LAW ENFORCEMENT LEGAL UPDATE OUTLINE

CASES ON ARREST, SEARCH, SEIZURE, AND OTHER TOPICAL AREAS OF INTEREST TO LAW ENFORCEMENT OFFICERS; PLUS A CHRONOLOGY OF INDEPENDENT GROUNDS RULINGS UNDER ARTICLE I, SECTION 7 OF THE WASHINGTON CONSTITUTION

INTRODUCTORY NOTE: These materials were compiled by John Wasberg, formerly a Senior Counsel in the Washington Attorney General's Office, retired. The materials are provided as a research source only, are not intended as legal advice, and should not be relied on without independent research and legal analysis. Any views expressed are those of Mr. Wasberg alone and do not necessarily reflect the opinions of any other person or any agency.

TABLE OF CONTENTS FOR MAIN HEADINGS OF OUTLINE

I. STOP AND FRISK, AND ARREST 1

A. The Seizure Continuum: "Contact" v. "Terry Seizure" v. "Arrest" .. 1

B. The Information, Or Level-Of-Suspicion, Continuum; Plus Pretext .. 6

C. Frisk Authority And Related Officer-safety Issues 10

D. Arrest Authority 13

II. SEARCH WITH, WITHOUT A WARRANT 15

A. Defining "Search" – Privacy Protection; Plus Understanding The Concepts Of "Open View" And "Plain View" 15

B. Search With A Warrant – Select Cases On Writing And Executing 22

C. Warrantless Entry Of Private Premises To Arrest 23

D. Warrantless Search Of Vehicle Passenger Area Incident To Arrest 25

E. Warrantless Search Of Person And Personal Effects Incident To Arrest (No Vehicle Search) 31

F. Warrantless Search By Consent 35

G. Warrantless Search Based On Exigent Circumstances Or Under Non-investigative Rationales Of "Community Caretaking Function" Or Emergency Circumstance 39

H. Searches By Private Citizens 41

I. Searches By School Authorities 41

J. Probationer, Parolee Searches – Police Assistance To CCO 42

K. Impound – Inventory Of Motor Vehicles 42

L. Securing Room Or House On PC While Search Warrant Is Sought 43

M. Securing Personal Property On Reasonable Suspicion Or PC 43

N. No "Carroll Doctrine" In Washington 43

O. No "Forfeitable Property" Exception To Search Warrant Requirement..... 43

III. INTERROGATIONS LAW, A FEW SELECT CASES 44

A. Miranda warnings requirement (custody plus interrogation) 44

B. Initiation Of Contact" Rule Of Fifth Amendment 44

C. CrR 3.1 And CrRLJ 3.1 Require That Police Advise An Arrestee Of The Right To Counsel After Making An Arrest 46

D. CrR 3.1 And CrRLJ 3.1 Require That Reasonable Effort Be Made To Promptly Attempt To Accommodate Request For Phone Consult With Counsel 46

IV. CONSULAR CONTACT WARNINGS TO ARRESTED FOREIGN NATIONALS 47

V. INTERCEPTING AND RECORDING PRIVATE COMMUNICATIONS 47

A. Unlawful Arrest Of Citizen Who Tape Records Officer On Street .. 47

B. Officer Tape-recording Street Contact 47

C. Using Speakerphone Or Extension Phone To Eavesdrop 47

D. Taping Outgoing Inmate Call From County Jail 48

E. Miscellaneous Other Rulings Re Chapter 9.73 RCW 48

VI. ATTORNEY-CLIENT PRIVILEGE 48

VII. LAW ENFORCEMENT CIVIL LIABILITY IS POSSIBLE FOR NOT SHARING EXCULPATORY INFORMATION WITH PROSECUTOR 49

VIII. INDEPENDENT GROUNDS RULING UNDER ARTICLE 1, SECTION 7 OF WASHINGTON CONSTITUTION 50

LAW ENFORCEMENT LEGAL UPDATE OUTLINE

CASES ON ARREST, SEARCH, SEIZURE, AND OTHER TOPICAL AREAS OF INTEREST TO LAW ENFORCEMENT OFFICERS; PLUS A CHRONOLOGY OF INDEPENDENT GROUNDS RULINGS UNDER ARTICLE I, SECTION 7 OF THE WASHINGTON CONSTITUTION

INTRODUCTORY NOTE: These materials were compiled by John Wasberg, formerly a Senior Counsel in the Washington Attorney General's Office, retired. The materials are provided as a research source only, are not legal advice, and should not be relied on without independent research and legal analysis. Any views expressed are those of Mr. Wasberg alone and do not necessarily reflect the opinions of any other person or agency. Entries regarding cases from the past several years are generally in bold print.

I. STOP AND FRISK, AND ARREST

A. The Seizure Continuum: "Contact" v. "Terry Seizure" v. "Arrest"

1. *When does a "contact" become a "seizure"?*

Under article I, section 7 of Washington constitution, seizure occurs when, in light of the law enforcement words or actions directed at the person, a reasonable innocent person would not feel that he or she is free to either (1) decline to talk to the officer or (2) leave. State v. Thorn, 129 Wn.2d 347 (1996) Aug. '96 LED:13

Police contact with drug suspect was lawful social contact, and officer's request to take his hands from his pockets did not make contact a seizure. State v. Fortun-Cebada, 158 Wn. App. 158 (Div. I, October 25, 2010) January '11 LED:15

State v. Guevara, 172 Wn. App. 184 (Div. III, Dec. 6, 2012) Feb. '13 LED:09 (Seizure, not mere social contact, occurred where officer's accusation of criminal activity was followed by his request that teens voluntarily empty their pockets)

State v. Soto-Garcia, 68 Wn. App. 20 (Div. II, 1992), March '93 LED:09 (Request for ID + questions about drugs + request for consent to search = seizure)

State v. Harrington, 167 Wn.2d 656 (2009) Feb. '10 LED:17 (Field, or "social," contact held to have developed into a "seizure" without reasonable suspicion at the point during the contact when the officer, with a nearby officer standing by, requested consent to frisk)

State v, Young, 167 Wn. App. 922 (Div. II, 2012) July '12 LED:12 (Unjustified "seizure" found in follow-up, late-night contact where, in follow-up contact, two

officers essentially cornered woman behind Laundromat and asked her for identifying information)

State v. Elwood, 52 Wn. App. 70 (Div. I, 1988) Nov. '88 LED:05 (Telling FIR contact to "wait right here" – or taking ID and walking away – while checking for warrants is seizure)

State v. Hansen, 99 Wn. App. 575 (Div. I, 2000) June '00 LED:17 (Requesting ID, handing it to fellow officer who recorded information and handed it back to citizen within 30 seconds, radioing information, and then conversing with citizen in non-coercive manner, was not seizure under totality of the facts)

State v. Crane, 105 Wn. App. 301 (Div. II, 2001) June '01 LED:08 (Requesting ID and holding it for several minutes, while standing with subject, and checking by hand-held radio for outstanding warrants was seizure under totality of facts, and the seizure was not justified by the mere fact that the person had been observed approaching a residence for which police were in the process of obtaining a search warrant)

State v. O'Neill, 148 Wn.2d 564 (2003) April '03 LED:03 (Washington Supreme Court holds that no seizure occurred where officer spotlighted a car parked in a market parking lot, then followed up by asking the person in the driver's seat about his presence there and by asking him for ID)

State v. Gantt, 163 Wn. App. 133 (Div. III, 2011) Nov. '11 LED:10 (Turning on overhead flashers and asking person near to vehicle and apparently associated with the vehicle to explain his presence was a seizure)

State v. Young, 135 Wn.2d 498 (1998) Aug. '98 LED:02 (Shining spotlight on person was not a seizure)

Greene v. Camreta, 588 F.3d 1011 (9th Cir. 2009) Feb. '10 LED:05 (In Civil Rights Act lawsuit, 3-judge panel holds "seizure" occurred when social services caseworker and officer interviewed possible child sex abuse victims at elementary school without parental consent or court order or exigent circumstances). In 2011, the U.S. Supreme Court set aside this Ninth Circuit ruling, determining that the issue was moot in this case. 131 S. Ct. 2010 (2011) Aug. '11 LED:12

2. *May a Terry stop detainee be arrested for violating "obstructing" statute for merely refusing to identify himself or herself?*

No. Compare State v. White, 97 Wn.2d 92 (1982) April '82 LED:02; Carey v. Nevada Gaming Control Board, 279 F.3d 873 (9th Cir. 2002) Jan. '03 LED:02 with Hiibel v. Sixth Jud. Dt. Of Nevada, 124 S.Ct. 2451 (2004) Aug. '04 LED:02 (Arrest under a Nevada "stop and identify" statute that is worded differently than Washington's "obstructing" statute)

3. *Is a show of authority when attempting a stop a seizure?*

Yes, under the Washington constitution. Compare the U.S. Supreme Court's decision in California v. Hodari D., 499 U.S. 621 (1991) July '91 LED:01 (No seizure under Fourth Amendment if suspect flees from show of authority) with the Washington Supreme Court decision in State v. Young, 135 Wn.2d 498 (1998) Aug. '98 LED:02, where the Washington Court ruled that Washington constitution, article I, section 7, takes contrary view of what constitutes a seizure. Under the Washington constitution, a show of authority may be a seizure even if there is no compliance by the suspect.

4. *May passengers routinely be asked for ID at MV stops?*

No, not under the Washington constitution, article I, section 7. See State v. Larson, 93 Wn.2d 638 (1980) Aug. '80 LED:01 (Directing passenger in illegally parked car to show ID was unlawful seizure). State v. Rankin, 151 Wn.2d 689 (2004) Aug. '04 LED:07 (Washington Supreme Court majority opinion under article I, section 7 of Washington constitution interprets State v. Larson broadly, rejecting the argument that it is ok for officers to routinely request, so long as they do not demand, ID from non-violator, non-suspect passengers during traffic stops); In re Brown, 154 Wn.2d 787 (2005) Sept. '05 LED:17 (Washington Supreme Court holds that Rankin rule applies to requests to passengers for identifying information as well as to requests for ID documents); State v. Mote, 129 Wn. App. 276 (Div. I, 2005) Nov. '05 LED:10 (Rankin rule does not extend to non-seizure contacts with occupants in parked vehicles)

State v. Allen, 138 Wn. App. 463 (Div. II, 2007) July '07 LED:21 (Rankin rule does not permit asking passenger for ID where officer knows driver is protected by a no-contact order, but officer has no physical description and does not even know the gender of the prohibited person on the no-contact order, and the officer knows only the gender-neutral name of the prohibited person). **But see State v. Pettit, 170 Wn. App. 716 (Div. II, 2011) May '11 LED:12 (Officer held to have obtained sufficient descriptive information regarding the parties identified in a no-contact order to investigate whether driver was violating a no-contact order protecting a 16-year-old female)**

5. *Does "community caretaking function" give officers authority to make "stops" for non-investigative purposes in order to help citizens?*

Yes, but stop must be objectively and subjectively justified and not pretextual (similarly, certain non-investigative actions that might otherwise be deemed unlawful "searches" may be similarly justified). State v. Kinzy, 141 Wn.2d 373 (2000) Sept. '00 LED:07 (Washington Supreme Court holds that this function did not justify an officer's seizure of a young-looking teenage girl out at 10 p.m. on a school night with older, drug-historied companions, in downtown Seattle)

State v. Acrey, 148 Wn.2d 738 (2003) May '03 LED:04 (In an 8-1 decision, Washington Supreme Court distinguishes Kinzy and holds that it was ok for officers to detain a 12-year-old long enough to call his mother where the officers had responded at 12:40 a.m. to a report that youths were fighting – which, on police contact, they credibly denied – and

the youths were located in an "isolated" commercial area with no nearby residences or open businesses)

6. *May consent to search be sought routinely during or after MV stop for a civil infraction or minor offense or is this additional intrusion an impermissible extension of the seizure?*

Generally no, though a "clean break" might make request lawful. State v. Cantrell, 70 Wn. App. 340 (Div. II, 1993) Oct. '93 LED:21 (After speeding ticket signed by violator, it was unlawful seizure for officer to extend the duration and scope of the stop by asking for consent to search MV). For additional discussion of Washington and federal case law on possible constitutional restrictions on expanding the duration and scope of traffic and investigatory stops, see the LED discussion of Illinois v. Caballes, 125 S.Ct. 834 (2005) March '05 LED:03, April '05 LED:02 (United States Supreme Court rules that using dog outside stopped car did not violate the Fourth Amendment of the U.S. Constitution).

7. *Is there a strict time limit on the duration of a Terry stop?*

No. While a rule of thumb of a maximum of 20 minutes is suggested as a guideline by some, duration may be shorter or longer depending on what is reasonable as officers work diligently to investigate suspicious circumstances. **Liberal v. Estrada, 632 F.3d 1064 (9th Cir. January 19, 2011) March '11 LED:11;** U.S. v. Sharpe, 470 U.S. 675 (1985).

8. *May officers who do not have reasonable suspicion as to a drug violation bring a drug-sniffing dog to sniff the exterior of a vehicle if the use of the dog does not extend the duration of the traffic stop?*

"Maybe" is the best answer we have for Washington officers. Illinois v. Caballes, 125 S.Ct. 834 (2005) March '05 LED:03, April '05 LED:02 (United States Supreme Court rules that using dog to sniff for drugs outside a car stopped for a traffic violation did not violate the Fourth Amendment, which limits the duration of a stop but not the scope of the investigation; U.S. Supreme Court was focused on "seizure" issue but also addressed ther "search/privacy" issue; a different ruling might be made under article I, section 7 of the Washington constitution, either on seizure (scope-of-seizure limits) or search (K-9 sniffing as possible search of car and/or its occupants) rationale, but there are as yet no Washington appellate court decisions directly on point)

9. *Does the Washington constitution permit roadblocks?*

Generally no, unless conducted under narrow, suspicion-based circumstances. City of Seattle v. Mesiani, 110 Wn.2d 454 (1988) July '88 LED:14 (City of Seattle's DUI roadblock program held to violate article I, section 7 of the Washington constitution); State v. Silvernail, 25 Wn. App. 185 (Div. I, 1980) April '80 LED:04 (Stopping and inquiring of the occupants of every car coming off the ferry from Vashon to West Seattle held supported under the special circumstances of that case – i.e., report from victims of just-committed

robbery that gave police reasonable suspicion that robbers had taken that particular ferry to the mainland)

10. *Does Terry standard of reasonable suspicion justify a stop for a traffic infraction or is probable cause required?*

Reasonable suspicion will justify a traffic stop. See State v. Snapp, 174 Wn.2d 177 (2012) May '12 LED:25.

11. *Does Terry stop-and-frisk authority extend to non-traffic civil infractions?*

No (but, of course, safety first regarding frisk authority). State v. Duncan, 146 Wn.2d 166 (2002) June '02 LED:19 (Washington Supreme Court says "no" as it holds in an "open container" case that officer must have probable cause to believe that the infraction is occurring in his or her presence before making a seizure or frisk). State v. Day, 161 Wn.2d 889 (2007) Dec. '07 LED:18 (Washington Supreme Court also says that there is no Terry authority in a parking infraction case). Regardless of Duncan and Day, however, officers obviously will and must take reasonable safety precautions, including frisking non-traffic civil infraction suspects reasonably believed to be armed and dangerous.

12. *Does Terry authority apply to all previously committed (i.e., not committed "in the presence") misdemeanors and gross misdemeanors?*

Not as to some non-dangerous misdemeanors in circumstances where there is a reasonable alternative for identifying the suspect. U.S. v. Grigg, 498 F.3d 1076 (9th Cir. 2007) April '08 LED:06 (No; for those gross misdemeanors and misdemeanors that do not have potential for ongoing or repeated danger or risk of escalation, a Terry stop is not justified, at least if there is a reasonable alternative for identifying the suspect. Per our LED editorial comments re Grigg, we believe this restriction does not include those misdemeanors that are listed in RCW 10.31.100 as exceptions to the "in the presence" arrest rule.)

13. *May possible witnesses be seized under Terry?*

Generally no, though exigent circumstances may justify.

State v. Carney, 142 Wn. App. 197 (Div. II, 2008) Feb. '08 LED:17 (Not as to witnesses to possible reckless driving, but perhaps under narrow, compelling circumstances rules a 3-judge panel that issues 3 separate opinions). State v. Dorey, 145 Wn. App. 423 (Div. III, 2008) August '08 LED:08 (Officer's seizure of potential witness was not justified where there were no exigent circumstances, not even a report of a recently committed crime; Court notes that American Law Institute Model Code for Pre-arraignment Procedures indicates witnesses may be seized if all four of the following circumstances exist: (1) the crime was very recently committed, (2) it involves forcible injury to person or damage to property or theft, (3) there is probable cause to believe that the witness has helpful information, and (4)

temporary detention is reasonably necessary to get the information); State v. Barron, 176 Wn. App. 742 (Div. III, 2012) Jan. '13 LED:14 (Exigency for witness seizure ruled where officer reasonably believed that person was either victim or witness or perpetrator in knife fight moments before officer arrived)

14. *When does a "seizure" become an "arrest"? (Case law is a bit inconsistent, in part because State and defense sometimes argue opposite sides of the issue, depending on whether "probable cause" is at issue or "search incident" authority is at issue)*

Dunaway v. New York, 442 U.S. 200 (1979) July '79 LED:01 (Involuntary transport to stationhouse for questioning is per se an arrest)

State v. Belieu, 112 Wn.2d 587 (1989) Sept. '89 LED:17, and State v. Mitchell, 80 Wn. App. 143 (Div. I, 1995) March '96 LED:09 (Felony stop procedures not necessarily an "arrest" – depends on circumstances; not arrest here where persons in stopped car were reasonably suspected of being home invasion robbers)

State v. Wheeler, 108 Wn.2d 230 (1987) Aug. '87 LED:08 (Two-block transport of burglary suspect to scene of suspected burglary for show-up ID not an arrest under the circumstances; reviewed on totality of circumstances, considering: (1) length of time, (2) place of detention, (3) extent of movement of detainee, (4) need for moving suspect, (5) nature of restraints, (6) fact that officers were investigating a recently reported crime)

State v. Radka, 120 Wn. App. 43 (Div. III, 2004) March '04 LED:11 (Putting suspended driver in back seat of patrol car and telling him he is under arrest held not a "custodial arrest" for "search incident" purposes where he was not frisked, searched, or handcuffed, and he was allowed to use cell phone while sitting in the patrol car)

B. The Information, Or Level-Of-Suspicion, Continuum; Plus Pretext

1. *What constitutes articulable "reasonable suspicion"?*

Definition: In light of specific and articulable facts, would a reasonable officer, considering his or her experience and training, reasonably believe that a suspect has been, is, or is about to be engaged in criminal activity; this objective standard depends on the totality of the circumstances, and can result from a combination of facts, even if each fact taken alone is individually innocuous.

State v. Moreno, 173 Wn. App. 479 (Div. III, February 12, 2013) April '13 LED:15 (In night-time response to several shots-fired reports, reasonable suspicion supports Terry stop of spotlighted possible gang member driver wearing red in blue-colors rival gang area and driving quickly down a rutted alley)

State v. Diluzio, 162 Wn. App. 585 (Div. III, July 12, 2011) Nov. '11 LED:17 (In a split decision, the Court of Appeals holds that officer did not have reasonable suspicion for a Terry stop where the officer saw an unknown male driver in a vehicle stopped in a known prostitution area talk to a female pedestrian unknown

to the officer and allow her to get into his vehicle)

Illinois v. Wardlow, 528 U.S. 119 (2000) March '00 LED:02 (U.S. Supreme Court holds that unprovoked, headlong flight at sight of police car by person in area known for heavy drug trafficking is "reasonable suspicion" under the "totality of the circumstances")
State v. Doughty, 170 Wn.2d 70 (2010) Nov. '10 LED:04 (Where the sole apparent basis for police officers' labeling of a house as a "known drug house" was the neighbors' reports of heavy short-stay traffic to the house, a suspect's less-than-two-minute visit to that "known drug house" at 3:20 a.m. by a suspect unknown to police officers did not provide reasonable suspicion of drug crime and hence did not justify a stop of the suspect's car)

Florida v. J.L., 529 U.S. 266 (2000) May '00 LED:07 (U.S. Supreme Court holds that anonymous phone call regarding young man in plaid shirt at bus stop with a gun failed to meet the "reasonable suspicion" test, and therefore seizure and frisk was unlawful)

U.S. v. Palos-Marquez, 591 F.3d 1272 (9th Cir. 2010) July '10 LED:11 (In-person report by unknown, unidentified UPS driver held to be reliable in support of reasonable suspicion for a Terry stop)

Campbell v. DOL, 31 Wn. App. 833 (Div. I, 1982) Aug. '82 LED:04 (Conclusory statement to officer that driver of car going by is "drunk" does not justify stop, nature of crime and alternative investigative options are factors in reasonableness-of-seizure determination)

State v. Anderson, 51 Wn. App. 775 (Div. III, 1988) Oct. '88 LED:10 (Known citizen's action of pointing out car and making weaving gesture justified stop)

State v. Jones, 85 Wn. App. 797 (Div. III, 1997) Aug. '97 LED:16 (Unknown driver of marked commercial vehicle was not a sufficiently reliable source, even though he had made an in-person report). **But see State v. Lee, 147 Wn. App. 912 (Div. I, 2008) Feb. '09 LED:11 (Corroborated citizen's report constituted reasonable suspicion; Court questions part of the analysis in the Jones decision by Division Three)**

State v. Lyons, 85 Wn. App. 268 (Div. II, 1997) Aug. '97 LED:18 (Holding that RCW 46.20.349 constitutionally authorizes stop of vehicle based on reasonable suspicion that registered owner of MV has revoked or suspended driver's license). But see State v. Penfield, 106 Wn. App. 157 (Div. III, 2001) Aug. '01 LED:12, which holds that, while a MV stop to check for the registered owner was permissible under the Lyons-type facts, the officer was not permitted to extend the stop to ask for ID when the reasonable suspicion evaporated once the officer noticed that the driver could not be the person identified by records as the registered owner.

State v. Barber, 118 Wn.2d 335 (1992) April '92 LED:02 (Officers should not make irrelevant statements about the person's racial incongruity with the neighborhood)

State v. Mitchell, 80 Wn. App. 143 (Div. I, 1995) March '96 LED:09 (Holding dangerous suspect at gunpoint not necessarily an arrest; case also addresses "reasonable suspicion" question regarding a handgun that a citizen was carrying in his hand while walking in a residential area)

U.S. v. Arvizu, 122 S. Ct. 744 (2002) April '02 LED:02 (Totality of circumstances, including officer's experience and training, must be considered by the courts)

State v. Prado, 145 Wn. App. 646 (Div. I, 2008) Sept. '08 LED:16 (Traffic stop held not justified where driver crossed 8-inch-wide, exit-lane divider by 2 tire-widths for 1 second - - RCW 46.61.140(1) leaves some leeway because it provides that a person shall drive "as nearly as practicable within a single lane")

2. *What constitutes "probable cause" to arrest?*

Definition: Probable cause to arrest exists when an officer has reasonable grounds to believe that a suspect has committed or is committing a crime based on articulable and specific circumstances that support the conclusion; it is a "reasonable officer" standard based on the totality of the circumstances considering the time, place, and other circumstances, including the officer's experience and training. It is a higher standard than "reasonable suspicion" and a lower standard than "proof beyond a reasonable doubt" and the "preponderance" standard that is used to resolve fact questions in civil lawsuits.

State v. Rose, 175 Wn.2d 10 (Aug. 9, 2012) Oct. '12 LED:07 (Washington Supreme Court finds probable cause to arrest for possession of controlled substance where officer observed a glass tube, consistent with a tube that could be used to ingest illegal drugs, containing a white chalky substance (even though the arrest was originally characterized by the officer as being for mere possession of drug paraphernalia, which is a nonexistent crime under Washington state statutes; the facts that were known to the officer, not his or her labeling of the crime of arrest, are what determines whether arrest was supported by probable cause)

State v. Smith, 102 Wn.2d 449 (1984) Nov. '84 LED:11 (Aguilar-Spinelli standard controls informant-based PC standard under independent grounds reading of State constitution)

State v. Grande, 164 Wn.2d 135 (2008) Sept. '08 LED:07 (Moderate odor of marijuana coming from vehicle during traffic stop did not provide probable cause to arrest passenger under article I, section 7 of the Washington constitution. But arrest of driver of single-occupant vehicle apparently would still be justified based on smell of drugs and constructive possession theory; see discussion in State v. Wright, 155 Wn. App. 537 (Div. I, 2010 June '10 LED:12, reversed on other grounds, State v. Snapp, 172 Wn.2d 177 (2012) May '12 LED:25.)

3. *Is there a "pretext stop" prohibition?*

Yes, under the Washington constitution, article I, section 7.

Whren v. U.S., 517 U.S. 806 (1996) Aug. '96 LED:09 (U.S. Supreme Court holds under Fourth Amendment that there is no pretext stop rule; probable cause as to violation justifies stop regardless of officer's motive). However, on July 1, 1999, in State v. Ladson, 138 Wn.2d 343 (1999) Sept. '99 LED:05, the Washington State Supreme Court interpreted article I, section 7 of the Washington constitution as imposing a pretext stop prohibition, the violation of which can be proven through either: (1) subjective evidence (showing the officer had a pretextual motive through his or her own admissions or based on circumstantial evidence), or (2) objective evidence (showing the officer didn't follow normal or standard practices and procedures for that officer); See also State v. DeSantiago, 97 Wn. App. 446 (Div. III, 1999) Nov. '99 LED:12 (Court applies Ladson pretext rule to suppress evidence seized by patrol officer following a pretext stop)

State v. Arreola, 176 Wn.2d 284 (Dec. 20, 2012) March '13 LED:07 A patrol officer's mixed-motive vehicle stop is held not pretextual because he: (1) had an articulable, reasonable suspicion of muffler violation; and (2) consciously and independently determined the stop was needed to address the muffler violation. The Arreola majority opinion explains:

"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. 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.

. . . . 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. Hoang, 101 Wn. App. 732 (Div. I, 2000) Nov. '00 LED: 08 (Court upholds trial court finding of "NO pretext" where officer testified believably that, though he had other suspicions as well, he made stop for traffic enforcement reasons; officer's failure to issue citation after finding illegal drugs is not per se evidence of pretext);

State v. Quezadas-Gomez, 165 Wn. App. 593 (Div. II, 2011) June '12 LED:21 (Court of Appeals rules that there was no pretext problem where officers with probable cause to arrest a suspect for a felony drug crime stopped his car only to identify him and did not cite or arrest him for anything)

Note as to arrest warrants and search warrants: State v. Davis, 35 Wn. App. 724 (Div. I, 1983) Jan. '84 LED:06 (Court holds in pre-Ladson decision that arrest on a valid warrant can never be pretextual); State v. Goodin, 67 Wn. App. 623 (Div. II, 1993) March '93 LED:17 (Same rule for entry on search warrant); State v. Busig, 119 Wn. App. 381 (Div. III, 2003) Feb. '04 LED:16 (Search under a search warrant that was issued to allow officers to search a third party's residence to make an arrest on an arrest warrant held not subject to pretext challenge); State v. Lansden, 144 Wn.2d 654 (2001) Nov. '01 LED:03 (Same ruling regarding administrative search warrant). **But see State v. Hatchie, 161 Wn.2d 390 (2007) Oct. '07 LED:06 (Washington Supreme Court rules under the Washington constitution that forcible entry to arrest on gross misdemeanor warrant will be reviewed for pretext. It is not clear whether the Court would extend the Hatchie rule for pretext review to forcible entry to arrest on a felony arrest warrant.)**

C. Frisk Authority And Related Officer-safety Issues

1. *What constitutes reasonable belief of danger?*

State v. Collins, 121 Wn.2d 168 (1993) July '93 LED:07 (Court says question is, on totality of circumstances, whether the officer had a founded suspicion such that frisk was "not arbitrary or harassing")

State v. Horrace, 144 Wn.2d 386 (2001) Oct. '01 LED:05 (Because driver leaned over toward front-seat passenger as officer was conducting a radio check during a 1:15 a.m. traffic stop, the passenger was subject to a lawful frisk once the officer learned of and acted on information that the driver was subject to custodial arrest based on arrest warrants and based on driving while license suspended)

State v. Setterstrom, 163 Wn.2d 621 (2008) July '08 LED:06 (Officer could not lawfully frisk a lawfully seized man based solely on fact that the man was nervous and fidgeting when confronted by the officer); **Compare State v. Ibrahim, 164 Wn. App. 503 (Div. III, 2011) April '12 LED:20 (Frisk held justified in light of suspect's earlier presence in suspected stolen vehicle, plus his nervous behavior and continued ignoring of officer's requests that he keep his hands in view, not turn away, and not approach the officer)**

United States v. I.E.V., 705 F.3d 430 (9th Cir., Nov. 28, 2012) Feb. '13 LED:07 (2-1 majority concludes that: (1) delay in frisking suspect undercuts government's argument that frisk was justified by reasonable belief of danger; and (2) in any event, government failed to present evidence to show that lifting suspect's shirt was done for safety reason)

2. *What is the permissible scope of a frisk?*

State v. Horton, 136 Wn. App. 29 (Div. III, 2006) Jan. '07 LED:02 (Court of Appeals held that a cigarette pack could not have contained a weapon and therefore should not have been searched as part of a frisk) (Prosecutor's petition for Washington Supreme Court review was denied). But see U.S. v. Hartz, 458 F.3d 1011 (9th Cir. 2006) Nov. '06 LED:02) (Officer's testimony about potential for small weapons convinces 9th Circuit that Altoids tin could have contained weapon and hence could be searched in frisk)

3. *Is the test exclusively objective or is there a subjective element?*

One intermediate appellate court decision held there are both objective and subjective elements to the test in Washington, so officers should be prepared to explain that they were actually concerned for safety. State v. Coutier, 78 Wn. App. 239 (Div. III, 1995) Oct. '95 LED:04 (Court asserts that if officer not concerned about safety, then frisk not justified even if reasonable officer would have been; appears to be erroneous subjective standard, but officer might have avoided by testifying as to training and experience)

4. *May frisk be search for evidence?*

No. State v. Alcantara, 79 Wn. App. 362 (Div. I, 1995) Feb. '96 LED:11 (Suspicion, falling short of probable cause, that person may have secreted drugs in pocket doesn't justify frisking or searching pocket)

5. *May driver at stop routinely be directed into or out of MV?*

Yes. State v. Kennedy, 107 Wn.2d 1 (1986) Dec. '86 LED:01 (Apparently adopting U.S. Supreme Court view – Pa. v. Mimms, 434 U.S. 106 (1977) – that driver can be directed out of MV without articulable grounds). State v. Belieu, 112 Wn.2d 587 (1989) Sept. '89 LED:17 (Citing Mimms for the above principle)

6. *May passengers routinely be directed into or out of MV?*

No, not under the Washington constitution. Maryland v. Wilson, 519 U.S. 408 (1997) April '97 LED:02. (The U.S. Supreme Court holds by a 7-2 decision that Pa. v. Mimms applies to give officer automatic authority to order a passenger out of a lawfully stopped MV). But see State v. Mendez, 137 Wn.2d 208 (1999) March '99 LED:04 (In an "independent grounds" ruling under Washington constitution, article I, section 7, Washington Supreme Court holds that, while officers have automatic or "bright line"

authority to direct *drivers* out of, or back into, their vehicles during routine traffic stops, under a newly announced "heightened awareness of danger" test (apparently a less stringent test than the frisk standard), officers must be able to articulate an objective reason for directing *passengers* (*where such passengers themselves have committed no violation*) out of, or back into, vehicles in such routine traffic stops)

State v. Reynolds, 144 Wn.2d 282 (2001) Oct. '01 LED:08 (Officer may order those in the vehicle to get out if anyone in the vehicle is going to be subjected to a custodial arrest)

7. *When may MV's be "frisked"?*

Michigan v. Long, 463 U.S. 1032 (1983) Sept. '83 LED:08 (Frisk under same safety standard as governs frisk of person); *see also* State v. Belieu, cited above at I.C.5.

State v. Glossbrener, 146 Wn.2d 670 (2002) Sept. '02 LED:07 (Frisk of car held not justified under objective standard where, after observing driver lean over front-passenger seat while pulling over at outset of traffic stop, officer did not frisk car immediately, but instead: (1) left suspect in suspect's car and returned to patrol car to run radio check for warrants, and then (2) did FST's – which suspect successfully performed – before calling for back-up and doing a car frisk)

8. *When is a residence or a business premises subject to "protective sweep"?*

Maryland v. Buie, 494 U.S. 325 (1990) May '90 LED:02 (Officer safety is the justification – there must be individualized reasonable suspicion that others may be in residence and may pose danger to officers)

State v. Boyer, 124 Wn. App. 593 (Div. III, 2004) Feb. '05 LED:10 (Court of Appeals holds that there was not individualized reasonable suspicion that others were in residence and could pose danger to officers)

9. *Are there cross-gender pat-down considerations?*

No, not in a non-jail/prison setting, but be reasonable in word and deed, and try generally to use same- gender officer when same-gender officer is present.

10. *When does "plain feel" justify seizure of evidence?*

Minnesota v. Dickerson, 508 U.S. 366 (1993), Sept. '93 LED:15; State v. Hudson, 124 Wn.2d 107 (1994), Oct. '94 LED:06 (U.S. Supreme Court and Washington Supreme Court state restrictive standard for "plain feel" seizure; officer must recognize nature of contraband with tactile sense at or before completion of frisk and without turning the probe into a search for anything but weapons). **But see State v. Garvin, 166 Wn.2d 242 (2009) July '09 LED:18 (Seizure of drugs based on "plain feel" through pants coin pocket held unlawful because officer manipulated baggie after eliminating the baggie as a possible weapon)**

11. ***May frisk be done by emptying suspects' pockets, rather than patting them?***

No. State v. Fowler, 76 Wn. App. 168 (Div. III, 1994) May '95 LED:14 (No "single scoop")

12. ***Are there limits on when officer can accompany an arrestee into private premises following arrest?***

Yes. State v. Chrisman, 100 Wn.2d 814 (1984) April '84 LED:01 (Under article I, section 7 of the Washington constitution, the mere fact of an MIP arrest doesn't justify entry into 11th floor WSU dorm room in the absence of other articulable suspicions; the Chrisman decision is limited somewhat by its factual context, but officers should get consent or at least warn a person who wants to re-enter his or her private residence following arrest – for example, to put on pants, to let the cat out, or put out the fire in the fireplace – that the officer will retain control of the arrestee upon re-entry of the residence)

13. ***Frisking during warrant execution – see II.B.2 below***

14. ***Securing weapons***

State v. Cotten, 75 Wn. App. 669 (Div. II, 1994) May '95 LED:15 (Weapons may always be secured while officers conduct lawful search)

D. Arrest Authority

See also II.D. and E below re: "search incident to arrest"

1. ***Misdemeanor presence rule and other limits on arresting or citing persons under RCW 10.31.100 and CrR 2.11 and RCW 46.63.030)***

State v. Green, 150 Wn.2d 740 (2004) March '04 LED:08; May '04 LED:02 (Washington Supreme Court held as a matter of statutory interpretation that failure to transfer title is not a "continuing offense," and therefore arrest and "search incident" were unlawful); State v. Walker, 129 Wn. App. 572 (Div. III, 2005) Nov. '05 LED:22 (Court of Appeals extended Green's arrest restriction to Terry stops). **But the 2008 Washington Legislature nullified the appellate court rulings in Green and Walker by expressly providing that failure to transfer title is a continuing offense.**

State v. Holmes, 135 Wn. App. 588 (Div. II, 2006) Dec. '06 LED:19 (Custodial arrest upheld for driving with expired trip permit because this is an offense with driving as an element and the crime was being committed in the officer's presence)

Staats v. Brown, 139 Wn.2d 757 (2000) Dec. '00 LED:21 (Under CrRLJ 2.1(b), criminal citation may not be issued at the scene by an officer unless the officer would be justified in making a custodial arrest for that crime)

State v. Magee, 167 Wn.2d 639 (2009) Feb. '10 LED:23 (Where the infraction of second degree negligent driving did not occur in the presence of a law enforcement officer, officer could not lawfully issue a citation for that infraction – a concurring opinion by one Supreme Court Justice notes that prosecutor could have cited/charged the violator)

State v. Ortega, 177 Wn.2d 116 (March 21, 2013) June '13 LED:19 (Arrest for gross misdemeanor violation of Seattle drug-loitering ordinance held not to meet RCW 10.31.100 misdemeanor presence requirement, because the crime did not occur in the presence of the officers who made the arrest, and the observing officer was not involved in making the arrest; Court declares that "collective knowledge" or "police team" rule does not apply in analyzing whether misdemeanor presence requirement is met)

Ford v. City of Yakima, 706 F.3d 1188 (9th Cir., Feb. 8, 2013) June '13 LED:16 (Even though probable cause existed for the plaintiff's arrest, the plaintiff's section 1983 claim that the arrest violated his First Amendment right to be free from police acts motivated by retaliation motive must go to trial. Plaintiff, who was violating a city noise ordinance, was repeatedly told that if he cooperated and did not "run his mouth" he would be released with a ticket, but he would be booked if he "acted a fool." Beware of the Ford Court's discussion of CrRLJ 2.1(b)(2)(ii)"s "release factors" - - concerns about 1) ID, 2) protecting safety or property or peace, 3) lack of ties to community or other indicators of non-response to citation, or 4) prior FTAs - - as a limitation on discretionary arrest)

2. *Extraterritorial arrest authority*

a. 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) Upon the prior written consent of the sheriff or chief of police in whose primary territorial jurisdiction the exercise of the powers occurs; (2) In response to an emergency involving an immediate threat to human life or property; (3) 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) When the officer is transporting a prisoner; (5) When the officer is executing an arrest warrant or search warrant; or (6) When the officer is in fresh pursuit, as defined in RCW 10.93.120. [NOTE: fresh pursuit is authorized both as to criminal offenses and as to traffic infractions]

State v. King, 167 Wn.2d 324 (2009) Dec. '09 LED:21 (Reckless driving does not qualify per se as "an emergency involving an immediate threat to human life or property" under RCW 10.93.070(2); particular facts of case must be assessed)

NOTE: If an officer makes an arrest outside the officer's territory, then the officer is limited in authority to that of a citizen making an arrest. See State v. Harp, 13 Wn. App. 239 (Div. I, 1975).

b. Beware of tagging along on other-jurisdiction warrant without consent letter

In State v. Bartholomew, 56 Wn. App. 617 (Div. I, 1990) April '90 LED:03, the Court of Appeals held that RCW 10.93.070(5) did not authorize Seattle P.D. officers – who were not part of a task force with Tacoma and were not acting under a consent letter from the Tacoma chief or Pierce County Sheriff – to tag along on a Pierce County warrant being executed in Tacoma by Tacoma P.D. officers. In State v. Rasmussen, 70 Wn. App. 853 (Div. I, 1993) April '94 LED:12, however, the Court held that officers with a consent letter from the chief of police or sheriff of another jurisdiction are not restricted by the rationale of Bartholomew from taking action in that other jurisdiction.

3. *Arrest in Washington for felonies committed in other states*.

RCW 10.88.330 – Arrest of person charged with felony in the courts of another state is expressly authorized by this statute.

Common law – There is no Washington case directly deciding the issue but there is case law elsewhere that an arrest can be made based solely on probable cause as to felony committed in other state (State v. Klein, 130 N.W.2d 816 (Wis. 1964)), but there is some suggestion in cases from other jurisdictions that express statutory authority is required (note that RCW 10.31.100 may or may not qualify as such statutory authority) – if at all practical, get legal advice in the case at hand before arresting without a warrant in this circumstance.

II. SEARCH WITH, WITHOUT A WARRANT

A. Defining "Search" – Privacy Protection; Plus Understanding The Concepts Of "Open View" And "Plain View"

1. *"Open view" and "plain view" concepts*

Many Washington appellate court cases refer to "open view" as the test of whether a "search" has occurred for constitutional purposes. No "search" occurs if the officer is lawfully in a position outside of a protected private area and is able to make observations into the protected area using only his or her own senses or using only permissible sense enhancements. Such "open view" observations do not justify immediate entry into the protected area unless one of the exceptions to the constitutional search warrant requirement (e.g., exigency) apply. **See State v. Jones, 163 Wn. App. 354 (Div. II, 2011)**

Feb. '12 LED:19; State v. Lemus, 103 Wn. App. 94 (Div. III, 2000) Feb. '01 LED:02; **see also discussion of this issue in January 2011 LED at page 3 and in April 2011 LED at pages 13-14.**

"Plain view" justifies immediate seizure of evidence. It is an exception to the search warrant requirement. Plain view was formerly said to have three elements: (1) lawful presence of an officer in the area; (2) immediate recognition (under a probable cause standard) of an item as evidence or contraband; and (3) *inadvertence in coming across the item*. In Horton v. Calif., 496 U.S. 128 (1990) Aug. '90 LED:02, the U.S. Supreme Court held that there is no third element of "inadvertence." In State v. Goodin, 67 Wn. App. 623 (Div. II, 1992) March '93 LED:17, and in State v. Hoggatt, 108 Wn. App. 257, 270 (Div. II, 2001), Division Two of our Court of Appeals agreed. *See also* the State Supreme Court decision in State v. Hudson, 124 Wn.2d 107 (1994) Oct. '94 LED:06 (State Supreme Court recognizes Horton test in "plain feel" case. (NOTE: "Plain feel" discussed above at I.C.10.) But beware: Washington appellate decisions occasionally, in contexts where it does not matter, erroneously note an "inadvertence" element of the "plain view" test.

2. *Entry of curtilage of residence not apparently open to the public (i.e., for which entry there is no implied invitation) is a "search"; time of day and nature of police activity can make a difference as to whether there is implied invitation.*

Definition of curtilage: At common law and under the Fourth Amendment, the curtilage of a residence is the area to which extends the intimate activity associated with the sanctity of home and the privacies of life and therefore has been considered part of the home itself for Fourth Amendment purposes. Courts have defined by reference to the factors that determine whether an individual reasonably may expect that an area immediately adjacent to the home will remain private. No single factor is determinative of the question of the scope of the curtilage: whether the place searched is within the curtilage is to be determined from the facts, including its proximity or annexation to the dwelling, its inclusion within the general enclosure surrounding the dwelling (e.g., fenced and gated for privacy), and its use and enjoyment as an adjunct to the domestic economy of the family. State v. Pourtes, 49 Wn. App. 579 (Div. III, 1987).

The U.S. Supreme Court decision in Jardines holds that a resident cannot be deemed to have extended an implied invitation for officers to go into the curtilage of the front porch where the sole reason for entry into the area was investigation and not to contact a person at the residence. The controlling opinion's trespass-based 4th Amendment theory holds that police exceeded the scope of the home resident's implied invitation for visitors to come onto front porch where officer and K-9 went onto porch, not for the purpose of talking to the resident, but instead for the objectively manifested purpose of conducting search, by having K-9 sniff for marijuana grow. Florida v. Jardines, ___U.S. ___, 133 S. Ct. 1409 (March 26, 2013) June '13 LED:06

State v. Hoke, 72 Wn. App. 869 (Div. I, 1994) Jan. '95 LED:06 (Entry of brush-and-junk-shielded yard of home unlawfully invaded "curtilage" because officer went farther than a

reasonably respectful citizen would go). COMPARE State v. Gave, 77 Wn. App. 333 (Div. II, 1995) Aug. '95 LED:14 ("No trespassing" signs alone generally don't establish constitutional privacy protection that would prohibit officers from knocking on the front door during the daytime) with State v. Boethin, 126 Wn. App. 695 (Div. II, 2005) June '05 LED:05 (Officer's leaving of the porch area to sniff at the closed doors of an adjoining garage invaded the privacy rights of the resident under article I, section 7 of the Washington constitution).

State v. Ross, 141 Wn.2d 304 (2000) Sept. '00 LED:02 (Late-night hour, lack of intent to contact resident, and lack of "legitimate police business" added up to a violation of Fourth Amendment and state constitutional privacy rights where undercover officers went into the impliedly open rear driveway of a residence at midnight to sniff at the garage for a suspected "marijuana grow")

State v. Dyreson, 104 Wn. App. 703 (Div. III, 2001) May '01 LED:15 (Enclosed garage gets protection against warrantless police entry even though: (1) door open, (2) loud music inside, and (3) renter directed officer to look for owner-resident inside garage)

3. *Unlike Fourth Amendment, there is no broad "open fields" exception to privacy protection under Washington constitution*

State v. Johnson, 75 Wn. App. 692 (Div. II, 1994) Jan. '95 LED:19 (Rural farm owner with fenced and gated property, posted with "No Trespassing" signs, had Washington state constitutional privacy protection even though the area was not within the home's curtilage)

State v. Thorson, 98 Wn. App. 528 (Div. I, 1999) Feb. '00 LED:02 (Unfenced, un-posted, heavily-wooded property with orchard on remote rural island was protected from warrantless search under article I, section 7 of the Washington constitution; community expectations on island appear to be a significant factor in the Court's ruling; the area was not within the home's curtilage and not a protected area under the Fourth Amendment)

State v. Littlefair, 129 Wn. App. 330 (Div. II, 2005) Nov. '05 LED:13 (Privacy protection under article I, section 7 of the Washington constitution extended to unfenced back yard area of two-acre parcel, where homeowner had posted "private property" and "no trespassing" signs alongside the roadway approaching his home, and the officer entered the backyard area around midnight dressed in camouflage)

State v. Jessen, 142 Wn. App. 852 (Div. III, 2008) March '08 LED:12 (Where 1) the entrance to Jessen's driveway was posted with "no trespassing" and "keep out" signs, 2) the entrance had a closed (though unlocked) gate, 3) the property was in a remote area, and 4) Jessen's secluded home could not be seen from the driveway entrance or from any neighboring properties, the home was not "impliedly open to the public" for purposes of article I, section 7 of the Washington constitution, and hence an officer could not lawfully approach the home in midday to talk to the resident as a possible witness to a theft)

4. *Aerial over-flight*

State v. Wilson, 97 Wn. App. 578 (Div. III, 1999) Jan. '00 LED:07 (Naked-eye observation from airplane at lawful elevation of 500 feet of marijuana grow in roofless shed did not violate state constitutional privacy rights of property owner; officers' observations gave them probable cause that supported issuance of a search warrant)

5. *Open business premises*

Dodge City Saloon v. Liquor Control Board, 168 Wn. App. 388 (Div. II, May 15, 2012) September '12 LED:13 (Dodge City Saloon has no reasonable privacy interest in areas of its licensed premises that it actively invites the public to enter)

6. *Trespassing camper on public land*

U.S. v. Sandoval, 200 F.3d 659 (9th Cir. 2000) Aug. '00 LED:03 (9th Circuit holds that camper trespassing on federal BLM land had a privacy interest in his makeshift abode in cave; case law in Washington and elsewhere is mixed on the question of the arguable privacy interest of a trespasser in his or her tent, "Hoovertown" shack, cave, cardboard abode, or other makeshift home)

7. *Second look at items in jail property box*

State v. Cheatam, 150 Wn.2d 626 (2003) Feb. '04 LED:05 (No search warrant was needed for police to take a "second look" in the jail property room at the soles of shoes that had been taken from an arrestee at the time of booking)

8. *Storage unit privacy*

State v. Bobic, 140 Wn.2d 250 (2000) June '00 LED:14 (While a storage unit renter generally has a right of privacy as to items in unit, naked-eye observation by officers, without a flashlight, through a pre-existing hole in the storage unit wall into neighboring storage unit was not a search)

9. *Toilet stall privacy*

Tukwila v. Nalder, 53 Wn. App. 746 (Div. I, 1989) Sept. '89 LED:17 (Holds it a privacy invasion for officer to peer over toilet stall door on a hunch that its single occupant was engaged in masturbation); Compare State v. White, 129 Wn.2d 105 (1996) July '96 LED:15 (Holding that toilet stall in which fleeing suspect was hiding is not a protected private area for purposes of Payton v. New York rule restricting entry of private premises to make warrantless arrest)

10. *Using a flashlight or binoculars is not a "search" under ordinary circumstances, but there are limits*

State v. Rose, 128 Wn.2d 388 (1996) March '96 LED:02 (Taking flashlight onto front porch and shining it into uncurtained window accessible from porch not a search)

State v. Jones, 33 Wn. App. 275 (Div. I, 1982) Feb. '83 LED:13 (Officers OK in watching parking lot cocaine use activity through binoculars – it is OK to use binoculars to observe activity that could be lawfully observed with naked eye but for need to maintain cover)

11. *Manipulating soft luggage may be a "search"*

Bond v. U.S., 529 U.S. 334 (2000) June '00 LED:12 (Manipulating soft luggage taken from overhead rack during bus sweep held to be "search")

12. *Warrant needed to get telephone long distance records and unlisted phone subscriber information under Washington constitution (presumably, similar privacy protection is extended to records of bank customers where the bank is not a victim of the customer, though there is no Washington case on point; Fourth Amendment does not extend privacy protection to bank records)*

State v. Gunwall, 106 Wn.2d 54 (1986) Aug. '86 LED:04 (Long distance toll call records); State v. Butterworth, 48 Wn. App. 152 (Div. I, 1987) Aug. '87 LED:19 (unlisted subscriber information)

13. *Warrant needed to search garbage cans under Washington constitution*

State v. Boland, 115 Wn.2d 571 (1990) Jan. '91 LED:02; State v. Sweeney, 125 Wn. App. 881 (Div. III, 2005) April '05 LED:15 (Boland and Sweeney involved garbage can searches at single-family residences) [NOTE: communal dumpsters, however, do not generally get same privacy protection – *see* State v. Rodriguez, 65 Wn. App. 409 (Div. III, 1992) Oct. '92 LED:06]

14. *Warrant needed to use thermal detection device on residence under Washington constitution*

State v. Young, 123 Wn.2d 173 (1994) April '94 LED:02 (Warrant required for use of thermal detection device on residence); see also Kyllo v. U.S., 533 U.S. 27 (2001) Aug. '01 LED:07 (Fourth Amendment also bars warrantless use of thermal detection device on residence)

15. *Using a drug-sniffing dog to check a package in transit is not deemed a search of the package, but using a drug-sniffing dog at a residence or to sniff people apparently requires a search warrant under the Washington constitution, article I, section 7*

State v. Dearman, 92 Wn. App. 630 (Div. I, 1998) Nov. '98 LED:06 (Holding that use of drug-sniffing dog at residence required search warrant; distinguishing and not disapproving prior decisions involving dog sniffs of packages in transit, including State v.

Gross, 57 Wn. App. 549 (1990) involving a warrantless dog sniff of a Federal Express package).

B.C. v. Plumas Unified Sch. Dist., 192 F.3d 1260 (9th Cir. 1999) Dec. '99 LED:12 (Using drug-dog to randomly sniff students at high school violates Fourth Amendment)

Illinois v. Caballes, 125 S.Ct. 834 (2005) March '05 LED:03, April '05 LED:02 (United States Supreme Court rules that using dog outside stopped car did not violate the Fourth Amendment of the U.S. Constitution, but U.S. Supreme Court was focused on "seizure" issue not on "search/privacy" issue; a different ruling might be made under article I, section 7 of the Washington constitution, either on seizure or search rationale, but there are as yet no Washington appellate court decisions directly on point)

16. *Checking DOL and WACIC records is not a "search"*

State v. McKinney, 148 Wn.2d 20 (2002) Jan. '03 LED:05 (Random checking of license plates against DOL database and then checking that information against WACIC database does not violate privacy rights of citizens under article I, section 7 of WA constitution)

17. *Abandoned property is not protected*

"Abandonment" for search and seizure purposes is different from abandonment under property law. Leaving/discarding an item in a public area (e.g., in the bushes in the park) with subjective intent to return and retrieve the item may not be abandonment of one's property interest in the item, but it may be abandonment for search and seizure purposes because it is abandonment of any reasonable expectation of privacy as against members of the public or the police discovering and seizing the item. See discussion in LaFave, Search and Seizure, A Treatise on the Fourth Amendment, section 2.6 (4th Ed., 2004)

State v. Whitaker, 58 Wn. App. 851 (Div. I, 1990) Nov. '90 LED:07 (Suspect's tossing of illegal drugs as officers approached held to be abandonment of the drugs where no police misconduct caused the tossing); State v. Kealey, 80 Wn. App. 162 (Div. II, 1995) May '96 LED:05 (Purse left in store not "abandoned" because owner did not discard it, but OK under "community caretaking function" for police to look for ID to help find owner); State v. Evans, 159 Wn.2d 402 (2007) March '07 LED:15 (Locked briefcase that was in the suspect's pickup truck cab was not "abandoned" where the truck was parked in the suspect's driveway, police lacked independent authority to search the truck or briefcase, the suspect denied ownership of the briefcase (denial of ownership of an item does not alone establish abandonment where item is in a protected private area), and he said that he could not consent to a seizure or search of the briefcase).

18. *"Day visitor" to home is not protected by Fourth Amendment, but Washington officers beware*

Minnesota v. Carter, 525 U.S. 83 (1998) Feb. '99 LED:04 (Coke dealers making consenting two-hour use of home to process product were not entitled to Fourth

Amendment protection – NOTE: Washington appellate courts would probably find privacy protection under article I, section 7 of the Washington constitution for such consensual visitors**);** State v. Link, 136 Wn. App. 685 (Div. II, 2007) March '07 LED:18 (Man who occasionally slept over at woman's house, had a key, and kept some personal effects there, had right of privacy in those premises under Fourth Amendment)

19. *Installing and tracking GPS system in suspect's car requires search warrant*

State v. Jackson, 150 Wn.2d 521 (2003) Nov. '03 LED:02 (In case in which officers *did* obtain a search warrant to install and track a global position system (GPS) tracking device, the Washington Supreme Court holds in an "independent grounds" interpretation of article I, section 7 of the Washington constitution that a search warrant is required for such law enforcement intrusion; the Court upheld the warrant in this case, ruling that probable cause supported the search warrant.) (Note that in U.S. v. Jones, 132 S.Ct. 945 (2012) March '12 LED:07, in a trespass-based ruling that is less broad than the Washington Supreme Court's constitutional ruling in Jackson, the U.S. Supreme Court placed some limits under the Fourth Amendment on law enforcement activity related to attaching GPS devices on suspects' vehicles and tracking the vehicles in those circumstances)

20. *Checking motel guest register, even with consent of motel operator, does not require a search warrant, but officers must have an objective individualized basis for requesting access*

State v. Jorden, 160 Wn.2d 121 (2007) July '07 LED:21 (Random check held prohibited under article I, section 7 of Washington constitution), In re Personal Restraint of Nichols, 171 Wn.2d 370 (2011) June '11 LED:21 (Officers held to have reasonable individualized suspicion of criminal activity (drug dealing) by a motel guest in his room, and therefore the officers were justified in requesting motel register information from motel staff)

21. *Employee's employer-provided work computer at office*

U.S. v. Ziegler, 474 F.3d 1184 (9th Cir. 2007) March '07 LED:13 (Because this child porn defendant had a lock and key for his office, and he had a personal password for his workplace computer, this worker for a private employer had a privacy right in his workplace computer against warrantless governmental search. However, his employer could and did lawfully consent to a government search where the employer: 1) owned the computer, 2) had a prohibition against certain kinds of usage, and 3) communicated to employees and carried out a policy and practice of routinely monitoring computer use and internet use, and made this clear in training.)

City of Ontario, Calif. v. Quon, 130 S.Ct. 2619 (2010) Aug. '10 LED:02 (Police employer's warrantless review of officer's pager transcript held reasonable as a non-investigatory, work-related search; Supreme Court avoids more difficult technology-privacy-search questions)

22. *Administrative subpoenas*

State v. Miles, 160 Wn.2d 236 (2007) Nov. '07 LED:07 (Use by State Department of Financial Institutions of statutorily authorized administrative subpoena to obtain subject's bank records violates Washington constitution; Washington Legislature lacks the constitutional authority to grant subpoena power to executive branch agencies)

B. Search With A Warrant – Select Cases On Writing And Executing

For POS training, Section B has been shortened a bit from CJTC Internet version.

1. *Officer misstatements in the affidavit (reckless or worse)*

Chism v. Washington, 655 F.3d 1106 (9th Cir. 2011) Jan. '12 LED:16 (Affidavit by law enforcement in child porn investigation involving computer search allegedly contained reckless material omissions and inaccurate statements)

2. *Frisking during warrant execution*

State v. Broadnax, 98 Wn.2d 289 (1982) Feb. '83 LED:02 ("Presence plus" rule: individualized articulable reason for frisking those present needed even in narcotics warrant execution); State v. Lennon, 94 Wn. App. 573 (Div. III, 1999) May '99 LED:04 (No justification to frisk non-occupant visitor who came to the front door as the warrant was being executed)

3. *Other execution concerns*

Fourth Amendment authority under Michigan v. Summers to seize residence occupants who are found in immediate vicinity of premises when execution of search warrant begins does not authorize seizing them if they have left the immediate vicinity before execution of search warrant begins; two blocks away was ruled not "immediate vicinity." Bailey v. United States, ___U.S. ___, 133 S. Ct. 1031 (Feb. 19, 2013) May '13 LED:03

Excessive force claims against officers executing search warrant get different assessment for claims by non-threatening children than claims by adults. Avina v. U.S., 681 F.3d 1127 (9th Cir., June 12, 2012) November '12 LED:10

4. *Boilerplate problems ("all vehicles"; "all persons")*

State v. Rivera, 76 Wn. App. 519 (Div. II, 1995) April '95 LED:05 (Boilerplate in warrant to search "all vehicles present" was not justified with particularity by affidavit); State v. Carter, 79 Wn. App. 154 (Div. II, 1995) Nov. '95 LED:10 (Boilerplate in warrant to search "all persons present" was not justified with particularity by affidavit)

5. *Probable cause; Plus staleness concerns*

State v. Thein, 138 Wn.2d 133 (1999) Aug. '99 LED:15 (Officer-affiant's statement about experience and training re drug dealers' habits alone won't establish link of drug-dealing to a suspect's home); State v. Maddox, 152 Wn.2d 499 (2004) Dec. '04 LED:18 (If officers learn new information bearing on probable cause between the time of issuance of the search warrant and the time of execution of the search warrant, the warrant is valid without further pre-execution review or authorization from the issuing court so long as the new information does not completely negate the existence of probable cause to search)

State v. Lyons, 174 Wn.2d 354 (2012) June '12 LED:13 (Affidavit failed to establish point in time when confidential informant observed marijuana grow in target premises)

Canine-based probable cause: U.S. Supreme Court holds that results of a drug-dog's field work are not mandatory for determining probable cause to search under Fourth Amendment; totality of circumstances must always be considered. Florida v. Harris, ___U.S. ___, 133 S. Ct. 1050 (Feb. 19, 2013) May '13 LED:07

C. Warrantless Entry Of Private Premises To Arrest

1. *Arrestee's own residence (Payton v. New York rule)*

Payton v. N.Y., 445 U.S. 573 (1980) June '80 LED:01 (In the absence of exigent circumstances, fresh pursuit, or a search warrant, officers seeking to make a forcible (non-consenting) entry to arrest a person from his or her residence must have: (1) an arrest warrant + (2) reason to believe the prospective arrestee is at home)

U.S. v. Gorman, 314 F.3d 1105 (9th Cir. 2002) March '03 LED:10 (The Ninth Circuit of the U.S. Court of Appeals held that the "reason to believe" test of Payton is a "probable cause" standard)

State v. Holeman, 103 Wn.2d 426 (1985) April '85 LED:11. (Ordering the person to come out of the house or reaching through the threshold to grab the prospective arrestee is the equivalent of a forced entry of the residence. Knocking at the door and requesting either voluntary consent to entry or voluntary exit by resident is permitted, but it is a legally risky tactic, because the person at the door can simply refuse consent.

Fisher v. City of San Jose, 558 F.2d 1069 (9th Cir. 2009) April '09 LED:04 (In March of 2009, a 6-5 majority of an 11-judge panel reversed an earlier 3-judge ruling and held that no arrest warrant or search warrant is required in a barricaded-person situation during the time that officers are attempting to deal with the situation; exigency is deemed to exist throughout the process, and therefore ordering the person out or going in and getting the barricaded person is not subject to the Payton rule.)

State v. Hatchie, 161 Wn.2d 390 (2007) Oct. '07 LED:06 (Payton rule applies under Washington constitution for entry to arrest the subjects of misdemeanor and gross

misdemeanor warrants, but the Washington rule is not entirely consistent with the federal constitution's Fourth Amendment Payton rule in this context. The Hatchie Court makes two significant rulings: 1) a misdemeanor arrest warrant justifies forcible entry of a person's own premises to arrest if officers have PC to believe the arrestee is present at the time of entry, but the Washington courts: a) will require that the subject of the warrant was actually home at the time of the entry; b) will review to see if the entry to arrest was pretextual; and c) will review the time and manner of the entry to determine reasonableness. Also, the Hatchie Court concludes that the address listed on the arrest warrant does not control in determining what residence constitutes the arrestee's present residence – what controls is the information, i.e., probable cause, that officers have at the time of entry concerning the arrestee's current place of residence)

2. *Third party's residence (Steagald v. U.S. rule)*

Steagald v. U.S., 451 U.S. 204 (1981) May-Aug. '81 LED:01 (In the absence of exigent circumstances or fresh pursuit, officers seeking to make a forcible (non-consenting) entry to arrest a person from a third party's residence must have a search warrant)

3. *Hot pursuit of misdemeanor offender into residence*

If officer has probable cause to believe that a person has committed DUI, or another serious crime with alcohol influence as element of crime, and the person tries to flee into a home, the officer apparently has the authority to forcibly enter the home and make an arrest. State v. Griffith, 61 Wn. App. 35 (Div. III, 1991) Sept. '91 LED:18 (Noting the special exigency of likely lost evidence – i.e., dissipation of alcohol – if officer has probable cause to arrest for DUI, not some more minor offense, before suspect flees into residence).

See also State v. Wolters, 133 Wn. App. 297 (Div. II, 2006) July '06 LED:17 (Holding that where officer had PC to arrest a DUI suspect who would not take his hands out of his pockets, and who then fled into his home, under all of the circumstances the officer was justified in making forcible warrantless residential entry to arrest the DUI suspect).

But see State v. Hinshaw, 149 Wn. App. 747 (Div. III, 2009) July '09 LED:21 (Holding that PC as to a DUI committed within the past hour, plus the fact that alcohol dissipates in the body, did not add up to exigent circumstances such as to justify officer's reaching through open doorway to arrest man); and see also Hopkins v. Bonvicino, 573 F.3d 752 (9th Cir. 2009) May '11 LED:06 (officers held not justified in entry of residence based on their speculation that witness statement that suspect smelled of alcohol supported a conclusion that the resident may be near a diabetic coma).

And also beware of Sims v. Stanton, 706 F.3d 954 (9th Cir., Dec. 3, 2012) Feb. '13 LED:03, March '13 LED:04 (Warrantless entry into curtilage (high-fence-and-gate-enclosed yard) in gang neighborhood in hot pursuit of suspect where probable

cause to arrest was for only disobeying order to stop was not justified under either exigent circumstances or emergency exceptions to the warrant requirement)

When there is no articulable exigency, it is much more difficult to argue that forcible, warrantless entry is permitted to carry out the probable cause arrest of one who is suspected of committing some other misdemeanor. *Compare* Seattle v. Altshuler, 53 Wn. App. 317 (Div. I, 1989) April '89 LED:17 (criminal case) with Altshuler v. Seattle, 63 Wn. App. 389 (Div. I, 1991) (Altshuler II is a civil case not reported in LED. Altshuler II suggests that Altshuler I's criminal case opinion may have been too restrictive regarding hot pursuit issue, but leaves the issue in doubt).

See also State v. Bessette, 105 Wn. App. 793 (Div. III, 2001) Aug. '01 LED:14 (Holds that officer in hot pursuit of MIP suspect did not have exigent circumstances justifying non-consenting, warrantless entry of third party's residence to arrest suspect)

D. Warrantless Search Of Vehicle Passenger Area Incident To Arrest

INTRODUCTORY NOTE: In Arizona v. Gant, 129 S.Ct. 1710 (2009) June '09 LED:13, the U.S. Supreme Court revised its interpretation of the Fourth Amendment and significantly restricted the authority of officers to conduct warrantless searches of the passenger areas of motor vehicles incident to arrests of occupants. The Gant Court noted that the rationale of allowing search incident to arrest is to prevent a suspect from obtaining a weapon and preserving possible evidence that a suspect might access and destroy or compromise. The Gant Court concluded that where an arrestee has been fully secured in handcuffs in the back seat of a locked patrol car, these rationales do not support allowing a search of the vehicle incident to arrest (though Gant did allow a Fourth Amendment exception in the circumstance where officers search the vehicle's passenger compartment based on reason to believe it contains evidence of the crime of arrest).

The June 2009 LED reported that there would be uncertainty for the foreseeable future regarding some aspects of the new Fourth Amendment rule. The LED then gave a best guess regarding the new basic Fourth Amendment rule for a warrantless motor vehicle search incident to arrest in light of Gant and in light of prior Washington appellate court decisions interpreting article I, section 7 of the Washington constitution. Within the next year or so after Gant was issued, the Washington Supreme Court issued three separate opinions addressing the question of whether the Washington constitution imposes greater restrictions than the Fourth Amendment on the trigger to conducting vehicle searches incident to arrest (the greater restriction of the Washington constitution would reject the Fourth Amendment exception for the circumstance where officers search for evidence related to the crime of arrest).

Those Washington Supreme Court decisions were State v. Patton, 167 Wn.2d 379 (2009) Dec. '09 LED:17; State v. Valdez, 167 Wn.2d 761 (2009) Feb. '10 LED:11;

and State v. Afana, 169 Wn.2d 169 (2010) Aug '10 LED:10. The lead opinions in those three cases were not written as clearly or consistently as they might have been, and the cases did not involve facts that necessarily would lead to a definitive holding interpreting article I, section 7 of the Washington constitution as constricting authority of Washington officers to conduct searches incident to arrest even further than does the Fourth Amendment under Gant. But it appeared to most legal commentators that a majority of the Washington Supreme Court justices were endorsing in the three cases a more restrictive Washington constitutional rule that would not allow.

In its decision issued April 5, 2012 in State v. Snapp, 174 Wn.2d 177 (2012) May '12 LED:25, the Washington Supreme Court cleared up the confusion created by its three decisions in Patton, Valdez and Afana. The Snapp Court clearly created a more restrictive rule under article I, section 7 of the Washington constitution than the U.S. Supreme Court created under the Fourth Amendment in Gant.

Using "strikeout" for deletions of Gant-authority language and underlining for new language of the Washington rule under Snapp to show how the Snapp decision has shrunk Washington officers' authority even further than Gant did under the Fourth Amendment, the Washington rule is as follows:

> **After officers have made a custodial arrest of a motor vehicle occupant – including searching the arrestee's person – and have secured the arrestee in handcuffs in a patrol car, and while the vehicle is still at the scene of the arrest, they may automatically search the vehicle – without a search warrant, without acutal exigent circumstances, and without need for justification under any other exception to the search warrant requirement – NEVER.**
>
> **~~in the passenger compartment of the vehicle and any unlocked containers in that compartment if and only if A) they proceed without unreasonable delay; and B) they have a reasonable belief that the passenger compartment contains evidence of: 1) the crime(s) for which the officers originally decided to make an arrest, or (2) any other crime(s) for which the officers have developed probable cause to arrest before beginning the search of the passenger compartment.~~**

It is probably no consolation to any current Washington law enforcement officers, but the Snapp Court's "independent grounds" ruling regarding MV search incident under article I, section 7 in Snapp had been seen before in Washington. Essentially the same "independent grounds" rule was created by the Washington Supreme Court almost 30 years earlier in State v. Ringer, 100 Wn.2d 686 (1983). That search incident ruling in Ringer (along with the Court's "independent grounds" elimination of the PC-car-search rule of the "Carroll Doctrine") brought an immediate hue and cry from many Washingtonians who saw Ringer as undermining law and order. Included in the response was an unsuccessful

initiative campaign involving the combined efforts of the AGO, prosecutors and law enforcement interests seeking to amend the Washington constitution to prevent any further personal-values-driven "independent grounds" rulings (the campaign was inspired by similar constitutional amendment campaigns that have succeeded long-term in limiting "independent grounds" rulings in California and Florida).

While the initiative campaign that was sparked by Ringer did not, unfortunately, succeed, the campaign may have gained the attention of the Washington Supreme Court. Less than three years after deciding Ringer, the Washington Supreme Court reverted back to essentially its pre-Ringer MV search incident rule in State v. Stroud, 106 Wn.2d 144 (1986) (though not then or thereafter did the Supreme Court restore the PC-car-search rule of the "Carroll Doctrine." And now in Snapp the Court has overturned Stroud). There has been no initiative campaign this time around.

Under the Washington constitution as interpreted in Snapp, there is essentially no authority to search a vehicle incident to arrest once officers have fully secured the arrestee-occupant in handcuffs in a patrol car, so much of the remainder of this subsection II.D. is largely only of historical interest to officers whose searches are reviewed under article I, section 7 of the Washington constitution. Nonetheless, we have only revised this section II.D. of the outline (1) to delete or revise material that is inconsistent with Snapp and Gant, but (2) to retain material that is not squarely inconsistent with Snapp and Gant. The court decisions that we cite and describe, of course, must be read with Snapp and Gant in mind.

1. *There must first be an "arrest"*

State v. O'Neill, 148 Wn.2d 564 (2003) April '03 LED:03 (Under article I, section 7 of Washington constitution, the search may not precede the arrest in order for the search to be deemed "incident to arrest" – Officers must do the arrest formally "by the numbers" before they search the vehicle or person under search incident authority)

State v. Radka, 120 Wn. App. 43 (Div. III, 2004) March '04 LED:11 (Putting suspended driver in back seat of patrol car and telling him he is under arrest held not a "custodial arrest" for "search incident" purposes where he was not frisked, searched, or handcuffed, and he was allowed to use cell phone while sitting in the patrol car)

2. *Crimes for which search incident of vehicle or of a person or of the person's effects is permitted*

State v. Pulfrey, 154 Wn.2d 517 (2005) Aug '05 LED:09 (Washington Supreme Court holds that in those circumstances where an officer has discretion whether to make a custodial arrest – or instead to cite and release – as a standard practice, the officer may make the custodial arrest, conduct a search incident to that arrest, and, after completing the search, exercise discretion whether to cite and release the detainee or instead to take

the detainee in for booking. Note, however, that the Washington Supreme Court did not address whether a more restrictive rule is required under article I, section 7 of the Washington constitution, nor was there a constitutional pretext issue presented in the Pulfrey case.) Consider also the discussion of searches incident to what some call "non-booking arrests" in the March 2003 LED article (pages 2-6) titled: "Custodial arrest and search incident to arrest of those arrested for driving while license suspended."

State v. Reding, 119 Wn.2d 685 (1992) Dec. '92 LED:17 (Declares that custodial arrest OK for all of the traffic crimes which are listed in RCW 10.31.100(3) -- *but* beware of State v. Nelson, 81 Wn. App. 249 (Div. II, 1996) Sept. '96 LED:06 (indicating limits to Reding rule though upholding negligent driving arrest under former (criminal) negligent driving RCW) But see Gant-Snapp limits on the threshold question of authority to do MV search-incident in the first place.

State v. McKenna, 91 Wn. App. 554 (Div. II, 1998) Oct. '98 LED:05 (If officer clearly manifests at the time intent not to make a custodial arrest, then no authority to "search incident")

Knowles v. Iowa, 525 U.S. 113 (1998) Feb. '99 LED:02 (Search held invalid under Fourth Amendment by U.S. Supreme Court where Iowa statute permitted "search incident to traffic citation")

Atwater v. City of Lago Vista, 532 U.S. 318 (2001) July '01 LED:18 (U.S. Supreme Court rules that the Fourth Amendment allows custodial arrest for all misdemeanors, even those punishable only by a fine; Washington constitution probably does not authorize arrest for fine-only misdemeanors, to the extent there may be such statutes or ordinances in Washington) But see Snapp and Gant limits on the threshold question of authority to do MV search-incident in the first place.

State v. O'Neill, 110 Wn. App. 604 (Div. III, 2002) June '02 LED:21 (Court upholds custodial arrest and "search incident" even though officer did not comply with local policy that required checking with jail before arresting on the particular type of offense); **State v. Gering, 146 Wn. App. 935 (Div. III, 2008) Jan. '10 LED:09 (Court upholds custodial arrest and "search incident," rejecting defendant's argument that custodial arrest should not be permitted on arrest for offense for which jail would not have taken him)**

3. *Search of vehicle following arrest of passenger, not driver (this subsection generally has relevance only to searches governed by the Fourth Amendment in light of Gant's exception* allowing a Fourth Amendment exception in the circumstance where officers search the vehicle's passenger compartment based on reason to believe it contains evidence of the crime of arrest).

State v. Cass, 62 Wn. App. 793 (Div. II, 1991) Jan. '92 LED:06 (Arrest of passenger on warrant justified search of passenger area of vehicle incident to that arrest); State v. Bello,

142 Wn. App. 930 (Div. I, 2008) March '08 LED:07 (same as Cass) (Gant likely would not allow a search incident to arrest where the arrest is on a warrant)

4. *Timing of vehicle search (this subsection generally has relevance only to searches governed by the Fourth Amendment in light of Gant's exception* allowing a Fourth Amendment exception in the circumstance where officers search the vehicle's passenger compartment based on reason to believe it contains evidence of the crime of arrest).

State v. Boyce, 52 Wn. App. 274 (Div. I, 1988) Nov. '88 LED:02 (Vehicle search not incident to arrest if made after the arrestee has been taken away from the scene)

U.S. v. Vasey, 834 F.2d 782 (9th Cir. 1987) (30- to 45-minute delay before searching arrestee's vehicle was too long; search was no longer "incident to" the arrest)

State v. Weaver, 433 F.3d 1104 (9th Cir. 2006) March '06 LED:02 (Search ruled to have occurred close enough in time to the time of arrest to be deemed "incident to arrest" even though, for safety reasons, the officers waited 10 to 15 minutes for a third officer to arrive before conducting the car search)

State v. Boursaw, 94 Wn. App. 627 (Div. I, 1999) May '99 LED:07 (After officer found likely drug paraphernalia in initial check of passenger area, delay of completion of search for 10 minutes waiting for drug-sniffing K-9 to arrive was OK). But see State v. Valdez, 137 Wn. App. 280 (Div. II, 2007) April '07 LED:08, affirmed on other grounds by Washington Supreme Court in State v. Valdez, 167 Wn.2d 761 (2009) Feb. '10 LED:11 (K-9 search of passenger area of vehicle held by Court of Appeals to be an impermissible second "search incident" of the vehicle following the arrest of occupants. Officers first secured the arrestee in patrol car, then did a quick search of the arrestee's car. After seeing a few missing screws and some loose paneling, officer called for a drug-sniffing k-9, which was brought to the scene fairly quickly. The dog sniffed out drugs that were behind the loose paneling. It is difficult to logically distinguish this decision from Division One's decision in Boursaw). We think that Boursaw was the correctly decided case on this delayed-search issue. As noted at the outset of this section of the outline, the Washington Supreme Court granted review in Valdez, but then decided the case on different grounds (i.e., determining that there was no threshold authority to search the vehicle incident to arrest after the arrestee had been secured in a patrol car).

5. *Required link between arrestee and MV and vehicle (this subsection generally has relevance only to searches governed by the Fourth Amendment in light of Gant's exception* allowing a Fourth Amendment exception in the circumstance where officers search the vehicle's passenger compartment based on reason to believe it contains evidence of the crime of arrest).

State v. Fore, 56 Wn. App. 339 (Div. I, 1989) March '90 LED:05 (MV was subject to Stroud search where arrestee used car to commit crime moments earlier, and he was near the unlocked vehicle when the arrest for selling marijuana from car was made)

State v. O'Neill, 110 Wn. App. 604 (Div. III, 2002) June '02 LED:21 (Where officer announced that driver was under arrest before the driver got out of the truck, the driver's act of locking the truck as he got out did not make the truck's passenger area off-limits to a warrantless "search incident")

State v. Perea, 85 Wn. App. 339 (Div. II, 1997) June '97 LED:02 (Where suspect parked, got out of vehicle and locked it before a seizure was made, the vehicle was not subject to a "search incident" under the Stroud rule)

State v. Quinlivan, 142 Wn. App. 960 (Div. III, 2008) March '08 LED:02 (Where, after being seized but before being told he was under arrest, driver got out of vehicle and locked it, vehicle was not subject to search incident)

State v. Porter, 102 Wn. App. 327 (Div. I, 2000) Nov. '00 LED:05 (MV not subject to Stroud search where arrest on warrant was made 300 feet from the vehicle, and the vehicle was not linked to the basis for the arrest)

State v. Wheless, 103 Wn. App. 749 (Div. I, 2000) March '01 LED:04 (Holding MV "search incident" not permitted where arrest made in tavern bathroom, even though, during "buy-bust" operation suspect had only moments earlier gone into his vehicle in the tavern parking lot 50-75 away)

State v. Johnston, 107 Wn. App. 280 (Div. II, 2001) Oct. '01 LED:19 (Vehicle search was not "incident to arrest" even though the arrest took place in the vicinity of the vehicle, because the arrestee had no ready access to the vehicle or immediate control of the vehicle at the time of the arrest)

State v. Rathbun, 124 Wn. App. 372 (Div. II, 2004) Jan. '05 LED:08 (Vehicle search could not be upheld under "incident to arrest" rationale because arrest process began over 40 feet from the vehicle, even though suspect had been standing near his vehicle when officers began to drive up his driveway to make contact with him)

Thornton v. U.S., 124 S. Ct. 2127 (2004) July '04 LED:02 (Under the Fourth Amendment, the arrestee's prior suspicious activity after he had spotted the officer while driving, and his physical location relatively near his car at the time of his later arrest were sufficient linkage in terms of time, space and behavioral link to his car to justify a warrantless searching of his car incident to his arrest for possession of illegal drugs, despite the fact that the officer's first contact with the suspect occurred after the suspect had gotten out of his car and had shut, but not locked, the door)

6. *Scope of the vehicle search – "bright line" rule (this subsection generally has relevance only to searches governed by the Fourth Amendment in light of Gant's*

exception **allowing a Fourth Amendment exception in the circumstance where officers search the vehicle's passenger compartment based on reason to believe it contains evidence of the crime of arrest).**

State v. Stroud, 106 Wn.2d 144 (1986) Aug. '86 LED:01 (MV search incident extends to passenger area and unlocked containers in that area)

State v. Mitzlaff, 80 Wn. App. 184 (Div. II, 1995) March '96 LED:11 (Engine compartment is not within scope of Stroud)

State v. Johnson, 128 Wn.2d 431 (1996) March '96 LED:06 (MV search of long-haul trucker's cab sleeping area is within scope of Stroud rule)

U.S. v. Mayo, 394 F.3d 1271 (9th Cir. 2005) March '05 LED:07 (Hatchback area of vehicle is within scope of the Fourth Amendment rule)

State v. Parker, State v. Jines, State v. Hunnel, 139 Wn.2d 486 (1999) Dec. '99 LED:13 (Where arrest is made of less than all of the occupants of the vehicle, then the officer may not automatically search those personal effects that are left behind in the passenger area and which are known to belong to non-arrested person(s). Some question remains as to whether the standard limiting the search is "effects known to belong" or "effects reasonably believed to belong" to non-arrestees. Note, however, that in State v. Reynolds, 144 Wn.2d 282 (2001) Oct. '01 LED:09, the Washington Supreme Court stated in dicta (language not necessary to support the decision) that "known to belong" is the standard under Parker.)

State v. Jackson, 107 Wn. App. 646 (Div. I, 2001) Oct. '01 LED:16 (Under Parker rule, officers may search personal effects for ID where the occupants give confusing information about the ownership of those personal effects)

State v. Jones, 146 Wn.2d 328 (2002) July '02 LED:11 (Washington Supreme Court reverses Court of Appeals and rules that driver who kept his gun in his girl-friend's purse had "automatic standing" to raise a Parker objection to a police search of the purse following his arrest, and that the search was unlawful under Parker because the arresting officer knew the purse belonged to passenger and was not in control of arrestee-driver)

State v. Boursaw, 94 Wn. App. 629 (Div. I, 1999) May '99 LED:07 (Removal of ashtray OK – this is not an impermissible dismantling of the vehicle)

State v. Vrieling, 144 Wn.2d 489 (2001) Oct. '01 LED: 02 (Entire readily-accessible passenger area of a Winnebago was subject to Stroud "search incident" where an occupant was custodially arrested in the Winnebago following a traffic stop. Also, the Court of Appeals had earlier held in Vrieling, 97 Wn. App. 152 (Div. I, 1999) Nov. '99 LED:07, that a zipped seat cushion was not a "locked" container under Stroud, and therefore officers could lawfully unzip cushion and search it as part of a search incident.)

E. Warrantless Search Of Person And Personal Effects Incident To Arrest (No Vehicle Search)

INTRODUCTORY NOTE: State v. Snapp, 174 Wn.2d 177 (2012) May '12 LED:29 and Arizona v. Gant, 129 S.Ct. 1710 (2009) June '09 LED:13, discussed above at the beginning of section II.D. addressed motor vehicle searches incident to arrest (Gant under the Fourth Amendment and Snapp under the Washington constitution's article I, section 7). But it is possible that those decisions may be interpreted to also limit the authority to search a person incident to arrest by barring a search of containers or effects taken from the arrestee once the arrestee has been secured in handcuffs in the back of a patrol car.

Division Three of the Washington Court of Appeals has issued conflicting opinions on this issue. Compare the pro-State decisions in State v. Johnson, 155 Wn. App. 270 (Div. III, 2010) June '10 LED:18 and State v. Whitney, 156 Wn. App. 405 (Div. III, 2010) Aug. '10 LED:16 with the decision against the State in State v. Byrd, 162 Wn. App. 612 (Div. III, 2011) Oct. '11 LED:21. As of July 1, 2013, the Byrd case remained under review in the Washington Supreme Court. The Court of Appeals decided Byrd under the Fourth Amendment, not the Washington constitution, but the Washington Supreme Court is considering the case under both Washington and federal constitutional provisions.

See also the four recent Court of Appeals opinions in Salinas, MacDicken, Ellison and Bonds addressing searches of persons and their personal effects incident to arrest. Unlike the decision in Byrd, each of those decisions involved circumstances where the arrestee was not fully secured at the time of the search (i.e., had not been secured in a patrol vehicle), and thus posed a risk of getting a weapon or destroying evidence, at the point when the search occurred.

In the first of those decisions, Salinas, the Court made 3 holdings: 1) Arrest preceded search of person that yielded rape suspect's ID cards, so search was lawful; 2) Warrantless seizure at police station of suspect's clothing as evidence of crime and later lab testing were lawful as incidental to arrest under the Washington constitution, and Snapp does not restrict search in this context; 3) RCW 10.31.030's requirement that a person arrested on a bail warrant be allowed to post bail before a booking inventory is executed does not apply where items were seized as evidence of crime. State v. Salinas, 169 Wn. App. 210 (Div. I, July 2, 2012) October '12 LED:17. Note: On January 8, 2013, the Washington Supreme Court denied defendant Salinas's Petition for Review.

In MacDicken, the Court of Appeals ruled that, under the totality of the factual circumstances, officer acted lawfully under federal and State constitutional doctrines for search incident to arrest when he searched a laptop bag that was taken from the armed robbery arrestee, who at the time of the search was in handcuffs standing about a car's length away from the bag (which officers had reason to believe contained a handgun); the Court of Appeals does not mention

the Snapp decision but appears to conclude that Gant restricts searches of personal effects incident to arrest; the Court rules, however, that because the handcuffed arrestee was standing outside, only a car's length away from his bag, he was not fully secured in the sense of Gant such as to preclude a search of the bag incident to his arrest. State v. MacDicken, 171 Wn. App. 169 (Div. I, Oct. 8, 2012) February '13 LED:16 Status: Defendant MacDicken's petition to the Washington Supreme Court for review has been granted; review is in process.

Division Two ruled in January 2013 in the Ellison case that officer-safety concerns justified the search of defendant's backpack, which was between his feet at point of seizure and was accessible to the handcuffed arrestee at the point of search; Arizona v. Gant does not dictate a different result; Division Two distinguishes Byrd on facts of this case. State v. Ellison, 172 Wn. App. 710 (Div. II, Jan. 8, 2013) March '13 LED:17. Status: Defendant Ellison has petitioned the Washington Supreme Court for discretionary review.

Division Two ruled in April 2013 in the Bonds case that searching the pockets of an arrestee moments after his lawful arrest on a warrant was lawful regardless of the crime for which the arrest was made because he posed a risk of getting at a weapon or destroying evidence despite his handcuffs. State v. Bonds, ___Wn. App. ___, 299 P.3d 663 (Div. II, 2013) July '13 LED:15 Status: Defendant Bonds has petitioned the Washington Supreme Court for discretionary review.

1. *There must first be an "arrest"*

State v. O'Neill, 148 Wn.2d 564 (2003) April '03 LED:03 (Under article I, section 7 of Washington constitution, the search may not precede the arrest – do the arrest "by the numbers")

State v. Salinas, 169 Wn. App. 210 (Div. I, July 2, 2012) October '12 LED:17 (Court holds that suspect was under arrest for purposes of O'Neill rule where, before searching his person, officers chased him down and ordered him to lie on the ground face down, officers then allowed a police dog to bite Salinas because he did not initially comply fully with the order, and officers then handcuffed him) Note: The Washington Supreme Court denied Salinas's request for review.

2. *Crimes for which custodial arrest and hence search incident permitted*

Case law allows a custodial arrest for any crime except for certain traffic crimes. See discussion in Part II.D.2 above regarding traffic crime limitation on custodial arrest.

3. *Timing of the search*

State v. Clayton Donald Smith, 119 Wn.2d 675 (1992) Dec. '92 LED:04 (A delay of 10 to 15 minutes before the officer looked inside a fanny pack taken from arrestee did not invalidate the search where the delay was due to other activity of the officer relating to the

arrest and investigation). **Aspects of Smith were called into question by Division Three of the Court of Appeals in State v. Byrd, 161 Wn. App. 612 (Div. III) Oct. '11 LED:21, Division Three suggesting that Arizona v. Gant's Fourth Amendment ruling is contrary to the reasoning and ruling in Smith. As noted above in this section, Byrd is now under review in the Washington Supreme Court.**

4. *Scope of the search (includes "lunge area" at point of arrest)*

The U.S. Supreme Court held in its 1969 Chimel decision that the scope of the search extends to all items on the person of and carried by the arrestee and all areas into which the arrestee might lunge to get a weapon or to destroy evidence. State v. Clayton Donald Smith (cited above) holds that a fanny pack being carried by the arrestee when the arrest process begins can be searched following handcuffing of the arrestee, even though at that point the fanny pack is lying on the ground outside the "lunge area". The location of items when the arrest process begins will justify a search of such items. **Again, aspects of Smith were called into question by Division Three of the Court of Appeals in State v. Byrd, 161 Wn. App. 612 (Div. III) Oct. '11 LED:21, Division Three suggesting that Arizona v. Gant's Fourth Amendment ruling is contrary to the reasoning and ruling in Smith.**

While the case law allows for a thorough search of the person, as well his or her outer clothing, packages, and containers based on the mere fact of the arrest, the Court of Appeals has held in State v. Rulan C., 97 Wn. App. 884 (Div. I, 1999) May '99 LED:15 that a complete, cheek-spreading "strip search" at the scene of arrest in a home went beyond the permissible scope.

5. *"Bright line" nature of authority*

State v. LaTourette, 49 Wn. App. 119 (Div. I, 1987) Dec. '87 LED:18 (Recognizes that the authority to search incident to arrest does not depend on fact-based probabilities that evidence or weapons will be found. The fact of the lawful arrest establishes the authority to search)

State v. Lowrimore, 67 Wn. App. 949 (Div. I, 1992) March '93 LED:15 (All containers are equally subject to "search incident")

6. *"Booking search" limits if arrest made on bail warrant*

State v. Gloria Smith, 56 Wn. App. 145 (Div. III, 1989) March '90 LED:12 & Feb. '91 LED:18 (Must allow person arrested on bail warrant to post bail to avoid "booking" search of personal effects; *suggestion*: be sure to search the personal effects in the field in the "search incident to arrest")

State v. Ross, 106 Wn. App. 876 (Div. I, 2001) Sept. '01 LED:15 (The Gloria Smith bail-warrant-arrest rule does not limit searches in the field that are "incident to arrest"; therefore, where an officer from one jurisdiction handed over a bail-warrant-arrestee to an

officer from another jurisdiction, the second officer could lawfully conduct a second "search incident" prior to continuing the transport of that prisoner to jail)

State v. Salinas, 169 Wn. App. 210 (Div. I, July 2, 2012) October '12 LED:17 (RCW 10.31.030's requirement that person arrested on bail warrant be allowed to post bail before a booking inventory is executed does not apply where items were seized as evidence of crime.) Note: On January 8, 2013, the Washington Supreme Court denied defendant Salinas's Petition for Review.

F. Warrantless Search By Consent

1. *First party consent*

a. Voluntariness considerations, including consent request forms, threats to get a warrant, warnings re rights, and deception

State v. Apodaca, 67 Wn. App. 736 (Div. III, 1992) March '93 LED:13 (Threat to "get warrant" may make consent involuntary; better to say "apply for")

State v. O'Neill, 148 Wn.2d 564 (2003) April '03 LED:03 (Consent not "voluntary" if given after officer asserts that "search incident" standard would justify a warrantless search anyway)

State v. Ferrier, 136 Wn.2d 103 (1998) Oct. '98 LED:02 (Officers seeking consent in a knock-and-talk situation must give warnings advising occupant of the 3 R's of consent – right to refuse, right to restrict scope, and right to revoke – in order to obtain valid consent to search residence)

State v. Bustamonte-Davila, 138 Wn.2d 964 (1999) Nov. '99 LED: 02 (Ferrier rule does not apply to request for residential entry where officer's intent is to make arrest on INS order, not to search)

State v. Williams (Harlan M.), 142 Wn.2d 17 (2000) Dec. '00 LED:14 (Request to homeowner to search residence for a felon-guest wanted on an arrest warrant is not subject to the Ferrier rule)

State v. Kennedy, 107 Wn. App. 972 (Div. II, 2001) Nov. '01 LED:06 (Full Ferrier warnings were required for officers to obtain valid consent to enter a motel room where the officers had gone to investigate after receiving a report of illegal drug-dealing by persons in the motel room)

State v. Freepons, 147 Wn. App. 649 (Div. II, 2008) Feb. '09 LED:14 (Ferrier warnings were required to seek consent to search house for person believed to have left scene of rollover MV accident)

State v. Dancer, ___Wn. App. ___, 300 P.3d 4750 (Div. II, April 30, 2013) July '13 LED:19 (Where officers were searching for a DV suspect reasonably suspected of being present in a third party's residence, Ferrier warnings were not required to obtain resident's consent to search her residence for the suspect)

State v. Westvang, ___Wn. App. ___, 2013 WL 2217326 (Div. II, May 21, 2013) July '13 LED:23 (Where officers were searching for an arrest warrant subject that an informant NOT shown to be reliable had told them was present in a third party's residence, Ferrier warnings were required to obtain the resident's consent to search her residence for the suspect; that is because the officers did not have reasonable suspicion the subject they were looking for was in the residence.

State v. Khounvichai, 149 Wn.2d 557 (2003) Aug. '03 LED:06 (Ferrier warnings were not required for officers to obtain valid consent from a suspect's grandmother for purposes of entry of the grandmother's home just to "talk to" her grandson who lived there and who was a suspect in a malicious mischief case; the majority opinion suggests, however, that if probable cause for a search had developed in this situation, the officers would have been required to obtain a search warrant rather than then obtaining consent to search)

U.S. v. McWeeney, 454 F.3d 1030 (9th Cir. 2006) Oct. '06 LED:03 (Where officers conducting a "consent" search of a car directed the disembarked, not-yet-seized, car occupants not to watch the search, the officers may have destroyed the continuing voluntariness, and hence the validity of, the consent; a person does not have a constitutional right to observe a search to which he has consented, but officers may not coerce a person into giving up his right to withdraw his consent)

State v. Tagas, 121 Wn. App. 872 (Div. I, 2004) July '04 LED:13 (Ferrier warnings were not required to obtain consent to search purse of person to whom officer had offered a ride from the freeway to a nearby restaurant)

State v. Cole, 122 Wn. App. 319 (Div. II, 2004) Sept. '04 LED:23 (Advance written consent-to-search from a person who was a housemate of a person sentenced to home detention was valid for duration of EHD agreement)

State v. Flowers, 57 Wn. App. 636 (1990) (Consent by person who was under arrest held voluntary on the totality of the circumstances)

State v. Garcia, 140 Wn. App. 609 (Div. III, 2007) Nov. '07 LED:17 (Court of Appeals invalidates written consent given at the jail by a sleep-deprived defendant who was not given Miranda warnings and whose alleged lack of intelligence and education was not rebutted at suppression hearing)

b. Implied consent is possible, but beware

State v. Schultz, 170 Wn.2d 746 (2010) March '11 LED:16 (Mere acquiescence to police entry does not constitute consent; officers did not ask for consent to entry)

U.S. v. Shaibu, 920 F.2d 1423 (9th Cir. 1989) May '90 LED:09 (Silently turning and walking back into apartment following officer's request to talk is not implied consent for officers to follow; officers did not ask for consent to entry)

c. Scope of consent must be considered

State v. Monaghan, 166 Wn. App. 782 (Div. I, 2012) March '12 LED:09 (General consent to search car and its trunk did not include consent to search a locked container in the trunk)

d. Undercover entries as consenting entries

State v. Nedergard, 51 Wn. App. 304 (Div. I, 1988) Aug. '88 LED:07 (Holds consent valid but scope of search limited by undercover role)

2. *Third party consent – Independent dominion & control + Assumed risk*

a. Mutual consent requirement of Leach for business partners, cohabitants

State v. Leach, 113 Wn.2d 735 (1989) Feb. '90 LED:03 (Holds that where two business "partners" both were present and had dominion and control over business premises, officers were required to ask both for consent to search)

State v. Walker, 136 Wn.2d 767 (1998) Jan.'99 LED:03 (Exclusionary rule does not apply to consenting cohabitant where Leach rule violated as to cohabitant not asked for consent)

State v. Hoggatt, 108 Wn. App. 257 (Div. II, 2001) Nov. '01 LED:08 (Leach rule does not apply where officers merely request consent to enter living room, as opposed to requesting consent to search)

State v. Morse, 156 Wn.2d 1 (2005) Feb. '06 LED:02 (Leach rule was violated where leaseholder of apartment was in a bedroom because officers obtained consent to search the apartment only from a houseguest who answered their knock on the entry door)

State v. Williams, 148 Wn. App. 678 (Div. II, 2009) April '09 LED:05 (Where uncle was located outside motel room that he was sharing with his adult nephew, the uncle's consent to police to enter room did not support entry to contact the nephew inside without getting nephew's consent too)

b. Exception to Leach rule for MV's (Cantrell)

State v. Cantrell, 124 Wn.2d 183 (1994) Sept. '94 LED:05 (Leach mutual consent rule applies only to fixed premises and does not apply to motor vehicle searches; *warning:* if

one co-occupant with right to dominion and control of MV objects to search, don't rely on consent of other co-occupant, whether the search is of a MV or of another type of protected area or premises)

c. Select Fourth Amendment cases involving co-occupants or co-users

See also Georgia v. Randolph, 126 S.Ct. 1515 (2006) May '06 LED:05 (Under the Fourth Amendment, which imposes a less restrictive mutual consent rule than does the Washington constitution, if two persons with authority to consent to a search of an area are both present and one consents and the other objects, officers do not have a valid consent to search the area)

And see U.S. v. Brown, 563 F.3d 410 (9th Cir. 2009) Aug. '09 LED:06 (Consent by residential co-occupant #1 supported search of residence where (A) co-occupant # 2 had been arrested and taken away from the scene, and (B) such arrest and transport was not a pretext to prevent him from objecting to the search)

Girlfriend had authority to consent to search for child porn on computer that imprisoned boyfriend owned, and he had allowed her to use without restriction and without password protection. United States v. Stanley, 653 F.3d 946 (9th Cir., Aug. 2, 2011) February '12 LED:08

d. Family relationships (parent-child)

State v. Summers, 52 Wn. App. 767 (Div. I, 1988) Feb. '89 LED:07 (Parent or guardian generally can consent to search of juvenile's room; but beware of the child who pays rent or is no longer dependent)

e. Real property relationships (landlord-tenant, host-guest, co-tenant)

State v. Birdsong, 66 Wn. App. 534 (Div. I, 1992) Jan. '93 LED:01 (Holds that landlord could not lawfully consent to search of premises not yet abandoned by tenant)

State v. Koepke, 47 Wn. App. 897 (Div. III, 1987) Oct. '87 LED:03 (Host who used guest's room to store items and accessed the room on occasion had authority to consent to search of the guest room)

f. Other relationships (bailor-bailee, employer-employee, school administration)

Generally, a person (bailor) who loans a car to another (bailee) assumes the risk that the borrower will consent to a search of the car. LaFave, Search & Seizure, § 8.6(a).

Employer authority to consent to search of employee desks, file cabinets, and lockers depends on regulations, policies and practices of employer in relation to those areas. LaFave, Search & Seizure, § 8.6(d).

K-12 school authorities may consent to search of a student's locker. LaFave, Search & Seizure, § 8.6(e).

3. *"Apparent authority" of 3rd party not enough under the Washington constitution*

Illinois v. Rodriguez, 497 U.S. 177 (1990) Aug. '90 LED:08 (U.S. Supreme Court holds under Fourth Amendment that "apparent authority" of 3rd party allows police to act on that person's consent to search - - But see next entry re the Washington Supreme Court's Morse decision, rejecting "apparent authority" doctrine on state constitutional grounds)

State v. Morse, 156 Wn.2d 1 (2005) Feb. '06 LED:02 (In case where leaseholder of apartment was in a bedroom and officers obtained consent to search the apartment only from a houseguest who answered their knock on the apartment entry door, the Washington Supreme Court holds that the Washington constitution, article I, section 7, does not recognize the "apparent authority" doctrine followed under the federal constitution's Fourth Amendment).

G. Warrantless Search Based On Exigent Circumstances Or Under Non-investigative Rationales Of "Community Caretaking Function" Or Emergency Circumstances

(NOTE: Washington appellate courts often fail to distinguish the investigative rationale of "exigent circumstances" and the non-investigative rationales of "community caretaking" or "emergency," and we have not tried to sort the differing rationales in this outline).

1. *There must be an articulable basis – for example, the need to protect property or persons under "community caretaking function" and both (1) objective and (2) subjective elements must be met.*

Domestic violence calls often present emergency or exigent circumstances. The following are examples:

State v. Lynd, 54 Wn. App. 18 (Div. I, 1989) Nov. '89 LED:07 (Looking for DV victim following hang-up call – man with cut on face admits to hitting spouse, but says that she is no longer home – officers may go in to look for her)

State v. Raines, 55 Wn. App. 459 (Div. I, 1989) Jan. '90 LED:10 (Looking for DV suspect – officer responding to DV report from neighbor, know of history of DV, officer's see man looking out window as they arrive, woman answers door and says "no problem" and no one there but her and son – officers may go in to look for suspect)

State v. Menz, 75 Wn. App. 351 (Div. II, 1994) Feb. '95 LED:17 (Anonymous caller reports sounds of DV; when police arrive, door open on a cold winter night, TV on, and no response to knock and announce – officers may go in to check on status of occupants)

U.S. v. Black, 466 F.3d 1143 (9th Cir. 2006) Dec. '06 LED:13 (For officers responding to a DV 911 call from a victim, exigent circumstances and community caretaking function justified entry of residence to look for the victim, whose present whereabouts were unknown, even though there was some reason to believe that the victim was no longer present in the premises).

But in State v. Schultz, 170 Wn.2d 746 (2011) March '11 LED:16, the Washington Supreme Court held that the circumstances of (1) overheard shouting, (2) somewhat excited or flustered demeanor of the woman opening the door to police, and (3) her initial lie that there was not another person in the premises (the other person appeared to police before they entered) did not add up to emergency DV circumstances that would justify non-consenting entry of the premises.

And in State v. Williams, 148 Wn. App. 678 (Div. II, 2009) April '09 LED:05, where an uncle was located outside the motel room that he was sharing with his adult nephew, and the uncle alleged that the nephew had previously assaulted him shortly before while both were inside, there was no justification for police entry under the community caretaking or emergency aid rationales where the nephew was alone inside and was not himself in any distress or danger.

2. *Other arguable exigencies reviewed on totality of circumstances*

Scientific fact of natural dissipation of alcohol in bloodstream is not per se exigency that justifies non-consenting blood test in criminal cases where driving under the influence is an element of the crime; totality of the circumstances must be considered in order to determine if exigent circumstances exist. Missouri v. McNeely, ___U.S. ___, 133 S. Ct. 1552 (April 17, 2013) June '13 LED:03

State v. Swenson, 59 Wn. App. 586 (Div. I, 1990) Feb. '91 LED:16 (Mere fact entry door was open on a warm summer night plus lack of response to police doesn't justify entry of home)

State v. Downey, 53 Wn. App. 543 (Div. I, 1989) June '89 LED:12 (Strong ether smell justified entry of apparently unoccupied house) **But see State v. Lawson, 135 Wn. App. 430 (Div. II, 2006) Dec. '06 LED:15 (In light of officers' actions treating the matter as an ordinary criminal investigation, not as an emergency, an anonymous 911 call and the officers' detection of strong chemical odor coming from a shed did not justify entry of the shed under community caretaking or emergency exceptions to search warrant requirement); see also State v. Leffler, 140 Wn. App. 223 (Div. II, 2007) Oct. '07 LED:16; State v. Leffler, 142 Wn. App. 175 (Div. II, 2007) Apr. '08 LED:25 (Similar ruling holding that entry of a fifth wheel trailer was unjustified)**

Mincey v. Arizona, 437 U.S. 385 (1978) (No "death scene" search exception; get a warrant once exigencies cease to exist)

State v. Angelos, 86 Wn. App. 253 (Div. I, 1997) Sept. '97 LED:12 (Mom OD'd on drugs; police search home for drugs to protect children living in the house)

State v. Smith, 165 Wn.2d 511 (2009) March '09 LED:10 (Officers at residence investigating theft of tanker truck carrying anhydrous ammonia were justified (based on objective test and the absence of evidence of pretext) in warrantless residence search for (1) gun (that they believed had been moved after they arrived) and (2) possible third methamphetamine manufacturing suspect.)

State v. Hos, 154 Wn. App. 238 (Div. II, 2010) March '10 LED:16 (Community caretaking function justified officer's warrantless entry of residence to see if the non-responsive, apparently unconscious person observed in open view on a couch was in need of medical help)

State v. Gibson, 152 Wn. App. 945 (Div. II, 2009) Jan. '10 LED:11 (Open view of methamphetamine manufacturing materials in car during traffic stop provided exigent or emergency circumstances supporting entry of the car to make sure the materials were secure before the car was transported to an impound lot while a search warrant was sought)

H. Searches By Private Citizens

Private citizens are not subject to restriction or exclusion of evidence unless an officer does something to make the citizen an "agent" of law enforcement. State v. Walter, 66 Wn. App. 862 (Div. I, 1992) Feb. '93 LED:12. Note, however, that the Fourth Amendment "private search doctrine" that allows law enforcement to follow up the private search by going without a warrant wherever the citizen has gone does not apply under article I, section 7 of the Washington constitution. State v. Eisfeldt, 163 Wn.2d 628 (2008) July 08 LED:09

I. Searches By School Authorities

There is a special rule for searches by school authorities not acting as agents of police: individualized reasonable belief standard – *see* RCW 28A.600.210-240. See, for example, State v. Brooks, 43 Wn. App. 560 (Div. I, 1986) Aug. '86 LED:11 (Search of student's locker by school administrator lawful based on reasonable suspicion that the locker contained illegal drugs); **State v. Brown and State v. Duke, 158 Wn. App. 49 (Div. III, 2010) Dec. '10 LED:18 (High school administrators' search of student's vehicle in school parking lot (with police standing by) upheld as reasonable under school search exception to search warrant requirement; Court of Appeals notes that article I, section 7 of the Washington constitution does not impose a more restrictive rule on school authorities than does the Fourth Amendment of the U.S. constitution); State v. Meneese, 174 Wn.2d 937 (August 2, 2012) Oct. '12 LED:10 (Search by police officer acting as resource officer at high school held under article I, section 7 of the Washington constitution as not qualified as a school search).**

J. Probationer, Parolee Searches – Police Assistance To CCO

State v. Reichert, 158 Wn. App. 374 (Div. II, 2010) Feb. '11 LED:07 (Court of Appeals holds: (1) that law enforcement officers did not pretextually make a community corrections officer their "stalking horse" when the officers supported the CCO in a warrantless arrest of a suspected probation violator from a residence; but (2) that, per State v. Winterstein, 167 Wn.2d 620 (2009) Feb. '10 LED:24, the case must be remanded for a trial court determination of whether the CCO and officers had probable cause, not mere reasonable suspicion, that the probationer resided in the premises from which he was arrested without a warrant (note that Winterstein left open the issue of whether there must also be probable cause that the probationer is home at the time of the entry).

U.S. v. Mayer, 530 F.3d 1099 (9th Cir. 2008) Oct. '08 LED:15; Cuevas v. De Roco, 531 F.3d 726 (9th Cir. 2008) Oct. '08 LED:15 (In light of interests of other residents, entry of a residence to seize a probationer or parolee for a suspected violation requires probable cause to believe that the probationer or parolee resides at the residence)

K. Impound – Inventory Of Motor Vehicles

Washington constitution is more restrictive than federal constitution

State v. White, 135 Wn.2d 761 (1998) Sept. '98 LED:08 (Inventory scope cannot extend to locked trunk absent a "manifest necessity" even if there is a trunk release button in passenger area of vehicle)

State v. Dugas, 109 Wn. App. 592 (Div. I, 2001) March '02 LED:02 (Inventory search authority does not permit inspection of contents of closed containers absent "manifest necessity" to do so)

All Around Underground, Inc. v. WSP, 148 Wn.2d 145 (2002) Feb. '03 LED:02 (As a matter of statutory interpretation, impound ordinances or WAC rules adopted under authority of RCW 46.55.113 provisions relating to vehicles that are driven by suspended or revoked drivers must allow officers to consider reasonable alternatives to impoundment). See also Potter v. WSP, 161 Wn.2d 335 (2007) Feb. '08 LED:09; Potter v. WSP, 165 Wn.2d 67 (2008) Jan. '09 LED:03 (WSP may be sued civilly on theory of "conversion" for applying its mandatory impound policy)

State v. Tyler, ___ Wn.2d ___, 2013 WL 2367952 (May 30, 2013) Aug '13 LED:__ (Impoundment of car that stopped on narrow shoulder in dangerous location and was driven by suspended driver was justified where reasonable alternatives to impoundment were considered; also lawful was inventory of contents of passenger area where operator of vehicle did not own vehicle, so plain view seizure of illegal drugs discovered in passenger area was lawful; Washington Supreme Court also holds that there is no requirement under the inventory exception of the Washington constitution for officers to request consent to conducting an inventory.)

U.S. v. Cervantes, (9th Cir. May 16, 2012) Aug. '12 LED:06 (Impound-inventory held to violate 4th amendment on grounds that (1) community caretaking rationale for impound of the safely parked vehicle was not met, and (2) inventory was pretextual; also, court indicates an arrest cannot support impound-inventory if impound-inventory precedes the arrest). The Ninth Circuit subsequently issued an amended opinion in United States v. Cervantes, deleting its ruling and analysis on pretext, but continuing to rule against the vehicle impound based on (1) failure of the impound of the safely parked vehicle to the satisfy community caretaking rationale for impounds, and (2) occurrence of the impound-inventory prior to the arrest of the vehicle operator. U.S. v. Cervantes, 703 F.3d 1135 (9th Cir., Nov. 28, 2012) February '13 LED:07

L. Securing Room Or House On PC While Search Warrant Is Sought

Illinois v. McArthur, 531 U.S. 326 (2001) April '01 LED:02 (Officers who develop probable cause to search residence while there for an unrelated purpose may secure the premises from the outside and expeditiously seek a search warrant) (U.S. Supreme Court)

State v. Solberg, 66 Wn. App. 66 (1992) Nov. '92 LED:10 (House may be secured from the outside on probable cause while warrant is sought, but search must await warrant)

U.S. v. Song Ja Cha, 597 F.3d 995 (9th Cir. 2010) July '10 LED:15 (seizure of residence for over 26 hours before making application for search warrant held to violate Fourth Amendment of U.S. constitution)

M. Securing Personal Property On Reasonable Suspicion Or PC

Officers with reasonable suspicion to search vehicles or other personal property may take such items from persons in possession and secure such items briefly (under time limits similar to those under Terry v. Ohio) to diligently investigate. Officers with probable cause to search such items may take such items from persons in possession and secure the items for a longer period, but still only for a period that is objectively reasonable in duration, while the officers expeditiously seek a search warrant. See LaFave, Search and Seizure, 3rd Ed., Sec. 9.8(e); see also State v. Huff, 64 Wn. App. 641 (Div. II, 1992) Apr. '98 LED:09 (Vehicle may be seized based on probable cause to search and towed to a secure location while officers are expeditiously seeking a search warrant)

N. No "Carroll Doctrine" In Washington

State v. Ringer, 100 Wn.2d 686 (1983) Feb. '84 LED:01 (Mobility of MV alone is not "exigent circumstance" justifying a warrantless search); **State v. Tibbles, 169 Wn.2d 364 (2010) Sept. '10 LED:09 (same ruling)**

O. No "Forfeitable Property" Exception To Search Warrant Requirement

State v. Hendrickson, 129 Wn.2d 61 (1996) July '96 LED:11 (Mere fact that MV lawfully seized for forfeiture under drug laws does not authorize full search without a warrant)

III. INTERROGATIONS LAW, A FEW SELECT CASES

A. Miranda warnings requirement (custody plus interrogation)

The requirement is triggered by (1) custody which is the functional equivalent of arrest (not by mere focus or PC to arrest) plus (2) interrogation.

Stansbury v. Calif., 511 U.S. 318 (1994) July '94 LED:02; See also State v. D.R., 84 Wn. App. 832 (Div. I, 1997) May '97 LED:10 (Warnings were required prior to officer's questioning of 14-year-old who had been called to the principal's office at school); State v. Heritage, 152 Wn.2d 210 (2004) Sept. '04 LED:12 (questioning by Spokane City Parks security guards was not "custodial"); State v. Lorenz, 152 Wn.2d 22 (2004) Sept. '04 LED:10 (questioning of suspect on her porch after she was told she did not have to answer questions and was free to leave was not "custodial" and the fact that the officers had PC to arrest her and had focused on her as a suspect was irrelevant); Beware of outlier analysis by Court of Appeals in State v. France, 129 Wn. App. 907 (Div. II, 2005) Dec. '05 LED:17 (Where officer told Terry DV detainee that the officer would let him go once matters were "cleared up," the suspect was in the functional equivalent of custodial arrest); **Howes v. Fields, 132 S.Ct. 1181 (2012) June '12 LED:09 (Considering all the circumstances, including fact that suspect Fields was told at start and later that he was free to leave at any time and return to his jail cell, Fields was not in custody for Miranda purposes – and therefore Miranda warnings and waiver were not required – where officers had him removed from his cell and questioned him about uncharged offenses allegedly committed prior to his incarceration.)**

B. Initiation Of Contact" Rule Of Fifth Amendment

The initiation of contact rule generally bars police initiation of contact with subject of custodial interrogation request who asserts right to silence or requests an attorney and then remains in continuous custody.

Fifth Amendment "Initiation" article is available on CJTC LED WEBPAGE. Recently added cases include:

Sixth Amendment initiation-of-contact rule of Michigan v. Jackson is eliminated in a 5-4 decision. Montejo v. Louisiana, 556 U.S. 778 (2009) July '09 LED:15

Fifth Amendment initiation-of-contact rule clarified: (1) bright-line, 14-day-break-in-custody rule created to set boundary for police-initiated, subsequent attempt at custodial interrogation after attorney-right asserted by custodial suspect; (2) the new 14-day standard includes convicted and sentenced prisoners immediately returned to general prison or jail population after asserting right to attorney

during custodial interrogation. Maryland v. Shatzer, 130 S.Ct. 1213 (2010) April '10 LED:03

Where custodial defendant understood lawful Miranda warnings, his silence at the outset of questioning and throughout much of nearly-three-hour interrogation session did not make inadmissible his confession that came near the end of the session; his waiver was implied in his confession and at no point had he invoked his Miranda rights. Berghuis v. Thompkins, 130 S.Ct. 2250 (2010) July '10 LED:02

Officer's initiation of contact with continuous-custody suspect who had asserted right to silence two hours earlier upheld under Michigan v. Mosley/Miranda initiation-of-contact rule; officer's initiation of contact related to a different crime than was the subject of the earlier contact, and he re-Mirandized the suspect before questioning him as to the other crime. State v. Brown, State v. Duke, 158 Wn. App. 49 (Div. III, 2010) December 10 LED:18

Mirandized suspect held to have made an "unequivocal" request for an attorney during custodial interrogation such that questioning should have stopped; State's context-based argument is rejected. State v. Nysta, 168 Wn. App. 30 (Div. I, May 7, 2012) July '12 LED:09 Status: The Washington Supreme Court denied the State's petition for review.

Suspect's attempt to anticipatorily invoke Miranda rights during non-custodial questioning will not bar later police contact to obtain waiver for questioning. Bobby v. Dixon, ___U.S. ___, 132 S. Ct. 26 (2011) August '12 LED:05. By 6-5 vote, a Ninth Circuit panel rules (despite the habeas standard that is highly deferential to State court rulings) that a custodial suspect's question about availability of an attorney and his statement that his father had advised him to ask for an attorney – uttered to detectives before they gave him Miranda warnings – prior to any waiver of Miranda rights should have been ruled by the California appellate court as either: (1) an ambiguous reference to his attorney right that must be honored as a preemptive Miranda request for an attorney terminating any attempt at interrogation and also precluding clarification; or (2) an unambiguous reference to his Miranda attorney right that likewise precludes interrogation or an attempt by officers to clarify. Sessoms v. Runnels, 691 F.3d 1054 (9th Cir., August 16, 2012) November '12 LED:06 Status: The California Attorney General's Office has filed a petition seeking U.S. Supreme Court review; action on the petition is likely in 2013.

Suspect's statement during interrogation that "I don't want to talk right now, man" must be viewed in context of what was said and done before that, and was merely his way of saying he was choosing to make a police-aided written statement over making a tape-recorded statement. State v. Piatnitsky, 170 Wn. App. 195 (Div. I, Aug. 20, 2012) November '12 LED:11 Status: The Washington Supreme Court has granted discretionary review, and review is in process.

C. CrR 3.1 And CrRLJ 3.1 Require That Police Advise An Arrestee Of The Right To Counsel After Making An Arrest

State v. Trevino, 127 Wn.2d 735 (1995) Jan. '96 LED:03 (Officer should have advised DUI arrestee of CrR 3.1 right to counsel at time of arrest, but there was no prejudice in the violation, so BAC test not suppressed)

State v. Templeton, 148 Wn.2d 193 (2002) Feb. '03 LED:03 (Because BAC testing is not "questioning," wording of warnings prior to BAC testing must advise of right "at this time," not merely that right exists "before or during questioning," so that DUI arrestee is informed of right to consult an attorney before arrestee decides whether to take BAC test – however, the erroneous warnings did not create prejudice in the consolidated cases on appeal, so suppression is not required)

State v. Copeland, 130 Wn.2d 244 (1996) Jan. '97 LED:03 (Officer should have advised murder suspect of CrR 3.1 counsel right before forcibly transporting him to jail facility, but there was no prejudice in the violation, because only physical evidence was taken and that evidence was seized under a search warrant previously obtained)

D. CrR 3.1 And CrRLJ 3.1 Require That Reasonable Effort Be Made To Promptly Attempt To Accommodate Request For Phone Consult With Counsel

State v. Kirkpatrick, 89 Wn. App. 407 (Div. II, 1997) March '98 LED:12 (Where arrestee terminated interrogation with request for an attorney during custodial interrogation, out-of-town detective should have attempted to place defendant in telephonic contact with counsel at stationhouse in Clallam County, rather than simply terminating questioning and making the transport back to Lewis County)

State v. Greer, 62 Wn. App. 779 (Div. I, 1991) Feb. '92 LED:05 (Request for attorney during post-arrest, pre-appearance screening at jail by public defender's office may trigger right to counsel under Washington Court Rules)

State v. Whitaker, 135 Wn. App. 923 (Div. I, 2006) Aug. '06 LED:18 (Partially handcuffed murder suspect's waiver of Fifth and Sixth Amendment rights prior to custodial questioning by FBI agents valid – and Criminal Rule 3.1 not violated – because, although suspect asked agents about the process for appointing counsel, he made clear that he was willing to be questioned without a lawyer; also, jailhouse informant could testify because police did not make him their "agent" for Sixth Amendment purposes)

Arrestee who had initially invoked his right to an attorney under Criminal Rule 3.1 held to have waived that right where he initiated a conversation with officers and made volunteered statements. State v. Mullins, 158 Wn. App. 360 (Div. II, November 1, 2010) January '11 LED:20

Double-murder defendant wins argument that 1) he unequivocally asserted his right under Criminal Rule 3.1 to attorney contact, and 2) he was not given reasonable assistance to make such contact. State v. Pierce, 169 Wn. App. 533 (Div. II, July 17, 2012) October '12 LED:13

IV. CONSULAR CONTACT WARNINGS TO ARRESTED FOREIGN NATIONALS

A website of the United States Department of State with comprehensive information ion the Vienna Convention on Consular Relations can be accessed by a link on the Criminal Justice Training Commission's Internet LED page; the link is titled "Consular Notification and Access." Also on the CJTC Internet LED page is a link to a comprehensive guide on a number of legal subjects of interest to law enforcement officers; "Confessions, Search, Seizure and Arrest: Guide for Police Officers and Prosecutors" by Pamela B. Loginsky, Staff Attorney, Washington Association of Prosecuting Attorneys; Ms. Loginsky's "Guide" contains extensive information of interest to law enforcement regarding the rights of arrested foreign nationals under the Vienna Convention.

V. INTERCEPTING AND RECORDING PRIVATE COMMUNICATIONS

A. Unlawful Arrest Of Citizen Who Tape Records Officer On Street

RCW 9.73, the "Privacy Act" governing the interception and recording of private conversations and communications, does not define "private conversation" for purposes of the Act's general prohibition on single-party-consent taping of private conversations. However, several decisions have held that that a citizen does not violate the statute if the citizen tapes the officer's spoken words or radio communications where the contact occurs in a public place. State v. Flora, 68 Wn. App. 802 (Div. I, 1992) July '93 LED:17; Alford v. Haner, 333 F.3d 972 (9th Cir. 2003) Sept. '03 LED:06 (Civil rights lawsuit for unlawful arrest); Johnson v. City of Sequim, 382 F.3d 944 (9th Cir. 2004) Oct. '04 LED:22; Dec. '04 LED:14 (Civil rights lawsuit for unlawful arrest).

B. Officer Tape-recording Street Contact

Lewis v. DOL, 157 Wn.2d 446 (2006) Sept. '06 LED:09 (Patrol car audio and video recording of traffic stops must comply with oral warning requirement of RCW 9.73.090(1)(c) even though the street conversations are not "private;" but only the recordings, not the officers' recollections of the events, are to be excluded from evidence for the chapter 9.73 violation)

C. Using Speakerphone Or Extension Phone To Eavesdrop

State v. Christensen, 153 Wn.2d 186 (2004) Feb. '05 LED:09 (The Washington Supreme Court holds that it violates RCW 9.73 to secretly use a speakerphone function, without court authorization, to eavesdrop on a private phone conversation; the Court distinguishes the "tipped phone" case of State v. Corliss, 123 Wn.2d 656 (1994) June '94 LED:02, where the Court found no violation of chapter 9.73 RCW when an officer, without court

authorization, listened in on a phone conversation by having a consenting participant tip the phone receiver so that the officer could hear the conversation too.)

D. Taping Outgoing Inmate Call From County Jail

State v. Modica, 164 Wn.2d 83 (2008) Sept. '08 LED:13 (Where King County Jail phones for outgoing inmate calls provided clear notice that all such calls are recorded, the Jail's recording of inmate calls was held to be both "not private" and "consenting" under chapter 9.73 RCW)

E. Miscellaneous Other Rulings Re Chapter 9.73 RCW

Washington case law supports answering phone calls that come in during execution of a search warrant at a drug dealer's residence (though it is good idea to justify and seek such authority in a search warrant application). State v. Goucher, 124 Wn.2d 778 (1994) Dec. '94 LED:14 (HELD: no constitutional violation of caller's rights occurred where detective answered phone during search warrant execution); State v. Gonzales, 78 Wn. App. 976 (Div. I, 1995) Jan. '96 LED:22 (HELD: answering phone during search warrant execution did not violate chapter 9.73 RCW because use of the phone was not use of a "device" nor was it an "interception" within the meaning of the statute; and such answering of phone call did not violate the constitution either case involved using the phone call information against the resident whose phone was answered).

See also State v. Wojtyna, 70 Wn. App. 689 (Div. I, 1993) Dec. '93 LED:20 (HELD: monitoring numbers coming to lawfully seized pager taken from a drug dealer incident to arrest did not violate the statutory or constitutional rights of the sender of the communications); **State v. Hinton, 169 Wn. App. 28 (Div. II, June 26, 2012) Oct. '12 LED:20 and State v. Roden, 169 Wn. App. 59 (Div. II, June 26, 2012) Oct. '12 LED:20 (HELD: monitoring iPhone previously seized from suspected drug dealer and setting up sting drug deals with senders of messages to iPhone did not violate the statutory or constitutional rights of the senders of the messages). No Washington appellate court decision has yet addressed the interests of the owner of a seized device in relation to warrantless monitoring of communications coming in to such a seized device). The Washington Supreme Court granted review in Hinton and Roden, and review is in process.**

Note also that in a tape-recorded interrogation of an arrestee, Miranda warnings must be on the tape even if the officer Mirandized the arrestee off the tape shortly before turning on the recorder. State v. Mazzante, 86 Wn. App. 425 (Div. II, 1997) Aug. '97 LED:20; **State v. Courtney, 137 Wn. App. 376 (Div. III, 2007) May '07 LED:08**

VI. ATTORNEY-CLIENT PRIVILEGE

Article: Inadvertent law enforcement agency recording of attorney telephone calls in violation of attorney-client privilege. February '13 LED:02

Detective's conduct in listening to several telephone conversations between a defendant and his attorney was egregious misconduct giving rise to a presumption of prejudice; however, under the unusual circumstances of this case, the presumption is overcome. State v. Pena Fuentes, ___ Wn. App. ___, 295 P.3d 252 (Div. I, Jan. 14, 2013) March '13 LED:15 Status: The Washington Supreme Court has granted defendant's petition for review, and review is in process.

Dismissal of charges held to be required based on detective's seizure and scrutiny of attorney-client-protected papers not covered by the search warrant; papers were taken during execution of a search warrant in a child sex abuse investigation and were studied and shared with the prosecutor. State v. Perrow, 156 Wn. App. 322 (Div. III, 2010) July '10 LED:24

VII. LAW ENFORCEMENT CIVIL LIABILITY IS POSSIBLE FOR NOT SHARING EXCULPATORY INFORMATION WITH PROSECUTOR

Under the due process ruling in Brady v. Maryland, 373 U.S. 83 (1963), law enforcement agencies are part of the prosecution team, and the team, through the prosecutor, must share exculpatory information with a criminal defendant. After criminal charges have been filed against a defendant, if key witnesses recant or change their stories in a material way, or if the investigating officers learn of other material exculpatory evidence, the officers should immediately share this information with the prosecutor's office. If the officers do not timely share this information with the prosecutor's office, and if the defendant is later acquitted or charges are dismissed or the conviction is vacated, the defendant may be able to later successfully pursue either (1) a federal Civil Rights Act lawsuit, or (2) a common law action under State law for malicious prosecution.

***Civil Rights Act Due Process Violation Based On Maryland v. Brady*:** Tennison v. City and County of San Francisco, 548 F.3d 1293 (9th Cir. 2008) Feb. '09 LED:05

***Malicious Prosecution Civil Lawsuit*:** Bender v. City of Seattle, 99 Wn.2d 582 (1983); Peterson v. Littlejohn, 56 Wn. App. 1 (Div. I, 1989)

Of course, Brady violations may also result in overturning of criminal convictions. U.S. v. Jernigan, 492 F.3d 10050 (9th Cir. 2007) Oct. '07 LED:05; U.S. v. Price, 566 F.3d 900 (9th Cir. 2009) Aug. '09 LED:13

VII. INDEPENDENT GROUNDS RULINGS UNDER ARTICLE I, SECTION 7 OF WASHINGTON CONSTITUTION

GENERALLY CHRONOLOGICAL (BY DATE OF FIRST DECISION IN THE PARTICULAR SUBTOPIC) LIST OF MAJOR RESTRICTIVE INDEPENDENT GROUNDS RULINGS UNDER ARTICLE I, SECTION 7, WASHINGTON

CONSTITUTION, ADDRESSING SEARCHES, SEIZURES AND ARRESTS BY LAW ENFORCEMENT OFFICERS

1. NO "GOOD FAITH" EXCEPTION TO THE EXCLUSIONARY RULE FOR OFFICERS ENFORCING CLEARLY UNCONSTITUTIONAL STATUTES

State v. White, 97 Wn.2d 92 (1982) April '82 LED:02

2. NO CARROLL DOCTRINE (NO PC CAR SEARCH EXCEPTION)

State v. Ringer, 100 Wn.2d 686 (1983) Feb. '84 LED:01
State v. Tibbles, 169 Wn.2d 364 (2010) Sept '10 LED:09

3. LIMITED AUTHORITY TO ACCOMPANY ARRESTEE INTO HIS OR HER PREMISES WITHOUT CONSENT

State v. Chrisman, 100 Wn.2d 814 (1984) April '84 LED:01

4. AGUILAR-SPINELLI TWO-PRONGED TEST FOR INFORMANT-BASED PROBABLE CAUSE REQUIRES THAT BOTH PRONGS BE FULLY SATISFIED

State v. Jackson, 102 Wn.2d 432 (1984) Nov. '84 LED:06
State v. Smith, 102 Wn.2d 449 (1984) Nov. '84 LED:11

5. "OPEN FIELDS" MAY BE PROTECTED IF LEGITIMATE EXPECTATION OF PRIVACY IS MANIFESTED

State v. Myrick, 102 Wn.2d 506 (1984)
Dec. '84 LED:06 (airplane over-flight ok)
State v. Wilson, 97 Wn. App. 578 (Div. III, 1999)
Jan. 2000 LED:07 (airplane over-flight ok)
State v. Johnson, 75 Wn. App. 692 (Div. II, 1995)
Jan. '95 LED:19 (unlawful entry of fenced, gated, signed farm)
State v. Thorson, 98 Wn. App. 528 (Div. I, 1999)
Feb. 2000 LED:02 (unlawful entry of remote island property)
State v. Littlefair, 129 Wn. App. 330 (Div. II, 2005)
Nov. '05 LED:13 (unlawful night entry of marked rural property)
State v. Jesson, 142 Wn. App. 852 (Div. III, 2008)
March '08 LED:12 (unlawful entry of marked rural property)

6. REASONABLE ALTERNATIVES TO IMPOUNDMENT OF A VEHICLE GENERALLY MUST BE CONSIDERED BEFORE IMPOUNDMENT

State v. Williams, 102 Wn.2d 733 (1984) Dec. '84 LED:01; State v. Hill, 68 Wn. App. 300 (1993); State v. Tyler, 2013 WL 2367952 (2013) Aug. '13 LED:__

7. TELEPHONE TOLL RECORDS (LONG DISTRANCE RECORDS) CAN BE OBTAINED BY LAW ENFORCEMENT ONLY BY SEARCH WARRANT OR PER ONE OF THE RECOGNIZED EXCEPTIONS TO THE WARRANT REQUIREMENT

State v. Gunwall, 106 Wn.2d 54 (1986) Aug. '86 LED:04

8. VEHICLE SEARCH INCIDENT TO ARREST IS LIMITED TO PASSENGER AREA AND UNLOCKED CONTAINERS, REPOSITORIES AND EFFECTS IN THAT AREA (BUT SEE ITEM # 38 BELOW RE: MV SEARCH INCIDENT TO ARREST)

State v. Stroud, 106 Wn.2d 144 (1986) Aug. '86 LED:01. Note that Stroud was overruled and its holding replaced by a more restrictive rule; see entry # 38 below.

9. WASHINGTON EXCLUSIONARY RULE APPLIES IN PROBATION AND PAROLE REVOCATION HEARINGS

State v. Lampman, 45 Wn. App. 228 (Div. II, 1986) Feb '87 LED:13

10. UNPUBLISHED PHONE LISTING INFORMATION MAY BE OBTAINED BY LAW ENFORCEMENT ONLY THROUGH SEARCH WARRANT OR PER EXCEPTION TO WARRANT REQUIREMENT

State v. Butterworth, 48 Wn. App. 152 (1987) Aug. '87 LED:19

11. SOBRIETY CHECKPOINTS ARE NOT ALLOWED, AT LEAST IN THE ABSENCE OF EXPRESS STATUTORY AUTHORITY

Seattle v. Mesiani, 110 Wn.2d 454 (1988) July '88 LED:14

12. CONSENT WHERE COHABITANT IS PRESENT ANYWHERE ON THE PREMISES REQUIRES CONSENT FROM SUCH COHABITANT

State v. Leach, 113 Wn.2d 735 (1989) Feb. '90 LED:03

State v. Morse, 156 Wn.2d 1 (2005) Feb. '06 LED:02

But see State v. Cantrell, 124 Wn.2d 183 (1994) Sept. '94 LED:05 (Leach rule not applicable to MV consent searches)

Compare State v. Walker, 136 Wn.2d 767 (1998) Jan. '99 LED:03 (Leach rule doesn't require exclusion of evidence as to consenting co-habitant)

Also compare State v. Hoggatt, 108 Wn. App. 257 (Div. II, 2001) Nov. '01 LED:08 (Leach rule does not apply to mere request to *enter living room* through the front door)

13. GARBAGE CAN FOR A SINGLE RESIDENCE LEFT AT CURBSIDE FOR PICKUP MAY NOT BE SEARCHED BY POLICE WITHOUT A SEARCH WARRANT OR PER EXCEPTION TO WARRANT REQUIREMENT

State v. Boland, 115 Wn.2d 571 (1990) Jan. '91 LED:02

State v. Rodriguez, 65 Wn. App. 409 (Div. III) 1992) Oct. '92 LED:06 (Boland rule not applicable to communal apartment complex dumpster)

State v. Sweeney, 125 Wn. App. 881 (Div. III, 2005) April '05 LED:15 (Boland rule applies to staged pickup of garbage that made garbage pickup person agent of police)

14. NO "GOOD FAITH" EXCEPTION TO EXCLUSIONARY RULE FOR OFFICERS EXECUTING A SEARCH WARRANT INCORRECTLY BELIEVING THE AFFIDAVIT ESTABLISHES PROBABLE CAUSE

State v. Crawley, 61 Wn. App. 29 (Div.III, 1991) Nov. '91 LED:09

15. INFRARED THERMAL DETECTION DEVICES MAY NOT BE USED FOR CRIMINAL INVESTIGATION WITHOUT A SEARCH WARRANT

State v. Young, 123 Wn.2d 173 (1994) April '94 LED:02 (Note that this is now also the 4th Amendment rule per U.S. Supreme Court decision in Kyllo v. U.S., 533 U.S. 27 (2001))

16. WASHINGTON EXCLUSIONARY RULE APPARENTLY GIVES "AUTOMATIC STANDING" TO CHALLENGE UNLAWFUL SEARCH WHERE POSSESSION IS AN ELEMENT OF CRIME CHARGED

State v. Carter, 127 Wn.2d 836 (1995) Jan. '96 LED:07

State v. Jones, 146 Wn.2d 328 (2002) July '02 LED:11

State v. Kypreos, 115 Wn. App. 207 (Div. I, 2002) June '03 LED:16 (in possessing stolen firearm case, defendant had automatic standing to challenge search of stolen fifth wheel trailer)
State v. Evans, 159 Wn.2d 402 (2007) March '07 LED:15

17. INVESTIGATORY SEARCHES OF VEHICLES SEIZED FOR FORFEITURE MAY NOT BE CONDUCTED WITHOUT A SEARCH WARRANT OR PER AN EXCEPTION TO WARRANT REQUIREMENT

State v. Hendrickson, 129 Wn.2d 61 (1996) July '96 LED:11

18. WHETHER A SUSPECT SUBMITS TO OFFICER'S "SHOW OF AUTHORITY" IS NOT DETERMINATIVE OF WHETHER A "SEIZURE" HAS OCCURRED

State v. Young, 135 Wn.2d 498 (1998) Aug. '98 LED:02

19. REGARDLESS OF WHETHER AGENCY HAS STANDARDIZED PROCEDURES, POLICE INVENTORYING A VEHICLE FOLLOWING A LAWFUL IMPOUND MAY NOT INSPECT THE CONTENTS OF A LOCKED TRUNK IF NO "MANIFEST NECESSITY" TO DO SO; SAME RULE APPLIES TO INSPECTING THE CONTENTS OF CLOSED CONTAINERS

State v. Houser, 95 Wn.2d 143 (l980) April '81 LED:01 (Note that Houser on its face was grounded solely on the Fourth Amendment, but that the Washington Supreme Court declared in its 1998 White decision that Houser had been grounded in an article I, section 7 interpretation)
State v. White, 135 Wn.2d 761 (1998) Sept.'98 LED:08
State v. Dugas, 109 Wn. App. 592 (Div. I, 2001) March '02 LED:02

20. OFFICERS USING A "KNOCK AND TALK" PROCEDURE TO OBTAIN CONSENT TO SEARCH A RESIDENCE MUST ADVISE OF THE THREE "R" RIGHTS – RIGHT TO REFUSE, RIGHT TO RESTRICT SCOPE, AND RIGHT TO RETRACT CONSENT

State v. Ferrier, 136 Wn.2d 103 (1998) Oct. '98 LED:02 (knock-and-talk regarding marijuana grow); State v. Kennedy, 107 Wn. App. 972 (Div. II, 2001) Nov. '01 LED:06 (Full Ferrier warnings were required for officers to obtain valid consent to enter a motel room to search for drugs); State v. Westvang, ___Wn. App. ___, 2013 WL 2217326 (Div. II, May 21, 2013) July '13 LED:(Where officers were searching for an arrest warrant subject that an informant NOT shown to be reliable had told them was present in a third party's residence, Ferrier warnings were required to obtain the resident's consent to search her residence for the suspect; that is because the officers did not have reasonable suspicion the subject they were looking for was in the residence)

But see decisions where Ferrier warnings were not required: State v. Bustamonte-Davila, 138 Wn.2d 964 (1999) Nov. '99 LED:02 (assisting INS arrest at residence); State v. Leupp, 96 Wn. App. 324 (Div. II, 1999) Oct. '99 LED:05 (consenting entry to look for possible DV victim); State v. Williams, 141 Wn.2d 17 (2000) Dec. '00 LED:14 (consenting entry of third party's residence to look for subject of arrest warrant); State v. Khounvichai, 149 Wn.2d 557 (2003) Aug. '03 LED:06 (consenting entry of third party's residence to talk to suspect in vandalism incident); State v. Tagas, 121 Wn.

App. 872 (Div. I, 2004) July '04 LED:13 (requesting consent for purse search prior to giving person a ride from the freeway)

21. OFFICERS NEED A WARRANT TO USE A DRUG-SNIFFING DOG TO CHECK FOR DRUGS AT A RESIDENCE

State v. Dearman, 92 Wn. App. 630 (Div. I, 1998) Nov. '98 LED:06

22. DRIVERS, BUT NOT PASSENGERS, MAY BE AUTOMATICALLY ORDERED OUT OF, OR BACK INTO, THEIR VEHICLES AT ROUTINE TRAFFIC STOPS

State v. Mendez, 137 Wn.2d 208 (1999) March '99 LED:04
("heightened awareness of danger" is required in order to take control over non-violator passengers)

23. "BEND OVER AND SPREAD 'EM" STRIP SEARCH NOT PERMITTED AS ON-SCENE "SEARCH INCIDENT TO ARREST"

State v. Rulan C., 97 Wn. App. 884 (Div. I, 1999) May '99 LED:15

24. PRETEXT STOPS PROHIBITED – PRETEXT MAY BE PROVEN BY EITHER SUBJECTIVE OR OBJECTIVE EVIDENCE

State v. Ladson, 138 Wn.2d 343 (1999) Sept. '99 LED:05
State v. Arreola, 176 Wn.2d 284 (2012) March '13 LED:07 (Washington Supreme Court rejects subjective-pretext argument in case where Court determined that officer had "mixed motive" for stop)

25. RULE FOR VEHICLE SEARCH INCIDENT TO ARREST DOES NOT PERMIT SEARCH OF NONARRESTEE'S PERSONAL EFFECTS UNLESS ARTICULABLE REASON TO DO SO

State v. Parker, Hunnel, and Hines, 139 Wn.2d 486 (1999) Dec. '99 LED:13

26. EMERGENCY EXCEPTION TO SEARCH WARRANT REQUIREMENT HAS BOTH SUBJECTIVE AND OBJECTIVE ELEMENTS

State v. Schultz, 170 Wn.2d 746 (2011) March '11 LED:16

27. TERRY SEIZURE ON REASONABLE SUSPICION NOT PERMITTED FOR NON-TRAFFIC CIVIL INFRACTIONS

Seattle v. Duncan, 146 Wn.2d 166 (2002) June '02 LED:19
State v. Day, 161 Wn.2d 889 (2007) December '07 LED:18

28. SEARCH WILL NOT BE DEEMED TO BE "INCIDENT TO ARREST" UNLESS AN ACTUAL CUSTODIAL ARREST PRECEDES THE SEARCH

State v. O'Neill, 148 Wn.2d 564 (2003) April '03 LED:03
State v. Radka, 120 Wn. App. 43 (Div. III, 2004) March '04 LED:11

29. SEARCH WARRANT IS REQUIRED FOR USE OF GPS DEVICE TO TRACK SUSPECT'S VEHICLE

State v. Jackson, 150 Wn.2d 251 (2003) November '03 LED:02 (Note that in U.S. v. Jones, 132 S.Ct. 945 (2012) March '12 LED:07, the U.S. Supreme Court placed some limits under the Fourth Amendment on law enforcement activity related to attaching and tracking GPS devices)

30. DURING TRAFFIC STOP, MV PASSENGERS NOT THEMSELVES SUSPECTED OF COMMITTING VIOLATION OF LAW SHOULD NOT BE ROUTINELY ASKED FOR ID OR IDENTIFYING INFORMATION

State v. Rankin, 151 Wn.2d 689 (2004) Aug. '04 LED:07 (Rankin clarifies State v. Larson, 93 Wn.2d 638 (1980) Aug. '80 LED:01)
In re Brown, 154 Wn.2d 787 (2005) Sept. '05 LED:17

Compare: State v. Mote, 129 Wn. App. 276 (Div. I, 2005) Nov. '05 LED:10 (Rankin rule does not apply to asking occupants of lawfully parked cars for ID or identifying information)

31. "APPARENT AUTHORITY" DOCTRINE FOR CONSENT SEARCH NOT APPLICABLE UNDER WASHINGTON CONSTITUTION

State v. Morse, 156 Wn.2d 1 (2005) Feb. '06 LED:02

32. RANDOM CHECK OF MOTEL REGISTRY IS NOT CONSITUTIONAL EVEN IF HOST/PROPRIETOR CONSENTS; BUT CHECK BASED ON OBJECTIVE INDIVIDUALIZED SUSPICION OF CRIMINAL ACTIVITY IN MOTEL ROOM IS PERMITTED

State v. Jorden, 160 Wn.2d 121 (2007) July '07 LED:18

In re Personal Restraint of Nichols, 171 Wn.2d 370 (2011) June 11 LED:21

33. MISDEMEANOR ARREST WARRANT JUSTIFIES FORCED ENTRY OF RESIDENCE TO ARREST UNDER PAYTON/STEAGALD RULE, BUT 1) ENTRY MUST BE REASONABLE IN TIME AND MANNER, 2) PRETEXT WILL INVALIDATE ENTRY, AND 3) ARRESTEE MUST BE HOME (WHETHER ELEMENTS 1, 2 AND 3 APPLY UNDER ARTICLE I, SECTION 7 TO ENTRY TO ARREST ON A FELONY ARREST WARRANT REMAINS UNDECIDED)

State v. Hatchie, 166 Wn.2d 398 (2007) Oct. '07 LED:07

34. STATUTORILY AUTHORIZED WASHINGTON STATE AGENCY ADMINISTRATIVE SUBPOENA FOR BANK RECORDS INVALID

State v. Miles, 160 Wn.2d 236 (2007) Nov. '07 LED:07

35. ARREST UNDER RCW 46.61.021(3) NOT JUSTIFIED IF BASIS FOR REQUEST FOR ID WAS NOT AN OFFENSE UNDER TITLE 46 RCW

State v. Moore, 161 Wn.2d 880 (2007) Dec. '07 LED:17

36. FOURTH AMENDMENT'S "PRIVATE SEARCH DOCTRINE" THAT ALLOWS POLICE TO GO WHERE CITIZEN HAS GONE NOT APPLICABLE

State v. Eisfeldt, 163 Wn.2d 628 (2008) July '08 LED:09

37. MODERATE ODOR OF MARIJUANA COMING FROM MV WITH MULTIPLE OCCUPANTS DURING TRAFFIC STOP NOT PC TO ARREST PASSENGER

State v. Grande, 164 Wn.2d 135 (2008) Sept. '08 LED:07

38. SEARCH OF MOTOR VEHICLE INCIDENT TO ARREST OF OCCUPANT GENERALLY NOT PERMITTED ONCE THE ARRESTEE IS SECURED

State v. Snapp, 172 Wn.2d 177 (2012) May '12 LED:25

39. SOCIAL CONTACT TURNED INTO "SEIZURE" WHEN OFFICER REQUESTED CONSENT TO FRISK

State v. Harrington, 167 Wn.2d 656 (2009) Feb. '10 LED:17

40. "INEVITABLE DISCOVERY" EXCEPTION TO EXCLUSIONARY RULE DOES NOT APPLY UNDER WASHINGTON CONSTITUTION

State v. Winterstein, 167 Wn.2d 620 (2009) Feb. '10 LED:24

41. CASE-LAW-BASED GOOD FAITH EXCEPTION TO EXCLUSIONARY RULE DOES NOT EXIST UNDER WASHINGTON CONSTITUTION

State v. Afana, 169 Wn.2d 169 (2010) Aug. '10 LED:10

State v. Adams, 169 Wn.2d 487 (2010) Oct. '10 LED:15

42. WARRANTLESS SEARCH OF STUDENT BY POLICE OFFICER ACTING AS SCHOOL RESOURCE OFFICER DID NOT QUALIFY AS A "SCHOOL SEARCH"

UNDER STATE CONSTITUTION REGARDLESS OF WHETHER IT WOULD HAVE QUALIFIED AS SUCH UNDER THE FOURTH AMENDMENT

State v. Meneese, 174 Wn.2d 937 (2012) Oct. '12 LED:10

QUASI-INDEPENDENT GROUNDS RULINGS (Important Washington Supreme Court decisions that purport to interpret the Fourth Amendment but may be more restrictive than the Fourth Amendment requires)

1. **FRISKS IN SEARCH WARRANT EXECUTION MUST ALWAYS BE BASED ON INDIVIDUALIZED BASIS FOR BELIEVING PERSON IS ARMED**

   State v. Broadnax, 98 Wn.2d 289 (1982) Feb. '83 LED:05

2. **UNDER PAYTON/STEAGALD RULE LIMITING POLICE ENTRY OF PRIVATE PREMISES TO MAKE WARRANTLESS ARREST, THE FACT THAT A PERSON FOR WHOM POLICE HAVE PROBABLE CAUSE TO ARREST (BUT NO ARREST/SEARCH WARRANT) OPENS THE DOOR WHEN POLICE KNOCK AT THE DOOR DOES NOT JUSTIFY REACHING THROUGH THE OPEN DOORWAY AND MAKING WARRANTLESS ARREST OF THE PERSON**

   State v. Holeman, 103 Wn.2d 426 (1985) April '85 LED:11

3. **OFFICER-AFFIANT'S STATEMENT ABOUT HIS EXPERIENCE AND TRAINING RE HABITS OF DRUG DEALERS WAS NOT SUFFICIENT ALONE TO LINK DEFENDANT'S RESIDENCE TO THE MERE FACT THAT DEFENDANT SOLD A LARGE QUANTITY OF MARIJUANA AT AN UNDISCLOSED LOCATION**

   State v. Thein, 138 Wn.2d 133 (1999) Aug. '99 LED:15