 297 P.3d 57 (Mar. 21, 2013).

Unless specifically listed in RCW 10.31.100 as an exception to the misdemeanor "presence" rule, however, the fellow officer rule is inconsistent with the unambiguous language of RCW 10.31.100 and thus does not apply to misdemeanor arrests. State v. Ortega ___ Wn.2d ___, ¶¶17-18, 297 P.3d 57 (Mar. 21, 2013)

> The officer who arrested Ortega for the gross misdemeanor of drug-traffic loitering was not "present" during the commission of the offense, and the officer who observed Ortega's conduct was not an "arresting officer" for purposes of the presence requirement under RCW 10.31.100. The arrest was unlawful. Therefore, the search incident to that arrest violated article I, section 7 of the Washington State Constitution. We suppress the evidence found in the search incident to that arrest, reverse the conviction, and remand for further proceedings.

State v. Ortega, ___ Wn.2d ___, ¶27, 297 P.3d 57 (Mar. 21, 2013) (A police officer positioned on the second floor of a building observed the defendant commit acts that gave the officer probable cause to believe the defendant was engaged in drug-traffic loitering, a gross misdemeanor. The observing officer maintained radio contact with fellow officers, described the defendant's activities to them, and instructed them to arrest the defendant. One of the other officers arrested the defendant and searched him incident to that arrest, finding crack cocaine and cash. Conviction reversed.)

5. Exceptions to Washington's "Presence" Rule for Nonminor Traffic Offenses

Read together, RCW 46.64.015, RCW 10.31.100 and CrRLJ 2.1 allow law enforcement to make a warrantless custodial arrest of a person for any of the nonminor traffic offenses listed in RCW 10.31.100(3), and then exercise discretion to retain the person in custody or cite and release. State v. Pulfrey, 154 Wn.2d 517, ¶18, 111 P.3d 1162 (2005).

> A police officer has discretion to make a full custodial arrest or to issue a citation for the [nonminor] offense of driving while license suspended. State v. Pulfrey, 154 Wn.2d 517, 525-27, 111 P.3d 1162 (2005). If an officer has probable cause to believe a person is driving with a suspended license, he or she may place that person under custodial arrest without considering other alternatives he or she has available under the statute or the rule while conducting an investigation.

State v. Brockob, 159 Wn.2d 311, ¶88, 150 P.3d 59 (2006) (citation omitted).

6. Exceptions to Washington's "Presence" Rule for Minor Traffic Offenses

An officer with probable cause may make a warrantless custodial arrest of a person for a minor traffic offense not committed in the officer's presence when the officer has reasonable grounds to believe that the driver will not respond to the citation. *See, e.g.*, State v. Johnson, 65 Wn.App. 716, 720-21, 829 P.2d 796

(1992) (Headlights out and fail to signal. Warrantless custodial arrest proper where defendant had no license or other identification, gave a false name and vehicle registered to another person.); and State v. Reeb, 63 Wn.App. 678,683, 821 P.2d 84 (1992) (warrantless custodial arrest of an individual who has accumulated 10 notices of failure to appear on DOL record is proper).

Chapter Twenty-Four

Warrantless Searches Incident to Arrest

A. Fourth Amendment

In Arizona v. Gant, 556 U.S. 332, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009), the United States Supreme Court held that a warrantless vehicle search incident to arrest of a recent occupant of the vehicle is proper under the Fourth Amendment only (1) when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search or (2) when it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle (the second exception is known as the Thornton v. United States, 541 U.S. 615, 124 S.Ct. 2127, 158 L.Ed.2d 905 (2004) exception).

> Those justifications [concerning the reasons for a warrantless vehicle search incident to arrest], set out in Chimel v. California, 395 U.S. 752, 762–63, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969), are to find and remove weapons that the arrestee might use to resist arrest or effect an escape and to find and seize any evidence the arrestee might conceal or destroy−thus the arrestee's person and the area into which an arrestee might reach may be searched incident to arrest.
>
> In returning to these justifications, the Court held in Gant that 'the Chimel rationale authorizes police to search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search.' Gant, 129 S.Ct. at 1719. The Court acknowledged that, as construed, the exception has limited application because when an officer makes an arrest, any remaining real possibility of access to weapons and evidence will be rare.

State v. Snapp, 174 Wn.2d 177, ¶26, 275 P.3d 289 (2012).

B. Const. Art. I, §7−A Lawful Custodial Arrest is Required

The categories of "narrowly and jealously drawn" exceptions to the warrant requirement recognized by the Washington Supreme Court include consent,

exigent circumstances, searches incident to a valid arrest, inventory searches, plain view searches, and investigative stops. State v. Duncan, 146 Wn.2d 166, 171-72, 43 P.3d 513 (2002); State v. Arreola, 176 Wn.2d 284, ¶13, 290 P.3d 983 (2012).

One such exception is a warrantless search incident to a lawful custodial arrest.

> 'Under article I, section 7, a lawful custodial arrest is a constitutionally required prerequisite to any search incident to arrest. It is the fact of arrest itself that provides the "authority of law" to search....'

State v. O'Neill, 148 Wn.2d 564, 585, 62 P.3d 489 (2003) (*quoting* State v. Parker, 139 Wn.2d 486, 496, 987 P.2d 73 (1999)) (citations omitted).

The function of the search incident to arrest is to ensure officer safety and to preserve evidence of the crime for which the suspect was arrested. State v. O'Neill, 148 Wn.2d 564, 585, 62 P.3d 489 (2003).

However, without a lawful custodial arrest, a full warrantless search may not be made, no matter the exigencies. State v. O'Neill, 148 Wn.2d 564, 585, 62 P.3d 489 (2003).

Probable cause to arrest is not enough; only an actual custodial arrest provides the authority to justify a search incident thereto. State v. O'Neill, 148 Wn.2d 564, 585, 62 P.3d 489 (2003).

An officer may make a lawful warrantless custodial arrest pursuant to the requirements of RCW 10.31.100. *See* Chapter 23 (Warrantless Custodial Arrests).

> A police officer may effect a custodial arrest without a warrant if the officer has probable cause to believe a driver has a suspended license. RCW 10.31.100(3)(e). Typically, however, a person arrested for a violation of the traffic laws that is punishable as a misdemeanor or by imposition of a fine is subjected to a temporary detention while the officer issues a citation. RCW 46.64.015. To secure release, the arrested person must give a written promise to appear in court as required by the citation. RCW 46.64.015. For certain crimes listed in RCW 10.31.100(3)−including driving with a suspended license−the officer may choose to make a full custodial arrest rather than the temporary cite-and-release detention. RCW 46.64.015(2).

State v. Radka, 120 Wn.App. 43, 83 P.3d 1038 (2004).

C. Const. Art. I, §7−A Warrantless Search is Not Permitted for a Lawful Non-Custodial Arrest

An officer may not conduct a warrantless search incident to a lawful non-custodial arrest.

> Although an officer may search incident to a lawful custodial arrest, he or she may not search incident to a lawful non custodial arrest. It is thought that the officer and arrestee will be in close proximity for only a few minutes, and the arrestee, who is about to be released anyway, will have little motivation to use a weapon or destroy evidence. The officer may pat the arrestee for weapons if he or she reasonably suspects the arrestee is armed.

State v. McKenna, 91 Wn.App. 554, 561, 958 P.2d 1017 (1998).

A non-custodial arrest occurs where the arresting officer "never formed an intent, much less manifested an intent, to arrest [the suspect] custodially." State v. McKenna, 91 Wn.App. 554, 562-63, 958 P.2d 1017 (1998) (Vehicle stopped for false license tabs. Officer discovered outstanding warrant, but due to jail overcrowding issued a citation for no valid driver's license and no proof of insurance. Officer told the suspect she was free to leave and directed her to contact the court issuing the warrant. The driver was then searched. Warrantless search held improper incident to a non-custodial arrest.).

D. Const. Art. I, §7−Custodial Arrest vs. Non-Custodial Arrest

Determining whether an arrest qualifies as a limited detention cite-and-release non-custodial arrest or a full custodial arrest can be difficult.

> In cases such as the present one, it is often difficult to determine whether an arrest qualifies as the limited detention of a cite-and-release or as a full custodial arrest.
>
> Courts have differed on the test to apply: an examination of the arresting officer's subjective intent, or an objective determination of what a reasonable detainee would consider to be the extent of the detention.

State v. Radka, 120 Wn.App. 49, 83 P.3d 1038 (2004).

In State v. McKenna, 91 Wn.App. 554, 562-63, 958 P.2d 1017 (1998), the court focused on the arresting officer's intent to conduct a custodial arrest.

Appellate court examinations of the issue of custodial arrest following McKenna have retreated from the consideration of the arresting officer's subjective intent.

> For example, in State v. Clausen, 113 Wn.App. 657, 660-61, 56 P.3d 587 (2002) and State v. Craig, 115 Wn.App. 191, 196, 61 P.3d 340 (2002), the determination of custody hinges upon the "manifestation" of the arresting officer's intent.
>
> In other words, rather than the subjective intent of the officer, the test is whether a reasonable detainee under these circumstances would consider himself or herself under full custodial arrest.
>
> Typical manifestations of intent indicating custodial arrest are the handcuffing of the suspect and placement of the suspect in a patrol vehicle, presumably for transport. Craig, 115 Wn.App. at 196 n. 8.
>
> Telling the suspect that he or she is under arrest also suggests custodial arrest, unless the suspect is also told that he or she is free to go as soon as the citation is issued (rather than after he or she is booked, as was the case in Clausen and Craig).

State v. Radka, 120 Wn.App. 43, 49-50, 83 P.3d 1038 (2004) (citation omitted).

> A suspect is in custody if a reasonable person in the suspect's circumstances would believe his movements were restricted to a degree associated with 'formal arrest.'

State v. Gering, 146 Wn.App. 564, 567, 192 P.3d 935 (2008) (Officer's subjective and non-communicated knowledge that jail would not accept suspect due to overcrowding irrelevant to determination of a lawful custodial arrest. Warrantless search held proper.) (citation omitted).

Whether an officer objectively manifests the intent to effectuate a full custodial arrest is a fact specific inquiry. *See* State v. Radka, 120 Wn.App. 43, 50, 83 P.3d 1038 (2004) (officer did not manifest intent of arrest when he placed defendant under arrest and put him in the back of patrol car because defendant was not handcuffed and was allowed to talk on a phone while sitting in the back of the patrol car); State v. McKenna, 91 Wn.App. 554, 562-63, 958 P.2d 1017 (1998) (officer did not manifest intent of arrest when he cited the defendant for not possessing a valid driver's license and told her that she was "free to go"); State v. Craig, 115 Wn.App. 191, 195-96, 61 P.3d 340 (2002) (officer manifested intent of arrest when he told defendant that he was under arrest, handcuffed him, and searched defendant's person before securing him in the car for transport).

E. Warrantless Search of Vehicle Incident to Arrest

Under Const. art. I, §7, warrantless searches are unreasonable per se, and any exceptions to the warrant requirement are narrowly drawn. State v. Parker, 139 Wn.2d 486, 496, 987 P.2d 73 (1999).

At the time the state constitution was adopted, it was "universally recognized that warrantless searches were allowed of the person of an arrestee when incident to lawful arrest." State v. Ringer, 100 Wn.2d 686, 692, 674 P.2d 1240 (1983).

It was at first a narrow exception, "intended solely to protect against frustration of the arrest itself or destruction of evidence by the arrestee." State v. Ringer, 100 Wn.2d 686, 698, 674 P.2d 1240 (1983).

Eventually, the permissible scope of the warrantless search of a vehicle incident to arrest expanded to the point where it "threatened to swallow the general rule that a warrant is required." State v. Ringer, 100 Wn.2d 686, 698-99, 674 P.2d 1240 (1983).

1. State v. Ringer (1983)

In State v. Ringer, 100 Wn.2d 686, 674 P.2d 1240 (1983), the defendant was lawfully parked in a rest area when two officers discovered that a felony arrest warrant existed justifying the defendant's arrest. The officers ordered the defendant out of his van, arrested him, handcuffed him, and placed him in the back of the patrol car. During this arrest process, the officers noticed a strong odor of marijuana emanating from defendant's van. The officers subsequently searched the van without a warrant, and discovered closed, unlocked suitcases which contained marijuana, cocaine, and other controlled substances.

The Ringer Court held that, absent actual exigent circumstances, a warrantless search of a suspect's vehicle was impermissible.

> A warrantless search in this situation is permissible only to remove any weapons the arrestee might seek to use in order to resist arrest or effect an escape and to avoid destruction of evidence by the arrestee of the crime for which he or she is arrested.

State v. Ringer, 100 Wn.2d 686, 699, 674 P.2d 1240 (1983).

The Ringer Court then examined the "totality of circumstances" surrounding the defendant's arrest, and decided that the burden was on the prosecution to show that the exigencies of the particular situation required a warrantless search. State v. Ringer, 100 Wn.2d 686, 701, 674 P.2d 1240 (1983).

The Ringer Court concluded that the prosecution failed to meet its burden to show a warrantless search was required where the suspect was handcuffed and locked in a police vehicle, and held that the warrantless search incident to arrest conducted in the case violated Const. art. I, §7.

> We conclude that the availability of a telephone warrant must also be considered in determining whether exigent circumstances exist.
>
> * * *
>
> In the present case there is no showing that the exigencies of Ringer's arrest made it impractical for state troopers to obtain a warrant prior to the search of Ringer's van. The vehicle was 'lawfully parked' and immobile at the Scatter Creek rest area and 'did not impede traffic or threaten public safety or convenience.' Presumably, state troopers at the scene of the arrest had probable cause to search Ringer's van. Nevertheless, they have made no showing that a telephonic warrant could not have been obtained to search the vehicle.

State v. Ringer, 100 Wn.2d 686, 702-3, 674 P.2d 1240 (1983).

2. State v. Stroud (1986)

Three years later, the Supreme Court rejected Ringer's weighing of the "totality of circumstances" on a case-by-case basis because the lack of a bright-line standard placed "too much of a burden" on law enforcement. State v. Stroud, 106 Wn.2d 144, 151, 720 P.2d 436 (1986).

State v. Stroud, 106 Wn.2d 144, 720 P.2d 436 (1986) announced a new rule which permitted the warrantless search of the passenger compartment of a vehicle incident to the arrest of the driver for weapons or destructible evidence. Stroud did prohibit, however, opening a locked container or locked glove compartment without a warrant.

> During 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.
>
> The rationale for this is twofold. First, by locking the container, the individual has shown that he or she reasonably expects the contents to

> remain private. Secondly, the danger that the individual either could destroy or hide evidence located within the container or grab a weapon is minimized. The individual would have to spend time unlocking the container, during which time the officers have an opportunity to prevent the individual's access to the contents of the container. This rule will more adequately address the needs of officers and privacy interests of individuals than the rules set forth by…Ringer.

State v. Stroud, 106 Wn.2d 144, 152-53, 720 P.2d 436 (1986) (citations omitted).

3. State v. Buelna Valdez (2009)

Stroud remained the state of the law in Washington concerning warrantless vehicle searches incident to arrest for twenty-three years until the United States Supreme Court decision in Arizona v. Gant, 556 U.S. 332, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009).

Calling for additional briefing in light of Arizona v. Gant, our Supreme Court was confronted with the issue whether and to what extent a warrantless search of a vehicle can be conducted incident to an arrest under the Fourth Amendment and Const. art. I, §7. State v. Buelna Valdez, 167 Wn.2d 761, ¶12, 224 P.3d 751 (2009).

In Buelna Valdez, an officer pulled over a vehicle because it had only one working headlight. The officer ran a records search on the driver, Buelna Valdez, and discovered there was an outstanding warrant for his arrest. Having handcuffed and secured the driver in the patrol car, the officer searched the vehicle and noticing loose dashboard panels, called a canine unit. The canine unit uncovered methamphetamine located under a molded cup holder. Valdez was convicted of felony drug offenses. State v. Buelna Valdez, 167 Wn.2d 761, ¶2, 224 P.3d 751 (2009).

The Buelna Valdez Court affirmed State v. Stroud, 106 Wn.2d 144, 720 P.2d 436 (1986)'s prohibition of searching locked containers, but overruled Stroud's holding permitting a warrantless search of a vehicle for weapons or evidence where the arrestee is secured and removed from the vehicle.

> [A]fter an arrestee is secured and removed from the automobile, he or she poses no risk of obtaining a weapon or concealing or destroying evidence of the crime of arrest located in the automobile, and thus the arrestee's presence does not justify a warrantless search under the search incident to arrest exception.

State v. Buelna Valdez, 167 Wn.2d 761, ¶32, 224 P.3d 751 (2009).

Finally, the Buelna Valdez court reaffirmed Const. art. I, §7's role as a jealous protector of privacy.

> Article I, section 7 is a jealous protector of privacy. As recognized at common law, when an arrest is made, the normal course of securing a warrant to conduct a search is not possible if that search must be immediately conducted for the safety of the officer or to prevent concealment or destruction of evidence of the crime of arrest.
>
> However, when a search can be delayed to obtain a warrant without running afoul of those concerns (and does not fall under another applicable exception), the warrant must be obtained.
>
> A warrantless search of an automobile is permissible under the search incident to arrest exception when that search is necessary to preserve officer safety or prevent destruction or concealment of evidence of the crime of arrest.

State v. Buelna Valdez, 167 Wn.2d 761, ¶33, 224 P.3d 751 (2009).

By overruling Stroud, the Buelna Valdez decision returned to the rule set out in Ringer where a warrantless search of a vehicle incident to arrest is "authorized when the arrestee would be able to obtain a weapon from the vehicle or reach evidence of the crime of arrest to conceal or destroy it." State v. Snapp, 174 Wn.2d 177, ¶29, 275 P.3d 289 (2012).

4. State v. Snapp (2012)

In State v. Snapp, 174 Wn.2d 177, 275 P.3d 289 (2012), a trooper noticed two air fresheners hanging from a vehicle's rearview mirror being driven by the defendant. Believing the fresheners blocked the defendant's view, the trooper pulled his vehicle next to the defendant's vehicle. The trooper observed that the driver's seat belt appeared to be patched together with blue carabiner and was thus defective. The trooper pulled the vehicle over, and saw what he believed to be methamphetamine in the opened glove box. The trooper believed the defendant was under the influence. After sobriety tests were performed, the trooper determined that the defendant was not impaired to the level justifying an arrest for DUI.

During questioning about the glove box, the defendant admitted that a meth pipe was in the car. The defendant was handcuffed and placed in the back of the

trooper's patrol vehicle. A records check revealed that the defendant had an outstanding no-bail warrant for escape from DOC and that his driver's license had been revoked. The defendant was arrested on the warrant, for driving while license suspended, and for drug paraphernalia. Incident to the defendant's arrest, the trooper searched the vehicle without a warrant and found items consistent with identity theft.

Snapp entered a guilty plea to six counts of second degree identity theft, but with reservation of his right to appeal the denial of his CrR 3.6 motion to suppress.

The court in State v. Snapp, 174 Wn.2d 177, 275 P.3d 289 (2012) was confronted with the warrantless search of a vehicle for evidence incident to arrest as authorized in Arizona v. Gant, 556 U.S. 332, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009) (known as the Thornton v. United States, 541 U.S. 615, 124 S.Ct. 2127, 158 L.Ed.2d 905 (2004) exception).

> In Arizona v. Gant, 556 U.S. 332, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009), the United States Supreme Court held that a warrantless automobile search incident to arrest of a recent occupant of the vehicle is proper under the Fourth Amendment to the United States Constitution only (1) when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search or (2) when it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.
>
> The first of these exceptions to the warrant requirement mirrors the vehicle search-incident-to-arrest exception under article I, section 7 of the Washington State Constitution. *See* State v. Patton, 167 Wn.2d 379, 219 P.3d 651 (2009); State v. Buelna Valdez, 167 Wn.2d 761, 224 P.3d 751 (2009).
>
> In the consolidated cases before us, the issue we must decide is whether an equivalent to Gant's second exception, referred to here as Thornton exception, applies under article I, section 7 of the Washington State Constitution.

State v. Snapp, 174 Wn.2d 177, ¶1, 275 P.3d 289 (2012) (footnote omitted).

Our Supreme Court held that such warrantless vehicle searches for evidence incident to arrest where the arrestee is handcuffed and secured in a police vehicle are not authorized by Const. art. I, §7.

> As we have so frequently explained, article I, section 7 is not grounded in notions of reasonableness. Rather, it prohibits any disturbance of an individual's private affairs without authority of law. Recognized exceptions to the warrant constitute authority of law justifying a search in the absence of a warrant, but only as carefully drawn and narrowly applied.
>
> Contrary to the urgency attending the search incident to arrest to preserve officer safety and prevent destruction or concealment of evidence, there is no similar necessity associated with a warrantless search based upon either a reasonable belief or probable cause to believe that evidence of the crime of arrest is in the vehicle.

State v. Snapp, 174 Wn.2d 177, ¶¶39,42, 275 P.3d 289 (2012).

F. Warrantless Search of Arrestee Incident to Arrest

1. Warrantless Search of Arrestee Generally

Unlike warrantless searches of vehicles incident to arrest, an arresting officer still may search an arrestee's person without a warrant. The court's recent cases return "to the common law origins of the search incident to arrest without a warrant and its dual justifications of officer safety and preservation of evidence." State v. Snapp, 174 Wn.2d 177, ¶38, 275 P.3d 289 (2012).

> Under the common law, the general rule was that 'where a person is legally arrested, the arresting officer has a right to search such person, and take from his possession money or goods which the officer reasonably believes to be connected with the supposed crime, and discoveries made in this lawful search may be shown at the trial in evidence.' The scope of the warrantless search of a person incident to arrest under article I, section 7 corresponds to the common law right…
>
> Once a person is arrested, there is a diminished expectation of privacy of the person, including clothing and personal possessions closely associated with clothing. The fact of a lawful arrest is enough by itself to justify a warrantless search of the person incident to arrest.

State v. Salinas, 169 Wn.App. 210, ¶22, 279 P.3d 917 (2012), *review denied*, 176 Wn.2d 1002 (2013) (Defendant lawfully arrested for rape. The warrantless seizure and forensic examination of his clothing was a proper warrantless search of his person incident to his lawful custodial arrest where the defendant's person materials were reasonably believed to be connected with the alleged crime.) (citations omitted).

2. Arizona v. Gant Does Not Apply

Arizona v. Gant and its progeny are inapplicable to a warrantless search of an arrestee's person incident to arrest.

> More recently, Arizona v. Gant, 556 U.S. 332, 340-43, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009) and its progeny, are inapplicable here because they involved searches of the passenger compartments of cars, which may or may not be under an arrestee's control at the time of a search, depending on whether the arrestee is secured and removed from the car.
>
> Furthermore, in [State v. Valdez, 167 Wn.2d 761, 768-69, 224 P.3d 751 (2009)], our Supreme Court discussed the Fourth Amendment and reaffirmed Chimel's [Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969)] validity, observing that−under the twin Chimel justifications of 'officer safety and the preservation of evidence of the crime prompting arrest'−'an officer may conduct a search incident to arrest of the arrestee's person and the area within his or her immediate control.'
>
> When the Valdez court turned to article I, section 7, it observed that searches incident to arrest arose from and are permitted for the same justifications.

State v. Bonds, 2013 WL 1755369, ___ Wn.App. ___, ¶36, ___ P.2d ___ (Apr. 23, 2013) (citations omitted).

3. Warrantless Search of Handcuffed Arrestee

An arrestee's person may be searched without a warrant incident to arrest, even if the arrestee is handcuffed at the time of the warrantless search.

> Unlike searches of vehicles incident to arrest, the arrestee's person, including the clothing he is wearing at the time of the search, is always under his immediate control, giving rise to a concern that he may access a weapon or destroy evidence concealed on his person.
>
> Handcuffing a defendant does not change this fact. As Division One of this court recently observed, "Cases exist where handcuffed individuals have acted extraordinarily, threatening officers and public safety." State v. MacDicken, 171 Wn.App. 169, 175, 286 P.3d 413 (2012).
>
>> 'Albeit difficult, it is by no means impossible for a handcuffed person to obtain. and use a weapon concealed on his person or within lunge reach, and in so doing to cause injury to his intended

> victim, to a bystander, or even to himself. Finally, like any mechanical device, handcuffs can and do fail on occasion.'
>
> MacDicken, 171 Wn.App. at 417 n.17.
>
> Thus, our holding in Jordan [State v. Jordan, 92 Wn.App. 25, 31, 960 P.2d 949 (1998)] that law enforcement officers may perform warrantless searches of an arrestee's person, including his clothing, is still valid under the federal and state constitutions.

State v. Bonds, 2013 WL 1755369, ___ Wn.App. ___, ¶37, ___ P.2d ___ (Apr. 23, 2013) (citations omitted).

4. Warrantless Search of Arrestee's Purse

In State v. Byrd, 162 Wn.App. 612, 258 P.3d 686, *review granted*, 173 Wn.2d 1001 (2011), an officer stopped a vehicle for stolen license plates. The driver was arrested on an outstanding warrant, and told the officer the vehicle belonged to the passenger. The officer approached the defendant/passenger who was sitting in the front passenger seat with a purse on her lap. The defendant was ordered out of the car. The officer removed the purse from the defendant's lap and placed it on the ground outside the car. He arrested the defendant for possession of stolen property, handcuffed her, and put her in a patrol car. The officer then searched the defendant's purse without a warrant and found methamphetamine and glass pipes with drug residue.

The court of appeals held under the Fourth Amendment that the warrantless search of the purse incident to the arrest of the defendant violated Arizona v. Gant, 556 U.S. 332, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009) because the purse was not within the reach of the defendant at the time of the warrantless search. State v. Byrd, 162 Wn.App. 612, ¶12, 258 P.3d 686, *review granted*, 173 Wn.2d 1001 (2011)

Chapter Twenty-Five

The Open View Doctrine

A. Open View Generally

Under the "open view" doctrine, an officer observes something in open view from a lawful vantage point outside a constitutionally protected area. State v. Seagull, 95 Wn.2d 898, 901-02, 632 P.2d 44 (1981).

Since the observation is not a search, the Fourth Amendment and Const. art. I, §7 are not implicated.

> [I]f an officer, after making a lawful stop, looks into a car from the outside and sees a weapon or contraband in the car, he has not searched the car. Because there has been no search, article [I], section 7 is not implicated.

State v. Kennedy, 107 Wn.2d 1, 10, 726 P.2d 445 (1986); State v. Rose, 128 Wn.2d 388, 392, 909 P.2d 280 (1996).

Once there is an intrusion into the constitutionally protected area, however, the intrusion must be justified if it is made without a warrant. State v. Kennedy, 107 Wn.2d 1, 9-10, 726 P.2d 445 (1986).

In State v. Jones, 163 Wn.2d 354, 266 P.3d 886 (2011), *review denied*, 173 Wn.2d 1009 (2012), the defendant was stopped for driving without a seat belt. When the officer approached the vehicle, he noticed a compartment in the driver's side door containing white pills and two pill bottles. The officer noted an imprint of the number 512 on one of the white pills and recognized the pill to be oxycodone. The defendant was arrested, handcuffed, searched and secured in the patrol vehicle. The defendant's vehicle was thereafter searched without a warrant.

The court of appeals upheld the officer's observation of the pills and pill bottles under the open view doctrine, but suppressed the evidence seized without a warrant.

> Under the open view doctrine, [the officer's] observation of the pills and pill bottles, from the nonconstitutionally protected area outside of Jones's

> vehicle, was not a search implicating article I, section 7; however, the open view doctrine did not permit his warrantless entry into Jones's vehicle to seize the items.
>
> * * *
>
> At the time of the search, Jones had been arrested, handcuffed, searched, and secured in the patrol car. Another officer was at the scene, and Jones's vehicle was parked in a parking lot. There was nothing to prevent the officers from safely securing the scene and obtaining a warrant. Thus the evidence seized from the car must be suppressed

State v. Jones, 163 Wn.App. 354, ¶¶18,20, 266 P.3d 886 (2011), *review denied*, 173 Wn.2d 1009 (2012).

See also State v. Myrick, 102 Wn.2d 506, 514-15, 688 P.2d 151 (1984) (plain view observation alone not enough to justify warrantless seizure of contraband); State v. Lemus, 103 Wn.App. 94, 102, 11 P.3d 326 (2000) (open view observation is not a search but may provide evidence supporting probable cause to constitutionally search under a warrant).

B. Binoculars and Flashlights

Generally, a search does not occur when an officer is able to detect something by use of one or more senses.

> As a general proposition, it is fair to say that when a law enforcement officer is able to detect something by utilization of one or more of his senses while lawfully present at the vantage point where those senses are used, that detection does not constitute a ‘search’....

State v. Young, 123 Wn.2d 173, 182, 867 P.2d 593 (1994) (*quoting* State v. Seagull, 95 Wn.2d 898, 901, 632 P.2d 44 (1981) (*quoting* 1 Wayne R. LaFave, Search and Seizure § 2.2, at 240 (1978)).

An officer's visual surveillance does not constitute a search if the officer observes an object with the unaided eye from a nonintrusive vantage point. State v. Kennedy, 107 Wn.2d 1, 10, 726 P.2d 445 (1986). *See also* State v. Myrick, 102 Wn.2d 506, 514, 688 P.2d 151 (1984) (not a search when police conducted aerial surveillance from 1,500 feet without the use of visual enhancement devices).

> This kind of surveillance does not violate Const. art. 1, § 7 because what is voluntarily exposed to the general public and observable without the use

> of enhancement devices from an unprotected area is not considered part of a person's private affairs. However, a substantial and unreasonable departure from a lawful vantage point, or a particularly intrusive method of viewing, may constitute a search. The nature of the property observed may also be a factor in determining whether a surveillance is unconstitutionally intrusive.

State v. Young, 123 Wn.2d 173, 182-83, 867 P.2d 593 (1994) (citations omitted) (footnote omitted).

The use of a flashlight has been upheld under the open view theory in a number of cases. *See, e.g.*, State v. Young, 28 Wn.App. 412, 624 P.2d 725, *review denied*, 95 Wn.2d 1024 (1981) (where vehicle parked in public place, and officer's observation would not have constituted a search if it occurred in daylight, fact that officer used a flashlight does not transform observation into search); State v. Cagle, 5 Wn.App. 644, 490 P.2d 123, *review denied*, 80 Wn.2d 1003 (1971); State v. Regan, 76 Wn.2d 331, 457 P.2d 1016 (1969).

In State v. Rose, 128 Wn.2d 388, 400-1, 909 P.2d 280 (1996), the Supreme Court upheld the use of a flashlight to look through a residence's window at night:

> In this case, … Rose left marijuana in plain view through an unobstructed window, and the flashlight used by the officer was no more invasive than observations with natural eyesight during daylight would have been.
>
> This case is thus similar to cases involving use of binoculars. Just as use of binoculars may enhance the officer's senses to see what lies at a distance but could be seen if the officer were closer, so does use of a flashlight enhance the officer's senses to see after darkness falls what could be seen in natural daylight.
>
> While there is no doubt that a person's home is a highly private place, that which is left exposed to anyone standing on a front porch impliedly open to the public has no privacy interest in the item exposed. There was no violation of Const. art. I, § 7 as a result of the officer's observations through the unobstructed window while using a flashlight.

Use of binoculars is similarly authorized. State v. Manly, 85 Wn.2d 120, 124, 530 P.2d 306, *cert. denied*, 423 U.S. 855, 96 S.Ct. 104, 46 L.Ed.2d 81 (1975).

C. Infrared Thermal Detection Devices and Narcotics Dogs

Washington open view cases draw a distinction between residences and other locations concerning the constitutional validity of the use of thermal detection devices and/or narcotics dogs.

1. Residences

A mechanism which goes beyond the enhancement of natural human senses near a residence to determine contents inside the residence is not permitted under the open view doctrine. Use of such tools has been held to be a search requiring either a warrant or an exception to the warrant requirement.

In State v. Young, 123 Wn.2d 173, 867 P.2d 593 (1994), the Supreme Court held that the use of an infrared thermal detection device to perform a warrantless surveillance of a residence violated Const. art. I, §7 and was thus not permitted under the open view doctrine.

> In this case, the police were positioned on the street, which is a lawful, nonintrusive vantage point. Therefore, the question is one of the intrusiveness of the means used and the nature of the property observed.
>
> The police used an infrared thermal detection device to detect heat distribution patterns undetectable by the naked eye or other senses. With this device the officer was able to, in effect, 'see through the walls' of the home. The device goes well beyond an enhancement of natural senses. In addition, the nighttime infrared surveillance enabled the officers to conduct their surveillance without Mr. Young's knowledge. The infrared device thus represents a particularly intrusive means of observation that exceeds our established surveillance limits.

State v. Young, 123 Wn.2d 173, 183, 867 P.2d 593 (1994),

In State v. Dearman, 92 Wn.App. 630, 962 P.2d 850 (1998), *review denied*, 137 Wn.2d 1032 (1999), after a detective ascertained that no one was home, a narcotics dog was told to sniff along the horizontal door seams of a garage to see if he could detect the odor of marijuana. The dog smelled marijuana and alerted. Police left the residence and obtained a search warrant. When they executed the warrant, they seized marijuana found growing in the garage.

The court held that, similar to the prohibited use of infrared thermal detection devices near a residence in State v. Young, the use of a narcotics dog improperly enhanced the normal senses of the officer to peer into the garage.

> Like an infrared thermal detection device, using a narcotics dog goes beyond merely enhancing natural human senses and, in effect, allows officers to 'see through the walls' of the home. The record is clear that officers could not detect the smell of marijuana using only their own sense of smell even when they attempted to do so from the same vantage point as [the narcotics dog]. As in Young, police could not have obtained the same information without going inside the garage.
>
> It is true that a trained narcotics dog is less intrusive than an infrared thermal detection device. But the dog 'does expose information that could not have been obtained without the device and which officers were unable to detect by using 'one or more of [their] senses while lawfully present at the vantage point where those senses are used.' The trial court thus correctly found that using a trained narcotics dog constituted a search for purposes of article 1, section 7 of the Washington Constitution and a search warrant was required.

State v. Dearman, 92 Wn.App. 630, 635, 962 P.2d 850 (1998), *review denied*, 137 Wn.2d 1032 (1999) (footnotes omitted).

In Florida v. Jardines, ___ U.S. ___, 133 S.Ct. 1409, ___ L.Ed.2d ___ (Mar. 26, 2013), an officer walked a narcotics dog up to the defendant's porch. The dog alerted to the presence of narcotics. A search warrant was obtained, and marijuana plants were thereafter seized.

The United States Supreme Court held that approaching the front door of a residence with a narcotics dog and commanding the dog to sniff for the presence of narcotics was a warrantless search in violation of the Fourth Amendment.

> The Fourth Amendment 'indicates with some precision the places and things encompassed by its protections': persons, houses, papers, and effects. The Fourth Amendment does not, therefore, prevent all investigations conducted on private property; for example, an officer may (subject to [Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967)]) gather information in what we have called "open fields"−even if those fields are privately owned−because such fields are not enumerated in the Amendment's text.
>
> But when it comes to the Fourth Amendment, the home is first among equals. At the Amendment's 'very core' stands 'the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.' This right would be of little practical value if the

State's agents could stand in a home's porch or side garden and trawl for evidence with impunity; the right to retreat would be significantly diminished if the police could enter a man's property to observe his repose from just outside the front window.

We therefore regard the area ‘immediately surrounding and associated with the home’−what our cases call the curtilage−as ‘part of the home itself for Fourth Amendment purposes.’ That principle has ancient and durable roots. Just as the distinction between the home and the open fields is ‘as old as the common law,’ so too is the identity of home and what Blackstone called the ‘curtilage or homestall,’ for the ‘house protects and privileges all its branches and appurtenants.’ 4 W. Blackstone, Commentaries on the Laws of England 223, 225 (1769). This area around the home is ‘intimately linked to the home, both physically and psychologically,’ and is where ‘privacy expectations are most heightened.’

While the boundaries of the curtilage are generally ‘clearly marked,’ the ‘conception defining the curtilage’ is at any rate familiar enough that it is ‘easily understood from our daily experience.’ Here there is no doubt that the officers entered it: The front porch is the classic exemplar of an area adjacent to the home and ‘to which the activity of home life extends.’

* * *

But introducing a trained police dog to explore the area around the home in hopes of discovering incriminating evidence is something else. There is no customary invitation to do that. An invitation to engage in canine forensic investigation assuredly does not inhere in the very act of hanging a knocker. To find a visitor knocking on the door is routine (even if sometimes unwelcome); to spot that same visitor exploring the front path with a metal detector, or marching his bloodhound into the garden before saying hello and asking permission, would inspire most of us to−well, call the police.

The scope of a license−express or implied−is limited not only to a particular area but also to a specific purpose. Consent at a traffic stop to an officer's checking out an anonymous tip that there is a body in the trunk does not permit the officer to rummage through the trunk for narcotics. Here, the background social norms that invite a visitor to the front door do not invite him there to conduct a search.

Florida v. Jardines, ___ U.S. ___, 133 S.Ct. 1409, 1414-16, ___ L.Ed.2d ___ (Mar. 26, 2013) (citations omitted) (footnotes omitted).

2. Vehicles

In State v. Hartzell, 156 Wn.App. 918, 237 P.3d 928 (2010), bullets were fired into a residence. Ultimately, the defendant exited a vehicle and a bullet hole was discovered in the passenger door. A K–9 officer was called to look for the gun that shot the bullet through the passenger door. The dog jumped up on the door, sniffed, and found a gun less than 100 yards away which a ballistics expert later determined was the gun that had fired into the residence. The Court of Appeals upheld the seizure of the gun.

> The inquiry whether the State unreasonably intruded into a person's private affairs focuses on the privacy interests that 'citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant.' State v. Myrick, 102 Wn.2d 506, 511, 688 P.2d 151 (1984).
>
> In general, a search does not occur if a law enforcement officer is able to detect something using one or more of his senses from a nonintrusive vantage point. State v. Seagull, 95 Wn.2d 898, 901, 632 P.2d 44 (1981). Such observation does not violate Washington's constitution because something voluntarily exposed to the general public and observable without an enhancement device from a lawful vantage point is not considered part of a person's private affairs. [State v. Young, 123 Wn.2d 173, 182, 867 P.2d 593 (1994)].
>
> An observation may constitute a search, however, if the officer substantially and unreasonably departs from a lawful vantage point or uses a particularly intrusive method of viewing. Young, 123 Wn.2d at 182-83. What is reasonable is determined from the facts and circumstances of each case. Seagull, 95 Wn.2d at 903.
>
> Whether or not a canine sniff is a search depends on the circumstances of the sniff itself. State v. Boyce, 44 Wn.App. 724, 729, 723 P.2d 28 (1986). In Boyce, this court held that as long as the canine 'sniffs the object from an area where the defendant does not have a reasonable expectation of privacy, and the canine sniff itself is minimally intrusive, then no search has occurred.'
>
> The trial court correctly concluded that Hartzell did not have a reasonable expectation of privacy in the air coming from the open window of the

> vehicle. Hartzell was not in the SUV when the dog sniffed from a lawful vantage point outside the vehicle. The sniff was only minimally intrusive. The trial court did not err when it denied Hartzell's motion to suppress the evidence.

State v. Hartzell, 156 Wn.App. 918, ¶¶11-13, 237 P.3d 928 (2010).

In Florida v. Harris, ___ U.S. ___, 133 S.Ct. 1050, 185 L.Ed.2d 61 (2013), the defendant's truck was pulled over for an expired license plate. Seeing that the defendant was nervous, unable to sit still, shaking and breathing rapidly, and after also noticing an open can of beer, the officer asked for consent to search the truck. The defendant refused. The officer retrieved his narcotics dog from the patrol vehicle, and walked the dog around the defendant's truck. The dog alerted to the driver's side door, indicating to the officer that the dog smelled drugs. Concluding that he had probable cause to search the truck based on the dog alert, the officer searched the vehicle and found items consistent with the manufacture of methamphetamine. The items discovered where not any of the drugs the dog was trained to detect.

The United States Supreme Court upheld the warrantless search under the Fourth Amendment. The Court outlined the standards to be followed when probable cause to search is challenged based upon a dog sniff as follows:

> For that reason, evidence of a dog's satisfactory performance in a certification or training program can itself provide sufficient reason to trust his alert. If a bona fide organization has certified a dog after testing his reliability in a controlled setting, a court can presume (subject to any conflicting evidence offered) that the dog's alert provides probable cause to search.
>
> The same is true, even in the absence of formal certification, if the dog has recently and successfully completed a training program that evaluated his proficiency in locating drugs. After all, law enforcement units have their own strong incentive to use effective training and certification programs, because only accurate drug-detection dogs enable officers to locate contraband without incurring unnecessary risks or wasting limited time and resources.
>
> A defendant, however, must have an opportunity to challenge such evidence of a dog's reliability, whether by cross-examining the testifying officer or by introducing his own fact or expert witnesses. The defendant, for example, may contest the adequacy of a certification or training

> program, perhaps asserting that its standards are too lax or its methods faulty. So too, the defendant may examine how the dog (or handler) performed in the assessments made in those settings.
>
> Indeed, evidence of the dog's (or handler's) history in the field, although susceptible to the kind of misinterpretation we have discussed, may sometimes be relevant, as the Solicitor General acknowledged at oral argument. See Tr. of Oral Arg. 23–24 ('[T]he defendant can ask the handler, if the handler is on the stand, about field performance, and then the court can give that answer whatever weight is appropriate'). And even assuming a dog is generally reliable, circumstances surrounding a particular alert may undermine the case for probable cause−if, say, the officer cued the dog (consciously or not), or if the team was working under unfamiliar conditions.
>
> In short, a probable-cause hearing focusing on a dog's alert should proceed much like any other. The court should allow the parties to make their best case, consistent with the usual rules of criminal procedure. And the court should then evaluate the proffered evidence to decide what all the circumstances demonstrate.
>
> If the State has produced proof from controlled settings that a dog performs reliably in detecting drugs, and the defendant has not contested that showing, then the court should find probable cause. If, in contrast, the defendant has challenged the State's case (by disputing the reliability of the dog overall or of a particular alert), then the court should weigh the competing evidence.
>
> In all events, the court should not prescribe, as the Florida Supreme Court did, an inflexible set of evidentiary requirements. The question−similar to every inquiry into probable cause−is whether all the facts surrounding a dog's alert, viewed through the lens of common sense, would make a reasonably prudent person think that a search would reveal contraband or evidence of a crime. A sniff is up to snuff when it meets that test.

Florida v. Harris, ___ U.S. ___, 133 S.Ct. 1050, 1057-58, 185 L.Ed.2d 61 (Feb.2013) (citations omitted) (footnotes omitted).

Chapter Twenty-Six

The Plain View Doctrine

A. The Plain View Doctrine Generally

The categories of "narrowly and jealously drawn" exceptions to the warrant requirement recognized by the Washington Supreme Court include consent, exigent circumstances, searches incident to a valid arrest, inventory searches, plain view searches, and investigative stops. State v. Duncan, 146 Wn.2d 166, 171-72, 43 P.3d 513 (2002); State v. Arreola, 176 Wn.2d 284, ¶13, 290 P.3d 983 (2012).

Under the "plain view" doctrine, an officer inadvertently observes an item immediately recognizable as evidence or contraband, after legitimately entering an area with respect to which a suspect has a constitutional expectation of privacy. State v. Seagull, 95 Wn.2d 898, 901, 632 P.2d 44 (1981).

The plain view discovery of evidence does not violate Const. art. I, §7 if the officer has a prior lawful justification for the intrusion and the officer immediately recognizes that the officer has evidence before him or her. State v. Khounvichai, 149 Wn.2d 557, 565-66, 69 P.3d 862 (2003); State v. O'Neill, 148 Wn.2d 564, 583, 62 P.3d 489 (2003).

If the intrusion is justified, an object of obvious evidentiary value that is in plain view and discovered inadvertently may be lawfully seized without a warrant. State v. Kennedy, 107 Wn.2d 1, 10, 726 P.2d 445 (1986).

It is well established that a discovery made in plain view is not a search. Const. art. I, §7 "[does] not prohibit a seizure without a warrant, where there is no need of a search, and where contraband subject-matter or unlawful possession of it is fully disclosed and open to the eye and hand." State v. Khounvichai, 149 Wn.2d 557, 565, 69 P.3d 862 (2003) (*quoting* State v. Miller, 121 Wash. 153, 154, 209 P. 9 (1922)).

Courts have applied the plain view doctrine to admit evidence discovered by sight during the course of a lawful warrantless Terry stop and frisk for weapons.

See Michigan v. Long, 463 U.S. 1032, 103 S.Ct. 3469, 3481, 77 L.Ed.2d 1201 (1983).

B. Inadvertent Discovery is Not Required

Inadvertent discovery is no longer required under the Fourth Amendment.

> In this case we revisit an issue that was considered, but not conclusively resolved, in Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971): Whether the warrantless seizure of evidence of crime in plain view is prohibited by the Fourth Amendment if the discovery of the evidence was not inadvertent. We conclude that even though inadvertence is a characteristic of most legitimate "plain-view" seizures, it is not a necessary condition.

Horton v. California, 496 U.S. 128, 130, 110 S.Ct. 2301, 2304, 110 L.Ed.2d 112 (1990).

No Washington court has held that the inadvertence prong still applies for analysis of the plain view doctrine under Const. art. I, §7. *See* State v. Hoggatt, 108 Wn.App. 257, 271 n.32, 30 P.3d 488 (2001).

C. Plain View Analysis

Under the plain view doctrine, the prosecution must prove (1) a prior justification for the intrusion, (2) an inadvertent discovery of incriminating evidence, and (3) an immediate knowledge that evidence has been discovered. Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 2037-41, 29 L.Ed.2d 564 (1971); State v. Bustamante-Davila, 138 Wn.2d 964, 982, 983 P.2d 590 (1999).

Plain view involves three stages: viewing, reaching and seizing. An officer does not need a warrant to seize an item observed during plain view if these requirements are met. State v. Hoggatt, 108 Wn.App. 257, 270-71, 30 P.3d 488 (2001) (footnote omitted).

1. The Viewing Stage

During the viewing stage, the officer must view the item to be seized without intruding unlawfully on the defendant's privacy.

> FN31. At the viewing stage, the officer may or may not be intruding on privacy. If the officer is not intruding on privacy, the situation is called "open view." If the officer is intruding on privacy, the situation is called "plain view," and the officer must have "prior justification for the intrusion.

State v. Hoggatt, 108 Wn.App. 257, 270 n.31, 30 P.3d 488 (2001) (citations omitted).

2. The Reaching Stage

During the reaching stage, the officer must reach the item without intruding unlawfully on the defendant's privacy.

> FN32. This means, among other things, that when an officer is intruding on a reasonable expectation of privacy, the officer must not exceed the scope of the warrant, consent, or other source of authority under which he or she acts. It used to be said that the officer must "inadvertently discover" the incriminating evidence. That idea, however, has since been discredited, or at least refined, by both federal and state courts. Yet the idea seems to persist in cases where it makes no difference.

State v. Hoggatt, 108 Wn.App. 257, 270 n.32, 30 P.3d 488 (2001) (citations omitted).

3. The Seizing Stage

During the seizing stage, the officer must seize the item (a) without intruding unlawfully on the defendant's privacy (as opposed to the defendant's possession), and (b) with probable cause to believe the item is contraband or evidence of a crime. State v. Hoggatt, 108 Wn.App. 257, 270, 30 P.3d 488 (2001) (citations omitted) (footnotes omitted).

D. Serial Numbers and Moving Objects

In State v. Murray, 84 Wn.2d 527, 529-30, 527 P.2d 1303 (1974), *cert. denied*, 421 U.S. 1004, 95 S.Ct. 2407, 44 L.Ed.2d 673 (1975), our Supreme Court determined that the plain view doctrine did not apply to the seizure of a serial number on a television where an officer, who had consent to be in the home, had to turn the television over to see the serial number. The court determined that the owner had a privacy interest in the serial number stamped on the bottom of the television and completely concealed from the police. *See also* Arizona v. Hicks, 480 U.S. 321, 325, 107 S.Ct. 1149, 94 L.Ed.2d 347 (1987) (police action not within plain view doctrine where stereo moved until its serial number became visible, and police thereafter determined stereo was stolen based upon serial number).

The plain view doctrine will not allow an officer to seize a video tape where the exterior of the tape does not indicate that the tape may be evidence of a crime.

State v. Johnson 104 Wn.App. 478, 502, 17 P.3d 3 (2001) ("When [law enforcement] first saw the tapes, nothing about the exterior of the tapes gave probable cause to believe the tapes were evidence of a crime. To acquire probable cause, they needed to view the tapes' contents, and doing that was an additional unauthorized search.").

Chapter Twenty-Seven

Consent to Conduct a Warrantless Vehicle Search

A. Consent to Warrantless Searches Generally

The categories of "narrowly and jealously drawn" exceptions to the warrant requirement recognized by the Washington Supreme Court include consent, exigent circumstances, searches incident to a valid arrest, inventory searches, plain view searches, and investigative stops. State v. Duncan, 146 Wn.2d 166, 171-72, 43 P.3d 513 (2002); State v. Arreola, 176 Wn.2d 284, ¶13, 290 P.3d 983 (2012).

Where the prosecution relies on consent to conduct a warrantless search, the court must address three questions. State v. Thompson, 151 Wn.2d 793, 803, 92 P.3d 228 (2004).

First, was the consent freely and voluntarily given? State v. Reichenbach, 153 Wn.2d 126, 131, 101 P.3d 80 (2004).

Second, was the consent granted by a person with authority to consent? State v. Reichenbach, 153 Wn.2d 126, 131, 101 P.3d 80 (2004).

Third, was the search conducted within the scope of the consent given? State v. Reichenbach, 153 Wn.2d 126, 131, 101 P.3d 80 (2004).

See also State v. Monaghan, 165 Wn.App. 782, ¶15, 266 P.3d 222 (2012).

B. Voluntariness of Consent

To show that valid consent to a search has been given, the prosecution must prove that the consent was freely and voluntarily given. Bumper v. North Carolina, 391 U.S. 543, 548, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968); State v. O'Neill, 148 Wn.2d 564, 588, 62 P.3d 489 (2003).

Whether consent was voluntary or instead the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of the circumstances. State v. O'Neill, 148 Wn.2d 564, 588, 62 P.3d 489 (2003).

Factors which may be considered in determining whether one has voluntarily consented include whether Miranda warnings (Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)) were given, the degree of education and intelligence of the individual, and whether he or she had been advised of the right to consent. State v. Bustamante-Davila, 138 Wn.2d 964, 981-82, 983 P.2d 590 (1999); State v. O'Neill, 148 Wn.2d 564, 588, 62 P.3d 489 (2003).

However, under the Fourth Amendment, when the subject of a search is not in custody and the question is whether consent is voluntary, knowledge of the right to refuse consent is not a prerequisite of a voluntary consent. Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041, 2058-59, 36 L.Ed.2d 854 (1973); State v. O'Neill, 148 Wn.2d 564, 588, 62 P.3d 489 (2003).

The United States Supreme Court has noted that "consent" granted "only in submission to a claim of lawful authority" is not given voluntarily. Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041, 2051, 36 L.Ed.2d 854 (1973) (*citing* Bumper v. North Carolina, 391 U.S. 543, 88 S.Ct. 1788, 1791-92, 20 L.Ed.2d 797 (1968)). In Bumper, the court reasoned that where an officer claimed authority to conduct a valid search without consent, the officer effectively stated that the individual asked to consent had no right to resist the search.

Additionally, an officer repeatedly requesting consent is a factor to be considered in assessing the voluntariness of consent. State v. O'Neill, 148 Wn.2d 564, 591, 62 P.3d 489 (2003).

> Here, Sergeant West did not merely advise O'Neill of the consequences of refusal. Instead, in response to O'Neill's contention that West could not search without a warrant, West claimed that he could search without a warrant regardless of whether consent was given. As noted, however, for whatever reason West was not inclined to effect an arrest prior to searching the vehicle. He thus used the claim that he could search in any event to pressure O'Neill to consent, i.e., to give in because it was futile not to. Moreover, Sergeant West repeated the statement several times, and thus it was not just informative, but instead was coercive.

State v. O'Neill, 148 Wn.2d 564, 590-91, 62 P.3d 489 (2003) (under the totality of the circumstances, no valid consent to search pursuant to the Fourth Amendment).

C. Voluntariness of Consent−Knock and Talk (Ferrier Warnings)

In State v. Ferrier, 136 Wn.2d 103, 960 P.2d 927 (1998), the court held that where the goal of law enforcement is to search a residence for contraband and/or evidence without a warrant (known as a "knock and talk"), Const. art. I, §7 requires notification to the consenting person of the right to refuse consent, the right to revoke consent at any time, and the right to limit the scope of the consent prior to law enforcement entry into the residence.

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

State v. Ferrier, 136 Wn.2d 103, 118-119, 960 P.2d 927 (1998).

Our Supreme Court later clarified that the Ferrier requirement is limited to situations where police request entry into a residence for the purpose of obtaining consent to conduct a warrantless search for contraband or evidence of a crime. State v. Khounvichai, 149 Wn.2d 557, 563, 566, 69 P.3d 862 (2003) (officers seeking consent of juvenile's grandmother to enter her home so they could speak to the juvenile about allegations he had broken complainant's window were not required to give Ferrier warnings).

See also State v. Freepons, 147 Wn.App. 689, 197 P.3d 682 (2008), *review denied*, 166 Wn.2d 1008 (2009) (Ferrier warnings required where officers were investigating an alcohol-related one vehicle collision, went to defendant's residence, encountered defendant at the door, gave Miranda warnings, and successfully obtained consent to search the residence. Evidence of marijuana grow suppressed.)

Central to the Ferrier Court's holding is the inherent coercive nature of the knock and talk process.

> Central to our holding is our belief that any knock and talk is inherently coercive to some degree. While not every knock and talk effort may be accompanied by as great a show of force as was present here, we believe that the great majority of home dwellers confronted by police officers on

> their doorstep or in their home would not question the absence of a search warrant because they either (1) would not know that a warrant is required; (2) would feel inhibited from requesting its production, even if they knew of the warrant requirement; or (3) would simply be too stunned by the circumstances to make a reasoned decision about whether or not to consent to a warrantless search.
>
> In this context, Ferrier's testimony, which was supported by the officers, that she was afraid and nervous seems totally reasonable. Indeed, we are not surprised that, as noted earlier, an officer testified that virtually everyone confronted by a knock and talk accedes to the request to permit a search of their home.
>
> We wish to emphasize that we are not entirely disapproving of the knock and talk procedure, and we understand that its coercive effects are not altogether avoidable. They can, however, be mitigated by requiring officers who conduct the procedure to warn home dwellers of their right to refuse consent to a warrantless search.
>
> This would provide greater protection for privacy rights that are protected by the state constitution and would also accord with the state's Fourth Amendment burden of demonstrating, by clear and convincing evidence, that consent to a search was voluntarily given.

State v. Ferrier, 136 Wn.2d 103, 115-16, 960 P.2d 927 (1998) (citation omitted).

Our Supreme Court has "long held the [Const. art. I, §7] right to be free from unreasonable governmental intrusion into one's 'private affairs' encompasses automobiles and their contents." State v. Parker, 139 Wn.2d 486, 494, 987 P.2d 73 (1999).

The Parker Court, citing to State v. Gibbons, 118 Wash. 171, 203 P. 390 (1922), noted:

> More than 75 years ago, in Gibbons, we explicitly recognized the citizens of this state have a right to the privacy of their vehicles.
>
> > We note that the case before us does not involve a search ... in the home of appellant; but manifestly the constitutional guaranty that 'no person shall be disturbed in his private affairs, or his home invaded, without authority of law,' protected the person of appellant, and the possession of his automobile and all that was in it, while upon a public street of Ritzville, against arrest and search without

> authority of a warrant of arrest, or a search warrant, as fully as he would have been so protected had he and his possession been actually inside his own dwelling; that is, his 'private affairs' were under the protection of this guaranty of the constitution, whether he was within his dwelling, upon the public highways, or wherever he had the right to be.

Gibbons, 118 Wash. at 187-88 (quoting Const. art. I, §7).

State v. Parker, 139 Wn.2d 486, 494, 987 P.2d 73 (1999).

Our Supreme Court again reaffirmed Const. art. I, §7's privacy protection of vehicles and their contents in State v. Snapp, 174 Wn.2d 177, ¶22, 275 P.3d 289 (2012) ("A privacy interest in vehicles and their contents is recognized under article I, section 7.").

Whether an officer seeking consent to conduct a warrantless search of a vehicle seized during a warrantless Terry traffic stop is an "inherently coercive" situation similar to the nature of a residential "knock and talk" requiring Ferrier warnings prior to a valid consent is yet to be determined in Washington.

D. Authority to Consent

Generally, the driver of a vehicle has authority to consent to search the vehicle. *See* State v. Monaghan, 165 Wn.App. 782, ¶18, 266 P.3d 222 (2012) (driver had authority to consent to search); State v. Cantrell, 124 Wn.2d 183, 188, 875 P.2d 1208 (1994) (borrower of vehicle may consent to search).

A passenger may also consent to search a vehicle where the persons have joint access and control over the vehicle. State v. Cantrell, 124 Wn.2d 183, 192, 875 P.2d 1208 (1994) (consent by passenger valid where vehicle owned by passenger's parents and driver did not object to consent).

E. Scope of Consent

A general and unqualified consent to search an area for particular items permits a search of personal property within the area in which the material could be concealed. State v. Jensen, 44 Wn.App. 485, 723 P.2d 443, *review denied*, 107 Wn.2d 1012 (1986) (general consent given when defendant in custody upheld where vehicle stopped for speeding and defendant arrested for driving while his license was suspended); State v. Mueller, 63 Wn.App. 720, 722, 821 P.2d 1267, *review denied*, 119 Wn.2d 1012 (1992) (warrantless search of gym bag during DUI investigation upheld where general and unqualified consent to search given).

However, the warrantless search of a locked container in a vehicle exceeds the scope of a general consent to search the vehicle. State v. Monaghan, 165 Wn.App. 782, ¶23, 266 P.3d 222 (2012) (driver gave general consent to search vehicle but not specific consent to search any locked containers found in the vehicle).

F. Extending a Warrantless Terry Traffic Stop to Seek Consent

If a warrantless Terry traffic stop is initially justified, the detention length and scope must be reasonably related to the circumstances justifying the stop. RCW 46.61.021(2); State v. Kennedy, 107 Wn.2d 1, 4, 726 P.2d 445 (1986); State v. Tijerina, 61 Wn.App. 626, 628-29, 811 P.2d 241, *review denied*, 118 Wn.2d 1007 (1991).

Once the initial stop purpose is accomplished, any further detention must be based on "articulable facts giving rise to a reasonable suspicion of criminal activity." State v. Armenta, 134 Wn.2d 1, 15-16, 948 P.2d 1280 (citation omitted).

In other words, "police officers may not use routine traffic stops as a basis for generalized, investigative detentions or searches." State v. Henry, 80 Wn.App. 544, 553, 910 P.2d 1290 (1995).

In State v. Tijerina, 61 Wn.App. 626, 811 P.2d 241, *review denied*, 118 Wn.2d 1007 (1991), the vehicle being driven by the defendant was stopped after law enforcement observed the vehicle cross the fog line approximately two feet and then return to the inside lane. The driver and passenger identified themselves. The officer found their driver's licenses and vehicle registration valid and decided not to issue a citation. The defendant was then asked to exit vehicle and consent to a warrantless search of vehicle, which he did. Cocaine was found during the warrantless search.

The court of appeals held that the consent to search was vitiated by the unlawful detention occurring after the officer decided to not issue a citation, and suppressed the evidence.

> Here, there were no intervening circumstances between the illegal detention and the consent to search. The purpose of the stop was satisfied when the Sergeant decided not to issue a citation and his subsequent conduct was based on unjustified suspicion. Further, Miranda warnings were not given prior to obtaining the consent. But for the illegal detention, the consent would not have been obtained. Thus, the evidence should have been suppressed.

State v. Tijerina, 61 Wn.App. 626, 630, 811 P.2d 241, *review denied*, 118 Wn.2d 1007 (1991).

In State v. Henry, 80 Wn.App. 544, 546, 910 P.2d 1290 (1995), the defendant was stopped for failure to stop and failure to signal. The officer observed that the defendant had glassy eyes, moved slowly, and acted "kind of like he was in some type of a daze" when pulled over for a traffic infraction. Based on this, the officer asked if the vehicle had been used in recent burglaries or drug transactions in the area. The defendant said, "No." The officer nonetheless asked for consent to search the vehicle after telling the defendant he could refuse to consent. The defendant consented, and drugs were found. The officer could not point to a specific articulable basis for his suspicion connecting the defendant with burglaries or drug transactions. The driver's appearance had no connection with burglaries or drug transactions.

> Here, although Deputy Small justifiably stopped Mr. Henry for two traffic infractions, he converted the routine traffic stop into a more intrusive detention for which he had no objective basis.

State v. Henry, 80 Wn.App. 544, 553, 910 P.2d 1290 (1995) (conviction reversed).

In State v. Armenta, 134 Wn.2d 1, 948 P.2d 1280 (1997), two men asked an officer for help with their vehicle. The officer became suspicious because the men had large amounts of cash and gave only sketchy accounts of their recent whereabouts. The officer placed their money on his patrol vehicle. The defendant ultimately consented to a warrantless search of the vehicle, and cocaine was found.

The Supreme Court held that the defendant's voluntary consent to the warrantless search of the vehicle was tainted by the prior unlawful detention, and was thus invalid.

> Here, Armenta consented to the search immediately after Officer Randles placed Armenta and Cruz's money in his patrol car. Furthermore, there were essentially no intervening circumstances, and Armenta and Cruz had not been read their Miranda rights. Although we feel certain that Randles was not acting maliciously, it is apparent that he was "fishing" for evidence of illegal drug trafficking. In our view, Armenta's consent, although voluntary, was tainted by the prior illegal detention.

State v. Armenta, 134 Wn.2d 1, 17, 948 P.2d 1280 (1997) (citation to record omitted).

In State v. Veltri, 136 Wn.App. 818, 150 P.3d 1178 (2007), an officer stopped the defendant to investigate mismatched license plates and a possibly stolen truck. The rear license plate was valid. The truck was not reported stolen. The officer decided not to issue an infraction. The defendant was thereafter requested to consent to a warrantless search of the vehicle, which she did. Drugs were found.

The court of appeals held that once the officer decided not to issue a citation, the further investigation including consent to a warrantless search was unlawful.

> Officer Edwards dispelled his stolen truck suspicions and decided not to issue an infraction, resolving the initial stop purposes. Given the trial court's findings, it correctly concluded Officer Edwards lacked further reasonable articulable suspicion of criminal activity. Thus, the trial court correctly decided an impermissible general exploratory search occurred….[T]he continued detention, questioning, and search were unlawful.

State v. Veltri, 136 Wn.App. 818, ¶12, 150 P.3d 1178 (2007) (citations omitted).

Chapter Twenty-Eight

The Exigent Circumstances Doctrine

A. Exigent Circumstances Generally

The categories of "narrowly and jealously drawn" exceptions to the warrant requirement recognized by the Washington Supreme Court include consent, exigent circumstances, searches incident to a valid arrest, inventory searches, plain view searches, and investigative stops. State v. Duncan, 146 Wn.2d 166, 171-72, 43 P.3d 513 (2002); State v. Arreola, 176 Wn.2d 284, ¶13, 290 P.3d 983 (2012).

The emergency aid doctrine discussed in Chapter 6 (Community Caretaking Function Contacts) is different from the "exigent circumstances" exception to the warrant requirement. Both involve situations in which law enforcement must act immediately, but for different purposes.

The emergency aid doctrine does not involve an officer investigating a crime but arises from an officer's community caretaking responsibility to come to the aid of persons believed to be in danger of death or physical harm.

The exigent circumstances exception, however, exists in situations where it may be impractical to obtain a search warrant during a criminal investigation. State v. Leupp, 96 Wn.App. 324, 330, 980 P.2d 765 (1999), *review denied*, 139 Wn.2d 1018 (2000).

The exigent circumstances exception applies where "obtaining a warrant is not practical because the delay inherent in securing a warrant would compromise officer safety, facilitate escape or permit the destruction of evidence." State v. Smith, 165 Wn.2d 511, 517, 199 P.3d 386 (2009) (citation omitted). Washington courts have long held that "danger to [the] arresting officer or to the public" can constitute an exigent circumstance. State v. Counts, 99 Wn.2d 54, 60, 659 P.2d 1087 (1983).

This exception may provide a basis for a warrantless search where search incident to arrest does not apply. State v. Snapp, 174 Wn.2d 177, ¶44 n.13, 275 P.3d 289 (2012).

"The underlying theme of the exigent circumstances exception remains '[n]ecessity, a societal need to search without a warrant.'" State v. Tibbles, 169 Wn.2d 364, ¶14, 236 P.3d 885 (2010) (*quoting* State v. Patterson, 112 Wn.2d 731, 734, 774 P.2d 10 (1989)).

A court must look at the totality of circumstances in order to determine whether exigent circumstances support a warrantless search. State v. Smith, 165 Wn.2d 511, 518, 199 P.3d 386 (2009).

The Washington Supreme Court has set out six factors to guide an exigent circumstances analysis:

> (1) the gravity or violent nature of the offense with which the suspect is to be charged;
>
> (2) whether the suspect is reasonably believed to be armed;
>
> (3) whether there is reasonably trustworthy information that the suspect is guilty;
>
> (4) there is strong reason to believe that the suspect is on the premises;
>
> (5) a likelihood that the suspect will escape if not swiftly apprehended; and
>
> (6) the entry [can be] made peaceably.

State v. Cardenas, 146 Wn.2d 400, 406, 47 P.3d 127, 57 P.3d 1156 (2002) (*citing* State v. Terrovona, 105 Wn.2d 632, 644, 716 P.2d 295 (1986)).

Because courts analyze the totality of the situation, circumstances may be "exigent" even if they do not satisfy every one of the six listed elements. State v. Cardenas, 146 Wn.2d 400, 408, 47 P.3d 127, 57 P.3d 1156 (2002).

B. Warrantless Blood Draws for Alcohol or Drug Evidence

1. Schmerber v. California (1966)

In Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826, 1835-36, 16 L.Ed.2d 908 (1966), the defendant suffered injuries in an accident and was taken to a hospital, where he was arrested for driving under the influence.

Under the "special facts" presented, the United States Supreme Court, pursuit to the exigent circumstances doctrine, upheld the constitutionality under the Fourth Amendment of the forced taking of a warrantless blood sample from an individual arrested for driving under the influence of alcohol. The court reasoned that the

officer “might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened the destruction of evidence.”

2. Missouri v. McNeely (2013)

In Missouri v. McNeely, ___ U.S. ___, 133 S.Ct. 1552, ___ L.Ed.2d ___ (Apr. 17, 2013), the defendant was stopped by a Missouri officer for speeding and crossing the centerline. After declining to take a breath test to measure his alcohol concentration, the defendant was arrested and taken to a nearby hospital for blood testing. The defendant refused to consent to the blood test. Nevertheless, the officer directed a lab technician to take a blood sample. The officer never attempted to obtain a search warrant. The defendant was charged with driving under the influence.

The trial court suppressed the blood test results, ruling that the taking of the defendant’s blood without a warrant violated his Fourth Amendment rights. The trial court reasoned that no exigent circumstances existed suggesting the officer faced an emergency other than the fact the defendant’s blood alcohol level was dissipating.

The Missouri Supreme Court found that the case involved a routine drunk driving investigation. Relying on Schmerber v. California’s totality of the circumstances approach, the Missouri Supreme Court reasoned that there were no factors, other than the natural dissipation of blood alcohol, suggesting the existence of an emergency justifying the non-consensual warrantless seizure of blood. The trial court’s ruling was affirmed due to the violation of the Fourth Amendment’s warrant requirement.

The United States Supreme Court accepted review, and phrased the issue as follows:

> In Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966), this Court upheld a warrantless blood test of an individual arrested for driving under the influence of alcohol because the officer “might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened the destruction of evidence.”
>
> The question presented here is whether the natural metabolization of alcohol in the bloodstream presents a per se exigency that justifies an exception to the Fourth Amendment's warrant requirement for nonconsensual blood testing in all drunk-driving cases.

> We conclude that it does not, and we hold, consistent with general Fourth Amendment principles, that exigency in this context must be determined case by case based on the totality of the circumstances.

Missouri v. McNeely, U.S. , 133 S.Ct. 1552, 1556, L.Ed.2d (Apr. 17, 2013) (citation omitted).

The Court described the physical intrusion necessary to obtain a person's blood as an invasion of one's "deep-rooted" constitutional expectation of privacy.

> Our cases have held that a warrantless search of the person is reasonable only if it falls within a recognized exception [to the Fourth Amendment's warrant requirement]. That principle applies to the type of search at issue in this case, which involved a compelled physical intrusion beneath McNeely's skin and into his veins to obtain a sample of his blood for use as evidence in a criminal investigation. Such an invasion of bodily integrity implicates an individual's "most personal and deep-rooted expectations of privacy."

Missouri v. McNeely, U.S. , 133 S.Ct. 1552, 1558, L.Ed.2d (Apr. 17, 2013) (citations omitted).

The Court next discussed its holding in Schmerber v. California.

> We first considered the Fourth Amendment restrictions on such searches in Schmerber, where, as in this case, a blood sample was drawn from a defendant suspected of driving while under the influence of alcohol. Noting that "[s]earch warrants are ordinarily required for searches of dwellings," we reasoned that "absent an emergency, no less could be required where intrusions into the human body are concerned," even when the search was conducted following a lawful arrest. We explained that the importance of requiring authorization by a 'neutral and detached magistrate' before allowing a law enforcement officer to 'invade another's body in search of evidence of guilt is indisputable and great.'

Missouri v. McNeely, U.S. , 133 S.Ct. 1552, 1558, L.Ed.2d (Apr. 17, 2013) (citations omitted).

One well-recognized exception to the Fourth Amendment's warrant requirement is the exigent circumstances doctrine.

> A variety of circumstances may give rise to an exigency sufficient to justify a warrantless search, including law enforcement's need to provide

> emergency assistance to an occupant of a home, engage in "hot pursuit" of a fleeing suspect, or enter a burning building to put out a fire and investigate its cause. As is relevant here, we have also recognized that in some circumstances law enforcement officers may conduct a search without a warrant to prevent the imminent destruction of evidence. While these contexts do not necessarily involve equivalent dangers, in each a warrantless search is potentially reasonable because "there is compelling need for official action and no time to secure a warrant."

Missouri v. McNeely, ___ U.S. ___, 133 S.Ct. 1552, 1558-59, ___ L.Ed.2d ___ (Apr. 17, 2013) (citations omitted).

The Supreme Court affirmed the holding in Schmerber that courts should examine a warrantless exigent circumstances search on a case-by-case basis based upon the totality of the circumstances.

> In those drunk-driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so.
>
> We do not doubt that some circumstances will make obtaining a warrant impractical such that the dissipation of alcohol from the bloodstream will support an exigency justifying a properly conducted warrantless blood test. That, however, is a reason to decide each case on its facts, as we did in Schmerber, not to accept the "considerable overgeneralization" that a per se rule would reflect.

Missouri v. McNeely, ___ U.S. ___, 133 S.Ct. 1552, 1561, ___ L.Ed.2d ___ (Apr. 17, 2013) (citations omitted).

The Supreme Court rejected the prosecution's proposed per se rule authorizing a warrantless blood draw for all driving under the influence situations, noting the advances in the 47 years since Schmerber was decided that allow for the more expeditious processing of warrant applications.

> This reality undermines the force of the State's contention, endorsed by the dissent, that we should recognize a categorical exception to the warrant requirement because BAC evidence "is actively being destroyed with every minute that passes." Consider, for example, a situation in which the warrant process will not significantly increase the delay before the blood test is conducted because an officer can take steps to secure a warrant while the suspect is being transported to a medical facility by

> another officer. In such a circumstance, there would be no plausible justification for an exception to the warrant requirement.
>
> The State's proposed per se rule also fails to account for advances in the 47 years since Schmerber was decided that allow for the more expeditious processing of warrant applications, particularly in contexts like drunk-driving investigations where the evidence offered to establish probable cause is simple…
>
> States have also innovated. Well over a majority of States allow police officers or prosecutors to apply for search warrants remotely through various means, including telephonic or radio communication, electronic communication such as e-mail, and video conferencing. And in addition to technology-based developments, jurisdictions have found other ways to streamline the warrant process, such as by using standard-form warrant applications for drunk-driving investigations

Missouri v. McNeely, ___ U.S. ___, 133 S.Ct. 1552, 1561-62, ___ L.Ed.2d ___ (Apr. 17, 2013) (citations omitted) (footnotes omitted).

Our Supreme Court has also discussed the necessity of examining the availability of a telephonic search warrant when assessing whether exigent circumstances existed to support a warrantless search and seizure by law enforcement.

In State v. Ringer, 100 Wn.2d 686, 674 P.2d 1240 (1983), the defendant was lawfully parked in a rest area when two officers discovered that a felony arrest warrant existed justifying the defendant's arrest. The officers ordered the defendant out of his van, arrested him, handcuffed him, and placed him in the back of the patrol car. During this arrest process, the officers noticed a strong odor of marijuana emanating from defendant's van. The officers subsequently searched the van without a warrant, and discovered closed, unlocked suitcases which contained marijuana, cocaine, and other controlled substances.

The Ringer Court held that exigent circumstances were not present justifying the warrantless search of the van, and suppressed the evidence seized from the van.

> The amount of time necessary to obtain a warrant by traditional means has always been considered in determining whether circumstances are exigent. CrR 2.3(c) and JCrR 2.10(c) [now CrRLJ 2.3(c)] allow for the issuance of a search warrant based on the sworn telephonic statement of the officer seeking the warrant, provided, of course, that the statement is properly recorded and subsequently transcribed. The provisions of CrR

2.3(c) and JCrR 2.10(c) [now CrRLJ 2.3(c)] closely parallel Fed.R.Crim.P. 41(c)(1), (2). 4A L. Orland, Wash.Prac. § 6162 (3d ed. 1983). As the Federal Advisory Committee on Rules stated:

> The unavailability of [a telephonic warrant] procedure ... makes more tempting an immediate resort to a warrantless search in the hope that the circumstances will later be found to have been sufficiently 'exigent' to justify such a step.

Fed.R.Crim.P. 41(c)(2). Like the federal rule, CrR 2.3(c) and JCrR 2.10(c) [now CrRLJ 2.3(c)] are intended to encourage law enforcement officers 'to seek search warrants in situations when they might otherwise conduct warrantless searches.'

We conclude that the availability of a telephone warrant must also be considered in determining whether exigent circumstances exist. According to one commentator:

> The availability of a search warrant via telephone or other electronic means obviates much of the claimed exigency justification for a warrantless search for objects.... Administrative obstacles heretofore cited for not securing a search warrant by appearing before a magistrate must now be examined in a different light. Such factors as the distance from a magistrate, the time required to appear before a magistrate, the normal business hours of a magistrate, the inconvenience of securing and dispatching additional agents to appear before a magistrate are now less determinative in justifying the exception. A magistrate, and a search warrant, can be as close as the nearest telephone or mobile radio. The mobility, and thus the risk of loss, of the object to be searched and property to be seized is reduced in importance.

Marek, Telephonic Search Warrants: A New Equation for Exigent Circumstances, 27 Clev.St.L.Rev. 35, 38 (1978).

In the present case there is no showing that the exigencies of Ringer's arrest made it impractical for state troopers to obtain a warrant prior to the search of Ringer's van. The vehicle was 'lawfully parked' and immobile at the Scatter Creek rest area and 'did not impede traffic or threaten public safety or convenience.' Presumably, state troopers at the scene of the arrest had probable cause to search Ringer's van. Nevertheless, they have made no showing that a telephonic warrant could not have been

> obtained to search the vehicle. CrR 2.3(c); JCrR 2.10(c) [now CrRLJ 2.3(c)].

State v. Ringer, 100 Wn.2d 686, 701-3, 674 P.2d 1240 (1983) (citations omitted).

The Supreme Court overruled Ringer, but only temporarily, in State v. Stroud, 106 Wn.2d 144, 720 P.2d 436 (1986). Today, Ringer is once again controlling law. State v. Valdez, 167 Wn.2d 761, 773-77, 224 P.3d 751 (2009); State v. Snapp, 174 Wn.2d 177, 275 P.3d 289 (2012).

The McNeely Court, continuing to focus on its case-by-case approach, noted that exigent circumstances might authorize a warrantless blood draw depending on the circumstances.

> Of course, there are important countervailing concerns. While experts can work backwards from the BAC at the time the sample was taken to determine the BAC at the time of the alleged offense, longer intervals may raise questions about the accuracy of the calculation. For that reason, exigent circumstances justifying a warrantless blood sample may arise in the regular course of law enforcement due to delays from the warrant application process.
>
> But adopting the State's per se approach would improperly ignore the current and future technological developments in warrant procedures, and might well diminish the incentive for jurisdictions "to pursue progressive approaches to warrant acquisition that preserve the protections afforded by the warrant while meeting the legitimate interests of law enforcement."
>
> In short, while the natural dissipation of alcohol in the blood may support a finding of exigency in a specific case, as it did in Schmerber, it does not do so categorically. Whether a warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case based on the totality of the circumstances.

Missouri v. McNeely, ___ U.S. ___, 133 S.Ct. 1552, 1563, ___ L.Ed.2d ___ (Apr. 17, 2013) (citations omitted).

Finally, the Supreme Court summarized its holding as follows:

> We hold that in drunk-driving investigations, the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant.

Missouri v. McNeely, ___ U.S. ___, 133 S.Ct. 1552, 1568, ___ L.Ed.2d ___ (Apr. 17, 2013).

3. Washington's Implied Consent Statute−RCW 46.20.308

The 50 states, faced with the prospect under Schmerber v. California that non-consenting arrestees would have to be restrained while their blood was drawn, opted to avoid forced blood draws by providing for the suspension of the driver's license of individuals refusing the test.

This was accomplished through the passage of implied consent laws based on the principle that driving is a privilege, not a right, and in accepting a driver's license, an individual is deemed to have given consent to a chemical test. Implied consent laws recognized that search warrants were not required to extract blood from a suspect pursuant to the exigent circumstances' holding in Schmerber, but provided arrestees with the right to refuse a warrantless seizure of their blood under most circumstances. Most implied consent statutes also had a preference for warrantless breath testing for alcohol concentration rather than a more invasive warrantless seizure of urine or blood.

The people adopted Washington's implied consent statute by initiative in the 1968 general election (Initiative Measure No. 242). The implied consent law is codified in RCW 46.20.308. *See also* RCW 46.61.506 (admissibility of alcohol or drug concentration based upon an analysis of breath or blood).

The three goals of Washington's implied consent statute are: (1) discouraging the commission of the offense of driving under the influence, (2) removing driving privileges from those individuals disposed to drive while under the influence, and (3) providing an efficient means of gathering reliable evidence of intoxication. City of Seattle v. St. John, 166 Wn.2d 941, ¶8, 215 P.3d 194 (2009).

"[A]n officer may obtain a blood alcohol test pursuant to a warrant regardless of the implied consent statute." City of Seattle v. St. John, 166 Wn.2d 941, ¶6, 215 P.3d 194 (2009). *See* RCW 46.20.308(1) ("Neither consent nor this section precludes a police officer from obtaining a search warrant for a person's breath or blood.").

4. Const. Art. I, §7 is Satisfied Where a Warrantless Forced Seizure of Blood is Taken in Compliance with RCW 46.20.308

Citing to Schmerber v. California, our Supreme Court held that the forced warrantless seizure of a person's blood who was arrested for vehicular homicide, drawn in compliance with RCW 46.20.308, was a reasonable warrantless search

and seizure under Const. art. I, §7 where at the time the blood was seized there were clear indications that the arrestee would be found intoxicated. State v. Curran, 116 Wn.2d 174, 184-85, 804 P.2d 558 (1991), *overruled on other grounds by* State v. Berlin, 133 Wn.2d 541, 947 P.2d 700 (1997).

The McNeely and Ringer holdings discussed above raise questions concerning Washington's implied consent law authorizing per se non-consensual warrantless blood searches for alcohol or drug concentration under certain circumstances. Both McNeely and Ringer focus on the availability of a telephonic search warrant when conducting a warrantless exigent circumstances analysis. Washington's implied consent statute, which authorizes per se non-consensual warrantless blood searches in some circumstances, fails to discuss the availability of a telephonic warrant. RCW 46.20.308(3) and (4) say:

> (3) Except as provided in this section, the test administered shall be of the breath only. If an individual is unconscious or is under arrest for the crime of vehicular homicide as provided in RCW 46.61.520 or vehicular assault as provided in RCW 46.61.522, or if an individual is under arrest for the crime of driving while under the influence of intoxicating liquor or drugs as provided in RCW 46.61.502, which arrest results from an accident in which there has been serious bodily injury to another person, a breath or blood test may be administered without the consent of the individual so arrested.
>
> (4) Any person who is dead, unconscious, or who is otherwise in a condition rendering him or her incapable of refusal, shall be deemed not to have withdrawn the consent provided by subsection (1) of this section and the test or tests may be administered, subject to the provisions of RCW 46.61.506, and the person shall be deemed to have received the warnings required under subsection (2) of this section.

Additionally, McNeely's holding is based upon the Fourth Amendment, and not the broader privacy protections provided in Const. art. I, §7.

Litigation is anticipated in light of the holdings in McNeely and Ringer.

Chapter Twenty-Nine

Warrantless Vehicle Impoundment

A. Warrantless Vehicle Impoundment Generally

Impoundment is a seizure because it involves the governmental taking of a vehicle into its exclusive custody. State v. Reynoso, 41 Wn.App. 113, 116, 702 P.2d 1222 (1985). The reasonableness of a particular impoundment must be determined from the facts of each case. State v. Greenway, 15 Wn.App. 216, 219, 547 P.2d 1231, *review denied*, 87 Wn.2d 1009 (1976).

Three circumstances justify impounding a vehicle. A vehicle may be impounded:

> (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 (in that it is abandoned, or impedes traffic, or poses a threat to public safety and convenience, or is itself threatened by vandalism or theft of its contents), and neither the defendant nor his spouse or friends are available to move the vehicle; 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.

State v. Simpson, 95 Wn.2d 170, 189, 622 P.2d 1199 (1980) (citations omitted).

Seizure of a vehicle for impoundment and seizure of a vehicle for evidence are distinct concepts. In State v. Davis, 29 Wn.App. 691, 630 P.2d 938, *review denied*, 96 Wn.2d 1013 (1981), the court explained that impoundment occurs when police take a vehicle for a purpose unrelated to a search for evidence.

> Initially, we note that a distinction must be drawn between an 'impoundment' of a vehicle and a search and/or seizure of a vehicle for incriminating evidence. Of course, an impoundment, because it involves taking a vehicle into exclusive custody, is a 'seizure' in the literal sense of that word. For purposes of the Fourth Amendment, however, the concepts

> are distinct. The term 'impoundment' refers to the taking of an object (usually a vehicle) into custody for some valid reason wholly apart from any purpose to search that object for incriminating matter.
>
> The purpose of an inventory of the contents of a vehicle conducted pursuant to a valid impoundment, then, is not to search for incriminating evidence but to protect the owner's property while it remains in police custody, to protect the police against claims of lost or stolen property, and to protect the police from potential danger.
>
> Thus, contraband or incriminating evidence found during a true inventory is discovered through inadvertence.
>
> On the other hand, when the police have probable cause to believe a vehicle, which is not itself evidence of a crime, contains contraband or incriminating evidence and 'exigent circumstances' exist, the vehicle may be searched, or seized and searched. In this type of search, of course, the avowed purpose is to unearth and seize any incriminating matter.

State v. Davis, 29 Wn.App. 691, 697, 630 P.2d 938, *review denied*, 96 Wn.2d 1013 (1981).

B. The Prosecution Must Prove Reasonable Cause for a Warrantless Vehicle Impoundment

A warrantless inventory search following a lawful vehicle impoundment is an exception to Const. art. I, §7's warrant requirement. State v. White, 135 Wn.2d 761, 769-70, 958 P.2d 982 (1998); State v. Ladson, 138 Wn.2d 343, 349, 979 P.2d 833 (1999).

The prosecution always has the burden to establish that an exception to the warrant requirement applies. State v. Afana, 169 Wn.2d 169, 177, 233 P.3d 879 (2010).

When determining whether the fruits of an inventory search following a vehicle impoundment are admissible evidence, the first question is whether the prosecution can show reasonable cause for the impoundment. State v. Houser, 95 Wn.2d 143, 148, 622 P.2d 1218 (1980).

Determining the validity of an impoundment is imperative when deciding whether evidence discovered during an inventory search is admissible in a criminal case. Potter v. Wash. State Patrol, 165 Wn.2d 67, 83, 196 P.3d 691, 694 (2008).

In Washington, "[a] vehicle may lawfully be impounded if authorized by statute or ordinance. 'In the absence of statute or ordinance, there must be reasonable cause for the impoundment.' " State v. Bales, 15 Wn.App. 834, 835, 552 P.2d 688 (1976), *review denied*, 89 Wn.2d 1003 (1977) (*quoting* State v. Singleton, 9 Wn.App. 327, 331, 511 P.2d 1396 (1973)).

C. The Reasonable Alternatives Rule

Our Supreme Court has repeatedly stated that, as a prerequisite to a valid impoundment and warrantless inventory search, the officer must offer the defendant the choice of submitting to a warrantless inventory search of the vehicle's contents or of declining the inventory and accepting the risk of theft or vandalism.

> However, even if impoundment had been authorized, it is doubtful that the police could have conducted a routine inventory search without asking petitioner if he wanted one done. The purpose of an inventory search is to protect the police from lawsuits arising from mishandling of personal property of a defendant. Clearly, a defendant may reject this protection, preferring to take the chance that no loss will occur.

State v. Williams, 102 Wn.2d 733, 743, 689 P.2d 1065 (1984); State v. White, 135 Wn.2d 761, 771 n.11, 958 P.2d 982 (1998).

The prosecution has the burden of showing that an impoundment is reasonable. State v. Hardman, 17 Wn.App. 910, 912, 567 P.2d 238 (1977), *review denied*, 89 Wn.2d 1020 (1978).

An impoundment is unreasonable where reasonable alternatives to impoundment exist.

> In Washington, impoundment is inappropriate when reasonable alternatives exist. State v. Greenway, 15 Wn.App. 216, 219, 547 P.2d 1231, *review denied*, 87 Wn.2d 1009 (1976); State v. Bales, 15 Wn.App. 834, 837, 552 P.2d 688 (1976), *review denied*, 89 Wn.2d 1003 (1977); *see* Reynoso [State v. Reynoso, 41 Wn.App. 113, 119, 702 P.2d 1222 (1985)].
>
> In State v. Hardman, 17 Wn.App. 910, 914, 567 P.2d 238 (1977), *review denied*, 89 Wn.2d 1020 (1978), the court stated that although an officer is not required to exhaust all possible alternatives before deciding to impound, the officer must show he "at least thought about alternatives; attempted, if feasible, to get from the driver the name of someone in the vicinity who could move the vehicle; and then reasonably concluded from

> his deliberation that impoundment was in order." Houser, 95 Wn.2d at 15, [State v. Houser, 95 Wn.2d 143, 622 P.2d 1218 (1980)] held: "It is unreasonable to impound a citizen's vehicle ... where a reasonable alternative to impoundment exists."

State v. Hill, 68 Wn.App. 300, 306-7, 842 P.2d 996, *review denied*, 121 Wn.2d 1020 (1993).

If a validly licensed driver is available to remove the vehicle, impoundment is not constitutionally reasonable. *See* State v. Coss, 87 Wn.App. 891, 899-900, 943 P.2d 1126 (1997), *review denied*, 134 Wn.2d 1028 (1998) (improper impoundment and inventory search where officer only considered arrest or impoundment); State v. Reynoso, 41 Wn.App. 113, 118-19, 702 P.2d 1222 (1985) (if a validly licensed driver is available to remove the vehicle, a reason to impound must be shown); State v. Hardman, 17 Wn.App. 910, 912-13, 567 P.2d 238 (1977), *review denied*, 89 Wn.2d 1020 (1978). (Although an officer is not required to exhaust all possibilities, the officer must at least consider alternatives; attempt, if feasible, to obtain a name from the driver of someone in the vicinity who could move the vehicle; and then reasonably conclude from this deliberation that impoundment is proper.).

When alternatives to impoundment are exhausted, a vehicle may be impounded and a warrantless inventory search conducted over the defendant's objections. State v. Tyler, 166 Wn.App. 202, 269 P.3d 379, *review granted*, 174 Wn.2d 1005 (2012) (defendant's denial of consent to search vehicle will not preclude warrantless inventory search where impound is necessary).

It remains unclear whether a mandatory impoundment statute which dispenses with the reasonable alternatives rule is constitutional under Const. art. I, §7.

In the impoundment case of In re Chevrolet Truck aka All Around Underground, Inc. v. Washington State Patrol, 148 Wn.2d 145, 60 P.3d 53 (2002), our Supreme Court avoided the constitutional issue by resolving the case on statutory grounds.

At issue was the State Patrol's mandatory impound regulation, WAC 204-96-010, requiring impoundment of every vehicle operated by a driver who was arrested for driving with a suspended or revoked license.

The court held the regulation was invalid because it exceeded the statutory authority in RCW 46.55.113 which permitted vehicle impoundments at the discretion of the officer at the scene.

The court in *dicta* suggests that mandatory impound statutes violate our state constitution.

> FN8. The dissent disagrees that RCW 46.55.113 merely grants discretionary authority to impound because "[n]othing in the plain language of RCW 46.55.113 requires or even suggests that the decision [to impound] must be a matter of individual officer discretion," dissent at 66, and seems to suggest the legislature may delegate to municipalities and agencies authority to issue mandatory-impoundment regulations, which is why, in the dissent's view, WAC 204-96-010 does not exceed the statutory authority in RCW 46.55.113.
>
> But courts have long held it is a constitutional requirement to consider reasonable alternatives to impoundment before impounding a vehicle. *See* supra n. 4. *See also* Anderson v. Morris, 87 Wn.2d 706, 716, 558 P.2d 155 (1976) ("Where a statute is susceptible to more than one interpretation, it is our duty to adopt a construction sustaining its constitutionality if at all possible."). The dissent does not even discuss the constitutionality of this regulation, which, unlike the majority, it cannot avoid.

In re Chevrolet Truck aka All Around Underground, Inc. v. Washington State Patrol, 148 Wn.2d 145, 155 n.8, 60 P.3d 53 (2002).

D. Statutes Authorizing Discretionary Warrantless Vehicle Impoundment

Washington statutes authorizing warrantless vehicle impoundment are either discretionary or mandatory. The Reasonable Alternatives Rule applies to discretionary warrantless vehicle impoundments. *See* Chapter 29(C) (Warrantless Vehicle Impoundment-The Reasonable Alternatives Rule).

1. RCW 46.55.113−Washington's General Impoundment Statute

RCW 46.55.113(1) authorizes discretionary warrantless vehicle impoundment whenever the driver of a vehicle is arrested for driving while license suspended or revoked and the local jurisdiction has enacted an ordinance or statute agency has enacted a rule permitting the impoundment.

The remaining sections of RCW 46.55.113 outline other circumstances where an officer may impound a vehicle without a warrant.

RCW 46.55.113 says:

> (1) [**DWLS/R Local Ordinance or State Agency Rule**] Whenever the driver of a vehicle is arrested for a violation of RCW 46.20.342 or 46.20.345, the vehicle is subject to summary impoundment, pursuant to the terms and conditions of an applicable local ordinance or state agency rule at the direction of a law enforcement officer.
>
> (2) [**Discretionary Impoundment**]. In addition, a police officer may take custody of a vehicle, at his or her discretion, and provide for its prompt removal to a place of safety under any of the following circumstances:
>
> (a) [**Vehicle Upon Roadway**]. Whenever a police officer finds a vehicle standing upon the roadway in violation of any of the provisions of RCW 46.61.560, the officer may provide for the removal of the vehicle or require the driver or other person in charge of the vehicle to move the vehicle to a position off the roadway;
>
> (b) [**Vehicle Obstructs Traffic or Jeopardizes Safety**]. Whenever a police officer finds a vehicle unattended upon a highway where the vehicle constitutes an obstruction to traffic or jeopardizes public safety;
>
> (c) [**Vehicle Accident**]. Whenever a police officer finds an unattended vehicle at the scene of an accident or when the driver of a vehicle involved in an accident is physically or mentally incapable of deciding upon steps to be taken to protect his or her property;
>
> (d) [**Driver Arrested and In Custody**]. Whenever the driver of a vehicle is arrested and taken into custody by a police officer;
>
> (e) [**Stolen Vehicle**]. Whenever a police officer discovers a vehicle that the officer determines to be a stolen vehicle;
>
> (f) [**Disabled Parking**]. Whenever a vehicle without a special license plate, placard, or decal indicating that the vehicle is being used to transport a person with disabilities under RCW 46.19.010 is parked in a stall or space clearly and conspicuously marked under RCW 46.61.581 which space is provided on private property without charge or on public property;
>
> (g) [**No Valid or Expired License**]. Upon determining that a person is operating a motor vehicle without a valid and, if required, a specially

endorsed driver's license or with a license that has been expired for ninety days or more;

(h) [**Specialty Zone Parking**]. When a vehicle is illegally occupying a truck, commercial loading zone, restricted parking zone, bus, loading, hooded-meter, taxi, street construction or maintenance, or other similar zone where, by order of the director of transportation or chiefs of police or fire or their designees, parking is limited to designated classes of vehicles or is prohibited during certain hours, on designated days or at all times, if the zone has been established with signage for at least twenty-four hours and where the vehicle is interfering with the proper and intended use of the zone. Signage must give notice to the public that a vehicle will be removed if illegally parked in the zone;

(i) [**Vehicle Registration Expired**]. When a vehicle with an expired registration of more than forty-five days is parked on a public street.

(3) [**DWLS/R Arrest and Commercial Vehicle**]. When an arrest is made for a violation of RCW 46.20.342, if the vehicle is a commercial vehicle or farm transport vehicle and the driver of the vehicle is not the owner of the vehicle, before the summary impoundment directed under subsection (1) of this section, the police officer shall attempt in a reasonable and timely manner to contact the owner of the vehicle and may release the vehicle to the owner if the owner is reasonably available, as long as the owner was not in the vehicle at the time of the stop and arrest and the owner has not received a prior release under this subsection or RCW 46.55.120(1)(a)(ii).

(4) [**Common Law Remains**]. Nothing in this section may derogate from the powers of police officers under the common law. For the purposes of this section, a place of safety may include the business location of a registered tow truck operator.

(5) [**“Farm Transport Vehible”**]. For purposes of this section "farm transport vehicle" means a motor vehicle owned by a farmer and that is being actively used in the transportation of the farmer's or another farmer's farm, orchard, aquatic farm, or dairy products, including livestock and plant or animal wastes, from point of production to market or disposal, or supplies or commodities to be used on the farm, orchard, aquatic farm, or dairy, and that has a gross vehicle weight rating of 7,258 kilograms (16,001 pounds) or more.

In City of Kent v. Mann, 161 Wn.App. 126, 253 P.3d 409 (2011), the court of appeals upheld a city ordinance adopted pursuant to RCW 46.55.113(1) which authorized officer discretion to impound a vehicle after arresting a driver with a suspended or revoked license, but required the period of impound to be at least 30 days.

Contra In re 1992 Honda Accord aka Becerra v. City of Warden, 117 Wn.App. 510, 71 P.3d 226 (2003) (a municipality exceeds RCW 46.55.113(1) when it promulgates an ordinance that limits the discretion of the impounding officer regarding the impoundment period and instead imposes fixed, mandatory impoundment periods).

See also In re Chevrolet Truck aka All Around Underground, Inc. v. Washington State Patrol, 148 Wn.2d 145, 60 P.3d 53 (2002) (RCW 46.55.113(1) vested in a law enforcement officer the discretion over whether to impound. Since the Washington State Patrol regulation overruled that discretion and mandated impoundment in all cases, the regulation exceeded the authority granted by the statute.).

2. RCW 46.55.085−Highway Right of Way

RCW 46.55.085 authorizes discretionary warrantless vehicle impoundment when a vehicle is left within a highway right of way, the vehicle is unauthorized and unattended, and the vehicle is not removed within 24 hours from the time the officer attached a notification sticker. RCW 46.55.085 says:

> (1) [**Notification Sticker Requirements**]. A law enforcement officer discovering an unauthorized vehicle left within a highway right-of-way shall attach to the vehicle a readily visible notification sticker. The sticker shall contain the following information:
>
> (a) The date and time the sticker was attached;
>
> (b) The identity of the officer;
>
> (c) A statement that if the vehicle is not removed within twenty-four hours from the time the sticker is attached, the vehicle may be taken into custody and stored at the owner's expense;
>
> (d) A statement that if the vehicle is not redeemed as provided in RCW 46.55.120, the registered owner will have committed the traffic infraction of littering -- abandoned vehicle; and

(e) The address and telephone number where additional information may be obtained.

(2) [**Reasonable Effort to Contact Owner**]. If the vehicle has current Washington registration plates, the officer shall check the records to learn the identity of the last owner of record. The officer or his or her department shall make a reasonable effort to contact the owner by telephone in order to give the owner the information on the notification sticker.

(3) [**Impoundment Authorized After 24 Hours**]. If the vehicle is not removed within twenty-four hours from the time the notification sticker is attached, the law enforcement officer may take custody of the vehicle and provide for the vehicle's removal to a place of safety. A vehicle that does not pose a safety hazard may remain on the roadside for more than twenty-four hours if the owner or operator is unable to remove it from the place where it is located and so notifies law enforcement officials and requests assistance.

(4) [**"Place of Safety"**]. For the purposes of this section a place of safety includes the business location of a registered tow truck operator.

3. RCW 46.32.060−Defective Equipment

RCW 46.32.060 authorizes discretionary warrantless vehicle impoundment when a vehicle is operated on a public highway and is found to be defective in equipment is such a manner that it may be considered unsafe. RCW 46.32.060 says:

> It shall be unlawful for any person to operate or move, or for any owner to cause or permit to be operated or moved upon any public highway, any vehicle or combination of vehicles, which is not at all times equipped in the manner required by this title, or the equipment of which is not in a proper condition and adjustment as required by this title or rules adopted by the chief of the Washington state patrol.
>
> Any vehicle operating upon the public highways of this state and at any time found to be defective in equipment in such a manner that it may be considered unsafe shall be an unlawful vehicle and may be prevented from further operation until such equipment defect is corrected and any peace officer is empowered to impound such vehicle until the same has been placed in a condition satisfactory to vehicle inspection. The necessary cost of impounding any such unlawful vehicle and any cost for the storage and keeping thereof shall be paid by the owner thereof. The

impounding of any such vehicle shall be in addition to any penalties for such unlawful operation.

The provisions of this section shall not be construed to prevent the operation of any such defective vehicle to a place for correction of equipment defect in the manner directed by any peace officer or representative of the state patrol.

4. RCW 46.12.725−Identification Number of Vehicle, Watercraft or Camper Defaced

RCW 46.12.725 authorizes discretionary warrantless vehicle impoundment when a manufacturer's serial number or any other distinguishing number or identification maker on a vehicle, watercraft or camper has been defaced. RCW 46.12.725 says:

> (1) [**Impoundment Authorized**]. Any vehicle, watercraft, camper, or any component part thereof, from which the manufacturer's serial number or any other distinguishing number or identification mark has been removed, defaced, covered, altered, obliterated, or destroyed, may be impounded and held by the seizing law enforcement agency for the purpose of conducting an investigation to determine the identity of the article or articles, and to determine whether it had been reported stolen.
>
> (2) [**Written Notice After Impoundment**]. Within five days of the impounding of any vehicle, watercraft, camper, or component part thereof, the law enforcement agency seizing the article or articles shall send written notice of such impoundment by certified mail to all persons known to the agency as claiming an interest in the article or articles. The seizing agency shall exercise reasonable diligence in ascertaining the names and addresses of those persons claiming an interest in the article or articles. Such notice shall advise the person of the fact of seizure, the possible disposition of the article or articles, the requirement of filing a written claim requesting notification of potential disposition, and the right of the person to request a hearing to establish a claim of ownership. Within five days of receiving notice of other persons claiming an interest in the article or articles, the seizing agency shall send a like notice to each such person.
>
> (3) [**Stolen**]. If reported as stolen, the seizing law enforcement agency shall promptly release such vehicle, watercraft, camper, or parts thereof as have been stolen, to the person who is the lawful owner or the lawful

successor in interest, upon receiving proof that such person presently owns or has a lawful right to the possession of the article or articles.

5. RCW 46.55.080−Parking in Public Facility or on Private Property

RCW 46.55.080 authorizes discretionary warrantless vehicle impoundment when a vehicle is parked in a public facility or on private property. RCW 46.55.080 says:

> (1) [**Impoundment Authorized**]. If a vehicle is in violation of the time restrictions of RCW 46.55.010(13), it may be impounded by a registered tow truck operator at the direction of a law enforcement officer or other public official with jurisdiction if the vehicle is on public property, or at the direction of the property owner or an agent if it is on private property. A law enforcement officer may also direct the impoundment of a vehicle pursuant to a writ or court order.
>
> (2) [**Signed Authorization for Impound**]. The person requesting a private impound or a law enforcement officer or public official requesting a public impound shall provide a signed authorization for the impound at the time and place of the impound to the registered tow truck operator before the operator may proceed with the impound. A registered tow truck operator, employee, or his or her agent may not serve as an agent of a property owner for the purposes of signing an impound authorization or, independent of the property owner, identify a vehicle for impound.
>
> (3) [**Private Impound**]. In the case of a private impound, the impound authorization shall include the following statement: "A person authorizing this impound, if the impound is found in violation of chapter 46.55 RCW, may be held liable for the costs incurred by the vehicle owner."
>
> (4) [**Tow Truck Master Log**]. A registered tow truck operator shall record and keep in the operator's files the date and time that a vehicle is put in the operator's custody and released. The operator shall make an entry into a master log regarding transactions relating to impounded vehicles. The operator shall make this master log available, upon request, to representatives of the department or the state patrol.
>
> (5) [**Limitations on Tow Truck Operator**]. A person who engages in or offers to engage in the activities of a registered tow truck operator may not be associated in any way with a person or business whose main activity is authorizing the impounding of vehicles.

6. RCW 9A.88.140(1)(a)−Prostitution Crimes

RCW 9A.88.140(1)(a) authorizes a warrantless vehicle impound when the vehicle was used in the commission of various prostitution crimes:

> (1)(a) Upon an arrest for a suspected violation of patronizing a prostitute, promoting prostitution in the first degree, promoting prostitution in the second degree, promoting travel for prostitution, the arresting law enforcement officer may impound the person's vehicle if (i) the motor vehicle was used in the commission of the crime; (ii) the person arrested is the owner of the vehicle or the vehicle is a rental car as defined in RCW 46.04.465; and (iii) either (A) the person arrested has previously been convicted of one of the offenses listed in this subsection or (B) the offense was committed within an area designated under (b) of this subsection.

RCW 9A.88.140 should be reviewed for additional requirements.

E. Statutes Requiring Mandatory Warrantless Vehicle Impoundment

Washington statutes authorizing warrantless vehicle impoundment are either discretionary or mandatory.

The constitutional validity of a mandatory warrantless vehicle impoundment statute which eliminates the Reasonable Alternatives Rule is unclear. *See* Chapter 29(C) (Warrantless Vehicle Impoundment-The Reasonable Alternatives Rule).

1. RCW 46.55.350−DUI, Physical Control, and Felony Counterparts

"Hailey's Law" was codified at RCW 46.55.350-.370. The Legislature passed the law to protect the public and to require law enforcement to impound every vehicle being driven or in control by someone arrested for DUI, physical control or their felony counterparts. RCW 46.55.350(2) says:

> (2) The legislature intends by chapter 167, Laws of 2011:
>
> (a) To change the primary reason for impounding the vehicle operated by a person arrested for driving or controlling a vehicle under the influence of alcohol or drugs. The purpose of impoundment under chapter 167, Laws of 2011 is to protect the public from a person operating a vehicle while still impaired, rather than to prevent a potential traffic obstruction; and

(b) To require that officers have no discretion as to whether or not to order an impound after they have arrested a vehicle driver with reasonable grounds to believe the driver of the vehicle was driving while under the influence of alcohol or drugs, or was in physical control of a vehicle while under the influence of alcohol or drugs.

RCW 46.55.360 sets forth the requirement of mandatory warrantless vehicle impound for DUI, physical control, felony DUI and felony physical control arrestees. Note that this mandatory impound law does not include vehicular homicide, RCW 46.61.520, vehicular assault, RCW 46.61.522, driver under 21 after consuming alcohol or marijuana, RCW 46.61.503, or negligent driving in the first degree, 46.61.5249.

RCW 46.55.360 says:

(1)(a) [**Mandatory Impound Required**]. When a driver of a vehicle is arrested for a violation of RCW 46.61.502 or 46.61.504, the vehicle is subject to summary impoundment and except for a commercial vehicle or farm transport vehicle under subsection (3)(c) of this section, the vehicle must be impounded. With the exception of the twelve-hour hold mandated under this section, the procedures for notice, redemption, storage, auction, and sale shall remain the same as for other impounded vehicles under this chapter.

(b) [**Inventory Authorized**]. If the police officer directing that a vehicle be impounded under this section has:

(i) Waited thirty minutes after the police officer contacted the police dispatcher requesting a registered tow truck operator and the tow truck responding has not arrived, or

(ii) If the police officer is presented with exigent circumstances such as being called to another incident or due to limited available resources being required to return to patrol,

the police officer may place the completed impound order and inventory inside the vehicle and secure the vehicle by closing the windows and locking the doors before leaving.

(c) [**Law Enforcement Liability**]. If a police officer directing that a vehicle be impounded under this section has secured the vehicle and left it pursuant to (b) of this subsection, the police officer and the government or agency employing the police officer shall not be liable for any damages to

or theft of the vehicle or its contents that occur between the time the officer leaves and the time that the registered tow truck operator takes custody of the vehicle, or for the actions of any person who takes or removes the vehicle before the registered tow truck operator arrives.

(2)(a) [**12 Hour Redemption Period for Driver/Registered Owner**]. When a driver of a vehicle is arrested for a violation of RCW 46.61.502 or 46.61.504 and the driver is a registered owner of the vehicle, the impounded vehicle may not be redeemed within a twelve-hour period following the time the impounded vehicle arrives at the registered tow truck operator's storage facility as noted in the registered tow truck operator's master log, unless there are two or more registered owners of the vehicle or there is a legal owner of the vehicle that is not the driver of the vehicle. A registered owner who is not the driver of the vehicle or a legal owner who is not the driver of the vehicle may redeem the impounded vehicle after it arrives at the registered tow truck operator's storage facility as noted in the registered tow truck operator's master log.

(b) [**Law Enforcement Redemption Notification Requirements**]. When a driver of a vehicle is arrested for a violation of RCW 46.61.502 or 46.61.504 and the driver is a registered owner of the vehicle, the police officer directing the impound shall notify the driver that the impounded vehicle may not be redeemed within a twelve-hour period following the time the impounded vehicle arrives at the registered tow truck operator's storage facility as noted in the registered tow truck operator's master log, unless there are two or more registered owners or there is a legal owner who is not the driver of the vehicle. The police officer directing the impound shall notify the driver that the impounded vehicle may be redeemed by either a registered owner or legal owner, who is not the driver of the vehicle, after the impounded vehicle arrives at the registered tow truck operator's storage facility as noted in the registered tow truck operator's master log.

(3)(a) [**Redemption Period When Driver is Not Registered Owner**]. When a driver of a vehicle is arrested for a violation of RCW 46.61.502 or 46.61.504 and the driver is not a registered owner of the vehicle, the impounded vehicle may be redeemed by a registered owner or legal owner, who is not the driver of the vehicle, after the impounded vehicle arrives at the registered tow truck operator's storage facility as noted in the registered tow truck operator's master log.

(b) [**Law Enforcement Redemption Notification Requirements**]. When a driver of a vehicle is arrested for a violation of RCW 46.61.502 or 46.61.504 and the driver is not a registered owner of the vehicle, the police officer directing the impound shall notify the driver that the impounded vehicle may be redeemed by a registered owner or legal owner, who is not the driver of the vehicle, after the impounded vehicle arrives at the registered tow truck operator's storage facility as noted in the registered tow truck operator's master log.

(c) [**Commercial or Farm Transport Vehicle**]. If the vehicle is a commercial vehicle or farm transport vehicle and the driver of the vehicle is not the owner of the vehicle, before the summary impoundment directed under subsection (1) of this section, the police officer shall attempt in a reasonable and timely manner to contact the owner of the vehicle and may release the vehicle to the owner if the owner is reasonably available, as long as the owner was not in the vehicle at the time of the stop and arrest.

(d) [**Tow Truck Operator Notification to Law Enforcement**]. The registered tow truck operator shall notify the agency that ordered that the vehicle be impounded when the vehicle arrives at the registered tow truck operator's storage facility and has been entered into the master log starting the twelve-hour period.

(4) [**Tow Truck Operator Liability**]. A registered tow truck operator that releases an impounded vehicle pursuant to the requirements stated in this section is not liable for injuries or damages sustained by the operator of the vehicle or sustained by third parties that may result from the vehicle driver's intoxicated state.

(5) [**"Farm Transport Vehicle"**]. For purposes of this section "farm transport vehicle" means a motor vehicle owned by a farmer and that is being actively used in the transportation of the farmer's or another farmer's farm, orchard, aquatic farm, or dairy products, including livestock and plant or animal wastes, from point of production to market or disposal, or supplies or commodities to be used on the farm, orchard, aquatic farm, or dairy, and that has a gross vehicle weight rating of 7,258 kilograms (16,001 pounds) or more.

RCW 46.55.370 limits law enforcement liability where an impoundment is found to violate the statute but the officer had reasonable suspicion to believe the arrestee was under the influence of intoxicating liquor or any drug:

> If an impoundment arising from an alleged violation of RCW 46.61.502 or 46.61.504 is determined to be in violation of this chapter, then the police officer directing the impoundment and the government employing the officer are not liable for damages for loss of use of the vehicle if the officer had reasonable suspicion to believe that the driver of the vehicle was driving while under the influence of intoxicating liquor or any drug, or was in physical control of a vehicle while under the influence of intoxicating liquor or any drug.

2. RCW 9A.88.140(2)−Commercial Sex Abuse of Minor Crimes

RCW 9A.88.140(2) requires a warrantless vehicle impound when the vehicle was used in the commission of commercial sexual abuse of a minor crimes:

> (2) Upon an arrest for a suspected violation of commercial sexual abuse of a minor, promoting commercial sexual abuse of a minor, or promoting travel for commercial sexual abuse of a minor, the arresting law enforcement officer shall impound the person's vehicle if (a) the motor vehicle was used in the commission of the crime; and (b) the person arrested is the owner of the vehicle or the vehicle is a rental car as defined in RCW 46.04.465.

RCW 9A.88.140 should be reviewed for additional requirements.

F. Right to Impoundment Hearing to Challenge Lawfulness of Impoundment and/or Tow Charges

1. Impoundment Hearings

RCW 46.55.120(2) authorizes any person seeking to redeem a vehicle to contest the validity of the impoundment or the amount of towing and storage charges in a court of limited jurisdiction. The request for hearing must be received by the court within 10 days after the tow truck operator provides written notice of the right to a hearing, or the hearing is waived. The person seeking the hearing is required to pay a filing fee.

RCW 46.55.120(2) says:

> (2)(a) [**Tow Truck Operator Written Notice**]. The registered tow truck operator shall give to each person who seeks to redeem an impounded vehicle, or item of personal property registered or titled with the department, written notice of the right of redemption and opportunity for a hearing, which notice shall be accompanied by a form to be used for

requesting a hearing, the name of the person or agency authorizing the impound, and a copy of the towing and storage invoice. The registered tow truck operator shall maintain a record evidenced by the redeeming person's signature that such notification was provided.

(b) [**Impoundment Hearing**]. Any person seeking to redeem an impounded vehicle under this section has a right to a hearing in the district or municipal court for the jurisdiction in which the vehicle was impounded to contest the validity of the impoundment or the amount of towing and storage charges.

[**District Court Jurisdiction**]. The district court has jurisdiction to determine the issues involving all impoundments including those authorized by the state or its agents.

[**Municipal Court Jurisdiction**]. The municipal court has jurisdiction to determine the issues involving impoundments authorized by agents of the municipality.

[**Request for Hearing Must be Received by Court Within 10 Days**]. Any request for a hearing shall be made in writing on the form provided for that purpose and must be received by the appropriate court within ten days of the date the opportunity was provided for in subsection (2)(a) of this section and more than five days before the date of the auction.

[**Filing Fee**]. At the time of the filing of the hearing request, the petitioner shall pay to the court clerk a filing fee in the same amount required for the filing of a suit in district court.

[**Right to Hearing Waived When Hearing Request Received After 10 Days**]. If the hearing request is not received by the court within the ten-day period, the right to a hearing is waived and the registered owner is liable for any towing, storage, or other impoundment charges permitted under this chapter. Upon receipt of a timely hearing request, the court shall proceed to hear and determine the validity of the impoundment.

RCW 46.55.120(3) sets out the parameters of the impoundment hearing.

RCW 46.55.120(3)(a) sets out the court's notice of hearing requirements:

(3)(a) [**Notice of Hearing Date and Time**]. The court, within five days after the request for a hearing, shall notify the registered tow truck operator, the person requesting the hearing if not the owner, the

> registered and legal owners of the vehicle or other item of personal property registered or titled with the department, and the person or agency authorizing the impound in writing of the hearing date and time.

RCW 46.55.120(3)(b) sets out the evidence the court may consider at the impoundment hearing:

> (b) [**Evidence**]. At the hearing, the person or persons requesting the hearing may produce any relevant evidence to show that the impoundment, towing, or storage fees charged were not proper. The court may consider a written report made under oath by the officer who authorized the impoundment in lieu of the officer's personal appearance at the hearing.

RCW 46.55.120(3)(c) provides that at the conclusion of the hearing, the court shall determine the validity of the impoundment, and whether the towing and storage fees charged were in compliance with posted rates. The court is prohibited from adjusting towing and storage fees if the fees were in compliance with posted rates. RCW 46.55.120(3)(c) says:

> (c) **[Issues Before Court**]. At the conclusion of the hearing, the court shall determine whether the impoundment was proper, whether the towing or storage fees charged were in compliance with the posted rates, and who is responsible for payment of the fees. The court may not adjust fees or charges that are in compliance with the posted or contracted rates.

If the impoundment is found to be proper, RCW 46.55.120(3)(d) provides:

> (d) [**Impoundment Found Proper−Petitioner Liable**]. If the impoundment is found proper, the impoundment, towing, and storage fees as permitted under this chapter together with court costs shall be assessed against the person or persons requesting the hearing, unless the operator did not have a signed and valid impoundment authorization from a private property owner or an authorized agent.

If the impoundment is found to be improper, RCW 46.55.120(3)(e) provides:

> (e) [**Impoundment Found Improper−Entity Authorizing Impound Liable**]. If the impoundment is determined to be in violation of this chapter, then the registered and legal owners of the vehicle or other item of personal property registered or titled with the department shall bear no impoundment, towing, or storage fees, and any security shall be returned or discharged as appropriate, and the person or agency who authorized

the impoundment shall be liable for any towing, storage, or other impoundment fees permitted under this chapter.

[**Judgment for Tow Operator Against Entity Authorizing Impound**]. The court shall enter judgment in favor of the registered tow truck operator against the person or agency authorizing the impound for the impoundment, towing, and storage fees paid.

[**Filing Fee and Reasonable Damages for Loss of Use Against Entity Authorizing Impound]**. In addition, the court shall enter judgment in favor of the registered and legal owners of the vehicle, or other item of personal property registered or titled with the department, for the amount of the filing fee required by law for the impound hearing petition as well as reasonable damages for loss of the use of the vehicle during the time the same was impounded against the person or agency authorizing the impound.

[**Limited Liability for DWLS/R Impound**]. However, if an impoundment arising from an alleged violation of RCW 46.20.342 or 46.20.345 is determined to be in violation of this chapter, then the law enforcement officer directing the impoundment and the government employing the officer are not liable for damages if the officer relied in good faith and without gross negligence on the records of the department in ascertaining that the operator of the vehicle had a suspended or revoked driver's license.

[**If Judgment Not Paid Within 15 Days, Reasonable Attorney's Fees and Costs**]. If any judgment entered is not paid within fifteen days of notice in writing of its entry, the court shall award reasonable attorneys' fees and costs against the defendant in any action to enforce the judgment. Notice of entry of judgment may be made by registered or certified mail, and proof of mailing may be made by affidavit of the party mailing the notice. Notice of the entry of the judgment shall read essentially as follows: [see statute]

2. Redemption of Impounded Vehicle

RCW 46.55.120(1) sets forth the process to redeem an impounded vehicle.

3. Abandonment of Impounded Vehicle or Personal Property

An impounded abandoned vehicle or personal property shall be sold at auction if not redeemed within 15 days of mailing notice of custody and sale. A vehicle or

personal property may be redeemed at any time before the start of the auction upon payment of towing and storage fees. RCW 46.55.120(4).

4. Conversion Action Also Authorized

RCW 46.55.120 is not the exclusive process for redeeming an impounded vehicle. A person whose vehicle is unlawfully impounded may bring a conversion action against the authority that authorized the impoundment. Potter v. Washington State Patrol, 165 Wn.2d 67, 196 P.3d 691 (2008) (vehicle owner, cited for driving while license suspended, brought class action against Washington State Patrol alleging conversion based upon wrongful impoundment of vehicle).

G. Sample Orders on Vehicle Impoundment Hearing

See the Appendix for sample vehicle impoundment hearing orders.

Chapter Thirty

Warrantless Vehicle Inventory Searches

A. Purposes of a Warrantless Inventory Search

The categories of "narrowly and jealously drawn" exceptions to the warrant requirement recognized by the Washington Supreme Court include consent, exigent circumstances, searches incident to a valid arrest, inventory searches, plain view searches, and investigative stops. State v. Duncan, 146 Wn.2d 166, 171-72, 43 P.3d 513 (2002); State v. Arreola, 176 Wn.2d 284, ¶13, 290 P.3d 983 (2012).

It is well settled that police officers may conduct a "good faith" inventory search following a "lawful impoundment" without first obtaining a search warrant. State v. Bales, 15 Wn.App. 834, 835, 552 P.2d 688 (1976), *review denied*, 89 Wn.2d 1003 (1977); State v. Montague, 73 Wn.2d 381, 385, 438 P.2d 571 (1968).

Unlike a probable cause search, where the purpose is to discover evidence of a crime, the purpose of the inventory search is to perform an administrative or caretaking function. State v. Dugas, 109 Wn.App. 592, 597, 36 P.3d 577 (2001).

The principal purposes of an inventory search are: (1) to protect the vehicle owner's property; (2) to protect the police against false claims of theft by the owner; and (3) to protect the police from potential danger. State v. White, 135 Wn.2d 761, 769-70, 958 P.2d 982 (1998).

Our Supreme Court has recognized that an additional "valid and important" purpose for the warrantless inventory search is to protect the public from vandals who might find a firearm or contraband drugs. State v. Houser, 95 Wn.2d 143, 154 n.2, 622 P.2d 1218 (1980). But the Houser Court noted that such purposes will not serve to justify an inventory search in each and every case. State v. Houser, 95 Wn.2d 143, 154 n.2, 622 P.2d 1218 (1980).

Accordingly, the Houser Court limited the scope of the warrantless inventory search to protect against only "substantial risks to property in the vehicle" and invalidated the inventory search of a locked trunk because no reason existed to

believe items in the trunk presented a “great danger of theft.” State v. Houser, 95 Wn.2d 143, 155, 622 P.2d 1218 (1980).

B. Scope of a Warrantless Inventory Search

A closed container can be inventoried as a unit and need not be opened and searched absent exigent circumstances.

> We conclude that where a closed piece of luggage in a vehicle gives no indication of dangerous contents, an officer cannot search the contents of the luggage in the course of an inventory search unless the owner consents.
>
> Absent exigent circumstances, a legitimate inventory search only calls for noting such an item as a sealed unit. If, however, the police have reason to believe a container “holds instrumentalities which could be dangerous even when sitting idly in the police locker” the police may and should search the contents of the container.

State v. Houser, 95 Wn.2d 143, 158, 622 P.2d 1218 (1980) (citation omitted).

An officer may not examine the locked trunk of an impounded vehicle in the course of a warrantless inventory search absent a manifest necessity for conducting such a search.

> From the history of article I, section 7 and from the precedent established in Montague [State v. Montague, 73 Wn.2d 381, 438 P.2d 571 (1968)], the rule enunciated in Houser [State v. Houser, 95 Wn.2d 143, 622 P.2d 1218 (1980)] emerged. Police are not permitted to search the locked trunk of an impounded vehicle absent a manifest necessity for so doing.
>
> Further, compliance with established police procedures does not constitutionalize an illegal search and will not enable the police to search a locked trunk without a warrant.
>
> While we recognize inventory searches may serve legitimate government interests, these interests are not limitless and do not outweigh the privacy interests of Washington citizens.

State v. White, 135 Wn.2d 761, 770-71, 958 P.2d 982 (1998) (footnote omitted).

Whether a key is needed or an interior release is used to open a locked trunk is of no distinction.

> [State v. Houser, 95 Wn.2d 143, 622 P.2d 1218 (1980)] established a bright line rule prohibiting the police from intruding into an individual's privacy interests of a locked trunk regardless of its accessibility. Whether a key is needed to unlock the trunk or whether an interior release is used is of no distinction to the privacy interests of the individual under article I, section 7 of the Washington State Constitution.

State v. White, 135 Wn.2d 761, 771, 958 P.2d 982 (1998).

Chapter Thirty-One

Law Enforcement Authority Involving Passengers

A. Passenger Movement

A warrantless Terry traffic stop is a seizure for the purpose of constitutional analysis. State v. Ladson, 138 Wn.2d 343, 350, 979 P.2d 833 (1999). Both our state constitution and related case law limit the permissible intrusion for a minor traffic offense. State v. Ladson, 138 Wn.2d 343, 362-63, 979 P.2d 833 (1999). Accordingly, an officer who initiates a traffic stop for a minor offense may only detain the driver long enough to issue and serve a citation and notice. RCW 46.64.015.

However, our Supreme Court has also recognized that Terry concerns for police safety apply to traffic stops. State v. Ladson, 138 Wn.2d 343, 350, 979 P.2d 833 (1999). Thus, a police officer may, after initiating a traffic stop, "take whatever steps necessary to control the scene, including ordering the driver to stay in the vehicle or exit it, as circumstances warrant. This is a *de minimis* intrusion upon the driver's privacy under article I, section 7." State v. Mendez, 137 Wn.2d 208, 220, 970 P.2d 722 (1999), *overruled on other grounds by* Brendlin v. California, 551 U.S. 249, 127 S.Ct. 2400, 168 L.Ed.2d 132 (2007).

With regard to passengers, Const. art. I, §7 requires law enforcement to have an articulable rationale predicated upon safety considerations in to order passengers out of car or to remain in car following a lawful warrantless Terry traffic stop. State v. Mendez, 137 Wn.2d 208, 212, 970 P.2d 722 (1999), *overruled on other grounds by* Brendlin v. California, 551 U.S. 249, 127 S.Ct. 2400, 168 L.Ed.2d 132 (2007) (A vehicle was stopped for running a stop sign. The passenger exited the vehicle and began walking away. An officer ordered the passenger to return to the vehicle, and the passenger fled. The passenger was ultimately detained, arrested and searched. The passenger was convicted of obstructing an officer and use of drug paraphernalia. Convictions reversed.).

B. Passenger Identification

In State v. Rankin, 151 Wn.2d 689, 92 P.3d 202 (2004), the court held that Const. art. I, §7 prohibits officers from requesting identification for investigative purposes from passengers in vehicles stopped by law enforcement after a show of authority unless an independent reason justifies the request.

The Rankin Court emphasized that passengers do not "have the realistic alternative of leaving the scene as does a pedestrian," and cited with approval, State v. O'Neill, 148 Wn.2d 564, 62 P.3d 489 (2003). O'Neill established that Const. art. I, §7 permits officers to engage in conversation and request identification from occupants in cars parked in public places because such occupants are like pedestrians.

An independent basis to seek identification from a passenger is an articulable suspicion of criminal activity. State v. Rankin, 151 Wn.2d 689, 697-98, 92 P.3d 202 (2004).

In order to satisfy that requirement, the officer must be able to identify specific and articulable facts that, taken together with rational inferences from those facts, reasonable warrant the intrusion. State v. Bliss, 153 Wn.App. 197, 204, 222 P.3d 107 (2009); State v. Pettit, 160 Wn.App. 716, ¶7, 251 P.3d 896, *review denied*, 171 Wn.2d 1034 (2011).

C. Warrantless Frisk of Passenger

Both the Fourth Amendment and Const. art. I, §7 prohibit warrantless searches unless one of the narrow exceptions to the warrant requirement applies. State v. Buelna Valdez, 167 Wn.2d 761, 768, 771-72, 224 P.3d 751 (2009). Const. art. I, §7 provides more extensive privacy protections than the Fourth Amendment and creates "an almost absolute bar to warrantless arrests, searches, and seizures." Valdez, 167 Wn.2d at 772 (internal quotation marks omitted) (quoting State v. Ringer, 100 Wn.2d 686, 690, 674 P.2d 1240 (1983)).

In the traffic stop context, the arrest of one or more vehicle occupants does not, without more, justify a warrantless search of other, nonarrested passengers. State v. Grande, 164 Wn.2d 135, 143, 187 P.3d 248 (2008).

Absent a reasonable, articulable, and individualized suspicion that a passenger "is armed and dangerous or independently connected to illegal activity, the search of a passenger incident to the arrest of the driver is invalid under article I, section 7." State v. Jones, 146 Wn.2d 328, 336, 45 P.3d 1062 (2002).

The level of articulable suspicion required to justify the search or seizure based on suspicion of criminal activity is "a substantial possibility that criminal conduct has occurred or is about to occur." State v. Mendez, 137 Wn.2d 208, 223, 970 P.2d 722 (1999), *overruled on other grounds by* Brendlin v. California, 551 U.S. 249, 127 S.Ct. 2400, 168 L.Ed.2d 132 (2007) (citation omitted).

The conduct the officer observes must be "more consistent with criminal than innocent conduct." State v. Pressley, 64 Wn.App. 591, 596, 825 P.2d 749 (1992) (citation omitted).

See State v. Abuan, 161 Wn.App. 135, 257 P.3d 1 (2011) (improper to frisk passenger in a vehicle stopped for expired tabs where driver arrested for driving while license suspended and both the driver and passenger were cooperative and made no furtive movements).

See also State v. Horrace, 144 Wn.2d 386, 28 P.3d 753 (2001) (passenger frisk proper where trooper observed driver make unexplained movements between seats and in passenger's direction, which could have been consistent with concealment of weapon, passenger was in close proximity to those movements, passenger was wearing bulky, zippered jacket, and even though trooper observed no movement by passenger, driver could have passed weapon to passenger or concealed one in passenger's jacket without causing him to make some movement observable to trooper).

Chapter Thirty-Two

The Exclusionary Rule

A. Fourth Amendment

1. Federal Exclusionary Rule Generally

The exclusionary rule requires the suppression of evidence obtained in violation of a defendant's constitutional rights. The exclusionary rule originated in Boyd v. United States, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746 (1886), in which the United States Supreme Court held that the admission of private papers seized in violation of the Fourth Amendment, in effect, compelled a person to be a witness against himself in violation of the Fifth Amendment.

After reverting to the common law rule of nonexclusion in Adams v. New York, 192 U.S. 585, 24 S.Ct. 372, 48 L.Ed. 575 (1904), the United States Supreme Court revived the exclusionary rule in Weeks v. United States, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914), *overruled on other grounds by* Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961), and Silverthorne Lumber Co. v. United States, 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed. 319 (1920). *See* State v. Eserjose, 171 Wn.2d 907, ¶10 n.5, 259 P.3d 172 (2011).

The United States Supreme Court views the primary purpose of the exclusionary rule as the deterrence of police conduct that violates Fourth Amendment rights. Stone v. Powell, 428 U.S. 465, 482, 96 S.Ct. 3037, 3048, 49 L.Ed.2d 1067 (1976).

2. Good Faith

The United States Supreme Court has adopted a good faith exception to the exclusionary rule for evidence seized in violation of the Fourth Amendment. *See* United States v. Leon, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984).

The good faith exception is based on the view that the exclusionary rule is intended simply to deter unlawful police action. Because the exclusionary rule "cannot be expected ... to deter objectively reasonable law enforcement activity," the United States Supreme Court has held that the exclusionary rule should not

be applied when police have acted in "good faith." United States v. Leon, 468 U.S. 897, 104 S.Ct. 3405, 3418-19, 82 L.Ed.2d 677 (1984).

By "good faith," the Court means "objectively reasonable reliance" on something that appeared to justify a search or seizure when it was made. Herring v. United States, 555 U.S. 135, 129 S.Ct. 695, 701, 172 L.Ed.2d 496 (2009).

Thus, the federal "good faith" exception is applicable when a search or seizure was unconstitutional but the police officer's belief that it was constitutional was objectively reasonable at the time of the police action. State v. Afana, 169 Wn.2d 169, ¶14, 233 P.3d 879 (2010).

3. Inevitable Discovery

The Fourth Amendment allows admission of illegally obtained evidence if the State can "establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means." Nix v. Williams, 467 U.S. 431, 104 S.Ct. 2501, 2509, 81 L.Ed.2d 377 (1984).

Under the inevitable discovery doctrine, there is no requirement of good faith on the part of the police. Nix v. Williams, 467 U.S. 431, 104 S.Ct. 2501, 2509-10, 81 L.Ed.2d 377 (1984).

4. Independent Source

"Under the independent source exception, evidence tainted by unlawful governmental action is not subject to suppression under the exclusionary rule, provided that it ultimately is obtained pursuant to a valid warrant or other lawful means independent of the unlawful action." State v. Gaines, 154 Wn.2d 711, ¶17, 116 P.3d 993 (2005).

The independent source exception to the exclusionary rule has long been accepted both in the Washington Supreme Court, *see* State v. Warner, 125 Wn.2d 876, 888-89, 889 P.2d 479 (1995), and the United States Supreme Court, *see* Murray v. United States, 487 U.S. 533, 537, 108 S.Ct. 2529, 101 L.Ed.2d 472 (1988).

> Almost simultaneously with our development of the exclusionary rule, in the first quarter of this century, we also announced what has come to be known as the 'independent source' doctrine. *See* Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392, 40 S.Ct. 182, 183, 64 L.Ed. 319 (1920). That doctrine, which has been applied to evidence acquired not

only through Fourth Amendment violations but also through Fifth and Sixth Amendment violations, has recently been described as follows:

> ‘[T]he interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a worse, position that they would have been in if no police error or misconduct had occurred.... When the challenged evidence has an independent source, exclusion of such evidence would put the police in a worse position than they would have been in absent any error or violation.’

Nix v. Williams, 467 U.S. 431, 443, 104 S.Ct. 2501, 2509, 81 L.Ed.2d 377 (1984).

The dispute here is over the scope of this doctrine. Petitioners contend that it applies only to evidence obtained for the first time during an independent lawful search. The Government argues that it applies also to evidence initially discovered during, or as a consequence of, an unlawful search, but later obtained independently from activities untainted by the initial illegality. We think the Government's view has better support in both precedent and policy.

Murray v. U.S., 487 U.S. 533, 108 S.Ct. 2529, 2533, 101 L.Ed.2d 472 (1988).

B. Const. Art. I, §7

1. Washington Exclusionary Rule Generally

Unlike its federal counterpart, Washington's exclusionary rule is “nearly categorical.” State v. Winterstein, 167 Wn.2d 620, 636, 220 P.3d 1226 (2009). This is due to the fact that Const. art. I, §7 “clearly recognizes an individual's right to privacy with no express limitations.” State v. White, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982).

In contrast to the Fourth Amendment, Const. art. I, §7 emphasizes “protecting personal rights rather than ... curbing governmental actions.” State v. White, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982). This understanding of that provision of our state constitution has led the court to conclude that the “right of privacy shall not be diminished by the judicial gloss of a selectively applied exclusionary remedy.” State v. White, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982).

> Thus, while our state's exclusionary rule also aims to deter unlawful police action, its paramount concern is protecting an individual's right of privacy. Therefore, if a police officer has disturbed a person's “private affairs,” we do not ask whether the officer's belief that this disturbance was justified was objectively reasonable, but simply whether the officer had the requisite “authority of law.” If not, any evidence seized unlawfully will be suppressed. With very few exceptions, whenever the right of privacy is violated, the remedy follows automatically.

State v. Afana, 169 Wn.2d 169, ¶15, 233 P.3d 879 (2010).

Accordingly, Washington’s exclusionary rule should be applied to achieve three objectives.

> [F]irst, and most important, to protect privacy interests of individuals against unreasonable governmental intrusions;
>
> [S]econd, to deter the police from acting unlawfully in obtaining evidence; and
>
> [T]hird, to preserve the dignity of the judiciary by refusing to consider evidence which has been obtained through illegal means.

State v. Bonds, 98 Wn.2d 1, 12, 653 P.2d 1024 (1982), *cert. denied*, 464 U.S. 831, 104 S.Ct. 111, 78 L.Ed.2d 112 (1983) (Conduct of Washington police, who had probable cause to arrest defendant as required by state law but who violated Oregon rule, when they arrested defendant in Oregon, that a private citizen may not arrest for a felony committed out of his presence, plus their summary removal of defendant from Oregon to Washington, cavalierly ignoring Oregon extradition proceedings, did not require application of exclusionary rule to suppress defendant's subsequent confession, because irregularities in arrest did not violate constitution or any other law applicable within Washington, and because costs of suppression outweighed benefits which would be achieved by suppression.).

The remedy for a violation of Const. art. I, §7 is suppression of the evidence obtained either during or as a direct result of an unconstitutional search or seizure. State v. Buelna Valdez, 167 Wn.2d 761, 778, 224 P.3d 751 (2009).

2. Good Faith

Washington's exclusionary rule under Const. art. I, §7 does not include a good faith exception wherein an officer's reliance on a subsequently invalidated legal authority to conduct a search would preclude suppression of the evidence.

A good faith exception "is incompatible with the nearly categorical exclusionary rule under article I, section 7." State v. Afana, 169 Wn.2d 169, ¶ 21 233 P.3d 879 (2010) (evidence must be suppressed where search incident to arrest was subsequently invalidated by Arizona v. Gant, 556 U.S. 332, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009)).

3. Inevitable Discovery

The inevitable discovery doctrine is "necessarily speculative and does not disregard illegally obtained evidence." State v. Winterstein, 167 Wn.2d 620, ¶31, 220 P.3d 1226 (2009).

For that reason, our Supreme Court rejected "the inevitable discovery doctrine because it is incompatible with the nearly categorical exclusionary rule under article I, section 7." State v. Winterstein, 167 Wn.2d 620, 636, ¶36, 220 P.3d 1226 (2009).

4. Independent Source

"Under the independent source exception, evidence tainted by unlawful governmental action is not subject to suppression under the exclusionary rule, provided that it ultimately is obtained pursuant to a valid warrant or other lawful means independent of the unlawful action." State v. Gaines, 154 Wn.2d 711, ¶17, 116 P.3d 993 (2005).

The independent source exception to the exclusionary rule has long been accepted both in the Washington Supreme Court, *see* State v. Warner, 125 Wn.2d 876, 888-89, 889 P.2d 479 (1995), and the United States Supreme Court, *see* Murray v. United States, 487 U.S. 533, 537, 108 S.Ct. 2529, 101 L.Ed.2d 472 (1988).

The independent source doctrine complies with Const. art. I, §7.

> The admission of evidence under the independent source exception to the exclusionary rule complies with article I, section 7 of the Washington Constitution. Here, probable cause existed to search the trunk independent of the initial, illegal search. The trial court found that the police would have sought a warrant for the trunk even absent the initial,

> illegal search. The evidence ultimately was seized pursuant to a lawful warrant and is thus admissible.

State v. Gaines, 154 Wn.2d 711, ¶29, 116 P.3d 993 (2005) (The defendant was arrested and the vehicle searched. One of the officers took the keys out of the ignition and unlocked the trunk. Inside, the officer saw what appeared to be the barrel of an assault rifle and numerous rounds of ammunition. The officer immediately closed the trunk without disturbing its contents. The car ultimately was impounded. A search warrant was thereafter obtained to search the vehicle. Evidence found in the truck held admissible.).

Unlike the inevitable discovery doctrine where evidence was wrongly obtained, the independent source doctrine deals with evidence lawfully obtained. The question under the independent source doctrine is whether the process of obtaining the evidence was tainted by an earlier illegality.

> When dealing with derivative evidence, the factual question that must be answered under the independent source doctrine appears similar to the issue presented by the inevitable discovery doctrine. However, it is not the same.
>
> Inevitable discovery involves evidence that was wrongly obtained. Washington courts will not entertain the speculative question about whether the police ultimately would have obtained the same information by other, lawful means.
>
> In contrast, inevitable discovery *in the context of derivative evidence*, necessarily deals with evidence that itself was not unlawfully obtained. Instead, the question is whether the process of obtaining the derivative evidence was tainted by an earlier illegality.
>
> This factual problem necessarily looks to what the police were doing and what motivated them to take the action they did. But it does not involve the speculative question of whether they later would have actually found the evidence by some legal means. Whether lawfully obtained (i.e., there is no question of additional illegality beyond the original error) evidence was tainted by earlier unlawful actions does not present a speculative question of what the officers might have done next.

State v. Hilton, 164 Wn.App. 81, ¶22, 261 P.3d 683 (2011), *review denied*, 173 Wn.2d 1037, *cert. denied*, ___ U.S. ___, 133 S.Ct. 349, 184 L.Ed.2d 208 (2012) (italics in original).

See also State v. Smith, 165 Wn.App. 296, 266 P.3d 250 (2011), *review granted*, 173 Wn.2d 1034 (2012) (victims' trial testimonies were product of independent source and were sufficiently attenuated from illegal motel registry search).

C. Fruit of the Poisonous Tree Doctrine

1. Fruit of the Poisonous Tree Generally

Generally, evidence seized during an illegal search is suppressed under the exclusionary rule. "The exclusionary rule mandates the suppression of evidence gathered through unconstitutional means." State v. Duncan, 146 Wn.2d 166, 176, 43 P.3d 513 (2002); Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

Evidence obtained by exploitation of an officer's initial unlawful conduct is also not admissible and must be suppressed. Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 417, 9 L.Ed.2d 441 (1963). This principle is known as the fruit of the poisonous tree doctrine.

> Absent an exception to the warrant requirement, a warrantless search is impermissible under both article I, section 7 of the Washington Constitution and the fourth amendment to the United States Constitution.
>
> Generally, evidence seized during an illegal search is suppressed under the exclusionary rule. In addition, evidence derived from an illegal search may also be subject to suppression under the fruit of the poisonous tree doctrine. See State v. O'Bremski, 70 Wn.2d 425, 428, 423 P.2d 530 (1967) (*citing* Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963)).

State v. Gaines, 154 Wn.2d 711, ¶14, 116 P.3d 993 (2005) (citations omitted) (footnote omitted).

In Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963), a person named Hom Way told federal agents that he bought heroin from a person named "Blackie Toy." Nothing in the record identified co-defendant James Toy as "Blackie Toy." Based upon Way's statement, six or seven federal agents went to Toy's laundry business at 6:00 AM and rang the bell. Toy appeared and opened the door. The agents made no effort to determine if Toy was "Blackie Toy."

As a ruse, one agent told Toy that the agent was there for his laundry and dry cleaning. Toy told the agent that the business did not open until 8:00 AM, and to

return at that time. Toy started to close the door when the agent took his badge from his pocket and identified himself as a federal agent.

Toy immediately slammed the door and ran through his business to the living quarters area of the building. The agents broke down the door, and followed Toy into his bedroom. An agent drew his gun, placed Toy under arrest and handcuffed him. No narcotics were found at the residence.

Toy denied selling any narcotics, but said he had smoked heroin the night before with “Johnny.” Toy described the house where he smoked the heroin with “Johnny.” The agents went to co-defendant Johnny Yee’s residence, and found heroin. Yee said he got the heroin a few days earlier from Toy and another person. Toy then told an agent that he bought the heroin from the person who ended up being co-defendant Wong Sun.

The evidence tending to prove the Toy’s possession consisted of four items which the trial court admitted over timely objections that they were inadmissible as ‘fruits' of unlawful arrests or of attendant searches: (1) the statements made orally by petitioner Toy in his bedroom at the time of his arrest; (2) the heroin surrendered to the agents by Yee; (3) Toy's pretrial unsigned statement; and (4) Wong Sun's similar statement.

The Supreme Court held that Toy’s warrantless arrest in his residence was unlawful because (1) probable cause did not exist at the time of the arrest, and (2) a search and arrest warrant was required to seize Toy from his residence.

The government asserted, however, that the narcotics and other evidence used at trial against Toy should not be suppressed because the evidence was obtained as a result of Toy’s free will in providing the information. The Supreme Court rejected the argument.

> We now consider whether the exclusion of Toy's declarations requires also the exclusion of the narcotics taken from Yee, to which those declarations led the police. The prosecutor candidly told the trial court that ‘we wouldn't have found those drugs except that Mr. Toy helped us to.’
>
> Hence this is not the case envisioned by this Court where the exclusionary rule has no application because the Government learned of the evidence ‘from an independent source,’ Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392, 40 S.Ct. 182, 183, 64 L.Ed. 319 (1920); nor is this a case in which the connection between the lawless conduct of the police and the discovery of the challenged evidence has ‘become so attenuated

> as to dissipate the taint.' Nardone v. United States, 308 U.S. 338, 341, 60 S.Ct. 266, 268, 84 L.Ed. 307 (1939).
>
> We need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police.
>
> Rather, the more apt question in such a case is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.' We think it clear that the narcotics were 'come at by the exploitation of that illegality' and hence that they may not be used against Toy.

Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 417, 9 L.Ed.2d 441 (1963) (citations omitted).

The fruit of the poisonous tree doctrine applies to evidence obtained directly or indirectly from police conduct. State v. Tan Le, 103 Wn.App. 354, 361, 12 P.3d 653 (2000).

If a warrantless Terry stop is unlawful, the fruits obtained as a result must be suppressed. State v. Doughty, 170 Wn.2d 57, ¶17, 239 P.3d 573 (2010).

2. Attenuation Doctrine

The fruit of the poisonous tree doctrine does not mandate the suppression of all evidence obtained as a result of unlawful police action because the exclusionary rule does not require the suppression of evidence where the connection between the lawless conduct of the police and the discovery of the challenged evidence has "become so attenuated as to dissipate the taint." Nardone v. United States, 308 U.S. 338, 341, 60 S.Ct. 266, 268, 84 L.Ed. 307 (1939).

Washington has not specifically adopted the attenuation doctrine under Const. art. I, §7.

> Although we have not explicitly adopted the attenuation doctrine under article I, section 7, we have employed it time and again in prior decisions to determine whether, in the time-worn metaphor of Nardone v. United States, 308 U.S. 338, 341, 60 S.Ct. 266, 84 L.Ed. 307 (1939), the challenged evidence was 'fruit of the poisonous tree' or so 'attenuated as to dissipate the taint.'

> For instance, in State v. Armenta, 134 Wn.2d 1, 17, 948 P.2d 1280 (1997), we applied the Brown factors [Brown v. Illinois, 422 U.S. 590, 95 S.Ct. 2254, 2261-62, 45 L.Ed.2d 416 (1975)] to determine whether a suspect's confession was tainted by a prior illegal seizure. While we have expressed the exclusionary prohibition in broad terms, our cases do not stand for the proposition that the exclusionary rule under article I, section 7 operates on a "but for" basis.
>
> Rather, we have consistently adhered to the 'fruit of the poisonous tree' doctrine as articulated in Nardone and Wong Sun. In doing so, we have, at least, implicitly adopted the attenuation doctrine, that doctrine being intimately related to the 'fruit of the poisonous tree' doctrine.

State v. Eserjose, 171 Wn.2d 907, ¶21, 259 P.3d 172 (2011) (citations omitted) (footnotes omitted).

The attenuation doctrine defines the parameters of the fruit of the poisonous tree doctrine by declining to invoke the exclusionary rule where the connection between the challenged evidence and the illegal actions of the police is "so attenuated as to dissipate the taint."

> In fact, the 'fruit of the poisonous tree' doctrine and the attenuation doctrine stem from the same source. In the very opinion in which he described evidence derived from the 'Government's own wrong' as 'fruit of the poisonous tree,' Justice Felix Frankfurter said, 'Sophisticated argument may prove a causal connection,' but '[a]s a matter of good sense, ... such connection may have become so attenuated as to dissipate the taint.' Nardone, 308 U.S. at 341, 60 S.Ct. 266 (*quoting* Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392, 40 S.Ct. 182, 64 L.Ed. 319 (1920)).
>
> The United States Supreme Court then relied on this language in Wong Sun, stating, '[T]his [is not] a case in which the connection between the lawless conduct of the police and the discovery of the challenged evidence has 'become so attenuated as to dissipate the taint.'' Wong Sun, 371 U.S. at 487, 83 S.Ct. 407 (*quoting* Nardone, 308 U.S. at 341, 60 S.Ct. 266). The Court went on to say,
>
>> We need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police.

> Rather, the more apt question in such a case is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'
>
> Id. at 487–88, 83 S.Ct. 407.
>
> Thus, the attenuation doctrine defines the parameters of the 'fruit of the poisonous tree' doctrine. Evidence is not 'fruit of the poisonous tree' if the connection between the challenged evidence and the illegal actions of the police is 'so attenuated as to dissipate the taint.'

State v. Eserjose, 171 Wn.2d 907, ¶22, 259 P.3d 172 (2011) (citations omitted).

See also State v. Smith, 165 Wn.App. 296, 266 P.3d 250 (2011), *review granted*, 173 Wn.2d 1034 (2012) (victims' trial testimonies were product of independent source and were sufficiently attenuated from illegal motel registry search).

D. Silver Platter Doctrine

1. Federal Silver Platter Doctrine

The Washington Supreme Court summarized the history of the federal silver platter doctrine.

> The court in Mollica [State v. Mollica, 114 N.J. 329, 554 A.2d 1315 (1989)] traced the history of the "silver platter" doctrine, which developed when federal standards for searches and seizures were more protective than many state standards. Because of the different standards, federal courts adopted the principle that any evidence independently obtained by state officials could be given to federal officials on a "silver platter."
>
> The court concluded that under federalism principles, state constitutions do not dictate federal action, and no legitimate state interests would be furthered by forbidding transfer of criminal evidence from federal to state authorities when the evidence was lawfully obtained by the former. Employing the "silver platter" doctrine, the court thus determined such evidence need not be suppressed if the federal officers acted without the assistance or cooperation of the state officers.

State v. Brown, 132 Wn.2d 529, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007, 118 S.Ct. 1192, 140 L.Ed.2d 322 (1998) (footnotes omitted).

The term “silver platter” doctrine was coined in Lustig v. United States, 338 U.S. 74, 69 S.Ct. 1372, 1374, 93 L.Ed. 1819 (1949) (“[t]he crux of that doctrine is that a search is a search by a federal official if he had a hand in it; it is not a search by a federal official if evidence secured by state authorities is turned over to the federal authorities on a silver platter”).

In Elkins v. United States, 364 U.S. 206, 80 S.Ct. 1437, 4 L.Ed.2d 1669 (1960), the Supreme Court abolished the silver platter doctrine, noting that the underlying foundation upon which the admissibility of state-seized evidence was in a federal court originally rested−that unreasonable state searches did not violate the federal constitution−disappeared in 1949 with the holding of Wolf v. Colorado, 338 U.S. 25, 69 S.Ct. 1359, 93 L.Ed. 1782 (1949) (Fourth Amendment applies to the state officials under the Fourteenth Amendment).

The holding in Elkins was further buttressed by Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961), in which the Court held that all evidence obtained by searches and seizures in violation of the federal constitution is, by that same authority, inadmissible.

> The principles of the doctrine (although no longer explicitly called the silver platter doctrine) still are applied in federal court, such as when evidence is obtained out of the country, in violation of the Fourth Amendment, which does not govern foreign officials' conduct. *See, e.g.*, Stonehill v. United States, 405 F.2d 738 (9th Cir.1968) (evidence obtained in the Philippines in violation of the Fourth Amendment by foreign agents was admissible in federal court when the federal officers did not undertake or unlawfully participate in the unconstitutional search and seizure).

State v. Fowler, 157 Wn.2d 387, ¶17 n.5, 139 P.3d 342 (2006).

2. Washington Silver Platter Doctrine

As a general principal, evidence that is lawfully obtained by federal officers pursuant to federal law is admissible in state court proceedings even where the state constitution would have required exclusion of evidence obtained in a similar manner by state officials. In re Teddington, 116 Wn.2d 761, 772-73, 808 P.2d 156 (1991) (rejecting Const. art. I, §7 challenge to evidence obtained by federal officers pursuant to federal constitutional standards; holding evidence admissible notwithstanding the dictates of our state constitution); State v. Gwinner, 59 Wn.App. 119, 124-25, 796 P.2d 728 (1990), *review denied*, 117 Wn.2d 1004 (1991) (explaining development of the silver platter doctrine).

"Neither state law nor the state constitution can control federal officers' conduct." State v. Bradley, 105 Wn.2d 898, 902-3, 719 P.2d 546 (1986).

The Washington Supreme Court in Teddington quoted a New Jersey case, State v. Mollica, 114 N.J. 329, 554 A.2d 1315, 1327 (1989), where the court concluded that "[s]tated simply, state constitutions do not control federal action."

A critical limitation to the Washington silver platter doctrine is that "the federal officer must not have been acting as an agent for the state at the time the officer acquired the evidence." In re Teddington, 116 Wn.2d 761, 774, 808 P.2d 156 (1991).

The silver platter doctrine is subject to a "vital significant condition that the federal officers acted without the cooperation or assistance of state officers." State v. Gwinner, 59 Wn.App. 119, 125, 796 P.2d 728 (1990), *review denied*, 117 Wn.2d 1004 (1991) (*quoting* State v. Mollica, 114 N.J. 329, 554 A.2d 1315, 1329-30 (1989)).

In *Gwinner*, the court set forth a number of factors that should be considered in making this determination:

> [A]ntecedent mutual planning, joint operations, cooperative investigations, or mutual assistance between federal and state officers may sufficiently establish agency and serve to bring the conduct of the federal agents under the color of state law.
>
> On the other hand, mere contact, awareness of ongoing investigations, or the exchange of information may not transmute the relationship into one of agency.

State v. Gwinner, 59 Wn.App. 119, 125, 796 P.2d 728 (1990), *review denied*, 117 Wn.2d 1004 (1991) (*quoting* State v. Mollica, 114 N.J. 329, 554 A.2d 1315, 1329 (1989)) (internal quotation marks omitted).

A formal agency relationship need not exist between federal and state law enforcement officials to trigger state constitutional protections under the silver platter doctrine. Cooperation may be sufficient.

> Our reading of Gwinner causes us to believe that when the court used the term "agency", it did not intend to hold that a formal agency relationship must exist before state constitutional protections are triggered. In our judgment, the term appears to have been used by the Gwinner court in a more informal sense.

> We conclude, therefore, that federal officers are subject to our state's constitution if they are acting with the cooperation and assistance of state officers. The factors relied on in Gwinner and Mollica, which themselves do not appear to necessarily contemplate formal agency, should be the guide.

State v. Johnson, 75 Wn.App. 692, 699-700, 879 P.2d 984 (1994), *review denied*, 126 Wn.2d 1004 (1995) (federal and state officers were cooperating to an extent sufficient to trigger state constitutional protection).

E. Private Search Doctrine

1. Fourth Amendment

A search by a private citizen does not trigger federal constitutional protection unless the person is working as an agent of the government.

Underlying the private search doctrine is the rationale that an individual's reasonable expectation of privacy under the constitution is extinguished when a private actor conducts a search. Where the government does not violate an individual's reasonable expectation of privacy, the Fourth Amendment is not offended. State v. Eisfeldt, 163 Wn.2d 628, 185 P.3d 580 (2008).

Under the federal private search doctrine, a warrantless search by a state actor does not offend the Fourth Amendment if the search does not expand the scope of the private search. The doctrine was first espoused in Walter v. United States, 447 U.S. 649, 100 S.Ct. 2395, 65 L.Ed.2d 410 (1980), and later applied in United States v. Jacobsen, 466 U.S. 109, 104 S.Ct. 1652, 80 L.Ed.2d 85 (1984) to sanction a warrantless search by federal agents after they received information about the searched contraband from a private freight carrier.

2. Const. Art. I, §7

Our Supreme Court has rejected the Fourth Amendment private search doctrine under Const. art. I, §7.

> The individual's privacy interest protected by article I, section 7 survives the exposure that occurs when it is intruded upon by a private actor. Unlike the reasonable expectation of privacy protected by the Fourth Amendment, the individual's privacy interest is not extinguished simply because a private actor has actually intruded upon, or is likely to intrude upon, the interest. The private search does not work to destroy the article I, section 7 interest, unlike the Fourth Amendment's, because the Fourth

> Amendment's rationale does not apply to our state constitutional protections.
>
> We therefore reject the private search doctrine and adopt a bright line rule holding it inapplicable under article I, section 7 of the Washington Constitution.

State v. Eisfeldt, 163 Wn.2d 628, ¶16-17, 185 P.3d 580 (2008) (footnotes omitted).

Appendix

Sample Orders on Vehicle Impoundment

1. Law Enforcement Tow Authorization

RIGHT TO IMPOUNDMENT HEARING

❑ Right to Impoundment Hearing Waived

The right to an impoundment hearing is waived and the registered owner is liable for any towing, storage, or other impoundment charges permitted under 46.55 RCW. The impoundment hearing request was not received by this Court within 10 days of the date the registered tow truck operator gave written notice of an opportunity for an impoundment hearing. RCW 46.55.120(2)(b).

IMPOUNDMENT OF VEHICLE

❑ Impoundment of Vehicle Proper

The impoundment is found to be proper for the reason(s) discussed below. Accordingly, the impoundment, towing, and storage fees together with court costs shall be assessed against the Petitioner. RCW 46.55.120(3)(d).

❑ Impoundment Not Contested. Petitioner does not contest the validity of the impoundment. RCW 46.55.120(2)(b).

❑ DUI or Physical Control. Officer had reasonable suspicion to believe that the driver of the impounded vehicle was driving while under the influence in violation of RCW 46.61.502, or was in physical control of the vehicle while under the influence in violation of RCW 46.61.504. RCW 46.55.360.

❑ Arrest. Vehicle's driver was arrested and taken into custody by an officer. RCW 46.55.113(2)(d).

❑ Standing on Roadway. Officer found the vehicle standing upon the roadway in violation of RCW 46.61.560. RCW 46.55.113(2)(a).

❑ Unattended on Highway. Officer found the vehicle unattended upon a highway and the vehicle constituted an obstruction to traffic or jeopardized public safety. RCW 46.55.113(2)(b).

❑ Highway Right-of-Way (24 Hours). Officer found the vehicle was left within a highway right-of-way, the vehicle was unauthorized and unattended, and the vehicle was not removed within 24 hours from the time the officer attached a readily visible notification sticker to the vehicle which contained the following information: (a) the date and time the sticker was attached; (b) the identity of the officer; (c) a statement that if the vehicle is not removed within twenty-four hours from the time the sticker is attached the vehicle may be taken into custody and stored at the owner's expense; (d) a statement that if the vehicle is not redeemed as provided in RCW 46.55.120, the registered owner will have committed the traffic infraction of littering–abandoned vehicle; and (e) the address and telephone number where additional information may be obtained. RCW 46.55.085 and RCW 46.55.010(14)(a)(ii).

❑ Defective Equipment. Vehicle was operated upon a public highway and found to be defective in equipment in such a manner that it may be considered unsafe. RCW 46.32.060.

❑ Expired Registration. Vehicle had an expired registration of more than forty-five days and was parked on a public street. RCW 46.55.113(2)(i).

❑ Accident. Officer found the unattended vehicle at the scene of an accident or the driver of a vehicle involved in an accident was physically or mentally incapable of deciding upon steps to be taken to protect his or her property. RCW 46.55.113(2)(c).

❑ Stolen Vehicle. Officer discovered the vehicle that the officer determined to be a stolen vehicle. RCW 46.55.113(2)(e).

❑ Identification Number Defaced. Manufacturer's serial number or any other distinguishing number or identification mark on the vehicle had been removed, defaced, covered, altered, obliterated, or destroyed, and vehicle was impounded and held by the seizing law enforcement agency for the purpose of conducting an investigation to determine the identity of the article or articles, and to determine whether it had been reported stolen. RCW 46.12.725(1).

❑ Disabled Parking Space. Vehicle did not have a special license plate, placard, or decal indicating that the vehicle was being used to transport a person with disabilities under RCW 46.19.010, and the vehicle was parked in

a stall or space clearly and conspicuously marked under RCW 46.61.581 which space was provided on private property without charge or on public property. RCW 46.55.113(2)(f).

❑ Unlawful Parking in Specialty Zones. Vehicle was illegally occupying a truck, commercial loading zone, restricted parking zone, bus, loading, hooded-meter, taxi, street construction or maintenance, or other similar zone where, by order of the director of transportation or chiefs of police or fire or their designees, parking is limited to designated classes of vehicles or is prohibited during certain hours, on designated days or at all times, if the zone has been established with signage for at least twenty-four hours and where the vehicle is interfering with the proper and intended use of the zone. Signage gave notice to the public that a vehicle will be removed if illegally parked in the zone. RCW 46.55.113(2)(h).

❑ Posted Public Parking Facility. Vehicle was unauthorized, located in a publicly owned or controlled parking facility, impounded at the direction of a law enforcement officer or other public official with jurisdiction, and a sign was posted near each entrance and on the property in a clearly conspicuous and visible location to all who park on such property that clearly indicated: (a) the times a vehicle may be impounded as an unauthorized vehicle, and (b) the name, telephone number, and address of the towing firm where the vehicle may be redeemed. RCW 46.55.080(1), RCW 46.55.010(14)(b)(iii), and RCW 46.55.070(1).

❑ No Valid Driver's License. Vehicle's driver was operating the vehicle without a valid driver's license or with a license that had been expired for ninety days or more. RCW 46.55.113(2)(g).

❑ Driving While License Suspended or Revoked. Vehicle's driver was arrested for driving while license suspended or revoked in violation of RCW 46.20.342 or 46.20.345, and the vehicle was impounded pursuant to local ordinance or state agency rule. RCW 46.55.113(1).

❑ Driving While License Suspended or Revoked & Commercial Vehicle. Vehicle's driver was arrested for driving while license suspended or revoked in violation of RCW 46.20.342, the vehicle was a commercial vehicle, and:

> ❑ Owner Not in Vehicle. Vehicle's driver was not the owner of the vehicle, and the officer attempted in a reasonable and timely manner to contact the owner of the vehicle, and the owner was not reasonably available. RCW 46.55.113(3).

❑ Owner in Vehicle. Vehicle's driver was not the owner of the vehicle, and the owner of the vehicle was in the vehicle at the time of the stop and arrest. RCW 46.55.113(3).

❑ Owner was Driver. Vehicle's driver was the owner of the vehicle. RCW 46.55.113(3).

❑ Owner Knew Driver Suspended. Vehicle's owner was not the driver and the vehicle's owner knew the driver of the vehicle's driver's license was suspended or revoked. RCW 46.55.120(1)(a)(ii) and RCW 46.55.113(3).

❑ Prior Release. Vehicle's owner had received a prior release under RCW 46.55.120(1)(a)(ii) or RCW 46.55.113(3).

❑ Impoundment of Vehicle Not Proper

The impoundment of the vehicle is found to be not proper because _____ _____.

❑ Towing and Storage Fees Refunded to Petitioner by Tow Truck Operator. The registered tow truck operator shall refund to the Petitioner all monies collected for the impoundment, towing and storage fees paid regarding this vehicle, in the amount of $_____. RCW 46.55.120(3)(e).

❑ Judgment in Favor of Tow Truck Operator Against Entity Authorizing Impound. Judgment is hereby awarded in favor of the registered tow truck operator _____ against [law enforcement agency], the person or agency authorizing the impound of the vehicle, for the impoundment, towing and storage fees paid/incurred, in the amount of $_____. RCW 46.55.120(3)(e).

❑ Judgment in Favor of Petitioner Against Entity Authorizing Impound. Judgment is hereby awarded in favor of the Petitioner against [law enforcement agency], the person or agency authorizing the impound of the vehicle, for the filing fee in the amount of $_____, and reasonable damages for loss of use of the vehicle during the time of the impound in the amount of $_____, for a total judgment of $_____. RCW 46.55.120(3)(e).

❑ Judgment Denied Against Entity Authorizing Impound (DWLS). Judgment is hereby denied against [law enforcement agency], the person or agency authorizing the impound of the vehicle. The impoundment herein is

determined to be not proper. Judgment, however, is denied because the impoundment arose from an alleged violation of RCW 46.20.342 or RCW 46.20.345, and the officer relied in good faith and without gross negligence on the records of the Department of Licensing in ascertaining that the operator of the vehicle had a suspended or revoked driver's license. RCW 46.55.120(3)(e).

TOWING AND STORAGE FEES

❑ Towing and Storage Fees Proper

❑ Towing and Storage Fees Not Contested. Petitioner does not contest the validity of the towing or storage fees. The vehicle's owner/driver is responsible for payment of the towing and storage fees. RCW 46.55.120(2)(b) and RCW 46.55.120(2)(c).

❑ Towing and Storage Fees in Compliance with Posted Rates. The towing and storage fees charged were in compliance with posted rates. The Court may not adjust fees or charges that are in compliance with the posted or contracted rates. The vehicle's owner/driver is responsible for payment of the towing and storage fees. RCW 46.55.120(2)(c).

❑ Towing and Storage Fees Not Proper

❑ Towing and Storage Fees Not in Compliance with Posted Rates. The towing and storage fees charged were not in compliance with posted rates. The registered tow truck operator shall refund to the Petitioner all monies collected for the impoundment, towing and storage fees paid regarding this vehicle, in the amount of $_____. RCW 46.55.120(3)(c) and (3)(e).

ANY JUDGMENT ENTERED MUST BE PAID WITHIN FIFTEEN DAYS OF TODAY'S DATE, OR REASONABLE ATTORNEY'S FEES AND COSTS SHALL BE AWARDED. RCW 46.55.120(E).

DATED: _____ _____

2. Private Party Tow Authorization

RIGHT TO IMPOUNDMENT HEARING

❑ Right to Impoundment Hearing Waived

The right to an impoundment hearing is waived and the registered owner is liable for any towing, storage, or other impoundment charges permitted under 46.55 RCW. The impoundment hearing request was not received by this Court within 10 days of the date the registered tow truck operator gave written notice of an opportunity for an impoundment hearing. RCW 46.55.120(2)(b).

IMPOUNDMENT OF VEHICLE

❑ Impoundment of Vehicle Proper

The impoundment is found to be proper for the reason(s) discussed below. Accordingly, the impoundment, towing, and storage fees together with court costs shall be assessed against the Petitioner. RCW 46.55.120(3)(d).

❑ Impoundment Not Contested. Petitioner does not contest the validity of the impoundment. RCW 46.55.120(2)(b).

❑ Residential Private Property. Vehicle was located on residential private property and impounded at the direction of the property owner or an agent. RCW 46.55.080(1) and RCW 46.55.010(14)(b)(i).

❑ Posted Non-Residential Private Property. Vehicle was unauthorized, located on non-residential private property, impounded at the direction of the property owner or an agent, and a sign was posted near each entrance and on the property in a clearly conspicuous and visible location to all who park on such property that clearly indicated: (a) the times a vehicle may be impounded as an unauthorized vehicle, and (b) the name, telephone number, and address of the towing firm where the vehicle may be redeemed. RCW 46.55.080(1), RCW 46.55.010(14)(b)(ii), and RCW 46.55.070(1).

❑ Not Posted Non-Residential Private Property (24 Hours). Vehicle was unauthorized, located on non-residential private property, impounded at the direction of the property owner or an agent, and the unauthorized vehicle was standing on the property for at least 24 hours. RCW 46.55.080(1), RCW 46.55.010(14)(b)(iii), and RCW 46.55.070(1).

❑ Impoundment of Vehicle Not Proper

The impoundment of the vehicle is found to be not proper because _____ _____.

❑ Towing and Storage Fees Refunded to Petitioner by Tow Truck Operator. The registered tow truck operator shall refund to the Petitioner all monies collected for the impoundment, towing and storage fees paid regarding this vehicle, in the amount of $_____. RCW 46.55.120(3)(e).

❑ Judgment in Favor of Tow Truck Operator Against Entity Authorizing Impound. Judgment is hereby awarded in favor of the registered tow truck operator _____ against _____, the person or agency authorizing the impound of the vehicle, for the impoundment, towing and storage fees paid/incurred, in the amount of $_____. RCW 46.55.120(3)(e).

❑ Judgment in Favor of Petitioner Against Entity Authorizing Impound. Judgment is hereby awarded in favor of the Petitioner against _____, the person or agency authorizing the impound of the vehicle, for the filing fee in the amount of $_____, and reasonable damages for loss of use of the vehicle during the time of the impound in the amount of $_____, for a total judgment of $_____. RCW 46.55.120(3)(e).

TOWING AND STORAGE FEES

❑ Towing and Storage Fees Proper

❑ Towing and Storage Fees Not Contested. Petitioner does not contest the validity of the towing or storage fees. The vehicle's owner/driver is responsible for payment of the towing and storage fees. RCW 46.55.120(2)(b) and RCW 46.55.120(2)(c).

❑ Towing and Storage Fees in Compliance with Posted Rates. The towing and storage fees charged were in compliance with posted rates. The Court may not adjust fees or charges that are in compliance with the posted or contracted rates. The vehicle's owner/driver is responsible for payment of the towing and storage fees. RCW 46.55.120(2)(c).

❑ Towing and Storage Fees Not Proper

❑ Towing and Storage Fees Not in Compliance with Posted Rates. The towing and storage fees charged were not in compliance with posted rates. The registered tow truck operator shall refund to the Petitioner all monies

collected for the impoundment, towing and storage fees paid regarding this vehicle, in the amount of $_____. RCW 46.55.120(3)(c) and (3)(e).

ANY JUDGMENT ENTERED MUST BE PAID WITHIN FIFTEEN DAYS OF TODAY'S DATE, OR REASONABLE ATTORNEY'S FEES AND COSTS SHALL BE AWARDED. RCW 46.55.120(E).

DATED: _____ _____