2025
SEARCH AND SEIZURE MANUAL

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Department of Justice
State of Oregon

2025 Manual of Oregon Search and Seizure Law
Oregon Department of Justice

This manual is intended to be a field guide to common search and seizure problems. It is a starting point for further research. Constant checking for new decisions is imperative in dealing with this rapidly shifting area of law. The cases in this manual include decisions through July 31, 2025.

This compilation of Oregon search and seizure law builds upon years of efforts of various members of the Criminal Justice and Appellate Divisions of the Department of Justice. The editors of this year's version are listed below.

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I. PRIVACY INTERESTS.

Article I, section 9, of the Oregon Constitution provides safeguards against unreasonable searches and seizures and protects both privacy and possessory interests. State v. Sholedice/Smith, 364 Or 146, 155, 431 P3d 386 (2018), *adh'd to as modified on recons,* 364 Or 575 (2019); State v. Owens, 302 Or 196, 205-06, 729 P2d 524 (1986).

Searches and seizures are separate acts and must be analyzed separately. State v. Tanner, 304 Or 312, 316, 745 P2d 757 (1987); State v. Barnum, 136 Or App 167, 174, 902 P2d 95 (1995), *rev den*, 323 Or 336 (1996). "A 'search' occurs when a person's privacy interests are invaded." State v. Owens, 302 Or 196, 206, 729 P2d 524 (1986). A protected privacy interest is an interest in freedom from government scrutiny; the existence of a possessory interest "is not the touchstone of whether a person has a privacy interest." State v. Lien/Wilverding, 364 Or 750, 759-60 n 2, 441 P3d 185 (2019) (defendants had privacy interest in garbage that was collected by sanitation company at police request). *But see* State v. Newcomb, 359 Or 756, 375 P3d 4343 (2016) (because defendant lacked a possessory interest in her dog after it was seized, test of the dog's blood did not implicate a protected privacy interest).

A seizure is "a significant interference with a person's possessory or ownership interests in property." State v. Owens, 302 Or 196, 207, 729 P2d 524 (1986); *see also* State v. Barnthouse, 360 Or 403, 418, 380 P3d 952 (2016) (addressee of a mail package has a protected possessory interest in the package). *See* State v. Galloway/Hoesly, 198 Or App 585, 595, 109 P3d 383 (2005) (police seizure of garbage cans before they were collected by sanitation company violated defendants' possessory rights). The permissible scope of a search may be limited by the purpose of the seizure.

The Fourth Amendment to the United States Constitution contains similar, although not identical, protections. *See* State v. Ainsworth, 310 Or 613, 619 n 8, 801 P2d 749 (1990) (recognizing that "many of the issues raised by the [state and federal privacy] analyses are similar"). Under the Fourth Amendment, "[a] 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed. A 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property." United States v. Jacobsen, 466 US 109, 113, 104 S Ct 1652, 80 L Ed 2d 85 (1984) (footnote omitted).

Article I, section 9, and the Fourth Amendment limit only the government. State v. Tucker, 330 Or 85, 90, 997 P2d 182 (2000); Walter v. United States, 447 US 649, 656, 100 S Ct 2395, 65 L Ed 2d 410 (1980) (search by a private party acting on his or her own volition does not violate the Fourth Amendment). Those provisions do not prevent private individuals from searching a defendant's property or seizing it, State v. Tanner, 304 Or 312, 321, 745 P2d 757 (1987), nor do they prohibit admission of evidence discovered as a result of a private search or seizure. State v. Davis, 313 Or 246, 253-54, 834 P2d 1008 (1992). However, a private party search can be deemed to be "state action" for purposes of Article I, section 9, if "a private citizen's conduct in pursuing his or her own search and seizure become so intertwined with the conduct of a state actor that the private citizen's actions are essentially those of the state and should be subject to constitutional restrictions on state searches and seizures." State v. Sines, 359 Or 41, 50, 379 P3d 502 (2016); *see also* State v. Lien/Wilverding, 364 Or 750, 777-79, 441 P3d 185 (2019). To determine whether a private search constitutes "state action," courts look to common-law agency principles as helpful guides to determining whether a state official communicated, by statements or conduct, that the private party was authorized to act as an agent of the state. Sines, 359 Or 41, 59, 379 P3d 502 (2016); *see also* State v. Benton, 317 Or App 384, 424, 505 P3d 975, *aff'd*, 371 Or 311 (2023) ("*Sines* stated only that common-law agency principles can provide assistance in the search and seizure context, not that a strict application of those principles is required."). Although common law agency principles are

helpful, "the ultimate inquiry is whether the state was involved enough in guiding, encouraging, or supporting the informant's activities that the informant's conduct is fairly attributable to the state." *State v. Benton*, 371 Or 311, 325, 534 P3d 724 (2023).

A county or other local government entity may not expand search-and-seizure protections in a manner that governs the conduct of state and federal officials. State v. Logsdon, 165 Or App 28, 32, 995 P2d 1178, *rev den*, 330 Or 362 (2000) (invalidating Josephine County charter provision directed to any "public official" and "any agent of the government" and that purported to expand search-and-seizure protections within the county; "[W]hatever else local government authority may entail, it does not include governing the conduct of state and federal officials.").

This chapter addresses three issues:

(1) Was a government agent involved in any challenged action? *See* Section A.

(2) Did a search or seizure occur? *See* Sections B and C.

(3) If a search or seizure occurred, did it violate the *defendant's* personal rights? *See* Section D.

A. PRIVATE-PARTY SEARCHES.

Oregon Law.

Oregon courts have not applied the exclusionary rule to the fruits of searches and seizures by private individuals acting on their own volition. *See also* State v. Tucker, 330 Or 85, 89, 997 P2d 182 (2000) ("Article I, section 9, prohibits only state action that infringes on a citizen's constitutional rights."); State v. Tanner, 304 Or 312, 321, 745 P2d 757 (1987) ("A section 9 privacy interest is an interest against the state; it is not an interest against private parties."). Even if a private party acts unlawfully in conducting a search or seizure, Article I, section 9, does not require the suppression of evidence discovered and delivered to police by the private party. State v. Luman, 347 Or 487, 492-93, 233 P3d 1041 (2009).

If the police initiate, participate in, or authorize an otherwise private-party search, however, that search may constitute government action. State v. Lien/Wilverding, 364 Or 750, 777-79, 441 P3d 185 (2019); State v. Sines, 359 Or 41, 50, 379 P3d 502 (2016).

> "[I]f a state officer requests a private person to search a particular place or thing, and if that private person acts because of and within the scope of the state officer's request, then Article I, section 9, will govern the search."

State v. Tucker, 330 Or 85, 90, 997 P2d 182 (2000) (search of vehicle by tow-truck driver was "state action" because driver acted because of, and within the scope of, a request from a police officer). *See also* Lien/Wilverding, 364 Or at 777-78 (relying on Tucker and Sines, holding that defendants did not lose privacy interest in their garbage at curbside on collection day because the garbage collector picked up the garbage at the behest of police). Similarly, if a state officer communicates to a private party through statements or conduct that he or she is authorized to act as an agent of the state, an ensuing search by the private party is "state action" for purposes of Article I, section 9. State v. Sines, 359 Or 41, 59, 379 P3d 502 (2016).

"[W]here the police are merely present as observers at a time when a private party makes an unauthorized search which the [police did] not initiate or participate in, the fruits of the search are not

subject to suppression." State v. Waterbury, 50 Or App 115, 119-20, 622 P2d 330, *rev den*, 290 Or 651 (1981). In that case, an informant's search of defendant's premises was not conducted with the encouragement or participation of the sheriff's office, so was not state action. *See also* State v. Wheelon, 137 Or App 63, 72-73, 903 P2d 399 (1995), *rev den*, 327 Or 123 (1998) (information provided by citizen informants who trespassed on defendants' property could be considered in probable cause determination if police did not induce the trespass). *Cf.* State v. Acremant, 338 Or 302, 328-29, 108 P3d 1139 (2005) (defendant's father was not acting as a police agent when soliciting incriminating information from him); State v. Smith, 310 Or 1, 13, 791 P2d 836 (1990) (addressing when private individual may be a "police agent" in context of obtaining statements from a represented defendant; a person is a police agent only "if the police were directly or indirectly involved to a sufficient extent in initiating, planning, controlling or supporting [the private individual's] activities").

Where a private party seizes evidence, examines or searches it, and then delivers the evidence to a police officer, the officer's "subsequent, confirmatory examination of that evidence" does not violate Article I, section 9, at least to the extent that the officer's examination of the evidence does not exceed the scope of the private search. State v. Luman, 347 Or 487, 495-96, 223 P3d 1041 (2009). That is because the private party's search of the evidence destroys the property owner's privacy interest in that evidence, "to the extent of the scope of the private search." *Id*; *see also* State v. Stokke, 235 Or App 477, 237 P3d 829, *rev den*, 349 Or 370 (2010) (officer's examination of contents of hotel safe after hotel staff made it available to the officer was not a search). If police exceed the scope of the private search, however, they conduct a search that requires probable cause and a warrant or exception to the warrant requirement. State v. Sines, 287 Or App 850, 875, 404 P3d 1060 (2017), *rev den*, 362 Or 545 (2018) (forensic testing of underwear given by defendant's housekeeper to police exceeded scope of private search and thus violated Article I, section 9).

Some non-police and even some non-governmental personnel are considered state agents when they carry out certain official functions. *See, e.g.*, State v. Okeke, 304 Or 367, 745 P2d 418 (1987) (detoxification facility required to comply with Article I, section 9); State v. DeAubre, 147 Or App 412, 937 P2d 125 (1997) (search by hospital personnel of a fanny pack belonging to a person detained under a mental hold was state action). *See also* State ex rel. Juv. Dept. v. M. A. D., 348 Or 381, 233 P3d 437 (2010) (public school official searched student for purposes of Article I, section 9, when he reached into student's pocket to look for drugs); State ex rel. Juv. Dept. v. Finch, 144 Or App 42, 925 P2d 913 (1996) (school official's search of a student's jacket violated Article I, section 9). *See* related discussion in Chapter IV (Warrantless Searches), (School Searches).

Fourth Amendment.

"The Fourth Amendment applies only to searches and seizures that are the product of government action." Forty-Ninth Annual Review of Criminal Procedure, 49 GEO. L.J. ANN. REV. CRIM. PROC. 4 (2020) (citing cases). *See, e.g.*, Ferguson v. City of Charleston, 532 US 67, 121 S Ct 1281, 149 L Ed 2d 205 (2001) (staff members of state-operated hospital were government actors); New Jersey v. T.L.O., 469 US 325, 336, 105 S Ct 733, 83 L Ed 2d 720 (1985) (public-school assistant vice-principal considered state agent in carrying out publicly mandated state policies).

Moreover, as is true under the Oregon Constitution, if the police initiate or participate in an otherwise private search, that search may be government action. Skinner v. Railway Labor Executives' Assn., 489 US 602, 614, 109 S Ct 1402, 103 L Ed 2d 639 (1989) (Fourth Amendment protects against searches and seizures conducted by private parties "if the private party acted as an instrument or agent of the government"); *see also* State v. Sines, 359 Or 41, 51, 379 P3d 502 (2016) ("Fourth Amendment cases generally hold that when law enforcement officers *participate* with private individuals in a search or seizure, the action is not a 'private search.'" (emphasis in original)).

A private-party search becomes a governmental search if "the government coerces, dominates or directs the actions" of the person conducting the search. *United States v. Smythe*, 84 F3d 1240, 1242 (10th Cir 1996). *See also* *United States v. Pervaz*, 118 F3d 1, 6 (1st Cir 1997) (declining to adopt specific standard or test, instead considering "the extent of the government's role in instigating or participating in the search, its intent and the degree of control it exercises over the search and the private party, and the extent to which the private party aims primarily to help the government or to serve its own interests"); *United States v. Walther*, 652 F2d 788, 791 (9th Cir 1981) ("The government must be involved either directly as a participant or indirectly as an encourager of the private citizen's actions before we deem the citizen to be an instrument of the state"); *State v. Capell*, 156 Or App 582, 587, 966 P2d 232 (1998), *rev den*, 328 Or 418 (1999) (because parents' interception of children's communications in the family home did not involve police conduct, the deterrence goal of the Fourth Amendment exclusionary rule would not be furthered by suppression).

Compare *Coolidge v. New Hampshire*, 403 US 443, 91 S Ct 2022, 29 L Ed 2d 564 (1971) (defendant's wife not state agent when no evidence of police coercion, domination, or subtle direction of her actions), and *United States v. Cleaveland*, 38 F3d 1092 (9th Cir 1994) (electric company employees were not state agents, even though they were accompanied by police to ensure safety; employees had "legitimate, independent motive" to inspect electric meter on defendant's property), *with* *Soldal v. Cook County*, 506 US 56, 113 S Ct 538, 121 L Ed 2d 450 (1992) (landlord's eviction of tenants while a deputy sheriff stood by to prevent resistance was a seizure under the Fourth Amendment), *and* *United States v. Reed*, 15 F3d 928 (9th Cir 1994) (hotel employee was a state agent when he continued to search hotel room to help police gather proof of narcotics trafficking while police stood in doorway as lookouts).

Under the Fourth Amendment, as with Article I, section 9, where a private party seizes evidence, searches it, and then gives it to government agents, the government agents' examination of the evidence does not violate the Fourth Amendment if the examination does not exceed that done by the private party. *United States v. Jacobsen*, 466 US 109, 104 S Ct 1652, 80 L Ed 2d 85 (1984); *State v. Luman*, 347 Or 487, 223 P3d 1041 (2009).

B. WHAT IS A SEARCH?

1. General Principles.

a. Article I, section 9.

Under Article I, section 9, a search occurs when a government agent intrudes upon a person's protected privacy interests. *State v. Lien/Wilverding,* 364 Or 750, 759, 441 P3d 185 (2019); *State v. Wacker*, 317 Or 419, 425, 856 P2d 1029 (1993); *State v. Rhodes*, 315 Or 191, 196, 843 P2d 927 (1992); *State v. Fulmer*, 366 Or 224, 229–30, 460 P3d 486 (2020) ("A search is an invasion of a privacy—rather than a possessory—interest."). In determining whether a "search" occurred, two issues are presented: (1) Does a constitutionally protected privacy interest exist in the area or object? and (2) Did the police conduct intrude upon that interest?

(1) Does a Privacy Interest Exist?

"No search occurs unless the police invade a protected privacy interest." *State v. Wacker*, 317 Or 419, 426, 856 P2d 1029 (1993); *see also* *State v. Lien/Wilverding*, 364 Or 750, 759, 441 P3d 185 (2019). Moreover, a defendant asserting a protected privacy interest in property that was searched or seized must have a *personal* interest in the property. *State v. Morton*, 326 Or 466, 469-70, 953 P2d 374 (1998); *see also* *State v. Makuch/Riesterer*, 340 Or 658, 670, 136 P3d 35 (2006) (suppression is warranted "only if police invaded the personal rights of the person who seeks

suppression; the violation of someone else's rights is not enough"); State v. Tanner, 304 Or 312, 315-16, 745 P2d 757 (1987) ("[A] search or seizure must violate *the defendant's* section 9 rights before evidence obtained thereby will be suppressed[.]"; emphasis added); City of Eugene v. Silva, 198 Or App 101, 106, 108 P3d 23 (2005) (same; officers' trespass into backyard of another person's residence violated privacy rights of defendant because he was a guest there); State v. Hartwig, 185 Or App 706, 60 P3d 1157 (2003) (defendant did not identify any protected interest of his that was violated when police made a warrantless entry onto another person's property and seized evidence, despite the owner's directive that the police were not to enter the property without a warrant). *See* further discussion of this issue in this chapter (Standing and Protected Privacy Interests).

"The privacy protected by Article I, section 9, is not the privacy that one reasonably *expects* but the privacy to which one has a *right*." State v. Campbell, 306 Or 157, 164, 759 P2d 1040 (1988) (emphasis in original).

> "In Oregon, the right to privacy—the individual freedom from government scrutiny—protected by Article I, section 9, is not defined by private property or contractual rights, although such rights may inform the analysis in a given case. Rather, … the right to privacy protected by Article I, section 9, 'is the freedom from scrutiny as '*determined by social and legal norms of behavior*, such as trespass laws and conventions against eavesdropping.'"

State v. Lien/Wilverding, 364 Or 350, 759-60, 441 P3d 185 (2019) (italics in original), quoting State v. Newcomb, 359 Or 756, 375 P3d 434 (2016), and *Campbell*, 306 Or at 170. See also Wacker, 317 Or at 425; State v. Dixson/Digby, 307 Or 195, 211, 766 P2d 1015 (1988). "If no privacy interest is affected, no search has occurred." State v. Barnum, 136 Or App 167, 172, 902 P2d 95 (1995), *rev den*, 323 Or 336 (1996).

Evidence showing defendant's intent to expose otherwise private information is relevant under the objective test. *See* State v. Louis, 296 Or 57, 60, 672 P2d 708 (1983) (in determining whether a person's privacy interests have been invaded, "[t]he first issue to determine is did the defendant exhibit an intention to protect his privacy?"), *quoted with approval in* Wacker, 317 Or at 425 (defendant, who sat in parked car at night in busy tavern parking lot with car's interior light on, had no privacy interest, and thus use of nightscope by police was not a search). As Louis and Wacker illustrate, however, a defendant's hope or expectation that what he willingly exposes to the public will not be observed by *the police* does not provide a basis for a privacy interest. *See* State v. Heckathorne, 347 Or 474, 223 P3d 1034 (2009) (although not a transparent container, defendant had no privacy interest in an opaque container that displayed telltale blue crystals distinctive to a precursor meth ingredient on the exterior and also emitted a distinctive ammonia odor); State v. Rodriguez-Ganegar, 186 Or App 530, 63 P3d 1225, *rev den*, 335 Or 578 (2003) (officer's observation of drug activity through a gap in the window curtains of a motel room was not a search because activity could be observed by casual passerby without any special effort). *But see* State v. Lien/Wilverding, 364 Or 750, 763-64, 441 P3d 750 (2019) (defendants had privacy interest in garbage that they had left at curbside for sanitation company pickup); State v. McCrary, 266 Or App 513, 337 P3d 1008 (2014) (although defendant's eyes were visible to the public, she had a protected privacy interest in the presence or absence of resting nystagmus (involuntary jerking of the eyes)).

Whether a person has a protected privacy interest often depends on the context in which the law-enforcement action was taken. For instance, in State v. Campbell, 306 Or 157, 759 P2d 1040 (1988) the court found that surreptitiously attaching a tracking device to the defendant's car on a public roadway and then using the device to follow the defendant was a search. In contrast, in State v. Meredith, 337 Or 299, 96 P3d 342 (2004), the court held that attaching a tracking device to a US Forest Service vehicle with the permission of the Forest Service was not a search because the

defendant, who was a Forest Service employee, had no privacy interest in the location of her publicly owned vehicle while she was working on public land and conducting her activities in public view. Although the action taken by law enforcement — attaching a tracking device to a vehicle — was the same in both cases, the court found that because *Meredith* involved an employment relationship and a consensual tracking, it was factually, and legally, distinguishable from *Campbell*, which involved a member of the public and a nonconsensual tracking.

Article I, section 9, extends to all areas in which a person has a privacy interest. *State v. Dixson/Digby*, 307 Or at 208. "[T]he privacy interests that are protected by Article I, section 9, commonly are circumscribed by the space in which they exist and, more particularly, by the barriers to public entry (physical and sensory) that define that private space." *State v. Smith*, 327 Or 366, 373, 963 P2d 642 (1998). However, "the absence of a physical or sensory invasion of [a] defendant's private space does not necessarily defeat [a] claim that the government conduct constituted a 'search' for purposes of Article I, section 9." *State v. Meredith*, 337 Or at 304. Rather, courts "must consider the interest for which [a] defendant asserts constitutional protection and determine whether that interest is 'private' within the meaning of Article I, section 9." *State v. Meredith*, 337 Or at 304. Under those principles, the court has held that a person has a privacy interest beyond the curtilage of the person's home, *State v. Dixson/Digby*, 307 Or at 210 (rejecting Fourth Amendment "open fields" doctrine), and in the open bed of a pickup truck, *State v. Guynn*, 162 Or App 594, 986 P2d 1190 (1999) (defendant had protected privacy interest in duffel bag, regardless of its location in his truck). *See* further discussion of privacy interests in areas surrounding the home in section on Privacy Interests in Real Property, below.

A person may initially possess a privacy interest in an area but may abandon that privacy interest by disclaiming the property or area in question. *See State v. Crandall*, 340 Or 645, 136 P3d 30 (2006) (defendant lost any privacy interest in a baggie of drugs by voluntarily discarding it in a public place); *State v. Bernabo*, 224 Or App 379, 197 P3d 610 (2008) (defendant lost any privacy interest in a glasses case when she voluntarily discarded it in a public place). *But see State v. Brown*, 273 Or App 347, 359 P3d 413 (2015) (defendant did not abandon McDonald's bag that he left outside a convenience store when questioned by police; "Nothing in the case law under Article I, section 9, suggests that a citizen must keep his hands on his property at all times—even in public places—in order to retain a protected interest in that property."). Circumstances exist, however, in which a person retains some privacy interests in the abandoned property. *See* further discussion of this issue in Chapter IV, Subsection A - WARRANTLESS SEARCHES: Abandoned and Lost Property.

Another way a person may lose an initial privacy interest in an area/property is through the actions of a private third party. *State v. Luman*, 347 Or 487, 223 P3d 1041 (2009). In *Luman*, restaurant employees discovered that their boss, defendant, had been secretly videotaping women using the restaurant restroom and storing the videotapes at work. The employees viewed one of the videotapes, then turned it over to the police. The Supreme Court held that once the employees viewed the contents of the videotape, any privacy interest that defendant "may have had in that piece of evidence is destroyed, * * * to the extent of the scope of the private search." If police exceed the scope of that private search, however, they conduct a search. *State v. Sines*, 287 Or App 850, 875, 404 P3d 1060 (2017), *rev den*, 362 Or 545 (2018).

Finally, a person does not have a privacy interest in business records kept and maintained by a third party unless a legal grant of privacy already exists (such as doctor-patient or attorney-client privilege). See cases listed under subsection: Chapter 1, Privacy Interests, section D(1)(2)(b) (No Protected Interest in a Third Party's Records).

When the third party does not keep the information sought by the state in the course of its regular business—meaning that the third party must create the information at the state's request—a

person may still hold a protected privacy interest in that information. State v. Hawthorne, 316 Or App 487, 499, 504 P3d 1185 (2021), *rev den*, 369 Or 856 (2022) (defendant had a protected privacy interest in cell phone location data that officers obtained by asking AT&T to ping the defendant's phone because that data was not contained within "independently maintained, historical records" and instead the state had asked the third party "to actively produce a record").

(2) Did the Officer's Actions Constitute an Intrusion Into a Protected Area?

If a person has a protected privacy interest in an area or object, the next question under Article I, section 9, is whether the officer's conduct *invaded* that protected interest. State v. Wacker, 317 Or 419, 426, 856 P2d 1029 (1993) ("The threshold question in any Article I, section 9, search analysis is whether the police conduct at issue is sufficiently intrusive to be classified as a search."); State v. Smith, 327 Or 366, 372, 963 P2d 642 (1998) ("the pivotal question * * * is whether the police invaded a protected privacy interest").

If the officer's act exposes to his or her observation what otherwise would be private or hidden, the act is a search. For example, in State v. Stowers, 136 Or App 448, 902 P2d 117 (1995), the officer's action in placing his hand on the defendant's neck to take his pulse was a search because it allowed the officer to examine aspects of the defendant's physical and psychological condition not otherwise observable by the officer or the public. Similarly, in State v. Reed, 169 Or App 456, 463 9 P3d 738 (2000), the officer's use of a flashlight to illuminate a semi-transparent film canister was a search because it "'revealed evidence that was not otherwise exposed to public view.'" *quoting* State v. Dickerson, 135 Or App 192, 898 P2d 193 (1995) (opening pocketknife was a search). *See also* State v. Stock, 209 Or App 7, 146 P3d 393 (2007) (defendant had privacy interest in contents of baggie inside a folded bottle cap); State v. Cardell, 180 Or App 104, 41 P3d 1111 (2002) (officer conducted unlawful search when he placed his hand on tire of defendant's parked car to determine whether it was hot); State v. Haney, 153 Or App 642, 958 P2d 192 (1998) (officer's pat-down of book bag before handing it to defendant was a search); State v. Brownlie, 149 Or App 58, 62, 941 P2d 1069 (1997) (X-ray screening at courthouse exposed contents of defendant's purse that were otherwise concealed and, therefore, constituted a search). The rule is different for animals, however; although animals are property, the animal's owner retains no protected privacy interest in the animal's blood, provided the animal was lawfully seized and the animal's blood is drawn and tested for purposes of diagnosis and treatment. State v. Newcomb, 359 Or 756, 773, 375 P3d 434 (2016).

Ordinarily, standing in a public place and looking through a person's car windows or through the windows of a person's home is not a search. State v. Wacker, 317 Or at 426-27 (windows of car parked in public parking lot); State v. Wilson, 291 Or App 581, 422 P3d 402, rev den, 363 Or 600 (2018) (12-inch gap under stall in public restroom); State v. Louis, 296 Or 57, 60-61, 672 P2d 708 (1983) (front windows of home); State v. Castillo-Salgado, 186 Or App 605, 64 P3d 1169, *rev den,* 336 Or 60 (2003) (gap in the blinds of an apartment kitchen window); State v. Rodriguez-Ganegar, 186 Or App 530, 63 P3d 1225, *rev den,* 335 Or 578 (2003) (gap in the window curtains of a motel room); State v. Orlovski, 146 Or App 632, 933 P2d 976 (1997) (windows of car parked on street).

However, if an officer opens a car door, directs a vehicle occupant to open a car door, or sticks his or her head through an open car window, the officer has engaged in a search if the officer thereby is able to observe something that otherwise would have remained hidden. State v. Rhodes, 315 Or 191, 197, 843 P2d 927 (1992) (opening car door); State v. Finlay, 170 Or App 359, 12 P3d 999 (2000) (ordering occupants out of vehicle to inspect VIN on doorpost of open car door); State v. Hendricks, 151 Or App 271, 948 P2d 740 (1997) (officer inserting his head through open car window to hand driver traffic citation). Similarly, in State v. Fortmeyer/Palmer, 178 Or App 485, 37 P3d 223

(2001), the court held that officers who had lawful access to a common area between two homes conducted an unlawful search when they kneeled to look through a narrow crack in a basement window.

Observations made from aircraft flown at lawful altitudes are not searches for purposes of the Oregon Constitution. State v. Gohring, 311 Or 33, 803 P2d 1189 (1991); State v. Ainsworth, 310 Or 613, 801 P2d 749 (1990); State v. Rodal, 161 Or App 232, 239, 985 P2d 863 (1999); *but see State v. Nakhiengchahn*, 341 Or App 516, __ P3d __ (2025) (although the police flew over defendant's property at a lawful altitude, an officer's warrantless use of a magnified camera system was an unlawful search because it allowed the officer to observe information about marijuana plants that was "materially different" from what he could have seen without the camera).

Note: Oregon statutes restrict law enforcement use of footage taken from "unmanned aircraft systems" (*i.e.*, drones). *See* ORS 837.310 *et seq.*

A physical invasion of "private space" in which a defendant has a privacy interest is a search. State v. Smith, 327 Or 366, 372, 963 P2d 642 (1998). *See also* State v. Rhodes, 315 Or 191, 196-97, 843 P2d 927 (1992) (opening a car door is a search); State v. Barnum, 136 Or App 167, 172, 902 P2d 95 (1995), *rev den*, 323 Or 336 (1996) (opening a notebook so that its contents are exposed is a search). But a defendant has no protected privacy interest in a structure that he unlawfully erects on public property. State v. Tegland, 269 Or App 1, 344 P3d 63 (2015) (defendant had no protected interest in unlawful temporary tarp structure that rested partly on city sidewalk; police entry into structure did not violate either Oregon or federal constitutions). And, even assuming that a defendant has a privacy interest in a detention cell where is he held after arrest, an officer's "act of partially lifting the curtain to check on defendant did not amount to an intrusion" of that interest, given that corrections officials had duty to maintain security in the facility and the defendant had no right to exclude others. State v. Taplin, 311 Or App 542, 491 P3d 80 (2021). See additional "intrusion" cases State v. Smith, 327 Or at 372; State v. Wacker, 317 Or at 426; and State v. Rhodes, 315 Or at 197.

Similarly, a "technological or figurative invasion" of private space by the police may constitute a search if it permits the police to observe private information about the interior:

> "[S]ome police techniques clearly do involve technological or figurative invasions of privacy interests. High-powered telescopes, parabolic sound gathering devices, and infrared cameras all are able to gather ordinarily imperceptible information (in the form of light rays, sound waves, or heat waves) from the *interior* of an enclosed space *as it emanates from that space*. Although such devices can operate *from* an external and public place, their use is invasive nevertheless, because they provide information from an enclosed space about the enclosure's contents that a police officer, standing at a lawful vantage point, cannot detect with ordinary human powers of perception. That is, they constructively move the observing police officer *into* the private space."

State v. Smith, 327 Or 366, 374, 963 P2d 642 (1998) (emphasis in original). A dog sniff of ambient air outside a storage locker is not a technological or figurative invasion of a private space and, thus, is not a search. "[D]og sniffs do not extract information from the interior of private space, either literally or figuratively. They are not invasive in any sense of the word." *Id.*

An intrusion into privacy interests may occur even if the same information lawfully could have been obtained another way. State v. Campbell, 306 Or 157, 759 P2d 1040 (1988) (use of tracking device to follow defendant on public roads was a search). "Whether police conduct is a search does not turn on whether its object could be discovered by conduct that is not a search." *Id.* at 166-67. The fact that information "may be legally obtained does not mean that every method that can

be used to obtain the same information does not invade an individual's privacy interest or constitute a search." State v. Casconi, 94 Or App 457, 460, 766 P2d 397 (1988) (use of hidden video camera to view open stalls in public restroom was a search). Thus, although following a car on a public roadway is not a search, affixing a tracking device to the car likely is a search under section 9. Campbell, 306 Or at 166-67. *But see* State v. Meredith, 337 Or 299, 304, 96 P3d 342 (2004) (attaching tracking device to public service vehicle to monitor the movements of employee operating the vehicle during working hours in public areas did not violate employee's privacy rights), State v. Holland, 272 Or App 211, 355 P3d 194 (2015) (police use of software to identify and locate child pornography files on defendant's computer was not a search), and State v. Combest, 271 Or App 38, 350 P3d 222, *rev den*, 358 Or 70 (2015) (police use of software to view and download files from file-sharing network where defendant posted child pornography was not a search); *see also* State v. Dulfu, 282 Or App 209, 386 P3d 85 (2016), *rev'd on other grounds*, 363 Or 647 (2018) (same). Likewise, the state's request for a cell service provider to ping the defendant's cell phone to reveal its real-time location is a search. State v. Hawthorne, 316 Or App 487, 497, 504 P3d 1185 (2021), *rev den*, 369 Or 856 (2022). "The intrusion caused by pinging a cell phone is even greater than that posed by a tracking device attached to a car" because most people carry cell phones most of the time and tracking a cell phone's location thus allows for "near perfect surveillance" of a person's location. *Id.*

> **NOTE: INTRUSIONS FOR NON-INVESTIGATORY PURPOSES.** Several forms of government intrusion into private space are not "searches" because the purpose is something other than criminal investigation — *e.g.*, **inventories**, *see* State v. Johnson, 177 Or App 244, 251, 35 P3d 1024 (2001) ("An inventory, whose purpose is simply to itemize what is present, is different in substance from a search, which is an endeavor to find evidence." (*quoting* State v. Tyler, 168 Or App 600, 602 n 2, 7 P3d 624 (2000)), and **administrative inspections**, *see* Nelson v. Lane County, 304 Or 97, 104-05, 743 P2d 692 (1987) ("Preventing prospective or ongoing violations is an administrative purpose as well, so long as the intended consequences of noncompliance with whatever standards the inspection is meant to uphold are noncriminal."). Such intrusions require a different justification and are governed by different limitations than criminal investigatory searches. *See* discussion of Inventories, Administrative Searches, in Ch. IV. Additionally, under some circumstances, an individual officer's particular purpose for intruding into private space is relevant to whether the intrusion constitutes a "search." *See, e.g.*, State v. Faulkner, 102 Or App 417, 794 P2d 821, *rev den*, 310 Or 422 (1990) (officer's use of flashlight to illuminate interior of pickup truck at night, not as part of an investigation, but because he was admiring the truck, did not transform appropriate "open view" observation into a search). In circumstances such as those present in *Faulkner*, where the intrusion is determined not to constitute a search, no justification is required to validate it. *Contrast* State v. Hendricks, 151 Or App 271, 948 P2d 740 (1997) (officer leaning into car from open window to deliver a traffic citation was a search; without legal justification, the observations were invalid).

See additional discussion and cases in this chapter, (Technological Enhancement), (Interests Protected Under Art. I, § 9), and (No Protected Privacy or Possessory Interest Under Art. I, § 9).

b. The Fourth Amendment.

Under the Fourth Amendment, a search occurs when government officials invade a defendant's legitimate expectation of privacy. Oliver v. United States, 466 US 170, 177-78, 104 S Ct 1735, 80 L Ed 2d 214 (1984); Katz v. United States, 389 US 347, 88 S Ct 507, 19 L Ed 2d 576 (1967). Official conduct that "does not compromise any legitimate interest in privacy" is not a Fourth Amendment search, and "any interest in possessing contraband cannot be deemed legitimate, and

thus, governmental conduct that only reveals possession of contraband compromises no legitimate privacy interest." *Illinois v. Caballes*, 543 US 405, 407, 125 S Ct 834, 160 L Ed 2d 842 (2005).

In *Katz v. United States*, 389 US at 361, the Court set forth a two-part test to determine if a person's expectation of privacy is legitimate. "First, the individual must have a subjective expectation of privacy in a location or thing. Second, society must be prepared to recognize that expectation as objectively reasonable." *Forty-Ninth Annual Review of Criminal Procedure*, 49 GEO. L.J. ANN. REV. CRIM. PROC. 7 (2020). *See also State v. Wacker*, 317 Or 419, 427-29, 856 P2d 1029 (1993) (discussing and applying Fourth Amendment test).

The *Katz* test did not displace the common-law rule, which made clear that, if police commit a trespass to obtain information, that too is a search. *United States v. Jones*, 565 US 400, 132 S Ct 945, 181 L Ed 2d 911 (2012) (officers committed a trespass by putting mobile tracking device on a car to detect its movements; thus, that conduct was a search). *See also Grady v. North Carolina*, 575 US 306, 135 S Ct 1368, 191 L Ed 2d 459 (2015) (GPS tracking of recidivist sex offender is a search).

A person has a reasonable expectation of privacy in a car that he or she lawfully possesses. *Byrd v. United States*, 548 US 395, 138 S Ct 1518, 200 L Ed 2d 805 (2018) (defendant had reasonable expectation of privacy in rental car despite fact that he was not listed on rental agreement). But the privacy interest that a person has while in a car is diminished. *United States v. Knotts*, 460 US 276, 281, 103 S Ct 1081, 75 L Ed 2d 55 (1983) (no search when police arranged for a seller of chemical used in drug manufacture to place "beeper" inside item that defendant purchased, which police then used to monitor location of defendant's car). Similarly, a person's expectation of privacy is diminished in the areas outside a business. *Dow Chemical Co. v. United States*, 476 US 227, 106 S Ct 1819, 90 L Ed 2d 226 (1986).

The owner of an animal lawfully seized based on suspicion that the animal is a victim of abuse or neglect retains no protected privacy interest in the dog's blood under the Fourth Amendment, when the blood is drawn and tested for purposes of medical diagnosis or treatment. *State v. Newcomb*, 359 Or 756, 773-74, 359 P3d 756 (2016).

"What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Katz v. United States*, 389 US at 351. For example, a person has no legitimate expectation of privacy in garbage bags left at the curb, *California v. Greenwood*, 486 US 35, 108 S Ct 1625, 100 L Ed 2d 30 (1988), or in telephone numbers dialed on a phone, *Smith v. Maryland*, 442 US 735, 99 S Ct 2577, 61 L Ed 2d 220 (1979) (pen register installed at telephone company), or in the odor of controlled substances that may be detected by trained dogs from outside a vehicle, *Illinois v. Caballes*, 543 US at 407-08. A person does, however, have a protected interest in cell phone location information, despite the fact that he or she exposes that information to a third party, the cell service provider. *Carpenter v. United States*, 585 US 296, 138 S Ct 2206, 201 L Ed 2d 507 (2018).

On the other hand, *private* activities in a home are protected by the Fourth Amendment. In a home, "all details are intimate details, because the entire area is held safe from prying eyes." *Kyllo v. United States*, 533 US 27, 37, 121 S Ct 2038, 150 L Ed 2d 94 (2001) (use of thermal imaging device to detect relative amounts of heat emanating from private home was search); *see also United States v. Karo*, 468 US 705, 104 S Ct 3296, 82 L Ed 2d 530 (1984) (warrantless use of beeper to track location of a chemical drum in private residence violated Fourth Amendment).

In determining whether government action constitutes a search, courts consider the intrusiveness of the action. *Forty-Ninth Annual Review of Criminal Procedure*, 49 GEO. L.J. ANN. REV. CRIM. PROC. 11 (2020). A government agent's minimal intrusion into an area in which a person

has a reasonable expectation of privacy may not violate the Fourth Amendment. *Maryland v. Wilson*, 519 US 408, 117 S Ct 882, 137 L Ed 2d 41 (1997) (ordering passenger to get out of car during traffic stop permissible under Fourth Amendment); *United States v. Place*, 462 US 696, 103 S Ct 2637, 77 L Ed 2d 110 (1983) (use of dogs to perform "sniff tests" for drugs is not a search because the intrusion is minimal); *but see Florida v. Jardines*, 569 US 1, 133 S Ct 1409, 1416, 185 L Ed 2d 495 (2013) (dog sniff for drugs on defendant's front porch is a search). But when "the Government uses a device that is not in general public use [*e.g.*, a thermal imaging device], to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant." *Kyllo v. United States*, 533 US at 40.

A defendant is not entitled to suppression absent a violation of his or her own rights. *Minnesota v. Carter*, 525 US 83, 119 S Ct 469, 142 L Ed 2d 373 (1998); *Rakas v. Illinois*, 439 US 128, 99 S Ct 421, 58 L Ed 2d 387 (1978). *See* more discussion in this chapter, (Standing and Protected Privacy Interests).

2. Privacy Interests in Real Property

a. Curtilage of Private Dwellings.

A person has a privacy interest in the immediate area surrounding his or her residence, *i.e.*, the curtilage. *City of Eugene v. Silva*, 198 Or App 101, 107-08, 108 P3d 23 (2005) ("A trespass by the police onto the curtilage of a residence constitutes a search under Article I, section 9."); *State v. Rodal*, 161 Or App 232, 239, 985 P2d 863 (1999). "The pertinent factors in determining whether an area is within the curtilage of a private dwelling are 'its proximity or annexation to the dwelling, its inclusion within the general enclosure surrounding the dwelling and its use and enjoyment as an adjunct to the domestic economy of the family.'" *State v. Larson*, 159 Or App 34, 40 n 2, 977 P2d 1175, *rev den,* 329 Or 318 (1999), *quoting State v. Russo*, 68 Or App 760, 763, 683 P2d 163 (1984).

However, "social and legal norms presume that, in the absence of evidence of intent to exclude others, an occupant impliedly consents to allowing business or casual visitors [including police officers] to walk to the front door and knock on it." *State v. Rodal*, 161 Or App at 239. *See also State v. Cardell*, 180 Or App 104, 108, 41 P3d 1111 (2002) ("Visitors, including the police, have implied consent to enter the driveways and front yards of homes, in the absence of some overt action by the residents to exclude them."). But "[a] homeowner can abrogate the presumption of implied consent to approach the front door by undertaking sufficient steps to exclude casual visitors from the front yard." *State v. Somfleth*, 168 Or App 414, 425, 8 P3d 221 (2000), *citing State v. Ohling*, 70 Or App 249, 253, 688 P2d 1384, *rev den*, 298 Or 334 (1984) (entry to knock on the front door is common in this society "unless there are posted warnings, a fence, a moat filled with crocodiles, or other evidence of a desire to exclude casual visitors"). Whether the homeowner has adequately done so will depend on all the circumstances. *Compare State v. Gabbard*, 129 Or App 122, 877 P2d 1217, *rev den*, 320 Or 131 (1994) ("NO TRESPASSING" sign on boundary fence inadequate to show intent to exclude visitors from using driveway to contact occupants of house) *with State v. Russo*, 68 Or App 760, 763, 683 P2d 163 (1984) (intent to exclude sufficient when driveway closed off by a cable and a sign informing visitors, "This is the front door to our home," and instructing them to honk their horn and await a reply). For a full discussion of when a property owner has sufficiently manifested an intent to exclude the public, *see* Manifestation of Intent to Exclude section, below.

But even when an officer has implied consent to enter the curtilage to approach the residence, that implied consent is "bounded by two considerations: location and behavior." *State v. Goldberg*, 309 Or App 660, 666, 483 P3d 671 (2021).

(1) Location

"An officer exceeds the implied consent as to location when the officer deviates from the path to the front door and explores other areas of the curtilage where, according to social norms, visitors would not have an implied invitation." State v. Goldberg, 309 Or App 660, 666, 483 P3d 671 (2021). Accordingly, just because an officer may enter onto a defendant's property to knock on the front door does not authorize the officer to search the *rest* of a defendant's residential property. *See* State v. Malvern, 230 Or App 370, 215 P3d 114 (2009) (although officers had the right – based on defendant's implied consent – to enter property to knock on the front door of defendant's house, they did not have the right to "meander around" the rest of defendant's fenced rural property and look inside a greenhouse); State v. Foster, 219 Or App 276, 182 P3d 262, *rev'd on other grounds*, 347 Or 1, 217 P3d 168 (2009) (although it was lawful for officers to approach front door to serve restraining order, they were not permitted to stand outside defendant's bedroom window, which was not on a path to the garage, driveway, front door, or back door, and was 20 feet from the front door). *But see* State v. Rodal, 161 Or App 232, 239, 985 P2d 863 (1999) (officers permissibly used cement walkway to approach front door, rather than taking more direct route across grass).

Further, although there is a presumption that homeowners implicitly consent to entry to approach the *front* door, "such a presumption of implied consent to enter is not ascribed to other areas of the curtilage." State v. Somfleth, 168 Or App 414, 425, 8 P3d 221 (2000). *See also* State v. Ohling, 70 Or App 249, 253, 688 P2d 1384, *rev den*, 298 Or 334 (1984) ("Going to the back of the house is a different matter [from entry to knock on the front door]. Such an action is both less common and less acceptable in our society. There is no implied consent for a stranger to do so."). Therefore, a police entry into other areas of the curtilage is presumed to be a trespass unless that presumption is "overcome by evidence that the homeowner has sufficiently implicitly or explicitly invited entry." State v. Somfleth, 168 Or App at 425 (presumption that entry through backyard gate was a trespass was not overcome by attendant circumstances — *i.e.*, gate was open and pathway led from gate to house); *see also* State v. Unger, 252 Or App 478, 287 P3d 1196 (2012), *rev'd on other grounds*, 356 Or 59 (2014) (officers trespassed onto defendant's property when they went through backyard to knock on back door); State v. Olinger, 240 Or App 215, 246 P3d 20 (2010), *rev den*, 350 Or 423 (2011) (officers seeking to contact homeowner were entitled to use driveway that led to house, but were not entitled to go back onto "offshoot" of driveway that went behind the house); State v. Pierce, 226 Or App 336, 203 P3d 343 (2009) (no implied consent to walk up driveway, past front door, to reach gate between side of the house and stand-alone garage, to contact defendant in backyard; rejecting dissent's analysis that defendant impliedly consented to that entry by engaging in disorderly conduct by yelling and screaming in a residential backyard); City of Eugene v. Silva, 198 Or App at 107-08 (officers' entry into ungated but fenced backyard was a trespass); State v. Hayes, 186 Or App 49, 61 P3d 960 (2003) (where defendant's back door was not visible from the public street, there was no doorbell on the back door, and all other visitors to the house used the front door, state failed to rebut the presumption that officer's approach to defendant's back door was a trespass). The presumption was rebutted when officers knocked at the side door of the defendant's house, where the side entry was adjacent to a common driveway visible from the sidewalk, and had a doorbell. State v. Glines, 134 Or App 21, 894 P2d 516, *rev den*, 321 Or 512 (1995).

The test for "implied consent" to enter property to contact a resident is objective, not subjective—whether a member of the general public would understand there to be an implied invitation to approach the residence. State v. Coffman, 266 Or App 171, 337 P3d 898 (2014) (although police officers knew that sole entry point to basement residence was through backyard, that fact was not visible to the general public; thus police entry into backyard was unlawful).

(2) Behavior

"The scope of a homeowner's implied consent to approach the home is limited to those acts reasonably undertaken to contact the residents of the home; such consent does not extend, for instance, to an exploratory search of the curtilage." State v. Cardell, 180 Or App 104, 108, 41 P3d 1111 (2002). Thus, even when an officer is lawfully present in a permissible area of the curtilage, if the officer's actions offend "social norms," that will render the officer's entry a trespass and an unlawful search under Article I, section 9. The question is whether the officer's behavior "exceeded the scope of consent, as defined by the expected social norms of behaviors for persons to take reasonable steps to make contact with the occupant." State v. Goldberg, 309 Or App 660, 666, 483 P3d 671 (2021). That inquiry does not depend on whether the officer physically manipulates or interferes with the occupant's property; "[t]he inquiry is broader—asking whether an officer's actions exceed those to which a reasonable property occupant impliedly consents." Goldberg, 309 Or App at 668. Under that test, an officer unlawfully trespassed when he walked onto the defendant's driveway and held up a piece of a car bumper, which was left at the scene of a hit-and-run, next to the defendant's car so that the officer could take a picture. Even though the officer did not physically manipulate the defendant's property, the officer "exceeded the social norms that one reasonably expects of visitors and exceeded the scope of consent that a reasonable property owner holds out to those visitors seeking to make contact." Goldberg, 309 Or App at 669. *See also* State v. Cardell, 180 Or App 104, 41 P3d 1111 (2002) (although officer had implied consent to walk up defendant's driveway past his parked car, he "exceeded that consent when he touched the tires in an attempt to obtain information that would aid him in his investigation"); State v. Fortmeyer/Palmer, 178 Or App 485, 37 P3d 223 (2001) (although officers were permissibly in common area between two homes, that did not give the police the right to kneel down to peer through crack in basement window of next-door residence); State v. Portrey, 134 Or App 460, 465-66, 896 P2d 7 (1995) (officer exceeded implied consent when he picked up pair of boots on front porch and examined soles); State v. Donahue, 93 Or App 341, 762 P2d 1022 (1988), *rev den,* 307 Or 303 (1989) (implied permission for a utility company employee to enter the property did not waive defendant's privacy interest; police entry with the meter reader was unlawful).

b. Manifestation of Intent to Exclude.

Under Article I, section 9, a person may have a protected interest in areas beyond the curtilage, including open fields. State v. Dixson/Digby, 307 Or 195, 210, 766 P2d 1015 (1988); *compare* Oliver v. United States, 466 US 170, 104 S Ct 1735, 80 L Ed 2d 214 (1984) (Fourth Amendment does not apply beyond curtilage). But, to preserve a constitutionally protected privacy interest in land outside the curtilage, a person must manifest the intention to exclude the public by erecting barriers to entry, such as fences, or by posting signs. State v. Dixson/Digby, 307 Or 195, 211-12, 766 P2d 1015 (1988).

> "An individual's privacy interest in land he or she has left unimproved and unbounded is not sufficient to trigger the protections of Article I, section 9. Thus, it is not sufficient that the property in question is privately owned, or that it is shielded from view by vegetation or topographical barriers, because those features do not necessarily indicate the owner's intention that the property be kept private. A person who wishes to preserve a constitutionally protected privacy interest in land outside the curtilage must manifest an intention to exclude the public by erecting barriers to entry, such as fences, or by posting signs. This rule will not unduly hamper law enforcement officers * * *, because it does not require investigating officers to draw any deduction other than that required of the general public: if land is fenced, posted or otherwise closed off, one does not enter it without permission or, in the officers' situation, permission or a warrant."

State v. Dixson/Digby, 307 Or at 211-12.

Similarly, as discussed above, a homeowner can abrogate the presumption that visitors are permitted to approach the front door of a home by manifesting an intent to exclude such visitors. But because of the strength of the inference that people generally impliedly consent to allow visitors to approach a front door, something more than a "no trespassing" sign is generally necessary to manifest an intent to exclude requires more would be required to exclude others from entering other parts of the property. *State v. Gabbard*, 129 Or App 122, 127, 877 P2d 1217, *rev den*, 320 Or 131 (1994). The following sections include cases involving both circumstances.

(1) Cases in Which *No* Intent to Exclude the Public Was Manifested.

State v. Dixson/Digby, 307 Or 195, 766 P2d 1015 (1988). No intent to exclude public from heavily forested land when cables with "No Hunting" signs were stretched across dirt road. "In this state, with its expanses of rough and open country, hiking, camping and the like commonly occur on land that is owned by large companies and individuals. * * * Unless they intended to hunt, neither the officers nor anyone else would have understood the posted signs to be intended to exclude them from the property entirely."

State v. Andreason/Cooke, 307 Or 190, 766 P2d 1024 (1988). Marking property line with posts and ribbons did not express intent to exclude public from forest land.

State v. Faught, 307 Or App 733, 477 P3d 1226 (2020), *rev den*, 367 Or 668 (2021). The defendant did not manifest an intent to exclude the public from walking to the front door of his residence. A "Beware of the Dog" sign combined with a closed gate "did not put casual visitors on notice that they were excluded from approaching the residence." And a "No Trespassing" sign on the nearby driveway leading to an abandoned house did not manifest "an intent to exclude the public from using the gate with the 'Beware of the Dog' sign to approach his main residence."

State v. Wilson, 285 Or App 296, 395 P3d 924, *rev den*, 361 Or 886 (2017). "NO TRESPASSING" and "PRIVATE DRIVE" signs on private road with multiple residences were insufficient to manifest intent to prohibit public from traveling on road to reach residences, particularly in the absence of other barriers to entry, "such as fences, gates, or signs clearly articulating an intention to exclude even casual visitors."

State v. Hockema, 264 Or App 625, 333 P3d 1134, *rev den*, 356 Or 517 (2014). A reasonable person could have viewed two "No Trespassing" signs on a fence, only one of which was immediately adjacent to driveway, as intending to keep visitors out of front yard but not to prevent visitors from using driveway to approach front door. Defendant therefore did not "rebut the presumption that an individual impliedly consents to the casual visitor going to the front door." Although defendant posted many other signs along his property, those other signs were not "related to the driveway" and so did not inform the analysis.

State v. Cam, 255 Or App 1, 296 P3d 578, *adh'd to as modified on recons*, 256 Or App 146, 300 P3d 208, *rev den*, 354 Or 148 (2013). The defendant did not manifest a clear intent to exclude visitors from approaching the front door by erecting a gate at the entrance to his driveway and posting "PRIVATE PROPERTY" and "PRIVATE PROPERTY, 10 MPH" signs. The gate was open, and the "[p]osting of a sign stating that property is private does not in and of itself suggest that visitors to the property are excluded."

State v. Erb, 135 Or App 421, 899 P2d 716, *rev den*, 322 Or 421 (1995). No intent to exclude public from an apartment complex parking lot posted with a sign stating, "Residential Parking Only," even though the lot "was somewhat hard to get to and a bit isolated."

State v. Poppe, 131 Or App 14, 883 P2d 905, *rev den*, 320 Or 492 (1994). Officers lawfully approached building on the defendant's heavily forested rural land where the defendant had taken no steps to exclude the public, other than a single strand of barbed wire lying on the ground and a "NO TRESPASSING" sign facing the road, which was not visible to persons entering the property from another direction. The officers' view into a shed window was lawful because the window was uncovered and situated near the front door, and the officers were lawfully at the front door.

State v. Gabbard, 129 Or App 122, 128, 877 P2d 1217, *rev den*, 320 Or 131 (1994). A "NO TRESPASSING" sign on boundary fence did not adequately manifest the defendant's intent to exclude visitors from using driveway to contact occupants of house, where no gate or other obstruction blocked the driveway. Other signs stating, "KEEP OUT" and "BEWARE OF DOG" were not immediately adjacent to driveway, and officers did not see them.

State v. Collier, 124 Or App 100, 861 P2d 397 (1993), *rev den*, 318 Or 326 (1994). Defendant's property was unfenced, and the trial court found that the officer did not see any signs and made no conscious attempt not to see them. Thus, defendant did not adequately manifest an intention to exclude the public from his property.

State v. McIntyre/Pereira, 123 Or App 436, 860 P2d 299 (1993), *rev den*, 318 Or 351 (1994). Where police approached a house in rural area surrounded by tall fence with a metal gate across the driveway, the fence, on its own, was insufficient to demonstrate intent to prohibit visitors from approaching the front door. The Court of Appeals remanded because the trial court had refused to consider additional information about, for example, whether the gate was locked or signs were posted.

State v. Gorham, 121 Or App 347, 353, 854 P2d 971, *rev den*, 318 Or 171 (1993). Where the defendant had posted "NO TRESPASSING" and "NO HUNTING" signs on trees in a field next to his driveway but separated from it by a fence, and defendant had left the gate to the driveway open, the signs did not "establish that the defendant intended to restrict access to his driveway."

State v. Hitesman/Page, 113 Or App 356, 833 P2d 306, *rev den*, 314 Or 574 (1992). Where property was unfenced, two "No Trespassing" signs, which were "old, faded, and difficult to see," were insufficient to provide objectively reasonable notice that entry onto land was unlawful.

State v. Walch, 99 Or App 180, 781 P2d 406 (1989). "No Trespassing" signs posted on road in front of defendant's rural property were insufficient to exclude the public and the police from areas of the property where no fences or signs marked the perimeter.

> **NOTE:** Testimony by the officers concerning whether they saw the signs or barriers is relevant to whether the property owner *objectively* manifested an intent to exclude the public. State v. Gabbard, 129 Or App 122, 128, 877 P2d 1217, *rev den,* 320 Or 131 (1994); State v. Collier, 124 Or App 100, 103, 861 P2d 397 (1993), *rev den,* 318 Or 326 (1994).

(2) Cases in Which Intent to Exclude the Public Was Manifested.

State v. Roper, 254 Or App 197, 294 P3d 517 (2012), *rev den*, 353 Or 714 (2013). The defendant manifested intent to exclude visitors from using driveway leading to front door by posting "NO TRESPASSING, KEEP OUT" sign on gate across driveway, with two additional "NO TRESPASSING"

signs on either side of the gate, even though gate was open and "KEEP OUT" sign was not immediately visible.

State ex rel Juv. Dept. v. Reeves, 163 Or App 497, 988 P2d 433 (1999), *rev den*, 330 Or 71 (2000). A sign stating, "PRIVATE ROAD, NO UNAUTHORIZED PERSONS BEYOND THIS POINT," posted on a gated driveway to the defendants' fenced property was sufficient to manifest their intent to exclude the public. The court rejected the state's argument "that the words 'unauthorized persons' expressed an intent to exclude only persons 'without legitimate business' on the property."

State v. Larson, 159 Or App 34, 977 P2d 1175, *rev den*, 329 Or 318 (1999). Officers invaded defendant's privacy interest in the common backyard of his apartment building; the backyard was partially enclosed by a fence, and another tenant had posted a "Keep Out" sign on a gate at edge of backyard.

State v. Poulos, 149 Or App 351, 942 P2d 901 (1997). Where defendant's residence was in a remote location, up a long, steep, single-vehicle driveway, and his mailbox and newspaper box were at the base of his driveway, the cumulative effect of signs saying "NO HUNTING OR TRESPASSING UNDER PENALTY OF LAW," "GUARD DOG ON DUTY" and "STOP" along driveway was sufficient to manifest the defendant's intent to exclude.

State v. Russo, 68 Or App 760, 763, 683 P2d 163 (1984). The defendants' driveway was "closed off by a cable and a sign" that read, "This is the front door to our home" and instructed visitors to honk and await a response.

c. Common Areas and Areas Surrounding Multi-Tenant Dwellings.

In determining whether a tenant has a constitutionally protected privacy right in a common area or the area surrounding a multi-tenant dwelling, such as an apartment building, each case must be determined on its own facts. "Of particular significance is the physical layout of the living units and the residents' use of the area in question." State v. Larson, 159 Or App 34, 40, 977 P2d 1175, *rev den*, 329 Or 318 (1999). "[T]he fact that a common area of an apartment building is involved is not, in itself, determinative of whether a privacy interest exists." *Id*. at 41.

(1) Cases in Which Tenant had a Privacy Interest

State v. Fortmeyer/Palmer, 178 Or App 485, 37 P3d 223 (2001). Officers who were in a common area between two homes with the consent of one resident, conducted an unlawful search by kneeling to peer through a narrow crack in the basement window of the next-door residence. "While the officers in this case had obtained a lawful vantage point, defendants still retained a privacy interest in items in the common area and within the house that were not entirely visible to someone standing there."

State v. Larson, 159 Or App 34, 977 P2d 1175, *rev den,* 329 Or 318 (1999). Officers invaded the defendant's privacy interest in the backyard of his apartment building, where the backyard was partially enclosed by a fence and another tenant had posted a "KEEP OUT" sign on a gate to backyard.

State v. Breshears/Oliver, 98 Or App 105, 889 P2d 158 (1989). The defendants had a privacy interest in the side yard of their apartment, which was surrounded by a fence, apartment buildings, and brush, and was reached by walking across a grassy area off the walkway.

State v. Roles, 75 Or App 63, 705 P2d 227 (1985). Defendants had protected interest in roof area that was accessible only from the defendant's second-floor apartment.

(2) Cases in Which Tenant did *not* have a Protected Privacy Interest

State v. Michel, 264 Or App 259, 331 P3d 1097 (2014). Common areas of a public storage facility are not private for purposes of Article I, section 9, even when the lot is protected by a locked gate; officer did not violate the rights of the defendant, who rented a space at the facility, when he drove onto the facility behind the defendant's car to investigate defendant for DUII.

State v. Castillo-Salgado, 186 Or App 605, 64 P3d 1169, *rev den*, 336 Or 60 (2003). The officer's act of looking through a gap in the blinds of an apartment kitchen window was not a search, because the officer did not violate social norms by looking into the window as he walked to the front door of the apartment to investigate a report of trespassing and cocaine use.

State v. Rodriguez-Ganegar, 186 Or App 530, 63 P3d 1225, *rev den*, 335 Or 578 (2003). The officer's observation of drug activity through a gap in the window curtains of a motel room was not a search because the defendant waived any privacy interest by conducting the activity in a way that it could be observed without any special effort.

State v. Stafford, 184 Or App 674, 57 P3d 598 (2002), *rev den*, 335 Or 181 (2003). Officers had implicit consent to enter the common entry area of a two-story house that had been converted into a four-plex apartment where the front door to the common entry area was unlocked, there was no sign posted prohibiting public entry, there was no doorbell or buzzer, and there was a common landing area between the two upstairs apartments, after entering the common area. Police were entitled to open a paper bag that the defendant had appeared to stash in the stairway railing. Because the defendant abandoned the bag in an area where the public had access and was likely to be, he retained no protected interest in it.

State v. Erb, 135 Or App 421, 899 P2d 716, *rev den*, 322 Or 421 (1995). An officer did not violate a protected privacy interest by entering an apartment complex parking lot that was posted "RESIDENTIAL PARKING ONLY."

State v. Portrey, 134 Or App 460, 896 P2d 7 (1995). An officer did not violate the defendant's privacy rights by entering onto the front porch of his apartment to knock on the door.

d. Commercial Property

An implied consent to enter public areas of a commercial business does not necessarily extend to an entry into a private office. In State v. Mast, 250 Or App 605, 615, 282 P3d 916 (2012), officers executing a writ of execution at a commercial establishment entered into the reception area but then directed defendant to take them back to his private office. The Court of Appeals concluded that the entry was unlawful because the writ was not legally sufficient to allow the entry in the private office and that defendant had not actually consented to entry.

e. The Fourth Amendment.

The Fourth Amendment's protection of "persons, houses, papers, and effects" omits protection for open fields. Open fields include "any unoccupied or undeveloped area outside of the curtilage." Oliver v. United States, 466 US 170, 180 fn 11, 104 S Ct 1735, 80 L Ed 2d 214 (1984). The Fourth Amendment does not protect these areas, even when a government agent may be trespassing on private property that is surrounded by "No Trespassing" signs. Oliver v. United States, 466 US 170; Hester v. United States, 265 US 57, 44 S Ct 445, 68 L Ed 898 (1924). The "open fields" doctrine dates from the 1924 decision in Hester v. United States, 265 US 57, 44 S Ct 445, 68 L Ed 898 (1924), and has never been limited by the United States Supreme Court. In 1984, the Court

affirmed the continued vitality of the "open fields" doctrine in Oliver v. United States, 466 US 170, 104 S Ct 1735, 80 L Ed 2d 214 (1984), and held it to be consistent with the expectation of privacy standard enunciated in Katz v. United States, 389 US 347, 88 S Ct 507, 19 L Ed 2d 576 (1967). S*ee also* Air Pollution Variance Bd. of Colorado v. Western Alfalfa Corp., 416 US 861, 94 S Ct 2114, 40 L Ed 2d 607 (1974) (state health inspector's actions in conducting visual pollution tests on outdoor premises of private commercial facility fell within open fields exception).

The curtilage is the area around the home "to which extends the intimate activity associated with the 'sanctity of a man's [or woman's] home and the privacies of life.'" Oliver v. United States, 466 US at 180. Whether an area fits within the curtilage turns on four factors:

(1) Proximity of the area to the home;
(2) Whether the area is within an enclosure surrounding the home;
(3) The nature of the uses to which the area is put; and
(4) The steps taken by the resident to protect the area from observation by passersby.

United States v. Dunn, 480 US 294, 301, 107 S Ct 1134, 94 L Ed 2d 326 (1987) (area near the barn not within the curtilage).

Although individuals retain a privacy interest in the curtilage of the home, a police officer may nonetheless enter the curtilage to approach a home and knock, precisely because that is 'no more than any private citizen might do.'" Florida v. Jardines, 569 US 1, 133 S Ct 1409, 1416, 185 L Ed 2d 495 (2013) (*quoting* Kentucky v. King, 563 US 452, 131 S Ct 1849, 179 L Ed 2d 865 (2011)). *See also* California v. Ciraolo, 476 US 207, 106 S Ct 1809, 90 L Ed 2d 210 (1986) (police observations from a private airplane flying over defendant's house at an altitude of 1,000 feet did not violate the Fourth Amendment, even though marijuana grow may have been within the curtilage; a person has no reasonable expectation of privacy from observations in publicly navigable airspace). But a dog sniff of a defendant's front porch for drugs is a search; there is no customary invitation onto the front porch to engage in "canine forensic investigation." Florida v. Jardines, 569 US at 9. Similarly, a retail store does not consent to a wholesale search just because it has invited the public to enter. Lo-Ji Sales, Inc. v. New York, 442 US 319, 99 S Ct 2319, 60 L Ed 2d 920 (1979).

3. Lab Testing.

Oregon Law.

The initial extraction of a blood sample, or the taking of a buccal swab for DNA, is a search that requires a warrant or must be justified by an exception to the warrant requirement. State v. Milligan, 304 Or 659, 664, 748 P2d 130 (1988) ("The extraction of a blood sample by the police is both a search of the person and the seizure of an 'effect'—the person's blood."); State v. Sanders, 343 Or 35, 39, 163 P3d 607 (2007) ("One ordinarily also has a right to privacy that protects against having a government agent swab the inside of one's cheek and then testing the swab to reveal physiological data."); State v. H. K. D. S., 305 Or App 86, 91, 469 P3d 770 (2020) ("When officers take a buccal swab, they conduct a 'search' within the meaning of Article I, section 9.").

Once upon a time, under Article I, section 9, the *testing* of a lawfully seized item was a separate search for which a warrant was required. *See, e.g.*, State v. Lowry, 295 Or 337, 667 P2d (1983). That view of the law was short-lived. *See, e.g.*, State v. Owens, 302 Or 196, 207, 729 P2d 524 (1986) (rejecting Lowry rule).

Under current law, "when there is probable cause to believe that a lawfully seized transparent container contains a controlled substance, opening the container, removing a modest quantity of its contents and subjecting it to chemical analysis for the sole purpose of confirming that it is a controlled substance, is not a 'search' or 'seizure' under the Oregon Constitution." *State v. Owens*, 302 Or at 207. *See also* *State v. Westlund*, 302 Or 225, 729 P2d 541 (1986) (transparent vial); *State v. Herbert*, 302 Or 237, 729 P2d 547 (1986) (paperfold); *State v. Dodge*, 223 Or App 130, 195 P3d 442 (2008), *rev den*, 346 Or 66 (2009) (transparent glass pipe); *State v. Plummer*, 134 Or App 438, 442-43, 895 P2d 1384 (1995) (transparent syringe).

A person generally retains no protected privacy interest in the "contents" of an animal lawfully seized on suspicion of abuse or neglect; if the animal is lawfully seized, police may draw and test the animal's blood in the course of diagnosis and treatment without conducting a "search" under Article I, section 9. *State v. Newcomb*, 359 Or 756, 773, 359 P3d 434 (2016).

After a lawful seizure of blood from a suspect, the testing of the blood by the crime lab to confirm the presence of alcohol is not a search. *State v. Langevin*, 84 Or App 376, 383-84, 733 P2d 1383 (1987), *aff'd*, 304 Or 674, 748 P2d 139 (1988).

If a blood sample is obtained by consent, the consent should be sufficient to authorize the additional step of testing the blood for the presence of alcohol. *See, e.g.*, *State v. Johnson*, 78 Or App 387, 717 P2d 187 (1986). However, the scope of the consent may limit the kinds of tests that can be performed. *See* *State v. Binner*, 131 Or App 677, 886 P2d 1056 (1994) (specific limited consent to seizure of blood for testing for alcohol did not authorize testing for drugs). Similarly, the scope of a search may be limited by the purpose of the seizure.

The rule is different when police obtain possession of an item from a third party. In that case, the question is whether the testing exceeds the scope of any "search" performed by the third party. If so, it is a search for which police must have probable cause and a warrant or exception to the warrant requirement. *State v. Sines*, 287 Or App 850, 875, 404 P3d 1060 (2017), *rev den*, 362 Or 545 (2018) (forensic testing of underwear given by defendant's housekeeper to police exceeded scope of private search and violated Article I, section 9).

Fourth Amendment.

A chemical test for drugs that results only in revealing whether a substance is a controlled substance, and no other "private fact," is not a search for Fourth Amendment purposes. *United States v. Jacobsen*, 466 US 109, 123, 104 S Ct 1652, 80 L Ed 2d 85 (1984).

A person generally retains no protected privacy interest in the "contents" of an animal lawfully seized on suspicion of abuse or neglect; if the animal is lawfully seized, police may draw and test the animal's blood in the course of diagnosis and treatment without conducting a "search" under the Fourth Amendment. *State v. Newcomb*, 359 Or 756, 775-76, 359 P3d 434 (2016).

If police receive an item from a third party and subject it to testing, they effect a search under the Fourth Amendment if the testing exceeds the scope of any "search" performed by the third party. *State v. Sines*, 287 Or App 850, 875, 404 P3d 1060 (2017), *rev den*, 362 Or 545 (2018) (testing of underwear that defendant's housekeeper gave to police, for the presence of spermatozoa, exceeded scope of private search and violated Fourth Amendment).

4. "The Container Announces Its Contents" Rule.

In State v. Owens, 302 Or 196, 206, 729 P2d 524 (1986), the Supreme Court explained:

> "When the police lawfully seize a container, they can thoroughly examine the container's exterior without violating any privacy interest of the owner or the person from whom the container was seized. For example, the police can observe, feel, smell, shake and weigh it. Furthermore, not all containers found by the police during a search merit the same protection under Article I, section 9. Some containers, those that by their very nature announce their contents (such as by touch or smell) do not support a cognizable privacy interest under Article I, section 9. Transparent containers (such as clear plastic baggies or pill bottles) announce their contents. * * * *No warrant is required for the opening and seizure of the contents of transparent containers or containers that otherwise announce their contents*."

(Emphasis added). Animals, although they are property, are generally not "containers." State v. Newcomb, 359 Or 756, 770, 359 P3d 434 (2016); *but see* n 13 (recognizing possibility that, in some circumstances, an animal could be like a container (for example, if an animal had a microchip containing sensitive information)).

When a container "announces its contents"—either because of its inherent nature, or because the observable characteristics of the container necessarily reveal what it contains—the owner retains no cognizable privacy interest in its contents, and police may examine its contents without probable cause or a warrant or warrant exception. *Compare* State v. Heckathorne, 347 Or 474, 484, 223 P3d 1034 (2009) (defendant lacked privacy interest in an opaque container the exterior of which showed blue crystals distinctive to a precursor meth ingredient and also emitted a distinctive odor) *with* State v. Garcia-Cruz, 287 Or App 516, 521, 402 P3d 750 (2017) (paperfold in defendant's wallet did not "announce" that it contained drugs). *See also* State v. Owens, 302 Or 196, 206, 729 P2d 524 (1986).

In State v. Kruchek, 156 Or App 617, 622, 969 P2d 386 (1998), *aff'd by an equally divided court*, 331 Or 664, 20 P3d 180 (2001), the Court of Appeals construed Owens, Herbert, and McCrory to mean that the "announce-the-contents" rule is limited to situations in which "the containers in question not only 'announce' their contents but do so in a way that announces that contraband is their *sole* content":

> "The rationale in Owens and its progeny is confined to situations in which there is no reason to believe that opening the container will result in any greater intrusion into a person's privacy than already has occurred through viewing or smelling the container. Accordingly, unless it is apparent that the container at issue holds nothing other than contraband, and that is not the case here, a warrant is required before the police lawfully can open it, unless an exception to the warrant requirement applies."

State v. Kruchek, 156 Or App at 622-23 (footnote omitted) (warrantless opening of opaque plastic cooler from which the strong odor of freshly cut marijuana emanated was an unlawful search because the cooler did not announce that marijuana was the only item it contained). *Accord* State v. Resler, 163 Or App 328, 987 P2d 1269 (1999), *rev dismissed*, 334 Or 190 (2002) (opening a fanny pack that "announced" that it contained a concealed handgun was an unlawful search; "[t]his case is squarely controlled by * * * Kruchek.").

In State v. Herbert, 302 Or 237, 242, 729 P2d 547 (1986), the court held that some *opaque* containers, such as balloons or tinfoil bindles,

> "may be so uniquely associated with the storage and transportation of controlled substances that their unique packaging alone might provide, to an officer with training and experience in the area of drug detection, probable cause to believe they contain a controlled substance."

Whether a container "announces its contents" is a different question than whether an officer has probable cause to believe that the container holds a particular item:

> "Although closely related, those are distinct inquiries. When a container, because of its unique or transparent quality, announces its contents, there is no search at all. Owens, 302 Or at 206, 729 P2d at 524. When a container does not announce its contents but—because of its nature and the context in which it is found—can be said more likely than not to contain contraband, there is a search, but one that nevertheless may be justified by a recognized exception to the warrant requirement. State v. Lane, 135 Or App 233, 239, 898 P2d 1358, *rev den*, 322 Or 360, 907 P2d 247 (1995). The result often may be the same, but the analytical paths are different."

State v. Stock, 209 Or App 7, 11 n 1, 146 P3d 393 (2006). *See also* State v. Fugate, 210 Or App 8, 16, 150 P3d 409 (2006) (tinfoil bindle did not "announce its contents"; therefore, opening it was a search subject to the warrant requirement or an exception to the warrant requirement). In other words, although a container may be sufficiently distinct to establish *probable cause* that it contains contraband, it may not be so distinct that it "announces its contents," such that the owner retains no cognizable privacy interest. State v. Garcia-Cruz, 287 Or App at 521 (paperfold in defendant's wallet was not so distinct that it "announced its contents"); State v. Stock, 209 Or App 7, 11 n 1, 146 P3d 393 (2006) (citing cases that "blurred" the "distinction between whether a container 'announces its contents' and whether an officer has probable cause to believe that a container holds drugs"). *See also* State v. Walker, 173 Or App 46, 20 P3d 834 (2001) (plastic bubble-soap container that rattled when shaken announced "I contain bubble soap," not "I contain drugs").

5. Dog Sniffs.

Oregon Law.

A dog sniff of ambient air outside a private storage locker is not a search, "at least when [the sniff is] conducted in a public place." State v. Smith, 327 Or 366, 374, 963 P2d 642 (1998). *See also* State v. Slowikowski, 307 Or 19, 761 P2d 1315 (1988) (police did not "search" defendant's rented storage locker when a drug dog on the premises for a training exercise alerted officers to a scent emanating from a locker, which the officers were then able to detect by themselves).

However, the detention of a person or the person's vehicle or belongings while a drug dog is brought to the scene may be a *seizure* requiring justification, such as consent or probable cause and exigent circumstances. State v. Juarez-Godinez, 326 Or 1, 942 P2d 772 (1997). *See also* State v. North, 72 Or App 1, 694 P2d 990, *rev den*, 299 Or 154 (1985) (probable cause and exigent circumstances justified detention of luggage long enough for a "dog sniff"). Under Court of Appeals case law, removal of a package from a postal service sorting bin to permit a drug dog sniff constitutes a seizure that requires probable cause and a warrant or exception to the warrant requirement State v. Barnthouse, 271 Or App 312, 337, 350 P3d 536 (2015), *aff'd on other grounds*, 360 Or 403 (2016). But if an employee of the postal service removes a package from the sorting bin for a dog sniff for its own purposes, consistently with the bailment agreement, the removal of the package for the dog sniff does not constitute a seizure. State v. Sholedice/Smith, 364 Or 146, 155, 431 P3d 386 (2018), *adh'd to as modified on recons,* 364 Or 575 (2019).

Fourth Amendment.

The use of a drug-detection dog is not a search under the Fourth Amendment, at least when the person or object is not being detained unlawfully. *Illinois v. Caballes*, 543 US 405, 125 S Ct 834, 837-38, 160 L Ed 2d 842 (2005) ("Accordingly, the use of a well-trained narcotics-detection dog — one that does not expose noncontraband items that otherwise would remain hidden from public view — during a traffic stop generally does not implicate legitimate privacy interests."). Using a drug-detection dog on a defendant's front porch, however, is a search. *Florida v. Jardines*, 569 US 1, 133 S Ct 1409, 1416, 185 L Ed 2d 495 (2013). *See also United States v. Place*, 462 US 696, 103 S Ct 2637, 77 L Ed 2d 110 (1983); *United States v. Quoc Viet Hoang*, 486 F3d 1156, 1161 (9th Cir 2007) (no search when dog sniffed package at FedEx airport facility for contraband); *United States v. Perez*, 37 F3d 510 (9th Cir 1994) (no search when dog sniff revealed contraband in undercarriage of van); *United States v. Lingenfelter*, 997 F2d 632 (9th Cir 1993) (dog sniff of public alleyway between warehouses not a search); *United States v. Gault*, 92 F3d 990, 992 (10th Cir 1996), *cert den*, 519 US 939 (1996) (dog sniff of luggage not a search); *State v. Smith*, 327 Or 366, 375, 963 P2d 642 (1998) (sniff of area outside private storage locker not a search under Fourth Amendment).

6. Technological Enhancement.

Oregon Law.

"[N]ot everything that police officers see or hear [a person] do in private quarters requires a search warrant." *State v. Louis*, 296 Or 57, 61, 672 P2d 708 (1983). *See also* discussion of "Open View" in Chapter IV (Warrantless Searches). "[A] police officer's *unaided* observation, purposive or not, from a lawful vantage point is not a search under Article I, section 9." *State v. Ainsworth*, 310 Or 613, 621, 801 P2d 749 (1990) (emphasis added). *See also State v. Campbell*, 306 Or 157, 170, 759 P2d 1040 (1988) ("A court has never held * * * that a police officer engages in a search by making unaided observations from a public place, and an individual therefore cannot be said to have a constitutionally protected interest in freedom from such scrutiny."). *But see State v. Fortmeyer/Palmer*, 178 Or App 485, 37 P3d 223 (2001) (even though they were in a lawful vantage point between two homes, officers nonetheless unlawfully searched by kneeling to look through a crack in a basement window).

Moreover, at least some degree of technological enhancement "may be used without triggering constitutional concerns." *State v. Smith*, 327 Or 366, 371 n 4, 963 P2d 642 (1998), *citing State v. Wacker*, 317 Or 419, 856 P2d 1029 (1993) (use of nightscope to view activities in car parked in public parking lot was not a search); *State v. Louis*, 296 Or 57, 61, 672 P2d 708 (1983) (no search when police used telephoto lens to photograph activities inside of defendant's home from other side of street); *State v. Combest*, 271 Or App 38, 55, 350 P3d 222 (2015) (use of sophisticated software to monitor and download child pornography files that defendant made publicly available on peer-to-peer file sharing network did not implicate a privacy interest; "the fact that technology has created efficiencies or conveniences in police practice does not mean that police conduct a 'search' when they use it"). The Supreme Court, in *State v. Campbell*, 306 Or 157, 759 P2d 1040 (1988), "did not purport to establish a *per se* rule against the warrantless use by police of any technologically enhanced observation regardless of the circumstances." *State v. Wacker*, 317 Or at 426 n 12. *See State v. Meredith*, 337 Or 299, 96 P3d 342 (2004) (use of a vehicle tracking device, installed with employer's permission in the context of a government employment relationship, did not implicate a privacy interest). *See also State v. Reed*, 169 Or App 456, 461-62, 9 P3d 738 (2000) ("whether a technological enhancement aids observation does not determine whether a search has occurred; the question is whether a privacy interest has been invaded"; but use of a flashlight in this case was a search); *State v. Faulkner*, 102 Or App 417, 420, 794 P2d 821, *rev den*, 310 Or 422 (1990) ("Use of an enhancing mechanism [a flashlight] does not itself make the activity a search, although the device

used in detecting evidence *may* be important in determining whether police conduct has interfered with defendant's interest in being free from governmental scrutiny." (Citation omitted; emphasis in original)).

The Oregon Test: "In deciding whether government practices that make use of these [technological] developments are searches, we must decide whether the practice, if engaged in wholly at the discretion of the government, will significantly impair 'the people's' freedom from scrutiny[.]" State v. Campbell, 306 Or at 171. The government practice, however, must be viewed "in light of the particular context in which [it] occurred." State v. Meredith, 337 Or 299, 306, 96 P3d 342 (2004).

Some general principles have emerged:

- **Use of Technology to Obtain Unusual but Lawful Vantage Point.**

Using technology or physical objects to obtain access to a vantage point that is unusual but that otherwise is lawful does not necessarily make the observation a search under Article I, section 9. State v. Ainsworth, 310 Or 613, 801 P2d 749 (1990) (using helicopter not a search); State v. Combest, 271 Or App 38, 350 P3d 222 (2015) (use of sophisticated software to monitor and download child pornography files from peer-to-peer file sharing network not a search); State v. Corra, 88 Or App 339, 745 P2d 786 (1987), *rev den*, 305 Or 331 (1988) (standing on a rock to peer over a fence not a search). *But see State v. Nakhiengchahn*, 341 Or App 516, __ P3d __ (2025) (although the police flew over defendant's property at a lawful altitude, an officer's warrantless use of a magnified camera system was an unlawful search because it allowed the officer to observe information about marijuana plants that was "materially different" from what the officer could have observed without the camera); State v. Fortmeyer/Palmer, 178 Or App 485, 37 P3d 223 (2001) (officers who lawfully obtained access to common area between two homes conducted an unlawful search by kneeling to look through a crack in a basement window). Oregon appellate courts have not addressed whether use of drones constitutes a search, but Oregon statutes limit police use of drone technology. *See* ORS 837.310 *et seq.*

- **Use of Technology to View Public Areas Surreptitiously.**

The use of technological enhancements to view areas that are public and not private, and hence do not enjoy protection under Article I, section 9, does not necessarily convert the observation into a search, even if the defendant may hope or expect not to be observed by the police. State v. Wacker, 317 Or 419, 856 P2d 1029 (1993) (use of a nightscope and camcorder to see activities in a lighted car in a busy tavern parking lot did not invade a privacy interest protected by Article I, section 9, or the Fourth Amendment). *But see* State v. Campbell, 306 Or 157, 759 P2d 1040 (1988) (attaching a beeper to a vehicle and tracking its movements on a public highway was a search); State v. Casconi, 94 Or App 457, 460, 766 P2d 397 (1988) (use of hidden video camera to view open stalls in public restroom was a search).

- **Use of Technology to Clarify or Confirm Lawful Observations.**

The use of technology to clarify or confirm an observation that an officer already made with the unaided senses generally is not a search. State v. Louis, 296 Or 57, 672 P2d 708 (1983) (telephoto photographing of a defendant in his living room by the police was not a search, because defendant could be seen from the street without the aid of the telephoto lens); State v. Rodal, 161 Or App 232, 985 P2d 863 (1999) (officer able to identify growing marijuana "with no visual aids other than his eyeglasses *before* using the telephoto lens to document his discovery" (emphasis in original)); State v. Carter/Grant, 101 Or App 281, 790 P2d 1152 (1990), *rev'd on other grounds*, 316 Or 6 (1993) (use of binoculars in a rural area to confirm naked-eye observation of a marijuana plant in the window of a house was not unlawful technological enhancement); *cf.* State v. Slowikowski, 307 Or 19, 761 P2d

1315 (1988) (inadvertent detection of the odor of marijuana by a drug dog where the odor was strong enough to be smelled by the human nose). But police use of a technological device to observe what perhaps *could have been* observed without the enhancement, but actually was not, is generally a search. *See, e.g.*, *State v. Nakhiengchahn*, 341 Or App 516, __ P3d __ (2025) (officer's warrantless use of a magnified camera system while flying over the defendant's property was an unlawful search because it allowed the officer to observe information about marijuana plants that was "materially different" from what the officer could have observed without the camera); State v. Campbell, 306 Or 157, 759 P2d 1040 (1988) (rejecting the state's argument that, in monitoring a beeper attached to defendant's car, police were only observing what legitimately *could have been* seen without the transmitter); State v. Casconi, 94 Or App at 460 (use of hidden video camera to view open stalls in public restroom was a search).

- **Use of Technology to View into Protected Areas.**

When police use technological enhancement for the specific purpose of observing a protected area that could not be examined without enhancement, the courts likely will determine that the observation is a search. State v. Smith, 327 Or 366, 372-73, 963 P2d 642 (1998) ("some police techniques clearly do involve technological or figurative invasions of privacy interests"; even when "operate[d] from an external and public place, their use is invasive"); State v. Campbell, 306 Or 157, 169, 759 P2d 1040 (1988) ("[i]ntrusions and technologically enhanced observations into 'protected premises' infringe privacy interests protected by Article I, section 9"); *State v. Nakhiengchahn*, 341 Or App 516, __ P3d __ (2025) (officer's use of a magnified camera system during aerial surveillance of defendant's property was a search because the officer could not have identified the plants he saw as marijuana without the magnified camera); State v. Reed, 169 Or App 456, 462, 9 P3d 738 (2000) (officer's use of a flashlight to illuminate semi-transparent film canister found in woman's purse was a search: to discern the drug-like packaging inside the film canister, he had to remove the canister from the purse and direct a beam of light onto it); State v. Blacker, 52 Or App 1077, 630 P2d 413 (1981) (use of binoculars to view objects within a home that are not otherwise visible from the outside is a search).

- **Use of Technology in Public Place to Detect Things About Private Place.**

May an officer who lawfully is in a public location use a technological device to detect things that are coming from a private space and that otherwise are not readily perceptible to the officer's unaided senses? Although the Oregon Supreme Court has held that an officer can use a trained dog to detect odors of controlled substances that a defendant has allowed to waft from his private space, State v. Smith, 327 Or 366, 374, 963 P2d 642 (1998), the court has avoided resolving that issue in other contexts. Police use of a technological device to detect low-light emission from private space is questionable. *See* State v. Wacker, 317 Or 419, 856 P2d 1029 (1993) (not resolving whether use of nightscope would be permissible if the observed location is private). Similarly, police use of a thermal-imaging device (TID) to detect infrared radiation being emitted from a private space, or a sound-amplification device to detect otherwise imperceptible sound waves, is likely a search. *See* State v. Smith, 327 Or at 374 (suggesting that use of TID would be impermissible).

Fourth Amendment.

The federal courts use a two-part test for whether the Fourth Amendment has been violated by a claimed governmental intrusion into a person's privacy. *See* Katz v. United States, 389 US 347, 88 S Ct 507, 19 L Ed 2d 576 (1967). "First, the individual must have a subjective expectation of privacy in a place or thing. Second, society must be prepared to recognize that expectation as objectively reasonable." Forty-Ninth Annual Review of Criminal Procedure, 49 GEO. L.J. ANN. REV. CRIM. PROC. 7-8 (2020).

Applying this test to the use of technological devices to view private activities within a home, the Supreme Court has held:

> "We think that obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical 'intrusion into a constitutionally protected area,' * * * constitutes a search— at least where (as here) the technology in question is not in general public use."

Kyllo v. United States, 533 US 27, 37, 121 S Ct 2038, 150 L Ed 2d 94 (2001) (warrantless use of thermal-imaging device to detect heat patterns in private home was an unreasonable search).

a. Aircraft.

Oregon Law.

Observations made from aircraft flown at lawful altitudes are not searches for purposes of the Oregon Constitution. State v. Gohring, 311 Or 33, 803 P2d 1189 (1991) (fixed-wing aircraft); State v. Ainsworth, 310 Or 613, 801 P2d 749 (1990) (helicopter); State v. Rodal, 161 Or App 232, 239, 985 P2d 863 (1999) (military helicopter). *But see State v. Nakhiengchahn*, 341 Or App 516, __ P3d __ (2025) (although the police flew over defendant's property at a lawful altitude, an officer's warrantless use of a magnified camera system constituted an unlawful search because it allowed the officer to observe information about marijuana plants that was "materially different" from what the officer could have observed without the camera). However, Oregon statutes restrict law enforcement use of footage taken from "unmanned aircraft systems" (*i.e.*, drones). *See* ORS 837.310 *et seq.*

Fourth Amendment.

Use of an aircraft to obtain a lawful vantage point does not violate the Fourth Amendment. Florida v. Riley, 488 US 445, 109 S Ct 693, 102 L Ed 2d 835 (1989) (helicopter); United States v. Allen, 633 F2d 1282 (9th Cir 1980). *See also* California v. Ciraolo, 476 US 207, 106 S Ct 1809, 90 L Ed 2d 210 (1986) (no search where police flew over defendant's property and saw marijuana grow).

b. Mobile tracking devices.

Oregon Law.

The use of a mobile tracking device is a search in most contexts, even on a public highway, if the device is attached surreptitiously to the vehicle without the owner's consent. *Compare* State v. Campbell, 306 Or 157, 759 P2d 1040 (1988) (attaching a tracking device to defendant's private car and monitoring his movements was a search), *with* State v. Meredith, 337 Or 299, 96 P3d 342 (2004) (attaching tracking device to public-service vehicle, with consent of public employer, and tracking movements of employee while driving on public lands did not violate her privacy rights). In most cases, the police need a warrant to use a surreptitiously installed mobile tracking device. *See* ORS 133.617 and ORS 133.619 (allowing mobile tracking device warrants and prescribing procedures).

> **QUESTION:** Many people install tracking devices in vehicles that can be activated if the vehicle is stolen. If such a vehicle is stolen and police then use the device to catch the thief, may the thief rely on Campbell to argue that the tracking violated his or rights under Article I, section 9? Presumably, such a tracking would be lawful under Meredith because it is with the owner's consent, even if the thief drives it onto private property.

See also Chapter VI (Electronic Surveillance) (Beeper/Bird Dogs).

Fourth Amendment.

Monitoring an electronic beeper on a public highway and in the "open fields" of private property is not a search or seizure under the Fourth Amendment. *United States v. Knotts*, 460 US 276, 103 S Ct 1081, 75 L Ed 2d 55 (1973).

But the Fourth Amendment is violated when officers, without a warrant, monitor a beeper in a private residence. *United States v. Karo*, 468 US 705, 104 S Ct 3296, 82 L Ed 2d 530 (1984) (beeper placed in chemical drum which ended up in residence). *See also* *Grady v. North Carolina*, 575 US 306, 135 S Ct 1368, 191 L Ed 2d 459 (2015) (GPS tracking of sex offender is a search).

c. Binoculars, Telephoto Lenses, Telescopes, and Nightscopes.

Oregon Law.

The use of binoculars to see objects within a home that are not otherwise visible from the outside is a search. *State v. Blacker*, 52 Or App 1077, 630 P2d 413 (1981); *State v. Nakhiengchahn*, 341 Or App 516, __ P3d __ (2025) (officer's use of a magnified camera system during aerial surveillance was a search because it allowed the officer to observe information about marijuana plants on defendant's property that was "materially different" from what the officer could have observed without the camera). But simply using binoculars or a telephoto lens to confirm what is otherwise visible with the naked eye is not a search. *State v. Carter/Grant*, 101 Or App 281, 790 P2d 1152 (1990), *rev'd on other grounds*, 316 Or 6 (1993) (binoculars); *State v. Louis*, 296 Or 57, 672 P2d 708 (1983) (telephoto lens); *State v. Rodal*, 161 Or App 232, 985 P2d 863 (1999) (telephoto lens). However, the court's opinion in *State v. Smith*, 327 Or 366, 374, 963 P2d 642 (1998) (discussed above), strongly suggests that the use of a "high-powered telescope" to see into a private space may be unlawful without a warrant.

In *State v. Wacker*, 317 Or 419, 421 & n 3, 856 P2d 1029 (1993), the court held that use of a nightscope, which "magnifies images and enables the user to see better in the dark," to see activities in a parked car in a busy tavern parking lot was not a search because the location was not private.

Fourth Amendment.

Under the Fourth Amendment, police may use binoculars without a warrant. *United States v. Dubrofsky*, 581 F2d 208, 211 (9th Cir 1978); *United States v. Minton*, 488 F2d 37, 38 (4th Cir 1973).

In *Dow Chemical Co. v. United States*, 476 US 227, 106 S Ct 1819, 90 L Ed 2d 226 (1986), the Court held that the use of a sophisticated camera, which enhanced human vision somewhat, to take aerial photographs was not a search. But the Court suggested that "surveillance of private property using highly sophisticated surveillance equipment not generally available to the public, such as satellite technology," might be unlawful without a warrant. *Dow Chemical Co. v. United States*, 476 US at 238.

d. Concealed Cameras.

Oregon Law.

The use of a hidden camera to detect and record indecent exposure in the common area of a public restroom violates a defendant's privacy rights under Article I, section 9, at least in the case of a

defendant who reasonably expects that his conduct is not being observed by others. State v. Owczarzak, 94 Or App 500, 766 P2d 399 (1988); State v. Casconi, 94 Or App 457, 766 P2d 397 (1988) (defendant had a protected privacy interest in the use of an open toilet in a public restroom; the use of a concealed camera to record acts not otherwise "exposed to public view" was an unlawful search). *But see* State v. Louis, 296 Or 57, 672 P2d 708 (1983) (use of telephoto lens to photograph defendant exposing himself in a private location not a search because he was visible to neighbors).

Fourth Amendment.

Silent video surveillance (in this case, the installation of silent closed circuit television cameras in an office) requires a court order similar to a court order authorizing a wiretap. United States v. Koyomejian, 970 F2d 536, 542 (9th Cir), *cert den*, 506 US 1005 (1992).

e. Electronic Surveillance Devices.

The use of tape recorders, wiretaps, pagers, pen registers, and other electronic surveillance equipment is discussed in Chapter VI (Electronic Surveillance).

f. Flashlights.

Oregon Law.

"It is not unlawful for an officer to use a flashlight to examine the outside of a container and see no more than is visible under normal indoor lighting." State v. Bechtold, 99 Or App 593, 597, 783 P2d 1008 (1989), *rev den*, 309 Or 521 (1990). Similarly, in State v. Faulkner, 102 Or App 417, 794 P2d 821, *rev den,* 310 Or 422 (1990), the court held that an officer's use of a flashlight to illuminate the interior of a truck at night while admiring the truck did not transform an appropriate "open view" observation into a search. The vial of cocaine on the seat of the truck would have been visible but for "the shroud of darkness." *See also* State v. Evans, 101 Or App 340, 343, 790 P2d 1177 (1990) (officer's use of a flashlight during course of traffic stop to keep track of what defendant was doing in his car was not a search). *Cf*. State v. Jackson, 296 Or 430, 438 n 4, 677 P2d 21 (1984) (noting that, because defendant had made "no complaint that a flashlight was used to enhance visibility at night," the court would not decide the issue).

In contrast, in State v. Reed, 169 Or App 456, 9 P3d 738 (2000), the Court of Appeals held that an officer's use of a flashlight to see "drug-like packaging" within a semi-transparent film canister found in the defendant's purse was a search. The trial court had found "that the drug packaging could only be seen with 'the assistance of some enhancement better than the lighting in th[e] courtroom[.]'" Reed, 169 Or App at 463. "In order for the officer to discern the drug-like packaging contained in the film canister, he had to remove the canister from the purse and direct a beam of light onto it[;] * * * his use of the flashlight to illuminate its contents revealed something that was not in plain view." Reed, 169 Or App at 462-63.

Thus, after Reed, the rule for flashlights, under Article I, section 9, of the Oregon Constitution, is that their use constitutes a search if the flashlight illuminates contents that would not have been visible in normal lighting. 169 Or App at 463. Applying that rule in State v. Peek, 310 Or App 587, 593, 485 P3d 292, *rev den*, 368 Or 597 (2021), the court held that an officer did not conduct a search when he used his flashlight to peer into a jacket pocket without opening the pocket, because "the flashlight did not let [the officer] see anything more than what he would have seen had he been looking at the jacket in daylight." *See also* Peek, 310 Or App at 593 (explaining that whether officer could have seen object in daylight is a factual question for the trial court).

Fourth Amendment.

"[T]he use of artificial means to illuminate a darkened area" is not a search under the Fourth Amendment. Texas v. Brown, 460 US 730, 740, 103 S Ct 1535, 75 L Ed 2d 502 (1983) (flashlight into stopped vehicle); United States v. Dunn, 480 US 294, 107 S Ct 1134, 94 L Ed 2d 326 (1987) (flashlight into barn located outside the curtilage).

g. Thermal-Imaging Devices (TIDs).

In Kyllo v. United States, 533 US 27, 121 S Ct 2038, 150 L Ed 2d 94 (2001), the United States Supreme Court held that the warrantless use of a thermal-imaging device to detect heat patterns within a private home was an unreasonable search under the Fourth Amendment:

> "We think that obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical 'intrusion into a constitutionally protected area,' constitutes a search — at least where (as here) the technology in question is not in general public use."

533 US at 37 (citation omitted). That holding is consistent with the suggestion made by the Oregon Supreme Court in State v. Smith, 327 Or 366, 374, 963 P2d 642 (1998), that, under Article I, section 9, the use of an infrared camera to detect heat waves emanating from a private space is a search.

C. WHAT IS A SEIZURE?

1. Seizure of a Person.

Oregon Law.

Under Article I, section 9, a person is seized when, under the circumstances, a reasonable person would "believe that a law enforcement officer intentionally and significantly restricted, interfered with, or otherwise deprived the individual of his or her liberty or freedom of movement." State v. Backstrand, 354 Or 392, 399, 313 P3d 1084 (2013). "What distinguishes a seizure (either a stop or an arrest) from a constitutionally insignificant police-citizen encounter 'is the imposition, either by physical force or through some 'show of authority,' of some restraint on the individual's liberty.'" *Id.* (quoting State v. Ashbaugh, 349 Or 297, 244 P3d 360 (2010)). *See also* State v. K.A.M., 361 Or 805, 401 P3d 805 (2017) (although a request for identification alone is not a sufficient show of authority to effect a seizure, "when the content of the questions, the manner of asking them, or other actions that police take (along with the circumstances in which they take them) would convey to a reasonable person that the police are exercising their authority to coercively detain the citizen, then the encounter rises to the level of a seizure"). Under Article I, section 9 (unlike the Fourth Amendment), a passenger in a car stopped for a traffic violation is not automatically seized. State v. Stevens, 364 Or 91, 100, 430 P3d 1059 (2018).

Arrests and stops are seizures. State v. Puffenbarger, 166 Or App 426, 433, 998 P2d 788 (2000). *See* State v. Dahl, 323 Or 199, 206, 915 P2d 979 (1996) (ordering defendant to come out of his house with his hands up was a seizure). But whether a person is stopped is a question separate from that of whether the person has a constitutionally protected privacy or possessory interest in his person or property.

See further discussion of seizure of a person in Chapter II, Subsection C – STOP AND FRISK: What is a Seizure?

Fourth Amendment.

Under the Fourth Amendment, a "seizure" occurs when an officer, "by means of physical force or show of authority, has in some way restrained the liberty of a citizen." *Terry v. Ohio*, 392 US 1, 19 n 16, 88 S Ct 1868, 20 L Ed 2d 889 (1968). A seizure occurs "only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States v. Mendenhall*, 446 US 544, 554, 100 S Ct 1870, 64 L Ed 2d 497 (1980); *Michigan v. Chesternut*, 486 US 567, 573, 108 S Ct 1975, 100 L Ed 2d 565 (1988) (seizure of a person occurs when, "in view of all of the circumstances surrounding the incident," a person reasonably believes that he or she is not "free to leave" an encounter with a government official); *see also Torres v. Madrid*, 592 US 306, 141 S Ct 989, 209 L Ed 2d 190 (2021) (concluding that, because "the application of physical force to the body of a person with intent to restrain is a seizure even if the person does not submit and is not subdued," officers' shooting of a fleeing suspect with an intent to detain was a "seizure" even if the suspect continued to flee).

Unlike Article I, section 9, a passenger in a car stopped for a traffic violation is seized for purposes of the Fourth Amendment. *See State v. Bailey*, 356 Or 486, 507, 338 P3d 702 (2014).

See also Chapter II (Stop and Frisk), (General Stop Principles).

2. Seizure of Property.

Oregon Law.

"A 'seizure' [of property] occurs when there is a significant interference with a person's possessory or ownership interests in property." *State v. Owens*, 302 Or 196, 207, 729 P2d 524 (1996); *State v. Fulmer*, 366 Or 224, 229, 460 P3d 486 (2020). *See also State v. Galloway/Hoesly*, 198 Or App 585, 594-95, 109 P3d 383 (2005) (police unlawfully seized defendants' garbage cans when they emptied them to inspect their contents).

"The seizure of an article by the police and the retention of it (even temporarily) is a significant intrusion into a person's possessory interest in that 'effect.'" *State v. Owens*, 302 Or at 207. *See also State v. Juarez-Godinez*, 326 Or 1, 6, 942 P2d 772 (1997) ("a 'seizure' of property occurs when police physically remove property from a person's possession"); *State v. Edwards*, 304 Or App 293, 296, 466 P3d 1034 (2020) (when deputy removed defendant's backpack from her possession so he could handcuff her as part of lawful arrest on outstanding warrant, deputy "seized" backpack and justification for seizure was required apart from warrant); *State v. Barnthouse*, 271 Or App 312, 350 P3d 536 (2015), *aff'd on other grounds*, 360 Or 403 (2016) (removal of package by police from postal sorting bin to allow drug dog sniff was a seizure). *Contrast State v. Sholedice/Smith*, 364 Or 146, 155, 431 P3d 386 (2018), *adh'd to as modified on recons,* 364 Or 575 (2019) (removal of package *by postal employee*, not at police behest, for drug dog sniff was not a seizure); *State v. Peek*, 310 Or App 587, 591-92, 485 P3d 292, *rev den*, 368 Or 597 (2021) (officer's act of picking up defendant's jacket from a public bike bath following motorcycle crash, while defendant was getting treatment from EMTs, was not a seizure); *State v. Ali*, 105 Or App 193, 196-97, 803 P2d 1231 (1991) (removal of paper wad from underneath defendant's car seat was a seizure); *State v. Finch*, 86 Or App 315, 319, 739 P2d 66 (1987) (officer's attempt to remove a cigarette case from defendant's pocket was not a sufficiently lengthy interference to rise to the level of a seizure).

However, taking clothing and items from a jail inmate during booking is not a "seizure":

> "The jail has not 'seized' the inmate's property in the sense that the facility may now treat that property as it desires. Rather, the items remain the property of the inmate; the jail has become the bailee of that property and holds it for the inmate's benefit."

State v. Johnson, 177 Or App 244, 251, 35 P3d 1024 (2001). *See also* State v. Hartman, 238 Or App 582, 243 P3d 480 (2010), *disp withdrawn on recons, otherwise aff'd*, 241 Or App 195 (2011) (jail deputies could not, as part of jail inventory process, lawfully photograph defendant's boots for purposes of criminal investigation).

As with persons, property also may be seized by a show of authority:

> "Just as a *person* may be seized by a show of authority, so can a piece of property. Just as police conduct with respect to a *person* is tested according to what a defendant *did* believe and what an objectively reasonable person *would* believe under the circumstances, so is police conduct with respect to *property*."

State v. Juarez-Godinez, 326 Or 1, 7, 942 P2d 772 (1997) (emphasis in original) (concluding that defendant's car was unlawfully seized when police detained it for 30 minutes or more to await the arrival of a drug dog).

Fourth Amendment.

Under the Fourth Amendment, "[a] seizure of property occurs when a governmental intrusion meaningfully interferes with an individual's possessory interest." Forty-Ninth Annual Review of Criminal Procedure, 49 GEO. L. J. ANN. REV. CRIM. PROC. 15 (2018); United States v. Jacobsen, 466 US 109, 113, 104 S Ct 1652, 80 L Ed 2d 85 (1984) (same).

Compare United States v. Jacobsen, 466 US 109 (seizure occurred when DEA agent asserted control over package), and Fuller v. Vines, 36 F3d 65 (9th Cir 1994), *cert den*, 514 US 1017 (1994) (seizure occurred when officer shot and killed defendant's dog), with Arizona v. Hicks, 480 US 321, 107 S Ct 1149, 94 L Ed 2d 347 (1987) (no seizure occurred when police simply recorded the serial numbers of stereo equipment because that action did not meaningfully interfere with defendant's possessory interests in either the numbers recorded or the stereo; however, when the police picked up the stereo equipment, a search occurred because such action constituted a new, unjustified invasion of privacy), and United States v. Brown, 884 F2d 1309 (9th Cir 1989), *cert den*, 493 US 1025 (1990) (luggage not seized when it was briefly detained after passenger relinquished it to airline).

3. Confirmatory Testing.

When an officer has probable cause to believe that a lawfully seized container holds a controlled substance, the additional interference associated with confirmatory testing is not significant enough to be a seizure. State v. Heckathorne, 347 Or 474, 223 P3d 1024 (2009); State v. Owens, 302 Or 196, 729 P2d 524 (1986). *But see* State v. Sines, 287 Or App 850, 875, 404 P3d 1060 (2017), *rev den*, 362 Or 545 (2018) (testing of underwear that defendant's housekeeper gave to police, for the presence of spermatozoa, exceeded scope of private search and violated Article I, section 9).

See more detailed discussion of this issue in this chapter, (Lab Testing).

4. Securing Premises or Persons.

Securing premises or a person until a warrant can be obtained is a seizure that must be justified by either a warrant or an exception to the warrant requirement. State v. Sargent, 323 Or 455,

918 P2d 819 (1996) (residence and its contents); *State v. Dowdy*, 117 Or App 414, 418, 844 P2d 263 (1992) (hotel room and vehicle).

Assigning an officer to watch a car that the police have probable cause to believe contains controlled substances is not a seizure; towing the car to the police lot is. *State v. Nicholson*, 89 Or App 306, 311, 748 P2d 1028, *rev den*, 305 Or 672 (1988).

See additional discussion of this issue in Chapter V (Searches With Warrant), (Securing Persons, Premises, or Objects While Seeking a Warrant).

D. STANDING AND PROTECTED PRIVACY INTERESTS.

Litigants and courts alike regularly confuse the separate concepts of "standing" and "protected privacy interests" by using the term "standing" to describe both concepts. True "standing" is the right to obtain an adjudication, and it is considered before the court considers the merits of the case. Some cases also use the term "standing" to discuss the defendant's protected privacy interest and whether the defendant's rights were violated. The Oregon Supreme Court has indicated that the term "standing" should be used only in the narrow sense of capacity to make a legal challenge; it should not be used in discussing the defendant's privacy interests. *State v. Tanner*, 304 Or 312, 316, 745 P2d 757 (1987). This distinction is further explained in *Eckles v. State of Oregon*, 306 Or 380, 383-84, 760 P2d 846 (1988), and in *State v. Jacobsen*, 142 Or App 341, 922 P2d 677 (1996).

1. True Standing: May the Court Consider the Defendant's Objections?

True standing is rarely an issue in criminal cases. A criminal defendant "always has standing to challenge the admission of evidence introduced by the state." *State v. Tanner*, 304 Or 312, 316, 745 P2d 757 (1987). *See also State v. McMurphy*, 291 Or 782, 785, 635 P2d 372 (1981); *State v. Fraga-Ortiz*, 176 Or App 268, 31 P3d 1089 (2001); *State v. Mulholland*, 132 Or App 399, 403 n 3, 888 P2d 594, *rev den*, 321 Or 284 (1995).

The same is true under federal law. "[I]n determining whether a defendant is able to show the violation of his (and not someone else's) Fourth Amendment rights, the 'definition of those rights is more properly placed within the purview of substantive Fourth Amendment law than within that of standing.'" *Minnesota v. Carter*, 525 US 83, 88, 119 S Ct 469, 142 L Ed 2d 373 (1998), *quoting Rakas v. Illinois*, 439 US 128, 140, 99 S Ct 421, 58 L Ed 2d 387 (1978).

2. Privacy Interests: Were the Defendant's Rights Violated?

a. Oregon Constitutional Standards.

To be entitled to suppression, a defendant must have a *personal* protected privacy interest in the property that has been searched or seized. If no right of the defendant was violated in the state's acquisition of the evidence, the claim for suppression fails. *State v. Morton*, 326 Or 466, 953 P2d 374 (1998); *State v. Kosta*, 304 Or 549, 748 P2d 72 (1987); *State v. Tanner*, 304 Or 312, 745 P2d 757 (1987); *State v. McMurphy*, 291 Or 782, 785, 635 P2d 372 (1981); *State v. Hartwig*, 185 Or App 706, 60 P3d 1157 (2003).

Article I, section 9, does not require suppression of evidence where the only effect would be to deter future police conduct. Under the Oregon exclusionary rule, suppression is appropriate only if it would vindicate a privacy interest. If no privacy interest is implicated, there is no search, and suppression is therefore not required. *State v. Sargent*, 323 Or 455, 462 n 4, 918 P2d 819 (1996); *State v. Davis*, 313 Or 246, 253-54, 834 P2d 1008 (1992); *State v. Tanner*, 304 Or at 321.

See also discussion in this chapter, (Burden of Proving a Protected Privacy Interest).

(1) Interests Protected Under Article I, section 9.

Under Article I, section 9, a person has a protected privacy or possessory interest in property over which the person has control or the right of control. *State v. Herrin*, 323 Or 188, 193, 915 P2d 953 (1996); *State v. Creighton*, 142 Or App 378, 382, 921 P2d 1339 (1996).

Protected privacy interests include:

- "[T]he contents of a closed, opaque residential garbage bin[] placed at the curbside for collection." *State v. Lien/Wilverding*, 364 Or 750, 762, 441 P3d 185 (2019).

- Property disclaimed by the defendant, but over which the defendant clearly exercised (and did not abandon) a possessory interest prior to the search, *State v. Cook*, 332 Or 601, 34 P3d 156 (2001); *State v. Morton*, 326 Or 466, 953 P2d 374 (1998); *State v. Fraga-Ortiz*, 176 Or App 268, 31 P3d 1089 (2001); *State v. Silva*, 170 Or App 440, 13 P3d 143 (2000); *State v. Gatto*, 304 Or App 210, 466 P3d 981 (2020).

- Places where a defendant stores stolen property, as long as the defendant had a protected interest in the place itself. *State v. Tanner*, 304 Or 312, 745 P2d 757 (1987). *See also State v. Rowell*, 251 Or App 463, 283 P3d 454 (2012) (holding that a thief has a protected interest in stolen property unless the state proves that the officers *knew* at the time of the search that defendant lacked a protected interest in stolen property).

- A defendant's personal belongings, *State v. Herrin*, 323 Or 188, 915 P2d 953 (1996), even after entrustment to a third person, *State v. Fraga-Ortiz*, 176 Or App 268, 31 P3d 1089 (2001); *State v. Britten*, 89 Or App 374, 749 P2d 1193, *rev den,* 306 Or 78 (1988); *State v. Lynch*, 94 Or App 168, 764 P2d 957 (1988); or after a lawful seizure by the police, *State v. Barnum*, 136 Or App 167, 902 P2d 95 (1995), *rev den*, 323 Or 336 (1996); *State v. Dickerson*, 135 Or App 192, 898 P2d 193 (1995).

- Contents of the defendant's cell phone, *State v. McClatchey*, 259 Or App 531, 314 P3d 721 (2013) (text messages).

- A defendant's personal privacy in a public restroom, *State v. Holiday*, 258 Or App 601, 310 P3d 1149 (2013); *State v. Owcarzak*, 94 Or App 500, 766 P2d 399 (1988).

- Noncontraband property in the jail cell of the defendant, who was detained pending trial. *State v. Moore*, 260 Or App 303, 317 P3d 293 (2013) (defendant's manuscript).

- Areas of the defendant's workplace that are not open to the public. *State v. Mast*, 250 Or App 605, 282 P3d 916 (2012) (private office that was separated from lobby by reception station, long hallway, and door); *State v. Rivas*, 100 Or App 620, 788 P2d 464, *rev den*, 310 Or 122 (1990) (restaurant kitchen).

- A defendant's residence or a residence where the defendant is a guest, *City of Eugene v. Silva*, 198 Or App 101, 106-07, 108 P3d 23 (2005); *State v. Brown*, 183 Or App 434, 52 P3d 1110 (2002); *State v. Munro*, 96 Or App 238, 772 P2d 1353 (1989); *State v. Breshears/Oliver*, 98 Or App 105, 79 P2d 158 (1989).

- The defendant's boat, *State v. Lecarros*, 187 Or App 105, 66 P3d 543 (2003).

- Property belonging to another that is in the defendant's possession, *State v. Jacobsen*, 142 Or App 341, 922 P2d 677 (1996).

Protected *possessory* interests include:

- A mail addressee's property-based possessory interest in mail sent with a "guaranteed delivery time"; that interest exists even during transit, and includes, at a minimum, the right to receive the mail by the guaranteed time. *State v. Barnthouse*, 360 Or 403, 418, 380 P3d 952 (2016).

- Garbage placed at the curbside for pickup, before it is collected by the sanitation company. *State v. Galloway*, 198 Or App 585, 109 P3d 383 (2005). (A defendant also has a protected *privacy* interest in that garbage, as discussed above.)

See also Technological Enhancement cases in this chapter.

(2) No Protected Interest Under Article I, section 9.

In the following cases, the court concluded that the defendant lacked any privacy or possessory interest in the object or in the area that was searched or seized.

(a) No Protected Interest in Object Searched or Seized.

State v. Newcomb, 359 Or 756, 375 P3d 434 (2016). Defendant had no protected privacy interest in the blood of her dog after the dog was lawfully seized on suspicion of abuse and neglect; an officer could have the dog's blood drawn and tested for diagnostic and treatment purposes without conducting a "search" under Article I, section 9.

State v. Brown, 348 Or 293, 232 P3d 962 (2010). Defendant abandoned any Article I, section 9 (or Fourth Amendment) privacy interest in luggage when the police found her as an unregistered guest in a motel room, ordered her to leave, and asked if luggage she voluntarily left behind was hers. Defendant specifically disclaimed any possessory interest in the luggage. Later on, the registered motel guest consented to a search of the luggage, and police found defendant's wallet and other people's stolen ID documents inside. *Compare State v. Gatto*, 304 Or App 210, 466 P3d 981 (2020) (concluding that, where defendant had left his hotel room "well before the hotel's check-out time" but left items in the room and still had the room keys with him, defendant had not "abandoned a privacy interest *in the hotel room*").

State v. Luman, 347 Or 487, 223 P3d 1041 (2009). Defendant had no protected privacy interest in the contents of a videotape that he kept in his restaurant kitchen where defendant's employees watched the tape, delivered it to a deputy sheriff, and described the contents of the tape to the sheriff's department; private party viewing of the tape destroyed any privacy interest that defendant had in it.

State v. Heckathorne, 347 Or 474, 223 P3d 1024 (2009). Defendant had no protected privacy interest in pressurized metal cylinders containing anhydrous ammonia where distinctive turquoise discoloration of tanks and smell of tanks revealed contents of tanks to officers.

State v. Kosta, 304 Or 549, 748 P2d 72 (1987). Defendant had no protected interest in a package detained by the police because he was neither the sender, the addressee, nor the intended recipient of the package.

State v. Gonzalez, 292 Or App 342, 423 P3d 117, *rev den,* 363 Or 815 (2018). Defendant had no protected interest in the area under the back steps of a home he was visiting because the homeowner's invitation for him to be on the property did not extend to that area.

State v. Whitlow, 241 Or App 59, 250 P3d 24 (2011). Officers did not significantly interfere with any protected possessory interest that defendant had in his truck, when they stopped the truck for a traffic investigation while a third party was driving it (and defendant was not in the truck).

State v. Stokke, 235 Or App 477, 237 P3d 829, *rev den,* 349 Or 370 (2010). Defendant abandoned any Article I, section 9 (or Fourth Amendment) privacy interest in property that he left in a motel safe, once the time for checking out had passed and hotel staff entered room for purpose of evicting him. *Note:* Defendant was not present when the hotel staff entered the room, but he had left behind all of his personal property. The staff found scales, drugs, and stolen IDs in the room safe.

State v. Trevino/Ahumada, 133 Or App 24, 899 P2d 1317, *rev den,* 321 Or 340 (1995). Defendants did not have a protected interest in cocaine seized from a third party where, although the evidence indicated that one of the defendants had "fronted" the cocaine to the third party, it did not clearly establish that the defendant retained the right to reclaim the cocaine if it was not paid for.

State v. Mulholland, 132 Or App 399, 888 P2d 594, *rev den,* 321 Or 284 (1995). Where marijuana was seized in an unlawful search of a duffel bag belonging to a person who had stolen the marijuana from defendants, defendants lacked a protected interest in the bag regardless of whether defendants had a protected interest in the marijuana it contained, and thus could not contest the legality of the officers' search of the bag. *Contrast* State v. Tanner, 304 Or 312, 745 P2d 757 (1987) (where defendants entrusted property to another, they had a protected interest in both the property and the place where it was stored).

State v. Peterson, 114 Or App 126, 129-31, 834 P2d 488, *rev dismissed*, 315 Or 272 (1992). Defendant lacked a privacy interest in stolen dolls he was displaying for sale; thus their seizure was justified by the plain-view doctrine. *But see* State v. Rowell, 251 Or App 463, 283 P3d 454 (2012) (holding that a thief has a protected interest in stolen property unless the state proves that the officers *knew* at the time of the search that defendant lacked a protected interest in stolen property).

State v. Garoutte, 104 Or App 418, 801 P2d 881 (1990). Defendant had no protected interest in a stolen car once he was lawfully removed from it and had disclaimed any right to possession. *Contrast* State v. Tanner, 304 Or 312, 745 P2d 757 (1987) (defendant retained a privacy interest in property he stole, then entrusted to a third person).

(b) No Privacy Interest in a Third Party's Records

State v. Makuch/Riesterer, 340 Or 658, 136 P3d 35 (2006). Defendants lacked a constitutionally protected privacy interest in notations of their names and addresses within their lawyer's personal organizer, which the police seized from their lawyer's office.

State v. Johnson, 340 Or 319, 335-36, 131 P3d 173 (2006). Defendant did not have privacy interest in subscriber information maintained by cell phone provider.

State v. DeWitt Simons, 329 Or App 506, 540 P3d 1130, *review allowed*, 372 Or 290 (2024). Defendant did not have a right to privacy protected by Art I, § 9, or a reasonable expectation of privacy under the Fourth Amendment, in records of his internet browsing history on a restaurant's guest Wi-Fi network, which were captured by the network's firewall and provided to police by the restaurant, where he had entered into a user agreement that prohibited using the network to transmit obscene material or engage in illegal activity, and that notified defendant that the restaurant had the ability to monitor users' activities on the network.

State v. Miller, 284 Or App 818, 395 P3d 584, *vacated, rev dismissed*, 362 Or 300 (2017). Hospital's disclosure to police of defendant's blood-alcohol level, after the hospital had drawn and tested blood for medical purposes, did not violate Art. I, § 9 or the Fourth Amendment.

State v. Combest, 271 Or App 38, 51, 350 P3d 222, *rev den*, 358 Or 70 (2015). Defendant had no protected interest in anonymity when sharing images of child pornography over a peer-to-peer network, "even if [he] expected that no other user would take notice of that information or find it particularly useful."

State v. Carle, 266 Or App 102, 337 P3d 904 (2014), *rev den*, 356 Or 767 (2015). The defendant had no protected interest in text messages that she sent to another person and were stored on that person's cell phone.

State v. Delp, 218 Or App 17, 178 P3d 259, *rev den*, 345 Or 317 (2008). Defendant lacked a protected privacy interest in his internet service provider's records.

State v. Ghim, 267 Or App 435, 340 P3d 753, (2014), *aff'd on other grounds*, 360 Or 425, 381 P3d 789 (2016). Defendant had no protected privacy interest under Article I, section 9, in subpoenaed bank records, which were created in the course of the bank's regular operations and held and maintained by the bank for the bank's own purposes.

State v. Davis, 237 Or App 351, 239 P3d 1002 (2010), *aff'd by equally divided court*, 353 Or 166 (2013). A driver has no protected interest in DMV records when an officer does a random license-plate check. *See also* State v. Brown, 306 Or App 652, 473 P3d 1164 (2020) (rejecting argument that *Davis* is "plainly wrong").

State v. Magana, 212 Or App 553, 159 P3d 1163, *rev den*, 343 Or 363 (2007). Defendant had no protected privacy interest in the records of his cell phone calls maintained by his cell phone provider. Although defendant may have had a protected interest in the *contents* of those calls, he did not have a protected interest in the records of the calls maintained by a third party. *Contrast* Carpenter v. United States, 585 US 296, 138 S Ct 2206, 201 L Ed 2d 507 (2018) (under Fourth Amendment, person has protected interest in historical cell-site location information contained in records kept by cell phone company).

State v. Gonzalez, 120 Or App 249, 852 P2d 851, *rev den*, 318 Or 61 (1993). Statutes protecting the confidentiality of medical records do not create protected privacy or possessory interests in the records. As a result, a grand jury subpoena to acquire medical records did not violate Article I, section 9. *See also* State v. Miller, 284 Or App 818, 395 P3d 584, *vacated, rev dismissed*, 362 Or 300 (2017) (citing *Gonzalez*; defendant retained no protected interest in blood-alcohol level that hospital obtained for medical purposes and later disclosed to police).

(c) No Protected Interest in the Land or Area Entered by the Officer.

State v. Villasenor-Sibrian, 337 Or App 465, 563 P3d 999 (2025). Defendant did not have a protected privacy interest in the back of an ambulance where she was receiving treatment following a serious motor vehicle collision. As a result, police officer did not violate Article I, section 9, by entering the back of the ambulance and asking defendant to step outside.

State v. Cromb, 220 Or App 315, 185 P3d 1120, *rev den*, 345 Or 381 (2008). Defendant did not have a protected privacy interest in hospital emergency room, even the curtained-off area that he occupied. As a result, police officer did not violate Article I, section 9, by observing defendant there.

State v. Hartwig, 185 Or App 706, 60 P3d 1157 (2003). The trial court correctly denied the defendant's motion to suppress evidence where defendant did not identify any property or privacy interest that the police violated when they entered another person's real property without a warrant, conducted a search and seized evidence, despite the property owner's directive that the police were not to enter the property without a warrant.

State v. Avalos-Izquierdo, 175 Or App 229, 27 P3d 528 (2001), *rev den*, 334 Or 190 (2002). The evidence introduced at the suppression hearing supported the trial court's finding that defendant was not a resident of the labor camp where he was arrested. Because the defendant's assertion of a privacy interest in the labor camp was based solely upon his claim of residency, his motion to suppress evidence obtained as a result of the entry into the camp by the police, and their arrest of the defendant, was properly denied. (Note: The court declined to consider defendant's alternate argument, which he raised for the first time on appeal, that he had a protected interest in the camp because he was a guest.)

State v. Bartley, 121 Or App 301, 305, 854 P2d 996, *rev den*, 318 Or 25 (1993). The seizure of defendant's gun from its hiding place in the victim's house pursuant to the victim's consent to search did not violate defendant's protected privacy interests.

(d) No Protected Interest Due to Status of Defendant.

Under Article I, section 9, persons may lose protected possessory or privacy interests by virtue of their status as a prisoner or a felon.

In State v. Tiner, 340 Or 551, 135 P3d 305 (2006), the Oregon Supreme Court rejected an argument by defendant, who was being held in jail pending trial for aggravated murder, that the state violated his privacy interests by photographing tattoos on his chest. Once defendant became a prisoner, he enjoyed few rights regarding his privacy. "Among the rights he forfeited was the right to keep his personal appearance * * * from being known to the state." Tiner, 340 Or at 563.

Similarly, in State v. Sanders, 343 Or 35, 163 P3d 607 (2007), the court analyzed whether the defendant's rights under Article I, section 9, or the Fourth Amendment were violated by a seizure from him of a DNA sample under ORS 137.076, which requires any person convicted of a felony and certain enumerated misdemeanors to submit a DNA sample as a consequence of the conviction. The court held that, at least as it applies to *felony* convicts, the convicts lost any protected interest in avoiding suspicionless collection and testing of a blood or buccal sample. Sanders, 343 Or at 42. Because the defendant in that case was subject to the statute as a consequence of a conviction for a felony, and not one of the enumerated misdemeanors, the court declined to answer whether its analysis would also apply to misdemeanor convicts. In reaching its conclusion under the Fourth Amendment, the Supreme Court relied in part on Samson v. California, 547 US 843, 126 S Ct 2193, 165 L Ed 2d 250 (2006), discussed below, in which the United States Supreme Court upheld a

California statute that required all parolees to agree to suspicionless searches or seizures by parole officers or other peace officers solely on the basis of the parolee's status as an inmate on parole.

That analysis does not apply when the prisoner has not yet been convicted or sentenced, but is being held pending trial. State v. Hartman, 238 Or App 582, 243 P3d 480 (2010), *disp withdrawn on recons, otherwise aff'd,* 241 Or App 195, 248 P3d 448 (2011) (jail deputies could not, as part of jail inventory process, lawfully seize and photograph defendant's boots for purposes of criminal investigation). *See also* State v. Moore, 260 Or App 303, 317 P3d 293 (2013) (defendant, in custody pending trial, retained privacy interest in non-contraband property that he kept in his jail cell and that was discovered "during a targeted police investigation"); State v. Taplin, 311 Or App 542, 491 P3d 80 (2021) (not deciding "whether a pretrial detainee who was arrested on drug crimes also has a diminished right to privacy similar to that articulated by *Sanders*" because, even if detainee had protected privacy interest in holding cell, officer's actions did not violate that interest).

b. Federal Constitutional Standards.

Fourth Amendment rights are personal. Alderman v. United States, 394 US 165, 174, 89 S Ct 961, 22 L Ed 2d 176 (1969). *See also* Minnesota v. Carter, 525 US 83, 88, 119 S Ct 469, 142 L Ed 2d 373 (1998) ("the Fourth Amendment is a personal right that must be invoked by an individual"). A defendant's right to challenge a search under the Fourth Amendment depends upon whether "governmental officials violated any legitimate expectation of privacy" held by the defendant. United States v. Salvucci, 448 US 83, 100 S Ct 2547, 65 L Ed 2d 619 (1980); Rawlings v. Kentucky, 448 US 98, 100 S Ct 2556, 65 L Ed 2d 633 (1980). *See* discussion regarding federal "expectation of privacy" test in this chapter, (General Principles/The Fourth Amendment).

"[T]he extent to which the Fourth Amendment protects people may depend upon where those people are." Minnesota v. Carter, 525 US 83, 88, 119 S Ct 469, 142 L Ed 2d 373 (1998). An overnight guest has a legitimate expectation of privacy in his or her host's house. Minnesota v. Olson, 495 US 91, 110 S Ct 1684, 109 L Ed 2d 85 (1990). A more casual visitor — "one who is merely present with the consent of the householder" — does not. Minnesota v. Carter, 525 US 83, 90 (defendants, who were in another person's apartment for a short time solely for the purpose of packaging cocaine, had no legitimate expectation of privacy in the apartment). *But see* Bonner v. Anderson, 81 F3d 472, 475 (4th Cir 1996) (frequent visitor to residence had expectation of privacy).

Likewise, the existence or extent of Fourth Amendment protections may vary depending on a person's particular status. For example, prisoners and probationers and other persons on conditional release have reduced expectations of privacy and, therefore, they may be deprived of many constitutional rights that law-abiding citizens enjoy, including the right to be free from unreasonable searches and seizures under the Fourth Amendment. United States v. Knights, 534 US 112, 119-21, 122 S Ct 587, 151 L Ed 2d 497 (2001). In fact, the United States Supreme Court has upheld a California law requiring every prisoner eligible for release on state parole to agree in writing to suspicionless searches by a parole officer or peace officer while on parole. Samson v. California, 547 US 843, 126 S Ct 2193, 165 L Ed 2d 250 (2006).

A person arrested for committing a crime retains legitimate privacy expectations, although those expectations are diminished when he is taken into police custody. Maryland v. King, 569 US 435, 133 S Ct 1958, 186 L Ed 2d 1 (2013). Although using a buccal swab to obtain the DNA of a defendant arrested for a serious offense (here, rape) is a search under the Fourth Amendment, it is reasonable as part of a legitimate police booking procedure and therefore lawful. *Id*. (upholding Maryland law authorizing police to obtain DNA of persons arrested for violent crimes).

Fourth Amendment cases generally place greater emphasis on a defendant's inability to control access to property in someone else's possession. For example, the Court has held that a passenger in another person's car has no basis to object to the search of the car. Rakas v. Illinois, 439 US 128, 99 S Ct 421, 58 L Ed 2d 387 (1978). Similarly, a person who hands a controlled substance to another person to put it in her purse does not have a basis to object to the search of the purse. Rawlings v. Kentucky, 448 US 98, 100 S Ct 2556, 65 L Ed 2d 633 (1980).

Property used for commercial purposes receives different Fourth Amendment protections than a residence. Minnesota v. Carter, 525 US 83, 90, 119 S Ct 469, 142 L Ed 2d 373 (1998). "An expectation of privacy in commercial premises * * * is different from, and indeed less than, a similar expectation in an individual's home." New York v. Burger, 482 US 691, 700, 107 S Ct 2636, 96 L Ed 2d 601 (1987).

A person has no constitutionally protected interest in contraband. "Official conduct that does not compromise any legitimate interest in privacy is not a search subject to the Fourth Amendment," and "any interest in possessing contraband cannot be deemed legitimate, and thus, governmental conduct that only reveals the possession of contraband compromises no legitimate privacy interest." Illinois v. Caballes, 543 US 405, 125 S Ct 834, 837-38, 160 L Ed 2d 842 (2005).

3. Burden of Proving a Protected Privacy Interest.

Oregon Law.

ORS 133.693(4) places on the government the burden of establishing the validity of a warrantless search, but the statute does not expressly allocate the burden of proving the existence or non-existence of a protected interest. But, in State v. Tucker, 330 Or 85, 997 P2d 182 (2000), the court held that the burden is on the state:

> "[I]n the context of a warrantless search, a defendant is not required to assert a protected property or privacy interest on which the state intruded. Rather, consistent with ORS 133.693(4), the burden is on the state to prove that the warrantless search did *not* violate a protected interest of the defendant."

State v. Tucker, 330 Or at 88-89 (emphasis in original). *Accord* State v. Knox, 160 Or App 668, 673, 984 P2d 294, *rev den*, 329 Or 527 (1999) (to justify a warrantless search on the ground that the defendant did not have a protected privacy interest, the state "has the burden of proving the negative proposition that no interest of the defendant's was involved").

Moreover, the state's burden may be narrowed by the terms of the motion to suppress and by the evidence offered by the defendant at the hearing. In State v. Avalos-Izquierdo, 175 Or App 229, 27 P3d 528 (2001), *rev den*, 334 Or 190 (2002), the defendant challenged the officer's entry into a farm-labor camp without a search warrant and his subsequent arrest of defendant. The defendant's motion asserted that the entry by the police violated defendant's privacy based on a claim that he was a resident of the camp. At the hearing, the state offered evidence showing that defendant was not a resident, and the trial court denied the motion on that basis. On appeal, the defendant argued for the first time that he had a privacy right even if he was only a guest. The Court of Appeals declined to consider this new claim. Because the defendant asserted a specific factual ground as a basis for a protected privacy interest, the state was not required to anticipate and disprove other possible (and conflicting) factual claims. *See also* discussion of this issue in Chapter VII (Motions and the Exclusionary Rule), (Requirement of a Timely and Specific Motion), (Burden of Proof) and (Raise the Argument or Waive It on Appeal).

Fourth Amendment Standards.

A defendant is not entitled to suppression unless the defendant is able to demonstrate that the search violated his or her personal Fourth Amendment rights to a legitimate expectation of privacy. United States v. Salvucci, 448 US 83, 100 S Ct 2547, 65 L Ed 2d 619 (1980) (rejecting a rule of "automatic standing" for a defendant accused of a possessory offense); Rakas v. Illinois, 439 US 128, 99 S Ct 421, 58 L Ed 2d 387 (1978) (vehicle passengers who never asserted ownership or any other interest in property seized from the vehicle were not entitled to suppression). *See also* Minnesota v. Carter, 525 US 83, 88, 119 S Ct 469, 142 L Ed 2d 373 (1998) ("in order to claim the protection of the Fourth Amendment, a defendant must demonstrate that he personally has an expectation of privacy in the place searched, and that his expectation is reasonable").

4. Privacy Interest Denied, Disclaimed, or Abandoned. See Chapter IV (Warrantless Searches).

If a person with a protected privacy interest in property abandons that interest *before* police officers search the property, the person will not be entitled to suppression based on any illegality committed by the police in conducting the search. State v. Morton, 326 Or 466, 953 P2d 374 (1998). *But see* State v. Lien/Wilverding, 364 Or 750, 780-81, 441 P3d 185 (2019) (defendants did not lose protected privacy interest in garbage placed at curb for collection on garbage collection day, even after it was collected, because the garbage collector acted at the behest of police). "Abandonment of property is an intentional and permanent relinquishment of one's interests in the property without vesting those rights in another person." State v. Stinstrom, 261 Or App 186, 192, 322 P3d 1076 (2014) (defendant did not abandon backpack by moving away from it when he was arrested). "[A] person may relinquish the person's constitutionally protected rights in an object by communicating to police through actions or words an intention to relinquish those interests." State v. Pilgrim, 276 Or App 747, 750, 369 P3d 434 (2016) (defendant's action, when asked by officer whether anything in the car about to be searched belonged to him, of silently grabbing a bag of candy and walking away did not "unequivocally" manifest his intent to relinquish interests in bag that he left in the car). To determine whether a person has relinquished constitutionally protected interests in an item, the court considers three factors: (1) whether the person has separated himself from the items "as a result of police instruction, or illegal police conduct"; (2) whether he left the item on public or private property; and (3) whether he attempted to hide the item or otherwise manifested an intention to maintain control of the item. State v. Stubblefield, 279 Or App 483, 380 P3d 1126 (2016); State v. Stafford, 184 Or App 674, 679, 57 P3d 598 (2002), *rev den*, 335 Or 181 (2003). *See also* State v. Ipsen, 288 Or App 395, 406 P3d 105 (2017) (applying factors); State v. Montiel-Delvalle, 304 Or App 699, 468 P3d 995 (2020) (applying factors; defendant abandoned privacy interest in totaled vehicle he left in intersection); State v. Lewis, 306 Or App 492, 474 P3d 907 (2020) (applying factors; defendant did not abandon privacy interest in backpack by leaving it in stolen vehicle); State v. Laney, 318 Or App 509, 507 P3d 308, *rev den*, 370 Or 197 (2022) (applying factors; defendant abandoned his possessory and privacy interest in computers that that he left behind, in his son-in-law's possession, despite his request that they should be "recycled").

A person who claims ownership of some items, and not others, does necessarily communicate the intent to relinquish all constitutionally protected interests in the remaining items. State v. Bunch, 305 Or App 61, 468 P3d 973 (2020); State v. Jones, 280 Or App 135, 380 P3d 1132 (2016). *See also* State v. Brown, 273 Or App 347, 359 P3d 413 (2015) (defendant did not abandon McDonald's bag that he left outside a convenience store when questioned by police; "Nothing in the case law under Article I, section 9, suggests that a citizen must keep his hands on his property at all times—even in public places—in order to retain a protected interest in that property."); State v. Bernabo, 224 Or App 379, 197 P3d 610 (2008); State v. Linville, 190 Or App 185, 78 P3d 136 (2003), *rev den*, 337 Or 34

(2004); *State v. Kauffman*, 162 Or App 402, 986 P2d 696 (1999), *rev den*, 329 Or 650 (2000); *State v. Knox*, 160 Or App 668, 984 P2d 294, *rev den*, 329 Or 527 (1999).

See discussion of these issues in Chapter IV (Warrantless Searches), (Abandoned and Lost Property).

II. STOP AND FRISK.

A. OREGON'S STOP STATUTES

Oregon's stop statutes authorize police to take the actions described in those statutes, but a violation of a statute does not necessarily require suppression of evidence. Rather, the state and federal constitutions alone govern whether evidence is subject to suppression. That was not always the case. Before the enactment of ORS 136.432 in 1997, Oregon courts imposed a suppression remedy for violations of the stop statutes. Thus, although a mere violation of the stop statutes no longer will require suppression of evidence, those statutes played an integral role in Oregon's search and seizure law for many years. Thus, it is very difficult to excise all reference to them from the Search and Seizure Manual. Nor would that be desirable, as they appear so frequently in the caselaw. It is important for prosecutors to keep this history in mind when reviewing older cases, including cases cited in the manual, in order to recognize if and when the holding in an older case might be premised on statutory rather than constitutional law. In some older cases, the basis for the holding may not be clear. At times courts have construed certain provisions of the stop statutes as merely restating the constitutional standard — a premise that may have held true over time or that may later have been abrogated by evolutions in the constitutional law or amendments to the statutes. (For example, the stop statutes often are quoted for their definitions of concepts like "reasonable suspicion."). Prosecutors should be aware in reviewing older cases that the present constitutional standard will determine the outcome of a motion to suppress. Going forward, prosecutors need to remain current on the complicated and rapidly developing body of caselaw dealing with constitutional stop issues, particularly under Article I, section 9, of the Oregon Constitution, which has evolved significantly over the years.

1. ORS 131.605 to 131.625 (criminal investigatory stops); ORS 810.410 (traffic violations); ORS 153.039 (other violations).

ORS 131.605 to ORS 131.625 are Oregon's stop-and-frisk statutes addressing criminal investigation stops. They were enacted in 1973 after the United States Supreme Court's decision in *Terry v. Ohio*, 392 US 1, 88 S Ct 1868, 20 L Ed 2d 889 (1968). When they were originally enacted, they "were intended to be in part a codification of decisions by the United States Supreme Court and Oregon Supreme Court interpreting [Article I, section 9, and the Fourth Amendment]." *State v. Kennedy*, 290 Or 493, 624 P2d 99 (1981). They have been amended over the years. Presently, they authorize police to stop someone whom they reasonably suspect has committed or is about to commit a crime. The statutes authorize police to inquire about the circumstances that aroused the officers' suspicion, as well other circumstances arising in a lawful stop that give rise to a reasonable suspicion of criminal activity. The statutes also authorize police to inquire during the stop about weapons, to request consent to search, and to frisk a person they reasonably believe to be armed and dangerous; however, those authorizations are constrained by constitutional limitations.

In 1983, the Oregon Legislature enacted ORS 810.410, which authorizes a police officer to "stop and detain a person for a traffic violation[.]" Also in 1983, the Oregon Legislature enacted a statute which authorized a police officer to "stop and detain a person for a violation offense." That provision is presently codified at ORS 153.039, and allows an officer to "stop and detain any person if the officer has reasonable grounds to believe that the person has committed a violation" for the period of time necessary to identify the person, investigate the violation, and issue a citation.

2. ORS 136.432: Violations of stop statutes do not provide a basis for suppression of evidence

Oregon courts previously imposed a suppression remedy for violations of the statutory standards. Thus, there is a body of old case law construing the stop statutes and earlier versions of those statutes in the context of motions to suppress. In reaction to various court decisions and as a result of other code revisions, the statutes have been amended over the years, sometimes quite significantly. Therefore, much of that old case law relates to prior versions of the statutes.

Since the enactment of ORS 136.432 in 1997, evidence in a criminal case may be suppressed if it was obtained in violation of the state or federal constitution; but it may not be suppressed if the police conduct simply violated a statute. State v. Rodgers/Kirkeby, 347 Or 610, 621, 227 P3d 695 (2010) ("ORS 136.432 prohibits the judicial branch from excluding evidence obtained by government conduct that exceeds statutory authority"; evidence obtained when police officers exceed the scope of authority described in ORS 810.410 "is not suppressible unless it violates some constitutional rule"); State v. Rudder, 347 Or 14, 20, 217 P3d 1064 (2009) (ORS 136.432 precludes suppression for an officer's "failure to conform his conduct to ORS 131.625"). In short, as a consequence of ORS 136.432, certain stop-and-frisk cases in which suppression was ordered for a violation of a statute are no longer valid. But prosecutors should be aware that ORS 136.432 does not supersede other statutes that contain an express exclusionary directive. *See, e.g.*, State v. Powell, 242 Or App 645, 256 P3d 185 (2011), *rev'd on other grounds*, 352 Or 210, 282 P3d 845 (2012) (holding that anti-suppression statute is inapplicable to ORS 136.425(1) because it contains an explicit directive that involuntary confessions "cannot be given in evidence against the defendant").

See also Chapter VII (Motions; Exclusionary Rule) for further discussion of suppression issues.

B. IS IT A STOP?

1. General Principles.

Oregon Law.

There are three generally recognized categories of encounters between police officers and individuals. In descending order of justification, they are:

(1) **Arrest**, justified only by probable cause;

(2) **Stop**, a temporary restraint of a person's liberty, justified by reasonable suspicion or, if the offense is a traffic violation, by probable cause; and

(3) **Mere conversation or a mere encounter**, questioning without any restraint of liberty, which requires no justification.

State v. Dahl, 323 Or 199, 206, 915 P2d 979 (1996). *See also* State v. Rodgers, 347 Or 610, 621, 227 P3d 695 (2010) (listing and explaining the three categories); State v. Fast, 133 Or App 102, 889 P2d 1349 (1995) (a stop is less intrusive than a search; authorization in a search warrant to search a named person necessarily includes authority to stop the person).

Note: The requirement that an officer have probable cause to believe for a traffic violation is a *statutory* requirement. The Oregon Supreme Court has never held what quantum of suspicion is required under Article I, section 9, to justify a traffic stop. State v. Watson, 353 Or 768, 774 n 7, 305

P3d 94 (2013) (so stating). In *dictum*, it has suggested that only reasonable suspicion is required. *See* State v. Suppah, 358 Or 565, 568 n 2, 369 P3d 1108 (2016) (in noting the state's concession that the traffic stop lacked a lawful justification because the detaining officer could not remember the reason for the stop, stating: "Constitutionally, an officer needs reasonable suspicion to stop a defendant"); *see also* State v. Bliss, 363 Or 426, 434, 423 P3d 53 (2018) ("police may stop an erratic driver based on *reasonable suspicion* that the driver has committed either the violation of careless driving, ORS 811.135, or the crime of reckless driving, ORS 811.140") (emphasis added). But even though that *dictum* suggests that a traffic stop is constitutionally valid if supported by reasonable suspicion of a traffic violation, even though there is a statutory probable cause requirement for traffic stops, the Court of Appeals has refused to reconsider its prior case law on that point and continues to apply the probable cause standard for purposes of Article I, section 9. *See* State v. Jones, 286 Or App 562, 566 n 1, 401 P3d 271 (2017).

In any stop case, the first question is: Did a "stop" actually occur? *See, e.g.,* State v. Jacobus, 318 Or 234, 239, 864 P2d 861 (1993) ("We first determine when, if ever, the police officer 'stopped' the defendant."). If the contact is not a "stop," the state does not need to justify it.

Merely talking to a person is not a stop — a restraint of liberty is a stop. There are four key cases in this area: State v. Ashbaugh, 349 Or 297, 244 P3d 360 (2010); State v. Backstrand, 354 Or 392, 313 P3d 1084 (2013); State v. Highley, 354 Or 459, 313 P3d 1068 (2013); and State v. Anderson, 354 Or 440, 313 P3d 1113 (2013). In Ashbaugh, the court set forth the following test for whether a seizure has occurred:

> A "seizure" of a person occurs under Article I, section 9, of the Oregon Constitution: (a) if a law enforcement officer intentionally and significantly restricts, interferes with, or otherwise deprives an individual of that individual's liberty or freedom of movement; or (b) if a reasonable person under the totality of the circumstances *would* believe that (a) above has occurred.

349 Or at 316 (emphasis in original). Ashbaugh is significant because it provided clear answers to two issues that had caused confusion in other cases, as described below.

A stop occurs when an officer, by show of authority, restrain[s] the liberty of the person encountered so that a reasonable person would not feel free to refuse to cooperate or leave the scene. The court in Ashbaugh affirmatively disavowed its previous statement—which it characterized as a "regrettable misstatement," Ashbaugh, 349 Or at 316—in State v. Toevs, 327 Or 525, 535, 964 P2d 1007 (1998), that a stop occurs if a reasonable person "could" believe that his or her liberty was being restrained. Rather, the court in Ashbaugh made clear that the question is whether a reasonable person "would" feel free to leave. 349 Or at 316.

The person's *subjective* belief is now irrelevant. Although the previous test, announced by the Supreme Court in State v. Holmes, 311 Or 400, 813 P2d 28 (1991), was phrased in terms of whether the person reasonably "believes" that he or she was stopped, the court in Ashbaugh has now "abandon[ed] forthrightly" the subjective component of the "part (b)" test in State v. Holmes, 311 Or 400, 813 P2d 28 (1991). In Holmes, the Oregon Supreme Court had stated that a "seizure" occurs in either of the following situations: "(a) if a law enforcement officer intentionally and significantly restricts, interferes with, or otherwise deprives an individual of that individual's liberty or freedom of movement; or (b) whenever an individual *believes* that (a), above, has occurred and such belief is objectively reasonable in the circumstances." Holmes, 311 Or at 409-10 (emphasis added). In determining whether an officer has stopped a person for purposes of Article I, section 9, the inquiry focuses on the officer's actions and how a generic "reasonable person" would have perceived them. State v. K.A.M., 279 Or App 191, 195, 379 P3d 686, *reversed on other grounds*, 361 Or 805 (2017)

(rejecting youth's contention that the relevant inquiry in determining whether there was an Article I, section 9 stop is whether a youth with his characteristics—17 years old and homeless—would have felt free to end the encounter with police).

Notwithstanding *Ashbaugh*, the test in *Holmes* remains good law, except for the reference, in "section (b)" of the test, to the person's *actual* subjective belief. Specifically, *Holmes* remains good authority for the proposition that "law enforcement officers may approach persons on the street or in public places, question them, and even accompany them to another location without the encounter necessarily constituting a 'seizure' of a person under Article I, section 9." *Holmes*, 311 Or at 409. In *Holmes*, an officer had been flagging down motorists on a rural highway and directing them to a detour around a wreck that was blocking the highway. When the officer made contact with the defendant, he discovered that the defendant was intoxicated. Under those circumstances, the court held that the defendant was not subjected to a "stop" under Article I, section 9, merely because he pulled over at the officer's request. *See also State v. Ehly*, 317 Or 66, 79, 854 P2d 421 (1993) (a person is not "stopped" or "seized" unless police engage in conduct significantly beyond that accepted in ordinary social contact).

Because the inquiry focuses on whether, under the totality of the circumstances, a reasonable person would believe that he or she is being restrained, the existence of any *initial* restraint—for example, the restraint on the driver effected by an initial lawful traffic stop—is likely to make it difficult to show that any further contact is "mere conversation." In *State v. Rodgers*, 347 Or 610, 622-23, 227 P3d 695 (2010), the Oregon Supreme Court expressed some skepticism about whether a "mere encounter" often can occur between an officer and the driver of a stopped car:

> [W]e agree that police inquiries during the course of a traffic stop (including requests to search a person or vehicle) are not searches and seizures and thus *by themselves* ordinarily do not implicate Article I, section 9. However, police conduct that involves physical restraint or a show of authority that restricts an individual's freedom of movement typically does implicate Article I, section 9.
>
> Nevertheless, in contrast to a person on the street, who may unilaterally end an officer-citizen encounter at any time, the reality is that a motorist stopped for a traffic infraction is legally obligated to stop at an officer's direction * * * and to interact with the officer * * * and therefore is not free unilaterally to end the encounter and leave whenever he chooses. Moreover, an officer ordinarily cannot casually "approach" a moving vehicle on the road in the same way that an officer may approach a person on the street. It follows that *a traffic stop by its nature is not an ordinary police-citizen "encounter," as the court described such encounters in Holmes.*

Rodgers, 347 Or at 622-23 (emphasis added). Bear in mind, however, that traffic stops present a unique set of circumstances that, at least thus far, the courts have treated differently from criminal stops. Thus, it is particularly important to consider whether an officer's interaction with a person occurred "on the street" or somewhere else the person could have left at any time or whether, instead, the interaction occurred during or immediately following a traffic stop. *Rodgers* and other traffic-stop cases are addressed in more detail later in this chapter.

After *Ashbaugh*, the Supreme Court issued its decisions in *Backstrand*, *Highley*, and *Anderson*, further shedding light on the circumstances that will convert a mere encounter into a seizure. The court discussed the issue in the most detail in *Backstrand*. The Supreme Court first reiterated that something more than "asking a question, requesting information, or seeking an individual's cooperation is required of an officer's conduct" to transform an encounter into a seizure.

Backstrand, 354 Or at 403. "The 'something more' can be such things as the content or manner of questioning, or the accompanying physical acts by the officer, if those added factors would reasonably be construed as a 'threatening or coercive' show of authority requiring compliance with an officer's request." *Id*. Though the court did not decide whether a warrants check might convert an encounter into a seizure, the court held that neither an officer's request for identification nor the officer's verification of that identification necessarily transforms an encounter into a seizure. *Id*. at 412-14. The court also noted that "the fact that an officer asks a citizen for cooperation in the course of conducting a criminal investigation" is not dispositive and thus "decline[d] to debate whether a person in [the] defendant's position would have believed he was the subject of a 'criminal investigation.'" *Id*. at 396 n 4.

The *Backstrand* court expressly rejected the "free to leave" test as the sole test for determining whether the police have seized a person under Article I, section 9: "The federal test under the Fourth Amendment is often described as whether a reasonable person would feel or believe himself to be 'free to leave.' But as this court recognized in *Holmes*, the feel-free-to-leave formulation does not state the entire federal test for a 'seizure' of a person by a non-forcible 'show of authority.' Rather, as the Supreme Court has clarified, whether a reasonable person would have believed that he was not free to leave 'states a *necessary* but not *sufficient*, condition for a seizure effected through a 'show of authority.' The test for existence of a 'show of authority' is an objective one: not whether the citizen perceived that he was being ordered to restrict his movement, but *whether the officer's words and actions would have conveyed* that to a reasonable person. Under that more complete articulation of the federal test, the analysis of what constitutes a seizure under Article I, section 9, and under the Fourth Amendment is not meaningfully different." *Id*. at 402, n 11 (internal quotation marks, brackets, and ellipses omitted). Nevertheless, the Court of Appeals and the Oregon Supreme Court sometimes describe the seizure standard as asking whether a reasonable person would feel free to leave. *See, e.g., State v. Jackson*, 268 Or App 139, 147, 342 P3d 119 (2014) ("A reasonable person in defendant's position would believe that he was not free to leave until [the officer] gave him a citation or indicated that he was free to go."); *State v. Leiby*, 293 Or App 293, 298, 427 P3d 1141 (2018) ("Under Article I, section 9, whether a police-citizen interaction amounts to a seizure turns on the objective assessment of whether a reasonable person in defendant's position would believe that he was not free to go about his ordinary affairs."); *State v. K. A. M.*, 361 Or 805, 810, 401 P3d 774 (2017) (concluding that the youth "reasonably perceived that he was not free to leave").

The Supreme Court expressly rejected the notion that a seizure occurs *solely* because a reasonable person would believe that he was the subject of a criminal investigation. *Anderson*, 354 Or at 453-54 (concluding that, even though officers "objectively conveyed possible suspicion that [the defendant and his companion] could be involved in criminal activity," the officers' words and actions did not "communicate an exercise of authority of the kind required for a seizure"). *See also State v. Cline*, 264 Or App 293, 330 P3d 1255 (2014) (rejecting argument that requests for consent to search would have conveyed to a reasonable person that he was the subject of a criminal investigation and therefore seized); *State v. Dierks*, 264 Or App 443, 448, 332 P3d 348 (2014) (noting that the Supreme Court—when it concluded in *Anderson* that the defendant had not been seized under the principles announced in *Backstrand*—made clear that a police interaction with a citizen is not a seizure merely because the circumstances reasonably suggest suspicion and investigation of criminal activity). Nevertheless, the Court of Appeals has sometimes suggested that a seizure occurs merely because a person would believe that he or she is the subject of an investigation. *State v. Charles*, 263 Or App 578, 331 P3d 1012 (2014) (seizure occurred because "a reasonable person in defendant's shoes would have concluded that he or she was the subject of a criminal investigation").

In considering whether a seizure occurred under the totality of the circumstances, both the Supreme Court and the Court of Appeals have taken into account whether an officer's words and

actions would have conveyed to a reasonable person that he or she was the subject of a criminal investigation. In State v. Reyes-Herrera, 369 Or 54, 66, 500 P3d 1 (2021), for example, the Supreme Court observed that an officer's statements—the officer told the defendant that he had seen him had walk away from a man who was counting money, asked whether the defendant had purchased drugs, and then asked to search the defendant—"conveyed that [the officer] suspected defendant of criminal activity." That is, the officer conveyed that the defendant "could be in trouble and must remain where he was." *Id.* Similarly, in K. A. M., the court observed that an officer's statement to the youth's companion that she "need[ed] to stay off the meth" conveyed that the companion and the youth "were suspected of illegal drug use," given the context of that exchange. 361 Or at 811. The Court of Appeals has taken a similar approach. See State v. Newton, 286 Or App 274, 283, 398 P3d 390 (2017) (reasoning that an officer's "investigatory focus is a pertinent consideration in evaluating whether the combination of circumstances converted an otherwise lawful encounter into a seizure for purposes of Article I, section 9—although not necessarily dispositive"); State v. Thier, 322 Or App 680, 683, 521 P3d 175 (2022), *rev den*, 370 Or 827 (2023) (reasoning that "an encounter between an officer and individual may become a stop * * * where the officer makes a direct and unambiguous accusation that the individual committed a crime," but "the officer can make statements conveying possible suspicion or general inquiries about criminal activity, without necessarily converting the encounter into a stop"); State v. True, 324 Or App 621, 627, 527 P3d 42 (2023) (concluding that no seizure occurred under the totality of the circumstances even though the officer "would have conveyed to a reasonable person that [he] was investigating defendant's driving" by stating that he received a "complaint" that the defendant had driven off the road and was tailgating and passing in a no-passing lane). Regardless of what an officer conveys about a criminal investigation, the ultimate question in determining whether a seizure occurred remains whether "the totality of the circumstances was such that reasonable people in defendant's position would have believed that their liberty was restricted." Reyes-Herrera, 369 Or at 68.

Unlike the Fourth Amendment, Article I, section 9, does not require that the suspect actually *submit* to police authority or the use of physical force for police action to constitute a seizure. State v. Puffenbarger, 166 Or App 426, 998 P2d 788 (2000) (officers' conduct in following the defendant in their patrol vehicle for 12 blocks, calling out questions to him as he walked, and getting out of the patrol car and approaching defendant was a stop, even though the defendant fled and did not submit to the officers' authority; absent reasonable suspicion, it was unlawful).

Also unlike the Fourth Amendment, the officer's purpose for contacting a person can sometimes be a factor in determining whether a stop has occurred, but usually only where the officers are not conducting a criminal investigation. *See, e.g.*, State v. Gerrish, 311 Or 506, 815 P2d 1244 (1991) (no seizure where officer stopped all motorists leaving a particular area in order to seek information from potential witnesses); State v. Holmes, 311 Or 400, 813 P2d 28 (1991) (motorist who was stopped by officer for purpose of advising him of a detour was not seized). However, it appears that Oregon courts are moving towards the strictly objective standard outlined above. *See, e.g.*, State v. Fair, 353 Or 588, 302 P3d 417 (2013) (officers responding to an emergency 9–1–1 call seized defendant by ordering her to exit her home and remain on the porch while they investigated whether she was the victim of assault).

Fourth Amendment.

Federal case law, like Oregon case law, distinguishes between a stop and an encounter. A person is "seized within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." United States v. Mendenhall, 446 US 544, 554, 100 S Ct 1870, 64 L Ed 2d 497 (1980). "Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." Terry v. Ohio, 392 US 1, 19 n 16, 88 S Ct 1868, 20 L Ed 2d 889 (1968).

A seizure does not occur simply because an officer approaches an individual and asks a few questions, as long as a reasonable person would feel free to disregard the officer and go about his or her business; such encounters are consensual and need not be supported by reasonable suspicion of criminal activity. *United States v. Drayton*, 536 US 194, 122 S Ct 2105, 153 L Ed 2d 242 (2002) (police officer who boarded a bus, questioned passengers and requested consent to search luggage did not "seize" the passengers for Fourth Amendment purposes); *Florida v. Bostick*, 501 US 429, 111 S Ct 2382, 115 L Ed 2d 389 (1991) (same); *INS v. Delgado*, 466 US 210, 104 S Ct 1758, 80 L Ed 2d 247 (1984) (immigration survey of employees at a factory was an encounter, not a stop); *Florida v. Royer*, 460 US 491, 103 S Ct 1319, 75 L Ed 2d 229 (1983) (it is not a stop when officers approach a person in a public place and ask if the person is willing to answer questions).

A law enforcement officer's purpose for contacting an individual is not a factor in determining *whether a stop has occurred*. *See Whren v. United States*, 517 US 806, 116 S Ct 1769, 135 L Ed 2d 89 (1996) (individual officer's subjective intentions are irrelevant to the Fourth Amendment validity of a traffic stop that is justified by probable cause). The purpose of the seizure can be a factor, however, in determining whether the seizure was reasonable if the seizure in question occurs outside of the more typical realm of a criminal investigation. For example, in *Illinois v. Lidster*, 540 US 419, 124 S Ct 885, 157 L Ed 2d 843 (2003), the Court held that a roadblock that police designed to gather information about a fatal hit-and-run accident that had occurred a week earlier at the same location effected a seizure of the motorists who were briefly detained. The reasonableness of the seizure, however, is assessed by balancing the "the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty." *Lidster*, 540 US at 426-27. The Court concluded that the brief and minimally intrusive checkpoint stop for the purpose of identifying witnesses was reasonable and therefore did not violate the Fourth Amendment.

> The stop's primary law enforcement purpose was *not* to determine whether a vehicle's occupants were committing a crime, but to ask vehicle occupants, as members of the public, for their help in providing information about a crime in all likelihood committed by others. The police expected the information elicited to help them apprehend, not the vehicle's occupants, but other individuals.

Lidster, 540 US at 423 (emphasis in original).

Nevertheless, the United States Supreme Court later held that an officer's stop of a vehicle for the purpose of investigating the driver for an offense constitutes a Fourth Amendment seizure of other occupants. *Brendlin v. California*, 551 US 249, 127 S Ct 2400, 168 L Ed 2d 132 (2007). Because the test focuses on what a reasonable person would believe, it is immaterial that the officer intends to investigate only the driver and not the occupants; rather, a reasonable person would understand that none of the occupants is free to leave. *Brendlin*, 127 S Ct at 2407-09.

> **Note:** Note that, in *Brendlin*, the initial stop was unlawful because it was conducted without any lawful justification. Although *Brendlin* holds that a passenger may challenge the lawfulness of the initial stop, it does not purport to limit the scope of any questioning by an officer of passengers during a lawful traffic stop. *See Maryland v. Wilson*, 519 US 408, 117 S Ct 882, 137 L Ed 41 (1997) (during a *lawful* stop of the driver, an officer may ask a passenger to get out of the car without violating the Fourth Amendment). By comparison, under Article I, section 9, passengers are not seized by virtue of the traffic stop itself. *State v. Thompkin*, 341 Or 368, 377, 143 P3d 530 (2006). In *State v. Stevens*, 364 Or 91, 430 P3d 1059 (2018), the Oregon Supreme Court reaffirmed that, under Article I, section 9, a passenger in a car stopped for a traffic violation is not seized by virtue of the traffic

stop alone, unless the passenger is the target of the traffic stop (for example, for not wearing a seat belt).

Even when an officer exerts official authority, no stop occurs under the Fourth Amendment if the person does not submit to the officer's authority. Accordingly, the fact that a suspect flees from the police is a factor that can be included in the totality of circumstances that make up the reasonable suspicion justifying a stop. California v. Hodari D., 499 US 621, 111 S Ct 1547, 113 L Ed 2d 690 (1991) (an officer attempted to talk with defendant, but he ran away; the officer pursued and had to tackle defendant; no "stop" occurred until the officer physically stopped him by tackling him); *but see* Torres v. Madrid, 592 US 306, 141 S Ct 989, 209 L Ed 2d 190 (2021) (officers who shot suspect seized her for the instant that the bullets struck her, despite fact that she temporarily eluded capture; use of physical force to the body of a person with intent to restrain is a Fourth Amendment seizure even if the person does not submit and is not subdued).

2. Stops vs. Encounters: The Initial Contact — Specific Situations.

NOTE: The majority of Oregon courts' recent decisions involve *only* the interpretation and application of Article I, section 9. Whether an officer has effected a seizure for purposes of the Fourth Amendment—and whether that seizure is lawful—are separate questions that involve separate analyses. When responding to a motion to suppress based on the Fourth Amendment, be sure to look for those cases that specifically address the federal constitutional standards.

Under Article I, section 9:

- **Approaching a person in a public place and asking to speak with the person may not be a stop, if it does not involve a show of authority or suggest the person is not free to leave.** State v. Kuehne, 300 Or App 698, 454 P3d 797 (2019), *rev den*, 366 Or 493 (2020) (officer did not seize defendant by stopping his patrol car 150 feet behind defendant and contacting him to ask why he was pushing a shopping cart down the middle of the road); State v. Chittenden, 305 Or App 483, 470 P3d 424 (2020) (officer's initial contact with defendant, who was in driver's seat of parked car, to investigate report of "suspicious vehicle" was not a seizure; officer introducing himself and asking for identification were mere conversation); State v. Cline, 264 Or App 293, 330 P3d 1255 (2014) (pulling police car alongside defendant and telling defendant to stay on sidewalk while they conversed was not a seizure); State v. Soto, 252 Or App 50, 284 P3d 1254 (2012) (officer's conduct in following defendant on foot and catching up to him 30 feet later was not a stop, even if it "inconvenienced or annoyed" defendant because it was not "substantially beyond" what a person might expect in normal social intercourse; questions about weapons did not elevate contact to a stop without any other show of authority); State v. Moats, 251 Or App 568, 284 P3d 568 (2012) (officer did not stop defendant by approaching his parked car and stating his concern that defendant might be trespassing, then asking questions about suspicious behavior of another occupant during the contact); State v. Deneen, 234 Or App 582, 228 P3d 680 (2010) (officer's low-key request to speak with a bicycling defendant did not stop defendant, even though defendant *previously* had been lawfully stopped; officer's request to speak did not involve a show of authority, the officer at the end of the previous stop had told the cyclist that he was free to go, and nothing about the later contact suggested that the cyclist was not free to leave); State v. Shaw, 230 Or App 257, 215 P3d 105, *rev den*, 347 Or 365 (2009) (officer did not stop a person merely by conversationally asking him to come over and talk; no order or other show of authority was involved).

But see State v. Winter, 328 Or App 747, 538 P3d 1228 (2023) (officer stopped defendant when stopped his vehicle, approached her on the sidewalk, and started asking her questions about her current activities, including her drug use and whether she was "clean."); State v. Najar, 287 Or App 98, 103-07, 401 P3d 1205 (2017) (considering the totality of the circumstances of the police-citizen

contact, officer's direction to defendant to use his hands in a certain way to reach for his wallet was a sufficient show of authority to effect a seizure of defendant).

- **Approaching a parked car to question the occupants is not a stop.** State v. Chittenden, 305 Or App 483, 470 P3d 424 (2020) (officer's initial contact with defendant, who was in driver's seat of parked car, to investigate report of "suspicious vehicle" was not a seizure; officer introducing himself and asking for identification were mere conversation); State v. Anderson, 354 Or 440, 313 P3d 1113 (2013) (officers did not effect a seizure by approaching parked car and explaining to car's occupants that they were executing a search warrant at a nearby apartment and interested in talking to them); State v. Dierks, 264 Or App 443, 332 P3d 348 (2014) (officer did not stop defendant when he asked for her name after approaching defendant and her companion in a parked car; nor did officer stop defendant when he ran the name she gave him through a database in his patrol car); State v. Moats, 251 Or App 568, 284 P3d 568 (2012) (officer did not stop defendant by approaching his parked car and stating his concern that defendant might be trespassing, then asking questions about suspicious behavior of another occupant during the contact); State v. Jones, 245 Or App 186, 263 P3d 344 (2011), *rev den*, 354 Or 838 (2014) (officer did not effect a seizure by shining spotlight into defendant's parked car, knocking on window, asking him to end his phone call and answer questions, and asking him if he was on probation or parole); State v. Aronson, 247 Or App 422, 271 P3d 121 (2011), *rev den*, 352 Or 33 (2012) (defendant was not seized when officer parked his cruiser a few car lengths behind defendant's car and shone his spotlight on him); State v. Warren, 221 Or App 514, 191 P3d 722 (2008), *rev den*, 346 Or 66 (2009) (officers did not stop person who was slumped over in parked car when they approached on foot after parking their patrol car in a way that did not block ther person's car and did not activate overhead lights or draw weapons); State v. Lane, 135 Or App 233, 898 P2d 1358, *rev den*, 322 Or 360 (1995). *See also* State v. Bond, 189 Or App 198, 74 P3d 1132 (2003), *rev den*, 336 Or 376 (2004) (defendant was not stopped when, late at night, an officer saw defendant sitting in his truck in a parking lot for 45 minutes with the courtesy lights on, and knocked on defendant's window several times to check on his welfare).

- **Beckoning a person to come over may not be a stop.** State v. Hall, 339 Or 17, 115 P3d 908 (2005) (officer did not stop defendant when, without activating his overhead lights or blocking defendant's way, he stopped his vehicle next to defendant and then motioned with two fingers for defendant to approach him); State v. Killion, 229 Or App 347, 211 P3d 367, *rev den*, 347 Or 349 (2009) (ODFW biologist did not stop a person when he waved at the person's car so the person would stop and talk about whether he had been hunting). *See* State v. McFarland, 210 Or App 744, 152 P3d 967 (2007) (officer responding to a 911 call about a dispute at an unspecified address did not seize defendant when he told her to stop her car as she drove past and she told the officer that she had made the 911 call; a reasonable person would expect an officer to elicit information about the emergency that the person had reported). *But see* State v. Turner, 221 Or App 621, 191 P3d 697 (2008) (officer stopped bicycle rider in organized rally when he "directed" the cyclist to alter his course).

- **Parking a police car in a manner that blocks exit is usually treated as a stop.** *See* State v. Thacker, 264 Or App 150, 331 P3d 1036 (2014) (officer seized defendant by following her to end of her driveway and parking behind her such that she was prevented from leaving); State v. Phillips, 232 Or App 547, 222 P3d 738 (2009) (officer stopped person when he blocked car person had been driving, even though person no longer was in car); State v. Langager, 156 Or App 385, 965 P2d 1037 (1998), *rev den,* 328 Or 275 (1999) (use of patrol car to block pickup in alley and shining a spotlight through the pickup's windshield was a stop). *See also* Brower v. Inyo County, 489 US 593, 109 S Ct 1378, 103 L Ed 2d 628 (1989) (police use of 18-wheeler roadblock to stop fleeing car thief was a stop). But compare those cases with: State v. Aronson, 247 Or App 422, 271 P3d 121 (2011), *rev den*, 352 Or 33 (2012) (defendant was not seized when officer parked his cruiser a few car lengths behind defendant's car and shone his spotlight on him); State v. Jones, 245 Or App 186, 263 P3d 344 (2011), *rev den*, 354 Or 838 (2014) (no seizure where officer parked patrol car behind defendant's car

in such a way as to avoid blocking it). *See also* State v. Newton, 286 Or App 274, 285, 398 P3d 390 (2017) ("even if it were physically possible for defendant to have walked away or asked [the officer] to move, [the officer]'s choice to stand between the van and its access to the street hindered defendant's ability to leave the encounter and was a 'show of authority' that the van would be staying put until [the officer] completed his investigation").

- **Driving up behind a vehicle that pulls over without any signal from the police officer is not a stop.** State v. Jensen, 102 Or App 323, 794 P2d 448 (1990); State v. Calhoun, 101 Or App 622, 792 P2d 1223 (1990). Similarly, officers who merely follow closely (but safely) behind a car, without using lights or a siren, do not conduct a stop, even if the defendant feels compelled to pull over. State v. Spenst, 62 Or App 755, 662 P2d 5, *rev den*, 295 Or 447 (1983); see also State v. Serini, 339 Or App 68, 566 P3d 1199 (2025) (officer did not stop the defendant by following him in an unmarked police car for three blocks on a main road and then continued to follow as the defendant took two right turns into a neighborhood without giving any signal to stop). But an Article I, section 9, seizure of a driver occurs when a uniformed police officer in a marked patrol car "doggedly" follows a car for a significant period of time (without using lights or siren), causing the driver of the followed car to finally pull into a parking lot and park (apparently waiting for the officer to contact him), and then approaches the driver and asks, "Is there any reason or do you want to tell me why you're trying to avoid me?" State v. Leiby, 293 Or App 293, 427 P3d 1141 (2018). Even though the officer in Leiby never used the patrol car's lights or siren before contacting the driver, and did not block defendant's parked car with the patrol car, "[t]he dogged following, in conjunction with a confrontational question implying that avoiding an officer is suspicious, and deserving of explanation, would lead a reasonable person to believe that he was not free to go about his ordinary affairs." 293 Or App at 299.

- **Activating a patrol car's overhead lights usually is a stop.** *See, e.g.,* State v. Jacobus, 318 Or 234, 864 P2d 861 (1993) (officer pulled in behind defendant's parked car, activated overhead lights, approached on foot and requested identification; this was a stop). *But see* State v. Holmes, 311 Or 400, 813 P2d 28 (1991) (officer's activation of overhead lights on his vehicle as he flagged down passing motorists to direct them onto a detour; the use of the overhead lights under these circumstances did not turn the encounter into a "stop"); State v. Gerrish, 311 Or 506, 815 P2d 1244 (1991) (officer's use of overhead lights and signaling motorist was not a "seizure" where officer's primary intent was to locate witnesses to a recent robbery); *see also* State v. Aronson, 247 Or App 422, 428, 271 P3d 121 (2011), *rev den*, 352 Or 33 (2012) (officer's act of shining a police car's spotlight into a car, in and of itself, does not constitute a "show of authority" or restraint of a defendant's liberty); State v. McFarland, 210 Or App 744, 152 P3d 967 (2007) (officer responding to a 911 call about a dispute at an unspecified address did not stop defendant in a constitutional sense when he told her to stop her car as she drove past and pointed to a house and told the officer that she had made the 911 call; a reasonable person would expect an officer to elicit information about the emergency that the person reported, and would not feel that the officer was significantly interfering with the person's liberty).

- **The use of emergency lights for safety reasons usually is not a stop.** *See, e.g.,* State v. Blair/Vanis, 171 Or App 162, 173, 14 P3d 660 (2000), *rev den*, 332 Or 137 (2001) (officer's use of overhead flashing lights for safety purposes did not stop defendants, who were occupants of van slowly driving on highway, straddling fog line, with hazard lights flashing); State v. Onstad, 144 Or App 149, 925 P2d 154 (1996) (defendant, who was walking along the sidewalk, was not stopped when an officer stopped his car in the intersection, turned on his four-way emergency flashers, and called out defendant's name); State v. Miller, 120 Or App 349, 852 P2d 895 (1993) (after defendant parked at an emergency pullout and began walking away from her vehicle, an officer pulled in behind her, activated his flashing yellow lights, and called out to defendant to see if she needed assistance; this was not a stop). *But see* State v. Loud, 149 Or App 250, 253-54, 942 P2d 814, *rev den*, 326 Or 58

(1997) (the use of police "emergency" lights and spotlight to pull over defendant's vehicle was a sufficient show of authority). *See also* State v. Humphrey, 337 Or App 715, 564 P3d 490 (2025) (officer's conduct in turning emergency lights on to focus on defendant while pointing car at defendant, with no other obvious targets being stopped, would cause reasonable person to believe they were being stopped.

- **The mere use of a flashlight or spotlight alone is not usually a stop.** The mere use of spotlights and flashlights, without any other show of authority, does not constitute a stop. State v. Aronson, 247 Or App 422, 271 P3d 121 (2011), *rev den*, 352 Or 33 (2012) (defendant was not seized when officer parked his cruiser a few car lengths behind defendant's car and shone his spotlight on him was not stop as long as the officer did not use the spotlight to prevent defendant from safely driving away); State v. Jones, 245 Or App 186, 263 P3d 344 (2011) (use of spotlight and flashlight not a stop).

- **Asking passenger to get out of car is not necessarily a stop of the passenger.** In the absence of any other "show of authority," an officer's act of *asking* a passenger to get out of a stopped car for reasons related to the traffic stop (*i.e.*, to tow the car) is not a seizure of the passenger. State v. Graves, 278 Or App 126, 373 P3d 1197, *rev den*, 360 Or 465 (2016) (officer did not seize passenger when he asked her to get out of her car, directed her toward the front of his patrol car, and asked about her criminal history and parole status); State v. Smith, 247 Or App 624, 270 P3d 382 (2012) (asking passenger out of car to have it towed was not stop, even though officer did not tell passenger the reason for asking the passenger to get out and did not tell passenger he was free to leave); State v. Dudley, 245 Or App 301, 263 P3d 1054 (2011) (asking passenger out of car after driver's arrest for DUII was not stop, even though officer asked questions about drugs and weapons and sought consent to search); State v. Lantsch, 244 Or App 330, 260 P3d 662 (2011) (asking passenger to get out of car after driver's arrest on warrant was not a stop, even though officer followed with questions about weapons and a request for consent to search); State v. Jones, 241 Or App 597, 250 P3d 452 (2011) (asking passenger out of car, then asking about drugs and weapons, was not seizure: officer previously had told him he was free to go and did not make any show of authority). *But see* State v. Anderson, 354 Or 440, 313 P3d 1113 (2013) (officer's request that defendant get out of car in which he was passenger was a seizure under state constitution, as a reasonable person would have interpreted the request as a directive and believed his liberty was restrained, given that officer had expressed disbelief in defendant's identification of himself with name officer knew to be false); State v. Soto-Navarro, 309 Or App 218, 482 P3d 150 (2021) (*en banc*) (when officer ordered passenger in vehicle stopped for traffic violation to "just keep your hands where I can see them," passenger was seized under Article I, section 9).

But see also State v. Vannoy, 326 Or App 11, 22, 530 P3d 503 (2023) (questioning "whether Graves and cases like it"—which allow "investigative inquiries" of a passenger without an independent constitutional justification that would support a stop—"survive *Arreola-Botello*."

- **A request for identification, *without more*, does not convert an encounter into a stop.** State v. Ashbaugh, 349 Or 297, 244 P3d 360 (2010) (defendant was not seized within meaning of state constitution when police officer spoke to her, asked about contents of her purse, and asked whether he could search her purse); State v. Backstrand, 354 Or 392, 313 P3d 1084 (2013) (mere request for identification does not elevate a mere encounter into a seizure); State v. Highley, 354 Or 459, 313 P3d 1068 (2013) (asking defendant if he was "still on probation" and requesting identification did not convert mere encounter into seizure); State v. McHaffie, 271 Or App 379, 350 P3d 600 (2015) (officer did not seize defendant, the passenger in a vehicle stopped for a traffic infraction, merely by asking for his name and whether he had been in jail (after explaining that the officer had been a corrections officer and recognized defendant)); State v. Campbell, 263 Or App 315, 327 P3d 1188 (2014) (defendant not seized when two police officers approached him in front of a

park bench in an area the officers associated with drug activity and, in a conversational tone, requested defendant's identifying information); State v. Beasley, 263 Or App 29, 326 P3d 634, *rev den*, 356 Or 397 (2014) (no seizure where officer asked for and received defendant's identification and briefly retained it to verify it while simultaneously asking for defendant's permission to run a records check). *But see* State v. Zamora-Martinez, 264 Or App 50, 331 P3d 1023 (2014) (officer seized defendant when he identified himself as an ICE officer, asked for and received defendant's identification card, asked where defendant was from, and, upon learning he was from Mexico, requested additional identification).

3. When Does an "Encounter" Escalate Into a "Stop"?

Many cases involve a claim that a mere encounter escalated to become a stop. Each case, of course, is determined by its particular circumstances. State v. Holmes, 311 Or 400, 408, 813 P2d 28 (1991) (whether an encounter between a police officer and a person constitutes a seizure is necessarily a "fact-specific inquiry into the totality of the circumstances of the particular case").

Nonetheless, there are several consistent factors to consider in evaluating whether a mere encounter has converted into a stop:

- **Whether a reasonable person would believe that they are the subject of a criminal investigation is a pertinent, but not dispositive, consideration.** Questioning or actions that would reasonably suggest that a person is the target of a criminal investigation may, along with other factors, support the conclusion that a seizure occurred. *See* State v. Reyes-Herrera, 369 Or 54, 66, 500 P3d 1 (2021) (officer's statements and questions about an illegal drug transaction conveyed that the defendant "could be in trouble and must remain where he was" and contributed to conclusion that seizure occurred); K. A. M., 361 Or 811 (officer's statement that a youth's companion "needed to stay off the meth" conveyed suspicion of illegal drug use by the youth and contributed to conclusion that seizure occurred); State v. Winter, 328 Or App 747, 538 P3d 1228 (2023) (officer stopped defendant when stopped his vehicle, approached her on the sidewalk, and started asking her questions about her current activities, including her drug use and whether she was "clean."). *See also* State v. True, 324 Or App 621, 627, 527 P3d 42 (2023) (distinguishing Reyes-Herrera and concluding that no seizure occurred even though the officer's statements "would have conveyed to a reasonable person that [he] was investigating defendant's driving"); State v. Vannoy, 326 Or App 11, 20, 430 P3d 503 (2023) (concluding that a seizure occurred when an officer "directed his attention to defendant [a passenger in a stopped vehicle] and asked her about marijuana, inspected the marijuana she presented, asked her to get out of the van, and, finally, asked for her consent to the search of her bag"; "a reasonable person in defendant's position would have understood that she was just as much a subject of the criminal investigation as the driver and could not simply choose to walk away"); State v. Elbinger, 322 Or App 498, 521 P3d 168 (2022) (when officer investigating shoplifting contacted people associated with shoplifter, who was in the back of the officer's patrol car, and then radioed a description of them to another officer, that constituted a stop because it then "became clear that defendant was part of the investigation, and it would not have been reasonable for defendant to believe he was free to leave"); State v. Norton, 270 Or App 584, 349 P3d 576 (2015) (although, during stop defendant's companion for possible jaywalking violation, defendant initiated contact with the officers about a prior jaywalking citation that defendant had received, the encounter continued to evolve and "several developments coalesced to convert the encounter into one in which a reasonable person would believe that the officers were intentionally and significantly restricting defendant from leaving until [the officer's] investigation was complete"); State v. Paskar, 271 Or App 826, 352 P3d 1279 (2015) (troopers' initial question about whether defendant and his companions had caught any fish was not a stop, but the subsequent command to show their halibut tags constituted a stop); State v. Cline, 264 Or App 293, 330 P3d 1255 (2014) (no seizure occurred even though questions may have suggested that officer subjectively believed defendant was engaging in criminal activity); State v.

Dierks, 264 Or App 443, 448, 332 P3d 348 (2014) (noting that the Supreme Court—when it concluded in *Anderson* that the defendant had not been seized under the principles announced in *Backstrand*—made clear that a police interaction with a citizen is not a seizure merely because the circumstances reasonably suggest suspicion and investigation of criminal activity); *State v. Soto*, 252 Or App 50, 284 P3d 1254 (2012) (officer's conduct in following defendant on foot and catching up to him 30 feet later was not a stop, even though it may have "inconvenienced or annoyed" defendant because it was not "substantially beyond" what a reasonable person would expect in normal social intercourse); *State v. Moats*, 251 Or App 568, 284 P3d 568 (2012) (officer did not stop defendant by approaching his parked car and stating his concern that defendant might be trespassing, then asking questions about suspicious behavior of another occupant during the contact); *State v. Maxie*, 235 Or App 49, 230 P3d 69 (2010) (officer who approached parked car on foot did not stop defendant, who was sitting in driver's seat, when he indicated that the area was known for drug and prostitution activity, and said he wanted to know if any such activity was occurring; the statement "was general in nature and did not impart to defendant the suggestion that she was the subject of an ongoing investigation into any particular criminal activity"); *State v. Shaw*, 230 Or App 257, 215 P3d 105, *rev den*, 347 Or 365 (2009) (officer did not stop a person when he asked what the person was carrying; no show of authority was involved); *State v. Baker*, 154 Or App 358, 961 P2d 913, *rev den,* 327 Or 553 (1998) (officer saw defendant, whom he knew to be a drug user, coming from a "crack house"; officer parked, approached defendant on foot, and greeted him by saying, "So, Craig, did you buy any good crack in there?"; not a stop because officer merely inquired about drug use and did not make any accusation).

- **An officer does not stop a person *merely* by requesting consent to search during the course of a non-coercive encounter.** *State v. Ashbaugh*, 349 Or 297, 244 P3d 360 (2010) (defendant was not seized within meaning of state constitution when police officer spoke to her, asked about contents of her purse, and asked whether he could search her purse); *State v. Bretches*, 225 Or App 602, 202 P3d 883, *rev den*, 346 Or 361 (2009) (after an initial stop ended and officer told person he was free to go, person "just stood there" and continued speaking conversationally with officer, who then asked whether person had anything illegal and sought consent to search; the questions did not stop defendant and the officer did nothing to negate his statement that defendant was free to leave).

- **An officer's statement to a person that the person has broken the law in the presence of the officer generally converts an encounter into a stop.** *State v. K. A. M.*, 361 Or 805, 401 P3d 774 (2017) (officer stopped youth and his companion based on the officer's "unexplained entry into [the bedroom of a suspected drug house] and his accusation that [youth's companion] was using or had recently used methamphetamine"; those circumstances "created a coercive atmosphere that reasonably conveyed that youth and his companion were suspected of illegal drug use and were not free to leave until [the officer] had completed his inquiry"); *State v. Morfin-Estrada*, 251 Or App 158, 283 P3d 378, *rev den*, 352 Or 565 (2012) (officer's conduct in telling pedestrian that he had just seen him jaywalking would lead a reasonable person to believe he was not free to leave unless and until he was issued a citation or told he was free to go); *State v . Allen*, 224 Or App 524, 198 P3d 466 (2008) (officer stopped person when officer said he knew the person was coming from a dope house, then said that if she was honest and gave him the dope, he would give her a citation); *State v. Terhear/Goemmel*, 142 Or App 450, 458, 923 P2d 641 (1996) (two officers approached a parked car on foot and informed the occupants that the officers had observed traffic violations). *See also Florida v. Royer*, 460 US 491, 501, 103 S Ct 1319, 75 L Ed 2d 229 (1983) (defendant was stopped when officers identified themselves as narcotics agents, told defendant he was suspected of transporting narcotics, and asked him to accompany them to "police room"). *Contrast State v. Baker*, 154 Or App 358, 961 P2d 913, *rev den*, 327 Or 553 (1998) (unlike in *Terhear*, the officer here merely asked defendant a question, "So, Craig, did you buy any good crack in there?"; the officer "did not announce that he had seen defendant break the law"); *State v. Kennedy*, 290 Or 493, 624 P2d 99

(1981) (an officer did not stop defendant by approaching him in the airport, displaying his badge, and stating that he believed defendant was carrying narcotics).

- **The advice of *Miranda* rights may be a factor in deciding whether an encounter has escalated into a stop.** In State v. Charles, 263 Or App 578, 331 P3d 1012 (2014), the Court of Appeals reasoned that, because *Miranda* warnings are only required when a person is in full custody or "compelling circumstances," when an officer informs a person of his *Miranda* rights, "it would generally be reasonable to conclude that * * * the person 'is in custody, *i.e.*, not free to leave.'" The court specifically declined to decide whether the giving of *Miranda* warnings *by itself* would effect a seizure, ruling only that the giving of *Miranda* warnings constitutes a part of the totality of the circumstances that must be considered.

- **Directions or orders to do something generally convert an encounter into a stop, particularly if the order is accompanied by a show of authority or force.** *See, e.g.*, State v. Johnson, 322 Or App 635, 640, 522 P3d 8 (2022), *rev den*, 371 Or 60 (2023) (concluding that, although "an officer's instruction to an individual about how to position their body, including their hands, can be a factor in finding the individual to have been seized," no seizure occurred when an officer instructed the defendant "how to stand in order to execute a safe weapons transfer," where the officer did not engage in "some additional show of authority"); State v. Meeker, 293 Or App 82, 427 P3d 1114 (2018) (defendant was seized when officer ordered him to show his hands); State v. Soto-Navarro, 309 Or App 218, 482 P3d 150 (2021) (*en banc*) (when officer ordered defendant, passenger in vehicle stopped for traffic violation, to "just keep your hands where I can see them," defendant was seized under Article I, section 9); State v. Najar, 287 Or App 98, 401 P3d 1205 (2017) (officer seized defendant when the officer "directed him to use his hands in a specific way to retrieve his identification" because the direction, under the circumstances, "would reasonably be construed as a threatening or coercive show of authority requiring compliance with the officer's request"); State v. Charles, 263 Or App 578, 331 P3d 1012 (2014) (seizure occurred after an officer knocked on door of defendant's residence, asked him to come outside and talk, directed him to a place outside to conduct field sobriety tests, read him his *Miranda* rights, and then asked for his consent to a patdown search); State v. Courtney, 242 Or App 321, 255 P3d 577 (2011) (telling passenger to "stay" in car during investigation of driver, followed by later request to exit the car and officer's order to put his hands on his head, constituted a stop); State v. Zaccone, 245 Or App 560, 261 P3d 1287 (2011) (a reasonable person could believe he was stopped when an officer: (1) asked subject why he had lied about his name; and (2) ordered him to stand near patrol car); State v. Fair, 233 Or App 298, 225 P3d 848 (2010), *rev'd on other grounds*, 353 Or 588, 302 P3d 417 (2013) (officer seized apparent domestic-violence victim by ordering her to come out of the house and stay outside with the officer); State v. Shaw, 230 Or App 257, 215 P3d 105, *rev den*, 347 Or 365 (2009) (officer stopped a person when he ordered the person to show his hands; officer did not stop a person merely by conversationally asking him to come over and talk; no order or other show of authority was involved); State v. Jacobus, 318 Or 234, 240-41, 864 P2d 861 (1993) (ordering defendant out of car was a stop); State v. Ehly, 317 Or 66, 854 P2d 421 (1993) (police did not "stop" defendant by asking him to return room key to motel manager or to empty gym bag in a search for the key, but did stop him when an officer put her hand on her gun and told defendant to "back up"); *but compare* State v. Hall, 339 Or 7, 115 P3d 908 (2005) (officer did not stop defendant when, without activating his overhead lights or blocking defendant's way, he stopped his vehicle next to defendant and then motioned with two fingers for defendant to approach him); State v. Radtke, 242 Or App 234, 255 P3d 543 (2011) (an officer did not stop a person when he "motioned for [her] to come over," although later events transformed the encounter into a stop); State v. Killion, 229 Or App 347, 211 P3d 367, *rev den*, 347 Or 349 (2009) (ODFW biologist did not stop driver by waving at car so the person would stop and talk about whether he had been hunting).

- **Interfering with a person's freedom of movement generally converts an encounter into a stop.** *State v. Martinez*, 230 Or App 492, 216 P3d 347 (2009) (officer stopped defendant when he refused to allow her to use the bathroom and blocked the doorway; the stop continued after an officer allowed her into the bathroom and stayed with her as she vomited); *State v. Rocha-Ramos*, 161 Or App 306, 985 P2d 217 (1999) (officer seized defendant, even though officers were in his apartment with his consent, when defendant asked to use the bathroom, by "physically interpos[ing]" herself between defendant and the bathroom and asked him to sit down). *See also State v. Terhear/Goemmel*, 142 Or App 450, 923 P2d 641 (1996) (mere size of an officer does not convert an encounter into a stop, unless the officer uses his or her size in such a way as to enhance any restriction of liberty or freedom of movement); *State v. Newton*, 286 Or App 274, 285, 398 P3d 390 (2017) ("even if it were physically possible for defendant to have walked away or asked [the officer] to move, [the officer]'s choice to stand between the van and its access to the street hindered defendant's ability to leave the encounter and was a 'show of authority' that the van would be staying put until [the officer] completed his investigation").

- **Simply asking a person for identification and writing it down does not convert an encounter into a stop**. *State v. Backstrand*, 354 Or 392, 313 P3d 1084 (2013) (mere request for identification does not elevate a mere encounter into a seizure); *State v. Highley*, 354 Or 459, 313 P3d 1068 (2013) (asking defendant if he was "still on probation" and requesting identification did not convert mere encounter into seizure); *State v. Campbell*, 263 Or App 315, 327 P3d 1188 (2014) (defendant not seized when two police officers approached him in front of a park bench in an area the officers associated with drug activity and, in a conversational tone, requested defendant's identifying information); *State v. Beasley*, 263 Or App 29, 326 P3d 634 (2014) (no seizure where officer asked for and received defendant's identification and briefly retained it to verify it while simultaneously asking for defendant's permission to run a records check); *State v. Soto*, 252 Or App 50, 284 P3d 1254 (2012) (officer's request for defendant's name after contacting him on foot, without any suggestion that he would be checking for warrants, was not a stop). *State v. Maxie*, 235 Or App 49, 55, 230 P3d 69 (2010) (officer did not stop person either when he asked to see her driver's license or when he wrote down her name and date of birth after she was unable to find her license, even though he did run the person for warrants *outside* her presence). Even asking personal questions or other questions a private person ordinarily would not ask does not turn an encounter into a stop. *State v. Moreno*, 150 Or App 306, 946 P2d 317 (1997) (rejecting defendant's argument that he was stopped because the officer's questions were "outside the realm of questions that are considered within 'acceptable social intercourse'"); *State v. Thier*, 322 Or App 680, 521 P3d 175 (2022), *rev den*, 370 Or 827 (2023) (concluding that a trooper did not stop defendant when he approached her vehicle on foot, told her that law enforcement "had a lot of problems in the area," and asked if she "had her ID with her by chance"). *But see State v. Zamora-Martinez*, 264 Or App 50, 331 P3d 1023 (2014) (officer seized defendant when he identified himself as an ICE officer, asked for and received defendant's identification card, asked where defendant was from, and, upon learning he was from Mexico, requested additional identification).

- **Retaining identification or other documents generally converts an encounter into a stop.** Mere conversation does not become a stop when an officer requests, receives, or inspects identification. Even after *Backstrand*, however, the encounter likely will be converted into a seizure if the officer retains the identification. *State v. Orman*, 322 Or App 707, 521 P3d 506 (2022) (concluding that an officer unlawfully stopped the defendant, a passenger in a car that was lawfully stopped, where the officer obtained the defendant's license and then, without "actively conducting any further investigation into defendant's identity," kept it during the hour-long stop); *State v. Ayles*, 348 Or 622, 237 P3d 805 (2010). In some contexts, however, retaining an individual's identification is not a stop. For instance, in *State v. Frey*, 195 Or App 219, 97 P3d 1239 (2004), an officer found the defendant in a police building in an area where the public is not permitted. The officer's request for, and retention of, the defendant's identification was not a stop, because, under those

circumstances, "a request for and retention of identification for noninvestigative purposes hardly exceeds the boundaries of what a reasonable person ordinarily would expect." 195 Or App at 224.

- **Retention of other property likely will constitute a seizure.** *See* State v. Rutledge, 243 Or App 603, 260 P3d 532 (2011) (holding onto defendant's purse and asking about its contents after defendant exerted authority over it was seizure); State v. Bailey, 143 Or App 285, 924 P2d 833 (1996) (retention of defendant's firearm after termination of a traffic stop was a sufficient show of authority to constitute an extension of the stop, because a reasonably objective person would not have felt free to leave); State v. Johnson, 322 Or App 635, 640-41, 522 P3d 8 (2022), *rev den*, 371 Or 60 (2023) (concluding that officer did not effect a seizure by securing defendant's firearm in officer's patrol car because defendant consented to the officer temporarily taking the firearm).

- **Calling dispatch for a warrants check is a stop if the person is aware or reasonably believes that a warrants check is being done.** A person's knowledge that an officer is running a warrants check may be a factor in determining whether an objectively reasonable person would feel free to terminate the encounter. *See* State v. Hall, 339 Or 7, 115 P3d 908 (2005). That is true even if the officer returns the person's identification card before receiving back any information. *See* State v. Thompkin, 341 Or 368, 143 P3d 530 (2006); State v. Jones, 245 Or App 186, 263 P3d 344 (2011) (running warrants check in defendant's presence converted encounter into stop). *But see* State v. Highley, 354 Or 459, 313 P3d 1068 (2013) (no seizure occurred where officer wrote down information from defendant's identification card, immediately returned the card to defendant, and then walked to patrol car to run records check); State v. Beasley, 263 Or App 29, 326 P3d 634 (2014) (no seizure occurred where officer asked for defendant's identification and, while retaining it, inquired about whether he was on probation or had any warrants and if he could run a records check).

- **Calling dispatch for a warrants check *outside* the person's presence may not be a stop, if the officer does not communicate any intent to make use of the information.** State v. Campbell, 263 Or App 315, 327 P3d 1188 (2014) (even though one of the officers used defendant's identification to run a warrant check, there was no seizure because record did not establish that defendant was aware that warrant check was being run); State v. Maxie, 235 Or App 49, 230 P3d 69 (2010) (officer did not stop defendant either when he asked to see her driver's license or when he wrote down her name and date of birth after she was unable to find her license, because officer "did not communicate to defendant his intention to make any use of the information, instruct her to remain while he ran a warrant check, or run the warrant check in her presence," although he did run a warrants check *outside* her presence).

- **Ordering a person to get out of a car as part of an investigation is a stop.** State v. Jacobus, 318 Or 234, 864 P2d 861 (1993) (under statute); *see also* State v. Finlay, 170 Or App 359, 12 P3d 999 (2000) (such order was a "search" when officer's purpose was to view interior of car). Asking a person to get out of a car, without circumstances suggesting that the person is being investigated, usually is not a stop. *See, e.g.,* State v. Amaya, 336 Or 616, 89 P3d 1163 (2004) (asking passenger to step out of the vehicle after the driver consented to a search was not a stop of the passenger); State v. Woods, 134 Or App 53, 894 P2d 511, *rev den*, 321 Or 340 (1995) (police officer lawfully stopped car, arrested driver, and then asked passenger to get out of car so that it could be towed; the request was not a "stop" of the passenger); *but see* State v. Tetro, 98 Or App 492, 779 P2d 1080 (1989) (asking passenger to get out of car was not a stop because request resulted from passenger's express consent to be searched, but asking defendant to step out of car after officer discovered marijuana in the passenger's pocket was a stop).

- **Walking a drug dog around a stopped car may constitute a seizure of a passenger.** Although Oregon courts have held that a mere passenger is not seized under Article I, section 9, when an officer walks a drug dog around a vehicle stopped based on a law violation by the driver, those

cases are helpful only if the officer has not otherwise effected a section 9 stop of the passenger. If the officer has made a show of authority that suggests that the passenger is not free to leave, the use of a drug dog will unlawfully exceed the scope of the stop unless it complies with the subject-matter limitations on investigative activity under State v. Arreola-Botello, 365 Or 695, 451 P3d 939 (2019).

The following cases hold that a dog sniff of a vehicle does not independently seize a passenger not otherwise stopped by the officer: State v. Sexton, 278 Or App 1, 378 P3d 83 (2016) (defendant, a passenger in a stopped car, was not seized under Article I, section 9, when officer walked drug dog around outside of car after defendant refused to consent to a search of the car); State v. Rosales, 291 Or App 762, 423 P3d 112 (2018) (no section 9, seizure of passenger in stopped car when officer deployed drug dog to sniff outside of car; fact that officer and dog may have momentarily blocked the passenger door was not a seizure of passenger, nor was she seized simply because the dog sniff conveyed that the occupants were under investigation for criminal activity); State v. Kamph, 297 Or App 687, 442 P3d 1129 (2019) (passenger in a truck stopped for a traffic infraction, was not seized under Article I, section 9, by dog sniff of truck's exterior, as "the sniff of the outside of the truck was not a 'direct and unambiguous' accusation that defendant was engaged in criminal activity"; "[i]t was not defendant's truck, and defendant was not contacted nor was an investigation begun until after the signaled that it had detected narcotics in the vehicle.").

But see State v. Sherriff, 303 Or App 638, 465 P3d 288 (2020) (officer seized *car* by circling it with a drug-detection dog after driver was arrested and the passenger sought to drive it away but was prevented from doing so). And, under the Fourth Amendment, if the dog sniff—conducted without reasonable suspicion that the vehicle contains drugs—extends the length of the traffic stop because it is not done simultaneously with traffic-stop-related activities, a passenger or other occupant of the vehicle can assert that the dog sniff unlawfully extended the traffic stop under the Fourth Amendment (under which both the driver and occupants of car are "seized" by the initial traffic stop). *See* Rosales, 291 Or App at 767-70 (suspicionless drug dog sniff unlawfully extended the duration of traffic stop under the Fourth Amendment and thus drug evidence should have been excluded under federal law); Kamph, 297 Or App at 695-98 (remanding to trial court for decision on Fourth Amendment unlawful-extension issue).

4. Terminating a Traffic Stop and Returning to an Encounter.

This issue arises most frequently in cases involving the termination of a traffic stop for a violation, followed by a request for consent to search. The law relating to this issue is addressed in Section G of this chapter (Questioning After Stop Has Ended).

> **COMMENT:** Be aware that, with the Supreme Court's decision in State v. Arreola-Botello, 365 Or 695, 451 P3d 939 (2019), the scope of permissible police investigatory activities during a traffic stop is significantly narrower than it was under the "unavoidable lull" doctrine, which the Court of Appeals had applied for years to traffic stops. For further discussion on this issue, see Section G of this chapter, addressing limits on the scope and duration of a stop.

C. PRETEXT STOPS.

Oregon law and Fourth Amendment law on this issue are the same: A pretext does not invalidate an otherwise valid stop. State v. Bea, 318 Or 220, 864 P2d 854 (1993). "[I]f there is a legitimate basis for a stop, the fact that an officer may also have other motives for the stop does not make it illegal." State v. Allen, 112 Or App 70, 73, 826 P2d 127, *rev den*, 314 Or 176 (1992); State v. De La Rosa, 228 Or App 666, 671, 208 P3d 1012 (2009) ("Oregon law does not prohibit pretext stops."). *Accord* Whren v. United States, 517 US 806, 116 S Ct 1769, 135 L Ed 2d 89 (1996) (if the

police have lawful grounds to stop a person for a traffic violation, it does not matter that they actually stopped the person for the purpose of investigating a crime for which they had little or no evidence).

D. CRIMINAL INVESTIGATION STOPS — REASONABLE SUSPICION REQUIRED.

This section contains cases in which the court has addressed reasonable suspicion in the context of *criminal* investigations, including investigations for traffic crimes such as DUII. Stops for **traffic violations** are addressed in Section F of this Chapter.

1. General Principles.

a. Definition of Reasonable Suspicion; Objective and Subjective Components.

Oregon Statutory Law.

A police officer has authority to stop and question a person if the officer "reasonably suspects" that a crime has been or is about to be committed. ORS 131.615(1). Reasonable suspicion "means that a peace officer *holds a belief that is reasonable* under the totality of the circumstances existing at the time and place the peace officer acts[.]" ORS 131.605(5) (emphasis added). "Thus, reasonable suspicion must be based on a subjective belief by the stopping officer that a crime has been committed, and that subjective belief must be objectively reasonable under the totality of the circumstances." *State v. Busacker*, 154 Or App 528, 534, 962 P2d 723, *rev den*, 327 Or 620 (1998); *State v. Olson*, 116 Or App 525, 842 P2d 424 (1992) (stop of passenger, after arrest of driver, was unlawful where officer said he had no subjective belief that the passenger had committed any crime).

Oregon Constitutional Law

"[T]he standard for 'reasonable suspicion' required to support the lawfulness of an investigative stop of a person suspected of criminal conduct is well-established. For police officers to make a stop, they must reasonably suspect—based on specific and articulable facts—that the person committed a specific crime or type of crime or was about to commit a specific crime or type of crime. For a court to determine that an investigative stop was lawful under Article I, section 9, the court (1) must find that the officers actually suspected that the stopped person had committed a specific crime or type of crime, or was about to commit a specific crime or type of crime, and (2) must conclude, based on the record, that the officer's subjective belief—their suspicion—was objectively reasonable under the totality of the circumstances existing at the time of the stop." *State v. Maciel-Figueroa*, 361 Or 163, 182, 389 P3d 1121 (2017). *See also State v. Brown*, 298 Or App 771, 446 P3d 568 (2019) (summarizing and applying reasonable suspicion standards in reversing trial court's suppression order). *But see State v. Miller*, 345 Or 176, 191 P3d 651 (2008) (holding in the probable cause context that subjective probable cause exists if the officer believes that he or she has lawful authority to restrain the individual, even if the officer is mistaken about the basis of the authority or the extent of the restraint. "[A]n officer's expressed reason for making an arrest does not control a court's determination of that arrest's legality – so long as the officer acted on the belief that there was a legal justification for that action (the subjective component) and the officer's belief was objectively reasonable (the objective component)."). "[T]he standard for 'reasonable suspicion' requires that the articulated facts that formed the basis for the officer's suspicion give rise to a reasonable *inference* that the defendant has committed or is about to commit the crime that the officer suspects. * * * [T]he state need not prove that the articulated facts give rise to a conclusion with certainty that a crime has occurred or is about to occur; instead, based on the specific facts known and articulated by the officer, a reviewing court must conclude that the officer's subjective belief *could* be true, as a matter of logic." *Maciel-Figueroa*, 361 Or at 184 (emphasis in original; citations omitted).

Whether an officer "*holds a belief*" that a crime has been committed need not be established by direct testimony, but can be inferred from the particular circumstances confronting the officer. State v. Belt, 325 Or 6, 11-13, 932 P2d 1177 (1997); *see also* State v. Gilbertz, 173 Or App 90, 20 P3d 262, *rev den*, 332 Or 559 (2001) (same). *But see* State v. Bickford, 157 Or App 386, 390 fn 1, 970 P2d 234 (1998), *rev den*, 329 Or 589 (2000) ("If a trial court could infer subjective probable cause *from* the arrest, we would not need to inquire into subjective probable cause *for* the arrest." (emphasis in original). See further discussion in the chapter on Probable Cause.

In determining objective reasonableness, courts look for "specific and articulable facts that are sufficient as a matter of law to give rise to an inference that a *reasonable* officer would hold the required subjective belief." State v. Belt, 325 Or at 12 (emphasis in original). Those facts include "the objective facts of the defendant's conduct, the officer's knowledge at the time, the officer's expertise or experience, and the conduct of the officer including the officer's choices and manner of investigation." State v. Gilbertz, 173 Or App at 93, *quoting* State v. Bickford, 157 Or App at 390. *See also* State v. Holdorf, 355 Or 812, 829, 333 P3d 982 (2014) (an officer's training and experience are taken into consideration in criminal cases when determining reasonable suspicion, but that training and experience "is not presumed based solely upon a police officer's employment status"; it must be established through "evidence of specific articulable facts that permit an officer to make a reasonable inference based on the officer's pertinent training and experience").

The reasonable suspicion standard is lower than the standard of probable cause. State v. Valdez, 277 Or 621, 628, 561 P2d 1006 (1977); State v. Morton, 151 Or App 734, 739, 951 P2d 179 (1997), *rev den*, 327 Or 521 (1998); State v. Bartosz, 34 Or App 123, 127, 578 P2d 426 (1978). "Reasonable suspicion does not require that the articulable facts as observed by the officer *conclusively* indicate illegal activity but, rather, only that those facts support the *reasonable inference* that a person has committed a crime." State v. Hammonds, 155 Or App 622, 627, 964 P2d 1094 (1998) (emphasis in original). As the Supreme Court stated in State v. Maciel-Figueroa, 361 Or 163, 183-84, 389 P3d 1121 (2017) (citations omitted):

> We agree that "reasonable suspicion" does not require an officer to *conclude* that the defendant has committed a crime, in the sense that the verb "conclude" connotes reaching a final decision or judgment that something is certainly true. The term "reasonable suspicion" itself conveys that nuance; in its ordinary usage, "suspicion" means a feeling or belief that something is true, rather than an objective certainty. However, an officer's subjective belief must be "objectively reasonable"; thus, as the state identifies, the standard for "reasonable suspicion" requires that the articulated facts that formed the basis for the officer's suspicion give rise to a reasonable *inference* that the defendant has committed or is about to commit the crime that the officer suspects. In sum, the state need not prove that the articulated facts give rise to a conclusion with certainty that a crime has occurred or is about to occur; instead, based on the specific facts known and articulated by the officer, a reviewing court must conclude that the officer's subjective belief *could* be true, as a matter of logic.

"[T]he fact that there are possible lawful explanations for behavior does not mean that the behavior may not give rise to a reasonable suspicion of criminal conduct." State v. Hammonds, 155 Or App at 626 (although "it is possible that the couple in the van were engaging in sexual activity that was not based on an exchange of money, * * * it was reasonable to suspect that an act of prostitution had taken place"); *see also* State v. Acuna, 264 Or App 158, 331 P3d 1040, *rev den*, 356 Or 400 (2014) ("Reasonable suspicion 'does not require that the facts as observed by the officer conclusively indicate illegal activity but, rather, only that those facts support the reasonable inference of illegal activity by that person.'"); Cibula v. DMV, 202 Or App 551, 123 P3d 382, *rev den*, 340 Or 308

(2006) (reasonable suspicion existed even though defendant's acts were "susceptible of either an innocent or a culpable explanation"); *see also* State v. Crites, 151 Or App 313, 948 P2d 757 (1997), *rev den*, 327 Or 82 (1998) (officer had reasonable suspicion to stop defendant for transporting cedar without a permit; the possibility of a non-criminal explanation – that the defendant might have cut the cedar lawfully on one of the few tracts of private land within the forest – did not mean that the officer did not have a reasonable suspicion).

A stop based on reasonable suspicion is valid even if the stop was based on the officer's mistaken belief that the defendant was someone else who the officer did have reasonable suspicion to stop. State v. Lawton, 194 Or App 190, 94 P3d 154 (2004), *rev den*, 338 Or 16 (2005). In Lawton, the officer, who mistakenly, but reasonably, believed that the defendant was another person, had reasonable suspicion to stop the defendant on the basis of his belief that the defendant was that other person and that that person was trespassing in a drug-free zone.

Under the collective knowledge doctrine, a stop by an officer who does not personally have knowledge of the circumstances justifying the stop is nonetheless valid if the officer is reasonably relying on a request or order from another officer and reasonable suspicion, in fact, exists; it is not necessary that the officer requesting the stop fully communicate the objective basis for the stop or that the officer making the stop independently form a subjective belief. *See* State v. Soldahl, 331 Or 420, 15 P3d 564 (2000) (collective knowledge of probable cause justified a traffic stop). However, the collective knowledge doctrine does not mean that all of the facts known to all law-enforcement personnel are germane to whether reasonable suspicion or probable cause existed. State v. Barber, 279 Or App 84, 91 n 6, 379 P3d 651 (2016) (rejecting that previous understanding of the doctrine). As noted in Soldahl, "[a]s a unit, officers may direct one another to carry out lawful police activities[;] [h]owever, the state retains the obligation at trial to establish that police action was initiated by an officer who had both objective and subjective probable cause [or reasonable suspicion]." Soldahl, 331 Or at 428.

Fourth Amendment.

The Supreme Court did not define "reasonable suspicion" in Terry v. Ohio, 392 US 1, 88 S Ct 1868, 20 L Ed 2d 889 (1968). In later cases, however, the Court has said that the term entails some minimal level of objective justification for making a stop, that is, something more than an unparticularized suspicion or hunch, but less than the level of suspicion required for probable cause. United States v. Sokolow, 490 US 1, 109 S Ct 1581, 104 L Ed 2d 1 (1989). This statement of reasonable suspicion under the Fourth Amendment is similar to Oregon's statutory definition.

Under the Fourth Amendment, reasonable suspicion for an investigative stop requires merely "that there exists at the time of the stop a substantial possibility—or, indeed, even a '*moderate chance*'—that illegal conduct has occurred, is occurring, or is about to occur." 4 Wayne R. LaFave, *Search & Seizure* § 9.5(b), at 658-59 (5th ed 2012) (emphasis added) (citing Safford Unified School District # 1 v. Redding, 557 US 364, 370-71, 129 S Ct 2633, 174 L Ed 2d 354 (2009) (describing the "reasonable suspicion" standard applicable to a school administrator's search of a student as "a *moderate chance* of finding evidence of wrongdoing" (emphasis added)). The reasonable suspicion standard for initiating an investigative stop depends on the factual and practical considerations of everyday life on which reasonable and prudent persons, not legal technicians, act; the reasonable suspicion standard cannot reasonably demand scientific certainty where none exists, and an officer is not limited to drawing inferences gained only through law enforcement training and experience (everyday life experience is also a permissible source). Kansas v. Glover, __ US __, 140 S Ct 1183, 206 L Ed 2d 412 (2020) (officer had reasonable suspicion to stop vehicle registered to defendant based on commonsense inference that defendant, whose license had been revoked, was likely the driver). "[C]onduct that is as consistent with innocence as with guilt may form the basis for an investigative stop where there is some indication of possible illicit activity." United States v.

Singletary, 798 F3d 55, 60 (2d Cir 2015) (internal quotation marks and citation omitted). Note that the Oregon Court of Appeals—although recognizing that "[t]he fact that there might be innocent explanations for conduct does not mean that the conduct cannot also give rise to reasonable suspicion of criminality"—has made it clear that reasonable suspicion does *not* exist if the conduct or circumstances "could be characterized as consistent with either lawful or unlawful activity." *State v. Martin*, 260 Or App 461, 478-79, 317 P3d 408 (2014) (internal quotation marks and citation omitted) (explaining why the court had held in three previous cases that reasonable suspicion of criminal activity did not exist). The various facts making up the "totality of the circumstances" should be viewed in combination with each other, not in isolation. *United States v. Arvizu*, 534 US 266, 122 S Ct 744, 151 L Ed 2d 740 (2002) (disapproving "divide-and-conquer" approach, which viewed each circumstance in isolation from the others and gave "no weight" to any circumstance that, alone, was "susceptible to an innocent explanation").

b. Mere Suspicion or Hunches.

A mere suspicion alone is not enough to justify a stop. *State v. Greer*, 93 Or App 409, 763 P2d 158 (1988) (report of "suspicious persons" in a "suspicious vehicle" did not justify stop). Although an officer reasonably may draw inferences about human behavior from their training and experience, the officer's "hunch" based on training and experience is, by itself, insufficient to form the basis for reasonable suspicion of criminal activity so as to justify a stop. *State v. Kreis*, 365 Or 659, 451 P3d 954 (2019).

Although police may develop reasonable suspicion based on facts that might appear innocuous to a lay person, *State v. Ehly*, 317 Or 66, 80, 854 P2d 421 (1993), the intuition of an experienced officer, by itself, does not amount to reasonable suspicion. *State v. Houghton*, 91 Or App 71, 754 P2d 13 (1988); *see also State v. Valdez*, 277 Or 621, 628, 561 P2d 1006 (1977) (in the absence of any remarkable activity, a police officer's instinct and experience cannot, by itself, justify a stop); *State v. Gattenby*, 301 Or App 229, 455 P3d 582 (2019) (officer cannot infer that a person has committed a crime from behavior that is "not too remarkable"); *State v. Mock*, 310 Or App 454, 485 P3d 295 (2021) (police lacked reasonable suspicion to stop defendant to investigate possible illegal drug activities). *Mock* illustrates the Court of Appeals' fairly demanding approach in reviewing the reasonable suspicion question, particularly as it relates to detentions to investigate suspected illegal drug activities. For example, the court emphasized that it had "routinely concluded that lawful behavior that is nevertheless consistent with buying or selling drugs, such as defendant's short visit to a suspected drug house, does not amount to reasonable suspicion that the defendant committed a drug crime without more." *But see State v. Heckathorne*, 347 Or 474, 485, 223 P3d 1034 (2009) (officer's individual expertise and training "may provide the knowledge that turns various sensory clues into probable cause"); *State v. Hollins*, 312 Or App 682, 493 P3d 535 (2021) (trial court correctly found reasonable suspicion of drug distribution where officer "articulated specific facts about his training and experience and the circumstances he observed and how, collectively, they led him to believe that the hand-to-hand transaction he had seen was a drug transaction").

c. Furtive Gestures, Fleeing, and Lying.

Oregon Law.

Flight or furtive movements alone do not provide reasonable suspicion. *State v. Goguen*, 308 Or App 706, 481 P3d 1011 (2021) (fact that defendant reached into jacket pocket not alone sufficient to support officer safety concern; more than single suspicious or furtive movement is necessary to give rise to an objectively reasonable officer-safety concern); *State v. Meeker*, 293 Or App 82, 427 P3d 1114 (2018) (standing alone, defendant's single suspicious movement—reaching for the passenger seat—was not enough to give rise to a reasonable safety concern, even considering that the

encounter took place in a poorly lit area at night); State v. Guggenmos, 225 Or App 641, 202 P3d 892, *rev'd on other grounds,* 350 Or 243 (2011); State v. Kentopp, 251 Or App 527, 284 P3d 564 (2012) (furtive movements—defendant's act of leaning down as he was being pulled over—did not amount to reasonable suspicion). But furtive gestures and other elusive and deceptive behavior, including flight, can contribute to reasonable suspicion. *See, e.g.,* State v. Mitchele, 240 Or App 86, 251 P3d 760 (2010) (defendant's act of "tucking" himself into foliage as officers approached to investigate burglary contributed to reasonable suspicion); Guggenmos, 225 Or App at 645 (flight coupled with knowledge that "wanted" people were being harbored at the house, that a car associated with narcotics activity was outside the house, and that the occupant of the house had lied about defendant's presence at the house, constituted reasonable suspicion); State v. Loud, 149 Or App 250, 942 P2d 814, *rev den*, 326 Or 58 (1997) (observation of actions consistent with street sale of drugs, combined with suspect's apparent attempt to hand something to passenger as officer initiated traffic stop, was sufficient reasonable suspicion to escalate traffic stop into criminal stop); State v. Frias, 115 Or App 149, 836 P2d 1367 (1992) (furtive gesture – trying to hide a rolled-up paper bag – plus officer's testimony that such bags are commonly used to carry drugs was sufficient).

But, "in the absence of any evidence of criminal activity, furtive gestures provide no basis for a stop." State v. Butkovich, 87 Or App 587, 591, 743 P2d 752, *rev den*, 304 Or 548 (1987) (observation of defendant's car parked in drive-up lane of closed restaurant at 2 a.m., a "very surprised look" on female passenger's face upon seeing officer, and her apparent effort to put something under seat did not amount to reasonable suspicion); *see also* State v. Dampier, 244 Or App 547, 552, 260 P3d 730 (2011) ("mere presence" in a high crime area is insufficient to establish a reasonable suspicion of illegal activity); State v. Berry, 232 Or App 612, 222 P3d 758 (2009), *rev dismissed*, 348 Or 71 (2010) (defendant's initial nervousness, "furtive movements," improbable explanation for her whereabouts at the time of the stop, and recent presence at a restaurant known for drug activity did not support a finding of reasonable suspicion); State v. Hall, 339 Or 7, 17, 115 P3d 908 (2005) ("[officer's] observations of defendant repeatedly turning to look at [officer's] patrol vehicle and then averting his gaze did not give rise to a reasonable suspicion that defendant was engaged in any criminal conduct."); State v. Peterson, 164 Or App 406, 991 P2d 1104 (1999) (in the absence of indications that a disturbance involving a man and woman was anything more than a non-criminal domestic argument in a public place, the fact that the male suspect made a U-turn and drove away as the officer approached on foot "could not contribute to reasonable suspicion").

Similarly, furtive gestures can justify a stop "only if they are coupled with an attempt to hide a suspicious object." State v. Brown, 110 Or App 604, 611, 825 P2d 282 (1992); State v. Robles, 229 Or App 287, 211 P3d 311 (2009) (officers lacked reasonable suspicion because although they saw defendant look around and attempt to place an object in his clothing, there was no evidence that, at that time, defendant was aware that the officers were observing him, and officers did not testify that any characteristic of the object itself that made it reasonable to believe that the object was a weapon or contraband). And furtive gestures may contribute to probable cause, when considered along with additional indications of potential criminal activity. State v. Clink, 270 Or App 646, 348 P3d 1187, *rev den*, 358 Or 69 (2015) (officer had reasonable suspicion that defendant had been engaged in criminal activity (unlawful possession of drugs) based on totality of circumstances when he ordered defendant out of the vehicle: a citizen report that two individuals were "smoking something in a newer silver Volvo" in a residential neighborhood, the fact that citizen reports from that neighborhood were usually reliable, defendant's furtive movements, and the identity of his companion as a known drug user).

See also discussion of the distinction between a furtive gesture and an action that asserts a constitutional right to refuse a search, in Ch. III.

Fourth Amendment.

Although a person's mere presence in a high-crime area is not sufficient in itself to justify a stop, when a person in a high-crime area deliberately tries to evade the police, reasonable suspicion exists under the Fourth Amendment. *Illinois v. Wardlow*, 528 US 119, 120 S Ct 673, 145 L Ed 2d 570 (2000); *compare Florida v. Royer*, 460 US 491, 103 S Ct 1319, 75 L Ed 2d 229 (1983) (when an officer without reasonable suspicion or probable cause approaches, a person has the right to go about his business).

d. Informant Information.

Oregon Law.

Information from named and unnamed informants can establish reasonable suspicion for a stop. *State v. Lichty*, 313 Or 579, 835 P2d 904 (1992) (named informant); *State v. Langager*, 156 Or App 385, 965 P2d 1037 (1998), *rev den*, 328 Or 275 (1999) (unknown informant).

"When reasonable suspicion is based **solely** on a citizen informant's report, that report must contain some indicia of reliability." *State v. Villegas-Varela*, 132 Or App 112, 115, 887 P2d 809 (1994). Among the factors that are important in determining the reliability of a citizen informant's report are: (1) "whether the informant is exposed to possible criminal and civil prosecution if the report is false"; (2) "whether the report is based on the personal observations of the informant," which may be inferred from the detail of the report; and (3) "whether the officer's own observations corroborated the informant's information." *Id*.

If the informant gives his or her name to law enforcement authorities or if the informant delivers the information to the officer in person, courts generally have treated the informant's information as sufficient to establish reasonable suspicion for a stop. *See, e.g., State v. Perrin*, 143 Or App 123, 923 P2d 1249 (1996), *rev den*, 325 Or 368 (1997) (name provided to 911 operator and to police); *State v. Rickard,* 150 Or App 517, 523, 947 P2d 215, *rev den*, 326 Or 234 (1997) (informants conveyed their information to the officer in person); *State v. Vanness*, 99 Or App 120, 781 P2d 391 (1989) (informant personally contacted the officer and remained anonymous only because the officer failed to ask his name); *see also State v. Goss*, 219 Or App 645, 184 P3d 1155, *rev den*, 345 Or 94 (2008) (citizen does not have to justify the reasonableness of his belief that defendant was DUII; rather, what those witnesses knew and whether their conclusions were reasonable is immaterial to the analysis of reasonable suspicion, which is based solely on the information known by police).

(1) Information From Named Informants.

State v. Humphrey, 337 Or App 715, 564 P3d 490 (2025). Within minutes after police received a "vague" report that two people had been assaulted with a stick, they arrived and spoke with victims and bystanders, learned that the assailant was a 45- to 50-year-old Black man and which direction he had gone. A minute later, when they found defendant sitting alone at a bus stop a few blocks away, all of that information supported a reasonable suspicion that he was the assailant.

State v. Cage, 324 Or App 430, 526 P3d 785 (2023). Officer did not have authority to stop defendant based on a motel clerk's call to 911 that defendant was involved in a dispute, because (1) the caller had not observed the incident himself and instead passed on information relayed to him; and (2) the officer's personal observations did not corroborate the report.

State v. Walker, 277 Or App 397, 372 P3d 540, *rev den*, 360 Or 423 (2016). Report by named citizen of possible drug deal, combined with officer's observations and his training and experience, supplied reasonable suspicion for stop.

State v. Maciel-Figueroa, 361 Or 163, 184-85, 389 P3d 1121 (2017). Information from a 911 caller, who gave her name, that a man was in her daughter's home yelling and threatening to break things did not provide objectively reasonable suspicion that defendant, whom police found leaving the house, had committed the crimes that the police suspected.

State v. Lichty, 313 Or 579, 835 P2d 904 (1992). A named informant's statement to an officer that a wallet found in the informant's store contained a "bag of coke" established reasonable suspicion to stop the defendant when he returned to retrieve the wallet.

State v. Wiseman, 245 Or App 136, 261 P3d 76 (2011). A named informant reported that a suspicious pickup truck had been parked near her house for a while, and that a person had ridden up to the truck on a bicycle and loaded the bicycle into the bed of the truck and got into the truck before it drove away. That, combined with the officer's knowledge that the observations were consistent with methods used by individuals who are trying to commit residential burglaries, provided reasonable suspicion for a stop of the truck.

State v. Mitchele, 240 Or App 86, 251 P3d 760 (2010). Named informant reported that the defendant was possibly casing houses. That, along with officer's knowledge that burglaries regularly occurred in the neighborhood, that defendant was found on pathway often used as an escape route for criminals, and defendant's furtive behavior, supplied reasonable suspicion for burglary.

State v. Killion, 229 Or App 347, 211 P3d 367, *rev den,* 347 Or 349 (2009). An ODFW biologist who had briefly conversed with defendant as they passed each other on a one-lane road, reported to OSP deputy that defendant appeared to be intoxicated. Although the biologist reported the wrong license-plate number and the wrong make of car, the deputy who observed defendant on a different road had sufficient reasonable suspicion to stop defendant for DUII based on the general description of the car and the fact that the plate number was close to that reported by the biologist.

State v. Hames, 223 Or App 624, 196 P3d 88 (2008). The officer lacked reasonable suspicion because his observations were inconsistent with the details provided by the named informant.

State v. Nguyen, 176 Or App 258, 31 P3d 489 (2001). A report from a named citizen informant regarding a car prowl, and describing the suspects and the direction in which they were traveling, supported a stop of the sole car driving away from the location, even though the officer could not confirm that the subjects fit the informant's description before stopping the car.

State v. Ricks, 166 Or App 436, 998 P2d 234, *modified and adh'd to on recons*, 168 Or App 552, 7 P3d 675, *rev den*, 331 Or 429 (2000). Information given by victim's son was reliable, even if he was not subject to prosecution for *initiating* a false report because the police *contacted him*.

State v. Perrin, 143 Or App 123, 923 P2d 1249 (1996), *rev den*, 325 Or 368 (1997). A 911 call from a named informant indicating that an intoxicated driver had just left the scene of an accident, followed by an officer's personal contact with the caller, was sufficient to establish reasonable suspicion. *See also* State v. Bybee, 131 Or App 492, 884 P2d 906 (1994); State v. Walsh, 103 Or App 517, 798 P2d 262 (1990), *rev den*, 311 Or 60 (1991).

State v. Faulkner, 89 Or App 120, 747 P2d 1011 (1987). Information voluntarily reported to the police by a named informant who personally saw erratic driving, which the officer corroborated with his own observation of "irregular," though not illegal, driving, supplied reasonable suspicion.

(2) Information from Unnamed Informants.

State v. Simpson, 245 Or App 152, 261 P3d 90 (2011). Citizen's report that driver of yellow sports car that had been involved in a traffic accident may be intoxicated was sufficiently detailed to allow inference that the report was based on her personal observations, where officer found car matching the description, with matching license plate, a block from the scene.

State v. Harper, 197 Or App 221, 105 P3d 883 (2005). Information from an unnamed store employee that the defendant had purchased iodine was sufficiently corroborated by the defendant's own admissions that he had purchased the iodine.

State v. Cardell, 180 Or App 104, 41 P3d 1111 (2002). An officer received an anonymous report that a blue Pontiac GTO was "racing." The officer located a vehicle matching that description parked at a residence in the area described by the caller. The court found that if the officer "had encountered the blue GTO being driven lawfully on the street" he would not have had reasonable suspicion for a stop. "Necessarily, then," the officer also lacked probable cause to do a warrantless inspection of the car's tires.

State v. Cook, 163 Or App 24, 986 P2d 1228 (1999), *rev'd on other grounds*, 332 Or 601, 34 P3d 156 (2001). Officers received an early morning report from an anonymous caller, that two individuals might be trying to take items from cars in an apartment complex parking lot. When the officers arrived, they saw the defendant in a dumpster enclosure sorting clothing into a bag. "Under the circumstances, including the defendant's proximity to the parking lot, his activities and the time of night, * * * the officers had an objectively reasonable suspicion that defendant was involved in the reported car prowls."

State v. Langager, 156 Or App 385, 965 P2d 1037 (1998), *rev den*, 328 Or 275 (1999). The defendants' suspicious behavior in a liquor store, combined with an unknown informant's detailed tip, created a reasonable suspicion that the defendants had attempted to rob the liquor store.

State v. Busacker, 154 Or App 528, 962 P2d 723, *rev den*, 327 Or 620 (1998). A report from an unidentified Navy security officer that a boater might be intoxicated was reliable. "[N]othing suggests that the [officer] was not willing to be identified" and, "[b]ecause of his position he was readily identifiable." His report was based on personal observations that were corroborated by the stopping officers. (**NOTE:** The court did not decide whether a report by a Navy officer should be given more weight "because, even under the general test for citizen informant reliability, the test here is satisfied.").

State v. Rickard, 150 Or App 517, 947 P2d 215, *rev den*, 326 Or 234 (1997). A Portland police officer stopped at a red light behind two other cars. The occupants of a pickup truck jumped out, pointed at a car, and yelled, "He's got a gun, a gun, a gun." Their statements, coupled with the officer's observations, supported a reasonable suspicion that someone in the car had displayed a gun. Although the informants did not give their names, nothing indicated that they were unwilling to do so or that they had any reason to lie, and they conveyed their information to the officer in person.

State v. Villegas-Varela, 132 Or App 112, 887 P2d 809 (1994). An anonymous telephone call from an unidentified member of a volunteer "watchdog group" described a car that had an "intoxicated driver" who "was driving erratically all over the road." Based solely on that information, the officer stopped the car over an hour later. Because the informant was not identified or identifiable and the tip did not otherwise contain sufficient indicia of reliability, the stop was unlawful.

State v. Shumway, 124 Or App 131, 861 P2d 384 (1993), *rev den*, 318 Or 459 (1994). An unnamed informant personally informed an officer that the defendant was drunk and driving erratically, that he had confronted people in a park, and that he had left the park to get more beer. The officer recalled seeing the defendant's truck in the park earlier that day. Later, he saw the defendant driving back into the park and, although the officer saw no bad driving, he stopped him. The informant's report and the officer's observations partially corroborating the informant's information provided reasonable suspicion that the defendant had committed a crime.

State v. Vanness, 99 Or App 120, 781 P2d 391 (1989). An officer had reasonable grounds to stop a suspected drunk driver based on the report of an anonymous informant, even though the officer did not himself observe any unusual driving. The informant personally contacted the officer and remained anonymous only because the officer failed to ask his name. *But see* *State v. Tibbett*, 96 Or App 116, 771 P2d 654 (1989) (court reaches opposite result on similar facts).

State v. Lindstrom, 37 Or App 513, 588 P2d 44 (1978). Although the officer did not personally observe any erratic driving, reasonable suspicion of DUII was established by an informant's face-to-face report to a police officer that the driver of a yellow Ford pickup had been driving recklessly and appeared to be intoxicated.

Fourth Amendment.

Under the Fourth Amendment, an anonymous tip may be sufficient to justify a stop if it is corroborated by independent police observations, even if those observations are of wholly innocuous conduct. *Alabama v. White*, 496 US 325, 110 S Ct 2412, 110 L Ed 2d 301 (1990). *See also* *United States v. Sokolow*, 490 US 1, 109 S Ct 1581, 104 L Ed 2d 1 (1989); *Adams v. Williams*, 407 US 143, 147, 92 S Ct 1921, 32 L Ed 2d 612 (1972); *but see* *Florida v. J.L.*, 529 US 266, 120 S Ct 1375, 146 L Ed 2d 254 (2000) (anonymous caller reported that young black male in plaid shirt standing at a particular bus stop was carrying gun; this tip, which neither described observable criminal conduct, nor predicted suspect's behavior, and therefore, did not provide a means for officers to test informant's knowledge or credibility, was not sufficient in itself for reasonable suspicion).

e. Profile Stops.

Officers may not rely solely upon "general statistics" regarding profiles of offenders to construct a basis for an investigative stop. *Reid v. Georgia*, 448 US 438, 100 S Ct 2752, 65 L Ed 2d 890 (1980); *State v. Baldwin*, 76 Or App 723, 729, 712 P2d 120 (1985), *rev den*, 301 Or 193 (1986).

On the other hand, conduct innocent in itself, such as paying cash for an airline ticket or traveling under an alias, may serve as part of the foundation for reasonable suspicion. *United States v. Sokolow*, 490 US 1, 109 S Ct 1581, 104 L Ed 2d 1 (1989); *United States v. Low*, 887 F2d 232, 236 (9th Cir 1989) (applying *Sokolow*); *State v. North*, 72 Or App 1, 694 P2d 990, *rev den*, 299 Or 154 (1985). The United States Supreme Court has held that the articulation of factors in support of reasonable suspicion in the form of a "profile" of the general characteristics of a class of offenders "does not * * * detract from their evidentiary significance as seen by a trained agent." *United States v. Sokolow*, 490 US at 10.

In *State v. Juarez-Godinez*, 326 Or 1, 942 P2d 772 (1997), however, the Oregon Supreme Court disregarded several conclusions drawn by a trained and experienced officer, and concluded that the officer lacked reasonable suspicion to believe that several Hispanic persons driving to Washington in the early morning hours were transporting controlled substances. Along with testimony about a number of incriminating factors and inferences, the record included testimony by the officer that he had previously made approximately 35 traffic stops of drivers exhibiting similar characteristics and,

in *every one* of those cases, he had found controlled substances during a consent search. The court distinguished Sokolow and held that reasonable suspicion was not present under either Oregon law or the Fourth Amendment.

2. Specific Crimes.

a. Assault; Menacing; Disorderly Conduct.

(1) Reasonable Suspicion Present.

State v. Gant, 237 Or App 74, 239 P3d 269 (2010). An officer had reasonable suspicion to stop the defendant for disorderly conduct after he watched defendant ride his bicycle abruptly into the front yard of a residence, where the officer could see defendant and the property owner shouting and gesturing at each other, with the property owner yelling at defendant to leave the property.

State v. Santacruz-Betancourt, 157 Or App 26, 969 P2d 1040 (1998), *rev den*, 328 Or 464 (1999). A police officer received information from a named informant that an individual had shined a laser beam into a home, onto the foreheads of the residents. Because laser devices are used to sight weapons, the use of a laser in this manner was sufficient to supply reasonable suspicion for menacing.

(2) No Reasonable Suspicion.

State v. Peterson, 164 Or App 406, 991 P2d 1104 (1999). An officer dispatched at 4 a.m. to a motel to investigate "some sort of argument and a suspicious vehicle" was told only that a man was throwing things (perhaps beer bottles) at a dumpster, that the man had been arguing with a woman, and that the man had driven off while the woman went to a gas station. The officer found both people sitting in a truck in a parking lot and, when the defendant tried to drive off, stopped the truck. The officer testified only that "possibly domestic violence [was] occurring." The court held that, even if the officer had a subjective belief, that belief would not have been objectively reasonable.

b. Trespassing; Burglary; Car Prowls; Criminal Mischief; Theft

(1) Reasonable Suspicion Present.

State v. Wampler, 325 Or App 722, 530 P3d 133 (2023). Officer had reasonable suspicion that defendant was trespassing at a locked gate on a private gravel road, despite the lack of any "No Trespassing" sign, where (1) it was 9 p.m.; (2) the road was "narrow and unpaved, and there was a closed gate to which defendant's van was blocking access"; (3) the "gate and defendant's van were about 650 feet from the highway"; and (4) "the part of the road where defendant's van was parked did not connect to any public areas or roads" other than the highway.

State v. Brown, 298 Or App 771, 446 P3d 568, *rev den*, 365 Or 819 (2019). Officer had reasonable suspicion that defendant had committed unlawful entry into a motor vehicle; thus, investigatory stop was lawful under section 9.

State v. Maciel, 254 Or App 530, 295 P3d 145 (2013). Officer possessed reasonable suspicion to extend a traffic stop and investigate possible stolen vehicle where he learned that: (1) the vehicle had California license plates and was travelling northbound on I-5 at 4 a.m., (2) the vehicle was registered to a third-party; (3) both the driver and passenger had identical prepaid cellular phones; (4) the defendant, who was the passenger, offered inconsistent explanations about the ownership of the car; (5) defendant had no paperwork for the claimed recent purchase of the car, and the car's interior—which contained trash and an apparently long-installed child's car seat—did not

appear to be consistent with a recent purchase; and (6) defendant appeared angry and avoided eye contact. [**Note**: The court nonetheless suppressed the evidence because the officer conducted a drug investigation as opposed to a theft investigation.]

State v. Wiseman, 245 Or App 136, 261 P3d 76 (2011). A named informant reported that a suspicious pickup truck had been parked near her house for a while, and that a person had ridden up to the truck on a bicycle and loaded the bicycle into the bed of the truck and got into the truck before it drove away. That, combined with the officer's knowledge that the observations were consistent with methods used by individuals who are trying to commit residential burglaries, provided reasonable suspicion to stop the truck.

State v. Mitchele, 240 Or App 86, 251 P3d 760 (2010). Named informant reported that defendant was possibly casing houses. That, in combination with the officer's knowledge that burglaries had occurred frequently in the neighborhood, that defendant was found on pathway commonly used as an escape route for criminals, and defendant's furtive behavior, supplied reasonable suspicion for burglary.

State v. Klein, 234 Or App 523, 228 P3d 714 (2010). Officer's observation of a key ring with approximately 30 keys, some of which appeared to be house and car keys, some that appeared to be blanks, and some that appeared to have been filed down, provided reasonable suspicion to inquire about defendant's possession of burglary tools in violation of ORS 164.235. But it did not provide reasonable suspicion to inquire about drugs.

Cibula v. DMV, 202 Or App 551, 123 P3d 382 (2005), *rev den*, 340 Or 308 (2006). Officer's observation of man running away from convenience store with beverage bottles at a time when a city ordinance prohibited the sale of alcohol provided reasonable suspicion of theft.

State v. Nguyen, 176 Or App 258, 31 P3d 489 (2001). A report from a named citizen informant about a car prowl and describing the suspects and the direction in which they were traveling, supported a stop of the sole car driving away from the location, even though the officer could not confirm that the subjects fit the informant's description before he stopped the car.

State v. Cook, 163 Or App 24, 986 P2d 1228 (1999), *rev'd on other grounds*, 332 Or 601, 34 P3d 156 (2001). Officers received an anonymous early morning report that two individuals might be trying to steal items from cars in a parking lot. When the officers arrived, they saw the defendant in a dumpster enclosure, sorting clothing into a bag. "Under the circumstances, including defendant's proximity to the parking lot, his activities and the time of night, * * * the officers had an objectively reasonable suspicion that defendant was involved in the reported car prowls." See similar cases State v. Strawn, 154 Or App 460, 963 P2d 34 (1998) and State v. Codr, 99 Or App 417, 782 P2d 442 (1989).

State v. Taylor, 116 Or App 647, 842 P2d 460 (1992), *modified on recons*, 119 Or App 209, 850 P2d 1118, *rev den*, 317 Or 584 (1993). A traffic stop escalated to reasonable suspicion to investigate a burglary when the officer saw a pillowcase in the car filled with jagged-edged items and two-way radio headphones (known by the officer to be used in recent burglaries).

State v. LaFrienier, 97 Or App 672, 776 P2d 1325 (1989). Officer who knew of a series of burglaries in the neighborhood had reasonable suspicion when he saw an open front door to a house on a rainy day, and an unfamiliar car similar to the reported suspect vehicle backed into the driveway.

(2) No Reasonable Suspicion

State v. Semore, 298 Or App 341, 445 P3d 895 (2019). Officer lacked reasonable suspicion that defendant was engaged in theft; mere presence in high-crime area is insufficient to establish reasonable suspicion of criminal activity.

c. Drug Offenses.

(1) Reasonable Suspicion Present.

United States v. Arvizu, 534 US 266, 122 S Ct 744, 151 L Ed 2d 740 (2002). Reasonable suspicion justified the stop of a vehicle headed north 30 miles from the Mexican border on a remote road frequently used by drug smugglers. Several factors indicated that the people in the vehicle were not just "a family in a minivan on a holiday outing": (1) The vehicle slowed dramatically when the driver saw the officer; (2) the driver sat rigidly and did not look at the officer; (3) the knees of the children in the back seat were unusually high, as if their feet were propped up on cargo; and (4) as if on command, all the children suddenly waved at the officer in an abnormal fashion.

Illinois v. Wardlow, 528 US 119, 120 S Ct 673, 145 L Ed 2d 570 (2000). Although a person's mere presence in a high-crime area is not sufficient in itself to justify a stop, when a person in a high-crime area deliberately tries to evade the police, reasonable suspicion exists under the Fourth Amendment. Distinguishes Florida v. Royer, 460 US 491, 103 S Ct 1319, 75 L Ed 2d 229 (1983) (when an officer without justification approaches a person, the person has right to go about his business).

United States v. Sokolow, 490 US 1, 109 S Ct 1581, 104 L Ed 2d 1 (1989). The fact that the defendant bought two airplane tickets for a total of $2,100 from a roll of $20 bills, traveled under a name different from the one listed for his telephone number, traveled for 10 hours from Honolulu to stay in Miami (a source city for illegal drugs) for only 48 hours, appeared nervous, and did not check his luggage supported a reasonable suspicion of wrongdoing. *But see* State v. Juarez-Godinez, 326 Or 1, 10, 942 P2d 772 (1997) (distinguishing Sokolow and concluding that somewhat similar facts were not sufficient to justify an investigatory detention of defendant's car).

State v. T.T., 308 Or App 408, 479 P3d 598, *rev den*, 368 Or 37 (2021). In light of state's legalization of marijuana possession, smell of marijuana in car in which adult is present, by itself, does not give rise to reasonable suspicion that marijuana is being unlawfully possessed by or delivered to underage passenger; but trooper had reasonable suspicion of marijuana importation.

State v. Robinson, 310 Or App 644, 486 P3d 28 (2021). Strong odor of marijuana and defendant's admission to driving from state to state provided reasonable suspicion that defendant was trafficking marijuana.

State v. Rhyne, 290 Or App 827, 417 P3d 422 (2018). Police officers did not unlawfully extend stop because they had reasonable suspicion that defendant was involved in drug crimes, based on his presence in a vehicle with at least one person (Collier) who was involved in the controlled buy and the officers' training and experience with regard to drug transactions, which suggested that Collier was the "middleman" in the drug deal and defendant was the dealer—a common arrangement for large drug transactions.

State v. Westcott, 282 Or App 614, 385 P3d 1268 (2016), *rev den*, 361 Or 486 (2017). Officers had reasonable suspicion to extend traffic stop to investigate the defendant for possession of methamphetamine because, when at time of officers' interaction with the defendant changed from traffic stop to criminal investigation, officers knew that the defendant's car had visited known drug

house three times in one day; that each visit was consistent with visits that drug users or dealers made when purchasing drugs; that on same day as the defendant's visits three other individuals had purchased methamphetamine while visiting house; that the defendant and his passenger were known drug users; and that the defendant appeared to be extremely nervous during the stop.

State v. Barber, 279 Or App 84, 379 P3d 651 (2016). Officer had reasonable suspicion that the defendant possessed drugs, and thus could extend of the traffic stop to conduct a criminal investigation, when other officers had informed the officer that either the defendant or his passenger had gone into an apartment that was under surveillance for suspected heroin distribution and had quickly returned to the defendant's car; the defendant and passenger were staying at a motel that was common location for drug activity; and, when officer initiated traffic stop, officer saw the defendant drive slowly to very back of the motel parking lot while the passenger fumbled under the seat.

State v. Vennell, 274 Or App 94, 359 P3d 1255 (2015), *rev den*, 358 Or 529 (2016). Officer's observation of a strong odor of marijuana coming from the defendant provided reasonable suspicion to justify stop, even if the officer could not then ascertain whether the amount of marijuana was enough to constitute a crime.

State v. Walker, 277 Or App 397, 372 P3d 540, *rev den*, 360 Or 423 (2016). Report by named informant of possible drug deal, combined with officer's observations and his training and experience, supplied reasonable suspicion for stop.

State v. Holdorf, 355 Or 812, 333 P3d 982 (2014). Officers had reasonable suspicion to stop the passenger in a car, where the car previously had been involved in a drug transaction and had eluded police on a prior occasion; the driver was a suspect in drug crimes and had an outstanding felony probation warrant; and the passenger was nervous and fidgety, consistent with drug use.

State v. Guggenmos, 225 Or App 641, 202 P3d 892, *rev'd on other grounds,* 350 Or 243 (2011). Although flight alone does not provide reasonable suspicion, the officers had information that "wanted" people were being harbored at the house, that a car associated with narcotics activity was outside the house, and the occupant of the house had lied about defendant's presence at the house. Those facts, combined with the defendant's attempted flight from the house, supplied reasonable suspicion.

State v. McKinney, 174 Or App 47, 23 P3d 386 (2001), *rev den*, 330 Or 260 (2002). Officer had reasonable suspicion of drug dealing when, shortly before midnight in a high-drug-activity area, he saw the defendant display an item in her palm to two other persons, in a manner that he recognized from training and experience to be consistent with the sale of drugs.

State v. Loud, 149 Or App 250, 942 P2d 814, *rev den*, 326 Or 58 (1997). Officer had reasonable suspicion to extend traffic stop into criminal investigation after observing actions consistent with a street sale of drugs, combined with the suspect's apparent attempt to hand something to a passenger as the officer initiated the traffic stop.

State ex rel Juv. Dept. v. Rohlffs, 147 Or App 565, 938 P2d 768 (1997). School officials had reasonable suspicion to detain and question a student based on independent reports by two other reliable students that the suspect student "probably had drugs on him."

State v. Johnson, 120 Or App 151, 851 P2d 1160, *rev den*, 318 Or 26 (1993). The odor of methamphetamine emanating from the suspect was sufficient for reasonable suspicion.

(2) No Reasonable Suspicion.

State v. Vannoy, 326 Or App 11, 530 P3d 503 (2023). Strong smell of marijuana coming from vehicle did not, without more, provide reasonable suspicion that the defendant, a passenger, possessed an unlawful amount of marijuana.

State v. Moore, 311 Or App 13, 488 P3d 816 (2021). Very strong smell of marijuana coming from vehicle did not justify extending traffic stop to conduct criminal investigation; officer lacked reasonable suspicion that defendant possessed unlawful amount of marijuana.

State v. Arivett, 309 Or App 480, 483 P3d 29 (2021). No reasonable suspicion that defendant possessed an unlawful amount of marijuana to justify extending stop to investigate drug crime.

State v. Taylor, 308 Or App 61, 479 P3d 620 (2020). No objective reasonable suspicion to extend traffic stop and conduct drug investigation of defendant who had large amount of cash rolled up in wallet, reported staying at motel in area associated with high drug activity, was nervous, and was driving late at night where amount of cash and bill denominations were unclear, presence at public motel, without more, was not inherently suspicious, and nervousness and nighttime travel were not linked to other facts that made those facts indicative of criminal activity.

State v. Sarmento, 296 Or App 763, 439 P3d 994 (2019). Officer lacked reasonable suspicion that defendant possessed controlled substances based on the following facts: officer observed "fresh track marks" on defendant's arms, defendant was in a high-crime area, and defendant's two companions were nervous and made "furtive movements."

State v. Dockery, 296 Or App 758, 436 P3d 99 (2019) (*per curiam*). "Although the trooper made observations that could give rise to suspicions that defendant and a passenger were drug users, the circumstances he recounted could not support an objectively reasonable inference of current drug possession. '[E]ven if [an officer] could reasonably infer that defendant was a drug user, evidence of a person's past or even routine drug use, without additional evidence, does not give rise to the reasonable inference that the person currently possesses drugs.' *State v. Oller*, 277 Or App 529, 538, 371 P3d 1268 (2016), *rev den*, 361 Or 803, 401 P3d 1187 (2017)."

State v. Colbert, 288 Or App 696, 404 P3d 1150 (2017) (*per curiam*). Officer's call for a drug dog to come to the scene of a traffic stop unlawfully extended the stop because the officer lacked reasonable suspicion of a drug crime. The officer's suspicion of drug activity—based on defendant's companions' criminal histories, and his presence in a high-drug-crime area—was not reasonable.

State v. Reich, 287 Or App 292, 403 P3d 448 (2017). Officers' request for consent to search car stopped for traffic violation unlawfully extended stop because officers lacked reasonable suspicion of drug crime. Defendant's nervousness and change in demeanor, along with fact that defendant's passenger had possessed methamphetamine in the past, were insufficient to establish reasonable suspicion that defendant possessed methamphetamine.

State v. Howard, 287 Or App 118, 399 P3d 483 (2017) (*per curiam*). Officer's observations of defendant talking nonstop, shaking badly, and driving with a known drug user did not create reasonable suspicion of drug possession.

State v. Davis, 286 Or App 528, 400 P3d 994 (2017). Reasonable suspicion does not require that the facts *conclusively* indicate illegal activity; only that they support the *reasonable inference* that a person has committed a crime." "[S]omething more" than "mere intoxication or evidence of past drug use" is necessary to establish reasonable suspicion of current drug possession. Here, without

further testimony supporting a specific inference of drug possession, the facts—defendant's nervousness and suspicious explanation for his travel, his "rummaging" in the cab's pickup (which the officer described as a safety concern, not a basis for a suspicion of drug activity), and his presence in a known thoroughfare for drugs—did not provide the "something more" required for objective reasonable suspicion, where the officer did not connect defendant's presence or behavior with the "drug deals" common in that location.

State v. Tapp, 284 Or App 583, 393 P3d 262 (2017). Officer lacked reasonable suspicion to extend traffic stop to investigate drug trafficking, and thus unlawfully extended stop, when he knew only that the defendant was driving with a suspended license on an interstate highway in a messy car with his mother driving behind him, that the defendant was nervous to talk to the officer, and that the defendant's mother appeared to deliberately weave her car when the officer started following them.

State v. Martinez, 275 Or App 645, 365 P3d 659 (2015). An officer lacked reasonable suspicion of drug possession by the defendant—one of four people in a car—based only on odor of green marijuana in car.

State v. Maciel, 254 Or App 530, 295 P3d 145 (2013). Officer lacked reasonable suspicion to extend a traffic stop to investigate drug crimes where he observed the following: (1) the vehicle had California license plates and was travelling northbound on I-5 at 4:00 a.m., (2) the vehicle was registered to a third-party, (3) both the driver and passenger had identical prepaid cellular phones, (4) a religious medallion was affixed to the rearview mirror, (5) there was a lack of visible luggage, and (6) the defendant, who was the passenger, offered inconsistent explanations about the ownership of the car. The court expressly refused to consider the medallion or lack of visible luggage on the ground that neither added to reasonable suspicion determination. *See* *State v. De La Rosa*, 228 Or App 666, 674 n 2, 208 P3d 1012 (2009) (declining to consider officer's observation of "Jesus Malverde" medallion, despite "detailed testimony" of the medallion's significance to drug dealers).

State v. Kingsmith, 256 Or App 762, 302 P3d 471 (2013). The defendant's mere presence in a car that officers believed they saw involved in a drug deal did not justify a stop of the defendant, because the officers were unable to identify which individual had been involved in the drug deal.

State v. Kentopp, 251 Or App 527, 284 P3d 564 (2012). Officer's extension of traffic stop to investigate drug crimes was not supported by reasonable suspicion; the defendant's furtive movement of leaning over while pulling vehicle to side of road, nervous demeanor, rotting teeth, conduct consistent with trying to flee, failure to have registration or proof of insurance for vehicle, and statement to officer that he was borrowing vehicle, did not support belief that he had drugs.

State v. Kolb, 251 Or App 303, 283 P3d 423 (2012). Without testimony explaining why a person who had used drugs would retain items that would constitute evidence of past drug possession, the officer's observations of the defendant's signs of drug intoxication did not support a reasonable suspicion that the defendant presently possessed methamphetamine.

State v. Bertsch, 251 Or App 128, 284 P3d 502 (2012). Officer lacked reasonable suspicion to extend a traffic stop based on his belief that the defendant possessed drugs. It was insufficient that the defendant had been in an apartment associated with drug activity, was accompanied by a person known to associate with drug dealers and users, and had a probationary history for a past drug crime, and the defendant had not engaged in any conduct suggesting that she possessed drugs.

State v. Rutledge, 243 Or App 603, 260 P3d 532 (2011). After a traffic stop, officer lacked reasonable suspicion to question passenger about the contents of her purse, despite fact that she had

just left a motel that police believed was involved in drug activity, and she acted nervous when the officer asked about her purse.

State v. Ayles, 220 Or App 606, 188 P3d 378 (2008), *aff'd*, 348 Or 622 (2010). The defendant was a passenger in a car that was stopped for a license-plate violation, but, upon contacting the driver, the stopping officer immediately realized that he was impaired by methamphetamine. While the officer asked the driver about whether she had any meth in the car, the defendant spoke up and tried to divert the conversation back to the license-plate violation. Although defendant had behaved oddly, the officer did not have reasonable suspicion of criminal activity on his part.

State v. Aguilar, 139 Or App 175, 912 P2d 379, *rev den*, 323 Or 265 (1996). The fact that the defendant was seen entering a car that was parked in front of a known drug house did not provide reasonable suspicion to believe that the defendant was engaged in a drug transaction.

d. DUII.

In most cases of DUII (or boating under the influence), the suspect's poor driving and physical condition are the primary factors supporting reasonable suspicion.

> **CAVEAT:** Remember that a field sobriety test is a search. An officer can lawfully conduct DUII field sobriety tests only if the officer receives voluntary consent, State v. Greenough, 142 Or App 506, 923 P2d 646 (1996), or has probable cause *and* either a search warrant *or* another applicable exception to the search warrant requirement (*e.g.,* exigent circumstances). State v. Nagel, 320 Or 24, 880 P2d 451 (1994). *See* additional discussion in Chapter III (Probable Cause), (DUII and Blood Draws) and in Chapter IV (Warrantless Searches), (Consent to Search – DUII and Field Sobriety Tests).

(1) Erratic or Suspect Driving: Reasonable Suspicion Present.

State v. Shupe, 276 Or App 496, 368 P3d 41, *rev den*, 360 Or 423 (2016). Trooper's observation of the defendant's in-lane weaving and crossing of fog line was sufficient for reasonable suspicion that the defendant was driving while intoxicated.

State v. Simpson, 245 Or App 152, 261 P3d 90 (2011). Informant's report that the driver of a yellow sports car, who appeared to be intoxicated, was involved in a traffic accident, with license plate provided, was sufficient to supply reasonable suspicion when the officer encountered the defendant, the vehicle was as described by informant and within a block of the reported accident scene, and nothing that the officer saw contradicted anything in the informant's report.

State v. Connell, 186 Or App 620, 64 P3d 579, *rev den*, 335 Or 504 (2003). Officer had reasonable suspicion to stop the defendant for DUII when, after he first observed the defendant speeding and cross over the center line, the officer saw the defendant park in parking lots or driveways of residences that were not the registered address for the defendant's car three separate times in the course of 15 minutes; the officer knew, from his training and experience, that drunk drivers often will use "stop and go" tactics to avoid the police. Moreover, even though the officer did not stop the defendant for committing traffic infractions, he could nevertheless rely on the traffic infractions to form a reasonable suspicion that the defendant was driving while under the influence.

State v. Kusaj, 174 Or App 575, 28 P3d 1182 (2001), *rev den*, 333 Or App 400 (2002). Officer had reasonable suspicion based upon an observation of a vehicle making a wide turn and weaving within its lane.

State v. Gilbertz, 173 Or App 90, 20 P3d 252, *rev den*, 332 Or 559 (2001). Officer had reasonable suspicion based upon observation of a vehicle weaving in its own lane five times.

State v. Busacker, 154 Or App 528, 962 P2d 723, *rev den*, 327 Or 620 (1998). Officers had reasonable suspicion to stop the defendant for boating under the influence (ORS 830.325) based on reports from two named and one unnamed informant of "inappropriate behavior by a boat maneuvering between a Navy vessel and the seawall."

State v. Whitman, 144 Or App 385, 927 P2d 132 (1996). When an officer saw a car parked outside a bar that had just closed, observed the driver attempt to avoid being seen by passing motorists, and saw the driver start to drive twice and stop because another vehicle came along, the officer formed an objectively reasonable suspicion that the driver was DUII.

State v. Susler, 127 Or App 45, 871 P2d 126 (1994). Crossing over the center line twice and weaving within the lane gave the officer reasonable suspicion to believe the driver was under the influence. *See also Fischer v. MVD*, 101 Or App 580, 792 P2d 445 (1990) (crossing over fog line twice); *State v. Wright*, 94 Or App 468, 765 P2d 1251 (1988), *rev den*, 307 Or 514 (1989) (vehicle "jerking" back and forth, as well as left to right); *State v. Perry*, 39 Or App 37, 591 P2d 379 (1979) (weaving within traffic lane).

State v. Hibler, 92 Or App 140, 757 P2d 864 (1988). Officer had reasonable suspicion to stop the defendant for DUII when the defendant ignored a green light for 15-30 seconds, sprayed gravel on the police car when proceeding through the intersection, and then accelerated and decelerated rapidly several times over a 10-block distance.

(2) Condition of Defendant – Reasonable Suspicion Present.

State v. Schmitz, 299 Or App 170, 448 P3d 699 (2019). Officer's stop of defendant was justified under the emergency-aid exception to the warrant requirement. The constitutional reasoning that allows law enforcement to enter a home without a warrant to provide emergency aid applies equally to law enforcement effectuating a stop for the same purpose. Officer reasonably suspected that defendant was having a medical issue when he stopped defendant.

State v. Rhodes, 315 Or 191, 843 P2d 927 (1992). Seeing the defendant at 2 a.m. asleep in a parked vehicle, slumped toward the passenger door, with the vehicle lights on, the motor running, and the door ajar, gave the officer reasonable suspicion to stop and investigate for DUII. *See State v. Bond*, 189 Or App 198, 74 P3d 1132 (2003), *rev den*, 336 Or 376 (2004) (officer had reasonable suspicion that defendant had been driving, even though the officer did not see the defendant drive and his truck's motor was not running, where the defendant, who had been resting behind the wheel of his truck in a parking lot between 12:30 a.m. and 1:15 a.m., with the courtesy lights on, admitted that he had driven to the parking lot from his sister's house). *But see State v. Martin*, 124 Or App 459, 863 P2d 1276 (1993) (when a driver is slumped over the steering wheel with the engine running and the lights on, reasonable suspicion supports a stop; but if the investigating officer's only subjective concern is the driver's welfare, the stop cannot be justified on the basis of reasonable suspicion).

State v. Braukman, 246 Or App 123, 265 P3d 28 (2011), *rev den*, 351 Or 675 (2012). Officer had reasonable suspicion of DUII where defendant had a flushed appearance, slow and lethargic movements, and was responding to questions in an unusually low voice. Defendant had also committed two traffic violations, continued eating a hamburger during the traffic stop, and was wearing dark sunglasses. That the defendant could have been flushed from the heat of the day and that the officer did not smell alcohol did not defeat a finding of reasonable suspicion of DUII.

State v. Cottrell, 215 Or App 276, 168 P3d 1200 (2007). Defendant's bloodshot and watery eyes and his admission to drinking, combined with his inattentive and messy eating, provided reasonable suspicion for DUII.

State v. Ziebart, 172 Or App 288, 16 P3d 1212, *rev den*, 332 Or 326 (2001). Officer observed a minivan parked by the roadside with a flat tire and stopped to help. There she encountered the defendant, dressed in motorcycle gear, apparently having stopped his motorcycle to help. The defendant's uneven gait, uncoordinated movements, and odor of alcoholic beverage provided reasonable suspicion that he was under the influence.

State v. Berg, 140 Or App 388, 914 P2d 1110 (1996). An odor of alcohol and bloodshot eyes were sufficient for reasonable suspicion. *But see* State v. Kimmel, 82 Or App 486, 728 P2d 894 (1986) (even coupled with a driver's inattentiveness to a pedestrian, a flushed face and watery eyes were not enough, without testimony explaining the significance of these physical symptoms).

State v. Liebrecht, 120 Or App 617, 853 P2d 1322, *rev den*, 317 Or 584 (1993). An odor of alcohol emanating from a car during a traffic stop, coupled with the driver's admission that he had drunk two or three beers, established reasonable suspicion to investigate for DUII.

State v. Nelson, 109 Or App 97, 817 P2d 1344 (1991), *rev den*, 312 Or 589 (1992). An officer saw the defendant come out of a bar, walk with difficulty, re-enter the bar after seeing the officer, and then drive slowly away. The officer had reasonable suspicion to stop defendant for DUII.

e. DWS – Reasonable Suspicion Present.

State v. Jones, 245 Or App 186, 263 P3d 344 (2011). Evidence that the defendant was parked in front of a bar and handed the officer an inmate identification card, rather than a driver's license, when asked for identification, provided reasonable suspicion that the defendant may have violated the law by driving with a suspended license.

State v. Panko, 101 Or App 6, 788 P2d 1026 (1990). A license-plate check showing the registered owner to be suspended, combined with the fact that the driver's appearance was similar to the description of the registered owner, provided reasonable suspicion to stop for DWS.

State v. Wright, 85 Or App 545, 737 P2d 646 (1987). A traffic stop is lawful if it is based on knowledge that the registered owner of the vehicle has a suspended driver's license, unless the driver's observable physical characteristics (*e.g.*, sex, age) put the officer on notice that the driver is not the vehicle's owner.

f. Prostitution Offenses.

(1) Reasonable Suspicion Present.

State v. Belt, 325 Or 6, 932 P2d 1177 (1997). A report by several young women that the defendant had accosted them and said, "I've got the money if you've got the time," and made other such comments, created a reasonable suspicion to stop the defendant to investigate a possible prostitution offense.

State v. Williams, 178 Or App 52, 35 P3d 1088 (2001). Officer who was experienced in prostitution enforcement was justified in stopping a vehicle on suspicion of prostitution activity after he saw a woman, who was sitting in a bus shelter commonly used by prostitutes, attempt to make eye contact with passing drivers, then enter a vehicle that pulled into a parking lot behind the shelter.

State v. Hammonds, 155 Or App 622, 964 P2d 1094 (1998). Based on the officer's experience as a vice officer, the time and location of the stop, the driver's nervousness, and the presence of pornographic magazines, it was reasonable for officer to suspect that an act of prostitution had taken place or that the car's occupants had taken steps to commit one.

City of Portland v. Spangler, 109 Or App 370, 819 P2d 754 (1991). An observation of a known prostitute making contact with passing cars, entering one car, and making gestures consistent with sexual contact was sufficient for reasonable suspicion.

(2) No Reasonable Suspicion.

State v. Meyers, 153 Or App 551, 958 P2d 187 (1998). The mere presence of a man and woman in a car parked in an area known for prostitution activity did not supply reasonable suspicion.

State v. Brown, 31 Or App 501, 570 P2d 1001 (1977). No reasonable suspicion to stop a pedestrian walking in an area known for its high incidence of prostitution.

g. Robbery.

(1) Reasonable Suspicion Present.

State v. Stanley, 325 Or 239, 935 P2d 1202 (1997). After responding to a report of two men who appeared to be preparing to rob a store, officers lawfully stopped and frisked the defendant and his companion, who were lurking suspiciously outside the store, appearing to be high on stimulants.

State v. Jacobus, 318 Or 234, 864 P2d 861 (1993). Officer had reasonable suspicion based on a report by a convenience store customer that occupants of the defendant's car had referred to the fact that "there was only one clerk in the store," coupled with the following observations by the officer: the occupants frantically stuffed something under the seat; two of the three occupants left the car after seeing the patrol car; and the third occupant hid something under coats.

State v. Worthington, 265 Or App 368, 335 P3d 348 (2014), *rev den*, 346 Or 837 (2015). Officer had reasonable suspicion that the defendant had been involved in armed robbery: although the defendant's clothing and body type did not precisely match description of robber, the defendant was located about 75 yards from the store 45 minutes after the robbery, he suddenly appeared from behind a parked van, his height matched the description of the robber, he appeared "extremely nervous," and he gave a "suspicious" story explaining his whereabouts.

State v. Langager, 156 Or App 385, 965 P2d 1037 (1998), *rev den*, 328 Or 275 (1999). The defendants' suspicious behavior in a liquor store, combined with an unknown informant's detailed tip, created a reasonable suspicion that the defendants had attempted to rob the liquor store.

(2) No Reasonable Suspicion.

State v. Khoshnaw, 234 Or App 24, 227 P3d 1188 (2010). At the time of the stop, officer lacked reasonable suspicion that the defendant intended to commit a future robbery of the convenience store, because any reasonable suspicion that the officer had based on the defendant's unusual movements dissipated when he entered the store, left minutes later carrying soda and chips, and walked more than a block away from the store.

h. Weapons Offenses.

(1) Reasonable Suspicion Present.

State v. Bradford, 290 Or App 889, 417 P3d 530 (2018). Officer lawfully stopped defendant based on reasonable suspicion that defendant had just discarded an illegally possessed firearm, where officer saw defendant, a passenger in car stopped for a traffic violation, get out of the car, run up a dark driveway, and then casually walk back down the driveway. Defendant was a known gang member who the officer knew had been shot several times in the past in connection with gang activities. Officer knew from his training and experience that gang members who have been shot in the past frequently carry guns for self-protection.

State v. Ehly, 317 Or 66, 854 P2d 421 (1993). Officers knew that the defendant recently had associated with someone who owned an automatic weapon, and they believed he was under the influence of methamphetamine. Thus, when he rummaged through a duffel bag, they reasonably suspected he was looking for a weapon.

State v. Lawton, 194 Or App 190, 94 P3d 154 (2004), *rev den*, 338 Or 16 (2005). The defendant's act of discarding what appeared to be a gun when police were chasing him from a drug-free zone would lead a reasonable person to believe that he possessed the gun unlawfully.

State v. Santacruz-Betancourt, 157 Or App 26, 969 P2d 1040 (1998), *rev den*, 328 Or 464 (1999). Officer received information from a named informant that an individual had shined a laser beam into a home, onto the foreheads of the residents. Because laser devices are used to sight weapons, the use of a laser in that manner provided reasonable suspicion for menacing.

State v. Rickard, 150 Or App 517, 947 P2d 215, *rev den*, 326 Or 234 (1997). The occupants of a truck stopped at a red light jumped out, pointed at another vehicle, and yelled, "He's got a gun, a gun, a gun." Those statements supported a reasonable suspicion that someone in the suspect vehicle had displayed a gun.

(2) No Reasonable Suspicion.

State v. Turner, 221 Or App 621, 191 P3d 697 (2008). Probable cause or reasonable suspicion of carrying a concealed weapon may exist if the officer observes an "unsuccessful attempt 'to prevent disclosure or recognition' of the weapon." But because there was no evidence that the defendant was attempting to hide the sword observed by the officer, the officer lacked reasonable suspicion to stop defendant for carrying a concealed weapon.

State ex rel Juv. Dept. v. Finch, 144 Or App 42, 925 P2d 913 (1996). School officials lacked reasonable suspicion to search a student's jacket for a weapon even though his jacket felt heavy and he had been in a fight.

State v. Johnson, 96 Or App 166, 772 P2d 426 (1989). Once the officer discovered that the defendant carried his knife openly at his waist, reasonable suspicion of CCW dissipated.

State v. Messer, 71 Or App 506, 692 P2d 713 (1984). The mere presence of the defendant and a companion in a car in a shopping center parking lot at 2:00 a.m., with an unsheathed hunting knife on the seat between them, was insufficient to support reasonable suspicion of criminal activity.

3. Probation Violations.

Although a probation violation is not a crime, a police officer may stop and investigate a possible probation violation if the officer has reasonable suspicion to believe that the person has violated a condition of probation. *State v. Hiner*, 240 Or App 175, 246 P3d 35 (2010). That authority derives from ORS 137.545(2), which allows any parole and probation officer, police officer or other officer with power of arrest to arrest a probationer without a warrant for a probation violation.

In *Hiner*, an officer had reasonable suspicion to stop defendant for a probation violation based on facts that the defendant was on probation, was prohibited from consuming alcohol, and had consumed alcohol. The defendant also had made "guarded" movements and had falsely denied being on probation. The fact that the officer later learned that he in fact did not have a condition that prohibited alcohol consumption did not mean that he lacked reasonable suspicion at the time of the stop. *Hiner*, 240 Or App at 181. *Compare State v. Jones*, 245 Or App 186, 263 P3d 344 (2011) (without information about the source of his belief, officer's statement that parolees often are prohibited from being near establishments that sell alcohol did not supply reasonable suspicion).

In contrast, there is no express or implied statutory authority for an officer to investigate a PPS violation. *State v. Miller*, 339 Or App 746, 568 P3d 983 (2025). Thus, in *Miller*, the officer unlawfully expanded the scope of a traffic stop by investigating a PPS violation.

E. WITNESSES TO CRIMES.

Oregon Law.

Article I, section 9, allows officers to temporarily "seize" a victim or material witness to a possible crime under certain, limited situations. In *State v. Fair*, 353 Or 588, 302 P3d 417 (2013), two police officers were dispatched to the defendant's house based on an interrupted 911 call that suggested a domestic assault was in progress; no one answered when the 911 operator called back. The officers circled the house, and one of the officers saw through a sliding glass door "an angry-looking man" inside, who did not comply with officers' command to come out. The officers then knocked on the front door and the defendant and the man answered the door together. The officers observed a "large swollen area" over her eye, but no injuries to the man. An officer "ordered" both of them to come out onto the porch, and they complied. The officers separated the two and told defendant to stay on the porch and not to say anything. Eventually, an officer arrested the man, while another officer interviewed the defendant. She admitted calling 911 but said it was an accident. She gave her name to the officer, but there was no record of that name. In the ensuing conversation on that topic, the defendant admitted that she had been arrested for PCS. As the officer interviewed her about the dispute, he "observed an orange plastic syringe cap fall out of defendant's pant leg." He asked her about drug use, in response to which she made admissions and eventually consented to a search of her person, which uncovered a pipe with residue. She was charged with PCS, and she moved to suppress contending that the officer had unlawfully seized her and that her admissions and consent to search were the products of that illegality.

The Oregon Supreme Court concluded that the officers had seized the defendant, but only because of her interest in personal autonomy within her home. Nevertheless, the court held that officers "constitutionally may, in appropriate circumstances, stop and temporarily detain for questioning a person whom they reasonably believe is a potential material witness to a crime."

A stop and temporary on-the-scene detention of a likely material witness is constitutional if:

(1) the officer reasonably believes that an offense involving danger of forcible injury to a person recently has been committed nearby;

(2) the officer reasonably believes that the person has knowledge that may aid the investigation of the suspected crime; and

(3) the detention is reasonably necessary to obtain or verify the identity of the person, or to obtain an account of the crime.

See State v. Cage, 324 Or App 430, 526 P3d 785 (2023) (concluding that officer's stop of defendant was not justified on the basis that the officer believed that defendant was a material witness "because the officers did not have an objectively reasonable basis to believe that defendant was a material witness to a crime" based only on his proximity to the scene of the crime); State v. Middleton, 302 Or App 339, 459 P3d 918 (2020) (holding that officer did not have an objectively reasonable basis to believe that the defendant was a material witness to a DUII based on the fact that the defendant was driving near the area of a car accident; "[t]he fact that anyone driving in the area might theoretically have been in the area earlier and witnessed the suspected crime is not sufficiently specific or individualized to trigger the material-witness exception").

Federal Law.

While the focus under Oregon law is generally whether a seizure of a potential witness has occurred, under federal law, the focus will generally be whether the seizure was reasonable. The primary case is Illinois v. Lidster, 540 US 419, 124 S Ct 885 (2004). In Lidster, police set up a roadblock near the location of a fatal hit-and-run. An officer would stop each car for about 10 to 15 seconds, ask the occupants whether they had seen anything regarding the hit-and-run, and hand each driver a flyer seeking information about the accident. Under Article I, section 9, that would not constitute a seizure. *See* Gerrish and Holmes. In Lidster, there was no dispute, however, that this constituted a seizure for purposes of the Fourth Amendment. Rather, the focus was on whether the seizure was reasonable in light of numerous factors: the gravity of the relevant public concern (investigating a crime that had resulted in death); whether the stop advanced the public concern to a significant degree; and the degree of intrusion or interference with liberty. Balancing all of those considerations, the Supreme Court concluded that the stop was reasonable: the public interest was grave, the stop was appropriately tailored to reach those individuals most likely to have information, and there was only a minimal interference with each driver's liberty. Compare with City of Indianapolis v. Edmond, 531 US 32, 121 S Ct 447, 148 L Ed 2d 333 (2000) (roadblock unconstitutional where primary purpose was to detect criminal activity without individualized suspicion).

F. TRAFFIC VIOLATIONS — PROBABLE CAUSE REQUIRED BY STATUTE.

1. General Principles.

To stop an individual for a traffic crime, such as DUII, requires only reasonable suspicion. *See* earlier discussion in this chapter.

In Oregon, the requirement that an officer have probable cause to believe that a driver committed a traffic violation is a statutory requirement, the violation of which is not subject to suppression. *See* Section A.1. of this chapter. Whether Article I, section 9, also requires probable cause (as opposed to reasonable suspicion) is a question that the Supreme Court has never decided (as a holding). State v. Watson, 353 Or 768, 774 n 7, 305 P3d 94 (2013); State v. Matthews, 320 Or 398, 402 n 2, 884 P2d 1224 (1994) (expressly declining to address constitutional standard). But in State v.

Suppah, 358 Or 565, 568 n 2, 369 P3d 1108 (2016), the court—in noting the state's concession in the trial court that the traffic stop was unlawful because it could not show any justification for the stop (the detaining officer could not remember the specific traffic violation that led him to stop the defendant)—said: "Constitutionally, an officer needs reasonable suspicion to stop a defendant. *State v. Musser*, 356 Or 148, 158, 335 P3d 814 (2014) (reasonable suspicion required for investigatory stop). Statutorily, an officer must have 'probable cause to believe' that a traffic violation has occurred when the officer stops a driver 'based on a description of the vehicle or other information received from [another] police officer who observed a traffic violation.' ORS 810.410(2)(b)." Thus, the Supreme Court appears to have concluded, albeit in *dictum*, that a traffic stop is constitutionally valid if supported by reasonable suspicion of a traffic violation. Nevertheless, the Court of Appeals continues to apply the probable cause standard for purposes of Article I, section 9. *See State v. Jones*, 286 Or App 562, 566 n 1, 401 P3d 562 (2017) ("The state challenges our prior holdings (1) that an officer must have probable cause to initiate a traffic stop; and (2) that the facts perceived by the officer must, in fact, constitute a violation of the law. On the latter point, the state argues that we should abandon our rule of law in favor of the Fourth Amendment rule adopted by the U.S. Supreme Court in *Heien v. North Carolina*, 574 US 54, 135 S Ct 530, 190 L Ed 2d 475 (2014) (holding that, under Fourth Amendment, reasonable suspicion for a traffic stop can rest on a reasonable mistake of law). We decline the state's invitation to revisit our prior holdings.").

Citing to *Matthews*, the Court of Appeals consistently has applied a probable cause standard to traffic stops in deciding the constitutionality of the stop under Article I, section 9. *See, e.g.*, *State v. Stookey*, 255 Or App 489, 297 P3d 548 (2013) (traffic stop unconstitutional because officer lacked probable cause); *State v. Boatright*, 222 Or App 406, 410, 193 P3d 78, *rev den*, 345 Or 503, 200 P3d 147 (2008) (setting forth standard). *See* further discussion of this issue in Chapter III, (The Objective and Subjective Components of Probable Cause).

"Although the state has the burden of identifying the specific act that constitutes the violation that the officer has probable cause to believe was committed, the fact that the state initially identifies the wrong statute applicable to the violation is immaterial." *State v. Matthews*, 320 Or at 404 fn 7. *See also State v. Jackson*, 149 Or App 662, 666, 945 P2d 544 (1997) ("An officer's inability to identify the specific law violated or his mistaken identification of the wrong statute violated does not make a stop unlawful."); *State v. Baer*, 97 Or App 467, 776 P2d 876 (1989) (officer had valid basis to stop defendant's vehicle for failure to display an out-of-state license plate on the front of the vehicle, when the law of South Dakota in fact required a front license plate, even though the officer did not know South Dakota's law on the subject). Further, an officer's mistaken belief that he had seen a traffic infraction does not necessarily mean that the officer lacked probable cause to stop the vehicle. *Compare State v. Gordon*, 273 Or App 495, 359 P3d 499 (2015), *rev den*, 358 Or 529 (2016), with *State v. Jones*, 286 Or App 562, 566 n 1, 401 P3d 271 (2017) (an officer must have probable cause to initiate a traffic stop, and the facts perceived by the officer must, in fact, constitute a violation of the law). And an officer may stop a driver for a violation even if the officer intends only to warn, rather than to issue a citation to, the driver. *Efimoff v. DMV*, 204 Or App 648, 131 P3d 814 (2006).

To justify a traffic violation stop, the state need not prove that the driver in fact committed the violation. *Matthews*, 320 Or at 403-04. Nor does the fact that the driver may have a defense to the violation defeat probable cause. *State v. Isley*, 182 Or App 186, 48 P3d 179 (2002) (rejecting defendant's claim that the officer caused him to commit the traffic violation by blinding him with overhead "takedown" lights; although possibly relevant as a defense to the violation, this claim could not undermine the subjective and objective components of probable cause – "It is irrelevant whether the officer's belief is actually correct."); *State v. Chilson*, 219 Or App 136, 182 P3d 241, *rev den*, 344 Or 671 (2008) (even if there is a defense of "impossibility" to the failure to signal within 100 feet, an officer who stops for that infraction does not need to rule out the defense to have probable cause).

NOTE: Although an officer's inability to identify the specific law violated, or an officer's mistaken identification of the wrong statute violated, does not make a stop unlawful, probable cause requires that the facts, as the officer perceives them, to *actually satisfy* the elements of a traffic infraction. *See* State v. Elmore, 241 Or App 419, 425, 250 P3d 439 (2011) (although deputy believed that crack in car windshield provided probable cause to believe that defendant was driving with obstructed windows in violation of ORS 815.220, that belief was objectively unreasonable because statute applies only if window is obstructed by a material "upon" the windshield, and crack is not "upon" the windshield; record did not support other possible theories of probable cause for different violations).

A police officer may stop a vehicle based on information from another officer that the driver committed a traffic violation in the other officer's presence. Under the collective knowledge doctrine, a traffic stop by an officer who does not personally possess probable cause is nonetheless valid if the officer is reasonably relying on a request or order from another officer and probable cause does, in fact, exist; it is not necessary that the officer requesting the stop fully communicate the objective basis of probable cause or that the officer making the stop independently form a subjective belief. State v. Soldahl, 331 Or 420, 15 P3d 564 (2000) . *See* State v. Barber, 279 Or App 84, 91 n 6, 379 P3d 651 (2016) (explaining that collective knowledge doctrine is no longer understood to allow for the following conclusion: that a criminal stop is justified if all the facts known to all law enforcement personnel, considered as a whole, amount to reasonable suspicion; overruling prior decisions to the extent that they applied that understanding of collective knowledge doctrine).

See also discussion of collective police knowledge in the probable cause determination in Chapter III (Probable Cause), (Collective Knowledge of Police).

Fourth Amendment.

A traffic stop is valid under the Fourth Amendment if it is supported by reasonable suspicion. *See* Kansas v. Glover, 589 US 376, 140 S Ct 1183, 206 L Ed 2d 412 (2020); Brendlin v. California, 551 US 249, 127 S Ct 2400, 168 L Ed 2d 132 (2007); *see also* United States v. Twilley, 222 F3d 1092 (9th Cir 2000) (officer lacked reasonable suspicion to make traffic stop based on his mistaken belief that law required vehicle to display two license plates, as opposed to one).

2. Specific Violations.

State v. Yocom, 334 Or App 34, 555 P3d 322 (2024). Where officer stopped defendant for displaying expired tags, ORS 803.560(1)(b), during period when moratorium was in place barring citations for that offense, trial court correctly denied defendant's motion to suppress, because ORS 810.410(3)(b) authorized the deputy to stop defendant to investigate the offense even though he could not cite her for it.

State v. Cowan, 330 Or App 149, 542 P3d 905 (2023). Officer's observation of defendant driving with a license plate that was so worn that it was illegible provided probable cause to stop defendant for driving a vehicle with an altered/obscured license plate, ORS 803.550. Wear on the plate that made it illegible was an "alteration," which includes "any change of color, configuration, numbers, letters."

State v. Little, 326 Or App 788, 533 P3d 1107 (2023). Officer did not have probable cause to stop defendant for failing to stay within his lane, in violation of ORS 811.370(1)(a), based on his observation that defendant's vehicle, while turning, crossed over the fog line by six inches for 1½ seconds. A "momentary and minor lane deviation is not a violation of ORS 811.370."

State v. Redding, 325 Or App 115, 528 P3d 314 (2023). Defendant did not "change lanes" for purposes of ORS 811.375(1)(b), which requires a signal when a driver "changes lanes," when the highway that she was driving on widened and divided from one lane into two lanes and defendant moved to the right and then into the righthand lane.

State v. Sullivan, 322 Or App 563, 520 P3d 911 (2022), *rev den*, 370 Or 827 (2023). Where a deputy saw that the plate on a car was not properly registered, deputy had probable cause to stop the driver for violating ORS 803.300, which requires a car owner to register their car. "Without facts indicating otherwise, it is objectively reasonable to believe that the driver of a vehicle is the owner."

State v. Hughes, 311 Or App 123, 488 P3d 795 (2021). Officer lacked probable cause to stop defendant, who was driving dealer vehicle, for failure to display registration plates.

State v. Lawson, 300 Or App 292, 454 P3d 20 (2019). Traffic stop not supported by probable cause for violation of rear-view mirror statute.

State v. Posey, 303 Or App 246, 463 P3d 551 (2020). Statutory stop-sign provision requires vehicles to cease movement before crossing the stop line. State trooper had probable cause to believe defendant had violated that provision.

State v. Carson, 287 Or App 631, 404 P3d 1017 (2017). Because defendant's car was completely stopped in the right lane of a two-lane one-way road when an officer pulled behind him, the officer had probable cause to stop defendant for impeding traffic in violation of ORS 811.130.

State v. Murphy, 273 Or App 566, 359 P3d 507 (2015). Driving 32 mph at night in a 35-mph zone did not provide probable cause to believe driver was violating ORS 811.315 (requiring drivers driving "less than the normal speed" to move into the right-hand lane).

State v. Matthews, 320 Or 398, 884 P2d 1224 (1994). Where the headlights of the defendant's vehicle shined into the eyes of the officer, constituting either a failure-to-dim violation or evidence of a violation of ORS 816.050(7) (driving with maladjusted headlights), the officer had probable cause to stop the defendant, even though: (a) he was not sure why the defendant's headlights blinded him, (b) he was unable "to identify the specific law that the defendant's headlights violated," and (c) he never inspected the headlights to see if they, in fact, were set properly.

State v. Stookey, 255 Or App 489, 297 P3d 548 (2013). A horizontal crack that passed through the driver's line-of-sight was insufficient, without more, to establish that the single crack exposed someone to a danger of *probable* harm or loss by interfering with the defendant's vision as required by ORS 815.020 (operating an unsafe vehicle).

State v. Pettersen, 256 Or App 385, 300 P3d 277 (2013). Probable cause to stop the defendant for expired tags dissipated when, after approaching the vehicle, the officer noticed the tags were facially valid (the tags themselves were not visible before the stop, so the officer had obtained information from DMV regarding the car's registration status), and the officer testified that he knew DMV is frequently delayed in recordkeeping.

State v. Wentworth, 252 Or App 129, 284 P3d 1250 (2012). Briefly crossing over a fog line can constitute a violation of ORS 811.370(1)(a) (failure to drive within a lane); thus, the officer who observed that event had probable cause to stop defendant for that violation.

State v. Elmore, 241 Or App 419, 425, 250 P3d 439 (2011). Deputy's belief that crack in car windshield provided probable cause to believe that defendant was driving with obstructed windows in violation of ORS 815.220 was objectively unreasonable because statute applies only if window is obstructed by a material "upon" the windshield, and crack is not "upon" the windshield.

State v. Moreno-Rosales, 234 Or App 89, 227 P3d 1219 (2010). No probable cause when officer learns that the vehicle's insurance had expired, where vehicle had been sold to a new owner.

State v. Nguyen, 223 Or App 286, 196 P3d 40 (2008). A driver who put his registration plate behind the front windshield of his vehicle failed to display the plate on "the front of the vehicle."

State v. McBroom, 179 Or App 120, 39 P3d 226 (2002). The offense of failure to drive within a lane is committed even when a person drives on, but does not cross over, the center line that divides a roadway. "[T]he legislature did not intend to permit opposing motorists to vie for control of the center dividing line." *See also State v. Vanlom*, 232 Or App 492, 222 P3d 49 (2009).

State v. Bourget-Goddard, 164 Or App 573, 993 P2d 814, *rev den*, 330 Or 331 (2000). Officers had probable cause to stop the defendant for failure to wear a seatbelt based on their observation of the defendant's seatbelt harness hanging straight down, apparently unused; the officers were not required to establish that none of the statutory exemptions to the seat belt requirement applied. The court distinguishes *State v. Rivera*, 121 Or App 246, 855 P2d 188 (1993), in which the officer knew that seatbelts were only "optional" in the 1966 truck that defendant was driving.

State v. Arthur, 158 Or App 623, 976 P2d 1146, *rev den*, 328 Or 666 (1999). ORS 811.335(1)(b) requires motorists, including those turning at stop signs, to signal the turn continuously for the last 100 feet before making a turn. Here, because the officer saw the defendant signal only for the last 10 feet before stopping and turning, the officer had probable cause to stop for an unlawful or unsignaled turn.

State v. Gonzalez, 150 Or App 220, 945 P2d 636 (1997). Defendant's act of swerving through two lanes of traffic, almost hitting another car, supplied probable cause for careless driving.

State v. Mealer, 129 Or App 456, 879 P2d 230*, rev den*, 320 Or 272 (1994). An officer lawfully stopped the defendant for driving on the wrong side of the road in violation of ORS 811.295, even though there was no oncoming traffic.

State v. Bea, 318 Or 220, 864 P2d 854 (1993). The statutory requirement that a driver signal a turn applies whether the turn is mandatory or optional; a stop for failure to signal a turn was valid where the driver failed to signal a mandatory turn at an L-shaped intersection.

3. Jurisdiction to Issue Citation.

ORS 810.410(2) provides that, when otherwise authorized to issue a citation for a traffic violation, a police officer may issue the citation "at any place within or outside the jurisdictional authority of the governmental unit by which the officer is authorized to act * * *." However, this authorization permits an officer to issue a traffic violation citation to a driver who crosses into another state only if the other state authorizes the officer's entry for that purpose. *State v. Meyer*, 183 Or App 536, 53 P3d 940 (2002) (officer who witnessed violation on Interstate Bridge not authorized to issue citation in Washington, where he did not initiate stop until defendant had reached exit on Washington side; Washington law permitted entry only by an officer pursuing driver suspected of certain crimes); *State v. Keller*, 361 Or 566, 396 P3d 917 (2017) (Washington state trooper's stop of defendant after

defendant had crossed state line into Oregon constituted a state action for purposes of Article I, section 9; and stop, while without statutory authority, did not violate Article I, section 9).

G. DURATION AND SCOPE OF A CRIMINAL OR TRAFFIC STOP OF A PERSON

This section addresses the limitations on what an officer can do during a criminal or traffic stop of a person. Seizures of a person's *property* are generally not authorized, except to the extent that they are necessarily part of the stop of the person, under the Oregon Constitution unless the seizure is authorized by a warrant or a warrant exception. Seizures of *property* are addressed in Chapter IV (Warrantless Searches).

1. Statutory and constitutional overview

As explained below, both Oregon statutes and state and federal constitutional provisions place limitations on the length of a stop and what an officer can do during a stop. Limitations on *length* are more straightforward than the limitations on the conduct that an officer can engage in during a stop, which is generally described as the permissible *scope* of a stop.

a. Limits on Duration of a Stop

ORS 131.615(2) limits detention and inquiry during a criminal investigative stop to [1] the "vicinity of the stop" and [2] a period that is "no longer than a reasonable time." ORS 131.615(3) provides that the inquiry "shall be considered reasonable" if it is limited to: (1) the immediate circumstances that aroused the officer's suspicions; (2) other circumstances arising during the course of the detention and inquiry that give rise to a reasonable suspicion of criminal activity; and (3) ensuring the safety of the officer, the person stopped or other persons present, including an inquiry regarding the presence of weapons. ORS 810.410 governs traffic stops: it generally permits a police officer to investigate only the traffic violation that formed the basis for the stop.

Despite those statutory limits, suppression questions will be resolved based on constitutional standards as a result of ORS 136.432 (barring suppression based solely on a statutory violation unless statute provides for an exclusionary remedy). The constitutional standard for the *length* of a detention is governed by an overall "reasonableness" standard, which will depend on the specific facts of the case. *See, e.g.*, State v. Crescencio-Paz, 196 Or App 655, 103 P3d 666 (2004), *rev den*, 339 Or 230 (2005) (detention for 10 minutes while identification witness arrived was permissible); State v. Wolfe, 93 Or App 401, 763 P2d 154 (1988), *rev den*, 307 Or 303 (1989) (detention for 27 minutes to determine identity, question suspects about possible burglaries, and write brief report was proper). Generally speaking, an officer has no authority to continue to detain a stopped person after the investigation is complete unless, during the course of the stop, the officer develops independent grounds to detain the defendant longer.

The scope of an officer's questioning and other investigative activity during a stop will be subject to *constitutional* limitations, the frameworks for which are described in the next section of this chapter.

b. Limits on the Scope of Inquiries During a Stop.

This subsection describes the general limitations placed by the Oregon and federal constitutions on an officer's conduct during a traffic or criminal stop. Different categories of officer conduct are addressed in more detail in the subsections that follow.

Oregon Constitution.

The Oregon Constitution places both durational limitations and subject-matter limitations on an officer's ability to engage in investigative activity during a stop.

In *State v. Arreola-Botello*, 365 Or 695, 451 P3d 939 (2019), the Oregon Supreme Court held that, during a traffic stop, an officer can engage in "investigative activity" only if it is "reasonably related" to the reason for the stop and carrying out the investigation for which the stop was made, unless the officer develops an "independent constitutional justification" that would justify a stop on another basis. Thus, the court concluded, the officer's inquiries in that case—a question about the presence of drugs, weapons, or other illegal items in the stopped car and a request for consent to search the car—violated the state constitution because neither inquiry was reasonably related to processing the traffic stop and neither was supported by some justification independent of the probable cause for the traffic stop.

In *Arreola-Botello*, the Oregon Supreme Court rejected the Court of Appeals' longstanding "unavoidable lull" rule, under which police could lawfully make unrelated inquiries during a criminal or traffic stop, as long as they did not extend the *duration* of the stop: unrelated inquiries were permissible if they were made during an "unavoidable lull" in the investigation, such as while awaiting the results of a records check," but the officer was not entitled to make inquiries in lieu of proceeding to the "next step in processing the infraction, such as writing or issuing a citation." *State v. Rodgers*, 219 Or App 366, 372, 182 P3d 209 (2008), *aff'd sub nom*, *State v. Rodgers/Kirkeby*, 347 Or 610, 227 P3d 695 (2010).

Although *Arreola-Botello* dealt with the scope of an officer's investigative activity during a *traffic* stop, the general requirement that any *questioning* be "reasonably related" to the purposes of the stop or the investigation of the law violation applies to criminal stops, as well as traffic stops. In *State v. Pichardo*, 360 Or 754, 388 P3d 320 (2017), the Supreme Court held that, although an investigation to determine whether criminal activity has occurred or is occurring may involve "a broader range of questions than an investigation to determine whether a defendant has committed a traffic violation," the state must be able to point to a "reasonable, circumstance-specific" relationship between the inquiry and carrying out the criminal investigation, even though the circumstance-specific relationship need not rise to the level of reasonable suspicion of other criminal activity. *Pichardo*, 360 Or at 759, *quoting* *State v. Jimenez*, 357 Or 417, 429, 353 P3d 1227 (2015).

Both before and after *Arreola-Botello,* questions designed to carry out a stop *safely* are "reasonably related" to the stop if the circumstances reasonably suggest to the officer that such a question is warranted, but not as a matter of routine. A question about the possible presence of weapons is "reasonably related" only if the officer has a "reasonable, circumstance-specific reason" to be concerned about the safety of the officer or the public. *State v. Jimenez*, 357 Or 417, 353 P3d 1227 (2015); *State v. Miller*, 363 Or 374, 422 P3d 240, *adh'd to as modified on recons*, 363 Or 742 (2018). A court must consider not only the totality of factual circumstances that existed when the officer acted, but also the officer's articulation of the danger that the officer perceived and the reason for the officer's inquiry. In *Jimenez*, the trooper testified that he asked about weapons only as a matter of routine, and thus the state failed to prove that the inquiry was reasonably related to his traffic investigation and reasonably necessary to effectuate it.

In *Miller*, the court rejected the notion that a safety inquiry is justified only if the defendant's *behavior,* as opposed to the circumstances as a whole, suggests a safety concern. In that case, the officer developed reasonable suspicion of DUII after contacting defendant in his parked car, and asked defendant about weapons immediately prior to administering FSTs. At the hearing on defendant's motion to suppress, the officer explained that he was concerned for his safety because there is "absolutely nothing safe" about administering FSTs "on the side of the road at 12:30 in the

morning." The officer further testified that he was concerned that defendant might be carrying a gun and that it is "police work 101" that an officer not allow a DUII suspect "to have a handgun on his person" during FSTs. The Supreme Court concluded that the officer's circumstance-specific perception of danger was reasonable, thus warranting the pre-FST inquiry about weapons.

Those cases authorize only an *inquiry* for safety reasons, and do not authorize a seizure or search. *See* State v. Davenport, 272 Or App 725, 730 n 5, 357 P3d 514, *adh'd to as modified on recons,* 275 Or App 20 (2015), *rev den*, 359 Or 525 (2016).

Fourth Amendment.

A *Terry* stop under the Fourth Amendment is limited to *brief* questioning to establish the identity of the stopped person and to dispel the officer's reasonable suspicion of imminent criminal activity. *Terry v. Ohio*, 392 US 1, 22-23, 30, 88 S Ct 1868, 20 L Ed 2d 889 (1968). To qualify as reasonable seizures under the Fourth Amendment, *Terry* detentions must be "limited in [both] scope and duration." *Florida v. Royer*, 460 US 491, 500, 103 S Ct 1319, 75 L Ed 2d 229 (1983). Under *Terry*'s duration prong, a stop must "last no longer than is necessary to effectuate the purpose of the stop." *Royer*, 460 US at 500. Under its scope prong, "the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time." *Id*.; *see also United States v. Sharpe*, 470 US 675, 682, 105 S Ct 1568, 84 L Ed 2d 605 (1985) (stop must be "reasonably related in scope to the circumstances which justified the interference in the first place").

Under the Fourth Amendment, officers may ask questions that are unrelated to the basis for the stop, provided that those inquiries do not extend the duration of the stop beyond the time that would otherwise reasonably be required to complete the investigation. *See Rodriguez v. United States*, 575 US 348, 135 S Ct 1609, 1614, 191 L Ed 2d 492 (2015); *Arizona v. Johnson*, 555 US 323, 333, 129 S Ct 781, 172 L Ed 2d 694 (2009); *Muehler v. Mena*, 544 US 93, 125 S Ct 1465, 161 L Ed 2d 299 (2005); *United States v. Campbell*, 912 F3d 1340 (11th Cir 2019) (accurately and helpfully describing and applying the *Rodriguez* rule for investigatory stops, including traffic stops).

Questioning or other investigative activities unrelated to the reason for the stop, even without independent reasonable suspicion, will not implicate the federal constitution unless the questioning or activities have the effect of detaining the defendant beyond the time that would otherwise reasonably be required to complete the traffic stop. *Illinois v. Caballes*, 543 US 405, 125 S Ct 834, 160 L Ed 2d 842 (2005) ("A seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission"; approving of the use of a marijuana-sniffing dog during an otherwise lawful traffic stop for an unrelated infraction because the use of the dog did not extend the duration of the stop).

The United States Supreme Court held that an officer's stop of a vehicle to investigate the driver for an offense constitutes a seizure of other occupants for purposes of the Fourth Amendment. *Brendlin v. California*, 551 US 249, 127 S Ct 2400, 168 L Ed 2d 132 (2007). Because the test focuses on what a reasonable person would believe, the court held that it is immaterial that the officer intends to investigate only the driver and not the occupants; rather, a reasonable person would understand the officer to be exercising control such that none of the occupants is free to leave. *Brendlin*, 127 S Ct at 2407-09.

But note that in *Brendlin* the initial stop was unlawful because it was conducted without any lawful justification. Although *Brendlin* holds that a passenger may challenge the lawfulness of the initial stop, it does not purport to limit the scope of *questioning* of passengers during a lawful traffic

stop. *See* Maryland v. Wilson, 519 US 408, 117 S Ct 882, 137 L Ed 41 (1997) (during a *lawful* stop of the driver, an officer may ask a passenger to exit car without violating the Fourth Amendment).

2. Investigative Activity Reasonably Related to Stop

a. Approaching the vehicle

It should be uncontroversial that an officer can approach a vehicle and take steps to communicate with the stopped person during a stop. Here are some pre-*Arreola-Botello* cases addressing those investigative steps.

"[A]n officer who has lawfully stopped a vehicle may approach it from either side and need not justify that action in terms of officer safety or any other reason." State v. Kemp/Haworth, 112 Or App 522, 525, 831 P2d 37, *rev den*, 313 Or 627 (1992). *See also* State v. Jackson, 296 Or 430, 677 P2d 21 (1984) (police did not exceed permissible scope of stop by circling van and looking inside passenger window).

Similarly, an officer's request, during the course of a lawful traffic stop, that a driver roll down his car window is not an improper expansion of the initial stop.

> "We have no difficulty concluding that [the officer's] request to open the window was reasonably related to identification and issuance of the citation, at least. We do not read ORS 810.410 or [State v. Dominguez-Martinez, 321 Or 206, 895 P2d 306 (1995)] to suggest that a lone police officer approaching a traffic offender at 2:30 in the morning must conduct her inquiries through a two-inch crack in a car window."

Brown v. MVD, 157 Or App 167, 174, 967 P2d 919 (1998).

Fully opening a partially opened car door to turn off the engine and remove car keys is reasonable and within the scope of a DUII stop. State v. Rhodes, 315 Or 191, 843 P2d 927 (1992). But the court held in State v. Hendricks, 151 Or App 271, 948 P2d 740 (1997), that an officer conducted an unlawful search when he stuck his head through the open window of the defendant's truck to deliver a traffic citation. The officer did not reasonably suspect that the defendant had engaged in any criminal activity before the intrusion into the interior of the car.

b. Request for ID; Registration; Proof of Insurance.

An officer's request, during a **criminal stop**, to see a license, registration, and proof of insurance when those documents are reasonably related to the investigation at issue. State v. Black, 146 Or App 1, 932 P2d 554, *rev den*, 325 Or 247 (1997) (driver's license, registration, and proof of insurance were a logical part of "the general investigation into identification of defendant and ownership of the van thought to be involved in the crime" of illegal dumping). *See also* Florida v. Royer, 460 US 491, 501, 103 S Ct 1319, 75 L Ed 2d 229 (1983) ("Asking for and examining [stopped person's airline] ticket and his driver's license were no doubt permissible."); *but see* State v. Aguirre-Lopez, 291 Or App 78, 419 P3d 751 (2018) (officer unlawfully extended traffic stop by asking defendant about the car's ownership; questions were not "reasonably related" to the traffic stop, even though officer sought to ensure that defendant had legal authority to drive away).

Likewise, a request for a driver's license and vehicle registration will be reasonably related to a **traffic stop**. State v. Bea, 318 Or 220, 864 P2d 854 (1993) (driver's license); Brown v. MVD, 157 Or App 167, 967 P2d 919 (1998); *but see* State v. Dow, 116 Or App 542, 842 P2d 430 (1992) (officer lacked authority to take driver's license from *driver* and run status check on it where officer stopped

car solely based on reasonable suspicion that *passenger*, not driver, had committed the violation of failure to register vehicle).

c. Warrants Check Can be Reasonably Related to Stop.

Although for years Oregon appellate courts have appeared to at least assume, if not hold, that a records check, including a warrants check, is *always* permissible reasonably related to a criminal or traffic investigative stop, as long as it does not unreasonably extend the duration of the stop—*see* State v. Leino, 248 Or App 121, 127, 273 P3d 228, *rev den*, 352 Or 76 (2012) (contacting dispatch with defendant's identifying information for "warrant check" at same time as "records check" to identify the person and issue a citation was permissible where both were done simultaneously)—the Court of Appeals examined that question after Arreola-Botello in State v. Civil, 328 Or App 662, 539 P3d 317 (2023). In Civil, the court expressly stated that it was only addressing "warrants checks," because no evidence was obtained in that case from a mere check of DMV records. *Id.* at 670-71.

In Civil, the court rejected the state's argument that a routine "warrants check" is permissible under Art I, § 9, in all traffic stops, stating: "No matter how compelling the practical arguments for routine warrants checks during traffic stops may be, we understand the Supreme Court [in *Arreola-Botello*] to have largely rejected *per se* rules for traffic stops. … Accordingly, we proceed to an individualized inquiry as to whether the warrants check in this case was reasonably related to the traffic stop of defendant." *Id.* at 674. To show that an officer's action is reasonably related to a traffic stop and reasonably necessary to effectuate it, the state must present evidence that (1) the officer perceived a circumstance-specific danger and decided that the action was necessary to address that danger; and (2) the officer's perception and decision were objectively reasonable. *Id.* at 675.

Based on the record in Civil, the court held that the officer's testimony sufficiently established that the "warrants check" was reasonably related to ensuring the officer's safety during the stop. The officer had testified that he was alone, at night, in a dimly lit area, in close contact with someone he knew nothing about, and "it is objectively reasonable for an officer under those circumstances to have heightened concerns about safety." *Id.* at 676. The court noted that, although those circumstances "are broadly applicable to most late-night traffic stops," they nonetheless were sufficient to meet the state's burden to prove that an officer possessed a circumstance-specific perception of danger. *Id.*

> **NOTE**: Be sure that the officer testifies about the reasons for any records check or warrants check in any individual case. It will be helpful to develop a record about what kind of check was being run and why, including whether, as part of verifying the driver's status and identification, a warrant check is run simultaneously, to show that there is no undue delay. But, in addition to evidence about the effect of a records check on the *duration* of the stop, it is necessary to elicit testimony about the *reason* for the check—*i.e.*, for ordinary records checks, explain the need to identify the person and verify driving privileges (if applicable), and, for warrants checks, to develop testimony that a person with a warrant is likely to be more dangerous than a person without a warrant, along with any additional circumstances that might support a concern.

d. Questions Related to the Reason for the Stop.

As explained above, to comport with Article I, section 9, there need only be a "reasonable, circumstance-specific" connection between an officer's inquiry and the reason for the stop and investigation: the circumstance-specific reason need not rise to the level of reasonable suspicion of other criminal activity).

But if the officer's activities exceed those limits, then there must be an independent constitutional justification for those activities. *See* State v. Arreola-Botello, 365 Or 695, 451 P3d 939 (2019). Some cases decided before *Arreola-Botello* may be useful, because they interpret statutes that require a reasonable relationship between questioning and the stop.

Cases finding reasonable relationship between questions and stop:

State v. Wampler, 325 Or App 722, 530 P3d 133 (2023). Questions to defendant and his passenger about "names and dates of birth" were reasonably related to criminal trespass investigation "because their identities would be relevant as to whether they had permission to be at that location."

State v. Williams, 297 Or App 384, 441 P3d 242, *rev den*, 365 Or 658 (2019). Officer's questions regarding defendant's possession of alcohol and drugs were reasonably related to DUII investigation, even though possession of those items is not an element of the crime.

State v. Strawn, 154 Or App 460, 963 P2d 34 (1998). Officer's inquiry about weapons was permissible under ORS 131.615(3)(a), because "[c]ar break-ins frequently are accomplished with weapons [such as] baseball bats, crow bars, wrenches or gun butts, * * * it was reasonable for the officer to have asked whether defendant possessed any weapons."

Cases finding no reasonable relationship between questions and stop:

State v. Swafford, 331 Or App 308, 545 P3d 1284 (2024). During a lawful stop for hit-and-run on private property, officer's questions to driver concerning a possible theft exceeded the permissible scope of the stop, despite the state's argument that the possible theft related to the stop as evidence of "motive" for the hit-and-run. Although those questions would have been permissible if the officer had reasonable suspicion of theft, the officer did not yet have that level of suspicion for that possible offense.

State v. Bradley, 329 Or App 736, 542 P3d 56 (2023). Officer's question to defendant during DUII investigation, "Do you have anything on you that you are not supposed to have?," exceeded the permissible scope of the stop. Because the state did not argue that defendant's subsequent consent to the patdown and search of his pockets was only tenuously related to the officer's unlawful inquiry the state did not carry its burden to show attenuation.

State v. Krieger, 318 Or App 441, 508 P3d 62 (2022). Questions by an officer who stopped defendant over for speeding in a construction zone—including "Do you live in this area?," "What are you doing up here?, and "Where are you coming from today?—were not reasonably related to the stop or supported by reasonable suspicion.

3. Expansion of Investigation Based on Independent Reasonable Suspicion.

The scope of the questioning during a stop can be expanded to other matters based on independent reasonable suspicion. ORS 131.615(3)(b); ORS 810.410(3)(c); State v. Arreola-Botello, 365 Or 695, 451 P3d 939 (2019). Cases decided before *Arreola-Botello* will still be useful in determining whether reasonable suspicion developed during a stop.

Earlier in this chapter is a section with cases discussing the presence or absence of reasonable suspicion for specific crimes. See Chapter II (Stop and Frisk), D (Criminal Investigation Stops – Reasonable Suspicion). But below are post-*Arreola-Botello* cases addressing whether reasonable suspicion developed in the course of a stop.

Officer developed reasonable suspicion independent from traffic stop:

State v. Hlebechuk, 339 Or App 120, 566 P3d 673 (2025). Officer had reasonable suspicion to expand stop for speeding to investigate DUII, based on defendant's excessive speed, his conduct in pulling into parking lot instead of the side of the road, and facts that defendant had an unlit cigarette in his mouth, haphazardly handled his paperwork, and his speech was slurred and incoherent.

State v. Duffee, 336 Or App 763, 561 P3d 1140 (2024). During traffic stop, officer developed reasonable suspicion for UUV/PSV where truck lacked license plates, the trip permit in window was expired, a man riding in the truck bed walked off when the officer approached, defendant lacked a driver's license and said he owned the truck but had not yet insured it.

State v. Wicks, 332 Or App 67, 549 P3d 49 (2024). Reasonable suspicion supported inquiry into possible drug use and DUII during traffic stop where defendant got his truck stuck in a ditch while trying to turn around, and was shaking, which is a possible sign of present intoxication. Although those facts could have multiple explanations, together they support the inference that defendant was under the influence.

State v. Keck, 328 Or App 296, 537 P3d 163 (2023). Officer's observation, during traffic stop, of the handle of what appeared to be a long-bladed dagger accessible to defendant when he was the driver, which may have violated ORS 166.240(1), gave him reasonable suspicion for that crime.

Officer lacked reasonable suspicion to expand scope of traffic stop:

State v. Miller, 339 Or App 746, 568 P3d 983 (2025). Officer unlawfully expanded scope of traffic stop by investigating a PPS violation, for which he lacked any express or implied statutory authority to investigate.

4. Circumstance-Specific Reasons for Officer Safety Questions.

ORS 131.615(3)(c) and ORS 810.410(3)(d) authorize officers, during the course of any lawful stop, to ask questions to ensure "the safety of the officer, the person stopped or other persons present, including an inquiry regarding the presence of weapons."

Article I, section 9, does not require reasonable suspicion of a crime in order for an officer to ask about weapons during a stop, but it requires at least a reasonable relationship to the stop based on "circumstance specific" reasons. State v. Jimenez, 357 Or 417, 353 P3d 1227 (2015) (less than reasonable suspicion required for officer to ask about presence of weapons); State v. Sarmento, 296 Or App 763, 439 P3d 994 (2019) (applying less demanding Jimenez standard to detaining officer's safety-related measures short of a search: in order for an officer's perception of a threat to be reasonable, for purposes of addressing safety concerns with less intrusive actions than a search that are reasonably related to the safe investigation of traffic violation, the officer must be able to articulate reasonable, circumstance-specific concerns for safety, but those concerns need not arise from facts particular to the detained individual; they can arise from the totality of the circumstances that the officer faces).

But conduct beyond an *inquiry* about weapons or to ensure officer safety must be justified by the officer safety exception to the warrant requirement of Article I, section 9. Under that standard, a police officer may take "reasonable steps"—including a limited search—to protect the officer or others if, "during the course of a lawful encounter with a citizen, the officer develops a reasonable suspicion, based upon specific and articulable facts, that the citizen might pose an

immediate threat of serious physical injury to the officer or to others then present." *State v. Foster*, 347 Or 1, 8, 217 P3d 168 (2009) (quoting *State v. Bates*, 304 Or 519, 524, 747 P2d 991 (1987) (internal quotation marks omitted)). Because the officer safety rule announced in *Bates* applies to any "lawful encounter with a citizen," it applies to both to criminal investigatory stops and stops for violations. *See also State v. Blevins*, 142 Or App 237, 920 P2d 1131, *rev den*, 327 Or 521 (1998) (officer safety doctrine applies to stops for traffic violations). See Section I (Frisk Searches and Other Officer Safety Measures), later in this Chapter.

5. Questioning After Stop Has Ended.

A traffic stop may be terminated by returning identification, completing the action on the reason for the stop by issuing a citation or a warning, turning off the overhead lights on the patrol car, and advising the person, in a manner that a reasonable person would understand, that he or she is free to leave. *State v. Toevs*, 327 Or 525, 964 P2d 1007 (1998); *State v. Corning*, 157 Or App 379, 971 P2d 894 (1998), *rev den*, 328 Or 365 (1999).

In *Toevs*, the court clarified "the proper methodology for determining whether a traffic stop either continued or ended." 327 Or at 532. "Because a detention is the continuation of a stop, that same analysis applies when determining whether an unlawful detention occurred following a lawful stop." 327 Or at 535. In *Toevs*, the court held that the officer's request for consent to search, which he made immediately after he told the suspect he was free to go, and the officer's continued requests for consent despite the suspect's initial refusal, amounted to an unlawful detention in violation of ORS 810.410. The consent to search obtained as a result of the unlawful detention was invalid.

> **NOTE:** The *Toevs* methodology for determining whether a stop has continued or ended is the same under the vehicle code (ORS 810.410) as under the criminal procedure code (ORS 131.615). 327 Or at 534.

Other cases in this area include:

State v. Peterson, 259 Or App 294, 313 P3d 388 (2013). Under the totality of the circumstances, and despite the officer's verbal assurance to defendant that he was free to go, he was unlawfully seized because the officer's patrol car blocked his egress: "Although Connelly offered to move his patrol car, he never actually moved it; instead, he continued to question defendant while defendant was still restrained." The obligation to unambiguously end traffic stops does not fall on citizens; it falls on police.

State v. Primeaux, 230 Or App 470, 216 P3d 887 (2009). Insufficient evidence that the traffic stop had ended when officer gave the defendant back his license, warned him not to litter, told him to have his taillight cover fixed, and then waited 10-15 seconds before asking further questions.

State v. Bretches, 225 Or App 602, 202 P3d 883, *rev den*, 346 Or 361 (2009). After an initial stop of person ended and officer told the defendant that he was free to go, the defendant "just stood there" and continued speaking conversationally with officer, who then asked whether the defendant had anything illegal and sought consent to search; the questions did not stop the defendant and the officer did nothing to negate his statement that defendant was free to leave.

State v. Presley, 181 Or App 296, 46 P3d 212 (2002). "[A] traffic stop continues until the person has had a 'real time' opportunity to move on. That requires 'a distinct temporal "break in the action" between an officer's indication that the motorist is free to go and any unrelated inquiries.'" *Citing State v. Hadley*, 146 Or App 166, 932 P2d 1194 (1997).

State v. Corning, 157 Or App 379, 971 P2d 894 (1998), *rev den*, 328 Or 365 (1999). An officer turned off his overhead lights, returned the driver's ODL and registration, told her that he was not going to cite her, and said "that's all." As the officer returned to his patrol car, he stopped and spoke to another officer and then recontacted the driver. The stop was terminated, even though the officer did not tell the driver she was "free to go."

State v. Bishoff, 150 Or App 591, 947 P2d 1120 (1997). Officer cited the defendant for DWS, agreed to wait while one of the passengers attempted to locate an alternate driver, and told the driver he was "free to exit the vehicle if he wished." The stop was not terminated.

6. Ordering Driver and Passenger to Get Out of Car.

Under the Fourth Amendment, an officer may order both the driver and the passenger to get out of a lawfully stopped car. Pennsylvania v. Mimms, 434 US 106, 98 S Ct 330, 54 L Ed 2d 331 (1977) (officer may order driver to get out of car during a traffic stop); Maryland v. Wilson, 519 US 408, 117 S Ct 882, 137 L Ed 2d 41 (1997) (Fourth Amendment allows an officer making a routine traffic stop to order a passenger to get out of the car pending completion of the stop).

The Oregon rule appears to be more restrictive than the federal rule, at least as to passengers. In State v. Berg, 140 Or App 388, 914 P2d 1110 (1996), the court held that asking the *driver* to get out of the car did not exceed the proper scope of a DUII stop. *See also* State v. Wilson, 283 Or App 823, 390 P3d 1114 (2017) (officer safety doctrine justified ordering defendant to exit his vehicle); *but see* State v. O'Dell, 291 Or App 359, 421 P3d 417 (2018) (officer unlawfully extended traffic stop when, upon learning that defendant had a folding knife in his pocket, he asked defendant to get out of the car and patted him down, because officer did not have a reasonable concern for his safety); State v. Finlay, 170 Or App 359, 12 P3d 999 (2000) (ordering driver and passenger out of car *after* stop terminated, so that officer could view doorpost VIN, constituted a *search* requiring probable cause).

In State v. Morton, 151 Or App 734, 951 P2d 179 (1997), *rev den*, 327 Or 521 (1998), the court held that the officer, who stopped the passenger for failing to wear a seat belt, impermissibly expanded the scope of the stop under ORS 810.410 when he asked the passenger to get out of the car to investigate him for drug activity without reasonable suspicion. *See also* State v. Lantzsch, 229 Or App 505, 214 P3d 22 (2009) (where officers asked the passenger to get out of the car and began questioning him about the presence of drugs or weapons, the passenger had been unlawfully seized); State v. Smith, 236 Or App 5, 237 P3d 853 (2010) (after officer learned that the driver did not have a license and that the car needed to be towed, the officer stopped defendant, a passenger, when he asked him to get out of the car and asked if he had anything on him that he "shouldn't have"). *Contrast* State v. Woods, 134 Or App 53, 57, 894 P2d 511, *rev den*, 321 Or 340 (1995) (after arresting driver of car, the officer asked the passenger to get out of the car because the officer intended to tow the car; not a stop of passenger).

> **PRACTICAL SUGGESTION:** In preparing your response to a motion to suppress, determine from the officer whether officer safety concerns justified asking (or ordering) the driver and passenger to get out of the car. *See* State v. Blevins, 142 Or App 237, 920 P2d 1131, *rev den*, 327 Or 521 (1998) (during traffic stop, officer reasonably became concerned for his safety and asked defendant, a passenger, to step from the car in order to be frisked). Similarly, if there is some reason that the vehicle would not have been permitted to proceed on its way after issuing the driver a citation—*e.g.,* the driver was under arrest; or the vehicle might have to be towed because the driver did not have a license or the vehicle did not have proper registration or insurance—the officer may lawfully be entitled to ask the passenger to step out of the car to tow the vehicle or possibly to ascertain if the passenger has a

valid license to drive the vehicle. If supported by the facts, develop a record on other circumstances that may have provided a lawful basis for the officer's actions.

7. Calling a Drug-Detection Dog.

During a traffic stop of a driver, a call for a drug-detection dog must be supported by reasonable suspicion or some other constitutional justification independent of the traffic stop. *See* State v. Escudero, 311 Or App 170, 173, 489 P3d 569 (2021) (as a result of *Arreola-Botello*, "in the post-'unavoidable lull' landscape," the officer's "call for a drug dog eight seconds into the traffic stop—before he had made contact with defendant or developed any independent constitutional justification to investigate anything other than the traffic infraction—was an unconstitutional investigative action"); State v. Soto-Navarro, 309 Or App 218, 223, 482 P3d 150 (2021) (same); State v. Gabr, 324 Or App 588, 595, 527 P3d 49 (2023) (call for a drug dog was unlawful without reasonable suspicion).

8. Scope of Stop as to Passengers.

A police officer has authority under ORS 810.410 to detain a passenger of a lawfully stopped car for a reasonable amount of time incident to the traffic stop. State v. Bogart, 116 Or App 443, 841 P2d 672 (1992). Aside from the initial stop, a passenger ordinarily is not part of the traffic investigation and is free to leave the scene of a stop unless the officer has reasonable suspicion to support a stop. *See* State v. Mastin, 203 Or App 366, 124 P3d 1275 (2005), *adh'd to on recons*, 205 Or App 528, 134 P3d 1052 (2006) (ordering passenger to "get back in the car" for a reason *unrelated* to the investigation of the traffic stop and without reasonable suspicion was not justified).

For state constitutional purposes, a passenger is *not* "seized" by virtue of the traffic stop itself, State v. Stevens, 364 Or 91, 430 P3d 1059 (2018), but may later be "seized" by other conduct by the officer toward the passenger. Under the Fourth Amendment, however, a passenger *is* seized and has standing to challenge the constitutionality of the traffic stop. Brendlin v. California, 551 US 249, 127 S Ct 2400, 168 L Ed 2d 132 (2007). Even though the passenger will have been seized under the Fourth Amendment, remember that officers enjoy greater latitude than under the Oregon Constitution to question the car's occupants during a seizure. *See* State v. Graves, 278 Or App 126, 373 P3d 1197, *rev den*, 360 Or 465 (2016) (defendant, a passenger, was not seized during a traffic stop when she consented to get out of the car and the officer directed her to the front of the patrol car and asked questions about her parole status and criminal history); State v. Evans, 284 Or App 806, 397 P3d 42 (2017) (holding that defendant, a passenger in truck stopped for traffic infraction, was not seized under Art. I, § 9, and although seized under Fourth Amendment, that seizure was justified by reasonable suspicion of criminal activity); State v. Sexton, 278 Or App 1, 378 P3d 83 (2016) (defendant, a passenger in a vehicle stopped for traffic infraction, not seized under Art. I, § 9, but was seized under Fourth Amendment, and that seizure was unlawful because police did not articulate a factual basis for the initial traffic stop).

Generally, the limitations on the scope of stops for traffic violations protect the passengers even after the driver is arrested; at the point of the driver's arrest, the traffic stop is over and the officer must have a separate justification for detaining a passenger. State v. Foster, 139 Or App 303, 912 P2d 377, *rev den*, 323 Or 691 (1996); State v. Herrin, 323 Or 188, 915 P2d 953 (1996).

PRACTICAL SUGGESTION: For some traffic stops, an argument can be made that the passenger is a potential witness and so the officer needs to obtain the passenger's identity. The officer may have other legitimate reasons for identifying the passenger or asking the passenger to exit the vehicle. In responding to a motion to suppress, determine whether the officer had officer safety concerns or if there was

some reason that the vehicle would not have been permitted to proceed on its way in the normal course of the stop. In some circumstances, the officer may be entitled to ask the passenger to step out of the car to tow the vehicle or to ascertain if the passenger has a valid license to drive the vehicle.

9. Scope and Length of Detention for Failure to Present a License.

A person may be arrested for the traffic offense of failure to carry a license or to present a license to a police officer, because the offense is a class C misdemeanor. ORS 807.570(5). But ORS 807.570(4) limits the detention for such an offense to "such time as [is] reasonably necessary to investigate and verify the person's identity."

A "person who fails to satisfy the officer of his identity may be taken into custody and to jail to give the officer time to ascertain his identity." *State v. Towle*, 102 Or App 643, 646, 796 P2d 1208 (1990). However, once an individual's identity is verified, "detention is no longer reasonably necessary and the individual must be released." *State v. Bishop*, 157 Or App 33, 42, 967 P2d 1241 (1998) (officer not justified in detaining defendant and transporting him to the police station because he provided his name, address, and date of birth at the scene and the officer verified that information). That investigation does not include a *search* for evidence of identity. *See State v. Roque-Escamilla*, 106 Or App 270, 806 P2d 1173, *rev den*, 311 Or 427 (1991) (search of driver's wallet unlawful).

An officer may seek consent to search for evidence of the driver's identity only, unless further investigation is supported by independent reasonable suspicion. *State v. May*, 162 Or App 317, 986 P2d 608 (1999), *rev den*, 330 Or 375 (2000) (post-arrest request for consent to search for "drugs, weapons, means of escape" exceeded officer's authority); *State v. Claxton*, 140 Or App 168, 915 P2d 421 (1996) (request for consent exceeded officer's authority where not limited to search for evidence of identity).

H. DISSIPATING REASONABLE SUSPICION.

State v. Farley, 308 Or 91, 775 P2d 835 (1989). Officer who discovered a valid temporary permit on the defendant's windshield after stopping the defendant for no license plates was not justified in detaining the defendant further or obtaining the defendant's driver's license. Therefore, the officer's subsequent discovery that the defendant was suspended was invalid. *But see State v. Brown*, 107 Or App 280, 812 P2d 4 (1991) (after stopping vehicle for expired license tags and seeing a temporary permit on the rear window, observations of beer cans and indications of intoxication made while the officer examined the permit to determine its validity were lawful).

State v. Warner, 284 Or 147, 585 P2d 681 (1978). Once reasonable suspicion has dissipated, the stop or officer safety search must end. If the stop continues, it will be deemed unlawful.

State v. Craig, 284 Or App 786, 789, 395 P3d 634, *rev den*, 361 Or 803 (2017). Lack of obvious damage to the defendant's vehicle was not sufficient to dissipate an officer's reasonable suspicion that the defendant was driver of vehicle that had left scene of nearby accident; report of nearby accident described it as having caused damage to plants and possibly a fence, perhaps causing a flat tire, and the defendant's vehicle matched the make and color of vehicle involved and was driving from direction of accident scene with a flat tire; the officer saw scratches on front of the defendant's vehicle and some weeds underneath front bumper, so reasonable suspicion supported short detention until the officer could confer with another officer sent to inspect the accident scene.

State v. Pearson, 262 Or App 368, 323 P3d 994 (2014). Officer unlawfully extended traffic stop by asking, "where's the weapon," because he lacked reasonable suspicion of a crime or that the

defendant was a threat to his safety. Even if seeing an apparent box of ammunition would have given the officer reasonable suspicion of criminal activity or officer safety concerns to justify an initial inquiry about weapons, any such suspicion or concern dissipated as soon as the officer realized that the box was actually a carton of cigarettes, and officer's second question about weapon was unlawful.

State v. Khoshnaw, 234 Or App 24, 227 P3d 1188 (2010). Any reasonable suspicion that the defendant was about to commit a crime when an officer saw him walk toward a convenience store, pause some distance from the door, and reach into the front of his pants before entering, dissipated when the defendant peacefully left the store a few minutes later with soda and chips. Therefore, the officer's later stop of the defendant and discovery of a concealed weapon were invalid.

State v. Lovell, 233 Or App 381, 226 P3d 76 (2010). Officer who believed that he had just seen a drug buy obtained consent to search the defendant's person, but found nothing. Even if the stop was lawful, the officer was not justified in then requesting consent to search the defendant's backpack, because his suspicion that the defendant had just bought drugs dissipated after his fruitless search of her person.

State v. Hitchcock/Winters, 224 Or App 77, 197 P3d 33 (2008). Police officers temporarily detained defendant Winters during a protective sweep of a house while executing an arrest warrant on another occupant. The officers were not justified in subsequently questioning Winters and obtaining her consent to search her bedroom, when they had already arrested the subject of the warrant and any basis for officer safety concerns had dissipated.

State v. Petri, 214 Or App 138, 162 P3d 1053 (2007). Even if officer safety concerns justified a patdown of the defendant, the officer was not justified in opening a closed sunglasses case he removed from the defendant's pocket during the patdown, because whatever weapon might have been inside was no longer a threat to the officer once the case had been taken from the defendant.

I. FRISK SEARCHES AND OTHER OFFICER SAFETY MEASURES.

1. Fourth Amendment.

In *Terry v. Ohio*, 392 US 1, 88 S Ct 1868, 20 L Ed 2d 889 (1968), the Court held that an officer may conduct a limited patdown frisk for weapons if the officer reasonably believes a lawfully stopped person poses a threat to the officer's safety or the safety of others:

> "[W]here a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the person with whom he is dealing *may be armed and presently dangerous* * * * he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him."

392 US at 30 (emphasis added).

Several years later, in *Adams v. Williams*, 407 US 143, 92 S Ct 1921, 32 L Ed 2d 612 (1972), the Court stated the authority-to-frisk rule derived from *Terry v. Ohio* as follows: "So long as the officer is entitled to make a forcible stop, and has reason to believe that the suspect *is armed and dangerous*, he may conduct a weapons search limited in scope to this protective purpose." 407 US at 146 (emphasis added).

2. Oregon Law.

Under ORS 131.625, a police officer "may frisk a stopped person * * * if the officer reasonably suspects that the person *is armed and dangerous*." This statutory language is consistent with the language of *Adams v. Williams*, 407 US 143, 92 S Ct 1921, 32 L Ed 2d 612 (1972) (quoted above). ORS 810.410 and ORS 153.039 do not specifically authorize frisk searches during the course of stops for violations. However, ORS 131.625 does not define the "outer limits of permissible officer safety measures," and officer-safety measures will be governed by constitutional standards. *State v. Rickard*, 150 Or App 517, 947 P2d 215, *rev den*, 326 Or 234 (1997).

In *State v. Bates*, 304 Or 519, 747 P2d 991 (1987), the court concluded that the Oregon Constitution permits an officer, during a lawful encounter, to conduct a frisk search if the officer develops a reasonable suspicion that the stopped person might pose an immediate threat of serious physical injury to the officer or to others who are present:

> "Article I, section 9, of the Oregon Constitution does not forbid an officer to take reasonable steps to protect himself or others if, during the course of a lawful encounter with a citizen, the officer develops a reasonable suspicion, based upon specific and articulable facts, that the citizen might pose an immediate threat of serious physical injury to the officer or to others then present. * * * [I]t is not our function to uncharitably second-guess an officer's judgment. A police officer in the field frequently must make life-or-death decisions in a matter of seconds. There may be little or no time in which to weigh the magnitude of a potential safety risk against the intrusiveness of protective measures. An officer must be allowed considerable latitude to take safety precautions in such situations. Our inquiry therefore is limited to whether the precautions taken were reasonable under the circumstances as they reasonably appeared at the time that the decision was made."

304 Or at 524-25. *See also State v. Blevins*, 142 Or App 237, 920 P2d 1131, *rev den*, 327 Or 521 (1998) (officer safety doctrine applies to traffic violation stops).

3. General Officer Safety and Frisk Principles.

The encounter must be lawful. *State v. Bates*, 304 Or at 524 (frisk must be during course of a lawful encounter; announcing this rule in case involving traffic violation stop); *see also State v. Dahl*, 323 Or 199, 206, 915 P2d 979 (1996) (the "three distinct categories of police-citizen encounters" are arrests, stops and "mere conversation"); *State v. Shaw*, 230 Or App 257, 215 P3d 105, *rev den*, 347 Or 365 (2009) (officer safety doctrine applies during "mere conversation" encounter).

Reasonable officer safety concerns may justify converting a mere encounter into a stop. In *State v. Ruiz*, 196 Or App 324, 101 P3d 824 (2004), *rev den*, 388 Or 363 (2005), the court held that the officer's command to the defendant to remove his hand from his pocket – which, the court held, constituted a stop – was justified by officer safety concerns. The officer contacted the defendant and a companion, who were sitting in an area known to have a "bad problem" with drugs. The officer spoke with the companion, who had something in his mouth; he asked him to open his mouth, revealing a bindle of cocaine. The defendant then began to reach into his pocket and the officer feared that he was reaching for a weapon and told him to remove his hand from his pocket, which revealed that his hand was covered with tar heroin. Under the circumstances, defendant's conduct in putting his hand in his pocket reasonably caused the officer to be concerned for his safety. *See also State v. Shaw*, 230 Or App 257, 215 P3d 105, *rev den*, 347 Or 365 (2009) (officer's command to defendant to show him his hands during a "mere conversation" encounter was a lawful seizure, because the officer reasonably was concerned for his safety).

The reasonable suspicion standard does not require certainty. State v. Blevins, 142 Or App 237, 245, 920 P2d 1131, *rev den*, 327 Or 521 (1998).

The officer must have objective facts supporting the decision to frisk, and the officer must believe that the defendant might pose an immediate threat to the officer or others. State v. Miglavs, 337 Or 1, 10, 90 P3d 607 (2004); State v. Bates, 304 Or at 524-25. *See also* State v. Suter, 157 Or App 107, 111, 969 P2d 1035 (1998), *rev'd on other grounds*, 332 Or 629, 34 P3d 169 (2001), *on remand*, 179 Or App 482 (2002) (The officer-safety justification applies only if the officer articulates particularized facts to justify a reasonable fear of immediate threat of physical injury).

Generalized safety concerns are not sufficient. State v. Whitlock, 334 Or App 107, 554 P3d 825 (2024) (in investigation of car crash, defendant's erratic behavior, including touching bulge in pants pocket, did not justify patdown where video showed that defendant was cooperative, not aggressive, and appeared distraught about his marital relationship, not hostile); State v. Steffens, 250 Or App 742, 749, 282 P3d 888 (2012) (without reason to believe defendant might engage in violence, mere fact that defendant had multiple prior arrests for carrying concealed weapons was insufficient to support frisk of suspect during bicycling stop); State v. Zumbrum, 221 Or App 362, 189 P3d 1235 (2008) (officer's belief that defendant posed a threat was not objectively reasonable; mere facts that defendant was on PPS and was in a "high-crime area" were not specific facts that supported officer's generalized safety concern). *See also* State v. Knox, 160 Or App 668, 671, 984 P2d 294, *rev den*, 329 Or 527 (1999) (a defendant's "reputation for carrying weapons, by itself, is insufficient to create a reasonable suspicion that defendant might use them during the otherwise routine traffic stop"); State v. Pope, 150 Or App 457, 946 P2d 1157 (1997), *rev den*, 327 Or 521 (1998) (although "perceptions of the stereotypical practices of motorcycle club members is the kind of generalized suspicion that seldom will constitute a reasonable suspicion," additional facts supplied reasonable suspicion in this case.); State v. Thomas, 276 Or App 334, 367 P3d 537 (2016) (when an officer lawfully stopped defendant for jaywalking, the collective circumstances—including the officer's observation that defendant was agitated and made eye contact with his companion as if they were communicating—did not create safety concens that justified a patdown); State v. Davenport, 272 Or App 725, 357 P3d 514, *adh'd to as modified on recons* (2015), *rev den*, 359 Or 525 (2016) (where defendant was cooperative and unarmed, and officer had moved defendant 10 feet from car, officer safety exception did not justify removal of an object felt during patdown of defendant's pocket, which the officer thought was a gun cartridge, even though defendant had a BB gun in car).

Standard practice is *not* a substitute for reasonable suspicion. State v. Hoskinson, 320 Or 1, 879 P2d 180 (1994) (officer's testimony that it was his "normal practice" to search an arrestee's wallet was not sufficient to justify search); State v. Walker, 181 Or App 548, 47 P3d 65 (2002) (search of jacket lying on ground next to suspect was invalid where officer testified only that he always checks personal property for weapons before returning it to someone).

The discovery of one weapon does not end the officer's authority to search for more. State v. Pope, 150 Or App 457, 946 P2d 1157 (1997), *rev den*, 327 Or 521 (1998) (discovery of a sheathed knife on defendant's belt increased the officer's suspicion that defendant was holding additional weapons, and a patdown for additional weapons was justified); State v. Redmond, 114 Or App 197, 834 P2d 516 (1992) (observation of sheathed knife on belt of motorcyclist wearing insignia identifying him as the sergeant-at-arms of a motorcycle club, together with the officer's knowledge of the practices of motorcycle clubs, justified frisk of motorcyclist for additional weapons).

Finding a weapon on one suspect may justify a frisk search of other suspects. State v. Bowen, 88 Or App 584, 746 P2d 249 (1987), *rev den*, 305 Or 45 (1988) (police had reasonable grounds to frisk defendant, one of two passengers in automobile that was stopped for driving without lights at 2 a.m.– the driver and the other passenger falsely identified themselves, the police did not

know whether defendant had truthfully identified herself, and the driver was armed). *But see* State v. Rodriguez-Perez, 262 Or App 206, 325 P3d 39 (2014) (police lacked reasonable suspicion that defendant posed immediate threat of serious physical injury during investigatory stop of defendant and his brother even though officers discovered that brother had a prior conviction for carrying a concealed firearm and defendant's demeanor changed and he became visibly nervous when officers asked whether defendant or brother had weapons).

The number of suspects may increase the urgency of the officer's need for intervention. State v. Miglavs, 337 Or 1, 14, 90 P3d 607 (2004) (officer concerns may be heightened by need to divide attention among suspects); State v. Hendricks, 213 Or App 360, 367, 160 P3d 1017 (2007) ("when an officer observes suspicious behavior by a companion close by, the officer's safety concerns are legitimately heightened because of the need to focus on both the person being investigated and the companion.").

Number of "cover officers" may diminish officer safety concerns. State v. Holdorf, 250 Or App 509, 280 P3d 404 (2012), *rev'd other grounds*, 355 Or 812, 333 P3d 982 (2014) (even if officer had basis for safety concerns earlier in stop, before cover officer arrived, "all danger had dissipated" by the time of the frisk because the stop was in the parking lot of a K-Mart store at 8:00 a.m., three armed officers were present, and there was no reason for continued detention of defendant, who was merely a passenger who wanted to walk away from the stop).

See additional discussion and cases regarding frisk searches in section below; *see also* discussion of Searches Incident to Arrest in Chapter IV (Warrantless Searches), (Subject of the Search – Weapons and Implements of Escape).

4. Reasonable Suspicion Justifying Frisk or Other Safety Measures.

a. Reasonable Suspicion Present.

State v. Keck, 328 Or App 296, 537 P3d 163 (2023). During traffic stop, officer-safety grounds for handcuffing defendant and patting him down for weapons: the officer had reason to believe that defendant had a knife with a long blade next to him in the truck, was not being straight about his probation, and defendant had admitted he had other knives in the vehicle. Despite defendant's cooperative behavior, those facts support the trial court's conclusion that, "under the totality of the circumstances," officer's "subjective safety concerns were objectively reasonable."

State v. Bradford, 290 Or App 889, 417 P3d 530 (2018). Defendant's known gang affiliation, history as a gunshot victim during gang-related activities, and suspicious behavior upon seeing police gave rise to reasonable suspicion that he had just discarded an illegally possessed firearm, and that he was a safety threat, which justified officers' decision to detain defendant, pat him down, and handcuff him while they searched for the firearm suspected of being discarded.

State v. Madden, 363 Or 703, 427 P3d 157 (2018). Officer-safety concerns allowed officers to approach, pat down, handcuff, and detain defendant, the driver of a vehicle that was found parked in the driveway of a drug house that the officers were about to execute a search warrant, for the length of time needed to secure the house. But, once the house was secured, continued detention of defendant was not justified.

State v. Morgan, 348 Or 283, 230 P3d 928 (2010). The defendant was the passenger in a lawfully stopped car when the driver was arrested for DWS. Before releasing the vehicle to the defendant, the officer asked for consent to search it. The defendant agreed, taking a large purse with her. The officer asked for consent to search the purse for officer safety reasons, but defendant refused

and backed away nervously and reached into the purse. Under those circumstances, the officer was justified in seizing the purse for officer safety (at which point he saw drugs in plain view).

State v. Foster, 347 Or 1, 217 P3d 168 (2009). Safety concerns justified deputies' decision to station themselves at the corners of a trailer to ensure against ambush or escape by residents who were serving a restraining order on occupant, because the home was known to house up to 10 violent persons who previously had violent confrontations with police and where weapons, including automatic weapons, had been seized over the prior six years.

State v. Miglavs, 337 Or 1, 90 P3d 607 (2004). A patdown search was justified by officer safety concerns where (1) the defendant's and his companion's appearance, *e.g.*, clothing and tattoos, identified them as members of a *specific gang* known to operate in the *immediate vicinity* of the contact; (2) the officers had *personal experience* with members of that gang who carried weapons; (3) one officer had removed a concealed gun from a member of this specific gang; (4) it was late and dark; (5) defendant refused to say which apartment he lived in; and (6) although the defendant was free to leave, he remained near one officer while she cited his companion for curfew.

State v. Amaya, 336 Or 616, 89 P3d 1163 (2004). Even if the defendant, as a passenger of a stopped vehicle, was constitutionally "seized" when an officer asked her what she had in her bag, the seizure was justified by officer safety concerns in light of the following circumstances: (1) as the officer first approached the van, the defendant appeared nervous and was moving something around and putting something into a large purse-like bag at her feet, (2) as the defendant got out of the van directly before the officer searched it, she took the bag with her, even though the officer encouraged her to leave it in the van, (3) the defendant placed the bag on the ground between her feet and attempted to conceal it with her coat, (4) the stop occurred at 1:00 a.m. in an area known for drug dealing, and (5) the officer was the only officer present.

State v. Stanley, 325 Or 239, 935 P2d 1202 (1997). Officers responding to a report of two men who appeared to be preparing to rob a store found the defendant and his companion lurking outside the store in a suspicious manner, evidently under the influence of stimulants. The officers contacted the two men and then frisked them. The stop and frisk was lawful.

State v. Hendricks, 213 Or App 360, 160 P3d 1017 (2007). An officer responded to a 911 report that defendant's companion had a gun inside a 7-Eleven store and saw the men look surprised and immediately try to distance themselves from each other. Based on the report and the fact that the companion could have passed the gun to defendant, the officer was entitled to order one man to sit down on the floor while he frisked the other. "[W]hen an officer observes suspicious behavior by a companion close by, the officer's safety concerns are legitimately heightened because of the need to focus on both the person being investigated and the companion." Hendricks, 213 Or App at 367.

State v. Grover, 193 Or App 165, 9 P3d 8 (2004). Officer safety concerns justified a patdown of the defendant where the officer was the only officer present with four people in an apartment where drugs had been found and the officer was aware of a recent incident in which the defendant had a weapon and had threatened to kill himself and his mother. But, during the frisk, officer safety concerns did not justify removing a cigarette pack from the defendant's pocket and opening it.

State v. Weems, 190 Or App 341, 79 P3d 884 (2003). Officer safety concerns justified a patdown of the defendant where a "felony-caution" warrant for the defendant was outstanding, a knife was on the seat next to him when he got out of his truck and the stop occurred at around 4 a.m. The officer's search of the inside of the defendant's pockets, however, was not justified by officer safety concerns, because there was no evidence that the defendant posed a threat after the patdown.

State v. Jackson, 190 Or App 194, 78 P3d 584 (2003), *rev den*, 337 Or 182 (2004). Officer safety justified a patdown of the defendant where: (1) The defendant was a passenger in a vehicle that was weaving in a manner that, based on the officer's past experience, indicated gang behavior; (2) The driver committed several traffic violations, including going through a red light after the officer's had turned on their lights and sirens; (3) The car stopped and both the driver and the defendant raised their hands in apparent surrender, but then drove off after the officers approached on foot; (4) One officer had had a prior similar gang-related experience in which he had been threatened with a gun; (5) The officers knew Blood gang activity, drive-by shootings, and drug trafficking were routine in the area where they finally stopped the vehicle, and it was after midnight; and (6) after stopping the vehicle, the officers discovered the driver was associated with a known gang in the area.

State v. Clew, 187 Or App 322, 67 P3d 420 (2003). During a traffic stop, the officer developed sufficient officer safety concerns to justify a patdown of the defendant based on the defendant's possession of a large knife, his nervous and fidgety demeanor, his vague and non-responsive answer to the officer's inquiry regarding additional weapons, and his simultaneous movement toward his pocket.

State v. Stephens, 184 Or App 556, 56 P3d 950 (2002), *rev den*, 335 Or 195 (2003). An officer was justified in reaching into the defendant's pants pocket when, after the officer asked the defendant if he had any weapons, the defendant replied that he had a knife in his pocket and put his hand into his pocket to pull it out. The defendant's unexpected move for the knife, his proximity to the officer, and the lateness of the hour supported the officer's safety concerns.

State v. Wiggins, 184 Or App 333, 56 P3d 436 (2002). An officer was justified in patting down the passenger of a motor home before searching the van for evidence of meth manufacturing. The officer knew that people who manufacture and sell meth often carry weapons, that the driver was known to carry weapons and that the passenger was an avid hunter. However, the officer lacked authority to open a cigarette pack he found in the passenger's pocket, because there was no evidence that the officer subjectively believed that the cigarette pack contained a weapon.

State v. Hannaford, 178 Or App 451, 37 P3d 200 (2001). Officer safety concerns justified an officer in ordering a passenger out of the car and searching the area near where the passenger had been seated where: (1) the driver had been arrested for DWS and had outstanding felony warrants; (2) the passenger claimed to be the owner of the car, but could produce no supporting documentation; (3) the passenger was on probation for attempted UUV; (4) when asked for proof of insurance, the passenger turned his back to the officer and shoved a box, large enough to hold a gun, further under his seat.

State v. Gilkey, 172 Or App 95, 18 P3d 402 (2001). The defendant's furtive reaching into his pocket during a drug-related stop that already had resulted in the arrest of the defendant's companion "frightened" the officer, who believed the defendant could have a weapon. Under those circumstances, it was reasonable for the officer to conclude that the defendant possessed a weapon and was trying to use it. Therefore, the officer was justified in seizing the item (a ChapStick container sealed with duct tape) and retaining it during the contact, but he was not entitled to open the container.

State v. Campbell, 166 Or App 31, 999 P2d 466 (2000). An officer safety frisk of a traffic detainee was justified where the detainee: kept looking nervously from left to right in an apparent attempt to find an escape route; resisted the officer's request to keep his hands out of his pockets; and admitted that he had a pocket knife. The officer was further justified in having the detainee remove cigarette packs from his pockets so that the officer could determine whether any weapon was concealed behind them. However, the officer was not justified in opening one of the cigarette packs after it was removed from the detainee's pocket. [NOTE: Although *Campbell* involved a *traffic* stop, the court relied on the *criminal* stop statute, ORS 131.625.]

State v. Aman, 164 Or App 348, 991 P2d 1096 (1999). An officer safety frisk of the driver was justified where the officer found within the vehicle a syringe containing brown liquid; and the passenger told the officer that the syringe was the driver's, that it contained heroin, and that the driver had a gun.

State v. Haney, 158 Or App 53, 993 P2d 359 (1999). An officer had specific and articulable facts that prompted him to request the passenger's consent to search her purse for weapons: the vehicle had just visited a "meth house"; the driver and another occupant repeatedly attempted to reach under the front seat, despite several commands that they not do so; and the officer testified that, in his experience, persons who frequent drug houses often carry weapons.

State v. Brenner, 151 Or App 159, 947 P2d 1139 (1997). A police officer conducting a criminal investigation had reasonable suspicion to believe that the defendant posed an immediate threat to his safety when the defendant suddenly reached into his jacket pocket, walked around a pickup truck, so that he was shielded from view, and handed a metal object to a passenger, who then hid the object between her legs. "Defendant's sudden movements could lead a reasonable officer to conclude that defendant had a weapon that he had hidden on the passenger's person."

State v. Pope, 150 Or App 457, 946 P2d 1157 (1997), *rev den*, 327 Or 521 (1998). The defendant and a fellow motorcyclist (who was wearing motorcycle gang insignia) were stopped because of the defendant's unlit tail light. A handgun was discovered in the defendant's pocket during an officer safety frisk. The patdown search was justified. "[T]he fact that the officer believed, based upon his training and experience, that defendant was affiliated with a motorcycle gang, and therefore likely to be armed and dangerous, was not in itself enough to justify expansion of the traffic stop [to conduct a frisk search]. … [P]erceptions of the stereotypical practices of motorcycle club members is the kind of generalized suspicion that seldom will constitute a reasonable suspicion," but additional facts supplied reasonable suspicion in this case. Because "the two riders behaved in an unusual and disconcerting manner, by separating and immediately dismounting," the officer was justified in asking whether the defendant was carrying weapons.

State v. Austin, 145 Or App 217, 929 P2d 1022 (1996), *rev den*, 325 Or 368 (1997). Search of the defendant's pocket was justified because of the defendant's extreme nervousness and his volunteered statement that he had a BB gun in his pocket.

State v. Blevins, 142 Or App 237, 920 P2d 1131, *rev den*, 327 Or 521 (1998). Seizure of an object felt in an officer safety frisk was justified where the officer testified that the object "might" contain a weapon and his belief was reasonable under the circumstances: the vehicle occupants refused to keep their hands in view; they appeared nervous, furtive, and drug-affected; and the officer already had found a syringe in one of the defendant's pockets.

See also discussion of Searches Incident to Arrest in Chapter IV (Warrantless Searches), (Subject of the Search – Weapons and Implements of Escape).

b. No Reasonable Suspicion.

State v. Dacquisto, 338 Or App 91, 564 P3d 947 (2025). Officer lacked authority to conduct patdown of defendant after responding to report of a domestic dispute and observing defendant's nervous and distressed behavior while talking to the officer. Neither defendant's unadorned statement that he did not want to go "back" to prison nor the fact that his girlfriend was "just across the street" provided specific reasons to believe he was an imminent threat. Because officer lacked authority for patdown, his question about weapons was unlawful because it was preceded by his statement that he would be doing a patdown.

State v. Whitlock, 334 Or App 107, 554 P3d 825 (2024). Officer-safety patdown at scene of car crash was not justified by fact that defendant was "emotionally labile," was making "drastic hand movements," and kept touching his pants pockets; defendant willingly followed the officer when directed without complaint, protest, or demonstrating any aggression.

State v. Bailey, 307 Or App 782, 479 P3d 304 (2020). Officers lacked officer-safety justification for warrantless patdown of suspect for weapons during investigation into gunshots.

State v. O'Dell, 291 Or App 359, 421 P3d 417 (2018). Officer unlawfully extended traffic stop when, upon learning that defendant had a folding knife in his pocket, he asked defendant to get out of the car and did a patdown, because the officer did not have a reasonable concern for his safety. The mere fact that defendant was carrying a folding knife and seemed nervous did not support an objectively reasonable belief that he posed an immediate threat of harm to the officers.

State v. Gaylor, 287 Or App 495, 404 P3d 1140 (2017). Because officer lacked an objectively reasonable basis to suspect that defendant posed an immediate threat of harm, his search of defendant for weapons did not fall within officer safety exception. The officer had approached defendant and his companion after they had parked their car in the driveway of a house the officer knew was abandoned and which was near the scene of a recent burglary. As the officer approached the driveway in a patrol car, defendant walked away but then walked back toward the driveway when the officer got out of his car. After the officer asked both defendant and his companion for identification, defendant's companion ran away. The officer, concerned that the companion would return and might be armed, handcuffed and searched defendant, finding drugs. Based on those facts, the officer lacked reasonable suspicion that either defendant or his companion were armed and dangerous, and no facts suggested the companion would return.

State v. Davis, 282 Or App 660, 385 P3d 1253 (2016). Officer doing traffic stop did not have an objectively reasonable belief that the defendant might pose an immediate threat of serious injury, as required to justify patdown search of the defendant under the officer safety exception to the warrant requirement, even though the defendant appeared nervous and initially said he did not know what was in his pants pockets; although the defendant briefly reached down toward the floor of his truck, he ceased immediately when officer arrived at his window and asked the defendant to put his hands on the steering wheel, defendant was cooperative and nonconfrontational in providing his license and answering questions about the ownership of the truck, and nothing in his behavior suggested imminent aggressiveness or hostility toward the officer.

State v. Smith, 277 Or App 298, 373 P3d 1089 (*en banc*), *rev den*, 360 Or 401 (2016). Forest Service officer's warrantless patdown search of the defendant, who was with a group of people shooting guns at targets on trees in a remote forest, was not justified by officer safety concerns, despite fact that the group had been armed, the officer was alone, and potential backup was hours away; the defendant and his companions complied with the officer's request to secure their weapons and were not difficult or threatening, and mere possibility that the defendant might have committed a violation by illegally damaging forest property and fact that his clothing might have been suitable receptacle to hold a weapon did not support reasonable belief that he posed an immediate threat.

State v. Thomas, 276 Or App 334, 367 P3d 537 (2016). Officer lacked a reasonable safety concern to justify patdown search of the defendant, who was stopped for jaywalking, even though the encounter did not feel "normal" to the officer, the defendant seemed a "little" uncomfortable and agitated, did not make eye contact with officer, and the location was near a motel where the officer's associate had, in the past, recovered drugs and weapons; a feeling that the encounter was "not normal" was not an objectively reasonable basis to believe that defendant might pose an immediate danger, his act of jaywalking did not suggest he was a dangerous person, his baggy clothes and a

backpack did not support inference that he was a threat, and the officer testified to no facts that would indicate defendant or his associate had any association with weapons or posed any risk of violence.

State v. Kennedy, 284 Or App 268, 392 P3d 382 (2017). Officer's stated concern for his safety when he conducted a warrantless patdown search of the defendant near the scene of a traffic accident was not objectively reasonable, and thus was not justified under the officer safety exception to the warrant requirement; although the officer suspected that the defendant was involved in a car theft, the encounter had lasted several minutes by the time of the patdown, during which time the defendant was cooperative and in a submissive physical posture, and another officer had arrived at the scene; although the officers believed that defendant had an associate whose location was unknown, that fact did not suggest that the defendant posed an imminent threat at the time of the patdown.

State v. Bennett/McCall, 265 Or App 448, 338 P3d 143 (2014). Police had control of defendant's backpack and thus had no reasonable suspicion of an immediate threat. Although defendant had asked for his catheter out of his backpack, if the police were concerned about safety, they could have sought emergency medical services to provide a catheter or requested consent to search the backpack.

State v. Easton, 264 Or App 339, 332 P3d 315 (2014). Police encountered a woman who appeared to be high on methamphetamine, with a gun a few feet away from her. She told officers that her houseguest, defendant, had given her the gun and consented to a search of her apartment. Police encountered defendant lying face-down on a bed in the apartment and were worried that he was faking sleep and hiding weapons underneath his body. Those facts did not create an objectively reasonable basis for believing that defendant posed an immediate risk of serious physical injury. The officer's training that "where there's one weapon, there's often more than one" was insufficient.

State v. Rodriguez-Perez, 262 Or App 206, 325 P3d 39 (2014). During a police encounter with the defendant and his brother, officers discovered that the brother had a prior conviction for carrying a concealed weapon and the defendant's demeanor changed and he became visibly nervous when officers asked about whether the defendant or his brother had weapons. The defendant would not answer questions or make eye contact, and he took several steps away from the officer as if to run. Because he did not make any aggressive, hostile, or threatening movements, nor did he make any threatening remarks, neither his demeanor nor his physical actions supported a reasonable inference that he posed an immediate threat of serious physical injury.

State v. Steffens, 250 Or App 742, 749, 282 P3d 888 (2012). Without reason to believe the defendant might engage in violence, mere fact that the defendant might engage in violence, mere fact that the defendant had multiple prior arrests for carrying concealed weapons—and his extreme nervousness when asked about weapons—did not support frisk of suspect during bicycling stop.

State v. Holdorf, 250 Or App 509, 280 P3d 404 (2012), *rev'd other grounds*, 355 Or 812, 333 P3d 982 (2014). Even if the officer had basis for safety concerns earlier in encounter with defendant before cover arrived, "all danger had dissipated" by the time of the frisk because the contact was in a store parking lot at 8 a.m., three armed officers were present, and there was no reason for continued detention of the defendant, a mere passenger who wanted to leave the scene of the traffic stop.

State v. Rudder, 347 Or 14, 217 P3d 1064 (2010). No reasonable officer-safety concerns justified police opening of pants pocket of handcuffed defendant without first conducting a patdown. State v. Stanley, 223 Or App 1, 195 P3d 454 (2008), *rev den*, 347 Or 446 (2009) (same).

State v. Amell, 230 Or App 336, 215 P3d 910 (2009). During a traffic stop, an officer saw the defendant making "digging" movements between the car seats, but did not view the defendant as an

"immediate risk." A few minutes later, when the officer had finished writing the citations, he told the defendant that he was "somewhat suspicious," but the defendant denied doing anything wrong. Because the defendant was cooperative, nothing suggested that his movements were directed at the officer, and there was a break in time, the officer did not have reasonable suspicion to justify a frisk when the defendant stepped out after consenting to a search of his car.

State ex rel. Juv. Dept v. M.A.-J., 228 Or App 580, 209 P3d 381 (2009). Officer safety concerns did not justify a patdown of youth, when youth wore baggy clothing and was with another man who wore baggy clothing of a type "common" to gangs and who had previously been seen with an admitted gang member. Those facts were insufficient to support a belief that youth posed an immediate risk to the officer.

State v. Zumbrum, 221 Or App 362, 189 P3d 1235 (2008). Officer safety concerns did not justify patting down the defendant, when the officer who performed the patdown testified that he did so because the neighborhood where the defendant lived was a high-crime area and because the defendant and the person who was with him at the time were both on post-prison supervision. The officer's generalized concerns were not supported by specific and articulable facts.

State v. Swibies, 183 Or App 460, 53 P3d 447 (2002). While officers were executing a search warrant on a drug house, an unknown person (the defendant) appeared at the front door and the officers pulled him into the house, asked him whether he had any weapons or drugs and frisked him. This "stop" was not supported by specific, articulable facts supporting a belief that the defendant posed an immediate risk to the officers. The officers' generalized belief that drug purchasers may use firearms when officers execute a search warrant was not sufficient.

State v. Walker, 181 Or App 548, 47 P3d 65 (2002). Officer safety did not justify the search of a jacket found lying at the feet of an MIP suspect where the officer who searched the jacket testified only that he always checks personal property for weapons before he returns it to someone.

State v. Cocke, 334 Or 1, 45 P3d 109 (2002). Extension of "protective sweep" of arrestee's home into a separate apartment occupied by a third person, without either probable cause to search or a reasonable suspicion that a person in the apartment posed an immediate threat of serious physical injury to the officers or others, was invalid.

State v. Miears, 166 Or App 228, 999 P2d 493, *rev den*, 331 Or 192 (2000). The trial court properly suppressed a marijuana pipe and a bindle found in a cigarette pack, which the officer removed from the defendant's pockets after an officer safety frisk. The officer did not have an objectively reasonable belief that any of those items either was, or contained, a deadly or dangerous weapon.

State v. Dyer, 157 Or App 326, 970 P2d 249 (1998). A vehicle search was not justified by officer safety concerns, although the defendant was dressed in outlaw biker style, carried a large folding knife on his belt, and previously had been convicted of unlawful possession of a weapon.

State v. Moreno, 150 Or App 306, 946 P2d 317 (1997). When officers asked the defendant if he had weapons, he pushed his hands further into his pockets and seemed tense and wary. The patdown search for weapons was unlawful, because "[t]here are no articulable facts that demonstrate objectively, such as gestures or threats, that the officers were in danger."

State ex rel Juv. Dept. v. Finch, 144 Or App 42, 925 P2d 913 (1996). School officials' search of student was not justified based on fact that student had been in a fight and his jacket felt heavy.

State v. Dyer, 141 Or App 6, 917 P2d 51 (1996). An officer safety frisk was not justified where defendant, carrying a crutch and wearing clothing capable of hiding a weapon, came to the lottery office with stolen tickets and security officers wished to question him in a closed environment.

State v. Baldwin, 76 Or App 723, 712 P2d 120 (1985), *rev den*, 301 Or 193 (1986). The suspect's possession of less than one ounce of marijuana, plus fact that many people in the area typically carried weapons, was not enough to justify a frisk search.

5. Scope of the Frisk.

a. The Exterior Patdown.

Under both the Fourth Amendment and Oregon law, frisk searches generally are limited to a patdown of the outer clothing of the suspect, ORS 131.625(1), 131.605(3); Terry v. Ohio, 392 US 1, 30, 88 S Ct 1868, 20 L Ed 2d 889 (1968). Absent some special justification, an officer cannot intrude into the suspect's clothing. *See* State v. Rudder, 347 Or 14, 217 P3d 1064 (2009) (reasonable suspicion authorized officers to pat defendant down and handcuff him when he resisted the patdown, but officers were not permitted to visually inspect defendant's pocket without first conducting a patdown); State v. Coffer, 236 Or App 173, 234 P3d 1082 (2010) (it was unreasonable for officer to lift defendant's pant leg to look inside cowboy boot because, even if the boot was thick enough to prevent the officer from feeling a weapon concealed inside, defendant was handcuffed at the time she was searched, and the record did not explain how she might be able to access a weapon concealed in the boot); State v. Stanley, 223 Or App 1, 195 P3d 454 (2008), *rev den*, 347 Or 446 (2009) (without explanation for why it was necessary to open defendant's pocket without first patting it down, search of the pocket was unlawful). *But see* State v. Bechtold, 99 Or App 593, 783 P2d 1008 (1989), *rev den*, 309 Or 521 (1990) (lifting defendant's shirttail to check his waistband for weapons "was not overly intrusive," even if the search did not strictly comply with ORS 131.605).

It is also reasonable to ask a suspect to place his or her hands and upper body on the car in connection with a frisk search, State v. Lumpkin, 129 Or App 601, 880 P2d 468 (1994), *aff'd after remand*,133 Or App 265, 891 P2d 660, *rev den*, 321 Or 138 (1995). *But see* State v. Messer, 71 Or App 506, 692 P2d 713 (1984) (unlawful for officer to remove defendant from car merely because unsheathed knife was visible next to him).

b. Seizure of Potential Weapons.

If, in the course of the frisk search, an officer feels an object that is reasonably suspected to contain a dangerous or deadly weapon, the officer may take possession of the object. ORS 131.625(2); State v. Lumpkin, 129 Or App 601, 880 P2d 468 (1994), *aff'd after remand*,133 Or App 265, 891 P2d 660, *rev den*, 321 Or 138 (1995); *cf*. Minnesota v. Dickerson, 508 US 366, 113 S Ct 2130, 124 L Ed 2d 334 (1993) (the "plain view" doctrine applies to objects *felt*, not only those seen; *i.e.*, if an officer lawfully pats down a suspect and feels an object whose contour or mass makes it immediately apparent to the officer as contraband, the officer may seize it without a warrant).

The officer must reasonably believe only that the object felt "might contain" a weapon; it is not necessary that the officer reasonably believe that the container "actually contained" a weapon. The test is "whether the officer's subjective safety concerns and resulting actions are objectively reasonable under the circumstances." State v. Blevins, 142 Or App 237, 244, 920 P2d 1131, *rev den*, 327 Or 521 (1998) (officer who felt a cylindrical object that could contain a weapon or razor blade was entitled to remove it); *see also* State v. Gilkey, 172 Or App 95, 18 P3d 402 (2001) (officer entitled to seize Chapstick container sealed with duct tape where defendant made furtive movements toward container and officer previously had seen weapons inside such containers).

c. Search of Potential Weapon After Seizure.

In State v. Ehly, 317 Or 66, 82-83, 854 P2d 421 (1993), the court held that it was reasonable for officers to dump out the contents of a duffel bag after they developed reasonable suspicion to believe that it might contain a weapon. "We are not persuaded that a bright-line rule to the effect that an officer may never search an item that has been seized is appropriate."

The Court of Appeals, however, has suggested in a number of cases that "once the police have seized a closed container from an arrestee, the threat to officer safety from any item within that container has dissipated, and the police can protect themselves by taking steps short of conducting a search while waiting to obtain a search warrant." State ex rel Juv. Dept. v. Singh, 151 Or App 223, 229, 949 P2d 303 (1997) (citing cases). *See also* State v. Petri, 214 Or App 138, 162 P3d 1053 (2007) (officer not justified in opening a closed sunglasses case that he removed from defendant's pocket during patdown; any weapon the case may have held no longer posed a threat once it had been removed from defendant); State v. Gilkey, 172 Or App 95, 18 P3d 402 (2001) (seizure and retention of Chapstick container was sufficient to protect officers and others present; officers not justified in opening container as officer safety measure); State v. Dickerson, 135 Or App 192, 898 P2d 193 (1995) (once knife had been taken away from defendant, no officer-safety need to examine blade).

d. Extension of the Frisk Search.

Oregon Law.

Although frisk searches generally are limited to a patdown of the outer clothing of the suspect, the rule has been extended to include other areas when circumstances dictate. *See* State v. Kemp/Haworth, 112 Or App 522, 831 P2d 37, *rev den*, 313 Or 627 (1992) (seeing a rifle under the passenger's seat and observing furtive movements by the passenger justified entry into the car, seizure of the rifle, and a limited search of the front passenger area for more weapons); State v. Starkweather, 98 Or App 7, 777 P2d 418 (1989) (police were justified in looking under a coat on the seat in defendant's car, because defendant's conduct after he was stopped for speeding gave police reasonable suspicion that he was armed and dangerous). *But see* State v. Bridgeman, 173 Or App 37, 23 P3d 370 (2001) (once driver was arrested, car was being towed and defendant, a passenger, was handcuffed several feet from the car, search of car not justified as safety measure).

Fourth Amendment.

Michigan v. Long, 463 US 1032, 103 S Ct 3469, 77 L Ed 2d 1201 (1983). A search of a car for weapons is permissible when the police reasonably believe that the motorist is dangerous and can grab a weapon from inside the car. *But see* Arizona v. Gant, 556 US 332, 129 S Ct 1710, 173 L Ed 2d 485 (2009) (officer safety concerns did not justify a search of car after defendant was arrested and handcuffed, because he was no longer "within reaching distance of the vehicle" at the time).

Arizona v. Johnson, 555 US 323, 129 S Ct 781, 172 L Ed 2d 694 (2009). Because traffic stops are "fraught with danger to police officers," the Fourth Amendment permits an officer during a lawful traffic stop to order the occupants—including passengers—out of the vehicle. Incident to that, the officer may perform a patdown of the driver and any passengers upon reasonable suspicion that they may be armed and dangerous.

6. Use of Force, Handcuffing, and Other Security Measures.

ORS 131.615(5) authorizes the use of force by an officer in a criminal investigatory stop:

> "A peace officer making a stop may use the degree of force reasonably necessary to make the stop and ensure the safety of the peace officer, the person stopped or other persons who are present."

An identical provision in ORS 810.410(3)(f) authorizes similar measures in a traffic stop. They provide *statutory* authority for safety measures in addition to a patdown for weapons.

However, even apart from the statutes, an officer's *constitutional* authority under Article I, section 9, to take safety measures during a stop is not strictly limited to a patdown frisk for weapons. In State v. Rickard, 150 Or App 517, 947 P2d 215, *rev den*, 326 Or 234 (1997), the officers had a reasonable suspicion that the occupants of a vehicle had just threatened others with a gun. As a result, the officers reasonably conducted a "high-risk" stop, in which they pointed weapons at the suspects, ordered them from their vehicle one-by-one, handcuffed them, emptied their pockets, and placed them in a patrol car. Although the officers' conduct was not statutorily authorized by the pre-1997 version of ORS 131.625 that was in effect at the time of the stop, the court held that that version of the statute did not "define the outer limits of permissible officer safety measures." The officers' conduct was authorized by Article I, section 9, because the officers knew that someone in the car had waved a gun, because the stop occurred in a busy intersection, and because the officers did not know which occupant of the vehicle was armed.

Similarly, in State v. Foster, 347 Or 1, 217 P3d 168 (2009), deputies were dispatched to serve a restraining order at a trailer. Based on their past visits, where they often found numerous people inside the trailer, physical confrontations had occurred, and automatic weapons had been seized, four deputies went to the scene. For officer safety, one deputy went to the front door, one to the back door, and one went past the front door to the side of the trailer—where, through a window, he saw defendant enter a room, pick up a pipe and fill it with methamphetamine. Fearing imminent destruction of the drugs, the deputies entered the trailer without a warrant. The Supreme Court held that the deputies' safety measures and entry into the trailer were reasonable. The court explained that, under State v Bates, 304 Or 519, 747 P2d 991 (1987), once specific, articulable facts lead an officer to reasonably suspect an immediate threat to her safety, the inquiry is limited to whether the safety steps that the officer chose were reasonable under the circumstances—not whether other reasonable steps alternatively could have been taken. The court also held that officer safety concerns can be based on past facts and are not limited to events that occur during the officer's contact. Finally, the court held that the "compelling and urgent need" to justify entry into the private recesses of a residence does not apply to entry of the curtilage. For those reasons, the deputy's entry onto the curtilage and looking into the uncovered window was a reasonable officer safety measure in light of the facts known to him at the time.

Rickard and Foster indicate that, under appropriate circumstances, officer safety concerns may allow an officer to display a weapon, handcuff the suspect, enter the curtilage of a house, or take other precautions that are reasonable under the circumstances. "[O]fficer safety measures in the context of a stop are circumscribed by principles of reasonableness broadly announced in State v. Bates, 304 Or 519, 524, 747 P2d 991 (1987)." State v. Rickard, 150 Or App at 525; State v. Hendricks, 213 Or App 360, 160 P3d 1017 (2007) (based on officer safety concerns, officer was entitled to order one suspect to sit on the floor while he frisked the other suspect); State v. Rudder, 347 Or 14, 217 P3d 1064 (2009) (based on officer safety concerns, "[h]andcuffing or otherwise restraining defendant for the limited purpose of carrying out the patdown was permissible" when defendant resisted a patdown); State v. Weigel, 276 Or App 342, 367 P3d 541 (2016) (officer's act of

handcuffing defendant was not an unreasonable precautionary measure to take during an investigatory stop to guard against the possibility of defendant accessing and discharging his weapon); *State v. Bradford*, 290 Or App 889, 417 P3d 530 (2018) (officer-safety concerns justified officer's decision to detain defendant, pat him down, and handcuff him while police searched for weapon they believed defendant had just discarded). *But see State v. Gaylor*, 287 Or App 495, 404 P3d 1140 (2017) (handcuffing and patting down defendant not justified, as officer's belief that defendant posed an immediate threat of serious physical injury was not objectively reasonable); *State v. Faccio*, 114 Or App 112, 834 P2d 485 (1992) (ordering the driver to exit car to be handcuffed, without reasonable basis for believing the driver was presently armed and dangerous, exceeded the lawful scope of stop).

Handcuffing under some circumstances may convert a mere encounter or a stop into an arrest. *See State v. Johnson*, 120 Or App 151; *State v. Koester*, 117 Or App 139, 843 P2d 968 (1992), *rev den*, 315 Or 644 (1993) (handcuffing defendant following a fruitless frisk for weapons converted the stop into an arrest); *State v. Morgan*, 106 Or App 138, 806 P2d 713, *rev den*, 312 Or 235 (1991) (officers stopped a car and, with guns drawn, directed the occupants to get out of the car, told them to raise their hands, and frisked them; suspicion of a possible kidnapping "entitled [the officers] to take reasonable precautions for their safety"; but handcuffing the defendant and placing him in the patrol car after a fruitless frisk for weapons turned the stop into an unlawful arrest).

7. Frisk Searches Incident to Arrest.

"[A] 'patdown or limited search for weapons' to protect a police officer or prevent escape always is permissible incident to a person's arrest." *State v. Jackson*, 127 Or App 170, 173, 871 P2d 1019, *rev den*, 319 Or 211 (1994), *quoting State v. Owens*, 302 Or 196, 200, 729 P2d 524 (1986). *State v. Durando*, 262 Or App 299, 304, 323 P3d 985, *rev den*, 356 Or 400 (2014) (the permissible scope of a search for weapons incident to arrest is limited to the facts surrounding the arrest; although a pat down or limited search for weapons to protect the officer or to prevent escape is justified whenever a person is taken into custody, a more intrusive search—like a search of the interior of the arrestee's pockets—is justified only if the officer develops reasonable suspicion, based on specific and articulable facts, that the arrestee poses a serious threat of harm or escape and that a search would lessen or eliminate that threat).

See additional discussion in Chapter IV (Warrantless Searches), (Searches Incident to Arrest).

8. Frisk Searches/Handcuffing When Search Warrant Is Executed.

Handcuffing and frisking an occupant of a residence in the course of executing a search warrant is permissible, if the police have a reasonable suspicion that the person poses a threat of serious physical injury. ORS 133.605; *State v. Barnett*, 132 Or App 520, 888 P2d 1064, *rev den*, 321 Or 137 (1995) (handcuffing justified where officers had probable cause—and therefore, necessarily, reasonable suspicion—to believe that the occupants of the house had ready access to weapons and would use them. *See Muehler v. Mena*, 544 US 93, 125 S Ct 1465, 161 L Ed 2d 299 (2005) (detention of resident in handcuffs during execution of search warrant was lawful under the Fourth Amendment where the officers were searching for deadly weapons and evidence of gang membership in a known gang member's house).

But, under both the Fourth Amendment and Oregon law, frisk searches conducted during the execution of a search warrant must be based on reasonable suspicion to believe the particular person is armed or dangerous. *Ybarra v. Illinois*, 444 US 85, 100 S Ct 338, 62 L Ed 2d 238 (1979) (a lawful search of a tavern and its bartender does not include the right to search its patrons, unless there is a

reasonable belief they are armed); *State v. Weber*, 64 Or App 459, 668 P2d 475 (1983) (extends *Ybarra* rule to a residence; minimally odd behavior was not enough for a frisk).

In *State v. Swibies*, 183 Or App 460, 53 P3d 447 (2002), the Oregon Court of Appeals described how the degree of specificity required before an officer may take particular security precautions will depend on the particular circumstances. At the time of the initial entry, an officer who has "reason to believe that some of the occupants may be armed and dangerous" may handcuff persons who are present but not named in the warrant, and may detain them long enough to ensure both the officers' and the occupants' safety, "even though the officers may not be able to identify anything about the persons other than their presence in such a place." *Id.* at 467. But if the officer does not have reason to believe that the occupants are armed and dangerous, "something more specific must be shown" before the officer may handcuff persons who are in the house when they enter. 183 Or App at 467-68, *citing* *State v. Reinhardt*, 140 Or App 557, 916 P2d 313, *rev den*, 327 Or 521 (1998). *See also* *State v. Madden*, 363 Or 703, 427 P3d 157 (2018) (officer-safety concerns allowed officers to approach, pat down, handcuff, and detain defendant, the driver of a vehicle that was parked in the driveway of a drug house when the officers arrived to execute a search warrant, for the length of time needed to secure the house in question; but the officer safety doctrine did not justify continued detention of or questioning of defendant once the drug house was secured. The *Swibies* court characterized *Reinhardt* as a case in which, before they entered, the officers lacked sufficient reason to believe that persons inside might be armed. In *Reinhardt*, the officers executing the warrant were aware of the following circumstances: (1) the occupants of the house dealt in methamphetamine and stolen property; (2) they were heavily tattooed "biker type" people recently paroled from prison; (3) in the officer's training and experience, biker parolees often are armed and prone to violence; and (4) sometime within the preceding two months, an informant had seen a man at the house wearing a handgun in a shoulder holster. These facts did not justify a belief that the defendant presented a risk of harm. Therefore, an officer executing the search warrant exceeded the bounds of permissible officer safety measures by handcuffing the defendant, a man wearing biker gear encountered by the officer when the police entered the residence.

Under *Swibies*, an officer's authority to take safety measures after the initial entry and securing of the premises is different: "Once the officers are inside and the premises are secure, * * * the risks associated with initially entering the house no longer exist. Officers still have legitimate concerns for their safety while they continue to execute the warrant, but, in the absence of specific evidence indicating otherwise, those concerns will ordinarily diminish after the officers have entered the home and secured it." In *Swibies*, the court held that, where officers remained on the premises processing evidence for several hours after initial entry under the warrant, officer safety concerns did not justify seizure and patdown of a person who came to the front door and peered inside. Accordingly, during this phase, more specific information will be required to justify frisking or handcuffing an individual found on the premises.

See also Chapter V (Warrants), (Officer Safety; Use of Force in Executing Warrants). A discussion of "protective sweeps" is in Chapter IV (Warrantless Searches) (Searches Incident to Arrest).

III. PROBABLE CAUSE.

A. PROBABLE CAUSE TO SEARCH OR SEIZE.

As a general rule, to be valid, searches and seizures require **probable cause.** There are exceptions to this rule. For example, see the following warrantless search categories in Chapter IV of this outline: consent searches, emergencies, and inventories. *See also* Chapter II, Stop and Frisk.

Oregon Law.

The Oregon Supreme Court's clearest definition of probable cause to search appears in State v. Anspach, 298 Or 375, 380-81, 692 P2d 602 (1984): Probable cause exists if there are objective facts that would "lead a reasonable person to believe that seizable things will probably be found in the location to be searched." *See also* State v. Moylett, 313 Or 540, 552, 836 P2d 1329 (1992) (same); State v. Castilleja, 345 Or 255, 264, 192 P3d 1283, *adh'd to on recons*, 345 Or 473 (2008) (same).

"Probably" means "more likely than not." State v. Maxfield, 133 Or App 371, 374, 891 P2d 1342, *mod on recons*, 134 Or App 542 (1995). State v. Usher, 135 Or App 143, 145, 897 P2d 1185, *rev den*, 321 Or 560 (1995); *see also* State v. Chambless, 111 Or App 76, 80, 824 P2d 1183, *rev den*, 313 Or 210 (1992) (same).

Probable cause does not require certainty. State v. Goodman, 328 Or 318, 975 P2d 458 (1999); State v. Herbert, 302 Or 237, 241, 729 P2d 547 (1986). Neither does it require proof beyond a reasonable doubt. State v. Ayvazov, 246 Or App 641, 647, 267 P3d 196 (2011), *rev den*, 351 Or 675 (2012); State v. Rayburn, 246 Or App 486, 492, 266 P3d 156 (2011), *rev den*, 351 Or 675 (2012).

Probable cause requires more than "reasonable suspicion" or "reasonable grounds." State v. Gulley, 324 Or 57, 921 P2d 396 (1996). It also requires more than a "well-warranted suspicion." State v. Jones, 248 Or 428, 432, 435 P2d 317 (1967) ("[m]ere suspicion or belief, unsupported by facts or circumstances, is insufficient"); State v. Lane, 135 Or App 233, 241, 898 P2d 1358, *rev den*, 322 Or 360 (1995) (a suspicion, no matter how well founded, is not probable cause, *quoting* State v. Verdine, 290 Or 553, 557, 624 P2d 580 (1981)). State v. Hebrard, 244 Or App 593, 600, 260 P3d 759 (2011) (defendant's proximity to recently-driven stolen truck might support reasonable suspicion, but not probable cause).

In State v. Carter/Grant, 316 Or 6, 13, 848 P2d 599 (1993), the court said:

> "A fact that merely supports an inference that some other fact is possible — as one among the range of many other and different possibilities — does not support an inference that any specific one of the possible facts is itself probable. Probable cause is necessary to support a warrant, not merely one possibility, among many."

Police are not limited to searching one "most promising place." Uncertainty over the exact location of evidence does not preclude searches of several locations. State v. Villagran, 294 Or 404, 413, 657 P2d 1223 (1983) ("[T]he circumstances of a case may give rise to probable cause to search several different locations at the same time[.]"); State v. Bruno, 68 Or App 827, 683 P2d 1383, *rev den*, 297 Or 824 (1984) (proximity of two residences to a rural marijuana grow, combined with shared access and other features, established probable cause to search *both* residences). *See also* State v. Grimes/Thornton, 135 Or App 497, 899 P2d 1201 (1995), *rev den*, 322 Or 490 (1996) (the inference that defendants' marijuana grow was located inside their home was justified by high power consumption and the recitation that it was too cold in December to grow marijuana outdoors); State v. Dunn, 99 Or App 519, 783 P2d 29 (1989), *rev den*, 309 Or 522 (1990) (defendant's involvement in

his brother's "chop shop" in another county gave rise to probable cause to search defendant's residence for evidence of car theft); State v. Farrar, 309 Or 132, 786 P2d 161, *cert den*, 498 US 879 (1990) (multiple search warrants issued on basis of a single original affidavit); State v. Henderson, 341 Or 219, 142 P3d 58 (2006) (probable cause to search for stolen ring in defendant's home, even though there were other possible locations it could be); State v. Klingler, 284 Or App 534, 393 P3d 737 (2017) (affidavit reporting defendant's statement that he had marijuana in his RV sufficient to establish probable cause for searching RV, despite the fact that defendant had two RVs and did not specify in his statement which one contained the marijuana).

But the mere fact that evidence *could* be in a place is insufficient absent specific, articulable facts connecting it to the place. *See* City of Eugene v. Silva, 198 Or App 101, 108 P3d 23 (2005) (officers who were investigating a hit-and-run involving defendant's pickup truck and found defendant's truck outside a home nearby did not have probable cause to believe that defendant was at that address, rather than simply in the area); State v. Keerins, 197 Or App 428, 106 P3d 166, *rev den*, 338 Or 681 (2005) (statement in affidavit that the suspect had been caught with a sizeable quantity of heroin in his underwear outside of residence, by itself, was not evidence from which a reasonable person could conclude that, more likely than not, additional drugs would be found in residence).

See cases in this chapter discussing the required nexus between criminal activity and the place to be searched (Chapter V, Searches with Warrants).

A statement in an affidavit that drug-related evidence is "**often**" found at the residence of a drug dealer may not be sufficient to establish that it is "**probable**" that such evidence will be at the residence. *See* State v. Keerins, 197 Or App 428, 435 n 1, 106 P3d 166, *rev den*, 338 Or 681 (2005), and State v. Harper, 197 Or App 221, 229 n 3, 105 P3d 883 (2005). In State v. Webber, 281 Or App 342, 383 P3d 951 (2016), the Court of Appeals concluded that a warrant authorizing the search of an alleged drug dealer's home was invalid. Although the objective content of the detective's affidavit supplied probable cause to believe that defendant was engaged in illegal drug activity, it did not contain sufficient information suggesting that evidence of that activity would be found in his home. The officer's mere statement that he expected a drug dealer to possess paraphernalia did not supply probable cause that it would be found in defendant's home. *But see* State v. Soto-Sarabia, 333 Or App 46, 551 P3d 980, *rev den*, 372 Or 813 (2024) (where affidavit stated that two controlled buys had occurred from the defendant's car, there was a sufficient connection to that vehicle to establish probable cause to believe that, more likely than not, drug evidence would be found in the car).

However, the Oregon Supreme Court has determined that probable cause is not limited to the place that the evidence is most likely to be found; probable cause can be established for places criminals "often" keep evidence of a crime under certain circumstances. State v. Henderson, 341 Or 219, 142 P3d 58 (2006). In that case, the Supreme Court overruled the decision by the Court of Appeals in State v. Henderson, 200 Or App 225, 113 P3d 944 (2005), *rev'd*, 341 Or 219 (2006). In Henderson, the appellate courts reviewed a search warrant that authorized the search of a residence for stolen property. In the affidavit for the search warrant, the officer averred that, based on his training and experience, defendants "'sometimes,' 'oftentimes,' or 'probably'" store stolen property "'at their residence and in their vehicle,' 'in a travel trailer or outbuilding,' 'in the soil near their residence,' 'on their person,' 'on the[] persons or in the[] vehicles' of anyone present during the execution of the warrant, and 'on or about elderly persons or children.'" The Court of Appeals found that, without some information regarding the specific case, the officer's statements about his training and experience as to the likely locations of stolen property were so general that they were not sufficient to justify a search of the defendant's residence. The Supreme Court disagreed, holding that, based on all of the information included in the affidavit, it was probable that the stolen property would be found in the defendant's home, even though there were other places it could possibly be found. The property in question was a pair of stolen rings; the fact that these were valuable, non-

perishable, personal items made it reasonable to conclude that the defendant would want to keep them, and that she was likely to do so at her home. *See also* State v. Ulizzi, 246 Or App 430, 266 P3d 139 (2011), *rev den*, 351 Or 649 (2012) (heat lamp was "durable," not perishable or consumable).

> **Probable cause for information on electronic devices.** With respect to electronic devices, the standard for probable cause is the same as for any other evidence, but a search of the data within the device requires a warrant, which will be subject to the constitutional "particularity" requirement and limitations on the use of evidence that was not within the scope of the probable cause in the warrant. Those requirements are discussed in Chapter V, Searches Pursuant to a Warrant.
>
> Probable cause to believe that *one* device owned by the defendant contains evidence does not automatically equate to probable cause to believe it is on *every* device. *See* State v. Burnham, 289 Or App 783, 412 P3d 1233 (2018) (warrant for multiple devices failed to establish probable cause to search all devices, even though officers had probable cause to believe that one in particular contained the evidence); State v. Friddle, 281 Or App 130, 381 P3d 979 (2016) (same). In State v. Cannon, 299 Or App 616, 450 P3d 567 (2019), the Court of Appeals held that a warrant failed to supply probable cause to search "all" of defendant's electronic devices for child pornography, but acknowledged the possibility that an affidavit could supply probable cause to believe that evidence is on *any* of a "defined group of electronic devices, each of which may contain the evidence or contraband that is the subject of the search." Cannon, 299 Or App at 630-32, n 4. But because the affidavit in that case did not explain why it was likely that evidence would be on the "all-encompassing group" of devices listed in the affidavit, it did not supply probable cause to search all devices found in the defendant's car. Cannon, 299 Or App at 632, n 4; *see also* State v. Ritter, 314 Or App 241, 496 P3d 1047 (2021) (warrant affidavit did not support search all of defendant's digital devices for child pornography).

Although—as explained in the Fourth Amendment section below—the federal constitution does not preclude "anticipatory warrants" predicated on probable cause to believe that objects of the search will be at the location *in the future*, the Oregon Supreme Court has held that Oregon statutes preclude issuance of anticipatory search warrants. State v. Lee, 371 Or 200, 532 P3d 984 (2023), *adh'd to on recons*, 373 Or 525 (2025) (holding that legislature clearly specified that an affidavit must "demonstrate the existence of probable cause to search" when a warrant is issued, and intended, "particularly, that the averments establish the objects of the search are in the location to be searched at that time.")

Fourth Amendment.

The United States Supreme Court has said that probable cause to search exists when "there is a **fair probability** that contraband or evidence of a crime will be found in a particular place." Illinois v. Gates, 462 US 213, 238, 103 S Ct 2317, 76 L Ed 2d 527 (1983). This requires less than either a preponderance of the evidence or a *prima facie* showing. Illinois v. Gates, 462 US at 235. The probable-cause determination is a "practical, common sense" decision based upon the "totality of the circumstances." Illinois v. Gates, 462 US at 238. Probable cause exists if the known facts and circumstances are sufficient to support a reasonable belief that contraband or evidence of a crime will be found. Ornelas v. United States, 517 US 690, 116 S Ct 1657, 134 L Ed 2d 911, 918 (1996).

The Fourth Amendment allows a school administrator to search a student based on the lower standard of reasonable suspicion (a belief that there is a "moderate chance" of finding the evidence in the location searched); "probable cause" s not required. Safford Unified School District #1 v.

Redding, 557 US 364, 129 S Ct 2633, 174 L Ed 2d 354 (2009) (but, in particular case, "the content of the suspicion did not match the degree of the intrusion," where search involved requiring female student to remove outer clothing and lift her bra and the elastic of her underpants to allow school officials to determine whether she had contraband concealed there).

Anticipatory warrants. The United States Supreme Court has also authorized anticipatory warrants. "An anticipatory warrant is 'a warrant based upon an affidavit showing probable cause that at some future time (but not presently) certain evidence of crime will be located at a specified place.'" *United States v. Grubbs*, 547 US 90, 94, 126 S Ct 1494, 1498, 164 L Ed 195 (2006), *quoting* 2 W. LaFave, Search and Seizure § 3.7(c), (4th ed 2004). An anticipatory warrant affidavit must establish by probable cause (1) that a triggering event will occur, and (2) that upon that triggering event the evidence will be found in a particular place. *United States v. Grubbs*, 547 US at 96.

B. PROBABLE CAUSE TO ARREST.

A warrantless arrest based on probable cause does not violate either the Oregon or the federal constitution. *United States v. Watson*, 423 US 411, 422, 96 S Ct 820, 46 L Ed 2d 598 (1976); *Carroll v. United States*, 267 US 132, 156, 161-62, 45 S Ct 280, 69 L Ed 543 (1925); *State v. Mace*, 67 Or App 753, 681 P2d 140, *rev den*, 297 Or 339 (1984). *See also State v. Pratt*, 309 Or 205, 785 P2d 350 (1990) (arrest in Arizona based solely on a teletype request from Oregon authorities who had probable cause was valid).

A police officer has statutory authority to make a warrantless arrest for any felony or misdemeanor based on probable cause. ORS 133.310.

> **CAUTION:** In the absence of "hot pursuit" or any other pre-existing, exigent circumstances, the mere fact that officers have probable cause does not authorize a warrantless nonconsensual entry into the suspect's house to make a routine felony arrest of the suspect; in that circumstance, an arrest warrant, based on probable cause, is required. *State v. Dahl*, 323 Or 199, 209, 915 P2d 979 (1996). *See also State v. Ritz*, 361 Or 781, 399 P3d 431 (2017) (without an exigency, probable cause did not justify entry into home to arrest DUII suspect).

Oregon Law.

Probable cause means "a substantial objective basis for believing that more likely than not an offense has been committed and a person to be arrested has committed it." ORS 131.005(11).

"An officer must subjectively believe that a crime has been committed and thus that a person or thing is subject to seizure, and this belief must be objectively reasonable in the circumstances." *State v. Pollock*, 337 Or 618, 102 P3d 684 (2005), *quoting State v. Owens*, 302 Or 196, 204, 729 P2d 524 (1986); *State v. Vasquez-Villagomez*, 346 Or 12, 203 P3d 193 (2009) (same). This statutory standard is stricter than the federal constitutional standard. *State v. Anfield*, 313 Or 554, 836 P2d 1337 (1992); *State v. Medinger*, 235 Or App 88, 92 n 1, 230 P3d 76 (2010).

A mere possibility is not enough. *State v. Demus*, 141 Or App 509, 513, 919 P2d 1182 (1996) ("A mere possibility is insufficient to demonstrate probable cause."). *See also State v. Verdine*, 290 Or 553, 557, 624 P2d 580 (1981) ("a suspicion, no matter how well founded, does not rise to the level of probable cause"); *but see State v. Keller*, 280 Or App 249, 380 P3d 1144 (2016) (trooper's plain-view observation of baggie of heroin under passenger's leg from outside parked car did not provide probable cause to arrest the person in the driver's seat, despite the fact that he had "an expression of pure fear" when he saw the officer); *State v. Barraza*, 206 Or App 505, 136 P3d 1126 (2006) (officer responded to home in which both minors and adults were consuming alcohol; officer's

belief that one of the adults furnished the alcohol illegally was not objectively reasonable because it was equally possible that the minors brought their own); State v. Edmiston, 229 Or App 411, 211 P3d 340 (2009) (although the mere fact that there is a "legitimate potential use for a container that is typically used to store and transport controlled substances does not preclude the existence of probable cause to arrest," there were no objective facts that supplied probable cause to arrest the defendant for PCS based on detection of "small plastic baggie of unknown contents").

But certainty is not required. An officer is not required to consider and eliminate all other possible explanations of the suspicious behavior. State v. Foster, 350 Or 161, 252 P3d 292 (2011) (mere possibility that drug dog may have detected only a residual odor of drugs possessed in the *past* does not defeat probable cause for current drug possession); State v. Ayvazov, 246 Or App 641, 647, 267 P3d 196 (2011), *rev den*, 351 Or 675 (2012) (possibility that defendant, passenger of stolen car, did not know car was stolen, did not defeat probable cause under circumstances here); State v. Rayburn, 246 Or App 486, 492, 266 P3d 156 (2011), *rev den*, 351 Or 675 (2012)(same); State v. Tropeano, 238 Or App 16, 241 P3d 1184 (2010), *rev den*, 349 Or 654 (2011) (possibility that defendant had child pornography that was obtained lawfully from country in which such material is not unlawful did not defeat probable cause to believe that he had unlawful child pornography); State v. Chilson, 219 Or App 136, 142, 182 P3d 241, *rev den*, 344 Or 670 (2008) (to have probable cause to stop the defendant for improperly signaled turn, the officer was not required to first determine whether statutory exemption applied); State v. Williams, 178 Or App 52, 62 n 9, 35 P3d 1088 (2001) (before arresting woman exhibiting behavior indicative of prostitution, officer not required to eliminate non-criminal explanations for her behavior); State v. Bourget-Goddard, 164 Or App 573, 993 P2d 814 (1999), *rev den*, 330 Or 331 (2000) (officers not required to have probable cause to believe that exemptions to seat belt law did not apply); State v. Spruill, 151 Or App 87, 948 Or App 726 (1997) (the officer had probable cause for DUII, regardless of the possibility of other plausible explanations); State v. Gilmour, 136 Or App 294, 901 P2d 894, *rev den*, 322 Or 360 (1995) (officer need not eliminate all possible alternative explanations).

The officer is not required to accept the suspect's explanation as true. *See* State v. Vantress, 195 Or App 52, 96 P3d 867 (2004) (officer not required to accept suspect's explanations for appearing intoxicated); State v. Codr, 99 Or App 417, 782 P2d 442 (1989) (probable cause was not defeated by fact that suspect stopped for tampering with a car showed a purported bill of sale).

"The test for probable cause is one of the totality of the circumstances and not of isolated facts." State v. Vasquez-Villagomez, 346 Or 12, 25-27, 203 P3d 193 (2009) (although general suspect descriptions may not have been sufficient to establish probable cause to arrest the two defendants, similarities in appearance between the suspects and the defendants, coupled with other corroborating circumstances, sufficed to establish probable cause); State v. McCoy, 155 Or App 610, 615, 964 P2d 309 (1998). *See also* State v. Vantress, 195 Or App 52, 96 P3d 867 (2004) (in determining the reasonableness of the officer's belief, the court considers the totality of the circumstances, including how a trained police officer would view them, not just isolated facts); State v. Morgan, 230 Or App 395, 400, 215 P3d 120, *rev den*, 347 Or 365 (2009) ("In evaluating the objective reasonableness of an officer's belief, we examine the totality of the circumstances, including the officer's training and experience, although such training and experience by itself does not suffice."), *quoting* State v. Jacobs, 187 Or App 330, 333, 67 P3d 408 (2003).

CAUTION: An Exercise of Constitutional Rights Is Not An Incriminating Circumstance. The act of refusing an officer's request to search cannot be used to support probable cause to arrest. State v. Gilmour, 136 Or App 294, 299, 901 P2d 894, *rev den*, 322 Or 360 (1995) (a driver's refusal to consent to field sobriety tests); State v. Barker, 271 Or App 63, 348 P3d 1138 (2015) (police could not could not consider defendant's protective behavior toward her purse in evaluating probable

cause); *State v. Medinger*, 235 Or App 88, 94, 230 P3d 76 (2010) (defendant's attempt to avoid interaction with the officer, followed by ignoring the officer's questions, could play no part in probable-cause analysis).

Fourth Amendment.

Probable cause, for the purpose of arrest, appears to mean essentially the **"fair probability"** standard established by the Supreme Court for searches. *Illinois v. Gates*, 462 US 213, 238, 103 S Ct 2317, 76 L Ed 2d 527 (1983); *see* discussion defining probable cause to search and seize, in this chapter. As distinct from searches, however, arrests require a fair probability that an offense has been or is being committed by the person who is to be arrested. *See Beck v. Ohio*, 379 US 89, 91, 85 S Ct 223, 13 L Ed 2d 142 (1964); *Brinegar v. United States*, 338 US 160, 69 S Ct 1302, 93 L Ed 1879 (1949). *See also Ornelas v. United States*, 517 US 690, 116 S Ct 1657, 134 L Ed 2d 911, 918 (1996) (probable cause exists "where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found[.]").

C. THE OBJECTIVE AND SUBJECTIVE COMPONENTS OF PROBABLE CAUSE.

Oregon Law.

In contrast to the Fourth Amendment standard, which is an objective test, probable cause under Oregon law (whether for an arrest, a search or a seizure) has both an objective and a subjective component. *State v. Dahl*, 323 Or 199, 203, 915 P2d 979 (1996) (arrest); *State v. Nagel*, 320 Or 24, 32, 880 P2d 451 (1994) (search); *State v. Hart*, 149 Or App 635, 945 P2d 532 (1997) (arrest); *see also State v. Berringer*, 234 Or App 665, 229 P3d 615, *rev den,* 348 Or 669 (2010) (probable cause if officer "reasonably believes that, more likely than not, the suspect has committed an offense."), *citing State v. Miller*, 345 Or 176, 191 P3d 651 (2008).

The record must establish that the officer subjectively believed he or she had lawful authority to arrest or search. In *State v. Miller,* 345 Or 176, 191 P3d 651 (2008), the deputy testified that he "had a reasonable suspicion, but [he] had not reached sufficiently to call it probable cause" to arrest the defendant for suspected DUII. *Miller*, 345 Or at 179. The court held that subjective PC exists if the officer believes that he or she has lawful authority to restrain the individual, even if the officer is mistaken about the basis of the authority or the extent of the restraint. "[A]n officer's expressed reason for making an arrest does not control a court's determination of that arrest's legality – so long as the officer *acted on the belief* that there was a legal justification for that action (the subjective component) and the officer's belief was objectively reasonable (the objective component)." *Miller*, 345 Or at 186 (emphasis in original). The deputy's testimony—that he did not yet have probable cause—was, at best, an opinion on a complex legal issue, and was not a statement of fact. *See also State v. Lesher*, 223 Or App 720, 196 P3d 120 (2008) (trooper's testimony that he had "reasonable suspicion" to stop the defendant was not binding. The officer's belief that he had legal justification to restrain defendant's liberty established subjective probable cause); *State v. Johnston*, 222 Or App 338, 193 P3d 1010 (2008) (trial court was not required to accept the deputy's testimony that he did not have probable cause, a complex legal determination on which the officer's testimony was not dispositive).

PRACTICAL SUGGESTION: Equivocal Testimony/Ambiguous Language. Although the courts have upheld arrests even when the officer gave equivocal testimony about his or her subjective belief, prosecutors should attempt to clarify any ambiguous testimony. If an officer describes subjective belief in ambiguous terms, follow up by asking whether the facts observed by the officer led the officer to think

it was more likely than not that the defendant was under the influence of an intoxicant?

Inferring subjective belief from the officer's actions. If the officer does not clearly verbalize his or her belief, a court can nonetheless infer subjective belief from the actions taken by the officer. *See* State v. Belt, 325 Or 6, 932 P2d 1177 (1997) (subjective component of reasonable suspicion could be inferred from the fact that officer stopped suspect); State v. Gilbertz, 173 Or App 90, 20 P3d 252, *rev den*, 332 Or 559 (2001) (same); State v. Getzelman, 178 Or App 591, 39 P3d 195, *rev den*, 334 Or 289 (2002) (subjective belief that additional evidence of drug manufacturing would be found in vehicle inferred from fact that, after finding paraphernalia in trunk and bindle in defendant's fanny pack, officers arrested vehicle occupants and opened a backpack); State v. Miller, 157 Or App 489, 972 P2d 896 (1998), *rev den*, 328 Or 365 (1999) (subjective component of probable cause inferred from the officer's conclusion that the defendant was influenced by meth, his observation of powder consistent with that belief and his arrest of the defendant for drug possession); State v. Stanley, 153 Or App 16, 955 P2d 764 (1998) (subjective probable cause to arrest for DUII could be inferred from officer actions consistent with belief that defendant committed DUII); State v. Koester, 117 Or App 139, 843 P2d 968 (1992), *rev den*, 315 Or 644 (1993) (subjective belief inferred from officer's actions, although he told suspect he was not under arrest).

Inferring subjective belief from the warrant affidavit. The issuing magistrate is authorized to make reasonable inferences from the information in the affidavit. State v. Forker, 214 Or App 622, 168 P3d 279 (2007). If the officer has not clearly articulated subjective belief in the language of the affidavit, argue that the court can infer that belief from the other language in the affidavit, including boilerplate. *See* State v. McDowell, 211 Or App 341, 155 P3d 877 (2007) (officer's subjective belief that evidence of illegal drug activity would be found in defendant's apartment could be inferred from other information in the affidavit). For further discussion of the sufficiency of search warrant affidavits, see Chapter V, Searches With Warrants.

Can the subjective component of probable cause be inferred from the mere fact that the officer made the arrest? In State v. Bickford, 157 Or App 386, 970 P2d 234 (1998), *rev den*, 329 Or 589 (2000), the Court of Appeals opined in a footnote that an arrest was *not* a sufficient basis in itself for inferring subjective belief. "If a trial court could infer subjective probable cause *from* the arrest, we would not need to inquire into subjective probable cause *for* the arrest." State v. Bickford, 157 Or App at 390 fn 1. On its face, this conclusion seems to conflict with State v. Belt, wherein the Supreme Court held that subjective reasonable suspicion could be inferred from the fact that the officer conducted a stop. The court stated: "When, as here, no evidence provides a contrary explanation of that conduct, the conduct supports the inference that the stopping officer subjectively believed what the statute requires. As a matter of law, such an inference is available for use in this case." State v. Belt, 325 Or at 12. In Belt, however, the record also contained evidence of the citizen report that was the basis for the stop and showed that the officer's actions were consistent with that report. Thus, in the context of Belt, the Bickford footnote appears to mean only that the *fact* of an arrest is not a sufficient indication of subjective belief without evidence supporting an inference that the officer knew of the objective circumstances. This is consistent with the Court of Appeals' approach in State v. Koester, 117 Or App at 145.

"Moreover, the officer must formulate that belief 'at the time he acts.'" State v. Stowers, 136 Or App 448, 454, 902 P2d 117 (1995) (officer's admission that he did not have subjective probable cause to arrest defendant for DUII until after searching defendant by checking his pulse rendered arrest invalid), *quoting* Owens, 302 Or at 204. *See also* State v. Rutherford, 160 Or App 343, 981 P2d 386, *rev den*, 329 Or 447 (1999) (probable cause to justify field sobriety tests was not established where officer testified he developed probable cause after the tests were concluded); State v. Dickerson, 135 Or App 192, 898 P2d 193 (1995) (where officer testified that he did not think he

had probable cause to believe that defendant was involved in a tire slashing incident until after he had inspected the blade, search and seizure of the knife were invalid); State v. Bailey, 143 Or App 285, 924 P2d 833 (1996) (although a valid search incident to arrest may precede the arrest, the officer must have probable cause at the outset of the search).

"For an officer's belief to be objectively reasonable, the facts, *as the officer perceives them* must actually constitute an infraction." State v. Harrop, 296 Or App 541, 545, 439 P3d 548, *rev den*, 365 Or 556 (2019) (emphasis in original). "The officer's belief is objectively reasonable even if it turns out that the officer was mistaken about the facts forming the basis for the stop and that no infraction had occurred." *Id.* *See also* State v. Tiffin, 202 Or App 199, 203, 121 P3d 9 (2005) ("an officer's belief may be objectively reasonable even if it turns out to be factually incorrect").

An officer is not required to arrest immediately upon developing probable cause. State v. Dinsmore, 182 Or App 505, 49 P3d 830 (2002) (the timing of an officer's development of probable cause is separate from the question of when the officer decided to arrest for the offense; here, the evidence allowed the trial court to find that the officer subjectively believed he had probable cause, even though he did not decide to arrest the defendant until later).

Subjective belief cannot be based on evidence that is unlawfully obtained. Ezzell v. DMV, 171 Or App 591, 17 P3d 516 (2000), *rev den*, 332 Or 316 (2001) (no subjective probable cause for arrest where officer's belief depended in part on unlawfully administered FSTs); *see also* State v. Stowers, 136 Or App 448, 902 P2d 117 (1995) (subjective belief based on results of unlawful search).

Probable cause is not invalidated by later-acquired information, as long as the officer has subjective and objective probable cause at the time of the arrest. State v. Dodge, 223 Or App 130, 133, 195 P3d 442 (2008), *rev den*, 346 Or 66 (2009) (officers who saw the defendant's name on "unentered warrant" list had subjective and objective PC to arrest the defendant, even if no valid arrest warrant existed); State v. Esplin, 314 Or 296, 839 P2d 211 (1992) (a later showing that informant's information was inaccurate was irrelevant); State v. Castro, 194 Or App 109, 93 P3d 815 (2004) (in determining whether a warrant affidavit supplied probable cause, the court attached no significance to the fact that, by the time the warrant was executed, unbeknownst to the police, the tenant named in the warrant had moved out of the residence and defendant had just moved in).

An arrest is not invalidated merely because the arresting officer articulates another, even invalid, reason for it, as long as the arrest is objectively based on probable cause. State v. Cloman, 254 Or 1, 456 P2d 67 (1969) (officers were unsure about probable cause for theft, arrested defendant for violating an "after hours" ordinance; the arrest remained valid even after the ordinance was found unconstitutional); State v. Tiffin, 202 Or App 199, 203, 121 P3d 9 (2005) ("[A]n officer's belief may be objectively reasonable even if it turns out to be factually incorrect."). State v. Boatright, 222 Or App 406, 410, 193 P3d 78, *rev den*, 345 Or 503 (2008) (probable cause may be based on mistake as to *which* law the defendant violated, if the facts that the officer perceives establish the elements of some offense).

An officer's subjective belief may be based on a determination by other officers, if the officer conducting the arrest or search is reasonably relying on another officer's request and probable cause does, in fact, exist. State v. Soldahl, 331 Or 420, 15 P3d 564 (2000). The arresting officer must have a reasonable subjective belief that the other officers have probable cause. State v. Pratt, 309 Or 205, 216-17, 785 P2d 350 (1990); State v. Koester, 117 Or App 139, 843 P2d 968 (1992), *rev den*, 315 Or 644 (1993); State v. Radford, 222 Or App 87, 89-90, 191 P3d 776 (2008) (same).

See cases on Collective Knowledge of Police, in this chapter.

Fourth Amendment.

Probable cause under the Fourth Amendment is determined by an essentially *objective* standard. As explained in *Ornelas v. United States*, 517 US 690, 116 S Ct 1657, 134 L Ed 2d 911, 918 (1996), probable cause exists "where the known facts and circumstances are *sufficient to warrant a man of reasonable prudence* in the belief that contraband or evidence of a crime will be found[.]" (Emphasis added). *See also Devenpeck v. Alford*, 543 US 146, 125 S Ct 588, 160 L Ed 2d 537 (2004). As such, if an officer objectively has probable cause to arrest for a valid offense, there is no Fourth Amendment violation merely because the officer erroneously arrested the suspect only for a different offense.

D. PROBABLE CAUSE TO STOP FOR A TRAFFIC VIOLATION.

To make a stop for a **traffic violation** (as opposed to a traffic crime), the police are statutorily required to have probable cause, not merely reasonable suspicion. *State v. Matthews*, 320 Or 398, 403, 884 P2d 1224 (1994) ("reasonable basis" to believe that a traffic infraction has occurred is the functional equivalent of "probable cause"). Whether Article I, section 9, also requires probable cause (as opposed to reasonable suspicion) is a question that has never been clearly resolved by the Supreme Court. *See State v. Watson*, 353 Or 768, 305 P3d 94 (2013) (declining to decide issue); *Matthews*, 320 Or at 402 n 2 (same). Despite *dictum* in *State v. Suppah*, 358 Or 565, 369 P3d 1108 (2016), stating that Article I, section 9 requires only reasonable suspicion for a violation stop—a question that was not directly before the court—the Court of Appeals continues to apply a probable cause constitutional standard to traffic stops. *See, e.g., State v. Hughes*, 311 Or App 123, 488 P3d 795 (2021); *State v. Derby*, 301 Or App 134, 455 P3d 1009 (2019). As a result, trial courts are bound by those Court of Appeals holdings.

Probable cause cannot be based on a mistake of law, even if the mistake is reasonable; for that reason, an officer lacked probable cause to stop defendant for failing to have two license plates on his vehicle, where the plate was a "dealer plate" that, unbeknownst to the officer, fell within an exception to the two-plate rule. *State v. Hughes*, 311 Or App 123, 488 P3d 795 (2021).

See cases and discussion in Chapter II, Stop and Frisk, Traffic Violations – Probable Cause Required.

E. INTRUSIONS REQUIRING LESS THAN PROBABLE CAUSE.

There are areas in which limited intrusions based on less than probable cause are allowed. These are discussed in other sections of this outline and are summarized below.

Fourth Amendment.

In certain areas, the Supreme Court "has held that **reasonable suspicion** of unlawful activity justifies searches and seizures when the intrusion on individual privacy is minimal and outweighed by an important government interest." *Forty-Ninth Annual Review of Criminal Procedure*, 49 GEO. L. J. ANN. REV. CRIM. PROC. 24 (2020) (emphasis added). These intrusions include:

1. Investigative detentions. *Terry v. Ohio*, 392 US 1, 22-24, 88 S Ct 1868, 20 L Ed 2d 889 (1968).

2. Protective sweeps. *Maryland v. Buie*, 494 US 325, 333-34, 110 S Ct 1093, 108 L Ed 2d 276 (1990).

3. Searches extending beyond routine border searches. *United States v. Montoya de Hernandez*, 473 US 531, 541, 105 S Ct 3304, 87 L Ed 2d 381 (1985).

4. Searches involving special governmental needs beyond normal law enforcement. *New Jersey v. T.L.O.*, 469 US 325, 341-42, 105 S Ct 733, 83 L Ed 2d 720 (1985).

"Some searches may be reasonable under the Fourth Amendment **without any individualized suspicion**." *Forty-Ninth Annual Review of Criminal Procedure*, 49 GEO. L. J. ANN. REV. CRIM. PROC. 24 (2020). Examples:

1. Searches incident to arrest. *Chimel v. California*, 395 US 752, 762-63, 89 S Ct 2034, 23 L Ed 2d 685 (1969).

2. Investigative checkpoints. *Illinois v. Lidster*, 540 US 419, 124 S Ct 885, 157 L Ed 2d 843 (2004).

3. Sobriety checkpoints. *Michigan Dept. of State Police v. Sitz*, 496 US 444, 451, 110 S Ct 2481, 110 L Ed 2d 412 (1990).

4. Routine border searches. *United States v. Montoya de Hernandez*, 473 US 531, 538, 105 S Ct 3304, 87 L Ed 2d 381 (1985).

5. Inventories. *Colorado v. Bertine*, 479 US 367, 371, 107 S Ct 738, 93 L Ed 2d 739 (1987).

6. Searches of pervasively regulated industries. *New York v. Burger*, 482 US 691, 702-3, 107 S Ct 2636, 96 L Ed 2d 601 (1987).

7. Random drug tests of student athletes. *Vernonia School District 4J v. Acton*, 515 US 646, 115 S Ct 2386, 132 L Ed 2d 564 (1995).

Oregon Law.

Oregon also recognizes several intrusions requiring less than probable cause.

1. Abandoned Property. *See* Chapter IV, section A.

2. Consent. *See* Chapter IV, section F.

3. Inventories. *See* Chapter IV, section K.

4. Protective Sweeps. *See* Chapter IV, section I(6).

5. Stop and Frisk. *See* Chapter II.

6. Detention of Material Witnesses. *See State v. Fair,* 353 Or 588, 302 P3d 417 (2013). *See* Chapter II, section E.

7. School searches. *See State ex. rel. Juv. Dept. v. M.A.D.*, 348 Or 381, 233 P3d 437 (2010). *See* Chapter IV.

F. GENERAL CONSIDERATIONS REGARDING PROBABLE CAUSE.

1. Common Sense.

Oregon Law.

Common sense is a proper component of probable cause under Article I, section 9. *State v. Cole/Hood*, 87 Or App 93, 98 n 3, 741 P2d 525, *rev den*, 304 Or 280 (1987).

Fourth Amendment.

The Fourth Amendment probable cause determination is a "practical, common sense" decision based upon the "totality of the circumstances." *Illinois v. Gates*, 462 US 213, 238, 103 S Ct 2317, 76 L Ed 2d 527 (1983). "In dealing with probable cause * * *, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Brinegar v. United States*, 338 US 160, 175, 69 S Ct 1302, 93 L Ed 1879 (1949). For instance, in *Maryland v. Pringle*, 540 US 366, 124 S Ct 795, 157 L Ed 2d 769 (2003), the Court held that an officer had probable cause to arrest all occupants of a vehicle where the officer found $763 in cash in the glove box and cocaine under backseat armrest; because occupants of a car are often involved in a common enterprise and would often have the same interest in concealing a crime, it was reasonable for an officer to infer, in light of the quantity of drugs and cash in the car, that all the occupants were engaged in drug dealing.

2. Expertise and Experience of Police Officers.

Under federal and Oregon law, officers can rely on their specialized training and experience in making inferences of criminality from circumstances that might otherwise seem innocent or unremarkable. *See Texas v. Brown*, 460 US 730, 742-43, 103 S Ct 1535, 75 L Ed 2d 502 (1983).

An individual act, while entirely innocuous to a lay person with no additional knowledge or experience, may be suspicious when viewed by a veteran police officer, especially in conjunction with other factors. *State v. Martin*, 327 Or 17, 23, 956 P2d 956 (1998) (observation of an apparent street sale of drugs, "filtered through the lens of [the officer's] experience," provided probable cause even though the officer could not directly see an object being exchanged); *State v. Herbert*, 302 Or 237, 243, 729 P2d 547 (1986) (officer, based on his experience, had probable cause to believe a paperfold held contraband); *State v. Gibson*, 268 Or App 428, 342 P3d 168 (2015) (officer's knowledge about how car thieves operate was relevant to probable cause); *State v. Vantress*, 195 Or App 52, 96 P3d 867 (2004) (officer observed signs that defendant was intoxicated); *State v. Williams*, 178 Or App 52, 35 P3d 1088 (2001) (experienced officer who was qualified as a prostitution expert validly concluded that woman sitting in bus shelter was working as prostitute); *State v. Morgan*, 230 Or App 395, 400-01, 215 P3d 120, *rev den*, 340 Or 365 (2009) (officer, based on his "direct, relevant experience with metal theft," had probable cause to believe that copper wire in car and sheathing in the dumpster consistent with metal theft); *State v. McCoy*, 155 Or App 610, 964 P2d 309 (1998) (experienced officer had probable cause to believe defendant possessed drugs based on missing teeth, fidgety demeanor, signs of meth impairment, and outstanding drug warrant); *State v. Cole/Hood*, 87 Or App 93, 97, 741 P2d 525, *rev den*, 304 Or 280 (1987) (probable cause that two people in a parked car were snorting cocaine); *but see State v. Jacobs*, 187 Or App 330, 67 P3d 408 (2003) (distinguishing *State v. Martin*, 327 Or 17 (1998), on the basis that there was "no evidence that the specific location [of the drug sale] was a cite of continuous, hand to hand drug traffic").

An officer's experience in similar situations is relevant to the same officer's interpretation of similar circumstances in another case. *State v. Jangala*, 154 Or App 176, 179, 961 P2d 246 (1998)

(officer's experience that if police are unable to enter or secure a residence where a beer-keg party involving minors is being held, the keg and the individuals involved tend to disappear, was relevant to determining exigent circumstances for warrantless entry); *see also* State v. Goodman, 328 Or 318, 975 P2d 458 (1999) (upholding an affidavit reciting, among other things, that on all 10 previous occasions when the affiant had searched a marijuana grower's residence located on property separate from the grow, evidence of the grow had been found). But an officer's generalized assumptions, even if based on training and experience, about human behavior must connect to objective facts about the defendant's particular conduct and circumstances to be more than mere speculation. State v. Sanchez-Anderson, 300 Or App 767, 455 P3d 531 (2019) (officer's assumption that female, who appeared to be a past drug user, found in drug-dealer's car was in a sex-for-drugs relationship with the dealer was a mere "speculative, gender-based assumption[].").

"A magistrate may give weight to the expression in a supporting [search warrant] affidavit of an officer's knowledge when it is based on training and experience so long as there are other facts in the affidavit that provide a nexus to the place to be searched." State v. Beagles/White, 143 Or App 129, 136, 923 P2d 1244, *rev den,*324 Or 487 (1996).

On the other hand, general recitations based upon the officer's training and experience will not, by themselves, supply probable cause without specific facts establishing a nexus to the place to be searched or the basis for the arrest. *See* State v. Martin, 260 Or App 461, 478-79, 317 P3d 408 (2014) (officer lacked probable cause to arrest defendant for prostitution based on her manner of dress and the fact that she was on as street known for prostitution activity, where her conduct was otherwise "not too remarkable"); State v. Wilson, 178 Or App 163, 35 P3d 1111 (2001) (search of defendant's home not justified where informant made a controlled buy from defendant at a separate location and officer/affiant recited that, in his experience, drug traffickers keep evidence in their residences); State v. Gloster, 145 Or App 555, 932 P2d 68 (1997) (a recitation that persons who possess meth often possess additional amounts in their homes, outbuildings and vehicles did not provide probable cause to search an outbuilding within the curtilage, which the affiant knew was rented to another person). *But see* State v. Keerins, 197 Or App 428, 106 P3d 166, *rev den*, 338 Or 681 (2005) (distinguishing Wilson because, in this case, the officer's general knowledge that drug traffickers keep evidence at their residence was connected to objective evidence that drug activity occurred at defendant's house.).

In State v. Juarez-Godinez, 326 Or 1, 942 P2d 772 (1997), the Oregon Supreme Court rejected several conclusions drawn by a trained and experienced officer, holding that he lacked reasonable suspicion that Hispanic drivers heading to Washington state in the early morning hours were transporting drugs. Along with testimony about various incriminating factors and inferences, the record included testimony by the officer that he had made 35 other traffic stops of drivers under similar circumstances and, in every case, he had found controlled substances during a consent search.

3. Furtive Gestures.

Furtive gestures, alone, do not supply probable cause. State v. Kelly, 274 Or App 363, 360 P3d 691 (2015) (no probable cause based solely on defendant saying, "Hide that" and moving furtively); State v. Jacobs, 187 Or App 330, 67 P3d 408 (2003). But, along with other suspicious circumstances, furtive movements can become the determining factor in a probable cause analysis.

Furtive gestures contributed to probable cause in the following cases:

State v. McCoy, 155 Or App 610, 964 P2d 309 (1998). Defendant's attempt to deliver his coat to a bystander during contact with the officer was indicative of drug possession when considered with other circumstances indicating past and present use of methamphetamine.

State v. $113,871 in U.S. Currency and James Robinson, 152 Or App 770, 954 P2d 218, *rev den*, 327 Or 305 (1998). The officer had probable cause to seize currency for forfeiture based upon: (1) initial false statements the about the existence and contents of a briefcase and the suspects' reason for travel; (2) discovery, during a consent search of the vehicle trunk, of a large amount of currency bundled and packaged in a manner indicative of drug trafficking; (3) a furtive effort by the driver to conceal the money; and (4) a drug dog's alert to the trunk and the money.

State v. Brenner, 151 Or App 159, 947 P2d 1139 (1997). A furtive attempt to dispose of a container, coupled with the officer's experience in finding controlled substances in similar containers, provided probable cause and exigent circumstances to open the container.

State v. Nevel, 126 Or App 270, 868 P2d 1338 (1994). Furtive gestures, combined with an observation of loaded syringes, gave police probable cause to search a vehicle.

State v. Frias, 115 Or App 149, 836 P2d 1367 (1992). Defendant's furtive attempt to hide a rolled up bag and admission that it was a fix-kit gave police probable cause to search the bag.

> **CAUTION: Furtive Gestures v. Assertions of Constitutional Rights.** Furtive attempts to conceal evidence can contribute to probable cause, but actions taken to assert constitutionally protected privacy rights cannot. *See State v. Morgan,* 226 Or App 515, 203 P3d 927 (2009); *State v. Gilmour*, 136 Or App 294, 901 P2d 894, *rev den*, 322 Or 360 (1995) (the act of refusing an officer's request to search cannot be used to support probable cause); *State v. Lavender*, 93 Or App 361, 762 P2d 1027 (1988) (by closing her purse and pulling it away from the officer, defendant showed her intent to protect her privacy; this assertion of a constitutional right could not justify a search). "Furtive gestures can give rise to probable cause only if they are coupled with an attempt to hide a suspicious object," *e.g.*, drugs or stolen property. *State v. Brown*, 110 Or App 604, 611, 825 P2d 282 (1992) (a parolee's attempt to hide his car keys during a search of his house did not supply probable cause to search his car, because the keys themselves were not inherently suspicious).
>
> A suspect's refusal to consent to a search may have evidentiary value in the limited circumstances where the suspect has no right to refuse consent. *See State v. Gefre*, 137 Or App 77, 903 P2d 386 (1995), *rev den*, 323 Or 483 (1996) (an arrested driver's refusal to submit to a breath test was admissible). *But see State v. Banks*, 364 Or 332, 343, 434 P3d 361 (2019) (breath-test refusal is admissible only if the request is clear that the driver is being asked to simply physically cooperate with a constitutionally authorized search, not that the driver is being asked for voluntary consent).

4. Other Deceptive or Evasive Conduct.

Deceptive or evasive activity can be part of the mosaic of probable cause. *State v. $113,871 in U.S. Currency and James Robinson*, 152 Or App 770, 954 P2d 218, *rev den*, 327 Or 305 (1998) (false statements in combination with furtive gesture, odor of cocaine, distinctive packaging of currency); *State v. Futch*, 123 Or App 176, 860 P2d 264 (1993), *aff'd*, 324 Or 297 (1996) (false statement to investigators); *State v. Lopez*, 95 Or App 325, 768 P2d 934 (1989) (defendant switched vehicle plates before using his car to engage in drug activity); *State v. North*, 72 Or App 1, 694 P2d 990, *rev den*, 299 Or 154 (1985) (false statements to officers regarding identity and other circumstances). *See also State v. Barone*, 328 Or 68, 969 P2d 1013 (1998), *cert den*, 528 US 1135 (2000) (admission at trial of defendant's false denial regarding ownership of vehicle containing incriminating evidence did not violate his Fourth or Fifth Amendment rights).

5. Anonymous Reports.

"An anonymous informant's report that lacks detail as to the basis of the informant's knowledge is not enough, standing alone, to satisfy the less rigorous standard of reasonable suspicion," and thus cannot establish probable cause. *State v. Kelly*, 274 Or App 363, 360 P3d 691 (2015) (anonymous DHS hotline call that defendant was using drugs in her house lacked sufficient indicia of reliability for probable cause); *State v. Cardell*, 180 Or App 104, 110-11, 41 P3d 1111 (2002) (anonymous report of car "racing" not sufficient). *See also* *State v. Keerins*, 197 Or App 428, 106 P3d 166, *rev den*, 338 Or 681 (2005).

See also discussion of information from unnamed informants in Chapter II (Stop and Frisk), and Chapter V (Search Warrants).

6. Collective Knowledge of Police.

Oregon Law.

An officer who does not personally possess probable cause may nonetheless make an arrest or conduct a search if the officer (1) reasonably believes that other officers who have requested him or her to act do have probable cause, (2) and if probable cause does, in fact, exist. In other words, police may base probable cause on the "collective knowledge" of other police officers. *State v. Soldahl*, 331 Or 420, 15 P3d 564 (2000) (traffic stop by officer who did not personally possess probable cause was valid because officer reasonably relied on request from other officer and probable cause did, in fact, exist); *State v. Pratt*, 309 Or 205, 785 P2d 350 (1990) (arrest in Arizona based solely on a teletyped request from Oregon authorities who had probable cause); *State v. Koester*, 117 Or App 139, 843 P2d 968 (1992), *rev den*, 315 Or 644 (1993) (valid arrest); *State v. Seibold*, 96 Or App 571, 773 P2d 789 (1989) (valid search).

The officer requesting a stop, arrest, or search need not fully communicate the objective basis for probable cause; nor must the officer acting on the request independently form a subjective belief. *State v. Soldahl*, 331 Or 420, 15 P3d 564 (2000). Moreover, the arresting officer need not learn of the existence of probable cause directly from the officer who has the knowledge, *i.e.,* the knowledge need only be possessed by the police as a unit. *State v. Radford*, 222 Or App 87, 90-91, 191 P3d 776 (2008). *But see* *State v. Groda*, 285 Or 321, 591 P2d 1354 (1979) (knowledge of other officers does not contribute to probable cause unless it is shared or the officer who performs the arrest or search is directed to do so by an officer with the knowledge); *State v. Crawford*, 91 Or App 597, 756 P2d 68 (1988) (arrest invalid where state failed to prove that officer who ordered the arrest had probable cause). But the arresting officer must reasonably believe that the other officers have probable cause. *State v. Pratt*, 309 Or 205, 216-17, 785 P2d 350 (1990); *State v. Koester*, 117 Or App 139, 843 P2d 968 (1992), *rev den*, 315 Or 644 (1993).

With respect to dog sniffs, the collective knowledge doctrine permits officers to rely on the knowledge of the officer deploying a drug-detection dog about the dog's training, certification, performance, and other knowledge that contributes to the handler-officer's belief that the dog's alert was reliable. *State v. Foster*, 350 Or 161, 177 n 11, 252 P3d 292 (2011).

Fourth Amendment.

Police officers may make an arrest or stop based upon a bulletin issued by another police agency, even if the bulletin does not specify the facts constituting probable cause or reasonable suspicion. *United States v. Hensley*, 469 US 221, 229-33, 105 S Ct 675, 83 L Ed 2d 604 (1985).

7. Escalating Probable Cause.

Reasonable suspicion may "ripen" into probable cause. Moreover, probable cause regarding one offense may escalate into probable cause to arrest or search in relation to additional offenses. State v. Anfield, 313 Or 554, 561, 836 P2d 1337 (1992) (traffic accident investigation escalated into probable cause to arrest and search for CCW, and subsequently, for PCS; "a routine example of escalating probable cause"); State v. Taylor, 116 Or App 647, 842 P2d 460 (1992), *modified on recons*, 119 Or App 209, 850 P2d 1118, *rev den*, 317 Or 584 (1993) (traffic stop escalated into probable cause to search for evidence of burglary); State v. Frias, 115 Or App 149, 836 P2d 1367 (1992) (traffic stop escalated into probable cause to search bag/fix-kit for drugs); State v. Kemp/Haworth, 112 Or App 522, 831 P2d 37, *rev den*, 313 Or 627 (1992) (traffic stop escalated into officer safety search, followed by search for drugs).

G. OREGON CASES ON PROBABLE CAUSE.

The cases below address "probable cause" in all contexts — warrantless arrests and searches, and applications for arrest and search warrants. The list is merely illustrative, because probable cause is always circumstance-specific.

1. Burglary, Trespass, Theft.

State v. Huerta-Contreras, 336 Or App 251, 560 P3d 728 (2024), *rev allowed*, 373 Or 736 (2025). Officers lacked probable cause to arrest defendant for UUV under ORS 164.135, where defendant was found in the driver's seat of a car reported stolen several hours earlier, in a "high crime area" where stolen vehicles were regularly recovered. Those circumstances, both individually and collectively, did not support an inference that defendant had the requisite mental state for UUV.

State v. Henderson, 341 Or 219, 142 P3d 58 (2006). Affidavit supplied probable cause to search defendant's home for two stolen rings where it established: 1) the rings were non-perishable items of high value, 2) the rings would be easy to conceal, 3) the rings would retain their value, and 4) the rings were the type that some people might like to keep for personal use. The affidavit established that defendant had traded drugs for the rings three weeks earlier. Given all of the circumstances, the affidavit supported probable cause that the rings were likely to still be in the defendant's home.

State v. Dent, 324 Or App 167, 525 P3d 487 (2023). Affidavit supplied probable cause to search the defendant's home for evidence of mail theft—including a substantial amount of cash—despite the defendant's argument that "cash is common and fungible." Given all of the circumstances, the affidavit supplied probable cause that the cash would still be in the home.

State v. McCall, 315 Or App 538, 501 P3d 1086 (2021), *rev den*, 369 Or 505 (2022). Officers had probable cause to arrest defendant for possession of a stolen vehicle where they knew that the vehicle had been stolen, that defendant was standing within the open driver's side door, and that defendant was working on the inside door handle with a pair of pliers.

State v. Newsted, 279 Or App 701, 381 P3d 1025 (2016). A police officer's search-warrant affidavit established probable cause to believe that the defendant possessed a stolen utility vehicle (UTV), because it showed that defendant was seen driving a stripped-down UTV less than two weeks after the victim's very similar UTV was stolen in the same small city, and the defendant had a history of arrests and convictions for UUV and theft.

State v. Brock, 270 Or App 675, 349 P3d 613 (2015). Police had probable cause that a car would contain evidence of a theft-related crime when they found defendant with a car that had

fraudulent registration tags and was registered to another owner, defendant was unable to produce a bill of sale and proof of insurance, and he resisted when police arrested him on a warrant.

State v. Lambert, 263 Or App 683, 328 P3d 824, *adh'd to as modified on recons*, 265 Or App 742 (2014). The police had probable cause to search for an item in the defendant's truck, which was stolen during a burglary two months earlier, where police had tied defendant to the burglary, the item stolen was easily marketed, and defendant was clearly hiding something when confronted by police.

State v. Ayvazov, 246 Or App 641, 647, 267 P3d 196 (2011), *rev den*, 351 Or 675 (2012). Probable cause supported defendant's arrest for possessing a stolen vehicle. Officers responded to a call about a man following a woman in a green Honda Accord, and then saw a car fitting that description in a driveway in the same neighborhood. After learning that the car was stolen, the officers arrested defendant. Even though defendant was in the passenger seat of the parked car, the officers reasonably believed that he recently drove the car, which was known to be stolen, and was acting suspiciously.

State v. Rayburn, 246 Or App 486, 492, 266 P3d 156 (2011), *rev den*, 351 Or 675 (2012). Totality of circumstances at time of the defendant's arrest provided probable cause to believe that he was aware that the car in which he was a passenger was stolen. Officers knew from DMV records that the car was stolen, and the officers were able to confirm reports that the driver was driving recklessly and that the occupants were throwing items from the car. Those facts supported a belief that the men were "joyriding" in a car that the occupants knew to be stolen.

State v. Hebrard, 244 Or App 593, 600, 260 P3d 759 (2011). Defendant's proximity to recently driven stolen truck might support reasonable suspicion, but not probable cause, to believe that he committed UUV or possession of a stolen vehicle.

State v. Morgan, 230 Or App 395, 215 P3d 120, *rev den*, 347 Or 365 (2009). Facts supplied objective probable cause that metal theft was occurring, where: (1) a caller reported that people were loading copper wire into a car at a specific location; (2) the officer saw two people leaning over a car that matched the car mentioned by the caller; (3) the two people walked away even after the officer asked them to stop, one of them making eye contact with the officer, and both walked into a motel room and shut the door; (4) the officer saw copper wire in the car and wire sheathing in a dumpster nearby; (5) the officer articulated direct, relevant experience with metal theft and how it is typically accomplished which was consistent with what he observed in plain view.

State v. Koroteev, 222 Or App 596, 194 P3d 842 (2008). Probable cause was *not* established where an officer responded to a report of a "theft in progress from a vehicle in a parking lot" of an apartment complex. The dispatcher gave the description of the car and its location, but did not say whether the caller had identified herself. The officer went to the lot and saw a group of people who pointed at a car with a person under its hood, who was "manipulating cables," and immediately arrested him without speaking to anyone else or questioning defendant.

State v. Torres, 201 Or App 275, 118 P3d 268 (2005), *rev den*, 340 Or 308 (2006). Probable cause that a burglary was committed was established objectively by (1) a 911 call that a person was seen breaking a window and entering a home; (2) a person at the scene who admits not being a resident of the home in question; and (3) a broken window and open door of that home.

State v. Westfall, 178 Or App 343, 37 P3d 1030 (2001), *rev den*, 333 Or 595 (2002). The affidavit in support of a search warrant provided probable cause to search defendant's motel room and vehicles for evidence of forgery and theft where: (1) defendant and his wife had been registered under a false name for a week; (2) they prohibited staff from cleaning the room; (3) the defendant was

a prime suspect in an adjoining county for using stolen checks; (4) police suspected that defendant was moving between motels to avoid detection; (5) the motel manager saw a computer and three trash bags full of bank statements in the room; (6) through the room's open door, officers saw defendant using methamphetamine; (7) defendant's wife was on probation for PCS; and (8) in the officer's training and experience, meth addicts often resort to burglary and theft.

a. Burglary/Car Clout In Progress.

State v. Lynch, 135 Or App 528, 900 P2d 1042, *rev den*, 322 Or 362 (1995). Officers had probable cause to believe burglars were in defendant's house based on a neighbor's report of people breaking into the house.

State v. Codr, 99 Or App 417, 782 P2d 442 (1989). A suspect who was stopped for tampering with a car produced a bill of sale, but in spite of that bill of sale and the fact that there were keys in the ignition, the officer nonetheless had probable cause because of the suspect's "suspicious behavior in the car, her inability to establish a definitive connection between herself and the car," her vague explanation of her activities, and the officer's knowledge that there had been several vehicle break-ins in the area.

State v. Apodaca, 85 Or App 128, 735 P2d 1264 (1987). An open door and broken screen do not supply probable cause to believe that a burglary was being committed or had been committed.

b. Flight from Burglary/Car Clout.

State v. Nguyen, 176 Or App 258, 31 P3d 489 (2001). Defendant and his passenger matched the general description of two men who had broken into a parked car, their car was observed leaving a nearby parking lot soon after the crime, their car was the only car on the road at the time (3 a.m.), and tools and surgical gloves were in plain view that was sufficient to justify a stop and arrest.

State v. Ruznak, 128 Or App 488, 876 P2d 488 (1994). An officer had probable cause to arrest where, after responding to a report of three young, white males stripping a car, he saw the defendant (a young, white male), who was walking toward the stripped vehicle from two-tenths of a mile away, and who looked startled when he saw the officer, and where the officer saw two other young, white males leap over a nearby embankment.

State v. Taylor, 116 Or App 647, 842 P2d 460 (1992), *adh'd to as modified on recons*, 119 Or App 209, 850 P2d 1118, *rev den*, 317 Or 584 (1993). A traffic stop escalated into probable cause to search for evidence of burglary when (1) the officer spotted items concealed in a pillowcase and radio equipment similar to what had been used in a recent burglary/robbery, (2) the suspects gave an unlikely explanation for these items, and (3) the suspects also said they were in the area to visit a man who the officer knew was a convicted burglar and a suspect in the burglary/robbery.

State v. Matthys, 106 Or App 276, 808 P2d 276 (1991). An officer's observation of defendants' car parked in a residential area under suspicious circumstances, a citizen's report that two men had loaded items into the car, combined with evasive responses by the two occupants to the officer's questions, did not amount to probable cause for a search of the vehicle. The police had no report of a burglary and, although they could see that items were present in the back of the car, they could not see what the items were.

State v. Spencer, 101 Or App 425, 790 P2d 1205 (1990). Observation of defendant in a high-crime area carrying a VCR in a plastic bag did not give the officer probable cause to justify his seizure of the bag and inspection of the VCR to determine whether it was stolen.

State v. Knaub, 90 Or App 152, 750 P2d 1206 (1988). Police had probable cause to arrest and search a person matching a description of the burglar (shirtless, long brown hair, scraggly beard) who was found several minutes after the burglary three blocks from the scene of crime.

2. DUII and Blood Draws.

In State v. Nagel, 320 Or 24, 880 P2d 451 (1994), the Oregon Supreme Court held that requiring a driver to perform field sobriety tests is a "search" under Article I, section 9, of the Oregon Constitution. Such a search can be justified under the "probable cause and exigent circumstances" exception to the search warrant requirement. If the officer does not advise the driver of the adverse consequences of refusing to perform the tests, this search can also be justified by voluntary consent. *See* State v. Mazzola, 260 Or App 378, 317 P3d 360 (2013), *aff'd*, 356 Or 804 (2015); State v. Greenough, 142 Or App 506, 923 P2d 646 (1996); State v. Maddux, 144 Or App 34, 925 P2d 124 (1996). However, in the absence of voluntary consent or some other exception to the search warrant requirement, an officer needs to have probable cause before conducting field sobriety tests.

a. Cases in Which Probable Cause Was Present.

State v. Nagel, 320 Or 24, 880 P2d 451 (1994). Defendant had an odor of alcohol, glassy eyes, and fumbled to get his driver's license.

State v. Miller, 265 Or App 442, 335 P3d 355 (2014). Officer had probable cause to order defendant out of his car to perform FSTs after second traffic stop in a short period of time. During the first stop for speeding, defendant was "short-tempered and angry" while receiving the citation and refused or failed to give certain documents to the officer. Defendant denied drinking and, after being cited, drove off in a "reckless manner," committing several violations. The officer stopped the defendant again and he was even more agitated and struggled to find his insurance card. Under those circumstances, the officer had objective probable cause that defendant was under the influence.

State v. Minow, 246 Or App 179, 265 P3d 54 (2011), *rev den*, 351 Or 545 (2012). Officer had probable cause to arrest defendant for *attempted* driving under the influence of intoxicants (DUII). Officer could see that defendant was intoxicated, that he was trying to get into the truck with keys in his hand, and it was only the presence of a restaurant employee that stopped him from getting into the truck before the officer arrived.

State v. Gardner, 236 Or App 150, 236 P3d 742, *rev den,* 349 Or 173 (2010). An officer stopped defendant for erratic driving. Defendant seemed confused when asked for her license, and tried to give the officer her checkbook instead. Her eyes were glassy, her pupils were dilated, and her speech was choppy. Those facts justified her arrest for DUII after she refused to do FSTs.

State v. Lesher, 223 Or App 720, 196 P3d 120 (2008). Probable cause was established because: the officer found defendant standing on the side of the road at 4 a.m. about a quarter mile from a single-car rollover; the officer knew the driver of the car had fled; defendant was soaking wet and covered in mud, smelled strongly of alcohol, had slurred speech, and could not maintain his balance. That was sufficient to establish probable cause despite the fact that the officer testified that he believed that he only had reasonable suspicion to stop defendant, not probable cause.

State v. Kappel, 190 Or App 400, 79 P3d 368 (2003), *rev den*, 336 Or 509 (2004). A half hour after an eyewitness reported seeing defendant's car run into a ditch, an officer found the defendant's abandoned car a half mile from his house. The officer went to the defendant's house to find him, but the defendant was not at home. When the officer returned to the car 15 minutes later, the defendant was in the driver's seat with an odor of alcohol on his breath.

State v. Crampton, 176 Or App 62, 31 P3d 430 (2001). As the officer approached the defendant's vehicle following a stop for DWS, she observed that the defendant was moving around a lot, that he was nervous and fidgety and that he did not comply with instructions to keep his hands on the wheel. The officer had probable cause to believe that he was driving under the influence of drugs.

State v. Forrest, 174 Or App 129, 25 P3d 392 (2001). Defendant seen driving erratically, had a strong odor of alcohol, watery eyes, "halting" speech and admitted to drinking earlier that evening.

State v. Barnes, 172 Or App 408, 18 P3d 1108 (2001). Defendant made two unsignaled lane changes, smelled of alcohol, had bloodshot, watery eyes, balance problems, and admitted drinking.

Brown v. MVD, 157 Or App 167, 967 P2d 919 (1998). Defendant was driving after 2 a.m. with no headlights, had a strong odor of alcohol, bloodshot eyes, poor finger dexterity, and admitted having a "couple" of drinks. The subjective element of probable cause was present before the officer requested FST's, even though the officer did not decide to arrest until after defendant did two FSTs.

State v. Smalley/Yaws, 156 Or App 325, 965 P2d 419 (1998), *rev den*, 328 Or 247 (1999). Evidence of defendant's erratic driving and behavior, of a slight odor of burnt marijuana, of his bloodshot eyes, droopy eyelids, "hugely dilated pupils," and that he exhibited four of six indicators on HGN test was not overcome by the fact that the defendant exhibited a "lack of smooth pursuit" on the HGN, which, the officer testified, is often *inconsistent* with marijuana intoxication.

State v. Spruill, 151 Or App 87, 948 P2d 726 (1997). The defendant "abruptly" got out of his car, was somewhat distracted and unable to maintain a train of thought, exuded a mild to moderate odor of alcohol and admitted he'd been drinking since about five hours before the stop.

State v. Wetzell, 148 Or App 122, 939 P2d 106, *rev den*, 325 Or 621 (1997). Defendant had been driving erratically, had a strong odor of alcohol, flushed face, bloodshot eyes, a tentative voice and possibly slurred speech. The officer's belief that there "was a good chance that [defendant] was DUII" was sufficient to establish the officer's subjective belief.

State v. Chambers, 147 Or App 626, 938 P2d 793 (1997), *rev den*, 327 Or 82 (1998). Defendant had been driving erratically, had an odor of alcohol, bloodshot and watery eyes and difficulty finding her ODL. The officer's testimony that he thought defendant "may be impaired, that she may be under the influence of something" was sufficient to establish the subjective component of probable cause for DUII.

State v. Kimsey, 147 Or App 456, 936 P2d 1030 (1997). Defendant failed to stop vehicle at stop line, had an odor of alcohol, bloodshot and watery eyes and difficulty maintaining balance.

State v. Gilmour, 136 Or App 294, 901 P2d 894, *rev den*, 322 Or 360 (1995). While leaving a tavern parking lot at 2 a.m., defendant committed a traffic infraction and the officer subsequently observed bloodshot, watery eyes and smelled a strong odor of alcohol. Defendant's refusal to do FSTs, which constitute a search, could not be used to support probable cause.

State v. Clem, 136 Or App 37, 900 P2d 1064 (1995). Defendant committed seven traffic infractions within four minutes and had an odor of alcohol on her breath.

State v. Holliday, 135 Or App 256, 898 P2d 812, *rev den*, 322 Or 228 (1995). Defendant had been driving erratically, had watery and dilated eyes, was sniffing, sweating and shaking, and admitted to being on methadone, there were syringes in the car, and the passenger said that they were coming from an allegedly unsuccessful attempt to buy drugs at motel known for drug activity.

b. Cases in Which Probable Cause Was Not Present.

State v. Sinkey, 303 Or App 673, 465 P3d 284 (2020). 911 caller's report that defendant was drinking while driving and stopped at a store to buy more beer did not, in and of itself, provide probable cause to support officer's "exigent circumstances" entry onto defendant's property to arrest him for DUII.

State v. Stroup, 147 Or App 118, 935 P2d 438 (1997). Defendant had a slight odor of alcohol, bloodshot eyes, and admitted drinking two beers.

State v. Demus, 141 Or App 509, 919 P2d 1182 (1996). Even though defendant had been driving erratically, had an odor of alcohol, admitted drinking 7-8 beers and said he shouldn't be driving, the state failed to prove that officer had probable cause because he testified only that he believed defendant was "possibly" under the influence.

State v. Vandehey, 83 Or App 325, 731 P2d 1049 (1987). The defendant had lost control of her vehicle and the officer did not detect an odor of alcohol while speaking to her for 20-30 seconds before she was removed to an ambulance.

c. Probable Cause to Administer Breath Test.

State v. Burshia, 201 Or App 678, 120 P3d 487 (2005), *rev den*, 340 Or 672 (2006). Officer conducted a DUII investigation, believing that defendant was under the influence of a controlled substance, not alcohol. Officer gave the breath test, revealing a 0.00% BAC result. The court ruled that the officer had probable cause to believe that defendant had committed DUII, which includes driving under the influence of controlled substances. It was likely that a breath test would reveal evidence of that crime; a 0.00% result is evidence that defendant was under the influence of something other than alcohol.

NOTE: This case contains a helpful summary of the probable cause requirements related to obtaining breath tests in DUII cases.

3. Weapons.

State v. Anfield, 313 Or 554, 836 P2d 1337 (1992). An officer lawfully investigating a car accident had probable cause to arrest defendant for carrying a concealed weapon when the officer saw the defendant put down an obviously heavy gun bag and it made a metallic "clunk." *But see State v. Guynn*, 162 Or App 594, 986 P2d 1190 (1999) (distinguishing *Anfield* in a case where the suspect possessed a heavy duffel bag that seemed to contain a single object that did not bend – this did not create probable cause to believe that the defendant carried a weapon).

State v. Lipka, 314 Or App 154, 498 P3d 811, *rev dismissed*, 368 Or 703 (2021). Based on the victim's report of harassment or menacing, officers had probable cause to arrest defendant, but were not justified in searching incident to that arrest a duffel bag they saw him put in the garage. Although the victim had told them that it contained a gun, there was no suggestion that it was evidence of a crime, let alone the crimes for which defendant was arrested.

State v. Hernandez, 308 Or App 783, 481 P3d 959, *adh'd to on recons*, 309 Or App 784 (2021). Although police had probable cause to believe that defendant had used a gun in a menacing incident and knew that he had dropped a phone while leaving the scene, general assertions in the search warrant affidavit about the behavior of illegal gun users did not supply probable cause to believe evidence of gun possession would be on the phone.

State v. McGinnis, 185 Or App 483, 62 P3d 398 (2002). Defendant's admission that he was a felon and his verbal and nonverbal responses to the officer's questions about weapons gave the officer probable cause to believe that defendant was a felon in possession of a firearm.

State v. Westfall, 178 Or App 343, 37 P3d 1030 (2001), *rev den*, 333 Or 595 (2002). The affidavit in support of a search warrant provided probable cause to search defendant's motel room and vehicles for weapons where: (1) the defendant had just been arrested in his room for possession of a substance that appeared to methamphetamine, (2) in the officer's training and experience, persons involved with controlled substances often possess firearms, (3) defendant had prior convictions for felon in possession of a firearm and PCS, and (4) an officer from an adjoining county advised that he had probable cause to arrest defendant for felon in possession of a firearm.

State v. Crampton, 176 Or App 62, 31 P3d 430 (2001). The officer had probable cause for unlawful possession of a weapon where the defendant admitted that he had a gun in the vehicle and the officer believed he did not have a permit to carry a concealed weapon because the dispatcher did *not* inform the officer that the defendant *did* have a permit.

State ex rel Juv. Dept. v. Gallegos, 150 Or App 344, 945 P2d 656 (1997). A student's report that another student had a gun tucked into his pants was sufficient probable cause to search him for a gun. The informant's poor attendance record and progress reports were irrelevant to credibility.

State v. Booker, 110 Or App 6, 820 P2d 1378 (1991). The mere fact that a purse seized from a female bus passenger was heavy did not give the officer probable cause to open it after it was lawfully seized in investigation of a report that a male bus passenger had made threats with a gun.

State v. Meyer, 120 Or App 319, 852 P2d 879 (1993). Although defendant admitted that he had an unlawful weapon in his car, there was no probable cause to search a box in his car, absent evidence that the box was consistent with concealing a weapon.

State ex rel Juv. Dept. v. DuBois, 110 Or App 314, 821 P2d 1124 (1991). A report by credible students that a juvenile suspect had possessed a gun at school the previous day, combined with school authorities' knowledge that the juvenile had possessed weapons on school grounds before, constituted probable cause to search the juvenile's backpack for weapons.

State v. Johnson, 96 Or App 166, 722 P2d 426 (1989). Defendant's carrying of a sheathed knife on his belt, partly covered by jacket, was not unlawful. As a result, no probable cause existed to arrest him or search him for carrying a concealed weapon.

State v. Anderson, 81 Or App 267, 725 P2d 394 (1986). After arresting defendant for possessing a concealed .25 caliber weapon, and finding .357 caliber ammunition on his person, the police had probable cause to search his vehicle for a weapon that used that type of ammunition.

4. Prostitution.

State v. Williams, 178 Or App 52, 35 P3d 1088 (2001). An officer experienced in prostitution enforcement had probable cause to issue a prostitution-free zone exclusion order where: (1) a woman sitting in a bus shelter, which was commonly used by prostitutes, was attempting to make eye contact with passing drivers; (2) she entered a vehicle that pulled into a lot behind the shelter; (3) although the driver said that the woman was his friend, the woman said she did not know the driver; and (4) when the officer told the woman he did not want her "working" in the area, she said "Okay."

On the other hand, in State v. Martin, 260 Or App 461, 478-79, 317 P3d 408 (2014), an officer lacked probable cause to arrest a suspected prostitute where, for about an hour late one evening, the officer trailed the suspect, who had several prostitution-related arrests in the mid-2000s, as she strolled up and down 82nd Avenue in Portland, a "high-vice area." She was wearing a puffy jacket, heeled boots, and a short skirt. She did not have any direct contact with drivers or pedestrians, but stopped once to talk briefly with a known prostitute, and played a cat-and-mouse game with a driver who eventually parked, but as she walked toward his vehicle, she saw the officer watching her and turned away. The court held that officer's training and experience alone did not support the arrest where, other than the observations noted above, her conduct was otherwise "not too remarkable."

5. Drugs.

a. Recognition of Controlled Substances By Sight And Smell.

An experienced officer often has probable cause to make an arrest, conduct a search or seize evidence because the officer recognizes an item as a controlled substance, either by sight or by smell. Cases that discuss probable cause based on the sight and smell of a controlled substance follow.

(1) Pills — sight.

State v. Gilbert, 24 Or App 907, 547 P2d 632, *rev den* (1976). The officer recognized Ritalin and did not need to know that defendant did not have a prescription for it.

State v. Miller, 23 Or App 341, 542 P2d 141 (1975). A bottle of pills with a label saying that federal law prohibited dispensing contents without a prescription did not alone create probable cause.

State v. Dills, 19 Or App 702, 528 P2d 1354 (1974). The police found "cross tops, cross wheels, bennies." The remote possibility that aspirin might be run through an amphetamine pill press does not destroy probable cause.

State v. Cavazos, 18 Or App 197, 524 P2d 546 (1974). Probable cause existed where officers recognized pills in a bottle as barbiturates, the names listed on the prescription label did not match defendant's name and defendant gave conflicting accounts as to why he had the bottle.

(2) Powder — sight.

State v. Owens, 302 Or 196, 729 P2d 524 (1986). After discovering an amber vial with white powder in defendant's purse, the officer had probable cause to arrest defendant for PCS and was justified in opening two compact mirror cases as a search incident to that arrest.

> **NOTE:** Owens also held that no warrant is required to open transparent containers or containers that "announce their contents," and no warrant is required to confirm probable cause by chemically testing the contents. 302 Or at 207. *But see* State v. Kruchek, 156 Or App 617, 969 P2d 386 (1998), *aff'd by an equally divided court*, 331 Or 664 (2001) (declining to apply this doctrine where the opaque container [a cooler emitting an odor of freshly cut marijuana] did not announce that it contained *only* a controlled substance and nothing else). *See also* Chapter I(B)(4), Privacy Interests.

State v. Miller, 157 Or App 489, 972 P2d 896 (1998), *rev den*, 328 Or 365 (1999). Officers had probable cause to arrest the passenger where a mirror and white powder was found on car seat near the passenger's belongings and passenger appeared to be under the influence.

State v. Morgado, 154 Or App 296, 962 P2d 698, *rev den*, 327 Or 554 (1998). Powder in and around defendant's nose, nervousness, rapid speech, bloodshot eyes and inability to stand still constituted probable cause justifying a warrantless vehicle search.

State v. Dowdy, 117 Or App 414, 844 P2d 263 (1992). Scales and crystal powder on a countertop did not establish probable cause because the officer never testified that he believed the powder was a controlled substance.

State v. Kemp/Haworth, 112 Or App 522, 831 P2d 37, *rev den*, 313 Or 627 (1992). Observation of white powder on a mirror supplied probable cause.

State v. Lichty, 313 Or 579, 585, 835 P2d 904 (1992). A named informant's unembellished statement that she saw "a bag of coke" gave the officer *reasonable suspicion* to stop defendant, because evidence showed that the appearance of cocaine is a matter of general common knowledge.

State v. Bechtold, 99 Or App 593, 783 P2d 1008 (1989), *rev den*, 309 Or 521 (1990). Baggies of white powder concealed in a box on the defendant's waistband.

(3) Methamphetamine — smell.

State v. Gabbard, 129 Or App 122, 877 P2d 1217, *rev den*, 320 Or 131 (1994). An informant's tip that defendant was cooking methamphetamine was corroborated when defendant came out of his shed smelling of P2P, a precursor chemical that is used to manufacture methamphetamine, and exhibiting the influence of methamphetamine.

State v. Brown, 109 Or App 636, 642, 820 P2d 878 (1991), *rev den*, 313 Or 210 (1992). The strong odor of methamphetamine, plus the officer's training and experience, supplied probable cause.

State v. Heikkinen, 94 Or App 472, 765 P2d 1252 (1988). Officers had probable cause that a house contained an illegal drug lab where the house emitted a strong odor of methamphetamine production and a drug user had identified it as the place where she obtained her drugs.

(4) Marijuana — smell.

As we all know, Oregon law now allows recreational use of marijuana by adults. Because the cases cited below were decided before recreational marijuana was legal, be careful in relying on them for the proposition that the smell or sight of marijuana alone establishes probable cause of a crime. Although the mere presence of marijuana may not itself be evidence of a crime, it may still contribute to probable cause for other crimes in some circumstances, such as delivery of a controlled substance or endangering the welfare of a minor.

State v. Rein/Jungwirth, 324 Or 178, 923 P2d 639 (1996). An odor of marijuana coming from a house and from persons who had just left was sufficient to support a warrant for the house.

State v. Bingman, 162 Or App 615, 986 P2d 676 (1999). The strong odor of fresh-cut marijuana emanating from a stopped vehicle, which the officer believed was too strong to be explained by a small amount of dried marijuana produced from the pocket of one occupant, was sufficient probable cause to justify a search of the vehicle for more marijuana.

State v. Burr, 136 Or App 140, 149, 901 P2d 873, *rev den*, 322 Or 360 (1995). An officer with a marijuana allergy smelled marijuana immediately after getting out of his patrol car and he

found that the odor increased as he approached the bed of a stopped pickup. "[P]robable cause to search existed as soon as the officer smelled the marijuana."

State v. Lynch, 119 Or App 97, 849 P2d 556 (1993). The affiant's recitations that he detected the odor of growing marijuana coming from a house and that the residents used unusually high amounts of electricity were sufficient to establish probable cause.

> **NOTE:** While the odor of marijuana emanating from an opaque container may justify a seizure of the container, the odor in itself does not necessarily justify opening the container without a warrant. *See* State v. Kruchek, 156 Or App 617, 969 P2d 386 (1998), *aff'd by an equally divided court*, 331 Or 664 (2001) (officer conducted unlawful search by opening plastic cooler that exuded odor of marijuana).

(5) Marijuana — sight.

Generally, visual identification of marijuana by an officer supplies probable cause.

State v. Fronterhouse, 239 Or App 194, 243 P3d 1208 (2010) (officer training was sufficient to explain his basis of knowledge in identifying marijuana plants seen in aerial surveillance, even without providing description of particular characteristics of marijuana plants).

State v. Burr, 136 Or App 140, 901 P2d 873, *rev den,* 322 Or 360 (1995). An officer saw a marijuana leaf sticking out of an ice chest.

State v. Hunt, 15 Or App 76, 514 P2d 1363 (1973). The officer recognized marijuana "joint."

A recitation in a search warrant affidavit that an informant saw marijuana requires an explanation of the informant's basis for recognizing that a plant is marijuana. *See* ORS 133.545(4) (requiring showing of unnamed informant's basis of knowledge).

State v. Kreutzer, 138 Or App 306, 313, 909 P2d 175 (1995). Informant's bare statement that he saw marijuana plants, without information about the informant's basis for recognizing marijuana, was insufficient. "Many in our society cannot distinguish marijuana plants from other vegetation."

State v. Goff, 134 Or App 92, 894 P2d 1207 (1995). The affidavit established the ability of defendant's nine-year-old daughter to identify marijuana, even though she did not positively identify it. The court distinguished State v. Carter/Grant, 316 Or 6, 848 P2d 599 (1993), on the ground that, in that case, the Supreme Court held police officers to a higher standard of identification.

b. Recognition of Controlled Substances by Feel.

The following are cases in which the Court of Appeals has addressed situations in which an officer feels something during a lawful pat-down search that the officer believes to be drugs.

State v. Rubio, 193 Or App 208, 89 P3d 1184 (2004). No probable cause for PCS where, during a pat-down search, officer felt a bulge that he thought "might well be drugs."

State v. Clew, 187 Or App 322, 67 P3d 420 (2003). Where, during a lawful pat-down frisk, the officer felt a large bag of a leafy substance and a pipe and smelled a strong odor of marijuana, the officer had probable cause to arrest defendant for PCS.

c. Search Restrictions When Officer Finds Less Than One Ounce of Marijuana.

In State v. Tallman, 76 Or App 715, 712 P2d 116 (1985), the court held that the discovery of less than one ounce of marijuana "cannot *by itself* create probable cause to search for more." 76 Or App at 720 (emphasis added). The principal underpinning of this holding was the legislature's 1973 de-criminalization of the offense of possession of less than one ounce. The court reasoned, first, that the enactment of a non-criminal penalty for possession of less than one ounce created a motivation for users to restrict their possession to non-criminal amounts. Additionally, the court believed that the legislative policy of de-criminalization would be significantly undermined if officers were permitted to conduct a warrantless search of any person found to possess any quantity of marijuana. Tallman has since been applied, refined and distinguished by a line of cases.

(1) Cases in Which There Was Probable Cause to Search for More Marijuana.

State v. Bingman, 162 Or App 615, 986 P2d 676 (1999). Less than one ounce of marijuana produced from a passenger's pocket, combined with a strong odor of fresh-cut marijuana, justified a vehicle search for more marijuana.

State v. Austin, 145 Or App 217, 929 P2d 1022 (1996). The police had probable cause to search defendant for more marijuana where he was huddled with ten others at an intersection known for a high level of street dealing, and carried a pager, a weapon, and less than one ounce of marijuana.

State v. Cromwell, 109 Or App 654, 820 P2d 888 (1991). The discovery of a quantity of marijuana totaling less than an ounce, which was divided between two locations within defendant's vehicle, provided probable cause to believe that additional marijuana might be found.

State v. Quigley, 100 Or App 418, 786 P2d 1274 (1990). A baggie on the seat with half an ounce of marijuana, a small amount of fresh marijuana scattered on the seat and floor, and an odor of fresh-cut marijuana justified a vehicle search.

(2) Cases in Which There Was *Not* Probable Cause to Search for More Marijuana.

State v. Brownlie, 149 Or App 58, 941 P2d 1069 (1997). A pipe with marijuana residue did not give the officer probable cause to believe that there was more marijuana in defendant's purse.

State v. Lane, 135 Or App 233, 898 P2d 1358, *rev den*, 322 Or 360 (1995). A pipe with marijuana residue did not supply probable cause to believe that there was more marijuana in truck.

d. Circumstances Indicating Use or Possession.

The way in which a substance is treated by a defendant may also support probable cause.

State v. Pollock, 337 Or 618, 624, 102 P3d 684 (2005). A credible report of an offer to deliver a controlled substance constituted probable cause to arrest defendant for possession of a controlled substance and, therefore, to search defendant incident to arrest.

State v. Herbert, 302 Or 237, 729 P2d 547 (1986). Probable cause existed where the defendant tried to divert an officer's attention from a paperfold with distracting hand gestures.

State v. Walls, 290 Or App 735, 417 P3d 501 (2018). Officers had probable cause to believe that the car in which defendant was a passenger, and her purse, contained contraband, because one of the passengers possessed a user amount of heroin, two people were carrying "large sums of cash," the car had circled the neighborhood, left quickly with a wanted fugitive, and "engaged in evasive maneuvers before finally crashing into a building." *Id.* at 741.

State v. Keller, 280 Or App 249, 380 P3d 1144 (2016). Trooper's plain-view observation into parked car of baggie with heroin residue under passenger's leg did not provide probable cause to believe that defendant, who was sitting in the driver's seat, constructively possessed the residue.

State v. Hart, 149 Or App 635, 945 P2d 532 (1997). An officer's observation of needle marks on a suspect's arm, combined with the suspect's admission that he had syringes in his car, established probable cause to allow a vehicle search for drugs.

State v. Lopez, 95 Or App 325, 768 P2d 934 (1989). Officers had probable cause to arrest defendant for possessing heroin where the defendant switched license plates before a brief visit to a house, then went to a parking lot where he used a lighter in a manner consistent with heating heroin.

State v. Cole/Hood, 87 Or App 93, 741 P2d 525, *rev den*, 304 Or 280 (1987). An officer had probable cause when (1) defendants were parked in a parking lot known for frequent drug consumption; (2) the officer saw a two-inch length of drinking straw on the seat between defendants; (3) one defendant was fumbling with something in his lap while holding a flashlight; and (3) after seeing the officer, that defendant concealed something under his seat.

(1) Signs of Drug Influence.

A belief that a suspect is under the influence of a controlled substance is not, by itself, probable cause to believe that the suspect currently possesses drugs. But additional circumstances may make it reasonable to infer that the suspect still has drugs after using them. *See* State v. Rudnitskyy, 266 Or App 560, 565, 338 P3d 742 (2014), *rev den* 357 Or 112 (2015) (defendant's furtive gesture with a plastic straw, combined with information that a drug transaction had just occurred in the car, supported officer's belief that drug evidence would be in the car); State v. McCoy, 155 Or App 610, 964 P2d 309 (1998) (the fact that defendant appeared to be high, combined with his effort to deliver his coat to a bystander during his contact with the officer, amounted to probable cause). But a bare statement about the behavior of drug users based on the officer's "training and experience" is not a "specific and articulable fact" that makes it probable that the user currently has drugs. *See* State v. Schmitz, 299 Or App 170, 177, 448 P3d 699 (2019) (officer's statement that, in his experience, users tend to keep implements of drug use with trace amounts of the drug did not supply probable cause for drug possession); State v. Shaw, 311 Or App 537, 489 P3d 147 (2021) (where trial court erroneously found probable cause based solely on defendant's possession of a meth pipe but did not resolve dispute as to whether officer saw residue on the pipe, remand was necessary to allow trial court to make that determination).

Drug influence can establish probable cause to arrest a driver for DUII. *See, e.g.,* State v. Crampton, 176 Or App 62, 31 P3d 430 (2001) (as officer approached defendant's vehicle in the course of a stop for DWS, she saw defendant moving around a lot, that he was nervous and fidgety and that he did not comply with orders to keep his hands on the wheel; those facts supplied probable cause to believe defendant was under the influence of drugs); State v. Smalley/Yaws, 156 Or App 325, 965 P2d 419 (1998), *rev den*, 328 Or 247 (1999) (erratic driving and behavior, slight odor of burnt marijuana, bloodshot eyes, droopy eyelids, "hugely dilated pupils," and four of six indicators on HGN test; these indicia of influence were not overcome by the fact that the defendant exhibited a "lack of smooth pursuit" on the HGN, which the officer testified is often *inconsistent* with marijuana

intoxication); State v. Holliday, 135 Or App 256, 898 P2d 812, *rev den*, 322 Or 228 (1995) (probable cause existed based on defendant's erratic driving; watery, dilated eyes; sniffing, sweating, and shaking; admission to being on methadone; passenger's claim that they were coming from an unsuccessful attempt to buy drugs at motel known for drug activity; syringes in car).

(2) Drug Paraphernalia.

The observation of drug paraphernalia, standing alone, will not constitute probable cause to search for drugs. Simply seeing drug paraphernalia, without more, is not enough to establish probable cause to believe that drugs are present as well. State v. Sunderman, 304 Or App 329, 467 P3d 52 (2020) (mere fact that defendant possessed unused meth pipes did not support probable cause to believe she had drugs in her car); State v. Huff, 253 Or App 480, 490-91, 291 P3d 751 (2012) (mere discovery of meth pipe with residue in defendant's RV did not provide probable cause to search the RV for more drugs).

However, the observation of paraphernalia, coupled with other factors, may establish probable cause. Examples:

State v. Polezhaev, 318 Or App 1, 507 P3d 296 (2022). "Given that defendant appeared to be under the influence of heroin, and had the trappings of heroin use in his lap, including a **piece of foil** with a burn mark and black residue that appeared to be a residue amount of heroin, it was objectively reasonable for [an officer] to believe that defendant was in present possession of some amount of heroin, namely, the residue amount on the piece of foil in his lap."

State v. Dodge, 223 Or App 130, 136, 195 P3d 442, *rev den*, 346 Or 66 (2008). "When the officers found the **glass pipe** in defendant's pocket, he disavowed ownership, claiming that he had 'just found' it and 'picked it up.' And a glass pipe, while not an object that necessarily announces its function or contents to the world at large, is nonetheless an unusual object that reasonable people might regard as suspicious. Under all of these circumstances, the officers' belief that the glass pipe contained incriminating evidence was objectively reasonable."

State v. Hart, 149 Or App 635, 945 P2d 532 (1997). An officer's observation of needle marks on a suspect's arm, combined with the suspect's admission that he had **syringes** in his car, established probable cause to allow a vehicle search for drugs.

State v. Nevel, 126 Or App 270, 868 P2d 1338 (1994). **Loaded syringes** plus furtive movements created probable cause.

State v. Hayes, 99 Or App 322, 781 P2d 1251 (1989). A **burnt spoon** on the floorboard, encrusted with crystallized residue, plus furtive movements, was sufficient.

State v. Askay, 96 Or App 563, 773 P2d 785, *rev den*, 308 Or 197 (1989). **Syringes,** plus the defendant's hurried delivery of a rolled-up brown paper bag to his roommate as the police were entering his residence, established probable cause.

State v. Cole/Hood, 87 Or App 93, 741 P2d 525, *rev den*, 304 Or 280 (1987). An officer had probable cause when (1) defendants were parked in a parking lot known for frequent drug consumption; (2) the officer saw a two-inch length of **drinking straw** on the seat between defendants; (3) one defendant was fumbling with something in his lap while holding a flashlight; and (3) after seeing the officer, that defendant concealed something under his seat.

State v. York, 37 Or App 339, 587 P2d 111 (1978). A **hash pipe,** coupled with erratic driving and the absence of any odor of alcohol either on defendant's person or in the vehicle established probable cause to search defendant's vehicle. *Distinguishing* *State v. Parks*, 5 Or App 601, 485 P2d 1246 (1971)).

(3) Paperfolds and Small Containers.

Containers that, by their very nature, "announce their contents (such as by touch or smell)," for example, clear plastic baggies or pill bottles, may supply probable cause. Additionally, they may be opened without a warrant. *State v. Owens*, 302 Or 196, 729 P2d 524 (1987).

> **NOTE:** This doctrine was narrowed in *State v. Kruchek*, 156 Or App 617, 969 P2d 386 (1998), *aff'd by an equally divided court*, 331 Or 664 (2001), in which officers opened a plastic cooler that was emitting an odor of marijuana. The court held that, although the cooler announced that it contained marijuana, it did not announce that marijuana was the *only* thing it contained. Therefore, a warrant was required. Read broadly, *Kruchek* could mean that, under most circumstances, an opaque container cannot announce its contents by smell.

Often, the officer's personal knowledge that a particular type of container is frequently used to carry illegal drugs can be pivotal to the court's determination.

A **paperfold** may provide probable cause that it contains controlled substances. *State v. Herbert*, 302 Or 237, 729 P2d 547 (1986) (unique shape of paper, and fact that suspect attempted to conceal paperfold, established probable cause to believe that the paper contained drugs). For a discussion of the distinction between containers that "announce their contents" such that a person has no protected privacy interest in them, and containers whose nature may establish *probable cause* that they contain contraband, *see* Chapter I(B)(2) (Privacy Interests).

Similarly, a **compact mirror case** seized from a man's boot was sufficient in itself to establish probable cause for an officer who was knowledgeable in drug packaging. *State v. Smith*, 97 Or App 114, 775 P2d 335, *rev den*, 308 Or 315 (1989); *but see* *State v. Pruett*, 95 Or App 494, 770 P2d 70 (1989) (no probable cause to open a compact mirror case found in a purse belonging to a woman who had been arrested for DUII and who had needle marks on her arms).

In *State v. English*, 164 Or App 580, 994 P2d 165 (1999), *rev den*, 331 Or 244 (2000), the court held that an **opaque plastic vial** closed with cellophane tape announced its contents. The officer testified that, in his experience, such containers always held controlled substances. However, in *State v. Walker*, 173 Or App 46, 20 P3d 834 (2001), the court held that, although the police acted lawfully in seizing an **opaque bubble-soap bottle** that rattled when shaken, the container did not announce its contents. Therefore, by opening it without a warrant, the officers unlawfully searched. "The container, by its nature, announced to the world 'I contain bubble soap,' not 'I contain drugs.'" *State v. Walker*, 173 Or App at 50. The state offered no testimony about the use of such containers.

"A **film canister** is not so uniquely associated with the storage and transportation of drugs that, by itself, it suggests that it contains drugs." *State v. Lanig*, 154 Or App 665, 669, 963 P2d 58 (1998) (film canister in suspect's purse did not amount to reasonable suspicion and was not sufficient even to justify expanding the scope of a traffic stop); *see also* *State v. Lane*, 135 Or App 233, 240, 898 P2d 1358, *rev den*, 322 Or 360 (1995) (no probable cause where film canister found in a vehicle along with a hash pipe with residue and a set of scales).

But if a **film canister is found in close proximity to drugs or drug paraphernalia**, that may establish probable cause to believe it contains more drugs. In State v. Poulson, 150 Or App 164, 945 P2d 1084 (1997), a film canister was found in a fanny pack with drug paraphernalia, including razor blades, straws, scales, a powder grinder, and a pipe. These circumstances established probable cause justifying a search under the former automobile exception. *See also* State v. Diaz, 29 Or App 523, 564 P2d 1066 (1977) (drugs found in a residence pursuant to a warrant; the resident, a known narcotics user, furtively attempted to pass a **metal film canister** to another person in the residence; the officer knew *metal* film canisters were no longer used for film and were commonly used for drugs; the officer had probable cause to believe the canister contained drugs).

A **small, clear, plastic baggie** is similar to a film canister. An officer's observation of a small, clear, plastic baggie sticking out of a day planner, along with the officer's drug investigation training and experience were insufficient to establish probable cause. State v. Edmiston, 229 Or App 411, 211 P3d 340 (2009). "The fact that this type of baggie is commonly used to package methamphetamine does not determine whether this particular baggie contained anything, much less controlled substances." *Id*. at 416-17. As in the case of film canisters, the officer's testimony about the typical use of the container must be supplemented by corroborating evidence, such as "observ[ation of] the contents of the baggie, a furtive gesture, signs of intoxication or previous drug use, drug paraphernalia, nervous behavior, or evasiveness on the part of defendant." *Id*. at 417-18.

In State v. Brenner, 151 Or App 159, 947 P2d 1139 (1997), the officer had probable cause to open a **metal match container** that defendant furtively handed to a passenger in the car, who immediately concealed the container between her legs. The officer knew from prior experience that similar containers were used to contain controlled substances.

(4) Dog Sniffs.

An alert by a properly trained and reliable drug-detection dog can provide probable cause for a search. State v. Foster, 350 Or 161, 252 P3d 292 (2011). The court must consider the facts known to the officers which often will include the dog's training, certification, continued training and recertification, and performance in the field. *Id*. at 170. In Foster, the dog's alert was reliable enough to provide probable cause, where the dog had extensive training, had been certified at least twice by the Oregon Police Canine Association, and 66% of his alerts had revealed drugs or paraphernalia. Although "statistics do not control" the analysis, the dog's find rate "is sufficiently high that, when considered with his training and certification," the officers reasonably relied on his alert. *Id.* at 176.

To show that the officer's reliance was reasonable, evidence about the dog's training and certification must disclose how that training ensured reliability. State v. Farmer, 258 Or App 693, 311 P3d 888 (2013). That standard can be met by showing that "the dog-handled team [was] *trained* in a manner that ensures the dog alerts in response to drug odors as opposed to, for example, a desire for a reward, nondrug odors, or handler cues or physical or scent trails left by the person who hid the drugs" and that the team achieved certification after being "*tested* in a controlled environment, where precautions against human curing have been taken and the dog's accuracy can be assessed[.]" *Id.* at 311. The state can also rely on field reports of the dog's performance, although their value is limited because it is unlikely that either false positives or false negatives will be detected in the field. *Id.*

The lack of evidence of the reliability of the dog's alert can defeat probable cause. State v. Snyder, 281 Or App 308, 383 P3d 357 (2016) (officer testimony that the dog had "special training" and that he was "a reliable drug dog" was insufficient without evidence that the dog was certified or of the type or quality of testing or field results); *see also* State v. Helzer, 350 Or 153, 252 P3d 288 (2011) (evidence did not establish reliability of dog alert where handler described training in general

terms, dog and handler received training from private organizations rather than state agencies, and handler did not keep records of dog's performance on tests for false positives).

e. Circumstances Indicating Drug Manufacture.

(1) Glassware.

State v. Getzelman, 178 Or App 591, 39 P3d 195, *rev den*, 334 Or 289 (2002). Pursuant to consent obtained during a vehicle stop, officers found a bindle of meth in the passenger's fanny pack, a library book on chemicals in the passenger compartment and, in the trunk, bottles of iodine and muriatic acid, plastic tubing and fittings, and other material indicative of meth manufacture – this provided probable cause to believe that occupants were involved in drug manufacturing.

(2) Indoor Marijuana Cultivation.

High power usage is not alone sufficient to establish probable cause, but it is an important factor to be considered. *State v. Johnson*, 186 Or App 186, 62 P3d 861 (2003); *State v. Russell*, 122 Or App 261, 266, 857 P2d 220 (1993); *State v. Prince*, 93 Or App 106, 113, 760 P2d 1356, *rev den*, 307 Or 246 (1988). In combination with other circumstances, unusually high power consumption can strongly contribute to probable cause.

State v. Duarte, 237 Or App 13, 238 P3d 411, *rev den*, 349 Or 370 (2010). An officer's experience and training about characteristics of marijuana grows, including electrical use, hydroponic cultivation methods, and structural modifications corroborated informant's descriptions of defendant's residence and supported a finding of probable cause.

State v. Johnson, 186 Or App 186, 62 P3d 861 (2003). Evidence of an anonymous tip, high electricity usage, the odor of fresh, growing marijuana, and extra security measures established probable cause to search defendant Barkau's residence. However, evidence that defendant Johnson associated with Barkau, had an eight-year-old conviction for possession of less than one ounce of marijuana, and high electricity usage did not rise to the level of probable cause to believe that the Johnsons' house contained evidence of drug offenses.

> **PRACTICAL SUGGESTION: Power Records.** To give full significance to records of power usage, it is important to provide an adequate basis for the magistrate to compare the suspect's purportedly high rate of power consumption with normal power usage. A comparison between the suspect's power usage and the power consumption of a single prior resident, or other homes that are not sufficiently similar, will likely be insufficient. *See State v. Milks/Sales*, 127 Or App 397, 872 P2d 988 (1994); *State v. Carter*, 132 Or App 461, 467-69, 889 P2d 354, *rev den*, 321 Or 268 (1995) (averages for all-electric homes not helpful in drawing inferences about a house with wood heat).

Even without evidence of high power consumption, it may be possible to establish probable cause for an indoor marijuana grow with circumstantial evidence.

State v. Stockton, 120 Or App 111, 852 P2d 227 (1993). A metal barn was erected on rural property that was purchased under a false name. Near the barn were plastic pipes, buckets, drain rock, a water tank and a well. The barn had an exhaust pipe, its only window was blacked-out, a generator was audible at night and propane tanks were seen being taken onto the property. Those circumstances were sufficient for probable cause.

State v. Morrison/Bartee, 107 Or App 343, 812 P2d 832, *adh'd to as modified on recons on other grounds*, 108 Or App 766, 816 P2d 1217 (1991). No probable cause despite circumstances indicating a large grow, including a padlocked barn sealed to prevent light from escaping, a concealed generator, and overheard discussions about getting water into the barn.

(3) Required Nexus Between Outdoor Marijuana Grows and Nearby Property.

In State v. Goodman, 328 Or 318, 975 P2d 458 (1999), the court held that, to establish probable cause to search a building for evidence related to an outdoor marijuana growing operation, the facts must be sufficient to allow a reasonable judge to believe that the following are *probable*:

> "(1) that the residents or owners of the building have some relationship to the growing operation; and (2) that marijuana, tools, or evidence of processing and sale of marijuana probably are in the building for which the warrant is sought."

328 Or at 325, *citing* State v. Anspach, 298 Or 375, 692 P2d 602 (1984). In Goodman, the court found probable cause to search the defendant's residence, which was eight miles away from a marijuana growing operation on separately owned forest land. The defendant was identified on a videotape surreptitiously recorded at the grow site. This satisfied the first prong of the standard. The second prong was established by recitations that, although the grow was cultivated, no implements of cultivation were present at the grow, and the affiant knew, based on his experience and training, that the residences of marijuana growers typically contain tools of cultivation, harvested marijuana, processing mechanisms and records.

Previously, in Anspach, the court considered whether a search warrant affidavit, which established probable cause to believe that marijuana was growing on the defendant's property, also established probable cause to believe that further evidence of cultivation would be found in the nearby house and outbuilding. The plants were on a 51-acre lot in an unpopulated area. The lot was surrounded on three sides by private timberland and on the fourth side by a river. In the absence of any indication of access by trespassers, these circumstances were sufficient to connect the buildings with the marijuana crop. An observable path or other evidence of connection was unnecessary.

(a) Cases in Which a Nexus Was Proven.

State v. Williams, 191 Or App 270, 81 P3d 743 (2003). Applying Goodman, the court found sufficient evidence to establish a nexus between the remote grow and defendant's residence, which was 35 miles from the grow site.

State v. Milosevich, 131 Or App 51, 883 P2d 898, *rev den*, 320 Or 492 (1994). An odor of growing marijuana emanated from the defendant's car while he was stopped after leaving a grow site on Forest Service land. The defendant also had a drug record and the affidavit recited that, in the affiant's experience, marijuana growers commonly take harvested plants to their residences to be processed — probable cause existed to search the defendant's residence.

State v. Strailey, 131 Or App 44, 883 P2d 901 (1994), *rev den*, 320 Or 508 (1995). The affidavit was sufficient to establish a nexus between a marijuana grow site on BLM forest land and defendant's house, where the affidavit showed that defendant was the grower and six plants had been harvested while the grow site was under camera surveillance. Also, no implements of cultivation were at the grow site and the defendant's house was only a short distance away.

(b) Cases in Which a Nexus Was *Not* Proven.

State v. Harp, 299 Or 1, 697 P2d 548 (1985). The distance between a marijuana grow and defendants' house (three-eighths of a mile) did not provide probable cause to search the house. "Some other connection is required."

State v. Yuen, 182 Or App 387, 49 P3d 819 (2002). A trail led from a rural marijuana grow to a residence and an outbuilding, which was being used as a separate residence by another person; that circumstance did not establish probable cause to believe that *both* the main residence and the outbuilding were connected to the grow. "[W]here there are multiple residences nearby [to an outdoor marijuana growing site], the likelihood that one particular residence is connected to the marijuana is diffused and a stronger factual showing is required to demonstrate that one residence should be the target of the search."

State v. Evans, 119 Or App 44, 849 P2d 539 (1993). The affidavit failed to establish a factual link between a marijuana grow in the forest and the suspect's house 30 miles away, where the suspect was seen tending plants but the only connection to the residence was the affiant officer's recitation that marijuana growers "commonly" keep tools and paraphernalia in residences.

f. Circumstances Indicating Drug Dealing.

(1) Direct Observation of Apparent Street Dealing.

State v. Martin, 327 Or 17, 956 P2d 956 (1998). Observation of an apparent hand-to-hand drug delivery on a corner known to be a place of drug dealing 24 hours a day was sufficient for probable cause, although the officer could not directly see any objects being exchanged.

State v. Lebanno, 314 Or App 172, 497 P3d 1280 (2021). Without more, an officer's observation of two men engage in an "extended handshake" at 9:40 a.m. in a high-drug area did not supply probable cause where the officer did not see anything in defendant's hand. The state's argument depended on the stacking of inferences—first, that the men exchanged a small item, and, second, that it was illegal drugs.

State v. Newport, 204 Or App 489, 130 P3d 792 (2006). An officer watched an apparent hand-to-hand drug deal in a truck, although he could not see the actual exchange. The parties matched descriptions given by an unnamed informant a few weeks earlier. A consent search of defendant's person revealed drugs and a large amount of cash. Collectively, this established probable cause that a crime had occurred, and that evidence would be in the truck.

State v. Jacobs, 187 Or App 330, 67 P3d 408 (2003). The officer unlawfully stopped and searched defendant based solely on his suspicion that he had seen him engage in a hand-to-hand drug transaction in downtown Salem near an ATM. The officer's testimony that he had seen the men "huddled together" and looking around "in a nervous manner" while the defendant passed to another man what appeared to be money in "a high traffic area" did not establish probable cause. Mere furtiveness does not establish probable cause, and no evidence established that the specific time and location of the incident were suspicious. Distinguishing State v. Martin, 327 Or 17, 956 P2d 956 (1998), on the ground that, in this case, there was "no evidence that the *specific* location was a site of continuous, hand to hand drug traffic." 187 Or App at 335 (emphasis added).

State v. Mosley, 178 Or App 474, 38 P3d 278 (2001), *rev den*, 334 Or App 121 (2002). While making numerous street deals, defendant repeatedly entered a Cadillac parked nearby. That provided probable cause to search the Cadillac for drugs.

State v. Boundy, 115 Or App 638, 840 P2d 1307 (1992), *rev dismissed*, 317 Or 579 (1993). Officers saw an apparent drug deal in a parking lot, but could not see an actual exchange. That observation did not establish probable cause by itself, but probable cause was sufficient when this observation was combined with the results of a preceding 15-month investigation that included controlled purchases from the suspect.

(2) Large Volume of Visitors or Phone Calls.

A large number of short-term visitors to a residence is suggestive of drug trafficking and can contribute to probable cause. *See* State v. Evoniuk/Niemi, 80 Or App 405, 722 P2d 1277 (1986) (repeated observations of a pattern consisting of a bag drop in the driveway followed by the arrival of several short-term visitors to the house was sufficient for probable cause). *See also* State v. Arnold, 115 Or App 258, 838 P2d 74 (1992), *rev den*, 315 Or 312 (1993) (police observation of frequent visitors to the residence corroborated the informant's observation of drug dealing inside the house). *But see* State v. Buffington, 87 Or App 559, 743 P2d 738 (1987) ("[I]n the absence of any evidence that an unusually large number of people entering and quickly leaving a residence is in itself an indication of drug trafficking, the magistrate was not entitled to draw an inference against defendant that would amount to probable cause[.]").

Frequent telephone calls to the home of a person suspected of dealing in drugs does not *per se* establish probable cause. State v. Cotter/Ray, 125 Or App 210, 864 P2d 875 (1993).

g. Required Nexus Between Drug House and Vehicles/Outbuildings.

A suspect's involvement in drug dealing will not, itself, supply probable cause to search the suspect's residence for evidence of those crimes. Without a nexus between the criminal activity and the residence, the mere fact that a suspect regularly left the residence in his car to sell drugs from the car at other locations does not supply probable cause for a search of the residence. *See* State v. Miller, 254 Or App 514, 295 P3d 158 (2013) (statement that drug dealers "store records" of drug sales did not provide probable cause because it was not tied to the residence); *see also* State v. Webber, 281 Or App 342, 383 P3d 951 (2016) (defendant's involvement in ongoing drug sales, lack of evidence of those sales in his car, and officer's training and experience did not supply nexus to the residence).

A warrant that authorizes a search of vehicles or outbuildings associated with a residence used in drug activity must establish a nexus between the drug activity and the vehicles or outbuildings. The officer's training and experience regarding the connection of vehicles and outbuildings with drug manufacture or delivery occurring in the main residence may be an important component of probable cause. *Cf.* State v. Goodman, 328 Or 318, 975 P2d 458 (1999) (upholding an affidavit reciting, among other things, that on all 10 previous occasions when the affiant had searched a marijuana grower's residence located on property separate from the grow, evidence of the grow had been found). But if the only known facts connect the drug dealing with one building and not others on the property, the affidavit will not support a search of a building other than the one connected to the drug dealing. *See* State v. Nelson, 307 Or App 226, 476 P3d 100 (2020) (probable cause to search shipping container in the back yard did not justify a search of the primary residence, where no facts supported an inference that evidence probably would be in any other location; mere fact that the suspect used his cell phone to facilitate drug sales did not draw a sufficient nexus to the home because it was not probable that the cell phone would be in the home at any given time).

Proximity of vehicles or outbuildings and the fact that traffickers may store evidence in vehicles and outbuildings is not enough to supply probable cause to search an outbuilding occupied by *someone other than the suspect. See* State v. Yuen, 182 Or App 387, 49 P3d 819 (2002) (trail leading

from rural marijuana grow to a residence and to an outbuilding that was being used as separate residence by another person did not establish probable cause to believe that *both* the main residence and the outbuilding were connected to grow); State v. Thibodeaux, 173 Or App 353, 22 P3d 248 (2001) (no nexus between suspects' criminal activity and individuals living in a bus on suspects' property). State v. Gloster, 145 Or App 555, 932 P2d 68 (1997) (statement in affidavit that "methamphetamine users often may store drugs in their sheds" did not establish probable cause to search a shed that the affidavit described as being rented by person other than the person suspected of criminal activity); *see also* State v. Murphy, 285 Or App 338, 339, 393 P3d 745 (2017) (warrant failed to establish nexus between drug evidence and defendant's camp trailer). *Compare* State v. Chase, 219 Or App 387, 182 P3d 274 (2008) ("when a building is owned or occupied by persons other than those suspected of criminal activity, something more than mere proximity is required"; here, it was sufficient that defendant's daughter lived in the outbuilding, that drugs had been sold at least once inside defendant's home, and that defendant's wife, who also lived there, was aware of the drug sales on the property).

See also discussion in Chapter V, Searches with Warrants, (Premises with Multiple Residences).

h. Profiles.

Officers may not rely solely upon general profiles of offenders to construct a basis for an investigative stop or for probable cause. Reid v. Georgia, 448 US 438, 100 S Ct 2752, 65 L Ed 2d 890 (1980); State v. Baldwin, 76 Or App 723, 729, 712 P2d 120 (1985), *rev den*, 301 Or 193 (1986).

But innocent conduct, such as paying cash for an airline ticket or traveling under an alias, may serve as part of the foundation for reasonable suspicion or probable cause. *See* United States v. Sokolow, 490 US 1, 109 S Ct 1581, 104 L Ed 2d 1 (1989); United States v. Low, 887 F2d 232, 236 (9th Cir 1989); State v. North, 72 Or App 1, 5-7, 694 P2d 990, *rev den*, 299 Or 154 (1985).

The special expertise of trained investigators has been relied on by Oregon courts to help evaluate otherwise ambiguous conduct. *See, e.g*, State v. Martin, 327 Or 17, 23, 956 P2d 956 (1998) (observation of an apparent street sale of drugs, "filtered through the lens of [the officer's] experience," provided probable cause even though the officer could not directly see an object being exchanged); State v. Norman, 66 Or App 443, 674 P2d 626, *rev den*, 296 Or 712 (1984) (experienced narcotics officer allowed to assist court by describing characteristics of "classic" hand-to-hand narcotics deal and relating those characteristics to what the officer had observed).

The United States Supreme Court has held under the Fourth Amendment that the articulation of factors in support of probable cause or reasonable suspicion in the form of a "profile" of the general characteristics of a class of offenders "does not somehow detract from their evidentiary significance as seen by a trained agent." United States v. Sokolow, 490 US 1, 10, 109 S Ct 1581, 104 L Ed 2d 1 (1989). In comparison, though, even in mere reasonable-suspicion cases, Oregon courts have responded with skepticism and concern about certain "profile" characteristics that are common to a particular racial or ethnic group. *See* State v. De La Rosa, 228 Or App 666, 674 n 2, 208 P3d 1012 (2009) (refusing to include officer's observation of "Jesus Malverde" medallion in defendant's car, despite officer's detailed recitation of his training and experience and his opinion that it was a "cultural icon specifically related to narcotics trafficking in the Hispanic community").

In State v. Juarez-Godinez, 326 Or 1, 942 P2d 772 (1997), however, the Oregon Supreme Court disregarded several conclusions drawn by a trained, experienced officer, holding that he lacked reasonable suspicion that several Hispanic individuals driving to Washington in the early morning hours were transporting controlled substances. Along with testimony about a number of

incriminating factors and inferences, the record included testimony by the officer that he had previously made approximately 35 traffic stops of drivers exhibiting similar characteristics and that in all of those cases, he had found controlled substances in the vehicle. The court distinguished *Sokolow* and held that reasonable suspicion was not present under either Oregon or federal law.

For a discussion of the related topic of "pretext stops," see Chapter II, Stop and Frisk.

i. Frequenting.

A person may not be arrested for frequenting a drug house without evidence that he or she is aware of illegal activity and has authority to forbid it. *State v. Woodward*, 107 Or App 123, 810 P2d 1330 (1991). It is not necessary to show that the person has been to the place more than once. *State v. Arnett*, 104 Or App 180, 799 P2d 687 (1990) (defendant present when police found drugs and paraphernalia, and he appeared to be under the influence of methamphetamine); *State v. Anderson*, 95 Or App 178, 768 P2d 427 (1989) (defendant found sleeping in a strongly fortified drug house).

A defendant's presence in or near the residence is not sufficient, without more, to establish the defendant's awareness of drug activity. *See State v. Van Osdol*, 290 Or App 902, 417 P3d 488 (2018) (informant's purchase of drugs at defendant's residence twice in preceding 30 days, from two different dealers, did not establish probable cause that evidence of frequenting would be found in the residence); *State v. Grover*, 193 Or App 165, 9 P3d 8 (2004) (evidence that defendant previously had less than an ounce of marijuana and that he knocked on the door of a drug house where police were executing a warrant was not sufficient to establish probable cause for frequenting); *State v. Woodward*, 107 Or App at 126 (no probable cause when defendant entered house without knocking while police were executing a search warrant for drugs).

j. School Searches.

When school officials perceive an immediate threat to student or staff safety at a school, they may take prompt, reasonable steps to remove that threat, including a limited search. Because the school context creates heightened safety concerns, and school officials are responsible for maintaining a safe learning environment, neither probable cause for a crime nor a search warrant is necessary when this standard is met. *State ex rel. Juv. Dept. v. M.A.D.*, 348 Or 381, 233 P3d 437 (2010) (search of defendant's backpack for marijuana was justified under this standard); *State v. A. J. C.*, 355 Or 552, 326 P3d 1195 (2014) (after receiving information that youth threatened to bring a gun to school and shoot a particular fellow high-school student, school principal's limited search of youth's backpack was reasonable under Article I, section 9).

6. Miscellaneous Crimes.

Animal Abuse and Neglect. Officer had probable cause to seize dog based on dog's emaciated physical appearance, a report of abuse and neglect, the dog's behavior (eating non-food items in the yard and attempting to vomit), and defendant's acknowledgment that she had run out of dog food. *State v. Newcomb*, 262 Or App 256, 324 P3d 557 (2014), *rev'd on other grounds*, 359 Or 756 (2016).

IV. WARRANTLESS SEARCHES.

Under the Oregon Constitution and the Fourth Amendment, warrantless searches and seizures by the government are *per se* unreasonable unless they fall within one of the few specifically established and carefully delineated exceptions to the warrant requirement. Katz v. United States, 389 US 347, 357, 88 S Ct 507, 19 L Ed 2d 576 (1967); State v. Snow, 337 Or 219, 223, 94 P3d 872 (2004); State v. Bridewell, 306 Or 231, 235, 759 P2d 1054 (1988).

"The burden to establish the lawfulness of a warrantless search and seizure is on the state." State v. Sargent, 323 Or 455, 461, 918 P2d 819 (1996).

A. ABANDONED AND LOST PROPERTY.

1. Abandoned Property.

Although the category of "abandoned property" is included in this chapter as one of the "exceptions" to the search warrant requirement, abandoned property is more properly thought of as a category of property for which no "search" occurs because no privacy interest is invaded.

Oregon Law.

If a person with a protected privacy or possessory interest in property abandons that interest *before* police officers search the property, the person will have no entitlement to suppression for any illegality perpetrated by the police in conducting the search. State v. Crandall, 340 Or 645, 136 P3d 30 (2006); State v. Morton, 326 Or 466, 953 P2d 374 (1998); State v. Linville, 190 Or App 185, 193, 78 P3d 136 (2003), *rev den,* 337 Or 34 (2004); State v. Kauffman, 162 Or App 402, 986 P2d 696 (1999), *rev den,* 329 Or 650 (2000); State v. Knox, 160 Or App 668, 984 P2d 294, *rev den,* 329 Or 527 (1999); State v. Johnson, 153 Or App 535, 538 fn 1, 958 P2d 887, *rev den,* 327 Or 554 (1998).

a. Abandonment and "Disclaimers" of Ownership.

Depending on the particular circumstances, a defendant's disclaimer of a protected privacy interest in any item at the time of the search may or may not constitute an abandonment. The court must examine the totality of the circumstances to determine if the defendant has relinquished a privacy interest in the searched property. State v. Cook, 332 Or 601, 608, 34 P3d 156 (2001); State v. Tucker, 330 Or 85, 91, 997 P2d 182 (2000); State v Bunch, 305 Or App 61, 468 P3d 973 (2020); State v. Linville, 190 Or App at 192; State v. Stafford, 184 Or App 674, 679-80, 57 P3d 598 (2002), *rev den,* 335 Or 181 (2003); State v. Kauffman, 162 Or App 402, 986 P2d 696 (1999), *rev den,* 329 Or 650 (2000). The state has the burden of proving abandonment. State v. Cook, 332 Or at 608; State v. Tucker, 330 Or 85; State v. Galloway/Hoesly, 198 Or App 585, 1, 109 P3d 383 (2005).

In State v. Cook, 332 Or at 607-08, the court summarized "[t]hree important points" from its prior abandonment cases:

> "First, the determination whether a defendant has relinquished a constitutionally protected interest in an article of property involves both factual and legal questions * * *.
>
> "Second, because Article I, section 9, protects both possessory and privacy interests in effects, property law concepts of ownership and possession are relevant, though not always conclusive, in the factual and legal determination whether a defendant relinquished all constitutionally protected interests in an article of property.

> "Finally, for constitutional purposes, the question to be resolved in [these cases] is whether the defendant's statements and conduct demonstrate[] that he relinquished all constitutionally protected interests in the articles of property[.]"

The court concluded in Cook that neither the defendant's disclaimer of ownership nor his conduct demonstrated that he "intended to relinquish all his constitutionally protected interests" in a duffel bag and its contents. 332 Or at 608.

> "Although defendant had relinquished his immediate physical possession of the bag and clothing by leaving them on the ground, undisputedly he did so only after [the officer] instructed him to 'step out' of the area near the dumpster where defendant was sorting the clothes into the bag. Leaving the items on the ground in compliance with the officer's request to 'step' out is not conduct demonstrating an intent permanently to relinquish possession of the items or the privacy interests that accompanied the right to possess them."

332 Or at 608-09. In State v. Brown, 348 Or 293, 232 P3d 962 (2010), the Supreme Court clarified that the reference in Cook to "permanent" relinquishment was unnecessary to its holding and "disavow[ed] that requirement now." *Id.* at 301-302. That is, there are a number of circumstances in which a person relinquishes privacy interests without doing so permanently: a consent to search is a temporary relinquishment of a privacy interest, and need not demonstrate an intent to permanently give up all interests in an item; likewise, a person who places an item in plain view has temporarily lost any privacy interest in the item, but may regain that interest by removing the item from plain view. *Id.* at 300-301. For those reasons, the court held that Cook does not require *permanent* relinquishment of a protected interest.

Frequently, an abandonment involves both a defendant's physical relinquishment of the item and a verbal disclaimer of any interest. For example, in State v. Standish, 197 Or App 96, 104 P3d 624, *rev dism'd*, 339 Or 450 (2005), an officer stopped the defendant after a high-speed chase in a stolen vehicle. When asked about bags that were in the truck, the defendant denied that the bags were his. The officer then searched the bags and found evidence connecting the defendant to a robbery. The Court of Appeals upheld the search, concluding that although the defendant constructively possessed the items in the truck, including the bags, and therefore had a constitutionally protected possessory interest in them at the time of his arrest, his disclaimer and his failure to object or assert any interest when the officer searched the bags constituted an abandonment. The court noted that "although a disclaimer of ownership does not *necessarily* constitute abandonment of all protected interests in property, such a disclaimer may trigger an obligation by the defendant to assert a protected interest other than ownership in the property where no possessory or privacy interest may be inferred from the circumstances." *See also* State v. Kauffman, 162 Or App 402 (before police arrived at accident scene, defendant surrendered any control that he had over a duffel bag when he chose to turn it over to strangers and walked away; when police arrived, defendant denied knowing anything about the bag); State v. Knox, 160 Or App 668, 984 P2d 294, *rev den*, 329 Or 527 (1999) (defendant left pouch in patrol car; when the police found it, defendant denied knowing anything about it); State v. Bogart, 116 Or App 443, 841 P2d 672 (1992) (where defendant disclaimed any interest in a paper bag that appeared under the patrol car during the stop, the officer could open the bag); State v. MacDonald, 105 Or App 102, 803 P2d 1211 (1990), *rev den,* 311 Or 433 (1991) (defendant had no protected interest in a bindle dropped from his speeding car where he denied knowledge or possession at scene of arrest and did not claim an interest in the bindle at the suppression hearing). *Compare* State v. Cook, 332 Or 601 (defendant disclaimed ownership, but not possession; further, he did not voluntarily relinquish possession, but was ordered to move away from the duffel bag before police searched it); State v. Bunch, 305 Or App at 69-70 (where defendant told an officer that a purse sitting next to her belonged to a friend who had left to run an errand but

claimed that some of her belongings were in the purse, she did not unequivocally relinquish her possessory or privacy interest in the purse, even though she had disclaimed ownership of the purse and did not object when officer announced that he was taking the purse for safekeeping); *State v. Rowell*, 251 Or App 463, 475-76, 283 P3d 454 (2012) (defendant initially disclaimed interest but then asserted an interest before bag was searched: not abandonment).

An abandonment, however, may be based only on the defendant's voluntary relinquishment of the item or an express disclaimer of any interest in it. *State v. Stafford*, 184 Or App 674 (when he saw officers entering apartment complex, defendant stashed wadded up paper bag in common area and left the area); *State v. Linville*, 190 Or App 185 (during a car stop, defendant, a passenger, expressly denied to officer that any of the items in the car was his). Thus, courts cannot find abandonment just because a defendant fails to claim ownership of an item. *State v. McClatchey*, 259 Or App 531, 538, 314 P3d 721 (2013) (where cell phone was found next to defendant in a motel room, trial court could not properly find abandonment based solely on defendant's failure to assert a protected interest in cell phone); *State v. Jones*, 280 Or App 135, 380 P3d 1132 (2016) (fact that defendant told officer that certain bags in a car were his did not unequivocally manifest defendant's intention to relinquish his protected privacy interest in other items in the car).

Among the factors the courts will consider to determine whether the defendant abandoned an item by relinquishing possession are: "(1) whether the defendant separated himself from the property as a result of police instruction or illegal police conduct; (2) whether the defendant left the property on public or private property; (3) whether the defendant 'made any attempt to hide the property or in any other way manifest an intention to the police that he . . . was attempting to maintain control over it"; (4) whether the defendant 'has left his property under circumstances which objectively make it likely that others will inspect it'; (5) whether the defendant has placed the item in plain view; and (6) whether the defendant gave up his rights to control the disposition of the property." *State v. Ipsen*, 288 Or App 395, 406 P3d 105 (2017) (citations omitted). Thus, if the defendant voluntarily places an item out in the open in a public area and then leaves, an officer reasonably may conclude that the defendant abandoned the item, even if he subjectively intended to return later to retrieve the item. *State v. Stafford*, 184 Or App at 680. *See also State v. Montiel-Delvalle*, 304 Or App 699, 468 P3d 995, *rev den*, 367 Or 387 (2020) (defendant abandoned vehicle when he left it disabled in a public road intersection after a crash); *Ipsen*, 288 Or App at 400–01 (defendant abandoned property when he left what appeared to be an AC adapter but was actually a hidden camera plugged into an outlet in a public restroom for several days); *State v. Dickson*, 173 Or App 567, 24 P3d 909, *rev den,* 332 Or 559 (2001) (backpack dropped by fleeing defendant in plain sight of officers who announced they had a search warrant was properly treated as abandoned property); *State v. Bernabo*, 224 Or App 379, 197 P3d 610 (2008) (defendant abandoned privacy interest in a sunglasses case that she voluntarily, not at the direction of the police, dropped during a lawful traffic stop). Conversely, leaving property in a parked car—even when that car is stolen—does not manifest a similar intent to abandon the property. *State v. Lewis*, 306 Or App 492, 501–03, 474 P3d 907 (2020).

Courts also consider the "nature of the property involved" in determining whether a defendant intended to relinquish a possessory or privacy interest in the item. *Contrast State v. Kendall*, 173 Or App 487, 24 P3d 914 (2001) (bicycle discarded in bushes near home by defendant fleeing from police was not abandoned) *with State v. Stafford*, 184 Or App at 680 (defendant abandoned wadded up paper bag that appeared to be "discarded trash" when he left it in the open in public area). But the mere fact that the item at issue is trash to be discarded does not establish that the suspect effectively has abandoned it. *State v. Galloway/Hoesly*, 198 Or App at 594-96 (defendants retained protected possessory interest in items in garbage can left at curbside for collection). *See also State v. Lien/Wilverding*, 364 Or 750, 441 P3d 185 (2019) (defendants retained protected *privacy* interest in contents of closed, opaque garbage can, so that sanitation company acting as a state agent was prohibited from segregating that garbage for a search).

"In general, the entrustment of an article of personal property to another does not forfeit a privacy interest in the article[.]" State v. Fraga-Ortiz, 176 Or App 268, 275, 31 P3d 1089 (2001) (defendant retained privacy interest in contents of suitcase found in another person's apartment). But individuals can, in some circumstances, abandon an interest in property by giving it to another, particularly if that entrustment is not merely a bailment. State v. Zweygartt, 337 Or App 234, 562 P3d 1106 (2025) (defendant did not retain property or privacy interest in phone when he gave it to a minor child without restriction on her use, even though it was meant for emergency use and the minor would have given it back if defendant had requested); State v. Laney, 318 Or App 509, 507 P3d 308 (2022) (defendant abandoned possessory and privacy interest in hard drives when he gave them to his son-in-law with instructions to destroy them; defendant "fundamentally gave up the right to control their disposition once he left them" with his son-in-law and did not follow up for at least six years).

> **PRACTICAL SUGGESTION: IF POSSIBLE, OBTAIN CONSENT.** Even a defendant who denies knowledge or possession of the property searched at the time of the search may prevail on a motion to suppress. *See, e.g.* State v. Cook, 332 Or 601; State v. Morton, 326 Or 466; State v. Bunch, 305 Or App 61. For that reason, officers cannot necessarily rely on a defendant's mere disclaimer at the scene and should be advised to always seek his or her consent to a search, too. (For example: "If it isn't yours, then you won't mind if I look inside, right?") If consent cannot be obtained, officers should determine whether another warrant exception is available.

b. Timing of the Abandonment.

An abandonment of a protected privacy or possessory interest may be effective in terminating a person's right to challenge the search only if the abandonment occurs *before* the search. State v. Morton, 326 Or 466, 470, 953 P2d 374 (1998); State v. Kauffman, 162 Or App 402, 986 P2d 696 (1999), *rev den,* 329 Or 650 (2000) (defendant's relinquishment of duffel bag occurred before police arrived on the scene).

An abandonment, in whatever form (*e.g.*, physical relinquishment, verbal disclaimer), that occurs after the search cannot validate the search under the abandonment doctrine. But if, after the search, the defendant denies that he or she ever had any interest in the item, that disclaimer may be relevant to prove that he or she in fact did not have a privacy or possessory interest in the item at the time of the search. *See, e.g.*, State v. Tucker, 330 Or at 91 (noting that a defendant's post-search denial of an interest in item "is not necessarily dispositive" on that issue).

Similarly, if the defendant's disclaiming statements or conduct at the scene are found to constitute his or her consent to the search, they can validate the search only if that consent was given before the search, unless the record also shows that the defendant knew that the search was done and intended his or her consent to be retroactive. State v. Weaver, 319 Or 212, 874 P2d 1322 (1994); *but see* State v. Larson, 159 Or App 34, 42-43, 977 P2d 1175, *rev den*, 329 Or 318 (1999) (third party's retroactive consent could not waive unlawfulness of police conduct with respect to defendant). *See also* Consent to Search Following Unlawful Police Conduct, in this chapter.

c. Abandonment Resulting from Police Conduct.

An abandonment is effective even if the defendant abandoned the item only in response to police conduct, provided that conduct is lawful. *See, e.g.*, State v. Standish, 197 Or App 96, 104 P3d 624, *rev dism'd*, 339 Or 450 (2005) (upon being stopped after a high-speed chase in a stolen vehicle, defendant denied that the bags in the car were his; his disclaimer and failure to object when the officer searched the bags constituted an abandonment); State v. Linville, 190 Or App 185 (during lawful car stop, defendant expressly denied to officer that any of the items in the car was his); State v.

Stafford, 184 Or App at 680 (after seeing officers enter apartment building, defendant voluntarily placed item in the open in a public area and left); *State v. Dickson*, 173 Or App 575-76 (fleeing defendant dropped backpack in plain sight of officers who announced they had a search warrant); *State v. Stubblefield*, 279 Or App 483, 380 P3d 1126, *rev den*, 360 Or 697 (2016) (defendant who made illegal U-turn in stolen truck, sped up and crashed truck after officer signaled for him to stop, and yelled "Yahoo!" and took off running when police approached him, abandoned any constitutionally protected interest in items that he left in the truck).

But if the defendant's abandonment of a protected interest follows unlawful police conduct, the state cannot rely on the abandonment to validate the subsequent search, unless the defendant's conduct was voluntary and independent of the illegality. *Compare* *State v. Morton*, 326 Or 466, 470-71, 953 P2d 374 (1998) (defendant's disclaimer of interest in a container of drugs that fell from her jacket during a frisk directly resulted from her arrest on an invalid warrant), *and* *State v. Silva*, 170 Or App 440, 450-51, 13 P3d 143 (2000) (in light of fact driver and passenger were unlawfully detained, the state had to prove "that defendants were no longer operating under the influence of the illegal restraint of their liberty at the time of their disclaimers"; burden not met) *with* *State v. Knox*, 160 Or App 668, 984 P2d 294, *rev den,* 329 Or 527 (1999) (defendant's deposit of pouch in patrol car after his arrest was the product of his own volition, not an exploitation of an earlier illegal search).

The Oregon Supreme Court has distinguished the circumstances in *Morton* from those in *State v. Crandall*, 340 Or 645, 136 P3d 30 (2006). In that case, although the officer unlawfully seized defendant by telling him to stop, defendant then unilaterally and voluntarily placed a baggie under a nearby car. The court held that defendant's intervening act sufficiently attenuated the discovery of the evidence such that the unlawful police conduct could not "be viewed properly as the source of that evidence." *Crandall*, 340 Or at 653, *quoting* *State v. Hall*, 339 Or 7, 25, 115 P3d 908 (2005).

d. Scope of a Search of Abandoned Property.

When a police officer searches "lost" property in an effort to determine ownership, the officer must stop searching once he or she can identify the owner. *See, e.g.*, *State v. Rowell*, 251 Or App 463, 473, 283 P3d 454 (2012) (search of laptop bag could not be justified under "lost property" exception because officer continued searching after he found defendant's checks inside); *State v. Paasch*, 117 Or App 302, 843 P2d 1011 (1992) (search of lost wallet to determine owner's identity should have ended when identification was found) (*see* additional cases and discussion in this chapter (Lost Property Searched for Identification). That limitation does not apply to "abandoned" property. *See, e.g.*, *State v. Morton*, 326 Or 466, 468, 470, 953 P2d 374 (1998) (no suggestion that police were searching for identification when they inspected container dropped by defendant). Thus, if the property is truly abandoned, rather than merely lost, the scope of the search is unlimited.

> **COMMENT:** In *State v. Belcher*, 306 Or 343, 759 P2d 1096 (1988), the Supreme Court held that a police search of an abandoned backpack for evidence of the owner's identity did not violate Article I, section 9. But this opinion left open the question of whether Article I, section 9, prohibits a more expansive search of abandoned property for other types of evidence. Because the officer who searched the backpack involved in *Belcher* did not find identification, the court was not asked to decide whether the officer would have been required to stop searching once he found identification. The court's later pronouncement on abandoned property, *State v. Morton*, 326 Or 466, does not suggest that an abandoned item may be searched only for identification. Moreover, since *Morton*, the Court of Appeals has upheld thorough searches of abandoned containers in cases where the officers made no claim that their purpose was to discover the owner's identity (because the officers already knew who had abandoned the item). *See* *State v. Standish*, 197 Or App 96, 104 P3d

624, *rev dism'd*, 339 Or 450 (2005) (search of bags found in vehicle was lawful based on defendant's express disclaimer and failure to object); State v. Dickson, 173 Or App 575-76 (fleeing defendant dropped his backpack in plain sight of officers); State v. Kauffman, 162 Or App 402; State v. Knox, 160 Or App 668. Therefore, language in Belcher suggesting that the scope of a search of abandoned property is limited to a search for evidence of identity is not a current statement of the law.

Fourth Amendment.

"Warrants are not required for searches and seizures of abandoned property. By voluntarily abandoning property, an individual forfeits any reasonable expectation of privacy in that property, even if he or she retains an ownership interest in it." Forty-Ninth Annual Review of Criminal Procedure, 49 GEO. L.J. ANN. REV. CRIM. PROC. 51, 171-72 (2020) (footnotes omitted). "There can be nothing unlawful in the Government's appropriation of * * * abandoned property." Abel v. United States, 362 US 217, 241, 80 S Ct 683, 4 L Ed 2d 668 (1960) (warrantless seizure of items abandoned in hotel wastepaper basket did not violate Fourth Amendment).

See, e.g., California v. Hodari D., 499 US 621, 111 S Ct 1547, 113 L Ed 2d 690 (1991) (cocaine abandoned during police pursuit); California v. Greenwood, 486 US 35, 108 S Ct 1625, 100 L Ed 2d 30 (1988) (trash left on the street); Hester v. United States, 265 US 57, 44 S Ct 445, 68 L Ed 2d 898 (1924) (discarded moonshine bottles).

To lose Fourth Amendment protections, the property must actually be abandoned, and not merely set aside or concealed. For example, in Smith v. Ohio, 494 US 541, 110 S Ct 1288, 108 L Ed 2d 464 (1990), where the suspect threw a sack onto the hood of a car when approached by police, he did not abandon the sack, but instead attempted to protect it.

2. Abandoned Premises Entered by an Officer.

Oregon Law.

The same rules relating to searches of abandoned personal property apply to abandoned real property and premises. If the defendant intentionally relinquishes possessory or privacy rights in premises, the police may enter. *Compare* State v. Maxfield, 3 Or App 308, 472 P2d 845 (1970), *cert den*, 406 US 973 (1972) (defendant had abandoned rental house by December 7 when his "rent was up November 30," and defendant was on the property on December 2 and, when told his rent was up, "he said give me another day or two and I will be gone"), *with* State v. Gatto, 304 Or App 210, 466 P3d 981 (2020) (state did not offer sufficient evidence to permit conclusion that defendant abandoned hotel room when he left in a hurry, with bags, before checkout time but left several items of value in the room). In order to search personal property left within the premises, the defendant also must have intentionally relinquished privacy interests in that property. Thus, the court in State v. Britten, 89 Or App 374, 749 P2d 1193, *rev den,* 306 Or 78 (1988), held that the landlord had authority to allow police to enter an abandoned cabin, but that he did not have authority to authorize the police to search personal property that defendant had left in the cabin, because defendant had manifested an intent to maintain his rights to the property he left behind. Similarly, the court held in State v. Fraga-Ortiz, 176 Or App 268, that although the officers lawfully entered the apartment at which defendant said he no longer lived, their search of the closed suitcase he had left behind was not lawful. But in Maxfield, 3 Or App 308, the defendant's month-to-month tenancy had expired, the defendant had moved out and not paid the next month's rent, and the officers' search of the residence was held to be proper.

PRACTICAL SUGGESTION: If officers enter abandoned premises and discover closed containers or stored effects and papers, they should verify that they have an independent basis to search those items without a warrant before doing so. If the circumstances do not establish that *those items* have been either lost or abandoned, the officers should obtain consent to search, conform their actions to the limitations of another search-warrant exception, or apply for a warrant.

See also Third-party consent by landlords and innkeepers, in this chapter.

Fourth Amendment.

Most Fourth Amendment cases do not recognize a continuing expectation of privacy in premises that have been abandoned. *See, e.g.*, Abel v. United States, 362 US 217, 80 S Ct 683, 4 L Ed 2d 668 (1960) (warrantless seizure of items abandoned in a hotel room wastepaper basket did not violate Fourth Amendment when defendant had already checked out).

3. Lost Property Searched for Identification.

Police are authorized to inspect lost property in an effort to identify the owner. For example, in State v. Pidcock, 306 Or 335, 759 P2d 1092 (1988), *cert den*, 489 US 1011 (1989), a woman found a briefcase along the side of a rural country road and brought it to police. Sheriff's deputies opened it and observed marijuana, a gun, cash, and envelopes containing drugs inside. Fingerprint analysis revealed the defendant's identity. The Supreme Court upheld the search, holding that the deputies were assisting the finder of lost property in an effort to identify the owner of the property—as the finder was required to do under ORS 98.005, the "finders keepers" law—rather than searching for evidence. Note that the court has not yet decided whether the same exception applies if *police* find the lost property, rather than helping a private citizen to identify the owner. State v. Vanburen, 262 Or App 715, 327 P3d 555 (2014).

For the exception to apply, "the officer must have a good faith, subjective belief that the property is lost"; uncertainty as to the owner's identity is insufficient. State v. Lewis, 306 Or App at 497-98 (record did not establish that officer had a subjective belief that backpacks were lost when he testified that it "'crossed [his] mind' that the backpacks might belong to defendant and his friend"); State v. Bunch, 305 Or App 61, 468 P3d 973 (2020) (where defendant told officer that a purse in her possession belonged to a friend but the officer suspected that it belonged to defendant, evidence did not support a finding that officer believed the purse was lost). Further, the officer's belief that a particular item of property is lost must be objectively reasonable under the circumstances. State v. Lewis, 306 Or App at 498 (any belief that backpacks were lost was unreasonable when officer knew the backpacks were found in a stolen vehicle that defendant and his friend had been driving immediately before the officer found the backpacks); State v. Woods, 288 Or App 47, 54–55, 405 P3d 169 (2017) (police officer's immediate belief that phone was lost was not objectively reasonable when woman brought the phone to police, but her purpose was to ensure that the owner did not return to her house to retrieve it, rather than to ask the police to identify the owner of the phone, and police made no effort to obtain the owner's name from the woman); State v. Vanburen, 262 Or App at 723 (police did not have objectively reasonable belief that bag was lost when they found it on private property, at most five feet away from the door to defendant's residence, the bag would not have been visible from the street, and the officer had observed it for no more than two minutes before searching it). In addition, when the sole purpose of the search is to determine the identity of the owner, police must stop searching the property once they can identify the owner. Only evidence found before the police locate evidence of identification or ownership is admissible. State v. Paasch, 117 Or App 302, 843 P2d 1011(1992) (search of a lost wallet to determine the owner's identity should have ended when identification was found, and drugs found in a continued search of the wallet were

inadmissible); State v. Morton, 110 Or App 219, 822 P2d 148 (1991) (after finding evidence of the owner's identity in a mislaid purse, the officer was not entitled to open a cigarette case inside).

The rules that apply to "lost property" also generally apply to stolen property recovered by police. For example, the Court of Appeals held in State v. Garoutte, 104 Or App 418, 801 P2d 881 (1990), that the officer's lawful removal of defendant from a stolen car terminated any personal privacy right he might have had as to its use and occupancy without the consent of the owner. The police were entitled to search the vehicle without his consent and without a warrant. *See also* State v. Buchholz, 97 Or App 221, 226, 775 P2d 896 (1989), *affirmed*, 309 Or 442, 788 P2d 998 (1990) (warrantless search of stolen car after defendant's arrest proper as inventory prior to return to owner). *But see* State v. Rowell, 251 Or App 463, 473, 283 P3d 454 (2012) (search of laptop bag in defendant's possession could not be justified under "lost property" exception on ground that officer thought it was stolen; the exception does not "allow police to open a closed container in order to determine whether its contents were or were not stolen").

B. ARREST ON PRIVATE PREMISES WITH ARREST WARRANT

A police officer who has a valid arrest warrant may lawfully enter a private residence to make an arrest if the officer has probable cause to believe that the subject of the warrant is inside the residence. "Relieving an officer who has a valid arrest warrant of the requirement to procure a search warrant acknowledges the practical necessity that the police might need to act quickly to execute the warrant[.]" State v. Jones, 332 Or 284, 289, 27 P3d 119 (2001).

The arrest warrant must be valid under Oregon constitutional standards in order for evidence to be admissible. State v. Davis, 313 Or 246, 834 P2d 1008 (1992). An arrest warrant must be supported by an affidavit showing probable cause, or supported by contempt occurring in the court's presence. State v. Noble, 314 Or 624, 842 P2d 780 (1992). Failure to appear occurs in the court's presence, and an arrest warrant for failure to appear does not require a sworn statement. State v. Seal, 138 Or App 693, 910 P2d 394, *rev den,* 323 Or 483 (1996). However, a warrant that issues because a defendant violated a court order requiring the defendant either to perform some act outside of the court's presence (such as making payments) *or* to appear before the court must be supported by an affidavit. State v. Beckstead, 164 Or App 538, 994 P2d 174 (1999). In other words, "'[a] perusal of court records by the issuing magistrate is not a valid substitute for the statement supported by oath or affidavit.'" Beckstead, 164 Or App at 541, *quoting* State v. Noble, 314 Or at 632.

Federal administrative warrants may not satisfy the Article I, section 9, requirement that a warrant must be supported by oath or affirmation. *See* State v. Davis, 313 Or 246; State v. Rodriguez, 110 Or App 544, 823 P2d 1026 (1992), *reversed on other grounds*, 317 Or 27, 854 P2d 399 (1993).

An out-of-state arrest or search by non-Oregon law enforcement officers must comply with the Oregon Constitution for evidence to be admissible in Oregon. State v. Davis, 313 Or 246, 834 P2d 1008 (1992).

1. Entry Into the Suspect's Residence with an Arrest Warrant.

Oregon Law.

An entry into private premises with an arrest warrant is lawful if officers have both a warrant and probable cause to believe that the subject of the warrant is on the premises. No additional search warrant is required. State v. Jordan, 288 Or 391, 402, 605 P2d 646, *cert den*, 449 US 846 (1980). *See also* State v. Turley, 202 Or App 40, 120 P3d 1229 (2005), *rev den,* 340 Or 157 (2006) (entry to serve arrest warrant was lawful because defendant had listed the trailer as his current address and the

officer could tell that someone was inside and refusing to respond to his knock); *State v. Powell*, 109 Or App 374, 819 P2d 756 (1991) (entry into defendant's residence with arrest warrant was proper).

The Oregon Supreme Court decided *Jordan* before the United States Supreme Court's decisions in *Payton v. New York*, 445 US 573, 100 S Ct 1371, 63 L Ed 2d 639 (1980) and *Steagald v. United States*, 451 US 204, 101 S Ct 1642, 68 L Ed 2d 38 (1981), in which the Court held that, under the Fourth Amendment, an officer may, under the authority of an arrest warrant, enter a suspect's residence provided the police have a *reasonable belief* that the suspect is within the residence. Later, however, the Oregon Supreme Court, in *State v. Jones*, 332 Or 284, 27 P3d 119 (2001), reaffirmed the rule in *Jordan*. Therefore, under Article I, section 9, the search of a residence for a person named in an arrest warrant is not permitted unless the officer conducting the search has a valid arrest warrant and *probable cause* to believe that the person sought is inside; a reasonable belief is not enough.

> **PRACTICAL SUGGESTION:** Even if the person who answers the door lacks authority to consent or declines to allow the officers to enter, questioning that person about the presence of the subject of the arrest warrant may contribute to probable cause justifying an entry without consent. In *Jones*, the resident who answered the door refused to consent to officers' entry and denied that the subject of the warrant was there.

A valid arrest warrant means only that an officer has legal authority to seize the person named in the warrant. It "does not, standing alone, permit the police to search a private residence." *State v. Jones*, 332 Or at 289-90. *See also State v. Wise*, 305 Or 78, 749 P2d 1179 (1988) (same). But under some circumstances, a limited "protective sweep" of the premises to search for other persons may be justified. *State v. Guggenmos*, 350 Or 243, 253 P3d 1042 (2011) (circumstances known to officers did not justify "protective sweep" of residence); *State v. Cocke*, 334 Or 1, 45 P3d 109 (2002) (officers exceeded proper scope of a search incident to arrest when they extended their "protective sweep" of the arrestee's home into the apartment of a third person). *See* further discussion of protective sweeps in this chapter. Furthermore, evidence of criminal activity that the officers see in plain view during a lawful entry to execute the arrest warrant may be subject to seizure under the plain-view exception. *See* further discussion of the plain-view exception in this chapter.

Fourth Amendment.

Police have lawful authority under the Fourth Amendment to enter the residence of a person for whom they have an arrest warrant, provided that the officers reasonably believe that the person is present. *Payton v. New York*, 445 US 573, 100 S Ct 1371, 63 L Ed 2d 639 (1980).

The police may not search for anyone or anything other than the subject of the warrant unless the officers also have a search warrant, but police officers may conduct a protective "sweep" of the residence for officer-safety purposes if they reasonably believe that the area harbors persons posing a danger to the police or to others. *Maryland v. Buie*, 494 US 325, 110 S Ct 1093, 108 L Ed 2d 276 (1990).

2. Execution of Arrest Warrant on Third-Party Premises.

Oregon Law.

Oregon law generally is consistent with federal law in this area. Without exigent circumstances or consent to the entry, an officer must have a search warrant to enter a home to execute an arrest warrant for a person who does not live there. The purpose of this limitation is to protect the interests of the third party. Evidence obtained in an unlawful entry is not admissible

against the third-party resident. State v. Court, 81 Or App 598, 726 P2d 1205 (1986). But an unlawful entry without a search warrant into a third party's home to execute a valid arrest warrant of someone else does not violate the constitutional rights of the person arrested. State v. Sargent, 323 Or 455, 918 P2d 819 (1996); State v. Davis, 313 Or 246, 834 P2d 1008 (1992).

> **CAUTION:** A search warrant to enter a third party's premises to execute an arrest warrant on a person inside may authorize a limited search only for the subject of the arrest warrant. If the officers wish to search more broadly for evidence (*e.g.*, to support a hindering charge against the resident or of the crime underlying the arrest warrant), they must establish probable cause to believe such evidence will be on those premises. Alternatively, the officers may obtain consent to search more broadly from someone with authority to do so once they are lawfully on the premises.

Fourth Amendment.

In general, in the absence of exigent circumstances or consent to the entry, if the subject to be arrested pursuant to an arrest warrant is on the premises of a third party, the officers must obtain a search warrant to protect the interests of the third party. Steagald v. United States, 451 US 204, 101 S Ct 1642, 68 L Ed 2d 38 (1981). However, when a defendant is arrested on an arrest warrant while in a third person's residence, no Fourth Amendment right of the *defendant* is violated by an unlawful entry without a search warrant. State v. Davis, 313 Or 246, 834 P2d 1008 (1992).

C. ARREST ON PRIVATE PREMISES WITHOUT ARREST WARRANT.

Oregon Law.

"[W]here there is neither 'hot pursuit' nor any other pre-existing, exigent circumstances, police officers with probable cause to arrest a suspect may not make a warrantless and nonconsensual entry into a suspect's house in order to make a routine felony arrest of the suspect." State v. Dahl, 323 Or 199, 209, 915 P2d 979 (1996). *See also* State v. Olson, 287 Or 157, 598 P2d 670 (1979). However, where officers had probable cause to arrest the defendant (even for a misdemeanor), they acted lawfully by surrounding the defendant's residence, ordering him to come out, and effecting the arrest outside the residence. These actions did not constitute either an unlawful warrantless entry of the residence, or an unlawful arrest. State v. White, 115 Or App 104, 838 P2d 605 (1992); *but see* State v. Dahl, 323 Or 199 (where the officers did *not* have probable cause for an arrest, ordering the defendant by telephone to come out of his residence constituted an unlawful seizure).

See discussion of exigent circumstances and hot pursuit in section 8 of this chapter ("Exigent Circumstances"), under subsection 4, "Escape by Suspect/Hot Pursuit."

> **PRACTICAL SUGGESTION:** When there is time to obtain a search and arrest warrant, the officers should be directed to do so. When there is insufficient time, they should be prepared to testify about the length of time it would take to obtain a warrant and why that amount of time would have created an exigency such that an immediate entry was necessary. Be careful that they do not underestimate the time needed to draft a warrant, obtain DA approval, and locate an on-duty judge.

Under particular circumstances, a limited "protective sweep" of the premises to search for other persons may be justified. State v. Cocke, 334 Or 1, 45 P3d 109 (2002) (entry and arrest without warrant); State ex rel Juv. Dept. v. Qutub, 75 Or App 298, 706 P2d 962, *rev den,* 300 Or 332 (1985) (entry and arrest with warrant). *See* further discussion of protective sweeps in this chapter.

Fourth Amendment.

Under the Fourth Amendment, in the absence of exigent circumstances or consent, probable cause to arrest is not sufficient alone to justify an officer's warrantless forced entry into the home of a suspect in order to arrest him or her. *Payton v. New York*, 445 US 573, 100 S Ct 1371, 63 L Ed 2d 639 (1980). *Accord Kirk v. Louisiana*, 536 US 635, 122 S Ct 2458, 153 L Ed 2d 599 (2002) (*per curiam*) ("As *Payton* [*v. New York*] makes plain, police officers need either a warrant or probable cause plus exigent circumstances in order to make a lawful entry into a home."). Even probable cause and exigent circumstances may not justify warrantless entry into a home to make an arrest for a "non-criminal" offense. *Welsh v. Wisconsin*, 466 US 740, 104 S Ct 2091, 80 L Ed 2d (1984).

D. AUTOMOBILES.

1. Automobile Exception.

Oregon Law.

Until recently, Oregon recognized an "automobile exception" under Article I, section 9, of the Oregon Constitution. *State v. Brown*, 301 Or 268, 721 P2d 1357 (1986). But the Oregon Supreme Court has since overruled *Brown*, holding that the mobility of a vehicle no longer constitutes a *per se* exigency that will justify a warrantless search under the Oregon Constitution based on probable cause. *State v. McCarthy*, 369 Or 129, 177, 501 P3d 478 (2021). Instead, to justify a warrantless seizure or search of a vehicle, "the state must prove that exigent circumstances actually existed at the time of the seizure or the search, each of which must be separately analyzed." *State v. McCarthy*, 369 Or at 177. Thus, even if an exigency justifies a *seizure* of a vehicle, "the seizure itself may eliminate any exigency that would justify proceeding further without a warrant. Once officers have seized a vehicle, their control over it may eliminate the need to search it before a warrant application can be processed." *State v. McCarthy*, 369 Or at 178. *See also State v. Hopkins*, 319 Or App 53, 508 P3d 599 (2022) (trial court erred in denying motion to suppress because all of its findings pertaining to actual exigency were specific to the seizure of the vehicle and not the search, and no evidence supported a finding that exigency existed after the vehicle was seized).

Fourth Amendment.

The Fourth Amendment "automobile exception" permits a warrantless search of an automobile when officers have probable cause to believe that it contains contraband or evidence of criminal activity. *United States v. Ross*, 456 US 798, 102 S Ct 2157, 72 L Ed 2d 572 (1982).

> "[The Fourth Amendment] automobile exception does not have a separate exigency requirement: 'If a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment * * * permits police to search the vehicle without more.'"

Maryland v. Dyson, 527 US 465, 467, 119 S Ct 2013, 144 L Ed 2d 442 (1999) (*per curiam*), *quoting Pennsylvania v. Labron*, 518 US 938, 940, 116 S Ct 2485, 135 L Ed 2d 1031 (1996). Application of the automobile exception does not turn on the officer's subjective motivation. If the officer has probable cause to arrest the driver and search the car, it is irrelevant the officer may be motivated by his suspicion that he will discover evidence of some other crime inside the vehicle. *Arkansas v. Sullivan*, 532 US 769, 121 S Ct 1876, 149 L Ed 2d 994 (2001). Moreover, the exception applies even if the officer already has taken the driver and sole occupant into custody. *Thornton v. United States*, 541 US 615, 124 S Ct 2127, 158 L Ed 2d 905 (2004).

Because the federal automobile exception is based both on "the inherent mobility of vehicles and the reduced expectation of privacy that results from their pervasive regulation," the federal exception includes parked and unattended cars that are readily capable of being moved, even if "a vehicle's mobility is temporarily restricted or potential drivers have been secured." *Forty-Ninth Annual Review of Criminal Procedure*, 49 GEO. L.J. ANN. REV. CRIM. PROC. 51, 132 (2020). *See also* *United States v. Chadwick*, 433 US 1, 97 S Ct 2476, 53 L Ed 2d 538 (1977). Thus, the police may search a vehicle after arresting the driver even if the vehicle already was parked and the driver was standing outside when the officer first contacted him. *Thornton v. United States*, 541 US 615. Further, "the configuration, use and regulation of automobiles" tend to diminish the reasonable expectation of privacy attendant to other forms of private property. *Arkansas v. Sanders*, 442 US 753, 761, 99 S Ct 2586, 61 L Ed 2d 235 (1979). But the police may not enter a person's home or curtilage in order to search a vehicle under the automobile exception; instead, the police must have a warrant or another exception to the warrant requirement before entering the home or curtilage. *Collins v. Virginia*, 584 US 586, 138 S Ct 1663, 201 L Ed 2d 9 (2018).

The federal automobile exception extends to motor homes that are readily capable of being moved, as long as an objective observer would conclude that the home was being used as a vehicle rather than a residence. *California v. Carney*, 471 US 386, 105 S Ct 2066, 85 L Ed 2d 406 (1985).

Under the federal automobile exception, the police may search the passenger compartment of a vehicle after arresting the driver. *Thornton v. United States*, 541 US 615. In addition, the police may open any closed container in the vehicle that may conceal the object of the search. *See California v. Acevedo*, 500 US 565, 111 S Ct 1982, 114 L Ed 2d 619 (1991); *United States v. Ross*, 456 US 798. Accordingly, if probable cause and mobility are present, an officer may open a container belonging to a passenger, regardless of individualized suspicion of criminal conduct by the passenger. *Wyoming v. Houghton*, 526 US 295, 119 S Ct 1297, 143 L Ed 2d 408 (1999) (discovery of syringe in driver's pocket justified search of purse belonging to passenger).

The federal automobile exception allows warrantless searches of the vehicle, but it does not allow police to search the vehicle's occupants. *State v. Freeman*, 253 Or App 472, 473, 290 P3d 908 (2012) (*per curiam*) (citing *United States v. Di Re*, 332 US 581, 586-87 (1948)).

2. Warrantless Seizure or Search of Parked Cars (Exigency)

Oregon Law.

> **NOTE:** As explained above, the Oregon Supreme Court recently held that the mobility of a vehicle no longer constitutes a *per se* exigency that will justify a warrantless search under the Oregon Constitution based on probable cause. Thus, a warrantless seizure or search of a vehicle must now be justified by a separate exception, such as exigent circumstances. *See* further discussion of Exigent Circumstances in this chapter.

In *State v. Snow*, 337 Or 219, 94 P3d 872 (2004), police officers tried to stop defendant for reckless driving, but he eluded the officers in a short chase through the city. Eventually the officers found his vehicle parked and unattended in a parking lot, and they searched it for evidence of identity. The court upheld the search based on the exigent circumstances exception, concluding (1) that the officers had probable cause to believe that the defendant had committed a felony and that evidence of his identity would be inside the car, and (2) that his fleeing "required the officers to act quickly to prevent his escape." *State v. Snow*, 337 Or at 223. Similarly, in *State v. Hickey*, 107 Or App 8, 810 P2d 859 (1991), the court held that where the police found an abandoned vehicle just used in an armed robbery, exigent circumstances justified their immediate entry of the vehicle to search for

evidence of the robber's identity. *See also* State v. Bass, 98 Or App 266, 778 P2d 993, *rev den,* 308 Or 500 (1989) (exigent circumstances justified search of the defendants' car 30 minutes after they fled from it; officers were entitled for their own safety to determine whether the fugitives had taken a shotgun with them). The court distinguished a factually similar case, *State v. Crook*, 93 Or App 509, 762 P2d 1062 (1988), on the ground that the police in *Crook* already had information about the burglar's identity. *See also* State v. Giffen, 98 Or App 332, 778 P2d 1001 (1989) (no exigency to search defendant's parked car after she was arrested and her keys were seized).

As discussed above, a *seizure* of a vehicle will be analyzed separately from a *search* of the vehicle, and "the seizure itself may eliminate any exigency" and prohibit any further intrusion without a warrant. State v. McCarthy, 369 Or at 178. *See also* State v. Parras, 110 Or App 200, 822 P2d 151 (1991) (warrantless seizure of a rifle from the bed of a pickup truck 30 minutes after a shooting incident was reported was justified by exigencies of officer safety and need to preserve evidence, but the later warrantless seizure of cartridges and shell casings from inside the pickup after one suspect had been arrested was not). Moreover, police may be required to watch a parked vehicle while a warrant is obtained rather than towing it.*State v. Nicholson*, 89 Or App 306, 748 P2d 1028, *rev den,* 305 Or 672 (1988) (warrantless seizure of a vehicle parked in a parking lot was not justified by exigent circumstances, even though there were no officers available to watch the car while a warrant was obtained; the police were entitled only to watch the car until a warrant could be obtained).

3. Warrantless, Non-Consensual Search for Identity Under Oregon Law

A warrantless, nonconsensual search of a stopped vehicle to find evidence of the driver's identity is permissible if the officer has probable cause to believe that the driver has unlawfully provided false identification (ORS 807.620). State v. Robinson, 107 Or App 410, 812 P2d 837, *rev den,* 312 Or 528 (1991); State v. Banks, 103 Or App 312, 797 P2d 383 (1990). But if the driver commits only the offense of failure to display a driver's license (ORS 807.570) and provides sufficient identifying information, that offense generally does not authorize a warrantless search of the vehicle for evidence of his or her identity, because that crime "is complete upon noncompliance." State v. Bishop, 157 Or App 33, 42-43 fn 4, 967 P2d 1241 (1998). *See also* State v. Roque-Escamilla, 106 Or App 270, 806 P2d 1173, *rev den,* 311 Or 427 (1991) (search of driver's wallet unlawful); State v. Scarborough, 103 Or App 231, 796 P2d 394 (1990) (search of driver's purse); State v. Towle, 102 Or App 643, 796 P2d 1208 (1990) (search of vehicle). In such a situation, however, the officer may seek consent to search for evidence of identity. ORS 810.410(3)(b) to (e); *see also* State v. Claxton, 140 Or App 168, 915 P2d 421 (1996); State v. White, 130 Or App 289, 881 P2d 169 (1994).

E. COMMUNITY CARETAKING.

See also the discussion of Emergencies in this chapter. "The emergency aid doctrine is similar but not identical to the statutory community caretaking exception." State v. Christenson, 181 Or App 345, 352, 45 P3d 511 (2002).

Oregon Law.

"There is no community caretaking exception under the Oregon Constitution[.]" State v. Christenson, 181 Or App 345, 351, 45 P3d 511 (2002).

Without statutory or other authority from a politically accountable body, police may not enter upon private property in a non-emergency situation to inquire into an occupant's possible need of assistance. In the absence of consent or some other recognized justification, evidence discovered in the course of a non-emergency, non-investigative search will be suppressed. State v. Bridewell, 306 Or 231, 759 P2d 1054 (1988) (the officer had no general "community caretaking" authority to enter

defendant's property to check on his welfare; because there was no emergency, the police entry violated Article I, section 9).

In contrast, the court found in State v. Rhodes, 315 Or 191, 843 P2d 927 (1992), that a community-caretaking *purpose* did not invalidate actions that were otherwise authorized by a criminal investigatory statute. Late at night, the officer came upon a vehicle that was parked in a strange fashion, with the engine running and the driver's door ajar. The occupant was slumped over the wheel. Although the officer was primarily motivated by concern for the person's welfare, he also had a reasonable suspicion of DUII. Therefore, despite the community-caretaking purpose, the statute authorizing criminal investigatory stops (ORS 131.615) provided sufficient authority for the officer to open the car door fully to investigate the DUII offense.

In 1991, the Oregon legislature gave police officers statutory authority to engage in "community caretaking functions." ORS 133.033. The statute provides:

> "(1) Except as otherwise expressly prohibited by law, any peace officer of this state, as defined in ORS 133.005, is authorized to perform community caretaking functions.
>
> "(2) As used in this section, 'community caretaking functions' means any lawful acts that are inherent in the duty of the peace officer to serve and protect the public. 'Community caretaking functions' includes, but is not limited to:
>
> "(a) The right to enter or remain upon the premises of another if it reasonably appears to be necessary to:
>
> "(A) Prevent serious harm to any person or property;
>
> "(B) Render aid to injured or ill persons; or
>
> "(C) Locate missing persons.
>
> "(b) The right to stop or redirect traffic or aid motorists or other persons when such action reasonably appears to be necessary to:
>
> "(A) Prevent serious harm to any person or property;
>
> "(B) Render aid to injured or ill persons; or
>
> "(C) Locate missing persons.
>
> "(3) Nothing contained in this section shall be construed to limit the authority of a peace officer that is inherent in the office or that is granted by any other provision of law."

An officer's authority under ORS 133.033(2)(a) to enter a residence to carry out a community caretaking function arises "under circumstances in which 'it reasonably appears to be necessary' to do so for one of the reasons listed in the statute. * * * [A]lthough the statute does not require an actual emergency, the need to enter a house must be based on an officer's objectively reasonable perceptions. The subjective beliefs of the officers are not * * * dispositive." State v. Christenson, 181 Or App 345, 349, 45 P3d 511 (2002); *see also* Sivik v. DMV, 235 Or App 358, 363, 231 P3d 1177 (2010) (officer's perception that motorist was "injured or ill" would justify stop under statute).

The legislative history of ORS 133.033 reflects an intent to overturn the outcome in the following cases, in which searches or seizures were invalidated on the ground that the officers acted without community-caretaking authority: State v. Sanchez, 105 Or App 451, 805 P2d 153 (1991) (police officer entering burning building with firefighters because an "ether" smell created a risk that firefighters might encounter meth cooks); State v. Watson, 95 Or App 134, 769 P2d 201 (1989) (officer at vehicle accident opening victim's purse to gather identifying information for medical personnel); State v. Bramson, 94 Or App 374, 765 P2d 824 (1988) (officer entering residence to investigate possible burglary); State v. Lumsden, 93 Or App 604, 763 P2d 194 (1988) (police stopping vehicle to advise passenger not to return to her sister's house following a quarrel).

But the broad authority in ORS 133.033 is subject to constitutional constraints. In State v. Fredricks, 238 Or App 349, 243 P3d 97 (2010), the court concluded that a determination that a warrantless search is authorized under ORS 133.033, the community-caretaking statute, implicitly incorporates a determination that the requirements of the emergency-aid doctrine under Article I, section 9, have been met. Without such a determination, the court reasoned, the search is not a "lawful act," which is the only kind of act that ORS 133.033 authorizes.

The Court of Appeals has clarified that "the constitutional prohibition on warrantless searches, subject to limited exceptions, acts as a limitation on an officer's actions under ORS 133.033. * * * As a result, when an officer's actions—logically intended to keep serious harm from happening to a person or property—include a warrantless search of a home, the search must fall within one of the constitutional exceptions to the warrant requirement." State v. Goodall, 219 Or App 325, 334, 183 P3d 199 (2008). The emergency aid doctrine is the applicable exception to the warrant requirement; the state must thus demonstrate that: (1) the requirements of ORS 133.033 are met, and (2) the conditions of the emergency aid doctrine are satisfied. Id. at 336. *See also* State v. Salisbury, 223 Or App 516, 523, 196 P3d 1017 (2008) ("[E]ven if the state is able to satisfy the requirements of ORS 133.033, it must also satisfy the requirements of the emergency aid doctrine.").

With those constitutional limitations in mind, the court concluded in State v. Will, 131 Or App 498, 885 P2d 715 (1994), that ORS 133.033 did not authorize officers investigating a domestic dispute to re-enter the scene to inform the victim's mother that the victim had been found some distance away and that she was safe. The court stated: "Community caretaking is not a generic function; specific functions of police officers are a matter of statutory law and must be exercised so as to ensure compliance with Article I, section 9." State v. Will, 131 Or App at 504.

Similarly, in State v. Christenson, 181 Or App 345, 45 P3d 511 (2002), the court held that officers were not justified in entering defendant's home where: (1) a neighbor called to report that the front door was open under "suspicious" circumstances and that the resident's dogs were at large, (2) the officers found the front door open, and (3) when the officers called out, no one responded.

In sum, "ORS 133.033 does not independently establish an exception to the warrant requirement. Rather, it provides legislative authorization for (among other things) a particular class of searches, subject to many of the same constitutional constraints that operate to limit other searches, including the warrant requirement. A lawful community caretaking search, in other words, must first be within the universe of police action described in ORS 133.033, and then it must also fall within one of the constitutional exceptions to the warrant requirement." State v. Martin, 222 Or App 138, 146, 193 P3d 993 (2008), *rev den*, 345 Or 690 (2009) (internal quotation marks and citation omitted). *See also* State v. Snyder, 227 Or App 544, 206 P3d 1083 (2009) (community caretaking statute does not create "an independent exception to the constitutional warrant requirement").

NOTE: THE ADMISSIBILITY OF EVIDENCE DISCOVERED. The Oregon Supreme Court stated in State v. Bridewell, 306 Or 231, 239-40, 759 P2d 1054 (1988), that although "law enforcement officers, like private individuals, * * * may enter to render emergency assistance," any "incriminating evidence arising from the intrusion by law enforcement officers must be suppressed." This language suggested that, even if the legislature provided authority for intrusions by police in the exercise of community-caretaking functions, any evidence they discovered would not be admissible in a criminal trial. However, the Court of Appeals has since declared this statement regarding suppression to be dictum and has declined to apply it. In State v. Russell, 118 Or App 652, 848 P2d 657, *rev den,* 317 Or 272 (1993), the court rejected a *Bridewell*-based argument that evidence discovered in the course of an emergency-aid entry was subject to exclusion. The court observed: "In State v. Follett, 115 Or App [672,] 677, [840 P2d 1298 (1992)], we pointed out that the dictum [in *Bridewell*] cannot be reconciled with the court's reasoning in State v. Miller, 300 Or 203, 709 P2d 225 (1985), *cert den*, 475 US 1141 (1986), in which the court held that evidence discovered in the course of an emergency entry into a motel room was admissible in a criminal proceeding." 118 Or App at 657.

Accordingly, the Court of Appeals has consistently held that evidence discovered by officers in the course of an entry or intrusion for the purpose of rendering emergency aid is admissible in a criminal prosecution. *See, e.g.,* State v. Torres, 201 Or App 275, 118 P3d 268 (2005), *rev den,* 340 Or 308 (2006) (marijuana-grow operation discovered in emergency-aid entry into garage based on noises heard during lawful entry into house to investigate possible burglary in progress); State v. McDonald, 168 Or App 452, 7 P3d 617, *rev den,* 331 Or 193 (2000) (needle marks and hype kit found by officers searching for indications of which drugs contributed to defendant's overdose); State v. Martofel, 151 Or App 249, 948 P2d 1253, *rev den,* 327 Or 82 (1998) (marijuana plants discovered when police responded to 911 report of man with gun). *See* additional cases under Emergencies in this chapter.

PRACTICAL SUGGESTION: SEEK CONSENT OR DEVELOP A BASIS FOR EMERGENCY-AID SEARCH IN COMMUNITY-CARETAKING SITUATIONS. An investigating officer who intends to undertake a community-caretaking entry or search should attempt first to obtain permission to enter or to search from someone with authority to do so, if that is at all possible. If the officer obtains consent to enter or search either by word or conduct, evidence discovered in the course of a nonemergency, noninvestigative search will not be suppressed. *See, e.g.,* State v. Paulson, 313 Or 346, 350-51, 833 P2d 1278 (1992) (an officer accompanied medical personnel into a residence in response to a request for emergency assistance on a possible drug overdose; evidence in plain view was used by the officer to obtain a search warrant; "*Bridewell* did not limit the authority of the police to act pursuant to the voluntary consent of a citizen."). *See also* State v. Portrey, 134 Or App 460, 464, 896 P2d 7 (1995) ("[T]he law assumes that, absent evidence of an intent to exclude, an occupant impliedly consents to people walking to the front door and knocking on it[.]"). Alternatively, if circumstances permit, the officer should investigate to determine whether the situation is sufficiently exigent and life-threatening to authorize a warrantless entry or search under the emergency-aid exception. *See* State v. Torres, 201 Or App 275, 118 P3d 268 (2005), *rev den,* 340 Or 308 (2006) (not addressing whether community-caretaking justification existed because entry into attached garage based on noises heard during lawful entry into house was a justified

emergency-aid measure). In short, an officer should rely on community-caretaking authority only as a last resort if criminal activity may be involved.

Fourth Amendment.

The concept of a community caretaking function was recognized in Cady v. Dombrowski, 413 US 433, 93 S Ct 2523, 37 L Ed 2d 706 (1973), in which the United States Supreme Court noted that police often engage in "community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." State v. Bridewell, 306 Or 231, 238, 759 P2d 1054 (1988), *quoting* Cady v. Dombrowski, 413 US at 441. But the Court's recognition of that function did not create "a standalone doctrine that justifies warrantless searches and seizures in the home." Caniglia v. Strom, 593 US 194, 141 S Ct 1596, 1598, 209 L Ed 2d 604 (2021) (noting that Cady involved an impounded vehicle, not a home).

The Court of Appeals has held that Fourth Amendment "community caretaking" principles may justify impoundment of a vehicle. In State v. Oneill, 251 Or App 424, 285 P3d 1127 (2012), the defendant was lawfully stopped for a traffic infraction. Because defendant's license was suspended, he was uninsured, and he was not the registered owner, the officer decided to impound, inventory, and tow the car. Even though the car did not present an impediment or hazard, because it was parked in a high-crime area known for vehicle break-ins and contained a number of pieces of property, some of them valuable, it was reasonable for the officer to impound the car. The officer was not required to explore potential alternatives to impoundment: "it was reasonable for [the officer] not to relinquish custody of the car where the registered owner was not at the scene and where additional efforts would have been required in order to obtain the owner's permission." 251 Or App at 429.

F. CONSENT SEARCHES

Consent is a recognized exception to the warrant requirement of both the state and federal constitutions. State v. Blair, 361 Or 527, 396 P3d 908 (2017) (discussing consent exception to the warrant requirement under Article I, section 9); Schneckloth v. Bustamonte, 412 US 218, 222, 93 S Ct 2041, 36 L Ed 2d 854 (1973) (same under the Fourth Amendment). A valid search may be made without a warrant and without probable cause if the person to be searched or the person in control of the property to be searched voluntarily consents to the search. However, the consent exception in Oregon is different from—and in some ways, more restrictive than—the consent exception under the Fourth Amendment. In Oregon, the "touchstone" of the consent exception is *actual* consent, viewed from the standpoint of the consenting person; in contrast, under the Fourth Amendment, the focus is on the objective reasonableness of the police conduct. State v. Blair, 361 Or at 535-36. For that reason, the "consent" exception to the warrant requirement under Article I, section 9, requires that the person who provides the consent have actual rather than apparent authority. State v. Bonilla, 358 Or 475, 366 P3d 331 (2015). As discussed below, however, the court has not addressed whether a search conducted after a person with apparent authority consents may nonetheless be "reasonable," even though it does not fall within a warrant exception.

"The state bears the burden of establishing that a consent search was lawfully conducted and that any limitations on the scope of consent were complied with. State v. Weaver, 319 Or 212, 219, 874 P2d 1322 (1994)." State v. Harvey, 194 Or App 102, 106, 93 P3d 838, *rev den,* 337 Or 657 (2004). *See also* State ex rel Juv. Dept. v. Stephens, 175 Or App 220, 225, 27 P3d 170 (2001).

Oregon Law.

Most exceptions to the warrant requirement involve an intrusion into a person's privacy interest, "which nevertheless is justified as reasonable if certain circumstances (exigency, officer

safety concerns, etc.) are present." State v. Blair, 361 Or at 535. The consent exception, in Oregon, is different. "It posits that, by voluntarily granting a governmental actor permission to search a place or thing, the person relinquishes his or her privacy interest in the place or thing so that there is no intrusion by the state into a protected privacy interest that must be justified." State v. Blair, 361 Or at 535. Thus, the rationale for the consent exception "presumes that a person to whom a privacy interest belongs *actually* intends to give consent to the intrusion." State v. Blair, 361 Or at 535.

"Under the consent exception to the search warrant requirement, the state must prove by a preponderance of the evidence that someone having the authority to do so voluntarily gave the police consent to search the defendant's person or property." State v. Paulson, 313 Or 346, 351-52, 833 P2d 1278 (1992). *See also* State v. Jenkins, 179 Or App 92, 99, 39 P3d 868 (2002) (consent can come from the party claiming the right to privacy, or from a third party with actual authority to consent). Whether a defendant's consent was voluntary is a legal question, but likely to depend heavily on issues of fact. State v. Miller, 336 Or App 606, 609, 561 P3d 675 (2024) (although defendant's intoxication was relevant to the question of her capacity to consent, the record supported the trial court's finding that defendant's consent was voluntary despite intoxication).

Although statutes may impose a different obligation on officers, as explained in the note below, the Oregon constitution does *not* require officers to advise a suspect that he or she has a right to refuse to consent. In State v. Flores, 280 Or 273, 570 P2d 965 (1977), the Oregon Supreme Court adopted the federal standard that a suspect, whether in custody or not, need not be advised of the right to refuse consent. *Accord* State v. Poulson, 150 Or App 164, 945 P2d 1084 (1997). Failure to inform the person of the right to refuse consent is merely one factor to be considered under the totality of the circumstances. State v. Maddux, 144 Or App 34, 925 P2d 124 (1996). However, a suspect's knowledge of his or her right to refuse consent can be an important factor if unlawful conduct by the police has preceded the request for consent. *See, e.g.,* State v. Land, 106 Or App 131, 806 P2d 1156 (1991) (defendant's consent was voluntary although it was preceded by an arguably unlawful entry into his garage; defendant freely and voluntarily consented to a search after being fully advised of his right to refuse consent).

NOTE: New *statutory* obligation to advise of right to refuse consent. In 2022, the Oregon legislature amended the stop statutes to require an officer who seeks consent to search for crime evidence in the course of a criminal stop or traffic stop to advise the person "that the person has the right to refuse the request," and to "ensure that there is a written, video or audio record that the person gave informed and voluntary consent to search." ORS 131.615(4); ORS 810.410(3)(e). The statutes do not include an express reference to exclusion of evidence in the event of a violation; however, it does seem likely that defendants will seek exclusion for violations. Both statutes expressly provide that an officer is not required to give that advice with respect to searches under the Implied Consent statutes, ORS 813.100, 813.131, or 813.135. Moreover, neither statute applies during mere conversation.

NOTE: CIVIL FORFEITURE. The state civil-forfeiture statute requires a law-enforcement officer who requests consent to search a motor vehicle to advise the occupants in writing of the right to refuse consent. If the officer fails to provide a written bilingual warning to that effect, the statute provides an affirmative defense to the civil-forfeiture case. ORS 131A.025. But the officer's failure to comply with this statutory warning requirement has no effect on a criminal prosecution.

NOTE: CRIMINAL FORFEITURE. The state criminal-forfeiture law, which was originally enacted in 2001, was later re-enacted by Oregon Laws 2005 and is set forth in ORS 131.550, *et. seq.* It does not require a law-enforcement officer to advise the occupants of a motor vehicle of the right to refuse consent.

An officer does not need probable cause to request consent. State v. Greenough, 142 Or App 506, 923 P2d 646 (1996); State v. Barber, 151 Or App 84, 949 P2d 1236 (1997) (probable cause is not a necessary prerequisite to asking a defendant for consent to perform FSTs in the context of a DUII stop). In fact, neither the state nor federal constitution requires that mere questioning of a suspect or a request for consent to search requires reasonable suspicion of criminal activity. State v. Wood, 188 Or App 89, 93-94, 69 P3d 1263 (2003); State v. Duffy, 176 Or App 49, 53, 29 P3d 1222 (2001), *rev den,* 337 Or 669 (2004). *See also* State v. Amaya, 336 Or 616, 626, 89 P3d 1163 (2004).

It is not necessary for an officer seeking entry into premises to announce his or her identity and purpose. In State v. Barclay, 196 Or App 311, 100 P3d 1148 (2004), officers responding to a report of a possible domestic assault knocked at the door of the defendant's apartment. The defendant said, "Come in," but they knocked again, and a woman told them again to come in. The officers entered and saw marijuana plants in plain view. The defendant sought to suppress the evidence on the ground that the officers did not announce their identity before entering. The Court of Appeals held that the officers had no duty to identify themselves before entry, because the "knock and announce" rule applies only in the execution of a warrant or if other exigent circumstances authorize a forcible entry. The court also held that even if the woman lacked actual authority to consent to the entry, when defendant initially told the officers to "come in," that was an invitation for them to enter.

A police officer may obtain consent even after the defendant has been arrested or has invoked the right to silence or the right to counsel. State v. Hatfield, 246 Or App 736, 742-45, 268 P3d 654 (2011) (a post-invocation request for consent to search is not unlawful interrogation); State v. Norkeveck, 214 Or App 553, 168 P3d 265 (2007), *rev den*, 344 Or 558 (2008); State v. Bradbury, 80 Or App 613, 723 P2d 1051, *rev den,* 302 Or 342 (1986); State v. Baumeister, 80 Or App 626, 723 P2d 1049, *rev den,* 302 Or 299 (1986). But, a consent search after a *Miranda* violation may require suppression of evidence that was "derived from" the *Miranda* violation. State v. Vondehn, 348 Or 462, 236 P3d 691 (2010).

The act of refusing an officer's request to search cannot be used to support probable cause. State v. Gilmour, 136 Or App 294, 901 P2d 894, *rev den,* 322 Or 360 (1995) (defendant's refusal to consent to field sobriety tests could not be used to establish probable cause).

Retroactive Consent. Consent to search will not validate an earlier unlawful search or seizure unless there is "evidence that the person giving the consent intended the consent to be retroactive." State v. Weaver, 319 Or at 221-22; *see also* the discussion of exploitation in the preceding paragraph. In State v. Larson, 159 Or App 34, 977 P2d 1175, *rev den,* 329 Or 318 (1999), the court was asked to consider whether a *third party* could give retroactive consent that would bind the defendant. The court held, under the circumstances of that case, that the third party's consent did not "relate back" to the time of the previous warrantless entry by the police. In other words, the consent given by the third party did not waive *the defendant's* claim that the earlier police entry was unlawful. *Accord* State ex rel Juv. Dept. v. Reeves, 163 Or App 497, 988 P2d 433 (1999), *rev den,* 330 Or 71 (2000) (citing *Larson* for proposition that retroactive consent is essentially a matter of waiver and that a third party cannot waive a prior violation of another person's privacy interests; here, youth's father could not effectively retroactively consent to invasion of youth's privacy interests).

Fourth Amendment.

Under the Fourth Amendment, police may search without a warrant if, under the totality of the circumstances, the suspect voluntarily consents to the search. The consent need not be knowing and intelligent. Schneckloth v. Bustamonte, 412 US 238, 93 S Ct 2041, 36 L Ed 2d 854 (1973).

A person who is lawfully stopped for a traffic infraction need not be advised that he or she is free to leave before the officer can lawfully request consent to search for evidence of an unrelated offense. *Ohio v. Robinette*, 519 US 33, 117 S Ct 417, 136 L Ed 2d 347 (1996).

The United States Supreme Court's opinion in *Florida v. Bostick*, 501 US 429, 111 S Ct 2382, 115 L Ed 2d 389 (1991), provides a useful illustration of Fourth Amendment principles. In *Bostick,* the Court held that the officer's conduct in boarding buses, questioning passengers, and requesting consent to search luggage was not a "seizure" that vitiated consent; under these circumstances, which included notice of the right to refuse consent, a reasonable person would have felt free to decline the request for consent or otherwise terminate the encounter. And later the Court held in *United States v. Drayton*, 536 US 194, 122 S Ct 2105, 153 L Ed 2d 242 (2002), that bus passengers need not be advised of their right not to cooperate. "The Court has rejected in specific terms the suggestion that police officers must always inform citizens of their right to refuse when seeking permission to conduct a warrantless consent search."

In *United States v. Patane*, 542 US 630, 124 S Ct 2620, 159 L Ed 2d 667 (2004), the Court held that an officer's failure to give *Miranda* warnings before questioning a suspect under arrest did not require suppression of the physical fruits of his unwarned but voluntary statements — *i.e.*, the suspect's consent to allow the officer to seize his gun was valid despite the *Miranda* violation. Although physical fruits may be suppressed as a remedy for a *coerced* statement, that exclusionary rule does not require suppression of the physical fruits of otherwise voluntary statements and consent.

1. Consent versus "mere acquiescence."

"Mere acquiescence in an officer's lawful authority" is not consent. *State v. Lowe*, 144 Or App 313, 317, 926 P2d 332 (1996) (officer testified that he "had" defendant step out of the car and that he "wanted" defendant to perform field sobriety tests). *See also State v. Stanley*, 287 Or App 399, 404 P3d 1100 (2017) (officer's statement to defendant they were "going to go in and check on" the victim "invited no response other than acquiescence"); *State v. Bertha*, 256 Or App 375, 307 P3d 564 (2013) (a woman who opened the door to her home, exposing to the officer's view a theft suspect who was holding a kitchen knife, did not, by moving out of the way when the officer drew his weapon, consent to the officer's entry; at best, she "merely acquiesced" to the entry, and was not given a "reasonable opportunity" to decline to consent); *State v. Guzman*, 164 Or App 90, 990 P2d 370 (1999), *rev den,* 331 Or 191 (2000) (probationer did not consent to search of his home by accompanying probation officer to the residence after PO told probationer, "We need to go over to your house and take a look around"); *State v. Freund*, 102 Or App 647, 796 P2d 656 (1990) (defendant's acquiescence in response to the officer's statement that he had come to pick up the marijuana plants was not a voluntary consent; "the officer's statement told defendant that she had no choice whether a search would occur").

In analyzing consent versus mere acquiescence, the court views the situation from the perspective of the person being asked for consent. *State v. Tennant*, 310 Or App 70, 76, 483 P3d 1226 (2021). The court pays "close attention to the words used by an officer who requests consent to perform a warrantless search." *State v. Briggs*, 257 Or App 738, 307 P3d 564 (2013) (although the officer's statement, "I need to talk to the person that just ran in," was a declaration and not a question, it was not a statement that would convey that the only choice was to permit the officer to enter; room's occupant's decision to step aside and permit entry constituted valid consent); *see also State v. Ry/Guinto*, 211 Or App 298, 306, 154 P3d 724, *rev den*, 343 Or 224 (2007) ("Although most of the requests were not framed as questions, Bennett's phrasing—e.g., 'I'd *like* to search it' (emphasis added)—expressed both his desire to receive consent to search the vehicle and his understanding that he would not, and could not, search without consent."). But "[t]he impression that a search is inevitable can come from what is said, the manner in which it is said, the situational context of the

encounter, as well as what is left unsaid." State v. Tennant, 310 Or App at 76 (where defendant knew that he was on probation and "was operating under the mistaken belief that defendant's probationary status required him to consent to a search," consent was invalid). *See also* State v. Jordan, 308 Or App 547, 554-55, 481 P3d 1017 (2021) (although officer's choice of words appeared to be seeking consent, his actions—moving closer to defendant to position himself to begin the search and touching defendant's poncho—indicated that a search was inevitable, particularly in context of entire interaction, where officer had accused defendant of committing crimes).

Merely expressing an intent to seek a warrant if the individual does not consent will not render consent invalid because it does not indicate that a search *will* occur regardless of whether the individual consents, but only that a search will occur if a warrant is obtained. State v. Berg, 223 Or App 387, 393-94 196 P3d 547 (2008) (consent to search house was not "mere acquiescence" where officer threatened to seek a warrant; the officer did not suggest that a search was inevitable, and stated only the court could decide to issue a warrant).

2. Consent Manifested by Conduct.

Consent may be manifested by words or by conduct. State v. Voits, 186 Or App 643, 648, 64 P3d 1156, *rev den,* 336 Or 17 (2003) ("defendant manifested his consent to the police officers' initial entry into his home"); State ex rel Juv. Dept. v. Stephens, 175 Or App 220, 225, 27 P3d 170 (2001) ("voluntary consent may be manifested by conduct as well as by words"). Under the Oregon Constitution, whether a defendant actually consented is a factual question, to be resolved by the trial court. Blair, 361 Or at 535-37. Note that many of the following opinions were issued before the Supreme Court clarified, in Blair, that the consent exception is based on a defendant's *actual* consent and that whether a defendant consented to a particular search is a fact question for the trial court. Thus, although these cases may provide guidance in resolving that factual question, they may no longer be binding precedent.

a. Conduct Constituting Consent.

State v. Rodriguez, 317 Or 27, 854 P2d 399 (1993). After responding to a knock at the door and being informed by an INS officer that he was under arrest, defendant stepped backward into his home; this constituted consent to the officer's entry.

State v. Paulson, 313 Or 346, 833 P2d 1278 (1992). A police officer accompanied medical personnel into a residence in response to a request from defendant's wife for emergency assistance on a drug overdose. She admitted the medical personnel and the police officer into the house and did not ask the police officer to leave. This was consent.

State v. Briggs, 257 Or App 738, 307 P3d 564 (2013). The officers, who followed a DUII suspect as he ran into a hotel room, had lawful consent to enter the room after one officer told the woman who answered the door "I need to talk to the person that just ran in here," and the woman stepped aside, motioned to the back of the room, and told the officer that the defendant was in the back; although the officer's statement was a declaration, rather than a request, it was not a statement that would, in "ordinary social intercourse," communicate to the listener that she had no choice about whether the entry would occur and the woman's action of stepping aside and motioning toward the defendant showed that she was choosing to let the officer in.

State v. Voits, 186 Or App 643, 648, 64 P3d 1156, *rev den,* 336 Or 17 (2003). Defendant called 911 to report a suicide, did not restrict entry only to medical personnel, left the door ajar, and did not object when police officers entered. By so doing, "defendant manifested his consent to the police officers' initial entry into his home to investigate the death of a person."

Smith v. Washington County, 180 Or App 505, 43 P3d 1171, *rev den,* 334 Or 491 (2002). Consent to a courthouse security search may be implied when a "citizen submits to a search rather than face a disagreeable alternative *if* the choice to which the government puts the citizen is itself lawful." 180 Or App at 512 (emphasis in court's opinion). Courthouse security searches with metal detectors are constitutionally permissible under Article I, section 9.

State v. Stanley, 153 Or App 16, 955 P2d 764 (1998). A driver's exit from his vehicle in response to the officer's statement that he "hop out" was a consent; under these circumstances, the officer's statement was a request, not a command.

State v. Brownlie, 149 Or App 58, 941 P2d 1069 (1997). Defendant voluntarily consented to X-ray screening of her purse by placing it on a conveyor belt at the courthouse.

State v. Greenough, 142 Or App 506, 923 P2d 646 (1996). Defendant's compliance with the officer's request to look into the defendant's eyes to conduct an HGN test was consent.

State v. Larson, 141 Or App 186, 917 P2d 519, *rev den,* 324 Or 229 (1996). Defendant manifested consent to a search of his van by taking the keys out of his pocket and unlocking the door.

State v. Kelsey, 67 Or App 554, 679 P2d 335 (1984). By attempting to board an airplane, defendant impliedly consented to a pre-boarding search at terminal gate.

State v. Radford, 30 Or App 807, 568 P2d 692 (1977). Defendant's silence while his companion consented to opening the trunk of their vehicle constituted consent.

b. Conduct *Not* Constituting Consent.

State v. Jordan, 308 Or App 547, 481 P3d 1017 (2021). Defendant's conduct in holding his arms to his side, lifting his arms up, and bringing them down, when "viewed in the context of the overall coercive nature of [the officer's] conduct," did not show more than passive acquiescence.

Nelson v. DMV, 299 Or App 62, 447 P3d 1212 (2019). Homeowner's response of "yes" to the officer's question, "Are we good?" did not constitute consent to enter the bedroom where the homeowner and his guest—defendant—were located, given the surrounding context, including that the officer had never asked for consent to be in the house or to come in the bedroom.

State v. Bertha, 256 Or App 375, 307 P3d 564 (2013). Woman did not consent by opening the door and moving out of the way when the officer drew his weapon.

State v. Martin, 222 Or App 138, 193 P3d 993 (2008), *rev den*, 345 Or 690 (2009). Officers went to defendant's house and knocked on the front door, and defendant, who was completely naked, flung open the door and ran back into a back bedroom; the mere fact that the defendant opened the door and fled did not satisfy the state's burden to prove that she tacitly was inviting the officers to enter.

State v. Guzman, 164 Or App 90, 990 P2d 370 (1999), *rev den,* 331 Or 191 (2000). Probationer did not consent to search of his home by accompanying probation officer to the residence after PO told probationer, "We need to go over to your house and take a look around."

State v. Lowe, 144 Or App 313, 317, 926 P2d 332 (1996). Officer testified that he "had" defendant step out of the car and that he "wanted" defendant to perform field sobriety tests.

State v. Edgell, 153 Or App 108, 956 P2d 988 (1998). A passenger's silence when the driver consented to a search of the passenger's bag was not a valid consent by the passenger. *See also State v. Doyle*, 186 Or App 504, 63 P3d 1253, *rev den,* 335 Or 655 (2003) (one occupant of a motel room opened the door and allowed the officers to enter while defendant silently stood by; defendant did not consent, by her silence, to the officers' entry).

> **PRACTICAL TIP:** To avoid the situation that resulted in the suppression of evidence in *Doyle* and *Edgell*, officers who obtain consent to enter premises should ensure at the outset that the consent was obtained directly from a person who actually has control over the premises, particularly if more than one person is present and only one expressly consented. If there is any doubt, officers should seek consent from all those who are present (*e.g.*, by asking whether anyone present objects to their entry).

3. Consent Implied from Circumstances.

See also the discussion in this chapter of Implied Consent in DUII Cases, and Searches of Probationers and Parolees.

Oregon Law.

a. Implied Consent to Entry onto Real Property. *See* Chapter I, Privacy Interests.

"[T]he law assumes that, absent evidence of an intent to exclude, an occupant impliedly consents to people walking to the front door and knocking on it[.]" *State v. Portrey*, 134 Or App 460, 464, 896 P2d 7 (1995). Although this doctrine is framed in terms of implied consent, application of the doctrine means that an individual has no privacy interest in the area.

See the discussion of this doctrine in Chapter I (What is a Search?; Privacy Interests in Real Property).

b. Checkpoints & security searches.

Oregon Law.

A person voluntarily consents to a search by entering an area at which he or she will be subjected to lawful security screening. For example, in *Smith v. Washington County*, 180 Or App 505, 43 P2d 1171, *rev den,* 334 Or 491 (2002), the court upheld a courthouse security search with a metal detector as constitutionally permissible under Article I, section 9. Similarly, in *State v. Brownlie*, 149 Or App 58, 941 P2d 1069 (1997), the defendant voluntarily consented to X-ray screening of her purse by placing it on a conveyor belt at the courthouse, in *State v. Kelsey*, 67 Or App 554, 679 P2d 335 (1984), the defendant impliedly consented to a pre-boarding search at the airline gate by attempting to board the aircraft, and in *State ex rel. Juv. Dept. v. Stephens*, 175 Or App at 226-27, the court upheld locker searches at alternative school. But the court held that a defendant did not impliedly consent to a search merely by showing up at an active evacuation scene after a school shooting, standing in the general vicinity of evacuating students, and complying with an officer's orders. *State v. Powell*, 288 Or App 660, 668, 406 P3d 1111 (2017).

Further, a person's consent to a security search may be limited in scope. In *State v. Winn*, 361 Or 636, 396 P3d 926 (2017), a security officer asked for consent to search the defendant's purse after running it through a courthouse x-ray machine at a security checkpoint. The defendant agreed, and the officer opened a compact inside the purse. At issue was whether the defendant consented to

the search of the compact when she consented to the search of her purse. The Supreme Court did not decide the issue, but remanded to the trial court to determine whether the defendant, as a factual matter, intended to consent to the search of the compact.

And a more intrusive security search may be unlawful if it is not justified by a lawfully enacted policy. In State v. Snow, 247 Or App 497, 268 P3d 802 (2011), the defendant was entering a courthouse when he set off the metal detector, the security personnel asked him to empty his pockets, and he pulled out a cigarette pack. Rather than putting the pack separately through the metal detector, the security officer opened it up, looked inside, and found narcotics. The Court of Appeals held that the officer's visual inspection of the inside of the pack was not lawful because it was not justified by either a lawfully enacted policy or defendant's consent.

Sobriety checkpoints and other "checkpoints" that subject citizens to a stop without any particularized suspicion that the stopped person is involved in criminal activity generally violate Article I, section 9. Nelson v. Lane County, 304 Or 97, 743 P2d 692 (1987).

Fourth Amendment.

Federal courts generally permit warrantless searches of air passengers and baggage, without probable cause, to discover weapons and to prevent air piracy. United States v. Montoya de Hernandez, 473 US 531, 105 S Ct 3304, 87 L Ed 2d 381 (1985); Torres v. Puerto Rico, 442 US 465, 99 S Ct 2425, 61 L Ed 2d 1 (1979).

However, the authority to search, seize, or detain persons or property is not unlimited. United States v. Place, 462 US 696, 103 S Ct 2637, 77 L Ed 2d 110 (1983). Under the Fourth Amendment, luggage may be temporarily detained on reasonable suspicion. In Place, however, a detention of 90 minutes while the officer waited for a drug dog was too long. *See also* United States v. Mendenhall, 446 US 544, 100 S Ct 1870, 64 L Ed 2d 497 (1980) (especially see the concurring opinion by Powell, J., later employed in Place).

4. Third-Party Consent.

Fourth Amendment.

> "[C]onsent of one who possesses common authority over premises or effects is valid as against the absent, nonconsenting person with whom that authority is shared."

United States v. Matlock, 415 US 164, 170, 94 S Ct 988, 39 L Ed 2d 242 (1974). However, under the Fourth Amendment, if a cotenant of a residence is present and objects to the entry, the other cotenant cannot override that objection, and any entry cannot be justified as reasonable as to the non-consenting resident. Georgia v. Randolph, 547 US 103, 126 S Ct 1515, 164 L Ed 2d 208 (2006); *see also* State v. Caster, 236 Or App 214, 234 P3d 1087, *rev den*, 349 Or 479 (2010) (search of the defendant's residence was unlawful under Randolph where, after the defendant refused to consent to a search, the police arrested him on a warrant, took him to the police station, and then obtained the girlfriend's consent to enter and seize firearms); State v. Weaver, 214 Or App 633, 168 P3d 273, *rev den,* 343 Or 691 (2007) (entry based on children's consent was unlawful because mother objected to entry). But the "narrow exception under Randolph requires an express objection." State v. Salah, 335 Or App 576, 584, 558 P3d 1279 (2024). Thus, an officer, having received consent, is not required to first contact other cotenants who might object but otherwise are absent, asleep, or unavailable. Randolph, 547 US at 122. And the Oregon Court of Appeals has explained that a cotenant cannot override another cotenant's consent while at the same time "claiming no right to

control who enters the premises." *State v. Gonzalez-Coria*, 318 Or App 524, 533, 508 P3d 52 (2022). Thus, where a cotenant both disclaimed the ability to consent to entry and voiced an objection to entry, the court held that the "disagreeing tenants" exception from *Randolph* did not apply. *State v. Gonzalez-Coria*, 318 Or App at 533.

> "Common authority is, of course, not to be implied from the mere property interest a third party has in the property. The authority which justifies the third-party consent does not rest upon the law of property, with its attendant historical and legal refinements [citations omitted], but rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the cohabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched."

United States v. Matlock, 415 US at 171 fn 7. *See also State v. Jenkins*, 179 Or App 92, 100 fn 8, 39 P3d 868 (2002) (noting that "Oregon courts have consistently cited *Matlock* in assessing the lawfulness of warrantless consent searches under Article I, section 9").

Because application of the exclusionary rule under the Fourth Amendment is based on "deterrence" principles, the Fourth Amendment standard for a valid third-party consent includes "apparent authority" — a reasonable belief by the government agent that the person giving consent has authority to do so, even if the person actually did not have authority to give consent. *Illinois v. Rodriguez*, 497 US 177, 110 S Ct 2793, 111 L Ed 2d 148 (1990); *see also United States v. Matlock*, 415 US 164 (shared premises, consent valid); *Frazier v. Cupp*, 394 US 731, 89 S Ct 1420, 22 L Ed 2d 684 (1969) (duffel bag, common authority).

Oregon Law.

As the law currently stands, Article I, section 9, is more restrictive than the Fourth Amendment. It requires that the officer obtain consent from someone who has actual authority, rather than someone with mere apparent authority. *State v. Bonilla*, 358 Or 475, 366 P3d 331 (2015); *State v. Surface/Hurley*, 183 Or App 368, 372, 51 P3d 713 (2002); *State v. Jenkins*, 179 Or App 92, 99, 39 P3d 868 (2002); *State v. Wrenn*, 150 Or App 96, 945 P2d 608 (1997); *State v. Ready*, 148 Or App 149, 153-54, 939 P2d 117, *rev den,* 326 Or 68 (1997); *State v. Johnson*, 123 Or App 124, 859 P2d 555 (1993). In *Bonilla*, the Oregon Supreme Court held that a valid consent to search, under the consent exception to the warrant requirement, requires that the individual giving consent has actual, rather than apparent, authority to consent. 358 Or at 484–92. Note, however, that the court declined to address the state's alternative argument that a search conducted after someone with apparent authority consents is nonetheless "reasonable" under Article I, section 9, even if it does not fall into a categorical exception to the warrant requirement. *State v. Bonilla*, 358 Or at 493–95. The court also did not address whether there may be an additional categorical exception to the warrant requirement for searches conducted with consent from a person with apparent authority. *See State v. Bonilla*, 358 Or at 495–96 (Landau, J., concurring) (emphasizing that the court's opinion does not address (1) whether a separate exception to the warrant requirement may allow a search conducted after someone with apparent authority consents or (2) whether the court should abandon the categorical approach and determine whether a given search is "reasonable" on a case-by-case basis).

"The state bears the burden of proving that the third party has actual authority." *Surface/Hurley*, 183 Or App at 372; *State v. Kurokawa-Lasciak*, 249 Or App 435, 440, 278 P3d 38 (2012). Actual authority comes from joint use or control of, or access to an area for most purposes. *State v. Meredith*, 337 Or 299, 306-07, 96 P3d 342 (2004) (because employer validly consented to placement of transmitter on a truck that it owned and allowed defendant employee to use while

working, she had no right of privacy regarding truck's location); State v. Johnson, 123 Or App at 127. Sufficient common authority exists if the third party has the right to permit the search and if the affected party either has assumed the risk that the other may consent to a search or has given up his reasonable expectation of privacy. State v. Surface/Hurley, 183 Or App at 373 (defendants' note giving housesitter "complete control of my household" conferred authority to consent to a search). Authority to give third-party consent to a search is not co-extensive with the person's protected privacy interests. State v. Wrenn, 150 Or App 96 (temporary guest in a trailer, with access to all areas, had protected interest in entire trailer, but not actual authority to consent to search of every room). Although it may be presumed that a co-occupant has authority to consent to a search, "where a defendant has expressly or by implication limited a co-occupant's authority, the resulting consent depends on whether the search is within that limited authority." State v. Kurokawa-Lasciak, 249 Or App at 441 (although defendant had left the key to the van with his passenger, she did not have actual authority to consent to a search).

Because of the differences between the state and federal constitutional analysis of consent, the Oregon Court of Appeals has expressly declined to decide whether the "disagreeing tenants" exception to third-party consent from Georgia v. Randolph (discussed above) applies under the Oregon Constitution. State v. Gonzalez-Coria, 318 Or App 524, 533-35, 508 P3d 52 (2022). But the court has recognized that such an exception would apply only if, at a minimum, "a cotenant is present, claims a privacy interest in the space, and expressly objects to the search or refuses consent." State v. Gonzalez-Coria, 318 Or App at 534-35.

Authority to consent to a search of an area does not necessarily include authority to consent to a search of all containers or personal items within the area. *See, e.g.*, State v. Solorio, 304 Or App 666, 673–74, 468 P3d 522 (2020) (although defendant gave his girlfriend authority over van, she did not have authority to consent to search of safe inside van); State v. Surface/Hurley, 183 Or App at 373 (defendants' note giving housesitter "complete control of my household" did not necessarily confer authority to consent to a search of personal property); State v. Fraga-Ortiz, 176 Or App 268, 274, 31 P3d 1089 (2001) (tenant's consent to enter and search apartment did not justify officer's search of suitcase that contained defendant's personal belongings); State v. Fuller, 158 Or App 501, 976 P2d 1137 (1999) (housemate's joint occupancy of bedroom did not confer actual authority to consent to search of defendant's nightstand). Similarly, obtaining consent to enter an area by someone with actual authority may not be sufficient to allow an officer to seize items within the area or to engage in conduct that constitutes a further search. State v. Voyles, 280 Or App 579, 581, 382 P3d 583, *rev den*, 360 Or 751 (2016) (although owner of property where defendant was boarding horses had authority to consent to search of property, she did not have consent to allow police to seize horses); State v. Fortmeyer, 178 Or App 485, 37 P3d 223 (2001) (although officer obtained consent from a neighbor to be in common area, that did not authorize him to kneel down and look through a crack in an obstructed window). Instead, "actual authority over a personal item requires 'permission or acquiescence' by the defendant for the third party to exercise control over that personal item." State v. Solorio, 304 Or App at 674 (evidence that defendant's girlfriend knew what was inside a safe, that the girlfriend had the combination to the safe at one point, and that the safe was unlocked did not satisfy state's burden to prove that girlfriend had authority to consent to search of safe).

A person who has only limited authority and consents to a search thereby waives his own privacy interests, even though his consent may not be sufficient to waive the privacy interest of others. "It is only when the state relies on the consent of a *third party* that the state must show that the third party had actual authority to consent." State v. Brown, 183 Or App 434, 438, 52 P3d 1110 (2002) ("Although defendant's consent to a search of the entire motor home may not have waived his father's privacy interest, * * * defendant's consent was nevertheless valid as to his *own* privacy interest in the motor home. By consenting to the search, defendant relinquished whatever rights or interests *he* had in the area searched or the items seized * * *.") (Emphasis in court's opinion.).

In State v. Larson, 159 Or App 34, 977 P2d 1175, *rev den,* 329 Or 318 (1999), the court was asked to consider whether a third party could give consent that "related back" to the time of a previous warrantless search. *See* State v. Weaver, 319 Or 212, 874 P2d 1322 (1994) (consent may validate an earlier unlawful search if there is "evidence that the person giving the consent intended the consent to be retroactive"). The court held in Larson that the third party's consent could not "relate back." In other words, the consent given by a third party cannot waive *the defendant's* claim that the police entry was unlawful. Therefore, a third party cannot "retroactively" consent to a police search of a defendant's property, even if that third party would have had actual authority to consent prospectively to the exact same search. *Accord* State ex rel Juv. Dept. v. Reeves, 163 Or App 497, 988 P2d 433 (1999) (retroactive consent by homeowner to police entry onto property was not valid against homeowner's juvenile sons).

> **PRACTICAL SUGGESTION:** Although actual authority is a question of law and an officer is not required to determine actual authority before seeking consent—see State v. Beylund, 158 Or App 410, 416-17, 976 P2d 1141, *rev den,* 328 Or 594 (1999)—it is better practice for the officer to inquire first into the person's authority to consent, and the scope of that authority, any time there is any question on that issue. Although the person's assurances at the scene that he has such authority will not be binding, if the person later attempts to disavow his authority at a suppression hearing, his at-the-scene assertion of authority will provide a factual basis for the court to disbelieve that testimony. Moreover, the at-the-scene assertion will provide a basis for the court to find "apparent authority" under the Fourth Amendment.

The state has the burden to prove actual authority by a preponderance of the evidence. State v. Surface/Hurley, 183 Or App at 372; State v. Beylund, 158 Or App at 414; ORS 133.693(4).

a. Parents and Children.

A parent may not consent to the search of a child's *person*. State v. H. K. D. S., 305 Or App 86, 469 P3d 770 (2020) (*en banc*). But a parent or guardian may, in some circumstances, consent to the search of a child's premises or property. The validity of such third-party consent is always a fact-specific question that hinges upon the degree of *actual* control. The relationship of parent and child does not necessarily create a right of third-party consent in the parent. State v. Jenkins, 179 Or App 92, 100-01, 39 P3d 868 (2002); State v. Patrick, 87 Or App 430, 742 P2d 690 (1987) (*criticized in* State v. Edgell, 153 Or App 108, 956 P2d 988 (1998), for seeming to rely on an "apparent authority" test). Nor does the parent-child relationship necessarily create the right of a third-party consent in the child, even as to common areas. State v. Will, 131 Or App 498, 885 P2d 715 (1994). Moreover, a parent also cannot consent retroactively to a search of property in which the child has a privacy interest. State ex rel Juv. Dept. v. Reeves, 163 Or App 497, 988 P2d 433 (1999).

State v. Carsey, 295 Or 32, 664 P2d 1085 (1983). Consent search invalid where defendant had not assumed the risk that his grandmother would consent to a search of his room.

State v. A. S., 296 Or App 722, 443 P3d 618, *rev den* 365 Or 502 (2019). Where grandmother owned house and was permitting youth, her grandson, live in her home and had "always" asserted her authority over the room that youth occupied, the grandmother had authority to consent to search of his room. That was true even though youth had disputed his grandmother's authority and objected to the search, distinguishing Georgia v. Randolph, 547 US 103 (2006), which involved two adults who were "legal and social equals."

State v. J. D. H., 294 Or App 364, 432 P3d 297 (2018), *rev den*, 364 Or 409 (2019). Youth's mother had authority to consent to search of youth's guitar case and journal, found in youth's room. Youth's mother had unrestricted access to the items in youth's room; she was an "involved parent" and regularly entered his room; and was obligated to closely supervise youth, who was on probation.

State ex rel. Juv. Dept. v. S. L. M., 227 Or App 408, 206 P3d 283 (2009). An officer took a 16-year-old runaway into custody at a drug house. The girl refused the officer's request to search her purse. At the officer's suggestion, when the girl's mother arrived, the mother dumped the girl's purse out, finding meth inside. Nothing in the record establishes that the mother had a right to control the youth's effects in this particular case. Thus, because the mother was acting as an agent of the officer, her actions were subject to the limitations on state authority, *i.e.* a warrant or warrant exception.

> **NOTE:** This opinion shows that the issue of a parent's right to search possessions of their own children, who might possess drugs, is resolved on a case-by-case basis. Where the parents are not acting as "state agents," the private searches are not grounds for suppression. Where parents may be acting at the behest of officers, *i.e.*, as state agents, the parents *may* have authority to search private possessions of the children if the record establishes the parent has historically exercised control over the possessions of the minor.

State v. Weaver, 214 Or App 633, 168 P3d 273, *rev den*, 343 Or 691 (2007). Although officers initially lawfully entered defendant's residence to protect her children, their subsequent search for firearms after arresting defendant for interfering with a peace officer was not authorized by the children's consent. Because defendant, who was still present, had refused to permit the entry, the officers' entry over his objection was unlawful under Georgia v. Randolph, 547 US 103 (2006).

State v. Jenkins, 179 Or App 92, 39 P3d 868 (2002). Defendant's parents lacked actual authority to consent to a search of their garage where they had agreed with their son (defendant) that he could "have" it for his own use and they seldom entered without their son's permission. The "parents had effectively ceded most of the control over the garage to defendant." 179 Or App at 102.

Lincoln Loan Co. v. City of Portland, 138 Or App 688, 909 P2d 1243, *rev den,* 323 Or 136 (1996). Consent by a 13-year-old child was valid because the child's parent had instructed the child to admit someone if the person said he had a search warrant; thus, when the housing inspector said he had a warrant, the child had actual authority to consent to the search.

State v. Will, 131 Or App 498, 885 P2d 715 (1994). Defendant's 8-year-old daughter lacked "actual authority" to consent to police entry into apartment. Defendant testified she never gave her daughter authority to let anyone into the apartment.

State v. Scott, 82 Or App 645, 729 P2d 585 (1986). A third-party consent by a minor is not *per se* invalid under either the Fourth Amendment or the Oregon Constitution.

b. Spouses.

Consent by one spouse to a search of their joint residence generally is valid against the non-consenting spouse. *But see* Georgia v. Randolph, 547 US 103, 126 S Ct 1515, 164 L Ed 2d 208 (2006) (a cotenant cannot consent on behalf of another cotenant if that person is present and objecting; any search will not be deemed reasonable as to the objecting cotenant).

State v. Carrillo, 304 Or App 192, 199, 466 P3d 1023, *rev den*, 367 Or 220 (2020). Defendant's ex-wife had authority to consent to search of bedroom and bed, even though she lacked

ownership interest in house or bed, when "there was evidence that [she] had been living in the house for six years, had been sharing the bedroom and the bed with defendant for six years, kept her clothes in the bedroom closet, and had personal items all over the bedroom."

State v. Kurokawa-Lasciak, 249 Or App 435, 441-42, 278 P3d 38 (2012). Although defendant had left the key to the van with passenger, his partner, when he was arrested, she did not have actual authority to consent to a search.

State v. Berg, 223 Or App 387, 196 P3d 547 (2008), *adhered to as modified*, 228 Or App 754, 208 P3d 1006, *rev den*, 346 Or 361 (2009). Consent to search family home for evidence of various sexual offenses committed against defendant's daughters properly obtained from defendant's wife (victims' mother). An officer is free to inform a person that, in the event that consent is withheld, he will *seek* a search warrant, which would be up to a judge to decide whether to issue.

State v. Schmitt, 110 Or App 374, 822 P2d 159 (1991). Search of a common residence based on the wife's consent was lawful, even though husband/defendant was present and refused to consent until the police told him they would secure the house while obtaining a warrant.

State v. Rohrbach, 93 Or App 608, 763 P2d 196 (1988). Defendant's estranged wife retained sufficient relationship to defendant's residence to have actual authority to consent to a search, where she retained a key and continued to store most of her personal belongings in the residence.

c. Roommates, Lodgers, House Sitters, and House Guests.

Whether residents of a house may consent to a search depends on whether they are residing there on a permanent or only a temporary basis and on the nature and scope of the authority, either express or implied, that has been granted to them by the owner or principal tenant.

In State v. Doyle, 186 Or App 504, 63 P3d 1253, *rev den,* 335 Or 655 (2003), officers responded to a report that drug activity was taking place in a motel room registered to defendant. They knocked to ask for consent to come in. Another person opened the door and allowed the officers to come in while defendant silently stood by. While in the room, one officer saw drugs and paraphernalia in plain view. The Court of Appeals held that defendant did not consent, by her silence, to the officers' entry into the room, and their entry was unlawful. *Cf.* State v. Barclay, 196 Or App 311, 100 P3d 1148 (2004) (officers responding to a report of a possible domestic assault knocked at the door of defendant's apartment; defendant said, "Come in," but they knocked again, and a woman told them again to come in; the officers entered and saw marijuana plants in plain view; even if the woman lacked actual authority to consent to the entry, when defendant told the officers to "come in," that was an invitation for them to do so).

State v. Brown, 183 Or App 434, 52 P3d 1110 (2002). Defendant consented to a search of his father's motor home, where he and his father both lived and that contained items belonging to both of them. Defendant argued that the search was unlawful because he did not have actual authority. *Held*: It is only when the state relies on the consent of a third party that the state must show that the third party had actual authority to consent. Because defendant's consent was valid as to his own privacy interest in the motor home, he relinquished any rights or interests he had in the area or items seized.

State v. Surface/Hurley, 183 Or App 368, 51 P3d 713 (2002). A note from defendants granting their house sitters "complete control of [the] household and everything pertaining to it" was sufficient to give the house sitters actual authority to consent to a search of the entire house, including the freezer and a locked room.

State v. Fuller, 158 Or App 501, 976 P2d 1137 (1999). A housemate's joint occupancy of a bedroom and past access into defendant's lockable nightstand did not establish her "actual authority" to consent to a search of the nightstand, where there was no evidence that defendant had authorized or acquiesced in her previous entries.

State v. Wrenn, 150 Or App 96, 945 P2d 608 (1997). A person's authority to give third-person consent to a search is not co-extensive with the person's protected privacy interests; a person who has a constitutionally protected interest in an area may still lack actual authority to consent to a search. The state failed to establish that a "homeless" person, who had been sleeping on the living-room couch of a mobile home, possessed actual authority to consent to a search of the adjoining kitchen area, the hallway, and a bedroom.

State v. Bowen, 137 Or App 327, 904 P2d 1076 (1995), *rev den,* 323 Or 74 (1996). Consent by defendant's roommate was voluntary and was not the product of arguably coercive statements by the police, but, rather, resulted from the roommate's conversation with defendant, who was then under arrest.

State v. Lambert, 134 Or App 148, 894 P2d 1189 (1995). The occupant of an apartment validly consented to a search of her portion and the common portions of the apartment, even though the rental agreement provided that a different person was the legal renter and that only the renter was to occupy the premises.

State v. Arnold, 115 Or App 258, 838 P2d 74 (1992), *rev den,* 315 Or 312 (1993). Consent to search given by a person who was watching defendant's house while defendant was in jail was valid because the person had actual authority over the house.

City of Portland v. Paulson, 98 Or App 328, 779 P2d 188 (1989). The mere fact that the woman giving consent lived in the apartment was insufficient to prove a valid third-party consent to search a bedroom.

State v. Lynch, 94 Or App 168, 764 P2d 957 (1988). The state did not prove that defendant's girlfriend had actual authority to consent to a search of a duffel bag that defendant left with her.

d. Landlord and Tenant.

Generally, landlords lack authority to allow the police to enter and search rented premises, but tenants have authority to allow the police to search any location to which they have access.

Chapman v. United States, 365 US 610, 81 S Ct 776, 5 L Ed 2d 828 (1961). Landlord could not validly consent to a search of the house he had rented to another.

State v. Beylund, 158 Or App 410, 976 P2d 1141, *rev den,* 328 Or 594 (1999). A tenant who had full access to the basement, kept a key to that area, and entered it regularly to tend the marijuana grow as part of his "rent" had "actual authority" to consent to a search; the landowner "assumed the risk" that the person he placed in charge of his property would consent to a search.

State v. Britten, 89 Or App 374, 749 P2d 1193, *rev den,* 306 Or 78 (1988). Although landlord had authority to enter defendant's cabin after he had failed to pay the rent, that did not include authority to consent to a police search of property defendant had left in the cabin.

State v. Pearson, 83 Or App 624, 732 P2d 937 (1987). Landlord could not consent to a search of defendant's residence, even though he had authority to inspect the premises for damage.

e. Innkeeper and Lodgers.

Similarly, an innkeeper generally does not have authority to allow the police to enter and search a rented room, unless the person has overstayed the prescribed period.

Stoner v. California, 376 US 483, 84 S Ct 889, 11 L Ed 2d 856 (1964). Night hotel clerk could not validly consent to search of customer's room.

State v. Dowdy, 117 Or App 414, 844 P2d 263 (1992). A motel manager could consent to a search of a motel room after check-out time expired and the occupant had not rented the room for an additional day, although there was a "do not disturb" sign still on the door, the occupant's belongings were still in the room, and only 18 minutes had elapsed since check-out time.

State v. Bonner, 49 Or App 849, 621 P2d 87 (1980). Innkeeper's consent valid despite defendant's claim that his arrest prevented him from paying the rent.

State v. Taggart, 14 Or App 408, 512 P2d 1359 (1973), *rev den*, *cert den*, 419 US 877 (1974). Motel manager's consent was valid despite defendant's claim that the motel had previously accepted past-due rent.

State v. Cox, 12 Or App 215, 505 P2d 360 (1973). Consent by the hotel manager was valid where the rent was past due and the key was left in the box – the hotel room reverted back to the hotel upon expiration of the rent.

f. Business Partners.

State v. Parker, 317 Or 225, 855 P2d 636 (1993). Defendant's business partner voluntarily consented to police entry onto their business property.

g. Driver and Passengers.

A driver or owner has authority to consent to a search of the vehicle, but that authority does not extend to allow a search of a closed container that belongs to another.

State v. Kurokawa-Lasciak, 249 Or App 435, 441-42, 278 P3d 38 (2012). Although defendant had left the key to the van with his passenger when he was arrested, she did not have actual authority to consent to a search.

State v. Baker/Jay, 232 Or App 112, 221 P3d 749 (2009). A person who is lawfully operating a car with the owner's consent has authority to consent to a search of "constituent parts of the car to which the driver normally has access." Those parts may include the glove box if it is a location in which the item sought could be found. Because the driver was told that officers were looking for a gun, and because the driver consented to the search and "offered no restrictions on the search," the scope of her consent extended to any place that could reasonably contain a gun or any other evidence connecting the suspect to the car.

State v. Getzelman, 178 Or App 591, 39 P3d 195, *rev den,* 334 Or 289 (2002). An officer obtained the driver's consent to search a vehicle, in which defendant was a passenger. After discovering evidence of methamphetamine manufacturing and a backpack, the officer called in a narcotics team to finish the search. The narcotics officers opened the backpack and discovered more evidence. *Held*: The search was lawful.

State v. Edgell, 153 Or App 108, 956 P2d 988 (1998). A driver did not have actual authority to consent to the search of a bag belonging to a passenger.

State v. Williams, 48 Or App 293, 616 P2d 1178 (1980). A driver who consented to a search of his vehicle had no common authority over, and thus could not consent to a search of, a cassette tape case placed in the vehicle by another.

State v. Johnson, 34 Or App 73, 578 P2d 413, *rev den,* 283 Or 235 (1978). The manager of the trucking company for which defendant worked, and defendant's co-driver, validly consented to a search of the truck defendant had been driving.

h. Employer and employees.

State v. Meredith, 337 Or 299, 96 P3d 342 (2004). Employer's consent to placement of a tracking transmitter on its own truck, in order to monitor the whereabouts of defendant employee on public roads during working hours, did not violate her rights.

State v. Johnson, 34 Or App 73, 578 P2d 413, *rev den,* 283 Or 235 (1978). The manager of the trucking company for which defendant worked, and defendant's co-driver, validly consented to a search of the truck defendant had been driving.

i. Other Relationships.

State v. Ventris, 164 Or App 220, 991 P2d 54 (1999). As a general rule, entrusting property to another delegates to that person actual authority to surrender the entrusted property to police upon their request. Conversely, the scope of such authority generally extends only to the surrender and not to a more invasive inspection, such as forensic testing. Here, a defendant who entrusted a pair of pants to a friend delegated to the friend actual authority to surrender them to the police, but the friend did not have authority to consent to forensic testing of the pants. *But see State v. Voyles*, 280 Or App 579, 581, 382 P3d 583*, rev den*, 360 Or 751 (2016) (holding that third party did not have authority to consent to seizure of defendant's horses that were being boarded on third party's property; distinguishing *Ventris* on the ground that, in *Ventris*, the officer had probable cause to believe that the pants contained evidence of a crime, so that once the defendant's friend retrieved the pants, the officer could seize them as evidence in plain view and reasoning that *Ventris* "does not stand for the blanket proposition that an owner of a private space, there a car, can consent to the police seizure of any personal property within it regardless of who owns the personal property").

State v. Donahue, 93 Or App 341, 762 P2d 1022 (1988), *rev den,* 307 Or 303 (1989). Implied permission for a utility company employee to come onto the property did not waive defendant's privacy interest; police entry with the meter reader was unlawful.

5. Voluntariness.

In any case in which the state relies upon a defendant's consent to validate a warrantless search, the state must prove by a preponderance of the evidence that the defendant's consent was voluntary. *State v. Unger*, 356 Or 59, 333 P3d 1009 (2014); *State v. Lorenzo*, 356 Or 134, 335 P3d 821 (2014); and *State v. Musser*, 356 Or 148, 335 P3d 814 (2014); *State v. Hall*, 339 Or 7, 20, 115 P3d 908 (2005). *See also State v. Wood*, 188 Or App 89, 95, 69 P3d 1263 (2003); *State v. Guzman*, 164 Or App 90, 99, 990 P2d 370 (1999), *rev den,* 331 Or 191 (2000). If a person's consent is involuntary, rendering the search invalid, the resulting evidence must be suppressed as to anyone who had a protected privacy interest in the area that was searched. *State v. Magana/Rivera*, 265 Or App

416, 424, 335 P3d 318 (2014) (when co-tenant's consent to search apartment was involuntary, evidence found in apartment suppressed in case against defendant).

Under Oregon and federal law, the court determines as a question of fact whether voluntary consent has been given. In making that determination, the court considers the totality of the circumstances. United States v. Mendenhall, 446 US 544, 100 S Ct 1870, 64 L Ed 2d 497 (1980); Schneckloth v. Bustamonte, 412 US 238, 93 S Ct 2041, 36 L Ed 2d 854 (1973); State v. Larson, 141 Or App 186, 917 P2d 519, *rev den,* 324 Or 229 (1996).

a. Factors Determining Voluntariness.

Oregon Law.

> "In deciding whether the state has satisfied that burden [to prove that the consent was voluntary] for the purposes of Article I, section 9, the test is whether, under the totality of the circumstances, the defendant's consent was an act of free will or, instead, resulted from police coercion, either express or implied."

State v. Hall, 339 Or at 20 (citation omitted); State v. Parker, 317 Or 225, 230, 855 P2d 636 (1993); State v. Voits, 186 Or App 643, 649, 64 P3d 1156, *rev den,* 336 Or 17 (2003); State ex rel Juv. Dept. v. Stephens, 175 Or App 220, 225, 27 P3d 170 (2001). Voluntariness of consent need only be established by a preponderance of the evidence. State v. Hall, 339 Or at 20; State v. Parker, 317 Or at 230-31; State v. Stevens, 311 Or 119, 137, 806 P2d 92 (1991). In both Parker and Stevens, the court rejected the former "clear and convincing" standard.

Although consent must be voluntary, there is no requirement that it also be knowing or intelligent. Although statutes may impose a different obligation on officers, as explained in the note below, the Oregon constitution does not require an officer to advise that the person has a right to refuse consent. State v. Flores, 280 Or 273, 570 P2d 965 (1977); State v. Poulson, 150 Or App 164, 945 P2d 1084 (1997). Failure to inform the person of the right to refuse consent is merely one factor to be considered under the totality of the circumstances. State v. Maddux, 144 Or App 34, 925 P2d 124 (1996). Moreover, the consent is valid even if the officer fails to inform the person that the officer already has a search warrant. State v. Soen, 132 Or App 377, 384, 888 P2d 583, *rev den,* 321 Or 47 (1995). The officer need not even identify himself or herself as a police officer. State v. Barclay, 196 Or App 311, 100 P3d 1148 (2004) (officers were not required to identify themselves when they knocked on defendant's door and got permission to enter); State v. Gloster, 103 Or App 473, 798 P2d 256 (1990) (undercover police agent validly obtained admittance into a residence).

> **New *statutory* obligation to advise of right to refuse consent:** In 2022, the Oregon legislature amended the stop statutes to require an officer who seeks consent to search for crime evidence in the course of a criminal stop or traffic stop to advise the person "that the person has the right to refuse the request," and to "ensure that there is a written, video or audio record that the person gave informed and voluntary consent to search." ORS 131.615(4); ORS 810.410(3)(e). The statutes do not include an express reference to exclusion of evidence in the event of a violation; however, it does seem likely that defendants will seek exclusion for violations. Both statutes expressly provide that an officer is not required to give that advice with respect to searches under the Implied Consent statutes, ORS 813.100, 813.131, or 813.135.

In seeking consent, a law-enforcement officer may promise or threaten to do anything the officer has a legal right to do. State v. McCray, 304 Or App 279, 283, 466 P3d 1042 (2020). A threat

by an officer to seek a warrant is not improper coercion because the officer is not threatening to do anything the police do not have a legal right to do. *State v. Williamson*, 307 Or 621, 772 P2d 404 (1989); *State v. Hirsch*, 267 Or 613, 518 P2d 649 (1974); *State v. Douglas*, 260 Or 60, 488 P2d 1336 (1971), *cert den*, 406 US 974 (1972); *State v. Hatfield*, 246 Or App 736, 746, 268 P3d 654 (2011); *State v. Rodal*, 161 Or App 232, 985 P2d 863 (1999) (consent valid where officer told suspect police had probable cause to obtain a warrant, it would be a quicker process if defendant consented, defendant would be detained while a warrant was obtained, and if contraband was later found he would probably be arrested). A threat to report the defendant's drug possession to a child protective agency is not improper coercion. *State v. Binner*, 128 Or App 639, 877 P2d 642, *rev den,* 320 Or 325 (1994). Similarly, advising a suspect of the potential adverse consequences resulting from a refusal to consent does not render the suspect's consent involuntary. *State v. Moore*, 354 Or 493, 318 P3d 1133 (2013) (an officer's accurate statement of potential lawful adverse consequences of a refusal ordinarily cannot be deemed to unlawfully coerce a defendant's consent). *See also State v. Ramirez-Carmona*, 313 Or App 533, 537, 495 P3d 213 (2021) (warning that the state "may use" the suspect's refusal against him in court did not render consent to breath test involuntary even if state would not be able to use refusal against suspect in criminal case, because the warning "did not convey certainty as to the use or admissibility of the evidence, nor did it specifically refer to a criminal proceeding").

But an officer's threat to detain, arrest, or search if consent is not given renders the consent invalid if the officer did not have sufficient evidence to justify the threat. *State v. Coen*, 203 Or App 92, 125 P3d 761 (2005), *rev den,* 341 Or 141 (2006) (in the absence of probable cause, a threat to arrest if defendant did not consent to give blood and urine samples rendered consent involuntary); *State v. Powelson*, 154 Or App 266, 961 P2d 869 (1998) (threat to detain defendant while warrant sought, where there was no evidence that the police had probable cause to arrest the defendant or otherwise detain him, rendered consent invalid); *State v. Cox*, 150 Or App 464, 947 P2d 207 (1997) (threat to arrest invalidated consent where the officer did not have probable cause). And, conversely, a promise of leniency or to not use information learned during the search for purposes of a criminal prosecution, may a render a person's consent involuntary. *State v. Marshall*, 254 Or App 419, 501, 295 P3d 128 (2013) (defendant's consent to search was involuntary where the officers falsely induced his consent by agreeing with his statement that he would "not be responsible" for what was found).

The mere existence of a probation condition that requires a defendant to consent to a search by his probation officer does not render that consent involuntary. *State v. Dunlap*, 215 Or App 46, 52, 168 P3d 295 (2007); *State v. Davis*, 133 Or App 467, 891 P2d 1373 (1995). The "pressure" not to violate the terms of probation does not constitute coercion. *Dunlap*, 215 Or App at 55.

"Consent" that is mere acquiescence in a police request that is, under the circumstances, an order or demand, is not voluntary. *State v. Lowe*, 144 Or App 313, 317, 926 P2d 332 (1996); *State v. Ching*, 107 Or App 631, 813 P2d 1081 (1991); *State v. Freund*, 102 Or App 647, 796 P2d 656 (1990). "In determining whether an officer's statement is a request or an order, it is important to consider the officer's tone of voice * * *, and whether the statement itself invites a response or mere acquiescence." *State v. Larson*, 141 Or App 186, 197-98, 917 P2d 519, *rev den,* 324 Or 229 (1996). *See also State v. Buchanan*, 185 Or App 68, 73, 57 P3d 930 (2002) ("In the absence of explicit request to search," the fact that defendant "acquiesced" to officer's request to "turn around" did not constitute consent to a search of his pockets). Acquiescence to an officer's request is not valid consent if the defendant is not given a reasonable opportunity to make a choice to consent or if the defendant is informed that the search is going to occur, regardless of the failure to consent. *State v. Guzman*, 164 Or App 90, 990 P2d 370 (1999), *rev den,* 331 Or 191 (2000) (probationer did not consent to search of his home by accompanying probation officer to the residence after PO told probationer, "We need to go over to your house and take a look around"). Similarly, if the defendant acquiesces to search in response to a court order, the search cannot be justified based on consent if the order is not valid. *State v. Mast*, 250 Or App 605, 615, 282 P3d 916 (2012). Other considerations

include the number of officers present, use or threat of physical force, the display of weapons, the setting, whether the person is the subject of an investigation, the emotional atmosphere, and the effect of drug use by the defendant. State v. Larson, 141 Or App 186; *see also* State v. Stanley, 153 Or App 16, 955 P2d 764 (1998) (the officer's statement to a driver to "hop out" was, under these circumstances, a request, not a command).

> **PRACTICAL SUGGESTION:** If the officer fairly presents the defendant with a choice whether to consent, the mere fact that defendant subjectively may feel that he or she has no realistic choice under the circumstances does not render the consent invalid as "mere acquiescence." Accordingly, when requesting consent, the officer should *ask* in a question format (rather than direct or command) and avoid using words or phrases that fairly could be understood by the suspect as requiring compliance. Although an officer is not obliged to tell the person that he or she has a right to refuse, the officer should avoid acts or words that fairly could convey to the suspect that a search will occur regardless of whether he or she consents.

Lawful custody does not necessarily invalidate otherwise valid, voluntary consent; it is one factor in the totality of the circumstances. State v. Lerch, 63 Or App 707, 666 P2d 840 (1983), *affirmed*, 296 Or 377, 677 P2d 678 (1984). Moreover, an officer may obtain a valid consent even after an arrest or invocation of Miranda rights. State v. Hatfield, 246 Or App 736, 745-46, 268 P3d 654 (2011); State v. Norkeveck, 214 Or App 553, 168 P3d 265 (2007), *rev den*, 344 Or 558 (2008).

Relevant factors for consent to search following a lawful arrest include:

- The time of day when the arrest occurred;
- Whether the arrest was made with a display of weapons;
- Whether the arrest was made by way of a forcible entry or by use of force;
- Whether the arrestee was placed in handcuffs or other close restraint;
- Whether the arrest was used as leverage (arrestee told he would be released if he gave consent to search);
- Whether arrestee was subjected to interrogation in a station house atmosphere (the factor with the greatest significance).

State v. Bea, 318 Or 220, 864 P2d 854 (1993).

Furthermore, *unlawful* custody does not *necessarily* invalidate otherwise voluntary consent. *See* discussion of unlawful police conduct and its effect on consent in this chapter, ("Consent to Search Following Unlawful Police Conduct").

Fourth Amendment.

The court considers the following factors in evaluating the voluntariness of the consent, although no single factor will determine voluntariness:

- Age;
- Education;
- Intelligence;
- Mental condition;

- Physical condition;
- Custodial status;
- Length of interrogation;
- Nature of interrogation;
- Cooperation with police;
- Person's attitude about the likelihood that contraband will be discovered;
- Physical punishment or other coercive police behavior;
- Whether the person was advised he or she could refuse consent (but not so advising the person does not necessarily make consent involuntary).

Schneckloth v. Bustamonte, 412 US 238, 93 S Ct 2041, 36 L Ed 2d 854 (1973). *See also* United States v. Mendenhall, 446 US 544, 100 S Ct 1870, 64 L Ed 2d 497 (1980) (applying totality of the circumstances test); United States v. Drayton, 536 US 194, 122 S Ct 2105, 153 L Ed 2d 242 (2002) ("The Court has rejected in specific terms the suggestion that police officers must always inform citizens of their right to refuse when seeking permission to conduct a warrantless consent search.").

A person arrested and in custody may give valid consent. United States v. Watson, 423 US 411, 96 S Ct 820, 46 L Ed 2d 598 (1976); State v. Hatfield, 246 Or App 736, 746, 268 P3d 654 (2011). Whether or not the defendant is in custody, the test for voluntariness is an objective test based on the totality of the circumstances. Consent is involuntary when it is the product of coercion or threat, express or implied. Schneckloth v. Bustamonte, 412 US 238.

A person who is lawfully stopped for a traffic infraction need not be advised that he or she is free to leave before the officer can lawfully request consent to search for evidence of an unrelated offense. Ohio v. Robinette, 519 US 33, 117 S Ct 417, 136 L Ed 2d 347 (1996).

b. Cases in Which Consent Was Found to Be Voluntary.

State v. Parker, 317 Or 225, 855 P2d 636 (1993). Despite testimony that the police had threatened to enter regardless of defendant's consent, a finding of voluntariness was supported by a preponderance of the evidence. *See* the description of the facts in State v. Parker, 113 Or App 513, 835 P2d 918 (1992) (they included the presence of several armed officers and a police dog).

State v. Stevens, 311 Or 119, 133-36, 800 P2d 92 (1991). Defendant's consent was voluntary even though he had ingested methamphetamine the night before the 8:25 a.m. interview because record supported trial court's findings that "the defendant knew what he was doing, understood his right to refuse, and voluntarily consented to the search."

State v. Vu, 307 Or 419, 770 P2d 577 (1989). Despite evidence that Vietnamese people tend to be more compliant with authority than others, the state proved that this Vietnamese defendant's consent was voluntary; defendant refused consent when first informed that he had a right to do so, but later changed his mind.

State v. Hayes, 272 Or App 1, 353 P3d 1237, *rev den*, 358 Or 145 (2015). Defendant's consent was voluntary even though he initially stated that he wanted to speak with an attorney before consenting. After a "low key and amiable conversation" with the officers, which did not include any further questioning of defendant, defendant recanted his earlier statement and granted consent.

State v. Hatfield, 246 Or App 736, 268 P3d 654 (2011). Although the defendant was in custody and had invoked his right to counsel, his consent to search was voluntary where he waived his Miranda rights, and officers repeatedly told him that he did not have to consent and that they would apply for a search warrant if necessary.

State v. De La Rosa, 228 Or App 666, 208 P3d 1012 (2009). Defendant's consent to search her apartment was voluntary, even though she had already been placed in custody by police; before obtaining defendant's consent, officer informed defendant that she was not required to consent and that she had right to request that officer go and apply for search warrant. *See also* State v. Hatfield, 246 Or App 736, 746, 268 P3d 654 (2011) (similar).

State v. Wammack, 228 Or App 520, 208 P3d 1000, *rev den*, 347 Or 349 (2009). Defendant's consent to search was not coerced, where defendant gave consent after being informed that a condition of his post-prison supervision from a prior conviction required him to submit to a search at the request of defendant's supervising officer. Although supervising officer would have had defendant arrested if defendant had refused to consent, defendant was not told that he would be arrested, and defendant had in fact refused to consent to previous searches.

State v. Berg, 223 Or App 387, 196 P3d 547 (2008), *adh'd to as modified on recons*, 228 Or App 754 (2009). Officer's statement to defendant's wife that he had previously been successful in obtaining search warrants, while meant to influence the wife's decision to consent to a search, did not, under the circumstances, render the consent involuntary. *See also* State v. Rodal, 161 Or App 232, 985 P2d 863 (1999).

State v. Dunlap, 215 Or App 46, 168 P3d 295 (2007). The mere existence of a probation condition requiring the defendant to consent to a search did not render his consent involuntary.

State v. Norkeveck, 214 Or App 553, 168 P3d 265 (2007), *rev den*, 344 Or 558 (2008). Defendant's consent to a search of his computer during the booking process after he was arrested and had invoked his right to counsel was voluntary; the officer made it clear that defendant was not required to consent.

State v. Ry/Guinto, 211 Or App 298, 306, 154 P3d 724, *rev den*, 343 Or 224 (2007). Officer's repeated requests for consent to search did not make consent involuntary. Although defendant repeatedly had responded that he had no weapons in the car, he did not expressly refuse to consent. None of the officer's requests was a "command" or suggested that defendant could not refuse.

State v. Voits, 186 Or App 643, 649, 64 P3d 1156, *rev den,* 336 Or 17 (2003). Defendant called 911 to report that his wife had committed suicide. Officers responded and went through the front door, which was ajar. Defendant consented to the officers' request to go upstairs to examine the death scene. While they were upstairs, the officers made observations inconsistent with the victim having shot herself. Defendant later signed a written consent to search form, and investigators returned to the residence and photographed, measured, and seized a number of items. Officers obtained a warrant to search defendant's workplace and residence, and defendant also consented to searches of those areas. The court held that defendant's various consents were voluntary.

State ex rel Juv. Dept. v. Stephens, 175 Or App 220, 27 P3d 170 (2001). Youth's agreement to submit to "random searches of possessions, lockers, [and] person" as a condition of admission into an alternative school for at-risk youth constituted voluntary consent to a random search of his locker and the opening of a transparent pager found inside. "[T]he fact that consent derives from a difficult or unpleasant choice is not enough to render it involuntary." 175 Or App at 226.

State v. Beylund, 158 Or App 410, 976 P2d 1141, *rev den,* 328 Or 594 (1999). A tenant's consent to a search of his landlord's locked grow room was voluntary, even though, when the tenant initially claimed not to have a key, the officers suggested "popping" the door; the tape-recorded conversation demonstrated that the officers were seeking *permission* to enter the locked room by whatever means, and they did not threaten to break down the door if the tenant refused to consent.

State v. Charlesworth/Parks, 151 Or App 100, 951 P2d 153 (1997), *rev den,* 327 Or 82 (1998). Defendant's consent to search of his car was voluntary although he was cuffed and surrounded by police with drawn guns who were executing a search warrant at his house; defendant had "considerable experience" in the criminal justice system and "knew" he could refuse consent.

State v. Poulson, 150 Or App 164, 945 P2d 1084 (1997). The absence of a Miranda warning and notice of the right to refuse consent did not render defendant's consent involuntary.

State v. Maddux, 144 Or App 34, 925 P2d 124 (1996). Consent to perform field sobriety tests was voluntary where the officer requested consent without first giving the statutorily-required FST warning; the officer also did not give Miranda warnings or a warning that the driver had the right to refuse consent; a suspect's knowledge about the right to refuse consent is only one factor in the totality of the circumstances; the trial court erred by treating this single factor as determinative.

State v. Larson, 141 Or App 186, 917 P2d 519, *rev den,* 324 Or 229 (1996). Despite defendant's claim that he was intimidated by the police presence at the accident scene and that he was "stuporous" from alcohol consumption, his acquiescence in a police request to search his van constituted a voluntary consent. *See also* State ex rel Juv. Dept. v. Doty, 138 Or App 13, 906 P2d 299 (1995) (consent given by a juvenile who was under the influence of marijuana was voluntary under the totality of the circumstances).

Lincoln Loan Co. v. City of Portland, 138 Or App 688, 909 P2d 1243, *rev den,* 323 Or 136 (1996). Consent by a 13-year-old child was valid because the child's parent had instructed the child to admit someone if the person said he had a search warrant; the mere presence of four police officers equipped with a battering ram did not make the consent invalid.

State v. White, 130 Or App 289, 293, 881 P2d 169 (1994). "The fact that defendant was in handcuffs when he consented does not render the consent involuntary *per se*." Because the encounter took place on a public street, involved only one officer, involved no threat of force or display of weapons, and was "low-key and without hostility," the consent to search was voluntary.

c. Cases in Which Consent Was Found *Not* to Be Voluntary.

State v. Dimeo, 304 Or 469, 747 P2d 353 (1987). An informant's consent to recording of telephone conversations between himself and defendant was not voluntary because he was subjected to a coercive threat/promise and his request for counsel was not honored.

State v. Jordan, 308 Or App 547, 481 P3d 1017 (2021). Defendant's ultimate consent was involuntary where he had repeatedly refused the officer's persistent requests to search and officer ultimately obtained assent while the officer stood over him, positioned to search, after confronting defendant with committing crimes and implying that he could be arrested if he did not consent.

State v. Watts, 284 Or App 146, 392 P3d 358 (2017). Several officers executed a search warrant on defendant's uncle's property, where defendant lived in a shed. They pulled into the driveway in three armored vehicles with their spotlights and sirens on, wearing tactical body armor, and carrying AR-15 style semi-automatic rifles. They ordered the occupants out of the house with their hands up. When police came across the shed, there were dogs barking aggressively inside. An officer told defendant that police needed him to safely let the dogs out so they could search the shed. Defendant did so and stated, "have at it, it's all yours." The defendant merely acquiesced to the police commands and did not consent to search.

State v. Marshall, 254 Or App 419, 501, 295 P3d 128 (2013). The defendant's consent to search was not voluntary where the officers falsely induced his consent by agreeing with his statement that he would "not be responsible" for what was found.

State v. Coen, 203 Or App 92, 125 P3d 761 (2005), *rev den,* 341 Or 141 (2006). In the absence of probable cause, an officer's threat to arrest the defendant if he did not provide breath and urine samples rendered the defendant's consent involuntary.

State v. Guzman, 164 Or App 90, 990 P2d 370 (1999), *rev den,* 331 Or 191 (2000). A probationer did not consent to a search of his home going with his probation officer after the PO told the probationer, "We need to go over to your house and take a look around."

State v. Powelson, 154 Or App 266, 961 P2d 869 (1998). Defendant's consent to search during a "knock and talk" was not voluntary where the police threatened to detain defendant while they applied for a search warrant, despite the fact that they lacked probable cause to do so; the threat of unlawful arrest rendered his consent involuntary.

6. Consent to Search Following Unlawful Police Conduct.

For a discussion of the validity of consent searches following unlawful police conduct, see the discussion of exploitation in Chapter VII.

7. Consent to Search — DUII and Field Sobriety Tests.

The administration of field sobriety tests is a search. *State v. Nagel*, 320 Or 24, 880 P2d 451 (1994). In the absence of a warrant, the administration of field sobriety tests may be justified by probable cause and exigency. *State v. Nagel*, 320 Or 24. FSTs also may be administered by voluntary consent. *State v. Iams*, 336 Or App 830, 841, 562 P3d 625 (2024) (consent to FSTs was voluntary under the circumstances; the encounter was not coercive and occurred openly in the driveway of a private residence, and nothing suggested defendant was too impaired to consent); *State v. Dinsmore*, 182 Or App 505, 517-18, 49 P3d 830 (2002) (consent to FSTs voluntary despite prior *Miranda* violation); *State v. Ramos*, 149 Or App 269, 942 P2d 841 (1997); *State v. Maddux*, 144 Or App 34, 925 P2d 124 (1996); *State v. Greenough*, 142 Or App 506, 923 P2d 646 (1996).

The state must make a good record regarding voluntary consent to perform the tests. In *State v. Lowe*, 144 Or App 313, 926 P2d 332 (1996), the officer testified that he "had" defendant step out of the car and that he "wanted" defendant to perform some tests. The defendant testified that he felt he had no choice but to get out of the car and do the tests. Despite the fact that the officer did not read the statutory warnings, the court held that the state did not show that the consent was voluntarily given. *But see State v. Berg*, 140 Or App 388, 391 fn 1, 914 P2d 1110 (1996) (a DUII suspect's acquiescence in an officer's request to exit his vehicle was a voluntary consent); *see also State v. Finney*, 154 Or App 166, 961 P2d 256 (1998) (officer not required to inform driver of right to refuse).

A defendant's refusal to consent to field sobriety tests cannot be used to establish probable cause to believe that the defendant is intoxicated. *State v. Gilmour*, 136 Or App 294, 901 P2d 894, *rev den,* 322 Or 360 (1995).

8. Scope of Consent / Limited Consent.

Oregon Law.

"When police rely on consent as a basis of a search, they have no more authority to search than they are given by consent." State v. Lerch, 63 Or App 707, 712, 666 P2d 840 (1983), *aff'd*, 296 Or 377, 677 P2d 678 (1984). Thus, when police search pursuant to consent, the court must determine whether the defendant's consent extended to the particular item or area searched and whether it was otherwise limited in purpose or time.

a. Actual Intent Standard

In determining whether a particular search falls within the scope of a defendant's consent, the trial court determines, "based on the totality of circumstances, what the defendant actually intended. That determination is a factual one." State v. Blair, 361 Or 527, 537, 396 P3d 908 (2017). "However, where—based on the totality of circumstances—the defendant's intent with respect to the scope of consent is unambiguously expressed, that manifestation of intent is controlling." State v. Blair, 361 Or at 538.

Note that *Blair* overruled previous Court of Appeals case law, which had held that the standard for determining the scope of consent is one of "objective reasonableness," meaning "what a typical person would have understood the scope to be." As a result, be aware that any Court of Appeals case law issued before *Blair* likely applies the wrong test and is of little utility.

In determining whether an individual actually intended to consent to the search performed by the officers, the court considers all the circumstances, including the words used, whether the individual knows what the officer is looking for, and whether the individual expressed any limitations on the search. In State v. J. D. H., 294 Or App 364, 432 P3d 297 (2018), *rev den*, 364 Or 409 (2019), for example, the youth's mother gave officers consent to search the youth's room for evidence relating to a planned school shooting. At some point, the mother learned that police officers were looking for a journal or notebook; she found a school notebook and gave it to the officers, but it was not the journal they were looking for. Ultimately, the officers opened a guitar case and a journal they found inside, which contained plans for the shooting. The trial court found that the mother's consent extended to the journal, and the Court of Appeals determined that evidence in the record supported that finding. State v. J. D. H., 294 Or App at 369. That evidence included that youth's mother (1) consented to the search of the room without expressing any limitation; (2) actively assisted officers in their search for a notebook or journal by providing a different notebook belonging to the youth; and (3) did not object or express any limitation on the search when she learned that the officers were searching for a notebook or journal. State v. J. D. H., 294 Or App at 370. *See also* State v. McGee, 341 Or App 237, 245–46, __ P3d __ (2025) (record supported trial court's finding that defendant's consent extended to a search of his entire phone, where defendant maintained to the officer that there was nothing of concern on his phone, agreed to unlock his phone and provided his password, and did not limit his consent to a search of cloud storage only). *But see* State v. Sunderman, 304 Or App 329, 337-38, 467 P3d 52 (2020) (state failed to prove, by a preponderance of the evidence, that defendant's consent to a search of her car extended to her purse when the officer did not remember exactly how he asked defendant for consent and the only evidence in the record about the purse was defendant's testimony that she had expressly and unambiguously denied consent to search her purse).

When the defendant gives unqualified consent to conduct a search and does not object to the search of a particular item when given the opportunity, that suggests—or perhaps unambiguously demonstrates—that the defendant intended to consent to search of that item. *See* State v. Cross, 316 Or App 506, 512, 502 P3d 753 (2021) (trial court permissibly inferred that defendant consented to

search of bag, rather than just purse contained inside the bag, where "defendant had ample opportunity to object if she thought that [the officer] was exceeding the scope of her intended consent, yet she did not"; distinguishing State v. Blair, 361 Or at 541, where the record did not demonstrate that the defendant had the opportunity to object). *See also* State v. Lamoreux, 271 Or App at 763 n 1 (noting, under now-overruled objective reasonableness test, the "significance of a person not objecting or withdrawing previously given consent when an officer conducting a consent search begins to open a container").

Additionally, when the defendant knows that police are searching for a particular item, that may help to support an inference that the defendant intends to consent to a search of anywhere that is likely to contain that item, but not places unlikely to contain it. *See* State v. Blair, 361 Or at 540-41 (noting that, on remand, trial court could find that officer "was asking for consent to look for drugs and that defendant's generalized consent therefore extended to closed containers inside [his] backpack that could have held drugs"); State v. Winn, 361 Or 636, 643–44, 396 P3d 926 (2017) (reasoning that defendant, who consented to a search of her purse at the security checkpoint in a courthouse, may have believed that the screener sought only weapons, in which case she did not consent to the search of a compact within her purse, or may have believed that the screener was searching for any contraband, in which case she did consent to search of the compact). Consideration of that fact is consistent with Court of Appeals case law, which—although applying the now-overruled "objective reasonableness" test—held that, when an officer is searching for a particular item, the defendant's consent extends to all places where that item may be found but does not extend to places where the item would not reasonably be found. *E.g.,* State v. Lamoreux, 271 Or App 757, 354 P3d 717 (2015) (where defendant would understand that the officer was searching for drugs, consent to search car extended to backpack within car); State v. Quale, 225 Or App 461, 201 P3d 273 (2009) (consent to search "for weapons" did not include opening small folded piece of foil, which officer felt in defendant's pocket, but did include opening backpack, which could have contained weapons); State v. McMilian, 191 Or App 62, 65, 80 P3d 538 (2003) (consent to search for weapons did not permit officer to open a checkbook); State v. Helow, 171 Or App 236, 242, 15 P3d 103 (2000), *rev den*, 332 Or 56 (2001) ("In light of the fact that the object of this search was checks, it was reasonable for the officer to examine the contents of a purse found in the front seat of the car."); State v. Allen, 112 Or App 70, 826 P2d 127, *rev den*, 314 Or 176 (1992) (unqualified consent to search vehicle for weapons, narcotics, or large amounts of money allowed officer to open suitcase); State v. Gaither, 76 Or App 201, 708 P2d 646 (1985) (defendant's unqualified consent to search of his person for drugs or weapons was broad enough to authorize opening bindle found during search). *Compare* State v. Jacobsen, 142 Or App 341, 922 P2d 677 (1996) (where officer made a general request to search a vehicle for unspecified evidence, it was not objectively reasonable to believe that the consent authorized him to open a zippered duffel bag).

Note, however, that the mere fact that an item could be kept in a particular container will not always mean that the defendant intends to consent to a search of that container. In State v. Soprych, 324 Or App 659, 527 P3d 808 (2023), for example, the defendant authorized officers to enter his house to "check" for weapons, and the officers opened a locked safe inside the defendant's bedroom. The Court of Appeals noted that the officer asked only to "check" the house for weapons—which "does not suggest the type of highly intrusive inspection that would extend to opening locked containers" and instead "tends to suggest a more cursory inspection"—and that the defendant did not offer his keys to the officers when he consented to the search. State v. Soprych, 324 Or App at 664. In light of those facts, the court determined that it was not inferable that the defendant intended to authorize the officers to open the locked safe, even though a weapon could have been kept in the safe and the defendant knew the officers were looking for weapons. State v. Soprych, 324 Or App at 663-64. Although the defendant ultimately gave the officers his keys, he did so with the belief that they intended to use them to open his locked bedroom door, not the safe. Thus, merely giving the officers

the keys (which they ultimately used to open the safe) did not "expand the scope of the consent he granted in authorizing officers to check for weapons." *State v. Soprych*, 324 Or App at 665.

> **PRACTICAL SUGGESTION:** Although the test for consent relies on the defendant's actual intent, unambiguous expressions of that intent are controlling. Thus, if the officer specifically asks whether consent extends, for example, to closed containers, and the defendant agrees, then the defendant will not be able to argue that he or she did not intend the consent to extend that far.

b. Examples of Ways in Which Consent May Be Limited

Under the old "objective reasonableness" test, the court presumed that generalized consent was unqualified, unless the defendant expressly placed limits on it. Under the new "actual intent" test, it appears that the court must find that the defendant affirmatively intended the scope of consent to encompass the officer's search. Thus, the defendant need not place express limits for the court to find that his or her consent was, in fact, limited. The following cases illustrate particular ways in which consent may be limited. However, because many of them were decided under the old "objective reasonableness" test, they are of value only as illustrations, not as binding precedent.

Limited to a particular room, area, or item. For example, in *State v. Drouhard*, 31 Or App 1083, 572 P2d 331 (1977), the invitation to the police was limited to the living room. The officers did not have consent, therefore, to walk through the remainder of the house looking for other persons. *See also State v. Musalf*, 280 Or App 142, 380 P3d 1087 (2016) (consent to an external patdown did not authorize intrusion into the suspect's pocket); *State v. Buchanan*, 185 Or App 68, 73, 57 P3d 930 (2002) (suspect's consent to "turn around" so the officer could see whether he had a wallet on him did not authorize the officer to lift up his shirt to look inside his pocket); *State v. Selmer*, 26 Or App 555, 553 P2d 1069, *rev den,* 276 Or 555 (1976) (officers exceeded scope of permission to enter residence).

Limited to particular circumstances. For example, if a person puts her garbage can out on the curb to be collected by a garbage-disposal service during a particular period, that does not constitute her general consent to search or a waiver of privacy under Article I, section 9. Consequently, the police may not rummage through the garbage before it has been collected by the service—either directly or by enlisting the garbage collector to collect the garbage and turn it over to police to search *State v. Lien/Wilverding*, 364 Or 750, 441 P3d 185 (2019); *see also State v. Galloway/Hoesly*, 198 Or App 585, 109 P3d 383 (2005). *Cf. California v. Greenwood*, 486 US 35, 108 S Ct 1625, 100 L Ed 2d 30 (1988) (under Fourth Amendment, defendant had no expectation of privacy in garbage he left on the curb for collection).

Limited to particular people. Although under the old objective reasonableness standard, unqualified consent to allow officers to enter a residence to investigate a crime generally also included permission for entry by other investigative personnel, *State v. Voits*, 186 Or App 643, 650, 64 P3d 1156, *rev den,* 336 Or 17 (2003), that may not be true under the current test. Thus, police should ensure that consent extends to all people who may be conducting the search.

Limited to a particular purpose. In *State v. Oxford*, 311 Or App 1, 488 P3d 808 (2021), the defendant invited police into his home to render emergency aid to his roommate, who had overdosed on drugs. After paramedics arrived, the officer contacted the Westside Interagency Narcotics (WIN) team to begin a "Len Bias investigation"; the WIN team arrived around the same time that the paramedics were leaving, taking the roommate to a nearby hospital. The court held that "the scope of defendant's consent was for the limited purpose of administering medical aid" to his roommate, and that "the WIN team's entry for the purpose of conducting a criminal investigation exceeded that scope." *State v. Oxford*, 311 Or App at 10. That was true despite the WIN team's "incidental

'obligation'" to provide information to the roommate's medical providers if the criminal investigation turned up information relevant to his care. State v. Oxford, 311 Or App at 10-11.

In State v. Binner, 131 Or App 677, 886 P2d 1056 (1994), the court held that consent to seize blood and test it for alcohol did not authorize later testing of sample for drugs.

> **PRACTICAL SUGGESTION:** If the officer's search is lawful based only the person's consent and the focus of the investigation changes, the officer needs to remain mindful of the scope of the consent originally granted. If there is any doubt, the officer should recontact the person either to clarify the scope of the consent granted or to obtain consent for a broader search.

Limited duration. Once a search has concluded, an officer must obtain new consent to commence a second search of the same area. *See* State v. Marino, 259 Or App 608, 314 P3d 984 (2013) (defendant's consent to a search of her car by one officer did not justify a second search by another officer during the same encounter, because the first search had been completed at the time the second officer began the second search). But whether a delay or other intervening circumstances between consent and execution of the search invalidates the consent depends on the totality of the circumstances. State v. Tate, 315 Or App 751, 759-61 & 761 n 1, 501 P3d 1064 (2021), *rev den*, 369 Or 733 (2022) (rejecting defendant's argument that "pressure" from DHS worker between consent and DNA swab rendered consent involuntary but noting that, in some circumstances, unlawful conduct between consent and execution of a search "could be used to prevent a defendant from revoking or limiting a previously obtained voluntary consent"). Under the old objective reasonableness standard, the court had held that initial consent continues through subsequent re-entry in defendant's presence without objection. *See, e.g.,* State v. Luther, 63 Or App 86, 663 P2d 1261, *aff'd*, 296 Or 1, 672 P2d 691 (1983). Although those cases would appear to be of limited utility under the new standard, the court has relied on them after the new standard was announced. State v. Tate, 315 Or App at 760.

Retroactive Consent. In the absence of evidence that the defendant intended consent to be retroactive, the scope of consent does not include evidence seized before obtaining the defendant's consent. State v. Weaver, 319 Or 212, 874 P2d 1322 (1994).

c. Scope of Consent of Third Parties.

The scope of consent given by a third party is limited by the extent of the third party's actual authority. *See* State v. Voyles, 280 Or App 579, 581, 382 P3d 58*3, rev den*, 360 Or 751 (2016) (although owner of property where defendant was boarding horses had authority to consent to search of propery, she did not have consent to allow police to seize horses); State v. Fortmeyer, 178 Or App 485, 37 P3d 223 (2001) (although officer obtained consent from a neighbor to be in common area, that did not authorize him to kneel down and look through a crack in an obstructed window); State v. Ventris, 164 Or App 220, 991 P2d 54 (1999) (where defendant had entrusted his property to his friend, the friend had authority to surrender the property to the police, but he could not consent to more intrusive inspection, such as forensic testing).

d. Scope of Implied Consent.

Implied consent to allow an officer to enter does not permit the officer to conduct a search that is outside the scope that reasonably is implied by the circumstances. See, e.g., State v. Cardell, 180 Or App 104, 41 P3d 1111 (2002) (although officer had implied consent to walk up defendant's driveway past his parked car, he "exceeded that consent when he touched the tires in an attempt to obtain information that would aid him in his investigation"); State v. Portrey, 134 Or App at 465-66

(officer exceeded implied consent when he picked up pair of boots on front porch and examined soles). *See also* cases in this chapter, Implied Consent to Entry onto Real Property.

Fourth Amendment.

> "The scope of a consent search may not exceed the scope of the consent given. The scope of consent is determined by asking how a reasonable person would have understood the conversation between the officer and the person who gave consent at the time consent was given. The express object of a search defines the scope of consent, unless the person who gave consent expressly limits the search's scope."

Forty-Ninth Annual Review of Criminal Procedure, 49 GEO. L.J. ANN. REV. CRIM. PROC. 51, 129-31 (2020) (footnotes omitted). An unqualified consent to search permits the officer to open closed containers that could contain objects that would be within the scope of the requested search. *Florida v. Jimeno*, 500 US 248, 111 S Ct 1801, 114 L Ed 2d 297 (1991) (where defendant gave unqualified consent to search his vehicle for drugs, it was objectively reasonable for officer to believe that the scope of the consent permitted him to open a paper bag).

G. EMERGENCIES

"The emergency aid doctrine is similar but not identical to the statutory community caretaking exception." *State v. Christenson*, 181 Or App 345, 352, 45 P3d 511 (2002). The Court of Appeals has held that "[e]ven if the state is able to satisfy the requirements of ORS 133.033 [the community caretaking statute], it must also satisfy the requirements of the emergency aid doctrine." *State v. Salisbury*, 223 Or App 516, 523, 196 P3d 1017 (2008).

Oregon Law.

Under Article I, section 9, police officers may enter premises or conduct a stop without a warrant to render emergency aid if they reasonably believe an individual is in distress and in need of help, and if they have reasonable grounds to believe that there is an actual emergency. *State v. Schmitz*, 299 Or App 170, 175 448 P3d 699 (2019) (emergency aid exception applies to warrantless stops); *State v. Baker*, 350 Or 641, 260 P3d 476 (2011); *State v. Wan*, 251 Or App 74, 281 P3d 662 (2012). *See also State v. McCullough*, 264 Or App 496, 336 P3d 6 (2014) (officer must have *subjective* belief of an emergency). This exception is often used when the police are responding to a non-criminal emergency. *State v. Bridewell*, 306 Or 231, 759 P2d 1054 (1988); *State v. Miller*, 300 Or 203, 709 P2d 225 (1985), *cert den*, 475 US 1141 (1986); *State v. Torres*, 201 Or App 275, 118 P3d 268 (2005), *rev den,* 340 Or 308 (2006). The emergency-aid exception does not require a life-threatening emergency or violence in progress; entry is permitted if there are articulable facts reasonably indicating that an individual is imminently threatened with suffering serious physical injury or harm. *State v. Rennells*, 253 Or App 580, 583, 291 P3d 777 (2012), *rev den*, 353 Or 410 (2013).

In *State v. Baker*, 350 Or at 649, the court held that the "emergency aid exception to the Article I, section 9 warrant requirement is justified when police officers have an objectively reasonable belief, based on articulable facts, that a warrantless entry is necessary to either render immediate aid to persons, or to assist persons who have suffered, or who are imminently threatened with suffering, serious physical injury or harm." The exception applies regardless of whether the need for immediate aid is triggered "by a human source or a condition idiopathic to the person needing aid," and it does not require a belief of "life threatening" circumstances. *Id.* at n 5. The court upheld the officers' entry onto the defendant's property based on information from a neighbor about

yelling and screaming coming from the house, the possible presence of a child, and the use of a "code word" by the possible victim.

> ***The emergency-aid doctrine provides an exception to the warrant requirement of Article I, section 9, when these conditions are met:***
>
> *1) The police have a subjective belief;*
>
> *2) That is objectively reasonable and based on articulable facts;*
>
> *3) That a warrantless entry is necessary;*
>
> *4) To either render immediate aid; or*
>
> *5) To assist those who have suffered, or who are imminently threatened with suffering, serious physical injury or harm.*

A "true emergency" is not required; the test is objective reasonableness. Baker, 350 Or at 648-49. The officer's actions will be upheld if the officer subjectively believed that imminent action was necessary, and the circumstances, as they appeared at the time of the entry, would lead a prudent and reasonable officer to conclude that imminent action was necessary. State v. Jones, 45 Or App 617, 621, 608 P2d 1220 (1980). However, in determining whether an emergency exists, "the officers are not required to explore and eliminate all possible explanations for the circumstances that gave rise to their reasonable belief that there was a true emergency." State v. Torres, 201 Or App at 287.

The entry must be for a compelling reason and contemporaneous with the circumstances giving rise to the emergency. If the emergency dissipates before the entry, the exception does not apply. State v. Davis, 295 Or 227, 666 P2d 802 (1983); State v. Garcia, 276 Or App 838, 370 P3d 512 (2016) (although officers' belief that defendant's wife needed help justified entry into home, the emergency dissipated once the officers encountered defendant's wife, who was not injured and did not request help; as a result, officers were not permitted to remain in the home). And the emergency must lead the officer to believe that there is an immediate need to assist a person who has suffered or is imminently threatened with suffering serious physical injury; the exception does not apply when the officer is investigating and mitigating a potential threat in response to an emergency. State v. Powell, 288 Or App 660, 668, 406 P3d 1111 (2017) (emergency aid doctrine did not apply when officer was responding to an emergency—a school shooting—and searched defendant because he believed defendant might have been involved).

1. Cases in Which Emergency-Aid Exception Was Justified.

State v. Baker, 350 Or 641, 260 P3d 476 (2011). The officers lawfully entered on defendant's property based on information from a neighbor about yelling and screaming coming from the house, the possible presence of a child, and the use of a "code word" by the possible victim.

State v. Scofield, 338 Or App 190, 565 P3d 869 (2025). Two named eyewitnesses reported that they had seen defendant assault a person in defendant's apartment with a hammer. Responding officers found a refrigerator lying on the floor and opened it, finding the victim's body inside. "Given the information available to police at the time, they could reasonably believe that there was a victim

of a hammer assault inside the refrigerator in need of their aid," and thus the emergency-aid exception applied.

State v. Starr, 337 Or App 682, 564 P3d 933 (2025). Where deputy saw defendant in the driver's seat of a car that was on the side of the road with the engine running, and defendant appeared unconscious, the deputy's "limited entry into defendant's vehicle to use his flashlight to rouse defendant was justified by the emergency aid exception to the warrant requirement."

State v. M. T. F., 326 Or App 371, 376, 532 P3d 913 (2023). Two officers responded to a 911 call expressing concern that someone may have overdosed, and they were taken to a tent where they observed youth exhibiting early signs of a drug overdose. The presence of a medical volunteer did not render the officers' intervention unnecessary.

State v. Schmitz, 299 Or App 170, 175, 448 P3d 699 (2019). An observer reported a man jerking back and forth in his car and hitting his head on the steering wheel, and the responding officer saw the man's head jerking back and forth and saw his body dip down toward passenger side of the vehicle and go completely rigid. Those facts justified stop to see if he needed medical attention.

State v. Clay, 293 Or App 797, 429 P3d 1038 (2018), *rev den*, 364 Or 209 (2018). A neighbor heard sounds of a man and woman arguing and that the fight was escalating, and when officers responded, they heard a loud conversation, then a door slam, a man say "shut the fuck up," a woman whimpering and crying, and then a loud thump. After ten minutes of knocking without response, the officers forced entry into the apartment. Those circumstances supported a reasonable belief that more than a verbal argument was happening such that someone needed immediate help.

State v. Garcia, 276 Or App 838, 370 P3d 512 (2016). A neighbor reported hearing screaming and "possibly hitting" coming from defendant's home, and when officers responded to the call, defendant appeared intoxicated, was uncooperative and belligerent, refused to leave his home to speak with the officers, and repeatedly lied about anyone else being in the home. Defendant then admitted that his wife was in the home. Under those circumstances, the officers' belief that defendant's wife was in danger was objectively reasonable.

State v. Fessenden, 258 Or App 639, 310 P3d 1163 (2013), *affirmed other grounds*, State v. Fessenden/Dicke, 355 Or 759 (2014); State v. Dicke, 258 Or App 678, 310 P3d 1170 (2013), *affirmed other grounds*, State v. Fessenden/Dicke, 355 Or 759 (2014). Emergency-aid exception allows police to enter property and seize an animal on verge of death, where officer reasonably believes that entry and seizure is necessary to protect animal's life. *See also* State v. Hershey, 286 Or App 824, 401 P3d 256, *rev den*, 362 Or 281 (2017) (same).

State v. Rennells, 253 Or App 580, 583, 291 P3d 777 (2012), *rev den*, 353 Or 410 (2013). Officers had reasonable belief that person was in physical danger and needed help where (1) neighbors reported screaming coming from apartment where there had been trouble before, (2) police knew defendant was not to contact resident but his car was nearby, (3) police knew one of the apartment occupants had seen them, but there was no response from within apartment when police asked to enter, and (4) screaming had gone silent.

State v. Wan, 251 Or App 74, 80, 281 P3d 662 (2012). Police officers responded to a call that a woman had been in an apartment crying for four hours after an argument. As the officers approached, they could hear loud crying coming from the apartment. When defendant, who is from Taiwan and does not speak English well, opened the door, the officers saw a woman lying in the fetal position crying. Despite defendant's physical resistance, the officers entered to check on the woman. The entry was lawful: "The officers knew that a woman had been crying in an apartment for four

hours after an argument. The officers could hear loud crying as they approached the apartment and confirmed that the crying came from inside when defendant opened his door. When defendant opened the door wider, the officers saw a woman lying in the fetal position crying. At that point, the officers had an objectively reasonable belief that a warrantless entry was necessary to assist a person who was seriously injured."

State v. Weaver, 214 Or App 633, 168 P3d 273, *rev den,* 343 Or 691 (2007). During a welfare check on defendant's children, the emergency-aid doctrine authorized an officer to physically prevent defendant from slamming the front door. Defendant's reported neglect, her prior mental-commitment order, her erratic behavior, and her possession of weapons supplied reasonable grounds to believe that the children were in danger.

State v. Torres, 201 Or App 275, 118 P3d 268 (2005), *rev den*, 340 Or 308 (2006). Officers' warrantless entry into an attached garage after lawfully entering residence to investigate possible burglary in progress was justified by officers' reasonable belief, based on noises coming from garage, that a person inside might be in need of assistance.

State v. McDonald, 168 Or App 452, 7 P3d 617, *rev den*, 331 Or 193 (2000). An officer was justified in searching defendant's room for information to determine the amount, variety, and combination of drugs taken by defendant to avert an apparently life-threatening drug overdose. The emergency did not dissipate merely because, by the time the officers arrived, defendant had regained consciousness and was denying that he had ingested drugs.

State v. Martofel, 151 Or App 249, 948 P2d 1253 (1997), *rev den,* 327 Or 82 (1998). Officers reasonably believed that an emergency existed when they received reports of an armed man in a residential area, even though the man later proved to be a hunter waiting for a ride.

State v. DeAubre, 147 Or App 412, 937 P2d 125 (1997). Hospital staff who were treating defendant for an overdose of prescription drugs acted within the emergency aid exception when they searched her backpack to identify what drugs she had taken.

State v. Karlow, 121 Or App 524, 855 P2d 1134 (1993). Evidence in plain view of officers who entered a hotel room in response to a medical emergency was admissible.

State v. Agnes, 118 Or App 675, 848 P2d 1237 (1993). The "emergency-aid exception" justified entry into an apartment by officers responding to neighbors' report of screaming and banging; the door was answered by a frightened female, the apartment was in disarray, and an abusive, intoxicated male told the officers to leave.

State v. Russell, 118 Or App 652, 848 P2d 657 (1993). Where small children in a house could not awaken their mother or open the door, the "emergency-aid exception" justified entry into the residence; the officer's discovery and warrantless seizure of marijuana plants was lawful.

State v. Follett, 115 Or App 672, 840 P2d 1298 (1992), *rev den,* 317 Or 163 (1993). The "emergency-aid exception" justified search of defendant's car for drugs where defendant, after being arrested for DUII, experienced seizures and manifested symptoms of drug overdose.

State v. Miller, 300 Or 203, 709 P2d 225 (1985), *cert den*, 475 US 1141 (1986). Court upheld warrantless entry of defendant's hotel room; police did not have to accept defendant's word that his victim was already dead.

2. Cases in Which Emergency-Aid Exception Was *Not* Justified.

State v. Stanley, 287 Or App 399, 404 P3d 1100 (2017). Police responded to a domestic violence call, and defendant was sitting outside. Police went inside, where the victim was, to see "if there was a crime, in fact, that happened" or "if anybody was injured inside," and "to make sure that [the victim] was okay." Police did not have the requisite subjective belief under the emergency aid exception, because that exception "requires more than a speculative concern that someone may need assistance; rather, police must actually have a subjective belief that a person *is* seriously injured and in need of immediate assistance."

State v. Hamilton, 285 Or App 315, 397 P3d 61 (2017). When police responded to a call that the caller was in a dispute with his roommate, who had threatened to kill him, police did not have subjective belief that warrantless entry was necessary to render immediate aid after police had already removed two people from the house. The officers' testimony that they went back in the house to discover *if* anyone else was inside and needed aid did not show the necessary belief because "a speculative belief that someone might require aid does not justify a warrantless search under the emergency aid exception."

State v. Potter, 282 Or App 605, 385 P3d 1105 (2017). Police responded to a suspected suicide attempt and found defendant sitting outside her home; defendant was upset, but conscious and able to clearly articulate her frustrations. The initial emergency dissipated when police found defendant, who was not demonstrating symptoms of a recent drug overdose or a need for urgent medical care. The emergency was reintroduced when defendant locked herself in her bedroom after expressing suicidal thoughts. That emergency, however, dissipated when the officer kicked down the door and observed defendant without any pills or a glass of water nearby. Thus, the officer's later search for pills that defendant might have ingested was not justified.

State v. Sullivan, 265 Or App 62, 333 P3d 1201 (2014). Evidence did not show risk of *imminent* harm to defendant's seven-year-old child, even though defendant had refused to obey the officer's order to stop, yelled at the child in a slurred voice, fled after a police command to stop, had a concealed weapons permit, and that he had 'urged or pushed' the child up the stairs and into the apartment, then slammed the door and locked himself and the child in his apartment, and had concealed himself and the child from view.

State v. McCullough, 264 Or App 496, 336 P3d 6 (2014). Because there was no evidence in the record to support a finding the officer had a subjective belief that defendant needed immediate aid or assistance, court did not address whether such a belief would have been objectively reasonable.

State v. Lange, 264 Or App 126, 329 P3d 797 (2014). The manager of an Internet café called 911, after defendant stayed in the restroom for fifteen minutes and the manager heard banging and moaning coming from restroom. When Officer Juilfs arrived, he heard "running water in the sink, throat clearing, and rustling and banging noises." Those noises were insufficient to support a reasonable belief that defendant was in need of immediate aid or had suffered, or was imminently threatened with suffering, serious physical injury or harm. The fact that Juilfs waited five minutes for his backup to arrive and did not ask defendant about his condition suggests that Juilfs did not believe that defendant's condition or circumstances were such that he required emergency aid.

State v. Bistrika, 262 Or App 385, 324 P3d 584 (2014). Emergency-aid exception initially justified warrantless entry onto property where defendant's mother reported she thought defendant's brother had fallen into pond on the property, but emergency dissipated after person identified himself as the brother and said he was fine.

State v. Lorenzo, 252 Or App 263, 287 P3d 1133 (2012), *reversed other grounds*, 356 Or 134 (2014). Officer did not have objectively reasonable belief that it was necessary to enter defendant's apartment to assist someone who had suffered serious physical injury or harm. Officers were called because a man who lived with defendant and had a firearm was suicidal, that man was in handcuffs, officer's experience was that suicidal persons sometimes harm others, and there was no answer when friend called defendant and officers repeatedly knocked on defendant's door; nevertheless, officers had no specific information that defendant was injured or in danger.

State v. Shirk, 248 Or App 278, 273 P3d 254 (2012). The emergency-aid doctrine did not justify entry into motel room to check on baby because there was no "true emergency" requiring immediate aid to the baby, given that the officers did not observe signs that the baby was in distress or immediate danger and thus had no reason to believe that he had suffered or was "imminently threatened with suffering, serious physical injury or harm."

State v. Pierce, 226 Or App 336, 203 P3d 343 (2009). Police officers responding to noise complaint did not have good faith belief or reasonable grounds to believe that noise from residential backyard indicated "an immediate need for their assistance for the protection of life" as required under emergency aid exception to search warrant requirement; rather, officers were merely investigating crime of disorderly conduct.

State v. Salisbury, 223 Or App 516, 196 P3d 1017 (2008). Forced entry not justified under emergency-aid doctrine where: (1) officer followed defendant home after seeing him speeding, (2) officer heard "a female voice screaming, heard someone use a profanity, heard yelling and screaming with both a male and a female voice," and (3) nobody answered door when officer knocked and announced his presence or for the next 20 minutes while officers tried to find the phone number for the apartment or contact the manager. No "true emergency" existed here because nothing indicated that an act of violence had occurred inside the apartment, and the record failed to show why officer believed someone inside apartment was in peril.

State v. Martin, 222 Or App 138, 193 P3d 993, *rev den*, 345 Or 690 (2009). Emergency-aid doctrine did not justify officers' entry into defendant's house. Although some evidence indicated defendant had been in an auto collision, nothing suggested she had been hurt. Moreover, when she answered the door naked and ran into a back bedroom, nothing suggested that she was in danger or that police needed to protect her.

State v. Goodall, 219 Or App, 183 P3d 199 (2008). Officers who were invited into the entry of defendant's house noted a dozen bags of rotting garbage on the porch, black mold on the inside of the front window, and an overwhelming smell of feces, garbage, and mold. Emergency-aid doctrine did not authorize their warrantless walk-through of the remainder of the house because officers testified that they would have taken infant (that defendant was holding in her arms) into protective custody based on their observations from the porch and living room regardless of observations made in the rest of the house; no "true emergency" existed because the officers did not need to search the house for the infant, and any emergency could have been alleviated by taking the child into protective custody immediately.

State v. Christenson, 181 Or App 345, 45 P3d 511 (2002). Warrantless entry was not authorized under either the community-caretaking statute, ORS 133.033, or the constitutional emergency-aid exception where: (1) a neighbor called to report that the front door was open under "suspicious" circumstances and that the resident's two pits bulls were at large, (2) the officers found the front door open, and (3) when the officers called out, no one responded.

State v. Sanchez, 105 Or App 451, 805 P2d 153 (1991). The mere fact that the officer smelled ether coming from an apparently unoccupied residence did not justify his warrantless entry into the residence under the "emergency assistance" doctrine to aid entry by the firefighters.

State v. Bramson, 94 Or App 374, 756 P2d 824 (1988). No "emergency" justifying a warrantless entry into a residence was established where the occupants were out of town, the door was open at 7:20 a.m., the temperature was 30 degrees, the house was unlighted, and a car was parked in the driveway.

State v. Apodaca, 85 Or App 128, 735 P2d 1264 (1987). Open front door and broken screen did not constitute "strong showing" that a seriously injured person might be inside the house or that a burglary was in progress or had been committed.

State v. Pearson, 83 Or App 624, 732 P2d 937 (1987). Entry was not justified by the emergency doctrine where officers entered with landlord during inspection of premises for damage.

Fourth Amendment.

The Fourth Amendment permits a warrantless entry and search where:

(1) Officer reasonably believes that someone immediately needs assistance, or
(2) To protect or to preserve life or property.

The fact that an officer might also subjectively intend to make an arrest is irrelevant as long as the circumstances, when viewed objectively, justify the action. *Brigham City, Utah v. Stuart*, 547 US 398, 126 S Ct 1943, 1948, 164 L Ed 2d 650 (2006). The gravity of the underlying offense is a factor in determining the nature of the emergency; however, even in a situation involving only a minor assault, the existence of *ongoing violence* within the home will provide an objectively reasonable basis to believe that someone might need aid and that the violence is just beginning. *Brigham City, Utah* v. *Stuart*, 126 S Ct at 1948-49.

In such an entry, officers may seize any contraband or evidence of a crime that is in their plain view. *Mincey v. Arizona*, 437 US 385, 98 S Ct 2408, 57 L Ed 2d 290 (1978). The exception continues only as long as the emergency/exigency continues. *Michigan v. Clifford*, 464 US 287, 104 S Ct 641, 78 L Ed 2d 477 (1984). In *Clifford*, the Supreme Court held that entry to fight a fire did not require a warrant, and officers could remain on the premises to seize evidence of arson in plain view and investigate the causes of the fire. But a later entry was too detached from the initial exigency, was not a continuation of the earlier entry and, therefore, violated the Fourth Amendment.

In *Michigan v. Fisher*, 558 US 45, 130 S Ct 546, 175 L Ed 2d 410 (2009), officers responded to a domestic-disturbance call and found a pickup crashed in the driveway, windows of the house broken, and blood on the pickup and on a door to the house; they could see defendant inside screaming and throwing things, but he would not answer the door. When they attempted to push partway through the barricaded front door, they saw defendant pointing a rifle at them. The Court held that the officers' entry was justified under the "emergency-aid exception" to the Fourth Amendment because they had a basis to believe that defendant or someone else was injured inside (application of the exception "does not depend on the officers' subjective intent or seriousness of any crime they are investigating when the emergency arises"); and, although the trail of blood could have been (and was) the result of only a minor injury to defendant's hand, "officers do not need ironclad proof of a likely serious, life-threatening injury to invoke the emergency-aid exception."

In *State v. Dicke*, 258 Or App 678, 310 P3d 1170 (2014), *affirmed other grounds*, *State v. Fessenden/Dicke*, 355 Or 759 (2014), the court held that the federal emergency-aid exception allowed police to enter property and seize an animal on verge of death, where officer reasonably believed that entry and seizure was necessary to protect animal's life.

H. EXIGENT CIRCUMSTANCES.

1. General Principles.

Oregon Law.

Exigent-circumstances cases decided under Article I, section 9, are generally consistent with principles developed under the Fourth Amendment.

This exception differs from the emergency-aid exception, because it requires both exigent circumstances *and* probable cause to believe that a crime has occurred. *State v. Bridewell*, 306 Or 231, 235-36, 759 P2d 1054 (1988); *State v. Meharry*, 342 Or 173, 177, 149 P3d 1155 (2006).

"An exigent circumstance is a situation that requires the police to act swiftly to prevent danger to life or serious damage to property, or to forestall a suspect's escape or destruction of evidence." *State v. Stevens*, 311 Or 119, 126, 806 P2d 92 (1991); *State v. Torres*, 201 Or App 275, 285, 118 P3d 268, *rev den*, 340 Or 308 (2006). *See also State v. Pierce*, 226 Or App 336, 203 P3d 343 (2009) (crime of disorderly conduct—"based merely on people loudly 'having an argument' in the middle of the night"—did not create such a situation). Whether exigent circumstances exist is assessed based on objective reasonableness, and the analysis is not well-served by too readily second-guessing the officer's decisions in the field. *State v. Fair*, 353 Or 588, 611-13, 302 P3d 417 (2013).

The exigent circumstances must exist both: (1) For the item police wish to seize; *and* (2) during the time frame in which police wish to seize it. *See State v. Sanders*, 233 Or App 373, 226 P3d 82 (2010) (warrantless entry into defendant's house while in process of obtaining search warrant was justified when police learned from CRI that defendant planned to move out of house shortly, and because obtaining a warrant would have taken over an hour and a half); *State v. Morgan*, 230 Or App 395, 215 P3d 120, *rev den*, 347 Or 365 (2009) (exigent circumstances justified warrantless entry into motel room when defendant fled into the room after the officer tried to stop defendant, who was loading copper wire into car that he believed was stolen, and when officers saw one of the room's occupants try to escape from the back window); *State v. Parras*, 110 Or App 200, 822 P2d 151 (1991) (warrantless seizure of a rifle from the bed of a pickup truck a half hour after a shooting incident was reported was justified by exigent circumstances, but the subsequent warrantless seizure of cartridges and shell casings from inside the pickup after one suspect had been arrested was not); *State v. Meyer*, 120 Or App 319, 852 P2d 879 (1993) (search of a box in a car parked at defendant's residence not justified by the officer-safety or exigent-circumstances rationales, because defendant had been arrested, handcuffed, and placed in a patrol car; even if the box could have contained a gun, any exigency dissipated once the officers took possession of the box).

Additionally, if police seize an item based on exigent circumstances, keeping that item in police custody constitutes a "continuing seizure" that itself must be justified. *State v. Thompson*, 370 Or 273, 281, 518 P3d 923 (2022). And "the police may not create or prolong exigent circumstances by their own inaction or for their own convenience." *State v. Thompson*, 370 Or at 282. Thus, an officer cannot "extend" the circumstances that justify a warrantless seizure of property by deciding "not to apply for a warrant despite having the necessary information." *State v. Thompson*, 370 Or at 285. In *Thompson*, for example, an officer seized the defendant's phone based on the exigency that, if the officer left the phone with the defendant, he might destroy the evidence on it before the officer

could get a warrant. But, rather than immediately seeking a warrant, the officer retained the phone for five days before doing so. State v. Thompson, 370 Or at 276-77. The Oregon Supreme Court held that the continued seizure of the phone was unlawful, reasoning that "the circumstances that justified the initial seizure of defendant's cellphone did not justify police in keeping it for five days." State v. Thompson, 370 Or at 285. The court rejected the state's argument that, once police have lawfully seized evidence of a crime, they may retain that evidence indefinitely for use at trial. State v. Thompson, 370 Or at 285. The court explained that police may do so only if the evidence at issue is contraband. State v. Thompson, 370 Or at 285-86. But the court made clear that it did "not hold that there is a specific time limit within which police must obtain a warrant in every case, or that there was such a precise deadline in this case." Instead, "the continued seizure was justified only for the time that was reasonably necessary to obtain a warrant," and the five-day delay was not reasonable under the circumstances. State v. Thompson, 370 Or at 288.

Note that the exigencies involved with field sobriety tests and tests of blood alcohol content during DUII investigations create somewhat special circumstances and are discussed fully in a separate section below.

> **PRACTICAL SUGGESTION:** The state must provide testimony regarding the estimated time required to get a warrant, including a telephonic warrant, to establish exigency. *See* State v. Moylett, 313 Or 540, 836 P2d 1329 (1992); *but see* State v. Machuca, 347 Or 644, 227 P3d 729 (2010) (discussed fully below; disavowing Moylett in part); *see also* State v. Kruse, 220 Or App 38, 184 P3d 1182 (2008) (sole explanation for exigency was officer's statement that it would take a "very lengthy" time to get a warrant held insufficient to support finding of exigent circumstances to enter residence); State v. Saunders, 103 Or App 488, 799 P2d 159 (1990). The Oregon Court of Appeals has suggested that a period of five to six hours to obtain a search warrant was not unreasonable. *See* State v. Sargent, 123 Or App 481, 860 P2d 836 (1993), *aff'd on other grounds*, 323 Or 455, 918 P2d 819 (1996). But the court has also recognized that technological advances and legislative changes have made the process of obtaining a warrant more efficient. State v. McCarthy, 369 Or 129, 173-76, 501 P3d 478 (2021); State v. Mazzola, 356 Or 804, 811, 345 P3d 424 (2015). In presenting evidence of the time required to apply for a search warrant, consider the time needed to draft the affidavit and proofread it, as well as the time to find a judge to review the affidavit and sign the warrant.

> **NOTE**: ORS 133.539 provides additional restrictions on "forensic imaging" (commonly known as a "data dump") from portable electronic devices. Police may not download or transfer data from a portable electronic device based solely on probable cause and exigent circumstances. Instead, police need either a warrant or lawful consent. Further, any information obtained in violation of ORS 133.539 is inadmissible in any proceeding against "either the owner of the portable electronic device or a person with a reasonable expectation of privacy in the contents of the device." *See* "Miscellaneous Categories, Portable Electronic Devices" for more information.

Fourth Amendment.

The Fourth Amendment also permits warrantless entry and search if (1) probable cause supports the search or seizure and (2) "exigent circumstances" exist. "Exigent circumstances include imminent destruction of evidence, a threat to the safety of law enforcement officers or the general public, 'hot pursuit' of a suspect by police, or likelihood that a suspect will flee before the pursuing officer can obtain a warrant." Forty-Ninth Annual Review of Criminal Procedure, 49 GEO. L.J. ANN.

REV. CRIM. PROC. 51, 98 (2020) (footnotes omitted). *See* Kentucky v. King, 563 US 452, 131 S Ct 1849, 179 L Ed 2d 865 (2011); *United States v. Santana*, 427 US 38, 96 S Ct 2406, 49 L Ed 2d 300 (1976); *Cupp v. Murphy*, 412 US 291, 93 S Ct 2000, 36 L Ed 2d 900 (1973); *Warden v. Hayden*, 387 US 294, 87 S Ct 1642, 18 L Ed 2d 782 (1967); *Schmerber v. California*, 384 US 757, 86 S Ct 1826, 16 L Ed 2d 908 (1966); *Ker v. California*, 374 US 23, 83 S Ct 1623, 10 L Ed 2d 726 (1963).

At such times, officers may seize any contraband or evidence of a crime that is in their plain view. *Mincey v. Arizona*, 437 US 385, 98 S Ct 2408, 57 L Ed 2d 290 (1978). The exception continues only as long as the emergency/exigency continues. *Michigan v. Clifford*, 464 US 287, 104 S Ct 641, 78 L Ed 2d 477 (1984). A need to quell ongoing violence is an exigent circumstance. *See Brigham City, Utah v. Stuart*, 547 US 398, 126 S Ct 1943, 1949, 164 L Ed 2d 650 (2006) (officers who had probable cause to believe that violence was just beginning were not required to wait for another blow: "[T]he role of a peace officer includes preventing violence and restoring order, not simply rendering first aid to casualties").

In *Kentucky v. King*, officers closed in to arrest a drug dealer after a controlled buy at an apartment complex, but the dealer went into an apartment. The officers did not know which door he had entered, but smelled burning marijuana coming from the apartment on the left and assumed (wrongly, it turned out) that the dealer had entered that apartment. The officers banged loudly on that door and announced their presence, and then heard people moving inside and things being moved about. Believing that evidence of the drug deal was about to be destroyed, they forced open the door. Defendant and others were inside smoking marijuana. The Court held that officers lawfully entered the apartment without a warrant because they were in hot pursuit of a fleeing suspect.

In *Arizona v. Johnson,* 555 US 323, 129 S Ct 781, 172 L Ed 2d 694 (2009), the Court upheld officers' request for a driver stopped for an infraction to step out of the car for questioning based on her belief that defendant was involved in gang activity and upheld the resulting frisk and discovery of a firearm. Because traffic stops are "fraught with danger to police officers," the Fourth Amendment permits an officer during a lawful traffic stop to order the occupants out of the vehicle. Incident to that, an officer also may perform a patdown of the driver and any passenger on reasonable suspicion that they may be armed and dangerous. "[A]n officer's inquiries into matters unrelated to the justification for the traffic stop *** do not convert the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop."

To justify a warrantless search based on exigent circumstances, the government must show that the search was conducted in a reasonable manner. *Schmerber v. California*, 384 US 757. The government should also be prepared to prove that a warrant, even a telephonic warrant, was unavailable or impractical.

a. Police May Not Create Their Own Exigent Circumstances.

The police may not create exigent circumstances by choosing not to obtain a warrant before confronting a suspect. *State v. Fondren*, 285 Or 361, 367, 591 P2d 1374 (1979) (police approached defendant at work and asked for consent to search his parked car, which defendant refused); *State v. Price*, 92 Or App 669, 759 P2d 1130 (1988) (defendant refused officer's request to search her purse for marijuana); *State v. Rudder,* 347 Or 14, 217 P3d 1064 (2009) (officer not entitled to visually inspect contents of defendant's pockets after handcuffing him without attempting first to complete a patdown frisk); *State v. Pierce,* 226 Or App 336, 203 P3d 343 (2009) (officer responding to neighbor's 1 a.m. noise complaint heard shouting in back yard and walked down driveway and looked through fence into back yard rather than knocking on front door not justified by exigent circumstances). "Similarly, law enforcement agencies and courts cannot create exigent circumstances by failing to take reasonable steps to develop warrant processes that protect against the invasion of

the rights of a citizen that results from an unnecessarily cumbersome warrant process." State v. McCarthy, 369 Or 129, 177, 501 P3d 478 (2021) (internal quotation marks and citation omitted).

But it is permissible for the police to act on an exigency that arises because of their lawful observations. State v. Porter, 198 Or App 274, 281, 108 P3d 107 (2005) (officers responding to a noise complaint lawfully observed drug activity through window as they approached, knocked, confronted the occupants, and then conducted a lawful warrantless sweep of the residence to prevent destruction of evidence); State v. Kosta, 304 Or 549, 748 P2d 72 (1987) (police did not improperly create exigency for a warrantless search of defendant's trunk by waiting until after defendant had picked up a package of drugs and placed it in his trunk before approaching him); State v. Rodriguez-Ganegar, 186 Or App 530, 63 P3d 1225, *rev den,* 335 Or 578 (2003) (officers who inadvertently but lawfully saw drug activity through crack in curtains of motel room had exigent circumstances justifying an entry when occupants delayed responding to knocks and officers feared destruction of evidence). *See also* State v. Sanders, 233 Or App 373, 226 P3d 82 (2010) (warrantless entry into defendant's house while in process of obtaining search warrant for a meth-dealing operation was justified when police learned from CRI that defendant planned to move out of the house shortly, and obtaining a warrant would have taken over an hour and a half; officers did not create the exigency by abandoning further attempts to obtain the warrant before entering to secure drugs, or by failing to obtain warrant earlier while actively working to confirm a CRI's statements). Further, a county does not create its own exigency simply by declining to use telephonic warrants. See State v. Gerety, 286 Or App 175, 181, 399 P3d 1049 (2017). Thus, the court will decide cases based on the evidence regarding "how long it actually takes to obtain a warrant given the procedures available to the officers." State v. Gerety, 286 Or App at 181.

Unlike the Oregon appellate courts, the Court in Kentucky v. King, 563 US 452, 131 S Ct 1849, 179 L Ed 2d 865 (2011), rejected the "police-created exigency doctrine" on the ground that it "unjustifiably interferes with legitimate law-enforcement strategies." Officers need not seek a warrant as soon as the bare minimum probable cause is acquired; rather, nothing precludes them from knocking at the door. Thus, an officer does not create an exigency merely because a later court disagrees with his or her approach (or even if it is contrary to the practices of their jurisdictions); that approach fails to provide clear guidance to officers and allows courts to make judgments on matters that are the province of law-enforcement agencies.

b. Anticipatory Warrants.

In State v. Collicott, 56 Or App 605, 642 P2d 1187, *rev den,* 293 Or 190 (1982), the exigency arose from the immediacy of a drug transaction that was pre-arranged by informants cooperating with the police. The court concluded that the exigency (that the evidence would be destroyed) was brought about by police and, as such, could not support the warrantless entry into defendant's home. The opinion speaks in terms of *prospective* probable cause for a warrant to head off exigency, *i.e.*, that the officers should have sought a warrant even before the delivery took place and executed it only if the deal was consummated. *But see* State v. Ritter, 71 Or App 282, 692 P2d 158 (1984) (because the police did not know where or when defendant would arrive, they could not get a warrant, and, therefore, an exigency existed). But the Oregon Supreme Court has since made clear that, under Oregon statutory law, a judge may issue a warrant only based on probable cause to believe that the objects of the search are in the place to be searched at the time the warrant is issued. State v. Lee, 371 Or 200, 532 P3d 894 (2023), *adh'd to as modified*, 373 Or 525 (2025). Thus, anticipatory warrants are not permitted under Oregon law, and evidence obtained by way of an anticipatory warrant must be suppressed under ORS 133.673(1). State v. Lee, 373 Or 525, 529-30, 568 P3d 139 (2025).

Although in *United States v. Grubbs*, 547 US 90, 126 S Ct 1494, 164 L Ed 2d 195 (2006), the United States Supreme Court held that the Fourth Amendment permits the issuance of anticipatory warrants, there is no affirmative requirement that an officer pursue that route.

2. Securing Premises While Awaiting Warrant.

Oregon Law.

Under Article I, section 9, of the Oregon Constitution, the "securing" of premises while a search warrant is sought is a seizure that must be justified under a recognized exception to the search warrant requirement. *State v. Smith*, 327 Or 366, 376, 963 P2d 642 (1998) (padlocking a storage unit while a warrant was sought to enter it was a warrantless seizure). Unless there is a legal justification for it, the seizure is unlawful. Absent probable cause and exigent circumstances, the state may not "secure premises." *State v. Juarez-Godinez*, 326 Or 1, 942 P2d 772 (1997).

Exigent circumstances can justify securing the premises while a warrant is obtained. *See State v. Heikkinen*, 94 Or App 472, 765 P2d 1252 (1988) (the sound of a flushing toilet and the strong odor of cooking meth coming from a residence); *State v. Pearson*, 69 Or App 211, 686 P2d 411, *rev den,* 298 Or 239 (1984) (suspects scurrying to vehicles with bags of items justified police entry onto defendant's property; "[t]he fact that [the officers] stated that their purpose was to 'freeze the scene' until they obtained a warrant does not affect the lawfulness of their entry").

The securing of property without lawful justification does not necessarily compel the suppression of evidence subsequently seized during execution of a warrant. In *State v. Smith*, 327 Or 366, 963 P2d 642 (1998), the court concluded that, in the absence of any showing that the padlocking of a storage unit while a warrant was sought allowed the police to obtain any evidence otherwise not available to the police (*e.g.*, if someone had attempted to gain access to the unit while it was secured), the Oregon Constitution did not require the suppression of evidence seized pursuant to a warrant. *Accord State v. Sargent*, 323 Or 455, 918 P2d 819 (1996). *But see State v. DeJong*, 368 Or 640, 497 P3d 710 (2021) (insufficient evidence to show that state would have inevitably discovered evidence without securing home, because individuals sought and were denied access to home).

> **PRACTICAL SUGGESTION:** To avoid suppression of evidence due to an officer's temporary seizure of a location or vehicle while a search warrant was obtained, you need to establish both (1) that the warrant was not based on anything discovered as a result of the seizure, and (2) that seizure did not actually enable to the police to discover any evidence during execution of the warrant that they would not have discovered had no seizure occurred. If no one with authority to enter the location or vehicle actually attempted to do so in the interim, the temporary seizure was harmless even if unlawful.

See also a more thorough discussion of securing persons, vehicles, and premises in Chapter V (Searches With Warrants).

Fourth Amendment.

Under the Fourth Amendment, "securing a dwelling, on the basis of probable cause, to prevent the destruction or removal of evidence while a search warrant is being sought is not itself an unreasonable *seizure* of either the dwelling or its contents." *Segura v. United States*, 468 US 796, 810, 104 S Ct 3380, 82 L Ed 2d 599 (1984) (emphasis added). *Accord Illinois v. McArthur*, 531 US 326, 121 S Ct 946, 148 L Ed 2d 838 (2001) (two-hour seizure of the defendant's home while police

obtained a warrant did not violate the Fourth Amendment because police reasonably feared defendant would destroy evidence if allowed to enter the home unaccompanied by an officer).

Unlike a mere seizure of premises, a warrantless *entry* into a dwelling without exigent circumstances is an illegal *search* under the Fourth Amendment. Segura v. United States, 468 US at 806, 810 (different interests are implicated by a seizure than by a search). But even though such an entry is unlawful, this illegality does not necessarily require the suppression of evidence subsequently seized under a warrant. Segura v. United States, 468 US at 799 (evidence seized pursuant to search warrant issued wholly on information known to officers before illegal entry was not the fruit of the illegal entry and need not be suppressed).

3. Danger to Persons, Property, or Animals.

See also discussion of the Emergency-Aid Exception in this chapter, and discussion of "Protective Sweeps" in this chapter.

Michigan v. Clifford, 464 US 287, 104 S Ct 641, 78 L Ed 2d 477 (1984). Entry to fight fire did not require a warrant, and officers could remain on the premises to seize evidence of arson in plain view and investigate the causes of the fire. But a later entry was too detached from the initial exigency, was not a continuation of the earlier search and, therefore, violated the Fourth Amendment.

State v. Fessenden/Dicke, 355 Or 759 (2014). Exigent circumstances authorized officers to enter property to seize horses that were suffering from neglect, because they had probable cause to believe that a crime was in progress and entry would prevent serious ongoing harm to the animals.

State v. Fair, 353 Or 588, 302 P3d 417 (2013). Police responded to an aborted 9-1-1 call suggesting that a woman in the home was being assaulted. When the officers arrived, the husband was uncooperative and evasive, and when the wife and her husband answered the front door, the wife had a large swollen area over her right eye. Those circumstance "created a patent exigency excusing a warrant" because "the husband was still in a position to harm [his wife] further, to slam the door shut and evade arrest, or to otherwise escalate into physical confrontation." Those exigent circumstances justified ordering the parties onto the porch, "for purposes of taking control of the unpredictable and potentially violent situation, and to take defendant's husband into custody."

State v. Miskell, 351 Or 680, 698, 277 P3d 522 (2012). A defendant's continuing involvement in undesirable activity that police would wish to stop is not an exigency that dispenses with the need to obtain a court order prior to intercepting the defendant's conversations.

State ex rel Juv Dept v. M.A.D., 348 Or 381, 233 P3d 437 (2010). When a school official develops reasonable suspicion that individual possesses illegal drugs, which pose a threat to others at the school, the official may search the individual without obtaining a warrant. See also State v. A.J.C., 355 Or 552, 326 P3d 1195 (2014) (school official can search backpack, even though it was already seized from student, where student had made targeted threat and official reasonably suspected that student had a firearm for the purpose of shooting another student at school).

State v. Stevens, 311 Or 119, 806 P2d 92 (1991). Search of defendant's residence to look for recently kidnapped children was justified by exigent circumstances, *i.e.*, imminent danger to life.

State v. Bridewell, 306 Or 231, 759 P2d 1054 (1988). Warrantless entry onto defendant's remote property was not justified by exigent circumstances because, although defendant was missing under apparently suspicious circumstances, the officer did not have probable cause and he waited until the next day before responding to the report.

State v. Hawthorne, 316 Or App 487, 500-02, 504 P3d 1185 (2021), *rev den*, 369 Or 856 (2022). Exigency existed to "ping" defendant's cell phone and find his location because the police had reasonable grounds to believe that immediately locating him was necessary to prevent physical harm to several people. Defendant had threatened the lives of W, his girlfriend J, and their unborn child for several months; defendant then traveled to W's family's home, threatened the people there with a gun, and fatally shot W's father. Given those circumstances, the exigency remained even though police did not "ping" defendant's phone until three hours after the shooting, when W, J, and W's family were with police or in the hospital.

State v. Hsieh, 314 Or App 313, 499 P3d 142 (2021), *rev den*, 369 Or 505 (2022). Where officer reasonably believed that cat was suffering under "conditions proscribed by statute" and that absent immediate action, the cat would continue to suffer, exigency justified seizure of cat.

State v. Torres, 201 Or App 275, 285, 118 P3d 268 (2005), *rev den,* 340 Or 308 (2006). The court upheld lawfulness of the officers' warrantless entry into defendant's residence to search for a victim or an accomplice, based on their reasonable belief that there was a burglary in progress.

State v. Lynch, 135 Or App 528, 533, 900 P2d 1042, *rev den,* 322 Or 362 (1995). Because officers had probable cause to believe a residential burglary was in progress, exigent circumstances justified their entry and search into areas that could conceal a burglar.

a. Danger to persons.

State v. Meyer, 120 Or App 319, 852 P2d 879 (1993). Search of a box in a car parked at defendant's residence not justified by the officer-safety or exigent-circumstances rationales, because defendant had been arrested, handcuffed, and placed in a patrol car; even if the box could have contained a gun, any exigency dissipated once the officers took possession of the box.

State v. Parras, 110 Or App 200, 822 P2d 151 (1991). Warrantless seizure of a rifle from the bed of a pickup truck 30 minutes after a shooting incident was reported was justified by exigent circumstances, but the subsequent warrantless seizure of cartridges and shell casings from inside the pickup after one suspect had been arrested was not.

State v. Bass, 98 Or App 266, 778 P2d 993, *rev den*, 308 Or 500 (1989). Exigent circumstances existed for a search of defendants' car, which stopped after running off the road during a high-speed chase during which an occupant had fired a shotgun at police. Police could not see whether anyone remained in or near the car, and waited 30 minutes before approaching it. Police had probable cause to believe that the car contained guns, ammunition, or a suspect, and were entitled, for their own safety, to search to determine whether the fugitives had taken a shotgun with them.

Warden v. Hayden, 387 US 294, 87 S Ct 1642, 18 L Ed 2d 782 (1967). Exigent circumstances justified warrantless entry of a house to search for an armed-robbery suspect and weapons, because delay would endanger the lives of officers and citizens.

b. Drug Labs.

Exigent circumstances may justify a warrantless entry if (1) police have probable cause to believe a meth lab is operating within a populated community; (2) they enter promptly; and (3) their search is not more intrusive than necessary. Under these circumstances, the state is not required to show how much time would have been required to obtain a warrant. State v. Chapman, 107 Or App 325, 813 P2d 557 (1991).

c. Animals.

In State v. Hsieh, 314 Or App 313, 499 P3d 142 (2021), *rev den*, 369 Or 505 (2022), the Oregon Court of Appeals held that exigent circumstances justified an officer's seizure of a cat based on a report by a veterinarian, which included photos showing a cat with severe injuries that included burns to the body and exposed bone. The veterinarian opined that the cat was suffering and in desperate need of immediate medical treatment, but that defendant had refused any treatment other than antibiotics and pain medication, neither of which would resolve the cat's medical issues. The officer went to defendant's home to see the cat and concluded that its condition "seemed like a serious condition that needed treatment." When defendant refused to arrange for treatment, the officer seized the cat. The trial court denied the defendant's motion to suppress evidence resulting from the seizure and defendant was convicted of animal neglect.

In upholding the seizure, the Court of Appeals rejected the defendant's argument that exigent circumstances existed only if the cat faced a "risk of serious injury or death and not mere pain," especially where the defendant had taken some steps to treat the pain. The Court relied on State v. Fessenden/Dicke, 355 Or 759 (2014), holding that exigent circumstances do not require a risk of death or serious injury to an animal; rather, an officer who has probable cause to believe that a perpetrator is in the process of causing unlawful harm can take action to prevent the perpetrator from causing further imminent harm to a victim. For that reason, the existence of an exigency is determined by reference to the "'particularity of care or treatment that is required' in the statutes criminalizing abuse or neglect of certain animals[.]" State v. Hsieh, 314 Or App at 322, *quoting* Fessenden/Dicke, 355 Or at 774. In other words, "the state's interest in protecting an animal and bringing an alleged perpetrator to justice must yield to the constitutional protections against search and seizure, and the attendant warrant process, unless the condition of the animal represents a gross deviation from the norm. In prescribing the standard of care a person owes to an animal in their possession, the legislature did not require the utmost care or the best medicine available, rather the legislature required only reasonable care. * * * [A]n exigency exists when the animal's condition is a result of a gross deviation from the required standard of care, and * * * there must be a reasonable temporal nexus between the observed condition of the animal and the feared harm." Hsieh, 314 Or App at 323. Here, "a pre-seizure examination determined the animal's condition and need for immediate treatment," and that the owner was not providing that treatment. Guided by the statutory standards and legislative policy animating the animal-welfare laws, the officer had probable cause that a crime was in progress, and based on specific, articulable facts about the animal's condition, determined that warrantless action was needed to prevent the ongoing criminal act from further injuring the victim of the crime. Hsieh, 314 Or App at 323.

Note: Because the court ruled that the seizure was lawful under the exigent circumstances exception, the court did not address whether it was lawful under the emergency-aid exception.

4. Escape by Suspect/Hot Pursuit.

a. Hot Pursuit.

This is the classic form of exigent circumstance. A warrantless entry in hot pursuit is limited to crimes (felonies or misdemeanors); it does not include violations or infractions. Welsh v. Wisconsin, 466 US 740, 104 S Ct 2091, 80 L Ed 2d 732 (1984); State v. DeKuyper, 74 Or App 534, 703 P2d 261 (1985) (warrantless entry of house to arrest for MIP, a violation, is not permitted under Oregon statutes). *See also* State v. Meyer, 183 Or App 536, 53 P3d 940 (2002) (OSP officer who witnessed traffic violation, VBR, on Interstate Bridge between Washington and Oregon was not authorized to issue a citation in Washington, where he did not initiate the stop until defendant had

reached an exit on the Washington side; Washington fresh pursuit law permits entry only by an officer pursuing a driver suspected of certain *crimes*).

Oregon Law.

State v. Ritz, 291 Or App 660, 422 P3d 397 (2018). Warrantless entry into defendant's trailer was not justified because the record did not support an objectively reasonable belief that defendant intended to "make a break" from his trailer after the police arrived, where officers neither saw defendant trying to openly flee nor heard defendant say anything suggesting that he was going to try to flee, and police had trailer surrounded.

State v. Morgan, 230 Or App 395, 215 P3d 120 (2009). Warrantless entry into motel room was justified when officers, responding to report that people were loading copper wire into car, saw people matching the description leaning into the car and then flee into motel room despite officers' order to stop, and then saw that one of the occupants was trying to escape out a rear window.

State v. Snow, 337 Or 219, 94 P3d 872 (2004). Police officers attempted to stop defendant for reckless driving, but he eluded the officers in a short chase through city streets. Eventually the officers found his vehicle parked and unattended in a parking lot, and they searched it for evidence of his identity. The court upheld the search based on the exigent-circumstances exception, concluding (1) that the officers had probable cause to believe that the defendant had committed a felony and that evidence of his identity would be inside the car, and (2) that his fleeing "required the officers to act quickly to prevent his escape."

State v. Jangala, 154 Or App 176, 961 P2d 246 (1998). Entry into a residence in which a party involving the consumption of alcohol by minors was occurring was justified by the officers' fear, based on prior experience, that suspects and evidence of the crime of furnishing alcohol to minors would disappear. *Contrast* State v. DeKuyper, 74 Or App 534, 703 P2d 261 (1985) (warrantless entry of house to arrest for MIP, a violation, is not permitted under Oregon statutes).

State v. Ellett, 82 Or App 652, 728 P2d 954 (1986). Because there was no basis for believing that defendant *likely* was preparing to escape or destroy evidence, hot pursuit and other exigency grounds did not apply.

State v. Niedermeyer, 48 Or App 665, 617 P2d 911 (1980), *cert den*, 450 US 1042 (1981). Police officers with probable cause to believe that defendant had eluded a pursuing officer (a Class A misdemeanor) were authorized to arrest him when they saw defendant drive into his driveway. "When defendant did not heed [the officer's] call to stop and instead ran into his house, the police acted lawfully when they followed him through an open door." 48 Or App at 670.

State v. Peller, 287 Or 255, 598 P2d 684 (1979). Exigent circumstances were not present where the suspect simply remained in his house and failed to respond to the police knocking at his door; the mere fact that the defendant could have fled was insufficient absent evidence that he was inclined to do so.

State v. Girard, 276 Or 511, 555 P2d 445 (1976). Exigent circumstances justified entry where the officers knocked on the door and heard the suspect say, "Hurry, they are coming."

Fourth Amendment.

Under the exigency exception commonly known as "hot pursuit" —

Officers may conduct a warrantless search where:

(1) The officer has probable cause to arrest the suspect;
(2) The officer has probable cause to believe the suspect is in particular premises; and
(3) There is an urgent need for immediate police action because delay would increase the risk of harm or escape.

Lange v. California, 594 US 295, 141 S Ct 2011, 2016, 210 L Ed 2d 486 (2021). Although "[a] great many misdemeanor pursuits involve exigencies allowing warrantless entry," the pursuit of a fleeing misdemeanor suspect does not "categorically" qualify as an exigent circumstance. The Court declined to consider whether such a categorical rule exists for fleeing felons.

Kentucky v. King, 563 US 452, 131 S Ct 1849, 179 L Ed 2d 865 (2011). Officers lawfully entered premises without a warrant because they were in hot pursuit of a fleeing suspect.

Welsh v. Wisconsin, 466 US 740, 104 S Ct 2091, 80 L Ed 2d 732 (1984). Under the federal constitution, hot pursuit into a home is inapplicable to minor traffic infractions, at least when there is no immediacy and no continuous pursuit from the scene of the crime.

United States v. Santana, 427 US 38, 96 S Ct 2406, 49 L Ed 2d 300 (1976). The fact that the pursuit ended almost as soon as it began does not make it less than a "hot pursuit." A suspect could not avoid arrest by retreating from a doorway into the house as officers initiated an arrest.

Warden v. Hayden, 387 US 294, 87 S Ct 1642, 18 L Ed 2d 782 (1967). The police were in hot pursuit of an armed robber and followed him into a house where a gun, clothing, and other items relating to the robbery were discovered. The Court held that, in such a factual situation, it would be unreasonable to require the police to halt their investigation until a warrant was obtained.

b. Other Exigent-Circumstance Cases Involving Danger of Escape.

The risk of escape also may justify warrantless intrusions in other instances that differ in some respects from a typical "hot pursuit." Minnesota v. Olson, 495 US 91, 100, 110 S Ct 46, 107 L Ed 2d 15 (1990) (warrantless intrusion may be justified by need to prevent suspect's escape).

State v. Snow, 337 Or 219, 94 P3d 872 (2004). Officers attempted to stop defendant, but he eluded them. The court upheld the search of his vehicle, which the officers found parked and unattended in a parking lot, concluding that the officers had probable cause to believe that the defendant had committed a felony and that evidence of his identity would be inside the car, and that his fleeing "required the officers to act quickly to prevent his escape."

State v. Wright, 280 Or App 259, 381 P3d 944 (2016). An officer attempted to stop defendant for several traffic infractions, but defendant accelerated away from the officer and ultimately drove into a private driveway. When the officer knocked on the window of defendant's car, defendant looked away and drove his car into his garage. The officer followed on foot. Defendant's actions in attempting to elude the officer, combined with the fact that the officer was the only officer on the property when he followed defendant into the garage, support a finding that the officer reasonably believed that he needed to enter the garage to prevent defendant from escaping.

State v. Hickey, 107 Or App 8, 810 P2d 859 (1991). Exigent circumstances justified immediate police entry into a vehicle, which apparently had been abandoned by a fleeing robber, in order to find evidence of the robber's identity. *But see* State v. Crook, 93 Or App 509, 762 P2d 1062

(1988) (warrantless search of a suspect's parked vehicle for identification was invalid where the police already had a general description of the suspect and enough officers to secure the vehicle).

State v. Wynn, 102 Or App 1, 792 P2d 1234 (1990). The possibility that defendant had monitored police broadcasts relating victim's accusations and that he might attempt to escape if he heard his name mentioned did not justify warrantless entry of defendant's residence to arrest him.

State v. Brown, 98 Or App 129, 778 P2d 976 (1989). Police were entitled to enter a motel room to search for an escaped prisoner because there was a strong likelihood, not just a mere possibility, that a man who was trying to escape from a rear window was the inmate.

State v. Court, 81 Or App 598, 726 P2d 1205 (1986). No exigent circumstances were shown where the defendant refused to answer the officers' knock at the door.

c. Burglary In Progress.

In State v. Torres, 201 Or App 275, 118 P3d 268 (2005), *rev den,* 340 Or 308 (2006), the court upheld the lawfulness of the officers' warrantless entry into defendant's residence based on probable cause and exigent circumstances based on their reasonable belief that there was a burglary in progress in which the occupants might be endangered. *See also* State v. Lynch, 135 Or App 528, 900 P2d 1042, *rev den,* 322 Or 362 (1995) (because officers had probable cause to believe burglars were in defendant's house based on a neighbor's report of people breaking in, exigent circumstances justified entry to search for the burglars). *But see* State v. Christenson, 181 Or App 345, 45 P3d 511 (2002) (open front door and pit bulls "on the lam" insufficient to justify entry).

5. Destruction or Loss of Evidence.

a. Generally

Conducting a warrantless search or seizure to preserve evidence is justified if the police reasonably believe that unless they immediately conduct a warrantless search, the evidence is in imminent danger of being removed or destroyed. *Forty-Ninth Annual Review of Criminal Procedure*, 49 GEO. L. J. ANN. REV. CRIM. PROC. 51, 97 (2020) (footnote omitted). *See* Kentucky v. King, 563 US 452, 131 S Ct 1849, 179 L Ed 2d 865 (2011) (officers lawfully entered premises without a warrant because they were in hot pursuit of a fleeing suspect and reasonably feared the imminent destruction of evidence); Ker v. California, 374 US 23, 83 S Ct 1623, 10 L Ed 2d 726 (1963) (exigent circumstances justified warrantless entry of apartment to search for drugs where police had probable cause to arrest and there was danger that evidence would be destroyed); State v. Sholedice/Smith, 364 Or 146, 155, 431 P3d 386 (2018), *adh'd to as modified on recons,* 364 Or 575 (2019) (where officer had probable cause that package contained contraband, seizure of the package while asking for consent to search was reasonable because officer reasonably could have concluded that a warrant could not have been obtained in time to deliver the package by its guaranteed delivery time and that the recipient would dispose of the contents of the package once delivered); In re J.C.L., 261 Or App 692, 698-99, 325 P3d 740 (2014) (seizure of youth's computer, which was in the possession of a third party, justified by exigent circumstances because officer had reasonable belief that "leaving the computer within [the third party's] control for any length of time to obtain a warrant" would have resulted in a loss of evidence of child pornography on computer); State v. Hudson, 253 Or App 327, 341-42, 290 P3d 868 (2012), *rev den*, 353 Or 562 (2013) (exigent circumstances supported warrantless entry into house to prevent destruction of evidence where police reasonably believed that defendant was inside, possibly destroying evidence related to murders); State v. Sanders, 233 Or App 373, 226 P3d 82 (2010) (warrantless entry into defendant's house while in process of obtaining search warrant for a meth-dealing operation was justified when police learned from CRI that defendant

planned to move out of the house shortly, and obtaining a warrant would have taken over an hour and a half); State v. Porter, 198 Or App 274, 281, 108 P3d 107 (2005) (officers responding to a noise complaint lawfully saw drug activity through the apartment window as they approached; they knocked, confronted the occupants, and then conducted a lawful warrantless sweep of the residence to prevent destruction of evidence); State v. Jangala, 154 Or App 176, 961 P2d 246 (1998) (evidence of furnishing alcohol to minors is easily destroyed, and the risk of destruction justified warrantless entry into residence where minor partygoers were present and were aware of the police presence; the officers' experience in similar situations was relevant); State v. Gorham, 121 Or App 347, 854 P2d 971 (1993) (game officers had exigent circumstances to search a barn for evidence of an illegal taking of freshly-killed deer); State v. Lovell, 99 Or App 672, 783 P2d 1040 (1989) (warrantless entry onto defendant's farm to perform a "mothering test" with an allegedly stolen calf was justified by the need to perform the test as soon as possible); State v. Heikkinen, 94 Or App 472, 765 P2d 1252 (1988) (police had exigent circumstances justifying warrantless entry into house when they saw woman running from the house, apparently under the influence of drugs, and, while talking to defendant at the front door, they smelled an odor associated with methamphetamine production emanating from the house and heard a toilet flushing continuously); State v. North, 72 Or App 1, 694 P2d 990, *rev den,* 299 Or 154 (1985) (exigent circumstances and probable cause justified detention of luggage long enough to conduct a "dog sniff" and to seek a warrant for opening); State v. Ritter, 71 Or App 282, 692 P2d 158 (1984) (warrantless entry of a hotel room was justified by a reasonable belief that defendant might become aware that a cohort had been apprehended and that defendant had the means to dispose of a large quantity of cocaine). *But see* State v. Ellett, 82 Or App 652, 728 P2d 954 (1986) (warrantless entry was not justified by exigent circumstances where police believed suspect *could* be destroying evidence but had no basis to believe that destruction was likely).

One factor in establishing that the risk of loss or destruction of evidence is present is whether a warrant could not have been obtained in time to avoid the exigency. State v. Wise, 305 Or 78, 749 P2d 1179 (1988) (*per curiam*) (search of a hotel room was not justified by exigent circumstances because the police could have obtained a warrant during the three hours they watched the room before entering it); State v. Saunders, 103 Or App 488, 799 P2d 159 (1990) (that a package of sturgeon roe waiting at the airport would be shipped within an hour did not, of itself, establish exigent circumstances sufficient to justify a warrantless search of the package; the state was required to prove that a search warrant could not have been obtained before the package was shipped); State v. Nicholson, 89 Or App 306, 748 P2d 1028, *rev den,* 305 Or 672 (1988) (warrantless seizure of a parked vehicle was not justified by exigent circumstances, even though there were no officers available to watch the car while a warrant was obtained). *But see* State v. Machuca, 347 Or 644, 227 P3d 729 (2010) (discussed below; holding that, for purposes of the Oregon Constitution, the evanescent nature of a suspect's blood alcohol content is an exigent circumstance that will ordinarily permit a warrantless blood draw so that the state is not required to separately prove that it could not have obtained a search warrant without sacrificing the evidence).

The arrest of a suspect, the seizure of an item, or some other event may terminate the risk that evidence will be destroyed or lost before a warrant may be obtained. In that circumstance, the exigent-circumstances justification may dissipate. *See* State v. Barnum, 136 Or App 167, 902 P2d 95 (1995), *rev den,* 323 Or 336 (1996) (exigent circumstances expired when the officers seized defendant's notebook; a warrant was required to open it); State v. Parras, 110 Or App 200, 822 P2d 151 (1991) (justification for warrantless seizure of cartridges and shell casings from suspect vehicle ended when a suspect was arrested); State v. Giffen, 98 Or App 332, 778 P2d 1001 (1989) (no justification for a search of defendant's car for additional evidence of PCS after defendant had been arrested and her keys seized). Additionally, as discussed above, even if exigent circumstances justify the initial seizure of an item, keeping the item in police custody constitutes a "continuing seizure" that itself must be justified. State v. Thompson, 370 Or 273, 281, 518 P3d 923 (2022).

See also the discussion above in this section regarding Securing Premises While Awaiting Warrant.

b. DUII Cases

See also probable cause for DUII in Chapter III and other cases on blood, breath, and urine samples, in this chapter.

(1) Blood Samples

If police have probable cause to believe that a suspect's blood contains evidence of a crime related to the consumption of alcohol or drugs, they may, if exigent circumstances exist, take a blood sample without a warrant and without the suspect's consent. Neither Article I, section 9, nor the Fourth Amendment requires that the suspect be under arrest before the sample is drawn.

In *State v. Machuca*, 347 Or 644, 227 P3d 729 (2010), the Oregon Supreme Court addressed exigent circumstances in the context of preventing destruction of blood-alcohol evidence. Police investigating defendant's single-car accident developed probable cause to believe he had committed DUII, went to the emergency room, interviewed him, and obtained his consent to submit to a blood test after reading him his DMV implied consent rights and consequences. The Oregon Supreme Court, disavowing its prior holding in *State v. Moylett*, 313 Or 540, 836 P2d 1329 (1992), held "[f]or purposes of the Oregon Constitution, the evanescent nature of a suspect's blood alcohol content is an exigent circumstance that will ordinarily permit a warrantless blood draw of the kind taken here." Although "particular facts may show, in the rare case, that a warrant could have been obtained *significantly* faster than the actual process otherwise used," "only in those rare cases will a warrantless blood draw be unconstitutional." *See also State v. Milligan*, 304 Or 659, 748 P2d 130 (1988) (officers investigating a vehicular homicide acted properly by seizing blood without consent or a warrant, because alcohol dissipation created exigent circumstances; the suspect's custody status was not relevant); *State v. Calderon*, 67 Or App 169, 678 P2d 1245, *rev den,* 297 Or 272 (1984) (because an Oregon police officer can obtain and execute a search warrant in any county, an officer similarly can perform warrantless taking of blood in any county).

The Court of Appeals has held that although the dissipation of a person's BAC will *ordinarily* permit a warrantless blood draw, that may not be true when hospital staff have already conducted a medical blood draw from the suspect. *State v. Kelly*, 305 Or App 493, 469 P3d 851 (2020). The court reasoned that, in those circumstances, the state must independently prove that the medical blood draw "did not extinguish the exigency." *State v. Kelly*, 305 Or App at 497. In *State v. McIntire*, 328 Or App 328, 338, 537 P3d 608 (2023), *rev den*, 372 Or 26 (2024), for example, the state offered evidence (and the trial court made findings) about the need for a forensic blood draw and why the medical draw would be insufficient, including "concerns about chain of custody, protocols for preservation, and security of the samples; assurances that the proper testing would be done on the forensic samples and lack of knowledge about what testing would be performed on the medical samples; knowledge that the forensic draw would be performed following a swab of defendant's arm with iodine rather than alcohol; knowledge about what preservatives or other additives would be included in the forensic samples; and the importance of preservation of forensic samples for the possibility of replication of testing if needed." In addition, in *McIntire*, an expert testified that the crime lab's testing of the medical sample revealed a different BAC than the hospital's earlier testing of the same sample, due to the lack of preservatives in the medical sample. *State v. McIntire*, 328 Or App at 338.

PRACTICE TIP: In *State v. Kelly*, the state offered on appeal several reasons that the medical blood draw was not equivalent to a forensic blood draw. The Court of Appeals rejected the state's argument, reasoning that "[i]t was the state's burden to establish whether a second blood draw was justified by the dissipating evidence of blood alcohol" and that the state had not adequately developed the record in the trial court. *State v. Kelly*, 305 Or App at 500–01. Thus, in cases where a hospital blood draw has already been performed, it is important to develop the record concerning the distinctions between a medical blood draw and a forensic blood draw to establish that an exigency existed. *See State v. McIntire*, 328 Or App at 338 (describing record).

And, as discussed below, the near *per se* rule of *Machuca* does not apply when a suspect flees into his or her home and the police seek to enter to prevent loss of evidence of intoxication. Instead, the court applies a different exigency analysis. *State v. Ritz*, 361 Or 781, 399 P3d 421 (2017).

The United States Supreme Court, in *Missouri v. McNeely*, 569 US 141, 133 S Ct 1552, 185 L Ed 2d 696 (2013), rejected the argument that, under the Fourth Amendment to the United States Constitution, the natural metabolism of alcohol in the bloodstream presents a *per se* exigency that always justifies an exception to the warrant requirement. Rather, according to the Court, exigency in the context of an arrest for DUII must be determined case-by-case, based on the totality of the circumstances. *Compare State v. Portulano*, 320 Or App 335, 514 P3d 93 (2022) (state did not show exigent circumstances where record demonstrated that telephonic and electronic warrants were available; at least three officers were present at accident scene and the state presented "no evidence of why, under the specific facts that comprise the totality of circumstances of this case, preparing a warrant application was incompatible with management of the accident scene"; and, "most critically," officers in the county "were operating as if there was a *per se* exigency rule for warrantless blood draws, well after *McNeely* had established that there was not") *with State v. Stephens*, 311 Or App 588, 601, 493 P3d 2 (2021) (where more than two hours had passed since collision, officer explained in detail why he was unable to immediately apply for a warrant, and record showed that it ultimately took 2 1/2 hours to obtain a warrant, exigent circumstances justified warrantless blood draw).

It is unclear whether the *McNeely* test differs significantly from the *Machuca* test. In *State v. Moore*, 354 Or 493, 497 n 5, 318 P3d 1133 (2013), the Oregon Supreme Court stated, "In our view, the [United States Supreme] Court's rejection of a *per se* exigency rule is not inconsistent with our statement in *Machuca II* that, while exigent circumstances are 'ordinarily' present in a case involving alcohol, that may not be true, depending on the facts of a particular case." *See also Mitchell v. Wisconsin*, 588 US 840, 139 S Ct 2525, 204 L Ed 2d 1040 (2019) (when a drunk driving suspect is unconscious, exigency ordinarily supports the seizure of a blood sample, but declining to "rule out the possibility" that the defendant could show Fourth Amendment violation in an "unusual case"). Subsequently, however, the Court of Appeals reasoned that the two tests are different. In particular, the court characterized *Machuca* as creating a "race to the needle approach," explaining, "If an officer can obtain a blood sample from a suspect faster than she can obtain a warrant from a magistrate, then, under *Machuca*, a warrantless blood draw is permissible." *State v. Portulano*, 320 Or App at 349. In contrast, the court reasoned, the *McNeely* Court "expressly rejected the argument that 'a warrantless blood draw is permissible if the officer could not secure a warrant (or reasonably believed he could not secure a warrant) in the time it takes to transport the suspect to a hospital or similar facility and obtain medical assistance.'" *State v. Portulano*, 320 Or App at 352. Thus, in *Portulano*, the Court of Appeals held that a warrantless blood draw was lawful under *Machuca* but violated *McNeely*, where officers in the county "were operating as if there was a *per se* exigency rule for warrantless blood draws, well after *McNeely* had established that there was not." *Portulano*, 320 Or App at 355-59.

In *State v. Mazzola*, 356 Or 804, 816 n 11, 345 P3d 424 (2015), the court noted that, "since deciding *McNeely*, the Court has taken a more lenient view of the demands of the warrant

requirement under the Fourth Amendment where less intrusive searches than blood draws are involved." *Mazzola* involved the constitutionality of the warrantless administration of field sobriety tests, and the court explained that *McNeely* was not controlling because it "did not address the application of the exigency exception in the context of the warrantless administration of FSTs at the scene of a DUII arrest." *See also State v. Portulano*, 320 Or App at 350 (noting the difference between breath tests and blood tests under the Fourth Amendment).

(2) Breath Samples

Machuca applies equally to the warrantless administration of a breath test. Thus, probable cause to arrest defendant for DUII, combined with the undisputed evanescent nature of alcohol in the blood, excuses the need for a search warrant to administer breath test under both Article I, section 9, and the Fourth Amendment. *State v. Hays*, 234 Or App 713, 228 P3d 731 (2010). The *refusal* to take a breath test, however, may be inadmissible in some circumstances. For a full discussion of that issue, *see* the section below on Blood, Breath, and Urine Samples.

(3) Urine Samples

If police have probable cause to believe that evidence of a controlled substance will be in a suspect's urine, the exigency exception justifies a warrantless search of the urine in most cases. *State v. McMullen*, 250 Or App 208, 213-14, 279 P3d 367 (2012) (exigency existed where police had probable cause to believe that evidence of a controlled substance would be in driver's urine and there was evidence that at least one controlled substance was of an evanescent nature; it was immaterial that officers did not identify specific, rapidly dissipating substance that they expected to find in urine); *State v. Fuller*, 252 Or App 245, 287 P3d 1147 (2012) (same); *State v. Walker*, 251 Or App 651, 652, 284 P3d 576 (2012) (*per curiam*).

(4) Field Sobriety Tests

The warrantless administration of field sobriety tests can be justified by probable cause and exigent circumstances (as well as other search-warrant exceptions, such as voluntary consent). *State v. Machuca*, 347 Or 644, 227 P3d 729 (2010); *State v. Nagel*, 320 Or 24, 880 P2d 451 (1994); *State v. Greenough*, 142 Or App 506, 923 P2d 646 (1996). *See also State v. Skeans*, 149 Or App 570, 945 P2d 529 (1997) (arrest for DUII does not negate exigent circumstances justifying field sobriety tests to collect additional evidence of DUII). When a defendant is subject to arrest for DUII and the administration of FSTs is reasonable in time, scope, and intensity, exigent circumstances will justify the warrantless administration of FSTs. *State v. Mazzola*, 356 Or 804, 820, 345 P3d 424 (2015). The officer's subjective determination of probable cause must be made before the administration of the tests. *State v. Rutherford*, 160 Or App 343, 981 P2d 386, *rev den,* 329 Or 447 (1999) (FST observations suppressed where officer testified he made his subjective determination of probable cause after tests were completed).

Obtaining a *refusal* to perform FSTs or to submit to a breath test is neither a search nor a seizure; thus, no showing of exigency is required. *State v. Greenough*, 216 Or App 426, 173 P3d 1227 (2007). The refusal is admissible because the defendant had no underlying right to refuse the tests—the state could have compelled the test based on probable cause and exigent circumstances.

(5) Entering a home

The Supreme Court has held that the exigency analysis is different when police enter a suspect's home. *State v. Ritz*, 361 Or 781, 399 P3d 421 (2017). In *Ritz*, the police had probable cause to believe that the defendant had committed DUII. They therefore entered the defendant's home—

into which the defendant had fled after officers arrived—to obtain a blood or breath sample from the defendant. The Supreme Court held that exigent circumstances did not support the officers' entry into the home. The court reasoned that *Machuca* was distinguishable "because a blood draw directly preserves a defendant's BAC, but a home entry does not." *State v. Ritz*, 361 Or at 795. The court explained that the police may not statutorily obtain a blood or breath test without first obtaining either consent or a warrant. The police "had no reason to think that obtaining a warrant to enter the home would delay a consensual search for defendant's BAC evidence, because they had no reason to think that defendant would consent to such a search." *State v. Ritz*, 361 Or at 796. And, if the defendant did not consent to a blood or breath test, the police would need to obtain a warrant to perform the test. "[I]f officers were required to obtain a warrant in order to preserve defendant's BAC, then obtaining a warrant before entering defendant's home would not have delayed preserving defendant's BAC evidence." *State v. Ritz*, 361 Or at 797.

The court left open the possibility that the state may be able to prove that officers had a need to enter a home to preserve observational evidence—that the defendant appeared intoxicated. *State v. Ritz*, 361 Or at 798. But the court suggested that, to prove exigency under that theory, the state would be required to prove (1) that the object of the officers' search was observational evidence, (2) how much alcohol a reasonable officer would believe remained in the defendant's body at the time of the entry, and (3) the amount of alcohol that must remain to produce observable effects. *State v. Ritz*, 361 Or at 798, 798 n 8. Additionally, the state may be able to show a need to enter a home to prevent the defendant from tampering with BAC evidence by consuming more alcohol. The court did not address that possibility in *Ritz*, but presumably the court would require a sufficient record establishing the potential for tampering.

The *Ritz* court did not decide the key issue in that case— the factors that courts should consider, and how those factors should be weighed, in determining whether an exigency justifies entering a home—because the court determined that the state had not proved that *any* exigency existed. Thus, that remains an open question.

c. Body Samples.

Cupp v. Murphy, 412 US 291, 93 S Ct 2000, 36 L Ed 2d 900 (1973). Exigent circumstances justified taking fingernail scrapings from the suspect in the investigation of a strangling when there was probable cause to arrest and police feared destruction of evidence. *See also State v. Murphy*, 2 Or App 251, 465 P2d 900, *cert den*, 400 US 944 (1970) (warrantless taking of fingernail scrapings during investigation of strangulation).

d. Homicide Scenes.

Oregon Law.

There is no "homicide scene" exception to the search-warrant requirement. Based upon exigent circumstances, police may immediately enter a homicide scene and search it to preserve the crime scene before the removal of the victim's body, to prevent accidental or intentional destruction of evidence. Once the exigency dissipates (*i.e.*, officers "freeze" the scene), a warrant is required, unless some other exception applies. *State v. Eacret*, 40 Or App 341, 345, 595 P2d 490 (1979).

In *Eacret*, relying on *Mincey v. Arizona*, 437 US 385, 98 S Ct 2408, 57 L Ed 2d 290 (1978), the court found that a warrantless entry and search during the first phase of a homicide investigation (locating the homicide weapon, preserving evidence, and securing the premises) was lawful. Once the officers were lawfully on the premises, they were entitled to photograph and seize evidence in plain view. *See State v. Corbin*, 22 Or App 505, 539 P2d 1113 (1975). After the victim's body was

removed and the crime scene was secured, the first phase of the investigation was discontinued. At that point, a search warrant was required because the initial exigent circumstances justifying the warrantless intrusion no longer existed. *State v. Eacret*, 40 Or App at 345. *See also State v. Brothers*, 4 Or App 253, 478 P2d 442 (1970) (2½-hour delay before warrantless search made search unlawful).

> **NOTE:** Police may not need to rely on exigent circumstances if the defendant does not have a privacy or possessory interest in the victim's home. *See* Chapter I, Privacy Interests. Also, the circumstances may establish that the entry was pursuant to consent. *State v. Voits*, 186 Or App 643, 648, 64 P3d 1156, *rev den,* 336 Or 17 (2003) (because defendant called 911 to report a suicide, did not restrict entry only to medical personnel, left the door ajar, and did not object when police officers entered, he "manifested his consent to the police officers' initial entry into his home to investigate the death of a person.")

State v. Hudson, 253 Or App 327, 341-42, 290 P3d 868 (2012), *rev den*, 353 Or 562 (2013). Exigent circumstances supported warrantless entry into house to prevent destruction of evidence where police reasonably believed that defendant was inside, possibly destroying evidence of murders.

State v. Ferrara, 218 Or App 57, 178 P3d 250 (2008). A deputy medical examiner's entry into a murder scene was lawful under ORS 146.107 to investigate a suspicious death. It was lawful under Art. I, § 9, based on probable cause and exigent circumstances, due to the potential degradation of evidence, including the need to determine the temperature of the body. Because the entry was limited to investigating the cause of death, the entry was lawful under the Fourth Amendment.

State v. Blasingame, 127 Or App 382, 873 P2d 361, *rev den,* 319 Or 406 (1994). Because the medical examiner was otherwise lawfully within a residence where a dead boy was found, his statutory authority under ORS chapter 146 to "take custody of or exercise control over" a dead body justified his turning the body over. The fact that the examiner, who was also the county sheriff, was also looking for a weapon was not material to whether the medical examiner violated defendant's privacy interest.

State v. Christopher, 55 Or App 544, 548, 639 P2d 642, *rev den,* 293 Or 190 (1982). "[W]hile executing [search] warrants [for controlled substances], the officers themselves became the victims of a new crime, namely, assault with a deadly weapon, followed by a homicide, which occurred in the plain view of the officers and evidence of which was in plain view during the completion of the execution of the warrants * * *. Under the circumstances, they were not required to stop their investigation until they could obtain a search warrant for evidence of homicide."

Fourth Amendment.

There is no "homicide" or "crime scene" exception to the warrant requirement of the Fourth Amendment. *Flippo v. West Virginia*, 528 US 11, 120 S Ct 7, 145 L Ed 2d 16 (1999) (*per curiam*). A warrantless search of a residence is "not constitutionally permissible simply because a homicide ha[s] occurred there." *Mincey v. Arizona*, 437 US 385, 395, 98 S Ct 2408, 57 L Ed 2d 290 (1978). But under *Flippo* and *Mincey*, "police may make warrantless entries onto premises if they reasonably believe a person is in need of immediate aid and may make prompt warrantless searches of a homicide scene for possible other victims or a killer on the premises." *Flippo*, 528 US at 14.

See also State v. Anderson, 42 Or App 29, 599 P2d 1225, *rev den*, 288 Or 1 (1979), *cert den*, 446 US 920 (1980) (warrantless entry into cabin to pictorially preserve "plain view" crime scene prior to removal of victim, and to prevent destruction of evidence, did not violate Fourth Amendment).

I. INCIDENT TO ARREST.

1. General Principles.

Oregon Law.

The search-incident-to-arrest exception "exists because an arrest creates a type of exigency that justifies a warrantless search of the arrested person." State v. Kruchek, 156 Or App 617, 624-25, 969 P2d 386 (1998), *aff'd by an equally divided court*, 331 Or 664, 20 P3d 180 (2001). Searches incident to arrest are governed by the standards set forth in State v. Caraher, 293 Or 741, 653 P2d 942 (1982), and State v. Owens, 302 Or 196, 729 P2d 524 (1986). Caraher interpreted Article I, section 9, of the Oregon Constitution more strictly than its federal counterpart with respect to searches incident to arrest. In Caraher, 293 Or at 756-57, the court expressly overruled State v. Florance, 270 Or 169, 527 P2d 1202 (1974), which tied Oregon's search-incident-to-arrest standard to that of the Fourth Amendment. The court held in Caraher that, under the Oregon Constitution, in contrast to the Fourth Amendment, a "valid custodial arrest does not alone give rise to a unique right to search." 293 Or at 757. *See also* State v. Sopiwnik, 176 Or App 127, 132, 30 P3d 430 (2001) ("valid custodial arrest does not by itself authorize a search").

Three requirements must be met for a valid search incident to arrest under Oregon law:

(1) A valid custodial arrest (although the search may precede formal arrest);

(2) The search must be justified as necessary to protect the arresting officer, a precaution to avoid the destruction of evidence or the escape of the defendant; or reasonably related to the crime for which the defendant is arrested;

(3) The search must be reasonable in time, scope, and intensity.

State v. Edwards, 319 Or App 60, 65, 509 P3d 177 (2022). *See also* State v. Caraher, 293 Or at 759-60; State v. Hoskinson, 320 Or 83, 86, 879 P2d 180 (1994); State v. Hite, 198 Or App 1, 107 P3d 677 (2005); State v. Burgholzer, 185 Or App 254, 59 P3d 582 (2002). Those three requirements are discussed in more detail below.

Notably, a *seizure* of property, even property on the arrested person, is not automatically permitted simply by virtue of the arrest. Instead, the seizure must meet the requirements of the incident-to-arrest exception or be justified by some other exception to the warrant requirement. In State v. Edwards, 304 Or App 293, 294, 466 P3d 1034 (2020), an officer arrested the defendant on an outstanding warrant for failure to appear. While handcuffing the defendant, the officer removed the defendant's backpack from her person, put it on the hood of the patrol car, and searched it pursuant to an inventory policy, which required an inventory before bringing property to the jail. State v. Edwards, 304 Or App at 294. The Court of Appeals held that the removal of the backpack from the defendant's person was a seizure and that the state had not established that any warrant exception justified that interference with the defendant's possessory rights in the backpack, which was a separate interference than that inherent in the arrest itself. It rejected the state's argument that "an arrest, in and of itself, necessarily effects a seizure of the arrestee's property, such that the lawful arrest of defendant as a matter of law resulted in a lawful seizure of the property on her person." State v. Edwards, 304 Or App at 296. *See also* State v. Wilcox, 371 Or 756, 763, 541 P3d 226 (2023) (rejecting the state's argument that police did not effect an independent seizure of defendant's *property* where seizure of property was incidental result of seizure of the defendant's *person* pursuant to a civil detoxification hold). Instead, the court held that, under the incident-to-arrest exception, "the fact of arrest authorizes the seizure of narrow categories of personal effects, including effects that

related to the probable cause for the arrest, and unrelated effects 'if their nature as contraband is evident on sight.'" *State v. Edwards*, 304 Or App at 297 (quoting *State v. Lowry*, 295 Or 337, 667 P2d 996 (1983), *abrogated in part by State v. Owens*, 302 Or 196, 729 P2d 524 (1986)). The *Edwards* court noted, somewhat cryptically, that it had not held that *no* exception to the warrant requirement existed, but only that the state had not "clearly identified" one in that case. *State v. Edwards*, 304 Or App at 298. And the court later held that a similar seizure was authorized as an *administrative* seizure, because a county ordinance required police to inventory property in the possession of an individual taken into police custody under a civil detoxification hold. *State v. Wilcox*, 335 Or App 743, 750-52, 560 P3d 91 (2024), *rev allowed on other ground*, 373 Or 712 (2025). *Wilcox* therefore provides some authority for an argument that seizure of an arrestee's property (if not authorized under the incident-to-arrest exception) is authorized as an administrative seizure, if a county ordinance (such as an inventory policy) requires the seizure or inventory of property in an arrestee's possession. That case is discussed more fully below in Section K. ("Inventories – Vehicles, Civil Holds, and Book-ins").

> **PRACTICAL SUGGESTION:** Unless some other warrant exception is applicable, such as a search incident to arrest for means of escape or evidence of the crime of arrest, officers should consider attempting to avoid the *Edwards* problem by *seeking consent* for any removal of an arrestee's property from their person before taking other action. And if they intend to transport the property to jail with the person, it may be advisable to seek consent to transport the property as well, after informing them that the property will be taken to the jail and subject to an inventory.

Further, even when the state lawfully seizes property incident to arrest, it "may not indefinitely retain property that it lawfully has taken from an arrestee; at some point, the justification for that retention may no longer exist." *State v. Olendorff*, 267 Or App 476, 486, 341 P3d 779 (2014) (even if police lawfully seized defendant's purse initially upon arrest, officers could not refuse to release purse to defendant's boyfriend when he arrived on scene without additional justification). *But see State v. Thompson*, 370 Or 273, 285-86, 518 P3d 923 (2022) (if evidence at issue is contraband, state may be permitted to retain the evidence indefinitely).

Fourth Amendment.

"When conducted incident to a lawful custodial arrest, a full search of the arrestee's person for both weapons and evidence is permitted." *Forty-Ninth Annual Review of Criminal Procedure*, 49 GEO. L.J. ANN. REV. CRIM. PROC. 51, 85 (2020) (footnotes omitted), citing *New York v. Belton*, 453 US 454, 101 S Ct 2860, 69 L Ed 2d 768 (1981); *Michigan v. DeFillippo*, 443 US 31, 99 S Ct 2627, 61 L Ed 2d 343 (1979); *United States v. Robinson*, 414 US 218, 94 S Ct 467, 38 L Ed 2d 427 (1973).

In *Robinson*, the Court noted that there are two historical rationales for the search-incident-to-arrest exception: (1) the need to disarm the suspect in order to take him into custody, and (2) the need to preserve evidence for later use at trial. 414 US at 235. *See also Knowles v. Iowa*, 525 US 113, 119 S Ct 484, 142 L Ed 2d 492 (1998) (same). The scope of the search is limited to the arrestee's person and the area within the arrestee's immediate control — "the area from within which [the arrestee] might gain possession of a weapon or destructible evidence," *Chimel v. California*, 395 US 752, 763, 89 S Ct 2034, 23 L Ed 2d 685 (1969), or closets or other places from which the officer could be attacked. *Maryland v. Buie*, 494 US 325, 110 S Ct 1093, 108 L Ed 2d 276 (1990) (discussed below, (Protective Sweeps)). With respect to vehicle searches incident to arrest, the Court has concluded that "circumstances unique to the vehicle context justify a search incident to a lawful arrest when it is 'reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle'" even absent officer safety or destruction-of-evidence concerns. *Arizona v. Gant,* 556 US 332, 129 S Ct

1710, 1719, 173 L Ed 2d 485 (2009) (quoting *Thornton v. United States*, 541 US 615, 632, 124 S Ct 2127, 158 L Ed 2d 905 (2004) (Scalia, J., concurring)).

2. Valid Custodial Arrest Requirement.

Oregon Law.

The exception for a search incident to arrest requires that the police have either a valid arrest warrant or probable cause to arrest. *State v. Davis*, 200 Or App 604, 116 P3d 254 (2005) (*per curiam*) (because officer did not have probable cause to believe that defendant had violated her probation, evidence he found during his arrest of her must be suppressed); *State v. Hite*, 198 Or App 1, 6, 107 P3d 677 (2005) ("A warrantless search incident to arrest must, at a minimum, involve a valid arrest."); *State v. Grover*, 193 Or App 165, 175, 9 P3d 8 (2004) (where officer did not have probable cause to arrest, search was not valid as search incident to arrest); *State v. Presley*, 181 Or App 296, 301 fn 3, 46 P3d 212 (2002) ("There cannot be a valid search incident to an invalid arrest."); *State v. Kemp/Haworth*, 112 Or App 522, 528, 831 P2d 37, *rev den,* 313 Or 627 (1992). *See also State v. Beckstead*, 164 Or App 538, 994 P2d 174 (1999) (search incident to arrest on invalid warrant not lawful).

When an arrest is made pursuant to a warrant and the defendant challenges the warrant's validity in a motion to suppress, the state has the obligation to offer the warrant at the suppression hearing. *State v. Perrodin*, 315 Or App 252, 500 P3d 704 (2021). It is only after the state does so that the burden shifts to the defendant to prove that the warrant was invalid. *State v. Perrodin*, 315 Or App at 261-62. Thus, in *State v. Perrodin*, where the defendant challenged his arrest on the basis that the warrant underlying it was facially defective, and the state did not offer the warrant at the motion hearing, the Court of Appeals held that the trial court should have granted suppression. *State v. Perrodin*, 315 Or App at 263. However, if the state argues and proves that the arrest was independently justified as a valid *warrantless* arrest—because the officers possessed subjective and objective probable cause to believe that a valid warrant had issued—then an arrest may be valid regardless of the ultimate validity of the arrest warrant. *State v. Perrodin*, 315 Or App at 258-59 (distinguishing *State v. Dodge*, 223 Or App 130, 195 P3d 442 (2008), *rev den*, 346 Or 66 (2009)).

When the probable cause relates only to a violation, the officer has no authority to arrest, and, therefore, no authority to conduct a search incident to arrest. *State v. Morton*, 326 Or 466, 471, 953 P2d 374 (1998) (arrest warrant issued for traffic *infraction* or *violation* offense invalid); *State v. Tyler*, 168 Or App at 602 ("The decisive issue is whether the city may punish a violation of Portland City Code § 16.70.220 as a crime. If it may not, then the officer did not have the authority to arrest defendant on that charge."). *But see State v. Mashia*, 183 Or App 254, 258, 51 P3d 711 (2002) (although open-container violation under the vehicle code could not provide justification for a search incident to arrest, the search of defendant was lawful as incident to arrest for the misdemeanor of open container under a municipal ordinance).

Fourth Amendment.

To conduct a search incident to arrest, the police must make an arrest. *United States v. Robinson*, 414 US 218, 235, 94 S Ct 467, 38 L Ed 2d 427 (1973) ("It is the fact of the lawful arrest which establishes the authority to search."). The issuance of a citation in lieu of a full custodial arrest (even if, under state law, the officer could have arrested the person) does not justify a search incident to arrest. *Knowles v. Iowa*, 525 US 113, 119 S Ct 484, 142 L Ed 2d 492 (1998). Moreover, if an arrest is illegal, the search pursuant to the arrest also will be illegal. *Hayes v. Florida*, 470 US 811, 105 S Ct 1643, 84 L Ed 2d 705 (1985).

3. Search May Precede Formal Arrest.

Oregon Law.

An officer may search incident to arrest with respect to any crime for which he has probable cause to arrest. The officer need not formally arrest the suspect before searching, and the search may be valid even if the officer never formally arrests the subject for the offense that justified the search. State v. Anfield, 313 Or 554, 561, 836 P2d 1337 (1992); State v. Brownlie, 149 Or App 58, 63, 941 P2d 1069 (1997); State v. Lander, 137 Or App 222, 225-26, 903 P2d 903 (1995), *rev den,* 323 Or 114 (1996); State v. Holliday, 135 Or App 256, 262-63, 898 P2d 812, *rev den*, 322 Or 228 (1995).

But the officer must have probable cause to make an arrest for an offense *before* beginning to search incident to arrest for that offense. State v. Kock, 302 Or 29, 725 P2d 1285 (1986); State v. Bailey, 143 Or App 285, 296, 924 P2d 833 (1996); State v. Hite, 198 Or App 1, 107 P3d 677 (2005) (search of backpack for firearm cannot be justified as search incident to his arrest on felon-in-possession charge because officer did not know then that defendant was a felon). Moreover, the search and the arrest must be sufficiently close in time and space. State v. Nevel, 126 Or App 270, 277, 868 P2d 1338 (1994).

> **REMEMBER:** Under Oregon law, probable cause has both an *objective* component and a *subjective* component. State v. Owens, 302 Or 196, 729 P2d 524 (1986); State v. Spruill, 151 Or App 87, 948 P2d 726 (1997). If the search is based on probable cause to arrest for an offense for which the defendant was never formally arrested, you still will need to establish that the officer subjectively believed that he or she had legal authority for the arrest. State v. Miller, 345 Or 176, 191 P3d 651 (2008) (subjective component of probable cause is satisfied if law enforcement officer believes that his or her conduct is legally justified).

Fourth Amendment.

"Searches incident to arrest conducted immediately before formal arrest are valid only if probable cause to arrest existed prior to the search." Forty-Ninth Annual Review of Criminal Procedure, 49 GEO. L.J. ANN. REV. CRIM. PROC. 51, 89 (2020), *citing* Rawlings v. Kentucky, 448 US 98, 111, 100 S Ct 2556, 65 L Ed 2d 633 (1980).

However, warrantless searches that provide probable cause to arrest where none existed previously are not justifiable as searches incident to arrest. Forty-Ninth Annual Review of Criminal Procedure, 49 GEO. L.J. ANN. REV. CRIM. PROC. 51, 90 (2020); Smith v. Ohio, 494 US 541, 543, 110 S Ct 1288, 108 L Ed 2d 464 (1990) (*per curiam*).

4. Subject of the Search — Evidence of a Crime.

Oregon Law.

Article I, section 9, permits a search incident to arrest "when it is relevant to the crime for which the defendant is being arrested and so long as it is reasonable under all the circumstances." State v. Caraher, 293 Or at 759. The fact that an officer discovers some evidence of the crime does not prevent the officer from searching further. State v. Owens, 302 Or at 205; State v. Bladorn, 289 Or App 1, 408 P3d 240 (2017), *rev den*, 362 Or 699 (2018) (where police had probable cause to arrest defendant for unlawful possession of a firearm, they were permitted to continue searching vehicle for other firearms even after discovery of one firearm). And the search need not be only for evidence supporting the *prima facie* elements of the crime; a search for evidence of motive, for example, may

be permissible. State v. Hernandez, 299 Or App 544, 549, 449 P3d 878 (2019), rev den, 366 Or 292 (2020) (where officer arrested defendant for failure to obey a lawful order after defendant repeatedly reached under dashboard despite officer's order not to do so, officer was permitted to search under dashboard for evidence that would show why defendant disobeyed the order). *See also* State v. Curtis, 307 Or App 297, 300, 475 P3d 942 (2020) (when officers had probable cause that defendant had committed criminal trespass by entering a truck, they were permitted to search for tools that might help defendant break into a car even though owner told police that he may not have locked the truck; whether defendant actually needed the tools, his possession of such tools would be evidence of criminal trespass). An officer, however, may not search incident to arrest for exculpatory evidence. State v. Scheer, 99 Or App 80, 83, 781 P2d 859 (1989).

A search incident to arrest may be for evidence of any crime for which the officer has probable cause to arrest the defendant at the time of the search. "If an officer arrests an individual for one crime but also has probable cause to arrest for another, a search for evidence of the other crime is permissible, provided it was otherwise reasonable under the circumstances." State v. Lander, 137 Or App 222, 225-26, 903 P2d 903 (1995), *rev den,* 323 Or 114 (1996). *See also* State v. Owens, 302 Or at 203-04; State v. Holliday, 135 Or App 256, 898 P2d 812, *rev den,* 322 Or 228 (1995); State v. Plummer, 134 Or App 438, 895 P2d 1384 (1995). Similarly, if police arrest the defendant on one crime and, during the course of an inventory or search incident to that arrest, develop probable cause to believe that the defendant committed *another* crime, the police may then *expand* the scope of the search to include a search for additional evidence of the new crime. *See* State v. Clew, 187 Or App 322, 327-28, 67 P3d 420 (2003) (frisk uncovered contraband, which provided probable cause for further search of defendant and his vehicle incident to that arrest); State v. Crampton, 176 Or App at 72; State v. Guynn, 162 Or App 594, 986 P2d 1190 (1999). In addition, if one of the officer's motivations in searching the property is to find evidence of a crime for which the officer has probable cause, the officer's other possible motivations are irrelevant. State v. Ramirez, 305 Or App 195, 217, 468 P3d 1006 (2020). However, an arrest for one crime does not, in the absence of additional probable cause, give the officer general authority to search for evidence of other crimes. State v. Dickerson, 135 Or App 192, 898 P2d 193 (1995) (while arresting on a PV warrant, the officer unlawfully opened defendant's pocketknife to search for evidence of tire slashing); State v. Boyd, 101 Or App 649, 792 P2d 462 (1990) (arrest for DWS; the officer's opening of a small metal container found in arrestee's pocket was unlawful).

An arrest pursuant to an outstanding warrant does not entitle the officer to search for evidence of the crime underlying the warrant unless the officer has probable cause to believe that evidence of that past crime still will be found on the arrestee's person. State v. Ching, 107 Or App 631, 813 P2d 1081 (1991); State v. Grelinger, 102 Or App 297, 794 P2d 446 (1990).

a. Arrest for a Drug Crime.

Probable cause to arrest for a drug crime (including *conspiracy* to commit a drug crime, *see* State v. Spencer, 92 Or App 459, 758 P2d 885 (1988)), gives the officer authority to conduct a thorough search for more drugs and other related evidence.

This authority may extend to:

- **The defendant's person**: State v. McCoy, 155 Or App 610, 964 P2d 309 (1998) (officer had probable cause to search coat defendant tried to hand to a third person); State v. Austin, 145 Or App 217, 226-28, 929 P2d 1022 (1996), *rev den,* 325 Or 368 (1997) (small quantity of marijuana plus other factors gave police probable cause to search defendant for narcotics); State v. Holliday, 135 Or App 256, 898 P2d 812, *rev*

den, 322 Or 228 (1995) (search of defendant's person based on probable cause to believe defendant was driving under the influence of drugs);

- **Closed containers:** *State v. Anfield*, 313 Or 554, 836 P2d 1337 (1992) (wallet); *State v. Stock*, 209 Or App 7, 146 P3d 393 (2006); *State v. Burgholzer*, 185 Or App 254, 260, 59 P3d 582 (2002) (cigarette package); *State v. Kemp/Haworth*, 112 Or App 522, 831 P2d 37, *rev den,* 313 Or 627 (1992) (opaque bottle); *State v. Spencer*, 92 Or App 459, 758 P2d 885 (1988) (purse);

- **Surrounding area:** *State v. Lander*, 137 Or App 222, 903 P2d 903 (1995), *rev den*, 323 Or 114 (1996) (air conditioner in defendant's motel room); *State v. Askay*, 96 Or App 563, 773 P2d 785, *rev den*, 308 Or 197 (1989) (a paper bag handed by defendant to another person); and

- **Vehicles:** *State v. Clew*, 187 Or App 322, 67 P3d 420 (2003) (discovery of drugs during pat-down frisk allowed search of vehicle and backpack inside); *State v. Hart*, 149 Or App 635, 945 P2d 532 (1997) (dog sniff incident to arrest permissible); *State v. Jackson*, 79 Or App 631, 719 P2d 1313, *rev den*, 302 Or 35 (1986) (a pouch and briefcase seized from defendant's vehicle and opened).

b. Arrest for DUII.

An officer arresting for DUII, under particular circumstances, may have authority to conduct an extensive search incident to arrest for intoxicants, drugs, or containers. *See State v. Washington*, 265 Or App 532, 534, 335 P3d 877, 879 (2014) (search of center console permissible when police had arrested driver for DUII); *State v. Burgholzer*, 185 Or App 254, 260, 59 P3d 582 (2002) (officer arrested defendant for DUII based on probable drug use and lawfully opened a cigarette pack he found in the car, discovering meth); *State v. Augard*, 122 Or App 485, 858 P2d 463 (1993) (search of glove box for containers of alcohol was valid after empties were found on the floorboards); *State v. Gotham*, 109 Or App 646, 820 P2d 884, *rev den*, 313 Or 677 (1992) (officer could validly seize and open an opaque container in defendant's pocket where he was unsure whether defendant's intoxication resulted from alcohol or drugs); *but see State v. Martin*, 124 Or App 459, 863 P2d 1276 (1993) (search of a Dristan tin *not* justified where the officer believed that defendant was intoxicated by alcohol); *State v. Lane*, 135 Or App 233, 898 P2d 1358, *rev den,* 322 Or 360 (1995) (in the absence of evidence that the identification card presented by the defendant was false, a search of his wallet to verify identity was not justified incident to DUII arrest). *See also State v. Mazzola*, 356 Or 804, 811-12, 345 P3d 424 (2015) (suggesting that warrantless administration of field sobriety tests may be justified under search-incident-to-arrest exception, but not reaching that issue). "[T]he permissible scope and intensity of a search incident to arrest does not turn on whether or not a particular criminal offense is a traffic offense" such as DUII, but instead "turns on whether the space searched was in the immediate control of the arrestee before the arrest, and on whether that space (and the containers therein) reasonably could conceal evidence of the crime of arrest." *State v. Washington*, 265 Or App at 540 (expressly overruling *State v. Brody*, 69 Or App 469, 686 P2d 451 (1984), which had held that a different standard applied for traffic offenses). However, where a traffic offense is not a crime, an officer cannot arrest a person for committing the offense, and the search-incident-to-arrest exception will not apply. *State v. Washington*, 265 Or App at 540 n 7.

c. Search for Identification.

A search for identification cannot be justified unless evidence of identity is relevant to some element of the offense.

Providing False Information to a Police Officer. The "only situation where [the Court of Appeals has] upheld the search incident to arrest for identification, as evidence of the crime of arrest, is in the context of providing a false name to a police officer" (ORS 807.620). State v. Ramirez, 305 Or App 195, 217, 468 P3d 1006 (2020); State v. Robinson, 107 Or App 410, 812 P2d 837, *rev den,* 312 Or 528 (1991); State v. Banks, 103 Or App 312, 797 P2d 383 (1990). *But see* State v. Bishop, 157 Or App 33, 37-39, 967 P2d 1241 (1998) (officers lacked probable cause to arrest defendant for giving false information).

Courts have invalidated incident-to-arrest searches for identification on charges of:

- **Driving While Suspended:** State v. Mituniewicz, 125 Or App 41, 864 P2d 1359 (1993) (seizure of a folded piece of paper from defendant's pocket); State v. Walker, 113 Or App 199, 830 P2d 633, *rev den,* 314 Or 574 (1992) (search of defendant's vehicle); State v. Smith, 82 Or App 636, 729 P2d 10 (1986), *rev den,* 302 Or 614 (1987) (search of vehicle).

- **Failure to Present a License:** State v. Bishop, 157 Or App 33, 42-43 fn 4, 967 P2d 1241 (1998) ("a search incident to arrest for failure to display is limited to a search for weapons, because there is no reason to search an individual for evidence of that crime, which is complete upon noncompliance"); State v. Claxton, 140 Or App 168, 172, 915 P2d 421 (1996) (arrest for failure to display does not authorize an officer to search a defendant's vehicle incident to that arrest); State v. Roque-Escamilla, 106 Or App 270, 806 P2d 1173, *rev den,* 311 Or 427 (1991) (search of wallet); State v. Nelson, 102 Or App 106, 792 P2d 486 (1990) (search of wallet).

- **DUII:** State v. Lane, 135 Or App 233, 898 P2d 1358, *rev den,* 322 Or 360 (1995) (search of defendant's wallet after defendant presented an apparently valid identification card.)

Fourth Amendment.

Under federal law, unlike a limited protective search for weapons during a stop, a search incident to arrest may include "a full search of the arrestee for both weapons and evidence." Forty-Ninth Annual Review of Criminal Procedure, 49 GEO. L.J. ANN. REV. CRIM. PROC. 51, 85 (2020), *citing* United States v. Robinson, 414 US 218, 229, 94 S Ct 467, 38 L Ed 2d 427 (1973).

5. Subject of the Search — Weapons and Implements of Escape.

Oregon Law.

"Searches incident to arrest for officer safety take two forms." State ex rel Juv. Dept. v. Singh, 151 Or App 223, 226, 949 P2d 303 (1997). First, "a pat-down or limited search for weapons to protect the officer or to prevent escape [is] justified whenever a person is taken into custody." State v. Owens, 302 Or 196, 200, 729 P2d 524 (1986). Second, "[a]n officer may conduct a further protective search if he or she develops a *reasonable suspicion*, based on specific articulable facts, that the person in custody poses a *serious threat of harm or escape* and that a search would lessen or eliminate that threat." State v. Hoskinson, 320 Or 83, 87, 879 P2d 180 (1994) (emphasis added) (search of DWS arrestee's wallet for small weapons not valid). *See also* State v. Clew, 187 Or App 322, 327, 67 P3d 420 (2003) (frisk for weapons was lawful); State v. Sopiwnik, 176 Or App 127, 134, 30 P3d 430 (2001) (search of arrestee's pockets for weapons was lawful). An officer may ask an arrestee whether he is carrying any "knives, guns, or syringes" as a legitimate officer-safety precaution. State v. Pender, 181 Or App 559, 562, 47 P3d 63 (2002); State v. Cunningham, 179 Or

App 498, 40 P3d 535 (2002) (proper to ask arrestee if he "ha[d] anything that would hurt [the officer] or was sharp"). But a further inquiry about "controlled substances" does not fit within that exception and must be preceded by *Miranda* warnings. State v. Pender, 181 Or App at 563. If the officer finds contraband in the course of a lawful frisk, he or she may seize it. State v. Clew, 187 Or App 327-28.

As the court explained in State ex rel Juv. Dept. v. Singh:

> "Owens states a *per se* rule defining the scope of search which is reasonable in *every* arrest. The justifications for *always* allowing some limited warrantless search incident to arrest are clear: The proximity of an officer to an arrestee during arrest and handcuffing make it imperative that the arrestee not have immediate access to a weapon or tool of escape that might be easily concealed and reachable even if the arrestee were handcuffed. * * * But those justifications also define the limits beyond which the Owens search should not be expanded. When the immediate danger of handcuffing and arresting a suspect has passed, and the officer has determined that the arrestee has no means of escape concealed on his person, the justification for the *per se* Owens search has ended. Any further search incident to arrest must be justified by specific and articulable facts. Hoskinson, 320 Or at 87."

151 Or App at 228-29 (emphasis in original). Under Singh, 151 Or App at 228, the "initial Owens pat-down search does not extend to a search of the interior of an arrestee's pockets, unless that search can be justified as an expanded search incident to arrest." The court also held that the initial Owens search may not include a pat-down of the belongings of a handcuffed arrestee if those items are not on the arrestee's person or immediately accessible to the arrestee. 151 Or App at 227-29.

A pat-down, however, is not an essential prerequisite to a more intrusive search. State v. Jackson, 127 Or App 170, 871 P2d 1019, *rev den,* 319 Or 211 (1994) (officer who saw a suspicious object protruding from defendant's pocket could remove it without first attempting to identify it through a pat-down). *Contrast* State v. Ching, 107 Or App 631, 813 P2d 1081 (1991) and State v. Yoakum, 104 Or App 291, 799 P2d 1150 (1990) (failure to conduct pat-down before more intrusive search resulted in suppression). But if the search is even marginally more intrusive than a pat down, the state and the police officer must be prepared to justify a basis for that more intrusive search. *See e.g.*, State v. Sopiwnik, 176 Or App at 134 (search of jacket pockets valid officer-safety search; "thick fabric of defendant's jacket made it difficult for [officer] to determine—from an external pat-down—what might be in the jacket pockets"). That is, the officer must have specific reason to think that the particular arrestee possesses weapons or implements of escape. State v. Hernandez, 195 Or App 355, 97 P3d 674 (2004) (arrest on warrant; officer failed to articulate any officer-safety justification for "full intrusive search" of defendant's pockets); State v. Komas, 170 Or App 468, 13 P3d 157 (2000) (record contains "no evidence of specific and articulable facts that would give rise to a reasonable suspicion that [defendant's] wallet contained a weapon"); State v. Lane, 135 Or App 233, 898 P2d 1358, *rev den,* 322 Or 360 (1995) (search for weapons in wallet of a DUII arrestee was not justified).

If the officer is able to articulate a basis to believe that the arrestee has weapons or escape devices, the officer may conduct a thorough search for them. State v. Jones, 103 Or App 123, 796 P2d 670, *rev den*, 311 Or 166 (1990); State v. Smith, 103 Or App 113, 796 P2d 665 (1990*), rev dismissed*, 312 Or 561 (1992).

> "Seizure of a closed container on officer safety grounds is valid only if there exists 'reasonable suspicion that the object "might" contain a weapon.' * * * Such reasonable suspicion exists where: (1) the container has the physical capacity to conceal a weapon; and (2) 'under the totality of the circumstances, there was a reasonable suspicion that it did contain a weapon.'"

State v. Gilkey, 172 Or App 95, 100, 18 P3d 402 (2001), *quoting* State v. Blevins, 142 Or App 237, 244, 920 P2d 1131 (1996), *rev den,* 327 Or 521 (1998).

Officer-safety concerns that initially justify action may dissipate if the officers take other steps that eliminate the risk. State v. Bridgeman, 173 Or App 37, 23 P3d 370 (2001) (handcuffing defendant and taking his weapons were reasonable officer-safety measures but searching car in which defendant had been a passenger was not); State v. Gilkey, 172 Or App 95, 18 P3d 402 (2001) (officer safety reasons justified seizure and retention of Chapstick container but not the opening of it); State v. Dickerson, 135 Or App 192, 898 P2d 193 (1995) (once a knife had been taken away from defendant, officer did not need to examine the blade for officer-safety purposes); State v. Meyer, 120 Or App 319, 852 P2d 879 (1993) (after arrestee had been placed in a patrol car, officer safety concerns did not justify opening a box in the arrestee's vehicle to see if it contained a weapon). *But see* State v. Castillo-Lima, 274 Or App 67, 360 P3d 597 (2015), *rev den*, 359 Or 39 (2016) (arrival of backup officer, handcuffing of defendant, and knowledge that gun in defendant's waistband was not real did not mean that safety concerns had so dissipated that it was unreasonable to search defendant's pockets). "[O]nce the police have seized a closed container from an arrestee, the threat to officer safety from any item within that container has dissipated, and the police can protect themselves by taking steps short of conducting a search while waiting to obtain a search warrant." Singh, 151 Or App at 229 (citing cases); *but see* State v. Ehly, 317 Or 66, 854 P2d 421 (1993) (during a criminal stop, it was reasonable for officers to examine contents of duffel they seized based on reasonable suspicion it contained a weapon).

When an officer has probable cause to arrest for a weapons offense, the officer may search for other weapons. State v. Ehly, 317 Or 66, 854 P2d 421 (1993) (incident to arrest for felon in possession of a firearm, the officers validly searched a duffel); State v. Anfield, 313 Or 554, 863 P2d 1337 (1992) (search of defendant's person incident to arrest for CCW); State v. Rose, 109 Or App 378, 819 P2d 757 (1991) (search of defendant's purse and wallet incident to arrest for CCW).

See also Frisk Searches and Other Officer Safety Measures, in Chapter II (Stop and Frisk).

Fourth Amendment.

Under federal law, a full search of the arrestee for *both* weapons *and* evidence may be done incident to arrest. Forty-Ninth Annual Review of Criminal Procedure, 49 GEO. L.J. ANN. REV. CRIM. PROC. 51, 168 (2018), *citing* United States v. Robinson, 414 US 218, 229, 94 S Ct 467, 38 L Ed 2d 427 (1973).

6. Protective Sweeps.

Fourth Amendment.

"In general, an arrest does not justify a search of the arrestee's entire home." Forty-Ninth Annual Review of Criminal Procedure, 49 GEO. L.J. ANN. REV. CRIM. PROC. 51, 89 (2020). The Fourth Amendment, however, allows officers to conduct a limited protective sweep in the course of an in-home arrest if they have a "reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene." Maryland v. Buie, 494 US 325, 337, 110 S Ct 1093, 108 L Ed 2d 276 (1990). A "protective sweep" is "a quick and limited search of premises, incident to an arrest and * * * narrowly confined to a cursory visual inspection of those places in which a person might be hiding." Maryland v. Buie, 494 US at 327. Items in plain view may be seized during a protective sweep. Buie, 494 US at 330.

Oregon Law.

Under Article I, section 9, of the Oregon Constitution, a "protective sweep" of a home as part of a search incident to arrest may be permissible. State v. Cocke, 334 Or 1, 45 P3d 109 (2002). "Such a search is justified if it is to protect the officer's safety and is objectively reasonable under the circumstances, including time, place and intensity." State ex rel Juv. Dept. v. Qutub, 75 Or App 298, 303-04, 706 P2d 962, *rev den,* 300 Or 332 (1985). *See also* State v. Guggenmos, 350 Or 243, 254, 253 P3d 1042 (2011) ("an officer's lawful encounter with a citizen may give rise to a reasonable suspicion that the citizen poses an immediate threat of serious physical injury to the officer or others," which may justify a protective sweep "regardless of whether the officer is conducting an arrest"); State v. Hawkins, 225 Or App 355, 201 P3d 239 (2009) (ORS 133.605(1) authorized the officers serving a search warrant to conduct a protective sweep and to detain the defendant while executing the warrant, but handcuffing defendant was an unconstitutional seizure because officers lacked reasonable suspicion of an immediate threat to officer safety).

In Cocke, the court held that the officers exceeded the proper scope of a search incident to arrest when they extended their "protective sweep" of the arrestee's home into a separate apartment occupied by a third person, without either probable cause to search or a reasonable suspicion that a person in the apartment posed an immediate threat of serious physical injury to the officers or others.

> "[W]e decline to hold that it is *per se* unreasonable, under Article I, section 9, for the police to search the nearby private residence of someone other than an arrestee to ensure officer safety, or that police must have probable cause in every case in which they do so. * * * But this case is one in which the officers could articulate only a generalized concern that was based on stale information and that focused neither on defendant nor on his apartment. Those circumstances do not justify the police officers' intrusion into the privacy of defendant's apartment."

State v. Cocke, 334 Or at 9-10. *See also* State v. Hitchcock/Winters, 224 Or App 77, 197 P3d 33 (2008) (officers unlawfully detained defendant when, after initially detaining her during a protective sweep of a house while executing an arrest warrant for another person, they continued to detain her after making the arrest, at a time when officer-safety concerns had dissipated).

7. Scope of the Search Incident to Arrest — Time, Space, and Intensity.

Oregon Law.

A search incident to arrest must be "reasonable, under all the circumstances," *i.e.*, it must be close to the arrest in time, space, and intensity. State v. Caraher, 293 Or 741, 759, 653 P2d 942 (1982). *See also* State v. Hite, 198 Or App 1, 7, 107 P3d 677 (2005); State v. Burgholzer, 185 Or App 254, 258-59, 59 P3d 582 (2002).

a. Proximity in Time.

The search must be reasonably close in time to the arrest. No particular amount of time has been established as reasonable; the courts consider the length of the delay and the justification for it.

1) Cases in which search was reasonable in time

State v. Nix, 236 Or App 32, 237 P3d 842 (2010), *rev dismissed*, 350 Or 298 (2011). A 40-minute delay between seizure of a cell phone incident to arrest and the forensic exam was "necessary and appropriate" to ensure that the phone could be searched by an expert and to protect against

inadvertent destruction of evidence. **Note:** *Nix* did not decide whether a cell phone is subject to search incident to arrest; however, the U.S. Supreme Court since has held that the Fourth Amendment prohibits search of a cell phone incident to arrest. *Riley v. California*, 573 US 373, 134 S Ct 2473, 189 L Ed 2d 43 (2014).

State v. Hernandez, 199 Or App 566, 113 P3d 437 (2005). Officers found a golf-ball sized object wrapped in duct tape after it fell from a car after they arrested the driver and believed that it contained heroin. Their decision to delay the opening of the item for 20 to 30 minutes while transporting it to the police station was reasonable given the time of day (after 9 p.m.), the location of the arrest site, and the risk of loss or contamination by examining the evidence on the street.

2) Cases in which search was unreasonable in time

State v. Warner, 117 Or App 420, 844 P2d 272 (1992). Vehicle search was too remote in time and space from arrest, where defendant was never arrested at the scene of the vehicle stop.

State v. Clarke, 110 Or App 114, 117-18, 822 P2d 138 (1991), *rev den*, 313 Or 75 (1992). Where the delay was unexplained, search of the defendant's briefcase "some time" after he was arrested and transported to the police station was not sufficiently close in time.

State v. Pruett, 95 Or App 494, 770 P2d 70 (1989). A booking officer's search of the defendant's purse and compact was not valid as a search incident to a DUII arrest because it was not close in space and time to the arrest.

State v. Sears, 69 Or App 260, 684 P2d 1240 (1984). Seven-week delay between the defendant's arrest and a search of a manila envelope in which his property was placed when he was booked into jail precluded the search from being classified as an incident-to-arrest search.

b. Proximity in Space and Intensity.

"Whether a search is reasonable in scope depends on the circumstances of each case." *State v. Lander*, 137 Or App 222, 226, 903 P2d 903 (1995), *rev den,* 323 Or 114 (1996). "The scope of the search extends to personal effects within the immediate control of the arrested person." *State v. Kruchek*, 156 Or App at 624 (citations omitted). If, during a traffic stop, the defendant is arrested outside his vehicle, the officer may search incident to arrest the area around where the defendant had been sitting, including closed containers. *State v. Clew*, 187 Or App at 328-29 (officer lawfully searched backpack found in vehicle on adjacent seat); *see also State v. Stock*, 209 Or App 7, 17, 146 P3d 393 (2006) (search incident to arrest was properly limited to baggie contained in a folded bottle cap, which was found during an automobile inventory, and which was immediately under the seat in which defendant was as passenger). Further, when a search incident to arrest is conducted for the purpose of discovering evidence of the crime of arrest, "the search will comport with Article I, section 9, even though the defendant no longer has control over the area searched, as long as the evidence reasonably could be found in that area and the search is otherwise reasonable in time, scope, and intensity." *State v. Krause*, 281 Or App 143, 146, 383 P3d 307 (2016), *rev den*, 360 Or 752 (2017); *see also State v. Stevens*, 329 Or App 118, 121, 540 P3d 50 (2023), *rev den*, 372 Or 437 (2024) (rejecting defendant's argument that *Krause* is plainly wrong in light of subsequent supreme court decisions); *State v. Delfino*, 281 Or App 725, 728-29, 386 P3d 133 (2016), *rev den*, 361 Or 525 (2017) (where police stopped defendant for a traffic infraction and then arrested him for a probation violation, and officer then saw drugs in his car, officer permitted to search car as search incident to arrest even though defendant no longer had control of car). The state need not prove that an "exigency" existed. *State v. Senin*, 301 Or App 358, 365, 456 P3d 334 (2019). Note, however, that the same principle may not apply if the purpose of the search incident to arrest is to protect officer

safety or prevent the destruction of evidence. "[I]n many circumstances, searches incident to arrest for those two reasons will be justified only when the area searched is still within the defendant's control, so that the defendant would be able to obtain a weapon stashed in the area or to destroy or conceal evidence located there." State v. Krause, 281 Or App at 146.

NOTE: The Oregon Supreme Court allowed review in State v. Barajas, 332 Or App 252 (2024) (nonprecedential memorandum opinion), *rev allowed*, 372 Or 763 (2024), which relied on Krause and Stevens. The defendant contends that police cannot rely on the search-incident-to-arrest exception if the defendant has been separated from the property or area to be searched and if no other exigent circumstances exist.

1) Cases in which search was reasonable in space and intensity

State v. Edwards, 319 Or App 60, 509 P3d 177 (2022). Search of metal box found in cab of truck reasonable when conducted incident to defendant's arrest for theft. The box was in close proximity to where defendant was when the officer arrived, it was reasonable to believe that defendant could have put stolen items in the cab, and it was reasonable to believe that the stolen items could be small enough to fit into the box, given the nature of the theft.

State v. Scott, 317 Or App 777, 505 P3d 1007 (2022). Search of defendant's purse reasonable when conducted incident to defendant's arrest for theft of merchandise from Home Depot, because it was reasonable to believe that the purse contained stolen items. The purse was found next to a stolen power tool, the officer could see a box inside the purse, and the trial court found that many items from Home Depot would easily fit in the purse.

State v. Curtis, 307 Or App 297, 300, 475 P3d 942 (2020). When officers had probable cause that defendant had committed criminal trespass by entering a truck, they were permitted to search for tools that might help defendant break into a car even though the owner told police that he may not have locked the truck; whether defendant actually needed the tools, his possession of such tools would be evidence of criminal trespass.

State v. Ramirez, 305 Or App 195, 468 P3d 1006 (2020). Officer's search of Altoids tin for identification was permissible where trial court credited officer's testimony that he had found identification in Altoids tins in the past.

State v. Brownlee, 302 Or App 594, 461 P3d 1015 (2020). Where officer saw defendant toss a backpack over a fence immediately before he arrested her for theft, officer was permitted to search the backpack incident to the arrest.

State v. Clew, 187 Or App 322, 67 P3d 420 (2003). During traffic stop, officer did a pat-down of defendant for officer-safety reasons and discovered a baggie of marijuana and pipe. The arrest on the PCS charge authorized a search of the vehicle, and a backpack inside, incident to arrest.

State v. Burgholzer, 185 Or App 254, 260, 59 P3d 582 (2002). Officer arrested defendant for DUII (drugs) and, in a search of the car incident to arrest, lawfully opened a cigarette pack found inside.

State v. Nguyen, 176 Or App 258, 265, 31 P3d 489 (2001). Officers had probable cause to arrest defendant and search his vehicle incident to a lawful arrest for car prowling.

State v. Crampton, 176 Or App 62, 31 P3d 430 (2001). The search of a locked tool box and closed "long cases" was valid incident to defendant's arrest for DUII and a weapons offense because the containers were the types of containers in which weapons or drugs were likely to be found.

State v. Lander, 137 Or App 222, 226, 903 P2d 903 (1995), *rev den,* 323 Or 114 (1996). A search of an air conditioner in a hotel room where the defendant was arrested was reasonable under the facts of this case; the officers heard the defendant monkeying with the air conditioner immediately before they entered the hotel room.

State v. Augard, 122 Or App 485, 858 P2d 463 (1993). The officer properly searched the car's glove box incident to defendant's arrest for DUII. The glove box was a likely place to store intoxicants — evidence relevant to the crime for which defendant was arrested. The officer was not required to stop searching after finding two empty beer cans behind the driver's seat.

State v. Hartley, 96 Or App 722, 725-26, 773 P2d 1356, *rev den,* 308 Or 331 (1989). A search of the arrestee's car trunk upheld when witnesses saw the suspect put evidence of the crime – a gun – in the trunk.

State ex rel Juv. Dept. v. Qutub, 75 Or App 298, 706 P2d 962, *rev den,* 300 Or 332 (1985). The court extended a search incident to arrest to a private residence where the arrest on a warrant occurred, to protect the officer's safety and to look for other suspects. *But see* State v. Cocke, 334 Or 1, 45 P3d 109 (2002) (officers exceeded proper scope of a search incident to arrest by extending their "protective sweep" of the arrestee's home into a separate apartment occupied by a third person).

State v. Gordon, 71 Or App 321, 692 P2d 618 (1984), *rev den,* 298 Or 705 (1985). Police had probable cause to arrest defendant for possession of a controlled substance; search of defendant's entire van, including a briefcase and other closed containers, was a valid search incident to arrest.

2) Cases in which search was not reasonable in space and intensity

State v. Harmon, 329 Or App 639, 541 P3d 267 (2023). Search of passenger's bag, which was on the passenger seat next to the passenger and which the officers knew belonged to passenger, exceeded permissible scope of search incident to *driver's* arrest, even though bag was within arm's reach of the driver. The bag was not associated with the driver or within the driver's immediate control and instead belonged to and was controlled by the passenger.

State v. Cocke, 334 Or 1, 45 P3d 109 (2002). Officers exceeded the proper scope of a search incident to arrest by extending their "protective sweep" of the arrestee's home into a separate apartment occupied by a third person, without either probable cause to search or a reasonable suspicion that someone inside posed an immediate threat of serious injury to the officers or others.

State v. Wise, 305 Or 78, 749 P2d 1179 (1988). A room search could not be justified as a search incident to arrest on a warrant, because it was not limited to the arrestee's person or the belongings in his immediate possession at the time of the arrest.

State v. Lipka, 314 Or App 154, 498 P3d 811, *rev dismissed*, 368 Or 703 (2021). Search of bag, which the victim had told officers contained a gun, was not justified after officers arrested defendant for harassment and menacing. Although the victim said that defendant had jabbed her in the back with something (perhaps keys), the officer "merely speculated" that defendant might have used the gun in his crimes.

State v. Scruggs, 274 Or App 575, 362 P3d 265 (2015). Strip search that included "forcible manipulation of [the defendant'] body and his buttocks" was not reasonable in scope even based on reasonable belief that defendant had hidden drugs in his buttocks. The privacy right "is particularly compromised" by a search into a defendant's body, "particularly the genital or anal areas."

State v. Lovaina-Burmudez, 257 Or App 1, 303 P3d 988 (2013). The defendant's clothing and shoes were not lawfully seized incident to arrest when police took them out of an ambulance that had transported the defendant to a hospital after officers had arrested him, because the arrest related to a robbery that occurred six days earlier and nothing in the record reflected any nexus between the seized items and that robbery.

State v. Newport, 204 Or App 489, 130 P3d 792 (2006). Defendant's truck was outside proper scope of a search incident to an arrest, even though defendant was within 10 feet of the truck, because officers had contacted him inside a bar and asked him to accompany them to that location.

State v. Hite, 198 Or App 1, 107 P3d 677 (2005). Defendant was arrested in a restaurant for possessing a stolen car found in the parking lot. The officer's search of two backpacks inside the trunk of the car was not justified as a search incident to arrest for the car theft, or as an officer-safety precaution, because the bags were not on defendant's person or in his immediate possession.

State v. Mituniewicz, 125 Or App 41, 864 P2d 1359 (1993). Removal of folded piece of paper (which did not resemble a bindle) from the defendant's pocket was not a lawful search incident to arrest for FDWR.

State v. Martin, 124 Or App 459, 863 P2d 1276 (1993). An officer's search of a Dristan tin was not justified as a search incident to arrest for officer safety where there was no evidence that the defendant posed a danger to the officer. The search was not justified as a search for evidence where the defendant was arrested for DUII based on alcohol, which could not be concealed in the tin.

Fourth Amendment.

"Although police must conduct searches incident to arrest reasonably promptly," the circumstances surrounding a particular arrest can justify substantial delay. *Forty-Ninth Annual Review of Criminal Procedure*, 49 GEO. L.J. ANN. REV. CRIM. PROC. 51, 89 (2020); *United States v. Edwards*, 415 US 800, 94 S Ct 1234, 39 L Ed 2d 771 (1974) (10-hour delay before search of arrestee's clothes, because substitute clothes not available; warrantless search still valid). *But see United States v. Vasey*, 834 F2d 782, 787-88 (9th Cir 1987) (warrantless search invalid when search occurred 30 to 45 minutes after defendant arrested); *United States v. Andersson*, 813 F2d 1450, 1456 (9th Cir 1987) (a search incident to arrest must be conducted at "about the same time as the arrest").

The arrestee and everything the arrestee wears may be searched. *United States v. Robinson*, 414 US 218, 94 S Ct 467, 38 L Ed 2d 427 (1973) (search of suspect's coat pocket). The scope of a search incident to arrest is not limited to the arrestee's person, but extends to the area within the arrestee's "immediate control." *Forty-Ninth Annual Review of Criminal Procedure*, 49 GEO. L.J. ANN. REV. CRIM. PROC. 51, 86 (2020). When the arrest occurs inside a residence, the search may extend to "closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched." *Forty-Ninth Annual Review of Criminal Procedure*, 49 GEO. L.J. ANN. REV. CRIM. PROC. 51, 90 (2020), *quoting Maryland v. Buie*, 494 US 325, 334, 337, 110 S Ct 1093, 108 L Ed 2d 276 (1990). "Immediate control" means "the area from within which [the arrestee] might gain possession of a weapon or destructible evidence." *Chimel v. California*, 395 US 752, 763, 89 S Ct 2034, 23 L Ed 2d 685 (1969). This includes the passenger compartment of a car. *New York v. Belton*, 453 US 454, 101 S Ct 2860, 69 L Ed 2d 768 (1981). The *Belton* rule is not

restricted to situations in which the occupant is in the vehicle when the officer first initiated contact with him; rather, it includes situations in which the arrestee is a "recent occupant" and is still "within close proximity, both temporally and spatially," to the vehicle. *Thornton v. United States*, 541 US 615, 124 S Ct 2127, 158 L Ed 2d 905 (2004). However, the *Belton* rule "does not authorize a vehicle search incident to a recent occupant's arrest after the arrestee has been secured and cannot access the interior of the vehicle." *Arizona v. Gant*, 556 US 332, 129 S Ct 1710, 173 L Ed 2d 485 (2009).

Searches of containers found on the arrestee or within the arrestee's reach generally are valid. However, the Fourth Amendment prohibits police from searching a cell phone incident to arrest. *Riley v. California*, 573 US 373, 134 S Ct 2473, 189 L Ed 2d 43 (2014). Although *Riley* addresses cell phone searches specifically, the Court's rationale suggests that the opinion likely extends to searches of other digital media, such as a thumb drive.

Finally, once police have gained exclusive control over an arrestee's personal property, a later search of that property is generally not valid as incident to arrest. In contrast, when the police make a valid arrest of the occupant of a vehicle, they may search the passenger compartment of the vehicle and containers within it either: (1) "when it is reasonable to believe that evidence of the offense of arrest might be found in the vehicle"; or (2) "when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search." *Forty-Ninth Annual Review of Criminal Procedure*, 49 GEO. L.J. ANN. REV. CRIM. PROC. 51, 87-88 (2020); *see Arizona v. Gant*, 556 US 332, 129 S Ct 1710, 173 L Ed 2d 485 (2009); *New York v. Belton*, 453 US 454, 460, 101 S Ct 2860, 69 L Ed 2d 768 (1981).

c. Closed Containers

An officer may open containers "found on or immediately associated with the arrestee" when it is reasonable to believe that the container holds evidence of a crime for which there is probable cause to arrest the person. *State v. Owens*, 302 Or 196, 202, 729 P2d 524 (1986); *State v. Crampton*, 176 Or App at 73. The officer does not need have to probable cause to believe that the object contains evidence or contraband:

> **"**We do not agree that the search of a particular place, or the opening of a container, during a search incident to a lawful arrest must be supported by probable cause. Rather, * * * once an officer has probable cause to support the arrest, the proper inquiry is the *reasonableness* of the time, scope, and intensity of the search for evidence of the crime for which the defendant is arrested."

State v. Burgholzer, 185 Or App 254, 259, 59 P3d 582 (2002) (emphasis in original). Absent probable cause to believe that evidence of the crime may be in a container that is found elsewhere, however, police may not open containers that are not on the arrestee's person at the time of arrest and that otherwise do not present a danger to the officer. *State ex rel Juv. Dept. v. Singh*, 151 Or App 223, 949 P2d 223 (1997); *see also State v. Newport*, 204 Or App 489, 130 P3d 792 (2006) (officer unlawfully searched backpack found in truck defendant had been driving after arresting him 10 feet away from the car); *State v. Hite*, 198 Or App 1, 107 P3d 677 (2005) (search of car not authorized based on arrest of defendant in nearby restaurant).

Although a limited search for weapons is permitted upon arresting a person, an officer may not open closed containers unless he or she identifies a safety concern related specifically to that closed container. *State v. Martinez*, 305 Or App 220, 222, 468 P3d 1021 (2020), *rev den*, 367 Or 496 (2021). In addition, the scope of officer-safety searches is limited by cases holding that officer-safety concerns may dissipate if the officer takes other steps to eliminate the risk. *State v. Gilkey*, 172 Or App 95, 18 P3d 402 (2001) (officer-safety reasons justified seizure and retention of Chapstick

container but not the opening of it); State v. Meyer, 120 Or App 319, 852 P2d 879 (1993) (after arrestee was placed in a patrol car, officer-safety concerns did not justify opening a box in the arrestee's vehicle to see if it held a weapon). *But see* State v. Ehly, 317 Or 66, 854 P2d 421 (1993) (in criminal stop, it was reasonable for officers to search duffel they seized based on reasonable suspicion it contained a weapon); State v. Sopiwnik, 176 Or App 127, 134, 30 P3d 430 (2001) (search of jacket pockets justified by officer safety; "thick fabric of defendant's jacket made it difficult for [officer] to determine—from an external pat-down—what might be in the jacket pockets").

8. Searches After Arrest on Probation Violation.

Oregon Law.

"A warrantless search cannot be justified as 'incident to arrest' unless there is *probable cause* to arrest for a particular offense." State v. Meier, 145 Or App 179, 186, 929 P2d 1052 (1996) (emphasis in original). A probationer may be arrested for a probation violation on *"reasonable grounds."* ORS 144.350; *see also* ORS 137.545. Reasonable grounds is a lesser standard than "probable cause." State v. Gulley, 324 Or 57, 921 P2d 396 (1996). If the arrest for the probation violation is based on "reasonable grounds" and the arresting officer does not possess probable cause to arrest for a crime, the officer is not authorized to conduct a search incident to arrest. State v. Davis, 200 Or App 604, 116 P3d 254 (2005) (*per curiam*); State v. Meier, 145 Or App 179. A probationer's refusal to submit to a search cannot form a part of "reasonable grounds" or probable cause. State v. Brown, 110 Or App 604, 825 P2d 282 (1992).

In any event, an arrest pursuant to an outstanding probation-violation warrant does not entitle the officer to search for evidence of the violations underlying the warrant unless the officer also has probable cause to believe that evidence of the violations will be found on the arrestee's person. State v. Cook, 114 Or App 571, 836 P2d 160 (1992) (no authority to search for evidence of failure to abide by probation officer's directive, failure to complete drug treatment, positive UA, and other conditions of defendant's probation for PCS conviction; "All of the alleged violations of his probation * * * had already been completed, and there was no need of further evidence to prove them.").

Fourth Amendment.

Searches involving individuals subject to government control or supervision have also been upheld as special needs searches. One area in which the Supreme Court has permitted such searches is the homes and property of probationers and parolees. Their legitimate privacy interests, which are diminished through the ongoing supervisory relationship between the state and the individual, are outweighed by the state's interest in adequate supervision. The validity of these special needs searches is determined under a reasonableness standard; they need not be based on probable cause. Forty-Ninth Annual Review of Criminal Procedure, 49 GEO. L.J. ANN. REV. CRIM. PROC. 51, 165 (2020); Griffin v. Wisconsin, 483 US 868, 107 S Ct 3164, 97 L Ed 2d 709 (1987) (upholding search of probationer's home based on reasonable suspicion). *See also* United States v. Knights, 534 US 112, 122 S Ct 587, 151 L Ed 2d 497 (2001) (warrantless search of probationer, supported by reasonable suspicion and authorized by a probation condition, satisfied the Fourth Amendment; fact that search may have been for "investigatory" rather than "probationary" purposes immaterial).

See further discussion of "special needs" rule in this chapter.

J. INEVITABLE DISCOVERY. *See* Chapter VII, Exclusionary rule

"Inevitable discovery" is not an exception to the requirement of a search warrant, but rather an exception to the exclusionary rule. It is a doctrine that permits the state to "purge the taint from"

evidence that might otherwise be subject to suppression because it was obtained unlawfully. *See* State v. Johnson, 340 Or 319, 326-28, 131 P3d 173 (2006); *see also* State v. Johnson, 177 Or App 244, 35 P3d 1024 (2001).

K. INVENTORIES — VEHICLES, CIVIL HOLDS, AND BOOK-INS

Oregon Law.

Inventories in Oregon are controlled by State v. Atkinson, 298 Or 1, 688 P2d 832 (1984). In Atkinson, the court held that warrantless entry into an impounded vehicle, pursuant to an "adopted and uniformly administered" policy, to inventory the contents to protect private property, and to discourage false claims against the police, does not violate Article I, section 9. The Atkinson principle applies to inventories of an arrestee incident to booking and temporary detention (including an inventory at the scene of an arrest). *See* State v. Coleman, 196 Or App at 129-30 (defendant lawfully searched incident to temporary detention at the station after his arrest); State v. Maynard, 149 Or App 293, 942 P2d 851 (1997), *rev den*, 327 Or 448 (1998). And it also applies to inventories during civil detoxification or mental holds. *See* State v. Perry, 298 Or 21, 688 P2d 827 (1984).

As the court made clear in State v. Caraher, 293 Or 741, 744-45, 653 P2d 942 (1982), "booking" or "inventory" inspections are distinct from searches incident to arrest and involve a separate issue under Article I, section 9. "'An inventory, whose purpose is simply to itemize what is present, is different in substance from a search, which is an endeavor to find evidence.' State v. Tyler, 168 Or App 600, 602 n 2, 7 P3d 624 (2000)." State v. Johnson, 177 Or App at 251 (noting that the court "generally avoid[s] the term 'inventory search,' * * * because it is internally contradictory"). *See also* State v. Guerrero, 214 Or App 14, 162 P3d 1048 (2007) (emphasizing difference). An inventory is "deemed reasonable because it is made for purposes of protecting an arrested person's personal property from loss or theft and to prevent liability of the government for that loss or theft." State v. Komas, 170 Or App 468, 477, 13 P3d 157 (2000). Thus, the purpose must be administrative, not criminal, in nature. State v. Guerrero, 214 Or App 14, 162 P3d 1048 (2007).

Nonetheless, "[a]n inventory, if lawfully conducted, does not violate its fundamental purpose of safeguarding property merely because the police believe that evidence of a crime might come to light in the process." State v. Tschantre, 182 Or App 313, 321, 50 P3d 1174 (2002), *citing* State v. Atkinson, 298 Or 1, 11 n 7, 688 P2d 832 (1984). That is, if an inventory is properly conducted pursuant to a valid policy, the fact that the officer also may have probable cause to believe that criminal evidence will be found during the inventory neither invalidates the inventory nor requires the officer to seek a warrant or rely on another exception to the warrant requirement. State v. Nelson, 181 Or App 593, 604-05, 47 P3d 521 (2002). But the suspicion of a crime must not play any part in the decision whether to seize a particular item that will be subject to an inventory. State v. Lambert, 263 Or App 683, 328 P3d 824, *adh'd to as modified on recons*, 265 Or App 742 (2014) (initial "administrative seizure" of car before inventory is conducted must not be based on a desire to search car for criminal evidence); State v. Gaunce, 114 Or App 190, 834 P2d 512, *rev den*, 315 Or 271 (1992) ("Although an officer may suspect criminal activity when he decides to have a car impounded, his suspicions can play no part in the discretion that he exercises when deciding whether to impound a car."). Further, evidence discovered in the course of a valid inventory may be seized and is admissible in a criminal trial. State v. Lippert, 317 Or 397, 856 P2d 634 (1993) (paperfold discovered during a detoxification inventory); State v. Nelson, 181 Or App 593, 604-05, 47 P3d 521 (2002) (marijuana in backpack found during vehicle inventory).

When using an inventory policy to bolster an inevitable-discovery argument, the burden is on the state to prove, by a preponderance of the evidence, that the inventory would have been conducted according to a properly authorized administrative program and that the evidence seized inevitably

would have been discovered during that inventory. State v. Steele, 290 Or App 675, 414 P3d 458 (2018); State v. Herrin, 323 Or 188, 915 P2d 953 (1996). *See also* State v. Ray, 179 Or App 397, 40 P3d 528 (2002) (because vehicle inventory policy prohibited opening any containers, state did not prove that evidence from gym bag during an unlawful consent search of vehicle inevitably would have been discovered during an inventory); State v. Johnson, 177 Or App 244, 252, 35 P3d 1024 (2001) (even if jail staff would have taken custody of defendant's clothing and boots as part of the booking process, record failed to show that the property inevitably would have been seized for criminal investigatory purposes).

REQUIREMENTS FOR LAWFUL INVENTORY SEARCH:

1) ***The state must lawfully possess the property it inventories*** (e.g., *as a result of a lawful vehicle impoundment, a lawful arrest, or civil hold*);

2) ***The inventory must be "conducted pursuant to a properly authorized administrative program, designed and systematically administered so that the inventory involves no exercise of discretion"; and***

3) ***The person conducting the inventory must follow the specified procedures.***

State v. Atkinson, 298 Or at 8. *See also* State v. Haney, 195 Or App 273, 97 P3d 1211, *adh'd to as modified on recons*, 196 Or App 498, 103 P3d 108 (2004).

Note, however, that the Oregon Supreme Court has held that, although Atkinson set out the "minimum standards to which law enforcement must adhere when relying on the inventory exception to the warrant requirement," it left open "the possibility that a policy that complies with those minimum standards may, in circumstances other than those present in Atkinson, yield results that may not pass constitutional muster." State v. Fulmer, 366 Or 224, 231, 460 P3d 486 (2020). The court reasoned that "the inventory exception to the warrant requirement applies only when its use serves the administrative purposes that justify the exception and is consistent with the rights protected by Article I, section 9." State v. Fulmer, 366 Or at 233. Applying that principle, the court held that, before police inventory a vehicle, they must inform an occupant of the vehicle who is present, not under arrest, and competent, that the occupant may retrieve personal items from the vehicle. State v. Fulmer, 366 Or at 237. The court reasoned that "the failure to give an occupant in those circumstances notice that he or she may retrieve personal items from the vehicle causes the scope of the inventory to exceed the purposes that justify the exception" and that there were "no insurmountable barriers to" implementing such a requirement. State v. Fulmer, 366 Or at 237. Moreover, the police must so inform the occupant *before* they begin the inventory. State v. Sevits, 333 Or App 745, 747, 553 P3d 564 (2024) (police did not comply with Fulmer because they did not ask defendant if he wanted to remove any items until 40 seconds after beginning inventory).

1. The state must have authority to seize the property.

The initial seizure of the property must be lawful before the property may be inventoried. State v. Atkinson, 298 Or 1, 8, 688 P2d 832 (1984). *See also* State v. Balabon, 292 Or App 870, 426 P3d 133 (2018) (Portland Police policy could not authorize police to tow a car after citing the driver for driving uninsured based on reasonable suspicion, because statute and constitution required

probable cause). Further, the breadth of the authority to seize the property may affect whether an inventory is justified. *Atkinson*, for example, involved an inventory of an impounded car. *State v. Atkinson*, 298 Or at 9. The statutory scheme at issue there "permitted the police to take custody of abandoned vehicles and authorized a lien 'on the vehicle *and its contents* to pay storage and towing charges.'" *State v. Wilcox*, 371 Or 756, 766, 541 P3d 226 (2023) (quoting *Atkinson*, 298 Or at 9 (emphasis in *Atkinson*)). Thus, "the authority to seize property under that statutory scheme was broad and impliedly authorized a further inventory of the contents of the vehicle." *State v. Wilcox*, 371 Or at 766-67.

The issue of whether police have authority to seize property in the course of taking custody of a *person* may present more difficult issues. In *State v. Wilcox*, for example, the police took the defendant into custody pursuant to ORS 430.399, which allows police to take an intoxicated person to a sobering facility. While one officer placed the defendant in the patrol car, another inventoried a backpack that defendant had with him. *State v. Wilcox*, 371 Or at 759. The Oregon Supreme Court rejected the state's argument that police had not effected an independent seizure of the defendant's *property* and that the police had instead inventoried the backpack pursuant to the lawful seizure of *the defendant*. Instead, the court held that the police had conducted an independent seizure of the backpack that required justification. *State v. Wilcox*, 371 Or at 764. On remand, the Court of Appeals nonetheless held that a Washington County ordinance justified that seizure. *State v. Wilcox*, 335 Or App 743, 560 P3d 91 (2024), *rev allowed* on other grounds, 373 Or 712 (2025). That ordinance required police to inventory "the personal property in the possession of a person taken into police custody" whenever the person "will be transferred" to a treatment facility under ORS 430.399. *State v. Wilcox*, 335 Or App at 751. Because the court determined that the county ordinance justified the seizure, the court did not address the state's additional argument that ORS 430.399 also implicitly authorized the seizure of the property. *State v. Wilcox*, 335 Or App at 752. The court also rejected the defendant's argument that, under *State v. Fulmer*, 366 Or 224, 460 P3d 486 (2020), the police were required to offer the defendant a reasonable opportunity to dispose of his belongings before taking him into custody. *State v. Wilcox*, 335 Or App at 753. The court distinguished *Fulmer* on the ground that the defendant was intoxicated and thus incapable of taking care of his property. *State v. Wilcox*, 335 Or App at 753.

The Court of Appeals has also held that an *arrest* of an individual does not automatically justify the seizure of an item of property, like a backpack, even on the arrestee's person. In *State v. Edwards*, 304 Or App 293, 294, 466 P3d 1034 (2020), an officer arrested the defendant on an outstanding warrant for failure to appear. While handcuffing the defendant, the officer removed the defendant's backpack from her person, put it on the hood of the patrol car, and searched it pursuant to an inventory policy, which required an inventory before bringing property to the jail. *Edwards*, 304 Or App at 294. The Court of Appeals held that the removal of the backpack from the defendant's person was a seizure and that the state had not established that any warrant exception justified that interference with the defendant's possessory rights in the backpack, which was a separate interference than that inherent in the arrest itself. It rejected the state's argument that "an arrest, in and of itself, necessarily effects a seizure of the arrestee's property, such that the lawful arrest of defendant as a matter of law resulted in a lawful seizure of the property on her person." *Edwards*, 304 Or App at 296. Instead, the court held that "the fact of arrest authorizes the seizure of narrow categories of personal effects, including effects that related to the probable cause for the arrest, and unrelated effects 'if their nature as contraband is evident on sight.'" *Edwards*, 304 Or App at 297 (quoting *State v. Lowry*, 295 Or 337, 667 P2d 996 (1983), *abrogated in part by State v. Owens*, 302 Or 196, 729 P2d 524 (1986)). *See also State v. Stinstrom*, 261 Or App 186, 196, 322 P3d 1076 (2014) (officer's seizure and search of backpack that the defendant had disclaimed failed the first prong of *Atkinson* because the seizure "was not specifically authorized by law, as administrative seizures must be").

Although the Oregon Supreme Court acknowledged the holding in *Edwards* when it decided *Wilcox* (discussed above), it expressed no opinion on whether *Edwards* was correctly decided. *State v. Wilcox*, 371 Or at 758. The court reasoned that *Wilcox* was distinguishable from *Edwards* because in *Wilcox*, the seizure of the *defendant* was administrative, rather than a criminal arrest (as in *Edwards*). Notably, in the context of an arrest, the seizure of the arrestee's property may be justified under the incident-to-arrest exception. *See* discussion in section I of this chapter ("Incident to Arrest"). Additionally, if an ordinance like the one at issue in *Wilcox* requires police to inventory the property of a person taken into custody pursuant to an arrest, the seizure of the *property* may be justified as an administrative seizure (even though the seizure of the *defendant* is not administrative).

2. The policy must be valid.

The state must establish the existence and nature of the inventory policy and the authority that promulgated the policy. *State v. Herrin*, 323 Or 188, 915 P2d 953 (1996). *See also* *State v. Cherry*, 262 Or App 612, 325 P3d 813 (2014) (court would not affirm based on inventory policy that state presented for the first time on appeal, because record might have developed differently had the state relied on that policy in the trial court); *State v. Petri*, 214 Or App 138, 162 P3d 1053 (2007) (without evidence of a policy and its scope, an officer's testimony that he would have "inventoried" defendant's car was insufficient); *State v. Redmond*, 114 Or App 197, 202, 834 P2d 516 (1992) (officer's testimony about his impressions of jail's inventory procedures was not sufficient to establish what those inventory procedures were). *But see State v. Nelson*, 181 Or App 593, 604-05, 47 P3d 521 (2002) (state's failure to offer inventory policy as an exhibit at the motion-to-suppress hearing not a basis for suppression; defendant conceded both the content of the policy and the fact that it was lawfully enacted); *State v. Brown*, 229 Or App 294, 211 P3d 315 (2009) (defendant's argument that "the officer's search of his pockets and wallet cannot be regarded as a lawful inventory because the officer did not testify that he was acting pursuant to a lawfully adopted inventory" fails; the officer was not required to testify to a subjective belief that he acted pursuant to an inventory policy, and Art I, § 9, requires only that officers "reasonably believe that their conduct is justified, not that they be able to articulate a correct justification on which they actually relied").

> **PRACTICE TIP:** In litigating the validity of inventory searches, prosecutors should make a record of the terms of the relevant inventory ordinance and offer evidence that the officer subjectively knew he was acting under the inventory policy.

a. Properly authorized

The authority to conduct an inventory may, in some cases, be *implied* from an express legislative grant of authority to take possession of the person or property that is the subject of the inventory. *State v. Boone*, 327 Or 307, 313, 959 P2d 76 (1998). In *Boone*, the court held that a city ordinance expressly authorizing the police to impound vehicles under certain conditions also impliedly authorized them to inventory the contents of the impounded vehicles. The court indicated that inventory authority also could be implied from other similar legislative grants of authority to take possession of property. "The scope of the [police agency's] authority to exercise control over [the property inventoried] may be instructive in determining whether the police also may have implied authority to conduct an inventory[.]" *State v. Boone*, 327 Or at 313. Not every authorization for police to take possession of property will be sufficient to impliedly authorize an inventory.

> "[W]here government officials are allowed *only limited authority to take temporary control of personal property* — such as to move an automobile after a traffic accident — the officer's authority does not extend to conducting a general inventory of the automobile's contents."

State v. Atkinson, 298 Or at 9-10, *quoted in* Boone, 327 Or at 313 (emphasis added). In State v. Layman, 162 Or App 386, 986 P2d 624 (1999), the court held that a general authorization by the county commissioners for the establishment of a jail was a sufficient basis from which to imply the authority to conduct jail inventories and to adopt policies governing those inventories. *See also* State v. Ketelson, 163 Or App 70, 986 P2d 1202 (1999) (authority for inventories implied from the decision to establish a detoxification center).

If an inventory has been properly authorized by a grant of authority from a legislative body, either expressly or impliedly, the "law enforcement agency itself may adopt an inventory policy, provided that the policy comports with *Atkinson*'s other requirements." State v. Boone, 327 Or at 314 (checklist used by local police department sufficient where source of authority to impound vehicle was city ordinance).

b. Limited discretion

The policy must adequately limit the discretion of the officer as to whether to conduct an inventory and as to the scope of the inventory to be conducted. State v. Eldridge, 207 Or App 337, 342, 142 P3d 82 (2006) (inventory policy that provided that "every impounded vehicle 'shall be completely searched and inventoried'" provided too much discretion); State v. Coleman, 196 Or App 125, 129-30, 100 P3d 1085 (2004), *rev den*, 338 Or 16 (2005) (inventory policy for detainees adequately limited officer's discretion where it required search of all detainees; allowed a search only of the person, not closed containers; and required removal of any items that could be used to cause damage to the individual or the waiting room); State v. Haney, 195 Or App 273, 97 P3d 1211, *adh'd to on recons*, 196 Or App 498, 103 P3d 108 (2004) (even though ORS 810.460 required officer to complete accident report after any accident involving injury or death, it did not limit officer discretion "about whether to conduct searches in order to prepare accident reports"); State v. Taylor, 250 Or App 90, 98, 279 P3d 254 (2012) (policy did not adequately limit discretion when it required officer to search property that the officer "deem[ed] appropriate"). A policy that is valid on its face may be rendered invalid if the evidence shows that police are not administering the policy according to its nondiscretionary terms "but instead are administering it such that officers are exercising their individual discretion to open various types of closed containers depending on the circumstances of a particular inventory." State v. Krumenaker, 306 Or App 9, 18, 472 P3d 760 (2020).

The officer may, however, retain discretion to determine whether to *seize* the property in the first instance. State v. Komas, 170 Or App 468, 478, 13 P3d 157 (2000) (policy requiring officer to inventory property of an arrested person was valid, even though it allowed individualized discretion in determining whether to release seized property to a third person); State v. Gaunce, 114 Or App 190, 195, 834 P2d 512, *rev den,* 315 Or 271 (1992) (explaining that "[a]n officer's decision to impound a vehicle may involve the exercise of discretion," but also noting that the officer's suspicions of criminal activity may play no part in the decision to impound).

3. The person conducting the inventory must follow specified procedures.

An inventory that deviates from the established policy is invalid. State v. Rowell, 251 Or App 463, 469-72, 283 P3d 454 (2012) (search of laptop bag not lawful under inventory policy because defendant was not actually or constructively detained as required by policy); State v. Hanna, 248 Or App 608, 273 P3d 945 (2012) (pre-tow inventory search of pickup by looking under tonneau cover was not authorized by policy); State v. Bernabo, 224 Or App 379, 197 P3d 610 (2008) (deputies' inventory of motor vehicle after it was impounded during traffic stop deviated from procedures established in county's administrative program and thus violated Article I, section 9); State v. Sparks, 228 Or App 163, 206 P3d 1197 (2009) (officer's search of defendant's purse after she removed it from a vehicle before a consent search of the vehicle did not comply with the inventory ordinance

because it was not in "the interior of the vehicle," but rather was outside with defendant, when the officer searched it); State v. Dillon, 182 Or App 308, 50 P3d 1172 (2002) (inventory policy authorizing police to inventory possessions of "prisoners" did not authorize police to inventory possessions of person taken into custody pursuant to a civil detoxification hold). *Compare* State v. Bostwick, 226 Or App 57, 202 P3d 259, *rev den*, 346 Or 589 (2009) (officer's inventory of locked passenger compartment of impounded pickup truck was lawful; policy required search of passenger compartment of impounded vehicles, whether locked or unlocked, and distinguished between passenger compartment and other compartments and closed containers); State v. Hewitt, 300 Or App 792, 454 P3d 830 (2019), rev den, 366 Or 205 (2020) (officer did not deviate from inventory policy when he found an additional item in defendant's jacket several hours after defendant had signed the inventory form, because the inventory policy contained no "time limit" and officer was permitted to remove items while preparing the jacket for storage; the court noted, however, that it was not addressing the constitutionality of the policy itself).

4. Scope of Inventory and Closed Containers.

Although a vehicle inventory may include closed *compartments*, such as the glove box, State v. Atkinson, 298 Or at 11-12, an inventory "'provides no general license'" for detailed scrutiny of closed *containers* and papers, which can be inventoried without opening them. Atkinson, 298 Or at 11, *quoting* South Dakota v. Opperman, 428 US 364, 380, 96 S Ct 3092, 49 L Ed 2d 1000 (1976) (Powell, J., concurring). "Generally, property is to be listed by its outward appearance; no closed, opaque container may be opened to determine what, if anything, is inside it so that the contents may be inventoried in turn." State v. Hite, 266 Or App 710, 720, 338 P3d 803 (2014) (internal quotation marks omitted). *See also* State v. Keller, 265 Or 622, 510 P2d 568 (1973) (police should have inventoried a fishing tackle box as "one fishing tackle box" rather than opening and searching it); State v. May, 162 Or App 317, 986 P2d 608 (1999), *rev den*, 330 Or 375 (2000) (officer could not open object wrapped in cloth); State v. Jones, 158 Or App 118, 972 P2d 1217, *rev den*, 329 Or 287 (1999) (officer could not open folded tissue); State v. Myers, 156 Or App 561, 967 P2d 887 (1998) (officer could not open brown paper wrapper inside plastic bag); State v. Maynard, 149 Or App 293, 942 P2d 851 (1997), *rev den*, 327 Or 448 (1998) (officer could not open matchbox); State v. Ridderbush, 71 Or App 418, 692 P2d 667 (1984) (officer could not open black box). *But see* State v. Tschantre, 182 Or App 313, 319-20, 50 P3d 1174 (2002) (defining "closed" container, and concluding that cell phone case, which was open on both ends, was *not* a closed container). As a result, a policy that allows the opening of closed containers will generally be found to be overbroad and invalid. State v. Hite, 266 Or App at 720 (policy overbroad when it required officers to look for specific items, including food items and alcohol, and therefore implicitly required police to open any container that was "uniquely designed or objectively likely to hold any of those items").

But the court has "recognized an exception to that rule: An inventory policy may authorize officers to open closed containers that are 'designed to or likely to contain' valuable items." State v. Hite, 266 Or App at 720; State v. Mundt/Fincher, 98 Or App 407, 780 P2d 234, *rev den*, 308 Or 660 (1989) (policy authorizing opening wallet or purse permissible because primarily intended to store valuables); State v. Salkoski, 299 Or App 180, 448 P3d 718 (2019) (backpack); State v. Bean, 150 Or App 223, 946 P2d 292 (1997), *rev den*, 327 Or 448 (1998) (fanny pack); State v. Johnson, 153 Or App 535, 958 P2d 887, *rev den*, 327 Or 554 (1998) (briefcase); State v. Rutledge, 162 Or App 301, 986 P2d 99 (1999) (zippered bag resembling coin purse). *But see* State v. Lippert, 317 Or 397, 403–04, 856 P2d 634 (1993) (officer implementing civil detoxification hold not permitted to inventory the contents of a purse that the person was not going to take into the secure facility because that inventory was "not necessary to carry out the officer's obligation to safeguard either the person to be detoxified or others"). The policy need not expressly direct the officer to open closed containers; if it specifically requires the officer to inventory valuables, the policy implicitly requires the officer to open all containers objectively likely to hold valuables. State v. Hite, 266 Or App at 720. *But see*

State v. Guerrero, 214 Or App 14, 162 P3d 1048 (2007) (general reference in policy to protection of money and jewelry did not implicitly authorize search of closed containers that are likely to hold nonmonetary valuables). Such policies must be limited; a policy that permits the inventory of *all* closed containers is impermissible. State v. Cordova, 250 Or App 397, 280 P3d 1036 (2012) (inventory policy that required search of "all closed containers that *could* contain valuables" was overbroad because it allowed search of *all* closed containers); State v. Williams, 227 Or App 453, 206 P3d 269 (2009) (inventory ordinance that allowed a search of "all containers" was overbroad; overbreadth could not be cured by the fact that the law-enforcement agency adhered to a policy with a narrower scope; because policy conflicted with ordinance, it was invalid); State v. Kay, 227 Or App 359, 206 P3d 208 (2009) ("all containers" policy held to be overbroad). In addition, if the record reflects that police are "exercising discretion to open closed containers based on the circumstances of the individual case, and not based on the standardized procedures of the inventory policy that allow closed containers to be opened based only on the nature of the closed container itself," an otherwise valid inventory may be rendered invalid. State v. Krumenaker, 306 Or App at 19-20.

> **NOTE**: The Oregon Supreme Court recently allowed review to address whether the rule from Mundt/Fincher is correct. State v. Wilcox, 335 Or App 743, 560 P3d 91 (2024), *rev allowed*, 373 Or 712 (2025). The defendant in that case argues that the purposes justifying inventories do not permit police to open closed containers in any circumstance.

Further, as described above, before inventorying the contents of an impounded vehicle, an officer must inform an occupant of the vehicle who is present, not under arrest, and competent, that the occupant may retrieve any personal items from the vehicle. State v. Fulmer, 366 Or at 237.

Note that at least one judge has recognized the tension between the rule allowing officers to open containers designed to carry valuables and the requirement that inventory policies limit officer discretion, discussed above. State v. Cleland, 289 Or App 379, 389-90 (2017), *rev den*, 362 Or 699 (2018) (James, J., concurring) (acknowledging court's case law upholding policies that allow opening of closed containers designed to contain valuables, but contending that such policies necessarily inject discretion into the inventory); State v. Barnett, 299 Or App 656, 449 P3d 914 (2019), rev den, 366 Or 257 (2020) (James, J., concurring) (similar). *Compare* State v. Cleland, 289 Or App at 383 (inventory policy requiring officers to open all containers designed to contain valuables was valid, because the term "valuables" describes "a category of property with sufficiently clear boundaries to impose the constitutionally required limitation on officer discretion") *with* State v. Willhite, 110 Or App 567, 574, 824 P2d 419 (1992) (policy that specified only that an officer must complete a report after an inventory "and that property of 'great value' be noted on the standard property receipt form" did not adequately limit discretion because it would require court to assess whether officer had reasonable belief that valuables would be found in any given location).

The court has not yet addressed whether a policy may also allow officers to open all containers that are objectively likely to contain weapons, drugs or other contraband. State v. Hite, 266 Or App at 723. *Compare* State v. Taylor, 250 Or App 90, 97 n 4, 279 P3d 254 (2012) (acknowledging that "security may be a valid justification for administrative searches in contexts where property would otherwise remain accessible to persons entering the secure portion of a facility" but noting that, "in the jail inventory context, it is not apparent how the purpose of safety would be served by allowing officers to open closed, opaque containers to look for contraband where those containers can be seized, inventoried by their outward appearance, and placed securely in storage") *and* State v. Cleland, 289 Or App 379, 385, 410 P3d 386 (2017), *rev den*, 362 Or 699 (2018) (James, J., concurring) (noting that, under Oregon law, reliance on officer safety as a rationale for an inventory policy "must have a concrete basis in specific circumstances; it may not simply be assumed as a basis of a general precautionary practice" (quoting State v. Atkinson, 298 Or at 8)), *with* State v.

Stone, 232 Or App at 364 (focusing on fact that policy required opening of closed containers that hold valuables, but noting that ordinance required officer to open containers if the officer "reasonably believes that a closed container holds valuable or dangerous personal property"). *See also* *State v. Connally*, 339 Or 583, 587, 125 P3d 1254 (2005) (stating generally that "police may inventory the contents of containers when doing so is necessary to serve the inventory's purposes").

Even if an inventory policy allowing the opening of some closed containers is valid, an inventory is not valid if the officer does not follow that policy when conducting the inventory. *State v. Cruz-Renteria*, 250 Or App 585, 280 P3d 1065 (2012) (inventory at jail of contents of small metal canister in defendant's possession was not authorized by policy allowing opening of containers "designed to typically carry identification, cash, valuables, medications or contraband"); *State v. Guerrero*, 214 Or App 14, 162 P3d 1048 (2007) (where policy, at most, required opening containers designed to contain money or jewelry, officers not permitted to open black leather case marked "Panasonic Light Scope"); *State v. Swanson*, 187 Or App 477, 481-85, 68 P3d 265 (2003) (opening "purse accessory" kit, described as similar to a makeup bag, was not authorized by inventory policy); *State v. Hockersmith*, 264 Or App 560, 333 P3d 1085 (2014) (because policy specifically required a determination of whether a container, "based upon 'context and/or physical appearance would reasonably be expected to contain valuables,'" state was required to provide evidence about the context or physical appearance of shorts that officer searched; policy did not allow search of any container "designed to carry" valuables, so court refused to determine whether the pocket on every pair of men's shorts is such a container); *State v. Kendall*, 173 Or App 487, 24 P3d 914 (2001) (opening a key case was not permissible under Portland inventory ordinance, because a key is not a "valuable" as defined in the ordinance).

The converse, however, is not true. That is, if a policy is overbroad because, for example, it allows the search of all closed containers, an inventory will not be upheld simply because the officer opened only those closed containers designed to contain valuables. *State v. Nordloh*, 208 Or App 309, 144 P3d 1013 (2006). Although the court has indicated that an inventory is not permissible when it is conducted pursuant to an overbroad inventory policy, *Nordloh*, 208 Or App at 313 ("The power to inventory a vehicle's contents exists only pursuant to a properly authorized policy. Whether the policy itself is properly authorized does not depend on the circumstances of the application of the policy to a particular defendant."); *State v. Cherry*, 262 Or App 612, 617, 325 P3d 813 (2014) (citing *Nordloh* for the proposition that "suppression is required when an officer acts pursuant to an overbroad policy regardless of whether the officer's conduct violated the defendant's constitutional rights"), the court has not squarely addressed whether a portion of an inventory policy (for example, the portion concerning closed containers) may be severed from unrelated, permissible portions of the policy. *See* *State v. Steele*, 290 Or App 675, 684-93, 414 P3d 458 (2018) (DeVore, J., concurring) (discussing issue).

Fourth Amendment.

Under the Fourth Amendment, officers may conduct an inventory inspection of an impounded vehicle or the articles belonging to a person who is being booked into custody. Although not based on probable cause or a warrant, such inventories are reasonable where the purpose is not investigative, but rather:

(1) To protect the police or the public from potential danger;
(2) To protect the police against claims of lost property; or
(3) To protect the owner's property while it is in police custody.

Colorado v. Bertine, 479 US 367, 107 S Ct 738, 93 L Ed 2d 739 (1987); *Illinois v. Lafayette*, 462 US 640, 103 S Ct 2605, 77 L Ed 2d 65 (1983); *South Dakota v. Opperman*, 428 US 364, 96 S Ct 3092, 49 L Ed 2d 1000 (1976).

If the arrest, impoundment, and inventory otherwise is lawful, the mere fact that the officer was motivated by a suspicion that evidence of other crimes would be found is not a basis to suppress evidence, because "subjective intentions play no role in ordinary probable-cause Fourth Amendment analysis." *Arkansas v. Sullivan*, 532 US 769, 772, 121 S Ct 1876, 149 L Ed 2d 994 (2001) (internal quotations omitted).

The inventory must be administered according to standardized criteria that limit the discretion of the officer. *Florida v. Wells*, 495 US 1, 4, 110 S Ct 1632, 109 L Ed 2d 1 (1990) ("an inventory search must not be a ruse for a general rummaging in order to discover incriminating evidence"). But some officer discretion is permitted, and the officer may search closed containers to inventory their contents. *Colorado v. Bertine*, 479 US 367 (backpack in vehicle); *Illinois v. Lafayette*, 462 US 640 (arrestee's shoulder bag). Evidence discovered pursuant to a valid inventory search may properly be seized. *South Dakota v. Opperman*, 428 US 364 (marijuana found in the glove box of a vehicle).

A regularly conducted strip search of jail inmates, including body-cavity inspections, for contraband or weapons does not violate the Fourth Amendment, even if the inmate is being held on minor charges and there is no individualized suspicion. *Florence v. Board of Chosen Freeholders*, 566 US 318, 132 S Ct 1510, 182 L Ed 2d 566 (2012). *See also Maryland v. King*, 569 US 435, 133 S Ct 1958, 186 L Ed 2d 1 (2013) (DNA swabbing and identification of arrestees is a reasonable search that can be considered part of a routine booking procedure).

L. OPEN FIELDS. *See* Chapter I, Privacy Interests.

The Fourth Amendment's protection of "persons, houses, papers, and effects" omits protection for open fields, which includes "any unoccupied or undeveloped area outside of the curtilage." *Oliver v. United States*, 466 US 170, 180 fn 11, 104 S Ct 1735, 80 L Ed 2d 214 (1984). In contrast, Article I, section 9, can extend to protect open fields, but only if the owner manifests an intention to exclude the public. *State v. Dixson/Digby*, 307 Or 195, 211-12, 766 P2d 1015 (1988). The open fields doctrine is not an exception to the warrant requirement. Instead, if the doctrine applies, the property owner has no protected privacy interest at all.

See the discussion of this doctrine in Chapter I (What is a Search?; Privacy Interests in Real Property).

M. OPEN VIEW.

Open view and plain view are two separate doctrines that, in different ways, obviate the need for a warrant. The "plain view" exception is discussed later in this chapter.

OPEN VIEW — [Lawfully Outside and Looking Inside Private Space]

The "open view" rule obviates the officer's need to obtain a warrant to **search** — *i.e.,* to make the observation — but generally does not negate the need to obtain a warrant to **enter** the protected area or to **seize**.

> **Example:** An officer lawfully **outside** premises, standing on a sidewalk or front porch, looks through open windows and sees contraband **inside** the house. The officer's observation is lawful, but the officer still needs either a search warrant or an

exception to the warrant requirement before he or she may **enter** to **seize** the contraband. Lawful observation — under open-view exception.

See, e.g., State v. Foster, 347 Or 1, 217 P3d 168 (2009). Deputy's entry into a side yard, and peering into window of home, during service of a restraining order was justified for officer safety purposes, where occupants had a history of violent response to officers and history of weapon possession. Drug use seen inside, prompting exigent circumstances seizure.

PLAIN VIEW — [Lawfully Inside Private Space and Looking Inside]

The "plain view" rule obviates the officer's need to obtain a warrant to **seize**.

Example: An officer lawfully **inside** private premises executing a warrant to search for and seize a gun used in a homicide finds **inside** unrelated contraband in plain view while looking for the gun. The officer's entry and observation are lawful, and the officer does *not* need either an additional search warrant or an exception to the warrant requirement before he or she may seize the contraband. Lawful entry, observation, and seizure — under the plain-view exception.

NEITHER PLAIN VIEW NOR OPEN VIEW — Other cases that involve neither "plain view" nor "open view" involve lawful observations made by an officer within an area that is not protected by a privacy interest. *E.g.*, State v. Crandall, 340 Or 645, 136 P3d 30 (2006) (defendant placed transparent baggie containing drugs under car); State v. Asher, 24 Or App 491, 546 P2d 762 (1976) (vial of drugs on ground). *See* Section A of this chapter (Abandoned and Lost Property). *See also* Chapter I (What is a Search?).

Oregon Law.

In a series of aircraft-flyover cases, the Oregon courts reviewed "open view" cases and clarified that it is not a "search" under Article I, section 9, for officers to look into a protected area from an aircraft so long as the aircraft is at a lawful vantage point. "[A] police officer's unaided observation, purposive or not, from a lawful vantage point is not a search under Article I, section 9, of the Oregon Constitution." State v. Ainsworth, 310 Or 613, 621, 801 P2d 749 (1990); *see also* State v. Gohring, 311 Or 33, 803 P2d 1189 (1991); State v. Castillo-Salgado, 186 Or App 605, 610, 64 P3d 1169, *rev den,* 336 Or 60 (2003); State v. Rodal, 161 Or App 232, 985 P2d 863 (1999).

The *Ainsworth* rule has two important limitations:

(1) The observation must be from "a lawful vantage point," which means that if the officer trespasses onto property or violates ground-clearance regulations to be in a location to make the observation, the observation may constitute a "search." For a full discussion on when an officer is in a "lawful vantage point," *see* Chapter I (Privacy Interests in Real Property).

(2) The observation must be "unaided," which presumably means that the officer cannot use an *intrusive* technological device or a trespass to an object in order to observe or detect what otherwise could not be observed or detected from that location. For a full discussion on when an observation is "unaided," *see* Chapter I (Technological Enhancement).

Some classic examples of "open view" cases include State v. Louis, 296 Or 57, 672 P2d 708 (1983); State v. Castillo-Salgado, 186 Or App at 610; and State v. Mahon/Sheedy, 17 Or App 177,

521 P2d 37 (1974), in which the visual observations were made by officers standing in a public place looking through undraped windows. Classic examples of "open smell" cases are State v. Rein/Jungwirth, 324 Or 178, 923 P2d 639 (1996), and State v. Johnson, 186 Or App 186, 191, 62 P3d 861 (2003), in which officers in a public place smelled a strong odor of marijuana coming from inside a residence. For other examples, *see* Chapter I (What is a Search?).

> **NOTE: Search Warrant Exception Justifying Entry.** Suppose the police officers who saw and recognized unlawful drugs through an undraped window also saw a person inside the house who appeared startled when he saw the officers looking at the drugs? There would be no need to get a search warrant, because there would be **probable cause**, plus **exigent circumstances**, based on the obvious danger that the evidence would be destroyed by the time the police got back with a warrant. The seizure in this example would be valid, not because of open view, but because of exigent circumstances. *See* State v. Porter, 198 Or App 274, 108 P3d 107 (2005); State v. Rodriguez-Ganegar, 186 Or App 530, 539-40, 63 P3d 1225, *rev den,* 335 Or 578 (2003); State v. Clevenger, 36 Or App 695, 585 P2d 718 (1978). *But see* State v. Price, 92 Or App 669, 673, 759 P2d 1130 (1988) ("officer cannot create exigent circumstances by his own action or inaction").

Although Oregon courts have not always drawn a sharp distinction between "open view" and "plain view" situations, the following are "open view" cases:

State v. Smith, 327 Or 366, 963 P2d 642 (1998). The use of a drug-detection dog to smell the exterior of a locked storage unit for odors *emanating from* the locker, *i.e.*, to detect odor molecules *outside* the protected area, was not a search.

State v. Rein/Jungwirth, 324 Or 178, 923 P2d 639 (1996). Officer in a public location lawfully smelled a "strong odor of marijuana" coming from residence and defendants.

State v. Wacker, 317 Or 419, 856 P2d 1029 (1993). Police observation of defendant's conduct in a lighted car in a tavern parking lot did not invade a privacy interest protected by section 9, or the 4th Amendment; thus, police use of night vision scope and camcorder did not constitute search.

State v. Louis, 296 Or 57, 672 P2d 708 (1983). Officer standing in a public location and looking through undraped windows observed defendant unlawfully exposing himself.

State v. Porter, 198 Or App 274, 108 P3d 107 (2005). Officers responding to a noise complaint at an apartment observed drug use and drug paraphernalia through a window as they approached the door.

State v. Castillo-Salgado, 186 Or App 605, 610, 64 P3d 1169, *rev den,* 336 Or 60 (2003). Officers investigating a report of possible trespassers at an apartment building walked by a kitchen window and lawfully observed, through a gap in the blinds, two men snorting cocaine.

State v. Rodriguez-Ganegar, 186 Or App 530, 539-40, 63 P3d 1225, *rev den,* 335 Or 578 (2003). An officer investigating a "suspicious person" report at a motel walked by a motel room and lawfully, through a gap in the curtains, someone packaging large amounts of drugs.

State v. Johnson, 186 Or App 186, 191, 62 P3d 861 (2003). An officer in a public location lawfully smelled a strong odor of fresh, growing marijuana coming from inside a residence.

State v. Cardell, 180 Or App 104, 109, 41 P3d 1111 (2002). In a "plain feel" case, the court held that although the officer lawfully walked up defendant's driveway past his parked car, the officer "exceeded that consent when he touched the tires in an attempt to obtain information that would aid him in his investigation."

State v. Fortmeyer/Palmer, 178 Or App 485, 37 P3d 223 (2001). Officers who were in a common area between two homes with consent from one resident, unlawfully searched when they kneeled down to peer through a narrow crack in the basement window of the next-door residence.

State v. Reed, 169 Or App 456, 9 P3d 738 (2000). Shining a flashlight through a semi-transparent film canister to reveal that which would not be visible in "normal" lighting was a search, not an open view observation.

State v. Orlovski, 146 Or App 632, 933 P2d 976 (1997). Observations through the window of a vehicle parked on a public street are valid under Article I, section 9.

State v. Poppe, 131 Or App 14, 22, 883 P2d 905, *rev den*, 320 Or 492 (1994). An officer's observation of paraphernalia for marijuana cultivation through a shop window located next to the front door of the shop was lawful.

State v. Gabbard, 129 Or App 122, 877 P2d 1217, *rev den*, 320 Or 131 (1994). Detective's view into shed through cracks in the siding was a search, although it was justified by probable cause and exigent circumstances.

State v. Faulkner, 102 Or App 417, 794 P2d 821, *rev den*, 310 Or 422 (1990). No search occurred when an officer casually shined his flashlight into defendant's customized pickup to admire the interior; evidence the officer discovered in the pickup was admissible.

State v. Breshears/Oliver, 98 Or App 105, 779 P2d 158 (1989). Police officer's observation of a marijuana plant growing in defendants' window violated defendants' privacy interests, even though officer was in a "common area" of the apartment complex; the common area, in fact, was not used by anyone other than the defendants.

State v. Crook, 93 Or App 509, 762 P2d 1062 (1988). Police observation of stolen property in defendant's parked vehicle, through open back window, was justified by open view.

State v. Corra, 88 Or App 339, 745 P2d 786 (1987), *rev den,* 305 Or 331 (1988). A police officer who stood on a small rock in a neighbor's yard to look over defendant's six-foot-high fence did not conduct an illegal search. *Distinguished in* State v. Fortmeyer/Palmer, 178 Or App 485, 489-90, 37 P3d 223 (2001) (kneeling down to peer through crack in basement window was a search).

State v. Slowikowski, 87 Or App 677, 743 P2d 1126, *aff'd on other grounds*, 307 Or 19, 761 P2d 1315 (1988). Nonpurposive discovery by a trained narcotics detection dog of marijuana in a storage unit was not a search. The officer's subsequent unaided smell of marijuana was proper under the "plain smell" variant of the "plain view" doctrine [this is, in fact, the *open* smell variant of the "open view" doctrine, rather than "plain view"].

Fourth Amendment.

See Chapter I (Technological Enhancement) for a full discussion of when police conduct constitutes a search under the Fourth Amendment.

N. PLAIN-VIEW SEIZURE.

An officer who is in a place where he or she has a right to be may seize evidence in plain view without the necessity of first securing a search warrant. *See* the **Open View** section immediately preceding this section for a discussion of the difference between the open view and plain view exceptions to the search warrant requirement. As a reminder:

Open View — outside premises and lawfully looking inside

- The "open view" rule obviates the officer's need to obtain a warrant to **search** — *i.e.,* to make the observation — but generally does not negate the need to obtain a warrant to **enter** the protected area or to **seize**.

Plain View — lawfully inside premises and looking inside

- The "plain view" rule obviates the officer's need to obtain a warrant to **seize**.

Generally, **plain view** applies to broaden the scope of what an officer may *seize*, but does *not* broaden the perimeter within which the officer may *search*. The doctrine "authorizes seizure of evidence under circumstances where the police are in a place where they are entitled to be when they observe the evidence in plain view and the incriminating character of the evidence is immediately apparent." State v. Carter, 200 Or App 262, 268, 113 P3d 969 (2005), *aff'd*, 342 Or 39 (2006).

NECESSARY CONDITIONS FOR A PLAIN-VIEW SEIZURE*:*

(1) A justifiable intrusion onto premises by the officer;

(2) The officer observes the object in plain view from a lawful vantage point; and

(3) The incriminating nature of the evidence is immediately apparent.

Oregon Law.

See State v. Sargent, 323 Or 455, 463 & n 5, 918 P2d 819 (1996); State v. Peterson, 114 Or App 126, 834 P2d 488, *rev dismissed*, 315 Or 272 (1992).

1. Justifiable Intrusion by Officer.

Most plain-view cases turn on the question of whether, at the time when the officer made the observation and seizure, the officer was in a place where he or she had a right to be.

Examples of justifiable intrusions include:

Entry to execute warrant to search for and seize other evidence: State v. Carter, 342 Or 39 (2006); State v. Allen, 126 Or App 553, 869 P2d 875, *rev den*, 319 Or 281 (1994); State v. Chambless, 111 Or App 76, 81-82, 824 P2d 1183, *rev den*, 313 Or 210 (1992). Note that if the warrant is partially invalid, whether the officers observed the item from a lawful vantage point depends on whether they discovered the item while searching for items covered by valid portions of the warrant. State v. Burnham, 289 Or App 783, 786, 412 P3d 1233 (2018).

Entry to execute an arrest warrant: State v. Sargent, 323 Or 455, 918 P2d 819 (1996).

Entry to serve restraining order: State v. Foster, 347 Or 1, 217 P3d 168 (2009).

Exigent circumstances or hot pursuit: State v. Lynch, 135 Or App 528, 900 P2d 1042, *rev den*, 322 Or 362 (1995) (police found marijuana grow while looking for burglary suspect); State v. Brown, 98 Or App 129, 778 P2d 976 (1989).

Emergency-aid exception: State v. Agnes, 118 Or App 675, 848 P2d 1237 (1993); State v. Russell, 118 Or App 652, 848 P2d 657 (1993).

Consent: State v. Ford, 220 Or App 247, 185 P3d 550 (2008); State v. Blasingame, 127 Or App 382, 873 P2d 361, *rev den*, 319 Or 406 (1994); State v. Karlow, 121 Or App 524, 855 P2d 1134 (1993); State v. Bartley, 121 Or App 301, 854 P2d 996 (1993).

Detoxification-intake inventory: State v. Lippert, 317 Or 397, 856 P2d 634 (1993).

Vehicle inventory: State v. Heckathorne, 347 Or 474, 223 P3d 1034 (2009); State v. Corey, 123 Or App 207, 859 P2d 560 (1993), *rev den*, 318 Or 351 (1994).

Vehicle stop: State v. Rhodes, 315 Or 191, 843 P2d 927 (1992); State v. Forrister, 179 Or App 516, 40 P3d 571 (2002) (plain smell).

Obviously, a plain-view seizure also will be valid if the officer has not made any intrusion into a constitutionally protected area before making the seizure. State v. Crandall, 340 Or 645, 136 P3d 30 (2006) (defendant purposely dropped baggie under car on premises open to public); State v. Stafford, 184 Or App 674, 679-80, 57 P3d 598 (2002), *rev den*, 335 Or 181 (2003) (defendant stashed wadded up paper bag in common area of apartment complex and left; search lawful); State v. Erb, 135 Or App 421, 899 P2d 716 (1995) (apartment complex parking lot); State v. Peterson, 114 Or App 126, 834 P2d 488, *rev dism'd*, 315 Or 272 (1992) (dolls offered for sale at antique mall).

2. Officer Observes Object in Plain View.

The officer must have probable cause to seize the object from the lawful vantage point. In other words, the evidence must truly be *in plain view*. If the officer must seize the item or invade a privacy interest in order to determine whether he or she has probable cause, the seizure cannot be justified under the plain-view exception. *Compare* State v. Portrey, 134 Or App 460, 896 P2d 7 (1995) (although defendant's boots were in plain view on porch, the soles were not; the officer's act of picking up the boots to inspect the soles was an unconstitutional search), *with* State v. Peterson, 114 Or App at 129 (officer's inspection and seizure of dolls offered for sale was lawful because inspection was "in the same way that an inquisitive doll collector might"); *see also* State v. Morgan, 348 Or 283, 230 P3d 928 (2010) (officer's plain view observation of drug paraphernalia through open top of purse lawfully seized for officer-safety reasons was a valid plain-view observation).

> **NOTE:** This principle constitutes Oregon's functional equivalent of the federal requirement that probable cause be "immediately apparent." *See* Arizona v. Hicks, 480 US 321, 107 S Ct 1149, 94 L Ed 2d 347 (1987) (moving stereo equipment a few inches to view serial numbers constituted a warrantless search not justified by the "plain view" doctrine).

Oregon has followed the lead of the United States Supreme Court in Minnesota v. Dickerson, 508 US 366, 113 S Ct 2130, 124 L Ed 2d 334 (1993), and extended the "plain view" exception to

"plain touch." State v. Bunn, 125 Or App 419, 421, 865 P2d 471 (1993) (officer conducting pat down discovered two items that "felt like a syringe" in suspect's pocket).

3. Probable Cause to Seize the Item Once Seen, Smelled or Felt.

Even if the officer has made a lawful intrusion into a private space and lawfully has observed an object in plain view, the officer may not lawfully seize that object unless he or she has probable cause to believe that the object is contraband or otherwise is subject to seizure. *Compare* State v. Heckathorne, 347 Or 474, 223 P3d 1034 (2009) (where officers lawfully seized and vented a cylinder, the anhydrous ammonia inside cylinder was "exposed and discernable" because officer could smell ammonia); State v. James, 336 Or App 55, 67-69, 560 P3d 747 (2024) (incriminating nature of video camera was immediately apparent because it matched the description that the victim gave of a camera that the victim said defendant used to record abuse; incriminating nature of drawing by the victim was apparent even though the message on the drawing was "open to interpretation"); State v. Wise-Welsh, 318 Or App 146, 148, 506 P3d 454, *rev den*, 370 Or 198 (2022) (officer's belief that syringe contained contraband was reasonable where he had probable cause to believe that defendant was in possession of methamphetamine); State v. Newcomb, 262 Or App 256, 263-64, 324 P3d 557, *rev'd on other grounds*, 359 Or 756 (2016) (officer could seize dog where he saw it was near-emaciated and there were other facts indicating that owner was not feeding it); and State v. Peterson, 114 Or App at 131 (seizure was lawful because "incriminating nature of the dolls [as stolen property] was obvious") *with* State v. James, 336 Or App at 66 (no authority to seize hard drive and CD because the incriminating nature of the items was not immediately apparent); State v. Currin, 258 Or App 715, 311 P3d 903 (2013) (officer could not seize white envelope dropped by suspect because the envelope was not uniquely associated with drugs).

Inadvertence is not a requirement of the Article I, section 9, plain-view exception. State v. Heckathorne, 347 Or 474, 223 P3d 1034 (2009); State v. Peterson, 114 Or App at 131; *see also* State v. Ainsworth, 310 Or 613, 621 fn 9, 801 P2d 749 (1990). The Oregon constitutional plain-view doctrine is, therefore, consistent with the Fourth Amendment in this regard.

> **CAUTION:** Although there is no requirement, in the context of a search warrant, that the officer's discovery of the item was inadvertent in order for the officer to seize it under the plain-view doctrine, it still is necessary for the officer to have found the item while searching in a location that he or she had lawful authority to search under the warrant. Thus, if the officer expects to find a particular item during the search but the warrant omits any authority to search for that item, the plain-view doctrine allows the officer to seize the item only if he or she actually can discover it during a search that remains within the permissible scope of the search authority expressly granted by the warrant. If finding the item will require the officer to search beyond what is authorized expressly, the officer should apply for an additional warrant or seek consent to search.
>
> *See* further discussion of this issue in Chapter V (Searches with Warrants).

Fourth Amendment.

The Fourth Amendment "plain view" exception applies when:

(1) The officer did not violate the Fourth Amendment to arrive at the vantage point from which the evidence in plain view could be observed;
(2) The incriminating character of the evidence is "immediately apparent"; and
(3) The officer has a "lawful right of access to the object itself."

If these three criteria are met, the officer may seize the object, even though the evidence is wholly unrelated to the offense that justified the initial search. *Horton v. California*, 496 US 128, 110 S Ct 2301, 110 L Ed 2d 112 (1990); *Coolidge v. New Hampshire*, 403 US 443, 91 S Ct 2022, 29 L Ed 2d 564 (1971); *State v. Peterson*, 114 Or App at 131.

For an officer to search or to seize an object that is in plain view, the incriminating nature of the evidence must be immediately apparent. If the officer must engage in additional inspection to determine the character of the item, that constitutes a search that requires a separate justification. *Arizona v. Hicks*, 480 US 321, 107 S Ct 1149, 94 L Ed 2d 347 (1987) (moving stereo equipment a few inches to view serial numbers constituted a warrantless search; seizure of the equipment was not justified by the "plain view" doctrine because there was no probable cause to search the stereo equipment); *see also Minnesota v. Dickerson*, 508 US 366, 113 S Ct 2130, 124 L Ed 2d 334 (1993) (the officer's continued manipulation and squeezing of a soft bulge discovered during a weapons frisk was an unjustified warrantless search).

In 1990, the United States Supreme Court abandoned the "inadvertent discovery" limitation. In *Horton v. California*, 496 US 128, 110 S Ct 2301, 110 L Ed 2d 112 (1990), the Court concluded that the Fourth Amendment does not prohibit a warrantless seizure of an item an officer finds in plain view during a lawful search of premises for different items, even though the officer's discovery of the seized item was not inadvertent. Provided that the officer's presence on the premises was otherwise lawful, the Court determined that no logical reason justified suppression simply because the officer expected to find the items that were seized in plain view.

In *Minnesota v. Dickerson*, 508 US 366, the United States Supreme Court extended the "plain view" exception to include "plain touch." The Court unanimously held that the "plain view" doctrine applies to objects felt, in addition to those seen; *i.e.*, if an officer lawfully pats down a suspect and feels an object whose contour or mass makes its identity immediately apparent to the officer as contraband, the officer may seize it without a warrant. Although the Court found the inspection of the package in *Dickerson* to be unlawful because the officer did not immediately recognize the package as contraband, the Court clearly announced an extension of the "plain view" doctrine.

See also:

Illinois v. Andreas, 463 US 765, 103 S Ct 3319, 77 L Ed 2d 1003 (1983). After a customs officer lawfully opened a container and identified its contents as illegal, the contents were then in "plain view" and owner's privacy interest in the item was lost. Resealing the package for a controlled delivery did not violate the Fourth Amendment.

Washington v. Chrisman, 455 US 1, 102 S Ct 812, 70 L Ed 2d 778 (1982). While arresting a student, the officer had a right to go with the student to his dorm room to get ID, and he was entitled to enter the room to seize contraband that he observed while standing in the doorway of the room.

4. Electronic Evidence.

In *State v. Mansor*, 363 Or 185, 421 P3d 323 (2018), the Oregon Supreme Court grappled with issues of warrant overbreadth when searching for electronic data. The court held that, due to the unique nature of electronic data and forensic searches—which expose to the examiner's view data that otherwise cannot be evaluated for whether it falls within the probable cause that supported the warrant—a magistrate cannot be expected to determine ahead of time *where* or *what* the data will look like. *State v. Mansor*, 363 Or at 199. Thus, in some circumstances, a warrant may not be facially overbroad even though it exposes to view data not supported by probable cause. But, to protect the

defendant's privacy interests in those circumstances, the court adopted a "use limitation" with respect to such data. *State v. Mansor*, 363 Or at 220. In adopting that limitation, the court left open whether and how the "plain view" doctrine can justify the use of such data, but the Court of Appeals has since held that it does not. *State v. Bock*, 310 Or App 329, 485 P3d 931 (2021). And, in two companion cases, the Court of Appeals interpreted the "use limitation" from *Mansor* to preclude *all uses*—not just evidentiary use in the same case—of "nonresponsive" data (data outside the scope of the probable cause in the affidavit) discovered in the execution of a warrant for an electronic device. *State v. Serrano*, 324 Or App 453, 527 P3d 54, *adh'd to as modified on recons*, 325 Or App 296, 528 P3d 1219 (2023), *rev den*, 372 Or 192 (2024); *State v. Serrano*, 324 Or App 475, 526 P3d 773 (2023), *rev den*, 372 Or 192 (2024). In those cases, the Court of Appeals held that the state's "use" of non-responsive images to identify new victims of sexual offenses required suppression of all evidence discovered as a result of those images. *Id.*

See Chapter V (Searches with Warrants) for a full discussion of that issue.

O. PRIVATE-PARTY SEARCHES. See Chapter I, Privacy Interests.

"Article I, section 9, is a restriction on *government* searches and seizures, not private ones." *State v. Sines*, 359 Or 41, 53, 379 P3d 502 (2016). Similarly, "[t]he Fourth Amendment applies only to searches and seizures that are the product of government action." *Forty-Ninth Annual Review of Criminal Procedure*, 49 GEO. L.J. ANN. REV. CRIM. PROC. 3, 4 (2020) (citing cases). Thus, a private search does not require a warrant or an exception to the warrant requirement.

P. MISCELLANEOUS CATEGORIES.

1. Administrative Searches.

Note: Additional information on administrative searches can be found in the Oregon Administrative Law BarBook, published by the Oregon State Bar, and in the Attorney General's Administrative law manual.

a. Generally.

> "One of the recognized exceptions to the warrant requirement is the administrative search exception. A valid administrative search must be conducted for purposes other than law enforcement, pursuant to a policy that is authorized by a politically accountable lawmaking body. Furthermore, to be valid, such a policy must limit the discretion of those responsible for conducting the search and the scope of search authorized must reasonably relate to its purpose."

State v. Coleman, 196 Or App 125, 129, 100 P3d 1085 (2004), *rev den,* 338 Or 16 (2005) (citations omitted). The term "administrative search" generally describes routine, nonemergency governmental actions that may intrude into constitutionally protected interests for noncriminal inspection or regulatory purposes. 1 CRIMINAL LAW §§ 3.24, 3-32 (Oregon CLE 2005). An "administrative search" has been defined in Oregon as "one for a purpose other than the enforcement of laws by means of criminal sanctions." *State v. Anderson*, 304 Or 139, 141, 743 P2d 715 (1987), *citing Nelson v. Lane County*, 304 Or 97, 743 P2d 692 (1987); *see also Dept. of Justice v. Spring*, 201 Or App 367, 120 P3d 1 (2005), *rev den*, 340 Or 483 (2006). Consequently, the initial purpose of the search will determine whether it is "administrative." *See* discussion below under the heading, "Requirement 2."

Although the initial justification for the administrative search or seizure must be a noncriminal, regulatory purpose, evidence of criminal activity discovered during the course of the administrative search nonetheless may be admissible in subsequent criminal proceedings. *State v.*

Lippert, 317 Or 397, 405, 856 P2d 634 (1993) (paperfold of cocaine seized during an inventory search from the pocket of a person lodged for detoxification admissible in criminal proceeding); *Nelson v. Lane County*, 304 Or at 104 fn 5 (evidence of a crime found during a "legally authorized and properly administered administrative inspection" could be admissible in a criminal prosecution if the prerequisites for the "plain view" doctrine were met). *See* "Plain View Seizure" in this chapter for a more detailed discussion of this issue.

The general framework governing administrative searches is set forth in *Nelson* as follows:

> "[A]n administrative search conducted without individualized suspicion of wrongdoing could be valid if it were permitted by a 'source of authority,' that is, a law or ordinance providing sufficient indications of the purposes and limits of executive authority, and if it were carried out pursuant to 'a properly authorized administrative program, designed and systematically administered' to control the discretion of non-supervisory officers."

Nelson v. Lane County, 304 Or at 104, *quoting* *State v. Atkinson*, 298 Or 1, 9, 10, 688 P2d 832 (1984); *Smith v. Washington County*, 180 Or App 505, 516-17, 43 P3d 1171, *rev den,* 334 Or 491 (2002) (upholding courthouse security measures).

A valid **administrative search** must meet four requirements:

(1) There must be extra-executive authority for the intrusion;
(2) The intrusion must be for legitimate administrative reasons;
(3) The policy must limit officer discretion re scope and intensity of the search; and
(4) The executing official must follow agency guidelines.

➢ **Requirement 1: There must be extra-executive authority for the intrusion.**

"If the government agents had no authority to take custody of the property, then there can be no lawful intrusion into it. The inquiry ends there." *State v. Atkinson*, 298 Or 1, 9, 688 P2d 832 (1984). To be valid, an administrative search must be authorized, directly or indirectly, by politically accountable policy makers:

> "An administrative search is one conducted for a purpose other than the enforcement of the laws by means of criminal sanctions. Among other requirements, an administrative search must be properly authorized, which means that politically accountable officials, through laws, ordinances, or delegations of rulemaking authority, have engaged in the predicate policy-making choice to take such action. Such an authorization need not be explicit but can be implied. Nor must the politically accountable body itself conceive of, design, and authorize every aspect of the search procedures. Rather, that body's role can be limited to one of authorizing the policy to search, while leaving the details of implementation to the agency or entity charged with executing the searches."

Smith v. Washington County, 180 Or App at 516-17 (citations, footnote, and internal quotations omitted); *see also* *Weber v. Oakridge School District 76*, 184 Or App 415, 435, 56 P3d 504 (2002), *rev den,* 335 Or 442 (2003).

The authority for intrusion must come from outside the executive branch of government. That authority may be provided by either:

- "[P]olitically accountable officials [through] laws, ordinances, or delegations of rulemaking authority," *Atkinson*, 298 Or at 6; **or**

- A judicial warrant, *e.g.*, *Parks v. City of Klamath Falls*, 82 Or App 576, 728 P2d 934 (1986), *rev den,* 303 Or 74 (1987) (fire-inspection warrant); *Accident Prevention Division v. Hogan*, 37 Or App 251, 586 P2d 1132 (1978) (safety-inspection warrant); *State ex rel Accident Prevention Division v. Foster*, 31 Or App 291, 570 P2d 398 (1977) (statute authorizing safety-inspection warrants).

See discussion of administrative warrants in section on business inspections, licensing, and regulated activities in this chapter.

Generally, the authority for the initial intrusion (impoundment, search, or seizure) must be explicit. "Before they search or seize, executive agencies must have explicit authority[.]" *Nelson v. Lane County*, 304 Or 97, 104, 743 P2d 692 (1987). However, in *AFSCME Local 2623 v. Dept. of Corrections*, 315 Or 74, 81-83, 843 P2d 409 (1992), a broad grant of authority to the Department of Corrections to "[p]rovide a secure and healthy environment inside prisons" implicitly authorized implementation of a Department of Corrections program to search employees reasonably suspected of possessing unauthorized property or contraband. Similarly, in *State v. Boone*, 327 Or 307, 959 P2d 76 (1998), the court held that if the authority to *impound* is explicitly authorized by a politically accountable legislative body, the authority to conduct an inventory search on the impounded property may be *implied*, and the law enforcement agency may adopt an inventory policy subject to judicial review for constitutional compliance. *See also Weber v. Oakridge School District 76*, 184 Or App at 436 (drug-testing policy properly adopted by school board pursuant to general statutory authority); *Smith v. Washington County*, 180 Or App at 518-23 (authority to promulgate courthouse-security measures implied from "broad administrative, supervisory, and management authority" granted by statutes and rules); *State v. Layman*, 162 Or App 386, 986 P2d 624 (1999) (authority to create a jail inventory policy is implied by the county ordinance establishing a correctional facility). *Compare State v. Weaver*, 214 Or App 633, 168 P3d 273, *rev den,* 343 Or 691 (2007) (statute authorizing DHS to "investigate" abuse did not expressly or implicitly allow warrantless entry into home).

In *State v. Mast*, 250 Or App 605, 282 P3d 916 (2012), a plaintiff in a civil case obtained a money judgment against defendant, a business partner, and the company they owned. As a judgment creditor, the plaintiff subsequently obtained a writ of execution—issued by a Washington County Circuit Court clerk under ORS 18.865—directing the sheriff to seize and sell the personal property of the judgment debtors, including defendant, to satisfy the judgment. After receiving the writ and the judgment creditor's instructions as to what property to seize, sheriff's deputies went to defendant's business premises. Given that the deputies searched defendant's private office to carry out a writ of execution—not to enforce laws through criminal sanctions—the search was an administrative search. But the warrantless search of defendant's office was not a valid administrative search because the statute governing a writ of execution, ORS 18.887(1), does not authorize a sheriff to "forcibly enter" structures and other enclosures without a specific court order authorizing such an entry. Because a nonconsensual entry into an enclosure like defendant's private office constitutes a forcible entry, the deputies' entry into the office without a court order "was not permitted by ORS 18.887—the only source of legal authority for the search—and, therefore, the administrative search exception does not apply" and the evidence had to be suppressed.

Various state agencies have explicit statutory authorization to inspect regulated businesses. For example: mobile home parks (ORS 446.066); hazardous substances (ORS 453.105); elevators

(ORS 460.135); air and water pollution (ORS 468.095); commercial fire safety inspections (ORS 476.150); boilers and pressure vessels (ORS 480.580); and meat selling establishments (ORS 619.036) (includes authority to "seize" tainted products).

> **CAUTION:** The authority to inspect does not automatically include the authority to seize. In State v. Anderson, 101 Or App 594, 792 P2d 451 (1990), the court held that the state fire marshal's administrative rule authority to *inspect* records from a fireworks stand did not authorize *seizure* of the records.

➢ **Requirement 2: The intrusion must be for legitimate administrative reasons.**

The intrusion must be for a legitimate administrative or regulatory purpose, not for purposes of criminal-law enforcement.

> "Preventing prospective or ongoing violations is an administrative purpose * * *, so long as the intended consequences of noncompliance with whatever standards the inspection is meant to uphold are noncriminal. If offenders face criminal sanctions, the inspection implicates criminal law enforcement purposes and is not 'administrative' in nature."

Nelson v. Lane County, 304 Or 97, 104-05, 743 P2d 692 (1987), *citing* Brown v. Multnomah County Dist. Ct., 280 Or 95, 570 P2d 52 (1977); State v. Alcaraz, 318 Or App 179, 193-95, 508 P3d 13, *rev allowed*, 370 Or 197 (2022) (record was not adequately developed to show that officer's purpose in asking to see fishing license was to cite for a noncriminal violation, "let alone" that the officer was acting "pursuant to a properly authorized administrative program, designed and systematically administered to control the discretion of non-supervisory officers"); State v. Coleman, 196 Or App 125, 129-30, 100 P3d 1085 (2004), *rev den*, 338 Or 16 (2005) (policy lawfully authorized administrative search of persons detained temporarily at police station, both to ensure safety of detainees and to prevent damage to facility); Weber v. Oakridge School District 76, 184 Or App 415, 434, 56 P3d 504 (2002), *rev den,* 335 Or 442 (2003). "If the purpose of the statutory directive is to search for evidence of a crime, then the constitutional strictures of Article I, section 9, must be satisfied." State v. Saunders, 103 Or App 488, 494, 799 P2d 159 (1990). *See also* Michigan v. Clifford, 464 US 287, 294, 104 S Ct 641, 78 L Ed 2d 477 (1984) (if the purpose of the search is to uncover evidence of criminal conduct, officers must obtain a criminal search warrant). But if the primary purpose of the administrative search is noncriminal, it does not matter that "there is some *possibility* that evidence obtained by means of a search *might* be used later as the basis for a criminal prosecution." Weber v. Oakridge School District 76, 184 Or App at 434 (emphasis in original).

To determine whether the administrative-search scheme has a legitimate noncriminal purpose, "[t]he proper analysis involves first identifying the purpose or purposes of the policy and then determining whether the search is reasonable in relation to that purpose or purposes." Weber v. Oakridge School District 76, 184 Or App at 437. "To be reasonable, the search need not be the least restrictive means to accomplish an end." 184 Or App at 439. Moreover, "[m]erely because a means selected to accomplish an end is underinclusive or less than perfect does not mean that it is unreasonable." 184 Or App at 440.

Under the Fourth Amendment, courts must balance the degree of the intrusion into the individual's protected interests against the intrusion's furtherance of legitimate governmental interests. Dept. of Justice v. Spring, 201 Or App 367, 374, 120 P3d 1 (2005), *rev den,* 340 Or 483 (2006), *citing* Vernonia School District 47J v. Acton, 515 US 646, 652-53, 115 S Ct 1386, 132 L Ed 2d 564 (1995) In Spring, the court addressed whether a statutory mandatory buccal-sample requirement in a child-support action in which paternity is contested was reasonable. First, it

considered the minimal nature of the intrusion (DNA tests are common and routinely done for other purposes); the scope of the intrusion (results can be used only to determine paternity); and the fact that the requirement is equally applied in all cases in which paternity is at issue. It then held that those factors, when weighed against the state's significant interest in ensuring that Oregon children obtain the support to which they are entitled, demonstrated that the mandatory DNA-testing requirement is reasonable. *Spring*, 201 Or App at 374.

- **Requirement 3: The procedure must limit officer discretion as to the scope and intensity of the search.**

The search procedure must be narrowly and specifically drawn so that the executing official has no individual discretion as to the scope or intensity of the search. *State v. Atkinson*, 298 Or 1, 10, 688 P2d 832 (1984); *State v. B.A.H.*, 245 Or App 203, 263 P3d 1046 (2011) (search of student at public high school was not valid administrative search); *State v. Coleman*, 196 Or App 125, 129-30, 100 P3d 1085 (2004), *rev den,* 338 Or 16 (2005); *Weber v. Oakridge School District 76*, 184 Or App 415, 436, 56 P3d 504 (2002), *rev den,* 335 Or 442 (2003) ("The purpose of that requirement is to protect against arbitrariness and to ensure that individuals or particular items of property are not improperly singled out for special attention."). If "the legislative authority * * * does not sufficiently limit the scope of executive discretion concerning such searches, it is possible for the executive itself to provide such limits by establishing a systematically administered program pursuant to its statutory authority." *AFSCME Local 2623 v. Dept. of Corrections*, 315 Or 74, 83, 843 P2d 409 (1992) (rules "more than adequately rein[ed] in executive discretion"). *See also State v. Boone*, 327 Or 307, 959 P2d 76 (1998) (when authority to impound vehicle is authorized by legislative body, a law-enforcement agency may adopt an inventory policy subject to judicial review to ensure it does not violate constitutional guarantees); *but see State v. Lecarros*, 187 Or App 105, 66 P3d 543 (2003) (although ORS 830.035(1) authorizes officers to board watercraft for administrative purposes, the lack of rules to guide officers' discretion makes a suspicionless search based on the statute unlawful).

The property must not have been "'singled out for special searching attention.'" *State v. Atkinson*, 298 Or 1, 10 fn 5, 688 P2d 832 (1984), *quoting United States v. Hellman*, 556 F2d 442, 444 (9th Cir 1977). In *State v. Haney*, 195 Or App 273, 97 P3d 1211, *adhered to as modified on recon*, 196 Or App 498, 103 P3d 108 (2004), the court held that the requirement in ORS 810.460 that an officer file an accident report did not provide authority to search a vehicle for ownership and insurance information, because "[n]either the statute nor the DMV form limits officer discretion about whether to conduct searches" and there are no "guidelines limiting officer discretion regarding the scope of searches." In *State v. Gaunce*, 114 Or App 190, 196, 834 P2d 512 (1992), the court remanded the case for a determination of whether the officer impounded the car for criminal investigation purposes or for administrative purposes. If the officer's "suspicions [of criminal activity] influenced his decision [to impound], then his decision initiated an investigative search for crime evidence * * * [and] defendant's car was not lawfully impounded."

The form of the limitation on the discretion of the individual officer may vary. It may, for example, consist of a requirement that the officer conduct an inspection in *every* instance governed by the policy. *See, e.g., State v. Boone*, 327 Or at 315. It also might provide that the search may only be "triggered" by some level of "individualized suspicion," such as reasonable suspicion. *See, e.g., AFSCME Local 2623 v. Dept. of Corrections*, 315 Or at 83. Or it may require random inspections or tests with nondiscretionary follow-up procedures. *Weber v. Oakridge School District 76*, 184 Or App at 436-37 (approving school's drug-testing policy).

➢ **Requirement 4: The executing official must follow agency guidelines.**

"If the evidence shows that the inventory deviated from the established policy or procedures of the particular * * * agency, the inventory should be deemed invalid." *Atkinson*, 298 Or at 10; *see also State v. Swanson*, 187 Or App 477, 481-85, 68 P3d 265 (2003) (opening lock-box and "purse accessory" kit was not authorized by inventory policy); *State v. Dillon*, 182 Or App 308, 50 P3d 1172 (2002) (inventory policy authorizing police to inventory possessions of "prisoners" did not authorize police to inventory possessions of person taken into custody pursuant to a civil detoxification hold); *State v. May*, 162 Or App 317, 321-22, 986 P2d 608 (1999), *rev den,* 330 Or 375 (2000) (officer who opened opaque cloth bundle violated arrest inventory policy; evidence suppressed).

But if the arrest, impoundment, and inventory otherwise is lawful, the mere fact that the officer was motivated by a suspicion that evidence of other crimes would be found is not a basis to suppress evidence, because "subjective intentions play no role in ordinary probable-cause Fourth Amendment analysis." *Arkansas v. Sullivan*, 532 US 769, 772, 121 S Ct 1876, 149 L Ed 2d 994 (2001) (internal quotations omitted).

For a discussion of other types of searches that implicate administrative search principles, *see also* "School Searches" and "Employee Searches by a Public Employer" in this chapter.

b. Airport Security and Security Screening.

Although security measures in airports and other places open to the public serve valid administrative purposes, they are usually discussed in terms of consent given as a condition of admittance. For that reason, this chapter includes cases involving security screening under the "Consent Implied From Circumstances" subsection of the "Consent Searches" section of this chapter.

c. Arson and Fire-Safety Inspections.

Oregon Law.

ORS chapter 476 authorizes the State Fire Marshall to enter premises for safety inspections and fire investigations.

In *State v. Felger*, 19 Or App 39, 526 P2d 611 (1974), the court held that the first inspection of premises after a fire has occurred is permissible in furtherance of the statutory duty in ORS 476.210 to investigate fires. The court went on to indicate that the majority of federal and state courts do not require a search warrant or consent before inspecting premises where a fire has occurred. Quoting a federal case decided under the Fourth Amendment: "The absurdity of requiring the fire investigator to secure a warrant in order to search for the fire's cause is self evident." *Felger*, 19 Or App at 48, *quoting United States v. Green*, 474 F2d 1385, 1389 (5th Cir), *cert den*, 414 US 829 (1973). The court declined to decide whether a warrant is necessary for subsequent inspections of the premises because the defendant had abandoned the tenancy shortly after the fire. *But see Michigan v. Tyler*, 436 US 499, 98 S Ct 1942, 56 L Ed 2d 486 (1978) (discussed in next section).

Fourth Amendment.

The issuance of a search warrant for an annual fire-safety inspection of an attorney's office does not violate the Fourth Amendment. *Parks v. City of Klamath Falls*, 82 Or App 576, 728 P2d 934 (1986), *rev den,* 303 Or 74 (1987) (warrant authorized by statute and a city ordinance).

A warrantless search immediately after a fire to determine its cause was upheld in *Michigan v. Tyler*, 436 US 499, 98 S Ct 1942, 56 L Ed 2d 486 (1978), where the Court noted that a burning building is an exigency of sufficient proportion to render a warrantless entry reasonable. The firefighter may remain for a "reasonable time" after the fire is abated to investigate its cause. However, a series of warrantless entries by fire and police officials days after the fire was extinguished violated the Fourth and Fourteenth Amendments.

Under the Fourth Amendment, a non-criminal, administrative warrant to determine the cause of a fire may issue if officials show that "a fire of undetermined origin occurred on the premises, that the scope of the proposed search is reasonable and will not intrude on the fire victim's privacy, and that the search will be executed at a reasonable and convenient time." *Michigan v. Clifford*, 464 US 287, 294, 104 S Ct 641, 78 L Ed 2d 477 (1984).

d. Border and Immigration Searches.

Fourth Amendment.

Border and customs searches are a longstanding, historically recognized exception to the search-warrant requirement. *United States v. Ramsey*, 431 US 606, 97 S Ct 1972, 52 L Ed 2d 617 (1977). The Fourth Amendment does not require warrants for routine stops and searches at the border because the executive branch has "plenary authority" to conduct such searches "in order to regulate the collection of duties and to prevent the introduction of contraband into this country." *United States v. Montoya de Hernandez*, 473 US 531, 537-38, 105 S Ct 3304, 87 L Ed 2d 381 (1985); *United States v. Martinez-Fuerte*, 428 US 543, 96 S Ct 3074, 49 L Ed 2d 1116 (1976) (questioning occupants about citizenship is constitutional). Routine border inspections include the authority to remove and disassemble a vehicle's fuel tank, because interference with the motorist's possessory interest is justified by the government's paramount interest in protecting the border. *United States v. Flores-Montano*, 541 US 149, 124 S Ct 1582, 158 L Ed 2d 311 (2004).

This exception also applies to searches conducted at the "functional equivalent" of the border. *Almeida-Sanchez v. United States*, 413 US 266, 93 S Ct 2535, 37 L Ed 2d 596 (1973) (intersection of two or more roads extending from border or at international airport). The rationale for the border exception also applies to persons or objects leaving the country. *California Bankers Association v. Schultz*, 416 US 21, 94 S Ct 1494, 39 L Ed 2d 812 (1974).

Away from the border or its functional equivalent, a roving border patrol may stop a vehicle and question occupants only if the officer has "reasonable suspicion" to believe immigration laws have been violated. *United States v. Brignoni-Ponce*, 422 US 873, 95 S Ct 2574, 45 L Ed 2d 607 (1975). *See also* *United States v. Arvizu*, 534 US 266, 122 S Ct 744, 151 L Ed 2d 740 (2002) (Border Patrol Agent had reasonable suspicion to believe defendant was engaged in illegal drug activity). A stop at a permanent checkpoint located away from the border, to allow brief questioning based upon reasonable suspicion, is permissible. *United States v. Martinez-Fuerte*, 428 US 543, 96 S Ct 3074, 49 L Ed 2d 1116 (1976). However, either probable cause or consent would be needed to search at such a checkpoint. *United States v. Ortiz*, 422 US 891, 95 S Ct 2585, 45 L Ed 2d 623 (1975).

A federal administrative deportation warrant issued without oath or affirmation violates section 9. *State v. Rodriguez*, 110 Or App 544, 823 P2d 1026 (1992), *reversed other grounds*, 317 Or 27, 854 P2d 399 (1993).

The inspection of incoming, international mail has been approved as a type of border search. *United States v. Ramsey*, 431 US 606, 97 S Ct 1972, 52 L Ed 2d 617 (1977) (statute authorizing

inspection of international mail based on reasonable cause to suspect illegal importation is valid under Fourth Amendment).

e. Business Inspections, Licensing, and Regulated Activities.

(1) Generally.

"Search warrants are generally required for administrative fire, health, or safety inspections of residential or private commercial property. Even where a warrant is not required, there must be some opportunity for precompliance review before a neutral decision maker, unless there is consent or an exigent circumstance. The probable cause requirement for administrative warrants is less stringent than for criminal investigations because the privacy interests at stake are considered less important." *Forty-Ninth Annual Review of Criminal Procedure*, 49 GEO. L.J. ANN. REV. CRIM. PROC. 51, 161 (2020) (footnotes omitted), *citing* *Camara v. Municipal Court*, 387 US 523, 87 S Ct 1727, 18 L Ed 2d 930 (1967) (resident has a Fourth Amendment right to insist that housing-code inspectors obtain a warrant for safety inspection); *See v. City of Seattle*, 387 US 541, 87 S Ct 1737, 18 L Ed 2d 943 (1967) (warrantless inspection of defendant's locked, commercial warehouse by fire department representative was invalid under the Fourth Amendment); *Marshall v. Barlow's, Inc.*, 436 US 307, 98 S Ct 1816, 56 L Ed 2d 305 (1978) (statutory authorization under the Occupational Safety and Health Act of 1970 does not allow warrantless searches; electrical and plumbing installation business was not a "pervasively regulated business"); and other cases. *Accord* *Accident Prevention Division v. Hogan*, 37 Or App 251, 256, 586 P2d 1132 (1978) (*citing* *Camara* and *Marshall*): "A governmental intrusion into a portion of business premises not ordinarily open to the public for the purpose of determining whether or not certain statutory or regulatory violations have occurred is a 'search' * * * [requiring,] as a rule, * * * [a warrant] unless exigent circumstances exist or consent is obtained."

The standard justifying issuance of a judicial administrative search warrant is different from the standard for a criminal search warrant.

> "Probable cause in the criminal law sense is not required. For purposes of an administrative search such as this, probable cause may be based not only on specific evidence of an existing violation but also on a showing that reasonable legislative or administrative standards for conducting an * * * inspection are satisfied with respect to a particular [establishment], *Camara v. Municipal Court*, [387 US] at 538."

Marshall v. Barlow's Inc., 436 US at 320, *quoted in* *Accident Prevention Division v. Hogan*, 37 Or App at 257 (prior history of safety violations, reluctance to cure violations, unwillingness to allow voluntary inspections, and employee injuries justified issuance of safety inspection warrant).

In an Oregon case addressing the validity of a safety inspection warrant, the court held that administrative search standards must prevent "arbitrary government intrusion" by regulating the "manner of *selection* of the premises to be searched" as well as the "manner of *execution* of the inspection." *State ex rel. Accident Prevention Division v. Foster*, 31 Or App 291, 298, 570 P2d 398 (1977) (emphasis added) (warrants for inspection of business premises were invalid because they were issued without proper legislative or administrative standards governing the selection of the business for inspection). *Foster* also held that the provision in the Oregon Safe Employment Act that generally authorizes inspection warrants does not itself violate the Fourth Amendment. 31 Or App at 296.

Additional Cases:

A statute authorizing *inspection* of the records of a fireworks vendor does not authorize the warrantless *seizure* of records that are evidence of unlawful sales activity. State v. Anderson, 101 Or App 594, 792 P2d 451 (1990).

A fire inspection warrant for an attorney's office does not violate ORS 9.695 (restricting the search or seizure of lawyer files or premises) or the Fourth Amendment. Parks v. City of Klamath Falls, 82 Or App 576, 728 P2d 934 (1986), *rev den,* 303 Or 74 (1987).

Under the Fourth Amendment, however, a warrant is not necessarily required before searching or seizing a business's *records* pursuant to an administrative scheme. Donovan v. Lone Steer, Inc., 464 US 408, 414-15, 104 S Ct 769, 773, 78 L Ed 2d 567 (1984). Instead, the state need only give an opportunity for precompliance review, such as an administrative subpoena, before the business owner faces penalties for failing to comply. Los Angeles v. Patel, 576 US 409, 135 S Ct 2443, 2452-54, 192 L Ed 2d 435 (2015). Similarly, under Article I, section 9, "an administrative subpoena issued as part of a civil investigation will comply with Article I, section 9, as long as the subpoena is 'relevant to a lawful investigatory purpose and . . . no broader than the needs of the particular investigation.'" State v. Ghim, 360 Or 425, 439, 381 P3d 789 (2016).

(2) Pervasively Regulated Businesses.

Oregon cases considering Article I, section 9, challenges to warrantless administrative searches of "pervasively regulated" businesses have adopted the Fourth Amendment standard. State v. Westside Fish Co., 31 Or App 299, 570 P2d 401 (1977) (approving the statutorily authorized warrantless inspection of the business premises of a licensed food-fish canner and wholesale dealer); State v. Saunders, 103 Or App 488, 799 P2d 159 (1990) (holding that a statute authorizing a search of all places where food fish may be kept did not authorize the warrantless search of a package of sturgeon roe passing through an airport). In Saunders, the court held that a warrantless inspection of a "pervasively regulated business" is constitutionally reasonable if ***three criteria*** are met:

- There is a "'substantial' governmental interest that informs the regulatory scheme pursuant to which the inspection is made";
- "the warrantless inspection is necessary to further [the] regulatory scheme"; and
- the statutory scheme fulfills the "two basic functions of a warrant" by advising the owner "that the search is being made pursuant to the law and has a properly defined scope," and limiting "the discretion of the inspecting officers."

Saunders, 103 Or App at 492, *quoting* New York v. Burger, 482 US 691, 702-03, 107 S Ct 2636, 96 L Ed 2d 601 (1987) (warrantless search of defendant's auto-wrecking yard pursuant to an administrative inspection statute was justified under the Fourth Amendment because of the reduced expectation of privacy in "pervasively regulated businesses" and the public need for periodic regulatory inspection).

> **NOTE: ADMINISTRATIVE PURPOSE REQUIRED FOR SEARCH.** Not all searches and seizures in "pervasively regulated" businesses will be upheld. The court in Saunders suppressed the evidence because the purpose of the seizure of the salmon roe was for a "criminal" investigation. "If the purpose of the statutory directive is to search for evidence of a crime, then the constitutional strictures of Article I, section 9, must be satisfied." Saunders, 103 Or App at 494. *Contrast* State v. Westside Fish Co., 31 Or App 299, in which a routine warrantless inspection of a licensed fish

cannery apparently had regulatory, non-criminal purposes, but it resulted in criminal prosecution for violations of the commercial fishing laws. The inspection was nevertheless upheld under the Fourth Amendment and Article I, section 9.

Other "pervasively regulated" businesses:

Mining Facilities: *Donovan v. Dewey*, 452 US 594, 101 S Ct 2534, 69 L Ed 2d 262 (1981) (Federal Mine Safety and Health Act, authorizing warrantless searches of mines and quarries, does not violate Fourth Amendment).

Pawn Shop (firearms): *United States v. Biswell*, 406 US 311, 92 S Ct 1593, 32 L Ed 2d 87 (1972) (warrantless inspections to enforce the Gun Control Act did not violate the Fourth Amendment).

Liquor Industry: *Colonnade Catering Corp. v. United States*, 397 US 72, 90 S Ct 774, 25 L Ed 2d 60 (1970).

Not a "pervasively regulated" business:

Hotels: *City of Los Angeles, California v. Patel*, 576 US 409, 135 S Ct 2443, 192 L Ed 2d 435 (2015).

f. Death Investigations.

This area is governed by the statutes in ORS chapter 146.

ORS 146.090 requires the medical examiner "to investigate and certify the cause and manner" of human deaths occurring in a variety of circumstances.

ORS 146.107(1) authorizes the medical examiner, deputy medical examiner, or district attorney to enter any location in which they have "reasonable cause to believe that a body or evidence of the circumstances of death requiring investigation may be found." If they are "refused entry," under ORS 146.107(2), they "may apply to any judge authorized to issue search warrants for an *order to enter* such premises." The statutory procedure for obtaining the "order to enter and search and seize" is very similar to that for search warrants. Under ORS 146.107(4), the medical examiner (or deputy) or district attorney may curtail access of others to the location, including enclosing or locking the location for up to five days.

On a constitutional level, many issues pertaining to suspicious deaths will fall within the emergency-aid and exigent-circumstances doctrines.

g. Detoxification and Civil Holds; Other Inventories.

See a complete discussion of inventories during civil holds in the section on Inventories in this chapter.

h. Roadblocks and Routine Traffic Checks.

Oregon Law.

"Sobriety roadblocks," without individualized suspicion of criminal activity, violate Article I, section 9; they are not valid "administrative inspections" because they are used to gather evidence for criminal prosecutions. *Nelson v. Lane County*, 304 Or 97, 743 P2d 692 (1987); *State v. Boyanovsky*, 304 Or 131, 743 P2d 711 (1987); *State v. Anderson*, 304 Or 139, 743 P2d 715 (1987).

In two other cases that presented challenges to police use of a roadblock, the Oregon Supreme Court concluded that no constitutional "stop" had occurred. In *State v. Holmes*, 311 Or 400, 813 P2d 28 (1991), an officer flagged down traffic on a rural highway and directed drivers to a detour around a wreck. When defendant stopped, the officer determined that he was intoxicated and arrested him for DUII. The Supreme Court held that the officer's conduct was only an "encounter," not a "stop." In *State v. Gerrish*, 311 Or 506, 815 P2d 1244 (1991), the court reversed a suppression order in a DUII case where the basis for the suppression was that the officer had made his observations of defendant's intoxication when defendant stopped at an informal roadblock hastily erected immediately after a robbery. The officer's purpose in checking vehicles was to either catch the escaping robber or find witnesses to the crime, and was not a "stop" for constitutional purposes.

See also *State v. Lunow*, 114 Or App 239, 835 P2d 129, *rev den,* 314 Or 574 (1992) (parking patrol car on narrow road that left sufficient room to drive around it was not a "roadblock").

Fourth Amendment.

The United States Supreme Court held in *Delaware v. Prouse*, 440 US 648, 99 S Ct 1391, 59 L Ed 2d 660 (1979), that, in the absence of articulable facts justifying reasonable suspicion that the vehicle or the operator was unlicensed, a "random" stop of an automobile for the purpose of checking the vehicle registration and the operator's license violated the Fourth Amendment. *Prouse* noted, however, that if *all* traffic is stopped in roadblock fashion, it is not a violation of the Fourth Amendment. Consistent with this principle, the Court upheld a plain-view seizure following a stop at a driver-license checkpoint in *Texas v. Brown*, 460 US 730, 103 S Ct 1535, 75 L Ed 2d 502 (1983). In *Illinois v. Lidster*, 540 US 419, 124 S Ct 885, 157 L Ed 2d 843 (2003), police officers investigating a fatal hit-and-run accident set up a checkpoint at that location a week after the accident in order to stop motorists briefly to hand out flyers and request any information concerning the accident, and the defendant was stopped at the checkpoint and eventually was arrested and convicted of DUII. The Court held that the brief and minimally intrusive checkpoint stop for the purpose of investigating the fatal accident did not violate the Fourth Amendment.

In *Michigan Dept. of State Police v. Sitz*, 496 US 444, 110 S Ct 2481, 110 L Ed 2d 412 (1990), the Court approved the use of DUII roadblocks, as long as they are conducted pursuant to a consistently applied administrative scheme and the stop is brief. But in *City of Indianapolis v. Edmond*, 531 US 32, 121 S Ct 447, 148 L Ed 2d 333 (2000), the Court held that a highway checkpoint program whose primary purpose is the discovery and interdiction of illegal narcotics violated the Fourth Amendment. 531 US at 44.

2. Blood, Breath, and Urine Samples.

After a legal seizure of blood from the suspect, the removal of blood from the vial and the testing of the blood by the crime lab is not a separate "search." *State v. Langevin*, 84 Or App 376, 733 P2d 1383 (1987), *affirmed*, 304 Or 674, 748 P2d 139 (1988).

a. DNA Samples for Databanking.

See also the discussion of Probationers and Parolees, in this chapter.

Oregon Law.

ORS 137.076, which requires that a person convicted of any felony or certain misdemeanors must provide a fingerprint and blood or buccal sample for a DNA databank, does not violate the defendant's constitutional rights. State v. Sanders, 343 Or 35, 163 P3d 607 (2007) (expressly limiting its holding to felony defendants); State v. Brown, 212 Or App 164, 157 P3d 301, *rev den*, 343 Or 223 (2007) (requiring convicted felons to provide a buccal sample is akin to the fingerprinting of a person in custody, and thus is not an unreasonable seizure under either Article I, § 9, or the Fourth Amendment); State v. Stickney, 195 Or App 155, 97 P3d 1205 (2004), *rev den,* 338 Or 17 (2005); State ex rel Juv. Dept. v. Mitchell, 130 Or App 134, 880 P2d 958 (1994), *aff'd by an equally divided court*, 325 Or 479, 940 P2d 518 (1997). After adjudication for first-degree sodomy, child challenged the juvenile court's order requiring him to submit a blood sample to a DNA databank pursuant to ORS 419C.473(1) and ORS 137.076. A blood draw under these statutes does not violate a child's rights under Article I, section 9, or the Fourth Amendment. *See also* State ex rel Juv. Dept. v. Orozco, 129 Or App 148, 878 P2d 432 (1994), *rev den,* 326 Or 58 (1997).

Fourth Amendment.

The compulsory DNA profiling of arrestees without individualized suspicion is lawful under the Fourth Amendment, in light the defendants' substantially diminished expectations of privacy, the minimal intrusion, and the overwhelming societal interests in collecting such information. *Maryland v. King*, 569 US 435, 133 S Ct 1958, 186 L Ed 2d 1 (2013). Oregon statutes requiring persons convicted of aggravated murder, murder, and a variety of sex offenses to provide blood samples to a DNA databank — *viz.*, ORS 137.076, 161.325(4), 181.085, 419C.473, and 419A.260(1)(d)(K) — do not violate the Fourth Amendment. State v. Sanders, 343 Or 35, 163 P3d 607 (2007); Rise v. State of Oregon, 59 F3d 1556 (9th Cir 1995), *cert den*, 517 US 1160 (1996). The Ninth Circuit found that: felons have a reduced expectation of privacy, blood extractions are a relatively minimal intrusion into privacy interests, the public has an incontestable interest in preventing recidivism and in identifying and prosecuting murders and sexual offenders, and it is likely that a DNA data bank would advance this interest. *See also* State ex rel Juv. Dept. v. Mitchell, 130 Or App 134, 880 P2d 958 (1994), *aff'd by an equally divided court*, 325 Or 479, 940 P2d 518 (1997) (decided under both the Fourth Amendment and the Oregon Constitution); State ex rel Juv. Dept. v. Orozco, 129 Or App 148, 878 P2d 432 (1994), *rev den*, 326 Or 58 (1997) (also rejecting claim under the Due Process Clause).

b. Exigent circumstances.

See Discussion of DUII cases in Exigent Circumstances section of this chapter. State v. Machuca, 347 Or 644, 227 P3d 729 (2010) (where probable cause exists to believe that the defendant has committed DUII,"for purposes of the Oregon Constitution, the evanescent nature of a suspect's blood alcohol content is an exigent circumstance that will ordinarily permit a warrantless blood draw"); State v. Milligan, 304 Or 659, 748 P2d 130 (1988) (officers investigating a vehicular homicide acted properly by seizing blood without consent or a warrant because alcohol dissipation created exigent circumstances); State v. Skeans, 149 Or App 570, 945 P2d 529 (1997) (dissipation of blood alcohol is an exigent circumstance even after the officer decides to arrest; arrest does not "freeze" the biological process of alcohol dissipation). *But see* State v. Ritz, 361 Or 781, 399 P3d 421 (2017) (*Machuca* exigency analysis does not allow entry into suspect's home to obtain blood sample).

c. Breath and blood tests in DUII prosecutions.

The result of a blood test obtained from a DUII arrestee pursuant to a search warrant but not in compliance with ORS 813.140 (defendant did not consent and was not unconscious) is admissible in a DUII trial, because ORS 136.432 precludes suppression for statutory violations. State v. Hays, 234 Or App 713, 228 P3d 731 (2010) (even assuming that the officer violated the implied consent statutes in seeking defendant's consent to a breath test, ORS 136.432 provides that a police officer's violation of the implied consent statutes is not grounds for suppressing breath test results); State v. Silbernagel, 229 Or App 688, 215 P3d 876 (2009); State v. Bloom, 216 Or App 245, 249, 172 P3d 663 (2007), *rev den*, 344 Or. 280, 180 P3d 702 (2008). Likewise, ORS 813.320(2) expressly states that a failure to comply with the Implied Consent law will not require suppression of otherwise competent evidence obtained pursuant to a warrant or a hospital blood draw. State v. Snyder, 337 Or 410, 97 P3d 1181 (2004) ("the legislature intended that the evidence in question be competent 'in a different way or manner' than as provided by the implied consent law, as long as the circumstances in subsection (2)(a) or (2)(b) are satisfied."); State v. Shantie, 193 Or App 813, 92 P3d 746 (2004).

> **NOTE: IMPACT OF ORS 136.432 AND ORS 813.320(2).** These statutory limitations on the exclusionary remedy do *not* change or repeal the substantive limitations on the authority of police officers to obtain blood, breath, and urine samples. In other words, although a violation of the implied-consent statutes will not necessarily require suppression of evidence in the criminal case, neither ORS 136.432 nor ORS 813.320(2) provides immunity from any civil liability.

(1) Breath Tests and Breath-Test Refusals.

Oregon's Implied Consent Law requires a person under arrest for DUII to submit to a chemical test of the person's breath for alcohol content or suffer various consequences. ORS 813.100. "A police officer's accurate statement of the potential lawful adverse consequences resulting from a refusal ordinarily cannot be deemed to unlawfully coerce a defendant's consent to a search or seizure." State v. Moore, 354 Or 493, 318 P3d 1133 (2013) (disavowing statement to contrary in State v. Newton, 291 Or 788, 636 P2d 393 (1981)). *See also* State v. Ramirez-Carmona, 313 Or App 533, 537, 495 P3d 213 (2021) (warning that the state "may use" the suspect's refusal against him in court did not render consent to breath test involuntary even if state would not be permitted to use refusal against suspect in criminal case, because the warning "did not convey certainty as to the use or admissibility of the evidence, nor did it specifically refer to a criminal proceeding"). Further, failure to comply with the implied consent laws will not affect the constitutionality of a search based on the defendant's consent, if that consent is otherwise voluntary. State v. Moore, 265 Or App 1, 6-8, 336 P3d 507, *rev den*, 356 Or 638 (2014).

However, admitting evidence of an individual's *refusal* to take a breath test may violate his rights under Article I, section 9, in some circumstances, even if the officer had a lawful basis for obtaining a breath test. State v. Banks, 364 Or 332, 434 P3d 361 (2019). In Banks, the officer had a legitimate basis for obtaining a breath test from defendant—exigent circumstances and probable cause—but asked defendant to take the breath test after reading the "rights and consequences" required by the implied consent laws. The court reasoned that the officer's question—"Will you take a breath test?"—could be understood as either (1) a request for express consent to search the driver's breath that, if given, would supply a constitutional basis for the test; or (2) a request for the defendant to physically submit to the test, which was constitutionally permissible for other reasons. State v. Banks, 364 Or at 342. "Stated another way, a driver's refusal to answer that question affirmatively may be either an invocation of a constitutional right or a refusal to cooperate without constitutional significance." State v. Banks, 364 Or at 342. Defendant argued that he understood the officer's question as seeking express consent to search and, thus, that his refusal was an invocation of his

constitutional right to refuse the search. State v. Banks, 364 Or at 343. Because the officer's question was ambiguous, the court held that the state had not met its burden of demonstrating that the request "was solely a request for physical cooperation and could not reasonably be understood as a request for constitutionally significant consent to search." As a result, the state did not establish that defendant's refusal to take the test was admissible as evidence of his guilt. State v. Banks, 364 Or at 343. *See also* State v. Brandes, 317 Or App 672, 506 P3d 431 (2022) (under the totality of the circumstances, state failed to prove that defendant's refusal to take breath test was not an invocation of a constitutional right, where defendant verbally agreed to take the test but then repeatedly pretended to blow and physically did not provide a sample). On a different record, however, the state may be able to show that the defendant understood the officer's request solely as a request to provide physical cooperation or otherwise show, based on the circumstances, that the request could reasonably be understood only as a request for physical cooperation. In that case, the refusal should be admissible. The same analysis applies with respect to refusals to perform field sobriety tests "because, like breath tests, FSTs are searches within the meaning of Article I, section 9." State v. Hamilton, 330 Or App 258, 267, 543 P3d 704 (2024) (refusal inadmissible where deputies asked if defendant would "consent" or "volunteer" to do FSTs, even though deputies also stated that the tests were "purely physical").

Although a refusal to take a breath test may be inadmissible under Article I, section 9, "[t]he privilege against self-incrimination contained in Article I, section 12, of the Oregon Constitution, does not prevent admission of evidence that a defendant has refused to take a breath test." State v. Ratliff, 82 Or App 479, 485, 728 P2d 896 (1986), *affirmed*, 304 Or 254, 744 P2d 247 (1987). *See also* South Dakota v. Neville, 459 US 553, 564, 103 S Ct 916, 74 L Ed 2d 748 (1983) ("[A] refusal to take a blood-alcohol test, after a police officer has lawfully requested it, is not an act coerced by the officer, and thus is not protected by the privilege against self-incrimination.").

Evidence of a breath-test result, or a refusal, is not admissible in a DUII prosecution if the arrestee was not afforded a reasonable opportunity to consult privately with counsel before deciding whether to submit, even if the officer otherwise fully complied with all of the statutory requirements. State v. Spencer, 305 Or 59, 750 P2d 147 (1988) (construing Article I, section 11, to entitle arrestee to opportunity to consult with counsel before deciding whether to submit); State v. Durbin, 335 Or 183, 63 P3d 576 (2003) (expanding *Spencer* to require opportunity for *private* consultation with counsel); State v. Dinsmore, 342 Or 1, 147 P3d 1146 (2006). *But see* State v. Davis, 350 Or 440, 461, 256 P3d 1075, 1087 (2011) (noting that *Spencer* appears inconsistent with the text and history of Article I, section 11). Although, under ORS 813.320(1), the implied-consent law do not limit admission of an otherwise competent and admissible breath-test result that is offered in the prosecution of a charge other than DUII, if the defendant was not allowed to privately consult with his lawyer, the breath-test result must be excluded in the prosecution of any offense. State v. Dinsmore, 342 Or at 10.

(2) Blood Tests.

Although the implied-consent statutes used to limit the availability of evidence obtained in violation of the implied-consent law, ORS 813.320 now provides that most evidence will not be subject to suppression for violation of implied consent. For crimes other than DUII, it provides that the implied-consent law "shall not be construed by any court to limit the introduction of otherwise competent, relevant evidence in any civil action, suit or proceedings, or in any criminal action other than a violation of ORS 813.010 or a similar municipal ordinance." ORS 813.320(1). And for DUII prosecutions, it provides that violations of the implied-consent law shall not limit the introduction of any otherwise competent, relevant evidence "of the amount of alcohol in the blood of a defendant."

Moreover, since 2013, ORS 813.100 additionally states that "[n]othing in [the implied consent statute] precludes a police officer from obtaining a chemical test of the person's breath or

blood through any lawful means for use as evidence in a criminal or civil proceeding including, but not limited to, obtaining a search warrant." Thus, obtaining a blood sample based only upon probable cause and exigent circumstances no longer violates the implied-consent law. *See* State v. Moylett, 313 Or 540, 836 P2d 1329 (1992) (construing statute before amendment to preclude blood draws based on probable cause and exigency). And, in any event, with the enactment of ORS 136.432 and ORS 813.320(2), a violation of the implied-consent law does not require suppression.

(3) Urine Tests.

Oregon Law.

Under ORS 813.131, a driver impliedly consents to a urine test for the presence of a controlled substance or an inhalant under certain circumstances, as a matter of statute. The officer making the request must have completed eight hours of training in drug recognition and must have a reasonable suspicion that the person is under the influence of a controlled substance. The subject must be arrested for DUII and must have either blown less than .08 percent BAC on a breath test or been in an accident resulting in injury or property damage. Failing or refusing a urine test under such circumstances requires a license suspension, which runs consecutively to the breath-test suspension. ORS 813.131 and 813.132.

These implied-consent provisions provide authority independent from the officer's authority to obtain a urine sample under the circumstances described in ORS 813.140 (either express consent or probable cause of DUII plus inability to consent).

Federal Law.

Ferguson v. City of Charleston, 532 US 67, 121 S Ct 1281, 149 L Ed 2d 205 (2001). Urine screening of maternity patients conducted without a warrant or consent by staff members of a state-operated hospital, for the purpose of developing evidence of violations of criminal laws, violated the Fourth Amendment.

3. Booking Records — Fingerprints and Photographs.

Oregon Law.

In general, it is permissible to fingerprint and photograph an arrested person. *State v. Cullop*, 19 Or App 129, 526 P2d 1048 (1974) (fingerprints).

Fourth Amendment.

Davis v. Mississippi, 394 US 721, 89 S Ct 1394, 22 L Ed 2d 676 (1969). Defendant's fingerprints obtained after unlawful arrest were not admissible.

4. Employees — Searches by Public Employers.

Oregon Law.

Oregon courts have not adopted the "special needs" balancing analysis that federal courts apply under the Fourth Amendment to justify various types of warrantless searches of employees. *See* discussion of "special needs" rule in this chapter.

Relying instead on "administrative search" principles, the court in *AFSCME Local 2623 v. Dept. of Corrections*, 315 Or 74, 83, 843 P2d 409 (1992), held that Department of Corrections rules that require employees reasonably suspected of possessing unauthorized property or contraband to submit to a search did not violate Article I, section 9, because "the rules more than adequately rein in executive discretion by establishing a fully described administrative program that is triggered by individualized suspicion." *See also* the discussion of "Administrative Searches" in this chapter.

The *AFSCME* court specifically declined to decide whether an employee could be disciplined for refusing to consent to a search and whether employees' personal belongings located on DOC property, but outside a secure facility, may legally be searched.

> "We decide only that the Department's statutory duties [to provide a secure and healthy environment inside prisons] give it implicit authority to promulgate rules concerning * * * [requests to search employees], and that the rules that the Department has promulgated sufficiently limit the exercise of discretion in their enforcement under the rule of *State v. Atkinson*, [298 Or 1, 9, 10, 688 P2d 832 (1984)] and *Nelson v. Lane County*, [304 Or 97, 104, 743 P2d 692 (1987)]."

AFSCME Local 2623 v. Dept of Corrections, 315 Or at 83.

In *State v. Meredith*, 337 Or 299, 96 P3d 342 (2004), the court assumed that a public employer validly may place a concealed transmitter on its own vehicle for the purpose of monitoring an employee's location while on the job. The court held that police monitoring of the transmission to follow the employee did not violate her right to privacy under Article I, section 9. *But see State v. Price*, 92 Or App 669, 759 P2d 1130 (1988) (in the absence of exigent circumstances, the warrantless seizure of a purse belonging to a state employee for the purpose of securing it while seeking a warrant to search it for marijuana violated the employee's section 9 rights).

Fourth Amendment.

Fourth Amendment protections extend to a public employee's desk or working area; employees generally have a reasonable expectation of privacy in their offices. *O'Connor v. Ortega*, 480 US 709, 107 S Ct 1492, 94 L Ed 2d 714 (1987). However, "special needs" may justify a search of a public employee's office by a supervisor for evidence of work-related misconduct in support of disciplinary action. In *O'Connor*, state hospital employees investigating misconduct by a state-employed physician searched his office several times and seized personal items that were used to impeach the credibility of a defense witness at a disciplinary hearing. Weighing the substantial government interest in the efficient operation of the government workplace against the minimal intrusion in the individual's rights, the Court in *O'Connor* concluded that requiring probable cause to conduct a search was impracticable and that such a search need only be "reasonable."

> "*Special Needs Searches.* The Supreme Court has held that certain programmatic searches do not require a warrant or probable cause when they are conducted in furtherance of a government 'special need' other than investigation of criminal activity. These 'special needs' searches are evaluated under a two-pronged approach. First, they must further a 'special need[], beyond the normal need for law enforcement,' which would be jeopardized by a warrant or probable cause requirement. To qualify as a special need, a government interest must be a real, current, or vital problem that the proposed search effectively addresses. Second, if there is a special need, and the individualized suspicion requirement would jeopardize that need, courts evaluate the reasonableness of the search by balancing the nature of the intrusion on the privacy interest at stake against the government

interest served by the search. Determining whether special needs searches are permissible is therefore heavily fact and case specific.

Special needs searches have been permitted in several distinct areas. For example, the Supreme Court has upheld programmatic, suspicionless drug testing of government employees as a special needs search. The interest in public safety served by testing government employees often outweighs the intrusion on the employee's privacy interests. However, even unintrusive drug testing is invalid if the government does not show that there is an immediate public safety concern and that the search in question effectively addresses the concern.

Warrantless searches of the homes and property of parolees and probationers have also been permitted if they are reasonable under the totality of the circumstances. Such searches do not require probable cause, but they must be conducted in furtherance of the state's special need to supervise parolees and probationers and thus must be related to parole or probation conditions.

Collection of DNA from individuals who have been arrested is permitted without a warrant as part of a routine booking process. Law enforcement's strong interest in identifying arrestees outweighs the privacy interests of individuals who have been arrested on probable cause.

The Supreme Court has also upheld searches of the offices or persons of public employees as special needs searches. Even if a public employee has a reasonable expectation of privacy in the particular workplace area searched, probable cause of a crime is not required for a government search of a workplace conducted either for 'noninvestigatory, work-related purposes' or in the course of 'investigations of suspected work-related misconduct.'"

Forty-Ninth Annual Review of Criminal Procedure, 49 GEO. L.J. ANN. REV. CRIM. PROC. 51, 165-71 (2020) (footnotes and citations omitted).

The government may require public employees seeking transfers or promotion to certain positions within a law-enforcement agency to submit to urinalysis. In *National Treasury Employees Union v. Von Raab*, 489 US 656, 109 S Ct 1384, 103 L Ed 2d 685 (1989), the Court approved a Customs Service requirement of drug testing for positions in which employees would be carrying firearms, handling classified materials, or enforcing drug laws.

In *Skinner v. Railway Labor Executives' Association*, 489 US 602, 109 S Ct 1402, 103 L Ed 2d 639 (1989), the Court used "special needs" analysis to approve federal regulations providing for the warrantless drug testing of railroad workers involved in "major" train accidents, without individualized suspicion of wrongdoing.

See "Administrative Searches" in this chapter for related discussion.

5. Handwriting Samples and Voice Exemplars.

Depending on the circumstances, obtaining and examining an existing sample of a suspect's handwriting may constitute a search that requires a warrant or some exception to the warrant requirement. *State v. Barnum*, 136 Or App 167, 173, 902 P2d 95 (1995), *rev den,* 323 Or 336 (1996) (seizing notebook belonging to defendant, and reading and examining the handwriting within, was a search under Article I, section 9).

"There are ways to obtain handwriting samples that would not constitute a search." *State v. Barnum*, 136 Or App at 173. For example, it is not a search under Article I, section 9, "to compel [a] defendant to produce a standard handwriting exemplar pursuant to [a] trial court's order." 136 Or App at 173. Similarly, compelling a defendant to provide a handwriting exemplar is not a search or seizure subject to Fourth Amendment protections. *United States v. Euge*, 444 US 707, 718, 100 S Ct 874, 63 L Ed 2d 141 (1980). *See also United States v. Mara*, 410 US 19, 93 S Ct 774, 35 L Ed 2d 99 (1973) (requiring witness, a potential defendant, to furnish a specimen of his handwriting to the grand jury pursuant to a grand jury subpoena "violated no legitimate Fourth Amendment interest"); *United States v. Dionisio*, 410 US 1, 93 S Ct 764, 35 L Ed 2d 67 (1973) (a grand jury subpoena requiring the recipient to furnish a voice exemplar does not violate the Fourth Amendment).

Requiring a defendant to provide handwriting exemplars does not violate the privilege against compelled self-incrimination or the right to counsel. *Gilbert v. California*, 388 US 263, 87 S Ct 1951, 18 L Ed 2d 1178 (1967) (handwriting is an "identifying physical characteristic" subject to compelled production); *State v. Fisher*, 242 Or 419, 422, 410 P2d 216 (1966). *See also State v. Barnum*, 136 Or App at 173 ("A determination that a handwriting exemplar is not testimonial or communicative would allow for its compelled production without violating the Article I, section 12, protection against self-incrimination.").

A defendant's refusal to give a handwriting exemplar, after being ordered to do so, is admissible at trial to show guilty knowledge. *State v. Riley*, 24 Or App 665, 546 P2d 1097, *rev den,* (1976) (testimony that defendant initially refused to give a handwriting exemplar, after the trial court ordered him to do so, was admissible to show defendant's guilty knowledge).

6. Prisoners — Cells, Telephone Calls, and Mail.

A prisoner has no reasonable expectation of privacy in a prison cell entitling the person to Fourth Amendment protection. *Hudson v. Palmer*, 468 US 517, 104 S Ct 3194, 82 L Ed 2d 393 (1984). The need to maintain security and discipline provides the basis to dispense with the warrant and probable cause requirements for searching a prison cell or electronically monitoring a conversation. *Block v. Rutherford*, 468 US 576, 104 S Ct 3227, 82 L Ed 2d 432 (1984); *Lanza v. New York*, 370 US 139, 82 S Ct 1218, 8 L Ed 2d 384 (1962).

ORS 165.540(2)(a)(B) authorizes public officials "in charge of and at jails, police premises, sheriffs' offices, Department of Corrections institutions, and other penal or correctional institutions" to monitor and record, without a court order, any face-to-face conversations and telephone communications other than privileged attorney-client communications. Under ORS 41.910(2)(b), however, such an intercepted communication is "not admissible in any court of this state" unless: "The participant in the communication, against whom the evidence is being offered, had actual notice that the communication was being monitored or recorded." Note that the suppression remedy requires exclusion of "the intercepted communication" only. A violation will not require suppression of the officer's independent observations or recollection of the conversation. *State v. Jones*, 339 Or 438, 121 P3d 657 (2005); *State v. Prew*, 213 Or App 336, 161 P3d 323 (2007).

> **PRACTICAL TIP:** In order for a communication intercepted at a jail, prison, or police station to be admissible under ORS 41.910(2)(b), it is necessary for the public official to warn all participants through a sign, oral warning, or other notice that their conversation may be monitored or recorded. Note that the intercepted communication cannot be used as evidence against a person who was on the outside unless he or she had actual notice, too.

A prison or jail policy that authorizes the inspection of inmate mail does not violate the Fourth Amendment. If corrections officials discover evidence of criminal conduct while carrying out a routine mail inspection, that evidence may be provided to investigators and admitted as evidence in a criminal prosecution. State v. McCoy, 270 Or 340, 346, 527 P2d 725 (1974) (finding no Fourth Amendment violation "where, as in this case, defendant was aware that his letters might be read").

CAUTION: TARGETED SCREENING OF MAIL OR TELEPHONE CALLS. McCoy approved a routine inspection of inmate mail that was done pursuant to policy and based upon the security needs of the institution. It probably is *not* authority for individualized scrutiny of an inmate's correspondence for the specific purpose of discovering evidence of a crime that does not threaten institutional order.

7. Probationers and Parolees.

See also discussion of DNA blood draws in this chapter.

Oregon Law.

a. Condition of Probation Requiring Consent to Search.

A court's authority to order a probationer to submit to searches as a condition of probation is limited by the language of ORS 137.540. The condition must specify that the probationer must consent to a search "if the supervising officer has reasonable grounds to believe that evidence of a violation will be found." ORS 137.540(1)(i). *See* State v. Hindman, 125 Or App 434, 866 P2d 481 (1993). *See also* State v. Tejeda, 111 Or App 201, 826 P2d 25 (1992); State v. Stephens, 47 Or App 305, 614 P2d 1180 (1980) (the probation officer has no authority to impose his or her own conditions). "'Reasonable grounds' means a quantum of evidence, less than probable cause, that produces a belief in the probation officer, which belief is reasonable in the circumstances, that the probationer has violated a condition of probation and that a search will produce evidence of that violation." State v. Gulley, 324 Or 57, 65-66, 921 P2d 396 (1996). "Where a defendant consented in acquiescence to an assertion of police authority, the court's determination as to the lawfulness of the police conduct may bear directly on its determination of the voluntariness of the defendant's consent." State v. Dunlap, 215 Or App 46, 54, 168 P3d 295 (2007). Thus, if a probationer consents to a search pursuant to such a probation condition, or a similar agreement, the consent is valid only if the *request* for consent was permissible—that is, the officer had "reasonable grounds" to request consent. State v. Canepa, 313 Or App 348, 352, 497 P3d 319 (2021).

A probation condition that requires consent to searches is not self-executing and does not constitute a prospective consent to all future searches. If the probationer does not consent to the search, he or she may be subject to probation revocation, but the officers may not search. State v. Gulley, 324 Or at 62; State v. Dunlap, 215 Or App 46, 168 P3d 295 (2007); State v. Davis, 133 Or App 467, 891 P2d 1373 (1995); State v. Hindman, 125 Or App 434. As a result, in determining the lawfulness of a search of a probationer in these circumstances, the issue generally reduces to "one of common variety consent" (discussed in Section F., above). State v. Tennant, 310 Or App 70, 74, 483 P3d 1226 (2021). Generally, a probationer's mere acquiescence in a search is not consent. "If the circumstances are such that the probationer is effectively denied a reasonable opportunity to refuse the search, then the probationer's decision to submit peacefully cannot be deemed voluntary consent." State v. Davis, 133 Or App at 475; *see also* State v. Dunlap, 215 Or App at 54 (citing Davis). *Cf.* State v. Wammack, 228 Or App 520, 208 P3d 1000 (2009) (the mere fact that defendant was subject to a PPS condition that required him to consent to a search did not render his consent involuntary; defendant had an adequate opportunity to refuse). Under some circumstances, cooperation with a probation search may constitute consent. State v. Davis, 133 Or App 467 (where probation officer

said, "Why don't you give me a tour of your apartment," and the defendant immediately acquiesced, this was consent). In assessing whether a probationer has been given "a reasonable opportunity to refuse," the court gives "considerable weight" to whether the officer informed the probationer that he could refuse to consent, while explaining that a refusal could subject him to arrest for a probation violation. State v. Tennant, 310 Or App at 77.

b. Home Visit Condition of Probation.

Home visit conditions of probation do not authorize a probation officer to conduct a search of private areas of the probationer's home. State v. Altman, 97 Or App 462, 777 P2d 969 (1989). *See also* State v. Tennant, 310 Or App 70, 74, 483 P3d 1226 (2021) ("[T]he authority to conduct a home visit under the conditions of probation does not encompass the authority to conduct a search."). Instead, home visit conditions of probation allow the probation officer to enter common areas of the "probationer's residence where visitors are customarily allowed." State v. Guzman, 164 Or App 90, 96-97, 990 P2d 370 (1999), *rev den,* 331 Or 191 (2000).

c. Arrest for a Probation Violation — Search Incident to Arrest.

"A warrantless search cannot be justified as 'incident to arrest' unless there is *probable cause* to arrest for a particular offense." State v. Meier, 145 Or App 179, 186, 929 P2d 1052 (1996) (emphasis in original). A supervisory authority may order the arrest of a probationer, based on "reasonable grounds" to believe that the person violated the conditions of probation. ORS 144.350. Reasonable grounds is a lesser standard than "probable cause." State v. Gulley, 324 Or 57, 921 P2d 396 (1996). If the arrest for the probation violation is based upon "reasonable grounds" and the arresting officer lacks probable cause to arrest for a crime, the officer is not authorized to conduct a search incident to arrest. State v. Davis, 200 Or App 604, 116 P3d 254 (2005) (*per curiam*) (because officer lacked probable cause to believe that defendant had violated probation, evidence he found during arrest must be suppressed); State v. Meier, 145 Or App 179. A probationer's refusal to submit to a search cannot form a part of "reasonable grounds" or probable cause. State v. Brown, 110 Or App 604, 825 P2d 282 (1992). Notably, although the supervisory authority may issue an order for an arrest based on reasonable grounds, a police officer may conduct a *warrantless* arrest of a probationer only based on probable cause for a probation violation. State v. Smith, 292 Or App 335, 339, 424 P3d 755, *adh'd to as modified on recons*, 295 Or App 135 (2018).

In any event, an arrest pursuant to an outstanding probation-violation warrant does not entitle the officer to search for evidence of the violations underlying the warrant unless the officer also has probable cause to believe that evidence of the violations still will be found on the arrestee's person. State v. Cook, 114 Or App 571, 836 P2d 160 (1992) (no authority to search for evidence of failure to abide by probation officer's directive, failure to complete drug treatment, positive UA, and other conditions of defendant's probation for PCS conviction; "All of the alleged violations of his probation * * * had already been completed, and there was no need of further evidence to prove them."). Similarly, an arrest on a probation-violation warrant does not entitle the officer to conduct a general search of the arrestee or question about other crimes. State v. Pender, 181 Or App 559, 47 P3d 63 (2002) (officer arrested defendant on an outstanding warrant for a probation violation and asked him whether he had any "knives, guns, syringes, [or] controlled substances." Although question about "knives, guns, [or] syringes" was permissible as an officer-safety inquiry, the question about "controlled substances" was designed to elicit incriminating information and should have been preceded by *Miranda* warnings.)

d. Exclusionary Rule.

The exclusionary rule applies in probation-revocation proceedings in order to vindicate personal rights under section 9. State ex rel Juv. Dept. v. Rogers, 314 Or 114, 836 P2d 127 (1992).

Fourth Amendment.

A warrantless search of a probationer's residence based on "reasonable grounds" does not violate the Fourth Amendment. Griffin v. Wisconsin, 483 US 868, 107 S Ct 3164, 97 L Ed 2d 709 (1987). *Accord* United States v. Knights, 534 US 112, 122 S Ct 587, 151 L Ed 2d 497 (2001) (warrantless search of probationer, supported by *reasonable suspicion* and authorized by a probation condition, satisfied the Fourth Amendment; fact that search may have been for "investigatory" rather than "probationary" purposes immaterial). A state law that requires a prisoner, upon release from parole, to agree to suspicionless searches sufficiently diminishes a released prisoner's reasonable expectation of privacy that a suspicionless search by a law-enforcement officer does not offend the Fourth Amendment; the state's overwhelming need to supervised released prisoners justifies such a requirement. Samson v. California, 547 US 843, 126 S Ct 93, 165 L Ed 2d 250 (2006).

8. School Searches.

Oregon Law.

The protections of Article I, section 9, apply to searches of public school students by school officials on campus. State ex rel Juv. Dept. v. DuBois, 110 Or App 314, 821 P2d 1124 (1991); *see also* State ex rel Juv. Dept. v. Rohlffs, 147 Or App 565, 568, 983 P2d 763 (1997) ("school official who conducts a search is a public official subject to constitutional restraints"); State ex rel Juv. Dept. v. Gallegos, 150 Or App 344, 945 P2d 656 (1997) (the search was valid because the school officials had probable cause to search); State ex rel Juv. Dept. v. Finch, 144 Or App 42, 925 P2d 913 (1996) (the search was not valid because the school official did not even have reasonable suspicion). *See also* State ex rel Juv. Dept. v. Stephens, 175 Or App 220, 27 P3d 170 (2001) (youth's agreement to submit to "random searches of possessions, lockers, [and] person" as a condition of admission into an alternative school for at-risk youth constituted voluntary consent to a random search of his locker and the opening of a transparent pager found inside); State ex rel Juv. Dept. v. Doty, 138 Or App 13, 906 P2d 299 (1995) (the search was valid because, under the totality of facts and circumstances test, the child consented to a search of his backpack for marijuana).

Oregon courts, however, have recognized that some of the ordinary exercises of authority in the school will not necessarily implicate Article I, section 9, concerns.

> "Students are at school, and are subject to limitations on their freedom that have nothing to do with any possibility that they are engaged in criminal activity * * * . Actions to protect the school's educational purposes and the security of its students, including investigating rumors or tips of possible illegal activity, do not necessarily involve stops or other exercises of authority beyond that involved in students' required attendance at school. That is the case even if the investigation includes stopping students long enough to ask them questions."

State ex rel Juv. Dept. v. Rohlffs, 147 Or App at 569 (removing student from class, seeking consent search of his locker, asking him to empty his pockets, and detaining him when he refused was stop).

The unique context of the school setting—including the responsibility of protecting students from harm, maintaining order, and fulfilling the schools' educational mission—distinguishes searches

by school officials from searches conducted by law enforcement officers in other settings. Thus, under Article I, section 9, when school officials at a public high school have a reasonable suspicion, based on specific and articulable facts, that an individual student possesses illegal drugs on school grounds, they may respond to the immediate risk of harm created by the student's possession of the drugs by searching the student without first obtaining a warrant. *State ex rel. Juv. Dept. v. M.A.D.*, 348 Or 381, 233 P3d 437 (2010). The concerns underlying the well-established "officer-safety exception" also apply to some searches conducted in public schools by school officials. The school context—characterized by compulsory attendance and large numbers of students and educators present each day in a relatively confined area—raises heightened safety concerns. As persons responsible for maintaining a safe learning environment, when school officials perceive there to be an immediate threat to student or staff safety, they must be able to take prompt, reasonable steps to remove that threat. Thus, as with an officer-safety search, when a school official has a "reasonable suspicion," based on specific articulable facts, that an individual on school property either personally poses or is in the possession of some item that poses an immediate threat to the safety of the student, the official, or others at the school, the school official may take reasonable steps, including a limited search, to respond to that threat. *State v. B.A.H.*, 245 Or App 203, 263 P3d 1046 (2011) (search of student at public high school was not valid administrative search but was lawful under *M.A.D.*, because disciplinarian had reasonable suspicion he had contraband that presented danger).

Article I, section 9, does not preclude a school district from requiring high-school student-athletes to submit to a random, suspicionless drug-urinalysis program in order to participate in extracurricular school athletics. *Weber v. Oakridge School District 76*, 184 Or App 415, 56 P3d 504 (2002), *rev den*, 335 Or 442 (2003). There, the program was a valid, reasonable administrative search because the primary purpose is noncriminal, it was authorized by a politically accountable body, no discretion is involved in directing the search, and the scope of the search was reasonably related to the legitimate interests of the school district in discouraging alcohol and drug use and protecting student-athletes. Although it was not permissible to require the students to disclose prescription medication before the test, it is permissible to require the student to disclose such medication if the test is positive, in order to ensure accuracy.

The exclusionary rule does not preclude use in an administrative proceeding of evidence that allegedly was obtained in violation of the student's constitutional rights. Thus, even if the school official's conduct did not comply with constitutional limitations on obtaining evidence for use in a criminal prosecution, the resulting evidence nonetheless may be used as a basis for expulsion or other discipline. In *T.M.M. v. Lake Oswego School District*, 198 Or App 572, 108 P3d 1211 (2005), school employees who suspected a student of smoking marijuana on school property questioned him for two hours without asking him if he wished to have his parents or an attorney present. The student eventually confessed and was expelled from school after a hearing. He contested admission of his statements at the expulsion hearing, contending that those statements were involuntary and were obtained in violation of his constitutional right to counsel. The court held that the exclusionary rule does not apply in the context of the disciplinary hearing, which resulted only in the student being expelled from school for five months. (Presumably, the same result would obtain if the evidence at issue was obtained in violation of Article I, section 9.)

Fourth Amendment.

Fourth Amendment protections apply to searches of students by public school officials, but full probable cause is not required. A warrantless search of a student's belongings by a school official is justified if the official has "reasonable grounds for suspecting" that the search will reveal evidence of a violation of law or school rules, so long as the search is limited in scope, taking into account the nature of the suspected infraction and other circumstances. *Safford Unified School District #1 v. Redding*, 557 US 364, 129 S Ct 2633, 174 L Ed 2d 354 (2009) (the Fourth Amendment

allows a school administrator to search based on the low standard of reasonable suspicion (a belief that there is a "moderate chance" of finding the evidence in the location searched), and, under the facts, there was a sufficient basis to search the student's pockets and her backpack. Nevertheless, there were insufficient grounds for a belief that the student might conceal the medications in her underwear, and, thus, the content of the suspicion did not match the degree of the intrusion); *New Jersey v. T.L.O.*, 469 US 325, 105 S Ct 733, 83 L Ed 2d 720 (1985) (school's interest in maintaining discipline and order constituted "special needs" justifying warrantless search of a student's purse). The student's expectation of privacy did not outweigh school's need to maintain discipline. *See* discussion of "special needs" rule in this chapter.

In *State ex rel Juv. Dept. v. DuBois*, 110 Or App 314, 317, 821 P2d 1124 (1991), the court described the Fourth Amendment test for a warrantless search of a public school student on campus is whether the search was reasonable under all of the circumstances, stating:

> "The first question * * * is whether the action was 'justified at its inception.' If it was, the court must then inquire whether the search was reasonably related in scope to the circumstances that justified the interference. [*Citing New Jersey v. T.L.O.*, 469 US 325, 105 S Ct 733, 83 L Ed 2d 720 (1985).]"

State v. DuBois, 110 Or App at 317 (warrantless search of student for gun was justified under Fourth Amendment).

The Fourth Amendment does not preclude a school district from requiring high-school student athletes to submit to a random, suspicionless drug-urinalysis program. *Vernonia School District 47J v. Acton*, 515 US 646, 115 S Ct 2386, 132 L Ed 2d 564 (1995). In this case, the substantial, legitimate interests of the school district in discouraging drug use and protecting student-athletes outweighed the minimal intrusion into the limited privacy interests of the students. The Court cautioned that suspicionless testing would not readily pass muster in other contexts because of the uniqueness of the public school system responsibilities "as guardian and tutor of children entrusted to its care." *Vernonia School District 47J v. Acton*, 515 US at 665.

9. Portable Electronic Devices

ORS 133.539 provides further limitations on the state's conduct regarding portable electronic devices (most often cell phones). Before police may use "forensic imaging" to obtain information from a portable electronic device, they must have either a search warrant or lawful consent. In other words, exigent circumstances and probable cause will not be sufficient. But note that ORS 133.539 does not govern police searches of cell phones generally, only "forensic imaging." "Forensic imaging" means "using an electronic device to download or transfer raw data from a portable electronic device onto another medium of digital storage," more commonly referred to as a "data dump." Any information obtained in violation of ORS 133.539 will be inadmissible in any proceeding against the owner of the device or anyone "with a reasonable expectation of privacy in the contents of the device."

10. Properly Seized Animals

Once animal has been lawfully seized based on probable cause of neglect, drawing and testing animal's blood for the purpose of diagnosis and treatment does not invade owner's privacy interests under either Article I, section 9, of the Oregon Constitution, or the Fourth Amendment of the federal constitution. *State v. Newcomb*, 359 Or 756, 375 P3d 434 (2016). The court noted, however, that this case did not involve a situation in which the animal was being used as a container (e.g., to

hide contraband), and the owner/defendant did not challenge the propriety of the veterinary care or of the original seizure.

V. SEARCHES WITH WARRANTS.

A. THE CONSTITUTIONAL REQUIREMENT FOR A WARRANT.

The Fourth Amendment to the United States Constitution and Article I, section 9, of the Oregon Constitution each prohibit "unreasonable" searches and seizures. Warrantless government searches and seizures are *per se* unreasonable unless they fall within one of the few specifically established and carefully delineated warrant exceptions. Katz v. United States, 389 US 347, 357, 88 S Ct 507, 19 L Ed 2d 576 (1967); State v. Bridewell, 306 Or 231, 235, 759 P2d 1054 (1988).

These federal and state constitutional guarantees also specify procedural requisites for the issuance of a search warrant. The Fourth Amendment declares:

> "[N]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Article I, section 9, contains nearly identical language. Thus, although many search warrant requirements are stated in Oregon statutes, several (*viz.,* probable cause, oath or affirmation, particularity of description) are directly rooted in the federal and state constitutions. As a result, despite the elimination of judicial suppression remedies for statutory violations (*see* ORS 136.432), the violation of many search warrant requirements requires suppression.

Judicial Preference for Search Warrants.

The desire of the courts to encourage the use of search warrants by law enforcement officers is reflected in a longstanding policy of deference to the determination made by the issuing magistrate. *See* Ornelas v. United States, 517 US 690, 698-99, 116 S Ct 1657, 134 L Ed 2d 911 (1996); State v. Tacker, 241 Or 597, 601-02, 407 P2d 851 (1965) (*citing* United States v. Ventresca, 380 US 102, 85 S Ct 741, 13 L Ed 2d 684 (1965)). "[T]he resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants." United States v. Ventresca, 380 US at 109. *See also* State v. Henderson, 341 Or 219, 225, 142 P3d 58 (2006) ("while adhering to the probable cause requirement, we resolve doubtful or marginal cases in favor of the preference for warrants"); State v. Wilson, 178 Or App 163, 167, 35 P3d 1111 (2001) (same).

B. THE PROPER SUBJECTS OF A SEARCH WARRANT.

1. Object of Search.

ORS 133.535 sets forth the permissible objects of a search warrant. These include evidence of a criminal offense, information "concerning" the commission of a criminal offense, contraband, "things * * * criminally possessed," and persons subject to arrest or who are being unlawfully held in concealment. Oregon courts have not addressed whether "information concerning the commission of a crime" includes a search for information showing that *no* crime occurred. *See* State v. Bray, 281 Or App 584, 591, n 6, 383 P3d 883 (2016), *aff'd*, 363 Or 226, 422 P3d 250 (2018) (noting the open question).

The "fruits" of criminal activity are also proper objects of a search. ORS 133.535(2). Consider including assets that are fruits of criminal activity in the list of things seized to ensure that such assets are preserved for possible forfeiture. *See* State v. Houchins/Massey, 79 Or App 66, 717 P2d 665 (1986) (failure to list currency as object of search leads to return of cash to defendant).

2. Nature of Offense.

The authority provided by ORS 133.535(1) to issue a search warrant for mere "evidence" is limited to evidence of a "criminal offense." It does not authorize a warrant for evidence of a violation. State v. Weist, 302 Or 370, 373-74, 730 P2d 25 (1986). But a warrant may issue under ORS 133.535(3) for "[p]roperty that has been used, or is possessed for the purpose of being used, to commit or conceal the commission of an *offense*." (Emphasis added). The Supreme Court has held that because this subsection applies to offenses, not just to criminal offenses, it authorizes a search warrant for property used to commit a violation. State v. Weist, 302 Or 370 (1986) (seizure of pickup used to commit illegal-registration violation). The court further indicated that the limited authorization in ORS 133.535(1) to search for "evidence" of a "criminal offense" is statutory only and is not compelled by either the Fourth Amendment or Article I, section 9.

C. THE AFFIDAVIT.

1. Oath or Affirmation.

Article I, section 9, and the Fourth Amendment each require that the issuance of a search warrant must be supported by statements made under oath or affirmation. This requirement is reflected in ORS 133.545(6) and (7), which require either an affidavit (a written statement under oath), or an "oral statement under oath," before a warrant may issue.

a. Unsworn Statement Cannot Be Considered.

An unsworn statement may not be considered by the magistrate. State v. Burton/ Cunningham, 121 Or App 508, 855 P2d 1124 (1993), *rev den*, 318 Or 351 (1994) (house address listed in affidavit and warrant was incorrect and court's later correction based on affiant's unsworn statement was improper). But if, by a reasonable inference, the magistrate may find probable cause despite a scrivener's error, the magistrate may do so. *See* State v. Marquardt, 43 Or App 515, 603 P2d 1198 (1979) (although affidavit incorrectly stated that information was learned in 1978, the magistrate reasonably could conclude from the rest of the affidavit that the information was actually learned in 1979).

b. Extrinsic Evidence to Prove Oath.

When a magistrate fails to attest to the affiant's signature on the affidavit, extrinsic evidence is admissible at the suppression hearing to establish that the affidavit was sworn. State v. Nunn, 99 Or App 503, 783 P2d 26 (1989); State v. Feehely, 27 Or App 343, 348, 556 P2d 142, *rev den*, 277 Or 1 (1977); *see also* State v. Evans, 110 Or App 46, 54, 822 P2d 1198 (1991) (extrinsic evidence would have been admissible to establish that a telephonic oral affidavit was made under oath).

2. Probable Cause. (*See also* Chapter III).

A warrant may issue only if the record before the magistrate supports a finding of probable cause to believe that "the search will discover things specified in the application." ORS 133.555(2).

> "'Probable cause' for purposes of ORS 133.555(2) exists when the facts set out in the warrant 'lead a reasonable person to believe that seizable things will probably be found in the location to be searched.'"

State v. Henderson, 341 Or 219, 225, 142 P3d 58 (2006), *quoting* State v. Goodman, 328 Or 318, 324-25, 975 P2d 458 (1999), *in turn quoting* State v. Anspach, 298 Or 375, 381, 692 P2d 602 (1984).

See also State v. Castilleja, 345 Or 255, 270, 192 P3d 1283, *adh'd to on recons*, 345 Or 473 (2008) (probable cause is not certainty; to uphold the warrant, the reviewing court need only conclude that the issuing magistrate reasonably could conclude that the facts alleged, together with reasonable inferences, establish that seizable things *probably* will be found at the location to be searched); State v. Arana, 165 Or App 454, 456-57, 998 P2d 688 (2000) ("'Probably' means 'more probably than not,' * * * and probable cause is based on the information presented in its totality") (citations omitted). *See also* State v. Keerins, 197 Or App 428, 433, 106 P3d 166, *rev den*, 388 Or 681 (2005); State v. Westfall, 178 Or App 343, 349, 37 P3d 1030 (2001), *rev den*, 333 Or 595 (2002) ("In assessing whether an affidavit establishes probable cause, we rely on the facts as stated, together with any reasonable inferences that can be drawn from those facts."); State v. Wilson, 178 Or App 163, 167, 35 P3d 1111 (2001) ("The standard is one of probability, which requires more than a mere possibility, but less than a certainty."(citations omitted)).

Probable cause must be determined from the "'four corners' of the affidavit," State v. Russell, 293 Or 469, 474, 650 P2d 79 (1982), or from oral statements under oath taken telephonically (*see* ORS 133.545(7)), or in person before the magistrate (*see* ORS 133.555(5)). If an affiant fails to expressly state his or her subjective belief that evidence will be found in the location, it may be possible to *infer* subjective probable cause based on the affiant's recitation of the objective facts. *See* State v. McDowell, 211 Or App 341, 155 P3d 877 (2007) (inference of subjective probable cause was reasonable, based on affiant's statements about his personal knowledge of the facts connecting the location with the known criminal activity).

Because the task of a reviewing court is to determine whether an issuing magistrate reasonably *could* have concluded from the facts and circumstances set out in the supporting affidavit establish probable cause, the existence of other "innocent explanations" for facts in the affidavit do not defeat probable cause. State v. Tropeano, 238 Or App 16, 20, 241 P3d 1184 (2010), *rev den*, 349 Or 370 (2010) (possibility that images on computer were created in a country where child pornography is legal did not defeat other, criminal, inferences); State v. Duarte, 237 Or App 13, 19, 238 P3d 411, *rev den*, 349 Or 370 (2010) (possibility of "innocent explanations" for high power and water consumption and structural modifications to house did not require magistrate to accept those possible inferences).

In some circumstances, officers may wish to obtain an "anticipatory" search warrant based on an affidavit establishing probable cause to believe that at some future time – but not presently – certain evidence of a crime will be located at a specific place. In United States v. Grubbs, 547 US 90, 126 S Ct 1494, 164 L Ed 2d 195 (2006), the United States Supreme Court held that anticipatory warrants are permissible under the Fourth Amendment. The Court held that an affidavit for an anticipatory warrant will satisfy the probable-cause requirement if it shows: (1) that, if the triggering condition occurs, there is a fair probability that contraband or crime evidence will be found in a particular place; and (2) that there is probable cause to believe that the triggering condition will occur. Grubbs, 547 US at 96-97.

> **Note: Oregon "Flies With her Own Wings."** The Oregon Supreme Court recently has held that Oregon's statutes, including ORS 133.555(2) and ORS 133.545(6), require averments that establish that there is probable cause to search *at the time* a warrant is issued, and, as a result, those statutes do not authorize issuance of an "anticipatory search warrant" that is based on an averment that the objects of the search will be in a particular location to be searched sometime in the future. State v. Lee, 371 Or 200, 532 P3d 894 (2023), *adh'd to as modified on recons*, 373 Or 525 (2025).

See also the discussion regarding "Trial Court Review of a Search Warrant Affidavit" in Chapter VII (Motions).

3. Nexus Between Criminal Activity, Place to Be Searched, and Items Sought.

Article I, section 9, and ORS 133.565 both require that ***the warrant*** specifically identify the persons and places to be searched. *See* discussion of specificity later in this chapter.

To support a warrant to search a particular place or person, ***the affidavit*** must provide probable cause to believe that the items sought will be found in the location to be searched *and* that the items relate to the crime alleged.

When the location to be searched is the suspect's residence, the affiant should ensure that the affidavit explains the relationship between the people and the places described in the affidavit and give the address of any "residence" or other location that the warrant will authorize to be searched. State v. Marsing, 244 Or App 556, 260 P3d 739 (2011) (although affidavit never expressly explained that the listed address and defendant's "residence" were one and the same, a reasonable magistrate could have made that inference).

Further, in addition to establishing probable cause to believe that the crime was committed by the suspect and that the suspect possesses evidence of the crime, the affidavit must provide probable cause to believe that the target evidence is located in the suspect's residence — the mere fact that the suspect resides there does not establish the nexus. *Contrast* State v. Chamu-Hernandez, 229 Or App 334, 343-44, 212 P3d 514, *rev den*, 347 Or 43 (2009) (evidence of ongoing drug dealing and officer's experience that dealers keep records and other evidence in their homes was sufficient nexus between criminal activity and defendant's "day residence") *with* State v. Miller, 254 Or App 514, 295 P3d 158 (2013) (no nexus to residence because affidavit did not explain why residence would contain evidence of drug deals conducted in a vehicle; mere statement that drug dealers "store records" was insufficient) *and* State v. Colgrove, 334 Or App 128, 555 P3d 331 (2024) (following *Miller* and holding that affidavit failed to establish nexus between criminal activity and apartment, where police observed three controlled buys away from the apartment but the police did not observe drug dealer travel from apartment to controlled buys or ensure that drug dealer did not stop somewhere before arriving at a controlled buy). Similarly, to support a warrant for a search of other places frequented by the suspect, an affidavit must describe particular facts that establish a nexus between the crime evidence and that particular location. *See* State v. Miser, 303 Or App 347, 463 P3d 599, *rev den,* 366 Or 827 (2020) (defendant's movements, phone activity and behavior described in the affidavit established probable cause that he was running a drug operation that implicated his place of work).

Moreover, although an affidavit can supply probable cause for the entire premises—*see* State v. Henderson, 341 Or 219, 142 P3d 58 (2006), where the affidavit explained how a stolen ring might be almost anywhere on the property—an affidavit that establishes that the criminal activity occurred *only* in a discrete building on the property and provides no facts to support an inference that evidence will be found in another location will not support a search warrant for the other building. *See* State v. Nelson, 307 Or App 226, 476 P3d 100 (2020) (affidavit detailing drug-dealing activity only in a storage container in the back yard did not provide probable cause to justify a search of the primary residence, where no facts in the affidavit allowed an inference that evidence probably would be anywhere other than the shipping container; mere fact that defendant's cellphone probably contained evidence did not authorize search of residence where nothing showed that the phone would be in the residence at any given time); *see also* State v. Wagner, 339 Or App 1, 566 P3d 1241 (2025) (accepting state's concession and holding that search warrant affidavit did not supply probable cause to search defendant's vehicle, which was temporarily located at someone else's property, where police developed reason to believe that owner of that property was engaged in the crime of

encouraging child sexual abuse, because affidavit did not establish a nexus between defendant's vehicle and the crimes under investigation).

In the case of crimes committed at a location separate from the person's residence, such as a remote illegal outdoor marijuana grow, the affidavit must establish a specific connection between that operation and the place for which a warrant is requested:

> "In cases involving warrants to search buildings for evidence of outdoor marijuana growing operations, the affidavit must contain facts and objective observations sufficient to permit a reasonable judge to conclude that there is probable cause to believe (1) that the residents or owners of the building have some relationship to the growing marijuana; and (2) that marijuana, tools, or evidence of processing and sale of marijuana probably are in the building for which the warrant is sought. * * * "

State v. Goodman, 328 Or 318, 325, 975 P2d 458 (1999), *citing* *State v. Anspach*, 298 Or 375, 381, 692 P2d 602 (1984) (affidavit must supply probable cause that there is a relationship between residents and marijuana plants found elsewhere, and probable cause that more marijuana or cultivation equipment will be found in the building searched).

> "[W]here there is more than one residence located near a marijuana growing operation, the likelihood that one particular residence is connected to the contraband is diffused and a stronger factual showing is necessary to demonstrate that either one of the residences or both of the residences should become the target of a search."

State v. Yuen, 182 Or App at 398 (affidavit failed to supply probable cause that both the main residence and an outbuilding occupied by another person were connected to nearby marijuana grow, particularly because the trail from the grow operation went directly to the main residence, not the outbuilding).

Facts derived from an officer's training and experience may contribute to the factual nexus linking the criminal activity to the place to be searched. *See* *State v. Goodman*, 328 Or at 328 ("Here, the officer's expertise is used only to provide a criminal law nexus to a series of other, separately verified facts which — absent the officer's explanation — could be understood to be innocent."); *State v. Soto-Sarabia*, 333 Or App 46, 53, 551 P3d 980, *rev den*, 372 Or 813 (2024) (explaining that "the objective facts in the affidavit—two controlled buys of heroin out of [the] defendant's car—and the connection between those objective facts and [the affiant's] training and experience that persons who traffic in drugs often keep drugs, drug paraphernalia, and sales records in their cars" established factual nexus between criminal activity and the defendant's car). However, training and experience alone will not supply probable cause: rather, the affidavit must connect a defendant's particular conduct or circumstances with the specific evidence that police seek, and it must be supported by objective facts derived from other sources. *State v. Webber*, 281 Or App 342, 350, 383 P3d 951 (2016), *citing* *Goodman*, 328 Or at 328.

The following cases exemplify the need for objective facts connecting officer experience to the particular facts:

Insufficient Nexus Between Officer Training and Particular Investigation:

State v. Hernandez, 308 Or App 783, 481 P3d 959, *on recon*, 309 Or App 784 (2021). In a case involving defendant's shooting a gun from a car and then dropping his cell phone as he fled the scene, the affiant's averments, based on "training and experience," that suspects of attempted murder

often use their cell phones in the course of their crimes were insufficient absent specific facts that provided probable cause that evidence of the crime would be on defendant's cellphone.

State v. Cazee, 308 Or App 748, 482 P3d 140 (2021). Although warrant affidavit established probable cause to believe that defendant had engaged in "peeping Tom" activities, it did not support a search of the cellphone he had when he was arrested. Affiant's "training and experience" that voyeurs and other people involved in criminal sexual behaviors use electronic devices as binoculars and to take photos did not supply probable cause to search the phone where none of the facts *of this case* suggested that defendant used the phone while committing the offenses.

State v. Gustafson, 300 Or App 438, 452 P3d 962 (2019), *rev den* 366 Or 493 (2020). Court of Appeals "question[ed]" whether affidavit's general recitations about his hours of training in unspecified topic and that he had "personally conducted investigations in the area of Sexual Abuse involving Minors" could support his assertion that sexual abusers "almost always began their addiction by viewing child pornography" and that they "continually feed" that addiction by doing so. *Compare* State v. Daniels, 234 Or App 533, 228 P3d 695, *rev den*, 349 Or 171 (2010) (described below; approving of similar statements based on more detailed affidavit describing affiant's substantial relevant experience).

State v. Webber, 281 Or App 342, 350, 383 P3d 951 (2016). Although the affidavit established probable cause to believe that defendant was engaged in illegal cocaine sales of unknown quantities and frequency, detective's assertion that drug dealers usually possess paraphernalia was insufficient to provide probable cause to believe that drug evidence would be found in defendant's residence.

State v. Williams, 270 Or App 721, 726, 349 P3d 616 (2015). Where the only nexus to defendant's vehicle was the fact that he drove a gunshot victim to the hospital, the affiant's explanation that "people involved in the unlawful use of firearms" often leave firearms or other evidence in vehicles was insufficient.

State v. Miller, 254 Or App 514, 295 P3d 158 (2013). Affiant's statement that drug dealers "store records" failed to show nexus to residence where affidavit described drug dealing from car and did not explain why records would be stored in residence.

State v. Wilson, 178 Or App 163, 171, 35 P3d 1111 (2001). Affiant's general statement that drug dealers often have evidence of drug activity in their homes or on their property did not supply nexus to defendants' residence, given fact that controlled buy occurred in third party's residence.

Sufficient Nexus Between Officer Training and the Particular Investigation:

State v. Soto-Sarabia, 333 Or App 46, 551 P3d 980, *rev den*, 372 Or 813 (2024). Affiant's training and experience that people who traffic in drugs often keep drugs, drug paraphernalia, and sales records in their cars, along with description of two controlled buys out of the defendant's car, established probable cause to believe that evidence of drug activity would be found in the defendant's car.

State v. Turay, 313 Or App 45, 493 P3d 1058, *aff'd in part and rev'd in part on other grounds*, 371 Or 128 (2023). Officer's training and experience about how cell phones are used in prostitution supported probable cause to search defendant's phone for evidence of sex trafficking when combined with corroborating facts showing the particular women's use of their phones to arrange prostitution dates.

State v. McNutt, 303 Or App 142, 463 P3d 563, *rev den*, 367 Or 115 (2020). Affiant's substantial training and experience investigating child sexual abuse crimes, along with his reference in the affidavit to statutory citations defining crimes involving sexually explicit conduct, added "objective" support to his characterization of images downloaded from defendant's computer through file-sharing network as "child pornography," despite defendant's argument that that assessment was "subjective" and too conclusory.

State v. Klingler, 284 Or App 534, 393 P3d 737 (2017). Affidavit reporting defendant's statement that he had marijuana in his RV provided sufficient nexus to his RV, despite the fact that he had two RVs and had not specified which one contained marijuana.

State v. Fronterhouse, 239 Or App 194, 243 P3d 1208 (2010). Officer training was sufficient to explain his basis of knowledge in identifying marijuana plants seen in aerial surveillance, even without providing description of particular characteristics of marijuana plants.

State v. Duarte, 237 Or App 13, 238 P3d 411, *rev den* 349 Or 370 (2010). Officer's experience and training about characteristics of marijuana grows, including electrical use, hydroponic cultivation methods, and structural modifications corroborated informant's descriptions of defendant's residence and supported probable cause.

State v. Daniels, 234 Or App 533, 228 P3d 695, *rev den*, 349 Or 171 (2010). Averment in affidavit that pedophiles often own and retain deviant movies was sufficiently explained by affiant's 24 years of law enforcement experience, advanced training in sexual abuse of children, familiarity with the methods used by offenders, investigation of numerous cases for different agencies and numerous interviews of offenders and victims.

State v. Chamu-Hernandez, 229 Or App 334, 344, 212 P3d 514, *rev den*, 347 Or 43 (2009) Reliance on officer experience with drug-dealing activities was a permissible way to explain the facts and establish nexus between the suspected crime and a particular location to be searched.

State v. Clapper, 216 Or App 413, 173 P3d 1235 (2007). Officer's training and experience supported his belief that evidence of wildlife offenses committed in another county would be found in defendant's residence.

State v. Keerins, 197 Or App 428, 435, 106 P3d 166, *rev den*, 388 Or 681 (2005). Even though defendant's drug deliveries took place away from his home, the affidavit connected his activity to his home, because he left from his home on foot and had been caught months before engaging in drug activity there. With that background, affiant's statements that drug dealers keep records and often accept and retain stolen property in exchange for drugs established probable cause to believe that evidence of defendant's heroin dealing would be in his home.

State v. Harper, 197 Or App 221, 233, 105 P3d 883 (2005). Affidavit containing facts supporting an inference that defendant—who had given an implausible explanation for his purchase of a large amount of iodine—was engaged in an ongoing large-scale methamphetamine operation. Officer's training and experience as to nature of that type of operation was sufficient to connect the criminal activity to defendant's home.

See also detailed discussion of "Required Nexus Between Outdoor Marijuana Grows and Nearby Property" in Chapter III (Probable Cause), and "Required Nexus Between Drug House and Vehicles/Outbuilding" in Chapter III (Probable Cause).

4. Facts Justifying Special Authorizations.

ORS 133.565 provides that a search warrant may authorize limited extensions of the statutory timing restrictions relating to execution of the warrant and return of the warrant. The statute requires that these special authorizations appear on the face of the warrant. The factual justification for seeking any special authorization also should appear in the body of the affidavit.

- **Nighttime Execution — Authorization to execute the warrant after 10:00 p.m. or before 7:00 a.m.** The judge may authorize execution of the warrant "at any time of the day or night." ORS 133.565(3). *See* State v. O'Driscoll, 65 Or App 362, 365, 671 P2d 752 (1983), *rev den*, 296 Or 486 (1984). The affidavit must describe "special circumstances" justifying a nighttime search. State v. Brock, 294 Or 15, 17-18, 653 P2d 543 (1982). *See also* discussion of "Time Restrictions on Execution" in this chapter.

- **Extension of Time for Execution.** Failure to execute the warrant within the statutory time requirements, or the period of time specified on the face of the warrant, is the same as proceeding without a warrant. *See* State v. Daw, 94 Or App 370, 372, 765 P2d 241 (1988). Although the warrant must be *served* within the statutory timeframe, that does not mean that the searches authorized by the warrant must be *completed* within that timeframe. State v. Monger, 306 Or App 50, 472 P3d 270, *rev den*, 367 Or 291 (2020) (officers "executed" warrant authorizing forensic analysis of cell phone in police custody by serving the warrant on the forensic examiner and requesting the forensic analysis). Although there is *no requirement* that an application for extension must be supported by a sworn affidavit or transcribed testimony under State v. Whalen, 90 Or App 18, 750 P2d 1168 (1988), prudent practice would suggest that you do so when possible. Because these extension requests are typically submitted a few days after the initial issuance of the search warrant, it is usually not possible to set forth the justification for the request in the initial affidavit. *See also* Time Restrictions on Execution; "Execution Within 5 Days" in this chapter.

5. "Staleness."

Information contained in an affidavit must be sufficiently "fresh" to justify the conclusion that seizable evidence is present at the location to be searched at the time the warrant application is made. State v. Young, 108 Or App 196, 204, 816 P2d 612 (1991), *rev den*, 314 Or 392 (1992); State v. Koppenhofer, 59 Or App 213, 650 P2d 981, *rev den*, 294 Or 149 (1982) (noting that pertinent time is time of application, rather than time of execution)

Establishing that the information in the affidavit is not stale can be done in a variety of ways. No particular information is required. State v. Usher, 135 Or App 143, 146, 897 P2d 1185, *rev den*, 321 Or 560 (1995) (rejecting defendant's argument that an affidavit in support of a warrant to search for controlled substances must contain information concerning the quantity of controlled substances observed at the place to be searched, the identity of the person in whose possession the controlled substance was observed, and the prior history of the location); State v. Goff, 134 Or App 92, 97, 894 P2d 1207 (1995) (rejecting defendant's argument that an informant must always specify the amount of a controlled substance that the informant saw in order for the information to not be stale).

The length of time is only one factor in the analysis. State v. Arana, 165 Or App 454, 458, 998 P2d 688 (2000) ("Although the length of time is relevant to the determination of probable cause, its probative value is considered in light of all of the presented facts."). Even if a single fact, by itself,

would be stale, a trial court should not evaluate the affidavit in piecemeal fashion, but should consider all facts. State v. Marsing, 244 Or App 556, 260 P3d 739 (2011) (7-month-old information about drug dealing was refreshed by controlled buy within 72 hours of search warrant application).

The Court of Appeals has identified five factors relevant to determining staleness: (1) the length of time; (2) the "perishability" versus the durability of the evidence; (3) the mobility of the evidence; (4) the "nonexplicitly inculpatory character" of the evidence; and (5) the "propensity of an individual suspect or general class of offenders to maintain and retain possession of such evidence." State v. Gustafson, 300 Or App 438, 452 P3d 962 (2019), *rev den* 366 Or 493 (2020), *quoting* State v. Van Osdol, 290 Or App 902, 909, 417 P3d 488 (2018), and State v. Ulizzi, 246 Or App 430, 438-39, 266 P3d 139 (2011), *rev den*, 351 Or 649 (2012).

OTHER FACTORS TO CONSIDER

a. Character of the Crime and the Items To Be Seized.

"Whether the passage of time makes a fact 'stale' depends on the character of the crime and the thing to be seized." State v. Corpus-Ruiz, 127 Or App 666, 670, 874 P2d 90 (1994), *citing* State v. Young, 108 Or App 196, 204, 816 P2d 612 (1991), *rev den*, 314 Or 392 (1992).

(1) Commercial Quantity of Drugs.

State v. Arnold, 115 Or App 258, 838 P2d 74 (1992), *rev den*, 315 Or 312 (1993) (observation of three pounds of methamphetamine two days before the warrant issued was not stale).

State v. Young, 108 Or App 196, 204, 816 P2d 612 (1991), *rev den*, 314 Or 392 (1992) (contrasting a marijuana growing operation with "possession of a small amount of marijuana that would be consumed in a short period of time").

State v. Strubhar/Jackson, 82 Or App 560, 728 P2d 928 (1986), *rev den*, 302 Or 657 (1987) (seven-day-old observation of a half-pound of marijuana was not stale).

State v. Kittredge/Anderson, 36 Or App 603, 606, 585 P2d 423 (1978) ("The amount observed is significant because it affects the likelihood that some marijuana will be found there later.") *Compare* State v. Usher, 135 Or App 143, 897 P2d 1185, *rev den*, 321 Or 560 (1995) (probable cause showing was sufficient where informant told police that "½ ounce quantities [of methamphetamine] would be accessible any time") *with* State v. Wilson, 178 Or App 163, 35 P3d 1111 (2001) (single sale of an unknown quantity of methamphetamine to CRI and suspect's "vague statement" to CRI about having "lots" of methamphetamine to sell insufficient) and State v. Urbach, 83 Or App 39, 730 P2d 571 (1986) (observation of ¼ to ½ ounce of methamphetamine in defendant's residence within preceding 48 hours insufficient without more).

(2) "Durable" Quality of Items Sought.

Despite lengthy delay in seeking the warrant, probable cause may still be found if the items sought are typically retained for a significant length of time and not readily discarded or consumed. *See* State v. Henderson, 341 Or 219, 225, 142 P3d 58 (2006) (magistrate reasonably concluded that rings, which are valuable, nonperishable items suitable for personal use, permitted the inference that defendant may have kept them for three or more weeks); *see also* State v. Ulizzi, 246 Or App 430, 266 P3d 139 (2011), *rev den* 351 Or 649 (2012) (heat lamp was "durable," not perishable or consumable); State v. Arana, 165 Or App 454, 458-59, 998 P2d 688 (2000) ("the ongoing nature of an activity and the durability of its accoutrements are relevant to probable cause"), *citing* State v.

Bice, 115 Or App 482, 485-86, 839 P2d 244 (1992), *rev den*, 315 Or 312 (1993) ("durable evidence of an on-going drug manufacturing operation," consisting of structural modifications to a room and a closet was not stale).

The mere fact that an item is not of a type that a person might keep for personal use is not dispositive if it might be difficult to dispose of. *See* State v. Lambert, 263 Or App 683, 328 P3d 824, *adh'd to as modified on recons*, 265 Or App 742 (2014) (although items stolen months earlier consisted of specialized water-testing equipment that a thief would be unlikely to keep for personal use, the issuing judge could infer that the equipment, which was not consumable or easily marketed, would still be present in vehicle). But even if the evidence is of a type that is "mobile" and *could* be easily disposed of, that fact can be countered by other circumstances showing that the suspect is likely to have kept the evidence. In State v. Dent, 324 Or App 167, 525 P3d 487 (2023), the Court of Appeals stated, with respect to defendant's claim that any cash or checks she stole from mail while acting as a mail carrier was "common and fungible," the "correct inquiry is not whether the property in question was fungible, or whether there is another plausible way of thinking about the property, but rather whether the information in the affidavit supported the conclusion that the stolen property probably would be found in the location to be searched." *See also* State v. Gustafson, 300 Or App 438, 449, 452 P3d 962 (2019), *rev den* 366 Or 493 (2020) (affidavit supported inference that, despite passage of 10 years, defendant was likely to continue to possess images of child gymnasts whom he coached, which he had kept for his sexual gratification; the affidavit showed continued sexual interest in children and that defendant used his business to maintain access to them).

With respect to digital images on a particular device, it is not *always* necessary that the affidavit contain specific facts showing that the suspect still owns the particular device. Because it is common knowledge that digital images can be copied from one device to another, the fact that the original device may no longer exist does not require an inference that the image itself was discarded or deleted. State v. Gustafson, 300 Or App at 448-49.

(3) Non-Contraband Nature of Items Sought.

In addition to durability, the fact that an item may be lawfully possessed is an additional factor indicating that the suspect may be less likely to dispose of the item. *See, e.g.,* State v. Ulizzi, 246 Or App 430, 266 P3d 139 (2011), *rev den*, 351 Or 649 (2012) (heat lamp was not inculpatory *per se,* so defendant would have no obvious or compelling motive to discard it, move it, or transfer it to another person in period of time between observation and warrant application); State v. Schroeder, 62 Or App 331, 336, 661 P2d 111, *rev den*, 295 Or 161 (1983) (non-contraband nature of a ski mask used in rapes was factor supporting probable cause); State v. Diaz, 29 Or App 523, 564 P2d 1066 (1977) (home furnishings for defendant's home).

(4) Observations of Ongoing Criminal Activity.

Evidence that the criminal activity is ongoing increases the likelihood that, even after the passage of time, items subject to seizure will remain in the location to be searched. State v. Arana, 165 Or App 454, 458-59, 998 P2d 688 (2000) (ongoing growing operation). *See also* State v. Forker, 214 Or 622, 168 P3d 279 (2007) (week-old information that defendant had "extensive" collection of child pornography was not stale). But the *type* of activity will determine the likelihood that evidence will still be on the premises at a later time. *See* State v. Marmon, 303 Or App 469, 463 P3d 555 (2020) (because all information about ongoing drug *dealing* was excised because the affidavit did not show the informant's reliability, information that defendant *purchased* drugs three weeks before the warrant issued did not support an inference that drug evidence probably would be on the premises at the later date).

In some instances, **an isolated observation** is sufficient to indicate that the criminal activity is ongoing. *See* State v. Poulson, 150 Or App 164, 945 P2d 1084 (1997) ("discovery in defendant's truck of drugs and the *implements* of distribution, *i.e.*, scales and a powder grinder" were indicative of "a continuing drug operation"); State v. Albee, 118 Or App 212, 218-19, 847 P2d 858, *rev den*, 316 Or 528 (1993) (ongoing cockfighting operation); *but see* State v. Wilson, 178 Or App 163, 35 P3d 1111 (2001) (single sale of an unknown quantity of methamphetamine to CRI and suspect's "vague statement" to CRI about having "lots" more to sell did not support inference of ongoing drug operation because suspect's statement was not corroborated); State v. Corpus-Ruiz, 127 Or App 666, 874 P2d 90 (1994) (six-month-old single observation of heroin use was stale); State v. Kittredge/Anderson, 36 Or App 603, 585 P2d 423 (1978) (single observation of marijuana use within prior 96 hours insufficient). *See also* State v. Huff, 253 Or App 480, 291 P3d 751 (2012) (recent personal use of drugs in home did not refresh 45-month-old information about drug dealing at home; affidavit did not support inference of continued presence of drug evidence in home).

More commonly, however, the inference that criminal activity is ongoing is based upon **repeated observations**.

Drug Manufacturing: "If the crime is the manufacture of a controlled substance, a magistrate can infer that the conduct will continue for some time." State v. Chezem, 125 Or App 341, 349, 865 P2d 1307 (1993) (ongoing methamphetamine manufacturing). *See also* State v. Duarte, 237 Or App 13, 238 P3d 411, *rev den*, 349 Or 370 (2010) (information that marijuana dealers ordinarily maintain a continuous supply of plants to ensure an ongoing source for sale, along with expensive nature of marijuana-grow equipment, supported probable cause to believe that evidence would be found months after informant's observations); State v. Payne, 150 Or App 469, 474, 946 P2d 353 (1997), *rev den*, 326 Or 390 (1998) (two observations of indoor marijuana growing separated by one year); State v. Wilson, 120 Or App 382, 852 P2d 910, *rev den*, 317 Or 584 (1993) (ongoing methamphetamine manufacturing); State v. Brown, 109 Or App 636, 820 P2d 878 (1991), *rev den*, 313 Or 210 (1992) (a connection between a safe deposit box and ongoing methamphetamine manufacturing overcame a 10-month lapse in specific information about the safe deposit box); State v. Gale/Rowden, 105 Or App 489, 805 P2d 158, *rev den*, 311 Or 427 (1991) (methamphetamine manufacturing). *Compare* State v. Ulizzi, 246 Or 430, 266 P3d 139 (2011), *rev den*, 351 Or 649 (2012) (without information about maturity or growth cycle of marijuana plants or the projected yield from plants, informant's observation of three plants six weeks before issuance of search warrant failed to supply probable cause to believe that marijuana would still be in location at time of search).

Drug Dealing: State v. Soto-Sarabia, 333 Or App 46, 551 P3d 980, *rev den*, 372 Or 813 (2024) (holding that information in the affidavit was not stale and established probable cause to search defendant's vehicle for evidence of drug dealing, where affidavit stated that CRI made two controlled buys, the police applied for warrant 72 hours later, and the officer's training and experience established that people who sell drugs from their car will often keep drugs, drug paraphernalia, and sales records in their car); State v. Van Osdol, 290 Or App 902, 417 P3d 488 (2018) (mere fact that two dealers sold drugs on different occasions at defendant's house, in defendant's presence, did not make it more likely than not that evidence remained in the home thereafter); State v. Marsing, 244 Or App 556, 260 P3d 739 (2011) (controlled buy of half-ounce of marijuana 72 hours before search-warrant affidavit prepared, observations of scale and other drugs, and conversation with defendant about future purchases supported inference that evidence would be on premises days later); State v. Keerins, 197 Or App 428, 435, 106 P3d 16, *rev den*, 388 Or 681 (2005) (8-month-old information of drug dealing at residence was "refreshed" with recent information of similar conduct); State v. Usher, 135 Or App 143, 897 P2d 1185, *rev den* 321 Or 560 (1995) (two purchases within a two-week period combined with the admission that "½ ounce quantities [of meth] would be accessible anytime"); State v. Ingram, 104 Or App 389, 802 P2d 656 (1990), *rev'd on other grounds*, 313 Or 139, 831 P2d 674 (1992) (three drug purchases during a two-

week period); State v. Arreola, 93 Or App 680, 763 P2d 748 (1988) (four controlled buys during a two-month period); State v. Evoniuk/Niemi, 80 Or App 405, 722 P2d 1277 (1986) (drug activity over a period as long as seven months). *Compare* State v. Huff, 253 Or App 480, 291 P3d 751 (2012) (recent personal use of drugs in home did not refresh 45-month-old information about commercial drug use at home; affidavit did not support inference of continued presence of drug evidence).

Sexual Abuse: *See* State v. Kirkpatrick, 45 Or App 899, 609 P2d 433 (1980) (ongoing sexual abuse justified a warrant to search for sexually explicit photographs used in the abuse, despite the fact that they had not been shown to the victims in more than a year). *See also* State v. Gustafson, 300 Or App 438, 449, 452 P3d 962 (2019), *rev den* 366 Or 493 (2020) (affidavit supported inference that, despite passage of 10 years, defendant was likely to continue to possess images of child gymnasts whom he coached, which he had kept for his sexual gratification; the affidavit showed continued sexual interest in children and that defendant used his business to maintain access to them).

b. Admissions Regarding Expectation of Continuing Presence of Seizable Evidence.

Compare State v. Wilson, 178 Or App 163, 35 P3d 1111 (2001) (single sale of an unknown quantity of meth to CRI and suspect's "vague statement" to CRI about having "lots" of meth to sell did not make it probable that he was involved in an ongoing drug operation because suspect's statements to CRI were not corroborated) *with* State v. Usher, 135 Or App 143, 897 P2d 1185, *rev den*, 321 Or 560 (1995) (suspect told informant that ½ ounce quantities of meth were "accessible anytime") and State v. Wilson/Helms, 83 Or App 616, 733 P2d 54, *rev den*, 303 Or 172 (1987) (dealer's statement to CI that dealer expected to have more drugs in future).

c. Prior Criminal Activity.

Prior drug arrests or convictions are one component in determining whether too much time has lapsed between the observation and the issuance of the warrant. *Compare* State v. Koppenhofer, 59 Or App 213, 650 P2d 981, *rev den* 294 Or 149 (1982) (prior drug arrests one component in finding probable cause) *with* State v. Kittredge/Anderson, 36 Or App 603, 585 P2d 423 (1978) (lack of prior history one factor in finding lack of probable cause) and State v. Buffington, 87 Or App 559, 743 P2d 738 (1987) (large amount of foot traffic but only a quarter of visitors had prior drug convictions).

6. Informants and Hearsay.

A foundation must be laid for information provided by named or unnamed informants. *See, e.g.*, State v. Kreutzer, 138 Or App 306, 909 P2d 175 (1995); State v. Horwedel, 66 Or App 400, 674 P2d 623, *rev den*, 296 Or 638 (1984). That foundation must appear within the four corners of the affidavit as it is presented to the magistrate — *i.e.*, a later hearing on a motion to suppress "is, of course, too late to shore up any deficiency" in the affidavit. State v. Culley, 198 Or App 366, 375 n 6, 108 P3d 1179 (2005).

a. Unnamed Informants.

ORS 133.545(6) requires that an affiant shall "set forth facts bearing on any unnamed informant's reliability and shall disclose, as far as possible, the means by which the information was obtained." *See* State v. Bostwick, 226 Or App 57, 62, 202 P3d 259, *rev den*, 346 Or 589 (2009); State v. Keerins, 197 Or App 428, 433, 106 P3d 16, *rev den*, 388 Or 681 (2005).

The statute was an attempt to "embody the special requirements of particularity [formerly] required by the United States Supreme Court under the federal constitution." State v. Alvarez, 308 Or 143, 147 fn 3, 776 P2d 1283 (1989). The Oregon Supreme Court and the Court of Appeals have each

said that the statute codifies the foundation requirements expressed in *Aguilar/Spinelli*. *State v. Coffey*, 309 Or 342, 346, 788 P2d 424 (1990); *State v. Young*, 108 Or App 196, 201, 816 P2d 612 (1991), *rev den*, 314 Or 392 (1992). *See Aguilar v. Texas*, 378 US 108, 84 S Ct 1509, 12 L Ed 2d 723 (1964); *Spinelli v. United States*, 393 US 410, 89 S Ct 584, 21 L Ed 2d 637 (1969).

> **NOTE**: The United States Supreme Court has since rejected the *Aguilar/Spinelli* test in favor of a "totality of the circumstances" test. *See Illinois v. Gates*, 462 US 213, 103 S Ct 2317, 76 L Ed 2d 527 (1983). Nevertheless, the two-pronged *Aguilar/Spinelli* test for information supplied by *unnamed* informants remains applicable in Oregon under ORS 133.545(6).

The affidavit must establish:

- ***First prong*** — The **reliability** of the information provided **or** the **veracity** of the unnamed informant.

- ***Second prong*** — That the unnamed informant had an adequate **basis of knowledge**.

See State v. Bostwick, 226 Or App 57, 64, 202 P3d 259, *rev den*, 346 Or 589 (2009) (first prong can be met by showing either that the informant is "credible" or by showing that the information is "reliable"); *State v. Arana*, 165 Or App 454, 456, 998 P2d 688 (2000), *citing State v. Brust*, 94 Or App 416, 765 P2d 1246 (1988).

> **NOTE: OREGON'S STATUTORY *AGUILAR/SPINELLI* REQUIREMENT AND ORS 136.432.** The requirements of ORS 133.545(6) that govern information supplied by unnamed informants create a more stringent standard than the current Fourth Amendment "totality of the circumstances" test. *See Illinois v. Gates*, 462 US 213, 103 S Ct 2317, 76 L Ed 2d 527 (1983). Therefore, if an affidavit is defective for failing to satisfy the statutory *Aguilar/Spinelli* standard, ORS 136.432 would seemingly preclude the suppression of evidence seized under the search warrant unless the affidavit is also inadequate under the "totality of the circumstances" test. Most likely, however, this would probably *not* be the outcome in most cases, because the Oregon courts have seen little practical difference between these two standards. They have generally analyzed cases governed by the "totality of the circumstances" standard in the same manner as those analyzed under ORS 133.545(6). *See State v. Wilson*, 120 Or App 382, 387-88, 852 P2d 910, *rev den*, 317 Or 584 (1993) ("Information from a named informant is subject to *essentially the same analysis* [as unnamed informants] to determine whether a reasonable magistrate could conclude, under the totality of the circumstances, that there was probable cause to support the issuance of the warrant."; emphasis added).

(1) The Informant's Reliability.

This is sometimes described as the "veracity" prong of the statutory *Aguilar/Spinelli* test. The affidavit must demonstrate that the informant is believable or that the information is reliable.

> "When an affidavit is based on information supplied by an unnamed informant, the affidavit must show that the information is reliable by demonstrating the basis for the informant's knowledge and including facts that establish the informant's veracity. * * * The 'veracity' of the informant refers to the extent to which the information supplied is trustworthy on a specific occasion. Veracity can be established in several ways, including corroboration by the police or corroboration by another informant."

State v. Harper, 197 Or App 221, 228, 105 P3d 883 (2005) (some citations and quote marks omitted).

Fine distinctions may be drawn between establishing "reliability" by showing that the informant is credible ("his reputation as a truth-speaker or his demonstrated history of truth-speaking") and establishing "reliability" by showing that the information comes from circumstances assuring that the particular information is "indeed trustworthy on a specific occasion." State v. Alvarez, 308 Or 143, 147, 776 P2d 1283 (1989); State v. Nuttall, 97 Or App 285, 290, 776 P2d 26, *rev den*, 308 Or 593 (1989). *See also* Moylan, *Hearsay and Probable Cause: An Aguilar and Spinelli Primer*, 25 MERCER L REV 741, 761 (1974) (comparing the distinction to a debate regarding the number of angels that can stand upon the head of a pin), *cited and quoted with approval* in Alvarez, 308 Or at 147 n 4. But because there is no legal penalty for including too much information in a search warrant affidavit, it is best to include all facts that establish "reliability."

There are many ways of meeting this burden. The magistrate must be given "'sufficient raw data to make an *independent* judgment of [the CI's] trustworthiness.'" State v. Nuttall, 97 Or App at 290 (emphasis in court's opinion), *quoting* State v. Diaz, 29 Or App 523, 527, 564 P2d 1066 (1977).

THE FOLLOWING LIST IS NOT EXCLUSIVE:

(a) Hearsay Exceptions; Statement Against Penal Interest.

Generally, statements that fall within hearsay exceptions are deemed trustworthy because of the circumstances of their utterance, and, for those reasons, the same "indicia of reliability are also valuable in weighing the sufficiency of an affidavit in support of a warrant application." State v. Hoffer, 114 Or App 508, 512 fn 4, 835 P2d 959, *rev den*, 315 Or 272 (1992) (motel registration slips reliable as "business records").

The hearsay exception used most often to establish informant reliability is the statement against penal interest. OEC 804(3)(c); *see* State v. Castilleja, 345 Or 255, 267, 192 P3d 1283, *adh'd to on recons*, 345 Or 473 (2008) (although named informant was connected to the criminal enterprise, the magistrate could have concluded that her status as such enhanced her credibility because her statements were against the criminal interests of her own daughter); State v. Alvarez, 308 Or 143, 776 P2d 1283 (1989) (declaration against penal interest is entitled to "*some*" weight, and other "circumstances" may contribute to the reliability of the information thus conveyed); State v. Henderson, 200 Or App 225, 232 n 7, 113 P3d 944 (2005), *rev'd on other grounds* 341 Or 219 (2006) (named informant's statement was reliable in part because it was "against her penal interest"); State v. Chezem, 125 Or App 341, 865 P2d 1307 (1993) (unwitting informant's veracity was established by his statements against penal interest and the police's corroboration of the statements).

In State v. Worsham, 114 Or App 170, 175, 834 P2d 1033, *rev den*, 314 Or 574 (1992), the court said: "Some declarations against penal interest might of themselves be of sufficient weight to make an informant's statements reliable." However, the majority in this fractured opinion (one concurred, three dissented) did not need to rely solely on the statement against penal interest because it found other corroboration of the "unwitting informant's" reliability in other aspects of the facts.

See also cases addressing statements against penal interest by *named* informants, discussed later in this chapter.

(b) Previous Reliability of the Informant.

An informant's reliability may be demonstrated in the affidavit by establishing that the informant has historically provided reliable information that has led to successful arrests, convictions, or seizures. State v. Grimes, 135 Or App 497, 899 P2d 1201 (1995), *rev den*, 322 Or 490 (1996) (informant previously provided information resulting in seizure of indoor marijuana growing operations and felony arrests); State v. Chezem, 125 Or App 341, 865 P2d 1307 (1993) (informant had given reliable drug information in the past and made recent controlled buys); State v. Strubhar/Jackson, 82 Or App 560, 563-64, 728 P2d 928 (1986), *rev den*, 302 Or 657 (1987) (CI previously gave information resulting in two search warrants and three felony arrests).

The experience of the informant need not be immediately recent. State v. Kapsalis/Scroggins, 123 Or App 138, 859 P2d 1157 (1993), *rev den*, 318 Or 326 (1994) (informant gave information "some time ago" that resulted in two search warrants and subsequent prosecutions).

(c) Controlled Buys.

A controlled buy occurs when police search an informant before sending the informant to the target (thus establishing that the informant had no contraband), observe the informant travel to and from meeting with the target, and then recover drugs from the informant. *See, e.g.*, State v. Davis, 62 Or App 772, 662 P2d 13, *rev den*, 295 Or 259 (1983); State v. Middleton, 79 Or App 794, 720 P2d 1310, *rev den*, 301 Or 765 (1986), *cert dismissed*, 480 US 913 (1987).

A single controlled buy is sufficient to establish the reliability of a confidential informant. State v. Wilson/Helms, 83 Or App 616, 733 P2d 54, *rev den*, 303 Or 172 (1987). *See also* State v. Hayward/Hayward, 18 Or App 128, 131, 523 P2d 1278 (1974) (informant's successful purchase of drugs "persuasive corroborative evidence of his reliability").

On the other hand, a controlled buy is not a prerequisite to establishing a CI's credibility. State v. Kapsalis/Scroggins, 123 Or App 138, 859 P2d 1157 (1993), *rev den*, 318 Or 326 (1994).

> **NOTE: ENTRY TO MAKE A CONTROLLED BUY IS NOT A SEARCH.** Some defendants have suggested that the informant's controlled entry itself constitutes a search requiring a search warrant. This argument was rejected in State v. Gloster, 103 Or App 473, 798 P2d 256 (1990) (mere fact that occupants of premises did not know informant was a police agent when he entered home did not make entry illegal, and informant's observations inside the home could support the warrant).

(d) Independent Police Corroboration.

Police corroboration supporting an informant's detailed statements may increase the reliability of an informant and may overcome the fact that the informant has no track record with the police. State v. Bostwick, 226 Or App 57, 65, 202 P3d 259, *rev den*, 346 Or 589 (2009) (corroboration of some details provided by an informant supports an inference that other information provided by the same informant also is reliable); State v. Henderson, 200 Or App 225, 232 n 7, 113 P3d 944 (2005), *rev'd on other grounds*, 341 Or 219 (2006) (named informant's statement was reliable in part because "aspects of her account * * * were independently corroborated"); State v. Nuttall, 97 Or App 285, 776 P2d 26, *rev den*, 308 Or 593 (1989) (informant had previously provided information that was "reliable and accurate in every respect, through independent investigation," and was partially corroborated by police in present case).

> "'Police corroboration which does not directly relate to the circumstances establishing probable cause is as demonstrative of "present good performance" and as relevant to establishing the informant's veracity as is corroboration of the criminal activity itself.'"

State v. Payne, 150 Or App 469, 474, 946 P2d 353 (1997), *rev den*, 326 Or 390 (1998), *quoting* State v. Hermach, 53 Or App 412, 420, 632 P2d 466, *rev den*, 291 Or 893 (1981). *Accord* State v. Duarte, 237 Or App 13, 238 P3d 411, *rev den*, 349 Or 370 (2010) (officer experience with hydroponic grow operations and knowledge of their characteristics helped corroborate informant reports of hydroponic grow in basement); State v. Binner, 128 Or App 639, 648, 877 P2d 642, *rev den*, 320 Or 325 (1994) ("That some of the corroborated details concern non-incriminating facts does not adversely affect their worth for establishing the informant's veracity."); State v. Arana, 165 Or App 454, 458, 998 P2d 688 (2000) (officer corroborated both neutral information and information relevant to criminal activity). *See also* State v. Brotherton, 123 Or App 243, 247, 859 P2d 565 (1993); State v. Young, 108 Or App 196, 201-02, 816 P2d 612 (1991), *rev den*, 314 Or 392 (1992).

> **CAUTION:** The corroboration of "easily obtainable and innocent" information may not, "[s]tanding alone," establish the veracity of an informant. State v. Spriggs, 137 Or App at 605 (location of residence, its color, and the presence of vehicles not sufficient, standing alone, to establish informant's veracity but affidavit contained other corroborating information). *See also* State v. Marmon, 303 Or App 469, 474, 463 P3d 555 (2020) (state failed to establish "reliability" of informant's information when the sole facts that could be corroborated were defendant's name and the location of the home where he allegedly used drugs, which did not tend to suggest that informant was telling truth about drug activity).

(e) "Cross-Corroboration" with Other Informants.

"Cross-corroboration among informants is a well-accepted method of demonstrating the validity of the information given." State v. Prince, 93 Or App 106, 111, 760 P2d 1356, *rev den*, 307 Or 246 (1988). *See also* State v. Pelster/Boyer, 172 Or App 596, 605, 21 P3d 106, *rev den*, 332 Or 632 (2001) (named informants gave identical information to the police); State v. Souders, 74 Or App 123, 700 P2d 1050, *rev den* 300 Or 112 (1985) (unnamed informant corroborated by named informant's observation of defendant in possession of a gun two months earlier); State v. Jones, 58 Or App 277, 648 P2d 869, *rev den*, 294 Or 295 (1982) (four informants, not criminally involved, satisfactorily corroborated one another). "The similarity of information provided by two or more independent sources establishes the veracity of that information; it indicates that neither source fabricated the story from whole cloth." State v. Harper, 197 Or App 221, 229, 105 P3d 883 (2005).

Information corroborated by another "need not relate directly to the suspected criminal activity, [but] must be relevant to the issue of the reliability of the information or the veracity of the informants." State v. Strance, 118 Or App 645, 650, 848 P2d 1226, *rev den*, 317 Or 584 (1993) (statement that informant lived with defendant was corroborated by fact that they shared phone number).

An informant's information may be corroborated by the suspect's own statements admitting to the same facts. State v. Harper, 197 Or App at 229 ("[T]he fact that defendant corroborated the information supplied by the store employee established the trustworthiness of the information.").

Although cross-corroboration among informants can enhance the validity of the information, statements by an informant who is not shown to be credible cannot bolster the reliability of another informant's statement. State v. Kreutzer, 138 Or App 306, 314-15, 909 P2d 175 (1995) ("There must

be satisfactory proof of the credibility of every person involved in the chain of information from the initial observer to the affiant").

(f) Weight of Detail.

The fact that the information given by an informant contains a high degree of detail is strongly indicative of the informant's veracity. *State v. Bostwick*, 226 Or App 57, 65, 202 P3d 259, *rev den*, 346 Or 589 (2009). *See also State v. Binner*, 128 Or App 639, 647, 877 P2d 642, *rev den* 320 Or 325 (1994) ("The informant's ability to describe the grow operation in extreme detail also engenders indicia of reliability."). *See also State v. Arana*, 165 Or App 454, 457, 998 P2d 688 (2000) (CI related a large amount of detail as to the configuration and ongoing nature of grow operation).

(g) Polygraph Examination.

In *State v. Coffey*, 309 Or 342, 346, 788 P2d 424 (1990), the Supreme Court found that "the opinion of the polygraph examiner is * * * a fact bearing on the reliability of the informant's information and is, accordingly, a fact bearing on his or her reliability" under ORS 133.545.

CAUTION: The court in *State v. Coffey* also noted:

> "Were the polygraph examiner's opinion * * * the *sole* fact bearing on reliability, the affidavit would not be sufficient to support a determination of probable cause. The insufficiency of the polygraph examiner's opinion is due to doubts about the validity and potential rate of error of the polygraph. *See State v. Brown*, 297 Or 404, 433, 687 P2d 751 (1984)." 309 Or at 347 fn 7 (emphasis in original).

See also State v. Thorfinnson, 121 Or App 10, 853 P2d 1368, *rev den*, 317 Or 584 (1993) (unnamed informant's veracity was established by controlled buys, successful polygraph examination, and partial police corroboration).

(h) Lack of Information Showing Informant Has Reason to Fabricate.

The fact that there is nothing on the face of the affidavit that requires the magistrate to discredit the informant is an appropriate consideration in establishing the veracity of the informant. *See State v. Binner*, 128 Or App 639, 647, 877 P2d 642, *rev den*, 320 Or 325 (1994) (informant's disinterestedness relevant to credibility). *See also State v. Arana*, 165 Or App 454, 457, 998 P2d 688 (2000) (affidavit explained that CI "had no criminal convictions, was not involved criminally with defendant, nor was he otherwise interested in the outcome of this case").

But see State v. Keeney, 323 Or 309, 918 P2d 419 (1996). The affidavit in this case stated that an unnamed informant had "no reason to exaggerate or fabricate," but, in fact, the informant was the estranged wife of one defendant and was engaged in a bitter child-custody battle with him. The trial court found that several material sworn statements within the affidavit were not truthful. The Supreme Court held that the trial court thus was permitted to infer that other material misstatements existed within the affidavit, and the court was entitled to distrust the remaining statements. Probable cause, therefore, did not exist. *Compare State v. Bostwick*, 226 Or App 57, 65, 202 P3d 259, *rev den*, 346 Or 589 (2009) (affidavit contained information about the informant's possible motive to fabricate; inclusion of that information allowed the magistrate to weigh that motive against other factors and conclude that the information nonetheless was reliable).

See discussion of negative information about an informant's motives in this chapter.

(i) Lack of Criminal History or Background.

"An informant's lack of a criminal record is also an appropriate consideration in establishing veracity." *State v. Fink*, 79 Or App 590, 595, 720 P2d 372, *rev den*, 302 Or 36 (1986) (an unnamed informant's veracity was established by a successful polygraph examination and lack of any criminal record). *See also State v. Arana*, 165 Or App 454, 457, 998 P2d 688 (2000) (affidavit explained that CI "had no criminal convictions, was not involved criminally with defendant, nor was he otherwise interested in the outcome of this case").

(j) Disinterested Citizen Informant.

Even if unnamed, a disinterested "citizen" informant should be considered more reliable than an interested party. *See State v. Prince*, 93 Or App 106, 111, 760 P2d 1356, *rev den*, 307 Or 246 (1988) ("[B]ecause the information came from citizens apparently unconnected with the crime being investigated, rather than from criminals or from persons who were criminally involved, the degree of proof needed to establish veracity is less.").

But see discussion of statements against penal interest as an indication of the veracity of an informant in this chapter.

(2) The Informant's Basis of Knowledge.

Under the second prong of the statutory *Aguilar*/*Spinelli* test, the statute and cases require that the affidavit set forth facts justifying the inference that the informant was in a position to perceive the events the informant reported to the police. ORS 133.545(5); *Aguilar v. Texas*, 378 US 108, 84 S Ct 1509, 12 L Ed 2d 723 (1964); *State v. Keerins*, 197 Or App 428, 433-34, 106 P3d 166, *rev den* 388 Or 681 (2005); *State v. Buffington*, 87 Or App 559, 743 P2d 738 (1987) (conclusory claim of "first hand knowledge" insufficient). *But see State v. Pelster/Boyer*, 172 Or App 596, 606, 21 P3d 106, *rev den*, 332 Or 632 (2001) ("there is no statutory or constitutional requirement that the basis of a *named* informant's knowledge be set forth expressly in the affidavit"; emphasis added).

Failure to set forth the informant's basis of knowledge means the information must be disregarded. *State v. Keerins*, 197 Or App at 434. *See also State v. Miller*, 254 Or App 514, 524, 295 P3d 158 (2013) (affidavit provided no basis for inference of personal knowledge, rather than speculation, from unnamed informant's statement that he could get more drugs from defendant).

There are many ways of meeting this burden. Most difficulties with the basis-of-knowledge element can be avoided by careful drafting of the affidavit. At every assertion of fact attributed to an informant or affiant, ask the officer *how* the affiant or informant knows that the assertion is true. A balance must be struck between the degree of detail necessary to meet the requirements of the law and the proportionate increase in risk of disclosure of the informant's identity. See "Search Warrant Checklist" in the appendix to this chapter.

THE FOLLOWING LIST IS NOT EXCLUSIVE:

(a) Personal Observation.

"[P]ersonal observation is a sufficient basis for knowledge." *State v. Arana*, 165 Or App 454, 457, 998 P2d 688 (2000), *citing State v. Spriggs*, 137 Or App 601, 604, 905 P2d 265 (1995); *see also State v. Harper*, 197 Or App 221, 228, 105 P3d 883 (2005) ("[T]he basis for the informant's knowledge is direct observation, and * * * that is sufficient."). But, the description of a personal observation should be sufficiently clear to enable the magistrate to determine how the informant

knows what is being asserted. An affidavit indicating that the informant personally observed criminal activity was sufficient in State v. Miebach, 52 Or App 709, 629 P2d 1312, *rev den*, 291 Or 771 (1981) (officer saw pan of dried marijuana in defendant's home). *See also* State v. Kreutzer, 138 Or App 306, 909 P2d 175 (1995) (affidavit failed to establish how informant knew that growing plants were marijuana); State v. Munro, 96 Or App 238, 241, 772 P2d 1353 (1989) (affiant's statement that defendant "is known by name and appearance to the informant and is presently hiding from police" at a specified address was not adequate).

(b) Weight of Detail.

Personal knowledge may be inferred from the level of specificity of the information provided by the informant. State v. Castilleja, 345 Or 255, 268, 192 P3d 1283, *adh'd to on recon* 345 Or 473 (2008). Accumulation of specific detail regarding the target's criminal activity may support an inference that the informant gained the information by some form of personal observation. *See, e.g.,* State v. Dunning, 81 Or App 296, 724 P2d 924 (1986) (informant provided detailed facts along with observation of defendant in possession of cocaine); State v. Moreno, 45 Or App 489, 608 P2d 611 (1980) (informant gave detailed information concerning a heroin courier); State v. Delker, 26 Or App 497, 522 P2d 1313 (1976) (highly detailed account of a bookmaking operation). An informant's lack of certainty may not necessarily weigh against her credibility. Castilleja, 345 Or at 268 (informant's lack of certainty that defendants' OMMA permit was current did not weigh against her credibility, because her accompanying statement that she did not know "for sure" showed that she wanted to be truthful).

But see State v. Hall, 79 Or App 597, 603, 720 P2d 376, *rev den*, 301 Or 765 (1986) (despite high degree of detail and informant's familiarity with defendant, the court declines to apply the rule of self-verifying detail in the absence of other evidence of basis of knowledge).

(c) Informant's Knowledge of Contraband.

The informant's ability to identify with reasonable certainty the contraband nature of the articles sought should be documented in the affidavit. This information could be supplied by relating the informant's own experience with the contraband in question or by exhibiting samples to the informant after the observations of the target are made.

State v. Castilleja, 345 Or 255, 267-68, 192 P3d 1283, *adh'd to on recons*, 345 Or 473 (2008) (informant's own drug-dealing experience lent credibility to her belief that defendants were dealers).

State v. Arana, 165 Or App 454, 457, 998 P2d 688 (2000) (statement in affidavit that CI previously had observed and smoked marijuana established his ability to identify marijuana).

State v. Kreutzer, 138 Or App 306, 909 P2d 175 (1995) (bare assertion that an informant saw marijuana plants without an allegation about experience or familiarity with drugs was insufficient).

State v. Goff, 134 Or App 92, 894 P2d 1207 (1995) (nine-year-old's ability to identify marijuana was based on what she had learned at school and by showing her samples).

(d) Independent Observations of Informant's Opportunity to Perceive Events.

The police or other informants may provide information that places the informant in a position to make personal sensory observations. *Cf.* State v. Wilson/Helms, 83 Or App 616, 733 P2d

54, *rev den*, 303 Or 172 (1987) (controlled buy necessarily places informant in position to gather direct evidence of target's criminal activity).

b. Named Informants.

The text of ORS 133.545(6) imposes the *Aguilar/Spinelli* foundational requirements only on *anonymous* informants; those requirements do **not** apply to named informants. *State v. Farrar*, 309 Or 132, 144, 786 P2d 161, *cert den*, 498 US 879 (1990); *State v. Fitzpatrick*, 81 Or App 592, 596, 726 P2d 950 (1986). No statute defines the foundation required for named informants.

Further, the *Aguilar/Spinelli* standard is **not** required by the Oregon Constitution with respect to named informants. *See State v. Johnson*, 340 Or 319, 329, 131 P3d 173 (2006) (*Aguilar/Spinelli* test is "inapplicable" when information in affidavit is provided by named informant). In *State v. Farrar*, 309 Or at 145, the court said that affidavits based on information from named informants should be "construed in a common-sense, realistic fashion." The Court of Appeals has interpreted *Farrar* to require application of "the common law test to determine if, under the totality of the circumstances disclosed in the affidavit, the information is sufficiently reliable to support the issuance of the search warrant. *See Illinois v. Gates*, 462 US 213, 103 S Ct 2317, 76 L Ed 2d 527 (1983)." *State v. Young*, 108 Or App 196, 202-03, 816 P2d 612 (1991), *rev den*, 314 Or 392 (1992).

When information in an affidavit is provided by *named* informants, "**the test to be applied is a 'totality of the circumstances' test**." *State v. Pelster/Boyer*, 172 Or App 596, 600, 21 P3d 106, *rev den*, 332 Or 632 (2001). *See also State v. Milks/Sales*, 127 Or App 397, 400, 872 P2d 988 (1994) ("we look to the totality of the circumstances in the affidavit to determine if the information provided by the [named] informant is sufficiently reliable").

> "'Probable cause' arises from information provided by named informants when a reasonable person, based on the totality of the circumstances, would believe that it is probable (more likely than not) that the objects of the search will be found at the location to be searched."

State v. Pelster/Boyer, 172 Or App at 601. *Accord State v. Westfall*, 178 Or App 343, 349, 37 P3d 1030 (2001), *rev den*, 333 Or 595 (2002).

Despite its conclusion that ORS 133.545(6) and *Aguilar/Spinelli* are inapplicable to named informants, the Supreme Court in *Farrar* nevertheless analyzed the basis of knowledge and credibility of each of the named informants. The Court of Appeals has since interpreted this feature of *Farrar* to mean that *Aguilar/Spinelli* "provides a useful framework within which to consider the issue" of named informants. *State v. Evans*, 110 Or App 46, 58, 822 P2d 1198 (1991). As a result, the Court of Appeals in a number of cases has assessed information from a named informant in essentially the same manner it uses to evaluate information from an unnamed informant:

> "Information from a named informant is subject to essentially the same analysis [as for unnamed informants] to determine whether a reasonable magistrate could conclude, under the totality of the circumstances, that there was probable cause to support the issuance of the warrant."

State v. Wilson, 120 Or App 382, 387-88, 852 P2d 910, *rev den*, 317 Or 584 (1993). *See also State v. Henderson*, 200 Or App 225, 232 n 7, 113 P3d 944 (2005), *rev'd on other grounds*, 341 Or 219 (2006) (that informant was named was one factor, among others, that established "her reliability"); *State v. Goff*, 134 Or App 92, 95, 894 P2d 1207 (1995) ("we analyze the statements of a named informant in essentially the same manner as we analyze those of an unnamed informant").

More recently, however, the Court of Appeals has emphasized that the "totality of the circumstances" test is *not* synonymous with the statutory test and the ***Aguilar/Spinelli*** rule for unnamed informants:

> "In this case, we adhere to the rule in *Farrar* that the analytical framework provided in [ORS 133.545(5)] is but one consideration in determining the reliability of the information from named informants and that the proper legal standard is the 'totality of the circumstances' test."

State v. Pelster/Boyer, 172 Or App 596, 602, 21 P3d 106, *rev den*, 332 Or 632 (2001); *see also* *State v. Forker*, 214 Or App 622, 168 P3d 279 (2007) (contrasting totality-of-circumstances analysis with the ***Aguilar/Spinelli*** two-factor test); *State v. Moore*, 335 Or App 74, 76-78, 557 P3d 554 (2024) (citing *Pelster/Boyer* and concluding that information provided by informant—who was also the victim of the crime under investigation—was reliable because informant was named in affidavit, was subject to potential criminal or civil liability if he gave false information, provided a statement against penal interest, and provided information that was largely corroborated by the police, as reflected by other information in the affidavit).

In close cases, this distinction may be important. For example, in *Pelster/Boyer*, 172 Or App at 606, the court pointed out that "there is no statutory or constitutional requirement that the basis of a *named* informant's knowledge be set forth expressly in the affidavit." (Emphasis added). The court went on to hold that in this case the basis of the informants' knowledge — "first-hand contacts with defendants' residence or members of their household" — reasonably could be inferred from the facts set forth in the affidavit. 172 Or App at 608. Similarly, in *Forker*, 214 Or App at 629-30, the informant claimed to be defendant's therapist, but did not expressly state that he obtained the information directly from defendant; however, the court concluded that it was reasonable to infer – based on the content and the context of the information provided – that he obtained it from defendant in the course of their therapeutic involvement. *Forker*, 214 Or App at 630.

> **PRACTICAL SUGGESTION:** The best practice for prosecutors is to **attempt to satisfy the *Aguilar/Spinelli* test for named as well as anonymous informants**. In addition to the previously listed methods of establishing reliability, a variety of factors may be of assistance in cases involving named informants.

(1) Identifying the Informant as a Factor Enhancing Credibility.

Named informants are generally deemed more worthy of belief than anonymous informants, largely because a named informant who supplies information about criminal conduct is subject to criminal or civil liability if the information is false. *State v. Johnson*, 340 Or 319, 329, 131 P3d 173 (2006) (the reliability of the informant's statements was properly inferred from the fact that she was a citizen informant who was willing to have her name used and who had no apparent motive to falsely accuse defendant); *State v. Farrar*, 309 Or 132, 144, 786 P2d 161, *cert den*, 498 US 879 (1990) (suggesting two statutes as a basis for possible criminal liability, *i.e.,* ORS 162.375, which makes it a crime to initiate a false report to a law enforcement agency, and ORS 162.325, which makes it a crime to hinder prosecution); *State v. Montigue*, 288 Or 359, 605 P2d 656 (1980) (named informant may suffer liability in damages for malicious prosecution, and, further, criminal prosecution for initiating a false report or perjury); *State v. Forker*, 214 Or App 622, 629-30, 168 P3d 279 (2007) (although defendant's therapist was immune from civil liability for incorrect information given in good faith, he would be liable for bad-faith information); *but see* *State v. Villagran*, 294 Or 404, 657 P2d 1223 (1983) (noting that this rationale does not apply when the information provided does not implicate anyone in criminal activity, but finding that information provided by a named citizen

informant was reliable nonetheless because "[r]easonable persons routinely rely upon factual information obtained in a manner such as this").

Even an *unnamed* non-criminal informant will be given some credence by the court if the informant is still identifiable:

> "We note that, although the motel manager and the neighbor were unnamed, their identities are not confidential and can be easily ascertained. Unlike confidential informants, they potentially expose themselves to civil and criminal liability for making false statements. *Cf.* State v. Girard, 106 Or App 463, 467, 808 P2d 1017 (1991). Although the state does not raise the issue, we believe that exposure engenders additional indicia of the informant's reliability."

State v. Hoffer, 114 Or App 508, 513 fn 5, 835 P2d 959, *rev den*,315 Or 272 (1992). *See also* State v. Bostwick, 226 Or App 57, 63, 202 P3d 259, *rev den*, 346 Or 589 (2009) (although informant was not named, the affiant disclosed that the informant was known to him through traffic stops and other contacts, and stated that "if necessary his name could be revealed").

But "information provided by a named informant who is criminally involved must be corroborated." State v. Arnold, 115 Or App 258, 263, 838 P2d 74 (1992), *rev den*, 315 Or 312 (1993), *citing* State v. Carlile, 290 Or 161, 168, 619 P2d 1280 (1980); *see also* State v. Henderson, 200 Or App 225, 232 n 7, 113 P3d 944 (2005), *rev'd on other grounds*, 341 Or 219 (2006) (that criminally-involved informant was named was one factor, together with corroboration, that established "her reliability"); State v. Payne, 150 Or App 469, 474 946 P2d 353 (1997), *rev den*, 326 Or 390 (1998) (corroboration of non-incriminating details was sufficient where named, criminally involved informant made statement against penal interest); State v. Milks/Sales, 127 Or App 397, 872 P2d 988 (1994) (named informant not credible because of two convictions of false report and her desire to punish her estranged boyfriend; this deficiency was not overcome by corroboration of non-incriminating details and evidence of high power usage); State v. Strance, 118 Or App 645, 650, 848 P2d 1226, *rev den* 317 Or 584 (1993) (reviewing court required corroboration of named informant where affidavit omitted information about the informant's criminal background).

> **COMMENT:** *Henderson* and *Payne* may be at odds with State v. Carlile, 290 Or 161, 619 P2d 1280 (1980). In both *Henderson* and *Payne*, the information was supplied by a named, criminally involved informant and reliability was established because the informants' statements were against penal interest and by corroboration of *non-incriminating* details. In *Carlile*, the court held that where a named, criminally involved informant made a statement against penal interest, corroboration of only the suspect's name and address was not sufficient. In similar cases, advise police officers to seek more corroboration than just the suspect's name and address, as was obtained in *Carlile*.

(2) Non-Criminal Informants.

These types of informants are also referred to in case law as "citizen" informants. Unlike many anonymous informants, whose involvement in criminal activity makes them inherently suspect, a named citizen who is not criminally involved is likely to be credited by the court. *See* State v. Villagran, 294 Or 404, 657 P2d 1223 (1983) (named informant without criminal background and with no involvement in the criminal conduct that was the subject of the affidavit found to be credible); State v. Westfall, 178 Or App 343, 350, 37 P3d 1030 (2001), *rev den*, 333 Or 595 (2002) (information provided by motel manager and police officer, "as named informants, was presumptively reliable").

State v. Forker, 214 Or App 622, 168 P3d 279 (2007) (information provided by defendant's former therapist about defendant's ongoing possession of child pornography provided probable cause because it was based on admissions made by defendant during treatment and because therapist could be criminally and civilly liable for bad-faith information).

State v. Donahue, 93 Or App 341, 762 P2d 1022 (1988), *rev den*, 307 Or 303 (1989) (search warrant affidavit based on information from named citizen informants and officer's observations concerning unusual power consumption held sufficient to support search for marijuana, even after information derived from officer's trespass onto property with meter reader was deleted).

State v. Prince, 93 Or App 106, 760 P2d 1356, *rev den*, 307 Or 246 (1988) (affidavit based on information from three unnamed citizen informants not involved in criminal activity, corroborative of each other, and further corroborated by officers' own observations, including increased power consumption, held sufficient to support search for marijuana-growing operation).

State v. Eisman, 21 Or App 92, 533 P2d 1379 (1975) (reliability of hearsay informant sufficiently established where informant is named police officer).

(3) Statements Against Penal Interest.

State v. Castilleja, 345 Or 255, 267, 192 P3d 1283, *adh'd to on recons*, 345 Or 473 (2008) (although named informant was connected to the criminal establishment, the magistrate could have concluded that her status as such enhanced her credibility because her statements were against the criminal interests of her own daughter).

State v. Carlile, 290 Or 161, 619 P2d 1280 (1980) (criminally involved named informants; statements against penal interest held sufficient when coupled with partial police corroboration, but insufficient without such partial corroboration).

State v. Henderson, 200 Or App 225, 232 n 7, 113 P3d 944 (2005), *rev'd on other grounds*, 341 Or 219 (2006) (that named informant's statement was "against her penal interest" was one factor, together with corroboration, that established "her reliability").

State v. Pelster/Boyer, 172 Or App 596, 605-06, 21 P3d 106, *rev den*, 332 Or 632 (2001) (named informant's statements regarding drug purchase were statements against her penal interest, "a factor that weighs in favor of probable cause").

State v. Payne, 150 Or App 469, 474, 946 P2d 353 (1997), *rev den*, 326 Or 390 (1998) (named informant's statement against penal interest a significant factor, along with police corroboration of non-incriminating details).

State v. Wilson, 120 Or App 382, 388-89, 852 P2d 910, *rev den*, 317 Or 584 (1993) (credibility of named informant established, in part, by fact that "statements made against penal interest bear favorably on a speaker's credibility").

State v. Young, 108 Or App 196, 203, 816 P2d 612 (1991), *rev den*, 314 Or 392 (1992) (statements against interest made by a named, unwitting informant entitled to credibility because they were made to a person the unwitting informant did not suspect was working with the police).

State v. Christiansen, 78 Or App 594, 717 P2d 649, *rev den*, 301 Or 445 (1986) (named informant's credibility established by declarations against penal interest; corroborated with information used to justify a previous unlawful search).

(4) Informant Voluntarily Initiated Report.

State v. Montigue, 288 Or 359, 605 P2d 656 (1980) (named, disinterested informant who initiated report was credible).

State v. Faulkner, 89 Or App 120, 123, 747 P2d 1011 (1987) (named informant "deemed reliable if he personally observed the events reported and voluntarily initiated the report").

State v. Evoniuk/Niemi, 80 Or App 405, 722 P2d 1277 (1986) (fact that a named informant, uninvolved in criminal activity, voluntarily reported the activity to the police may show reliability).

Cf. *State v. Lichty*, 313 Or 579, 835 P2d 904 (1992) (fact that named informant "initiated her report to the officer" created a presumption, in evaluating whether the officer had reasonable suspicion for a stop, that the informant was "credible and reliable").

7. Negative or Questionable Information.

Except for information obtained unlawfully, the magistrate considering an application for a search warrant usually should be apprised of all information available to the officer that may reflect negatively on the informant or the investigating officers.

a. Information Obtained Unlawfully.

Unconstitutionally obtained information may *not* be considered in the probable-cause determination. *State v. Cartwright*, 246 Or 120, 418 P2d 822, *cert den*, 386 US 937 (1967). However, a warrant is not automatically invalidated by the inclusion in the affidavit of information obtained unlawfully. *State v. Morrison/Bartee*, 107 Or App 343, 812 P2d 832, *modified on recons*, 108 Or App 766, 816 P2d 1217 (1991).

In earlier cases, the Court of Appeals had held that "[w]hen a [warrant] application includes constitutionally tainted information, the correct action is for the magistrate and reviewing court to excise from the application all such information and to determine whether the remaining information is sufficient to establish probable cause." *State v. Binner*, 128 Or App 639, 646, 877 P2d 642, *rev den*, 320 Or 325 (1994). But the Oregon Supreme Court "implicitly overruled *Binner*" and related cases in *State v. DeJong*, 368 Or 640, 642, 497 P3d 710 (2021). *State v. De Witt Simons*, 329 Or App 506, 523, 540 P3d 1130 (2023), *rev allowed*, 372 Or 290 (2024). Courts must now apply the burden-shifting framework from *DeJong*. "Under that framework, the defendant has the initial burden to establish a minimal factual nexus between the illegality and the challenged evidence. If the defendant does so, the burden shifts to the state to establish that the challenged evidence was untainted by the illegality." *DeJong*, 368 Or at 642. For more detail, see the discussion in Chapter VII (Fruit of the Poisonous Tree—Causal Connection & Attenuation/Exploitation: Attenuation and Warranted Searches).

See Trial Court Review of a Search Warrant Affidavit in Chapter VII (Motions and Exclusionary Rule).

b. Information Used to Justify an Earlier Unlawful Search.

Information that led to an earlier illegal search may be used to lay the foundation for an informant even though the *fruits* of the earlier search could not be used. *State v. Christiansen*, 78 Or App 594, 717 P2d 649, *rev den*, 301 Or 445 (1986).

c. Negative Information About the Conduct of the Officers — Prior Unlawful Search.

As discussed above, evidence discovered in prior unlawful searches should not be included in the affidavit. Criminal defendants, however, have occasionally challenged affidavits by claiming that the affiant's failure to disclose *the fact of the prior unlawful search* (as distinct from its fruits) constituted bad faith by the affiant and, therefore, justified suppression. Such omissions do not necessarily establish bad faith, *see* State v. Hitesman/Page, 113 Or App 356, 833 P2d 306, *rev den*, 314 Or 574 (1992); State v. Morrison/Bartee, 107 Or App 343, 812 P2d 832, *modified on recons*, 108 Or App 766, 816 P2d 1217 (1991). On the other hand, an affiant who wishes to be completely candid about the investigation leading up to the search warrant application is not precluded from describing prior unlawful intrusions, as long as probable cause is not based on the fruits of those intrusions.

d. Negative Information About the Background of an Informant.

The affiant is required to "set forth the facts bearing on any *unnamed* informant's credibility." ORS 133.545(6); State v. Keeney, 323 Or 309, 918 P2d 419 (1996). Therefore, if the informant is unnamed, information about the criminal history of the informant should be included in the affidavit. Even for named informants, the better practice is to include criminal-history information in the affidavit. *See* State v. Strance, 118 Or App 645, 649, 848 P2d 1226, *rev den*, 317 Or 584 (1993); *but see* State ex rel Juv. Dept. v. Gallegos, 150 Or App 344, 945 P2d 656 (1997) (student informant's poor attendance records and progress reports were not relevant to credibility). The inclusion of negative information, while giving a defendant ammunition for a motion to suppress alleging an inadequate foundation for the information, should prevent a motion to controvert on the ground that the officer intentionally and in bad faith omitted critical information. *See* State v. Keeney, 323 Or 309, 918 P2d 419 (1996).

When such information has been omitted, the courts have supplemented the affidavit with the omitted criminal history information and re-evaluated probable cause in light of the new information. *See* State v. Coffey, 309 Or 342, 349 fn 8, 788 P2d 424 (1990) (warrant upheld); State v. Strance, 118 Or App 645 (1993) (warrant upheld); State v. Stockton, 120 Or App 111, 852 P2d 227 (1993) (affiant's omission of criminal history did not establish bad faith, but suppression was justified because of another flaw in the affidavit).

e. Information Bearing on the Informant's Motivation to Tell the Truth.

The affiant must disclose to the magistrate any facts known to the affiant that would tend to create a motivation for the informant to fabricate or exaggerate. Such facts may include:

- Pending charges against or investigations of the informant, *see* State v. Strance, 118 Or App 645, 649, 848 P2d 1226, *rev den*, 317 Or 584 (1993);

- Agreements between law enforcement officers and the informant, *see* State v. Payne, 150 Or App 469, 946 P2d 353, *rev den*, 326 Or 390 (1998);

- That the informant was sufficiently intoxicated that her judgment and perception may have been impaired, *see* State v. Culley, 198 Or App 366, 374-75, 108 P3d 1179 (2005);

- The relationship between the informant and the suspect, *see* State v. Keeney, 323 Or 309, 918 P2d 419 (1996) (informant involved in custody dispute with a suspect); State v. Culley, 198 Or App at 374-75 (informant was disgruntled girlfriend of

suspect and hence "had possible motives to falsify her report"); State v. McKee, 89 Or App 94, 747 P2d 395 (1987) (informants operating a bingo enterprise in competition with suspect); *but see* State v. Goff, 134 Or App 92, 96, 894 P2d 1207 (1995) (the fact that defendant's 9-year-old daughter did not want to live with the defendant "until [defendant] gets better" did not provide a basis for questioning the veracity of the child's statements). *See also* State v. Castilleja, 345 Or 255, 267, 192 P3d 1283, *adh'd to on recons*, 345 Or 473 (2008) (although named informant was connected to the criminal establishment, the magistrate could have concluded that her status as such enhanced her credibility because her statements were against the criminal interests of her own daughter).

The omission of these kinds of information may be determined to constitute untruthfulness, thereby entitling the reviewing court to distrust the entire affidavit. State v. Keeney, 323 Or 309, 918 P2d 419 (1996). Therefore, in deciding whether to seek a warrant or to use information from a particular informant, the applicant must weigh the requirement of candor imposed by ORS 133.545 and State v. Keeney against the risk that the inclusion of information relevant to the reliability of a confidential informant may reveal the informant's identity.

8. Inaccurate Information. ***See*** **Chapter VII (Motions to Controvert).**

9. Attachments to Affidavits.

State v. Moore, 113 Or App 66, 831 P2d 70, *rev den*, 314 Or 176 (1992) (an affidavit that incorporates by reference an unsigned copy of an affidavit used in an earlier stage of the investigation could support the issuance of a search warrant).

State v. Chambless, 111 Or App 76, 824 P2d 1183, *rev den*, 313 Or 210 (1992) (a police incident report, incorporated by reference in the affidavit, became part of the sworn statement and, therefore, could be considered in the probable cause determination).

D. THE APPLICATION AND THE WARRANT.

1. The "Particularity" Requirement for Warrants: Overview.

"Particularity" in a search warrant is required by the Fourth Amendment, the Oregon Constitution, and Oregon statutes, each of which requires a warrant to describe with particularity "the place to be searched" and the persons or things "to be seized." US Const, Amend IV; Art. I, § 9; ORS 133.565(2). The Oregon Supreme Court has interpreted the particularity requirements of ORS 133.565(2)(b) "to be at least as restrictive as the constitutional prohibitions against general warrants." State v. Ingram, 313 Or 139, 143, 831 P2d 674 (1992).

The purpose of requiring a particular description in the warrant is to narrow the scope of the search to the premises (and things) for which a magistrate has found probable cause to authorize the search. State v. Cortman, 251 Or 566, 569, 446 P2d 681 (1968), *cert den*, 394 US 951 (1969). *See also* State v. Showalter, 134 Or App 34, 36-37, 894 P2d 504 (1995) (same); State v. Massey, 40 Or App 211, 594 P2d 1274 (1979) (requirement that warrant specifically describe place to be searched protects unintended premises from intrusion).

> "*If the search warrant describes the premises in such a way that it makes possible the invasion of this interest in privacy without the foundation of probable cause for the search, the warrant is too broad and therefore constitutionally defective.*"

State v. Blackburn/Barber, 266 Or 28, 34, 511 P2d 381 (1973) (footnotes omitted; emphasis added), *quoted in* State v. Ingram, 313 Or at 144.

The constitutional particularity requirement as implicating two analytically distinct, but intertwined, concepts: specificity and overbreadth. State v. Mansor, 363 Or 185, 218, 421 P3d 323 (2018). The warrant, as supplemented by any attached or incorporated documents, must describe the place to be searched and the items to be seized and examined with enough specificity that officers can, "with reasonable effort, ascertain" that place and those items to "a reasonable degree of certainty." Mansor, 363 Or at 212, *quoting* Blackburn/Barber, 266 Or at 34-35. But, even if the warrant is sufficiently specific, it must not allow a search "broader than the supporting affidavit supplies probable cause to justify." Mansor, 363 Or at 212. When the warrant authorizes a search of electronic data, if the search exceeds the bounds of the probable cause in the affidavit, any further "use" of evidence outside that scope is prohibited. Mansor, 363 Or at 220.

The language in an affidavit can operate to narrow the apparent scope of the warrant if the circumstances "reasonably communicate to the executing officers that the warrant and affidavit are functionally one document, such that it is appropriate for the officers to rely on the contents of the affidavit in limiting their search." State v. Breedwell, 323 Or App 172, 522 P3d 876 (2022), *rev den*, 371 Or 106 (2023). The defendant carries the burden of proof to establish that the affidavit should *not* be considered in evaluating the warrant's particularity. Breedwell, 323 Or App at 183. "Whether the circumstances establish a sufficient connection between a warrant and supporting affidavit such that the affidavit can be considered in construing the warrant is viewed from the perspective of the circumstances *at the time of the search*." Breedwell, 323 Or App at 185. For purposes of the Oregon Constitution, whether the affidavit was sufficient to cure an apparent lack of particularity in the warrant "is a practical one based on the totality of the circumstances," and there is no "bright-line" rule in Oregon requiring attachment or incorporation of the affidavit to serve that purpose; however, the mere fact of incorporation may not be sufficient if the affidavit was not physically present at the time of the warrant's execution. Breedwell, 323 Or App at 188-89. Oregon's pragmatic approach requires that, to limit the scope of a warrant, "the affidavit must be so connected to the warrant that the two are functionally one document when the warrant is executed to actually provide those limitations." Breedwell, 323 Or App at 185.

Note: The Breedwell court interpreted the Fourth Amendment to require *both* incorporation by attachment or reference *and* that the affidavit accompany the warrant at the time of execution, but held that suppression was not required because the good-faith exception applied in that case. Breedwell, 323 Or App 192-94.

Note that, both before and after Mansor, Oregon appellate decisions address the particularity requirements without carefully distinguishing between overbreadth and specificity concerns.

2. Particularity of "place to be searched": real property.

a. Description of Place to be Searched.

The test for specificity in a search warrant is whether the executing officer can ascertain the identity and object of the search with reasonable effort. State v. Blackburn/Barber, 266 Or 28, 35, 511 P2d 381 (1973), *quoted in* State v. Ingram, 313 Or 139, 144, 831 P2d 674 (1992).

Cases involving the sufficiency of descriptions of the "place" to be searched most commonly involve real property or vehicles. *See* State v. Reger, 277 Or App 81, 91-92, 372 P3d 26, *rev den*, 359 Or 847 (2016) (describing warrant as authorizing search of "a particular place—defendant's home" for specifically identified evidence). When the property is an electronic device, it is sufficient to

describe the *device* as the place to be searched, as long as the "things" to be searched *for—i.e.*, the type of data—is described with particularity, as discussed in "Items to be Seized," subsection c. below. *See also* State v. Mansor, 363 Or 185, 218, 421 P3d 323 (2018) (holding that warrant sufficiently described the computer to be searched). The warrant must specifically describe the contours of that "place."

An officer's authority to search premises under a search warrant is "wholly circumscribed by the description in the warrant." State v. Davis, 106 Or App 546, 551-52, 809 P2d 125 (1991). The state will not be permitted to supplement the description by testimony at the hearing on the motion to suppress. State v. Blackburn/Barber, 266 Or at 35-36; *see also* State v. Bush, 174 Or App 280, 288, 25 P3d 368 (2001), *rev den*, 334 Or 491 (2002) (pre-search briefing of searching officers is not relevant to consideration of the warrant's particularity); State v. Martin/Dills, 170 Or App 366, 375, 12 P3d 548 (2000) (face of executed telephonic warrant controls; executing officer's knowledge of court's oral authorization is irrelevant).

In applying the particularity test, the Court of Appeals has indicated that warrants should be read "in a realistic and common-sense manner." State v. Jennings, 220 Or App 1, 5, 184 P3d 1200 (2008). For an example of a case applying this rule, *see* State v. Kadin/Coleman, 172 Or App 353, 18 P3d 484, *rev den*, 332 Or 326 (2001) (defendants' interpretation of the warrant, which authorized the search of "any persons frequenting [*sic*], certain premises, garages/outbuildings and residence," to mean that the warrant only authorized a search of persons frequenting the premises, and not the premises themselves, was "at odds with the [comma after "frequenting"] and the context").

Evaluation of the particularity of a description must take into account the factual setting of each case. Although a tax lot number may be adequate for rural property, State v. Eaton, 60 Or App 176, 653 P2d 250 (1982), *rev den*, 294 Or 460 (1983), the better policy is to include as complete a description as possible.

A detailed description can save a search under the authority of a warrant that recites the wrong street address if there is little possibility that the executing officer would enter the wrong property. State v. Bush, 174 Or App 280, 25 P3d 368 (2001), *rev den*, 334 Or 491 (2002) ("even if a warrant contains an incorrect street or road address, the warrant is nonetheless sufficiently particular if other information contained in the warrant provides a precise description that is a significant and more unmistakable guide than a mere number"). *See also* State v. Edwards, 149 Or App 702, 945 P2d 553, *rev den*, 326 Or 234 (1997). Likewise, if the warrant otherwise clearly identifies premises to be searched, a mistaken reference to an "above-described" vehicle, which, in fact, was not described anywhere in the affidavit or warrant, will not render the warrant insufficiently particular. *See* State v. McDowell, 211 Or App 341, 347-48, 155 P3d 877 (2007) (stating that, given the lack of any other reference of a vehicle, the executing officer reasonably could determine from the face of the warrant that the reference to a vehicle was mistaken).

In State v. Ingram, 313 Or 139, 143, 831 P2d 674 (1992), the Supreme Court ruled that a warrant directing the search of "all vehicles determined to be associated with the occupants of" the targeted residence was overbroad. The Supreme Court held that that language was invalid because it was "so standardless that the executing officer must employ discretion in deciding which vehicles to search," and thus created a risk that the officers would conduct searches of vehicles for which probable cause did not exist. State v. Ingram, 313 Or at 145.

***Additional Factual Situations*:**

No Apartment Number Specified: State v. Cortman, 251 Or 566, 569, 446 P2d 681 (1968), *cert den*, 394 US 951 (1969) (description of apartment by street number and name of occupant, but not apartment number, was sufficiently specific). *But see* State v. Martin/Dills, 170 Or App 366, 372, 12 P3d 548 (2000) (description of place to be searched in duplicate original warrant – 524 Spruce Street [a multi-unit apartment complex] – deviated substantially from the magistrate's oral authorization to search 524 Spruce Street, Apartment No. 5; evidence suppressed).

Abandoned Vehicles Within Curtilage: State v. Showalter, 134 Or App 34, 36-37, 894 P2d 504 (1995) (search warrant for "the [p]remises located at 1721 E. 9th Street" authorized search of house and its curtilage, including an engineless, disabled truck being used for storage and parked in the yard 30 feet from the house).

Wrong Address Not Cured by Other Information in Warrant: State v. Davis, 106 Or App 546, 809 P2d 125 (1991) (search of house at 18**7**7 S.E. Main Street was not authorized because the warrant authorized search at 18**3**7 SE Main Street). State v. Burton/ Cunningham, 121 Or App 508, 855 P2d 1124 (1993), *rev den*, 318 Or 351 (1994) (warrant specifying address of 421 Douglas Road rather than correct address of "429" was too vague; attached physical description and photograph of target residence did not add enough detail to correct deficiency).

(1) Premises with Multiple Residences.

While executing a search warrant for specified premises, officers may encounter multiple separate residences. In those circumstances, the following issues can arise: (1) whether the warrant described the place to be searched with sufficient specificity; (2) whether the executing officers exceeded the scope of their authority by searching beyond the area described in the warrant; and (3) whether the affidavit supporting the warrant established probable cause to search separate residences.

A search of any residence not encompassed by the description in a search warrant is illegal. In State v. Devine, 307 Or 341, 768 P2d 913 (1989), the court held, under Article I, section 9, that a warrant for the search of certain premises is limited to those premises alone. In that case, the search warrant authorized the search of premises at a specific street address and described in some detail the dwelling located at that address. The officers executing the warrant searched the dwelling described in the warrant and a separate garage building containing an apartment with a different address number over the door. The court held that the premises as described in the warrant did not extend to the separate premises of the garage apartment and therefore, the officers exceeded their authority when searching the garage. *See also* State v. Martini, 104 Or App 44, 799 P2d 184 (1990) (police could not search travel trailer parked on premises searched pursuant to a warrant describing a motorcycle gang clubhouse, outbuildings, and "curtilage" because the travel trailer was a separate living unit).

In contrast, in State v. Wood, 114 Or App 601, 605, 836 P2d 176, *rev den*, 314 Or 574 (1992), the court permitted police to enter a distinct living area that they found above the *attached* garage when they entered the garage pursuant to a search warrant. The police were not required to seek a new warrant because, unlike that in Devine, the search warrant specifically identified the garage as an area to be searched.

When officers unexpectedly encounter separate residences while executing a search warrant for a single described premise, the Supreme Court has held that officers may use "reasonable effort" – *i.e.*, "*minimal* police effort in conjunction with the warrant" – to resolve any ambiguity as to the property contemplated by the magistrate. State v. Trax, 335 Or 597, 609 n 8, 75 P3d 440 (2003).

In *Trax*, the Supreme Court upheld a warrant for a single-family dwelling with a single street address that, unknown to the police until the execution of the warrant, had been internally divided into two separate residences. When executing officers discovered that the house had been divided, they searched only the residence that they could identify, by questioning a resident, as the subject of the warrant. The Supreme Court held that the search was valid because the police used "reasonable effort" to "ascertain the location of defendants' residence within the house particularly described."

THREE **GENERAL PRINCIPLES** HAVE EMERGED FROM THE CASES DISCUSSED ABOVE:

(1) A warrant to search the premises at a specific address authorizes the police to search only one residence at that address unless the warrant describes more than one residence.

(2) If a warrant authorizes the search of premises at a specific address but the officers executing the warrant discover more than one residence at that address, the officers may use reasonable efforts to discern which residence is the proper subject of the search.

(3) If it is not possible to determine — through the use of reasonable efforts — to a reasonable degree of certainty which particular premises are authorized to be searched, the warrant may not be executed and *any* search pursuant to it is illegal, whether of the premises actually intended or not.

See *State v. Trax*, 335 Or at 608-09.

COMMENT: Premises occupied by different residents are not necessarily different *residences*. *State v. Hawkins*, 225 Or App 355, 360, 201 P3d 239 (2009) (search warrant for residence included bedrooms; the mere fact that multiple people live in a residence does not automatically convert it into a multi-unit structure); *see also* *State v. Ramirez*, 223 Or App 241, 246, 195 P3d 460 (2008) (no evidence that defendant's bedroom was separate unit). A separate living area likely is a separate residence if the resident has "exclusive control" over the living area; but if the area is "simply a detached but nonetheless integral part of the living quarters of the main house," then it probably is not a separate residence. *State v. Devine*, 307 Or at 345.

In assessing whether probable cause exists to search a separate residence, courts have cautioned that mere proximity to premises where illegal activity is suspected may not be sufficient. "When * * * the building that is located in close proximity to the residence to be searched is known to be lawfully occupied by persons other than those suspected of criminal activity, proximity alone fails to establish any likelihood that evidence of a crime might be found in that building." *State v. Gloster*, 145 Or App 555, 558-59, 932 P2d 68 (1997). *Accord* *State v. Thibodeaux*, 173 Or App 353, 22 P3d 248 (2001) (although search warrant authorized a search of "all vehicles on the premises" and a 30-foot trailer on the property was arguably a "vehicle" under ORS 801.590, the affidavit failed to establish probable cause to believe that evidence would be in the trailer, which was a residence of someone other than the residents of the principal residence and was not permanently affixed to the property, where the affidavit did not provide a nexus between the trailer and the illegal activity in the principal residence). *See also* discussion of "Required Nexus Between Drug House and Vehicles/Outbuildings" in Chapter III (Probable Cause).

Fourth Amendment Cases involving separate residences:

In *Maryland v. Garrison*, 480 US 79, 88, 107 S Ct 1013, 94 L Ed 2d 72 (1987), the Supreme Court held under the Fourth Amendment that the validity of the search of a separate apartment pursuant to a warrant authorizing the search of an entire floor (under the officers' mistaken belief there was only one apartment on the floor) depended on "whether the officers' failure to realize the overbreadth of the warrant was objectively understandable and reasonable." Officers did not learn that there were actually two apartments until after they had seized contraband from the unknown suspect's apartment, and they immediately terminated the search when they learned this. The Supreme Court upheld the search stating that "[t]he objective facts available to the officers at the time suggested no distinction between [the unknown suspect's] apartment and the third-floor premises." 480 US at 88.

Under the Fourth Amendment, a warrant may authorize a search of an entire street address while reciting probable cause as to only a portion of the premises (1) if the premises are occupied in common rather than individually; (2) if a multi-unit building is used as a single entity; (3) if the defendant was in control of the whole premises; or (4) if the entire premises are suspect. *State v. Hawkins*, 225 Or App 355, 361, 201 P3d 239 (2009), *citing United States v. Whitten*, 706 F2d 1000, 1008 (9th Cir 1983), *cert den*, 465 US 1100, 104 S Ct 1593, 80 L Ed 2d 125 (1984).

b. Person(s) to be Searched.

Generally, the particularity considerations discussed above with respect to locations are equally applicable to search warrants for persons.

To authorize a search of a person, a warrant must name or describe the person or persons to be searched to comply with ORS 133.565(2)(b) and Article I, section 9. *State v. Ingram*, 104 Or App 389, 399, 802 P2d 656 (1990), *affirmed* 105 Or App 621, 805 P2d 750, *rev'd on other grounds*, 313 Or 139, 831 P2d 674 (1992). But even a mistaken name will not be fatal to a warrant if: (1) the officer can determine, with minimal effort in conjunction with the warrant, the identity of the person to be searched; or if (2) the error is a mere clerical error, and the officer is aware of the error and uses personal knowledge to remedy the incorrect information in the warrant. *See State v. Kauppi*, 277 Or App 485, 489, 371 P3d 1264, *rev den,* 360 Or 465 (2016) (even though a blood-draw warrant used wrong first and middle name for DUII suspect, the officer's knowledge of the error and that defendant was the person for whom he had sought the warrant could cure mistaken information).

A search warrant authorizing the search of "all persons present" is overbroad unless the affidavit demonstrates probable cause to believe "that *all* 'persons present' on the premises would be associated with the criminal activity taking place there." *State v. Reid*, 319 Or 65, 71, 872 P2d 416 (1994). As examples, the court noted that mail carriers, package delivery persons, volunteers seeking contributions, neighbors borrowing sugar, and small children could be present and not involved in the criminal activity.

It is "legally sufficient that a warrant describe a general category of persons," but again only *if the affidavit provides probable cause* for the search of all persons generally described. *State v. Ingram*, 104 Or App at 399-400 (emphasis added) (warrant description of "all individuals and occupants found to be frequenting the premises" was not overbroad because it could be read to apply only to persons who could be charged with crime of frequenting a drug house).

NOTE: The Oregon Supreme Court in its decision in *Ingram*, 313 Or 139, expressly declined to give an opinion on the sufficiency of the language purporting to

authorize the search of individuals and occupants "found to be frequenting" the targeted residence. 313 Or at 143.

PRACTICAL SUGGESTION: It is not clear what descriptions of general classes of persons or vehicles to be searched will be adequate. It is possible that a warrant will be lawful if it directs the search of all persons found or arriving at the targeted residence who either: (1) reside there, or (2) exercise any control over the residence, or its contents, by paying expenses associated with the residence, performing household chores, storing personal property, or exercising any other form of control over the target.

c. Items to be Seized.

The objects sought to be seized also must be described with particularity in the search warrant. Article I, section 9; ORS 133.565(2)(c).

The authorization in a search warrant to search for items is not itself an authorization to *seize* the objects searched for. But a warrant that does not contain an authorization of a "seizure" is not invalid on its face. State v. Carter, 342 Or 39, 147 P3d 1151 (2006); State v. Miller, 188 Or App 514, 518, 72 P3d 643, *rev den*, 336 Or 146 (2003). If an otherwise lawful search warrant does not also authorize a seizure, the plain-view doctrine may independently allow a *warrantless* seizure of evidence by an officer who observes it from a lawful vantage point during the search pursuant to the warrant. Carter, 342 Or at 45. (See "Plain View Seizure," in Chapter IV, Warrantless Searches).

A warrant will be overbroad with respect to the things to be seized if it authorizes a search for things "for which no probable cause exists." The following cases illustrate the Oregon appellate courts' application of overbreadth principles to physical evidence described in warrants.

State v. Hargrove, 327 Or App 437, 536 P3d 612 (2023). Warrant clause authorizing search for evidence of murder, including "firearms," was not overbroad merely because the affidavit stated that the victim "likely" was shot with a "12-gauge shotgun"; the affidavit did not conclusively state that a shotgun had been used. Nor was the authorization overbroad because it authorized a search for "evidence related to the crime of murder," without naming the particular victim.

State v. Beagles, 143 Or App 129, 135, 923 P2d 1244, *rev den*, 324 Or 487 (1996). A search clause authorizing a search for "controlled substances" is not overbroad if the affidavit sets forth probable cause to believe there will be more than one form of controlled substance.

A warrant also must describe the things to be seized with sufficient specificity that an officer can determine what type of evidence the magistrate intended to authorize. Applying the Fourth Amendment standard, the court in State v. Tidyman, 30 Or App 537, 543, 586 P2d 666, *rev den*, 280 Or 683 (1977), held that:

> "[t]he degree of specificity required to accomplish these purposes varies with the circumstances and with the property to be seized. * * * 'When the circumstances make an exact description * * * a virtual impossibility, the searching officer can only be expected to describe the generic class of items he is seeking.' [*Quoting James v. United States*, 416 F2d 467, 473 (5th Cir 1969)] * * * The degree of specificity constitutionally required may also be affected by the nature of the right which is protected."

The court in *Tidyman* upheld a search warrant authorizing seizure of "business records" pertaining to a specified business. *State v. Tidyman*, 30 Or App at 543-44. But although general descriptive language for items to be seized has been allowed by the courts, more recent cases disapprove of "catch-all" provisions. *Compare State v. Farrar*, 309 Or 132, 151, 786 P2d 161, *cert den*, 498 US 879 (1990) (approving a warrant authorizing a search for "any other physical evidence of the aggravated murder of Muriel Bentson") *with State v. Mansor*, 363 Or 185, 213-14, 421 P3d 323 (2018) (limiting *Farrar*, holding that *Farrar* did not approve of catch-all language for evidence of a named crime, but, rather, merely held that because the officers' search of the home for other specific evidence was supported by probable cause, evidence found in plain view during search for described evidence was admissible). Identification of the place to be searched (*i.e.*, a residence) for certain types of evidence (DNA, hair, and other trace evidence) generally will be sufficient to search any place where that evidence could be found. *See State v. Reger*, 277 Or App at 92 (seizure and search of carpet and carpet shampooer authorized by warrant for "fibers, DNA, blood or blood spatter, hair, and other trace evidence.").

Electronic data is also subject to the particularity requirement for "things" to be seized—meaning the type of information or data sought, as explained below—but the nature of electronic devices and the broad scope of their potential contents can require different application of the general principles.

3. Particularity of Warrants Authorizing Searches of Electronic Devices.

Application of the particularity requirements to warrants for electronic evidence has resulted in substantial litigation in recent years. That type of warrant presents its own set of issues with respect to both overbreadth and specificity of the description in the warrant. Moreover, as explained below, even when a warrant for electronic evidence is sufficiently particular in both respects, evidence discovered as a result is subject to a judicially created "use limitation" that serves to vindicate the privacy of material outside the probable cause supplied by the warrant and affidavit.

In *State v. Mansor*, 363 Or 185, 421 P3d 323 (2018), the Supreme Court announced special rules for the particularity of warrants for electronic devices. In that case, the defendant had called 911 to report that his infant son had stopped breathing, and police suspected that defendant was responsible for the child's medical condition. (The victim later died as a result of injuries inflicted on him). Police obtained a warrant to search his laptop for evidence "of the crime of criminal mistreatment," based on an affidavit explaining that the defendant had admitted to having done internet searches about his infant son's medical condition in the 15-minute period before he called 911. A forensic search revealed inculpatory internet searches done by defendant months before the 911 call, and the state offered that evidence at trial. The Court of Appeals, in its opinion, had held that the warrant was constitutionally overbroad because it did not, on its face, impose limits on the specific data to be subjected to the forensic examination, so that it would not reveal data other than internet searches done within the 15-minute time period for which there was probable cause. *State v. Mansor*, 279 Or App 778, 793, 381 P3d 930 (2016). That is, because the warrant authorized a temporally unlimited examination of "files and functions unrelated to internet searches" that was far broader than the more limited nature of the probable cause, it was facially invalid. *Mansor*, 279 Or App at 802-03. The Supreme Court rejected the Court of Appeals' overbreadth analysis, but held that the evidence outside the scope of the probable cause nonetheless was required to be suppressed.

The Oregon Supreme Court rejected the Court of Appeals' holding that the warrant was overbroad because it did not impose precise temporal and substantive limits on the data that could be subjected to the forensic search. *Mansor*, 363 Or at 220. The court recognized that, due to the unique nature of both electronic data and forensic searches—which expose to the examiner's view data that otherwise cannot be evaluated for whether it falls within the probable cause that supported the

warrant—a magistrate cannot be expected to determine ahead of time *where* or *what* the data will look like. *Mansor*, 363 Or at 199. Thus, although a warrant for electronic devices need not identify particular files or programs that contain the evidence sought, it must meet the following requirements:

> "To meet the particularity requirement of Article I, section 9, the warrant must identify, as specifically as reasonably possible in the circumstances, the information to be searched for, including, *if relevant and available*, *the time period during which that evidence was created, accessed or otherwise used*."

Mansor, 363 Or at 218 (emphasis added).

In *Mansor*, the Supreme Court held that the warrant's scope was limited by the affidavit, which defendant did not prove was *not* attached to the warrant itself at the time of execution, and, so limited, was not overbroad because the affidavit limited the scope of evidence sought to the 15-minute window supported by probable cause. *Mansor*, 363 Or at 220. However, to protect a defendant's right to privacy in any "nonresponsive" data (for which probable cause does not exist), there is a "necessary trade-off" that required the court to adopt a "use limitation" with respect to that data. *Mansor*, 363 Or at 220. The *Mansor* court held that—absent an exception to the warrant requirement—the state was thus precluded from using any evidence found in executing the warrant if it fell outside the scope of that supported by probable cause. *Mansor*, 363 Or at 221.

> **PLAIN VIEW?** In adopting its "use limitation," the Supreme Court did not address whether the "plain view" doctrine can justify the use of data located during the forensic search. Clearly, if applied broadly, the "plain view" doctrine would swallow the rule precluding the "use" of evidence not targeted by the warrant.
>
> Since then, however, the Court of Appeals has rejected any argument that the plain-view doctrine can apply to evidence outside the scope of the probable cause supporting the warrant. In *State v. Bock*, 310 Or App 329, 485 P3d 931 (2021), the court held that, because of the necessary breadth of an electronic search, the "digital medium undercuts the plain view doctrine's pivotal assumption" that seizing an item in plain view involves only a minor intrusion. *Bock*, 310 Or App at 339. That is, if, as *Mansor* recognized, technical realities mean that a forensic search necessarily will uncover data for which there is no probable cause, then application of a "plain view" doctrine would "sanction the sort of general warrant that the plain view doctrine was never meant to authorize." *Bock*, 310 Or App at 340. As a result, it held that the evidence in that case—photographs that inculpated the defendant in gun crimes—should have been suppressed. *Bock*, 310 Or App at 340.
>
> The Court of Appeals has since held that the "use limitation" from *Mansor* not only precludes the use *as evidence* of any nonresponsive information uncovered in the execution of a forensic search pursuant to a warrant, but that it further precludes police from using that information as a basis for *investigation of other crimes. See State v. Serrano*, 324 Or App 453, 527 P3d 54, *adh'd to on recons*, 325 Or App 296, 528 P3d 1219 (2023), *rev den*, 372 Or 192 (2024); *State v. Serrano*, 324 Or App 475, 526 P3d 773 (2023), *rev den*, 372 Or 192 (2024).
>
> **WHAT KINDS OF ELECTRONIC DEVICES?** By its terms, *Mansor* limited its ruling to "searches of *personal* electronic devices." 363 Or at 187 (emphasis added). It stated that its holding applied to "some digital devices"—such as cellphones and computers—while leaving to future cases "the determination of the specific boundaries" of the "category of items that must be seized and searched pursuant to

the rules discussed in" that opinion. 363 Or at 201 n 10. Oregon's appellate courts have yet to say more about what devices—beyond cellphones, computers, and similar devices such as tablets—are included in that "category of items." But some guidance may be found in *Mansor*'s reliance on the "unique characteristics of computers" as a rationale for developing the special particularity rules announced in that case. 363 Or at 214. *Mansor* drew those unique characteristics from the analysis in *Riley v. California*, 573 US 373, 134 S Ct 2473 (2014). In that case, the United States Supreme Court held that cellphones merit special treatment because their pervasive use and storage capacity make them "a digital record of nearly every aspect of their [owners'] lives—from the mundane to the intimate." *Riley*, 573 US at 393–97; *see also Mansor*, 363 Or at 209–10 (describing "the unique characteristics of the cell phone described in *Riley*" as "containing many types of information, having immense storage capacity, and playing a role in many aspects of life"). In cases involving electronic devices other than cellphones, computers, and tablets, consider whether the device might not have the "unique characteristics" that support application of the *Mansor*'s special particularity rules.

PARTICULARITY AND RECORDS OBTAINED FROM THIRD-PARTY SERVICE PROVIDERS? Oregon courts have not yet directly addressed whether *Mansor*'s particularity requirement applies to records—even of cell-phone or computer use—kept by third parties. As a result, prosecutors and police should assume that the particularity requirements apply, at least to third-party records (like those of social media providers) that pervade many aspects of life in the way contemplated by *Mansor*. Although the Court of Appeals rejected the defendant's argument that *Mansor* should apply equally to those third-party records in *State v. Hargrove*, 327 Or App 437, 451, 536 P3d 612 (2023), it did so only on the ground that defendant had not "sufficiently developed this argument." In a case in which a defendant does develop that argument, it seems likely that the appellate courts will conclude that the drafter of a warrant must include any relevant narrowing descriptions that the third party can apply in collecting and providing those records.

GEOFENCE WARRANTS AND THE FOURTH AMENDMENT. Currently (2025), the federal courts of appeal are split on the question whether "geofence" warrants (sometimes called "reverse" search warrants) constitute a search under the Fourth Amendment. A geofence warrant is a request from law enforcement to a private company (usually Google), to provide location data for all devices within a specific geographic area and within a specific timeframe. A three-judge panel of the Fourth Circuit recently held that such requests do not constitute a search under the Fourth Amendment, under the third-party records doctrine. *See United States v. Chatrie*, 107 F4th 319, 330-32 (4th Cir 2024). The court then reheard the case en banc and concluded, in a per curiam order with no reasoning, that the district court correctly denied defendant's motion to suppress the evidence obtained through the geofence warrant. *United States v. Chatrie*, 136 F4th 100 (4th Cir 2025) (en banc). The per curiam opinion was accompanied by eight concurring opinions and a dissenting opinion. Meanwhile, the Fifth Circuit has held that people have a reasonable expectation of privacy in geofence location data from their cell phones protected by the Fourth Amendment, and geofence warrants are "general warrants" categorically prohibited by the Fourth Amendment. *See United States v. Smith*, 110 F4th 817, 830-38 (5th Cir 2024). For more insight into the issue and the circuit split, see Orin Kerr, "The Fifth Circuit Shuts Down Geofence Warrants—and Maybe a Lot More," *available at* https://reason.com/volokh/2024/08/13/fifth-circuit-shuts-down-geofence-warrants-and-maybe-a-lot-more/.

a. Overbreadth Analysis for Electronic Evidence

Although the courts' discussions of the two issues often are less than clear, *overbreadth* is legally distinct from the issue of *specificity* with respect to the descriptions of the data sought, which is discussed in the next section. The following are cases addressing whether search authorizations for data within a single device suffer from overbreadth:

In State v. Turay, 371 Or 128, 532 P3d 57 (2023), the Supreme Court mostly addressed the specificity prong of the particularity requirement; however, with respect to one clause—authorizing a search for "any and all communications" between defendant, his girlfriend (who was accomplice in prostitution enterprise), and a minor victim, the court addressed the different relationships differently. With respect to communications between defendant and the girlfriend, it ruled that the search clause was overbroad because the relationship was not limited to criminal activity, and that "all communications" would include data for which there was no probable cause. *Id.* at 153. But the similar authorization was not overbroad as it related to communications between either defendant or the girlfriend and the minor victim, because the affidavit described facts showing that the "sole reason for those relationships" was involvement in the prostitution-related activities. *Id.* at 154.

In State v. Harris, 369 Or 628, 509 P3d 83 (2022), the Supreme Court held that a warrant for a broad category of cell-phone records for a phone that had called the murder victim several times around the time of a murder was overbroad, both temporally and in terms of subject matter. Although the warrant provided probable cause that records showing ownership of the phone would be evidence of a crime, the warrant sought 60 hours' worth of records of the phone's use, including all communications and all location data for that period of time, which swept beyond the probable cause in the affidavit. Harris, 369 Or at 651.

In State v. Goode, 335 Or App 108, 120, 557 P3d 1132 (2024), *rev den*, 373 Or 280 (2025), the Court of Appeals held that a warrant to search Facebook records for messages between defendant and the victim was not overbroad, even though the warrant sought evidence of crimes that allegedly occurred in 2012 in a different country and crimes that allegedly occurred in 2018 in Oregon. The court held that there was probable cause to search for evidence of the 2012 crimes because "any evidence relating to the 2012 sexual assault could be probative of the charges the police were investigating in 2018."

Overbreadth: multiple devices.

The cases discussed above involved challenges to a warrant's authorization of a search within a specific device, but other cases involve overbreadth challenges to warrants authorizing seizures and searches of multiple devices on the ground the affidavit failed to establish probable cause to seize and search all of those devices. In State v. Burnham, 289 Or App 783, 412 P3d 1233 (2018), the Court of Appeals found a warrant for multiple devices to be overbroad in some respects, but found that the affidavit contained specific facts that established probable cause to search one of the devices—a laptop believed to have been used to upload images of an unlawful taking of wildlife. The Burnham court ruled that, although the defendant was entitled to suppression of evidence found pursuant to the invalid provisions of the warrant, evidence obtained as a result of *valid* provisions need not be suppressed). In State v. Friddle, 281 Or App 130, 381 P3d 979 (2016), the Court of Appeals ruled that, although the warrant affidavit supplied probable cause to believe that surveillance footage would be on *one* device (defendant's cell phone, which they knew contained the footage), the warrant was overbroad to the extent that it authorized officers to search "all" of the devices in the defendant's residence; hence, evidence found in a search of a gun safe while looking for *additional* devices had to be suppressed as the product of the overbroad provision.

The holdings in *Burnham* and *Friddle* are understandable because the facts in the affidavit provided probable cause to believe that evidence was on a *specific known* device, but the warrants authorized searches of other devices for which the affidavit did not describe probable cause. But in *State v. Cannon*, 299 Or App 616, 450 P3d 567 (2019), the court addressed overbreadth in a case in which the state had probable cause to believe that the defendant had unlawful images on *some* device in his possession but no basis for determining what device it might be. In *Cannon*, the state obtained a warrant to search all devices found in the defendant's vehicle, based on information that defendant, a sex offender, had recently returned a laptop within weeks of buying it, and that the laptop contained images of child sexual exploitation. Officers were aware that the defendant had a cell phone and, after obtaining information that he was using that phone to take pictures of children in a Walmart store, sought a warrant for any electronic devices possessed by the defendant. The affidavit provided only general assertions that people who possess child pornography tend to save it on devices to which they have easy access. A search of the defendant's car revealed two cell phones and other devices, and prohibited images were found on one of the phones. The defendant moved to suppress, claiming that the affidavit did not supply probable cause to search any devices owned by defendant, let alone all of the devices that the warrant authorized. The trial court agreed and suppressed the evidence, and the state appealed. The state argued that the affidavit supplied probable cause to believe that any of the devices contained illegal images, based on the nature of the crime and the facts derived from the affiant's training and experience. The Court of Appeals acknowledged the possibility that an affidavit could supply probable cause to believe that evidence is on *any* of a "defined group of electronic devices, each of which may contain the evidence or contraband that is the subject of the search," but held that the affidavit in this case failed to explain that it was likely that evidence would be on the "all-encompassing group" of devices generally listed in the affidavit. *State v. Cannon*, 299 Or App at 630-32, n 4, 450 P3d 567 (2019).

In *State v. Ritter*, 314 Or App 241, 496 P3d 1047 (2021), the court reached a similar overbreadth conclusion where, although affiant had probable cause to believe that defendant had child pornography on a specific cell phone, the warrant allowed the seizure and search of all of his other cell phones, computers, and electronic devices. And in *State v. Cantrell*, 327 Or App 548, 327 P3d 606 (2023), the Court of Appeals applied *Cannon* in yet another case in which the affidavit provided probable cause that defendant had taken photographs while abusing a child would be found on *a* device used by defendant, but provided no facts identifying any device located in the search—two laptops, an iPad, or a keyboard—as being more likely than any other to contain the images.

In *State v. James*, 336 Or App 55, 65, 560 P3d 747 (2024), the court held that a warrant that authorized the seizure and search of computers and electronic storage devices from defendant's house was overbroad, where police had probable cause the believe that defendant uploaded videos from cameras to his computer, because the warrant "did not provide any details about the types or numbers of computers and hard drives that defendant owned and that he would have uploaded his camera to[.]"

But in *State v. Meyers*, 338 Or App 59, 69, 565 P3d 463 (2025), the Court of Appeals held that a warrant authorizing the search of six cellphones seized from defendant's vehicle was not overbroad, because "the affidavit established probable cause that evidence would be found on one or more of the phones and the phones constituted a sufficiently defined group of digital devices." The affidavit included information that defendant was sending explicit text messages and photos to an undercover officer who was posing as an underage girl, that defendant had used two different phone numbers (including one that could be accessed from a mobile app or web browser), that defendant was sending messages while traveling to the purported meeting spot, that defendant had six cellphones in his truck when he was arrested, and that defendant's wife told police that defendant had two working phones but kept his old phones and transferred content between them during his breaks.

b. Specificity of Description of "Things to be Seized."

The Oregon appellate courts have also invalidated warrant commands as overbroad where they fail to identify subject-matter limitations, or sufficiently narrow the time period, even if the command contains *some* temporal limitations and describes the *type* of data sought (such as location information or certain types of communications). As the Supreme Court explained in State v. Turay, 371 Or 128, 532 P3d 57 (2023), the problem with an insufficiently specific clause is not that it authorizes a search broader than what the probable cause will allow, but, rather, that it creates "ambiguity about the scope of the search that is authorized." To avoid unnecessary intrusion into a defendant's privacy interests as a result of a forensic search, a warrant "must describe, with as much specificity as reasonably possible under the circumstances" the nature of the evidence that investigators believe will be found on the device. Turay, 371 Or at 145, *quoting* Mansor, 363 Or 216.

In Turay, although the warrant affidavit was sufficient to establish that there was probable cause to believe defendant's phone would contain evidence of prostitution activity involving a minor, some of the search commands in the warrant were insufficiently specific because of a lack of available limitations.

Insufficiently specific clauses under *Turay*:

- A command to search for data **"related to the relationship"** between defendant and two other people did not provide any meaningful guidance (either by time or subject-matter limitations) to avoid undue rummaging by the executing officers. Turay, 371 Or at 151.

- Clauses authorizing searches for data about **any use of ride-sharing or taxi companies** and **"any other evidence" relating to prostitution offenses** lacked any subject-matter or temporal limitations—even though limitations were available to officers—that would provide a "reasonable degree of specificity" to limit the intrusion as much as possible. Turay, 371 Or at 151.

- A clause authorizing a search for **"any and all communications" between defendant and two other people** was not as narrow as "reasonably possible under the circumstances" because it lacked limitations on time and subject matter. Turay, 371 Or at 153.

- A search command for **all geolocation information over a three-month span** was insufficiently specific, given that the suspected prostitution activity had occurred at known locations by known persons and the affidavit did not explain *what* geolocation data would be evidence of any criminal activity. Turay, 371 Or at 154.

Sufficiently specific clauses under *Turay*:

The following clauses were found by the Supreme Court (or were unchallenged in that court and were upheld by the Court of Appeals) to be sufficiently specific:

- "Evidence regarding any **communications (voice, email, text, or otherwise) involving prostitution related activities**."

- "Any photos of [J, defendant, or Gregg] that **show an association with prostitution** including profiting from prostitution."

- "Images, videos and/or data **depicting [J or Gregg] in sexually explicit positions or conduct relating to internet postings or ads**."

- "Any evidence **related to use of internet sites associated with prostitution**, including [the website] between 06/15/2017 to 09/06/2017."

Turay, 371 Or at 156.

If for no other reason than that it is a Supreme Court opinion, Turay is probably the most important case on the specificity prong of the particularity requirement. But Court of Appeals cases addressing the specificity requirement are binding on trial courts and are generally consistent with Turay, as described below:

State v. Scofield, 338 Or App 190, 195, 565 P3d 869 (2025). Applying *Turay* and holding that, even though search commands did not specify *where* to search on defendant's phones, search commands were sufficiently specific because they were "reasonably limited to specific times and communications related to specific crimes[.]"

State v. Vesa, 324 Or App 674, 527 P3d 786 (2023). Even when narrowed by the affidavit, certain commands within a warrant to search defendant's cellphone for evidence related to robbery of his ex-girlfriend were insufficiently specific to allow an executing officer to know what to look for. Although the affidavit sufficiently narrowed the command to search for text and Instagram messages so that an executing officer would understand that it authorized a search for communications between defendant and the victim, it did not implicitly limit other search authorizations—such as for Facebook messages, voicemails, Snapchat, and Twitter. Similarly, the warrant authorized searches for "photographs" and "videos" created, modified or deleted within a nine-day period, but did not include any other descriptions. As a result, those authorizations were unlimited in terms of subject matter or other relevant limitations, and thus were insufficiently specific.

State v. Hargrove, 327 Or App 437, 536 P3d 612 (2023). Command to search for "all communications" between defendant, the victim, and others believed to be connected to murder, was insufficiently specific, even if no temporal limitations were reasonably known at the time police drafted the warrant. That is because the search commands could have been narrowed to communications regarding the nature of the named parties' relationships or conflicts between the parties, communications about a gun, or communications about the parties' whereabouts in the days leading up to the murder.

State v. Bock, 310 Or App 329, 485 P3d 931 (2021). [1] In a warrant for evidence of a shooting, search commands that allowed a search of cell phone for "any evidence identifying the owner/user of the device," was insufficiently specific because that information is too varied to anticipate, and effectively allowed a search for "*any* material" on the cell phone, such as the photographic images that the state used as evidence in that case. [2] Given the nature of the crime under investigation, a command to search a device for "any evidence related to" gun possession was insufficiently specific because—unlike contraband, such as images of child exploitation—a gun itself cannot be found on a cell phone, and there was no other way to distinguish among the various types of data in the device. Bock, 310 Or App at 336**.**

State v. McNutt, 303 Or App 142, 463 P3d 563, *rev den*, 367 Or 115 (2020). Warrant to search electronic devices for "evidence of the crimes of first- and second-degree child sexual abuse" was sufficiently specific to allow a reasonable officer to know what to look for: that is, "evidence of visual recordings of sexually explicit conduct involving children."

State v. Savath, 298 Or App 495, 501, 447 P3d 1, *rev den* 365 Or 722 (2019). Warrant to search a cell phone for communications "related to controlled substances" was insufficiently specific to "apprise the executing officer of which items were or were not subject to the warrant.

Note: The court in *Savath* did distinguish between the description there—of "[evidence] relating to controlled substances"—and descriptions of other types of evidence, such as sexually explicit images of children, that are themselves "contraband" 298 Or App at 502-503.

c. Suppression of electronic evidence when search clause is insufficiently particular.

Because the particularity requirement for search warrants is not only statutory, but also *constitutional*, suppression is an available remedy. But the mere fact that a warrant contains an invalid clause does not require suppression of all evidence obtained pursuant to the warrant.

One overbroad authorization is not necessarily fatal to the entire warrant, and only evidence obtained pursuant to an invalid search authorization must be suppressed. *State v. Burnham*, 289 Or App 783, 412 P3d 1233 (2018) (remanding to trial court to determine which evidence was obtained pursuant to invalid provisions in warrant); *State v. Frischman*, 298 Or App 186, 445 P3d 946, *rev den*, 365 Or 721 (2019) (same). But the next question is *how* to determine whether evidence was found pursuant to a valid command. Although the Court of Appeals has referred, at times, to that analysis as a question of "severance" of good provisions from bad ones, the Supreme Court has declined to adopt that framing of how to apply the exclusionary rule in *State v. Turay*, 371 Or 128, 532 P3d 57 (2023). In *Turay*, the state had argued that suppression should depend on an objective examination of the warrant, and that suppression is not required for any evidence that could have been found pursuant to one of the warrant's lawful provisions, regardless of how the warrant in fact was executed. *Turay*, 371 Or at 157. But the Supreme Court rejected that argument as inconsistent with the purposes of the exclusionary rule, which is to return the defendant to the position he would have been in without the constitutional violation. *Turay*, 371 Or at 160. Rather, the Supreme Court applied the test from *State v. DeJong*, 368 Or 640, 497 P3d 710 (2021), which provides that if a defendant establishes a factual nexus between a constitutional violation and a search pursuant to a warrant, the state has the burden to prove—as a factual matter—that the evidence obtained pursuant to the warrant was *not* tainted by the illegality. *Turay*, 371 Or at 166. The Supreme Court declined to say precisely what the state will have to prove to establish a lack of taint from an invalid provision; however, it is likely that, to establish a lack of taint, the state will have to convince the trial court that the same evidence either was, or inevitably would have been, discovered pursuant to one of the lawful provisions in the warrant.

Note that, in cases in which the trial court found some search commands to be lawful and others unlawful and applied a "severance" or "excision" analysis, the Court of Appeals will remand to the trial court for application of the *Turay* burden-shifting framework when the state did *not* have an opportunity to develop a factual record on the question whether the challenged evidence was untainted by the unlawful search commands. *See State v. Curry*, 336 Or App 72, 90, 560 P3d 694 (2024) (determining that some search categories in warrant authorizing search of defendant's residence were unlawful and remanding to trial court to allow state to develop record as to whether evidence was tainted by those unlawful search commands); *State v. James*, 336 Or App 55, 71, 560 P3d 747 (2024) (same); *State v. Meyers*, 338 Or App 59, 75, 565 P3d 463 (2025) (same). *But see State v. Rose*, 334 Or App 66, 77-80, 555 P3d 336 (2024) (holding that state failed to meet its burden to show that evidence obtained after execution of search warrant in 2019 was not tainted by unlawful search in 2011, because "the state did not develop any theory or put on any evidence to overcome the taint on the evidence from the 2019 warranted search").

PRACTICE TIP: To prove that evidence seized pursuant to warrant was not tainted by an invalid provision, it will be very important for forensic examiners to document the steps taken in their examination of electronic data, and, ideally, for

them to conduct the examination of the narrower categories of data before searching broader ones.

See discussion of "Scope of the Search" in this chapter for additional insights.

d. Errors in the Warrant.

(1) Error in the Description of the Place to Be Searched.

"Cases generally hold that where apartment or street addresses in the warrant are in error but there is identifying information in the warrant by which the officers can determine with a reasonable degree of certainty the premises intended, they properly may proceed to make the search." *State v. Blackburn/Barber*, 266 Or 28, 36, 511 P2d 381 (1973). *See also State v. McDowell*, 211 Or App 341, 347-48, 155 P3d 877 (2007) (mistaken reference to a generic "vehicle" that was not otherwise described did not prevent the executing officer from being able to determine from the face of the warrant that the place to be searched was the residence, and that the reference to a vehicle was mistaken); *State v. Bush*, 174 Or App 280, 25 P3d 368 (2001), *rev den*, 334 Or 491 (2002) ("even if a warrant contains an incorrect street or road address, the warrant is nonetheless sufficiently particular if other information contained in the warrant provides a precise description that is a significant and more unmistakable guide than a mere number").

(a) Examples Finding Sufficient Supporting Detail.

State v. Bush, 174 Or App 280, 25 P3d 368 (2001), *rev den*, 334 Or 491 (2002). The search warrant described defendant's rural property with sufficient particularity, despite the fact that it erroneously listed a neighboring street address as the address to be searched. The physical description of the property in the warrant described defendant's property and did not match the neighboring property. In addition, the warrant included the correct tax lot number for the property.

State v. Edwards, 149 Or App 702, 945 P2d 553, *rev den*, 326 Or 234 (1997). An erroneous street number did not invalidate the warrant where the physical description of the residence and its location was so specific that there was no reasonable question about which residence the warrant authorized to be searched.

State v. Jost/Oregon-Washington Recovery Co., 122 Or App 531, 858 P2d 881 (1993). An erroneous description in the warrant of the place to be searched was salvaged by a more detailed and complete description in the affidavit incorporated by reference into the warrant; warrant was valid because the place to be searched could be determined with sufficient certainty — it was obvious that the premises was in Multnomah County and that references to Lincoln County were erroneous.

State v. Gomez, 107 Or App 698, 813 P2d 567 (1991). Warrant containing the correct street address and very complete physical description of the premises was sufficient despite errors in the directions and a map to the residence also included in the warrant.

(b) Examples Without Sufficient Supporting Detail.

State v. Burton/Cunningham, 121 Or App 508, 855 P2d 1124 (1993), *rev den*, 318 Or 351 (1994). Warrant listing the address of 42**1** Douglas Road rather than the correct address of "42**9**" was too vague because the attached physical description and photograph of the target residence were "not remarkable," *i.e.*, they did not add enough detail to correct the deficiency.

State v. Davis, 106 Or App 546, 809 P2d 125 (1991). Warrant authorizing a search of a "green single story house located at 1837 SE Main Street" did not authorize search of correct house located at 1877 SE Main Street.

(2) Error in Date on Warrant.

In *State v. Radford*, 223 Or App 406, 409, 196 P3d 23 (2008), *rev den*, 346 Or 362 (2009), the court held that a scrivener's error in the date on an otherwise valid warrant did not render the warrant invalid and did not violate the requirement in ORS 133.565(2)(a) that a warrant shall state with particularity "the date the warrant was issued." *See also State v Dalton*, 132 Or App 36, 887 P2d 379, *rev den*, 321 Or 94 (1995).

(3) Attempts to Correct an Error.

The executing officer may not rely on personal knowledge of the correct location or information in the affidavit to cure an erroneous description in the search warrant. *State v. Davis*, 106 Or App 546, 553, 809 P2d 125 (1991). Nor may an executing officer correct an error in the warrant by interlineation. *State v. Jost/Oregon-Washington Recovery Co.*, 122 Or App 531, 858 P2d 881 (1993) (unauthorized correction was invalid but did not invalidate the entire warrant in this case).

A judge may not correct the address of the location to be searched in the warrant based upon an officer's unsworn statement because unsworn testimony may not be considered by the magistrate. *State v. Burton/Cunningham*, 121 Or App 508, 855 P2d 1124 (1993), *rev den*, 318 Or 351 (1994).

> **PRACTICAL SUGGESTION:** If officers discover upon their arrival that the premises subject to search has been improperly described in the warrant, and they have not yet executed the search warrant, they should withdraw, return the unexecuted warrant to the court, and seek a new warrant based upon the correct description.

4. Additional Requirements for the Warrant.

In addition to requiring "particularity" with respect to the location to be searched, the name of the person to be searched, and the things authorized to be seized, **the warrant must:**

- **Contain the date the warrant was issued.** ORS 133.565(1) and (2)(a).
- **"[B]e addressed to and authorize its execution by an officer authorized by law to execute search warrants."** ORS 133.565(1) [*e.g.*, "To any peace officer of the State of Oregon."].
- **Set forth the identity of the judge who issued the warrant.** ORS 133.565(2)(a). The legibility of the signature of the judge issuing the warrant is a factual issue. *See State v. Scofield*, 338 Or App 190, 194-95, 565 P3d 869 (2025) (upholding trial court's finding that magistrate's signature was legible).
- **Contain authorization to execute the warrant after 10 p.m. or before 7 a.m.** The judge may authorize execution "at any time of the day or night." ORS 133.565(3). *See State v. O'Driscoll*, 65 Or App 362, 365, 671 P2d 752 (1983), *rev den*, 296 Or 486 (1984). *See also* discussion of "Time Restrictions on Execution" in this chapter.

- **Specify an extended period of time (not to exceed 10 days) within which the warrant must be executed.** ORS 133.565(3). The statute does not require that the warrant indicate the execution time limit unless more than 5 days is authorized. *See also* discussion of "Execution Within 5 Days" in this chapter.

- **Specify the period of time (not to exceed 5 days after execution) within which the warrant is to be returned to the court.** ORS 133.565(2)(d). The reference in subsection (2)(d) of ORS 133.565 to subsection (3) of the same statute (which allows the judge to extend the period of time — up to 10 days — within which the warrant must be executed) *may* allow the court to authorize additional time to return the warrant. *See also* discussion of "Returning the Warrant" in this chapter.

5. Suggestions for Drafting Warrant.

Many difficulties with the specification of the location to be searched and the scope of a search warrant may be avoided by careful drafting. In addition to the considerations contained in the "Search Warrant Checklist" in the appendix to this chapter, consider the following suggestions:

a. Proofread. Carefully proofread the description on the face of the warrant for typographical errors and transposed numbers — particularly addresses, names, dates, vehicles identification, and the descriptions of specific items. Consider having someone other than the drafter do the proofreading. Make certain that a factual basis for the description stated on the face of the warrant is set forth in the affidavit.

b. Authorization to Seize. Ensure that the warrant expressly authorizes the police *to seize* those items for which they are searching. *See* State v. Carter, 342 Or 39 (2006).

c. Specify Small Items. Be explicit in the description of the things sought. The circumstances of many offenses justify requesting a warrant to look for very small articles. Inclusion of small items will not only avoid challenges to the warrant based on lack of specificity, but will also serve to expand the scope of the search. Individual bullets, folded bindles of controlled substances, papers with names and phone numbers of potential co-conspirators, and papers that tend to identify the person in custody or control of the premises are a few examples of common items that can bolster specificity and expand the boundaries of the search. *See* discussion of "Scope of the Search" in this chapter for additional insights.

d. Expand List of Crimes Under Investigation. Describing additional crimes under investigation may expand the potential scope of the search warrant, if supported by a warrant application providing probable cause to believe additional evidence of those crimes will be found. For example, the permissible scope of a search for evidence of criminal conspiracy will allow a search for evidence proving the existence of the conspiracy, the terms of the conspiratorial agreement, and the identity of the co-conspirators. Similarly, a warrant authorizing a search for evidence of racketeering may expand the scope of a search to include evidence proving the existence of the "enterprise," the relationships among the members of the "enterprise," and the nexus between the "enterprise" and the criminal predicates.

e. Search for Evidence of Frequenting (Drug Cases). Probable cause to believe a residence has been the location of narcotics sales will often support the inference that persons found on the premises at the time the warrant is executed will be committing the crime of frequenting a place where controlled substances are kept. ORS 167.222. Proof of identity is an element of that offense, and one can reasonably expect that any person will have some evidence of identity in his or her possession. *See* State v. Pyritz, 90 Or App 601, 752 P2d 1310 (1988)

("frequenting" criminal statute constitutional as construed by court). *But see* State v. Kadin/Coleman, 172 Or App 353, 359 fn 4, 18 P3d 484 (2001) (court does not decide whether use of the phrase "any persons frequenting" in a warrant is sufficiently narrow).

f. Search for Identity of Primary Suspect. The identity of the prime suspect may be only partially known. Request authority to search persons present for identification to determine whether they may be the prime suspect.

g. Justify Car and Person Searches. Include language justifying searches of cars and persons when probable cause exists for such a search.

h. Seize Forfeitable Items. ORS 131A.060(2) (civil forfeiture) and ORS 131.561 (criminal forfeiture) each permit a court to issue an order or endorse a search warrant with authority to seize property for forfeiture. The language might follow this format:

> "The court further finds probable cause to believe that the following described property is presently located in the area described below and is subject to civil or criminal forfeiture to the government pursuant to (_____ [*Insert appropriate statutory citation*]):
>
> (Describe property to be seized)
> (Describe location of property)
>
> "If the property is in whole or in part intangible, the person having control or custody of the property shall deliver the same over to the seizing officer."

6. The Issuing Magistrate.

Only a judge can issue a search warrant and only a judge can dictate the terms of a warrant. ORS 133.545(1). An officer executing a search warrant has no authority to correct an error in the warrant, but unauthorized interlineations do not necessarily invalidate the warrant. State v. Jost/Oregon-Washington Recovery Co., 122 Or App 531, 858 P2d 881 (1993).

a. The Requirement of a Neutral and Detached Magistrate.

No Oregon decision currently recognizes a state constitutional requirement of an impartial and detached magistrate. *See* State v. Hale, 252 Or App 187, 204, 204 n. 9, 288 P3d 1 (2012), *rev den*, 353 Or 533 (2013) (declining to reach issue); State v. Pierce, 263 Or App 515, 524, 333 P3d 1069, *rev den,* 356 Or 400 (2014) (same). But the Fourth Amendment requires that a search warrant be issued by a "neutral and detached magistrate." That standard requires severance and disengagement from activities of law enforcement. Coolidge v. New Hampshire, 403 US 443, 449, 91 S Ct 2022, 29 L Ed 2d 564 (1971) (invalidating a warrant issued by a Justice of the Peace, who was also the State Attorney General and who supervised the criminal investigation and served as chief prosecutor at trial); State v. Burnam, 66 Or App 132, 136, 672 P2d 1366 (1983) (invalidating a warrant issued by a Justice of the Peace whose secretary was the victim of the crime under investigation). But mere prior knowledge or involvement by the magistrate does not require a finding of lack of neutrality. *See* State v. Hale, 252 Or App at 203-04 (judge who was involved, in previous job as prosecutor, in early investigative stages of case nonetheless was neutral and detached at time of warrant issuance because he had no affiliation with law enforcement or the prosecutor's office and nothing suggests that he based his issuance of the warrant on information outside the affidavit).

The Fourteenth Amendment Due Process Clause also supports the requirement of a neutral and detached magistrate. The inquiry is not solely whether the judge is actually, subjectively biased, but is an objective question whether the average judge in his position is "likely" to be neutral, or whether there is an unconstitutional "potential for bias." *See* Hale, 252 Or App at 203, *quoting* Caperton v. A.T. Massey Coal Co., Inc, 556 US 868, 881, 129 S Ct 2252, 173 L Ed 2d 1208 (2009).

b. Geographic Limitations on Jurisdiction of Court.

Search warrants issued by circuit judges generally may be executed within the judicial district in which the court is located. ORS 133.545(1). A circuit judge also may sign a warrant that may be executed *outside* the judicial district in which the judge sits *if* the judge finds from the application that one or more "of the objects of the search relate to an offense committed or triable" within the judicial district. ORS 133.545(2). In State v. Chamu-Hernandez, 229 Or App 334, 212 P3d 514, *rev den*, 347 Or 43 (2009), the court expressly held that ORS 133.545(2) does not require the magistrate to make express findings of fact to support its issuance of an out-of-district warrant.

> **PRACTICAL SUGGESTION:** Although express findings need not appear on the face of the warrant, it is advisable to include a clear explanation – rather than just leaving it to inference – to support a conclusion that that the offense was committed or is triable within the issuing jurisdiction. For example, the affiant should state his or her belief that "one or more of the objects of the search authorized in this search warrant relate to an offense triable within this judicial district."

A justice of the peace may issue a warrant for a target anywhere in the justice's county. ORS 133.545(2); State v. Schlotzhauer, 77 Or App 553, 714 P2d 243, *rev den*, 301 Or 241 (1986). A municipal court judge "authorized to exercise the powers and perform the duties of a justice of the peace" may *only* issue warrants for targets within municipal boundaries. ORS 133.545(1).

Search warrants "issued by a judge of the Supreme Court or Court of Appeals may be executed anywhere in the state." ORS 133.545(1).

An elected or appointed judge who is appointed pursuant to ORS 1.615 to sit *pro tem* in another court may issue warrants in the *pro tem* jurisdiction, if the affidavit shows that the regularly elected or appointed circuit judge for the judicial district is not available to issue the warrant within a reasonable time. ORS 133.545(3); *see also* State v. Blasingame, 127 Or App 382, 873 P2d 361, *rev den*, 319 Or 406 (1994) (Klamath County District Court judge was authorized to issue a search warrant as a judge *pro tem* of the Lake County Circuit Court).

A judge whose appointment has expired lacks authority to issue a search warrant, and any search conducted pursuant to a warrant issued by that judge is invalid and is treated as a warrantless search. State v. Effinger, 98 Or App 651, 780 P2d 768 (1989) (Justice of the Peace *pro tem* issued search warrant after 60-day appointment expired).

7. Mechanics of Issuance.

a. Who May Apply?

ORS 133.545(5) provides that "[a]n application for a search warrant may be made only by a district attorney, a police officer, or a special agent employed [by the Governor] under ORS 131.805." A "police officer" is defined in ORS 133.525(2) to include a member of the Oregon State Police, a sheriff, municipal police officer, investigator of a district attorney's office if certified as a peace

officer in any state, an investigator of the Criminal Justice Division of the Department of Justice, a humane special agent, or a liquor-enforcement inspector exercising authority under ORS 471.775(2).

In *State v. Surface*, 104 Or App 618, 802 P2d 100 (1990), a warrant was invalidated because a Pendleton police officer lacked authority under the tribal code to apply for a search warrant to be executed on the Umatilla Reservation.

b. The Application.

"The application * * * consist[s] of a proposed warrant in conformance with ORS 133.565, and shall be supported by one or more affidavits particularly setting forth the facts and circumstances tending to show that the objects of the search are in the places, or in the possession of the individuals, to be searched." ORS 133.545(6). "[A]n oral application by a police officer or conduct that is tantamount to a request for a warrant satisfies the statute." *State v. Ferris*, 108 Or App 81, 84, 813 P2d 1123 (1991) (officer's oral application based upon the affidavit of a citizen informant). Although a private citizen cannot "apply" for a warrant, a private citizen's affidavit can constitute an affidavit under ORS 133.545(6) in support of the warrant application. *State v. Ferris*, 108 Or App at 83.

c. Supplementing the Information in the Affidavit.

ORS 133.555(1) permits the judge to "examine on oath the affiants, and the applicant and any witnesses the applicant may produce, and [to] call such witnesses as the judge considers necessary to a decision." If this supplemental proceeding is used, the statute requires the judge to "make and keep a record of any testimony taken before the judge." The purpose of the recording requirement is:

> "[T]o facilitate subsequent review for the existence of probable cause, * * * to avoid the possibility of justification for a search or an arrest based upon facts or evidence discovered in the course of the execution of the warrant * * * [and] to minimize the necessity of calling the issuing magistrate or other witnesses at a later hearing to prove what can easily be documented."

State v. Russell, 293 Or 469, 473, 650 P2d 79 (1982) (affiant's averment in affidavit that informant was taken before the judge "so judge could satisfy himself of [informant's] credibility" does not establish credibility of informant; an unrecorded event before the judge cannot establish credibility of informant).

Although the statute provides that the judge "shall" record such statements, failure to record is not fatal if the judge who conducted the examination and issued the warrant testifies at the suppression hearing about the substance of the supplemental testimony and supplies sufficient additional information. *State v. Mathis*, 24 Or App 53, 544 P2d 170 (1976).

The statute does not require the recording or transcription of the entire conversation between the judge and the officer or prosecutor. Conversations between the affiant and the judge that are not recorded or made part of the examination need not be preserved, even if they occurred as part of the same conversations in which relevant information supporting probable cause is provided. *State v. Fox*, 93 Or App 565, 763 P2d 186 (1988), *rev den*, 307 Or 340 (1989). [**NOTE:** *Fox* pertains to oral testimony for a telephonic search warrant, but is probably applicable to the supplemental examination provisions of ORS 133.555(1)]. Any information that is not preserved in some fashion is simply not considered in support of issuance of the warrant. *See State v. Fox*, 93 Or App at 568 fn 1.

d. Multiple Warrants.

In State v. Farrar, 309 Or 132, 147-48, 786 P2d 161, *cert den*, 498 US 879 (1990), the court upheld the issuance of multiple warrants for different locations on the authority of a single affidavit. The court held that ORS 133.545 does not require that the original affidavit be attached to each of the warrants. State v. Farrar, 309 Or at 148. The court also upheld the service of a "conformed copy" (not a photocopy) of the original warrant on the defendant. State v. Farrar, 309 Or at 147.

e. Confidentiality of Application Proceedings.

ORS 133.555(4) requires that "[u]ntil the warrant is executed, the proceedings upon the application for a search warrant shall be conducted with secrecy appropriate to the circumstances." The "secrecy" lasts only until the warrant is served and not until the search is completed. "It seems clear that once the warrant has been given to the person in control of the premises (ORS 133.575(3)), and the search commenced, there is nothing secret about it, or any need for secrecy with respect to the proceedings." State v. Callaghan, 33 Or App 49, 56, 576 P2d 14 (1978).

See also discussion of "Sealing the Warrant and Application" in this chapter.

f. Paperflow.

An appendix illustrating the typical paperflow of the search warrant process is included at the end of this chapter.

8. Telephonic Warrants.

a. Authorizing Statutes.

ORS 133.545(7) and 133.555(3), taken together, provide the statutory procedure to obtain telephonic search warrants. *See* 1973 Commentary to the Proposed Oregon Criminal Procedure Code, §§ 133-34, pp. 72-74. "[T]elephonic warrants are subject to the requirements generally applicable to all warrants, including the 'particularity' requirement of ORS 133.565(2)[.]" State v. Martin/Dills, 170 Or App 366, 372, 12 P3d 548 (2000).

> **ORS 133.545(7):** "Instead of the written affidavit described in subsection (5) of this section, the judge may take an oral statement under oath. The oral statement shall be recorded and a copy of the recording submitted to the judge who took the oral statement. In such cases, the judge shall certify that the recording of the sworn oral statement is a true recording of the oral statement under oath and shall retain the recording as part of the record of proceedings for the issuance of the warrant. The recording shall constitute an affidavit for the purposes of this section. The applicant shall retain a copy of the recording and shall provide a copy of the recording to the district attorney if the district attorney is not the applicant."
>
> **HISTORICAL NOTE:** The statute originally required the applicant to have the recorded oral statement transcribed; however, the 2013 legislature changed that requirement to allow the certification and use of the recording itself as the "affidavit" for purposes of a telephonic warrant. 2013 Or Laws, ch 225 § 1. This change was made to eliminate the cost of transcription.
>
> **ORS 133.555(3):** "The judge may orally authorize a police officer or a district attorney or a special agent employed under ORS 131.805 to sign the judge's name on

a duplicate original warrant. A duplicate original warrant shall be a search warrant for the purposes of ORS 133.535 to 133.615, and it shall be returned to the judge as provided in ORS 133.615. In such cases a judge shall enter on the face of the original warrant the exact time of the issuance of the warrant and shall sign and file the original warrant in the manner provided by law."

Courts have encouraged officers to make greater use of telephonic search warrants. *See* State v. Brown, 301 Or 268, 278 fn 6, 721 P2d 1357 (1986) (noting that day would come when telephonic warrants could be obtained "within minutes"); State v. Chapman, 107 Or App 325, 334, 813 P2d 557 (1991) ("[A]ll law enforcement authorities should have a policy regarding telephonic warrants[.]"); State v. Lovell, 99 Or App 672, 676 fn 1, 783 P2d 1040 (1989), *rev den*, 309 Or 441 (1990) ("Telephonic warrants should be considered whenever feasible.").

NOTE: Impact of Availability of Telephonic Warrants on "Exigency." The availability of a telephonic warrant is "one relevant factor in assessing whether an exigent circumstance exists [as an exception to the general requirement for a search warrant]." State v. Stevens, 311 Or 119, 129-30, 806 P2d 92 (1992), *citing* State v. Wise, 305 Or 78, 82 fn 3, 749 P2d 1179 (1988). *See also* State v. Wynn, 102 Or App 1, 792 P2d 1234 (1990) (whether police attempted to obtain telephonic warrant is a consideration in assessing exigency; unfamiliarity with procedures is "no excuse"). In contrast, State v. Chapman, 107 Or App 325, 334, 813 P2d 557 (1991), decided five months after Stevens, holds that a working methamphetamine lab in a residential setting is an exigent circumstance and the failure to obtain a telephonic warrant "does not change the rule that, when probable cause and exigent circumstances exist, a warrant need not be obtained." For additional insights, *see* discussion of "Exigent Circumstances" in Chapter IV (Warrantless Searches).

b. Statutory Mechanics.

State v. Martin/Dills, 170 Or App 366, 12 P3d 548 (2000) and State v. Jordan, 73 Or App 84, 87-89, 697 P2d 1004, *rev den*, 299 Or 251 (1985), provide a good summary description of the telephonic warrant process. The specific elements of that process are discussed below.

PRACTICAL SUGGESTION: Sample "Telephonic Search Warrant Protocol" "Telephonic Search Warrant" forms appear at the end of this chapter as an appendix.

(1) Oral Statement Under Oath In Lieu of Affidavit.

The oral statement is to be recorded, certified by the judge receiving it, and retained as part of the record. ORS 133.545(7); State v. Evans, 110 Or App 46, 822 P2d 1198 (1991). "Requiring an officer to articulate facts under oath to a magistrate, who then decides whether those facts demonstrate probable cause to justify a search" is required under Article I, section 9, of the Oregon Constitution. State v. Evans, 110 Or App at 53. Previous versions of the statute required the agency to transcribe the recording; however, the statute was amended in 2013 to omit the transcription requirement in favor of simply having the judge certify and retain the recording.

ORS 133.545(7) requires the magistrate to "certify that the recording of the sworn oral statement is a true recording of the oral statement under oath and shall retain the recording as part of the record of proceedings for the issuance of the warrant." The record must allow an examining court to "ascertain with accuracy what information the issuing magistrate had when he issued the search warrant' * * * so that a reviewing court can determine whether the warrant was properly issued [pursuant] * * * to a constitutionally permissible procedure." State v. Evans, 110 Or App at 53. An

additional consideration for requiring the recording, according to *Evans*, is "to avoid the possibility of justification for a search * * * based upon facts or evidence discovered in the course of the execution of the warrant." 110 Or App at 53 (*citing* *State v. Russell*, 293 Or 469, 473, 650 P2d 79 (1982). Failure to record the affiant's oath or to certify the accuracy of the recording does not invalidate the warrant if the state can prove at a motion hearing that those requirements were met. *Evans,* 110 Or App at 53. *State v. Feehely*, 27 Or App 343, 348, 556 P2d 142, *rev den*, 277 Or 1 (1977) (testimony by the issuing magistrate).

Conversations between the affiant and the judge that are not recorded or made part of the examination need not be preserved, even if they occurred as part of the same conversations in which relevant information supporting probable cause is provided. *State v. Fox*, 93 Or App 565, 763 P2d 186 (1988), *rev den*, 307 Or 340 (1989). Information provided to the judge that is not preserved in some way is not considered in issuance of the warrant. *State v. Fox*, 93 Or App at 568 fn 1.

(2) The Oral Application and the Warrant.

"It is obviously impossible for a telephonic application to include a proposed warrant. * * * [A]lthough the statute does not say so, the officer's oral request must take the place of the proposed warrant" that would ordinarily be accompanied by supporting affidavits if an officer made a personal application for a search warrant. *State v. Jordan*, 73 Or App at 88.

When a telephonic warrant is obtained, **two original warrants** must be generated — an "original warrant" (for the magistrate) and a "duplicate original warrant" (for the applicant):

- **"Original warrant" for the magistrate.** The "original" will be generated by either the court (on blank forms prepared in advance by the prosecutor) or, more typically, by the applicant and later presented to the magistrate. In either case, the magistrate is required to "enter on the face of the original warrant the exact time of the issuance of the warrant and [to] sign and file the original warrant [in the same manner] as provided by law [for typical search warrants]." ORS 133.555(3). *See also* *State v. Martin/Dills*, 170 Or App 366, 371, 12 P3d 548 (2000) ("under ORS 133.555(3), the issuing magistrate must create and file an original warrant contemporaneously with the oral authorization or soon thereafter"). The preparation of the "original" warrant allows the reviewing court to compare the "original" with the "duplicate" to verify that the applicant accurately recorded the judge's authorization to search. *State v. Evans*, 110 Or App 46, 54, 822 P2d 1198 (1991) (officer added to the warrant items that were not approved by the issuing magistrate as verified by the recording).

  ORS 133.555(3) "does not state exactly *when* the judge must sign and file the original warrant." *State v. Jordan*, 73 Or App at 89 (emphasis in original) (warrant signed and filed over 30 days after issuance is valid).

  PRACTICAL SUGGESTION: If the "original warrant" is generated by the applicant and later presented to the magistrate, the "original" should be prepared by referring to the tape recording of the judge's authorization for location of search, list of seizable items, and the date and time of issuance.

- **A "duplicate original warrant" for the applicant.** The judge must "orally authorize [the applicant] to *sign the judge's name* on a *duplicate original warrant*." ORS 133.555(3) (emphasis added). The preferred practice is for the judge to specifically authorize the applicant during the recorded application to sign the judge's name, but the statement "'I'll allow you to have a search warrant,' with the limitations described [on the tape recording]" has been approved as an "implicit authorization." *State v. Jordan*, 73 Or App at 88. "If the

statutory scheme is to operate practically and legally, officers, in creating a *duplicate* original warrant, must accurately memorialize the material elements of the court's order." *State v. Martin/Dills*, 170 Or App 366, 372, 12 P3d 548 (2000) (description of place to be searched in duplicate original warrant – 524 Spruce Street [a five-building apartment complex] – contained multiple substantial deviations from the magistrate's oral authorization, which identified specific apartment number; evidence suppressed). But not every deviation from the language of the oral authorization is a material deviation. *State v. Jennings*, 220 Or App 1, 7, 184 P3d 1200 (2008) (inclusion of "search and seize" language in duplicate original warrant was not a material deviation from the judge's oral authorization to "search," where it was clear from the context that the magistrate was using shorthand term and in fact intended to authorize both a search and a seizure).

The "duplicate original warrant" is executed in the same fashion as a warrant that is obtained directly from the judge. Once the duplicate original warrant has been executed, it should be returned to the issuing judge, with the return of service listing the things seized and the date and time of the search, as provided in ORS 133.615.

The duplicate warrant is effective from the time that the applicant, as the judge's agent, signs the warrant. *State v. Jordan*, 73 Or App at 89.

(3) Certification Requirement.

ORS 133.545(7) requires that the recording of the sworn oral statement shall be certified by the judge receiving it and shall be retained as a part of the record of proceedings for the issuance of the warrant. Although the precise nature of the certification is not specified, some version of the following certification would probably suffice:

I certify that the attached tape recording contains the sworn statement(s) supporting the telephonic search warrant issued by me on _____, 20__, at _____ o'clock ___. (a.m./p.m.)

Dated this _____ day of _____, 20__.

_____
Issuing Magistrate
[Insert Title]

A failure to certify as accurate the transcript of the oral affidavit may be cured by testimony of the affiant or issuing magistrate. *State v. Evans*, 110 Or App 46, 54, 822 P2d 1198 (1991).

See also discussion of "Oral Statement Under Oath in Lieu of Affidavit" in this chapter.

(4) Curing Defects.

The statutory procedures for obtaining telephonic search warrants have been construed in ways that seem calculated to encourage their use by tolerating a degree of deviation from the face of the statutes. "When the procedure for issuing a telephonic warrant has not been perfectly followed, later performance can cure the defect." *State v. Evans*, 110 Or App 46, 54, 822 P2d 1198 (1991), *citing* *State v. Nunn*, 99 Or App 503, 783 P2d 26 (1989). Moreover, under ORS 136.432, mere statutory violations no longer require suppression unless they rise to a constitutional violation.

Specific Examples of Curable Errors:

- Failure to certify as accurate the recording of the oral affidavit may be cured by testimony at the suppression hearing. State v. Evans, 110 Or App at 54.

- Failure to immediately sign or file the original warrant may be cured by having the issuing judge sign it "*nunc pro tunc* [date of issuance]" and filing. State v. Evans, 110 Or App at 54; State v. Jordan, 73 Or App 84, 89, 697 P2d 1004, *rev den*,299 Or 251 (1985).

- Lack of an original warrant may be cured by calling the issuing magistrate as a witness to attest to the accuracy of the duplicate original warrant. State v. Evans, 110 Or App at 54-55.

- Failure to tape record the **oath** (not testimony) of the affiant can be cured by testimony that the statement was made under oath. State v. Feehely, 27 Or App 343, 348, 556 P2d 142, *rev den*,277 Or 1 (1977) (testimony by the issuing magistrate).

However, the execution of a duplicate original warrant that violates the particularity requirements of ORS 133.565 and Article I, section 9, is not a mere statutory violation. State v. Martin/Dills, 170 Or App 366, 375-75, 12 P3d 548 (2000) (description of place to be searched in duplicate original warrant – 524 Spruce Street [a multi-unit apartment complex] – deviated substantially from the magistrate's oral authorization to search 524 Spruce Street, Apartment No. 5, and was overbroad; evidence suppressed).

9. Warrants By Fax.

ORS 133.545 alternatively authorizes submission of a proposed warrant and supporting affidavit by fax or email. The application "may be sent to the court by facsimile transmission or any similar electronic transmission that delivers a complete printable image of the signed and acknowledged affidavit and proposed warrant." ORS 133.545(8)(a). This statute also authorizes the judge to transmit the *signed* search warrant to the district attorney or police officer by facsimile or similar electronic transmission. ORS 133.545(8)(b)(A).

The judge who signs the warrant must file "the original signed warrant and a printed image of the application with the return." ORS 133.545(8)(b)(A). The statute requires the district attorney or police officer to deliver "the original signed affidavit to the court with the return." ORS 133.545(8)(b)(B).

E. EXECUTION.

1. Securing Persons, Premises, or Objects While Seeking a Warrant.

a. Securing Persons.

There is no independent exception that allows the police to "secure" a person while a warrant is sought. *See* State v. Wise, 72 Or App 58, 62-63, 695 P2d 68 (1985) (two-hour detention of defendants while warrant was obtained was an illegal seizure).

A person may not be "seized" while a warrant is obtained unless the police have probable cause to arrest, or some other independent authority (*e.g.*, ORS 131.615, authorizing stop and reasonable detention of person suspected of criminal activity), to detain the person. State v.

Powelson, 154 Or App 266, 961 P2d 869 (1998) (officers' threat to apply for a search warrant was constitutionally permissible, but officers went beyond that by threatening to detain defendant while they applied for the warrant; because the officers lacked probable cause to arrest defendant, the officers' threat to detain him constituted an unlawful seizure). Officer safety is one such exception. *State v. Madden*, 363 Or 703, 427 P3d 157 (2018). (See "Officer Safety: Use of Force in Executing Warrants," later in this chapter).

A "seizure" of a person under section 9 occurs upon "a *significant* interference with an individual's liberty of movement." *State v. Juarez-Godinez*, 326 Or 1, 6 n 3, 942 P2d 772 (1997) (emphasis in original). As discussed in more detail in Chapter 1, the inquiry is whether the person believed that the officer significantly restricted his or her liberty and whether that belief was objectively reasonable. *State v. Toevs*, 327 Or 525, 535, 964 P2d 1007 (1998).

b. Securing Premises.

Oregon Law.

There is no independent exception under Oregon law for "freezing the scene" pending the acquisition of a search warrant. Rather, under Article I, section 9, the "securing" of premises while a search warrant is sought is a seizure that must be justified under a warrant exception. *State v. Smith*, 327 Or 366, 376, 963 P2d 642 (1998) (padlocking a storage unit while a warrant was sought was a seizure); *State v. Hansen*, 295 Or 78, 84, 664 P2d 1095 (1983) (securing a residence was constitutional seizure). But exigent circumstances may justify a warrantless seizure of premises. *See* Chapter IV (Warrantless Searches — Exigent Circumstances, Securing Premises While Awaiting Warrant).

That property was unlawfully seized, however, does not necessarily require the suppression of evidence. *See* Chapter VII (Motions – Exclusionary Rule).

Fourth Amendment.

Under the Fourth Amendment, "securing a dwelling, on the basis of probable cause, to prevent the destruction or removal of evidence while a search warrant is being sought is not itself an unreasonable *seizure* of either the dwelling or its contents." *Segura v. United States*, 468 US 796, 810, 104 S Ct 3380, 82 L Ed 2d 599 (1984) (emphasis added). *Accord Illinois v. McArthur*, 531 US 326, 121 S Ct 946, 148 L Ed 2d 838 (2001) (the actions of police officers in securing defendant's residence for two hours while seeking a search warrant, based upon probable cause that the residence contained illegal drugs, was lawful; under the circumstances, including the officers' reasonable fear that defendant might destroy evidence inside house if not restrained, the seizure was reasonable).

However, a warrantless *entry* into a dwelling without exigent circumstances is an illegal *search* under the Fourth Amendment. *Segura v. United States*, 468 US at 806, 810 (different interests are implicated by a seizure than by a search). But even though such an entry is unlawful, this illegality does not necessarily require the suppression of evidence subsequently seized under a warrant. *Segura*, 468 US at 799 (evidence seized pursuant to warrant issued wholly on information known to officers before illegal entry was not the fruit of the illegal entry; suppression not required).

c. Securing Automobiles and Other Objects.

Oregon Law.

The Article I, section 9, "securing the premises" rules discussed above apply to the securing of automobiles and other items. The act of securing a vehicle or an object while a warrant is sought is a seizure. Absent probable cause and exigent circumstances, such a seizure is unlawful. *State v. Dowdy*, 117 Or App 414, 418, 844 P2d 263 (1992) (car); *State v. Nicholson*, 89 Or App 306, 748 P2d 1028, *rev den*, 305 Or 672 (1988) (suggesting police should have assigned officer to watch car, instead of towing it to impound lot, until search warrant could be obtained); *State v. Price*, 92 Or App 669, 759 P2d 1130 (1988) (purse). *See also State v. Juarez-Godinez*, 326 Or 1, 942 P2d 772 (1997) (detention of car to subject it to dog-sniff was a seizure of the car).

Fourth Amendment.

Under the Fourth Amendment, it is reasonable to seize and impound an automobile, on the basis of probable cause, for "whatever period is necessary to obtain a warrant for the search." *Chambers v. Maroney*, 399 US 42, 51, 90 S Ct 1975, 26 L Ed 2d 419 (1970).

The Court also has "approved warrantless seizures of [personal] property, on the basis of probable cause, for the time necessary to secure a warrant, where a warrantless search was either held to be or likely would have been held impermissible." *Segura v. United States*, 468 US 796, 806, 104 S Ct 3380, 82 L Ed 2d 599 (1984). *See, e.g., United States v. Chadwick*, 433 US 1, 97 S Ct 2476, 53 L Ed 2d 538 (1977) (footlocker).

2. Who May Participate in the Execution of the Warrant.

ORS 133.575(1) permits warrants to be executed "only by a police officer." The search warrant, however, need not be directed to a specific, named officer, notwithstanding the language in ORS 133.565(1) that "[a] search warrant * * * shall be addressed to and authorize its execution by an officer authorized by law to execute search warrants." *State v. Nehl*, 19 Or App 586, 588-89, 528 P2d 553 (1974), *rev den* (1975) (warrant directed to "any police officer in the State of Oregon" was proper).

The executing officer "may be accompanied by such other persons as may be reasonably necessary for the successful execution of the warrant with all practicable safety." ORS 133.575(1). In *State v. Wheelon*, 137 Or App 63, 73, 903 P2d 399 (1995), *rev den*, 327 Or 123 (1998), the court held that the Oregon National Guard lawfully assisted the police in executing a warrant because the governor had authorized the guard to cooperate generally with the county narcotics team; specific authorization for this particular operation was not required.

It is a violation of the Fourth Amendment for police officers to bring members of the media or other third parties into a home during the execution of a search warrant when the presence of the third parties is not in aid of the execution of the warrant. *Wilson v. Layne*, 526 US 603, 119 S Ct 1692, 142 L Ed 2d 818 (1999).

3. Time Restrictions on Execution.

ORS 133.575(1) permits warrants to be executed "only within the period and at the times authorized by the warrant[.]" ORS 133.565(3) provides:

"Except as otherwise provided herein, the search warrant shall be executed between the hours of 7 a.m. and 10 p.m. and within five days from the date of issuance. The judge issuing the warrant may, however, by endorsement upon the face of the warrant, authorize its execution at any time of the day or night and may further authorize its execution after five days, but not more than 10 days from date of issuance."

a. Daytime *vs.* Nighttime Service.

ORS 133.565(3) "requires that any search warrant be executed during the daytime unless the issuing judge authorizes a nighttime search." *State v. Brock,* 294 Or 15, 18, 653 P2d 543 (1982). "[T]he purpose of the statute is to avoid the potential terror and violence associated with violent intrusions into private homes during darkness." *State v. O'Driscoll,* 65 Or App 362, 365, 671 P2d 752 (1983), *rev den*, 296 Or 486 (1984).

"Execute," as that term is used in ORS 133.565(3), does not mean "a fully completed search." Thus, a warrant that is served at 8:30 a.m. is "executed during the daytime" within the meaning of ORS 133.565(3) even if the search continues beyond 10 p.m. *State v. Callaghan*, 33 Or App 49, 55-57, 576 P2d 14, *rev den*, 284 Or 1 (1978). Likewise, a warrant authorizing forensic analysis of cell phone is "executed" when the warrant is served, even though the search itself likely will not be done within the five-day period. *See State v. Monger*, 306 Or App 50, 472 P3d 270, *rev den*, 367 Or 291 (2020) (officers "executed" warrant authorizing forensic analysis of device in police custody by serving the warrant on the forensic examiner and requesting the forensic analysis); *see also State v. Tardie*, 319 Or App 229, 509 P3d 705 (2022) (same).

. The "authorization for nighttime service of a search warrant must be endorsed on the warrant," *State v. O'Driscoll*, 65 Or App at 364, and the affidavit submitted in support of a request for such endorsement must specify the "special circumstances" that justify a nighttime search. *State v. Brock*, 294 Or at 17-18 (construing ORS 133.565(3) to require allegation of special circumstances).

Examples of "special circumstances" justifying a nighttime search endorsement include: "where there is a reasonable possibility that the fruits, instrumentalities or evidence of crime sought would not be expected to be at the searched premises during the day or might be removed or dissipated if the search is delayed" and "where the safety of the executing officers, occupants of premises or possessors of property would not be affected by a nighttime search." *State v. Brock*, 294 Or at 20. *See also State v. Berardinelli*, 95 Or App 364, 368, 769 P2d 235, *rev den*, 308 Or 79 (1989) (statements in search warrant application that defendant was armed, that drug operation was protected by lookouts, and that drug sales had occurred after 10 p.m. on three occasions in the week before warrant application constituted "special circumstances" justifying nighttime endorsement).

The issuing judge does not need to "make express findings, as long as the allegations [in the affidavit] are sufficient and the [nighttime] endorsement [on the search warrant] is in proper form." *State v. Brock*, 294 Or at 20-21.

Even before the 1997 enactment of ORS 136.432 (precluding suppression as a remedy for statutory violations), the court had held that a violation of ORS 133.565(3) does not require the suppression of evidence seized during a nighttime search. *State v. Brock*, 294 Or at 21-22 (warrant contained nighttime endorsement, but no showing made to justify endorsement); *State v. O'Driscoll*, 65 Or App at 364-65 (warrant not endorsed for nighttime service; executed at 6:45 a.m.). *See also State v. Ness*, 294 Or 8, 10, 653 P2d 548 (1982) ("suppression is not an authorized sanction" for a violation of ORS 133.565(3)).

b. Execution Within 5 Days Unless Extension Granted.

Generally, a search warrant must be executed "within five days from the date of issuance." ORS 133.565(3). The "judge issuing the warrant may, however, by endorsement upon the face of the warrant, authorize its execution * * * after five days, but not more than 10 days from date of issuance." ORS 133.565(3).

An application for an extension of time need not be supported by a sworn affidavit or transcribed oral testimony. State v. Whalen, 90 Or App 18, 20 n 1, 750 P2d 1168 (1988).

The computation of the time limits in ORS 133.565(3) is governed by ORS 174.120. State v. Daw, 94 Or App 370, 372, 765 P2d 241 (1988). ORS 174.120 provides:

> "The time within which an act is to be done, as provided in the civil and criminal procedure statutes, is computed by excluding the first day and including the last day unless the last day falls upon any legal holiday [Sundays are legal holidays, ORS 187.010] or on Saturday, in which case the last day is also excluded."

"If a search warrant is not executed within the time specified by the warrant, the officer shall forthwith return the warrant to the issuing judge." ORS 133.615(1).

In State v. Daw, 94 Or App at 372, the court held that a search warrant expires if it is not executed within the statutory time requirements. According to the court, "[a] search based on an expired warrant is a warrantless search. Evidence seized in a warrantless search must be suppressed, unless an exception to the warrant requirement exists."

> **COMMENT:** One interpretation of the holding in Daw is that, because a warrant "expires" if it is not executed within the statutory time limit, the execution of an expired warrant is an *unconstitutional* warrantless search, and, therefore, more than a mere statutory violation. For this reason, it is not clear whether ORS 136.432 (precluding suppression as a remedy for statutory violations) will salvage evidence seized after the statutory time limit for execution has passed. Obviously, the best practice is to adhere to statutory time limits and to seek extensions if needed.

A mere procedural error in obtaining an extension will not require suppression. ORS 136.432; State v. Whalen, 90 Or App at 20-21 (no suppression merely because extension signed by judge other than issuing magistrate). *See also* State v. Dalton, 132 Or App 36, 887 P2d 379 (1994), *rev den*, 321 Or 94 (1995) (scrivener's error on search warrant, mistakenly showing date of issuance as "October 9" rather than November 9, did not invalidate warrant).

4. Knock and Announce.

ORS 133.575(2) provides:

> "The executing officer shall, before entering the premises, give appropriate notice of the identity, authority and purpose of the officer to the person to be searched, or to the person in apparent control of the premises to be searched, as the case may be."

The Fourth Amendment to the United States Constitution also requires police officers to announce their presence and authority before entering the targeted residence. In Wilson v. Arkansas, 514 US 927, 936, 115 S Ct 1914, 131 L Ed 2d 976 (1995), the Court held that the knock-and-

announce requirement is an element of the Fourth Amendment "reasonableness" inquiry and that the "search or seizure of a dwelling might be constitutionally defective if police officers enter without prior announcement." **But suppression is not required:** a violation of the knock-and-announce requirement does not warrant application of the exclusionary rule. *Hudson v. Michigan*, 547 US 586, 126 S Ct 2159, 165 L Ed 2d 56 (2006).

The Oregon Constitution does not contain a knock-and-announce requirement. *State v. Valentine/Darroch*, 264 Or 54, 65-66, 504 P2d 84 (1972), *cert den*, 412 US 948 (1973).

The "knock and announce" rule applies only during the execution of a search warrant or during a forcible entry into premises based on exigent circumstances. That rule does not require officers to announce their identity and purpose when they obtain entry by consent. *State v. Barclay*, 196 Or App 311, 314, 100 P3d 1148 (2004).

5. Officer Safety; Use of Force in Executing Warrants.

"In evaluating the use of force in executing search warrants, both statutory [ORS 133.605] and constitutional limitations come into play." *State v. Reinhardt*, 140 Or App 557, 562, 916 P2d 313 (1996), *rev den*, 327 Or 521 (1998). Even if statutory authority supports a detention, the method of detention may be unconstitutional. *State v. Hawkins*, 225 Or App 355, 362, 201 P3d 239 (2009) (because of the absence of any specific safety concerns, handcuffing defendant during search of house was unlawful seizure).

In evaluating a police officer's use of force under both ORS 133.605 and the Oregon Constitution, the court's focus "is on the reasonableness of the officers' actions in 'the circumstances as they reasonably appeared at the time' they were taken." *State v. Barnett*, 132 Or App 520, 524, 888 P2d 1064, *rev den*, 321 Or 137 (1995), *quoting* *State v. Bates*, 304 Or 519, 525, 747 P2d 991 (1987). *See also* *State v. Reinhardt*, 140 Or App at 562.

ORS 133.605 governs the use of force in executing a warrant. ORS 133.605(1) provides:

> "The executing officer and other officers accompanying and assisting the executing officer may use the degree of force, short of deadly physical force, against persons, or to effect an entry, or to open containers, as is reasonably necessary for the execution of the search warrant with all practicable safety."

See also *State v. Valentine/Darroch*, 264 Or 54, 60, 504 P2d 84 (1972), *cert den*, 412 US 948 (1973) (after announcing presence and purpose, officers "have the right to force entry" if entry is denied).

The use of deadly physical force in executing a warrant is authorized under certain limited exceptions. ORS 133.605(2).

The statute "provides independent authority for officers to control persons present [at the search scene] to the extent necessary to execute the warrant with all practicable safety," *i.e.*, the use-of-force authority granted by ORS 133.605 is in addition to the authority police have to make stops and arrests. *State v. Barnett*, 132 Or App 520, 523, 888 P2d 1064, *rev den*, 321 Or 137 (1995).

In addition to the statutory authority to use force, Article I, section 9, of the Oregon Constitution does not prohibit an officer from taking

> "reasonable steps to protect himself or others if, during the course of a lawful encounter with a citizen, the officer develops a reasonable suspicion, based upon

> specific and articulable facts, that the citizen might pose an immediate threat of serious physical injury to the officer or to others then present."

State v. Bates, 304 Or 519, 524, 747 P2d 991 (1987). "Although Bates involved a search incident to a lawful traffic stop, the rationale for the 'officer safety' exception discussed there is applicable [in the context of executing search warrants]." State v. Barnett, 132 Or App at 524.

Similarly, officer-safety searches under the Fourth Amendment require police to have a reasonable belief, based on specific, articulable facts, that the person searched is armed and dangerous or may gain immediate control of weapons. Michigan v. Long, 463 US 1032, 1049, 103 S Ct 3469, 77 L Ed 2d 1201 (1983); Ybarra v. Illinois, 444 US 85, 100 S Ct 338, 62 L Ed 2d 238 (1979).

> **NOTE:** In State v. Barnett, 132 Or App at 525, the court noted that Oregon cases interpreting the Article I, section 9, officer-safety exception "rely on the United States Supreme Court's interpretation of the Fourth Amendment." Thus, cases interpreting the officer-safety exception under the Fourth Amendment *may* be persuasive authority in interpreting the exception under Article I, section 9.

"Intuition and generalized fear do not give rise to reasonable suspicion of an immediate threat to the safety of the officers or others present at a search." State v. Reinhardt, 140 Or App 557, 562, 916 P2d 313 (1996), *rev den*, 327 Or 521 (1998). "Rather, there must be specific and articulable facts to justify the officer's conclusion that a particular person presents an immediate threat of harm." Reinhardt, 140 Or App at 563. *Compare* Reinhardt, 140 Or App 557 (defendant's suspected involvement in a "biker" organization insufficient to justify handcuffing) *with* State v. Reeves, 144 Or App 305, 927 P2d 93 (1996), *rev den*, 324 Or 513 (1997) (individual history and conduct sufficient to justify a weapons search). In State v. Madden, 363 Or 703, 427 P3d 157 (2018), officers were justified in handcuffing and detaining—for a *reasonable* period of time—the defendant, who was the driver of a car parked in the driveway of a house at the time officers began executing the warrant, because officers believed that there was a weapon in the car that either defendant or the passenger could have accessed. The officers reasonably could be concerned about the safety of officers and occupants of the home if they left the men in the car while they executed the warrant, so it was permissible to handcuff them and bring them into the house while entering the house and securing it. But once the house was secured, officers unreasonably continued to detain defendant, in handcuffs, and repeatedly questioning him, given that no continuing officer-safety concern existed.

a. Identifying, Detaining, and Controlling Persons at Search Scene.

"ORS 133.605 authorizes officers to control persons present at a place where a search warrant is being executed to the extent necessary to execute the warrant with all practicable safety. That includes the authority to identify anyone entering the site." State v. Cawrse, 105 Or App 325, 328, 804 P2d 513, *rev den*, 311 Or 482 (1991) (police lawfully detained defendant to determine his identity after he pulled into the driveway of a residence the police were searching).

Under the Fourth Amendment, a warrant to search premises for contraband implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted. This detention must be based on reasonable suspicion to believe the person detained is connected to the premises being searched. Muehler v. Mena, 544 US 93, 125 S Ct 1465, 161 L Ed 2d 299 (2005) (§ 1983 plaintiff and others were detained in handcuffs for two or three hours and questioned during execution of a search warrant at a residence they occupied; based on the circumstances, including the information of gang membership and presence of deadly weapons, defendants' detention of plaintiff in handcuffs during execution of the warrant was lawful under the Fourth Amendment); Michigan v. Summers, 452 US 692, 101 S Ct 2587, 69 L Ed 2d 340 (1981).

Because the *Summers* rule is based on the interests in executing a safe and efficient search, it is limited to the immediate vicinity of the premises to be searched. *Bailey v. United States*, 568 US 1036, 133 S Ct 1031, 185 L Ed 2d 19 (2013) (officers lacked authority to detain a former occupant of a basement apartment, who had left by car during police surveillance before execution of the warrant, about a mile from the apartment and five minutes after the occupant left apartment).

> **NOTE:** Usually the search warrant will command a search of the occupants. The warrant in *Michigan v. Summers*, 452 US 692, apparently did not do so, and defendant Summers was first encountered and detained while he was outside the premises subject to the search warrant.

b. Handcuffing.

Under the Fourth Amendment, handcuffing an occupant of a residence during the execution of a search warrant is permissible if the police have reasonable suspicion to believe that the person poses a threat to the safety of the officers or others. *Muehler v. Mena*, 544 US 93, 125 S Ct 1465, 161 L Ed 2d 299 (2005) (several-hour detention in handcuffs was lawful). "Although handcuffing [a] defendant is a seizure under Article I, section 9, a police officer's right to reasonable self protection and protection of others while performing the job outweighs an individual's right to be free from restraint." *State v. Barnett*, 132 Or App 520, 524, 888 P2d 1064, *rev den*, 321 Or 137 (1995) (police lawfully placed defendant face down on the floor, handcuffed her, and frisked her during the execution of a search warrant for a residence in which she was a visitor). *But see State v. Reinhardt*, 140 Or App 557, 916 P2d 313 (1996), *rev den*, 327 Or 521 (1998) (defendant's suspected involvement in a "biker" organization insufficient to justify handcuffing).

The degree of specificity required before an officer may take reasonable steps to ensure his or her safety will vary depending on the situation in which the officer finds himself or herself. When an officer enters a residence to execute a search warrant and has reason to believe that *any* of the occupants is armed and dangerous, officer-safety concerns permit the officer to handcuff persons who are present and not named in the warrant and detain them long enough to ensure the safety of the officers and other persons present. *State v. Swibies*, 183 Or App 460, 467, 53 P3d 447 (2002) (comparing *Barnett* and *Reinhardt*). That is true even if the officers cannot identify anything about the persons other than their presence in such a place. *Ibid.* But, conversely, when the officers do not have reason to believe that the occupants are armed and dangerous, something more specific must be shown before officers can handcuff persons found in the house. *Swibies*, 183 Or App at 467.

See also Chapter II (Stop and Frisk), (Handcuffing).

c. Frisk Searches.

An officer may frisk an occupant of the place searched if there is reasonable suspicion that the person is armed and dangerous. *State v. Barnett*, 132 Or App 520, 525, 888 P2d 1064, *rev den*, 321 Or 137 (1995). *See also Ybarra v. Illinois*, 444 US 85, 100 S Ct 338, 62 L Ed 2d 238 (1979) (frisk of tavern customer not supported by a reasonable belief that he was armed and presently dangerous); *State v. Weber*, 64 Or App 459, 668 P2d 475 (1983) (pat-down search of person on premises being searched held impermissible, where person was acting strangely and was unaware of what was happening, but did not otherwise appear dangerous).

Police officers are authorized to conduct frisk searches of individuals even when they are handcuffed. *State v. Barnett*, 132 Or App at 525 (rejecting defendant's argument that, once she was handcuffed, officer could not frisk her because she no longer was a threat to their safety).

d. Wing-Span Searches.

A police officer also is entitled to conduct an officer-safety search of the immediate area around an individual when the officer has reason to believe that the individual may gain immediate control of a weapon. State v. Reeves, 144 Or App 305, 311-12, 927 P2d 93 (1996), *rev den*, 324 Or 513 (1997) (officer-safety search around hotel-room bed, including lifting the mattress, upheld), *citing* State v. Ehly, 317 Or 66, 83 n 16, 854 P2d 421 (1993) (when an officer reasonably believes that a lawfully stopped individual is dangerous and may gain immediate control of a weapon, he may search the area around the individual from which the individual could obtain a weapon).

6. Reading and Delivering a Copy of the Warrant.

ORS 133.575(3) provides that, except for mobile tracking device warrants,

> "before undertaking any search or seizure pursuant to the warrant, the executing officer shall read and give a copy of the warrant to the person to be searched, or to the person in apparent control of the premises to be searched. If the premises are unoccupied or there is no one in apparent control, the officer shall leave a copy of the warrant suitably affixed to the premises."

In State v. Farrar, 309 Or 132, 147, 786 P2d 161, *cert den*, 498 US 879 (1990), the court upheld the service on defendant of a conformed copy of the original warrant, *i.e.*, on the service copy of the warrant, the detective "filled in the conformed signature of the judge."

A statutory violation of ORS 133.575(3) does not require suppression of the evidence. ORS 136.432. For example, in State v. Blasingame, 127 Or App 382, 388-89, 873 P2d 361, *rev den*, 319 Or 406 (1994), the officer executing the search warrant failed to read the warrant to the defendant and failed to give him a copy of it. He did, however, accurately tell the defendant what the warrant said. The court held that even though the officer failed to comply with the statutory requirements, suppression of the evidence was not required.

Officers seizing property pursuant to a search warrant are not required by the Due Process Clause to provide the property owner with a notice of state law remedies for the return of the property. West Covina v. Perkins, 525 US 234, 119 S Ct 678, 142 L Ed 2d 636 (1999).

7. Scope of the Search.

a. Areas Subject to Search.

The areas subject to lawful search pursuant to the warrant are defined by the description set forth on the face of the warrant. *See, e.g.*, State v. Fast, 133 Or App 102, 889 P2d 1349 (1995) (warrant to search defendant's residence *and his person* authorized search of defendant's person anywhere he was found, such as on the street, not just at his residence); State v. Brown, 109 Or App 636, 820 P2d 878 (1991), *rev den*, 313 Or 210 (1992) (warrant to search defendant's trailer authorized its search, even though it was physically situated on the other side of the property line separating premises occupied by defendant from neighbor's property); State v. Rogers, 85 Or App 303, 736 P2d 1024, *rev den*, 303 Or 590 (1987) (warrant for search of premises entitled police to open safe in premises; right to search safe was not extinguished when police removed it from the residence momentarily). *See also* State v. Everett, 237 Or App 556, 240 P3d 102 (2010), *rev den*, 349 Or 601 (2011) (warrant that authorized search of defendant's "person" for "bullets and bullet fragments" implicitly authorized use of surgical procedure to remove bullet, where affidavit established probable cause to believe that defendant had been shot by deputy in commission of other crimes).

Moreover, the character of the things specified in the warrant defines the areas that may be searched. For example, police could not move a stereo to view serial numbers while executing a warrant for evidence of a shooting. *Arizona v. Hicks*, 480 US 321, 107 S Ct 1149, 94 L Ed 2d 347 (1987). *See also* State v. Gilbert, 276 Or 801, 556 P2d 651 (1976) (officers executing search warrant specifying certain other property were not authorized to open the engine compartment of an outboard motor to look for a serial number absent probable cause to believe the motor was stolen). On the other hand, an officer reasonably looked under a mattress's edge where the warrant directed a search for an athletic shoe. State v. Chambless, 111 Or App 76, 824 P2d 1183, *rev den*, 313 Or 210 (1992).

There are three recognized tests for determining whether an officer executing a warrant to search premises may search the personal property of a person not subject to search pursuant to the warrant. Under the "physical possession" test, an officer executing a warrant may search all items that could contain articles identified in the warrant except those that are in the actual physical possession of a person not subject to the warrant. State v. Reid, 190 Or App 49, 60, 77 P3d 1134 (2003), *rev den*, 337 Or 182 (2004). Under the "relationship" test, police executing a premises warrant are authorized to search possessions of an individual only if the police know that the individual has a sufficient relationship to the premises—usually characterized as something other than a "mere guest" or "casual visitor"—that examination of the individual's possession does not violate the visitor's reasonable expectation of privacy. State v. Walker, 350 Or 540, 258 P3d 1228 (2011). Under the "actual notice" test, the officer may search any items on the premises *unless* the officer has actual notice that the property belongs to a nonresident. Reid, 190 Or App at 57. The premise of the "actual notice" test is that a magistrate issuing a premises-wide warrant does not intend to authorize a search of the effects of "mere visitors" to the property; however, the requirement of actual notice provides some guidance to the officer executing the warrant. Reid, 190 Or App at 57. The Oregon Court of Appeals has concluded that the "physical possession" test is the appropriate test under the Fourth Amendment; however, Oregon courts have not articulated the test that applies under Article I, section 9, of the Oregon Constitution. Reid, 190 Or App at 51 n 1, 67.

b. Persons Subject to Search.

Absent probable cause or reasonable officer-safety concerns (*see* discussion entitled "Officer Safety; Use of Force in Executing Warrants" in this chapter), persons not named in a search warrant who happen to be present during the execution of a warrant are not themselves subject to search. Ybarra v. Illinois, 444 US 85, 100 S Ct 338, 62 L Ed 2d 238 (1979) (tavern customer); State v. Weber, 64 Or App 459, 668 P2d 475 (1983) (applying Ybarra to search of occupants in apartment). *But see* Michigan v. Summers, 452 US 692, 101 S Ct 2587, 69 L Ed 2d 340 (1981) (a warrant to search premises for contraband implicitly allow limited *detention* of occupants during the search).

> **PRACTICAL SUGGESTION:** If the search of a particular person exceeds the scope of the warrant, consider making the following **alternative arguments**:
>
> - The person was lawfully stopped and frisked under ORS 131.615 and 131.625. *See* Chapter II (Stop and Frisk); *see also* ORS 133.605 (authorizing reasonable use of force by police during execution of a warrant) and State v. Barnett, 132 Or App 520, 888 P2d 1064, *rev den*, 321 Or 137 (1995) (handcuffing and frisking defendant, a visitor at a residence that was the subject of a search warrant, was a reasonable safety measure), both discussed in this chapter.
>
> - If officers executing a search warrant arrest a person for an offense, then they may search that person for evidence of that crime, such as records of drug sales in the case of a warrant for drugs. State v. Evans, 110 Or App 46, 60-61, 822 P2d 1198 (1991). *See also* Chapter IV (Warrantless Searches — Search Incident to Arrest).

c. Items Subject to Search and Seizure.

(1) Items Seized Pursuant to Warrant.

The general question is whether the items seized are consistent with the items described in the search warrant. "Minor discrepancies" are not fatal in this analysis. For example, in State v. Eisman, 21 Or App 92, 96, 533 P2d 1379 (1975), the court held that the fact that the search warrant affidavit described the item to be seized as a "newspaper" in an envelope with no return address, when, in fact, the item seized was a letter on motel stationery, did not fatally compromise the search.

The purpose for which a warrant authorizes a search does not circumscribe the scope of any later examination of property for other purposes. In State v. Munro, 339 Or 545, 124 P3d 1221 (2005), the Oregon Supreme Court held that a defendant does not retain any privacy interest in items lawfully seized pursuant to a warrant that authorizes seizure and search of those items. Thus, officers did not exceed the scope of a warrant that authorized a search for evidence of drug crimes when they viewed a seized videotape later after learning that it may contain child pornography. The Munro rule is limited to examination of physical objects whose "search" is already authorized by the warrant, however; it does not authorize "searches" beyond that authorized by the warrant. State v. Mansor, 363 Or 185, 209-210, 421 P3d 323 (2018) (rejecting state's argument that Munro allows police to *search* all data on electronic device merely because they lawfully seized it and searched for certain data pursuant to a warrant).

(2) Plain-View Seizures.

If, after entering an area to be searched pursuant to the warrant, the officer discovers items that he or she has probable cause to believe are subject to seizure, then the items may be seized. State v. Carter, 342 Or 39, 45, 147 P3d 1151 (2006) (although warrant did not expressly authorize seizure, officers have authority to seize evidence lawfully found in plain view during execution); State v. Chambless, 111 Or App 76, 81-82, 824 P2d 1183, *rev den*, 313 Or 210 (1992) (court upholds seizure of mushrooms during lawful search for shoes).

The constitutional criteria for a valid plain-view seizure are:

(1) The officer must have seen the evidence in plain view from a lawful vantage point;

(2) The incriminating character of the evidence must be "immediately apparent;" and

(3) The officer must have a "lawful right of access to the object itself."

Horton v. California, 496 US 128, 136, 110 S Ct 2301, 110 L Ed 2d 112 (1990); State v. Peterson, 114 Or App 126, 131, 834 P2d 488, *rev dismissed*, 315 Or 272 (1992). *See also* State v. Sargent, 323 Or 455, 463 n 5, 918 P2d 819 (1996) (under the "plain view" doctrine, the intrusion must be valid and it must be immediately apparent that the items are crime evidence).

> **Note:** The plain-view doctrine does not apply in the context of searches for electronic evidence. State v. Bock, 310 Or App 329, 485 P3dc 931 (2021). Allowing for plain-view observations made in the course of a forensic search would eviscerate the "use limitation" created by State v. Mansor, 363 Or 185, 209-210, 421 P3d 323 (2018). State v. Serrano, 324 Or App 453, 465-66, 527 P3d 54 (2023), *adh'd to on recons*, 325 Or App 296, *rev denied*, 372 Or 192 (2024).

Under the state and federal constitutions, inadvertence is not a necessary component of a plain-view seizure. *Horton v. California*, 496 US at 136; *State v. Peterson*, 114 Or App at 131. *See also State v. Ainsworth*, 310 Or 613, 621 n 9, 801 P2d 749 (1990) (citing *Horton v. California* with approval); *State v. Carter*, 342 Or at 45 (although warrant did not expressly authorize seizure, officers had authority to seize evidence lawfully found in plain view during execution). *Former* ORS 133.585 previously imposed an inadvertence requirement, but that statute was repealed in 1997.

See further discussion of plain-view seizures in Chapter IV (Warrantless Searches).

d. Drafting Warrant and Affidavit.

Many difficulties with the scope of a search pursuant to a warrant may be avoided by careful drafting of the affidavit and warrant. *See* "Suggestions for Drafting Warrant" in this chapter. See also "Search Warrant Checklist" in the appendix to this chapter.

8. Receipt for Things Seized.

Except for mobile tracking device warrants, ORS 133.595 requires that:

> "promptly upon completion of the search, the officer shall make a list of the things seized, and shall deliver a receipt embodying the list to the person from whose possession they are taken, or the person in apparent control of the premises or vehicle from which they are taken. If the vehicle or premises are unoccupied or there is no one present in apparent control, the executing officer shall leave the receipt suitably affixed to the vehicle or premises."

The failure to furnish a list of things seized following a *warrantless* seizure, which is required by ORS 133.623(2), is not grounds for suppression. *State v. Fitzgerald*, 19 Or App 860, 862-63, 530 P2d 553 (1974). The same should be true for violations of ORS 133.595, especially in light of ORS 136.432. *Cf. State v. Cortman*, 251 Or 566, 571, 446 P2d 681 (1968), *cert den*, 394 US 951 (1969) (suppression not required when police failed to give magistrate a list of items seized pursuant to a search warrant, as required by *former* ORS 141.130, now ORS 133.615(2)).

Similarly, the omission of particular seized items from a list given to the defendant should not result in suppression. ORS 136.432; *cf. State v. Ronniger*, 7 Or App 447, 456, 492 P2d 298 (1971) ("defects in the return of a search warrant are ministerial and are not grounds for invalidating the search, at least where defendant is not prejudiced").

> **NOTE:** Officers seizing property under the authority of a search warrant are not required by the Due Process Clause to provide the property owner with a notice of state law remedies for the return of the property. *West Covina v. Perkins*, 525 US 234, 119 S Ct 678, 142 L Ed 2d 636 (1999).

9. Returning the Warrant.

a. The Requirement.

ORS 133.615(2) provides:

> "An officer who has executed a search warrant shall, as soon as is reasonably possible and in no event later than the date specified in the warrant, return the

warrant to the issuing judge together with a signed list of things seized and setting forth the date and time of search."

The return and warrant are then filed with the original affidavit, completing the record of the issuance and execution of the search. ORS 133.615(3).

b. Time Frames.

ORS 133.565(2)(d) requires that the period of time within which the warrant must be returned to the court must be specified in the warrant and cannot exceed 5 days. However, the reference in ORS 133.565(2)(d) to ORS 133.565(3) (allowing judge to extend period of time within which the warrant must be executed) *may* allow the court to authorize additional time to return the warrant.

c. Failure to Comply with Return Requirements.

Defects in returning the warrant do not lead to suppression, unless the failure to comply results in the state being unable to prove a lawful search pursuant to a warrant. *State v. Drummond*, 137 Or App 168, 903 P2d 925 (1995) (failure to comply with ORS 133.615 and failure to call executing officer to testify at suppression hearing resulted in the state's inability to show that the warrant that was issued was the same warrant that the officer executed).

Generally, "a good search [under a warrant is] not made bad by the failure of the officers thereafter to make a prompt inventory and return." *State v. Cortman*, 251 Or 566, 571, 446 P2d 681 (1968), *cert den*, 394 US 951 (1969) (suppression not required when police failed to give magistrate a list of items seized pursuant to a search warrant, as required by *former* ORS 141.130, now ORS 133.615(2)). "[I]t is settled law that defects in the return of a search warrant are ministerial and are not grounds for invalidating the search, at least where defendant is not prejudiced thereby." *State v. Ronniger*, 7 Or App 447, 456, 492 P2d 298 (1971). Because the "return" requirement is only statutory, ORS 136.432 (no suppression in a criminal case for a statutory violation) also may be asserted as a basis for denying a motion for suppression.

10. Sealing the Warrant and Application.

a. Authority.

Until a warrant is executed, ORS 133.555(4) requires that the search warrant proceedings "shall be conducted with secrecy appropriate to the circumstances." Under this statute, the secrecy lasts only until the warrant is served. *State v. Callaghan*, 33 Or App 49, 576 P2d 14, *rev den*, 284 Or 1 (1978).

Oregon has no express statutory authority authorizing the sealing of search warrant materials and there are no reported Oregon cases on this issue. However, arguably, Oregon courts also have *inherent authority* to issue orders to seal search warrant materials. Oregon prosecutors have asked for and received orders sealing search warrants and search warrant affidavits.

NOTE: A sample motion and order to seal is attached as an appendix to this chapter.

Federal courts have held that trial courts have "inherent authority" to issue such orders in appropriate cases. In *Matter of Sealed Affidavit(s) to Search Warrants*, 600 F2d 1256 (9th Cir 1979), the Ninth Circuit rejected the argument that federal district courts have no authority to seal search warrant affidavits:

> "[C]ourts have inherent power, as an incident to their constitutional function, to control papers filed with the courts within certain constitutional and other limitations."

600 F2d at 1257. In a more recent case, the Ninth Circuit noted that the government "has always been able to restrict access to warrant materials by requesting a sealing order, which courts have freely granted upon a showing that a given criminal investigation requires secrecy." *Times Mirror Co. v. United States*, 873 F2d 1210, 1214 (9th Cir 1989).

A number of state courts have reached similar conclusions. *See, e.g.*, *People v. Hobbs*, 7 Cal 4th 948, 873 P2d 1246, 30 Cal Rptr 2d 651 (1994); *Matter of an Application for a Search Warrant*, 108 Misc 2d 440, 437 NYS 2d 635 (1981) (courts have inherent powers to seal warrant applications).

In addition to any inherent authority Oregon courts may have to seal search warrant materials, several Oregon statutes provide a basis for the entry of such orders by Oregon courts.

- ORS 135.873 (pretrial discovery): allows the trial court *at any time* to order that specified disclosures be denied, restricted, or deferred upon a showing of good cause.

- ORS 192.345(3) (public records law): provides that investigative information complied for criminal law purposes is exempt from disclosure "for so long as there is a clear need to delay disclosure in the course of a specific investigation, including the need to protect the complaining party or the victim." *Jensen v. Schiffman*, 24 Or App 11, 544 P2d 1048 (1976) (discussing ORS 192.501(3)); *see also Times Mirror Co.*, 873 F2d at 1215 (search warrant process "has always been considered an extension of the criminal investigation itself").

- OEC 510: allows the state to keep the identity of an informant confidential. *See People v. Hobbs*, 7 Cal 4th 948, 873 P2d 1246, 30 Cal Rptr 2d 651 (1994) (search warrant affidavits may be sealed to protect identity of confidential informants).

b. Constitutional Issues.

Courts have rejected claims that the sealing of search warrant materials violates the public's First Amendment rights or the common-law right of access. *Times Mirror Co.*, 873 F2d at 1221; *Matter of 2 Sealed Search Warrants*, 710 A2d 202 (Del 1997).

The constitutional issues are not as clear under the Oregon Constitution. Article I, section 10, of the Oregon Constitution, provides, in part, that "[n]o court shall be secret, but justice shall be administered openly and without purchase, completely and without delay." *But see Oregon Newspaper Publishers v. Dept. of Corrections*, 156 Or App 30, 966 P2d 819 (1998) (press not entitled, under Article I, section 10, to witness pre-execution procedures), *reversed on other grounds* 329 Or 115, 988 P2d 359 (1999).

The Washington Supreme Court, however, has concluded that its state constitution (which contains a provision similar to Article I, section 10, of the Oregon Constitution, *viz.*, "Justice in all cases shall be administered openly, and without unnecessary delay.") "does not provide for a right of access to a search warrant affidavit until charges relating to the investigation involving the affidavit are filed." The Washington court reasoned that if its state constitution "were held to apply to judicial proceedings in the investigatory process, the secrecy required by [Washington's grand jury statutes] could not withstand constitutional scrutiny." *Seattle Times Co. v. Eberharter*, 713 P2d at 715-17.

c. Suggested Procedure.

(1) Get the Order Before the Warrant is Filed.

Obtain the order before the search warrant materials are filed with the court. Seek the order to seal at the same time the judge is presented with the search warrant or get the court order after the warrant is signed but before it (and the supporting affidavit) is filed with the court.

(2) Demonstrate Good Cause for the Order.

As with any protective order, demonstrate good cause for the sealing. In particular, explain why the investigation, or particular material in the affidavit, needs to remain secret. Permissible reasons may include:

- The sealing of the affidavit is necessary to protect an informant or witness, *United States v. Mann*, 829 F2d 849, 853 (9th Cir 1987); *People v. Hobbs*, 873 P2d 1246; *Seattle Times Co. v. Eberharter*, 713 P2d at 711.

- The disclosure of the information in the affidavit will compromise an on-going investigation, *United States v. Mann*, 829 F2d at 853; *In the Matter of an Application for a Search Warrant*, 437 NYS2d at 637.

- The suspects under investigation "might destroy evidence, coordinate their stories before testifying [before the grand jury], or even flee the jurisdiction" if the information is disclosed. *Times Mirror Co.*, 873 F2d at 1215.

(3) Consider Sealing Only What You Need To Seal.

The warrant may not need to be sealed, particularly after it is served on the suspect location. If only portions of the affidavit need to be protected, seek an order sealing the confidential portions. For example, if only an informant's name needs to be protected, consider sealing the original affidavit and filing, as a public record, a redacted version of the affidavit. *See* *Seattle Times Co.*, 713 P2d at 711 (edited version of search warrant affidavit released to press).

(4) Set a Deadline.

Ask that the seal be effective only until criminal charges are filed or set a time period (such as 60 days) for the order to be in effect. *Times Mirror Co.*, 873 F2d at 1221 (indefinite seal approved, at least until indictment is returned). If you need more time, apply for an extension.

TELEPHONIC SEARCH WARRANT PROTOCOL/CHECKLIST

GENERAL:

___ Organize all materials before calling judge. You will need to proceed quickly and efficiently through the steps once the conversation is being recorded.

___ Have your criminal code book open to ORS 133.545-133.555.

___ Have capability to tape record ALL statements [judge and you].
* Consider using recorded dispatch center line.

COMPILE/ORGANIZE FACTS:

___ Crime(s) under investigation.

___ Probable Cause:
* Police officer training and experience * Facts and basis of knowledge
* Credibility of any named or unnamed informants
- Is informant involved or uninvolved in criminal activity?
- Any facts or circumstances suggesting informant not credible?
*Reliability of information * List facts you were able to corroborate

___ Places/Objects/Persons to search, and why:
* Premises (phys. descr.; address; county) * Persons (name; DOB; location)
* Vehicle (descr.; license #; location)
* *[If location out of county]* Explain how evid. relates to crime committed/triable in judge's county.

___ Evidence you want to search and seize, and why:
* Evidence/information of crime * Contraband, fruits of crime
* Property used to commit offense * Evidence Id'ing persons involved in crime
* Persons you have PC to arrest or who are unlawfully held

___ Facts supporting "Nightime Service" [execution after 10:00 p.m. or before 7:00 a.m.]:
* Disposition/destruction of evidence * Tactical problems

PREPARE SEARCH WARRANT:

___ Contact DA/DDA to advise of circumstances [*If* policy in your county].

___ Complete search warrant form with DA/DDA.
* ID premises/persons/vehicle *List crimes *Specify location (incl. county)
* Identify and list evidence being sought for seizure

___ Duplicate search warrant (photocopy or by hand).

[NOTE: You will have one original warrant (later signed by judge) and one "duplicate original" warrant (signed by officer after being authorized to do so by judge).]

PROCEDURE:

___ Telephone contact with judge [need ability to record all parties to call].
* Consider using recorded dispatch line *Consider conference call

___ Advise judge:
___ Your Name, Title and Office.
___ Conversation is being recorded (if using recorded dispatch line).
___ Who else is party to conversation [DA; additional officer].

___ Judge administers oath to officer/affiant/applicant:
* EVERYTHING officer says is part of affidavit/application.
* LEAVE TAPE RECORDER ON continually until entire contact is concluded.

___ Officer/Affiant recites facts (see above).
___ Ask Judge if Judge has any questions regarding facts.

___ Read proposed telephonic search warrant to judge.
___ "I am requesting authorization for the following search warrant . . ."

___ Ask judge to declare that "probable cause exists."

___ Have judge make special findings for:
___ "Nighttime" service (see above) [*Must authorize on face of warrant*].
___ Out-of-county warrants (see above).

___ Have judge authorize officer to sign judge's name to the warrant.
___ Indicate date and time on tape and write on warrant.
___ Sign duplicate original warrant. [See form; or "Judge _____ by officer [signature]."]

___ TURN OFF TAPE RECORDER.

EXECUTION OF SEARCH WARRANT:

___ Need copy of Duplicate Original Warrant (signed by officer) to leave at location.

___ Serve as you would conventional warrant.
* Prepare receipt at location. * Prepare "Return" to file with court.

RETURN:

___ Compare judge's authorization on the tape to the language of original warrant.

___ Deliver Duplicate Original Warrant, Original Warrant, original of the tape (copy of tape permissible if recorded dispatch line used) to ISSUING judge.

___ Ask judge to "certify" tape recording. Example:
I certify that the attached tape recording contains the sworn statement(s) supporting the Telephonic Search Warrant issued by me on [month] [day], 20__ at ___ o'clock __.m.
Dated this ___ day of _____, 20__.

_____
[Title of Issuing Magistrate]

___ Make sure judge signs and enters date and exact time of issuance on the original warrant.

___ File all documents, including your "Return," with court.

STATE OF OREGON)
COUNTY OF _____)

TELEPHONIC SEARCH WARRANT

ORS 133.545(6), 133.555(3)

TO ANY POLICE OFFICER OF THE STATE OF OREGON, GREETINGS:

1. This court finds probable cause to believe that the items described below may be found at the locations described below.

2. YOU ARE HEREBY AUTHORIZED TO SEARCH THE:

Premises, including: ___ dwelling, ___ building, ___ outbuildings, ___ other _____
_____
further described as _____
_____
Persons(s) of:_____
_____
Vehicle(s):_____
_____
All located at:_____
_____
in _____ County, Oregon,
For evidence of the crime(s) of:_____
_____
Including, but not limited to:_____
_____
_____
_____
_____
_____
and to seize the same.

Unless otherwise specified below, this warrant shall be executed between 7:00 am and 10:00 pm, within 5 days from the date of issuance. You are further directed to make proper return of this warrant within 5 days after execution.

___ This warrant may be executed anytime day or night.

ISSUED this ___ day of _____, 20__ at _____ o'clock _m.

_____ by:_____
Issuing Magistrate Officer

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MARION

IN THE MATTER OF THE APPLICATION FOR A SEARCH WARRANT.) No. _____)

MOTION FOR AN ORDER SEALING FILE

The State moves the Court for an order sealing the file herein because it contains an application for a search warrant which has not yet been served nor a return filed; that sensitive information which would be beneficial to a criminal defendant is contained therein; and that said file should be sealed until an appropriate order of the Court is entered for interested parties to examine the same.

DATED at Salem, Oregon, this ___ day of _____, 20__.

PAIGE CLARKSON
Marion County District Attorney

_____

Deputy District Attorney

ORDER SEALING FILE

Based on the motion of the District Attorney,

IT IS HEREBY ORDERED that this file be sealed until further order of the Court upon application of an interested person for examination of the same.

DATED at Salem, Oregon, this ___ day of _____, 20__.

_____
CIRCUIT COURT JUDGE

SEARCH WARRANT CHECKLIST

Affidavit

"Boilerplate"
Does affidavit narrowly tailor the affiant's expertise to particular case?

Case information

Include specific facts of case and the *significance* of those facts to the PC determination

Basis of knowledge:
Is it clear that the information is based on affiant's personal knowledge?
"I saw…." "Witness/officer told me…"

Information from informants:
Does affidavit address credibility of *each* informant?
Motive to lie/other reasons to question credibility (drug/alcohol use, etc.)
Impeachable criminal history
Previously provided accurate information
Voluntarily provided evidence supporting contentions

Does affidavit address reliability of information?
Cross-corroborated
Consistent with police knowledge/expertise
Was accuracy verified?

Descriptions

Is place to be searched described with particularity?
Describe a unique location? Include outbuildings/vehicles/yards/persons, if applicable

Is property [or electronic data] to be seized described with particularity?

Does it include a catchall: "… and any other evidence of [the crime]"? [DO NOT use "catchall" language in warrants for electronic data!!]

Probable Cause

Does affidavit establish probable cause that property in question is crime-related?

Does affidavit explain why property in question is likely to be at place to be searched?

Does affidavit explain why property is likely to *still* be there?

If applicable, does affidavit explain why nighttime service is justified?

If applicable, does affidavit explain why more than five days is needed for service?

Does request say to "search" *and* "seize"?

Warrant

Does place described in warrant exactly match place described in affidavit?

Does description of property/information sought in warrant exactly match description in affidavit?

Does request say to "search" *and* "seize"?

Does it include a nighttime indorsement?

Does it include an extension of the five-day service limit?

Warrant Service

Before executing:

Knock and announce

Give copy of warrant to the person to be searched/person in apparent control of the property
If unoccupied/no one in apparent control, affix copy of warrant to premises/vehicle

After executing:

Make list of things seized

Deliver receipt embodying list to the person from whom items seized/person in apparent control
If unoccupied/no one in apparent control, affix copy of receipt to premises/vehicle

Warrant Return

If not executed within time specified in warrant, return warrant to issuing judge immediately.

If executed within time limits on warrant, return warrant to issuing judge by the date specified in the warrant with:
Signed list of things seized
Date and time of the search

VI. ELECTRONIC SURVEILLANCE.

Scope: This chapter deals with the laws that authorize the State to conduct proactive surveillance through the means of specialized electronic equipment and techniques (e.g. wire taps, body wires, pen trap and trace devices, tracking devices, etc.) and that place limitations on the power of State to do so. This chapter does not attempt to cover all forms of electronic evidence and does not cover the search and seizure of already existing information stored electronically in a variety of forms to show prior activities. For more information regarding the search, seizure and analysis of personal electronic devices see Chapter V. Searches with Warrants, Section D. The Application and The Warrant. And for more information about internet accounts, cloud storage, social media accounts, and geofence warrants, in addition to Chapter V., see also Chapter I. Privacy Interests.

A. IMPACT OF FEDERAL LAW.

Congress began its regulation of electronic surveillance in 1934 with the passage of the Federal Communications Act of 1934, ch. 652, § 605, 48 Stat. 1103, 47 USC § 605. This initial legislation was passed in response to an opinion by the United States Supreme Court, which invited Congress to adopt statutory controls over wiretapping. *Olmstead v. United States*, 277 US 438, 465-66, 48 S Ct 564, 72 L Ed 944 (1928).

47 USC § 605 remained the only federal statute to regulate wiretapping until the passage of the Omnibus Crime Control and Safe Streets Act of 1968, PL 90-351, § 802, 82 Stat. 212. Because the specific provisions relating to wiretapping were contained in Title III of the 1968 Act, federal wiretap applications are often referred to as "Title III" requests.

The Electronic Communications Privacy Act of 1986 (ECPA), PL 99-508, 100 Stat. 1968, 18 USC § 2510 *et seq*., added another level of complexity to the rules regulating the use of electronic devices to detect or monitor criminal activity. In response to changing federal laws, the 1989 Oregon Legislature revised several aspects of Oregon electronic surveillance law. *See* 1989 Or Laws, chapters 1078, 983, and 639 (House Bills 2252, 2469, and 2191).

In 1994, the Communications Assistance for Law Enforcement Act (CALEA or "Digital Telephony" statute) modified slightly the provisions of the ECPA relating to cordless telephones, pen registers and trap-and-trace devices. In response to terrorist attacks occurring on September 11, 2001, Congress enacted the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, which, among other things, significantly enhanced the ability of federal law enforcement officers to acquire information regarding certain types of wire and electronic communications.

> **CAUTION:** Agencies involved in joint state-federal investigations should consult with the United States Attorney's office and the local District Attorney's office before intercepting communications pursuant to federal or state law. Legal and policy constraints may prevent or limit the use of intercepted communications in criminal prosecutions.

> **CONSENSUAL MONITORING:** Federal law allows the United States Attorney's office may authorize law enforcement officers to intercept face-to-face communications between the officer or a person who consents to the interception and a third party without a court order. *See* 18 USC § 2511(2)(c). This practice is known as consensual monitoring. State officers may be deputized as federal agents and, while acting in that capacity, intercept face-to-face communications pursuant to consensual monitoring. However, face-to-face communications intercepted without a

court order may be subject to suppression in state court under ORS 165.540 and 41.910. *See* section D(3)(g) of this Chapter for more discussion on Motions to Suppress.

1. Establishes Minimum Standards.

Like previous federal legislation regulating wiretaps, the ECPA of 1986 established areas of protection that states may not invade unless the state's law complies with the standards set forth in the federal act. *See* 18 USC § 2516(2), which allows specific persons to apply for wiretaps *only if* the federal procedures are followed. Although federal statutes have preempted the field of electronic surveillance, Congress did not intend to preempt more protective state requirements. State v. Williams, 94 Wash 2d 531, 617 P2d 1012 (1980); State v. Aurillo, 366 So2d 71 (Fla App D4 1978), *cert den* 376 So2d 76 (Fla S Ct 1979). A state may elect to provide more protection than the ECPA requires.

Electronic surveillance law is complicated further by the divergent standards in state and federal statutory and constitutional law. *Compare, e.g*., ORS 165.667 (An order supported by probable cause is required for pen registers and trap and trace device) and State v. Mituniewicz, 186 Or App 95, 62 P3d 417, *rev den*, 335 Or 578 (2003) (". . . an affidavit supporting a trap and trace order must permit a neutral and detached magistrate to conclude that probable cause justifies issuance of the order.") with 18 USC 3123 (Allowing the use of pen registers and trap-and-trace devices "if the court finds that the attorney for the Government has certified to the court that the information likely to be obtained by such installation and use is relevant to an ongoing criminal investigation."). The United States Supreme Court has held that neither device offends the Fourth Amendment. United States v. New York Telephone Co., 434 US 159, 166-67, 98 S Ct 364, 54 L Ed 2d 376 (1977) (pen registers); Smith v. Maryland, 442 US 735, 99 S Ct 2577, 61 L Ed 2d 220 (1979) (trap-and-trace devices).

2. Applicability to Oregon.

Section 111 of the ECPA provided that certain provisions of the act would become binding on the states on October 21, 1988. Since that date, the ECPA has served as an additional constraint on the use of electronic surveillance devices.

3. Suppression Considerations.

Although ORS 136.432 prohibits *judicially* created suppression rules for evidence obtained in violation of a statute, ORS 41.910(1)(a) and federal statutes specifically prohibit the use of electronic communications obtained in violation of state and federal law [*i.e.*, the provisions of 18 USC chapter 119].

ORS 41.910(1) provides that "[e]vidence of the contents of any wire or oral communication intercepted [i]n violation of ORS 165.540 shall not be admissible in any court of this state, except as evidence of unlawful interception." This more specific statute requiring the exclusion of evidence takes precedence over the more general provisions of ORS 136.432. State v. Thompson-Seed, 162 Or App 483, 986 P2d 732 (1999) (ORS 136.432 does not abrogate an express statutory provision requiring the exclusion of evidence obtained in violation of a specific statute); *see also* State v. Fleetwood, 331 Or 511, 16 P3d 503 (2000) (under the law in effect before ORS 136.432, body wire evidence obtained in violation of ORS 165.540 was subject to suppression under ORS 41.910).

ORS 133.735 and 133.736 provide a procedure for an "aggrieved person" to challenge the admissibility of an unlawfully intercepted communication or other evidence derived from the

communication. An "aggrieved person" is a person who was a party to the intercepted communication or who was identified in the order as a person whose communications are to be intercepted. State v. Klein, 352 Or 302, 283 P3d 350 (2012). These statutes require a motion to suppress be made before the trial, hearing or proceeding at which the evidence is to be offered. However, the motion may be made later if "there was no opportunity to make such motion or the person was not aware of the grounds of the motion." ORS 133.736(2). *See also* State v. Rodriguez, 115 Or App 281, 840 P2d 711 (1992) (under the statutes in effect before 2001 amendments [Or Laws 2001, ch 385], use of body wire could be challenged only by written motion to suppress, not by oral motion *in limine*). *See* later sections on specific types of electronic evidence.

Under the federal Supremacy Clause (US Const., Art. VI, cl. 2), the federal statutes, as the "supreme law of the land," predominate over state law and require suppression if the federal statute is violated. Two specific federal provisions are pertinent:

- **18 USC § 2515:** "Whenever any wire or oral communication has been intercepted, *no part of the contents* of such communication *and no evidence derived therefrom may be received in evidence* in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter [18 USC §§ 2510 *et seq*.]" (Emphasis added).

- **18 USC § 2518(9):** "The contents of any wire, oral, or electronic communication intercepted pursuant to this chapter [18 USC §§ 2510 *et seq*.] or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a Federal or State court unless each party, not less than ten days before the trial, hearing, or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved. This ten-day period may be waived by the judge if he finds that it was not possible to furnish the party with the above information ten days before the trial, hearing, or proceeding and that the party will not be prejudiced by the delay in receiving such information." [**NOTE:** Virtually identical language is contained in ORS 133.733.]

B. THE OREGON STATUTORY FRAMEWORK – DEFINITIONS.

The following statutory definitions are the cornerstone of the criminal prohibitions in ORS chapter 165, and also the authority of law enforcement officers to intercept particular classes of communications, which is mainly set forth in ORS chapter 133.

(1) **"Conversation"** [defined at ORS 165.535(1); criminalized at ORS 165.540(1)(c)];
(2) **"Telecommunication"** [defined at ORS 165.535(4); criminalized at ORS 165.540(1)(a)];
(3) **"Radio communication"** [defined at ORS 165.535(3); criminalized at ORS 165.540(1)(a)];
(4) **"Oral communication"** [defined at ORS 133.721(7); criminalized at ORS 165.543(1); (most oral communications also constitute "conversations")];
(5) **"Wire communication"** [defined at ORS 133.721(10); criminalized at ORS 165.543(1); (most wire communications are also "telecommunications")]; and
(6) **"Electronic communication"** [defined at ORS 133.721(3)].

"Telecommunication," as defined in ORS 165.535(4), includes traditional telephone calls in which connections are made by wire. ORS 165.540(1)(a) prohibits interception of "a telecommunication * * * to which [the interceptor] is not a participant * * * unless consent is given by at least one participant." A telephone call to a police dispatcher is a "telecommunication," rather than a "conversation," as those terms are defined in ORS 165.535(1) and (4). *City of Lake Oswego v. Mylander,* 84 Or App 15, 18, 733 P2d 455 (1987).

In 2001, the legislature amended ORS 133.721 to make clear that an overheard portion of a telephone or radio conversation is an "**oral communication**," and thus is subject to interception by a lawfully authorized body wire. That statutory change was made in response to *State v. Fleetwood*, 331 Or 511, 16 P3d 503 (2000), in which the Oregon Supreme Court had held that telephone conversations constituted "**wire communications**," even when overheard, and, as a result, no portion of the conversation could be intercepted without a wiretap order obtained under ORS 133.724. The amended definition of "oral communication" now includes:

> "An utterance by a person who is participating in a wire or electronic communication, if the utterance is audible to another person who, at the time the wire or electronic communication occurs, is in the immediate presence of the person participating in the communication."

In *State v. Jones*, 339 Or 438, 121 P3d 657 (2005), the Oregon Supreme Court found that the term **"conversation,"** which is defined in ORS 165.535 as "the transmission between two or more persons of an oral communication[,]" was not further defined by the term **"oral communication"** found in ORS 133.721. Essentially, the court found that the term **"conversation"** is broader than the term "**oral communication,"** which is limited to communications where the person making the communication exhibits an expectation that the communication is not subject to interception under circumstances justifying such an expectation. Practically speaking, then, a person need not have an expectation of privacy in a communication for it to be a conversation under ORS 165.535.

The ECPA defines a class of communications it calls "electronic communications." 18 USC § 2510(12). Electronic communications may be intercepted by state authorities only in conformity with the ECPA "and with the applicable State statute." 18 USC § 2516(2). Oregon law (adopted after the ECPA became effective on the states) also defines "electronic communications." ORS 133.721(3). **"Electronic communications"** include the use of a wide range of devices. Facsimile transmissions, voice and digital pagers, and radio communications, including cordless and cellular telephones, are all within the class of "electronic communications." Although the unlawful interception of "electronic communications," as defined in federal law, is a federal criminal offense under 18 USC § 2511(1)(a), (4) & (5), the unlawful interception of "electronic communications," as defined in state law, is not specifically identified as a separate crime. *See* ORS 165.540 (criminalizing various interceptions of "radio communications" and "telecommunications," but not specifically criminalizing the interception of "electronic" communications).

C. TELEPHONE CALLS AND OTHER ELECTRONIC COMMUNICATIONS.

1. "Wiretaps," a.k.a. "Electronic Communication Intercepts."

a. Oregon Statutory Requirements.

Oregon has adopted statutes authorizing interception of "electronic communications." *See* ORS 133.721, ORS 133.724, and ORS 133.729 to 133.739. The process for obtaining authorization for interception under ORS 133.724 is the same for all "electronic communications," whether the communication is by the traditional telephone call (wire, cordless or cellular) or otherwise (*e.g.*,

computer-data exchange by microwave transmission). Thus, it is more accurate to speak of "electronic-communication interception orders" than to refer to ORS 133.724 orders simply as "wiretaps."

A decision whether to seek such an order should take into account the following:

(1) Who May Apply for Order.

Although ORS 133.724(1) provides that a written application for an electronic-communication interception order may be "made upon oath or affirmation of the individual who is the district attorney, *or a deputy district attorney authorized by the district attorney* for the county in which the order is sought," the Oregon Supreme Court has ruled that such delegation violates 18 USC § 2516(2). State v. Harris, 369 Or 628, 509 P3d 83 (2022). 18 USC § 2516(2) specifically grants authority to apply for an electronic-communication interception order to "[t]he *principal prosecuting attorney* of any State, or the *principal prosecuting attorney* of any political subdivision thereof, if such attorney is authorized by a statute of that State[.]" (*emphasis added*). As a result, an application for an electronic-communication interception order must be made by the Attorney General or District Attorney.

NOTE: The *Harris* court distinguished the facts in that case from decisions from other jurisdictions that upheld applications where the principal prosecuting attorney was aware of and had approved the application but the act of *filing* the application was delegated. *Id.* at 641-642 (citing State v. Verdugo, 180 Ariz.180, 182-84, 883 P2d 417 (Ariz Ct App 1993) (upholding statute that permitted applications by "'such prosecuting attorneys as [the attorney general or the county attorney] may designate in writing,'" and noting that applications had been supported by affidavit of the county attorney); State v. Marine, 464 A2d 872, 877-78 (Del 1983) (wiretapping application that was personally authorized by state Attorney General by phone—but signed by a deputy—satisfied the legislative purpose, "the centralization of authorization authority in the Attorney General"); Commonwealth v. Vitello, 367 Mass 224, 231-32, 257-58, 327 NE 2d 819 (1975) (concluding that special designation under state statute comported with § 2516(2) as long as "the district attorney . . . [gave] full and fair review of the grounds asserted for seeking a wiretap warrant," did so "on a case by case basis only," and the authority was "specifically granted in writing"); State v. Peterson, 841 P2d 21, 22, 24 n 1 (Utah Ct. App. 1992) ("Here, the Utah County Attorney prepared a document specifically authorizing Deputy County Attorney Taylor to apply for the wiretap order [of a particular phone], thus fulfilling the requirements of both the federal and state acts"). In other words, cases in which it was clear that the decision to apply for an electronic-communication interception order rested with the principle prosecuting attorney, but the ministerial task of filing the application was delegated.

PRACTICAL SUGGESTION: The *Harris* opinion leaves room to argue that an authorized attorney can sign the application if the application makes clear on its face that the Attorney General or District Attorney has personally approved the application. However, the court did not expressly approve of this form of delegation, so we strongly advise to have the Attorney General or District Attorney personally sign the application whenever possible. If, in the rarest of circumstances, it is not possible, be sure to include details in the application that make clear that the Attorney General or District Attorney is aware of all the relevant facts, has personally approved the of the application, is unavailable to sign the application, and has authorized the applicant to file on the application on their behalf.

(2) Applicable Offenses.

ORS 133.724(1)(c) limits wiretaps and interception of electronic communications to the investigation of murder, kidnapping, arson, robbery, bribery, extortion, felonies involving danger to life, racketeering, drug felonies, prostitution, or conspiracy to commit any of the crimes mentioned.

(3) Showing Required.

ORS 133.724(1)(c) requires the affiant/applicant to set forth, and ORS 133.724(3) requires the court to find, "probable cause to believe" that the suspect "is committing, has committed or is about to commit" one of the crimes listed in ORS 133.724(1)(c). Additionally, the court must find that "there is probable cause for belief that the facilities from which, or the place where, the wire, electronic or oral communications to be intercepted are being used, or are about to be used, in connection with the commission of that crime are open to the public or are owned by, leased to, listed in the name of, or commonly used by the individual suspected." ORS 133.724(3)(d).

(4) Exploration of Other Investigative Procedures.

A court may not issue an interception order without first finding that "[n]ormal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or are likely to be too dangerous[.]" ORS 133.724(3)(c). The Oregon Supreme Court has explained that this provision requires that the applicant "catalogue the other things that have been done, as well as those that have not been done." *State v. Stockfleth*, 311 Or 40, 46, 804 P2d 471 (1991). However, "the purpose of 'other investigative techniques' is not to foreclose electronic surveillance until every other imaginable method of investigation has been unsuccessfully attempted, but simply to inform the issuing judge of the difficulties involved in the use of conventional techniques." *State v. Oslund*, 71 Or App 701, 706, 693 P2d 1354 (1984), citing *United States v. Martino*, 664 F2d 860, 868 (2d Cir 1981), *cert den*, 458 US 1110 (1982).

Federal Courts review whether an adequate showing of other investigative procedures has been made for an abuse of discretion. *United States v. Bennett*, 219 F3d 1117, 1121 (9th Cir 2000). The burden of showing "necessity" is not great, and the adequacy of such a showing is to be tested in a practical and commonsense fashion that does not hamper unduly the investigative powers of law enforcement agents. *United States v. Wilson*, 484 F.3d 267, 281 (4th Cir 2007). The 9th Circuit has consistently upheld finding of necessity where traditional investigative techniques lead only to the apprehension and prosecution of the main conspirators, but not to the apprehension and prosecution of other satellite conspirators. *United States v. Fernandez*, 388 F3d 1199, 1236 (9th Cir 2004).

See also:

State v. Stockfleth/Lassen, 311 Or 40, 48, 804 P2d 471 (1991). The fruit of a wiretap was suppressed because investigating authorities, at the time of their application for a wiretap, had not yet executed planned search warrants or made contact with "numerous witnesses."

State v. Oslund, 71 Or App 701, 693 P2d 1354, *rev den*, 299 Or 37 (1985). Because the critical witnesses for the state were vulnerable to impeachment without the buttressing effect of the wiretap evidence, this vulnerability was sufficient to support a finding that traditional investigative techniques had failed or were unlikely to succeed; wiretap order upheld.

(5) Minimization of Interception of Extraneous Information.

The interception order must provide that the officers executing it must do so "in such a way as to minimize the interception of communications not otherwise subject to interception[.]" ORS 133.724(5). However, the minimization requirement "does not forbid the interception of all non-relevant conversations, but rather instructs the agents are to conduct the surveillance in such a manner as to 'minimize' the interception of such conversations." Scott v. United States, 436 US 128, 139-140, 98 S Ct 1717, 56 L Ed 2d 168 (1978). The circumstances of the wiretap impact the scope of allowable interceptions. Interception of communications involving conspiracies has a broader allowable scope of interception. *Id*. at 140. Permissible interception is generally greater at the beginning of a case. "During the early stages of surveillance the agents may be forced to intercept all calls to establish categories of non-pertinent calls which will not be intercepted thereafter." *Id.* at 141. The determination as to whether minimization should have occurred requires an assessment of the reasonableness of the interceptions in light of the purpose of the wiretap and the totality of the circumstances. United States v. Gotti, 42 F Supp 2d 252, 268 (SDNY 1999). Courts have identified several measures which, if taken by the government, support a finding of compliance with the minimization requirement. These include: 1) maintenance of monitoring logs, 2) judicial supervision of the progress of the surveillance, 3) supervision by the prosecutor, 4) requiring all monitoring personnel to read the minimization instruction, court orders and applications, and the posting of these documents at the monitoring locations. *Id.* at 268, citing United States v. Santoro, 647 F Supp 153, 161 (EDNY 1986), *aff'd*, 880 F2d 1319 (2d Cir 1989). Intermittent monitoring techniques known as "spot checking" are also approved by the court when used with reasonableness. See United States v. Angiulo, 847 F2d 956, 979 (1st Cir 1988).

Interception applications and orders that omit minimization provisions are fatally defective and all intercepted communications can be suppressed. *See* State v. Pottle, 296 Or 274, 287, 677 P2d 1 (1984); United States v. George, 465 F2d 772 (6th Cir 1972), *cited in* State v. Tucker, 62 Or App 512, 662 P2d 345, *rev den*, 295 Or 618 (1983) (motion to suppress all intercepted telephone conversations allowed because, although wiretap order was proper, it was not given to the officers in charge of the interceptions). **NOTE:** George was limited to its facts by United States v. Baranek, 903 F2d 1068, 1070 (6th Cir 1990) (conversations overheard when lawfully wiretapped phone was inadvertently left off the hook and not in use were admissible under the "plain view" doctrine).

> **PRACTICAL SUGGESTION:** To comply with the minimization requirement, officers executing the order must be familiar with the terms of the order so that the limits of interception are clearly understood. In some circumstances it may be useful to use bilingual officers to monitor communications.

(6) Resource Considerations.

Proper monitoring of the execution of the order may require a substantial investment of resources. It may be helpful to consult with a police agency that has previously undertaken a wiretap to make an estimate of the commitment required.

Statistics compiled for wiretaps conducted in 2022 reveal that the average cost of a state or federal wiretap was $106,123. Administrative Office of the US Courts, WIRETAP REPORT FOR THE PERIOD JANUARY 1, 2022 TO DECEMBER 31, 2022 (available online at: www.uscourts.gov).

(7) Particularity of the Order and Strict Compliance.

"Because of the inherent dangers of abuse in the wiretap process, we hold that Oregon courts must require strict compliance with all statutory requirements leading to the issuance of a wiretap

order." *State v. Pottle*, 296 Or 274, 287, 677 P2d 1 (1984). For that reason, prosecutors and police officers should proceed with extreme caution.

> **NOTE: LEGISLATIVE HISTORY.** The history of the 1989 legislative changes (enacted after *Pottle*) strongly suggests that their primary purpose was to facilitate criminal investigations. Does this history provide a basis to argue that substantial compliance, rather than *Pottle*'s "strict compliance," is sufficient? *See* ORS 174.020(1).

As for strict compliance with the terms of the order, the Sixth Circuit has declined to rule that "any departure from the order of authorization will result, *ipso facto*, in suppression" of evidence. *United States v. Baranek*, 903 F2d 1068, 1070 n 4 (6th Cir 1990) (conversations overheard when lawfully wiretapped phone was inadvertently left off the hook and not in use were admissible under the "plain view" doctrine).

(8) Sealing, Custody, and Retention of Tapes.

ORS 133.729 and 18 USC § 2518(8)(a) each require that the tape from interceptions of electronic communications be "[i]mmediately * * * sealed." The United States Supreme Court noted in *United States v. Ojeda Rios*, 495 US 257, 110 S Ct 1845, 109 L Ed 2d 224 (1990), that delayed sealing, without a satisfactory explanation, holds the same potential for government tampering as no sealing at all. Accordingly, in *Ojeda Rios*, the contents of the tapes were suppressed. ORS 133.729 also provides that "[t]he presence of the seal * * *, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire, electronic or oral communication or evidence derived therefrom[.]" ORS 133.729 provides that the judge may order where the sealed tapes are to be kept.

> **PRACTICAL SUGGESTION:** Standard practice in your county will probably dictate the usual storage location. If the District Attorney or involved police agency has a need to maintain possession of the tapes in a manner inconsistent with the usual practice, an order should be obtained from the court.

ORS 133.729 authorizes the State Court Administrator to determine the minimum retention period for the tapes. Under the rule presently in effect, sealed tapes must be maintained a minimum of 10 years from the date of the order (longer if ordered by the court), and a court order is required before destruction. State Court Administrator, RECORDS RETENTION, DISPOSITION AND REFERENCE MANUAL, Section 2.510.

(9) Disclosure of Contents.

ORS 133.737 generally restricts the disclosure of communications intercepted under ORS 133.724 to disclosures made to "another investigative or law enforcement officer" as "appropriate to the proper performance of * * * official duties" and to disclosures during sworn testimony. These disclosures may occur without further order of the court. However, before an officer may testify about intercepted "communications relating to crimes other than those specified in the order," the officer must first apply for and obtain authorization or approval by a circuit judge. The judge must first find that "the contents were * * * intercepted in accordance with the provisions of ORS 133.724." ORS 133.737(5). *See also* ORS 133.733.

ORS 133.733 also sets forth specific prerequisites for the introduction or disclosure of wiretap evidence at a trial, hearing, or other proceeding. No fewer than 10 days before the trial, hearing or other proceeding, each party must be provided with copies of the court order and

application under which the interception was authorized or approved. ORS 133.733. This statutory language echoes the federal requirement set forth in 18 USC § 2518(9), which is set forth in this chapter (Suppression Considerations).

b. Federal Statutory Requirements.

The federal requirements for a "wiretap" or "Title III" application are set forth at 18 USC § 2518(1). These requirements are virtually identical to the Oregon requirements and include:

- Applicant's authority to apply;
- Identity of person making application;
- Identity of officer authorizing application;
- Facts justifying the request ("probable cause for belief");
- Details of the offense being investigated;
- Nature and location of place or facilities from which surveillance will be conducted;
- Type of communication to be intercepted;
- Identity of person to be overheard;
- Inadequacy of alternative investigative procedures;
- Period for which authorization is sought (maximum 30 days); and
- Details concerning results of prior orders, if any.

c. Federal Reporting Requirements.

18 USC § 2519(2) requires that specific information on wiretaps be reported to the Administrative Office of the United States Courts by the "principal prosecuting attorney" for any political subdivision of a state that has a statute authorizing electronic-communications intercepts. The reports are due by January 31 of each year for the orders and extensions obtained in the preceding year. PDF fillable forms for state and federal wiretap orders can be found at:

State/local wiretap forms: www.uscourts.gov/forms/other-forms/report-application andor-order-authorizing-interception-communications-state-county-local

Federal wiretap forms: www.uscourts.gov/forms/other-forms/report-application-andor-order-authorizing-interception-communications-federal

d. Suppression Issues.

ORS 133.735 provides that the contents of a wire or electronic communication intercepted pursuant to ORS 133.724, or evidence derived therefrom, is subject to a motion to suppress on the grounds that:

(a) The communication was unlawfully intercepted;

(b) The order of authorization or approval under which it was intercepted is insufficient on its face; or

(c) The interception was not made in conformity with the order of authorization or approval.

Although ORS 136.432 requires admission of evidence that was obtained in violation of a statute, electronic surveillance law is complicated by ORS 41.910(1) and by federal statutes that specifically prohibit the use of electronic communications obtained in violation of federal law (*i.e.*, the provisions of 18 USC ch. 119).

ORS 41.910(1) provides that "[e]vidence of the contents of any wire or oral communication intercepted [i]n violation of ORS 165.540 shall not be admissible in any court of this state, except as evidence of unlawful interception." A "wiretap," or interception of an electronic communication, is unlawful under ORS 165.540(1)(a) "[e]xcept as provided in ORS 133.724." The more specific provisions of ORS 41.910 and ORS 165.540(1)(a) (making the unauthorized interception criminal) take precedence over the more general provisions of ORS 136.432. *State v. Thompson-Seed*, 162 Or App 483, 986 P2d 732 (1999) (ORS 136.432 does not abrogate an express statutory provision requiring the exclusion of evidence obtained in violation of a specific statute); *see also State v. Fleetwood*, 331 Or 511, 16 P3d 503 (2000) (under the law in effect before ORS 136.432, body wire evidence obtained in violation of ORS 165.540 was subject to suppression under ORS 41.910).

Applying the federal Supremacy Clause (US Const., Art. VI, cl. 2), the federal statutes, as the "supreme law of the land," predominate over state law and require suppression if the federal statute is violated. Because federal wiretap requirements are virtually identical to state law, a violation of state statutory provisions, in most cases, will result in suppression of the evidence under federal law.

> **NOTE**: Compliance with ORS 133.724 in the interception of electronic communications will shield the interceptor from federal criminal and civil liability. 18 USC § 2516(2).

See further discussion of suppression issues in this chapter under the heading "Suppression Considerations."

2. Recording Phone Calls with One Party's Consent.

Oregon Law.

A telecommunication may be intercepted (*i.e.*, recorded) if at least one party thereto consents to the interception. ORS 165.540(1)(a); *State v. Lissy,* 304 Or 455, 463, 747 P2d 345 (1987). *See also State v. Underwood*, 293 Or 389, 648 P2d 847 (1981) (no "interception" occurs when one party records the conversation).

"Consent" means voluntary consent. The test for voluntariness in this context is essentially the same as the test that is used to determine the voluntariness of a consent to search — *i.e.,* whether, under the totality of the circumstances, the consent was given by the party's free will or was the result of express or implied coercion. *State v. Walton,* 311 Or 223, 237-38, 809 P2d 81 (1991) (foundation for voluntariness held adequate because there were no threats, promises or coercion and, although the informant knew of a reward, his motivation to be an informant was to help a friend); *State v. Dimeo,* 304 Or 469, 474, 747 P2d 353 (1987) (informant's consent not voluntary where he was subjected to a coercive threat/promise and his request for counsel was ignored). "Voluntariness of consent must be shown by a preponderance of the evidence." *State v. Walton*, 311 Or at 238, relying on *State v. Stevens,* 311 Or 119, 137, 806 P2d 92 (1991) (discussing, under Article I, sections 9 and 12, the voluntariness of defendant's consent to search and incriminating statements to the police).

The propriety of an interception is governed by the law of the state where the listening or recording activity took place. In *State v. Fleming,* 91 Or App 394, 755 P2d 725, *rev den*, 306 Or 661 (1988), the court held that a telephone call from Oregon to Washington (validly recorded pursuant to one party's consent under Oregon law) was admissible, notwithstanding the fact that, in Washington, all parties must consent.

Federal Law.

Federal law provides a general exception under 18 USC § 2510 *et seq.* (ch. 119) for an interception where "one of the parties to the communication has given prior consent to such interception." 18 USC § 2511(2)(c).

3. Interceptions at Jails, Prisons and Police Stations.

ORS 165.540(2)(a) provides: "The prohibitions of subsections (1)(a), (b) and (c) of this section do not apply to: * * * (B) Public officials in charge of and at jails, police premises, sheriffs' offices, Department of Corrections institutions and other penal or correctional institutions, except as to communications or conversations between an attorney and the client of the attorney." ORS 41.910 provides that

> "Evidence of the contents of any wire or oral communication intercepted:
>
> * * * * *
>
> "(2) Under ORS 165.540(2)(a) shall not be admissible in any court of this state unless:
>
> "(a) The communication was intercepted by a public official in charge of and at [the authorized location]; and
>
> "(b) The participant in the communication, against whom the evidence is being offered, had actual notice that the communication was being monitored or recorded."

Thus, a correctional facility or police agency lawfully may intercept and record unprivileged conversations involving a participant who uses a facility phone. But such recordings are admissible as evidence *only if* the participant against whom the evidence of the communication is being offered had "actual notice" of the monitoring. ORS 165.540(2)(a); State v. Jones, 339 Or 438, 121 P3d 657 (2005). The statute does not further describe what sort of notice is necessary, but presumably a posted notice will suffice, at least for the participant inside the facility who can see the notice.

4. Interception Within the Home by a Family Member.

Oregon Law.

The prohibitions in ORS 165.540(1) against intercepting conversations and radio and telephone communications "do not apply to subscribers or members of their family who perform the acts prohibited * * * in their homes." ORS 165.540(3). This exception does not, by its terms, provide an exclusion from the criminal liability that is separately defined by ORS 165.543. However, because an interception conducted by a resident in accordance with ORS 165.540(3) does not violate ORS 165.540, the intercepted communication is not subject to suppression under ORS 41.910, which is specifically addressed to violations of ORS 165.540. Nor would this evidence be subject to suppression under any other specific Oregon statute. Therefore, even if officers of the state encouraged such an interception by a private citizen, Oregon statutes would not preclude admission. *See* ORS 136.432.

> **NOTE**: ORS 165.540(3) does not define "members of their family" or purport to limit the exception only to spousal or parent/child relationships. Presumably, the exception extends to any persons who share a phone in a single

"home" while living in a familial relationship. That would include extended families and relatives sharing a household.

Federal Law.

The general prohibition in 18 USC § 2511 against intercepting any wire, oral or electronic communication does not apply to a parent who, while acting for the well-being of his or her child, and without police encouragement, intercepts or tape records the telephone conversations of the child in the family home. This exception applies even to the recording of an *adult* son or daughter. State v. Capell, 156 Or App 582, 586, 966 P2d 232 (1998), *rev den*, 328 Or 418 (1999). This is commonly referred to in federal case law as the "domestic telephone extension exception." State v. Capell, 156 Or App at 585; *see also* State v. Kayfes, 213 Or App 543, 162 P3d 308 (2007) (rejecting defendant's argument that Capell was wrongly decided).

In any event, the exclusionary remedy provided by 18 USC § 2515 does not exclude evidence obtained without unlawful conduct by the police. State v. Capell, 156 Or App at 587. [**NOTE:** In Capell, the defendant did not challenge this evidence under Oregon law.]

5. Cordless and Cellular Telephones.

Cordless and cellular telephone communications are carried in part by radio and in part by wire. Consequently, both types of communications are "electronic communications" under ORS 133.721(3) and 18 USC § 2511(1)(a) and may be intercepted only pursuant to a court order under ORS 133.724.

a. Oregon Law.

In State v. Carston, 323 Or 75, 82, 913 P2d 709 (1996), the Oregon Supreme Court held that the interception of a cordless telephone conversation by a private citizen violated ORS 165.540(1)(a). The court rejected the state's argument that cordless telephone transmissions fall within the statutory exception in ORS 165.540(4) for radio broadcasts "transmitted for the use of the general public." State v. Carston, 323 Or at 85. The court also noted that the police had violated ORS 165.540(1)(d) and (e) by obtaining, using, and relying on the information gathered by the private citizen in violation of ORS 165.540(1)(a). Carston, 323 Or at 82, 85. The reasoning of the Oregon Supreme Court in Carston would seem equally applicable to cell-phone communications.

The court in Carston suggested that a person who unintentionally or inadvertently intercepts the radio portion of a cordless phone call is not necessarily guilty of a crime because the act of interception may have been done without criminal intent. Carston, 323 Or at 85 fn 6. But Carston makes it clear that a person who then passes such information to the police, or a police officer or deputy district attorney who uses or divulges such information, has done so intentionally and in violation of ORS 165.540(1)(e).

Although not addressed by the court in Carston, an often-overlooked Oregon statute may also be applied in the context of communications through cellular and cordless telephones. ORS 165.543 makes it unlawful to "intercept" or "attempt to intercept" any "wire or oral communication where such person is not a party to the communication and where none of the parties to the communication has given prior consent to the interception[.]" ORS 165.543(1). "Wire communication" is defined in ORS 133.721(10) to mean "any communication made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable or other like connection[.]"

In short, communications through cordless and cellular telephones may be intercepted only after obtaining an interception order pursuant to ORS 133.724.

See discussion of procedures for obtaining and executing an order under ORS 133.724, in this chapter (Oregon Statutory Requirements, at section C(1)(a)).

b. Federal Law.

Although the interception of *cellular* telephone communications was clearly unlawful under the general provisions of the ECPA, the 1986 law specifically exempted "the radio portion of a cordless telephone that is transmitted between the cordless handset and the base unit." *Former* 18 USC § 2510(1) and (12)(A). With the passage of the CALEA on October 25, 1994, however, the exception for cordless phones was repealed. The federal statute now imposes the same criminal penalties for the unauthorized, intentional interception of cordless telephone communications that it imposes for the interception of cellular telephone communications.

18 USC § 2515 (set forth verbatim in this chapter under the heading "Suppression Considerations") prohibits any use of an intentionally intercepted electronic communication and § 2511 imposes criminal sanctions for such conduct.

c. Consent.

If one party to the communication has consented to its interception, the interception is lawful, and both state and federal law permit evidentiary use of the intercepted communication. 18 USC § 2511(2)(c) and (d); ORS 165.540(1)(a). *See* further discussion in this chapter (Recording Phone Calls with One Party's Consent).

d. Inadvertent Interceptions — Suppression Issues.

18 USC § 2515 prohibits the use in any proceeding of electronic communications intercepted in violation of federal law [18 USC ch. 119]. *See* the discussion on pp. 341 and 348 of this chapter. The definition of "intercept" in federal law does *not* distinguish between inadvertent and intentional actions. Therefore, although the criminal sanctions of 18 USC § 2511 are limited to interceptions that were "intentional," the § 2515 exclusionary rule refers more generally to an "interception" and hence is *not* limited to evidence that is the product of an intentional act. Consequently, evidence that is obtained through an inadvertent interception of an electronic communication is suppressible in Oregon courts under 18 USC § 2515.

Similarly, ORS 41.910(1) provides: "Evidence of the contents of any wire or oral communication intercepted: In violation of ORS 165.540 shall not be admissible in any court of this state, except as evidence of unlawful interception." *See also* State v. Thompson-Seed, 162 Or App 483, 986 P2d 732 (1999) (ORS 136.432 does not abrogate an express statutory provision requiring the exclusion of evidence obtained in violation of a specific statute).

See further discussion of this issue in this chapter, (Suppression Considerations).

6. Pen Registers and Trap-and-Trace Devices.

a. Oregon Law.

A "pen register" records telephone numbers that are dialed *from* a targeted phone, ORS 165.657(2), and a "trap and trace device" records telephone numbers that are traced *to* phones that

dial into a targeted telephone, ORS 165.657(4). State v. Mituniewicz, 186 Or App 95, 62 P3d 417, *rev den*, 335 Or 578 (2003).

Any police officer may apply to a circuit court for an order by submitting an affidavit that sets forth probable cause to believe that the use of the device will yield evidence relevant to specified crimes. ORS 165.663; State v. Mituniewicz, 186 Or App at 103. The use of the devices is limited to felony drug offenses, murder, kidnapping, arson, robbery, bribery, extortion, racketeering with at least one felony predicate, and other felonies "dangerous to life." ORS 165.663(3); ORS 165.667(1). No law-enforcement agency may disclose the product of the investigation except in the performance of a law-enforcement function or as otherwise provided by law or court order. ORS 165.673.

An application for a pen register or trap-and-trace device is reviewed in the same manner as an application for a search warrant: "Consistently with ORS 133.545, an affidavit supporting a trap and trace order must permit a neutral and detached magistrate to conclude that probable cause justifies issuance of the order." State v. Mituniewicz, 186 Or App at 103-04. If the information in the application was too stale and otherwise failed to establish probable cause, the order will be invalidated. State v. Mituniewicz, 186 Or App at 106-07.

b. Federal Limitations.

In 2001, the USA PATRIOT ACT expanded the federal definition of pen registers and trap-and-trace devices to include devices that record or decode "dialing, routing, addressing, or signaling information" that is "transmitted by an instrument or facility from which a wire or electronic communication is transmitted." 18 USC § 3127(3). Neither device offends the Fourth Amendment. United States v. New York Telephone Co., 434 US 159, 166-67, 98 S Ct 364, 54 L Ed 2d 376 (1977) (pen registers); Smith v. Maryland, 442 US 735, 99 S Ct 2577, 61 L Ed 2d 220 (1979) (trap-and-trace devices). Federal-law provisions governing use of trap-and-trace devices and pen registers are set forth at 18 USC §§ 3121-3127. Under 18 USC 3123(a)(1), a court may issue an order permitting such a device to be installed "if the court finds that the attorney for the Government has certified to the court that the information likely to be obtained by such installation and use is relevant to an ongoing criminal investigation." A state court judge may issue an order permitting the use of such devices only if the court "is authorized by the law of that state" to do so. 18 USC § 3127(2)(B). ORS 165.657 to 165.673 were enacted in 1989 to provide such authority.

Since passage of the Communications Assistance for Law Enforcement Act (CALEA) in 1994, federal law has limited the extent of information that a law-enforcement officer may obtain lawfully from a pen register or trap-and-trace device. The Act states that "call-identifying information" shall not include any information that may disclose the physical location of the subscriber (except to the extent that the location may be determined from the telephone number). 47 USC § 1002(a)(2). Thus, a law-enforcement officer may not take advantage of the "caller ID" to immediately learn the physical address of the caller and the recipient when a call is placed.

Under 18 USC § 3125(a), a pen register or trap-and-trace device may be placed without a prior court order if "an emergency situation exists," there are adequate grounds for obtaining an order, and the government actually obtains an order within 48 hours. Although that statute also allows "the principal prosecuting attorney of any State or subdivision thereof acting pursuant to a statute of that State," to place such a device without a prior court order, Oregon statutes do not authorize that to be done.

With respect to "pen registers," Congress enacted the following additional limitation:

> "A government agency authorized to install and use a pen register or trap and trace device under this chapter or under State law shall use technology reasonably available to it that restricts the recording or decoding of electronic or other impulses to the dialing, routing, addressing, and signaling information utilized in the processing and transmitting of wire or electronic communications so as not to include the contents of any wire or electronic communications."

18 USC § 3121(c) (as amended in 2001 by the USA PATRIOT Act). Before executing an order for a pen register, officers should make an effort to determine whether this kind of technology is available.

c. Suppression Issues.

No specific Oregon statutory provision requires exclusion of pen-register or trap-and-trace information obtained in violation of Oregon law. Consequently, the admissibility of such evidence may be determined by the provisions of ORS 136.432, which prohibits suppression of evidence in a criminal case for a mere statutory violation. State v. Mituniewicz, 186 Or App 95, 62 P3d 417, *rev den*, 335 Or 578 (2003) (noting issue but not resolving whether invalid trap-and-trace order requires suppression as a violation of Article I, section 9).

Moreover, there is no specific provision in federal law requiring suppression of pen register or trap-and-trace information that is obtained in violation of the federal statute. This is in contrast to 18 USC § 2515, which requires suppression of communications intercepted in violation of the provisions of 18 USC chapter 119. *See* discussion in this chapter (Suppression Considerations) and (Inadvertent Interceptions — Suppression Issues).

However, there are criminal penalties imposed under federal law for installing or using a pen register or trap-and-trace device without first obtaining a court order. 18 USC § 3121(d).

7. Police Radio Transmissions.

Oregon Law.

Police radio transmissions are "radio" communications, ORS 165.535(3), and "electronic" communications, ORS 133.721(3). Therefore, unless a statutory exception applies, law-enforcement radio transmissions may be intercepted only with consent of a party under ORS 165.540(1)(a) or pursuant to a court order issued under ORS 133.724. ORS 165.540(1)(a).

One such exception is in ORS 165.540(7)(b), which exempts from the prohibition on interception "a radio communication which is transmitted by any governmental, law enforcement, civil defense or public safety communications system, including police and fire, readily accessible to the general public provided that the interception is not for purposes of illegal activity."

Federal Law.

Police radio transmissions fit within the definition of an "electronic" communication under federal law. 18 USC § 2510(12). But it is not unlawful to intercept electronic communications that are "readily accessible to the general public," § 2511(2)(g)(i), or to intercept any radio communication that "is transmitted * * * by any governmental, law enforcement * * * communications system, including police and fire, readily accessible to the general public." 18 USC § 2511(2)(g)(ii)(II).

8. Sensory Enhancement with Technological Devices,

Police use of technological enhancements such as airplanes, video cameras, thermal detection devices, flashlights, and trained dogs is discussed in Chapter I, Privacy Interests.

D. ORAL COMMUNICATIONS.

1. Non-Surreptitious Recordings.

a. Recording with Notice to Participants.

Any oral conversation may be recorded without a court order if all participants in the conversation are "specifically informed" that their conversation is being recorded or otherwise "obtained" by some device. ORS 165.540(1)(c).

ORS 165.540(1)(c) does not require any particular form of warning, nor does it require that the person either understand the warning or expressly consent. *State v. Haase*, 134 Or App 416, 420 n 4, 895 P2d 813 (1995), *rev den* 322 Or 612 (1996). As long as the warning reasonably imparts the statutory information, it is sufficient. *State v. Haase*, 134 Or App at 419-20 (telling DUII suspect that "this conversation is being monitored by camera and by audio means" sufficient to comply with statute). *See also State v. Mathews*, 55 Or App 708, 639 P2d 705 (1982) (statute does not require that defendant consent to recording or that, at all times, he be subjectively aware that his conversation is being recorded; officer not required to turn off recorder at defendant's request). Moreover, once a party to a conversation informs the other participants to the conversation that the conversation is being recorded or obtained, then any person may record or obtain the conversation. *State v. Neff*, 246 Or App 186, 265 P3d 62 (2011). In *Neff*, the court found that defendant lawfully recorded his conversation with a police officer during a traffic stop, because even though defendant did not inform the officer that he was recording their conversation, the officer informed defendant that *he* was recording the conversation, and thus was "informed" that the conversation was being recorded. *Id.*

ORS 165.540(1)(c) requires "an unequivocal warning" that the conversation is being "obtained"; it is not sufficient that a party to a conversation, although not specifically warned, "reasonably should have known that [a] recording was being made." *State v. Bichsel*, 101 Or App 257, 790 P2d 1142 (1990); *but see* ORS 165.540(6)(a)(C) (providing that ORS 165.540(1)(c) is not violated if a person records oral communications at a private meeting or conference with an *unconcealed* recording device and "all others involved knew or reasonably should have known that the recording was being made").

ORS 165.540(1)(c) prohibits "the use of a device, contrivance, machine or apparatus to intercept a conversation in any form." But simply transcribing a conversation first perceived by one's auditory senses does not constitute intercepting or obtaining a conversation within the meaning of this statute. *State v. Knobel*, 97 Or App 559, 562-63, 777 P2d 985 (1989), *rev den*, 309 Or 522 (1990). *See also State v. Wischnofske*, 129 Or App 231, 234, 878 P2d 1130 (1994) (holding that the statements of a defendant arrested for DUII were not "oral communications," as defined in ORS 133.721, "because defendant did not have a justifiable expectation that his statements made out loud to himself would not be intercepted after he was arrested and seated in a patrol car").

b. Recording at Jails, Prisons and Police Stations.

ORS 165.540(2)(a) provides that the "prohibitions of subsections (1)(a), (b) and (c) * * * do not apply to public officials in charge of and at jails, police premises, sheriffs' offices, Department of Corrections institutions and other penal or correctional institutions, except as to communications or

conversations between an attorney and the client of the attorney." However, communications obtained ORS 41.910 provides that

> "Evidence of the contents of any wire or oral communication intercepted:
>
> * * * * *
>
> "(2) Under ORS 165.540(2)(a) shall not be admissible in any court of this state unless:
>
> "(a) The communication was intercepted by a public official in charge of and at [the authorized location]; and
>
> "(b) The participant in the communication, against whom the evidence is being offered, had actual notice that the communication was being monitored or recorded."

Thus, a correctional facility or police agency lawfully may intercept and record unprivileged conversations between persons within a listed facility. Such recordings are admissible as evidence *if* the participant against whom the communication is being offered had "actual notice" of the monitoring. ORS 165.540(2)(a), 41.910; *see* State v. Jones, 339 Or 438, 121 P3d 657 (2005).

For a discussion of recordings made during interviews conducted pursuant to ORS 133.400, *see* section D(4) of this Chapter.

c. Openly Recording Meetings and Classes.

The prohibition in ORS 165.540(1)(c) against obtaining a conversation without specifically informing all participants does not prohibit a person from intercepting or attempting to intercept, oral communications occurring at public or semipublic meetings, or at regularly scheduled classes or educational activities provided that the interception is done with an *unconcealed recording device*. This exception also permits recording of a private meeting or conference "if all others involved knew or reasonably should have known that the recording was being made." ORS 165.540(6). No court order or other exception to the court-order requirement is necessary to authorize recording under the circumstances specified in these exceptions.

d. Openly Recording On-Duty Police Officers.

In 2015, the legislature created a new exception to the prohibition contained in ORS 165.540(1)(c) authorizing a person to record a conversation to which a law enforcement officer is a participant if:

- The recording is made while the officer is performing official duties;
- The recording is made openly and in plain view of the participants in the conversation;
- The conversation being recorded is audible to the person by normal unaided hearing; and
- The person is in a place where the person lawfully may be.

ORS 165.540(5)(b) explicitly states that the exception does not authorize the person to interfere with the officer or engage in criminal trespass to obtain the recording.

NOTE: The Court of Appeals noted, without holding, that "It seems unlikely to us that the legislature intended ORS 165.540(5)(b) to apply to recordings . . . *by* a law enforcement officer *of* a member of the public . . . the issue [ORS 165.540(5)(b)] aimed to address was the recording *of* law enforcement officers *by* members of the public when the member of the public, for whatever reason does not 'specifically inform' the officer of the recording." State v. Sells, 339 Or App 299, 305-306, 568 P3d 1011 (2025) (*emphasis in original*) (The record was insufficient to support a finding that the recording made by the officer done "openly and in plain view.")

2. Surreptitious Interception by a Non-Party – "Bugging."

ORS 133.724, which authorizes the issuance of a court order for the interception of a "wire" or "electronic" communication (*i.e.,* a wiretap or "electronic communication intercept"), also provides that such orders are available for the interception of "oral" communications. For a discussion of the requirements and procedures for obtaining an order to intercept oral communications under ORS 133.724, *i.e.*, to surreptitiously "bug" a conversation, *see* discussion in this chapter, ("Wiretaps," aka "Electronic Communication Intercepts").

3. Surreptitious Interception by a Party — Body Wires.

Oregon Law.

a. Person Using Body Wire Must Be a "Party."

A law-enforcement officer is authorized to "intercept" a particular kind of oral communication without obtaining the form of order specified in the "wiretap" statute (ORS 133.724) — *i.e.,* "an oral communication to which the officer or someone under the direct supervision of the officer is a party[.]" ORS 133.726(1). "[A] person is a party to an oral communication if the oral communication is made in the person's immediate presence and is audible to the person regardless of whether the communication is specifically directed to the person." ORS 133.726(2). Interceptions of this type of oral communication, under the authority of ORS 133.726, are described throughout this chapter as "body wires."

When neither a law-enforcement officer nor a person under an officer's direct supervision is a party to an oral communication, an officer may not surreptitiously intercept the communication without first obtaining a court order under ORS 133.724. For a discussion of the requirements and procedures for obtaining an order to intercept oral communications under ORS 133.724, *i.e.*, to surreptitiously "bug" a conversation, *see* discussion in this chapter, ("Wiretaps," aka "Electronic Communication Intercepts").

b. General Rule – An Order is Required.

ORS 165.540(1)(c) prohibits any person from surreptitiously recording or otherwise "obtaining" oral communications, including those in which the person obtaining the communication is a party, unless an order is obtained under ORS 133.726 or the communication fits exceptions set forth in ORS 133.726 or ORS 165.540.

ORS 133.726 describes the appropriate form for the application and the order.

PRACTICAL SUGGESTION: A sample application and order prepared by the Criminal Justice Division of the Department of Justice are attached as appendices to this chapter.

ORS 133.726(7), which is discussed below, contains two exceptions to the general rule requiring a court order.

c. Body Wire Applications and Orders.

Recording is permitted if the offense being investigated is a felony or the misdemeanor offense of prostitution. ORS 133.726(3)(b). A series of misdemeanors that forms a pattern of racketeering activity engaged in by a criminal enterprise may constitute criminal racketeering (RICO), a class A felony. ORS 166.720(5)(a).

ORS 133.726(5)(a) requires the court to find that there "is probable cause to believe" that a person whose conversation is to be recorded "is engaged in committing, has committed or is about to commit" the crime of prostitution or a felony. ORS 133.726(5)(a). The court must also find that "[t]here is probable cause to believe that the oral communication to be obtained will contain evidence concerning that crime." ORS 133.726(5)(b).

d. Exceptions to the General Rule – Order Not Required.

A law-enforcement officer does not need to obtain a court order to surreptitiously intercept an "oral communication to which the officer or someone under the direct supervision of the officer is a party if the oral communication is made by a person whom the officer has probable cause to believe has committed, is engaged in committing or is about to commit * * * [a] crime punishable as a felony under ORS 475.992 or 475.995 [drug offenses] or as a misdemeanor under ORS 167.007 [prostitution]." ORS 133.726(7). Additionally, no order is required if the "the oral communication is made by a person whom the officer has probable cause to believe has committed, is engaged in committing or is about to commit * * * [a]ny * * * crime punishable as a felony if the circumstances at the time the oral communication is intercepted are of such exigency that it would be unreasonable to obtain an order under ORS 133.724 or [ORS 133.726]." ORS 133.726(7).

> **PRACTICAL SUGGESTION:** The constitutional validity of the police use of a body-wire device without a prior court order, under the authority granted by ORS 133.726(7), has yet to be *finally* determined. *See* discussion of Oregon Constitutional Issues in this chapter. Until this issue is decided by the Supreme Court, the safest course is to seek a body-wire order unless exigent circumstances require going forward without one. An officer who chooses to rely on the drug-or-prostitution exception to the general rule should clearly articulate the probable cause in his or her reports. The cautious approach is to assume that "probable cause" will be measured in the same way it is measured for search warrants — including Oregon's restrictive rules for evaluating anonymous hearsay information. The officer should effectively write a body wire "affidavit" in his or her reports.

See also below regarding Recording During a Felony that Endangers Human Life.

e. Requirements for Lawfully Executing a Body Wire.

(1) Recording Mandatory; Minimization Not Required.

ORS 133.726(8) provides that a law enforcement officer who intercepts an oral communication "may not intentionally fail to record and preserve the conversation in its entirety." The officer or informant may lawfully record incidental oral communications of persons who are not suspects:

> "A law enforcement officer, or a person under the direct supervision of the officer, who is authorized under this section to intercept an oral communication is not required to exclude from the interception an oral communication made by a person for whom probable cause does not exist if the officer or person under the officer's direct supervision is a party to the oral communication."

ORS 133.726(8). A person may be a party to a communication, even if the person is not directly participating in the communication:

> "a person is a party to an oral communication if the oral communication is made in the person's immediate presence and is audible to the person regardless of whether the communication is specifically directed to the person."

ORS 133.726(2).

Moreover, an officer or informant who is lawfully using a body wire may record statements made in the presence of the officer or informant by a person who is speaking audibly into a telephone or similar electronic communications device. That is because under ORS 133.721(7)(b), the definition of "oral communication" includes:

> "An utterance by a person who is participating in a wire or electronic communication, if the utterance is audible to another person who, at the time the wire or electronic communication occurs, is in the immediate presence of the person participating in the communication."

In sum, body-wire authority contrasts sharply with the authority to use a wiretap or "bug" under ORS 133.724, which requires that the interception "shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception." ORS 133.724(5).

> **NOTE: LEGISLATIVE HISTORY AND INTENT.** In 2001, the legislature enacted several amendments to the body wire statutes in response to *State v. Fleetwood*, 331 Or 511, 16 P3d 503 (2000), in which the Court had effectively limited the use of a body wire to intercepting or recording *only* the oral communications spoken by the suspect in direct conversation with the officer or informant who was using the body wire. The legislative record indicates that the Senate and House Judiciary Committees recommended passage of these amendments after hearing explanations of a very significant practical difference between a body wire and a wiretap — *i.e.,* although an officer who is carrying out a wiretap can minimize unauthorized interceptions by simply turning off the interception device, it is both impractical and unsafe for a person who is wearing a body wire, or an officer who is monitoring the wire, to attempt to turn the device on and off during the course of face-to-face contacts. Consequently, these changes reflect the legislature's understanding of the inherent dangers of undercover investigations and its intent to protect officers and informants who wear body wires.

(2) Sealing, Custody, and Retention of Tapes.

In contrast to the provisions governing recordings obtained from wiretaps, ORS 137.726 and ORS 165.540 are silent regarding whether body-wire recordings must be sealed, whether any particular person or officer must maintain custody of the tapes, and whether the tapes must be retained for a minimum period. The absence of statutory requirements regarding the sealing and the

custody of the tapes suggests that law enforcement has broad discretion to determine what should be done. Because it is a crime in Oregon to destroy any "public record" without lawful authority, ORS 162.305, it is necessary that the tapes be maintained in accordance with rules adopted by the Secretary of State for the retention and disposal of public records. According to the schedule adopted by the Secretary of State for "Police Records," the minimum retention period for an "incident case file" in a case involving a crime with no statute of limitation is for 75 years after case closure, and, in all other cases, for one year after the statute of limitations expires. OAR 166-200-0100(30).

(3) Disclosure of Contents.

Before the trial or preliminary hearing at which evidence of the intercepted communication is going to be introduced as evidence, an officer may not divulge the contents of any oral communication intercepted under ORS 133.726 except to a "superior officer," another "official with whom the officer is cooperating in the enforcement of felony laws," a magistrate, a state or federal grand jury or another person in compliance with a court order. ORS 133.726(9).

> **PRACTICAL SUGGESTION:** The definition of "other official" is unclear. If it will be necessary to translate or transcribe the recorded interception, consider including in the application and order the specific authorization to use an interpreter who may not otherwise fit the statutory categories for disclosure. Sample language is included in the application and order attached as appendices to this chapter.

f. Reporting Requirements.

ORS 165.542 requires the collection of statistics on the number of investigations in which conversations were surreptitiously recorded *without court orders*. A law-enforcement agency that employs a body wire *without obtaining a court order* must make a report to the district attorney within 30 days. ORS 165.542(1). Each January, the district attorney is required to send a summary of his or her data to the Department of Justice, which must make reports to the Oregon Legislature every other year, during Legislative sessions. ORS 165.542(2), (4). The annual report is required to include: the total number of interceptions, the duration of interceptions, the offenses investigated, the identity of the agency conducting the interception, the number of interceptions in which the person wearing the body wire was an officer, and the number of times in which the person wearing the device was a person acting under the supervision of an officer. But "[f]ailure to comply with the reporting requirements of this section shall not affect the admissibility of evidence." ORS 165.542(5).

Reports to the Department of Justice should be sent to:

Oregon Department of Justice
Criminal Justice Division
2250 McGilchrist St SE Suite 100
Salem, Oregon 97302
ATTN: Body Wire Statistical Reporting

g. Motions to Suppress.

The federal statutes do not require exclusion of evidence obtained from the unauthorized use of body wires or other surreptitious, face-to-face recordings. But ORS 41.910(1) provides that "[e]vidence of the contents of any wire or oral communication intercepted * * * [i]n violation of ORS 165.540 shall not be admissible in any court of this state, except as evidence of unlawful interception." This specific statute requiring exclusion of unlawfully obtained conversations takes

precedence over the more general provisions of ORS 136.432, which prohibits the exclusion of evidence in a criminal case for a statutory violation. State v. Thompson-Seed, 162 Or App 483, 488, 986 P2d 732 (1999); *see also* State v. Fleetwood, 331 Or 511, 16 P3d 503 (2000) (under the law in effect before ORS 136.432, body wire evidence obtained in violation of ORS 165.540 was subject to suppression under ORS 41.910).

The suppression remedy provided by ORS 41.910 is tied specifically to violations of ORS 165.540. Therefore, an interception conducted in conformity with ORS 165.540, even if it violates the express terms of, for example, ORS 165.543, would not require suppression under ORS 41.910.

The procedure for challenging evidence obtained pursuant to a law-enforcement body wire, on the ground that it was obtained unlawfully, is set forth in ORS 133.736. In accordance with this statute, an "aggrieved person" may challenge the admissibility of the evidence through a motion to suppress made before the trial, hearing, or proceeding at which the evidence is to be offered. The motion may be made later if "there was no opportunity to make such motion or the person was not aware of the grounds of the motion." ORS 133.736; Or Laws 2001, ch 385, § 3; s*ee also* State v. Rodriguez, 115 Or App 281, 840 P2d 711 (1992) (under pre-2001 statutes, use of body wire could be challenged only by written motion to suppress, not by oral motion in limine).

OTHER EVIDENCE OF THE CONVERSATION: Remember that, even if *the recording* is suppressed, a person who participated in or heard the conversation nevertheless may testify from his or her recollection. *See* State v. Jones, 339 Or 438, 121 P3d 657 (2005). In Jones, the police failed to notify the defendant that they were recording his statements while interviewing him at the police station. Although the actual recording was inadmissible under ORS 41.910, the Court held that the officers' testimony concerning their own personal knowledge of defendant's statements during the interview based on their direct participation, rather than monitoring of the videotape, was not subject to suppression under either ORS 41.910 or ORS 133.735. *See also* State v. Prew, 213 Or App. 336, 161 P3d 323 (2007) (even though trooper unlawfully recorded his conversation with defendant in violation of ORS 165.540(1)(c) – which rendered the recording inadmissible under ORS 41.910 – he could testify regarding his independent recollection of the conversation); State v. Armstrong, 24 Or App 785, 547 P2d 170 (1976) (police who unlawfully eavesdropped on conversation in violation of ORS 165.540(1)(c) were not allowed to testify, but participant to conversation who had cooperated with police was permitted to testify). Additionally, ORS 133.736 provides that an aggrieved party may seek suppression of "recordings of any oral communication intercepted in violation of ORS 133.726 or testimony or other evidence derived *solely* from the unlawful interception." ORS 133.736(1) (emphasis added).

See also Chapter VII (Motions and the Exclusionary Rule), (Motion to Suppress).

h. Oregon Constitutional Issues.

In State v. Casteel, 122 Or App 218, 857 P2d 204 (1993), the Court of Appeals declined to resolve the defendant's claim that an officer's use of a body wire in a drug investigation without a court order, in reliance upon *former* ORS 165.540(5), violated Article I, section 9, by permitting a warrantless search or seizure in the absence of exigent circumstances. The court noted, however, "that a plurality of the [United States] Supreme Court decided an identical issue adversely to defendants under the Fourth Amendment. United States v. White, 401 US 745, 752-53, 91 S Ct 1122, 28 L Ed 2d 453 (1971)." State v. Casteel, 122 Or App at 225 n 5.

The Court of Appeals reached the constitutional issue in State v. Bass, 126 Or App 303, 868 P2d 761 (1994), *remanded for recons,* 331 Or 693, 21 P3d 1086, *rev'd on remand*, 175 Or App 283, 27 P3d 165 (2001). The court first noted that "[t]he threshold question in any Article I, section 9,

search analysis is whether the police conduct at issue is sufficiently intrusive to be classified as a search. State v. Wacker, 317 Or 419, 426, 856 P2d 1029 (1993)." State v. Bass, 126 Or App at 306. The court then rejected the defendant's argument, based on State v. Campbell, 306 Or 157, 759 P2d 1040 (1988), that the surreptitious recording of his conversation violated his right to privacy protected by Article I, section 9:

> "Defendant assumed the risk that his customer was not what she represented herself to be and that she might relate what defendant said to her. Defendant's assumption of that risk was the same whether the informant related orally or electronically what defendant said to her. Just as in the analogous situations involving taped telephone calls, when an informant has consented to the taping but the defendant has not, defendant risked that what he said to the informant would not remain private. *See* State v. Young, 1 Or App 562, 566, 463 P2d 374, *rev den* (1970). The recording here was not sufficiently intrusive to constitute a search that implicated defendant's rights under Article I, section 9."

State v. Bass, 126 Or App at 307-08.

> **CAVEAT**: The Oregon Supreme Court has not yet decided whether Article I, section 9, is violated when a law enforcement officer uses a body wire without a court order in accordance with an express statutory authorization. This issue was presented in State v. Fleetwood, 331 Or 511, 16 P3d 503 (2000), and State v. Cleveland, 331 Or 531, 16 P3d 514 (2000). But the court decided those cases on statutory grounds and did not reach the constitutional question. Moreover, the court subsequently remanded Bass for reconsideration in light of its *statutory* interpretation in Fleetwood. State v. Bass, 331 Or 693, 21 P3d 1086, *rev'd on remand*, 175 Or App 283, 27 P3d 165 (2001). Therefore, although the resolution of the Article I, section 9, issue by the Court of Appeals in Bass has not been disturbed, the constitutional validity of a body wire employed by the police without a court order under the authority granted by ORS 133.726(7), has yet to be *finally* determined. Until this question is decided by the Supreme Court, the safest course is to seek a body-wire order unless exigent circumstances require going forward without one.

Federal Law.

When an informant has consented to the interception of a conversation with a suspected criminal by means of a body wire, the interception and recording of the conversation does not violate federal law, because 18 USC § 2511(2)(c) provides an exception where: (1) the person is acting under color of law (as an agent of law enforcement) and is a party to the communication; and (2) one of the parties to the communication (*e.g.*, the informant) has given prior consent to the interception. United States v. Ransom, 515 F2d 885 (5th Cir 1975), *cert den*, 424 US 944 (1976); United States v. Little, 753 F2d 1420 (9th Cir 1984) (approving consent provisions of Title III).

Transmission of a conversation by a wired informant to government agents does not violate the Fourth Amendment, and no prior judicial order is required. United States v. White, 401 US 745, 91 S Ct 1122, 28 L Ed 2d 453 (1971).

4. Recording During Interview Conducted Pursuant to ORS 133.400

Absent specific exemptions, ORS 133.400 requires law enforcement officers to record a custodial interview conducted in a law enforcement facility if the interview is in connection with an

investigation into aggravated murder or a Measure 11 crime. The prohibitions of ORS 165.540 do not apply to a person who, pursuant to ORS 133.400, records an interview. ORS 165.540(5)(b).

5. Recording During a Felony that Endangers Human Life.

Any person may record a conversation without specifically informing all participants as required by ORS 165.540(1)(c) if that occurs "during a felony that endangers human life." ORS 165.540(5)(a).

6. Recording While Operating a Vehicle-Mounted Video Camera

ORS 165.540(5)(d) provides an exception to criminal liability when an officer, while operating a vehicle-mounted video camera, fails to advise all participants of a conversation that the conversation is being recorded. The amendment was intended to apply in situations in which it would be impracticable to advise all participants that their conversation is being recorded, such as at the scene of an accident. The amendment provides that the prohibitions against obtaining conversations without actual notice do not apply to:

> A law enforcement officer who is in uniform and displaying a badge and who is operating a vehicle-mounted video camera that records the scene in front of, within or surrounding a police vehicle, unless the officer has reasonable opportunity to inform participants in the conversation that the conversation is being obtained.

ORS 165.540(5)(d). Because the prohibitions of ORS 165.540(1)(c) do not apply, any evidence obtained that falls with the scope of this amendment is not subject to suppression under ORS 41.910.

7. Police-Worn Body Cameras

Oregon law authorizes the use of police-worn body cameras to record conversations without notice to all participants, if, under the certain circumstances, the police officer did not have an opportunity to provide notice or if providing notice would have put either the officer or another person in jeopardy. ORS 165.540(5)(d)(B).

8. Recording While Deploying a Taser

ORS 165.540 to provide an exception to criminal liability when a "law enforcement officer who, acting in the officer's official capacity, deploys an Electro-Muscular Disruption Technology device that contains a built-in monitoring system capable of recording audio or video, for the duration of that deployment." ORS 165.540(5)(e). An "Electro-Muscular Disruption Technology Device includes devices commonly known as tasers. ORS 165.540(11).

E. BEEPERS/BIRD DOGS: "Mobile Tracking Devices."

Oregon Law.

In *State v. Campbell,* 306 Or 157, 173, 759 P2d 1040 (1988), the Oregon Supreme Court held that the warrantless monitoring of radio transmissions from a tracking device that the police secretly affixed to the car of a burglary suspect without his knowledge or consent constituted a search under Article I, section 9, of the Oregon Constitution. The court reached this conclusion even though the vehicle was traveling on public roads while it was being monitored.

ORS 133.617 and ORS 133.619, which create procedures for the use of mobile tracking devices, were enacted in 1989 in reaction to *Campbell.*

In *State v. Meredith*, 337 Or 299, 96 P3d 342 (2004), the court distinguished *Campbell* and held that warrantless monitoring of radio transmissions from a tracking device that the police secretly affixed to a truck with the consent of the truck's owner in order to track the whereabouts of defendant, who was the owner's employee, as she drove about on public roads while on the job did not violate her rights under Article I, section 9.

> **PRACTICAL SUGGESTION:** Although *Meredith* presented the issue of third-party consent in the context of an employer/employee relationship, it does not appear that the holding was limited to employer/employee relationships. That is, the same result should obtain in a case in which a parent allows the police to monitor her child's use of her vehicle, or a car-rental agency allows monitoring of a rented vehicle. However, the person being tracked may have a protected expectation of privacy in their location under the 4th Amendment. *See Carpenter v. United States*, 585 US 296, 138 S Ct 2206, 201 L Ed 2d 507 (2018) (a person has a reasonable expectation of privacy in their locations over time). Under *Meredith*, a person has no reasonable expectation in privacy in the installation of a tracking device on a car owned by a third party, but in light of *Carpenter*, to be safe, an officer should obtain a warrant prior to monitoring the location.

Several factors should be considered before employing a mobile tracking device:

1. Jurisdiction.

ORS 133.545(2) recognizes the mobility of tracking devices by authorizing the officer executing a mobile tracking warrant to track it "in any county to which it is transported."

> **PRACTICAL SUGGESTION:** ORS 133.545(2) notwithstanding, some defendants may argue that the issuing judge lacked authority to issue the warrant to the extent that it is to be executed outside the geographic jurisdiction of that judge. To avoid this issue, have the issuing judge make written findings on the face of the search warrant that the vehicle may leave the judge's county and justify those findings with appropriate facts in the affidavit.

2. Search Warrant Mechanics.

Because the surreptitious nature of mobile electronic surveillance was inconsistent with then-existing statutes requiring officers to read search warrants aloud before commencing a search, the court's decision in *State v. Campbell*, 306 Or 157, 759 P2d 1040 (1988), effectively precluded the use of such devices.

ORS 133.619(4) was enacted to permit a delayed notification of the search. Notice of the execution of the warrant must now be given to registered owners of vehicles to which a device is attached, and to such other persons as the court may direct, but the officer need not inform these persons of the "existence or content" of the warrant at the time of its execution.

The standard warrant application procedures of ORS 133.545(4) and (5), and the standard warrant content requirements of ORS 133.565, are incorporated by reference into ORS 133.619.

3. Consequences of Noncompliance with Search Warrant Mechanics.

Even without the provisions of ORS 136.432, failure to comply with the statutory mechanics of executing a warrant would not necessarily require suppression. *See State v. Valentine/Darroch,* 264 Or 54, 504 P2d 84 (1972), *cert den*, 412 US 948 (1973) (failure to comply with knock-and-

announce statute may not require suppression); *State v. Blasingame*, 127 Or App 382, 873 P2d 361, *rev den*, 319 Or 406 (1994) (officer's failure to read warrant to defendant and to give him a copy did not require suppression where officer accurately told defendant what the warrant said). *See* discussion of related topics in Chapter V (Searches with Warrants), (Execution).

4. Limited Class of Offenses.

The class of offenses that may be investigated by means of a tracking device placed pursuant to a warrant is limited to murder, kidnapping, arson, robbery, and other felonies dangerous to life, a drug felony under ORS 475.752 or ORS 475.806 to 475.894, bribery, extortion, burglary, felony unauthorized use of a motor vehicle, unlawful transport of metal property or other metal property offenses under ORS 165.118, wildlife and commercial fishing offenses, and conspiracy to commit any of these crimes. A warrant authorizing the use of a tracking device may be issued only on a showing "that probable cause exists to believe that an individual is committing or is about to commit" a listed felony. ORS 133.619(6).

NOTE: SB 302 (2017) removed marijuana from ORS Chapter 475. ORS 133.619(6) has not been updated to reflect this change. As a result, there is currently no statutory authority to use a mobile tracker in marijuana crime investigations.

PRACTICAL SUGGESTION: If the crime being investigated is not one of the listed offenses and the suspect is using a vehicle owned by someone else, the officer should consider obtaining the owner's consent to affix the tracking device. Although the third-party consent issue was presented in *State v. Meredith*, 337 Or 299, 96 P3d 342 (2004), in the context of an employer/employee relationship, it does not appear that that decision necessarily is limited only to that circumstance. However, the officer should keep in mind that, if the period of time the location is to be monitored is protracted, the suspect's expectation of privacy in their location under the 4th Amendment may be violated. *See Carpenter v. United States*, 585 US 296, 138 S Ct 2206, 201 L Ed 2d 507 (2018) (a person has a reasonable expectation of privacy in their location over time.)

Federal Law.

The federal cases distinguish between the act of installing the mobile tracking device on the vehicle and the act of monitoring the device.

With regard to the attachment or installation of the device, the United States Supreme Court has held that attaching a tracking device to the exterior of a vehicle is a "trespass" and, therefore, is a search. *United States v. Jones*, 565 US 400, 132 S Ct 945, 181 L Ed 2d 911 (2012).

Regarding the second issue—whether the act of monitoring violates the Fourth Amendment—the United States Supreme Court held in *United States v. Knotts*, 460 US 276, 103 S Ct 1081, 75 L Ed 2d 55 (1983), that monitoring a "bird-dog device" while it traveled on a public highway did not constitute a search or seizure. However, monitoring a "bird-dog" beeper that is inside a private residence, without either a search warrant or an exception to the warrant requirement, is a Fourth Amendment violation. *United States v. Karo*, 468 US 705, 712-17, 104 S Ct 1081, 75 L Ed 2d 530 (1984).

F. USE OF CELLULAR PHONE TO IDENTIFY A PERSON'S LOCATION.

With the use of cellular technology and global positioning systems (GPS), law enforcement can identify the location of a person's cellular phone in real time. Relying on prospective cell-site data provided by a cellular service provider is the most common method law enforcement uses to obtain the location of a target cellular phone in real time. In some circumstances, law enforcement may also rely on GPS or triangulation information to identify the location of a target cellular phone.

1. Prospective Cell-Site Data.

Cell-site data includes (1) a list of each call made or received by the target cellular phone, along with a date, start time and end time, (2) the physical location of the cell tower used to transmit the call, and (3) the sector or face of the tower. A cell tower has three 120-degree sectors or faces that face north, southeast and southwest, and a service radius that can range from 200 meters (656') to 30 km (18+ miles). Law enforcement can use cell-site data to determine that a phone was used within the service area of a particular sector of a cell tower. Cell-site data, however, cannot be used to determine the precise location where the phone was used to make or receive a call. The accuracy of the location information available through the use of cell-site data depends on the density of the cell towers in a particular area, as well as the terrain in which they are located.

2. GPS/Triangulation.

Due to the difficulty in identifying the location of a cell phone user during an emergency, the Federal Communications Commission (FCC) has required cellular service providers to develop systems to identify more precisely the locations of cell phones used to make 911 calls. The FCC has approved two methods for identifying the location of a cell phone user: a handset-based approach and a network-based approach. Under either approach, a cellular service provider can identify the location of the cell phone, regardless of whether the user places a call, by sending a single signal – commonly referred to as a "ping" – to the phone. Both approaches enable cellular service providers to identify the location of cellular phone with much greater accuracy than would otherwise be possible using cell-site data derived from a single phone call.

a. Handset-Based Approach (GPS).

The handset-based approach uses GPS to identify the location of the cellular phone. GPS works by measuring the time it takes for a signal to travel the distance between satellites and a cellular phone's GPS chip. Cellular service providers using GPS must be able to locate a cell phone used to place a 911 call within 50 meters 67% of the time and within 150 meters 95% of the time. *See* 47 CFR § 20.18(h) (2005).

b. Network-Based Approach (Triangulation).

The network-based approach, which is less precise than GPS, uses triangulation technology to identify the location of a cell phone. Triangulation requires the use of signals sent to and from the cell phone to nearby towers. Triangulation enables the cellular service provider to identify the location of the cell phone using either Time Difference of Arrival ("TDOA") or Angle of Arrival ("AOA"). The TDOA system measures the amount of time it takes for the signal to travel between the cell phone and the cell tower and then compares that measurement with signals sent to other towers. Similarly, the AOA system measures the angle at which a cell phone's signal arrives at a cell tower and compares that with the angles of the signals sent to and from other towers. Through the use of a mathematical algorithm, those measurements are used to identify the location of the cell phone. Under FCC rules, cellular service providers utilizing a network-based approach must identify the

location of a cell phone used to place a 911 call within 100 meters for 67% of the calls and 300 meters for 95% of the calls. *See* 47 CFR § 20.18(h) (2005).

3. Statutory and Constitutional Requirements.

Federal Law.

Currently, the federal government relies on the combined authority of 18 USC § 3121 *et seq*. (pen registers) and 18 USC § 2703(d) (historical transactional records) to obtain a court order for prospective cell-site data.

Under 18 USC § 3123, a court may issue an order authorizing a pen register if the court finds that the information "likely to be obtained" by the pen register is "relevant to an ongoing criminal investigation." In 2001, the USA PATRIOT ACT expanded the definition of a pen register device to include devices that record or decode, among other things, "signaling information" that is "transmitted by an instrument or facility from which a wire or electronic communication is transmitted." 18 USC § 3127(3). A cell phone communication is carried in part by radio and in part by wire and, therefore, is an "electronic communication." 18 USC § 2510(12). "Signaling information" includes information transmitted to and from the cell phone for purposes of locating the telephone, *i.e*., cell-site data. *See* United States Telecom Ass'n v. FCC, 227 F3d 450, 463-64 (DC Cir 2000) (signals that are necessary to achieve cell phone communications are "signaling information"). On its face, then, a pen register appears to be sufficient to obtain real-time cell-site data. Under the Communications Assistance for Law Enforcement Act (CALEA), however, "information acquired solely pursuant to the authority for pen registers * * * * * shall not include any information that may disclose the physical location of the subscriber." 47 USC § 1002(a)(2).

The government has relied on the word "solely" in support of its position that Congress intended to allow for combining the pen register statute with another statute to authorize the disclosure of cell-site data. According to the government's position, that additional authority is provided under the SCA, which allows the government to obtain historical cell-site data upon a showing that there are reasonable grounds to believe that the information sought is relevant and material to an ongoing investigation. 18 USC 2703(d). The US Supreme court has accepted this statutory interpretation without discussion. However, they held that a person's expectation of privacy in their movements over time is protected by the 4th Amendment. Carpenter v. United States, 585 US 296, 138 S Ct 2206, 201 L Ed 2d 507 (2018). The Court did suggest, although it did not provide a bright line rule for how long, that the government may obtain some cell cite data for limited time period before the 4th Amendment is implicated.

Although most federal districts rely on the hybrid approach for obtaining prospective cell-site data, the trend regarding the statutory process required for obtaining GPS or triangulation information is less consistent. Questions regarding the current legal position of the United States Attorney for the District of Oregon should be directed to the current Assistant United States Attorney who has been designated as a Computer Hacking and Intellectual Property ("CHIP") attorney.

Oregon Law.

There are no cases in Oregon that specifically address the statutory or constitutional requirements for obtaining prospective cell-site data or for using GPS or triangulation technology to identify a person's location. Given the lack of guidance on the use of this technology, the best approach in either case is to obtain a search warrant for the information. *See* State v. Campbell, 306 Or 157, 173, 759 P2d 1040 (1988) (holding that the warrantless monitoring of a tracking device that the police secretly affixed to a suspect's car violated Article I, section 9). *See* discussion of

Beepers/Bird Dogs: "Mobile Tracking Devices" in section E of this chapter. In cases in which law enforcement has obtained the information without the authority of a warrant or in which there is an insufficient basis to obtain a warrant, consider distinguishing *Campbell* on the ground that the information cannot be used to "track" a person's movement in same manner as a traditional tracking device. *See, e.g.,* *In the Matter of the Application of the United States of America for an Order Directing a Provider of Electronic Communication Service to Disclose Records to the Government*, 620 F3d 304 (3rd Cir 2010) (comparing the use of a traditional tracking device with the use of cell phone tracking). That argument is strongest with the use of cell-site data, which, unlike a traditional tracking device, reveals only that a phone was used within the general service radius of a cell-tower sector, not the precise movements of the phone.

Moreover, if a search warrant is required, officers may be required to obtain a warrant pursuant to the procedures prescribed for a mobile tracking device. *See* ORS 133.617, ORS 133.619. That is because a cell tower could be considered to act as a mobile tracking device when it is used to identify the location of a person with a cellular phone. *See* ORS 133.617 ("'mobile tracking device' means an electronic or mechanical device which permits the tracking of the movement of a person or object."). *See* discussion of Beepers/Bird Dogs: "Mobile Tracking Devices" in section E of this chapter. Notably, however, unlike the wiretap and body wire statutes, the legislature did not provide a statutory suppression remedy for violations of the mobile tracking device statutes. As a result, nonconstitutional violations of the mobile tracking device statutes do not require suppression of evidence. *See* ORS 136.432 (a court may not exclude evidence based on a statutory violation).

> **NOTE:** The terms of service of most cellular providers allow for disclosure of customer information in certain circumstances, including emergency situations and when the service is used in the commission of a crime. As a result, in some cases, a defendant arguably may have contractually waived any privacy interest he might have had in information related to his cellular use. However, both the State and Federal Supreme Courts have found privacy interest in situations where the defendant has arguably waived them contractually. *See, e.g.,* *State v. Lien/Wilverding*, 364 Or 750, 441 P3d 185 (2019) (defendant had a privacy interest in garbage after it was picked up by the sanitation company), and *Carpenter v. United States*, 585 US 296, 138 S Ct 2206, 201 L Ed 2d 507 (2018) (Noting that " . . . cell phones and the services they provide are 'such a pervasive and insistent part of daily life' that carrying one is indispensable to participation in modern society" such that users do not voluntarily assume the risk having their movements disclosed), *citing* *Riley v. California*, 573 US 373, 134 S Ct 2473, 189 L Ed 2d 430 (2014). *See also* discussion of related topics in Chapter I (Privacy Interests).

For a discussion of the requirements to obtain *historical* cell-site data, see the discussion that follows this section of the chapter.

G. EVIDENCE RELATING TO STORED COMMUNICATIONS.

The Stored Wire and Electronic Communications Act (SCA), 18 USC §§ 2701-2712, which is part of the Electronic Communications Privacy Act (ECPA), limits law enforcement access to the stored records of providers of electronic communication services and remote computing services.

An **electronic communication service** is any service that provides users the ability to send and receive wire or electronic communications. 18 USC § 2510(15). For example, cell phone companies and Internet service providers are electronic communication service providers. However, a company that merely receives and sends wire or electronic communications, such as Amazon, is not an electronic service provider.

A **remote computing service** provides off-site storage or processing services for computer-related data on behalf of its customers. 18 USC § 2711(2). This is often refered to as cloud computing. An electronic bulletin board is an example of a remote computing service. *Steve Jackson Games v. United States Secret Serv.*, 816 F Supp 432, 443 (W Dist Tex 1993).

Often a service is both an electronic communication service provider and a remote computing service depending on the type of service provided. Yahoo!, for instance, is an electronic service provider when it provides users the ability to send e-mails, but is a remote computing service with respect to opened e-mails that users store on its servers.

> **NOTE:** Although the SCA distinguishes between electronic communication services and remote computing services, that distinction has little practical meaning. That is because the Ninth Circuit's decision in *Theofel v. Farey-Jones*, 359 F3d 1066 (9th Cir 2003), effectively eliminated the differences between the legal process required to obtain the records of an electronic communication service and the records of a remote computing service.

1. Records Available.

Electronic communication service providers and remote computing services create, maintain, and store information that may be useful in criminal investigations. The categories of information created by the SCA are subscriber information, transactional records, and content.

a. Subscriber Information.

Subscriber information includes basic information about a customer. The SCA defines subscriber information as the following:

(A) name;

(B) address;

(C) local and long-distance telephone connection records, or records of session times and durations;

(D) length of service (including start date) and types of service utilized;

(E) telephone or instrument number or other subscriber number or identity, including any temporarily assigned network address; and

(F) means and source of payment for such service (including any credit card or bank account number),

18 USC § 2703(c)(2).

b. Transactional Records.

The SCA defines the second category of information as "records or other information pertaining to a customer or a subscriber." 18 USC § 2703(c)(1). This type of material commonly is referred to as transactional records and includes everything that is neither subscriber information nor content. Examples of transaction records include e-mail addresses of sent and received e-mails, cell-site data, and account logs showing web sites visited.

NOTE: Oregon courts have held that a subscriber or customer of a service provider does not have a constitutionally protected privacy right in business records held by service providers. State v. Johnson, 340 Or 319, 335-36, 131 P3d 173, *cert den*, 127 S Ct 724 (2006) (information from cell phone provider); State v. Magana, 212 Or App 553, 159 P3d 1163, *rev den*, 343 Or 363 (2007) (same); State v. Delp, 218 Or App 17, 178 P3d 259, *rev den*, 345 Or 317 (2008) (subscriber information from Internet service provider). However, the US Supreme Court has found that disclosure of 127 days' worth of cell-site data was a search under the 4th Amendment and required a warrant. *See* Carpenter v. United States, 585 US 296, 138 S Ct 2206, 201 L Ed 2d 507 (2018). The Court suggested that disclosure of records for some shorter period of time may not implicate the 4th Amendment, but did not announce a bright line rule for how long is permissible.

c. Content.

Under the SCA, content "includes any information concerning the substance, purport, or meaning of a communication or data file." 18 USC § 2510(8). For instance, content includes the text or subject line of e-mails, word processing files, and voicemail messages.

2. Compulsory Disclosures.

a. Federal Law.

The SCA sets forth the procedures that law enforcement must follow to compel service providers to disclose records in their possession. Any court of competent jurisdiction may issue orders under the Act, which includes a state court of general criminal jurisdiction authorized to enter orders authorizing the use of a pen register or trap-and-trace device under state law. 18 USC § 3127. A warrant obtained from a state court may be issued using state warrant procedures. 18 USC § 2703.

(1) Preservation Letter.

18 USC § 2703(f) provides that "a provider of wire or electronic communication services or a remote computing service, upon the request of a governmental entity, shall take all necessary steps to preserve records and other evidence in its possession pending the issuance of a court order or other process." Government requests pursuant to § 2703(f) commonly are made in writing and are referred to as preservation letters. Upon receiving such a request, service providers are required to maintain the records that are the subject of the request for a period of 90 days. The government has no remedy if a service provider fails to comply with a lawful request, however.

PRACTICE TIP: Preservation letters are an essential step in any criminal investigation that might rely on evidence in the possession of service providers. To ensure that records are not destroyed or lost, a preservation letter should be sent the moment the need for the records of a service provider becomes apparent. The letter should ask for preservation of any documents that could be relevant to the investigation. Once the documents are preserved, an officer may follow up with a request for the specific information needed.

(2) Consent of Subscriber or Customer.

The government may require a service provider to disclose subscriber information and transactional records if the governmental entity has the "lawful consent of the subscriber or customer" to such disclosure. 18 USC § 2703(c).

NOTE: A service provider may – but is not required to – divulge the contents of communications to a government entity, if the entity "obtains the lawful consent of the originator or an addressee or intended recipient of such communication, or the subscriber in the case of a remote computing service." 18 USC § 2702(b). As discussed, *infra*, a governmental entity may require the disclosure of the contents of a communication only pursuant to a warrant. 18 USC § 2703(a).

(3) Subpoena.

Pursuant to 18 USC § 2703(c)(2), a provider of electronic communication service or remote computing service shall disclose subscriber information to a governmental entity when that entity "uses an administrative subpoena authorized by a Federal or State statute or Federal or State grand jury or trial subpoena." The governmental entity is not required to provide notice to the subscriber prior to issuing the subpoena. 18 USC § 2703(c)(3).

(4) Order Pursuant to 18 USC § 2703(d)

Under 18 USC § 2703(d), a court may order the disclosure of subscriber information or transactional records if "a governmental entity offers specific and articulable facts showing that there are reasonable grounds to believe that [the information or records] sought are relevant and material to an ongoing criminal investigation." However, if the records sought are historical cell cite location data the 4th Amendment may require probable cause. *See* *Carpenter v. United States*, 585 US 296, 138 S Ct 2206, 201 L Ed 2d 507 (2018) (disclosure of 127 days' worth of cell-site data was a search under the 4th Amendment and required a warrant. The Court suggested that disclosure of records for some shorter period of time may not implicate the 4th Amendment, but did not announce a bright line rule for how long is permissible).

An application for a § 2703 (d) order should include a request for a non-disclosure provision, to prevent the service provider from alerting the suspect that the suspect's account is the subject of a criminal investigation.

(5) Warrant.

A governmental entity may require a service provider to disclose the contents of any communication or record only pursuant to a search warrant. 18 USC § 2703(a). Although the SCA provides for a lower standard of process for content retained by a remote computing service or an electronic communication service if the content has been in electronic storage for more than 180 days, the Ninth Circuit has interpreted the SCA in a manner that has rendered those provisions ineffective. *See* *Theofel v. Farey-Jones*, 359 F3d 1066 (9th Cir 2003). Moreover, although no Oregon appellate court has held that a customer has a constitutionally protected privacy right in the contents of his or her past communications that are stored and kept by a service provider, the Supreme Court has suggested that such a privacy right does exist. *State v. Johnson*, 340 Or 319, 335-36, 131 P3d 173, *cert den*, 127 S Ct 724 (2006) (noting that a defendant has a cognizable privacy interest in the content of his real-time telephone conversations). For that reason, even assuming that the Ninth Circuit incorrectly interpreted the SCA's provisions in *Theofel*, law enforcement should obtain a search warrant for the content of a suspect's stored communications.

A governmental entity also may rely on a search warrant to compel the disclosure of subscriber information and transactional records. 18 USC § 2703(1)(c)(A).

b. Out-of-State Process.

ORS 136.583 establishes that criminal process authorizing the seizure or production of business records may be issued by the state or a criminal defendant to a recipient outside of the State of Oregon, regardless of whether the recipient or the records are physically located within this state, so long as Oregon has jurisdiction over the crime. *See* State v. Rose, 264 Or App 95, 330 P3d 680, *rev den*, 356 Or 400 (2014) (characterizing ORS 136.583 as a long-arm statute that authorizes out-of-state service of process on businesses who are subject to personal jurisdiction in Oregon). Under ORS 136.583, criminal process means a subpoena, search warrant or other court order.

3. Non-compulsory Disclosures.

In addition to the compulsory process described above, a service provider may divulge the contents of communications to a governmental entity:

> (1) with the lawful consent of the originator or an addressee or intended recipient of such communication, or the subscriber in the case of a remote computing service;
>
> (2) if the governmental entity is a law enforcement agency and the contents were inadvertently obtained by the service provider and appear to pertain to the commission of a crime; or
>
> (3) if the provider, in good faith, believes that an emergency involving danger of death or serious physical injury to any person requires disclosure without delay of information relating to the emergency.

18 USC § 2702(b).

A service provider may disclose subscriber information and transactional records to a governmental entity:

> (1) with the lawful consent of the customer or subscriber; or
>
> (2) if the provider, in good faith, believes that an emergency involving danger of death or serious physical injury to any person requires disclosure without delay of information relating to the emergency.

18 USC § 2702(c).

4. Suppression.

Nonconstitutional violations of the SCA do not require suppression. 18 USC § 2708. However, a person aggrieved by a violation may be entitled to a civil remedy. 18 USC § 2707.

APPENDIX

"BODY WIRE" AFFIDAVIT/APPLICATION

WORKSHEET FOR BODY WIRE
AFFIDAVIT/APPLICATION

1. Name of applicant (peace officer/DA/Deputy DA).

2. Applicant's position (peace officer/DA/Deputy DA).

3. Applicant's employer.

4. [Optional – If Deputy DA is applicant, set forth specific authorization granted by DA.]

5. Factual statement describing probable cause to believe that evidence of a crime will likely be obtained by the recording. Prepare like search warrant affidavit. If anonymous hearsay is relied upon, recite qualifications of CRI. Include factual basis for conclusion that agent/informant is participating voluntarily. Describe special qualifications of the officer, if necessary for this particular case.

6. Name of law enforcement officer or informant/agent who will be "wired."

7. Names of crimes that are under investigation, with statutory citations – specify either particular felony or felonies, or misdemeanor of prostitution under ORS 167.007.

8. [Optional – If the applicant is not a police agency, insert the name of the police agency that will be authorized to intercept the oral communications.]

9. [Optional – If the applicant is not a police agency, insert the name of the informant/agent who will be "wired."]

10. [Optional – If you are seeking disclosure of the contents beyond the usual statutorily authorized persons, insert the names or status of persons to whom the communications will be disclosed, *e.g.*, interpreter.]

11. [Optional – If you are seeking disclosure of the contents beyond the usual statutorily authorized persons, set forth reasons why disclosure of the contents to the described person(s) is appropriate.]

12. Number of days you are requesting that the order remain in effect.

13. Date order is to be signed.

14. Time order is to expire.

15. Date order is to expire.

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF _____

IN THE MATTER OF THE APPLICATION FOR AN ORDER AUTHORIZING INTERCEPTION OF ORAL COMMUNICATIONS	Case No. _____ **AFFIDAVIT/APPLICATION**

I, [1], being first duly sworn on oath, hereby depose and say:

AUTHORITY TO MAKE APPLICATION

This is a good faith application for an order to intercept and record oral communications under authority of ORS 133.726(5). I am currently employed as a [2] by the [3]. I have authority to make application for an order to intercept and record oral communications under ORS 133.726(3). [4 – (Optional)]

STATEMENT DEMONSTRATING PROBABLE CAUSE

I have probable cause to believe that the person whose oral communications are to be intercepted, *i.e.* [5], is engaged in committing, has committed or is about to commit a crime specified in ORS 133.726(3)(b), and that the interception of the oral communications will yield evidence of that crime. My belief is based on the following facts:

[6]

IDENTITY OF PERSON(S) WHOSE ORAL COMMUNICATIONS WILL BE INTERCEPTED

The persons whose oral communications are to be intercepted are [5], [7] and other unknown subjects who may be present during contacts by [7] with [5].

IDENTITY OF PERSON SUSPECTED OF COMMITTING CRIME(S)

The person who is suspected of committing crimes is [5]. The oral communications are expected to yield evidence of the particular crimes of [8].

AGENCY AUTHORIZED TO INTERCEPT ORAL COMMUNICATIONS
[Optional]

The [9] has agreed to accept the responsibilities set forth in ORS 133.726 for intercepting, recording and maintaining the oral communications referred to in this request and for directly supervising [10] while intercepting such oral communications. Accordingly, I request that the [9] be designated in the order as the agency authorized to intercept the oral communications.

DISCLOSURE OF CONTENTS OF ORAL COMMUNICATIONS
[Optional]

ORS 133.726(9) restricts the disclosure of the contents of oral communications intercepted under ORS 133.726 to a "superior officer," "[an]other official with whom the officer is cooperating," a magistrate, a grand jury, or other persons by "court order." Accordingly, I request authorization for disclosure of the contents of the intercepted oral communications to [11] [12].

EXPIRATION DATE OF ORDER

I know from my training and experience that oral communications taking place in the course of an investigation such as this do not always take place at the time planned. The opportunity to participate in such oral communications can arise suddenly. Your affiant/applicant therefore requests that the court order that the authority to intercept such oral communications be conducted over a [13]-day period of time, to commence immediately upon the signing of the Order on [14] and to expire at [15] on [16].

[(Optional) **SEALING OF APPLICATION AND ORDER**

I also know from my experience and training that the inadvertent disclosure of the information contained in this application and the order to be issued herein would be beneficial to a

criminal suspect and damaging to the ongoing criminal investigation. Your affiant/applicant therefore requests that the Court order that this Affidavit/Application and the Court's Order be sealed and not disclosed until further order of the Court.]

_____
District Attorney/Deputy District Attorney
for _____ County

OR

_____
[Title and agency of peace officer]

SUBSCRIBED AND SWORN TO BEFORE ME THIS _____ day of _____, 20__.

_____
Circuit Court Judge

APPENDIX

"BODY WIRE" FINDINGS AND ORDER

WORKSHEET FOR BODY WIRE FINDINGS AND ORDER

1. Name of applicant (peace officer/DA/Deputy DA).

2. Applicant's employer.

3. Name of suspect, if known. If unknown, use Jane or John Doe.

4. Names of crimes that are under investigation, with statutory citations – specify either particular felony or felonies, or misdemeanor of prostitution under ORS 167.007.

5. Name of informant/agent who is cooperating with the investigation.

6. [Optional – If you are seeking disclosure of the contents beyond the usual statutorily authorized persons, insert the names or status of persons to whom the communications will be disclosed, *e.g.*, interpreter.]

7. Name of police agency that will be authorized to intercept oral communications.

8. Name of the law enforcement officer or informant/agent who will be "wired."

9. Applicant's position [*e.g.,* peace officer (include rank)/DA/Deputy DA].

10. Applicant's address.

11. Time order will expire.

12. Date order will expire.

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF _____

IN THE MATTER OF THE APPLICATION FOR AN ORDER AUTHORIZING INTERCEPTION OF ORAL COMMUNICATIONS	Case No. **FINDINGS AND ORDER**

This matter came before the Court upon the affidavit/application of [1] of the [2] for an *ex parte* order authorizing the interception and recording of oral communications pursuant to ORS 133.726(5);

The Court having authority to issue such an order pursuant to ORS 133.726; and,

The Court, having fully examined the affidavit/application submitted herein, hereby enters the following findings and order:

FINDINGS PURSUANT TO ORS 133.726(5)

The Court determines on the basis of the facts submitted by the applicant, [1], that:

(a) There is probable cause to believe that the subject known to the applicant as [3] is engaged in committing, is about to commit or has committed the following crimes: [4].

(b) There is probable cause to believe that oral communications, more particularly described below, will contain evidence concerning those crimes.

[(c) (Optional) [5] has voluntarily cooperated with the police and has voluntarily consented to carry out this order by intercepting his/her own oral communications and those of [3].]

[(d) (Optional) It is necessary and appropriate that the contents of the oral communications described below be disclosed to [6] in order to facilitate the investigation herein.]

SPECIFICATIONS OF ORDER PURSUANT TO ORS 133.726(6)

The Court hereby orders that the [7] be duly authorized and approved to record and intercept specified oral communications as follows:

///

(a) The persons whose oral communications are to be recorded are [3], [8], and other unknown subjects who may be present during contacts by [8] with [3]. This order authorizes only the interception of oral communications to which [8] is party, which means oral communications that are made in the immediate presence of [8] and are audible to [8].

(b) The particular crimes to which the oral communications are expected to relate are [4].

(c) The [7] is the agency authorized and approved to intercept and record the oral communications.

(d) The name of the applicant is [1], a [9], whose office is located at [10].

(e) The authority to intercept oral communications pursuant to this order shall commence immediately and shall expire at [11] on [12].

{(f) (Optional) The contents of the oral communications intercepted and recorded pursuant to this Order may be disclosed to [6].}

[(g) (Optional) The Application/Affidavit in this matter and this Order shall be sealed and not disclosed until further order of this Court.]

DATED this _____ day of _____, 20__ at _____a.m./p.m.

_____
Circuit Court Judge

APPENDIX

"MOBILE TRACKING DEVICE"

Affidavit/Application
Search Warrant
Return & Receipt

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR _____ COUNTY

IN THE MATTER OF AN APPLICATION FOR A SEARCH WARRANT [Attachment and Monitoring of a Mobile Tracking Device]	))))	No. _____ Affidavit/Application

STATE OF OREGON)
) SS.
COUNTY OF _____)

I, (name of officer), being first duly sworn on oath, hereby depose and say:

[*Detail background/experience/training of officer just as in typical search warrant affidavit*.]

[*Detail facts supporting probable cause to believe suspect is involved in criminal activity and why tracking of vehicle is significant investigative tool*.]

[SUGGESTED PARAGRAPHS]

I know from my involvement in this investigation that (suspect) has access to one access to one vehicle. This vehicle is a [describe vehicle]. This vehicle is currently parked at [describe location (eg. Driveway), address and city], _____ County, Oregon.

Based upon information outlined in this affidavit I believe that probable cause exists that (suspect) will attempt to go to (location) where he will (describe expected activities).

I know that (suspect) has limited access to motor vehicles based on (describe reasons), and that (suspect) needs a vehicle in order to (describe expected activities). I also know that (suspects) are aware that they are under the scrutiny of law enforcement because (suspect) has expressed to other persons that he believes he is being followed by the police. Based upon this information, I believe that (suspect) is alert to his surroundings and who may be following him. I also know that he is still employed and maintains a work schedule and that he is married and maintains a family life with responsibilities. Based upon this information, it is likely that (suspect) may not drive directly to the focal location, but rather may attempt to maintain a semblance of a normal routine and may attempt to evade possible or perceived surveillance.

I know from prior training and experience that police can utilize a piece of equipment known as an electronic, mobile tracking device. This device, when attached to a motor vehicle can be monitored by police from a remote distance and enables the police to follow the motor vehicle without drawing attention to the surveillance. I believe that by utilizing a mobile tracking device law enforcement officers can monitor the activities of (suspects) for a period of time and that by doing so the police may [*Describe objective of "bird-dog" use*].

Based upon information outlined in this affidavit, I request that a police officer be authorized to place a mobile tracking device on the vehicle belonging to (registered owner of possessor). This vehicle is a (describe vehicle) and is currently parked at (address of location including city), _____ County, Oregon. I further request authority to use the device and monitor the vehicle movements.

Based upon the above information your affiant has reason to believe that objects of this search will relate to an offense committed or triable within _____ County, to-wit: [*list of criminal offenses for which warrant may be authorized – ORS 133.619(6)*]. I further have reason to believe that the vehicle being monitored may leave this county, and I seek authorization to monitor the vehicle anywhere in the State of Oregon.

I am familiar with the provisions of ORS 133.619 and I believe that a period of time greater than five days for the execution (i.e., attachment and monitoring of the device) and return of this warrant is required. Your affiant specifically requests authorization to leave and use the mobile tracking device in place for ___ days, and requests that the time frame for the return required by ORS 133.619(4) commence at the conclusion of those ___ days.

For purposes of assuring that the suspect is unaware of the electronic surveillance, the mobile tracking device will/may be placed on the vehicle after 10:00 p.m. and before 7:00 a.m. In addition, (suspect) may choose to drive the vehicle after 10:00 p.m. and/or before 7:00 a.m. For these reasons, I am requesting authority to execute the search warrant any time of the night or day.

_____
(Name & Title of Officer)
(Agency of Officer)

Subscribed and sworn to before me this ____ day of _____, 20___.

_____
Circuit Court Judge

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF _____

IN THE NAME OF THE STATE OF OREGON
SEARCH WARRANT
[Attachment and Monitoring of Mobile Tracking Device]

To Any Police Officer of the State of Oregon:

Upon information given under oath to me by an affidavit/application signed and sworn to by _____ of the (police agency), this Court finds probable cause to believe:

1) That (suspect) is committing or is about to commit in _____ County, Oregon, the crime(s) of _____, a felony listed in ORS 133.619; and

2) That evidence of the commission of the above-described felony, and the location of this evidence, will be obtained through the installation and monitoring of a mobile tracking device to be installed on the vehicle described below.

The Court further finds, pursuant to the provisions of ORS 133.619, that a period of time greater than the five (5) days for the execution and return of this warrant is required.

YOU ARE, THEREFORE, COMMANDED to make immediate search of: A [Describe vehicle by year, make, model, color, body-style], bearing Oregon license number _____ and currently parked at (address), (city), _____ County, Oregon.

YOU ARE AUTHORIZED TO INSTALL ON AND ATTACH to the above-described vehicle a mobile tracking device at any time of the day or night in any area which is accessible to the general public.

YOU ARE FURTHER HEREBY AUTHORIZED to leave in place, monitor, and use the mobile tracking device for ___ days, anywhere within the State of Oregon.

YOU ARE HEREBY ORDERED to mail a receipt listing things seized and observations made, and detailing dates and times during which an officer monitored or attempted to monitor the mobile tracking device under authority of this warrant, to the following person(s) not later than (date): *[Registered owner of vehicle]*; *[Suspect or other persons ordered by the court]*.

YOU ARE HEREBY ORDERED to return to this Court within five (5) days of the date the authority to monitor the mobile tracking device has expired (i.e. return not later than (date = today's date + # days authorized + 5 days)) a signed list of things seized or observations made under authority of this warrant and setting forth the date and time of the attachment of the mobile tracking device and the dates and times during which officers monitored or attempted to monitor the mobile tracking device.

This warrant shall be executed not later than (time) on the _____ day of (month), 20__.

This search warrant may be executed at any time of the day or night.

_____ _____
Judge Date & Time

SEARCH WARRANT RETURN
[Attachment and Monitoring of Mobile Tracking Device]

STATE OF OREGON

County of _____

ATTACHMENT OF TRACKING DEVICE

I hereby certify that I received the attached search warrant on the ___ day of _____, 20___. The search warrant was executed on the ___ day of _____, 20__, at (time), by placing a mobile tracking device on a [Describe vehicle by hear, make, model, color, body-style] , bearing Oregon license _____. During this execution, I was accompanied and assisted by the following officers:

[*List officers and agencies they represent.*]

The mobile tracking device was installed on said vehicle at (time) on (date) , 20__ at (address), (city), _____ County, Oregon.

DETAIL OF MONITORING ACTIVITIES AND OBSERVATIONS

[*Detail dates and times of monitoring (or attempted monitoring) and generally describe observations made (or things seized)*].

REMOVAL OF TRACKING DEVICE

The tracking device was removed from the vehicle at (time) on (date) , 20___.

_____
[Name & Capacity of Officer
Executing Search Warrant]

LETTER/"RECEIPT" TO PERSONS AS ORDERED IN SEARCH WARRANT

[Date]

[Subject's Name]
[Address]

Mr./Ms. _____:

Pursuant to ORS 133.619, you are hereby notified that an electronic tracking device was placed on a [Describe vehicle by year, make, model, color, body-style & license #].

The mobile tracking device was installed on said vehicle at (time) on (date), 20__, (address), (city), _____ County, Oregon.

[*Detail the dates and times of monitoring (or attempted monitoring) and generally describe observations made or things seized.*]

The tracking device was removed from the vehicle at (time) on (date), 20__.

_____
[Name & capacity of officer
Executing search warrant]

VII. MOTIONS AND THE EXCLUSIONARY RULE.

A. MOTIONS TO SUPPRESS.

A challenge to the use of evidence seized under the authority of a search warrant or through a warrantless search must be made before trial, and that motion "shall be heard and determined" by the court "in advance of trial." ORS 133.673(1). The defendant must file a written pretrial motion that "reasonably apprises" the court and the state of the arguments and the authorities relied upon. State v. Hall, 166 Or App 348, 356, 999 P2d 509 (2000); State v. Sweet, 122 Or App 525, 858 P2d 477 (1993); State v. Rodriguez, 115 Or App 281, 840 P2d 711 (1992).

> "The court is required to order a suppression hearing on motion of either party. ORS 135.037; State v. Caruso, 43 Or App 405, 408, 602 P2d 1135 (1979), *rev'd on other grounds*, 289 Or 315, 613 P2d 752 (1980) ('[t]he trial court's obligation to hold an omnibus hearing upon the request of a party is absolute')"

State v. Fox, 165 Or App 289, 292-93, 995 P2d 1193 (2000) (footnote omitted). *See also* State v. Edwards, 231 Or App 531, 536-37, 219 P3d 602 (2009) (prosecutor's failure to appear at omnibus hearing did not justify grant of motion to suppress; both parties have a statutory entitlement to a hearing on an omnibus motion).

A motion to suppress must be resolved "in advance of trial" because the state may appeal from an order suppressing evidence under ORS 138.045(1)(d) only if the order "is made prior to trial." But the trial court retains discretionary authority to reconsider a prior ruling denying a motion to suppress, "on the ground of newly discovered evidence, or as the interests of justice may require." ORS 133.673(2); State v. Farkes, 71 Or App 155, 160-61, 691 P2d 489, *rev den*, 298 Or 704 (1984) (trial court did not abuse its discretion in declining to hear defendant's renewed motion to suppress). If the court reconsiders and grants a motion to suppress during trial, the state cannot appeal from that ruling, which militates against reconsidering such motions. A defendant is not required to renew a motion to suppress at trial in order to preserve a claim that was adequately presented in his or her pretrial motion to suppress. *See* State v. Cole, 323 Or 30, 35, 912 P2d 907 (1996).

1. Requirement of a Timely and Specific Motion.

As a general rule, if the defendant seeks to suppress evidence, he or she must file a written motion to suppress before trial. ORS 133.673; State v. Hacker, 51 Or App 743, 627 P2d 11 (1981). ORS 133.673(1) requires that objections to the use of evidence seized "in violation of any of the provisions of ORS 133.525 to 133.703 shall be made by a motion to suppress which shall be heard and determined by … the trial court in advance of trial." (The cited statutes generally pertain to seizures pursuant to search warrants.)

The required contents of the motion are set out in Uniform Trial Court Rule 4.060(1), along with the local rules of the court in which the case is pending. UTCR 4.060(1) currently provides that a motion to suppress evidence "[m]ust cite any constitutional provision, statute, rule, case, or other authority upon which it is based" and "[m]ust include in the motion document the moving party's brief, which must sufficiently apprise the court and the adverse party of the arguments relied upon."

Citation to Authority: A motion that does not cite any constitutional or statutory authority is insufficient under UTCR 4.060(1). State v. Jacinto-Leiva, 287 Or App 574, 576-77, 404 P3d 1118 (2017).

"Brief": The requirement in UTCR 4.060 of a "brief" should not be applied mechanistically. Arguably, a memorandum that summarizes cases but refers to those summaries only as "points and authorities" constitutes a brief that can "adequate reasonably to apprise the court and the adverse party of the arguments and authorities relied upon." *State v. Hampton*, 247 Or App 147, 268 P3d 711 (2011) (trial court erred in denying defendant's motion as insufficiently specific, but that error was harmless because the motion failed on the merits).

"Reasonably Apprise" (now "sufficiently apprise"): In *State v. Oxford*, 287 Or App 580, 586-87, 403 P3d 528 (2017), the Court of Appeals interpreted the phrase "reasonably apprise the court … of the arguments and authorities relied upon" in an earlier version of UTCR 4.060. The court held that the rule required a very low standard of specificity: "A motion that generally identifies a search or seizure by the state, asserts that the search or seizure was warrantless … , cites authority in support of the motion, and requests suppression of evidence obtained as a result of the search or seizure 'sufficiently apprise[s]' the court and the adverse party of the arguments relied upon by the moving party."

That conclusion seems to be inconsistent with that in *State v. Sweet*, 122 Or App 525, 529, 858 P2d 477 (1993), where the court noted:

> "A written motion to suppress serves dual functions. It frames the issues that the court will be required to decide, and it notifies the state of the contentions that it must be prepared to address at the hearing on the motion. *State v. Rodriguez*, 115 Or App 281, 285, 840 P2d 711 (1992); *State v. Johnson/Imel*, 16 Or App 560, 566-67, 519 P2d 1053 (1974). Because the defendant in a criminal case is the proponent of the motion to suppress, it is the defendant who bears the responsibility of framing the issues contemplated by the motion."

In *Sweet*, though, the motion's deficiencies were fundamental: The motion "did not assert that any officer conducted a warrantless search, and it did not identify the evidence that was purportedly observed or seized." *Sweet*, 122 Or App at 529. The motion therefore "was insufficient," and the suppression hearing "did not alleviate that insufficiency." *Id.*

But, when the defendant has moved to suppress evidence obtained during a warrantless search, the state bears the burden of proving at all the facts that are necessary to establish that the search was valid, even if the defendant does not assert a specific challenge to each step. *State v. Tucker*, 330 Or 85, 89, 997 P2d 182 (2000) (in the case of a warrantless search, the burden is on the state to prove that did not violate a protected interest of the defendant); *State v. Miears*, 166 Or App 228, 999 P2d 493, *rev den*, 331 Or 192 (2000) (although motion to suppress did not specifically challenge the scope of the officer-safety frisk, it nonetheless placed burden on state to offer evidence justifying removal of cigarette packs from defendant's pocket). In accord with that authority, UTCR 4.060(1)(b) currently provides that, "[i]f evidence sought to be suppressed was obtained without a warrant, it is sufficient for the moving party to so state." But the state's burden to prove the validity of a warrantless search does not arise if no evidence establishes that any search occurred. *State v. Barnes*, 172 Or App 408, 18 P3d 1108 (2001) (in the absence of any evidence indicating whether defendant got out of his pickup on his own initiative, or was asked or ordered to do so by officer, state had no burden either to prove that no search occurred or to justify a search).

> **PRACTICE TIP**: A motion to suppress may be vague as to which parts of the incident the defendant contends were unlawful. If the prosecutor merely assumes that the motion is limited in scope and presents evidence on the lawfulness of only that portion of the incident, a court may grant the motion based on its own more expansive construction of the motion. *See, e.g.*, *State v. McClellan*, 189 Or App 230,

234, 74 P3d 1167 (2003) (prosecutor construed motion too narrowly); State v. Miears, 166 Or App at 235-36 (prosecutor failed to prove frisk was lawful even though defendant had not specifically challenged that step). Consequently, it is a good practice for the prosecutor to clarify *on the record* at the start of the hearing precisely which issues defendant believes need to be litigated and which steps in the encounter the defendant does not challenge. Also, if the defendant cites a provision of the federal constitution in support of the motion to suppress but does not offer a separate and distinct analysis under that provision, it may be helpful to emphasize that point on the record. Remember if the trial court grants the motion and the state appeals, the failure to respond to a particular issue raised by the defendant in the trial court will preclude the state from challenging it on appeal. *See* State v. Wood, 188 Or App 89, 69 P3d 1263 (2003) (declining to address state's argument that defendant's consent was voluntary because state never contested that issue at trial).

UTCR 4.010 requires motions to be filed at least 21 days before trial, or within 7 days of arraignment, whichever is later, unless the court permits a different timeline based upon a showing of good cause by the moving party. The trial court's decision whether to entertain an untimely motion is reviewed for abuse of discretion. State v. Johnson, 340 Or 319, 323, 131 P3d 173 (2006) (trial court's decision not to hear untimely motions to suppress was "well within the trial court's discretion").

Caution: A trial court may abuse its discretion in requiring strict adherence to a filing deadline if there would be no prejudice to the state or the court in permitting the tardy filing. *See* State v. Owens, 68 Or App 343, 681 P2d 165 (1984) (refusal to entertain untimely motion to suppress was an abuse of discretion because state had 40 days to prepare for hearing and did "not assert that it would have been prejudiced"); State v. Peterson, 66 Or App 477, 675 P2d 1055 (1984) (trial court's refusal to hear defendant's untimely motion to suppress was an abuse of discretion where state could not show prejudice). But the Court of Appeals has upheld the discretion of the trial court to either consider or refuse to consider a suppression issue raised shortly before or during trial. *See* State v. Betnar, 214 Or App 416, 166 P3d 554 (2007) (defendant's motion to suppress, filed on the eve of trial, properly denied); State v. Gable, 127 Or App 320, 873 P2d 351, *rev den*, 319 Or 274 (1994) (defendant's mid-trial *Miranda* motion allowed); State v. Graber, 21 Or App 765, 537 P2d 117 (1975) (denial of mid-trial motion to suppress upheld because motion untimely).

ANTICIPATING POST-CONVICTION RELIEF. If the defendant has a potentially meritorious basis to suppress evidence but the motion to suppress was time-barred only because the defense attorney inexcusably delayed in filing the motion, prosecutors should take into account the risk of reversal in a later action for post-conviction relief. In such a situation, it may be expedient to waive any default and allow the motion to be considered on the merits. But remember that a defendant will not be entitled to post-conviction relief based on the default if either the defendant personally was responsible for the default or the defense counsel made a reasonable tactical decision not to file a timely motion.

2. Burden of Proof.

a. Warrantless Searches and Seizures.

In the case of a warrantless search, the state must prove by a preponderance of the evidence that the search was valid—*i.e.*, that the warrantless search was reasonable and within the scope of an exception. ORS 133.693(4); United States v. Matlock, 415 US 164, 94 S Ct 988, 39 L Ed 2d 242 (1974); State v. Tucker, 330 Or 85, 89, 997 P2d 182 (2000) ("the burden is on the state to prove that the warrantless search did *not* violate a protected interest of the defendant"; emphasis in original);

State v. Sargent, 323 Or 455, 461, 918 P2d 819 (1996) ("The burden to establish the lawfulness of a warrantless search and seizure is on the state."). The burden may be satisfied by the uncontroverted testimony of an officer. State v. Arnold, 115 Or App 258, 262-63, 838 P2d 74 (1992), *rev den*, 315 Or 312 (1993).

The state's burden to prove the validity of a warrantless search does not arise if the evidence establishes that no search occurred. Illinois v. Caballes, 543 US 405, 125 S Ct 834, 160 L Ed 2d 842 (2005) (dog sniff of vehicle exterior during course of lawful traffic stop did not require any justification because it was not a "search"); State v. Barnes, 172 Or App 408, 18 P3d 1108 (2001) (without evidence about whether defendant got out of his pickup on his own initiative, or was asked or ordered to do, state had no burden either to prove that no search occurred or to justify a search).

b. Searches and Seizures Conducted Pursuant to a Warrant.

The state generally has no burden when a defendant challenges the sufficiency of the information to issue a search warrant, because when state agents have acted under authority of a warrant, "the burden is on the party seeking suppression—*i.e.*, the defendant—to prove the unlawfulness of a search or seizure." State v. Walker, 350 Or 540, 553, 258 P3d 1228 (2011), *quoting* State v. Johnson, 335 Or 511, 520, 72 P3d 282 (2003). *See also* State v. Hall, 166 Or App 48, 356, 999 P2d 509 (2000) ("the burden of proof is on the defendant to show the invalidity of the warrant"), *quoting* State v. Coatney, 44 Or App 13, 18, 604 P2d 1269, *rev den*, 289 Or 107 (1980). The defendant must establish by a preponderance of the evidence that the warrant itself or a search or seizure made pursuant to the warrant was defective. *See* State v. Mansor, 363 Or 185, 203, 421 P3d 323 (2018) (defendant failed to prove that affidavit was not attached to warrant). If the defendant establishes that the evidence at issue was discovered and seized outside the permissible scope of the warrant, the state then has the burden to establish that the evidence otherwise was lawfully obtained by means of an exception to the warrant requirement. *Id.* at 221.

Despite an earlier Court of Appeals opinion stating that the *state* bears the burden of demonstrating that the seizure or search of a contested item falls within the scope of a valid warrant—State v. Reid, 190 Or App 49, 53, 77 P2d 1134 (2003), *rev den*, 337 Or 182 (2004)—the Oregon Supreme Court in Walker expressly rejected that argument, ruling:

> "Defendant reasons that, if the search exceeded the scope of the warrant, the result is that it was essentially warrantless. The problem with defendant's argument is that it confuses the effect of prevailing on an argument with the burden of proving it in the first place. A defendant, for example, could challenge the *validity* of the warrant itself, and, if successful, the result would be that the search at issue was essentially warrantless. Yet, in such cases, the burden of proving the invalidity of the warrant rests squarely with the defendant[.] The same is true in this case."

Walker, 350 Or at 555.

c. Searches Following a Constitutional Violation.

When a warrantless search follows an illegality, the state has the burden to prove that the evidence that was obtained was not the product of that illegality. State v. Unger, 356 Or 59, 333 P3d 1009 (2014); State v. Lorenzo, 356 Or 134, 335 P3d 821 (2014); State v. Musser, 356 Or 148, 335 P3d 814 (2014).

The Oregon Supreme Court has adopted a "burden-shifting framework that applies when a defendant challenges the admission of evidence obtained in a warranted search that is preceded by an

illegality. Under that framework, the defendant has the initial burden to establish a minimal factual nexus between the illegality and the challenged evidence. If the defendant does so, the burden shifts to the state to establish that the challenged evidence was untainted by the illegality." *State v. DeJong*, 368 Or 640 ,642, 497 P3d 710 (2021).

See also discussion in this chapter (Fruit of the Poisonous Tree – Causal Connection & Attenuation/Exploitation).

d. Motions to Controvert.

See discussion in this chapter (Motions to Controvert, Defendant's Burden).

3. Trial Court Review of a Search-Warrant Affidavit.

The affidavit must state facts that establish probable cause to support the issuance of the warrant. ORS 133.555(2). The court must be able to determine probable cause from the "four corners" of the affidavit. *State v. Russell*, 293 Or 469, 474, 650 P2d 79 (1982); *State v. Stull*, 113 Or App 156, 157, 831 P2d 690 (1992). Oregon's statutes, including ORS 133.555(2) and ORS 133.545(6), require averments to demonstrate the existence of probable cause to search when a warrant is issued; those statutes do not authorize issuance of an "anticipatory search warrant" that is predicated on an averment that the objects of the search will be in a particular location to be searched sometime in the future. *State v. Lee*, 371 Or 200, 532 P3d 894 (2023).

When the defendant's challenge to the warrant is an assertion that its search commands are not sufficiently particular under Article I, § 9, the court "will consider the warrant and affidavit together, … [But] the only information that the trial court could consider in deciding whether the warrant was sufficiently particular was that contained in the warrant and affidavit, and we therefore do not consider the officers' testimony at the suppression hearing." *State v. Vesa*, 324 Or App 674, 680, 527 P3d 786 (2023). The question whether the affidavit was sufficient to cure an apparent lack of particularity in the warrant "is a practical one based on the totality of the circumstances." For that purpose, "the affidavit must be so connected to the warrant that the two are functionally one document when the warrant is executed to actually provide those limitations." Whether the warrant was incorporated or attached the affidavit are relevant considerations, and whether the affidavit was present at the scene of the execution. *State v. Breedwell*, 323 Or App 172, 186-87, 522 P3d 876, *rev den*, 371 Or 106 (2022).

If probable cause depends upon information contained in the affidavit that was obtained during a preceding warrantless search, the state may offer testimony at the motion-to-suppress hearing to satisfy its burden to establish the validity of that warrantless search. *State v. Harper*, 197 Or App 221, 233-37, 105 P3d 883 (2005) (remanding to determine whether admissions by defendant that were included in affidavit were obtained from him during unlawful stop); *State v. Arnold*, 115 Or App 258, 838 P2d 74 (1992), *rev den*, 315 Or 312 (1993) (search warrant upheld on basis of testimony at suppression hearing regarding preceding consent search of residence). If the court determines that a warrantless search was lawful, the information that was obtained as a result of the search may be considered in the evaluation of whether the affidavit establishes probable cause. *State v. Acuna*, 264 Or App at 172 (upholding warrant after determining that information was obtained during lawful warrantless search).

In reviewing the affidavit, the issuing magistrate's determination is paid great deference. *State v. Klingler*, 284 Or App 534, 540, 393 P3d 737 (2017); *State v. Voits*, 186 Or App 643, 652, 64 P3d 1156, *rev den*, 336 Or 17 (2003) . If the "existence of probable cause is marginal, the decision should be tempered by the preference to be accorded search warrants." *United States v. Ventresca*,

380 US 102, 109, 85 S Ct 741, 13 L Ed 2d 684 (1965). *See also* State v. Eaton, 60 Or App 176, 181, 653 P2d 250 (1982), *rev den*, 294 Or 460 (1983). Whether the affidavit is sufficient must be judged in a common-sense, nontechnical, and realistic manner. State v. Villagran, 294 Or 404, 408, 657 P2d 1223 (1983); State v. Klingler, 284 Or App at 540; State v. Heyne/Yunke, 270 Or App 601, 605, 348 P3d 1170, *rev den,* 358 Or 146 (2015); State v. Chamu-Hernandez, 229 Or App 334, 341, 212 P3d 14 (2009); State v. Keerins, 197 Or App 428, 432, 106 P3d 166, *rev den,* 338 Or 681 (2005); State v. Voits, 186 Or App at 652; State v. Collier, 124 Or App 100, 104, 861 P2d 397 (1993), *rev den,* 318 Or 326 (1994). Probable cause is determined from the totality of the circumstances, which may include an officer's training and experience; as the information becomes more esoteric, specialized, counter-intuitive, or scientific, an increasingly persuasive explanation of the nature of that training and experience is necessary. State v. Heyne/Yunke, 270 Or App at 606-07; State v. Daniels, 234 Or App 533, 542, 228 P3d 695 (2010).

The reviewing court looks both at the facts the affidavit recites and at the reasonable inferences that can be drawn from those facts. State v. Newsted, 279 Or App 701, 381 P3d 1025, *rev den*, 360 Or 697 (2016); State v.Westfall, 178 Or App 343, 37 P3d 1030 (2001), *rev den*, 333 Or 595 (2002) (stating the rule). The appellate courts do not defer to the *trial court's* findings and conclusions, but allow inferences that the *issuing* magistrate may have fairly drawn from the affidavit. State v. Chamu-Hernandez, 229 Or App 334, 341, 212 P3d 14 (2009). The question is whether the facts upon which the warrant is premised "lead a reasonable person to believe that seizable things will probably be found in the location to be searched." State v. Anspach, 298 Or 375, 380-81, 692 P2d 602 (1984); *see also* State v. Keerins, 197 Or App at 432-33.

Information included in the affidavit that was obtained from the defendant by the police illegally—whether the product of an unlawful search or statements obtained unlawfully—may not be considered in determining probable cause. State v. Cartwright, 246 Or 120, 418 P2d 822, *cert den*, 386 US 937 (1967); State v. Harper, 197 Or App at 237. 6.

In earlier cases, the Court of Appeals had held that "[w]hen a [warrant] application includes constitutionally tainted information, the correct action is for the magistrate and reviewing court to excise from the application all such information and to determine whether the remaining information is sufficient to establish probable cause." State v. Binner, 128 Or App 639, 646, 877 P2d 642, *rev den*, 320 Or 325 (1994). But the Oregon Supreme Court "implicitly overruled Binner" and related cases in State v. DeJong, 368 Or 640, 642, 497 P3d 710 (2021). State v. De Witt Simons, 329 Or App 506, 523, 540 P3d 1130 (2023), *rev allowed*, 372 Or 290 (2024). Courts must now apply the burden-shifting framework from DeJong. "Under that framework, the defendant has the initial burden to establish a minimal factual nexus between the illegality and the challenged evidence. If the defendant does so, the burden shifts to the state to establish that the challenged evidence was untainted by the illegality." DeJong, 368 Or at 642. See the discussion later in this chapter (Fruit of the Poisonous Tree—Causal Connection & Attenuation/Exploitation: Attenuation and Warranted Searches).

4. Evidentiary Rules.

The Oregon Rules of Evidence do not apply in a hearing on a motion to suppress, except with respect to privileges. OEC 101(4)(a); State v. Wright, 315 Or 124, 843 P2d 436 (1992); State v. McRae, 271 Or App 558, 560, 351 P3d 797 (2015) (such a hearing is one "involving a preliminary question concerning evidence within the meaning of OEC 101(4)(a) and OEC 104(1)").

Hearsay evidence is admissible in a motion-to-suppress hearing. United States v. Matlock, 415 US 164, 94 S Ct 988, 39 L Ed 2d 242 (1974); State v. Wright, 315 Or at 129 (hearsay offered to prove reasonable suspicion); State v. Ferguson, 201 Or App 261, 119 P3d 794 (2005), *rev den*, 340 Or 34 (2006) (trial court erred by refusing to consider hearsay in motion-to-suppress hearing). But

when a defendant offers his or her own affidavit in support of the motion, the state is entitled to call the defendant and cross-examine on those averments. *See* State v. Strickland, 265 Or App 460, 335 P3d 867, *rev den*, 356 Or 517 (2014) (where defendant submitted an affidavit in support of motion to exclude prior conviction as invalid, prosecutor was entitled to call him as witness to cross-examine him on his assertions of fact).

5. Waiver of Counsel at Motion-to-Suppress Hearings.

A defendant has the right to the assistance of counsel at a pretrial hearing on a motion to suppress. Although the defendant may elect to waive this right, the court must conduct a thorough inquiry before permitting the defendant to do so.

In State v. Cole, 323 Or 30, 912 P2d 907 (1996), the Supreme Court held that the defendant's waiver of his right to counsel was ineffective because the trial court failed to engage him in an on-the-record colloquy regarding the dangers of proceeding without counsel and the record did not establish that he otherwise was already aware of those dangers. As a result, the court reversed.

6. Prosecutor's Failure to Appear at Motion-to-Suppress Hearing

A trial court may not summarily grant a defendant's motion to suppress when the state fails to appear at a hearing on the motion, because both parties have a statutory entitlement to a hearing on the merits of the motion. ORS 135.037; State v. Edwards, 231 Or App 531, 536, 219 P3d 602 (2009).

7. Defendant's Failure to Appear at Motion-to-Suppress Hearing.

A defendant's failure to appear at the hearing on his or her motion to suppress "does not empower the trial court to refuse to hold the hearing." State v. Fox, 165 Or App 289, 293, 995 P2d 1193 (2000) (defendant's failure to appear at suppression hearing in violation of release agreement did not disentitle him to a hearing on his motion), *citing* State v. Desirey, 99 Or App 283, 782 P2d 429 (1989). The trial court may not simply strike the defendant's motion when the defendant fails to appear. As the Court of Appeals held in Desirey:

> "The [trial] court could have decided the motion in defendant's absence, but it did not have the authority to refuse to consider it. Moreover, even though she may have waived her right to be present, there is no evidence in the record that would support a finding that defendant's failure to appear constituted a waiver of her right to a hearing on the matter."

99 Or App at 285.

> **PRACTICE TIPS**: Be alert for the possibility that the success of the motion to suppress necessarily may depend on some testimony from the defendant. For example, if the officer will testify that the defendant expressly consented to the search and the defendant fails to appear and hence does not present any evidence to the contrary, the motion may be denied on that basis alone. In such cases, it may be to your benefit to proceed in the defendant's absence and hence bind the defendant to that factual record that is made.

8. Findings of Fact Encouraged.

In general, "[t]rial courts are strongly encouraged to make findings of fact, particularly when credibility is in issue." State v. Allen, 104 Or App 622, 624, 802 P2d 690 (1990), *rev den*, 311 Or 426

(1991); *State v. Wise*, 305 Or 78, 82 n 2, 749 P2d 1179 (1988). But if a trial court does not make express findings as to facts that could be decided either way, appellate courts will interpret any disputed fact consistently with the trial court's ruling. *Ball v. Gladden*, 250 Or 485, 443 P2d 621 (1968). Put another way, "[w]hen the trial court has failed to make express findings on all pertinent facts and there is conflicting evidence in the record as to those facts, [the appellate court] will presume that the trial court found facts consistent with its ultimate conclusion." *State v. Weaver*, 319 Or 212, 214 n 1, 874 P2d 1322 (1994) (citing *State v. Stevens*, 311 Or 119, 126-27, 806 P2d 92 (1991)).

If an appellate court cannot determine what the trial court found as fact, even after applying *Ball v. Gladden*, it may reverse and remand to allow the trial court to resolve the issue. An illustration is provided by *State v. Lyman*, 134 Or App 212, 216, 894 P2d 1219 (1995), in which the Court of Appeals found that the trial court failed to make "necessary and dispositive findings of fact." The court remanded the case "for the [trial] court to make findings" and to "then dispose of defendant's motion to suppress on the basis of those findings." 134 Or App at 216. *See also State v. Billings*, 231 Or App 404, 220 P3d 65, *rev dismissed*, 347 Or 447 (2009) (where record contained evidence of defendant's subjective belief, remanded for finding regarding credibility of that belief); *State v. Hall*, 166 Or App 348, 999 P2d 509 (2000) (remanding for credibility finding); *State v. Jackson*, 162 Or App 534, 986 P2d 668 (1999) (trial court's order suppressing evidence incorporated findings of fact and conclusions of law made "on the record," but record on appeal did not contain any findings and conclusions; proper remedy is to reverse and remand for further proceedings).

If the appellate court determines that the trial court did not apply the correct legal standard in ruling on the defendant's motion to suppress, it may conclude that the court's factual findings are no longer dispositive, and so a remand will be necessary to make complete findings under the correct standard. *See, e.g.*, *State v. Winn*, 361 Or 636, 643-44, 396 P3d 926 (2017) (remanding for further findings under correct standard); *State v. Blair*, 361 Or 527, 541-42, 396 P3d 908 (2017). Similarly, if the appellate court modifies the legal standard that applies, a remand for further fact development and reconsideration may be appropriate. *State v. Turay*, 371 Or 128, 167-70, 532 P3d 57 (2023). *State v. Meyers*, 338 Or App 59, 75, 565 P3d 463 (2025); *State v. Curry*, 336 Or App 72, 89, 560 P3d 694 (2024); *State v. James*, 336 Or App 55, 71, 560 P3d 747 (2024).

Finally, if the trial court did not find a fact that would be necessary to affirm its ruling, and the appellate court determines that the record does not contain "legally sufficient evidence" to support that finding, the appellate court must reverse. *State v. DeJong*, 386 Or 640, 657-59, 497 P3d 710 (2021) (officers' unlawful seizure of house while obtaining warrant required suppression of evidence found inside during execution of warrant, because state failed to prove that the officers inevitably would have found the evidence during the search).

9. Findings of Fact / Conclusions of Law.

In *Ball v. Gladden,* 250 Or 485, 443 P2d 621 (1968), the court explained the legal significance of the difference between a finding of fact and a conclusion of law:

> "What actually transpired is a question of fact for the trial court or jury. If the evidence sustains such historical factual findings they will not be disturbed [by the appellate court]."

250 Or at 487. A finding of fact does not need to be express; it may be implicit in the nature of the court's ruling. *State v. Johnson*, 335 Or 511, 523, 72 P3d 282 (2003) ("we are bound by a trial court's 'finding' that a party's evidence is not sufficiently persuasive"; trial court's implicit finding that the police would not have obtained evidence inevitably was binding on appeal); *State v. Torres*,

201 Or App 275, 282-83, 118 P3d 268 (2005), *rev den*, 340 Or 308 (2006) (trial court's implicit factual finding binding on appeal). In contrast, legal conclusions drawn from factual findings are not binding on the appellate courts. *See, e.g.*, State v. Kappel, 190 Or App 400, 404, 79 P3d 368 (2003), *rev den*, 336 Or 509 (2004) (reversing order suppressing evidence and noting: "Whether probable cause exists presents us with an issue of law."). Consequently, the trial court's findings of fact often are pivotal on how the issue will be analyzed on appeal.

Some additional examples:

• Findings relating to the nature and timing of perceptual observations are findings of fact. State v. Torres, 201 Or App at 283-85 (that officers heard noises that could be human-caused was a binding factual finding); State v. Cole, 78 Or App 450, 454, 717 P2d 221, *rev dismissed*, 302 Or 297 (1986) (that officer observed marijuana plants from the air was a factual finding).

• Whether the historical facts found by the trial court "establish either probable cause or exigent circumstances presents a question of law." State v. Snow, 337 Or 219, 223 n 2, 94 P3d 872 (2004); *see also* State v. Torres, 201 Or App at 288-89; City of Eugene v. Silva, 198 Or App 101, 108-09, 108 P3d 23 (2005).

• In determining whether a "stop" occurred, the appellate court is "bound by the trial court's findings of historical facts if constitutionally sufficient evidence in the record supports those findings" but must independently assess whether those findings support the court's legal conclusion. State v. Hall, 339 Or 7, 17, 115 P3d 908 (2005); *see also* State v. Sanchez, 148 Or App 284, 288, 940 P2d 242 (1997).

• In determining whether a "stop" occurred, whether the defendant believed that he was free to leave is a question of fact, but whether that belief was objectively reasonable is a question of law. State v. Wood, 188 Or 89, 94, 69 P3d 1263 (2003); State v. Puffenbarger, 166 Or App 426, 434, 998 P2d 788 (2000).

• In determining whether an officer-safety search was lawful, the appellate court reviews, as a matter of law, "the reasonableness of an officer's concern for safety [under] the totality of the circumstances as they reasonably appeared to the officer at the time," based on the factual findings made by the trial court. State v. Ruiz, 196 Or App 324, 327, 101 Pd 824, *rev den*, 388 Or 363 (2005).

• Whether established historical facts, as found by the trial court, meet the constitutional standards for voluntariness is reviewed by the appellate courts as a question of law. State v. Foster, 303 Or 518, 529, 739 P2d 1032 (1987). *See also* State v. Charlesworth/Parks, 151 Or App 100, 113, 951 P2d 153 (1997), *rev den*, 327 Or 82 (1998) ("The determination [of] whether consent [to search] was voluntary is a legal issue that we review independently.").

• Whether the defendant had a constitutionally protected privacy interest in the item or area searched is a conclusion of law, not a finding of fact. City of Eugene v. Silva, 198 Or App at 106-08; State v. Trevino/Ahumada, 133 Or App 24, 27 n 1, 889 P2d 1317, *rev den*, 321 Or 340 (1995).

• Whether an affidavit contains inaccuracies or omits material information is a factual inquiry, and appellate courts will defer to a trial court's findings as long as

there is any evidence to support them. *State v. Wilson,* 178 Or App 163, 167, 35 P3d 1111 (2001); *see also* State v. Keeney, 323 Or 309, 317, 918, P2d 419 (1996).

• Whether a search was "pursuant to and within the scope of a valid warrant is a question of law." *State v. Hall*, 166 Or App 348, 356, 999 P2d 509 (2000).

• In determining whether evidence obtained after an illegality must be suppressed as a product of that illegality, although the appellate court is bound by the trial court's findings of historical fact, the appellate court must assess independently whether, as a matter of law, suppression is required. *State v. Hall*, 339 Or at 35-36.

Because an appellate court is "bound by a trial court's 'finding' that a party's evidence is not sufficiently persuasive," that kind of ruling effectively requires the appellate court to assume that the trial court, consistent with its ultimate ruling, must have disbelieved all of that party's evidence that it did not otherwise specifically find to be true. *State v. Johnson*, 335 Or at 526. Detailed findings of fact and conclusions of law may avoid that problem and prevent the appellate courts from having to assume that the trial court implicitly rejected all the state's evidence that was inconsistent with the ruling made. *See, e.g.*, *State v. Hayes*, 186 Or App 49, 56, 61 P3d 960 (2003), *rev den*, 339 Or 230 (2005) (trial court's detailed ruling showed that its suppression order was based on an erroneous legal premise and not on an implicit finding of fact adverse to the state; remanded for further fact-finding).

PRACTICAL SUGGESTION: The prosecutor should play an active role in shaping the court's findings, particularly when the court's ruling is adverse to the state. In appropriate cases, you should strongly consider offering to draft the court's findings of fact, the conclusions of law, and the order. When the court has granted the defendant's motion only in general terms, be mindful that an appellate court may construe such an order as implicitly finding all of the disputed facts in the defendant's favor—which may include disbelieving the testimony of the officer or other state's witnesses. If possible, try to provide detailed findings on disputed factual issues to eliminate the scope of any implicit findings that will be adverse to the state and to sharpen the legal issue presented.

10. Raise the Argument or Waive It on Appeal.

Generally, an appellate court will not consider an argument in support of a motion to suppress if the defendant did not raise that argument before the trial court. But the court may search the record for any basis, whether or not it was presented to the trial court, to sustain the trial court's ruling, provided the record contains sufficient evidence to affirm the ruling on the alternative ground. *State v. Dowell*, 274 Or 547, 552, 547 P2d 619 (1976); *State v. Corbin*, 233 Or App 113, 116-18, 224 P3d 705 (2009) (to preserve error, defendant must preserve challenge to all bases on which trial court denied motion to suppress); *State v. Williams*, 161 Or App 111, 984 P2d 312 (1999) (affirming suppression order on alternative ground not argued in the trial court); *State v. Knox*, 134 Or App 154, 160-61, 894 P2d 1185 (1995), *rem'd on other grounds*, 327 Or 97, 957 P2d 1209 (1998). But the appellate court may not affirm on an alternative theory that was not raised below if the facts in the record do not support that theory or the evidence might have been developed differently had the respondent had specifically raised that argument before the trial court. *State v. Washington*, 284 Or App 454, 465-69, 392 P3d 348 (2017) (declining to consider state's argument that trial court's denial of defendant's motion to suppress should be affirmed on the alternative ground that encounter did not constitute a "stop"); *State v. Berg*, 281 Or App 101, 106-07, 383 P3d 281 (2016) (same); *State v. Keller*, 280 Or App 249, 257-58, 380 P3d 1144 (2016) (declining to consider state's alternative basis for affirmance, noting that if the state had raised that issue before the trial court, the defendant may have made a different factual record in response); *State v. Holiday*, 258 Or App 601, 609-10, 310 P3d

1149 (2013) (declining to consider state's inevitable-discovery argument in support of affirmance because it was not raised before the trial court); *State v. Pirtle*, 255 Or App 195, 201, 296 P3d 625 (2013) (declining to consider state's exigency argument in support of affirmance because it was not raised before the trial court); *State v. Jepson*, 254 Or App 290, 297, 292 P3d 660 (2012) (declining to consider state's argument in support of affirmance that defendant lacked standing to challenge search, because it was not raised before the trial court); *State v. Woodall*, 181 Or App 213, 45 P3d 484 (2002) (declining to affirm based on newly raised theory of search incident to arrest).

When a new constitutional rule relating to search and seizure is announced by an appellate court while a case is on appeal, the appellate court may choose to exercise its "plain error" review authority to apply that new rule, even though the defendant did not raise that same argument before the trial court. *See*, *e.g.*, *State v. Campoverde*, 317 Or App 347, 505 P3d 466, *rev den*, 369 Or 785 (2022) (in light of *Arreola-Botello*, the deputies exceeded the permissible scope of the stop, and that new claim is reviewable as plain error, but the proper remedy is to remand for reconsideration of defendant's motion to suppress in light of *Arreola-Botello*, because the state did not have notice at the original hearing of its obligation to develop a record); *but see State v. Baca*, 314 Or App 485, 497 P3d 218 (2021) (*per curiam*), *rev den*, 369 Or 209 (2022) (declining to consider unpreserved argument attempting to rely on *Arreola-Botello*).

If the state appeals from an order suppressing evidence, the appellate court will not consider new legal arguments in support of a search or seizure that the prosecutor did not make to the trial court. *State v. Castilleja*, 215 Or App 235, 248 n 10, 168 P3d 1177 (2007), *rev'd on other grounds*, 345 Or 255 (2008) ("although it is axiomatic that we may affirm on grounds not argued in the trial court, there is no authority for the proposition that, without invoking 'plain error,' we can *reverse* the trial court on grounds not argued to it," *quoting State ex rel Juv. Dept. v. Pfaff*, 164 Or App 470, 480 fn 6, 994 P2d 147 (1999), *rev den*, 331 Or 193 (2000)); *State v. Hickmann,* 273 Or 358, 360, 540 P2d 1406 (1975) ("Generally, on appeal the case … should be heard on the same theory upon which it was presented in the court below."); *State v. Rumler*, 199 Or App 32, 40-42, 110 P3d 115 (2005) (declining to consider new arguments raised by state on appeal); *State v. Wood*, 188 Or 89, 95, 69 P3d 1263 (2003) (same); *see also State v. Avalos-Izquierdo*, 175 Or App 229, 27 P3d 528 (2001), *rev den*, 334 Or 190 (2002) (where state met its burden to prove that defendant lacked protected interest by disproving defendant's claim that he was a "resident" of area searched, Court of Appeals affirmed suppression without considering defendant's new argument that he was a "guest"). Likewise, in a defendant's appeal in which he or she contends that the trial court erred when it denied a pretrial motion to suppress, the appellate court generally will not consider new arguments for reversal that the defendant did not raise before the trial court. *See, e.g., State v. Brown*, 264 Or App 592, 598-99, 333 P3d 1153 (2014) (declining to review newly raised challenges to officer's entry into his room); *State v. Gillson*, 259 Or App 528, 314 P3d 719 (2013) (declining to review newly raised challenge to reliability of drug-sniff dog); *State v. Pickle*, 253 Or App 235, 288 P3d 1039 (2012), *rev den*, 353 Or 428 (2013) (declining to review newly raised claim that search exceeded scope of consent).

> **PRACTICAL SUGGESTION:** In responding to a motion to suppress, you should take care to explore all plausible arguments regarding the defendant's claimed privacy interest, procedural issues, alternative theories for admissibility, and the application of the exclusionary rule. Although you may have one argument that you believe is dispositive, back it up with alternative theories in case the court rejects that theory. Your argument on the alternative grounds can be brief, but you should cite supporting authority—and you *must* present, by stipulation or proof, all the facts that are necessary to support the alternative theory.

11. Law of the Case.

Once an appellate court has made a ruling or decision in a particular case, that ruling or decision is binding on the trial court in any further proceedings. This doctrine, termed "law of the case," is described more particularly as follows:

> "It is a general principle of law and one well recognized in this state that when a ruling or decision has been once made in a particular case by an appellate court, while it may be overruled in other cases, it is binding and conclusive both upon the inferior court in any further steps or proceedings in the same litigation and upon the appellate court itself in any subsequent appeal or other proceeding for review."

State v. Pratt, 316 Or 561, 569, 853 P2d 827, *cert den*, 510 US 969 (1993) (*quoting* Simmons v. Wash. F. N. Ins. Co., 140 Or 164, 166, 13 P2d 366 (1932). *See also* State v. Langley, 331 Or 430, 437-43, 16 P3d 489 (2000) (rulings by Supreme Court in first appeal did not preclude defendant from waiving *ex post facto* bar on remand, but did preclude him from relitigating on remand the determination that he had waived a privilege).

The "law of the case" doctrine does not prevent a trial court from exercising its discretion to reconsider its own ruling before an appeal is taken. ORS 133.673(2); State v. Farkes, 71 Or App 155, 160-61, 691 P2d 489, *rev den*, 298 Or 704 (1984) (trial court did not abuse its discretion in declining to hear defendant's renewed motion to suppress). Nor does it prevent one trial judge in a multi-judge jurisdiction from reconsidering a ruling previously made by a different judge in the same jurisdiction. State v. Demings, 116 Or App 394, 841 P2d 660 (1992), *rev den*, 315 Or 443 (1993).

Law-of-the-case principles apply only within a single case. An adverse ruling in an administrative-agency hearing does not preclude the state from relitigating the same legal issue in a subsequent criminal proceeding. State v. Krueger, 170 Or App 12, 12 P3d 53 (2000) (determination in DMV hearing that stop was invalid did not preclude state in subsequent DUII prosecution from relitigating whether stop was lawful). Similarly, a defendant who previously has unsuccessfully challenged a search warrant in one case is not barred from relitigating that issue in another case. State v. Logsdon, 165 Or App 28, 995 P2d 1178, *rev den*, 330 Or 362 (2000). And the state is not barred, after an adverse pretrial ruling, from prosecuting the defendant in a separate case for factually related crimes committed against different victims. State v. Hunt, 161 Or App 338, 985 P2d 832 (1999).

When an appellate court determines that the record was not sufficient to support the trial court's ruling on a motion to suppress and it remands for reconsideration of that ruling, law-of-the-case principles do not preclude the state from presenting additional evidence to establish a basis for admission of the evidence at issue. State v. Martin, 321 Or App 633, 517 P3d 372 (2022) (The "law of the case" rule does not apply because the Court of Appeals in the first appeal held only that the factual record in the original proceeding did not establish a chain of custody, and it did not preclude the state, in proceedings on remand, from offering additional evidence to prove chain of custody).

In limited circumstances, principles of "claim preclusion" may be applied to prevent a defendant from relitigating a motion to suppress that already was fully litigated and resolved against him or her in another case based on the same incident. State v. Ipsen, 288 Or App 402, 406, 405 P3d 156 (2017) (affirming trial court's ruling in Deschutes County that denied defendant's motion to suppress based on previous ruling in Washington County that denied his identical motion based on same facts). The doctrine of issue preclusion applies in a criminal case when the following requirements are satisfied: (a) the issue in the present proceeding must be identical to an issue in a prior proceeding; (b) the issue must have been actually litigated and essential to a final decision on the merits in the prior proceeding; (c) the party sought to be precluded must have had a full and fair

opportunity to be heard on that issue; (d) the party precluded must have been a party or in privity with a party to the earlier proceeding; and (e) the prior proceeding must have been the type of proceeding to which this court will give preclusive effect. *Id.* at 405.

B. MOTIONS TO CONTROVERT.

ORS 133.693 sets forth procedures for a challenge to the content of a search-warrant affidavit. That statute, which is the only mechanism for challenging the substance of facts stated in the affidavit, gives the state significant procedural and substantive advantages.

In a motion-to-controvert hearing, the trial court should make express findings on any issues of disputed facts. *State v. Brown*, 109 Or App 636, 641, 820 P2d 878 (1991), *rev den*, 313 Or 210 (1992). "Whether an affidavit contains inaccuracies or omits material information is a factual inquiry, and [the appellate courts] defer to a trial court's findings in that regard as long as there is any evidence to support them." *State v. Wilson,*178 Or App 163, 167, 35 P3d 1111 (2001); *see also State v. Keeney*, 323 Or 309, 317, 918, P2d 419 (1996). In reviewing the trial court's ruling, the appellate court will "review the record, and all inferences it will support, in the light most favorable to the trial court's express findings and to those that are implicit in the trial court's ruling." *State v. Culley*, 198 Or App 366, 374, 108 P3d 1179 (2005).

1. When is an Evidentiary Hearing Required?

To controvert a search-warrant affidavit, the defendant must file "a supplementary motion, supported by affidavit, setting forth substantial basis for question such good faith, accuracy and truthfulness." ORS 133.693(2). If the court finds that the defendant has satisfied the initial burden to set forth a substantial basis for questioning the good faith, accuracy, or truthfulness of the affiant, the court will hold an evidentiary hearing at which the defendant has the burden of proving by a preponderance of the evidence that the affiant acted in bad faith, was inaccurate, or was untruthful.

The allegation that an affiant failed to fully disclose unfavorable information known to the affiant about the informant may demonstrate a "substantial basis." *State v. Culley*, 198 Or App 366, 108 P3d 1179 (2005) (defendant successfully controverted affidavit by establishing that affiant omitted facts material to informant's reliability); *State v. Brown/Ford*, 106 Or App 291, 807 P2d 316, *rev den*, 311 Or 427 (1991); *State v. Hermach*, 53 Or App 412, 632 P2d 466, *rev den*, 291 Or 893 (1981). Similarly, a claim that the affiant misrepresented hearsay information supplied by the informant as first-hand observations by the informant may be sufficient to require a hearing. *State v. Modrell-Lydall*, 128 Or App 372, 876 P2d 315 (1994). But a motion that merely contends that information in the affidavit is, on its face, legally insufficient or must be disregarded as not reliable presents only an issue for a motion to suppress and not one for an evidentiary hearing.

2. Scope — Attack on the Affiant.

The defendant's attack is limited to representations made by the affiant. In general, the defendant may not attack the truth of factual representations made by the informant that are accurately set forth by the affiant. *State v. Castilleja*, 345 Or 255, 267 n 7, 269 n 9, 192 P3d 1283, *adh'd to on recons*, 345 Or 473, 198 P3d 937 (2008); *State v. Esplin*, 314 Or 296, 839 P2d 211 (1992); *State v. Coffey*, 309 Or 342, 349, 788 P2d 424 (1990); *State v. Hitt*, 305 Or 458, 753 P2d 415 (1988); *State v. Goecks*, 265 Or App 158, 159, 333 P3d 1227 (2014); *State v. Morrison/Bartee*, 107 Or App 343, 812 P2d 832, *mod on recons on other grounds*, 108 Or App 766, 816 P2d 1217 (1991); *State v. Coatney*, 44 Or App 13, 604 P2d 1269, *rev den*, 289 Or 107 (1980). "A motion to controvert is not designed to challenge the truthfulness and accuracy of statements made by the declarants to the affiant." *State v. Hoffer*, 114 Or App 508, 511, 835 P2d 959, *rev den*, 315 Or 272 (1992). The

informant may be mistaken, or even lying, but the terms of ORS 133.693 insulate the affidavit from successful attack as long as the affiant's statements were made in good faith, are accurate, and are truthful. But the affiant's belief in the accuracy of the informant's information must be objectively reasonable. *State v. Esplin*, 314 Or at 303.

In *State v. Hitt*, 305 Or at 464-65 n 5, the Oregon Supreme Court reviewed federal law based on *Franks v. Delaware*, 438 US 154, 98 S Ct 2674, 57 L Ed 2d 667 (1978), and noted the possibility of some constitutional challenge to the restrictive effect of ORS 133.693. The court later addressed such a challenge in *State v. Esplin*, 314 Or 296. The court held that neither the Oregon nor the federal constitution entitles a defendant to challenge the good faith, accuracy, and truthfulness of an unnamed informant whose statements are included in a search warrant affidavit.

Esplin involved what the court characterized as "garden-variety 'controlled buys' by a paid citizen informant." 314 Or at 303-04. The court did not decide whether informants who are "professional agent[s]" of the government could be challenged. Citing *United States v. Smith*, 918 F2d 1501 (11th Cir 1990), *cert den*, 502 US 890 (1991), the Oregon Supreme Court suggested that non-police "governmental agents" could be attacked in a motion to controvert, but "informants" were completely shielded. *State v. Esplin*, 314 Or at 303-07.

Later, in *State v. Darroch*, 117 Or App 185, 843 P2d 978 (1992), *rev den*, 315 Or 643 (1993), the Court of Appeals held, under both Article 1, section 9, and the Fourth Amendment, that the defendant was not entitled to challenge the accuracy of information that was supplied by a police officer and recited in the affidavit by another officer who was acting as the affiant.

3. The Standard.

Oregon Law.

The statute requires that the defendant attack the "good faith, accuracy and truthfulness" of the affiant. ORS 133.693(2). Before *State v. Miller,* 116 Or App 174, 840 P2d 1329 (1992), *mod on recons*, 119 Or App 102, 849 P2d 563 (1993), it was not clear whether a defendant was required to allege all three of these grounds or could instead challenge an affiant solely on the ground that the officer was inaccurate, regardless of good or bad faith.

Miller at least implicitly holds that it is sufficient for the defendant to prove that the affiant was inaccurate. Citing ORS 133.693(5), which requires the reviewing court to determine whether "any inaccuracy, untruthfulness *or* lack of good faith requires suppression," the court made explicit its view that the good faith of the affiant will not prevent the defendant from striking inaccurate portions of the affidavit.

The Oregon Supreme Court has since embraced that view, stating:

> "ORS 133.693(3) requires that the party seeking suppression of evidence show, by a preponderance of the evidence, that facts in a sworn affidavit submitted as part of the application for a search warrant were not offered in good faith *or* were inaccurate *or* were untruthful."

State v. Keeney, 323 Or 309, 319, 918 P2d 419 (1996) (emphasis in original). The court announced this characterization of the statute despite the express language of ORS 133.693(3), which provides that "the moving party shall have the burden of proving by a preponderance of the evidence that the evidence presented before the issuing authority was not offered in good faith, was not accurate *and* was not truthful." But the mere fact of an inaccurate statement, without evidence that the affiant

affirmatively *lied*, will not require the magistrate to disregard the affiant's other statements. Castilleja, 345 Or at 269 n 9. In other words, the mere fact of an inaccuracy does not suggest that the affiant's *other* statements are inaccurate.

Fourth Amendment.

If the defendant shows by a preponderance of the evidence that the affiant knowingly or recklessly made false statements or omissions that were material to a finding of probable cause, the evidence must be suppressed. *Franks v. Delaware*, 438 US 154, 98 S Ct 2674, 57 L Ed 2d 667 (1978); *United States v. Dozier*, 844 F2d 701, 705 (9th Cir 1988), *cert den*, 488 US 927 (1988).

4. Defendant's Burden.

The defendant still bears the burden of persuading the court by a preponderance of the evidence that the grounds listed in the statute have been shown. ORS 133.693(3); *State v. Morrison/Bartee*, 107 Or App 343, 347, 812 P2d 832, *mod on recons on other grounds*, 108 Or App 766, 816 P2d 1217 (1991) (defendants who failed to call affiant as witness offered no facts to explain affiant's motivation for alleged bad faith). Such a challenge presents an issue of fact:

> "Whether an affidavit contains inaccuracies or omits material information is a factual inquiry, and [the appellate courts] defer to a trial court's findings in that regard as long as there is any evidence to support them."

State v. Wilson, 178 Or App 163, 167, 35 P3d 1111 (2001); *see also State v. Culley*, 198 Or App 366, 374, 108 P3d 179 (2005).

The appellate courts have denied motions to controvert on the ground that the defendant failed to meet his or her burden of persuading the trial court that the affidavit was incorrect or submitted in bad faith. In *State v. Coffey*, 309 Or 342, 349 n 8, 788 P2d 424 (1990), the court upheld an affidavit that incorrectly reported that an informant had no criminal record because the trial court "properly could have concluded" that evidence that the affiant knew the informant had been charged with or convicted of assault in the fourth degree and hindering prosecution "did not establish a lack of good faith by a preponderance of the evidence." In *State v. Hitesman/Page*, 113 Or App 356, 833 P2d 306, *rev den*, 314 Or 574 (1992), the court concluded that the record supported the trial court's findings that the officer/affiant "neither intentionally nor recklessly omitted that of which he was reasonably aware." *See also State v. Westfall*, 178 Or App 343, 37 P3d 1030 (2001), *rev den*, 333 Or 595 (2002) (defendant failed to carry burden where affiant omitted the fact that an officer had already entered the defendant's motel room with the motel manager's permission); *State v. Young*, 108 Or App at 204 (the mere fact that the informant denies he made the statements described in the affidavit does not necessarily controvert the affidavit, because a trial court need not believe that testimony).

But the courts have sustained challenges where the trial court found that the defendant established that material representations were false or misleading, or were presented in bad faith. *See, e.g.*, *State v. Keeney*, 323 Or 309, 319, 918 P2d 419 (1996) (defendant established that material statements in affidavit were false and misleading by omission); *State v. Goecks*, 265 Or App at 173 (trial court properly found that the affidavit contained inaccuracies in that it omitted information that would impeach informant); *State v. Culley*, 198 Or App at 373-74 (affiant omitted that informant was intoxicated and had motive to provide information against defendant); *State v. Wilson*, 178 Or App at 168 (affidavit incorrectly stated that controlled buy had occurred within preceding 72 hours and incorrectly implied that the buy took place at defendant's residence); *State v. Stockton*, 120 Or App 111, 852 P2d 227 (1993) (affiant's failure to include the informant's criminal record in the affidavit was not bad faith; but the affiant *did* act in bad faith when he recited conflicting oral information from

the power company concerning who was the power subscriber at the target residences and omitted the written power-company records showing that the defendant was not the subscriber).

5. Consequences.

Suppression does not follow automatically from a successful motion to controvert. In most cases, the court is to proceed by a process of subtraction, eliminating from consideration all of the successfully challenged information and then evaluating the remainder for probable cause. *State v. Harp*, 299 Or 1, 697 P2d 548 (1985); *State v. McManus*, 267 Or 238, 517 P2d 250 (1973); *State v. Culley*, 198 Or App 366, 372-73, 108 P3d 1179 (2005) (omitted facts call "into question the reliability and accuracy of [informant's] information," and remaining averments in affidavit fail to provide "the needed corroboration"); *State v. Derrah*, 191 Or App 511, 516, 84 P3d 1084, *rev den*, 337 Or 84 (2004); *State v. Wilson*, 178 Or App 163, 167, 35 P3d 1111 (2001) (remaining information not sufficient to support warrant). An inaccuracy within a sentence does not necessarily require that the entire sentence be excised. *State v. Thorfinnson*, 121 Or App 10, 853 P2d 1368, *rev den*, 317 Or 584 (1993). Moreover, irrelevant or legally insufficient information may not be "excised" from the affidavit, but rather, simply should be ignored by the reviewing court. *State v. Pelster/Boyer*, 172 Or App 596, 21 P3d 106, *rev den*, 332 Or 632 (2001). Similarly, if the assertion at issue is not necessary to the determination of probable cause to support the warrant, the reviewing court may affirm the validity of the warrant without resolving the motion to controvert. *State v. Derrah*, 191 Or App at 516-19 (affidavit was sufficient even without considering statements at issue).

If it appears that facts detracting from probable cause were incorrectly omitted, the reviewing court will re-examine the affidavit to determine whether "the magistrate as a reasonable, cautious person would have found probable cause to issue the warrant if the omitted facts had been known and correct inferences had been drawn from those facts to detract from those stated in the affidavit when the warrant was issued." *State v. Sloan*, 66 Or App 269, 273, 673 P2d 567 (1983). The Court of Appeals has summarized the process as follows:

> "In effect, a reviewing court: (1) deletes affirmatively wrong information; and (2) deletes inferences that are reasonable on the face of the affidavit but that would not have been reasonable if the omitted information had been disclosed. After doing so, the trial court tests the remaining information in the affidavit for probable cause."

State v. Wilson, 178 Or App at 168 (affidavit insufficient after excision of inaccurate statement regarding time-frame of controlled buy and after deletion of inaccurate inference, based on omitted facts, that buy occurred at defendant's house); *see also State v. Goecks*, 265 Or App at 171-74 (after allowing motion to controvert, trial court properly analyzed the information in the affidavit "in light of the information that it omitted"); *State v. Pelster/Boyer*, 172 Or App at 599 ("one way of subtracting from an affidavit is to use the additional information developed on the motion to controvert in order to weaken the force of the officer's statements in the affidavit"); *State v. Payne*, 150 Or App 469, 946 P2d 353 (1997), *rev den*, 326 Or 390 (1998) (affidavit sufficient even after addition of information about agreement between police and informant); *State v. Brown*, 109 Or App 636, 642-43 fn 1, 820 P2d 878 (1991), *rev den*, 313 Or 210 (1992) (information sufficient "even if we add to the affidavit the information that the state concedes on appeal should have been in it"); *State v. McKee*, 89 Or App 94, 101, 747 P2d 395 (1987) ("affidavit supports the reliability of the informants, even though they were defendants' competitors," a fact known by the affiant but not included in the affidavit). In re-examining the affidavit after allowing a motion to controvert, the trial court is not obliged to defer to the magistrate's determination of probable cause:

> "When, as here, an affidavit has been successfully controverted, the suppression court resolves the sufficiency of the affidavit to establish probable cause for the

> warrant independently of the decision of the magistrate who issued the warrant. As a result, … there is no occasion for deference to the issuing magistrate's decision because the magistrate's decision was itself the product of faulty information. In other words, the traditional deference given to the issuing magistrate as a way of resolving doubtful or marginal cases in favor of warranted affidavit anew."

State v. Culley, 198 Or App at 373 (citations and internal quote marks omitted). *See also* State v. Harp, 299 Or 1, 10, 697 P2d 548 (1985) (no deference to the magistrate's decision when the defendant succeeds in showing material inaccuracies in the affidavit).

> **PRACTICAL SUGGESTION:** Because an appellate court that reviews an order of suppression following a successful motion to controvert will accept all findings of fact that are either expressly *or implicitly* included in the trial court's ruling, it is important to have the trial court make any adverse findings as narrow and specific as possible. For example, if the trial court finds that the affiant omitted material information that the informant was intoxicated, *see* State v. Culley, 198 Or App at 372-74, it would be helpful, for purposes of appeal, for the court expressly to find further that that omission was inadvertent or in good faith, that all of the remaining information from the affiant was truthful and in good faith, and that the omission was of little significance because her intoxication was minimal.

Although the defendant can add negative information that the affiant improperly omitted from the affidavit, the state is bound by the four corners of the affidavit and cannot correct or supplement erroneous information by either substitution or addition. *See* State v. Wilson, 178 Or App at 170 (assertion that controlled buy occurred "within the past 72 hours" was inaccurate, because 5 days actually had elapsed when affidavit finally was executed, and subtraction process meant "affidavit contained no information at all as to when the controlled buy occurred"—*i.e.*, the averment as to time was deleted entirely and could not be corrected by substituting "5 days" for "72 hours"). A false assertion may be disregarded or excised in its entirety even though it merely was an innocent mistake (as in *Wilson*, where the affiant failed to modify the statement in light of the unexpected delay in submitting the affidavit) or a typographical error. State v. Derrah, 191 Or App at 515 (reversing order suppressing evidence based on affiant's innocent misspelling of his name because, even after excising all those references, the affidavit supplied probable cause.

> **PRACTICAL SUGGESTION:** Because an assertion that is false must be excised in its entirety, even if that mistake is innocent, it is crucial to proofread affidavits carefully to ensure that all specific statements about time, place, names, or other objective details are precisely accurate as of the moment the affidavit is executed. In particular, watch for typographical errors in crucial dates or addresses, because those errors may be fatal if the erroneous statement is excised.

If the reviewing court determines that the affiant has been "untruthful," rather than merely "inaccurate," it is entitled to disbelieve the remainder of the affidavit and strike it in its entirety as not credible. "Untruthful" is the same as "dishonest." State v. Keeney, 323 Or 309, 918 P2d 419 (1996). In *Keeney*, the affiant failed to disclose an existing dispute between the informant and the suspect and falsely stated that, to his knowledge, the informant had "no reason to exaggerate or fabricate."

CONSEQUENCES OF A SUCCESSFUL MOTION TO CONTROVERT.

Consequence	***Type of Inaccuracy***
An inaccurate statement SHOULD NOT be stricken if:	It was information provided by an informant, the affiant accurately recited that information in the affidavit, the affiant believed in the truth of the statement, and that belief was objectively reasonable. State v. Esplin, 314 Or 296.
An inaccurate statement SHOULD be stricken if:	It was information provided by an informant and *either* the affiant did not accurately recite that information in the affidavit *or* the affiant's belief in the truth of the information was not objectively reasonable; OR It was information provided by the affiant.
The entire affidavit MAY be stricken if:	An inaccurate statement or a material omission by the affiant is found by the reviewing court to be "untruthful" and, on that basis, it chooses to disbelieve the remainder of the affidavit. State v. Keeney, 323 Or 309.

6. Informer Privilege.

ORS 133.703; OEC 510.

The courts repeatedly have upheld the right of the state to maintain the confidentiality of informants. *See, e.g.*, State v. Vatland, 123 Or App 577, 860 P2d 820 (1993), *rev den*, 318 Or 583 (1994); State v. Dunning, 81 Or App 296, 724 P2d 924 (1986).

The state may be compelled to disclose the identity of a confidential informant if the informant's testimony bears on the defendant's guilt or innocence. OEC 510; State v. Elliott, 276 Or 99, 553 P2d 1058 (1976); State v. Robertson, 289 Or App 703, 412 P3d 223, *rev den*, 363 Or 481 (2018). The issue in a hearing on a motion to suppress or controvert is *not* the defendant's guilt or innocence; it is only whether the affidavit supplied probable cause. State v. Waterbury, 50 Or App 115, 118, 622 P2d 330, *rev den*, 290 Or 651 (1981). Under ORS 133.703, if the good faith of the testimony presented to establish probable cause is contested, and that testimony included a report of information provided by a confidential informant, the defendant is entitled to prevail on the motion to suppress unless:

(1) The evidence was seized pursuant to a search warrant and the informant testified personally before the issuing magistrate; or
(2) The judge determines from the affiant by a preponderance of the evidence that the confidential informant exists and is reliable.

ORS 133.703(1). An *in camera* examination of the confidential informant is not required if the judge can make the required factual determinations based on credible testimony offered by the affiant. State v. Age, 38 Or App at 501.

The defendant must do more than merely assert that the informant has information about the defendant's guilt or innocence. *State v. Juhl*, 150 Or App 585, 946 P2d 683, *rev den*, 326 Or 234 (1997) (mere speculation that the informant might be able to rebut the testimony of a state's witness was not sufficient); *State v. Gill*, 22 Or App 484, 539 P2d 1138 (1975) (defendant's claim that informant entrapped defendant was insufficient); *State v. Braun*, 22 Or App 592, 540 P2d 1029 (1975) (defendant's assertion that the informant planted drugs was insufficient). Moreover, the state need not disclose the identity of an informant whose information would tend to show only that the defendant is guilty. *State v. Cullen*, 128 Or App 436, 876 P2d 864 (1994); *State v. Vatland*, 123 Or App 577, 860 P2d 820, *rev den*, 318 Or 583 (1993). On the other hand, disclosure is required if there is a reasonable probability that the informant could aid in determining guilt or innocence. *State v. Martinez*, 97 Or App 170, 776 P2d 3 (1989).

As construed by the Court of Appeals, this privilege contains a significant limitation that can be exploited tactically by the defense to discover the identity of an informant. In *State v. Brown/Ford*, 106 Or App 291, 807 P2d 316, *rev den*, 311 Or 427 (1991), the court stated that OEC 510 does not permit a claim of privilege by a witness when the defense subpoenas an individual with the intent of asking the individual whether the witness was the informant, because the privilege belongs to the "unit of government," not to the informant. This means that the defendant may subpoena a suspected informant to a hearing and ask the person whether he or she provided information to the police. Neither the state nor the witness may invoke the privilege to preclude such an inquiry of the informant himself.

> **PRACTICAL SUGGESTION:** When faced with the tactic employed in *State v. Brown/Ford*, argue that defense counsel must first make a showing regarding the relevance of the testimony of the proposed witness. Ask what the witness would have to say that could bear on the "good faith, truthfulness and accuracy" of the *affiant*. *See State v. Cartwright*, 336 Or 408, 85 P3d 305 (2004) (upholding trial court order quashing defendant's subpoena for pretrial production of videotaped interviews; defendant had no right to pretrial production without showing, among other things, that the interviews were evidentiary and relevant, and that pretrial inspection was not a "fishing expedition").

C. STANDING AND PROTECTED PRIVACY INTERESTS.

Litigants and courts alike regularly have confused the separate concepts of "standing" and "protected privacy interests" by using the term "standing" to include both concepts. True "standing" means the right to obtain an adjudication, and it is considered before the court considers the merits of the case. Some cases also use the term "standing" to discuss whether the defendant has a protected privacy interest and whether the defendant's rights were violated by the action at issue. The Oregon Supreme Court has indicated that the term "standing" should be used only in the narrow sense of capacity to make a legal challenge; it should not be used to refer to whether the defendant has a privacy interest. *State v. Tanner*, 304 Or 312, 316, 745 P2d 757 (1987). This distinction is further explained in a civil case, *Eckles v. State of Oregon,* 306 Or 380, 383-84, 760 P2d 846 (1988), and in *State v. Jacobsen*, 142 Or App 341, 922 P2d 677 (1996).

1. True Standing: May the Court Consider Defendant's Objections?

True standing is rarely an issue in criminal cases. The Oregon Supreme Court consistently has held that a "criminal defendant always has standing to challenge the admission of evidence introduced by the state." *State v. Tanner,* 304 Or 312, 316, 745 P2d 757 (1987).

The same holds true under federal law: "in determining whether a defendant is able to show the violation of his (and not someone else's) Fourth Amendment rights, the 'definition of those rights is more properly placed within the purview of substantive Fourth Amendment law than within that of standing.'" *Minnesota v. Carter*, 525 US 83, 88, 119 S Ct 469, 142 L Ed 2d 373 (1998), *quoting* *Rakas v. Illinois*, 439 US 128, 140, 99 S Ct 421, 58 L Ed 2d 387 (1978). Consequently, if the search of a vehicle violated the defendant's legitimate expectation of privacy for purposes of the Fourth Amendment, he may challenge that search even though he was not the owner or lessee of the vehicle. *Byrd v. United States*, 584 US 395, 138 S Ct 1518, 200 L Ed 2d 805 (2018).

2. Privacy Interests: Were the Defendant's Constitutional Rights Violated?

To obtain an order suppressing evidence that the government seeks to offer, the defendant against whom the evidence would be offered must have a *personal* protected privacy interest in the property that has been searched or seized. If no right belonging to the defendant was violated in obtaining the evidence, the challenge fails on the merits. *State v. Taplin*, 311 Or App 542, 491 P3d 80 (2021) (officer did not violate defendant's privacy interests by looking past privacy curtain into holding cell); *State v. Newcomb*, 359 Or 756, 771-73, 375 P3d 434 (2016) (no privacy interest in interior of dog); *State v. Kosta*, 304 Or 549, 748 P2d 72 (1987); *State v. Tanner*, 304 Or 312, 745 P2d 757 (1987); *State v. Gonzalez*, 292 Or App 342, 423 P3d 117 (2018) (mere guest at residence did not have privacy interest in area under back steps); *State v. Miller*, 284 Or App 818, 395 P3d 584 (2017) (officer's acquisition from hospital staff of report of defendant's blood-alcohol content did not violate his privacy interest); *State v. Wilson*, 291 Or App 581, 422 P3d 402, *rev den*, 363 Or 600 (2018) (officer looking under door of bathroom stall to see defendant lying on floor did not violate his right to privacy); *State v. Carle*, 266 Or App 102, 337 P3d 904 (2014), *rev den,* 356 Or 767 (2015).

Where the defendant previously had abandoned his or her possessory and privacy interests in property, a police search of that property does not violate the defendant's rights under Art I, § 9. *State v. Forker*, 323 Or App 323, 523 P3d 670 (2022) (where defendant, as part of the plea agreement, relinquished his privacy and possessory interests in a computer, the state's subsequent search of that computer pursuant to a warrant did not violate his rights). When the evidence at issue was obtained from a third party who voluntarily turned it over to the police after the defendant had abandoned all possessory and privacy interests in the evidence, police do not violate the defendant's privacy rights under Art. I, § 9, by viewing its contents. *State v. Laney,* 318 Or App 509, 507 P3d 308, *rev den* 370 Or 197 (2022) (defendant abandoned his possessory and privacy interest in computers that that he left behind in his son-in-law's possession, despite his request that they should be "recycled"). Likewise, if a third party voluntarily, without any request or prompting, retrieves and turns over defendant's property to the police and the police recognize the property as contraband or seizable evidence, the seizure does not violate the defendant's privacy interest under Art I, § 9. *State v. Hall*, 324 Or App 802, 526 P3d 815 (2023) ("where a state official does not affirmatively encourage or instigate a search or seizure, a private person who seizes evidence does not become a state actor, even if the official may know or believe that the private person might undertake that seizure"). But the mere fact that the state obtained the information from a third party does not necessarily mean that the defendant did not have a constitutionally protected privacy interest in that information. *State v. Hawthorne*, 316 Or App 487, 504 P3d 1185 (2021), *rev den*, 369 P3d 856 (2022) (detective's obtaining of ping information from AT&T for defendant's phone was a search).

See the more detailed discussion of state and federal privacy interests in Chapter I.

3. Burden of Proving or Disproving a Protected Privacy Interest.

ORS 133.693(4) places on the government the burden of establishing the validity of a warrantless search, but the statute does not expressly allocate the burden of proving the existence or

non-existence of a protected interest. Nevertheless, in State v. Tucker, 330 Or 85, 997 P2d 182 (2000), the court held that this burden is on the state:

> "[I]n the context of a warrantless search, a defendant is not required to assert a protected property or privacy interest on which the state intruded. Rather, consistent with ORS 133.693(4), the burden is on the state to prove that the warrantless search did *not* violate a protected interest of the defendant."

330 Or at 88-89 (emphasis in original). *Accord* State v. Galloway/Hoesly, 198 Or App 585, 591, 109 P3d 383 (2005) ("The state bears the burden of demonstrating that the defendant lacked possessory or privacy interests in the property in question").

Moreover, "a defendant's denial of a protected interest is not necessarily dispositive of whether the state has met its burden of proving the validity of a warrantless search." State v. Tucker, 330 Or at 91, *citing and discussing* State v. Morton, 326 Or 466, 953 P2d 374 (1998); *see also* State v. Lewis, 306 Or App 492, 501-03, 474 P3d 907 (2020) (defendant did not abandon his privacy interest in contents of bag by leaving it in stolen vehicle); State v. Bunch, 305 Or App 61, 68-70, 468 P3d 972 (2020) (defendant did not abandon privacy interest in her purse by repeatedly telling officer it was not hers); State v. McClatchey, 259 Or App 531, 538, 314 P3d 721 (2013); State v. Standish, 197 Or App 96, 101-03, 104 P3d 624, *rev dismissed*, 339 Or 450 (2005). *See* further discussion of Morton and related cases in Chapter IV (Warrantless Searches), (Abandoned and Lost Property).

The state's burden to prove that the defendant lacked a protected privacy interest does not arise if the evidence establishes that no search occurred. Illinois v. Caballes, 543 US 405, 125 S Ct 834, 160 L Ed 2d 842 (2005) (dog sniff for drugs of exterior of vehicle during course of lawful traffic stop did not require any justification because it was not a "search"); State v. Wilson, 291 Or App 581, 586-88, 422 P3d 402 (2018) (officer's observation, from lawful vantage point, of defendant lying on floor of bathroom stall was not a "search"); State v. Hockema, 264 Or App 625, 630-35, 333 P3d 1134 (2014) (officers' entry onto defendant's property to knock on front door did not invade his privacy interests because he failed to establish that he had manifested intent to exclude visitors); State v. Barnes, 172 Or App 408, 18 P3d 1108 (2001) (in the absence of evidence indicating whether defendant got out of his pickup on his own initiative, or was asked or ordered to do so by officer, state had no burden to either prove that no search occurred or to justify a search).

Also, the state's burden may be narrowed by the terms of the motion to suppress and by the evidence offered by the defendant at the hearing on that motion. In State v. Avalos-Izquierdo, 175 Or App 229, 27 P3d 528 (2001), *rev den*, 334 Or 190 (2002), the defendant challenged the officers' actions in entering a farm labor camp without a warrant and arresting the defendant. The defendant asserted that the entry by the police invaded his protected interests because lived at the camp. At the hearing, the state offered evidence that he was not a resident, and the trial court denied the motion on that basis. On appeal, the defendant argued for the first time that he had a protected interest in the camp even if he was only a guest. The Court of Appeals declined to consider this new claim and it affirmed the denial of suppression. Because the defendant asserted a specific factual ground as a basis for a protected privacy interest, the state did not have to anticipate and disprove other possible (and conflicting) factual claims.

D. CHOICE OF LAW.

When a challenged search was conducted outside of Oregon, or is conducted by governmental agents who are not agents of the state of Oregon, the state must still prove that the search was conducted in a manner that was consistent with Oregon constitutional standards.

1. Officers of Other States Acting in Their Own States.

In *State v. Davis,* 313 Or 246, 834 P2d 1008 (1992), the Supreme Court clarified previously murky rules regarding the admissibility of evidence obtained in searches that occur outside Oregon or that are conducted by non-Oregon governmental entities. In *Davis*, Mississippi police officers who were in possession of an Oregon arrest warrant for the defendant, but not a search warrant, entered the Mississippi residence of the defendant's mother, and they thereby obtain evidence relevant to a homicide in Oregon. The Supreme Court gave Article I, section 9, an extra-territorial effect:

> "The standard of governmental conduct and the scope of the individual rights protected by Article I, section 9, are precisely the same as those that would apply to a search by Oregon police in Oregon. …
>
> "It does not matter *where* that evidence was obtained (in-state or out-of-state), or *what* governmental entity (local, state, federal, or out-of-state) obtained it; the constitutionally significant fact is that the Oregon government seeks to use the evidence in an Oregon criminal prosecution."

State v. Davis, 313 Or at 253-54 (emphasis in original).

> **CAVEAT.** In *Davis*, the Mississippi officers executed an arrest warrant issued by an Oregon court specifically for the purpose of obtaining evidence relating to a pending homicide investigation in Oregon. The Supreme Court concluded that, in such circumstances, the search and arrest had to comply with Oregon constitutional standards in order for the evidence to be admissible in an Oregon court. But it is not clear from *Davis* whether the court would apply the same rule if officers in another state, acting in full compliance with that state's laws and the federal constitution, obtain evidence of a crime that the suspect committed in Oregon but the officers, when they acted, had no reason to believe that the search would uncover such evidence. Also, remember that *Davis* applies only to the defendant's rights under the Oregon Constitution; if the search or seizure at issue failed to comply only with a *statutory* requirement, ORS 136.432 precludes suppression.

See also:

State v. Sholedice/Smith, 364 Or 146, 155, 431 P3d 386 (2018), *adh'd to as modified on recons,* 364 Or 575 (2019). Conduct by federal postal inspectors within post office is examined for compliance with Art. I, § 9, when evidence that was obtained thereby is offered in state prosecution.

State v. Keller, 361 Or 566, 572-75, 396 P3d 917 (2017). Reaffirming *Davis* and applying Oregon law to legality of stop in Oregon by Washington officer who followed defendant into Oregon.

State v. Makuch/Riesterer, 340 Or 658, 136 P3d 35 (2006). A determination by a Washington criminal court that a search of the defendant's Washington residence was unlawful under the Washington Constitution did not require suppression of the evidence resulting from the search in an Oregon case; rather, Oregon law governs the admissibility of the evidence in Oregon courts.

State v. Britten, 89 Or App 374, 749 P2d 1193, *rev den*, 306 Or 78 (1988). Oregon law applied to the search of a cabin in Montana by the defendant's landlord and a Montana officer.

State v. Fleming, 91 Or App 394, 755 P2d 725, *rev den*, 306 Or 661 (1988). A recorded phone call made from Oregon to a Washington resident with the Oregon caller's consent was admissible because it complied with Oregon law, although Washington required two-party consent.

2. Federal Officers in Oregon.

In *State v. Rodriguez,* 317 Or 27, 854 P2d 399 (1993), the Supreme Court applied the *Davis* rule to conflicts between state and federal law. The court held that, when a federal officer makes an arrest in Oregon on a federal charge and the state later offers evidence resulting from that arrest in an Oregon court, the Oregon court must determine the validity of the arrest under Oregon constitutional standards and exclude the evidence if it was obtained in violation of Article I, section 9.

3. Search and Seizure Provisions in County Charters.

In *State v. Logsdon*, 165 Or App 28, 995 P2d 1178, *rev den*, 330 Or 362 (2000), the court held invalid a Josephine County charter provision that was directed to any "public official" and "any agent of the government" and that purported to expand search-and-seizure protections within the county: "whatever else local government authority may entail, it does not include governing the conduct of state and federal officials." 165 Or App at 32.

E. EXCLUSIONARY RULE.

1. Constitutional Violations.

Oregon Law.

Under the Oregon Constitution, evidence is suppressed, not to deter police misconduct, but to vindicate the defendant's "personal right" to be free from unconstitutional searches and seizures. *State v. Hall*, 339 Or 7, 24-25, 115 P3d 908 (2005); *State v. Smith*, 327 Or 366, 379, 963 P2d 642 (1998). As the Supreme Court reiterated in *State v. Unger*, 356 Or 59, 67, 333 P3d 1009 (2014): "The goal of the exclusionary rule in Oregon is to restore a defendant to the same position as if the government's officers had stayed within the law by suppressing evidence obtained in violation of the defendant's rights."

Consequently, evidence seized in violation of a defendant's Article I, § 9, rights is not admissible against the defendant for any purpose in subsequent criminal proceedings, including the trial, *State v. Iseli*, 80 Or App 208, 720 P2d 1343, *rev den*, 302 Or 36 (1986) (inadmissible for impeachment), the sentencing hearing, *State v. Swartzendruber*, 120 Or App 552, 853 P2d 842 (1993), or a probation-violation proceeding, *State ex rel. Juv. Dept. v. Rogers*, 314 Or 114, 836 P2d 127 (1992). *But see State ex rel. DHS v. W.P.*, 345 Or 657, 202 P3d 167 (2009) (state and federal exclusionary rules do not apply in juvenile-dependency cases); *T.M.M. v. Lake Oswego School District*, 198 Or App 572, 108 P3d 1211 (2005) (exclusionary rule did not apply in school-disciplinary hearing that resulted only in student's five month expulsion—student contested admission of his statements at the expulsion hearing, contending that those statements were involuntary and were obtained in violation of his constitutional right to counsel). Evidence need not be suppressed, despite an illegality, if the state establishes that the discovery of the evidence is attenuated from that illegality. *State v. Unger*, 356 Or 59, 333 P3d 1009 (2014). *See* discussion in this chapter (Fruit of the Poisonous Tree – Causal Connection & Attenuation/Exploitation).

Federal Law.

Under the Fourth Amendment, illegally obtained evidence, to which a timely objection is made by a defendant with a legitimate privacy interest, will not be admitted into evidence as direct evidence of guilt. The federal exclusionary rule is not a personal constitutional right, but rather a judicially created remedy to deter constitutional violations. *Forty-Ninth Annual Review of Criminal Procedure*, 49 GEO. L.J. ANN. REV. CRIM. PROC. 253 (2020), *citing* *United States v. Leon*, 468 US 897, 104 S Ct 3405, 82 L Ed 2d 677 (1984); *see* *State v. Hall*, 339 Or 7, 23, 115 P3d 908 (2005) (noting that "deterrence of unlawful police conduct [is] the primary purpose of the exclusionary rule for violations of the Fourth Amendment"). Not all evidence obtained by an unlawful search or arrest is the fruit of the illegality. The test is whether the evidence was obtained by "exploitation" of the unlawful conduct or by other means "sufficiently distinguishable to be purged of the primary taint." *Wong Sun v. United States*, 371 US 471, 83 S Ct 407, 9 L Ed 2d 441 (1963). *See* discussion in this chapter (Fruit of the Poisonous Tree – Causal Connection & Attenuation/Exploitation).

Because the purpose of the federal exclusionary rule is to deter improper conduct by police, evidence obtained by officers acting in objectively reasonable good-faith reliance on a search warrant need not be excluded, even if the search warrant was not supported by probable cause or otherwise does not comply with the Fourth Amendment. *United States v. Leon*, 468 US 897; *Massachusetts v. Sheppard*, 468 US 981, 104 S Ct 3424, 82 L Ed 2d 737 (1984); *State v. Breedwell*, 323 Or App 172, 194-99, 522 P3d 876, *rev den*, 371 Or 106 (2022) (although the search warrant violated the particularity requirement of the Fourth Amendment, the "good faith exception" applied). Similarly, the Fourth Amendment does not require suppression when the unlawful search results from a clerical error by a court employee, because suppression under these circumstances would have no deterrent value. *Arizona v. Evans*, 514 US 1, 115 S Ct 1185, 131 L Ed 2d 34 (1995); *see also* *Herring v. United States*, 555 US 135, 129 S Ct 695, 172 L Ed 2d 496 (2009) (holding that evidence obtained in violation of the Fourth Amendment is not to be suppressed when, due to a recordkeeping error, a police officer reasonably but mistakenly believed that a warrant was outstanding for defendant's arrest. *Note*: The Court cautioned that suppression may be an appropriate remedy if the police were "reckless in maintaining a warrant system" or knowingly made false entries.)

Unlawfully obtained evidence may be admitted for the purpose of impeaching the testimony of the accused. *United States v. Havens*, 446 US 620, 627-28, 100 S Ct 1912, 64 L Ed 2d 559 (1980) (evidence seized in violation of the Fourth Amendment); *see also* *Michigan v. Harvey*, 494 US 344, 110 S Ct 1176, 108 L Ed 2d 293 (1990) (violation of the Sixth Amendment right to counsel); *Oregon v. Hass*, 420 US 714, 95 S Ct 1215, 43 L Ed 2d 570 (1975) (*Miranda* violation); *Harris v. New York*, 401 US 222, 91 S Ct 643, 28 L Ed 2d 1 (1971) (*Miranda* violation). *Contrast* *State v. Isom*, 306 Or 587, 761 P2d 524 (1988) (statements improperly elicited from an in-custody suspect after the suspect requests counsel are not admissible under the Oregon Constitution, even for impeachment); *State v. Finonen,* 272 Or App 589, 356 P3d 656 (2015) (same).

2. Statutory Violations.

Oregon Law.

ORS 136.432, enacted in 1997, provides that "[a] court may not exclude relevant and otherwise admissible evidence in a criminal action on the grounds that it was obtained in violation of any statutory provision unless exclusion of the evidence is required by" the federal or state constitutions, the "rules of evidence governing privileges and the admission of hearsay," or the "rights of the press."

Under ORS 136.432, evidence obtained in violation of a variety of statutory provisions has been held to be admissible. *See, e.g.*, State v. Keller, 361 Or 566, 581-83, 396 P3d 917 (2017) (evidence obtained by officer acting without lawful authority but that did not violate constitutional provision was properly admitted); State v. Sparks, 267 Or App 181, 192-93, 340 P3d 688 (2014), *rev den,* 357 Or 325 (2015) (no suppression for alleged errors in obtaining power billing records by grand-jury subpoena); State v. Moore, 265 Or App 1, 7-8, 336 P3d 507, *rev den,* 356 Or 638 (2014) (no suppression for alleged violation of ORS 813.100(1)); State v. Henderson, 341 Or 219, 223 n 3, 142 P3d 58 (2006) (no suppression for violation of requirement in ORS 133.575(3) that search warrant be read to resident before search); State v. Hays, 234 Or App 713, 228 P3d 731 (2010) (even if officer violated the implied-consent statutes in seeking defendant's consent, under ORS 136.432, an officer's violation of the implied consent statutes is not grounds for suppressing breath test results); State v. Silbernagel, 229 Or App 688, 215 P3d 876 (2009) (holding that it was unnecessary to decide whether the officer violated implied-consent laws by informing defendant, who had been arrested for DUII, that if he did not consent to a breath test, the officer would apply for a warrant to obtain a sample of defendant's blood resulting in defendant's consent to the breath test because "ORS 136.432 precludes suppression of the evidence" on that ground and no statute "provides an exclusionary remedy for a violation of ORS 813.100(2) and ORS 813.140"); State v. Radford, 223 Or App 406, 196 P3d 23 (2008), *rev den*, 346 Or 362 (2009) (holding no suppression for scrivener's error in warrant even if warrant violated ORS 133.565 because ORS 136.432 precludes suppression unless exclusion of the evidence is required by the constitution, rules of evidence governing privileges and hearsay, or the rights of the press); State v. Bloom, 216 Or App 245, 172 P3d 663 (2007), *rev den*, 344 Or 280 (2008) (no suppression of breath test result in DUII case for error in rights and consequences read to arrested driver, a violation of ORS 813.130); State v. Warner, 181 Or App 622, 47 P3d 497 (2002) (violation of requirement in ORS 813.160(2) that blood be drawn by, or under the supervision of, a physician not a ground for excluding blood test results); State v. Arabzadeh, 162 Or App 423, 986 P2d 736 (1999) (evidence obtained from consent preceded by a presumptively unlawful extension of a traffic stop, in violation of former version of ORS 810.410).

But, under ORS 136.432, evidence that was seized in violation of a statute is not admissible if the police conduct leading to the seizure violates the state or federal constitution. ORS 136.432(1); State v. Edgell, 153 Or App 108, 956 P2d 988 (1998) (evidence seized in violation of the scope limitations of ORS 810.410, the traffic stop statute, was not admissible under ORS 136.432 where the seizure also violated Art I, § 9, in that it was conducted pursuant to consent from a third person who lacked actual authority to consent); *see also* State v. $113,871 in U.S. Currency and James Robinson, 152 Or App 770, 954 P2d 218, *rev den*, 327 Or 305 (1998) (holding in a civil forfeiture proceeding that police inquiry that exceeds the permissible scope of a traffic stop under ORS 810.410 does not itself constitute a violation of Article I, section 9).

ORS 136.432 also does *not* abrogate pre-existing statutes that expressly or implicitly require evidentiary exclusion for specific statutory violations. State v. Lee, 371 Or 200, 218-19, 532 P3d 894 (2023), *adh'd to on recons*, 373 Or 525 (2025) (because "anticipatory warrant" failed to comply with statutory requirements, the proper remedy is suppression, despite ORS 136.432, because ORS 133.673(1) required suppression as a remedy); State v. Jones, 339 Or 438, 121 P3d 657 (2005) ("Once all other conditions are met, ORS 41.910 requires suppression" of unlawfully recorded communication); State v. Eskie, 277 Or App 93, 100, 370 P3d 1266 (2016) (despite ORS 136.432, defendant's refusal of breath test must be suppressed because the refusal was obtained in violation of ORS 813.316); State v. Prew, 213 Or App 336, 161 P3d 323 (2007) (suppression remedy provided by ORS 41.910 for evidence of conversation obtained in violation of ORS 165.540 survived enactment of ORS 136.432; but defendant did not meet his burden of proving factual nexus between arresting officer's unlawful recording of DUII stop, in violation of notice requirement of ORS 165.540(1)(c), and officer's subsequent testimony regarding his own observations); State v. Thompson-Seed, 162 Or

App 483, 986 P2d 732 (1999) (ORS 136.432 did not override statute specifically requiring exclusion of bank records obtained in violation of ORS 192.565).

Before the enactment of ORS 136.432, Oregon courts inconsistently applied exclusion as a remedy for a statutory violation. As noted in *State v. Ingram*, 313 Or 139, 831 P2d 674 (1992), suppression was the proper remedy for a statutory violation when the statute defined the authority of officers to search or seize and the evidence was offered against a person whose rights were violated. Examples of instances in which suppression was applied for a violation of a statute include violation of the statute limiting the scope of a traffic stop (ORS 810.410; *see State v. Dominguez-Martinez*, 321 Or 206, 895 P2d 306 (1995)), and the statute requiring the filing of a transcript of the oral application for a telephonic warrant (ORS 133.545); *see State v. Evans*, 110 Or App 46, 822 P2d 1198 (1991)).

In contrast, suppression was not required for violation of the statute requiring that an officer executing a search warrant read the warrant and deliver a copy of it to the occupant (ORS 133.575(3); *see State v. Blasingame*, 127 Or App 382, 873 P2d 361, *rev den*, 319 Or 406 (1994)), the statute requiring officers to file the original search warrant with the court (ORS 133.615; *see State v. Lynch*, 119 Or App 97, 849 P2d 556 (1993)), or the statute governing search warrant extensions (ORS 133.565(3); *see State v. Whalen*, 90 Or App 18, 750 P2d 1168 (1988)).

ORS 9.490(2) prohibits a court from suppressing evidence or dismissing a criminal prosecution if the sole reason for doing so is a violation of a disciplinary rule of the Oregon State Bar. *See also State v. Charlesworth/Parks*, 151 Or App 100, 951 P2d 153 (1997), *rev den*, 327 Or 82 (1998) (no suppression for violation of *former* DR 4-101 or ORS 9.460, which prohibit disclosure of client confidences and secrets).

In *State v. Logsdon*, 165 Or App 28, 995 P2d 1178, *rev den*, 330 Or 362 (2000), the court held that a county charter provision purporting to expand search-and-seizure protections within Josephine County was invalid and, thus, could not provide a basis for suppression in a criminal case.

3. Fruit of the Poisonous Tree — Causal Connection & Attenuation/Exploitation.

Oregon Law.

As noted above, the Oregon exclusionary rule "exists to vindicate a personal right to be free from unlawful searches and seizures. To support *that* purpose, it is sufficient to suppress only evidence that is *actually obtained* out of an illegal search or seizure." *State v. Smith*, 327 Or 366, 379, 963 P2d 642 (1998) (emphasis in original; citation omitted). Hence, the court in *Smith* held that the unlawful act of "securing" a storage locker without a warrant did not require suppression of evidence later seized pursuant to the warrant, because the officers did not obtain any evidence as result of securing the locker. Rather, the officers obtained the evidence at issue only as a result of their execution of the warrant. *State v. Sargent*, 323 Or 455, 918 P2d 819 (1996). If there is no connection, then, the evidence is not the fruit of the illegality.

But, generally, there will be some connection between evidence and the illegality—even if only a temporal one. The state will then have to prove that the evidence did not result from exploitation of the illegality, or that there was sufficient attenuation that there is no significant causal link between the two. *See State v. Unger*, 356 Or 59, 333 P3d 1009 (2014); *State v. Lorenzo*, 356 Or 134, 335 P3d 821 (2014); and *State v. Musser*, 356 Or 148, 335 P3d 814 (2014).

In *Unger*, *Lorenzo*, and *Musser*, the Supreme Court addressed whether evidence obtained pursuant to a consent to search was attenuated from a prior violation of Article I, § 9. The court expressly rejected the notion that the mere fact that consent follows closely after an illegality without

any intervening circumstances invariably will be a "product" of the illegality. Rather, the court explained that the question turns instead on a fact-specific analysis of whether the defendant's consent is "unrelated or only tenuously related to the prior illegal conduct." *Unger*, 356 Or at 79. The court affirmed the importance of an individual's voluntary consent, and held that the exploitation analysis should include not only include considerations of temporal connection and intervening or mitigating circumstances, but also "the nature of the unlawful conduct, including its purpose and flagrancy." *Unger*, 356 Or at 93. In explaining why the nature, purpose, and flagrancy of police conduct is pertinent, the court observed that "to treat a police trespass onto a defendant's property to reach and knock on a back door no differently in terms of its causal effect on defendant's voluntary consent than if the police had broken down all the doors simultaneously, entered the home with guns drawn, and arrested defendant—simply because both scenarios involve violations of Article I, section 9—is to ignore reality."

Before *Unger* and its companion cases, the supreme court had imposed a requirement on the defendant to make a threshold showing of a "minimal factual nexus" between the illegality and the evidence obtained, and then put the burden on the state to prove that the connection was sufficiently attenuated. *See State v. Hall*, 339 Or 7, 25, 115 P3d 908 (2005). But the Supreme Court later disavowed *Hall*'s imposition of that threshold requirement on the defendant in cases involving warrantless searches. *See Unger*, 356 Or at 76.

Federal Law

Although it variably has been described as either an exploitation analysis or an attenuation analysis, Oregon's analysis follows the general contours of the federal doctrine laid out in *Wong Sun v. United States*, 371 US 471, 487-88, 83 S Ct 407, 9 L Ed 2d 441 (1963)—*i.e.*, was the fruit of the search at issue obtained by exploitation of the earlier illegality, or did it instead derive from "means sufficiently distinguishable to be purged of the primary taint"? *State v. Rodriguez*, 317 Or 27, 854 P2d 399 (1993); *State v. Kennedy,* 290 Or 493, 624 P2d 99 (1981); *State v. Chambers*, 147 Or App 626 (a breath test was not the fruit of unlawfully compelled field sobriety tests). This route around the "fruit of the poisonous tree" doctrine was given life by the United States Supreme Court in *Nardone v. United States,* 308 US 338, 60 S Ct 266, 84 L Ed 307, 312 (1939), and in *Wong Sun* itself. *See State v. Quinn,* 290 Or 383, 396 fn 3, 623 P2d 630 (1981) (briefly distinguishing the concept of attenuation from that of original causation); Broeder, "*Wong Sun v. United States: A Study in Faith and Hope*," 42 NEB L REV 483 (1963).

a. Is the Causal Connection Broken by Voluntary Consent?

An illegal seizure may affect the validity of a defendant's consent to search in two ways: (1) the illegal police conduct rendered the consent involuntary in fact; or (2) the consent was voluntary but "derived from" the preceding violation. Thus, the Supreme Court in *Unger* held that the state must prove both that the defendant's consent was voluntary and that it was not "derived from" or the product of "exploitation" of the illegality: "The proper test for voluntariness of consent is to examine the totality of the facts and circumstances to see whether the consent was given by defendant's free will or was the result of coercion, express or implied. To prove the voluntariness of a consent to search in the context of an illegal stop or an illegal search, the state must prove that the defendant's consent was the product of his or her own free will, rather than the result of coercion." 356 Or at 72 (citations and internal quotations marks omitted). *See also State v. Rodriguez*, 317 Or 27, 38, 854 P2d 399 (1993) (state must prove by preponderance that the consent was voluntary).

Before *Unger*, Oregon courts found exploitation in almost any case in which consent was given during an unlawful seizure or soon after an illegality. *See State v. Ayles*, 348 Or 622, 237 P3d 805 (2010) (request for consent for a patdown was made during unlawful seizure; lack of intervening

circumstances required suppression); State v. Rodgers/Kirkeby, 347 Or 610, 227 P3d 695 (2010) (no attenuation where voluntary consent to search was given after unlawful questions about weapons during traffic stop); State v. Klein, 234 Or App 523, 228 P3d 714 (2010) (consent to search given after officer asked questions about weapons was unattenuated product of the unlawful extension of the stop); State v. Orcutt, 232 Or App 268, 221 P3d 835 (2009) (officers unlawfully extended stop by asking about weapons, for a patdown, and consent to search purse, and Miranda warnings did not attenuate that illegality). Those decisions may no longer be valid under Unger.

But some pre-Unger cases finding a lack of attenuation appear to remain good law because the officers in those cases traded on incriminating information obtained due to the illegality to obtain consent. State v. Bertsch, 251 Or App 128, 284 P3d 502 (2012) (officer unlawfully seized defendant by telling her to get out of the vehicle and asked her about her probation and drug use; the fact that he defendant that she could refuse consent to a search did not attenuate illegality because seizure was ongoing and officer suggested that defendant should consent if she had nothing to hide); State v. Shirk, 248 Or App 278, 289, 273 P3d 254 (2012) (consent not attenuated from officers' unlawful entry into hotel room because unlawful trespass yielded incriminating evidence, and officers obtained consent to search only after unlawfully seizing defendant after she lawfully refused to consent to a search of her room); State v. Tyler, 218 Or App 105, 178 P3d 282 (2008) (consent search did not attenuate the evidence from the unlawful warrants check, because the state did not prove that the officer's request was *not* prompted by his discovery that defendant was on probation). *Compare* State v. Dinsmore, 182 Or App 505, 516-18, 49 P3d 830 (2002) (failure to give *Miranda* warnings did not invalidate defendant's later consent to do FSTs, because officer did not exploit information gained from her statements to obtain her consent).

Finally, several pre-Unger cases finding sufficient attenuation describe factors that remain relevant even after Unger. Volunteered consent would be a relevant factor, as long as the officers' conduct is not particularly flagrant. *See* State v. Kennedy, 290 Or 493, 624 P2d 99 (1981) (defendant's volunteered invitation—"Would you like to search my luggage?"—during unlawful detention at airport was not the product of the detention); State v. Phillips, 232 Or App 547, 222 P3d 738 (2009) (defendant's spontaneous offer to allow search of car attenuated officer's unlawful conduct in blocking his vehicle); State v. Hendon, 222 Or App 97, 194 P3d 149 (2008) (defendant's offer to allow officer to search attenuated the connection to the illegal records check). Consent that is given after advice that the defendant is not required to consent will likely be sufficient attenuation. *See* State v. Hinds, 225 Or App 470, 202 P3d 187, *rev den*, 347 Or 43 (2009) (even if officer unlawfully "stopped" defendant by asking him to take his hands out of his pockets, defendant's consent to a pat-down search was not tainted because officer made clear that defendant was not *required* to consent); *see also* State v. Land, 106 Or App 131, 806 P2d 1156 (1991) (volunteered consent attenuated connection between unlawful entry into garage and discovery of evidence).

See additional voluntariness cases and further discussion in Chapter IV (Warrantless Searches) (Voluntariness).

Factors to Consider under Unger/Lorenzo When the Defendant's Consent Was Elicited After Illegal Police Conduct:

- Was there any coercion express or implied by the officer that prompted the consent?

- Was the officer's request for consent induced by information that was obtained as a result of the illegality?

- Did the illegality put the officer in a more advantageous position to elicit the defendant's consent?

• Was the illegality merely technical, inadvertent, and de minimis or was it deliberate and flagrant?

• Was the defendant aware of the illegality?

• Was the interaction polite and non-confrontational or was the officer clearly conducting a criminal investigation?

• Was the defendant advised expressly, either by the officer or otherwise, that he or she could refuse consent?

• Was there a significant passage of time or any intervening event between the illegality and the consent that served to dissipate the taint?

• Was the defendant being held or detained unlawfully when the officer elicited the consent—i.e. had the illegality terminated or did it continue, possibly coercing the consent?

• Was the nature of the contact up to the giving of the consent a stressful police-dominated encounter or a relaxed and polite non-confrontational contact?

• Is the defendant someone who is sufficiently assertive and sophisticated so as not to be affected by the illegality at issue?

• Did the defendant spontaneously volunteer the consent, or was it elicited only after prodding by the officer?

• How intrusive was the search?

Post-*Unger* (2014) Cases: Consent Was Not Product of Exploitation of Illegality

State v. Riley, 288 Or App 264, 406 P3d 81 (2017), *rev den*, 362 Or 861 (2018). Even if defendant was unlawfully seized when the police surrounded the apartment where he was hiding and ordered occupants to come out, the discovery of evidence inside the apartment pursuant to other occupants' voluntary statements and consent, given more than two hours later, was attenuated from the effect of that illegality. The police conduct was minimally intrusive, and the police did not trade on any information that they had obtained from the initial seizure of defendant to induce the occupants to speak with them or to consent to the search.

State v. Lowell, 275 Or App 365, 364 P3d 34 (2015). Even if the officer had unlawfully seized defendant, who had been in an accident, by inducing him to go to the hospital for medical treatment, that illegality was attenuated when defendant voluntarily submitted to treatment and officer met back up with him to issue him a citation and obtained his consent to a search of his belongings.

State v. Delong, 357 Or 365, 350 P3d 433 (2015). Defendant's offer to allow officers to search his car sufficiently attenuated the evidence from their prior failure to give *Miranda* warning.

State v. Unger, 356 Or 59, 333 P3d 1009 (2014). Defendant's voluntary consent to search home was not product of exploitation of officers' unlawful trespass into his backyard to knock on his back door after he did not respond to knocks at the front door. Although the trespass put the officers in a place where they could contact defendant, the officers did not unlawfully arrest or stop defendant.

The trespass "was not flagrant or egregious," and defendant "does not argue that anything about the nature of the trespass or his interactions with the detectives significantly affected his consent."

State v. Lorenzo, 356 Or 134, 335 P3d 821 (2014). Defendant's consent was not the product of exploitation of officers' unlawful opening of his door to check on his safety after his roommate was reported as a suicide risk. From outside the apartment, the officers questioned defendant and eventually obtained his consent to search, which led to discovery of drugs. No exploitation because: (a) after he emerged from his bedroom, defendant voluntarily consented to have the officer step inside; (b) the illegality was limited in time and severity and "was unlikely to have had a significant effect on defendant's consent"; (c) "the officer did not gain any information about potentially criminal activity as a direct result" of the illegal opening of the door; (d) nothing suggested that police were pursuing a criminal investigation or doing random searches for crime evidence; and (e) the restrained interaction between police and defendant and the absence of any threats or intimidation were not flagrant circumstances that likely would have affected defendant's voluntary consent.

***Post-Unger* Cases: Consent Was Product of Exploitation of Illegality**

State v. Wagner, 339 Or App 1, 566 P3d 1241 (2025). Through an unlawful search, police obtained images of defendant sexually abusing an unidentified child. After defendant was indicted on charges based on the images, police issued a press release seeking information about the victim, which provided defendant's name and described evidence from the unlawful search. The victim's mother responded to the press release and police spoke with her and confirmed that her child was depicted in the unlawfully obtained images. A week later, the mother volunteered that she had a camera that defendant had used, and asked police to search it. Because police "took advantage of information gained" from the unlawful search to obtain the mother's consent and evidence found on the camera, that evidence had to be suppressed.

State v. Pitz, 317 Or App 8, 504 P3d 685 (2021). After defendant was arrested on a PV show-cause warrant that the court lacked authority to issue because her probation had expired, she consented to a search of a lunchbox, which revealed drugs. Because the arrest occurred immediately before she was asked for consent, the search was a product of the illegality.

State v. Pichardo, 360 Or 754, 388 P3d 320 (2017). Defendant's consent to search during vehicle stop did not attenuate the illegal extension caused by the officer's request for consent. Defendant consented immediately after the request, and no intervening circumstances, such as *Miranda* warnings, occurred. The dispositive factor was the nature of the officers' conduct during the stop, which involved several officers surrounding the car and removing the driver from the car at gunpoint. The officer's request for consent both unlawfully extended the stop and immediately followed that show of force. "Given that show of force, we are not persuaded that defendant's consent, while voluntary, was sufficient to attenuate the taint of the illegal extension of the stop."

State v. Kelly, 274 Or App 363, 360 P3d 691 (2015). Officers exploited their unlawful entry into garage to obtain defendant's subsequent consent to a search; although the officers did not see evidence of drug use upon entry, the "intrusiveness, purpose, and flagrancy" of the entry put defendant in a "disadvantaged position" that likely influenced her decision to consent.

State v. Sanchez, 273 Or App 778, 359 P3d 563 (2015). Defendant's consent to do FSTs (and all other evidence of DUII) was the product of an officer's unlawful conduct in entering her backyard and ordering her out of the house, which subjected her to the scrutiny of the officers and the victim (who identified her as the driver). Hence, defendant's voluntary decision to speak to the officer at the door did not break the connection because it was close in time to the unlawful conduct and the unlawful seizure was still ongoing. The unlawful conduct was also flagrant because by going into the

gated backyard and looking into a window without a warrant, the first officer showed disregard for well-established search-and-seizure law.

State v. Musser, 356 Or 148, 335 P3d 814 (2014). Defendant's consent to search her purse was the product of her seizure by officer in absence of reasonable suspicion. Even though the interaction was short, the officer exploited the unlawful seizure to obtain consent: (a) the officer, in unlawfully requiring defendant to approach and speak to him, brought her "significantly under [his] control"; (b) the seizure was ongoing when the officer asked for consent to search; (c) the seizure led directly to officer's ability to view pouches that led him to ask to search; (d) the stop itself was a "shot in the dark" to check for criminal activity; and (e) by the time the officer asked for consent to search, he was focused—and "defendant well understood" that he was—"on drug possession."

b. Retroactive Consent.

Consent obtained after a search has begun will not validate the search unless there is "evidence that the person giving the consent intended the consent to be retroactive." State v. Weaver, 319 Or 212, 222, 874 P2d 1322 (1994). In State v. Larson, 159 Or App 34, 977 P2d 1175, *rev den*, 329 Or 318 (1999), the court was asked to consider whether a *third party* could give retroactive consent that would be binding on the defendant. The court held that, under the circumstances of that case, the third party's consent did not "relate back" to the time of the previous warrantless entry by the police. In other words, the consent given by the third party did not waive *the defendant's* claim that the police entry was unlawful. *Accord* State ex rel Juv. Dept. v. Reeves, 163 Or App 497, 499, 506, 988 P2d 433 (1999), *rev den*, 330 Or 71 (2000) ("our premise in Larson was that retroactive consent is 'essentially' a matter of waiver and that a third party cannot waive a prior violation of another person's constitutionally protected interests"; here, "[juvenile's] father could not effectively retroactively consent to the unlawful invasion of [juvenile's] privacy interests").

c. Was the Connection Attenuated by Circumstances Other Than Consent to Search?

Oregon courts have had little opportunity to apply the Unger test to attenuating circumstances other than voluntary consent. However, in State v. Suppah, 358 Or 565, 369 P3d 1108 (2016), the Oregon Supreme Court held that the defendant's commission of the crime of giving false information to a peace officer during a traffic stop was a sufficient attenuating circumstance despite the fact that the officer could not remember the basis for the stop, which rendered it unlawful. *See also* State v. Jordan, 308 Or App 547, 481 P3d 1017 (2021) (although unlawful stop and search entitled defendant to suppression of drugs found on his person, he was not entitled to dismissal of failure-to-appear charge for failing to appear on the citation issued upon his arrest). *See* State v. Leos-Garcia, 337 Or App 47, 55, 562 P3d 1121 (2024) (concluding that the defendant's refusal to take a breath test, which is a traffic violation, not a criminal offense, did not serve to attenuate illegality from prior unlawful search).

Those cases show that, as a general rule, the courts do not apply the exclusionary rule to suppress evidence of a new crime that the defendant commits after an unlawful stop, arrest, or search, even if crime does not threaten an officer's safety. *See also* State v. Bistrika, 261 Or App 710, 714-16, 322 P3d 583 (2014) (trial court correctly denied motion to suppress evidence of disorderly conduct and resisting arrest that defendant committed after allegedly unlawful warrantless entry); State v. Janicke, 103 Or App 227, 796 P2d 392 (1990) (evidence of assault and resisting arrest committed after presumptively unlawful warrantless entry). This exception to the exclusionary rule also extends to other evidence discovered during an otherwise unlawful search resulting from the new crimes. State v. Weiland, 72 Or App 25 (no suppression of drug evidence found on defendant after seizure of weapon and struggle with defendant). But this exception does not validate evidence of

mere possession of contraband during an unlawful stop, arrest, or search. *State v. Williams*, 161 Or App 111, 984 P2d 312 (1999) (marijuana discovered during inventory following unlawful arrest properly suppressed). The new crime need not involve physical force or violent action against an officer. *Suppah*, 358 Or at 578-80; *State v. Neill*, 216 Or App 499, 173 P3d 1262 (2007) (after officers' warrantless entry into her home, defendant committed crime of refusing to obey lawful order by police officer, under circumstances that caused officers to believe she was retrieving weapon; trial court correctly received evidence of her refusal to obey officers' orders).

Although the Supreme Court in *Unger* clarified the test for determining attenuation, cases decided prior to *Unger* nonetheless may be instructive in identifying factors relevant to the determination. Where there is no attenuation—or where there is clear exploitation of the illegality, *Unger* will not require a different result. *See State v. Juarez-Godinez*, 326 Or 1, 942 P2d 772 (1997) (drug dog's "alert" to the defendant's vehicle and a search warrant based on that alert were "unquestionably" the products of the unlawful detention of defendant's vehicle); *see also State v. Bryant,* 191 Or App 620, 83 P3d 941 (2004) (where an officer unlawfully searched for and seized cocaine from the defendant, then asked about it, the defendant's response resulted from exploitation of the unlawful search; had the officer not found the cocaine, he would not have asked the question).

And pre-*Unger* cases that recognize volunteered statements or conduct as sufficient attenuating circumstances are likely to remain good law under *Unger* as long as the police conduct is not flagrant. *See State v. Crandall*, 340 Or 645, 136 P3d 30 (2006) (defendant's voluntary act of discarding a baggie of drugs while approaching the officer in response to unlawful command sufficiently attenuated the discovery of that evidence from the prior illegality); *State v. Lay*, 242 Or App 38, 252 P3d 850 (2011) (defendant, a passenger who was unlawfully stopped by the officer's temporary retention of his driver's license, later volunteered incriminating statements; sufficient attenuation); *see also State v. Knox*, 160 Or App 668, 984 P2d 294, *rev den*, 329 Or 527 (1999) (defendant's concealment of pouch in rear seat of patrol car during transport was not the result of preceding unlawful officer-safety frisk; his transportation to police station following arrest was an intervening event and defendant's act of concealment abandoned his interest).

Finally, pre-*Unger* cases involving facts in which the police did not trade on the illegality may be useful even in a post-*Unger* world. *See State v. Mituniewicz*, 186 Or App 95, 62 P3d 417, *rev den*, 335 Or 578 (2003) (although officers gained information from an invalid trap-and-trace order that identified the defendant as a suspect, they relied on other evidence gathered from their investigation, not the information from the trap-and-trace order, to obtain a search warrant; as a result, the marijuana found in the defendant's house pursuant to the warrant was sufficiently attenuated from the trap-and-trace order that suppression was not required); *see also State v. Schwartz*, 173 Or App 301, 21 P3d 1128, *rev den*, 333 Or 162 (2001) (statements made by defendant to police during execution of a search warrant on his residence were not obtained by exploitation of the search because, even if the warrant or its execution was defective, nothing found during the search caused the police either to interview the defendant or to ask questions they otherwise would not have asked). Another example is *State v. Crescencio-Paz*, 196 Or App 655, 103 P3d 666 (2004), *rev den*, 339 Or 230 (2005), in which officers lawfully stopped defendant, but unlawfully handcuffed him while waiting 10 minutes for the victim to arrive to identify whether he was the robber. Because the defendant did not challenge the detention itself, the victim's identification was not the product of the handcuffing because defendant would have been detained for identification purposes in any event.

d. Causal Connection Broken by a Valid Arrest Warrant.

Oregon Law.

The rule in Oregon previously was that the "taint" of an unlawful arrest or detention could be "purged" by the subsequent discovery and execution of a valid outstanding arrest warrant—*i.e.*, evidence obtained after the arrest on the warrant is not the fruit of the prior illegality, but rather the fruit of the valid arrest on the warrant. State v. Dempster, 248 Or 404, 434 P2d 746 (1967); State v. Snyder, 72 Or App 359, 695 P2d 958, *rev den*, 299 Or 251 (1985). The Court of Appeals later refused to extend the Dempster/Snyder rule to validate retroactively an officer's search or seizure of evidence that occurred before the officer learned of the warrant. State v. Taylor, 151 Or App 687, 950 P2d 930 (1997), *rev den*, 327 Or 432 (1998).

But in State v. Bailey, 356 Or App 486, 338 P3d 702 (2014), the court "disavowed" *Dempster* on the ground that it was based on an outmoded view of the Fourth Amendment. The court noted that under the current interpretation of the Fourth Amendment, three factors to determine whether the connection between a police illegality and challenged evidence was sufficiently attenuated by discovery of an arrest warrant so as to purge the taint of illegality: (1) the temporal proximity between the illegality and the discovery of the evidence; (2) the presence of intervening circumstances; and (3) particularly, the purpose and flagrancy of the official misconduct. 356 Or at 504-06. Applying that test to the facts of that case, the court concluded that discovery of the warrant for the defendant's arrest did not sufficiently attenuate the preceding illegality: "The officers in this case detained defendant for an investigatory purpose without reasonable suspicion that he had engaged in unlawful activity for more than 30 minutes after the lawful justification for the traffic stop had ended. That conduct was purposeful, and it should have been obvious to the officers that they had extended the detention without regard to defendant's right to be free from an unreasonable seizure. For purposes of the federal exclusionary rule, the effect of that factor, when considered along with the temporal proximity between the unlawful detention and the discovery of the challenged evidence, outweighs any value that otherwise might be assigned to the subsequent discovery of a valid arrest warrant." 356 Or at 508.

Based on Bailey, the Court of Appeals has disavowed State v. Snyder and held that the discovery of arrest warrant does not automatically "purge" previous illegality under Article I, § 9; the court follows the State v. Unger framework for determining attenuation. *See* State v. Batistia, 276 Or App 634, 368 P3d 465 (2016) (suppression required despite arrest warrant); State v. Jones, 275 Or App 771, 365 P3d 679 (2015) (same); State v. Benning, 273 Or App 183, 359 P3d 357 (2015) (same); *but see* State v. Mitchell, 273 Or App 207, 360 P3d 525 (2015) (alleged illegality did not require suppression of evidence discovered after arrest on warrant).

> **PRACTICE TIP:** If illegality preceded the officer's discovery of the warrant for the defendant's arrest, be alert for the possibility that you may nonetheless have a valid inevitable-discovery argument. If the officer inevitably would have determined the defendant's identity and learned of the warrant, without regard to the information obtained as a result of the illegality and before discovery of the warrant, and so the officer (1) would have arrested the defendant anyway, (2) conducted the same search as a result of that arrest, and (3) thereby found and seized the evidence at issue, then the evidence should be admissible. *See* State v. Ray, 179 Or App 397, 402-04, 40 P3d 528 (2002) (rejecting the state's inevitable-discovery argument on the facts).

Federal Law.

Assuming that an illegal search occurred in the past, the question is whether the fruit of the present search was obtained by exploitation of the earlier illegality, or did it instead derive from "means sufficiently distinguishable to be purged of the primary taint?" *Wong Sun v. United States*, 371 US 471, 487-88, 83 S Ct 407, 9 L Ed 2d 441 (1963).

In *Utah v. Strieff*, 579 US 232, 136 S Ct 2056, 195 L Ed 2d 400 (2016), the Court held that an officer's discovery of a valid arrest warrant broke the "causal chain" from an unlawful stop.

In *New York v. Harris*, 495 US 14, 110 S Ct 1640, 109 L Ed 2d 13 (1990), a stationhouse confession was held admissible even though it was preceded by an illegal, warrantless arrest of Harris in his own home. Although the statement was the product of the arrest, it was not the product of the illegal conduct, *i.e.*, the *warrantless* arrest. Because the officers had probable cause, the statement could equally have been the product of a lawful arrest on the public sidewalk outside Harris's home.

An unlawful stop or arrest can, in some circumstances, invalidate a resulting consent to search. *See, e.g.*, *Florida v. Royer*, 460 US 491, 103 S Ct 1319, 75 L Ed 2d 229 (1983) (consent obtained during airport detention was invalid because the detention exceeded the reasonable scope of a stop and became, therefore, an unlawful arrest without probable cause).

e. Attenuation and Warranted Searches.

The Oregon Supreme Court has adopted a "burden-shifting framework that applies when a defendant challenges the admission of evidence obtained in a warranted search that is preceded by an illegality. Under that framework, the defendant has the initial burden to establish a minimal factual nexus between the illegality and the challenged evidence. If the defendant does so, the burden shifts to the state to establish that the challenged evidence was untainted by the illegality." *State v. DeJong*, 368 Or 640, 642, 497 P3d 710 (2021). "Defendant's burden of establishing a factual nexus is *minimal* and intended merely to rebut the presumption of regularity attendant to warranted searches." *Id.* at 654–55. "[S]atisfying that minimal standard does not require a defendant to identify and produce evidence related to discrete factual theories connecting the unlawful conduct with the challenged evidence." *Id.* at 655.

In *DeJong*, the court held that officers' unlawful seizure of a house while obtaining a warrant required suppression of evidence found inside during execution of warrant. The defendant established a minimal factual nexus, the court explained, because "as a result of the unlawful seizure" of the house, an officer obtained a statement that was used to obtain the warrant. *Id.* at 655. To establish that the challenged evidence was untainted by the illegality, the state argued that the officers inevitably would have found the evidence during the search. But the supreme court held that the evidence was legally insufficient to support that finding. *Id.* at 659; *see also State v. Thompson*, 370 Or 273, 518 P3d 923 (2022) (even if the police lawfully seized defendant's cellphone, they violated Art I, § 9, by continuing to hold it for five days before obtaining a warrant; so, defendant established a minimal factual nexus between that unlawful seizure and the information that was discovered as the result of a warranted search of his phone and also the statements that police later elicited from him during the interview based on that information, which required that those statements should have been suppressed); *State v. Rose*, 334 Or App 66, 78, 555 P3d 336 (2024) (concluding that the defendant established a minimum factual nexus between an unlawful search of a phone and evidence obtained in a later search of an SD card, because the search of the phone revealed the existence of the SD card).

In earlier cases, the Court of Appeals had held that "[w]hen a [warrant] application includes constitutionally tainted information, the correct action is for the magistrate and reviewing court to

excise from the application all such information and to determine whether the remaining information is sufficient to establish probable cause." *State v. Binner*, 128 Or App 639, 646, 877 P2d 642, *rev den*, 320 Or 325 (1994). But "*DeJong* implicitly overruled *Binner*" and related cases. *State v. De Witt Simons*, 329 Or App 506, 523, 540 P3d 1130 (2023), *rev allowed*, 372 Or 290 (2024). Courts must now apply the burden-shifting framework from *DeJong*.

The burden-shifting framework from *DeJong* also applies when a warrant contains valid and invalid (that is, unlawful) search commands. *See State v. Turay*, 371 Or 128, 532 P3d 57 (2023); *see also State v. Meyers*, 338 Or App 59, 75, 565 P3d 463 (2025) (finding that warrants contained invalid and valid commands, and explaining that the invalid commands "establish that all the challenged evidence is presumptively a product of the constitutional violation as to particularity," and the trial court had to determine on remand whether the state can establish that that evidence was untainted by the violation); *State v. Curry*, 336 Or App 72, 89, 560 P3d 694 (2024) (same); *State v. James*, 336 Or App 55, 71, 560 P3d 747 (2024) (same).

4. Independent Source.

Oregon Law.

In *State v. Smith*, 327 Or 366, 963 P2d 642 (1998), and *State v. Sargent*, 323 Or 455, 918 P2d 819 (1996), the Supreme Court held that Article I, § 9, does not require the suppression of evidence seized pursuant to a search warrant that was obtained after the police had initially conducted a unlawful "seizure" by securing the premises while the warrant was sought. In each case, the record reflected that no item of evidence was obtained *as a result* of securing the premises; the evidence at issue was discovered only later during execution of the warrant. *Accord State v. Rodal*, 161 Or App 232, 985 P2d 863 (1999). Although the opinions do not use the term "independent source," they are factually similar to Fourth Amendment "independent source" cases.

Also, citing *Smith*, the Oregon Supreme Court has indicated that evidence obtained pursuant to a consent to search given after a violation of Article I, § 9, nevertheless may be admissible if the state proves that "the police obtained the disputed evidence independently of the violation of the defendant's rights under Article I, section 9." *State v. Hall*, 339 Or 7, 25, 115 P3d 908 (2005).

To prevail on an independent-source theory when the search and seizure were accomplished by state actors, the state must show that the evidence would have been available to the police irrespective of the unlawful seizure. *State v. Johnson*, 335 Or 511, 520, 72 P3d 282 (2003). In other words, evidence obtained by way of a search warrant or consent to search will not save a preceding unlawful seizure if the state cannot show that the police would have obtained the evidence lawfully even if the unlawful seizure had not occurred. In *Johnson*, although the police obtained a valid search warrant for evidence belonging to the defendant, the court suppressed the evidence because it found that the police would not have been able to obtain the evidence through a warrant if they had not previously seized it unlawfully and stored it in a police evidence locker. *State v. Lambert*, 263 Or App 683, 328 P3d 824, *adh'd to as modified on recons*, 265 Or App 742 (2014) (impounded vehicle was searched pursuant to warrant, but court held that seizure of vehicle was unlawful; remanded for state to prove whether vehicle would have been searched regardless of seizure).

Similarly, evidence obtained while executing a valid warrant may be suppressed if the record shows that the officer's decision to apply for a search warrant was "prompted" by information obtained from an unlawful search. In *State v. Sines*, 287 Or App 850, 404 P3d 1060 (2017), *rev den*, 362 Or 545 (2018), the sheriff's deputy lawfully accepted the victim's underwear from defendant's employees, but the subsequent warrantless testing of the underwear violated Art. I, § 9, and the Fourth Amendment. A search warrant then was obtained for defendant's residence. The Court of

Appeals held that evidence obtained during a search pursuant to the warrant had to be suppressed because defendant "proved that [the] decision to apply for a warrant was prompted by the test results. … Although the state elicited testimony to support the view that there might have been probable cause to support the warrant application even absent the test results, it did not present any evidence that the state would have sought a warrant even in the absence of the test results." *Id.* at 881-82.

Another form of "independent source" is when information is obtained by a search and seizure conducted by private citizens—without police involvement—and the citizens then give it to police. In such circumstances, the evidence is not subject to suppression "even if the private parties acted unlawfully in conducting the search and seizure that ultimately led to the police possession of the evidence." *State v. Luman*, 347 Or 487, 493, 223 P3d 1041 (2009) (private citizens discovered and turned over the evidence). In *State v. Sines*, 359 Or 41, 379 P3d 502 (2016), the defendant's housekeeper suspected that he was sexually abusing his daughter and, after a DHS worker told her that underwear could be tested for DNA (but that the worker could not advise her to seize it), obtained evidence and turned it over to the police. The trial court denied the defendant's motion to suppress, and the Oregon Supreme Court affirmed, ruling that, under those circumstances, the housekeeper's acts were not "state action" for purposes of Article I, § 9. 359 Or at 61-62. *Cf. State v. Tucker*, 330 Or 85, 90, 997 P2d 182 (2000) (because the tow-truck driver searched vehicle at request of police officer, it was "state action" subject to Article I, § 9).

See also:

State v. Jones, 339 Or 438, 121 P3d 657 (2005). Officers' knowledge of the defendant's statements did not derive from the videotape of their interview with him, which was recorded without advance notice to defendant as required by ORS 165.540(1)(c), but rather from their direct participation in the communication; therefore, their personal recollections of the interview were not subject to suppression under ORS 41.910.

State v. Mastin, 203 Or App 366, 124 P3d 1275 (2005), *adh'd to on recons*, 205 Or App 528 (2006). Despite an unlawful search of a vehicle passenger's backpack, the officer's later discovery of drugs in the trunk of the car was lawful because, as soon as the officer learned that the driver's license was suspended, he had authority to tow and inventory the vehicle. "Those facts were sufficient to support the state's inevitable discovery argument." (Note: Because the officer actually *did* inventory the vehicle and discovered drugs in the trunk while doing so, this case is more appropriately categorized under the "independent source" doctrine, rather than as an "inevitable discovery" case.)

Federal Law.

The Fourth Amendment does not require the suppression of evidence discovered during an initial unlawful search if police later obtain it through means that were independent of the unlawful search. A search warrant for the same premises can constitute an independent source if the officer's decision to seek a warrant was not prompted by observations made during the unlawful entry and if information obtained during that entry was not included in the search warrant application. Moreover, the federal "independent source" doctrine permits the admission of "primary evidence" discovered during the initial unlawful search, as well as "secondary evidence" subsequently obtained. *Murray v. United States*, 487 US 533, 108 S Ct 2529, 101 L Ed 2d 472 (1988) (marijuana bales discovered during warrantless intrusion were admissible under independent-source doctrine).

See also:

Segura v. United States, 468 US 796, 104 S Ct 3380, 82 L Ed 2d 599 (1984). Evidence discovered pursuant to a search warrant, after police had unlawfully entered the residence to secure it, was discovered through an "independent source."

Silverthorne Lumber Co. v. United States, 251 US 385, 40 S Ct 182, 64 L Ed 319 (1920). Announcing the doctrine.

5. Inevitable Discovery.

Oregon Law.

> "[T]aint may be purged, thus rendering that evidence admissible, by proving that 'such evidence inevitably would have been discovered, absent the illegality, by proper and predictable police investigatory procedures.' State v. Miller, 300 Or 203, 225, 709 P2d 225 (1985). To prevail on an inevitable discovery theory, the state must show, 'by a preponderance of the evidence: (1) that certain proper and predictable investigatory procedures would have been utilized in the instant case, and (2) that those procedures inevitably would have resulted in the discovery of the evidence in question.'"

State v. Johnson, 340 Or 319, 326-27, 131 P3d 173 (2006), *quoting* State v. Miller, 300 Or at 326; *see also* State v. Hall, 339 Or 7, 25, 115 P3d 908 (2005) (relying on Johnson for the proposition that evidence obtained pursuant to consent to search that is obtained following a violation of Article I, § 9, nevertheless may be admissible if the state demonstrates that "the police inevitably would have obtained the disputed evidence through lawful procedures even without the violation of the defendant's rights under Article I, section 9"). *See* State v. DeJong, 368 Or App 640, 656-59, 497 P3d 710 (2021) (the record does not establish that the police inevitably would have discovered the evidence during execution of the warrant if they had not unlawfully seized the residence).

Note: Older decisions relied on *former* ORS 133.683, *repealed by* Or Law 1997, ch 313, § 37, to conclude that the inevitable discovery doctrine applied only to "secondary" or "derivative" evidence but not "primary" evidence. State v. Will, 131 Or App 498, 506 n 7, 885 P2d 715 (1994); State v. Schellhorn, 95 Or App 297, 769 P2d 221 (1989). But the legislature repealed that provision, and that limitation no longer applies.

a. Cases in Which Inevitable Discovery Was Established.

State v. Johnson, 340 Or 319, 328-29, 131 P3d 173 (2006). Evidence obtained under a presumptively defective search warrant was admissible because, if the magistrate had rejected the defective warrant application, the police "ultimately could have, and would have, produced an affidavit that established probable cause."

State v. Miller, 300 Or 203, 709 P2d 225 (1985), *cert den*, 475 US 1141 (1986). A murder victim's body in a hotel room, and other evidence, which initially were discovered as a result of an unlawful warrantless entry, would have been discovered inevitably when hotel staff cleaned the room.

State v. Yaeger, 321 Or App 543, 517 P3d 1029 (2022). After defendant proved that some information in the affidavit in support of the search warrant for her SD card for her cellphone was unlawfully obtained, the state sufficiently established the police inevitably would have discovered the other information in the affidavit that established probable cause to justify the search.

State v. Hudson, 253 Or App 317, 3346, 290 P3d 868 (2012), *rev den*, 353 Or 562 (2013). Officers investigating a double murder hailed defendant out of his residence by loudspeaker and obtained his consent to search. Under the circumstances, even if the consent was invalid, the evidence at issue "inevitably would have been discovered" in the normal course.

State v. Mastin, 203 Or App 366, 124 P3d 1275 (2005), *adh'd to on recons*, 205 Or App 528 (2006). Despite a preceding unlawful search of a vehicle passenger's backpack, the officer's discovery of methamphetamine in the trunk of the car was lawful because, as soon as the officer discovered that the driver's license was suspended, he had authority to tow and inventory the vehicle. "Those facts were sufficient to support the state's inevitable discovery argument." *Note*: Because the officer actually *did* inventory the vehicle and discovered methamphetamine in the trunk while doing so, this case is more appropriately categorized under the "independent source" doctrine.

State v. Crescencio-Paz, 196 Or App 655, 103 P3d 666 (2004), *rev den*, 339 Or 230 (2005). Even if the officer unlawfully arrested the defendant, the officer had authority to detain him, and hence, the victim's later identification of the defendant as the robber was admissible.

State v. Seal, 138 Or App 693, 910 P2d 394, *rev den*, 323 Or 483 (1996). Drugs seized during an incident-to-arrest frisk for weapons [primary evidence] would have been discovered inevitably in a subsequent booking search.

b. Cases in Which Inevitable Discovery Was Not Established.

State v. DeJong, 368 Or App 640, 656-59, 497 P3d 710 (2021). The officers' illegal seizure of defendant's residence allowed them to obtain information that was used to obtain the warrant. The record does not establish that the police inevitably would have discovered the evidence during execution of the warrant if they had not unlawfully seized the residence.

State v. Alonso-Vasquez, 315 Or App 208, 501 P3d 20 (2021) (*per curiam*). Officers observed a vehicle—in which defendant was a passenger—make several short stops, during which a different passenger got out and then back in, and eventually stopped the vehicle. The officers arrested the driver as the suspect in a robbery, and they unlawfully searched defendant and found cocaine in his pocket. The state failed to prove that the officers inevitably would have arrested defendant and searched his pockets anyway after finding the cocaine in the car.

State v. O'Dell, 291 Or App 359, 421 P3d 417 (2018). Drug evidence found in defendant's car and pockets during unlawful extension of traffic stop could not be admitted on basis that that evidence inevitably would have been found as a result of a tow inventory or the car where the officer testified only that he *could* have arrested defendant and had the car towed, not that he *would* have, and the record did not establish that defendant would have consented to searches of his pockets and phone if the officer had arrested him and had the car towed.

State v. Steele, 290 Or App 675, 414 P3d 458 (2018). Evidence found in unlawful search of defendant's pockets upon arrest could not be admitted on basis that evidence inevitably would have been discovered and seized during booking inventory because the record established that the jail inventory policy was unconstitutionally overbroad.

State v. Sines, 287 Or App 850, 404 P3d 1060 (2017), *rev den*, 362 Or 545 (2018), The police lawfully accepted the victim's underwear from defendant's employees, but they unlawfully searched the underwear by doing a forensic examination without a warrant. As a result, evidence obtained pursuant to a search warrant based in part on the test results had to be suppressed because the "decision to apply for a warrant was prompted by the test results." Even though the warrant was

supported by probable cause even absent the test results, the state failed to prove inevitable discovery because it did not offer any evidence that it would have sought a warrant even without those results.

State v. Sigfridson, 287 Or App 74, 401 P3d 1269 (2017). Where defendant was unlawfully interrogated without *Miranda* warnings, the trial court erroneously declined to suppress drugs the officer found on his person. The state's position that the syringe and cooker would have been discovered during a lawful patdown "requires impermissible speculation" because the record did not show that the officer would have believed that the object in defendant's sweatshirt pocket was a capped needle, or that the "cooker" in his pants was a weapon of some kind, such that he could have reached into defendant's pockets." Because the record supports, at most, only that the officer *might* have lawfully discovered the evidence in a patdown, the state did not establish inevitable discovery.

State v. Scruggs, 274 Or App 575, 587-88, 362 P3d 265 P3d (2015). Officer's discovery, during intrusive post-arrest search at jail, that defendant had "keistered" drugs could not be saved by "inevitable discovery" doctrine because the inventory policy was not offered into evidence, and the record did not establish which of two possible policies might have authorized the search; the state did not prove that the evidence would have been discovered by predictable and proper police procedures.

State v. Easton, 264 Or App 339, 332 P3d 315 (2014). Officers seized defendant, who was lying on a bed feigning sleep, by handcuffing him and turning him over, thereby finding bindle underneath him. The Court of Appeals held that the seizure was not justified by officer-safety concerns and that the record did not support a finding that the officers inevitably would have discovered the bindle if they had not seized defendant.

State v. Lovaina-Burmudez, 257 Or App 1, 12-20, 303 P3d 988 (2013). Officers seized defendant's clothes upon his arrest. Six months later, they were searched pursuant to a warrant. The Court of Appeals held that the initial seizure was unlawful and rejected the state's inevitable-discovery argument by concluding that the state failed to prove that the clothes still would have been available for seizure six months later if they had not been seized.

State v. Medinger, 235 Or App 88, 230 P3d 76 (2010). The state's argument that the officers would have inevitably discovered the pay stubs in defendant's pockets during an inventory at the treatment center, which is where the officers would have taken defendant if they had not unlawfully arrested him, was rejected because the officer's general testimony about the civil detoxification facility's inventory procedure did not establish that a properly authorized inventory policy existed, and the state did not prove that the evidence would have been inevitably discovered in the inventory.

State v. Weems, 190 Or App 341, 79 P3d 884 (2003). The state's argument that illegally seized evidence – a bindle of meth – eventually would have been discovered at the jail did not salvage the evidence, because there was nothing in the record about the jail's intake procedures.

State v. Walker, 181 Or App 548, 47 P3d 65 (2002). The state failed to establish that drugs found during an unauthorized warrantless search of the defendant's jacket would have been discovered inevitably during a jail inventory – the officer did not testify that, before searching the jacket, he intended to arrest the defendant.

State v. Johnson, 177 Or App 244, 35 P3d 1024 (2001). Clothing and boots improperly seized from a murder suspect were not rendered admissible under the "constitutional inevitable discovery doctrine" by testimony that these items would have been taken from the suspect and inventoried by jail staff after his arrest – this testimony did not establish that the police inevitably would have "seized" and "searched" the clothing as evidence.

State v. May, 174 Or App 560, 26 P3d 188 (2001). Inevitable discovery could not justify an unlawful search of an opaque bag found on an arrestee where the state claimed that the evidence in the bag would have been found in a jail inventory, because policy itself was unconstitutional.

Federal Law.

Under the Fourth Amendment, "a court may admit illegally obtained evidence if the evidence inevitably would have been discovered through independent, lawful means." Forty-Ninth Annual Review of Criminal Procedure, 49 GEO. L.J. ANN. REV. CRIM. PROC. 269 (2020), *citing* Nix v. Williams, 467 US 431, 104 S Ct 2501, 81 L Ed 2d 377 (1984).

"The inevitable discovery doctrine, with its distinct requirements, is in reality an extrapolation from the independent source doctrine: *Since* the tainted evidence would be admissible if in fact discovered through an independent source, it should be admissible if it inevitably would have been discovered." Murray v. United States, 487 US 533, 539, 108 S Ct 2529, 101 L Ed 2d 472, 481-82 (1988) (emphasis in court's opinion). The federal inevitable-discovery doctrine is applicable, not only to "secondary" or "derivative" evidence discovered sometime after an officer's unlawful conduct (*i.e.*, "fruit"), but also to "primary" evidence discovered as a direct result of the illegality. Murray v. United States, 487 US 533.

F. MOTION FOR RETURN OF PROPERTY SEIZED.

1. The Statutory Procedure.

ORS 133.623 *et seq*. governs the treatment of property that is seized by police during criminal investigations. These statutes provide that the person from whom the items were seized, or any person asserting a claim to rightful possession of things seized, may move for return or restoration of the items based upon the grounds listed in ORS 133.643. State v. Smith, 40 Or App 91, 594 P2d 860 (1979). By its terms, ORS 133.623 "applies only to warrantless seizures" and hence does not entitle a defendant to return of contraband that was seized during execution of a search warrant. State v. Ehrensing, 255 Or App 402, 412, 296 P3d 1279 (2013). Under ORS 133.643, a movant is entitled to return of seized property only if he or she "is lawfully entitled to possess" that property. Although ORS 133.643(4) does not also include the term "lawfully" in conjunction with "entitled," the term "'entitled' in subsection (4) necessarily connotes and requires a showing of *lawful* entitlement to possession" and that requirement of "'lawfully entitled' encompasses both state and federal law." Ehrensing, 255 Or App at 413. Consequently, ORS 133.643 does not authorize the return of seized marijuana, because possession of that marijuana by defendant and the other cardholders, even if lawful under Oregon law, would violate federal law. *Id.* at 415-16.

If "there is a substantial question whether they [the items] should be returned to the person from whose possession they were seized or to some other person, or a substantial question among several claimants to rightful possession," the court may hold a hearing to determine which claimant should receive custody. ORS 133.663(1)(b). Alternatively, the court may "leave the several claimants to appropriate civil process for the determination of the claims." ORS 133.663(3); *see also* State v. Jourdain, 147 Or App 721, 938 P2d 244 (1997) (a defendant convicted of robbery moved for the return of jewelry seized from him by the police, which the state believed had been taken in another robbery in Nevada; under ORS 133.663, the court properly denied the motion without a hearing); Filipetti v. Department of Fish and Wildlife, 224 Or App 122, 197 P3d 535 (2008) (holding that individuals, who did not possess a permit or license to hold wildlife, could not lawfully possess black-tailed doe which was seized from their property pursuant to a search warrant but no longer needed for evidentiary purposes, and thus individuals failed to establish a valid claim to rightful possession of the doe, as required to compel return of the doe).

The motion may be granted if, among other possibilities, the items are "no longer needed for evidentiary purposes." ORS 133.643(4). *See, e.g.*, *State v. Terry,* 37 Or App 333, 587 P2d 1033 (1978) (the state could not retain cards used for gambling under the theory that they were needed for evidence because the defendant stipulated to the number of cards).

A certification that the property is no longer needed as evidence is a condition precedent to an appeal from an order denying a motion for the return of property. *State v. Richey*, 54 Or App 175, 634 P2d 487 (1981).

The Due Process Clause does not require officers seizing property under the authority of a search warrant to provide the property owner with a notice of these state law remedies for the return of the property. *West Covina v. Perkins*, 525 US 234, 119 S Ct 678, 142 L Ed 2d 636 (1999).

2. Relation to Forfeiture Proceedings.

A motion for the return of seized property may be filed in a criminal-forfeiture case. The 2001 legislature amended ORS 133.643 to provide that a motion for the return of seized property may be based upon a claim that the property seized was not in fact subject to criminal forfeiture.

Property that has been seized for civil forfeiture is not subject to a motion or order to return under ORS chapter 133. ORS 131A.050. A person's rights in such property are governed entirely by Oregon's civil-forfeiture law. Nonetheless, in an attempt to defeat forfeiture, some defendants/claimants have raced to the courthouse to secure an order under ORS 133.623 *et seq.* before forfeiture proceedings could be commenced.

> **PRACTICAL SUGGESTION:** Do not acquiesce in a motion to return seized property until you have determined that no forfeiture action is contemplated.

3. Medical Marijuana.

The Oregon Medical Marijuana Act (OMMA) contains a special provision directing the return of seized marijuana and paraphernalia to a person who validly claims that the marijuana seized was lawfully being used for medical purposes. ORS 475C.894(2) provides in part:

> "Any property interest possessed, owned or used in connection with the medical use of marijuana or acts incidental to the medical use of marijuana that has been seized by state or local law enforcement officers may not be harmed, neglected, injured or destroyed while in the possession of a law enforcement agency, except that a law enforcement agency has no responsibility to maintain live marijuana plants lawfully seized. Such property interest may not be forfeited under any provision of law providing for the forfeiture of property, except pursuant to a sentence imposed after conviction of a criminal offense. Marijuana and equipment or paraphernalia used to produce, process or administer marijuana that was seized by a law enforcement officer shall be returned immediately if the district attorney in whose county the property was seized, or the district attorney's designee, determines that the person from whom the marijuana, equipment or paraphernalia was seized is entitled to the protections provided by ORS 475C.770 to 475C.919. The determination may be evidenced by a decision not to prosecute, the dismissal of charges or acquittal."

Under this provision, a defendant who lawfully possessed marijuana in accordance with the OMMA is entitled to return of seized marijuana upon acquittal. On the other hand, if the charge is dismissed without prejudice for procedural reasons and the district attorney has not determined

whether the case will be recharged, the defendant is not entitled to return of the seized marijuana. *See State v. Ehrensing*, 255 Or App 402, 410-12, 296 P3d 1279 (2013) (decided under previous version of statute).

A law-enforcement agency may not refuse to comply with this mandate on the ground that, by returning marijuana to a claimant, the agency would be delivering a controlled substance in violation of federal law. *State v. Kama*, 178 Or App 561, 39 P3d 866, *rev den*, 334 Or 121 (2002). The *Kama* court rejected the state's argument on that ground, concluding that the return of marijuana pursuant to the OMMA would fall within the civil and criminal immunity conferred by federal statute upon state and local law-enforcement officers who are engaged in the enforcement of the controlled-substance laws.