# CRIMINAL CASELAW NOTEBOOK©
# 2023

by

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## EDITOR'S NOTE

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***State v. Roberts***, 80 Wn.App. 342 (1996)

Defense to VUCSA charge is that defendant-landlord was aware of marijuana grow operation in basement but that he had no dominion and control; held: landlord is not an accomplice by accepting rent, paying utilities, not exercising self-help to terminate the grow operation, not contacting police or otherwise terminating tenancy, as one does not aid and abet unless he associates himself with the undertaking, participates in it as something he desires to bring about, and seeks by his action to make it succeed, *State v. Amezola*, 49 Wn.App. 78, 89 (1987) *(dicta), overruled, on other grounds, State v. McDonald*, 138 Wn.2d 680 (1999), *cf.: State . Eplett,* 167 Wn.App. 660 (2012), *but see: State v. Winterstein*, 140 Wn.App. 676, 685-87 (2007), *rev'd, on other grounds*, 167 Wn.2d 620 (2009)*;* I.

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***State v. Jackson,*** 87 Wn.App. 801, 809-12 (1997)

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***State v. Boot***, 89 Wn.App. 780, 792-4 (1998)

Defendant claims co-defendant shot victim and defendant did not know co-defendant would shoot, objects to accomplice instruction "if you are convinced defendant participated in a crime . . . and that a crime . . . [has] been proven beyond a reasonable doubt, you need not determine which participant was an accomplice and which was a principal"; held: accomplice need not share same mental state as principal, *State v. Guloy*, 104 Wn.2d 412, 431 (1985), criminal liability is predicated upon general knowledge of the crime, RCW 9A.08.020(3)(a), *State v. Hoffman*, 116 Wn.2d 51, 103-5 (1991), *State v. McDonald*, 90 Wn.App. 604, 610-11

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***State v. Alires*,** 92 Wn.App. 931, 935-36 (1998)

Evidence that defendant fled from scene of burglary with another, moved property within residence, open window, paint smear on defendant's clothing consistent with paint on point of entry window, defendant's sweating is sufficient to permit accomplice instruction; III.

***State v. Jackson***, 137 Wn.2d 712, 720-26 (1999)

In criminal mistreatment 1° (child abuse) case, while parents have a common law duty to protect children in their custody, a parent's failure to perform this duty does not subject them to liability as an accomplice to a crime, as the accomplice liability statute does not extend to a failure to come to the aid of another person who is being assaulted or abused, affirming *State v. Jackson*, 87 Wn.App. 801, 809-12 (1997), *cf.: State v. Berube*, 150 Wn.2d 498, 509-10 (2003); 7-2.

***State v. McDonald*,** 138 Wn.2d 680, 685-91 (1999)

Defendant shoots and kills victim who was already fatally wounded by another, claims his shooting was not proximate cause as victim would have died anyway; held: where there is substantial evidence to support accomplice liability, then it is irrelevant that defendant's shooting was not the proximate cause of victim's death, because principal and accomplice liability are not alternative means of committing a single offense, jury need not be instructed that they must be unanimous as to which alternative is used, overruling, in part, *State v. Amezola*, 49 Wn.App. 78, 90 (1987), *State v. Holcomb*, 180 Wn.App. 583, 586-88 (2014); affirms *State v. McDonald*, 90 Wn.App. 604 (1998), *see: State v. Guzman*, 98 Wn.App. 638 (1999); 9-0.

***State v. Roberts***, 142 Wn.2d 471, 509-13 (2000)

An accomplice is not subject to strict liability for any crime committed by the principal, thus instructing jury that a person is legally accountable when he is "an accomplice of such other person in the commission of a crime*"* is improper; while an accomplice need not have knowledge of each element of the principal's crime in order to be convicted, the state must prove the accomplice's general knowledge of his coparticipant's substantive crime, *State v. Grendahl*, 110 Wn.App. 905 (2002), *State v. Cronin*, 142 Wn.2d 568 (2000), *State v. Rice*, 102 Wn.2d 120, 125 (1984), *State v. Thomas*, 150 Wn.2d 821, 840-50 (2004), *State v. Williams*, 136 Wn.App. 486, 492-96 (2007), *see: State v. Mangan*, 109 Wn.App. 73 (2001), *Pers. Restraint of Sarausad*, 109 Wn.App. 824 (2001), *State v. Brown*, 147 Wn.2d 330 (2002)(harmless error analysis), *State v. Stovall*, 115 Wn.App. 650 (2003)(harmless error analysis), *State v. Wren*, 115 Wn.App. 922 (2003), *State v. Trujillo*, 112 Wn.App. 390, 400-08 (2002), *State v. King*, 113 Wn.App. 243, 264-67 (2002)(harmless error analysis), *Pers. Restraint of Sims*, 118 Wn.App. 471 (2003)(harmless error analysis), *Pers. Restraint of Kiet Hoang Le*, 122 Wn.App. 816 (2004)(harmless error and retroactivity analysis), *Pers. Restraint of Domingo*, 155 Wn.2d 356 (2005), *see also: State v. Trout*, 125 Wn.App. 403, 408-13 (2005), *State v. Whitaker*, 133 Wn.App. 199, 229-30 (2006), *State v. Dreewes*, 192 Wn.2d 812 (2019), distinguishing *State v. Davis*, 101 Wn.2d 654 (1984); 6-3.

***State v. Swenson***, 104 Wn.App. 744, 756-63 (2000)

Where accomplice instruction erroneously states that a person is legally accountable when he is "an accomplice of such other person in the commission of a crime," *State v. Roberts*, 142 Wn.2d 471, 509-13 (2000), in felony murder/robbery case, because the state of mind necessary to prove felony murder is same state of mind necessary to prove the underlying robbery, the instruction is harmless, distinguishing *State v. Jackson*, 137 Wn.2d 712, 726-27 (1999), *State v. Brown*, 147 Wn.2d 330 (2002)(harmless error analysis), *State v. Trujillo*, 112 Wn.App. 390, 400-08 (2002), *State v. King*, 113 Wn.App. 243, 264-67 (2002)(harmless error analysis), *State v. Stovall*, 115 Wn.App. 650 (2003), *State v. Wren*, 115 Wn.App. 922 (2003), *cf.: State v. Grendahl*, 110 Wn.App. 905 (2002), *Pers. Restraint of Sims*, 118 Wn.App. 471 (2003), *State v. Moran*, 119 Wn.App. 197, 209-17 (2003); I.

***State v. Stovall***, 115 Wn.App. 650 (2003)

Where jury instruction erroneously states that defendant is accountable when he is an "accomplice of such other person in the commission of a crime," *State v. Roberts*, 142 Wn.2d 471 (2000), and there is evidence before the jury of an uncharged crime and the prosecutor argues that the defendant's participation in such crime triggered liability for the specific crime charged, then the error is not harmless, *cf.: State v. Johnson*, 116 Wn.App. 851, 856-59 (2003), *State . Eplett*, 167 Wn.App. 660 (2012); I.

***State v. Allen***, 116 Wn.App. 454, 459-60 (2003)

Defendant is not entitled to a bill of particulars to explain whether state contends he was an accomplice or principal, as there is no distinction between accomplice or principal liability, the charging of one theory adequately apprises defendant of his liability for the other, *State v. Molina*, 83 Wn.App. 144, 148 (1996); III.

***Auburn v. Hedlund***, 165 Wn.2d 645, 651-54 (2009)

Defendant furnishes liquor to minor who drives drunk and severely injures defendant-passenger, who is charged with accomplice to DUI; held: an injured passenger of a drunk driver is a victim and thus cannot be an accomplice, *State v. Jameison*, 4 Wn.App.2d 184 (2018), RCW 9A.08.020(5) (1975); *reverses, on other grounds*, *Auburn v. Hedlund*, 137 Wn.App. 494 (2007); 5-4.

***State v. Bobenhouse***, 143 Wn.App. 315, 322-24 (2008), 166 Wn.2d 881 (2009)

Defendant forces his young children to engage in sexual intercourse, is convicted of rape as an accomplice; held: even though principals could not have been convicted of the crime, forcing innocent people to engage in conduct that would constitute a crime if defendant engaged in the same conduct establishes the elements of accomplice liability, *see: State v. B.J.S.*, 72 Wn.App. 368, 371-72 (1994); III.

***State v. Montejano***, 147 Wn.App. 696 (2008)

Felony riot statute, RCW 9A.84.010, which provides that a person is guilty if, acting with others, he knowingly threatens force and is armed, defines a specific type of accomplice liability, thus where defendant did not know his cohorts were armed, he is not complicit in the felony; III.

***State v. Asaeli***, 150 Wn.App. 543, 568-70 (2009)

In murder case, evidence that three men, not including defendant, witnessed victim shoot at a car a week before the homicide, week later defendant is seen talking to two of the three in a

bar, defendant, with one of the three and the two others drive separately to a park, defendant speaks to people in another car, one of the others shoots victim; held: mere presence is insufficient to prove complicity, defendant's presence with others whom he knew were looking for victim is insufficient to support a murder conviction; evidence that co-defendant spoke with the shooter at a bar right before the homicide, shooter and co-defendant arrived at park at the same time, several members of the group with whom they arrived called out victim, two of the group covered their faces, co-defendant signaled to shooter who shot victim, all sufficient to allow jury to conclude that co-defendant knew shooter was armed and prepared to shoot; II.

***State v. McDaniel***, 155 Wn.App. 829, 862-64 (2010)

Robbery victim approaches vehicle that defendant is driving, asks to purchase drugs, passenger tells victim to follow vehicle, victim approaches vehicle again, passenger is armed, takes money and shoots victim, vehicle speeds away, all leading to reasonable inference that driver positioned vehicle for quick getaway, allowed time for shooter to draw his gun, thus sufficient to convict as accomplice to robbery; 2-1, II.

***State v. McChristian***, 158 Wn.App. 392, 399-401 (2010)

To prove accomplice to assault 1°, state is not required to prove that defendant had knowledge that the principal intended to assault victim with a deadly weapon, only that defendant knew the pricnipal intended to assault; "[b]y facilitating the assault…, [defendant] ran the risk that an accomplice would elevate the assault to a first degree offense," at 410 ¶ 14, *State v. Davis*, 101 Wn.2d 654 (1984); an accomplice may be subject to a mandatory minimum, RCW 9.94A.540(1)(b), for assault 1°; II.

***State v. Ferguson***, 164 Wn.App. 370 (2011)

Accomplice liability statute, RCW 9A.08.020, is not unconstitutionally overbroad, *State v. McPherson*, 186 Wn.App. 114, 119-21 (2015), does not criminalize constitutionally protected speech, *State v. Coleman*, 155 Wn.App. 951, 961 (2010), *State v. Holcomb*, 180 Wn.App. 583, 588-90 (2014); II.

***State v. Hayes,*** 164 Wn.App. 459 (2011)

In leading organized crime case, RCW 9A.82.060(1)(a) (2003), it is error to give an accomplice instruction as the defendant must actually be the leader; I.

***State v. Knight***, 176 Wn.App. 936, 948-50 (2013)

Defendant willingly participates in home invasion robbery in which co-defendant assaults victims while defendant was in another room, is convicted of felony assault; held: defendant's participation in the robbery was more than merely a present, uninvolved observer, reasonable jury could find defendant promoted or facilitated the commission of the assaults by aiding another in planning or committing the assaults; II.

***State v. Bauer***, 180 Wn.2d 929 (2014)

Defendant leaves loaded gun on dresser, 9-year old visitor takes gun to school and shoots another student, defendant is charged with assault 3° "[w]ith criminal negligence, causes bodily harm to another person by means of a weapon…," RCW 9A.36.031(1)(d) (2011), trial court denies *Knapstad* motion; held: defendant did not have knowledge that his acts would promote or facilitate the commission of the crime, RCW 9A.08.020(3)(a) (2011), nor did he cause an

innocent or irresponsible person to engage in such conduct, RCW 9A.08.020(2)(a), as no evidence was offered to prove defendant had the *mens rea* to commit *the* crime, *State v. Stein,* 144 Wn.2d 236, 245 (2001), thus evidence was insufficient to convict him as an accomplice; reverses *State v. Bauer,* 174 Wn.App. 59 (2013); 6-3.

***State v. Allen***, 182 Wn.2d 364, 382-85 (2015)

Aggravating sentencing factor that victim was a police officer, RCW 9.94A.535(3)(v) (2008), applies to an accomplice if the jury finds the required elements based on the accomplices own misconduct, *State v. McKim,* 98 Wn.2d 111, 117 (1982), *State v. Davis,* 101 Wn.2d 654, 658 (1984), *State v. Hayes,* 182 Wn.2d 556 (2015), *State v. Weller,* 185 Wn.App. 913, 927-31 (2015); reverses, in part, *State v. Allen,* 178 Wn.App. 893 (2014); 9-0.

***State v. Farnsworth***, 185 Wn.2d 768, 780-81 (2016)

Co-defendant, after agreeing with defendant to steal from a bank, defendant advising "whenever you're robbing a bank" tellers do what they're told, enters bank in disguise, hands teller a note that reads "no die *[sic]* packs, no tracking devices, put the money in the bag," teller hands over money, defendant drives getaway car, is convicted of robbery 1º; held: evidence was sufficient to prove accomplice liability in light of accomplice's planning the robbery, writing the note, implied threat, *State v. Clark*, 190 Wn.App. 736 (2015); reverses *State v. Farnsworth,* 184 Wn.App. 305 (2014); 5-4.

***State v. Wiebe***, 195 Wn.App. 252 (2016)

Trial court instructs jury that "a person is not an accomplice…if he or she terminates his or her complicity prior to commission of the crime" and notifies police or makes a good faith effort to prevent the crime, RCW 9A.08.020(5)(b), defense maintains that state has the burden to prove that defendant did not terminate; held: termination of accomplice statute neither negates an element nor is an affirmative defense, thus trial court's instruction was proper and instruction did not shift burden to defense; prosecutor's closing argument that defendant did not call the police did not suggest that defense had the burden of proving he was not an accomplice; II.

***State v. Jameison***, 4 Wn.App.2d 184 (2018)

Shooter shoots at armed defendant, hits bystander who is run over and killed by a car, defendant is accused of accomplice to murder; held: victim is not an accomplice, *Auburn v. Hedlund,* 165 Wn.2d 645, 651-54 (2009); III.

***State v. Miller***, 14 Wn.App.2d 469 (2020)

Defendant is charged as principal, defense case lays blame on a state's witness, trial court over objection, gives accomplice instruction; held: when determining if the evidence at trial is sufficient to support the giving of an instruction, the court views the supporting evidence in the light most favorable to the party that requested the instruction." *State v. Fernandez-Medina*, 141 Wn.2d 448, 455-56 (2000);" here, because defendant could be viewed as an accomplice, even though the original state's theory was that he was the principal, the instruction was proper; III.

# AFFIDAVITS OF PREJUDICE/NOTICE OF DISQUALIFICATION

***Matter of Hiebert***, 28 Wn.App. 905 (1981)

Where a judge hears dependency case, and later a deprivation petition is filed, same judge must approve affidavit of prejudice, as these are separate proceedings; appointment of counsel and setting case for hearing are not discretionary rulings for purposes of filing affidavit of prejudice, RCW 4.12.050; III.

***State v. Cockrell***, 102 Wn.2d 561 (1984)

Defendant learns of possible prejudice by judge two months before trial, advises counsel three weeks before trial, affidavit of prejudice filed two weeks before trial, denied as not timely; held: defendant's waiver of speedy trial cured lack of timeliness problems, if any; 9-0.

***State v. Hansen***, 107 Wn.2d 331 (1986)

Defendant files affidavit of prejudice on day of trial, RCW 4.12.040, stating purpose of affidavit is to obtain continuance, trial judge offers to switch with another judge, defense declines offer, trial judge rejects affidavit; held: only right of defendant is for a different judge, trial judge's offering to switch satisfied that right, defendant's rejection of switch waived right to file affidavit; *affirms, on other grounds*, *State v. Hansen*, 42 Wn.App. 755 (1986); *see: State v. Parra*, 122 Wn.2d 590 (1993); 9-0.

***State v. Guajardo***, 50 Wn.App. 16 (1987)

Granting or denying a continuance is a discretionary ruling for purposes of an affidavit of prejudice, *State v. Lile*, 188 Wn.2d 766, 777-81 (2017); where the court declines to rule on a motion, then no discretionary action has been taken, and an affidavit of the prejudice is timely; III.

***Seattle v. Marshall***, 54 Wn.App. 829 (1989)

In district or municipal court, CrRLJ 8.9(b) requiring that an affidavit of prejudice be filed within ten days of learning of the judge who will hear a case does not conflict with RCW 3.66.090; I.

***State v. Clemons***, 56 Wn.App. 57 (1989)

Following hung jury and declaration of mistrial, defense sought to file affidavit of prejudice, RCW 4.12.040, -050, against judge who tried case first time; held: untimely, as judge had made discretionary rulings, retrial is not a new proceeding, *cf.: State v. Torres*, 85 Wn.App. 231 (1997); I.

***State v. Dennison***, 115 Wn.2d 609 (1990)

Once defendant "calls upon" judge to make discretionary ruling regarding waiver of counsel, affidavit of prejudice is untimely; where parties stipulate to a continuance, granting of same is a discretionary ruling, at n. 10, *State v. Lile*, 188 Wn.2d 766, 777-81 (2017); counsel does not have an independent right to file affidavit of prejudice once defendant's affidavit is filed and appropriately rejected, *State ex rel. Sheehan v. Reynolds*, 111 Wash. 281 (1920); 9-0.

***State v. Belgarde***, 119 Wn.2d 711 (1992)

When a judgment of trial court is reversed and remanded for new trial, parties may not disqualify original trial judge by affidavit of prejudice without cause, *State v. Torres*, 85 Wn.App. 231 (1997); 9-0.

***State v. Parra***, 122 Wn.2d 590 (1993)

Ruling on discretionary discovery motions, CrR 4.7(b)(2), by agreed order is an exercise of discretion precluding a subsequent affidavit of prejudice, *Rhinehart v. Seattle Times Co.*, 51 Wn.App. 561, 578 (1988), *State v. Lile*, 188 Wn.2d 766, 777-81 (2017); filing affidavit of prejudice 45 minutes before superior court trial is timely absent prior exercise of discretion, RCW 4.12.050, *In re Marriage of Lemon*, 118 Wn.2d 422, 423 (1992), *Harbor Enters., Inc. v. Gudjonsson*, 116 Wn.2d 283, 293 (1991), *distinguishing Hanno v. Neptune Orient Lines, Ltd.*, 67 Wn.App. 681 (1992) and *In re Marriage of Hennemann*, 69 Wn.App. 345 (1993), *see also: State v. Hansen*, 42 Wn.App. 755, *aff'd*, 107 Wn.2d 331 (1986), *cf.:* CrRLJ 8.9(b), *Seattle v. Marshall*, 54 Wn.App. 829 (1989) re: courts of limited jurisdiction; 9-0.

***Special Inquiry Judge***, 78 Wn.App. 13 (1995)

An attorney representing a witness before a special inquiry judge, RCW 10.27, is not a party entitled to file an affidavit of prejudice, RCW 4.12.040, .050; a witness before a special inquiry judge is not entitled to file an affidavit of prejudice; III.

***State v. Torres***, 85 Wn.App. 231 (1997)

Following dismissal without prejudice and refiling of same charge, affidavit of prejudice is timely even where judge made discretionary rulings prior to the dismissal if no discretionary rulings were made after refiling, *see: State v. Rock*, 65 Wn.App. 654 (1992); III.

***State v. Detrick***, 90 Wn.App. 939 (1998)

Where one consolidated juvenile respondent files an affidavit of prejudice, it may be imputed to correspondents, *LaMon v. Butler*, 112 Wn.2d 193 (1989); I.

***State v. Waters***, 93 Wn.App. 969, 974-75 (1999)

In one-judge counties, statute which requires an affidavit of prejudice to be filed not later than the day on which the case is called to be set for trial, RCW 4.12.050, does not apply to a visiting judge, against whom an affidavit is timely until the judge has made a discretionary ruling; III.

***State v. Tarabochia***, 150 Wn.2d 59 (2003)

In one-judge counties, an affidavit of prejudice is timely only if filed on or before the date the case is called to be set for trial, RCW 4.12.050, without exceptions, overruling *State v. Norman*, 24 Wn.App. 811 (1979); 9-0.

***State v. Hawkins***, 164 Wn.App. 705, 712-14 (2011)

A ruling on a post-conviction motion to dismiss is a discretionary ruling, defendant has no right to an affidavit of prejudice as to that judge in a subsequent motion to modify or vacate a sentence, CrR 7.8(b), as it is not a new case arising from new facts that have occurred since the

entry of final judgment, *State v. Belgarde*, 119 Wn.2d 711, 715 (1992), *State v. Clemons*, 56 Wn.App. 57, 59 (1989), distinguishing *State v. Torres*, 85 Wn.App. 231, 234 (1997); I.

***State v. Gentry***, 183 Wn.2d 749, 759-63 (2015)

A motion to disqualify focused on the appearance of fairness and seeking a discretionary disqualification need not be treated as the equivalent of an affidavit of prejudice; 9-0.

***State v. Lile,*** 188 Wn.2d 766, 777-81 (2017)

Granting an agreed motion to continue is a discretionary ruling precluding an affidavit of prejudice, *State v. Guajardo*, 50 Wn.App. 16 (1987), *State v. Dennison*, 115 Wn.2d 609 (1990), *State v. Parra*, 122 Wn.2d 590 (1993), overruling *State ex rel. Floe v. Studebaker*, 17 Wn.2d 8, 15-17 (1943), reversing, in part, *State v. Lile*, 193 Wn.App. 179 (2016), *but see:* RCW 4.12.050(2) (2017); 9-0.

***State, ex rel. Haskell, v. Spokane County District Court,*** 198 Wn.2d 1 (2021)

Following a ruling in district court prosecutor obtains an *ex parte* writ of review from a superior court judge, defense files notice of disqualification, RCW 4.12.050, superior court denies disqualification; held: a writ of review is a discretionary ruling precluding a notice of disqualification even where defense had no notice that the writ was being sought; 7-2.

# APPEAL

***In re Lee,*** 95 Wn.2d 357, 363 (1980)*, overruled, on other grounds, Hews v. Evans*, 99 Wn.2d 80 (1983)

Failure to object to admissibility of evidence precludes attacking the use of the evidence on appeal; however, if challenge is raised in a motion for new trial, issue is preserved, *State v. Fagalde*, 85 Wn.2d 730 (1975), *State v. Ray*, 116 Wn.2d 531 (1991), *State v. Wicke*, 91 Wn.2d 638, 642 (1979), *State v. Bird*, 136 Wn.App. 127, 133 (2006), *but see: State v. Jones*, 71 Wn.App. 798, 807 n. 2 (1993); 6-3.

***State v. Carner***, 28 Wn.App. 439 (1981)

Where state appeals a suppression order, trial court's findings will be reviewed by the substantial evidence test; not subject to independent evaluation of evidence; II.

***State v. Kerry***, 34 Wn.App. 674 (1983)

Merely because defense puts on evidence does not preclude review for sufficiency, *see: State v. Jackson*, 82 Wn.App. 594, 608 (1996); I.

***State v. Valladares***, 99 Wn.2d 663 (1983)

Affirmatively withdrawing motion to suppress waives issue on appeal, *Johnson v. United States*, 87 L.Ed.2d 704 (1943), *State v. Massey*, 60 Wn.App. 131, 139 (1990), *see also*: *State v. Tarica*, 59 Wn.App. 368 (1990); 9-0.

***State v. Baeza***, 100 Wn.2d 487 (1983)

Challenge to sufficiency of evidence may be raised for first time on appeal; 9-0.

***Jones v. Barnes***, 77 L.Ed.2d 987 (1983)

Counsel on appeal is not constitutionally required to raise every nonfrivolous issue on appeal requested by defendant if counsel, as a matter of professional judgment, decides not to present those points; 6-3.

***Simonson v. Veit***, 37 Wn.App. 761 (1984)

A timely motion for reconsideration suspends the finality of judgment; notice of appeal may be filed within 30 days of ruling on motion for reconsideration; I.

***Cheney v. Marchand***, 40 Wn.App. 124 (1985)

A decision in an RALJ appeal is not final until an order is signed by a superior court judge; absent a signed order, the court of limited jurisdiction lacks jurisdiction to proceed; III.

***State v. Miller***, 40 Wn.App. 483 (1985)

During deliberations jury sends out a note to judge, record fails to indicate what response, if any, was made, defense claims denial of right to appeal as record was not preserved; held: appellate counsel, having made no apparent effort to obtain affidavits from trial court or counsel,

waived issue on appeal, *see*: *State v. Larson*, 62 Wn.2d 64 (1963) (Hill, J. concurring), *State v. Keller*, 65 Wn.2d 907 (1965), *but see: State v. Tilton*, 149 Wn.2d 775 (2003); I.

***Seattle v. Braggs***, 41 Wn.App. 646 (1985)

Where court of limited jurisdiction fails to advise defendant of right to appeal, RALJ 2.7, compelling circumstances will be found to extend appeal notice filing period, *distinguishing State v. Mayville*, 36 Wn.App. 174 (1983); *accord*, *State v. Lewis*, 42 Wn.App. 789 (1986), *see also*: *Pers. Restraint of Vega*, 118 Wn.2d 449 (1992); I.

***State v. Smissaert***, 103 Wn.2d 636 (1985)

Murder 1° defendant is sentenced to 20 years, two years later court learns of error, sentences to life; held: upon correction of sentence, defendant may appeal initial conviction if he did not originally appeal; 7-1.

***State v. Rolax***, 104 Wn.2d 129 (1985)

Motion on the merits procedures, RAP 18.14, wherein appeal is decided by court commissioner subject to review by panel of Court of Appeals, does not violate defendant's constitutional right to appeal, CONST. Art. I, § 22; 8-1.

***Evitts v. Lucey***, 83 L.Ed.2d 821 (1985)

Counsel fails to perfect appeal in state court, whereupon state appellate court dismisses appeal; held: due process clause requires effective assistance of counsel for a first appeal of a criminal conviction, thus appeal is reinstated, *cf.: State v. Tomal*, 82 Wn.App. 415 (1996); 7-2.

***State v. Perkins***, 108 Wn.2d 212 (1987)

As part of a plea bargain, a defendant can **waive the right to appeal** a tried case if done knowingly, voluntarily and intelligently, *State v. Lee*, 132 Wn.2d 498, 505-6 (1997), *see*: *State v. Cooper*, 63 Wn.App. 8 (1991), *Pers. Restraint of Breedlove*, 138 Wn.2d 298 (1999), *but see: Garza v. Idaho*, 586 U.S. ___, 139 S.Ct. 738, 203 L.Ed.2d 77 (2019), *Roe* v. *Flores-Ortega*, 528 U. S. 470 (2000); 8-0.

***State v. Knighten***, 109 Wn.2d 896 (1988)

Appellate court is not bound by officer and state's concession that it lacked probable cause to arrest; 4 justices concur in plurality opinion.

***State v. Arko***, 52 Wn.App. 130 (1988)

It is not a breach of a plea bargain for the state to support, on appeal, an exceptional sentence even though the state recommended a sentence within the standard range, unless the parties so agreed as part of the initial plea bargain; I.

***McCoy v. Court of Appeals***, 100 L.Ed.2d 440 (1988)

Right to counsel not violated by state law requiring appointed appellate counsel, in writing brief pursuant to *Anders v. California*, 18 L.Ed.2d 493 (1967), to argue why appeal is frivolous; 5-3.

***State v. Wethered***, 110 Wn.2d 466 (1988)

Appellate court need not address application of state constitution to search and seizure issue where counsel has not adequately addressed the criteria set forth in *State v. Gunwall*, 106 Wn.2d 54 (1986), *but see: State v. Mayfield,* 192 Wn.2d 871 (2019); *accord*: *State v. Motherwell*, 114 Wn.2d 353 (1990).

***State v. Pittman***, 54 Wn.App. 58 (1989)

A general objection that does not specify particular ground upon which it is made does not preserve issue for appellate review except where specific basis was apparent from the context; I.

***State v. Ortiz***, 113 Wn.2d 32 (1989)

Defendant's appeal is dismissed following his deportation to Mexico; held: while an appeal may be dismissed when defendant becomes a **fugitive** from justice, *State v. Johnson*, 105 Wn.2d 92 (1986), *State v. Estrada*, 78 Wn.App. 381 (1995), *but see: State v. French*, 157 Wn.2d 593, 600-03 (2006), *Seattle v. Klein*, 161 Wn.2d 554 (2007), a defendant who was deported neither renders the appeal moot, *State v. Mosley*, 84 Wn.2d 608, 610-11 (1974), nor has defendant treated the appellate process contemptuously, thus reversed; burden on defense to prove deportation as opposed to flight, *State v. Rosales-Gonzales*, 59 Wn.App. 583 (1990); 9-0.

***State v. Trader***, 54 Wn.App. 479 (1989)

Failure to object to a polygraph test in the absence of a written stipulation as required in *State v. Renfro*, 96 Wn.2d 902 (1982) waives issue on appeal; II.

***State v. Robinson***, 58 Wn.App. 599 (1990)

Right to counsel on appeal is violated where brief filed pursuant to *Anders v. California*, 18 L.Ed.2d 493 (1967) fails to contain citations to the record or legal authority supporting arguable issues; appellate court must review the record before granting leave to withdraw, *State v. Hairston*, 133 Wn.2d 534 (1997); I.

***State v. Massey***, 60 Wn.App. 131 (1991)

Failing to pursue a filed motion to suppress with argument is deemed an abandonment of the motion, *State v. Valladares*, 31 Wn.App. 63, 75-76 (1982), *rev'd, on other grounds,* 99 Wn.2d 663 (1983); II.

***State v. West***, 64 Wn.App. 541 (1992)

After timely notice of appeal is filed, superior court lacks jurisdiction to extend the time allowed for filing a motion for indigency if latter is filed beyond the time allowed for filing a notice of appeal, RAP 15.2(a), *see: Lakewood v. Cheng,* 169 Wn.App. 165 (2012); II.

***State v. Stearns***, 119 Wn.2d 247 (1992)

Where not objected to in trial court, defendant cannot challenge definition of "manufacture," RCW 69.50.101(m), for first time on appeal; as long as instructions properly inform jury of elements of the charged crime, any error in further defining terms used in the elements is not of constitutional magnitude; *affirms State v. Stearns*, 59 Wn.App. 445 (1990); 9-0.

***State v. Putman***, 65 Wn.App. 606 (1992)

Absence of verbatim report of proceedings of suppression hearing and closing argument held not error, as state submitted narrative report prepared from hearing notes, court's written findings and conclusions, oral ruling, *distinguishing* *State v. Larson*, 62 Wn.2d 64, 67 (1963); *modifies* *State v. Putman*, 61 Wn.App. 450 (1991); II.

***State v. Pollard***, 66 Wn.App. 779 (1992)

RAP 15.2(h) does not require appellate counsel to discuss why arguable issues are frivolous, *Anders v. California*, 18 L.Ed.2d 493 (1967), *see also:* *State v. Hairston*, 85 Wn.App. 196 (1997); I.

***State v. Smith***, 67 Wn.App. 81 (1992)

Failure of trial court to enter **findings** pursuant to CrR 3.5 and 3.6 is not grounds for reversal where the judge's oral opinion is adequate to allow review, *see:* *State v. Cannon*, 130 Wn.2d 313, 329-30 (1996), *distinguishing* *State v. Witherspoon*, 60 Wn.App. 569, 572 (1991); *accord:* *State v. Riley*, 69 Wn.App. 349 (1993), *State v. Miller*, 92 Wn.App. 693, 703-4 (1998), *State v. Brockob*, 159 Wn.2d 311, 343-44 (2006), *State v. Bluehorse*, 159 Wn.App. 410, 422-23 (2011), *see: State v. Powell*, 181 Wn.App. 716, 722-23 (2014), *but see:* *State v. McCrorey*, 70 Wn.App. 103, 115-6 (1993), *State v. Denison*, 78 Wn.App. 566 (1995), *State v. Naranjo*, 83 Wn.App. 300 (1996), *State v. Head*, 136 Wn.2d 619 (1998); I.

***State v. Lynn***, 67 Wn.App. 339 (1992)

To analyze alleged constitutional error raised for the first time on appeal, (1) appeals court must make a cursory determination as to whether the alleged error is constitutional, (2) is error manifest?, RAP 2.5, *see: State v. Warren*, 134 Wn.App.. 44, 56-58 (2006), *aff'd, on other grounds*, 165 Wn.2d 17 (2008), (3) address merits, (4) harmless error analysis, *see:* *State v. Scott*, 110 Wn.2d 682 (1988), *State v. Trout*, 125 Wn.App. 313 (2005), *State v. Binh Thach*, 126 Wn.App. 297, 311-13 (2005), *but see:* *State v. Hieb*, 107 Wn.2d 97 (1986), *State v. Williams*, 91 Wn.App. 344 (1998); I.

***State v. Barberio,*** 121 Wn.2d 48 (1993)

Where one count of two-count information is reversed on appeal and dismissed, and upon resentencing trial court does not independently review the sentence on remaining count, and where legality of sentence was not raised at first appeal, the appellate court need not review the issue, RAP 2.5(c)(1), *State v. Traicoff*, 93 Wn.App. 248, 257-58 (1998), *State v. Kilgore*, 141 Wn.App. 817 (2007), 167 Wn.2d 28 (2009), *State v. Parmalee*, 172 Wn.App. 899 (2013), *State v. Wheeler*, 183 Wn.2d 71 (2015), *affirming State v. Barberio*, 66 Wn.App. 902 (1992), *see:* *State v. Sauve*, 100 Wn.2d 84 (1983).

***Butts v. Heller***, 69 Wn.App. 263 (1993)

Writ of prohibition, RCW 7.16.300, is appropriate to review denial of a speedy trial motion where (1) reversal would be unquestioned if the case were on appeal and (2) litigation will terminate once error is corrected by interlocutory review, *Seattle v. Williams*, 101 Wn.2d 445 (1984), *State v. Harris*, 2 Wn.App. 272 (1970), *rev'd on other grounds,* 78 Wn.2d 894,

*rev'd, Harris v. Washington*, 30 L.Ed.2d 212 (1971), *Mabe v. White*, 105 Wn.App. 827 (2001); II.

***State v. Young***, 70 Wn.App. 528 (1993)

Where indigent defendant challenged sufficiency of the evidence before, during and after trial, s/he is entitled to a verbatim report of proceedings of the trial itself, excluding voir dire and opening statements; I.

***State v. Olson***, 126 Wn.2d 315 (1995)

Trial court suppresses and dismisses, state appeals from dismissal order but not suppression order; held: failure to assign error to an issue, by itself, should not preclude appellate review unless appellant fails to raise an issue in assignments of error, RAP 10.3(a)(3), and fails to present any argument on the issue or provide any legal citation, *State v. Pam*, 101 Wn.2d 507, 511 (1984), *overruling, on other grounds, State v. Fortun*, 94 Wn.2d 754 (1980), *State v. Cruz*, 189 Wn.2d 588 (2017), *see also: State v. Perry*, 120 Wn.2d 200 (1992); *affirms State v. Olson*, 74 Wn.App. 126 (1994); 9-0.

***State v. McFarland***, 127 Wn.2d 322 (1995)

Failure to move to suppress evidence is not *per se* deficient representation, *State v. Lee*, 162 Wn.App. 852 (2011), overruling *State v. Tarica*, 59 Wn.App. 368, 374 (1990); where a search is challenged for the first time on appeal, appellant must show, from the record, actual prejudice, *i.e.*, that the trial court likely would have granted the motion if made, *see: State v. Rainey*, 107 Wn.App. 129 (2001), *State v. Trout*, 125 Wn.App. 313 (2005), *State v. Kirkpatrick*, 160 Wn.2d 873, 879-81 (2007), *overruled, on other grounds, State v. Jasper*, 174 Wn.2d 96 (2012), *State v. Garbaccio*, 151 Wn.App. 716, 730-31 (2009), *State v. Trujillo*, 153 Wn.App. 454 (2009); reverses *State v. McFarland*, 73 Wn.App. 57 (1994), *State v. Fisher*, 74 Wn.App. 804 (1994); a personal restraint petition is the appropriate means of having the reviewing court consider matters outside the record, at n. 5, *see: State v. Klinger*, 96 Wn.App. 619 (1999); 7-0.

***State v. Worl***, 129 Wn.2d 416 (1996)

**Law of the case doctrine**: appeals courts should not revisit issues already determined in a prior appeal on same case absent a conclusion that the first appellate decision was clearly erroneous, *Greene v. Rothschild*, 68 Wn.2d 1 (1966), *Folsom v. County of Spokane*, 111 Wn.2d 256, 263-4 (1988), *see: State v. Schwab*, 134 Wn.App. 635, 644-45 (2006); 6-3.

***State v. Huddleston***, 80 Wn.App. 916, 924-6 (1996)

In entering findings following assault 1° bench trial, court uses wrong definition of great bodily harm; held: remedy is a remand to trial court to either apply correct definition to the evidence previously presented or, if trial court believes it cannot fairly do this, grant new trial; II.

***State v. Massey***, 81 Wn.App. 198 (1996)

Probationer cannot appeal a condition of probation as unconstitutional until harmfully affected, *State v. Langland*, 42 Wn.App. 287, 292 (1985), *State v. Phillips*, 65 Wn.App. 239, 244 (1992), *State v. J.B.*, 102 Wn.App. 583 (2000), *State v. Cates*, 183 Wn.2d 531 (2015), *but see: State v. Armstrong*, 91 Wn.App. 635 (1998), *State v. Bahl*, 164 Wn.2d 739 (2008), *State v.*

*Valencia*, 169 Wn.2d 782, 786-91 (2010), *State v. Irwin*, 191 Wn.App. 644 (2015), *State v. Padilla*, 190 Wn.2d 672, 677 (2018), *but see: State v. T.J.S.-M.*, 193 Wn.2d 450 (2019), *State v. Blazina*, 182 Wn.2d 827, 833-34 (2015), *State v. Peters*, 10 Wn.App.2d 574 (2019); I.

***State v. Brown***, 132 Wn.2d 529, 591-3 (1997)

Where part of verbatim report of proceedings is missing, trial judge's notes may provide a record of sufficient completeness for adequate review, RAP 9.1(b), 9.3, *State v. Classen*, 143 Wn.App. 45, 54-58 (2008), *cf.: State v. Tilton*, 149 Wn.2d 775 (2003), *State v. Burton*, 165 Wn.App. 866 (2012), *State v. Waits*, 200 Wn.2d 507 (2022); 9-0.

***State v. Broadaway***, 133 Wn.2d 118, 129-31 (1997)

Review of findings of fact following CrR 3.5 hearings will be based upon substantial evidence (facts will be verities if unchallenged) rather than by independent review, *State v. Hill*, 123 Wn.2d 641 (1994), *State v. Neeley*, 113 Wn.App. 100, 103-05 (2002); 9-0.

***State v. Cruz***, 88 Wn.App. 905 (1997)

Failure of superior court to enter adequate CrR 3.6 findings will result in a presumptive reversal, *State v. Smith*, 68 Wn.App. 201 (1992), *but see: State v. Head*, 113 Wn.2d 619 (1998); III.

***State v. Tomal***, 133 Wn.2d 985 (1997)

Counsel files notice of appeal, does nothing for four years, then, in response to motion to dismiss, files a brief then fails to file transcript for four months, appeal dismissed; held: absent evidence of a knowing, voluntary and intentional abandonment, appeal may proceed, *State v. Sweet*, 90 Wn.2d 282, 286 (1978), *Seattle v. Klein*, 161 Wn.2d 557 (2007), *cf. State v. Cater*, 186 Wn.App. 384 (2015), subject to sanctions against counsel; 9-0.

***State v. Smith***, 134 Wn.2d 849 (1998)

Following suppression hearing, counsel informs court defense will plead guilty and appeal, respondent enters plea of guilty, Court of Appeals holds that plea waives appeal, *State v. Smith*, 87 Wn.App. 293 (1997); held: because it is unclear whether respondent knowingly relinquished right to appeal suppression ruling due to counsel's error, remanded to trial court to permit respondent to withdraw plea in favor of stipulated facts trial, *see also: State v. Neff*, 163 Wn.2d 453, 459-61 (2008), *State v. Snapp*, 153 Wn.App. 485, 491-93 (2009); *per curiam.*

***State v. Head***, 136 Wn.2d 619 (1998)

Failure of trial court to enter **findings and conclusions** following bench trial, CrR 6.1(d), requires remand for entry of findings; reversal may be appropriate where defense shows actual prejudice, *State v. Pray*, 96 Wn.App. 25, 30-31 (1999), burden on defendant; no additional evidence may be taken, trial court is not bound by its earlier oral decision, may acquit despite its earlier conviction, *see: State v. Pruitt*, 145 Wn.App. 784 (2008);; 7-2.

***State v. Armstrong***, 91 Wn.App. 635 (1998)

Defendant does not waive right to appeal conditions of community placement by failing to object in trial court, *State v. Paine*, 69 Wn.App. 873, 884 (1993), *State v. Moen*, 129 Wn.2d 535, 547 (1996), *State v. Rasmussen*, 109 Wn.App. 279, 285 (2001), *State v. Bahl*, 164 Wn.2d

739 (2008), *but see:* *State v. Massey*, 81 Wn.App. 198 (1996), *State v. Langland*, 42 Wn.App. 287, 292 (1985), *State v. Phillips*, 65 Wn.App. 239, 244 (1992), *State v. Peters*, 10 Wn.App.2d 574 (2019); I.

***State v. Nichols***, 136 Wn.2d 859 (1998)

Appellate counsel files motion to withdraw on grounds that appeal is frivolous, files brief with arguable issues, *Anders v. California*, 18 L.Ed.2d 493 (1967), Court of Appeals finds a sentencing issue and remands for new sentencing; held: where appeals court determines that there are any nonfrivolous issues, it must appoint counsel to pursue appeal and prepare an advocate's brief, *McCoy v. Court of Appeals*, 100 L.Ed.2d 440 (1988), *Penson v. Ohio*, 102 L.Ed.2d 300 (1988), *cf.:* *State v. Wade*, 133 Wn.App. 855 (2006), *Smith v. Robbins*, 145 L.Ed.2d 756 (2000); *per curiam.*

***State v. Williams***, 137 Wn.2d 746 (1999)

Failure of court to advise defendant of right to testify or not, CrR 3.5(b), is not a constitutional error, thus should not be considered for the first time on appeal, reversing *State v. Williams*, 91 Wn.App. 344 (1998); 9-0.

***State v. Leeloo***, 94 Wn.App. 403 (1999)

Before seeking to withdraw pursuant to *Anders v. California*, 18 L.Ed.2d 493 (1967), claiming no good faith appeals arguments, counsel must review and provide to appeals court transcripts of plea and sentencing hearings; I.

***Commanda v. Cary***, 143 Wn.2d 651 (2001)

Defendant's motion to dismiss DUI for violation of equal protection is denied, superior court issues *ex parte* stay and writ of review, RCW 7.16.120, denies motion to quash writ and reverses district court; held: statutory writ of review may only be granted if (1) district court exceeded jurisdiction or acted illegally and (2) there is no adequate remedy at law, *State v. Epler*, 93 Wn.App. 520 (1999), *Alter v. Issaquah Dist. Court*, 35 Wn.App. 590, 591 (1983), *cf.:* *Butts v. Heller*, 69 Wn.App. 263 (1993), *see:* *Mabe v. White*, 105 Wn.App. 827 (2001), *Seattle v. Holifield*, 170 Wn.2d 230, 239-46 (2010), *State v. Chelan County District Court*, 189 Wn.2d 625 (2017); here there was an adequate remedy via RALJ appeal, thus writ is quashed, *see:* *Seattle v. Keane*, 108 Wn.App. 630 (2001); 9-0.

***Seattle v. Keene***, 108 Wn.App. 630 (2001)

Municipal court holds patent-holder of breath test instrument in contempt and, as sanction, suppresses breath test, city seeks writ of review, superior court dismisses; held: errors of law are reviewable by statutory writ, *Seattle v. Williams*, 101 Wn.2d 445 (1984), *see:* *Seattle v. Holifield*, 170 Wn.2d 230 (2010), *cf.:* *Commanda v. Cary*, 143 Wn.2d 651 (2001), *but see:* *State v. Epler*, 93 Wn.App. 520, 524 (1999), *State v. Chelan County District Court*, 189 Wn.2d 625 (2017); I.

***State v. Kinard***, 109 Wn.App. 428, 431-32 (2001)

Test for appellate review of pretrial photo identification issue is substantial evidence, *State v. Hill*, 123 Wn.2d 641 (1994); III.

***State v. Giles***, 148 Wn.2d 449 (2003)

Where "grounds of appeal" state juror bias during *voir dire*, defendant is entitled to transcript of *voir dire* for his *pro se* supplemental brief, *Mayer v. City of Chicago*, 30 L.Ed.2d 372 (1971), *Draper v. Washington*,9 L.Ed.2d 899 (1963); 9-0.

***State v. Jones***, 148 Wn.2d 719 (2003)

Court of Appeals reverses and remands for *in camera* review of police internal investigation files and for proceedings consistent with its opinion, trial court on remand reviews files, discloses some but denies new trial, holding that result would not have differed; held: where it is apparent from a decision on direct appeal that the appellate court anticipated a new trial, trial court lacks discretion to do otherwise; *per curiam.*

***State v. Taylor***, 150 Wn.2d 599 (2003)

An order of dismissal without prejudice is not appealable, overruling *State v. Rock*, 65 Wn.App. 654 (1992), nor is defendant an "aggrieved party," RAP 3.1, for purposes of discretionary review, unless charges are refiled; affirms *State v. Taylor*, 114 Wn.App. 124 (2002); 9-0.

***State v. Busig***, 119 Wn.App. 381, 390-91 (2003)

Defendant challenges warrant for first time on appeal; held: while a search not based on probable cause is of constitutional magnitude, where prejudice is not evident in the record, defendant has not shown actual prejudice, thus error is not manifest, *see: State v. McFarland*, 127 Wn.2d 322, 332-33 (1995), *State v. Trout*, 125 Wn.App. 313 (2005), *State v. Kirkpatrick*, 160 Wn.2d 873, 879-81 (2007), *overruled, on other grounds, State v. Jasper*, 174 Wn.2d 96 (2012), *State v. Garbaccio*, 151 Wn.App. 716, 730-31 (2009); III.

***Pers. Restraint of Isadore***, 151 Wn.2d 294, 302 (2004)

"A plurality opinion has limited precedential value and is not binding on the courts," *State v. Gonzalez*, 77 Wn.App. 479, 486 (1995); 9-0.

***Halbert v. Michigan***, 162 L.Ed.2d 552 (2005)

State law precluding appointment of counsel on appeal following a *nolo contendere* plea violated due process and equal protection clauses, *see: Douglas v. California*, 9 L.Ed.2d 811 (1963); 6-3.

***State v. Larranaga***, 126 Wn.App. 505 (2005)

Denial of a motion to vacate or amend a judgment, RAP 2.2(a), is appealable as a matter of right, thus defendant is entitled to counsel, RCW 10.73.150(1), *State v. Thompson*, 93 Wn.App. 364, 368-69 (1998), although defendant is not entitled to appointed counsel during the initial hearing on the CrR 7.8 motion, *State v. Winston*, 105 Wn.App. 318, 325 (2001), *State v. Forest*, 125 Wn.App. 702, 707-08 (2005); II.

***State v. French***, 157 Wn.2d 593, 600-03 (2006)

Where defendant **flees** jurisdiction after conviction but before sentencing, he may still appeal after he is caught and sentenced, CONST. art. I, § 22, *Seattle v. Klein*, 161 Wn.2d 557

(2007), *State v. Hoa Van Tran*, 149 Wn.App. 144 (2009), *overruling State v. Estrada*, 78 Wn.App. 381 (1995); 9-0.

***Seattle v. Klein***, 161 Wn.2d 554 (2007)

Where defendant **flees** pending appeal, he has not waived the right to appeal, *State v. French*, 157 Wn.2d 593, 600-03 (2006), *State v. Hoa Van Tran*, 149 Wn.App. 144 (2009), overruling, *sub silentio*, *State v. Rempel*, 114 Wn.2d 77 (1990), *State v. Handy*, 27 Wash. 469 (1902), *State v. Mosley*, 84 Wn.2d 608 (1974), *State v. Estrada*, 78 Wn.App. 381 (1995), *see: State v . Wences*, 189 Wn.2d 675 (2017); 9-0.

***State v. Stein***, 140 Wn.App. 43, 55-56 (2007)

A Supreme Court of Washington decision supersedes a Court of Appeals decision only on the issues the Supreme Court decides, even where the Supreme Court grants review on issues that it does not ultimately decide, *State v. Strauss*, 119 Wn.2d 401, 412 (1992); II.

***State v. Davenport***, 140 Wn.App. 925, 932 (2007)

Where a case is reversed and remanded for resentencing, trial court has discretion to consider issues defendant did not raise at his initial sentencing or in his first appeal, *State v. Barberio*, 121 Wn.App. 48, 51 (1993), *State v. Wheeler*, 183 Wn.2d 71 (2015), *see: State v. Parmalee*, 172 Wn.App. 899 (2013), *State v. Gleim*, 200 Wn.App. 40 (2017); where trial court exercises discretion at a resentencing, defendant has the right to be present, *State v. Rodriguez*, 171 Wn.2d 46 (2011); II.

***State v. Kilgore***, 141 Wn.App. 817 (2007), 167 Wn.2d 28 (2009)

At first appeal, *State v. Kilgore*, 107 Wn.App. 160, *aff'd*, 147 Wn.2d 288 (2002), two counts are reversed, state chooses not to retry those counts, trial court declines to resentence; held: because offender score was greater than 9 and thus standard range did not change following dismissal of the two reversed counts, defendant is not entitled to a resentencing and may not appeal, *see: State v. Argo*, 81 Wn.App. 552, 569 (1996); 2-1, II.

***Greenlaw v. United States***, 171 L.Ed.2d 399 (2008)

Defendant appeals length of sentence, government does not cross-appeal, Court of Appeals finds sentence was unlawful, vacates and orders increase of sentence; held: principle of party presentation dictates that an appellate court may not alter a judgment to benefit a non-appealing party, *cf.: Castro v. United States*, 157 L.Ed.2d 778 (2003); 6-3.

***State v. Bahl***, 164 Wn.2d 739, 745 (2008)

As condition of community custody, defendant is ordered not to possess pornography, appeals; held: vagueness challenges to conditions of community custody may be raised for the first time on appeal, *State v. Sanchez-Valencia*, 169 Wn.2d 783, 786-91 (2010), *State v. Padilla*, 190 Wn.2d 672 (2018), *see: State v. Peters*, 10 Wn.App.2d 574 (2019), *cf.: State v. Cates*, 183 Wn.2d 531 (2015); 9-0.

***State v. Classen***, 143 Wn.App. 45, 54-58 (2008)

Where the trial record is incomplete, whether or not a reconstructed record is sufficient for appeal depends on (1) whether all or only part is missing, (2) the importance of the missing portion to review the issues raised on appeal, (3) the adequacy of the reconstructed record, (4) the degree of resultant prejudice from the missing or reconstructed record, *see:* *State v. Putnam*, 65 Wn.App. 606 (1992), *State v. Miller*, 40 Wn.App. 483 (1985), *State v. Larson*, 62 Wn.2d 64 (1963), *State v. Tilton*, 149 Wn.2d 775, 781 (2003), *State v. Burton,* 165 Wn.App. 866 (2012), *State v. Waits,* 200 Wn.2d 507 (2022); II.

***State v. Smith***, 144 Wn.App. 860 (2008)

Trial court lacks authority to dismiss a motion to vacate a judgment, CrR 7.8(c) (2007), on timeliness grounds, but must transfer the motion to the Court of Appeals for consideration as a personal restraint petition; superior court may only rule on the merits of a motion to vacate when the motion is timely and defendant makes a substantial showing that he is entitled to relief or the motion cannot be resolved without a factual hearing, *State v. Robinson,*193 Wn.App. 215 (2016); II.

***Pers. Restraint of Rowland***, 149 Wn.App. 496 (2009)

A judgment and sentence is valid on its face for purposes of the time bar to a collateral attack, RCW 10.73.090(1) (1989), where the judgment and sentence itself reflects an offender score without findings about comparability; where a judgment and sentence is a result of a guilty plea,, the phrase "on its face" includes those documents signed as part of the plea agreement, *Pers. Restraint of Stoudmire,* 141 Wn.2d 342, 353 (2000), *Pers Restraint of Banks*, 149 Wn.App. 513 (2009); where an intervening appellate opinion has effectively overturned a prior appellate decision, the intervening opinion constitutes a significant change of the law for purposes of exemption from procedural bars, *Pers. Restraint of Greening*, 141 Wn.2d 686, 697 (2000), *cf.: State v. Miller,* 185 Wn.2d 111 (2016); I.

***State v. Snapp***, 153 Wn.App. 485, 491-93 (2009)

Defendant pleads guilty, in plea statement prosecutor writes that defendant can appeal suppression motion; held: state waived objection to defendant's appeal, *see:* *State v. Smith*, 134 Wn.2d 489 (1998); II.

***State v. Drum***, 168 Wn.2d 23, 38 n. 3 (2010)

Appellant is responsible to designate the necessary portions of the record, *see:* RAP 9.6(a), and in absence of an adequate record, appellate court may decline to review the issue; 5-4.

***Pers. Restraint of Clark***, 168 Wn.2d 581 (2010)

At plea, defendant is informed that he will be sentenced to community custody, judgment and sentence has boilerplate language which states defendant is sentenced to community custody for certain offenses which do not apply, court later amends, *ex parte,* J&S to delete the community custody language, ten years later defendant seeks to withdraw plea, claiming judgment and sentence is invalid on its face, RCW 10.73.090(1); held: PRP more than a year after sentencing may only be considered if J&S is invalid on its face, not whether plea documents are facially invalid, *Pers. Restraint of Hemenway*, 147 Wn.2d 529, 532-33 (2002); a J&S is not valid on its face when, without further elaboration, it "evidences an error," at 585 ¶ 11, *Pers Restraint of Thompson*, 141 Wn.2d 712, 718 (2000); here, J&S was not invalid,

amendment may have violated due process but even if void, original J&S was not facially invalid, defendant's affidavit and reference to guilty plea are external documents which are beyond the face of the J&S, thus cannot overcome the one year time limit for PRP; 8-1.

***State v. Osman***, 168 Wn.2d 632 (2010)

Part of district court suppression hearing recording is lost, including trial judge's oral findings and conclusions, on remand district judge finds that the missing portions were not significant or material, RALJ 5.4; held: appellate review of court of limited jurisdiction's determination that missing record is significant or material is reviewed *de novo*, trial court may not reconstruct the record from other sources, *cf.:* RAP 9.4, loss of findings and conclusions is material and significant, remedy is new trial, RALJ 5.4, even though only suppression hearing is missing; reverses *State v. Osman*, 147 Wn.App. 867 (2008); 9-0.

***Seattle v. Holifield***, 179 Wn.2d 230, 239-46 (2010)

Municipal judge suppresses breath test results due to government misconduct, CrRLJ 8.3(b), city seeks writ of review, RCW 7.16.040; held: writ of review may issue where lower court "(1) has committed an obvious error that would render further proceedings useless; (2) has committed probable error and the decision substantially alters the status quo or substantially limits the freedom of a party to act; or (3) has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of revisory jurisdiction by an appellate court," at 244-45; here, suppression would constitute, at most, a mere error of law that, without more, would not justify issuance of a writ of review, *State v. Chelan County District Court,* 189 Wn.2d 625 (2017); 9-0.

***Pers. Restraint of Nichols***, 171 Wn.2d 370, 373-76 (2011)

A motion to suppress may be raised for the first time in a timely PRP, *Pers. Restraint of Robinson,* 171 Wn.2d 292 (2011), reversing *Pers. Restraint of Nichols,* 151 Wn.App. 262 (2009); 5-4.

***State v. Sims***, 171 Wn.2d 436 (2011)

Sentencing court grants special sex offender sentencing alternative, RCW 9.94A.670, as condition banishes defendant from the county where victim lives, defendant appeals this condition, Court of Appeals reverses but remands for sentencing judge to reconsider SSOSA, *State v. Sims,* 128 Wn.App. 526 (2009); held: while the necessities provision of RAP 2.4(a) provides for broader relief where petitioner's claim cannot be considered separately from issues a respondent raises in response, here the broader remedy of reconsideration of the SSOSA is not demanded by the necessities as court may narrow the banishment condition by itself, thus avoiding the chilling effect on the right to appeal; 7-2.

***State v. Lee***, 162 Wn.App. 852 (2011)

Failure to move to suppress an auto search after *Arizona v. Gant,* 556 U.S. 332, 173 L.Ed.2d 485 (2009) is a waiver of the right to have the evidence excluded, *State v. Mierz,* 72 Wn.App. 783, 789 (1994), *cf.: State v. Jones,* 163 Wn.App. 354, 360 n.9 (2011); here, ineffective assistance was not addressed on direct appeal; II.

***State v. Hecht***, 173 Wn.2d 92 (2011)

Appellant who receives food stamps is presumptively indigent for purposes of appellate expenses, RCW 10.101.010; *per curiam.*

***Pers. Restraint of Heidari***, 174 Wn.2d 288 (2012)

Where evidence is insufficient to support a conviction, appellate court may only permit entry of judgment on a lesser if the jury was instructed on the lesser, *State v. Green,* 94 Wn.2d 216, 234 (1979), *State v. Richardson,* 12 Wn.App.2d 657 (2020), distinguishing *State v. Gilbert,* 68 Wn.App. 379, 384 (1993), *State v. Gamble,* 118 Wn.App. 332, 336 (2003); affirms *Pers. Restraint of Heidari*, 159 Wn.App. 601 (2011); 5-4.

***State v. Hayes***, 165 Wn.App. 507, 514-20 (2011)

Record establishes that defense recognized the existence of a confrontation clause issue, failed to object and then raised issue for first time on appeal, RAP 2.5(a)(3); held: a manifest constitutional issue deliberately not litigated at trial is waived and may not be raised on direct appeal, *State v. Walton,* 76 Wn.App. 364, 368-70 (1994), *Johnson v. United States*, 87 L.Ed. 704 (1943), *State v. Valladares*, 99 Wn.2d 663, 666-72 (1983), *State v. White,* 83 Wn.App. 770, 776 (1996), *rev'd, on other grounds,* 135 Wn.2d 761 (1998), *State v. Garbaccio,* 151 Wn.App. 716, 730-31 (2009), *see also: State v. Trout,* 125 Wn.App. 313 (2005); I.

***State v. Burton***. 165 Wn.App. 866 (2012)

Three-year delay in preparing transcript for appeal, while inexcusable, does not warrant a new trial; while some of the transcript is garbled, state's clarifying affidavit is sufficient to settle the record for review, not offered as a substitute for the record, distinguishing *State v. Tilton,* 149 Wn.2d 775 (2003), *see: State v. Waits,* 200 Wn.2d 507 (2022); III.

***State v. Chetty***, 167 Wn.App. 432 (2012)

Following stipulated facts trial in 2004, defendant-resident alien does not appeal, after deportation proceedings are commenced defendant seeks to extend period of time to appeal, avers that counsel did not advise that he was deportable, that counsel said an appeal was a waste of time, and that if immigration issues arose "I should not volunteer" information; held: failure to provide advice on deportation consequences of a plea being ineffective assistance, *State v. Sandoval*, 171 Wn.2d 163 (2011), *Padilla v. Kentucky*, 559 U.S. 356, 176 L.Ed.2d 284 (2010), *see: Chaidez v. United States,* 568 U.S. 342, 185 L.Ed.2d 149 (2013), *cf.: Pers. Restraint of Ramos,* 181 Wn.App. 743 (2014), failure to so advise may impact proper advice regarding right to appeal, remanded for evidentiary hearing as to whether counsel's performance was deficient and whether defendant knowingly, voluntarily and intelligently waived right to appeal, *see: State v. Chetty,* 184 Wn.App. 607 (2014); I.

***Lakewood v. Cheng***, 169 Wn.App. 165 (2012)

Defendant faxes notice of appeal to superior court on 30th day, no evidence exists that clerk received it, defense has facsimile transmission verification report showing date, clerk "accepts" notice of appeal next day, defendant pays filing fee six weeks later, superior court holds appeal is timely; held: superior court's acceptance of the faxed notice of appeal establishes it was timely filed, *see: State v. West,* 64 Wn.App. 541 (1992); II.

***State v. Harvey***, 175 Wn.2d 919 (2012)

Appellant claims court closed courtroom during voir dire, trial court refuses to order transcription of voir dire at public expense; held: by claiming that courtroom was closed during voir dire, defendant made a "colorable need" for transcript of voir dire, *State v. Giles*, 148 Wn.2d 449, 450 (2003), entitling him to transcript; *per curiam.*

***State v. Flaherty***, 177 Wn.2d 90 (2013)

Five years after conviction, defendant mails a motion to vacate, CrR 7.8, superior court does not file it and returns it as time barred, defendant appeals; held: clerk must file a motion presented in the proper form, CR 5(e), if motion is time barred court must transfer it to the Court of Appeals, CrR 7.8(c)(2); reverses *State v. Flaherty,* 166 Wn.App. 716 (2012); *per curiam.*

***Pers. Restraint of Adams***, 178 Wn.2d 417 (2013)

Defendant is convicted of murder, does not appeal, ten years later files motion to vacate sentence as offender score had been miscalculated, parties agree and defendant is resentenced, then files PRP claiming ineffective assistance at trial; held: time bar exception for a judgment and sentence invalid on its face does not open the door to all claims including those that do not relate to the invalidity of the judgment and sentence, *Pers. Restraint of Snively,* 180 Wn.2d 28 (2014), *Pers. Restraint of Smalls,* 182 Wn.App. 381 (2014), *State v. Wheeler,* 183 Wn.2d 71, 77-80 (2015), thus PRP is time barred and dismissed, *Pers. Restraint of Coats,*173 Wn.2d 123 (2011), *Pers. Restraint of Skylstad,* 160 Wn.2d 944 (2007), *Pers. Restraint of Snively,* 180 Wn.2d 1 (2014); 8-1.

***State v. Parmelee***, 172 Wn.App. 899 (2013)

Mandate from Supreme Court vacates exceptional sentence based solely on lack of jury finding, *Blakely v. Washington,* 542 U.S. 296, 159 L.Ed.2d 403 (2004), at resentencing defendant argues that his offender score was wrongly calculated, judge allows argument but expressly declines to consider it, stating that the "offender score is 13," the same as it was at original sentencing; held: where sentencing court declines to consider an issue that was not remanded, and merely states what the score is, the court has not independently reviewed the issue (rejecting state's concession) and thus may not be appealed, *State v. Barberio,* 121 Wn.2d 48, 50 (1993) , *State v. Wheeler,* 183 Wn.2d 71 (2015); I.

***State v. Hand***, 173 Wn.App. 903 (2013)

At probation revocation hearing, trial court does not advise of right to appeal, three years later defendant files notice of appeal and seeks extension; held: revocation is not a stage of criminal prosecution where defendant is entitled to full panoply of constitutional rights, court is not obliged to inform revoked probationer of right to appeal, no extraordinary circumstances justify extension; I.

***Pers. Restraint of Snively***, 180 Wn.2d 28 (2014)

Plea agreement and sentence includes community custody which was not authorized, 17 years later defendant seeks to withdraw plea due to erroneous community placement; held: facially invalid judgment and sentence does not permit raising of other time-barred claims, RCW 10.73.100, *Pers. Restraint of Toledo-Sotelo,* 176 Wn.2d 759 (2013), *Pers. Restraint of Clark,*168 Wn.2d 581, 587 (2010), *State v. Wheeler,* 183 Wn.2d 71, 77-80 (2015), defendant's sole remedy is correction of sentence; *per curiam.*

***Pers. Restraint of Ruiz-Sanabria***, 184 Wn.2d 632 (2015)

Superior Court which receives a post-conviction motion must expressly state the basis for transferring the motion to the Court of Appeals, CrR 7.8(c)(2), and should assure that the documents necessary for review are transferred to the Court of Appeals, *cf.: State v. Frohs,* 22 Wn.App.2d 88 (2022); *per curiam.*

***Pers. Restraint of Khan***, 184 Wn.2d 679, 684-87 (2015)

A personal restraint petition is frivolous where it fails to present an arguable basis for collateral relief either in law or in fact, *cf.: Matter of James,* 190 Wn.2d 686 (2018); 5-4.

***State v. Cater***, 186 Wn.App. 384 (2015)

Thirty-four years after pleading guilty defendant seeks to enlarge time to appeal, record does not show defendant was advised of right to appeal following sentencing, plea statement states he was giving up right to appeal from finding of guilt and sentence, defendant's only contemporary claim is that 1979 plea was invalid; held: while advisement in plea statement was potentially misleading, absent a declaration from defendant or prior counsel claiming he was unaware of limited right to appeal or that he would have directed his attorney to appeal or that he was misadvised by his attorney support "strong inference" that he knowingly, intelligently and voluntarily waived his limited right to appeal following a guilty plea, distinguishing *State v. Sweet,* 90 Wn.2d 282 (1978), *State v. Kells,* 134 Wn.2d 309 (1998); I.

***State v. Fort***, 190 Wn.App. 202, 238 (2015)

When raising public trial violation in a PRP petitioner must show prejudice but by arguing counsel was ineffective by not asserting public trial rights during an appeal petitioner need not prove prejudice; III.

***State v. Miller***, 185 Wn.2d 111 (2016)

Defendant is sentenced to consecutive sentences for two counts of murder, RCW 9.94A.589(1)(b) (2002), defendant files untimely collateral attack seeking resentencing because *Pers. Restraint of Mulholland,* 161 Wn.2d 322 (2007) authorized court to impose concurrent exceptional sentences, trial court agrees it was unaware it had the authority and imposes concurrent sentences, state appeals; held: *Mulholland* did not qualify as a significant change in the law, *Pers. Restraint of Gentry,* 179 Wn.2d 614, 625 (2014), *Pers. Restraint of Zamora,* 14 Wn.App.2d 858 (2020), RCW 10.73.100(6) (1989), could have argued at original sentencing for concurrent sentences thus concurrent sentences vacated; 8-1.

***State v. Robinson***, 193 Wn.App. 215 (2016)

Following sanctions imposed by DOC for community custody violation defendant files a motion for relief, CrR 7.8(b), superior court dismisses asserting it lacks jurisdiction; held: a motion to vacate judgment must either be transferred to Court of Appeals or order a show cause hearing directing adverse party to appear, CrR 7.8(c)(3), and hold a hearing "attended by both [petitioner] and DOC," *cf.: State v. Bandura,* 85 Wn.App. 87, 92-93 (1997), superior court has jurisdiction to hear motion challenging sanctions imposed for community custody violations as it relates to the original sentence, *State v. Madsen,* 153 Wn.App. 471, 475 (2009), *overruled on other grounds, Pers. Restraint of Flint,* 174 Wn.2d 539 (2012); II.

***State v. Gonzalez-Gonzalez***, 193 Wn.App. 683, 688-91 (2016)

Standard of review of a hearsay ruling is *de novo*, *but see: State v. Woods*, 143 Wn.2d 561, 595 (2001); III.

***Pers. Restraint of Troupe***, 194 Wn.App. 701 (2016)

Court of Appeals lacks statutory authority to waive filing fee for an indigent prisoner seeking to file a personal restraint petition challenging conditions of confinement if prisoner has filed three or more prior PRPs, RCW 4.24.430 (2010), *see: Matter of Troupe*, 4 Wn.App.2d 715 (2018); II.

***State v . Wences***, 189 Wn.2d 675 (2017)

Deadly weapon special verdict, court imposes firearm enhancement, defendant had absconded in 2005 but was tried after *Pers. Restraint of Eastmond*, 173 Wn.2d 632, 634 (2012) held that a sentencing court cannot impose a firearm enhancement on a deadly weapon finding which applies to all cases on direct review, rule applies even though defendant had absconded, *but see: State v. Handy*, 27 Wash. 469, 470-71 (1902), *State v. Mosley*, 84 Wn.2d 608 (1974); 6-3.

***State v. Cruz***, 189 Wn.2d 588 (2017)

Trial court suppresses evidence, finds that suppression order effectively terminates case, RAP 2.2(b)(2), then state moves to dismiss with prejudice, granted by trial court, state appeals suppression order; held: state's failure to brief and assign error to its invited dismissal order precludes review, *State v. Fortun*, 94 Wn.2d 754 (1980), *State v. Perry*, 120 Wn.2d 200, 202 (1992), *overruled on other grounds State v. Olson*, 126 Wn.2d 315, 319, 893 P.2d 629 (1995); reverses, in part, *State v. Cruz*, 195 Wn.App. 120 (2016); 9-0.

***State v. Chelan County District Court***, 189 Wn.2d 625 (2017)

In DUI case District Court judge suppresses refusal to take breath test, state seeks writ of review which Superior Court denies; held: where there is no finding that the trial court's decision effectively terminated the state's case, RALJ 2.2(c)(2), RAP 2.2(b)(2), and the decision may be a mere error of law then an interlocutory writ should be denied; here, the trial court did not "act illegally," *Seattle v. Holifield*, 170 Wn.2d 230, (2010), RCW 7.16.040 (1987), thus regardless of whether or not the decision was correct interlocutory review is not available, *cf.: Seattle v. Keene*, 108 Wn.App. 630 (2001); 7-2.

***Pers. Restraint of Fero***, 190 Wn.2d 1 (2018)

A motion for discretionary review may be timely if filed within thirty days of a Court of Appeals denial of a motion for reconsideration; 5-2 (two justices do not address this issue in a dissent on other grounds).

***Pers. Restraint of Arnold***, 190 Wn.2d 136 (2018)

One division of the Court of Appeals is not bound, via "horizontal *stare decisis,"* by another division's published opinion, *see also: State v. Ridgley*, 17 Wn.App.2d 846 (2021); 9-0.

***Pers. Restraint of Knight***,4 Wn.App.2d 248 (2018)

Defendant negotiated a plea to attempted manslaughter 1°, which is an invalid crime as one cannot attempt a non-intent crime; even though defendant filed an untimely PRP the judgment is invalid on its face; II.

***Pers. Restraint of Light-Roth***, 191 Wn.2d 328 (2018)

While youth is a mitigating factor, *State v. O'Dell*, 183 Wn.2d 680 (2015), it is not a new mitigating factor, RCW 9.94A.535(1)(e) (2016), and thus an untimely PRP is time-barred, *Matter of Meippen,* 193 Wn.2d 310 (2019), *Pers. Restraint of Kennedy,* 16 Wn.App.2d 423 (2021), 200 Wn.2d 1 (2022), *see: Pers. Restraint of. Young*, 21 Wn.App.2d 826 (2022); reverses *Pers. Restraint of Light-Roth*, 200 Wn.App. 149 (2017); 9-0.

***State v. Mayfield***, 192 Wn.2d 871 (2019)

*State v. Gunwall*, 106 Wn.2d 54 (1986) analysis is no longer required to justify an independent state law analysis of article I, section 7 in new contexts; 9-0.

***Garza v. Idaho***, 568 U.S. __ (2019)

Defendant pleads guilty, in plea form gives up right to appeal, tells trial counsel to file appeal, trial counsel declines stating that defendant waived; held: an appeal waiver doesn't give up the right to appeal all issues, thus counsel was ineffective for failure to file notice of appeal, *Roe* v. *Flores-Ortega*, 528 U. S. 470 (2000), *Roe* v. *Flores-Ortega*, 528 U. S. 470 (2000); 6-3.

***State v. McKee***, 193 Wn.2d 271 (2019)

Trial court denies a motion to suppress, court of appeals reverses and remands with order to dismiss, state appeals remedy; held: when an appellate court holds that a search was improper the remedy must be remand to suppress, not dismiss; 9-0.

***State v. T.J.S.-M.***, 193 Wn.2d 450 (2019)

Respondent has the right to appeal a manifest injustice SSODA suspended sentence, RCW 13.40.162 (2011), need not wait until it is revoked, disapproving *State v. J.B.*, 102 Wn.App. 583 (2000), *cf.: State v. Langland*, 42 Wn.App. 287 (1985); 9-0.

***State v. Basra***, 10 Wn.App.2d 279 (2019)

A motion to dismiss pursuant to CrR 8.3(b) cannot be raised post-judgment. I.

***State v. Vandervort***, 11 Wn.App.2d 300 (2019)

One-year time period to seek review of LFOs begins at sentencing, not revocation, RAP 5.2(c), CR 58(a), *In re Pers. Restraint of Wolf*, 196 Wn.App. 496, 509-10 (2016),;*State v. Vandervort*, 11 Wn.App.2d 300 (2020); II.

***Matter of Domingo-Cornelio***, 196 Wn.2d 255 (2020)

Where a juvenile sentenced as an adult files a PRP more than a year after finality *State v. Houston-Sconiers*, 188 Wash.2d 1, 8 (2017) constitutes a significant and material change in the law that requires retroactive application on collateral review, *Personal Restraint of Ali,* 196 Wn.2d 220 (2020), *but see: Matter of Forcha-Williams*, ___ Wn.2d ___, 520 P.3d 939 (2022), *Matter of Williams*, ___ Wn.2d ___, 520 P.3d 933 (2022); 6-3.

***Pers. Restraint of Tricomo***, 13 Wn.App.2d 223 (2020)

Petitioner files timely personal restraint petition *pro se* raising specific issues of ineffective assistance of counsel, RCW 10.73.090(1), after prosecutor replies petitioner retains counsel who files untimely supplemental PRP raising other ineffective assistance issues, claims it is part and parcel of original PRP; held: ineffective assistance of counsel claims that raise distinct complaints about the conduct of counsel and rely on distinct legal theories should not be treated as a single claim simply because they fall under the ineffective assistance of counsel rubric, thus counsel's supplemental petition is time-barred, *but see: Pers. Restraint of Fowler*, 197 Wn.2d 46 (2021); II.

***Pers. Restraint of Millspaugh***, 14 Wn.App.2d 137 (2020)

Governor's emergency proclamation suspending statutes that limit an individual's right to seek post-conviction relief, during the COVID-19 pandemic, do not revive previously time-barred PRPs, *Pers. Restraint of Blanks*, 14 Wn.App.2d 559 (2020); II & III.

***Pers. Restraint of Fowler***, 197 Wn.2d 46 (2021)

Egregious failure of defense counsel to file a timely personal restraint petition is grounds to equitably toll time limits for filing, RCW 10.73.090(1) (1989), *cf.: Pers. Restraint of Tricomo*, 13 Wn.App.2d 223 (2020); 6-3.

***State v. Waller***, 197 Wn.2d 218 (2021)

"A trial court's order granting a CrR 7.8(b) motion to vacate a judgment and sentence and setting a resentencing hearing vacates that judgment and sentence. Accordingly, the State may appeal such an order under RAP 2.2(b)(3)", at ¶32; 9-0.

***State v. Molnar***, 198 Wn.2d 500 (2021)

Defendant moves trial court for resentencing four years after judgment and sentence became final, claiming state breached the plea agreement by arguing aggravating sentencing factors, trial court denies motion, defendant appeals; held: motion for resentencing was an untimely collateral attack, RCW 10.73.090, thus superior court should have transferred it to the court of appeals, CrR 7.8(c)(2); because court of appeals ruled on the merits, supreme court grants review on the merits, holding that state did not breach the plea agreement; 9-0.

***Pers. Restraint of Gilbert***, 18 Wn.App.2d 75 (2021)

While constitutional double jeopardy allows an untimely PRP, RCW 10.73.100, where petitioner was convicted in both state and federal court of the same crime Washington's statutory double jeopardy prohibition, RCW 10.43.040, is not a constitutional issue, thus a PRP filed after one year alleging such a violation is untimely; II.

***Pers. Restraint of Williams***, 18 Wn.App.2d 707 (2021)

Defendant files untimely PRP claiming that one of his prior convictions that was a strike for purposes of a POAA life without parole sentence occurred when he was a juvenile and thus was unconstitutional; held: RCW 10.73.100(2) (1989) which provides for an exception to the one year time limit, RCW 10.73.090, only applies if the statute of conviction is unconstitutional, *see: Pers. Restraint of Monschke*, 197 Wn.2d 305 (2021), here defendant is challenging a sentencing statute; II.

***State v. Fletcher****,* 19 Wn.App. 566 (2021)

When court imposes an exceptional sentence where the standard range is incorrectly calculated then the judgment and sentence is invalid on its face and thus a motion to modify, CrR 7.8(b), is timely even if filed more than a year after finality, *Pers. Restraint of Goodwin*, 146 Wn.2d 861, 872 (2002), *State v. Parker,* 132 Wn.2d 182 (1997); however where defendant filed a timely petition and failed to raise the offender score issue in his first motion then his second motion is successive and thus barred, *State v. Crumpton,* 90 Wn.App. 297 (1998); III.

***State v. Waits****,* ___ Wn.2d ___, 520 P.3d 49 (2022)

Where the verbatim report of proceedings is incomplete the state, not defense or appellate counsel, is responsible for reconstructing it, with the assistance of trial counsel, *see: State v. Burton,* 165 Wn.App. 866 (2012), *State v. Tilton*, 149 Wn.2d 775 (2003), *State v. Classen*, 143 Wn.App. 45, 54-58 (2008); reverses, in part, *State v. Waits,* 20 Wn.App.2d 800 (2022); 9-0.

***Matter of Pheth****,* 20 Wn.App.2d 326 (2022)

Defendant's self-serving affidavit claiming that he told he trial counsel that he could not understand the interpreter is insufficient to establish prejudice where defendant makes no effort to obtain his trial counsel's version; I.

***Matter of McMurtry****,* 20 Wn.App.2d (2022)

Community custody condition that defendant have a curfew at home is a restraint allowing relief via a PRP; Sixth Amendment standard for ineffective assistance does not apply to revocation of community custody; I.

***Matter of Fernandez****,* 20 Wn.App.2d 883 (2022)

*State v. Allen,* 192 Wn.2d 526 (2018) (aggravating circumstances are elements of the crime for double jeopardy purposes), is not a significant change in the law justifying an untimely PRP; II.

***Pers. Restraint of Young****,* 21 Wn.App.2d 826 (2022)

Twenty-year old defendant is sentenced in 2014, filed PRP more than a year later arguing he is entitled to be resentenced per *State v. Houston-Sconiers*, 188 Wn.2d 1 (2017) due to his youth; held: while *Houston-Sconiers, supra.,* is a significant change in the law, it only applies to juvenile defendants, thus PRP is untimely; II.

***State v. Frohs****,* 22 Wn.App.2d 88 (2022)

Defendant files CrR 7.8 motion to amend his sentence, state replies in writing concurring in one request, superior court rules without oral argument on one request and effectively denying the other two, defense appeals arguing court did not enter findings or hold oral argument; held: "CrR 7.8(c)(2) requires transfer of a postconviction motion to this court for consideration as a personal restraint petition (PRP) unless the motion is not time barred and 'either the defendant has made a substantial showing of merit or a factual hearing is required to decide the motion.' The trial court is prohibited from deciding the merits of a motion if those conditions are not met. But if one of those conditions is met, then CrR 7.8(c)(3) states the superior court 'shall enter an order fixing a time and place for hearing and directing the adverse party to appear and show cause why the relief asked for should not be granted.' The plain terms of CrR 7.8(c) do not require oral argument for a show cause

hearing, only that the court consider the motion after hearing from both parties. Indeed, the general rule for criminal motions, CrR 8.2, provides that courts look to CrR 3.6 for guidance, and CrR 3.6 gives courts discretion to decide 'based upon the moving papers' whether an evidentiary hearing is required," distinguishing *Pers. Restraint of Ruiz-Sanabria,* 184 Wn.2d 632 (2015); I.

***State v. Edwards***, 23 Wn.App.2d 118 (2022)

While case is on direct appeal trial court resentences defendant without obtaining leave from Court of Appeals; held: amended judgment and sentence is void, RAP 7,2(e); I.

***Pers. Restraint of Rhone***, 22 Wn.App.2d 307 (2022)

*Seattle v. Erickson*, 188 Wn.2d 721 (2017) and *State v. Jefferson*, 192 Wn.2d 225, 230 (2018) changing the state's *Batson* inquiry to an "objective observer" standard are significant changes in the law, apply retroactively thus one-year time bar to PRP does not apply; 2-1, II.

***Seattle v. Wiggins***, 23 Wn.App.2d 401 (2022)

Municipal court enters findings of fact and conclusions of law, appellant City does not challenge findings, superior court fails to accept unchallenged findings and enters its own findings; held: appellate courts may not engage in *de novo* review of evidence, *State v. Basson*, 105 Wn.2d 314, 315 (1986); I.

***Matter of Sylvester,*** ___ Wn.App.2d ___, 520 P.3d 1123 (2022)

A void drug possession conviction, *State v. Blake*, 197 Wn.2d 170 (2021), may be challenged in a PRP beyond one year after finality, not time-barred; II.

# ARREST
## Probable Cause

***Payton v. New York***, 63 L.Ed.2d 639 (1980)

Warrantless and nonconsensual entry into suspect's home to make routine felony arrest is prohibited by Fourth Amendment, absent exigent circumstances; *see: State v. Solberg*, 122 Wn.2d 688 (1993); 6-3; retroactive, *United States v. Johnson*, 73 L.Ed.2d 202 (1982); 6-3.

***United States v. Crews***, 63 L.Ed.2d 537 (1980)

In-court identification not suppressible due to illegal arrest, *State v. Tan Le*, 103 Wn.App. 354, 361-67 (2000); 9-0.

***State v. Gardner***, 28 Wn.App. 721 (1981)

Investigative stop and removal of suspect to another place for further investigation is not an arrest, *but see*: *State v. Byers*, 88 Wn.2d 1 (1977); I.

***State v. Maesse***, 29 Wn.App. 642 (1981)

**Fellow officer rule**: arresting officer is entitled to act on instructions from other officers who, taken as a whole, possess probable cause, *State v. Perez*, 5 Wn.App.2d 867 (2018), *see: State v. Bravo Ortega*, 177 Wn.2d 116 (2013); I.

***State v. Fletcher***, 30 Wn.App. 58 (1981)

Police can arrest on probable cause for attempted theft 2°, even if not in presence of officer, because crime involves unlawful taking of property, RCW 10.31.100(1); I.

***State v. Jordon***, 30 Wn.App. 335 (1981)

*Aguilar-Spinelli* test can apply to a warrantless arrest and search; police investigation can supply corroboration to informant's tip; I.

***State v. White***, 97 Wn.2d 92 (1982)

Defendant is arrested for obstructing for providing false information to police, per RCW 9A.76.020(1), the "stop and identify" statute, following which defendant confesses to a burglary; held: statute is unconstitutionally vague; although *Michigan v. DeFillippo*, 61 L.Ed.2d 343 (1979) holds that a similar statute, while vague, was presumptively valid, and thus police reliance thereon was reasonable, the within statute is flagrantly unconstitutional, and further, Wash. CONST. Art. I, § 7 provides broader protections than the Fourth Amendment; 6-3.

***State v. Broadnax***, 98 Wn.2d 289 (1982), *overruled, on other grounds, Minnesota v. Dickinson*, 124 L.Ed.2d 334 (1993)

The discovery of evidence of criminal activity (drugs) during the execution of a search warrant does not, without more, establish probable cause to arrest all persons present; while the occupant may be detained during a search, this does not extend to all persons present, *State v. Smith*, 145 Wn.App. 268 (2008); 5-3.

***State v. Bonaparte***, 34 Wn.App. 285 (1983)

**Marital privilege** does not bar spouse's statements offered to demonstrate probable cause; II.

***State v. Dugger***, 34 Wn.App. 315 (1983)

RCW 10.31.030, which requires that police arresting a defendant on a warrant either show it at the time of arrest or advise that it will be shown at the place of intended confinement, is substantially complied with when defendant knows what he is being arrested for, *State v. Singleton*, 9 Wn.App. 327 (1973), *see also*: *State v. Simmons*, 35 Wn.App. 421 (1983), *State v. Jordan*, 92 Wn.App. 25 (1998).

***State v. Poirier***, 34 Wn.App. 839 (1983)

An exchange between two persons unknown to arresting officers of white envelopes in plain view in an open lot not itself known for frequent drug transactions does not establish probable cause to arrest; *cf.*: *State v. Fore*, 56 Wn.App. 339 (1989), *but see: State v. Rodriguez-Torres*, 77 Wn.App. 687 (1995), *State v. Graham*, 130 Wn.2d 711, 723-6 (1996); II.

***State v. Koetje***, 35 Wn.App. 157 (1983)

City police officer who also had a commission from county sheriff has authority to arrest in unincorporated county; I.

***State v. Bowers***, 36 Wn.App. 119 (1983)

Informant tells police defendant was on street with Ritalin, police observe defendant standing on corner contacting two drivers, arrest him, find drugs; held: whereas *Aguilar-Spinelli* tests are abandoned in favor of totality of the circumstances, *Illinois v. Gates*, 76 L.Ed.2d 527 (1983), *cf.: State v. Lee*, 147 Wn.App. 912 (2008), veracity and basis of knowledge are still to be considered in determining probable cause; here, informant's report was conclusory only, with no factual basis; defendant's approaching two vehicles without police observations of an exchange fails to establish probable cause, thus evidence suppressed; pre-*State v. Jackson*, 102 Wn.2d 432 (1984); II.

***State v. Counts***, 99 Wn.2d 54 (1983)

Exigent circumstances which would permit a warrantless arrest in the home are (1) hot pursuit, (2) fleeing suspect, (3) danger to police or public, (4) mobility of vehicle, and (5) mobility or destruction of evidence. Where police argue with suspect's father at threshold for one hour before entering and arresting, there can be no hot pursuit; test for destruction of evidence exception is whether police "reasonably fear" evidence will be destroyed; merely opening door when police knock is not equivalent of consent; 9-0.

***In re Armed Robbery***, 99 Wn.2d 106 (1983)

Police, believing that a description of a robber fit a suspect, show montage to victim who states that suspect bore a "striking resemblance" to the robber; police obtain a show cause order to require suspect to appear in lineup; held: an individual may not be ordered to participate in a lineup where no probable cause exists to believe that the suspect has committed the offense; *dicta* that police may not seize a suspect to obtain physical evidence (such as eyewitness identification) on less than probable cause, at 111; 9-0.

***Florida v. Royer***, 75 L.Ed.2d 229 (1983)

Suspect who fit **drug courier profile** is approached by police who request his ticket and license; without oral consent, suspect surrenders documents, suspect complies with request to accompany them to a small room 40 feet away; without consent, police retrieve luggage; when asked if he would consent to search, suspect produces a key; plurality held that police action exceeded the permissible bounds of an investigative stop, suspect's consent was tainted by the illegal detention, *Kaupp v. Texas*, 155 L.Ed.2d 814 (2003); 6-3.

***State . Bockman,*** 37 Wn.App. 474 (1984)

Front porch is "public place" for arrest purposes once probable cause is established, *distinguishing* *Payton v. N.Y.*, 63 L.Ed.2d 639 (1980); *see*: *United States v. Santana*, 49 L.Ed.2d 300 (1976); suspect's retreat into residence does not defeat arrest, *United States v. Fleming*, 677 F.2d 602, 608 (7th Cir. 1982); I.

***State v. Welker***, 37 Wn.App. 628 (1984)

Rape victim reports she scratched suspect's face, police enter suspect's home without warrant or consent, arrest suspect; held: exigent circumstance to avoid destruction of evidence, *State v. Counts*, 99 Wn.2d 54 (1983), excuses nonconsensual entry into home to arrest; containing premises to obtain warrant would take too long, defendant could destroy trace evidence; II.

***State v. McIntyre***, 39 Wn.App. 1 (1984)

Exigent circumstances excusing warrantless arrest in home include: (1) a grave offense; (2) suspect armed; (3) there is reasonably trustworthy information that suspect is armed; (4) strong reason to believe suspect is on premises; (5) suspect likely to escape and (6) entry is peaceable, *Dorman v. United States*, 435 F.2d 385 (Defendant.C. Cir. 1970), *Welsh v. Wisconsin*, 80 L.Ed.2d 732 (1984), *State v. Hoffman*, 116 Wn.2d 51, 101 (1991); II.

***State v. Dresker***, 39 Wn.App. 136 (1984)

Police, believing some minors may be drinking at a party, enter residence and find drugs; held: mere possibility of escape is not sufficient exigent circumstance to enter a residence without warrant; police must observe specific person commit specific misdemeanor to justify warrantless arrest for a misdemeanor being committed in the presence of the officer, *State v. Perez*, 5 Wn.App.2d 867 (2018), *see: State v. Bravo Ortega*, 177 Wn.2d 116 (2013), RCW 10.31.100; III.

***State v. Smith***, 102 Wn.2d 449 (1984)

Police have description of escapee and anonymous tip of his general whereabouts, stop suspect generally meeting description who denies he is escapee; police frisk suspect, find concealed weapon, transport him to precinct where they determine suspect lacks specific tattoos of escapee; held: seizure of an individual other than one for whom a warrant exists is constitutionally valid if police act in good faith, *cf.:* *State v. Afana*, 169 Wn.2d 169, 173-84 (2010), *State v. Brown*, 193 Wn.2d 280 (2019), and have reasonable articulable grounds to believe suspect is the intended arrestee; should doubt arise, police must make immediate

reasonable efforts to confirm; if, after such efforts, officer reasonably believes suspect is intended arrestee, a protective frisk is permissible; 7-2.

***State v. Komoto***, 40 Wn.App. 200 (1985)

Erratic driving plus description of vehicle involved in hit and run plus previous contact with defendant for erratic driving and drinking 26 hours earlier plus car found with damage in defendant's parking place at an apartment plus police determination defendant is sole occupant of apartment support probable cause defendant was drinking and was involved in hit and run; I.

***State v. Bryan***, 40 Wn.App. 366 (1985)

Defendant is taken into "protective custody" for intoxication during which police notice he has a wallet containing photos and identification; after defendant is released police receive report that a vehicle is stolen near station, is recovered ten miles away, defendant's wallet found nearby; police go to defendant's home, ask him if he lost wallet, defendant says yes, show him wallet, defendant denies it's his, later admits it is his, is advised of rights, confesses to car theft; held: police had probable cause to arrest defendant as soon as he denied wallet was his, thus statements after that point are suppressed; trial court's finding that confession after advice of rights was tainted by prior statement *affirmed*, *State v. Lavaris*, 99 Wn.2d 851 (1983); II.

***State v. Dorsey***, 40 Wn.App. 459 (1985)

While **mere presence** with others suspected of criminal activity does not give rise to probable cause, *State v. Broadnax*, 98 Wn.2d 289 (1982), *Ybarra v. Illinois*, 62 L.Ed.2d 238 (1979), more than mere propinquity may be enough, particularly if the known criminal activity is contemporaneous with the association; I.

***State v. Franklin***, 41 Wn.App. 409 (1985)

Unnamed citizen tells officer a man in a bus station rest room stall has a gun, describes suspect; officer enters rest room, sees man who meets description, holds him at gun point, is told by suspect that suspect has a blank gun in his rucksack, handcuffs suspect, searches rucksack, finds starter pistol and handcuffs in rucksack; officer recalls a police bulletin concerning a crime committed with handcuffs, arrests defendant who, following further investigation, is charged and convicted of a robbery; held: investigatory stop was proper where an anonymous informant of undetermined reliability states he observed suspect carrying or displaying a gun in a public place, *Navarette v. California*, 572 U.S. 393, 188 L.Ed.2d 680 (2014), *but see: Florida v. J.L.*, 146 L.Ed.2d 254 (2000), *State v. Saggers*, 182 Wn.App. 832 (2014); where officer is told by suspect he has a gun in a container, officer may search container since releasing it to suspect would put officer in danger; arrest was unlawful as officer at best only suspected suspect of committing a crime, and recollection of police bulletin was too vague to support probable cause; I.

***State v. Williamson***, 42 Wn.App. 208 (1985)

**Undercover officers** in civilian attire are invited into home where they arrest defendant without warrant; held: where invited, undercover police may effectuate warrantless arrest in home, *distinguishing Payton v. N.Y.*, 63 L.Ed.2d 639 (1980); knowing and voluntary waiver analysis does not apply to Fourth Amendment issues, *Schneckloth v. Bustamonte*, 36 L.Ed.2d 854 (1973); II.

***State v. Goodman***, 42 Wn.App. 331 (1985)

Vague, incredible explanation for presence in area plus defendant seen circling area plus passenger running out of car and returning with suitcase plus inconsistent statements about who owned suitcase plus officer knowing defendant on parole plus late at night in neighborhood where defendant did not live equals probable cause; mere fact that officer could not articulate what crime was committed does not defeat probable cause, *State v. Huff*, 64 Wn.App. 641 (1992); II.

***State v. Ekkelkamp***, 42 Wn.App. 375 (1985)

Requirement of RCW 10.31.010 that arresting officer making arrest pursuant to a warrant not in his possession tells arrestee he will be shown a copy of the warrant upon incarceration is excused where arrestee is so uncooperative that officer lacks opportunity to so inform him; I.

***State v. Holeman***, 103 Wn.2d 426 (1985)

Police, on porch of defendant's home without warrant investigating theft, reach across threshold to take defendant, whose father threatens police with crowbar, whereupon police enter home; defendant attempts to prevent father's arrest, is arrested for obstructing, at station confesses to theft; held: while first arrest was unlawful, second arrest for obstructing was lawful, thus confession admissible, *cf.: State v. Solberg*, 122 Wn.2d 688 (1993); *affirms State v. Holeman*, 37 Wn.App. 283 (1984); 9-0.

***Hayes v. Florida***, 84 L.Ed.2d 705 (1985)

Absent probable cause police may not take a suspect to the station for fingerprinting; *dicta* that an investigative detention for fingerprinting in the field is lawful; 8-0 (holding), 6-2 (*dicta*).

***State v. McIntosh***, 42 Wn.App. 573 (1986)

Police observe equipment violation, stop defendant's vehicle, defendant states he lacks a license or any identification; police arrest driver, pat him down, find fruits of burglary; other officer, while talking to passenger, observes possible weapon, removes passenger, searches vehicle, finds burglary tools, pats down passenger, finds fruits of burglary; held: absence of identification permits arrest for no valid license, *distinguishing State v. Hehman*, 90 Wn.2d 45 (1978); full search of suspect's person, following arrest, is permissible, *distinguishing Terry v. Ohio*, 20 L.Ed.2d 889 (1968); because passenger was not yet arrested when officer searched vehicle, *State v. Ringer*, 100 Wn.2d 686 (1983) is inapposite, since passenger "could return to the car"; further, the early morning hour, fact that driver had a knife, appearance of a weapon in car justifies a *Terry* "quick check" of the vehicle for a weapon; *cf.: State v. Barwick*, 66 Wn.App. 706 (1992); I.

***Waid v. Department of Licensing***, 43 Wn.App. 32 (1986)

Officer receives a radio call about a citizen complaint of another citizen's driving, arrives at scene, observes appellant without shoes, hair disorderly, strong odor of intoxicants, citizen with appellant tells officer that appellant had been weaving all over the road; held: officer had probable cause to arrest for DUI; I.

***State v. Burgess***, 43 Wn.App. 253 (1986)

Police respond to burglar alarm, observe suspect run from scene, discover truck registered to suspect across from burglary, arrest suspect, who met description provided by responding officer two hours after burglary within blocks of burglary; held: detailed description from responding officer provided probable cause; search of suspect during booking process was proper; II.

***Wenatchee v. Durham***, 43 Wn.App. 547 (1986)

Police, following suspect vehicle across county line without using emergency equipment, stop defendant for traffic infraction, arrest him for suspended driver's license; held: fresh pursuit must be justified by: (1) felony occurred in the jurisdiction (also "traffic or criminal laws," RCW 10.93.120); (2) suspect is attempting to escape or at least knows he is being pursued; (3) police pursue without unnecessary delay; (4) pursuit is continuous and uninterrupted, although continuous surveillance is not required; and (5) relationship in time between commission of offense, commencement of pursuit and apprehension; here, no criminal violation was observed, only civil traffic infraction, police delayed, no evidence suspect knew of pursuit, thus arrest was unlawful, evidence suppressed; *see*: RCW 10.93, **Mutual Aid Peace Officers Powers Act**, *State v. Waters*, 93 Wn.App. 969, 976-81 (1999), *but see: Tacoma v. Durham*, 95 Wn.App. 876 (1999), *Vance v. Dep't of Licensing*, 116 Wn.App. 412 (2003); III.

***State v. Carlow***, 44 Wn.App. 821 (1986)

Police, with probable cause but without a warrant, walk to defendant's doorway, defendant crosses threshold, police tell defendant they want to talk to him at station, defendant agrees, enters house to get a coat, is handcuffed in house, taken to station, advised, confesses; held: it is implicit in the police "request" at the doorway that defendant was not free to go, thus defendant was arrested before he re-entered the house, *see also: State v. Solberg*, 122 Wn.2d 688 (1993); but even if defendant was arrested in the house, his predisposition to talk to police alleviates the taint, *distinguishing Payton v. N.Y.*, 44 Wn.App. 821 (1986); 2-1.

***State v. Evans***, 45 Wn.App. 678 (1986)

Police enter tavern in response to a rape call describing suspect as black male, 5'8", 200 pounds, horizontally braided hair, blue jacket; police observe defendant meeting description of suspect, plus flight, plus "arresting officers' special expertise in identifying criminal behavior" equal probable cause; III.

***State v. Gonzales***, 46 Wn.App. 388 (1986)

Police observe unfamiliar vehicle in high crime area commit traffic infraction, stop vehicle, officer is aware of driver's burglary history; driver says some guy told him to meet him and driver claims he knows nothing about stuff in car; police observe television in rear seat; police place driver in patrol car to investigate; officer examines package that passenger kicks into street, observes a local address on package, handcuffs driver and passenger, takes them to precinct, discovers burglary at address on package; held: initial detention to investigate was well founded, but handcuffing and transporting suspect was an unlawful arrest, as police did not know that a crime was committed until after arrest; III.

***State v. Terrovona***, 105 Wn.2d 632 (1986)

Exigent circumstances for **warrantless arrest in the home**, *distinguishing* Payton v. New York, 63 L.Ed.2d 573 (1980); *accord*: State v. McIntyre, 39 Wn.App. 1 (1984), State v. Hoffman, 116 Wn.2d 51, 101 (1991); where police lawfully enter premises without a warrant to make an arrest, pursuant to exigent circumstances, and secure premises until a warrant is obtained, then the actions of the police were lawful where no incriminating evidence was found before service of the warrant, *distinguishing* State v. Bean, 89 Wn.2d 467 (1978); 9-0.

***State v. LaTourette***, 49 Wn.App. 119 (1987)

Custodial arrest for **criminal traffic offense** is permitted, *distinguishing* State v. Hehman, 90 Wn.2d 45 (1987); *accord*: State v. Reding, 119 Wn.2d 685 (1992), State v. Perea, 85 Wn.App. 342 (1997), State v. Thomas, 89 Wn.App. 774 (1998), *see:* State v. Nelson, 81 Wn.App. 249, 256 (1996), State v. Pulfrey, 154 Wn.2d 517 (2005); I.

***State v. Lidge***, 49 Wn.App. 311 (1987)

Police receive call of theft describing three suspects and vehicle, stop defendants' vehicle, question suspects who acknowledge being at scene of theft, search vehicle, seize *res* of theft; held: police had probable cause to arrest and search; I.

***State v. Jordan***, 50 Wn.App. 170 (1987)

Custodial arrest following **traffic** stop was valid where defendant had no license or other identification and was driving a vehicle he did not own, State v. McIntosh, 42 Wn.App. 573 (1986), *distinguishing* State v. Hehman, 90 Wn.2d 45 (1978); in spite of defendant's claim that he merely left his license at home, where police lacked access in field to Department of Licensing records, police are entitled to assume, until proven otherwise, that defendant's failure to produce a valid license means that he did not have one; I.

***Sunnyside v. Lopez***, 50 Wn.App. 786 (1988)

The illegal arrest of a defendant does not prevent his subsequent prosecution so long as the evidence utilized arises from sources independent of the arrest and is untainted by it, Pasco v. Titus, 26 Wn.App. 412, 417 (1980), United States v. Crews, 63 L.Ed.2d 537 (1980), State v. Peyton, 29 Wn.App. 701 (1983), State v. Tan Le, 103 Wn.App. 354, 361-67 (2000); III.

***State v. Knighten***, 109 Wn.2d 896 (1988)

Police officer, while at scene of felony hit and run, is aware that a black vehicle, owned and driven by defendant, had been removed from a ditch directly across from the accident; officer observes defendant's vehicle driving past accident site, stops vehicle, arrests defendant, obtains confession; held: police had probable cause to arrest for felony hit and run even though officer testified he believed he did not have probable cause and state conceded it did not have sufficient evidence for a *Terry* stop; four (4) justices concur in plurality opinion; *see*: State v. Lewis, 62 Wn.App. 350 (1991).

***State v. Rodriguez***, 53 Wn.App. 571 (1989)

Affidavit states that a mechanic, while working on a vehicle, found drugs, called police who obtained warrant, drugs placed back in car, car turned over to suspect who drives it away, police stop vehicle, arrest defendant, search and find drugs; held: while citizen-informant was unnamed in affidavit, he obtained his information in entirely unsuspicious circumstances and

description in warrant makes him readily identifiable, thus credibility prong met, *see: State v. Mance*, 82 Wn.App. 539, 542-3 (1996); defendant's driving car provided probable cause to arrest; III.

***State v. Stortroen***, 53 Wn.App. 654 (1989) *overruled, in part, State v. Reding*, 119 Wn.2d 685 (1992)

Police stop vehicle for speeding, driver lacks a license, officer, intending to cite and release, search vehicle, find drugs; held: a custodial arrest for **driving without a license** should not be made unless there are grounds to believe that arrestee will fail to appear in court; where a custodial arrest is not justified, no warrantless search pursuant to that arrest may be upheld; *see*: *State v. Carner*, 28 Wn.App. 439 (1981), *State v. Barajas*, 57 Wn.App. 556 (1990), *State v. Watson*, 56 Wn.App. 665 (1990), *State v. Jordan*, 50 Wn.App. 170 (1987), *State v. LaTourette*, 49 Wn.App. 119 (1987), *State v. McIntosh*, 42 Wn.App. 573 (1986), *State v. Feller*, 60 Wn.App. 678 (1991), *State v. Reeb*, 63 Wn.App. 678 (1992), *State v. Nelson*, 81 Wn.App. 249, 256 (1996), *State v. McKenna*, 91 Wn.App. 554 (1998), *State v. Thomas*, 89 Wn.App. 774 (1998), *State v. Clausen*, 113 Wn.App. 657 (2002), *see: State v. Balch*, 114 Wn.App. 55 (2002), *but see: State v. Perea*, 85 Wn.App. 342 (1997), *State v. Pulfrey*, 154 Wn.2d 517 (2005); 2-1.

***State v. Steinbrunn***, 54 Wn.App. 506 (1989)

Taking of blood from unconscious vehicular homicide suspect pursuant to implied consent statute, RCW 46.20.308, can only be done if suspect is lawfully arrested; Washington officer was in fresh pursuit even though he lacked probable cause to arrest until he arrived in Oregon and smelled defendant's breath, Uniform Act on Fresh Pursuit, 10.89 RCW; failure of police to take suspect to a local magistrate as required by RCW 10.89.020 does not apply to a noncustodial arrest, *but see: Clarkston v. Stone*, 63 Wn.App. 500 (1991), *see: License Suspension of Richie*, 127 Wn.App. 935 (2005); III.

***State v. Machado***, 54 Wn.App. 771 (1989)

Warrantless robbery **arrest in the home** justified by exigent circumstances where there was reason to believe suspect was armed, description of suspect in home points emphatically to suspect as robber, entry is peaceful, *State v. Wolters*, 133 Wn.App. 297, 304-05 (2006), not a preplanned arrest operation, *Dorman v. United States*, 435 F.2d 385 (D.C.Cir. 1970), *State v. Terrovona*, 105 Wn.2d 632 (1986); III.

***Seattle v. Cadigan***, 55 Wn.App. 30 (1989)

An arrest on one charge without probable cause is lawful if police had probable cause to arrest on a different charge, *State v. Stebbins*, 47 Wn.App. 482 (1987), *State v. Vangen*, 72 Wn.App. 548 (1967), *see: State v. Eserjose*, 171 Wn.2d 907 (2011); I.

***State v. Fore***, 56 Wn.App. 339 (1989)

Police observation, through binoculars, in high drug area, of three transactions in which suspect exchanged small plastic bags containing brownish or greenish matter with passing motorists for currency plus suspect observed going to vehicle, removing large plastic bag from underneath dashboard and removing smaller plastic packets containing green vegetable matter equals probable cause, *State v. Graham*, 130 Wn.2d 711, 723-6 (1996), *distinguishing State v.*

*Poirier*, 34 Wn.App. 839 (1983); probable cause is not negated merely because it is possible to imagine innocent explanation for observed activities; I.

***New York v. Harris***, 109 L.Ed.2d 13 (1990)

Police, with probable cause but without a warrant, unlawfully arrest suspect in his home; at station, suspect confesses; held: exclusionary rule does not bar use of statement made outside of the home even though the arrest is made in the home in violation of *Payton v. New York*, 63 L.Ed.2d 639 (1980), as long as police have probable cause to arrest, *State v. Eserjose*, 171 Wn.2d 907 (2011), *but see: State v. Tan Le*, 103 Wn.App. 354 (2000); 5-4.

***Minnesota v. Olson***, 109 L.Ed.2d 85 (1990)

Warrantless, nonconsensual entry into residence to arrest an overnight guest violates the guest's Fourth Amendment rights, *Payton v. New York*, 63 L.Ed.2d 639 (1980); 7-2.

***State v. Alvarado***, 56 Wn.App. 454 (1990)

Two officers observe defendant sell cocaine, radio to third officer who arrests defendant; at suppression hearing, state cannot show who made the arrest; held: **fellow officer rule**: cumulative information possessed by all of the investigating officers could be considered when assessing whether police had probable cause to arrest, *State v. Maesse*, 29 Wn.App. 642 (1981); whether arresting officer had personal knowledge of the information amounting to probable cause is irrelevant, rather the evidence established that the arresting officer acted on a directive made by another officer who had probable cause to arrest, *cf.: State v. Bravo Ortega,* 177 Wn.2d 116 (2013), *State v. Perez,* 5 Wn.App.2d 867 (2018); I.

***State v. Hudson***, 56 Wn.App. 490 (1990)

**Fleeing** from a police officer effecting an arrest without probable cause is still obstructing as the officer is "engaged in the performance of his official duties provided he is not on a 'frolic of his own,'" *Spokane v. Hays*, 99 Wn.App. 653, 661 (2000), *State v. Contreras*, 92 Wn.App. 307 (1998), *State v. Turner*, 103 Wn.App. 515-26 (2000), *State v. K.A.B.,* 14 Wn.App.2d 677 (2020), *but see: State v. Barnes*, 96 Wn.App. 217, 225-26 (1999), *see: State v. Mierz*, 127 Wn.2d 460 (1995), *State v. D.E.D.,* 200 Wn.App. 484, (2017); I.

***State v. Bartholomew***, 56 Wn.App. 617 (1990)

Seattle police, investigating a robbery, receive anonymous tip that defendant committed robbery, learn that Tacoma police had warrant to search defendant's home for evidence of a Tacoma robbery; Seattle police accompany Tacoma police in search, seize evidence, arrest defendant; held: because Seattle police were not executing a search or arrest warrant, RCW 10.93.070(5), nor were they responding "to a request of a peace officer with enforcement authority" in the jurisdiction, RCW 10.93.070(3), then evidence must be suppressed, *cf.: State v. Chambers,* 23 Wn.App.2d 917 (2022), *but see: State v. Rasmussen*, 70 Wn.App. 853 (1993); I.

***State v. Watson***, 56 Wn.App. 665 (1990)

Respondent is stopped for driving at night without lights, lacks license, is arrested, drugs found; held: custodial arrest for **driving without a valid license** is valid only where officer has a substantial reason, "beyond the infraction itself," to make an arrest, *e.g.*, *State v. Jordan*, 50 Wn.App. 170 (1987); (no identification, car not driver's), *State v. LaTourette*, 49 Wn.App.

119 (1987); ("unique circumstances and hostile bystanders"), *State v. McIntosh*, 42 Wn.App. 573 (1986); (no identification, car not driver's, suspicious account of circumstances), *State v. Nelson*, 81 Wn.App. 249, 256 (1996) ("truly dangerous driving"); here, no additional circumstances other than the minor traffic violation are present to support the arrest, *State v. Stortroen*, 53 Wn.App. 654 (1989), *State v. Feller*, 60 Wn.App. 678 (1991), *cf.: State v. Perea*, 85 Wn.App. 339 (1997); II.

***State v. Flowers***, 57 Wn.App. 636 (1990)

Radio broadcast of robbery reports suspects are black male and female wearing sunglasses in black VW rabbit or BMW; police observe similar vehicle in motel six miles from robbery, speak with motel clerk, learn that suspects were nervous, looked out window, showed large sum of money in small bills; police use ruse to get female from room, upon her exit she yells "police," states she just lent car out; police order male from room at gunpoint, obtain consent to search; held: police had probable cause to arrest male for robbery; grave offense of robbery, use of gun, peaceable "entry," justify **warrantless arrest in home**; I.

***State v. Conner***, 58 Wn.App. 90 (1990)

Crime victim pointing out suspect is inherently reliable for purposes of *Aguilar-Spinelli* analysis, *State v. Northness*, 20 Wn.App. 551 (1978), *State v. Chatmon*, 9 Wn.App. 741, 748 n. 4 (1973), *State v. Howerton*, 187 Wn.App. 357 (2015); victim need not first explain how he knows he was victimized or why he believes suspect is the perpetrator; once police have sufficient evidence that a crime has been committed, along with an identification of the suspect by the victim, there is probable cause for an arrest; I.

***State v. Lewis***, 59 Wn.App. 834 (1990), 62 Wn.App. 350 (1991)

Drug search warrant authorizes search of residence and defendant; during execution of another warrant on another residence, defendant is handcuffed, frisked, read *Miranda* rights, transported to precinct for strip-searching and questioning, drugs found; held: arrest was unlawful, as it lacked probable cause; transport to precinct exceeded scope of permissible *Terry* stop; III.

***State v. Quintero-Quintero***, 60 Wn.App. 902 (1991)

Police knowledge that defendant had a **revoked license** 2 1/2 weeks earlier plus weaving is grounds for stop and search of vehicle, *State v. Perea*, 85 Wn.App. 339 (1997), *State v. Marcum*, 116 Wn.App. 526, 530-33 (2003), *distinguishing State v. Stortroen*, 53 Wn.App. 654 (1989); *see: State v. Reding*, 119 Wn.2d 685 (1992); III.

***Ghaffari v. Department of Licensing***, 62 Wn.App. 870 (1991)

Statute authorizing police to arrest outside jurisdiction with consent of sheriff, RCW 10.93.070(1), is constitutional; I.

***Clarkston v. Stone***, 63 Wn.App. 500 (1991)

Washington police chase speeding vehicle into Idaho, arrest for DUI; held: Uniform Act on **Fresh Pursuit**, RCW 10.89 (and identical Idaho counterpart) only applies to felony; because Washington officer did not have authority to arrest for misdemeanor in Idaho, fruits must be

suppressed, *cf.:* *License Suspension of Richie*, 127 Wn.App. 935 (2005), *State v. Eriksen*, 172 Wn.2d 506 (2011); III.

***State v. Huff***, 64 Wn.App. 641 (1992)

Probable cause to arrest the occupants of a car for possession of a controlled substance exists when a trained officer detects that the odor of a controlled substance is emanating from the vehicle, *but see:* *State v. Grande*, 164 Wn.2d 135 (2008), irrespective of whether the smell emanates from the person or the car, *State v. Ramirez*, 49 Wn.App. 814, 819 (1987); an arrest supported by probable cause is not made unlawful by officer's belief or announcement of an offense different from the one for which probable cause exists, *State v. Louthan*, 158 Wn.App. 732, 741-44 (2010); II.

***State v. Blair***, 65 Wn.App. 64 (1992)

Police officer, pursuant to an agreement with public housing authority, arrest defendant for drug offense nearby, admonish defendant to stay out of housing complex; three weeks later, officer sees defendant on complex grounds, arrest, search, find drugs; held: officer's knowledge that defendant did not live in complex, plus prior admonishment not to return establishes an articulable suspicion that defendant might be **trespassing** but does not establish probable cause to arrest, thus absent further investigation, search was unlawful, *see:* *State v. Glover*, 116 Wn.2d 509 (1991), *State v. Little*, 116 Wn.2d 488 (1991), *State v. Morgan*, 78 Wn.App. 208, 211 (1995), *Bremerton v. Widell*, 146 Wn.2d 561 (2002), *cf.:* *State v. Thompson*, 69 Wn.App. 436 (1993); I.

***State v. Dunivin***, 65 Wn.App. 501 (1992)

Smell of alcohol plus statement that defendant was afraid he was drunk plus fleeing from scene plus alcohol in car plus accident resulting in death is sufficient to establish probable cause to arrest for DUI; II.

***State v. Reding***, 119 Wn.2d 685 (1992)

Custodial arrest for **traffic offenses** that are not minor, such as reckless driving, is permissible, *State v. Hehman*, 90 Wn.2d 45 (1978), RCW 10.31.100, 46.64.015, *State v. Reeb*, 63 Wn.App. 678, 682 (1992), *State v. Quintero-Quintero*, 60 Wn.App. 902 (1991), *State v. Feller*, 60 Wn.App. 678 (1991), *State v. LaTourette*, 49 Wn.App. 119 (1987), *State v. Nelson*, 81 Wn.App. 249, 256 (1996), *State v. Perea*, 85 Wn.App. 339 (1997), *State v. Thomas*, 89 Wn.App. 774 (1998), *see:* *State v. Pulfrey*, 154 Wn.2d 517 (2005), *State v. Bravo Ortega*, 177 Wn.2d 116 (2013); *overrules, in part,* *State v. Stortroen*, 53 Wn.App. 654 (1989); 9-0.

***State v. Barwick***, 66 Wn.App. 706 (1992)

Passenger is stopped for open container violation, RCW 46.61.519(2), a **traffic infraction**, police demand identification, defendant hands officer a Costco card, officer asks for more identification, defendant denies he has any, acts furtively as if to stop officer from looking in wallet, officer asks defendant to place wallet on hood of car, observes bindle in wallet, seizes it, finds drugs; held: passenger has no obligation to carry identification, *see also:* *State v. Rankin*, 151 Wn.2d 689 (2004), *State v. Brown*, 154 Wn.2d 787 (2005), *State v. Pettit*, 160 Wn.App. 716 (2011), defendant's concealing of contents of wallet does not support custodial arrest for an infraction where police lack a reasonable belief that suspect would fail to appear, thus drugs

suppressed, *distinguishing* State v. McIntosh, 42 Wn.App. 579 (1986); *accord:* State v. Cole, 73 Wn.App. 844 (1994), *but see:* State v. Chelly, 94 Wn.App. 254 (1999); III.

***State v. Smith***, 67 Wn.App. 81 (1992)

Radio broadcast of burglary plus suspect description as black male in dark clothing plus defendant meeting description in vehicle proceeding from burglary site in light traffic plus obscured license plate plus officers' observations of televisions, VCR and speakers in vehicle which are type of goods typically associated with a residential burglary equals probable cause to arrest; I.

***State v. Thompson***, 69 Wn.App. 436 (1993)

Police twice warn defendant to stay out of apartment complex where defendant does not live, defendant fled each time prior to contact by police, on day in question defendant hid from police, defendant had previously stated he did not live in complex nor did he have permission from manager to be there, no **trespass**ing signs present; held: defendant's failure to explain or justify his presence, flight and hiding, *see:* State v. Friederick, 34 Wn.App. 537, 542-3 (1983), arise to probable cause, *distinguishing* State v. Blair, 65 Wn.App. 64 (1992), *see also:* State v. Morgan, 78 Wn.App. 208, 211 (1995); under these circumstances, officer was not obliged to question defendant regarding his right to be on the property prior to arrest, *cf.:* Blair, *supra*, at 69-70; I.

***State v. Rogers***, 70 Wn.App. 626 (1993)

At scene of serious injury accident, damage which established high-speed collision, suspect admitting he was owner and driver and had been drinking, strong odor of alcohol on breath, need to restrain suspect from fleeing, resistance equal probable cause for DUI and vehicular assault; II.

***State v. Rasmussen***, 70 Wn.App. 853 (1993)

Undercover Black Diamond police purchase drugs from defendant in Kent; Black Diamond had a notice of consent pursuant to Washington **Mutual Aid Peace Officer Powers Act of 1985**, RCW 10.93, but had not notified Kent of their operation; held: defendant was observed and apprehended outside jurisdiction of arresting agency, which had a consent letter, thus arrest was valid, *Ghaffari v. Department of Licensing*, 62 Wn.App. 870 (1991), *distinguishing* State v. Bartholomew, 56 Wn.App. 617 (1990), *see:* State v. Plaggemeier, 93 Wn.App. 472 (1999), State v. Barron, 139 Wn.App. 266 (2007); I.

***State v. Solberg***, 122 Wn.2d 688 (1993)

Police may make warrantless arrest on probable cause when suspect voluntarily exits residence to speak to officers on unenclosed front porch, State v. Carlow, 44 Wn.App. 821, 826 (1986), State v. Bockman, 37 Wn.App. 474, 481 (1984), State v. Griffith, 61 Wn.App. 35, 40 n. 2 (1991), State v. Holeman, 103 Wn.2d 426, 429 (1985), *reversing State v. Solberg*, 66 Wn.App. 66, 79 (1992); 9-0.

***State v. Terrazas,*** 71 Wn.App. 873 (1993)

Trooper stops vehicle for weaving, asks driver for license, defendant says he has none, trooper asks for name and birthdate, suspects false name, pats down driver, finds nothing, arrests driver for

driving without license, observes passenger with blanket on lap, suspects weapon, removes passengers from car, searches, finds guns, drugs; held: an arrest solely for **driving without a license**, without other reasonable grounds, is improper, *State v. Hehman*, 90 Wn.2d 45 (1978), *State v. Barajas*, 57 Wn.App. 556 (1990), *State v. Watson*, 56 Wn.App. 665 (1990), *see: State v. Reding*, 119 Wn.2d 685 (1992), *State v. Perea*, 85 Wn.App. 339 (1997), *cf.: State v. Pulfrey*, 154 Wn.2d 517 (2005); mere suspicion that driver gave a false name is not enough; search of vehicle for officer safety was improper, as blanket on passenger's lap does not rise to an articulable suspicion that passenger was dangerous or armed, *see: State v. Collins*, 121 Wn.2d 168, 173 (1993), *State v. McIntosh*, 42 Wn.App. 573, 578-9 (1986), *State v. Cruz*, 195 Wn.App. 120 (2016), *reversed, on other grounds*, 189 Wn.2d 588 (2017), *State v. Martin*, 13 Wn.App.2d 625 (2020), *see also: State v. Rankin*, 151 Wn.2d 689 (2004), *State v. Pettit*, 160 Wn.App. 716 (2011), *State v. Russell*, 180 Wn.2d 860 (2014), *but see: Maryland v. Wilson*, 137 L.Ed.2d 41 (1997), *State v. Miller*, 91 Wn.App. 181 (1998), *State v. Mendez*, 137 Wn.2d 208 (1999), *cf.: State v. Reynolds*, 144 Wn.2d 282 (2001), *State v. Horace*, 144 Wn.2d 386 (2001); III.

***State v. White***, 76 Wn.App. 801, 804-5 (1995), *aff'd, on other grounds*, 129 Wn.2d 105 (1996)

Police observe defendant speak with another man, point to third man, second man goes to third man, defendant follows, third man drops object, second man picks it up, puts it in his mouth for moment, gives money to third man, arrest defendant; held: observations were sufficient to believe defendant was **lookout** or setup person in a drug transaction; *see: State v. Rodriguez-Torres*, 77 Wn.App. 687, 693-4 (1995), *but see: State v. Alcantara*, 79 Wn.App. 362 (1995); I.

***State v. Rodriguez-Torres***, 77 Wn.App. 687 (1995)

Officer observes man give defendant money, defendant shows man an object cupped in his hand, someone yells "police" when officer approaches, defendant and companion leave scene quickly, police stop defendant and search pockets, find drugs; held: police had probable cause to believe defendant had committed the offense of possession with intent to deliver drugs, *State v. White*, 76 Wn.App. 801, 804-5 (1995), *aff'd, on other grounds*, 129 Wn.2d 105 (1996) , *State v. Fore*, 56 Wn.App. 339 (1989), *State v. Graham*, 130 Wn.2d 711, 723-6 (1996), *but see: State v. Poirier*, 34 Wn.App. 839 (1983), *State v. Alcantara*, 79 Wn.App. 362 (1995), thus search incident to arrest was valid, *State v. Ward*, 24 Wn.App. 761, 765 (1979); I.

***State v. Morgan***, 78 Wn.App. 208, 211 (1995)

Police observe defendants inside park closed by ordinance, no evidence offered of signs or notice; held: absent some notice, no reasonable grounds for police to believe misdemeanor **trespass** had been committed in officer's presence, RCW 10.31.100, *see: State v. Blair*, 65 Wn.App. 64, 67 (1992), *State v. Glover*, 116 Wn.2d 509, 514 (1991), *State v. Thompson*, 69 Wn.App. 436, 442 (1993), *State v. Walker*, 157 Wn.2d 307 (2006), *State v. Setterstrom*, 163 Wn.2d 621 (2008), *State v. Bravo Ortega*, 177 Wn.2d 116 (2013), *State v. Perez*, 5 Wn.App.2d 867 (2018); drug paraphernalia on hood of car stopped in a park at night is grounds to arrest driver and passenger, *distinguishing State v. Harris*, 14 Wn.App. 414, 417 (1975) , *see: State v. Rose*, 175 Wn.2d 10, 18-22 (2012); 2-1.

***State v. Nelson***, 81 Wn.App. 249 (1996)

Police may make a custodial arrest, and search incident to that arrest, for **negligent driving**, a nonjailable misdemeanor, former RCW 46.61.525, where the driving was "truly dangerous," at 256, pursuant to RCW 10.31.100(3)(f), 46.64.015(2) and U.S. and Washington

constitutions, *State v. Watson*, 56 Wn.App. 665 (1990), *State v. Reding*, 119 Wn.2d 685 (1992), *see: State v. Walker*, 157 Wn.2d 307 (2006), *cf.: State v. Hehman*, 90 Wn.2d 45 (1978), *State v. Klinker*, 85 Wn.2d 509 (1975); II.

***State v. Mance***, 82 Wn.App. 539 (1996)

Car dealer reports car stolen, next day calls to report he erred, after which police stop defendant driving car based upon the stolen car hot sheet, which had not been corrected, arrest defendant who spits out drugs; held: while original report of theft was sufficient to establish probable cause as it came from victim, *see: State v. Rodriguez*, 53 Wn.App. 571, 574-5 (1989), and **fellow officer** rule justifies an arrest on basis of a police bulletin, *Whiteley v. Warden, Wyo. State Penitentiary*, 28 L.Ed.2d 306 (1971), *see: State v. Gaddy*, 152 Wn.2d 64, 70-71 (2004), *State v. O'Cain,* 108 Wn.App. 542 (2001), *State v. Bravo Ortega*, 177 Wn.2d 116 (2013), when police fail to correct records, probable cause may no longer exist by the time an arrest is made, at 543, *State v. Nall*, 117 Wn.App. 647 (2003); state has burden of proving probable cause absent warrant or consent, *cf.: State v. Smith*, 50 Wn.2d 408, 412 (1957), and has burden of proving two-day delay between cancellation of stolen vehicle report and arrest was reasonable, *cf.: State v. Sandholm*, 96 Wn.App. 846 (1999); *dicta* that had defendant been detained for investigation and not arrested until after he spit out drugs, arrest might have been lawful, *see: State v. Creed*, 179 Wn.App. 534 (2014); II.

***State v. Graham***, 130 Wn.2d 711 (1996)

Off-duty Seattle police officers, working as security guards in Seattle, observe defendant carrying large amount of cash and small packet containing what looked like rock cocaine in hands, defendant quickly conceals contents of his hands when he sees officers, refuses request to stop, sweats, looks nervous; held: a police officer has authority to arrest whenever the officer reasonably believes a crime is committed in the officer's presence, whether or not the officer is on duty, *State v. Brown*, 36 Wn.App. 166 (1983); **furtive gestures** plus officers' observations and experience establish probable cause to arrest, *State v. Fore*, 56 Wn.App. 339, 343-5 (1989), *State v. Rodriguez-Torres*, 77 Wn.App. 687 (1995), *cf.: State v. Poirier*, 35 Wn.App. 839 (1983), *but see: State v. Gatewood*, 163 Wn.2d 534 (2008); 9-0.

***Jacques v. Sharp***, 83 Wn.App. 532 (1996)

Domestic violence protection order directs that respondent stay out of the Magnolia neighborhood of Seattle, police arrest respondent in Magnolia; held: police may only arrest for violation of those restraint provisions in a protection order that restrain respondent from acts of domestic violence, exclusion from residence or contact, RCW 26.50.060(1); only remedy for violation of other provisions of protection order is contempt, not arrest, *but see: State v. Chapman*, 140 Wn.2d 436 (2000); I.

***State v. Perea***, 85 Wn.App. 342 (1997)

Police observe defendant driving, know that his license was suspended from a records check seven days earlier, activate emergency lights, defendant exits, closes door and walks away, is ordered to return to vehicle, defendant refuses, is arrested, police confiscate keys, search car, find illegal gun; held: seven-day-old information about **suspended license** constitutes articulable facts to support a detention, *State v. Pressley*, 64 Wn.App. 591, 595 (1992), *State v. Quintero-*

*Qunitero*, 60 Wn.App. 902 (1991), *State v. Marcum*, 116 Wn.App. 526, 531-33 (2003); custodial arrest for DWLS is proper, see: *State v. Reding*, 119 Wn.2d 685 (1992); II.

***State v. Duffy***, 86 Wn.App. 334, 339-41 (1997)

Lack of probable cause to stop is not a basis to dismiss a charge of attempting to elude, *State v. Mather*, 28 Wn.App. 700, 703 (1981); III.

***State v. Plaggemeier***, 93 Wn.App. 472 (1999)

City police officer arrests defendant outside city limits for DUI, Mutual Aid Agreement, RCW 10.93, was in effect but had not been adopted by ordinance as required by Interlocal Cooperation Act, RCW 39.34, nor filed with county auditor; held: while the Mutual Aid Agreement is invalid for failure to comply with Interlocal Cooperation Act, the consent section of the agreement is independently enforceable, RCW 10.93.070, thus arrest was valid; II.

***Tacoma v. Durham***, 95 Wn.App. 876 (1999)

Tacoma police, receiving report of drunk driver, pursue defendant into Lakewood, no evidence that defendant knew he was being pursued while he was in Tacoma; held: **Washington Mutual Aid Peace Officers Powers Act**, RCW 10.93.120, abrogates common law of fresh pursuit, thus statute is to be liberally construed, suspect need not know he is being pursued, nor must the active pursuit cross a boundary, distinguishing *Wenatchee v. Durham*, 43 Wn.App. 547 (1986); police may cross over to another jurisdiction and arrest "in response to an emergency involving an immediate threat to human life or property," RCW 10.93.070(2), defendant's erratic driving meets that test, *Vance v.Dep't of Licensing*, 116 Wn.App. 412 (2003), *see: State v. Eriksen*, 172 Wn.2d 506 (2011), *cf.: State v. King*, 167 Wn.2d 324 (2009); II.

***State v. Sandholm***, 96 Wn.App. 846 (1999)

Absent evidence of the source of a stolen vehicle report from WACIC, or procedures followed by WACIC in accepting and broadcasting a report, probable cause to arrest is insufficient, *State v. O'Cain*, 108 Wn.App. 542 (2001), *see: State v. Gaddy*, 152 Wn.2d 64 (2004), distinguishing *State v. Mance*, 82 Wn.App. 539 (1996), however here, evidence of damage to driver's door and trunk locks and defendant's nervous demeanor provides probable cause; I.

***State v. Walker***, 101 Wn.App. 1 (2000)

Municipal court clerk issues bench warrant without prior approval by a judge, on service of warrant police find drugs; held: a clerk may not order the issuance of a warrant of arrest absent a statute, court rule or ordinance; remedy for all violations of CONST. Art. I, § 7 is suppression, *see: State v. Parks*, 136 Wn.App. 232 (2006); 2-1, II.

***State v. Tan Le***, 103 Wn.App. 354 (2000)

Warrantless arrest in a home without exigent circumstances is unlawful irrespective of the existence of probable cause, *Payton v. New York*, 63 L.Ed.2d 639 (1980), *State v. Griffith*, 61 Wn.App. 35, 41 (1991); identification of suspect immediately following the unlawful arrest must be suppressed absent attenuation of taint, *see: Utah v. Strieff*, 579 U.S. 232, 136 S.Ct. 2056, 195 L.Ed.2d 400 (2016), *Brown v. Illinois*, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975), *State*

*v. Mayfield*, 192 Wn.2d 871 (2019); in-court identification, absent unreliability, is admissible irrespective of lawfulness of arrest, *United States v. Crews*, 63 L.Ed.2d 537 (1980); I.

***Atwater v. City of Lago Vista***, 149 L.Ed.2d 549 (2001)

Custodial arrest for nonjailable misdemeanor does not violate Fourth Amendment; 5-4.

***State v. Bessette***, 105 Wn.App. 793 (2001)

Police observe juvenile holding beer, chase him to defendant's home, demand entry, defendant refuses absent warrant, defendant is convicted of obstructing; held: minor in possession of alcohol is a minor offense, no indication juvenile was armed or likely to escape, *State v. Wolters*, 133 Wn.App. 297, 303-04 (2006), was not a threat, telephonic warrant could have been obtained, *Seattle v. Pearson*, 192 Wn.App. 802, 811-17 (2016), *cf.: State v. Anderson*, 9 Wn.App.2d 430 (2019), thus insufficient exigent circumstances to enter without a warrant, *State v. Hinshaw*, 149 Wn.App. 747 (2009), thus defendant did not obstruct, *see: State v. Ramirez*, 49 Wn.App. 814 (1987), *State v. Griffith*, 61 Wn.App. 35 (1991), *Seattle v. Altschuler*, 53 Wn.App. 317, 321 (1989); III.

***State v. O'Cain***, 108 Wn.App. 542 (2001)

Police stop car based on stolen vehicle radio report, at suppression hearing detective testifies that he confirmed that the vehicle had been stolen and that defendant lacked permission to drive it, trial court denies suppression; held: post-seizure verification that vehicle was stolen does not satisfy 4th Amendment; under **fellow officer** rule, *State v. Mance*, 82 Wn.App. 539, 542 (1996), *United States v. Hensley*, 83 L.Ed.2d 604 (1985), police may rely upon collective knowledge, but where a dispatch is challenged, police must establish reliability of the dispatch prior to the seizure, *State v. Sandholm*, 96 Wn.App. 846 (1999), *cf.: State v. Gaddy*, 152 Wn.2d 64 (2004); I.

***Clement v. Dep't of Licensing***, 109 Wn.App. 371 (2001)

Trooper reports to arresting trooper that radar shows driver is speeding, arresting trooper observes front end of car dip as if driver hit the brakes, stops driver who is intoxicated, RALJ judge finds no probable cause because there is no radar foundation evidence, *Seattle v. Peterson*, 39 Wn.App. 524 (1985); held: foundation evidence need not be presented to establish probable cause in license revocation proceeding, *Jury v. Dep't of Licensing*, 114 Wn.App. 726 (2002); I.

***State v. Neeley***, 113 Wn.App. 100, 106-110 (2002)

Police see vehicle in high drug and prostitution area at 2:00 a.m., approach and illuminate vehicle, defendant leans over seat, head bobs up and down as if ingesting or concealing something, police observe from outside steel wool pad, scissors, lighter which they recognize as drug paraphernalia, arrest, search, find drugs; held: while possession of drug paraphernalia alone does not support probable cause, RCW 69.50.412, *State v. McKenna*, 91 Wn.App. 554, 563 (1998), *State v. Lowrimore*, 67 Wn.App. 949, 959 (1992), other evidence present here indicating the paraphernalia had been used for drugs supports probable cause, *State v. Williams*, 62 Wn.App. 748, 752-53 (1991); III.

***State v. Clausen***, 113 Wn.App. 657 (2002)

Police stop defendant for driving while license suspended, decide to book him, advise him that he'll be released following booking, inventory car, find drugs, at suppression hearing it is established that jail advised police that it would not book nonviolent misdemeanants; held: because it was officer's intent to book, defendant was validly arrested and would not be cited, thus search incident to arrest was valid, *State v. Balch*, 114 Wn.App. 55 (2002), distinguishing *State v. McKenna*, 91 Wn.App. 554 (1998); II.

***Maryland v. Pringle***, 157 L.Ed.2d 769 (2003)

Police stop car, search, find $763 cash in glove compartment, drugs in back-seat armrest accessible to driver and two passengers, ask three suspects about ownership of drugs and money, all three offer no information, arrest all three, defendant-passenger confesses; held: reasonable officer could conclude that all in vehicle possessed drugs, thus arrest was lawful, *but see: State v. Grande*, 164 Wn.2d 135 (2008); 9-0.

***State v. Nall***, 117 Wn.App. 647 (2003)

Police arrest defendant on an invalid, non-judicial out-of-state warrant, find drugs; held: while police may rely upon collective knowledge of other police agencies, *State v. Stebbins*, 47 Wn.App. 482, 484 (1987), where the issuing agency's information is out of date, the arresting officers also lack probable cause, *State v. Mance*, 82 Wn.App. 539, 542 (1996); RCW 10.88.330(1), authorizing arrest without a warrant "upon reasonable information" that suspect is charged in court of another state, does not provide a good faith exception; 2-1, I.

***State v. Gaddy***, 152 Wn.2d 64 (2004)

Driver is stopped for infraction, DOL reports license suspended, police arrest, search car, find drugs; held: applying *Aguilar-Spinelli* test to DOL records establishes that they are presumptively reliable, *cf.: State v. Creed*, 179 Wn.App. 534 (2014); defendant's offering evidence that her record was inaccurate fails, as she did not show that DOL records are *prima facie* inaccurate; affirms *State v. Gaddy*, 114 Wn.App. 702 (2002); 9-0.

***Devenpeck v. Alford***, 160 L.Ed.2d 537 (2004)

To be a lawful arrest under the Fourth Amendment, the crime for which there is probable cause need not be closely related to the crime stated or believed by the arresting officer at the time of the arrest; 8-0.

***Illinois v. Caballes***, 160 L.Ed.2d 842 (2005)

Following stop for traffic infraction, police bring in drug dog to sniff car, reacts positively, police open trunk, seize marijuana; held: where duration of traffic stop was justified by the traffic offense and the ordinary inquiries to such a stop, *see: United States v. Jacobsen*, 80 L.Ed.2d 85 (1984), a lawful canine sniff, *United States v. Place*, 77 L.Ed.2d 110 (1983), *but see: State v. Dearman*, 92 Wn.App. 630 (1998), does not implicate legitimate privacy interests, *cf.: Florida v. Jardines*, 569 U.S. 1, 185 L.Ed.2d 495 (2013); 5-3.

***State v. Pulfrey***, 154 Wn.2d 517 (2005)

Defendant is stopped for infraction, officer arrests for suspended license 3°, searches incident to arrests, finds drugs; officer testifies he always arrests and searches on suspended license cases, irrespective of CrRLJ 2.1(b)(2); held: police may arrest and search incident to

arrest and then exercise discretion to cite and release or book, *State v. Brockob*, 159 Wn.2d 311, 346-47 (2006); driving while suspended is a "nonminor offense" for which police may arrest, distinguishing *State v. Hehman*, 90 Wn.2d 45 (1978), *State v. Stortroen*, 53 Wn.App. 654 (1989), *State v. WS*, 40 Wn.App. 835 (1985), *State v. Pettitt*, 93 Wn.2d 288 (1980), *see: State v. Reding*, 119 Wn.2d 685 (1992); *affirms State v. Pulfrey*, 120 Wn.App. 270 (2004); 9-0.

***License Suspension of Richie***, 127 Wn.App. 935 (2005)

Unconscious driver is taken from collision in Washington to Idaho hospital, Washington trooper smells alcohol on driver's breath in hospital, orders blood draw, arrests for DUI, DOL suspends license; held: applying Idaho's fresh pursuit statute, Idaho Code § 19-701, trooper had reasonable suspicion to detain for DUI, which for purposes of fresh pursuit statute is treated as a felony, *see:* RCW 10.31.100(3)(d), trooper could thus pursue into Idaho and arrest when probable cause is established, distinguishing *Clarkston v. Stone*,63 Wn.App. 500 (1991), *State v. Steinbrunn*, 54 Wn.App. 506 (1989); III.

***State v. Fisher***, 132 Wn.App. 26, 29-31 (2006)

In lawful patdown, police find glass pipe with bulb and burnt residue in defendant's pocket, defendant claims it's not his, police search, find drugs; held: denial with no other explanation plus pipe with residue that had been used to inhale a drug equals probable cause that defendant possessed drug paraphernalia with intent to use it; I.

***State v. Potter***, 156 Wn.2d 835 (2006)

Police arrest for suspended license 3º, search, find drugs; held: while the method by which a license is suspended may violate due process, *Redmond v. Moore*, 151 Wn.2d 664 (2004), DOL records are presumed reliable, *State v. Gaddy*, 152 Wn.2d 64 (2004), subsequent invalidation of license suspension procedures do not void the probable cause that existed to arrest, *State v. Brockob*, 159 Wn.2d 311, 346-47 (2006), distinguishing *State v. White*, 97 Wn.2d 92 (1982); affirms *State v. Potter*, 129 Wn.App. 494 (2005), *State v. Holmes*, 129 Wn.App. 24 (2005); 9-0.

***State v. Walker***, 157 Wn.2d 307 (2006)

Statutory expansion to common law rule allowing for warrantless misdemeanor arrests only when the misdemeanor occurs in the officer's presence, RCW 10.31.100(1), does not violate CONST. art I, § 7, *see: State v. Hornaday*, 105 Wn.2d 120, 130 (1986), *Staats v. Brown*, 139 Wn.2d 757, 766-67 (2000), or Fourth Amendment, *see: Atwater v. City of Lago Vista*, 149 L.Ed.2d 549 (2001); legislature may provide exceptions to the common law "in the presence" rule for warrantless misdemeanor arrests, *see: State v. Bravo Ortega*, 177 Wn.2d 116 (2013), *State v. Perez*, 5 Wn.App.2d 867 (2018); 9-0.

***State v. Hatchie***, 161 Wn.2d 390 (2007)

Police may enter a home to serve a misdemeanor arrest warrant if there is probable cause to believe arrestee resides there and is present pursuant to Fourth Amendment and CONST. art. I, § 7, *State v. Winterstein*, 167 Wn.2d 620, 628-31 (2009); affirms *State v. Hatchie*, 133 Wn.App. 100, 106-17 (2006); 9-0.

***State v. Link***, 136 Wn.App. 685, 696 (2007)

Officer approaches apartment to investigate meth lab, smells acetone and hears fan, knocks on front door, two children arrive behind him and open door, officer enters, announces presence, sees drugs, trial court finds that primary motivation was to search for evidence; held: community caretaking function must be divorced from a criminal investigation, *State v. Kypreos*, 115 Wn.App. 207, 217 (2002), where officer's primary motive is to search for evidence, even if a secondary motive is safety, there is no exception to warrant requirement; II.

***State v. Chavez***, 138 Wn.App. 29 (2007)

Officer hears a snorting noise coming from a barroom bathroom stall, observes three men in stall, one man leaves, another man, who is seen holding a dollar bill with white powder, attempts to hand bill to defendant who refuses it, police arrest defendant, find drugs in wallet; held: police did not see defendant holding drugs, using it or in dominion and control; an aspect of dominion and control is that defendant may immediately reduce object to actual possession, which here defendant refused to do, thus police lacked probable cause, search of wallet was unlawful; III.

***State v. Grande***, 164 Wn.2d 135 (2008)

Trooper stops a vehicle, smells marijuana, arrests driver and passengers, finds drugs on passenger; held: while smell of drug will justify search of a vehicle, *see: State v. Huff*, 64 Wn.App. 641 (1992), *State v. Ramirez*, 49 Wn.App. 814, 819 (1987), arrest of occupants without individualized probable cause violated state constitution, *cf.: Maryland v. Pringle*, 157 L.Ed.2d 769 (2003); here, trooper arrested passenger before determining individual probable cause, thus arrest and subsequent search was unlawful; 9-0.

***State v. Prado***, 145 Wn.App. 646 (2008)

Defendant crosses lane divider by two tire widths for one second, is stopped for lane change violation, RCW 46.61.140 (2020), processed and arrested for DUI; held: statute which requires that a vehicle be driven "as nearly as practicable" within a lane does not authorize a stop by police as the statute does not impose strict liability, *State v. Jones,* 186 Wn.App. 786 (2015), *but see: State v. Huffman,* 185 Wn.App. 98 (2014), *State v. Kocher,* 199 Wn.App. 336 (2017), *State v. Alvarez,* 6 Wn.App.2d 398 (2018), *State v. Tysyachuk,* 13 Wn.App.2d 35 (2020); I.

***State v. Bishop***, 149 Wn.App. 439 (2009)

Following sentencing, defendant fails to report to work crew, court issues arrest warrant based upon unsworn letter from work crew staff, defendant is arrested, searched, drugs found; held: once court finds probable cause to detain for the original crime, it may issue bench warrants on the same oath that supported the original arrest warrant, *but see: State v. Erickson*, 168 Wn.2d 41 (2010); II.

***State v. King***, 167 Wn.2d 324 (2009)

Reckless driving that does not reach the level of erratic driving that constitutes "an emergency involving an immediate threat to human life or property," RCW 10.94.070(2), does not justify an extraterritorial arrest, distinguishing *Tacoma v. Durham*, 95 Wn.App. 876 (1999); 7-2.

***State v. Patton***, 167 Wn.2d 379 (2009)

Police, seeking to serve arrest warrant, see defendant with his head in the window of a car, announce he's under arrest, defendant flees, is arrested in a nearby residence, police search car and find drugs; held: defendant was arrested upon the officer's exercise of authority to arrest, fleeing does not defeat the arrest, *State v. Young*, 135 Wn.2d 498 (1998); defendant was not a driver or recent occupant of the vehicle searched, no evidence he had keys, brief proximity did not give rise to safety concerns upon his arrest, thus search was improper, *Arizona v. Gant*, 173 L.Ed.2d 485 (2009), *see: State v. Chesley*, 158 Wn.App. 36, 44-47 (2010); 9-0.

***State v. Trujillo***, 153 Wn.App. 454 (2009)

Police respond to report of domestic violence by a man against a woman at a particular house, items strewn in front yard, defendant answers door and refuses to respond to questions about what was going on, victim refuses to talk but looks distraught, disheveled, puffy eyes, grass and leaves in hair, finger bleeding all support probable cause to arrest; III.

***State v. Erickson***, 168 Wn.2d 41 (2010)

A probation bench warrant may be issued upon a well-founded suspicion that a violation has occurred, effectively overruling *State v. Bishop*, 149 Wn.App. 439 (2009), *distinguishing State v. Parks*, 136 Wn.App. 232 (2006); affirms *State v. Erickson*, 143 Wn.App. 660 (2008); 9-0.

***State v. Hardgrove***, 154 Wn.App. 182 (2010)

University police have the same powers as sheriffs, may pursue and arrest beyond university's boundaries, RCW 28B.10.555(1), ch. 10.93 RCW; III.

***State v. Mann***, 157 Wn.App. 428 (2010)

A person cannot respond to unlawful police conduct by shooting at the police, *State v. Valentine*, 132 Wn.2d 1, 21 (1997); III.

***State v. Chesley***, 158 Wn.App. 36, 41-44 (2010)

Officer, responding to bait car silent alarm, sees defendant between bait car and another car, defendant jumps in to adjacent car, officer detains, sees that bait car's door lock had been punched and sees burglary tools inside adjacent car, arrests defendant; held: appearance, conduct and presence in the vicinity of a crime establishes a well-founded suspicion that defendant activated bait car alarm, *State v. Clark*, 13 Wn.App. 21 (1975), observation of tools established probable cause to arrest; although arrest for a misdemeanor may be limited to a crime committed in the officer's presence, police may arrest if the misdemeanor involves harm to property or theft, RCW 10.31.100(1); 2-1, II.

***State v. Eserjose***, 171 Wn.2d 907 (2011)

Police, with probable cause to arrest, unlawfully enter home without a warrant and arrest defendant illegally, *Payton v. New York*, 445 U.S. 573, 63 L.Ed.2d 639 (1980), at sheriff's office advise of *Miranda* warnings, defendant confesses; lead opinion (3 justices) holds that "attenuation doctrine" is compatible with CONST., art. I, § 7, *sic:* evidence is not the fruit of the poisonous tree if the connection between the challenged evidence and the illegal actions of the police is so attenuated as to dissipate the taint, *New York v. Harris*, 495 U.S. 14, 109 L.Ed.2d 13 (1990), *see: Utah v. Strieff*, 579 U.S. 232, 136 S.Ct. 2056, 195 L.Ed.2d 400 (2016), *cf.: State v.*

*Mayfield*, 192 Wn.2d 871 (2019); here, defendant was not questioned during the unlawful entry and maintained his innocence at the sheriff's office until informed that co-defendant had confessed, thus it was this information and not the illegal arrest that induced the confession; one justice concurs in the result without an opinion; one justice concurs in an opinion concluding that there was no connection between the police unlawful act and the confession, thus attenuation inquiry is erroneous; dissent would reject attenuation exception under state constitution.

***State v. Eriksen***, 172 Wn.2d 506 (2011)

Tribal officer may not stop and detain outside the reservation for a traffic infraction, at least absent cross-deputization or mutual aid pact, *see: United States v. Cooley*, ___ U.S. ___, 141 S.Ct. 1638, 210 L.Ed.2d 1 (2021); supersedes *State v. Eriksen*, 166 Wn.2d 953 (2009), 170 Wn.2d 209 (2010); 5-4.

***State v. Louthan***, 158 Wn.App. 732, 740-44 (2010)

An officer's subjective intent to arrest for a particular offense is immaterial if there is probable cause to arrest for any offense, *State v. Huff*, 64 Wn.App. 641, 646 (1992); 2-1, II.

***State v. Rose,*** 175 Wn.2d 10, 18-22 (2012)

Officer observes glass pipe with residue, arrests for VUCSA; held: while mere possession of drug paraphernalia is not a crime, *State v. O'Neill,* 148 Wn.2d 564, 584 n.8 (2003), observation of "chalky white residue" supports officer's belief that the residue was contraband; 9-0.

***State v. Bravo Ortega***, 177 Wn.2d 116 (2013)

Officer on second floor of a building observes defendant commit drug-traffic loitering, directs by radio fellow officers to arrest defendant who find drugs; held: because the officer who arrested defendant was not present when the gross misdemeanor occurred and the officer who observed the offense was not an arresting officer, the arrest was unlawful as the **fellow officer rule** does not apply to an arrest for a misdemeanor, RCW 10.31.100 (2010), *but see: State v. Perez*, 5 Wn.App.2d 867 (2018), RCW 10.31.100 (2017); reverses *State v. Ortega*, 159 Wn.App. 889 (2011); 9-0.

***State v. Ruem***, 179 Wn.2d 195 (2013)

Police have arrest warrant for Chantha, observe Chantha's car outside house, knock on door, defendant Dara answers and says Chantha is not there, officer asks to enter to look for Chantha, defendant agrees then says no, police smell burnt marijuana, enter, search, do not find Chantha but find drugs; held: police lacked probable cause to believe that Chantha was present at the time of entry even if they had probable cause to believe that Chantha lived there, *State v. Hatchie*, 161 Wn.2d 390, 392-93 (2007), thus arrest warrant did not authorize police to enter; police need not inform subject of right to refuse consent when serving an arrest warrant, distinguishing *State v. Ferrier*, 136 Wn.2d 103, 115-16 (1998), *State v. Williams*, 142 Wn.2d 17, 23-28 (2000), *State v. Westvang*, 184 Wn.App. 1 (2014); because record is unclear that police smelled the marijuana prior to the unlawful entry, there was no independent source of probable cause; lead opinion of four justices plus one in dissent hold that *Ferrier* warnings need not be

given, concurring opinion of four justices would hold that *Ferrier* does apply, *see: State v. Blockman,* 190 Wn.2d 651 (2018).

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***State v. Jones***, 186 Wn.App. 786 (2015)

Police observe defendant's vehicle pass over fog line an inch three times, correcting each time, stops for erratic lane travel, no other vehicle on roadway, observe gun, defendant admits to prior felony, is convicted of felon in possession; held: crossing line three times absent other traffic does not, under totality of circumstances, establish a basis to stop by itself, must be evidence of unsafe driving, *State v. Prado,* 145 Wn.App. 646 (2015), distinguishing *State v. McLean,* 178 Wn.App. 236 (2013), *but see: State v. Kocher,* 199 Wn.App. 336 (2017), *State v. Alvarez,* 6 Wn.App.2d 398 (2018), *State v. Tysyachuk,* 13 Wn.App.2d 35 (2020); I.

***District of Columbia v. Wesby***, ___ U.S. ___ , 138 S.Ct. 577, 199 L.Ed.2d 453 (2018)

Police receive complaint about loud noise in a vacant house, knock, see people run and hide, house in complete disarray, arrest people for unlawful entry, after charges are dropped some sue police claiming that police lacked evidence that people inside were not supposed to be there; held: under totality test court is to examine the events leading up to the arrest, and then decide whether, viewed from the standpoint of an objectively reasonable police officer, is there probable cause, *Maryland v. Pringle*, 540 U.S. 366, 371, 124 S.Ct. 795, 157 L.Ed.2d 769 (2003), in light of condition of the house, the fact that people hid, *Illinois v. Wardlow*, 145 L.Ed.2d 570 (2000)**,** police could reasonably have concluded that most homeowners do not live in near-barren houses, do not invite people over to use their living room as a strip club, to have sex in their bedroom, to smoke marijuana inside, and to leave their floors filthy, officers could thus infer that the partygoers knew their party was not authorized; 9-0.

***State v. Perez***, 5 Wn.App.2d 867 (2018)

Statute that previously only allowed a misdemeanor arrest if the offense occurred in the presence of the arresting officer, *State v. Bravo Ortega,* 177 Wn.2d 116 (2013), was amended to allow the **fellow officer rule** to apply to misdemeanor arrests that occurred in the presence of an officer, RCW 10.31.100(1) (2017); police observed defendant accompanying a woman who is seen shoplifting, discards concealed items when he sees store detective is sufficient to establish probable cause to arrest; I.

***State v. Alvarez***, 6 Wn.App.2d 398 (2018)

Respondent is stopped by a trooper after car wheels briefly cross over a fog line and onto an area not designated as a roadway, is cited for driving with wheels off roadway, RCW 46.61.670, trial court dismisses as car was driven "as nearly as practicable" within lane, *State v. Prado*, 145 Wn.App. 646 (2008); held: *Prado, id.*, only applies to driving on roadways lined for traffic, RCW 46.61.140, area over fogline is not a roadway thus any crossing over fogline establishes grounds to stop the vehicle, *see: State v. Huffman,* 185 Wn.App. 98 (2014), *State v. Kocher,* 199 Wn.App. 336 (2017), *State v. Brooks,* 2 Wn.App.2d 371 (2018); 2-1, III.

***State v. Pines,*** 17 Wn.App.2d 483 (2021)

Officer recognizes defendant and was aware of a bulletin a month earlier stating he had a warrant, three officers follow him into a restaurant, tackle and handcuff him, observe his hand move towards his waistline, defendant says he has a gun, police seize gun, verify warrant,

defendant is convicted of unlawful possession of a firearm; held: police failed to verify existence of warrant and acted on stale information, test for staleness is whether facts indicated information is recent and contemporaneous, *see:* *State v. Perea*, 85 Wn.App. 342 (1997) (7-days is not stale); I.

# ARREST
## Well-Founded Suspicion

***Brown v. Texas***, 61 L.Ed.2d 357 (1979)
Defendant's conviction under state law requiring identification upon a lawful police stop was improper where officer stopped defendant solely to ascertain identity and had no reasonable suspicion to believe defendant was engaged in criminal conduct; 9-0.

***State v. Sykes***, 27 Wn.App. 111 (1980)
Where informant tells police he observed drugs in defendant's car and that defendant would arrive at a place in his car to sell drugs and police corroborate by observing defendant's arrival, there is enough to stop vehicle; ordering defendant to step from car is a "de minimis" intrusion , *Pennsylvania v. Mimms*, 54 L.Ed.2d 331 (1977); 2-1.

***State v. Melin***, 27 Wn.App. 589 (1980)
Police, executing a search warrant on a residence, stop a car which approaches residence and search it; held: police may stop vehicles approaching scene to prevent interference, but may not search, therefore evidence suppressed; I.

***State v. Thompson***, 93 Wn.2d 838 (1980)
Proximity of defendant to others suspected of criminal activity does not raise reasonable suspicion and does not justify arrest; 9-0.

***State v. Sieler***, 95 Wn.2d 43 (1980)
Informant's tip is not enough to detain lacking indicia of reliability, *State v. Z.U.E.*, 178 Wn.App. 769 (2014), 183 Wn.2d 610 (2015); fact that informant's name is disclosed is not enough to establish reliability, *State v. Saggers*, 182 Wn.App. 832 (2014), *State v. Morrell*, 16 Wn.App.2d 695 (2021), expands *State v. Lesnick*, 84 Wn.2d 940 (1975), *accord*: *State v. Walker*, 66 Wn.App. 622 (1992), *see also: State v. Jones*, 85 Wn.App. 797 (1997), *but see: State v. Lee*, 147 Wn.App. 912 (2008), *State v. Howerton*, 187 Wn.App. 357 (2015); 6-3.

***State v. Stroud***, 30 Wn.App. 392 (1981)
"Unfamiliar" vehicle parked in high crime area, police put on lights, order suspect from car, smell marijuana, search, find cocaine; held: initial stop was a seizure as a reasonable person would have believed s/he was not free to go, *State v. Ganntt*, 163 Wn.App. 133 (2011), insufficient objective facts that suspect was involved in criminal activity, fruits suppressed; *accord*: *State v. Soto-Garcia*, 68 Wn.App. 20 (1992), *overruled, in part, State v. Thorn*, 129 Wn.2d 347 (1996), *State v. O'Day*, 91 Wn.App. 244 (1998), *State v. Johnson*, 8 Wn.App.2d 728 (2019), *cf.: State v. Smith*, 154 Wn.App. 695 (2010); II.

***State v. Selvidge***, 30 Wn.App. 406 (1981)
Police are called to burglary, observe footprints with distinctive tread; 90 minutes later, police observe car parked in high crime area three blocks from burglary scene; car had been seen "prowling" for several hours before burglary; police stop car, ask defendants what they are doing, recognize one defendant from prior burglaries, ask to see their shoes, release defendants; upon further investigation, police determine that suspects' shoe treads match footprints; held:

police had sufficient articulable facts to support a well-founded suspicion to detain; suspects had no reasonable expectation of privacy in the tread pattern of shoes they wear in public; II.

***Michigan v. Summers***, 452 U.S. 692, 69 L.Ed.2d 340 (1981)

Police, executing warrant, encounter defendant leaving his residence, require him to return to house, detain him while searching, find drugs in house, then search defendant and find drugs on his person; held: existence of warrant justified detention of occupant of home while search is conducted and, upon finding contraband in house, justifies arrest and search of occupant on probable cause, *but see: Bailey v. United States*, 568 U.S. 186, 185 L.Ed.2d 19 (2013); this type of detention is "less intrusive than an arrest," *Illinois v. McArthur*, 148 L.Ed.2d 838 (2001), *Muehler v. Mena*, 544 U.S. 93, 161 L.Ed.2d 299 (2005); 6-3.

***State v. Cole***, 31 Wn.App. 501 (1982)

Police, knowing that suspect is from out of town, was carrying large amounts of cash, gave address of known drug offender, inquired about traveling to San Diego (known drug city), may have used traveler's checks to launder money, inquired about wiring $50,000 cash to undisclosed location, have well-founded suspicion of actual or potential criminal activity, and may stop suspect's vehicle and detain him; III.

***State v. Montgomery***, 31 Wn.App. 745 (1982)

Defendant screams obscenities at police officers, who try to calm him down to no avail; crowd gathers on sidewalk; police arrest defendant for disorderly conduct, find marijuana; held: no probable cause to arrest, as defendant has First Amendment right to scream obscenities; I, 2-1.

***Campbell v. Department of Licensing***, 31 Wn.App. 833 (1982)

In the absence of any corroborative information or observations, police may not stop a vehicle on the sole basis that a passing motorist points to a vehicle and announces that it is being driven by a drunk driver; *accord: State v. Vandover*, 63 Wn.App. 754 (1992), *State v. Jones*, 85 Wn.App. 797 (1997), *but see: State v. Lee*, 147 Wn.App. 912 (2008); I.

***State v. Tocki***, 32 Wn.App. 457 (1982)

Police stop defendant because he moves while in a parked vehicle, late at night, in a high crime area; held: no particularized objective basis for suspecting defendant of presently engaging in criminal activity, thus evidence suppressed, *State v. Larson*, 93 Wn.2d 638 (1980), *but see*: *State v. Gluck*, 83 Wn.2d 424 (1974); III.

***Seattle v. Urban***, 32 Wn.App. 634 (1982)

Silent alarm plus truck emerging from behind store where alarm was plus officer's suspicions due to fact that business was closed permits police to pull over truck and detain for investigation; I.

***State v. Quaring***, 32 Wn.App. 728 (1982)

Police, responding to burglary in progress call, observe vehicle leave area with lights off, pull to side of road, whereupon police approach vehicle and ask defendant to step outside; held: no arrest, *State v. Wakely*, 29 Wn.App. 238 (1981), *State v. Gluck*, 83 Wn.2d 424 (1974), but investigative detention based upon well-founded suspicion; I.

***State v. Swaite***, 33 Wn.App. 477 (1982)

Police respond to burglary scene, get description of suspect, detain defendant after flight, seize knife from belt, patdown, find two cigarette holders, ask defendant his name, then learn cigarette holders did not belong to burglary victim; police then determine defendant gave false name and arrest him for obstruction, later learn that cigarette holders were stolen from another nearby burglary; held: since obstructing statute, RCW 9A.76.020 (1975), is unconstitutional, *State v. White*, 97 Wn.2d 92 (1982), cigarette holders are suppressed, but police may testify that they found holders on defendant, as they were seen before the obstruction arrest; I.

***State v. Friederick***, 34 Wn.App. 537 (1983)

Police, knowing suspect meets general description of rapist, order him to stop; he flees; police chase, draw guns; held: description gave police well-founded suspicion to detain; when defendant fled, police could use reasonable force to stop him including guns and handcuffs, *see: State v. Mitchell*, 80 Wn.App. 143 (1995); I.

***State v. Hoffman***, 35 Wn.App. 13 (1983)

Police observe fight, one participant points to defendant and tells police defendant started fight, police demand identification, defendant refuses to comply, is arrested, resists; held: arrest was unlawful, *State v. White*, 97 Wn.2d 92 (1982), *but see: State v. Reeb*, 63 Wn.App. 678 (1992), thus defendant could resist and assault 2° charge must be dismissed; I.

***In re Armed Robbery***, 99 Wn.2d 106 (1983)

Police, believing that a description of a robber fit a suspect, show montage to victim who states suspect bore a "striking resemblance" to robber; police obtain a show cause order to require suspect to appear in lineup; held: an individual may not be ordered to participate in a lineup where no probable cause exists to believe that suspect has committed the offense; *dicta* that police may not seize a suspect to obtain physical evidence (such as eyewitness identification) on less than probable cause, at 111; 9-0.

***State v. Sweet***, 36 Wn.App. 377 (1984)

Report of suspicious vehicle and suspect's proximity to vehicle and police finding vehicle is parked outside a business that was closed at night in an area not frequently travelled plus suspect ran when approached by police plus, when stopped, suspect found wearing gloves and holding a stocking cap on "a mild spring day" is a well-founded suspicion to detain, *State v. Gluck*, 83 Wn.2d 424 (1974); when suspect was transported to crime scene but rape victim described assailant before suspect arrived, suspect's description is not a fruit of arrest; I.

***State v. Belanger***, 36 Wn.App. 818 (1984)

Police need not have a well-founded suspicion or articulable facts to merely inquire about suspicious circumstances; uniformed, armed officer who approaches a citizen and engages him in conversation has not seized him, *State v. Nettles*, 70 Wn.App. 706 (1993), *State v. Smith*, 154 Wn.App. 695 (2010), *cf.: State v. Harrington*, 167 Wn.2d 656 (2009), *State v. Johnson*, 8 Wn.App.2d 728 (2019), *see*: *State v. Machado*, 54 Wn.App. 771 (1989), *State v. Lyons*, 85 Wn.App. 268 (1997), *State v. Johnson*, 156 Wn.App. 82, 90-92 (2010), *but see: State v. Soto-Garcia*, 68 Wn.App. 20, *abrogated, on other grounds, State v. Thorn*, 129 Wn.2d 347 (1996), *State v. Ibarra Guevara*, 172 Wn.App. 184 (2012); II.

***State v. Kennedy***, 38 Wn.App. 41 (1984)

Neighbors complain of heavy traffic at a residence; informant reports defendant habitually purchased marijuana from residence, describes defendant's vehicle; police observe suspect vehicle enter and leave residence, stop vehicle, observe furtive gesture, observe baggie protruding from under seat, seize it with drugs; held: reasonable for officer to conclude defendant had just completed a drug transaction; III.

***State v. Johnston***, 38 Wn.App. 793 (1984)

After observing a man attempting to conceal himself while carrying an object from an open car into a home, police order all persons in home outside at gunpoint, after which suspect confesses to a burglary that occurred the night before; held: while the suspicious circumstance justified an investigative stop, police did not use the least intrusive means reasonably available to verify or dispel suspicion that a burglary was being committed; police did not need to use guns to investigate, thus confession suppressed, *Florida v. Royer*, 75 L.Ed.2d 229 (1983), *Kaupp v. Texas*, 155 L.Ed.2d 814 (2003); I.

***State v. Owens***, 39 Wn.App. 130 (1984)

Commission of a crime following an illegal arrest does not require suppression of the police officer's description of the crime; the illegality of the attempted arrest may provide a defense to the subsequent crime if the conduct was a normal and reasonable reaction to the attempted stop; III.

***Welsh v. Wisconsin***, 80 L.Ed.2d 732 (1984)

Police enter suspect's home without a warrant and arrest for DUI, claiming hot pursuit; held: warrantless home arrest for a minor offense is not justified by hot-pursuit doctrine where there was no continuous pursuit, no threat to public safety, *State v. Bessette*, 105 Wn.App. 793 (2001), *cf.*: *State v. Griffith*, 61 Wn.App. 35 (1991), *Stanton v. Sims*, 571 U.S. 3, 187 L.Ed.2d 341 (2013); 7-2.

***Florida v. Rodriguez***, 83 L.Ed.2d 165 (1984)

Police, observing suspects at airport act suspiciously, show badges, ask if they might talk, request consent to search bags, get consent and find drugs; held: asking suspects if they would step aside and talk implicates no Fourth Amendment interest; strange movements and contradictory answers to trained narcotics officers provide articulable suspicion for a seizure; 6-3.

***State v. Samsel***, 39 Wn.App. 564 (1985)

Radio broadcasts robbery committed by black male and Puerto Rican male running east, police see black male and white male enter cab one mile east of robbery, furtive gesture in cab, police block cab, order suspects out at gunpoint; held: sufficient, articulable facts to justify the investigative stop, as information and experience of police provided more than "inchoate hunch", *State v. Thierry*, 60 Wn.App. 445 (1991); because an armed robbery was being investigated the stop was reasonably related in scope to the circumstances, *i.e.*, gunpoint stop and frisk approved, *State v. Williams*, 102 Wn.2d 733 (1984), *State v. Mitchell*, 80 Wn.App. 143 (1995), *State v. Keller-Deen*, 137 Wn.App. 396 (2007); III.

***State v. Dorsey***, 40 Wn.App. 459 (1985)

California police arrest suspect at request of Washington police, although arguably Washington police lacked probable cause to arrest for credit card theft, but did have a well-founded suspicion to detain; California police stop suspect disembarking from airplane, direct him to another area, observe him attempting to get rid of evidence, seize it, feel credit cards; held: California police actions were no more intrusive than a *Terry* stop would have permitted; *see:* *State v. Pressley*, 64 Wn.App. 591 (1992); upon feeling credit cards, police had probable cause; I.

***State v. Franklin***, 41 Wn.App. 409 (1985)

Unnamed citizen tells officer that a man in a bus station rest room stall has a gun, describes suspect; officer enters rest room, sees man who meets description, holds him at gun point, is told by suspect that suspect has a blank gun in his rucksack, handcuffs suspect, searches rucksack, finds starter pistol and handcuffs in rucksack; officer recalls a police bulletin concerning a crime committed with handcuffs, arrests defendant who, following further investigation, is charged and convicted of a robbery; held: investigatory stop was proper where an anonymous informant of undetermined reliability states he observed suspect carrying or displaying a gun in a public place, *Navarette v. California*, 572 U.S. 393, 188 L.Ed.2d 680 (2014), *but see:* *Florida v. J.L.*, 146 L.Ed.2d 254 (2000), *State v. Saggers*, 182 Wn.App. 832 (2014), *cf.:* *State v. Vandover*, 63 Wn.App. 754 (1992); where officer is told by suspect he has a gun in a container, officer may search container since releasing it to suspect would put officer in danger; arrest was unlawful as officer at best only suspected suspect of committing a crime, and recollection of police bulletin was too vague to support probable cause; I.

***State v. Thornton***, 41 Wn.App. 506 (1985)

Minutes after 3:30 a.m. robbery, police radio broadcasts report describing two suspects as "probably Caucasian," armed, one wearing eyeglasses, other wearing "bulky parka"; 11 blocks from robbery scene, police observe speeding vehicle, occupants meet description; police stop vehicle at gun point, observe robbery tools (gloves, tape, cuffs) in car, arrest defendant; held: police had reasonable suspicion to stop vehicle; drawn guns and ordering suspect out of vehicle did not exceed scope of *Terry* stop as report was that suspects were armed; length of stop was minimal, *United States v. Sharpe*, 84 L.Ed.2d 605 (1985), *see:* *State v. Watkins*, 76 Wn.App. 726, 729-31 (1995); observation of robbery tools provided probable cause; I.

***State v. Harvey***, 41 Wn.App. 870 (1985)

Radio reports burglary in progress, suspect black male with partial clothing description; police respond, unidentified taxi driver points at black male 12 blocks from burglary; police patdown suspect; held: investigative stop was proper, patdown was lawful as, "it is well known that burglars often carry weapons," *State v. Smith*, 67 Wn.App. 81 (1992); statements during *Terry* stop, but prior to advice of rights, are admissible; I.

***State v. Aranguren***, 42 Wn.App. 452 (1985)

Officer, investigating a vandalism call, approaches two people on bicycles six blocks from crime scene, asks to talk to them, then asks for identification, takes identification to his car to run a warrant check, then gets report on radio of bicycle theft, suspects' bicycles match description, arrests suspects; held: initial encounter was not a seizure, since there was nothing coercive about the encounter, officer did not use lights or sirens to stop suspects, *State v. Nettles*, 70 Wn.App. 706 (1993); once officer took identification, suspects were detained, *State v. Barnes*,

96 Wn.App. 217 (1999), *State v. Coyne*, 99 Wn.App. 566 (2000), *but see: State v. Hansen*, 99 Wn.App. 575 (2000), *State v. O'Neill,* 148 Wn.2d 564 (2003), *State v. Crane*, 105 Wn.App. 311 (2001), *overruled, on other grounds, State v. O'Neill,* 148 Wn.2d 564 (2003), *State v. Afana*, 147 Wn.App. 843 (2008), *aff'd, on other grounds,* 169 Wn.2d 169 (2010), *State v. Ibarra Guevara*, 172 Wn.App. 184 (2012), *see: State v. Armenta*, 134 Wn.2d 1 (1997), *State v. O'Day,* 91 Wn.App. 244 (1998), *State v. Vanderpool*, 145 Wn.App. 81 (2008); because officer had already seen the bicycles before the detention occurred, and no information was acquired from defendants following the initial detention, the unlawful seizure did not taint the evidence; *cf.: State v. Chapin*, 75 Wn.App. 460, 462-4 (1994); I.,

***United States v. Hensley***, 83 L.Ed.2d 604 (1985)

If police have a reasonable, articulable suspicion that a person has committed a completed felony, an investigatory stop is permissible, even in the absence of probable cause; if a "wanted flyer" is issued on the basis of articulable facts supporting a reasonable suspicion that the person wanted has committed an offense, then a *Terry* stop is permitted, *State v. O'Cain,* 108 Wn.App. 542 (2001), expanding *Terry v. Ohio*, 20 L.Ed.2d 889 (1968); 9-0.

***United States v. Sharpe***, 84 L.Ed.2d 605 (1985)

Police observe two trucks in tandem for 20 miles in known drug trafficking area, testify that trucks with campers are often used to transport marijuana, one truck heavily loaded with windows covered, take evasive action when drivers become aware police are following them held to establish articulable, reasonable suspicion that both trucks were engaged in marijuana trafficking; 20 minute detention to investigate is reasonable; test for permissible length of *Terry* stop: whether police diligently pursued a means of investigation that was likely to dispel or confirm suspicions quickly during which time it was necessary to detain the defendant; *see: State v. Flores-Moreno*, 72 Wn.App. 733, 740-1 (1994); 7-2.

***Hayes v. Florida***, 84 L.Ed.2d 705 (1985)

Absent probable cause police may not take a suspect to the station for fingerprinting; *dicta* that an investigative detention for fingerprinting in the field is lawful; 8-0 (holding), 6-2 (*dicta*).

***State v. Sweet***, 44 Wn.App. 226 (1986)

Report of suspicious vehicle plus police observing suspect flattened up against a building 3 feet from a pile of horse manure at 11:20 p.m. in a dark area somewhat isolated near the suspicious vehicle next to closed businesses plus suspect's flight as soon as he saw police vehicle establishes well-founded suspicion to detain; scope of detention was reasonable as suspect told police he was a lookout, amount of intrusion, while significant, was reasonable due to flight, frisk was proper as police observed ski mask, reasonably associated with burglary, *but see: State v. Walker*, 66 Wn.App. 622 (1992), *State v. Gatewood,* 163 Wn.2d 534 (2008), *State v. Cardenas-Muratalla,* 179 Wn.App. 307 (2013), *State v. Tarango,* 7 Wn.App.2d 425 (2019), detention was reasonable as it took only 10-20 minutes; I.

***State v. Mercer***, 45 Wn.App. 769 (1986)

Police observe vehicle with dome light on in school parking lot at 3:30 a.m.; one individual, upon seeing patrol car, runs away, officer asks two remaining suspects for identification, observes mag wheels in vehicle, defendant says he purchased them, police make

radio call, discover defendant did not purchase wheels, arrest defendant, search vehicle, find drugs; held: officer's inability to articulate the exact crime being committed does not make a suspicion a mere hunch; although circumstances must be more consistent with criminal than innocent conduct, reasonableness is measured not by exactitudes but by probabilities, *State v. Thierry*, 60 Wn.App. 445 (1991); scope of stop was reasonable; III.

***State v. Kennedy***, 107 Wn.2d 1 (1986)

Police testify at suppression hearing that informant had given tips for several months, that informant is reliable, that one tip resulted in a warrant and conviction, that informant told officer that defendant purchased drugs from a certain house, that defendant drove a specific car, that defendant only went to that house to buy drugs, that officer had received complaints of frequent foot traffic at the house and that he saw defendant leave house and drive off in the car described by informant; held: a well founded suspicion to detain is established where "there is a substantial possibility that criminal conduct has occurred or is about to occur", *United States v. Cortez*, 66 L.Ed.2d 621 (1981); here, the activity was consistent with both criminal and noncriminal conduct, thus a brief detention was justified, *see: State v. Watkins*, 76 Wn.App. 726, 729-31 (1995), *State v. Lee*, 147 Wn.App. 912 (2008), *State v. Marcum*, 149 Wn.App. 194 (2009), *cf.: State v. Doughty*, 170 Wn.2d 57 (2010), *State v. Diluzio*, 162 Wn.App. 585 (2011), *State v. Fuentes*, 183 Wn.2d 149 (2015), *State v. Weyand*, 188 Wn.2d 804 (2017); 5-4.

***State v. Guzman-Cuellar***, 47 Wn.App. 326 (1987)

Police observe suspect, at 2:30 a.m., walk out of a residential driveway, cross street, enter another yard, stop suspect for trespass, determine that he meets description of homicide suspect, pat him down, cuff him, transport him to a tavern for a showup; held: initial stop was based upon sufficiently suspicious circumstances to justify detention even though officer had no report about a prowler; upon recognizing suspect as possible murder suspect, scope of investigation is broadened, *State v. Santacruz*, 132 Wn.App. 615 (2006), and transport to showup was reasonable; I.

***State v. Wheeler***, 108 Wn.2d 230 (1987)

Police receive report that a person was casing a house, darted into a yard, tossed gloves away and ran; police respond to area, detain defendant who met description, frisk, handcuff and transport him to scene where he is identified; held (1) purpose of stop was legitimate, as police suspicion was focused on defendant, circumstances were sufficiently suspicious to detain, (2) amount of intrusion, while significant, was proper; handcuffing is appropriate where suspect is validly transported in police car, and (3) length of detention was reasonable, *see also: State v. Lyons*, 85 Wn.App. 268 (1997); police may transport suspect during a *Terry* stop where there is knowledge that a crime has been committed, but may not where defendant's conduct was suspicious but there has not been any report of a crime; 6-3.

***State v. Williams***, 50 Wn.App. 696 (1988)

Following anonymous call to police of an accident involving motorcycles falling off a particularly described vehicle, police stop vehicle meeting description, run warrant check, arrest driver on warrant who later confesses to stealing motorcycles; held: investigatory stop for hit and run and negligent driving was valid, *Waid v. Department of Licensing*, 43 Wn.App. 32 (1986), *Navarette v. California*, 572 U.S. 393, 188 L.Ed.2d 680 (2014), *but see: Florida v. J.L.*, 146 L.Ed.2d 254 (2000), *State v. Saggers*, 182 Wn.App. 832 (2014); warrant check during valid

criminal investigatory stop which does not unreasonably extend stop is reasonable, *State v. Kerens*, 9 Wn.App. 448 (1973), *State v. Madrigal*, 65 Wn.App. 279 (1992), *State v. Villarreal*, 97 Wn.App. 636, 645 (1999); I.

***Seattle v. Mesiani***, 110 Wn.2d 454 (1988)

Stopping all vehicles at sobriety checkpoints to determine if drivers are under the influence violates CONST. Art. 1, § 21 and the Fourth Amendment; *reverses Fury v. Seattle*, 46 Wn.App. 110 (1986), *but see*: *Michigan State Police v. Sitz*, 110 L.Ed.2d 412 (1990), *Illinois v. Lidster*, 157 L.Ed.2d 843 (2004), *cf.: Seattle v. Yeager*, 67 Wn.App. 41 (1992), *City of Indianapolis v. Edmond*, 148 L.Ed.2d 333 (2000), *Schlegel v. Dep't of Licensing*, 137 Wn.App. 364 (2007), *see: State v. Thorp*, 71 Wn.App. 175 (1993); 9-0.

***State v. Anderson***, 51 Wn.App. 775 (1988)

Police observe a known citizen waving at officer, pointing at another vehicle and gesturing like a snake; officer follows vehicle, observes weaving within the lane, stops vehicle, determines driver is under the influence, arrests; held: known informant was reliable, *State v. Kennedy*, 107 Wn.2d 1, 8 (1986), *State v. Howerton*, 187 Wn.App. 357 (2015), weaving gesture was more than a conclusory statement establishing an articulable suspicion justifying the stop, *distinguishing Campbell v. Department of Licensing*, 31 Wn.App. 833 (1982); *cf.: State v. Jones*, 85 Wn.App. 797 (1997); III.

***State v. Ellwood***, 52 Wn.App. 70 (1988)

Police observe suspects near an alley in a high crime area, walk up and ask what they are doing, then ask for names and birthdates, tell suspects to wait, run warrant check, discover outstanding warrant, arrest, search, find drugs; held: while requesting identification was not a seizure, *State v. Aranguren*, 42 Wn.App. 452, 455 (1985), *INS v. Delgado*, 80 L.Ed.2d 247 (1984), *State v. Armenta*, 134 Wn.2d 1 (1997), *State v. Hansen*, 99 Wn.App. 575 (2000), *State v. O'Neill*, 148 Wn.2d 564 (2003), *State v. Vanderpool*, 145 Wn.App. 81 (2008), *State v. Afana*, 147 Wn.App. 843 (2008), *aff'd, on other grounds*, 169 Wn.2d 169 (2010), *but see: State v. Markgraf*, 59 Wn.App. 509 (1990), telling defendant to wait was a detention without a well-founded suspicion, *State v. Crane*, 105 Wn.App. 301 (2001), *overruled, on other grounds, State v. O'Neill, supra., State v. Beito*, 147 Wn.App. 504 (2008), *State v. Ibarra Guevara*, 172 Wn.App. 184 (2012), *State v. Carriero*, 8 Wn. App. 2d 641 (2019); seizure of drugs resulted from officer's unlawful detention, thus suppressed, *State v. O'Day*, 91 Wn.App. 244 (1998), *State v. Barnes*, 96 Wn.App. 217 (1999), *State v. Coyne*, 99 Wn.App. 566 (2000), *cf.: State v. Madrigal*, 65 Wn.App. 279 (1992); I.

***Michigan v. Chesternut***, 100 L.Ed.2d 565 (1988)

Police in marked patrol car observe defendant run upon seeing car, police accelerate, catch up with and drive alongside defendant, who discards items, police pick up items, discover drugs, arrest; held: no seizure, since a reasonable person would not believe that he was not at liberty to ignore the police, *State v. Toney*, 60 Wn.App. 804 (1991), *California v. Hodari D.*, 113 L.Ed.2d 690 (1991), *Torres v. Madrid*, ___ U.S. ___, 141 S.Ct. 989, 209 L.Ed.2d 190 (2021); 9-0.

***State v. Dudas***, 52 Wn.App. 832 (1988)

Police observe defendant in dark parking lot late at night when no businesses in area are open in high crime area, approach, learn defendant is looking for keys, ask for identification, take identification to patrol car, call in for warrants, find none, release defendant, moments later learn of warrant, find defendant, arrest, find drugs; held: initial demand for identification was reasonable, *State v. Aranguren*, 42 Wn.App. 452, 455 (1985), *INS v. Delgado*, 80 L.Ed.2d 247 (1984), *State v. Hansen*, 99 Wn.App. 575 (2000); seizure of ID card was a seizure of defendant without articulable suspicion that criminal conduct had or would occur, *State v. Crane*, 105 Wn.App. 301 (2001), *overruled, on other grounds*, *State v. O'Neill, supra., State v. Beito,* 147 Wn.App. 504 (2008), *State v. Carriero*, 8 Wn. App. 2d 641 (2019), *but see: State v. Vanderpool*, 145 Wn.App. 81 (2008); however, since police released defendant, and had already identified him lawfully, then the subsequent arrest was proper as untainted by the improper detention; I.

***State v. Garza***, 53 Wn.App. 49 (1988)

Unidentified witness reports burglary by Mexican male; police respond to scene, observe male run, detain him, whereupon suspect states, "you've got me," police cuff and transport to station, detain suspect for three hours, after which police verify burglary and arrest; held: initial stop was a valid *Terry* stop, continued detention due to flight and statement was valid, *State v. Sweet*, 44 Wn.App. 226, 230-31 (1986), *State v. Swaite*, 33 Wn.App. 477, 481 (1982), *but see: State v. Gatewood*, 163 Wn.App. 534 (2008), however, holding at station for three hours amounted to an arrest without probable cause, *State v. Ellwood*, 52 Wn.App. 70, 74 (1988), *State v. Coyne*, 99 Wn.App. 566 (2000), thus suppressed; III.

***State v. Belieu***, 112 Wn.2d 587 (1989)

Five police officers, lacking probable cause but with a well founded suspicion, stop defendants' vehicle at gunpoint, knowing that weapons had been burglarized from residences in the area and having observed furtive gestures by suspects; held: police may use drawn guns in a *Terry* stop where a reasonably prudent person would be warranted in the belief that safety was in danger; here, force did not exceed the scope of *Terry* stop and thus did not convert the detention into an arrest, *reversing State v. Belieu*, 50 Wn.App. 834 (1988), *c.f,: State v. Horton*, 136 Wn.App. 29 (2006); detailed analysis of scope of detention vs. arrest; *accord: State v. Smith*, 67 Wn.App. 81 (1992); 9-0.

***United States v. Sokolow***, 104 L.Ed.2d 1 (1989)

Airline passenger whom police know paid cash for ticket, traveled under a name that did not match telephone number which passenger gave, had an original destination of Miami, a drug source city, stayed in Miami for 48 hours even though flight took 20 hours, appeared nervous, checked no luggage is stopped by DEA, detained, after dope dog reacted positively is arrested, searched; held: irrespective of drug courier profile, all factors together lead to reasonable suspicion to believe that suspect was transporting drugs even though each factor alone is consistent with innocent travel; 7-2.

***State v. DeArman***, 54 Wn.App. 621 (1989)

Police observe vehicle stopped at a stop sign for 45-60 seconds, activate emergency lights, vehicle begins to pull away, then pulls over, police find warrants, arrest, find drugs; held: defendant was seized upon activation of emergency lights, *State v. Gantt*, 163 Wn.App. 133 (2011); motionless at stop sign plus beginning to pull away when lights activated do not rise to well founded suspicion for *Terry* stop, *State v. Stroud*, 30 Wn.App. 392 (1981), *State v. Larson*,

93 Wn.2d 638 (1980); community caretaker function, *State v. Chisholm*, 39 Wn.App. 864 (1985), does not justify search as officer knew vehicle was not disabled when it moved, *cf.: State v. Madrigal*, 65 Wn.App. 279 (1992); I.

***State v. Pimintel***, 55 Wn.App. 569 (1989)

Warrant authorizes search of premises and "Juan Doe, Mexican Male," 21 years old, 5'10", 165 pounds; police serve warrant, defendant enters room, is secured, reaches toward his left shirt pocket, police search, find drugs in pocket, officer testifies he did not believe defendant had weapon; held: defendant matched "Juan Doe," drugs found on premises, thus detention was valid; III.

***State v. Mason***, 56 Wn.App. 93 (1989)

Police respond to call to remove unwanted person from apartment, speak with resident who states suspect would not leave and had threatened to kill himself, officer was aware of a prior suicide attempt by suspect; police patdown suspect, find drugs, detain at police station; held: police may detain a person based upon suicidal history and present threat to kill self for interview by mental health professional, RCW 71.05.150(4); detaining suspect in a segregated holding room within campus police station does not violate RCW 71.05.020(16), which states that a jail is not an "evaluation and treatment facility"; III.

***State v. Biegel***, 57 Wn.App. 192 (1990)

Police observe defendant in high crime area drive up, park, converse with one of several persons standing on corner for 30 seconds, follow person into apartment building; police testify that was the normal mode of conduct for a drug transaction, detain defendant, search wallet without consent, call in identification, find warrant, patdown defendant, find drugs; held: police had sufficient evidence to make a *Terry* stop to identify defendant but seizing wallet was not a weapons search, which was the extent of the *Terry* search, thus drugs suppressed; III.

***State v. Mennegar***, 114 Wn.2d 304 (1990)

Police stop vehicle for speeding, determine driver is drunk, ask passenger if he wishes to drive vehicle from scene in lieu of impound, passenger agrees, officer orders passenger to return to and remain in vehicle, requests driver's license from passenger, runs computer check, finds warrant, arrests passenger, searches, finds drugs; held: directing passenger to remain in vehicle was not a detention, *reversing State v. Mennegar*, 53 Wn.App. 257 (1989), as a reasonable person would not have believed himself to be detained, *State v. Thorn*, 129 Wn.2d 347 (1996), *State v. Nettles*, 70 Wn.App. 706 (1993), *see: State v. Harrington*, 167 Wn.2d 656 (2009), *State v. Johnson*, 156 Wn.App. 82, 90-92 (2010), *but see: State v. Gleason*, 70 Wn.App. 13 (1993), as passenger had agreed to drive vehicle away; requesting passenger's license was reasonable, as passenger was free to refuse, *State v. Mote*, 129 Wn.App. 276 (2005), *State v. Afana*, 147 Wn.App. 843 (2008), *aff'd, on other grounds*, 169 Wn.2d 169 (2010), *but see: State v. Rankin*, 151 Wn.2d 689 (2004) *State v. Brown*, 154 Wn.2d 787 (2005), *cf.: State v. Pettit*, 160 Wn.App. 716 (2011), *State v. Ibarra Guevara*, 172 Wn.App. 184 (2012); within community caretaking function to call in to determine if license was valid; *see: Maryland v. Wilson*, 137 L.Ed.2d 41 (1997), *State v. Brown*,*see also: State v. Mendez*, 137 Wn.2d 208 (1999), *State v. Kinzy*, 141 Wn.2d 373 (2000); 9-0.

***State v. Conner***, 58 Wn.App. 90 (1990)

Investigatory stop deemed valid where police knew that radio dispatch received call from person who identified herself as an employee of a business at a certain location, that a wallet had been stolen nearby within the hour, that suspect was at the business office being stalled by other employees, upon arrival, defendant met description, *distinguishing* *State v. Sieler*, 95 Wn.2d 43 (1980), in that person calling reported a crime, not just suspicious activity; citizen informant is inherently reliable even if calling on the telephone, *State v. Howerton*, 187 Wn.App. 357 (2015), *but see: State v. Z.U.E.*, 178 Wn.App. 769 (2014), 183 Wn.2d 610 (2015), *State v. Saggers*, 182 Wn.App. 832 (2014); patdown and removal of papers was reasonably related in scope to the reason for the stop; I.

***Alabama v. White***, 110 L.Ed.2d 301 (1990)

Police receive anonymous telephone tip that suspect would leave a particular apartment at a particular time in a certain vehicle, would go to a specific place and would possess drugs; police follow suspect, who acts in accordance with tip, detain her, she consents to search, drugs found; held: tip plus police corroboration, *Illinois v. Gates*, 76 L.Ed.2d 527 (1983), establish a well-founded suspicion to detain, *Adams v. Williams*, 32 L.Ed.2d 612 (1972), *cf.: Navarette v. California*, 572 U.S. 393, 188 L.Ed.2d 680 (2014), *but see: Florida v. J.L.*, 146 L.Ed.2d 254 (2000), *State v. Saggers*, 182 Wn.App. 832 (2014); 6-3.

***California v. Hodari D.***, 113 L.Ed.2d 690 (1991)

Suspect sees police and runs, police chase without reasonable suspicion, suspect throws drugs while fleeing, is stopped and arrested, police recover drugs; held: absent the application of physical force or submission to a show of authority, no seizure for purposes of the Fourth Amendment occurs, *Michigan v. Chesternut*, 100 L.Ed.2d 565 (1988), *Torres v. Madrid*, ___ U.S. ___, 141 S.Ct. 989, 209 L.Ed.2d 190 (2021), *see*: *United States v. Mendenhall*, 64 L.Ed.2d 497 (1980), *State v. Perea*, 85 Wn.App. 339, 344 (1997),; here, suspect was not seized until he was tackled, *but see: State v. Young*, 135 Wn.2d 498 (1998), *State v. Butler*, 2 Wn.App. 2d 549, 560-61 (2018), *State v. Carriero*, 8 Wn.App.2d 641 (2019); 7-2.

***Florida v. Bostick***, 115 L.Ed.2d 389 (1991)

Police routinely board bus at scheduled stop and ask passengers for permission to search luggage, defendant grants permission, police seize drugs; held: no seizure where a reasonable innocent person would feel free to say no, *United States v. Drayton*, 153 L.Ed.2d 242 (2002); cramped confines of bus is but one factor in determining if consent is voluntary; *accord: State v. Thorn*, 129 Wn.2d 347 (1996), *but cf.: State v. Rankin*, 151 Wn.2d 689 (2004); 6-3.

***State v. Little***, 116 Wn.2d 488 (1991)

Police receive report of loitering juveniles in large (500 resident) apartment complex which is posted with signs warning against loitering, observe several juveniles in area, respondent flees upon seeing officer provides "substantial grounds of criminal activity" to warrant detention; in companion case, officers conducting a "premise check" of same apartment complex spot group of juveniles standing around, police recognize none as residents, juveniles disperse as police approach provides reasonable grounds to believe criminal trespass was being committed justifying investigative stop, *State v. Contreras*, 92 Wn.App. 307 (1998), *cf.: State v. Blair*, 65 Wn.App. 64 (1992), *State v. Morgan*, 78 Wn.App. 208, 211 (1995), *Bremerton v. Widell*, 146 Wn.2d 561 (2002); 7-2.

***State v. Glover***, 116 Wn.2d 509 (1991)

Police patrolling 500-resident apartment complex that is posted with no loitering signs observe respondent, whom they do not recognize as a resident, leave an apartment, walk toward police then turn away and walk faster, play with his baseball hat, police approach him, ask if he lives there, respondent says yes, police observe baggie in hand, grab him, seize baggie, find drugs; four justices hold that police possessed sufficient reasonable suspicion to stop respondent to investigate him for criminal trespass; respondent's claim that he lived in complex, combined with police familiarity with the 500 residents, established probable cause to arrest for criminal trespass; *cf.:* *State v. Blair*, 65 Wn.App. 64 (1992), *State v. Morgan*, 78 Wn.App. 208, 211 (1995), *Bremerton v. Widell*, 146 Wn.2d 561 (2002), *State v. Keller-Deen*, 137 Wn.App. 396 (2007); police knowledge that baggies are used to transport narcotics provided reasonable suspicion to believe respondent possessed drugs, thus police could demand that respondent turn over baggie; three justices hold that seizure was lawful as incident to arrest for criminal trespass; 7-2.

***State v. Massey***, 60 Wn.App. 131 (1991)

Homicide report states white male and female fleeing, police decide to stop all traffic along only escape route; officer sees two vehicles, realizes she can stop only one, chooses closer containing white male and two black males, detains defendant black male because he had been listed as a missing juvenile; held: decision to stop closer vehicle with white male was not arbitrary, supported by sufficient suspicion of criminal activity, minimal invasion of obtaining occupants' identification; II.

***State v. Thierry***, 60 Wn.App. 445 (1991)

Police observe defendant drive slowly through crime area with high incidence of gang activity, windows down in 40° weather, radio loud, meeting police profile of drive-by shootings; as police approached car, defendant turned down radio, observe furtive hand motions, see, seize gun; held: circumstances, to trained officer, were more consistent with criminal than innocent conduct; officers may do far more if suspect conduct endangers life or safety, initial intrusion was negligible, thus seizure was valid, *State v. Mercer*, 45 Wn.App. 769, 774-5 (1986), *State v. Samsel*, 39 Wn.App. 564 (1985), *State v. McCord*, 19 Wn.App. 250, 253 (1978); II.

***State v. Toney***, 60 Wn.App. 804 (1991)

Police observe youths in high crime area, youths run upon observing police, respondent breaks away from group, is followed by police, without sirens or lights, officer then follows respondent on foot, observes him discard a plastic bag in which police find drugs; held: police conduct would not have communicated to the reasonable person an attempt to capture or otherwise intrude upon respondent's freedom of movement, thus no arrest or detention occurred, *Michigan v. Chesternut*, 100 L.Ed.2d 565 (1988), *State v. Thorn*, 129 Wn.2d 347 (1996); I.

***State v. Bennett***, 62 Wn.App. 702 (1991)

Police observe vehicle park across from empty convenience store "in such a way as to go unnoticed," presence of juveniles in early morning hours, suspect stops at door of store when officer approaches rather than entering, police know of previous incidents at store, stop suspect for questioning, check for warrants, allow suspect to leave; minutes later, officer learns that suspect had recently stated he did not drive and had no car, police block car, check with radio, determine car is stolen; held: limited nature of stop at store door for brief questioning was based

upon reasonable suspicion, *State v. Kennedy*, 38 Wn.App. 41, 46-7 (1984); blocking vehicle for further limited time to check plates based upon additional information was also reasonable; I.

***State v. Reeb***, 63 Wn.App. 678 (1992)

Gas station clerk calls police late at night, reports that six or seven young people had approached a white car parked nearby, exchanged something with passenger and left; police respond, locate car, stop it, ask defendant-driver for identification, check with radio, determine ten failures to appear from DOL, former RCW 46.64.020(3), arrest, search, find drugs; held: complaint from identified clerk provided sufficient information to justify inquiry and investigation, thus initial detention was lawful; III.

***State v. Rowe***, 63 Wn.App. 750 (1991)

Police, speaking with gang members, observe occupants of passing vehicle flash hand signal of rival gang which, officer testifies, sometimes leads to violence; police stop vehicle; held: mere expression of gang membership is not grounds for *Terry* stop; I.

***State v. Vandover***, 63 Wn.App. 754 (1992)

Police receive anonymous phone tip that man in gold Maverick brandished shotgun, police stop green Maverick, seize guns, drugs; held: because record is devoid of information whether informant was eyewitness, there is no basis of knowledge or reliability established, *State v. Lesnick*, 84 Wn.2d 940 (1975), *Campbell v. Department of Licensing*, 31 Wn.App. 833 (1982), *State v. Z.U.E.*, 178 Wn.App. 769 (2014), 183 Wn.2d 610 (2015), nor other indicia of reliability, *cf.: State v. Howerton*, 187 Wn.App. 357 (2015); although potential danger to public may be factor to consider, it cannot substitute for reliability of informant, *State v. Saggers*, 182 Wn.App. 832 (2014), *distinguishing* *State v. Franklin*, 41 Wn.App. 409 (1985), *see: Florida v. J.L.*, 146 L.Ed.2d 254 (2000), *but see: State v. Lee*, 147 Wn.App. 912 (2008), *Navarette v. California*, 572 U.S. 393, 188 L.Ed.2d 680 (2014); II.

***State v. Blair***, 65 Wn.App. 64 (1992)

Police officer, pursuant to an agreement with public housing authority, arrest defendant for drug offense nearby, admonish defendant to stay out of housing complex; three weeks later, officer sees defendant on complex grounds, arrest, search, find drugs; held: officer's knowledge that defendant did not live in complex, plus prior admonishment not to return establishes an articulable suspicion that defendant might be trespassing but does not establish probable cause to arrest, thus absent further investigation, search was unlawful, *see:* *State v. Glover*, 116 Wn.2d 509 (1991), *State v. Little*, 116 Wn.2d 448 (1991), *State v. Morgan*, 78 Wn.App. 208 (1995), *Bremerton v. Widell*, 146 Wn.2d 561 (2002), *cf.:* *State v. Thompson*, 69 Wn.App. 436 (1993); I.

***State v. Madrigal***, 65 Wn.App. 279 (1992)

Police observe defendant and a woman engaged in a heated argument, conclude defendant's body language was "overpowering," inquire of woman if there is a problem, she responds there was none, ask defendant for identification, discover warrants, arrest, search, find drugs; held: loud altercation established a reasonable and articulable suspicion of criminal activity justifying detention, *distinguishing* *State v. Ellwood*, 52 Wn.App. 70 (1988); after a lawful investigatory stop, police may detain for a warrant check where duration of warrant check was two minutes, *State v. Sinclair*, 11 Wn.App. 523, 529 (1974), *distinguishing* *State v. DeArman*, 54 Wn.App. 621 (1989); 2-1, III.

***State v. Walker***, 66 Wn.App. 622 (1992)

Police radio reports individuals going door-to-door asking for people who do not live in area, police observe defendant who matches description, appears startled by police, stops on request, states he was looking for an apartment, is patted down, fruits of burglary found; held: no basis for stop, as trustworthiness of information was unknown to officers, *State v. Sieler*, 95 Wn.2d 43 (1980) , *State v. Z.U.E.*, 178 Wn.App. 769 (2014), 183 Wn.2d 610 (2015), *cf.: State v. Maesse*, 29 Wn.App. 643 (1981), *State v. Alvarado*, 56 Wn.App. 454 (1990), *State v. Lee*, 147 Wn.App. 912 (2008), *see also: State v. Saggers*, 182 Wn.App. 832 (2014), *but see: State v. Contreras*, 92 Wn.App. 307 (1998), only corroboration was defendant appearing startled [flight alone is not enough, *see: State v. Little*, 116 Wn.2d 488, 504 (Utter, J., dissenting)]; even if stop was valid, patdown was not, as frisk occurred on residential sidewalk in middle of the afternoon, suspect alone with two police officers, thus facts do not support officers' safety concerns, *State v. Williams*, 102 Wn.2d 733 (1984), *distinguishing State v. Sweet*, 44 Wn.App. 226 (1986); I.

***Seattle v. Yeager***, 67 Wn.App. 41 (1992)

Statute authorizing stop of a vehicle which has tab on license plate indicating that owner had been cited for driving without a license, RCW 46.16.710(3), does not violate Fourth Amendment or CONST. Art. 1, § 7, where sole purpose of stop is to ascertain if driver has a valid license, *State v. Lyons*, 85 Wn.App. 268, 270 (1997), *State v. Phillips*, 126 Wn.App. 584 (2005), *see: State v. Harlow*, 85 Wn.App. 557 (1997), *distinguishing Seattle v. Mesiani*, 110 Wn.2d 454 (1988), *Delaware v. Prouse*, 59 L.Ed.2d 660 (1979), *United States v. Brignoni-Ponce*, 45 L.Ed.2d 607 (1975), *see also: State v. Penfield*, 106 Wn.App. 157 (2001), *Kansas v. Glover*, ___ U.S. ___, 140 S.Ct. 1183, 206 L.Ed.2d 412 (2020); I.

***State v. Smith***, 67 Wn.App. 81 (1992)

Police drawing firearms during burglary investigation does not convert *Terry* stop to custodial arrest, *State v. Belieu*, 112 Wn.2d 587, 601-2 (1989), as it is well-known that burglars carry weapons, *State v. Harvey*, 41 Wn.App. 870, 875 (1985); I.

***State v. Lowrimore***, 67 Wn.App. 949 (1992)

Dispatch reports that suspect fought with her mother, possessed knives, threatened suicide; police arrive at scene, find defendant upset, denies intent to kill herself, detains defendant, searches, finds drugs; held: information and observation of defendant's highly unstable state justifies belief that she was suffering from a mental disorder, information about knives justifies belief that there was an imminent likelihood of serious harm permitting detention for possible civil commitment, RCW 71.05.150, *State v. Lynd*, 54 Wn.App. 18 (1989); I.

***State v. Soto-Garcia***, 68 Wn.App. 20 (1992), *overruled, on other grounds, State v. Thorn*, 129 Wn.2d 347 (1996)

Police observe defendant, who looks away, patrol car stops, defendant approaches, police ask where he is going, defendant answers appropriately, police ask for name, defendant produces identification, police run radio check, ask if he has drugs, defendant says no, ask if they may search, defendant says yes, police find drugs; held: point where defendant was asked if he had drugs amounts to seizure without well-founded suspicion, *State v. Rodriguez*, 68 Wn.App. 20 (1982), *State v. O'Day*, 91 Wn.App. 244 (1998), *State v. Coyne*, 99 Wn.App. 566 (2000), *State v.*

*Ibarra Guevara*, 172 Wn.App. 184 (2012), *but see: State v. Harrington*, 167 Wn.2d 656 (2009), *State v. Bailey*, 154 Wn.App. 295 (2010), *cf.: State v. Smith*, 154 Wn.App. 695 (2010); consent obtained through exploitation of prior illegal detention is invalid unless free of taint, *Taylor v. Alabama*, 73 L.Ed.2d 314 (1982), *State v. Gonzales*, 46 Wn.App. 388, 397-9 (1986); II.

***State v. Koopman***, 68 Wn.App. 514 (1992)

Where detention occurs in another state, choice of law to be applied depends upon legitimate interests of the parties, legitimate needs of law enforcement, protection of justified expectations, fairness, ease with which law may be ascertained, interests of certainty, predictability, uniformity of result and comity, *United States v. Gerena*, 667 F.Supp. 911, 914-5 (Defendant.Conn. 1987); III.

***State v. Gleason***, 70 Wn.App. 13 (1993)

Police observe white male in "low income Hispanic" neighborhood, approach, ask to talk, demand identification, observe bindle in hand, seize drugs; held: reasonable person in defendant's position would have believed he was not free to go, *distinguishing State v. Mennegar*, 114 Wn.2d 404 (1990), thus defendant was seized; disregarding racial incongruity, *State v. Barber*, 118 Wn.2d 335 (1992), there were no facts to support a *Terry* stop, thus suppressed and dismissed; *cf.: State v. Nettles*, 70 Wn.App. 706, 712 n. 8 (1993), *State v. Harrington*, 167 Wn.2d 656 (2009), *State v. Bailey*, 154 Wn.App. 295 (2010); III.

***State v. Lund***, 70 Wn.App. 437 (1993)

With a well-founded suspicion, jailers detain a paralegal for smuggling drugs, seize her purse, move her to a reception area for four minutes, whereupon she produces drugs; held: a *Terry* stop, while limited to place, allows some movement of the suspect in the general vicinity without converting the detention to an arrest; movement may be for safety and security, *Florida v. Royer*, 84 L.Ed.2d 705 (1985)*(dictum)*, to get out of the rain and promote safety of passing vehicles, *United States v. Pino*, 855 F.2d 357 (6th Cir. 1988), for purposes of identification, *State v. Wheeler*, 108 Wn.2d 230, 236-7 (1987), or to talk more conveniently, *United States v. Richards*, 500 F.2d 1025 (9th Cir. 1974); here, detention and movement was minimally intrusive and reasonable; where police make a valid seizure of a purse, then desire to obtain a search warrant, they may retain the purse for the time reasonably needed to secure a warrant, *see: State v. Huff*, 64 Wn.App. 641, 653 (1992); II.

***State v. Nettles***, 70 Wn.App. 706 (1993)

Officer observes defendant hurry away when he sees her, parks, asks to speak with him, when defendant turns towards officer, she tells him to remove his hands from his pockets and come toward her car, defendant throws baggie of drugs under her car; held: defendant's testimony that he did not believe he was under arrest or would be arrested, and that officer was polite establishes no seizure, as a reasonable person would have believed he was free to go, *State v. Thorn*, 129 Wn.2d 347 (1996), *State v. Richardson*, 64 Wn.App. 693, 696 (1992), *State v. Aranguren*, 42 Wn.App. 452, 455 (1985), *State v. Belanger*, 36 Wn.App. 818, 820 (1984), *cf.: State v. Barnes*, 96 Wn.App. 217 (1999), *State v. Harrington*, 167 Wn.2d 656 (2009), *State v. Bailey*, 154 Wn.App. 295 (2010); police may, in an otherwise permissive encounter, ask individual to make his hands visible; 2-1, I.

***State v. Thorp***, 71 Wn.App. 175 (1993)

Police stop truck to check if it had a "specialized forest products permit," discover warrant, find marijuana; held: forest products industry is not a pervasively regulated industry, which would permit a search without a warrant, *United States v. Biswell*, 32 L.Ed.2d 87 (1972), *Colonnade Catering Corp. v. United States*, 25 L.Ed.2d 60 (1970), *Washington Massage Found. V. Nelson*, 87 Wn.2d 948 (1976), *see: State v. Miles*, 160 Wn.2d 236, 250 ¶¶ 24-26 (2007), thus stop was invalid; II.

***State v. Randall***, 73 Wn.App. 225 (1994)

Radio broadcasts armed robbery with description of two robbers, ten minutes later officer observes two males fitting description six blocks from robbery, suspects leave area upon observing police, officer finds suspect, stops him, pats down, feels hard object, seizes it, finds pipe and drugs; held: where an investigatory stop is based on information given by another person, the stop is valid if under totality of circumstances officer had reasonable suspicion that defendant was engaged in criminal activity, rejecting *Aguilar-Spinelli* and *State v. Jackson*, 102 Wn.2d 432 (1984) in *Terry* stop situations, *State v. Lee*, 147 Wn.App. 912 (2008), *State v. Marcum*, 149 Wn.App. 894, 904 (2009); since reported offense was a violent, armed crime, requiring an in-depth analysis of reliability of the information by the officer would increase threat to public safety, *State v. Franklin*, 41 Wn.App. 409 (1985), *see: State v. Lesnick*, 84 Wn.2d 940, 944-5 (1975), *cf.: State v. Z.U.E.*, 178 Wn.App. 769 (2014), 183 Wn.2d 610 (2015), *State v. Saggers*, 182 Wn.App. 832 (2014), *State v. Morrell*, 16 Wn.App.2d 695 (2021); here, investigatory stop and frisk was reasonable; *but see: State v. Vandover*, 63 Wn.App. 754 (1992); I.

***State v. Cole***, 73 Wn.App. 844 (1994)

Police stop vehicle for infraction, observe passenger not wearing seat belt, ask passenger for identification, passenger lacks written identification but provides name and birthdate, police remove passenger from vehicle, patdown passenger, later observe passenger slough drugs while being detained outside of vehicle; held: passengers need only provide name and address and sign citation, RCW 46.61.020(3), need not carry identification, *State v. Barwick*, 66 Wn.App. 706, 709 (1992); removing passenger from car converted infraction investigation to an unwarranted *Terry* stop, as officer had no suspicions nor a reasonable belief that defendant was armed and presently dangerous, *State v. Collins*, 121 Wn.2d 168, 173 (1993), *see: State v. Rankin*, 151 Wn.2d 689 (2004), *State v. Reichenbach*, 153 Wn.2d 126 (2004), *cf.: State v. Pettit*, 160 Wn.App. 716 (2011), thus evidence obtained as result of seizure is suppressed, *State v. Mendez*, 137 Wn.2d 208 (1999), *but see: Maryland v. Wilson*, 137 L.Ed.2d 41 (1997), *cf.: State v. McIntosh*, 42 Wn.App. 573 (1986), *State v. Miller*, 91 Wn.App. 181 (1998) *State v. Chelly*, 94 Wn.App. 254 (1999), *Spokane v. Hays*, 99 Wn.App. 653 (2000), *State v. Cook*, 104 Wn.App. 186 (2001), *State v. Reynolds*, 144 Wn.2d 282 (2001), *State v. Horace*, 144 Wn.2d 386 (2001); III.

***State v. Alcantara***, 79 Wn.App. 362 (1995)

Police officer observes defendant intently looking at a plastic bag in his hand, when defendant sees officer he turns away and makes shoving motions into pants, officer stops defendant and pats him down, seizing bag with drugs; held: stop was made to search pocket where officer suspected he might find evidence, not a weapon, thus search exceeded scope of

*Terry* stop, *distinguishing* State v. Rodriguez-Torres, 77 Wn.App. 687 (1995), State v. Pressley, 64 Wn.App. 591 (1992); I.

***State v. Graham***, 80 Wn.App. 137 (1995)

Uniformed, off-duty police officers working as security guards who make a narcotics arrest are public servants engaging in their official powers and duties for purposes of obstructing a public officer, RCW 9A.76.020(3), *see: State v. K.L.B.,* 180 Wn.2d 735 (2014); I.

***State v. Mitchell***, 80 Wn.App. 143 (1995)

Police observe suspect openly carrying a semiautomatic weapon walking down street in urban, residential area at night, order suspect to stop and raise hands, police draw weapons, suspect tosses gun into shrubs; held: "[o]penly carrying such a weapon at that time and place was sufficient to warrant reasonable suspicion" that suspect was committing crime of unlawful display of firearm, RCW 9.41.270, at 147; the fact that the officer did not give unlawful display as a reason for the stop does not invalidate the stop, as reasonable suspicion is determined by an objective standard, *Scott v. United States*, 56 L.Ed.2d 168 (1978); police had reasonable fear of danger, thus drawing weapon did not convert *Terry* stop into arrest, *State v. Williams*, 102 Wn.2d 733, 740 n. 2 (1984), *State v. Friederick*, 34 Wn.App. 537, 542 (1983); *cf.: State v. Pines*, 17 Wn.App.2d 483 (2021); I.

***State v. Thorn***, 129 Wn.2d 347 (1996)

Police observe vehicle lawfully parked, see flicker of light from within, approach and ask driver, "where is the pipe?", driver hands drug pipe to officer, is arrested for paraphernalia, searched, other drugs found, trial court finds insufficient evidence to establish articulable suspicion for *Terry* stop and suppresses; held: determination of whether a seizure has occurred is a mixed question of law and fact reviewed *de novo*, *overruling, in part*, *State v. Soto-Garcia*, 68 Wn.App. 20, 24 (1992); focus to determine whether seizure occurred is not merely whether suspect felt free to leave but whether he felt free to terminate the encounter and refuse to answer, *i.e.*, was police conduct coercive, *Florida v. Bostick*, 115 L.Ed.2d 389 (1991), *United States v. Drayton*, 153 L.Ed.2d 242 (2002); here, stipulated facts trial failed to establish details of the encounter to determine if it was coercive, thus suppression reversed as burden of proving that a seizure occurred is on defendant, *see: State v. Mennager*, 114 Wn.2d 304, 310 (1990), *State v. Nettles*, 70 Wn.App. 706, 708 (1993), *State v. Toney*, 60 Wn.App. 804, 806 (1991), *State v. Knox*, 86 Wn.App. 831 (1997); 7-2.

***Maryland v. Wilson***, 137 L.Ed.2d 41 (1997)

Following stop for traffic infraction, police may order driver and passengers to exit vehicle, *Pennsylvania v. Mimms*, 54 L.Ed.2d 331 (1977), *but see: State v. Mendez*,137 Wn.2d 208 (1999), *cf.: State v. Rankin*, 151 Wn.2d 689 (2004); 7-2.

***State v. Lyons***, 85 Wn.App. 268 (1997)

Police observe vehicle whose owner they know had a revoked license and warrants, driver gets out and walks away, ignores directives to stop, officer grabs driver, tells him he's under arrest, then determines that it is the owner, finds drugs; held: police may stop driver of vehicle based on well-founded suspicion arising from evidence that owner has revoked license, *State v. Harlow*, 85 Wn.App. 557 (1997), *Seattle v. Yeager*, 67 Wn.App. 41 (1992), *State v. Phillips*, 126 Wn.App. 584 (2005), *Kansas v. Glover*, ___ U.S. ___, 140 S.Ct. 1183, 206 L.Ed.2d

412 (2020), *but see:* *State v. Penfield*, 106 Wn.App. 157 (2001), grabbing suspect and stating suspect is under arrest does not convert stop into a custodial arrest, as police may use reasonable force to detain a suspect pending investigation, *State v. Belanger*, 36 Wn.App. 818 (1984); III.

***State v. Williams***, 85 Wn.App. 271 (1997)

Driver stops for identification at gate of military base, sentry smells alcohol, calls for military security officer who administers field sobriety tests, arrests, advises of implied consent rights, driver refuses breath test, Department of Licensing revokes license, driver appeals; held: "smell of alcohol on a driver's breath is a specific fact that raises a substantial possibility that the driver is in violation of drunk driving laws," at 279, thus detention at gate was lawful; II.

***State v. Perea***, 85 Wn.App. 342 (1997)

Police observe defendant driving, know that his license was suspended from a records check seven days earlier, activate emergency lights, defendant exits, closes door and walks away, is ordered to return to vehicle, defendant refuses, is arrested, police confiscate keys, search car, find illegal gun; held: seven-day-old information about **suspended license** constitutes articulable facts to support a detention, *State v. Harlow*, 85 Wn.App. 557 (1997), *State v. Pressley*, 64 Wn.App. 591, 595 (1992), *State v. Quintero-Qunitero*, 60 Wn.App. 902 (1991), *State v. Marcum*, 116 Wn.App. 526, 531-33 (2003); arrest for DWLS is proper, *see:* *State v. Reding*, 119 Wn.2d 685 (1992); II.

***State v. Harlow***, 85 Wn.App. 557 (1997)

Police maintain list of persons who have been cited for driving with **suspended license**, observe defendant driving, knows she is on list, ran DOL check day before and confirmed license was suspended, arrests for DWLS; held: under United States and Washington constitutions, there is no right to privacy in DOL records, *State v. Hathaway*, 161 Wn.App. 634, 641-45 (2011), at least where police were not on a fishing expedition, thus stop was valid, *State v. Perea*, 85 Wn.App. 339, 342-3 (1997),*State v. Lyons*, 85 Wn.App. 268, 270 (1997), *Seattle v. Yeager*, 67 Wn.App. 41 (1992), *State v. Quintero-Quintero*, 60 Wn.App. 902 (1991), *State v. McKinney*, 148 Wn.2d 20 (2002); III.

***State v. Jones***, 85 Wn.App. 797 (1997)

Driver of a truck with a company name on it indicates with hand signals to officer that car in front weaved, officer observes no infractions but stops car, after tests arrests defendant for DUI; held: name written on side of truck is not qualitatively different from a named but unknown telephone caller, insufficient to establish reliability of citizen informer, *Campbell v. Department of Licensing*, 31 Wn.App. 833, 835 (1982), *State v. Sieler*, 95 Wn.2d 43, 47-49 (1980), *State v. Z.U.E.*, 178 Wn.App. 769 (2014), 183 Wn.2d 610 (2015), *cf.:* *State v. Lee*, 147 Wn.App. 912 (2008), distinguishing *State v. Anderson*, 51 Wn.App. 775 (1988), 2-1; III.

***State v. Rife***, 133 Wn.2d 140 (1997)

Following a traffic stop (here, jaywalking), police may not detain for a warrant check as RCW 46.61.020 authorizes detention only for time necessary to identify, check license status and issue citation; reverses *State v. Rife*, 81 Wn.App. 258 (1996); legislatively overruled, RCW 46.61.020; 7-2.

***State v. Knox***, 86 Wn.App. 831 (1997)

Trooper observes state ferry worker unsuccessfully attempt to awaken a driver blocking vehicles, observes sleeping driver awaken, eyes watery, bloodshot in apparent stupor, motions driver to roll window down, smells odor of alcohol, driver starts vehicle, then asks, "where am I?," trooper turns engine off, has defendant leave vehicle, after field tests arrests for DUI; held: defendant failed to prove that trooper's motioning to roll down window and initial questions were a seizure, reasonable person would have believed he was free to go or could refuse to speak, *State v. Thorn*, 129 Wn.2d 347, 352-3 (1996); II.

***State v. Seitz***, 86 Wn.App. 865 (1997)

Police observe defendant-passenger in vehicle speaking with a man on a sidewalk, do not observe drugs, money or anything else change hands, stop vehicle for traffic infraction, ask passenger to get out, she removes her purse, police tell her not to leave, police find drugs in driver's purse, ask passenger if she has drugs, she says she does, police look in passenger's purse; held: valid arrest of driver does not justify search of a purse known to belong to passenger where purse is not in the car but rather is on passenger's person outside the car, *State v. Nelson*, 89 Wn.App. 179 (1997), *State v. O'Day*, 91 Wn.App. 244 (1998), distinguishing *State v. Fladebo*, 113 Wn.2d 388 (1989); police telling passenger she could not leave is a seizure, here without any basis; II.

***State v. Armenta***, 134 Wn.2d 1 (1997)

Officer provides mechanical assistance to two men, asks to see identification, observes large amount of cash, asks where the money came from, is told by one he earned it on a ranch but doesn't remember where, other says he sold a car, lacks bill of sale but still has title, officer calls in names, discovers one has suspended license, other has no driving record at all, takes money and locks it in patrol car, obtains permission to search, finds drugs; held: request for identification and questioning relating to identity is not a seizure, *State v. Aranguren*, 42 Wn.App. 452, 455 (1985), *Immigration & Naturalization Serv. v. Delgado*, 80 L.Ed.2d 247 (1984), *State v. Ellwood*, 52 Wn.App. 70, 73 (1988), *State v. Hansen*, 99 Wn.App. 575 (2000), *State v. O'Neill*, 148 Wn.2d 564 (2003), *State v. Vanderpool*, 145 Wn.App. 81 (2008), *State v. Afana*, 147 Wn.App. 843 (2008), *aff'd, on other grounds*, 169 Wn.2d 169 (2010), *cf.: State v. Cook*, 104 Wn.App. 186 (2001); once police placed money in patrol car, defendants were seized, *State v. O'Day*, 91 Wn.App. 244 (1998), *State v. Barnes*, 96 Wn.App. 217 (1999), *State v. Crane*, 105 Wn.App. 301 (2001), *overruled, on other grounds*, *State v. O'Neill, supra.*, *State v. Beito*, 147 Wn.App. 504 (2008), *State v. Ibarra Guevara*, 172 Wn.App. 184 (2012), *State v. Carriero*, 8 Wn. App. 2d 641 (2019), *cf.: State v. Coyne*, 566 (2000); officer did not arrest driver for driving with suspended license, thus search was not incident to arrest, distinguishing *State v. Reding*, 119 Wn.2d 685, 691 (1992), there was no hope of discovering information about the driving offense from the search, *State v. Cantrell*, 70 Wn.App. 340 (1993), *aff'd on other grounds*, 124 Wn.2d 183 (1994), there was no articulable suspicion, *State v. Tijeriña*, 61 Wn.App. 626 (1991), consent occurred immediately after the seizure, thus not vitiated; reverses *State v. Armenta*, 83 Wn.App. 118 (1996); 6-3.

***State v. Dane***, 89 Wn.App. 226, 231-2 (1997)

Prison officials receive anonymous note that defendant-visitor may smuggle drugs for her prisoner-husband who associates with inmates known to have drug problems in prison, defendant is nervous when questioned; held: officials had well founded suspicion to detain and question

defendant, *cf.: Florida v. J.L.*, 146 L.Ed.2d 254 (2000), but because WAC §§ 275-80-905, -915, -925 require prison investigators to ask for consent, expel if consent refused and allow local police to handle searches, which were not followed here, drugs suppressed; II, 2-1.

***State v. Laskowski***, 88 Wn.App. 858 (1997)

Officer, dispatched to vehicle prowl, sees six suspects matching description, some hesitate to remove hands from pockets, defendant is nervous, officer knows one suspect has a weapon history, patdown of all suspects discloses shotgun shell, officer then pats down defendant's backpack, feels long hard object, opens pack and finds shotgun; held: any reasonable basis supporting an inference that the investigatee or a companion is armed will justify a protective search for weapons, at 860, *State v. Wilkinson*, 56 Wn.App. 812, 818 (1990); totality of suspicious circumstances supported officer's belief that respondent was armed and dangerous, protective frisk may extend beyond a person to his area of immediate control if there is reasonable suspicion that suspect is dangerous and may gain access to weapon, *State v. McIntosh*, 42 Wn.App. 579, 582 (1986), *State v. Bray*, 143 Wn.App. 148 (2008), *cf.: State v. Martinez*, 135 Wn.App. 174 (2006); I.

***State v. Young***, 135 Wn.2d 498 (1998)

Police observe suspect in high crime area, make a "social contact" and get name, run records check, find drug priors, shine spotlight on suspect who discards materials, detain suspect, find imitation controlled substance; held: shining flashlight on suspect did not constitute such a show of authority that a reasonable person would not believe himself free to leave, *but see: State v. Gantt*, 163 Wn.App. 133 (2011), *cf.: State v. Ibarra Guevara*, 172 Wn.App. 184 (2012), *State v. Butler*, 2 Wn.App. 2d 549, 560-61 (2018), spotlight did not illuminate anything suspect sought to keep private as he was in the open on a public street, spotlight did not reveal the contraband he had concealed on his person, thus suspect was not seized, *State v. Bailey*, 154 Wn.App. 295 (2010), *State v. Smith*, 154 Wn.App. 695 (2010), *State v. Johnson*, 156 Wn.App. 82, 90-92 (2010); Washington declines to adopt United States Supreme Court test that because suspect did not submit to authority, no seizure occurred, *California v. Hodari D.*, 113 L.Ed.2d 690 (1991). *Torres v. Madrid*, ___ U.S. ___, 141 S.Ct. 989, 209 L.Ed.2d 190 (2021); 7-2.

***State v. Thomas***, 89 Wn.App. 774 (1998)

Due to jail conditions, police policy is to cite and release for reckless driving unless driver is gang affiliated; defendant is arrested based upon erroneous gang affiliation designation, drugs found; held: where police have probable cause to arrest, court should not look at the reason police made the arrest, as police had the authority to arrest, *State v. Reding*, 119 Wn.2d 685, 695 (1992), *State v. O'Neill*, 110 Wn.App. 604 (2002); III.

***State v. Thomas,*** 91 Wn.App. 195 (1998)

Officer approaches defendant-driver and passenger, asks for and receives defendant's identification, passenger says she has none, officer saw passenger drive earlier, calls in identification while holding defendant's license, asks defendant if he has weapons, he says he has a knife, officer has defendant and passenger leave car, observes hundreds of dollars of change scattered in car plus newspaper vendor's key on defendant, passenger says she and defendant were stealing from vending machines, police arrest, impound, find drugs; held: retaining identification was an unlawful seizure, *State v. Dudas*, 52 Wn.App. 832, 834-35 (1988),

*State v. Crane*, 105 Wn.App. 301 (2001), *overruled, on other grounds, State v. O'Neill,* 145 Wn.App. 81 (2008), *State v. Beito*, 147 Wn.App. 504 (2008), *State v. Carriero,* 8 Wn. App. 2d 641 (2019), *but see: State v. Hansen*, 99 Wn.App. 575 (2000), *State v. Vanderpool*, 145 Wn.App. 81 (2008), but officer's observations of coins, key and passenger's admission were separate from defendant's seizure, established probable cause to arrest, evidence was thus untainted by initial unlawful seizure; II.

***State v. O'Day*,** 91 Wn.App. 244 (1998)

Police arrest driver, passenger told to leave vehicle, passenger's purse placed on hood, passenger is not suspected of a crime but police testify that she could not leave remote area, police ask if they may search purse, she consents, police find drugs; held: since purse was not in vehicle, it was not subject to search incident to arrest, *State v. Parker*, 139 Wn.2d 486 (1999), *State v. Seitz*, 86 Wn.App. 865 (1997), *State v. Nelson*, 89 Wn.App. 179 (1997), *see also: Wyoming v. Houghton*, 143 L.Ed.2d 408 (1999), *State v. Rankin*, 151 Wn.2d 689 (2004), *State v. Brown*, 154 Wn.2d 787 (2005), *State v. Flores*, 188 Wn.App. 305 (2015), *cf.: State v. Lee*, 7 Wn.App.2d 692 (2019); III.

***State v. Contreras*,** 92 Wn.App. 307, 314-17 (1998)

Police receive report of possible vehicle prowl of white car by unidentified male at an address, arrive in five minutes, find defendant in white car in front of address, defendant appears high, refuses to speak or raise hands or get out of car, is removed from car, won't cooperate with patdown, is handcuffed, placed in patrol car, told if he does not say who he is or why he was in the car he can be arrested for obstructing, defendant gives false name, is arrested for obstructing, drugs found; held: prompt response to scene plus defendant's noncooperation other than refusing to answer justifies investigatory stop, *State v. Little*, 116 Wn.2d 488 (1991), *State v. Glover*, 116 Wn.2d 509 (1991); while refusal to answer is not sufficient grounds to arrest for obstruction, disobeying orders to put hands up, exit car, provide true name is sufficient, *State v. Hudson*, 56 Wn.App. 490, 497-98 (1990), *State v. Mendez*, 88 Wn.App. 785, 792-93 (1997), *Sunnyside v. Wendt*, 51 Wn.App. 846, 851-52 (1988), *State v. Turner*, 103 Wn.App. 515, 525-26 (2000), *cf.: State v. Setterstrom*, 163 Wn.2d 621 (2008); II.

***State v. Mendez*,** 137 Wn.2d 208 (1999)

Police stop vehicle for infraction, order passenger to stay in vehicle, passenger runs away, is convicted of obstructing, RCW 9A.76.020(1); held: absent reasonable suspicion or danger to officer, police may not detain passenger by obliging him/her to remain in vehicle, CONST. Art. I, § 7, distinguishing *Maryland v. Wilson*, 137 L.Ed.2d 41 (1997), reversing *State v. Mendez*, 88 Wn.App. 785 (1997), *Spokane v. Hays*, 99 Wn.App. 653 (2000), *see: State v. Reynolds*, 144 Wn.2d 282 (2001), *State v. Horace*, 144 Wn.2d 386 (2001), *State v. Rankin*, 151 Wn.2d 689 (2004), *State v. Reichenbach*, 153 Wn.2d 126 (2004), *State v. Brown*, 154 Wn.2d 787 (2005); 9-0.

***State v. Chelly*,** 94 Wn.App. 254 (1999)

Police stop vehicle for infraction, passenger is not wearing seat belt, lacks identification and states he never had identification, officer testifies at suppression hearing that in his experience it is unusual for an adult to state he never had identification and that he was likely to give a false name to conceal his identity, probably due to warrants, passenger is removed from vehicle, gives false name, false birthdate, correct social security number, police run warrant

information, discover warrants, arrest passenger, search vehicle, find drugs; held: police had specific articulable facts to detain to ascertain true identity, as one stopped for infraction (seat belt violation) must identify self, RCW 46.61.021, officer had reason to believe passenger would give a false name, thus detention was proper, *State v. Cook*, 104 Wn.App. 186 (2001), distinguishing *State v. Cole*, 73 Wn.App. 844 (1994), *State v. Barwick*, 66 Wn.App. 706 (1992); I.

***State v. Almanza-Guzman***, 94 Wn.App. 563 (1999)

Defendant enters gun show, fails to disable weapon as required at entrance, speaks Spanish to dealers-undercover border patrol agents and shows them his weapon, outside show defendant's vehicle is stopped by agents based upon his language and their knowledge that Washington rarely issues gun permits to aliens; held: language is not a proper consideration to justify an investigative stop, mere fact that state rarely issues gun permits to aliens is insufficient to suspect one of criminal activity; I.

***State v. Barnes***, 96 Wn.App. 217 (1999), *disapproved, in part, State v. D.E.D.,* 200 Wn.App. 484, 493-97 (2017)

Officer approaches defendant erroneously believing a warrant is outstanding, tells defendant there's a warrant and asks if he "would be willing to stick around while I check on it," defendant fidgets, puts hands in pocket, is searched, arrested but not charged for obstructing, drugs found; held: police communicating belief that there are lawful grounds to detain is coercive, encounter is not consensual, as a reasonable person so informed would not feel free to leave, evidence must be suppressed, *State v. Ellwood*, 52 Wn.App. 70, 73 (1988), *State v. Armenta*, 134 Wn.2d 1, 10-11 (1997), *State v. Coyne*, 99 Wn.App. 566 (2000), distinguishing *State v. Nettles*, 70 Wn.App. 706, 710 (1993), *State v. Richardson*, 64 Wn.App. 693, 695 (1992), *State v. Aranguren*, 42 Wn.App. 452, 455-56 (1985); unlawful detention is by definition not part of lawful police duties, thus arrest for obstructing was improper, *but see: State v. Mierz*, 127 Wn.2d 460 (1995), *State v. Hudson*, 56 Wn.App. 490 (1990), *State v. D.E.D.*, 200 Wn.App. 484, (2017), *State v. K.A.B.,* 14 Wn.App.2d 677 (2020); 2-1, III.

***Illinois v. Wardlow***, 145 L.Ed.2d 570 (2000)

Defendant, in high drug area, flees upon seeing police who chase, stop, frisk, find gun; held: unprovoked flight in high drug area is sufficiently indicative of wrongdoing to justify detention, *District of Columbia v. Wesby*, ___ U.S. ___ , 138 S.Ct. 577, 199 L.Ed.2d 453 (2018), distinguishing *Florida v. Royer*, 75 L.Ed.2d 229 (1983); 5-4.

***Florida v. J.L.***, 146 L.Ed.2d 254 (2000)

Anonymous call to police reports young black male at a bus stop wearing plaid shirt carrying a gun, police respond to specific bus stop, see black male in plaid shirt, frisk, find gun; held: anonymous tip that a person is carrying a gun, without more, is insufficient to justify a stop and frisk, distinguishing *Alabama v. White*, 110 L.Ed.2d 301 (1990), *cf.: State v. Franklin*, 41 Wn.App. 409 (1985), *Navarette v. California*, 572 U.S. 393, 188 L.Ed.2d 680 (2014), *State v. Saggers*, 182 Wn.App. 832 (2014); 9-0.

***State v. Coyne***, 99 Wn.App. 566 (2000)

Police are given a coat found by a citizen, defendants in car contact officer, one says that the coat is his, officer states he needs identification of both driver and passenger, officer testifies he was satisfied with driver's identification and ownership of coat, finds warrant for passenger, while retaining coat and driver's identification asks permission to search trunk which is granted, finds drugs; held: retaining coat and license was a seizure without authority, *State v. Ellwood*, 52 Wn.App. 70 (1988), *State v. Barnes*, 96 Wn.App. 217 (1999), *State v. O'Day,* 91 Wn.App. 244 (1998), *State v. Crane,* 105 Wn.App. 301 (2001), *overruled, on other grounds, State v. O'Neill,* 148 Wn.2d 564 (2008), *State v. Beito,* 147 Wn.App. 504 (2008), *State v. Carriero,* 8 Wn. App. 2d 641 (2019), *cf.: State v. Hansen*, 99 Wn.App. 575 (2000), **community caretaking function** was complete when police were satisfied of ownership, *State v. Markgraf*, 59 Wn.App. 509, 513 (1990), consent was tainted by the seizure, *State v. Soto-Garcia*, 68 Wn.App. 20 (1992), *overruled, in part, State v. Thorn,* 129 Wn.2d 347 (1996); III.

***State v. Hansen***, 99 Wn.App. 575 (2000)

Two officers approach defendant, ask to see identification, defendant hands it to an officer who hands it to the other officer who writes down information and returns it to defendant after 30 seconds, discover warrant, arrest, find drugs; held: handing license to other officer would not have led a reasonable person to believe that he was not free to leave, thus initial consensual encounter did not ripen into unlawful detention, *State v. Armenta*, 134 Wn.2d 1, 10-11 (1997), *State v. Vanderpool*, 145 Wn.App. 81 (2008), *State v. Afana*, 147 Wn.App. 843 (2008), *aff'd, on other grounds,* 169 Wn.2d 169 (2010), distinguishing *State v. Thomas,* 91 Wn.App. 195, 200-01 (1998), *State v. Dudas,* 52 Wn.App. 832, 834 (1988), *see: State v. Crane,* 105 Wn.App. 301 (2001), *overruled, on other grounds, State v. O'Neill,* 148 Wn.2d 564 (2008), *but see: State v. Beito*, 147 Wn.App. 504 (2008), *State v. Carriero,* 8 Wn. App. 2d 641 (2019); I.

***Spokane v. Hays***, 99 Wn.App. 653 (2000)

Police stop car for infraction, observe **passenger** manipulating an article of clothing, order passenger to open window, which he refuses, pull passenger from car who then refuses to cooperate with search, is convicted of obstructing; held: whether it is reasonable to order a passenger to get out or remain in a car depends upon relative numbers of officers vs. vehicle occupants, behavior of occupants, time and place of stop, traffic at scene, officer's familiarity with occupants, *State v. Mendez*, 137 Wn.2d 208, 220-21 (1999); here, passenger's behavior justified ordering him out of car, *State v. Reynolds*, 144 Wn.2d 282 (2001), *State v. Horace*, 144 Wn.2d 386 (2001); III.

***State v. Cormier***, 100 Wn.App. 457 (2000)

Police, serving a warrant, observe defendant at night ride by on bicycle several times, stop and stare, police approach, ask him to remove hands from pockets, defendant refuses, is told he will be arrested for obstructing, officers try to take him in custody, defendant strikes police who search and find drugs; held: police had no reasonable belief that defendant was armed, thus had no basis to stop; once defendant assaulted the officer, police had probable cause to arrest, *State v. Mierz*, 127 Wn.2d 460,, 50 A.L.R.5 921 (1995) *State v. Valentine*, 132 Wn.2d 1, 21-22 (1997), *State v. McKinlay*, 87 Wn.App. 394, 398-99 (1997), *State v. D.E.D.*, 200 Wn.App. 484, (2017), and may search incident to that arrest, irrespective of the legality of the initial encounter; 2-1, III.

***State v. Kinzy***, 141 Wn.2d 373 (2000)

Police observe girl whom they believe to be 11-13 years old in high crime area late at night with adults known to be associated with drugs, hail her, she walks away, restrain her, observe drugs; held: **community caretaking function** may not be used as a pretext for a criminal investigation; balancing a citizen's privacy interest in freedom from police intrusion against public interest in having police perform caretaking, privacy must prevail, *see: State v. Lawson,* 135 Wn.App. 430 (2006), *State v. Boisselle,* 194 Wn.2d (2019), police may conduct noncriminal investigation as long as it is necessary and strictly relevant to performance of caretaking function; 5-4.

***State v. Lemus***, 103 Wn.App. 94, 101 (2000)

Following lawful traffic stop, police observation of suspected cocaine residue on driver's pants (white powder) plus odor of intoxicants is sufficient to detain, *State v. Gonzales*, 46 Wn.App. 388, 394-95 (1986); III.

***City of Indianapolis v. Edmond***, 148 L.Ed.2d 333 (2000)

Police set up drug roadblock, stop a predetermined number of vehicles, ask for identification, look for signs of impairment, conduct open-view examination of cars, drug dog walks around vehicles, search if particularized suspicion develops; held: because primary purpose of stop is to detect evidence of ordinary criminal wrongdoing, as opposed to border, *United States v. Martinez-Fuerte*, 49 L.Ed.2d 1116 (1976), or sobriety checkpoints, *Michigan Dept. of State Police v. Sitz*, 110 L.Ed.2d 412 (1990), drug roadblock violates Fourth Amendment, see: *Delaware v. Prouse*, 59 L.Ed.2d 660 (1979), *Illinois v. Lidster*, 157 L.Ed.2d 843 (2004); 6-3.

***State v. Cook***, 104 Wn.App. 186 (2001)

During traffic stop, officer asks passenger for name, passenger gives a name which officer knows is wrong, demands identification, passenger opens cigarette box where he keeps his license, drugs fall out; held: an officer's request for passenger's identification is "unlikely to constitute a Fourth Amendment seizure," *State v. Armenta*, 134 Wn.2d 1, 11 (1997), *State v. Afana*, 147 Wn.App. 843 (2008), *aff'd, on other grounds,* 169 Wn.2d 169 (2010), *but see: State v. Rankin*, 151 Wn.2d 689 (2004), officer placing himself outside the passenger door so passenger couldn't leave is not a seizure where passenger never testifies that he wanted to leave, thus his freedom of movement was not restrained, *but see: State v. Byrd*, 110 Wn.App. 259 (2002), officer was justified in demanding identification when passenger lied about his identity, *State v. Chelly*, 94 Wn.App. 254, 261 (1999), *cf.: State v. Barwick*, 66 Wn.App. 706 (1992); II.

***State v. Crane***, 105 Wn.App. 301 (2001), *overruled, on other grounds, State v. O'Neill,* 148 Wn.2d 564 (2008)

Police are maintaining status quo on a house while awaiting a warrant, car drives up, defendant is passenger, defendant exits, is told to stop, police request identification, defendant complies, officer uses hand-held radio to call, discovers warrant, arrests defendant, finds drugs; held: while police may stop and question persons approaching a place to be searched to determine their business at the location and to prevent them from interfering with the search, *State v. Melin*, 27 Wn.App. 589, 592 (1980), there is no authority allowing police to question persons approaching a scene where police have not yet obtained a warrant; even with a warrant, such a stop is not a license to detain and frisk all who approach, absent a reasonable articulable

suspicion; while the initial request for identification was not a detention, *State v. Armenta*, 134 Wn.2d 1 (1997), *State v. Aranguren*, 42 Wn.App. 452, 455 (1985), *State v. Hansen*, 99 Wn.App. 575, 576 (2000), *see: State v. Rankin*, 151 Wn.2d 689 (2004), retaining identification during a warrants' check is a seizure, *State v. Coyne*, 99 Wn.App. 566, 572 (2000), *State v. Ellwood*, 52 Wn.App. 70, 73 (1988), *but see: State v. Vanderpool*, 145 Wn.App. 81 (2008), *State v. Afana*, 147 Wn.App. 843 (2008), *aff'd, on other grounds*, 169 Wn.2d 169 (2010); here, defendant complied with all police requests, there was no basis to suspect him, thus drugs suppressed; 2-1, II.

***State v. Penfield***, 106 Wn.App. 157 (2001)

Officer runs license check, finds female owner's license is suspended, stops vehicle, discovers driver is male, asks for license, driver states his license is suspended, is arrested, searched, drugs found; held: while police may stop a vehicle when they learn owner's privilege to drive is suspended, RCW 46.20.349, *Seattle v. Yeager*, 67 Wn.App. 41 (1992), *State v. Phillips*, 126 Wn.App. 584 (2005), *cf.: State v. Vanderpool*, 145 Wn.App. 81 (2008), once police determine that driver is not the owner, they may not, absent more, continue to detain, *State v. Creed*, 179 Wn.App. 534 (2014); III.

***State v. Reynolds***, 144 Wn.2d 282 (2001)

Lone officer lawfully stops vehicle, observes coat in vehicle, lawfully arrests driver, passenger leaves car, officer asks passenger to stay in car, when officer returns to suspect's car and observes coat stuffed underneath car, searches it, finds drugs; held: police may order passenger into or out of vehicle only if officer has legitimate safety concerns, *State v. Mendez*, 137 Wn.2d 208 (1999), factors include (1) number of officers vs. number of occupants; (2) time of day, (3) location of stop, (4) traffic at scene, (5) officer knowledge of occupants, and (6) whether officer arrested driver, *State v. Parker*, 139 Wn.2d 486 (1999), *see: State v. Horace*, 144 Wn.2d 386 (2001), *see: State v. Rankin*, 151 Wn.2d 689 (2004); here, passenger abandoned coat without a causal nexus to alleged unlawful conduct by police, thus seizure of drugs from coat was lawful, *cf.: State v. Reichenbach*, 153 Wn.2d 126 (2004); 9-0.

***State v. O'Cain***, 108 Wn.App. 542 (2001)

Experienced narcotics officer observing two vehicles parked side-by-side in the middle of the day in a 7-11 parking lot, occupants conversing, none appear to be shopping has a hunch but not a well-founded suspicion that a narcotics transaction had occurred, *Terry v. Ohio*, 20 L.Ed.2d 889 (1968); I.

***United States v. Arvizu***, 151 L.Ed.2d 740 (2002)

In determining whether a police officer has a particularized and objective basis for suspecting legal wrongdoing, court should look to totality of the circumstances and should not reject factors merely because they have, by themselves, an innocent explanation; 9-0.

***State v. Duncan***, 146 Wn.2d 166 (2002)

Police observe defendant in a park next to open alcohol container, possession of an open container is a civil infraction (although police apparently believed it was a crime, at 173), pat him down, find contraband; held: police may not patdown a suspect for a non-criminal infraction, *Terry v. Ohio* is inapplicable for a non-traffic infraction, *State v. Day*, 161 Wn.2d 889

(2007); because defendant did not actually possess the container, the infraction did not occur in the presence of the officer, so police had no basis to stop defendant, RCW 7.80.050(2); 9-0.

***State v. Byrd***, 110 Wn.App. 259 (2002)

Police observe vehicle with expired tabs, observe trip permit in back window, pull over car to see if permit is valid, after stop officer observes equipment violation and that passenger is not wearing seat belt, discovers that permit is valid, finds warrant for passenger, arrests, searches, finds drugs; held: passenger has standing to challenge traffic stop, stopping vehicle to verify validity of trip permit is impermissible, equipment violation cannot justify stop since it was seen after the stop; I.

***State v. McKinney***, 148 Wn.2d 20 (2002)

In consolidated cases, police run license plate number in DOL database, discover that (1) driver's license is suspended, (2) a no-contact order exists and passenger is protected party, (3) driver has a warrant, all are arrested; held: drivers have no protected privacy interest in DOL driver's record pursuant to Fourth Amendment reasonable expectation of privacy analysis nor art. I, § 7 expectation of privacy which a citizen should be entitled to hold, *State v. Myrick*, 102 Wn.2d 506, *State v. McCready*, 123 Wn.2d 260, 270 (1994), *State v. Harlow*, 85 Wn.App. 557 (1997), *State v. Hathaway*, 161 Wn.App. 634, 641-45 (2011), distinguishing *State v. Maxfield;* affirms *State v. Martin*, 106 Wn.App. 850 (2001); 9-0.

***State v. Wayman-Burks***, 114 Wn.App. 109 (2002)

"Severely cracked windshield" justifies traffic stop, RCW 46.37.010(1); III.

***State v. O'Neill***, 148 Wn.2d 564 (2003)

Officer observes car in parking lot of recently burglarized business, approaches, defendant says he drove there until his car broke, officer asks for identification, driver responds his license is suspended, officer asks defendant to step out of car, observes "cook spoon" on floor, asks repeatedly for consent to search which is eventually granted, police find drugs; held: approaching and asking for identification is not a seizure, *State v. Young*, 135 Wn.2d 498 (1998), *State v. Armenta*, 134 Wn.2d 1, 11 (1997), *State v. Cerillo*, 122 Wn.App. 341 (2004), *State v. Afana*, 147 Wn.App. 843 (2008), *aff'd, on other grounds,* 169 Wn.2d 169 (2010), effectively overruling *State v. Markgraf*, 59 Wn.App. 509 (1990); when asking defendant to step outside, officer had probable cause to arrest for driving while license suspended, thus defendant was seized at that point; observation of cook spoon meets plain view test; pursuant to CONST. art. I, § 7, a custodial arrest is a prerequisite to a search incident to arrest, because defendant was not arrested, drugs must be suppressed, overruling *State v. Brooks*, 57 Wn.2d 422 (1960), *State v. Smith*, 88 Wn.2d 127, 138 (1977), effectively overruling, in part, *State v. Garcia*, 35 Wn.App. 174 (1983), *State v. McIntosh*, 42 Wn.App. 573 (1986), *State v. Brantigan*, 59 Wn.App. 481 (1990), *State v. Harrell*, 83 Wn.App. 393 (1996); reverses *State v. O'Neill,* 104 Wn.App. 850 (2001); 5-4.

***United States v. Drayton***, 153 L.Ed.2d 242 (2002)

Police board bus, state they are looking for drugs, ask defendant "mind if I check you?," defendant agrees, patdown reveals drugs; held: police are not obliged to advise bus passengers of their right to refuse search as they were not seized, were free to leave, nothing said would

suggest to a reasonable person that he was barred from leaving or refusing, *Florida v. Bostick*, 115 L.Ed.2d 389 (1991), *but cf.: State v. Rankin*, 151 Wn.2d 689 (2004); 6-3.

***Illinois v. Lidster***, 157 L.Ed.2d 843 (2004)

A week after hit-an-run fatality, police set up checkpoint at place of collision, stop all cars for 10-15 seconds to ask drivers if they saw anything, hand out flyer, officer smells alcohol on defendant's breath, detain, perform tests, arrest; held: purpose of stop was not to determine if occupants were committing a crime, distinguishing *City of Indianapolis v. Edmond*, 148 L.Ed.2d 333 (2000), "special law enforcement concerns will sometimes justify highway stops without individualized suspicion," at 851, *Michigan Dept. of State Police v. Sitz*, 110 L.Ed.2d 412 (1990), stops involved minimal intrusion and thus provided "little reason for anxiety or alarm," at 853, detention was thus valid under Fourth Amendment, *State v. Silvernail*, 25 Wn.App. 185 (1980), overruled, in part, on other grounds, *State v. McKim*, 98 Wn.2d 111 (1982), *but see: State v. Marchand*, 104 Wn.2d 434 (1985); 6-3.

***State v. Phillips***, 126 Wn.App. 584 (2005)

Police randomly run defendant's plate, find that owner's license was suspended, stop vehicle, arrest driver-owner; held: police may stop a vehicle when they learn owner's privilege to drive is suspended, RCW 46.20.349, *Seattle v. Yeager*, 67 Wn.App. 41 (1992), *cf.: State v. Vanderpool*, 145 Wn.App. 81, 85 (2008), need not compare a description of the registered owner to the driver before proceeding, distinguishing *State v. Penfield*, 106 Wn.App. 157 (2001); III.

***State v. Carlson***, 130 Wn.App. 589 (2005)

Two "rough dressed, unkempt and dirty" men enter rural store, one purchases muriatic acid, the other purchases denatured alcohol, store manager reports to police the purchase, as his training taught him that when these items are mixed, along with others, one can manufacture methamphetamine, police stop defendants' car, discover pseudoephedrine, defendants are convicted of possession of pseudoephedrine with intent to manufacture meth; held: while entering a store with a companion, splitting up and buying pseudoephedrine products may be enough for an investigative stop, here the activity was so innocuous, insufficient to support a *Terry* stop, *cf.: State v. Keller-Deen*, 137 Wn.App. 396 (2007); 2-1, III.

***State v. Keller-Deen***, 137 Wn.App. 396 (2007)

Defendant and cohort are seen making separate purchases of two meth precursor item, store detective "believed" cohort made previous precursor purchases, defendant and cohort meet in parking lot, scan parking lot, police recognize cohort from other purchases, car registered to defendant as being associated with other precursor purchases, police stop car, handcuff defendant-passenger, arrest driver for warrants, search, find drugs; held: facts support reasonable suspicion to conduct *Terry* stop, *State v. Glover*, 116 Wn.2d 509 (1991), *State v. Samsel*, 39 Wn.App. 564, 570 (1985), *see: State v. Thierry*, 60 Wn.App. 445 (1991), distinguishing *State v. Carlson*, 130 Wn.App. 589, 593 (2005); III.

***State v. Bee Xiong***, 137 Wn.App. 720 (2007)

Police, serving a felony warrant on Kheng Xiong stop defendant who states, accurately, that he is the brother of the wanted person, lacks identification, defendant is handcuffed, police notice a hard object in pocket, defendant pulls away and states he does not wish to be searched, police pat him down, find pipe, search incident to arrest, find drugs; held: similarity of

appearance between defendant and brother plus time to clarify initial identification plus fact that defendant was in wanted person's home plus bulge in pocket plus reaction when police tried to touch it justify initial search which led to pipe; 2-1, III.

***State v. Day***, 161 Wn.2d 889 (2007)

Police observe car illegally parked, approach and see defendant in driver's seat, holster on floor, defendant admits to a gun in car, police remove defendant, frisk, cuff, find gun in car, discover gun is stolen, search further and find drugs; held: where police merely suspect a civil infraction, there is no ground for a *Terry* stop and no grounds to frisk, *State v. Larson*, 93 Wn.2d 638 (1980), *State v. Duncan*, 146 Wn.2d 166 (2002); reverses *State v. Day*, 130 Wn.App. 622 (2005); 6-3.

***State v. Bee Xiong***, 164 Wn.2d 506 (2008)

Police, serving a warrant on Kheng Xiong at his residence, defendant drives up, officer thinks he is Kheng Xiong, defendant is immediately handcuffed, frisked, tells police he is Bee Xiong, brother of Kheng Xiong, officer notices a bulge, touches the bulge, defendant pulls away and says he doesn't wish to be searched, police squeeze bulge, decide it is a "potential weapon," pull out drug pipe with drugs; held: because no specific facts support a reasonable belief that defendant was armed and presently dangerous, as defendant was handcuffed and made no suspicious movements, the frisk was unlawful, *see: State v. Setterstrom*, 163 Wn.2d 621 (2008), *State v. Smith*, 145 Wn.App. 268 (2008), *reversing State v. Bee Xiong*, 137 Wn.App. 720 (2007); 9-0.

***State v. Bray***, 143 Wn.App. 148 (2008)

Police observe defendant driving in fenced storage unit compound at 2:30 a.m., lights off, looking at doors of units, aware that defendant had been stopped two earlier times in same area, aware that burglaries had occurred nearby, detain defendant for 30 minutes, discovery wire cutters, twine, wire, miner's lamp, gloves, camouflage clothing, unit door broken, search defendant's van, find fruits of burglaries; held: *Terry* stop was valid as totality of circumstances establish particularized suspicion, *State v. Laskowski*, 88 Wn.App. 858 (1997), distinguishing *State v. Martinez*, 135 Wn.App. 174 (2006); length of investigation and detention was reasonably related in scope to the circumstances, defendant's explanation did nothing to dispel officers' suspicions, scope and duration of stop bay be extended if the investigation confirms police suspicions, *State v. Williams*, 102 Wn.2d 733, 738 (1984); III.

***State v. Gatewood***, 163 Wn.2d 534 (2008)

Defendant, sitting in bus shelter, widens eyes when he sees police, twists like he was trying to hide something, leaves bus shelter and jaywalks, police order him to stop, defendant continues walking, sloughs gun, police find drugs at bus shelter; held: insufficient for a *Terry* stop, all evidence suppressed, *State v. Cardenas-Muratalla,* 179 Wn.App. 307 (2013), *State v. Tarango,* 7 Wn.App.2d 425 (2019); 9-0.

***State v. Rowell***, 144 Wn.App .453 (2008)

Within minutes of early-morning shots fired call, officer observes defendant riding a bicycle fast in area of call, no others present, stopped by officer, defendant is nervous and fidgety, asked for identification, warrant discovered, arrested, drugs found; held: apparent flight

was reasonably suspicious to justify a stop, *State v. Price*, 126 Wn.App. 617, 645 (2005), *but see: State v. Bruton*, 66 Wn.2d 111, 112 (1965), warrant check during an investigatory stop is an accepted, routine police procedure, *State v. Madrigal*, 65 Wn.App. 279, 283 (1992); 2-1, III.

***State v. Mitchell***, 145 Wn.App. 1 (2008)

Defendant reports that he was robbed, police ask him to remain at scene during the investigation, observe marijuana in his car, drug dog signals drugs in car, police search and find cocaine; held: brief detention of a potential witness to a crime is permitted by the Fourth Amendment, *cf.: Florida v. Jardines*, 569 U.S. 1, 185 L.Ed.2d 495 (2013); I.

***State v. Vanderpool***, 145 Wn.App. 81 (2008)

Police observe defendant drive, park, begin walking from car, ask for identification, defendant gives officer identification card, officer runs license check, finds license suspended, arrest, search, find drugs; held: asking for identification and running license check is not a seizure, *State v. Dudas*, 52 Wn.App. 832 (1988), *State v. Hansen*, 99 Wn.App. 575 (2000), *but see: State v. Ellwood*, 52 Wn.App. 70 (1988), *State v. Thomas*, 91 Wn.App. 195 (1998), *State v. Crane*, 105 Wn.App. 301 (2001); III.

***State v. Beito***, 147 Wn.App. 504 (2008)

Officers observe car parked in open convenience store lot, park behind car, approach, ask for identification, driver asks to leave, police say no, run passenger's name, find warrant, search, find contraband; held: immobilizing car by blocking it and stating driver can't leave amounts to a seizure without reasonable articulable suspicion, *State v. Thomas*, 91 Wn.App. 195, 200-02 (1998), *State v. Dudas*, 52 Wn.App. 832, 834 (1988), *State v. O'Day*, 91 Wn.App. 244, 252 (1998), *State v. Carriero*, 8 Wn.App.2d (2019), thus contraband suppressed; III.

***State v. Lee***, 147 Wn.App. 912 (2008)

Police observe pedestrian approached by a car, speak to occupants and walk away looking frightened, officer approaches woman who identifies herself and says occupants of car asked her to smoke crack with them, showing her bag of crack and pipe, police stop car, order passenger to exit, pipe falls from his person, arrest for drug parephernalia, search, find drugs; held: *Aguilar-Spinelli* test is inapplicable to a *Terry* stop, distinguishing *State v. Jackson*, 102 Wn.2d 432 (1984), totality of circumstances here was sufficient for police to stop car; I.

***State v. Marcum***, 149 Wn.App. 894 (2009)

In exchange for police not pursuing unrelated criminal charges, informant who had previously provided accurate information states that he had purchased drugs from defendant, describes defendant, his home and his truck, arranges to buy drugs, police follow defendant's truck toward place where he was to meet informant, stop him for speeding even though police acknowledge he was not speeding, smell marijuana, remove defendant from vehicle, drug dog reacts positively, defendant admits to drugs in car, police search and find drugs, trial court suppresses; held: an informant's track record of prior drug buys meets *Aguilar/Spinelli* test, *State v. Fisher*, 96 Wn.2d 962, 964 (1982), a higher standard than the totality of the circumstances required for a *Terry* stop, *State v. Jackson*, 102 Wn.2d 432, 435-36 (1984), *State v. Lee*, 147 Wn.App. 912, 916 (2008), *State v. Randall*, 73 Wn.App. 225, 228-29 (1994), thus stop here was valid, *State v. Kennedy*, 107 Wn.2d 1 (1986); informant's tips that are accurate but do not lead to

arrests are sufficient, *State v. Fisher, supra., at* 965; determination that reasonable suspicion exists need not rule out the possibility of innocent conduct, *United States v. Arvizu,* 151 L.Ed.2d 740, 751-52 (2002); informant's motive to avoid prosecution is sufficient to support reliability, *State v. Bean,* 89 Wn.2d 468, 471 (1978), *State v. Estorga,* 60 Wn.App. 298 (1991), *State v. Lopez,* 70 Wn.App. 259 (1993), *State v. Ollivier,* 161 Wn.App. 307 (2011), 178 Wn.2d 813, 851 (2013), *but see: State v. Morrell,* 16 Wn.App.2d 695 (2021); the fact that defendant is subjected to a *Terry* stop by numerous police vehicles does not convert the stop to a custodial arrest, *see: Arizona v. Johnson,* 172 L.Ed.2d 694 (2009); a detaining officer may ask "a moderate number of questions during a *Terry* stop to … confirm or dispel the officer's suspicions without rendering the suspect 'in custody' for the purposes of *Miranda,*" *State v. Heritage,* 152 Wn.2d 210, 218 (2004); I.

***State v. Harrington***, 167 Wn.2d 656 (2009)

Officer observes defendant walking, approaches, asks to talk, defendant says he's coming from his sister's house, doesn't know address, bulges in pockets, fidgety, hands in pocket, trooper approaches, officer asks to pat defendant down, telling him he is not under arrest, defendant agrees, officer feels hard cylinder, asks what it is, defendant responds it's his meth pipe, defendant is arrested, drugs found; held: while initial contact was not a seizure, *State v. Bailey,* 154 Wn.App. 295 (2010), sudden arrival of second officer, request to remove hands from pockets, request to frisk would all lead a reasonable person to feel he was not free to leave, *State v. Gantt,* 163 Wn.App. 133 (2011), *State v. Ibarra Guevara,* 172 Wn.App. 184 (2012), *State v. Butler,* 2 Wn.App. 2d 549, 560-61 (2018), *State v. Butler,* 2 Wn.App. 2d 549, 560-61 (2018), *cf.: State v. Smith,* 154 Wn.App. 695 (2010), thus consent to search was obtained through exploitation of a prior illegal seizure requiring suppression; reverses *State v. Harrington* 144 Wn.App. 558 (2008), *see: State v. Young,* 135 Wn.2d 498 (1998), *United States v. Mendenhall,* 64 L.Ed.2d 497 (1980), *State v. Soto-Garcia,* 68 Wn.App. 20 (1992), *overruled, on other grounds, State v. Thorn,* 129 Wn.2d 347 (1996), *cf.: State v. Nettles,* 70 Wn.App. 706, 712 (1993), *State v. Johnson,* 156 Wn.App. 82, 90-92 (2010); 9-0.

***State v. Doughty***, 170 Wn.2d 57 (2010)

Defendant visits a house identified as a drug house for two minutes early in the morning, drives off, is stopped by police, license suspended, searched, drugs found; held: police may not seize a person who visits a suspected drug house merely because the person was there at 3:20 a.m., *State v. Richardson,* 64 Wn.App. 693 (1992), *State v. Diluzio,* 162 Wn.App. 585 (2011), *State v. Fuentes,* 183 Wn.2d 149 (2015), *State v. Weyand,* 188 Wn.2d 804 (2017), *State v. Johnson,* 8 Wn.App.2d 728 (2019), reversing *State v. Doughty,* 148 Wn.App. 585 (2009); 6-3.

***State v. Bailey***, 154 Wn.App. 295 (2010)

Officer sees defendant walking on deserted street, asks if he "had a minute," defendant walks toward officer who asks where he's going, says he is going to a friend's, is asked for identification, defendant gives identification and says he has a warrant, officer verifies warrant, arrests, finds drugs; held: approach and request for identification "in the course of a casual conversation" is a social contact not a seizure, degree of intrusion is less than *State v. Harrington,* 167 Wn.2d 656 (2009), distinguishing *State v. Gleason,* 70 Wn.App. 13 (1993) where tone of request plus presence of two officers created more of an "environment of investigation," *see: State v. Young,* 135 Wn.2d 498 (1998), *State v. Johnson,* 156 Wn.App. 82,

90-92 (2010), *State v. Gantt*, 163 Wn.App. 133 (2011), *cf.: State v. Ibarra Guevara*, 172 Wn.App. 184 (2012); III.

***State v. Smith***, 154 Wn.App. 695 (2010)

Police, with DOC officers, check on client in motel, ask visiting defendant and another to step outside, defendant leaves, other man does not, officer outside room asks for name, finds no warrants but eye color is different than description in computer, asks for identification, defendant hands a card with same eye color discrepancy, asks to look in wallet, finds drugs; held: defendant was not directed to remain in the area outside the motel room, officer's conduct was not threatening although other armed officers were present, request for identification is not a seizure, *State v. Ellwood*, 52 Wn.App. 70, 73 (1988), *State v. O'Neill*, 148 Wn.2d 564 (2003), holding identification in his presence is not a seizure, *see State v. Hansen*, 99 Wn.App. 575, 578-89 (2000); while "progressive intrusion" may amount to a seizure, *State v. Harrington*, 167 Wn.2d 656, 669 (2009), here defendant was not asked about illegal activity, there was no attempt to control his actions or frisk him, thus defendant was not seized before consenting to search of wallet; II.

***State v. Diluzio***, 162 Wn.App. 585 (2011)

Officer, in high prostitution area, observes defendant-driver talking to a female pedestrian, she gets in car, officer stops car, asks for identification, finds warrant, searches, finds drugs; held: investigatory stop must be justified at its inception, *State v. Gatewood*, 163 Wn.2d 534, 539 (2008), here "incomplete observations," lacking money change hands or overheard conversations or knowledge that either were involved in prostitution establish insufficient basis for *Terry* stop, *State v. Doughty*, 170 Wn.2d 57 (2010), *State v. Gleason*, 70 Wn.App. 13 (1983), *State v. Richardson*, 64 Wn.App. 693 (1992), *State v. Cardenas-Muratalla*, 179 Wn.App. 307 (2013), *State v. Fuentes*, 183 Wn.2d 149 (2015), *State v. Weyand*, 188 Wn.2d 804 (2017), *State v. Tarango*, 7 Wn.App.2d 425 (2019, *State v. Johnson*, 8 Wn.App.2d 728 (2019); 2-1, III.

***State v. Gantt***, 163 Wn.App. 133 (2011)

Police observe van stopped, later see it again in front of a driveway with man walking towards residence, officer activates emergency lights and pull up behind van, after further investigation observe through van window property that had been stolen that night in a burglary, arrest, search; held: while illumination by a spotlight is not a sufficient show of authority, *State v. Young*, 135 Wn.2d 498 (1998), use of emergency lights constitutes a display of authority such that a reasonable person would believe he was seized, *State v. DeArman*, 54 Wn.App. 621 (1989), *State v. Stroud*, 30 Wn.App. 392, 396 (1981), more authority than a social contact, distinguishing *State v. Harrington*, 167 Wn.2d 656 (2009), *State v. Ibarra Guevara*, 172 Wn.App. 184 (2012); 2-1, III.

***State v. Snapp***, 174 Wn.2d 177, 197-99 (2012)

Police stop vehicle for no headlights after dark, smell marijuana, search, find drugs, at hearing officer testifies it was dark, cold and icy, stop occurred 24 minutes after sunset, RCW 46.37.020 requires lights 30 minutes after sunset; held: officer reasonably believed an infraction was committed, thus *Terry* stop was valid, *cf.: State v. Creed*, 179 Wn.App. 534 (2014); 8-1.

***State v. Young***, 167 Wn.App. 922 (2012)

Officer asks defendant her name because her actions in a market were suspicious, defendant gives correct name, local warrant check is clear, defendant leaves, then two officers approach defendant with back against a wall at 45-degree angles from her, ask for social security number, open her bag to show she had not shoplifted, she walks away, police do a statewide warrant check, discover warrant, arrest, find drugs; held: police lacked a reason to suspect defendant was or would engage in criminal wrongdoing, any reasonable person in defendant's position, with back to a wall and police on either side would not feel free to leave without answering questions; II.

***State v. Ibarra Guevara***, 172 Wn.App. 184 (2012)

School resource officer observes students walking towards an area where students smoke marijuana five minutes before classes start, follows in patrol car, tops behind them, walks toward them, ask what they are doing, tells them he believes they are going to use drugs, ask to see contents of pockets, defendant empties pockets, officer observes baggie, asks what's in it, defendant says drugs, trial court concludes the stop was a "social contact;" held: request to search after voicing suspicion of drug suspicion is inconsistent with a social contact, defendant "would hardly have felt free to simply walk away," *State v. Soto-Garcia*, 68 Wn.App. 20 (1992), *overruled, on other grounds, State v. Thorn*, 129 Wn.2d 347 (1996), *State v. Harrington*, 167 Wn.2d 656 (2009), *State v. Johnson*, 8 Wn.App.2d 728 (2019), *cf.: State v. Nettles*, 70 Wn.App. 706 (1993); III.

***Bailey v. United States***, 568 U.S. 186, 185 L.Ed.2d 19 (2013)

Police, about to serve a search warrant, observe defendant, meeting description of suspect, leave residence to be searched, follow him for a mile, detain him, patdown, find evidence; held: while police may detain individuals incident to a search warrant, *Michigan v. Summers*, 452 U.S. 692, 69 L.Ed.2d 340 (1981), once an individual has left the immediate vicinity of premises to be searched, detention must be justified by some other rationale; 6-3.

***State v. Moreno***, 173 Wn.App. 479 (2013)

Radio reports shots fired, police arrive at place reported, defendant's car is seen a block away, officer knew shots came in a specific gang neighborhood, driver is wearing shirt of rival gang, car "hurriedly leaving the alley," is sufficient for *Terry* stop; III.

***State v. Bonds***, 174 Wn.App. 553 (2013)

Police run random license plate check, learn from DOL that car had been sold and owner failed to change title within 45 days, RCW 46.12.101(6) (2008), a continuing misdemeanor offense, officer testifies he believed that he recognized passenger who he believed had a DOC warrant, stop car, learn that new owner had properly transferred title but discover no contact order between passenger and driver, defendant convicted of NCO violation; held: stop of the car for the transfer title violation was valid to investigate whether driver was registered owner, officer's belief that passenger had a warrant established a sufficient probability, enough to perform a traffic stop, officer's belief was based upon more than a hunch; neither reasons for the stop were pretextual; II.

***Navarette v. California***, 572 U.S. 393, 188 L.Ed.2d 680 (2014)

Anonymous citizen calls 911, reports a specific vehicle ran her off the road, provides license plate, police stop the vehicle, smell marijuana, search, find drugs; held: while an anonymous tip alone cannot justify an investigative stop, *Florida v. J.L.*, 529 U.S. 266, 146 L.Ed.2d 254 (2000), caller's detailed eyewitness account establishes basis of knowledge, relaying a startling event supports veracity as does police corroborating that the vehicle was where the caller predicted, *Alabama v. White,* 496 U.S. 325, 110 L.Ed.2d 310 (1990), use of 911 supports veracity as it is traceable to the caller, thus stop was proper, *see: State v. Howerton,* 187 Wn.App. 357 (2015), *but see: State v. Saggers,* 182 Wn.App. 832 (2014); 5-4.

***Heien v. North Carolina,*** 574 U.S. 54, 135 S.Ct. 530, 190 L.Ed.2d 475 (2014)
Defendant is driving with one burnt out brake light, sheriff asks to search car, finds drugs, state law does not require two brake lights; held: a reasonable mistake of law by a police officer (here, there was some ambiguity and inconsistency in the equipment code, *see:* Kagan, J., concurring) may constitutionally establish reasonable suspicion to stop a car, *see also: Michigan v. DeFillippo,* 443 U.S. 31, 61 L.Ed.2d 343 (1979), *but see: State v. Brown,* 193 Wn.2d 280 (2019); 8-1.

***State v. Cardenas-Muratalla***, 179 Wn.App. 307 (2013)
Anonymous tip reports man with a gun, police observe defendant matching description, draw weapons, order defendant to ground, defendant does not comply, police shoot him and recover handgun, defendant is convicted of felon in possession; held: an informant's tip lacking reliability is not sufficient to justify an investigatory stop, *Florida v. J.L.*, 529 U.S. 266, 146 L.Ed.2d 254 (2000), *State v. Vandover,* 63 Wn.App. 754 (1992); while an accurate description of a suspect's location and appearance is reliable, it must also be reliable in its assertion of illegality, *Alabama v. White,* 496 U.S. 325, 331-32, 110 L.Ed.2d 301 (1990), *State v. Gatewood,* 163 Wn.2d 534 (2008), *State v. Carriero,* 8 Wn. App. 2d 641 (2019); presence of a firearm in public alone is insufficient for an investigatory stop, *Florida v. J.L., supra. at* 272, *State v. Tarango,* 7 Wn.App.2d 425 (2019); I.

***State v. Creed***, 179 Wn.App. 534 (2014)
Officer runs defendant's license plate, enters wrong letter, computer shows vehicle stolen, stops car, before approaching runs correct plate and discovers it was not stolen, approaches to tell her she can go but observes her toss item behind seat, uses flashlight, sees drugs; held: while police may reasonably but erroneously believe a violation occurred based upon objective facts, *State v. Snapp,* 174 Wn.2d 177 (2012), and may reasonably rely on incorrect information provided by third parties, *State v. Gaddy,* 152 Wn.2d 64 (2004), they may not reasonably rely on their own mistaken assessment of material facts, *State v. Mance,* 82 Wn.App. 539 (1996), *State v. Penfield,* 106 Wn.App. 157 (2001), to justify an investigation; here, after realizing his error officer ordered driver to remain in car, held her for several seconds while he checked the proper number, never turned off overhead lights, used flashlight to look in vehicle, all of which were improper; 2-1, III.

***State v. Fuentes***, 183 Wn.2d 149 (2015)
Two cases consolidated on appeal: *State v. Sandoz:* police observing a high drug crime apartment building for which they had a trespass agreement and know residents and their vehicles, see defendant who appears surprised, pale and shaking, police do not recognize vehicle,

ask him "if he would mind stepping out of the vehicle," suspect admits he has a crack pipe, hands it to officer, is arrested for paraphernalia, during search police find drugs; held: startled reaction to police does not amount to a reasonable suspicion, *State v. Gatewood,* 163 Wn.2d 534, 540 (2008), nor does suspect being pale and shaking, unknown vehicle may justify a contact but is not connected with anything observed about defendant, trespass agreement does not mean a person is not an invited guest, *State v. Doughty*, 170 Wn.2d 57 (2010), *State v. Diluzio,* 162 Wn.App. 585 (2011), totality of circumstances do not justify a *Terry* stop, *State v. Weyand,* 188 Wn.2d 804 (2017); *State v. Fuentes:* police have made controlled buys from an apartment, observe high foot traffic at apartment, see suspect enter apartment, return to car, get a bag and returns to apartment, then leaves with same bag with less content, drives off, police stop vehicle, advise, defendant admits that she delivered drugs; held: establishes a reasonable suspicion for *Terry* stop, *cf.: State v. Weyand, supra.,* distinguishing *State v. Richardson,* 64 Wn.App. 693 (1992), *State v. Doughty, supra.;* 5-4.

***State v. Z.U.E.***, 183 Wn.2d 610 (2015)

911 caller states she observed a woman approximately 17 years old with a gun; held: an informant's report can justify an investigative stop when (1) the information available to the officer showed that the informant was reliable, or (2) when officer's observations corroborate either criminal activity or that informant's report was obtained in a reliable fashion, *State v. Sieler,* 95 Wn.2d 43, 47-48 (1980), *State v. Lesnick,* 84 Wn.2d 940, 944 (1975); named but otherwise unknown informant is not presumed reliable, *State v. Sieler, supra. at* 48, *State v. Hopkins,* 128 Wn.App. 855, 858-89 (2005), *State v. Morrell,* 16 Wn.App.2d 695 (2021, *but see: State v. Howerton,* 187 Wn.App. 357 (2015); multiple 911 callers providing similar information is a factor; informant's tip must contain objective facts of criminal activity to justify a detention, *State v. Hopkins, supra. at* 862-64; while possession of a gun by a minor is a crime, here there was not factual basis for the estimate of the age; affirms *State v. Z.U.E.,* 178 Wn.App. 769 (2014); 9-0.

***State v. Howerton***, 187 Wn.App. 357 (2015)

Citizen calls 911, identifies herself, says she witnessed car prowl by "black male, average build, 5'7", baggy black leather jacket and baggy pants," officer arrives six minutes later, observed man meeting description walking in same directly described by citizen who turns and walks away upon seeing officer, stops, cuffs, 911 caller says it's the car prowler; held: known citizen informants are presumptively reliable, *State v. Gaddy,* 152 Wn.2d 64, 73 (2004), *but see: State v. Z.U.E.,* 178 Wn.App. 769 (2014), *State v. Sieler,* 95 Wn.2d 43, 47-48 (1980); eyewitness contemporaneously reporting "objective facts that indicated criminal rather than legal activity" reinforces reliability, at 368-69; call from a personal cell phone rather than a pay phone, *see: State v. Saggers,* 182 Wn.App. 832 (2014), enhances reliability; detailed observations of officer confirming 911 tip regarding description, direction of travel, "flight" are factors that support well-founded suspicion, *State v. Marcum,* 149 Wn.App. 894, 907-08 (2009); I.

***State v. Flores***, 186 Wn.2d 506 (2016)

Police receive anonymous report that a named person assaulted another with a gun, officer observes the suspect walking with defendant, order both down on their knees, both comply, after suspect is cuffed police order defendant to walk backwards towards them, defendant complies and states he has a gun, police seize gun, defendant is charged with felon in

possession; held: police had reason to seize defendant to secure scene and assure defendant did not interfere with arrest of the suspect, *State v. Parker*, 139 Wn.2d 486, 497 (1999), *State v. Mendez*, 137 Wn.2d 208 (1999), *abrogated, on other grounds*, *Brendlin v. California*, 551 U.S. 249, 168 L.Ed.2d 132 (2007), *State v. Horrace*, 144 Wn.2d 386 (2001), an objective rationale existed to seize the non-arrested defendant to secure the scene as officer was alone at first, recognized suspect as one who had held firearms, defendant and suspect were together and remained together, defendant volunteered that he had a gun and thus police had reasonable suspicion to further detain and seize the gun, *State v. King*, 89 Wn.App. 612 (1986); *Terry* "individualized reasonable articulable suspicion/armed and dangerous" rationale is inapplicable, apparently because defendant was not a suspect; court rejects an "automatic companion rule" which would allow all companions of any arrestee to be subject to a pat-down, requiring police to articulate an objective rationale to control the scene; reverses *State v. Flores*, 188 Wn.App. 305 (2015); 7-2.

***State v. Weyand***, 188 Wn.2d 804 (2017)

Police observe defendant leave a known drug house at 2:30 a.m., looks up and down the street twice then drives off, stopped, drugs found; held: a reasonable observer would not have grounds to believe that a crime was occurring or was about to occur, reliance upon "furtive movements" is "problematic;" reasonable suspicion must be individualized to the person being stopped, leaving a known drug house is no more than being located in a high crime area which is insufficient, *State v. Larson* 93 Wn.2d 638, 645 (1980), *State v. Fuentes*, 183 Wn.2d 149 (2015), *State v. Richardson*, 64 Wn.App. 693 (1992), *State v. Doughty*, 170 Wn.2d 57 (2010), *State v. Diluzio*, 162 Wn.App. 585 (2011), *State v. Johnson*, 8 Wn.App.2d 728 (2019), *cf.: State v. Kennedy*, 107 Wn.2d 1 (1986); 9-0.

***State v. Kocher***, 199 Wn.App. 336 (2017)

Trooper observes defendant as she drove in the far right lane southbound on Interstate 5, as traffic to defendant's front and left come to a stop defendant drives two wheels of her vehicle over the fog line for approximately 200 feet, stopped and found to be under the influence; held: driving with wheels off roadway, RCW 46.61.670 (1977), applies rather than driving on roadways lined for traffic, RCW 46.61.140 (1965), which provides that car must be driven within lanes "as nearly as practicable," thus trooper had a reasonable basis to stop the vehicle, *see: State v. Brooks*, 2 Wn.App.2d 371 (2018), distinguishing *State v. Prado*, 145 Wn.App. 646 (2008) and *State v. Huffman*, 185 Wn.App. 98, 107 (2014), *State v. Alvarez*, 6 Wn.App.2d 398 (2018); I.

***State v. D.E.D.***, 200 Wn.App. 484 (2017)

Following an illegal seizure by police a defendant's behavior obstructing (or assaulting) a police officer is not subject to suppression, *State v. Mierz*, 127 Wn.2d 460, 474-75 (1995), *State v. Bonds*, 98 Wn.2d 1, 10-14 (1982), *State v. Hoffman*, 116 Wn.2d 51, (1991), *State v. Holeman*, 103 Wn.2d 426, 429-31 (1985), disapproving, in part, *State v. Barnes*, 96 Wn.App. 217, 225 (1999); III.

***State v. Butler***, 2 Wn.App. ad 549, 560-61 (2018)

Police stop vehicle, another vehicle parks legally nearby and defendant-driver gets out, driver of stopped vehicle claims other driver hit his car, drove away and may have warrants, officer "commands" defendant to stop, he leaves area, officer broadcasts that defendant "fled"

and probably has warrants, another officer views defendant at a residence, tells him "hey come talk to me," gets identification, discovers warrant, searches, finds drugs; held: initial command to stop of driver who was not a passenger of the vehicle stopped for traffic violation and was thus the equivalent of a pedestrian, command to stop was a detention, *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S.Ct. 1870, 64 L.Ed. ad 497 (1980), *State v. Young*, 135 Wn.2d 498, 510 (1998), flight alone may not be a basis for a *Terry* stop, *State v. Mendez*, 137 Wn.2d 208 (1999), *State v. Larson*, 93 Wn.2d 638, 645 (1980), *State v. Walker*, 66 Wn. App. 622, 629 (1992), *State v. Carriero*, 8 Wn.App.2d (2019), there was no lawful basis to seize defendant; the later contact with the police was a continuation of the unlawful seizure, *Mendez, supra., at* 224; I.

***State v. Muhammad***, 4 Wn.App.2d 31 (2018)

Following homicide police view surveillance video, see a "distinctive" car approached by the victim shortly after which her body is found, three days later officer observes the distinctive car, identified defendant-driver and released him, resulting in further investigation and ultimately arrest and conviction; held: a *Terry* stop of a car is permitted where there is a substantial possibility that criminal conduct has occurred, is not limited to a crime in progress, *State v. Snapp*, 174 Wn.2d 177, 198 (2012), a temporary seizure of property based on a reasonable and articulable suspicion of criminal activity and the object's connection to a crime is lawful, *United States v. Van Leeuwen*, 397 U.S. 249, 25 L.Ed.2d 282 (1970), *State v. Jackson*, 82 Wn.App. 594, 605-06 (1996); *reversed, in part, on other grounds, State v. Muhammad*, 194 Wn.2d 577 (2019); III.

***State v, Alexander***, 5 Wn.App.2d 154 (2018)

Citizen report she saw a man punch a woman, describes both, officer detains man and woman meeting description, man identifies himself, officer runs name and discovers no contact order, woman denies assault, gives a false name, upon discovering her true name as protected party arrest defendant, trial court suppresses discovery of no contact order; held: initial investigatory stop was valid, following any valid stop police may run name for warrants; here, the Terry stop involved detention of an alleged assailant and victim, a very recent assault, a warrant check disclosing a protection order, admitted quarreling, and unwillingness to disclose the alleged victim's identity provided officer with sufficient reasonable suspicion to investigate whether the woman with defendant was the protected person, *see: State v. Pettit*, 160 Wn.App. 716 (2011), *: State v. Allen*, 138 Wn.App. 463 (2007), *affirmed, on other grounds*, 192 Wn.2d 526 (2018); I.

***State v. Brown***, 194 Wn.2d 972 (2019)

Driver uses turn signal, moves left into designated left turn lane, does not reactivate turn signal and makes the left turn, is stopped by police, processed for DUI; held: turn signal statute, RCW 46.61.305 (1975), requires a driver to signal intent to turn or change lanes on a public roadway, reversing *State v. Brown,* 7 Wn.App.2d 121 (2019), *cf.: State v. Brown*, 119 Wn.App. 473 (2003) , *overruled on other grounds, State v. Jasper*, 174 Wn.2d 96 (2012); 9-0.

***State v. Tarango***, 7 Wn.App.2d 425 (2019)

Citizen calls 911, identifies himself, reports that there is a man with a gun in a car in a parking lot, police observe car which drives off, police stop car, find gun, learn that defendant has a felony conviction, defendant is convicted of felon in possession of a firearm; held:

possession of a firearm in public is insufficient, standing alone, to support an investigatory stop, *Florida v. J.L.*, 529 U.S. 266, 146 L.Ed.2d 254 (2000), *State v. Cardenas-Muratalla,* 179 Wn.App. 307 (2013); III.

***State v. Carriero***, 8 Wn.App. 2d 641 (2019)

911 caller reports "suspicious vehicle" parked at the end of an alley, police, aware of burglaries, drive up behind vehicle blocking the alley with flashers but not emergency lights, ask for identification from both occupants, dispatch reports one occupant is a felon without warrants, the other has a warrant, arrest occupant with warrant, observe gun, arrest the felon, obtain search warrant and seize gun, defendant is charged and convicted of felon in possession of a firearm; held: a seizure occurs when the police immobilize a defendant, *State v. Beito*, 147 Wn.App. 504 (2008), *State v. Coyne*, 99 Wn.App. 566, 570 (2000), *State v. Crane*, 105 Wn.App. 301 (2001), *overruled, on other grounds, State v. O'Neill,* 148 Wn.2d 564 (2003), a reasonable person would have believed he was seized under these facts; mere presence in a high crime area does not rise to a reasonable suspicion to detain, *State v. Weyand*, 188 Wn2d 804 (2017), *but see: State v. Dudas*, 52 Wn.App. 832 (1988); a claim of "officer safety" cannot create a reasonable suspicion to detain; 2-1, III.

***State v. Johnson***, 8 Wn.App.2d 728 (2019)

Defendant and passenger are seated in vehicle in parking lot at 2:00 a.m., only exit was to back straight out, two officers approach on either side, one asks defendant, as a ruse, if the car belonged to another person, defendant responds that it's his car, officer asks for name and then identification, defendant hands id card, while one officer is running name for license and warrants other one notices a handgun, removes gun, removes defendant, learns defendant's license is suspended, has a warrant and is a felon, is charged with felon in possession of a firearm, trial court suppresses ruling that offices lacked sufficient grounds for a "social contact;" held: police need not have any basis for a social contact; under totality of circumstances, officers' approaching vehicle early in the morning, shining flashlight, using a ruse, asking for name and identification a reasonable person would believe he was seized, *cf.: State v. Thorn*, 129 Wn.2d 347, 351-52 (1996); fact that police experience tells them that a person in a car in a parking lot late at night in a high crime area might be using drugs is not a reasonable articulable suspicion of potential criminal activity, *State v. Diluzio*, 162 Wn.App. 585 (2011); I.

***Kansas v. Glover***, ___ U.S. ___, 140 S.Ct. 1183, 206 L.Ed.2d 412 (2020)

Sheriff runs license plate check, discovers owner of vehicle's license is suspended, stops car, determines that driver is owner who is convicted of driving while an habitual traffic offender; held: police may pull over a car when the officer has learned that the owner's license is suspended, absent other evidence that negates the inference that the owner is driving, *State v. Lyons,* 85 Wn.App. 268 (1997), *Seattle v. Yeager*, 67 Wn.App. 41 (1992), *State v. Phillips*, 126 Wn.App. 584 (2005), *see: State v. Penfield*, 106 Wn.App. 157 (2001), *State v. Creed,* 179 Wn.App. 534 (2014); 8-1.

***State v. Sum***, 199 Wn.2d 627 (2022)

"[A] person has been seized as a matter of independent state law if, based on the totality of the circumstances, an objective observer could conclude that the person was not free to leave, to refuse a request, or to otherwise terminate a police encounter due to law enforcement's display of authority or use

of physical force. For purposes of this analysis, an objective observer is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in disproportionate police contacts, investigative seizures, and uses of force against BIPOC in Washington;" here, defendant, a person of color, was asleep in his car on a public street, awakened by a uniformed deputy sheriff who asked what he was doing there, "implying that they did not belong there," asked to whom the car belonged, requested identification to which defendant inquired "why," answered that there are a lot of stolen cars in the area, defendant gives a false name, deputy returns to his vehicle to check, defendant is charged with false reporting, an objective observer could conclude that if defendant had refused to identify himself and requested to be left alone he would not have been permitted to do so, thus was detained; 9-0.

# ARSON

***State v. Flowers***, 30 Wn.App. 718 (1981)

Jury need not be unanimous as to which method of committing arson 1° defendant employed as long as there is substantial evidence of each mode charged; distinguishes *State v. Green*, 94 Wn.2d 216 (1980); I.

***State v. Hobart***, 34 Wn.App. 187 (1983)

Arson 2° and reckless burning 2° are not lessers of arson 1°; II.

***State v. Plewak***, 46 Wn.App. 757 (1987)

Arson, RCW 9A.48.020, is not vague; "manifestly dangerous" can include the presence of occupants, combustibility, proximity to other structures and the inherent danger to firefighters; II.

***State v. Leech***, 114 Wn.2d 700 (1990)

A death that is caused by an arson fire before it is extinguished occurs "in furtherance of" the arson, RCW 9A.32.030(1)(c), and renders the arsonist liable of felony murder, *reversing* *State v. Leech*, 54 Wn.App. 597 (1989); 9-0.

***State v. Picard***, 90 Wn.App. 890, 900-2 (1998)

In arson case, burned house, evidence that portable heater was rigged by a human to ignite combustibles, movement of valuables out of house just before fire, over-insurance and defendant's proximity to fire establish *corpus;* court need not instruct jury that a fire is presumed accidental or natural, *but see: State v. Kindred*, 16 Wn.App. 138 (1976), *State v. Smith*, 142 Wash. 57, 58-9 (1927); II.

***State v. Westling***, 145 Wn.2d 607 (2002)

Defendant, angry at victim, sets victim's car on fire which spreads to two other cars, is convicted of three counts of arson; held: unit of prosecution for arson is maliciously causing *a* fire, thus one conviction is appropriate where one fire damages multiple automobiles, reversing *State v. Westling*, 106 Wn.App. 884 (2001); 9-0.

***State v. Flinn***, 119 Wn.App. 232, 241-42 (2003), *aff'd, on other grounds,* 154 Wn.2d 194 (2005)

Proof that defendant designed an incendiary device for purposes of wilful destruction is not an element of the crime of possession of an incendiary device, RCW 9.40.110, -120; I.

***State v. Bainard,*** 148 Wn.App. 93. 105-10 (2009)

Defendant shoots and kills two people in a house then sets house on fire, is convicted, *inter alia*, of arson 1º, RCW 9A.48.020(1)(c); held: to prove that defendant caused a fire in a building in which "there shall be at the time a human being…," state must prove that the being was a living person; III.

***State v. Sweany***, 174 Wn.2d 909 (2012)

Arson 1°, RCW 9A.48.020(1)(b), -(d), by the means of causing a fire on property valued at $10,000 or more to collect insurance, refers to market value, not insured value; affirms *State v. Sweany*, 162 Wn.App. 223 (2011); 9-0.

***State v. Boyer***, 200 Wn.App. 7 (2017)

Witness testifies he observed respondent in an alley next to a store doing something with his hand, two minutes later a fire is observed where respondent was sitting although he was gone, is arrested later and confesses; held: substantial evidence supports conviction of reckless burning 2°, RCW 9A.48.050 (2011), *corpus delicti* for reckless burning is a fire that places property in danger and proof that the fire occurred "as a result of the actions of someone criminally responsible;" II.

***State v. Moose***, ___ Wn.App.2d ___, 520 P.3d 511 (2022)

Arson is not a concurrent statute with malicious mischief under the general-specific rule, *see: State v. Ou*, 156 Wn.App. 899-902-03 (2010), *State v. Zheng*, 18 Wn.App. 2d 316, 319 (2021), *State v. Numrich*, 197 Wn.2d 1 (2021); I.

# ASSAULT

***State v. Clinton***, 25 Wn.App. 400 (1980)

**Transferred intent** instruction approved, *see: State v. Frasquillo,* 161 Wn.App. 907, 915-16 (2011); III.

***State v. Hall***, 95 Wn.2d 536 (1981)

Where two victims are alleged in the same count, may be error to charge in the conjunctive and instruct in the disjunctive, but harmless error here; 9-0..

***State v. Claborn***, 95 Wn.2d 629 (1981)

Assault 1° with intent to commit felony, RCW 9A.36.010(1)(a), may be proved as long as there is causal connection between assault and felony; felony need not be "inherently dangerous;" 9-0.

***State v. Williams***, 29 Wn.App. 86 (1981)

Assault 3° applies to arrest with or without a warrant or other court process; statute is not void for vagueness; court seems to limit application to criminal arrests only, and not to detention of children, mental patients or citizen arrests; III.

***State v. Johnson***, 29 Wn.App. 807 (1981)

Assault 2° is established when within shooting distance one points a loaded or apparently loaded gun at another, *State v. Alvis*, 70 Wn.2d 969 (1967), *State v. Murphy*, 7 Wn.App. 505 (1972); where apprehension of victim is an issue, it may be inferred when a gun is pointed at someone who does not know the gun is unloaded, *State v. Frazier*, 82 Wn.2d 628 (1972), *State v. Stewart*, 73 Wn.2d 701 (1968); II.

***State v. Takacs***, 31 Wn.App. 868 (1982)

In order to prove assault 2°, RCW 9A.36.020(1)(b), state must prove defendant knew he was inflicting grievous bodily harm; III.

***State v. LeBlanc***, 34 Wn.App. 306 (1983)

In assault-self-defense case jury must be instructed state has burden of disproving self-defense beyond a reasonable doubt, *State v. McCullum*, 98 Wn.2d 484 (1983); III.

***State v. Maurer***, 34 Wn.App. 573 (1983)

Assault may be proved where defendant led victim to believe injury was about to be inflicted with unlawful force and there was "apparent present ability to give effect to an attempt to inflict such injury"; there must be a showing of some overt act or "violence begun" as opposed to mere threats; victim's apprehension is gravamen, not actual power or intent of defendant to injure; II.

***State v. Hoffman***, 35 Wn.App. 13 (1983)

Police observe fight, one participant points to defendant and tells police defendant started fight, police demand identification, defendant refuses to comply, is arrested, resists; held: **arrest was unlawful**, *State v. White*, 97 Wn.2d 92 (1982), thus defendant could resist and assault 3° charge must be dismissed, *but see: State v. Valentine*, 132 Wn.2d 1 (1997), *Spokane v. Hays*, 96 Wn.App. 653, 661 (2000), *State v. Cormier*, 100 Wn.App. 457, 462-64 (2000), *State v. Kolesnik*, 146 Wn.App. 790, 809-10 (2008), *State v. Mann*, 157 Wn.App. 428 (2010), *State v. D.E.D.*, 200 Wn.App. 484, (2017); I.

***State v. Goree***, 36 Wn.App. 205 (1983)

An arrestee's **knowledge of the lawfulness of his arrest** is not an element of assault 3°, RCW 9A.36.030(1)(a); *see also: State v. Belleman*, 70 Wn.App. 778 (1993); defendant's lack of knowledge of a lawfully issued warrant is not relevant; III.

***State v. Singleton***, 41 Wn.App. 71 (1985)

Where **parental discipline** defense, RCW 9A.16.020(5), is raised, reasonableness of force is judged by objective standard of what a reasonably prudent person would consider appropriate under the circumstances, as opposed to a subjective standard as applied in self-defense cases, *State v. Schlichtmann*, 114 Wn.App. 162 (2002); I.

***State v. Ekkelkamp***, 42 Wn.App. 375 (1985)

Potential invalidity of a warrant is not a defense to assault 3°, RCW 9A.36.030, where the warrant is valid on its face and there is no reason for officer to question the validity, *Bender v. Seattle*, 99 Wn.2d 582 (1983); I.

***State v. Miller***, 103 Wn.2d 792 (1985)

Assault 3° is not unconstitutionally vague; store employees have authority to use reasonable force to detain shoplifters; assault on a security officer in the course of an arrest is assault 3°, RCW 9A.36.030; 9-0.

***State v. Stewart***, 43 Wn.App. 744 (1986)

Assault on a jail custody officer booking defendant is assault 3°, RCW 9A.36.030(1)(a); III.

***State v Tucker***, 46 Wn.App. 642 (1987)

Reckless endangerment, RCW 9A.36.050, is not a **lesser** of assault 3°, RCW 9A.36.030; I.

***State v. Hupe***, 50 Wn.App. 277 (1988), *disapproved, on other grounds, State v. Smith*, 159 Wn.2d 778 (2007)

Defendant points unloaded rifle at victim in defendant's home, is convicted of assault 2° held: assault 2° and display of a firearm, RCW 9.41.270, are not concurrent statutes, *State v. Eakins*, 73 Wn.App. 271, 273-6 (1994), *see also: State v. Karp*, 69 Wn.App. 369 (1993), thus defendant was properly charged with assault; pointing an unloaded gun and threatening to blow away victim is sufficient evidence to prove intent to inflict bodily harm, *State v. Krup*, 36 Wn.App. 454, 461 (1984), *State v. Maurer*, 34 Wn.App. 573, 580 (1983); I.

***State v. Ortiz***, 52 Wn.App. 523 (1988)

In assault 3°, former RCW 9A.36.030(1)(a), proposed instructions on lawfulness of detention must carefully and accurately set forth law on probable cause and well founded suspicion or may be properly refused; I.

***State v. Austin***, 59 Wn.App. 186 (1990)

Element of assault 2°, former RCW 9A.36.020(1)(c), is intent to cause apprehension and fear, *State v. Krup*, 36 Wn.App. 454 (1984); refusal of trial court to permit defendant to testify as to his intent when he went for gun is due process violation; *cf.: State v. Byrd*, 125 Wn.2d 703 (1995); I.

***State v. Brown***, 60 Wn.App. 60 (1990)

"Torture" and "by design," RCW 9A.36.021(1)(g), are not vague; I.

***State v. Washington***, 64 Wn.App. 118 (1992)

In reckless endangerment 1°/drive-by shooting case, RCW 9A.36.045(2), inference of intent instruction is proper where court defines "reckless," defense does not request definition of "accident"; I.

***State v. Davis***, 64 Wn.App. 511 (1992)

Diminished capacity is defense to assault 2° with deadly weapon, RCW 9A.36.021(1)(a); III.

***State v. Carlson***, 65 Wn.App. 153 (1992)

Pointing an unloaded, broken BB gun at a person is insufficient to support a conviction of assault 2° with a deadly weapon, RCW 9A.36.021(1)(c), but is sufficient to support assault 4°, RCW 9A.36.041; Division I holds that since definition of assault 2° was amended in 1988 to eliminate language "with a weapon or other instrument likely to produce bodily harm," state must prove assault with a deadly weapon as defined in RCW 9A.04.110(6), *cf.: State v. Hentz*, 99 Wn.2d 538 (1983), *State v. Bowman*, 36 Wn.App. 798 (1984), *State v. Majors*, 82 Wn.App. 843, 846-7 (1996), *State v. Taylor*, 97 Wn.App. 123 (1999).

***State v. Plano***, 67 Wn.App. 674 (1992)

Name of assault victim is not an essential element which need be alleged in information; I.

***State v. Allen***, 67 Wn.App. 824 (1992), *overruled, in part, State v. Brown*, 140 Wn.App. 456 (2000)

Information alleging that defendant "did assault officer while officer was performing official duties" is sufficient where challenged for first time after verdict, *State v. Kjorsvik*, 117 Wn.2d 93, 106 (1991), *see: State v. Tunney*, 129 Wn.2d 336, 338-9 (1998); III.

***State v. Karp***, 69 Wn.App. 369 (1993)

Assault 2°, RCW 9A.36.021(1) and unlawful display of a weapon, RCW 9.41.270(1), are not concurrent, as the latter lacks a *mens rea* element, *State v. Hupe*, 50 Wn.App. 277 (1988),

*disapproved, on other grounds, State v. Smith*, 159 Wn.2d 778 (2007), *State v. Murphy*, 7 Wn.App. 505 (1972), *State v. Eakins*, 73 Wn.App. 271, 273-6 (1994); II.

***State v. Ferreira***, 69 Wn.App. 465 (1993)

In response to prior drive-by shooting, defendant directs others to drive to a house, knowing the others in the car would shoot up the house, no evidence that shooters saw anyone in house, defendant is convicted of accomplice to assault 1°; held: evidence insufficient to support a finding that shooters acted with intent to inflict great bodily harm, but is sufficient to support finding that they intended to create apprehension or fear to the likely occupants, thus defendant is guilty of assault 2°, *cf.: State v. Woo Won Choi*, 55 Wn.App. 895, 906 (1989), *State v. Mancilla*, 197 Wn.App. 631 (2017); reckless endangerment, RCW 9A.36.045, is not a lesser of assault 1°, *State v. Rivera*, 85 Wn.App. 296, 302 (1997); since state proved five people were in house and each feared serious bodily injury, state proved five counts of assault; III.

***State v. Salamanca***, 69 Wn.App. 817 (1993)

**Transferred intent** instruction in this drive-by shooting-assault 1° case "may have been superfluous" since there was evidence that defendant intended to inflict great bodily harm on all occupants of the car, thus specific intent can be inferred, *State v. Delmarter*, 94 Wn.2d 634, 638 (1980), *State v. Frasquillo*, 161 Wn.App. 907 (2011); Division III leaves open issue as to whether transferred intent can apply to a specific intent crime, *see: State v. Cogswell*, 54 Wn.2d 240 (1959).

***State v. Belleman***, 70 Wn.App. 778 (1993)

In assault 3° on a police officer, where arrest is lawful but defendant does not know he is being lawfully arrested, he does not have a right to self-defense nor to such an instruction, *see: State v. Goree*, 36 Wn.App. 205 (1983), *Seattle v. Cadigan*, 55 Wn.App. 30, 37 (1989); I.

***State v. Ashcraft***, 71 Wn.App. 444, 455 (1993)

Evidence is sufficient to prove simple assault, RCW 9A.36.041(1), where witness testifies she saw defendant appear to strike crying child-victim with a stick, victim sat quietly for the rest of the day which was unusual; evidence is sufficient to prove substantial bodily harm, RCW 9A.04.110(4)(b) for assault 2° where there are bruises consistent with being hit by a shoe, *see: State v. Hovig*, 149 Wn.App. 1 (2009), *State v. Fry*, 153 Wn.App. 235, 240-41 (2009), *State v. McKague*, 159 Wn.App. 489 (2011), *see also: State v. Weber*, 137 Wn.App. 852, 861-62 (2007); I.

***State v. Bland***, 71 Wn.App. 345, 352-9 (1993), *disapproved, on other grounds, State v. Smith*, 159 Wn.2d 778 (2007)

Defendant fires gun at one person, bullet enters another sleeping person's window, who is awakened, covered with glass; held: intent to assault victim can be transferred to another, *State v. Clinton*, 25 Wn.App. 400, 403 (1980); here, second victim did not experience apprehension or fear before bullet entered window; lack of victim's knowledge is insufficient to support an assault by "reasonable fear and apprehension" charge, *State v. Nichelson*, 119 Wn.App. 855 (2003), *distinguishing State v. Frazier*, 81 Wn.2d 628, 630 (1972) (assault can be committed without victim's knowledge in attempted battery mode); fear and apprehension after the fact is insufficient, as it cannot be transferred along with the intent element; touching by the

flying glass caused by defendant's shooting a bullet is a battery which can support an assault conviction; evidence was sufficient to establish elements of assault 2° with a deadly weapon, to wit (1) intentional act, with unlawful force, (2) with a weapon, and (3) resulting in unlawful touching, *State v. Rivas*, 97 Wn.App. 349 (1999), *overruled, on other grounds, State v. Smith, supra.*; I.

***State v. Anderson***, 72 Wn.App. 453, 455-9 (1994)

In assault 1° (intent to inflict great bodily harm) case, RCW 9A.36.011(1)(a), prisoner fighting with guard and attempting to take his gun is sufficient to convict; I.

***State v. Eakins***, 73 Wn.App. 271, 273-6 (1994)

Assault 2° and unlawful display of weapon, RCW 9.41.270(1), even if they have same elements, do not violate equal protection, *see: State v. Hupe*, 50 Wn.App. 277 (1988), *disapproved, on other grounds, State v. Smith*, 159 Wn.2d 778 (2007), *State v. Karp*, 69 Wn.App. 369 (1993); two criminal statutes with identical elements but disparate penalties do not violate equal protection clause, *United States v. Batchelder*, 60 L.Ed.2d 755 (1979), Kennewick v. Fountain, 116 Wn.2d 189, 192 (1991), *State v. Wright*, 183 Wn.App. 719, 730-32 (2014), overruling State v. Zornes, 78 Wn.2d 9 (1970); II.

***State v. Wilson***, 125 Wn.2d 212 (1994)

Defendant fires gun into tavern, missing intended victims but striking two unintended victims, is convicted of four counts of assault 1°, RCW 9A.36.011; held: once it is established that defendant intended to commit great bodily harm, statute provides that any unintended victim is assaulted if they fall within the terms and conditions of the statute, *State v. Smith*, 124 Wn.App. 417, 431-33 (2004), *aff'd, on other grounds,* 159 Wn.2d 778 (2007), *State v. Elma*, 138 Wn.App. 306, 314-19 (2007), *see: State v. Elmi*, 166 Wn.2d 209 (2009), *State v. Abuan*, 161 Wn.App. 135 (2011), *State v. Mancilla*, 197 Wn.App. 631 (2017); **transferred intent** is only applicable when a statute matches specific intent with a specific victim; reverses *State v. Wilson*, 71 Wn.App. 880, 887-90 (1993); 9-0.

***State v. Smith***, 74 Wn.App. 844 (1994)

Neither information charging felony murder-assault nor plea statement contain a *mens rea* element, defendant seeks to withdraw plea; held: assault itself indicates an intentional act, *State v. Osborne*, 102 Wn.2d 87, 94 (1984); II.

***State v. Byrd***, 125 Wn.2d 707 (1995)

In assault 2°, specific intent either to create apprehension of bodily harm or to cause bodily harm is an essential element, jury must be instructed that defendant intended to create apprehension of bodily harm; *affirms State v. Byrd*, 72 Wn.App. 774 (1994); *see: State v. Krup*, 36 Wn.App. 454 (1984), *State v. Austin*, 59 Wn.App. 186 (1990), *State v. Jarvis*, 160 Wn.App. 111, 118-19 (2011), *accord: State v. Eastmond*, 129 Wn.2d 497 (1996), *cf.: State v. Esters*, 84 Wn.App. 180 (1996) (assault by battery), *State v. Daniels*, 87 Wn.App. 149 (1997), *State v. Hall*, 104 Wn.App. 56, 61-63 (2000), *State v. Cardenas-Flores*, 194 Wn.App. 496, 510-15 (2016), 189 Wn.2d 243 (2017); 9-0.

***State v. Ratliff***, 77 Wn.App. 522 (1995)

Victim is doused with urine, fears subsequent disease; defendant is charged with assault by touching (battery) or reasonable apprehension (common law assault), claims insufficiency as to common law assault as victim did not reasonably fear harm before he was touched; held: victim's fear of disease after contact from urine is sufficient to establish "an intentional act, with unlawful force, which creates a reasonable apprehension of serious bodily injury," *distinguishing* *State v. Bland*, 71 Wn.App. 345, 352-9 (1993), *disapproved, on other grounds, State v. Smith*, 159 Wn.2d 778 (2007); I.

***State v. Mierz***, 127 Wn.2d 460 (1995)

Where police **unlawfully enter** a constitutionally protected area and are assaulted, suppression of the assault is not a remedy, at 471-75, *State v. Aydelotte*, 35 Wn.App. 125, 131-2 (1983), *State v. Crider*, 72 Wn.App. 815, 819-20 (1994), *State v. McKinlay*, 87 Wn.App. 394, 398-9 (1997), *State v. Cormier*, 100 Wn.App. 457, 462-64 (2000), overruling *State v. Apodaca*, 67 Wn.App. 736 (1992), *State v. D.E.D.*, 200 Wn.App. 484, (2017); in assault against a police officer, state may charge RCW 9A.36.031(1)(g) [assault on officer performing official duties] or RCW 9A.36.031(1)(a) [assault to prevent execution of lawful process or lawful apprehension] without violating equal protection, latter is not a special statute relative to the former, at 477-79, *State v. Belleman*, 70 Wn.App. 778, 784 (1993); police officer is involved in "official duties," RCW 9A.36.030(1)(g), encompassing all aspects of police officer's good faith performance of job-related duties, excluding conduct occurring when the officer is on a frolic of his or her own, at 478-79, *State v. Hoffman*, 116 Wn.2d 51, 100 (1991), *see: State v. Little*, 116 Wn.2d 488, 496-97 (1991), *State v. Barnes*, 96 Wn.App. 217, 224-25 (1999), *State v. K.A.B.*, 14 Wn.App.2d 677 (2020); *affirms* *State v. Mierz*, 72 Wn.App. 783 (1994); 9-0.

***State v. Esters***, 84 Wn.App. 180 (1996)

In assault 2° by battery (consummated assault), RCW 9A.36.021 (1)(a), state must prove intentional touching and reckless infliction of substantial bodily harm, need not prove intent to harm, distinguishing *State v. Byrd*, 125 Wn.2d 707 (1995), *State v. Eastmond*, 129 Wn.2d 497 (1996); II.

***State v. Kiser***, 87 Wn.App. 126 (1997)

Assault of a child 1°, RCW 9A.36.120(b)(ii), requiring proof of an assault which causes substantial bodily harm preceded by a pattern or practice of assaults, does not require a unanimity instruction absent more than one distinct episodes of assault, *Matter of Mulamba*, 199 Wn.2d 488 (2022); I.

***State v. Daniels***, 87 Wn.App. 149 (1997)

In assault of a child 2°, RCW 9A.36.130, where the offense is committed by an actual battery, the definition of battery is not an element of the crime, thus failure to define battery to the jury is not reviewable for the first time on appeal, distinguishing *State v. Byrd*, 125 Wn.2d 707 (1995), *State v. Eastmond*, 129 Wn.2d 497 (1996); I.

***State v. R.H.S.***, 94 Wn.App. 844 (1999)

In assault 2° (intentional assault/recklessly inflicting substantial bodily harm), RCW 9A.36.021(1)(a), defendant's testimony that he was unaware that a punch could break bones is excluded as irrelevant; held: "reckless" has both an objective and subjective component, *State v.*

*Hovig*, 149 Wn.App. 1 (2009), thus defendant's knowledge is relevant, thus court's exclusion of defendant's knowledge was erroneous, *cf.: State v. Keend*, 140 Wn.App. 858 (2007); I.

***State v. Taylor***, 97 Wn.App. 123 (1999)

Respondent holds BB gun to victims' heads, threatens to kill them, is convicted of assault 2° with a deadly weapon, RCW 9A.36.021(1)(c); held: while a BB gun is not a deadly weapon *per se*, *State v. Carlson*, 65 Wn.App. 153, 161 n.10 (1992), and while there was no direct evidence that the BB gun was loaded, in light of the method in which the gun was "threatened to be used," RCW 9A.04.110(6), a reasonable trier of fact could find that it was "readily capable of causing death or serious bodily harm," distinguishing *Carlson, supra*; III.

***State v. Rivas***, 97 Wn.App. 349 (1999)

Defendant is charged with assault 2° with a weapon, RCW 9A.36.021(1)(c), instruction defining assault lists three common law definitions (battery, attempted battery, assault), no unanimity instruction or special verdict is provided but all evidence establishes common law assault only; held: because evidence established only one of the alternative means and substantial evidence supported that alternative, unanimity instruction is not required, *but see: State v. Smith*, 159 Wn.2d 778 (2007); I.

***State v. Hiott***, 97 Wn.App. 825 (1999)

Two boys shoot at each other with BB guns, one loses an eye, defendant is charged with assault, claims consent; held: while consent may be a defense during an athletic contest, *State v. Shelley*, 85 Wn.App. 24 (1997), *see: State v. Whitfield*, 132 Wn.App. 878, 898-99 (2006), *State v. Jarvis*, 160 Wn.App. 111, 120 (2011), shooting BB guns at each other is not a "generally accepted game" with "generally accepted rules," and shooting at a person with a BB gun is a breach of public policy, *see: State v. Baxter*, 135 Wn.App. 587, 598-603 (2006), *State v. Weber*, 137 Wn.App. 852 (2007), *State v. Weber*, 137 Wn.App. 852 (2007); II.

***State v. Taylor***, 140 Wn.2d 229 (2000)

Assault 4° complaint which alleges that defendant pushed, kicked and punched complainant is sufficient to inform defendant of intent element, where challenged prior to trial, as assault is sufficient to convey the element of intent, *State v. Davis*, 119 Wn.2d 657 (1992), *State v. Chaten*, 84 Wn.App. 85 (1996), *State v. Hopper*, 118 Wn.2d 151 (1992), *reversing State v. Taylor*, 91 Wn.App. 606 (1998), *overruling State v. Robinson*, 58 Wn.App. 599 (1990); 5-4.

***State v. Brown***, 140 Wn.2d 456 (2000)

In assault 3° on police officer, RCW 9A.36.031(1)(g), state need not allege or prove that defendant knew that victim was a law enforcement officer or that victim was performing official duties at the time of the assault, overruling, in part, *State v. Allen*, 67 Wn.App. 824 (1992), effectively overruling *State v. Filbeck*, 89 Wn.App. 113 (1997); affirms *State v. Brown*, 94 Wn.App. 327 (1999); 9-0.

***State v. Hall***, 104 Wn.App. 56 (2000)

Assault by battery does not require specific intent to inflict harm or cause apprehension, rather it requires intent to do the physical act constituting the assault, at 62, *State v. Cardenas-Flores*, 194 Wn.App. 496, 510-15 (2016), 189 Wn.2d 243 (2017); of the three means of assault

[(1) battery, (2) attempt to inflict injury, (3) placing victim in reasonable apprehension of injury], an attempted assault is a possible lesser to (1) and (3), at 63-64, *State v. Music*, 40 Wn.App. 423, 432 (1985), *State v. Godsey*, 131 Wn.App. 278, 281-88 (2006); III.

***State v. Pierre***, 108 Wn.App. 378 (2001)

Repeated kicking the head of a defenseless victim is sufficient to prove "force or means likely to produce death or great bodily harm," RCW 9A.36.011(1)(a), even where jury is hung on whether great bodily harm was actually inflicted; I.

***State v. Atkinson***, 113 Wn.App. 661, 666-68 (2002)

In defining "substantial bodily harm" for assault 2°, RCW 9A.04.110(4)(b), court instructs that "disfigurement means that which impairs or injures the beauty, symmetry, or appearance of a person or thing; that which renders unsightly, misshapen, or imperfect, or deforms in some manner," defense claims definition is overbroad and eliminates distinction between assault 2° and assault 4°; held: trial courts have "considerable discretion in wording jury instructions," *State v. Castle*, 86 Wn.App. 48, 62 (1997), definition here was accurate and merely supplemented and clarified statutory language; III.

***State v. Freigang***, 115 Wn.App. 496 (2002)

Where defendant is "obviously armed" and utters a threat to kill, there is sufficient evidence to prove assault 2º with a deadly weapon, *State v. Murphy*, 7 Wn.App. 505, 511 (1972), victim's lack of actual fear does not defeat these elements, at 505 n. 11; II.

***State v. Nicholson***, 119 Wn.App. 855 (2003), *disapproved, on other grounds, State v. Smith*, 159 Wn.2d 778 (2007)

Defendant-father holds knife to baby, prosecutor is allowed to argue that mother's fear and apprehension is sufficient to prove common law assault prong of assault of a child; held: conviction of assault of a child 2° cannot be based upon the mother's fear and apprehension; I.

***State v. Smith***, 124 Wn.App. 417, 431-33 (2004), *aff'd, on other grounds*, 159 Wn.2d 778 (2007)

Defendant fires one bullet into car containing three people, is convicted of three counts of assault 2°; held: firing once into vehicle with three people assaults three individuals, resulting in three units of prosecution, *see: State v. Wilson*, 125 Wn.2d 212, 220 (1994), *State v. Elmi*, 166 Wn.2d 209 (2009), and is not the same criminal conduct as there are three victims, *State v. Tili*, 139 Wn.2d 107, 123 (1999); II.

***State v. Saunders***, 132 Wn.App. 592 (2006)

Assault 3º, RCW 9A.36.031(1)(f), is not vague, AT 598-600; neck pain for three hours and swelling and an abrasion is sufficient to prove "substantial pain" and "considerable suffering," *State v. Fry*, 153 Wn.App. 235, 240-41 (2009), *see: State v. Robertson*, 88 Wn.App. 836, 947 (1997); I.

***State v. Leming***, 133 Wn.App. 875 (2006)

The crime of **assault in violation of a court order**, RCW 26.50.110(4), and assault 2º do not violate double jeopardy as legislature intended to punish separately both, *see: State v.*

*Moreno*, 132 Wn.App. 664, 665 (2006), and do not merge, *State v. Novikoff*, 1 Wn.App.2d 166 (2017), *see:* *State v. Louis*, 155 Wn.2d 563, 571 (2005); convictions of assault 2º with intent to commit felony harassment and felony harassment do violate double jeopardy, *see:* *State v. Freeman*, 153 Wn.2d 765, 778 (2005), *State v. Kier*, 164 Wn.2d 798 (2008); II.

***State v. Baxter***, 134 Wn.App. 587, 598-603 (2006)

Defendant, based upon Bible, attempts to circumcise his 8-year old son "in a dirty bathtub, with no medical training, using a hunting knife and animal wound cauterizing powder," trial court rejects consent instructions; held: consent is generally disfavored in assault cases, *State v. Shelley*, 85 Wn.App. 24 (1997), *State v. Hiott*, 97 Wn.App. 825 (1999), *State v. Weber*, 137 Wn.App. 852 (2007), *State v. Lyon*, 160 Wn.App. 111, 120 (2011), circumcision not performed by a trained professional violates public policy, the law disfavors the notion that a child can consent to medical treatment, *cf.:* *State v. Koome*, 84 Wn.2d 901, 911 (1975)(abortion), *Smith v. Seibly*, 72 Wn.2d 16 (1967); state may interfere with a parent's right to control religious upbringing of a child where physical harm is caused, *see:* *State v. Norman*, 61 Wn.App. 16, 24 (1991); II.

***State v. Chavez***, 134 Wn.App. 657, 666-68 (2006), 163 Wn.2d 262, 273-74 (2008)

Judicial definition of "assault" according to common law, *See* *State v. Frazier*, 81 Wn.2d 628, 631 (1972), *State v. Rush*, 14 Wn.2d 138, 139-40 (1942), *State v. Shaffer*, 120 Wash. 345, 348-50 (1922), *Peasley v. Puget Sound Tug & Barge Co.*, 13 Wn.2d 485 (1942), does not violate separation of powers doctrine; II.

***State v. Smith***, 159 Wn.2d 778 (2007)

The three common law definitions of assault in a jury instruction do not constitute alternative means of committing the crime of assault, and thus there need not be substantial evidence to support each of the three definitions, *State v. Winings*, 126 Wn.App. 75, 89-90 (2005), *State v. Christian*, 18 Wn.App.2d 185 (2021), *see:* *State v. Linehan*, 147 Wn.2d 638 (2002), disapproving, in part,), *State v., State v. Hupe*, 50 Wn.App. 277 (1988), *State v. Bland*, 71 Wn.App. 345 (1993), *State v. Rivas*, 97 Wn.App. 349 (1999), *State v. Nicholson*, 119 Wn.App. 855 (2003); affirms *State v. Smith*, 124 Wn.App. 417 (2004), disapproves, in part, *State v. Hupe*, 50 Wn.App. 277 (1988), *State v. Bland*, 71 Wn.App. 345 (1993;); 5-4.

***State v. Weber***, 137 Wn.App. 852 (2007)

Consent is not a defense to assault between incarcerated persons, *see:* *State v. Shelley*, 85 Wn.App. 24, 29 (1997), *State v. Hiott*, 97 Wn.App. 825, 828 (1999), *State v. Lyon*, 160 Wn.App. 111, 120 (2011); III.

***Postsentence Review of Leach***, 161 Wn.2d 180 (2007)

Attempted assault 2º is not a crime against a person as it is not expressly listed in RCW 9.94A.411(2), and thus community custody is not authorized, RCW 9.94A.715, overruling *Postsentence Review of Manier*, 135 Wn.App. 33 (2006); 9-0.

***State v. Hoeldt***, 139 Wn.App. 225 (2007)

Depending upon circumstances of use, a dog can be a deadly weapon for purposes of assault 2°; here, defendant intentionally released his large, barking, growling dog to attack a police officer, thus evidence was sufficient; II.

***State v. Blatt***, 139 Wn.App. 555 (2007)

When charging assault 3°, RCW 9A.36.031(1), information need not allege and state need not prove that the charged act did not constitute assault 1° or 2°, *see: State v. Ward*, 148 Wn.2d 803 (2003), *State v. Olsen*, 187 Wn.App. 149 (2015), *State v. Melland*, 9 Wn.App.2d 786 (2019); II.

***State v. Brooks***, 142 Wn.App. 842 (2008)

"Unlawful force" is not an element of assault unless defense raises lawful use of force; III.

***State v. Hovig***, 149 Wn.App. 1, 7-13 (2009)

In assault of child 2º case, RCW 9A.36.130(1)(a), intentionally biting 4-month old child's face leaving a bruise that physician testifies would last 7-14 days is sufficient to prove both objective and subjective components of reckless element, RCW 9A.08.010(1), *see: State v. Keend*, 140 Wn.App. 858, 869 (2007), *State v. R.H.S.*, 94 Wn.App. 844 (1999); serious bruising can rise to the level of substantial bodily injury, *State v. Ashcraft*, 71 Wn.App. 444, 455 (1993), *State v. Salinas*, 87 Wn.2d 112, 121-22 (1976), *State v. McKague*, 159 Wn.App. 489, 501-06 (2011), *cf.: State v. Miles*, 77 Wn.2d 593 (1970); II.

***State v. Elmi***, 166 Wn.2d 209 (2009)

From outside, defendant shoots at his wife in living room, three children are in room, no one is injured, defendant is convicted of four counts of assault 1º; held: "[w]here a defendant intends to shoot into and to hit someone occupying a house…, he certainly bears the risk of multiple convictions when several victims are present, regardless of whether the defendant knows of their presence. And, because the intent is the same, criminal culpability should be the same where a number of persons are present but physically unharmed," at 218 ¶ 18, *see: State v. Wilson*, 125 Wn.2d 212 (1994), *cf.: State v. Abuan*, 161 Wn.App. 135, 154-60 (2011), *see also: State v. Frasquillo*, 161 Wn.App. 907 (2011); affirms *State v. Elmi*, 138 Wn.App. 306 (2007); 6-3.

***State v. Hayward***, 152 Wn.App. 632, 641-48 (2009)

In assault 2º/reckless infliction case, RCW 9A.36.021(1)(a), where the *mens rea* elements are intentional assault and reckless infliction of substantial bodily harm, instruction defining reckless that includes "recklessness also is established if a person acts intentionally" is error as it relieves state of burden of proving that defendant acted recklessly if jury finds that defendant assaulted intentionally, *State v. Goble*, 131 Wn.App. 194, 202-04 (2005), *see also: State v. Sibert*, 168 2306, 315-17 (2010), *but see: State v. Holzknecht*, 157 Wn.App. 754 (2010), effectively overruling *State v. Keend*, 140 Wn.App. 848, 863-68 (2007), *State v. Nordgren*, 167 Wn.App. 653 (2012), *cf.: State v. McKague*, 159 Wn.App. 489, 508-10 (2011); II.

***State v. Holzknecht***, 157 Wn.App. 754 (2010)

In assault of a child 2° case, instructions that make clear that a different mental state must be determined for each element (intent as to assault and recklessness as to infliction of substanital bodily harm), then instructions that also direct that recklessness is established if a person acts intentionally or knowingly do not create impermissible presumptions, *State v. Sibert,* 168 Wn.2d 306, 315-17 (2010), *State v. Gerdts*, 135 Wn.App. 720 (2007), *State v. Nordgren,* 167 Wn.App. 653 (2012), *but see: State v. Hayward*, 152 Wn.App. 632 (2009), *see also: State v. McKague,* 159 Wn.App. 489, 508-10 (2011); II.

***State v. Marohl***, 170 Wn.2d 691 (2010)

Defendant forces victim to the floor, impact breaks his prosthetic arm and causes abrasions and bruises to victim's face, defendant is convicted of assault 3º; held: a floor is not an "instrument or thing likely to produce bodily harm," RCW 9A.36.031, *State v. Shepard,* 167 Wn.App. 887 (2012); a bare hand or arm is not a "weapon or other instrument or thing," *State v. Altman,* 23 Wn.App.2d 705 (2022), *see: State v. Donofrio,* 141 Wash. 132, 137-38 (1926); reverses *State v. Marohl,* 151 Wn.App. 469 (2009); 9-0.

***State v. McKague***, 172 Wn.2d 802 (2011)

Trial court's definition of "substantial" as "something having substance or actual existence" to support "substantial bodily harm/assault 2° was erroneous as it would make practically any demonstrable impairment or disfigurement a substanial injury no matter how minor; substanial, as used in RCW 9A.36.021(1)(a) (2007), signifies a degree of harm that is considerable and necessarily requires a showing greater than an injury merely having some existence, at 806 ¶ 8, "considerable in amount, value, or worth;" pain, by itself, is not substantial, at 807 n.3; Supreme Court expresses "no opinion whether a jury should be further instructed on the definition of "substantial," at 805 n.2; affirms *State v. McKague,* 159 Wn.App. 489 (2011); *per curiam.*

***State v. McKague***, 159 Wn.App. 489, affirmed, 172 Wn.2d 802 (2011)

In assault 2°/substantial bodily harm case, scalp contusion, severe neck and shoulder pain, puffy face, bump on head, swelling around eye, abrasion of cheek, laceration to head are sufficient for "temporary but substantial disfigurement," RCW 9A.04.110(4)(b); dizziness, concussion without loss of consciousness is sufficient for "temporary substantial impairment of bodily part or organ function," at 501-06, RCW 9A.04.110(4)(b), *State v. Hovig,* 149 Wn.App. 1 (2009); recklessness instruction that reads "when recklessness as to a particular fact is required to establish an element of a crime, the element is also established if a person acts intentionally or knowingly" does not relieve state of burden, *State v. Nordgren,* 167 Wn.App. 653 (2012), curing problem in *State v. Hayward,* 152 Wn.App. 632 (2009), at 159 Wn.App. 508-10; 2-1, II.

***State v. Jarvis***, 160 Wn.App. 111, 118-19 (2011)

"[I]ntent required for assault is merely the intent to make physical contact with the victim, not the intent that the contact be a malicious or criminal act," at ¶ 11, *State v. Hall,* 104 Wn.App. 56, 62 (2000); II.

***State v. Abuan***, 161 Wn.App. 135, 154-60 (2011)

Evidence shows that defendant shot at a garage, victim specified in information is in the house next to the garage, defendant is convicted of assault 2°; held: absent a **transferred intent** instruction, evidence is insufficient where information specifies a victim as the intended victim and alleges that defendant assaulted another, *see: State v. Elmi,* 166 Wn.2d 209 (2009), *State v. Hickman,* 135 Wn.2d 97, 102 (1998), gun was not pointed directly at victim, *see: State v. Miller,* 71 Wn.2d 143 (1967); 2-1, II.

***State v. Frasquillo***, 161 Wn.App. 907 (2011)

**Transferred intent** instruction must include language that defendant acts with intent to assault a person but the act harms another or places another in apprehension of harm, at 915-16, *State v. Elmi,* 166 Wn.2d 209, 218 (2009); where there is evidence that defendant intended to assault more than one person in a drive-by shooting at a house, the act of shooting is a substantial step towards assaulting every person in the house, at 916-17, *State v. Ferreira,* 69 Wn.App. 465, 469-70 (1993); where a shooting into a house does not harm or place occupants in apprehension of harm, evidence is sufficient to prove attempted assault; transferred intent applies to attempted assault; II.

***State v. Harris***, 164 Wn.App. 377 (2011)

In assault of a child 1°, RCW 9A.36.120(1)(b)(1), defining "reckless" in instruction to include "wrongful act" is error as the crime requires proof that defendant recklessly disregarded that great bodily harm would occur, *State v. Gamble,* 154 Wn.App. 457 (2005), *but see: State v. Johnson,* 180 Wn.2d 295, 304-07 (2014); II.

***State v. Reed***, 168 Wn.App. 553, 574-77 (2012)

In assault 2° by strangulation case, RCW 9A.36.021(1)(g) (2011), court need not instruct jury that defendant intended to obstruct blood flow or breathing where court instructs that, to convict, defendant intentionally assaulted victim by strangulation; I.

***State v. Cortes Aguilar***, 176 Wn.App. 264, 275-77 (2013)

**Transferred intent** need not be included in an assault information, *State v. Clinton,* 25 Wn.App. 400 (1980), *State v. Wilson,* 113 Wn.App. 122, 131 (2002); III.

***State v. Bauer***, 180 Wn.2d 929 (2014)*)*

Defendant leaves loaded gun on dresser, 9-year old visitor takes gun to school and shoots another student, defendant is charged with assault 3° "[w]ith criminal negligence, causes bodily harm to another person by means of a weapon…," RCW 9A.36.031(1)(d) (2011), trial court denies *Knapstad* motion; held: legal cause in criminal cases is narrower than legal cause in tort cases; where gun was taken without owner's permission or knowledge and later used to cause injury legal causation is not satisfied, *McGrane v. Cline,* 94 Wn.App. 925 (1999), *cf.: State v. Harris,* 199 Wn.App. 137 (2017); reverses *State v. Bauer,* 174 Wn.App. 59 (2013); 6-3.

***State v. Alcantar-Maldonado***, 184 Wn.App. 215, 223-27 (2014)

RCW 9A.36.011(1) (1997), assault 1º with a firearm and intent to inflict great bodily harm, does not oblige state to prove that bodily injury be inflicted; III.

***State v. Rodriquez***, 187 Wn.App. 922, 930-334 (2015)

Assault 2° by strangulation, RCW 9A.36.021(1)(g) (2011), applies equally to complete and partial obstructions of a victim's ability either to breathe or to experience blood flow, victim having difficulty breathing is sufficient; I.

***State v. Cardenas-Flores***, 189 Wn.2d 243 (2017)

Assault 2° based on battery does not require specific intent to inflict substantial bodily harm, state need prove only that defendant intended to do the physical act constituting an assault, ***State v. Hall***, 104 Wn.App. 56 (2000); in assault on a child by a parent court need not include "with unlawful force" in to convict instruction unless defense claims that the force used was lawful, *see:* WPIC 35.50 (2014) note and comment; reverses, on other grounds, *State v. Cardenas-Flores*, 194 Wn.App. 496 (2016); 9-0.

***State v. Mancilla***, 197 Wn.App. 631 (2017)

Defendant shoots into a house that is occupied, claims evidence is insufficient to show that he intended to assault a person; held: to prove assault state must offer evidence that defendant intended to harm an actual person, here circumstantial evidence was sufficient as cars were parked outside the residence at 4:00 a.m., *distinguishing State v. Ferreira*, 69 Wn.App. 465, 469 (1993); III.

***State v. Shelley***, 3 Wn.App.2d 196 (2018)

Defendant lives with girlfriend and her minor son, assaults girlfriend's son, is convicted of assault with domestic violence enhancement; held: for purposes of sentence enhancement RCW 9.94A.525(21) (2013) limits domestic violence as defined in RCW 9.94A.030(20) (2015) which includes children in common or children 16 years or older residing in the same household, RCW 9.94A.030(3) (2004); while victim's age here is not disclosed in opinion, by context it is less than 16 and thus domestic violence aggravator was improper; I.

***State v. Melland***, 9 Wn.App.2d 786 (2019)

Defendant is charged with assault 2°/RCW 9A.36.021(1)(a) (2011)/intentional assault and recklessly cause substantial bodily harm, evidence shows that he grabbed a phone complainant was holding and her finger broke; held: evidence is insufficient to show that defendant knew of a substantial risk and disregarded the risk that a wrongful act may occur, thus state failed to prove recklessness, RCW 9A.08.010(1)(c); I.

***State v. Loos***, 14 Wn.App.2d 748 (2020)

Defendant is charged with assault of a child 3°, is convicted of assault 4° as an inferior degree offense; held: assault 4° is not an inferior degree offense of assault 3° by criminal negligence, RCW 9A.36.031(1)(f) (2013), as assault 4° requires proof of intent; I.

***State v. Birge***, 16 Wn.App.2d 16 (2021)

Police officers advise mother to beat her misbehaving child with a belt, child is injured, officers are charged with official misconduct and assault of a child, RCW 9A.36.140(1), trial court dismisses; held: state's evidence, if true, is sufficient to establish a *prima facie* case of assault of a child as accomplices and official misconduct, RCW 9A.80.010(1); II.

***State v. Christian***, 18 Wn.App.2d 185 (2021)

Defendant is charged with assault 2°, RCW 9A.36.021(1)(g), by strangulation and suffocation, no evidence at trial discusses suffocation, jury is instructed on both; held: strangulation and suffocation are means within a means and not alternative means; I.

***State v. Griepsma***, 17 Wn.App.2d 606 (2021)

For purposes of assault 3°, RCW 9A.36.031(1)(g), corrections officers employed by the county sheriff are law enforcement officers; custodial assault, RCW 9A.36.100(1), is not concurrent with assault 3°, thus state did not err in charging assault 3° of jail staff; I.

***Matter of Mulamba***, 199 Wn.2d 488 (2022)

Assault of a child 1° and 2° are alternative means crimes that do not require a unanimity instruction, *State v. Kiser*, 87 Wn.App. 126 (1997); 8-1.

***State v. Altman***, 23 Wn.App.2d 705 (2022)

Assault 3° with criminal negligence by means of a weapon or other instrument or thing likely to produce bodily harm, RCW 9A.36.031(1)(d) (2013), is not violated where the defendant used his hand only, *State v. Marohl*, 170 Wn.2d 691 (2010); II.

***Matter of Arntsen,*** ___ Wn.App.2d ___, 2023WL20726 (2023)

In road rage incident defendant walks towards complainant's car carrying a rifle aggressively, does not point the weapon at complainant, is convicted of assault 2° with a deadly weapon; held: while specific intent to create reasonable fear and apprehension of bodily injury may be inferred from pointing a gun, *State v. Byrd*, 125 Wn.2d 707, 713 (1995), but cannot be inferred from mere display of a gun, *State v. Eastmond*, 129 Wn.2d 497, 502-03 (1996), *overruled, on other grounds, State v. Easterlin*, 159 Wn.2d 203 (2006); I.

# ASSAULT
## Lesser Included/Lesser Degree Offenses

***State v. Siverson***, 40 Wn.App. 518 (1985)

Negligent driving is not a lesser of assault 2°, even if the assault was alleged to have been committed with a motor vehicle; elements of the lesser offense must invariably be inherent in the greater offense and be part of the same act; I.

***State v. Partosa***, 41 Wn.App. 266 (1985)

Unlawfully discharging a firearm, RCW 9.41.230, is not a lesser of assault 2°, RCW 9A.36.020; state concedes that unlawfully displaying a weapon, RCW 9.41.270, is a lesser of assault 3°; *see*: *State v. Fowler*, 114 Wn.2d 59 (1990), *State v. Lucky*, 128 Wn.2d 727 (1996); I.

***State v. Sample***, 52 Wn.App. 52 (1988)

Simple assault, former RCW 9A.36.040, is not lesser of **assault** 3° by criminal negligence; II.

***State v. Fowler***, 114 Wn.2d 59 (1990), *disapproved, on other grounds, State v. Blair*, 117 Wn.2d 479, 487 (1991)

Although unlawful display of weapon, RCW 9.41.270(1), is lesser of assault 2°, *State v. Baggett*, 103 Wn.App. 564 (2000), where defendant did not offer evidence at trial that he intended to intimidate victim or he displayed gun in manner which would cause victim alarm, then defendant was not entitled to instruction, *see: State v. Fernandez-Medina*, 114 Wn.2d 448 (2000), *State v. Ward*, 125 Wn.App. 243 (2004), *but see: State v. Coryell*, 197 Wn.2d 397 (2021), *cf.: State v. Avington*, 23 Wn.App.2d 847 (2022); 9-0.

***State v. Daniels***, 56 Wn.App. 646 (1990)

Assault 3° was properly not given as a lesser of assault 2° [grievous bodily harm with or without a weapon, former RCW 9A.36.020(1)(b)] because assault 2° requires a weapon, and because "it is inconceivable [defendant] did not knowingly inflict grievous bodily harm," *distinguishing* RCW 10.61.003; I.

***State v. Karp***, 69 Wn.App. 369 (1993)

While unlawful display is a lesser of assault 2°, *State v. Fowler*, 114 Wn.2d 59 (1990), where defendant admits pointing shotgun at another, evidence does not support inference that only unlawful display statute was violated, *see: State v. Fernandez-Medina*, 114 Wn.2d 448 (2000), *State v. Baggett*, 103 Wn.App. 564 (2000), *but see: State v. Coryell*, 197 Wn.2d 397 (2021); II

***State v. Ferreira***, 69 Wn.App. 465 (1993)

In response to prior drive-by shooting, defendant directs others to drive to a house, knowing the others in the car would shoot up the house, no evidence that shooters saw anyone in house, defendant is convicted of accomplice to assault 1°; held: evidence insufficient to support a finding that shooters acted with intent to inflict great bodily harm, but is sufficient to support

finding that they intended to create apprehension or fear to the likely occupants, thus defendant is guilty of assault 2°, *State v. Frasquillo,* 161 Wn.App. 907, 918 (2011), *cf.:* *State v. Woo Won Choi,* 55 Wn.App. 895, 906 (1989), *see: State v. Mancilla,* 197 Wn.App. 631 (2017); reckless endangerment, RCW 9A.36.045, is not a lesser of assault 1°, *State v. Rivera*, 85 Wn.App. 296, 302 (1997), *State v. Prado*, 144 Wn.App. 227, 242 (2008); III.

***Seattle v. Wilkins***, 72 Wn.App. 753 (1994)

Intentional simple assault is not a lesser of a local ordinance charging reckless or intentional assault in the alternative, as intent cannot be a lesser of reckless; I.

***State v. Hurchalla***, 75 Wn.App. 417 (1994), *overruled, on other grounds, State v. Fernandez-Medina,* 141 Wn.2d 448 (2000)

Unlawful display of a firearm, RCW 9.41.270, is not a lesser of assault 2°, *State v. Davis,* 121 Wn.2d 1 (1993), *State v. Curran*, 116 Wn.2d 174 (1991), *but see: State v. Baggett*, 103 Wn.App. 564 (2000), *State v. Ward*, 125 Wn.App. 243 (2004); I.

***State v. Herrera***, 95 Wn.App. 328 (1999)

Assault 3° (resist lawful apprehension), RCW 9A.36.031(1)(a), is not a lesser of robbery; III.

***State v. Laico***, 97 Wn.App. 759 (1999)

Co-defendants are charged with assault 1°, principle claims self-defense, defendant seeks lesser of assault 4°, claiming he was not an accomplice of principal who acted with lawful force, since no crime would have been committed by the principal; held: evidence supports inference that only the lesser was committed; I.

***State v. Fernandez-Medina***, 141 Wn.2d 448 (2000)

Assault 1° defendant points gun at victim who hears a click, defendant presents alibi defense and presents evidence through his own expert and cross-examination of state's expert that reasons other than pulling trigger may cause a click, trial court declines to instruct on inferior degree of assault 2°; held: a requested instruction on a lesser included or inferior degree offense should be given if the evidence would permit a jury to rationally find defendant guilty of the lesser offense and acquit him of the greater, *State v. Warden,* 133 Wn.2d 559, 563 (1997), *see: State v. Coryell,* 197 Wn.2d 397 (2021); while it is not enough that the jury might disbelieve the evidence pointing to guilt, *State v. Fowler,* 114 Wn.2d 59, 67 (1990), *overruled on other grounds, State v. Blair,* 117 Wn.2d 479 (1991), here for purposes of the lesser analysis, the alibi defense may not preclude the court from instructing as to assault 2°, as jury could have disbelieved the alibi (which it did), but believe that defendant did not pull the trigger, *State v. Hunter,* 152 Wn.App. 30, 43-48 (2009), *see: State v. McClam,* 69 Wn.App. 885 (1993); reverses *State v. Fernandez-Medina,* 94 Wn.App. 263 (1999), overrules *State v. Hurchalla,* 75 Wn.App. 417 (1994), *State v. McJimpson,* 79 Wn.App. 164 (1995); 8-1.

***State v. Baggett***, 103 Wn.App. 564, 569-71 (2000)

Defendant is charged with assault 2°, at bench trial court finds that defendant's capacity was diminished, acquits of assault 2° but convicts of **unlawful display** of a weapon; held: unlawful display is a legal lesser of assault 2°, *State v. Fowler,* 114 Wn.2d 59, 67 (1990),

*overruled on other grounds, State v. Blair*, 117 Wn.2d 479, 486-87 (1991); the manner in which defendant held the weapon warranted alarm for the safety of a police officer, coupled with evidence of defendant's diminished capacity to form the specific intent for assault, supports an inference that defendant committed only the offense of unlawful display of a weapon; III.

***State v. Hall***, 104 Wn.App. 56, 63-64 (2000)

Of the three means of assault [(1) battery, (2) attempt to inflict injury, and (3) placing victim in reasonable apprehension of injury], an attempted assault is a possible lesser to (1) and (3), not to (2), *State v. Music*, 40 Wn.App. 423, 432 (1985), *State v. Godsey*, 131 Wn.App. 278, 281-88 (2006); III.

***State v. Walther,*** 114 Wn.App. 189, 192 (2002)

Assault 3° is a lesser degree offense of assault 1°, however where defendant uses a weapon, defendant is not entitled to instruction on assault 3° as a lesser, *State v. Daniels*, 56 Wn.App. 646 (1990); II.

***State v. Winings***, 126 Wn.App. 75, 86-90 (2005)

Drunk defendant, charged with assault 2°/deadly weapon, RCW 9A.36.021(1)(c), threatens and cuts victim with a sword, seeks lesser of assault 4°; held: while a sword is not a deadly weapon *per se* as defined in the enhancement statute, RCW 9.94A.602, court may consider circumstances of weapon's use, including intent and present ability of use, degree of force, part of body to which it was applied and physical injuries inflicted, *State v. Shilling*, 77 Wn.App. 166, 171 (1995); where record fails to support any rational inference that the assault was committed only with a non-deadly weapon, defendant is not entitled to the lesser instruction; II.

***State v. Godsey***, 131 Wn.App. 278, 288-90 (2006)

Resisting arrest, RCW 9A.76.040(1), is a lesser of assault 3º against a police officer, RCW 9A.36.030(1)(a), *State v. Marshall*, 37 Wn.App. 127, 128 (1984); III.

***State v. Keend***, 140 Wn.App. 858, 868-70 (2007)

Defendant punches victim, breaks jaw, is convicted of assault 2°/recklessly inflicts, RCW 9A.36.021(1)(a), on appeal claims counsel was ineffective for not offering assault 4° as a lesser; held: absent evidence that supports defendant's theory that he did not recklessly inflict substantial bodily harm, evidence was insufficient to support an inference that defendant unlawfully touched victim but did not recklessly inflict serious harm; any reasonable person knows that punching someone in the face could result in a broken jaw which would constitute substantial harm, *State v. R.H.S.*, 94 Wn.App. 844, 847 (1999), *see: State v. Hovig*, 149 Wn.App. 1 (2009); it is not enough to support a lesser that the jury might simply disbelieve the state's evidence, *State v. Charles*, 126 Wn.2d 353, 355 (1995), *State v. Speece*, 115 Wn.2d 360, 362 (1990); "not amounting to assault in the first degree," RCW 9A.36.021(1), is not an element of the crime that the state must prove or that the court must instruct, *State v. Ward*, 148 Wn.2d 803, 812-13 (2003), *see: State v. Melland*, 9 Wn.App.2d 786; II.

***State v. Cuellar***, 164 Wn.App. 701 (2011)

Resisting arrest is not a lesser of assault 3°; I.

# ATTEMPT

***State v. Stewart***, 35 Wn.App. 552 (1983)

In attempted rape case, reversible error to fail to instruct jury that attempt must include "intent" and "substantial step," *State v. Jackson*, 62 Wn.App. 53 (1991), *see: State v. Rhode*, 63 Wn.App. 630 (1991), *State v. Davis*, 174 Wn.App. 623, 635-38 (2013); I.

***State v. Austin***, 39 Wn.App. 109 (1984)

An attempt to obtain drugs by a forged prescription, RCW 69.50.403(2)(3), is a felony and does not fall under the general attempt statute, RCW 9A.28.020; I.

***State v. Allen***, 101 Wn.2d 355 (1984)

The level of culpability which must be proved for an attempted crime is that mental state which must be proved for the substantive offense; defense is entitled to have the mental state element defined for the jury; 5-4.

***State v. Jackson***, 62 Wn.App. 53 (1991)

Defendant orders 14-year old to lift up her skirt or he would kill her, backs her up but never touches her, is convicted of attempted rape 2°; held: evidence was sufficient, as it is doubtful that, under substantial step requirement, an overt act toward penetration is necessary to prove attempted rape, *distinguishing State v. Meyer*, 37 Wn.2d 759, 771 (1951); substantial step can be proved by (1) lying in wait, searching for or following the contemplated victim, (2) enticing or seeking to entice the victim to go to the place contemplated for the commission of the crime; and (3) unlawful entry of place where it is contemplated the crime will be committed, *State v. Workman*, 90 Wn.2d 443, 451 n. 2 (1978); I.

***State v. Billups***, 62 Wn.App. 122 (1991)

Defendant leans out his van window and says to juvenile, "I'll pay you a dollar if you'll come down to [a park] with me," hides when police approach; held: sufficient to convict of attempted kidnap 2°; attempt statute, RCW 9A.28.020, is neither vague nor overbroad; I, 2-1.

***State v. Dunbar***, 117 Wn.2d 587 (1991)

Murder 1° by creation of a grave risk of death, former RCW 9A.32.030(1)(b), lacks element of intent, thus attempted murder is not a lesser, as attempted murder requires the specific intent to cause the death of another person; *cf.: State v. Chhom*, 128 Wn.2d 739 (1996); 9-0.

***State v. Rhode***, 63 Wn.App. 630 (1991)

"Attempt" in information encompasses and is sufficient to inform defendant that "substantial step" is element of the crime, *State v. Smith*, 49 Wn.App. 596, 599 (1987), *State v. Gallegos*, 65 Wn.App. 230 (1992), *State v. Berglund*, 65 Wn.App. 648 (1992), *State v. Borrero*, 97 Wn.App. 101 (1999); I.

***State v. Gallegos***, 65 Wn.App. 230 (1992)

An attempt is a lesser which need not be charged for trier of fact to convict; information which alleges defendant, "by forcible compulsion did attempt to engage in sexual intercourse" sufficiently establishes elements of intent and substantial step where challenged for first time on appeal; *accord:* *State v. Berglund*, 65 Wn.App. 648 (1992); I.

***State v. Hale***, 65 Wn.App. 752 (1992)

Defendant gives child 40 times sleeping pill dose, states she did it so they would go to sleep and never wake up; held: sufficient to establish substantial step for murder 1° as it is no defense that true facts render commission of a completed crime legally or factually impossible, RCW 9A.28.020(2), physician testified that dose could have been lethal; III.

***State v. Vermillion***, 66 Wn.App. 332 (1992)

ER 404(b) "handiwork" evidence can establish intent requirement of attempted burglary; III.

***State v. Lynn***, 67 Wn.App. 339 (1992)

Police deliver counterfeit drugs to defendant who is convicted of attempted possession, RCW 69.50.407; held: impossibility is not a defense under the general attempt statute, RCW 9A.28.020, *State v. Townsend*, 147 Wn.2d 666, 679-80 (2002), or under the VUCSA attempt law, RCW 69.50.407, *State v. Wojtyna*, 70 Wn.App. 689 (1993), *see:* *State v. Davidson*, 20 Wn.App. 893, 898 (1979); I.

***State v. Pacheco***, 70 Wn.App. 27 (1993), *reversed*, 125 Wn.2d 150 (1994)

One can attempt to deliver a controlled substance where the sole accomplice is an undercover police informant who committed the crime, albeit with police permission, *State v. Davidson*, 20 Wn.App. 893, 897-8 (1978), *State v. Peterson*, 54 Wn.App. 75 (1989); II.

***State v. Walsh***, 123 Wn.2d 741, 747 (1994)

Neither legal nor factual impossibility is a defense to an attempted crime, *State v. Townsend*, 147 Wn.2d 666, 679-80 (2002), *State v. Wilson*, 158 Wn.App. 305, 316-20 (2010); 9-0.

***State v. Grundy***, 76 Wn.App. 335 (1994)

Officer approaches suspect, asks what he wants, suspect replies "coke," officer asks if suspect has money, suspect says yes, suspect is arrested, convicted of attempted possession of drugs; held: while there is sufficient evidence of intent, an overt act requires more than mere preparation; it must be "a direct, ineffectual act done toward commission of a crime and, where the design of a person to commit a crime is clearly shown, slight acts done in furtherance of this design will constitute an attempt," *State v. Roby*, 67 Wn.App. 741, 746-7 (1992); here, parties were still negotiating, insufficient evidence of overt act, *cf.:* *State v. Wilson*, 158 Wn.App. 305, 316-20 (2010), *State v. Wilson*, 1 Wn.App.2d 73 (2017); III.

***State v. Aumick***, 126 Wn.2d 422, 428-31 (1995)

Failure to require proof of intent and substantial step in to convict instruction for an attempt is constitutional error, *State v. Wilson*, 1 Wn.App.2d 73 (2017), affirming *State v. Aumick*, 73 Wn.App. 379, 384-6 (1994); 9-0.

***State v. Chhom***, 128 Wn.2d 739 (1996)

Rape of a child, RCW 9A.44.073, can support attempted rape of a child irrespective of the lack of a *mens rea* element in the greater offense, *State v. Patel,* 170 Wn.2d 476 (2010), *distinguishing State v. Dunbar*, 117 Wn.2d 587, 590 (1991); 9-0.

***State v. Price***, 103 Wn.App. 845, 851-54 (2000)

Firing a gun once into a vehicle with two people in it is sufficient to prove two counts of attempted murder, even if there is no evidence that defendant knew the car was occupied by more than one person; II.

***State v. Red***, 105 Wn.App. 51 (2001)

Because **manslaughter** is not a specific intent crime, then attempted manslaughter is not a lesser of attempted murder; II.

***State v. Borrero***, 147 Wn.2d 353 (2002)

Attempted murder information fails to allege "substantial step," RCW 9A.28.020(1), defense moves to dismiss after state rests; held: "substantial step" is commonly understood from the word "attempt," thus defendant had sufficient notice, *see also: Pers. Restraint of Borrero*, 161 Wn.2d 532 (2007); 5-4.

***State v. DeRyke***, 149 Wn.2d 906 (2003)

In attempted rape 1° case, "to convict" instruction fails to set forth the degree of rape attempted, but other instruction defines rape 1°, and verdict form states that the crime charged is attempted rape 1°; held: while it was error to give "to convict" instruction without specifying degree, because no lessers were given, the error was harmless; affirms *State v. DeRyke*, 110 Wn.App. 815, 819-21 (2002); 9-0.

***State v. Luther***, 157 Wn.2d 63 (2006)

State proves defendant possessed photos of what appear to be minors engaged in sexually explicit conduct, but state does not prove age of minors, court convicts defendant of attempted possessing depictions of minors engaged in sexually explicit conduct, RCW 9.68A.070; held: while one cannot be found guilty of possession of child pornography unless it is proved to actually be child pornography, *Ashcroft v. Free Speech Coalition*, 152 L.Ed.2d 403 (2002), First Amendment does not preclude conviction of attempted possession without proof of age of the minors, *United States v. Williams*, 170 L.Ed.2d 650 (2008), *see also: State v. Aljutily*, 149 Wn.App. 286 (2009); affirms *State v. Luther*, 125 Wn.App. 176 (2005); 9-0.

***State v. Reed***, 150 Wn.App. 761, 769-70 (2009)

Attempted murder to convict instruction need not set forth the elements of murder where another instruction sets forth the elements of murder, *State v. Besabe*, 166 Wn.App. 872, 883-84 (2012), *State v. Embry*, 171 Wn.App. 714, 757-58 (2012), *State v. Boswell*, 185 Wn.App. 321, 335-37 (2014), *State v. Jefferson*, 199 Wn.App. 772, 809-10 (2017), *reversed, on other grounds*, 192 Wn.2d 225 (2018), *State v. Orn*, 197 Wn.2d 343 (2021), *State v. Burrus*, 17 Wn.App.2d 162 (2021), *State v. Canela*, 199 Wn.2d 321 (2022); II.

***State v. Wilson***, 158 Wn.App. 305, 316-20 (2010)

Defendant engages in e-mail exchange with officer posing as a woman offering sex for money with herself and her teenage daughter, agrees to price and sex acts, agrees to a meeting place, is arrested in his car with the agreed sum, challenges sufficiency; held: evidence was sufficient to establish a substantial step, *State v. Sivins*, 138 Wn.App. 52, 62-65 (2007), *State v. Townsend*, 147 Wn.2d 666, 679 (2002); I.

***State v. Oakley***, 158 Wn.App. 544, 549-50 (2010)

Pointing a gun and attempting to fire it even though it jams is sufficient to prove attempted drive-by shooting; II.

***State v. Davis***, 174 Wn.App. 623, 635-38 (2013)

Instructing jury that a substantial step is conduct that "strongly indicates" a criminal purpose rather than "strongly corroborates" does not relieve state of burden to prove intent; instructing jury that a substantial step must strongly indicate "*a* criminal purpose" as opposed to the specific criminal purpose is not error, *State v. Eplett*, 167 Wn.App. 660, 666 (2012), distinguishing *State v. Roberts*, 142 Wn.2d 471 (2000); II.

***State v. Alexander***, 184 Wn.App. 892 (2014)

Criminal attempt statute, RCW 9A.28.020 (2001), does not violate single subject and subject in title rules, CONST. Art. 2, § 19; II.

***State v. Jefferson***, 199 Wn.App. 772, 809-10 (2017), *reversed, on other grounds*, 192 Wn.2d 225 (2018)

In attempted murder 1° case, to convict instruction sets out elements of attempt, separate instruction defines murder 1°; held: in a charge of an attempted crime the to convict instruction need not set out all of the elements of the substantive crime where a separate instruction defines and includes all of the elements of the substantive crime, *State v. DeRyke*, 149 Wn.2d 906, 910 (2003), *State v. Reed*, 150 Wn.App. 761, 772 (2009), *State v. Orn*, 197 Wn.2d 343 (2021), *State v. Burrus*, 17 Wn.App.2d 162 (2021), *State v. Canela*, 199 Wn.2d 321 (2022); I.

***State v. Wilson***, 1 Wn.App.2d 73 (2017)

Defendant-stepparent asks five-year old, in bedroom, to "suck on his spot," victim says no, defendant says "go ahead," victim says no again, defendant says okay, is charged with attempted rape of a child; held: in the context of defendant being a caretaker of young victim who "directs" victim to have sexual contact in an isolated place evidence is sufficient to prove attempt, *State v. Jackson*, 62 Wn.App. 53, 57 (1991), distinguishing *State v. Grundy*, 76 Wn.App. 335 (1994); I.

***State v. Nelson***, 191 Wn.2d 61 (2018)

Defendant enters pharmacy, at gunpoint demands drugs and money from pharmacist who says he lacks access to either, defendant leaves, is charged with attempted robbery, argues to trial court that an element of attempted robbery is that victim had ownership, representative, or possessory interest in the property, court declines to so instruct; held: elements in a prosecution of criminal attempt are (1) intent to commit a specific crime, and (2) any act which is a

substantial step toward the commission of that crime, forcibly taking personal property from the person or his or her presence implies that that person, and not the defendant, has a superior possessory right to the item being taken, overruling *State v. Richie*, 191 Wn.App. 916 (2015); 9-0.

***State v. Briggs***, 18 Wn.App.2d 544 (2021)

Information alleging attempted violation of a no contact order must include *mens rea* element that defendant intended to commit the specific crime; I.

# BILL OF PARTICULARS

***State v. Dailey***, 93 Wn.2d 454 (1980)

Failure to provide bill of particulars, where ordered, is grounds for CrR 8.3(b) motion to dismiss; 9-0.

***State v. Maurer***, 34 Wn.App. 573 (1983)

A bill of particulars is part of the state's pleading for purposes of pretrial factual consideration; pretrial motion to dismiss for factual insufficiency may properly be based on information and bill, *State v. Morton*, 83 Wn.2d 863 (1974), *State ex rel. Clark v. Hogan*, 49 Wn.2d 457 (1956); II.

***State v. Holt***, 104 Wn.2d 315 (1985)

Where information fails to allege a statutory element of the crime, defense may move to dismiss at any time; failure of the defense to request a bill of particulars does not waive the issue as a bill of particulars is not a part of the information and cannot cure a fundamentally defective information; a complete jury instruction cannot cure a defective information; 9-0.

***State v. Peerson***, 62 Wn.App. 755 (1991)

Where instructions fail to include names of victims set forth in bill of particulars, no error since defense would have been the same even if victims were named, thus no prejudice; I.

***State v. Allen***, 116 Wn.App. 454, 459-60 (2003)

Defendant is not entitled to a bill of particulars to explain whether state contends he was an accomplice or principal, as there is no distinction between accomplice or principal liability, the charging of one theory adequately apprises defendant of his liability for the other, *State v. Molina*, 83 Wn.App. 144, 148 (1996); III.

***State v. Turner***, 167 Wn.App. 871, 879-82 (2012)

Defendant grabs officer's waist during arrest process, after cuffing head butts officer, is convicted of assault 3°, on appeal argues defense counsel was ineffective for not demanding a bill of particulars as to which event was the assault; held: there was a continuing course of assaultive behavior, thus a bill of particulars would not have limited the prosecutor to one act, trial court was not obliged to grant a bill even if demanded; 2-1, III.

# BURGLARY/CRIMINAL TRESPASS

***State v. Mace***, 97 Wn.2d 840 (1982)

Possession of recently stolen property, unless accompanied by other evidence of guilt, is not *prima facie* evidence of burglary; *see*: *State v. Rodriquez*, 20 Wn.App. 876 (1978), *State v. Evans*, 45 Wn.App. 678 (1986), *State v. Ehrhardt*, 167 Wn.App. 934, 939-41 (2012; 9-0.

***State v. Mounsey***, 31 Wn.App. 511 (1982)

Criminal trespass 2° is not a **lesser** of burglary 1°; III.

***State v. Loucks***, 98 Wn.2d 563 (1983)

Tracking dog evidence, while admissible, *State v. Socolof*, 28 Wn.App. 407 (1981), is not sufficient, without corroboration, to sustain conviction of **burglary**, *reversing State v. Loucks*, 32 Wn.App. 77 (1981); *see*: *State v. Nicholas*, 34 Wn.App. 775 (1983), *State v. Salinas*, 169 Wn.App. 210, 223 (2012); 9-0.

***State v. Johnson***, 100 Wn.2d 607 (1983)

In **burglary** case, **inference of intent** instruction, RCW 9A.52.040, may not be given when defendant does not present evidence on the issue of intent; extensive discussion of various types and effects of presumptions; *modified: State v. Bergeron*, 105 Wn.2d 1 (1985); *see: State v. Brunson*, 128 Wn.2d 98 (1995), *State v. Deal*, 128 Wn.2d 693 (1996); 6-3.

***State v. Gilbert***, 33 Wn.App. 753 (1983)

Burglary 1°, RCW 9A.52.020, is committed when defendant assaults any person while defendant is entering any dwelling, while he is in the dwelling or while he is in immediate flight from the dwelling, *but see: State v. Gilbert*, 68 Wn.App. 379 (1993), *see: State v. Koss*, 158 Wn.App. 8, 14-16 (2010), *affirmed, on other grounds,* 181 Wn.2d 493 (2014); III.

***State v. Tyson***, 33 Wn.App. 859 (1983)

Entering a detachable **semitrailer**, with intent to commit a crime, is burglary; I.

***State v. Schneider***, 36 Wn.App. 237 (1983)

Estranged wife arranges for others to break into husband's home, which was community property, argues no unlawful entry is possible; held: test for determining unlawfulness of entry is occupancy or possession, not ownership, *State v. Klein*, 195 Wash. 338, 342 (1938); I.

***State v. Fryer***, 36 Wn.App. 312 (1983)

Defendant enters building unlawfully but maintains his intent to commit a crime developed after entry; held: criminal intent for purposes of burglary may occur at the time of unlawful entry or at any time thereafter so long as defendant "remains unlawfully"; assault does not merge into burglary 1°, *State v. Hunter*, 35 Wn.App. 312 (1983), *State v. Davison*, 56 Wn.App. 554 (1990), *State v. Davis*, 90 Wn.App. 777, 783-5 (1998), *distinguishing State v. Johnson*, 92 Wn.2d 671, 677 (1979); *but see: State v. Ortiz*, 77 Wn.App. 790 (1995); I.

***State v. McDaniels***, 39 Wn.App. 236 (1984)

Suspects enter church during services, are ordered to leave, return later and steal a coat; held: although church was open to public, defendant was not licensed, invited or privileged to enter or remain, thus evidence sufficient to convict, *accord: State v. Kutch*, 90 Wn.App. 244 (1998), *see: State v. Miller*, 90 Wn.App. 720 (1998); II.

***State v. Brown***, 39 Wn.App. 549 (1984)

An accomplice need not have actual knowledge of the principal's being armed to be convicted of burglary 1°, but must have such knowledge to enhance penalty by a deadly weapon finding, following *State v. McKim*, 98 Wn.2d 111 (1982), *State v. Davis*, 35 Wn.App. 506 (1983), *but see*: *State v. Plakke*, 31 Wn.App. 262 (1982), *State v. Van Pilon*, 32 Wn.App. 944 (1982); I.

***State v. Loucks***, 98 Wn.2d 563 (1983)

Tracking dog evidence, while admissible, *State v. Socolof*, 28 Wn.App. 407 (1981), is not sufficient, without corroboration, to sustain conviction of burglary, *reversing State v. Loucks*, 32 Wn.App. 77 (1981); 9-0.

***State v. Steinbach***, 101 Wn.2d 460 (1984)

Juvenile files alternative residential placement petition, RCW 13.32A.150, is placed by court in alternative residence; parent tells respondent she could not live at home, but could visit; ARP order does not order respondent out of home; held: no unlawful entry, thus no burglary of parent's home is possible; *reverses State v. Steinbach*, 35 Wn.App. 473 (1983); *see*: *State v. Walsh*, 57 Wn.App. 488 (1990), *State v. Jensen*, 57 Wn.App. 501 (1990); 5-4.

***State v. Bergeron***, 105 Wn.2d 1 (1985)

The specific crime intended to be committed inside burglarized premises is not an element of burglary that must be included in the information, jury instructions, *State v. Federov*, 181 Wn.App. 187, 196-99 (2014), or findings and conclusions except where the specific crime intended by the burglar is material to defendant's theory of the case, wherein a bill of particulars should be ordered, overruling *State v. Johnson*, 100 Wn.2d 607 (1983), *cf.*: *Kreck v. Spalding*, 721 F.2d 1229 (9th Cir. 1983); **inference of intent** instruction, RCW 9A.52.040, WPIC 60.05, is approved for burglary and attempted burglary cases except where defendant's conduct is patently equivocal, *State v. Woods*, 63 Wn.App. 588, 591-2 (1991), *State v. Sandoval*, 123 Wn.App. 1 (2004), *see*: *State v. Grayson*, 48 Wn.App. 667 (1987), *State v. Rivas*, 49 Wn.App. 677, 686 (1987), *State v. Jackson*, 51 Wn.App. 100 (1988); 6-3.

***State v. Couch***, 44 Wn.App. 26 (1986)

An enclosed area beneath a building is part of the building, RCW 9A.04.110(5), *cf.: State v. Dunleavy*, 2 Wn.App.2d 420, 427-31 (2018); II.

***State v. Lira***, 45 Wn.App. 653 (1986)

Statutory definition of **building**, RCW 9A.04.110(5), is not vague; I.

***State v. Evans***, 45 Wn.App. 678 (1986)

Mere possession of recently stolen property is not *prima facie* evidence of burglary, *State v. Mace*, 97 Wn.2d 840, 843 (1982); evidence of flight, attempts to dispose of evidence prior to arrest, improbable or false explanation by suspect, presence near the scene of the crime are sufficient, *State v. Ehrhardt*, 167 Wn.App. 934, 939-41 (2012); III.

***State v. Soto***, 45 Wn.App. 839 (1986)

Criminal trespass 1° is a lesser of burglary 2°; I.

***State v. Southerland***, 45 Wn.App. 885 (1986)

Defendant, charged with **burglary** 1°, testifies he was lawfully in the building and did not assault anyone; state's evidence asserts defendant was unlawfully in building, inconsistent as to an assault; court refuses criminal trespass 1° instruction; held: because jury could have believed some of defendant's testimony but not all of it, defense is entitled to trespass instruction as a lesser; aiming a firearm, RCW 9.41.230, is not a lesser of assault 2°; II.

***State v. Hall***, 46 Wn.App. 689 (1987)

Stealing a firearm during a burglary is sufficient to enhance from burglary 2° to burglary 1°, RCW 9A.52.020(1), *State v. Hernandez*, 172 Wn.App. 537 (2012), *State v. Hernandez*, 172 Wn.App. 537 (2012), *but see*: *Pers. Restraint of Martinez*, 171 Wn.2d 354 (2011), *State v. Gotcher*, 52 Wn.App. 350 (1988); *accord*: *State v. Faille*, 53 Wn.App. 111 (1988), *State v. Speece*, 56 Wn.App. 412 (1990); III.

***State v. Peters***, 47 Wn.App. 854 (1987)

Defendant admits to burglary, claims duress, excepts to court's failure to instruct as to trespass as a **lesser**; held: unless the evidence supports an inference that only the lesser crime had been committed, defendant is not entitled to an instruction on the lesser, *distinguishing State v. Wilson*, 41 Wn.App. 397 (1985); I.

***State v. Kilponen***, 47 Wn.App. 912 (1987)

State need not prove that a victim was inside a dwelling to prove burglary 1°; III.

***State v. Scott***, 48 Wn.App. 561 (1987)

While mere presence at scene of burglary is insufficient to convict as an accomplice, *State v. Rotunno*, 95 Wn.2d 931 (1981), *In re Wilson*, 91 Wn.2d 487 (1979), finding defendant in back seat of burglar's vehicle with the stolen property is sufficient, *State v. Knight*, 176 Wn.App. 936 (2013); I.

***State v. Grayson***, 48 Wn.App. 667 (1987)

Evidence sufficient to establish intent to commit theft where defendant knocked on victim's door morning of offense, was aware house was occupied by a person he did not know, forced open door, fled upon discovery; I.

***State v. Rivas***, 49 Wn.App. 677 (1987)

Although information alleges that the intended crime was theft, to convict instruction need not specify same as the language in the information was mere surplusage, *State v. Bergeron*, 105 Wn.2d 1 (1985), *State v. McGary*, 37 Wn.App. 856 (1984), *cf.: Musacchio v.*

*United States*, 577 U.S. 237, 136 S.Ct. 709, 193 L.Ed.2d 639 (2016), *see*: *State v. Barringer*, 32 Wn.App. 882 (1982), *State v. Johnson*, 188 Wn.2d 742 (2017), *State v. Hickman*, 135 Wn.2d 97 (1998); I.

***State v. Kolisynk***, 49 Wn.App. 890 (1987)

Unlawful entry of a gas station building to turn on pumps in order to steal gas from pump located outside building is sufficient to convict of burglary as the entry was done with intent to commit theft of electricity and the service delivery system within the building; *see: State v. Black*, 86 Wn.App. 791, 794 (1997); I.

***State v. Brown***, 50 Wn.App. 873 (1988)

A **fenced area** is not a building for purposes of criminal trespass 1°, RCW 9A.52.070; I.

***State v. Collins***, 110 Wn.2d 253 (1988)

Defendant is invited into residence to use telephone, after which he assaults victim; held: a limitation on or revocation of the privilege to be on premises may be inferred from the circumstances; here, once defendant finished with the telephone and grabbed victim, his privilege to be present was revoked, *State v. Gohl*, 109 Wn.App. 817, 823-24 (2001), *reversing State v. Collins*, 48 Wn.App. 95 (1987), *State v. Lambert*, 199 Wn.App. 51, 72-77 (2017), *cf.: State v. Miller*, 90 Wn.App. 720 (1998), *State v. Klimes*, 117 Wn.App. 758 (2003), *disapproved, in part*, *State v. Allen*, 127 Wn.App. 125 (2005), *see: State v. Howard*, 127 Wn.App. 862, 872-77 (2005); 9-0.

***State v. Faille***, 53 Wn.App. 111 (1988)

Stealing an unloaded gun during a burglary is sufficient to enhance to burglary 1°; *accord*: *State v. Speece*, 56 Wn.2d 412 (1990), *see also: State v. Chiariello*, 66 Wn.App. 241 (1992); I.

***State v. Jackson***, 112 Wn.2d 867 (1989)

**Inference of intent** instruction, RCW 9A.52.040, WPIC 60.05, should not be given in attempted burglary case, *see: State v. Bencivenga*, 137 Wn.2d 703 (1999), *State v. Brooks*, 107 Wn.App. 925 (2001), *but see: State v. Berglund*, 65 Wn.App. 648 (1992); malicious mischief is not a **lesser** included offense of attempted burglary; 7-2 (inference), 9-0 (lesser).

***State v. Speece***, 115 Wn.2d 360 (1990)

Defendant, charged with **burglary** 1°, testifies he did not commit a crime, objects to failure of trial court to instruct on lesser of burglary 2°; held: as there is no affirmative evidence in record that would support an inference that defendant was not armed during the burglary, once the jury found that he was the burglar, then defense is not entitled to instruction on lesser, *State v. Fowler*, 114 Wn.2d 59 (1990); effectively overrules *State v. Wilson*, 41 Wn.App. 397 (1985); *accord: State v. Charles*, 126 Wn.2d 353 (1995), *see: State v. Fernandez-Medina*, 114 Wn.2d 448 (2000), *see: State v. Coryell*, 197 Wn.2d 397 (2021); 9-0.

***State v. Lucca***, 56 Wn.App. 597 (1990)

Fingerprint on a broken out window at point of entry where window was not accessible to public, victim did not know defendant, is sufficient to convict of burglary even though no

evidence was presented establishing whether fingerprint was on inside or outside of window or age of print, or placing defendant at or near residence at time of offense, *distinguishing* *State v. Sewell*, 49 Wn.2d 244 (1956), *see:* *State v. Bridge*, 91 Wn.App. 98 (1998); I.

***State v. Howe***, 116 Wn.2d 466 (1991)

A parental order prohibiting minor child from entering parent's home is sufficient to revoke privilege for purposes of unlawful entry element of burglary where parents have provided some alternative means of assuring that the parents' statutory duty of care is met, *State v. Steinbach*, 101 Wn.2d 460 (1984); *affirms* *State v. Walsh*, 57 Wn.App. 488 (1990) and *State v. Jensen*, 57 Wn.App. 501 (1990); *reverses* *State v. Howe*, 57 Wn.App. 63 (1990); *see:* *State v. Woods*, 63 Wn.App. 588 (1991), *State v. Crist*, 80 Wn.App. 511 (1996), *State v. Cantu*, 156 Wn.2d 819 (2006); 9-0.

***State v. Woods***, 63 Wn.App. 588 (1991)

Mother arranges for son to live with another family, grants permission to enter home only when mother is present; defendant and son break door and enter home, act surprised that mother is home from work ill, run off; at trial, defendant testifies that son told him he was going in for a coat, son's property still in house; held: manner of entry supports sufficient evidence of unlawful entry; patently equivocal evidence of defendant and son's intent upon entry will not support inference of intent to commit crime, RCW 9A.52.030(1), *State v. Bergeron*, 105 Wn.2d 1, 20 (1985), *State v. Couch*, 44 Wn.App. 26, 32 (1986), *State v. Sandoval*, 123 Wn.App. 1 (2004), thus burglary reversed; I.

***State v. Berglund***, 65 Wn.App. 648 (1992)

In attempted burglary 2°, fingerprint evidence establishing that burglar broke glass from outside then pulled more glass from window outward establishes entry, RCW 9A.52.010(2), thus **inference of intent** instruction, RCW 9A.52.040, WPIC 60.05, may be given, *distinguishing* *State v. Jackson*, 112 Wn.2d 867 (1988), *see:* *State v. Bencivenga*, 137 Wn.2d 703 (1999), *State v. Brooks*, 107 Wn.App. 925 (2001); I.

***State v. Chiariello***, 66 Wn.App. 241 (1992)

Mere threat to use a weapon, or searching in pocket for weapon without production of weapon, is insufficient to convict of burglary 1°, *State v. Faille*, 53 Wn.App. 111, 113 (1988), *State v. Gotcher*, 52 Wn.App. 350, 353 (1988), *see: Pers. Restraint of Martinez*, 171 Wn.2d 354 (2011); III.

***State v. Gilbert***, 68 Wn.App. 379 (1993)

An assault outside a burglarized dwelling does not elevate residential burglary to burglary 1°, *but see:* *State v. Gilbert*, 33 Wn.App. 753 (1983); I.

***State v. Murbach***, 68 Wn.App. 509 (1993)

Burglary in an attached garage is residential burglary, RCW 9A.52.025(1), *State v. Neal*, 161 Wn.App. 111 (2011), *State v. Moran*, 181 Wn.App. 316, 321-23 (2014), *State v. McPherson*, 186 Wn.App. 114 (2015); III.

***State v. Hummell***, 68 Wn.App. 538 (1993)

Where defendant testifies he was invited into residence by a person in possession and committed assault after the invitation, then assault 4° is a **lesser** of burglary 1°; II.

***State v. Pollnow***, 69 Wn.App. 160 (1993)

Where underlying crime is not alleged as an element, *State v. Bergeron*, 105 Wn.2d 1 (1985), court need not define elements of underlying crime or instruct as to defenses to underlying crime; III.

***Pers. Restraint of Ness***, 70 Wn.App. 817 (1993)

While possession of recently stolen property alone is insufficient to support a burglary conviction, "slight corroborative evidence of other inculpatory circumstances" is sufficient, *State v. Mace*, 97 Wn.2d 840, 843 (1982); observation of defendant's car at area of burglary on day it occurred plus defendant's working a short distance from the burglaries plus flight from work release after burglary is sufficient, *State v. Ehrhardt*, 167 Wn.App. 934, 939-41 (2012); III.

***State v. Thomson***, 71 Wn.App. 634 (1993)

A bedroom within a single-family dwelling is not a separate building, RCW 9A.04.110(5), for purposes of burglary, *distinguishing State v. Collins*, 110 Wn.2d 253 (1988), *but see: State v. Crist*, 80 Wn.App. 511 (1996), *see also: State v. Miller*, 91 Wn.App. 869 (1998), *State v. Dunleavy*, 2 Wn.App.2d 420, 427-31 (2018); II.

***State v. Deitchler***, 75 Wn.App. 134 (1994)

Defendant, working in police station, probes into evidence locker, is convicted of burglary of "a structure used for the deposit of goods," and thus a **building**, RCW 9A.04.110(5); held: a structure within a larger building will not be a separate building unless the larger building has two or more units separately secured or occupied; here, the police station was occupied by a single tenant, thus did not consist of two or more units, *State v. Thomson*, 71 Wn.App. 634 (1993), *see: State v. Miller*, 90 Wn.App. 720 (1998), *State v. Miller*, 91 Wn.App. 869 (1998), *State v. Dunleavy*, 2 Wn.App.2d 420, 427-31 (2018); II.

***State v. Gans***, 76 Wn.App. 445 (1994)

A donkey is "goods," and thus a corral for the donkey is a **building**, RCW 9A.04.110(5); a fenced area is a building where it's primary purpose is to protect property within its confines, *State v. Wentz*, 149 Wn.2d 342 (2003), *see also: State v. Engel*, 166 Wn.2d 579 (2009) ,*State v. Johnson*, 159 Wn.App. 766 (2011); I.

***State v. Brooks***, 77 Wn.App. 516, 520-1 (1995)

Where burglary information alleges that defendant entered buildings, state must elect the building, or unanimity instruction must be given; III.

***State v. Ortiz***, 77 Wn.App. 790 (1995)

Assault merges into burglary 1°, *State v. Johnson*, 92 Wn.2d 671, 677 (1979), RCW 9A.52.050; Division III declines to follow Division I in *State v. Davison*, 56 Wn.App. 554, 561 (1990), *State v. Fryer*, 36 Wn.App. 312, 315 (1983), *State v. Hunter*, 35 Wn.App. 708, 717 (1983), *State v. Davis*, 90 Wn.App. 777, 783-5 (1998).

***State v. Brunson***, 128 Wn.2d 98 (1995)

**Inference of intent** instruction, RCW 9A.52.040, WPIC 60.05, is permissive, not mandatory, *State v. Jackson*, 112 Wn.2d 867, 875 (1989), which trial court must find is proved by a preponderance, not beyond a reasonable doubt, unless the inference is the sole and sufficient proof of an element, *County Court of Ulster County v. Allen*, 60 L.Ed.2d 777 (1979), overruling *State v. Delmarter*, 68 Wn.App. 770 (1993), *but see: Schwendeman v. Wallenstein*, 971 F.2d 313 (9th Cir. 1992); here, criminal intent flows more likely than not from defendants' unlawful entries; *affirms State v. Brunson*, 76 Wn.App. 24 (1994); *see: State v. Deal*, 128 Wn.2d 693 (1996), *State v. Sandoval*, 123 Wn.App. 1 (2004), *but see: State v. Cantu*, 156 Wn.2d 819 (2006); 7-1.

***State v. Deal***, 128 Wn.2d 693 (1996)

That portion of **inference of intent** instruction that reads "unless such entering or remaining shall be explained by evidence satisfactory to the jury to have been made without such criminal intent," RCW 9A.52.040, WPIC 60.05, is an impermissible production- and pursuasion-shifting instruction, *State v. Cantu*, 156 Wn.2d 819, 825-29 (2006), harmless here; *accord: State v. Schloredt*, 97 Wn.App. 780, 795-801 (1999); 7-2.

***State v. Crist***, 80 Wn.App. 511 (1996)

Minor child living at home is told not to enter parents' locked bedroom, breaks in and steals from bedroom, respondent claims evidence is insufficient to prove burglary; held: while respondent has a privilege to enter the family home, *State v. Howe*, 116 Wn.2d 466 (1991), the privilege does not extend to a bedroom from which respondent was expressly excluded, bedroom is a "dwelling," RCW 9A.52.010(3), for purposes of residential burglary, RCW 9A.52.025(1), *but see: State v. Thomson*, 71 Wn.App. 634 (1993), *cf.: State v. Cantu*, 156 Wn.2d 819, 823-25 (2006); II.

***State v. Kutch***, 90 Wn.App. 244 (1998)

Defendant is caught shoplifting, store security guard gives written and verbal notice banning entry into the mall, defendant returns and shoplifts, is convicted of burglary 2°; held: private property owner may restrict the use of its property to those purposes for which it is lawfully dedicated, as long as restrictions are not discriminatory, *Adderley v. Florida*, 17 L.Ed.2d 149 (1966), *State v. McDaniels*, 39 Wn.App. 236 (1984); verbal or written notice to exclude is sufficient, *see: State v. Blair*, 65 Wn.App. 64 (1992); violation of notice revoking invitation was sufficient to prove unlawful entry element of burglary, *State v. Bellerouche*, 129 Wn.App. 912 (2005), *see: State v. Klimes*, 117 Wn.App. 758 (2003), *disapproved, in part, State v. Allen*, 127 Wn.App. 125 (2005); III.

***State v. Miller***, 90 Wn.App. 720 (1998)

Defendant drives into open car wash, breaks coin box and steals money, is convicted of burglary; held: it is immaterial whether defendant formulated intent to steal before or after he entered the car wash, as an entry or remaining in a business open to the public is not rendered unlawful by defendant's intent to commit a crime, *State v. Klimes*, 117 Wn.App. 758 (2003), *disapproved, in part, State v. Allen*, 127 Wn.App. 125 (2005), distinguishing *State v. Collins*, 110 Wn.2d 253 (1988), *State v. Thomson*, 71 Wn.App. 634 (1993), *State v. Deitchler*, 75

Wn.App. 134 (1994), *State v. McDaniels*, 39 Wn.App. 236 (1984); to hold otherwise would convert every shoplift into burglary; III.

***State v. Davis***, 90 Wn.App. 777, 781-2 (1998)

One roommate, from outside home, gives defendant permission to enter apartment, defendant enters, is told to leave by another tenant when he pulls a gun, he remains, is convicted of burglary; held: defendant's license to enter was specifically revoked, thus evidence was sufficient to convict; trial court has discretion whether or not to apply burglary anti-merger statute, RCW 9A.52.050, *see: Lessley, supra.*, at 780-1, *State v. Kisor*, 68 Wn.App. 610, 618 (1993); I.

***State v. Allen***, 90 Wn.App. 957 (1998)

Defendant is caught inside an empty public school classroom rifling a jacket, is convicted of burglary; held: school policy requires individuals arriving at school must report to office, defendant had no child in the class, thus he did not have a license, privilege or invitation to enter the classroom, *see: State v. Thomson*, 71 Wn.App. 634 (1993); III.

***State v. Bridge***, 91 Wn.App. 98 (1998)

Defendant's fingerprint is found on a store tag attached to a recently-purchased tool moved during burglary, no other evidence offered against defendant; held: if fingerprint evidence is the only evidence linking a defendant with a crime, state must present evidence that the object on which the fingerprint appears was inaccessible to defendant prior to the burglary, *see: State v. Lucca*, 56 Wn.App. 597, 599 (1990), *see: State v. Todd*, 141 Wn.App. 945 (2000); here, absent proof that the print could only have been impressed at the time the crime was committed, evidence is insufficient to support a burglary conviction; III.

***State v. Miller***, 91 Wn.App. 869 (1998)

In a multi-unit apartment complex, a secured storage locker large enough to accommodate a human being is a separate building, RCW 9A.04.110(5), *State v. Dunleavy*, 2 Wn.App.2d 420, 427-31 (2018), distinguishing *State v. Thomson*, 71 Wn.App. 634 (1993), *State v. Deitchler*, 75 Wn.App. 134 (1994); II.

***State v. Grimes***, 92 Wn.App. 973 (1998)

Defendant claims that strangers offered him money to assist them in moving furniture from a residence, offers good faith belief instruction, court declines; held: because court instructed jury that state must prove criminal intent, jury could have acquitted on defendant's lack of intent to steal, thus error, if any, was harmless; III.

***State v. Bencivenga***, 137 Wn.2d 703 (1999)

Defendant is observed in dark clothing at 3:30 am in snowstorm prying open door of restaurant, tells police he sought to win a bet that he could remove a pin on the door, is convicted of attempted burglary; held: if finder of fact concludes there is an alternative reasonable explanation for defendant's actions, then evidence is insufficient, but here trial court discarded one possible inference when it concluded that the inference was unreasonable under the circumstances, *State v. Brooks*, 107 Wn.App. 925, 928-32 (2001); nothing forbids a court from logically inferring intent from proven facts as long as it is satisfied the state has proved intent;

trial court's finding that defendant's story was not believable and that defendant acted with intent was a rational inference based on the evidence, *State v. Chacky*, 177 Wash. 694, 696 (1934), *State v. Brunson*, 128 Wn.2d 98, 102 (1995), *State v. Bergeron*, 105 Wn.2d 1, 10-11 (1985); 9-0.

***State v. Brooks***, 107 Wn.App. 925, 928-32 (2001)

Defendant is seen using screwdriver to try to enter apartment building, bypassing intercom, then enters complex through a gate and tries to open an apartment door with screwdriver, claims he was trying to get in to use bathroom, is convicted of attempted burglary; held: as long as court does not instruct as to inference of intent, *State v. Jackson*, 112 Wn.2d 867 (1989), *but see: State v. Berglund*, 65 Wn.App. 648 (1992), jury may still infer intent to commit a crime from the surrounding circumstances, which are sufficient here; I.

***State v. Gohl***, 109 Wn.App. 817, 823-34 (2001)

Victim tells defendant he cannot enter residence, defendant enters, asks for water, victim gives defendant water, defendant assaults her; held: defendant had no license to be in apartment, once he entered it was for limited purpose of getting water, *State v. Collins*, 110 Wn.2d 253, 261 (1988), *State v. Howard*, 127 Wn.App. 862- 872-77 (2005), *State v. Lambert*, 199 Wn.App. 51, 72-77 (2017), *cf.: State v. Klimes*, 117 Wn.App. 758 (2003), *disapproved, in part, State v. Allen*, 127 Wn.App. 125 (2005), thus evidence is sufficient to prove burglary, *State v. Cordero*, 170 Wn.App. 351 (2012); I.

***State v. Wentz***, 149 Wn.2d 342 (2003)

A fenced back yard is a building for purposes of burglary statute, RCW 9A.04.110(5), overruling *State v. Flieger*, 45 Wn.App. 667 (1986), *see: State v. Engel*, 166 Wn.2d 579 (2009); III.

***State v. Snedden***, 149 Wn.2d 914 (2003)

Defendant enters building from which he had been precluded and exposes himself, trial court dismisses burglary 2˚; held: indecent exposure is a crime against a person for purposes of burglary, *State v. Lawson*, 185 Wn.App. 349 (2014), *cf.: State v. Kindell*, 181 Wn.App. 844 (2014); *affirms State v. Snedden*, 112 Wn.App. 122 (2002); 8-1.

***State v. Klimes***, 117 Wn.App. 758 (2003), *disapproved, in part, State v. Allen*, 127 Wn.App. 125 (2005)

Police testify that it appears defendant was stealing parts from an open junkyard, having entered it by climbing over a fence, defendant testifies he entered the junkyard by the open gate, jury is instructed that they may convict if they find that defendant "entered or remained unlawfully," prosecutor argued that defendant could be convicted even if he entered the gate because he intended to steal; held: "enters unlawfully" and "remains unlawfully" are alternate means of committing burglary and, where both are charged, there must be substantial evidence to support both means unless the prosecutor elects one, *see: State v. Sony*, 184 Wn.App. 496 (2014), *but see: State v. Allen*, 127 Wn.App. 125 (2005), *State v. Howard*, 127 Wn.App. 862, 872-77 (2005), *State v. Spencer*, 128 Wn.App. 132 (2005), *State v. Gonzales*, 133 Wn.App. 236, 243-44 (2006); here, if the jury believed that defendant entered lawfully, then no burglary occurred, *see: State v. Collins*, 110 Wn.2d 253 (1988), *State v. Thompson*, 71 Wn.App. 634

(1993), *State v. Miller*, 90 Wn.App. 720 (1998), *State v. Kutch*, 90 Wn.App. 244 (1998), *State v. Smith*, 17 Wn.App. 146 (2021); I

***State v. Stinton***, 121 Wn.App. 569 (2004)

Defendant, restrained from entering victim's home by protection order, enters home with permission of victim who later directs him to leave, defendant leaves then immediately re-enters, is charged with residential burglary, predicate crime being violation of the protection order; held: violation of a protection order is a crime against a person and is harassment, RCW 9A.46.060(36), thus violation of a protection order may be the intended crime necessary to prove burglary, *State v. Spencer*, 128 Wn.App. 132 (2005), *see: State v. Wilson*, 136 Wn.App. 596 (2007); II.

***State v. Sandoval***, 123 Wn.App. 1 (2004)

Drunk defendant kicks in front door of stranger's home, expresses surprise at seeing occupant, shoves occupant when confronted, at trial defendant's wife testifies that he has kicked in his own door when he has knocked and she did not answer immediately, court gives permissive **inference of intent** instruction, without objection; held: inference was the only evidence of intent, there was no fact, alone or in conjunction with others, from which entering with intent to commit a crime more likely than not could flow, *State v. Woods*, 63 Wn.App. 588 (1991), *see: State v. Brunson*, 128 Wn.2d 98 (1995), thus trial court erred in giving instruction, which was a due process violation, *State v. Deal*, 128 Wn.2d 693, 698 (1996), *see also: State v. Cantu*, 156 Wn.2d 819 (2006); III.

***State v. McDonald***, 123 Wn.App. 85 (2004)

Defendant burglarizes a house under reconstruction, at residential burglary trial, RCW 9A.52.025, court rejects lesser instruction for burglary 2°; held: burglary 2° is a lesser degree offense, RCW 10.61.003, of residential burglary; because a dwelling is defined as one "ordinarily used by a person for lodging," RCW 9A.04.110(7), jury could have found building was not a residence, trial court erred in refusing instruction, *see: State v. Hall*, 6 Wn.App.2d 238 (2018); II.

***State v. Allen***, 127 Wn.App. 125 (2005)

Defendant enters building partially open to public, intrudes into private areas and steals, court instructs that defendant both "entered unlawfully" and "remained unlawfully," unanimity instruction is not given; held: where the initial entry is lawful but the scope of any implied or express privilege is exceeded by intruding into areas not open to the public, an instruction requiring either unlawful entry or remaining raises no unanimity concerns, as there is no evidence of unlawful entry and no rational juror could rely on the unlawful entry means to establish burglary, disapproving, in part, *State v. Klimes*, 117 Wn.App. 758 (2003), *see: State v. Collins*, 110 Wn.2d 253 (1988), *State v. Thomson*, 71 Wn.App. 634 (1993), *State v. Howard*, 127 Wn.App. 862, 872-77 (2005), *State v. Spencer*, 128 Wn.App. 132 (2005), *State v. Johnson*, 132 Wn.App. 400, 409-10 (2006), *State v. Gonzales*, 133 Wn.App. 236, 243-44 (2006), *State v. Smith*, 17 Wn.App. 146 (2021); here, because prosecutor argued that jury should convict if it found that defendant entered the building with intent to steal, defendant was prejudiced, *State v. Miller*, 90 Wn.App. 720, 725 (1998); I.

***State v. Howard***, 127 Wn.App. 862, 872-77 (2005)

Defendant enters house without permission, commits assault, in burglary 1° trial to convict instruction states "enters or remains unlawfully," no *Petrich* unanimity instruction is given; held: while "enters unlawfully" and "remains unlawfully" are alternative means, *State v. Allen*,127 Wn.App. 125 (2005), *cf.: State v. Thomson*, 71 Wn.App. 634, 636-40 (1993), *State v. Collins*, 110 Wn.2d 253 (1988), they are not necessarily repugnant and, where evidence establishes that both unlawful entry and remaining occurred, lack of unanimity instruction is not error; an unlawful remaining can occur even after an unlawful entry; I.

***State v. Allen***, 127 Wn.App. 945 (2005)

Defendant, with sledgehammer and crowbar, covered with sheetrock dust, found inside of a building containing several offices after hours, outside doors damaged, window pane removed, holes smashed through one office into another, drawers rummaged, seeks trespass lesser to burglary; held: jury could not find that whoever entered the building did so without an intent to commit a crime therein, thus court did not err in refusing trespass instruction; II.

***State v. Spencer***, 128 Wn.App. 132 (2005)

In violation of no contact order, defendant enters victim's home, is convicted of residential burglary and violation of a no contact order; held: a no contact order violation is a continuing crime, *State v. Stinton*, 121 Wn.App. 569 (2004), satisfying the "intent to commit a crime...therein" element of burglary; I.

***State v. J.P.***, 130 Wn.App. 887 (2005)

Real estate agent testifies that she has exclusive listing for house, she changed locks, she had only keys and that respondent was not authorized to be inside, defense claims property was abandoned and that state failed to prove he lacked permission; held: state need not call actual owner (here, a bank), circumstantial evidence was sufficient to prove lack of permission; abandonment is a defense to burglary since it is a defense to criminal trespass and negates the "unlawful presence" element, RCW 9A.52.090(1), *Bremerton v. Widell*, 146 Wn.2d 561, 570 (2002), *but see: State v. Jensen*, 149 Wn.App. 393, 398-401 (2009), *State v. Olson*, 182 Wn.App. 362 (2014), *cf.: State v. Ayala Ponce*, 166 Wn.App. 409 (2012), however here the house was vacant, not abandoned, thus trial court properly found state met its burden; III.

***State v. Johnson***, 132 Wn.App. 400 (2006)

A roofed, detached garage with no door is a building, at 406-09, RCW 9A.04.110(5); where defendant entered a building and steals, it is not error to instruct as to both the entering and remaining mean, and no unanimity instruction or election is required, at 409-10, *State v. Allen*, 127 Wn.App. 125 (2005), *but see: State v. Smith*, 17 Wn.App. 146 (2021); II.

***State v. Cantu***, 156 Wn.2d 819 (2006)

Juvenile, who sometimes lives at mother's home but was not living there on day in question, is seen breaking mother's locked bedroom door, items are found to be missing from bedroom, no evidence produced that mother expressly forbade son from entering bedroom, trial court finds respondent "failed to rebut the statutory presumption that he broke into his mother's bedroom with the intent to commit some crime;" held: while a juvenile's entry into a parent's home is not unlawful where the parent has not prohibited entry, *State v. Steinbach*, 101 Wn.2d

460, 463 (1984), the privilege to enter may be implied by a locked door, *see also:* *State v. Crist*, 80 Wn.App. 511 (1996), *State v. Jensen*, 57 Wn.App. 501 (1990); trial court treated the statutory inference of intent, RCW 9A.52.040, as mandatory, shifting burden to respondent, *State v. Deal*, 128 Wn.2d 693 (1996), thus reversed; reverses *State v. Cantu*, 123 Wn.App. 404 (2004); 8-1.

***State v. Pittman***, 134 Wn.App. 376 (2006)

In attempted burglary case, instructing jury from WPIC 100.01 (2d ed. 1994) that "a person commits the crime of attempted … burglary when, with intent to commit that crime, he or she does any act which is a substantial step toward the commission of that crime," while potentially confusing as it could be read as attempting to commit attempted burglary, *State v. Smith*, 131 Wn.2d 258, 263 (1997), is not clearly erroneous where to convict instruction accurately listed all elements, at 381-83; failure of defense counsel to offer attempted criminal trespass as a lesser is ineffective assistance, at 387-90, *State v. Ward*, 125 Wn.App. 243 (2004), *but see: State v. Hassan*, 151 Wn.App. 209, 221 n. 6 (2009); I.

***State v. Wilson***, 136 Wn.App. 596, 604-12 (2007)

No contact order prohibits contact with complainant but not residence, defendant and complainant sign lease on house, cohabit, quarrel, defendant leaves and returns and assaults complainant, trial court dismisses charge of burglary 1º; held: dismissal was proper as defendant could not have burglarized his own residence; II.

***State v. Powell***, 139 Wn.App. 808, 814-16 (2007), *rev'd, on other grounds*, 166 Wn.2d 73 (2009)

In attempted burglary 1° case, victim's fear of defendant, prior threat to kill if she prevented him from seeing their son, defendant's dress outside victim's home in camouflage clothing, attempt to sneak into home is sufficient even though defendant had a right to see his son; 2-1, II.

***State v. Brown***, 162 Wn.2d 422, 430-35 (2007)

Defendant commits a burglary during which he finds a gun in a closet and moves it to a bed but is interrupted and leaves it behind, is convicted of burglary 1° with a firearm; held: evidence that a firearm was briefly in a burglar's possession and thus "merely loot," at 434 ¶ 27, without more, does not establish a nexus between defendant, the weapon and the crime, *State v. Schelin*, 147 Wn.2d 562 (2002), *see: State v. Hernandez*, 172 Wn.App. 537 (2012); "defendant's intent or willingness to use the rifle is a condition of the nexus requirement that does, in fact, appear in Washington cases," at 434 ¶ 26; 5-4.

***State v. Jensen***, 149 Wn.App. 393 (2009)

Abandonment, RCW 9A.52.090(1), is not a defense to burglary, *State v. Olson*, 182 Wn.App. 362 (2014), *but see: State v. J.P.*, 130 Wn.App. 887 (2005); II.

***State v. Engel***, 166 Wn.2d 572 (2009)

"Fenced area," RCW 9A.04.110(5), is limited to the curtilage of a building or structure that itself qualifies as an object of burglary, and must be completely enclosed either by fencing or a combination of fencing and other structures; 9-0.

***State v. Devitt***, 152 Wn.App. 907 (2009)

Following hit and run, police chase defendant who enters an apartment through an unlocked door, drinks tea with resident where defendant is arrested, trial court convicts for residential burglary based upon obstructing an officer as the "crime against a person or property therein, RCW 9A.52.025(1); held: obstructing is not a crime against a person or property under Sentencing Reform Act, RCW 9.94A.411(2)(a), *cf.: State v. Lawson*, 185 Wn.App. 349 (2014), nor was there evidence that defendant intended to commit that crime against the police when he entered the residence; III.

***State v. Elmore***, 154 Wn.App. 885, 899-901 (2010)

Burglary and felony murder/burglary may be punished separately even where the burglary is the predicate offense, per burglary antimerger statute, RCW 9A.52.050; II.

***State v. Koss***, 158 Wn.App. 8, 14-16 (2010), *affirmed, on other grounds*, 181 Wn.2d 493 (2014)

Defendant, on porch, punches victim after she opens door, is convicted of burglary 1°; held: whether assault occurred in or out of the house is a question for the jury, *see also: State v. Gilbert*, 68 Wn.App. 379 (1993), *State v. Gilbert*, 33 Wn.App. 753 (1983); III.

***Pers. Restraint of Martinez***, 171 Wn.2d 354 (2011)

Mere possession of a knife during a burglary is insufficient to enhance to burglary 1°, state must prove that it was "used, attempted to be used, or threatened to be used," RCW 9A.04.110(6), as a weapon, *State v. Gotcher*, 52 Wn.App. 350 (1988), overruling *State v. Gamboa*, 137 Wn.App. 650 (2007) , unless the weapon is a loaded or unloaded firearm, *State v. Hall*, 46 Wn.App. 689, 695 (1987), *State v. Faille*, 53 Wn.App. 111 (1988), *State v. Hernandez*, 172 Wn.App. 537 (2012); 9-0.

***State v. Johnson***, 159 Wn.App. 766 (2011)

A locomotive is a building, RCW 9A.04.110(5), *see: State v. Petit*, 32 Wash. 129, 130 (1903); 2-1, II.

***State v. Neal***, 161 Wn.App. 111 (2011)

A tool room in an apartment building is a dwelling, RCW 9A.04.110(7), for purposes of residential burglary, RCW 9A.52.025(1), *State v. Murbach*, 68 Wn.App. 509, 513 (1993), because entire building is a dwelling, *State v. Moran*, 181 Wn.App. 316, 321-23 (2014), *see: State v. McPherson*, 186 Wn.App. 114 (2015); I.

***State v. Sanchez***, 166 Wn.App. 304 (2012)

Protection order prohibits defendant from being within 300 feet of complainant who invites defendant to her home, defendant commits a crime against her, is charged with burglary, trial court dismisses, *State v. Knapstad*, 107 Wn.2d 346 (1986); held: victim's consent to entry into residence from which defendant is excluded by law does not make defendant's presence there lawful, thus trial court reversed, distinguishing *State v. Wilson*, 136 Wn.App. 596, 604-12 (2007), *see: State v. Stinton*, 121 Wn.App. 569 (2004); III.

***State v. Ayala Ponce***, 166 Wn.App. 409 (2012)

In burglary case, officer testifies that defendant told him that people in the shop he is accused of burglarizing let him in and that he believed they were employees, trial court instructs jury that it is a defense to the lesser of criminal trespass that defendant reasonably believed he was or would have been licensed to enter and that state has the burden of proving the absence of the defense, but court declines to instruct similarly on the greater burglary charge; held: statutory defense to criminal trespass, RCW 9A.52.090 (2011) is not applicable to burglary, *State v. Cordero,* 170 Wn.App. 351, 369-71 (2012), distinguishing *State v. J.P.,* 130 Wn.App. 887 (2005), *see: Bremerton v. Widell,* 146 Wn.2d 56, 570 (2002); officer's testimony as to defendant's statement was sufficient to support instructing as to lesser of criminal trespass; III.

***State v. Ehrhardt***, 167 Wn.App. 934, 939-41 (2012)

While mere possession of stolen property is insufficient to establish burglary, *State v. Mace,* 97 Wn.2d 840 (1982), *State v. Evans,* 45 Wn.App. 678 (1986), a jury instruction saying same is misleading where it does not inform the jury that presence at the scene combined with possession of recently stolen property could be sufficient; 2-1, II.

***State v. Cordero***, 170 Wn.App. 351, 360-71 (2012)

Complainant is living in motel room with 14-year old daughter who invites defendant in in spite of complainant's disapproval of defendant's presence, known to both defendant and daughter, defendant flashes a gun, complainant calls police and tries to detain defendant who shoves complainant aside and leaves with daughter, is convicted of burglary 1°; held: evidence was sufficient to establish that daughter's invitation was ineffective in light of mother's known objection, thus state established element of unlawful entry; where initial entry was "clearly unlawful," defendant cannot be said to have any license or privilege to remain, *State v. Allen,* 127 Wn.App. 125, 133-35 (2005), *State v. Gohl,* 109 Wn.App. 817, 823-34 (2001); the fact that complainant may have precluded defendant from leaving may exclude the period of her detention from the definition of "unlawfully remain," but here there was sufficient evidence to support the element for at least part of the time defendant was present, plus defendant was not entitled to ignore mother's order that he leave without the daughter; III.

***State v. Moran***, 181 Wn.App. 316, 321-23 (2014)

Defendant crawls underneath a house through an access door in the foundation, inaccessible from inside the home, and sabotages plumbing, is convicted of residential burglary; held: entire building is a dwelling for purposes of residential burglary, *State v. Murbach,* 68 Wn.App. 509 (1993), *State v. Neal,* 161 Wn.App. 111 (2011), *see: State v. McPherson,* 186 Wn.App. 114 (2015); I.

***State v. Kindell***, 181 Wn.App. 844 (2014)

Unlawful possession of a firearm is not a crime against a person or property for purposes of proving burglary, *cf.: State v. Snedden,* 149 Wn.2d 914, 919-23 (2003), *State v. Lawson,* 185 Wn.App. 349 (2014); II.

***State v. Sony***, 184 Wn.App. 496 (2014)

Intent to commit a crime against "a person or property," RCW 9A.52.025(1), are not

alternative means, distinguishing *State v. Gonzalez* , 133 Wn.App. 236, 243 (2006), *State v. Tresenriter*, 101 Wn.App. 486, 490-94 (2000); I.

***State v. Lawson***, 185 Wn.App. 349 (2014)

Voyeurism, RCW 9A.44.115(1) (2003), is a crime against a person or property for purposes of proving burglary, *see: State v. Snedden*, 149 Wn.2d 914, 919-22 (2003), distinguishing *state v. Devitt*, 152 Wn.App. 907, 912-13 (2009); where defendant commits a trespass and voyeurism and assaults a security guard elsewhere in the building in escaping there is sufficient evidence to prove burglary 1º; II.

***State v. McPherson***, 186 Wn.App. 114 (2015)

Defendant burglarizes a jewelry store with an apartment above it used for lodging, is convicted of residential burglary; held: whether a building constitutes a dwelling, RCW 9A.52.025 (2011), 9A.04.110 (2011), is a question of fact, *State v. McDonald*, 123 Wn.App. 85, 90-91 (2004), *State v. Hall*, 6 Wn.App.2d 238 (2018), *see: State v. Moran*, 181 Wn.App. 316, 321-23 (2014), *State v. Neal*, 161 Wn.App. 111, 113-14 (2011), *State v. Murbach*, 68 Wn.App. 509, 513 (1993); II.

***State v. Joseph***, 189 Wn.2d 645 (2017)

For purposes of **criminal trespass 2°,** RCW 9A.52.080(1), a vehicle is "premises," RCW 9A.52.010(6) (2011), RCW 9A.04.110(5); affirms *State v. Joseph*, 195 Wn.App. 737 (2016); 9-0.

***State v. Jusila,*** 197 Wn.App. 908, 932-34 (2017)

In burglary 1° case under deadly weapon prong evidence is sufficient to prove firearm where state offers photographs of guns, witnesses testify that they found loaded rifles, no one testified that the rifles were operable, but that can be inferred from photos and testimony, *State v. Mathé*, 35 Wn.App. 572 (1983), *State v. Emery*, 161 Wn.App. 172, 197-200 (2011), *affirmed, on other grounds*, 174 Wn.2d 741 (2012), *State v. Tasker*, 193 Wn.App. 575 (2016), *State v. Crowder*, 196 Wn.App. 861, 872-73 (2016); I.

***State v. Lambert***, 199 Wn.App. 51, 72-77 (2017)

Defendant is invited into home to visit victim, kills victim, goes to another home to steal gun, enters house then comes out, sees second victim in driveway and demands keys to garage, victim refuses, defendant kills him in driveway, claims insufficient evidence to support felony murder/burglary 1° as he did not remain unlawfully; held: a jury could reasonably infer that defendant's license to remain was revoked when defendant attacked first victim in home, *State v. Collins*, 110 Wn.2d 253 (1988); while, to prove felony murder, there must be evidence that the murder occurred in the course of or in furtherance of the burglary, RCW 10.95.020(11) (2003), there is insufficient evidence here that the second murder occurred in immediate flight from the burglary, *State v. Hacheney*, 160 Wn.2d 503, 506-20 (2007), distinguishing *State v. Irby*, 187 Wn.App. 183, 199-203 (2015); I.

***State v. Dunleavy***, 2 Wn.App.2d 420, 427-31 (2018)

A jail cell is a building, RCW 9A.04.110(5) (2011), for purposes of burglary, distinguishing *State v. Thomson*, 71 Wn.App. 634 (1993), *see: State v. Miller*, 91 Wn.App. 869 (1998); III.

***State v. Hall***, 6 Wn.App.2d 238 (2018),

Defendant is convicted of residential burglary, RCW 9A.52.025 (2011), for stealing from a house that was unoccupied for 16 months but had furniture; held: whether a building is a dwelling, RCW 9A.04.110(7) (2011), is a question of fact for the jury, *State v. McDonald*, 123 Wn.App. 85 (2004), *State v. McPherson*, 186 Wn.App. 114 (2015); II.

***State v. Moreno***, 198 Wn.2d 737 (2021)

Knowledge of the unlawfulness of entering or remaining is not an implied essential element of burglary; 9-0.

***State v. Smith,*** 17 Wn.App. 146 (2021)

Burglary ("enters or remains unlawfully") is not an alternative means offense; Division II rejects holdings to the contrary in *State v. Sony*, 184 Wn.App. 496, 500 (2014), *State v. Allen*, 127 Wn.App. 125, 131 (2005), *State v. Klimes*, 117 Wn.App. 758 (2003); even if burglary is an alternative means offense where the jury is instructed as to both entering and remaining unlawfully, there is no evidence of entering unlawfully, and prosecutor elects in closing only remaining, defendant's right to a unanimous verdict is not violated; II.

# COMPETENCY

***State v. Crenshaw***, 27 Wn.App. 326 (1980)

Competency is within discretion of trial court, *State v. McCarthy*, 193 Wn.2d 792 (2019), defense counsel's opinion as to client's competency is a factor, *see: State v. Dufloth*, 19 Wn.App.2d 347 (2021), lay witness may testify as to opinion of defendant's sanity; 2-1, I.

***Estelle v. Smith***, 68 L.Ed.2d 359 (1981)

In capital case, court appointed psychiatrist, *sua sponte*, to evaluate defendant's competency; psychiatrist reported defendant was competent; defendant convicted of murder; in penalty phase, state calls psychiatrist who testified that defendant was dangerous; jury imposed death penalty; court holds that testimony of psychiatrist violated defendant's Fifth Amendment privilege, as defendant was not advised of *Miranda* rights by psychiatrist and did not waive Sixth Amendment right to counsel, although defendant did not have right to counsel present during evaluation; 9-0.

***State v. Swanson***, 28 Wn.App. 759 (1981)

Retrograde amnesia, in the absence of a mental disease or defect, does not render a defendant incompetent to stand trial; I.

***State v. Jones***, 32 Wn.App. 359 (1982)

Defendant is competent to stand trial if she is able to testify, understand nature of charges, comprehend the mechanics or consequences of a trial, and to assist and confer with counsel, *State v. Maryott*, 6 Wn.App. 96 (1971); I.

***State v. Wicklund***, 96 Wn.2d 798 (1982)

RCW 10.77 applies to courts of limited jurisdiction for competency determinations, limited to 15-day commitment for observation.

***State v. Higa***, 38 Wn.App. 522 (1984)

Where a psychiatric evaluation determines that defendant is competent and defense counsel does not seek a formal competency hearing, no error is committed if court fails to hold a hearing; II.

***Seattle v. Gordon***, 39 Wn.App. 437 (1985)

Where defense counsel questions defendant's competency, trial court has considerable discretion to determine whether there was "reason to doubt" defendant's competency, *State v. McCarthy*, 193 Wn.2d 792 (2019), giving considerable weight to counsel's opinion, *cf.: State v. Dufloth*, 19 Wn.App.2d 347 (2021); here, defense counsel raised the competency issue for the first time at trial without an affidavit, making it appear that it was a trial tactic rather than a true concern; once court finds a reason to doubt, then court must appoint experts, RCW 10.77.060(1), *State v. Fedoruk*, 5 Wn.App.2d 317 (2018); *accord: State v. Lord*, 117 Wn.2d 829, 900-3 (1991); I.

***State v. Lover***, 41 Wn.App. 685 (1985)

Defendant can be medicated against his will to gain competence to stand trial if it is pursuant to a court order following a hearing, improves defendant's competency, there is no less intrusive means, *State v. Adams*, 77 Wn.App. 50, 55-7 (1995), *Riggins v. United States*, 118 L.Ed.2d 479 (1992); I.

***State v. Ortiz***, 104 Wn.2d 479 (1985)

An ability to choose among alternative defenses is not a test for competency to stand trial, *distinguishing State v. Jones*, 99 Wn.2d 735 (1983); *accord*, *State v. Hahn*, 106 Wn.2d 885, 893-4 (1986); *State v. Minnix*, 63 Wn.App. 494 (1991), *State v. Benn*, 120 Wn.2d 631, 662 (1993); 9-0.

***State v. Bebb***, 44 Wn.App. 803, 108 Wn.2d 515 (1987)

In competency proceedings, court is not limited to the appointment of a sanity commission, RCW 10.77.010, *et seq*., but also retains the inherent authority in order to determine competency, *State v. Wicklund*, 96 Wn.2d 798 (1982) to order additional evaluations, *see: State v. Heddrick*, 166 Wn.2d 898 (2009), during which speedy trial rule is tolled, CrR 3.3(g)(1); III.

***State v. Jones***, 111 Wn.2d 239 (1988)

Statements to a psychologist with respect to competency are admissible at trial where defendant pleads not guilty by reason of insanity, even where the statements were made prior to the NGI plea, *State v. Jones*, 99 Wn.2d 735 (1983), *State v. Bonds*, 98 Wn.2d 1 (1982); 9-0.

***State v. Lord***, 117 Wn.2d 829, 900-3 (1991), *abrogated,in part, State v. Schierman*, 192 Wn.2d 577 (2018)

Absent insanity defense, a mere motion to determine competency does not have to be granted absent a factual basis, *Seattle v. Gordon*, 39 Wn.App. 437, 441 (1985); defendant telling jailer that devil told him to drink blood to prove innocence plus wanting to fire defense counsel does not reach threshold to require competency hearing where defense declined to allow state's expert to evaluate defendant and defense was unable to arrange for defense expert to evaluate defendant, *see: State v. Fedoruk*, 5 Wn.App.2d 317 (2018); 6-3

***Riggins v. Nevada***, 118 L.Ed.2d 479 (1992)

Involuntary antipsychotic drugs may be administered to a pretrial detainee only where court finds that medication was medically appropriate and, considering less intrusive alternatives, essential for defendant's own safety or the safety of others, *see: Washington v. Harper*, 108 L.Ed.2d 178 (1990), *Sell v. United States*, 156 L.Ed.2d 197 (2003), *State v. Mosteller*, 162 Wn.App. 418 (2011); state may be able to justify medically appropriate involuntary treatment by establishing that it could not obtain an adjudication of defendant's guilt or innocence by less intrusive means *(dicta), see: State v. Hernandez-Ramirez*, 129 Wn.App. 504 (2005); 7-2.

***Medina v. California***, 120 L.Ed.2d 353 (1992)

State statute which places burden of proving incompetency to stand trial on defense by preponderance does not violate due process clause, *State v. Hurst*, 173 Wn.2d 597 (2012), *cf.:*

*State v. P.E.T.*, 174 Wn.App. 590 (2013), 185 Wn.App. 891 (2015), *see: State v. Coley*, 180 Wn.2d 543 (2014); 7-2.

***Cooper v. Oklahoma***, 134 L.Ed.2d 498 (1996)

While a state may presume a defendant to be competent and require him to prove incompetence by a preponderance, *Medina v. California*, 120 L.Ed.2d 353 (1992), state may not require proof of competency by clear and convincing evidence, as it would permit state to try a defendant who is more likely than not incompetent, *State v. Hurst*, 173 Wn.2d 597 (2012); 9-0.

***State v. E.C.***, 83 Wn.App. 523 (1996)

Juvenile court may dismiss with prejudice a case against an incompetent juvenile respondent in order to adequately respond to the needs of that offender as long as such dismissal poses no substantial danger to others; in general, RCW 10.77 should be followed for juveniles, although the Juvenile Justice Act takes precedence when a conflict arises; I.

***Pers. Restraint of Fleming***, 142 Wn.2d 853 (2001)

Where defense counsel has a psychological evaluation concluding that defendant is not competent, it is ineffective assistance not to raise competency with the trial court, and a subsequent guilty plea must be vacated; incompetency cannot be "waived," nor can there be a tactical decision not to raise it, *see: State v. Marshall*, 144 Wn.2d 266 (2001), *cf.: State v. Heddrick*, 166 Wn.2d 898 (2009); 9-0.

***State v. Chance***, 105 Wn.App. 291, 299 (2001)

Court may not consider a court-ordered competency evaluation in determining future dangerousness unless defendant was warned prior to the evaluation that it might be used at sentencing, *Estelle v. Smith*, 68 L.Ed.2d 359 (1981), *see: State v. Bankes*, 114 Wn.App. 280 (2002); II.

***State v. Cox***, 106 Wn.App. 487 (2001)

Stay of time for trial rule for competency determination, CrR 3.3(g)(1), begins when a party or the court makes an oral or written motion for a competency evaluation, *State v. Harris*, 122 Wn.App. 498 (2004), and ends when the court enters a written order finding defendant competent, which may be presented by defense counsel; II.

***State v. Marshall***, 144 Wn.2d 266 (2001)

Capital defendant pleads guilty, seeks to withdraw plea, calls experts who testify that defendant had brain abnormalities, trial court denies motion without appointing experts and convening formal competency hearing, RCW 10.77.060(1)(a); held: where a defendant moves to withdraw plea with evidence that defendant was incompetent when plea was entered, trial court must either grant the motion or appoint two experts and convene a hearing, *see: State v. DeClue*, 157 Wn.App. 787 (2010); 9-0.

***State v. Lawrence***, 108 Wn.App. 226, 231-33 (2001)

Mildly developmentally disabled defendant with a slow thought process who can communicate with counsel, albeit slowly, is competent, *see: State v. Minnix*, 63 Wn.App. 494,

499 (1991), within discretion of trial court, *State v. Ortiz*, 104 110 Wn.2d 479, 482 (1985), *State v. Lewis*, 141 Wn.App. 367, 383-84 (2007), *State v. McCarthy*, 193 Wn.2d 792 (2019); I.

***Sell v. United States***, 156 L.Ed.2d 197 (2003)

To order involuntary antipsychotic drugs, court must find (1) offense is a serious crime against a person or property, looking at facts of individual case and whether or not defendant will be civilly committed, (2) drugs would be substantially likely to render defendant competent and side effects are unlikely to interfere significantly with defendant's ability to assist counsel, (3) less intrusive treatments are unlikely to achieve the same result, and (4) administration of drugs is in the patient's best medical interest, *see: Riggins v. Nevada*, 118 L.Ed.2d 479 (1992), *Washington v. Harper*, 108 L.Ed.2d 178 (1990), *State v. Hernandez-Ramirez*, 129 Wn.App. 504 (2005), *State v. Mosteller*, 162 Wn.App. 418 (2011); 7-2.

***State v. Webbe***, 122 Wn.App. 683 (2004)

Defendant demands a jury trial on competency, RCW 10.77.090(4), defense counsel proposes to testify as to his opinion that defendant is not competent, trial court decides that, if counsel testifies, defendant has waived the attorney-client privilege, orders defense to turn over client interview notes to prosecutor as discovery, later appoints guardian *ad litem* to determine whether defendant should waive his privilege for purposes of competency hearing, guardian informs court that it is not in defendant's best interests to waive privilege, court orders prosecutors to return interview notes, defense counsel does not testify, defendant found competent, challenges involuntary waiver on appeal; held: trial court has inherent authority to appoint guardian *ad litem;* while court should have inquired of counsel whether defendant actually waived prior to ordering discovery of counsel's notes, because counsel was acting as a vigorous, loyal advocate, defendant must show prejudice for counsel's improperly allowing court to assume waiver when it did not exist; because defendant's testimony was consistent with notes, no prejudice occurred; I.

***State v. Lewis***, 141 Wn.App. 367, 381-85 (2007)

While DSHS must provide a developmental disabilities professional if any party advises the court that defendant may be developmentally disabled during the 15-day competency evaluation, RCW 10.77.060(1)(a), following a 90-day competency restoration commitment DSHS need not provide a developmental disability professional to evaluate defendant and any expert may testify as to absence of a developmental disability; even if a defendant is developmentally disabled, if he meets the competency requirements, trial court may find defendant competent, *State v. Lawrence*, 108 Wn.App. 226, 231-33 (2001); 2-1, II.

***State v. Carneh***, 149 Wn.App. 402 (2009)

Following dismissal without prejudice for incompetency, RCW 10.77.086, and civil commitment, state hospital advises that defendant has earned unaccompanied grounds privileges, state refiles charges and trial court commits for competency restoration; held: state may refile charges against an incompetent defendant where it has a good faith basis to believe that competency restoration will likely succeed; known incompetency does not bar refiling; trial court may order competency restoration treatment upon refiling; I.

***State v. Anene***, 149 Wn.App. 944 (2009)

During trial recess, defendant attempts suicide, is comatose, trial court resumes trial claiming defendant voluntarily absented himself; held: trial court was not obliged to order competency evaluation since comatose person is clearly incompetent, but continuing with trial of an incompetent person was a due process violation, *Drope v. Missouri*, 43 L.Ed.2d 103 (1975); II.

***State v. Heddrick***, 166 Wn.2d 898 (2009)

Defendant, after commitment for competency restoration, is found competent, later new defense counsel expresses doubt as to competency, trial court appoints psychologist requested by defense and orders state hospital to prepare a report, defense counsel later reports that her psychologist determined defendant is competent and declines production of a report, state psychologist's report is not entered into evidence and counsel withdraws competency motion, on appeal defendant claims statutory competency process was not followed and is thus a denial of due process; held: statutory competency procedures may be waived; a court need not follow statutory process where there is a stipulation to competency and counsel represents medical findings of competency, erasing doubt in the court's mind, *State v. Israel*, 19 Wn.App. 773 (1978), although competency in substance cannot be waived, *Pers. Restraint of Fleming*, 142 Wn.2d 853 (2001); 9-0.

***Pers. Restraint of Jian Liu***, 150 Wn.App. 484 (2009)

A fugitive is entitled to a competency hearing prior to extradition to determine if the fugitive is can assist counsel in raising or waiving the factual defenses to extradition; I.

***State v. DeClue***, 157 Wn.App. 787 (2010)

Defendant seeks to withdraw guilty plea, submits declaration that he was not competent due to medications, trial court holds evidentiary hearing at which nurse, defendant and relatives testify, court finds that claim of impairment was unpersuasive, declines to hold formal competency hearing and denies motion to withdraw plea; held: where evidence submitted in motion to withdraw a plea due to alleged incompetency, either in declaration or at a hearing, does not establish a "legitimate question of competency," *State v. Marshall*, 144 Wn.2d 266, 279 (2001), the court need not appoint two experts or hold a formal competency hearing; II.

***State v. Mosteller***, 162 Wn.App. 418 (2011)

Failure to object to court-ordered antipsychotic medication to restore competency waives challenge, distinguishing *Riggins v. Nevada*, 504 U.S. 127, 118 L.Ed.2d 479 (1992); here, record does not show that defendant was actually forced to take medication during trial precluding structural error analysis as to whether trial court must engage in an analysis pursuant to *Sell v. United States*, 539 U.S. 166, 156 L.Ed.2d 197 (2003); II.

***State v. Hurst***, 173 Wn.2d 597 (2012)

Commitment for restoration of competency for 180 days following two 90-day commitments is based upon court finding by a preponderance, not clear, cogent and convincing, meets due process clause requirements, *Medina v. California*, 505 U.S. 437, 445, 120 L.Ed.2d 353 (1976), affirming *State v. Hurst*, 158 Wn.2d 803 (2010), effectively overruling *Born v.*

*Thompson*, 154 Wn.2d 749, 755-57 (2005), distinguishing *Mathews v. Eldridge*, 424 U.S. 319, 334-35, 47 L.Ed.2d 18 (1976); 9-0.

***State v. Lawrence***, 166 Wn.App. 378, 385-89 (2012)

Court commits defendant for competency evaluation and, having been advised he may be developmentally disabled, orders that a DD professional evaluate, RCW 10.77.060(1)(a) (1974), evaluation finding him competent does not address developmental disabilities; held: where evaluation does not find defendant incompetent, there is no requirement that he be evaluated for developmental disabilities and no requirement that the evaluation otherwise address the issue; III.

***State v. Sisouvanh***, 175 Wn.2d 607 (2012)

Murder defendant, born in Laos, came to U.S. at age 5, graduated high school, obtained certified nursing assistant certificate after passing boards, is evaluated for competency, state's psychologist considers cultural competency, concludes defendant meets "norm-based testing approach" and that defendant is competent and malingering, defense psychologist testifies state psychologist failed to obtain sufficient background information and failed to learn enough about defendant's culture, court finds defendant competent; held: "a trial court could not properly accept the competency evaluation of an appointed expert who refused to acknowledge the importance of cultural competency and who failed to reasonably account for the need for cultural competency… [E]ven if an appointed expert acknowledges the importance of cultural competency, if the expert…fails to sufficiently account for the need for cultural competency in his or her evaluation…, the expert's evaluation will not meet minimum standards of adequacy," at 624-25 ¶31; here, state's expert was qualified, made a reasonable judgment that defendant was sufficiently aculturated to use Western-based testing; norm-based testing is appropriate if defendant has a college-level education in English and/or lived in U.S. for many years from a young age and is competent in English, and/or English is the primary language spoken at home and/or defendant has performed at average level and/or higher on national standardized tests; 9-0.

***State v. Chao Chen***, 178 Wn.2d 350 (2013)

Once a competency evaluation is filed it is presumed open to the public subject to individualized findings that the *Ishikawa* factors weigh in favor of sealing or redacting, *State v. DeLauro*, 163 Wn.App. 290 (2011); CONST. art. I, § 10 trumps RCW 10.77.210; 9-0.

***State v. P.E.T.***, 174 Wn.App. 590 (2013), 185 Wn.App. 891 (2015)

Respondent is found incompetent resulting in dismissal, is later charged with a new crime, at competency hearing state expert testifies respondent is competent, trial court places burden of proving incompetence on respondent, finds him competent; held: common law presumes that one who is found incompetent remains so until adjudicated otherwise, *State v. Coley*, 180 Wn.2d 543 (2014); remedy is remand for trial court to first decide whether a meaningful hearing on defendant's competency at the prior proceeding is possible, if so court must determine if state rebutted presumption of incompetency, if not then remand for new trial if respondent is deemed competent; I.

***State v. Coley***, 180 Wn.2d 543 (2014)

After competency restoration period, Eastern State Hospital reports that defendant is competent, at competency hearing trial court places burden of proving his incompetence on defendant; held: 10.77 RCW legislative intent is to place the burden on the party challenging competency to prove by a preponderance that defendant is incompetent, *State v. P.E.T.*, 185 Wn.App. 891 (2015); reverses *State v. Coley*, 171 Wn.App. 177 (2012); 7-2.

***State v. Derenoff***, 182 Wn.App. 458 (2014)

Insanity acquitee need not be restored to competency before or during a less restrictive alternative revocation hearing; II.

***State v. Kidder***, 197 Wn.App. 292 (2016)

Court finds jailed defendant incompetent, orders 90 day restoration, after defendant is not transported to state hospital court holds DSHS in civil contempt and sets date for her to be transported, she is not transported, 139 days after commitment order court dismisses without prejudice; held: " the court had the authority under former RCW 10.77.084(1)(c) to dismiss the criminal charge against Kidder without prejudice and the record establishes the State's failure to provide Kidder with restorative treatment within a reasonable time violated her right to due process," *cf.: State v. Hand*, 192 Wn.2d 289 (2018), *State v. Luvert*, 20 Wn.App.2d 133 (2021); I.

***State v. Ortiz-Abrego***, 187 Wn.2d 394 (2017)

After conviction court holds a competency hearing and concludes that defendant was not competent during the trial, based in part upon the judge's observations of defendant during trial, the lack of accommodation at trial that might have brought defendant to competency, the defendant's actual ability to understand the trial and defendant's capacity to understand; held: observations, actual ability to understand and consideration of possible accommodations are proper factors for a court to consider in determining whether defendant had the capacity to understand, *see: State v. Fedoruk*, 5 Wn.App.2d 317 (2018); 5-4.

***State v. Lyons***, 199 Wn.App. 235 (2017)

At forced medication hearing, *Sell v. United States*, 539 U.S. 166, 156 L.Ed.2d 197 (2003), defense seeks continuance to call its own expert who would testify to the resistance of delusional disorder to treatment with medication and that restoration of competency through medication often took a minimum of three to four months, trial court denies continuance and orders forced medication; held: denying defense motion to continue to call an expert who would present relevant admissible testimony on a material factor is a denial of procedural due process, *McWilliams v. Dunn*, 582 U.S. ___, 137 S.Ct. 1790, 198 L.Ed.2d 341 (2017); II.

***State v. Hand***, 192 Wn.2d 289 (2018)

Trial court finds jailed defendant incompetent, orders commitment for restoration within fifteen days, 61 days later is admitted to hospital, moves to dismiss, CrR 8.3(b); held: delay was a violation of substantive due process, *Trueblood v. Wash. State Dep't of Social & Health Services. (Trueblood* III), 822 F.3d 1037, 1042-43 (9th Cir. 2016), *see: State v. Luvert*, 20 Wn.App.2d 1331 (2021), but dismissal with prejudice is not a proper remedy, *cf.: State v.*

*Kidder*, 197 Wn.App., 197 Wn.App. 292 (2016); affirms *State v. Hand*, 199 Wn.App. 887 (2017); 9-0.

***State v. Fedoruk,*** 5 Wn.App.2d 317 (2018)

Defendant is found competent pretrial, during trial his behavior deteriorates, defense counsel raises competency, trial judge only deals with whether defendant has waived presence by his behavior; held: where medical history, family history, conduct and demeanor and counsel's opinion all create a reason to doubt competency, it is error not to order a competency evaluation even during trial, *see: In re Fleming*, 142 Wn.2d 853, 861-67 (2001); II.

***State v. McCarthy***, 193 Wn.2d 792 (2019)

Defendant is found incompetent, committed, restored, found competent by a jury, at time of trial defendant reports delusions different than the prior delusions, court does not order further competency evaluation; held: under abuse of discretion standard, court did not err in failing to *sua sponte* order another competency evaluation; reverses *State v. McCarthy*, 6 Wash. App. 2d 94 (2018); 9-0.

***State v. Dufloth***, 19 Wn.App.2d 347 (2021)

Defendant writes to trial court stating that a competency evaluation had been ordered in another court, the evaluation was not done and that he was decompensating, defense counsel informs court that he is not raising competency, court does not order an evaluation; held: "any party" may move for a competency evaluation, RCW 10.77.060(1)(a) (2021), defendant is a party even if represented, record supports a reason to doubt competency thus trial court abused discretion; I.

***State v. Luvert,*** 20 Wn.App.2d 133 (2021)

Trial court orders in-patient competency evaluation, after lengthy delay by DSHS to transport defendant trial court sets deadline, Department misses deadline, court finds DSHS in contempt and orders it to pay defendant $250 per day, retroactive to the 14th day after the evaluation was ordered; held: a contempt sanction is remedial, not punitive, if it allows the opportunity to purge, retroactive remedial sanctions are permitted as a sanction may be compensatory, RCW 7.23.030, *Gronquist v. Dep't of Corr.*, 196 Wn.2d 564, 573 (2020); I.

***State v. Vevea***, 23 Wn.App.2d 171 (2022)

Criminal discovery rules, CrR 7.7, apply to competency restoration proceedings; I.

# CONFRONTATION

***Ohio v. Roberts***, 65 L.Ed.2d 597 (1980)

At preliminary hearing, defense calls witness who becomes unavailable at trial, whereupon state introduces witness's testimony at preliminary hearing; held admissible as defense counsel had tested witness's testimony at the preliminary hearing with the equivalent of significant cross-examination; fact that defense counsel at trial was not same as that at preliminary makes no difference unless prior counsel is shown to be "ineffective"; sets forth what is constitutionally required to show "unavailability," at 613, *but see: Crawford v. Washington*, 158 L.Ed.2d 177 (2004), *State v. Hurtado,* 173 Wn.App. 592, 606-07 (2013); 6-3.

***State v. Roberts***, 25 Wn.App. 830 (1980)

In rape case, error to preclude defense from cross-examining witness's motivation by compulsion to cooperate with prosecutor; I.

***State v. Pickens***, 27 Wn.App. 97 (1980)

Where witness takes Fifth Amendment on cross, and denial of cross-examination prevents defendant from establishing bias, witness's direct testimony must be stricken; II.

***State v. Socolof***, 28 Wn.App. 407 (1981)

To admit tracking dog evidence, state must show (1) handler qualified, (2) dog trained in tracking humans, (3) dog is reliable, (4) dog placed on track where circumstances indicated the suspect has been and (5) trail not stale; does not violate confrontation clause, *see*: *State v. Carlin*, 40 Wn.App. 698 (1985), *State v. Salinas,* 169 Wn.App. 210, 223 (2012); I.

***State v. Olson***, 30 Wn.App. 298 (1981)

Defendant refuses to name potential co-conspirators on cross-examination, whereupon court strikes her direct testimony; held: court has four alternatives (1) strike testimony, (2) contempt, (3) instruct jury that it can consider defendant's refusal in determining credibility, and (4) no sanctions, all within court's discretion; II.

***State v. Wagner***, 36 Wn.App. 286 (1983)

Where tracking dog evidence is offered, defense is entitled to cautionary instruction prohibiting conviction upon such evidence alone, *see: State v. Salinas,* 169 Wn.App. 210, 223 (2012); where evidence requires corroboration, the jury must be so informed, *State v. Crouch*, 60 Wash. 450 (1910), *State v. Hess*, 86 Wash. 240 (1915), *State v. Aton*, 67 Wash. 485, 486 (1912); I.

***State v. Goddard***, 38 Wn.App. 509 (1984)

State obtains material witness warrant which is served, videotape deposition is taken, witness goes to California using a plane ticket purchased by state; held: videotape deposition was improperly admitted at trial, as state had not used good faith efforts to procure witness at trial, former CrR 4.6(d), ER 804; *see*: *Barber v. Page*, 20 L.Ed.2d 255 (1968), *Ohio v. Roberts*, 65 L.Ed.2d 597 (1980), RCW 10.55, *State v. DeSantiago*, 149 Wn.2d 402 (2003), *but see*:

*State v. Hobson*, 61 Wn.App. 330 (1991), *cf.: State v. Hacherey*, 160 Wn.2d 503, 520-24 (2007); I.

***State v. Dibley***, 38 Wn.App. 824 (1984)

State offered co-defendant's Statement of Defendant on Plea of Guilty at trial against defendant; co-defendant did not testify as it was part of his plea bargain that he would not be called to testify; held: co-defendant procured, by the plea bargain, his own unavailability, thus, state did not have to call him; plea statement was against interest, ER 804(b)(3), sufficiently corroborated by evidence of the crime, *but see: Crawford v. Washington*, 158 L.Ed.2d 177 (2004); II.

***State v. Toomey***, 38 Wn.App. 831 (1984)

Previously convicted co-defendant who asserts Fifth Amendment at defendant's trial and refuses to testify even when ordered is unavailable; court is not obliged to grant the witness immunity; II.

***State v. Hieb***, 39 Wn.App. 273 (1984)

Where state fails to establish unavailability of a witness and fails to produce the witness, hearsay which fits within an exception is inadmissible; defense need not call witness, as burden is on state, *State v. Hurtado*, 173 Wn.App. 592, 606-07 (2013), harmless, *State v. Hieb*, 107 Wn.2d 97 (1986), *see*: *State v. Whisler*, 61 Wn.App. 126 (1991), *cf.: State v. Lynn*, 67 Wn.App. 339 (1992); 2-1, I..

***State v. Dictado***, 102 Wn.2d 277 (1984)

A witness's claim of privilege and failed attempts to subpoena a witness make that witness unavailable, *Ohio v. Roberts*, 65 L.Ed.2d 597 (1980); factors to be considered in determining indicia of reliability to admit extrajudicial statements include close proximity of conversation to the crime, whether statements were spontaneous and against declarant's personal interest, and whether there was apparent reason for declarant to lie, *State v. Boost*, 87 Wn.2d 447 (1976), *but see: Crawford v. Washington*, 158 L.Ed.2d 177 (2004); 9-0.

***State v. Guloy***, 104 Wn.2d 412 (1985)

Co-conspirator testifies for state but is not asked about statement he made in furtherance of conspiracy; trial court admits testimony of another witness as to what co-conspirator said, ER 801(d)(2)(v); held: because co-conspirator was available as witness, it violated defendant's right of confrontation to introduce co-conspirator's statement through third party even though it met test for co-conspirator exception, *California v. Green*, 26 L.Ed.2d 489 (1970); harmless here; 9-0.

***United States v. Bagley***, 87 L.Ed.2d 481 (1985)

Prosecutor fails to provide exculpatory impeachment evidence to defense; held: there is no distinction between impeachment evidence and substantive evidence where government fails to disclose it, *Banks v. Dretke*, 157 L.Ed.2d 1166 (2004); test for appellate court is whether there is a reasonable probability that had evidence been disclosed, result of trial would have been different; case is not subject to automatic reversal for violation of confrontation clause; 5-3.

***Delaware v. Fensterer***, 88 L.Ed.2d 15 (1985)

Admission of opinion testimony of an expert witness who was unable to recall the basis for his opinion does not violate confrontation clause; 7-2.

***State v. Edmondson***, 43 Wn.App. 443 (1986)

To determine if a hearsay declaration against penal interest that meets the test of ER 804(b)(3) violates the confrontation clause, trial court must consider (1) whether statement contains no express assertion of past fact, (2) whether declarant had personal knowledge of identity and role of other participants in the crime, (3) whether declarant's statement was founded on faulty recollection, (4) whether circumstances indicate that declarant was telling the truth, had a motive to lie and degree to which the statement opposed his penal interest, (5) declarant's general character, (6) whether more than one person heard the statement, and (7) relationship between declarant and the witness; court should not consider other evidence of guilt of defendant in determining admissibility of the hearsay; II.

***State v. Portnoy***, 43 Wn.App. 455 (1986)

Where co-defendant testifies and is impeached with his guilty plea, he may be cross-examined as to his motive to plead even if the testimony reveals to the jury the sentence the defendant would receive if found guilty; II.

***State v. Robinson***, 44 Wn.App. 611 (1986)

Where both parties stipulate that a child victim is incompetent to testify and defense counsel fails to challenge victim's ability to relate just impression of the facts at the time she made hearsay statements, then prosecutor has met burden of producing declarant, *distinguishing* *State v. Doe*, 105 Wn.2d 889 (1986) and *State v. Ryan*, 103 Wn.2d 165 (1984), *see:* *Crawford v. Washington*, 158 L.Ed.2d 177 (2004); III.

***Kentucky v. Stincer***, 96 L.Ed.2d 631 (1987)

Excluding defendant, although not counsel, from hearing to determine competency of child witness held not to violate confrontation or due process clauses; 6-3.

***State v. Cooley***, 48 Wn.App. 286 (1987)

Confrontation clause is not violated where a declarant's out-of-court statement is admitted as long as declarant testifies as a witness, *California v. Green*, 26 L.Ed.2d 489 (1970), *distinguishing* *State v. Ryan*, 103 Wn.2d 165, 170 (1984); where a statement is properly admitted under the child hearsay statute, RCW 9.44.120, then confrontation rights are not violated, *Ryan* at 170, *but see*: *Idaho v. Wright*, 111 L.Ed.2d 638 (1990), *cf.:* *Crawford v. Washington*, 158 L.Ed.2d 177 (2004), *Ohio v. Clark*, 576 U.S. 237, 135 S.Ct. 2173, 192 L.Ed.2d 306 (2015); I.

***State v. Dickenson***, 48 Wn.App. 457 (1987)

"Whole impression or effect" of a witness's testimony is that defendant killed victim; defense request to impeach witness with a prior statement that the police killed victim is refused by trial court as not inconsistent, collateral; held: test for inconsistency is not words or phrases alone but whole impression or effect, *i.e.*, on a comparison of the two utterances are they in

effect inconsistent, or do they appear to have been produced by inconsistent beliefs?, *State v. Newbern*, 95 Wn.App. 277, 292-96 (1999); collateral test: could the fact have been brought into evidence for a purpose independent of the contradiction?; harmless here; *see: State v. Johnson*, 90 Wn.App. 54, 67-72 (1998); I.

***State v. Neslund***, 50 Wn.App. 531 (1988)

An adoptive admission of defendant does not violate confrontation clause, *State v. Ta'afulisia,* 21 Wn.App.2d 914 (2022), *see also: State v. Hill,* 6 Wn.App.2d 629 (2018); I.

***United States v. Owens***, 98 L.Ed.2d 951 (1988)

Assault victim testifies that he remembered identifying defendant as assailant in an interview with FBI, but does not remember the assailant nor could he recall who assaulted him; held: inability of victim to recall does not violate confrontation clause, as defense counsel had opportunity to cross-examine, *State v. Clark*, 139 Wn.2d 152 (1999), *State v. Price*, 158 Wn.2d 630 (2006), *State v. Mobley*, 129 Wn.App. 378, 387-89 (2005), *State v. Bates,* 196 Wn.App. 65 (2016), *see: Pers. Restraint of Grasso*, 151 Wn.2d 1 (2004), *cf.: State v. Kinzle,* 181 Wn.App. 774 (2014); 6-2.

***Coy v. Iowa***, 101 L.Ed.2d 857 (1988)

At statutory rape trial, court permitted a screen to be erected blocking complainant's view of defendant and vice versa; held: Sixth Amendment requires face to face confrontation, *State v. Palmer*, ___ Wn.App.2d ___, 518 P.3d 252 (2022), *but see*: *Maryland v. Craig*, 111 L.Ed.2d 666 (1990); 6-2.

***Olden v. Kentucky***, 102 L.Ed.2d 513 (1988)

Trial court refuses to permit rape defendant from cross-examining victim about her meretricious relationship which defendant maintained was the motive why victim lied about the rape; held: trial court violated defendant's confrontation rights to show motive to lie; 8-1.

***State v. Palomo***, 113 Wn.2d 789 (1989)

Excited utterance exception to hearsay rule, ER 803(a)(2), applies even though declarant is available as a witness and does not violate confrontation clause; 9-0.

***State v. Dukes***, 56 Wn.App. 660 (1990)

Denial of defense motion for lineup does not violate state or federal confrontation clauses; I.

***Idaho v. Wright***, 111 L.Ed.2d 638 (1990)

Physician testifies at trial to statements made to him by a three-year old regarding sexual abuse by her mother; held: absent a "firmly-rooted hearsay exception," hearsay statements are presumptively unreliable and inadmissible for confrontation clause purposes; this presumption may be overcome with particularized guarantees of trustworthiness drawn from the totality of circumstances surrounding the making of the statement; *see: State v. Strauss*, 119 Wn.2d 401, 416 (1992); bootstrapping by the use of corroborating evidence is not permitted; thus, physical evidence of abuse, opportunity of defendant to commit the crime and similar acts on another

victim are irrelevant to a showing of particularized guarantees of trustworthiness; *cf.*: *State v. Ryan*, 103 Wn.2d 165 (1984), *State v. Jones*, 112 Wn.2d 488 (1989), *State v. Swan*, 114 Wn.2d 613 (1990); 5-4.

***Maryland v. Craig***, 111 L.Ed.2d 666 (1990)

Use of live, one-way closed circuit television to take testimony of child sex abuse victim does not violate confrontation clause where trial court determines, following a hearing with expert testimony, that testimony by victim in courtroom will result in child suffering serious emotional distress such that the child cannot reasonably communicate, *distinguishing* *Coy v. Iowa*, 101 L.Ed.2d 857 (1988); *accord: State v. Foster*, 135 Wn.2d 441 (1998), *State v. D.K.*, 21 Wn.App.2d 342 (2022), *see: State v. Milko*, 21 Wn.App.2d 279 (2022); 5-4.

***State v. Sosa***, 59 Wn.App. 678 (1990)

Drug test lab report, certified under penalty of perjury, provided to defense at least 15 days prior to trial is admissible without further foundation if defendant has not served written demand to produce expert seven days prior to trial, CrR 6.13(b), *but see: Crawford v. Washington*, 158 L.Ed.2d 177 (2004), *Melendez-Diaz v. Massachusetts*, 174 L.Ed.2d 314 (2009), *cf.: State v. Lui*, 179 Wn.2d 457 (2014), unavailability need not be shown, *State v. Kreck*, 86 Wn.2d 112, 119 (1975); I.

***State v. Estorga***, 60 Wn.App. 298 (1991)

Uncharged, unavailable co-conspirator's taped statement is admitted over objection; held: because co-conspirator did testify at a suppression hearing and was questioned about taped statement, then defendant had opportunity to cross-examine; II.

***State v. Whisler***, 61 Wn.App. 126 (1991)

Ninety-four-year old theft complainant's physician informs state that she is ill and advises against travel, state informs court that it will not call her; *pro se* defendant is granted leave to depose complainant, state introduces deposition at trial; held: standard for unavailability due to illness to admit prior testimony, ER 804(a)(4), is that illness must be so severe as to render the witness's attendance "relatively impossible and not merely inconvenient;" prosecutor's contacting physician and providing affidavit to court as to physician's opinion establishes good faith effort to obtain witness's attendance, *see*: *State v. Ryan*, 103 Wn.2d 165, 170-71 (1984); prosecutor's affidavit recounting physician's opinion is admissible to determine unavailability, ER 1101(c)(3); deposition was admissible even though defendant was the proponent of the deposition (and, presumably, prosecutor cross-examined), as defendant had the "opportunity and similar motive" requirements of ER 804(b)(1); *see also*: *State v. Sanchez*, 42 Wn.App. 225 (1985), *State v. Sweeney*, 45 Wn.App. 81 (1986), *State v. Scott*, 48 Wn.App. 561 (1987), *State v. Aaron*, 49 Wn.App. 735 (1987), *State v. Hobson*, 61 Wn.App. 330 (1991); I.

***State v. Hobson***, 61 Wn.App. 330 (1991)

Subpoenaed theft victim informs state he is going on vacation during trial, state's motion to continue trial is denied, state does not seek material witness warrant, takes deposition of victim, defense counsel, with defendant present, cross-examines, trial court admits videotape at trial over objection; held: defendant's presence and cross-examination met "central concern" of

confrontation clause, *Maryland v. Craig*, 111 L.Ed.2d 666 (1990); defense was aware witness might not be present and had time to prepare, thus defense had full opportunity for effective cross, *State v. Jenkins*, 53 Wn.App. 228, 235-6 (1989), *State v. Hewett*, 86 Wn.2d 487 (1976); issuance of subpoena and fact that state did not indicate to witness he need not appear establishes good faith effort, *State v. Tatum*, 74 Wn.App. 81 (1994), *see: State v. DeSantiago*, 149 Wn.2d 402 (2003), *State v. Hacherey*, 160 Wn.2d 503, 520-24 (2007), *distinguishing State v. Sanchez*, 42 Wn.App. 225 (1985); material witness warrant would have been a "hardship" on witness, unnecessary here; I.

***State v. Greer***, 62 Wn.App. 779 (1991)

Co-defendant's statement implicating defendant is presumptively unreliable unless it bears sufficient indicia of reliability to rebut presumption, *Lee v. Illinois*, 90 L.Ed.2d 514 (1986), *State v. Rice*, 120 Wn.2d 549, 567 (1993); corroboration by admission of defendant plus other evidence at trial supporting the statement are factors to be considered in supporting trustworthiness, *State v. Hoskinson*, 48 Wn.App. 66, 71-2 (1987); *but see*: *Cruz v. New York*, 95 L.Ed.2d 162 (1987) [unclear from *Greer* opinion whether co-defendant testified at trial], *cf.*: *State v. St Pierre*, 111 Wn.2d 105 (1988); I.

***White v. Illinois***, 116 L.Ed.2d 848 (1992)

Spontaneous declarations and medical examination exceptions to hearsay rule do not violate confrontation clause, *State v. O'Cain,* 169 Wn.App. 228 (2012), prosecution need not produce declarant, trial court need not find unavailability, *United States v. Inadi*, 89 L.Ed.2d 390 (1986), *State v. Ackerman*, 90 Wn.App. 477, 482-4 (1998); 9-0.

***State v. Lynn***, 67 Wn.App. 339 (1992)

Where defense fails to challenge a claim of unavailability at trial where witness is charged with a crime, then the likelihood of the witness actually being unavailable is extremely likely, and defense may not raise the issue for the first time on appeal, *distinguishing State v. Hieb*, 39 Wn.App. 273 (1984), *rev'd,* 107 Wn.2d 97 (1986); I.

***State v. Estabrook***, 68 Wn.App. 309 (1993)

Trial court requires *pro se* defendant to submit written questions to the court, which were asked of a developmentally disabled child victim; held: because defendant failed to object, defendant had actual control over the questions asked, and the procedure did not impact the jury's perception that defendant was representing himself, defendant's right of self-representation was not violated, *see: McKaskle v. Wiggins*, 79 L.Ed.2d 122 (1984) *but see: State v. Palmer*, ___ Wn.App.2d ___, 518 P.3d 252 (2022); Division II did not directly address confrontation clause issues.

***State v. Mannhalt***, 68 Wn.App. 757 (1992)

While right to confront witnesses includes cross-examination to identify a witness with his community so that independent testimony may be sought and offered of his reputation for veracity in his own neighborhood, *Alford v. United States*, 75 L.Ed.2d 624 (1931), trial court may deny disclosure of witnesses' addresses where there is evidence that witnesses' safety was in danger, *Smith v. Illinois*, 19 L.Ed.2d 956 (1968)(White, J., concurring); I.

***State v. Jones***, 71 Wn.App. 798 , 809-12 (1993)

In child sex abuse case, prosecutor's comment in closing that defendant stared at victim during trial is unconstitutional comment on defendant's right of confrontation, harmless here; I.

***State v. Florczak***, 76 Wn.App. 55 (1994)

Child hearsay statements are admissible under the medical diagnosis exception, ER 803(a)(4), even if the child declarant does not understand that the statements were necessary for medical diagnosis if corroborating evidence supports the statements, and it appears unlikely that the child fabricated, *In re S.S.*, 61 Wn.App. 488, 503 (1991), *State v. Butler*, 53 Wn.App. 214, 222-3 (1989), trial court should identify on the record the specific evidence, drawn from the totality of circumstances, on which it relies to determine reliability, *see: Crawford v. Washington*, 158 L.Ed.2d 177 (2004); here, fearfulness, spontaneity are factors which would be difficult for a three-year old to consciously invent; while child hearsay/medical diagnosis exception, as interpreted in Washington, is not a firmly rooted exception, particularized guarantees of trustworthiness here establish that the statements did not violate confrontation clause, *State v. O'Cain,* 169 Wn.App. 228 (2012), *see: Idaho v. Wright*, 111 L.Ed.2d 638 (1990), *White v. Illinois*, 116 L.Ed.2d 848 (1992), *State v. Ackerman*, 90 Wn.App. 477, 482-4 (1998), *State v. Kilgore*, 107 Wn.App. 160, 182-84 (2001), *State v. D.*, 89 Wn.App. 77 (1997), *op. withdrawn, in part*, *State v. Carol M.D.*, 97 Wn.App. 355 (1999); I.

***State v. McDaniel***, 83 Wn.App. 179 (1996)

Trial court precludes cross-examination of assault complainant that she lied under oath about her drug use in a related civil case; held: because complainant was on probation, her prior false testimony provided her a motive to lie as to recent drug use, thus the evidence was relevant; the state's interest of insuring a just trial and preventing an acquittal based on prejudice against the victim's history of drug abuse is compelling but, because other evidence of drug use was admitted, the balance is in favor of admissibility, *see: State v. Hudlow*, 99 Wn.2d 1, 15-6 (1983), *State v. O'Connor,* 155 Wn.2d 335, 348-56 (2005), *State v. Lee,* 188 Wn.2d 473, 485-96 (2017), *State v. Duarte Vela,* 200 Wn.App. 306 (2017), *State v. Fleeks,* ___ Wn.App.2d ___, 2023WL355082 (2023), *cf.: State v. Burnam,* 4 Wn.App.2d 368 (2018); I.

***State v. Connie J.C.***, 86 Wn.App. 453 (1997)

Trial court admits co-defendant's guilty plea form, containing co-defendant's confession, at defendant's trial, no showing co-defendant was unavailable; held: a confession is not a public record, RCW 5.44.040, as it is not a routine daily product of government and business, admission deprives defendant of right to cross-examine; III.

***State v. Foster***, 135 Wn.2d 441 (1998)

Six-year old child molestation complainant is permitted to testify via one-way closed-circuit television, RCW 9A.44.150(1); held: confrontation clauses are not violated where, following a hearing, substantial evidence establishes that child complainant under the age of ten would suffer serious emotional distress that would prevent her from reasonably communicating at trial if required to testify in presence of defendant, *Maryland v. Craig*, 111 L.Ed.2d 666 (1990), *affirming State v. Foster,* 81 Wn.App. 444 (1996); CONST. Art. I, §22 provides greater protection to defendants than Sixth

Amendment to United States Constitution, overruling *sub nom.*, in part, *State v. Florczak*, 76 Wn.App. 55 (1994), but live video is the functional equivalent of "face-to-face," *cf.:* *State v. Ulestad*, 127 Wn.App. 209 (2005), *State v. Sweidan,* 13 Wn.App.2d 53 (2020), *State v. D.K.*, 21 Wn.App.2d 342 (2022), *State v. Palmer*, ___ Wn.App.2d ___, 518 P.3d 252 (2022), *State v. Milko,* 21 Wn.App.2d 279 (2022); 5-4.

***Lilly v. Virginia***, 144 L.Ed.2d 117 (1999)

Trial court admits nontestifying accomplice's entire confession that contains some statements against accomplice's penal interest and others that inculpate defendant; held: admission of accomplice's "untested" statement violates defendant's right to confront; 9-0 (4 concurring opinions).

***State v. Clark***, 139 Wn.2d 152 (1999)

Where no objection to child hearsay is taken, appellate court will only review admissibility pursuant to confrontation clause; where complainant on stand denies that she was molested and only hearsay accounts of her prior statements are admitted, there is no confrontation clause violation as witness was subject to cross-examination, *State v. Price*, 158 Wn.2d 630 (2006), *State v. Mobley*, 129 Wn.App. 378, 387-89 (2005), *see: State v. Bates*, 196 Wn.App. 65 (2016), *Pers. Restraint of Grasso*, 151 Wn.2d 1 (2004), *State v. Williams*, 137 Wn.App. 736, 744-45 (2007), *cf.:*distinguishing *State v. Rohrich*, 132 Wn.2d 472 (1997), *see: Crawford v. Washington*, 158 L.Ed.2d 177 (2004); affirms *State v. Clark*, 91 Wn.App. 69 (1998); 7-2.

***State v. Ayala***, 108 Wn.App. 480 (2001)

Defendant is accused of kidnapping for ransom, offers evidence that 14-year old victim was part of extortion plot against his father, trial court precludes defense and cross-examination; held: acquiescence of a kidnap victim less than 16 years old is statutorily excluded as a defense, RCW 9A.40.020(2)(b); confrontation clause does not oblige a court to allow cross-examination on irrelevant issues: 2-1, III.

***State v. Darden***, 145 Wn.2d 612 (2002)

In drug case, surveillance officer testifies to his height from street and location relative to transaction observed but court overrules defendant's objection to the specific location; held: there is no surveillance location privilege, court's restriction violated defendant's right to confront, *see:* *State v. Reed*, 101 Wn.App. 704 (2000); reverses *State v. Darden*, 103 Wn.App. 368 (2000); 9-0.

***State v. Smith***, 148 Wn.2d 122 (2002)

In rape of child case, trial court finds that 5-year old child is unavailable due to her emotional state, social worker testifies that she could testify in a "quiet reassuring environment," defense requests that she testify via closed-circuit television, RCW 9A.44.150(9), trial court declines stating that county lacks the facilities, admits child hearsay; held: before a court can find that a child victim is unavailable for purposes of admitting her hearsay statements, RCW 9A.44.120, it must consider the use of closed-circuit television if there is evidence that the child may be able to testify in an alternative setting, *see:* *Crawford v. Washington*, 158 L.Ed.2d 177

(2004); if equipment is not readily available, court may consider whether the cost of bringing in outside equipment is unreasonable; reverses *State v. Smith*, 108 Wn.App. 581 (2001); 9-0.

***State v. DeSantiago***, 149 Wn.2d 402, 408-15 (2003)

Following mistrial, state discovers its witnesses moved to Mexico or Texas, makes efforts to locate witnesses, mails subpoenas, contacts family members to no avail, trial court admits former testimony at second trial, ER 804(b)(1); held: party need not exercise due diligence, distinguishing *State v. Adamski*, 111 Wn.2d 574 (1988), or invoke out of jurisdiction summons, ch. 10.55 RCW, where witness' presence is unknown, *see: State v. Sweeney*, 45 Wn.App. 81, 86 (1986), *cf.: State v. Rivera*, 51 Wn.App. 556 , 560 (1988), as long as the party exercises good faith and reasonable efforts; where state adds a charge between trials, former testimony is admissible, within discretion of trial court, as long as motive and incentive to cross-examine are substantially the same; affirms *State v. DeSantiago*, 108 Wn.App. 581 (2001); 7-2.

***Crawford v. Washington***, 158 L.Ed.2d 177 (2004)

In attempted murder case, police take statements from defendant's wife describing incident; at trial, defense invokes marital privilege, court admits wife's statement against penal interest; held: testimonial statements are inadmissible at trial unless declarant testifies at trial or defense was previously able to cross-examine declarant; "testimonial" statements include *ex parte* in-court testimony or its functional equivalent, such as affidavits, custodial examinations, prior testimony that defendant was unable to cross-examine or similar pretrial statements that declarants would reasonably expect to be used prosecutorially, including those made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial, *see: State v. Mason*, 160 Wn.2d 910 (2007), *Davis v. Washington*, 165 L.Ed.2d 224 (2006); overrules reliability test of *Ohio v. Roberts*, 65 L.Ed.2d 597 (1980), *State v. Koslowski*, 166 Wn.2d 409 (2009); reverses *State v. Crawford*, 147 Wn.2d 424 (2002); *see: White v. Illinois*, 116 L.Ed.2d 848 (1992) (Thomas, J., concurring); 7-2.

***Pers. Restraint of Grasso***, 151 Wn.2d 1 (2004)

In child rape case, prosecutor tells 5-year old witness that, if she wants, she can say "I don't know" if she doesn't remember or "I don't want to talk about it" if she doesn't want to answer, witness answers most questions on direct but says she does not remember to some questions and declines to answer others; on cross, witness says she doesn't remember to some questions but never says she doesn't want to talk about it; held: while it is improper for prosecutor to give a witness permission to refuse to testify, "I don't remember" is a constitutionally acceptable response, *United States v. Owens*, 98 L.Ed.2d 951 (1988); because witness did not refuse to answer any defense questions, no confrontation clause violation occurred, *State v. Clark*, 139 Wn.2d 152, 158 (1999), *see: State v. Price*, 158 Wn.2d 630 (2006), *State v. Mobley*, 129 Wn.App. 378, 387-89 (2005), *State v. Bates*, 196 Wn.App. 65 (2016), *cf.: State v. Kinzle*, 181 Wn.App. 774 (2014); fractured opinion.

***Pers. Restraint of Markel***, 154 Wn.2d 262, 268-73 (2005)

*Crawford v. Washington*, 158 L.Ed.2d 177 (2004), does not apply retroactively to cases on collateral review, *Pers. Restraint of Hacheney*, 169 Wn.App. 1 (2012); 7-2.

***State v. Ulestad***, 127 Wn.App. 209 (2005)

Trial court finds that child molestation complainant may testify via closed circuit television, places complainant and attorneys is separate chambers, defendant, judge and jury remain in courtroom, court directs that if counsel wishes to object, judge will "lean through the door" to the room where attorneys are, hear objection and rule from bench; held: RCW 9A.44.150(h) requires that defendant must "communicate constantly" with defense counsel, here communication was delayed, not constant, to talk to jury defendant had to signal in front of jury and interrupt the trial; because court did not strictly follow the constant communication requirement, error is reversible without a showing of prejudice, distinguishing *State v. Foster*, 135 Wn.2d 441 (1998), *State v. Palmer*, ___ Wn.App.2d ___, 518 P.3d 252 (2022); 2-1, II.

***State v. Moses***, 129 Wn.App. 718 (2005)

Homicide victim's statement to a health care provider for purposes of treatment is not testimonial, distinguishing *Crawford v. Washington*, 158 L.Ed.2d 177 (2004), where there was no "prosecutorial purpose" to the examination, *State v. Fisher*, 130 Wn.App. 1 (2005), *State v. Hurtado*, 173 Wn.App. 592 (2013), *State v. Scanlan*, 193 Wn.2d 753 (2019), *cf.: State v. Hopkins*, 134 Wn.App. 780, 789-92 (2006); statement to a social worker did not implicate *Crawford* as it was not introduced for the truth of the matter asserted but to show why the social worker contacted CPS; I.

***State v. Fisher***, 130 Wn.App. 1, 10-13 (2005)

Child abuse victim's statement to a private family practice physician that defendant hit him is not testimonial, *State v. Scanlan*, 193 Wn.2d 753 (2019), *cf.: State v. Hopkins*, 134 Wn.App. 780, 789-92 (2006), *State v. Hurtado*, 173 Wn.App. 592 (2013); II.

***State v. Price***, 158 Wn.2d 630 (2006)

Child molestation victim is asked on direct examination about touching, says "me forgot" to all questions, does remember talking to police but not what she said, trial court admits her hearsay statements; held: because the witness took the stand, testified, was asked about the sexual contact and her hearsay statements, defense had opportunity to cross-examine, no confrontation clause violation occurred, *Pers. Restraint of Grasso*, 151 Wn.2d 1 (2004), *State v. Bates*, 196 Wn.App. 65 (2016), *cf.: State v. Kinzle*, 181 Wn.App. 774 (2014), *State v. Rohrich*, 132 Wn.2d 472 (1997); affirms *State v. Price*, 127 Wn.App. 193 (2005); 6-3.

***State v. Shafer***, 156 Wn.2d 381 (2006)

Incompetent 3-year old's statement to her mother is not testimonial; test is whether a reasonable person in declarant's position would expect that her statement would be used in prosecuting the crime, *but see State v. Scanlan*, 193 Wn.2d 753 (2019) (overruling "declarant-centric test with "primary purpose" test), *see: State v. Hurtado*, 173 Wn.App. 592 (2013); statement from same declarant to a family friend who had served as a police informant was not testimonial as the testifying witness was not acting for any law enforcement agency at the time she talked to declarant; trial court did not err in applying reliability factors, *State v. Ryan*, 103 Wn.2d 165, 175-76 (1984), for admissibility under child hearsay statute; 8-1.

***State v. Williams***, 131 Wn.App. 488, 493-94 (2006)

Co-conspirator's statement, ER 801(d)(2)(v), is not testimonial, *State v. Chambers*, 134 Wn.App. 853, 859-62 (2006); III.

***State v. Benefiel***, 131 Wn.App. 651 (2006)

Certified copy of a judgment and sentence is not testimonial, *State v. Goggin*, 185 Wn.App. 59, 71-75 (2014); III.

***State v. Mohamed***, 132 Wn.App. 58 (2006)

Victim reports domestic violence assault to 911 operator, recants at trial, at pretrial hearing state elicits from victim prior acts of domestic violence, defense examines victim, as on direct, about the 911 call and the recanted events, victim then disappears and is deemed unavailable, trial court admits former testimony: assuming, without deciding, that the 911 call was testimonial, Division I holds that, at the preliminary hearing, counsel had an adequate opportunity and motive to examine the witness as to her credibility, since trial court had to determine if her recantation was credible, distinguishing *State v. Rohrich*, 132 Wn.2d 472 (1997); "where the witness was recanting her out of court statements, the protection of the confrontation clause was not undermined by requiring the defendant to conduct a direct examination," at 68 ¶ 25, ER 804(b)(1), *see: State v. Price*, 158 Wn.2d 630 (2006).

***Davis v. Washington***, 165 L.Ed.2d 224 (2006)

Complainant calls 911, "hysterical and crying," operator asks what's happening, complainant responds "he's jumpin' on me again," operator asks who and whether he had been drinking, complainant identifies assailant, trial court admits 911 tape; held: "statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution," at 237, *State v. Mason*, 160 Wn.2d 910, 919-20 (2007), *State v. James*, 138 Wn.App. 628, 638-42 (2007), *State v. Burke*, 196 Wn.2d 712 (2021), here, the 911 caller was speaking about events as they were actually happening rather than describing past events, *Lilly v. Virginia*, 144 L.Ed.2d 117 (1999) (plurality opinion), *State v. Robinson*, 189 Wn.App. 877 (2015), the elicited statements were necessary to be able to resolve the present emergency rather than learn what happened in the past, including operator's effort to establish identity of assailant, *State v. Pugh*, 167 Wn.2d 825 (2009), *State v. Bird*, 136 Wn.App. 127, 134-38 (2006), *State v. Williams*, 136 Wn.App. 486, 503-04 (2007), *State v. Reed*, 168 Wn.App. 553, 562-71 (2012), *State v. McWilliams*, 177 Wn.App. 139, 156-57 (2013), *State v. Perez*, 181 Wn.App. 321 (2014), *see State v. Ohlson*, 162 Wn.2d 1 (2007), *State v. Saunders*, 132 Wn.App. 592, 602-07 (2006), *State v. Koslowski*, 166 Wn.2d 409 (2009), *Ohio v. Clark*, 576 U.S. 237, 192 L.Ed.2d 306 (2015); affirms *State v. Davis*, 116 Wn.App. 81 (2003), 154 Wn.2d 291 (2005); 8-1.

***State v. Hopkins***, 134 Wn.App. 780, 789-92 (2006)

Nurse who examines child molestation complainant and takes statement identifying perpetrator is unavailable to testify due to family emergency, state calls nurse's supervisor to read her report to the jury; held: because nurse created her report under circumstances that would

lead an objective witness to believe that the statements would be available for use at a later trial, and because medical providers are required to file reports with law enforcement where they have reasonable cause to believe abuse or neglect of a child, RCW 26.44.030(1)(a), nurse's report was testimonial, reading it in evidence violates confrontation clause, *Crawford v. Washington*, 158 L.Ed.2d 177 (2004), *cf.: State v. Moses*, 129 Wn.App. 718 (2005), *State v. Fisher*, 130 Wn.App. 1, 10-13 (2005), *State v. Hurtado*, 173 Wn.App. 592 (2013), *State v. Scanlan*, 193 Wn.2d 753 (2019), harmless here; II.

***State v. Chambers***, 134 Wn.App. 853 (2006)

Undercover police observe van pull to house, passenger walks to house, tells officer he has the money for drugs and asks how much, passenger walks back to van, speaks with driver, gets money from driver, returns to officer, pays, gets drugs, driver is arrested, at trial officer testifies to what passenger said; held: statement by a coconspirator does not violate confrontation clause, *State v. Williams*, 131 Wn.App. 488 (2006), *Crawford v. Washington*, 158 L.Ed.2d 177, 195-96 (2004), as an objective witness would not reasonably believe that his statements to an undercover police officer would laer be available for use at trial; II.

***State v. Bird***, 136 Wn.App. 127, 134-38 (2006)

While excited utterance is a hearsay exception, where there is no ongoing emergency when police question witness and questions are intended to determine how a crime was committed and who did it, statements are testimonial and inadmissible, *Davis v. Washington*, 165 L.Ed.2d 224 (2006), *see: State v. Williams*, 136 Wn.App. 486, 501-04 (2007), *State v. Perez*, 181 Wn.App. 321 (2014); II.

***State v. Hacheney***, 160 Wn.2d 503, 520-24 (2007)

Three subpoenaed witnesses advise that they will be out of the country at trial, state takes depositions with defendant present, trial court admits depositions at trial; held: while a witness' absence from the jurisdiction, without more, is not enough to satisfy the confrontation clause, *Barber v. Page*, 20 L.Ed.2d 255 (1968), here prosecutor did not tell witnesses they need not appear, distinguishing *State v. Sanchez*, 42 Wn.App. 225 (1985), trial court's finding that it would have been a hardship for witnesses to appear and trial court's reasonable inference that even then witnesses would not have returned meet confrontation clause requirements, *State v. Allen*, 94 Wn.2d 860, 866 (1980), *State v. DeSantiago*, 149 Wn.2d 402, 411 (2003), *see: Pers. Restraint of Hacheney*, 166 Wn.2d 322 (2012), *distinguishing State v. Aaron*, 49 Wn.App. 735 (1987); 7-2.

***State v. Watt***, 160 Wn.2d 626 (2007)

Harmless error analysis applies to a confrontation clause violation pursuant to *Crawford v. Washington*, 158 L.Ed.2d 177 (2004), *State v. James*, 138 Wn.App. 628, 641-42 (2007), *State v. Gonzales Flores*, 164 Wn.2d 1, 18-19 (2008); 9-0.

***State v. Mason***, 160 Wn.2d 910 (2007)

Where trial court finds by clear, cogent and convincing evidence that defendant was responsible for a declarant's unavailability, here by murder, **doctrine of forfeiture by wrongdoing** results in defendant forfeiting his right of confrontation of the declarant's

testimonial hearsay, *State v. Fallentine*, 149 Wn.App. 614, 619-23 (2009), *State v. Dobbs*, 180 Wn.2d 1 (2014), *State v. DeJesus Hernandez*, 192 Wn.App. 673 (1992), *but see: Giles v. California*, 171 L.Ed.2d 488 (2008), *State v. Fraser*, 170 Wn.App. 13, 19-24 (2012); 5-4.

***State v. Ohlson***, 162 Wn.2d 1 (2007)

Police arrive pursuant to a 911 call, declarant states, in response to questions, that defendant yelled at her, then returned and tried to hit her with a car, does not testify but trial court admits statements; held: while excited utterances are not *per se* nontestimonial, *Davis v. Washington*, 165 L.Ed.2d 224, 243-44 (2006), overruling, in part, *State v. Ohlson*, 131 Wn.App. 71, 84 (2005), here the statements were made within minutes of the assault, contemporaneously with the events described albeit not as they were occurring, involved a threat to harm in light of defendant's return to the scene once already, were necessary to resolve a present emergency, and were the product of informal interrogation, thus were not testimonial, *State v. Reed*, 168 Wn.App. 553, 562-71 (2012), *State v. Perez*, 181 Wn.App. 321 (2014), *see: State v. Pugh*, 167 Wn.2d 825 (2009), *State v. Robinson*, 189 Wn.App. 877 (2015); 8-0.

***State v. Tyler***, 138 Wn.App. 120 (2007)

Police observe man and woman fighting, separate them, woman expresses fear, says defendant will kill her if she testifies, does not appear at intimidating a witness trial, court admits her statements to police; held: because exigency was terminated when police separated defendant and victim, statement was for the primary purpose of establishing past events and thus were testimonial, *Davis v. Washington*, 165 L.Ed.2d 224 (2006), *State v. Mason*, 160 Wn.2d 910, 919-20 (2007), *State v. Koslowski*, 166 Wn.2d 409 (2009), *see: State v. Pugh*, 167 Wn.2d 825 (2009), *State v. Burke*, 196 Wn.2d 712 (2021), *cf.: State v. Reed*, 168 Wn.App. 553, 562-71 (2012); "doctrine of forfeiture," requiring that one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confront, is inapplicable here because it cannot be raised for the first time on appeal, *but see: State v. Mason, supra.*, at 924-27; III.

***Pers. Restraint of Hegney***, 138 Wn.App. 511, 543-47 (2007)

A co-defendant's properly redacted statement, *Bruton v. United States*, 20 L.Ed.2d 476 (1968), that is admitted at trial is not considered a witness against defendant, and thus does not violate confrontation clause, *State v. Moses*, 193 Wn.App. 341 (2016), *see: Crawford v. Washington*, 158 L.Ed.2d 177 (2004), *Richardson v. Marsh*, 95 L.Ed.2d 176 (1987), *Gray v. Maryland*, 140 L.Ed.2d 294 (1998), *State v. DeLeon*, 185 Wn.App. 171, 206-13 (2014), *reversed, on other grounds*, 185 Wn.2d 478 (2016); II.

***State v. Perez***, 139 Wn.App. 522, 526-30 (2007)

In absence of jury, trial court expresses concern that complaining witness is under the influence "of something," inquires, witness denies, trial court precludes defense from cross-examining witness as to whether he is under the influence while testifying; held: abuse of discretion for trial court to preclude examination of a witness regarding whether or not he is under the influence while testifying where the witness had given confused and inarticulate testimony and where trial court observed that he appeared confused and disoriented, *cf.: State v. Arredondo*, 190 Wn.App. 512, 532-34 (2015); II.

***Giles v. California***, 171 L.Ed.2d 488 (2008)

Where trial judge finds that defendant committed a wrongful act that resulted in unavailability of witness at trial, here homicide, doctrine of **forfeiture by wrongdoing** does not overcome confrontation clause preclusion of victim's unconfronted out of court testimony unless evidence establishes that defendant engaged in conduct designed to prevent the witness from testifying, *State v. Fraser,* 170 Wn.App. 13, 19-24 (2012), *but see: State v. Mason,* 160 Wn.2d 910 (2007), *see: State v. Fallentine,* 149 Wn.App. 614, 619-23 (2009), *State v. Dobbs,* 167 Wn.App. 905 (2012), 180 Wn.2d 1 (2014); 6-3.

***State v. Fisher***, 165 Wn.2d 727, 751-53 (2009)

In child sex abuse case, trial court permits defense to inquire of victim's mother about her general bias against defendant because of a rancorous divorce, but precludes evidence about details of financial disputes arising during the divorce; held: while a defendant has a right to put specific reasons motivating a witness' bias before the jury, defendant does not have the right to prove specific facts behind the motivation, *State v. Brooks*, 25 Wn.App. 550, 551-52 (1980), and court has the discretion to limit the evidence as speculative and remote; 9-0.

***Melendez-Diaz v. Massachusetts***, 557 U.S. 305, 129 S.Ct. 314, 174 L.Ed.2d 314 (2009)

Lab reports showing that material seized was cocaine are testimonial and violate the confrontation clause, *Crawford v. Washington*, 158 L.Ed.2d 177 (2004), *State v. Jasper*, 174 Wn.2d 96 (20120, *State v. Lee,* 159 Wn.App. 795, 813-19 (2011), *see: State v. Schroeder,* 164 Wn.App. 164 (2011), *cf.:* CrR 6.13(b), *State v. Sosa,* 59 Wn.App. 678 (1990), *State v. Lui,* 179 Wn.2d 457 (2014), *State v. Federov,* 183 Wn.App. 736, 745-48 (2014), *aff'd, on other grounds,* 183 Wn.2d 669 (2015), *State v. Farnworth,* 199 Wn.App. 185, 202-05 (2017), *reversed, on other grounds,* 192 Wn.2d 468 (2018), *Seattle v. Wiggins,* 23 Wn.App.2d 401 (2022); while documents kept in the regular course of business may be admitted at trial, "that is not the case if the regularly conducted business activity is the production of evidence for use at trial," at 328, *Palmer v. Hoffman*, 87 L.Ed.2d 645 (1943); 5-4.

***State v. Koslowski***, 166 Wn.2d 409 (2009)

Police respond to robbery call, officer observes complainant "extremely emotional and very upset," through questions she explains that suspect is not present and describes details of the offense, complainant dies before trial; held: four factors to determine where primary purpose of police interrogations is for ongoing emergency to establish or prove past events: (1) was speaker speaking about current events as they were occurring, requiring police assistance, or describing past events? (2) would a reasonable listener conclude that speaker was facing an ongoing emergency that required help? (3) what was the nature of what was asked and answered; viewed objectively, were the elicited statements necessary to resolve a present emergency or show what had happened in the past? (4) what was the level of formality of the interrogation?, *Davis v. Washington*, 165 L.Ed.2d 224 (2006), *Crawford v. Washington*, 158 L.Ed.2d 177 (2004), *see: : State v. Burke,* 196 Wn.2d 712 (2021); here, complainant was describing events that occurred, no reason to believe that robber might return, while complainant was frightened there was no reason to think she faced further threat with police present, police questions were to learn past facts, not to resolve a present emergency, questioning was less formal than interrogation in a police station, thus admission of statements violated confrontation clause, *State v. Pugh*, 167 Wn.2d 825

(2009), *cf.: State v. Reed,* 168 Wn.App. 553, 562-71 (2012), *State v. McWilliams,* 177 Wn.App. 139, 156-57 (2013), *State v. Robinson,* 189 Wn.App. 877 (2015); "the emotional state has little relevance to the question whether the individual's statements are testimonial," at 424 ¶ 26; 6-3.

***State v. Pugh***, 167 Wn.2d 825 (2009)

Victim calls 911, says defendant "was beating me up," "he's walking away," describes defendant, says he's "just outside" and "[h]e's beating me up," when asked then says she can no longer see him, trial court admits 911 call; held: while parsing call out of context suggests at some point victim was describing past events, call was intended for immediate safety and medical assistance, questions by operator, including identity of suspect were, objectively viewed, an effort to establish identity so officers might know if they would be encountering a "violent felon," thus statements were nontestimonial under Sixth Amendment, *Davis v. Washington,* 165 L.Ed.2d 224 (2006), *State v. Reed,* 168 Wn.App. 553, 562-71 (2012), *State v. Perez,* 181 Wn.App. 321 (2014), *State v. Robinson,* 189 Wn.App. 877 (2015); *res gestae* statements are not *per se* inadmissible under CONST. art. I, § 22; 8-1.

***State v. Alvarez-Abrego***, 154 Wn.App. 351, 362-69 (2010)

In child abuse case, court admits doctor's testimony that victim's mother told doctor that victim's sister, who was not called to testify, told her that victim had been thrown against the wall; held: while child hearsay statements made to a family member are not testimonial, *State v. Shafer,* 156 Wn.2d 381 (2006), *State v. Hopkins,* 137 Wn.App. 441, 448-51 (2007), *see: Ohio v. Clark,* 576 U.S. 237, 135 S.Ct. 2173, 192 L.Ed.2d 306 (2015), there must be "some threshold evaluation of the underlying circumstances to meet the constitutional strictures," at 364 ¶ 29, not established here; II.

***State v. Price***, 154 Wn.App. 480 (2009)

A note found near homicide victim in her handwriting declaring that defendant shot her for "fooling around" is admissible as a dying declaration, ER 804(b)(2), evidence that victim was shot for another reason than "fooling around" does not preclude admissibility, goes to weight; declaration was addressed to her daughter, thus it is not testimonial; I.

***Michigan v. Bryant***, 562 U.S. 344, 179 L.Ed.2d 93 (2011)

Police respond to man shot dispatch, find victim wounded, ask what happened, who shot him, where shooting occurred, victim answers, later dies, trial court admits victim's answers as excited utterances; held: in determining whether a statement is testimonial, court should objectively ascertain the primary purpose of the interrogation by examining the statement and all of the circumstances in determining whether an emergency exists, looking at the type and scope of danger posed to the victim, the police and the public, and not just the intent of the police in interrogating the declarant; here, there was an ongoing emergency as an armed shooter, whose motive was unknown, was at large within minutes of the shooting, police did not know the circumstances in which the shooting occurred or whether the public or police were in danger, questions were necessary to allow police to assess the situation, the threat to their own safety and the public, it was not a structured interrogation, thus statements were not testimonial, *Davis v. Washington,* 547 U.S. 813, 158 L.Ed.2d 224 (2006), *State v. Reed,* 168 Wn.App. 553, 562-71 (2012), *Ohio v. Clark,* 576 U.S. 237, 135 S.Ct. 2173, 192 L.Ed.2d 306 (2015); 6-2.

***Bullcoming v. New Mexico***, 564 U.S. 647, 180 L.Ed.2d 610 (2011)

In DUI case, court admits lab report stating blood alcohol concentration through an analyst familiar with testing procedures but who neither participated in nor observed the test on the blood sample; held: lab report is testimonial, *Melendez-Diaz v. Massachusetts*, 552 U.S. 1256, 174 L.Ed.2d 314 (2009), accused is entitled to confront the analyst who made the certification, *see: State v. Schroeder,* 164 Wn.App. 164 (2011), substituting another knowledgeable analyst does not meet the Sixth Amendment confrontation requirement, *but see: State v. Manion*, 173 Wn.App. 610 (2013); 5-4.

***State v. Lee***, 159 Wn.App. 795, 813-19 (2011)

Trial court admits cell phone records, without objection, via an affidavit of the custodian that attests to their authenticity, RCW 10.96.030; held: while an affidavit that contains factual assertions offered as substantive evidence to prove a crime violate confrontation clause, *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 174 L.Ed.2d 314 (2009), an affidavit of authenticity is not testimonial; I.

***State v. Mares***, 160 Wn.App. 558 (2011)

In violation of no contact order case, victim does not appear at trial, court admits certified copy of her driver's license by way of certified letter from Department of Licensing records custodian stating that the attached license is for "Knopff, Brittany," which is the name of victim; held: although letter from records custodian states name of complainant, it is not testimonial as it attests only to the existence of a certain public record, custodian did not attest that the license belonged to "any particular Brittany Knopff" nor that the photograph on the license was the victim of the crime, *State v. Bajardi*, 3 Wn.App.2d 726, 729-33 (2016), *cf.: State v. Jasper*, 174 Wn.2d 96 (2012); I.

***State v. Turnipseed***, 162 Wn.App. 60 (2011)

Videotaped deposition of state's ballistics' expert is played for jury due to witness unavailability, defects in the recording cause portions, including portions of cross-examination, to be inaudible, no stenographic record made at the time of the deposition; held: without some record of what cross-examination was lost, court assumes a confrontation violation occurred, but here there was no reasonable probability that the outcome of the trial would have been different, thus error was harmless, *State v. Moses*, 129 Wn.App. 718, 732 (2005), *Harrington v. California*, 395 U.S. 250, 23 L.Ed.2d 284 (1969); depositions in criminal cases may be videotaped but stenographic record should be made simultaneously at expense of noting party, CrR 4.6(c), CR 30(b)(8)(E); III.

***State v. Caton***, 163 Wn.App. 659 (2011), *rev'd, on other grounds,* 163 Wn.App. 659 (2011)

In failure to register as a sex offender case, admission at trial of defendant's registration form containing sheriff's classification of him as a level II sex offender does not violate confrontation clause here as sheriff testified that he classified defendant as a level II offender after reviewing defendant's records, thus error, if any, is not manifest, *cf.: State v. Jasper*, 174 Wn.2d 96 (2012); II.

***State v. Schroeder***, 164 Wn.App. 164 (2011)

Court admits lab report without objection, argues confrontation clause violation on appeal; held: defendant has burden of raising a confrontation clause objection and has burden to demand presence of test report expert, CrR 6.13(b), *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S.Ct. 2527, 2541, 174 L.Ed.2d 314 (2009), failure to object or demand waives confrontation rights, *State v. O'Cain,* 169 Wn.App. 228 (2012), *State v. J.K.T.*, 11 Wn.App.2d 544 (2019), *State v. Burns*, 193 Wn.2d 190, 207 (2019); Division III fails to address effective assistance issue in published portion of opinion.

***State v. Jasper***, 174 Wn.2d 96 (2012)

Certifications as to the existence or nonexistence of public records are testimonial, *Melendez-Diaz v. Massachusetts,* 557 U.S. 305, 174 L.Ed.2d 314 (2009), *State v. Rainey,* 180 Wn.App. 830, 843-45 (2014), *overruling State v. Kirkpatrick,* 160 Wn.2d 873 (2007) and *State v. Kronich,* 160 Wn.2d 893 (2007), *cf.: State v. Lee,* 159 Wn.App. 795, 813-19 (2011), *State v. Mecham,* 181 Wn.App. 932, 948-52 (2014), *rev., on other grounds,* 186 Wn.2d 128 (2016), *State v. Farnworth,* 199 Wn.App. 185, 202-05 (2017), *reversed, on other grounds,* 192 Wn.2d 468 (2018); affirms *State v. Jasper,* 158 Wn.App. 518 (2010); 9-0.

***State v. Hummel,*** 165 Wn.App. 749, 774-77 (2012)

Witnesses testify at trial that they did an internet search and were unable to locate the victim; held: while a motion *in limine* regarding the scientific validity of evidence of internet searches may have been appropriate, the witnesses were all subject to cross-examination and thus confrontation clause is not implicated; I.

***State v. Hayes***, 165 Wn.App. 507, 514-20 (2011)

Record establishes that defense recognized the existence of a confrontation clause issue, failed to object and then raised issue for first time on appeal, RAP 2.5(a)(3); held: a manifest constitutional issue deliberately not litigated at trial is waived and may not be raised on direct appeal, *State v. Walton*, 76 Wn.App. 364, 368-70 (1994), *Johnson v. United States*, 87 L.Ed. 704 (1943), *State v. Valladares*, 99 Wn.2d 663, 666-72 (1983), *State v. White,* 83 Wn.App. 770, 776 (1996), *rev'd, on other grounds,* 135 Wn.2d 761 (1998), *State v. Garbaccio*, 151 Wn.App. 716, 730-31 (2009), *see: State v. O'Cain,* 169 Wn.App. 228 (2012), *see also: State v. Trout*, 125 Wn.App. 313 (2005); I.

***Williams v. Illinois***, 567 U.S. 50, 183 L.Ed.2d 90 (2012)

State lab expert testifies that a DNA profile produced by an outside laboratory matched a profile that state lab produced using a sample of defendant's blood, based on business records stating that swabs taken from victim were sent to outside lab and returned; held: an expert may express an opinion that is based on facts that the expert assumes, but does not know, to be true, expert may explain the facts on which expert's opinion is based without testifying to the truth of those facts which are not hearsay and do not violate confrontation clause, *State v. Manion,* 173 Wn.App. 610 (2013); outside lab report was produced before any suspect was identified, was not sought to obtain evidence against defendant and thus does not violate confrontation clause; expert's testimony that the outside lab's sample came from the victim is admissible in a bench trial but not a jury trial; 5-4 (plurality opinion).

***State v. Hubbard***, 169 Wn.App. 182 (2012)

In violation of no contact order trial court admits clerk's minute entry from sentencing on prior conviction that defendant was served with no contact order in open court; held: certified public record memorializing facts as they occur in court, without reference to future litigation, is not testimonial, *State v. Hart*, 195 Wn.App. 449, 460 (2016), *abrogated, on other grounds, State v. Burns,* 193 Wn.2d 190 (2019), *but see: State v. Jasper,* 174 Wn.2d 96 (2012); II.

***State v. O'Cain***, 169 Wn.App. 228 (2012)

Hearsay statements made for purposes of **medical treatment** do not violate U.S. or state confrontation clauses, CONST., Art. I, § 22, *Michigan v. Bryant*, 562 U.S. 344, 179 L.Ed.2d 93 (2011); confrontation clause objection cannot be raised for first time on appeal, *State v. J.K.T.*, 11 Wn.App.2d 544 (2019), *State v. Burns,* 193 Wn.2d 190, 207 (2019); I.

***State v. Fraser,*** 170 Wn.App. 13, 19-24 (2012)

In homicide case, trial court admits victim's statement to police three months earlier that he feared defendant, gives limiting instruction that statement is admitted for victim's state of mind, not for truth; held: statement that survives a hearsay challenge does not, *per se*, survive a confrontation clause challenge, *State v. Mason,* 160 Wn.2d 910, 922 (2007); here, the statement was used to prove victim feared defendant, thus it was not only for state of mind, violated confrontation clause; harmless here; I.

***State v. Doerflinger***, 170 Wn.App. 650 (2012)

Treating physician testifies that he suspected a nose fracture, ordered CT scan, based upon radiology results and consultation with radiologist he confirmed, over objection, nasal fracture; held: out of court statements that are related by an expert solely to explain the assumptions on which an opinion rests are not testimonial and fall outside the scope of the confrontation clause, *Williams v. Illinois,* 567 U.S 50, 183 L.Ed.2d 89 (2012), *see: State v. Manion,* 173 Wn.App. 610 (2013), and was properly admitted as a business record, *State v. Ziegler,* 114 Wn.2d 533 (1990); I.

***State v. Hurtado***, 173 Wn.App. 592 (2013)

Domestic violence victim, during treatment in emergency room, tells medical personnel, with police officer present, that her boyfriend hit her, victim does not testify at trial, court admits statement; held: statement to medical personnel is nontestimonial (1) where made for diagnosis and treatment, (2) where there is no indication that witness expected statement to be used at trial, (3) the doctor does not work for the state, *but see: State v. Scanlan,* 193 Wn.2d 753 (2019) (abrogating three-factor test in favor of primary purpose test); here, a reasonable person would believe that the statement made in the presence of a police officer would be used as evidence, *distinguishing State v. Sandoval,* 137 Wn.App. 532, 537 (2007), *State v. Moses,* 129 Wn.App. 718, 729-30 (2005), officer was actively collecting evidence, thus state "failed to meet its burden in proving that [the] statements were nontestimonial;" where state does not call a witness whose hearsay statement is admitted and does not establish a good faith effort to secure the presence of the witness, then the witness is not **unavailable**, at 606-07, *State v. Beadle,* 173 Wn.2d 97, 107-

13 (2011), *State v. DeSantiago,* 149 Wn.2d 402, 410-11 (2003), *cf.: State v. DeJesus Hernandez,* 192 Wn.App. 673, 686-89 (1992), harmless here; I.

***State v. Manion****,* 173 Wn.App. 610 (2013)

DNA analyst is unavailable, court admits testimony of technical peer reviewer who conducted "an independent review of the DNA evidence and gave her independent opinion" consistent with the unavailable witness; held: experts can "partially rely" on the reports of others, ER 703, without violating confrontation clause, *cf.: State v. Lui,* 179 Wn.2d 457 (2014), *Seattle v. Wiggins,* 23 Wn.App.2d 401 (2022), distinguishing *Melendez-Diaz v. Massachusetts,* 558 U.S. 305, 174 L.Ed.2d 314 (2009), *Bullcoming v. New Mexico,* 564 U.S. 647, 180 L.Ed.2d 610 (2011), *Williams v. Illinois,* 567 U.S. 50, 183 L.Ed.2d 89, (2012), *State v. Federov,* 183 Wn.App. 736, 745-48 (2014) , *aff'd, on other grounds,* 183 Wn.2d 669 (2015); I.

***State v. Lui****,* 179 Wn.2d 457 (2014)

Medical examiner, not present during autopsy, testifies to cause of death based upon photographs of autopsy, makes some statements from the autopsy report, including temperature, and recites from the report negative result of toxicology report; DNA expert, who did not participate or observe DNA testing testifies from a report that she could not eliminate defendant as donor, defense objects to both under confrontation clause; held: confrontation clause applies where an expert testifies against the defendant with some capacity to inculpate defendant, *see: State v. Federov,* 183 Wn.App. 736, 745-48 (2014) , *aff'd, on other grounds,* 183 Wn.2d 669 (2015), *State v. Ramirez,* 7 Wn.App.2d 277 (2019); DNA evidence is not inculpatory until a human analyst uses expertise to interpret readings, create a profile that incriminates defendant; here, the expert was the appropriate witness to introduce the DNA evidence, and was the only DNA witness "against" the defendant, who does not have confrontation rights with respect to chain of custody, authenticity of the sample or accuracy of the testing device; pathologist who took temperature readings did not provide evidence against the defendant, as it had no relevance until interpreted by the testifying medical examiner; toxicology results did tend to inculpate defendant, thus confrontation right was violated, *Seattle v. Wiggins,* 23 Wn.App.2d 401 (2022), albeit harmless here; 5-4.

***State v. Dobbs****,* 180 Wn.2d 1 (2014)

Before and after arrest, defendant threatens victim who fails to appear at trial, court finds by clear, cogent and convincing evidence that defendant's acts caused victim's absence, admits hearsay statements; held: doctrine of **forfeiture by wrongdoing** is applicable, court may consider acts before and after state initiated criminal proceedings, *Giles v. California,* 554 U.S. 353, 377, 171 L.Ed.2d 488 (2008), lack of a direct statement from victim that she feared harm as a result of testifying is not required as long as court concludes that it was highly likely why victim did not appear, hearsay statements need not meet a hearsay exception, *State v. Fallentine,* 149 Wn.App. 614, 623-24 (2009), *State v. DeJesus Hernandez,* 192 Wn.App. 673 (1992), as defendant waived his hearsay objection; affirms *State v. Dobbs, 167* Wn.App. 905 (2012); 6-3.

***State v. Pearson****,* 180 Wn.App. 576 (2014)

To prove school bus route stop enhancement in VUCSA case, state offers testimony from county Director of Geographic Information Systems who produces a map showing bus stops provided by the school district, RCW 69.50.435(5) (2003), trial court strikes special verdict finding that map was wrongly admitted; held: map is prepared, per the statute, for use in a

criminal proceeding and is thus testimonial, defendant had right to confront the official who supplied the information, confrontation clause was violated; III.

***State v. Kinzle***, 181 Wn.App. 774, 780-84 (2014)

In molestation case prosecutor asks child complainant about school, relatives, peripheral details but doesn't ask if she recognizes defendant or about touching, witness did not testify that defendant touched her or that she told interviewers that defendant touched her, she did not testify she didn't remember, *State v. Price,* 158 Wn.2d 630, 649 (2006), *Pers. Restraint of Grasso,* 151 Wn.2d 1 (2004), trial court admits child hearsay describing offense; held: when a witness is not questioned about the alleged criminal act or prior statement, the cross-examiner has nothing to confront and is caught between the "constitutionally impermissible Catch-22 of calling the child for direct or waiving his confrontation rights," *State v. Clark,* 139 Wn.2d 152, 158 (1999), *cf.: State v. Bates,* 196 Wn.App. 65 (2016), thus conviction reversed, *State v. Rohrich,* 132 Wn.2d 432 (1997); I.

***State v. Mecham***, 181 Wn.App. 932, 948-51 (2014), *reversed., on other grounds,* 186 Wn.2d 128 (2016)

Affidavit from Department of Licensing attesting that notice of license revocation was mailed to defendant is testimonial, *Crawford v. Washington,* 541 U.S. 36, 51, 158 L.Ed.2d 177 (2004), but because it is admitted to establish whether the license revocation complied with due process, a legal question, rather than an element of the crime, defendant's confrontation rights were not violated, distinguishing *State v. Jasper,* 174 Wn.2d 96 (2012); I.

***State v. Hudlow***, 182 Wn.App. 266 (2014)

En route to a controlled buy detective overhears informant's side of telephone call with defendant and testifies, over objection, that he "understood" that there were arrangements to buy drugs, state arguing that it wasn't hearsay but was admitted to explain "how he contacted" *[sic]* and for detective's **state of mind**; held: detective's mental condition was not relevant, *State v. Lowrie,* 14 Wn.App. 408 (1975), *State v. Aaron,* 57 Wn.App. 277, 279-81 (1990), *State v. Johnson,* 61 Wn.App. 539, 545 (1991), *State v. Edwards,* 131 Wn.App. 611, 614 (2006), *State v. Gonzalez-Gonzalez,* 193 Wn.App. 683, 688-91 (2016), *State v. Rocha,*21 Wn.App.2d 26 (2022), thus statement was both hearsay and violated confrontation clause; III.

***State v. Berniard***, 182 Wn.App. 106, 124-32 (2014)

Over objection, court admits severed co-defendants' statements through police witnesses "to explain why the police were pursuing" the identity of a person leading to the arrest of defendant, instructed jury to consider statements "only for the purpose of determining their involvement in the charged crime," *State v. Mason,* 127 Wn.App. 554, 566 (2005); held: statements were testimonial, a statement is not immunized from confrontation clause challenge simply because it is not offered for the truth of the matter, *State v. Mason,* 160 Wn.2d 910, 921-22 (2007), courts must guard against backdoor admission of inadmissible hearsay statements that violate confrontation clause; an officer may describe context and background of investigation so long as the testimony does not incorporate out of court statements, *State v. O'Hara,* 141 Wn.App. 900, 910 (2007), *reversed, on other grounds,* 167 Wn.2d 91 (2009); here, only relevant purpose for introducing the statements was to establish defendant's culpability, reversed; II.

***State v. Federov***, 183 Wn.App. 736, 745-48 (2014) , *aff'd, on other grounds,* 183 Wn.2d 669 (2015)

In DUI case breath-alcohol technician and custodian of records of quality assurance procedures testifies that the device used to test defendant met quality assurance procedures performed by a non-testifying technician and that simulator solution was properly prepared and replaced according to maintenance records; held: where records are offered that were not made to establish facts at defendant's trial they are not testimonial, *State v. Lui*, 179 Wn.2d 457 (2014), distinguishing *Bullcoming v. New Mexico*, 564 U.S. 647, 180 L.Ed.2d 610 (2011); here, the testing about which the technician testified were not made to identify or inculpate the defendant, thus confrontation clause was not violated, *State v. Ramirez*, 7 Wn.App.2d 277 (2019); II.

***State v. Perez***, 184 Wn.App. 321 (2014)

Prison inmate, in distress with ligature around neck, tells guards defendant strangled him within minutes of the incident, refuses to testify, trial court admits statement as nontestimonial and excited utterance; held: objective evaluation demonstrates that primary purpose of questioning by guard was to respond to ongoing medical emergency and assess risk of harm to other inmates and corrections officers, thus statement falls under ongoing emergency exception to confrontation clause, *Michigan v. Bryant*, 562 U.S. 344, 179 L.Ed.2d 93 (2011); I.

***State v. Goggin***, 185 Wn.App. 59, 71-75 (2014)

State confrontation clause, CONST. art. I, § 22, is co-extensive with Sixth Amendment, *State v. Lui*, 179 Wn.2d 457, 469 (2014); certified copy of an Idaho judgment and sentence was not created in anticipation of litigation or to prove a fact at trial, is inherently trustworthy, thus is not testimonial, *State v. Benefiel*, 131 Wn.App. 651, 655-56 (2006); III.

***Ohio v. Clark***, 576 U.S. 237, 135 S.Ct. 2173, 192 L.Ed.2d 306 (2015)

Teacher asks 3-year old about abrasions, child says defendant did it, doesn't testify at trial but statements are admitted; held: while statements to non-police witnesses are not categorically non-testimonial, under "primary purpose" test this statement was not for the purposes of creating evidence, rather it was to protect a child; statements by very young children will rarely, if ever, implicate the Confrontation Clause, *State v. Streepy*, 199 Wn.2d 487, 493-97 (2017); 9-0.

***State v. Lozcano***, 188 Wn.App. 338, 366-68 (2015)

Witness invokes right to remain silent, trial court admits statement witness made to police during interrogation to show defendant's "intent" and "knowledge;" held: statement made to law enforcement during interrogation for the purpose of proving past events violate defendant's right to confront, *Davis v. Washington*, 547 U.S. 813, 821, 165 L.Ed.2d 224 (2006); III.

***State v. Starbuck***, 189 Wn.App. 740, 759-60 (2015)

Silent 911 call from homicide victim's telephone contemporaneous with the homicide is not testimonial; III.

***State v. Robinson***, 189 Wn.App. 877 (2015)

911 caller reports robbery as it happens, caller, while identified, does not testify, court admits contents of call; held: where speaker is speaking about current events as they were actually occurring, a reasonable listener would conclude that speaker was facing ongoing emergency, questions and answers were necessary to resolve the present emergency and not what happened in the past, level of formality of the interrogation is less then statements are not testimonial, *State v. Koslowski,* 166 Wn.2d 409, 417-19 (2009), statement need not be by the victim; I.

***State v. Wilcoxon***, 185 Wn.2d 324 (2016)

In joint trial civilian testifies that codefendant bragged that he and "a friend" burglarized a business, motion to sever denied but not renewed, no objection made to statement; held: because statement was not testimonial *Bruton* doctrine was not violated as statement is outside the scope of the confrontation clause, trial court apparently instructed jury not to use statement of codefendant against defendant, severance was not required; affirms *State v. Wilcoxon,* 185 Wn.App. 534 (2015); 5-4.

***State v. DeJesus Hernandez***, 192 Wn.App. 673 (2016)

Trial court's finding that defendant's crudely coded jail phone calls persuaded victim and victim's mother to move to Mexico, establishing **forfeiture by wrongdoing**, authorizing admission of victim's testimonial hearsay statements including child hearsay, *State v. Mason,* 160 Wn.2d 910 (2000), *State v. Dobbs,* 180 Wn.2d 1 (2014); I.

***State v. Moses***, 193 Wn.App. 341 (2016)

In joint trial codefendant's redacted statement does not violate confrontation clause where statement is facially neutral, free of deletions or blanks, accompanied by limiting instruction, *State v. Larry*, 108 Wn.App. 894 (2001), *Richardson v. Marsh,* 481 U.S. 200, 208, 95 L.Ed.2d 176 (1987), and where references to codefendant were not inculpatory; II.

***State v. Bates***, 196 Wn.App. 65 (2016)

In child rape case court admits recorded victim interview, when victim testifies state inquires about sex assault but does not inquire about whether victim made the previously admitted hearsay statement, defense counsel cross-examines about the incident and about the hearsay statement, defense argues for the first time on appeal that confrontation clause was violated because court admitted recorded statement but questioning on direct was not broad enough to subject her to cross-examination; held: cross-examination about the interview was within the scope of direct, ER 611(B), *State v. Montgomery*, 95 Wn.App. 192, 198-99 (1999), *State v. Clark*, 139 Wn.2d 152 (1999), *State v. Kilgore*, 107 Wn.App. 160, 173-75 (2001), *State v. Price*, 158 Wn.2d 630 (2006), distinguishing *State v. Rohrich*, 132 Wn.2d 472 (1997), *cf.: State v. Kinzle,* 181 Wn.App. 774, 780-84 (2014), both the hearsay statement and victim's testimony were inculpatory; III.

***State v. Arredondo***, 188 Wn.2d 244, 267-71 (2017)

At offer of proof state's witness testifies he has problems with depression, concentration, comprehension, anxiety, distrust of other people, hypervigilance, PTSD, substance abuse, but none impact long term memory, trial court finds that his issues do not affect his ability to recall

or describe, precludes defense from inquiring during trial; held: witness did not display any readily apparent mental deficiencies, distinguishing *State v. Perez,* 139 Wn.App. 522 (2007), *State v. Froehlich,* 96 Wn.2d 301(1981), absent evidence that witness was under influence at time of incident or at time of testifying, *State v. Tigano,* 63 Wn.App. 336, 344 (1991), trial court did not abuse discretion, *State v. Darden,* 145 Wn.2d 612 (2002); trial court should apply the following factors to assess whether past mental health issues are permissible on cross-examination: 1) the nature of the psychological problems; 2) whether the witness suffered from the condition at the time of the events to which the witness will testify; 3) the temporal recency or remoteness of the condition; affirms *State v. Arredondo,* 190 Wn.App. 512, 532-34 (2015); 5-4.

***State v. Lee***, 188 Wn.2d 473, 485-96 (2017)

In child sex abuse case defense seeks to cross-examine complainant who would admit that she made a prior false rape accusation against another, trial court limits cross to false accusation, precludes cross that the accusation was about rape; held: court had discretion to exclude as the accusation of rape against another has minimal probative value, *State v. Kunze,* 97 Wn.App. 832, 859, 988 P.2d 977 (1999); *see also State v. O'Connor,* 155 Wn.2d 335, 349, 119 P.3d 806 (2005), evidence intended to paint the witness as a liar is less probative than evidence demonstrating a witness' bias or motive to lie in a specific case, distinguishing *State v. McDaniel,* 83 Wn.App. 179, 186-87, 920 P.2d 1218 (1996); the prejudicial value in the state's interest to protect rape victims outweighs the probative value to the defendant in light of court admitting the fact that complainant made a false accusation, *cf.: State v. Jones,* 168 Wn.2d 713 (2010), *State v. McDaniel,* 83 Wn.App. 179 (1996) , *State v. Barnes,* 54 Wn.App. 536 (1989), *State v. Kunze,* 97 Wn.App. 832, 858-60 (1999), *State v. Blair,* 3 Wn.App.2d 343 (2018), *State v. Case,* 13 Wn.App.2d 657 (2020), *State v. Orn,* 197 Wn.2d 343 (2021); 9-0.

***State v. Farnworth,*** 199 Wn.App. 185, 202-05 (2017), *reversed, on other grounds,* 192 Wn.2d 468 (2018)

A defendant cannot claim a confrontation clause violation if the court admits the defendant's own out of court statements; the right of confrontation exists as to accusations of third parties implicating a criminal defendant, not a criminal defendant implicating himself; 2-1, III.

***State v. Streepy***, 199 Wn.2d 487 (2017)

Police respond to domestic violence call, detain and handcuff suspect due to aggressiveness, talk to victim who describes assault, talk to victim's 7-year old son who describes assault, court admits son's statement to police, son does not testify, court precludes defense from inquiring of victim's immigrations status; held: a reasonable person would not conclude that child's statement was for the *primary* purpose of providing a substitute for testimony, *Ohio v. Clark,* 576 U.S. 237, 135 S.Ct. 2173, 2180, 192 L.Ed.2d 306 (2015); even though statements were in the past tense statements were made contemporaneously with the events described, *State v. Ohlson,* 162 Wn.2d 1, 17 (2007); fact that defendant was handcuffed was due to officer safety, police did not have probable cause to arrest until after child's statement; ruling that defense could not inquire as to victim's immigration status was not an abuse of discretion as victim testified in offer of proof that she was unaware of the "U Visa" procedure which might allow a domestic violence immigrant to remain in the United States until

after the incident, thus her immigration status was not relevant *see also: State v. Romero-Ochoa*, 193 Wn.2d 341 (2019), *cf.: State v. Bedada*, 13 Wn.App.2d 185 (2020); I.

***State v. Horn***, 3 Wn.App.2d 302 (2018)

Defendant threatens domestic partner with death, court admits ER 404(b) evidence of prior threats to support victim's reasonable fear, *State v. Magers*, 164 Wn.2d 174 (2008), excludes defense offer that after the charged incident defendant and victim got engaged and travelled together; held: 3-step test for **right to present a defense** analysis: (1) evidence must be at least minimally relevant, (2) if relevant burden shifts to state to show that relevant evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial, *State v. Jones*, 168 Wn.2d 713, 720 (2010), (3) the state's interest in excluding prejudicial evidence must also be balanced against the defendant's need for the information sought, and relevant information can be withheld only if the state's interest outweighs the defendant's need, *State v. Orn*, 197 Wn.2d 343 (2021); here, considering judicial recognition of battered woman's syndrome, *State v. Allery*, 101 Wn.2d 591, 597 (1984), specifically cycles of domestic violence in which victim forgives hoping that the violence will not recur, trial court's exclusion of evidence of engagement and trip with defendant was not minimally relevant, was not an abuse of discretion; II.

***State v. Blair***, 3 Wn.App.2d 343 (2018)

In rape case trial court permits defense to cross-examine victim about her knowledge that respondent was on probation and that she knew what he was on probation for but excludes cross as to her knowledge that respondent's probation was due to his history of sex offenses; held: trial court did not abuse discretion in limiting cross-examination, did not violate **right to present a defense,** *cf.: State v. Orn*, 197 Wn.2d 343 (2021); II.

***State v. Burns***, 193 Wn.2d 190, 206-211 (2019)

Failure to object to confrontation clause violation waives the issue; 9-0.

***State v. Scanlan***, 193 Wn.2d 753 (2019)

Victim's statements to medical providers in emergency room and later statements to primary care provider and wound care medical team, including identity of person who assaulted him, were not testimonial as primary purpose was for treatment; when the primary purpose is to respond to an ongoing emergency its purpose is not to create a record for trial; factors to be considered are whether or not there is an emergency, informality of the situation; statements made to someone who is not principally charged with uncovering and prosecuting crimes are significantly less likely to be testimonial, *Ohio v. Clark*, 578 U.S. 237, 135 S.Ct. 2173, 192 L.Ed.2d 306 (2015), *State v. Burke*, 196 Wn.2d 712 (2021); victim's signing medical release to allow records to go to police and prosecutors does not defeat primary purpose; victim's statements to police officers after defendant was arrested are more likely testimonial, *cf.: Michigan v. Bryant*, 562 U.S. 344, 179 L.Ed.2d 93 (2011); primary purpose test supersedes "declarant-centric" test, *State v. Shafer*, 156 Wn.2d 381 (2006) and "three-factor" test, *State v. Sandoval*, 137 Wash. App. 532, 537 (2007), *State v. Hurtado*, 173 Wn.App. 592, 599-600 (2013) ; affirms *State v. Scanlan*, 2 Wn.App.2d 715 (2018); 9-0.

***State v. Ramirez,*** 7 Wn.App.2d (2019)

Technician extracts cell phone data from phone found at crime scene which connects co-defendants to each other, technician does not testify, state calls another technician from same office who explains how the data was extracted based upon the first technician's report, does not testify to the contents of the report, trial court admits the report and a detective testifies to how the data connects the co-defendants; held: while the first technician was a witness, he was not a witness against the defendants, the report was not inculpatory or testimonial thus did not violate confrontation clause, *State v. Lui,* 179 Wn.2d 457 (2014), *State v. Federov,* 183 Wn.App. 736, 745-48 (2014), *aff'd, on other grounds,* 183 Wn.2d 669 (2015); II.

***State v. Richardson,*** 12 Wn.App.2d 657 (2020)

Statement of co-conspirator is not testimonial, *State v. Sanchez-Guillen,* 135 Wn.App. 636, 641-45 (2006); III.

***State v. Sweidan***, 13 Wn.App.2d 53 (2020)

State's witness in Michigan, under subpoena, RCW 10.55.060, submits unsworn statement that she cannot appear in person, in-home caregiver for ill mother, physician writes that mother needs continuous medical care for which witness needs to be present, court permits, over objection, live video testimony; held: confrontation clause entitles a defendant to "meet the witnesses . . . face-to-face," CONST. art. I, § 22, although considerations of public policy and necessities of the case, in narrow circumstances, may preempt the right of a physical face to-face encounter, *Maryland v. Craig*, 497 U.S. 836, 845-46, 110 S. Ct. 3157, 111 L. Ed. 2d 666 (1990), trial court must render a case-specific finding that (1) excusing the presence of the witness necessarily furthers an important public policy, and (2) the procedure otherwise assures the reliability of the testimony, *State v. Foster*, 135 Wn.2d 441 (1998), *State v. Milko*, 21 Wn.App.2d. 279 (2022); here, state failed to establish the necessity to present the witness' testimony by video, no evidence that the witness was unable to find another caregiver, *but see: State v. D.K.*, 21 Wn.App.2d 342 (2022); trial court should enter findings of fact and declare on record the details of how the video is set up, who can see the screens; harmless here; III.

***State v. Bedada***, 13 Wn.App.2d 185 (2020)

In domestic violence case court precludes defense from inquiring of complainant-wife about her knowledge that defendant is not a citizen and thus, if convicted, would be deported; held: while ER 413(a) puts limits on admissibility of immigration status, precluding defense from eliciting evidence of defendant's immigration status because it might be prejudicial to defendant is abuse of discretion, *cf.: State v. Orn*, 197 Wn.2d 343 (2021); evidence of potential consequences that flow from conviction may have probative value; demonstrating bias arguably based upon the key witness' desire that defendant be deported is an important element of the right to **present a defense,** *State v. Carballo17* Wn.App.2d 337 (2021); I.

***State v. Case***, 13 Wn.App.2d 657 (2020)

In domestic violence case complainant provides police with sworn statement detailing defendant's assault, at trial she recants and testifies she does not remember the incident, defense counsel elicits on cross that she is not afraid of defendant and not afraid to testify, trial court sustains objections to questions about whether or not she was threatened in order to get her to testify, whether she found it difficult to testify and whether she was concerned about being

charged with perjury; held: while the court erred in sustaining relevance objections to threats which would have made it more probable that she was telling the truth at trial and would have affected her credibility, to establish a Sixth Amendment violation the excluded evidence must have extremely high probative value, *State v. Lee*, 188 Wn.2d 473, 485-96 (2017), *State v. Arndt*, 194 Wn.2d 784, 812 (2019); here, defense was still able to argue that complainant's recantation was genuine, thus error was harmless under non-constitutional standard, *State v. Barry*, 183 Wn.2d 297, 317 (2015); II.

***State v. Burke***, 196 Wn.2d 712 (2021)

Rape victim speaks with "sexual assault nurse examiner" hours after medical treatment, nurse testifies that her exam has a forensic and medical component, complainant signed consent that evaluation would include collection of evidence, nurse, while not a law enforcement employee, was collecting evidence for prosecution, complainant dies before trial, court admits statements as non-testimonial; held: an objective evaluation of the circumstances of the interrogation reveals that the primary purpose was to guide the provision of medical care, sexual assault nurse examiners are not principally charged with uncovering and prosecuting criminal behavior, *State v. Scanlan*, 193 Wn.2d 753, 766 (2019), *Ohio v. Clark*, 576 U.S. 237, 245, 135 S. Ct. 2173, 192 L. Ed. 2d 306 (2015); while the nurse was not gathering information in response to an ongoing emergency, she is not a law enforcement officer, statements were made primarily for medical purposes and thus were non-testimonial; while the victim's description of the suspect was testimonial, its admission was harmless based upon other evidence of identification; other than the identification, the statements admitted, while hearsay, were for the purpose of medical treatment, trial court did not abuse its discretion in admitting them, ER 803(a)(4); reverses *State v. Burke*, 6 Wn.App.2d 950 (2018); 9-0 (3-justice concurrence would hold that the statements were all testimonial but admission was harmless).

***State v. Orn***, 197 Wn.2d 343 (2021)

In attempted murder case trial court precludes defense from cross-examining key state's witness regarding his work for the police as a confidential informant in exchange for not filing felony cases against him, allows defense to ask a single misleading question about working for the police; held: a trial court violates a defendant's Sixth Amendment rights when it effectively hides the fact that the prosecution's key witness worked as a confidential informant for the same police department that investigated the case, the right to present evidence of a witness' bias is essential to the fundamental constitutional right of a criminal defendant to present a complete defense, which encompasses the right to confront and cross-examine adverse witnesses, *State v. Jones*, 168 Wn.2d 713, 720 (2010), *State v. Darden*, 145 Wn.2d 612, 620 (2002), *Washington v. Texas*, 388 U.S. 14, 23, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967); harmless here; 9-0.

***State v. Carballo***, 17 Wn.App.2d 337 (2021)

During interrogation by police key witness denies knowledge of the crime until police threaten her with deportation, defense seeks to cross-examine her as to her deportation fear impacting her testimony, trial court excludes it, ER 413; held: the right to confront to show bias and the right to present a defense trumps ER 413(a) where exclusion would "result in a violation of a defendant's constitutional rights," ER 413(a)(5), *State v. Bedada*, 13 Wn.App.2d 185 (2020); while the rule requires a written

motion, ER 413(a)(1), a procedural rule cannot be wielded as a sword to defeat the constitutional rights of the accused, *State v. Grant,* 10 Wn.App. 468 (1974); I.

***State v. Brownlee***, 18 Wn.App.2d 1 (2021)

Complainant fails to appear at trial, the state having mailed a subpoena, attempted personal service and obtained a material witness warrant, court finds that complainant is unavailable and that defendant's jail phone calls to a third party asking her to "fix" his situation, that he can't say much over the phone, that he had sent letters and thus she knows what to do, and that victim won't show up, trial court finds that victim is unavailable and that defendant procured her unavailability and thus waived confrontation rights; held: substantial evidence supported the finding that it is highly probable that complainant didn't appear due to defendant's action, thus **forfeiture by wrongdoing** allows admission of victim's hearsay statements, *State v. Mason,* 160 Wn.2d 910 (2007), *State v. Dobbs,* 180 Wn.2d 1 (2014), *State v. DeJesus Hernandez,* 192 Wn.App. 673 (1992); II.

***Hemphill v. New York***, 595 U.S. ___, 142 S.Ct. 681, 211 L.Ed.2d 534 (2022)

At murder trial defense elicits evidence that a pistol like the murder weapon was found in an unavailable other person's home, trial court rules that defense opened the door and admits the other person's unsworn plea statement to rebut defendant's theory that the other person committed the murder; held: the opening the door rule is a procedural rule, not a confrontation clause exception, *see: Melendez-Diaz v. Massachusetts,* 557 U.S. 305, 129 S.Ct. 314, 174 L.Ed.2d 314 (2009) ; 8-1.

***State v. D.K.***, 21 Wn.App.2d 342 (2022)

Molestation victim and caretaker are permitted to testify remotely, state submits medical declarations that victim is immunocompromised, susceptible to COVID and that caretaker is also immunocompromised and if she contracted COVID victim would almost certainly be infected; held: trial court's finding that remote testimony is medically necessary, gravity of risk is high, testimony is reliable, *c.f.: State v. Sweidan,* 13 Wn.App.2d 53 (2020); while remote witness should be able to see the jury and defendant, it is not necessary to fulfill the strictures of confrontation clause; I.

***Seattle v. Wiggins***, 23 Wn.App.2d 401 (2022)

At DUI trial toxicologist who tested blood is unavailable, city offers testimony of the "reviewing toxicologist" who co-signed the report but was not present during testing, did not perform tests, and confirmed that he did not sign the report under penalty of perjury as the only person who performed the work can attest to the fact that it was done, trial court refuses to admit the testimony as the witness did not engage in independent inquiry; held: toxicologist who did the testing was the witness "against" the defendant, testimony of reviewer violated defendant's confrontation clause right, *Melendez-Diaz v. Massachusetts,* 558 U.S. 305, 174 L.Ed.2d 314 (2009), *Bullcoming v. New Mexico,* 564 U.S. 647, 180 L.Ed.2d 610 (2011), distinguishing *State v. Lui,* 179 Wn.2d 457 (2014)(DNA evidence); I.

***State v. Palmer***, ___ Wn.App.2d ___, 518 P.3d 252 (2022)

In child molestation case with *pro se* defendant trial court requires that defendant write out questions and that his standby counsel read them to the complainant; held: in order to modify courtroom procedures to prevent a face-to-face confrontation between witness and defendant court must analyze why such changes are necessary and what impact they will have on defendant's rights, *State v. Foster,*

135 Wn.2d 441 (1998), *Maryland v. Craig*, 497 U.S. 836, 845-46, 110 S. Ct. 3157, 111 L. Ed. 2d 666 (1990), *State v. D.K.*, 21 Wn.App.2d 342 (2022), *Coy v. Iowa*, 101 L.Ed.2d 857 (1988) *State v. Estabrook*, 68 Wn.App. 309 (1993), *State v. Ulestad*, 127 Wn.App. 209 (2005); II.

***State v. Milko***, 21 Wn.App.2d 279 (2022)

During pre-vaccine COVID-19 pandemic trial court enters detailed findings allowing two witnesses from out of state to testify via video; held: defendant's right to confront may be satisfied absent a face-to-face confrontation where denial of such confrontation is necessary to further an important public policy; here, at the time of the trial there was uncertainty as to whether air travel was safe, trial courts must critically analyze on a case by case basis the issue of necessity for remote testimony, which was satisfied here, *Maryland v. Craig*, 497 U.S. 836, 845-46, 110 S. Ct. 3157, 111 L. Ed. 2d 666 (1990) *State v. Foster*, 135 Wn.2d 441 (1998); II.

***State v. Ta'afulisia***, 21 Wn.App.2d 914 (2022)

At the behest of the police a relative secretly records a conversation with defendant and his co-defendant where, in response to inquiries, co-defendant confesses to homicide, states both were involved, defendant remains silent, trial court admits statement as non-testimonial; held: while the relative's motive in recording the conversation was that the recording would be used by the police, neither defendant nor co-codefendant were aware of the motive, thus the statements were not testimonial, *Ohio v. Clark*, 576 U.S. 237, 249, 135 S.Ct. 2173, 192 L.Ed.2d 306 (2015); "when the primary purpose test is applied to an utterance unknowingly made by a co-conspirator, co-defendant or accomplice to an informant the informant's secret purpose in gathering or recording evidence for possible use at a later trial does not transform such an utterance into 'a solemn declaration made for the purpose of proving some fact,'" interrogator's purpose in asking questions does not control, an objective viewer, aware of the circumstances, would reasonably credit the utterer's motives a having greater weight than the conflicting motives of others, at 937-39; I.

***State v. Ritchie***, ___ Wn.App.2d ___, 520 P.3d 1105 (2022)

In assault trial victims claimed that they did not know each other prior to the incident, defense offers evidence that they were seen together months prior to the assault and that they were trespassing, trial court admits the evidence that they were together but that the trespass was more prejudicial than probative; held: when defendant asserts that a ruling violates his **right to present a defense**, the two-part analysis is to review the ruling for abuse of discretion and then consider de novo if there is a violation of the Sixth Amendment, *State v. Arndt*, 194 Wn.2d 784, 797 (2019); here, court properly exercised discretion; for step two, the exclusion of the trespassing did not rise to a constitutional violation; if a rule of evidence or procedure interferes with a defendant's right to cross-examine and confront then the evidence should not be excluded, did not happen here as defense still could show that victims lied about knowing each other, *see:* *Chambers v. Mississippi*, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973), *Davis v. Alaska*, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974), *State v. Jennings*, 199 Wash.2d 53 (2022), *State v. Chicas Carballo*, 17 Wash. App. 2d 337 (2021); I.

# CONSPIRACY AND CO-CONSPIRATOR HEARSAY EXCEPTION

***State v. Langworthy***, 92 Wn.2d 148 (1979)

Where substantive crime (delivery of drugs) necessarily involves two persons, and where no more than two persons are alleged to be involved in the agreement to commit the crime, conspiracy will not lie as a separate offense; *reverses* *State v. Langworthy*, 20 Wn.App. 822 (1978); *accord:* *State v. McGonigle*, 144 Wash. 252 (1927), *State v. Valdobinos*, 122 Wn.2d 270 (1993); 9-0.

***Albernaz v. United States***, 67 L.Ed.2d 275 (1981)

Where a defendant is convicted of two counts of conspiracy which arise from a single conspiracy having multiple objectives, consecutive sentences may be imposed; 9-0.

***State v. Putnam***, 31 Wn.App. 156 (1982)

A defendant cannot be charged with promoting prostitution 2° by advancing prostitution, RCW 9A.88.08(1)(b) and conspiracy to promote prostitution, RCW 9A.28.040, as the specific statute (promoting prostitution) excludes the general (conspiracy); I.

***State v. Miller***, 35 Wn.App. 567 (1983)

Testimony by a witness about statements made by conspirators is not hearsay because it is offered to prove the "verbal acts," *see:* *State v. Rangel-Reyes*, 119 Wn.App. 494, 498 (2003), in forming the conspiracy, and is not subject to the rule requiring independent proof of a conspiracy before the statements are admissible; statements of a co-conspirator are admissible after the state has made a *prima facie* case of conspiracy, ER 801(d)(2)(v); I.

***State v. Valladeres***, 99 Wn.2d 663 (1983)

Where two persons are charged with conspiring solely with each other, verdicts in a joint trial finding one person guilty and one not guilty are inconsistent and the guilty verdict is invalid; here, defendant may have "conspired" with police agents, but he was not so charged; 9-0.

***State v. Culver***, 36 Wn.App. 524 (1984)

Defendant charged with conspiracy and substantive offenses; co-defendant's statements inculpating defendant are admitted; held: where trial court determines there is evidence that establishes or tends to establish conspiracy, then co-conspirator's statements are admissible, *State v. McGonigle*, 144 Wash. 252, 258 (1927), *State v. Langworthy*, 20 Wn.App. 822, 836 (1978); I.

***State v. Dictado***, 102 Wn.2d 277 (1984)

Co-conspirator statements, ER 801(d)(2)(v), are admissible even if no conspiracy is charged if court determines that there is substantial evidence, independent of the statements themselves, of the existence of a conspiracy and at least slight evidence of the participation of the person against whom the statements are to be admitted, *State v. Baruso*, 72 Wn.App. 603,

612-5 (1993), *State v. Barnes*, 85 Wn.App. 638, 663-5 (1997); *but see: Bourjaily v. United States*, 97 L.Ed.2d 144 (1987); 9-0.

***State v. Anderson***, 41 Wn.App. 85 (1985), *rev'd on other grounds*, 107 Wn.2d 745 (1987)

In determining whether the state has established a *prima facie* case of conspiracy to admit a statement of a co-conspirator, ER 801(d)(2)(v), the court may not consider the statement itself; a co-conspirator's statements are not made during the course of and in furtherance of the conspiracy if they consist of casual, retrospective comments about past events; *but see*: *Bourjaily v. United States*, 97 L.Ed.2d 144 (1987), *State v. Baruso*, 72 Wn.App. 603, 614-5 (1993); II.

***State v. Guloy***, 104 Wn.2d 412 (1985)

Prior to the admission of hearsay statements per the co-conspirator exception, ER 801(d)(2)(v), trial judge must find that there is evidence, other than the hearsay statements, which establishes a conspiracy by a preponderance, *State v. Dictado*, 102 Wn.2d 277 (1984), *State v. Whitaker*, 133 Wn.App. 199, 222-25 (2006), *but see: Bourjaily v. United States*, 97 L.Ed.2d 144 (1987) 9-0.

***State v. Brown***, 45 Wn.App. 571 (1986)

Where conspiracy information charges defendant with conspiring with specific individuals, and does not allege there are other unknown or uncharged co-conspirators, then the "to convict" instruction must name the individuals with whom defendant is alleged to have conspired, *State v. Jain*, 151 Wn.App. 117 (2009), *see: Pers. Restraint of Hegney*, 138 Wn.App. 511, 522-24 (2007); I.

***United States v. Inadi***, 89 L.Ed.2d 390 (1986)

Government need not establish unavailability of a co-conspirator as condition for admission of conspirator's out-of-court statements as long as the statements were made in the course of and in furtherance of the conspiracy, Fed. R. Evid. 801(d)(2)(E); 7-2.

***State v. Hawthorne***, 48 Wn.App. 23 (1987)

Drug conspiracy must be charged under RCW 69.50.407, and may not be charged under general conspiracy statute, RCW 9A.28.040; an overt act or substantial step is not an element of a drug conspiracy, RCW 69.50.407, *see also: United States v. Shabani*, 130 L.Ed.2d 225 (1994), *Whitfield v. United States*, 160 L.Ed.2d 611 (2005), *but see: State v. Piñeda-Piñeda*, 164 Wn.App. 653, 667-71 (2010); I.

***Bourjaily v. United States***, 97 L.Ed.2d 144 (1987)

In determining whether the government has established a conspiracy by a preponderance to admit a co-conspirator's statement, Fed. R.Evid. 801(d)(2), the court may consider independent evidence of the conspiracy and the co-conspirator's statement per Fed. R. Evid. 104(a); *cf.*, *State v. Dictado*, 102 Wn.2d 277 (1984), *State v. Anderson*, 41 Wn.App. 85 (1985), *State v. Guloy*, 104 Wn.2d 412 (1985); *but see*: *State v. Pierre*, 111 Wn.2d 105 (1988); 6-3.

***State v. Estorga***, 60 Wn.App. 298 (1991)

Uncharged, unavailable co-conspirator's taped statement is admitted over objection; held: because co-conspirator did testify at a suppression hearing and was questioned about taped statement, then defendant had opportunity to cross-examine; II.

***State v. Smith***, 65 Wn.App. 468 (1992)

Defendant agrees to drive co-defendant to another city so that co-defendant can collect on a debt and also so co-defendant can deliver LSD; held: by agreeing to drive co-defendant with prior knowledge that purpose was to sell LSD is sufficient to prove conspiracy to deliver LSD, RCW 69.50.407, 9A.28.040(1); because defendant encouraged the sale by assuring buyer of potency of drug, evidence is sufficient to establish "agreement and concerted action" requirement of conspiracy, *State v. King*, 113 Wn.App. 243, 284-87 (2002) ; I.

***State v. Baruso***, 72 Wn.App. 603, 612-15 (1993)

Co-conspirator's statements are admissible, ER 801(d)(2)(v), where court determines a conspiracy existed and defendant is a member of the conspiracy, *State v. Guloy*, 104 Wn.2d 412, 419-20 (1985), even if the conspiracy in question is not charged in the information, as long as defendant has notice, and even if the conspiracy lasts beyond the charging period, *State v. Dictado*, 102 Wn.2d 277, 284-5 (1984); while casual, retrospective statements of past events do not fall within the co-conspirator exception, *State v. Anderson*, 41 Wn.App. 85, 105, *rev'd in part on other grounds*, 107 Wn.2d 745 (1987), statements relating to past events are admissible if they facilitate the criminal activity of the conspiracy, *see: State v. Barnes*, 85 Wn.App. 638, 663-5 (1997), *State v. King*, 113 Wn.App. 243, 280-83 (2002); here, statements of co-conspirator that were veiled threats by defendant which included inculpatory statements are admissible; I.

***State v. Dent***, 123 Wn.2d 467, 473-7 (1994)

"Substantial step" requirement for conspiracy, RCW 9A.28.040(1), need not be limited to conduct which is more than mere preparation; definition of substantial step in conspiracy case is not the same as in attempt, RCW 9A.28.020(1), WPIC 100.05, *State v. Smith*, 80 Wn.App. 462, 467-8 (1996), *see: Yates v. United States*, 1 L.Ed.2d 1356 (1957); if any co-conspirator exhibits conduct which strongly indicates a criminal purpose, that is sufficient to show the conspiracy exists; *affirms State v. Dent*, 67 Wn.App. 656 (1992).

***State v. Jacobson***, 74 Wn.App. 715, 723-4 (1994)

*Wharton's* rule: where a crime requires the participation of two persons, and no more than two persons are involved in the agreement to commit the crime, the charge of conspiracy will not lie, *see: Gebardi v. United States*, 77 L.Ed. 206 (1932), *State v. Miller*, 131 Wn.2d 78 (1997); here, defendant agreed to sell property to another, in spite of a TRO prohibiting same, but, since the crime of theft can be committed by one person, and because the sale was to two buyers, *Wharton's* rule is inapplicable; I.

***State v. Pacheco***, 125 Wn.2d 150 (1994)

A conspiracy conviction under RCW 9A.28.040 and 69.50.407 is not valid where defendant conspires solely with an undercover police officer, as a genuine agreement with at least one other co-conspirator is required, *reversing State v. Pacheco*, 70 Wn.App. 27 (1993); 5-4.

***State v. Atkinson***, 75 Wn.App. 515, 518-21 (1994)

Drug informant's statements to police officer in the course of buying drugs in cooperation with police are not admissible under co-conspirator exception, ER 801(d)(2)(v), as they were not made in the course of and in furtherance of conspiracy, but were made in opposition of a conspiracy; harmless here; I.

***State v. Halley***, 77 Wn.App. 149 (1995)

To admit co-conspirator's statement, ER 801(d)(2)(v), court must determine, by a preponderance, at 152 n.5, that a conspiracy existed and defendant was a member, *State v. Whitaker*, 133 Wn.App. 199, 222-25 (2006), but state need establish no more than an agreement made by two or more persons confederating to do an unlawful act, *State v. Barnes*, 85 Wn.App. 638, 663-5 (1997); *Wharton's* rule, to the effect that a conspiracy to commit a crime that necessarily requires the participation of two people cannot exist unless a third party was involved in the agreement, is only applicable in proving the substantive offense of conspiracy, and is inapplicable in determining the admissibility of hearsay; I.

***State v. Miller***, 131 Wn.2d 78 (1997)

Conspiracy to deliver a controlled substance must allege the involvement of a person in addition to those involved in the delivery, *i.e.*, more than two persons, which instructions must reflect, *State v. Valdobinos*, 122 Wn.2d 270 (1993), *State v. Langworthy*, 92 Wn.2d 148, 152 (1979), *see: State v. Morgan*, 163 Wn.App. 341 (2011), *see also: State v. McCarty*, 140 Wn.2d 420 (2000), *State v. Mendoza-Solorio*, 108 Wn.App. 823, 829-33 (2001); 9-0.

***State v. Bobic***, 140 Wn.2d 250, 260-67 (2000)

Defendant and co-conspirator participate in a criminal enterprise which includes stealing, stripping, repurchasing and reselling stolen vehicles, are convicted of three counts of conspiracy; held: a single agreement to commit a series of crimes by the same conspirators in which each crime is only one step in the advancement of the scheme as a whole constitutes only one violation of the conspiracy statute, as the legislature intended that there be but a single unit of prosecution, *Braverman v. United States*, 87 L.Ed. 23 (1942), *State v. Adel*, 136 Wn.2d 629 (1998), *cf.: State v. Varnell*, 162 Wn.2d 165 (2007); 9-0.

***State v. McCarty***, 140 Wn.2d 420 (2000)

Drug conspiracy information which fails to allege involvement of more than two people is insufficient, *State v. Miller*, 131 Wn.2d 78, 91 (1997), even where raised for the first time on appeal, *State v. Mendoza-Solorio*, 108 Wn.App. 823, 829-33 (2001), *cf.:State v. Morgan*, 163 Wn.App. 341 (2011); 5-4.

***State v. Stein***, 144 Wn.2d 236 (2001)

In conspiracy case, court instructs as to statutory accomplice liability, RCW 9A.08.020, and further that defendant may be liable for the substantive acts of others upon proof that defendant was a co-conspirator, another co-conspirator committed the substantive crime as a reasonably foreseeable consequence of the conspiracy, and was a member or the conspiracy at the time of the offense, *Pinkerton v. United States*, 90 L.Ed. 1489 (1946); held: *Pinkerton*

doctrine is inapplicable under Washington's statutory scheme which requires proof that a co-conspirator know what crime his co-conspirators are committing, *State v. Roberts*, 142 Wn.2d 471, 510-11 (2000), *State v. Cronin*, 142 Wn.2d 568, 579 (2000), thus instructions permitting conviction of a defendant-conspirator regardless of whether or not he had knowledge of the crimes is error, *State v. King*, 113 Wn.App. 243, 274-80 (2002); affirms *State v. Stein*, 94 Wn.App. 616 (1999); 9-0.

***State v. Mendoza-Solorio***, 108 Wn.App. 823, 829-33 (2001)

Drug conspiracy information which fails to allege involvement of more than two people is insufficient, *State v. Miller*, 131 Wn.2d 78, 91 (1997), even where raised for first time on appeal, *State v. McCarty*, 140 Wn.2d 420 (2000), *cf.:State v. Morgan*, 163 Wn.App. 341 (2011), and cannot be supplemented with the names of co-conspirators after trial; III.

***State v. King***, 113 Wn.App. 243, 280-83 (2002)

Co-defendant testifies, over objection, that defendant committed a robbery, showed co-defendant roll of money, said he got a tip for robbery from third co-defendant and that they were "getting better scores," trial court admits statement under co-conspirator exception, ER 801(d)(2)(v), finding it was made to induce further participation in the conspiracy; held: while casual, retrospective statements of past events do not fall within co-conspirator exception, *see:* *State v. Baruso*, 72 Wn.App. 603, 612-15 (1993), declarant's intent to induce further participation may be inferred from the encounter; even if it was inadmissible on that basis, statement was admissible as it advised testifying co-defendant of the conspiracy's progress and that it was still operating; I.

***United States v. Jimenez Recio***, 154 L.Ed.2d 744 (2003)

Police seize drugs from a truck, convince driver to turn, use driver to turn over truck to the people who were to get the drugs, convict receipients of truck of conspiracy; held: federal conspiracy does not end automatically when the object of the conspiracy becomes impossible to achieve; 8-1.

***State v. Williams***, 131 Wn.App. 488, 494-97 (2006)

Defendant and others plan to rob victim, take substantial steps, robs and shoots him, is convicted, *inter alia*, of conspiracy to commit robbery and burglary, co-conspirator's statements admitted at trial; held: one plan is one crime irrespective of the number of statutory offenses are planned, thus only one count of conspiracy can survive, *State v. Knight*, 134 Wn.App. 103, 109-10 (2006), 162 Wn.2d 806 (2008); co-conspirator's statement, ER 801(d)(2)(v), is not testimonial, at 493-94, *State v. Chambers*, 134 Wn.App. 853, 859-62 (2006); III.

***State v. Sanchez-Guillen***, 135 Wn.App. 636, 641-45 (2006)

Defendant shoots and kills police officer, tells his mother what he did and seeks her help fleeing, mother tells witness what son said and asks witness for assistance to get son to Mexico, state calls witness to testify what mother said defendant did; held: mother and son conspired to flee from justice, mother's statement to witness was thus a statement made *by* a co-conspirator which, to be admitted, need not be *to* a conspirator, ER 801(d)(2)(v), *State v. Dictado*, 102 Wn.2d 277, 283-84 (1984); state is not obliged to give pretrial notice every time it seeks to offer

a co-conspirator's statement; co-conspirator's statement is not testimonial, *Crawford v. Washington*, 158 L.Ed.2d 177, 195-96 (2004), *State v. Richardson*, 12 Wn.App.2d 657 (2020); III.

***State v. Piñeda-Piñeda***, 154 Wn.App. 653 (2010)

Controlled substance conspiracy, RCW 69.50.407, is concomitant with general conspiracy, RCW 9A.28.020, thus state must plead and prove substantial step, overruling, in part, *State v. Casarez-Gastelum*, 48 Wn.App. 112 (1987) and *State v. Hawthorne*, 48 Wn.App. 23 (1987), harmless here when raised for first time on appeal as defendant was also convicted of delivery; I.

***State v. Stark***, 158 Wn.App. 952, 961-63 (2010)

Defendant met with others to obtain guns, they all go to family home, defendant kills husband, is convicted of murder and conspiracy; held: conspiracy may be proved by statements, acts, conduct or concert of action, proof may be circumstantial, *State v. King*, 113 Wn.App. 243, 284 (2002), *State v. Embry*, 171 Wn.App. 714, 743-45 (2012), sufficient here; where information names co-conspirators they must be named in to convict instruction, *State v. Brown*, 45 Wn.App. 571, 577 (1986); III.

***State v. Morgan***, 163 Wn.App. 341, 344-47 (2011)

Conspiracy to intimidate a witness information that does not allege "intent that conduct constituting a crime be performed," RCW 9A.28.040(1) (1997), is sufficient where it alleges attempt to influence testimony as common meaning of attempt includes intent; failure to allege that defendant agreed with one or more persons is not fatal to information because the term conspiracy implies involvement of two or more people and the term conspire means to make an agreement to do an act, *cf.: State v. McCarty*, 140 Wn.2d 420 (2000), *State v. Mendoza-Solorio*, 108 Wn.App. 823, 829-33 (2001); 2-1, I.

***Smith v. United States***, 568 U.S. 106, 184 L.Ed.2d 570 (2013)

Where withdrawal is an affirmative defense to conspiracy, statute allocating burden to prove withdrawal on defendant does not violate Due Process clause; 9-0.

***State v. Houston-Sconiers***, 188 Wn.2d 1, 391 P.3d 409, 417-18 (2017)

Firearm enhancement applies to conspiracy; 8-0.

***State v. Sandoval***, 189 Wn.2d 811 (2018)

Conspiracy to commit murder by extreme indifference, RCW 9A.32.030(l)(b), is a cognizable crime; 5-4.

# CONTEMPT

***State v. Heiner***, 29 Wn.App. 193 (1981)

Full discussion of contempt power of court where **witness refuses to testify** after immunity is granted; civil contempt, RCW 7.20, is coercive, thus no fixed sentence may be imposed, *see: Moreman v. Butcher*, 126 Wn.2d 36 (1995); in criminal contempt, RCW 9.23.010, defendant is entitled to a trial by jury; *see*: *Taylor v. Hayes*, 41 L.Ed.2d 897 (1974); I.

***United States v. Thoreen***, 653 F.2d 1332 (9th Cir. 1981)

Throughout government's case, defense counsel had someone other than defendant seated at counsel table; witness identified nondefendant; counsel held in contempt; held: counsel was unethical and contemptuous.

***State v. Martin***, 36 Wn.App. 1 (1983)

Civil contempt, RCW 7.20.040, must be based upon an affidavit, and record must demonstrate egregious circumstances and that all less restrictive alternatives have failed, *State v. Norlund*, 31 Wn.App. 725, 729 (1982); criminal contempt, state must file an information or complaint, *State v. Heiner*, 29 Wn.App. 193, 198 (1981); in a proceeding the purpose of which is other than determining guilt of contempt, a court is without authority, absent an appropriate pleading, to find a party in contempt for an act committed outside its presence, *Dimmick v. Hume*, 62 Wn.2d 407, 409 (1963); *Storkey v. Storkey*, 40 Wn.2d 307 (1952); *Schaefer v. Schaefer*, 36 Wn.2d 514 (1950); I.

***Marriage of Nielsen***, 38 Wn.App. 586 (1984)

Indirect contempt is based on acts committed outside presence of the court; if the judge lacks personal knowledge of the elements, the contempt is indirect even though contemner admits the act in open court; for indirect contempt, contemner is entitled to notice, a hearing and counsel, *Cooke v. United States*, 69 L.Ed. 767 (1925); II.

***Seventh Elect Church v. Rogers***, 102 Wn.2d 527 (1984)

Where counsel makes claim of privilege in good faith, trial court should stay sanctions for (and possibly finding of) contempt pending appellate review, *Dike v. Dike*, 75 Wn.2d 1 (1968), *State v. Rogers*, 3 Wn.App.2d 1 (2018); 9-0.

***State v. Boatman***, 104 Wn.2d 44 (1985)

An order finding a defendant in civil contempt, RCW 7.20.010, must contain a purging clause setting forth the act to be performed, *see: Interest of M.B.*, 101 Wn.App. 425 (2000), *State v. A.C.H.*, 116 Wn.App. 158 (2003); 9-0.

***Graves v. Duerden***, 51 Wn.App. 642 (1988)

Court may exercise its inherent contempt authority where statutory contempts are inadequate and may use inherent contempt to punish summarily contemptuous conduct occurring in presence of the court, to enforce orders or judgments in aid of the court's jurisdiction and to

punish violations of orders or judgments, *Keller v. Keller*, 52 Wn.2d 84 (1957), *see: Dependency of A.K.*, 162 Wn.2d 632 (2007); III.

***State v. John***, 69 Wn.App. 615 (1993)

To punish for disobedience of a consent decree, criminal contempt proceedings, including right to jury trial, must be pursued as it is intended to punish past behavior, RCW 7.21.010(1)(b), *In re King*, 110 Wn.2d 793, 799 (1988), *Interest of Rebecca K.*, 101 Wn.App. 309 (2000), *State v. A.C.H.*, 116 Wn.App. 158 (2003); III.

***State v. Miller***, 74 Wn.App. 334, 342-5 (1994)

Failure to provide court-ordered handwriting exemplar is subject to civil contempt confinement, which may continue until the court is certain that contemner will never comply with the order, *In re King*, 110 Wn.2d 793 (1988); the mere passage of time does not convert the confinement to a punitive action; contemner's unequivocal refusal to comply does not bind the trial court to release her, *King*, *supra*, at 804; I.

***State v. Hobble***, 126 Wn.2d 283, 292-303 (1995)

**Witness refuses to testify** over an order to do so and, after trial, is sentenced to a term in jail; held: a refusal to answer questions as a witness is the kind of behavior for which summary contempt proceedings are appropriate, *United States v. Wilson*, 44 L.Ed.2d 186 (1975), *State v. Buddress*, 63 Wash. 26, 32 (1911), RCW 7.21.050(1); judgment of contempt should recite that the contempt was seen or heard by the judge and thoroughly recite the facts of the contempt; providing contemner with the opportunity to speak at disposition satisfies statutory requirement that court allow contemner to speak in mitigation, *supra.*, *Templeton v. Hurtado*, 92 Wn.App. 847 (1998); imposition of sentence for contempt one week after the underlying criminal trial ended met the statutory requirement that "[t]he judge shall impose the sanctions immediately after the contempt of court or at the end of the proceeding," *supra*, where adjudication of contempt was made immediately; no right to jury trial under state or federal constitutions for direct contempt; the contempt is not remedial, RCW 7.21.030, as contemner is unable to purge the contempt, nor is it punitive, RCW 7.21.040, as contempt was not commenced by complaint or information, *State v. Sims*, 1 Wn.App.2d 472, 478-80 (2017), *rev. granted*, 415 P.3d 1201 (2018); 7-2.

***Pounders v. Watson***, 138 L.Ed.2d 976 (1997)

Counsel's repeated questions about punishment in spite of admonishments and orders by the court to stop are subject to summary contempt as "contumacious conduct disruptive of judicial proceedings and damaging to the court's authority. Advocacy that is 'fearless, vigorous, and effective'. . . does not extend to disruptive conduct in the course of trial and in knowing violation of a clear and specific direction from the trial judge;" 7-2.

***Templeton v. Hurtado,*** 92 Wn.App. 847 (1998)

Before imposing sanction for direct contempt, RCW 7.21.050(1), court must give contemner opportunity to speak in mitigation and enter written findings specifying the act the court found contemptuous, *State v. Hobble*, 126 Wn.2d 283, 295 (1995), *but cf.: State v. Dennington,*, 12 Wn.App.2d 845 (2020); I.

***Detention of Broer***, 93 Wn.App. 852 (1998)

A court order cannot be collaterally attacked in a contempt proceeding arising from its violation unless the order was entered by a court that lacked inherent authority or jurisdiction; an order is void when the court lacks subject matter and *in personam* jurisdiction; a court lacks subject matter jurisdiction when it attempts to decide a type of controversy that it has no authority to adjudicate, *Marley v. Department of Labor & Indus.*, 125 Wn.2d 533 (1994); a court does not lose jurisdiction by interpreting the law erroneously; orders enforcing unconstitutional prior restraint, *State v. Coe*, 101 Wn.2d 364, 369-70 (1984), and orders compelling disclosure of materials protected by the attorney-client privilege, *Seattle N.W. Sec. Corp. v. SDG Holding Co.*, 61 Wn.App. 725 (1991), *Dike v. Dike*, 75 Wn.2d 1 (1968), are void; I.

***State v. S.H.***, 95 Wn.App. 741 (1999), *op. withdrawn and superseded on reconsideration,* 102 Wn.App. 468 (2000)

Defense counsel waits until day of juvenile fact-finding hearing, then moves for diversion, trial court grants diversion, imposes $50 sanction for seeking diversion when witnesses were present; held: a trial court has inherent authority to sanction litigation conduct upon a finding of bad faith, *Wilson v. Henkle*, 45 Wn.App. 162, 174 (1986), *Roadway Express, Inc. v. Piper*, 65 L.Ed.2d 488 (1980), *but see: State v. Gassman*, 175 Wn.2d 208 (2012); bad faith includes waiting until trial to agree to diversion; I.

***State v. Dugan***, 96 Wn.App. 346 (1999)

Prosecutor asks defendant during cross-examination if he used marijuana in response to defendant's testimony that he was a "health nut," defense objection is sustained, trial court holds prosecutor in contempt; held: direct contempt, RCW 7.21.010(1)(a), lies for intentional "disorderly, contemptuous, or insolent behavior…tending to impair [court's] authority, or to interrupt the due course of a trial"; asking a factually accurate improper question resulting in a fleeting interruption is not contempt, distinguishing *State v. Caffrey*, 70 Wn.2d 120, 122-23 (1966), *State v. Zioncheck*, 171 Wash. 388, 392-93 (1933), *In re Willis*, 94 Wash. 180, 183-84 (1917), *State v. Buddress*, 63 Wash. 26, 30 (1911), *Hedican v. Pennsylvania Fire Ins. Co.*, 21 Wash. 488, 490 (1899); II.

***State v. Noah***, 103 Wn.App. 29, 45-47 (2000)

In contempt proceedings, a law may not be collaterally attacked as unconstitutional, *Walker v. City of Birmingham*, 18 L.Ed.2d 1210 (1967), nor may the underlying court order, the violation of which led to contempt, be collaterally attacked since contempt judgment will stand even if the order violated was erroneous or is later ruled invalid, *Detention of Broer v. State*, 93 Wn.App. 852, 858 (1998), except where the underlying order is void, which only occurs where the court issuing the order lacks jurisdiction to enter the order, *Pearce v. Pearce*, 37 Wn.2d 918 (1951); I.

***State v. Cox***, 109 Wn.App. 779 (2002)

Trial court orders defendant in custody whereupon he escapes from courtroom, upon return is held in summary contempt, later is charged with and pleads guilty to escape; held:

because contempt and escape have separate elements, they are not the same offense and defendant can be punished for each, *United States v. Dixon,* 125 L.Ed.2d 556 (1993); II.

***State v. Berty***, 136 Wn.App. 74 (2006)

During argument on an objection before the jury, defense counsel states that the witness is lying, objection is sustained, during closing argument defense counsel argues that there were motives for the complainant's dissembling and that "I wish I could tell you all of the motives," repeats for the jury that he had previously said victim was lying, trial court announces it will hold a sanctions hearing, finds counsel in contempt two months later and fines him $750 for each comment; held: summary contempt, RCW 7.21.050, within the courtroom may be imposed after the proceeding, thus sanction here was timely; violations of court orders flouting court's authority are punishable, maximum penalty is $500 per incident; II.

***Interest of J.L.***, 140 Wn.App. 438 (2007)

In truancy case, trial court imposes 2 days in detention and suspends 4 days; held: civil contempt must provide for the opportunity to purge immediately, not for past behavior, *In the Interest of M.B.,* 101 Wn.App. 425 (2000); writing a "substantial paper with a subject matter reasonably related to the nature and cause of the contempt" is a possible purge condition; imposing a specific amount of time in custody is criminal contempt, which requires a full panoply of due process rights; II.

***Dependency of A.K.***, 162 Wn.2d 632 (2007)

Before a dependency court may exercise inherent power to hold juvenile in contempt, it must first find that remedies for criminal contempt, RCW 7.21.040, are inadequate (plurality opinion); 5-4.

***State v. Jordan***, 146 Wn.App. 395 (2008)

Defense counsel fails to appear for a hearing, trial court finds him in contempt in his absence; held: both due process clause and RCW 7.21.050 require an opportunity to be heard before court may impose summary contempt; "an attorney absenting himself from the courtroom when his case is called for trial does not commit contempt in the court's presence," at 403 ¶ 11, *State v. Winthrop,* 148 Wash. 526, 531 (1928), *but see: State v. Hatten,* 70 Wn.2d 618, 621 (1967); II.

***State v. Gassman***, 175 Wn.2d 208 (2012)

Two months after learning that police believed the offense date was two days after the charge in the original information, state moves to amend, knowing that defense had planned an alibi defense for the original date, trial court denies motion to dismiss but imposes $2000 sanction on prosecutor, state appeals; held: while trial court need not make a specific finding of bad faith, *State v. S.H.,* 102 Wn.App. 468, 479 (2000), a finding that state's conduct was "careless and not purposeful," plus concessions of defense at oral argument that defendant was aware of possible amendment, did not need a continuance, is insufficient to impose sanction, *see: In re Firestorm 1991,* 129 Wn.2d 130, 139 (1996); reverses, in part, *State v. Gassman,* 160 Wn.App. 12 (2011); 9-0.

***State v. Salazar***, 170 Wn.App. 486 (2012)

Defendant acts out in court, judge finds "inherent contempt," sends defendant to jail until he apologizes, later imposes 30 days consecutive to sentence for crime; held: before relying upon inherent contempt powers, trial court must first find that statutory remedial or punitive contempt procedures and remedies, RCW 7.21.050 are inadequate, *Dependency of A.K.*, 162 Wn.2d 632 (2007); 2-1, II.

***State v. Rogers***, 3 Wn.App.2d 1 (2018)

Defendant sends letter of apology to complainant and offer to pay her to drop charges to complainant's daughter who gives letter to complainant who gives the letter to defense counsel and tells prosecutor that she did so, counsel is then removed from case, court serves that lawyer with a subpoena *duces tecum* to produce the letter, lawyer moves to quash arguing that he learned of the letter from his client and thus the letter is privileged and that it is a confidence or secret, RPC 1.6, refuses to comply with subpoena, is held in contempt; held: lawyer did not obtain the letter as a result of direct or confidential communication with his client, even if client had some discussion with counsel about the letter it is not privileged, is not a confidence and even if it is a secret RPC 1.6(b) authorizes disclosure pursuant to a court order, distinguishing *State ex. rel. Sowers v. Lowell*, 64 Wn.2d 828 (1964); because the claim of privilege was made in good faith contempt is vacated, *Seventh Elect Church in Israel v. Roger*, 102 Wn.2d 527 (1984), *Dike v. Dike*, 75 Wn.2d 1, 448 (1968); I.

***State v. Sims***, 193 Wn.2d 86 (2019)

Oral order of remedial or civil contempt is effective immediately, need not be written, although a written order is necessary for appellate review, *Templeton v. Hurtado*, 92 Wn.App. 847 (1998), *State v. Dailey*, 93 Wn.2d 454, 458-59 (1980); affirms, in part, *State v. Sims*, 1 Wn.App.2d 472, 481-83 (2017); 9-0.

***State v. Dennington***, 12 Wn.App.2d 845 (2020)

In court contemnor "rudely" comments on lawyer's physical appearance, turns back on judge, tells judge he does not respect court, judge holds him in contempt and imposes 30 days consecutive to whatever sentence he receives; held: where court is in session and contemnor has been admonished and persists in behavior then summary contempt is appropriate, RCW 7.21.050 (2009) as it presented a direct threat to the authority and dignity of the court and to maintaining proper decorum during court proceedings; failure of court to permit contemnor to speak in mitigation requires remand, *Templeton v. Hurtado*, 92 Wn.App. 847 (1998); I.

***State v. Luvert,*** 20 Wn.App.2d 133 (2021)

Trial court orders in-patient competency evaluation, after lengthy delay by DSHS to transport defendant trial court sets deadline, Department misses deadline, court finds DSHS in contempt and orders it to pay defendant $250 per day, retroactive to the 14th day after the evaluation was ordered; held: a contempt sanction is remedial, not punitive, if it allows the opportunity to purge, retroactive remedial sanctions are permitted as a sanction may be compensatory, RCW 7.23.030, *Gronquist v. Dep't of Corr.*, 196 Wn.2d 564, 573 (2020); I.

# CONTINUANCES

***State v. Gowens***, 27 Wn.App. 921 (1980)

Failure to issue a subpoena demonstrates lack of due diligence and is not grounds for continuance; I.

***State v. James***, 30 Wn.App. 520 (1981)

Trial court abused its discretion when it denied state's motion to reopen a suppression hearing and for a continuance, *see also:* *Detention of G.V.*, 124 Wn.2d 288 (1994); I.

***State v. Kelly***, 32 Wn.App. 112 (1982)

Defendant, having had two prior continuances for substitution of counsel, moves for a continuance two days prior to trial to seek appointment of an expert to determine diminished capacity defense, having previously been provided another expert for such a defense; held: no abuse of discretion denying continuance as defendant did not show due diligence; I.

***State v. Nitschke***, 33 Wn.App. 521 (1982)

State's mailing of subpoena plus telephone contact with witness, witness' relatives and witness' probation officer establish due diligence permitting continuance of trial, *distinguishing* *State ex rel. Nugent v. Lewis*, 93 Wn.2d 80 (1980), *State ex rel. Rupert v. Lewis*, 9 Wn.App. 839 (1973), *but see:* *Bellevue v. Vigil*, 66 Wn.App. 891 (1992), *cf.: Kent v. Sandhu*, 159 Wn.App. 836 (2011); I.

***State v. Sain***, 34 Wn.App. 553 (1983)

Denial of continuance where counsel was appointed one day prior to commencement of robbery 1° trial was abuse of discretion, *State v. Hartwig*, 36 Wn.2d 598, 601 (1950); *State v. Burri*, 87 Wn.2d 175, 181 (1976); III.

***State v. Purdom***, 106 Wn.2d 745 (1986)

State's motion to amend information on day of trial from conspiracy to deliver drugs to accomplice is granted, defense motion for continuance is denied; held: when information is amended on day of trial, continuance should be granted if requested, *State v. Jones*, 26 Wn.App. 1, 6 (1980); 6-3.

***State v. Hartley***, 51 Wn.App. 442 (1988)

Denial of continuance proper where counsel failed to request a subpoena until a day before trial, failed to interview witness and failed to confirm she would testify, *State v. Smith*, 56 Wn.2d 368, 370 (1960); I.

***State v. Day***, 51 Wn.App. 544 (1988)

Continuing trial, apparently beyond expiration date, so that defendant's wife may procure a dissolution and thereby have the capacity to testify against defendant approved, as unavailability of a witness is grounds for a continuance where there is a valid reason for the unavailability, there is reasonable grounds to believe the witness will become available in a

reasonable time, and where there is no substantial unfair or unjust prejudice, *see:* *State v. Torres*, 111 Wn.App. 323 (2002), *Stae v. Iniguez*, 167 Wn.2d 273, 294 (2009), *Kent v. Sandhu*, 159 Wn.App. 836 (2011); III.

***State v. Adamski***, 111 Wn.2d 574 (1988)

A mailed subpoena is a nullity in juvenile court, as it does not conform with JuCR 1.4, CR 45(c), CrR 4.8, and thus is not grounds for due diligence, *cf.:* CrRLJ 4.8(c), *State v. DeSantiago*, 149 Wn.2d 402 (2003); a continuance beyond the expiration date, JuCR 7.8(b), to obtain a witness who was not properly served is an abuse of discretion, *State v. Hairychin*, 136 Wn.2d 862 (1998), *reversing State v. Adamski*, 49 Wn.App. 371 (1987); *cf.: State v. McPherson*, 64 Wn.App. 705 (1992); 5-3.

***State v. Lane***, 56 Wn.App. 286 (1989)

Trial court orders informant disclosed, investigator searches for informant for five days unsuccessfully, court denies continuance to find informant; held: where continuance is requested to locate witness, accused must show that the witness can probably be found if granted and that due diligence has been used; test on appeal is whether defendant was denied a fair trial because defendant would not have been convicted had the witness testified; III.

***State v. Wake***, 56 Wn.App. 472 (1989)

One day before trial, court grants, beyond expiration date, state's motion for continuance because unsubpoenaed crime lab expert would be out of town, no reason given for his unavailability; held: because prosecutor knew of problem two weeks before trial and thus could have sought to advance the trial date, and because witness had not been subpoenaed, *State v. Alford*, 25 Wn.App. 661, 665 (1980); *State v. Yuen*, 23 Wn.App. 377, 379 (1979); *State v. Smith*, 56 Wn.2d 368, 370 (1960); *State v. Toliver*, 6 Wn.App. 531, 533 (1972), *State v. Denton.* 21 Wn.App.2d 437 (2022), continuance beyond expiration date was abuse of discretion, *but see:* *State v. McPherson*, 64 Wn.App. 705 (1992), *State v. Woods*, 143 Wn.2d 561, 582-85 (2001), *State v. Salgado-Mendoza*, 189 Wn.2d. 420 (2017); III.

***State v. Gould***, 58 Wn.App. 175 (1990)

Newly discovered adverse evidence is not grounds for a continuance where defense makes no showing it could procure evidence to controvert or other prejudice, *distinguishing* *State v. Oughton*, 26 Wn.App. 74 (1980); I.

***State v. Davis***, 64 Wn.App. 511 (1992)

On morning of trial, court permits state to amend from assault 2° (bodily injury) to assault 2° (deadly weapon), defense moves for continuance "to prepare a defense," motion denied; held: because defense failed to indicate any defense to amended charge that was not available as a defense to the prior charge, no prejudice was shown, thus continuance motion was properly denied; III.

***State v. McPherson***, 64 Wn.App. 705 (1992)

Officer acknowledges to prosecutor that he was served with subpoena through interagency mail procedure normally used by prosecutor's office; officer states he is going on vacation; prosecutor sends note to defense counsel advising he would seek continuance, defense

denies receiving message until two days before trial; on trial date, court grants continuance beyond expiration date, later denies motion to dismiss; held: where subpoena was received by police witness, then there was due diligence, *distinguishing* *State v. Adamski*, 111 Wn.2d 574 (1988); interagency mail procedure is reasonable where officer in fact receives the subpoena in spite of JuCR 7.8 and CR 45(c); while sending a note to opposing counsel and assuming lack of response constitutes acquiescence is insufficient notice, here officer failed to notify prosecutor of vacation until day he left, foreclosing opportunity to preserve his testimony, *but see:* *State v. Wake*, 56 Wn.App. 472 (1989), *State v. Hairychin*, 136 Wn.2d 862 (1998), *State v. Woods*, 143 Wn.2d 561, 582-85 (2001); I.

***Bellevue v. Vigil***, 66 Wn.App. 891 (1992)

Domestic violence victim fails to appear in response to subpoena, phone is disconnected, city moves for continuance and material witness warrant, after two-day continuance without witness appearing, court dismisses; held: while due diligence and availability of witness within reasonable time are not explicitly required under CrRLJ 3.3(d)(8), court may consider these factors in exercise of discretion; while *State ex rel. Nugent v. Lewis*, 93 Wn.2d 80 (1980) has been distinguished by *State v. Henderson*, 26 Wn.App. 187 (1980) and *State v. Nitschke*, 33 Wn.App. 521 (1982), allowing court to continue cases where witness fails to respond to a subpoena, in light of time for trial period having expired, court did not abuse discretion in denying city's motion to continue, *Kent v. Sandhu*, 159 Wn.App. 836 (2011); I.

***State v. Nguyen***, 68 Wn.App. 906 (1993)

Subpoenaed witness called to active military duty is grounds for a continuance, CrR 3.3(h)(2), beyond expiration date absent prejudice; I.

***State v. Duggins***, 121 Wn.2d 524 (1993)

Juvenile Court grants two-day continuance within time for trial period, JuCR 7.8, as officer had not responded to subpoena that was not personally served; held: because defendant was tried within speedy trial period, there are no bases for dismissal under speedy trial rule, *Seattle v. Clewis*, 159 Wn.App. 842 (2011); *affirms, in part*, *State v. Duggins*, 68 Wn.App. 396 (1993).

***State v. Early***, 70 Wn.App. 452 (1993)

While a denial of a continuance to substitute retained counsel may deprive a defendant of his right to counsel of choice, *Wheat v. United States*, 100 L.Ed.2d 140 (1988), in the absence of substantial reasons a late request should generally be denied, especially if it may delay the trial, *State v. Chase*, 59 Wn.App. 501, 506 (1990); trial court must consider diligence, due process, the need for an orderly procedure, impact on trial, whether prior continuances have been granted, *State v. Barnes*, 58 Wn.App. 465, 471 (1990), *aff'd in part, rev'd in part,* 117 Wn.2d 701 (1991); here, one state's witness had been "turned" and had a tenuous relationship with prosecution, prior continuances had been granted, thus no abuse of discretion in denying continuance; III.

***State v. Watkins***, 71 Wn.App. 164 (1993)

Absence of standby counsel is justification for continuance of trial beyond expiration date; continuance in the absence of *pro se* defendant does not infringe right of self-representation; I.

***State v. Tatum***, 74 Wn.App. 81 (1994)

Trial court denies defense motion to continue for a witness's failure to appear because the subpoena issued was for a prior trial date; held: subpoenas remain in effect beyond the specific date for which they are issued and impose a continuing duty to appear until discharged by the court, even where trial date for which the subpoena was issued is continued, CR 45(g), CrR 6.12(b), *State v. Iniguez*, 143 Wn.App. 845 (2008), *rev'd, on other grounds,* 167 Wn.2d 273 (2009), *cf.: State v. Hobson*, 61 Wn.App. 330, 337 (1991), thus court erred in denying continuance, harmless here; I.

***State v. Lopez***, 74 Wn.App. 264, 268-9 (1994)

Defendant seeks continuance of trial and signs time for trial waiver, no interpreter present but counsel represents defendant is sufficiently fluent to understand, defendant later claims waiver was involuntary; held: where defendant requests continuance, defense has the burden of showing an abuse of discretion in granting the continuance, *see: State v. Dowell*, 16 Wn.App. 583, 588 (1976), *State v. Livengood*, 14 Wn.App. 203, 209 (1975); trial court reasonably relied upon representations of counsel that defendant understood proceedings; I.

***State v. Ford***, 125 Wn.2d 919 (1995)

Defendant offers to plead guilty at arraignment, prosecutor's motion to continue arraignment in order to provide defense further discovery is granted over defense objection, before next arraignment prosecutor amends to a greater charge; held: because defendant was not "substantially prejudiced in the presentation of the defense," CrR 3.3(h)(2), at the time the continuance was granted, then the continuance was proper; 6-2.

***State v. Campbell***, 78 Wn.App. 813, 820 (1995)

Failure to grant continuance is abuse of discretion only if result of trial would probably have been different or denial was for untenable reasons, *State v. Angulo*, 69 Wn.App. 337, 341-2 (1993); II.

***State v. Honton***, 85 Wn.App. 415, 422-4 (1997)

After trial court determines defendant may waive counsel, having told defendant a continuance will not be granted, defendant moves for continuance to prepare; held: where last-minute motion to proceed *pro se* is made for purpose of delay, court can recognize it as such and deny continuance, *see: State v. Fritz*, 21 Wn.App. 354, 365 (1978); III.

***State v. Hairychin***, 136 Wn.2d 862 (1998)

Prosecutor arranges for defense counsel to interview complainant, does not subpoena complainant who moves out of state, prosecutor obtains continuance beyond expiration date; held: a continuance may be granted if state's evidence is unavailable, prosecutor has exercised due diligence, and there are reasonable grounds to believe evidence will be available within reasonable time, JuCR 7.8(e)(2)(ii), due diligence requires proper issuance of subpoenas, *State v.*

*Adamski*, 111 Wn.2d 574, 578 (1988), *State v. Duggins*, 121 Wn.2d 524, 525 (1993), thus continuance was improperly granted; *cf.: State v. Bible*, 77 Wn.App. 470 (1995); *per curiam.*

***State v. Downing***, 151 Wn.2d 265 (2004)

In child molestation case, defense learns "moments before" competency hearing that complainant was told about and met other victims of defendant; following finding of competency, defense contacts an expert to testify that contact with other victims could taint complainant's testimony, defense motion for continuance for expert testimony is denied; held: while defense counsel was diligent, trial court's determination that the "maintenance of orderly procedure outweighed the reasons favoring a continuance, such as surprise and due process" was a proper exercise of discretion, also considering possible detriment to the child, RCW 10.46.085, *see: State v. Eller*, 84 Wn.2d 90 (1974), *State v. Miles*, 77 Wn.2d 593, 597 (1970), *State v. Hurd*, 127 Wn.2d 592, 594 (1995); while denying a continuance where a material witness, having been served with a subpoena, failed to appear may be a denial of due process, *State v. Edwards*, 68 Wn.2d 246 (1966), here because the complainant's statements before the alleged taint were consistent afterwards, no due process violation occurred; 8-1.

***State v. Chichester***, 141 Wn.App. 446 (2007)

At a readiness hearing the week before the scheduled trial date well within expiration date, state announces that it is ready then advises that it only has one prosecutor and two cases are set for the same day, trial court states that state will need to find some alternative, on trial date state moves to continue for same reason, trial court identifies another prosecutor who is not in trial, state refuses to reassign, trial court dismisses; held: while prosecutor is not obliged to reassign a case when the originally assigned lawyer becomes unavailable, *State v. Heredia-Juarez*, 119 Wn.App. 150, 154-55 (2003), where trial court determines whether reassignment is feasible and necessary in a particular situation and considers the complexity of the case and seriousness of the charge, and state has made no showing of a diligent attempt to solve the problem, denial of a continuance is within court's discretion, *cf.: State v. Raper*, 47 Wn.App. 530, 535 (1987), *State v. Jones*, 117 Wn.App. 721, 728-29 (2003), *State v. Downing*, 151 Wn.2d 265, 272-73 (2004); dismissal is a proper remedy where there is no last-minute emergency beyond the control of the state, *see: State v. Koerber*, 85 Wn.App. 1 (1996); court need not apply CrRLJ 8.3(b) arbitrary action or government misconduct analysis; trial court may dismiss even though time is left before time for trial expiration date, *see: State v. Brooks*, 149 Wn.App. 373, 391-93 (2009), *Seattle v. Clewis*, 159 Wn.App.842 (2011); 2-1, I.

# *CORPUS DELICTI*

***State v. Mason***, 31 Wn.App. 41 (1982)

*Mens rea* element of a felony need not be proved by independent evidence prior to trial use of a defendant's confession when that element of crime charged provides merely the degree of the generic crime charged; need not establish "intent to commit a felony" to establish *corpus delicti* of assault 1°, *State v. Burnette*, 78 Wn.App. 952 (1995); II.

***State v. Sellers***, 39 Wn.App. 799 (1985)

*Corpus delicti* for **homicide** is (1) fact of death and (2) responsibility of a criminal agency for death; causal connection between defendant and crime is not required; no body need be found; II.

***State v. Komoto***, 40 Wn.App. 200 (1985)

*Corpus delicti* for felony **hit and run**, RCW 46.52.020, does not include identity, *distinguishing State v. Hamrick*, 19 Wn.App. 417, 420 (1978), as defendant's physical condition is not an element of the crime; I.

***Bremerton v. Corbett***, 106 Wn.2d 569 (1986)

*Corpus delicti* must be established to corroborate an admission or confession irrespective of whether or not the statement was custodial, *reversing, in part*, *Bremerton v. Corbett*, 42 Wn.App. 45 (1985); in **DUI** case, *corpus* is met by proof that defendant was driving while intoxicated; standard for *corpus delicti* is that there be sufficient circumstances to support a logical and reasonable inference that defendant was driving, *but see: State v. Flowers*, 99 Wn.App. 57 (2000); while mere evidence that defendant was at scene of accident and was registered owner of vehicle may not be sufficient, additional factors such as other person present unable to start vehicle, defendant seen earlier driving the vehicle, injuries to defendant consistent with blood on driver's side of vehicle are sufficient, *State v. Hendrickson*, 140 Wn.App. 913 (2007); 9-0.

***State v. Acheson***, 48 Wn.App. 630 (1987)

**Indecent liberties**: proof of identity of perpetrator is not an element of *corpus delicti*; II.

***State v. Quillin***, 49 Wn.App. 155 (1987)

In **homicide** case, proof of disappearance of victim, defendant's possession of victim's vehicle and possessions and testimony that defendant had told another that he was going to meet the victim shortly before disappearance establishes *corpus*; II.

***State v. Neslund***, 50 Wn.App. 531 (1988)

In **homicide** case, *corpus* may be established by physical evidence as interpreted by expert testimony and by circumstantial evidence that supports a logical and reasonable inference that victim died by criminal means; confession is admissible as long as state later proves *corpus, State v. Hummel,* 165 Wn.App. 749 (2012); I.

***State v. Cobelli***, 56 Wn.App. 921 (1990)

In possession with intent to deliver **drugs** case, evidence of possession of several baggies containing a total of 1.4 grams marijuana and observation of defendant in several brief conversations in area known for drug trafficking is insufficient to establish *corpus, State v. Whalen*, 131 Wn.App. 58 (2005), *cf.: State v. Hotchkiss,* 1 Wn.App.2d 275 (2017); I.

***State v. Smith***, 115 Wn.2d 775 (1990)

In **attempted murder** case, $1500 cash in defendant's pocket, concealed knife strapped to leg, pair of handcuffs on co-defendant's person, loaded gun, two knives, ammunition, pistol in passenger compartment of car, knives, bow and arrows, shotgun, pellet gun, ammunition, shovel, pickax, bag of lime in trunk plus officer's observations that car was illegally parked at 1 a.m. in park, absence of apparent driver, nervous agitation and lack of cooperation of third suspect establish *corpus delicti*, thus confession is admissible; *corpus delicti* rule does not require that state prove, absent confession, that murder had been attempted, rather the state must produce evidence of sufficient circumstances which would support a logical and reasonable deduction that a substantial step had been taken to criminally end someone's life; *reverses State v. Smith*, 54 Wn.App. 467 (1989); *see: State v. Flowers*, 99 Wn.App. 57 (2000), *State v. Powers*, 124 Wn.App. 92 (2004); 6-3.

***State v. Riley***, 121 Wn.2d 22 (1993)

Observation of hacking activity plus phone trace to defendant's home establish *corpus* for **computer trespass**; 7-0.

***State v. Vangerpen***, 71 Wn.App. 94 (1993), *overruled on other grounds,* 125 Wn.2d 782 (1995)

Detained driver with a loaded, cocked revolver hidden under leg which he attempted to reach when questioned by police establishes *corpus* for **attempted murder** 1°, *State v. Smith*, 115 Wn.2d 775, 780 (1990), *State v. Barajas*, 143 Wn.App. 24, 35-37 (2007); evidence establishing *corpus* need not exclude every reasonable hypothesis consistent with the crime not having occurred, *Bremerton v. Corbett*, 106 Wn.2d 569, 578 (1986); thus, even though facts could support equally logical alternative inference of assault, assuming facts in light most favorable to state, *corpus* of murder is established by *prima facie* evidence; assuming that there must be corroborative evidence of each element of the crime to establish the *corpus, Smith v. United States*, 99 L.Ed. 192 (1954), the cocked gun is sufficient to establish premeditation; I.

***State v. Sjogren***, 71 Wn.App. 779 (1993)

*Corpus delicti* for **DUI** is established where evidence shows defendant was present at the scene of accident in close proximity to vehicle registered to defendant, only other person who could have been driving was passed out in the crew cab behind the front seats, *Bremerton v. Corbett*, 106 Wn.2d 569, 579 (1986), *State v. Hendrickson*, 140 Wn.App. 913 (2007); III.

***State v. Thompson***, 73 Wn.App. 654 (1994)

To prove *corpus* in **homicide** case where no body is found, state may offer evidence of victim's habit and character to establish circumstantial evidence of the fact of death by a criminal agency, as it is not being introduced to show that victim acted in conformity with a particular character or habit trait on a particular occasion, ER 404(a); where character and habit evidence established that victim never missed appointments, never had been gone for more than 24 hours,

was a good housekeeper, took care of her pets, and other evidence established that she was missing, did not feed her cat, house was messy, a strong inference is raised that she died and that her death was sudden and caused by criminal means; *see:* *State v. Neslund*, 50 Wn.App. 531 (1988), *State v. Lung*, 70 Wn.2d 365, 371 (1967), *State v. Hummel*, 165 Wn.App. 749 (2012); I.

***State v. Solomon***, 73 Wn.App. 724 (1994)

Identity is not an element of the *corpus* of possession of **drugs**, *distinguishing* *Bremerton v. Corbett*, 106 Wn.2d 569, 574 (1986), *State v. Smith*, 115 Wn.2d 775, 781 (1990), unlike reckless driving, DUI, attempt, conspiracy, perjury; I.

***State v. C.D.W.***, 76 Wn.App. 761 (1995)

In **rape** case, where only evidence of penetration is established by defendant's confession, it is ineffective assistance not to object to the confession, *cf.:* *State v. Angulo*, 148 Wn.App. 642 (2009); III.

***State v. Wright***, 76 Wn.App. 811, 816-9 (1995), *overruled, in part, State v. Allen*, 130 Wn.2d 640 (1996)

Identity is an element of the *corpus delicti* of **VUFA**, former RCW 9.41.040(4), *Bremerton v. Corbett*, 106 Wn.2d 569, 574 (1986), as the element of a prior conviction cannot be proved without identifying a particular person; I.

***State v. Burnette***, 78 Wn.App. 952 (1995)

In felony **murder** case, proof of underlying robbery is not part of the *corpus* to admit confession, *see:* *State v. Mason*, 31 Wn.App. 41, 48 (1982); even if robbery is an element of *corpus*, evidence that victim had money and had purchased items an hour before he was stabbed and had no money on his body establishes that money was lost through criminal agency; I.

***State v. DuBois***, 79 Wn.App. 605 (1995)

Evidence independent of confession that **theft** defendant did not purchase cigarettes and that security guard recovered a pack of cigarettes from her after she left the store is insufficient to establish *corpus*, at 609-11; evidence in **burglary** of an open window at a school shop and the presence of items in defendant's living room similar to materials in the shop is insufficient to establish *corpus* of burglary; I.

***State v. Aten***, 130 Wn.2d 640 (1996)

Pathologist testifies infant's death could have been caused by SIDS or by manual interference with her breathing, defendant-baby-sitter arranges for care of her own children, gives away her possessions, later confesses; held: *corpus delicti* of **manslaughter** must include more than a failure to rule out criminality, none of defendant's confessions or admissions may be considered as guilt absent corroboration, insufficient independent evidence of manslaughter, *cf.:* *State v. Baxter*, 134 Wn.App. 587, 595-98 (2006), *State v. Young*, 196 Wn.App. 214 (2016), *see:* *State v. Brockob*, 159 Wn.2d 311 (2006); 8-1.

***State v. Dodgen***, 81 Wn.App. 487 (1996)

Where defendant fails to make a *corpus delicti* objection to a confession, moves instead to dismiss at close of state's case, then presents evidence on his behalf, reviewing court will look to the evidence as a whole to determine whether *corpus* was established, *State v. Mathis*, 73 Wn.App. 341 (1994), *State v. Chavez*, 65 Wn.App. 602, 605 (1992), *State v. Smith*, 56 Wn.App. 909, 914 (1990); *corpus* of **rendering criminal assistance/homicide** is independent proof that a homicide victim was concealed by someone other than the person who committed the murder, at 493; I.

***State v. Ray***, 130 Wn.2d 673 (1996)

In **child molestation** case, evidence independent of statements establishes nude defendant accompanied child to her room, returned to his room upset and crying and called his sexual deviancy counselor, insufficient to establish *corpus* (9-0); Supreme Court expressly affirms *corpus delicti* rule, declines to adopt federal "trustworthiness" standard, *Opper v. United States*, 99 L.Ed.2d 101 (1954), *State v. Dow*, 168 Wn.2d 243 (2010); 8-1.

***State v. Ackerman***, 90 Wn.App. 477, 485 (1998)

Admissible hearsay statements are sufficient to corroborate a confession, *State v. Biles*, 73 Wn.App. 281, 285 (1994); I.

***State v. Picard***, 90 Wn.App. 890, 900-2 (1998)

In **arson** case, burned house, evidence that portable heater was rigged by a human to ignite combustibles, movement of valuables out of house just before fire, over-insurance and defendant's proximity to fire establish *corpus;* evidence of *corpus* must be *prima facie*, need not be enough to convict or even send case to jury, *State v. Aten*, 130 Wn.2d 640, 656 (1996), *State v. Baxter*, 134 Wn.App. 587, 595-98 (2006); II.

***State v. Dyson,*** 91 Wn.App. 761 (1998)

Statement made during and part of the crime itself is not excludable under *corpus delicti* rule, *State v. Witherspoon*, 171 Wn.App. 271, 295-97 (2012), *affirmed, on other grounds*, 180 Wn.2d 875 (2014), which applies to confessions, expressions of guilt as to a past act, *cf.: State v. Miller*, 35 Wn.App. 567 (1983); I.

***State v. Liles-Heide***, 94 Wn.App. 569 (1999)

Defendant's motion to dismiss DUI case claiming insufficient evidence, absent her confession, that she was driving, is denied, *State v. Hamrick*, 19 Wn.App. 417 (1978), at trial defendant testifies that she drove and is convicted; held: once defendant offers evidence, appellate court will review sufficiency of the *corpus* based upon all of the evidence to determine if there is sufficient evidence to support the crime, *State v. Dodgen*, 81 Wn.App. 487, 492-94 (1996), *State v. McPhee*, 156 Wn.App. 44, 59-62 (2010), *see: State v. Kerry*, 34 Wn.App. 674 (1983), *State v. Baeza*, 100 Wn.2d 487 (1983); I.

***State v. Phillips***, 94 Wn.App. 829 (1999)

In **violation of a no contact order** case, return of service of the order establishes the knowledge element to permit into evidence defendant's admission that he knew of the order; I.

***State v. Flowers***, 99 Wn.App. 57 (2000)

In **attempt to elude** case, police observe motorcycle "doing donuts," signal to stop with lights and siren, rider looks at officer, speeds away and flees before apprehension at scene, defendant later confesses; held: evidence supports an inference that someone attempted to elude, thus establishing *corpus;* the showing required for a *corpus delicti* depends on the evidence, not on the statutory elements; "[t]here are no 'certain crimes' for which identity is always a part of *corpus delicti,"* at 61, distinguishing *Bremerton v. Corbett*, 106 Wn.2d 569, 574 (1986), *State v. Smith*, 115 Wn.2d 775, 781 (1990); II.

***State v. Pineda***, 99 Wn.App. 65 (2000)

In **child homicide** case, evidence independent of defendant's statement that child was a healthy nine-day old prior to death, that autopsy report showed nothing, that defendant-mother was dressed at death and did not show emotion after death is insufficient to establish *corpus;* coroner's testimony that but for defendant's statement he would have said that cause of death is SIDS but that his opinion is homicide by smothering due to defendant's statement is insufficient, as it was not based upon facts wholly independent of the alleged confession; II.

***State v. James***, 104 Wn.App. 25, 35-38 (2000)

*Corpus* of **bail jumping**, RCW 9A.76.170(2), is (1) being released from custody by court order and (2) failing to appear; defendant's signature on order setting conditions of release and notice of trial date are not "statements" but evidence of his presence in court when ordered to appear at trial; II.

***State v. Bernal***, 109 Wn.App. 150 (2001)

Fourteen-year old dies of heroin overdose, defendant admits selling him heroin day before, is charged with **homicide by controlled substance** and distributing a controlled substance to a minor; held: absent independent evidence that decedent obtained the heroin by delivery as opposed to stealing it, finding it or some other means, *corpus delicti* is lacking, *cf.: State v. Zilyette,* 163 Wn.App. 124, 128-31 (2011); 2-1, II.

***State v. C.M.C.***, 110 Wn.App. 285 (2002)

Owner of car testifies that her car was stolen and that respondent did not have permission to ride in it, respondent argues that her confession is inadmissible because state did not prove knowledge element; held: *corpus* was established when state proved that a crime was committed, respondent's identity and *mens rea* is not required to be proved independent of her confession, *State v. Cardenas-Flores,* 189 Wn.2d 243 (2017), *State v. Young,* 196 Wn.App. 214 (2016), *see: State v. Flowers*, 99 Wn.App. 57, 61 (2000); I.

***State v. Pietrzak***, 110 Wn.App. 670 (2002)

Defendant's statements prior to homicide that he wanted to kill victim can corroborate post-crime statements for purposes of establishing *corpus, see: State v. Witherspoon,* 171 Wn.App. 271, 295-97 (2012), *affirmed, on other grounds,* 180 Wn.2d 875 (2014), challenge to *corpus* during defense case is timely, *State v. McConville*, 122 Wn.App. 640, 647-51 (2004); III.

***State v. McConville***, 122 Wn.App. 640 (2004)

Even where defense stipulates to the admissibility of a confession, defense may raise *corpus* objection up to the time defense rests, *State v. Pietrzak*, 110 Wn.App. 670 (2002); I.

***State v. Rooks***, 130 Wn.App. 787, 801-06 (2005)

**Homicide** victim's body is found months after death, medical examiner cannot determine cause of death and cannot rule out drug overdose and strangulation, defendant seeks to exclude his confession that he strangled victim; held: independent evidence of defendant's domestic violence against victim, sudden disappearance, custody dispute, unusual circumstances of victim's absence including left keys and purse, *State v. Thompson*, 73 Wn.App. 654 (1994), all lead to reasonable and logical inference that her death was the result of a criminal act establishing *corpus delicti*; "where there is more than one reasonable and logical inference as to the cause of death, if one inference is more consistent with the independent evidence than another, it might make the other inference less likely or reasonable," *State v. Aten*, 130 Wn.2d 640, 660-61 (1996), *State v. Hummel*, 165 Wn.App. 749 (2012); I.

***State v. Whalen***, 131 Wn.App. 58 (2005)

Defendant steals several boxes of pseudoephedrine, admits he was going to manufacture meth; held: mere possession of pseudoephedrine is insufficient to establish *corpus* of **possession with intent to manufacture**, RCW 69.50.440, *State v. Brockob*, 159 Wn.2d 311, 330-33 (2006), *see: State v. Cobelli*, 56 Wn.App. 921 (1990), *State v. Montgomery*, 163 Wn.2d 577 (2008), *but see:* RCW 69.50.440, *State v. Moles*, 130 Wn.App. 461 (2005), *cf.: State v. Hotchkiss*, 1 Wn.App.2d 275 (2017); 2-1, II.

***State v. Brockob***, 159 Wn.2d 311 (2006)

Defendant 1 steals packs of cold medicine, removes tablets from packages, when arrested admits he was going to give them to someone to manufacture methamphetamine, is charged with unlawful possession of pseudoephedrine with intent to manufacture meth, former RCW 69.50.440; held: mere possession is insufficient to establish *corpus* of possession with intent, *State v. Whalen*, 131 Wn.App. 58 (2005); defendant 2 is arrested for driving while license suspended, search incident to arrest finds three bottles of ephedrine and coffee filters, admits he would use the ephedrine to manufacture meth, is charged with possession of ephedrine with intent, RCW 69.50.440; held: coffee filters provide additional corroboration to establish possession with intent, *State v. Montgomery*, 163 Wn.2d 577 (2008), thus statement is admissible; defendant 3 enters residence of a friend, finds a visitor, takes a DVD player claiming he was borrowing it, visitor and defendant argue and fight, defendant later admits he didn't have permission, at trial owner of DVD player testifies defendant had permission to take it, defendant is convicted of attempted robbery; held: because independent evidence supported hypotheses of both guilt and innocence, the corpus is insufficient and statement is inadmissible, *State v. Aten*, 130 Wn.2d 640, 660 (1996), *but see: State v. Hotchkiss*, 1 Wn.App.2d 275 (2017); 7-2.

***State v. Hendrickson***, 140 Wn.App. 913 (2007)

*Corpus delicti* for **DUI** is established where independent evidence shows car is registered to defendant who is only person in area, smell of alcohol, eyes watery and bloodshot, face flushed, *see: State v. Sjogren*, 71 Wn.App. 779 (1993); trial court may permit introduction of the

defendant's statements before the state has completed its evidence of the *prima facie* case on the condition that the state present the corroborating evidence at a later time or risk dismissal; III.

***State v. Page***, 147 Wn.App. 849 (2008)

Defendant is arrested and booked, at jail tells police there's a gun in his house, police allow defendant to call his brother to ask him to get the gun, police drive to the house, see brother coming out who tells police "I didn't touch the gun," defendant is charged with **VUFA**, no gun is offered, no *corpus* objection is made; held: failure to raise *corpus delicti* may be raised for first time on appeal, *State v. Cardenas-Flores,* 189 Wn.2d 243 (2017), as ineffective assistance, but construed in favor of the state, evidence was sufficient to establish a reasonable and logical inference that a gun had been in defendant's home, thus *corpus* was established; II.

***State v. Angulo***, 148 Wn.App. 642 (2009)

In **child rape** case, defendant confesses to penetration, victim testifies to molestation but not penetration, court admits confession; held: the *corpus delicti* rule focuses on a criminal act, not the elements of the crime charged, *State v. Boyer,* 200 Wn.App. 7 (2018); victim's testimony established that a criminal act of the same basic nature as the charged offense occurred, sufficient to admit the confession; 2-1, III.

***State v. Dow***, 168 Wn.2d 243 (2010)

RCW 10.58.035, which directs that where a victim is dead or incompetent a defendant's statement is admissible "if there is substantial independent evidence that would tend to establish the trustworthiness of the confession" is constitutional, but deals only with admissibility and not sufficiency, thus there still must be sufficient evidence independent of a confession to support a conviction, *see: State v. Young,* 196 Wn.App. 214 (2016); 9-0.

***State v. McPhee***, 156 Wn.App. 44, 59-62 (2010)

After a *corpus* motion is denied, if defendant offers substantive evidence, including his own testimony that establishes the *corpus,* he cannot prevail on appeal, *State v. Pietrzak,* 110 Wn.App. 670, 680 (2002), *State v. Liles-Heide,* 94 Wn.App. 569, 572 (1999); III.

***State v. Young***, 196 Wn.App. 214 (2016)

*Corpus* for **murder** is fact of death and a causal connection between death and a criminal act, *State v. Hummel,* 165 Wn.App. 749 (2012); state need not prove every element of a crime independent of defendant's confession, *distinguishing State v. Dow,* 168 Wn.2d 243 (2010); apparently holds that state need not prove specific *mens rea* element before statement is admissible; III.

***State v. Cardenas-Flores***, 189 Wn.2d 243 (2017)

*Corpus delicti* may be raised for the first time on appeal as it "permeates" sufficiency of the evidence in addition to the evidentiary foundation required before admission of a confession; *corpus delicti* rule does not require state to present independent evidence of the *mens rea* element of a crime where the *mens rea* element merely establishes the degree of the crime, *State v. Mason,* 31 Wn.App. 41, 48 (1982), *State v. Hummel,* 165 Wn.App. 749, 764-65 (2012), *State v. Young,* 196 Wn.App. 214 (2016), *distinguishing dicta in State v. Dow,* 168 Wn.2d 243, 254

(2010); in child assault case evidence, independent of confession, that infant's femur fracture occurred while child was in defendant's control, child was "nonambulatory" and thus could not have caused his own injury, femur fracture requires more force than what would occur in normal everyday life and fracture was likely caused by compression and torsion all establish sufficient evidence that the offense occurred; reverses, in part, *State v. Cardenas-Flores,* 194 Wn.App. 496 (2016); 9-0.

***State v. Hotchkiss***, 1 Wn.App.2d 275 (2017)

Pursuant to search warrant police seize 8.1 g. methamphetamine and $2150 cash from defendant's home, defendant admits intent to deliver, at trial defendant testifies that the money was rent and salary, argues insufficient evidence to support *corpus delicti* so statement should not have been admitted; held: "[the same general rules for sufficiency of evidence to convict apply for corroborating evidence under the *corpus delicti* rule;" while mere possession of a large amount of drugs is insufficient to establish *corpus,* where there is at least one more factor, here money, then evidence is sufficient, *see:* *State v. Brown*, 68 Wn.App. 480 (1993), *State v. Hutchins*, 73 Wn.App. 211, 216 (1994), *State v. Davis*, 79 Wn.App. 591 (1995), *State v. Mejia*, 111 Wn.2d 892 (1989), *State v. Harris*, 14 Wn.App. 414 (1975), *State v. Lopez*, 79 Wn.App. 755, 767-9 (1995), *State v. Miller*, 91 Wn.App. 181, 186 (1998), *State v. Niggard*, 154 Wn.App. 641, 647-49 (2010), *State v. O'Connor,* 155 Wn.App. 282, 290-91 (2010), *State v. Sprague*, 16 Wn.App.2d 213 (2021); while defendant's "innocent" explanation for the money might arguably call for the suppression of defendant's confession to the police pursuant to *State v. Brockob*, 159 Wn.2d 311, 329 (2006), *State v. Aten,* 130 Wn.2d 640, 660 (1996), here there was still sufficient evidence to convict, Worswick, J., concurring; II.

***State v. Sprague***, 16 Wn.App.2d 213 (2021)

Police serve search warrant, seize 9-10 grams of meth, a homemade pipe, a metal container with methamphetamine residue, a scale, and a bundle of plastic grocery bags, defendant confesses to dealing, is convicted of **possession with intent to deliver**; held: quantity alone is insufficient to establish intent to deliver, *State v. Cobelli*, 56 Wn.App. 921 (1990), possession of other items is consistent with both innocence and guilt as to intent to deliver, thus evidence is insufficient to establish *corpus* of the charged crime, *State v. Brockob*, 159 Wn.2d 311 (2006), *State v. Aten*, 130 Wn.2d 640, 660 (1996), *State v. Cardenas-Flores,* 189 Wn.2d 243 (2017), thus statements were improperly admitted, however the evidence absent the confession established a *prima facie* case of possession with intent to deliver, thus there was sufficient evidence to convict, *State v. O'Connor,* 155 Wn.App. 282, 290-91 (2010), *State v. Lane*, 56 Wn.App. 286 (1989), *State v. Simpson*, 22 Wn.App. 572, 575 (1979); unlike the corpus delicti analysis, the sufficiency of the evidence analysis does not involve evaluation of hypotheses of innocence; II.

# COUNSEL
## Conflict of Interest

***State v. Peyton***, 29 Wn.App. 701 (1981)

Joint representation of **co-defendants** is not error *per se*, *see: Pers. Restraint of Gomez*, 180 Wn.2d 337 (2014), particularly where court explains hazards to defendants who do not object; *see also*: *Burger v. Kemp*, 97 L.Ed.2d 638 (1987); II.

***State v. Lingo***, 32 Wn.App. 638 (1982)

Where **co-defendants** are represented by one attorney, court does not have obligation to inquire into possible conflict; burden rests on trial counsel to raise appropriate concerns; when no objection is raised, actual conflict must be readily apparent in order for claim of ineffective assistance to be successful; *see*: *State v. Alexis*, 21 Wn.App. 161 (1978), *State v. Ningham*, 23 Wn.App. 826 (1979), *Burger v. Kemp*, 97 L.Ed.2d 638 (1987), *State v. Graham*, 78 Wn.App. 44, 53-4 (1995); II.

***In re Richardson***, 100 Wn.2d 669, 677 (1983)

At trial, it was learned that a witness who was called by the defense to testify to matters that would incriminate the **witness**, was represented by defendant's attorney; Supreme Court remands personal restraint petition, holding that a trial court commits reversible error if it knows or reasonably should know of a particular conflict into which it fails to inquire, *State v. McDonald*, 143 Wn.2d 506 (2001), *State v. Santacruz-Hernandez*, 139 Wn.App. 328 (2001), *State v. Chavez*, 162 Wn.App. 431 (2011), *but see: State v. Dhaliwal*, 150 Wn.2d 559 (2003), *Mickens v. Taylor*, 152 L.Ed.2d 291 (2002), *State v. Regan*, 143 Wn.App.419 (2008); on remand, defense need not demonstrate prejudice, but court must determine if an actual conflict of interest existed, *State v. Graham*, 78 Wn.App. 44, 53-4 (1995); *cf.: State v. White*, 80 Wn.App. 406, 413-4 (1996); 6-2.

***State v. Anderson***, 42 Wn.App. 659 (1986)

Defense counsel moves to withdraw because a state's **witness** had previously been represented by a lawyer from counsel's office, and counsel intended to examine witness as to his intoxication which could result in revocation of the witness's probation, court denies counsel's motion to withdraw; held: no actual conflict, since counsel's examination of the witness is based upon facts discovered in preparation for defendant's case, not as a result of the prior representation of the witness, *see: State v. Hunsaker*, 74 Wn.App. 38, 47 (1994), *State v. Vicuna*, 119 Wn.App. 26 (2003), *State v. Pierce*, 169 Wn.App. 533, 559-60 (2012), *Pers. Restraint of Gomez*, 180 Wn.2d 337 (2014); I.

***State v. James***, 48 Wn.App. 353 (1987)

Where counsel represents **co-defendants**, and must choose whether or not to put on evidence that will help one defendant and harm another, there is an actual conflict of interest; no prejudice must be shown to require a new trial, *State v. Robinson*, 79 Wn.App. 383 (1995); *cf.: State v. Graham*, 78 Wn.App. 44, 53-4 (1995); III.

***State v. Hatfield***, 51 Wn.App. 408 (1988)

At trial, public defender informs court that an adverse **witness**, whom defendant was blaming for the offense, was represented by another public defender from same office, court denies motion to withdraw, but appoints outside counsel for the witness to advise witness about Fifth Amendment privilege; held: if trial court knows or should know about a potential conflict, it must inquire to determine if an actual conflict exists; failure to inquire mandates reversal; here, the trial court's appointment of other counsel plus defense counsel's vigorous defense establish she did not actively represent conflicting interests which adversely affected her performance, *cf.: State v. Graham*, 78 Wn.App. 44, 53-4 (1995), *see: Pers. Restraint of Pirtle*, 136 Wn.2d 467, 474-76 (1998); I.

***Wheat v. United States***, 100 L.Ed.2d 140 (1988)

Trial court may refuse to permit counsel to represent defendant where counsel represented **co-defendants**, even where all clients waive right to conflict-free counsel; 5-4.

***State v. Martinez***, 53 Wn.App. 709 (1989)

Public defense office represents defendant and severed **co-defendant** who does not testify at defendant's trial because counsel says testimony would be harmful to defendant; held: trial court has no duty to initiate an inquiry into the propriety of multiple representation unless there are special circumstances such that the trial court knows or reasonably should know that a particular conflict exists, *Cuyler v. Sullivan*, 64 L.Ed.2d 333 (1980), *State v. White*, 80 Wn.App. 406, 413-4 (1996); where there is no showing that counsel actively represented conflicting interests and that an actual conflict adversely affected counsel's performance, then defendant received effective assistance of counsel, *State v. Graham*, 78 Wn.App. 44, 53-4 (1995), *State v. Dhaliwal*, 150 Wn.2d 559 (2003), *Mickens v. Taylor*, 152 L.Ed.2d 291 (2002); 2-1.

***State v. Early***, 70 Wn.App. 452 (1993)

Former law partner with whom counsel maintains a business relationship previously represented **victim** in unrelated criminal matters; held: because counsel stated he had never viewed victim's files or done any legal work for victim and was not in law partnership with victim's attorney at time of trial, then proscriptions of RPC 1.9 were not violated, and disqualification was not required, *see: Intercapital Corp. v. Intercapital Corp.*, 41 Wn.App. 9, 11 (1985); III.

***State v. Hunsaker***, 74 Wn.App. 38 (1994)

Respondent is charged with child molestation, nine days before expiration date, state endorses a **witness** who had previously been represented by an attorney in the same public defender office as respondent's counsel, trial court excludes the witness's testimony due to conflict and late notice, state seeks discretionary review; held: RPC 1.9(a) requires withdrawal in a matter where a former client has been represented by the same attorney in the same or a substantially related matter; substantially related means that the court must determine whether any factual matter in the former representation is so similar to any material factual matter in the new representation that a lawyer would consider it useful in advancing the interests of the client in the latter representation, Wolfram, *Modern Legal Ethics* § 7.4.3 at 370 (1986), Modern Rules of Professional Conduct Rule 1.9 cmt., at 38 (1989); here, the record establishes that

representation of witness and the respondent are totally unrelated, disqualification is unwarranted, RPC 1.9(a); RPC 1.9(b) prohibits counsel from using confidences or secrets to the disadvantage of former client; here, it is apparent that cross-examination of the former client will involve inquiry into prior convictions, which are available in discovery, and are not based upon confidences or secrets, *State v. Anderson*, 42 Wn.App. 659, 664 (1986), *Teja v. Saran*, 68 Wn.App. 793, 799 (1993), thus, trial court erred in concluding that withdrawal of counsel or exclusion of the witness was required, *accord: State v. Ramos*, 83 Wn.App. 622, 628-33 (1996), *see: State v. Vicuna*, 119 Wn.App. 26 (2003), *State v. Pierce*, 169 Wn.App. 533, 559-60 (2012); I.

***State v. Robinson***, 79 Wn.App. 383 (1995)

Where counsel fails to call a helpful **witness** who is also his client, there is no presumption of effectiveness, new trial is required, *State v. James*, 48 Wn.App. 353, 369 (1987); I.

***State v. White***, 80 Wn.App. 406 (1995)

Counsel is appointed to represent defendant Shim, reads police report, meets with a relative but not with defendant, who retains private counsel; same appointed counsel is then appointed to represent co-defendant White, both are convicted, both maintain reversal is necessary due to conflict of interest; held: although appointed counsel may have violated RPC 1.7(b), no actual conflict of interest existed, since counsel never spoke with Shim; trial court had no duty to inquire where the potential conflict was not brought to the court's attention, mere fact that appointed counsel entered an appearance in court file is not notice, *cf.: State v. McDonald*, 96 Wn.App. 311, 316-21 (1999), *aff'd* 143 Wn.2d 506 (2001), *distinguishing In re Richardson*, 100 Wn.2d 669 (1983), breach of RPC 1.7 and 1.9 do not warrant reversal absent prejudice, *State v. Tjeersdma*, 104 Wn.App. 878, 885 (2001), where raised for first time on appeal; II.

***State v. Ramos***, 83 Wn.App. 622, 628-33 (1996)

In VUCSA case, public defender seeks leave to withdraw as the public defender's agency had previously represented a witness against defendant in a theft case, witness waives privilege in open court, trial court grants leave to withdraw; held: trial court erred, as the prior representation was unrelated to the current charge, RPC 1.9(a), prior theft case was public record and defense failed to present any evidence that cross-examination of the witness would involve inquiry into confidences or secrets, *State v. Hunsaker*, 74 Wn.App. 38 (1994), *see: State v. Vicuna*, 119 Wn.App. 26 (2003); where witness waived privilege, counsel is relieved from restraints on cross-examination which might have otherwise arisen, *see: In re Richardson*, 100 Wn.2d 669 (1983); I.

***Pers. Restraint of Stenson***, 142 Wn.2d 710, 721-32 (2001)

In evaluating whether an irreconcilable conflict exists between counsel and client, appellate court will look to (1) extent of the breakdown of communication and the breakdown's effect on the representation the client actually receives, (2) adequacy of trial court's inquiry into the conflict, and (3) timeliness of motion, *see: State v. Stenson*, 132 Wn.2d 668 (1997), *State v. Schaller*, 143 Wn.App. 258 (2007), *State v. Thompson*, 169 Wn.App. 436, 457-58 (2012), *State v. Davis*, 3 Wn.App.2d 763, 790-91 (2018); 8-1.

***State v. McDonald***, 143 Wn.2d 506 (2001)

Before trial, defendant sues standby counsel/public defender in federal court, prosecutor's office represents counsel who moves to withdraw, trial court declines to substitute counsel; held: when the trial court knows or should know of a conflict of interest between defendant and standby counsel, it must conduct an inquiry into the nature and extent of the conflict and, after such inquiry, the court may remove standby counsel, failure to make an inquiry and take action constitutes reversible error and prejudice will be presumed, *In re Pers. Restraint of Richardson*, 100 Wn.2d 669, 677 (1983), *State v. Regan*, 143 Wn.App. 419 (2008), *but see: State v. Dhaliwal*, 150 Wn.2d 559 (2003); 9-0.

***State v. Tjeerdsma***, 104 Wn.App. 878 (2001)

Defendant discovers after conviction that his lawyer was a contract municipal prosecutor, key witnesses at defendant's trial were police from same municipality; held: where an alleged conflict is raised after trial, prejudice is presumed only if defendant shows that counsel (1) actively represented conflicting interests and (2) the actual conflict adversely affected counsel's performance, *State v. Davis*, 141 Wn.2d 798, 860-64 (2000), *Strickland v. Washington*, 80 L.Ed.2d 674 (1984), *Mickens v. Taylor*, 152 L.Ed.2d 291 (2002); here, counsel's duty, per the contract, was to the municipality, not the individual police officers, had never advised or represented any of the witnesses, thus there was no showing counsel had actively represented conflicting interests; violation of RPC is not grounds for reversal, *State v. White*, 80 Wn.App. 406, 412-13 (1995); I.

***Mickens v. Taylor***, 152 L.Ed.2d 291 (2002)

After trial, defendant discovers his lawyer represented victim immediately prior to his murder, defense seeks rule of automatic reversal; held: where trial judge fails to inquire into a conflict which s/he knows or reasonably should know exists, *Cuyler v. Sullivan*, 64 L.Ed.2d 333 (1980), reversal is only required where defense establishes that the conflict adversely affected his counsel's performance; 5-4.

***State v. Vicuna***, 119 Wn.App. 26 (2003)

Defense counsel's statement that a conflict exists because of the ability to call witnesses is insufficient to allow trial court to determine if a conflict in fact exists, trial court should hold *in camera* hearing with sealed record or ask more general questions to make such a determination, *see: State v. Hunsaker*, 74 Wn.App. 38, 42 (1994), *State v. Anderson*, 42 Wn.App. 659 (1986), *State v. Ramos*, 83 Wn.App. 622 (1996); I.

***State v. Dhaliwal***, 150 Wn.2d 559 (2003)

Defense counsel previously represented two defense witnesses and a prosecution witness, trial court inquires of defendant about conflict with defense witnesses, fails to inquire about state's witness, nor did trial court advise defendant that he was entitled to a conflict-free attorney, that he could receive outside legal advice about waiving, and that he could "ask questions;" held: colloquy was inadequate, *see: In re Pers. Restraint of Pirtle*, 136 Wn.2d 467 (1998), *State v. Regan*, 143 Wn.App. 419 (2008), as it did not establish a knowing, voluntary and intelligent waiver, was not "targeted at the conflict issue;" reversal is only required where

defendant asserts a conflict of interest and shows that the conflict adversely affected trial counsel's performance, *Mickens v. Taylor*, 152 L.Ed.2d 291 (2002); here, there is no evidence that the actual conflict adversely affected counsel's performance, *State v. Robinson*, 79 Wn.App. 386, 394 (1995), *Cuyler v. Sullivan*, 64 L.Ed.2d 333 (1980), counsel thoroughly examined witnesses that counsel had previously or was currently representing, failure to object was tactical, defendant failed to meet burden of proving actual conflict that adversely affected counsel's performance; remand is not required absent actual conflict and resulting adverse consequences, *cf.: State v. Kitt*, 9 Wn.App.2d 235 (2019), *distinguishing Wood v. Georgia*, 67 L.Ed.2d 220 (1981); affirms *State v. Dhaliwal*, 113 Wn.App. 226 (2002); failure to adequately brief precludes state constitutional analysis; 9-0.

***State v. MacDonald***, 122 Wn.App. 804, 812-14 (2004)

In rape case, trial court disqualifies retained counsel because he was attorney of record for rape complainant's mother in dissolution; held: under "factual context" analysis, *see: State v. Hunsaker*, 74 Wn.App. 38, 43-44 (1994), trial court must (1) reconstruct scope of facts involved in former representation and project scope of facts that will be involved in second representation, (2) assume that lawyer obtained confidential client information about all facts within scope of former representation, and (3) determine whether any factual matter in the former representation is so similar to any material factual matter in the latter representation that a lawyer would find it useful in assisting the client in the latter representation; actual receipt of impeaching information from complainant's mother is not the standard for disqualification, *Wheat v. United States*,100 L.Ed.2d 140 (1988); here, it must be assumed that counsel received personal information about complainant from the client-mother, a witness for the state in rape case, thus trial court properly disqualified counsel, *State v. Johnston*, 143 Wn.App. 1, 22-23 (2007); II.

***State v. Jensen***, 125 Wn.App. 319, 329-35 (2005)

In child molestation case, it may be a conflict where defense counsel is facing separate child molestation charges brought by the same prosecutor, counsel had at least a duty to disclose, remedy is remand for trial court to determine if an actual conflict existed and if it adversely affected his representation of defendant; II.

***State v. Rooks***, 130 Wn.App. 787, 795-801 (2005)

Where a law office represents a defendant and another client in custody who is considering providing state with information that defendant confessed to him in jail, counsel must seek to withdraw, trial court need not provide the clients with an opportunity to waive the conflict, *see: Wheat v. United States*, 100 L.Ed.2d 140, 150-152 (1988); *ex parte* in-chambers hearing to discuss conflict does not violate defendant's right to be present, *see: State v. Berrysmith*, 87 Wn.App. 268, 273-74 (1997); I.

***State v. Johnston***, 143 Wn.App. 1, 22-23 (2007)

Trial court disqualifies retained counsel when it learns that rape victim had consulted with a member of counsel's firm to discuss a civil suit regarding the criminal offense; held: trial court does not abuse discretion when it disqualifies an attorney due to a serious potential for a conflict of interest, *State v. MacDonald*, 122 Wn.App. 804, 812-13 (2004), *Wheat v. United*

*States*, 100 L.Ed.2d 140 (1988); trial court is not limited in its exercise of discretion to actual conflict of interest; III.

***State v. Stenson***, 143 Wn.App. 258 (2007)

Defendant is not entitled to new counsel on the basis of a breakdown in communications where he simply refuses to cooperate with his attorneys, *State v. Thompson*, 169 Wn.App. 436, 457-58 (2012); I.

***State v. Regan***, 143 Wn.App. 419 (2008)

In bail jumping case, state calls supervising counsel to testify while defendant is represented by subordinate acting as primary counsel; held: trial court's failure to obtain waiver from defendant or engage in inquiry as to whether defense counsel's testimony is both necessary and unobtainable from other sources, *State v. Sullivan*, 60 Wn.2d 214 (1962), *Pers. Restraint of Richardson*, 100 Wn.2d 669, 677 (1983), *overruled, on other grounds, State v. Dhaliwal*,150 Wn.2d 559, 568 (2003), requires automatic reversal; 2-1, III.

***State v. Fualaau***, 155 Wn.App. 347, 359-65 (2010)

Defendant assaults defense counsel in front of the jury, trial court denies motion to withdraw, finding that the assault was calculated to create a conflict in order to force a mistrial; held: a defendant's misconduct towards his attorney does not necessarily create an actual conflict; where a defendant intentionally creates a conflict of interest, the defendant may be deemed to have forfeited the right to the assistance of counsel free of the conflict created; I.

***State v. Chavez***, 162 Wn.App. 431 (2011)

Defense counsel advises court that he has a conflict of interest, court permits him to withdraw from one count that was severed but not on other counts, defendant pleads guilty then seeks to withdraw plea, court appoints another lawyer who files what he calls an *Anders* brief, *Anders v. California*, 386 U.S. 738, 18 L.Ed.2d 493 (1967), declaring there are no non-frivolous grounds to withdraw plea, trial court denies motion; held: combination of conflict that was inadequately developed by trial court, *Mickens v. Taylor*, 535 U.S. 162, 167, 152 L.Ed.2d 291 (2002), *Holloway v. Arkansas*, 435 U.S. 475, 55 L.Ed.2d 426 (1978) plus new counsel's effective abandonment of defendant's motion requires remand for trial court to take a "second look at the motion to withdraw" the plea; 2-1, III.

***State v. Thompson***, 169 Wn.App. 436, 457-64 (2012)

One-sided breakdown in communication does not entitle defendant to a new lawyer, *State v. Schaller*, 143 Wn.App. 258, 271 (2007), *State v. Wood*, 19 Wn.App.2d 743 (2021); disagreement over trial strategy does not entitle defendant to a new lawyer, *State v. Stenson*, 132 Wn.2d 668, 734 (1997), *State v. Davis*, 3 Wn.App.2d 763, 790-91 (2018), as trial tactics are properly entrusted to counsel, not defendant; I.

***State v. Pierce***, 169 Wn.App. 533, 559-60 (2012)

In homicide case, defendant intends to blame a third party who had been represented 28 times by the same public defender agency, moves to disqualify public defender as the agency possessed confidential information of the third party's drug and alcohol use, third party testifies

he rarely drinks and never uses methamphetamines; held: because there is nothing in the record to show that public defender agency had any confidential information about other suspect's history that could have been used to impeach, motion to disqualify was properly denied, *see: State v. Anderson,* 42 Wn.App. 659 (1986), *State v. Hunsaker,* 74 Wn.App. 38 (1994), *State v. vicuna,* 119 Wn.2d 26 (2003); II.

***State v. Sanchez,*** 171 Wn.App. 518, 550-62 (2012)

Defense counsel, at own expense, fly potential juvenile witnesses out-of-state, trial court disqualifies counsel; held: while at the time of disqualification there was no evidence that relocation would be admissible at trial, the potential admissibility if further evidence of defendant's involvement was developed that trial court did not abuse discretion, *see: State v. Kosanke,* 23 Wn.2d 211 (1945); specter of criminal charges against counsel was a tenable reason supporting disqualification; III.

***Pers. Restraint of Gomez,*** 180 Wn.2d 337, 348-50 (2014)

In child abuse case dependency proceeding defense counsel represents co-respondent after which defendant is charged with homicide by abuse, at criminal trial no evidence is offered that counsel's prior client abused the victim; held: a theoretical conflict of interest is "insufficient to impugn a criminal conviction," *Cuyler v. Sullivan,* 446 U.S. 335, 350, 64 L.Ed.2d 333 (1980), violation of RPCs do not "embody the constitutional standard for effective assistance of counsel," *State v. White,* 80 Wn.App. 406, 412-13 (1995), but are mere guides for determining what is reasonable; here, there was no significant risk that the representation of one client was materially limited by the lawyer's representation of the other, RPC 1.7(a)(1), (2); 5-4.

***State v. Reeder,*** 181 Wn.App. 897, 908-11 (2014)

Attorney in defense counsel's law office previously gave legal advice to defendant's sister on a civil matter which may have been similar to the current fraud charge, never opened a file, trial court denies new counsel, orders Chinese wall, orders counsel not to speak to each other about prior representation; held: absent any interest sister had that was adverse to his own or any facts showing that the attorneys did not impose a proper Chinese wall or that the wall did not resolve any alleged conflict, no prejudice or even conflict was shown, *see: State v. Stenger,* 111 Wn.2d 516, 522-23 (1988); I.

***State v. O'Neil,*** 198 Wn.App. 537 (2017)

For purposes of a pretrial motion state seeks to interview a lawyer who is supervised by defendant's attorney who seeks to withdraw, trial court authorizes the interview and finds no conflict; held: a significant risk exists that representation of defendant would be materially affected by the personal interests of the supervisor under RPC 1.7(a)(2) should the lawyer being supervised be a witness for the state, defendant is entitled to counsel where there is no such risk thus trial court abused its discretion in denying the motion to withdraw; I.

***State v. Kitt,*** 9 Wn.App.2d 235 (2019)

In homicide case evidence showed that defendant shot a bystander but intended to shoot a rival gang member who had been represented by defendant's counsel who advised trial court of conflict, arguing that he cannot attack the character and reputation of his former client, court

denies motion to withdraw; held: counsel had confidential information that he could not use in defending his client, raised it before the trial court and thus had an actual conflict of interest requiring reversal, distinguishing *State v. Dhaliwal*, 150 Wn.2d 559, 573 (2003); II.

***State v. Wood***, 19 Wn.App.2d 743 (2021)

Defense counsel receives a letter from a third party incriminating the defendant, does not provide it to defendant and, upon demand of the state, turns it over to the prosecutor, seeks to withdraw because he could be called as a witness for the defense to testify that defendant did not provide the letter, and because the client had lost confidence, trial court denies motion to withdraw as the case was already in progress, jury having been selected, and orders that the letter not be introduced into evidence; held: a defense attorney has an obligation to turn over, after a reasonable period of time, inculpatory evidence not received from the client or an agent of the client, *State ex rel. Sowers v. Olwell*, 64 Wn.2d 828, 833 (1964), and does not violate the duty of loyalty to the client or RPC 1.6 and 1.8; an attorney can be called as a witness about an uncontested issue, RPC 3.7(a), although here counsel would not need to testify as the court suppressed the letter; a general loss of confidence in trial counsel is insufficient to justify a motion to withdraw, particularly considering scheduling issues, *State v. Stenson*, 132 Wn.2d 668, 730-37 (1997), *State v. Thompson*, 169 Wn.App. 436, 457-64 (2012), *State v. Davis*, 3 Wn.App.2d 763, 790-91 (2018); I.

# COUNSEL
## Effective Assistance

***State v. Jones***, 33 Wn.App. 865, 872-73 (1983)

After losing a motion, defense counsel refuses to participate in the rest of the trial; held: "[t]he decision by defendants' trial attorneys here, not to examine or call witnesses, or give closing arguments is best depicted as tactical…[Conscious unprofessional conduct and involuntary ineptitude] should be kept distinct even though admittedly both may prejudice the client. To equate the two would provide an improper incentive to use unprofessional conduct as a means to secure mistrials or reversals of convictions having as the end the delay of a valid conviction or the possible escape from prosecution. *United States v. Altamirano*, 633 F.2d 147, 150–51 (9th Cir.1980) (footnotes omitted). In addition, the record shows trial counsel represented defendants zealously during the many weeks of the two trials before they decided to cease functioning, and that defendants acted as co-counsel during the trial. Finally, we note the trial judge characterized counsels' conduct as strategic. All these factors indicate defendants had effective representation;" I.

***State v. Bradbury***, 38 Wn.App. 367 (1984)

Defense counsel calls severed co-defendant, who takes the 5th; held: no ineffective assistance as no showing of prejudice, *Strickland v. Washington*, 80 L.Ed.2d 674 (1984), *State v. Ermert*, 94 Wn.2d 839, 849 (1980); III.

***State v. Stark***, 48 Wn.App. 245 (1987)

Court need not appoint substitute counsel merely because defendant claims ineffective assistance, *State v. Sinclair*, 46 Wn.App. 433 (1986), *State v. Staten*, 60 Wn.App. 163 (1991), *State v. Rosborough*, 62 Wn.App. 341 (1991), *State v. Martin*, 149 Wn.App. 689, 701-02 (2009), *State v. Lindsey*, 188 Wn.App. 233, 248-50 (2013), *but see: State v. Young*, 60 Wn.App. 95 (1991); I.

***State v. James***, 48 Wn.App. 353 (1987)

Failure of defense counsel to communicate a plea bargain offer to defendant is ineffective assistance of counsel, *Pers. Restraint of McCready*, 100 Wn.App. 259 (2000), *State v. Drath*, 7 Wn.App.2d 255 (2018), *see also: State v. Holm*, 91 Wn.App. 429, 435-39 (1998), *Pers. Restraint of James*, 190 Wn.2d 686 (2018), *see: State v. Estes*, 188 Wn.2d 450 (2017); where defense counsel discloses his subjective belief that his client may commit perjury without a firm basis and without first communicating his suspicions to his client, there is an actual conflict of interest, *see also: State v. Berrysmith*, 87 Wn.App. 268 (1997); where counsel represents co-defendants, and must choose whether or not to put on evidence that will help one defendant and harm another, there is an actual conflict of interest; no prejudice must be shown to require a new trial; III.

***State v. Martinez***, 53 Wn.App. 709 (1989)

Public defense office represents defendant and severed co-defendant who does not testify at defendant's trial because counsel says testimony would be harmful to defendant; held: trial court has no duty to initiate an inquiry into the propriety of multiple representation unless there are special circumstances such that the trial court knows or reasonably should know that a particular conflict exists, *Cuyler v. Sullivan*, 64 L.Ed.2d 333 (1980); where there is no showing that counsel actively represented conflicting interests and that an actual conflict adversely affected counsel's performance, then defendant received effective assistance of counsel, *State v. Dhaliwal*, 150 Wn.2d 559 (2003); 2-1.

***State v. Garrett***, 124 Wn.2d 504 (1994)

Defense counsel's deliberate tactic to push trial court "beyond the limits of tolerance" is not a basis for reversal for ineffective assistance of counsel, *State v. Jefferson,* 199 Wn.App. 772, 811-12 (2017), *reversed, on other grounds,* 192 Wn.2d 225 (2018); 8-1.

***State v. McFarland***, 127 Wn.2d 322 (1995)

Failure to move to suppress evidence is not *per se* deficient representation, overruling *State v. Tarica*, 59 Wn.App. 368, 374 (1990); where a search is challenged for the first time on appeal, appellant must show, from the record, actual prejudice, *i.e.*, that the trial court likely would have granted the motion if made; reverses *State v. McFarland*, 73 Wn.App. 57 (1994), *overrules, in part, State v. Fisher*, 74 Wn.App. 804 (1994), *see: State v. Klinger*, 96 Wn.App. 619 (1999), *State v. Rainey*, 107 Wn.App. 129 (2001), *State v. Horton*, 136 Wn.App. 29 (2006), *State v. Trujillo*, 153 Wn.App. 454 (2009); 7-0.

***State v. Maurice***, 79 Wn.App. 544, 550-03 (1995)

In vehicular homicide case, failure of counsel to have vehicle inspected where defendant insisted a mechanical malfunction caused him to lose control is deficient performance; III.

***State v. Thomas***, 128 Wn.2d 553 (1996)

A mere assertion, on appeal, that defense counsel prevented defendant from testifying is insufficient to require an evidentiary hearing, *see: In re Lord*, 123 Wn.2d 296, 317 (1994), *State v. Robinson*, 138 Wn.2d 753 (1999), *State v. Rainey*, 107 Wn.App. 129 (2001), *State v. Lee*, 12 Wn.App.2d 378 (2020); 9-0.

***State v. Doogan***, 82 Wn.App. 185 (1996)

Trial court giving a "to convict" instruction proposed by defense counsel that includes an uncharged alternative means for committing the crime is ineffective assistance where the error undermines confidence in the outcome, *State v. Bray*, 52 Wn.App. 30, 34 (1988), *State v. Rodriguez*, 122 Wn.App. 180 (2004), *see: State v. Aho*, 137 Wn.2d 736, 744-46 (1999), *State v. Laramie*, 141 Wn.App. 332, 341-44 (2007); I.

***State v. Bandura***, 85 Wn.App. 87, 94-7 (1997)

Counsel submits lesser included offense instructions, defendant claims he must consent on the record; held: because lessers may be offered on request of the state, the defense or on the court's own initiative, defendant has no right to be tried only on the offense charged; II.

***State v. Glenn***, 86 Wn.App. 40 (1997)

Presumption that counsel was effective, *State v. Benn*, 120 Wn.2d 631, 665 (1993), *Pers. Restraint of Mockovak*, 194 Wn.App. 310 (2016), applies to a legal intern, APR 9, as long as the intern complied with the requirements of APR 9; II.

***State v. Berrysmith***, 87 Wn.App. 268 (1997)

Trial court holds *in camera* hearing with defense counsel, following which court allows counsel to withdraw because counsel believed that defendant would commit perjury at trial; held: the question for the court is whether the lawyer reasonably believes defendant will commit perjury and not whether client in fact intends to commit perjury, at 275; while counsel's "gut level" suspicion is not enough to authorize withdrawal, here counsel established a firm factual basis; defendant has no constitutional right to be represented by an attorney who reasonably believes he will commit perjury, at 276; *see also: State v. James*, 48 Wn.App. 353, 366-7 (1987), *State v. Fleck*, 49 Wn.App. 584, 586 (1987) RPC 1.6, 1.15, 3.3; counsel should bring to court's attention his/her belief before defendant testifies rather than seek to withdraw afterwards, at 279, *Nix v. Whiteside*, 89 L.Ed.2d 123 (1986); I.

***State v. Holm,*** 91 Wn.App. 429, 434-39 (1998)

Prosecutor mails defense counsel guilty plea offer expiring at omnibus hearing which, if accepted, would result in sentence range of one-three months, defense counsel does not receive offer, never discusses with defendant pleading nor does defense counsel initiate plea bargaining, defendant misses numerous appointments with defense counsel, following trial defendant is sentenced to 75 months; held: under the facts of this case, counsel was not ineffective in failing to negotiate a plea offer or discuss the possibility with defendant; "situations might arise in which defense counsel must engage in plea bargaining without first consulting with the client," at 439, but here, defendant's failure to keep appointments precluded discussions; I.

***State v. Saunders,*** 91 Wn.App. 575 (1998)

In drug case, defense counsel elicits defendant's prior drug conviction during direct testimony, not having moved to exclude it, *State v. Hardy*, 133 Wn.2d 701, 706-13 (1997), and having no tactical reason for offering it; held: ineffective assistance; II.

***State v. Alires,*** 92 Wn.App. 931, 936-39 (1998)

In response to general question, "does anybody believe Hispanics are more likely to commit crimes," six jurors raise their hands, one of the jurors is questioned and is not seated, other five are not questioned individually, indicate they would be fair, defense counsel does not excuse the jurors, defendant claims ineffective assistance; held: jurors indicated they would be fair and impartial, counsel made a "trial decision" not to pursue the topic because it was unlikely court would excuse jurors for cause, and did not want to risk antagonizing jurors, thus counsel was effective; 2-1, III.

***State v. Cloud***, 95 Wn.App. 606, 611-16 (1999)

In a post-trial motion regarding ineffective assistance of trial counsel, it is error to permit trial counsel to intervene as a party; I.

***State v. Garza***, 99 Wn.App. 291 (2000)

Following escape attempt, jail guards seize legal materials from inmates, trial court concludes that documents were read, finds no prejudice and that state acted in good faith, denies dismissal; held: remanded for superior court to enter findings as to whether security concerns justified reading legal materials, precise articulation of what guards were looking for and why it might have been contained in legal materials and why reading was required; if security concerns did not justify specific level of intrusion, there is a presumption of prejudice, *State v. Peña Fuentes*, 179 Wn.2d 808 (2014), *State v. Irby*, 3 Wn.App.2d 247 (2018); even if there is no presumption of prejudice, defense may prove prejudice by demonstrating that evidence gained will be used at trial or that prosecution is using confidential information pertaining to defense strategies or that intrusions destroyed defendants' confidence in counsel or that intrusion will otherwise give state unfair advantage; even if prejudice is established, dismissal is not necessarily the appropriate remedy, *e.g.*, suppression may resolve the prejudice; *see: State v. Cory*, 62 Wn.2d 371, 373-74 (1963), 5 A.L.R.3rd 1352 (1963), *State v. Granacki*, 90 Wn.App. 598, 601-2 (1998) , *State v. Blizzard*, 195 Wn.App. 717, 732-33 (2016); III.

***Pers. Restraint of McCready***, 100 Wn.App. 259 (2000)

Defendant rejects plea offer to a lesser charge, is convicted of greater, proves that counsel did not advise him that mandatory minimum sentence after trial would be ten years, although he was advised that standard range would be more than ten years; held: because defendant might have accepted the plea offer had he known that he could not have obtained an exceptional sentence less than ten years, he was prejudiced by the insufficient advice of counsel, thus remanded for retrial; 2-1, III.

***State v. S.M.***, 100 Wn.App. 401, 409-13 (2000)

Where a legal assistant provides the only substantive advice to respondent regarding a guilty plea, and respondent only meets with counsel moments before the plea is entered, then defendant has been deprived of counsel; II.

***Pers. Restraint of Fleming***, 142 Wn.2d 853 (2001)

Where defense counsel has a psychological evaluation concluding that defendant is not competent, it is ineffective assistance not to raise competency with the trial court, and a subsequent guilty plea must be vacated; incompetency cannot be "waived," nor can there be a tactical decision not to raise it; 9-0.

***Pers. Restraint of Brett***, 142 Wn.2d 868 (2001)

When defense counsel knows or has reason to know of a capital defendant's medical and mental problems that are relevant to making an informed defense theory, defense counsel has a duty to conduct a reasonable investigation into medical and mental health, have such problems fully assessed and, if necessary, retain qualified experts to testify, failure to do so is ineffective

assistance, *State v. Fedoruk,* 184 Wn.App. 866, 878-84 (2014), *State v. K.A.B.,* 14 Wn.App.2d 677 (2020); 9-0.

***Pers. Restraint of Stenson***, 142 Wn.2d 710, 732-57 (2001)

Counsel's decision to "admit guilt" in penalty phase of capital trial falls "within the exclusive province of the lawyer," at 736, 1 ABA, STANDARDS FOR CRIMINAL JUSTICE std. 4-5.2 (2nd ed. Supp. 1986), *see: State v. Molina,* 16 Wn.App.2d 908 (2021), *but see: McCoy v. Louisiana,* 584 U.S. ___ , 138 S.Ct. 1500, 200 L.Ed.2d 821 (2018); failure or refusal of counsel to call witnesses requested by the defendant is not, by itself, ineffective assistance, as the decision to call witnesses rests with counsel, not with the defendant, at 741, *Taylor v. Illinois,* 98 L.Ed.2d 798 (1988), *State v. Piche,* 71 Wn.2d 583, 590 (1967); *see: State v. Stenson,* 132 Wn.2d 668 (1997); 8-1.

***Glover v. United States***, 148 L.Ed.2d 604 (2001)

Sentencing guideline error, not raised at sentencing or on appeal, is prejudicial, *Strickland v. Washington,* 80 L.Ed.2d 674 (1984); 9-0.

***State v. Hernandez-Hernandez***, 104 Wn.App. 263 (2001)

At sentencing, where defense presents mitigating factors but does not seek an exceptional sentence, counsel was effective, as trial court had authority to impose exceptional sentence on its own, *but see: State v. McGill,* 112 Wn.App. 95 (2002); III.

***State v. Wicker***, 105 Wn.App. 428 (2001)

Failure of counsel to timely comply with client's request to file a motion for revision 2 'from a trial before a commissioner is ineffective assistance; I.

***State v. Silva***, 106 Wn.App. 586 (2001)

Defense counsel's conceding guilt during closing argument to some charges for strategic purpose is not ineffective assistance, *cf.: Wiley v. Sowders,* 647 F.2d. 642, 644 (6th Cir. 1981); I.

***State v. Lopez***, 107 Wn.App. 270, 275-78 (2001)

In unlawful possession of firearm case, RCW 9.41.040, state offers no evidence of prior conviction of serious offense in its case-in-chief, defense counsel neglects to move to dismiss, defendant testifies and admits to prior serious offense; held: no tactical or strategic reason could flow from counsel's failure, defendant was prejudiced, thus reversed; III.

***State v. McGill***, 112 Wn.App. 95, 101-02 (2002)

Failure to cite relevant caselaw in support of an exceptional sentence is ineffective assistance, depriving trial court of making an informed decision, *but see: State v. Hernandez-Hernandez,* 104 Wn.App. 263 (2001), *State v. Knight,* 176 Wn.App. 936, 957-58 (2013); I.

***State v. Shaver***, 116 Wn.App. 375, 381-85 (2003)

Counsel's failure to learn that defendant had a prior out-of-state drug conviction and thus failure to move *in limine* to exclude defendant's impeachment is ineffective assistance; 2-1, III.

***State v. Horton***, 116 Wn.App. 909 (2003)

In rape of a child trial, complainant denies on direct that she had previously engaged in sexual intercourse, defense does not ask on cross to explain or deny her pretrial statement to the contrary, defense allows witness to be excused, ER 612(b), offers extrinsic evidence of inconsistency which is refused because witness was not given opportunity to explain or deny, ER 613(b); held: because foundation for impeachment may be laid during cross or after extrinsic evidence is admitted by recalling the witness, *State v. Johnson*, 90 Wn.App. 54, 63-72 (1998), counsel's performance was deficient; failure to object to prosecutor's closing that state believes defendant lied is ineffective assistance, *see: State v. Sargent*, 40 Wn.App. 340, 343-44 (1985), *rev'd, on other grounds,* 111 Wn.2d 641 (1988); II.

***State v. Rodriguez***, 121 Wn.App. 180, 184 (2004)

Proposing a flawed self-defense instruction is ineffective assistance, *State v. Kyllo*, 166 Wn.2d 856 (2009), *but see: State v. Lucero*, 140 Wn.App. 782, 785-87 (2007), 152 Wn.App. 287, 291-92 (2009); III.

***State v. Webbe***, 122 Wn.App. 683 (2004)

Defendant demands a jury trial on competency, RCW 10.77.090(4), defense counsel proposes to testify as to his opinion that defendant is not competent, trial court decides that, if counsel testifies, defendant has waived the attorney-client privilege, orders defense to turn over client interview notes to prosecutor as discovery, later appoints guardian *ad litem* to determine whether defendant should waive his privilege for purposes of competency hearing, guardian informs court that it is not in defendant's best interests to waive privilege, court orders prosecutors to return interview notes, defense counsel does not testify, defendant found competent, challenges involuntary waiver on appeal; held: trial court has inherent authority to appoint guardian *ad litem;* while court should have inquired of counsel whether defendant actually waived prior to ordering discovery of counsel's notes, because counsel was acting as a vigorous, loyal advocate, defendant must show prejudice for counsel's improperly allowing court to assume waiver when it did not exist; because defendant's testimony was consistent with notes, no prejudice occurred; I.

***Florida v. Nixon***, 160 L.Ed.2d 565 (2004)

In capital murder case, defendant neither approves nor protests defense counsel's disclosed strategy to admit the crime during the fact-finding stage and focus on mitigation during penalty phase; held: there is no presumption of deficient performance where counsel's representation does not fall below an objective standard of reasonableness, *Strickland v. Washington,* 80 L.Ed.2d 674 (1984), where counsel has discussed potential strategies with the defendant who does not expressly consent to a tenable strategy, *cf.: McCoy v. Louisiana,* 584 U.S. ___ , 138 S.Ct. 1500, 200 L.Ed.2d 821 (2018), *State v. Molina,* 16 Wn.App.2d 908 (2021), distinguishing *United States v. Cronic*, 80 L.Ed.2d 657 (1984); 8-0.

***State v. Carter***, 127 Wn.App. 713 (2005)

In unlawful possession of firearm case, trial court instructs that state must prove knowledge, *State v. Anderson*, 141 Wn.2d 357, 366 (2000), and gives defense proposed instruction on unwitting possession; held: because jury was misled to believe defendant had the burden, defendant was prejudiced by ineffective assistance; 2-1, III.

***State v. McSorley***, 128 Wn.App. 598, 605-10 (2005)

Failure of defense counsel to investigate child luring defendant's claim that he was where he was in order to make a doctor's appointment rather than trolling to lure children where, after trial, evidence is shown that defendant did have such an appointment is ineffective assistance; failure to object to hearsay that defendant did not have such an appointment is ineffective assistance; II.

***State v. Cross***, 156 Wn.2d 580, 605-10 (2006)

In capital penalty phase, defense presents mental health evidence over defendant's objection; held: details of strategy are generally for counsel, not the client, to decide; when the relationship between lawyer and client completely collapses, the refusal to substitue new counsel is a violation of Sixth Amendment right to effective assistance, *Pers. Restraint of Stenson*, 142 Wn.2d 710, 722 (2001), however there is a difference between a complete collapse and mere lack of accord, *see: Morris v. Slappy*, 75 L.Ed.2d 610 (1983), *State v. Levy*, 156 Wn.2d 709, 729 ¶ 43 (2006), *State v. Schaller*, 143 Wn.App. 258 (2007) , *State v. Lindsey*, 188 Wn.App. 233, 248-50 (2013), *State v. Elwell*, 199 Wn.2d 256 (2022); 5-4.

***State v. Riofta***, 134 Wn.App. 669, 692-96 (2006), *aff'd, on other grounds,* 166 Wn.2d 358 (2009)

Failure of defense counsel to seek DNA testing here was not ineffective assistance as legitimate tactical reasons support the decision, specifically that there was significant evidence of guilt and that counsel "likely feared that Riofta's DNA would be discovered…inculpating Riofta beyond a reasonable doubt," *but see*: CrR 3.1(f)(2); II.

***State v. Crawford***, 159 Wn.2d 86 (2006)

Neither prosecutor nor defense counsel are aware before trial that out-of-state priors were strikes, defense is aware of out-of-state conviction but does not investigate it to determine if it's a strike, defendant rejects plea bargain believing standard range is 57-75 months, is convicted at trial and sentenced to life without parole; held: failure to investigate and advise defendant of mandatory minimum sentence, while deficient, is not ineffective assistance, as defense failed to "affirmatively prove prejudice, not simply show that the 'errors had some conceivable effect on the outcome,'" *Strickland v. Washington*, 80 L.Ed.2d 674 (1984), *but see: Pers. Restraint of Crawford*, 150 Wn.App. 787 (2009), *State v. Estes*, 188 Wn.2d 450 (2017), *Pers. Restraint of James*, 190 Wn.2d 686 (2018); reverses *State v. Crawford*, 128 Wn.App. 376 (2005); 5-4.

***State v. B.J.S.***, 137 Wn.App. 622, 631-33 (2007)

After juvenile is found guilty of burglary at a trial, defense counsel moves for a deferred disposition, RCW 13.40.127(1), and, when informed that the motion was untimely, respondent alleges ineffective assistance; held: while counsel's failure to advise client properly fell below an

objective standard of reasonableness, satisfying first prong of *Strickland v. Washington*, 80 L.Ed.2d 674 (1984), there is nothing to show that the juvenile court judge would have deferred disposition had he moved for it in a timely fashion, thus respondent did not establish the prejudice prong, *see: State v. Cox*, 109 Wn.App. 937, 941 (2002); II.

***State v. Varnell***, 137 Wn.App. 925, 931-33 (2007)

Defense counsel has implied authority to waive procedural matters on client's behalf, here a drug court termination hearing where defendant asked in open court to be terminated, *see: State v. Ford*, 125 Wn.2d 919, 922 (1995), *State v. Fanger*, 34 Wn.App. 635, 637 (1983); II.

***Pers. Restraint of Elmore***, 162 Wn.2d 236, 259-61 (2007)

While counsel is obliged to object to shackling of defendant, *Pers. Restraint of Davis*, 152 Wn.2d 647, 699 (2004), shackling here was harmless as he was only shackled on first day of penalty phase jury selection, trial strategy was to demonstrate remorse and accept responsibility, *but see: State v. Jackson*, 195 Wn.2d 841 (2020); 8-1.

***Pers. Restraint of Hubert***, 138 Wn.App. 924 (2007)

Defendant is convicted of attempted rape 2º for raping a drunk woman, defense counsel fails to offer instruction on the defense that defendant reasonably believed the person was not mentally incapacitated, RCW 9A.44.030(1); held: it is ineffective assistance for counsel to fail to advance a defense authorized by statute where there is evidence to support the defense, *State v. Powell*, 150 Wn.App. 139 (2009); I.

***State v. B.J.S.***, 140 Wn.App. 91, 100-02 (2007)

Defense counsel erroneously advises respondent that he is eligible for a deferred disposition, RCW 13.40.127(1), if convicted after a trial; held: in light of trial court's comments in favor of rehabilitation, it is likely it would have "preferred" a deferred disposition, thus counsel's error establishes prejudice; II.

***State v. Borsheim***, 140 Wn.App. 357, 375-77 (2007)

While it is ineffective assistance for an attorney to actually prevent a defendant from testifying, defendant must prove the attorney refused to allow him to testify in the face of defendant's unequivocal demands that he be allowed to testify, *State v. Robinson*, 138 Wn.2d 753 (1999), *see also: State v. Lee*, 12 Wn.App.2d 378 (2020); I.

***State v. Castro***, 141 Wn.App. 485, 492-93 (2007)

In child molestation case, defense counsel does not challenge for cause a juror who disclosed during voir dire that she had been molested but declared she could be impartial; held: it is a legitimate trial strategy not to challenge a juror who states she can be impartial; III.

***State v. Hicks***, 163 Wn.2d 477, 486-89 (2008), *overruled, State v. Pierce*, 195 Wn.2d 230 (2020)

Defense counsel informing a jury in a non-capital murder case that the death penalty is not an option, *State v. Townsend*, 142 Wn.2d 838 (2001), *State v. Mason*, 160 Wn.2d 910, 929 (2007), and failing to object when the trial court and prosecution make a similar reference is

ineffective assistance, *but see: State v. Rafay,* 168 Wn.App. 734, 774-81 (2012), *State v. Clark,* 187 Wn.2d 641 (2017), harmless here; 6-3.

***Pers. Restraint of Reise***, 146 Wn.App. 772, 786-89 (2008)

Defendant's claim that defense counsel misinformed him of the sentence that would be imposed is not a basis to withdraw a plea where the guilty plea statement and the court at the time of entry of the plea correctly advised defendant of the range; alleged misinformation about good time is a collateral consequence and, absent a showing that defendant would not have pled guilty otherwise is not a basis to withdraw plea, *State v. Stowe*, 71 Wn.App. 415, 418-22 (1997), *State v. Vermillion*, 112 Wn.App. 844 (2002); 7-2182 (1993); defendant's claim that defense counsel told him he would be paroled, which is a direct consequence of a plea, is "so outrageous that it is not credible on its face," at 789 ¶ 28; II.

***Knowles v. Mirzayance***, 173 L.Ed.2d 251 (2009)

Counsel's recommending withdrawal of insanity plea that he "reasonably believed was a claim doomed to fail," even with nothing to lose by pursuing it, is not ineffective assistance; 9-0.

***State v. Sutherby***, 165 Wn.2d 870, 883-88 (2009)

Failure to seek severance of counts where there is a reasonable probability that trial court would have granted the motion and outcome at a separate trial would have been different is ineffective assistance; 6-3.

***State v. Kyllo***, 166 Wn.2d 856 (2009)

If instructional error is the result of ineffective assistance of counsel, the invited error doctrine does not preclude review, *State v. Aho*, 137 Wn.2d 736, 745 (1999), *but see: State v. Studd*, 137 Wn.2d 533 (1999), *Seattle v. Patu*, 147 Wn.2d 717 (2002); in a non-homicide self defense case, where defense proposes and court gives an "act on appearances" instruction, WPIC 17.04, but substitutes "injury" with "great bodily injury," it is ineffective assistance; 9-0.

***State v. Yarbrough***, 151 Wn.App. 66, 89-94 (2009)

Failure to request a limiting instruction for ER 404(b) evidence may be a legitimate tactical decision and thus is not ineffective assistance, *State v. Embry,* 171 Wn.App. 714, 762-63 (2012), *State v. Humphries,* 181 Wn.2d 708, 719-21 (2014); II.

***Pers. Restraint of Nichols***, 151 Wn.App. 262, 272-75 (2009)

Where counsel moves to suppress evidence on one ground but does not anticipate a law change on a different ground, it is not ineffective assistance, *State v. Nichols,* 161 Wn.2d 1, 15 (2007), *State v. Studd,* 137 Wn.2d 533, 551 (1999); I.

***State v. A.N.J.***, 168 Wn.2d 91 (2010)

Twelve-year old respondent pleads guilty to child molestation 1°, counsel having erroneously advised respondent that he "believes" the conviction may be removed from his record, only speaks to respondent in the presence of his parents, does no investigation, trial court

fails to ascertain if respondent understood that mere contact with the genitals of another is not sufficient to prove the crime; held: juvenile sex offenses never go away, RCW 9.94A.525(2) (2008), while failure to advise that the conviction would remain on respondent's record may not rise to a manifest injustice itself, where respondent is misinformed, he should be allowed to withdraw his plea; failure of counsel to consult with a client in a confidential manner is a factor that may be considered in determining whether a plea is voluntary; public defense contract that requires counsel to pay investigative, expert and conflict fees out of the defender's fees is evidence of ineffective assistance; 9-0.

***State v. Mullins***, 158 Wn.App. 360, 364-70 (2010)

In this murder 1° case, it was not objectively unreasonable for counsel to pursue a strategy of acquittal only and not request a murder 2° lesser instruction, *State v. Grier*, 171 Wn.2d 17 (2011), *State v. Hassan*, 151 Wn.App. 209 (2009), *State v. Classen*, 4 Wn.App.2d 520, 539-44 (2018), distinguishing, *State v. Ward*, 125 Wn.App. 243 (2004), *State v. Pittman*, 134 Wn.App. 376, 387-90 (2006); I.

***Harrington v. Richter***, 562 U.S. 86 178 L.Ed.2d 624 (2011)

*Habeas* petitioner argues that defense counsel failed to consult blood evidence experts; held: appellate courts must avoid second-guessing counsel's assistance, *Strickland v. Washington*, 466 U.S. 668, 689, 80 L.Ed.2d 674 (1984), should evaluate conduct from counsel's perspective at the time; "[e]ven if it had been apparent that expert blood testimony could support Richter's defense, it would be reasonable to conclude that a competent attorney might elect not to use it," 178 L.Ed.2d at 644; "[j]ust as there is no expectation that competent counsel will be a flawless strategist or tactician, an attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for what appear to be remote possibilities," 178 L.Ed.2d at 646, *see also: Premo v. Moore*, 562 U.S. 115, 178 L.Ed.2d 649 (2011); 8-0.

***State v. Grier***, 171 Wn.2d 17 (2011)

In murder case, counsel submits manslaughter lessers then withdraws them, defendant agrees on the record upon inquiry of the court, counsel argues self defense and reasonable doubt, defendant is convicted, appeals claiming ineffective assistance for failure to request lessers; held: decision whether or not to seek lessers is a tactical decision by counsel with consultation with client, defendant's waiver does not preclude a claim of ineffective assistance; choosing not to request lessers is a tactical decision by counsel and is not ineffective assistance; counsel's decision to proceed with an all or nothing approach is a proper tactic regardless of the lesser penalty of the lesser, *State v. Conway*, ___ Wn.App.2d ___, 519 P.3d 257 (2022), *cf.: State v. Classen*, 4 Wn.App.2d 520, 539-44 (2018), reversing *State v. Grier*, 150 Wn.App. 619 (2009), overruling *State v. Ward*, 125 Wn.App. 243 (2004), *State v. Pittman*, 134 Wn.App. 376, 387-90 (2006); 9-0.

***Pers. Restraint of Monschke***, 160 Wn.App. 479 (2011)

Defense counsel's strategic decision to call an expert with whom counsel meets right before trial is not ineffective even if the witness volunteers information from the stand which

arguably damages defendant; there is no absolute requirement that counsel interview witnesses before trial, *Pers. Restraint of Pirtle,* 136 Wn.2d 467, 488 (1998), *Pers. Restraint of Stenson,* 142 Wn.2d 710, 754-57 (2001); II.

***State v. Larson***, 160 Wn.App. 577, 589-90 (2011)

Failure to subpoena a jailed co-defendant who had pleaded guilty inculpating defendant but who also made statements exculpating defendant is not ineffective assistance as it was a reasonable tactic, balancing positive effect of exculpatory evidence against negative effect of prior incriminating evidence; III.

***State v. Chavez***, 162 Wn.App. 431 (2011)

Defense counsel advises court that he has a conflict of interest, court permits him to withdraw from one count that was severed but not on other counts, defendant pleads guilty then seeks to withdraw plea, court appoints another lawyer who files what he calls an *Anders* brief, *Anders v. California,* 386 U.S. 738, 18 L.Ed.2d 493 (1967), declaring there are no non-frivolous grounds to withdraw plea, trial court denies motion; held: combination of conflict that was inadequately developed by trial court, *Mickens v. Taylor,* 535 U.S. 162, 167, 152 L.Ed.2d 291 (2002), *Holloway v. Arkansas,* 435 U.S. 475, 55 L.Ed.2d 426 (1978), plus new counsel's effective abandonment of defendant's motion requires remand for trial court to take a "second look at the motion to withdraw" the plea; 2-1, III.

***Missouri v. Frye***, 566 U.S. 134, 182 L.Ed.2d 379 (2012)

Where prosecutor makes a formal plea offer, favorable to the defendant, with a fixed expiration date, counsel's failure to communicate the offer to the client is ineffective assistance; to get relief, defendant must show a reasonable probability he would have accepted the plea offer and that there is a reasonable probability that the prosecutor would not have withdrawn it and that the trial court would have accepted the offer; formal plea offers may be made part of the record; 6-3.

***Lafler v. Cooper,*** 566 U.S. 156, 163, 132 S.Ct. 1376, 182 L.Ed.2d 398 (2012)

Counsel communicates a favorable plea offer to client and advises client to reject it, defendant is convicted and receives a harsher sentence, parties concede on appeal that counsel's advice to reject the plea offer was based upon an erroneous reading of the law and thus was ineffective; held: where ineffective advice leads to a plea offer's rejection, conviction at trial and a harsher sentence, defendant must show that there is a reasonable probability that defendant would have pleaded guilty and that the sentence would have been less; remedy may be resentencing or, if the plea offer was to a lesser charge, court may order prosecutor to reoffer the plea proposal, *State v. Drath,* 7 Wn.App.2d 255 (2018); court leaves open the scenario that, after the plea is rejected, prosecutor learns of new information about defendant's culpability; 5-4.

***State v. Perez***, 166 Wn.App. 55, 61-63 (2012)

In eluding case, defendant testified that he did not see lights or hear a siren, defense counsel did not request an instruction on the affirmative defense that a reasonable person would not believe the signal to stop was given by a police officer, RCW 46.61.024(2) (2010); held:

defendant must show that counsel's failure to request the instruction was other than tactical, defendant would have had to prove the affirmative defense, state had to prove that conduct was willful; III.

***State v. Chetty***, 167 Wn.App. 432 (2012)

Following stipulated facts trial in 2004, defendant-resident alien does not appeal, after deportation proceedings are commenced defendant seeks to extend perior of time to appeal, avers that counsel did not advise that he was deportable, that counsel said an appeal was a waste of time, and that if immigration issues arose I should not volunteer information; held: failure to provide advice on deportation consequences of a plea being ineffective assistance, *State v. Sandoval*, 171 Wn.2d 163 (2011), *Padilla v. Kentucky*, 559 U.S. 356, 176 L.Ed.2d 284 (2010), *see: Chaidez v. United States*, 568 U.S. 342, 185 L.Ed.2d 149 (2013), failure to so advise may impact proper advice regarding right to appeal, remanded for evidentiary hearing as to whether counsel's performance was deficient and whether defendant knowingly, voluntarily and intelligently waived right to appeal, *see: State v. Chetty*, 184 Wn.App. 607 (2014); I.

***State v. Gomez Cervantes***, 169 Wn.App. 428 (2012)

In a motion to vacate a judgment and sentence, CrR 7.8, a bare statement that "counsel did not inform him of the immigration implications of his plea" is insufficient to show the "deficient performance" prong to establish ineffective assistance, *see: Pers. Restraint of Rice*, 117 Wn.2d 876, 886 (1992); III.

***State v. Edwards***, 171 Wn.App. 379, 393-400 (2012)

Prior to child molestation trial, state offers a SSOSA, defense counsel explains the offer to defendant and recommends against it, defendant is convicted, argues inadequate advice; held: while effective assistance extends to plea negotiations, *Lafler v. Cooper*, 566 U.S. 156, 163, 132 S.Ct. 1376, 182 L.Ed.2d 398 (2012), *Missouri v. Frye*, 566 U.S. 134, 182 L.Ed.2d 379 (2012), *Pers. Restraint of James*, 190 Wn.2d 686 (2018), *see: Burt v. Titlow*, 571 U.S. 12, 187 L.Ed.2d 348 (2013), *State v. Estes*, 188 Wn.2d 450 (2017), where evidence establishes that counsel reasonably evaluated the evidence and where defendant does not show a reasonable probability that he would have accepted a plea agreement, counsel's representation does not prejudice defendant; where counsel does not submit instructions for a lesser included offense, defendant's assertion that counsel did not consult him and his post-trial declaration that he would have asked counsel to seek a lesser is hindsight, absent evidence in the record of a failure to consult, defense has not established the counsel's performance was deficient, *State v. Grier*, 171 Wn.2d 17 (2011); II.

***Pers. Restraint of Morris***, 176 Wn.2d 157, 165-68 (2012)

Appellate counsel's failure to raise a public trial right violation is ineffective assistance, *but see: Pers. Restraint of Speight*, 182 Wn.2d 103 (2014), *Pers. Restraint of Coggin*, 182 Wn.2d 115 (2014), *cf.: Pers. Restraint of Eagle*, 195 Wn.App. 51 (2016), *but see: Weaver v. Massachusetts*, 137 S. Ct. 1899, 1905, 198 L. Ed. 2d 420 (2017), *Pers. Restraint of Salinas*, 189 Wn.2d 747 (2018); 5-4.

***Hinton v. Alabama***, 571 U.S. 263,188 L.Ed.2d 1 (2014)

Defense counsel, erroneously believing that there was a cap on what could be appropriated to hire an expert, retains a one-eyed firearms examiner who is badly impeached on cross; held: while selection of an expert witness is a strategic decision that is "virtually unchallengeable," counsel's error of law which caused him to retain an expert that counsel agreed was inadequate was ineffective assistance; *per curiam.*

***Pers. Restraint of Gomez***, 180 Wn.2d 337 (2014)

Failure of counsel to meet prevailing professional standards, here Washington Defender Association's *Standards for Public Defense Services,* endorsed by WSBA Board of Governors, may serve as a guide for determining what is reasonable but is not a checklist for evaluating attorney performance, at 351-52; allegation that defense counsel used unqualified interpreters in speaking with defendant is not error unless defense shows defendant was prejudiced, at 353-54; where counsel obtains an expert who generally supports defense theory of the case it is not ineffective assistance if counsel did not search the entire country for experts or find multiple witness who could provide the most favorable opinion, at 356-57; 5-4.

***State v. Humphries***, 181 Wn.2d 708 (2014)

Failure of defense counsel to request a limiting instruction regarding a prior conviction is presumed to be a reasonable tactical decision; 6-3.

***Pers. Restraint of D'Allesandro***, 178 Wn.App. 457 (2013)

Failure to raise a valid public trial issue in a petition for review from direct appeal is ineffective assistance; II.

***State v . Cobos***, 178 Wn.App. 692 (2013), *aff'd, on other grounds,* 182 Wn.2d 12 (2014)

Defendant moves to represent himself at sentencing, before court approves defense counsel agrees to offender score of 9, at sentencing defendant objects to offender score, court offers continuance for state to prove priors, defendant declines, court accepts counsel's agreement; held: counsel's agreement while defendant's motion to represent himself was improper, *Haller v. Wallis,* 89 Wn.2d 539, 547 (1978), as an attorney can waive substantive rights only with specific authorization, *State v. Ford,* 125 Wn.2d 919, 922 (1995), *Graves v. P.J. Taggares Co.*, 94 Wn.2d 298, 303 (1980), *State v. Sain,* 34 Wn.App. 553, 556-57 (1983); III.

***State v. Kloepper***, 179 Wn.App. 343, 354-56 (2014)

Officer testifies that defendant's photograph is in a system used to record contacts with police, counsel does not object; held: the decision of when or whether to object is a "classic example of trial tactics. Only in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel," *State v. Madison,* 53 Wn.App. 754, 763 (1989); 2-1, III.

***State v. Carson***, 179 Wn.App. 961, 972-80 (2014)

In 3-count child rape case with identical to convict instructions defense counsel objects to unanimity instruction, *State v. Petrich,* 101 Wn.2d 566 (1984), *overruled on other grounds, State*

*v. Kitchen*, 110 Wn.2d 403 (1988), arguing it's unnecessary and confusing, trial court doesn't so instruct, on appeal defense raises ineffective assistance; held: invited error doctrine precludes claiming error, *State v. Corbett*, 158 Wn.App. 576, 585-92 (2010), counsel's decision was a reasonable trial strategy; 2-1, II.

***State v. Johnson***, 180 Wn.App. 92, 105-07 (2014)

Over objection of the defendant, defense counsel recommends high end of standard range which court imposes; held: "even assuming defense counsel's performance was deficient," defense fails to show prejudice as sentencing judge considered factors supporting a more lenient sentence and exercised its broad discretion thus defendant failed to show a reasonable probability that any defective performance affected the sentence, *State v. Goldberg*, 123 Wn.App. 848, 853 (2004); I.

***Pers. Restraint of Ramos***, 181 Wn.App. 743 (2014)

Defendant pleads guilty to theft 1° in 1997, told in plea statement that a plea of guilty may result in deportation, filed PRP seeking to vacate plea maintaining counsel did not inquire as to immigration consequences and that he is subject to mandatory deportation; held: Court of Appeals role is to decide "on our own" if defendant's conviction is one for an "aggravated felony," an immigration lawyer's opinion is not binding as questions of law are not the subject of expert testimony; as fraud and deceit "did not infect" defendant's theft per probable cause affidavit or plea, crime is not an aggravated felony nor does it involve moral turpitude, if the law is not succinct and straightforward, counsel must provide only a general warning of a risk of adverse immigration consequences, *Padilla v. Kentucky*, 559 U.S. 356, 369, 176 L.Ed.2d 284 (2010), *see: State v. Sandoval*, 171 Wn.2d 163 (2011), thus counsel was not ineffective, PRP denied; III.

***Woods v. Donald***, 575 U.S. 312, 135 S.Ct. 464, 191 L.Ed.2d 464 (2015)

Counsel's brief absence from court during testimony regarding codefendants is not a *per se* violation of the Sixth Amendment; *per curiam.*

***Pers. Restraint of Yung-Cheng Tsai***, 183 Wn.2d 91 (2015)

*Padilla v. Kentucky*, 559 U.S. 356, 176 L.Ed.2d 284 (2010), requiring counsel to provide advice about risk of deportation, is retroactive in Washington, *Pers. Restraint of Orantes*, 197 Wn.App. 737 (2017), *Pers. Restraint of Garcia-Mendoza*, 196 Wn.2d 836 (2021), distinguishing *Chaidez v. United States*, 568 U.S. 342, 185 L.Ed.2d 149 (2013); affirms *Pers. Restraint of Jagana*, 170 Wn.App. 32 (2012); 5-4.

***State v. Maynard***, 183 Wn.2d 253 (2015)

Charge filed before respondent turns 18, defense fails to seek extension of jurisdiction, court dismisses after respondent's birthday, charge is refiled in adult court which dismisses for ineffective assistance of counsel; held: because juvenile court did not lose jurisdiction because of pre-accusatorial delay, *State v. Dixon*, 114 Wn.2d 857, 860-61 (1990), here the charge was filed affording respondent opportunity to seek extension, thus delay is not a basis to dismiss; counsel

was ineffective, defendant was prejudiced, remedy is to remand for further proceedings in accordance with Juvenile Justice Act, state is ordered to reoffer plea proposal of deferred disposition, trial court may impose a juvenile disposition, *State v. Posey,* 174 Wn.2d 131 (2012), distinguishing *Pers. Restraint of Dalluge,* 152 Wn.2d 772 (2004); reverses, in part, *State v. Maynard,* 178 Wn.App. 413 (2013); 5-4.

***State v. Jones****,* 183 Wn.2d 327 (2015)

Failure to interview identified witnesses is deficient performance absent some reason from defense counsel why the witnesses were not interviewed; an uninformed or unreasonable failure to interview a witness is not a strategic decision to which courts must defer; here, the case involved a credibility contest and, while the state's witnesses outnumbered defense witnesses even if the uninterviewed witnesses had been called, there is a reasonable probability that it would have affected the outcome, undermining supreme court's confidence in the verdict rejecting self-defense claim; 5-4.

***State v. Carson****,* 184 Wn.2d 207 (2015)

In 3-count child rape case with identical to convict instructions defense counsel objects to unanimity instruction, *State v. Petrich,* 101 Wn.2d 566 (1984), *overruled on other grounds, State v. Kitchen,* 110 Wn.2d 403 (1988), arguing it's unnecessary and confusing, trial court doesn't so instruct, on appeal defense raises ineffective assistance; held: invited error doctrine precludes claiming error, *State v. Corbett,* 158 Wn.App. 576, 585-92 (2010), counsel's decision was a reasonable trial strategy; affirms *State v. Carson,* 179 Wn.App. 961, 972-80 (2014); 9-0.

***State v. Fedoruk***,184 Wn.App. 866, 878-884 (2014)

Shortly before trial defense moves for continuance to pursue mental illness defense, defendant having been previously acquitted of crimes by reason of insanity and having been civilly committed, trial court denies continuance; held: failure to investigate a mental health defense where the record establishes the crime was bizarre, a competency evaluation showed a major mental illness and a history of mental illness is ineffective assistance, *Pers. Restraint of Brett,* 142 Wn.2d 868 (2001), *State v. K.A.B.,* 14 Wn.App.2d 677 (2020); II.

***State v. West****,* 185 Wn.App. 625 (2015)

Failure to make a motion to acquit, RCW 10.77.080 (1998), is not ineffective assistance where, here, jury rejected defendant's insanity defense; III.

***State v. Lawler****,* 194 Wn.App. 275 (2016)

Juror expresses doubt that he can be objective, defense counsel does not challenge for cause or exercise peremptory challenge; held: because defense cannot establish the absence of any conceivable legitimate tactic for not excusing a juror defense has not overcome the presumption of effective performance; II.

***Pers. Restraint of Eagle****,* 195 Wn.App. 51 (2016)

Arraignment on amended information in chambers violates public trial right absent *Boneclub* findings but on collateral review defense must show prejudice, *Pers. Restraint of*

*Speight*, 182 Wn.2d 103 (2014), absent here; while failure to raise a public trial issue on direct appeal is ineffective assistance and prejudice need not be proved by defense, *Pers. Restraint of Speight*, 182 Wn.2d 103 (2014), *Pers. Restraint of Morris*, 176 Wn.2d 157, 166 (2012), remedy is not automatically a new trial, *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1905, 198 L. Ed. 2d 420 (2017), *Pers. Restraint of Salinas*, 189 Wn.2d 747 (2018), unless the public trial right was violated during the trial itself, *State v. Rainey*, 180 Wn.App 830, 843 (2014), *Waller v. Georgia*, 467 U.S. 39, 81 L.Ed.2d 31 (1984), most defendant is entitled to is a public arraignment; I.

***State v. Ortiz***, 196 Wn.App. 301 (2016)

Failure to raise a meritorious knock and announce violation is ineffective assistance; III.

***Pers. Restraint of Caldwell's***, 187 Wn.2d 127, 140-43 (2016)

In murder by extreme indifference case, RCW 9A.32.030(1)(b) (1990), defense counsel's failure to request self-defense instruction and instead argues excusable homicide is a legitimate trial tactic; one cannot "kill by accident and claim that the homicide was justifiable." *State v. Brightman*, 155 Wn.2d 506, 525, 122 P.3d 150 (2005); 9-0.

***State v. Flores***, 197 Wn.App. 1 (2016)

Defendant is represented by a lawyer who does not meet the Standards for Indigent Defense (SID), CrR 3.1 *ff.*, requisite experience; held: violation of SID is evidence of deficient performance but does not constitute ineffective assistance *per se;* III.

***Weaver v. Massachusetts***, 137 S. Ct. 1899, 1905, 198 L. Ed. 2d 420 (2017)

While violation of open courts doctrine is structural error, when raised in the context of ineffective assistance because it was not preserved defense must prove prejudice, *State v. Salinas*, 189 Wn.2d 747 (2018); 7-2.

***State v. Estes***, 188 Wn.2d 450 (2017)

Defense counsel, unaware that conviction of any felony with a deadly weapon enhancement is a strike offense, RCW 9.94A.030(33)(t) (2000), -.570 (2016), does not plea bargain, defendant is convicted of lesser assault 3° with a deadly weapon, sentenced to life without parole; held: where failure to plea bargain is based on ignorance of the law and failure to advise of the potential consequences of failing to negotiate, prejudice is demonstrated and counsel is ineffective, *State v. James*, 48 Wn.App. 353 (1987), *cf.: State v. Edwards*, 171 Wn.App. 379 (2012), *State v. Crawford*, 159 Wn.2d 86, 100 (2006), *Pers. Restraint of James*, 190 Wn.2d 686 (2018), *see: State v. Drath*, 7 Wn.App.2d 255 (2018); affirms *State v. Estes*, 193 Wn.App. 479 (2016); 9-0.

***State v. Clark***, 187 Wn.2d 641 (2017), *overruled, State v. Pierce*, 195 Wn.2d 230 (2020)

In non-capital murder case court invites counsel to handle issue of telling jury it's not a death penalty case as appropriate, state informs some jurors during individual voir dire, defense does not object; held: absent proof of prejudice informing jury that a murder case is not a death penalty case is not ineffective assistance, *but see: State v. Townsend*, 142 Wn.2d 838, 846-49 (2017); 5-4.

***Pers. Restraint of Sanchez***, 197 Wn.App. 686 (2017)

At arraignment on aggravated murder charge counsel does not appear, photographers are present and film, court enters not guilty plea for defendant, case is based, in part, on eyewitness identification, witness may have seen press coverage before identification is made; held: arraignment is a critical stage, *Hamilton v. Alabama*, 368 U.S. 52, 82 S.Ct,. 157, 7 L.Ed.2d 114 (1961), *Powell v. Alabama*, 287 U.S. 45, 57, 69, 53 S.Ct. 55, 77 L.Ed. 158 (1932), CrR 3.1(b)(1), failure to provide counsel is arguably structural error, *but see: State v. Scherf*, 192 Wn.2d 350 (2018), but constitutional harmless error analysis applies, absent a risk of waiving rights or foregoing defenses it is harmless, *see: State v. Jackson*, 66 Wn.2d 24 (1965); record does not establish what was filmed or broadcast from the arraignment, defense cross-examined eyewitness about possible misidentification, thus error, if any, was harmless; III.

***McCoy v. Louisiana***, 584 U.S. ___ , 138 S.Ct. 1500, 200 L.Ed.2d 821 (2018)

Defendant denies guilt to counsel and testifies to innocence in spite of overwhelming evidence to the contrary, counsel argues to jury that defendant committed the crime but seeks lesser, jury convicts of greater; held: Sixth Amendment guarantees a defendant the right to choose the objective of his defense and to insist that his counsel refrain from admitting guilt, even when counsel's experienced-based view is that confessing guilt offers the defendant the best chance to avoid the death penalty, *cf.: State v. Molina*, 16 Wn.App.2d 908 (2021), distinguishing *Florida v. Nixon*, 160 L.Ed.2d 565 (2004); counsel's admission of a client's guilt over the client's express objection is error "structural in kind;" 6-3.

***State v. Lopez***, 190 Wn.2d 104, 410 P.3d 1117 (2018)

Trial judge grants new trial, finding that defense counsel was depressed which severely handicapped his performance, failed to appear in court regularly, failed to complete investigation and request funding to complete investigative tasks that he had ordered, based upon judge's observations of counsel at trial, evidence from counsel's mental health provider, and testimony of investigator; held: while mental illness alone is not a basis to find ineffective assistance but coupled with poor trial performance and failure to adequately investigate supports motion for a new trial; 5-4.

***State v. Linville***, 191 Wn.2d 513 (2018)

Defendant is convicted of one count of "leading organized crime," in violation of Washington's Criminal Profiteering Act (CPA), RCW 9A.82.060(l)(a), plus 137 other offenses, some of which were crimes listed in RCW 9A.82.010(4) as predicate offenses, which, when combined, form the requisite "pattern of criminal profiteering" on which the umbrella crime called "leading organized crime" is based but some of these 137 other offenses were not listed in RCW 9A.82.010(4) as predicate crimes, RCW 9A.82.085 ("joinder bar") prohibits joinder of non-predicate crimes in a single prosecution, defense does not move to sever, defendant claims ineffective assistance on appeal; held: while the statutory list of predicate profiteering crimes is exclusive and thus defendant would have had a right to a severance, the record fails to reflect why defense counsel failed to object, which could have been tactical to avoid separate

convictions and sentencings which can only be established by collateral attack; reverses *State v. Linville,* 199 Wn.App. 461 (2017); 9-0.

***State v. Salas***, 1 Wn.App.2d 931, 947-52 (2018)

Where defendant makes an incriminating statement to a physician examining him, and defense counsel does not object, defense has been ineffective; I.

***Pers. Restraint of Burlingame***, 3 Wn.App.2d 600 (2018)

Defendant is charged with rape 3°, defense counsel has discovery prior to arraignment, defendant wants to plead guilty but is advised not to because defense counsel thought state might amend to a gross misdemeanor, defendant declines to enter a plea, trial court enters plea of not guilty, state later is granted leave to amend to rape 2° to which defendant pleaded guilty and is sentenced to indeterminate life sentence; held: CrR 4.2(a) provides a defendant with the right to plead guilty at arraignment, *State v. Martin*, 94 Wn.2d 1, 4 (1980), "[g]iven the evident risk of an amendment to a higher charge, the strength of the State's evidence for the higher charge, its harsh consequences, and Mr. Burlingame's demonstrated interest in pleading guilty at arraignment, we conclude that competent counsel would have advised Mr. Burlingame of his one-time right to plead guilty as charged without the agreement of the prosecutor—even if the lawyer's recommendation was that Mr. Burlingame *not* plead guilty," at 610; III.

***State v. Davis***, 3 Wn.App.2d 763 (2018)

Failure to provide defendant with a copy of discovery is not ineffective assistance as a represented defendant does not have the right to discovery, CrR 4.7(h)(3) (2007), or access to a law library; while CrR 4.7(a)(1)(iv) requires the state to disclose "to the defendant" any expert reports," providing same to counsel meets that requirement, at 783-86; I.

***State v. Backemeyer***, 5 Wn.App.2d 841 (2018)

During deliberations jury sends out questions which clearly establish that they did not understand the self defense instructions, defense counsel agrees with suggestion that court answer the questions with "read your instructions;" held: where a jury indicates that it does not understand a jury instruction, court must eliminate the confusion, . *Bollenbach v. United States*, 326 U.S. 607, 612-13, 66 S.Ct. 402, 90 L.Ed. 350 (1946), *cf.: State v. Sutton,* 18 Wn.App.2d 38 (2021), and counsel's failure to ask court to re-instruct to clear up the confusion is ineffective assistance; 2-1, III.

***State v. Drath***, 7 Wn.App.2d 255 (2018)

After conviction and sentence to 128 months new counsel moves for a new trial, at hearing evidence shows that defendant was offered a plea to 50 months which, she testifies, she "would have considered," various defense counsel testify that they misadvised as to sentence range if convicted; held: deprivation of the ability to make an informed decision due to counsels' errors is prejudicial ineffective assistance, *Lafler v. Cooper*, 566 U.S. 156, 163, 132 S.Ct. 1376, 182 L.Ed.2d 398 (2012), *State v. Estes*, 188 Wn.2d 450, 457 (2017), test is whether there is a reasonable probability, lower than a preponderance, that the result would have been different,

defendant need not say that she definitely would have pleaded guilty; remedy is remand for either resentencing or for an order requiring prosecutor to reoffer the plea proposal, trial court may reject the plea bargain and, if so, judgment and sentence stands; 2-1, II.

***Garza v. Idaho***, 568 U.S. __ , 139 S.Ct. 738, 203 L.Ed.2d 77 (2019)

Defendant pleads guilty, in plea form gives up right to appeal, tells trial counsel to file appeal, trial counsel declines stating that defendant waived; held: an appeal waiver doesn't give up the right to appeal all issues, thus counsel was ineffective for failure to file notice of appeal, *Roe* v. *Flores-Ortega*, 528 U. S. 470 (2000), *Roe* v. *Flores-Ortega*, 528 U. S. 470 (2000); 6-3.

***State v. Vazquez***, 198 Wn.2d 239 (2021)

In drug case counsel's failure to object to impeachment with prior drug convictions is not reasonable regardless of whether or not it is strategic, *Roe v. Flores-Ortega*, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000); counsel's failure to object to prosecutor's questioning witnesses that they were testifying even though they had been threatened, not by defendant, is ineffective as questions were improper bolstering, *State v. Bourgeois*, 133 Wn.2d 389 (1997)

***State v. Molina***, 16 Wn.App.2d 908 (2021)

In assault 2° case counsel argues in favor of a lesser, on appeal defendant claims ineffective assistance for not pursuing self defense; held: counsel's trial strategy is not ineffective assistance where defendant does not expressly object to counsel, *see: Florida v. Nixon*, 160 L.Ed.2d 565 (2004), *cf.: McCoy v. Louisiana*, —— U.S. ——, 138 S. Ct. 1500, 200 L. Ed. 2d 821 (2018); here, counsel did not negate defendant's autonomy by overriding his desired defense objective because he never asserted any such objective; I.

***State v. Davis,*** 17 Wn.App.2d 264 (2021)

In response to defense counsel's question on cross witness arguably volunteers damaging information, defense counsel does not object to non-responsive answer; held: a decision to avoid emphasizing testimony with an objection can be purely tactical and entirely reasonable; I.

***Pers. Restraint of Ayerst***, 17 Wn.App.2d 356 (2021)

Defense counsel at trial is licensed in Idaho and was working under the supervision of a Washington attorney, after conviction WSBA files a complaint alleging he was not authorized to practice in Washington; held: while structural error applies to representation by a person who has never been licensed in any jurisdiction, here petitioner has not demonstrated that counsel's licensing problems were sufficient severe to require reversal, *see: Seattle v. Ratliff*, 100 Wn.2d 212 (1983), *State v. Edison*, 61 Wn.App. 530 (1991), at least for collateral relief; III.

***State v. Clark***, 17 Wn.App.2d 794 (2021)

Failure to move to change venue to a county with more Black people when representing a Black person is not ineffective assistance; failure to raise a novel argument does not render counsel's performance constitutionally ineffective, *State v. Brown*, 159 Wn.App. 366, 371-72 (2011), *State v. Brown*, 21 Wn.App.2d 541 (2022); II.

***State v. Elwell***, 21 Wn.2d 914 (2022)

Defendant seeks new counsel as present counsel declined to bring a motion to suppress, concluding it was not "viable," defendant filed motion to suppress *pro se,* counsel agrees to question witnesses and argue the motion which is denied (albeit granted on appeal); held: a motion to suppress is a matter of strategy to be decided by counsel, not the client; here the hybrid type of representation was properly allowed even though defendant did not seek hybrid representation; a conflict over strategy is not the same as a conflict of interest, *State v. Cross,* 156 Wn.2d 580, 607 (2018) absent a complete collapse of the attorney-client relationship; counsel's failure to bring the motion to suppress is at most ineffective assistance, not a conflict of interest; 9-0.

***Matter of Pheth***, 20 Wn.App.2d 326 (2022)

Defendant's self-serving affidavit claiming that he told he trial counsel that he could not understand the interpreter is insufficient to establish prejudice where defendant makes no effort to obtain his trial counsel's version; I.

***State v. Conway***, ___ Wn.App.2d ___, 519 P.3d 257 (2022)

Foregoing a lesser-included offense instruction is a strategic decision and is thus not ineffective assistance, *State v. Grier*, 171 Wn.2d 17 (2011), *cf.: State v. Classen,* 4 Wn.App.2d 520, 539-44 (2018); III.

***State v. Fleeks***, ___ Wn.App.2d ___, 2023WL355082 (2023)

Defendant initiates a fight, arguably withdraws and disengages from it, victim follows defendant who has backed up against a wall, victim throws a "hard punch," defendant shoots and kills victim, court gives first aggressor instruction, defense counsel does not offer instruction on revived self-defense; held: "the right of self-defense is revived as to the aggressor if that person in good faith withdraws from the aggression in such time and manner as to clearly apprise the other person that they intend to disengage in further aggression," *State v. Dennison*, 115 Wn.2d 609 (1990), *State v. Craig*, 82 Wn.2d 777 (1973), counsel was ineffective for failing to propose such an instruction; I.

# COUNSEL
## Right to

***State v. Fitzsimmons***, 93 Wn.2d 436, *remanded*, 66 L.Ed.2d 240, *aff'd*, 94 Wn.2d 858 (1980)
Must have access to attorney in DUI before taking breath test, *see: Seattle v. Wakenight*, 24 Wn.App. 48 (1979), *Spokane v. Kruger*, 116 Wn.2d 135 (1991), *State v. Dunn*, 108 Wn.App. 490 (2001), *State v. Templeton*, 148 Wn.2d 193 (2002), *see: State v. Federov*, 183 Wn.2d 669 (2015); 9-0.

***Seattle v. Box***, 29 Wn.App. 109 (1981)
Police arrest DUI suspect, who calls his lawyer; lawyer has client tell police he will be at precinct in 20 minutes; upon arrival, lawyer is told client had been released when in fact client had been transported to jail; reversed as defendant denied reasonable access to counsel, *see*: *Spokane v. Kruger*, 116 Wn.2d 135 (1991); I.

***State v. Halbakken***, 30 Wn.App. 834 (1981)
State has no burden to provide counsel following DUI arrest unless defendant requests counsel; I.

***Tacoma v. Myhre***, 32 Wn.App. 661 (1982)
Defendant arrested at 10:00 p.m. for DUI, is permitted by police to call his attorney's office, receives no answer; defendant requests permission to call his mother who has attorney's home phone, request refused by police; held: additional call would not have burdened police and was necessary to permit defendant to contact counsel, thus dismissed, *State v. Pierce*, 169 Wn.App. 533, 544-51 (2012), *but see: Spokane v. Kruger*, 116 Wn.2d 135 (1991); II.

***Seattle v. Carpenito***, 32 Wn.App. 809 (1982)
Following a DUI arrest, police must provide a defendant with access to a telephone and access to a telephone book in order to contact an attorney, police need not specifically provide defendant with the telephone number for the public defender, *see; State v. Pierce*, 169 Wn.App. 533, 544-51 (2012); I.

***Seattle v. Ratliff***, 100 Wn.2d 212 (1983)
Trial court, in preventing an APR 9 legal intern from consulting with his supervisor prior to trying a case in a court of limited jurisdiction, denied defendant his right to counse, *cf.*: *State v. Edison*, 61 Wn.App. 530 (1991); 9-0.

***Morris v. Slappy***, 75 L.Ed.2d 610 (1983)
Right to counsel does not include right to "meaningful attorney-client relationship"; 9-0.

***State v. Judge***, 100 Wn.2d 706 (1984)

Negligent homicide suspect does not have right to counsel when blood sample was taken, as she had not been formally charged, *Kirby v. Illinois*, 32 L.Ed.2d 411 (1972), *Schmerber v. California*, 16 L.Ed.2d 908 (1966); *see*: *State v. Schulze*, 116 Wn.2d 154 (1991); 9-0.

***State ex. rel. Juckett v. Evergreen District Court***, 100 Wn.2d 824 (1984)

When DUI suspects are arrested, they must be advised of their *Miranda* right to counsel prior to taking breath test, and must be provided access to counsel if requested; if *Miranda* warnings are given, defendant need not again be advised of right to counsel prior to taking breath test, *see: State v. Templeton*, 148 Wn.2d 193 (2002), *State v. Dunn*, 108 Wn.App. 490 (2001); prior to the issuance of a citation, no Sixth Amendment right to counsel exists, however defendant does have right to counsel pursuant to JCrR 2.11(c); 9-0.

***State v. Long***, 104 Wn.2d 285 (1985)

Indigent defendant charged with a nonjailable crime (here, negligent driving, RCW 46.61.525) is not entitled to court appointed counsel; right to court appointed counsel is not co-extensive with right to jury trial; 9-0.

***Maine v. Moulton***, 88 L.Ed.2d 481 (1985)

After indictment, co-defendant, a secret government informant, records via body wire statements of defendant made to counsel; held: even though police may have had other legitimate reasons to record defendant's statements (*i.e.*, threats to kill the state's witnesses), use of defendant's incriminating statements at trial violated his Sixth Amendment right to counsel, *see also: Pers. Restraint of Benn*, 134 Wn.2d 868, 911-2 (1998), *State v. Whitaker*, 133 Wn.App. 199, 218-22 (2006); 5-4.

***State v. Wade***, 44 Wn.App. 154 (1986), *overruled, on other grounds, Pers. Restraint of Carrier*, 173 Wn.2d 791 (2012)

While CrR 3.1(c)(2) requires police to provide suspect with access to telephone and number of public defender at earliest opportunity, 45 minutes after arrest defendant confesses, thus police lacked opportunity to provide him with access to telephone, *State v. Mullins*, 158 Wn.App. 360, 363-70 (2010), *see: State v. Scherf*, 192 Wn.2d 350 (2018), *but see: State v. Kirkpatrick*, 89 Wn.App. 407 (1997), *State v. Templeton*, 148 Wn.2d 193 (2002), *State v. Dunn*, 108 Wn.App. 490 (2001); II.

***State v. Stock***, 44 Wn.App. 467 (1986)

Defense moves to suppress handwriting exemplar provided by defendant after her attorney had requested that he be present during questioning, and after defendant had informed police she wanted her attorney present; held: while police action is to be "deplored," Sixth Amendment right to counsel is not the basis for suppression of nontestimonial evidence; I.

***Airway Heights v. Dilley***, 45 Wn.App. 87 (1986)

Defendant, arrested for DUI, requests counsel before deciding whether or not to take breath test; police, defendant and defendant's wife make several calls, cannot reach attorney, police do not give defendant 24-hour public defender number; held: reasonable but unsuccessful

attempts to contact counsel for defendant satisfy his right to counsel; III; *accord*: *Bellevue v. Ohlson*, 60 Wn.App. 485 (1991), *Seattle v. Sandholm*, 65 Wn.App. 747 (1992).

***Moran v. Burbine***, 89 L.Ed.2d 410 (1986)

Failure of police to inform defendant of counsel's telephone call during interrogation did not affect validity of defendant's waiver of Fifth Amendment right to remain silent and right to have counsel present, *State v. Bradford*, 95 Wn.App. 935 (1999); Sixth Amendment right to counsel does not attach until charges are filed, thus interference by police of counsel's attempts to contact her client is not unlawful; police lying to counsel that defendant would not be interrogated does not violate due process clause; 6-3.

***Kuhlmann v. Wilson***, 91 L.Ed.2d 364 (1986)

Police place informant in defendant's cell with instructions to listen to defendant but not ask any questions; defendant confesses, informant testifies; held: Sixth Amendment right to counsel not violated where informant listens and reports defendant's confession, but does not question him; 6-3.

***State v. Prok***, 107 Wn.2d 153 (1986)

Defendant is involved in an accident, is extremely intoxicated and injured, police transport defendant to jail and determine that his condition is due to intoxication not injury, advise of *Miranda* rights, but defendant does not speak English and does not understand his right to counsel; held: defendant was not taken into custody, JCrR 2.11(c), until police determined he was drunk, not injured (even though he was taken to jail), thus right to counsel did not accrue until that point; because state conceded defendant was not able to understand right to counsel and state conceded that police violated defendant's right to be so advised, remedy is suppression of evidence following custody, not dismissal, *distinguishing* *Tacoma v. Heater*, 67 Wn.2d 733 (1966), *State v. Fitzsimmons*, 93 Wn.2d 436 (1980), *reversing State v. Prok*, 42 Wn.App. 166 (1985); 9-0.

***State v. Conlin***, 49 Wn.App. 593 (1987)

Probationer has a procedural, not a constitutional, right to counsel at revocation hearing, CrR 7.5(b), thus need not knowingly, voluntarily and intelligently waive counsel; trial court should hold a brief colloquy regarding right to counsel, risks of self-representation and penalty; II.

***State v. Sargent***, 111 Wn.2d 641 (1988)

Following murder conviction defendant is interviewed by probation officer for presentence report, not advised of *Miranda* rights, confesses, conviction is reversed on appeal, confession is used at retrial; held: P.O. was a state official, defendant was in custody, failure to advise violated defendant's Fifth Amendment rights, thus reversed, *State v. Everybodytalksabout*, 161 Wn.2d 702 (2007); *reverses* *State v. Sargent*, 49 Wn.App. 64 (1987); 6-2.

***State v. Glessner***, 50 Wn.App. 397 (1988)

Police take blood sample from seriously injured vehicular homicide suspect without first advising him of right to counsel; held: due to defendant's condition, it was not feasible to advise defendant of right to counsel prior to taking blood, *State v. Prok*, 107 Wn.2d 153 (1986); I.

***Perry v. Leeke***, 102 L.Ed.2d 624 (1989)

After defendant completed direct examination, trial court takes 15 minute recess, judge *sua sponte* orders defense counsel not to consult with defendant; held: during a short recess while defendant is testifying, defendant does not have the constitutional right to consult with counsel, *distinguishing Geders v. United States*, 47 L.Ed.2d 592 (1976) (court cannot prohibit consultation with counsel during overnight recess); 6-3.

***Seattle v. Koch***, 53 Wn.App. 352 (1989)

DUI arrestees ask to speak with counsel, are given access to telephone but officer remains in room, neither defendant nor counsel request privacy; held: since defendants did not request privacy nor establish prejudice, *see: State v. Federov,* 183 Wn.2d 669 (2015), rights pursuant to CrRLJ 3.1(c)(2) were not violated; I.

***State v. Shattuck***, 55 Wn.App. 131 (1989)

Where defendant asks to speak to a specific attorney and police attempt to contact that attorney, police are not obliged to suggest other attorneys or to tell defendant that public defender is available as long as defendant has been advised of right to public defender; I.

***State v. Visitacion***, 55 Wn.App. 166 (1989)

Post-indictment confessions in the absence of counsel are admissible upon proof of a knowing, voluntary and intelligent waiver of counsel; *Miranda* warnings will suffice, *Patterson v. Illinois*, 101 L.Ed.2d 261 (1988), *see: Fellers v. United States*, 157 L.Ed.2d 1016 (2004); counsel's relying upon a witness's statement to police without attempting to contact or interview the witness falls below professional norms, *Hawkman v. Parratt*, 661 F.2d 1161 (8th Cir. 1981), thus remanded for fact finding hearing; I.

***Seattle v. Orwick***, 113 Wn.2d 823 (1989)

Following arrest for obstructing, defendant demands an attorney, CrRLJ 3.1(c), which is not provided; trial court dismisses, finding defendant was prejudiced in that an attorney might have been able to locate witnesses for defense; held: defendant's claim that an attorney could find witnesses was speculation, insufficient to support a finding of prejudice; *reverses Seattle v. Orwick*, 53 Wn.App. 53 (1988), *see*: *Spokane v. Kruger*, 116 Wn.2d 135 (1991), *State v. Templeton*, 148 Wn.2d 193 (2002), *State v. Dunn*, 108 Wn.App. 490 (2001); 9-0.

***State v. Trull***, 56 Wn.App. 795 (1990)

Juvenile, charged with malicious mischief, facing a standard range of no detention is nevertheless entitled to appointment of counsel, as incarceration is a possible penalty for the offense, *McInturf v. Horton*, 56 Wn.2d 704 (1975); I.

***Michigan v. Harvey***, 108 L.Ed.2d 293 (1990)

While a confession made in violation of a defendant's Sixth Amendment right to counsel is inadmissible in state's case-in-chief, *Michigan v. Jackson*, 89 L.Ed.2d 631 (1986), *but see: Montejo v. Louisiana*, 173 L.Ed.2d 955 (2009), it is admissible in rebuttal to impeach defendant's testimony, *Kansas v. Ventris*, 173 L.Ed.2d 801 (2009); 6-3.

***State v. Royer***, 58 Wn.App. 778 (1990)

At arraignment, defendant requests and is given counsel, following which defendant is advised by police, signs a waiver, makes incriminating statements; held: after defendant's assertion, at arraignment, of Sixth Amendment right to counsel, any waiver of the defendant's right to counsel for subsequent police-initiated interrogation is invalid, *Michigan v. Jackson*, 89 L.Ed.2d 631 (1986), *but see: Montejo v. Louisiana*, 173 L.Ed.2d 955 (2009), relative to the specific charge for which defendant was arraigned, *Texas v. Cobb*, 149 L.Ed.2d 321 (2001), *State v. Gregory*, 158 Wn.2d 759, 818-20 (2006), *overruled, on other grounds, State v. W.R.*, 181 Wn.2d 757 (2014), *State v. Hahn*, 162 Wn.App. 885, 897-900 (2011), *rev'd, on other grounds, State v. Hahn*, 174 Wn.2d 126 (2012); II.

***State v. Chase***, 59 Wn.App. 501 (1990)

A motion to continue trial to retain counsel of choice may be denied if it will result in delay of the trial, *State v. Garcia*, 92 Wn.2d 647, 655-6 (1979); II.

***Minnick v. Mississippi***, 112 L.Ed.2d 489 (1990)

Once an arrestee has requested counsel, s/he may not be reinterrogated in the absence of counsel even if suspect has consulted with counsel, unless accused initiates conversation; 6-2.

***McNeil v. Wisconsin***, 115 L.Ed.2d 158 (1991)

Defendant is arrested for robbery, advised of *Miranda* warnings, does not request counsel but refuses to answer questions, is later arraigned with counsel; police later readvise and question defendant about unrelated murder, defendant confesses; held: request for counsel at arraignment is offense-specific under the Sixth Amendment, *Michigan v. Jackson*, 89 L.Ed.2d 631 (1986), *but see: Montejo v. Louisiana*, 173 L.Ed.2d 955 (2009), and does not preclude police-initiated interrogation regarding other matters absent a Fifth Amendment demand for counsel, *Texas v. Cobb*, 149 L.Ed.2d 321 (2001), *Edwards v. Arizona*, 68 L.Ed.2d 378 (1981), *State v. Gregory*, 158 Wn.2d 759, 818-20 (2006), *overruled, on other grounds, State v. W.R.*, 181 Wn.2d 757 (2014), *State v. Hahn*, 162 Wn.App. 885, 897-900 (2011), *rev'd, on other grounds, State v. Hahn*, 174 Wn.2d 126 (2012); 6-3.

***State v. Aamold***, 60 Wn.App. 175 (1991)

Receipt of a verdict is likely a critical stage requiring counsel, harmless here where jury was polled, no irregularity apparent; I.

***State v. Earls***, 116 Wn.2d 364 (1991)

Where an unretained attorney telephoned the police station during interrogation and asked to leave a message for defendant to call him, *Moran v. Burbine*, 89 L.Ed.2d 410 (1986), and where defendant, after *Miranda* rights, agreed to confess to murder in exchange for a

promise not to charge aggravated murder, then statement is voluntary and admissible, *State v. Bradford*, 95 Wn.App. 935 (1999); 8-1.

***Spokane v. Kruger***, 116 Wn.2d 135 (1991)

Remedy for denial of counsel in violation of JCrR 2.11 [CrRLJ 3.1(b)] in DUI case is suppression of any evidence acquired after the violation, not dismissal, overruling *State v. Fitzsimmons*, 93 Wn.2d 436, *vacated and remanded*, 66 L.Ed.2d 240, *aff'd on remand,* 94 Wn.2d 858 (1980), *see: State v. Templeton*, 148 Wn.2d 193 (2002), *State v. Dunn*, 108 Wn.App. 490 (2001); 6-3.

***State v. Schulze***, 116 Wn.2d 154 (1991)

Vehicular homicide suspect does not have right to counsel before blood sample is taken under CONST. Art. 1, § 22 or CrR 3.1, as suspect does not have the right to refuse the blood sample, *State v. Copeland*, 130 Wn.2d 244, 281-83 (1996), *see: State v. Judge*, 100 Wn.2d 706 (1984); 7-2.

***Bellevue v. Ohlson***, 60 Wn.App. 485 (1991)

Following DUI arrest, defendant asks for counsel, officer calls defendant's attorney six times, phone busy for 20 minutes, calls three different public defenders, reaches two answering machines, no answer at third; held: officer made every reasonable effort to provide access to counsel, thus CrRLJ 3.1 is satisfied even though actual contact is not effected, *Seattle v. Wakenight*, 24 Wn.App. 48, 51 (1979) *see also: Seattle v. Sandholm*, 65 Wn.App. 747 (1992), *State v. Kirkpatrick*, 89 Wn.App. 407 (1997), *cf.: State v. Pierce,* 169 Wn.App. 533, 544-51 (2012) ; I.

***State v. Edison***, 61 Wn.App. 530 (1991)

After arraignment but before trial, defense counsel is suspended for failure to meet CLE requirements, and then reinstated; held: having a lawyer who is suspended is not a *per se* violation of right to counsel, *distinguishing Seattle v. Ratliff*, 100 Wn.2d 212 (1983)(counsel was never licensed); no prejudice, thus no error, *Pers. Restraint of Ayerst*, 17 Wn.App.2d 356 (2021); I.

***State v. Greer***, 62 Wn.App. 779 (1991)

Request for counsel to a public defense indigency screener is insufficient to require termination of interrogation, *Edwards v. Arizona*, 68 L.Ed.2d 378 (1981), as it was not expressed to law enforcement personnel, *McNeil v. Wisconsin*, 115 L.Ed.2d 158, 169 (1991), *State v. Stewart*, 113 Wn.2d 462 (1989); jail personnel and police conspire to keep suspect and counsel apart, police refuse counsel's request to see suspect or advise him she was present, suspect confesses after *Miranda* waiver; held: *Miranda* advice and waiver is dispositive of Fifth Amendment and CONST. Art. 1, § 3 claims, *Moran v. Burbine*, 89 L.Ed.2d 410 (1986), *State v. Earls*, 116 Wn.2d 364 (1991); while police deliberately thwarted CrR 3.1 right to counsel, harmless here; I.

***Seattle v. Sandholm***, 65 Wn.App. 747 (1992)

DUI suspect asks to call his out-of-town attorney at suspect's expense, police refuse but allow him to talk to a public defender, after which defendant demands again to talk to his own attorney, refused, defendant refuses to take breath test, trial court dismisses; held: CrRLJ 3.1(c) is satisfied when police put suspect in touch with a public defender even if suspect demands his own attorney; CrRLJ 3.1 does not contemplate a right of access to counsel of choice, thus reversed; I.

***State v. P.B.T.***, 67 Wn.App. 292 (1992)

Juvenile has the right to have counsel present at predisposition interview where respondent is concerned about his Fifth Amendment rights with respect to closely related pending charges; counsel's role is only to assist client in preserving right against self-incrimination with respect to the closely related pending charge; I.

***State v. Early***, 70 Wn.App. 452 (1993)

While a denial of a continuance to substitute retained counsel may deprive a defendant of his right to counsel of choice, *Wheat v. United States*, 100 L.Ed.2d 140 (1988), in the absence of substantial reasons a late request should generally be denied, especially if it may delay the trial, *State v. Chase*, 59 Wn.App. 501, 506 (1990); trial court must consider diligence, due process, the need for an orderly procedure, impact on trial, whether prior continuances have been granted, *State v. Barnes*, 58 Wn.App. 465, 471 (1990), *aff'd in part, rev'd in part,* 117 Wn.2d 701 (1991); here, one state's witness had been "turned" and had a tenuous relationship with prosecution, prior continuances had been granted, thus no abuse of discretion in denying continuance; III.

***State v. Teller***, 72 Wn.App. 49 (1993)

DUI suspect is advised, *inter alia*, "if you cannot afford an attorney you are entitled to have one appointed by the court," argues she should have been told she had right to public defender before she took breath test; held: warnings were adequate under constitution, *Duckworth v. Eagan*, 106 L.Ed.2d 166 (1989), *California v. Prysock*, 69 L.Ed.2d 696 (1981), *Florida v. Powell*, 559 U.S. 50, 175 L.Ed.2d 1009 (2010), *distinguishing* *State v. Creach*, 77 Wn.2d 194, 198 (1969) and *State v. Tetzlaff*, 75 Wn.2d 649 (1969), and CrRLJ 3.1, *State v. Wurm*, 32 Wn.App. 258 (1982), *aff'd sub nom.* *State ex rel. Juckett v. Evergreen Dist. Court*, 100 Wn.2d 824 (1984), *State v. Halbakken*, 30 Wn.App. 834, 836 (1981); III.

***State v. Roth***, 75 Wn.App. 808, 823-27 (1994)

Defendant retains two attorneys, lead counsel is unavailable for voir dire due to another trial, court grants a continuance, lead counsel remains unavailable, court obliges secondary counsel to commence voir dire, directs that transcripts be prepared for lead counsel before peremptory challenges; held: right to retained counsel of choice is not of the same force as other aspects of the right to counsel; "only an unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay violates defendant's right," *Morris v. Slappy*, 75 L.Ed.2d 610 (1983), *Ungar v. Sarafite*, 11 L.Ed.2d 921 (1964), *State v. Hampton*, 184 Wn.2d 656 (2015); factors (1) whether court had granted previous continuance at defendant's request, (2) whether defendant has some legitimate cause for dissatisfaction with counsel, even though short of incompetent representation, (3) whether available counsel is prepared, and

(4) prejudice, *State v. Price*, 126 Wn.App. 617, 631-34 (2005); while defense need not establish actual prejudice, its absence is a factor which may be considered by trial court; I.

***State v. Harrell***, 80 Wn.App. 802 (1996)

Motion to withdraw guilty plea is a critical stage requiring counsel or valid waiver of counsel; implicit in trial court's decision to hold a hearing on a motion to withdraw plea is a finding that sufficient facts were alleged to warrant a hearing, *but see: State v. Winston*, 105 Wn.App. 318 (2001), *State v. Forest*, 125 Wn.App. 702, 707-08 (2005); I.

***State v. Bandura***, 85 Wn.App. 87, 97-8 (1997)

Defendant seeks continuance of sentencing for new counsel, trial court denies continuance, allows present counsel to withdraw and requires defendant to proceed *pro se;* held: sentencing is a critical stage, court cannot relieve counsel and require a nonwaiving defendant to proceed without counsel; II.

***State v. Mills***, 85 Wn.App. 285 (1997)

Indigent defendants are not entitled to appointed counsel to assist in filing a motion for discretionary review following RALJ decision in superior court, nor to a verbatim report of court of limited jurisdiction proceedings at public expense, *Richland v. Kiehl*, 87 Wn.App. 418 (1997); I.

***State v. Stenson***, 132 Wn.2d 668, 730-37 (1997)

Defendant requests other appointed counsel as current counsel was unwilling to accuse another of the homicide, counsel argued that it was inadmissible and tactically dangerous in death penalty case; held: attorney-client conflicts justify grant of a substitution only when counsel and defendant are so at odds as to prevent presentation of an adequate defense, *State v. Lopez*, 79 Wn.App. 755, 766 (1995), factors include (1) the reasons given for the dissatisfaction, (2) court's own evaluation of counsel, and (3) effect of substitution on scheduling, *State v. Stark*, 48 Wn.App. 245, 253 (1987), *State v. Varga*, 151 Wn.2d 179, 200-01 (2004), *State v. Schaller*, 143 Wn.App. 258 (2007), *State v. Wood*, 19 Wn.App.2d 743 (2021), *see: Pers. Restraint of Stenson*, 142 Wn.2d 710 (2001); 8-0.

***Richland v. Kiehl***, 87 Wn.App. 418 (1997)

Indigent misdemeanor defendant is not entitled to appointment of counsel at public expense unless a motion for discretionary review of RALJ decision is granted, *State v. Mills*, 85 Wn.App. 285 (1997), RCW 10.73.150, although defendant is entitled to waiver of filing fee; III.

***State v. Kirkpatrick***, 89 Wn.App. 407 (1997)

After *Miranda* warnings, defendant requests counsel, police cease interrogation but do not contact a lawyer, defendant later waives Fifth Amendment right to counsel and confesses; held: pursuant to CrR 3.1(c)(2), police are obliged to make reasonable efforts to contact an attorney "at the earliest opportunity," or state must show why such efforts could not have been made, *State v. Scherf*, 192 Wn.2d 350 (2018), or that defendant knowingly, intelligently and voluntarily waived right to counsel, *Bellevue v. Ohlson*, 60 Wn.App. 485, 487 (1991), *Seattle v. Wakenight*, 24 Wn.App. 48, 49-50 (1979), distinguishing *State v. Wade*, 44 Wn.App. 154 (1986),

*overruled, on other grounds, Pers. Restraint of Carrier*, 173 Wn.2d 791 (2012), *State v. Pierce*, 169 Wn.App. 533, 544-51 (2012), *but see: State v. Mullins*, 158 Wn.App. 360, 363-70 (2010); harmless here; II.

***State v. Thompson***, 93 Wn.App. 364 (1998)

Indigent defendant is entitled to counsel at public expense to appeal a motion to vacate a judgment, as a party has the right to appeal such an order, RAP 2.2(a)(10), and an indigent is entitled to counsel when filing an appeal "as a matter of right," RCW 10.73.150(1), *State v. Larranaga*, 126 Wn.App. 505 (2005); I.

***State v. Corn***, 95 Wn.App. 41, 56-64 (1999)

Attorney retained by arrested suspect's relative asks to speak to suspect, police refuse as suspect had not requested counsel; held: Fifth Amendment right to counsel is not invoked until suspect requests counsel, *Moran v. Burbine*, 89 L.Ed.2d 410 (1986), *State v. Earls*, 116 Wn.2d 364 (1991); right to counsel pursuant to CrR 3.1(c)(2) is not activated until the accused requests an attorney, *State v. Kirkpatrick*, 89 Wn.App. 407, 413 n.2 (1997), *State v. Bradford*, 95 Wn.App. 935 (1999); III.

***State v. Hunter***, 100 Wn.App. 198 (2000)

After conviction, defense discovers that its investigator was working as a paid informant for the government in an unrelated case, seeks dismissal; held: because investigator had not even an implicit agreement with government with respect to the case at bar, nor did government have the ability to control his undertaking, *In re Benn*, 134 Wn.2d 868, 912 (1998), the investigator was not a government agent, *State v. Whitaker*, 133 wn.App. 199, 218-222 (2006), thus no government misconduct occurred, distinguishing *State v. Cory*, 62 Wn.2d 371 (1963), *State v. Granacki*, 90 Wn.App. 598 (1998); I.

***Pers. Restraint of Stenson***, 142 Wn.2d 710 (2001)

Trial court is not obliged to appoint other counsel to represent defendant at a hearing on defendant's motion to substitute counsel where counsel assists defendant in preparing his motion for substitution, at 737-39; *see: State v. Stenson*, 132 Wn.2d 668 (1997); 8-1.

***Lackawanna County Dist. Attorney v. Coss***, 149 L.Ed.2d 608 (2001)

Failure to appoint counsel for an indigent is a unique constitutional defect rising to the level of a jurisdictional defect which can be raised in a *habeas corpus* petition where the remedy might be barred on other bases, *Custis v. United States*, 128 L.Ed.2d 517 (1994).

***State v. Winston***, 105 Wn.App. 318 (2001)

Eleven months after plea and sentencing, defendant moves *pro se* in trial court for withdrawal of plea, trial court grants hearing and denies motion, defendant appeals, seeking counsel; held: an application for post-conviction relief other than a first direct appeal is not a critical stage for which there is a constitutional right to counsel, *Pennsylvania v. Finley*, 95 L.Ed.2d 539 (1987), mere fact that trial court scheduled a hearing at defendant's request does not imply that there is a basis for such a hearing, CrR 7.8(c)(2), *State v. Forest*, 125 Wn.App. 702

(2005), *but see:* *State v. Larranaga*, 126 Wn.App. 505 (2005), distinguishing *State v. Harrell*, 80 Wn.App. 802 (1996); I.

***State v. Jaquez***, 105 Wn.App. 699, 712-17 (2001)

After arrest, defendant invokes his right to counsel, police attempt to display defendant to victim for a showup, defendant refuses to leave police car and hides face, state seeks to offer refusal as evidence of guilt; held: while there is no constitutional right to counsel at a post-arrest showup, *Kirby v. Illinois*, 32 L.Ed.2d 411 (1972), see: *State v. Bradford*, 95 Wn.App. 935, 947-48 (1999), defendant, having requested counsel, does have a right pursuant to CrR 3.1(c)(2) to have the police contact an attorney, *State v. Kirkpatrick*, 89 Wn.App. 407, 413-14 (1997), *State v. Mullins*, 158 Wn.App. 360, 363-70 (2010); absent a showing that the showup or trial would have been different if he had been able to contact counsel, error was harmless; II.

***State v. Erickson***, 108 Wn.App. 732 (2001)

Defendant, represented by counsel, initiates discussion with police and makes statements; held: non-coerced, custodial, defendant-initiated statements made without police interrogation fall outside the general rule prohibiting custodial interrogation following invocation of Sixth Amendment right to counsel, distinguishing *State v. Stewart*, 113 Wn.2d 462 (1989), *Michigan v. Jackson*, 89 L.Ed.2d 631 (1986), *cf.:* *Montejo v. Louisiana*, 173 L.Ed.2d 955 (2009); III.

***Alabama v. Shelton***, 152 L.Ed.2d 888 (2002)

Court may not impose a suspended sentence upon an unrepresented defendant, since incarceration may occur if probation is revoked, *Argersinger v. Hamlin*, 32 L.Ed.2d 530 (1972), although an unrepresented defendant may be fined if no jail term is possible, *Scott v. Illinois*, 59 L.Ed.2d 383 (1979); 5-4.

***State v. Templeton***, 148 Wn.2d 193 (2002)

Police advise DUI suspects that they have a right to talk to an attorney before answering questions, trial courts suppress breath tests; held: CrRLJ 3.1, which requires that police advise arrestees of right to counsel as soon as practicable, was violated because advice here provided that the right to a lawyer accrues not when suspect is arrested but rather when arrestee is questioned, *State v. Fitzsimmons*, 93 Wn.2d 436 (1980), *affirmed on remand*, 94 Wn.2d 858 (1980), *State ex rel. Juckett v. Evergreen District Court*, 100 Wn.2d 824 (1984), *Spokane v. Kruger*, 116 Wn.2d 135 (1991); because no defendant here alleged that, but for the improper advice he or she would have requested counsel before submitting to breath test, error was harmless, reversing *State v. Templeton*, 107 Wn.App. 141 (2001); 5-4.

***State v. DeVries***, 109 Wn.App. 322 (2001), *rev'd, on other grounds,* 149 Wn.2d 842 (2003)

Denial by trial court of closing argument in bench trial violates Sixth Amendment; III.

***State v. Robinson***, 153 Wn.2d 689 (2005)

Defendant is not entitled to counsel at public expense at a motion to withdraw a guilty plea after sentencing, *see:* *State v. Davis*, 125 Wn.App. 59 (2004), unless the trial court makes a preliminary finding that there are grounds for relief; 7-2.

***State v. Larranaga***, 126 Wn.App. 505 (2005)

Six months after sentencing, defendant files a motion for resentencing, CrR 7.8(b)(1), -(4), arguing ineffective assistance and abuse of discretion in denying DOSA, trial court denies resentencing, finds defendant indigent but denies counsel on appeal; held: denial of a motion to vacate or amend a judgment, RAP 2.2(a), is appealable as a matter of right, thus defendant is entitled to counsel, RCW 10.73.150(1), *State v. Thompson*, 93 Wn.App. 364, 368-69 (1998), although defendant is not entitled to appointed counsel during the initial hearing on the CrR 7.8 motion, *State v. Winston*, 105 Wn.App. 318, 325 (2001), *State v. Forest*, 125 Wn.App. 702, 707-08 (2005), *but see: State v. Smith*, 144 Wn.App. 860 (2008); II.

***State v. Price***, 126 Wn.App. 617, 631-34 (2005)

During *voir dire*, defendant claims conflict with appointed counsel, that they were not representing him the way he wants, that he does not feel able to communicate with them, that they did not see him enough times in jail and had not yet interviewed a witness, and that defendant is "looking around" for retained counsel that his mother may pay for, counsel state that they saw him 7-10 times in jail, trial court denies new counsel and continuance; held: "essential aim of the Sixth Amendment is to guarantee an effective advocate...not to ensure that a defendant will inexorably be represented by his or her counsel of choice," *Wheat v. United States*, 100 L.Ed.2d 140 (1988), *but see: State v. Hampton*, 184 Wn.2d 656 (2015); while a defendant need not demonstrate that current counsel is ineffective, *State v. Roth*, 75 Wn.App. 808, 823-27 (1994), trial court did not abuse discretion in light of fact that defendant did not establish he could afford counsel, he did not have counsel ready to go to trial, day of trial continuances are not favored, *State v. Chase*, 59 Wn.App. 501, 506 (1990), defendant failed to articulate a legitimate cause for substituting counsel, disputes over trial strategy or a general dissatisfaction with counsel are not sufficient reasons to substitute counsel, *State v. Varga*, 151 Wn.2d 179, 200 (2004), *State v. Cameron*, 47 Wn.App. 878, 882-83 (1987); II.

***United States v. Gonzalez-Lopez***, 165 L.Ed.2d 409 (2006)

Erroneous deprivation of a criminal defendant's choice of retained counsel entitles him to a new trial, harmless error analysis is inapposite, *see: State v. Johnston*, 143 Wn.App. 1, 22-23 (2007), *State v. Castillo-Lopez*, 192 Wn.App. 741 (2016); 5-4.

***State v. Johnston***, 143 Wn.App. 1, 22-23 (2007)

Trial court disqualifies retained counsel when it learns that rape victim had consulted with a member of counsel's firm to discuss a civil suit regarding the criminal offense; held: trial court does not abuse discretion when it disqualifies an attorney due to a serious potential for a conflict of interest, *State v. MacDonald*, 122 Wn.App. 804, 812-13 (2004), *Wheat v. United States*, 100 L.Ed.2d 140 (1988); trial court is not limited in its exercise of discretion to actual conflict of interest; III.

***Rothgery v. Gillespie County***, 171 L.Ed.2d 366 (2008)

Sixth Amendment right to counsel applies when an accused is brought before a magistrate for probable cause determination, *Gerstein v. Pugh*, 43 L.Ed.2d 54 (1975), and setting of bail even where no prosecutor is involved; 8-1.

***Kansas v. Ventris***, 173 L.Ed.2d 801 (2009)

Police place informant in represented, charged defendant's cell who elicits a confession, trial court allows cellmate to impeach defendant's testimony; held: statement obtained in violation of Sixth Amendment is admissible to impeach, *Harris v. N.Y.*, 28 L.Ed.2d 1 (1971), *State v. Simpson*, 95 Wn.2d 170, 180 (1980); 7-2.

***Montejo v. Louisiana***, 173 L.Ed.2d 955 (2009)

Where defendant is arraigned and requests or is supplied counsel automatically, courts must not presume that a subsequent waiver of counsel preceeding interrogation is invalid, overruling *Michigan v. Jackson*, 89 L.Ed.2d 631 (1986); 5-4.

***State v. Perrow***, 156 Wn.App. 322 (2010)

Defendant consults with counsel who asks him to prepare a narrative for counsel, police serve search warrant on defendant's home, seize narrative, defendant informs police that it is privileged, police take narrative to precinct, read and analyze, give it to prosecutor who charges defendant with child molestation, trial court dismisses; held: seized writings were privileged, RCW 5.60.060(2)(a), regardless of whether defendant was charged or not when prepared, *Dietz v. John Doe*, 131 Wn.2d 835, 843 (1997), thus seizure was a violation of the privilege and dismissal was a proper remedy, *State v. Cory*, 62 Wn.2d 371 (1963), in light of egregious violation, police were informed that the materials were privileged but seized and analyzed them anyway, trial court's conclusion that suppression is inadequate is properly within its discretion, *see: State v. Peña Fuentes*, 179 Wn.2d 808 (2014), *State v. Irby*, 3 Wn.App.2d 247 (2018); 2-1, III.

***State v. Mullins***, 158 Wn.App. 360, 364-70 (2010)

Defendant, told he is not under arrest, invokes right to counsel, police terminate interview, defendant leaves, later defendant learns he is a suspect, surrenders and is arrested, defendant is not questioned but confesses after being reminded he had invoked; held: police need not interrupt booking process to facilitate a call to counsel, CrR 3.1(c)(2), *State v. Wade*, 44 Wn.App. 154 (1986), *overruled, on other grounds, Pers. Restraint of Carrier*, 173 Wn.2d 791 (2012), distinguishing *State v. Kirkpatrick*, 89 Wn.App. 407, 413-14 (1997), *State v. Jaquez*,105 Wn.App. 699, 712-17 (2001), *State v. Scherf*, 192 Wn.2d 350 (2018), unless booking process is "unduly protracted," or arrest is for DUI; I.

***State v. Hawkins***, 164 Wn.App. 705, 714-15 (2011)

A defendant's motion for a ministerial correction to a sentence is not a critical stage, defendant has no constitutional right to an attorney in post-conviction proceedings, *Pers. Restraint of Gentry*, 137 Wn.2d 378, 390 (1999), *Coleman v. Thompson*, 501 U.S. 722, 752, 115 L.Ed.2d 640 (1991); I.

***State v. Pierce***, 169 Wn.App. 533, 544-51 (2012)

Police arrest defendant, question him about one crime then accuse him of murder, defendant states, "[i]f you're…trying to say I'm doing it I need a lawyer. I'm gonna need a lawyer because it wasn't me," defendant is booked, jail policy is to call public defender home number after hours if a lawyer is demanded, five hours later defendant asks to speak with detectives again, makes statements that are used at murder trial, trial court finds that statement was equivocal and posted business number for public defender plus use of phone was adequate; held: "gonna need a lawyer" is an unequivocal request for counsel, *State v. Nysta,* 168 Wn.App. 30, 40-42 (2012), conditional language did not render request for counsel equivocal, police were obliged to make reasonable efforts to put defendant in touch with a lawyer, CrR 3.1(c)(2), mere access to a phone is not reasonable, *Tacoma v. Myhre,* 32 Wn.App. 661, 664 (1982), *cf.: Seattle v. Wakenight,* 24 Wn.App. 48, 51 (1979), *Seattle v. Carpenito,* 32 Wn.App. 80-9, 813 (1982), *State v. Gasteazoro-Paniagua,* 173 Wn.App. 751 (2013); II.

***State v. McCarthy***, 178 Wn.App. 90, 96-102 (2013)

During deliberations, jury asks for masking tape and a tape measure, trial court provides them without consulting counsel; held: responding to a jury request for non-evidentiary materials is not a critical stage of a trial at which defendant has a right to counsel, *State v. Jasper,* 158 Wn.App. 518, 538-39, *aff'd,* 174 Wn.2d 96, 121-24 (2012), *but see: State v. Caliguri,* 99 Wn.2d 501, 508-09 (1983); II.

***State v. Hampton***, 184 Wn.2d 656 (2015)

Defendant is appointed counsel following arraignment, at "trial call" defendant reports he is dissatisfied with appointed counsel who is ready for trial, retained counsel appears and moves to substitute and for a continuance, trial court denies continuance so retained counsel declines to substitute; held: reasons for dissatisfaction with appointed counsel is a factor to be considered in ruling on motion to substitute, *State v. Price,* 126 Wn.App. 617,, 632 (2005), *State v. Roth,* 75 Wn.App. 808, 825 (1994); trial court did not abuse discretion given that defendant did not make his request until the trial date, trial had already been continued once, victim opposed the continuance and defendant did not explain his dissatisfaction with appointed counsel, *State v. Castillo-Lopez,* 192 Wn.App. 741 (2016), *cf.: United States v. Gonzalez-Lopez,* 548 U.S. 140, 165 L.Ed.2d 409 (2006); reverses, in part, *State v. Hampton,* 182 Wn.App. 805 (2014); 8-1.

***State v. Federov***, 183 Wn.2d 669 (2015)

Defendant is arrested for DUI, asks to speak with counsel, asks for privacy when counsel is contacted on telephone, *Seattle v. Koch,* 53 Wn.App. 352 (1989), *State v. Fitzsimmons,* 93 Wn.2d 436 (1980), *affirmed on remand,* 94 Wn.2d 858 (1980), trooper remains in room but testifies at suppression hearing that he did not hear defendant's conversation, counsel "felt unable … to ask open-ended questions;" held: CrR 3.1 right to counsel is limited, not coextensive with Sixth Amendment right to counsel, right to private consultation is to be weighed against legitimate safety and practical concerns; affirms *State v. Federov,* 183 Wn.App. 736 (2014); 9-0.

***State v. Schierman***, 192 Wn.2d 577 (2018)

"[I]f the accused is not in front of a judge, not confronted by the procedural system, not confronted by the adversary, and not really confronted at all, then the right to counsel does not attach. In this case, the trial court established a hardship determination procedure that afforded both parties an opportunity to object. One of the steps in that procedure was that the lawyers could view juror hardship determinations—some of which came in online and some of which came in on paper—in the jury administrators' office. The State and the defense did go to that office, but they went separately. They looked at declarations there, just as they might look at declarations in the privacy of their own offices. Then, based on their record review, they informed the administrator and the judge about whether a hearing was necessary. Every time a party requested a hearing, the request was granted. Thus, this is not a situation where the State was represented at an adversarial proceeding and the defendant was not," at ¶¶ 67-74.

***State v. Scherf,*** 192 Wn.2d 350 (2018)

Defendant-prisoner is arrested for murder of guard, asks for counsel, is not placed in touch with a lawyer, CrR 3.1, until next day, later is provided a lawyer, consults and confesses in spite of counsel's advice; held: while police have a court-rule obligation to put an arrestee in touch with counsel, *State v. Kirkpatrick*, 89 Wn.App. 407 (1997), *State v. Pierce*, 169 Wn.App. 533, 548 (2012), delay here was justified as police had to obtain a search warrant, had to lockdown the prison, akin to booking procedures which excuse delay to obtain counsel, *State v. Mullins*, 158 Wn.App. 360, 369-70 (2010); even if rule was violated it was harmless here as defendant was provided an attorney before he confessed, *State v. Wade*, 44 Wn.App. 154, 159 (1986), *abrogated, on different grounds*, *In re Pers. Restraint of Carrier*, 173 Wn.2d 791 (2012); 9-0.

***State v. Irby***, 3 Wn.App.2d 247 (2018)

Jail guards read letters defendant wrote to counsel, trial court denies motion to dismiss placing burden of proving prejudice on defendant, distinguishing between investigating state actors and custodial state actors; held: misconduct by law enforcement and misconduct by jail guards is an artificial distinction, where any state actor eavesdrops on attorney-client communication there is a presumption of prejudice which state must overcome beyond a reasonable doubt, *State v. Cory*, 62 Wn.2d 371, 378 (1963), *State v. Peña Fuentes*, 179 Wn.2d 808, 811 (2014), *State v. Perrow*, 156 Wn. App. 322, 332 (2010), *State v. Garza*, 99 Wn. App. 291, 301 (2000), *State v. Granacki*, 90 Wn.App. 598, 603-04 (1998), on remand if court finds prejudice then remedy may be dismissal, suppression of evidence, disqualification of specific prosecutors or entire office or exclusions of witnesses tainted by the misconduct; I.

***State v. Anderson***, 19 Wn.App.2d 556 (2021)

Defendant appears at resentencing by video from prison with his attorney on the telephone from a separate location, during the hearing defendant asks a question, court tells him to confer with counsel and adjourns; held: without some method of consulting privately with counsel there is a constitutional violation, albeit harmless here, *see: State v. Gonzales-Morales*, 138 Wb,2d 374, 376-77 (1999); III.

***State v. M.N.H.***, 199 Wn.2d 337 (2022)

At a juvenile court community supervision revocation hearing respondent has the statutory right to counsel, RCW 13.40.140, reversing, in part, *State v. M.N.H.*, 19 Wn.App. 281, 285-86 (2021); *per curiam.*

***State v. Charlton***, 23 Wn.App.2d 150 (2022)

At a first preliminary appearance, CrR 3.2.1(e)(1), CrRLJ 3.2.1, arrestee is entitled to counsel, *Rothgery v. Gillespie Cnty., Tex.*, 554 U.S. 191, 198 (2008), but the first appearance is not a critical stage even though bail is set; the second appearance is a critical stage, but failure to provide counsel is harmless error, *see: In re Sanchez*, 197 Wn.App. 686 (2017), even if it structural error; II.

# COUNSEL
## Waiver

***State v. Garcia***, 92 Wn.2d 647 (1979)

Trial court need not advise defendant of right to proceed *pro se;* 8-0.

***State v. Hoff***, 31 Wn.App. 809 (1982)

*Pro se* defendant is not entitled to special consideration by trial court, and "must bear the consequences of his or her own representation and cannot on appeal complain of the quality of the defense"; II.

***State v. Johnson***, 33 Wn.App. 15 (1982)

After defendant was found ineligible for appointed counsel, he persisted in stating he could not afford retained counsel; held: defendant's failure to obtain retained counsel was a waiver of the right to counsel, defendant having been informed of consequences of self-representation, *see: State v. Nordstrom*, 89 Wn.App. 737 (1998); I.

***State v. Dougherty***, 33 Wn.App. 466 (1982)

Defendant seeks to fire his appointed attorney, court refuses, but permits defendant to proceed *pro se*; held: where a defendant seeks to discharge court-appointed counsel, "a penetrating and comprehensive examination by the court of the defendant's allegation will serve as the basis of whether different counsel needs to be appointed . . . within the sound discretion of the trial court," *State v. Shelton*, 71 Wn.2d 838, 840 (1967), *State v. Lytle*, 71 Wn.2d 83 (1967), *State v. Lopez*, 79 Wn.App. 755, 763-7 (1995), *State v. Schaller*, 143 Wn.App. 258 (2007), *cf.: State v. Witherspoon*, 171 Wn.App. 271, 292-93 (2012), *affirmed, on other grounds*, 180 Wn.2d 875 (2014); here, inadequate inquiry into *pro se* representation; *accord*: *State v. Brittain*, 38 Wn.App. 740 (1984); III.

***State v. Barker***, 35 Wn.App. 388 (1983)

Where a defendant requests to proceed as co-counsel, court need not insure that defendant is aware of the disadvantages of self-representation; I.

***State v. Hightower***, 36 Wn.App. 536 (1984)

Defendant does not have constitutional right to act as co-counsel; I.

***State v. Imus***, 37 Wn.App. 170 (1984)

Illiterate defendant who unequivocally requests the right to represent himself must be permitted to do so; I, 2-1.

***Bellevue v. Acrey***, 103 Wn.2d 203 (1984)

Colloquy on the record is required to establish a waiver of counsel; colloquy must reflect accused's understanding of the charge and maximum penalty, *State v. Howard*, 1 Wn.App.2d 420 (2017), that accused must conduct defense within the rules, and disadvantages of proceeding without counsel, *see*: *State v. Chavis*, 31 Wn.App. 784 (1982), *State v. Silva*, 108 Wn.App. 536

(2001), *Iowa v. Tovar*, 158 L.Ed.2d 209 (2004); *accord*: *Renton v. Willard*, 44 Wn.App. 525 (1986), *State v. Buelna*, 83 Wn.App. 658 (1996); 7-2.

***McKaskle v. Wiggins***, 79 L.Ed.2d 122 (1984)

Standby counsel for *pro se* defendant may participate in trial, even over defendant's objection, when participation is outside presence of the jury; participation in the presence of the jury is not absolutely barred as long as it is invited by defendant or "within reasonable limits;" 6-3.

***State v. Christensen***, 40 Wn.App. 290 (1985)

*Pro se* defendant was advised by trial court of right to counsel, maximum penalty, colloquy established that defendant had 11th grade education and could read and write English; held: inadequate colloquy for waiver of counsel, as defendant was not advised of technical aspects of conducting a defense, of rules regarding preservation of error, that presenting a defense is not just a matter of telling one's story; defendant's lack of participation in voir dire, minimal cross-examination, etc., establishes defendant did not make a knowing and intelligent waiver of counsel, *State v. Palmer*, ___ Wn.App.2d ___, 518 P.3d 252 (2022),*see also*: *State v. Smith*, 50 Wn.App. 524 (1988), *but see: Iowa v. Tovar*, 159 L.Ed.2d 209 (2004); III.

***State v. Strodtbeck***, 46 Wn.App. 26 (1986)

Where defendant was represented by counsel at a previous trial on the same charge, then defendant is aware of the dangers of self-representation at a second trial even absent a colloquy; I.

***State v. Sinclair***, 46 Wn.App. 433 (1986)

On day of trial, defendant requests substitute counsel for his public defender, claiming counsel had lied and refused to research, trial court concludes there was no basis for substituting counsel, tells defendant that he may represent himself or proceed with his public defender; defendant proceeds *pro se*, court advises defendant he is bound by rules of evidence, periodically assists defendant during trial; held: where indigent defendant fails to provide court with legitimate reasons for new counsel, he may be forced to continue with appointed counsel or to proceed *pro se*, *State v. Madsen*, 168 Wn.2d 496 (2010), *State v. Staten*, 60 Wn.App. 163 (1991), *State v. Stutzke*, 2 Wn.App.2d 927, 937-38 (2018); waiver of right to counsel is unequivocal when he expresses a preference for acting *pro se* over all alternatives to which he is legally entitled; indigent defendant may not force new counsel by filing a complaint with the Bar Association; I.

***State v. Hahn***, 106 Wn.2d 885 (1986)

Mentally ill but competent defendant is held to same standard for waiver of counsel as other defendants', *i.e.*, is decision intelligent and voluntary; trial court must conduct an inquiry designed to assure defendant has been fully informed of alternatives available, comprehends the consequences of self-representation and freely chooses to waive counsel, *State v. Jones*, 99 Wn.2d 735 (1983) (but overruling n. 3 at 746), *accord: State v. Honton*, 85 Wn.App. 415, 418-22 (1997), *State v. Vermillion*, 112 Wn.App. 844 (2002), *but see: Indiana v. Edwards*, 171 L.Ed.2d 345 (2008), , *State v. Englund*, 186 Wn.App. 444 (2015), *see: Pers. Restraint of Rhome*,

172 Wn.2d 654 (2011), *State v. Lawrence*, 166 Wn.App. 378 (2012), *State v. Smith*, 13 Wn.App.2d 807 (2020), *State v. Sabon*, ___ Wn.App.2d ___, 519 Wn.App. 600 (2022); *reverses* *State v. Hahn*, 41 Wn.App. 876 (1985); 9-0.

***State v. Harris***, 48 Wn.App. 279 (1987)

Motions to proceed as co-counsel are not favored, and should only be granted where there has been a substantial showing that cause of justice will thereby be served; I.

***Patterson v. Illinois***, 101 L.Ed.2d 261 (1988)

After indictment, defendant is interviewed by police, advised of *Miranda* warnings, waives, confesses; held: accused may waive Sixth Amendment right to counsel if properly advised by police, who are not barred from initiating interrogation, *see:* *Fellers v. United States*, 157 L.Ed.2d 1016 (2004); 5-4.

***State v. Hegge***, 53 Wn.App. 345 (1989)

*Pro se* defendant's lack of preparedness is not grounds for depriving him of his *pro se* status, *State v. Vermillion*, 112 Wn.App. 844 (2002); a complete breakdown of communication between defendant and counsel mandates granting counsel's motion to withdraw, *see: State v. Thompson*, 169 Wn.App. 436, 457-58 (2012); III.

***State v. Nicholas***, 55 Wn.App. 261 (1989)

Incarcerated *pro se* defendant may be denied physical access to law library where a lawyer is appointed to obtain materials for defendant; where *pro se* defendant permits standby counsel to act as his attorney at trial and does not reassert his desire to represent himself, he has waived his right to proceed *pro se*; I.

***State v. Chase***, 59 Wn.App. 501 (1990)

A motion to continue trial to retain counsel of choice may be denied if it will result in delay of the trial, *State v. Garcia*, 92 Wn.2d 647, 655-6 (1979); II.

***McNeil v. Wisconsin***, 115 L.Ed.2d 158 (1991)

Defendant is arrested for robbery, advised of *Miranda* warnings, does not request counsel but refuses to answer questions, is later arraigned with counsel; police later readvise and question defendant about unrelated murder, defendant confesses; held: request for counsel at arraignment is offense-specific under the Sixth Amendment, *Michigan v. Jackson*, 89 L.Ed.2d 631 (1986), *but see:* *Montejo v. Louisiana*, 173 L.Ed.2d 955 (2009), *Texas v. Cobb*, 149 L.Ed.2d 34 (2001), and does not preclude police-initiated interrogation regarding other matters absent a Fifth Amendment demand for counsel, *Edwards v. Arizona*, 68 L.Ed.2d 378 (1981), *State v. Hahn*, 162 Wn.App. 885, 892-900 (2011), *rev'd, on other grounds, State v. Hahn,* 174 Wn.2d 126 (2012); 6-3.

***State v. DeWeese***, 117 Wn.2d 369 (1991)

Defendant fires two appointed attorneys, demands third, trial court, after lengthy colloquy addressing defenses, disadvantages, consequences and details of *pro se* representation, requires defendant to choose between second attorney and representing self; held: following proper

refusal to appoint other counsel, *State v. Staten*, 60 Wn.App. 163 (1991), *State v. Sinclair*, 46 Wn.App. 433 (1986), *United States v. Wheat*, 100 L.Ed.2d 140 (1988), court may pose option that defendant either remains with current attorney or proceed *pro se* as long as colloquy shows defendant understands seriousness of charge, maximum penalty, *State v. Howard*, 1 Wn.App.2d 420 (2017), existence of technical procedural rules, *State v. Silva*, 108 Wn.App. 536 (2001), *State v. Madsen*, 168 Wn.2d 496 (2010), *State v. Mehrabian*, 175 Wn.App. 678, 690-95 (2013), *see: State v. Modica*, 136 Wn.App. 434 (2006), *aff'd, on other grounds*, 164 Wn.2d 83 (2008), *State v. James*, 138 Wn.App. 628, 635-37 (2007), *State ex rel. Schmitz v. Knight*, 142 Wn.App. 291 (2007); once waiver of counsel is made, defendant may not later demand appointment of counsel as a matter of right, *State v. Imus*, 37 Wn.App. 170 (1984), *State v. Pablo Navarro*, 188 Wn.App. 550, 557-58 (2015), *see: State v. Barker*, 75 Wn.App. 236, 238-42 (1994), *State v. Bolar*, 118 Wn.App. 490, 515-17 (2003), *State v. Modica*, *supra.* At 443-46; 9-0.

***State v. Estabrook***, 68 Wn.App. 309 (1993)

Trial court requires *pro se* defendant to submit written questions to the court, which were asked of a developmentally disabled child victim; held: because defendant failed to object, defendant had actual control over the questions asked, and the procedure did not impact the jury's perception that defendant was representing himself, defendant's right of self-representation was not violated, *see: McKaskle v. Wiggins*, 79 L.Ed.2d 122 (1984); II.

***State v. Joyner***, 69 Wn.App. 356 (1993)

Defendant, denied appointed counsel due to wife's income, is advised of right to appointed counsel, right to challenge indigency determination in court, fact that trial is governed by formal rules and procedures to which defendant would be held, disadvantages of self-representation, defendant agrees to represent self; held: while trial court may not blindly defer to an erroneous indigency determination by a designee (here, King County Office of Public Defense), consideration of defendant's wife's income was proper, RCW 10.101.020(2), *distinguishing* CrR 3.1(d)(1), court fully advised defendant who waived right to retained counsel; I.

***Godinez v. Moran***, 125 L.Ed.2d 321 (1993)

Competency standard for waiving counsel is the same as competency to be tried, *i.e.*, sufficient present ability to consult with counsel with a reasonable degree of rational understanding plus a rational as well as factual understanding of the proceedings, *but see: Indiana v. Edwards*, 171 L.Ed.2d 345 (2008), *State v. Englund*, 186 Wn.App. 444 (2015), *State v. Smith*, 13 Wn.App.2d 807 (2020), *cf.: Pers. Restraint of Rhome*, 172 Wn.2d 654 (2011), *State v. Lawrence*, 166 Wn.App. 378 (2012); 7-2.

***State v. Osborne***, 70 Wn.App. 640 (1993)

Trial court permits defendant to fire appointed counsel just before trial, denies motion to continue to obtain counsel; held: absent advice of the dangers and disadvantages of self-representation, there was no implied waiver of counsel, *State ex rel. Schmitz v. Knight*, 142 Wn.App. 291 (2007), *State v. Palmer*, ___ Wn.App.2d ___, 518 P.3d 252 (2022), thus reversed; II.

***State v. Luvene***, 127 Wn.2d 690, 698-99 (1995)

Defendant objects to defense counsel's request for a continuance, states 'he is "prepared to go for myself," and "I'm not even prepared about that. . .[t]his is out of my league"'; held: in context, the statements were not an unequivocal assertion of the right to self-representation, *State v. Stenson*, 132 Wn.2d 668, 730-43 (1997), *State v. Woods*, 143 Wn.2d 561, 585-88 (2001), *but see: State v. Curry,* 191 Wn.2d 475 (2018), *State v. Modica,* 136 Wn.App. 434 (2006), *aff'd, on other grounds,* 164 Wn.2d 83 (2008), *State v. Mehrabian,* 175 Wn.App. 678, 690-95 (2013); 9-0.

***State v. Breedlove***, 79 Wn.App. 101 (1995)

Twelve days before trial, defendant files motion to dismiss counsel and proceed *pro se* with standby counsel, court sets hearing on last court day before trial date at which defendant asks for a continuance to prepare his own defense, all motions denied; held: where request to proceed *pro se* is made shortly before or at trial, trial court must exercise discretion by balancing defendant's interest in self-representation and society's interest in the orderly administration of justice, at 107; to deny motion, court must find either that the motion is made for improper purposes, *i.e.*, unjustifiable delay, or that granting the request would obstruct the orderly administration of justice, at 108, *State v. Paumier*, 155 Wn.App. 673, 686-88 (2010), *affirmed, on other grounds*, 176 Wn.2d 29 (2012); when court is put on notice that defendant wishes self-representation but delays ruling, timeliness of request is measured from date of initial request, at 109; court may not infer improper motive from a simultaneous continuance motion that is not a condition of his request to proceed *pro se*, at 109; continuance request is not a bar to motion, at 109-110; *see: State v. Fritz*, 21 Wn.App. 354 (1978), *State v. Kender*, 21 Wn.App. 622, 624 (1978), *State v. Jordan*, 39 Wn.App. 530, 541 (1985), *State v. Vermillion*, 112 Wn.App. 844 (2002); II.

***State v. Canedo-Astorga***, 79 Wn.App. 518, 523-7 (1995)

Defendant validly waives counsel, standby counsel is appointed, during trial defendant demands that standby counsel take over, standby counsel expresses need for "not a short" recess to prepare, court denies defendant's demand; held: once counsel is waived, it is within trial court's discretion whether to reappoint counsel, *State v. DeWeese*, 117 Wn.2d 369, 376-7 (1991), *State v. Modica*, 136 Wn.App. 434, 443-46 (2006), *aff'd, on other grounds,* 164 Wn.2d 83 (2008), defendant's ineptitude itself does not dictate reappointment, trial court properly denied reappointment due to proposed delay, *State v. Fisher,* 188 Wn.App. 924 (2015); II.

***Tacoma v. Bishop***, 82 Wn.App. 850 (1996)

Defendant appears at three trial dates without counsel, claiming he didn't have time to get one, trial court denies last continuance motion and obliges defendant to proceed to trial *pro se;* held: while a defendant may waive the right to counsel by dilatory behavior, *State v. Stutzke,* 2 Wn.App.2d 927, 937-38 (2018), defendant must be first warned about the risks and disadvantages of self-representation, thus denial of continuance was abuse of discretion, *State v. Nordstrom*, 89 Wn.App. 737 (1998), *State ex rel. Schmitz v. Knight*, 142 Wn.App. 291 (2007), *State v. Palmer,* ___ Wn.App.2d ___, 518 P.3d 252 (2022), *see: State v. Afeworki,* 189 Wn.App. 327 (2015) II.

***State v. Buelna***, 83 Wn.App. 658 (1996)

Presence of standby counsel does not obviate the need to engage in full colloquy by court to determine intelligent and knowing waiver of counsel, *see:* *State v. DeWeese*, 117 Wn.2d 369 (1991); II.

***State v. Stenson***, 132 Wn.2d 668, 737-43 (1997)

Where defendant requests substitute counsel or to proceed *pro se*, trial court may look at record as a whole to determine if defendant's waiver of counsel is unequivocal, *see:* *State v. Modica*, 136 Wn.App. 434 (2006) , *State v. Madsen*, 168 Wn.2d 496 (2010), , *aff'd, on other grounds*, 164 Wn.2d 83 (2008)*State v. Mehrabian*, 175 Wn.App. 678, 690-95 (2013); 8-1.

***State v. Romero***, 95 Wn.App. 323 (1999)

While defendant may waive right to counsel on appeal, *State v. Rafay*, 167 Wn.2d 644 (2009), until he has done so he may not file pleadings in an appellate court other than a *pro se* supplemental brief, RAP 10.1(d), as there is no right to hybrid representation at trial or on appeal, *see:* *Martinez v. Court of App. Of Cal.*, 145 L.Ed.2d 597 (2000); III.

***Martinez v. Court of App. of Cal.***, 145 L.Ed.2d 597 (2000)

Defendant does not have constitutional right to represent self on appeal, distinguishing *Faretta v. California*, 45 L.Ed.2d 562 (1975), *but see:* *State v. Rafay*, 167 Wn.2d 644 (2009); 9-0.

***Spokane v. Hamlett***, 98 Wn.App. 841 (2000)

At each pretrial hearing, defendant expresses desire to represent himself, court engages in full colloquy on waiver of counsel 16 days before trial, on RALJ appeal, superior court dismisses, holding colloquy was not timely; held: defendant's desire to represent himself was consistent throughout proceedings, when colloquy was held he did not request continuance, thus colloquy was timely; III.

***State v. Silva***, 107 Wn.App. 605 (2001)

A *pro se* pretrial detainee has a right of reasonable access to state-provided resources to prepare a meaningful defense, CONST., art. I, § 22; what measures are necessary to constitute reasonable access lie within sound discretion of trial court after considering nature of charge, complexity of issues, need for investigation, orderly administration of justice, fair allocation of resources, security, conduct of accused, *see:* *State v. Fritz*, 21 Wn.App. 354, 359-63 (1978); whether an investigator must be appointed must be determined by trial court after considering needs of the case; inmate need not be granted access to a direct dial telephone where all of defendant's needs can be met by a jail collect-only telephone; unless otherwise ordered by trial court, standby counsel is not required to actually perform research and errands on behalf of a *pro se* defendant; standby counsel may be ordered by the court to act as liaison between accused and court including confirming motions, coordinating discovery and interviews, providing forms, assisting in securing an investigator, if necessary, and any other duties logically associated with appointed counsel that would satisfy accused's right of access to tools necessary to prepare an adequate defense; I.

***State v. Bolar***, 118 Wn.App. 490, 515-17 (2003)

One month before trial, court grants defendant right to proceed *pro se* with standby counsel, trial begins and is then recessed for months, defendant decides to accept counsel, later seeks to proceed *pro se* again which trial court denies; held: because trial had begun, trial court had discretion to grant or deny defendant's request to proceed *pro se, State v. DeWeese*, 117 Wn.2d 369, 376-77 (1991), *but see: State v. Paumier*, 155 Wn.App. 674, 686-88 (2010), *affirmed, on other grounds*, 176 Wn.2d 29 (2012); I.

***Iowa v. Tovar***, 158 L.Ed.2d 209 (2004)

At arraignment, trial court advises defendant, who expresses a desire to waive counsel and plead guilty, of his right to counsel, maximum and minimum penalties and elements of the crime, accepts plea, defendant seeks to set it aside; held: Sixth Amendment does not oblige trial court to advise a defendant, seeking to plead guilty without counsel, of the risk that a viable defense may be overlooked or that waiving counsel deprives defendant of opportunity to obtain an independent opinion on whether, under facts and law, it is wise to plead guilty; "[t]he constitutional requirement is satisfied when the trial court informs the accused of the nature of the charges against him, of his right to be counseled regarding his plea, and of the range of allowable punishments," at 216; 9-0.

***State v. Lillard***, 122 Wn.App. 422, 427-30 (2004)

During colloquy on waiver of counsel, trial court's failure to advise defendant of elements of crime and possible defenses is not error where record establishes that defendant was aware of the nature of the charges, distinguishing *State v. Silva*, 108 Wn.App. 536 (2001); I.

***State v. Hemenway***, 122 Wn.App. 787 (2004)

Trial court may properly deny a defendant's demand to represent himself where defendant engages in disruptive behavior, *State v. Bolar*, 118 Wn.App. 490, 516 (2003), as long as court performs a proper colloquy and analyzes facts and circumstances on the record, distinguishing *State v. Barker*, 75 Wn.App. 236, 241-42 (1994); II.

***State v. Modica***, 136 Wn.App. 434 (2006), *aff'd, on other grounds*, 164 Wn.2d 83 (2008)

Defense counsel seeks continuance over defendant's objection, defendant demands to proceed *pro se*, trial court engages in full colloquy and grants motion, state adds count later; held: when a defendant makes a clear and knowing request to proceed *pro se*, such a request is not rendered equivocal by the fact that the defendant is motivated by something other than a singular desire to conduct his own defense, *State v. DeWeese*, 117 Wn.2d 369, 378-79 (1991), *State v. Madsen*, 168 Wn.2d 496 (2010), *State v. Curry*, 191 Wn.2d 475 (2018). *cf.: State v. Woods*, 143 Wn.2d 561 (2001), *State v. Luvene*, 127 Wn.2d 690 (1995), *State v. Mehrabian*, 175 Wn.App. 678, 690-95 (2013); reappointment of counsel after a valid waiver is within discretion of trial court, *State v. DeWeese, supra.*, at 376-77, *State v. Canedo-Astorga*, 79 Wn.App. 518, 525-27 (1995), *State v. Fisher*, 188 Wn.App. 924 (2015), addition of new charge is a factor weighing in favor of granting the motion, although it is still within trial court's discretion to find that other circumstances militated in favor of denying the request, at 444 n. 4; trial court is not required to engage in an additional colloquy where information is amended, at 446 ¶¶ 29-30, *see State v. Phan*, ___ Wn.App.2d ___, 522 P.3d 105 (2022); I.

***State ex rel. Schmitz v. Knight***, 142 Wn.App. 291 (2007)

Prior to civil contempt hearing which may result in incarceration, contemnor persists in demanding counsel but appeared numerous times without counsel, trial court finds contemnor forfeited right to counsel; held: waiver of counsel by conduct does not conform to the Sixth Amendment unless contemnor is first warned of the consequences, including the risks of proceeding *pro se*, *Tacoma v. Bishop*, 82 Wn.App. 850 (1996), *State v. Osborne*, 70 Wn.App. 640 (1993), *State v. Palmer*, ___ Wn.App.2d ___, 518 P.3d 252 (2022), *see: In re Welfare of G.E.*, 116 Wn.App. 326, 337-38 (2003), *State v. Afeworki*, 189 Wn.App. 327 (2015), *State v. Stutzke*, 2 Wn.App.2d 927, 937-38 (2018); I.

***Indiana v. Edwards***, 171 L.Ed.2d 345 (2008)

States may insist upon representation by counsel for competent defendants who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves, *see: Pers. Restraint of Rhome*, 172 Wn.2d 654 (2011), *State v. Lawrence*, 166 Wn.App. 378 (2012), *State v. Englund*, 186 Wn.App. 444 (2015), *State v. Smith*, 13 Wn.App.2d 807 (2020), *distinguishing Faretta v. California*, 45 L.Ed.2d 562 (1975), *but see: State v. Hahn*, 106 Wn.2d 885 (1986), *State v. Honton*, 85 Wn.App. 415, 418-22 (1997), *State v. Vermillion*, 112 Wn.App. 844 (2002); 7-2.

***State v. Rafay***, 167 Wn.2d 644 (2009)

Defendant has a state constitutional right to represent himself on appeal, *cf.: Martinez v. Court of App. Of Cal.*, 145 L.Ed.2d 597 (2000) ; 9-0.

***State v. Pugh***, 153 Wn.App. 569 (2009)

Defendant, appearing *pro se* with standby counsel, seeks to withdraw guilty plea, argues on appeal that standby counsel was ineffective for not obtaining affidavits or serving subpoenas; held: standby counsel is not obligated to perform research and errands unless ordered by the court, *State v. Silva*, 107 Wn.App. 605 (2001), court here ordered counsel to assist defendant in preparing motion to withdraw plea which counsel completed, record does not even show that defendant asked standby counsel to help obtain witnesses; II.

***State v. Paumier,*** 155 Wn.App. 673, 686-88 (2010), *affirmed, on other grounds,* 176 Wn.2d 29 (2012)

After jury is selected but before it was sworn, defendant asks to represent himself, does not seek a continuance, trial court denies it as untimely; held: while court has some discretion to deny self-representation on the eve of or during trial, *State v. Breedlove*, 79 Wn.App. 101 (1995), timeliness should not operate as a bar to defendant's right to defend *pro se;* absent evidence that trial would be delayed it is an abuse of discretion to deny the unequivocal demand; 2-1, II.

***Pers. Restraint of Rhome***, 172 Wn.2d 654 (2011)

When a mentally ill defendant seeks to waive counsel, trial court is not independently obliged to determine whether defendant is mentally competent to proceed *pro se, State v. Lawrence,* 166 Wn.App. 378 (2012), *State v. Phan,* ___ Wn.App.2d ___, 522 P.3d 105 (2022)*;* courts may inquire further into a defendant's ability to waive counsel when mental health concerns are present, *see: Indiana v. Edwards,* 554 U.S. 164, 171

L.Ed.2d 345 (2008), *State v. Kolocotronis,* 73 Wn.2d 92 (1968), *State v. Hahn,* 106 Wn.2d 885 (1986), , *State v. Englund*, 186 Wn.App. 444 (2015), *State v. Smith,* 13 Wn.App.2d 807 (2020); 9-0.

***State v. Lawrence***, 166 Wn.App. 378 (2012)

While trial court has discretion to consider a defendant's known mental illness in determining if he is competent to represent himself, it is not required to do so, particularly where there is no present behavior to suggest defendant is mentally incompetent to represent himself, *State v. Phan,* ___ Wn.App.2d ___, 522 P.3d 105 (2022), *see: Indiana v. Edwards*, 554 U.S. 164, 171 L.Ed.2d 345 (2008), *Pers. Restraint of Rhome*, 172 Wn.2d 654 (2011), *State v. Englund*, 186 Wn.App. 444 (2015), *see: State v. Smith,* 13 Wn.App.2d 867 (2020); III.

***State v. Thompson***, 169 Wn.App. 436, 465-69 (2012)

Purposeful disruptive misconduct may be grounds to deny *pro se* status, *State v. Hemenway,* 122 Wn.App. 787, 792-96 (2004), *State v. Smith,* 13 Wn.App.2d 867 (2020), distinguishing *State v. Madsen,* 168 Wn.2d 496, 509 (2010); I.

***State v. Mehrabian***, 175 Wn.App. 678, 690-95 (2013)

Defendant expresses dissatisfaction with appointed counsel, retains a lawyer, later asks to proceed *pro se* with retained counsel as standby counsel which court approves after colloquy, later retained counsel is granted leave to withdraw since he was not being paid, court readvises defendant that he has no right to standby counsel, that court will not appoint standby counsel, gives defendant the chance to get a public defender, defendant declines and says he will represent himself; held: a desire to proceed *pro se* partly because defendant is dissatisfied with counsel does not constitute an equivocal request, *State v. Curry*, 191 Wn.2d 475 (2018) ,*State v. Modica*, 136 Wn.App. 434, 442 (2006), *aff'd,* 164 Wn.2d 83 (2008), *State v. Stenson*, 132 Wn.2d 668, 742 (1997), distinguishing *State v. Woods,* 143 Wn.2d 561 (2001); "when a defendant makes a clear and knowing request to proceed *pro se*, such a request is not rendered equivocal by the fact that the defendant is motivated by something other than a singular desire to conduct his or her own defense," *State v. DeWeese*, 117 Wn.2d 369, 378 (1991); I

***State v. Floyd***, 178 Wn.App. 402 (2013)

Defendant, representing himself with standby counsel, refers during closing to several facts not in evidence, is admonished, continues to attempt to offer evidence through statements to the jury, trial court excuses jury, defendant promises to avoid further disruption, court declines another chance, finds defendant was intentionally disrupting the trial, over defense and state's objection revokes *pro se* status, standby counsel gives closing argument raising a defense different that the one defendant was raising (defendant: victim injured herself; counsel: convict only of lesser as injuries were not substantial); held: trial court may revoke *pro se* status where it finds, and the record supports, intentional disruptive conduct, *State v. Madsen,* 168 Wn.2d 496 (2010); trial court should consider the fact that forcing counsel on a defendant may force an unwanted defense, *see: State v. Coristine,* 177 Wn.2d 370, 376-77 (2013), here revocation was not manifestly unreasonable; II.

***State v . Cobos***, 178 Wn.App. 692 (2013), *aff'd, on other grounds,* 182 Wn.2d 12 (2014)

Defendant moves to represent himself at sentencing, before court approves defense counsel agrees to offender score of 9, at sentencing defendant objections to offender score, court offers continuance for state to prove priors, defendant declines, court accepts counsel's agreement; held: counsel's agreement while defendant's motion to represent himself was improper, *Haller v. Wallis*, 89 Wn.2d 539, 547 (1978), as an attorney can waive substantive rights only with specific authorization, *State v. Ford*, 125 Wn.2d 919, 922 (1995), *Graves v. P.J. Taggares Co.*, 94 Wn.2d 298, 303 (1980), *State v. Sain*, 34 Wn.App. 553, 556-57 (1983); III.

***State v. Coley***, 180 Wn.2d 543, 559-62 (2014)

A trial court may defer a decision on self-representation pending a competency determination as long as there has been a proper referral for evaluation and treatment, *State v. Madsen*, 168 Wn.2d 496, 510 (2010), *State v. Sabon*, ___ Wn.App.2d ___, 519 P.3d 600 (2022); defendant's moved to proceed *pro se* which was deferred pending competency hearing, after defendant is found competent, following filing by defendant of a "Motion for Order to Speculate Right to Self Defense," trial court expressed that it did not understand the motion, defendant replies with an unrelated question about plea bargaining, trial court did not abuse discretion in denying defendant's equivocal request to represent himself; 7-2.

***State v. Englund***, 186 Wn.App. 444 (2015)

Defendant asks to represent himself, trial judge orders him to file a written motion, at next hearing with no written motion court engages in colloquy, defendant answers tangentially, court finds defendant lacked capacity to understand and follow rules, denies self-representation, counsel later moves for reconsideration, court denies it because it wasn't filed timely; held: trial court may consider defendant's capacity to represent himself and deny self-representation, *see: Indiana v. Edwards*, 554 U.S. 164, 171 L.Ed.2d 345 (2008), *Pers. Restraint of Rhome*, 172 Wn.2d 654 (2011), *State v. Smith*, 13 Wn.App.2d 867 (2020), *but see: State v. Hahn*, 106 Wn.2d 885 (1986); dissent distinguishes ability v. capacity to represent oneself; 2-1, II.

***State v. Fisher***, 188 Wn.App. 924 (2015)

Defendant waives counsel, is provided standby counsel shortly before trial, when state rests defendant demands counsel, standby reports he is unprepared to proceed and moves for a mistrial, arguing defendant is "mentally incapable" of self-representation, denied; held: no evidence supported the claim that defendant was mentally incapable of representing himself, distinguishing *State v. Bebb*, 108 Wn.2d 515 (1987), standby counsel is not obliged to be prepared to take over representation on a moment's notice, *see: State v. McDonald*, 143 Wn.2d 506, 511 (2001), rather standby counsel's role is to provide technical information, trial court did not abuse discretion; II.

***State v. Afeworki***, 189 Wn.App. 327, 344-51 (2015)

Defendant demands to proceed *pro se*, court engages in full colloquy finding valid waiver, defendant later is granted leave to change his mind and court appoints counsel, at trial defendant again demands to represent himself which is denied as untimely, defendant threatens counsel, judge warns him that if he continues he will be forced to represent himself, defendant threatens counsel again, court refuses to appoint other counsel, engages in colloquy whereupon defendant waives counsel, next day defendant demands new counsel, court denies it and obliges defendant to represent himself; held: where defendant is made aware of the risks of self-

representation he may lose his right to counsel through forfeiture or waiver by conduct, *Tacoma v. Bishop*, 82 Wn.App. 850, 856 (1996), *see: State ex rel. Schmitz v. Knight*, 142 Wn.App. 291 (2007), *State v. Osborne*, 70 Wn.App. 640 (1993), *In re Welfare of G.E.*, 116 Wn.App. 326, 337-38 (2003), *Dependency of E.P.*, 136 Wn.App. 401 (2006), *State v. Stutzke*, 2 Wn.App.2d 927, 937-38 (2018), *State v. Palmer*, ___ Wn.App.2d ___, 519 P.3d 252 (2022); 2-1, I.

***State v. Howard,*** 1 Wn.App.2d 420 (2017)

Waiver of the right to counsel is invalid if the trial court does not inform the defendant of the maximum penalty for the charged crime *State v. DeWeese*, 117 Wn.2d 369, 376-77 (1991), *State v. Silva*, 108 Wn.2d. 536, 541-42 (2001), and the defendant is not otherwise aware of the maximum penalty, *State v. Sinclair*, 46 Wash. App. 433, 437, 730 P.2d 742 (1986); II.

***State v. Curry***, 191 Wn.2d 475 (2018)

Expressing frustration with his attorney's motion for a continuance, defendant asserts he has "no choice" but to represent himself because he wishes to assert his right to a speedy trial, court engages in colloquy, defendant asserts that his waiver is not voluntary, court accepts waiver of counsel; held: while defendant's waiver was motivated by his frustration with delays by counsel, the court's colloquy established that the waiver was unequivocal, trial court did not abuse discretion; reverses *State v. Curry*, 199 Wn.App. 43 (2017); 9-0 (see concurrence regarding arguably inconsistent decisions).

***State v. Stutzke***, 2 Wn.App.2d 927, 937-38 (2018)

Over the course of three years defendant fired his first public defender to proceed *pro se*, then asked for and received new public defender, later alleged that the new lawyer was intoxicated in court and refused to meet with the lawyer, court previously advised defendant of the consequences of proceeding *pro se* and warned defendant that the right to counsel will be lost if defendant engages in dilatory conduct or misconduct, defendant refused to come to court and complained to county risk management about counsel, court allows counsel to withdraw and requires defendant to proceed without counsel; held: defendant received requisite warnings, through his conduct defendant forfeited right to counsel, *Tacoma v. Bishop*, 82 Wn.App. 850 (1996), *State v. DeWeese*, 117 Wn.2d 369, 379 (1991), *State v. Afeworki*, 189 Wn.App. 327, 346 (2015), *State v. Sinclair*, 46 Wn.App. 433, 437 (1986), *State v. Palmer*, ___ Wn.App.2d ___, 518 P.3d 252 (2022); III.

***State v. Davis***, 195 Wn.2d 571 (2020)

At trial, after court denies *pro se* defendant's motions for continuance and standby counsel, defendant becomes extremely disruptive, demands to leave, after court cautions defendant and informs him that if he leaves he will not be able to cross-examine state's witnesses defendant continues to disrupt and leaves courtroom, trial proceeds, on appeal defendant claims right to be present was violated and he was denied right to counsel to cross-examine witnesses; held: " trial judges who are confronted with disruptive, "contumacious, stubbornly defiant defendants must be given sufficient discretion to meet the circumstances of each case. *No one formula* for maintaining the appropriate courtroom atmosphere will be best in all situations," *Illinois v. Allen*, 397 U.S. 337, 343, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970), *State v. Chapple*, 145 Wn.2d 310, 318 (2001); while court would have been justified in removing defendant due to his disruptive behavior, here defendant's repeated demands to absent himself

amounts to a waiver of the right to be present, *see:* *State v. DeWeese*, 117 Wn.2d 369, 381 (1991); reverses *State v. Davis*, 6 Wn.App. 43 (2018); 6-3.

***State v. Palmer***, ___ Wn.App.2d ___, 518 P.3d 252 (2022) (2022)

Defendant, with court's permission, fires three lawyers after which court requires that he represent himself with standby counsel; held: defendant's behavior was not "extremely dilatory," *see:* *Tacoma v. Bishop*, 82 Wn.App. 850 (1996), *Dependency of E.P.*, 136 Wn.App. 401, 405-406 (2006), no evidence he was threatening or abusive or refused to communicate with lawyers, was not advised of the dangers of proceeding *pro se*, *State v. Christensen*, 40 Wn.App. 290 (1985), or that he will lose the right to counsel if he engages in dilatory tactics or misconduct, thus defendant did not waive the right to counsel; op. at 18 Wn.App. 825 (2021) withdrawn; II.

***State v. Sabon***, ___ Wn.App.2d ___, 519 Wn.App. 600 (2022)

Defendant seeks to proceed *pro se,* judge asks for a reason, defendant states that counsel isn't raising issues he wishes to raise, states that he is suffering from "untreated mental issues," court finds that request was equivocal and he was not competent to waive; held: motion to proceed *pro se* was timely and unequivocal, frustration with counsel's performance does not render the request equivocal, *State v. Modica,* 136 Wn.App. 434 (2006), *aff'd on other grounds,* 164 Wn.2d 83 (2008), court failed to engage in waiver colloquy to determine if waiver is knowingly, voluntary and intelligent, *State v. Burns,* 193 Wn.2d 190 (2019), *State v. Madsen,* 168 Wn.2d 496 (2010), absent competency evaluation court erred in determining defendant was incompetent to waive counsel, *Madsen, id.,* at 510, *State v. Hahn*, 106 Wn.2d 885 (1986), *State v. Coley*, 180 Wn.2d 543, 559-62 (2014); I.

***State v. Phan***, ___ Wn.App.2d ___, 2022WL17958603 (2022)

After full colloquy defendant waives counsel after which information is amended to add another felony, at bench trial defense is diminished capacity due to mental illness, rejected by court, defendant maintains court should have *sua sponte* conducted another colloquy on self-representation due to added charge and mental illness; held: fact that maximum penalty changed due to added charge, which was not included in the waiver colloquy, does not invalidate the waiver or require further colloquy; adding a new charge does not obligate the court to engage in further colloquy on waiver of counsel, *State v. Modica*, 136 Wn.App. 434, 444-53 (2006), *aff'd, on other grounds,* 164 Wn.2d 83 (2008); trial court has no duty to inquire into a defendant's mental health when assessing validity of waiver of counsel and no duty to reassess validity of waiver absent any indication that defendant is not competent to stand trial, *State v. Lawrence*, 166 Wn.App. 378 (2012), *Pers. Restraint of Rhome,* 172 Wn.2d 654 (2011); "[w]hen a trial court sua sponte induces a pro se defendant to engage in a second colloquy, the purpose of which is to get the pro se defendant to second-guess the defendant's original unequivocal decision to waive counsel, the defendant's choice is *not* "be[ing] honored," *Faretta v. California*, 422 U.S. 806, 834, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975); I.

# DEADLY WEAPON/FIREARM

***State v. Theroff***, 95 Wn.2d 385 (1980)

Special allegations must be included in the information or they cannot be used to enhance penalty, *but see: State v. Henthorn*, 85 Wn.App. 235 (1997); 6-3.

***State v. Claborn***, 95 Wn.2d 629 (1981)

Where defendant fired at police with a .357, failure to instruct that state must prove firearm beyond a reasonable doubt, is harmless error; accomplice may have sentence enhanced even if s/he never touched firearm; 9-0.

***State v. Rieger***, 96 Wn.2d 546 (1981)

Deadly weapon and firearm special verdicts should not be submitted to jury unless there is specific evidence providing a reasonable basis by which trier of fact could find actual or constructive possession; *reverses State v. Rieger*, 26 Wn.App. 321 (1980); 7-2.

***State v. Hauck***, 33 Wn.App. 75 (1982)

Defendant was convicted of robbery 1° but found not to have been armed with a deadly weapon; the only evidence of a weapon was of a 6-3/4" knife (by statute a deadly weapon); defendant argued inconsistent verdicts; held: jury could have believed defendant "displayed" a deadly weapon per robbery 1° statute RCW 9A.56.200, but was not "armed with" such a weapon per deadly weapon statute RCW 9.95.015, 9.95.040; III.

***State v. Goforth***, 33 Wn.App. 405 (1982)

Two witnesses testify defendant displayed what appeared to be a shotgun and that they are familiar with shotguns; held: *prima facie* case established, *State v. Pam*, 30 Wn.App. 471 (1981), *State v. Bowman*, 36 Wn.App. 798, 803 (1984), *State v. McKee*, 141 Wn.App. 22, 30-32 (2007); I.

***State v. McKim***, 98 Wn.2d 111 (1982)

Jury must be instructed that, in order to return a special verdict finding defendant armed with a deadly weapon and/or firearm, it has to find that unarmed defendant knew his/her co-defendant was so armed; distinguishes *State v. Willis*, 5 Wn.App. 441 (1971), *State v. Silvernail*, 25 Wn.App. 185 (1980); *accord*: *State v. Davis*, 39 Wn.App. 916 (1985), *see:* , *State v. Hayes*, 182 Wn.2d 556 (2015), *but see: State v. Bilal*, 54 Wn.App. 778 (1989), *State v. Pulido*, 68 Wn.App. 59 (1992) ; 5-4.

***State v. Beaton***, 34 Wn.App. 125 (1983)

Where a pistol is used, court may instruct jury that a pistol is a deadly weapon, and need not give WPIC 2.07; where defendant is charged with robbery with a firearm (as opposed to "appeared to be a firearm"), court need not instruct jury that firearm, for special verdict, must be proved beyond a reasonable doubt, *distinguishing State v. Tongate*, 93 Wn.2d 751 (1980); II.

***State v. Harvey***, 34 Wn.App. 737 (1983)

Deadly weapon statute, RCW 9.95.040, when applied to robbery 1°, does not violate double jeopardy clause; *accord*, *State v. Woods*, 34 Wn.App. 750 (1983); *State v. Harris*, 34 Wn.App. 649 (1983); I

***State v. Henderson***, 34 Wn.App. 865 (1983)

Robber puts hand in pocket and threatens "I have this" to get money from victim who believes pocket contains a firearm; held: evidence was sufficient to establish element "displays what appears to be a firearm," former RCW 9A.56.200(1)(b), *State v. Kennard*, 101 Wn.App. 533, 537-39 (2000), *cf.: Pers. Restraint of Bratz*, 101 Wn.2d 662, 674-77 (2000), *State v. Scherz*, 107 Wn.App. 427 (2001), *State v. Jennings*, 111 Wn.App. 54, 62-66 (2002); III.

***State v. Thomas***, 35 Wn.App. 161 (1983)

Defendant receives suspended sentence, RCW 9.92.060, for assault, completes probation and has civil rights restored, RCW 9.92.066 is charged with felon in possession of pistol, RCW 9.41.040; held: restoration of civil rights following suspended sentence will not prevent subsequent conviction of Uniform Firearms Act prosecution, RCW 9.41.040, *State v. S.G.*, 11 Wn.App.2d 74 (2019); I.

***State v. Mathé***, 35 Wn.App. 572 (1983)

Where no gun is recovered, but a proper *State v. Tongate*, 93 Wn.2d 751 (1980) instruction is given, court will not reverse firearm finding for insufficient evidence, even though there is no direct evidence as to whether gun was "real and operable", *State v. Anderson*, 94 Wn.App. 151, 158-63 (1999), *rev'd, on other grounds,* 141 Wn.2d 357 (2000), *State v. Emery*, 161 Wn.App. 172, 197-200 (2011), *affirmed, on other grounds*, 174 Wn.2d 741 (2012), *State v. Tasker*, 193 Wn.App. 575 (2016), *State v. Crowder*, 196 Wn.App. 861, 872-73 (2016), *State v. Jusila*, 197 Wn.App. 908, 932-34 (2017), *but see: State v. Pierce*, 155 Wn.App. 701, 714 (2010), *effectively overruled*, *State v. Olsen*, 10 Wn.App.2d 731 (2019); I.

***State v. Pam***, 98 Wn.2d 748 (1983)

Failure to give *Tongate* instruction where weapon was never recovered or fired was error, *reversing State v. Pam*, 30 Wn.App. 471 (1981), *see*: *State v. Fowler*, 114 Wn.2d 59 (1990); 9-0.

***Dickeson v. New Banner Institute, Inc.***, 74 L.Ed.2d 845 (1983)

1968 Gun Control Act (felon in possession), 18 USC § 922(g) and (h) applies to state defendants whose deferred sentence was dismissed; 5-4.

***State v. Bowman***, 36 Wn.App. 798 (1984)

Witness's testimony that she believed gun was real plus defendant's threat to shoot is sufficient evidence to support a firearm finding, *State v. Anderson*, 94 Wn.App. 151, 158-63 (1999), *rev'd, on other grounds,* 141 Wn.2d 357 (2000), *State v. Emery*, 161 Wn.App. 172, 197-200 (2011) , *affirmed, on other grounds*, 174 Wn.2d 741 (2012); I.

***State v. Alferez***, 37 Wn.App. 508 (1984)

State amends information to add special allegations, sends copy to defense counsel but defendant is not arraigned on amended information; held: may not enhance penalty without actual notice, thus remanded for resentencing, *State v. Theroff*, 95 Wn.2d 385 (1980); III.

***State v. Rahier***, 37 Wn.App. 571 (1984)

When defendant is charged with special allegations that defendant used a firearm, jury should be instructed that a firearm is a deadly weapon as a matter of law; first sentence of WPIC 2.07, RCW 9.95.040 should be deleted; defense may be precluded from arguing that an unloaded firearm is not a deadly weapon; II.

***State v. Gore***, 101 Wn.2d 481 (1984)

Following defendant's conviction of felon in possession of a firearm, RCW 9.41.040, his prior burglary was reversed for insufficiency; held: to prove VUFA, state must prove validity of prior conviction, *State v. Swindell*, 101 Wn.2d 481 (1984), *State v. Summers*, 120 Wn.2d 801 (1993); *reverses State v. Gore*, 35 Wn.App. 62 (1983); 9-0.

***State v. Davis***, 101 Wn.2d 654 (1984)

Accomplice to robbery 1° may be convicted even if s/he did not know the principal was armed, *State v. McChristian*, 158 Wn.App. 392, 399-40 (2010), *affirming State v. Davis*, 35 Wn.App. 506 (1983), *reversing State v. Plakke*, 31 Wn.App. 262, 266 (1982) and *State v. McKeown*, 23 Wn.App. 582, 591-93 (1979); to enhance with special allegations accomplice must know principal was armed, *State v. McKim*, 98 Wn.2d 111 (1982) *see: , State v. Hayes*, 182 Wn.2d 556 (2015); 5-4.

***State v. Theilken***, 102 Wn.2d 271 (1984)

Deadly weapon/firearm enhancement provisions, RCW 9.41.025, RCW 9.95.040, may apply to unintentional crimes such as manslaughter; 9-0.

***State v. Hall***, 40 Wn.App. 162 (1985)

Witness testifies defendant held a knife "a little bigger than a penknife" to her neck; held: sufficient for deadly weapon finding; I.

***State v. Reid***, 40 Wn.App. 319 (1985)

Double jeopardy clause does not prohibit deadly weapon/firearm enhancement for substantive offense of violation of uniform firearm act, *State v. Harris*, 102 Wn.2d 148 (1984); *Missouri v. Hunter*, 74 L.Ed.2d 535 (1983); II.

***State v. Barnes***, 42 Wn.App. 56 (1985)

To prove possession of a weapon by a prisoner, RCW 9.94.040, state need not prove validity of underlying conviction; I.

***State v. Sabala***, 44 Wn.App. 444 (1986)

For sentence enhancement purposes, RCW 9.95.040(1) and former RCW 9.41.025, a defendant is "armed with" a deadly weapon when he is arrested in his vehicle for VUCSA and there is a loaded gun under the driver's seat, *cf.: State v. Mills*, 80 Wn.App. 231 (1995), *see:*

*State v. Johnson*, 94 Wn.App. 882 (1999), *State v. Schelin*, 147 Wn.2d 562 (2002), *State v. Gurske*, 120 Wn.App. 63 (2004), *State v. Sassen Van Elsloo*, 191 Wn.2d 798 (2018); III.

***McLaughlin v. United States***, 90 L.Ed.2d 15 (1986)

An unloaded handgun is a "dangerous weapon," 18 USC. §2113(d); 9-0.

***State v. Sullivan***, 47 Wn.App. 81 (1987)

An unloaded firearm is a deadly weapon, RCW 9.94A.125, for purposes of sentence enhancement, former RCW 9.94A.310(3), [recodified as RCW 9.94A.533, 9.94A.825], *State v. Anderson*, 94 Wn.App. 151, 156-63 (1999), *rev'd, on other grounds,* 141 Wn.2d 357 (2000), *see also: State v. Faust*, 93 Wn.App. 373 (1998), *State v. Bernier*, 110 Wn.App. 639 (2002), *State v. Raleigh*, 157 Wn.App. ; II.

***State v. Randle***, 47 Wn.App. 232 (1987)

A defendant is armed with a deadly weapon if it is readily available and accessible for either offensive or defensive purposes, RCW 9A.52.020; accomplice need not know principal is armed to be convicted of burglary 1°, *State v. Brown*, 36 Wn.App. 549 (1984); I.

***State v. Coe***, 109 Wn.2d 832 (1988)

Mere threat to use deadly weapon, without actually displaying same, is sufficient to convict of rape 1°, *State v. Hentz*, 99 Wn.2d 538 (1983), *see: State v. Bright*, 129 Wn.2d 257, 265-73 (1996), *State v. Majors*, 82 Wn.App. 843, 846-7 (1996); 9-0.

***State v. Faille***, 53 Wn.App. 111 (1988)

Stealing an unloaded gun during a burglary is sufficient to enhance to burglary 1°, *State v. Hall*, 46 Wn.App. 689 (1987), *State v. Hernandez*, 172 Wn.App. 537 (2012), *see: Personal Restraint of Martinez*, 171 Wn.2d 354 (2011), *but see: State v. Gotcher*, 52 Wn.App. 350 (1988), *State v. Chiariello*, 66 Wn.App. 241 (1992); I.

***State v. Anderson***, 54 Wn.App. 384 (1989)

Knowledge that a gun is loaded is not an element of carrying a loaded pistol in a vehicle without a license, RCW 9.41.050(3), *State v. Pinkham*, 2 Wn.App.2d 411 (2018), *see: State v. Anderson*, 141 Wn.2d 357 (2000); III.

***State v. Bilal***, 54 Wn.App. 778 (1989)

Post SRA, jury need not be instructed that, to return special verdict, defendant knew co-defendant was armed, legislatively *reversing State v. McKim*, 98 Wn.2d 111 (1982); I, 2-1.

***State v. Fowler***, 114 Wn.2d 59 (1990)

Where court gives reasonable doubt instruction, but fails to instruct that firearm must be found beyond reasonable doubt, error may be harmless, *distinguishing State v. Tongate*, 93 Wn.2d 751 (1980); 9-0.

***State v. Thierry***, 60 Wn.App. 445 (1991)

Statute prohibiting carrying loaded pistol in any vehicle absent license, RCW 9.41.050(3), does not require proof that defendant had gun on his person; II.

***Seattle v. Riggins***, 63 Wn.App. 313 (1991), op. withdrawn, 68 Wn.App. 934 (1993)

Ordinance prohibiting carrying of any fixed-blade knife, with exemptions, SMC § 12A.14.080(B), is not unconstitutional infringement on right to bear arms, CONST., Art. 1, § 24, nor is it overbroad; I.

***State v. Carlson***, 65 Wn.App. 153 (1992)

A BB gun is not a deadly weapon *per se*, but it is a question of fact as to whether or not it is readily capable of causing substantial bodily harm, RCW 9A.04.110(6), *see: State v. Taylor,* 97 Wn.App. 123 (1999); I.

***State v. Chiariello***, 66 Wn.App. 241 (1992)

Mere threat to use a weapon, or searching in pocket for weapon without production of weapon, is insufficient to convict of burglary 1°, *State v. Faille,* 53 Wn.App. 111, 113 (1988), *State v. Gotcher,* 52 Wn.App. 350, 353 (1988), *see: Personal Restraint of Martinez,* 171 Wn.2d 354 (2011); III.

***State v. Summers***, 120 Wn.2d 801 (1993)

In VUFA trial, defense may challenge present use of prior conviction, *State v. Gore,* 101 Wn.2d 481 (1984); initial defense burden is to offer a colorable, fact-specific argument supporting the claim of constitutional error in prior conviction, after which state bears burden of proving that predicate conviction is constitutionally sound, even where prior conviction was based upon a jury verdict affirmed on appeal; failure to assign burden of disproving lawful use of force to state invalidates present use of prior homicide conviction; 9-0.

***State v. Cook***, 69 Wn.App. 412 (1993)

For sentence enhancement, former RCW 9.94A.310(3) [recodified as 9.94A.533], court must define a deadly weapon as one capable of producing death, RCW 9.94A.125, WPIC 2.07, inflicting injury is insufficient, *State v. Thompson*, 88 Wn.2d 546, 549 (1977), harmless here; I.

***State v. Valdobinos***, 122 Wn.2d 270 (1993)

In VUCSA case, an unloaded rifle found under defendant's bed, without more, is insufficient to qualify as "armed," which requires having a weapon accessible and readily available for offensive or defensive purposes, *State v. Call*, 75 Wn.App. 866 (1994), *State v. Mills*, 80 Wn.App. 231 (1995), *State v. Johnson,* 94 Wn.App. 882, 891-97 (1999), *State v. Gurske,* 155 Wn.2d 134 (2005), *State v. Ague-Masters,* 138 Wn.App. 86, 102-05 (2007), *cf.: State v. Sabala*, 44 Wn.App. 444 (1986), *State v. Williams*, 85 Wn.App. 508, 513-4 (1997), *rev'd, on other grounds,* 135 Wn.2d 365 (1998), *State v. Willis,* 153 Wn.2d 366 (2005), *State v. Sassen Van Elsloo,* 191 Wn.2d 798 (2018), *but see: State v. Simonson,* 91 Wn.App. 874, 882-83 (1998), *State v. Schelin,* 147 Wn.2d 562 (2002), *State v. Holt,* 119 Wn.App. 712, 726-29 (2004), *State v. Neff,* 163 Wn.2d 453, 461-65 (2008); 8-0.

***Seattle v. Ballsmider***, 71 Wn.App. 159 (1993)

Ordinance prohibiting discharging a firearm, SMC § 12A.28.050, may set maximum penalty of one year in jail, RCW 9.41.290, 9.41.300(2)(a); I.

***State v. Ruff***, 122 Wn.2d 731 (1993)

RCW 9.41.040(4), which prohibits one acquitted by reason of insanity from ever possessing a short firearm, violates equal protection clause, as one who is convicted of a violent felony may apply for restoration of that right, *Morris v. Blaker*, 118 Wn.2d 133 (1992); 9-0.

***State v. Taylor***, 74 Wn.App. 111, 124-26 (1994)

Deadly weapon enhancement, RCW 9.94A.125, does not deny defendant constitutional right to keep and bear arms, CONST. Art. 1, § 24, *State v. Sabala*, 44 Wn.App. 444 (1986); gun sitting on table next to defendant, even if it is unloaded in a bag, is sufficient to enhance where a loaded clip is also in the bag, *State v. Schelin*, 147 Wn.2d 562 (2002), *State v. Sassen Van Elsloo*, 191 Wn.2d 798 (2018), *cf.: State v. Mills*, 80 Wn.App. 231 (1995), *State v. Johnson*, 94 Wn.App. 882, 891-97 (1999), *State v. Holt*, 119 Wn.App. 712, 726-29 (2004), *see: State v. Gurske*, 155 Wn.2d 134 (2005), *State v. Willis*, 153 Wn.2d 366 (2005); I.

***State v. Hernandez-Mercado***, 124 Wn.2d 368 (1994)

RCW 9.41.170, prohibiting unlicensed possession of a firearm by an alien who has not declared an intent to become a United States citizen, is neither preempted by federal law nor violative of equal protection clause; 9-0.

***State v. Spencer***, 75 Wn.App. 118 (1994)

Unlawful display of a weapon, former RCW 9.41.270(1), does not unconstitutionally restrict the right to bear arms, CONST. Art 1, § 24, *see: State v. Montana*, 129 Wn.2d 583 (1996), *Seattle v. Evans*, 184 Wn.2d 856 (2015); carrying a visibly loaded AK-47 assault rifle, head down, walking briskly, avoiding eye contact with passers-by, at night in a residential area falls within statute's core, applying a reasonable person standard into the statutory phrase, "warrants alarm," *State v. Maciolek*, 101 Wn.2d 259 (1984); I.

***State v. Samaniego***, 76 Wn.App. 76 (1994)

Defendant is arrested in vehicle with drugs, four-inch blade knife is wedged between driver's seat and armrest; held: knife over three inches is *per se* a deadly weapon , RCW 9.94A.125, defendant was armed for enhancement purposes due to placement of knife, *State v. Sabala*, 44 Wn.App. 444 (1986), *cf.: State v. Johnson*, 94 Wn.App. 882, 891-97 (1999); I.

***State v. Myles***, 127 Wn.2d 807 (1995)

Concealed weapons statute, RCW 9.41.250, which prohibits "furtively carry[ing] with intent to conceal" a weapon does not require an overt movement to conceal, *reversing State v. Myles*, 75 Wn.App. 643 (1994); carrying a kitchen knife in an inner pocket at 1:00 a.m. "in the presence of other people in an inhospitable situation" is sufficient to convict, *cf.: State v. Echeverria*, 85 Wn.App. 777, 784 (1997); 6-3.

***State v. Watkins***, 76 Wn.App. 726, 731-2 (1995)

In VUFA case, RCW 9.41.040(4), where prior conviction occurred before VUFA statute was adopted, there is no *ex post facto* violation where crime which constituted a violation of the firearms statute occurred after the VUFA law became effective, *State v. Schmidt*, 143 Wn.2d 658 (2001); I.

***State v. Wright***, 76 Wn.App. 811, 816-9 (1995)

Identity is an element of the *corpus delicti* of VUFA, former RCW 9.41.040(4), *Bremerton v. Corbett*, 106 Wn.2d 569, 574 (1986), as the element of a prior conviction cannot be proved without identifying a particular person; I.

***State v. Shilling***, 77 Wn.App. 166, 171-2 (1995)

A bar glass used by defendant to strike victim in the head causing lacerations, stitches, embedding of glass shard in head, is sufficient to prove use of a deadly weapon for assault 2°, RCW 9A.36.021(1), *see: State v. Banagan*, 102 Wn.App. 754, 760-62 (2000), *State v. Winings*, 126 Wn.App. 75, 87-88 (2005), *cf.: State v. Skenandore*, 99 Wn.App. 494 (2000); I.

***State v. Mills***, 80 Wn.App. 231 (1995)

Gun found with drugs in a motel room rented by defendant several miles from where defendant was arrested is not readily available and easily accessible for enhancement, RCW 9.94A.125, -.310(3)(c), *State v. Valdobinos*, 122 Wn.2d 270 (1993), *State v. Johnson*, 94 Wn.App. 882, 891-97 (1999), *State v. Holt*, 119 Wn.App. 712, 726-29 (2004), *State v. Ague-Masters*, 138 Wn.App. 86, 102-05 (2007), *distinguishing State v. Sabala*, 44 Wn.App. 444 (1986), *State v. Taylor*, 74 Wn.App. 111, 124-6 (1994), *but see: State v. Schelin*, 147 Wn.2d 562 (2002), *cf.: State v. Willis*, 153 Wn.2d 366 (2005); II.

***State v. Lucky***, 128 Wn.2d 727 (1996)

Unlawful display of a weapon, RCW 9.41.270, is not a lesser of assault 2°, as there are alternative means of committing the crime of assault 2°, and every element of the proposed lesser is not a necessary element of the greater, *State v. Davis*, 121 Wn.2d 1, 4 (1993), *State v. Curran*, 116 Wn.2d 174, 183 (1991), *State v. Hurchalla*, 75 Wn.App. 417 (1994), *overruled, on other grounds, State v. Fernandez-Medina*, 141 Wn.2d 448 (2000), even though defendant was only charged with assault 2° with a deadly weapon, RCW 9A.36.021(1)(c), *but see: State v. Boggett*, 103 Wn.App. 564 (2000); 7-2.

***State v. Bright***, 129 Wn.2d 257, 265-73 (1996)

Where rape 1° complainant testifies that defendant-police officer remained armed with his handgun in holster but did not threaten to use it, there is sufficient evidence to support the deadly weapon element, RCW 9A.44.040(1)(a), *reversing State v. Bright*, 77 Wn.App. 304, 309-10 (1995); *see: State v. Lubers*, 81 Wn.App. 614, 619-21 (1995); 6-3.

***Seattle v. Montana,*** 129 Wn.2d 583 (1996)

City ordinance prohibiting carrying, concealed or unconcealed, a fixed blade knife, SMC § 12A.14, does not violate CONST. Art. 1, § 24, ("right…to bear arms in defense"), as it is a reasonable arms regulation under city's police power, as the ordinance includes occupational and recreational exceptions, SMC § 12A.14.100(A), (B) and (C), *Seattle v. Evans*, 184 Wn.2d 856

(2015), *see: State v. Spencer*, 75 Wn.App. 118 (1994); court does not reach issue of whether knives in question are "arms" as counsel failed to engage in state constitutional law analysis, *State v. Gunwall*, 106 Wn.2d 54 (1986), *but see: State v. Mayfield*, 192 Wn.2d 871 (2019); ordinance is neither vague nor overbroad; 4-2-3.

***State v. Majors***, 82 Wn.App. 843, 846-7 (1996)

In attempted kidnapping 1° case, defendant points BB gun at victim, orders her into car or he would blow her head off, victim testifies she doubted that the gun could shoot bullets; held: while a BB gun is not capable of causing death or serious injury, the threat to use deadly force is sufficient to establish a substantial step, victim's disbelief does not negate substantial step; I.

***State v. Russell***, 84 Wn.App. 1 (1996)

Defendant is charged with two counts of VUFA, former RCW 9.41.040(1), for possessing two guns found in his car, statute prohibits possession by a felon of "any firearm"; held: "any" is ambiguous, thus statute must be construed in favor of defendant, *State v. Wissing*, 66 Wn.App. 745, 753 (1992), "any" means all embracing, equivalent to "all" or "every," *State ex rel. Evans v. Brotherhood of Friends*, 41 Wn.2d 133, 145 (1952), thus only one count will lie; statute subsequently amended, RCW 9.41.040(7); II.

***State v. Reed***, 84 Wn.App. 379 (1996)

In VUFA case, state need not prove that defendant knew his firearm possession was illegal, ignorance of the law not being a defense, *State v. Patterson*, 103 1005 (1984), *State v. Semakula*, 88 Wn.App. 719 (1997), *State v. Blum*, 1221 Wn.App. 1 (2004), *State v. Moore*, 121 Wn.App. 889 (2004), *State v. Mitchell*, 190 Wn.App. 919, 927-30 (2015), distinguishing *Staples v. United States*, 128 L.Ed.2d 608 (1994), *State v. Williams*, 158 Wn.2d 904 (2006), *but see: State v. Leavitt*, 107 Wn.App. 361 (2001), *State v. Minor*, 162 Wn.2d 796 (2008), *State v. Breitung*, 155 Wn.App. 601, 619-25 (2010), *State v. Garcia*, 198 Wn.App. 527 (2017); the fact that defendant's prior felony conviction occurred before state law required defendants to be given notice at sentencing, RCW 9.41.040, -047, does not violate equal protection; *accord: State v. Sweeney*, 125 Wn.App. 77 (2005), *State v. Carter*, 127 Wn.App. 713, 719-21 (2005), *State v. Stevens*, 137 Wn.App. 460, 469 (2007); II.

***State v. McKinley***, 84 Wn.App. 677 (1997)

In VUFA case, former RCW 9.41.040(1)(a)[1995], a prior juvenile adjudication of robbery constitutes a conviction, *see: In re A,B,C,D,E*, 121 Wn.2d 80, 87 (1993), *State v. Wright*, 88 Wn.App. 683 (1997); I.

***State v. Williams***, 85 Wn.App. 508 (1997), *rev'd, on other grounds,* 135 Wn.2d 365 (1998)

Where drug defendant handles firearm at time of delivery and that it was on top of refrigerator, loaded, easily accessible from place of delivery, then defendant is "armed" for purposes of deadly weapon enhancement, RCW 9.94A.125, .310(3), *State v. Sabala*, 44 Wn.App. 444 (1986), *State v. Simonson*, 91 Wn.App. 874, 882-83 (1998), *State v. Schelin*, 147 Wn.2d 562 (2002); distinguishes *State v. Valdobinos*, 122 Wn.2d 270, 281 (1993); II.

***State v. Echeverria***, 85 Wn.App. 777, 783-4 (1997)

Police find throwing star and gun under driver's seat of car respondent was driving, star not visible from outside, gun is visible, respondent convicted of "furtively carrying with intent to conceal any dangerous weapon," for star, RCW 9.41.250, minor in possession of gun, RCW 9.41.040; held: sufficient to convict of gun charge, as gun was in plain sight and thus reasonable to infer defendant possessed or controlled the gun that was within his reach, *State v. Turner*, 103 Wn.App. 515 (2000), *State v. Staley*, 123 Wn.2d 794, 798 (1994), *State v. Callahan*, 77 Wn.2d 27, 29-30 (1969), *State v. Summers*, 107 Wn.App. 373, 383-88 (2001), *but see: State v. George*, 146 Wn.App. 906, 919-24 (2008), *State v. Embry*, 171 Wn.App. 714, 746-48 (2012); "there was no evidence before the court that possession of a throwing star is prohibited," further no evidence that defendant "carried" the star, as "carrying includes having the dangerous weapon on one's person, not just having it in one's hand," *State v. Myles*, 127 Wn.2d 807, 813 (1995), *State v. Spruell*, 57 Wn.App. 383, 388 (1990); III.

***State v. Broadaway***, 133 Wn.2d 118, 123-9 (1997)

Initiative 159, RCW 9.94A.602, providing for 60-month firearm enhancement, satisfies title and single subject requirements of CONST. Art. II, § 19, *State v. Barnett*, 91 Wn.App. 671, 674 (1998), *aff'd, on other grounds,* 139 Wn.2d 462 (1999), *State v. McReynolds*, 117 Wn.App. 309, 340-42 (2003), *see: State v. Holm*, 91 Wn.App. 429, 439-40 (1998), *State v. Miller*, 92 Wn.App. 693, 699-702 (1998); 9-0.

***State v. Archambault***, 86 Wn.App. 711 (1997)

First offender sentencing option, RCW 9.94A.120(5), is not available for a defendant convicted of burglary 2° with a firearm, former RCW 9.94A.310(3) [recodified as 9.94A.533]; II.

***State v. Barajas***, 88 Wn.App. 387 (1997)

Possession with intent to deliver in a school zone doubles the maximum sentence, RCW 69.50.435(a), thus when such a defendant is armed, the firearm enhancement period, former RCW 9.94A.310(3)(a) [recodified as 9.94A.533], depends upon the enhanced maximum sentence, *State v. Blade*, 126 Wn.App. 174 (2005), *State v. O'Neal,* 126 Wn.App. 395, 426-30 (2005), *aff'd, on other grounds,* 159 Wn.2d 500 (2007); III.

***State v. Wright***, 88 Wn.App. 683 (1997)

Unlawful firearm possession statute, RCW 9.41.010, prohibits possession of a firearm by a juvenile previously convicted in juvenile court of a serious offense, *State v. Cheatham*, 80 Wn.App. 269 (1996), *State v. McKinley*, 84 Wn.App. 677 (1997); I.

***State v. Semakula***, 88 Wn.App. 719 (1997)

In unlawful firearm possession case, RCW 9.41.010, state need not prove defendant knew his firearm possession was illegal, *State v. Reed*, 84 Wn.App. 379 (1996), *State v. Blum*, 121 Wn.App. 1 (2004), *State v. Sweeney*, 125 Wn.App. 77 (2005), *State v. Carter*, 127 Wn.App. 713, 719-21 (2005), *State v. Stevens*, 137 Wn.App. 460, 468-69 (2007), *see: State v. Mitchell*, 190 Wn.App. 919, 927-30 (2015), *State v. Nielsen,* 14 Wn.App.2d 446 (2020), *but see: State v. Leavitt*, 107 Wn.App. 361 (2001), *State v. Moore*, 121 Wn.App. 889 (2004), *State v. Minor*, 162 Wn.2d 798 (2008), *State v. Breitung*, 155 Wn.App. 601, 619-25 (2010),*State v. Garcia,* 198 Wn.App. 527 (2017); I.

***Post Sentencing Review of Charles***, 135 Wn.2d 239 (1998)

Firearm enhancements, RCW 9.94A.310(3), run consecutive to the underlying sentence for the crime to which they apply, but when two or more offenses each carry firearm enhancements, they need not run consecutively to each other, *State v. Conover*, 183 Wn.2d 706 (2015), subject to the concurrent/consecutive determination pursuant to RCW 9.94A.400, reversing *State v. Lewis*, 86 Wn.App. 716 (1997), *accord: State v. Bonisisio*, 92 Wn.App. 783, 795-97 (1998), *see: State v. Price*, 103 Wn.App. 845, 859-61 (2000), *but see:* RCW 9.94A.533(3)(e), *State v. DeSantiago*, 149 Wn.2d 402 (2003), *State v. Callihan*, 120 Wn.App. 620 (2004), *State v. Mandanas*, 168 Wn.2d 84 (2010), *see also: State v. Barnett*, 21 Wn.App.2d 469 (2022); 9-0.

***State v. Meggyesy***, 90 Wn.App. 693, 706-10 (1998)

Jury finds, by special verdict, that defendant was armed with a deadly weapon, court enhances based on firearm, defense claims there must be a specific firearm allegation and finding; held: firearm enhancement, former RCW 9.94A.310(3) [recodified as 9.94A.533], is not an element of the crime, but is a sentence enhancement, court determines appropriate enhancement, *State v. Thorne*, 129 Wn.2d 736 (1996), *see: State v. Rai*, 97 Wn.App. 307 (1999), *State v. Olney*, 97 Wn.App. 913 (1999), not jury; I.

***Muscarello v. United States,*** 141 L.Ed.2d 111 (1998)

Phrase "carries a firearm" during drug trafficking transaction, 18 USC § 924(c)(1), for enhancement purposes, includes knowing possession in locked glove compartment or trunk; 5-4.

***State v. Weed,*** 91 Wn.App. 810 (1998)

VUFA, RCW 9.41.040(1)(b), precludes possession of a firearm by anyone convicted of any felony anytime and of a domestic violence misdemeanor committed on or after 1 July 1993; II.

***State v. Simonson,*** 91 Wn.App. 874, 884-86 (1998)

Defendant is convicted of VUCSA and six counts of unlawful possession of firearms 1º for six guns found in meth lab, trial court counts each firearm conviction as a separate offense; held: RCW 9.41.040 provides that each firearm unlawfully possessed shall be a separate offense, thus charging decision was proper, however sentencing is controlled by RCW 9.94A.400, *Post Sentencing Review of Charles*, 135 Wn.2d 239, 245 (1998), which was not amended by the initiative, *State v. Smith*, 99 Wn.App. 510 (1999), *State v. Roose*, 90 Wn.App. 513 (1998); since possession of the guns (1) had same criminal intent, (2) at same time and place, and (3) involved same victim, they involved the same criminal conduct, *State v. Williams*, 85 Wn.App. 508, 511 (1997), *rev'd on other grounds*, 135 Wn.2d 365 (1998), *State v. Murphy*, 98 Wn.App. 42, 50-52 (1999), *State v. McReynolds*, 104 Wn.App. 560, 581-82 (2000), *State v. DeSantiago*, 149 Wn.2d 402 (2003), *State v. Stockmyer*, 136 Wn.App. 212 (2006); II.

***State v. Faust***, 93 Wn.App. 373 (1998)

Firearm inoperable due to mechanical defect meets the definition of a firearm, RCW 9.41.010(1), for penalty enhancement, RCW 9A.36.021, RCW 9.94A.125, *State v. Anderson*, 94

Wn.App. 151, 158-63 (1999), *rev'd, on other grounds,* 141 Wn.2d 357 (2000), *State v. Padilla,* 95 Wn.App. 531 (1999), *State v. Berrier,* 110 Wn.App. 639 (2002), *State v. Tasker,* 193 Wn.App. 575 (2016), distinguishing *State v. Pam,* 98 Wn.2d 748, 753-54 (1983), *overruled on other grounds, State v. Brown,* 111 Wn.2d 124 (1988), *State v. Tongate,* 93 Wn.2d 751, 753 (1980), *see also: State v. Releford,* 148 Wn.App. 478, 489-97 (2009), , *State v. Olsen,* 10 Wn.App.2d 731 (2019), *but see: State v. Pierce,* 155 Wn.App. 701, 714 (2010), *State v. Raleigh,* 157 Wn.App. 728 (2010); II.

***State v. Anderson***, 94 Wn.App. 151 (1999), *rev'd, on other grounds*, 141 Wn.2d 357 (2000)

Where officers testify that the gun they found was loaded and appeared real, gun had serial number and was admitted at trial, there is sufficient evidence to find it is a firearm even if not test fired, *State v. Bowman,* 36 Wn.App. 798, 803 (1984), *State v. Mathe,* 35 Wn.App. 572, 581-82 (1983), *State v. Sullivan,* 47 Wn.App. 81, 84 (1987), *State v. Hattori,* 19 Wn.App. 74, 82 (1978), *State v. McKee,* 141 Wn.App. 22, 30-32 (2007), *State v. Emery,* 161 Wn.App. 172, 197-200 (2011), *affirmed, on other grounds,* 174 Wn.2d 741 (2012) I.

***State v. Johnson***, 94 Wn.App. 882, 891-97 (1999)

Police serve drug warrant, arrest defendant in apartment, find gun in a cabinet 5-6 feet from where defendant was handcuffed, jury finds deadly weapon enhancement, RCW 9.94A.125; held: because defendant was cuffed and the gun was well outside his reach, it was not easily accessible and the required proximity nexus was absent, thus sentence enhancement must be reversed, *State v. Taylor,* 74 Wn.App. 111, 124-26 (1994), *State v. Sabala,* 44 Wn.App. 444 (1986), *State v. Holt,* 119 Wn.App. 712, 726-29 (2004), *State v. Ague-Masters,* 138 Wn.App. 86, 102-05 (2007), *see: State v. Chouinard,* 169 Wn.App. 895 (2012), *cf.: State v. Eckenrode,* 159 Wn.2d 488 (2007), *but see: State v. Simonson,* 91 Wn.App. 874, 881-83 (1998), *State v. Schelin,* 147 Wn.2d 562 (2002), *State v. Willis,* 153 Wn.App. 366 (2005); I.

***State v. Padilla***, 95 Wn.App. 531 (1999)

A disassembled firearm that can be rendered operational with reasonable effort and within a reasonable time period is a firearm, RCW 9.41.010(1), *State v. Berrier,* 110 Wn.App. 639 (2002), *State v. Wade,* 133 Wn.App. 855, 872-73 (2006), *State v. Releford,* 148 Wn.App. 478, 489-97 (2009), *State v. Raleigh,* 157 Wn.App. 728 (2010), *cf.: State v. Faust,* 93 Wn.App. 373 (1998); I.

***State v. Shepherd***, 95 Wn.App. 787 (1999)

A motor vehicle is not a deadly weapon for purposes of sentence enhancement, RCW 9.94A.125, *State v. Ross,* 20 Wn.App. 448 (1978), *but see: State v. Morreira,* 107 Wn.App. 450, 458 (2001); II.

***State v. Brown***, 139 Wn.2d 20, 25-29 (1999)

Deadly weapon enhancement, former RCW 9.94A.310(4) [recodified as 9.94A.533], is mandatory, not subject to an exceptional sentence downward, *State v. Flett,* 98 Wn.App. 799, 805-08 (2000), *State v. Mandefero,* 14 Wn.App.2d 825 (2020); 5-4.

***State v. C.Q.***, 96 Wn.App. 273 (1999)

A starter pistol having no bore through its barrel is not a dangerous weapon, RCW 9.41.250, where it is merely possessed, thus is insufficient to prove possessing a dangerous weapon on school facilities, RCW 9.41.280; I.

***State v. Rai***, 97 Wn.App. 307 (1999)

Where jury finds that defendant was armed with a deadly weapon, and the evidence is uncontested that the weapon is a firearm, then court must enhance based upon firearm enhancement, former RCW 9.94A.310(3) [recodified as 9.94A.533], *State v. Olney*, 97 Wn.App. 913 (1999), *see: State v. Meggyesy*, 90 Wn.App. 693, 706-10 (1998); I.

***State v. Murphy***, 98 Wn.App. 42, 48-49 (1999)

Convictions of multiple counts of theft of firearm or unlawful possession of firearms must run consecutively, RCW 9.41.040(6), *State v. McReynolds*, 117 Wn.App. 309, 342-43 (2003); II.

***State v. Wadsworth***, 139 Wn.2d 724 (2000)

Statute prohibiting weapons in a courthouse, RCW 9.41.300(1), which delegates to "local judicial authority" to designate and mark those areas where weapons are prohibited does not violate separation of powers doctrine; 7-2.

***State v. Anderson***, 141 Wn.2d 357 (2000)

"Knowing possession" is an element of unlawful possession of a firearm 2°, RCW 9.41,040(1)(b), reversing *State v. Anderson*, 94 Wn.App. 151 (1999), *State v. Jones*, 106 Wn.App. 40 (2001), *see: State v. Krajeski*, 104 Wn.App. 377, 384-86 (2001), *Seattle v. Briggs*, 109 Wn.App. 484, 490-94 (2002), *State v. Banks*, 149 Wn.2d 38 (2003), *State v. Jones*, 117 Wn.App. 221, 227-31 (2003), *State v. Warfield*, 119 Wn.App. 871 (2003), *State v. Releford*, 148 Wn.App. 478, 494-97 (2009), *cf.: State v. Hartzell*, 153 Wn.App. 137, 171-72 (2009), *State v. Pinkham*, 2 Wn.App.2d 411 (2018); 5-4.

***State v. Skenandore***, 99 Wn.App. 494, 498-501 (2000)

A 2½-3 foot "spear" made of writing paper rolled into a rigid shaft bound with dental floss, affixed to a golf pencil which is thrust at a prison guard leaving pencil marks on the victim's shirt and nonabraded indentions on his chest that faded within hours of an assault is insufficient to prove use of a deadly weapon for assault 2°, distinguishing *State v. Shilling*, 77 Wn.App. 166, 171-2 (1995), *cf.: State v. Barragan*, 102 Wn.App. 754, 760-62 (2000); II.

***State v. Leatherman***, 100 Wn.App. 318 (2000)

Defendant's sentence is enhanced due to possession of a dagger; held: deadly weapon enhancement statute, RCW 9.94A.125, which dictates that a dagger is a deadly weapon *per se*, but a knife is only a deadly weapon *per se* if its blade exceeds three inches, is not vague, as a dagger is designed for stabbing and a knife is designed for cutting; I.

***State v. Hahn***, 100 Wn.App. 391, 394-97 (2000)

Defendant pleads guilty to assault with deadly weapon enhancement, to wit: hands and feet, at sentencing defendant argues he cannot be sentenced to the enhancement because, under

these facts, hands and feet do not meet the statutory definition of a deadly weapon, RCW 9.94A.125; held: where a guilty plea is entered knowingly and voluntarily, factual deficiencies underlying the agreement will not invalidate it, *In re Pers. Restraint of Barr*, 102 Wn.2d 265, 269-71 (1984), *State v. Majors*, 94 Wn.2d 354, 357-58 (1980), *State v. Morreira*, 107 Wn.App. 450, 458 (2001), where defendant receives some benefit from the bargain, *see also: State v. Zumwalt*, 79 Wn.App. 124 (1995), *disapproved, on other grounds, State v. Bisson*, 121 Wn.2d 507, 520 n.5 (2006), *but see: Pers. Restr. of Call*, 144 Wn.2d 315 (2001); II.

***State v. Kennard***, 101 Wn.App. 533, (2000)

**Robbery** instruction defining "what appears to be a firearm" as "exhibit or show what appears to be a firearm to the view of the victim or to otherwise manifest by words and actions the apparent presence of a firearm even though it is not actually seen by the victim" is accurate, at 537-39, *State v. Henderson*, 34 Wn.App. 865, 868-69 (1983), *see: Pers. Restraint of Bratz*, 101 Wn.App. 662, 674-77 (2000), *State v. Jennings*, 111 Wn.App. 54, 62-66 (2002), *but see:* RCW 9A.56.200, and is not a comment on the evidence; stating "I have a gun" and patting hip is sufficient, at 540, *cf.: State v. Scherz*, 107 Wn.App. 427 (2001); I.

***Pers. Restraint of Bratz***, 101 Wn.App. 662, 674-77 (2000)

"I have nitroglycerine in my coat…give me money or I'll blow up the bank" is insufficient to prove "displays what appeared to be a … deadly weapon" as a threat without any physical manifestation indicating a weapon is **robbery** 2°, not robbery 1°, *State v. Scherz*, 107 Wn.App. 427 (2001), *State v. Jennings*, 111 Wn.App. 54, 62-66 (2002), *see: State v. Kennard*, 101 Wn.App. 533, (2000), *State v. Henderson*, 34 Wn.App. 865, 868-69 (1983), *but see:* RCW 9A.56.200; II.

***State v. Jones***, 102 Wn.App. 89, 97-98 (2000)

Jury hangs on deadly weapon allegation, defendant is sentenced without it, new trial granted on appeal, state re-alleges deadly weapon allegation, jury finds defendant was armed; held: federal double jeopardy clause does not bar retrial of sentencing enhancement upon retrial after successful appeal; II.

***State v. Turner***, 103 Wn.App. 515 (2000)

Where there is evidence that there is control of a vehicle and knowledge of a firearm inside it, then there is a reasonable basis for "knowing **constructive possession**," *State v. Anderson*, 141 Wn.2d 357 (2000), and sufficient evidence to go to the jury, *State v. Echeverria*, 85 Wn.App. 777, 783 (1997), distinguishing *State v. Callahan*, 77 Wn.2d 27 (1969), *see: State v. Cantabrana*, 83 Wn.App. 204 (1996), *State v. Reid*, 40 Wn.App. 319, 325-26 (1985), *State v. George*, 146 Wn.App. 906, 919-24 (2008), *State v. Embry*, 171 Wn.App. 714, 746-48 (2012), *State v. Davis*, 176 Wn.App. 849 (2013); II.

***State v. Price***, 103 Wn.App. 845, 859-61 (2000)

For serious violent offenses, RCW 9.94A.400(1)(b), firearm enhancements must be served consecutively to the base sentence and to each other, *State v. Mandanas*, 168 Wn.2d 84 (2010), *see: State v. Callihan*, 120 Wn.App. 620 (2004), distinguishing *In re Post Sentencing Review of Charles*, 135 Wn.2d 239, 250 (1998) *cf.: State v. Conover*, 183 Wn.2d 706 (2015); II.

***State v. Radan***, 143 Wn.2d 323 (2001)

Defendant is charged with unlawful possession of firearm, RCW 9.41.040, predicate felony was from Montana which automatically restores firearm rights upon termination of state disposition, defendant proves he was discharged early upon a finding that defendant will not present risk to victim; held: while automatic restoration of right to possess a firearm will not act as a "finding of rehabilitation," here the finding is an "other equivalent procedure," thus dismissal affirmed, *see: State v. Harrison*, 181 Wn.App. 577 (2014), *see also: Nelson v. State*, 120 Wn.App. 470 (2003), *Woodward v. State*, 4 Wn.App.2d 789 (2018); reverses *State v. Radan*, 98 Wn.App. 652 (1999); 5-4.

***State v. Schmidt***, 143 Wn.2d 658 (2001)

Defendant is convicted of a felony in 1988, at which time the law did not forbid a felon to possess a rifle; in 1994, legislature amended RCW 9.41.040 to prohibit a person previously convicted of a felony to possess a rifle; defendant is convicted of felon in possession for having a rifle in 1997; held: while 1994 amendment is both criminal and punitive, thus subject to *ex post facto* analysis, *Kansas v. Hendricks*, 138 L.Ed.2d 501 (1997), here the 1994 statute only punishes future conduct, thus no *ex post facto* violation, *State v. Watkins*, 76 Wn.App. 726, 731-32 (1995), *State v. Lamb*, 175 Wn.2d 121, 124-30 (2012); affirms *State v. Schmidt*, 100 Wn.App. 297 (2000); 5-4.

***State v. Krajeski***, 104 Wn.App. 377, 384-86 (2001)

Unlawful possession of firearm information, RCW 9.41.040(1)(b), which alleges that defendant "unlawfully and feloniously" possessed firearm, but which fails to allege "knowingly" is sufficient when raised after trial, *State v. Nieblas-Duarte*, 55 Wn.App. 376, 378 (1989), distinguishing *State v. Anderson*, 141 Wn.2d 357, 366-67 (2000), *see: State v. Marcum*, 116 Wn.App. 526, 533-36 (2003), *State v. Jones*, 117 Wn.App. 221 (2003); II.

***State v. Alvarez***, 105 Wn.App. 215 (2001)

Respondent is found in apartment, police find gun in back bedroom closet, photographs of respondent taped to wall of closet, some of his clothes in room, savings account deposit books in his name in shoebox by bed, court finds constructive possession; held: evidence is insufficient to conclude respondent exercised dominion and control over the premises, *State v. Partin*, 88 Wn.2d 899, 906 (1977), *State v. Callahan*, 77 Wn.2d 27, 31 (1969), *State v. Hagen*, 55 Wn.App. 494 (1989), *State v. George*, 146 Wn.App. 906, 919-24 (2008), *State v. Embry*, 171 Wn.App. 714, 746-48 (2012), *see: State v. Davis*, 176 Wn.App. 849 (2013), *but see: State v. Ibarra-Erives*, 23 Wn.App.2d 596 (2022); III.

***State v. Krzeszowski***, 106 Wn.App. 638 (2001)

After felon's civil rights were restored, legislature adopts statute prohibiting a serious offender from possessing any firearm, defendant is convicted of possession of shotgun and rifle; held: prohibition was not an *ex post facto* law as it applies to possession of firearms in the future, *see: Rivard v. State*, 168 Wn.2d 775 (2010); knowledge that possession of a firearm is unlawful is not an element, *State v. May*, 100 Wn.App. 478, 482 (2000), *State v. Blum*, 121 Wn.App. 1 (2004), *State v. Stevens*, 137 Wn.App. 460, 468-69 (2007); while an express representation by government that defendant could possess firearms would be entrapment by estoppel, *see: State v.*

*Locati*, 111 Wn.App. 222 (2002), here the court that restored defendant's civil rights did not affirmatively represent that he could possess a rifle; I.

***State v. Leavitt***, 107 Wn.App. 361 (2001)

Defendant pleads guilty to domestic violence misdemeanor, sentencing court fails to advise defendant of firearms prohibition, RCW 9.41.047(1), leading him to believe that after probation he can possess firearms again; at subsequent arrest defendant volunteers that he has firearms in his car, is convicted of illegal possession of firearms; held: while knowledge of the illegality of firearm possession is not an element of the crime, *State v. Semakula*, 88 Wn.App. 719, 726 (1997), where defendant demonstrates actual prejudice from sentencing court's failure to comply with statute's mandate, due process clause requires dismissal, *State v. Moore*, 121 Wn.App. 889 (2004), *State v. Breitung* 155 Wn.App. 606, 619-25 (2010), *cf.: State v. Blum*, 121 Wn.App. 1, 5 (2004), *State v. Carter*, 127 Wn.App. 713, 719-21 (2005), *State v. Esquivel*, 132 Wn.App. 316 (2006), *State v. Minor*, 162 Wn.2d 796 (2008), *State v. Stevens*, 137 Wn.App. 460, 468-69 (2007), *State v. Mitchell*, 190 Wn.App. 919, 927-30 (2015), *see: State v. Garcia*, 198 Wn.App. 527 (2017); II.

***State v. Summers***, 107 Wn.App. 373, 383-88 (2001)

Firearm is found under felon's pillow, defendant claims weapon belongs to a friend, might have defendant's fingerprints as he had handled it in the past, trial court declines to instruct that possession does not entail only a momentary handling or that fleeting possession is not unlawful; held: while possession is more than passing control and momentary handling, without more, is insufficient to prove possession, evidence of momentary handling, when combined with other evidence such as dominion and control of premises or motive to hide the item from police, is sufficient to prove possession; even passing control of contraband is not legal, it is merely insufficient to prove possession, *see: State v. Callahan*, 77 Wn.2d 27 (1969), *State v. Werry*, 6 Wn.App. 540 (1972), *State v. Bowman*, 8 Wn.App. 148 (1972), *State v. Staley*, 123 Wn.2d 794 (1994), *see: State v. Davis*, 176 Wn.App. 849 (2013); II.

***State v. Scherz***, 107 Wn.App. 427 (2001)

In robbery case, defendant tells teller "I have a hand grenade in my pocket and I need a thousand dollars," defendant is convicted of robbery 1° for "displaying what appeared to be a … deadly weapon;" held: verbal threat without any physical display is insufficient to prove "display," *Pers. Restraint of Bratz*, 101 Wn.App. 662, 674-77 (2000), *cf.: State v. Kennard*, 101 Wn.App. 533 (2000), *State v. Henderson*, 34 Wn.App. 865 (1983); III.

***State v. Cuble***, 109 Wn.App. 362 (2001)

Jury instruction for unlawful possession of firearm charge must allege *mens rea* element of knowledge, *State v. Anderson*, 141 Wn.2d 357 (2000), *State v. Marcum*, 116 Wn.App. 526, 533-36 (2003), *see: State v. Jones*, 117 Wn.App. 221, 222-31 (2003), *but see: State v. Hartzell*, 153 Wn.App. 137, 171-72 (2009), even if raised for the first time on appeal; trial court's instructing as to unwitting possession does not cure error, even where the instruction was proposed by defense; II.

***Seattle v. Briggs***, 109 Wn.App. 484, 490-94 (2001)

Ordinance prohibiting carrying a weapon "concealed on his or her person" does not have an implied element of knowledge, distinguishing *State v. Anderson*, 141 Wn.2d 357 (2000), *see: State v. Pinkham*, 2 Wn.App.2d 411 (2018); I.

***State v. Berrier***, 110 Wn.App. 639 (2002)

Enhancing illegal possession of a short-barreled shotgun, RCW 9.41.190(1), with a deadly weapon allegation for the same shotgun violates equal protection clause as legislature exempted enhancements for machine guns, no rational basis for the distinction; II.

***State v. Locati***, 111 Wn.App. 222 (2002)

Court rejects defendant's proposed estoppel instruction based upon defendant's claim that his now deceased CCO told him he could possess a hunting rifle; held: to allow a defense based on misleading government conduct or estoppel, defendant must show his reliance was objectively reasonable considering source of information and whether defendant received inconsistent information from the same or different sources, *see: State v. Leavitt*, 107 Wn.App. 361, 371-73 (2001); here, because police officers subsequently told defendant he could not possess rifle, defense is unavailable, *cf.: State v. Moore*, 121 Wn.App. 889 (2004); III.

***State v. Schelin***, 147 Wn.2d 562 (2002)

Police serve warrant for manufacturing marijuana, find defendant at bottom of stairs ten feet from a loaded revolver hung on a wall, defendant is convicted of VUCSA with deadly weapon enhancement; held: defendant, at arrest, was a few seconds from the gun, thus evidence is sufficient to prove the deadly weapon allegation as there was a nexus between defendant, the weapon and the underlying crime, *State v. Sabala*, 44 Wn.App. 444 (1986), *State v. Taylor*, 74 Wn.App. 111, 124-26 (1994), *State v. Williams*, 85 Wn.App. 508 (1997), *rev'd, on other grounds*, 135 Wn.2d 365 (1998), *State v. Willis*, 153 Wn.2d 366 (2005), *State v. Sassen Van Elsloo*, 191 Wn.2d 798 (2018), distinguishing *State v. Valdobinos*, 122 Wn.2d 270 (1993), *State v. Mills*, 80 Wn.App. 231 (1995), *State v. Johnson*, 94 Wn.App. 882, 891-97 (1999), *cf.: State v. Gurske*, 155 Wn.2d 134 (2005), *State v. Eckenrode*, 159 Wn.2d 488 (2007), *State v. Ague-Masters*, 138 Wn.App. 86, 102-05 (2007), *but see: State v. Holt*, 119 Wn.App. 712, 726-29 (2004), *State v. Brown*, 162 Wn.2d 422, 430-35 (2007); affirms *State v. Schelin*, 104 Wn.App. 48 (2000); 4-1-2-1[fractured opinion].

***State v. Cramm***, 114 Wn.App. 170 (2002)

Trial court may order forfeiture of a firearm possessed by a person at the time of arrest for any felony, whether or not it is used or displayed, RCW 9.41.098(1); I.

***State v. DeSantiago***, 149 Wn.2d 402, 415-21 (2003)

Where jury enters special verdicts finding both a firearm, RCW 9.94A.510(3) and a separate deadly weapon, RCW 9.94A.510(4), the enhancements must run consecutively to each other as well as to the base sentence, *State v. Spandel*, 107 Wn.App. 352 (2001), *State v. Fast*, 90 Wn.App. 952 (1998), *State v. Callihan*, 120 Wn.App. 620 (2004), *cf.: Post Sentencing Review of Charles*, 135 Wn.2d 239 (1998), *State v. Conover*, 183 Wn.2d 706 (2015) ; reverses, in part, *State v. DeSantiago*, 108 Wn.App. 855 (2001); 5-4.

***State v. Thomas,*** 150 Wn.2d 666 (2003)

Defendant is convicted of two counts of robbery 2° with firearm allegations, is sentenced to concurrent terms for robbery, consecutive firearm enhancements, *State v. Price*, 103 Wn.App. 845, 859-61 (2000), sentence thus exceeds ten years; held: because the maximum sentence for two class B felonies is twenty years, as they can run consecutively, and because firearm enhancements must run consecutively to the base sentences and to each other, RCW 9.94A.310, 9.94A.420, sentence here does not exceed maximum, overruling *State v. Harvey*, 109 Wn.App. 157 (2001); *affirms* *State v. Thomas*, 113 Wn.App. 755 (2002); 9-0.

***State v. Marcum***, 116 Wn.App. 526, 533-36 (2003)

Because knowledge is an implied element of unlawful possession of a firearm, RCW 9.41.040(1), *State v. Anderson*, 141 Wn.2d 357 (2000), where information charges defendant with unlawful possession but description of the offense in the information fails to use word "unlawfully" or "knowingly," the information is insufficient, even on appeal, distinguishing *State v. Kajeski*, 104 Wn.App. 377, 381-82 (2001), *see: State v. Jones*, 117 Wn.App. 221, 227-31 (2003), *but see: State v. Hartzell*, 153 Wn.App. 137, 171-72 (2009); III.

***State v. Jones***, 117 Wn.App. 221, 227-31 (2003)

Failure to instruct jury that knowledge is an element of unlawful possession of a firearm, *State v. Anderson*, 141 Wn.2d 358 (2000), is subject to harmless error analysis, *Neder v. United States*, 144 L.Ed.2d 35 (1999), *State v. Brown*, 147 Wn.2d 330 (2002), *State v. Stouse*, 119 Wn.App. 793 (2004), *State v. Hartzell*, 153 Wn.App. 137, 171-72 (2009); I.

***State v. Huested***, 118 Wn.App. 92 (2003)

Consecutive time for deadly weapon enhancements for rape 1° and burglary 1° for the same weapon does not violate double jeopardy clause, RCW 9.94A.510; I.

***Smith v. State***, 118 Wn.App. 464 (2003)

A person convicted of indecent liberties and other crimes enumerated in RCW 9.41.040(4) may only have firearm rights restored by pardon or annulment, *see also: State v. Masangkay*, 121 Wn.App. 904 (2004); III.

***State v. Smith***, 118 Wn.App. 480 (2003)

Abode exception to unlawful display, RCW 9.41.270(3)(a) (1994), does not apply where defendant displays a weapon in his backyard, *State v. Owens*, 180 Wn.App. 846 (2014), *but see: State v. Haley*, 35 Wn.App. 96 (1983); I.

***State v. Spiers***, 119 Wn.App. 85, 91-95 (2003)

That portion of RCW 9.41.040(1)(b) which prohibits one from owning a gun while free on bond pending trial is an unconstitutional infringement on the right to bear arms, CONST. art. I, § 24; II.

***State v. Howell***, 119 Wn.App. 644, 649-50 (2003)

In unlawful possession of firearm case, RCW 9.41.040(1)(a), jury should not be instructed that "dominion and control may be immediately exercised," as state need not prove that the firearm was readily accessible; I.

***State v. Warfield***, 119 Wn.App. 871 (2003)

Knowledge of possession or control is an implied element of possession of an unlawful firearm, RCW 9.l41.190(1), *State v. Anderson,* 141 Wn.2d 357 (2000), *State v. O'Neal,* 126 Wn.App. 395, 413-15 (2005), *aff'd, on other grounds,* 159 Wn.2d 500 (2007); II.

***Nelson v. State***, 120 Wn.App. 470 (2003)

Expungement of a juvenile record, former RCW 13.50.050(11), restores right to possess a firearm, *Woodward v. State,* 4 Wn.App.2d 789 (2018), *see also: State v. Radan,* 143 Wn.2d 323 (2001), *State v. Schmidt,* 143 Wn.2d 658 (2001), *Nakatani v. State,* 109 Wn.App. 622 (2001), *State v. Harrison,* 181 Wn.App. 577 (2014), *State v. S.G.*, 11 Wn.App.2d 74 (2019); I.

***State v. Holt***, 119 Wn.App. 712 (2004)

Unlawful possession of a firearm 2°, RCW 9.41.040(1)(b), is an alternative means offense committed when a felon owns, possesses or controls a firearm, *disapproved in part,: State v. Barboza-Cortes,* 194 Wn.2d 639 (2019), and, where information charges some of the alternatives, jury should not be instructed on more than the charged alternatives, at 718-21, *State v. Williamson,* 84 Wn.App. 37, 42 (1996); for deadly weapon enhancement, jury must be instructed that they must find a nexus between defendant, weapon and crime, at 726-29, *State v. Schelin,* 147 Wn.2d 562, 577 (2002)(Alexander, C.J., concurring), *but see: State v. Willis,* 153 Wn.2d 366 (2005), *State v. O'Neal,* 126 Wn.App. 395-422-24 (2005), *aff'd, on other grounds,* 159 Wn.2d 250 (2007), *State v. Eckenrode,* 159 Wn.2d 488 (2007), *Pers. Restraint of Reed,* 137 Wn.App. 401, 409-10 (2007), *cf.: State v. Howard,* 127 Wn.App. 862,, 877-79 (2005); II.

***State v. Callihan***, 120 Wn.App. 620 (2004)

Firearm enhancements run consecutively, former RCW 9.94A.310, recodified as RCW 9.94A.533(3)(e), even where substantive offenses constitute the same criminal conduct, RCW 9.94A.589(1)(a), *State v. Mandanas,* 168 Wn.2d 84 (2010), distinguishing *In re Post Sentencing Review of Charles,* 135 Wn.2d 239, 250 (1998), *cf.: State v. Conover,* 183 Wn.2d 706 (2015), *see also" State v. Barnett,* 21 Wn.App.2d 469 (2022); III.

***State v. Smith***, 123 Wn.App. 417, 433-35 (2004)

Defendant fires one bullet into car containing three people, is convicted of three counts of assault 2° with three firearm enhancements, is sentenced to three consecutive 36 month terms for the enhancements; held: trial court had no discretion but to impose consecutive terms for three enhancements, *State v. DeSantiago,* 149 Wn.2d 402, 418 (2003), State v. Mandanas, 168 Wn.2d 84 (2010), court could not merge the convictions, *State v. Vladovic,*99 Wn.2d 413, 421 (1983); II.

***State v. Willis***, 153 Wn.2d 366 (2005)

Evidence establishes that defendant commits a burglary, in getaway vehicle is a pistol which defendant handles while driving from the burglary, trial court instructs that state must

prove defendant was armed which means "readily available for offensive or defensive purposes," jury finds that enhancement was proved; held: instructions adequately required that jury find a nexus between the defendant, the crime and the firearm, express nexus language is not required, *Pers. Restraint of Reed*, 137 Wn.App. 401, 409-10 (2007), *see: State v. Valdobinos*, 122 Wn.2d 270 (1993), *State v. Mills*, 80 Wn.App. 231, 233 (1995), *State v. Johnson*, 94 Wn.App. 882, 886-87 (1999), *State v. Schelin*,147 Wn.2d 562, 563-64 (2002), *State v. Holt*, 119 Wn.App. 712 (2004), *State v. Howard*, 127 Wn.App. 862, 877-79 (2005), *State v. Eckenrode*, 159 Wn.2d 488 (2007); 6-3.

***State v. Barnes***, 153 Wn.2d 378 (2005)

Knowledge of the presence of a firearm is not a requirement of a deadly weapon enhancement allegation and need not be included in the enhancement instruction, *State v. Woolfolk*, 95 Wn.App. 541, 550-51 (1999), *State v. O'Neal*, 126 Wn.App. 395, 430-31 (2005), *aff'd, on other grounds*, 159 Wn.2d 500 (2007), distinguishing *State v. Anderson*, 141 Wn.2d 357 (2000), *State v. Johnson*, 94 Wn.App. 882, 895-96 (1999); 6-3.

***State v. Sweeney***, 125 Wn.App. 77 (2005)

A juvenile burglary conviction does not "wash" for purposes of serving as a predicate offense for an unlawful possession of a firearm 1° conviction, RCW 9.41.040(1)(a) even if it washes for purposes of the offender score; fact that at the time of the juvenile conviction it was not a crime to possess a firearm thereafter does not excuse to the crime enacted later and does not violate due process; courts are not required to notify all felons convicted before 1994 to give notice prescribed in RCW 9.41.047, *State v. Reed*, 84 Wn.App. 379, 385-86 (1997); knowledge that possession of a firearm is illegal is not an element of the crime, *State v. Locati*, 111 Wn.App. 222, 225 (2002), *State v. Stevens*, 137 Wn.App. 460, 467-69 (2007); III.

***State v. Winings***, 126 Wn.App. 75, 87-89 (2005)

For purposes of proving assault 2° with a deadly weapon, RCW 9A.36.021, "deadly weapon" is defined pursuant to RCW 9A.04.110 and not from the deadly weapon enhancement statute, RCW 9.94A.602; where instructions explicitly define a deadly weapon "for purposes of a special verdict" in accordance with the enhancement statute, there is no error; II.

***Small v. United States***, 161 L.Ed.2d 651 (2005)

Federal felon in possession of firearm statute, 18 USC § 922(g)(1), which make it unlawful for anyone to possess a firearm if s/he has been convicted of a felony in "any court" only applies to convictions in United States courts; 5-3.

***State v. Recuenco***, 154 Wn.2d 156 (2005), 163 Wn.2d 428 (2008)

Where jury finds deadly weapon enhancement, trial court may not enhance further for a firearm, as that issue was not submitted to the jury, *Apprendi v. New Jersey*, 147 L.Ed.2d 435 (2000), *State v. Williams*, 147 Wn.App. 479 (2008), *State v. Bainard*, 148 Wn.App. 93, 100-05 (2009), *State v. Williams-Walker*, 167 Wn.2d 889 (2010), *cf.: State v. Vazquez*, 200 Wn.App. 220 (2017), *but see: State v. Pharr*, 131 Wn.App. 119 (2006), *State v. Nguyen*, 134 Wn.App. 863, 869-71 (2006), *State v. Tessema*, 139 Wn.App. 483 (2007), *State v. Anderson*, 144 Wn.App. 85, 90-91 (2008), *see: Washington v. Recuenco*, 165 L.Ed.2d 466 (2006); not retroactive, *Pers.*

*Restraint of Rivera*, 175 Wn.2d 155 (2012), *but see: State v . Wences*, 189 Wn.2d 675 (2017); 9-0.

***State v. Gurske***, 155 Wn.2d 134 (2005)

Defendant is arrested for driving while license suspended, during inventory search of his truck police find a gun, in a backpack behind driver's seat which defendant could not have reached without exiting truck or moving to passenger seat, also find drugs, defendant is convicted of VUCSA while armed with a deadly weapon; held: because evidence failed to establish that the pistol was easily accessible and readily available for use for offensive or defensive purposes, the enhancement was improper, *State v. Valdobinos*, 122 Wn.2d 270 (1993), *State v. Ague-Masters*, 138 Wn.App. 86, 102-05 (2007), distinguishing *State v. Schelin*, 147 Wn.2d 562 (2002), *see also: State v. Rooth*, 129 Wn.App. 761, 773-74 (2005), *cf.: State v. Eckenrode*, 159 Wn.2d 488, 494 (2007), *State v. Sassen Van Elsloo*, 191 Wn.2d 798 (2018); reverses *State v. Gurske*, 120 Wn.App. 63 (2004); 9-0.

***State v. O'Neal***, 126 Wn.App. 395 (2005), *aff'd, on other grounds*, 159 Wn.2d 500 (2007)

Where a drug sentence is doubled due to priors, RCW 69.50.408, a new statutory maximum is created and the length of the firearm enhancement is calculated based upon the new maximum, *State v. Cyr*, 195 Wn.2d 492 (2020), here a 60 month enhancement for a 20 year maximum, *State v. Barajas*, 88 Wn.App. 387, 388 (1997), *State v. Blade*, 126 Wn.App. 174 (2005), at 426-30; II.

***State v. Carter***, 127 Wn.App. 713 (2005)

In unlawful possession of firearm case, trial court instructs that state must prove knowledge, *State v. Anderson*, 141 Wn.2d 357, 366 (2000), and gives defense proposed instruction on unwitting possession; held: because jury was misled to believe defendant had the burden, defendant was prejudiced by ineffective assistance, *see: State v. Michael*, 160 Wn.App. 528 (2011); failure of juvenile court to advise respondent at time of disposition that he may not possess a firearm does not mislead a defendant in violation of due process rights, at 720, distinguishing *State v. Leavitt*, 107 Wn.App. 361, 372-73 (2001), *State v. Moore*, 121 Wn.App. 889, 896 (2004), *but see: State v. Breitung*, 155 Wn.App. 606, 619-25 (2010); 2-1, III.

***State v. Howard***, 127 Wn.App. 862, 877-79 (2005)

For special allegation enhancement, jury should be instructed of nexus requirement, *State v. Holt*, 119 Wn.App. 712 (2004), error may be harmless, *see: State v. Eckenrode*, 159 Wn.2d 488 (2007); I.

***State v. Cubias***, 155 Wn.2d 549 (2005)

**Consecutive sentences** for multiple firearm enhancements need not be submitted to a jury, *State v. Kinney*, 125 Wn.App. 778 (2005), distinguishing *Blakely v. Washington*, 159 L.Ed.2d 403 (2004); 5-4.

***State v. Wade***, 133 Wn.App. 855, 872-73 (2006)

An inoperable firearm may still be a deadly weapon and firearm to support a conviction of assault 2º, *State v. Berrier,* 110 Wn.App. 639, 645 (2002), *State v. Tasker,* 193 Wn.App. 575 (2016), *see also: State v. Releford,* 148 Wn.App. 478, 489-97 (2009); II.

***State v. Wolf***, 134 Wn.App. 196 (2006)

In unlawful possession of firearm case, defendant stipulates that he had previously been convicted of a serious offense, *Old Chief v. United States,* 136 L.Ed.2d 574(1997), parties agree that fact of stipulation would be included in a jury instruction, stipulation is not read to jury during presentation of evidence, defense claims insufficiency; held: by stipulating, defense waived the right to put the state to its burden of proof on the element to which he stipulated, *State v. Stephens,* 137 Wn.App. 460, 466 (2007); I.

***Washington v. Recuenco***, 165 L.Ed.2d 466 (2006)

Where jury finds deadly weapon enhancement but trial court enhances further for a firearm in possible violation of *Apprendi v. New Jersey,* 147 L.Ed.2d 435 (2000), it is not structural error precluding harmless error analysis, *see: Pers. Restraint of Eastmond,* 173 Wn.2d 632 (2012), *State v. Vazquez,* 200 Wn.App. 220 (2017), *but see: State v. Recuenco,* 163 Wn.2d 428 (2008), *State v. Williams-Walker,* 167 Wn.2d 889 (2010); not retroactive, *Pers. Restraint of Rivera,* 175 Wn.2d 155 (2012), *but see: State v . Wences,* 189 Wn.2d 675 (2017); 5-4.

***State v. Nguyen***, 134 Wn.App. 863 (2006)

Firearm enhancements do not violate double jeopardy even where the use of a weapon is an element of the crime, *State v. Pentland,* 43 Wn.App. 808, 811-12 (1986), *State v. Caldwell,* 47 Wn.App. 317, 320 (1987), *State v. Tessema,* 139 Wn.App. 483 (2007), *State v. Kelley,* 168 Wn.2d 72 (2010), *State v. Toney,* 149 Wn.App. 787, 797-98 (2009); although there is no specific statutory procedure for imposition of a firearm enhancement, deadly weapon enhancement procedure, RCW 9.94A.602, will work to allow a jury to find a firearm enhancement, *State v. Anderson,* 144 Wn.App. 85, 90-91 (2008), *State v. Vazquez,* 200 Wn.App. 220 (2017), distinguishing *State v. Recuenco,* 154 Wn.2d 156 (2005), *rev'd on other grounds,* 165 L.Ed.2d 466 (2006), *see: State v. Recuenco,* 163 Wn.2d 428 (2008), *State v. Williams,* 147 Wn.App. 479 (2008), *State v. Bainard,* 148 Wn.App. 93, 100-05 (2009); I.

***State v. Williams***, 158 Wn.2d 904 (2006)

To prove possession of an unlawful firearm, RCW 9.41.010(6), 9.41.190(1), state must prove defendant knowingly possessed the firearm and knew, or should have known, the characteristics of the firearm that make the firearm illegal *see: State v. Warfield,* 119 Wn.App. 871 (2003), *cf.: Staples v. United States,* 128 L.Ed.2d 608 (1994), harmless here; affirms *State v. Williams,* 125 Wn.App. 335 (2005); 5-4.

***State v. Easterlin***, 159 Wn.2d 203 (2006)

Defendant is found in a car with drugs in his sock and a gun on the seat next to him, pleads guilty to VUSA and felon in possession of a firearm, appeals enhancement; held: while state must establish a nexus among defendant, the weapon and the crime, *State v. Schelin,* 147 Wn.2d 562 (2002), *State v. Holt,* 119 Wn.App. 712 (2004), nexus is not an element which state must explicitly plead and prove, *State v. Johnson,* 185 Wn.App. 655, 672-78 (2015), *see: State v.*

*Willis*, 153 Wn.2d 366 (2005), *State v. Eckenrode*, 159 Wn.2d 488 (2007), *Pers. Restraint of Reed*, 137 Wn.App. 401, 409-10 (2007), factual basis for plea here was sufficient for trial court to accept plea; affirms *State v. Easterlin*, 126 Wn.App. 170 (2005); 8-1.

***State v. Stockmyer***, 136 Wn.App. 212 (2006)

Guns found in different rooms in the same house are found in different "places" for purposes of the same criminal conduct test, RCW 9.94A.589(1)(a), *see: State v. Simonson*, 91 Wn.App. 874, 885-86 (1998); II.

***State v. Eckenrode***, 159 Wn.2d 488 (2007)

Defendant calls police to report an intruder, caller says he is armed, when police arrive discover no intruder but find drugs, loaded rifle, arrest defendant in front yard "far from his weapons in his house," no nexus instruction is requested by defense, defendant found guilty of VUCSA while armed; held: because defendant did not ask for a nexus instruction, he is not entitled to seek relief on the ground of instructional error, *State v. Willis*, 153 Wn.2d 366 (2005), *cf.: State v. Howard*, 127 Wn.App. 862, 877-79 (2005), *State v. Holt*, 119 Wn.App. 712 (2004), *Pers. Restraint of Reed*, 137 Wn.App. 401, 409-10 (2007); evidence was sufficient to establish that defendant was armed in light of his phone call saying he was armed, presence of loaded gun, drug operation pervaded the house so jury could readily have found that the weapons were there to protect the criminal enterprise, *see: State v. Simonson*, 91 Wn.App. 874, 883 (1998), distinguishing *State v. Gurske*, 155 Wn.2d 134 (2005); 9-0.

***State v. O'Neal***, 159 Wn.2d 500 (2007)

Evidence was sufficient to find firearm enhancement to drug case where police find 20 guns, most in two gun safes, one locked, one unlocked, plus a loaded rifle in one bedroom and a loaded pistol in another, *see also: State v. Neff*, 163 Wn.2d 453, 461-65 (2008);; affirms *State v. O'Neal*, 126 Wn.App. 395 (2005); 7-2.

***State v. Fleming***, 136 Wn.App. 678 (2007)

Trial court has discretion to instruct jury with respect to deadly weapon or firearm enhancement, RCW 9.94A.602, *State v. Nguyen*, 134 Wn.App. 863 (2006); II.

***State v. Ague-Masters***, 138 Wn.App. 86, 102-05 (2007)

Police, serving search warrant, arrest defendant at front door, find meth lab in detached shed, no evidence of lab in house, find guns locked in a safe in house; held: evidence insufficient to show that the firearms in the safe were easily accessible and readily available, thus enhancement reversed, *State v. Valdobinos*, 122 Wn.2d 270 (1993), *State v. Johnson*, 94 Wn.App. 882, 894-95 (1999), distinguishing *State v. Simonson*, 91 Wn.App. 874 (1998); II.

***State v. Carter***, 138 Wn.App. 350 (2007)

Machine gun possession, RCW 9.41.190(1) and -.010(7), is not a crime unless state proves that an ammunition supply device was present at the scene, *cf.: State v. Releford*, 148 Wn.App. 478, 492 (2009); II.

***State v. Peterson***, 138 Wn.App. 477 (2007)

Defendant uses a 3-inch knife to damage an unoccupied vehicle in the course of stealing a stereo, is convicted of malicious mischief while armed with a deadly weapon; held: a 3-inch knife is not "longer than three inches," RCW 9.94A.602, thus is not a deadly weapon *per se*; the knife otherwise qualifies as a deadly weapon if it has the capacity to inflict death and defendant uses it in a way likely to produce death or may easily and readily produce death; here, absent another person's presence, evidence is insufficient to prove the enhancement; II.

***State v. Hoeldt***, 139 Wn.App. 225 (2007)

Depending upon circumstances of use, a dog can be a deadly weapon for purposes of assault 2°; here, defendant intentionally released his large, barking, growling dog to attack a police officer, thus evidence was sufficient; II.

***State v. McKee***, 141 Wn.App. 22, 30-32 (2007)

Evidence is sufficient to prove a firearm enhancement where victim testifies as to the weight and feel of the gun, seeing a "peripheral something to my head," the way defendant wielded the gun combined with evidence that defendant did have access to real guns, *State v. Goforth*, 33 Wn.App. 405, 412 (1982), *State v. Bowman*, 36 Wn.App. 798, 803 (1984), *State v. Jusila*, 197 Wn.App. 908, 932-34 (2017); I.

***State v. Brown***, 162 Wn.2d 422, 430-35 (2007)

Defendant commits a burglary during which he finds a gun in a closet and moves it to a bed but is interrupted and leaves it behind, is convicted for burglary 1° with a firearm; held: evidence that a firearm was briefly in a burglar's possession and thus "merely loot," at 434 ¶ 27, without more, does not establish a nexus between defendant, the weapon and the crime, *State v. Schelin*, 147 Wn.2d 562 (2002), *see: State v. Brown*, 172 Wn.App. 537 (2012); "defendant's intent or willingness to use the rifle is a condition of the nexus requirement that does, in fact, appear in Washington cases," at 434 ¶ 26; 5-4.

***District of Columbia v. Heller***, 171 L.Ed.2d 637 (2008)

Local ordinance prohibiting possession of handguns in the home violates Second Amendment, *see also: Caetano v. Massachusetts*, 577 U.S. 411, 136 S.Ct. 1027, 194 L.Ed.2d 99 (2016); 5-4.

***State v. Neff***, 163 Wn.2d 453, 461-65 (2008)

Police find meth lab in garage and loaded guns in locked safe and another loaded gun in a tool belt hanging from rafters, surveillance cameras, court enhances for firearms; held: "there are lawful places to keep guns other than in a methamphetamine lab equipped with counter-surveillance cameras watching for police or intruders," *State v. O'Neal*, 159 Wn.2d 500 (2007); 8-1.

***State v. Minor***, 162 Wn.2d 796 (2008)

At juvenile court disposition, pre-printed form with felony firearm prohibition is not checked, respondent is later convicted of unlawful possession of a firearm; held: by failing to check the firearm prohibition box, the court affirmatively represented to respondent that the prohibition did not apply to him, violating statutory notice requirement, RCW 9.41.047(1), thus

VUFA conviction reversed and dismissed, *State v. Leavitt*, 107 Wn.App. 361 (2001), *State v. Breitung*, 155 Wn.App. 606, 619-25 (2010), *cf.*: *State v. Semakula*, 88 Wn.App. 719 (1997), *State v. Reed*, 84 Wn.App. 379 (1996), *State v. Mitchell*, 190 Wn.App. 919, 927-30 (2015); reverses, in part, *State v. Minor*, 133 Wn.App. 636 (2006); 9-0.

***State v. Brooks***, 142 Wn.App. 842, 848-49 (2008)

Defining deadly weapon for an enhancement using "substantial bodily harm" rather than "serious bodily injury" or "substantial bodily injury" is adequate; II.

***State v. Hunter***, 147 Wn.App. 177, 189-93 (2008)

Statute making it unlawful for a person convicted of a juvenile sex offense to possess a firearm for life, RCW 9.41.040(4), does not violate Second Amendment, *District of Columbia v. Heller*, 171 L.Ed.2d 637 (2008), or CONST., art. I, § 24; I.

***State v. Williams***, 147 Wn.App. 479 (2008)

Information contains firearm allegation but court submits deadly weapon special verdict to jury; held: jury finding that defendant was armed with a deadly weapon does not permit the court to enhance as if it were a firearm, *State v. Bainard*, 148 Wn.App. 93, 100-05 (2009), *Pers. Restraint of Delgado*, 149 Wn.App. 223 (2009), as the jury verdict is not harmless, *State v. Recuenco*, 163 Wn.2d 428, 441-42 (2008), *State v. Williams-Walker*, 167 Wn.2d 889 (2010), *but see: State v. Vazquez*, 200 Wn.App. 220 (2017); not retroactive, *Pers. Restraint of Rivera*, 175 Wn.2d 155 (2012), *but see: State v . Wences*, 189 Wn.2d 675 (2017); III.

***United States v. Hayes***, 172 L.Ed.2d 816 (2009)

Gun Control Act, 18 U.S.C. § 921 *et seq.*, which prohibits possession of a firearm by persons previously convicted of a misdemeanor domestic violence offense, does not require that the predicate crime have as an element a domestic violence relationship as long as government proves at the firearm trial the domestic relationship beyond a reasonable doubt; 7-2.

***State v. Pedro***, 148 Wn.App. 945, 944-52 (2009)

Firearm enhancement, RCW 9.94A.533(3), does not violate assault 1º defendant's equal protection rights because it exempts some crimes involving use of a gun from enhancements but not assault 1º; I.

***State v. Simms***, 151 Wn.App. 677 (2009), 171 Wn.2d 244 (2011)

When seeking to double the length of confinement for a firearm enhancement where defendant has a prior firearm enhancement, RCW 9.94A.533(3)(d) (2009), state need not plead or prove beyond a reasonable doubt the prior enhancement, *Blakeley v. Washington*, 542 U.S. 296, 303, 159 L.Ed.2d 403 (2004), nor does the new enhancement violate double jeopardy; I.

***State v. Hartzell***, 153 Wn.App. 137, 163-72 (2009)

Information alleges firearm allegation, court submits deadly weapon special verdict to jury, court enhances for firearm; held: failure to instruct as to firearm allegation that is alleged in information is harmless error if it is clear that the jury would have returned a "yes" to a firearm special verdict, *but see: State v. Williams*, 147 Wn.App. 479 (2008), *State v. Williams-Walker*,

167 Wn.2d 889 (2010); VUFA instructions that fail to include "knowing" possession, *State v. Anderson*, 141 Wn.2d 357, 366 (2000), is harmless where jury found defendant guilty of a crime while armed, *see: State v. Jones*, 117 Wn.App. 221, 227-31 (2003); I.

***State v. Williams-Walker***, 167 Wn.2d 889 (2010)

Where jury is instructed and finds by special verdict that defendant was armed with a deadly weapon, court may not impose firearm enhancement, which can never be harmless, *State v. Williams*, 147 Wn.App. 479 (2008), overruling *State v. Pharr*, 131 Wn.App. 119 (2006), *but see: Pers. Restraint of Eastmond*, 173 Wn.2d 632 (2012), *cf.: State v . Wences*, 189 Wn.2d 675 (2017); overrules, *sub silentio*, *State v. Hartzell*, 153 Wn.App. 137, 163-66 (2009); 6-3.

***State v. Kelley***, 168 Wn.2d 72 (2010)

Firearm enhancement does not violate double jeopardy when an element of the underlying offense is use of a firearm, *State v. Caldwell*, 47 Wn.App. 317 (1987), *State v. Nguyen*, 134 Wn.App. 863 (2006); analysis is not changed by *Blakely v. Washington*, 159 L.Ed.2d 403 (2004); affirms *State v. Kelley*, 146 Wn.App. 370 (2008); 9-0.

***State v. Mandanas***, 168 Wn.2d 84 (2010)

Firearm enhancements run consecutively even where substantive offenses consitute the same criminal conduct, RCW 9.94A.533(3)(e) (2009), *State v. Callihan*, 120 Wn.App. 620 (2004); 9-0.

***State v. Sieyes***, 168 Wn.2d 276 (2010)

Second Amendment applies to the states, *McDonald v. Chicago*, 561 U.S. 742, 177 L.Ed.2d 894 (2010); 8-1.

***State v. Hammock***, 154 Wn.App. 630 (2010)

A hollowed-out bolt in which a bullet is inserted which fires when hit with a hammer is a firearm for firearm enhancement and unlawful possession of a firearm, RCW 9.41.010(1) (2001); II.

***State v. Breitung***, 155 Wn.App. 606, 619-25 (2010)

Where sentencing court fails to give defendant mandatory notice of firearm prohibition, RCW 9.41.047(1), and there is no evidence that defendant has otherwise acquired actual knowledge of the prohibition, conviction for unlawful possession of a firearm is invalid, *State v. Leavitt*, 107 Wn.App. 361, 366-68 (2001), *see: State v. Garcia*, 198 Wn.App. 527 (2017), *cf.: State v. Mitchell*, 190 Wn.App. 919, 927-30 (2015), *but see: State v. Carter*, 127 Wn.App. 713, 720 (2005); 2-1, II.

***State v. Pierce***, 155 Wn.App. 701, 713-14 (2010)

To enhance with a firearm finding, state must offer evidence that the firearm was operable, *but see: State v. Mathé*, 35 Wn.App. 572 (1983), *State v. Faust*, 93 Wn.App. 373 (1998), *State v. Tasker*, 193 Wn.App. 575 (2016), , *State v. Crowder*, 196 Wn.App. 861, 872-73 (2016), *State v. Jusila*, 197 Wn.App. 908, 932-34 (2017), *cf.: State v. Raleigh*, 157 Wn.App. 728 (2010); Division II rejects it's holding in *State v. Olsen*, 10 Wn.App.2d 731 (2019).

***State v. Raleigh***, 157 Wn.App. 728 (2010)

A rusty gun with a round in the chamber, a working safety and slide which, with some repair to the firing pin, is made operable is a firearm, RCW 9.41.040(1)(a), for purposes of felon in possession; "[w]hether an object is a 'firearm'…is a question of statutory interpretation" reviewed *de novo*, at 734; II.

***Pers. Restraint of Martinez***, 171 Wn.2d 354 (2011)

Mere possession of a knife during a burglary is insufficient to enhance to burglary 1°, state must prove that it was "used, attempted to be used, or threatened to be used," RCW 9A.04.110(6), as a weapon, *State v. Gotcher*, 52 Wn.App. 350 (1988), overruling *State v. Gamboa*, 137 Wn.App. 650 (2007) , unless the weapon is a loaded or unloaded firearm, *State v. Hall*, 46 Wn.App. 689, 695 (1987), *State v. Faille*, 53 Wn.App. 111 (1988), *State v. Hernandez*, 172 Wn.App. 537 (2012); 9-0.

***State v. Michael***, 160 Wn.App. 522 (2011)

It is not ineffective assistance of counsel for defense attorney not to offer an unwitting possession instruction in unlawful possession of a firearm case because knowledge is an element state must prove while burden on unwitting possession is on defense, *State v. Rowell*, 138 Wn.App. 780 (2007), *State v. Carter*, 127 Wn.App. 713, 718 (2005); III.

***State v. Carter***, 161 Wn.App. 532 (2011)

Statutory exemptions to possession of unlawful weapon, RCW 9.41.190(2), are affirmative defenses not elements of the crime, *State v. Moses*, 79 Wn.2d 104, 110 (1971), because the facts lie within the knowledge of the defendant, *see: State v. Fry*, 142 Wn.App. 456, 460-61 (2008); federal license permitting defendant to repair machine guns does not authorize him to personally possess a machine gun; II.

***State v. Damiani***, 162 Wn.App. 1 (2011)

Superior court judge, at sentencing, does not have authority to authorize a felon to possess a firearm during military service; II.

***State v. Webb***, 162 Wn.App. 195, 203-05 (2011)

Defendant robs store with toy gun, victim testifies he first believed it was a gun, then decided it was plastic, defendant is convicted of robbery 1°; held: "displays what appears to be a firearm," RCW 9A.56.200(1)(a)(ii), focuses on the victim's point of view, *State v. Kennard*, 101 Wn.App. 533, 537 (2000), *State v. Henderson*, 34 Wn.App. 865, 868 (1983), does not require that victim's perception that it was a firearm must continue throughout the course of the robbery; 2-1, III.

***State v. R.P.H.***, 173 Wn.2d 199 (2011)

Court terminating sex offender registration requirement is the equivalent of a "certificate of rehabilitation" requiring restoration of right to possess firearms. *State v. Radan*, 143 2 323 (2001), *see: State v. Harrison*, 181 Wn.App. 577 (2014); 7-2.

***Pers. Restraint of Eastmond***, 173 Wn.2d 632 (2012)

Rule that a firearm enhancement, when jury only finds deadly weapon, can never be harmless, *State v. Williams-Walker,* 167 Wn.2d 889, 901 (2010), does not apply to a PRP, *State v . Wences,* 189 Wn.2d 675 (2017); 7-2.

***State v. Guzman Nuñez***, 174 Wn.2d 707 (2012)

Jury must be unanimous to find that state did not prove special sentencing allegations, overruling *State v. Bashaw,* 169 Wn.2d 133 (2010), *State v. Goldberg,* 149 Wn.2d 888, 894 (2003); 9-0.

***State v. Ibrahim***, 164 Wn.App. 503, 510-15 (2011)

Statute which prohibits a resident legal alien from possessing a firearm, former RCW 9.41.170, violates equal protection clause; III.

***State v. Chouinard***, 169 Wn.App. 895 (2012)

Defendant, found in back seat of car owned by another within reaching distance of the gun, states he knew gun was there, is convicted of felon in possession of a firearm; held: mere proximity and knowledge of presence of a gun in a car is insufficient to prove constructive possession, *State v. Hagen*, 55 Wn.App. 494 (1989), *State v. Alvarez*, 105 Wn.App. 215 (2001), *State v. Cote*, 123 Wn.App. 546 (2004), *State v. Shumaker*, 142 Wn.App. 330 (2007); II.

***State v. Jorgenson***, 179 Wn.2d 145 (2013)

Prohibiting firearm possession by someone released on bond after court finds probable cause to believe the person has committed a serious offense, RCW 9.41.040(2)(a)(iv) (2011), does not violate Second Amendment nor CONST. art I, § 24; 5-4.

***State v. Soto***, 177 Wn.App. 706 (2013)

Firearm enhancement, RCW 9.94A.533(3) (2013), does not apply to an unranked felony, RCW 9.94A.505(2)(b) (2010); III.

***State v. Humphries***, 181 Wn.2d 708 (2014)

At unlawful possession of firearm trial defense counsel stipulates that defendant had previously been convicted of a serious offense, *Old Chief v. United States*, 519 U.S. 172, 136 L.Ed.2d 574 (1997), informs court that defendant does not agree, trial judge concludes that it's tactical; held: while court may presume that counsel's stipulation to an element of a crime is with defendant's consent, where defendant expressly objects trial court may not accept the stipulation, reversing, in part, *State v. Humphries,* 170 Wn.App. 777 (2012); 6-3.

***State v. Mata***, 180 Wn.App. 108 (2014)

Defendant is convicted of unlawful possession of the same firearm on the same day in Pierce and Yakima Counties; held: unlawful possession of a firearm is a course of conduct crime rather than a discrete act, *State v. Kenyon,* 150 Wn.App. 826 (2009), while an interruption in possession of a particular firearm might result in different possessions, *see: State v. Chouap,* 170 Wn.App. 114, 125 (2012), here there was no evidence that the possession was ever interrupted, thus second prosecution violated double jeopardy clause; III.

***State v. Owens***, 180 Wn.App. 846 (2014)

Defendant displays a rifle in his back yard, charged with unlawful display of a weapon, RCW 9.41.270 (1994), trial court refuses instruction "the act did not occur in the defendant's place of abode, RCW 9.41.270(3); held: a back yard is not "in his or her place of abode," thus the instruction was properly refused, *see: State v. Haley,* 35 Wn.App. 96 (1983), *State v. Smith,* 118 Wn.App. 480 (2003); failure of statute to define "place of abode" does not render the statute vague; II.

***State v. Harrison***, 181 Wn.App. 577 (2014)

California certificate of rehabilitation qualifies under RCW 9.41.040(3) (2011) to preclude a conviction of felon in possession of a firearm in Washington, *see: State v. Radan,* 143 Wn.2d 323 (2001), *State v. R.P.H.,* 173 Wn.2d 199 (2011); 2-1, III.

***State v. Mitchell***, 190 Wn.App. 919, 927-30 (2015)

Lack of notice of firearm prohibition is an affirmative defense to unlawful possession of a firearm, defendant must prove by a preponderance that he did not receive either oral or written notice that it was illegal for him to possess a firearm, *State v. Breitung,* 173 Wn.2d 393, 403 (2011), *State v. Garcia,* 198 Wn.App. 527 (2017); a statement of defendant on plea of guilty that contains notice of firearm prohibition is sufficient to prove written notice, state does not have burden of proving oral notice, *see: State v. Minor,* 162 Wn.2d 796 (2008); I.

***Seattle v. Evans***, 1184 Wn.2d 856 (2015)

Ordinance prohibiting carrying a fixed blade knife in public, SMC 12A.14.080, does not violate federal constitutional right to bear arms, *Seattle v. Montana,* 129 Wn.2d 583 (1996), distinguishing *District of Columbia v. Heller,* 554 U.S. 570, 171 L.Ed.2d 637 (2008); a knife does not qualify as "arms;" affirms *Seattle v. Evans,* 182 Wn.App. 188 (2014); 5-4.

***Caetano v. Massachusetts***, 577 U.S. 411, 136 S.Ct. 1027, 194 L.Ed.2d 99 (2016)

Stun gun is protected by the Second Amendment, *District of Columbia v. Heller*, 171 L.Ed.2d 637 (2008), *per curiam.*

***State v. Tasker***, 193 Wn.App. 575 (2016)

For purposes of firearm enhancement, RCW 9.41.010(9) (2015), 9.94A.533(3), a device must be capable of being fired, either instantly or with reasonable effort and within a reasonable time, but evidence that a device appears to be a real gun and is being wielded in committing a crime is sufficient circumstantial evidence that it is a firearm even if it is not recovered, *State v. Faust,* 93 Wn.App. 373 (1998), *State v. Padilla,* 95 Wn.App. 531 (1999) , *State v. Crowder,* 196 Wn.App. 861, 872-73 (2016), *State v. Jusila,* 197 Wn.App. 908, 932-34 (2017), , *State v. Olsen,*

10 Wn.App.2d 731 (2019) *but see: State v. Pierce,* 155 Wn.App. 701 (2010), *cf.: State v. Recuenco,* 163 Wn.2d 428 (2008); III.

***State v. Horton***, 195 Wn.App. 202, 217-21 (2016)

A withheld adjudication following a guilty plea in Florida counts as a felony conviction for purposes of felon in possession of a firearm in spite of Florida law's concluding that it is not a conviction in Florida; II.

***State v. Haggin***, 195 Wn.App. 315 (2016)

Multiple current convictions for unlawful possession of firearms run concurrently unless there also is a current conviction for theft of a firearm or possession of a stolen firearm, RCW 9.94A.589(1)(c) (2015); III.

***State v . Wences,*** 189 Wn.2d 675 (2017)

Deadly weapon special verdict, court imposes firearm enhancement, defendant had absconded in 2005 but was tried after *Pers. Restraint of Eastmond*, 173 Wn.2d 632, 634 (2012) held that a sentencing court cannot impose a firearm enhancement on a deadly weapon finding which applies to all cases on direct review, rule applies even though defendant had absconded, *but see: State v. Handy*, 27 Wash. 469, 470-71 (1902), *State v. Mosley*, 84 Wn.2d 608 (1974); 6-3.

***State v. McFarland***, 189 Wn.2d 47 (2017)

Defendant is convicted of burglary, ten counts of theft of a firearm and three counts of unlawful possession of a firearm, is sentenced to standard range sentences concurrent to the burglary but the firearm convictions consecutive to each other, defendant claims on appeal that court failed to recognize its power to impose concurrent mitigated sentences; held: pursuant to *Pers. Restraint of Mulholland*, 161 Wn.2d 322 (2007), *State v. Graham*, 181 Wn.2d 878 (2014), trial court had discretion to impose mitigated concurrent sentences, regardless of language in RCW 9.412.040(6) that firearm sentences shall run consecutively "notwithstanding any other law," *cf.: State v. Mille**r***, 185 Wn.2d 111 (2016), *State v. Brown,* 13 Wn.App.2d 288 (2020), if the court finds that the presumptive sentence is clearly excessive; 6-3; not retroactive, *Pers. Restraint of Henriques*, 14 Wn.App.2d 199 (2020).

***State v. Jusila,*** 197 Wn.App. 908, 932-34 (2017)

In burglary 1° case under deadly weapon prong evidence is sufficient to prove firearm where state offers photographs of guns, witnesses testify that they found loaded rifles, no one testified that the rifles were operable, but that can be inferred from photos and testimony, *State v. Mathé*, 35 Wn.App. 572 (1983), *State v. Emery*, 161 Wn.App. 172, 197-200 (2011), *affirmed, on other grounds*, 174 Wn.2d 741 (2012), *State v. Tasker*, 193 Wn.App. 575 (2016), *State v. Crowder*, 196 Wn.App. 861, 872-73 (2016); I.

***State v. Garcia***, 198 Wn.App. 527 (2017)

In VUFA case, because prior judgment and sentence and sentencing proceedings lacked evidence that defendant was advised of the firearm prohibition trial court dismisses, CrR 8.3(c); held: generally an affirmative defense must be submitted to the trier of fact where the burden is

on defense; here, where state has other evidence of defendant's knowledge of the firearm prohibition trial court erred in dismissing, *see: State v. Breitung*, 173 Wn.2d 393 (2011); I.

***State v. Clark***, 200 Wn.App. 20 (2017)

Court issues domestic violence protection order which requires a surrender of firearms, police find guns in defendant's storage locker, is convicted of unlawful possession of a firearm, RCW 9.41.040(2)(a)(ii)(C)(ll), which states that it is unlawful to possess a firearm if the underlying DVPO "explicitly prohibits the use...of physical force," and here the order does not mention "physical force;" held: protective order need not parrot the language of the statute to be sufficient as long as it clearly prohibits force, thus evidence was sufficient to convict; I.

***State v. Vazquez,*** 200 Wn.App. 220 (2017)

Defendant is charged with assault while armed with a firearm, RCW 9.94A.533(3) (2015), instructions only address deadly weapon finding but define a firearm as a deadly weapon, special verdict is for a firearm enhancement which jury finds; held: because this was an instructional error and not a sentencing error harmless error analysis applies, harmless here, *see: State v. Recuenco*, 163 Wn.2d 428, 437 (2008), *but see: State v. Williams*, 147 Wn.App. 479 (2008); III.

***State v. Garcia,*** 191 Wn.2d 986 (2018)

In VUFA case, because prior judgment and sentence and sentencing proceedings lacked evidence that defendant was advised of the firearm prohibition trial court dismisses, CrR 8.3(c); held: where state has other evidence of defendant's knowledge of the firearm prohibition trial court erred in dismissing, *see: State v. Breitung*, 173 Wn.2d 393 (2011); affirms *State v. Garcia*, 198 Wn.App. 527 (2017); 6-3.

***State v. Sassen Van Elsloo,*** 191 Wn.2d 798 (2018)

Police find drugs in car, firearm in cargo hold, defendant-driver is charged with VUCSA with firearm enhancement; held: evidence was sufficient (1) that a firearm was easily accessible and readily available for offensive or defensive purposes during the commission of the crime and (2) that a nexus exists among the defendant, the weapon, and the crime. *State v. Eckenrode*, 159 Wn.2d 488, 493, (2007); here, the firearm was close enough to establish nexus, distinguishing *State v. Gurske*, 155 Wn.2d 134,138 (2005); 6-3.

***State v. Pinkham***, 2 Wn.App.2d 411 (2018)

Possession of a loaded rifle in a vehicle, RCW 77.15.460(1) (2014), is a strict liability offense, distinguishing *State v. Anderson*, 141 Wn.2d 357 (2000), *State v. Anderson*, 54 Wn.App. 384 (1989); III.

***State v. Dennis***, 191 Wn.2d 169 (2018)

Defendant is convicted for a felony in 1991, then goes fifteen years crime-free, is convicted for a misdemeanor in 2014, later petitions for reinstatement of firearm rights; held: any five year crime-free period, regardless of a later conviction, requires court to reinstate right to possess firearms, RCW 9.41.040(4)(a)(ii)(A) (2018); reverses *State v. Dennis*, 200 Wn.App. 654 (2017); 6-3.

***State v. Rios***, 431 Wn.App.2d 1016 (2018)

Defendant is convicted of assault 2°/deadly weapon, CW 9A.36.021(1)(c) (2011), following trial in which some witnesses testified he possessed a gun, trial court orders that he register as a firearm offender as he was convicted of a "felony firearm offense," RCW 9.41.330 (2016); held: a general verdict of assault with a deadly weapon is insufficient to find that defendant was convicted of a firearm offense, thus trial court erred in ordering registration; II.

***State v. Olsen***, , 14 Wn.App.2d 731 (2019)

State need not prove that a firearm, RCW 9.41.010(9) (2015), is operable to be considered a firearm for purposes of unlawful possession of a firearm 1°, .: *State v. Raleigh*, 157 Wn.App. 728 (2010), *State v. Mathé*, 35 Wn.App. 572 (1983), *State v. Faust*, 93 Wn.App. 373 (1998), overruling *State v. Pierce*, 155 Wn.App. 701, 713-14 (2010); II.

***State v. S.G.,*** 11 Wn.App.2d 74 (2019)

A dismissed juvenile deferred disposition remains a conviction for purposes of restoration of firearm rights, RCW 9.41.040(3); I.

***State v. Brown***, 13 Wn.App.2d 288 (2020)

Sentencing court does not have the authority to impose, as an exceptional sentence, concurrent firearm enhancements, RCW 9.94A.533(3)(e) (2018), for an adult, *State v. Brown,* 120 Wn.2d 20, 29 (1999) distinguishing *Pers Restraint of Mulholland,* 161 Wn.2d 322 (2007), *State v. Houston-Sconiers*, 188 Wn.2d 1 (2017), *see: State v. Monschke,* 197 Wn.2d 305 (2021); I.

***State v. Nielsen***, 14 Wn.App.2d 446 (2020)

In attempted felon in possession of a firearm case, RCW 9.41.040(1) (2020), state must prove, and instructions must reflect, that defendant intended to possess a firearm, not that defendant intended to unlawfully possess a firearm, *State v. Minor*, 162 Wn.2d 798 (2008), *State v. Semakula*, 88 Wn.App. 719 (1997); I.

***State v. Mandefero***, 14 Wn.App.2d 825 (2020),

While court may have discretion to impose mitigated sentence based upon youth even if defendant is over 18 at the time of the crime, *State v. O'Dell,* 183 Wn.2d 680 (2015), and thus can impose an exceptional sentence for a firearms related offense, it may not impose an exceptional sentence for firearm enhancements, RCW 9.94A.533(3)(e) (2019), *State v. McFarland,* 189 Wn.2d 47, 55 (2017), *State v. Brown,* 139 Wn.2d 20, 25-29 (1999); I.

***State v. Flores***, 18 Wn.App.2d 486 (2021)

Alien in possession of a firearm, RCW 9.41.171, which does not contain an explicit mental state element, requires proof of knowing possession, *State v. Bash*, 130 Wn.2d 594 (1996), *State v. Blake*, 197 Wn.2d 170 (2021), *State v. Bash*, 130 Wn.2d 594 (1996); I.

***State v. Wright***, 19 Wn.App.2d 37 (2021)

Firearm enhancements must run consecutive to each other for adults, distinguishing *State v. McFarland*, 189 Wn.2d 47 (2017) which permits mitigated concurrent sentences for unlawful possession of a firearm; III.

***State v. Gouley***, 19 Wn.App.2d 185 (2021)

In felon in possession case state presents evidence that the recovered shotgun lacked a bolt but that a bolt is readily available, only way to tell if the gun is operable is to fire it which wasn't done here, defense claims insufficiency; held: whether a firearm can be rendered operational is immaterial to whether it is a firearm, RCW 9.41.010(9), state must show that the firearm is a "gun in fact, not a toy gun, and the real gun need not be loaded or even capable of being fired to be a firearm," *State v. Faust*, 93 Wn.App. 373, 380 (1998), *State v. Olsen*, 10 Wn.App.2d 731 (2019); II.

***State v. Flannery***, ___ Wn.App.2d ___, 520 P.3d 517 (2022)

Defendant is charged with domestic violence assault accompanied by a no contact order, RCW 10.99.040(2)(a), and order which prohibits him from possessing firearms, RCW 9.41.040(2)(a)(iii) (2020), objects to order that he surrender firearms on Fifth Amendment grounds; held: noncompliance with the firearm surrender order which subjects a defendant to a criminal charge violates the privilege against self-incrimination and thus firearm surrender statutory scheme is unconstitutional; scheme also violates Fourth Amendment; II.

# DIMINISHED CAPACITY/VOLUNTARY INTOXICATION

***State v. Edmon***, 28 Wn.App. 98 (1981)

Where *mens rea* elements are intent or knowledge per RCW 9A.08.010(1)(a) and (b), element may be negated by expert testimony of mental disorder preventing formation of intent or knowledge at the time of crime if proper foundation is laid; sets forth in detail foundational requirements, *accord*: *State v. Thamert*, 45 Wn.App. 143 (1986), *State v. Jones*, 64 Wn.App. 134 (1992), *State v. Davis*, 64 Wn.App. 511 (1992), *but see: State v. Ellis*, 136 Wn.2d 498 (1998); 2-1

***State v. Collins***, 30 Wn.App. 1 (1981)

Voluntary intoxication is defense to murder and manslaughter 1°, but not to manslaughter 2°; III.

***State v. Eaton***, 30 Wn.App. 288 (1981)

Court required defendant to testify before psychiatrist could testify as to intoxication defense as opinion was based upon defendant's recounting of incident; held: reversed, as violates intent of ER 703 and possibly defendant's 5th Amendment rights; II.

***State v. Simmons***, 30 Wn.App. 432 (1981)

Voluntary intoxication is a defense to taking and riding a motor vehicle, as knowledge is an element, *State v. Robinson*, 78 Wn.2d 479 (1970); evidence that defendant had been drinking, plus lay testimony "suggesting that his ability to acquire the requisite mental state had been impaired" requires instructions, WPIC 18.10; II.

***State v. Carter***, 31 Wn.App. 572 (1982)

Error to instruct jury that defense has burden of proving voluntary intoxication by preponderance, as defense of voluntary intoxication merely negates an element of the offense; I.

***State v. Lottie***, 31 Wn.App. 651 (1982)

To establish a valid involuntary intoxication defense to arson, defendant must show a loss of his faculties, such that he could not form the mental state to knowingly cause a fire, *but see: State v. Stacy*, 181 Wn.App. 553, 568-74 (2014); claim of a blackout after voluntarily consuming drugs and alcohol is not sufficient evidence to raise involuntary intoxication as a defense; I.

***State v. Corwin***, 32 Wn.App. 493 (1982)

Fact that a defendant is an alcoholic with organic brain syndrome does not support a contention of involuntary intoxication; there is no difference between voluntary and involuntary intoxication as to crimes that require proof of specific intent (here, robbery), *but see: State v. Stacy*, 181 Wn.App. 553, 568-74 (2014); I.

***State v. Brooks***, 97 Wn.2d 873 (1982)

Remand for new trial where defense expert was not permitted to testify re: effect of defendant's voluntary intoxication on his ability to premeditate murder.

***State v. Washington***, 36 Wn.App. 792 (1984)

Evidence that defendant was intoxicated is enough to support voluntary intoxication instruction, *State v. Jones*, 95 Wn.2d 616 (1981), *State v. Walters,* 162 Wn.App. 74, 81-85 (2011), *reversing State v. Washington*, 34 Wn.App. 410 (1983); I.

***State v. Mathews***, 38 Wn.App. 180 (1984)

In robbery case with voluntary intoxication defense, trial court refused to permit defense psychiatrist to testify that defendant's alcoholism was caused by post-traumatic stress syndrome; held: PTSS was not causally connected to a lack of specific intent, thus exclusion was proper, *State v. Edmon*, 28 Wn.App. 98 (1981), *see: State v. Bottrell*, 103 Wn.App. 706 (2000); I.

***State v. Commodore***, 38 Wn.App. 244 (1984)

Diminished capacity is a defense to both intent and premeditation elements in murder 1°; I.

***State v. Sandomingo***, 39 Wn.App. 709 (1985)

To obtain an intoxication instruction, there must be substantial evidence that defendant was intoxicated and that defendant was affected by the alcohol, *State v. Jones*, 95 Wn.2d 616 (1981), *State v. Simmons*, 30 Wn.App. 432 (1981), *cf.: State v. Walters,* 162 Wn.App. 74, 81-85 (2011).; II.

***State v. Smissaert***, 41 Wn.App. 813 (1985)

Court prohibits defense expert from testifying as to defendant's mental state and to voluntary intoxication, although it instructs jury as to voluntary intoxication; held: admission of expert testimony is within sound discretion of trial court, *Seattle v. Heatley*, 70 Wn.App. 573 (1993); effects of alcohol are commonly known, thus expert's testimony was unnecessary, *see: State v. Kruger*, 116 Wn.App. 685, 691-93 (2003); I.

***State v. Fuller***, 42 Wn.App. 53 (1985)

State need not prove the absence of intoxication; prior opinion, *State v. Fuller*, 39 Wn.App. 104 (1984) requiring a special instruction setting forth state's burden of proof regarding intoxication is reversed; *accord*: *State v. Sam*, 42 Wn.App. 586 (1986), *State v. James*, 47 Wn.App. 605 (1987), *State v. Sao*, 156 Wn.App. 67, 76-77 (2010); I.

***State v. Thamert***, 45 Wn.App. 143 (1986)

Within trial court's discretion to exclude testimony of a psychiatrist and a nurse who spoke with defendant, but cannot meet all nine foundational requirements of *State v. Edmon*, 28 Wn.App. 98, 102-3 (1981), *see: State v. Farr-Lenzini*, 93 Wn.App. 453, 459-65 (1999), *but see: State v. Ellis*, 136 Wn.2d 498, 504 (1998), *State v. Atsbeha*, 142 Wn.2d 904, 913-14 (2001), *State v. Acosta*, 123 Wn.App. 424 (2004); I.

***State v. Poulsen***, 45 Wn.App. 706 (1986)

Where an indigent defendant makes a clear showing that his mental state will be a significant factor at trial, trial court must appoint a psychiatric expert to assist in the defense; II.

***State v. Hansen***, 46 Wn.App. 292 (1986)

Where evidence establishes that drug intoxication produced a mental disorder that affected ability to form mental state, voluntary intoxication instruction is sufficient, and court need not instruct specially on diminished capacity, *State v. Furman*, 122 Wn.2d 440 (1993); *cf.: State v. Hackett*, 64 Wn.App. 780, 787 n. 3 (1992); I.

***State v. Brewton***, 49 Wn.App. 589 (1987)

Before trial, defense informs state that it is raising insanity and diminished capacity defenses, state is given access to psychiatric reports, after which defense withdraws insanity defense and demands return of records; trial court denies return of records, but prohibits state from using admissions of defendant contained in the reports; held: diminished capacity, like insanity, injects the issue of defendant's mental state, and thus disclosure of medical records is proper, with excision of incriminating statements; II.

***State v. Coates***, 107 Wn.2d 882 (1987)

State does not have the burden of disproving voluntary intoxication, RCW 9A.16.090, as it is not a defense but is merely evidence which bears upon the mental state; jury should be precluded from considering intoxication where the *mens rea* element is criminal negligence; 6-3.

***State v. Nuss***, 52 Wn.App. 735 (1988)

As soon as defendant asserts diminished capacity as a defense, state is entitled to psychiatric reports from defense, court may order defendant to be interviewed by a state's expert; defense counsel may be present at the interview, but may not participate; defendant may not claim Fifth Amendment privilege at interview as it is waived by raising the defense, although may be reclaimed if defense withdraws diminished capacity defense and does not call experts; III.

***State v. Hutchinson***, 111 Wn.2d 872 (1989)

Where defense states diminished capacity may be a defense, court may order psychiatric evaluation by a state's expert, during which defense counsel may be present but may not inhibit examination, *State v. Haq*, 166 Wn.App. 221, 273-77 (2012), *cf.: State v. Hutchinson*, 135 Wn.2d 863, 877 (1998), *but see: State v. Cochran*, 102 Wn.App. 480, 483-86 (2000); defendant may refuse to answer any question that might incriminate him or lead to evidence of an incriminating nature, *State v. Carneh*, 153 Wn.2d 274 (2004); at trial, opinions, observations and statements are admissible as to nonincriminatory statements by defendant, but observations and statements (other than opinions) as to incriminatory statements by defendant are not admissible; an observation or statement is not incriminatory merely because it tends to show the defendant is sane or had sufficient capacity to commit the crime, *State v. Craney*, 347 N.W.2d 668, 673 (Iowa, 1984); 9-0.

***State v. Gough***, 53 Wn.App. 619 (1989)

Evidence which supports an insanity defense does not necessarily justify a diminished capacity instruction; to obtain diminished capacity instruction, there must be some evidence to

explain how defendant's mental condition related to his inability to achieve a culpable mental state; II.

***State v. Davis***, 64 Wn.App. 511 (1992)

Diminished capacity is a defense to assault 2° with a deadly weapon, RCW 9A.36.021(1)(a); absent a logical connection between diagnosed disorders (here, acute anxiety and significant depression) and ability to form intent, it is proper for court to exclude expert testimony, *State v. Griffin*, 100 Wn.2d 417, 418-9 (1983); III.

***State v. Stumpf***, 64 Wn.App. 522 (1992)

Expert testimony is required to establish existence of mental disorder and causal connection between disorder and diminished capacity; to supplement expert testimony, lay witness may testify to establish defendant's mental state where (1) witness had sufficient acquaintance with defendant or had sufficient time to observe defendant, (2) witness testifies, at least in a general way, as to the peculiar facts and circumstances on which her conclusion is based, and (3) testimony refers to defendant's mental condition at or close to the time witness made observation and at or close to time of offense; III.

***State v. Hackett***, 64 Wn.App. 780 (1992)

Where there is sufficient evidence to establish drug intoxication such that defendant is unable to form intent, trial court must give voluntary intoxication instruction, WPIC 18.10, *State v. Zamora*, 6 Wn.App. 130 (1971), *distinguishing State v. Hansen*, 46 Wn.App. 292 (1986); definition of intent, inclusion of intent in "to convict" instruction and counsel's arguing same does not render failure to instruct harmless; I.

***State v. Gallegos***, 65 Wn.App. 230 (1992)

Defense is entitled to voluntary intoxication instruction if (1) crime has a *mens rea* element other than criminal negligence, *State v. Coates*, 107 Wn.2d 882 (1987), (2) substantial evidence of drinking, and (3) defense presents evidence that drinking affected defendant's ability to acquire required mental state; here, lay testimony that defendant was highly intoxicated is insufficient, *State v. Gabryschak*, 83 Wn.App. 249 (1996), *State v. Stevens*, 158 Wn.2d 304 (2006), *but see: State v. Walters*, 162 Wn.App. 74, 81-85 (2011), *cf.: State v. Rice*, 102 Wn.2d 120 (1984); I.

***State v. Furman***, 122 Wn.2d 440 (1993)

Where diminished capacity is premised wholly or partly on voluntary intoxication, one instruction can be adequate to permit defendant to argue defendant's theory of the case, *State v. Hansen*, 46 Wn.App. 292 (1987); 8-0.

***State v. Brown***, 78 Wn.App. 891 (1995)

Voluntary intoxication is not defense to rape, *State v. Swagerty*, 60 Wn.App. 830, 833-4 (1991), *see: State v. Stevens*, 158 Wn.2d 304 (2006); II.

***State v. Warden***, 80 Wn.App. 448 (1996)

In murder trial, where there is sufficient evidence that defendant had diminished capacity to intend to cause death of victim, then defendant is entitled to instructions on lesser included offenses of manslaughter 1° and manslaughter 2°, *State v. Colwash*, 15 Wn.App. 530 (1976), *aff'd,* 88 Wn.2d 468 (1977), *State v.Berge*, 25 Wn.App. 433 (1980), *State v. Jones*, 95 Wn.2d 616 (1981), *see: State v. Schaffer*, 135 Wn.2d 355 (1998); I.

***Montana v. Egelhoff***, 135 L.Ed.2d 361 (1996)

State statute which requires instructing jury that it may not consider voluntary intoxication in determining *mens rea* does not violate due process, *see also: Clark v. Arizona*, 165 L.Ed.2d 842 (2006), *Kahler v.. Kansas*, 589 U.S. ___, 140 S.Ct. 1021, 206 L.Ed.2d 312 (2020); 6-3.

***State v. Jones***, 82 Wn.App. 871 (1996)

Multiple personality disorder does not rise to diminished capacity where the core personality is unaware and not in control of the alter personality and where there is no evidence that the alter personality's capacity was diminished, *State v. Wheaton*, 121 Wn.2d 347 (1993), *see: State v. Greene*, 139 Wn.2d 64 (1999); III.

***State v. Gabryschak***, 83 Wn.App. 249 (1996)

Defense need not present any evidence and may still be entitled to voluntary intoxication instruction as long as evidence presented by state and elicited during cross-examination contains substantial evidence of defendant's drinking and of the effects of alcohol on defendant's mind or body, *State v. Thomas*, 109 Wn.2d 222, 231 (1987), *State v. Kruger*, 116 Wn.App. 685, 691-93 (2003), *but see: State v. Walters*, 162 Wn.App. 74, 81-85 (2011); here, defendant responded consistently to police requests to enter building, establishing he understood requests, attempted to flee upon arrest indicating he knew he was arrested, knew he was going to jail, no evidence that his speech was slurred or that he stumbled or appeared confused or was disoriented, thus voluntary intoxication instruction properly refused, *State v. Priest*, 100 Wn.App. 451, 453-55 (2000), *State v. Finley*, 97 Wn.App. 129 (1999), *see: State v. Coates*, 107 Wn.2d 882, 891 (1987), *State v. Rice*, 102 Wn.2d 120, 122-3 (1984), *State v. Brooks*, 97 Wn.2d 873, 876-7 (1982), *State v. Jones*, 95 Wn.2d 616, 623 (1981), *State v. Guilliot*, 106 Wn.App. 355, 365-66 (2001), *State v. Thomas*, 123 Wn.App. 771 (2004), *State v. Classen*, 4 Wn.App.2d 520, 534-39 (2018); I.

***State v. Hamlet,*** 133 Wn.2d 314 (1997)

Where defense raises diminished capacity, court may order defense to disclose name, reports and statements of a defense psychiatrist who interviewed defendant but whom defense stated it would not call as a witness, *State v. Pawlyk*, 115 Wn.2d 457 (1990); abuse of discretion to admit testimony that the psychiatrist was first retained by the defense, harmless here; 8-1.

***State v. Ellis,*** 136 Wn.2d 498 (1998)

Expert testimony demonstrating a mental disorder that impairs defendant's ability to form specific intent to commit a crime may be sufficient to meet ER 702 requirements for admissibility of expert testimony, *State v. Mitchell*, 102 Wn.App. 1 (2000); foundational requirements of *State v. Edmon*, 28 Wn.App. 98 (1981), are expressly not adopted, *see: State v.*

*Thamert*, 45 Wn.App. 143 (1986), *State v. Jones*, 64 Wn.App. 134 (1992), *State v. Davis*, 64 Wn.App. 511 (1992), *State v. Atsbeha*, 142 Wn.2d 904 (2001), *State v. Bottrell*, 103 Wn.App. 706 (2000); 7-2.

***State v. Mitchell***, 102 Wn.App. 21 (2000)

Psychologist testifies at assault 3° trial that defendant suffered from paranoid schizophrenia, a disorder capable of diminishing defendant's capacity to know that complainants were police but that he could not say with reasonable certainty that defendant's mental disorder actually diminished his capacity at the time of the incident, only that it was possible, trial court excludes testimony, ER 702; held: expert's opinion must be helpful to the trier of fact in assessing defendant's mental state, *State v. Greene*, 139 Wn.2d 64, 73 (1999); the opinion is helpful if it explains how the mental disorder relates to the asserted impairment; it is not necessary that the expert state an opinion that the disorder actually did produce the impairment, only that it could have and, if so, how the disorder operates, *see: State v. Ellis*, 136 Wn.2d 498 (1998), thus evidence should have been admitted, *State v. Bottrell*, 103 Wn.App. 706 (2000), *cf.: State v. Thomas*, 123 Wn.App. 771 (2004); I.

***State v. Baggett***, 103 Wn.App. 564, 569-71 (2000)

Defendant is charged with assault 2°, at bench trial court finds that defendant's capacity was diminished, acquits of assault 2° but convicts of unlawful display of a weapon; held: unlawful display is a legal lesser of assault 2°, *State v. Fowler*, 114 Wn.2d 59, 67 (1990), *overruled on other grounds, State v. Blair*, 117 Wn.2d 479, 486-87 (1991); the manner in which defendant held the weapon warranted alarm for the safety of a police officer, coupled with evidence of defendant's diminished capacity to form the specific intent for assault, supports an inference that defendant committed only the offense of unlawful display of a weapon; III.

***State v. Bottrell***, 103 Wn.App. 706 (2000)

In premeditated murder case, where expert testifies that defendant suffers from post-traumatic stress disorder (PTSD), that as a result of PTSD she experienced flashbacks during the homicide and that the flashbacks impaired her ability to act with intent to kill, it is error to exclude the testimony, *State v. Ellis*, 136 Wn.2d 498 (1998), *State v. Mitchell*, 102 Wn.App. 21 (2000); where there is sufficient evidence that defendant intended to commit robbery and that the PTSD did not interfere with that intent, then diminished capacity is not available as to felony murder; II.

***State v. Atsbeha,*** 142 Wn.2d 904 (2001)

In drug delivery case, physician offers testimony that, while defendant could perform a simple task upon request, such as getting something and bringing it to the person asking, in an unstructured, real world situation his ability to form the intent was diminished, trial court excludes evidence as insufficient to establish inability to form specific intent; held: it was not an abuse of discretion for trial court to exclude testimony as the evidence established that defendant could form the intent to deliver, *State v. Guilliot*, 106 Wn.App. 355 (2001), *State v. K.A.B.,* 14 Wn.App.2d 677 (2020); reverses *State v. Atsbeha*, 96 Wn.App. 654 (1999); 6-3.

***State v. Cienfuegos***, 144 Wn.2d 222 (2001)

In escape case, psychologist testifies defendant was in withdrawal, wasn't rational or reasonable, probably didn't know what he was doing or that he was escaping; held: sufficient to warrant diminished capacity instruction, WPIC 18.20; where counsel is able to argue lack of proof of intent, failure to offer specific diminished capacity instruction is not ineffective assistance, distinguishing *State v. Thomas*, 109 Wn.2d 222, 232 (1987), *State v. Warden*, 133 Wn.2d 559, 564 (1997); 5-4.

***State v. Guilliot***, 106 Wn.App. 355, 359-66 (2001)

In intentional murder case, court refuses defense offer of psychiatric testimony that defendant has narcissistic personality traits that tends to make him "deny physical defects," that there is a "logical bridge" between this and defendant's tendency to have insulin reactions; held: trial court did not abuse its discretion in ruling that personality disorder evidence was not helpful to jury, ER 702, *see: State v. Atsbeha*, 142 Wn.2d 904, 921(2001), *State v. K.A.B.,* 14 Wn.App.2d 677 (2020); II,

***State v. Kruger,*** 116 Wn.App. 685 (2003)

In assault case, evidence that defendant was drunk, experienced "blackout vomiting," slurred speech and imperviousness to pepper spray was sufficient to justify voluntary intoxication instruction, WPIC 18.10, *State v. Gabryschak*, 83 Wn.App. 249 (1996), *State v. Walters,* 162 Wn.App. 74-81 (2011), even without an expert witness, *see: State v. Smissaert*, 41 Wn.App. 813, 815 (1985); failure of defense to propose a voluntary intoxication instruction was ineffective assistance; 2-1, II.

***State v. Harris***, 122 Wn.App. 547 (2004)

Where defendant testifies that he had smoked crack cocaine and fired gun at victim in fear, he has not presented evidence that his intoxication prevented him from acquiring required mental state, thus trial counsel was not ineffective for failure to except to court's refusal to instruct on voluntary intoxication, *State v. Everybodytalksabout*, 145 Wn.2d 456, 479 (2002); II.

***State v. Acosta***, 123 Wn.App. 424 (2004)

To rebut defense expert, court admits expert's testimony which includes a recitation of defendant's arrest and conviction record to support expert's opinion that defendant has antisocial personality disorder, not diminished capacity; held: an expert can testify regarding basis for opinion for limited purpose of showing how he reached his conclusion only if the probative value of the basis for that opinion is not substantially outweighed by its prejudicial nature, *State v. Furman*, 122 Wn.2d 440, 452-53 (1993); here, even if expert could reasonably rely on defendant's criminal history, jury should not have heard it, ER 403, as probative value is far outweighed by danger of unfair prejudice; II.

***State v. Thomas***, 123 Wn.App. 771 (2004)

Expert's proposed testimony that defendant may have had diminished capacity because of voluntary intoxication, that it was possible she was in a blackout when victim was stabbed was insufficient to admit as witness could not state, to a reasonable medical certainty, that defendant suffered from a mental disorder that impaired her ability to form intent or that, if she were in a blackout, the blackout affected her ability to form the requisite specific intent, *State v.*

*Mitchell*, 102 Wn.App. 21 (2000); trial court properly instructed jury as to voluntary intoxication, as no expert is required, *State v. Kruger*, 116 Wn.App. 685, 692-93 (2003); I.

***State v. Stevens***, 158 Wn.2d 304 (2006)

Voluntary intoxication is a defense to child molestation, as "for the purpose of gratifying sexual desire," RCW 9A.44.010(2), is a specific intent requirement, whether or not it is an element of the crime, *see: State v. Lorenz*, 152 Wn.2d 22, 34-35 (2004); affirms *State v. Stevens*, 127 Wn.App. 269 (2005); 5-4.

***Clark v. Arizona***, 165 L.Ed.2d 842 (2006)

State law which limits expert testimony about a defendant's mental incapacity to an insanity defense but not on the element of *mens rea* does not violate due process, *see also: Kahler v.. Kansas,* 589 U.S. ___, 140 S.Ct. 1021, 206 L.Ed.2d 312 (2020); 5-4.

***State v. Johnson***, 150 Wn.App. 663 (2009)

Instructing jury that "evidence of a mental disease, disorder or defect may be taken into consideration in determining whether the defendant had the capacity to form the intent to commit" the crime is approved, distinguishing *State v. Atsbeha*, 142 Wn.2d 904 (2001), *State v. Ellis*, 136 Wn.2d 498 (1998); I.

***State v. Sao***, 156 Wn.App. 67, 76-77 (2010)

Voluntary intoxication and diminished capacity do not add an additional element akin to self-defense, thus defense is not entitled to a burden shifting instruction, *State v. James*, 47 Wn.App. 605, 608 (1987), *State v. Marchi,* 158 Wn.App. 823, 833-36 (2010); II.

***State v. Walters***, 162 Wn.App. 74, 81-85 (2011)

Physical manifestations of intoxication alone may be sufficient to support a voluntary intoxication instruction even absent direct evidence that intoxication affected defendant's mental state, *State v. Rice,* 102 Wn.2d 120 (1984), *State v. Brooks,* 97 Wn.2d 873 (1982), *State v. Jones,* 95 Wn.2d 616 (1981), *cf.: State v. Gabryschak,* 83 Wn.App. 249 (1996), *State v. Webb,* 161 Wn.App. 195, 208-11 (2011); where there is direct evidence that defendant's mental state was not impaired (here, defendant's statement that he would assault victim and then did so), failure to give an instruction is harmless error; 2-1, III.

***State v. Webb***, 161 Wn.App. 195, 208-11 (2011)

Evidence shows defendant was intoxicated, enters store with an altered toy gun, tells clerk he is stealing to provide for his daughter due to hard times, after robbery calls his AA sponsor to say he robbed the store, trial court refuses voluntary intoxication instruction; held: viewed in a light most favorable to the defendant, defense failed to "reasonably and logically connect the defendant's intoxication with the asserted inability to form the required level of culpability," *State v. Gabryschak,* 83 Wn.App. 249, 252-53 (1996), thus court did not err in refusing instruction, *cf.: State v. Webb,* 162 Wn.App. 74,, 81-85 (2011); 2-1, III.

***State v. Martin***, 169 Wn.App. 620 (2012)

Wife shoots husband after he confesses to an affair, trial court admits expert testimony as to defendant's depressive disorder and histrionic personality disorder and their effect on dissociation in support of diminished capacity defense but excludes "betrayal trauma theory" evidence as not generally accepted in the scientific community; held: like "rape trauma syndrome," betrayal trauma theory does not pass the *Frye* test, *see: State v. Black*, 109 Wn.2d 336 (1987), distinguishing *Carlton v. Vancouver Care, LLC,* 155 Wn.App. 151, 164 (2010); I.

***Kansas v. Cheever***, 571 U.S. 87, 187 L.Ed.2d 519 (2013)

Pursuant to statute court orders psychiatric evaluation, defense raises voluntary intoxication defense and calls expert, state calls court-ordered expert to rebut; held: where defendant puts his mental state at issue state may call a court-ordered expert to rebut which does not violate defendant's Fifth Amendment privilege, *Buchanan v. Kentucky*, 483 U.S. 402, 423–424, 97 L.Ed.2d 336 (1987); 9-0.

***State v. Stacy***, 181 Wn.App. 553, 568-74 (2014)

**Involuntary intoxication** is a complete defense but must rise to the level of insanity, *State v. Mriglot*, 88 Wn.2d 573, 575 (1977); I.

***State v. Clark***, 187 Wn.2d 641 (2017)

Defense affirmatively states that it is not raising diminished capacity defense, trial court excludes expert psychological testimony which defense offers "to rebut the State's *mens rea* evidence;" held: diminished capacity must be declared pretrial, *State v. Harris*, 122 Wn.App. 619, 622 (1989), CrR 4.7(b)(2)(xiv), failure to do so precludes expert testimony; "observation testimony" about relevant facts tending to rebut *mens rea* evidence is admissible; while the state is always required to prove the defendant's *actual* culpable mental state, it is not automatically required to prove the defendant's *capacity* to form a culpable mental state; such capacity is presumed unless the defendant places it at issue, *State v. Johnson*, 150 Wn.App. 663, 671 (2009); 5-4.

***State v. Classen***, 4 Wn.App.2d 520, 534-39 (2018)

In kidnapping case while there was evidence of defendant's methamphetamine intoxication, there was no evidence that defendant was unable to form the required level of culpability thus counsel's failure to propose a voluntary intoxication instruction was not ineffective assistance; unlike alcohol intoxication expert testimony is required because the effects of methamphetamine intoxication are not generally known, distinguishing *State v. Thomas*, 123 Wn.App. 771, 782 (2004), *State v. Gabryschak*, 83 Wn.App. 249 (1996), *State v. Thomas*, 109 Wn.2d 222, 231 (1987); II**.**

***State v. Pratt***, 11 Wn.App.2d 450 (2019), *affirmed, on other grounds*, 198 Wn.2d 849 (2021)

Trial court prohibits testimony of psychologist to testify that defendant may have had "sexsomnia," which involves people engaging in sex during sleep to support defendant's claim of lack of volition; held: while sleepwalking may constitute a defense, *State v. Utter*, 4 Wn.App. 137, 141-42 (1971), it is not akin to diminished capacity and must be proved by the defense by a preponderance, *State v. Deer*, 175 Wn.2d 725, 734 (2012), court properly excluded the testimony as expert could not testify that defendant had the disorder; 2-1, II.

***State v. Taylor,*** 18 Wn.App.2d 568 (2021)

Instruction on diminished capacity must include all of the relevant mental states; I.

# DISCOVERY

***State v. Smith***, 15 Wn.App. 716 (1976)

CrR 4.7 does not require state to disclose purpose or tactical use of exhibit, at least without specifying undue prejudice; II.

***Seattle v. Apodaca***, 18 Wn.App. 802 (1977)

**Police intelligence files** may be viewed *in camera*, *State v. Jones*, 96 Wn.App. 369 (1999); I.

***State v. Oughton***, 26 Wn.App. 74 (1980)

State must provide defendant with discovery as soon as state discovers evidence; failure to do so is error; if defendant moves for continuance, should be granted; III.

***State v. Johnston***, 27 Wn.App. 73 (1980)

Defendant cannot be ordered to disclose testimonial information to state by a discovery order; in embezzlement case court may not order defendant to disclose "all manner of personal financial holdings she may have received;" II.

***State v. Thacker***, 94 Wn.2d 276 (1980)

**Suppression** is not remedy for failure to provide discovery, *State v. Lewis*, 19 Wn.App. 35 (1978), *State v. Dailey*, 23 Wn.App. 233 (1979); *State v. Brown*, 48 Wn.App. 654, 658 n. 3 (1987), *State v. Ray*, 116 Wn.2d 531 (1991), *but see: State v. Hutchinson*, 135 Wn.2d 863, 879-84 (1998), *State v. Beliz*, 104 Wn.App. 206, 211-12 (2001), *State v. Wilson*, 149 Wn.2d 1, 12 (2003), *State v. Norris*, 157 Wn.App. 50, 78-81 (2010); 9-0.

***State v. Price***, 94 Wn.2d 810 (1980)

If state inexcusably fails to provide discovery until shortly before trial, forcing defendant to either waive speedy trial rule or go to trial unprepared, prejudice may result and case shall be dismissed if defendant can prove by preponderance that interjection of new facts into case when state has not acted with due diligence will compel defendant to choose between prejudicing either right to speedy trial or effective assistance of counsel, *State v. Brooks*, 149 Wn.App. 373 (2009), *State v. Norris*, 157 Wn.App. 50, 78-81 (2010), *but see: State v. Smith*, 67 Wn.App. 847 (1992), *State v. Woods*, 143 Wn.2d 561, 578-85 (2001), *State v. Barry*, 184 Wn.App. 790 (2014), *see: State v. Cannon*, 130 Wn.2d 313, 327-29 (1996), *State v. Ramos*, 83 Wn.App. 622, 634-39 (1996); 8-0.

***State v. Bradfield***, 29 Wn.App. 679 (1981)

**Sanctions** under CrR 4.7(h)(7) for violation of discovery rules discretionary with trial court; I.

***State v. Brush***, 32 Wn.App. 445 (1982)

If the state gathers evidence which it intends to use in **rebuttal**, it must furnish such statements to the defense, CrR 4.7(a)(1)(i); *State v. Harris*, 14 Wn.App. 414 (1975), *cf.: State v. Copeland*, 130 Wn.2d 244, 288-90 (1996); III.

***State v. Vavra***, 33 Wn.App. 142 (1982)

Prosecutor failed to reveal to defense that a witness had informal immunity and that prosecutor would appear at witness's sentencing in another county and speak on his behalf; held: prejudicial error; III.

***State v. Bartholomew***, 98 Wn.2d 173 (1982)

Defense discovers after trial that state's star witness took and flunked a polygraph; held: where undisclosed evidence demonstrates that the state's case included perjury and that the prosecution knew or should have known of the perjury, reversal should be granted if there is any reasonable likelihood that the perjured testimony could have affected the verdict, *United States v. Agurs*, 49 L.Ed.2d 342 (1976), however polygraph evidence is not reliable, so this test was not met here; where a pretrial request is made for "specific evidence" which was not disclosed, test is whether the evidence withheld "could have affected the outcome"; here, no request was made, thus test is whether defendant can establish if new evidence would establish a reasonable doubt which did not otherwise exist; 8-1.

***State v. Jones***, 33 Wn.App. 865 (1983)

Mistrial is proper remedy for failure of state to provide discovery, CrR 4.7(h)(7)(i); I.

***State v. Rinaldo***, 36 Wn.App. 86 (1983)

Defendant served subpoena *duces tecum* on newspaper for exculpatory information in its files; **newspaper** moved to quash alleging that sources were confidential; held: CONST. Art. 1, § 5 provides absolute privilege of nondisclosure of confidential news sources, as long as privilege is not "abused"; concurring opinion holds defendant failed to meet threshold requirement to compel *in camera* review, as defendant failed to show likelihood that newspaper's files contained exculpatory information and failed to exhaust reasonable alternative sources; 2-1, I.

***Barfield v. Seattle***, 100 Wn.2d 878 (1984)

Police **internal investigation** files are not privileged in a tort action, and shall be produced if the test of relevancy for pre-trial discovery is met, CR 26(b)(1), *State v. Jones*, 96 Wn.App. 369 (1999); 9-0.

***State v. Laureano***, 101 Wn.2d 745 (1984)

Dilatory presentation of discovery is not grounds for suppression of evidence, *State v. Thacker*, 94 Wn.2d 276, 280 (1980), *State v. Lewis*, 19 Wn.App. 35, 47-48 (1978), *but see: State v. Hutchinson*, 135 Wn.2d 863 (1998), *State v. Norris*, 157 Wn.App. 50, 78-81 (2010); dismissal, CrR 8.3(b), is an extraordinary remedy appropriate only if defendant's right to a fair trial has been prejudiced in a manner which could not be remedied by a new trial, *State v. Whitney*, 96 Wn.2d 578 (1981), *State v. Baker*, 78 Wn.2d 327, 332-33 (1970), *cf.: State v. Martinez*, 121 Wn.App. 21 (2004); 9-0.

***State v. Coe***, 101 Wn.2d 772 (1984)

While witness statements must be provided to the defense, CrR 4.7(a)(1)(i), police reports are not necessarily discoverable where court determines that portions are **work product**, *State v. Music*, 79 Wn.2d 699, 713 (1971); prosecutor must provide defense with information that witnesses had been hypnotized; fact that police had not informed prosecutor that witnesses were hypnotized does not excuse failure to provide this to defense; prosecutor must provide details of exculpatory information; providing name and address of a potentially exculpatory witness, without more, violates CrR 4.7(a)(3); 9-0.

***State v. Boot***, 40 Wn.App. 215 (1985)

Trial court granted defense motion for a lineup, CrR 4.7(b)(2), which was never held, defense never sought **order to compel** or other sanctions, CrR 4.7(h)(7)(i); held: failure to seek order to compel waives right to assign error on appeal; I.

***State v. Stock***, 44 Wn.App. 467 (1986)

State discloses to defense name of its expert on the morning of trial, which is begun after expiration date, CrR 3.3(d)(8); defense moves for exclusion of state's expert, *State v. Price*, 94 Wn.2d 810 (1980); held: exclusion of witness is not proper remedy where there is no showing that counsel was unprepared to meet the witness's testimony, and the only claim of prejudice is the right to a speedy trial; I.

***State v. Garcia***, 45 Wn.App. 132 (1986)

Eyewitness to homicide tells prosecutor that her original statement identifying defendant was false, prosecutor fails to disclose this to defense; witness later recants her recantation, trial court holds prosecutor's notes of this interview was **work product** and not exculpatory as it was a lie; held: prosecutor must, at the moment of discovery or confirmation, *State v. Oughton*, 26 Wn.App. 74, 79 (1980), disclose substance of oral statements to defense, CrR 4.7(a)(1)(i), *State v. Martinez*, 121 Wn.App. 21 (2004), irrespective of state's belief as to the veracity of the statement; work product only consists of opinions, theories or conclusions of investigating or prosecuting agencies, CrR 4.7(f)(1); a lawyer's notes are not *per se* work product, *State v. DeWilde*, 12 Wn.App. 255, 257 (1974); harmless here; I.

***State v. Mak***, 105 Wn.2d 692 (1986)

Assertions by the defense that **police internal investigation** files "may" contain information critical to the defense or "might" lead to other evidence is insufficient to trigger an *in camera* review of the files, *State v. Blackwell*, 120 Wn.2d 822, 828 (1993), *see also: State v. Kalakosky*, 121 Wn.2d 525 (1993), *State v. Youde*, 174 Wn.App. 873 (2013); 9-0.

***State v. Espinosa***, 47 Wn.App. 85 (1987)

Denial of discovery of **rape crisis center**'s interview notes with victim following an *in camera* review will only be reversed for abuse of discretion, RCW 70.125.065, *see: State v. Diemel*, 81 Wn.App. 44 (1996); presence of a police officer during the interview does not waive the privilege, *State v. Gibson*, 3 Wn.App. 596 (1970), RCW 70.125.060, *distinguishing State v. Wilder*, 12 Wn.App. 296 (1974); *see: State v. Kalakosky*, 121 Wn.2d 525 (1993); I.

***State v. Strandy***, 49 Wn.App. 537 (1987)

Trial court may order defense to turn over to state a tape recorded interview of a state's witness; interview was not work product; II.

***State v. Brewton***, 49 Wn.App. 589 (1987)

Before trial, defense informs state that it is raising insanity and diminished capacity defenses, state is given access to psychiatric reports, after which defense withdraws insanity defense and demands return of records; trial court denies return of records, but prohibits state from using admissions of defendant contained in the reports; held: diminished capacity, like insanity, injects the issue of defendant's mental state, and thus disclosure of medical records is proper, with excision of incriminating statements; II.

***Pennsylvania v. Ritchie***, 94 L.Ed.2d 40 (1987)

State statute creates qualified privilege in youth services agency's investigation files; defendant, charged with child abuse, seeks discovery of those files; held: under due process analysis, defendant has the right, upon making a general discovery request, to have trial court review file to determine if it has information that would probably change outcome of trial, *State v. Gregory*, 158 Wn.2d 759, 791-801 (2006), *overruled, on other grounds, State v. W.R.*, 181 Wn.2d 757 (2014), *but see: State v. Diemel*, 81 Wn.App. 44 (1996); defense counsel has no separate right to examine the confidential information absent a court's *in camera* review; 5-4.

***State v. Ahlfinger***, 50 Wn.App. 466 (1988)

Where **rape crisis center** employee uses notes to refresh recollection while testifying, ER 612 does not mandate disclosure to defense counsel absent *in camera* review, RCW 70.125.065, nor does failure to disclose violate confrontation clause; I.

***State v. Gonzalez***, 110 Wn.2d 738 (1988)

During deposition of rape complainant, defense counsel asks for names of all persons with whom she had sexual intercourse, which she refuses to answer; trial court suppresses her testimony, effectively terminating case; held: **rape shield statute**, RCW 9A.44.020, does not apply to pre-trial discovery; only material information may be discovered by criminal deposition, CrR 4.6(a); CR 26(b)(1) is not applicable in criminal cases; defense failed to establish materiality, as prior sexual intercourse is not probative of consent except where there is evidence that complainant is indiscriminately promiscuous, *State v. Hudlow*, 99 Wn.2d 1, 10-11 (1983), *see: State v. Sheets*, 128 Wn.App. 149 (2005), *State v. Gregory*, 158 Wn.2d 759, 791-801 (2006), *overruled, on other grounds, State v. W.R.*, 181 Wn.2d 757 (2014); Supreme Court states, in *dicta*, that, even where materiality is shown, trial court may deny discovery if it determines that harm to the complainant outweighs usefulness to defendant; 9-0.

***State v. Nuss***, 52 Wn.App. 735 (1988)

As soon as defendant asserts **diminished capacity** as a defense, state is entitled to psychiatric reports from defense, court may order defendant to be interviewed by a state's expert; defense counsel may be present at the interview, but may not participate; defendant may not claim Fifth Amendment privilege at interview as it is waived by raising the defense, although

may be reclaimed if defense withdraws diminished capacity defense and does not call experts; III.

***State v. Yates***, 111 Wn.2d 793 (1988)

Trial court may order defense to disclose statements, signed or unsigned, recorded or written, given by potential prosecution witnesses during interviews with defense counsel or defense investigators; notes taken during the interviews and summaries of interviews prepared by defense counsel or investigators are not discoverable unless counsel or the investigator are called at trial to impeach; where defense maintains that the statements contain work product, then trial court should review materials *in camera*; 6-3.

***State v. Clark***, 53 Wn.App. 120 (1988)

Four-year old indecent liberties victim refuses to answer defense counsel's questions in interviews, trial court dismisses; held: right to interview a witness does not include a right to a successful interview, at least where unavoidable difficulties prevent the interview; here, before dismissing, trial court should have held a hearing to determine competency of victim, and to determine admissibility of hearsay pursuant to child hearsay statute, RCW 9A.44.120 and, if child was incompetent and hearsay statements were inadmissible, then dismissal would be proper; I.

***State v. Hutchinson***, 111 Wn.2d 872 (1989)

Trial court may not order defense expert witnesses to prepare reports that do not exist, although defense counsel can be compelled to disclose in writing the testimony that such expert witnesses can be expected to relate at trial; where defense states that diminished capacity may be a defense, court may order a psychiatric evaluation by a state's expert, during which defense counsel may be present, *but see: State v. Cochran*, 102 Wn.App. 480, 483-86 (2000), but may not inhibit the examination; defendant may refuse to answer any question that might incriminate him or lead to evidence of an incriminating nature, *State v. Carneh*, 153 Wn.2d 274 (2004), *State v. Haq*, 166 Wn.App. 221, 273-77 (2012), *see: State v. Hutchinson*, 135 Wn.2d 863 (1998); 9-0.

***State v. Coleman***, 54 Wn.App. 742 (1989)

Prosecutor's providing telephone numbers for witnesses on the day of trial is not grounds for dismissal, CrR 8.3(b), as a continuance was still a possible remedy, *see: State v. Brooks*, 149 Wn.App. 373 (2009); while state is obligated to fulfill its discovery responsibilities, the defendant also has a responsibility to investigate and prepare; I.

***State v. Dukes***, 56 Wn.App. 660 (1990)

Trial court did not abuse discretion by denying defense motion for lineup in drug sale to undercover officer case; CrR 4.7(b)(2)(i) is directory, not mandatory; II.

***State v. Gould***, 58 Wn.App. 175 (1990)

Surprise, standing alone without unfair prejudice, is not a ground for exclusion of evidence under ER 403; I.

***State v. Pawlyk***, 115 Wn.2d 457 (1990)

Defense retains psychiatrist who interviews defendant for **insanity** defense, defense discloses that it will not call this psychiatrist, whereupon state seeks discovery of reports and serves psychiatrist with subpoena to testify at trial; held: attorney-client privilege does not extend to testimony of psychiatrist when defendant raises insanity as a defense, *State v. Bonds*, 98 Wn.2d 1, 20 (1982), defendant's request to prove insanity waives right to raise a Fifth Amendment challenge to state's use of evidence obtained through that examination to rebut the defense, *Powell v. Texas*, 106 L.Ed.2d 551, 556 (1989), *see: State v. Carneh*, 153 Wn.2d 274 (2004), by use of psychiatrist by state or by court-ordered disclosure of psychiatrist's reports, *Buchanan v. Kentucky*, 97 L.Ed.2d 336 (1987), *Kansas v. Cheever*, 571 U.S. 87, 187 L.Ed.2d 519 (2013), *see: State v.Bankes*, 114 Wn.2d 280 (2002), court to order disclosure of written reports in possession of defense which have been prepared by defense psychiatrists who examine defendant on issue of sanity where an insanity defense is raised, irrespective of defense decision not to call psychiatrist who prepared report, *State v. Hamlet*, 133 Wn.2d 314 (1997); work product doctrine, in a criminal case, applies only to "opinions, theories or conclusions" of defense counsel, CrR 4.7(f)(1), and does not extend to reports and testimony of experts, as CR 26 does not apply to criminal cases; 7-2.

***State v. Hoffman***, 116 Wn.2d 51 (1991)

State need not disclose all prosecution **theories** to defense; 9-0.

***State v. Farmer***, 116 Wn.2d 414 (1991)

Trial court may deny discovery of state's knowledge of **jurors'** prior verdicts; 9-0.

***State v. Ray***, 116 Wn.2d 531 (1991)

Trial court suppresses defense witness for failure of defense to provide prosecutor with summary of witness' testimony; held: **suppression** is not a remedy for failure to provide discovery, *but see: State v. Hutchinson*, 135 Wn.2d 863, 879-84 (1998), *State v. Wilson*, 149 Wn.2d 1, 12 (2003), *State v. Norris*, 157 Wn.App. 50, 78-81 (2010), record was preserved as prosecutor provided court with substance of proposed testimony; affidavit submitted in motion for new trial was sufficient to provide timely offer of proof; 9-0.

***State v. Terrovonia***, 64 Wn.App. 417 (1992)

To compel discovery to develop a claim of selective prosecution, defense must establish some evidence tending to show the essential elements of the claim beyond unsupported allegations, *State v. Bridges*, 91 Wn.App. 102, 105-7 (1998), *United States v. Armstrong*, 134 L.Ed.2d 687 (1996); III.

***Pers. Restraint of Rice***, 118 Wn.2d 876 (1992)

Prosecution retains psychiatrist for capital penalty phase, psychiatrist diagnoses defendant as having a disorder which psychiatrist does not reveal to prosecutor or defense; held: if prosecutor did not know of diagnosis, it had no duty to inquire further or to disclose, and thus there is no *Brady v. Maryland*, 10 L.Ed.2d 215 (1963) due process violation, *State v. Mullen*, 172 Wn.2d 881 (2011); 7-1.

***State v. Dunivin***, 65 Wn.App. 728 (1992)

Informant provides information leading to search and finding of drugs; before trial, defense discloses it will call informant as a defense witness, informant testifies inconsistently with information he provided police, state impeaches informant with a receipt he signed for money he received for the information, which is first defense learns that state had information from informant, trial court grants new trial; held: CrR 4.7(a)(1)(v), which obliges state to disclose documents it "**intends to use**" applies if state is aware of the document and there is a reasonable possibility that the document will be used at any phase of the trial, including impeachment and rebuttal, *State v. Falk*, 17 Wn.App. 905 (1977), *State v. Linden*, 89 Wn.App. 184 (1997), *State v. Cole*, 117 Wn.App. 870, 879-80 (2003), *see: State v. Martinez*, 121 Wn.App. 21 (2004), *but see: State v. Copeland*, 130 Wn.2d 244, 288-90 (1996); granting new trial was within trial court's discretion; III.

***State v. Smith***, 67 Wn.App. 847 (1992)

Where state provides discovery late, forcing defense to move to continue beyond expiration date or go to trial unprepared, trial court has discretion whether or not to dismiss, *State v. Guloy*, 104 Wn.2d 412, 428 (1985), *State v. Greene*, 49 Wn.App. 49 (1987), *see: State v. Salgado-Mendoza*, 189 Wn.2d 420 (2017), *distinguishing State v. Price*, 94 Wn.2d 810 (1980), *State v. Sherman*, 59 Wn.App. 763 (1990), *but see: State v. Mora-Lopez*, 22 Wn.App.2d 922 (2022), defense must prove that it was "impermissibly prejudiced" by interjection of new facts to prevail, *State v. Woods*, 143 Wn.2d 561, 578-85 (2001), *see: State v. Ramos*, 83 Wn.App. 622, 634-9 (1996), *State v. Farnsworth*, 133 Wn.App. 1, 13-15 (2006), *State v. Brooks*, 149 Wn.App. 373 (2009), *State v. Barry*, 184 Wn.App. 790 (2014); 2-1, I.

***State v. Blackwell***, 120 Wn.2d 822 (1993)

Defense counsel's assertion that an officer is racist is insufficient by itself to require disclosure of **police personnel files** absent an affidavit or representation that officer was racially motivated in the case before the court; 9-0.

***State v. Mannhalt,*** 68 Wn.App. 757 (1992)

While right to confront witnesses includes cross-examination to identify a witness with his community so that independent testimony may be sought and offered of his reputation for veracity in his own neighborhood, *Alford v. United States*, 75 L.Ed.2d 624 (1931), trial court may deny disclosure of witnesses' **addresses** where there is evidence that witnesses' safety was in danger, *Smith v. Illinois*, 19 L.Ed.2d 956 (1968)(White, J., concurring); I.

***State v. Kalakosky***, 121 Wn.2d 525 (1993)

**Rape crisis center**'s notes of victim interview are not absolutely privileged, as 42 USC. **§** 10604(d) does not preempt RCW 70.125; defense affidavit that interview notes "may contain details which may exculpate" accused is insufficient to overcome qualified privilege, thus no *in camera* review is required; *see: State v. Diemel*, 81 Wn.App. 44 (1996); 8-0.

***State v. Knutson***, 121 Wn.2d 766 (1993)

In rape of a child 3° case in which defense was misrepresentation of age, trial court refused to disclose a note in victim's medical file that victim had been "prostituting in the past"; held: under due process analysis, *Pennsylvania v. Ritchie*, 94 L.Ed.2d 40 (1987), disclosure of the note before trial, even if admissible, would not, to a reasonable probability, change the

outcome of the case, *State v. Chavez*, 76 Wn.App. 293 (1994), since the defense could not have been consent; 7-0.

***State v. Norby***, 122 Wn.2d 258 (1993)

Trial court consolidates numerous charged and uncharged defendants in order to hear preaccusatorial delay issues, orders state to answer interrogatories about state's investigations and charging policies and number of cases involved in prosecutor's backlog, state appeals; held: CrR 4.7 is not supplemented by the civil rules and is exclusive, *State v. Gonzalez*, 110 Wn.2d 738, 744 (1988); to obtain discovery beyond which the state intends to use, defense must establish "materiality to the preparation of the defense," *cf.: Seattle v. Lange*, 18 Wn.App.2d 139 (2021), *State v. Putman*, 21 Wn.App.2d 36 (2022), and reasonableness, CrR 4.7(e), *State v. Blackwell*, 120 Wn.2d 822, 826-8 (1993), *State v. Youde*, 174 Wn.App. 873 (2013); here, defense failed to establish prejudice in the delay, materiality or reasonableness; 8-0.

***State v. Miller***, 74 Wn.App. 334, 340-2 (1994)

To order defendant to provide **handwriting exemplar**, CrR 4.7(b)(2), state need only demonstrate a reasonable necessity as opposed to an absolute necessity; refusal to provide a court-ordered exemplar is subject to civil contempt confinement; I.

***State v. Chavez***, 76 Wn.App. 293 (1994)

Reversal for nondisclosure is only required if there is a reasonable probability that, had the evidence been disclosed, the result would have been different, *United States v. Bagley*, 87 Wn.2d 481 (1985), *State v. Knutson*, 121 Wn.2d 766, 772 (1993), *State v. Benn*, 120 Wn.2d 631, 650 (1993); test applies in all cases of nondisclosure, including prosecutor's knowing failure to disclose, whether or not defense made a specific request for the evidence; III.

***State v. Martinez***, 78 Wn.App. 870, 875-8 (1995)

Physical evidence that was never in possession or control of police or prosecutor is outside scope of discovery rules, CrR 4.7(a)(4); II.

***State v. Diemel***, 81 Wn.App. 464 (1996)

Defense seeks *in camera* review of rape-victim's post-offense counseling records, alleging that victim had said she had been in abusive relationship previously, might have discussed her intoxication at time of this offense and might have admitted to consent, trial court denies review of records; held: trial court did not abuse discretion in denying *in camera* review as defense showing was largely speculative, evidence of alcohol consumption was otherwise available, *State v. Espinosa*, 47 Wn.App. 85, 88 (1987), *State v. Kalakosky*, 121 Wn.2d 525, 550 (1993), *cf.: Pennsylvania v. Ritchie*, 94 L.Ed.2d 40 (1987), *State v. Gregory*, 158 Wn.2d 759, 791-801 (2006), *overruled, on other grounds, State v. W.R.*, 181 Wn.2d 757 (2014); I.

***State v. Copeland***, 130 Wn.2d 244, 288-90 (1996)

"Genuine" **rebuttal** witness need not be disclosed in advance of trial, *State v. Swan*, 114 Wn.2d 613, 654 (1990), *State v. White*, 74 Wn.2d 386, 394-5 (1968), *but see: State v. Dunivin*, 65 Wn.App. 728 (1992), *State v. Brush*, 32 Wn.App. 445 (1982), *State v. Falk*, 17 Wn.App. 905

(1977), *State v. Harris*, 14 Wn.App. 414 (1975), *see:* *State v. Linden*, 89 Wn.App. 184 (1997); 9-0.

***State v. Hamlet***, 133 Wn.2d 314 (1997)

Where defense raises **diminished capacity** defense, trial court may order defense to disclose name, reports and statements of a defense psychiatrist who interviewed defendant but whom defense stated it would not call as a witness, *State v. Pawlyk*, 115 Wn.2d 457 (1990); there are no discovery distinctions between insanity and diminished capacity cases, *State v. Hutchinson*, 111 Wn.2d 872, 880-1 (1989), *see: Kansas v. Cheever*, 571 U.S. 87, 187 L.Ed.2d 519 (2013); affirms *State v. Hamlet*, 83 Wn.App. 350 (1996).

***State v. Linden***, 89 Wn.App. 184 (1997)

During defendant's testimony in which he denied using cocaine, state informs court it received a police report one day before confirming defendant was arrested for possession of cocaine, defense motion for suppression and mistrial denied, court grants recess to next day, allows state to impeach defendant, who testifies that he "could not respond" to the police report; held: failure to disclose the police report was a discovery violation, as there was a "reasonable possibility" that state would use the report if defendant testified, state is required to provide reports it "intends to use," CrR 4.7(a)(v), *State v. Falk*, 17 Wn.App. 905, 908 (1977), *State v. Dunivin*, 65 Wn.App. 728 (1992), *State v. Cole*, 117 Wn.App. 870, 879-80 (2003), *State v. Martinez*, 121 Wn.App. 21 (2004), *cf.:* *State v. Copeland*, 130 Wn.2d 244, 288-90 (1996); recess rather than mistrial was within court's discretion, *State v. Falk, supra.*, *see:* *State v. Venegas*, 155 Wn.App. 507, 520-23 (2010); I.

***State v. Copeland***, 89 Wn.App. 492, 496-9 (1998)

Prosecutor fails to disclose local impeachable conviction of witness; held: where conviction record is in prosecutor's office, accessible to all members of the staff, then deputy's failure to disclose is misconduct, regardless of inadvertence, *State v. Dunivin*, 65 Wn.App. 728, 733 (1992), *State v. Martinez*, 121 Wn.App. 21 (2004), distinguishing *State v. Frederick*, 32 Wn.App. 624 (1982), *rev'd on other grounds*, 100 Wn.2d 550 (1983); II.

***State v. Hutchinson,*** 135 Wn.2d 863 (1998)

**Suppression** is a remedy for a defendant's ongoing, willful refusal to undergo a court-ordered mental examination, CrR 4.7(h)(7)(i), *Taylor v. Illinois*, 98 L.Ed.2d 798 (1988), distinguishing *State v. Ray*, 116 Wn.2d 531 (1991); factors to consider in deciding whether to exclude (1) effectiveness of less severe sanctions, (2) impact of witness preclusion on the evidence at trial and outcome of the case, (3) extent to which prosecution will be surprised or prejudiced by the witness's testimony, and (4) whether the violation was willful or in bad faith, at 882-3, *see:* *State v. Wilson*, 149 Wn.2d 1, 12 (2003), *State v. Carneh*, 153 Wn.2d 274 (2004), *State v. Venegas*, 155 Wn.App. 507, 520-23 (2010), *State v. Norris*, 157 Wn.App. 50, 78-89 (2010), *State v. Ruelas*, 7 Wn.App.2d (2019); 6-3.

***Pers. Restraint of Pirtle,*** 136 Wn.2d 467, 485-87 (1998)

Police officer testifies at trial about a statement made by defendant, not included in police reports, officer claims he remembered the statement while testifying; held: state did not violate discovery rules as prosecutor had no knowledge of the statement; 9-0.

***Strickler v. Greene***, 144 L.Ed.2d 286 (1999)

Officer's notes, undisclosed before trial, state that victim considers crime to be trivial, at trial victim testifies she was in terror; held: three components of *Brady* violation (1) exculpatory, (2) nondisclosure, and (3) prejudice; here, petitioner proved (1) & (2), but there is not a reasonable probability that conviction or death sentence would have been different had these materials been disclosed, thus affirmed; 7-2.

***State v. Jones***, 96 Wn.App. 369 (1999)

Internal investigation files from a police department's shooting review board hearing on the incident in question must be reviewed *in camera* before trial court determines that the files are privileged, RCW 5.60.060(5), *Barfield v. Seattle*, 100 Wn.2d 878 (1984), *Cook v. King County*, 9 Wn.App. 50, 52-54 (1973), *Seattle v. Apodaca*, 18 Wn.App. 802, 803 (1977); internal investigation files are not exempt from discovery in a criminal case under Public Disclosure Act, RCW 42.17.310(1)(d), distinguishing *Cowles Publishing Co. v. State Patrol*, 109 Wn.2d 712 (1988); I.

***State v. Greiff***, 141 Wn.2d 910 (2000)

In second trial following hung jury, police officer changes testimony materially, prosecutor fails to advise defense prior to second trial, defense states in opening what it expected officer to testify to, mistrial motion denied; held: while state's failure to advise defense of change of testimony is a discovery violation, CrR 4.7(a)(1)(i), *State v. Venegas*, 155 Wn.App. 507, 520-23 (2010), denial of mistrial was within trial court's discretion, instruction that jury should disregard remarks of counsel unsupported by the evidence was sufficient, *State v. Hopson*, 113 Wn.2d 273, 284 (1989); 5-4.

***State v. Beliz***, 104 Wn.App. 206, 211-12 (2001)

State notifies defense of witnesses just before trial, defense motion to dismiss, CrR 8.3(b), is denied but court excludes witnesses' testimony; held: remedy short of dismissal was not an abuse of discretion, *State v. Hutchinson*, 135 Wn.2d 863, 879-84 (1998), *State v. Wilson*, 149 Wn.2d 1, 12 (2003), *Seattle v. Holifield*, 170 Wn.2d 230 (2010), *State v. Ruelas*, 7 Wn.App.2d (2019), *but see: State v. Thacker*, 94 Wn.2d 276 (1980); III.

*State v. Hoffman*, 115 Wn.App. 91, 104, *rev'd, on other grounds*, 150 Wn.2d 536 (2003)

State's failure to produce a victim for defense interview, where state has exercised diligence, is neither a discovery violation nor prosecution misconduct, *see: State v. Wilson*, 149 Wn.2d 1 (2003); III.

***State v. Wilson***, 149 Wn.2d 1 (2003)

Defense obtains court order, shortly before expiration date, for prosecutor to arrange for interview with state's witnesses, interviews do not occur prior to deadline, trial court dismisses, CrR 8.3(b); held: while defense has the right to interview a witness in advance of trial, *State v.*

*Burri*, 87 Wn.2d 175, 181 (1976), here no misconduct occurred due to short time period for prosecutor to seek deposition or material witness warrant, *State v. Hoffman*, 115 Wn.App. 91 (2003); trial court ignored "intermediate remedial steps," *State v. Koerber*, 85 Wn.App. 1, 4 (1996), of releasing defendant to extend time for trial expiration date or suppression of evidence, *State v. Hutchinson*, 135 Wn.2d 863, 880-84 (1998), *aff'd*, 147 Wn.2d 197, 202-06 (2002), *Seattle v. Holifield*, 170 Wn.2d 230 (2010), *cf.: State v. Chichester*, 141 Wn.App. 446 (2007), *see: State v. Brooks*, 149 Wn.App. 373 (2009); affirms *State v. Wilson*, 149 Wn.2d 1 (2003); 8-1.

***Banks v. Dretke***, 157 L.Ed.2d 1166 (2004)

Prior to trial, state advises defense counsel that it will provide all discovery without requiring motions, 18 years after defendant sentenced to death state provides, pursuant to court order, evidence that one witness was a paid informant, another witness had been intensively coached, at trial both witnesses denied their involvement with state, which prosecutor did not correct; held: "[w]hen police or prosecutors conceal significant exculpatory or impeaching material in the State's possession, it is ordinarily incumbent on the State to set the record straight," at 1180; 7-2.

***State v. Martinez***, 121 Wn.App. 21 (2004)

During trial, state discloses to defense exculpatory evidence that defendant did not possess the firearm in question at the time of the crime, even after disclosure, state cross-examines defendant to infer that he is lying about the time of possession, jury hangs, court declares mistrial, state re-notes case for trial, amends information to allege more serious charges from same incident, trial court finds prejudicial misconduct and dismisses, state appeals; held: trial court's finding that untimely revelation of exculpatory evidence constituted misconduct and a due process violation, *In re Pers. Restraint of Gentry*, 137 Wn.2d 378, 396 (1999), was not an abuse of discretion; government misconduct may be so outrageous that it exceeds the bounds of fundamental fairness, barring subsequent prosecution, *State v. Lively*, 130 Wn.2d 1, 18 (1996), *State v. Solomon*, 3 Wn.App.2d 895 (2018), *see: State v. Markwart*, 182 Wn.App. 335, 347-52 (2014); had defendant moved for a mistrial when the exculpatory evidence was revealed, he could not have argued that retrial would be barred by double jeopardy unless he could have proved state intended to provoke a mistrial, *Oregon v. Kennedy*, 72 L.Ed.2d 416 (1982), *State v. Juarez*, 115 Wn.App. 881, 888 (2003), thus dismissal was appropriate; III.

***State v. White***, 126 Wn.App. 131 (2005)

A subpoena *duces tecum* must be served upon every party, CrR 4.8, CR 5, 26(c), 45; I

***State v. Gregory***,158 Wn.2d 759, 781-801 (2006)

In rape case with consent defense, trial court refuses *in camera* review of victim's dependency files; held: defense claim that victim was engaging in prostitution, had previously engaged in prostitution and if victim was currently engaged in prostitution would be reflected in dependency files was sufficient to require an *in camera* inspection of those files, *Pennsylvania v. Ritchie*, 94 L.Ed.2d 40 (1987), *cf.: State v. Diemel*, 81 Wn.App. 464 (1996); where victim in interview told defense counsel that her last drug use was in 1999 but dependency file shows she admitted to drug use in 2000, defense was denied the opportunity for discovery and impeachment, ER 608(b); 8-1.

***Pers. Restraint of Hegney***, 138 Wn.App. 511, 535-36 (2007)

Records in possession and knowledge of a probation officer and DSHS, not known to prosecutor, are not within prosecutor's duty to disclose to defense, *see:* *State v. Frederick*, 32 Wn.App. 624, 627, (1982), *rev'd on other grounds,* 100 Wn.2d 550 (1983), *overruled, in part, on other grounds, Thompson v. Department of Licensing*, 138 Wn.2d 783 (1999); II.

***State v. Lord***, 161 Wn.2d 276 (2007)

State discloses a report indicating that victim's family had hired a tracking dog search, does not have or disclose name of dog handler, after first trial is reversed on other grounds, defense investigation finds name of dog handler who has possibly exculpatory evidence; held: state disclosed what it had, was not obliged to investigate further, defense could have uncovered the full story through a diligent investigation, thus defense did not establish that state withheld exculpatory evidence; 7-2.

***State v. Boyd***, 160 Wn.2d 424 (2007)

Where police seize a computer from defendant, defense is entitled to a mirror image copy of the hard drive for testing, *State v. Norris*, 157 Wn.App. 50 (2010), subject to a protective order, *State v. Dingman*, 149 Wn.App. 648, 659-65 (2009), *State v. Grenning*, 169 Wn.2d 47 (2010); 8-1.

***State v. Brooks***, 149 Wn.App. 373 (2009)

Dismissal, CrR 8.3(b), is a remedy where state inexcusably fails to provide discovery, trial court grants continuances as an alternative to dismissal but discovery is still not forthcoming, state has burden of considering other alternatives besides continuances before trial court dismisses, *State v. Chichester*, 141 Wn.App. 446 (2007); II.

***State v. Dingman***, 149 Wn.App. 648 (2009)

State seizes computers from defendant, make mirror-image copies via a law enforcement program, defense seeks copies in a different program or access to the computers themselves, state objects claiming defense might damage the hard drives, court denies discovery; held: absent proof of a need for restrictions, rather than a mere claim or allegation, defense is entitled to access to the hard drives themselves, *State v. Boyd*, 160 Wn.2d 424 (2007), *State v. Norris*, 157 Wn.App. 50 (2010), particularly where state has a mirror-image and thus any alteration can be detected by the state; II.

***State v. Garcia-Salgado***, 170 Wn.2d 176 (2010)

In rape case, court orders cheek swab for DNA analysis pursuant to CrR 4.7(b)(2)(vi), no warrant obtained; held: cheek swab is a search which may be made pursuant to discovery rules if supported by probable cause based on oath, *cf.: State v. Reeder*, 184 Wn.2d 805 (2015), *but see: Carpenter v. United States*, 585 U.S. ___ , 138 S.Ct. 2206, 201 L.Ed.2d 507 (2018), *State v. Phillip*, 9 Wn.App.2d 464 (2019); here, record is unclear whether trial court had a sworn statement before it, so remanded; reverses *State v. Garcia-Salgado*, 149 Wn.App. 702 (2009); 9-0.

***State v. Venegas***, 155 Wn.App. 507, 520-23 (2010)

In child abuse case, defense endorses victim's physician as a fact witness to testify to observation of victim's injuries and lack of injuries, state's motion to suppress his opinion testimony about causation is granted by trial court for failure to provide discovery; held: defense is obliged to inform state of the "substance of any oral statements," CrR 4.7(b)(1), failure to inform state that witness would testify, in addition to treatment, about causation violates the rule, *see: State v. Greiff*, 141 Wn.2d 910, 919 (2000); while **suppression** may be a remedy for failure to provide discovery, and surprise is a factor, *State v. Hutchinson*, 135 Wn.2d 863, 881-84 (1998), *Taylor v. Illinois*, 484 U.S. 400, 415 n. 19 (1988), here trial lasted three weeks after physician testified, trial court should have postponed his testimony to allow state to interview and locate another expert to prevent prejudicial surprise, excluding causation testimony strongly undermined defense, counsel's failure appeared to be an oversight rather than a willful or bad faith violation; II.

***State v. Krenik***, 156 Wn.App. 314 (2010)

During drug trial, detective testifies that there was undisclosed DEA video surveillance of defendant's home and that he told prosecutor about it a week earlier, defense motion for mistrial is denied; held: state has an affirmative duty, without a request, to disclose electronic surveillance, CrR 4.7(a)(2); prosecutor may not withhold information that it deems not material if it is required by the rules; to justify dismissal, CrR 8.3(b), 4.7(h)(7), defendant must show actual prejudice, here prejudice was speculative; because defense counsel did not request a continuance, noncompliance with discovery rule by state was not prejudicial error, *State v. Brush*, 32 Wn.App. 445, 455-56 (1982), only remedy sought by defense was a mistrial, no indication that time for trial period would have expired had court granted a request for a continuance, *State v. Price*, 94 Wn.2d 810, 814 (1980); I.

***State v. Norris***, 157 Wn.App. 50 (2010)

Federal Adam Walsh Act, 18 U.S.C. § 3509(m), does not preempt CrR 4.7, state is obliged to provide child pornography discovery to defense counsel, *State v. Boyd*, 160 Wn.2d 424 (2007); where state intentionally engaged in misconduct by refusing to produce evidence after being ordered to do so and then removed the evidence from the trial court's jurisdiction, dismissal or suppression may be an appropriate remedy, *State v. Grenning*, 169 Wn.2d 47, 60 (2010); II.

***State v. Mankin***, 158 Wn.App. 111 (2010)

Defense counsel seeks to interview police who agree but refuse to be recorded, trial court orders depositions, state appeals; held: defense interviews of police witnesses are not private conversations under RCW 9.73.030(1)(b); a refusal of an officer to be recorded is not a *de facto* refusal to discuss the case, thus trial court lacks authority to order a deposition, CrR 4.6(a); II.

***State v. Mullen***, 171 Wn.2d 881 (2011)

State expert witness in criminal case testifies at a deposition in a related civil case in which state is not a party, defense is aware of civil case, does not subpoena records, claims testimony was inconsistent; held: state is obliged to disclose material, exculpatory evidence in its possession, *Brady v. Maryland*, 373 U.S. 83, 10 L.Ed.2d 215 (1963), and in the possession of

law enforcement, *Kyles v. Whitley,* 514 U.S. 419, 437, 131 L.Ed.2d 490 (1995), and in the possession of others working on the state's behalf, *State v. Lord,* 161 Wn.2d 276, 292 (2007), but is not obliged to volunteer information it does not possess or of which it is unaware; where defense has enough information to find the material on its own, there is no suppression by the government, *State v. Lord, supra. at* 293; evidence is material only if there is a reasonable probability the result would have been different, *United States v. Bagley,* 473 U.S. 667, 682, 87 L.Ed.2d 481 (1985), *Turner v. United States*, 137 S. Ct. 1885, 198 L. Ed. 2d 443 (2017), *see: Pers. Restraint of Stenson,* 174 Wn.2d 474 (2012), which is an intermediate test which does not require defense to demonstrate that the evidence would have resulted in acquittal; 9-0.

***State v. Shelmidine****,* 166 Wn.App. 107 (2012)

Prosecutor's policy of refusing to plea bargain if defense demands name of confidential informant does not violate due process clauses, does not preclude defense counsel from providing effective assistance, *State v. Moen,* 150 Wn.2d 221 (2003); II.

***State v. Kipp****,* 171 Wn.App. 14, 31-33 (2012), *reversed, on other grounds,* 179 Wn.2d 718 (2014)

Defense discloses witness six days before trial, trial court suppresses; held: on balance, factors in *State v. Hutchinson,* 135 Wn.2d 863, 883 (1998), support trial court's discretion, while a half day recess to interview and investigate tilt towards admissibility, witness' testimony was duplicated by other witnesses, prosecution is prejudiced by having to interview and find rebuttal witnesses close to trial, defense "could have avoided the late disclosure," thus was willful; 2-1, II.

***State v. Youde****,* 174 Wn.App. 873 (2013)

Defendant subpoenas information from tribal police, trial court does not determine materiality of discovery, tribe's motion to quash based upon sovereign immunity is granted, trial court dismisses, CrR 8.3(b); held: a trial court must determine that discovery is material before granting a motion to dismiss based on the unavailability of compulsory process; issuance of a subpoena, by itself, does not establish materiality, opposing party need not object to a subpoena to preserve the issue of materiality; I.

***State v. Brown****,* 178 Wn.App. 950 (2014)

Pecunious defendant demands free copy of 911 tape, state offers to allow defense to listen and record tape or buy a copy; held: CrR 4.7 requires parties to disclose discovery, absent proof of indigency state need not provide copies *gratis, see: State v. Boyd,* 160 Wn.App. 420, 435 (2007); III.

***State v. Merrill****,* 183 Wn.App. 749 (2014)

Victims sign "Notice of Victim's Intent to Rely on RCW 7.69.030(10)" exercising their right to have victim's advocate present at any prosecution or defense interview, defense counsel contacts victim and informs prosecutor about what was said, prosecutor states that he will consider sanctions, defense counsel contacts victim again to discuss prosecutor's sanction threat, trial court sanctions counsel for bad faith discovery misconduct; held: at the second contact counsel knew he was "not allowed" to contact victim without an advocate, RCW 7.69.030

applies to contact with victims to gain information to defend oneself from charges of misconduct, trial court's finding of bad faith in spite of counsel's claim that he was acting on the advice of supervisors and that his contact was not excused under the "safe harbor" provision of the victim's right statute was not an abuse of discretion, thus sanctions affirmed; III.

***State v. Vance***, 184 Wn.App. 902 (2014)

State obtains search warrant based upon a federal investigation, defense seeks to interview federal agents whom state will not call as witnesses, trial court authorizes subpoenas for depositions, United States Attorney informs defense counsel that he must comply with 28 CF.R. § 16.21 *et seq.* and 6 CF.R. § 5.44 *et seq., cf.: United States v. Bahamonde,* 445 F.3d 1225 (2006), and submit a "scope and relevancy letter," defense does not comply, trial court excises information in warrant affidavit provided by federal officials and suppresses; held: CrR 4.7(a) does not oblige state to produce federal agents for interviews, federal sovereignty precludes state court enforcing subpoenas on federal agents; II.

***State v. Bessey***, 191 Wn.App. 1 (2015)

Absent a "formal written request" defendant has no obligation to produce documentary evidence, CrR 4.7(b)(2)(x); II.

***State v. Salgado-Mendoza***, 189 Wn.2d 420 (2017)

In DUI case defense demands name of toxicologist state will call, state provides eight names, state contacts crime lab which does not respond, day before trial state narrows list to three, at trial defense moves to exclude testimony of toxicologist whom state intended to call, defense declines to move to continue as defendant chooses not to waive right to speedy trial, trial court denies motion to exclude, on RALJ appeal superior court reverses; held: while state's disclosures establish mismanagement, trial court considered all of the circumstances including nature of witness' testimony, fact that defense had five months to prepare following the initial disclosure, thus trial court's decision was not manifestly unreasonable and denial of suppression was not an abuse of discretion, *see also: State v. Price*, 94 Wn.2d 810 (1980), *State v. Sherman*, 59 Wn.App. 763 (1990), *State v. Michielli*, 132 Wn.2d 229, 239-46 (1997), *cf.: State v. Stock*, 44 Wn.App. 467 (1986), *State v. Smith*, 67 Wn.App. 847 (1992), *State v. Ruelas,* 7 Wn.App.2d 887(2019); reverses *State v. Salgado-Mendoza,* 194 Wn.App. 234 (2016); 5-4.

***State v. Rogers***, 3 Wn.App.2d 1 (2018)

Defendant sends letter of apology and offer to pay her to drop charges to complainant's daughter who gives letter to complainant who gives the letter to defense counsel and tells prosecutor that she did so, counsel is then removed from case, court serves that lawyer with a subpoena *duces tecum* to produce the letter, lawyer moves to quash arguing that he learned of the letter from his client and thus the letter is privileged and that it is a confidence or secret, RPC 1.6, refuses to comply with subpoena, is held in contempt; held: lawyer did not obtain the letter as a result of direct or confidential communication with his client, even if client had some discussion with counsel about the letter it is not privileged, is not a confidence and even if it is a secret RPC 1.6(b) authorizes disclosure pursuant to a court order, distinguishing *State ex. rel. Sowers v. Lowell,* 64 Wn.2d 828 (1964); because the claim of privilege was made in good faith

contempt is vacated, *Seventh Elect Church in Israel v. Roger*, 102 Wn.2d 527 (1984), *Dike v. Dike*, 75 Wn.2d 1, 448 (1968); I.

***State v. Davis***, 3 Wn.App.2d 763, 783-86 (2018)

Failure to provide defendant with a copy of discovery is not ineffective assistance as a represented defendant does not have the right to discovery, CrR 4.7(h)(3) (2007), or access to a law library; while CrR 4.7(a)(1)(iv) requires the state to disclose "to the defendant" any expert reports," providing same to counsel meets that requirement; I.

***State v. Ruelas,*** 7 Wn.App.2d 887 (2019)

Two days into jury trial defense discloses expert witness, trial court excludes the evidence; held: court considered and balanced the factors, *State v. Hutchinson*, 135 Wn.2d 863, 881 (1998), a continuance would have required jury to return in weeks and "likely would have forgotten much of the evidence," would burden court's ability to manage its calendar, defense had eight months to prepare, state was surprised thus court properly exercised discretion to exclude even though defense apparently did not act willfully or in bad faith, *see: State v. Wilson*, 149 Wn.2d 1, 12 (2003), *State v. Carneh*, 153 Wn.2d 274 (2004), *State v. Venegas*, 155 Wn.App. 507, 520-23 (2010), *State v. Norris*, 157 Wn.App. 50, 78-89 (2010); III.

***Seattle v. Lange***, 18 Wn.App.2d 139 (2021)

In DUI case police disclose to city that blood test analyst had erred in another case that caused a false positive, city discloses it to defense "days before trial," trial court suppresses blood test results for discovery violation, city seeks writ; held: CrRLJ 47(a)(3) mandates disclosure of any information which tends to negate guilt, impeachment information meets that test, unlike a constitutional *Brady* issue the rules do not require proof of materiality before mandating disclosure as long as the information sought is discoverable under the rules, suppression is a proper remedy within discretion of the trial court, CrRLJ 4.7(g)(7)(i) does not require proof of prejudice; I.

***State v. Asaeli***, 17 Wn.App.2d 697 (2021)

Defendant is not entitled to post-conviction discovery under CrR 4.7, and does not have a due process right to post-conviction discovery, *In re Pers. Restraint of Gentry*, 137 Wn.2d 378, 390-91 (1999); II.

***State v. Mora-Lopez***, 22 Wn.App.2d 922 (2022)

Trial court finds government mismanagement for filing witness list four days before trial and concludes defendant was prejudiced and dismisses finding prejudice to defendant's right to a speedy trial, relying upon *State v. Michielli*, 132 Wn.2d 229 (1997), erroneously calculating expiration date two weeks after witness list was disclosed; held: trial court properly exercised discretion finding mismanagement, CrR 8.3(b), but because expiration date was more than a month after the list was filed due to prior continuance, CrR 3.3(b)(5), *State v. Farnsworth*, 133 Wn.App. 1, 11-12 (2006), the court's conclusion that the mismanagement resulted in actual prejudice due to speedy trial violation was error, *Michielli, supra,* was decided under prior CrR 3.3; I.

***State v. Vevea***, 23 Wn.App.2d 171 (2022)

Criminal discovery rules, CrR 7.7, apply to competency restoration proceedings; I.

# DOMESTIC VIOLENCE

***State v. Horton*,** 54 Wn.App. 837 (1989)

Fact that prosecutor can charge defendant with violation of a domestic violence protection order, RCW 26.50.110(1), or contempt, former RCW 7.20.020, does not violate equal protection as the contempt is civil; I.

***State v. Raines***, 55 Wn.App. 459 (1989)

Police respond to domestic violence call, observe male through window, knock on door, female answers, denies problem, police ask to speak to male, female denies male is present, police ask to enter, female does not object, steps back, police enter; female shuts inside door, states it is her room, police state they will investigate, female does not object, police open door, see suspect, drugs; held: failure to object and stepping aside is more than mere acquiescence, *but see: State v. Schultz*, 170 Wn.2d 746, 756-59 (2011); failure to object is an implied waiver; entry of bedroom was justified by exigent circumstance in response to domestic violence report in light of fact that police knew suspect was violent; 2-1, I.

***State v. Yoder***, 55 Wn.App. 632 (1989)

Juvenile calls police to report her mother being assaulted by mother's boyfriend; upon arrival, mother says she was not assaulted, police enter to speak with juvenile, observe drugs; held: police were obliged to investigate and take a complete report under domestic violence law, RCW 10.99.030; mother's claim she was not assaulted was not dispositive, police required to investigate further, thus police were justified in the intrusion, inadvertently discovered drugs; II.

***State v. Sims***, 77 Wn.App. 236, 238-41 (1995)

Hearsay statement of a domestic violence victim made during **medical treatment** attributing fault to an abuser may be admissible, ER 803(a)(4), where identity of abuser is reasonably pertinent to treatment, *State v. Fisher*, 130 Wn.App. 1, 13-16 (2005), *State v. Saunders*, 132 Wn.App. 592, 601-08 (2006), *State v. Hopkins*, 134 Wn.App. 780, 787-92 (2006), *State v. Williams*, 137 Wn.App. 736, 745-47 (2007), including changing relationship patterns and avoiding threatening situations in the future, *State v. Ackerman*, 90 Wn.App. 477 (1998), *State v. Price*, 126 Wn.App. 617, 639-41 (2005), *see: State v. Butler*, 53 Wn.App. 214 (1989), *State v. Owens*, 78 Wn.App. 897, 901-2 (1995); confrontation clause issue not argued, thus not addressed; I.

***State v. Grant***, 83 Wn.App. 98 (1996)

In felony no contact order violation case, RCW 10.99.040(4), -.050(2), trial court admits prior assault conviction by defendant on victim pursuant to ER 609, state cross-appeals; held: prior assaults on domestic violence victim by same defendant are admissible pursuant to ER 404(b) as relevant to assess victim's credibility to explain why she minimized the incident, *State v. Nelson*, 131 Wn.App. 108, 114-16 (2006), *State v. Magers*, 164 Wn.2d 174 (2008), *State v. Baker*, 162 Wn.App. 468 (2011), *State v. Harris*, 20 Wn.App.2d 153 (2021), *but see: State v. Cook*, 131 Wn.App. 845 (2006), *State v. Gunderson*, 181 Wn.2d 916 (2014), *State v. Ashley*, 186 Wn.2d 32 (2016), as domestic violence victims fear retaliation by abusers, mistrust the judicial

system, remain with abusers, so that jury will "evaluate credibility with full knowledge of the dynamics of a relationship marked by domestic violence and the effect such a relationship has on the victim," at 108, within discretion of trial court, *see:* *State v. Wilson*, 60 Wn.App. 887 (1991), *State v. Binh Thach*, 126 Wn.App. 297, 310-11 (2005), *State v. Woods*, 198 Wn.App. 453 (2017); I.

***Jacques v. Sharp***, 83 Wn.App. 532 (1996)

Domestic violence protection order directs that respondent stay out of the Magnolia neighborhood of Seattle, police arrest respondent in Magnolia; held: police may only arrest for violation of those restraint provisions in a protection order that restrain respondent from acts of domestic violence, exclusion from residence or contact, RCW 26.50.060(1); only remedy for violation of other provisions of protection order is contempt, not arrest, *but see; State v. Chapman*, 140 Wn.2d 436 (2000); I.

***State v. Dejarlais***, 136 Wn.2d 939 (1998)

Consent is not a defense to violating a **protection order**, RCW 26.50.110(1), affirming *State v. Dejarlais*, 88 Wn.App. 297 (1997), *see: State v. Bunker*, 169 Wn.2d 571 (2010), *State v. Yelovich*, 191 Wn.2d 774 (2018); 9-0.

***Seattle v. Megrey***, 93 Wn.App. 391 (1998)

A person restrained by an **antiharassment order** may not send a demand letter, not required in the course of litigation, to the person protected by the order; I.

***State v. Phillips***, 94 Wn.App. 829 (1999)

In violation of a no contact order case, return of service of the no contact order is a public record, RCW 5.44.040, *see: State v. Bolen*, 142 Wash. 653, 663 (1927), *State v. Hines*, 87 Wn.App. 98, 101 (1997); I.

***State v. Rodman***, 94 Wn.App. 930 (1999)

Pre-trial domestic violence no contact order, RCW 10.99.040, is enforceable whether defendant is released or in jail; I.

***State v. Anaya***, 95 Wn.App. 751 (1999)

No contact order issued at arraignment, RCW 10.99.040, does not survive dismissal of the criminal charge, *cf.: State v. Schultz*, 146 Wn.2d 540 (2002); I.

***Bellevue v. Jacke***, 96 Wn.App. 209 (1999)

Husband and wife separate, husband moves into apartment, defendant-wife enters and remains in husband's apartment without permission and, when husband attempts to remove her, she kicks him, is charged with assault, trial court holds that because marriage was not "defunct," apartment was community property, defendant had right to be there and thus had right to resist husband's attempt to remove her, city seeks discretionary review; held: community property principles are irrelevant to determination of guilt in a criminal case, one spouse's right to possession of real or personal property may be superior to that of another spouse, *State v. Webb*, 64 Wn.App. 480, 490 (1992), *see: State v. Coria*, 146 Wn.2d 631 (2002); I.

***State v. Azpitarte***, 140 Wn.2d 138 (2000)

Assault 2° is not a predicate crime elevating a no-contact order violation from a misdemeanor to a felony, RCW 10.99.040(4), reversing *State v. Azpitarte*, 95 Wn.App. 721 (1999), *see: State v. Ward*, 148 Wn.2d 803 (2003), *but see: State v. Olsen*, 187 Wn.App. 149 (2015); *per curiam.*

***State v. Chapman***, 140 Wn.2d 436 (2000)

Defendant, with two prior domestic violence no-contact order convictions, violates order excluding him from coming within a mile of complainant's residence, is convicted of felony violation of domestic violence protection order, RCW 26.50.110(5); held: trial court had the authority to prohibit defendant from coming within a geographical distance or area of a named person's residence as "other relief…necessary for…protection," RCW 26.50.060(1)(e), violation of which is a crime, RCW 26.50.110(5), distinguishing *Jacques v. Sharp*, 83 Wn.App. 532 (1996); reverses *State v. Chapman*, 94 Wn.App. 495 (1999); 9-0.

***Spence v. Kaminski***, 103 Wn.App. 325 (2000)

A permanent protection order, issued after notice and a hearing, does not require an allegation of recent domestic violence, ch. 26.50 RCW, although a temporary protection order, issued *ex parte*, does require an allegation of recent violence or threat or other circumstances constituting "irreparable injury", RCW 26.50.070(4); III.

***State v. O.P.***, 103 Wn.App. 889 (2000)

A "domestic violence" designation in an information does not charge a different offense from the underlying substantive crime, *State v. Goodman*, 108 Wn.App. 355, 358-59 (2001), *State v. Hagler*, 150 Wn.App. 196 (2009); I.

***State v. Ancira***, 107 Wn.App. 650 (2001)

Defendant is convicted of violating a no contact order against his wife, children present during offense, sentencing court orders no contact with wife and children; held: state failed to demonstrate that the order prohibiting defendant from contacting his children was reasonably necessary to prevent the children from witnessing domestic violence, thus order deprived defendant of his fundamental right to parent, *State v. Sanford*, 128 Wn.App. 280, 288-89 (2005), *State v. Torres*, 198 Wn.App. 685 (2017), *see: State v. Letourneau*, 100 Wn.App. 424 (2000), *but see: State v. Warren*, 165 Wn.2d 17, 31-35 (2008), *State v. Armendariz*, 160 Wn.2d 106 (2007), *State v. Berg*, 147 Wn.App. 923, 941-44 (2008), *State v. Cortes Aguilar*, 176 Wn.App. 264, 277-78 (2013); while supervised visitation may have been appropriate as a condition of sentence, generally a criminal sentencing court is not a proper forum; I.

***State v. Karas***, 108 Wn.App. 692 (2001)

Procedures provided in Domestic Violence Protection Act, RCW 29.50, authorizing issuance of orders for protection meet procedural due process requirements; permanent orders for protection may be issued by commissioners, *see:* RCW 2.24.040, CONST. Art. IV, § 23; II.

***State v. Osalde***, 109 Wn.App. 94 (2001)

Repeated threats to kill domestic partner and testimony at sentencing from victim about psychological abuse is sufficient to establish aggravating factor of ongoing pattern of domestic violence involving psychological abuse, *see:* *State v. Barnett*, 104 Wn.App. 191 (2001); I.

***State v. Schultz***, 146 Wn.2d 540 (2002)

Defendant is charged with assault, pretrial no-contact order is issued, defendant is convicted, judgment and sentence reads that the no-contact order shall remain in effect, defendant is later convicted of violating that order; held: pretrial no-contact order, RCW 10.99.040, may continue in effect after conviction where court indicates in sentence that it is "extended," *State v. Luna*, 172 Wn.App. 881 (2013), *see:* RCW 10.99.050; affirms *State v. Schultz*, 106 Wn.App. 328 (2001); 5-4.

***State v. Coria***, 146 Wn.2d 631 (2002)

Husband who damages property owned by himself and his wife damages property of another for purposes of malicious mischief statute, RCW 9A.48.080(1)(a), *see:* *State v. Pike*, 118 Wn.2d 585 (1992), *State v. Webb*, 64 Wn.App. 480 (1992), *State v. Birch*, 36 Wn.App. 405 (1984), *Bellevue v. Jacke*, 96 Wn.App. 209 (1999), *State v. Wooten*, 178 Wn.2d 890 (2013); reverses *State v. Coria*, 105 Wn.App. 51 (2001); 8-1.

***State v. Sisemore***, 114 Wn.App. 75 (2002)

Officer sees defendant walking with woman protected by domestic violence order, later arrests defendant; at trial, woman testifies they were not walking together, trial court convicts of willful violation of protection order; held: evidence was sufficient to establish that defendant knowingly violated the order because they were "walking together," irrespective of a lack of evidence about who approached whom, *see: State v. Clowes*, 104 Wn.App. 935, 940-42 (2001), *overruled, on other grounds, State v. Nonog*, 169 Wn.2d 220 (2010); trial court may consider the fact that defendant did not defend on basis of accidental contact, rather that the contact did not occur; II.

***State v. Sutherland***, 114 Wn.App. 133 (2002)

No-contact order incorrectly cites ch. 10.99, RCW, rather than ch. 26.50, defendant is convicted of violating it; held: because there is no risk of mistake or prejudice, the order is valid; I.

***State v. O'Brien***, 115 Wn.App. 599 (2003)

Juvenile court has authority to issue no contact order as part of disposition order; III.

***State v. Ward***, 148 Wn.2d 803 (2003)

Violation of a court order, former RCW 10.99.050(2), which makes the offense a felony if the violation is an assault "that does not amount to assault in the first or second degree" does not require the state to prove the absence of a felony assault, *State v. Dukowitz*, 62 Wn.App. 418, 422 (1991), *State v. Chino*, 117 Wn.App. 531, 541-42 (2003), *State v. Keend*, 140 Wn.App. 858, 870-72 (2007), *State v. Heutink*, 12 Wn.App.2d 336 (2020), *see:* *State v. Azpitarte*, 140 Wn.2d 138 (2001) unless defendant is also charged with assault 1° or assault 2°, *see: State v. Olsen*, 187

Wn.App. 149 (2015), *State v. Melland*, 9 Wn.App.2d 786 (2019); any assault connected with a no contact order violation is a felony; affirms *State v. Ward*, 108 Wn.App. 621 (2001); where no contact order precludes telephone contact and evidence establishes that defendant called complainant's home, complainant's wife answered call and defendant conveyed information about complainant yet wife does not testify that she told complainant, evidence is sufficient to convict; 6-3.

***State v. Davis***, 116 Wn.App. 81, 90-96 (2003), *aff'd,* 154 Wn.2d 291 (2005), *aff'd, on other grounds*, *Davis v. Washington*, 165 L.Ed.2d 224 (2006)

In felony no contact order violation case, court gave to convict instruction without assault language, defined assault separately, instructed about finding an assault in special verdict instruction and special verdict form; held: instructional bifurcation "benefits the defendant," and is better practice, *State v. Oster*, 147 Wn.2d 141 (2002), *cf.: State v. Tysyachuk*, 13 Wn.App.2d 35 (2020); as long as all elements are properly instructed, they need not be included in a single to convict instruction; *accord: State v. Mills*, 154 Wn.2d 1 (2005)("threat to kill" elevating harassment to felony may be included in special verdict, need not be in to convict instruction); I.

***State v. Rice***, 116 Wn.App. 96 (2003)

Defendant is convicted of felony no contact order violation, RCW 26.50.110(5), having two previous convictions on the same day and in same judgment and sentence; held: two prior guilty pleas to domestic violence offenses which are contained within a single judgment and sentence is sufficient to establish two previous convictions, distinguishing *State v. Jones*, 138 Wash. 110 (1926), defendant need not have opportunities for rehabilitation between priors; I.

***Tacoma v. Cornell***, 116 Wn.App. 165 (2003)

Defendant is charged with violating a protection order that was in existence on the day of the offense but was vacated as improperly issued prior to the filing of the criminal charge; held: prosecutor may charge a defendant for violating an order during the time the order is valid and in effect, but may not charge after the order has been vacated, even if the violation occurred while the order was in effect; II.

***State v. Wilson***, 117 Wn.App. 1 (2003)

No contact order violation enhanced to felony due to two prior violations, former RCW 26.50.110(5), does not violate *ex post facto* clause because priors preceded enactment; I.

***State v. Turner***, 118 Wn.App. 135 (2003)

An order of protection issued pursuant to RCW 26.09.060 may serve as the basis of a criminal charge if violated, need not contain the warning set forth in RCW 26.50.035(1)(c); II.

***State v. Carmen***, 118 Wn.App. 655 (2003)

To prove felony violation of a no contact order, RCW 26.50.110(5), state must offer trier of fact evidence that defendant has two prior convictions of violating a no contact order; trial court must determine, as a question of law, whether the prior convictions were issued under one of the statutes listed in RCW 26.50.110(5) as a predicate to admissibility of the judgments and sentences, *State v. Gray*, 134 Wn.App. 547 (2006), *State v. Chambers*, 157 Wn.App. 465 (2010),

*State v. Miller*, 156 Wn.2d 23 (2005), *State v. Snapp*, 119 Wn.App. 614, 623-26 (2004), *see: State v. Case*, 187 Wn.2d 85 (2017); I.

***Auburn v. Solis-Marcial***, 119 Wn.App. 398 (2003)

Defendant is served with temporary protection order which notifies him of the hearing and states that failure to appear may result in the court granting relief, fails to appear, violates order, claims no notice; held: knowledge of a protection order, not personal service, is an element of the crime, trier of fact could find that defendant knew of the order, thus pretrial dismissal reversed; I.

***State v. Snapp***, 119 Wn.App. 614 (2004)

Defendant is arrested for DUI, court issues domestic violence no contact order, defendant is later charged with violating the order, information does not allege "willfully;" held: court issued no contact order under a separate pending domestic violence case where court had previously withdrawn the order, court is authorized to amend conditions of release due to change of circumstances, CrR 3.2(k)(1); because information alleged that defendant violated the order "feloniously," and alleged that defendant hit or kicked victim, it is sufficient to notify defendant that he acted willfully, *State v. Robbins*, 15 Wn.App. 108, 113 (1976); information need not specify degree of assault; validity of the no contact order is not an element of the crime, *see: State v. Miller*, 156 Wn.2d 23 (2005), *State v. Ingram*, 9 Wn.App.2d 482 (2019); II.

***State v. Powers***, 124 Wn.App. 92 (2004)

In domestic violence protection order trial, RCW 26.50.110(5), complainant's 911 call to report defendant's violation and describing defendant to assist in apprehension is admitted at trial; held: trial court must assess the 911 call as testimonial or nontestimonial and whether the statement originates from interrogation, *Crawford v. Washington*, 158 L.Ed.2d 177 (2004); here, because the call was not made to protect the victim from defendant, her hearsay statements were testimonial and erroneously admitted when she became unavailable at trial, *State v. Pugh*, 167 Wn.2d 825 (2009), *cf.: State v. Mason*, 160 Wn.2d 910, 919-20 (2007), *State v. Williams*, 136 Wn.App. 486, 501-04 (2007), *but see: Davis v. Washington*, 165 L.Ed.2d 224 (2006); II.

***State v. Felix***, 125 Wn.App. 575 (2005)

A judicial finding that a crime constituted domestic violence need not be submitted to a jury, *Blakely v. Washington*, 159 L.Ed.2d 403 (2004), as it does not increase punishment, *State v. Winston*, 135 Wn.App. 400 (2006), *see: State v. Ortega*, 131 Wn.App. 591, 595 (2006); firearm prohibition following misdemeanor domestic violence conviction is not punishment, *State v. Schmidt*, 143 Wn.2d 658 (2001); I.

***State v. Mills***, 154 Wn.2d 1 (2005)

In felony harassment case, trial court puts "threat to kill" element in special verdict, not in to convict instruction; held: "where the legislature has established a statutory framework which defines a base crime which is elevated to a greater crime if a certain fact is present, a trial court may, consistent with the guaranties of due process and trial by jury, bifurcate the elevating fact into a special verdict form," at 10 ¶ 19, *State v. Oster*, 147 Wn.2d 141 (2002); here, because

it was unclear that the threat to kill had to be proved beyond a reasonable doubt, felony conviction was in error; reverses *State v. Mills*, 116 Wn.App. 106 (2003); 9-0.

***State v. Miller***, 156 Wn.2d 23 (2005)

Existence of a no contact order is an element of the crime of violating such an order, but the validity is a question of law to be determined by the court, *State v. Case*, 187 Wn.2d 85 (2017), *State v. Ingram*, 9 Wn.App.2d 482 (2019); an invalid, vague or otherwise inapplicable no contact order is inadmissible, *State v. Chambers*, 157 Wn.App. 465 (2010), *affirming State v. Miller*, 123 Wn.App. 92 (2004), *State v. Gray*, 134 Wn.App. 547 (2006), *overruling Seattle v. Edwards*, 87 Wn.App. 305 (1997), *State v. Marking*, 100 Wn.App. 506 (2000), *see: State v. Turner*, 156 Wn.App. 707 (2010), *Seattle v. May*, 171 Wn.2d 857 (2011); 9-0.

***State v. Iverson***, 126 Wn.App. 329 (2005)

In no contact order violation case, victim does not appear at trial, court admits jail photo and booking records including victim's height, weight and address on officer's testimony that although he does not work for the jail and has not control over the accuracy of entries by other officers, he regularly uses the booking records system, enters data and pictures into the system and routinely relies upon the data; held: a photograph is not an oral or written assertion, and is thus not hearsay; because the identifying information is routine based upon perceptions of persons booking her or her own statements, the information is reliable and admissible, *State v. Christopher*, 114 Wn.App. 858, 862-64 (2003), distinguishing *State v. Tharp*, 26 Wn.App. 184, 186 (1980), *overruled, in part, State v. Monson*, 113 Wn.2d 833 (1989); victim's stating her own name was admitted solely for authentication and is thus not hearsay; I.

***State v. Spencer***, 128 Wn.App. 132 (2005)

In violation of no contact order, defendant enters victim's home, is convicted of residential burglary and violation of a no contact order; held: a no contact order violation is a continuing crime, *State v. Stinton*, 121 Wn.App. 569 (2004), satisfying the "intent to commit a crime...therein" element of burglary; I.

***State v. Nelson***, 131 Wn.App. 108, 114-16 (2006)

In assault case, prior assaults by defendant on his wife are admissible to show that complainant was afraid of defendant and to explain her inconsistent reports to the police, ER 404(b), *State v. Grant*, 83 Wn.App. 98 (1996), *State v. Cook*, 131 Wn.App. 845 (2006), *State v. Magers*, 164 Wn.2d 174 (2008), *State v. Baker*, 162 Wn.App. 468 (2011), *State v. Johnson*, 172 Wn.App. 112 (2012), *reversed, in part, on other grounds, State v. Johnson*, 180 Wn.2d 295 (2014), *State v. Ashley*, 186 Wn.2d 32 (2016), *State v. Woods*, 198 Wn.App. 453 (2017), *see: State v. Gunderson*, 181 Wn.2d 916 (2014); III.

***State v. Ortega***, 131 Wn.App. 591, 595 (2006)

Domestic violence with multiple incidents of sexual abuse over a prolonged period of time is a jury question, *Blakely v. Washington*, 159 low (2004), *see: State v. Felix*, 125 Wn.App. 575 (2005); III.

***State v. Cook***, 131 Wn.App. 845 (2006)

Victim recants at trial, claims she lied to police, trial court admits other acts of violence committed by defendant on victim, instructs jury that it may consider the prior incidents for the limited purpose of assessing credibility of victim; held: where victim recants, fails to timely report abuse or minimizes accusations, then evidence of prior abuse is relevant and potentially admissible, ER 404(b), to illuminate the victim's state of mind at the time of the inconsistent act, including state of mind at the time of the witness' trial testimony, *State v. Wilson*, 60 Wn.App. 887 (1991), *State v. Nelson*, 131 Wn.App. 108, 114-16 (2006), *State v. Harris*, 20 Wn.App.2d 153 (2021), provided court gives an adequate limiting instruction telling jury it can consider abuse to assess an alleged victim's state of mind at the time of the inconsistent act, not to determine victim's credibility, distinguishing *State v. Grant*, 83 Wn.App. 98 (1996), *see: State v. Magers*, 164 Wn.2d 174 (2008), *State v. Baker*, 162 Wn.App. 468 (2011), *State v. Gunderson*, 181 Wn.2d 916 (2014), *State v. Ashley*, 186 Wn.2d 32 (2016), *State v. Woods*, 198 Wn.App. 453 (2017); II.

***State v. Esquivel***, 132 Wn.App. 316 (2006)

Tribal restraining order that does not contain state statutory notice of criminal penalties and notice that consensual contact is prohibited, RCW 26.50.035(1)(c), must be given full faith and credit; due process does not defeat the validity of the order; III.

***State v. Moreno***, 132 Wn.App. 663, 667-71 (2006)

Felony violation of a no contact order and assault from a single incident, where the assault is the factor that causes the no contact order to be a felony, RCW 26.50.110(4), were intended by the legislature to have separate punishments, *State v. Freeman*, 153 Wn.2d 765, 771 (2005), thus do not violate double jeopardy clause, *State v. Leming*, 133 Wn.App. 875 (2006), *State v. Novikoff*, 1 Wn.App.2d 166 (2017); I.

***State v. Van Tuyl***, 132 Wn.App. 750 (2006)

Mailing a TRO, CR 5(b)(2)(A), entered in a marriage dissolution proceeding is sufficient to establish the notice requirement for conviction of violation of the order in spite of actual notice language of RCW 26.09.050(2); II.

***State v. Leming***, 133 Wn.App. 875 (2006)

The crime of assault in violation of a court order, RCW 26.50.110(4), and assault 2º do not violate double jeopardy as legislature intended to punish separately both, *see: State v. Moreno*, 132 Wn.App. 664, 665 (2006), and do not merge, *see: State v. Louis*, 155 Wn.2d 563, 571 (2005), *State v. Novikoff*, 1 Wn.App.2d 166 (2017); convictions of assault 2º with intent to commit felony harassment and felony harassment do violate double jeopardy, *see: State v. Freeman*, 153 Wn.2d 765, 778 (2005), *State v. Ralph*, 175 Wn.App. 814 (2013); II.

***State v. Washington***, 135 Wn.App. 42, 49 (2006)

Imprisoned defendant is visited by the protected person on a no contact order; held: evidence was sufficient to establish willful violation of no contact order; I.

***State v. Wilson***, 136 Wn.App. 596, 604-12 (2007)

No contact order prohibits contact with complainant but not residence, defendant and complainant sign lease on house, cohabit, quarrel, defendant leaves and returns and assaults complainant, trial court dismisses charge of burglary 1º; held: dismissal was proper as defendant could not have burglarized his own residence; II.

***State v. Laramie***, 141 Wn.App. 332, 337-40 (2007)

Information alleging **interfering with reporting of domestic violence,** RCW 9A.36.150, need not identify victim and the underlying domestic violence crime where other counts in the information do so, *State v. Nonog*, 169 Wn.2d 220 (2010), *cf.: State v. Holcomb,* 200 Wn.App. 54 (2017); III.

***State v. Magers***, 164 Wn.2d 174 (2008)

In domestic violence assault case, evidence of prior acts of violence known to victim is admissible to prove the element of assault that victim reasonably feared bodily injury, *State v. Ragin*, 94 Wn.App. 407 (1999), *State v. Barragan*, 102 Wn.App. 754 (2000), *State v. Johnson,* 172 Wn.App. 112 (2012), *reversed, in part, on other grounds, State v. Johnson,* 180 Wn.2d 295 (2014), even if defendant did not dispute the element, as state has burden of proving all elements; where victim recants, prior acts of violence against victim are admissible so jury can evaluate her credibility, *State v. Grant*, 83 Wn.App. 98 (1996), *State v. Cook*, 131 Wn.App. 845 (2006), *State v. Nelson*, 131 Wn.App. 108, 114-16 (2006), *State v. Gunderson,* 181 Wn.2d 916 (2014), *see: State v. Ashley,* 186 Wn.2d 32, 47 (2016), *State v. Woods,* 198 Wn.App. 453 (2017), *State v. Harris,* 20 Wn.App.2d 153 (2021), *see also: State v. Baker,* 162 Wn.App. 468 (2011); 6-3.

***State v. Becklin***, 163 Wn.2d 519 (2008)

Complainant testifies that, following issuance of no contact order, two people drive defendant's car past her home, two weeks later defendant follows her home, defendant is convicted of felony stalking, RCW 9A.46.110(1), after jury inquires whether a person can be stalked through a third party and court answers, "yes;" held: trial court's answer was a correct statement of the law, "course of conduct," as defined by legislature, contemplates that stalking could include direction or manipulation of third parties, RCW 10.14.020, both parties argued the theory to the jury, *cf.: State v. Ransom*, 56 Wn.App. 712, 714 (1990), *State v. Davenport*, 100 Wn.2d 757 (1984), thus trial court did not abuse discretion in further instructing the jury in response to the jury question; reverses *State v. Becklin*, 133 Wn.App. 610 (2006); 6-3.

***State v. Bunker***, 144 Wn.App. 406, 421-22 (2008), *aff'd, on other grounds*, 169 Wn.2d 571 (2010)

In no contact order case, victim's willingness to be in defendant's presence is grounds for a mitigated sentence; I.

***State v. Vant***, 145 Wn.App. 592, 598-600 (2008)

Protection order forbids defendant from knowingly coming within one mile of his niece or her residence, defendant goes to niece's mother's home, testifies he "assumed" she lived there, niece testifies she lived there off and on but was not present when defendant was arrested; held: reasonable trier of fact could find defendant violated order; II.

***State v. Nonog***, 145 Wn.App. 802, 811-13 (2008), *aff'd, on other grounds,* 169 Wn.2d 220 (2010)

Interfering with the reporting of domestic violence, RCW 9A.36.150(1), is an alternative means crime (calling 911 or obtaining medical assistance or reporting to any law enforcement official), *State v. Christian*, 18 Wn.App.2d 185 (2021), but where state alleges all three means and only offers evidence as to one, there is no possibility jury convicted on a mean unsupported by the evidence; I.

***United States v. Hayes***, 172 L.Ed.2d 816 (2009)

Gun Control Act, 18 U.S.C. § 921 *et seq.*, which prohibits possession of a firearm by persons previously convicted of a misdemeanor domestic violence offense, does not require that the predicate crime have as an element a domestic violence relationship as long as government proves at the firearm trial the domestic relationship beyond a reasonable doubt; 7-2.

***State v. Hagler***, 150 Wn.App. 196 (2009)

Designating an offense as "domestic violence" in a jury instruction is error as the fact of the designation does not assist the jury and might be prejudicial, harmless here, *see: State v. O.P.*, 103 Wn.App. 889, 892 (2000); I.

***State v. Allen***, 150 Wn.App. 300 (2009)

Domestic violence no contact order violation under former RCW 26.50.110(1) (2006) did not require that state prove acts or threats of violence, merely contact, *see: State v. Wofford*, 148 Wn.App. 870 (2009); where defendant sent two e-mails to victim who read them the same day, two counts do not violate double jeopardy clause, *State v. Brown*, 159 Wn.App. 1, 9-13 (2010), *see: State v. Parmelee*, 108 Wn.App. 702, 705-06 (2001); II.

***Pers. Restraint of Rainey***, 168 Wn.2d 367 (2010)

Defendant is convicted of kidnapping 1° of his 3-year old daughter and harassing his estranged wife, sentencing court imposes lifetime no contact order with each; held: crime-related prohibition, including a no contact order, may be imposed for the maximum of the crime irrespective of the period of community custody, *State v. Armendariz*, 160 Wn.2d 106, 118-20 (2007), *cf.: State v. Granath*, 200 Wn.App. 26 (2017), 190 Wn.2d 548 (2018), need not be decided by a jury; while a no contact order of some duration was appropriate as reasonably necessary to protect daughter from further victimization, court provided no reason for the duration, thus remanded for court to address parameters of the order under the "reasonably necessary" standard, *State v. Howard*, 182 Wn.App. 91, 100-03 (2014); 9-0.

***State v. Nonog***, 169 Wn.2d 220 (2010)

One count in information charging **interfering with reporting**, RCW 9A.36.150, need not name the underlying domestic violence crime if other counts do so when challenged for first time on appeal, *State v. Laramie*, 141 Wn.App. 332, 337-40 (2007), *cf.: State v. Holcomb*, 200 Wn.App. 54 (2017), overruling *State v. Clowes*, 104 Wn.App. 935, 940-42 (2001); affirms *State v. Nonog*, 145 Wn.App. 802 (2008); 9-0.

***State v. Turner***, 156 Wn.App. 707 (2010)

A no contact order that contains the language that violation is a crime, as required by RCW 10.99.040(b) (2010), is admissible, even if the language only appears on the back of the order in violation of GR 14(a); I.

***State v. Bunker***, 169 Wn.2d 571 (2010)

Any no-contact order violation is a crime whether or not the mandatory arrest provision is applicable, RCW 26.50.110 (2000), *see:* RCW 26.50.110 (2007); affirms *State v. Bunker*, 144 Wn.App. 406 (2008); 8-1.

***State v. Schultz***, 170 Wn.2d 746 (2011)

Police respond to call about neighbors yelling, arrive at apartment, hear man and woman with raised voices, knock, defendant-woman answers, appears agitated and flustered, denies anyone is there, when challenged she calls for man who emerges from bedroom, defendant steps aside and opens door wider, police enter, notice neck is red and blotchy, defendant denies anything physical, fidgets and picks up things, is warned not to, continues to pick up things, officer notices handgun and marijuana pipe, asks to search for drugs, defendant agrees, is arrested for use of drug paraphernalia, revokes consent to search, police obtain warrant, seize drugs; held: domestic violence is an important factor in evaluating subjective belief of officer that someone needs assistance and in assessing reasonableness of belief of an imminent threat of injury, *see: State v. Johnson*, 104 Wn.App. 409 (2001), *State v. Menz*, 75 Wn.App. 351 (1994), here there was insufficient evidence that an emergency existed, thus warrantless entry was improper, acquiescence is not consent; 5-4.

***Seattle v. Brown***, 171 Wn.2d 847 (2011)

Defendant charged with violation of a domestic violence protection order is collaterally barred from challenging the validity of the protection order; trial court should exclude orders that are void, don't apply to the defendant or the charged conduct and orders "that cannot be constitutionally applied to the charged conduct (e.g., orders that fail to give the restrained party fair warning of the relevant prohibited conduct)," at 854 ¶ 10, *State v. Miller*, 156 Wn.2d 23 (2005); no contact order that states that violation is a criminal offense under ch. 26.50, RCW, is adequate under the due process clause to give notice that violation is a crime where it states that a violator may be arrested; 6-3.

***State v. Brown***, 159 Wn.App. 1 (2010)

Multiple convictions of no contact order violations on separate days do not violate double jeopardy, *State v. Allen*, 150 Wn.App. 300 (2009); proper to elevate no contact order violation to a felony even if priors occurred under former version of RCW 26.50.110, *State v. Bunker*, 169 Wn.2d 571, 582 (2010); I.

***State v. Martin***, 169 Wn.App. 620 (2012)

Wife shoots husband after he confesses to an affair, trial court admits expert testimony as to defendant's depressive disorder and histrionic personality disorder and their effect on dissociation in support of diminished capacity defense but excludes "betrayal trauma theory" evidence as not generally accepted in the scientific community; held: like "rape trauma

syndrome," betrayal trauma theory does not pass the *Frye* test, *see: State v. Black*, 109 Wn.2d 336 (1987), distinguishing *Carlton v. Vancouver Care, LLC*, 155 Wn.App. 151, 164 (2010); I.

***State v. Veliz***, 176 Wn.2d 849 (2013)

A domestic violence protection order with a child visitation provision is not a "court-ordered parenting plan" required to prove custodial interference 1°, RCW 9A.40.060(2) (1998), *see: State v. Pesta*, 87 Wn.App. 515 (1997); only a document created under ch. 26.09 RCW qualifies; reverses *State v. Veliz*, 160 Wn.App. 396 (2011); 5-4.

***State v. Luna***, 172 Wn.App. 881 (2013)

Municipal court issues pretrial no contact order, after conviction at sentencing court informs defendant that the order remains extant, checks box on judgment and sentence marked "NCO," defendant is charged with violation of that no contact order, trial court dismisses; held: pretrial no contact order may be extended following conviction, *State v. Schultz*, 146 Wn.2d 540 (2002), RCW 10.99.040(3) (2010), oral notice to defendant at sentencing plus checking the box that reads "NCO" is sufficient to satisfy defendant's due process right to notice; III.

***State v. Cortes Aguilar***, 176 Wn.App. 264, 277-78 (2013)

Defendant murders his wife in daughters' presence, assaults daughter, is ordered to have ten year no contact with all of his children; held: trial court set forth reasons, state had a compelling interest in protecting children from reliving emotional trauma, defendant blamed victim, defendant can regain contact when children are more mature, distinguishing *State v. Ancira*, 107 Wn.App. 650 (2001), *see: State v. Torres*, 198 Wn.App. 685 (2017); III.

***State v. W.S.***, 176 Wn.App. 231 (2013)

Following adjudication, juvenile court may issue a domestic violence no contact order for the maximum period of the offense which may extend beyond respondent's 18th or 21st birthday; I.

***State v. Sweat***, 180 Wn.2d 156 (2014)

In domestic violence case, aggravating factor of **pattern of psychological, physical or sexual abuse**, RCW 9.94A.535(h)(i) (2011), does not require proof that the prior incidents of abuse involved the same victim; affirms *State v. Sweat*, 174 Wn.App. 126 (2013); 9-0.

***State v. Gunderson,*** 181 Wn.2d 916 (2014)

In domestic violence no contact order case complainant testifies no violence occurred, no other statements of complainant are offered, trial court admits evidence of prior domestic violence episodes to impeach complainant's testimony; held: while evidence of prior misconduct may be admissible to enable jury to assess credibility of complainant who gave conflicting statements about defendant's conduct, *State v. Magers*, 164 Wn.2d 174, 186 (2008), *State v. Harris*, 20 Wn.App.2d 153 (2021), absent conflicting statements by the witness probative value is outweighed by unfair prejudice, *State v. Saltarelli*, 98 Wn.2d 358, 363 (1982), *see: State v. Ashley*, 186 Wn.2d 32, 47 (2016); "we decline to extend *Magers* to cases where there is no

evidence of injuries to the alleged victim and the witness neither recants nor contradicts prior statements," at 925 ¶ 16; 8-1.

***State v. McDonald***, 183 Wn.App. 272 (2014)

RCW 9.94A.626(21) provides that if a present conviction is for a felony domestic violence offense where DV "as defined in RCW 9.94A.030" is pleaded and proved then prior convictions for "repetitive domestic violence offense[s]" count as points, RCW 9.94A.030(20) defines DV as having "the same meaning as defined in RCW 10.99.020 and 26.50.010," legislature intended "and" to mean "or," *State v. Ross,* 188 Wn.App. 768 (2015); I; Division II agrees, *State v. Kozey,* 183 Wn.App. 692 (2014); Division III agrees, *State v. Hodgins,* 190 Wn.App. 437 (2015).

***State v. Rodriguez****,* 183 Wn.App. 947 (2014)

Defendant pleads guilty to a felony DV no contact order violation and a misdemeanor DV no contact order violation which occurred at the same time but with different protected parties, sentencing judge counts the misdemeanor as a prior conviction and thus a point; held: a misdemeanor no contact order violation is a "prior conviction" for purposes of the SRA, RCW 9.94A.525(21)(c), as current offenses count as prior convictions, RCW 9.94A.589(1)(a), and the misdemeanor is a repetitive domestic violence offense, RCW 9.94A.030(41); II.

***State v. Brush***, 183 Wn.2d 550, 556-60 (2015)

Instruction regarding domestic violence aggravating factor, RCW 9.94A.535(3)(h)(i) (2008), that states that a "prolonged period of time means more than a few weeks" is a comment on the evidence, distinguishing *State v. Barnett,* 104 Wn.App. 191, 203 (2001), *cf.: State v. Hood,* 196 Wn.App. 127, 136-37 (2016); 9-0.

***State v. Johnson***, 185 Wn.App. 655, 666-70 (2015)

Both misdemeanor and felony stalking, RCW 9A.46.110 (2013), require harassing or following on two or more separate occasions, *State v. Kintz,* 169 Wn.2d 537, 548 (2010); I.

***State v. Olsen****,* 187 Wn.App. 149 (2015)

When a defendant is convicted of assault 1° or assault 2°, that conviction generally cannot serve as the predicate to a no contact order violation/felony, RCW 26.50.110(4) (2013), *State v. Ward,* 148 Wn.2d 803, 812 (2003), *State v. Azpitarte,* 140 Wn.2d 138, 141 (2000), but a jury can convict a defendant for felony violation of a court order, despite having also convicted the defendant of second degree assault, when the former is predicated upon reckless conduct that creates a substantial risk of death or serious bodily injury to another, *see: State v. Leming,* 133 Wn.App. 875 (2006); III.

***State v. Pablo Navarro***, 188 Wn.App. 550, 553-56 (2015)

A no-contact order issued as part of a sentence, RCW 9.94A.030(10), may be issued for maximum term of the crime, and are not limited to the victims of the crime, *State v. Warren,* 165 Wn.2d 17, 32-34 (2009); I.

***State v. Muñoz-Rivera***, 190 Wn.App. 870, 884-86 (2015)

A domestic violence protection order, RCW 10.99.040(2)(a) is improper to protect a victim-child if the defendant does not have a biological or parent-child relationship with the child; if the child's parent lives with defendant but never married him and the child is not an offspring of defendant than she cannot be a victim within the meaning of RCW 10.99.020(8), *distinguishing State v. Cortes Aguilar*, 176 Wn.App. 264 (2013); III.

***State v. Ashley***, 186 Wn.2d 32 (2016)

In unlawful imprisonment/domestic violence case prior acts of violence are admissible, ER 404(b), to prove lack of consent and intimidation, *State v. Fisher*, 165 Wn.2d 727, 744-45 (2009), *State v. Nelson*, 131 Wn.App. 108, 116 (2006), *State v. Magers*, 164 Wn.2d 174, 183 (2008), but not to bolster victim's credibility absent inconsistent testimony, at 47, *State v. Gunderson*, 181 Wn.2d 916 (2014), *but see: State v. Harris*, 20 Wn.App.2d 153 (2021); 9-0.

***State v. Whittaker***, 192 Wn.App. 395, 401-09 (2016)

Looking into victim's window or door on two occasions separated by several minutes is sufficient for jury to find the "repeated" element of **stalking**, RCW 9A.46.110(1) (2013), *State v. Kintz*, 169 Wn.2d 537 (2010); I.

***State v. Case***, 187 Wn.2d 85 (2017)

Where defendant stipulates to prior no contact order violations so that jury does not hear details failure of state to prove that the priors involved orders issued pursuant to the specific statutes listed in RCW 26.50.110 does not invalidate the priors as the trial court determined as a matter of law that they were sufficient, reversing *State v. Case*, 189 Wn.App. 422 (2015); 7-2.

***State v. Armstrong***, 188 Wn.2d 333, 339-44 (2017)

Felony violation of a domestic violence no contact order alleging both assault and two previous no contact order convictions, RCW 26.50.110(4), -(5) (2015), is an alternative means crime, jury need not be unanimous as to which means; 6-3.

***State v. Clark***, 200 Wn.App. 20 (2017)

Court issues domestic violence protection order which requires a surrender of firearms, police find guns in defendant's storage locker, is convicted of unlawful possession of a firearm, RCW 9.41.040(2)(a)(ii)(C)(ll), which states that it is unlawful to possess a firearm if the underlying DVPO "explicitly prohibits the use...of physical force," and here the order does not mention "physical force;" held: protective order need not parrot the language of the statute to be sufficient as long as it clearly prohibits force, thus evidence was sufficient to convict; I.

***State v. Holcomb***, 200 Wn.App. 54 (2017)

Information charging interfering with reporting of domestic violence, RCW 9A.36.150 (1996), must set forth the underlying crime of domestic violence, even when challenged for the first time on appeal, *cf.: State v. Nonog*, 169 Wn.2d 220 (2010), *State v. Laramie*, 141 Wn.App. 332, 337-40 (2007); III.

***State v. Granath***, 190 Wn.2d 548 (2018)

Defendant is convicted in district court of a domestic violence offense, court orders no contact as a condition of sentence with a probation period of two years and enters a separate domestic violence no contact order, RCW 10.99.050 (2000), that reads "This no-contact order expires on: _____. Five years from today if no date is entered," two years later conditions of sentence are complete and court closes the case but declines to vacate the domestic violence NCO; held: standalone no contact order lasts only as long as the sentence actually imposed regardless of the sentencing court's authority to set a longer period of jurisdiction, here five years, RCW 3.66.068(1)(a) (2013); affirms *State v. Granath*, 200 Wn.App. 26 (2017); 8-1.

***State v. Yelovich,*** 191 Wn.2d 774 (2018)

No contact order issued, defendant assaults victim, is charged with felony violation of a no contact order enhanced by the assault, claims she stole his phone from his car and he chased her to recover it, court declines to instruct on defense of property, RCW 9A.16.020(3) (1986); held: a no contact order must be followed, *State v. Dejarlais*, 136 Wn.2d 939, 969 (1998), defense of property is not available as a defense regardless of the fact that assault is an element of the crime; affirms *State v. Yelovich*, 1 Wn.App.2d 38 (2017); 9-0.

***State v. Novikoff***, 1 Wn.App.2d 166 (2017)

Assault 4° and violation of a no contact order based upon the same act do not violate double jeopardy and do not merge, RCW 26.50.110(4) (2015), *State v. Moreno*, 132 Wn.App. 663 (2006), *State v. Leming*, 133 Wn.App. 875 (2006); III.

***State v. Shelley***, 3 Wn.App.2d 196 (2018)

Defendant lives with girlfriend and her minor son, assaults girlfriend's son, is convicted of assault with domestic violence enhancement; held: for purposes of sentence enhancement RCW 9.94A.525(21) (2013) limits domestic violence as defined in RCW 9.94A.030(20) (2015) which includes children in common or children 16 years or older residing in the same household, RCW 9.94A.030(3) (2004); while victim's age here is not disclosed in opinion, by context it is less than 16 and thus domestic violence aggravator was improper; I.

***State v. Horn***, 3 Wn.App.2d 302 (2018)

Defendant threatens domestic partner with death, court admits ER 404(b) evidence of prior threats to support victim's reasonable fear, *State v. Magers*, 164 Wn.2d 174 (2008), excludes defense offer that after the charged incident defendant and victim got engaged and travelled together; held: 3-step test for **right to present a defense** analysis: (1) evidence must be at least minimally relevant, (2) if relevant burden shifts to state to show that relevant evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial, *State v. Jones*, 168 Wn.2d 713, 720 (2010), (3) the state's interest in excluding prejudicial evidence must also be balanced against the defendant's need for the information sought, and relevant information can be withheld only if the state's interest outweighs the defendant's need, *State v. Orn*, 197 Wn.2d 343 (2021); here, considering judicial recognition of battered woman's syndrome, *State v. Allery*, 101 Wn.2d 591, 597 (1984), specifically cycles of domestic violence in which victim forgives hoping that the violence will not recur, trial court's exclusion of evidence of engagement and trip with defendant was not minimally relevant was not an abuse of discretion; II.

***State v. Joseph***, 3 Wn.App.2d 365, 370-74 (2018)

Assault 3° where the defendant has caused "substantial pain" and "considerable suffering" to the same victim, is "of a similar nature" to the other crimes listed in RCW 9A.44.060, and falls within the legislature's intent to punish thus although the crime was not specifically listed in RCW 9A.44.060, the crime is a qualifying predicate crime under RCW 9A.46.020(2)(b)(i) to enhance to felony **harassment**; I.

***State v. Brush***, 5 Wn.App.2d 40 (2018)

Domestic violence/ongoing pattern of psychological abuse aggravator, RCW 9.94A.535(3)(h), is not overbroad; sentence aggravators are not subject to vagueness challenges, *State v. Baldwin*, 150 Wn.2d 448, 461 (2003), *State v. Burrus*, 17 Wn.App.2d 162 (2021); II.

***State v. Phillips***, 431 Wn.App.2d 1056 (2018)

As a condition of domestic violence sentence trial court orders no contact with adult victim over defendant's objection that such an order will make it impossible for him to visit his infant child while in prison; held: trial court had discretion to order no contact with victim, regardless of defendant's constitutional right to parent; I.

***State v. Taylor***, 193 Wn.2d 691 (2019)

In felony no contact order case defendant offers to stipulate that there was a no contact order and that defendant was aware of it so that jury would not see the order, *Old Chief v. United States*, 136 L.Ed.2d 574 (1997), *State v. Johnson*, 90 Wn.App. 54, 63 (1998), trial court denies stipulation and admits the order; held: because a no contact order provides the specific restrictions on defendant, is closely related to the felony no contact order charge, is evidence of multiple elements of that crime, an probative value "far outweighs" any danger of unfair prejudice, trial court did not abuse discretion, *State v. Ortega*, 134 Wn.App. 617, 624-25 (2006), *State v. Nguyen,* 10 Wn.App.2d 797 (2019); 9-0.

***State v. Ingram***, 9 Wn.App.2d 482 (2019)

Validity of out-of-state no contact order is not an element of the offense, *State v. Miller*, 156 Wn.2d 23 (2005); I.

***State v. Robinson***, 8 Wn.App.2d 629 (2019)

Defendant is convicted of violation of a no contact order enhanced to a felony by two prior misdemeanor no contact order violations, RCW 26.50.110(5) (2017), to which he had pleaded guilty albeit the two stemmed from a single incident which was originally charged as a felony but through plea negotiations defendant agreed to plead to two counts, one straight plea, the other to take advantage of the plea bargain, acknowledging that there was no factual basis; held: while a defendant may plead guilty to an amended charge if there is no factual basis as long as there is a factual basis for the original charge, *State v. Bao Sheng Zhao*, 157 Wn.2d 188 (2006), *State v. Wilson*, 16 Wn.App.2d 537 (2021), a defendant cannot be convicted of two crimes based on a single act and a single original charge as it violates the double jeopardy clause, *State v. Mutch*, 171 Wn.2d 646, 662 (2011); while a guilty plea precludes a collateral attack unless there is a double jeopardy violation; I.

***State v. Heutink***, 12 Wn.App.2d 336 (2020)

**Stalking** statute, RCW 9A.46.110(1) (2013), contains phrase "under circumstances not amounting to a felony attempt of another crime," defense argues that it is an essential element that must be pleaded and proved; held: legislative intent is that stalking and some other attempted felony should not lead to punishment for both, and thus it is not an element, *State v. Ward*, 148 Wn.2d 803 (2003); I.

***State v. Case***, 13 Wn.App.2d 657 (2020)

In domestic violence case complainant provides police with sworn statement detailing defendant's assault, at trial she recants and testifies she does not remember the incident, defense counsel elicits on cross that she is not afraid of defendant and not afraid to testify, trial court sustains objections to questions about whether or not she was threatened in order to get her to testify, whether she found it difficult to testify and whether she was concerned about being charged with perjury; state calls mental health counselor as an expert to testify that domestic violence victims somewhat commonly recant; held: while the court erred in sustaining relevance objections to threats which would have made it more probable that she was telling the truth at trial and would have affected her credibility, to establish a Sixth Amendment violation the excluded evidence must have extremely high probative value, *State v. Lee*, 188 Wn.2d 473, 485-96 (2017), *State v. Arndt*, 194 Wn.2d 784, 812 (2019); here, defense was still able to argue that complainant's recantation was genuine, thus error was harmless under non-constitutional standard, *State v. Barry*, 183 Wn.2d 297, 317 (2015); expert's testimony was not improper as he did not comment directly on complainant's credibility as witness did not link his testimony to the facts of the case, *State v. Ciskie*, 110 Wn.2d 263, 280 (1988), *State v. Stevens*, 58 Wn.App. 478 (1990), *but see: State v. Thach*, 126 Wn.App. 297, 314 (2005); I.

***State v. Marjama***, 14 Wn.App.2d 803 (2020)

Aggravator of domestic violence in the presence of **minor children**, RCW 9.94A.535(h)(2) (2019), applies if only one child is present; II.

***State v. Madden***, 16 Wn.App.2d 327 (2021)

Defendant has three no contact orders with the same victim, contacts her once and is convicted of three counts of violation of a no contact order; held: multiple convictions under a single statute based on a single act violate double jeopardy clause; I.

***State v. Christian***, 18 Wn.App.2d 185 (2021)

**Interfering with the reporting of domestic violence**, RCW 9A.36.150 (1996), is a strict liability crime; I.

***State v. Briggs***, 18 Wn.App.2d 544 (2021)

Information charging **no contact order violation**, RCW 10.99.050(2)(a), that does not include *mens rea* element of "willfulness" is deficient even when raised for the first time on appeal; information alleging attempted violation of a no contact order must include *mens rea* element that defendant intended to commit the specific crime; I.

***State v. Harris***, 20 Wn.App.2d 153 (2021)

In no contact order case victim recants, trial court allows state to cross-examine her regarding a prior assault; held: prior assault to challenge a recanting victim's credibility is admissible within court's discretion where court offers a limiting instruction and, on the record, identifies the purpose of the evidence, whether it proves an element of the crime and weighs probative value against prejudicial effect, *State v. Magers*, 164 Wn.2d 174 (2008), *cf.: State v. Gunderson*, 181 Wn.2d 916 (2014), expert testimony is not required, *see: State v. Case*, 13 Wn.App.2d 657, 678 (2020); I.

***State v. Abdi-Issa***, 199 Wn.2d 163 (2022)

Defendant kills his date's dog, is convicted of animal cruelty with a domestic violence aggravator; held: domestic violence statute, RCW 10.99.020(4), "includes, but is not limited to" specific crimes as domestic violence offenses, while the dog is the direct victim, the statutory definition of victim includes any person who has sustained injury as a direct result of the crime charged, RCW 9.94A.030(54), domestic violence aggravator was properly applied; 7-2.

***State v. Smalley*** ___ Wn.App.2d ___, 2023WL195252 (2023)

A no-contact order may be entered for the maximum penalty of the crime from the date of sentencing, defendant is not entitled to credit for time served; III.

# DOUBLE JEOPARDY/COLLATERAL ESTOPPEL

(see also: MERGER)

***State v. Kenney***, 23 Wn.App. 220 (1979)

Double jeopardy precludes retrial where court dismisses information after state's case, then *sua sponte* amends, *Evans v. Michigan,* 568 U.S. 313, 185 L.Ed.2d 124 (2013); state must move to amend, *see: State v. Johnston,* 100 Wn.App. 126, 132-33 (2000); II.

***In re Butler***, 24 Wn.App. 175 (1979)

A guilty plea to robbery 2°, assault 2°, same evidence, violates double jeopardy, *State v. Freeman,* 153 Wn.2d 765 (2005), *State v. Ralph,* 175 Wn.App. 814 (2013), *but see: State v. Tanberg,* 121 Wn.App. 134 (2004), set aside assault 2°; III.

***State v. McClelland***, 24 Wn.App. 689 (1979)

At bench trial, court acquits, changes mind and convicts; held: no double jeopardy, *see: Evans v. Michigan,* 568 U.S. 313, 185 L.Ed.2d 124 (2013); I, 2-1.

***Illinois v. Vitale***, 65 L.Ed.2d 228 (1980)

Negligent homicide prosecution not barred by prior conviction of failure to reduce speed to avoid an accident provided that negligent homicide did not always entail proof of failure to reduce speed; 5-4.

***State v. Jones***, 26 Wn.App. 1 (1980)

No double jeopardy if mistrial granted upon court's finding of manifest necessity and there was no abuse of discretion, *State v. Graham,* 91 Wn.App. 663 (1998); here, defendant asked for and got new counsel after jury sworn; I.

***State v. Agren***, 28 Wn.App. 1 (1980)

Defendant charged with assault 2°, convicted of lesser simple assault, new trial granted and re-tried on assault 2°, held: barred by double jeopardy clause, can only be retried on simple assault; II.

***Hudson v. Louisiana***, 67 L.Ed.2d 30 (1981)

Where trial judge grants a new trial due to insufficient evidence, double jeopardy clause bars retrial.

***State v. Escobar***, 30 Wn.App. 131 (1981)

Defendant, convicted of DUI, is later charged and convicted of negligent homicide relating to same incident; state had not completed investigation at time of DUI trial; held: double jeopardy does not prevent prosecution for a greater offense subsequent to a prosecution for a lesser offense which constitutes an element of the greater offense if evidence sufficient to prove

the greater offense was previously not available to the state despite its exercise of due diligence, *Brown v. Ohio*, 53 L.Ed.2d 187 (1977), *State v. Higley*, 78 Wn.App. 172 (1995), *State v. McMurray*, 40 Wn.App. 872 (1985), *but see: State v. Culp*, 30 Wn.App. 879 (1982); III.

***State v. Funkhouser***, 30 Wn.App. 617 (1981)

Where a defendant is acquitted at trial, state may be barred by collateral estoppel from using the evidence adduced at first trial against defendant at a subsequent trial on different charges if the evidence sought to be used in the second trial was necessarily determined in defendant's favor by the previous acquittal; II.

***State v. Culp***, 30 Wn.App. 879 (1982)

Defendant, convicted of DUI and negligent driving, is later charged with negligent homicide, held: DUI and negligent driving is lesser of negligent homicide, thus double jeopardy clause bars prosecution; conflicts with *State v. Escobar*, 30 Wn.App. 131 (1981); II.

***State v. Mason***, 31 Wn.App. 680 (1982)

Defendant charged with multiple counts of promoting prostitution for having multiple prostitutes working for him may be convicted on each count but must receive concurrent sentences, *see: State v. Adel*, 136 Wn.2d 629 (1998), *but see: State v. Barnee*, 187 Wn.2d 375 (2017); II.

***State v. Turner***, 31 Wn.App. 843 (1982)

Double jeopardy clause does not apply where defendant robs two people at same time, gets property from each, *State v. Larkin*, 70 Wn.App. 349 (1993); II.

***State v. Anderson***, 96 Wn.2d 739 (1982)

Defendant is convicted in 1977 of murder 1° by "extreme indifference," RCW 9A.32.030(1)(b); conviction is reversed on appeal, defendant is then charged with murder 1° by premeditation, Supreme Court orders information dismissed without prejudice, as state failed to join the related offenses of premeditated murder 1° with murder 1° by extreme indifference, CrR 4.3(c)(3); Supreme Court holds state is not barred by double jeopardy clause from charging defendant with any lesser included offense (murder 1°, manslaughter), as the original reversal was not based upon insufficiency of the evidence, but rather upon inapplicability of the statute [extreme indifference does not apply where the defendant intended the death of the particular victim], *State v. Anderson*, 94 Wn.2d 176 (1980)]; *see: State v. Markle*, 118 Wn.2d 424 (1992), *State v. Canfield*, 13 Wn.App.2d 410 (2020); 6-3.

***State v. Jones***, 97 Wn.2d 159 (1982)

Judge inquires of a jury whether there is any possibility of reaching a verdict by 1:30 am, having deliberated since 11:10 am the previous day; jury reports there is no possibility, court declares a mistrial; held: "extraordinary and striking circumstances" must exist before a judge can declare a hung jury; jury's acknowledgement of a hopeless deadlock meets test; here, court's inquiries were insufficient to establish that jury was genuinely deadlocked, thus mistrial was improperly declared, and retrial is prohibited by double jeopardy clause, *see: State v. Fish*, 99 Wn.App. 86, 90-92 (1999), *see also: Renico v. Lett*, 559 U.S. 766, 176 L.Ed.2d 678 (2010) , *State v. Strine*, 176 Wn.2d 742 (2013); 9-0.

***State v. Vladovic***, 99 Wn.2d 413 (1983)

Kidnapping does not merge into robbery 1°, *State v. Johnson*, 96 Wn.2d 926 (1982), *State v. McFarland*, 73 Wn.App. 57, 66-9 (1994), *State v. Grant*, 172 Wn.App. 496 (2012), *cf.*, *State v. Allen*, 94 Wn.2d 860, 864 (1980) (*dicta* to contrary reversed), *but see: State v. Muhammad*, 451 Wn.2d 1060 (2019), *see: State v. Rivera*, 85 Wn.App. 296, 301-3 (1997), *State v. Butler*, 165 Wn.App. 820, 828-33 (2012), *but see: State v. Korum*, 120 Wn.App. 686, 157 Wn.2d 614 (2006), *State v. Lindsay*, 171 Wn.App. 808, 840-48 (2012), *reversed, on different grounds*, 180 Wn.2d 423 (2014), *State v. Rattana Keo Phuong*, 174 Wn.App. 494 (2013), *see: State v. Berg*, 181 Wn.2d 857 (2014); double jeopardy does not prohibit consecutive sentences for robbery 1° and kidnapping; 5-4.

***State v. Caliguri***, 99 Wn.2d 501 (1983)

Defendant, convicted of racketeering in federal court, is charged in state court with conspiracy to commit murder 1° and conspiracy to commit arson 2°; RCW 10.45.040 prohibits prosecution in state court of persons acquitted or convicted in another state or country (construed to include federal court) of crimes "founded upon the act or omission with respect to which he is upon trial"; although the state charges are not lessers of racketeering because elements of state charges are permissive, not necessarily included in racketeering, actual use of a permissive element makes it a lesser for purposes of double jeopardy analysis; because arson case was included in racketeering charge, it is dismissed; *see*: *In re Cook*, 114 Wn.2d 802 (1990), *State v. Mathers*, 77 Wn.App. 487 (1995); 9-0.

***Missouri v. Hunter***, 74 L.Ed.2d 535 (1983)

Defendant is convicted of robbery and "armed criminal action" on same facts in one trial; state statute mandates that sentences shall run consecutively; held: with respect to cumulative sentences imposed in a single trial, double jeopardy does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended; 7-2.

***State v. Browning***, 38 Wn.App. 772 (1984)

State argues to jury that an instruction is misleading, whereupon court declares a mistrial *sua sponte*; held: no manifest necessity for mistrial, abuse of discretion by trial court prohibits retrial, *see: State v. Graham*, 91 Wn.App. 663 (1998), *State v. Robinson*, 146 Wn.App. 471 (2008); II.

***State v. Russell***, 101 Wn.2d 349 (1984)

Defendant initially charged with intentional murder 1°; at first trial, jury acquits, hangs on lesser of murder 2°; state amends to add felony-murder (assault) as alternative to murder 2° (intent); held: CrR 4.3 provides for dismissal of charge if defendant has been previously tried on a related charge; pursuant to CrR 4.3, a previous trial includes a mistrial following a hung jury; felony murder is a related charge to intentional murder, *but see: State v. Havens*, 70 Wn.App. 251 (1993), *cf.: State v. Ahluwalia*, 143 Wn.2d 527 (2001); 9-0.

***State v. Petrich***, 101 Wn.2d 566 (1984)

Defendant charged with one count each statutory rape and indecent liberties; victim-granddaughter testifies to numerous incidents; defense moves to require state to elect counts and to elect which incident is to be relied upon to convict; held: mere fact that victim is the same is not enough to call offense a continuing offense or transaction; state must elect or jury must be instructed that they must be unanimous as to which incident has been proved, modifying *State v. Workman*, 66 Wash. 292 (191l), *State v. Irby*, 187 Wn.App. 183, 197-99 (2015); 9-0.

***State v. Rupe***, 101 Wn.2d 664 (1984)

Defendant is convicted of two bank robberies for forcibly taking bank money from two tellers at same time; held: possession or custody is the requirement, not ownership, thus no double jeopardy violations; *see*: *State v. Johnson*, 48 Wn.App. 531 (1987), *State v. Larkin*, 70 Wn.App. 349 (1993), *State v. McJimpson*, 79 Wn.App. 164, 167-71 (1995), *overruled, on other grounds, State v. Fernandez-Medina*, 141 Wn.2d 448 (2000), *cf.: State v. Tvedt*, 116 Wn.App. 316 (2003); 9-0.

***State v. Cockrell***, 102 Wn.2d 561 (1984)

Remand for new trial due to improper denial of affidavit of prejudice does not violate defendant's right against being placed twice in jeopardy, as original judge lacked jurisdiction; 9-0.

***State v. LeFever***, 102 Wn.2d 777 (1984)

Dismissal of habitual criminal proceedings for insufficiency may not be reconsidered unless it was initially tentative or subject to further consideration, *Evans v. Michigan*, 568 U.S. 313, 185 L.Ed.2d 124 (2013); 8-l.

***Arizona v. Rumsey***, 467 U.S. 203, 81 L.Ed.2d 164 (1984)

Defendant is convicted of capital murder and at separate sentencing hearing court finds no aggravating factors and sentences to life; state appeals, state appellate court remands for new sentencing hearing whereupon defendant is sentenced to death; held: since state's capital sentencing proceeding is like a trial, double jeopardy clause bars death sentence since initial sentence constituted an acquittal of the death penalty; 7-2.

***Ohio v. Johnson***, 81 L.Ed.2d 425 (1984)

Defendant charged with murder pleads guilty over state's objection to manslaughter, whereupon court dismisses murder charge as violation of double jeopardy; held: guilty plea to lesser included offense while charges on greater offense remain pending is not an implied acquittal implicating the double jeopardy clause; 7-2.

***Richardson v. United States***, 82 L.Ed.2d 242 (1984)

Following a hung jury, defendant has no valid double jeopardy claim to prevent retrial, as there has been no termination of original jeopardy, regardless of sufficiency of the evidence; 7-2.

***Payne v. Virginia***, 82 L.Ed.2d 801 (1984)

Where conviction of a greater crime (murder) cannot occur without conviction of the lesser crime (robbery), the double jeopardy clause bars prosecution for the lesser crime after conviction of the greater; 9-0.

***State v. Howell***, 40 Wn.App. 49 (1985)

Where jury convicts, after which trial court arrests judgment and dismisses for failure to prove venue, appellate court can reinstate verdict, since defendant was already convicted and court is merely reinstating verdict, not retrying case, *United States v. Wilson*, 43 L.Ed.2d 232 (1975); III.

***State v. Mahoney***, 40 Wn.App. 514 (1985)

Suspect assaults, injures wife, then robs husband by threatening wife; held: no double jeopardy violation, since assault and robbery were distinct acts; I.

***Heath v. Alabama***, 88 L.Ed.2d 387 (1985)

Double jeopardy clause does not bar two different states from convicting a defendant for the same crime; 7-2.

***State v. Mershon***, 43 Wn.App. 132 (1986)

State is barred by the double jeopardy clause from seeking revision from a commissioner's acquittal, RCW 2.24.050, *see: Smith v. Massachusetts*, 160 L.Ed.2d 914 (2005); II.

***State v. Rudy***, 105 Wn.2d 921 (1986)

Due process clause does not prohibit state from prosecuting defendant who was convicted in federal court for the same crime; RCW 10.43.040 prohibits prosecution in state court for the same act, however such prosecution is proper where state court determines that there are different factual elements than those involved in the federal prosecution, *In re Cook*, 114 Wn.2d 802 (1990); here, neither burglary nor kidnapping were identical or included in the Hobbs Act conviction, 18 USC. § 1951 (1982); *see: State v. Ivie*, 136 Wn.2d 173 (1998), *State v. Moses*, 145 Wn.2d 370 (2002); 9-0.

***State v. Netling***, 46 Wn.App. 461 (1987)

Defendants, charged with possession of a controlled substance and delivery of the same substance, plead guilty to possession, seek dismissal of the delivery pursuant to double jeopardy analysis and RCW 10.43.050; held: state is not precluded from continuing prosecution of a greater offense where defendant pleads guilty to a lesser included offense as long as the lesser is not a lesser degree, *see: State v. Padilla*, 84 Wn.App. 523 (1996); state and federal double jeopardy clauses provide the same protection; II.

***State v. Davis***, 47 Wn.App. 91 (1987)

When an offense is proven which elevates another crime to a higher degree, an additional conviction for that offense cannot be allowed to stand unless it involves a separate and distinct injury not merely incidental to crime of which it forms an element; here, assault 1° merges into robbery 1°, *State v. Johnson*, 92 Wn.2d 671 (1979), *State v. Chesnokov*, 175 Wn.App. 345

(2013), *but see:* *State v. Cole*, 117 Wn.App. 870, 873-78 (2003), *State v. Saunders*, 120 Wn.App. 800, 802-24 (2004); I.

***Ricketts v. Adamson***, 97 L.Ed.2d 1 (1987)

Defendant, charged with capital murder, agrees to testify against co-defendants which he does, state permits defendant to plead to murder 1°; when co-defendant's convictions are reversed, defendant declines to testify again; state Supreme Court vacates defendant's conviction, whereupon defendant agrees to testify, rejected by state which convicts defendant of capital murder; held: defendant, breached plea bargain, voiding it; defendant knowingly entered plea bargain thus waived double jeopardy claim; defendant's subsequent offer to testify was of "no moment," as murder 1° conviction had already been vacated; 5-4.

***Lockhart v. Nelson***, 102 L.Ed.2d 265 (1988)

Where an appellate court determines that evidence was erroneously admitted at trial and that remaining evidence that was admitted was insufficient to convict, double jeopardy clause does not bar retrial with additional evidence, *State v. Becerra*, 66 Wn.App. 202 (1992); 6-3.

***State v. Duncan***, 111 Wn.2d 859 (1989)

Defendant, pending murder charges in Washington, is convicted of capital murder in Arkansas; in Arkansas trial, Washington charge is proved in sentencing phase as an aggravating factor; trial court in Washington dismisses murder charge on double jeopardy grounds; pending appeal before Washington appellate court, Arkansas Supreme Court reverses, state moves, RAP 7.2(e), and is granted leave to seek vacation of dismissal in trial court; trial court reverses its dismissal and reinstates charge; held: double jeopardy clause does not bar prosecutions by different states for same act, *Heath v. Alabama*, 88 L.Ed.2d 387 (1985); RCW 10.43.040 does not prohibit prosecution in Washington as Arkansas did not charge or convict defendant for the same act, *cf.:* *State v. Dennis*, 67 Wn.App. 863 (1992), *see:* *State v. Ivie*, 136 Wn.2d 173 (1998), *State v. Moses*, 145 Wn.2d 370 (2002); 9-0.

***State v. Hopson***, 113 Wn.2d 273 (1989)

Double jeopardy clauses of state and federal constitutions do not bar retrial following mistrial granted where a government investigator, who was not an officer of the court, twice violated an order *in limine* prohibiting testimony about defendant's prior record, as the misconduct was inadvertent and not consciously designed to prejudice defendant, *Oregon v. Kennedy*, 72 L.Ed.2d 416 (1982), *Oregon v. Kennedy*, 666 P.2d 1316 (1983), *cf.:* *Oregon v. Rathbun*, 600 P.2d 392 (1979), *see:* *State v. Lewis*, 78 Wn.App. 739 (1995), *State v. Martinez*, 121 Wn.App. 21 (2004); 9-0.

***State v. Moore***, 54 Wn.App. 211 (1989)

Convictions for possession of more than 40 grams of marijuana and manufacturing marijuana do not violate double jeopardy clause, *State v. Jones*, 25 Wn.App. 746 (1980); I.

***State v. Larson***, 56 Wn.App. 323 (1989)

Where a consecutive sentence is reversed on appeal and new concurrent sentence is equivalent to the total time on the reversed consecutive sentence, no double jeopardy violation,

because defendant appealed original case; a legal sentence on a multiple count charge may be increased to effectuate the trial court's original sentencing scheme when that scheme is upset by successful legal action of defendant, *Pennsylvania v. Goldhammer*, 88 L.Ed.2d 183 (1985), *Jones v. Thomas*, 105 L.Ed.2d 322 (1989), *see: State v. Brown*, 193 Wn.2d 280 (2019); I.

***Dowling v. United States***, 107 L.Ed.2d 708 (1990)

At bank robbery trial at which robber wore a mask and was with another man, government introduces evidence of which defendant had previously been acquitted, that defendant entered a woman's house two weeks after robbery, wearing a mask with the same other man; held: collateral estoppel does not bar the testimony as the prior acquittal did not determine an ultimate issue in the present case, *distinguishing* *Ashe v. Swenson*, 25 L.Ed.2d 469 (1970), and because government did not have to prove in present trial that the prior bad act occurred beyond a reasonable doubt, *United States v. One Assortment of 89 Firearms*, 79 L.Ed.2d 361 (1984), *State v. Stein*, 140 Wn.App. 43, 61-65 (2007); defendant failed to demonstrate that acquittal at first trial represented a jury determination that he was not one of the men who entered the woman's home, *see: Yeager v. United States*, 174 L.Ed.2d 78 (2009), *Pers. Restraint of Moi*, 184 Wn.2d 575 (2015), *Bravo-Fernandez v. United States*, 580 U.S. 5, 137 S.Ct. 352, 196 L.Ed.2d 242 (2016), *Currier v. Virginia*, 585 U.S. ___ , 138 S.Ct. 2144, 201 L.Ed.2d 650 (2018); 6-3.

***State v. Cleveland***, 58 Wn.App. 634 (1990)

Dependency court finds state failed to meet burden of establishing that defendant sexually abused his stepdaughter; following filing of statutory rape charge, trial court denies motion to dismiss on collateral estoppel grounds; held: test for collateral estoppel (1) issues are identical, (2) prior case ended in final judgment on merits, (3) parties were the same or in privity with prior party, and (4) application of doctrine will not work an injustice, *Beagles v. Seattle-First National Bank*, 25 Wn.App. 925, 929 (1980); collateral estoppel applies where prior adjudication was civil, current one is criminal, *Yates v. United States*, 1 L.Ed.2d 1356 (1957), *Harris v. Washington*, 30 L.Ed.2d 212 (1971); here, urgency and narrow focus of dependency proceedings, lack of prosecution resources and jury trial establish that public policy is against application of doctrine, *State v. Williams*, 132 Wn.2d 248 (1997), *State v. Vasquez*, 148 Wn.2d 303 (2002), *State v. Longo*, 185 Wn.App. 804 (2015), *but see: Harris v. Washington*, *supra*, *reversing* *State v. Harris*, 78 Wn.2d 894 (1971); I.

***State v. Souza***, 60 Wn.App. 534 (1991)

Following bench trial, court convicts and enters findings of fact that omit a material element; held: where there is evidence in the record to support the missing element, remedy is remand for entry of further findings without the introduction of new evidence, *State v. Jones*, 34 Wn.App. 848 (1983), *State v. Greco*, 57 Wn.App. 196, 205 (1990), *State v. Head*, 136 Wn.2d 619, 625 (1998), *distinguishing* *State v. Jacobson*, 36 Wn.App. 446, 450 (1983), *but see:* *State v. BJS*, 72 Wn.App. 368 (1994); 2-1, I.

***State v. Markle***, 118 Wn.2d 424 (1992)

Trial court permits amendment mid-trial to an offense that is not a lesser, defendant convicted; Supreme Court holds that while conviction on non-lesser is reversed, defendant may be retried on that charge, not barred by double jeopardy clause as conviction was not reversed for

insufficiency, *State v. Anderson*, 96 Wn.2d 739 (1982), *but see:* *State v. Dallas*, 126 Wn.2d 324 (1995); 9-0.

***State v. Laviollette***, 118 Wn.2d 670 (1992)

Defendant pleads guilty to theft in district court, is later convicted of burglary in which underlying crime was the theft; held: burglary trial court relied on conduct (theft) for which defendant had already been convicted, thus double jeopardy precludes burglary conviction, *but see:* *United States v. Dixon*, 125 L.Ed.2d 556 (1993); *accord:* *State v. Watkins*, 70 Wn.App. 245 (1993); 9-0.

***State v. Rich***, 63 Wn.App. 743 (1992)

After jury is sworn, defendant fails to appear; at state's request, over defense counsel's objection, court commences trial, during which no witness identifies defendant; after both parties rest, defendant appears; trial court gives defense choice of allowing state to reopen or mistrial, defense objects to both, trial court grants *sua sponte* mistrial; held: no manifest necessity or emergency existed that justified discharge of jury, thus mistrial over defense objection amounts to an acquittal, *State v. Connors*, 59 Wn.2d 879, 883 (1962), *State v. Juarez*, 115 Wn.App. 881 (2003), *State v. Sheets*, 128 Wn.App. 149 (2005), *State v. Robinson*, 146 Wn.App. 471 (2008), *see also:* *State v. Graham*, 91 Wn.App. 663 (1998); II.

***State v. Kirk***, 64 Wn.App. 788 (1992)

Jury returns no verdict on greater offense, convicts of lesser, *State v. Labanowski*, 117 Wn.2d 405 (1991); trial court discharges jury without consent of defendant and without determination of "extraordinary and striking" circumstances (such as jury acknowledgment of a hopeless deadlock on greater offense), *State v. Jones*, 97 Wn.2d 159, 162 (1982), state re-notes greater offense for trial, defense seeks discretionary review; held: mere acknowledgment that jurors were unable to agree on greater offense is insufficient to allow discharge of jury, thus defendant's right to be protected from double jeopardy was violated, *Green v. United States*, 2 L.Ed.2d 199 (1957), *see:* *State v. Fish*, 99 Wn.App. 86, 90-92 (1999), *State v. Linton*, 122 Wn.App. 73 (2004), 156 Wn.2d 777 (2006), *but see:* *State v. Barnes*, 85 Wn.App. 638, 656-8 (1997), *State v. Daniels*, 160 Wn.2d 256 (2007), 165 Wn.2d 627 (2009; III.

***State v. Garcia***, 65 Wn.App. 681 (1992)

Defendant is convicted of delivery of drugs and possession with intent to deliver, evidence having established that defendant delivered drugs, possessed more drugs upon arrest; held: because jury was not instructed that the possession with intent to deliver charge could only apply to the drugs still in defendant's possession at arrest and not to the actual delivery, the offenses merge, *see:* *State v. Vladovic*, 99 Wn.2d 413, 421 (1983), *State v. Burns*, 114 Wn.2d 314, 319 (1990), *State v. Louis*, 155 Wn.2d 563 (2005), *but see:* *State v. Carter*, 74 Wn.App. 320, 333-4 (1994), *rev'd, in part, on other grounds,* 127 Wn.2d 836 (1995), *State v. Fisher*, 74 Wn.App. 804, 816-8 (1994), thus remanded for new trial on possession with intent charge; concurrent sentences doctrine does not apply since SRA offender score on delivery increased due to possession with intent conviction, sentence imposed was not within standard range for delivery alone; I.

***State v. Austin***, 65 Wn.App. 759 (1992)

Where juvenile court fails to enter finding regarding *mens rea* element, and where record supports the missing element, then remand is the remedy, *but see: State v. PeBa*, 65 Wn.App. 711 (1992), *State v. BJS*, 72 Wn.App. 368 (1994), *State v. Head*, 136 Wn.2d 619 (1998); double jeopardy clause precludes remand only where record is devoid of any evidence to support the omitted finding; I, 2-1.

***State v. Becerra***, 66 Wn.App. 202 (1992)

Where evidence is admitted on a procedural error [here, lab test reports, CrR 6.13(b)], and the evidence would have been sufficient if procedural error had not occurred, retrial is not precluded by double jeopardy clause, *Lockhart v. Nelson*, 102 L.Ed.2d 265 (1988); III.

***State v. Soderholm***, 68 Wn.App. 363 (1993)

State serves defendant with noncriminal notice of infraction for performing work while not registered as a contractor, RCW 18.27.270, defendant pays fine in an untimely manner, defendant is charged and convicted for criminal unregistered contracting, RCW 18.27.020, based upon same incident; held: because the prior proceeding was not pursued to a final result, the "same evidence" test of *State v. Roybal*, 82 Wn.2d 577 (1973) and *Blockburger v. United States*, 76 L.Ed. 306 (1932) is not applicable; I.

***United States v. Dixon***, 125 L.Ed.2d 556 (1993)

Defendant 1, on PR on condition of no crimes, is arrested for a drug offense, found guilty of criminal contempt for violating release terms, and moves to dismiss the drug charge on grounds that indictment violates double jeopardy clause; defendant 2, found in contempt for violating a civil protection order, moves to dismiss subsequent assault charge on victim arising from same incident; held: where two offenses for which defendant is punished or tried cannot survive the "same elements" test, double jeopardy bar applies, *Blockburger v. United States*, 76 L.Ed. 306 (1932); same elements test: whether each offense contains an element not contained in the other; "same conduct" test, *Grady v. Corbin*, 109 L.Ed.2d 548 (1990) is overruled; (fractured opinion).

***State v. Watkins***, 70 Wn.App. 245 (1993)

Defendant pleads guilty to DUI in district court, later felony flight charge, from same incident, is dismissed by trial court; held: where state maintains that it will prove reckless driving elements of felony flight without reference to defendant's intoxication, then different conduct is being proved, *distinguishing Grady v. Corbin*, 109 L.Ed.2d 548 (1990), overruled by *United States v. Dixon*, 125 L.Ed.2d 556 (1993), thus double jeopardy clause is not violated; *Grady v. Corbin* does not establish a "same transaction" test, *State v. Laviollette*, 118 Wn.2d 670 (1992); III.

***State v. Larkin***, 70 Wn.App. 349 (1993)

Defendants commit residential robbery, stealing property of both husband and wife, charged with two counts; held: no double jeopardy violation where defendant robs from husband and wife; deprivation of any ownership interest, including an undivided share, will support a robbery conviction, as will a taking from one having custody or possession, *State v. Turner*,

31 Wn.App. 843 (1982), *State v. Rupe*, 101 Wn.2d 664 (1984), *distinguishing* *State v. Johnson*, 48 Wn.App. 531 (1987), *cf.: State v. Tvedt*, 153 Wn.2d 705 (2005); doctrine of merger only applies where one offense is a statutory lesser of the other, *State v. Johnson*, 92 Wn.2d 671, 677 n. 4 (1979); crimes against multiple victims are not subject to doctrine of merger, *State v. Hudlow*, 36 Wn.App. 630, 633 (1984), *State v. Clapp*, 67 Wn.App. 263, 275 (1992); I.

***State v. Jones***, 71 Wn.App. 798, 824-6 (1993)

Child molestation 1°, RCW 9A.44.083, and rape of a child 1°, RCW 9A.44.073, are not the same offense, since each requires the state to prove an element that the other does not, *In re Fletcher*, 113 Wn.2d 42, 47 (1989), and do not merge, as the latter is not a lesser of the former, *State v. Speece*, 115 Wn.2d 360, 362 (1990); where two offenses are legally and factually distinct, even though both may have occurred during the same incident, failure to provide a unanimity instruction does not violate double jeopardy clause or doctrine of merger; I.

***State v. BJS***, 72 Wn.App. 368 (1994)

Where findings of fact fail to address an element of the crime, remedy is dismissal, *State v. PeBa*, 65 Wn.App. 711, 715 (1992), *but see: State v. Souza*, 60 Wn.App. 534 (1991), *State v. Austin*, 65 Wn.App. 759 (1992), *State v. Head*, 136 Wn.2d 619 (1998); III.

***State v. Gocken*,** 72 Wn.App. 908 (1994)

Plea to use of drug paraphernalia, RCW 69.50.412(l), does not bar prosecution for possession of a controlled substance with intent to deliver, as each statute requires proof of a fact which the other does not, *United States v. Dixon*, 125 L.Ed.2d 556 (1993), *Blockburger v. United States*, 76 L.Ed. 306 (1932); III.

***State v. Cabrera***, 73 Wn.App. 165, 169-70 (1994)

To prove out-of-state priors at SRA sentencing, state offers, over objection, prior Washington judgments which contain findings of fact that out-of-state convictions were part of defendant's criminal history; held: collateral estoppel does not bar defendant from challenging priors, as there was no evidence defendant objected at prior proceeding, thus court cannot conclude that the identical issue was raised; I.

***State v. McFarland***, 73 Wn.App. 57, 66-9 (1994)

Attempted robbery and kidnapping do not merge and do not violate double jeopardy clause where tried together, as the offenses are not the same in law and in fact, *State v. Vladovic*, 99 Wn.2d 413, 423-3 (1983), *State v. Louis*, 155 Wn.2d 63 (2005), *State v. Leming*, 133 Wn.App. 875 (2006), *State v. Grant*, 172 Wn.App. 496 (2012), *State v. Rattana Keo Phuong*, 174 Wn.App. 494 (2013); II.

***State v. Crisler***, 73 Wn.App. 219 (1994)

Defendant pleads guilty to conspiracy to commit theft, is later tried for accomplice to theft for same incident; held: under the same elements test, *United States v. Dixon*, 125 L.Ed.2d 556, 573 (1993), *Blockburger v. United States*, 76 L.Ed. 306 (1932), double jeopardy clause does not bar second prosecution as conspiracy requires element of intent, accomplice liability requires knowledge, conspiracy requires that any conspirator take a substantial step, accomplice requires

that defendant solicit, command, aid or agree; guilty plea is a conviction, RCW 9.94A.030(9), *see:* *Tembruell v. Seattle*, 64 Wn.2d 503, 510 (1964); III.

***State v. Clark***, 124 Wn.2d 90, 95-102 (1994)

Combination of criminal punishment and civil forfeiture of home do not violate double jeopardy clause of United States Constitution, *United States v. Ursery*, 135 L.Ed.2d 549 (1996), *see: State v. Cole*, 128 Wn.2d 262 (1995); 9-0.

***State v. Carter***, 74 Wn.App. 320, 333-4 (1994), *rev'd, in part, on other grounds,* 127 Wn.2d 836 (1995)

Defendant is convicted of delivery and possession with intent to deliver, claims double jeopardy clause is violated as jury was not instructed regarding merger; held: because prosecutor clearly distinguished the charges during trial, jury was instructed she was being tried for two separate crimes, both parties during closing argued two separate acts, no double jeopardy violation, *State v. Fisher*, 74 Wn.App. 804, 816-8 (1994), *distinguishing* *State v. Garcia*, 65 Wn.App. 681, 691 (1992); I.

***State v. Maxfield***, 125 Wn.2d 378, 399-401 (1994), *rev'd, on other grounds, Pers. Restraint of Maxfield*, 133 Wn.2d 332 (1997)

Defendant is convicted of manufacturing marijuana and possession with intent to deliver; held: a double jeopardy challenge to multiple punishment within the same prosecution uses *Blockburger v. United States*, 76 L.Ed. 306 (1932) same elements test rather than *United States v. Dixon*, 125 L.Ed.2d 556, 573 (1993)(successive prosecutions); here, each offense contained different elements, thus they are not the same offense, *State v. Gocken*, 127 Wn.2d 95 (1995).

***State v. Fisher***, 74 Wn.App. 804, 816-8 (1994)

Defendant is charged as an accomplice to delivery of drugs and as an accomplice to possession with intent to deliver, "to convict" instructions do not distinguish between the two incidents; held: absent evidence of jury confusion as to the factual basis for each count, where separate crimes are charged, evidence is presented on each charge and the argument clearly distinguishes, then no double jeopardy violation exists, *distinguishing* *State v. Garcia*, 65 Wn.App. 681 (1992) (jury sent out note indicating confusion); I.

***State v. Zwiefelhofer***, 75 Wn.App. 440 (1994)

Jury announces acquittal, is polled and is discharged, after which jurors state foreperson erred and should have written "guilty" on one count, court reverses verdict and sentences; held: once acquittal is announced and jurors pass from trial court's control, "correction" of verdict violates defendant's double jeopardy rights; II.

***State v. Calle***, 125 Wn.2d 769 (1995)

Incest and rape, from a single act, are intended by legislature to be separate crimes, and do not violate double jeopardy clause, *State v. Smith,* 177 Wn.2d 533, 545-50 (2013), , *State v. Chenoweth,* 185 Wn.2d 218 (2016), *see:* *State v. Timothy K.*, 107 Wn.App. 784 (2001); double jeopardy analysis applies even if sentences run concurrently, overruling, in part, *State v.*

*Johnson*, 96 Wn.2d 926 (1982), *State v. Bonds*, 98 Wn.2d 1 (1982), *see:* *State v. Hull*, 83 Wn.App. 786, 792-4 (1996), *State v. Frohs*, 83 Wn.App. 803 (1996), *State v. Rivera*, 85 Wn.App. 296 (1997), *but see: State v. Eaton*, 82 Wn.App. 723, 729 (1996), *State v. Lynch*, 93 Wn.App. 716, 723-27 (1999); 9-0.

***State v. Mathers***, 77 Wn.App. 487 (1995)

Defendant is convicted of unauthorized use of a motor vehicle and theft of guns in Oregon, and taking and riding a motor vehicle and theft 2° in Washington; held: statutory prohibition against double jeopardy between states, RCW 10.43.040, requires that successive trials involve the same act and the same offense, *State v. Caliguri*, 99 Wn.2d 501, 513-4 (1983); here, taking and riding is the same as the Oregon offense, but thefts are not as Washington requires intent to deprive while in Oregon defendant was convicted for knowingly retaining a firearm which he knew was the subject of theft, and thus are not, in fact, the same, *In re Cook*, 114 Wn.2d 802, 816 (1990), *see: State v. Ivie*, 136 Wn.2d 173 (1998), *State v. Moses*, 145 Wn.2d 370 (2002), *State v. Rivera-Santos*, 166 Wn.2d 722 (2009); III.

***Witte v. United States***, 132 L.Ed.2d 351 (1995)

Defendant is convicted of a marijuana felony, sentencing judge takes into consideration cocaine importation activities in enhancing sentence, after which defendant is charged with same cocaine importation, trial court dismisses; held: the use of relevant conduct to increase the punishment of a charged offense does not punish the offender for the relevant conduct, *Williams v. Oklahoma*, 3 L.Ed.2d 516 (1959), thus does not violate double jeopardy clause; 8-1.

***State v. Alvarez***, 128 Wn.2d 1 (1995)

Where evidence is sufficient but trial court's findings are not, proper remedy is remand, not dismissal, *State v. Souza*, 60 Wn.App. 534 (1991), *State v. Royal*, 122 Wn.2d 413 (1993), *see: State v. Head*, 136 Wn.2d 619 (1998), overruling *State v. PeBa*, 65 Wn.App. 711 (1992), *State v. BJS*, 72 Wn.App. 368 (1994); *affirms* *State v. Alvarez*, 74 Wn.App. 250 (1994); 6-3.

***State v. Cole***, 128 Wn.2d 262, 273-85 (1995)

Civil forfeiture of proceeds traceable to a criminal violation does not constitute punishment under the Fifth Amendment; plurality declines to decide double jeopardy issue in companion case, remands for trial court determination whether property forfeited was proceeds, at 284-85, *see: United States v. Ursery*, 135 L.Ed.2d 549 (1996), *State v. Catlett*, 133 Wn.2d 355 (1997); 3-3-3.

***State v. Higley***, 78 Wn.App. 172, 178-81 (1995)

Defendant is charged with DUI following accident, petition for deferred prosecution is granted, prosecutor later learns accident victim was seriously injured, on state's motion district court dismisses DUI, defendant is charged and convicted of vehicular assault; held: defendant was not put to trial when deferred prosecution was entered, thus jeopardy did not attach, *Serfass v United States*, 43 L.Ed.2d 265 (1975), *United States v. Martin Linen Supply Co.*, 51 L.Ed.2d 642 (1977), *Pers. Restraint of Swagerty*, 186 Wash. 2d 801, 813-14 (2016); even if jeopardy had attached, defendant could be prosecuted for greater offense where the evidence sufficient to prove the greater offense was not previously available despite exercise of due diligence, *State v.*

*Escobar*, 30 Wn.App. 131 (1981), *State v. McMurray*, 40 Wn.App. 872 (1985), *Brown v. Ohio*, 53 L.Ed.2d 187 (1977); due diligence does not oblige police or prosecutor to recontact victim about extent of injuries after she has been discharged from hospital following accident with no apparent serious injury; II.

***State v. Bryant***, 78 Wn.App. 805 (1995)

Manufacturing marijuana, RCW 69.50.401(a)(1)(ii), and making a building available for the manufacture of a controlled substance, RCW 69.53.010(1), are not the same offense for double jeopardy analysis as they do not satisfy same elements test, *United States v. Dixon*, 125 L.Ed.2d 556 (1993); here, defendant was acquitted of manufacturing, jury hung on making building available, evidence admitted at first trial regarding manufacturing is admissible at retrial on making building available under double jeopardy analysis, court declines to address collateral estoppel as it was not raised at trial; II.

***State v. Kassahun***, 78 Wn.App. 938 (1995)

Defendant is charged with murder and assault, is acquitted of assault, hung on murder; at retrial on murder, defense offer of evidence of acquittal is refused, trial court gives first aggressor instruction, WPIC 16.04, which arguably referred to the previously acquitted assault; held: collateral estoppel doctrine requires that evidence of acquittal be admitted, *distinguishing State v. Tarman*, 27 Wn.App. 645, 652 (1980), and that jury receive an instruction as to the issue-preclusion consequences of the acquittal; first aggressor instruction must be crafted to preclude argument that defendant's aggression towards assault victim negates self-defense; I.

***State v. McJimpson***, 79 Wn.App. 164, 167-71 (1995), *overruled, on other grounds, State v. Fernandez-Medina*, 141 Wn.2d 448 (2000)

Felony murder (assault) and assault 2° are the same in law, *State v. Vladovic*, 99 Wn.2d 413, 423 (1983), but here are not the same in fact even though they arise from same transaction, *Vladovic, supra*, at 423, thus double jeopardy clause does not bar conviction and punishment for both, *State v. Calle*, 125 Wn.2d 769, 777 (1995), *State v. Timothy K.*, 107 Wn.App. 784 (2001), *distinguishing State v. Johnson*, 48 Wn.App. 531 (1987), assault is not a lesser included offense of felony murder, *State v. Davis*, 121 Wn.2d 1, 6 (1993); charges do not merge, *State v. Wanrow*, 91 Wn.2d 301, 312 (1978), *State v. Goodrich*, 72 Wn.App. 71, 78-9 (1993), *State v. Leonard*, 183 Wn.App. 532 (2014), *remanded, on other grounds*, 184 Wn.2d 505 (2015); I.

***State v. Lopez***, 79 Wn.App. 755, 760-03 (1995)

Defendant is arrested after buying cocaine from police, more cocaine is found on his person, is convicted of two counts; held: defendant possessed cocaine in a continuous, uninterrupted series of events during a relatively short period of time, thus double jeopardy clause precludes conviction of two counts, *State v. O'Connor*, 87 Wn.App. 119 (1997), *State v. Chenoweth*, 127 Wn.App. 444, 462-63 (2005), *aff'd, on other grounds,* 160 Wn.2d 454 (2007), *State v. Villanueva-Gonzalez*,180 Wn.2d 975 (2014), *distinguishing State v. McFadden*, 63 Wn.App. 441, 443 (1991), *State v. Adel*, 136 Wn.2d 629 (1998), *cf.: Pers. Restraint of Davis*, 142 Wn.2d 165 (2000); III.

***United States v. Ursery***, 135 L.Ed.2d 549 (1996)

Government forfeits a house where marijuana was present, subsequently convicts owners of crimes; held: *in rem* civil forfeitures do not constitute punishment, thus defendant was not placed in jeopardy in the civil forfeiture proceeding against his house, *distinguishing* *United States v. Halper*, 104 L.Ed.2d 487 (1989); *State v. Lynch*, 84 Wn.App. 467, 471-7 (1996), *see:* *State v. Catlett*, 133 Wn.2d 355 (1997), *State v. Cole*, 128 Wn.2d 262 (1995); 8-1.

***State v. Hardesty***, 129 Wn.2d 303 (1996)

Defendant is sentenced, serves his time, only remaining matter is payment of costs, prosecutor reports to trial court that defendant lied about priors, trial court concludes defendant committed fraud and resentences to more time; held: a defendant who defrauds the trial court has no expectation of finality merely because he has completed the "undeservedly short sentence," double jeopardy clause does not preclude resentencing, *see:* *United States v. DiFrancesco*, 66 L.Ed.2d 328 (1980), *reversing, in part*, *State v. Hardesty*, 78 Wn.App. 593 (1995); to set aside a served sentence, state must file a motion and affidavit, CrR 7.8(c), and prove all the elements of fraud, CrR 7.8(b)(3), by clear and convincing evidence; 9-0.

***State v. Corrado***, 81 Wn.App. 640, 643-62 (1996)

Defendant is acquitted of attempted murder 1°, convicted of lesser attempted murder 2°, conviction is reversed because state never filed a charging document, thus court lacked jurisdiction, *State v. Corrado*, 78 Wn.App. 612 (1995), state files information charging attempted murder 1°; held: jeopardy attached and terminated with respect to attempted murder 1°, as defendant was tried and acquitted irrespective of lack of jurisdiction, jeopardy has not terminated as to attempted murder 2°, thus defendant can be retried, *State v. Gamble*, 137 Wn.App. 892, 901 (2007), 168 Wn.2d 161 (2010), *see:* *State v. Barnes*, 146 Wn.2d 74 (2002), *State v. Rogers*, 146 Wn.2d 55, 56-60 (2002); II.

***State v. Grant***, 83 Wn.App. 98, 110-1 (1996)

Defendant is found to have violated community supervision by violating no contact order, felony no contact order violation is filed, RCW 10.99.040(4), -.050(2), defendant moves to dismiss claiming double jeopardy; held: CONST., Art. 1, § 9, is coextensive with United States Constitution double jeopardy clause, *State v. Gocken*, 127 Wn.2d 95, 107 (1995), an order of confinement for community supervision violation does not preclude subsequent criminal prosecution, *State v. Prado*, 86 Wn.App. 573 (1997); I.

***State v. Molina***, 83 Wn.App. 144, 146-67 (1996)

Defendants rob a store with two clerks, take money from one cash register, are convicted of two counts of robbery; held: when robbery occurs in a commercial establishment, multiple counts are identical in fact when victims exercise joint control over the property taken but there is no separate taking from each individual, thus double jeopardy clause bars conviction on two counts, *State v. Johnson*, 48 Wn.App. 531 (1987), distinguishing *State v. Rupe*, 101 Wn.2d 665 (1984), *State v. Larkin*, 70 Wn.App. 349 (1993), *see:* *State v. Tvedt*, 153 Wn.2d 705 (2005), *cf.:* *State v. McJimpson*, 79 Wn.App. 164, 167-71 (1995), *overruled, on other grounds, State v. Fernandez-Medina*, 141 Wn.2d 448 (2000); I.

***State v. Hull***, 83 Wn.App. 786, 792-4 (1996)

Theft and L&I fraud, RCW 51.48.020(2), are the same offenses for double jeopardy purposes, as the legislature intended L&I fraud to be a more specific species of theft, *see:* *State v. Potter*, 31 Wn.App. 883, 888 (1982), *State v. Calle*, 125 Wn.2d 769, 778-80 (1995), *State v. Timothy K.*, 107 Wn.App. 784 (2001); III.

***State v. Padilla***, 84 Wn.App. 523 (1996)

Defendant is charged in the alternative with assault 1° and with assault 2° with a deadly weapon allegation, trial court accepts guilty plea, over state's objection, to assault 2°, dismisses assault 1°; held: where defendant is acquitted or convicted of a crime, RCW 10.43.050 precludes trial for the same crime in another degree, unless second charge is a lesser included offense, *State v. Netling*, 46 Wn.App. 461 (1987), *State v. Ahluwalia*, 143 Wn.2d 527 (2001); weapons allegation does not convert assault 2° into a lesser of assault 1°, thus dismissal affirmed; III.

***United States v. Watts***, 136 L.Ed.2d 554 (1997)

Defendant is convicted on one count, acquitted on another, sentencing court finds facts on acquitted count by preponderance and adds points based on that count in imposing sentence; held: acquittal does not preclude government from relitigating an issue in a subsequent action governed by a lower standard of proof, *Dowling v. United States*, 107 L.Ed.2d 708 (1990), *McMillan v. Pennsylvania*, 91 L.Ed.2d 67 (1986), *but see: Alleyne v. United States*, 570 U.S. 99, 186 L. Ed. 2d 314 (2013), *Williams v. New York*, 93 L.Ed. 1337 (1949); 7-2.

***State v. McLendon***, 131 Wn.2d 853 (1997)

Defendants are arrested for DUI, breath tests exceed .10, Department of Licensing issues probationary licenses, RCW 46.61.502; held: administrative issuance of probationary licenses is not punishment under double jeopardy clause; 5-4.

***State v. Michielli***, 132 Wn.2d 229, 237-9 (1997)

Merger doctrine is inapplicable pretrial, can only apply where defendant is convicted of multiple counts; 9-0.

***State v. Williams***, 132 Wn.2d 328 (1997)

At DSHS administrative hearing, defendant is found to have been overpaid public assistance, ordered to repay, state charges defendant with welfare fraud, defense seeks dismissal; held: purposes underlying administrative hearings and criminal trials are wholly distinct, state would suffer an injustice if **collateral estoppel** doctrine were to apply, reversing *State v. Williams*, 78 Wn.App. 593 (1995), *see: State v. Cleveland*, 58 Wn.App. 634 (1990), *State v. Dupard*, 93 Wn.2d 268 (1980), *State v. Gary J.E.*, 99 Wn.App. 258 (2000), *State v. Vasquez*, 148 Wn.2d 303 (2002), *State v. Longo*, 185 Wn.App. 804 (2015); 7-2.

***State v. Williams***, 85 Wn.App. 271 (1997)

Revocation of driver's license is not punishment under double jeopardy clause, *State v. Scheffel*, 82 Wn.App. 872, 879 (1973), *Rowe v. Department of Licensing*, 88 Wn.App. 781 (1997), *cf.: State v. Hopkins*, 109 Wn.App. 558 (2001); II.

***State v. Rivera***, 85 Wn.App. 296 (1997)

Defendant fires 14 shots into service station, is convicted of three counts of assault 1° and seven counts of reckless endangerment 1°; test to determine if double jeopardy clause is violated (1) does either statute authorize multiple convictions for the same act?, (2) would proof of either charge prove the other offense (same evidence test)?, and (3) did legislature intend to inflict only a single punishment?, *State v. Calle*, 125 Wn.2d 769, 776-80 (1995), *State v. Timothy K.*, 107 Wn.App. 784 (2001); here, statutes do not expressly authorize multiple convictions, assault requires proof of intent, reckless endangerment proof of recklessness, thus elements differ, legislature did not intend to punish both crimes by a single punishment, *see:* *State v. Lynch*, 93 Wn.App. 716, 723-27 (1999); III.

***State v. Barnes***, 85 Wn.App. 638, 650-54 (1997)

Civil complaint against defendant alleging violation of criminal profiteering act, RCW 9A.82.100, is dismissed for lack of evidence, defendant is convicted later of leading organized crime, RCW 9A.82.060(1)(a), trial court denies motion to dismiss based upon **collateral estoppel**; held (1) issues were not identical, as civil action requires proof defendant was successful in obtaining gains, criminal action does not require that defendant succeeded, (2) defense failed to provide record of civil proceeding, thus appellate court cannot determine that earlier litigation was a final judgment on merits, *LeMond v. Dep't of Licensing*, 143 Wn.App. 797 (2008), (3) parties were in privity, and (4) application of doctrine would work an injustice against state as incarceration is a goal of criminal law which is unavailable in a civil action, *State v. Longo*, 185 Wn.App. 804 (2015); II.

***State v. Prado***, 86 Wn.App. 573 (1997)

Defendant, on SRA community supervision with condition of no new crimes, is charged with a felony and admits to the community supervision violation, which is later stricken; held: a community supervision violation is not a criminal prosecution for double jeopardy purposes, *State v. Grant*, 83 Wn.App. 98, 111 (1996), distinguishing *United States v. Dixon*, 125 L.Ed.2d 556 (1993), *see:* *State v. Dupard*, 93 Wn.2d 268, 276 (1980), *Standlee v. Smith*, 83 Wn.2d 405, 407 (1974), *State v. Collins*, 121 Wn.App. 16 (2004); I.

***State v. Catlett***, 133 Wn.2d 355 (1997)

Civil forfeiture of a car used in a drug transaction is not punishment under CONST. Art. I, § 9, *United States v. Ursery*, 135 L.Ed.2d 549 (1996), *State v. Cole*, 128 Wn.2d 262 (1995), reversing *State v. Catlett*, 81 Wn.App. 791 (1996); 5-4.

***State v. O'Connor***, 87 Wn.App. 119 (1997)

At traffic stop, defendant is found with drugs in his car, sock and pocket, is convicted of possession and possession with intent to deliver; held: double jeopardy clause applies if offenses are legally identical and based on same act or transaction, *Kansas v. Hendricks*, 138 L.Ed.2d 501 (1997); offenses are not legally identical if each offense contains an element not contained in the other, *State v. Gocken*, 127 Wn.2d 95, 101 (1995); possession of drugs does not contain an element not found in possession with intent to deliver, thus the offenses are identical, *see:* *State v. Portrey*, 102 Wn.App. 898, 904-07 (2000), *State v. Chenoweth*, 127 Wn.App. 444, 462-63 (2005), *aff'd, on other grounds*, 160 Wn.2d 454 (2007); defendant's possession here was based upon one transaction "in a continuous, uninterrupted series of events," *State v. Lopez*, 79

Wn.App. 755, 763 (1995), thus possession charge must be dismissed, distinguishing *State v. McFadden*, 63 Wn.App. 441 (1991), *see: State v. Adel*, 136 Wn.2d 629 (1998), *cf.: Pers. Restraint of Davis*, 142 Wn.2d 165 (2000); II.

***Hudson v. United States***, 139 L.Ed.2d 450 (1997)

Bankers are civilly fined and debarred for violation of federal banking statutes, later criminally prosecuted for same conduct; held: Congress intended civil fines and debarment sanctions to be civil, sanctions imposed were not so punitive in form and effect as to render them criminal despite Congress's intent to the contrary, *United States v. Ward*, 65 L.Ed.2d 742 (1980), *United States v. Ursery*, 135 L.Ed.2d 549 (1996), revocation of a privilege voluntarily granted, such as debarment, is free of punitive criminal element, *Helvering v. Mitchell*, 82 L.Ed.2d 917 (1938), debarment does not approach imprisonment, *Flemming v. Nestor*, 4 L.Ed.2d 1435 (1960), deterrence as a goal does not render a sanction criminal, thus double jeopardy clause is not violated, disavowing analysis in *United States v. Halper*, 104 L.Ed.2d 487 (1989); 9-0.

***State v. Knutson***, 88 Wn.App. 677 (1997)

School suspension for assault is not solely punitive, thus does not preclude conviction of assault, *State v. McClendon*, 131 Wn.2d 853, 867-8 (1997); I.

***Monge v. California***, 114 L.Ed.2d 615 (1998)

At sentencing, trial court finds defendant previously was convicted of assault with a deadly weapon, thus imposes "three strikes" sentence, appellate court reverses sentence based upon insufficiency of evidence of deadly weapon, state seeks remand for "retrial" on issue of deadly weapon; held: in a noncapital sentencing, double jeopardy clause does not preclude remand and rehearing on a prior conviction allegation, distinguishing *Bullington v. Missouri*, 68 L.Ed.2d 270 (1981); 8-1.

***State v. Taylor***,90 Wn.App. 312, 317-9 (1998)

Assault 2° (putting another in apprehension) and kidnapping 2° (by the use or threatened use of deadly force) do not contain the same elements, *State v. Calle*, 125 Wn.2d 769, 777 (1995), as one can kidnap using deadly force by directing force against another, and one can assault without abducting, thus concurrent charges do not offend double jeopardy clause; II.

***State v. Adel,*** 136 Wn.2d 629 (1998)

Defendant is found with small amounts of marijuana in his car and in his store, is convicted of two counts of possession; held: where the same drug is found within defendant's dominion and control at the same time, then double jeopardy clause precludes conviction of multiple counts, *Bell v. United States*, 99 L.Ed.2d 905 (1955), *State v. Jones*, 117 Wn.App. 721 (2003), *State v. Chenoweth*, 127 Wn.App. 444, 462-63 (2005), *aff'd, on other grounds,* 160 Wn.2d 454 (2007), unless legislature has "intended to punish a person multiple times for simple possession based upon the drug being stashed in multiple places," at 635 ("unit of prosecution"), *see: State v. Tili*, 139 Wn.2d 107, 112-19 (1999), *State v. Bobic*, 140 Wn.2d 250, 260-67 (2000), *State v. Soonalole*, 99 Wn.App. 207 (2000), *State v. Turner*, 102 Wn.App. 202 (2000), *State v. Diaz-Flores*, 148 Wn.App. 911 (2009), *cf.: Pers. Restraint of Davis*, 142 Wn.App. 165 (2000); 9-0.

***State v. Graham,*** 91 Wn.App. 663 (1998)

During bench trial, judge realizes and discloses that he works for complainant, defense does not agree to allow judge to continue, judge disqualifies himself and declares a mistrial; held: mistrial necessitated by recusal in accordance with CJC 3(D)(1) constitutes a manifest necessity, *see: State v. Eldridge,* 17 Wn.App. 270, 276 (1977), *State v. Jones,* 26 Wn.App. 1 (1980), absent bad faith, *see: State v. Browning,* 38 Wn.App. 772 (1984), *State v. Rich,* 63 Wn.App. 743 (1992), jeopardy has not terminated and trial may proceed before a different judge; II.

***State v. Traicoff***, 93 Wn.App. 248, 252-57 (1998)

Following remand, trial court changes sentence from one to two years community placement, based upon erroneous sentence originally imposed, not addressed in original appeal; held: double jeopardy clause does not bar a court from correcting its sentencing error by increasing severity of a sentence to conform to mandatory provisions of a statute, *Bozza v. United States,* 91 L.Ed. 818 (1947), *United States v. DiFrancesco,* 66 L.Ed.2d 328 (1980); I.

***State v. Sweet,*** 91 Wn.App. 612, 616-17 (1998), *aff'd*, 138 Wn.2d 466 (1999)

Under same elements test, *Blockburger v. United States*, 76 L.Ed. 306 (1932), double jeopardy does not bar convictions of assault 1º and burglary 1º because in order to commit assault a defendant does not need to enter or remain unlawfully in a building; II.

***State v. Lynch***, 93 Wn.App. 716 (1999)

Malicious harassment and assault 4° merge in spite of malicious harassment's antimerger clause, one cannot commit malicious harassment without committing simple assault, distinguishing *State v. Calle*, 125 Wn.2d 769 (1995), *State v. Worl*, 74 Wn.App. 605, 611-12 (1994), *cf.: State v. Timothy K.*, 107 Wn.App. 784 (2001); I.

***State v. Hollis***, 93 Wn.App. 804, 812-15 (1999)

Involving minor in a drug transaction, RCW 69.50.401(f) [recodified as RCW 69.50.4015 (2003)], and delivery of cocaine do not violate double jeopardy clause under same elements test, *Blockburger v. United States,* 76 L.Ed. 306 (1932), *State v. Calle,* 125 Wn.2d 769, 777 (1995); I.

***Thompson v. Department of Licensing***, 138 Wn.2d 783 (1999)

District court suppresses breath test in criminal case, defendant appeals DOL license revocation, argues collateral estoppel precludes revocation; held: even if district court erroneously suppressed breath test, collateral estoppel precludes admissibility of breath test in license revocation, as state had incentive, capability and opportunity to litigate the issue in the criminal case and it must abide the result it did not appeal from, *see: State v. Vasquez,* 148 Wn.2d 303 (2002), *see also: LeMond v. Dep't of Licensing,* 143 Wn.App. 797 (2008), *cf.: State v. Longo,* 185 Wn.App. 804 (2015); reverses *Thompson v. Department of Licensing,* 91 Wn.App. 887, 896-98 (1998); 9-0.

***State v. Tili***, 139 Wn.2d 107, 112-19 (1999)

Three acts of rape charged separately for digital penetration of two orifices and penile penetration within two minutes are separate units of prosecution justifying three separate charges, not in violation of double jeopardy clause, *State v. Soonalole*, 99 Wn.App. 207 (2000), *Pers. Restraint of Davis*, 142 Wn.2d 165 (2000), *State v. French*, 157 Wn.2d 593, 611-12 (2006), distinguishing *State v. Adel*, 136 Wn.2d 629 (1998), *see: State v. Wilkins*, 200 Wn.App. 794, 802-14 (2017), *cf.: Pers. Restraint of White*, 1 Wn.App.2d 788 (2017); 9-0.

***State v. Melton***, 97 Wn.App. 327 (1999)

During voir dire, some jurors state they can stay no longer than Monday of the next week, trial is expected to conclude on Monday, defense counsel calls in ill that day, court sets trial over to Tuesday, defense counsel leaves message that he is still sick, does not indicate when he anticipates recovering, trial court grants mistrial, defense seeks dismissal; held: trial court did not act precipitately, *Arizona v. Washington*, 54 L.Ed.2d 717 (1978), *State v. Robinson*, 146 Wn.App. 471 (2008), and, while court should have contacted defense counsel or a substitute and considered alternatives to mistrial on the record, because no practical alternative to mistrial existed, court properly exercised discretion, *see: State v. Eldridge*, 17 Wn.App. 270, 276-78 (1977); I.

***State v. Schwab***, 98 Wn.App. 179 (1999)

Convictions for both felony murder 2° and manslaughter 1° for a single homicide violate double jeopardy clauses, *see also: State v. Johnson*, 113 Wn.App. 482 (2002), *State v. Meas*, 118 Wn.App. 297, 304-07 (2003), *see: State v. Schwab*, 134 Wn.App. 635 (2006), *but see: State v. Schwab*, 163 Wn.2d 664, 673-74 (2008); I.

***State v. Hescock***, 98 Wn.App. 600 (1999)

Defendant is charged with alternative means of committing forgery, following bench trial court convicts of one method, is silent as to the other, state concedes on appeal that evidence was insufficient to support conviction of first method, seeks remand for fact finding on second; held: silence by the trier of fact bars further prosecution, *State v. Davis*, 190 Wash. 164, 166-67 (1937), *Green v. United States*, 2 L.Ed.2d 199 (1957), *but see: State v. Wright*, 165 Wn.2d 783 (2009), *State v. Daniels*, 160 Wn.2d 256 (2007), 165 Wn.2d 627 (2009), *State v. Fuller*, 185 Wn.2d 30 (2016), *see also: State v. Pruitt*, 145 Wn.App. 784 (2008); while a case may be remanded where findings and conclusions are incomplete, *State v. Head*, 136 Wn.2d 619, 622-23 (1998), *State v. Alvarez*, 128 Wn.2d 1, 19 (1995), here there were no findings as to the alternative means, thus jeopardy precludes remand, *State v. A.M.*, 163 Wn.App. 414, 423-26 (2011); II.

***State v. Bobic***, 140 Wn.2d 250, 260-67 (2000)

Defendant and co-conspirator participate in a criminal enterprise which includes stealing, stripping, repurchasing and reselling stolen vehicles, are convicted of three counts of conspiracy; held: a single agreement to commit a series of crimes by the same conspirators in which each crime is only one step in the advancement of the scheme as a whole constitutes only one violation of the conspiracy statute, as the legislature intended that there be but a single unit of prosecution, *Braverman v. United States*, 87 L.Ed. 23 (1942), *State v. Adel*, 136 Wn.2d 629

(1998), *State v. Turner*, 102 Wn.App. 202 (2000), *cf.: State v. Varnell*, 162 Wn.2d 165 (2007), *State v. Canter*, 17 Wn.App.2d 728 (2021); 9-0.

***State v. Soonalole***, 99 Wn.App. 207 (2000)

Defendant molests victim in car, stops, drives, stops, molests her again, is convicted of two counts of child molestation; held: considering time, place and defendant's intent, the events involved separate units of prosecution, thus no double jeopardy violation, *State v. Tili*, 139 Wn.2d 107, 113 (1999), *State v. Adel*, 136 Wn.2d 629, 634 (1998), *State v. Grantham*, 84 Wn.App. 854, 860 (1997), *State v. French*, 157 Wn.2d 593, 611-12 (2006); I.

***State v. Skenandore***, 99 Wn.App. 494, 501 (2000)

Prison discipline does not bar a subsequent criminal prosecution for the same conduct, *State v. Williams*, 57 Wn.2d 231, 232 (1960); II.

***State v. Read***, 100 Wn.App. 776, 789-93 (2000), *aff'd, on other grounds,* 147 Wn.2d 238 (2002)

Murder and assault, based upon the same act directed at the same victim, violate double jeopardy clause, *State v. Valentine*, 108 Wn.App. 24, 27-29 (2001), *State v. Gohl*, 109 Wn.App. 817, 820-22 (2001), *Pers. Restraint of Burchfield*, 111 Wn.App. 892 (2002), *Pers. Restraint of Orange*, 152 Wn.2d 795, 814-23 (2004), *State v. Weber*, 127 Wn.App. 879, 884-88 (2005), 159 Wn.2d 252, 265-69 (2006), *cf.: State v. Esparza*, 135 Wn.App. 54 (2006), *Pers. Restraint of Borrero*, 161 Wn.2d 532 (2007), *State v. Mandanas*, 163 Wn.App. 712 (2011), *State v. Davis*, 174 Wn.App. 623 (2013), *State v. Hart*, 188 Wn.App. 453, 457-60 (2015), even though sentences run concurrently, *State v. Calle*, 125 Wn.2d 769, 774-75 (1995), *Ball v. United States*, 84 L.Ed.2d 740 (1985), *see also: State v. Johnson*, 113 Wn.App. 482 (2002), *State v. Cole*, 117 Wn.App. 870 (2003), *State v. Meas*, 118 Wn.App. 297, 304 (2003); III.

***State v. Root***, 141 Wn.2d 701 (2000)

Unit of prosecution for sexual exploitation of a minor, RCW 9.68A.040, is each photo session per minor, not each photograph, reversing, in part, *State v. Root*, 95 Wn.App. 333 (1999), *see: State v. Sutherby*, 165 Wn.2d 870 (2009),*State v. Polk*, 187 Wn.App. 380 (2015); 9-0.

***Pers. Restraint of Davis,*** 142 Wn.2d 165 (2000)

Two separately located and self-contained marijuana grow operations are separate units of prosecution and, if charged and convicted in two counts, do not violate double jeopardy clause, *State v. McFadden*, 63 Wn.App. 441 (1991), *State v. Lopez*, 79 Wn.App. 755 (1995), distinguishing *State v. Adel*, 136 Wn.2d 629 (1998), *see: State v. Jones*, 117 Wn.App. 721 (2003), *cf.: State v. Chenoweth*, 127 Wn.App. 444, 462-63 (2005), *aff'd, on other grounds,* 160 Wn.2d 454 (2007); affirms *Pers. Restraint of Davis*, 95 Wn.App. 917 (1999); 7-2.

***State v. Jones***, 102 Wn.App. 89, 97-98 (2000)

Jury hangs on deadly weapon allegation, defendant is sentenced without it, new trial granted on appeal, state re-alleges deadly weapon allegation, jury finds defendant was armed; held: federal double jeopardy clause does not bar retrial of sentencing enhancement upon retrial after successful appeal; II.

***State v. Turner***, 102 Wn.App. 202 (2000)

Defendant steals from same victim using different schemes, is charged with three counts of theft 1° during the same intervening period; held: because the legislature's intent as to multiple punishment is unclear, the rule of lenity obliges that the unit of prosecution for theft 1° from the same victim over the same time precludes multiple counts, *State v. Adel*, 136 Wn.2d 629 (1998), *State v. Bobic*, 140 Wn.2d 250, 260-67 (2000), *cf.: Pers. Restraint of Davis*, 142 Wn.2d 165 (2000), *State v. Kinneman*, 120 Wn.App. 327 (2003), *see: State v. McReynolds*, 117 Wn.App. 309, 331-41 (2003), *but see: State v. K.R.*, 169 Wn.App. 742 (2012), *cf.: State v. Reeder*, 181 Wn.App. 897, 928-31 (2014), 184 Wn.2d 805 (2015); issue may be raised for first time on appeal; I.

***State v. Portrey***, 102 Wn.App. 898, 904-07 (2000)

Defendant is convicted of possession of marijuana with intent to manufacture and possession of more than 40 grams of marijuana, both for the same marijuana; held: while possession of marijuana has an additional element (40 g.), thus offenses are not legally identical under same evidence test, distinguishing *State v. O'Connor*, 87 Wn.App. 119, 123 (1997), the legislature did not intend that one would be convicted of both, *see: State v. Read*, 100 Wn.App. 776, 790 (2000) , *aff'd, on other grounds*, 147 Wn.2d 238 (2002), thus convictions violate double jeopardy, lesser possession charge is dismissed; III.

***State v. Ahluwalia***, 143 Wn.2d 527 (2001)

Defendant is acquitted of murder 1°, jury hung on murder 2° as lesser, at retrial defendant convicted of murder 2°; held: neither double jeopardy clauses nor RCW 10.43.050 bar successive prosecutions following a mistrial due to hung jury on lesser included offense, *see: State v. Russell*, 33 Wn.App. 579, *aff'd in part, rev'd in part,* 101 Wn.2d 349 (1984), *State v. Padilla*, 84 Wn.App. 523, 526 (1997); 9-0.

***State v. Westling***, 106 Wn.App. 884 (2001)

Defendant, angry at victim, sets his car on fire which burns two other cars, is convicted of three counts of arson 2º, seeks dismissal of two counts on double jeopardy grounds; held: unit of prosecution of arson is a fire, separate counts of arson are appropriate for each person damaged by a fire against whom malice is provable; evidence is sufficient to find malice on each count based upon defendant's willful disregard of the rights of the owners of nearby cars (*dicta);* I.

***State v. Timothy K.***, 107 Wn.App. 784 (2001)

Defendant may be convicted of malicious harassment and malicious mischief 2° based upon same conduct, *see: State v. Calle*, 125 Wn.2d 769 (1995), distinguishing *State v. Lynch*, 93 Wn.App. 716 (1999); I.

***Shuman v. Dep't of Licensing***, 108 Wn.App. 673 (2001)

At DUI trial, district court finds that defendant did not "wrongfully refuse to submit" to breath test; at DOL hearing, department declines to find collateral estoppel as district court did not hold a "fully litigated and contested evidentiary hearing;" held: collateral estoppel will apply where the party estopped has had a full and fair opportunity to present its case, *Hanson v.*

*Snohomish*, 121 Wn.2d 552, 561 (1993), *see: Thompson v. Department of Licensing*, 138 Wn.2d 783 (1999), thus remanded for determination of privity, *see also: LeMond v. Dep't of Licensing*, 143 Wn.App. 797 (2008); III.

***State v. Moses***, 145 Wn.2d 370 (2002)

Conviction in tribal court does not preclude prosecution in state court for similar offense based upon same incident because Indian tribes are not among the sovereigns included within RCW 10.43.040; affirms, on different grounds, *State v. Moses*, 104 Wn.App. 153 (2001); 9-0.

***State v. Cox***, 109 Wn.App. 779 (2002)

Trial court orders defendant in custody whereupon he escapes from courtroom, upon return is held in summary contempt, later is charged with and pleads guilty to escape; held: a guilty plea does not waive double jeopardy claim, *Menna v. New York*, 46 L.Ed.2d 195 (1975); because contempt and escape have separate elements, they are not the same offense and defendant can be punished for each, *United States v. Dixon*, 125 L.Ed.2d 556 (1993); II.

***Pers. Restraint of Burchfield***, 111 Wn.App. 892 (2002)

Convictions for assault 1˚ and manslaughter for the same act violate double jeopardy clauses, *State v. Valentine*, 108 Wn.App. 24 (2001), *State v. Read*, 100 Wn.App. 776 (2000), *Pers. Restraint of Orange*, 152 Wn.2d 795, 814-22 (2004), *State v. Davis*, 174 Wn.App. 623 (2013), *cf.: State v. Esparza*, 135 Wn.App. 54 (2006) *Pers. Restraint of Borrero*, 161 Wn.2d 532 (2007), *State v. Mandanas*, 163 Wn.App. 712 (2011); remedy is vacation of lesser conviction, *State v. Portrey*, 102 Wn.App. 898, 906-07 (2000) which, here is manslaughter because assault 1˚ is a class A felony and ranked higher than manslaughter, *State v. Hinz*, 22 Wn.App. 906, 912-13 (1979), *see: State v. Weber*, 127 Wn.App. 879, 884-88 (2005), 159 Wn.2d 252, 265-69 (2006); I.

***State v. Vermillion***, 112 Wn.App. 844, 858-62 (2002)

Robbery 1˚ and threats to bomb, RCW 9.61.160, arising from same incident, do not violate double jeopardy clause because bomb threats involve an injury separate and distinct from and not merely incidental to robbery, *State v. Johnson*, 92 Wn.2d 671, 680 (1979), *State v. Cole*, 117 Wn.App. 870, 873-78 (2003); I.

***State v. Brooks***, 113 Wn.App. 397 (2002)

Defendant breaks into home, assaults two people inside, is convicted of two counts of burglary 1°; held: unit of prosecution for burglary is entering or remaining, thus defendant can only be convicted of one burglary absent distinct acts of entering or remaining, distinguishing *State v. Rupe*, 101 Wn.2d 664 (1984); I.

***State v. Johnson***, 113 Wn.App. 482 (2002)

Defendant is charged with alternative counts of intentional murder and felony murder against same victim, jury convicts of both, court sentences on one count of murder 2°; held: while multiple convictions may violate double jeopardy even where sentences are concurrent, *State v. Schwab*, 98 Wn.App. 179 (1999), *Ball v. United States*, 84 L.Ed.2d 740 (1985), *State v.*

*Read*, 100 Wn.App. 776, 789-93 (2000), here court treated it as a single conviction and sentenced on a single count, thus defendant was punished only once, *State v. Meas*, 118 Wn.App. 297, 304-07 (2003), *State v. Ward*, 125 Wn.App. 138 (2005); I.

***State v. Vasquez***, 148 Wn.2d 303 (2002)

DOL hearing examiner concludes police lacked probable cause to stop DUI suspect, defendant is later charged with DUI and VUCSA from same stop; held: collateral estoppel will not bar trial court from independently determining probable cause, *State v. Dupard*, 93 Wn.2d 268 (1980), *State v. Cleveland*, 58 Wn.App. 634 (1990), *State v. Williams*, 132 Wn.2d 248 (1997), *cf.: State v. Longo*, 185 Wn.App. 804 (2015), distinguishing *Thompson v. Department of Licensing*, 138 Wn.2d 783 (1999); affirms *State v. Vasquez*, 109 Wn.App. 310 (2001); 9-0.

***Sattazahn v. Pennsylvania***, 154 L.Ed.2d 588 (2003)

Following conviction of capital murder, jury is deadlocked at penalty phase, per state law trial court sentences defendant to life, defendant prevails on appeal, at new trial defendant is sentenced to death; held: hung jury and sentence to life is not an acquittal for purposes of double jeopardy clause, *State v. Benn*, 161 Wn.2d 256 (2007), *see: State v. Ervin*, 158 Wn.2d 746 (2006), *State v. Daniels*, 160 Wn.2d 256 (2007), 165 Wn.2d 627 (2009), *State v. Glasmann*, 183 Wn.2d 117 (2015), thus death sentence affirmed; 5-4.

***Pers. Restraint of Percer***, 150 Wn.2d 41 (2003)

Vehicular homicide and felony murder 2°, stemming from the same death, do not violate double jeopardy clause, distinguishing *State v. Schwab*, 98 Wn.App. 179 (1999); reverses *Pers. Restraint of Percer*, 111 Wn.App. 843 (2002); 8-1.

***State v. Baldwin***, 150 Wn.2d 448, 453-57 (2003)

Identity theft, former RCW 9.35.020(1), and forgery do not have the same elements, thus conviction of both is not barred by double jeopardy clause; when offenses harm different victims, they are not factually the same for purposes of double jeopardy analysis, *State v. McJimpson*, 79 Wn.App. 164, 169 (1995); affirms *State v. Baldwin*, 111 Wn.App. 631 (2002); 9-0.

***State v. Juarez***, 115 Wn.App. 881 (2003)

Due to late discovery, trial court indicates it will suppress audiotapes, selects jury then reverses, defense being unprepared reluctantly seeks mistrial, which court grants; held: jeopardy attaches when jury is selected and sworn, *Downum v. United States*, 10 L.Ed.2d 100 (1963), defendant did not "freely consent" to mistrial, absent "extraordinary and striking" circumstances prompted by a manifest necessity, *State v. Browning*, 38 Wn.App. 772, 775 (1984), mistrial is inappropriate and retrial is barred by double jeopardy clause, *State v. Rich*, 63 Wn.App. 743 (1992), *State v. Sheets*, 128 Wn.App. 119 (2005); here, because trial court proceeded with jury selection before deciding crucial matters necessary to determine that the case was ready to be tried, the manifest necessity was of the trial court's making, thus dismissal is mandated; III.

***State v. McReynolds***, 117 Wn.App. 309, 331-41 (2003)

Where defendant is charged with continuous possession of stolen property during a period of time, the unit of prosecution is a single possession precluding multiple charges based upon different owners of the stolen property, *see:* *State v. Turner*, 102 Wn.App. 202 (2001), *see:* *State v. Ose*, 156 Wn.2d 140 (2005), *cf.: State v. Mason,* 2 Wn.App.2d 504 (2018); III.

***State v. Jones***, 117 Wn.App. 721, 725-27 (2003)

Defendant is observed picking up rocks of cocaine, at arrest police find crack pipe with cocaine residue, defendant is convicted of attempted possession of cocaine and possession of cocaine; held: because the conduct occurred at the same location, at the same time, and violated the same underlying statute, albeit one anticipatory offense, double jeopardy clause precludes conviction of the lesser, *State v. O'Connor,* 87 Wn.App. 119 (1997), *State v. Adel,* 136 Wn.2d 629 (1998), *State v. Villanueva-Gonzalez,* 180 Wn.2d 975 (2014); I.

***State v. Cole***, 117 Wn.App. 870, 873-78 (2003)

Defendant robs with a knife, cuts victim, is convicted of assault 2° and attempted robbery 1°; held: because elements are different, *State v. Gocken*, 128 Wn.2d 95, 101-02 (1995), and legislature intended to impose multiple punishments, *State v. Calle*, 125 Wn.2d 769, 776 (1995), double jeopardy clause does not preclude convictions on both offenses; I.

***State v. Williams***, 118 Wn.App. 178, 182-83 (2003)

Defendant, having been in a collision while impersonating another, signs settlement checks, release of claims, a "client information sheet" for counsel and a chiropractor's patient history form in false name, is convicted of multiple counts; held: unit of prosecution for **forgery** is each written instrument falsely made, not a single intent to defraud; II.

***State v. Kinneman***, 120 Wn.App. 327 (2003)

State may properly charge a lawyer with a separate count of theft for each discrete unauthorized withdrawal he made from his trust account, *State v. K.R.*, 169 Wn.App. 742 (2012), distinguishing *State v. Turner*, 102 Wn.App. 202 (2000); I.

***State v. Mullin-Coston***, 152 Wn.2d 107 (2004)

Jury acquits co-defendant of murder 1º, convicts of murder 2º, at subsequent trial different jury convicts defendant of murder 1º, defendant seeks reduction based upon collateral estoppel; held: nonmutual collateral estoppel does not apply in criminal proceedings, *Standefer v. United States*, 64 L.Ed.2d 689 (1980); affirms *State v. Mullin-Coston*,115 Wn.App. 679 (2003); 9-0.

***Pers. Restraint of Orange***, 152 Wn.2d 795, 814-22 (2004)

Assault and attempted murder of the same victim based on the same act violates double jeopardy, *State v. Valentine*, 108 Wn.App. 24, 27-29 (2001), *State v. Read,* 100 Wn.App. 776, 789-93 (2000), *aff'd, on other grounds,* 147 Wn.2d 238 (2002), *Pers. Restraint of Burchfield,* 111 Wn.App. 892 (2002), *State v. Davis,* 174 Wn.App. 623 (2013), *cf.: State v. Esperza,* 135 Wn.App. 54 (2006), *State v. Mandanas,* 163 Wn.App. 712 (2011); 9-0.

***State v. Collins***, 121 Wn.App. 16 (2004)

Defendant, while on community custody, commits new crimes, DOC sanctions defendant to jail, RCW 9.94A.737, after which prosecutor moves to modify sentence, trial court imposes more jail time, RCW 9.94A.634(3)(c) based upon same violations; held: neither double jeopardy clause nor collateral estoppel preclude trial court from imposing a sanction for acts already punished by DOC, *see: State v. Prado*, 86 Wn.App. 573 (1997), *In re Pers. Restraint of Mayner*, 107 Wn.2d 512, 521 (1986), *Standlee v. Smith*, 83 Wn.2d 405, 407 (1974); II.

***State v. Maestas***, 124 Wn.App. 352 (2004)

When an exceptional sentence is reversed because it was not based upon a jury determination of aggravating factors, *Blakely v. Washington*, 159 L.Ed.2d 403 (2004), double jeopardy clause does not preclude state from submitting those factors to a jury and imposing an exceptional sentence on remand; I.

***Smith v. Massachusetts***, 160 L.Ed.2d 914 (2005)

Midway through jury trial, judge acquits defendant of one offense, later court reverses herself and allows that offense to go to jury, which convicts; held: double jeopardy clause of the Fifth Amendment prohibits reexamination of a court-decreed acquittal to the same extent it prohibits reexamination of an acquittal by a jury, *State v. Mershon*, 43 Wn.App. 132 (1986), *Auburn v. Hedlund*, 137 Wn.App. 494 (2007), *reversed, on other grounds*, 165 Wn.2d 645 (2009), *cf.: United States v. Wilson*, 43 L.Ed.2d 232 (1975); 5-4.

***State v. Graham***, 153 Wn.2d 400 (2005)

Defendant endangers three people in her car, is convicted of three counts of reckless endangerment; held: unit of prosecution for reckless endangerment applies to each victim, thus three charges do not violate double jeopardy, *State v. Ramos*, 152 Wn.App. 684, 693-96 (2009), distinguishing *State v. Westling*, 145 Wn.2d 607, 610 (2002); *affirms: State v. A.G.*, 117 Wn.App. 462 (2003).

***State v. Tvedt***, 153 Wn.2d 705 (2005)

Defendant forces owner and cashier of gas station into office at knife point, demands money, owner gives defendant deposit bag, defendant also steals owner's truck keys and truck, later, defendant forces manager and assistant manager of another gas station to storage area, steals money and manager's cellular telephone, is convicted of four counts of robbery with four deadly weapon enhancements; held: unit of prosecution for robbery must encompass both a taking of property and a forcible taking against the will of the person from whom or from whose presence the property is taken, but multiple counts may not be based on multiple items of property taken from the same person at the same time nor may multiple counts be based on a single taking from or from the presence of multiple persons even if each has an interest in the property, at 720 ¶ 30; here, because defendant stole cash from the presence of the cashier and truck keys from owner, he was properly convicted of the first two counts, and because he forcibly took cash from the assistant manager and the cell phone from manager, he was properly convicted of the second two counts, *Pers. Restraint of Knight,* 196 Wn.2d 330 (2020), *see: State v. Rupe*, 101 Wn.2d 664 (1984), *State v. Larkin*, 70 Wn.App. 349 (1993), *State v. Molina*, 83

Wn.App. 144, 146-67 (1996), *State v. Kier*, 164 Wn.2d 798 (2008); affirms *State v. Tvedt*, 116 Wn.App. 316 (2003); 9-0.

***State v. Freeman***, 153 Wn.2d 765 (2005)

To determine if different crimes based on the same conduct violate double jeopardy clause, court must see if (1) statutes authorize separate punishments, *State v. Calle*, 125 Wn.2d 769, 777-78 (1995), *State v. Kier*, 164 Wn.2d 798, 802 (2008), (2) are the two crimes, as charged and proved, the same in law and in fact, *Blockburger v. United States*, 76 L.Ed. 306 (1932), (3) do the crimes merge, *State v. Vladovic*, 99 Wn.2d 413, 419 (1983), and (4) did the commission of the "included" crime have an independent purpose or effect from the other crime?, *State v. Frohs*, 83 Wn.App. 803 (1996), *State v. Leming*, 133 Wn.App. 875 (2006); legislature intended to punish assault 1° and robbery 1° separately, but not robbery 1° and assault 2°; assault 2° and robbery 1° will generally merge unless the offenses have an independent purpose or effect, *State v. Kier, supra.*, *State v. Chesnokov*, 175 Wn.App. 345 (2013), *State v. Ralph*, 175 Wn.App. 814 (2013), *cf.: State v. Wade*, 133 Wn.App. 855, 870-72 (2006), *State v. Lindsay*, 171 Wn.App. 808, 840-48 (2012), *reversed, on different grounds*, 180 Wn.2d 423 (2014), *State v. Knight*, 176 Wn.App. 936, 951-56 (2013), *but see: State v. Esparza*, 135 Wn.App. 54, 64-67 (2006), *State v. Amos*, 147 Wn.2d 217 (2008); affirms *State v. Freeman*,118 Wn.2d 365 (2003) and *State v. Zumwalt*, 119 Wn.App. 126 (2003); 9-0.

***State v. Jackman***, 125 Wn.App. 552, 561-63 (2005)

Communicating with a minor for immoral purposes and exploitation of a minor for the same acts do not violation double jeopardy, *but see: State v. Jackman*, 156 Wn.2d 736 (2006); II.

***State v. O'Neal***, 126 Wn.App. 395, 415-17 (2005), *aff'd, on other grounds,* 159 Wn.2d 500 (2007)

Convictions for manufacturing marijuana, RCW 69.50.401(a)(ii), and manufacturing methamphetamine, RCW 69.50.401(a)(iii), do not violate double jeopardy clause; because the acts violate different statutes, thus "same evidence" rule, *State v. Calle*, 125 Wn.2d 769 (1995), rather than "unit of prosecution" analysis, *Pers. Restraint of Davis*, 142 Wn.2d 165, 175 (2000) applies; II.

***State v. Heaven***, 127 Wn.App. 156 (2005)

Defendant is charged with three counts of child molestation against same victim over same charging period, information does not identify specific acts, state does not elect during trial, trial court gives unanimity instruction, jury acquits of two counts, hangs on third, trial court dismisses third count for double jeopardy violation; held: because nothing would prevent a second jury from convicting defendant for incidents for which he was acquitted, double jeopardy clause precludes the state from retrying defendant, *see: Ashe v. Swenson*, 25 L.Ed.2d 469 (1970), *Dowling v. United States*, 107 L.Ed.2d 708 (1990), *Bravo-Fernandez v. United States*, 580 U.S. 5, 137 S.Ct. 352, 196 L.Ed.2d 242 (2016), *see: Currier v. Virginia*, ___ U.S. ___ , 138 S.Ct. 2144, 201 L.Ed.2d 650 (2018); to avoid double jeopardy, state must elect and request special verdicts requiring jury to identify act or acts upon which it relies for each verdict; I.

***State v. Louis***, 155 Wn.2d 563 (2005)

Kidnapping and robbery convictions for robbing victim and binding him up in bathroom of store do not violate double jeopardy nor do they merge, *State v. Vladovic*, 99 Wn.2d 413 (1983), *Pers. Restraint of Fletcher*, 113 Wn.2d 42, 50 (1989), *State v. Johnson*, 96 Wn.2d 926 (1982), *State v. McFarland*, 73 Wn.App. 66-69 (1994), *State v. Leming*, 133 Wn.App. 875 (2006), *State v. Butler*, 165 Wn.App. 820, 828-33 (2012), *State v. Grant*, 172 Wn.App. 496 (2012), *see: State v. Rattana Keo Phuong*, 174 Wn.App. 494 (2013), *see: State v. Korum*, 120 Wn.App. 686, *reversed*, on other grounds, 157 Wn.2d 614 (2006), *State v. Lindsay*, 171 Wn.App. 808, 840-48 (2012), *reversed, on different grounds*, 180 Wn.2d 423 (2014), *see: State v. Berg*, 181 Wn.2d 857 (2014); 5-4.

***State v. Eggleston***, 129 Wn.App. 418, 426-35 (2005), 164 Wn.2d 61 (2008)

In aggravated murder of police officer trial, jury finds defendant guilty of lesser murder 2º, answers interrogatory that only applied to aggravated murder "no" that defendant knew victim was an officer performing official duties, in retrial on murder 2º following reversal, state offers evidence that defendant knew victim was an officer and that defendant premeditated the killing; held: neither premeditation nor defendant's knowledge of victim's official status were ultimate facts the state had to prove to convict defendant of murder 2º, thus collateral estoppel does not preclude the state offering the evidence; II.

***State v. Ose***, 156 Wn.2d 140 (2005)

Unit of prosecution for possession of stolen access device, RCW 9A.56.160(1)(c) is one count per access device, *State v. Douglas*, 50 Wn.App. 776 (1988), *see: State v. Mason*, 2 Wn.App.2d 504 (2018), *cf.: State v. McReynolds*, 117 Wn.App. 309, 331-41 (2003); 9-0.

***State v. Melick***, 131 Wn.App. 835 (2006)

Conviction of taking a motor vehicle without permission and possessing stolen property of the same vehicle is not a double jeopardy violation, as there is no express or implied legislative intent, *State v. Freeman*, 153 Wn.2d 765, 771-72 (2005), offenses do not meet same evidence test, *Blockburger v. United States*, 76 L.Ed. 306 (1932), *State v. Calle*, 125 Wn.2d 769, 777 (1995), *State v. Hite*, 3 Wn.App. 9, 12 (1970), nor do offenses merge, *State v. Parmelee*, 108 Wn.App. 702, 710 (2001), however one cannot be both a principal thief and the receiver of stolen goods, *State v. Hancock*, 44 Wn.App. 297, 301 (1986), *Milanovich v. United States*, 5 L.Ed.2d 773 (1961); remedy is that only TMV conviction may stand, *United States v. Gaddis*, 47 L.Ed.2d 222 (1976), *State v. Hancock, supra.*, even though punishment for PSP is greater; I.

***State v. Leyda***, 157 Wn.2d 335 (2006)

Unit of prosecution for **identity theft** where defendant possesses multiple pieces of identification belonging to one person is one count for each victim's means of identification or financial information, not one count per use, *State v. Fisher*, 139 Wn.App. 578, 582-85 (2007); *reverses, in part, State v. Leyda*, 122 Wn.App. 633 (2004); 7-2.

***State v. Ervin***, 158 Wn.2d 746 (2006)

Defendant is charged with aggravated murder 1º, jury is instructed to first consider crime charged and, if it acquits or is unable to agree on greater, can move to lesser, jury leaves verdict form for aggravated murder blank, convicts of lesser felony murder/assault which is later

vacated, *Pers Restraint of Andress*, 147 Wn.2d 602 (2002), state refiles aggravated murder; held: jurors leaving verdict form blank means on its face that the jury was unable to agree which is not an implied acquittal, thus jeopardy is not terminated and state may re-try defendant on the greater offense, *State v. Daniels*, 160 Wn.2d 256 (2007), *State v. Linton*, 156 Wn.2d 777, 789 (2006)(Sanders, J., concurring), *State v. Scott*, 145 Wn.App. 884 (2008), *State v. Wright*, 165 Wn.2d 783 (2009), *State v. Glasmann*, 183 Wn.2d 117 (2015), *see: State v. Allen,k* 1 Wn.App.2d 1 774 (2017); 9-0.

***State v. Linton***, 156 Wn.2d 777 (2006)

In assault 1º trial, jury is instructed to first consider greater and then, if it acquits or is unable to reach a verdict as to greater it can then consider lesser, jury is silent as to greater, convicts of assault 2º, trial court inquires of jurors who respond they were hung on greater, state seeks to retry defendant on assault 1º, trial court refuses; held: where court instructs jury that, if they are unable to agree on greater offense, they may consider lesser, *State v. Labanowski*, 117 Wn.2d 405 (1991), *State v. Watkins*, 31 Wn.App. 485 (1982), *aff'd*, 99 Wn.2d 166 (1983), then it is error for court to inquire into jurors' thinking about the greater, and thus jury implicitly acquitted defendant of greater, *State v. Kirk*, 64 Wn.App. 788, 789-90 (1992), *but see: State v. Ervin*, 158 Wn.2d 746 (2006), *State v. Daniels*, 160 Wn.2d 256 (2007), 165 Wn.2d 627 (2009), *State v. Scott*, 145 Wn.App. 884 (2008) affirms *State v. Linton*, 122 Wn.App. 73 (2004); 9-0 on result.

***State v. Moreno***, 132 Wn.App. 663, 667-71 (2006)

Felony violation of a no contact order and assault from a single incident, where the assault is the factor that causes the no contact order to be a felony, RCW 26.50.110(4), were intended by the legislature to have separate punishments, *State v. Freeman*, 153 Wn.2d 765, 771 (2005), thus do not violate double jeopardy clause, *State v. Leming*, 133 Wn.App. 875 (2006), *State v. Novikoff*, 1 Wn.App.2d 166 (2017); I.

***State v. Leming***, 133 Wn.App. 875 (2006)

The crime of assault in violation of a court order, RCW 26.50.110(4), and assault 2º do not violate double jeopardy as legislature intended to punish separately both, *State v. Novikoff*, 1 Wn.App.2d 166 (2017), *see: State v. Moreno*, 132 Wn.App. 664, 665 (2006), and do not merge, *see: State v. Louis*, 155 Wn.2d 563, 571 (2005); convictions of assault 2º with intent to commit felony harassment and felony harassment do violate double jeopardy, *see: State v. Freeman*, 153 Wn.2d 765, 778 (2005); II.

***State v. Schwab***, 134 Wn.App.635 (2006), *aff'd*, *State v. Schwab*, 163 Wn.2d 664 (2008)

Defendant is convicted of felony murder/assault and manslaughter for same homicide, Court of Appeals vacates manslaughter conviction, *State v. Schwab*, 98 Wn.App. 179 (1999), murder conviction is later vacated, *Pers. Restraint of Andress*, 147 Wn.2d 602 (2002), on remand trial court reinstates manslaughter conviction; held: validity of jury's verdict on manslaughter remains unimpaired, original vacation was to avoid double punishment, thus trial court properly reinstated manslaughter conviction when the erroneous charge of felony murder was set aside, *see: State v. Ward*, 125 Wn.App. 138 (2005), *State v. Turner*, 169 Wn.2d 448 (2010), *State v. Fuller*, 169 Wn.App. 797, 832-35 (2012), ; I.

***State v. Stivason***, 134 Wn.App. 648 (2006)

Military nonjudicial punishment for DUI does not statutorily prevent prosecution in state court, per 1999 amendments to RCW 10.43.040 in response to *State v. Ivie*, 136 Wn.App. 173 (1998); II.

***State v. Esparza***, 135 Wn.App. 54, 61-64 (2006)

Defendants enter jewelry store, point guns, announce it's a robbery, one defendant is shot by store owner, other defendant fires his weapon at the owner, shot defendant is convicted of attempted robbery 1º, assault 1º as accomplice to shooter, assault 2º based upon his own conduct; held: because it is not clear what specific event or events constituted the substantial step taken to commit attempted robbery, double jeopardy was not violated because it was not required for state to prove facts sufficient to convict of assault 2º to prove attempted robbery, *Pers. Restraint of Borrero*, 161 Wn.2d 532 (2007), *State v. Kier*, 164 Wn.2d 798, 807 (2008), distinguishing *Pers. Restraint of Orange*, 152 Wn.2d 795, 814-22 (2004); I.

***State v. Weber***, 159 Wn.2d 252, 265-70 (2006)

Defendant is convicted of assault 1° and attempted murder 2° of same victim, trial court vacates assault; held: while two charges violating double jeopardy may go to trial, *Ball v. United States*, 84 L.Ed.2d 740 (1985), *Ohio v. Johnson*, 81 L.Ed.2d 425 (1984), remedy is to vacate the charge with the lower penalty, *Pers. Restraint of Burchfield*, 111 Wn.App. 892, 899-900 (2002), *State v. Read*, 100 Wn.App. 776, 778 (2000), *State v. League*, 167 Wn.2d 672 (2009); affirms *State v. Weber*, 127 Wn.App. 879, 884-88 (2005); 5-4.

***Auburn v. Hedlund***, 137 Wn.App. 494, 503-06 (2007), *reversed, on other grounds*, 165 Wn.2d 645 (2009)

At end of city's case, trial court dismisses DUI charge, city appeals, defense does not raise double jeopardy in trial court; held: double jeopardy may be raised for first time on appeal, *State v. Tvedt*, 153 Wn.2d 705, 709 n.1 (2005); where trial court dismisses on the merits, double jeopardy precludes retrial absent the trial court's reconsideration prior to entry of a written judgment, *Evans v. Michigan*, 568 U.S. 313, 185 L.Ed.2d 124 (2013), distinguishing *State v. Collins*, 112 Wn.2d 303 (1989), *see: Smith v. Massachusetts*, 160 L.Ed.2d 914 (2005); I.

***State v. Womac***, 160 Wn.2d 643 (2007)

Defendant is convicted of homicide by abuse, felony murder and assault on same victim for same acts, trial court sentences for most serious offense, leaves other convictions on defendant's record; held: while state may properly charge multiple counts even though convictions on all counts may not stand where double jeopardy protections are violated, *State v. Calle*, 125 Wn.2d 769, 777 n.3 (1995), convictions for other counts must be vacated, *State v. Turner*, 169 Wn.2d 448 (2010), *State v. Ralph*, 175 Wn.App. 814 (2013), judgment may not stand, *Pers. Restraint of Strand*, 171 Wn.2d 817 (2011), *see: State v. Fuller*, 169 Wn.App. 797, 832-35 (2012), *State v. Howard*, 182 Wn.App. 91, 99-100 (2014), *State v. Caril*, 23 Wn.App.2d 416 (2022); reverses, in part, *State v. Womac*,130 Wn.App. 450 (2005), *State v. League*, 167 Wn.2d 672 (2009); 8-1.

***State v. George***, 160 Wn.2d 727, 741-45 (2007)

At a no contact order violation pretrial hearing before jury selection, trial court finds that state could not prove service of the order and dismisses "with prejudice," state refiles in superior court; held: "dismissal with prejudice" has no "talismanic quality for purposes of the Double Jeopardy Clause," *Serfass v. United States*, 43 L.Ed.2d 265, 276 (1975); defendant had not waived jury nor was a jury impaneled, defendant was not at risk of a determination of guilt, jeopardy had not attached, thus trial was not precluded; 9-0.

***State v. Benn***, 161 Wn.2d 256, 262-64 (2007)

In aggravated murder trial, jury leaves one of two aggravating factor special verdicts blank, answers "yes" to other, case is reversed, state resubmits same special verdicts to jury which convicts and answers "yes;" held: a jury's non-unanimous failure to find the existence of an aggravating factor does not constitute an acquittal of that factor for double jeopardy purposes, *Poland v. Arizona*, 90 L.Ed.2d 123 (1986), *cf.: Ring v. Arizona*, 153 L.Ed.2d 556 (2002), *Sattazahn v. Pennsylvania*, 154 L.Ed.2d 588 (2003), *see: State v. Allen*, 192 Wn.2d 526 (2018); reverses *State v. Benn*, 130 Wn.App. 308 (2005); 7-2.

***Pers. Restraint of Borrero***, 161 Wn.2d 532 (2007)

Defendant stuffs victim into duffle bag, drives him to river and throws him in, is convicted of kidnapping 1° and attempted murder; held: where one crime is an **attempt** and the information does not identify the facts that comprise the element of substantial step, and different facts would support the two convictions, double jeopardy is not violated, *State v. Esparza*, 135 Wn.App. 54, 61-64 (2006), *see: State v. Kier*, 164 Wn.2d 798, 807 (2008); 8-1.

***State v. Varnell***, 162 Wn.2d 165 (2007)

In a single conversation with undercover officer, defendant solicits murder of four people, is convicted of four counts of solicitation to commit murder; held: unit of prosecution for **solicitation**, like conspiracy, criminalizes the act of engaging another to commit a crime, centered on each solicitation regardless of the number of crimes of objects of solicitation, *State v. Bobic*, 140 Wn.2d 250, 260-67 (2000), *State v. Jensen*, 164 Wn.2d 943 (2008), *see: State v. Hall*, 168 Wn.2d 726 (2010), reversing *State v. Varnell*, 132 Wn.App. 441, 452-53 (2006), *cf.: State v. Canter*, 17 Wn.App.2d 728 (2021); 7-2.

***State v. Gaworski***, 138 Wn.App. 141 (2007)

Possession of precursor ingredients and manufacturing methamphetamine, RCW 69.50.101(p), do not violate the double jeopardy clause, at 146-47, *State v. Brewer*, 145 Wn.App. 666 (2009); enhancement for manufacturing meth in the presence of a minor, RCW 9.94A.605, does not merge with child endangerment, RCW 9A.42.100, at 147-48; possession of pseudoephedrine with intent to manufacture meth, RCW 69.50.440, and possession of anhydrous ammonia with intent to manufacture meth, have the same unit of prosecution, at 149-50; I.

***State v. Sutherby***, 138 Wn.App. 609, 613-16 (2007) , 165 Wn.2d 870, 878-83 (2009)

Simultaneously possessing multiple materials of child pornography, RCW 9.68.070, 9.68A.011(2), in the same location is one unit of prosecution, *see: State v. Polk*, 187 Wn.App. 380 (2015), *but see:* RCW 9.68A.001 (2010); I.

***State v. Stein***, 140 Wn.App. 43, 61-63 (2007)

Jury acquits of murder, convicts of other counts which are reversed on appeal, at retrial court admits evidence of the acquitted murder case; held: while collateral estoppel will preclude the government from offering evidence that a jury necessarily found the state failed to prove, *State v. Eggleston*, 129 Wn.App. 418, 426-27 (2005), 164 Wn.2d 61 (2008), *Ashe v. Swenson*, 25 L.Ed.2d 469 (1970), here the prior acquittal did not determine an ultimate issue in the present case, *Dowling v. United States*, 107 L.Ed.2d 708 (1990), *see: Yeager v. United States*, 174 L.Ed.2d 78 (2009), *Currier v. Virginia*, ___ U.S. ___ , 138 S.Ct. 2144, 201 L.Ed.2d 650 (2018), state having sought to admit evidence of the acquitted murder pursuant to ER 404(b), as evidence that defendant was part of an ongoing conspiracy to eliminate people he saw as obstacles to prospective wealth need only be proved by a preponderance, collateral estoppel does not bar the use of the evidence, *see: Pers. Restraint of Moi*, 184 Wn.2d 575 (2015); II.

***State v. Borsheim***, 140 Wn.App. 357, 364-71 (2007)

In four count rape of a child case with the same charging period in each count, jury is instructed that they must unanimously agree as to which act or acts have been proved, but is not instructed that a conviction on each charged count must be based on a separate and distinct underlying incident and that proof of any one incident cannot support a finding of guilt on more than one count; held: while defendant's right to jury unanimity was protected by instructing pursuant to WPIC 4.25, *State v. Petrich*, 101 Wn.2d 566 (1984), failure to instruct in a sexual abuse case where multiple identical counts are charged within the same period that jury must find separate and distinct acts for each count violates defendant's right to be free from double jeopardy, *State v. Hayes*, 81 Wn.App. 425, 431 (1996), *State v. Noltie*, 116 Wn.2d 831, 846 (1991), *State v. Ellis*, 71 Wn.App. 400, 404-06 (1993), *State v. Berg*, 147 Wn.App. 923 (2008), *State v. Carter*, 156 Wn.App. 561 (2010), *State v. Edwards*, 171 Wn.App. 379, 400-03 (2012), *see: Pers. Restraint of Delgado*, 160 Wn.App. 898 (2011), *but see: State v. Mutch*, 171 Wn.2d 646, 661-66 (2011), *State v. Land*, 172 Wn.App. 593, 599-603 (2013), *State v. Peña Fuentes*, 179 Wn.2d 808, 822-26 (2014); I.

***State v. Ramos***, 163 Wn.2d 654 (2008)

Defendant is tried for murder 1° with intentional murder 2° and felony murder 2°/assault as lessers, jury is silent as to murder 1°, answers interrogatories that jury is not unanimous as to intentional murder 2° but is unanimous guilty for felony murder/assault, which is reversed, *Pers. Restraint of Andress*, 147 Wn.2d 602 (2002); on remand trial court permits amendment to manslaughter 1°; held: when a jury renders a guilty verdict as to a single crime, but one of the alternative means for committing that crime is later held invalid on appeal, even if for insufficient evidence, double jeopardy does not bar retrial on the remaining valid alternative mean, *State v. Joy*, 121 Wn.2d 333, 345-46 (1993); because intentional murder and felony murder are alternative means of committing murder 2° and jury was not unanimous as to intentional murder, and because manslaughter is a lesser of intentional murder, defendant may be retried for manslaughter, *State v. Fuller*, 185 Wn.2d 30 (2016), *see also: State v. Ramos*,124 Wn.App. 334 (2004); 8-1.

***State v. Eggleston***, 164 Wn.2d 61 (2008)

Jury acquits defendant of murder 1º, convicts of lesser murder 2º, answers special interrogatory that only applied to murder 1º that defendant did not know victim was a police officer, conviction is reversed on appeal, at retrial court gives both self defense instruction if jury knew victim was a police officer and a self defense instruction if jury did not know victim was an officer; held: because the original special interrogatory that jury erroneously answered was surplusage, neither double jeopardy nor collateral estoppel preclude the state from offering evidence of defendant's knowledge, *see:* *State v. Thomas*, 166 Wn.2d 380, 394-95 (2009); 9-0.

***State v. Jensen***, 164 Wn.2d 943 (2008)

**Solicitation** to murder more than one person constitutes a single unit of prosecution where defendant entices, in a single conversation, another to commit murder, *State v. Varnell*, 162 Wn.2d 165 (2007), but where defendant entices a different person at a different time and place to murder a separate person, two convictions may follow; 8-1.

***State v. Knight***, 162 Wn.2d 806 (2008)

Defendant pleads guilty to conspiracy to commit burglary and conspiracy to commit robbery for a single plan; held: where plans serve a single criminal conspiracy, only one count will lie, *State v. Williams*, 131 Wn.App. 488 (2006), thus dismiss conspiracy to commit burglary; defendant's guilty plea did not waive right to claim double jeopardy on appeal, *State v. Cox*, 109 Wn.App. 779, 782 (2002), *State v. Martin*, 149 Wn.App. 689 (2009), *Pers. Restraint of Francis*, 170 Wn.2d 517 (2010), *but see:* *State v. Amos*, 147 Wn.App. 217 (2008); affirms *State v. Knight*, 134 Wn.App. 103 (2006); 9-0

***State v. Hall***, 162 Wn.2d 901 (2008)

State may not retry a defendant who has been convicted and objects to vacation of the conviction even if the crime didn't exist, *Pers. Restraint of Andress*, 147 Wn.2d 602 (2002), *State v. Walters*, 146 Wn.App. 138 (2008); 9-0.

***State v. Walker***, 143 Wn.App. 880 (2008)

Defendant steals old growth cedar, states he intended to sell it, is convicted of theft and trafficking in stolen property; held: double jeopardy clause permits a person to be convicted of theft and trafficking of the same property, *State v. Strohm*, 75 Wn.App. 301, 310-11 (1994), *overruled, on other grounds, State v. Owens*, 180 Wn.2d 90 (2014), *State v. Michielli*, 132 Wn.2d 229, 237 (1997), under both different elements, *Blockburger v. United States*, 76 L.Ed.2d 306 (1932), and, here, different evidence tests, *Pers. Restraint of Orange*, 152 Wn.2d 795, 815-20 (2004), *State v. Reiff*, 14 Wash. 664 (1896), as the evidence to prove one crime would not also completely prove a second crime; II.

***State v. Scott***, 145 Wn.App. 884 (2008)

Defendant is charged with murder 2º by alternative means of intentional or felony murder/assault, jury convicts, in special interrogatory jury checks box next to felony murder, leaves intentional murder box blank, conviction is reversed, *Pers. Restraint of Andress*, 147 Wn.2d 602 (2002), at retrial defendant is charged and convicted of manslaughter 1º, on appeal claims double jeopardy precludes conviction; held: failure to check box next to intentional murder is not an applied acquittal, *State v. Ervin*, 158 Wn.2d 746 (2006), reversal was on legal

grounds, *State v. Berlin*, 133 Wn.2d 541, 550-51 (1997), distinguishing *State v. Hescock*, 98 Wn.App. 600 (1999), thus defendant was properly charged and convicted of manslaughter; I.

***State v. Robinson***, 146 Wn.App. 471 (2008)

During trial, bailiff informs prosecutor that jury wanted to see some evidence that had been referred to during testimony, trial court hears from prosecutor who moves for mistrial over defense objection; held: double jeopardy clause precludes a second trial, as there was no manifest necessity for a mistrial; trial court's precipitate action, *see: State v. Melton*, 97 Wn.App. 327 (1999), failure to question bailiff and jurors, *State v. Crowell*, 92 Wn.2d 143, 145-47 (1979), failure to consider alternatives to mistrial, *State v. Willis*, 67 Wn.2d 681, 686 (1966) oblige dismissal absent prejudice to defendant, *State v. Hopson*, 113 Wn.2d 273, 284 (1989), *State v. Jungers*, 125 Wn.App. 895, 901-02 (2005); II.

***State v. Goldsmith***, 147 Wn.App. 317 (2008)

Defendant is charged with child molestation by causing two victims to molest a third but proves at trial that defendant himself molested the victims, jury convicts, trial court arrests judgment but denies dismissal and allows state to amend to retry defendant; held: arrest of judgment was proper because state failed to prove an element of the crime that was charged which requires dismissal with prejudice; III.

***State v. Wright***, 165 Wn.2d 783 (2009)

Defendants are charged with intentional murder and felony murder as alternatives, jury returns general verdict of guilt after receiving instructions only on felony murder which is later vacated, *Pers. Restraint of Andress*, 147 Wn.2d 602 (2002), on remand trial court rules that renewed prosecution placed defendants in double jeopardy but permits retrial on lessers; held: because defendant's convictions were reversed because the conviction was on a non-existent invalid charge, they may be retried for the same offense, *Montana v. Hall*, 95 L.Ed.2d 354 (1987), *State v. Gamble*, 137 Wn.App. 892, 901 (2007), *aff'd*, 168 Wn.2d 161 (2010); because defendants were charged by alternative means and not separate offenses, failure to reach a verdict on one of the means is not an applied acquittal, *State v. Ramos*, 163 Wn.2d 654, 661 (2008),*State v. Fuller*, 185 Wn.2d 30 (2016); 6-3.

***State v. Hughes***, 166 Wn.2d 675, 681-86 (2009)

Convictions for rape of a child and rape due to nonconsent by reason of mental incapacity or physical helplessness which arise out of the same act violate double jeopardy, reversing, in part, *State v. Hughes*, 142 Wn.App. 213 (2007), *cf.: State v. Smith*, 177 Wn.2d 533, 545-50 (2013); 9-0.

***State v. Rivera-Santos,*** 166 Wn.2d 722 (2009)

Trooper observes defendant drive erratically, observes him cross into Oregon where he is stopped and arrested by Oregon police, defendant is convicted of DUI in Oregon then prosecuted in Washington; held: no part of defendant's Washington DUI was committed in Oregon and his Oregon DUI was not committed "under such circumstances that [Washington] had jurisdiction," RCW 10.43.040, thus RCW 10.43.040 does not bar Washington prosecution; 9-0.

***State v. Martin***, 149 Wn.App. 689 (2009)

Defendant pleads guilty to assault 2º and attempted rape for the same act, argues on appeal that sentence for rape must be vacated as they constitute same offense; held: an indivisible plea agreement does not waive double jeopardy challenges to one count where the violation is clear from the record and was not otherwise waived, *State v. Knight*, 162 Wn.2d 806 (2008), *Pers. Restraint of Francis*, 170 Wn.2d 517, 522-23 (2010); I.

***Yeager v. United States***, 174 L.Ed.2d 78 (2009)

Defendant is convicted of some counts, jury hangs on others, government seeks retrial on hung counts, defendant seeks to preclude government from relitigating issues that were necessarily decided by acquittal; held: a mistrial is a non-event for double jeopardy purposes, thus analysis is the same as if government, after acquittal, indicted defendant on new related charges, *Ashe v. Swenson*, 25 L.Ed.2d 469 (1970), *Currier v. Virginia*, ___ U.S. ___ , 138 S.Ct. 2144, 201 L.Ed.2d 650 (2018); to identify what a jury necessarily determined in acquittals, court should scrutinize the jury's decisions to determine if a critical issue of ultimate fact which the jury decided is an issue in the pending charges; 6-3.

***State v. Fuentes***, 150 Wn.App. 444 (2009)

Defendant threatens to kill a witness, is convicted of both felony harassment and intimidating a witness; held: because each crime requires proof of additional facts not necessary to prove the other crime, they do not violate double jeopardy clauses, *State v. Meneses*, 169 Wn.2d 586, 592-95 (2010); I.

***State v. Yarbrough***, 151 Wn.App. 66, 94-96 (2009)

Sentencing enhancements, including aggravating factors, do not violate double jeopardy clause as legislature intended additional punishment; II.

***State v. Haines***, 151 Wn.App. 428 (2009)

In **stalking** case, RCW 9A.46.110, based upon repeated acts of harassment convictions of both stalking and harassment do not violate double jeopardy because the predicate acts supporting stalking were distinct from the pattern of conduct that they together comprised, *State v. Parmelee*, 108 Wn.App. 702707-08 (2001); I.

***State v. Hall***, 168 Wn.2d 726 (2010)

Defendant makes numerous telephone calls from jail seeking to persuade a witness to absent herself or testify falsely, is convicted of four counts of witness tampering, RCW 9A.72.120; held: unit of prosecution for **witness tampering** is the attempt to induce a witness not to testify or to testify falsely which is complete as soon as defendant attempts to induce the witness, thus only one count was proper, *State v. Thomas*, 158 Wn.App. 797 (2010), *see: State v. Varnell*, 162 Wn.2d 165 (2007), *State v. Vars*, 157 Wn.App. 482 (2010); 9-0.

***State v. Turner***, 169 Wn.2d 448 (2010)

Where a defendant is convicted of alternative crimes based on same conduct, trial court must vacate the lesser, and may not do so conditionally and may not issue an order stating that the lesser is a valid conviction for which defendant could be sentenced if the greater is overturned on appeal, even though it may indeed be

reinstated if the greater is overturned on appeal, *State v. Womac*, 160 Wn.2d 643 (2007), *State v. Weber*, 127 Wn.App. 879, 884-88 (2005), *Pers. Restraint of Strandy*, 171 Wn.2d 817 (2011), *State v. Fuller*, 169 Wn.App. 797, 832-35 (2012), *State v. Ralph*, 175 Wn.App. 814 (2013), *State v. Howard*, 182 Wn.App. 91, 99-100 (2014), *State v. Caril*, 23 Wn.App.2d 416 (2022); reverses *State v. Turner*, 144 Wn.App. 279 (2008), *State v. Faagata*, 147 Wn.App. 236 (2008); 9-0.

***State v. Meneses***, 169 Wn.2d 586, 592-95 (2010)

Intimidating a witness, RCW 9A.72.110, and telephone harassment, RCW 9.61.230, do not constitute the same offense, *see: State v. Fuentes*, 150 Wn.App. 444 (2009), affirms *State v. Meneses*, 149 Wn.App. 707 (2009); 9-0.

***Aberdeen v. Regan***, 170 Wn.2d 103 (2010)

Condition of probation is "no criminal violations of the law," defendant is charged with new crimes, is acquitted, same judge finds that they were proved by preponderance and revokes; held: standard for revocation of probation is preponderance of the evidence, not beyond a reasonable doubt, even when the violation is a new crime, *Habeas Corpus of Standlee*, 83 Wn.2d 405 (1974), acquittal does not collaterally estop a court from revoking for the same conduct; affirms *Aberdeen v. Regan*, 147 Wn.App. 538 (2008); 8-1.

***State v. S.S.Y.***, 170 Wn.2d 322 (2010)

Juvenile offenses of robbery and assault do not merge as legislature expressed its intent to punish the offenses separately, RCW 13.40.180, distinguishing *State v. Freeman*, 153 Wn.2d 765 (2005); II.

***State v. Milam***, 155 Wn.App. 365 (2010)

Defendant uses stolen ATM card to withdraw money, is convicted of theft 2° and identity theft 2°; held: while the factual prong of the same evidence test was met, the crimes are not the same in law as there are different non-illusory elements, thus convictions do not violate double jeopardy clause, *State v. Freeman*, 153 Wn.2d 765 (2005), *cf.: State v. Hughes*, 166 Wn.2d 675, 681-86 (2009); I.

***State v. McPhee***, 156 Wn.App. 44 (2010)

Defendant is charged with burglary and five counts of possessing property stolen in the burglary, jury acquits of burglary and two counts of PSP, hangs on others, at retrial defense seeks to preclude evidence of the burglary and dismiss PSPs, claiming jury found that he did not know the items were stolen; held: a reasonable jury could have determined that defendant learned items were stolen at different times, thus issue decided at first trial was not identical, *State v. Eggleston*, 164 Wn.2d 61 (2008); collateral estoppel does not preclude any evidence of the burglary at the second trial, *Eggleston, supra.*, at 71, *Dowling v. United States*, 493 U.S. 342, 348, 107 L.Ed.2d 708 (1990), *see: Currier v. Virginia*, ___ U.S. ___ , 138 S.Ct. 2144, 201 L.Ed.2d 650 (2018), as it was admitted to show that the weapons were stolen and that defendant knew it, not that defendant committed the burglary, plus court gave limiting instruction; III.

***State v. Williams***, 156 Wn.App. 482, 492-95 (2010)

Defendant strangles victim before and during rape, is convicted of assault 2° and rape 1°; held: the assault was used to effectuate the rape and had no purpose or effect independent of the rape, thus the offenses merge, *State v. Freeman*, 153 Wn.2d 765, 778-79 (2005); III.

***State v. Carter***, 156 Wn.App. 561 (2010)

Defendant is charged with four counts of rape of a child, apparently over the same charging period, trial court gives standard unanimity instruction, WPIC 4.25, neither party request an instruction that informs the jury that it had to find a "separate and distinct act" for each of the four identically charged rape counts; held: where there are multiple counts that are identically charged, it is manifest constitutional error not to instruct that jury find a separate and distinct act for each count, thus all but one count must be dismissed for double jeopardy violation, *State v. Berg*, 147 Wn.App. 923 (2008), *State v. Noltie*, 116 Wn.2d 831, 843 (1991), *cf.: State v. Corbett*, 158 Wn.App. 576 (2010), *State v. Carson*, 179 Wn.App. 961, 972-80 (2014), *but see: State v. Mutch*, 171 Wn.2d 646, 661-66 (2011), *State v. Land*, 172 Wn.App. 593, 599-603 (2013), *State v. Peña Fuentes*, 179 Wn.2d 808, 823-26 (2014); II.

***State v. Vars***, 157 Wn.App. 482 (2010)

A single undressing, observed by more than one person in different spots in the neighborhood establishes a single unit of prosecution for **indecent exposure**, RCW 9A.88.010 (2003), permitting conviction of one count, *see: State v. Hall*, 168 Wn.2d 726 (2010); I.

***State v. Gatlin***, 158 Wn.App. 126, 133-36 (2010)

Convictions for assault 2° with intent to commit gang intimidation and criminal gang intimidation, RCW 9A.46.120, do not violate double jeopardy clause, as legislature intended to distinguish the crimes, address different social concerns and are in different chapters of Title 9A RCW, *cf.: State v. Ticeson*, 26 Wn.App. 876 (1980); III.

***Pers. Restraint of Francis***, 170 Wn.2d 517 (2010)

Guilty plea does not waive double jeopardy challenge, *State v. Hughes*, 166 Wn.2d 675, 681 n.5 (2009), overruling *State v. Amos*, 147 Wn.App. 217, 226-27 (2008); where defendant pleads guilty to assault 2° and attempted robbery 1°, where the assault elevated the robbery charge to first degree, double jeopardy clause is violated, *State v. Chesnokov*, 175 Wn.App. 345 (2013), remedy is to vacate the assault conviction; defendant can challenge one conviction of an "indivisible, multiconviction plea agreement" on double jeopardy grounds; 9-0.

***State v. Mutch***, 171 Wn.2d 646, 661-66 (2011)

Defendant is charged with multiple counts of rape over the same charging period, instructions require unanimity but do not require that jury must find a "separate and distinct act" for each count; held: it is error not to instruct that jury must find a separate and distinct act for each count where multiple counts are identically charged, *State v. Carter*, 151 Wn.App. 561 (2010), *State v. Berg*, 147 Wn.App. 923 (2008), *State v. Wallmuller*, 164 Wn.App. 890 (2011); despite deficient instructions, where it is manifestly apparent that the jury found separate acts, then appellate court may be convinced beyond a reasonable doubt that the instructions did not actually effect a double jeopardy violation, *State v. Land*, 172 Wn.App. 593, 599-603 (2013),

*State v. Peña Fuentes,* 179 Wn.2d 808, 823-26 (2014) , *State v. Daniels,* 183 Wn.App. 109 (2014), *State v. Gonzales,* 1 Wn.App.2d 809 (2017); 9-0.

***State v. Marchi****,* 158 Wn.App. 823, 829-33 (2010)

Defendant poisons her 10-year old daughter, is convicted of attempted murder and assault of a child 1°; held: legislature did not intend to punish a one-time assault of a child that satisfies the elements of attempted murder by imposing an additional punishment, thus assault is dismissed; II.

***State v. Brown****,* 159 Wn.App. 1, 913 (2010)

Multiple convictions of no contact order violations on separate days do not violate double jeopardy, *State v. Allen,* 150 Wn.App. 300 (2009); I.

***State v. Rice****,* 159 Wn.App. 545, 568-70 (2011), *aff'd, on other grounds,* 174 Wn.2d 884 (2012)

Special allegation that victim is less than 15 years old, RCW 9.94A.837, does not violate double jeopardy where defendant is charged with kidnapping 1° which uses child molestation 1° as a predicate offense even though both involve age of victim, *State v. Kelley,* 168 Wn.2d 72 (2010), *State v. Aguirre,* 168 Wn.2d 350 (2010), *cf.: State v. Allen,* 192 Wn.2d 526 (2018); II.

***State v. Larson****,* 160 Wn.App. 577, 592-93 (2011)

Convictions for assault and drive-by shooting do not violate double jeopardy as each requires proof of facts that the other does not, *State v. Statler,* 160 Wn.App. 622, 638-39 (2011); 2-1, III.

***State v. Mandanas****,* 163 Wn.App. 712, 717-21 (2011)

Defendant points gun at victim, threatens to kill him and hits him in the head with the gun, is convicted of assault 2° and felony harassment; held: harassment criminalizes threats which, by themselves, would not constitute assault, thus the two crimes are not the same offense in law, nor are they the same in fact here because, while pointing the gun and threatening to kill also proved assault, striking victim in the head with the gun is a separate act constituting assault, *cf.: Pers. Restraint of Orange,* 152 Wn.2d 795 (2004); I.

***Blueford v. Arkansas****,* 566 U.S. 599, 182 L.Ed.2d 937 (2012)

Jury is instructed on charged offense and lessers, sends out a note saying it cannot agree "on any one charge," judge brings jurors into court, foreperson reports jury is unanimous "against" the charged offense, court orders more deliberations after which jury reports it has not reached a verdict, mistrial declared; at retrial, defendant is convicted of cgreater offense; held: oral report of foreperson was not a "final resolution of anything," thus double jeopardy clause does not preclude retrial, *see: State v. Strine,* 176 Wn.2d 742 (2013); instructions that jury may convict on any one offense or acquit on all were proper under state law, trial court did not abuse discretion by refusing to instruct that jury could acquit on some but not others; 6-3.

***State v. Tracer****,* 173 Wn.2d 708, 723 (2012)

Due to conflict, prosecutor appoints special prosecutor who fails to appear at a hearing, defense counsel reports to court that special prosecutor had agreed to reduce charge, trial court appoints a criminal defense attorney who happens to be in the courtroom as special prosecutor, orders attorney to move to reduce charge, takes plea to lesser charge, state appeals; held: judge improperly appointed attorney as special prosecutor, as a criminal defense attorney has a conflict of interest, thus plea was void, thus defendant was not placed twice in jeopardy, affirming, in part, *State v. Tracer,* 155 Wn.App. 171 (201); 9-0.

***State v. O'Brien***, 164 Wn.App. 924, 928-30 (2011)

Defendant is ordered to report to jail on four separate cases, fails to appear, is convicted of four counts of **bail jumping**; held: unit of prosecution for failure to appear under multiple orders is a single unit, defendant can only be punished once, *see: State v. Fisher,* 139 Wn.App. 578 (2007); I.

***State v. Butler***, 165 Wn.App. 820, 828-33 (2012)

Defendant beats victim, drags him to another room and robs him, is convicted of robbery and kidnapping; held: kidnapping and robbery do not merge, *State v. Vladovic,* 99 Wn.2d 413 (1983), , *State v. Grant,* 172 Wn.App. 496 (2012), *State v. Rattana Keo Phuong,* 174 Wn.App. 494 (2013), distinguishing *State v. Korum,* 120 Wn.App. 686, 703 (2004), *rev'd, in part, on other grounds,* 157 Wn.2d 614 (2006), *cf.: State v. Lindsay,* 171 Wn.App. 808, 840-48 (2012), *reversed, on different grounds,* 180 Wn.2d 423 (2014), *see: State v. Berg,* 181 Wn.2d 857 (2014); III.

***State v. Harris***, 167 Wn.App. 340 (2012)

Convictions for leading organized crime, RCW 9A.82.060(1)(a) (2003), and other crimes that are predicate offenses for leading organized crime do not violate double jeopardy clauses and do not merge; II.

***State v. Nysta***, 168 Wn.App. 30, 43-51 (2012)

Defendant is convicted of felony harassment (threat to kill) and forcible rape 2°, defendant argues that because the death threat was a basis of the force, double jeopardy clause is violated; held: when a felony threat occurs in the course of a rape, it may be punished separately so long as it is not the evidence *required* to prove the forcible compulsion, *Pers. Restraint of Orange,* 152 Wn.2d 795(2004); here, there was evidence of physical force in addition to the death threat; Division I provides good double jeopardy analysis for cases where defendant's act supports charges under two criminal statutes.

***State v. K.R.***, 169 Wn.App. 742 (2012)

Arrestee breaks door handle in police car, then defaces wall in holding cell, is convicted of two counts of malicious mischief; held: unit of prosecution for malicious mischief against same victim in different places and not in rapid succession supports two charges, *State v. Rivas,* 168 Wn.App. 882 (2012), *State v. Kinneman,* 120 Wn.App. 327 (2003), *but see: State v. Turner,* 102 Wn.App. 202 (2000); I.

***State v. Polo***, 169 Wn.App. 750 (2012)

Defendant is convicted of DUI and possessing a stolen vehicle, on appeal court dismisses possessing a stolen vehicle without prejudice, state refiles, trial court admits DUI conviction to prove defendant was driving; held: **collateral estoppel** is not established as the issue was not identical, DUI establishes defendant drove *a* motor vehicle, possessing a stolen vehicle requires proof defendant possessed a specific car; I.

***State v. Chouap***, 170 Wn.App. 114, 122-26 (2012)

Defendant is convicted of two counts of eluding a pursuing police vehicle for recklessly eluding Tacoma police who stop pursuit, later is pursued by Lakewood police and recklessly eludes them; held: each was a separate unit of prosecution, *cf.: State v. Mata,* 180 Wn.App. 108 (2014); II.

***State v. Clark***, 170 Wn.App. 166, 187-94 (2012)

Human trafficking 2°, RCW 9A.40.100(2)(a)(i) (2003), and promoting prostitution 1°, RCW 9A.88.070(1) (2007), do not violate double jeopardy and do not merge; I.

***State v. Smith***, 177 Wn.2d 533, 545-50 (2013)

Rape 1° and rape of a child 2° based upon same facts and same victim do not violate double jeopardy as they are not legally equivalent and legislature did not intend to prohibit multiple convictions arising from a single sexual act, *State v. Calle*, 125 Wn.2d 769 (1995), *State v. Chenoweth*, 185 Wn.2d 218 (2016), distinguishing *State v. Hughes*, 166 Wn.2d 675, 681-86 (2009); overrules *State v. Birgin*, 33 Wn.App. 1 (1982); 8-1.

***State v. Lindsay***, 171 Wn.App. 808, 840-48 (2012), *reversed, on different grounds*, 180 Wn.2d 423 (2014)

Defendant bursts through victim's front door, chokes, hog-ties, steals items, is convicted of robbery and kidnapping, state argues that crimes had an independent purpose as hog-tying was intended to humiliate; held: restraint was for purpose of facilitating robbery, necessary to allow defendant to steal, victim was not transported from his home, duration lasted no longer than necessary to complete robbery and leave, restraint did not create significant danger, thus restraint was incidental to robbery, convictions merge; co-defendant's assault and robbery convictions merge, *State v. Korum*, 120 Wn.App. 686, 707 (2004), *rev'd, in part, on other grounds,* 157 Wn.2d 614 (2006); 2-1, II.

***State v. Grant***, 172 Wn.App. 496 (2012)

Defendant pushes into victim's home with gun, ties her up, drags her downstairs, ransacks house, is convicted of robbery and kidnapping; held: separate convictions for robbery 1° and kidnapping 1° do not violate double jeopardy or merge, state does not have to prove that one crime was not incidental to the other, *State v. Vladovic*, 99 Wn.2d 413, 422-23 (1983), *but see: State v. Korum*, 120 Wn.App. 686 (2004), *rev'd, on other grounds,* 157 Wn.2d 614 (2006), *see: State v. Berg*, 181 Wn.2d 857 (2014); 2-1, I.

***Evans v. Michigan***, 568 U.S. 313, 185 L.Ed.2d 124 (2013)

Trial court grants directed verdict of acquittal after state's case on erroneous belief that state had failed to prove an element of the crime which was not an element; held: trial court's dismissal for insufficiency at close of state's case is an acquittal for double jeopardy purposes even where the dismissal was in error, *State v. Karpov,* 195 Wn.2d 288 (2020); 8-1.

***State v. Strine****,* 176 Wn.2d 742 (2013)

Jury returns verdict forms finding defendant not guilty, trial court polls jury believing it is obligatory, defense does not object, 6 jurors dissent, presiding juror states jury will be unable to reach unanimous verdict, court declares mistrial; held: polling jury is discretionary, CrR 6.16(a)(3), defense failure to object to polling waives review of decision to poll; appellate courts should defer to trial court's determination of a need for a mistrial, *Renico v. Lett,* 559 U.S. 766, 176 L.Ed.2d 678 (2010), *cf.: State v. Jones,* 97 Wn.2d 159 (1982), thus double jeopardy clause does not prevent retrial; 9-0.

***State v. Land****,* 172 Wn.App. 593, 598-603 (2013)

Defendant is convicted of child molestation and child rape over the same charging period of same victim, no unanimity instruction is given; held: where the only evidence of child rape is penetration, then rape is not the same crime as molestation as the latter requires proof of sexual gratification, rape does n *State v. Mutch,* 171 Wn.2d 646, 661-65 (2011), *State v. Noltie,* 116 Wn.2d 831, 849 (1991), *State v. Peña Fuentes,* 179 Wn.2d 808, 823-26 (2014)ot; where the only evidence of intercourse supporting child rape is sexual contact involving sex organs and mouth of anus, that act of intercourse, if done for sexual gratification, is both molestation and rape and thus are not separately punishable, so jury instruction requiring separate and distinct acts is required, *State v. Sanford,* 15 Wn.App.2d 748 (2020), but where state's argument, victim's testimony and to convict instructions make it clear state is not seeking to punish twice for same act, defendant's right to be free from double jeopardy is not violated, *State v. Mutch,* 171 Wn.2d 646, 661-65 (2011), *State v. Noltie,* 116 Wn.2d 831, 849 (1991), *State v. Peña Fuentes, supra*, *State v. Daniels,* 183 Wn.App. 109 (2014), *State v. Wilkins,* 200 Wn.App. 794, 802-14 (2017), *State v. Gonzales,* 1 Wn.App.2d 809 (2017); I.

***State v. McCarter****,* 173 Wn.App. 912 (2013)

Defendant is charged with DUI in district court which dismisses on motion of state in order to pursue felony DUI in superior court, at dismissal district court assesses $250 in fees for preparation and service of bench warrants, RCW 10.01.160 (2008), superior court denies motion to dismiss for double jeopardy; held: because a warrant fee is remedial not punitive, *see: State v. Brewster,* 152 Wn.App. 856 (2009), its imposition is not punitive by intent or in effect (even though it exceeds the maximum amount permitted by statute and is referred to by the court as a "fine"), thus double jeopardy principles do not apply; III.

***State v. Morales****,* 174 Wn.App. 370, 384-88 (2013)

In harassment case, defendant threatens to kill victim on two successive days, is convicted of two counts; held: if a person threatens a single harm, placing victim in fear, unit of prosecution is the threat of harm, not each time and place the threat is repeated to victim or third parties, thus conviction on one of the counts violates double jeopardy clause, *cf.: Pers. Restraint of France,* 199 Wn;App. 822 (2017); 2-1, II.

***State v. Davis***, 174 Wn.App. 623 (2013)

Defendant uses pistol to shoot victim, later shoots at victim's last known position with a shotgun, is convicted of attempted murder and assault 2°; held: while assault and attempted murder are the same in law, they are not the same in fact here because the assault was over when defendant committed attempted murder, thus double jeopardy clause is not violated, *Pers. Restraint of Orange,* 152 Wn.2d 795, 818-20 (2004); II.

***State v. Lust***, 174 Wn.App. 887 (2013), *disapproved, in part, State v. Johnson*, 188 Wn.2d 742 ¶ 18 (2017)

Defendant steals a purse containing credit cards, removes the credit cards, pleads guilty to theft 3° for the purse, is convicted of theft 2° for stealing the access cards, RCW 9A.56.040(1)(c) (2009); held: court must apply "same evidence" rule of statutory construction to determine if statutes really proscribe the same offense, *Blockburger v. United States,* 284 U.S. 299, 304, 76 L.Ed.2d 306 (1932), theft 3° statute does not require proof that credit cards were access devices, theft 2° statute does not require proof that credit cards were valued under $750, thus offenses are neither legally nor factually identical, no violation of double jeopardy clause applies; offenses that are committed during a single transaction are not necessarily the same offense, *State v. Vladovic,* 99 Wn.2d 413, 420-23 (1983), legislature did not clearly indicate the degree of one offense will be elevated if accompanied by conduct constituting the other offense, thus they do not merge; III.

***State v. Ralph***, 175 Wn.App. 814 (2013)

Defendant hits victim and takes his truck, is convicted of robbery 2° and taking a motor vehicle (TMV) without permission, at sentencing trial court merges the offenses, punishes only for robbery; held: TMV is the "functional equivalent of a lesser included of the" robbery 2° since both crimes required taking of personal property without permission, additional facts elevated TMV to robbery, thus the crimes are the same in fact based upon a single act from a single victim, double jeopardy clauses are violated when the evidence required to support a conviction of one crime would have warranted a conviction of another, *State v. Freeman,* 153 Wn.2d 765 (2005), *State v. Reiff,* 14 Wash. 664, 667 (1896); merger prohibits double punishment but double jeopardy clauses prohibit double convictions, thus remedy is to vacate the lesser punished crime, *State v. Turner,* 169 Wn.2d 448, 455 (2010); II.

***State v. Knight***, 176 Wn.App. 936, 950-56 (2013)

Defendant uses gun to commit robbery, elevating crime to robbery 1°, later assaults victim with different gun and by kicking her, is convicted of assault 2° and robbery 1°, claims merger; held: each crime had an independent purpose or effect, *State v. Freeman,* 153 Wn.2d 765, 778-79 (2005), *State v. Prater,* 30 Wn.App. 512, 516 (1981); II.

***Martinez v. Illinois,*** 572 U.S. 833, 188 L.Ed.2d 1112 (2014)

State announces it is unable to proceed and seeks continuance which is denied, court empanels and swears a jury, state declines to present evidence, defense motion for a directed not guilty verdict is granted, state appeals; held: swearing in jury is a bright line rule that jeopardy

attaches, because trial court found state's evidence insufficient there is no doubt defendant may not be retried, *Crist v. Bretz*, 437 U.S. 28, 35, 98 S.Ct. 2156, 57 L.Ed.2d 24 (1978), *Serfass v. United States*, 420 U.S. 377, 394, 95 S.Ct. 1055, 43 L.Ed.2d 265 (1975), *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 569, 97 S.Ct. 1349, 51 L.Ed.2d 642 (1977), *Downum v. United States*, 372 U.S. 734, 83 S.Ct. 1033, 10 L.Ed.2d 100 (1963), *Evans v. Michigan*, 568 U.S. 313, 133 S.Ct. 1069, 1074-75, 185 L.Ed.2d 124 (2013); *per curiam.*

***State v. Villanueva-Gonzalez***, 180 Wn.2d 975 (2014)

Defendant head-butts then attempts to strangle victim, is convicted of assault 2º and lesser assault 4º; held: actions were taken against the same victim within the same short time span, assault is not defined in terms of each physical act against a victim, *State v. Tili*, 139 Wn.2d 107, 116-17 (1999), *State v. Rodriquez*, 187 Wn.App. 922, 936-38 (2015), same evidence/course of conduct test applies where defendant has multiple convictions for violating different statutory provisions, thus double jeopardy clause precludes conviction on both, *Pers. Restraint of White*, 1 Wn.App.2d 788 (2017); unit of prosecution test is appropriate only where defendant is convicted for violating one statute multiple times, *State v. Adel*, 136 Wn.2d 629, 633 (1998); affirms *State v. Villanueva-Gonzalez*, 175 Wn.App. 1 (2013); 9-0.

***State v. Daniels***, 183 Wn.App. 109 (2014)

Defendant is charged with promoting commercial sexual abuse of a minor and promoting prostitution, evidence overlaps but state "clearly distinguished between the acts constituting one crime from the acts constituting the second crime" in closing, thus convictions did not violate double jeopardy clause, *State v. Peña Fuentes*, 179 Wn.2d 808, 924 (2014), *State v. Land*, 172 Wn.App. 593, 598-603 (2013), as it is "manifestly apparent" that jury convicted based on factually separate and distinct acts; II.

***State v. Mata***, 180 Wn.App. 108 (2014)

Defendant is convicted of unlawful possession of the same firearm on the same day in Pierce and Yakima Counties; held: unlawful possession of a firearm is a course of conduct crime rather than a discrete act, *State v. Kenyon*, 150 Wn.App. 826 (2009), while an interruption in possession of a particular firearm might result in different possessions, *see: State v. Chouap*, 170 Wn.App. 114, 125 (2012), here there was no evidence that the possession was ever interrupted, thus second prosecution violated double jeopardy clause; III.

***State v. Howard***, 182 Wn.App. 91, 99-100 (2014)

Defendant is found guilty of assault and attempted murder, trial court vacates assault conviction for double jeopardy, appends to judgment and sentence an order that the lesser charge would be reinstated if the greater is vacated on appeal; held: any reference to a vacated lesser in a judgment and sentence violates double jeopardy, *State v. Turner*, 169 Wn.2d 448, 463 (2010), *State v. Caril*, 23 Wn.App.2d 416 (2022), thus remanded to strike reference to lesser; II.

***State v. Blancaflor***, 183 Wn.App. 215, 229-37 (2014)

Three counts of employer's false reporting, RCW 51.48.020(1)(b), each encompassing acts in a calendar year, are separate units of prosecution, distinguishing *State v. Durrett*, 150 Wn.App. 402 (2009); I.

***State v. Anthone***, 184 Wn.App. 92, 94-98 (2014)

In **securities fraud**, RCW 21.20.010 (1959), defrauding of an individual investor is a separate unit of prosecution even if the fraud is perpetrated through a group presentation or through a single document signed by more than one investor

***State v. Glasmann***, 183 Wn.2d 117 (2015)

Where defendant is charged with greater and lesser offenses and jury is unable to agree regarding the greater but convicts of the lesser which is reversed on appeal, state may retry defendant for the greater without violating double jeopardy clause, *State v. Daniels*, 160 Wn.2d 256, 265 (2007), *adhered to on recons.*, 165 Wn.2d 627, 628 (2009); 6-3.

***Pers. Restraint of Moi***, 184 Wn.2d 575 (2015)

Defendant is charged with murder and unlawful possession of the firearm that killed the victim, moves to sever which is denied, defendant waives jury as to firearm charge, jury hangs on murder, judge acquits of firearm, state retries murder, defense does not raise double jeopardy challenge, is convicted of the murder with a gun he had been acquitted of possessing; held: of the four elements of collateral estoppel defense must establish (1. issue decided in prior case is identical to the one now, prior adjudication ended in final judgment on the merits, 3. privity, 4. application of doctrine must not work an injustice) first three were conceded, defense motion to sever did not cause an injustice nor did defendant's decision to waive jury; defendant's unexpected testimony at first trial did not cause an injustice; acquittal of possessing the gun that caused the murder was a final decision depriving the state of the right to retry the defendant; 9-0.

***State v. Boswell***, 185 Wn.App. 321, 326-32 (2014)

Defendant attempts to poison victim and, after she falls asleep, shoots her, is convicted of two counts of attempted murder; held: attempted murder is an offense that involves a continuing course of conduct, unit of prosecution is whether each course of conduct is separate or distinct including the method to commit the crime, the amount of time between the courses of conduct and whether the initial course of conduct was interrupted, failed or abandoned; here there were two courses of conduct, two methods separated by a period of time and no evidence that defendant's plan included using both poisoning and shooting as part of one continuous plan, *State v. Latham*, 3 Wn.App.2d 468 (2018); II.

***State v. Longo***, 185 Wn.App. 804 (2015)

Following drug seizure city seeks civil forfeiture, district court grants suppression and dismisses, state then files felony charge, superior court dismisses as **collaterally estopped**, state appeals; held: city and state were not in privity, distinguishing *Barlindal v. Bonney Lake*, 84 Wn.App. 135, 142-43 (1996), application of collateral estoppel doctrine would work an injustice, *State v. Barnes*, 85 Wn.App. 638, 653 (1997); I.

***State v. Polk***, 187 Wn.App. 380 (2015)

Each unit of possession of depictions of a minor in sexually explicit conduct 2°, RCW 9.68.070(2)(c) (2010), is one unit of prosecution even if possession includes more than one

depiction or image, *State v. Sutherby,* 165 Wn.2d. 870 (2009), distinguishing RCW 9.68A.001 (2010); III.

***State v. Lazcano***, 188 Wn.App. 338, 362 (2015)

Collateral estoppel is only available to a criminal defendant who was acquitted in the first prosecution, *see: State v. Morlock,* 87 Wn.2d 767 (1976); III.

***State v. Reeder***, 184 Wn.2d 805, 825-31 (2015)

Unit of prosecution for **securities fraud**, RCW 21.20.010, is every separate sale of a security, *cf.: State v. Mahmood*, 45 Wn.App. 200, 206 (1986); unit of prosecution for theft 1° by deception, RCW 9A.56.020(1)(b), is each separate transaction occurring at a separate time; 7-2.

***State v. Fuller***, 185 Wn.2d 30 (2016)

Defendant is charged with assault 2°/deadly weapon and alternatively assault 2°/substantial bodily harm for same incident, is acquitted of latter, jury hangs on former, state seeks retrial for remaining assault 2°; held: when state charges alternative means in separate counts and jury acquits on one but deadlocks on the other, state may retry defendant on count on which jury was hung, jeopardy never terminated as to that count or as to the overall offense, *State v. Ramos,* 163 Wn.2d 654, 660 (2008); 9-0.

***State v. Albarran***, 187 Wn.2d 15 (2016)

Defendant is convicted of rape of a child 2° and rape 2°/incapable of consent, for a single act, trial court vacates rape of a child as the lesser offense under double jeopardy analysis, *State v. Hughes*, 166 Wn.2d 675, 684–86 (2009), defense argues that rape 2° should be vacated as it is a more specific offense under equal protection/general-specific analysis, *State v. Shriner*, 101 Wn.2d 576, 580 (1984); held: because the legislature specifically authorized prosecution of rape 2°/incapable of consent for children under 15 years, RCW 9.94A.837 (2006), the general-specific analysis is inapplicable; 9-0.

***State v. Novick,*** 196 Wn.App. 513 (2016)

Multiple convictions for several acts of computer trespass, former RCW 9A.52.110 (2011) and intercepting a private communication, RCW 9.73.030 (1986) against same victim constitute multiple units of prosecution; II.

***State v. Barbee***, 187 Wn.2d 375 (2017)

Promoting prostitution of two women does not constitute a single unit of prosecution, *State v. Song,* 50 Wn.App. 325 (1988), overruling, in part, *State v. Mason,* 31 Wn.App. 680, 681 (1982); 9-0.

***Pers. Restraint of France***, 199 Wn.App. 822 (2017)

Defendant is convicted of multiple counts of felony harassment, RCW 9A.46.020 (2011), for threatening to cause bodily harm to the victim at different times and different places, argues unit of prosecution against a single victim is any number of threats; held: while making threats to a single victim on more than one occasion to cause bodily harm at the same place and time

violates double jeopardy if convicted of more than one count, here multiple counts for making different threats to cause harm at different times and places do not violate double jeopardy, distinguishing *State v. Morales*, 174 Wn.App. 370, 384-88 (2013); I.

***State v. Wilkins***, 200 Wn.App. 794, 802-14 (2017)

Child molestation and rape of a child for same act do not violate double jeopardy, *State v. Land*, 172 Wn.App. 593, 600 (2013), *cf.: State v. Sanford*, 15 Wn.App.2d 748 (2020); 2-1, II.

***State v. Novikoff***, 1 Wn.App.2d 166 (2017)

Assault 4° and violation of a no contact order based upon the same act do not violate double jeopardy and do not merge, RCW 26.50.110(4) (2015), *State v. Moreno*, 132 Wn.App. 663 (2006), *State v. Leming*, 133 Wn.App. 875 (2006); III.

***Pers. Restraint of White***, 1 Wn.App.2d 788 (2017)

Defendant points gun at victim then strangles her, is convicted of two counts of assault 2°; held: to determine if multiple assaultive acts are part of the same course of conduct, court must consider [1]-The length of time over which the assaultive acts took place, [2]-Whether the assaultive acts took place in the same location, [3]-The defendant's intent or motivation for the different assaultive acts, [4]-Whether the acts were uninterrupted or whether there were any intervening acts or events, and [5]-Whether there was an opportunity for the defendant to reconsider his or her actions, *State v. Villanueva-Gonzalez*, 180 Wn.2d 975 (2014); here, facts establish same course of conduct, distinguishing *State v. Tili*, 139 Wn.2d 107, 116, (1999); I.

***Currier v. Virginia***, ___ U.S. ___ , 138 S.Ct. 2144, 201 L.Ed.2d 650 (2018)

Defendant is charged with burglary, theft and felon in possession of a firearm, court severs felon in possession, defendant is acquitted of burglary and theft, seeks dismissal of felon in possession on double jeopardy grounds; held: where a defendant's agrees to severance he cannot later use the double jeopardy clause to either obtain dismissal to protect against multiple trials or the relitigation of issues, *Jeffers v. United States*, 432 U.S. 137, 53 L.Ed.2d 1`68 (1977), distinguishing *Ashe v. Swenson*, 25 L.Ed.2d 469 (1970); 5-4.

***Pers. Restraint of Schorr***, 191 Wn.2d 315 (2018)

Defendant pleads guilty to robbery 1° and murder 1° by alternative means of premeditation and felony murder/robbery, claims robbery and felony murder for same acts violated double jeopardy clause; held: plea of guilty does not waive double jeopardy violation as the sentence would exceed the courts authority; here, however, a defendant has no right to plead guilty to only one alternative means of committing a crime that is charged using alternative means, must plead guilty to all or nothing, *Pers. Restraint of Richey*, 162 Wn.2d 865, 872 (2008), premeditated murder does not merge with robbery thus double jeopardy clause was not violated; 9-0.

***State v. Farnworth***, 192 Wn.2d 468 (2018)

Defendant obtains workers' compensation benefits by falsely claiming he was unemployed on numerous occasions, state aggregates many numerous thefts that individually would be thefts 2° into three counts of theft 1° maintaining that there was a common scheme or plan and between each count defendant had the opportunity to reconsider; held: RCW 9A.56.010(21)(c) (2017) allows state to aggregate theft 3°s if each count differs as to its plan and scheme, which conflicts with common law aggregation which allows an endless variety of thefts as long as each is distinct in time, but because statute only refers to aggregation of theft 3°s common law still applies, *see:* *State v. Linden*, 171 Wn. 92, 102-03 (1932), *State v. Vining*, 2 Wn.App. 802, 808 (1970); because there is a factual basis for prosecutor to justify the separate charges there is no double jeopardy

violation, *State v. Perkerewicz*, 4 Wn.App. 937, 941-42 (1970); reverses, in part, *State v. Farnworth*, 199 Wn.App. 195, 202-05 (2017); 9-0.

***State v. Mason***, 2 Wn.App.2d 504 (2018)

On three occasions defendant secretly films another in the bathroom, is convicted of three counts of voyeurism, RCW 9A.44.115(2) (2003); held: unit of prosecution for voyeurism is per instance of filming, not per victim, *State v. Ose*, 156 Wn.2d 140 (2005); I.

***State v. Classen***, 4 Wn.App.2d 520, 531-34 (2018)

Kidnapping 1°, RCW 9A.40.020 (1)(c), (d), is a continuing course of conduct crime that continues until the victim's liberty is restored; here, defendant restrained victim in her car and, after she escaped, pursued her and tried to kidnap her again, is convicted of kidnapping and attempted kidnapping, because there were two separate course of conduct the convictions do not violate double jeopardy clause; II.

***State v. Allen***, 192 Wn.2d 526 (2018)

In murder case jury convicts but answers no as to aggravating circumstances, case is reversed and remanded, state refiles same aggravating circumstances, trial court dismisses them; held: aggravating circumstances are elements of the crime for double jeopardy purposes *Sattazahn v. Pennsylvania*, 537 U.S. 101, 111, 123 S.Ct. 732, 154 L.Ed.2d 588 (2003), *State v. Gordon*, 153 Wn.App. 516, 529-40 (2009), *rev'd, on other grounds,* 172 Wn.2d 671 (2011), *State v. Arndt*, 194 Wn.2d 784 (2019), *see: Matter of Fernandez*, 20 Wn.App.2d 883 (2022); affirms *State v. Allen*, 1 Wn.App.2d 1 774 (2017); 9-0.

***Gamble v. United States***, 587 U.S. ___ , 189 S.Ct. 1960, 204 L.Ed.2d 322 (2019)

Defendant is convicted for the same crime in state court and then in federal court; held: dual sovereignty convictions do not violate the double jeopardy clause, *Fox v. Ohio*, 46 U.S. 410 (1847); 7-2.

***State v. Brown***, 193 Wn.2d 280 (2019)

Defendant is convicted of seven crimes, offender score is greater than nine, trial court declines to impose exceptional sentence based upon **free crimes** aggravator, following appeal four counts are dismissed, at resentencing offender score remains above nine, state recommends exceptional sentence which trial court imposes, albeit less than original sentence; held: **collateral estoppel** does not bar the exceptional sentence, *State v. Collicott*, 118 Wn.2d 649 (1992), *State v. Harrison*, 148 Wn.2d 550, 561 (2003); 8-1.

***State v. Muhammad***, 194 Wn.2d 577 (2019)

Felony murder/rape and rape merge, affirming *State v. Muhammad*, 4 Wn.App. 31 (2018), *see: State v. Vladovic*, 99 Wn.2d 413 (1983), *State v. Saunders*, 120 Wn.App. 800, 820-24 (2004); (fractured opinion, 5 justices concur).

***State v. Arndt***, 194 Wn.2d 784 (2019)

Defendant is convicted of aggravated murder with arson 1° as aggravator and substantive crime of arson 1°; held: while an aggravating factor involves multiple prosecutions and thus is affected by the double jeopardy clause, *State v. Allen,* 192 Wn.2d 526 (2018), enhancing murder to aggravated murder involves multiple punishments and thus is not a violation of double jeopardy, *see: State v. Heng,* 22 Wn.App.2d 717 (2022); 6-3.

***State v. Min Sik Kim***, 7 Wn.App.2d 839 (2019)

RCW 9.994A.505(7) (2015) which forbids credit for time served for pretrial electronic home monitoring for, *inter alia,* violent offenses does not violate double jeopardy or equal protection clauses, *cf.: State v. Anderson,* 132 Wn.2d 203, 213 (1997), *Harris v. Charles,* 171 Wn.2d 455 (2011); II.

***State v. Karpov***, 195 Wn.2d 288 (2020)

While jurisdiction is usually not an element of a crime that must be proved beyond a reasonable doubt (except where it is set out specifically in a statute, *e.g.*, DUI), here the trial court erroneously treated it as an element of the crime and dismissed, thus judicially acquitting the defendant, precluding further prosecution based upon double jeopardy, *Evans v. Michigan,* 568 U.S. 313, 133 S. Ct. 1069, 185 L. Ed. 2d 124 (2013); 9-0.

***Pers. Restraint of Knight,*** 196 Wn.2d 330 (2020)

Two robberies do not merge here as there were separate forcible takings from the same victim, distinguishing *State v. Tvedt,* 153 Wn.2d 705, 714 (2005), *State v. Freeman,* 153 Wn.2d 765 (2005); while jury instructions did not distinguish between crimes, prosecutor's election in closing argument was adequate, *State v. Carson,* 184 Wn.2d 207, 227 (2015), *State v. Bland*, 71 Wn.App. 345, 350-2 (1993), *State v. Smith,* 17 Wn.App. 146 (2021); 5-4.

***State v. Lee****,* 12 Wn.App.2d 378 (2020)

Defendant strangles victim in kitchen, they then go to bedroom where defendant strangles and rapes her digitally and with his penis, is charged with two counts of assault 2° and rape, defense argues that because the strangulation may have been the forcible compulsion for the rape that the convictions violate double jeopardy; held: it is defense burden to establish that defendant faces multiple punishments for the same offense, *State v. Clark,* 124 nh.2d 90, 101 (1994), *overruled on other grounds by State v. Catlett,* 133 Wn.2d 355 (1997), there were other acts that could establish forcible compulsion, *State v. Nysta,* 168 Wn.App. 30, 49 (2012), *see also: State v. Mutch,* 171 Wn.2d 646, 653-56 (2011); I.

***State v. Wheeler***, 14 Wn.App.2d 571 (2020)

Defendant is granted a SSOSA, RCW 9.94A.670, is reinstated following two violation hearings, at third violation hearing prosecutor refers to prior violations and sanctions, defense objects claiming double jeopardy violation, trial court overrules and considers prior actions and revokes; held: revocation is not a second punishment, court can consider prior criminal history so court can consider prior violations and sanctions, *see: State v. Guy,* 87 Wn.App. 238 (1997), *aff'd,* 136 Wn.2d 453 (1998), nor is it prohibited by statute; I.

***State v. Sanford,*** 16 Wn.App.2d 748 (2020)

Defendant is charged with child rape and child molestation for oral/genital contact, no evidence of vaginal penetration, trial court does not give separate and distinct acts instruction; held: absent evidence of vaginal penetration convictions for child rape and child molestation violate double jeopardy where no separate and distinct acts instruction is given, *State v. Land*, 172 Wn.App. 593, 600 (2013), *State v. Wilkins*, 200 Wn.App. 794, 804-08 (2017); here, it was not manifestly apparent from prosecutor's argument that the state was not attempting to impose separate penalties for the same conduct, distinguishing *State v. Land*, *supra*, *State v. Mutch*, 171 Wn.2d 646, 661-65 (2011), *State v. Noltie*, 116 Wn.2d 831, 849 (1991), *State v. Peña Fuentes*, 179 Wn.2d 808, 823-26 (2014); 2-1, II.

***State v. Madden***, 16 Wn.App.2d 327 (2021)

Defendant has three no contact orders with the same victim, contacts her once and is convicted of three counts of violation of a no contact order; held: multiple convictions under a single statute based on a single act violate double jeopardy clause; I.

***State v. Hancock***, 17 Wn.App.2d 113 (2021)

Defendant is convicted of rape of a child 1° and child molestation 1° over the same time period, prosecutor in closing explains that rape involves instances of penetration, molestation doesn't rise to the level of sexual intercourse; held: where it is clear that two convictions of different crimes over the same period are not based upon the same evidence, *State v. Freeman*, 153 Wn.2d 765 (2005), and where the merger doctrine does not apply there is no double jeopardy violation; even when two statutory violations appear to merge on an abstract level they may be punished separately if defendant's conduct demonstrations an independent purpose or effect of each offense, *State v. Kier*, 164 Wn.2d 798, 804 (2008); III.

***State v. Canter***, 17 Wn.App.2d 728 (2021)

Detective poses on-line as the mother of two children seeking sex, defendant responds, is arrested at the place he was to meet the mother and children, is convicted of two counts of attempted child molestation, argues **double jeopardy** violation; held: while unit of prosecution for an attempt charge is the substantial step toward commission of the underlying crime, *State v. Boswell*, 185 Wn.App. 321, 329-30 (2014), attempted child molestation aims to punish a substantial step toward molesting each child, double jeopardy clause does not bar convictions for two counts, distinguishing *State v. Varnell*, 162 Wn.2d 165 (2007), *State v. Bobic*, 140 Wn.2d 250, 260-67 (2000); I.

***State v. Thompson***, 19 Wn.App.2d 727 (2021)

CONST. art. I § 9 is no broader than Fifth Amendment double jeopardy clause, *State v. Benn*, 161 Wn.2d 256, 261 (2007), thus retrial following a mistrial is constitutional; I.

***Denezpi v. United States***, ___ U.S. ___, 142 S.Ct. 1838, 213 L.Ed.2d 141 (2022)

Defendant is prosecuted for the same act in a tribal court that is administered by the U.S. government and then in federal court, claims it is the same sovereign and thus violates double jeopardy clause; held: double jeopardy clause prohibits separate prosecutions for the same offense but does not bar successive prosecutions by the same sovereign, dual sovereignty

doctrine, *see: Gamble v. United States*, 587 U.S. ___ , 189 S.Ct. 1960, 204 L.Ed.2d 322 (2019), is concerned with who defines the offense, not who prosecutes it; 6-3.

# DUI*

***Kaiser v. Suburban Transp. System***, 65 Wn.2d 461 (1965)

One who innocently takes prescribed drug cannot be convicted of DUI unless he has knowledge of the drug's harmful qualities, *but see: State v. Dailey*, 174 Wn.App. 810 (2013); 5-1.

***State v. Cornell***, 1 Wn.App. 425 (1969)

Field sobriety tests are not testimonial and need not be preceded by *Miranda* warnings to be admissible, *Mercer Island v. Walker*, 76 Wn.2d 607 (1960), *Seattle v. Stalsbroten*, 138 Wn.2d 227 (1999), *see: State v. Mecham*, 181 Wn.App. 932 (2014), , *rev., on other grounds*, 186 Wn.2d 128 (2016); character evidence as to defendant's reputation for sobriety in the community is proper; III.

***Seattle v. Box***, 29 Wn.App. 109 (1981)

DUI suspect contacts counsel, who tells police he would be at station in 20 minutes, police transport defendant to jail, give counsel false information when he arrives; held: denial of reasonable access to counsel; I.

***Seattle v. Scarpelli***, 31 Wn.App. 231 (1982)

City must prove validity of prior plea to enhance sentence for second DUI; I.

***Seattle v. Tolliver***, 31 Wn.App. 299 (1982)

Paved, private parking lot on a main intersection with easy access to the street is a "way open to the public"; I.

***McGuire v. Seattle***, 31 Wn.App. 438 (1982)

Defense of moving vehicle safely off roadway is not an element of DUI which must be proved by the city, it is an affirmative defense which must be established by the defendant, *Spokave v. Beck*, 130 Wn.App. 481, 486 (2005), *see also: State v. Votava*, 149 Wn.2d 178 (2003); I.

***Campbell v. Department of Licensing***, 31 Wn.App. 833 (1982)

Police may not stop a vehicle based solely upon a motorist pointing to the vehicle and asserting it is being driven by a drunk driver, *State v. Jones*, 85 Wn.App. 797 (1997), *but see: State v. Lee*, 147 Wn.App. 912 (2008).

***Seattle v. Urban***, 32 Wn.App. 634 (1982)

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* *See:* **DUI/Breath and Blood Tests, Implied Consent** and **VEHICULAR HOMICIDE/VEHICULAR ASSAULT**

Instruction stating "the law recognizes that a person may have drunk liquor yet not be under influence" need not be given where other instructions permit defense to argue theory; I.

***State v. Franco***, 96 Wn.2d 816 (1982)

DUI statute, RCW 46.61.502 sets forth three alternative ways of committing the crime, not three distinct crimes, *but see: State v. Sandholm*, 184 Wn.2d 726, 732-36 (2015); where defendant is charged with alternative modes, unanimity of mode need not be shown; 7-2.

***State v. Keller***, 36 Wn.App. 110 (1983)

In a DUI case, defendant blew a .10 on Breathalyzer, technician testified that machine had .01 margin of error; held: while Breathalyzer reading is not conclusive proof of actual blood alcohol content, a rational trier of fact could be convinced that defendant's blood alcohol content was not below .10 where machine was tested a few days prior to defendant's test and operated perfectly; I.

***State v. Smelter***, 36 Wn.App. 439 (1984)

Defendant is observed by police in driver's seat of vehicle on shoulder of interstate highway out of gas, intoxicated; issue: was defendant in actual physical control, RCW 46.61.504?; held: evidence that defendant, while intoxicated, drove his vehicle until it ran out of gas supports finding that he was in physical control, as "vehicle was reasonably capable of being operated or rendered operable"; definitive case on physical control; *Mount Vernon v. Quezada-Avila*, 77 Wn.App. 663 (1995); *cf.: State v. Maxey*, 63 Wn.App. 488 (1991); I.

***State ex. rel. Juckett v. Evergreen District Court***, 100 Wn.2d 824 (1984)

When DUI suspects are arrested, they must be advised of their *Miranda* right to counsel prior to taking breath test, and must be provided access to counsel if requested; if *Miranda* warnings are given, defendant need not again be advised of right to counsel prior to taking breath test, *see: State v. Templeton*, 148 Wn.2d 193 (2002), *State v. Dunn*, 108 Wn.App. 490 (2001); prior to the issuance of a citation, no Sixth Amendment right to counsel exists, however defendant does have right to counsel pursuant to JCrR 2.11(c)[CrRLJ 3.1]; 9-0.

***Welsh v. Wisconsin***, 80 L.Ed.2d 732 (1984)

Police enter suspect's home without a warrant and arrest for DUI, claiming hot pursuit; held: warrantless home arrest for a minor offense is not justified by hot-pursuit doctrine where there was no continuous pursuit, no threat to public safety; *cf.*: *State v. Griffith*, 61 Wn.App. 35 (1991), *Stanton v. Sims*, 571 U.S. 3, 187 L.Ed.2d 341 (2013); 7-2.

***Kirkland v. O'Connor***, 40 Wn.App. 521 (1985)

Suspect is not given breath test, court instructs jury that it shall not draw any inferences from the absence of a breath test result nor speculate on the reasons for the absence of such a test; held: comment on the evidence, in violation of CONST., Art. 4, § 16; I.

***Bellevue v. Redlack***, 40 Wn.App. 689 (1985)

Negligent driving, RCW 46.61.525, is not a lesser included offense of DUI; I.

***Paulson v. Deppartment of Licensing***, 42 Wn.App. 362 (1985)

Arresting officer need only advise suspect of his *Miranda* rights and the consequences of refusing a breath test; officer need not inform suspect that he may not make the receipt of legal advice a condition of his deciding whether to submit to a breath test or that he is not entitled to have an attorney present when taking the test, *State v. Staeheli*, 102 Wn.2d 305 (1984); I.

***Waid v. Department of Licensing***, 43 Wn.App. 32 (1986)

Officer receives a radio call about a citizen complaint of another citizen's driving, arrives at scene, observes appellant without shoes, hair disorderly, strong odor of intoxicants, citizen with appellant tells officer that appellant had been weaving all over the road; held: officer had probable cause to arrest for DUI; I.

***State v. Hazzard***, 43 Wn.App. 335 (1986)

Moving a vehicle safely off road is a defense to physical control, RCW 46.61.504, but not to DUI, RCW 46.61.502, *State v. Beck*, 42 Wn.App. 12 (1985); III.

***Airway Heights v. Dilley***, 45 Wn.App. 87 (1986)

Defendant, arrested for DUI, requests counsel before deciding whether or not to take breath test; police, defendant and defendant's wife make several calls, cannot reach attorney, police do not give defendant 24-hour public defender number; held: reasonable but unsuccessful attempts to contact counsel for defendant satisfy his right to counsel; *see: Seattle v. Sandholm*, 65 Wn.App. 747 (1992); III.

***Williams v. Department of Licensing***, 46 Wn.App. 453 (1986)

Following stop for infractions, suspect's refusal to roll down his window may be interpreted by an arresting officer and the trier of fact as a reaction to a consciousness of guilt, *State v. Bruton*, 66 Wn.2d 111, 112 (1965), in a license revocation proceeding; I.

***State v. Whitman County Dist. Court***, 105 Wn.2d 278 (1986)

Where police advise a DUI suspect that his refusal to take a breath test may be used against him at trial, the advice is accurate, since refusal may be used in rebuttal, *State v. Zwicker*, 105 Wn.2d 228 (1986), RCW 46.20.308; where police advise suspect that refusal shall be used against him/her at trial, the advise is inaccurate and, if the defendant took the breath test, the results must be suppressed; 9-0.

***Bremerton v. Corbett***, 106 Wn.2d 569 (1986)

*Corpus delicti* must be established to corroborate an admission or confession irrespective of whether or not the statement was custodial, *reversing, in part*, *Bremerton v. Corbett*, 42 Wn.App. 45 (1985); in DUI case, *corpus* is met by proof that defendant was driving while intoxicated, *but see: State v. Flowers*, 99 Wn.App. 57 (2000); standard for *corpus delicti* is that there be sufficient circumstances to support a logical and reasonable inference that defendant was driving; while mere evidence that defendant was at scene of accident and was registered owner of vehicle may not be sufficient, additional factors such as other person present unable to start vehicle, defendant was seen earlier driving the vehicle, injuries to defendant consistent with

blood on driver's side of vehicle are sufficient, *State v. Hendrickson*, 140 Wn.App. 913 (2007); 9-0.

***State v. Prok***, 107 Wn.2d 153 (1986)

Defendant is involved in an accident, is extremely intoxicated and injured, police transport defendant to jail and determine that his condition is due to intoxication not injury, advise of *Miranda* rights, but defendant does not speak English and does not understand his right to counsel; held: defendant was not taken into custody, JCrR 2.11(c), until police determined he was drunk, not injured (even though he was taken to jail), thus right to counsel did not accrue until that point; because state conceded defendant was not able to understand right to counsel and state conceded that police violated defendant's right to be so advised, remedy is suppression of evidence following custody, not dismissal, *distinguishing* *Tacoma v. Heater*, 67 Wn.2d 733 (1966), *State v. Fitzsimmons*, 93 Wn.2d 436 (1980), *reversing State v. Prok*, 42 Wn.App. 166 (1985); 9-0; *see*: *Spokane v. Kruger*, 116 Wn.2d 135 (1991).

***Keefe v. Department of Licensing***, 46 Wn.App. 627 (1987)

Police arrive at accident scene, observe suspect vehicle with severely damaged front end directly behind a bus, suspect behind the wheel, odor of intoxicants, obvious that suspect had rear-ended bus, suspect appeared to be feeling no pain; held: probable cause to arrest; failure to advise suspect of right to counsel prior to offering breath test which is refused does not invalidate license suspension as that is a civil, not criminal proceeding; I.

***State v. Barefield***, 47 Wn.App. 444, 110 Wn.2d 728 (1988)

Failure to advise an unconscious vehicular homicide suspect of right to additional tests is not error; while WAC 448-14-020 requires that a blood test shall employ a clean dry container, that samples be preserved with anticoagulant, and that a blank test be run, where state toxicologist testifies that while vial was in his possession it was not adulterated, that vial manufacturer always puts anticoagulants in this vial, and that he ran a test that was the equivalent of a blank test, a *prima facie* case was established, *but see:* *State v. Garrett*, 80 Wn.App. 651 (1996); jury need not be instructed regarding unanimity of mode; *accord*: *State v. Steinbrunn*, 54 Wn.App. 506 (1989); I.

***State v. Brayman***, 110 Wn.2d 183 (1988)

RCW 46.61.502(1), prohibiting operating a motor vehicle when one's breath alcohol level is .10 or greater, is constitutional; 9-0.

***Seattle v. Mesiani***, 110 Wn.2d 454 (1988)

Stopping all vehicles at sobriety checkpoints to determine if drivers are under the influence violates CONST. Art. 1, § 21 and the Fourth Amendment, *but see:* *Michigan State Police v. Sitz*, 110 L.Ed.2d 412 (1990), *Illinois v. Lidster*, 157 L.Ed.2d 843 (2004), *see also:* *State v. Williams*, 85 Wn.App. 271, 278 (1997), *cf.:* *Schlegel v. Dep't of Licensing*, 137 Wn.App. 364 (2007); *reverses* *Fury v. Seattle*, 46 Wn.App. 110 (1986); 9-0.

***State v. Amurri***, 51 Wn.App. 262 (1988)

While DUI, by itself, does not constitute reckless driving, RCW 46.61.500(1), *State v. Birch*, 183 Wash. 670, 673 (1935), *State v. Rich*, 184 Wn.2d 897 (2016), evidence of alcohol is relevant for the trier of fact to determine if alcohol influenced the driving, *State v. Travis*, 1 Wn.App. 971, 974 (1970); willful or wanton disregard for the driver's own safety satisfies the *mens rea* element; I.

***State v. Anderson***, 51 Wn.App. 775 (1988)

Police observe a known citizen waving at officer, pointing at another vehicle and gesturing like a snake, officer follows vehicle, observes weaving within the lane, stops vehicle, determines driver is under the influence, arrests; held: known informant was reliable, *State v. Kennedy*, 107 Wn.2d 1, 8 (1986), weaving gesture was more than a conclusory statement establishing an articulable suspicion justifying the stop, *distinguishing Campbell v. Department of Licensing*, 31 Wn.App. 833 (1982), *cf.: State v. Jones*, 85 Wn.App. 797 (1997); III.

***Sunnyside v. Wendt***, 51 Wn.App. 846 (1988)

Where a defendant stops his vehicle, exits it and enters a store, whereupon the vehicle rolls and strikes a pedestrian and vehicle, defendant is not in physical control of the vehicle, and is thus not guilty of negligent driving; III.

***Seattle v. Gellein***, 112 Wn.2d 58 (1989)

Jury instruction that city must prove that defendant "had 0.10 percent . . . alcohol in his blood as shown by chemical analysis of his breath" creates an unconstitutional mandatory presumption, *reversing Seattle v. Gellein*, 48 Wn.App. 341 (1987); 7-2.

***Seattle v. Koch***, 53 Wn.App. 352 (1989)

DUI arrestees ask to speak with counsel, are given access to telephone but officer remains in room, neither defendant nor counsel request privacy; held: since defendants or counsel did not request privacy nor establish prejudice, *see: State v. Federov*, 183 Wn.2d 669 (2015), rights pursuant to CrRLJ 3.1(c)(2) were not violated; I.

***State v. Bartels***, 112 Wn.2d 882 (1989)

Implied consent warnings stating suspect is entitled to additional tests "at your own expense" improperly prevent an indigent defendant from making an informed decision whether to submit to a blood test; state has burden of establishing whether defendant had financial ability at time of arrest to obtain an additional test; *Spokane v. Holmberg*, 50 Wn.App. 317 (1987) is effectively *overruled, but see: Gonzales v. Dept. of Licensing*, 112 Wn.2d 890, 901 (1989), *State v. Storhoff*, 133 Wn.2d 523 (1997); financial test is objective, *State v. White*, 58 Wn.App. 713 (1990); defense burden to show prejudice, *State v. Schulze*, 116 Wn.2d 154 (1991), *State v. Dunivin*, 65 Wn.App. 501 (1992); *cf.: Clyde Hill v. Rodriguez*, 65 Wn.App. 778 (1992); *see: State v. Berkley*, 72 Wn.App. 12 (1993); 9-0.

***State v. Shattuck***, 55 Wn.App. 131 (1989)

Where a deferred prosecution, RCW 10.05.020, is revoked, defendant's stipulation to the police report waives all defenses, *Abad v. Cozza*, 128 Wn.2d 575 (1996), *but see: State v. Drum*, 168 Wn.2d 23, 33-34 (2010); where defendant asks to speak to a specific attorney and police

attempt to contact that attorney, police are not obliged to suggest other attorneys or to tell defendant that public defender is available as long as defendant has been advised of right to public defender; I.

***State v. Gettman***, 56 Wn.App. 51 (1989)

Trial court may not defer prosecution on two DUIs which occur more than seven days apart, RCW 10.05.010; III.

***Pennsylvania v. Muniz***, 110 L.Ed.2d 528 (1990)

Prior to *Miranda* warnings, arrested DUI suspect is asked the date of his sixth birthday; held: whenever a suspect is asked for a response requiring him to communicate an express or implied assertion of fact or belief, response contains a testimonial component, as suspect is confronted with "trilemma" of truth, falsity or silence; questions about name, address, height, weight, eye color, birthdate, age, while testimonial, fall within "routine booking question" exception; suspect's statements made during "carefully scripted instructions" as to how to perform physical sobriety tests and breath test were not product of interrogation, and are thus admissible; 5-4.

***State v. Entzel***, 116 Wn.2d 435 (1991)

Police are not obliged to administer a breath or blood test to everyone accused of DUI, nor are they obliged to advise a suspect of the availability of breath or blood testing absent the state's use of the implied consent statute to request that the suspect submit to such testing; *accord*: *State v. Woolbright*, 57 Wn.App. 697 (1990); 9-0.

***Spokane v. Kruger***, 116 Wn.2d 135 (1991)

Remedy for denial of counsel in violation of JCrR 2.11 [CrRLJ 3.1(b)] in DUI case is suppression of any evidence acquired after the violation, not dismissal, overruling *State v. Fitzsimmons*, 93 Wn.2d 436, *vacated and remanded*, 66 L.Ed.2d 240, *aff'd on remand*, 94 Wn.2d 858 (1980), *see: State v. Templeton*, 148 Wn.2d 193 (2002, *State v. Dunn*, 108 Wn.App. 490 (2001); 6-3.

***Bellevue v. Ohlson***, 60 Wn.App. 485 (1991)

Following DUI arrest, defendant asks for counsel, officer calls defendant's attorney six times, phone busy for 20 minutes, calls three different public defenders, reaches two answering machines, no answer at third; held: officer made every reasonable effort to provide access to counsel, thus CrRLJ 3.1 is satisfied even though actual contact is not effected, *Seattle v. Wakenight*, 24 Wn.App. 48, 51 (1979), *cf.: State v. Pierce*, 169 Wn.App. 533, 544-51 (2012), *see also: Seattle v. Sandholm*, 65 Wn.App. 747 (1992); destruction of simulator solution did not violate due process, *Arizona v. Youngblood*, 102 L.Ed.2d 281 (1988), *California v. Trombetta*, 81 L.Ed.2d 413 (1984), *State v. Canaday*, 90 Wn.2d 808 (1978), nor does it violate statute mandating that "full information" about breath test be provided to counsel, RCW 46.61.506(6); I.

***State v. Griffith***, 61 Wn.App. 35 (1991)

Police observe suspect commit traffic infractions and strike a sign, follow with emergency lights, at residence suspect jumps out, runs toward residence, officer calls to stop,

suspects proceeds to front door, enters, officer prevents door from closing, smells alcohol, has suspect take sobriety tests, arrests for DUI; held: suspect's presence inside her home requires analysis of exigent circumstances, *State v. Holeman*, 103 Wn.2d 426 (1985), *Payton v. New York*, 63 L.Ed.2d 639 (1980), although rationale diminishes considerably when suspect is fleeing to the home to avoid arrest; here, there was hot pursuit, as officer did not enter home and there was more than a mere infraction, *distinguishing* *Seattle v. Altschuler*, 53 Wn.App. 317 (1989) plus fleeing suspect; destruction of evidence, *i.e.*, breath alcohol, is an exigency which, with other circumstances, justifies arrest, *distinguishing* *Welsh v. Wisconsin*, 80 L.Ed.2d 732 (1984); III.

***Steffen v. Department of Licensing***, 61 Wn.App. 839 (1991)

To be "unconscious," RCW 46.20.308(4), and thus incapable of refusing a breath test, an arrestee "must manifest symptoms of such a lack of self-awareness or inability to perceive as to render him completely unable to exercise judgment," *Oaks v. Department of Licensing*, 31 Wn.App. 892, 896 (1982); "incapable of refusal" refers to physical conditions, e.g., injury or pain, and not to voluntary or involuntary intoxication, *Junkley v. Department of Motor Vehicles*, 7 Wn.App. 827 (1972), *Department of Motor Vehicles v. McElwain*, 80 Wn.2d 624 (1972), *Gibson v. Department of Licensing*, 54 Wn.App. 188 (1989); III.

***State v. Williams***, 62 Wn.App. 336 (1991)

Proof of insurance is not a prerequisite to eligibility for deferred prosecution where defendant states he won't drive during term, RCW 10.05.140, -.160; II.

***Seattle v. Personeus***, 63 Wn.App. 461 (1991)

Even absent breath test, it is error for trial court to refuse expert testimony as to rate of alcohol burn-off for someone of defendant's weight; I.

***State v. Maxey***, 63 Wn.App. 488 (1991)

Defendant's wife is arrested in vehicle where defendant is passenger, wife has key; defendant gets in driver's seat, reaches forward as if he would turn on engine but lacks key, is arrested, convicted of physical control; held: while there is evidence to support defendant's intent to assert control of vehicle, he lacked the means of control, thus evidence is insufficient, *distinguishing* *State v. Smelter*, 36 Wn.App. 439 (1984); state must prove defendant had the means enabling him to exercise "influence, domination or regulation" of car; II.

***Clarkston v. Stone***, 63 Wn.App. 500 (1991)

Washington police chase speeding vehicle into Idaho, arrest for DUI; held: Uniform Act on Fresh Pursuit, RCW 10.89 (and identical Idaho counterpart) only applies to felony; because Washington officer did not have authority to arrest for misdemeanor in Idaho, fruits must be suppressed, *but see:* *License Suspension of Richie*, 127 Wn.App. 935 (2005), *see:* *State v. Eriksen*, 172 Wn.2d 506 (2011); III.

***State v. Elgin***, 118 Wn.2d 551 (1992)

Maximum sentence for repeat DUI offense may not exceed one year, irrespective of language in RCW 46.61.515(2), disapproving *State v. Elgin*, 54 Wn.App. 739 (1989); 5-3.

***State v. Dunivin***, 65 Wn.App. 501 (1992)

Smell of alcohol plus statement that defendant was afraid he was drunk plus fleeing from scene plus alcohol in car plus accident resulting in death is sufficient to establish probable cause to arrest for DUI; II.

***Seattle v. Sandholm***, 65 Wn.App. 747 (1992)

DUI suspect asks to call his out-of-town attorney at suspect's expense, police refuse but allow him to talk to a public defender, after which defendant demands again to talk to his own attorney, refused, defendant refuses to take breath test, trial court dismisses; held: CrRLJ 3.1(c) is satisfied when police put suspect in touch with a public defender even if suspect demands his own attorney; CrRLJ 3.1 does not contemplate a right of access to counsel of choice, thus reversed; I.

***State v. Martin***, 69 Wn.App. 686 (1993)

Absent a breath test, it is error to instruct jury as to alternative means of DUI, where one of those means is breath alcohol greater than .10; 2-1 (dissent: harmless), III.

***Mount Vernon v. Cochran***, 70 Wn.App. 517 (1993)

City appeals appointment of breath test expert for indigent; held: where an expert is appointed solely for trial testimony, and admissibility can be determined at the pre-appointment stage, then the expert services may not be "necessary," CrRLJ 3.1(f), if the evidence is inadmissible, *State v. Sandomingo*, 39 Wn.App. 709, 712 (1985), *State v. Niemczyk*, 31 Wn.App. 803 (1982); admissibility is not an issue, however, where the expert is sought for review and consultation, *see: United States v. Sims*, 617 F.2d 1371, 1375 n. 3 (9th Cir. 1980), thus appointment was not an abuse of discretion; I.

***Seattle v. Heatley***, 70 Wn.App. 573 (1993)

Officer's testimony, without objection, that in his opinion defendant was obviously intoxicated and affected by alcohol, and could not drive in a safe manner is an opinion encompassing an ultimate factual issue which supports the conclusion that defendant is guilty, but is not an improper opinion on guilt, and is admissible both as lay and expert opinion, within discretion of trial court, *State v. Forsyth*, 131 Wash. 611, 612 (1924), *State v. Llewellyn*, 78 Wn.App. 788, 793-6 (1995), *aff'd*, on other grounds, *State v. Smith*, 130 Wn.2d 215 (1996), *cf.: State v. Quaale*, 182 Wn.2d 191 (2014); I.

***State v. Hettich***, 70 Wn.App. 586 (1993)

Toxicologist's opinion testimony that a person with a .14 blood alcohol level would lose at least a third of their normal driving ability, while without scientific foundation, was harmless, if it was error at all, in light of witness's proper testimony that the person's ability to drive "would be significantly impaired," and in light of strong evidence of intoxication; testimony was probably not subject to *Frye* analysis since testimony was not based on novel scientific experimental procedures, but rather upon witness's own practical experience and acquired knowledge, *State v. Ortiz*, 119 Wn.2d 294, 311 (1992), *disapproved, on other grounds, State v. Condon*, 182 Wn.2d 307, 321-26 (2015); I.

***State v. Rogers***, 70 Wn.App. 626 (1993)

At scene of serious injury accident, damage which established high-speed collision, suspect admitting he was owner and driver and had been drinking, strong odor of alcohol on breath, need to restrain suspect from fleeing, resistance equal probable cause for DUI and vehicular assault; II.

***State v. Sjogren***, 71 Wn.App. 779 (1993)

*Corpus delicti* is established where evidence shows defendant was present at the scene of accident in close proximity to vehicle registered to defendant, only other person who could have been driving was passed out in the crew cab behind the front seats, *Bremerton v. Corbett*, 106 Wn.2d 569, 579 (1986), *State v. Hendrickson*, 140 Wn.App. 913 (2007); III.

***State v. Teller***, 72 Wn.App. 49 (1993)

DUI suspect is advised, *inter alia*, "if you cannot afford an attorney you are entitled to have one appointed by the court," argues she should have been told she had right to public defender before she took breath test; held: warnings were adequate under constitution, *Duckworth v. Eagan*, 106 L.Ed.2d 166 (1989), *California v. Prysock*, 69 L.Ed.2d 696 (1981), *Florida v. Powell*, 559 U.S. 50, 175 L.Ed.2d 1009 (2010), *distinguishing* *State v. Creach*, 77 Wn.2d 194, 198 (1969) and *State v. Tetzlaff*, 75 Wn.2d 649 (1969), and CrRLJ 3.1, *State v. Wurm*, 32 Wn.App. 258 (1982), *aff'd sub nom.* *State ex rel. Juckett v. Evergreen Dist. Court*, 100 Wn.2d 824 (1984), *State v. Halbakken*, 30 Wn.App. 834, 836 (1981), *but see:* *State v. Templeton*, 148 Wn.2d 193 (2002, *State v. Dunn*, 108 Wn.App. 490 (2001); III.

***State v. Cissne***, 72 Wn.App. 677 (1994)

Defendant's threats to sue the police and sexual advances are objective manifestations of insobriety and thus within court's discretion to admit where trial court balances probative value with prejudicial effect; III.

***Bokor v. Department of Licensing***, 74 Wn.App. 523 (1994)

Trial court's finding of a lack of probable cause is reversed where evidence establishes suspect admitted driving plus repeatedly swaying during interview, alcohol on breath, poor performance on field sobriety tests, irrespective of officer's knowledge that suspect had a bad leg, *see:* *Thompson v. Department of Licensing*, 91 Wn.App. 887, 895-96 (1998), *rev'd, on other grounds*, 138 2783 (1999), *O'Neill v. Department of Licensing*, 62 Wn.App. 112, 117 (1991), *State v. Staeheli*, 102 Wn.2d 305, 306 (1984); trial court properly gave portable breath test (PBT) no weight where sole evidence of reliability was that of trooper who testified device had given comparable results to a BAC in the past; *see also:* *State v. Smith*, 130 Wn.2d 215 (1996); III.

***State v. Kuhn***, 74 Wn.App. 787 (1994)

Defendant, on deferred prosecution, RCW 10.05, is convicted in trial court of a new DUI and appeals, claims that new DUI is not a conviction requiring mandatory revocation, RCW 10.05.100, until appeal is terminated; held: a conviction is a judgment that accused is guilty as charged, trial court need not await appellate determination before revoking; II.

***State v. Rushing***, 77 Wn.App. 356 (1995)

Filing DUI in superior court along with related felony does not deprive defendant of equal protection even though it precludes deferred prosecution, *State v. Hayes*, 37 Wn.App. 786 (1984); III.

***Mount Vernon v. Quezada-Avila***, 77 Wn.App. 663 (1995)

In a physical control case, the trier of fact should first determine whether the vehicle was operable or could reasonably be made operable and, if not, the trier of fact would then determine whether defendant was driving the vehicle when it became operable, *State v. Smelter*, 36 Wn.App. 439 (1984); I.

***State v. McNichols***, 128 Wn.2d 242 (1995)

Defendant is arrested for DUI, speaks with counsel, takes breath test, is booked, asks jail guards for blood test, is told jail does not administer tests; held: where implied consent rights are provided by arresting officer, jail personnel do not have an affirmative duty to advise a DUI suspect on obtaining additional tests, *State v. Entzel*, 116 Wn.2d 435, 442 (1991), *State v. Reed*, 36 Wn.App. 193 (1983), *distinguishing* *Blaine v. Suess*, 93 Wn.2d 722, 725-6 (1980), defendant had access to telephone and could have called to arrange for blood test; guards did not promise to assist, authorities have no duty to volunteer, thus no unreasonable interference with defendant's right to obtain additional testing; reverses *State v. McNichols*, 76 Wn.App. 283 (1994); 9-0.

***Seattle v. Williams***, 128 Wn.2d 341 (1995)

City ordinance prohibiting driving with a breath alcohol level of 0.08 grams/210 liters of breath is in contravention of RCW 46.08.020, .030 which requires traffic laws to be "uniform throughout this state"; 6-3.

***State v. Wilhelm***, 78 Wn.App. 188 (1995)

Police observe intoxicated defendant behind wheel of car stopped on shoulder, trial court dismisses for insufficiency; held: trier of fact could reasonably infer defendant drove to this location absent contrary evidence, as ability to handle vehicle, not driving, is the element; II.

***State v. Olsson***, 78 Wn.App. 202, 207-8 (1995)

Police stop vehicle for infraction, is told by driver he has a knife, which driver produces, officer observed "a heightened awareness to his surroundings. His pupils would not react and were fixed at midrange. He had glassy eyes with redness around the membrane," police patdown, find drugs; held: officer had sufficient and specific facts leading him to believe driver was under the influence of drugs, also had legitimate safety concerns prompting patdown search; III.

***State v. Ortiz***, 80 Wn.App. 746 (1996)

Charging document that reads "operating a motor vehicle while under the influence of intoxicants" is sufficient, need not include breath or blood alcohol level, *State v. Leach*, 113 Wn.2d 679, 696 (1989), *Seattle v. McKinney*, 58 Wn.App. 607, 609-10 (1990), *State v. Grant*, 104 Wn.App. 715 (2001); II.

***State v. Smith***, 130 Wn.2d 215 (1996)

Trooper stops defendant for DUI, administers portable breath test, does not record or remember result, trial court denies defense opportunity to cross on PBT; held: absent a *Frye* hearing or approval by state toxicologist, portable breath test (PBT) is inadmissible for any purpose, including probable cause, at 222; where one takes a voluntary PBT, BAC Verifier DataMaster II results are not the fruit of the poisonous tree, at 222-4; while PBT results may be been potentially useful, they were not material exculpatory evidence, thus failure to preserve is not grounds for dismissal, *State v. Wittenbarger*, 124 Wn.2d 467, 475 (1994); trial court erred in not permitting defense to cross-examine on PBT limited to testing trooper's recollection, harmless here; affirms *State v. Lewellyn*, 78 Wn.App. 788 (1995); 9-0.

***State v. Crediford***, 130 Wn.2d 747 (1996)

Statute requiring defendant to prove by a preponderance that s/he consumed alcohol after driving to cause BAC to be .10, RCW 46.61.502(3), unconstitutionally shifts burden of proving an element of the crime to defense (7-2); implied element of DUI is "that an amount of alcohol sufficient to cause a measurement of breath or blood of a defendant to register 0.10 percent or greater within two hours of driving was present in the defendant's system while he or she was driving," at 755, *see: State v. Robbins*, 138 Wn.2d 486 (1999), *State v. Norby*, 88 Wn.App. 545 (1997); (4-3-2).

***Medcalf v. Department of Licensing***, 83 Wn.App. 8 (1996)

Evidence of acquittal for DUI is not relevant in a license revocation proceeding, *Brewer v. Department of Motor Vehicles*, 23 Wn.App. 412, 415 (1979), *Fritts v. Department of Motor Vehicles*, 6 Wn.App. 233, 241 (1971); II.

***State v. Hahn***, 83 Wn.App. 825 (1996)

Defendant is granted a deferred prosecution, commits a new DUI, withdraws deferred prosecution and pleads guilty to first DUI and receives a deferred prosecution for new offense; held: voluntary withdrawal of a deferred prosecution is the equivalent of revocation for purposes of the five-year rule, RCW 10.05.010, thus later deferred prosecution was improperly granted; II.

***State v. McLendon***, 131 Wn.2d 853 (1997)

Defendants are arrested for DUI, breath tests exceed .10, Department of Licensing issues probationary licenses, RCW 46.61.502; held: administrative issuance of probationary licenses is not punishment under double jeopardy clause; 5-4.

***State v. Henthorn***, 85 Wn.App. 235 (1997)

State need not provide notice of a prior conviction to increase mandatory minimum sentence under 1994 DUI statutory scheme, as first offense sentencing statute, RCW 46.61.5051, is inapplicable to a person with a prior conviction within five years, RCW 46.64.5053, *In re Bush*, 95 Wn.2d 551, 554 (1981), distinguishing *State v. Frazier*, 81 Wn.2d 628 (1972), *State v. Theroff*, 95 Wn.2d 385 (1980); failure to object to sufficiency of evidence of a prior to enhance waives issue, *State v. Mak*, 105 Wn.2d 692, 718-9 (1986); I.

***State v. Williams***, 85 Wn.App. 271 (1997)

Driver stops for identification at gate of military base, sentry smells alcohol, calls for military security officer who administers field sobriety tests, arrests, advises of implied consent rights, driver refuses breath test, Department of Licensing revokes license, driver appeals; held: "smell of alcohol on a driver's breath is a specific fact that raises a substantial possibility that the driver is in violation of drunk driving laws," at 279, thus detention at gate was lawful; federal security officer is a law enforcement officer for purposes of implied consent statute, RCW 46.20.308, at 276; revocation of driver's license is not punishment under double jeopardy clause, *State v. Scheffel*, 82 Wn.App. 872, 879 (1973), *cf.: State v. Hopkins*, 109 Wn.App. 558 (2001); expectation of privacy at a military base is lessened as person seeking to enter it should expect inspection at least as to identification, at 278, *see also: Schlegel v. Dep't of Licensing*, 137 Wn.App. 364 (2007), distinguishing *Seattle v. Mesiani*, 101 Wn.2d 454, 457 (1988); II.

***State v. Jones***, 85 Wn.App. 797 (1997)

Driver of a truck with a company name on it indicates with hand signals to officer that car in front weaved, office observes no infractions but stops car, after tests arrests defendant for DUI; held: name written on side of truck is not qualitatively different from a named but unknown telephone caller, insufficient to establish reliability of citizen informer, *Campbell v. Department of Licensing*, 31 Wn.App. 833, 835 (1982), *State v. Sieler*, 95 Wn.2d 43, 47-9 (1980), distinguishing *State v. Anderson*, 51 Wn.App. 775 (1988), 2-1; III.

***State v. Knox***, 86 Wn.App. 831 (1997)

Trooper observes state ferry worker unsuccessfully attempt to awaken a driver blocking vehicles, observes sleeping driver awaken, eyes watery, bloodshot in apparent stupor, motions driver to roll window down, smells odor of alcohol, driver starts vehicle, then asks, "where am I?," trooper turns engine off, has defendant leave vehicle, after field tests arrests for DUI; held: defendant failed to prove that trooper's motioning to roll down window and initial questions were a seizure, reasonable person would have believed he was free to go or could refuse to speak, *State v. Thorn*, 129 Wn.2d 347, 352-3 (1996), *cf.: State v. Johnson*, 8 Wn.App.2d 728 (2019); II.

***Seattle v. Norby***, 88 Wn.App. 545 (1997), *overruled, in part, State v. Robbins*, 138 Wn.2d 486 (1999) Complaint that does not contain the implied element establishing a connection between the results of the blood or breath test and the defendant's alcohol level at the time of driving is sufficient where challenged for the first time on appeal, at 558-61; unanimity instruction requiring jury to agree whether to convict under two-hour rule or under the influence prong is not required, at 561-64, *State v. Franco*, 96 Wn.2d 816 (1982), *cf.: State v. Sandholm*, 184 Wn.2d 726, 732-36 (2015); I.

***Richland v. Michel***, 89 Wn.App. 764 (1998)

Statute which includes a dismissed **deferred prosecution** as a prior conviction for purposes of mandatory minimum sentences, RCW 46.61.5055(8)(a)(vii), does not violate due process or equal protection and is not an *ex post facto* law or bill of attainder, *Kent v. Jenkins*, 99 Wn.App. 287 (2000), *State v. Pruett*, 116 Wn.App. 746 (2003), *Bremerton v. Tucker*, 126 Wn.App. 26 (2005); III.

***State v. Bays***, 90 Wn.App. 731 (1998)

Statute precluding more than one **deferred prosecution** in five years, RCW 10.05.010 is interpreted to begin with the date the first court granted the earlier deferred prosecution, not date of completion of the program [effective 1 January 1999, one deferred prosecution per lifetime, RCW 10.05.010]; II.

***Thompson v. Department of Licensing***, 91 Wn.App. 887 (1998), *rev'd, on other grounds,* 137 Wn.2d 783 (1999)

Bloodshot, watery eyes plus smell of intoxicants plus slight sway on balance test plus failure to count aloud as instructed on walk and turn plus admission of drinking earlier that morning establishes probable cause to arrest and administer breath test, at 895-96, *O'Neill v. Department of Licensing*, 62 Wn.App. 112, 117-18 (1991); II.

***Seattle v. Stalsbroten***, 138 Wn.2d 227 (1999)

Refusal to perform field sobriety tests is nontestimonial and thus admission at trial does not violate suspect's privilege against self-incrimination, reversing *Seattle v. Stalsbroten*, 91 Wn.App. 226 (1998), *see: State v. Mecham,* 181 Wn.App. 932 (2014), *rev., on other grounds,* 186 Wn.2d 128 (2016); 5-4.

***State v. Robbins***, 138 Wn.2d 486 (1999)

Unless a defendant offers evidence that s/he consumed alcohol after driving, state need not prove the "implied element" of a connection between breath test result and alcohol level at the time of driving, and court need not so instruct the jury, clarifying *State v. Crediford*, 130 Wn.2d 747 (1996), overruling, in part, *Seattle v. Norby*, 88 Wn.App. 545 (1997); *see: State v. Shabel*, 95 Wn.App. 469 (1999); 6-3.

***Alwood v. Harper***, 94 Wn.App. 396 (1999)

Court grants deferred prosecution, later reviews file, sets hearing, vacates order as improvidently granted, suppresses statements made at original hearing and sets for trial; held: deferred prosecution is an interlocutory order, not a judgment, thus trial court is free to vacate it as long as due process considerations are met; I.

***Tacoma v. Durham***, 95 Wn.App. 876 (1999)

Tacoma police, receiving report of drunk driver, pursue defendant into Lakewood, no evidence that defendant knew he was being pursued while he was in Tacoma; held: **Washington Mutual Aid Peace Officers Powers Act**, RCW 10.93.120, abrogates common law of fresh pursuit, thus statute is to be liberally construed, suspect need not know he is being pursued, nor must the active pursuit cross a boundary, distinguishing *Wenatchee v. Durham*, 43 Wn.App. 547 (1986); police may cross over to another jurisdiction and arrest "in response to an emergency involving an immediate threat to human life or property," RCW 10.93.070(2), defendant's erratic driving meets that test; II.

***State v. Gillenwater***, 96 Wn.App. 667 (1999)

Defendant is involved in fatal accident which is other driver's fault, evidence known to police establishes no erratic driving by defendant but police observe cooler full of beer, three

opened cans of beer, strong odor of alcohol on defendant, sufficient to establish probable cause to arrest for DUI, *State v. Inman*, 2 Wn.App.2d 281 (2018); II.

***State v. Reid***, 98 Wn.App. 152 (1999)

Police observe defendant asleep in car with engine running three feet off roadway, detect strong odor of alcohol, defendant refuses field tests, is argumentative, arrested for DUI, trial court suppresses maintaining that officer lacked probable cause as defendant was safely off the road; held: safely off the road is an affirmative defense to DUI, RCW 46.61.504(2), *McGuire v. Seattle* 31 Wn.App. 438 (1982), thus has no role in determination of probable cause; where a defendant appears intoxicated in driver's seat of a running parked car, there is probable cause to arrest, *Edmonds v. Ostby*, 48 Wn.App. 867, 870 (1987), *Spokane v. Badeaux*, 20 Wn.App. 731, 734 (1978), *but see: Spokane v. Beck*, 130 Wn.App. 481 (2005); II.

***State v. Baity***, 140 Wn.2d 1 (2000)

Horizontal gaze nystagmus (**HGN**) testing satisfies *Frye* test, *State v. Cissne*, 72 Wn.App. 677 (1994); drug recognition evaluation (**DRE**) protocol and chart used to classify behavioral patterns associated with categories of drugs meet *Frye* standard where all 12 steps of protocol have been undertaken; officer may not testify in a fashion that casts an aura of scientific certainty to the testimony, *see also: State v. Quaale*, 182 Wn.2d 191 (2014), nor may officer predict specific levels of drugs present; qualified officer may express opinion that suspect's behavior and physical attributes are or are not consistent with behavioral and physical signs associated with certain categories of drugs, at 17-18; to meet ER 702, DRE evidence must include a description of witness's training, education and experience together with a showing that test was properly administered; court may not refer to DRE witness as an "expert" until witness is qualified, at 4, n.1; 9-0.

***Kent v. Jenkins***, 99 Wn.App. 287 (2000)

A successfully completed and dismissed **deferred prosecution** counts as a "prior offense" for purposes of mandatory minimum sentences, RCW 46.61.502, -.504, *Richland v. Michel*, 89 Wn.App. 764 (1998), *State v. Pruett*, 116 Wn.App. 746 (2003), *Bremerton v. Tucker*, 126 Wn.App. 26 (2005), distinguishing *State v. Cruz*, 139 Wn.2d 186 (1999); I.

***State v. Grant***, 104 Wn.App. 715 (2001)

Citation which alleges "driving while intoxicated" and includes statutory reference and BAC readings is sufficient for both BAC and "under the influence" means, *State v. Ortiz*, 80 Wn.App. 746 (1996), *Seattle v. McKinney*, 58 Wn.App. 607 (1990), where challenged after state has rested; III.

***Walla Walla v. Topel***, 104 Wn.App. 816 (2001)

Changes to **deferred prosecution** statute, ch. 10.05, RCW, which limit a person to one deferred prosecution for life do not violate *ex post facto* clause as it is not retroactive merely because some of the requisites are drawn from a time antecedent to the law's passage, *State v. Scheffel*, 82 Wn.2d 872, 879 (1973), *Richland v. Michel*, 89 Wn.App. 764 (1998); statute properly allows one deferred prosecution even if it was granted before enactment, *State v. Sell*, 110 Wn.App. 741 (2002); III.

***Clement v. Dep't of Licensing***, 109 Wn.App. 371 (2001)

Trooper reports to arresting trooper that radar shows driver is speeding, arresting trooper observes front end of car dip as if driver hit the brakes, stops driver who is intoxicated, RALJ judge finds no probable cause because there is no radar foundation evidence, *Seattle v. Peterson*, 39 Wn.App. 524 (1985); held: radar foundation evidence need not be presented to establish probable cause in license revocation proceeding, *Jury v. Dep't of Licensing*, 114 Wn.App. 726 (2002); I.

***State v. Hopkins***, 109 Wn.App. 558 (2001)

To enhance license suspension from 90 days to a year, former RCW 46.61.5055(1), issue of whether breath alcohol level was greater than .15 must be submitted to jury, *Apprendi v. New Jersey*, 147 L.Ed.2d 435 (2000), *see: State v. Gore*, 143 Wn.2d 288, 312 (2001), *Alleyne v. United States*, 570 U.S. 99, 186 L. Ed. 2d 314 (2013), *Spokane v. Wilcox*, 143 Wn.App. 568 (2008); license suspension following trial is a criminal penalty, distinguishing *State v. McClendon*, 131 Wn.2d 853 (1997), *State v. Williams*, 85 Wn.App. 271, 277 (1997); 2-1, I.

***College Place v. Staudenmaier***, 110 Wn.App. 841 (2002)

Strong odor of alcohol plus eyes watery and bloodshot plus admission to drinking 5-6 beers plus passing only one field test and performing marginally on others equals probable cause to arrest, *State v. Inman*, 2 Wn.App.2d 281 (2018); National Highway Traffic Safety Administration standards for field test performance have not been adopted in Washington; III.

***State v. Vasquez***, 148 Wn.2d 303 (2002)

DOL hearing examiner concludes police lacked probable cause to stop, defendant is later charged with DUI and VUCSA from same stop; held: collateral estoppel will not bar trial court from independently determining probable cause, *State v. Dupard*, 93 Wn.2d 268 (1980), *State v. Cleveland*, 58 Wn.App. 634 (1990), *State v. Williams*, 132 Wn.2d 248 (1997), *see also: LeMond v. Dep't of Licensing*, 143 Wn.App. 797 (2008), distinguishing *Thompson v. Department of Licensing*, 138 Wn.2d 783 (1999); affirms *State v. Vasquez*, 109 Wn.App. 310 (2001); 9-0.

***Tacoma v. Belasco***, 114 Wn.App. 211 (2002)

At physical control trial, defendant testifies he left a tavern, got in his car and went to sleep, trial court declines "safely off the roadway" affirmative defense instruction, reasoning that defendant must first drink, drive the car and park it, *see: McGuire v. Seattle*, 31 Wn.App. 438 (1982); held: defendant need not have been driving while intoxicated in order to be eligible to assert the "safely off the roadway" defense; II.

***State v. Votava***, 149 Wn.2d 178 (2003)

Physical control defendant testifies that a friend drove his car, parked it and left, defendant went to sleep, trial court declines to instruct as to safely off the road; held: safely off the road defense to physical control, RCW 46.61.504(2), is available even if defendant did not personally drive the vehicle off the roadway, *Tacoma v. Belasco*, 114 Wn.App. 211, 215 (2002), *cf.: Yakima v. Mendoza Godoy*, 175 Wn.App. 233 (2013), burden is on defense to prove by

preponderance, at 187, *Spokane v. Beck*, 130 Wn.App. 481, 486 (2005); reverses *State v. Votava*, 109 Wn.App. 529 (2001); 8-1.

***State v. Cerrillo***, 122 Wn.App. 341 (2004)

Police respond to "suspicious vehicle," see two men asleep, knock, ask driver for identification, smell odor of alcohol, officer decides driver is intoxicated, tells him to sleep it off, later sees car driving, commits infraction, stops, arrests for DUI; held: initial contact was not a seizure, *State v. O'Neill*, 148 Wn.2d 564, 574 (2003), second stop was lawful as police had probable cause to arrest based upon first stop, as "smell of alcohol emanating from [defendant] during the first encounter indicated that [he] likely was under the influence of alcohol," at 351; opinion in *State v. Cerillo*, 114 Wn.App. 259 (2002), withdrawn; III.

***Walla Walla v. Greene***, 154 Wn.2d 722 (2005)

DUI statute which establishes mandatory minimum sentence for a prior offense for negligent driving 1° that was originally charged as DUI does not violate due process, *see State v. Anderson*, 9 Wn.App.2d 430 (2019), overruling *State v. Shaffer*, 113 Wn.App. 812, 818-20 (2002); 7-2.

***State v. Warren***, 127 Wn.App. 893 (2005)

Defendant is charged with DUI, after statute of limitations runs state adds negligent driving 1° on same facts; held: because negligent driving is a less serious offense, based on same evidence and did not create a potential for "a greater stigma or penalty," it relates back to the original charge, does not violate statute of limitations, *see: State v. Eppens*, 30 Wn.App. 119 (1981), *but see: State v. Sutherland*, 104 Wn.App. 122 (2001); I.

***License Suspension of Richie***, 127 Wn.App. 935 (2005)

Unconscious driver is taken from collision in Washington to Idaho hospital, Washington trooper smells alcohol on driver's breath in hospital, orders blood draw, arrests for DUI, DOL suspends license; held: applying Idaho's fresh pursuit statute, Idaho Code § 19-701 (1941), trooper had reasonable suspicion to detain for DUI, which for purposes of fresh pursuit statute is treated as a felony, *see:* RCW 10.31.100(3)(d), trooper could thus pursue into Idaho and arrest when probable cause is established, distinguishing *Clarkston v. Stone*, 63 Wn.App. 500 (1991), *State v. Steinbrunn*, 54 Wn.App. 506 (1989); III.

***Spokane v. Whitehead***, 128 Wn.App. 145 (2005)

RCW 10.05.010(2) precluding a second **deferred prosecution** for a title 46 offense applies to persons charged with DUI under a city ordinance; III.

***Yakima v. Skov***, 129 Wn.App. 91 (2005)

*Blakely v. Washington*, 159 L.Ed.2d 403 (2004), does not require a jury determination that defendant has a prior **deferred prosecution,** RCW 46.61.5055(12)(a)(vii), to impose a mandatory minimum, as it does not increase the statutory maximum; III.

***Spokane v. Beck***, 130 Wn.App. 481 (2005)

In physical control case, acknowledgment by arresting officer that defendant's car was safely off the road establishes the affirmative defense, irrespective of a jury's verdict to the contrary, as evidence was insufficient for jury to conclude otherwise, thus appropriate for appellate court to dismiss, *State v. Lively*, 130 Wn.2d 1, 17 (1996), *State v. Edgar*, 16 Wn.App.2d 826 (2021), *see also: Edmonds v. Ostby*, 48 Wn.App. 867, 870 (1987), *State v. Reid*, 98 Wn.App. 152 (1999); III.

***Lewis v. Dep't of Licensing***, 157 Wn.2d 446 (2006)

Police record conversations at traffic stops, arrest for DUI; held: conversations between police officers and detainees at a traffic stop are not private for purposes of the privacy act, at 458-60, RCW 9.73.030, *State v. Flora*, 68 Wn.App. 802 (1992), *State v. Clayton*, 11 Wn.App.2d 172 (2019), *see: State v. Clark*, 129 Wn.2d 211 (1996); an officer's failure to advise a detainee that he was being recorded on the recording violates the privacy act, RCW 9.73.090(1)(c), at 460-67; remedy for recording traffic stop without warning is suppression of the recording, *State v. Cunningham*, 93 Wn.2d 823, 831 (1980), but not exclusion of other evidence acquired at the same time as the improper recordings since the conversation was not private, *State v. Courtney*, 137 Wn.App. 376, 382-85 (2007), distinguishing *State v. Fjermestad*, 114 Wn.2d 828 (1990); reverses *Lewis v. Dep't of Licensing*, 125 Wn.App. 666 (2005) and *Auburn v. Kelly*, 127 Wn.App. 54 (2005); 9-0.

***Schlegel v. Dep't of Licensing***, 137 Wn.App. 364 (2007)

Fish and Wildlife officers, on opening day of elk hunting season, observe truck, occupants in hunting clothing, in hunting area, stop vehicle to check hunting license, observe elk rifles, smell alcohol on driver, call state patrol, driver is arrested for DUI; held: articulable facts existed to indicate driver was hunting, permitting a brief investigatory stop, RCW 77.55.080(1), for hunting, a highly regulated activity, *see: State v. Williams*, 85 Wn.App. 271 (1997), distinguishing *Seattle v. Mesiani*, 101 Wn.2d 454 (1988); 2-1, III.

***Auburn v. Hedlund***, 137 Wn.App. 494, 498-503 (2007), *reversed, on other grounds*, 165 Wn.2d 645 (2009)

Defendant furnishes liquor to minor who drives drunk and severely injures defendant-passenger, who is charged with accomplice to DUI; held: an injured passenger of a drunk driver is a victim and thus cannot be an accomplice, RCW 9A.08.020(5); I.

***Butler v. Kato***, 137 Wn.App. 515 (2007)

Trial court cannot require AA meetings and alcohol treatment as conditions of release in DUI case absent evidence that defendant would fail to appear, CrRLJ 3.2(b)(7), or commit a violent crime, CrRLJ 3.2(a)(2), -(e), *see also: State v. Rose*, 146 Wn.App. 439 (2008); I.

***State v. Hendrickson***, 140 Wn.App. 913 (2007)

*Corpus delicti* for DUI is established where independent evidence shows car is registered to defendant who is only person in area, smell of alcohol, eyes watery and bloodshot, face flushed, *see: State v. Sjogren*, 71 Wn.App. 779 (1993); III.

***Spokane v. Wilcox***, 143 Wn.App. 568 (2008)

Refusal to take breath test is remedial, not punishment, *State v. McClendon*, 131 Wn.2d 853, 868 (1997), *but see: State v. Hopkins*, 109 Wn.App. 558 (2001), and thus need not be submitted to a jury before the court may inform DOL of the refusal, resulting in license revocation rather than 90 day suspension; III.

***State v. Dodson***, 143 Wn.App. 872 (2008)

Defendant drives wrong way on I-5 entrance ramp onto Fort Lewis, is arrested by military police officer who calls state patrol who processes defendant for DUI; held: where an essential element of a crime is committed within an area of state jurisdiction, district court has jurisdiction to hear the case; Secretary of the Army's retroceding to the state jurisdiction, 40 U.S.C. § 1314, 10 U.S.C. § 2683, over that portion of I-5 as it crosses Fort Lewis creates concurrent jurisdiction; II.

***State v. Nguyen***, 165 Wn.2d 428 (2008)

Physical control is a lesser included offense of DUI, *see: McGuire v. Seattle*, 31 Wn.App. 438 (1982); 9-0.

***State v. Prado***, 145 Wn.App. 646 (2008)

Defendant crosses lane divider by two tire widths for one second, is stopped for lane change violation, RCW 46.61.140, processed and arrested for DUI; held: statute which requires that a vehicle be driven "as nearly as practicable" within a lane does not authorize a stop by police as the statute does not impose strict liability, *State v. Jones,* 186 Wn.App. 786 (2015), *but see: State v. Huffman,* 185 Wn.App. 98 (2014), *State v. Kocher,* 199 Wn.App. 336 (2017), *State v. Tysyachuk,* 13 Wn.App.2d 35 (2020), *cf.: State v. Thibert,* 3 Wn.App.2d 358 (2018), *State v. Alvarez,* 6 Wn.App.2d 398 (2018); I.

***State v. Draxinger***, 148 Wn.App. 533 (2008)

Prior DUI convictions can be used both to enhance a new DUI to a felony, RCW 46.61.5055(4) (2008), and as part of the offender score; II.

***State v. Hinshaw***, 149 Wn.App. 747 (2009)

Police, with probable cause to arrest for DUI, go to defendant's home, smell alcohol through screen door which defendant leaves shut, open door, grab defendant and arrest; held: absent evidence of a "major crisis demanding immediate entry," and failure of state to make a showing that destruction of evidence (alcohol dissipation) was imminent or that arresting officers could not have obtained a warrant, *see: State v. Bessette*, 105 Wn.App. 793 (2001), *State v. Ringer,* 100 Wn.2d 686 (1983), *Missouri v. McNeely,* 569 U.S. 141, 133 S.Ct. 1552, 185 L.Ed.2d 696 (2013), *Seattle v. Pearson,* 192 Wn.App. 802, 811-17 (2016), *State v. Baird,* 187 Wn.2d 210 (2016), *cf.: State v. Anderson,* 9 Wn.App.2d 430 (2019), no exigent circumstance existed for a warrantless arrest in the home; III.

***State v. Rivera-Santos,*** 166 Wn.2d 722 (2009)

Trooper observes defendant drive erratically, observes him cross into Oregon where he is stopped and arrested by Oregon police, defendant is convicted of DUI in Oregon then prosecuted in Washington; held: no part of defendant's Washington DUI was committed in Oregon and his

Oregon DUI was not committed "under such circumstances that [Washington] had jurisdiction," RCW 10.43.040, thus RCW 10.43.040 does not bar Washington prosecution; 9-0.

***Seattle v. Winebrenner***, 167 Wn.2d 451 (2009)

Defendant 1 is granted a **deferred prosecution** for DUI, is convicted of a new DUI, trial court revokes deferred prosecution and sentences as if there were one prior in seven years; defendant 2 receives deferred prosecution, pleads guilty to new reckless driving, trial court revokes deferred prosecution but sentences as if there were no prior offenses; held: because of ambiguity in RCW 46.61.5055, rule of lenity requires that offenses that occur after the current offense must not be considered prior offenses of purposes of enhancing sentence; reverses *Seattle v. Quezada*, 142 Wn.App. 43 (2007); 9-0.

***State v. Castle***, 156 Wn.App. 539 (2010)

Defendant is arrested for DUI, at arrest he had one prior conviction and three pending DUIs of which he is convicted prior to trial, state seeks felony sentence, RCW 46.61.502, trial court dismisses felony DUI; held: "prior offenses" means convictions at the time of arrest, thus trial court properly dismissed; I.

***State v. Chambers***, 157 Wn.App. 465 (2010)

To prove felony DUI, RCW 46.61.5055(14) (2010), four prior DUI offenses are elements to be proved to trier of fact, but whether or not a prior DUI meets the statutory definition is a question of law, *State v. Cochrane*, 160 Wn.App. 18 (2011), *State v. Wu*,. 6 Wn.App. 2d 679 (2018), *review granted*, 193 Wn.2d 1002 (2019), and, if a prior is from another state, the court must look to the elements, *see: Pers. Restraint of Lavery*, 154 Wn.2d 249, 255 (2005), *State v. Miller*, 156 Wn.2d 23 (2005), *State v. Ingram*, 9 Wn.App.2d 482 (2019); I.

***State v. Cochrane***, 160 Wn.App. 18 (2011)

Felony DUI information alleges that defendant had four prior offenses but failed to state that they were within ten years, RCW 46.61.5055(4) (2008), defense moves to dismiss, on appeal state concedes information was insufficient, defense seeks remand for entry of judgment for misdemeanor DUI; held: remedy for failure to allege elements is dismissal without prejudice, *State v. Vangerpen*, 125 Wn.2d 782 (1995), *see also: State v. Chambers*, 157 Wn.App. 465 (2010); I.

***State v. Ceja Santos***, 163 Wn.App. 780 (2011)

To prove priors for felony DUI, state offers certified copies of judgments without more; held: name identity alone is insufficient to prove a prior as an element of a crime, *State v. Huber*, 129 Wn.App. 499, 502 (2005), *cf.: State v. Powell*, 172 Wn.App. 455, 459-62 (2012), *State v. Goggin*, 185 Wn.App. 59, 70-71 (2014), *see: State v. Sapp*, 181 Wn.App. 910 (2014), state must show that defendant was the person convicted of the prior offenses, remanded for entry of conviction and sentence for misdemeanor DUI; III.

***State v. Daily***, 164 Wn.App. 883 (2011)

Defendant is seen driving erratically, before police arrive she pulls into parking lot and falls asleep, defendant admits driving, trial court refuses lesser of physical control; held: while

physical control is a legal lesser of DUI, *State v. Huyen Bich Nguyen,* 165 Wn.2d 428, 433 (2008), here there is no affirmative evidence that only the lesser was committed, thus defendant was not entitled to an instruction on physical control; safely off the road defense to physical control, RCW 46.61.504(2) (2011), is not available to DUI; III.

***State v. Velasquez***, 176 Wn.2d 333 (2012)

Court may not require government to pay for **deferred prosecution** treatment for indigent defendants; 9-0.

***State v. Dailey***, 174 Wn.App. 810 (2013)

Defendant has the burden of proving that he took a prescription drug without knowledge of the soporific qualities, distinguishing *Kaiser v. Suburban Transp. System*, 65 Wn.2d 461 (1965); while DUI is not a strict liability offense, *see: State v. Bash,* 130 Wn.2d 594, 605-06 (1996), *but see State v. Burch,* 197 Wn.App. 382 (2016), *mens rea* is not an implied element, *see: State v. Deer,* 175 Wn.2d 725 (2012); I.

***Yakima v. Mendoza Godoy***, 175 Wn.App. 233 (2013)

Intoxicated defendant is driven by a friend to the friend's car where he waits for the friend to make a phone call, is convicted of physical control; held: safely off the roadway defense, RCW 46.61.504(3), is not available unless there is evidence that defendant moved the vehicle himself, distinguishing *State v. Votava*, 149 Wn.2d 178 (2003) where intoxicated defendant directed the car to be moved; III.

***Nielsen v. Dep't of Licensing***, 177 Wn.App. 45 (2013)

Statute which precludes an appeal by a person whose license is revoked but obtains an ignition interlock device permit to drive, RCW 46.20.385(1)(b), violates substantive due process; I, 2-1.

***State v. Mashek***, 177 Wn.App. 749 (2013)

To prove a prior conviction of vehicular assault, RCW 46.61.522, for purposes of felony DUI, RCW 46.61.502(6) (2012), the state can use a conviction under the statute effective until 2001, as "serious bodily injury," as required by prior statute, would certainly meet the current requirement of "substantial bodily harm," at 763-66; II.

***State v. McLean***, 178 Wn.App. 236 (2013)

Trooper observes defendant weave within lane, cross fog line three times, pulls defendant over, smells alcohol, defendant performs field sobriety tests, is arrested for DUI, defense maintains **pretext**, *State v. Ladson,* 138 Wn.2d 343 (1999), claims trooper had reasonable suspicion only of weaving and lacked reasonable suspicion of DUI; held: from training and experience, *State v. Doughty,* 170 Wn.2d 57, 62 (2010), it was rational for trooper to infer defendant was under the influence, *see: State v. Arreola,* 176 Wn.2d 284 (2012), *State v. Tysyachuk,* 13 Wn.App.2d 35 (2020); II.

***State v. Quaale***, 182 Wn.2d 191 (2014)

At DUI investigation trooper does horizontal gaze nystagmus (HGN) test, at trial trooper testifies over objection that, based upon the test there was "no doubt" defendant was impaired; held: to determine admissibility of challenged opinion testimony, factors are (1) type of witness, (2) specific nature of testimony, (3) charge, (4) defense and (5) other evidence before trier of fact, *State v. Montgomery*, 163 Wn.2d 577 (2008); here, officer's opinion on the core disputed fact in the form of a conclusion from scientific evidence that the jury was not in a position to independently assess, testimony violated defendant's constitutional right to have a fact critical to his guilt determined by the jury, *State v. Baity*, 140 Wn.2d 1 (2000), *cf.: Seattle v. Heatley*, 70 Wn.App. 573 (1993), *State v. Song Wang*, 5 Wn.App.2d 12, 28-30 (2018); affirms *State v. Quaale*, 177 Wn.App. 603 (2013); 5-4.

***State v. Goggin***, 185 Wn.App. 59, 70-71 (2014)

To prove a prior for purposes of felony DUI, RCW 46.61.502(1)(c), -(6)(a) (2011), name identity plus a state identification card containing a photograph, height, weight, hair and eye color, address matching what's contained on the prior judgment and sentence is sufficient, *State v. Sapp*, 181 Wn.App. 910 (2014), *see: State v. Ceja Santos*, 163 Wn.App. 780 (2011), *State v. Huber*, 129 Wn.App. 499 (2005) ; III.

***State v. Huffman***, 185 Wn.App. 98 (2014)

Officer observes defendant weave within lane then cross center line by one full tire width, stops, detains, arrests for DUI; held: crossing center line, by itself, is enough to stop vehicle for violation of RCW 46.61.100, *see: State v. Thibert*, 3 Wn.App.2d 358 (2018), ), *State v. Alvarez*, 6 Wn.App.2d 398 (2018), distinguishing *State v. Prado*, 145 Wn.App. 646, 649 (2008), *State v. Kocher*, 199 Wn.App. 336 (2017); I.

***State v. Hernandez***, 185 Wn.App. 680 (2015)

In determining offender score for felony DUI, former RCW 9.94A.525(2)(e) (2011), all prior convictions, traffic and other felonies, count, *State v. McAninch*, 189 Wn.App. 619 (2015, *State v. Sandholm*, 184 Wn.2d 726, 736-39 (2015); sentencing court may not order interlock device, RCW 46.20.720(1) (2013), for longer than the maximum sentence; III>

***State v. Bird***, 187 Wn.App. 942 (2015)

Defendant is charged with felony DUI, enhanced with prior vehicular assault while under the influence, RCW 46.61.502(6)(b)(ii) (2013), -5055(4)(b)(ii) (2012), prior conviction was via *Alford* plea to "all alternatives," in accepting plea court reads police report and certification for determination of probable cause which establish defendant is under the influence, enters general finding of guilt to vehicular assault at plea, judgment and sentence references "all alternatives," trial court dismisses; held: issue of whether a prior conviction qualifies to enhance is a question of law, not fact, *State v. Wu*, 6 Wn.App. 2d 679 (2018), *aff'd,* 194 Wn.2d 880 (2019), *cf.: State v. Anderson*, 9 Wn.App.2d 430 (2019), defendant pleaded to all alternatives and factual basis is sufficient to establish that the guilty plea referred to the DUI prong, thus reversed; I.

***State v. Federov***, 183 Wn.2d 669 (2015)

Defendant is arrested for DUI, asks to speak with counsel, asks for privacy when counsel is contacted on telephone, *Seattle v. Koch*, 53 Wn.App. 352 (1989), *State v. Fitzsimmons*, 93

Wn.2d 436 (1980), *affirmed on remand,* 94 Wn.2d 858 (1980), trooper remains in room but testifies at suppression hearing that he did not hear defendant's conversation, counsel "felt unable … to ask open-ended questions;" held: CrR 3.1 right to counsel is limited, not coextensive with Sixth Amendment right to counsel, right to private consultation is to be weighed against legitimate safety and practical concerns; affirms *State v. Federov,* 183 Wn.App. 736 (2014); 9-0.

***State v. McAninch***, 189 Wn.App. 619 (2015)

In determining offender score for felony DUI, former RCW 9.94A.525(2)(e) (2011), all prior convictions, traffic and other felonies, count, *State v. Hernandez,* 185 Wn.App. 680 (2015, *State v. Sandholm,* 184 Wn.2d 726, 736-39; II.

***State v. Sandholm***, 184 Wn.2d 726 (2015)

DUI statute does not create alternative means to commit the offense, thus jury need not be unanimous as to whether a defendant was under the influence of alcohol or drugs or was under the combined influence of alcohol and drugs, at 732-36, disavowing, in part, *State v. Franco,* 96 Wn.2d 816 (1982); in determining offender score for felony DUI all prior convictions that have not washed count, *State v. Hernandez,* 185 Wn.App. 680 (2015), *State v. McAninch,* 189 Wn.App. 619 (2015), overruling *State v. Martinez-Morales,* 168 Wn.App. 489 (2012) and *State v. Jacob,* 176 Wn.App. 351 (2013), at 736-39; 9-0.

***State v. Rich***, 184 Wn.2d 897 (2016)

While proof of DUI alone does not necessarily establish proof of reckless endangerment, RCW 9A.36.050(1), *see: State v. Hanna,* 123 Wn.2d 704 (1994), *State v. Randhawa,* 133 Wn.2d 67 (1997), *State v. Birch,* 183 Wash. 670, 673 (1935), here DUI, defendant's admission she was "tipsy," child in front seat, speeding is sufficient to prove reckless endangerment even absent erratic or dangerous driving; reverses, in part, *State v. Rich,* 186 Wn.App. 632 (2015); 9-0.

***State v. Mecham***, 186 Wn.2d 128 (2016)

A field sobriety test is not a search, defendant has no constitutional right to refuse, refusal may be used at trial, per four justices in lead opinion; four justices in dissent hold that FSTs are a seizure, defendant has the right to refuse; concurrence would hold that FSTs following a traffic stop based on evidence of impaired driving or following a stop for an unrelated offense where officer immediately discovers signs of impairment but suspect is not yet under arrest, are a seizure that may be justified as a *Terry* stop; thus, per Justice Wiggins lead opinion, "five justices hold that an FST is a seizure but not a search as long as the suspect has not already been arrested for an unrelated offense and the seizure is justified under *Terry, cf.: Vancouver v. Kaufman,* 10 Wn.App.2d 747 (2019)*;* reverses *State v. Mecham,* 181 Wn.App. 932 (2014).

***Seattle v. Pearson***, 192 Wn.App. 802 (2016)

Defendant is arrested for DUI, admits to smoking marijuana, police obtain warrantless blood sample, at suppression hearing officers testify that it would take up to 1½ hours to obtain a warrant by email but could have obtained a telephonic warrant, toxicologist testifies that marijuana dissipates, trial court holds that this was an exigent circumstance justifying warrantless seizure; held: government has burden of proving, by clear and convincing evidence

that a warrant could not have been obtained within a reasonable period of time, natural dissipation is a factor but is not a *per se* exigent circumstance, thus blood test results should have been suppressed, *State v. Hinshaw*, 149 Wn.App. 747 (2009), *State v. Rulan C.*, 97 Wn.App. 884 (1999), *State v. Bessette*, 105 Wn.App. 793 (2001), *Missouri v. McNeely*, 569 U.S. 141, 185 L.Ed.2d 696 (2013), *State v. Inman*, 2 Wn.App.2d 281 (2018), *State v. Rawley*, 13 Wn.App.2d 474 (2020), *see: State v. Baird*, 187 Wn.2d 210 (2016), *State v. Anderson*, 9 Wn.App.2d 430 (2019), at 811-17; trial court's failure to instruct that "it is not unlawful for a person to consume a drug and drive," WPIC 92.10 (3d ed. Supp. 2014-15), while legally accurate, is not error where court instructs that a person is under the influence if ability to drive is lessened in any appreciable degree thus allowing defense to argue its theory, at 820-23; I.

***State v. Olsen***, 189 Wn.2d 118 (2017)

Following DUI conviction in district court probation condition of random UAs is authorized, RCW 3.66.067 (2013), 46.61.5055 (2016), and does not violate state or U.S. constitutions, where ordered to monitor compliance with a condition of abstention; probation officer need not have a well-founded suspicion to demand UA; affirms *State v. Olsen*, 194 Wn.App. 264 (2016); 6-3.

***State v. Salgado-Mendoza***, 189 Wn.2d 420 (2017)

In DUI case defense demands name of toxicologist state will call, state provides eight names, state contacts crime lab which does not respond, day before trial state narrows list to three, at trial defense moves to exclude testimony of toxicologist whom state intended to call, defense declines to move to continue as defendant chooses not to waive right to speedy trial, trial court denies motion to exclude, on RALJ appeal superior court reverses; held: while state's disclosures establish mismanagement, trial court considered all of the circumstances including nature of witness' testimony, fact that defense had five months to prepare following the initial disclosure, thus trial court's decision was not manifestly unreasonable and denial of suppression was not an abuse of discretion, *see also: State v. Price*, 94 Wn.2d 810 (1980), *State v. Sherman*, 59 Wn.App. 763 (1990), *State v. Michielli*, 132 Wn.2d 229, 239-46 (1997), *cf.: State v. Stock*, 44 Wn.App. 467 (1986), *State v. Smith*, 67 Wn.App. 847 (1992); reverses *State v. Salgado-Mendoza*, 194 Wn.App. 234 (2016); 5-4.

***State v. Kocher***, 199 Wn.App. 336 (2017)

Trooper observes defendant as she drove in the far right lane southbound on Interstate 5, as traffic to defendant's front and left come to a stop, defendant drives two wheels of her vehicle over the fog line for approximately 200 feet, stopped and found to be under the influence; held: driving with wheels off roadway, RCW 46.61.670 (1977), applies rather than driving on roadways lined for traffic, RCW 46.61.140 (1965), which provides that car must be driven within lanes "as nearly as practicable," thus trooper had a reasonable basis to stop the vehicle, distinguishing *State v. Prado*, 145 Wn.App. 646 (2008) and *State v. Huffman*, 185 Wn.App. 98, 107 (2014), *see: State v. Brooks*, 2 Wn.App.2d 371 (2018), *State v. Huffman*, 185 Wn.App. 98 (2014); I.

***State v. Chelan County District Court***, 189 Wn.2d 625 (2017)

In DUI case District Court judge suppresses refusal to take breath test, state seeks writ of review which Superior Court denies; held: where there is no finding that the trial court's decision effectively terminated the state's case, RALJ 2.2(c)(2), RAP 2.2(b)(2), and the decision may be a mere error of law then an interlocutory writ should be denied; here, the trial court did not "act illegally," *Seattle v. Holifield*, 170 Wn.2d 230, (2010), RCW 7.16.040 (1987), thus regardless of whether or not the decision was correct interlocutory review is not available, *cf.: Seattle v. Keene*, 108 Wn.App. 630 (2001); 7-2.

***State v. Thibert***, 3 Wn.App.2d 358 (2018)

Deputy stops defendant for driving in left lane of freeway even though no vehicles were travelling in the right lane, determines defendant is under the influence; held: RCW 46.61.100 (2007) prohibits driving in the left lane except when passing even if no traffic is being obstructed; III.

***State v. Allen***, 5 Wn.App.2d 32 (2018)

Defendant is charged with felony DUI, enhancement is a prior vehicular assault, RCW 46.61.522(1)(b)." RCW 46.61.502(6)(b)(ii), to which he pleaded guilty, trial court considers vehicular assault information, plea statement and judgment and sentence and a witness who testified to the facts of the underlying vehicular assault, rules that the prior was alcohol/drug related, submits it to the jury; held: nature of a prior conviction is a question of law, *State v. Miller*, 156 Wn.2d 23, 31 (2005), *State v. Ingram*, 9 Wn.App.2d 482 (2019); court can only consider the documents to elucidate the nature of the conviction, defendant's plea was to all three prongs of vehicular assault including drugs/alcohol so enhancement was proper; nature of conviction is not a question for the jury, *Descamps v. United States*, 570 U.S. 254, 269-70, 133 S.Ct. 2276, 186 L.Ed. 2d 438 (2013); *In re Pers. Restraint of Lavery*, 154 Wn.2d 249, 258 (2005), *State v. Wu*, 194 Wn.2d 880 (2019); court should not have taken testimony about the facts of the prior, harmless here; III.

***State v. Taylor***, 5 Wn.App.2d 530 (2018)

A defendant may be prosecuted for DUI committed within a city in district court under state statutre even though the city has adopted a DUI ordinance, as district courts have concurrent jurisdiction with municipal courts, RCW 3.66.060; III.

***State v. Alvarez***, 6 Wn.App.2d 398 (2018)

Respondent is stopped by a trooper after car wheels briefly cross over a fog line and onto an area not designated as a roadway, is cited for driving with wheels off roadway, RCW 46.61.670, trial court dismisses as car was driven "as nearly as practicable" within lane, *State v. Prado*, 145 Wn.App. 646 (2008); held: *Prado, id.*, only applies to driving on roadways lined for traffic, RCW 46.61.140, area over fogline is not a roadway thus any crossing over fogline establishes grounds to stop the vehicle, *see: State v. Huffman*, 185 Wn.App. 98 (2014), *State v. Kocher*, 199 Wn.App. 336 (2017), *State v. Brooks*, 2 Wn.App.2d 371 (2018); 2-1, III.

***State v. Villela***, 194 Wn.2d 451 (2019)

RCW 46.55.360 authorizing summary impoundment following DUI arrest violates state constitution, *State v. Tyler*, 177 Wn.2d 690, 698 (2013); 9-0.

***State v. Wu***,. 194 Wn.2d 880 (2019)

Whether or not a prior DUI was an alcohol offense for purposes of enhancement of a DUI to felony DUI, RCW 46.61.5055(14)(a)(xii) (2018), is a question of law for the court, *State v. Bird*, 187 Wn.App. 942 (2015), not for the jury, *abrogating State v. Mullen,* 186 Wn.App. 321 (2015); once the court determines that the prior was an alcohol or drug offense, then the fact of conviction is a question for the jury, *cf.: State v. Anderson,* 9 Wn.App.2d 430 (2019); affirms *State v. Wu,* 6 Wn.App. 2d 679 (2018); 6-3.

***State v. Brown***, 194 Wn.2d 972 (2019)

Driver uses turn signal, moves left into designated left turn lane, does not reactivate turn signal and makes the left turn, is stopped by police, processed for DUI; held: turn signal statute, RCW 46.61.305 (1975), requires a driver to signal intent to turn or change lanes on a public roadway, reversing *State v. Brown,* 7 Wn.App.2d 121 (2019), *cf.: State v. Brown*, 119 Wn.App. 473 (2003) , *overruled on other grounds, State v. Jasper*, 174 Wn.2d 96 (2012); 9-0.

***Vancouver v. Kaufman,*** 10 Wn.App.2d 747 (2019)

Officer testifies that it is evidence of intoxication when an arrestee refuses field sobriety tests and breath tests; held: opinion regarding guilt is inadmissible, *State v. Demery,* 144 Wn.2d 753, 759 (2001), *Seattle v. Heatley*, 70 Wn.App. 573, 577 (1993); III.

***State v. Tysyachuk***, 13 Wn.App.2d 35 (2020)

In felony DUI case, RCW 46.61.502(6) (2017), court has discretion to deny bifurcation of determination whether defendant has prior DUIs for enhancement purposes, *State v. Roswell*, 165 Wn.2d 186, 192 (2008); III.

***Seattle v. Levesque,*** 12 Wn.App.2d 687 (2020)

Officer, not a drug recognition expert, testifies that defendant showed signs consistent with a central nervous system stimulant and was definitely impaired; held: officer was not qualified to opine as to whether defendant was affected by a specific category of drugs, *State v. Baity,* 140 Wn.2d 1 (2000), distinguishing *State v. McPherson*, 111 Wn.App. 747, 761-62 (2002), testimony that defendant was "definitely impaired" constituted an impermissible opinion of guilt; I.

***State v. Skrobo***, 17 Wn.App.2d 197 (2021)

**Deferred prosecution** for DUI can be revoked anytime within five years, *State v. Vinge*, 59 Wn.App. 134 (1990); II.

***State v. Edgar***, 16 Wn.App.2d 826 (2021)

Defendant is parked in a gas station, not in a parking stall but not blocking traffic, engine running, transmission in park, asleep, over the limit, argues safely off the road, is convicted of physical control, RCW 46.61.504; held: while defense has the burden of proving safely off the road, *State v. Votava*, 149 Wn.2d 178 (2003), an affirmative defense is reviewable for sufficiency, *State v. Lively*, 130 Wn.2d 1, 17 (1996), , *Spokane v. Beck*, 130 Wn.App. 481 (2005); here, defendant did what the legislature asked, he pulled safely off the road, thus a

rational trier of fact could not have found that defendant failed to prove the defense by a preponderance; III.

***Seattle v. Lange***, 18 Wn.App.2d 139 (2021)

In DUI case police disclose to city that blood test analyst had erred in another case that caused a false positive, city discloses it to defense "days before trial," trial court suppresses blood test results for discovery violation, city seeks writ; at trial, court admits unredacted abstract of driving record including prior DUI convictions to support joined suspended license and ignition interlock charges, trial court admits over objection, defense motion to sever is denied as untimely; held: CrRLJ 47(a)(3) mandates disclosure of any information which tends to negate guilt, impeachment information meets that test, unlike a constitutional *Brady* issue the rules do not require proof of materiality before mandating disclosure as long as the information sought is discoverable under the rules, suppression is a proper remedy within discretion of the trial court, CrRLJ 4.7(g)(7)(i) does not require proof of prejudice; admitting unredacted abstract which included information unfairly prejudicial was error, failure to grant severance was error; I.

***State v. Fraser***, 199 Wn.2d 465 (2022)

Statute prohibiting driving with blood concentration of 5.00 nanograms of THC within two hours after driving, RCW 46.61.502(1)(b) (2022), is a proper exercise of police powers; 9-0.

***Seattle v. Wiggins***, 23 Wn.App.2d 401 (2022)

At DUI trial toxicologist who tested blood is unavailable, city offers testimony of the "reviewing toxicologist" who co-signed the report but was not present during testing, did not perform tests, and confirmed that he did not sign the report under penalty of perjury as the only person who performed the work can attest to the fact that it was done, trial court refuses to admit the testimony as the witness did not engage in independent inquiry; held: toxicologist who did the testing was the witness "against" the defendant, testimony of reviewer violated defendant's confrontation clause right, *Melendez-Diaz v. Massachusetts*, 558 U.S. 305, 174 L.Ed.2d 314 (2009), *Bullcoming v. New Mexico*, 564 U.S. 647, 180 L.Ed.2d 610 (2011), distinguishing *State v. Lui*, 179 Wn.2d 457 (2014)(DNA evidence); I.

***State v. Gregory***, ___ Wn.App.2d ___, 521 P.3d 962 (2022)

Idaho "withheld judgment" is equivalent to a deferred prosecution for purposes of enhancing a DUI to a felony; III.

# DUI
# Breath and Blood Tests, Implied Consent

***Blaine v. Suess***, 93 Wn.2d 722 (1980)

DUI suspect demands additional tests, told he would be transported to hospital, but instead is taken to jail; held: unreasonable interference with defendant's efforts to obtain additional tests; remedy is dismissal, *but see: Spokane v. Kruger*, 116 Wn.2d 135 (1991), *State v. McNichols*, 128 Wn.2d 242 (1995); 9-0.

***State v. Bence***, 29 Wn.App. 223 (1981)

Breath test one hour after driving is admissible as circumstantial evidence of blood alcohol level at time of driving; II.

***State v. Keller***, 36 Wn.App. 110 (1983)

Breathalyzer reading of .10 is not conclusive proof of guilt; state must prove beyond a reasonable doubt that the reading is correct; I.

***State v. Reed***, 36 Wn.App. 193 (1983)

DUI suspect, under arrest, demands to be taken to hospital for blood test, police refuse, but offer to arrange for test in jail, provide suspect with telephone access; held: no interference with other test; *accord: State v. McNichols*, 128 Wn.2d 242 (1995); III.

***State v. Rogers***, 37 Wn.App. 728 (1984)

Following an accident, defendant is arrested for DUI; due to mouth injury, breath test test is not given, defendant consents to blood test, objects at trial claiming RCW 46.20.348 (Initiative 242) does not permit blood test except where suspect is unconscious or other party to collision is dead or dying; held: RCW 46.20.308(1) does not prohibit a blood test to a consenting driver nor are results inadmissible because police do not advise driver that his license could not be revoked if he refused; I.

***State v. Peterson***, 100 Wn.2d 788 (1984)

Breathalyzer test is admissible where maintenance operator or technician establishes that machine was checked, calibrated and deemed operable once every three months, RCW 46.61.506(3), WAC 448-12-015; 9-0.

***State ex. rel. Juckett v. Evergreen District Court***, 100 Wn.2d 824 (1984)

When DUI suspects are arrested, they must be advised of their *Miranda* right to counsel prior to taking breath test, and must be provided access to counsel if requested; if *Miranda* warnings are given, defendant need not again be advised of right to counsel prior to taking breath test, *see: State v. Templeton*, 148 Wn.2d 193 (2002), *State v. Dunn*, 108 Wn.App. 490 (2001), *State v. Kronich*, 131 Wn.App. 537, 542-44 (2006), *aff'd, on other grounds,* 160 Wn.2d 893 (2007), *overruled, on other grounds,State v. Jasper*, 174 Wn.2d 96 (2012); prior to the issuance of a citation, no Sixth Amendment right to counsel exists, however defendant does have right to counsel pursuant to JCrR 2.11(c)[CrRLJ 3.1]; 9-0.

***California v. Trombetta***, 81 L.Ed.2d 413 (1984)

Police need not preserve breath samples of suspected drunk drivers in order for the results of breath-analysis tests to be admissible; *accord*: *Bellevue v. Ohlson*, 60 Wn.App. 485 (1991); 9-0.

***Kirkland v. O'Connor***, 40 Wn.App. 521 (1985)

Suspect is not given breath test, court instructs jury that it shall not draw any inferences from the absence of a breath test result nor speculate on the reasons for the absence of such a test; held: comment on the evidence, in violation of CONST. Art. 4, § 16; I.

***State v. Russell***, 41 Wn.App. 391 (1985)

Defendant demands second breath test from officer because he believed officer cheated on first test; held: due process does not oblige officer to provide second test on demand; RCW 46.20.308(1), permitting additional tests by a qualified person, does not apply to a second test by the police officer; III.

***State v. Sanchez***, 42 Wn.App. 225 (1985)

Following arrest for negligent homicide, blood sample is drawn at 3:43 a.m.; at 5:52 a.m., police first inform defendant of right to independent test, RCW 46.20.308(1) [now 46.20.308(2)]; held: blood test was admissible because the notice of independent test gave defendant a reasonable opportunity to develop evidence of the alcohol content even though the advice was not given contemporaneously with the seizure of the blood sample; II.

***Paulson v. Department of Licensing***, 42 Wn.App. 362 (1985)

Arresting officer need only advise suspect of his *Miranda* rights and the consequences of refusing a breath test; officer need not inform suspect that he may not make the receipt of legal advice a condition of his deciding whether to submit to a breath test or that he is not entitled to have an attorney present when taking the test, *State v. Staeheli*, 102 Wn.2d 305 (1984); I.

***State v. Zwicker***, 105 Wn.2d 228 (1986)

Whereas RCW 46.61.517 and 46.20.308 limit the admissibility of the refusal to take a breath test to explain why no test was given, and required the court to instruct the jury that it may not consider the refusal, then refusal evidence is not probative of any fact that is of consequence to the determination of guilt, and is inadmissible at trial unless the door is opened by the defense; where the police tell suspect that a refusal to take the test "may" be used against him at trial, then there is no coercion in obtaining the refusal evidence in violation of the privilege against self-incrimination; 9-0.

***Tennant v. Roys***, 44 Wn.App. 305 (1986)

Blood test results in civil case are admissible where the blood sample was analyzed but once in spite of WAC 448-14-020 which states that blood analysis "should include . . . duplicate analysis", as "should" is directional, not mandatory; I.

***Airway Heights v. Dilley***, 45 Wn.App. 87 (1986)

Defendant, arrested for DUI, requests counsel before deciding whether or not to take breath test; police, defendant and defendant's wife make several calls, cannot reach attorney, police do not give defendant 24-hour public defender number; held: reasonable but unsuccessful attempts to contact counsel for defendant satisfy the right to counsel, *see:* *Seattle v. Sandholm*, 65 Wn.App. 747 (1992), *State v. Kronich*, 131 Wn.App. 537, 542-44 (2006), *overruled, on other grounds, State v. Jasper*, 174 Wn.2d 96 (2012) ; III.

***Roethle v. Department of Licensing***, 45 Wn.App. 607 (1986)

Police need not advise DUI suspect of the period of revocation that will follow refusal to take a breath test, *Burnett v. Department of Licensing*, 66 Wn.App. 253 (1992); III.

***State v. Whitman County District. Court***, 105 Wn.2d 278 (1986)

Where police advise a DUI suspect that his refusal to take a breath test may be used against him at trial, the advice is accurate, since refusal may be used in rebuttal, *State v. Zwicker*, 105 Wn.2d 228 (1986), RCW 46.20.308; where police advise suspect that refusal ***shall*** be used against him/her at trial, the advise is inaccurate and, if the defendant took the breath test, the results must be suppressed; 9-0.

***State v. Hill***, 48 Wn.App. 344 (1987)

Police may force a breath or blood test, RCW 46.20.308(3), if defendant is arrested for vehicular assault or homicide, is unconscious, or defendant is arrested for DUI and a life threatening injury was sustained; warrantless seizure of blood is permissible following arrest for vehicular assault, *Schmerber v. California*, 16 L.Ed.2d 908 (1966), *State v. Judge*, 100 Wn.2d 706, 711 (1984), *but see: Missouri v. McNeely*, 569 U.S. 141 185 L.Ed.2d 696 (2013), *Seattle v. Pearson*, 192 Wn.App. 802, 811-17 (2016), *State v. Inman*, 2 Wn.App.2d 281 (2018), *see: State v. Anderson*, 9 Wn.App.2d 430 (2019), *State v. Rawley*, 13 Wn.App.2d 474 (2020); III.

***State v. Stannard***, 109 Wn.2d 29 (1987)

The statutory right to additional chemical test, former RCW 46.61.506(5), does not include the right to a second Breathalyzer test administered by the arresting officer; 8-1.

***State v. Barefield***, 47 Wn.App. 444, 110 Wn.2d 728 (1988)

Failure to advise an unconscious vehicular homicide suspect of right to additional tests is not error; while WAC 448-14-020 requires that a blood test shall employ a clean dry container, that samples be preserved with anticoagulant, and that a blank test be run, where state toxicologist testifies that while vial was in his possession it was not adulterated, that vial manufacturer always puts anticoagulants in this vial, and that he ran a test that was the equivalent of a blank test, a *prima facie* case was established, *but see:* *State v. Garrett*, 80 Wn.App. 651 (1996); jury need not be instructed regarding unanimity of mode; *accord*: *State v. Steinbrunn*, 54 Wn.App. 506 (1989); I.

***State v. Glessner***, 50 Wn.App. 397 (1988)

Police take blood sample from seriously injured vehicular homicide suspect without first advising him of right to counsel; held: due to defendant's condition, it was not feasible to advise defendant of right to counsel prior to taking blood, *State v. Prok*, 107 Wn.2d 153 (1986); I.

***Borger v. Department of Licensing***, 51 Wn.App. 942 (1988)

Declining to provide a second sample for BAC Verifier DataMaster test is a refusal; III.

***State v. Watson***, 51 Wn.App. 947 (1988)

Where state fails to establish that a Breathalyzer was checked and calibrated at least every three months and was in working order at the time of the test, the results must be suppressed; evidence that the instrument was checked nine days after the test does not cure the error, *see*: *State v. Straka*, 116 Wn.2d 859, 875-6 (1991); 2-1, III.

***Seattle v. Gellein***, 112 Wn.2d 58 (1989)

Jury instruction that city must prove that defendant "had 0.10 percent . . . alcohol in his blood as shown by chemical analysis of his breath" creates an unconstitutional mandatory presumption, *reversing* *Seattle v. Gellein*, 48 Wn.App. 341 (1987); 7-2.

***State v. Weston***, 54 Wn.App. 105 (1989)

The presence of isopropyl alcohol does not prohibit admission of blood test results where testimony establishes that the testing method can separate isopropyl alcohol from ethanol, WAC 448-14-010(2)(a); I.

***Gibson v. Department of Licensing***, 54 Wn.App. 188 (1989)

Implied consent statute which authorizes a blood test for a person "incapable of refusal", RCW 46.20.308(4), refers to physical not mental conditions; license may be revoked for refusal, which need not be knowingly and intelligently made; *accord*: *Steffen v. Dep't of Licensing*, 61 Wn.App. 839 (1991), *Nettles v. Department of Licensing*, 73 Wn.App. 730 (1994), *Medcalf v. Dep't of Licensing*, 133 Wn.2d 290 (1997); I.

***State v. Bartels***, 112 Wn.2d 882 (1989)

Implied consent warnings stating suspect is entitled to additional tests "at your own expense" improperly prevent an indigent defendant from making an informed decision whether to submit to a blood test; state has burden of establishing whether defendant had financial ability at time of arrest to obtain an additional test; *Spokane v. Holmberg*, 50 Wn.App. 317 (1987) is effectively *overruled*, *see: State v. Storhoff*, 133 Wn.2d 523 (1997), *but see: Gonzales v. Dept. of Licensing*, 112 Wn.2d 890, 901 (1989); financial test is objective, *State v. White*, 58 Wn.App. 713 (1990); defense burden to show prejudice, *State v. Schulze*, 116 Wn.2d 154 (1991), *State v. Dunivin*, 65 Wn.App. 501 (1992); *cf.: Clyde Hill v. Rodriguez*, 65 Wn.App. 778 (1992); *see: State v. Berkley*, 72 Wn.App. 12 (1993); 9-0.

***State v. Steinbrunn***, 54 Wn.App. 506 (1989)

Unconscious vehicular homicide suspect is taken from accident scene in Washington to Oregon hospital where Washington police officer directs drawing of blood sample; held: taking of blood from unconscious suspect pursuant to implied consent statute, RCW 46.20.308, can only be done if suspect is lawfully arrested; Washington officer was in fresh pursuit even though he lacked probable cause to arrest until he arrived in Oregon and smelled defendant's breath,

Uniform Act on Fresh Pursuit, 10.89 RCW, *but see:* *Clarkston v. Stone*, 63 Wn.App. 500 (1991), *see:* *License Suspension of Richie*, 127 Wn.App. 935 (2005); III.

***State v. Long***, 113 Wn.2d 266 (1989)

Refusal to take a breath test is admissible in DUI cases, subject to ER 403 analysis, *State v. Cohen*, 125 Wn.App. 220 (2005), *cf.: Vancouver v. Kaufman,* 10 Wn.App.2d 747 (2019); 9-0.

***Graham v. Department of Licensing***, 56 Wn.App. 677 (1990)

Defendant advised she may take additional tests "at your own expense" must demonstrate that she would have been eligible, at the time she made her decision to refuse the breath test, for expert services at public expense, CrRLJ 3.1(f), *Gahagan v. Dep't of Licensing*, 59 Wn.App. 703 (1990); *but see:* *State v. Bartels*, 112 Wn.2d 882 (1989) regarding burden of proof; III.

***Sunnyside v. Fernandez***, 59 Wn.App. 578 (1990)

Blood in the mouth is not a "foreign substance," WAC 448-12-230, thus suppression of breath test reversed; III.

***State v. Entzel***, 116 Wn.2d 435 (1991)

Police are not obliged to administer a breath or blood test to everyone accused of DUI, nor are they obliged to advise a suspect of the availability of breath or blood testing absent the state's use of the implied consent statute to request that the suspect submit to such testing; *accord*: *State v. Woolbright*, 57 Wn.App. 697 (1990); 9-0.

***State v. Schulze***, 116 Wn.2d 154 (1991)

Defendant's burden to show prejudice where police advise additional tests are "at your own expense," at least where erroneous warnings were given prior to *State v. Bartels*, 112 Wn.2d 882 (1989); WAC 448-14 is sufficient to meet requirements of RCW 46.61.506(3) for blood alcohol testing, as a "cookbook" detailing every step is not necessary, *State v. Ford*, 110 Wn.2d 827, 832 (1988).

***State v. Straka***, 116 Wn.2d 859 (1991)

State Toxicologist is not required to promulgate in WAC procedures for evaluating, certifying and maintaining breath testing machines before results are admissible, *see:* *Seattle v. Clark-Muñoz*, 152 Wn.2d 39 (2004); state can meet *State v. Baker*, 56 Wn.2d 846 (1960) requirements whether or not approved methods of testing are published in WAC; challenges to qualifications of operator and sufficiency of the checking and testing procedures go to weight rather than admissibility, *Bremerton v. Osborne*, 66 Wn.2d 281 (1965), *State v. King County District Court*, 175 Wn.App. 630 (2013); state must provide all information about defendant's test, not other information about the machine's operation, RCW 46.61.506(6); failure of state to preserve a record of the invalid sample error code messages is not bad faith and does not violate defendant's due process rights; *accord:* *State v. Wittenbarger*, 124 Wn.2d 467 (1994); 6-3.

***Cooper v. Department of Licensing***, 61 Wn.App. 525 (1991)

Following DUI arrest, trooper properly advises defendant of Initiative 242 rights, RCW 46.20.308(2), adds that his license would be revoked "probably for at least a year"; held:

license revocation reversed as inaccurate warning implied defendant might have his license revoked for less than a year, *distinguishing* *Department of Licensing v. Sheeks*, 47 Wn.App. 65, 68 (1987) and *Strand v. Department of Motor Vehicles*, 8 Wn.App. 877, 882 (1973), wherein arrestees were correctly advised and failed to establish a lack of understanding; 2-1, III.

***Steffen v. Department of Licensing***, 61 Wn.App. 839 (1991)

To be "unconscious," RCW 46.20.308(4), and thus incapable of refusing a breath test, an arrestee "must manifest symptoms of such a lack of self-awareness or inability to perceive as to render him completely unable to exercise judgment," *Oaks v. Department of Licensing*, 31 Wn.App. 892, 896 (1982); "incapable of refusal" refers to physical conditions, e.g., injury or pain, and not to voluntary or involuntary intoxication, *Junkley v. Department of Motor Vehicles*, 7 Wn.App. 827 (1972), *Department of Motor Vehicles v. McElwain*, 80 Wn.2d 624 (1972), *Gibson v. Department of Licensing*, 54 Wn.App. 188 (1989), *Medcalf v. Department of Licensing*, 133 Wn.2d 290 (1997); III.

***State v. Cascade District Court***, 62 Wn.App. 587 (1991)

To determine if DataMaster readings are within "10% of the average" of two samples, WAC 448-12-220, court should not truncate the average; I.

***Clyde Hill v. Rodriguez***, 65 Wn.App. 778 (1992)

Implied consent warnings that suspect has "right to take one or more tests administered by a physician or a qualified person of your choosing" is adequate, police need not specify types of additional tests, nor precise language of statute, *Jury v. Dep't of Licensing*, 114 Wn.App. 726 (2002), nor precise language set forth in *State v. Bartels*, 112 Wn.2d 882 (1989), nor need police cite RCW 46.61.506 to suspect; distinguishes *Spokane v. Holmberg*, 50 Wn.App. 317 (1987); 2-1, I.

***Burnett v. Department of Licensing***, 66 Wn.App. 253 (1992)

Police need not advise a DUI suspect of the specific period of revocation if suspect refuses breath test, *Roethle v. Department of Licensing*, 45 Wn.App. 607 (1986), *Pryor v. Department of Motor Vehicles*, 8 Wn.App. 953 (1973), nor need they advise suspect that refusal will cause him to be ineligible for an occupational permit; II.

***Shelden v. Department of Licensing***, 68 Wn.App. 681 (1993)

To revoke license for refusal to provide blood sample by suspect being treated in a hospital, state must prove that there is no breath instrument present in the hospital, RCW 46.20.308(2), *O'Neill v. Department of Licensing*, 62 Wn.App. 112, 120 (1991); II.

***Mount Vernon v. Cochran***, 70 Wn.App. 517 (1993)

City appeals appointment of breath test expert for indigent; held: where an expert is appointed solely for trial testimony, and admissibility can be determined at the pre-appointment stage, then the expert services may not be "necessary," CrRLJ 3.1(f), if the evidence is inadmissible, *State v. Sandomingo*, 39 Wn.App. 709, 712 (1985), *State v. Niemczyk*, 31 Wn.App. 803 (1982); admissibility is not an issue, however, where the expert is sought for review and consultation, *see:* *United States v. Sims*, 617 F.2d 1371, 1375 n. 3 (9th Cir. 1980), thus appointment was not an abuse of discretion; I.

***Mairs v. Department of Licensing***, 70 Wn.App. 541 (1993)

Trooper's statement, following defendant's request for clarification, that refusal to take a blood test would "probably" result in suspension of privilege to drive is inaccurate and will not support revocation of license, *Cooper v. Department of Licensing*, 61 Wn.App. 525 (1991); an unapproved breath testing instrument does not vitiate refusal to take a blood test at a hospital at which no approved breath testing instrument is present, RCW 46.20.308(2)(a); where suspect refuses a blood test, but police do obtain results of a medical blood test, refusal will still result in revocation *(dictum), see: Department of Licensing v. Lax*, 125 Wn.2d 818 (1995), *State v. Cohen*, 125 Wn.App. 220 (2005); I.

***Johnson v. Department of Licensing***, 71 Wn.App. 326 (1993)

Police need not advise DUI suspect of period of revocation or availability of occupational license to validate suspension following refusal to take breath test, *Burnett v. Department of Licensing*, 66 Wn.App. 253, 257-9 (1992), at least where suspect does not inquire; request at scene that defendant take a portable breath test, without implied consent warnings, does not destroy suspect's opportunity to make an intelligent decision about a subsequent breath test, *Schoultz v. Department of Motor Vehicles*, 89 Wn.2d 664, 668 (1978); "will you now submit to a breath test?" is a request; II.

***Frank v. Department of Licensing***, 71 Wn.App. 585 (1993)

Implied consent warning that refusal to take breath test "may [as opposed to shall] be used in a criminal trial," RCW 46.20.308(2), is proper, *distinguishing Welsh v. Department of Motor Vehicles*, 13 Wn.App. 591 (1975) and *Gonzales v. Department of Licensing*, 112 Wn.2d 890 (1980); III.

***State v. Berkley***, 72 Wn.App. 12 (1993)

Where police erroneously advise DUI suspect that s/he may take additional tests "at your own expense," *State v. Bartels*, 112 Wn.2d 882 (1989), Fifth Amendment precludes trial court from requiring defendant's testimony to establish indigency and prejudice; state proved blood test would cost $14, trial court can take judicial notice that most can afford $14, defendant's admission to police that s/he was employed is sufficient for court to find defendant was able to pay for additional test *(dicta);* if defendant chooses to testify, *in camera* proceeding may be appropriate, *Seventh Elect Church v. Rogers*, 34 Wn.App. 96, 104 (1983); I.

***Nettles v. Department of Licensing***, 73 Wn.App. 730 (1994)

Where evidence establishes that arrestee, although injured, talked and responded to trooper, then arrestee's statement that he refuses blood test is sufficient to meet state's burden of establishing a refusal for purposes of revocation, *Gibson v. Department of Licensing*, 54 Wn.App. 188, 193 (1989), *Steffen v. Department of Licensing*, 61 Wn.App. 839, 847 (1991); implied consent law only requires that driver have the opportunity to exercise an informed judgment, *Department of Motor Vehicles v. McElwain*, 80 Wn.2d 624, 628 (1972), state need not establish a knowing and intelligent decision to refuse the test; focus is upon the officer's reasonable perceptions of the driver's physical capacity, not mental state, *Medcalf v. Dep't of Licensing*, 133 Wn.2d 290 (1997); III.

***State v. Wittenbarger***, 124 Wn.2d 467 (1994)

Lost maintenance and repair records of breath testing instruments are only potentially useful to the defense and were not material exculpatory evidence, *Arizona v. Youngblood*, 102 L.Ed.2d 281 (1988), as they are not directly related to the accuracy of a particular breath test, at 476, *State v. Straka*, 116 Wn.2d 859, 879 (1991); failure of state to keep previously maintained repair records does not establish bad faith, where logical and valid reasons for changes in record-keeping policies are established, at 477-79; State Toxicologist's meeting with prosecutors in drafting new protocols does not establish bad faith, as defense had opportunities to voice concerns regarding proposed protocol changes, at 477; due process clause as to preservation of evidence is coextensive under state and federal constitutions, at 479-80, re-overruling *State v. Vaster*, 99 Wn.2d 44 (1983) and *State v. Wright*, 87 Wn.2d 783 (1976); CrRLJ 6.13 affidavits that breath testing instruments were not in working order need not be filed where live testimony is taken regarding foundation, and failure to file is not grounds for suppression of breath test or dismissal, at 483-86, 488-89; defense has failed to demonstrate that approval of software for BAC DataMaster by State Toxicologist was arbitrary and capricious, at 486-8; 6-3.

***Bokor v. Department of Licensing***, 74 Wn.App. 523 (1994)

Trial court properly gave portable breath test (PBT) no weight where sole evidence of reliability was that of trooper who testified device had given comparable results to a BAC in the past; *see also: State v. Smith*, 130 Wn.2d 215 (1996); III.

***Department of Licensing v. Lax***, 125 Wn.2d 818 (1995)

Once defendant refuses a blood test, a subsequent agreement to take the test does not negate the refusal for license revocation purposes, *reversing Department of Licensing v. Lax*, 74 Wn.App. 7 (1984); 8-0.

***State v. Bostrom***, 127 Wn.2d 580 (1995)

Statutory implied consent warnings, former RCW 46.20.308(2), in effect at the time defendant took the test, are consistent with statutory requirements and are not fundamentally unfair; purpose of the statutory warnings is to allow drivers to make an intelligent decision about their right to refuse a breath test, not to make an informed decision about the consequences of submitting to the test, *State v. Robison*, 192 Wn.App. 658 (2016); overrules *Pryor v. Department of Motor Vehicles*, 8 Wn.App. 953 (1973); 9-0.

***State v. Treviño***, 127 Wn.2d 735 (1995)

Advice of right to counsel and implied consent warnings must be given before breath sample is provided; while advice of right to counsel should be provided immediately upon arrest, failure to so advise before mouth check does not taint the breath test; reverses *State v. Treviño*, 74 Wn.App. 496 (1994); 8-0.

***State v. McNichols***, 128 Wn.2d 242 (1995)

Defendant is arrested for DUI, speaks with counsel, takes breath test, is booked, asks jail guards for blood test, is told jail does not administer tests; held: where implied consent rights are

provided by arresting officer, jail personnel do not have an affirmative duty to advise a DUI suspect on obtaining additional tests, *State v. Entzel*, 116 Wn.2d 435, 442 (1991), *State v. Reed*, 36 Wn.App. 193 (1983), *distinguishing* *Blaine v. Suess*, 93 Wn.2d 722, 725-6 (1980), defendant had access to telephone and could have called to arrange for blood test; guards did not promise to assist, authorities have no duty to volunteer, thus no unreasonable interference with defendant's right to obtain additional testing; reverses *State v. McNichols*, 76 Wn.App. 283 (1994); 9-0.

***Seattle v. Carnell***, 79 Wn.App. 400, 404-5 (1995)

Chain of custody of simulator solution is not a foundational requirement for admissibility of BAC Verifier DataMaster result; I.

***Montesano v. Wells***, 79 Wn.App. 529 (1995)

DUI does not apply to bicycles; II.

***State v. McGinty***, 80 Wn.App. 157 (1995)

Electronics technician who works on circuit boards later used in BAC Verifier DataMaster need not be certified under WAC 448-13-170 for foundation to be laid for admission of test results; I.

***State v. Garrett***, 80 Wn.App. 651 (1996)

Blood sample must be preserved with an anticoagulant, WAC 448-14-020(3)(b), or results must be suppressed irrespective of expert witness's testimony that lack of anticoagulant did not change the results because of another procedure, as RCW 46.61.506(3) requires blood analysis to be performed according to methods approved by state toxicologist, *Singh v. State*, 5 Wn.App.2d 1 (2018), and anticoagulant language in WAC is mandatory; III.

***State v. Smith***, 130 Wn.2d 215 (1996)

Trooper stops defendant for DUI, administers portable breath test, does not record or remember result, trial court denies defense opportunity to cross on PBT; held: absent a *Frye* hearing or approval by state toxicologist, portable breath test (PBT) is inadmissible for any purpose, including probable cause, at 222; where one takes a voluntary PBT, BAC Verifier DataMaster II results are not the fruit of the poisonous tree, at 222-24; while PBT results may be been potentially useful, they were not material exculpatory evidence, thus failure to preserve is not grounds for dismissal, *State v. Wittenbarger*, 124 Wn.2d 467, 475 (1994); trial court erred in not permitting defense to cross-examine on PBT limited to testing trooper's recollection, harmless here; affirms *State v. Lewellyn*, 78 Wn.App. 788 (1995); 9-0.

***State v. Walker***, 83 Wn.App. 89 (1996)

Defense demands presence of DataMaster technician who performed quality assurance procedure (QAP), CrRLJ 6.13(c), state produces another technician who offers QAP documents as business records, defense seeks suppression; held: CrRLJ 6.13(c) is not the exclusive method of establishing the foundation for admissibility of breath test results, court may admit foundation evidence pursuant to business records exception, ER 803(a)(6) and RCW 5.45, evidence need not come from the record's author, *State v. Medley*, 11 Wn.App. 491, 499 (1974), distinguishing

*State v. Watson*, 51 Wn.App. 947 (1988); properly admitted business records do not violate confrontation clause, *State v. Kreck*, 86 Wn.2d 112, 121 (1975); II.

***State v. Rivard***, 131 Wn.2d 63 (1997)

Absent formal arrest, implied consent warnings and rights are inapplicable, *State v. Wetherell*, 82 Wn.2d 865 (1973), and failure to so advise is not grounds for suppression of a blood test where the test was consensual; reverses *State v. Rivard*, 80 Wn.App. 633 (1996); *see: State v. Anderson*, 80 Wn.App. 384 (1996); 9-0.

***State v. McLendon***, 131 Wn.2d 853 (1997)

Defendants are arrested for DUI, breath tests exceed .10, Department of Licensing issues probationary licenses, RCW 46.61.502; held: administrative issuance of probationary licenses is not punishment under double jeopardy clause; 5-4.

***State v. Brokman***, 84 Wn.App. 848 (1997)

DUI arrestees are advised of implied consent warnings, consent to breath test, BAC Verifier DataMaster malfunctions, police move arrestees to a different location and, without re-advising obtain breath samples; held: breath test is not complete until valid samples are obtained, police are thus authorized to transport arrestees to a different location to perform a complete test, *Sunnyside v. Sanchez*, 57 Wn.App. 299 (1990), and need not readvise; II.

***State v. Williams***, 85 Wn.App. 271 (1997)

Federal security officer is a law enforcement officer for purposes of implied consent statute, RCW 46.20.308, at 276; II.

***Medcalf v. Department of Licensing***, 133 Wn.2d 290 (1997)

Petitioner declines to take breath test, at *de novo* trial offers evidence of a psychological disorder which rendered him incapable of taking the test; held: absent objective evidence observable to the arresting officer, a driver may not present evidence showing that a mental disorder rendered him incapable of refusing or taking a breath test pursuant to the implied consent law, RCW 46.20.308, *Nettles v. Department of Licensing*, 73 Wn.App. 730 (1994), *Gibson v. Department of Licensing*, 54 Wn.App. 188 (1989); 8-1.

***Bellevue v. Moffitt***, 87 Wn.App. 144 (1997)

In addition to reading implied consent warnings, officer provides defendant with a copy of RCW 46.61.506 and reads it to him; held: reading statute and providing a copy to an arrestee is neither required nor prohibited; I.

***Smith v. Department of Licensing***, 88 Wn.App. 875 (1997)

Foundation for admissibility of breath test results at administrative hearing does not include proof that external standard had been properly prepared or quality assurance or that certified persons changed the solution, *see: State v. Wittenbarger*, 124 *State v.* 467, 489-90 (1994), WAC 448-13-060; II.

***Thompson v. Department of Licensing***, 91 Wn.App. 887, 896-97 (1998), *rev'd, on other grounds,* 137 Wn.2d 783 (1999)
Advising truck driver of both DUI implied consent and commercial implied consent warnings, while perhaps confusing and may have encouraged defendant to take the test, did not prejudice defendant because the license revocation would have been the same if he had refused, RCW 46.25.090(1), 46.25.120(4), *see: Lynch v. Dep't of Licensing,* 163 Wn.App. 697 (2011), *Allen v. Dep't of Licensing,* 169 Wn.App. 304 (2012), *Martin v. Dep't of Licensing,* 175 Wn.App. 9, 18-20 (2013); II.

***State v. Merritt***, 91 Wn.App. 969 (1998)
Technician who draws blood, RCW 46.61.506(4), need not have a permit to analyze blood from the state toxicologist, RCW 46.61.506(3), *see also: License Suspension of Richie,* 127 Wn.App. 935 (2005); I.

***Mount Vernon v. Municipal Court***, 93 Wn.App. 501 (1998)
Following breath test, BAC DataMaster fails to produce a ticket, later in the day breath test ticket relating to defendant's case is printed, trial court suppresses; held: WAC 448-13-050 requires the printing of a ticket, but not immediately after the test is completed; I.

***Rockwell v. Department of Licensing***, 94 Wn.App. 531 (1999)
Failure to blow hard enough to get a reading is a refusal, absent showing by defendant of impossibility of compliance, *Woolman v. Department of Motor Vehicles,* 15 Wn.App. 115, 118 (1976); III.

***Walk v. Department of Licensing***, 95 Wn.App. 653 (1999)
One officer observes DUI suspect for 15-minute period prior to breath test and testifies suspect did not put anything in his mouth, does not communicate this to the officer who administers the test; held: the officer who conducts the BAC test need not actually observe the suspect during the observation period required by WAC 448-13-040, but the observation information must be communicated to the testing officer, who must certify to the Department of Licensing that the WAC requirements were met in order for driver's license to be suspended; 2-1, III.

***Thompson v. Department of Licensing***, 138 Wn.2d 783 (1999)
District court suppresses breath test in criminal case, defendant appeals DOL license revocation, argues collateral estoppel precludes revocation; held: even if district court erroneously suppressed breath test, collateral estoppel precludes admissibility of breath test in license revocation, as state had incentive, capability and opportunity to litigate the issue in the criminal case and it must abide the result, as state did not appeal, *see also: LeMond v. Dep't of Licensing,* 143 Wn.App. 797 (2008); reverses, in part, *Thompson v. Department of Licensing,* 91 Wn.App. 887, 896-98 (1998); 9-0.

***State v. Avery***, 103 Wn.App. 527 (2000)
Police arrest suspect for hit and run/death, smell intoxicants but do not see other signs of intoxication, note "slight impairment, faint odor," suspect dozes but his father advises police he

is extremely tired, police ask defendant if he would submit to voluntary blood test, defendant consents, is not advised of implied consent warnings, blood alcohol level is .17, defendant charged with vehicular homicide; held: where police lack probable cause to believe that an arrestee is under the influence, implied consent statute does not apply, *State v. Rivard*, 131 Wn.2d 63, 76-77 (1997), thus suspect may voluntarily consent to a blood test, *State v. Wetherell*, 82 Wn.2d 865, 869 (1973); II.

***Kent v. Beigh***, 145 Wn.2d 33 (2001)

Three breath tests report interference, police advise defendant of blood test implied consent warnings, defendant consents, trial court suppresses; held: while a DUI suspect who is incapable of providing a breath sample impliedly consents to a blood test, RCW 46.20.308(2), the mere fact that the BAC DataMaster detects interference does not mean the motorist is physically incapable of providing a sample, thus officer was not authorized to request a blood sample, thus suppressed; affirms *Kent v. Beigh*, 102 Wn.App. 269 (2000), but disapproves of Court of Appeals' holding that RCW 46.20.308(3) provides the only authority under which an officer may request a blood test; 5-4.

***State v. Bosio***, 107 Wn.App. 462, 467-68 (2001)

WAC 448-14-020(3) unambiguously requires that an enzyme poison be added to blood sample and, where no evidence is offered to support that, blood test results must be suppressed, *State v. Hultenschmidt*, 125 Wn.App. 254, 263-67 (2004), *Singh v. State*, 5 Wn.App.2d 1 (2018), *see: State v. Wilbur-Bobb*, 134 Wn.App. 627 (2006), *State v. Charley*, 136 Wn.App. 58 (2006), *State v. Brown*, 145 Wn.App. 62 (2008); III.

***Shuman v. Dep't of Licensing***, 108 Wn.App. 673 (2001)

At DUI trial, district court finds that defendant did not "wrongfully refuse to submit" to breath test; at DOL hearing, department declines to find collateral estoppel as district court did not hold a "fully litigated and contested evidentiary hearing;" held: collateral estoppel will apply where the party estopped has had a full and fair opportunity to present its case, *Hanson v. Snohomish*, 121 Wn.2d 552, 561 (1993), *see: Thompson v. Department of Licensing*, 138 Wn.2d 783 (1999), thus remanded for determination of privity, *see also: LeMond v. Dep't of Licensing*, 143 Wn.App. 797 (2008); III.

***Grewal v. Dep't of Licensing***, 108 Wn.App. 815 (2001)

In advising arrestee of implied consent law, police need not inform suspect of RCW section, description of the offense or breath alcohol level that will result in revocation; I.

***State v. Baldwin***, 109 Wn.App. 516 (2001)

Defendant is arrested on probable cause for DUI, passes breath test, tells police he took a prescription antidepressant, refuses blood test, refusal is admitted at trial; held: due to defendant's obvious intoxication and passing breath test, police had probable cause to believe he was under influence of a drug, authorizing police to offer blood test, RCW 46.20.308(2), refusal to take blood test for drugs is admissible, RCW 46.61.517; III.

***Cannon v. Dep't of Licensing***, 147 Wn.2d 41 (2002)

State must offer evidence that simulator solution thermometer was certified, WAC 448-13-035, as required by WAC 448-13-040, for breath test results to be admitted; 9-0.

***Pattison v. Dep't of Licensing***, 112 Wn.App. 670 (2002)

State Patrol informs arrestees that, in addition to the administrative action that will occur upon refusal or a breath alcohol level above the legal limit, "if you are in violation of" statute, suspension of license will occur, petitioner claims confusion; held: while penalties provided by implied consent statute for refusal are separate from penalties imposed as the result of a criminal trial, informing arrestees of those penalties is not confusing or inaccurate or prohibited; I.

***Ball v. Dep't of Licensing***, 113 Wn.App. 193 (2002)

Suspect repeatedly drinks from fountain ignoring officer's order that he put nothing in his mouth, including water; held: unwillingness to cooperate with the administration of a breath test constitutes refusal, *Woolman v. Dep't of Motor Vehicles,* 15 Wn.App. 115, 117 (1976), *Dep't of Motor Vehicles v. McElwain*, 80 Wn.2d 624, 627-28 (1972); driver has no right to counsel in license revocation proceedings before deciding whether to take a breath test, *Vance v. Dep't of Licensing*, 116 Wn.App. 412, 416-18 (2003), *Leininger v. Dep't of Licensing,* 120 Wn.App. 68 (2004); II.

***Seattle v. Allison***, 148 Wn.2d 75 (2002)

Where breath test document reflects that simulator solution temperature is within range of 34° ± 0.2° C., then temperature foundation is met, former WAC 448-13-040 (1999), question of whether variance in thermometer accuracy goes to weight, *see: Seattle v. Clark-Muñoz*, 152 Wn.2d 39 (2003); 6-3.

***State v. Templeton***, 148 Wn.2d 193 (2002)

Police advise DUI suspects that they have a right to talk to an attorney before answering questions, trial courts suppress breath tests; held: CrRLJ 3.1, which requires that police advise arrestees of right to counsel as soon as practicable, was violated because advice here provided that the right to a lawyer accrues not when suspect is arrested but rather when arrestee is questioned, *State v. Fitzsimmons,* 93 Wn.2d 436 (1980), *affirmed on remand*, 94 Wn.2d 858 (1980), *Spokane v. Kruger*, 116 Wn.2d 135 (1991), *State ex rel. Juckett v. Evergreen District Court*, 100 Wn.2d 824 (1984); because no defendant here alleged that, but for the improper advice he or she would have requested counsel before submitting to breath test, error was harmless, reversing *State v. Templeton,* 107 Wn.App. 141 (2001); 5-4.

***State v. MacKenzie***, 114 Wn.App. 687 (2002)

After legislature changed BAC limit from .10 to .08, state toxicologist retroactively modified WAC with emergency regulations, determining that quality assurance procedures were not necessary when replacing simulator solution cylinders and entering new 10% margins on DataMaster instruments; held: trial court has inherent power to interpret language of an administrative rule in a criminal proceeding to determine if the rule is contrary to law or is arbitrary and capricious, *State v. Ford*, 110 Wn.2d 827, 828-30 (1988); here, because State Toxicologist's actions were remedial in nature, retroactive application is permitted, emergency

regulation was both curative and remedial, furthering the purpose of maintaining admissibility of breath test results; I.

***Jury v. Dep't of Licensing***, 114 Wn.App. 726 (2002)

Misplaced semicolon in implied consent warnings does not sufficiently change meaning of warnings to justify suppression, *Clyde Hill v. Rodriguez*, 65 Wn.App. 778 (1992), *Pattison v. Department of Licensing*, 112 Wn.App. 670 (2002); 2-1, I.

***Alforde v. Dep't of Licensing***, 115 Wn.App. 576 (2003)

State offers officer's sworn report and an unsigned cover sheet declaring that the attached reports are true, superior court reverses hearing examiner and reinstates license; held: RCW 46.20.308(8) does not require that the cover sheet be signed, as documents necessary to establish a *prima facie* case were signed and sworn, *see: Lyle v. Dep't of Licensing,* 94 Wn.App. 357, 362 (1999); 2-1, III.

***Vance v. Dep't of Licensing***, 116 Wn.App. 412, 418 (2003)

After implied consent warnings, driver repeatedly asks whether he should take the test, trooper repeatedly replies she has no opinion, driver ultimately refuses; held: while a manifestation of confusion requires clarification, *Gonzales v. Dep't of Licensing,* 112 Wn.2d 890, 906 (1989), indecision does not constitute confusion, *Leininger v. Dep't of Licensing,* 120 Wn.App. 68 (2004); I.

***Seattle v. Clark-Muñoz***, 152 Wn.2d 39 (2004)

Because WAC 448-13-035, requires that temperature of simulator solution be measured by thermometers certified by a reference thermometer traceable to standards maintained by National Institute of Standards and Technology, then state must prove that uncertainties be measured and recorded, as required by NIST standards; breath tests that do not meet this test are not admissible as "other evidence" of intoxication when not admissible to prove *per se* intoxication, *State v. Charley,*136 Wn.App. 58 (2006); *but see: Seattle v. Ludvigsen,* 162 Wn.2d 660 (2007) for retroactivity and *ex post facto* analysis; 9-0.

***State v. Cohen***, 125 Wn.App. 220 (2005)

Refusal to take a breath test is admissible even where the breath test, had it been taken, would have been inadmissible, *cf.: Vancouver v. Kaufman,* 10 Wn.App.2d 747 (2019); I.

***State v. Koch***, 126 Wn.App. 589 (2005)

At arrest, trooper states that if defendant is cooperative and polite, he'll be released after testing, properly advises of implied consent warnings, defense claims that defendant was coerced into taking breath test because of fear of being uncooperative resulting in possible booking; held: because trooper's statement was not part of implied consent warnings and was not specifically addressed to decision of whether or not to take breath test, the statement did not deprive defendant of the opportunity to knowingly and intelligently decide whether to take the test, distinguishing *Mairs v. Dep't of Licensing,* 70 Wn.App. 541, 546-47 (1993), *State v. Bartels*, 112 Wn.2d 882 (1989); II.

***State v. Babiker***, 126 Wn.App. 664, 666-68 (2005)

Requiring "[d]uplicate analyses that should agree to within 0.01%," WAC 448-14-020(1)(a)(iii), does not mean that the duplicate analyses agree within 0.0001 in spite of the use of the per cent character in the code, *State v. Reier*, 127 Wn.App. 753756-58 (2005); failure of defense to express an objection on the grounds that the state did not prove that blood collection vial contained an enzyme to preserve the blood waives error, *State v. Jones*, 71 Wn.App. 798, 820-21 (1993); I.

***State v. Reier***, 127 Wn.App. 753 (2005)

To admit blood test result, state must establish that the chromatograph is calibrated by testing different mixtures to verify that the instrument can differentiate between different types of alcohol, but the quantity of those compounds need not be shown; state must establish that instrument is capable of performing replicate analyses, WAC 448-14-010, but need not show that replicate analysis was performed; I.

***License Suspension of Richie***, 127 Wn.App. 935, 943-44 (2005)

An Idaho phlebotomist is *prima facie* qualified to take blood, RCW 46.20.309(8), 46.61.506(5); III.

***Letourneau v. Dep't of Licensing***, 131 Wn.App. 657 (2006)

New statute requires that breath test thermometer be approved by state toxicologist, RCW 46.61.506(4)(a)(iv), petitioner's test occurred before toxicologist approved any thermometers, but thermometer had been "certified" per former WAC 448-13-020; held: for purpose of breath testing, certified is the same as approved, subsequent emergency WAC, while not specifically stating that it is retroactive, is curative, adopted to clarify an inconsistency, thus applicable to this test; I.

***Fircrest v. Jensen***, 158 Wn.2d 384 (2006)

2004 amendments to implied consent statute, SHB 3055, RCW 46.20.308, 46.61.506, do not violate separation of powers doctrine or due process clauses, nor do they incorporate more than one subject in the title of the bill, CONST., art. II, § 19; 7-2.

***State v. Wilbur-Bobb***, 134 Wn.App. 627, 630-32 (2006)

Where blood vial contains the words "sodium fluoride" on it and toxicologist testifies that sodium fluoride is an enzyme poison, requirement that a blood sample be preseved with an enzyme poison, WAC 448-14-020(3)(b), is met, *State v. Brown*, 145 Wn.App. 62 (2008), *see: State v. Bosio*, 107 Wn.App. 462, 467-68 (2001), distinguishing *State v. Bosio*, 107 Wn.App. 462, 467-68 (2001), *State v. Hultenschmidt*, 125 Wn.App. 259, 267 (2004); I.

***State v. Charley***, 136 Wn.App. 58 (2006)

Hospital draws two blood samples for medical purposes from seriously injured vehicular homicide suspect, turns sample A over to state toxicology lab which fails to comply with WACs, tests sample B itself; held: where state agents perform blood analysis, RCW 46.61.506(3), WAC 448-14-020 but fail to comply with WACs, results are inadmissible as "other evidence" of DUI, *State v. Clark-Muñoz*, 152 Wn.2d 39, 49 (2004); where medical personnel draw and test blood,

the result is admissible as "other evidence" of intoxication, *see:* *State v. Donahue*, 105 Wn.App. 67 (2001), although neither are admissible to prove a *per se* violation; III.

***Ingram v. Dep't of Licensing***, 162 Wn.2d 514 (2007)

DOL hearing officer is authorized to admit document from State Toxicologist declaring that all thermometers in breath testing machines are approved thermometers; 9-0.

***State v. Brown,*** 145 Wn.App. 62, 68-77 (2008)

Phlebotomist testifies that she believed powdery substance in blood vials was sodium oxalate, an enzyme poison, toxicologist testifies that vials are provided by manufacturer with potassium oxalate and sodium fluoride and that if they were not present, the blood would clot and no alcohol would be detected, blood here was not clotted and alcohol was present; held: hearsay is admissible to prove foundation, ER 104(a), 1101(c)(1), witness' testimony established a *prima facie* case, RCW 46.61.506, that the sample was unadulterated and contained the proper chemicals, WAC 448-14-020(3)(b), distinguishing *State v. Bosio*, 107 Wn.App. 462 (2001) and *State v. Hultenschmidt*, 125 Wn.App. 254 (2004) wherein no evidence was offered to support the presence of the necessary chemicals, *see: Singh v. State*, 5 Wn.App.2d 1 (2018); while the testimony of the toxicologist regarding what the manufacturer claimed was in the vials was hearsay and should not have been heard by the jury, it was proper for the court to consider it in determining admissibility for foundational purposes, allowing the jury to hear it was harmless; III.

***Seattle v. St. John***, 166 Wn.2d 941 (2009)

Defendant refuses blood alcohol test following arrest, officer obtains search warrant, trial court suppresses; held: refusal to take a blood or breath test does not preclude police from obtaining a search warrant, RCW 46.20.308(1); 7-2.

***State v. Elkins***, 152 Wn.App. 871 (2009)

Implied consent warnings need not include language that a mandatory jail term flows from a conviction after refusing the test; I.

***State v. Yallup***, 160 Wn.App. 500 (2011)

Implied consent law applies to enrolled member of Yakama Nation driving on state highway on the reservation; III.

***Lynch v. Dep't of Licensing***, 163 Wn.App. 697 (2011)

Implied consent warnings that accurately mirror statutory requirements, RCW 46.20.308 (2008), and commercial driver's license disqualification, RCW 46.25.090(1) (2006), are not misleading and do not prejudice a driver in a civil proceeding, *Allen v. Dep't of Licensing,* 169 Wn.App. 304 (2012), *Martin v. Dep't of Licensing*, 175 Wn.App. 9, 18-20 (2013), *see: Thompson v. Dep't of Licensing,* 91 Wn.App. 887, 869-97 (1998), 138 Wn.2d 783 (1999); CDL warning need not state duration of disqualification; II.

***State v. Morales***, 173 Wn.2d 560 (2012)

Interpreter advises vehicular assault arrestee of implied consent warnings, interpreter is not called to testify, trial court admits blood test; held: state must demonstrate at trial the warnings were meaningfully read, *State v. Turpin*, 94 Wn.2d 820, 824-25 (1980), *State v. Stannard*, 109 Wn.2d 29, 41 (1987) (Utter, J., concurring), RCW 46.20.308; here, only evidence that the warnings were read was trooper's testimony that an interpreter read the warnings in Spanish which he could not understand, thus "his testimony was hearsay and inadmissible," at 576, *but see:* ER 104(a), 1101(c)(1), thus court erred in admitting blood test results, depriving defendant of knowing that he had the right to additional tests; reverses *State v. Morales*, 154 Wn.App. 26 (2010); 8-1.

***Missouri v. McNeely***, 569 U.S. 141, 185 L.Ed.2d 696 (2013)

In DUI investigations, natural dissipation of alcohol in bloodstream does not constitute an exigency in every case sufficient to justify a blood test without a warrant, whether a warrantless blood test is reasonable must be determined case by case based upon totality of the circumstances, *Schmerber v. California*, 384 U.S. 757, 771, 16 L.Ed.2d 908 (1966), *Seattle v. Pearson*, 192 Wn.App. 802, 811-17 (2016), *State v. Baird*, 187 Wn.2d 210 (2016), *State v. Inman*, 2 Wn.App.2d 281 (2018), *State v. Anderson*, 9 Wn.App.2d 430 (2019), *State v. Rawley*, 13 Wn.App.2d 474 (2020), *but see: Birchfield v. North Dakota*, 579 U.S. 438, 136 S.Ct. 2160, 195 L.Ed.2d 560 (2016), state's proposed *per se* rule fails to account for advances that allow for the more expeditious processing of warrant applications; 5-4.

***State v. King County District Court***, 175 Wn.App. 630 (2013)

District Court enters blanket order requiring state to prove "uncertainty statement, presented as a confidence interval" before breath tests are admitted, and requiring state to provide uncertainty calculations in discovery in all cases; held: breath alcohol concentration tests (BrAC) via the DataMaster are generally accepted in the scientific community, *State v. Ford*,110 Wn.2d 827, 833 (1988), without confidence intervals, court may not add a foundational requirement, RCW 46.61.506(4) (2010), *see: State v. Straka*, 116 Wn.2d 859, 870 (1991), generally error rates go to weight, not admissibility, *State v. Keller*,36 Wn.App. 110, 113 (1983), unless, in individual cases the court determines that the error rate is so serious as to be unhelpful to the trier of fact; burden is on defense to present uncertainty evidence; I.

***State v. Mashek***, 177 Wn.App. 749, 756-63 (2013)

Officer testifies that defendant did not eat, drink or smoke during 15-minute period before breath test, video shows officer present in room but not looking at defendant for three minutes, trial court suppresses; held: *prima facie* evidence that a DUI suspect has no foreign substances in her mouth for 15 minutes, RCW 46.61.506(4)(a)(iii) and –(4)(b) (2012), does not require unbroken visual observation, officer may use "all of his senses, not just sight," at 763 ¶26; II.

***State v. Federov***, 183 Wn.App. 736, 745-48 (2014), *aff'd, on other grounds*, 183 Wn.2d 669 (2015)

Breath-alcohol technician and custodian of records of quality assurance procedures testifies that the device used to test defendant met quality assurance procedures performed by a non-testifying technician and that simulator solution was properly prepared and replaced

according to maintenance records; held: where records are offered that were not made to establish facts at defendant's trial they are not testimonial, *State v. Lui*, 179 Wn.2d 457 (2014), distinguishing *Bullcoming v. New Mexico*, 564 U.S. 647, 131 S.Ct. 2705, 180 L.Ed.2d 610 (2011); here, the testing about which the technician testified were not made to identify or inculpate the defendant, thus confrontation clause was not violated, *State v. Ramirez*, 7 Wn.App.2d 277 (2019); II.

***State v. Goggin,*** 185 Wn.App. 59, 66-70 (2014)

When blood is seized pursuant to a search warrant police need not advise arrestee of his right to an additional blood test, distinguishing *State v. Turpin*, 94 Wn.2d 820 (1980), as a warrant is a seizure independent of the implied consent statute, *Seattle v. St. John*, 166 Wn.2d 941, 946 (2009), *State v. Sosa*, 198 Wn.App. 196 (2017); III.

***State v. Figeroa Martines***, 184 Wn.2d 83 (2015)

A search warrant authorizing taking a blood sample for DUI is sufficient to authorize the testing of that sample; reverses *State v. Figeroa Martines*, 182 Wn.App. 519 (2014); 9-0.

***Birchfield v. North Dakota,*** 579 U.S. 438, 136 S.Ct. 2160, 195 L.Ed.2d 560 (2016)

Blood test is not permitted as a warrantless search incident to arrest; breath test is permitted as a warrantless search incident to arrest, *see: State v. Baird*, 187 Wn.2d 210 (2016), *State v. Nelson*, 7 Wn.App.2d 588 (2019), *Vancouver v. Kaufman,* 10 Wn.App.2d 747 (2019), *but see: State v. Inman*, 2 Wn.App.2d 281, 290-95 (2018), *State v. Anderson,* 9 Wn.App.2d 430 (2019), *Mitchell v. Wisconsin*, 588 U.S. ___, 139 S.Ct. 2525, 204 L.Ed.2d 1040 (2019); 5-3.

***State v. Murray***, 187 Wn.2d 115 (2016)

Prior to offering a breath test police need not advise defendant of statutory implied consent warnings that include marijuana warnings, RCW 46.20.308(2) (2013), because a breath test cannot measure THC, distinguishing *State v. Bostrom*, 127 Wn.2d 580 (1995; reverses *State v. Robison*, 192 Wn.App. 658 (2016); 9-0.

***Seattle v. Pearson***, 192 Wn.App. 802, 811-17 (2016)

Defendant is arrested for DUI, admits to smoking marijuana, police obtain warrantless blood test, at suppression hearing officers testify that it would take up to 1½ hours to obtain a warrant by email but could have obtained a telephonic warrant, toxicologist testifies that marijuana dissipates, trial court holds that this was an exigent circumstance justifying warrantless seizure; held: government has burden of proving, by clear and convincing evidence that a warrant could not have been obtained within a reasonable period of time, natural dissipation is a factor but is not a *per se* exigent circumstance; here blood test results should have been suppressed on different grounds, *State v. Hinshaw*, 149 Wn.App. 747 (2009), *State v. Rulan C.*, 97 Wn.App. 884 (1999), *State v. Bessette*, 105 Wn.App. 793 (2001), *Missouri v. McNeely*, 569 U.S. 141 185 L.Ed.2d 696 (2013), *Birchfield v. North Dakota*, 579 U.S. 438, 136 S.Ct. 2160, 195 L.Ed.2d 560 (2016), *State v. Inman*, 2 Wn.App.2d 281 (2018), *State v. Rawley*, 13 Wn.App.2d 474 (2020), *cf.: State v. Anderson,* 9 Wn.App.2d 430 (2019), *Mitchell v. Wisconsin*, 588 U.S. ___, 139 S.Ct. 2525, 204 L.Ed.2d 1040 (2019); I.

***State v. Murray***, 187 Wn.2d 115 (2016)

Former RCW 46.20.308 (2013) required arresting officer to advise DUI arrestees that license would be suspended if breath test showed breath alcohol concentration of .08 or higher or THC level of 5.00 or higher, failure of officer to advise of the THC portion does not require suppression of breath test since a breath test cannot measure THC level; 9-0.

***State v. Baird***, 187 Wn.2d 210 (2016)

"Under the implied consent statute, a driver's refusal to consent to a breath test is admissible as evidence of guilt in a criminal trial. Such refusal is not a comment on the exercise of a person's constitutional rights because once an exception to the warrant requirement is found to apply, no constitutional right to refuse exists," *Missouri v. McNeely,* 569 U.S. 141, 133 S.Ct. 1552, 185 L.Ed.2d 696 (2013), *cf.: Vancouver v. Kaufman,* 10 Wn.App.2d 747 (2019); 6-3.

***State v. Sosa***, 198 Wn.App. 176 (2017)

Defendant is arrested for vehicular assault, police obtain search warrant for blood which shows .12 BAC, defendant moves to suppress because he was not advised of his right to additional tests; held: after a blood test pursuant to a search warrant police need not advise defendant he has a right to additional independent tests, RCW 46.20.308 (2013), *distinguishing State v. Turpin,* 94 Wn.2d 820 (1980), *State v. Holcomb*, 31 Wn.App. 398 (1982); refusal to take a PBT is admissible as evidence of guilt, no *Frye* hearing is required, *State v. Baird,* 187 Wn.2d 210 (2016), *but see: Vancouver v. Kaufman,* 10 Wn.App.2d 747 (2019); III.

***Kandler v. City of Kent***, 199 Wn.App. 22 (2017)

Police need not give implied consent warnings following voluntary consent to a blood test where statute, RCW 46.20.308 (2013), does not mandate that warnings must be given before asking for consent, distinguishing *State v. Avery*, 103 Wn.App. 527, 535 (2000); I.

***State v. Inman***, 2 Wn.App.2d 281, 290-95 (2018)

Defendant is found near motorcycle crash, smells of alcohol, admits drinking and driving, before medivac takes defendant to hospital deputy draws blood at scene, at suppression hearing testifies that he lacked cell phone coverage and a warrant takes 45 minutes, telephone warrant process is "problematic" and hasn't worked in the past, court admits blood test results; held: obtaining a warrant for blood draw was "not practical," medical treatment may have impacted efficacy of blood sample, delay in obtaining blood at hospital might have resulted in dissipation of alcohol, thus exigent circumstances existed for warrantless search, *Mitchell v. Wisconsin,* 588 U.S. ___, 139 S.Ct. 2525, 204 L.Ed.2d 1040 (2019), *State v. Anderson,* 9 Wn.App.2d 430 (2019), *State v. Rawley*, 13 Wn.App.2d 474 (2020), distinguishing *Seattle v. Pearson,* 192 Wn.App. 802, 811-17 (2016), *Missouri v. McNeely,* 569 U.S. 141, 185 L.Ed.2d 696 (2013); II.

***Singh v. State***, 5 Wn.App.2d 1 (2018)

At administrative hearing regarding driver's license suspension following a DUI arrest the state must offer *prima facie* evidence that the blood collection test tubes were chemically clean and and contained enzyme poison and anticoagulants as required by WAC 448–14–020(3)(a), (b), *State v. Bosio,* 107 Wn.App. 462, 467-68 (2001), *State v. Clark,* 62 Wn.App. 263, 270

(1991). *State v. Brown*, 145 WnApp. 62, 69–70 (2008). *State v. Garrett*, 80 WnApp. 651, 653 (1996); I.

***Mitchell v. Wisconsin***, 588 U.S. ___, 139 S.Ct. 2525, 204 L.Ed.2d 1040 (2019)

Defendant is arrested for DUI, is too lethargic for a breath test at the scene, police drive him to station to take a more reliable breath test but on the way defendant becomes unconscious, is taken to hospital where blood is drawn; held: exigent circumstances "almost always" permits a blood draw without a warrant where a driver suspected of drunk driving is unconscious and therefore cannot be given a breath test; while the time required to obtain a warrant has shrunk with technology, it has not disappeared, and with an unconscious driver, forcing police to put off other tasks justify a blood draw without a warrant, distinguishing *Birchfield v. North Dakota*, 579 U.S. 438, 136 S.Ct. 2160, 195 L.Ed.2d 560 (2016); 5-4.

***State v. Nelson***, 7 Wn.App.2d 588 (2019)

Breath sample can be obtained as a search incident to arrest under state constitution, *State v. Baird*, 187 Wn.2d 210 (2016), *State v. Anderson*, 9 Wn.App.2d 430 (2019), *but see: Birchfield v. North Dakota*, 579 U.S. 438, 136 S.Ct. 2160, 195 L.Ed.2d 560 (2016); 2-1, III.

***State v. Anderson***, 9 Wn.App.2d 430 (2019)

Following collision with multiple deaths and injuries defendant is transported to hospital for his own injuries, blood test taken without a warrant; held: state proved by clear and convincing evidence that exigent circumstances existed for warrantless blood draw because of defendant's need for medical treatment which "could impair the integrity of the blood sample, officer testified that it would take 40 to 90 minutes to obtain a warrant for blood, delay caused by obtaining a warrant would result in destruction of evidence or postponing defendant's receipt of necessary medical care, *State v. Inman*, 2 Wn.App.2d 281, 290-95 (2018), distinguishing *Seattle v. Pearson*, 192 Wn.App.802 (2016), *see: Mitchell v. Wisconsin*, 588 U.S. ___, 139 S.Ct. 2525, 204 L.Ed.2d 1040 (2019), *State v. Rawley*, 13 Wn.App.2d 474 (2020), *but see: Birchfield v. North Dakota*, 579 U.S. 438, 136 S.Ct. 2160, 195 L.Ed.2d 560 (2016); I.

***Vancouver v. Kaufman***, 10 Wn.App.2d 747 (2019)

Defendant is arrested on a warrant and not for DUI, at station officer asks defendant to take PBT (preliminary breath test), defendant refuses, trial court admits refusal as evidence of guilt; held: where an arrest is based on an offense unrelated to DUI a search of the arrestee's breath for alcohol does not fall within the search incident to arrest rule, arrestee thus has a constitutional right to refuse the PBT which is inadmissible in court, distinguishing *State v. Baird*, 187 Wn.2d 210 (2016), *State v. Mecham*, 186 Wn.2d 128 (2016), *Birchfield v. North Dakota*, —— U.S. ——, 136 S. Ct. 2160, 2185, 195 L. Ed. 2d 560 (2016), *State v. Cohen*, 125 Wn.2d 220 (2005); Division II disagrees with *State v. Sosa*, 198 Wn.App. 176, 185 (2017); *dicta:* a search that precedes an arrest cannot be justified as a search incident to arrest exception to the warrant requirement, thus it is questionable whether PBT refusal is admissible, *id.*, n. 8.

***State v. Rawley***, 13 Wn.App.2d 474 (2020)

Following head-on collision with serious injuries sheriff notes strong odor of alcohol on defendant, medics state they will likely administer IV fluids or medication, sheriff takes blood

sample, testifies it takes 20-45 minutes to obtain a warrant; held: substantial evidence supports trial court's conclusion that exigent circumstances support warrantless seizure of blood, *State v. Inman,* 2 Wn.App.2d 281 (2018), *Missouri v. McNeely,* 569 U.S. 141, 185 L.Ed.2d 696 (2013), *Seattle v. Pearson,* 192 Wn.App. 802, 811-17 (2016); II.

# DUE PROCESS*

***State v. Peyton***, 29 Wn.App. 701 (1981)

Police dog searched courtroom in front of jurors each day, jurors viewed pile of **handcuffs** in courtroom, defendant escorted to courtroom on a leash by deputies, all held to be within court's discretion; *see: State v. Gilcrist*, 91 Wn.2d 603 (1979), *State v. Crawford*, 21 Wn.App. 146 (1978); II.

***State v. Wixon***, 30 Wn.App. 63 (1981)

Defendant is not denied due process merely because his trial is **televised**, *Chandler v. Florida*, 66 L.Ed.2d 740 (1981); I.

***State v. Shriner***, 33 Wn.App. 800 (1983)

Defendant rents car and keeps it, is convicted of theft 1°, RCW 9A.56.020(1)(a), 9A.56.030(1)(a), argues he should have been charged with criminal possession of leased or rented machinery, RCW 9A.56.095, as specific statute takes precedence over general statute, *State v. Becker*, 39 Wn.2d 94, 96 (1951); held: criminal possession statute requires service of a written demand letter; without such service state does not abuse discretion by charging general theft; I.

***State v. Cirkovich***, 35 Wn.App. 134 (1983)

Indigent defendant is not entitled to a **transcript** of co-defendant's trial; I.

***State v. Hunter***, 35 Wn.App. 708 (1983)

Following mistrial, court need not provide an indigent defendant with a **transcript** of first trial where second trial is set two days after first trial and court will make reporter available for conferences and where defendant can not show prejudice; I.

***State v. Sayler***, 36 Wn.App. 230 (1983)

Defendant exposes himself to two juveniles in defendant's garage, is charged with public indecency, RCW 9A.88.010(2) prohibiting "open and obscene exposure"; held: statute is ambiguous, *but see State v. Dubois*, 58 Wn.App. 299 (1990); II.

***State v. Weber***, 99 Wn.2d 158 (1983)

Deliberate violation of an order *in limine* by a witness does not require mistrial, test is actual prejudice; 9-0.

***Thigpen v. Roberts***, 82 L.Ed.2d 23 (1984)

Defendant is convicted by Justice of the Peace of DUI and reckless driving, appeals *de novo*, whereupon defendant is indicted for manslaughter for same incident; held: **presumption of vindictiveness** prohibits trial on greater charge as punishment of defendant's exercise of right to appeal, *see: State v. Bonisisio*, 92 Wn.App. 783, 790-92 (1998), *State v. Korum*, 157 Wn.2d

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* *See also*: **PRESENCE OF DEFENDANT, VAGUENESS/OVERBREADTH**

614 (2006), *see also:* *State v. Miller*, 92 Wn.App. 693, 702-3 (1998), *but see:* *State v. Parmelee*, 121 Wn.App. 707 (2004), *State v. Aguilar*, 153 Wn.App. 265, 279-80 (2009), *State v. Brown*, 193 Wn.2d 280 (2019); 6-3.

***State v. Forbes***, 43 Wn.App. 793 (1986)

Defense counsel may not argue to the jury that they must use due care because the charge is a felony; I.

***Moran v. Burbine***, 89 L.Ed.2d 410 (1986)

Failure of police to inform defendant of counsel's telephone call during interrogation did not affect validity of defendant's waiver of Fifth Amendment right to remain silent and right to have counsel present; Sixth Amendment right to counsel does not attach until charges are filed, thus interference by police of counsel's attempts to contact her client is not unlawful; police lying to counsel that defendant would not be interrogated does not violate due process clause; 6-3.

***McMillan v. Pennsylvania***, 91 L.Ed.2d 67 (1986)

State statute which mandates a minimum five-year sentence if judge finds by preponderance that accused visibly possessed firearm while committing a felony does not violate due process or right to jury trial, *Harris v. United States*, 153 L.Ed.2d 524 (2002), *but see: Alleyne v. United States*, 570 U.S. 99, 186 L. Ed. 2d 314 (2013), *Apprendi v. New Jersey*, 147 L.Ed.2d 435 (2000), *State v. Hopkins*, 109 Wn.App. 558 (2001); 6-3.

***State v. Harris***, 48 Wn.App. 279 (1987)

Absent actual prejudice, jurors seeing defendant in **handcuffs** is not grounds for mistrial, *State v. Peyton*, 29 Wn.App. 701, 714 (1981); I.

***State v. Baker***, 49 Wn.App. 778 (1987)

In order for a driver's license suspension to be effective, Department of Licensing must send notice to the most recent address listed on any of the papers in its possession, including citations forwarded by courts, as well as to the original address provided by the driver; failure of driver to notify DOL of new address, RCW 46.20.205, does not excuse DOL's obligation; proof of actual notice is not required, *State v. Thomas*, 25 Wn.App. 770 (1980); here, no proof that notice sent to address last obtained by DOL, thus suspended license charge dismissed; III.

***Rock v. Arkansas***, 97 L.Ed.2d 37 (1987)

Evidence rule prohibiting admissibility of **hypnotically** refreshed testimony cannot be invoked to prevent a defendant from testifying at her trial; 5-4.

***State v. Hancock***, 109 Wn.2d 760 (1988)

While ownership of a gun is inadmissible to draw adverse inference as to defendant's character, CONST. Art. 1, § 24, *State v. Rupe*, 101 Wn.2d 664, 706-07 (1984), it is relevant to support victim's fear of defendant where victim knew defendant owned a gun, *see:* *State v. Yates*, 161 Wn.2d 714, 775 (2007); 9-0.

***State v. Brown***, 55 Wn.App. 738 (1989)

In child sex abuse case with multiple incidents, lack of specificity of child's testimony as to dates does not deprive defendant of due process where defense is not alibi or misidentification, *State v. Hayes*, 81 Wn.App. 425, 429-31 (1996), *State v. Jensen*, 125 Wn.App. 319, 325-28 (2005), *see: State v. Edwards*, 171 Wn.App. 379, 400-03 (2012), *State v. Yallup*, 3 Wn.App.2d 546 (2018) ; II.

***State v. Handran***, 113 Wn.2d 11 (1989)

Judicial enlargement of a criminal statute should not be applied retroactively; where defendant committed a burglary before *State v. Bergeron*, 105 Wn.2d 1 (1985) was decided, then rule in *State v. Johnson*, 100 Wn.2d 607 (1983) should apply; harmless here; 9-0.

***Dowling v. United States***, 107 L.Ed.2d 708 (1990)

At bank robbery trial at which robber wore a mask and was with another man, government introduces evidence, of which defendant had previously been acquitted, that defendant entered a woman's house two weeks after robbery, wearing a mask with the same other man; held: admission of the testimony does not violate double jeopardy or due process fundamental fairness doctrine, *United States v. Lovasco*, 52 L.Ed.2d 752 (1977), *Currier v. Virginia*, ___ U.S. ___ , 138 S.Ct. 2144, 201 L.Ed.2d 650 (2018); 6-3.

***State v. Mendez***, 56 Wn.App. 458 (1990)

Defendant, without **interpreter**, enters guilty plea, responding in English to colloquy questions, following which defense counsel states he is satisfied defendant is pleading voluntarily and knowingly; defendant later seeks to withdraw plea, claiming he did not understand sufficient English; held: appointment of interpreter is within discretion of trial court, which has no affirmative obligation to appoint where lack of fluency is not apparent; I.

***Seattle v. Foley***, 56 Wn.App. 485 (1990)

In suspended license case, "**inquiry notice"** will satisfy due process; here, license was suspended after defendant refused a breath test, thus officer's advising defendant that license would be suspended if he refused, confiscating his license and issuing a temporary one and DOL mailing notice of revocation to defendant's last known address, even though it was returned unclaimed, was sufficient notice, *distinguishing* *State v. Baker*, 49 Wn.App. 778 (1987); I.

***State v. DeWeese***, 117 Wn.2d 369 (1991)

Removal of defendant from courtroom for **disruptive behavior** is within discretion of trial court, *Illinois v. Allen*, 25 L.Ed.2d 353 (1970), CrR 3.4(b); least severe remedy to maintain order is preferable, *Burgess v. Towne*, 13 Wn.App. 954, 960 (1975), *see: State v. Jaime*, 168 Wn.2d 857 (2010); 9-0.

***State v. Brinkley***, 66 Wn.App. 844 (1992)

Trial court has discretion to allow state to **reopen** after defense has rested to address a juror's question, *see:* *Estes v. Hopp*, 73 Wn.2d 263, 264-5 (1968), *Seattle v. Heath*, 10 Wn.App. 949 (1973), *State v. Vickers*, 18 Wn.App. 111, 113 (1977), *State v. Johnson*, 1 Wn.App. 602 (1969), *State v. Barnett*, 104 Wn.App. 191, 197-99 (2001); I.

***State v. Joyner***, 69 Wn.App. 356 (1993)

Requiring *pro se* defendant to testify on direct in question and answer format does not unduly burden defendant's choice of whether to testify; I.

***State v. Pacheco***, 70 Wn.App. 27 (1993)

Although a contingent fee agreement with **informant**, in which informant is paid to secure arrrest or conviction, is not favored, *State v. Whitney*, 96 Wn.2d 578, 582 (1981), here evidence showed informant was paid only an hourly rate plus expenses and mileage regardless of outcome; II.

***State v. Early***, 70 Wn.App. 452 (1993)

Defendant appears in **handcuffs** during jury selection, motion for mistrial denied; held: because incident did not "inflame or prejudice" jurors, denial of mistrial was not an abuse of discretion, *Pers. Restraint of Crace*, 157 Wn.App. 81, 102-04 (2010), *rev'd on other grounds,* 174 Wn.2d 835 (2012), although handcuffing should not be permitted except to prevent escape, injury or to maintain a quiet and peaceable trial, *State v. Ollison*, 68 Wn.2d 65, 69 (1966), *State v. Crawford*, 21 Wn.App. 146 (1978); III.

***Mount Vernon v. Cochran***, 70 Wn.App. 517 (1993)

City appeals appointment of breath test expert for indigent; held: where an **expert** is appointed solely for trial testimony, and admissibility can be determined at the pre-appointment stage, then the expert services may not be "necessary," CrRLJ 3.1(f), if the evidence is inadmissible, *State v. Sandomingo*, 39 Wn.App. 709, 712 (1985), *State v. Niemczyk*, 31 Wn.App. 803 (1982); admissibility is not an issue, however, where the expert is sought for review and consultation, *see: United States v. Sims*, 617 F.2d 1371, 1375 n. 3 (9th Cir. 1980), thus appointment was not an abuse of discretion; I.

***Seattle v. Lewis***, 70 Wn.App. 715 (1993)

Obstructing a public officer ordinance which requires the court to determine lawfulness of officer's action does not violate due process; failure to raise the issue of the lawfulness of the police action waives the defense, *State v. Scott*, 110 Wn.2d 682, 685 (1988); I.

***State v. Cozza***, 71 Wn.App. 252 (1993)

Information charges indecent liberties of a child between 1984 and 1987; held: defendant does not have due process right to a reasonable opportunity to raise an alibi defense, thus information alleging a crime that occurred over three-year period is valid; *see also: State v. Jordan*, 6 Wn.2d 719, 721 (1940), *State v. Warren*, 55 Wn.App. 645 (1989), *State v. Carver*, 37 Wn.App. 122, 126 (1984), *State v. Bailey*, 52 Wn.App. 42, 51 (1988), *aff'd,* 114 Wn.2d 340 (1990); III.

***United States v. Gaudin***, 132 L.Ed.2d 444 (1995)

In case of making false statements, 18 USC § 1001, where materiality of the alleged false statement is an element of the crime, then it must be submitted to jury, and trial court cannot

determine materiality, *Johnson v. United States*, 137 L.Ed.2d 718 (1997), *State v. Abrams*, 163 Wn.2d 277 (2008); 9-0.

***State v. Thomas***, 128 Wn.2d 553 (1996)

Trial court need not advise defendant of the right to testify in order for a waiver of the right to be valid, *State v. Russ*, 93 Wn.App. 241, 244-46 (1998), *State v. Lee*, 12 Wn.App.2d 378 (2020), *see: State v.Robinson*, 138 Wn.2d 753 (1999), *State v. Barnett*, 104 Wn.App. 191, 197-99 (2001); 9-0.

***State v. Lively***, 130 Wn.2d 1, 18-28 (1996)

Informant "trolling" for targets at AA/NA meetings, establishing sexual relationship with defendant who had no criminal history, persuading her to deliver drugs is **outrageous police conduct** violating due process clause, *State v. Solomon*, 3 Wn.App.2d 895 (2018), *see: State v. O'Neill*, 91 Wn.App. 978, 990-91 (1998), *State v. Rundquist*, 79 Wn.App. 786 (1995), *State v. Blackwell*, 120 Wn.2d 822, 830 (1993), *State v. Pleasant*, 38 Wn.App. 78 (1984), *United States v. Russell*, 36 L.Ed.2d 366 (1973), *State v. Emerson*, 10 Wn.App. 235 (1973), *State v. Putnam*, 31 Wn.App. 156 (1982), *State v. Markwart*, 182 Wn.App. 335, 347-52 (2014), *cf.: Pers. Restraint of Wiatt*, 151 Wn.App. 22, 48-50 (2009), *State v. Glant*, 13 Wn.App.2d 356 (2020); 5-4.

***State v. Bandura***, 85 Wn.App. 87, 92-93 (1997)

**Oral argument** is a matter of discretion, so long as movant is given the opportunity to argue in writing; a post-trial evidentiary hearing is not required absent affidavits from the witnesses or other competent evidence, allegations alone are insufficient to require a hearing; II.

***State v. Hutchinson***, 135 Wn.2d 863, 887-88 (1998), *abrogated as to remedy, State v. Jackson*, 195 Wn.2d 841 (2020)

**Shackling** during trial is within discretion of court, which must consider seriousness of present charge, temperament and character, age and physical attributes, past record, escapes, threats to harm or cause disturbance, self-destructive tendencies, risk of mob violence or revenge by others, possibility of rescue by others, size and mood of audience, nature and physical security of courtroom, adequacy and availability of alternative remedies, *State v. Finch*, 137 Wn.2d 792, 842-66 (1999), *State v. Hartzog*, 96 Wn.2d 383, 400 (1981), *State v. Alexander*, 52 Wn.App. 897, 900 (1988), *State v. Breedlove*, 79 Wn.App. 101, 113-15 (1995), *State v. Flieger*, 91 Wn.App. 236 (1998), *State v. Elmore*, 139 Wn.2d 250, 272-77 (1999), *State v. Jaquez*, 105 Wn.App. 699, 708-12 (2000), *see: State v. Rodriguez*, 146 Wn.2d 260 (2002), *State v. Turner*, 143 Wn.2d 715 (2001), *Deck v. Missouri*, 161 L.Ed.2d 953 (2005), *State v. Gonzales*, 129 Wn.App. 895 (2005), *Pers. Restraint of Elmore*, 162 Wn.2d 236, 259-61 (2007), *State v. Afeworki*, 189 Wn.App. 327, 351-56 (2015), *State v. Walker*, 185 Wn.App. 790 (2015), *State v. Lundstrom*, 6 Wn.App.2d 388 (2018); where there is no evidence that jury saw defendant in shackles, there is no prejudice, *State v. Jennings*, 111 Wn.App. 54, 61 (2002), *State v. Monschke*, 133 Wn.App. 313, 336-37 (2006), *see: Pers. Restraint of Davis*, 152 Wn.2d 647 (2004),; 6-3.

***State v. Aho***, 137 Wn.2d 736 (1999)

Defendant is charged with child molestation, statute under which he was charged and under which jury was instructed did not take effect until after the beginning of the charging period; held: *ex post facto* analysis only applies where legislature enacts a law applying to events

occurring before its enactment, which did not occur here, *Marks v. United States*, 51 L.Ed.2d 260 (1977); where charging period includes time before enactment of statute and jury is not asked to specify when the acts about which it convicts occurred, then defendant's due process rights are violated, *cf.: State v. Eaker*, 113 Wn.App. 111 (2002); defense counsel's submission of instructions including period before which the statute was effective is not invited error as it is ineffective assistance, *State v. Ermert*, 94 Wn.2d 839, 849-50 (1980); affirms, on different grounds, *State v. Aho*, 89 Wn.App. 842 (1998); 9-0.

***State v. Turner***, 143 Wn.2d 715 (2001)

In court, defendant is "volatile and hostile," disrupts hearings with verbal outbursts and physical violence, expressly threatens counsel and judge, after warnings from bench assaults counsel, court orders **shackling** without holding a separate hearing; held: when faced with actual disruptions caused by defendant's blatant and willful misbehavior, trial court did not abuse discretion by ordering shackling without a separate, formal hearing, which would have been redundant, distinguishing *State v. Finch*, 137 Wn.2d 792, 842 (1999), *see: Illinois v. Allen*, 25 L.Ed.2d 353 (1970), *State v. Lundstrom*, 6 Wn.App.2d 388 (2018), *State v. Jackson*, 195 Wn.2d 841 (2020); reverses *State v. Turner*, 99 Wn.App. 482 (2000); 9-0.

***State v. Garcia***, 107 Wn.App. 545, 549-50 (2001)

A law abolishing an affirmative defense may violate the due process clause if applied to antecedent conduct if it expands the scope of a criminal prohibition after the act is done, and if the change in law was unexpected and indefensible by reference to the law which existed prior to the conduct in issue, *Rogers v. Tennessee*, 149 L.Ed.2d 697 (2001), *Bouie v. City of Columbia*, 12 L.Ed.2d 894 (1964), *Collins v. Youngblood*, 111 L.Ed.2d 30 (1990); II.

***State v. Rodriguez***, 146 Wn.2d 260 (2002)

Defense witness is **shackled** during testimony, defense does not object; held: upon objection, trial court must hold a hearing to determine the need for security measures whenever a prisoner will appear before a jury in shackles, whether a defendant or defense or state witness, *State v. Lundstrom*, 6 Wn.App.2d 388 (2018), *see: State v. Jackson*, 195 Wn.2d 841 (2020); here, because defense did not object or request curative instruction, no prejudice; 8-1.

***State v. Mullin-Coston***, 115 Wn.App. 679, 692-95 (2003), *aff'd, on other grounds,* 152 Wn.2d 107 (2004)

Witnesses testify that defendant made statements while visiting him in jail; held: testimony that defendant is in jail on the charge for which he is being tried is less prejudicial than seeing defendant in **shackles**, *see: State v. Gonzales*, 129 Wn.App. 895 (2005); where trial court weighs probative value vs. unfair prejudice, ER 403, then there is no error, *State v. Classen*, 143 Wn.App. 45, 61-63 (2008); I.

***Sattazahn v. Pennsylvania***, 154 L.Ed.2d 588 (2003)

Following convicting of capital murder, jury is deadlocked at penalty phase, per state law trial court sentences defendant to life, defendant prevails on appeal, at new trial defendant is sentenced to death; held: following hung jury, sentence to death is not precluded by due process clause; 5-4.

***State v. Simmons***, 152 Wn.2d 450 (2004)

**Persistent prison misbehavior**, RCW 9.94.070, is not an unconstitutional delegation of legislative authority and does not violate equal protection clause, *see: State v. Brown*, 95 Wn.App. 952 (1999), 142 Wn.2d 57 (2000), *see also: State v. Donery*, 131 Wn.App. 667 (2006); affirms *State v. Simmons*, 117 Wn.App. 682 (2003); 5-4.

***State v. Sanchez***, 122 Wn.App. 579, 587-88 (2004)

Defendant appeared at jury trial in jail clothes, defense counsel expresses defendant's unhappiness but then states his tactical decision to present defendant before the jury in jail clothes to elicit sympathy; held: no error where a defendant is not coerced to go to trial in jail attire, *State v. Stevens*, 35 Wn.App. 68 (1983), *State v. Levy*, 156 Wn.2d 709, 730-31 (2006), *Pers. Restraint of Crace*, 157 Wn.App. 81, 95-97 (2010), *rev'd, on other grounds,* 174 Wn.2d 835 (2012), distinguishing *Estelle v. Williams*, 48 L.Ed.2d 126 (1976); III.

***State v. McEnry***, 124 Wn.App. 918 (2004)

Potential adverse impact on future employment is not a compelling circumstance to seal a court file, GR 15, *Seattle Times v. Ishikawa*, 97 Wn.2d 30 (1982), *see: State v. Walden*, 148 Wn.App. 952 (2009); II.

***Bradshaw v. Stumpf***, 162 L.Ed.2d 143 (2005)

At defendant's capital sentencing hearing, prosecutor argues that defendant was principal, at co-defendant's separate hearing, state argues that co-defendant was principal, defendant is sentenced to death, co-defendant to life; held: prosecutorial inconsistency may violate due process, remanded for further proceedings; 9-0.

***Pers. Restraint of Woods***, 154 Wn.2d 400 (2005)

In homicide case, court denies defense motion for spectators to remove visible "black and orange remembrance ribbons;" held: where trial court observes the courtroom scene presented to the jury and determines that what they saw was not so inherently prejudicial as to pose an unacceptable threat to a fair trial, *Holbrook v. Flynn*, 89 L.Ed.2d 525 (1986), court's discretion will be affirmed, at 416-20, *State v. Lord*, 161 Wn.2d 276, 284-91 (2007), *State v. Allen*, 182 Wn.2d 364, 385-87 (2015); use of an alias at trial is proper where relevant, *State v. Elmore*,139 Wn.2d 250, 283-84 (1999), here defendant was booked under an alias, fingerprints came up as belonging to the alias, at 423; 9-0.

***State v. McSorley***, 128 Wn.App. 598, 604-05 (2005)

Neither the state nor trial court may compel a defendant to raise or rely upon the statutory affirmative defense to child luring, RCW 9A.40.090(2), *State v. Coristine*, 177 Wn.2d 370 (2013), *State v. Lynch*, 178 Wn.2d 487 (2013), *State v. Jones*, 99 Wn.2d 735 (1983), *see: North Carolina v. Alford*, 27 L.Ed.2d 162, 169 (1970); II.

***State v. Gonzales***, 129 Wn.App. 895 (2005)

At outset of trial, judge *sua sponte* advises jurors that defendant is in custody and will be transported in handcuffs because he could not post bail, defense motion for mistrial denied; held:

advising jury that defendant was poor, being held in jail, transported in restraints violates due process, presumption of innocence, "equal justice;" 2-1, III.

***Pers. Restraint of Elmore***, 162 Wn.2d 236, 259-61 (2007)

While counsel is obliged to object to **shackling** of defendant, *Pers. Restraint of Davis*, 152 Wn.2d 647, 699 (2004), shackling here was harmless as he was only shackled on first day of penalty phase jury selection, trial strategy was to demonstrate remorse and accept responsibility, *Pers. Restraint of Crace*, 157 Wn.App. 81, 95-104 (2010), *rev'd, on other grounds,* 174 Wn.2d 835 (2012), *but see: State v. Jackson,* 195 Wn.2d 841 (2020); 8-1.

***State v. Frost***, 160 Wn.2d 765 (2007)

Trial court may not preclude defense counsel from arguing both duress and that state failed to prove accomplice liability, distinguishing *State v. Riker*,123 Wn.2d 351, 367-68 (1994), *see: State v. Arbogast,* 15 Wn.App.2d 851 (2020), 199 Wn.2d 356 (2022), *Glebe v. Frost,* 574 U.S. 21, 135 S.Ct. 429, 190 L.Ed.2d 317 (2014); harmless here; 5-4.

***State v. Lord***, 161 Wn.2d 276, 284-91 (2007)

In murder trial, defense motion to prevent spectators from wearing buttons with likeness of the victim is denied; held: "there is no *per se* 'inherent prejudice [to] the defendant's right to fair trial from the wearing of buttons or other displays,'" *Pers. Restraint of Woods*, 154 Wn.2d 400 (2005), *State v. O'Connor,* 155 Wn.App. 282, 288-90 (2010), *State v. Allen,* 182 Wn.2d 364, 385-87 (2015); affirms *State v. Lord*, 128 Wn.App. 216 (2005); 7-2.

***State v. Yates***, 161 Wn.2d 714, 775 (2007)

In murder case, evidence that defendant owned and used a specific caliber firearm is not an improper comment on his right to bear arms where ownership of a gun was relevant, *State v. Hancock*, 109 Wn.2d 760, 767-68 (1988); 8-1.

***State v. Russell***, 141 Wn.App. 733 (2007)

Trial court's prohibiting press from photographing juvenile witnesses without their permission is not closure of a court, and court need not apply *State v. Bone-Club*, 128 Wn.2d 254 (1995) factors; GR 16(c) authorizes trial court to limit courtroom photography if it makes particularized findings to support its decision, presuming open access, and allows the press to state its position; II.

***State v. Classen***, 143 Wn.App. 45, 61-63 (2008)

Trial court allows jailers to testify as to defendant's good behavior in jail to rebut a defense psychologist's testimony about mental illness, court weighs probative vs. prejudicial value and determines that prejudice is outweighed; held: given the high probative value of the testimony relative to the "slight likelihood of its prejudicial effect, most jurors likely knowing that a murder defendant is detained, there was no error, *State v. Mullin-Coston*, 115 Wn.App. 679, 692-95 (2003), *aff'd, on other grounds,* 152 Wn.2d 107 (2004); 2-1, II.

***State v. Jaime***, 168 Wn.2d 857 (2010)

Holding a jury trial in a courtroom located in the jail is inherently prejudicial, akin to **shackling**, only permitted if, after a careful analysis, the court finds that a jailhouse setting is the "fairest and most reasonable way to handle" defendants who are found to present a serious safety risk, *Illinois v. Allen*, 397 U.S. 337, 344, 25 L.Ed.2d 353 (1970), *State v. Sanchez*, 171 Wn.App. 518, 562-71 (2012), *see: State v. Rodriguez*, 163 Wn.App. 215, 223-27 (2011), *State v. Jackson*, 195 Wn.2d 841 (2020), *State v. Madden*, 16 Wn.App.2d 327 (2021), *State v. Fleeks*, ___ Wn.App.2d ___, 2023WL355082 (2023); 5-4.

***State v. O'Connor***, 155 Wn.App. 282, 288-90 (2010)

During drug and harassment trial, jurors observe display set out by prosecutor's office outside courthouse of shoes in memory of violent crime victims, trial judge questions jurors, dismisses one juror who says seeing empty children's shoes affected her, denies mistrial; held: display here was not improper contact with jurors, distinguishing *Remmer v. United States*, 98 L.Ed.2d 654 (1954), nor was it prosecution misconduct; III.

***Pers. Restraint of Crace***, 157 Wn.App. 81 (2010), *rev'd, on other grounds,* 174 Wn.2d 835 (2012)

Defendant, without objection, wears jail-issued sandals during jury trial, after conviction juror writes that she observed defendant **shackled**, in sandals, in hallway, not asked during voir dire, states she chose not to volunteer the information; held: defendant was not coerced to wear sandals as he simply lacked shoes, failure to object waives issue, *State v. Sanchez*, 122 Wn.App. 579, 587-88 (2004), *State v. Levy*, 156 Wn.2d 709, 730-31 (2006); passing glimpses of a defendant in restraints are insufficient to find prejudice, *State v. Early*, 70 Wn.App. 452, 462 (1993), *State v. Gosser*, 33 Wn.App. 428 435 (1982), *but see: State v. Jackson*, 195 Wn.2d 841 (2020); 2-1, II.

***State v. Emery***, 161 Wn.App. 172, 190-91 (2011), *affirmed*, 174 Wn.2d 741 (2012)

During defendant's testimony, joined co-defendant twice states loudly that defendant is lying, motion for mistrial is denied, trial court instructs jury to disregard the outburst and only consider witness testimony and admitted exhibits; held: trial court did not abuse discretion, court presumes jury followed instructions; II.

***State v. Rodriguez***, 163 Wn.App. 215, 223-27 (2011)

Trial court holds trial in jail courtroom after taking testimony regarding security, gang violence, defendant's disciplinary record in custody, danger of retribution against defendant and testifying co-defendant; held: record established that court did not abuse its discretion, at 223-27, *State v. Sanchez*, 171 Wn.App. 518, 562-71 (2012), distinguishing *State v. Jaime*, 168 Wn.2d 857 (2010); where witnesses know a defendant by a nickname suggesting a criminal disposition (here, Little Evil), trial court does not abuse discretion by admitting it, at 229-30; III.

***State v. Sanchez***, 171 Wn.App. 518, 562-71 (2012)

In aggravated murder case, trial court holds trial in jailhouse courtroom, finding defendant had a history of prior assaults, had exhibited threatening behavior in jail, threatened suicide, high profile case, family of victim and defendant had had an altercation at arraignment; held: while holding trial in jail courtroom is inherently prejudicial, *State v. Jaime*, 168 Wn.2d 857 (2010), here trial court properly engaged in fact-finding and exercised discretion, *State v. Rodriguez*, 163 Wn.App. 215, 223-27 (2011),

decision to do so is not limited to risks that would justify **shackling**, *see: State v. Jackson,* 195 Wn.2d 841 (2020); III.

***State v. Coristine***, 177 Wn.2d 370 (2013)

Trial court may not instruct jury on an affirmative defense that defendant does not wish to pursue, *State v. Jones,* 99 Wn.2d 735 (1983), *State v. McSorley,* 128 Wn.App. 598 (2005), *State v. Lynch,* 178 Wn.2d 487 (2013); 6-3.

***State v. Dye***, 178 Wn.2d 541 (2013)

Trial court allows a service-type dog owned by the prosecutor to sit by developmentally disabled adult victim during testimony; held: just as a court may allow a child victim to hold a "comfort item" during testimony, trial court did not err, where witness' need for emotional support outweighs the possibility of prejudice; affirms *State v. Dye,* 170 Wn.App. 340, 344-48 (2012); 9-0.

***State v. Allen***, 182 Wn.2d 364, 385-87 (2015)

In police homicide case spectators in court wear t-shirts reading "[y]ou will not be forgotten, Lakewood Police" and listing victims' names; held: mere presence of a spectator display is not inherently prejudicial, trial court should look to factors such as number of spectators wearing shirts, font size, closeness to jury, message must be scrutinized to determine if it advocates for guilt or innocence, *Holbrook v. Flynn,* 475 U.S. 560, 570, 89 L.Ed.2d 525 (1986), *State v. Lord,* 161 Wn.2d 276, 280 (2007), *Pers. Restraint of Woods,* 154 Wn.2d 400, 417-18 (2005); 9-0.

***State v. Walker***, 185 Wn.App. 790 (2015)

Trial court has "sole discretion" to determine whether defendant should be **shackled** at sentencing, *but see: State v. Jackson,* 195 Wn.2d 841 (2019), *State v. Madden,* 16 Wn.App.2d 327 (2021); I.

***State v. Farnsworth***, 185 Wn.2d 768, 788 (2016)

Defendant sitting in a hard wooden chair as opposed to counsels' leather chairs does not violate presumption of innocence as it does not carry the same association as do physical restraints, *State v. Clark,* 143 Wn.2d 731, 744 (2001); 5-4.

***State v. Caver***, 195 Wn.App. 774 (2016)

Denying defendant's request to wear jail clothes at jury trial is not error; I.

***State v. Lundstrom***, 6 Wn.App.2d 388 (2018)

Pursuant to jail policy defendant is brought to first appearance in restraints, trial court does not respond to counsel's objection; held: court's failure to address the issue of pretrial restraints is an abuse of discretion as "a prisoner is entitled to be brought into the presence of the court free from restraints," *State v. Damon,* 144 Wn.2d 686, 690 (2001), *State v. Williams,* 18 Wash. 47, 51 (1897), absent a hearing and findings regarding need for restraints on a particular prisoner, *State v. Gorman-Lykken,* 9 Wn.App.2d 687 (2019), *State v. Jackson,* 195 Wn.App.2d 841 (2019), *State v. Madden,* 16 Wn.App.2d 327 (2021); *but see: State v. Turner,* 143 Wn.2d 715 (2001); II.

***State v. Gorman-Lykken***, 9 Wn.App.2d 687 (2019)

Jail guard stands next to witness stand as defendant testifies, trial court defers to the guard; held: while having a corrections officer stand next to the defendant during testimony before a jury is not inherently prejudicial, *Holbrook v. Flynn*, 475 U.S. 560, 568-69, 106 S. Ct. 1340, 89 L. Ed. 2d 525 (1986), *State v. Jaime*, 168 Wn.2d 857, 865 (2010), *State v. Fleeks*, ___ Wn.App.2d ___, 2023WL355082 (2023), trial court must state case-specific reasons and determine that the need for the security measure outweighs the potential prejudice and cannot rely upon the security officer's preference, *State v. Damon*, 144 Wn.2d 686, 690 (2001), *State v. Madden*, 16 Wn.App.2d 327 (2021); here, court did not exercise discretion, thus reversed; II.

***State v. Jackson***, 195 Wn.2d 841 (2020)

Over objection, defendant is shackled during pretrial proceedings and put in a leg brace during jury trial, leg brace is hidden but defendant is unable to rise for the jury or while taking oath on witness stand; held: absent individualized inquiry by the court regarding the need for restraints both pretrial and before the jury, at every court appearance, shackling and leg brace is a constitutional violation, *C.F.: State v. Madden*, 16 Wn.App.2d 327 (2021), state did not prove harmlessness beyond a reasonable doubt so conviction is reversed, reversing, in part, *State v. Jackson*, 10 Wn.App.2d 136 (2019); overrules, in part regarding remedy, *State v. Hutchinson*, 135 Wn.2d 863, 887-88 (1998); 9-0.

***State v. Mansour****14* Wn.App.2d 323 (2020)

In child molestation case use of victim's initials in information and to convict instruction does not deprive defendant of due process, is not a comment on the evidence, and does not amount to a court closure; I.

***State v. Madden***, 16 Wn.App.2d 327 (2021)

Trial court's permitting defendant to be shackled at arraignment because of the nature of the underlying offense, his criminal history and a jail guard's statement that he had previously resisted being re-shackled is not an abuse of discretion; I.

***State v. Bejar***, 18 Wn.App.2d 454 (2021)

In gang murder case in which a witness was threatened and shot trial court requires secondary security at the courtroom, including jurors, and prohibiting cell phones; held: trial court has discretion to require extra security for case-specific reasons, *Holbrook v. Flynn*, 89 L.Ed.2d 525 (1986), *State v. Jaime*, 168 Wn.2d 857 (2010), *State v. Rodriguez*, 163 Wn.App. 215, 223-27 (2011); I.

***State v. Bass***, 18 Wn.App.2d 760 (2021)

In cold murder case defendant is charged under a felony murder statute which was amended after the killing, changing element that state must prove that defendant committed the predicate crime "in the course of and in furtherance of the crime" to "in the course of or in furtherance of the crime; held: while not an *ex post facto* violation, *State v. Aho*, 137 Wn.2d 736, 742 (1999), a conviction for acts occurring prior to the adoption of a statute violates the due process clause, *State v. Aho*, *supra* at 744, harmless here; I.

***State v. Fleeks***, ___ Wn.App.2d ___, 2023WL355082 (2023)

Jail officer stationed at door near witness stand while defendant testifies is not inherently prejudicial, *State v. Gorman-Lykken,* 9 Wn.App.2d 687 (2019); I.

# DURESS DEFENSE

***State v. Turner***, 42 Wn.App. 242 (1985)

The element of the duress defense that the actor or another would be liable to immediate death or immediate grievous bodily injury, RCW 9A.16.060, is a question of fact for the jury; instructions on the defense should be given even though the refusal to commit the offense would not result in simultaneous execution of the threat, *Colorado v. Maes*, 583 P.2d 942, 944 (1978); III.

***State v. Ng***, 110 Wn.2d 32 (1988)

Approves WPIC 18.01, RCW 9A.16.060, as sufficiently describing subjective nature of duress defense; 9-0.

***State v. Riker***, 123 Wn.2d 351 (1994)

Trial court does not abuse its discretion by excluding battered-person syndrome evidence in duress case to explain defendant's behavior with a nonintimate, nonbattering person, at 358-66; defense has burden of proving duress by preponderance, at 366-69, overruling *State v. Bromley*, 72 Wn.2d 150, 155 (1967), *State v. McAlister*, 71 Wn.App. 576, 584 (1993); 7-2.

***State v. Williams***, 132 Wn.2d 248, 258-60 (1997)

Defendant, charged with welfare fraud, claims her domestic partner, a merchant seaman, ordered her to commit crime, defendant believed she would be abused if she disobeyed, expert testified she suffered from battered women's syndrome, trial court declines to instruct on duress as the harm was not immediate; held: in battered person context, abuse affects perceptions and reactions to explain subjective mental state and reasonableness of defendant's actions, thus reasonableness of defendant's perception of immediacy should be evaluated in light of defendant's experience of abuse, thus trial court erred in declining duress instructions; 9-0.

***State v. Mannering***, 150 Wn.2d 277 (2003)

Duress is not a defense to attempted murder, former RCW 9A.16.060(2); affirms *State v. Mannering*, 112 Wn.App. 268 (2002); 9-0.

***Dixon v. United States***, 165 L.Ed.2d 299 (2006)

Requirement that defendant prove duress by a preponderance does not violate due process, *State v. Dow*, 162 Wn.App. 324, 329-32 (2011); 7-2.

***State v. Frost,*** 160 Wn.2d 765 (2007)

Trial court may not preclude defense counsel from arguing both duress and that state failed to prove accomplice liability, distinguishing *State v. Riker*,123 Wn.2d 351, 367-68 (1994), harmless here, *see: Glebe v. Frost*, 574 U.S. 21, 135 S.Ct. 429, 190 L.Ed.2d 317 (2014); 5-4;

***State v. Harvill***, 169 Wn.2d 254 (2010)

Defendant sells drugs to police agent who, defendant says, called him numerous times, aggressively said "you better get me some cocaine," no direct threat but defendant testified he feared he or his family would be hurt, trial court rejects duress instruction; held: a duress instruction must be given where there is an explicit or implicit threat arising indirectly from the circumstances, *State v. Williams*, 132 Wn.2d 248, 258-60 (1997); 9-0.

***State v. Budik***, 156 Wn.App. 123, 130-32 (2010), *rev'd on other grnds*, 173 Wn.2d 727 (2012)

Defendant is shot, lies to police claiming he does not know who shot him, some evidence is admitted that he feared for his safety; held: absent evidence of a threat and reasonable apprehension of immediate death or grievous bodily injury had defendant cooperated, he is not entitled to a duress instruction; III.

***State v. Healy***, 157 Wn.App. 502 (2010)

Defendant testifies he committed the charged burglaries after having been forced to do so against his will by former criminal associates, trial court instructs on duress defense and, over objection, that the defense is unavailable if defendant intentionally or recklessly placed himself in a situation in which it was probable he would be subject to duress, RCW 9A.16.060(3) (1999); held: recklessness exception to duress defense is appropriate for trier of fact to consider, *see: State v. Harvill*, 169 Wn.2d 254 (2010); I.

***State v. Dow***, 162 Wn.App. 324, 329-32 (2011)

Burden of proving duress is on the defendant by a preponderance, does not negate an element of the charged offense, *Dixon v. United States*, 548 U.S. 1, 165 L.Ed.2d 299 (2006), *State v. Peters*, 47 Wn.App. 854 (1987); II.

***State v. Whitaker***, 195 Wn.2d 333 (2020)

Duress is not a defense to murder or to the aggravating factors that enhance murder to aggravated murder; affirms *State v. Whitaker*, 6 Wn.App.2d 1 (2018); 9-0.

# ENTRAPMENT

***State v. Hubbard***, 27 Wn.App. 61 (1980)

State can use evidence of remote but similar conduct of defendant to show predisposition of defendant; II.

***State v. Whitney***, 96 Wn.2d 578 (1981)

Co-defendant, at separate trial, is acquitted on entrapment defense, defendant moves to dismiss, CrR 8.3(b), and to exclude evidence as fruit of police misconduct; held: exclusionary rule does not apply as entrapment, while improper police conduct, does not invade any independent constitutional right of the defendant; 9-0.

***State v. Keller***, 30 Wn.App. 644 (1981)

Error not to instruct on entrapment where defendant's testimony, if believed, would establish the defense; it is not necessary for defendant to prove outrageous conduct when asserting the defense; outrageous conduct may violate due process; III.

***State v. Putnam***, 31 Wn.App. 156 (1982)

Police hire a prostitute, direct her to go to work for Kinky Korner and turn tricks; held: police conduct was not so shocking to the universal sense of justice as to violate due process, *United States v. Russell*, 36 L.Ed.2d 366 (1973), *State v. Emerson*, 10 Wn.App. 235 (1973); I.

***State v. Smith***, 101 Wn.2d 36 (1984)

Police informant tells defendant that her husband is dying, needs drugs for pain, defendant sells marijuana; held: an appeal to sympathy or to friendship, by itself, does not constitute entrapment, *see:* *State v. Vinson*, 74 Wn.App. 32, 36-8 (1994), *State v. Trujillo*, 75 Wn.App. 523 (1994), *but see:: State v. Arbogast*, 15 Wn.App.2d 851 (2020), 199 Wn.2d 356 (2022) entrapment may have been established had informant been given the drugs as opposed to sale, *Sherman v. United States*, 2 L.Ed.2d 848 (1958); 6-3.

***Mathews v. United States***, 99 L.Ed.2d 54 (1988)

Defense is entitled to entrapment instructions whenever there is sufficient evidence to support the defense even if defendant denies one or more elements of the crime, *see: State v. Stegall*, 69 Wn.App. 750 (1993), *rev'd on other grounds,* 124 Wn.2d 719 (1994); 7-2.

***State v. Galisia***, 63 Wn.App. 833 (1992)

Where drug defendant gave phone number to police agent after agent asked to buy drugs, told agent he might be able to help him buy drugs, put agent in touch with dealer, negotiated drug deal, then defendant is not entitled to entrapment instruction even though the criminal design originated in agent's mind; failure to admit to crime does not preclude entrapment as a defense where defendant admits the activity on which a charge is based, *State v. Arbogast*, 15 Wn.App.2d 851 (2020), 199 Wn.2d 356 (2022), *distinguishing* *State v. Matson*, 22 Wn.App. 114, 121 (1978); I.

***State v. Stegall***, 69 Wn.App. 750 (1993), *rev'd on other grounds,* 124 Wn.2d 719 (1994)

Entrapment instructions need not be given unless defendant admits acts which, if proved, would constitute the crime, although s/he need not admit every element or even the crime itself, *State v. Galisia*, 63 Wn.App. 833 (1992), *cf.: State v. Draper*, 10 Wn.App. 802 (1974); where defendant denies having the state of mind required to demonstrate accomplice liability to delivery of drugs or even possession, proper to refuse instructions; *Mathews v. United States*, 99 L.Ed.2d 54 (1988), is inapplicable in Washington since the defense is statutory, not constitutional; I.

***State v. Vinson***, 74 Wn.App. 32, 36-8 (1994)

In drug delivery case, defendant testifies that he did not want to deliver in a bus shelter, officer insisted one time, defendant acceded, defense offers entrapment instruction as to bus shelter enhancement, RCW 69.50.435(a); held: without deciding whether entrapment is a defense to a sentence enhancement, officer's use of a normal amount of persuasion to overcome resistance does not justify entrapment instruction, *State v. Waggoner*, 80 Wn.2d 7, 11 (1971), *State v. Smith*, 101 Wn.2d 36, 42-3 (1984); single request by an undercover officer that a defendant engage in an illegal transaction is apparently insufficient to constitute entrapment; I.

***State v. Trujillo***, 75 Wn.App. 523, 75 Wn.App. 913 (1994) , *abrogated, State v. Arbogast*, 15 Wn.App.2d 851 (2020), 199 Wn.2d 356 (2022)

In order to entitle a defendant to an entrapment instruction, defense must present evidence which could create a reasonable doubt in the minds of the jurors as to the defendant's guilt, more than a scintilla, *but see: State v. Galisia*, 63 Wn.App. 833, 836 (1992), *State v. Lively*, 130 Wn.2d 1 (1996); informer asking three times for cocaine, defendant never refusing to obtain cocaine but stating he was unable to obtain any until he delivers drugs is insufficient to support an entrapment instruction, *State v. Enriquez*, 45 Wn.App. 580, 585 (1986), *distinguishing State v. Smith*, 101, Wn.2d 36 (1984); I.

***State v. Rundquist***, 79 Wn.App. 786 (1995)

Wildlife agents sell illegal fish eggs and fish to defendant who is charged with numerous counts of purchasing unlawfully taken salmon and steelhead, trial court dismisses claiming that defendant was entrapped; held: entrapment is a jury question, at 797-8; II.

***State v. Lively***, 130 Wn.2d 1 (1996)

Defendant must prove entrapment by preponderance, at 8-14, *State v. Chapin*, 75 Wn.App. 460, 470-22 (1994), *see: State v. Riker*, 123 Wn.2d 351, 366-68 (1994); test for sufficiency of entrapment evidence for dismissal: considering evidence in light most favorable to state, could a rational trier of fact find that defendant failed to prove the defense by preponderance?, at 14-18; informant "trolling" for targets at AA/NA meetings, establishing sexual relationship with defendant who had no criminal history, persuading her to deliver drugs is outrageous police conduct violating due process clause, at 18-28, *State v. Solomon,* 3 Wn.App.2d 895 (2018), *cf.: State v. O'Neill,* 91 Wn.App. 978, 990-91 (1998), *State v. Rundquist*, 79 Wn.App. 786 (1995), *United States v. Russell,* 36 L.Ed.2d 366 (1973), *State v. Emerson*, 10 Wn.App. 235 (1973), *State v. Putnam*, 31 Wn.App. 156 (1982), *State v. Markwart*, 182 Wn.App. 335, 347-52 (2014), *State v. Glant*, 13 Wn.App.2d 356 (2020), *State v. Arbogast*, 15 Wn.App.2d 851 (2020), 199 Wn.2d 356 (2022); 9-0 (burden), 5-4 (due process).

***State v. O'Neill***, 91 Wn.App. 978 (1998)

Police officer accepts a bribe from DUI defendant, officer pleads guilty, DUI defendant is charged with bribery, trial court instructs with WPIC 18.05, including language, "[t]he defense is not established if the law enforcement official(s) did no more than afford the defendant an opportunity to commit a crime. The use of a reasonable amount of persuasion to overcome reluctance does not constitute entrapment"; held: while first sentence usually applies to a sting operation, it is equally applicable where official accepts the bribe; "reasonable persuasion" sentence can only apply to an undercover operation, and is reversible error here, as it suggests that officer could have illegally threatened incarceration to extort a bribe by using "reasonable" persuasion; corrupt officer's accepting a bribe does not, by itself, constitute outrageous conduct justifying dismissal; I.

***State v. Johnson***, 12 Wn.App.2d 201 (2020)

Police post Craigslist advertisement purporting to be a juvenile seeking sex with an adult, defendant responds with explicit desires, drives to meet poster, is arrested, convicted of attempted rape of a child, at trial defendant testifies that he was "playing detective," did not believe she was a juvenile, trial court declines entrapment instruction; held: police merely offered an opportunity to commit the crime, no evidence of entrapment, state's failure to prove defendant's predisposition to commit crime does not meet defendant's burden for an affirmative defense, *see: State v. Fisher*, 185 Wn.2d 836, 848-52 (2016), *State v. Arbogast,* 15 Wn.App.2d 851 (2020), 199 Wn.2d 356 n. 5 (2022); II.

***State v. Arbogast***, 15 Wn.App.2d 851 (2020), 199 Wn.2d 356 (2022)

Police post Craigslist ad purporting to be a mother offering her children for sex, defendant responds, agrees to meet, is arrested, trial court refuses to admit defendant's evidence that he has no record as lack of predisposition to support his offer of an entrapment instruction, court finds that defendant did not present sufficient evidence by a preponderance to support the instruction, nor did defense establish that police presented more than the "normal amount of persuasion;" held: to obtain entrapment instruction defense need only present *prima facie* evidence to the court, overruling *State v. Trujillo*, 75 Wn.App. 913 (1994); lack of predisposition includes lack of criminal history, ER 404(a)(1); police testimony that they used no more than the "normal amount" of persuasion is not conclusive, state must offer evidence to support that claim; defense is entitled to entrapment instruction; 7-2.

# EQUAL PROTECTION

***Bearden v. Georgia***, 76 L.Ed.2d 221 (1983)

In revocation proceedings for failure to pay fine or restitution, court must inquire into reasons for failure to pay and, if probationer made bona fide efforts to acquire resources to pay, court must consider alternative measures of punishment other than imprisonment; 9-0.

***State v. Mason***, 34 Wn.App. 514 (1983)

Defendant is convicted of promoting prostitution 2°; Seattle Municipal Code proscribes exact same conduct as a misdemeanor; held: if police had discretion to charge as a misdemeanor or felony, then defendant's right to equal protection is violated, *Olsen v. Delmore*, 48 Wn.2d 545, 550 (1956), *State v. Zornes*, 78 Wn.2d 9, 23 (1970), *but see: Kennewick v. Fountain*, 116 Wn.2d 189 (1991), *State v. Eakins*, 73 Wn.App. 271, 273-6 (1994), however a municipality may not pass an ordinance making behavior which a state statute proscribes as a felony into a misdemeanor; state statute preempts municipal ordinance, thus affirmed; I.

***State v. Judge***, 100 Wn.2d 706 (1984)

Prosecutor's charging decisions to charge defendant-driver with negligent homicide but not her companion-passenger who purchased the alcohol is not discriminatory prosecution as the decision was not deliberately based upon race, religion or other arbitrary classification, *Oyler v. Boler*, 7 L.Ed.2d 446 (1962); 9-0.

***State v. Hall***, 104 Wn.2d 486 (1985)

Escape, RCW 9A.76.110(1), requires state to prove that defendant knew his actions would result in leaving confinement without permission, *State v. Descoteaux*, 94 Wn.2d 31, 35 (1980); failure to return from work release, RCW 72.65.070, requires state to prove willfulness; because there is no rational basis for the difference in treatment of these similarly situated groups, equal protection clause is violated; Supreme Court reads in willfulness as an element of RCW 9A.76.110(1) where defendant escaped from a local work release program; 6-3.

***State v. Seeley***, 43 Wn.App. 705 (1986)

Defendant, charged with theft, is alleged to have sold a vehicle knowing that the odometer was turned back, challenges conviction claiming he should have been charged with special odometer statute, RCW 46.37.550; held: general theft requires proof of intent to deprive and value; determining factor is that the general statute will be violated in each instance where the special statute has been violated, *State v. Shriner*, 101 Wn.2d 576, 580 (1984), *State v. Presba*, 131 Wn.App. 47 (2005), *State v. Chase*, 134 Wn.App. 792, 800-03 (2006); here, additional elements must be proved for the general statute, thus the general/specific rule is inapplicable, *see: State v. Wright*, 183 Wn.App. 719, 730-32 (2014), *State v. Numrich*, 197 Wn.2d 1 (2021); no equal protection violation, as elements differ.

***State v. Hodgson***, 44 Wn.App. 592 (1986)

Defendant may be charged with statutory rape or indecent liberties even though his conduct also constitutes incest; indecent liberties is not a lesser of statutory rape 1°; *accord*: *State v. Henderson*, 48 Wn.App. 543 (1987); I.

***State v. Poulsen***, 45 Wn.App. 706 (1986)

Where an indigent defendant makes a clear showing that his mental state will be a significant factor at trial, trial court must appoint a psychiatric expert to assist in the defense; II.

***State v. Datin***, 45 Wn.App. 844 (1986)

Statutory rape 1° and incest 1° are not concurrent, as neither statute will necessarily be violated each time the other is violated, thus state need not charge incest where facts support both offenses; because elements of both crimes are not the same, there is no equal protection violation; II.

***State v. Clinton***, 48 Wn.App. 671 (1987)

Where co-defendants are sentenced to disparate sentences for the same crime, there must be a rational basis established for the disparity to survive equal protection analysis, *see: State v. Caffee*, 117 Wn.App. 470 (2003); different sentencing judges is not a rational basis; *but see: State v. Handley*, 115 Wn.2d 275 (1990); I.

***Seattle v. Hogan***, 53 Wn.App. 387 (1989)

Where a city ordinance provides for a greater punishment than a state statute having the same elements, then the city may not impose a greater punishment than provided by state law; I.

***State v. Ankney***, 53 Wn.App. 393 (1989)

Legislation which permits the state to seek either criminal or civil penalties or both does not violate equal protection, *Yakima Cy. Clean Air Auth. v. Glascam Builders, Inc.*, 85 Wn.2d 255 (1975) *State v. Pollnow*, 69 Wn.App. 160 (1993), *State v. Von Thiele*, 47 Wn.App. 558, 561 (1987); I.

***State v. Elliott***, 54 Wn.App. 532, 114 Wn.2d 6 (1990)

Promoting prostitution 2° is a special statute as opposed to the general law of aiding and abetting prostitution, and thus there is no equal protection violation for charging the former rather than the latter; I.

***State v. Horton***, 54 Wn.App. 837 (1989)

Fact that prosecutor can charge defendant with violation of a domestic violence protection order, RCW 26.50.110(1), or contempt, former RCW 7.20.020, does not violate equal protection as the contempt is civil; I.

***State v. Handley***, 115 Wn.2d 275 (1990)

To establish an equal protection violation due to disparate sentence from that of co-defendant, defendant must (1) establish that he is similarly situated by virtue of near identical participation in the crime; if there is no rational basis for the differentiation, then there is an equal protection violation, or (2) if defendant is a member of a suspect class and can establish

that she received disparate treatment because of that membership, then there is an equal protection violation; distinguishes *State v. Clinton*, 48 Wn.App. 671 (1987); here, co-defendants' roles differed significantly, thus defendant cannot establish that he was similarly situated, *State v. Conners*, 90 Wn.App. 48 (1998); *affirms* *State v. Handley*, 54 Wn.App. 377 (1989); *see also:* *State v. Entz*, 58 Wn.App. 112 (1990), *State v. Caffee*, 117 Wn.App. 470 (2003); 9-0.

***Seattle v. Barrett***, 58 Wn.App. 698 (1990)

Seattle ordinance prohibiting intentionally damaging property, SMC § 12A.08.020, does not violate defendant's right to equal protection due to existence of malicious mischief, RCW 9A.48.090, which prohibits knowingly and maliciously destroying property, as a local ordinance does not conflict with a state statute in the constitutional sense merely because one prohibits a wider scope of activity than the other, *Seattle v. Eze*, 111 Wn.2d 22, 33 (1988), *Seattle v. Hammon*, 131 Wn.App. 801, 807-09 (2006); I.

***State v. Hoffman***, 116 Wn.2d 51 (1991)

Where federal and state crimes are concurrent, there is no equal protection violation where penalties differ as there are two different charging authorities, *distinguishing* *State v. Zornes*, 78 Wn.2d 9 (1970); *see:* *Kennewick v. Fountain*, 116 Wn.2d 189 (1991), *State v. Eakins*, 73 Wn.App. 271, 273-6 (1994); 9-0.

***Kennewick v. Fountain***, 116 Wn.2d 189 (1991)

Prosecutor's ability to choose to proceed under identical statutes prescribing different penalties does not empower the government to predetermine ultimate criminal sanctions; *reverses* *State v. Zornes*, 78 Wn.2d 9 (1970), per *United States v. Batchelder*, 60 L.Ed.2d 755 (1979); *see:* *State v. Marquez*, 68 Wn.App. 290 (1992), *State v. Presba*, 131 Wn.App. 47, 54-55 (2005); *accord:* *State v. Eakins*, 73 Wn.App. 271, 273-6 (1994), *Seattle v. Hammon*, 131 Wn.App. 801, 807-09 (2006); 9-0.

***State v. Shelby***, 61 Wn.App. 214 (1991)

Criminal trespass 1°, RCW 9A.52.080, and disobeying a valid order to leave school property, RCW 28A.87.055, are not concurrent, as the latter deals with disruptive or intoxicated persons only; *see*: *Kennewick v. Fountain*, 116 Wn.2d 189 (1991); I.

***State v. Anderson***, 63 Wn.App. 257 (1991)

Treating relatives differently in determining class of penalty for rendering criminal assistance 1°, RCW 9A.76.070(2), is a rational classification; II.

***State v. Danis***, 64 Wn.App. 814 (1992)

Liberty interest alone is subject to minimal equal protection scrutiny, *State v. Phelan*, 100 Wn.2d 508, 514 (1983), *In re Mota*, 114 Wn.2d 465 (1990), *cf.:* *In re Fogle*, 128 Wn.2d 5 (1995), *but see:* *State v. Lua*, 62 Wn.App. 34, 41 (1991), *State v. Coria*, 62 Wn.App. 44, 50 (1991); I.

***State v. Liewer***, 65 Wn.App. 641 (1992)

Bribery, RCW 9A.68.010(1)(b), does not have same elements as official misconduct, RCW 9A.80.010(1), misconduct of a public officer, RCW 42.20.010, or failure of duty of a public officer, RCW 42.20.100; I.

***State v. Karp***, 69 Wn.App. 369 (1993)

Assault 2°, RCW 9A.36.021(1), and unlawful display of a weapon, RCW 9.41.270(1), are not concurrent, as the latter lacks a *mens rea* element, *State v. Hupe*, 50 Wn.App. 277 (1988), *disapproved, on other grounds, State v. Smith*, 159 Wn.2d 778 (2007), *State v. Murphy*, 7 Wn.App. 505 (1972), *State v. Eakins*, 73 Wn.App. 271, 273-6 (1994); II.

***State v. Talley***, 122 Wn.2d 192 (1993)

Malicious harassment statute, RCW 9A.36.080, which permits prosecutor to charge either felony malicious harassment or a misdemeanor assault, does not violate equal protection clause, as elements differ, increased punishment is justified by the additional element of victim selection and its associated greater harm, *State v. Robertson*, 88 Wn.App. 836 (1997), *distinguishing* *State v. Devine*, 84 Wn.2d 467 (1974); 8-0.

***Everett v. Heim***, 71 Wn.App. 392 (1993)

Ordinance prohibiting adult entertainer from sitting on lap or separating a patron's legs is not overbroad or vague, prohibits pure conduct, not speech, *O'Day v. King Cy.*, 109 Wn.2d 796 (1988), does not violate equal protection by *distinguishing* entertainers who perform in adult entertainment places as opposed to other entertainers; I.

***State v. Ruff***, 122 Wn.2d 731 (1993)

RCW 9.41.040(4), which prohibits one acquitted by reason of insanity from ever possessing a short firearm, violates equal protection clause, as one who is convicted of a violent felony may apply for restoration of that right, *Morris v. Blaker*, 118 Wn.2d 133 (1992); 9-0.

***State v. Eakins***, 73 Wn.App. 271, 273-6 (1994)

Two criminal statutes with identical elements but disparate penalties do not violate equal protection clause, *United States v. Batchelder*, 60 L.Ed.2d 755 (1979), *Kennewick v. Fountain*, 116 Wn.2d 189, 192 (1991), overruling *State v. Zornes*, 78 Wn.2d 9 (1970); thus, assault 2° and unlawful display of a weapon, RCW 9.41.270(1), even if they have the same elements, do not violate equal protection, *see:* *State v. Hupe*, 50 Wn.App. 277 (1988), *disapproved, on other grounds, State v. Smith*, 159 Wn.2d 778 (2007), *State v. Karp*, 69 Wn.App. 369 (1993); II.

***United States v. Armstrong***, 134 L.Ed.2d 687 (1996)

To obtain discovery from government to support a claim of selective prosecution based upon race, defendant must produce some evidence that government has declined to prosecute similarly situated defendants of other races, *State v. Bridges*, 91 Wn.App. 102, 105-6 (1998); 8-1.

***State v. Heiskell***, 129 Wn.2d 113 (1996)

**Juveniles** are neither a suspect nor semi-suspect class, *State v. Schaaf*, 109 Wn.2d 1, 19 (1987), thus rational relationship test applies.

***State v. Conners***, 90 Wn.App. 48 (1998)

Disparate sentences for nonsuspect class co-defendants are justified by one defendant's not being a "kingpin" in drug operation, being directed by the other defendant, cooperating with authorities and pleading guilty, *see: State v. Handley*, 115 Wn.2d 275, 290-1 (1990), *State v. Clinton*, 48 Wn.App. 671 (1987), *State v. Entz*, 58 Wn.App. 112 (1990); III.

***State v. Marintorres***, 93 Wn.App. 442, 449-52 (1999)

Statutes which provide that hearing-impaired defendant is entitled to interpreter without cost to defendant, RCW 2.42.120(1), but that a non-English speaking defendant may be taxed costs of interpreters, RCW 2.43.040(4), violate equal protection clause, as there is no rational basis for the classification; II.

***State v. Berrier***, 110 Wn.App. 639 (2002)

Enhancing illegal possession of a short-barreled shotgun, RCW 9.41.190(1) with a deadly weapon allegation for the same shotgun violates equal protection clause as legislature exempted enhancements for machine guns, no rational basis for the distinction, *see also: State v. Pedro*, 148 Wn.App. 932, 944-52 (2009); II.

***State v. Caffee***, 117 Wn.App. 470 (2003)

Defendant goes to trial, is found guilty of murder 1°, co-defendant pleads guilty to murder 2°, cooperates with police and testifies at defendant's trial, defendant is sentenced to lesser term, trial court finding equal protection violation; held: disparate sentences between co-defendants satisfy rational basis analysis where one pleads guilty to a lesser crime and cooperates with police while a second is convicted at trial of a more serious offense, *State v. Handley*, 115 Wn.2d 275 (1990), distinguishing *State v. Clinton*, 48 Wn.App. 671 (1987); I.

***State v. Gaines***, 121 Wn.App. 687, 703-06 (2004)

Prosecutor's policy to recommend exceptional sentence downward for certain defendants who plead guilty does not deny equal protection to a defendant who went to trial before prosecutor enacted its policy, as saving resources of a trial is a rational basis for the distinction; I.

***State v. Harner***, 153 Wn.2d 228 (2004)

Absence of a drug court in the county in which a defendant is charged does not violate equal protection or due process clauses; 9-0.

***State v. Presba***, 131 Wn.App. 47, 54-55 (2005)

Defendant uses former friend's identification at a traffic stop, is convicted of identity theft, RCW 9.35.020(1), claims she should have been charged with criminal impersonation, RCW 9A.60.040(1); held: because criminal impersonation does not require assuming the identify of an actual person, *see: State v. Donald*, 68 Wn.App. 543, 550 (1993), no equal protection violation occurred, *see also: Kennewick v. Fountain*, 116 Wn.2d 189, 193 (1991), *United States v. Batchelder*, 60 L.Ed.2d 755 (1979); I.

*State v. Lewis,* 194 Wdn.App.. 709 (2016)

Mandatory DNA fee, RCW 43.43.7541 (2008), does not violate equal protection clause where defendant was ordered to pay previously for a prior conviction; I.

***State v. Min Sik Kim***, 7 Wn.App.2d 839 (2019)

RCW 9.994A.505(7) (2015) which forbids credit for time served for pretrial electronic home monitoring for, *inter alia,* violent offenses does not violate double jeopardy or equal protection clauses, *cf.:* *State v. Anderson*, 132 Wn.2d 203, 213 (1997), *Harris v. Charles*, 171 Wn.2d 455 (2011); II.

# ESCAPE

***State v. Bryant***, 25 Wn.App. 635 (1980)

As soon as defendant is away from restraint, there is an escape, no attempt instruction need be given; III.

***State v. Walker***, 27 Wn.App. 544 (1980)

Leaving a treatment program, completion of which was a condition of probation, does not constitute escape as it was not a detention facility; II.

***State v. Descoteaux***, 94 Wn.2d 31 (1980), *overruled, on other grounds, State v. Danforth*, 97 Wn.2d 255 (1982)

*Mens rea* element of escape 1° is that defendant knew his actions would result in leaving confinement without permission; must prove incarceration pursuant to felony conviction by certified copy of Judgment and Sentence; 9-0.

***State v. Teaford***, 31 Wn.App. 496 (1982)

A convicted felon who is temporarily transferred from prison to jail for trial on new charge has dual status of being detained pursuant to a felony and with being in custody after having been charged with a felony, thus an escape will support an escape 1° conviction; II.

***State v. Niemczyk***, 31 Wn.App. 803 (1982)

Defendant, charged with escape, is not entitled to necessity defense instructions where defendant did not make a bona fide effort to return to custody or surrender as soon as he reached a position of safety; II.

***State v. Danforth***, 97 Wn.2d 255 (1982)

Escapee from work release cannot be charged with escape 1°, RCW 9.76.110, must be charged with willful failure to return to work release, RCW 72.65.070, *State v. Smeltzer*, 86 Wn.App. 818 (1997); maximum sentence for violating RCW 72.65.070 is 10 years, $5000 fine; overrules *In re Little*, 95 Wn.2d 545 (1981), *State v. Descoteaux*, 94 Wn.2d 31 (1980), *State v. Yallup*, 25 Wn.App. 603 (1980); prospective only; 8-0.

***State v. Peters***, 35 Wn.App. 427 (1983)

Failing to return from a pass is escape; detention pursuant to some color of authority is sufficient to sustain charge even though order of detention has expired; I.

***State v. Gonzales***, 37 Wn.App. 251 (1984)

Defendant returns to work release facility after work, then absconds; at escape 2° trial defendant challenges validity of prior pleas; held: escape 1° is proper charge; defendant is being detained "pursuant to a conviction of a felony," RCW 9A.76.110, unless and until prior convictions are set aside; III.

***State v. Solis***, 38 Wn.App. 484 (1984)

A person who is arrested for a parole violation pursuant to a parole suspension warrant is being detained pursuant to a felony conviction for escape 1° charge, RCW 9A.76.110(1), 9.95.120, 72.04A.090, 9.95.130, *State v. Walls*, 106 Wn.App. 792 (2001); where police officer is holding suspect's arm and informs him he is under arrest for a parole violation, and suspect breaks and runs, suspect is escaping from custody, *State v. Sullivan*, 65 Wn.2d 47, 51 (1964), *Seattle v. Sayer*, 11 Wn.App. 481, 484-85 (1974); III.

***State v. Hickock***, 39 Wn.App. 664 (1985)

In willful failure to return to work release prosecution, RCW 72.65.070, state need not prove validity of underlying felony conviction; unless underlying felony conviction is set aside, it is valid for purposes of trial on willful failure to return charge, *State v. Gonzales*, 103 Wn.2d 564 (1985), *State v. Downing*, 122 Wn.App. 192-93 (2004), *State v. Paniuaga*, 22 Wn.App.2d 350 (2022); I.

***State v. Snyder***, 40 Wn.App. 338 (1985)

In escape 1° case, element of defendant's detention pursuant to a felony does not require proof he was actually serving his sentence for that felony as long as he had not been paroled and had been committed, *State v. Bryant*, 25 Wn.App. 635, 637 (1980); II.

***State v. Newman***, 40 Wn.App. 353 (1985)

Defendant serving time in a county work release facility pursuant to a suspended prison sentence who fails to return from work can only be charged with failure to return, RCW 72.65.070, and cannot be charged with escape 1°, RCW 9A.76.110, *State v. Danforth*, 97 Wn.2d 255 (1982), *State v. Dorn*, 93 Wn.App. 535 (1999); I.

***State v. Baker***, 40 Wn.App. 845 (1985)

Well-planned attempted escape does not, by itself, justify sentence outside standard range, RCW 9.94A.120(2); use of weapons, injuries, hostage-taking or destruction of property could be a substantial and compelling reason for an exceptional sentence; court may consider degree of sophistication and planning as an aggravating factor for any crime, RCW 9.94A.390; II.

***State v. Gonzales***, 103 Wn.2d 564 (1985)

Escape 1° defendant, RCW 9A.76.110(1), may not challenge the constitutional validity of the underlying conviction, *see: State v. Hickock*, 39 Wn.App. 664 (1985), *State v. Downing*, 122 Wn.App. 185, 192-93 (2004), *State v. Paniuaga*, 22 Wn.App.2d 350 (2022); 5-2-2.

***State v. Hall***, 104 Wn.2d 486 (1985)

Escape, RCW 9A.76.110(1), requires state to prove that defendant knew his actions would result in leaving confinement without permission, *State v. Descoteaux*, 94 Wn.2d 31, 35 (1980); failure to return from work release, RCW 72.65.070, requires state to prove willfulness; because there is no rational basis for the difference in treatment of these similarly situated groups, equal protection clause is violated; Supreme Court reads in willfulness as an element of RCW 9A.76.110(1) where defendant escaped from a local work release program; 6-3.

***State v. Christian***, 44 Wn.App. 764 (1986)

Leaving a work release facility without permission is escape, RCW 9A.76.110, not failure to return to work release, RCW 72.65.070, *distinguishing* *State v. Danforth*, 97 Wn.2d 255 (1982); I.

***State v. Perencevic***, 54 Wn.App. 585 (1989)

Defendant attempts to escape while being held pursuant to a warrant issued for violation of SRA community supervision violations; held: there is a causal relationship between the warrants and the prior felony convictions, thus detention was pursuant to a conviction of a felony, *State v. Walls*, 106 Wn.App. 792 (2001), defendant was properly convicted of attempted escape 1°, *State v. Brooks*, 157 Wn.App. 258 (2010); I.

***State v. Basford***, 56 Wn.App. 268 (1989)

A convicted felon who lawfully checks out of a work release program and fails to return may only be charged with willful failure to return to work release, RCW 72.65.070, may not be charged with escape, RCW 9A.76.110, irrespective of whether he was sentenced to more than a year and transferred to a work release facility from prison or whether he was sentenced to less than a year directly to work release, *see:* *State v. Smeltzer*, 86 Wn.App. 818 (1997), *State v. Dorn*, 93 Wn.App. 535 (1999); III.

***State v. Kent***, 62 Wn.App. 458 (1991)

Misdemeanants who fail to return to work release or jail following temporary release may be prosecuted for escape 2°, RCW 9A.76.120(1)(a), *State v. Peters*, 35 Wn.App. 427 (1983), *State v. Ammons*,, 136 Wn.2d 453 (1998), *distinguishing* *State v. Danforth*, 97 Wn.2d 255 (1982); II.

***State v. Anderson***, 72 Wn.App. 453, 459-60 (1994)

In escape 1°, RCW 9A.76.110, where defendant was being detained on three prior felonies, it was error to permit prosecutor to introduce evidence of all three when only one would have sufficed, harmless here; I.

***State v. Parker***, 76 Wn.App. 747 (1995)

Where defendant is serving time in home detention, leaving without permission constitutes escape, RCW 9A.76.110, *State v. Ammons*,, 136 Wn.2d 453 (1998); III.

***State v. Smeltzer***, 86 Wn.App. 818 (1997)

Defendant is sentenced to prison, judge allows a weekend furlough before serving sentence, defendant fails to surrender, is convicted of escape 1°; held: defendant should have been charged with the more specific failure to return from furlough, RCW 72.66.060, *State v. Danforth*, 97 Wn.2d 255, 257-8 (1982); a felon sentenced to more than a year is a state prisoner even if in the county jail awaiting transportation, *State v. Basford*, 56 Wn.App. 268, 272-3 (1989), *State v. Dorn*, 93 Wn.App. 535 (1999), a "furlough" is an authorized leave of absence, RCW 72.66.010(2); III.

***State v. Ammons***, 136 Wn.2d 453 (1998)

A defendant sentenced to partial confinement in a work crew program who fails to report or absents himself from the work crew is guilty of escape 1º, RCW 9A.76.110, as a work crew assignment is "custody," RCW 9A.76.010(1), *State v. Breshon*, 115 Wn.App. 874 (2003), *see: State v. Kent*, 62 Wn.App. 458 (1991), *State v. Parker*, 76 Wn.App. 747 (1995), *State v. Brooks*, 157 Wn.App. 258 (2010); affirms *State v. Guy*, 87 Wn.App. 238 (1997); 6-3.

***State v. Marintorres***, 93 Wn.App. 442 (1999)

Defendant's belief that his sentence had expired is not a defense to escape 1º; state need only prove that defendant knew he left prison without permission; II.

***State v. Dorn***, 93 Wn.App. 535 (1999)

Defendant is sentenced to 180 days in county jail for theft 2°, granted medical furlough and fails to return, is convicted of escape, RCW 9A.76.110, rather than failure to return from furlough, RCW 72.66.060; held: special statute of failure to return from furlough must be charged when it punishes the same conduct as a general statute, *State v. Danforth*, 97 Wn.2d 255, 258 (1982); a furlough is an authorized leave for any resident of a state correctional institution, RCW 72.66.010(2), -.010(4), a felon serving time in county jail is under the authority of the Department of Corrections, *State v. Basford*, 56 Wn.App. 268, 272 (1989), *State v. Newman*, 40 Wn.App. 353 (1985), *State v. Rinkes*, 49 Wn.2d 664, 666 (1957); II.

***State v. Hendrix***, 109 Wn.App. 508 (2001)

Juvenile leaves holding cell without authority, state offers no evidence to show she was arrested for an offense or confined pursuant to court order; held: escape 2˚ requires proof of status of detainee, not merely the existence of a detention facility, thus reversed for insufficiency and remanded for sentencing on escape 3˚, *see: State v. Gomez*, 152 Wn.App. 751 (2009); I.

***State v. Law***, 110 Wn.App. 36 (2002)

Defendant, being held pending a felony sentencing, is granted medical furlough by court, fails to return, trial court dismisses escape 2˚ on grounds that defendant should have been charged with failure to return from furlough, former RCW 72.66.060; held: failure to return from furlough applies only to prisoners sentenced to DOC, thus proper charge was escape 2˚, RCW 9A.76.120(1)(a); III.

***State v. Breshon***, 115 Wn.App. 874 (2003)

At sentencing, defendants are ordered, as alternatives to total confinement, RCW 9.94A.680(3), to report for a specific period to a community-based drug treatment program, defendants leave and fail to return, are convicted of escape 1°; held: because defendants were under restraint per court order, they escaped from custody, *State v. Ammons*, 136 Wn.2d 453 (1998); II.

***State v. Rizor***, 121 Wn.App. 898 (2004)

A defendant sentenced to less than a year in county jail followed by community custody who does not report to DOC is properly charged with escape from community custody, RCW 72.09.310; II.

***Pers. Restraint of Lofton***, 142 Wn.App. 412 (2008)

While former RCW 9A.94A.525(14) (2002) [now RCW 9A.94A.525(15)] states, "[i]f the present conviction is for … Escape … count adult prior convictions as one point," it refers to each prior conviction, does not require that all convictions collectively count as one point, *State v. Combs*, 149 Wn.App. 556 (2009), *see: State v. Baker*, 194 Wn.App. 678 (2016); I.

***State v. Eichelberger***, 144 Wn.App. 61 (2008)

Judge orally states "I'm going to have [defendant] taken in custody," defendant runs out of courtroom, is convicted of escape 1°; held: an oral statement by the court that defendant is in custody is sufficient to establish that defendant was "in custody," RCW 9A.76.110, *see: State v. Breshon*, 115 Wn.App. 874, 880 (2003); II.

***State v. Gomez***, 152 Wn.App. 751 (2009)

Escape from a booking room after arrest but prior to booking is escape from a detention area, sufficient to prove escape 2º, *see: State v. Hendrix*, 109 Wn.App. 508 (2001); III.

***State v. Brooks***, 157 Wn.App. 258 (2010)

Defendant is arrested on community custody warrant, escapes, is convicted of escape 1°, RCW 9A.76.110(1) (2001); held: arrest for a community custody violation is a detention pursuant to a felony, *State v. Bryant*, 25 Wn.App. 635, 637 (1980), *State v. Snyder*, 40 Wn.App. 338, 339 (1985), *State v. Solis*, 38 Wn.App. 484, 486-87 (1984); II.

***State v. Baker***, 194 Wn.App. 678 (2016)

Offender score for **escape** is limited to prior escape convictions, RCW 9.94A.525(14) (2013); III.

***State v. Rudolph***, 199 Wn.App. 813 (2017)

In community custody violation/escape from community custody, RCW 72.09.310 (1992), defining element of "willful" as knowledge and not as a "purposeful act" is correct; III.

# EVIDENCE
## Best Evidence Rule

***State v. Descoteaux***, 94 Wn.2d 31 (1980), *overruled, on other grounds, State v. Danforth*, 97 Wn.2d 255 (1982)

In seeking to prove a prior felony conviction in an escape case, best evidence is certified copy of judgment and sentence, *State v. Revers*, 130 Wn.App. 689 (2005), *but see: Pers. Restraint of Adolph*, 170 Wn.2d 556, 565-71 (2010); 9-0.

***State v. Mahmood***, 45 Wn.App. 200 (1986)

To prove the contents of a corporate record, the original writing is required unless it cannot be obtained by judicial process, ER 1002, 1004; to the extent that a foundation is laid, a witness may testify to personal knowledge of a corporate affair, ER 602, unless the matter is a corporate act or is not one of personal knowledge; I.

***State v. Detrick***, 55 Wn.App. 501 (1989)

Burglary victim enters suspect's home, steals letter written by suspect in which suspect confesses, destroys letter, is permitted at trial to testify to contents of letter; held: trial court did not abuse its discretion, *State v. Kinard*, 109 Wn.App. 428, 435-36 (2001); even if letter was destroyed in bad faith, ER 1004(a), victim was not a party and thus was not the proponent of the evidence, *State v. Cannon*, 125 Wash. 515, 519 (1923); even if victim was the proponent, victim destroyed letter not to conceal contents but because police told them it would be inadmissible and because of victim's fear he would be prosecuted for mail theft, thus not bad faith; I.

***State v. Smith***, 66 Wn.App. 825 (1992)

Faxed CCDR which contains an exact copy of an original seal, intended by the Department of Licensing to be a certified copy of the driving record, ER 902, is an original document, ER 1001(c), and an admissible duplicate, ER 1001(d), 1003; I.

***State v. Negrete***, 72 Wn.App. 62, 68 (1993)

Police photocopy buy money prior to purchase of drugs, court admits photocopies over objection that there was no testimony that anyone compared cash taken from defendant upon arrest with photocopies; held: because the bills themselves were not marked, the photocopy is the original record of the bills, thus was the best evidence, ER 1003; III.

***State v. Kinard***, 109 Wn.App. 428 (2001)

Informant testifies that defendant gave her paper with name and phone number, police lose paper, trial court admits testimony about contents; held: absent evidence of bad faith, witness may testify about contents of lost paper, ER 1004(a), *State v. Detrick*, 55 Wn.App. 501, 502-04 (1989); III.

***State v. Andrews***, 172 Wn.App. 703 (2013)

Police photograph text messages and record voice mail, defense states it has no evidence to challenge authenticity, trial court admits evidence; held: a duplicate is admissible absent a challenge to authenticity, ER 1003, 1004; a witness' testimony as to the defendant's phone number and signature sufficiently authenticate pictures of received text messages, *see: State v. Young,* 192 Wn.App. 850 (2016), *cf.: State v. Blizzard,* 195 Wn.App. 717, 734-35 (2016); here, victim identified defendant's voice on voice mail, name used by caller on voice mail and text messages was the same, evidence established that the name was used by the defendant, thus court had tenable grounds to admit both; III.

# EVIDENCE
## Business Records/Public Records

***State v. Ecklund***, 30 Wn.App. 313 (1981)

FBI serologist testifies as to tests on blood based on a compilation of lab tests performed by a technician working under witness's supervision; held: admissible as the underlying data are of a kind reasonably relied upon by experts in the field, ER 703, and as a business record, RCW 5.45.020, as the report itself was prepared in the regular course of business, *but see: State v. Nation*, 110 Wn.App. 651, 662-67 (2002); II.

***State v. Mason***, 31 Wn.App. 680 (1982)

Business record exception permits admission of a record containing double hearsay only if a third party is a member of the business organization and has a duty to supply the information on the form; it is improper to use the business record exception to admit hearsay medical opinion as to causation of a disease, *Young v. Liddington*, 50 Wn.2d 78 (1957), *see: State v. Christopher*, 114 Wn.App. 858 (2003); ER 803(a)(4) allowing statements made for purposes of medical diagnosis or treatment does not apply to statements of patient as to the suspected source of venereal disease; II.

***State v. Ben-Neth***, 34 Wn.App. 600 (1983)

Computer records offered as business records, RCW 5.45.020, are admissible within discretion of trial court; foundation may be laid by one who has custody of or has supervised creation of record, even if witness does not understand computer system, *State v. Quincy*, 122 Wn.App. 395 (2004); I.

***State v. Thompson***, 35 Wn.App. 766 (1983)

Public records may be authenticated pursuant to RCW 5.44.040 (certified) or, if live testimony is available, as a business record, RCW 5.45.020; *see:* ER 901(a), 902(d), *State v. Stephens*, 83 Wn.2d 485 (1974); I.

***State v. Sellers***, 39 Wn.App. 799 (1985)

Lab report showing homicide victim's blood type was admitted as a business record as part of her physician's file and identified as such by physician; held: physician's records, made in regular course of business, identified properly, is competent evidence of a condition therein recorded, RCW 5.45.020, *Benjamin v. Havens, Inc.*, 60 Wn.2d 196, 200 (1962); physician is a "qualified witness" in lieu of records custodian; *accord: State v. Garrett*, 76 Wn.App. 719 (1995); II.

***State v. Ross***, 42 Wn.App. 806 (1986)

Assault victim disappears during trial before she testifies, no record is made as to why she did not appear and what efforts were made to locate her, court admits victim's 911 call as an excited utterance, ER 803(a)(2); held: 911 tapes meet business record requirements, RCW 5.45.020, *State v. Bradley*, 17 Wn.App. 916 (1977); however, where the hearsay content in a business record goes to the heart of an issue at trial, the hearsay should be rejected unless it

meets the test of another exception, *State v. White*, 72 Wn.2d 524, 530 (1967); here, confrontation clause violated because unavailability not established, *State v. Guloy*, 104 Wn.2d 412 (1985), *but see: State v. Davis*, 131 Wn.App. 71 (2005), *aff'd, on other grounds, Davis v. Washington*, 165 L.Ed.2d 224 (2006); I.

***State v. Heggins***, 55 Wn.App. 591 (1989)

Medical examiner who supervised but did not perform autopsy testifies as to facts contained in autopsy report; held: witness may testify to factual contents of a report that is admissible as a business record where the record was prepared under the testifying witness's supervision, *State v. Kreck*, 86 Wn.2d 112, 115 (1975), *State v. Alexander*, 64 Wn.App. 147, 156-7 (1992); *see also: State v. Wicker*, 66 Wn.App. 409 (1992), *State v. Garrett*, 76 Wn.App. 719 (1995); I.

***State v. Alexander***, 64 Wn.App. 147 (1992)

Physician reads to jury child rape complainant's statements to another physician contained in medical records; held: declarant's statements, independently admissible under ER 803(a)(4), are therefore admissible under business records exception, as both statements fall within hearsay exceptions, ER 805, *State v. Heggins*, 55 Wn.App. 591, 596 (1989); I.

***State v. Wicker***, 66 Wn.App. 409 (1992)

Fingerprint technician testifies, over objection, that another technician's initials on fingerprint card verified his opinion that prints were defendant's; held: while exhibit meets business records exception, RCW 5.45.020, testimony converted character of evidence to an opinion; business record can only be a record of an act, condition or event, but expert opinion cannot constitute a business record, *State v. Heggins*, 55 Wn.App. 591, 596 (1989); because fingerprint analysis is not a routine laboratory test, the narrow exception of permitting drug analysis through business records, *State v. Kreck*, 86 Wn.App. 591, 596 (1989) is inapplicable; I.

***State v. Garrett***, 76 Wn.App. 719 (1995)

In child abuse case, physician at hospital at which victim was examined testifies to results of a pediatric resident's examination and tests of victim; held: medical records are admissible as business record where physician testifies that she is familiar with the procedures used, routinely relies on the reports, and that the record is part of the common medical file, *State v. Ziegler*, 114 Wn.2d 533, 538-39 (1990), *see: State v. DeVries*, 149 Wn.2d 842, 846-48 (2003), record need not have been made under the witness's supervision to be admissible, *see also: State v. Kreck*, 86 Wn.2d 112, 114-9 (1975), *State v. Alexander*, 64 Wn.App. 147, 156-7 (1992), *State v. Heggins*, 55 Wn.App. 591, 596 (1989), *State v. Iverson*, 126 Wn.App. 329 (2005), *State v. Doerflinger*, 170 Wn.App. 650 (2012); I.

***State v. Walker***, 83 Wn.App. 89 (1996)

In DUI case, defense demands presence of DataMaster technician who performed quality assurance procedure (QAP), CrRLJ 6.13(c), state produces another technician who offers QAP documents as business records, defense seeks suppression; held: CrRLJ 6.13(c) is not the exclusive method of establishing the foundation for admissibility of breath test results, court may admit foundation evidence pursuant to business records exception, ER 803(a)(6) and RCW 5.45,

evidence need not come from the record's author, *State v. Medley*, 11 Wn.App. 491, 499 (1974), distinguishing *State v. Watson*, 51 Wn.App. 947 (1988); properly admitted business records do not violate confrontation clause, *State v. Kreck*, 86 Wn.2d 112, 121 (1975); II.

***State v. Hines***, 87 Wn.App. 98 (1997)

Police incident report, while routine, is an investigation by the state including observations of an officer, cross-examination would permit defense to test accuracy, thus it is not a proper business record or public record exception, RCW 5.44.040; routine booking sheet containing name, social security number address, height, weight, is a routine public record, *State v. Mason*, 31 Wn.App. 680, 683-4 (1982); III.

***State v. Nation***, 110 Wn.App. 651, 661-67 (2002)

Supervisor of crime lab testifies that, based upon notes of criminalist who tested the drugs, his opinion is that they are controlled substances; held: because notes of criminalist were not admitted into evidence, distinguishing *State v. Ecklund*, 30 Wn.App. 313 (1981), and because there is no evidence as to the particular person from whom the criminalist received the substances, the opinion of the supervisor is not admissible as a business record, *see: State v. Neal*, 144 Wn.2d 600 (2001), *State v. Medley*, 11 Wn.App. 491, 499 (1974); III.

***State v. DeVries***, 149 Wn.2d 842, 846-48 (2003)

Doctor testifies by telephone, is asked about lab report which he cannot see and of which he lacks a copy, court admits report; held: no foundation was laid for the lab report as it was neither identified nor authenticated, *see: State v. Ziegler*, 114 Wn.2d 533, 538-40 (1990); 9-0.

***State v. Quincy***, 122 Wn.App. 395 (2004)

Following shoplift arrest, loss prevention manager scans each item stolen, generates a list with prices which is admitted in evidence as business record; held: "custodian" or "other qualified witness," RCW 5.45.020, is interpreted broadly, need not be person who actually made the record, *State v. Ben-Neth*, 34 Wn.App. 600, 603-05 (1983), as long as s/he has custody of records or supervises its creation, *Cantrill v. Am. Mail Line, Ltd.*, 42 Wn.2d 590 (1953); where witness demonstrates he understands the method for retrieving the price and how the records are created, business records exception is met even though witness cannot testify to accuracy of prices in the computer; difference between actual price tags, *State v. Rainwater*, 75 Wn.App. 256 (1994) and scanned records is immaterial; mere fact that record is likely to be used for litigation does not preclude its admissibility as long as they are created in the regular course of business, *but see: Melendez-Diaz v. Massachusetts*, 174 L.Ed.2d 314, 328 (2009); I.

***State v. Iverson***, 126 Wn.App. 329 (2005)

In no contact order violation case, victim does not appear at trial, court admits jail photo and booking records including victim's height, weight and address on officer's testimony that although he does not work for the jail and has no control over the accuracy of entries by other officers, he regularly uses the booking records system, enters data and pictures into the system and routinely relies upon the data; held: a photograph is not an oral or written assertion, and is thus not hearsay; because the identifying information is routine based upon perceptions of persons booking her or her own statements, the information is reliable and admissible, *State v.*

*Christopher*, 114 Wn.App. 858, 862-64 (2003), distinguishing *State v. Tharp*, 26 Wn.App. 184, 186 (1980), *overruled, in part, State v. Monson*, 113 Wn.2d 833 (1989); victim's stating her own name was admitted solely for authentication and is thus not hearsay; I.

***State v. Bellerouche***, 129 Wn.App. 912, 916-18 (2005)

Police officer who did not issue trespass admonition testifies that notice was filed, kept and accessed in accordance with routine recordkeeping procedures, court admits it; held: while a document may be created with the intent to use it at a future trial, if it is a business record, it is still admissible, *see: State v. Iverson*, 126 Wn.App. 329, 339-40 (2005), *State v. Ecklund*, 30 Wn.App. 313, 319 n.4 (1981), *Cantrill v. Am. Mail Line, Ltd.*, 42 Wn.2d 590, 607-08 (1953) and is not testimonial, *Crawford v. Washington*, 158 L.Ed.2d 177, 195-96; I.

***State v. Hopkins***, 134 Wn.App. 780, 789-92 (2006)

Nurse who examines child molestation complainant and takes statement identifying perpetrator is unavailable to testify due to family emergency, state calls nurse's supervisor to read her report to the jury; held: while medical records may be admissible, state still must lay proper foundation, RCW 5.45.020, *State v. Ziegler*, 114 Wn.2d 533, 538 (1990); because nurse created her report under circumstances that would lead an objective witness to believe that the statements would be available for use at a later trial, and because medical providers are required to file reports with law enforcement where they have reasonable cause to believe abuse or neglect of a child, RCW 26.44.030(1)(a), nurse's report was testimonial, reading it in evidence violates confrontation clause, *Crawford v. Washington*, 158 L.Ed.2d 177 (2004), *cf.: State v. Fleming*, 155 Wn.App. 489, 501-03 (2010), harmless here; II.

***State v. Fleming***,155 Wn.App. 489, 498-501 (2010)

State offers record through custodian, at pretrial hearing defense elicits from custodian that the employee who prepared the record "was fired for anomalies in her recordkeeping," trial court admits document; held: questions regarding accuracy of a record that otherwise meets business records exception goes to weight, not admissibility, *see: State v. Ben-Neth*, 34 Wn.App. 600, 602 n. 2 (1983), *but see: State v. Jasper*, 174 Wn.2d 96 (2012); business records are generally not testimonial for purposes of confrontation clause, *Crawford v. Washington*, 541 U.S. 36, 56, 158 .Ed.2d 177 (2004), *cf.: State v. Lee*, 159 Wn.App. 795, 813-19 (2011); here, proper foundation was laid, person who prepared the record did not compile it at the behest of law enforcement, *distinguishing State v. Hopkins*, 134 Wn.App. 780, 780 (2006), fact that the business began generating the type of document at the request of prosecutor's office does not render them testimonial; II.

***State v. Butler***, 198 Wn.App 484 (2017)

State provides in discovery copies of business records it intends to offer plus copies of certifications by custodian but fails to give specific notice as required by RCW 10.96.030 (2008); held: remedy for lack of written notice of business records is a continuance not suppression, *State v. Hughes*, 56 Wn.App. 172, 175 (1989); defense had sufficient notice here to object so failure of state to comply with statute was harmless; I.

# EVIDENCE
## Child Hearsay

***State v. Bouchard***, 31 Wn.App. 381 (1982), *overruled, on other grounds, State v. Sutherby*, 165 Wn.2d 870, 886 n.7 (2009)

Excited utterance in response to a parent's questions are admissible in sex offense cases where spontaneity is clear and danger of fabrication is remote, *State v. Bloomstrom*, 12 Wn.App. 416 (1974), *State v. Canida*, 4 Wn.App. 275 (1971); II.

***State v. Parris***, 98 Wn. 2d 140 (1982)

Child hearsay statute is constitutional, *but see: Crawford v. Washington*, 158 L.Ed.2d 177 (2004); 9-0.

***State v. Slider***, 38 Wn.App. 689 (1984)

Under child hearsay statute, RCW 9A.44.120, a child is unavailable if s/he lacks memory of the event; applying statute to events that occurred prior to the date it became effective does not violate *ex post facto* provision; legislature had power to enact statute; when court properly applies balancing test, statute does not violate confrontation clause; I.

***State v. Ryan***, 103 Wn.2d 165 (1984), *overruled, in part, State v. C.J.*, 148 Wn.2d 672, 683 (2003)

A child under ten years is not incompetent to testify until the trial court determines that she is incompetent, RCW 5.60.050; where parties stipulate to incompetency, that by itself will not deem the child witness unavailable for purposes of the child hearsay statute, RCW 9A.44.120, *State v. Hopkins*, 137 Wn.App. 441, 448-51 (2007); the state must make a good faith effort to produce the witness; factors to be applied by court in determining reliability (1) motive to lie, (2) character of declarant, (3) whether more than one person heard statements, (4) spontaneity, and (5) timing of declaration and relationship between declarant and witness, *State v. Cooley*, 48 Wn.App. 286, 293-5 (1987), *State v. Henderson*, 48 Wn.App. 543, 549-50 (1987), *State v. Justiniano*, 48 Wn.App. 572 (1987), *State v. Stonge*, 53 Wn.App. 638 (1989), *State v. Borland*, 57 Wn.App. 7 (1990), *Idaho v. Wright*, 111 L.Ed.2d 638 (1990), *State v. C.J., supra*.

***State v. Frey***, 43 Wn.App. 605 (1986)

Child hearsay statements, RCW 9A.44.120(1), are admissible where declarant has no motive to lie, her low mental development suggests she is less likely to fabricate, and she repeated story consistently to more than one person spontaneously, *State v. Ryan*, 103 Wn.2d 165, 170 (1984); such statements do establish *corpus delicti*; II.

***State v. Robinson***, 44 Wn.App. 611 (1986)

Where both parties stipulate that a child victim is incompetent to testify, defense counsel fails to challenge victim's ability to relate just impression of the facts at the time she made hearsay statements, then prosecutor has met burden of producing declarant, *distinguishing State v. Doe*, 105 Wn.2d 889 (1986) and *State v. Ryan*, 103 Wn.2d 165 (1984), *but see:*

*Crawford v. Washington*, 158 L.Ed.2d 177 (2004), *State v. Hopkins*, 137 Wn.App. 441, 448-51 (2007); III.

***State v. Griffith***, 45 Wn.App. 728 (1986)

While the testimonial competency of a child witness lies within the sound discretion of trial court, it is an abuse of that discretion for the court to declare the witness incompetent due to inconsistencies within the witness's testimony, as that is a credibility issue for the jury to determine, *but see: State v. C.J.*, 148 Wn.2d 672, 685 (2003); child hearsay statute, RCW 9A.44.120, is not met where there is a motive to lie, only one person heard the statement, the statement was made in response to leading questions, were not spontaneous, *cf.: State v. Kennealy*, 151 Wn.App. 861, 879-85 (2009); III.

***State v. Jackson***, 46 Wn.App. 360 (1986)

Trial court improperly admitted statutory rape victim's hearsay statements, RCW 9A.44.120, because victim had a motive to lie due to acrimonious relationship between victim's mother and defendant, trial court did not find indicia of reliability and thus appellate court cannot ascertain victim's character, victim's statements contained an assertion about a past fact and statements were made 12 years after defendant stopped living with victim; I.

***State v. Hancock***, 46 Wn.App. 672 (1987), *aff'd*, 109 Wn.2d 760 (1988)

Child hearsay exception, RCW 9A.44.120, met where there is no motive for child-victim to lie, although statement was elicited by mother's questioning, it was not directed to the topic of sexual abuse, statement was spontaneous, no evidence to establish that mother was predisposed to believe stories of sexual abuse about defendant; I.

***State v. John Doe***, 105 Wn.2d 889 (1986)

For purposes of the child hearsay statute, RCW 9A.44.120, an incompetent child is unavailable, *State v. Ryan*, 103 Wn.2d 165 (1984); trial court must determine competency after a hearing, RCW 5.60.050, *State v. Hopkins*, 137 Wn.App. 441, 448-51 (2007); even if child is determined to be incompetent, court must determine whether extrinsic evidence or the nature of the comments themselves make the child's statements sufficiently reliable, *State v. Ryan, supra*, at 174, *State v. Slider*, 38 Wn.App. 689 (1984), *In re Penelope B.*, 104 Wn.2d 643 (1985), *State v. Madison*, 53 Wn.App. 754, 759 (1989), *State v. Karpenski*, 94 Wn.App. 80 (1999), *State v. C.J.*, 148 Wn.2d 672, 685 (2003), *State v. Borboa*, 157 Wn.2d 108, 119-22 (2006), *State v. Grogan*, 147 Wn.App. 511, 519-22 (2008), *see: Crawford v. Washington*, 158 L.Ed.2d 177 (2004); 9-0.

***State v. Sammons***, 47 Wn.App. 762 (1987)

To admit child hearsay, RCW 9A.44.120, trial court must conduct a hearing to determine reliability or case will be remanded for such a hearing; hearing to determine competency of the child witness is not sufficient.

***State v. Harris***, 48 Wn.App. 279 (1987)

Child hearsay exception, RCW 9A.44.120, does not apply to statement by a child about an act committed on another child, *State v. Hancock*, 46 Wn.App. 672, 678 (1987); harmless here; I.

***State v. Henderson***, 48 Wn.App. 543 (1987)

Under child hearsay statute, RCW 9A.44.120, a statement may still be spontaneous even if it is the product of police questioning if the victim volunteers the information, *State v. Young*, 62 Wn.App. 895, 901 (1991); police officer who interrogates victim is more objective than a parent, *distinguishing* *State v. Ryan*, 103 Wn.2d 165, 176 (1984); *accord*: *State v. Borland*, 57 Wn.App. 7 (1990), *State v. Carlson*, 61 Wn.App. 865 (1991); I.

***State v. Justiniano***, 48 Wn.App. 572 (1987)

A statement by a mother to a physician about what the child told the mother is admissible, ER 803(a)(4), *but see:* *State v. Alvarez-Abrego*, 154 Wn.App. 351, 366-69 (2010); II.

***State v. McKinney***, 50 Wn.App. 56 (1987)

In applying child hearsay exception, RCW 9A.44.120, trial court must determine reliability of the victim's statement, not the reliability of the witness to whom the victim addressed the statement; I.

***State v. Leavitt***, 111 Wn.2d 66 (1988)

In determining reliability of child hearsay statements, trial court should, in addition to factors set forth in *State v. Ryan*, 103 Wn.2d 165 (1984), consider: (1) whether statement contained assertions about past fact; (2) whether cross-examination could establish that declarant was not in a position of personal knowledge to make the statement,; (3) how likely is it that the statement was founded on faulty recollection; and (4) are the circumstances surrounding the making of the statement such that there is no reason to suppose that declarant misrepresented defendant's involvement, *Dutton v. Evans*, 27 L.Ed.2d 213 (1970), *see also:* *State v. C.J.*, 148 Wn.2d 672 (2003); 9-0.

***State v. Bailey***, 52 Wn.App. 42 (1988)

Where trial court applies and makes a record of *State v. Ryan*, 103 Wn.2d 165 (1984) factors, it will be affirmed absent a manifest abuse of discretion, *State v. Pham*, 75 Wn.App. 626, 630-2 (1994), *State v. Kennealy*, 151 Wn.App. 861, 879-85 (2009); II.

***State v. Jones***, 112 Wn.2d 488 (1989)

In determining whether an unavailable child victim's hearsay statement is admissible, trial court may consider as corroboration similar deviant acts on other victims by defendant, even if those acts would be inadmissible at trial, ER 104(a), 1101(c)(3), *affirming* *State v. Jones*, 50 Wn.App. 709 (1988), *but see:* *Crawford v. Washington*, 158 L.Ed.2d 177 (2004); corroboration may thus be established by evidence of defendant's practicing an unusual sexual activity (here, urolagnia) and victim's precocious knowledge of it, *accord*: *State v. Swan*, 114 Wn.2d 613 (1990), *State v. C.J.*, 148 Wn.2d 672, 686-89 (2003), *but see:* *Idaho v. Wright*, 111 L.Ed.2d 638 (1990); 9-0.

***State v. Madison***, 53 Wn.App. 754 (1989)

Even though a child victim's hearsay declaration is not spontaneous, where the details of the event and the identity of the defendant were not suggested, then trial court may properly find sufficient indicia of reliability to satisfy RCW 9A.44.120, *State v. Ryan*, 103 Wn.2d 165, 175 (1984), *State v. Young*, 62 Wn.App. 895 (1991), *State v. Kennealy*, 151 Wn.App. 861, 879-85 (2009); where victim recants three weeks before trial while child was in company of an aunt who believed defendant's innocence, trial court did not abuse discretion in admitting hearsay statements, *State v. Hancock*, 46 Wn.App. 672, 676 (1987), *aff'd*, 109 Wn.2d 760 (1988); a defendant may offer child hearsay statements if statutory requirements are met; here, trial court acted within its discretion in excluding evidence that victim identified another, through a montage, as the attacker; I.

***State v. Warren***, 55 Wn.App. 645 (1989)

Where defense fails to object to absence of a hearing prior to admission of child victim hearsay, RCW 9A.44.120, and where the child testifies and is subjected to cross-examination, then the issue is waived, *State v. Leavitt*, 111 Wn.2d 66, 71-72 (1988); failure to object is deficient performance by counsel; I.

***State v. Hughes***, 56 Wn.App. 172 (1989)

Where state fails to give sufficient notice of intent to use child hearsay, RCW 9A.44.120, remedy is a continuance, not suppression, *State v. Butler*, 198 Wn.App. 484 (2017); I.

***State v. Borland***, 57 Wn.App. 7 (1990)

RCW 9A.44.120(2) is satisfied when the child witness is both competent and physically available to testify, *but see: State v. Rohrich*, 132 Wn.2d 472 (1997); testimony of the child declarant may be waived by the defendant on the record, where there is no apparent motive to lie and no challenge to declarant's general character, [unlike *State v. Ryan*, 103 Wn.2d 165 (1984)], victim told more than one person in response to questions that were neither leading nor suggestive, *State v. Henderson*, 48 Wn.App. 543, 550 (1987), and defendant was related to witnesses thus mitigating witnesses' predisposition to believe declarant, then *State v. Ryan* factors are substantially met; *Dutton v. Evans*, 27 L.Ed.2d 213 (1970); factors, to satisfy confrontation clause, can rarely if ever be met in child hearsay context and, if treated as essential, would render statute ineffective, and thus won't be used, *but see: State v. Leavitt*, 111 Wn.2d 66 (1988), *Crawford v. Washington*, 158 L.Ed.2d 177 (2004); I.

***State v. Swan***, 114 Wn.2d 613 (1990)

Consistent and independent descriptions of sexual abuse by more than one child may provide cross-corroboration sufficient to admit child hearsay; precocious sexual knowledge by a three-year old, even of behavior that is not unusual, is corroborative of abuse, *State v. Jones*, 112 Wn.2d 488 (1989), *State v. Swanson*, 62 Wn.App. 186 (1991); a child's behavior with an anatomically correct doll which demonstrates unusual sexual awareness serves as some corroboration of abuse even absent expert testimony explaining the behavior; child's complaints of pain in genitals or buttocks, even if not medically substantiated, provides some degree of corroboration; *see: State v. Bishop*, 63 Wn.App. 15 (1991), *State v. C.J.*, 148 Wn.2d 672, 686-89 (2003); medical testimony may provide corroboration; the essential purposes of the child hearsay

statute "should not be defeated by a stubborn insistence on corroboration that is impossible to obtain," *Jones*, 112 Wn.2d at 498; where *State v. Ryan*, 103 Wn.2d 165 (1984) factors are "substantially met," trial court's finding of reliability will be affirmed; since most child hearsay statements about sexual abuse will contain statements about a past fact, *Dutton v. Evans*, 27 L.Ed.2d 213 (1970), that factor weighs neither in favor of reliability nor unreliability, *State v. Leavitt*, 111 Wn.2d 66, 75 (1988), *State v. Gribble*, 60 Wn.App. 374 (1991), *State v. Young*, 62 Wn.App. 895, 902 (1991), *cf.*: *Idaho v. Wright*, 111 L.Ed.2d 638 (1990), *but see: Crawford v. Washington*, 158 L.Ed.2d 177 (2004); 9-0.

***Idaho v. Wright***, 111 L.Ed.2d 638 (1990)

Physician testifies at trial to statements made to him by a three-year old regarding sexual abuse by her mother; held: absent a "firmly-rooted hearsay exception," hearsay statements are presumptively unreliable and inadmissible for confrontation clause purposes; this presumption may be overcome with particularized guarantees of trustworthiness drawn from the totality of circumstances surrounding the making of the statement; bootstrapping by the use of corroborating evidence is not permitted; thus, physical evidence of abuse, opportunity of defendant to commit the crime and similar acts on another victim are irrelevant to a showing of particularized guarantees of trustworthiness; *cf.*: *State v. Ryan*, 103 Wn.2d 165 (1984), *State v. Jones*, 112 Wn.2d 488 (1989), *State v. Swan*, 114 Wn.2d 613 (1990), *State v. C.J.*, 148 Wn.2d 672 (2003); 5-4.

***State v. Stevens***, 58 Wn.App. 478 (1990)

Child victim's "sleep statements" telling defendant to stop are not hearsay, as not intended to be assertions, *In re Penelope B.*, 104 Wn.2d 643, 652-3 (1985), and are relevant where expert testifies that nightmares are a common experience of sexual abuse; where sleep statements do not contain direct allegations of sexual abuse, then probative value outweighs prejudicial impact; I.

***State v. Young***, 60 Wn.App. 95, *remanded, in part, on other grounds,* 117 Wn.2d 1002, 62 Wn.App. 895 (1991)

Applying *State v. Ryan*, 103 Wn.2d 165 (1984) factors (2) recantation at trial does not undermine trial court's assessment of character for truthfulness, (4) statements in response to nonleading or suggestive questions do not undermine spontaneity, *State v. Henderson*, 48 Wn.App. 543, 550 (1987), (5) timing of statements is not suspect merely because CPS worker-witnesses became aware of abuse before statements were made, *State v. Henderson*, *supra*, at 551, (6) assertions about past facts is no longer a *Ryan* factor, *State v. Stange*, 53 Wn.App. 638 (1989) as long as other factors indicating reliability are considered, (7) child's failure to recollect when an incident occurred does not establish faulty recollection in general; I.

***State v. Gribble***, 60 Wn.App. 374 (1991)

Evidence of physical changes "consistent with but not absolutely diagnostic of sexual abuse" plus personality changes meets test for corroboration, *State v. Swan*, 114 Wn.2d 613, 622 (1990), *but see: Crawford v. Washington*, 158 L.Ed.2d 177 (2004); I.

***State v. DeBolt***, 61 Wn.App. 58 (1991)

Report of sexual abuse to third party is admissible under "hue and cry" doctrine to prove that rape victim made a timely complaint as long as details and identity of offender are not admitted, *State v. Ackerman*, 90 Wn.App. 477, 481-2 (1998); I.

***State v. Carlson***, 61 Wn.App. 865 (1991)

For purposes of child hearsay analysis, a statement is spontaneous if it is volunteered in response to questions that were not leading, need not be contemporaneous with the event in question, unlike an excited utterance, *State v. Henderson*, 48 Wn.App. 543, 550 (1987); while lapse of time and intervening counseling may impact reliability, *Idaho v. Wright*, 111 L.Ed.2d 638 (1990), trial court should exclude child hearsay on those bases only when the evidence demonstrates that the lapse or counseling somehow affected the child's statements; I.

***State v. Swanson***, 62 Wn.App. 186 (1991)

A young child victim's (here, two years old) explicit descriptions of abuse supports reliability, *State v. Swan*, 114 Wn.2d 613, 648-9 (1990); indirect evidence of abuse, including yeast infection, behavioral changes, fear of defendant, conduct with anatomically correct dolls and precocious knowledge of sex are sufficient to satisfy corroboration requirement of RCW 9A.44.120, *State v. Jones*, 112 Wn.2d 488, 495 (1989), *State v. C.J.*, 148 Wn.2d 672, 686-89 (2003), *but see: Crawford v. Washington*, 158 L.Ed.2d 177 (2004); III.

***State v. Bishop***, 63 Wn.App. 15 (1991)

Where child victim testifies in detail to all elements of crime other than penetration, and did testify, to minimal extent, to penetration, then the witness is available, *see: United States v. Owens*, 98 L.Ed.2d 951 (1988), *Pers. Restraint of Grasso*, 151 Wn.2d 1 (2004), *cf.:* ER 804(a), *State v. Ryan*, 103 Wn.2d 165, 171 (1984), and corroboration of her out-of-court statements was not required, *State v. Pham*, 75 Wn.App. 626, 630-2 (1994); child's statement to physician examining her for physical or emotional injuries from sexual assault may be independently admissible as statement for medical diagnosis and treatment, ER 803(a)(4), and need not be corroborated even if witness is unavailable, *In re Penelope B.*, 104 Wn.2d 643, 655-6 (1985), *State v. Butler*, 53 Wn.App. 214 (1989); victim tells physician of painful urination one time after penetration, admissible under ER 803(a)(4); medical evidence based, in part, upon this statement, provides sufficient corroboration, *State v. Swan*, 114 Wn.2d 613, 637-8 (1990); I.

***State v. Bedker***, 74 Wn.App. 87, 92-94 (1994)

Evidence admissible under child hearsay statute is still subject to ER 403 analysis; where the victim testifies, hearsay may still be admissible where the evidence encompasses areas not covered in the victim's own testimony, within discretion of trial court; I.

***State v. Gregory***, 80 Wn.App. 516, 520-2 (1996)

Polygraph evidence is not relevant to the reliability determination required by the child hearsay statute, inquiry is restricted to "time, content and circumstances of the statements, not on their weight and substance in subsequent search for truth," at 521; I.

***State v. Rohrich***, 132 Wn.2d 472 (1997)

State calls child witness, asks innocuous questions and does not examine as to the alleged sexual acts, court admits child hearsay; held: statutory requirement that child either testify or be unavailable, requiring corroboration, RCW 9A.44.120, is not satisfied where the child does not testify as to the alleged sexual contact, *State v. Kinzle,* 181 Wn.App. 774 (2014), *cf.: State v. Borland*, 57 Wn.App. 7, 13 (1990), *State v. Montgomery*, 95 Wn.App. 192 (1999), *State v. Clark*, 139 Wn.2d 152 (1999), *State v. Kilgore*, 107 Wn.App. 160, 173-75 (2001), *Pers. Restraint of Grasso*, 151 Wn.2d 1 (2004), *State v. Price*, 158 Wn.2d 630 (2006), *State v. Mobley*, 129 Wn.App. 378, 387-89 (2005), *State v. Mohamed*, 132 Wn.App. 58 (2006), *State v. Williams*, 137 Wn.App. 736, 744-45 (2007), *State v. Bates*, 196 Wn.App. 65 (2016); *affirms State v. Rohrich*, 82 Wn.App. 674 (1996); 9-0.

***State v. D.***, 89 Wn.App. 77 (1997), *op. withdrawn, in part, State v. Carol M.D.*, 97 Wn.App. 355 (1999)

Where a child has not sought medical treatment but makes statements to a counselor procured by a state social agency, the record must affirmatively demonstrate the child made statement understanding that they would further the diagnosis and possible treatment of the child's condition, to be admitted as medical diagnosis exception, ER 803(a)(4), at 86; here, absent testimony from the counselor that she explained to child that treatment depended upon truthful and accurate information, then court cannot assume that child was motivated to tell the truth by her self-interest in obtaining proper medical treatment, at 87, *see: State v. Florczak*, 76 Wn.App. 55 (1994), *State v. Kilgore*, 107 Wn.App. 160, 182-84 (2001); III.

***Dependency of A.E.P.***, 135 Wn.2d 208 (1998)

Where defense alleges improper, suggestive interview techniques taint child's memory, trial court should determine, at the pretrial hearing, RCW 9A.44.120(1), whether the hearsay is reliable considering the timing of the declaration and the relationship between the declarant and the witness, the circumstances surrounding the statement, and likelihood that declarant's recollection was faulty, *State v. Ryan*, 103 Wn.2d 165, 175-6 (1984), *see: Idaho v. Wright*, 111 L.Ed.2d 638 (1990), *see also: State v. Woods*, 154 Wn.2d 613 (2005), *but see: Crawford v. Washington*, 158 L.Ed.2d 177 (2004); 7-2.

***State v. Ralph G.***, 90 Wn.App. 16, 22-7 (1998)

Four days prior to trial, state gives verbal notice of intent to use child hearsay, defense objects to proceeding with the hearing, *State v. Ryan*, 103 Wn.2d 165 (1984), court proceeds with state's evidence then continues hearing for defense preparation; held: RCW 9A.44.120 requires notice to admit child hearsay, but does not require written notice, continuance provided defense opportunity to meet and contest the hearsay statements, thus, while court criticizes state for lack of formal, sufficient notice, admission of hearsay was not error; 2-1, III.

***State v. Montgomery***, 95 Wn.App. 192, 198-99 (1999)

On witness stand, victim identifies defendant, says she was alone with him and that she remembers telling prosecutor that defendant touched her inside, trial court admits hearsay evidence; held: while a close case, testimony was sufficiently detailed to permit meaningful cross-examination, thus trial court did not abuse discretion, *cf.: State v. Kinzle*, 181 Wn.App. 774

(2014), distinguishing *State v. Rohrich*, 132 Wn.2d 472 (1997), *State v. Price*, 158 Wn.2d 630 (2006); I.

***State v. Lopez***, 95 Wn.App. 842, 850-54 (1999)

Applying *State v. Ryan*, 103 Wn.2d 165 (1984) factors, where there is no evidence that child has a reputation for not telling the truth, then **character** factor is satisfied; where child makes similar statements to different people, then **statements heard by more than one person** factor is satisfied even if versions differ; statements made that are not the result of leading or suggestive questions are **spontaneous**, *In re Dependency of S.S.*, 61 Wn.App. 488, 494-95 (1991); presence of professionals enhances reliability of statements, *State v. Young*, 62 Wn.App. 895, 901 (1991); III.

***State v. Clark***, 139 Wn.2d 152 (1999)

Where no objection to child hearsay is taken, appellate court will only review admissibility pursuant to confrontation clause; where complainant on stand denies that she was molested and only hearsay accounts of her prior statements are admitted, there is no confrontation clause violation as witness was subject to cross-examination, *State v. Kilgore*, 107 Wn.App. 160, 173-75 (2001), *State v. Price*, 158 Wn.2d 630 (2006), *State v. Mobley*, 129 Wn.App. 378, 387-89 (2005), *State v. Williams*, 137 Wn.App. 736, 744-45 (2007), *State v. Bates*, 196 Wn.App. 65 (2016), *see: Pers. Restraint of Grasso*, 151 Wn.2d 1 (2004), distinguishing *State v. Rohrich*, 132 Wn.2d 472 (1997); affirms *State v. Clark*, 91 Wn.App. 69 (1998); 7-2.

***State v. Hirschfield***, 99 Wn.App. 1 (1999)

Child witness informs court that she's not going to testify because she doesn't want to talk about it any more, even if ordered by the court which finds her unavailable and admits hearsay, RCW 9A.44.120(1)(b), ER 804(a)(2); held: trial court applied "appropriate judicial pressure by its questioning," and was not obliged to order the witness to testify before declaring her unavailable, *but see: Crawford v. Washington*, 158 L.Ed.2d 177 (2004); I.

***State v. Kilgore***, 107 Wn.App. 160, 173-75 (2001)

Where victim testifies about abuse but says she does not remember penetration, defense is able to cross-examine, meeting requirements of confrontation clause, *State v. Clark*, 139 Wn.2d 152, 159 (1999), *Pers. Restraint of Grasso*, 151 Wn.2d 1 (2004), *State v. Price*, 158 Wn.2d 630 (2006), *State v. Mobley*, 129 Wn.App. 378, 387-89 (2005), *State v. Williams*, 137 Wn.App. 736, 744-45 (2007), *see: Crawford v. Washington*, 158 L.Ed.2d 177 (2004), *cf.: State v. Kinzle*, 181 Wn.App. 774 (2014), distinguishing *State v. Rohrich*, 132 Wn.2d 472 (1997); II.

***State v. Smith***, 148 Wn.2d 122 (2002)

Trial court finds that 5-year old child is unavailable due to her emotional state, social worker testifies that she could testify in a "quiet reassuring environment," defense requests that she testify via closed-circuit television, RCW 9A.44.150(9), trial court declines stating that county lacks the facilities, admits child hearsay; held: before a court can find that a child victim is unavailable for purposes of admitting her hearsay statements, RCW 9A.44.120, it must consider the use of closed-circuit television if there is evidence that the child may be able to testify in an alternative setting; if equipment is not readily available, court may consider whether

the cost of bringing in outside equipment is unreasonable; reverses *State v. Smith*, 108 Wn.App. 581 (2001), *cf.: Crawford v. Washington*, 158 L.Ed.2d 177 (2004); 9-0.

***State v. C.J.***, 148 Wn.2d 672 (2003)

To admit child hearsay, trial court need not find that the witness was competent at the time the out-of-court declarations were made, *State v. Bouchard*, 31 Wn.App. 381 (1982), *overruled, on other grounds, State v. Sutherby*, 165 Wn.2d 870, 886 n.7 (2009), *State v. Gitchel*, 41 Wn.App. 820 (1985), *State v. John Doe*, 105 Wn.2d 889 (1986), *State v. Gribble*, 60 Wn.App. 374 (1991), *State v. Fisher*, 130 Wn.App. 1, 15-16 (2005), *State v. Grogan*, 147 Wn.App. 511, 519-22 (2008), reversing *State v. C.J.*, 108 Wn.App. 790 (2001), overruling, in part, *State v. Justiniano*, 48 Wn.App. 572 (1987), *State v. Karpenski*, 94 Wn.App. 80, 106-25 (1999), *State v. Ryan*, 103 Wn.2d 165, 173 (1984); whether the child had the ability to discern between truth and lies at the time the hearsay statement is made is a factor, in addition to those set forth in *State v. Ryan, supra*, and *State v. Leavitt*, 111 Wn.2d 66 (1988), which may be considered in determining reliability, *State v. Borboa*, 157 Wn.2d 108, 119-22 (2006); injury to genitals, physician's opinion that declarant is a victim of sexual abuse, balinitis and precocious sexual knowledge establish corroboration requirement for unavailable child witness; 7-2.

***State v. Dunn***, 125 Wn.App. 582, 587-89 (2005)

Repetitive admission of child hearsay from various witnesses including a videotape, while cumulative, is not unduly prejudicial, ER 403, within discretion of trial court, where offered as part of a logical sequence and timing of events; III.

***State v. Shafer***, 156 Wn.2d 381 (2006)

Incompetent 3-year old's statement to her mother is not testimonial, *State v. Hopkins*, 137 Wn.App. 441, 452-58 (2007), *see: State v. Alvarez-Abrego*, 154 Wn.App. 351, 362-69 (2010); test is whether a reasonable person in declarant's position would expect that her statement would be used in prosecuting the crime, *State v. Scanlan,* 193 Wn.2d 753 (2019), statement from same declarant to a family friend who had served as a police informant was not testimonial as the testifying witness was not acting for any law enforcement agency at the time she talked to declarant; trial court did not err in applying reliability factors, *State v. Ryan*, 103 Wn.2d 165, 175-76 (1984), for admissibility under child hearsay statute, *see: Ohio v. Clark,* 578 U.S. 237, 135 S.Ct. 2173, 192 L.Ed.2d 306 (2015); 8-1.

***State v. Hopkins***, 137 Wn.App. 441, 448-51 (2007)

Prior to admitting child hearsay, trial court must hold a competency hearing to determine availability, even if parties stipulate that complainant is incompetent, RCW 9A.44.120, *State v. Ryan*, 103 Wn.2d 165, 172 (1984), *overruled, in part, State v. C.J.*, 148 Wn.2d 672, 683 (2003), *State v. John Doe*, 105 Wn.2d 889 (1986); child's statement to CPS social worker is testimonial, *see: State v. Shafer*, 156 Wn.2d 381 (2006), *but see: State v. Scanlan,* 193 Wn.2d 753 (2019); II.

***State v. Kennealy***, 151 Wn.App. 861, 879-85 (2009)

Trial court's admission of child hearsay is affirmed where court did not specifically mention each *State v. Ryan*, 103 Wn.2d 165 (1984) factor but expressly stated that all *Ryan* factors were met; II.

***State v. Alvarez-Abrego***, 154 Wn.App. 351, 362-69 (2010)

In child abuse case, court admits doctor's testimony that victim's mother told doctor that victim's sister, who was not called to testify, told her victim had been thrown against the wall; held: while child hearsay statements made to a family member are not testimonial, *State v. Shafer*, 156 Wn.2d 381 (2006), *State v. Hopkins*, 137 Wn.App. 441, 448-51 (2007), there must be "some threshold evaluation of the underlying circumstances to meet the constitutional strictures," at 364 ¶ 29; II.

***State v. Brousseau***, 172 Wn.2d 331 (2011)

A bare assertion by defense that child victim is incompetent to testify is insufficient to require that she testify at a competency hearing; child victim is not required to testify at a child hearsay hearing, RCW 9A.44.120(2)(a); 5-4.

***State v. Beadle***, 173 Wn.2d 97 (2011)

Unavailable child's statements to police and a CPS social worker present to assist police are testimonial as primary purpose of interview was to establish or prove past events rather than respond to an ongoing emergency, *Michigan v. Bryant*, 562 U.S. 344, 179 L.Ed.2d 93 (2011), *see: Ohio v. Clark*, 135 U.S. 2173, 135 S.Ct. 2173, 192 L.Ed.2d 306 (2015), immediate danger had passed, modifying *State v. Shafer*, 156 Wn.2d 381 (2006) to the extent that "declarant-centric" standard that focuses on reasonable belief of declarant does not apply to statements to law enforcement, *State v. Scanlan,* 193 Wn.2d 753 (2019); child who refuses to testify in court is unavailable unless there is affirmative evidence that she may be able to testify via alternative means such as television, distinguishing *State v. Smith*, 148 Wn.2d 122 (2002), *cf.: State v. Streepy*, 199 Wn.2d 487, 493-97 (2017); evidence regarding non-testifying child's breakdown to explain why she did not testify is impermissible bolstering, harmless here; 9-0.

***Ohio v. Clark***, 135 U.S. 2173, 135 S.Ct. 2173, 192 L.Ed.2d 306 (2015)

Teacher asks 3-year old about abrasions, child says defendant did it, doesn't testify at trial but statements are admitted; held: while statements to non-police witnesses are not categorically non-testimonial, under "primary purpose" test this statement was not for the purposes of creating evidence, rather it was to protect a child, *State v. Burke*, 196 Wn.2d 712 (2021), statements by very young children will rarely, if ever, implicate the Confrontation Clause, *State v. Streepy*, 199 Wn.2d 487, 493-97 (2017); 9-0.

***State v. DeJesus Hernandez***, 192 Wn.App. 673 (1992)

Trial court's finding that defendant's crudely coded jail phone calls persuaded victim and victim's mother to move to Mexico, establishing **forfeiture by wrongdoing**, authorizing admission of victim's testimonial hearsay statements including child hearsay, *State v. Mason*, 160 Wn.2d 910 (2000), *State v. Dobbs*, 180 Wn.2d 1 (2014); I.

***State v. Moses***, 193 Wn.App. 341, 361-63 (2016)

For purposes of child hearsay statute, RCW 9A.44.120 (1995), "physical abuse" includes withholding food; III.

***State v. Bates***, 196 Wn.App. 65 (2016)

In child rape case court admits recorded victim interview, when victim testifies state inquires about sex assault but does not inquire about whether victim made the previously admitted hearsay statement, defense counsel cross-examines about the incident and about the hearsay statement, defense argues for the first time on appeal that confrontation clause was violated because court admitted recorded statement but questioning on direct was not broad enough to subject her to cross-examination; held: cross-examination about the interview was within the scope of direct, ER 611(B), *State v. Montgomery*, 95 Wn.App. 192, 198-99 (1999), *State v. Clark*, 139 Wn.2d 152 (1999), *State v. Kilgore*, 107 Wn.App. 160, 173-75 (2001), *State v. Price*, 158 Wn.2d 630 (2006), distinguishing *State v. Rohrich*, 132 Wn.2d 472 (1997), *cf.: State v. Kinzle*, 181 Wn.App. 774, 780-84 (2014), both the hearsay statement and victim's testimony were inculpatory; III.

# EVIDENCE
## Declaration Against Penal Interest

***State v. Russell***, 27 Wn.App. 309 (1980)

Within discretion of court to determine trustworthiness of third party confession; factors include (1) time of declaration and party to whom it was made, (2) existence of corroborating evidence in the case, (3) extent to which declaration is really against penal interest, and (4) availability of declarant; *see*: ER 804; I.

***State v. Parris***, 98 Wn.2d 140 (1982)

Severed co-defendant's inculpatory statement to undercover officers admitted into evidence against defendant as statement against penal interest; test: (1) statement must so far subject the declarant to criminal liability that a reasonable person would not have made the statement unless s/he believed it to be true; and (2) statement must be corroborated; in determining corroboration, factors include: (1) motive to lie; (2) character of declarant; (3) whether more than one person heard the statement; (4) spontaneity of statement; and (5) the timing of the declaration and the relationship between the declarant and the witness, *see: State v. Mitchell*, 117 Wn.2d 521 (1991), *but see: Crawford v. Washington*, 158 L.Ed.2d 177 (2004); fact that declarant made statement to a person who he thought was not likely to use the statement against him does not render statement unreliable; 5-3.

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***State v. Castro***, 32 Wn.App. 559 (1982)

Co-defendant's confession absolving defendant may be excluded where co-defendant repudiates confession, and confession is inconsistent with physical evidence; I.

***State v. Valladeres***, 31 Wn.App. 63 (1982), *affirmed*, 99 Wn.2d 663 (1983)

Hearsay statement against penal interest, ER 804(b)(3), is admissible if tests are met, whether statement is offered to inculpate or exculpate the accused, *see: State v. Roberts*, 142 Wn.2d 471 (2000), *State v. J.K.T.*, 11 Wn.App.2d 544 (2019); factors to be considered when determining if statement is against penal interest include whether or not declarant was in custody and whether or not declarant was offered immunity; where statement as a whole qualifies as a declaration against penal interest, the statement is admissible in its entirety, including both disserving and self-serving portions; corroboration requirement is not limited to circumstances surrounding the making of the declaration, but may come from any competent evidence that bolsters the reliability of the declarant's statement; II.

***State v. Dibley***, 38 Wn.App. 824 (1984)

State offered co-defendant's Statement of Defendant on Plea of Guilty at trial against defendant; co-defendant did not testify as it was part of his plea bargain that he would not be called to testify; held: co-defendant procured, by the plea bargain, his own unavailability, thus, state did not have to call him; plea statement was against interest, ER804(b)(3), sufficiently corroborated by evidence of the crime, *but see: Crawford v. Washington*, 158 L.Ed.2d 177 (2004); II.

***State v. Ng***, 104 Wn.2d 763 (1985)

Co-defendant's confession to police that he did all the shooting inadmissible at severed trial as corroborating circumstances did not clearly indicate the trustworthiness of the statement, ER 804(b)(3), in light of co-defendant's other lies and subsequent repudiation of statement.

***State v. Anderson***, 107 Wn.2d 745 (1987)

The fact that statements were made to a confidant prior to any police suspicions arising weighs heavily in favor of reliability, even if all *State v. Ryan*, 103 Wn.2d 165, 175-76 factors are not present; 9-0.

***State v. St. Pierre***, 111 Wn.2d 105 (1988)

Although nontestifying co-defendant's statement is inadmissible against defendant even if defendant's confession interlocks with statement, *Cruz v. New York*, 95 L.Ed.2d 162 (1987), it may be admissible as a declaration against penal interest if there are sufficient guarantees of trustworthiness, *State v. Greer*, 62 Wn.App. 779 (1991); to the extent that the defendant's confession interlocks with the accomplice's statement, there is some showing of reliability; however, where the statements diverge, there is a lack of reliability; 9-0.

***State v. Gee***, 52 Wn.App. 357 (1988)

Where factors properly applied, it is proper for a trial court to admit an unavailable co-defendant's inculpatory statement against penal interest but exclude a separate exculpatory statement against penal interest, *State v. Roberts*, 142 Wn.2d 471 (2000); I.

***State v. Whelchel***, 115 Wn.2d 708 (1990)

Severed, unavailable co-defendants' custodial statements which admitted witnessing murder but minimized responsibility fail to satisfy the "against penal interest" requirement of ER 804(b)(3); court applies nine-point set of guidelines to determine whether reliability required of inculpatory statements under confrontation clause is satisfied, *State v. McDonald*, 138 Wn.2d 680, 693-96 (1999); other evidence of guilt may not be used to establish reliability, *Idaho v. Wright*, 111 L.Ed.2d 638 (1990) 9-0; harmless error, 7-2.

***State v. Hutcheson***, 62 Wn.App. 282 (1991)

Severed co-defendant's confession to a friend is admissible against defendant where a reasonable person would be aware of the disserving nature of the remarks even if made to a supposed friend, *State v. Parris*, 98 Wn.2d 140, 150 (1982); evidence that declarant knew she was criminally liable, in that she made sure conversation was private, later denied involvement, lack of proof of mental impairment such that she was unable to perceive criminal nature of the acts described, support admissibility, ER 804(b)(3); applying *State v. Ryan*, 103 Wn.2d 165, 175-77 (1984) factors, declaration does not violate confrontation clause; credibility of the in-court witness in determining reliability of declarant's out-of-court statement is not a factor; I.

***State v. Greer***, 62 Wn.App. 779 (1991)

Co-defendant's statement implicating defendant is presumptively unreliable unless it bears sufficient indicia of reliability to rebut presumption, *Lee v. Illinois*, 90 L.Ed.2d 514 (1986); corroboration by admission of defendant plus other evidence at trial supporting the statement are

factors to be considered in supporting trustworthiness, *State v. Hoskinson*, 48 Wn.App. 66, 71-2 (1987); *but see: Cruz v. New York*, 95 L.Ed.2d 162 (1987)[unclear from *Greer* opinion whether co-defendant testified at trial], *cf.*: *State v. St. Pierre*, 111 Wn.2d 105 (1988); I.

***State v. Mitchell***, 117 Wn.2d 521 (1991)

Consolidated co-defendant's statements inculpating defendant may be admitted without redacting if it meets balancing test of *State v. Parris*, 98 Wn.2d 140 (1982) and *Dutton v. Evans*, 27 L.Ed.2d 213 (1970); statement to civilian in response to question is not a coercive official interrogation, thus fourth factor does not support exclusion; *Dutton* factor (1) express assertion of past fact does not render statement inadmissible where it stands alone against remaining *Parris-Dutton* factors; 9-0.

***State v. Rice***, 120 Wn.2d 549 (1993)

Test for reliability (1) whether declarant had an apparent motive to lie, (2) whether general character of declarant suggests trustworthiness, (3) whether more than one person heard statements, (4) whether statements were made spontaneously, (5) whether timing of statements and relationship between declarant and witness suggest trustworthiness, (6) whether statements contained express assertions of past fact, (7) whether cross-examination could not help to show declarant's lack of knowledge, (8) whether possibility of declarant's recollection being faulty is remote, and (9) whether circumstances surrounding the statements give no reason to suppose that declarant misrepresented defendant's involvement, *State v. Whelchel*, 115 Wn.2d 709 (1990), *State v. Edmondson*, 43 Wn.App. 443 (1986); statement made in police custody by co-conspirator is almost presumptively unreliable, *see: Crawford v. Washington*, 158 L.Ed.2d 177 (2004); 9-0.

***Williamson v. United States***, 129 L.Ed.2d 476 (1994)

Arrestee tells police that a third party put drugs in the car in which arrestee was arrested, later tells police that he lied, that he was transporting drugs for his accomplice, who is charged; at accomplice's trial, arrestee refuses to testify, police are permitted to testify to both of arrestee's versions as statements against penal interest, Fed. R. Evid. 804(b)(3); held: nonself-inculpatory statements, even if made within the context of a broader narrative that is generally self-inculpatory, are inadmissible under this rule as insufficiently reliable; 9-0.

***State v. McDonald***, 138 Wn.2d 680, 693-96 (1999)

Nine factors to determine reliability of inculpatory statements of another offered by defendant, ER 804(b)(3): (1) was there an apparent motive for declarant to lie?; (2) declarant's general character; (3) did more than one witness hear declarant's statement?; (4) was statement spontaneous?; (5) did timing of statement and relationship between declarant and witness suggest trustworthiness?; (6) does statement contain an express assertion of past facts?; (7) did declarant have personal knowledge of identity and role of the crime's other participants?; (8) was declarant's statement based upon faulty recollection?; and (9) was statement made under circumstances that provide reason to believe declarant misrepresented defendant's involvement in crime?, *State v. Whelchel*, 115 Wn.2d 708, 722 (1990); 9-0.

***State v. Roberts***, 142 Wn.2d 471, 491-500 (2000)

Trial court refuses to allow defense offer of co-defendant's statement to police which statement is inculpatory as to co-defendant's involvement in felony murder and exculpatory as to co-defendant's involvement in capital murder, state having offered co-defendant's statement against the co-defendant at his separate trial; held: in deciding whether to admit a statement against interest, court must separate the inculpatory portions from those that are self-serving and redact the narrative to exclude the self-serving statements, *Williamson v. United States*, 129 L.Ed.2d 476 (1994), then determine reliability of the inculpatory portions, *State v. McDonald*, 138 Wn.2d 680, 693 (1999), *State v. Crawford*, 147 Wn.2d 424, 432-40 (2002), *rev'd, Crawford v. Washington*, 158 L.Ed.2d 177 (2004), *State v. J.K.T.*, 11 Wn.App.2d 544 (2019), ER 804(b)(3); even co-defendant's exculpatory statements may be admissible where defense is offering it not for the truth but to argue its falsity, and state may offer it under rule of completeness, ER 106, *c.f: State v. Perez*, 139 Wn.App. 522, 530-31 (2007); inculpatory statements of co-defendant are presumed admissible where offered by defense, *Chambers v. Mississippi*, 35 L.Ed.2d 297 (1973), *see: State v. Jordan*, 106 Wn.App. 291, 299-302 (2001), *State v. Anderson*, 112 Wn.App. 828, 839 (2002); 6-3.

***State v. Jordan***, 106 Wn.App. 291, 299-302 (2001)

Defense offers hearsay testimony that a person who had been convicted on a "similar charge" [unclear from opinion if this was same incident] admitted killing victim here, trial court excludes testimony as insufficiently trustworthy, *State v. Valladares*, 99 2663, 668 (1983), *State v. Gee*, 52 Wn.App. 357 (1988); held: where reliability factors are evenly balanced and statement is offered by defense, then there is a presumption of admissibility, exclusion is an abuse of discretion, *State v. Roberts*, 142 Wn.2d 471 (2000); III.

***State v. Floreck***, 111 Wn.App. 135, 139-40 (2002)

Burglary accomplice, called by prosecution, testifies that she does not remember much of what she told police but describes burglaries, claiming she committed them alone, court admits statements to police inculpating herself and defendant, holding that declarant is unavailable, ER 804(a)(2), (3); held: while a witness who testifies to a lack of memory of the subject matter of her statement is unavailable, here declarant did not lack memory of the subject matter, namely the burglaries, thus she is available and statement should not have been admitted as substantive evidence; II.

***State v. Anderson***, 112 Wn.App. 828 (2002)

Analysis of 9-part reliability test here weighs against admissibility of co-defendant's incriminating statements; absent support for the proposition, set forth in *State v. Roberts*, 142 Wn.2d 471, 497 (2000), that a co-defendant's incriminating statements are presumed admissible, Division I rejects Supreme Court's analysis.

***State v. O'Connor***, 155 Wn.2d 335 (2005)

In malicious mischief case, trial court admits fact that defendant paid victim for damages; held: ER 408, precluding evidence of compromise, is inapplicable in criminal cases; 5-4.

# EVIDENCE
# DNA

***State v. Cauthron***, 120 Wn.2d 879 (1993)

RFLP method of DNA typing meets *Frye* test, *i.e.*, evidence has a valid, scientific basis and is generally accepted in appropriate scientific community, *State v. Russell*, 125 Wn.2d 24, 37-55 (1994), *State v. Gentry*, 125 Wn.2d 570, 585-9 (1995), *State v. Copeland*, 130 Wn.2d 244 (1996), *State v. Bander*, 150 Wn.App. 690 (2009); if there is a significant dispute between qualified experts as to the validity of scientific evidence, it may not be admitted; evidence that DNA-tested semen matched that of donor's semen was improperly admitted where the evidence did not include background probability information, as it is neither based on a generally accepted scientific theory nor helpful to the trier of fact, ER 702, *but see: State v. Buckner*, 133 Wn.2d 63 (1997); 7-2.

***State v. Kalakosky***, 121 Wn.2d 525 (1993)

Once DNA testing is determined to be generally admissible, then deviations in the correct test protocol which do not materially affect the test outcome go to weight, not admissibility, *State v. Cauthron*, 120 Wn.2d 879 (1993), *State v. Gentry*, 125 Wn.2d 570, 585-9 (1995), *see also: State v. Russell*, 125 Wn.2d 24, 37-55 (1994); 8-0.

***State v. Russell***, 125 Wn.2d 24, 37-55 (1994)

PCR method of DNA testing at HLA DQ alpha locus, and Cetus kit test results meet *Frye* test, *State v. Gentry*, 125 Wn.2d 570, 585-9 (1995), *see: State v. Cauthron*, 120 Wn.2d 879 (1993); if testing before a trial court shows that testing procedure as performed in case before court was so flawed as to be unreliable, results may be inadmissible because they are not helpful to trier of fact, ER 702, *State v. Kalakosky*, 121 Wn.2d 525, 543 (1993); self-interest of experts goes to weight, not admissibility, at 55; 5-4.

***State v. Gentry***, 125 Wn.2d 570, 589-596 (1995)

Bloodstain analysis based on agglutination inhibition testing (gamma marker) meets *Frye* test; phosphoglucomutase (PGM) type tests are admissible, ER 702, *see: State v. Roberts*, 142 Wn.2d 471, 522-24 (2000); 7-2.

***State v. Copeland***, 130 Wn.2d 244 (1996)

*Frye* standard will continue to apply to novel scientific evidence in Washington, court declines to adopt *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 125 L.Ed.2d 469 (1993); "product rule" or "multiplication rule" for calculating genetic profile frequency as applied in RFLP DNA typing is generally accepted in the scientific community, *State v. Cannon*, 130 Wn.2d 313, 324-5 (1996), *see: State v. Copeland*, 120 Wn.2d 879 (1993), *State v. Gore*, 143 Wn.2d 288, 302-12 (2001); 9-0.

***State v. Buckner***, 133 Wn.2d 63 (1997)

DNA expert may give an opinion that, based upon an exceedingly small probability of a defendant's DNA profile matching that of another in a random human population, the profile is

unique, affirming *State v. Buckner*, 74 Wn.App. 889 (1994), *overruled, in part, on other grounds*, *State v. Thomas*, 138 Wn.2d 630 (1999), reconsidering *State v. Buckner*, 125 Wn.2d 915 (1995), overruling, in part, *State v. Cauthron*, 120 Wn.2d 879 (1993); 9-0.

***State v. Gore***, 143 Wn.2d 288, 302-11 (2001)

*Frye* hearing for PCR-based systems, using polymarker and D1S80 techniques, or anytime a new loci is involved, is not necessary; product rule for calculating probabilities of a random match of a genetic profile in the human population is admissible to calculate frequencies where the PCR-based systems are involved; 9-0.

***State v. Leuluaialii***, 118 Wn.App. 780 (2003)

DNA comparison of dog blood does not meet *Frye* test, as frequency of loci in canine population are insufficient for specific markers to be accurate forensic indicators, harmless here; I.

***State v. Mezquia***, 129 Wn.App. 118, 132-34 (2005)

Defendant, on probation in Florida, is required to provide a DNA sample which Washington police later use to connect defendant to homicide; held: under the silver platter doctrine, *State v. Brown*, 132 Wn.2d 529, 587-88 (1997), evidence lawfully seized in another jurisdiction is admissible in Washington where the evidence was lawfully obtained in the other state and the other state's officers did not act as agents of Washington authorities, *State v. Martinez*, 2 Wn.App.2d 55, 63 (2018); here, Washington's participation in a database did not establish agency with Florida, thus samples were admissible; I.

***State v. Gregory***, 158 Wn.2d 759, 820-35 (2006), *overruled, on other grounds, State v. W.R.*, 181 Wn.2d 757 (2014)

Once DNA profile is lawfully in state's possession, state need not obtain an independent warrant to compare that profile with new crime scene evidence; no *Frye* hearing is required to admit STR testing, use of profiler plus testing kit, capillary electrophoresis, genotype frequencies for STR analysis; 8-1.

***State v. Riofta***, 166 Wn.2d 358 (2009)

A convicted person may seek DNA testing, RCW 10.73.170(2)(a)(iii), including DNA test results that did not exist at the time of trial and that are material to identity regardless of whether DNA testing could have been performed at trial, but defendant has the burden of showing the likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis, RCW 10.73.170(3); here, strength of eyewitness identification, evidence of motive and limited probative value of the DNA evidence sought was insufficient, *State v. Gray*, 151 Wn.App. 762 (2009), *State v. Braa*, 2 Wn.App.2d 510 (2018), *State v. Braa*, 2 Wn.App.2d 510 (2018), *cf.: State v. Thompson*, 155 Wn.App. 294 (2010), *State v. Crumpton*, 181 Wn.2d 252 (2014), *State v. Gentry*, 183 Wn.2d 749 (2015); affirms *State v. Riofta*, 134 Wn.App. 669 (2006); 6-3.

***State v. Bander***, 150 Wn.App. 690 (2009)

*Fry* hearing on the issues of allele identification and conclusions about whether to include defendant as a contributor is not necessary absent showing of a significant dispute among scientists over the acceptability of the laboratory's protocols for profile identification, at 713; probability of exclusion (PE) calculation is a generally accepted method for interpreting DNA profiles, at 717; evidence that defendant could not be excluded as a possible contributor is not the same as evidence that the sample matched the defendant, distinguishing *State v. Cauthron,* 120 Wn.2d 879 (1993); I.

***Williams v. Illinois***, 567 U.S. 50, 132 S.Ct. 2221, 183 L.Ed.2d 90 (2012)

State lab expert testifies that a DNA profile produced by an outside laboratory matched a profile that state lab produced using a sample of defenndant's blood, based on business records stating that swabs taken from victim were sent to outside lab and returned; held: an expert may express an opinion that is based on facts that the expert assumes, but does not know, to be true, expert may explain the facts on which expert's opinion is based without testifying to the truth of those facts which are not hearsay and do not violate confrontation clause, *State v. Manion,* 173 Wn.App. 610 (2013); outside lab report was produced before any suspect was identified, was not sought to obtain evidence against defendant and thus does not violate confrontation clause; expert's testimony that the outside lab's sample came from the victim is admissible in a bench trial but not a jury trial; 5-4 (plurality opinion).

***State v. Lui***, 179 Wn.2d 457 (2014)

DNA expert, who did not participate or observe DNA testing testifies from a report that she could not eliminate defendant as donor, defense objects to both under confrontation clause; held: confrontation clause applies where an expert testifies against the defendant with some capacity to inculpate defendant, *see: State v. Federov*, 183 Wn.App. 736, 745-48 (2014), *aff'd, on other grounds,* 183 Wn.2d 669 (2015); DNA evidence is not inculpatory until a human analyst uses expertise to interpret readings, create a profile that incriminates defendant; here, the expert was the appropriate witness to introduce the DNA evidence, and was the only DNA witness "against" the defendant, who does not have confrontation rights with respect to chain of custody, authenticity of the sample or accuracy of the testing device; 5-4.

***State v. Crumpton***, 181 Wn.2d 252 (2014)

In deciding a motion for post-conviction DNA testing, RCW 10.73.170, while substantive requirement to order post-conviction DNA testing is meant to be onerous, *State v. Riofta*, 166 Wn.2d 358, 367 (2009), trial court should presume DNA evidence would be favorable to the defendant when determining if it is likely the evidence would prove his or her innocence, *State v. Gentry*, 183 Wn.2d 749 (2015), *see: State v. Braa,* 2 Wn.App.,2d 510 (2018), *Matter of Pleth,* 20 Wn.App.2d. 326, 341-42 (2022), reversing *State v. Crumpton,* 172 Wn.App. 408 (2012); 6-3.

***State v. Braa***, 2 Wn.App.2d 510 (2018)

A self-defense claim does not bar the court from ordering post-conviction DNA testing, RCW 10.73.170), although here defendant did not prove by a preponderance that the test would demonstrate likely innocence, *State v. Riofta*, 166 Wn.2d 358 (2009), *see: State v. Crumpton,* 181 Wn.2d 252 (2014); I.

# EVIDENCE
## Excited Utterance/Present Sense Impression

***State v. Downey***, 27 Wn.App. 857 (1980)

Rape victim calls a friend shortly after rape and tells her what happened, in response to questions by friend, who is permitted to testify; held: under ER 803, even though statement is neither completely spontaneous nor contemporaneous with the inducing event it may be admitted if declarant was still upset, within discretion of trial court; *accord*, *State v. Fleming*, 27 Wn.App. 952 (1980), *State v. Collins*, 45 Wn.App. 541 (1986), *State v. Guizzotti*, 60 Wn.App. 289 (1991), *State v. Williams*, 137 Wn.App. 736, 748-49 (2007), *but see*: *State v. Bargas*, 52 Wn.App. 700 (1988); I.

***State v. Lopez***, 29 Wn.App. 836 (1981)

Officer testifies to statement made in English by X, translating excited utterance in Spanish by Y (victim); held: a witness is incompetent to testify to extrajudicial statements made by another person when it is necessary to have the statement translated before it can be understood by the witness; but here it was harmless as it was corroborated by eyewitness; I.

***State v. Whyde***, 30 Wn.App. 162 (1981)

Thirty minutes after rape, victim, in agitated state, tells third party, who is permitted to testify; held: no abuse of discretion; *but see*: *State v. Bargas*, 52 Wn.App. 700 (1988); I.

***State v. Woodward***, 32 Wn.App. 204 (1982)

Twenty hours after 5 year-old girl is raped, she tells her mother about it; held: considering her age, her physical condition and the fact she was laboring under a threat of further violence, mother can testify as to child's hearsay statements as spontaneous utterance, ER 803(a)(2); *accord*: *State v. Robinson*, 44 Wn.App. 611 (1986); II.

***State v. Hubbard***, 37 Wn.App. 137 (1984)

A statement may constitute an excited utterance even though made in response to a question by a police officer, *Johnston v. Ohls*, 76 Wn.2d 398 (1969), *State v. Williams*, 137 Wn.App.736, 748-49 (2007); I.

***State v. Dixon***, 37 Wn.App. 867 (1984)

A narrative statement of an upset crime victim without proof that the victim could not have fabricated some of the details does not meet the "guaranty of trustworthiness" test, ER 803(a)(2), *Beck v. Dye*, 200 Wash. 1 (1939); I.

***State v. Slider***, 38 Wn.App. 689 (1984)

Aggregate effect of passage of time (about 12 hours) plus child-witness's response to parents' leading questions attenuated reliability of statement, ER 803(a)(2); I.

***State v. Hieb***, 39 Wn.App. 273 (1984)

Present sense impression, ER 803(a)(1), requires statement be made while declarant was perceiving event or immediately thereafter; here, several-hour interval is too long; excited

utterance, ER 803(a)(2), need not be contemporaneous nor completely spontaneous and may be in response to questions; here, *State v. Williams*, 137 Wn.App. 736, 748-49 (2007), a few hours is close enough but two months is too long; confrontation clause may bar otherwise admissible hearsay if witness is available but not produced by state; I; harmless, *State v. Hieb*, 107 Wn.2d 97 (1986).

***State v. Sellers***, 39 Wn.App. 799 (1985)

Child of homicide victim tells police he saw nothing, thereafter tells police he heard argument, threats, gunshots, saw body; held: test for excited utterance: was statement made while declarant was still under the influence of the event to the extent that his statement could not be the result of fabrication, intervening actions or the exercise of choice or judgment, ER 803(a)(2), *Johnston v. Ohls*, 76 Wn.2d 398 (1969); here, fact that declarant changed his story demonstrates he had time to consider alternatives, thus statement was not admissible, although harmless; II.

***State v. Flett***, 40 Wn.App. 277 (1985)

Complainant's statement, "I was raped" made seven hours after incident held to be part of a "continuous process" satisfying excited utterance exception, ER 803(a)(2); *accord*: *State v. Thomas*, 46 Wn.App. 280 (1986), *State v. Sunde*, 98 Wn.App. 515 (1999), *State v. Woods*, 143 Wn.2d 561, 596-601 (2001), *but see*: *State v. Bargas*, 52 Wn.App. 700 (1988); III.

***State v. Griffith***, 45 Wn.App. 728 (1986)

Circumstances surrounding child victim's out-of-court statements indicate insufficient reliability to qualify as excited utterances where there is inadequate record as to the circumstances surrounding the victim's statements, the statements were the product of two hours of interrogation by the mother in response to leading questions, and physical evidence corroborates the abuse but not the person who committed it; III.

***State v. Ramirez***, 46 Wn.App. 223 (1986)

In cases involving sexual abuse of children, trial court should avoid strained interpretation of excited utterance exception, and should apply child hearsay statute, RCW 9A.44.120; held: five-hour delay between act and report to mother by eight-year-old victim was adequate time for reflection, defeating the exception; II.

***State v. Terrovona***, 105 Wn.2d 632 (1986)

Witness testifies that, on night of the homicide, decedent received a telephone call and told witness that the call was from defendant who had run out of gas and wanted decedent's help; held: decedent's hearsay statements are admissible to prove decedent's state of mind, ER 803(a)(3), to infer that he acted according to the stated intentions and with the person mentioned, *Mutual Life Ins. Co. v. Hillmon*, 36 L.Ed. 706 (1892), even though defendant's and decedent's states of mind were not at issue in the trial; 9-0.

***State v. Rivas***, 49 Wn.App. 677 (1987)

Co-defendant's statement to police officer identifying defendant, made shortly after crime in response to a question is not an excited utterance, ER 803(a)(2), as it was not a natural declaration growing out of the event, nor spontaneous and provoked by the occurrence itself; I.

***State v. Palomo***, 113 Wn.2d 789 (1989)

Excited utterance exception to hearsay rule, ER 803(a)(2), applies even though declarant is available as a witness and does not violate confrontation clause, *State v. Strauss*, 119 Wn.2d 401, 415-6 (1992); 9-0.

***State v. Guizzotti***, 60 Wn.App. 289 (1991)

Rape victim flees from defendant, hides for seven hours, then calls 911, state offers 911 tape; held: within court's discretion to find victim was still under "stress of excitement" caused by event or condition, *State v. Downey*, 27 Wn.App. 857, 860 (1980), *State v. Sunde*, 98 Wn.App. 515 (1999), *State v. Ramires*, 109 Wn.App. 749, 757-60 (2002); II.

***State v. Chapin***, 118 Wn.2d 681 (1992)

Nursing home patient with Alzheimer's disease and swollen rectum gets angry when he sees defendant-nurse's aide, when asked why he dislikes defendant, complainant states, "Raped me," admitted as excited utterance, ER 803(a)(2); held: test: (1) startling event or condition must have occurred, (a) event need not be principal act underlying case, *e.g.*, utterance in response to unexpected observation of a photo of assailant by victim may suffice, *State v. Owens*, 128 Wn.2d 908 (1996), *cf. State v. Ramirez-Estevez*, 164 Wn.App. 284 (2011), (b) startling nature of event cannot be determined merely by reference to event itself, rather it is event's effect on declarant that must be focused upon, (2) statement must be made while declarant under excitement or stress caused by event, (3) statement must relate to startling condition or event; here, a day had elapsed between alleged rape and utterance, increasing likelihood of fabrication, *but see:* *State v. Flett*, 40 Wn.App. 277 (1985), complainant's reaction was one of anger, complainant saw defendant regularly at nursing home thus event was not startling, utterance made after complainant had calmed down, complainant's mental deterioration was severe, thus trial court abused discretion, *cf.:* *State v. Woods*, 143 Wn.2d 561, 596-601 (2001), *State v. Rodriquez*, 187 Wn.App. 922, 938-40 (2015); 9-0.

***White v. Illinois***, 116 L.Ed.2d 848 (1992)

Spontaneous declarations and medical examination exceptions to hearsay rule do not violate confrontation clause, prosecution need not produce declarant, trial court need not find unavailability, *United States v. Inadi*, 89 L.Ed.2d 390 (1986); 9-0.

***State v. Bryant***, 65 Wn.App. 428 (1992)

Where child is very young, her age is an additional indication of reliability, since fabrication is more remote; incompetency of a three-year old does not act to exclude an excited utterance, *State v. Bouchard*, 31 Wn.App. 381, 383 (1982), *overruled, on other grounds, State v. Sutherby*, 165 Wn.2d 870, 886 n.7 (2009), *State v. Bloomstrom*, 12 Wn.App. 416, 418-9 (1974); I.

***State v. Sims***, 77 Wn.App. 236, 237-8 (1995)

Officer arrives within minutes of dispatch, observes victim crying and upset, talking to officer right after the incident, her statement was not so detailed as to suggest the exercise of

choice or judgment, her hesitancy in speaking does not negate spontaneity, meeting excited utterance exception, ER 803(a)(2); I.

***State v. Brown***, 127 Wn.2d 749, 757-59 (1995)

Where witness testifies that she fabricated part of a purported excited utterance, then content of entire utterance is inadmissible, as the statement is not within the "stress of nervous excitement...which stills the reflective faculties and removes their control...[nor] a spontaneous and sincere response to the actual sensations and perceptions already produced by the external shock rather than an expression based on reflection or self-interest," *State v. Chapin*, 118 Wn.2d 681, 686 (1992), *State v. Strauss*, 119 Wn.2d 401, 416 (1992), *Johnston v. Ohls*, 76 Wn.2d 398, 406 (1969); *see: State v. Sharp*, 80 Wn.App. 457 (1996), *State v. Hardy*, 133 Wn.2d 701, 713-4 (1997), *State v. Briscoeray*, 95 Wn.App. 167 (1999), *State v. Hochhalter*, 131 Wn.App. 506, 513-17 (2006), *see: State v. Williamson*, 100 Wn.App. 248, 255-59 (2000), *State v. Davis*, 131 Wn.App. 71 (2005), *Davis v. Washington*, 165 L.Ed.2d 224 (2006), *State v. Young*, 123 Wn.App. 854, 861-62 (2004), *cf.: State v. Woods*, 143 Wn.2d 561, 596-601 (2001), *State v. Lawrence*, 108 Wn.App. 226, 233-36 (2001), *but see: State v. Magers*, 164 Wn.2d 174, 187-88 (2008); 9-0.

***State v. Sharp***, 80 Wn.App. 457 (1996), *overruled, sub nom.*, *State v. Woods*, 143 Wn.2d 561, 597-98 (2001)

In kidnapping case, developmentally disabled 12-year old is found in defendant's car rocking back and forth, which he does when he is excited or fearful, victim is calmed down by relatives, taken to police, is asked leading questions after 30-40 minutes, would think for a minute before answering, state offers answers as excited utterances; held: evidence established victim was very impressionable, tried to please everyone, parrotted questions asked, had calmed down, thus trial court erred in admitting statements, as nothing supports "the inference" that victim was still responding to the stress of the event, *see: State v. Williamson*, 100 Wn.App. 248, 255-59 (2000); III.

***State v. Owens***, 128 Wn.2d 908 (1996)

Child rape victim undergoes physical examination and, after several hours denying abuse had occurred, victim, prompted by question from mother, screams and acknowledges he was molested; held: while a later startling event may trigger associations with an original trauma, recreating the stress earlier produced and causing the person to exclaim spontaneously, *State v. Chapin*, 118 Wn.2d 681, 686-7 (1992), here victim underwent extended questioning before he said he had been molested and identified defendant as assailant; where declarant changes statement after lengthy questioning, he has necessarily reflected upon the previous responses, thus statements were improperly admitted, *reversing State v. Owens*, 78 Wn.App. 897 (1995), harmless here; *per curiam.*

***State v. Briscoeray***, 95 Wn.App. 167 (1999)

Domestic violence victim runs to security guard crying and screaming that she had just been assaulted, at trial she recants, trial court admits statement as excited utterance; held: where witness recants and claims she fabricated excited utterance, trial court may still admit the statement where there was no time and opportunity for the witness to concoct a fabrication, *State v. Sunde*, 98 Wn.App. 515 (1999), *State v. Young*, 123 Wn.App. 854, 861-62 (2004), *State v.*

*Magers*, 164 Wn.2d 174, 187-88 (2008), *see:* *State v. Williamson*, 100 Wn.App. 248, 255-59 (2000), distinguishing *State v. Brown*, 127 Wn.2d 749, 757-59 (1995), *State v. Sharp*, 60 Wn.App. 457 (1996); I.

***State v. Williamson***, 100 Wn.App. 248, 255-59 (2000)

Kidnap victim arrives at witness's house upset, highly emotional, "in shock," is driven to police station, victim still crying, fearful, emotional, nervous, makes statement in response to questions, later recants, trial court admits statement as excited utterance; held: a later recantation does not disqualify a statement as an excited utterance, *State v. Briscoeray*, 95 Wn.App. 167, 173 (1999), *State v. Sunde*, 98 Wn.App. 515, 519-21 (1999), *State v. Magers*, 164 Wn.2d 174, 187-88 (2008), but if the witness had an opportunity to and did fabricate a lie after the startling event and before making the statement, then the statement is not an excited utterance, *State v. Brown*, 127 Wn.2d 749, 757-58 (1995), *State v. Hochhalter*, 131 Wn.App. 506, 513-17 (2006), *see:* *State v. Sharp*, 80 Wn.App. 457, 460-61 (1996); III.

***State v. Woods***, 143 Wn.2d 561, 596-601 (2001)

Following severe beating, victim is taken to hospital, informs her father what happened, does not tell father that she had been drinking or seeking drugs; held: admissibility of an excited utterance is reviewed on a deferential abuse of discretion standard, effectively overruling *State v. Sharp*, 80 Wn.App. 457 (1996), *see:* *State v. Briscoeray*, 95 Wn.App. 167, 171 (1999); statements here were made spontaneously, albeit in response to questions, *State v. Ryan*, 103 Wn.2d 165, 176 (1984), shortly after a startling event, *State v. Flett*, 40 Wn.App. 277, 287 (1985), *State v. Williams*, 137 Wn.App. 736, 748-49 (2007), *State v. Rodriquez*, 187 Wn.App. 922, 938-40 (2015), distinguishing *State v. Chapin*, 118 Wn.2d 681 (1992); failing to report details is not equivalent to fabrication leading to exclusion of the statement at trial, *State v. Magers*, 164 Wn.2d 174, 187-88 (2008), distinguishing *State v. Brown*, 127 Wn.2d 749, 757-59 (1995), *State v. Hochhalter*, 131 Wn.App. 506, 513-17 (2006); 9-0.

***State v. Martinez***, 105 Wn.App. 775 (2001)

Police testify that, as defendant's vehicle drove up, informant said "that's the vehicle," and that the officer's understanding, from the informant, is that more than one person will arrive in a vehicle with drugs; held: **present sense impression**, ER 803(a)(1), is not a "firmly rooted exception" to hearsay, thus does not satisfy confrontation clause, thus unless cross-examination would add nothing to the reliability of the statement, it is inadmissible, *Idaho v. Wright*, 111 L.Ed.2d 638 (1990); here, because informant's impression that car was arriving was only relevant when coupled with his memory and belief, based upon prior conduct, that defendant was arriving in a particular car from which he had previously sold drugs, the statement is inadmissible hearsay statement of memory and belief; rephrasing questions to avoid direct quotes by having a witness state his knowledge after the declarant spoke is backdoor hearsay, *cf.:* *State v. O'Hara*, 141 Wn.App. 900, 908-11 (2007), *rev'd, on other grounds*, 167 Wn.2d 91 (2009), *State v. Berniard*, 182 Wn.App. 106, 124-32 (2014); III.

***State v. Lawrence***, 108 Wn.App. 226, 233-36 (2001)

Ten to 15 minutes following rape, victim tells boyfriend of the rape, says she waited to tell because she did not want police involved since she had a warrant outstanding; held: brief

hesitation in calling police does not defeat the fact that victim was under stress of the event, distinguishing *State v. Brown*, 127 Wn.2d 749, 757-59 (1995), *cf.: State v. Hochhalter*, 131 Wn.App. 506, 513-17 (2006), *State v. Magers*, 164 Wn.2d 174, 187-88 (2008); I.

***State v. Thomas***, 150 Wn.2d 821, 853-56 (2004)

Court admits scared, shaking witness' statement that defendant shot victim, made 1½ to 2 hours after homicide, after declarant had assisted defendant in removing the body and ransacking victim's home; held: trial court's determination that the statement was made while declarant was under influence of the event was not an abuse of discretion, *see: State v. Woods*, 143 Wn.2d 561, 598-99 (2001), *State v. Flett*, 40 Wn.App. 277, 287 (1985), *cf.:* dissent (Madsen, J.), at 877-80; 6-3.

***State v. Young***, 123 Wn.App. 854 (2004)

An excited utterance itself may be sufficient to prove that an exciting even occurred, independent evidence is not required, *but see: State v. Terry*, 10 Wn.App. 874, 880 (1974); where witness testifies she fabricated a portion of the utterance, it may still be admitted where trial court determines that declarant was under the influence of the startling event and lacked the time or opportunity to fabricate the story before making the statements, *State v. Briscoray*, 95 Wn.App. 167, 172-73 (1999), distinguishing *State v. Brown*, 127 Wn.2d 749, 757-59 (1995); trial court does not err by weighing the witness' credibility against the evidence indicating that the statements were spontaneous and reliable; I.

***State v. Walker***, 129 Wn.App. 258, 269-72 (2005)

Trial court admits, as excited utterance, statement of jail inmate to police describing an assault on himself two hours after the assault; held: a detailed narrative in response to structured police questioning violates confrontation clause, *Crawford v. Washington*, 158 L.Ed.2d 177 (2004), *State v. Powers*, 124 Wn.App. 92 (2004), *cf.: State v. Williams*, 137 Wn.App. 736, 748-49 (2007), *State v. Perez*, 184 Wn.App. 321, 341-43 (2014); I.

***State v. Hochhalter***, 131 Wn.App. 506, 513-17 (2006)

After assault, victim drives a witness to his home because witness wants to avoid involvement with police due to a warrant, then victim calls police and excitedly tells of assault but withholds information about witness, police testify to utterances at trial; held: where evidence establishes that declarant reflected beforehand on what she said and consciously and intentionally omitted part of what she had observed, her statement is not an excited utterance, distinguishing *State v. Brown*, 127 Wn.2d 749 (1995), *cf.: State v. Magers*, 164 Wn.2d 174, 187-88 (2008); II.

***State v. Young***, 160 Wn.2d 799 (2007)

Where an excited utterance is offered and victim recants, trial court may weigh the credibility of the declarant's recantation against the evidence that the statement is reliable because it was made spontaneously while under the influence of a startling event; recantation by itself is not a basis to exclude an excited utterance, *State v. Magers*, 164 Wn.2d 174, 187-88 (2008), *distinguishing State v. Brown*, 127 Wn.2d 749, 758 (1995), *see: State v. Williamson*, 100 Wn.App. 248, 255-59 (2000); declarant's statement alone is insufficient to corroborate the

occurrence of a startling event, but circumstantial evidence, independent from the statement's bare words, can corroborate a startling event; here, while victim's statement itself may have been insufficient to corroborate that she was molested and offered money, victim's showing another witness money plus defendant's statement when confronted that he did not want the police called and fleeing provide ample circumstantial evidence independent of the bare words of the declarant, that a startling event occurred; 7-2.

***State v. Ohlson***, 162 Wn.2d 1, 7-9 (2007)

To admit a statement as an excited utterance, declarant need not directly provide the court with evidence that a startling event occurred, *State v. Williamson*, 100 Wn.App. 248, 258-59 (2000), *State v. Briscoeray*, 95 Wn.App. 167, 173-74 (1999); excited utterances are not *per se* nontestimonial, *Davis v. Washington*, 165 L.Ed.2d 224, 243-44 (2006); 8-0.

***State v. Magers***, 164 Wn.2d 174, 187-88 (2008)

Where a portion of a purported excited utterance is fabricated, the trial court may weigh the credibility of the recantation against the evidence that the statement is reliable because it was made spontaneously to determine if it is admissible, *State v. Young*, 160 Wn.2d 799, 808 (2007), *State v. Woods*, 143 Wn.2d 561, 600 (2001), distinguishing *State v. Brown*, 127 Wn.2d 749 (1995); 6-3.

***State v. Ramirez-Estevez***, 164 Wn.App. 284 (2011)

Two years after child victim is raped she reports rape to teacher and aunt, while recounting rape she cries, is upset, shakes, trial court admits hearsay as excited utterances, ER 803(a)(2); held: while the "startling event or condition…need not be the 'principal act' underlying the case," *State v. Young*, 160 Wn.2d 799, 810 (2007), *State v. Chapin*, 118 Wn.2d 681, 686 (1992), and the passage of time alone is not dispositive as to whether a statement is an admissible excited utterance, *State v. Strauss*, 119 Wn.2d 401, 416-17 (1992), where the victim recounts the traumatic events more than two years later, the reliability of an excited utterance close in time to the underlying traumatic event is no longer a predominant reliability factor, thus trial court erred in admitting the hearsay, albeit harmless; II.

***State v. Pavlik***, 165 Wn.App. 646 (2011)

During altercation and immediately after shooting, defendant yells to police, "you saw it, it was self defense," shortly thereafter makes two similar statements, defense seeks to offer statement as excited utterance or state of mind, trial court excludes as "self-serving," held: there is no self serving hearsay rule, party admission, ER 801(d)(2), which only can be offered by the state, does not exclude admission if the statement fits into another exception; while the first statement was likely admissible, within court's discretion, as an excited utterance, *State v. Woods*, 143 Wn.2d 561, 597 (2001), exclusion here was not an abuse of discretion and was harmless, as self defense failed on the facts, not the absence of the statement; 2-1, III.

***State v. Brush***, 183 Wn.2d 559, 560-61 (2015)

Witness testifies that murder victim, while defendant was driving behind her, said "[h]e's not stopping, run," and that a similar incident had happened earlier in the day; held: first statement was a **present sense impression**, ER 803(a)(1), second was not; 9-0.

# EVIDENCE
## Hearsay and Exceptions

***State v. Huelett***, 92 Wn.2d 967 (1979)

Recollection refreshed versus recollection recorded; I.

***State v. Lopez***, 29 Wn.App. 836 (1981)

Officer testifies to statement made in English by X, translating excited utterance in Spanish by Y (victim); held: a witness is incompetent to testify to extrajudicial statements made by another person when it is necessary to have the statement translated before it can be understood by the witness, *State v. Huynh*, 49 Wn.App. 192 (1987), *State v. Garcia-Trujillo*, 89 Wn.App. 203 (1997), *see: State v. Gonzalez-Hernandez*, 122 Wn.App. 53 (2004); harmless here; I.

***State v. Smith***, 30 Wn.App. 251 (1981)

Where defense counsel cross-examines to show a witness's testimony is a fabrication, state may introduce prior consistent statement of witness, ER 801(d)(1)(ii), *State v. Perez*, 137 Wn.App. 97, 107-08 (2007), *State v. McWilliams*, 177 Wn.App. 139, 148-49 (2013), *cf.: State v. Alexander*, 64 Wn.App. 147, 152 n. 1 (1992); I.

***State v. Jessup***, 31 Wn.App. 304 (1982)

Prostitute testifies in defendant's pimping trial that a third party told her that defendant had struck another prostitute for disobeying the rules; held: admissible under state of mind exception, ER 803(a)(3), as it was a factor in causing the witness to engage in prostitution.

***State v. Bouchard***, 31 Wn.App. 381 (1982), *overruled, on other grounds, State v. Sutherby*, 165 Wn.2d 870, 886 n.7 (2009)

Incompetent infant's excited utterances are admissible, ER 803(a), irrespective of the competence of the declarant; excited utterance in response to a parent's questions are admissible in sex offense cases where spontaneity is clear and danger of fabrication is remote, *State v. Bloomstrom*, 12 Wn.App. 416 (1974), *State v. Canida*, 4 Wn.App. 275 (1971); II.

***State v. Henry***, 36 Wn.App. 530 (1984)

Co-defendant testifies at suppression hearing, exculpating defendant, takes the Fifth at trial; trial judge refuses to admit former testimony, ruling that witness was not unavailable and that state did not have an opportunity and similar motive for cross-examination; held: claim of privilege upheld by court makes witness unavailable, ER 804(a)(1); state's motive in examination was sufficiently similar to motive at trial to require admission of former testimony; I.

***State v. Danielson***, 37 Wn.App. 469 (1984)

Police officer testifies at trial that he received a telephone call from someone who identified himself as defendant, who then confessed to a crime, giving his birthdate, address, and other details which the officer corroborated; held: identity of the caller is a preliminary question, ER 104(b), to which the rules of evidence do not apply, ER 1101(c)(1); identification was self-authenticating, ER 901(b); I.

***State v. Walker***, 38 Wn.App. 841 (1984)

Where defense expressly challenges the credibility of declarant by impeaching with prior bad acts, prior consistent statements, ER 801(d)(i)(ii), are admissible as substantive evidence, *State v. Perez*, 137 Wn.App. 97, 107-08 (2007) , *see also: State v. McWilliams,* 177 Wn.App. 139, 148-49 (2013); II.

***State v. Fitzgerald***, 39 Wn.App. 652 (1985)

A physician, whether treating the patient or examining a person solely to enable the doctor to testify at trial, may relate what the patient said regarding the nature or cause of the injury insofar as it pertains to treatment or diagnosis and not fault; statements regarding identity of an assailant are not sufficiently related to diagnosis or treatment to be admissible, ER 803(a)(4), *State v. Redmond*, 150 Wn.2d 489, 496-97 (2003), *but see: State v. Butler*, 53 Wn.App. 214 (1989), *State v. Eakins*, 73 Wn.App. 271, 273-6 (1994), *State v. Woods*, 143 Wn.2d 561, 601-03 (2001); I.

***State v. Flett***, 40 Wn.App. 277 (1985)

Rape victim's statement, "did you take the bastard home?", is not offered to prove the truth, thus not hearsay; "something upset me" is admissible as a then existing emotional condition exception, ER 803(a)(3); III.

***State v. Bernson***, 40 Wn.App. 729 (1985)

Homicide victim's statement to a friend that she had a job offer to sell apparel is admitted, along with evidence that defendant had made a similar job offer to another woman; held: admissible as "then existing mental, emotional or physical condition" exception, ER 803(a)(3); test: statement must be of a present, existing state of mind and must appear to have been made "in a natural manner and not under circumstances of suspicion," *Ford v. United Board of Carpenters*, 50 Wn.2d 832, 837 (1957); III.

***State v. Rangitsch***, 40 Wn.App. 771 (1985)

Expert may read from learned treatise on direct if expert has testified to its reliability as authority, ER 803 (18); I.

***State v. Sanchez***, 42 Wn.App. 225 (1985)

A witness's vacation does not satisfy the requirement of unavailability in order to permit the trial court to admit a videotaped deposition of the witness; the videotaped deposition is thus inadmissible hearsay, ER 804(b)(1); CrR 4.6 permits a court to order a deposition if there is reason to believe a witness may become unavailable, but the admissibility of deposition is governed by Rules of Evidence, not the prior CrR 4.6 order; *accord*: *State v. Sweeney*, 45 Wn.App. 81 (1986) (state must seek out-of-jurisdiction summons, RCW 10.55, before deposition is admissible), *State v. Scott*, 48 Wn.App. 561 (1987) (harmless error), *State v. Aaron*, 49 Wn.App. 735 (1987), *State v. Whisler*, 61 Wn.App. 126 (1991), *see: State v. DeSantiago*, 149 Wn.2d 402 (2003), *State v. Hurtado,* 173 Wn.App. 592, 606-07 (2013), *but see: State v. Hobson*, 61 Wn.App. 330 (1991); II.

***In re Penelope B.***, 104 Wn.2d 643 (1985)

An utterance, writing or nonverbal conduct that is not assertive is not hearsay; test is whether it was intended as an assertion; extensive analysis of assertions vs. nonassertive conduct; a physician's testimony as to a patient's assertions for purposes of diagnosis is admissible to prove the truth of the assertions even though the physician was consulted solely to qualify him as a witness, ER 803(a)(4); 9-0.

***State v. Robinson***, 44 Wn.App. 611 (1986)

Where both parties stipulate that a child victim is incompetent to testify, defense counsel fails to challenge victim's ability to relate just impression of the facts at the time she made hearsay statements, then prosecutor has met burden of producing declarant, *distinguishing* *State v. Doe*, 105 Wn.2d 889 (1986) and *State v. Ryan*, 103 Wn.2d 165 (1984); III.

***State v. Alvarez***, 45 Wn.App. 407 (1986)

At defendant's murder trial, witness testifies defendant's brother, in defendant's presence, said, "we came to kill you," then killed victim; brother was in Mexico at time of trial; held: statement was admissible to prove plan, design or intention of the declarant as part of then existing mental condition exception, ER 803(a)(3); 2-1.

***State v. Purdom***, 106 Wn.2d 745, 750 (1986)

Undercover officer testifies at VUCSA trial that money was handed to defendant and that defendant was given drugs; on cross, witness admitted that his police report did not contain that information; over objection, state elicited from witness that he had so testified at a deposition; held: error to admit prior consistent statement, as it is not admissible merely to reinforce or bolster testimony, *Thomas v. French*, 99 Wn.2d 95, 103 (1983), *State v. Alexander*, 64 Wn.App. 147, 152 n. 1 (1992), *State v. Brown*, 127 Wn.2d 749, 758 n. 2 (1995), *State v. Thomas*, 150 Wn.2d 821, 864-67 (2004); evidence which counteracts a suggestion that the witness changed his story in response to a threat, scheme or bribe is admissible, but repetition itself does not imply veracity, *State v. Harper*, 35 Wn.App. 855 (1983), *cf.: State v. Perez*, 137 Wn.App. 97, 107-08 (2007), *State v. Magers*, 164 Wn.2d 174, 187-88 (2008), *State v. McWilliams*, 177 Wn.App. 139, 148-49 (2013); 9-0.

***State v. Rivas***, 49 Wn.App. 686 (1987)

Co-defendant, arrested immediately after burglary, is asked by police who his crime partner is, responds, "my brother"; held: not an excited utterance, ER 803(a)(2), as it was not spontaneous or provoked by the occurrence itself, applying *Beck v. Dye*, 200 Wash. 1 (1939) factors as guidance, although no longer controlling since adoption of rules of evidence; I.

***State v. Young***, 50 Wn.App. 107 (1987)

A witness who persistently refused to testify despite an order of the court is unavailable, ER 804(a); III.

***State v. McKinney***, 50 Wn.App. 56 (1987)

In applying child hearsay exception, RCW 9A.44.120, trial court must determine reliability of the victim's statement, not the reliability of the witness to whom the victim addressed the statement, *but see: Crawford v. Washington*, 158 L.Ed.2d 177 (2004); I.

***State v. Neslund***, 50 Wn.App. 531 (1988)

Silence constitutes an **adoptive admission** only if the defendant heard the accusatory or incriminating statement and was mentally and physically able to respond and the statement and circumstances were such that it is reasonable to conclude that the defendant would have responded had there been no intention to acquiesce, *see:* *State v. King*, 113 Wn.App. 243, 281 n. 11 (2002), *State v. Hill*, 431 Wn.App.2d 1044 (2018); trial court must first require a preliminary determination that there are sufficient foundational facts from which the jury reasonably could conclude that the defendant actually heard, understood, and acquiesced in the statement, *State v. Ta'afulisia,* 21 Wn.App.2d 914 (2022); an adoptive admission of defendant does not violate confrontation clause; *accord:* *State v. Cotten*, 75 Wn.App. 669, 688-90 (1994); I.

***State v. Rivera***, 51 Wn.App. 556 (1988)

Mere issuance of a subpoena and failure of the witness to appear does not establish unavailability for purpose of admitting hearsay statements of the witness, *see:* *State v. DeSantiago*, 149 Wn.2d 402 (2003), *State v. Hurtado,* 173 Wn.App. 592, 606-07 (2013), at least where the conviction rests entirely on the hearsay evidence; III.

***Bellevue v. Mociulski***, 51 Wn.App. 855 (1988)

Speed measuring device (radar) affidavits are admissible in traffic infraction cases, CrRLJ 6.13, as an exception to the hearsay rule, *see also:* *Bellevue v. Hellenthal*, 144 Wn.2d 425 (2001); I.

***State v. Bargas***, 52 Wn.App. 700 (1988)

Prior consistent statement, ER 801(d)(1)(ii), is not admissible to merely corroborate a witness's earlier testimony, *State v. Harper*, 35 Wn.App. 855, 857 (1983), *State v. Alexander*, 64 Wn.App. 147, 152 n. 1 (1992), but is admissible to rehabilitate testimony that has been impugned by a suggestion of recent fabrication, *State v. Stark*, 48 Wn.App. 245, 249 (1987); cross-examination revealing inconsistencies that does not raise inferences that witness fabricated a story after the prior consistent statement is insufficient to admit the testimony, *State v. Stubsjoen*, 48 Wn.App. 139, 146 (1987), *see:* *State v. Brown*, 127 Wn.2d 749, 758 n. 2 (1995), *State v. Perez*, 137 Wn.App. 97, 107-08 (2007), *State v. Magers*, 164 Wn.2d 174, 187-88 (2008), *State v. McWilliams*, 177 Wn.App. 139, 148-49 (2013); harmless here; III.

***State v. Butler***, 53 Wn.App. 214 (1989)

Hearsay statement of a child abuse victim made during medical treatment identifying the source of the injury and identifying the assailant is admissible, ER 803(a)(4), where the identity of and relationship to the abuser is reasonably necessary for physical, emotional and psychological treatment, *State v. Ashcroft*, 71 Wn.App. 444, 456-8 (1993), *State v. Owens*, 78 Wn.App. 897, 901-2 (1995), *State v. Ackerman*, 90 Wn.App. 477 (1998), *State v. Fisher*, 130 Wn.App. 1 (2005), *State v. Hopkins*, 134 Wn.App. 780, 787-92 (2006), *State v. Sandoval*, 137 Wn.App. 532, 537-40 (2007), *State v. Williams*, 137 Wn.App. 736, 745-47 (2007), *but see:* *State v. Fitzgerald*, 39 Wn.App. 652 (1985), *State v. Scanlan,* 193 Wn.2d 753 (2019), *see also:* *State v. Florczak*, 76 Wn.App. 55, 64-7 (1994); I.

***State v. Hawkins***, 53 Wn.App. 598 (1989)

Witness testifies she heard defendant confess; defense seeks to elicit that witness later heard defendant say that confession was a lie, state's objection sustained; held: state of mind exception is inapplicable as the words were a statement of memory, ER 803(a)(3); II.

***State v. Monson***, 113 Wn.2d 833 (1989)

Certified copy of driving record is admissible as a public record, *State v. Chapman*, 98 Wn.App. 888 (2000), RCW 5.44.040, does not require a showing of unavailability, does not violate confrontation clause; admissible hearsay need not be excluded because it "goes to the heart" of an issue, overruling *State v. Tharp*, 26 Wn.App. 184 (1980); *State v. Barringer*, 32 Wn.App. 882 (1982); *affirms* *State v. Monson*, 53 Wn.App. 854 (1989), *State v. Connie J.C.*, 86 Wn.App. 453 (1997); 9-0.

***State v. Grover***, 55 Wn.App. 923 (1989)

Police testimony that victim stated that defendant committed robbery is not hearsay, as it is a prior statement of identification of a person made after perceiving him, ER 801(d)(1)(iii), *State v. Jenkins*, 53 Wn.App. 228, 233 n. 3 (1989), *State v. Grover*, 55 Wn.App. 252 (1989), *State v. Stratton*, 139 Wn.App. 511, 516-18 (2007); ER 801(d)(1)(iii) is not limited to lineup, showup or montage identifications; testimony does not violate confrontation clause, *United States v. Owens*, 98 L.Ed.2d 951 (1988); I.

***State v. Smith***, 56 Wn.App. 909 (1990)

Witness testifies that X told her that victim said she was raped by defendant, court instructs jury that X's statement is not evidence, admitted solely to show how witness reacted; held: so long as the testimony was used solely for this purpose, it was not hearsay, within discretion of trial court to admit it, *State v. Stubsjoen*, 48 Wn.App. 139, 147 (1987); III.

***State v. Aaron***, 57 Wn.App. 277 (1990)

Witness tells police radio, which broadcasts to police, that suspect used a jean jacket in committing crime, a jean jacket having been found on suspect at arrest, over objection, officer testifies what he heard over radio, state claiming that it was being offered not to prove the truth but to show the officer's state of mind in explaining why he acted as he did; held: officer's state of mind in reacting to the information was not relevant, and thus was offered to prove the truth of the matter asserted, *State v. Hudlow*, 182 Wn.App. 266 (2014); *State v. Edwards*, 131 Wn.App. 611 (2006), *State v. Rocha*,21 Wn.App.2d 26 (2022), if necessary at trial for police to relate historical facts about a case, it is sufficient for officer to report s/he acted upon "information received," *State v. Johnson*, 61 Wn.App. 539 (1991), *State v. Wicker*, 66 Wn.App. 409 (1992), *cf.*: *State v. Perez-Arellano*, 60 Wn.App. 781 (1991); a limiting instruction, ER 105, is mandatory when requested where evidence is admitted for a limited purpose, *State v. Redmond*, 150 Wn.2d 489, 496 (2003); I.

***State v. Hamilton***, 58 Wn.App. 229 (1990)

Defendant, accused of theft of money, offers to testify that deceased complainant gave him permission to use the money, trial court sustains state's hearsay objection; held: statement was offered to prove defendant's belief that he had permission to take the money to establish a lack of criminal intent, thus is admissible to show state of mind, ER 801(c), 803(a)(3), subject to a limiting instruction; "in criminal actions, a defendant is generally allowed to testify as to what was in his mind at the time he engaged in the harmful conduct," at 232; deadman's statute, RCW 5.60.030, is inapplicable in a criminal action, *State v. Doubleday*, 198 Wash. 440 (1939); III.

***State v. Stevens***, 58 Wn.App. 478 (1990)

Statements made during sleep are not assertions, ER 801(a), and thus are not hearsay, ER 801(c), as "nothing is an assertion unless intended to be one," Fed. R. Evid. 801(a) advisory committee note; thus, utterances such as greetings, pleasantries, expressions of joy, annoyance or other emotions, when not intended as expressions of fact or opinion, are not assertions, *In re Penelope B.*, 104 Wn.2d 643, 652-3 (1985); I.

***State v. Osborn***, 59 Wn.App. 1 (1990)

Proper for trial court to admit prior consistent statement, ER 801(d)(1), where, during cross by party seeking to exclude, it reasonably appeared to court that the supposed motive to falsify arose after the statements were made, *Tome v. United States*, 130 L.Ed.2d 574 (1995); where inferences raised in cross-examination are sufficient to allow counsel to argue motive to fabricate, then statements may be admitted to rebut those inferences, *State v. Dictado*, 102 Wn.2d 277, 290 (1984), *State v. Perez*, 137 Wn.App. 97, 107-08 (2007), *State v. McWilliams*, 177 Wn.App. 139, 148-49 (2013); when cross of one witness lays the groundwork to show motive to fabricate by a second witness, the second witness's prior consistent statement is admissible to rebut the inference; I.

***State v. Sosa***, 59 Wn.App. 678 (1990)

Drug test lab report, certified under penalty of perjury, provided to defense at least 15 days prior to trial is admissible without further foundation if defendant has not served written demand to produce expert seven days prior to trial, CrR 6.13(b), *see: State v. Neal*, 144 Wn.2d 600 (2001), *State v. Schroeder*, 164 Wn.App. 164 (2011); I.

***State v. Johnson***, 61 Wn.App. 235 (1991), *aff'd on other grounds*, 119 Wn.2d 167 (1992)

In permitting prostitution case, defense offers evidence that defendant told an acquaintance, prior to offense, that she thinks there is an undercover officer acting as a prostitute working out of her hotel; held: statement was not hearsay, as it was offered only as circumstantial evidence of her state of mind at the time of the offense, thus should have been admitted to those counts which occurred after defendant allegedly made the statement, properly refused as to count which occurred before the statement, *State v. Stubsjoen*, 48 Wn.App. 139, 146 (1987); I.

***State v. Hobson***, 61 Wn.App. 330 (1991)

Subpoenaed theft victim informs state he is going on vacation during trial, state's motion to continue trial is denied; state does not seek material witness warrant, takes deposition of victim, defense counsel, with defendant present, cross-examines; trial court admits videotape at trial over objection; held: defendant's presence and cross-examination met "central concern" of confrontation clause, *Maryland v. Craig*, 111 L.Ed.2d 666 (1990); defense was aware witness might not be present and had time to prepare, thus defense had full opportunity for effective cross, *State v. Jenkins*, 53 Wn.App. 228, 235-6 (1989), *State v. Hewett*, 86 Wn.2d 487 (1976); issuance of subpoena and fact that state did not indicate to witness he need not appear establishes good faith effort, *State v. DeSantiago*, 149 Wn.2d 402 (2003), *State v. Hacheney*, 160 Wn.2d 503, 520-24 (2007), *see: State v. Hurtado*, 173 Wn.App. 592, 606-07 (2013), *distinguishing State v. Sanchez*, 42 Wn.App. 225 (1985); material witness warrant would have been a "hardship" on witness, unnecessary here; I.

***State v. Johnson***, 61 Wn.App. 539 (1991)

In drug case, officer's testimony that he believed and suspected defendant was trafficking was inadmissible hearsay, as it was based upon search warrant affidavit and informant who was not called to testify; officer's state of mind was not relevant to the issues at trial, as defense was not challenging warrant, *State v. Aaron*, 57 Wn.App. 277 (1990), *State v. Hudlow*, 182 Wn.App. 266 (2014); failure of defense to request limiting instruction did not waive issue, since there was no relevant limited purpose for which the evidence could be admitted; I.

***State v. Makela***, 66 Wn.App. 164 (1992)

Trial court may rule on admissibility of prior consistent statements, ER 801(d)(1)(ii), based upon argument and offers of proof, prior to declarant's testimony; mere assertion that motives to lie may have existed at time of the prior consistent statement is insufficient to prevent their admission; trial court must decide whether motive to lie rises to threshold level to exclude it, *State v. Stark*, 48 Wn.App. 245 (1987), *State v. Osborn*, 59 Wn.App. 1, 5 (1990), *Tome v. United States*, 130 L.Ed.2d 574 (1995); if admitted, defense may present evidence of motive to fabricate to trier of fact; in sex offense case, state may offer evidence from declarant as to when she made a complaint, although details are inadmissible absent requisite foundation for prior consistent statements, *State v. Murley*, 35 Wn.2d 233, 236-8 (1949); cross-examination of complainant suggesting fabrication is sufficient to permit prior consistent statements, *State v. Perez*, 137 Wn.App. 97, 107-08 (2007), *State v. McWilliams*, 177 Wn.App. 139, 148-49 (2013); I.

***State v. Becerra***, 66 Wn.App. 202 (1992)

Where lab reports are not provided to defense at least 15 days before trial, or less time upon good cause, they must be excluded, CrR 6.13(b), *see:* *State v. Neal*, 144 Wn.2d 600 (2001), *State v. Schroeder*, 164 Wn.App. 164 (2011); III.

***United States v. Salerno***, 120 L.Ed.2d 255 (1992)

To admit, for defense, former testimony before a grand jury of an unavailable witness, Fed. R. Evid. 804(b)(1), court must find that government had a similar motive to develop the testimony by direct, cross or redirect examination; Supreme Court declines to establish an "adversarial fairness" exception to the "similar motive" requirement; 8-1.

***State v. Wicker***, 66 Wn.App. 409 (1992)

Fingerprint technician testifies, over objection, that another technician's initials on fingerprint card verified his opinion that prints were defendant's; held: initials and accompanying testimony were an assertion, offered to prove the truth of what it asserts, ER 801; state's argument that the initials were admitted not for the truth but to explain police procedures, was an unnecessary explanation to introduce inadmissible hearsay, *State v. Aaron*, 57 Wn.App. 277, 280 (1990), *State v. Hudlow*, 182 Wn.App. 266 (2014); expert opinion cannot constitute a business record, *see:* *State v. Heggins*, 55 Wn.App. 591, 596 (1989); I.

***State v. Rice***, 120 Wn.2d 549 (1993)

Statement to murder co-defendant "I know where we can get some money. It would be easy, stab them" is not hearsay as it is not offered to prove truth of matter asserted but only to show premeditation, *see:* *State v. Miller*, 35 Wn.App. 567 (1983); 9-0

***State v. Babich***, 68 Wn.App. 438 (1993)

Witness's testimony that the witness passed a drug test is hearsay; III.

***State v. Ashcraft***, 71 Wn.App. 444, 456-8 (1993)

Child abuse victim's statement to physician that "mama" caused her injuries is admissible where victim lived in accused's home, raising questions of possible psychological injuries, ER 803(a)(4), *State v. Butler*, 53 Wn.App. 214, 222-23 (1991), *State v. Fisher*, 130 Wn.App. 1 (2005), *State v. Hopkins*, 134 Wn.App. 780, 787-92 (2006), *see also:* *State v. Perez*, 137 Wn.App. 97, 106 (2007), *but see:* *State v. Fitzgerald*, 39 Wn.App. 652 (1985), *cf.:* *State v. Huynh*, 107 Wn.App. 68, 74-76 (2001); while normally the victim must understand that the statement identifying the assailant was needed for treatment to be admissible, where the child is too young to appreciate the need for treatment, the statement may be admissible because victim's young age establishes reliability, as she would have no reason to fabricate the nature of her injuries; I.

***State v. Jones***, 71 Wn.App. 798, 822-4 (1993)

In child sex abuse case, court prohibits defendant from testifying that defendant was aware of victim's sexual contact with others, to explain that defendant's contact with victim was to correct her behavior; held: evidence was not hearsay, as it was offered to prove defendant's state of mind, *State v. Hamilton*, 58 Wn.App. 229, 231 (1990), *State v. Mounsey*, 31 Wn.App. 511, 522 n. 3 (1982); here, however unfair prejudice to victim outweighs probative value, so evidence was properly excluded on other grounds, *State v. Markle*, 118 Wn.2d 424, 438 (1992), *State v. Rivas*, 49 Wn.App. 677, 688 (1987); I

***State v. Florczak***, 76 Wn.App. 55 (1994)

Child hearsay statements are admissible under the medical diagnosis exception, ER 803(a)(4), even if the child declarant does not understand that the statements were necessary for medical diagnosis if corroborating evidence supports the statements, and it appears unlikely that the child fabricated, *In re S.S.*, 61 Wn.App. 488, 503 (1991), *State v. Butler*, 53 Wn.App. 214, 222-3 (1989), *Dependency of M.P.*, 76 Wn.App. 87, 92-3 (1994), *State v. Fisher*, 130 Wn.App. 1 (2005), *but see:* *State v. D.*, 89 Wn.App. 77, 84-8 (1997), *op. withdrawn, in part*, 97 Wn.App. 355 (1999), *State v. Lopez*, 95 Wn.App. 842, 848-50 (1999), trial court should identify on the record the specific evidence, drawn from the totality of circumstances, on which it relies to determine reliability; here, fearfulness, spontaneity are factors which would be difficult for a three-year old to consciously invent; while child hearsay/medical diagnosis exception, as interpreted in Washington, is not a firmly rooted exception, particularized guarantees of trustworthiness here establish that the statements did not violate confrontation clause, *see:* *Idaho v. Wright*, 111 L.Ed.2d 638 (1990), *White v. Illinois*, 116 L.Ed.2d 848 (1992), *State v. Ackerman*, 90 Wn.App. 477 (1998), *State v. Kilgore*, 107 Wn.App. 160, 182-84 (2001); I.

***Dependency of M.P.***, 76 Wn.App. 87 (1994)

Medical diagnosis exception, ER 803(a)(4), does not require that the provider of treatment be a forensic specialist, can include social workers or sex abuse therapists, *see:* *In re S.S.*, 61 Wn.App. 488, 491, 503 (1991), *State v. Butler*, 53 Wn.App. 214, 221 (1989); I.

***Tome v. United States***, 130 L.Ed.2d 574 (1995)

Defendant, charged with abuse of his daughter, claims that the allegation was concocted so that child would not be returned to him from temporary custody with mother; after cross-examination of complainant, court admits prior consistent statements, Fed. R. Evid. 801(d)(1)(B), made while child was residing with mother; held: a prior consistent statement, in order to be admissible to rebut a charge of recent fabrication, improper influence or improper motive must have been made before alleged fabrication came into being; here, fabrication allegedly occurred after the child resided with her mother, thus prior consistent statements are inadmissible; *accord:* *State v. Ellison*, 36 Wn.App. 564 (1984), *State v. Stark*, 48 Wn.App. 245 (1987), *State v. Harper*, 35 Wn.App. 855, 857-8 (1983), *State v. Osborn*, 59 Wn.App. 1 (1990), *cf.:* *State v. Perez*, 137 Wn.App. 97, 107-08 (2007); 7-2.

***State v. Collins***, 76 Wn.App. 496 (1995)

While serving warrant, police answer phone, caller asks for Larry (defendant's first name) and refers to a need for drugs; held: an inquiry is not assertive and is thus not a statement, ER 801(a), is thus not hearsay, ER 801(c), *State v. Modest*, 88 Wn.App. 239, 248-9 (1997); the need for drugs was offered as the belief that the caller could get drugs at the apartment being searched, not as an assertion that the caller really did need or want the drugs; verbal conduct which is assertive but offered as a basis for inferring something other than the matter asserted is not hearsay; a person does not normally intend to assert an implied belief; *cf.:* *State v. Stenson*, 132 Wn.2d 668, 709-12 (1997); I.

***State v. Powell***, 126 Wn.2d 244 (1995)

Homicide victim's hearsay statement that she was going to go to an apartment because she had been beaten by defendant is admissible under state of mind exception, ER 803(a)(3), to prove that declarant acted in accordance with statements of future intent, *State v. Terrovona*, 105 Wn.2d 632, 642 (1986); where state of mind of deceased is at issue, in self-defense or accident cases, then other hearsay statements of victim may be admissible, *State v. Parr*, 93 Wn.2d 102, 103 (1980), *see:* *State v. Athan*, 160 Wn.2d 354, 381, 83 (2007), *but see: State v. Fraser*, 170 Wn.App. 13, 19-24 (2012); 9-0.

***State v. Sims***, 77 Wn.App. 236, 238-41 (1995)

Hearsay statement of a domestic violence victim made during medical treatment attributing fault to an abuser may be admissible, ER 803(a)(4), where identity of abuser is reasonably pertinent to treatment, *State v. Fisher*, 130 Wn.App. 1 (2005), *State v. Williams*, 137 Wn.App. 736, 745-47 (2007), including changing relationship patterns and avoiding threatening situations in the future, *State v. Ackerman*, 90 Wn.App. 477 (1998), *State v. Price*, 126 Wn.App. 617, 639-41 (2005), *see:* *State v. Butler*, 53 Wn.App. 214 (1989), *State v. Owens*, 78 Wn.App. 897, 901-2 (1995), *State v. Huynh*, 107 Wn.App. 68, 74-76 (2001); confrontation clause issue not argued, thus not addressed, *see:* *State v. Saunders*, 132 Wn.App. 592, 603 (2006), *State v. Hopkins*, 134 Wn.App. 780, 787-92 (2006), *but see:* *State v. Sandoval*, 137 Wn.App. 532, 537-40 (2007); I.

***State v. Roberts***, 80 Wn.App. 342, 352-3 (1996)

Defense to VUCSA charge is that defendant was aware of marijuana grow operation in basement but that he had no dominion and control, that grower had threatened him to stay out of basement, trial court excludes threat as hearsay; held: threat is not hearsay as it was offered not to prove that the grower intended to carry out the threat, but only to show the effect of the threat on defendant, *i.e.*, to cause him not to report the grow operation to the police, *State v. Jessup*, 31 Wn.App. 304, 314-5 (1982); I.

***State v. Smith***, 82 Wn.App. 327 (1996)

Excited utterances that are admitted in evidence as exceptions to hearsay are admissible even if consistent with the testimony of the declarant, as they are not offered as a prior consistent statement, but rather as independently admissible hearsay, *distinguishing State v. Harper*, 35 Wn.App. 855, 857-8 (1984); I.

***State v. Connie J.C.***, 86 Wn.App. 453 (1997)

Trial court admits co-defendant's guilty plea form, containing co-defendant's confession, at defendant's trial, no showing co-defendant was unavailable; held: a confession is not a public record, RCW 5.44.040, as it is not a routine daily product of government and business, admission deprives defendant of right to cross-examine; III.

***State v. Smith***, 87 Wn.App. 345 (1997)

In speed trap infraction case, RCW 46.61.470, officer's affidavit states that Aerial Surveillance Traffic Marks are painted at one-half mile intervals by Department of Transportation, defense objects for lack of foundation; held: absent some evidence of affiant's personal knowledge, ER 602, court erred in admitting the distance between the marks; I.

***State v. Modest***, 88 Wn.App. 239, 248-9 (1997)

Telephone bill, offered to prove that defendant used the telephone frequently to call a number, is not hearsay as it is not intended to be assertive, *State v. Kelly,* 19 Wn.App.2d 434 (2021); III.

***State v. Haack***, 88 Wn.App. 423, 436-41 (1997)

Assault victim testifies that he heard defendant was after him but he heard from another that defendant had drugs for him so he went to defendant's home; held: evidence of a victim's state of mind must be relevant to a material issue to be admissible, *State v. Cameron*, 100 Wn.2d 520, 531 (1983), *State v. Parr*, 93 Wn.2d 95, 98-104 (1980), *State v. Athan*, 160 Wn.2d 354, 381-83 (2007); here, victim's state of mind was relevant to show why he went to defendant's home, thus admissible; I.

***State v. D.***, 89 Wn.App. 77 (1997), *op. withdrawn, in part,* 97 Wn.App. 355 (1999)

Where a child has not sought medical treatment but makes statements to a counselor procured by a state social agency, the record must affirmatively demonstrate the child made statement understanding that they would further the diagnosis and possible treatment of the child's condition, to be admitted as medical diagnosis exception, ER 803(a)(4), at 86; here, absent testimony from the counselor that she explained to child that treatment depended upon

truthful and accurate information, then court cannot assume that child was motivated to tell the truth by her self-interest in obtaining proper medical treatment, at 87, *see:* *State v. Florczak*, 76 Wn.App. 55 (1994), *State v. Kilgore*, 107 Wn.App. 160, 182-84 (2001); III.

***State v. Alvarado***, 89 Wn.App. 543 (1998)

Witness to homicide tapes three statements shortly after crime, detailing events of crime, at trial witness testifies he does not remember the events or whether the tape is accurate, court admits taped statement as recorded recollection, ER 803(a)(5); held: to admit, proponent must establish that (1) record pertains to a matter about which witness once had knowledge, (2) witness has insufficient recollection of the matter to provide truthful and accurate trial testimony, (3) record was made or adopted by witness when the matter was fresh in witness's memory, and (4) record reflects the witness's prior knowledge accurately; witness need not vouch for or directly aver to the statement's accuracy, court may consider totality, including whether witness disavows accuracy, *State v. Derouin*, 116 Wn.App. 38 (2003), *State v. White*, 152 Wn.App. 173, 183-86 (2009), *see:* *State v. Floreck*, 111 Wn.App. 135, 139-40 (2002), *State v. Nava*, 177 Wn.App. 272 (2013), averred to accuracy at the time of making the statement, whether the recording process is reliable and other indicia of reliability, *In re Detention of Peterson*, 197 Wn.App. 722 (2017); here, two of the three statements were consistent with each other, witness acknowledged on tape the information was correct, statements were corroborated; witness' first statement denied knowledge, which does not render latter statements inadmissible, as witness explained later that this first statement was untrue due to his fear; while first statement of denial is not admissible under the rule, it is admissible under the rule of completeness, to allow defense to assail credibility; I.

***State v. Ackerman***, 90 Wn.App. 477 (1998)

In sex offense case, unavailable victim's hearsay statements that she had been sexually abused are admissible under the "hue and cry" doctrine, a caselaw exception to the hearsay rule allowing evidence that the victim made a timely complaint to someone after the assault, *State v. DeBolt*, 61 Wn.App. 58, 63 (1991), even if defense does not raise timeliness of complaint as an issue, *State v. Alexander*, 64 Wn.App. 147, 151 (1992), *State v. Murley*, 35 Wn.2d 233, 236-7 (1949), as long as trial court finds particular guarantees of trustworthiness from totality of circumstances, *State v. Florczak*, 76 Wn.App. 55 (1994); details and identify of offender are not permitted; I.

***State v. C.N.H.***, 90 Wn.App. 947 (1998)

Certified copy of state identification card is admissible as a public record, RCW 5.44.040, to prove age; I.

***State v. Marintorres***, 93 Wn.App. 442, 448-49 (1999)

State of mind exception to hearsay rule, ER 803(a)(3), applies only to the declarant's state of mind, not the witness's state of mind; escape defendant's testimony that others had told him his sentence had expired is not hearsay, as it is offered not for the truth but to prove the statement's effect on defendant's state of mind, but here, the evidence is not relevant; II.

***State v. Finch***, 137 Wn.2d 792, 824-25 (1999)

A statement of defendant to a third party that is self-serving and offered by the defense is inadmissible hearsay unless it meets some exception, *State v. Bennett*, 20 Wn.App. 783, 787 (1978), *State v. Stubsjoen*, 48 Wn.App. 139 (1987), *State v. Johnson*, 60 Wn.2d 21, 31 (1962); 7-2.

***State v. Phillips***, 94 Wn.App. 829 (1999)

In violation of a no contact order case, return of service of the no contact order is a public record, RCW 5.44.040, *see: State v. Bolen*, 142 Wash. 653, 663 (1927), *State v. Hines*, 87 Wn.App. 98, 101 (1997); I.

***State v. Lopez***, 95 Wn.App. 842, 848-50 (1999)

Child's statement to a "forensic interviewer" hired solely to interview children to determine sexual abuse for trial, is not admissible under medical diagnosis exception, ER 804(a)(4), as declarant's motive was not shown to be consistent with receiving medical care and it was not reasonable for a physician to rely on the information, *In re Dependency of M.P.*, 76 Wn.App. 87, 93 (1994), *cf.: In re Dependency of Penelope B.*, 104 Wn.2d 643, 656 (1985), *State v. Fisher*, 130 Wn.App. 1 (2005); III.

***Spokane County v. Bates***, 96 Wn.App. 893, 899-900 (1999)

In vicious dog case, witness testifies that she had investigated two complaints from defendant's neighbor that his dog had attacked her, court instructs jury that the evidence is offered solely for notice and not as to truth of the incidents; held: statements were not offered to prove substance of the complaints, but to prove that defendant had been informed about aggressive behavior of the dog; III.

***State v. Chapman***, 98 Wn.App. 888 (2000)

Certified copy of driving record and certified copy of order of license revocation are admissible without testimony by the official custodian, as foundation is evident on the face of the documents, *State v. Monson*, 53 Wn.App. 854, 858, *aff'd*, 113 Wn.2d 833 (1989); III.

***State v. Hirschfield***, 99 Wn.App. 1 (1999)

Child witness informs court that she's not going to testify because she doesn't want to talk about it any more, even if ordered by the court which finds her unavailable and admits hearsay, RCW 9A.44.120(1)(b), ER 804(a)(2); held: trial court applied "appropriate judicial pressure by its questioning," and was not obliged to order the witness to testify before declaring her unavailable, *but see: Crawford v. Washington*, 158 L.Ed.2d 177 (2004); I.

***State v. Crowder***, 103 Wn.App. 20 (2000)

Defendant is charged with theft by embezzlement by exercising unauthorized control over elderly victim's estate, trial court admits victim's out-of-court statements that defendant "has taken care of everything," later that he was going to "pull in the purse strings" to stop defendant's spending his money; held: statements were not hearsay, as they went to victim's state of mind, his reliance on defendant, and to defendant's influence on victim, not admitted to prove that victim had in fact taken care of everything or that defendant had in fact pulled in the purse strings; court admits statement of victim that he had turned over management of his affairs

to defendant but couldn't give any particulars on his affairs, held to be not hearsay but rather evidence that defendant did not comprehend his own financial situation, thus state of mind; I.

***State v. James***, 104 Wn.App. 25, 30-35 (2000)

In bail jumping case, court admits state's motion and declaration for issuance of bench warrant; held: court records exception, RCW 5.44.010, is a firmly rooted hearsay exception if the records contain facts rather than conclusions involving discretion or expression of opinion; court records, like public records, are admissible because of declarant's official duty and high probability that declarant has performed the public duty of making an accurate record, *State v. Monson*, 113 Wn.2d 833, 845 (1989); here, prosecutor was acting as an advocate, not creating a "routine court record"; II.

***State v. Woods***, 143 Wn.2d 561, 601-03 (2001)

Victim tells physician that she was threatened with rape, beaten and forced to observe and hear beating of another victim, admitted under medical diagnosis and treatment exception, ER 803(a)(4); held: because psychological treatment falls within definition of medical treatment exception, *State v. Florczak*, 76 Wn.App. 55, 65 (1994), entire story was necessary to arrange for counseling for post traumatic distress, thus admissible within discretion of trial court, *cf.: State v. Redmond*, 150 Wn.2d 489, 496-97 (2003); 9-0.

***State v. Neal***, 144 Wn.2d 600 (2001)

In drug case, state files CrR 6.13(b) certificate which states that crime lab received the substance from the "evidence vault" rather than a person as required in CrR 6.13(b)(1), defense files demand for expert 6 days before trial, trial court admits certificate as demand was untimely and it substantially complied with rule; held: defendant's untimely demand does not waive hearsay objection where report does not strictly comply with the rule establishing the hearsay objection, failure of the certificate to state the name of the person from whom the lab received the evidence is fatal to admissibility, reversing *State v. Neal*, 102 Wn.App. 99 (2000), *State v. Schroeder*, 164 Wn.App. 164 (2011); 9-0.

***State v. Nation***, 110 Wn.App. 651, 661-67 (2002)

Supervisor of crime lab testifies that, based upon notes of criminalist who tested the drugs, his opinion is that they are controlled substances; held: abuse of discretion to admit hearsay testimony of a subordinate who tested the drugs unless the expert establishes that he as well as others would act upon the information for purposes other than litigation; here, expert stated tests are prepared only for court testimony, *see: State v. Ecklund*, 30 Wn.App. 313 (1981), *State v. Berllerouche*, 129 Wn.App. 912, 916-18 (2005); III.

***State v. Floreck***, 111 Wn.App. 135, 139-40 (2002)

Where declarant denies accuracy of prior statement, it is inadmissible as recorded recollection, ER 803(a)(5), *cf.: State v. Alvarado*, 89 Wn.App. 543, 552 (1998), *State v. Derouin*, 116 Wn.App. 38 (2003), *State v. White*, 152 Wn.App. 173, 183-86 (2009), *In re Detention of Peterson*, 197 Wn.App. 722 (2017), *but see: State v. Nava*, 177 Wn.App. 272 (2013); II.

***State v. Spencer***, 111 Wn.App. 401, 407-11 (2002)

Court refuses defense offer of a witness to testify that state's witness told her that she said defendant committed crime because police threatened her; held: testimony offered to impeach the witness via her state of mind is not hearsay, *Betts v. Betts*, 3 Wn.App. 53, 59 (1970), and is admissible whether or not brought to the declarant's attention on the stand; II.

***State v. Crawford***, 147 Wn.2d 424, 432-40 (2002), *rev'd, Crawford v. Washington,* 158 L.Ed.2d 177 (2004)

Police take statements from defendant and his wife, later question them again getting a statement different than the first statements, defendant invokes marital privilege, court admits wife's statements; held: wife's first statement is not hearsay, as it was offered not to prove the truth of the matter asserted, but to demonstrate that she lied about the circumstances preceding the crime, *State v. Roberts*, 142 Wn.2d 471, 496 (2000), and is relevant only if a subsequent inconsistent statement is admitted; 9-0.

***State v. King***, 113 Wn.App. 243, 291-93 (2002)

Witness testifies for state at defendant's robbery trial, dies, at defendant's conspiracy trial court admits witness' former testimony, ER 804(b)(1); held: former testimony exception does not require that the issues be identical, merely that the issues and the purpose for which the testimony was offered must have been such that the party against whom the testimony is offered had an adequate motive for testing the credibility of the testimony in the earlier proceeding; I.

***State v. Jackson***, 113 Wn.App. 762 (2002)

Victim testifies that she listened to 911 tape, it was her voice and it was accurate; held: witness with personal knowledge of conversation who testifies that tape accurately portrays the original conversation and identifies each relevant voice authenticates the evidence, ER 901, *State v. Williams*, 49 Wn.2d 354. 360 (1956), *State v. Smith*, 85 Wn.2d 840, 847 (1975); II.

***State v. DeSantiago***, 149 Wn.2d 402, 408-15 (2003)

Following mistrial, state discovers its witnesses moved to Mexico or Texas, makes efforts to locate witnesses, mails subpoenas, contacts family members to no avail, trial court admits former testimony at second trial, ER 804(b)(1); held: party need not exercise due diligence, distinguishing *State v. Adamski*, 111 Wn.2d 574 (1988), or invoke out of jurisdiction summons, ch. 10.55 RCW, where witness' location is unknown, *see: State v. Sweeney*, 45 Wn.App. 81, 86 (1986), *cf.: State v. Rivera*, 51 Wn.App. 556 , 560 (1988), as long as the party exercises good faith and reasonable efforts; where state adds a charge between trials, former testimony is admissible, within discretion of trial court, as long as motive and incentive to cross-examine are substantially the same; affirms *State v. DeSantiago*, 108 Wn.App. 581 (2001); 7-2.

***State v. Derouin***, 116 Wn.App. 38 (2003)

Declarant makes statement to police, officer writes it down, declarant signs it, at trial declarant testifies she does not remember giving the statement or meeting with police, at pretrial hearing another witness testifies he spoke with declarant who made a statement consistent with statement to police, trial court denies state's offer of statement to police as past recorded recollection, ER 803(a)(5); held: totality of circumstances support sufficient indicia of reliability to admit statement, *State v. Alvarado*, 89 Wn.App. 543 (1998), *see: State v. Floreck*, 111 Wn.App. 135, 139-40 (2002), *State v. Nava*, 177 Wn.App. 272 (2013), *c.f: Crawford v.*

*Washington*, 158 L.Ed.2d 177 (2004); foundation testimony to establish that record reflects the witness' prior knowledge accurately need not come from same declarant who gave the prior statement; I.

***State v. Redmond***, 150 Wn.2d 489 (2003)

Where medical records are admitted in assault case, trial court should, upon request, redact statements attributing fault, *see: State v. Fitzgerald*, 39 Wn.App. 652 (1985), *State v. Woods*, 143 Wn.2d 561, 602 (2001), *State v. White*, 152 Wn.App. 173, 183-86 (2009); where a statement is offered for a non-hearsay purpose, trial court must give a limiting instruction if requested, *State v. Parr*, 93 Wn.2d 95, 98-99 (1980); 9-0.

***Crawford v. Washington***, 158 L.Ed.2d 177 (2004)

In attempted murder case, police take statements from defendant's wife describing incident; at trial, defense invokes marital privilege, court admits wife's statement against penal interest; held: testimonial statements are inadmissible at trial unless declarant testifies at trial or defense was previously able to cross-examine declarant; "testimonial" statements include *ex parte* in-court testimony or its functional equivalent, such as affidavits, custodial examinations, prior testimony that defendant was unable to cross-examine or similar pretrial statements that declarants would reasonably expect to bused prosecutorially, including those made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial, *see: Davis v. Washington*, 165 L.Ed.2d 224 (2006), *State v. Mason*, 160 Wn.2d 910 (2007); overrules reliability test of *Ohio v. Roberts*, 65 L.Ed.2d 597 (1980); reverses *State v. Crawford*, 147 Wn.2d 424 (2002); *see: White v. Illinois*, 116 L.Ed.2d 848 (1992)(Thomas, J., concurring); 7-2.

***State v. Thomas***, 150 Wn.2d 821, 864-67 (2004)

Prior consistent statement, ER 801(d)(1)(ii), is not admissible to reinforce or bolster testimony of a witness, *Thomas v. French*, 99 Wn.2d 95, 103 (1983), *State v. Harper*, 35 Wn.App. 855 (1983), *State v. McDaniel*, 37 Wn.App. 768 (1984), *State v. Purdom*, 106 Wn.2d 745, 750 (1986), except where an inference is raised in cross-examination that the witness changed her story in response to an external pressure, whereupon whether that witness gave the same account of the story prior to the onset of the external pressure becomes probative of the witness' veracity, *see: State v. Perez*, 137 Wn.App. 97, 107-08 (2007), *State v. McWilliams*, 177 Wn.App. 139, 148-49 (2013); 9-0.

***State v. Shaw***, 120 Wn.App. 847 (2004)

Value of a car may be proved by Kelley Blue Book web site under market report exception, ER 803(a)(17); I.

***State v. Orndorff***, 122 Wn.App. 781 (2004)

Excited utterance to a civilian is not testimonial, and is thus not excluded under confrontation clause, *Crawford v. Washington*, 158 L.Ed.2d 177 (2004); II.

***State v. Powers***, 124 Wn.App. 92 (2004)

In domestic violence protection order trial, RCW 26.50.110(5), complainant's 911 call to report defendant's violation and describing defendant to assist in apprehension is admitted at

trial; held: trial court must assess the 911 call as testimonial or nontestimonial and whether the statement originates from interrogation, *Crawford v. Washington*, 158 L.Ed.2d 177 (2004); here, because the call was not made to protect the victm from defendant, her hearsay statements were testimonial and erroneously admitted when she became unavailable at trial, *State v. Pugh*, 167 Wn.2d 825 (2009), *State v. Mason*, 160 Wn.2d 910, 919-20 (2007), *State v. Walker*, 129 Wn.App. 258 (2005), *State v. Williams*, 136 Wn.App. 486, 501-04 (2007), *see: Davis v. Washington*, 165 L.Ed.2d 224 (2006); II.

***State v. Price***, 126 Wn.App. 617 (2005)

A defendant's statement within an *Alford* plea is a party admission, at 634-36, ER 801(d)(2), *Mendoza v. Rivera-Chavez*, 88 Wn.App. 261, 272 (1997), *N.Y. Underwriters Ins. Co. v. Doty*, 58 Wn.App. 546, 550-51 (1990); II.

***State v. Howard***, 127 Wn.App. 862, 870-72 (2005)

Evidence as to the name by which a person is known is not hearsay, *State v. Siverly*, 140 Wash. 58, 60 (1926); I

***State v. Walker***, 129 Wn.App. 258 (2005)

Trial court admits, as excited utterance, statement of jail inmate to police describing an assault on himself two hours after the assault; in companion case, child rape complainant's statements to her mother describing the incident are admitted; held: a detailed narrative in response to structured police questioning violates confrontation clause, *Crawford v. Washington*, 158 L.Ed.2d 177 (2004), *State v. Powers*, 124 Wn.App. 92 (2004); statements to mother, even if initiated by the mother, do not violate confrontation clause, at 272-73; I.

***Pers. Restraint of Theders***, 130 Wn.App. 422, 429-33 (2005)

In attempted murder trial, court admits co-defendant's out of court cell telephoned statement that he and defendant were shopping, offered to prove that defendant and co-defendant had concocted an alibi; held: statements were not offered to prove the truth of the matter asserted, *i.e.*, that they were shopping, but rather to prove defendant's knowledge and agreement to co-defendant's false alibi, thus statement did not violate confrontation clause and was not hearsay; I.

***State v. Edwards***, 131 Wn.App. 611 (2006)

In drug case, trial court admits, over objection, detective's testimony that an informant told detective that defendant was dealing drugs to explain why detective started his investigation; held: because detective's state of mind was not relevant to whether defendant committed the drug offense, the statement was hearsay, offered to prove the substance of the statement, and should have been excluded, *State v. Hudlow,* 182 Wn.App. 266 (2014), *State v. Rocha*,21 Wn.App.2d 26 (2022), *State v. Gonzalez-Gonzalez,* 193 Wn.App. 683, 688-91 (2016), *distinguishing State v. Roberts*, 80 Wn.App. 342, 352-53 (1996), *State v. Jessup*, 31 Wn.App. 304, 314-15 (1982); III.

***State v. Benefiel***, 131 Wn.App. 651 (2006)

In escape from community custody case, community corrections officer testifies, over objection, that defendant did not report nor was CCO notified that defendant appeared in any other DOC office; held: personal knowledge of witness is not hearsay; III.

***State v. Saunders***, 132 Wn.App. 592, 601-07 (2006)

Domestic violence victim tells paramedic and physician that defendant choked her; held: there is no reason to believe that a reasonable person in victim's position would think she was making a record of evidence for prosecution, thus statement is not testimonial and is thus admissible under **medical treatment exception**, ER 803(a)(4), *but see: State v. Hurtado,* 173 Wn.App. 592 (2013); I

***State v. Chambers***, 134 Wn.App. 853 (2006)

Undercover police observe van pull to house, passenger walks to house, tells officer he has the money for drugs and asks how much, passenger walks back to van, speaks with driver, gets money from driver, returns to officer, pays, gets drugs, driver is arrested, at trial officer testifies to what passenger said; held: passenger's statements are not hearsay, not offered to prove that passenger had money or cared about the price but "to prove that a dialogue occurred…about purchasing drugs," at 859 ¶15; statements also were by an agent, ER 801(d)(2)(iv), which does not require unavailability; statement by a coconspirator does not violate confrontation clause, *State v. Williams,* 131 Wn.App. 488 (2006), *Crawford v. Washington*, 158 L.Ed.2d 177, 195-96 (2004); II.

***State v. Sanchez-Guillen***, 135 Wn.App. 636, 645-46 (2006)

Defense offers defendant's out-of-court statement at trial to show that the shooting was an accident as statement against interest and state of mind exception to hearsay rule, *see: State v. King*, 71 Wn.2d 573, 577 (1967); held: statement against interest exception, ER 804(b)(3), cannot apply to a criminal defendant's statement, as the defendant is not unavailable by mere assertion of a privilege, ER 804(a)(6), *cf.: State v. Dictado*, 102 Wn.2d 277, 287 (1984); state of mind exception applies to state of mind at the time the statement was made, not the earlier time the statement describes, *State v. Ammlung,* 31 Wn.App. 696, 703 (1982); III.

***State v. Williams***, 136 Wn.App. 486, 499-501 (2007)

CD of 911 call contains label asserting that recording was prepared by police communications section and was transferred from a master recording, no witness is called to authenticate it but trial court speaks with caller in court who refuses to testify, court admits call over objection; held: authentication, ER 901, is not subject to rules of evidence, ER 104(a), 1101(c)(1), *State v. Danielson*, 37 Wn.App. 469, 471 (1984), trial court may rely upon lay opinions, hearsay or the proffered evidence itself in determining authenticity; here, trial court spoke to declarant in court and listened to the recording, thus was in best position to determine if voice matched; other factors included recital of declarant's address on the 911 call, fact that events recounted by caller were consistent with testimony, label on front of CD, all within trial court's discretion; I.

***State v. Perez***, 137 Wn.App. 97, 106-08 (2007)

Child's statement about injuries and perpetrator to DCFS social worker acting as an investigator is inadmissible under medical diagnosis and treatment exception, ER 803(a)(4), harmless here; where 4-year old's testimony is challenged on the basis of his ability to recall and testify reliably, his prior consistent statements are admissible, ER 801(d)(1)(ii), *State v. Thomas,* 150 Wn.2d 821, 864-67 (2004), *State v. Smith*, 30 Wn.App. 251 (1981), *State v. Makela*, 66

Wn.App. 164 (1992), *but see:* *State v. Bargas*, 52 Wn.App. 700 (1988), *Tome v. United States*, 130 L.Ed.2d 574 (1995); III.

***State v. Williams***, 137 Wn.App. 736 (2007)

Rape and assault victim provides details of offense, including name of perpetrator, to forensic nurse at hospital using a history questionnaire, stating that she went to the hospital to "gather evidence" and to identify injuries, nurse testifies at trial; held: a party demonstrates a statement to be reasonably pertinent to medical treatment when (1) the declarant's motive in making the statement is to promote treatment and (2) the medical professional reasonably relied on the statement for purposes of treatment, at 746, *State v. Butler*, 53 Wn.App. 214, 220 (1989); here, victim did not go to hospital for purely forensic reasons; in sexual abuse situation, a declarant's statement disclosing identity of a closely-related perpetrator is admissible, ER 803(a)(4), to prevent recurrence and future injury, at 746 ¶ 20, *see:* *State v. Ackerman*, 90 Wn.App. 477, 482 (1998), *State v. Sims*, 77 Wn.App. 236, 239 (1995) (*dicta* here); witness may testify from notes to refresh recollection, ER 612, where (1) the witness' memory needs refreshing, (2) opposing counsel can examine the writing, and (3) trial court is satisfied that witness is not being coached, that the witness is using the notes to aid, not supplant, her memory, *State v. Little*, 57 Wn.2d 516, 521 (1961), *State v. McCreven*, 170 Wn.App. 444, 473-76 (2012), where test is met trial court does not abuse its discretion by allowing witness to refresh her memory by reading the notes, at 750-51; II.

***State v. Benn***, 161 Wn.2d 256, 265-67 (2007)

At first trial, defendant instructs counsel not to cross-examine a state's witness, counsel mistakenly believes he is obliged to follow instructions and asks no questions, conviction is reversed, on retrial court admits former testimony, ER 804(b)(1), witness having died; held: because defense had the opportunity and similar motive to cross-examine at first trial, former testimony was admissible and did not violate confrontation clause, *see also:* *Pers. Restraint of Benn*, 134 Wn.2d 868, 894 (1998); 7-2.

***State v. Stratton***, 139 Wn.App. 511, 516-18 (2007)

Civilian witness testifies that he could not remember what color shirt defendant was wearing, officer then testifies that civilian told him that the defendant's shirt was yellow; held: prior statement of identification of a person made after perceiving him is admissible as a hearsay exception, ER 801(d)(1)(iii), *State v. Grover*, 55 Wn.App. 923 (1989), *State v. Jenkins*, 54 Wn.App. 228, 233 n.3 (1989), *State v. Grover*, 55 Wn.App. 252 (1989), which may include the various physical characteristics of a person perceived by the witness; III.

***State v. Perez***, 139 Wn.App. 522, 530-31 (2007)

Defendant offers his own oral statement to police under "rule of completeness;" held: rule of completeness, ER 106, is limited to a writing or recorded statement, not oral statements, *but see:* *State v. West*, 70 Wn.2d 751, 754-55 (1967), *see also:* *State v. Roberts*, 142 Wn.2d 471, 492 (2000); II.

***State v. Brown,*** 145 Wn.App. 62, 68-77 (2008)

Toxicologist testifies that vials are provided by manufacturer with potassium oxalate and sodium fluoride and that if they were not present, the blood would clot and no alcohol would be

detected, blood here was not clotted and alcohol was present; held: hearsay is admissible to prove foundation, ER 104(a), 1101(c)(1); while the testimony of the toxicologist regarding what the manufacturer said was in the vials was hearsay and should not have been heard by the jury, it was proper for the court to consider it in determining admissibility for foundational purposes, allowing the jury to hear it was harmless; III.

***State v. White***, 152 Wn.App. 173, 183-86 (2009)

Witness testifies she was intoxicated, can't remember assault, when presented a copy of her signed police statement, she testifies she does not remember if the statements are true, officer testifies to taking the statement; held: prior recorded recollection, ER 803(a)(5), may be admitted where victim denies making the statement where trustworthiness and accuracy is established by the officer taking the statement, *State v. Derouin*, 116 Wn.App. 38, 45-46 (2003), and other evidence of reliability (here, 911 tape) is admitted, totality of circumstances support trial court's ruling; I.

***State v. Alvarez-Abrego***, 154 Wn.App. 351, 366-69 (2010)

In child abuse case, court admits doctor's testimony that victim's mother told doctor that victim's sister, who was not called to testify, told her victim had been thrown against the wall; held: medical diagnosis exception, ER 803(a)(4), does not allow for admission of double hearsay at least where the declarant is not the victim, distinguishing *State v. Justiniano*, 48 Wn.App. 572 (1987); II.

***State v. Price***, 154 Wn.App. 480 (2009)

A note found near homicide victim in her handwriting declaring that defendant shot her for "fooling around" is admissible as a dying declaration, ER 804(b)(2), evidence that victim was shot for another reason than "fooling around" does not preclude admissibility, goes to weight; declaration was addressed to her daughter, thus it is not testimonial; I.

***State v. McDaniel***, 155 Wn.App. 829 (2010)

Detective, deemed by court to be a gang expert, ER 702, testifies as to defendant Marlowe that his nickname is Reese, based upon a photograph of Marlowe with the name Reese on it, that Reese is a diminutive of Marlowe's first name Direce, and that recorded jail telephone calls to Marlow's residence used the nickname; detective also testifies that he learned through his expertese and investigation that defendant McDaniel's nickname is Tony Guns, by questioning unidentified people; held: detective's knowledge of Marlowe's nickname was based on firsthand, nonhearsay information, thus did not violate confrontation clause; detective's knowledge of McDaniel's nickname was based upon testimonial statements of others and thus violates confrontation clause; detective's evidence that a Tony Guns lived with McDaniel's grandmother does not prove that McDaniel is Tony Guns; unidentified persons are not "intimately associated with" McDaniel's family such that the nickname is admissible as a statement of personal or family history, ER 804(b)(4), nor is there evidence that they were unavailable, ER 804(b); 2-1, II.

***State v. Sublett***, 156 Wn.App. 160, 197-99 (2010), *aff'd, on other grounds,* 176 Wn.2d 58 (2012)

Where a person's state of mind is relevant, statements discussing the conduct of another person that may have created the declarant's state of mind are inadmissible under ER 803(a)(3), *State v. Parr*, 93 Wn.2d 95, 104 (1980); II.

***Det. of Coe,*** 175 Wn.2d 482 (2012)

HITS database evidence, a police tool which collects "signature details for similar crimes in a specific area" contains inadmissible hearsay, at 501-08, although it may be relied upon by an expert, at 512-13; 9-0.

***State v. Pavlik***, 165 Wn.App. 645 (2011)

During altercation and immediately after shooting, defendant yells to police, "you saw it, it was self defense," shortly thereafter makes two similar statements, defense seeks to offer statement as excited utterance or state of mind, trial court excludes as "self-serving," held: there is no self serving hearsay rule, party admission, ER 801(d)(2), which only can be offered by the state, does not exclude admission if the statement fits into another exception; while the first statement was likely admissible, within court's discretion, as an excited utterance, *State v. Woods,* 143 Wn.2d 561, 597 (2001), exclusion here was not an abuse of discretion and was harmless, as self defense failed on the facts, not the absence of the statement; 2-1, III.

***Williams v. Illinois***, 567 U.S. 50, 132 S.Ct. 2221, 183 L.Ed.2d 90 (2012)

State lab expert testifies that a DNA profile produced by an outside laboratory matched a profile that state lab produced using a sample of defenndant's blood, based on business records stating that swabs taken from victim were sent to outside lab and returned; held: an expert may express an opinion that is based on facts that the expert assumes, but does not know, to be true, expert may explain the facts on which expert's opinion is based without testifying to the truth of those facts which are not hearsay and do not violate confrontation clause, *State v. Manion,* 173 Wn.App 610 (2013); outside lab report was produced before any suspect was identified, was not sought to obtain evidence against defendant and thus does not violate confrontation clause; expert's testimony that the outside lab's sample came from the victim is admissible in a bench trial but not a jury trial; 5-4 (plurality opinion).

***State v. Lucas***, 167 Wn.App. 100 (2012)

Psychiatrist, in support of diminished capacity defense, testifies to defendant's statements during evaluation, defendant does not testify, trial court allows state to cross-examine psychiatrist as to defendant's prior felony conviction to impeach, ER 806; held: while the credibility of a hearsay statement may be attacked as if the declarant had testified, ER 806, a statement relied upon by an expert is not hearsay as not offered as substantive proof, thus do not expose declarant to impeachment under ER 806, *but see: State v. Mohamed,* 186 Wn.2d 235 (2016); II.

***State v. Fraser***, 170 Wn.App. 13, 19-24 (2012)

In homicide case, trial court admits victim's statement to police three months earlier that he feared defendant, gives limiting instruction that statement is admitted for victim's state of mind, not for truth; held: statement that survives a hearsay challenge does not, *per se,* survive a confrontation clause challenge, *State v. Mason,* 160 Wn.2d 910, 922 (2007); here, the statement

was used to prove victim feared defendant, thus it was not only for state of mind, violated confrontation clause; harmless here; I.

***State v. Bradford***, 175 Wn.App. 912, 927-30 (2013)

In stalking case, trial court admits officer's testimony reading to the jury text messages received by victim and an examination report of another witness' cell phone including the text messages received, defense challenges authentication, ER 901(a), asserting state did not prove he sent the messages; held: evidence that defendant appeared at victim's place of employment and home frequently, demonstrating a desperate desire to communicate with victim, authenticates the text messages as "consistent with this obsessive behavior that he would also send text messages" as an effort to contact victim; content of the messages are consistent with defendant's previous messages and acts linking him to the messages, *see: State v. Young*, 192 Wn.App. 850 (2016); during a five month period in which defendant was in jail and thus unable to text, upon release text messages began again also adds to authentication, *Det. of H.N.*, 188 Wn.App. 744, 750-61 (2015); I.

***State v. Nava***, 177 Wn.App. 272 (2013)

Police tape record interviews with witnesses inculpating defendant, at trial witnesses testify they were intoxicated when they gave the statements, one testifies he was "probably" lying, other two are equivocal, police testify to details in statements consistent with statements from other witness and with physical evidence, trial court admits statements as recorded recollections, ER 803(a)(5); held: to gauge admissibility of recorded recollection, court must examine whether witness disavows accuracy, whether witness averred accuracy at the time, whether recording process is reliability, and whether other indicia of reliability establish trustworthiness, *State v. Alvarado,* 89 Wn.App. 543 (1998), *see: In re Detention of Peterson,* 197 Wn.App. 722 (2017); admissibility does not require personal vouching by the witness as long as there is other reliable evidence and court articulates reasons "why the trial court disbelieves the witness' current disavowal," at 295; where a witness' disavowal is resolute, court must find the disavowal "to be essentially perjurious in addition to finding sufficient independent evidence of reliability; III.

***State v. Garcia***, 179 Wn.2d 828, 844-46 (2014)

In kidnapping case in which defendant enters an occupied home and has conversations with occupant, trial court excludes statements defendant made to complainant offered to show that he did not hold her as a hostage or cause mental distress; held: excluded statements were not offered for truth but to prove defendant's intent thus were not hearsay and were erroneously excluded; 9-0.

***State v. Dobbs***, 180 Wn.2d 1 (2014)

Before and after arrest, defendant threatens victim who fails to appear at trial, court finds by clear, cogent and convincing evidence that defendant's acts caused victim's absence, admits hearsay statements; held: doctrine of forfeiture by wrongdoing is applicable, court may consider acts before and after state initiated criminal proceedings, *Giles v. California,* 554 U.S. 353, 377, 171 L.Ed.2d 488 (2008), lack of a direct statement from victim that she feared harm as a result of testifying is not required as long as court concludes that it was highly likely why victim did not appear, hearsay statements need not meet a hearsay exception, *State v. Fallentine,* 149 Wn.App.

614, 623-24 (2009), as defendant waived his hearsay objection, *State v. DeJesus Hernandez,* 192 Wn.App. 673 (1992); affirms *State v. Dobbs, 167* Wn.App. 905 (2012); 6-3.

***State v. Hudlow****,* 182 Wn.App. 266 (2014)

En route to a controlled buy detective overhears informant's side of telephone call with defendant and testifies, over objection, that he "understood" that there were arrangements to buy drugs, state arguing that it wasn't hearsay but was admitted to explain "how he contacted" *[sic]* and for detective's state of mind; held: detective's mental condition was not relevant, *State v. Lowrie,* 14 Wn.App. 408 (1975), *State v. Aaron,* 57 Wn.App. 277, 279-81 (1990), *State v. Johnson,* 61 Wn.App. 539, 545 (1991), *State v. Edwards,* 131 Wn.App. 611, 614 (2006), thus statement was both hearsay and violated confrontation clause; III.

***State v. Chenoweth****,* 188 Wn.App. 521, 531-35 (2015)

Court admits evidence that victim disclosed rape to his sister a year after it occurred; held: while fact of complaint exception to hearsay rule is inapplicable where the complaint was not timely made, *State v. Ferguson,* 100 Wn.2d 131, 135-36 (1983), it is admissible to show "only how the allegations came to the attention of law enforcement," *State v. Iverson,* 126 Wn.App. 329, 333 (2005), thus is not hearsay, *State v. Martinez,* 196 Wn.2d 605 (2020), *cf. State v. Edwards,* 131 Wn.App. 611 (2006); II.

***Det. of H.N.,*** 188 Wn.App. 744, 750-61 (2015)

Text messages were properly admitted where respondent admitted she sent them, identifying information on the message indicated she was the sender, content referenced people in her life, content was consistent with events that happened in her life, timing was consistent with events independently described, ER 901(b)(10), *State v. Bradford,* 175 Wn.App. 912 (2013); proponent must make only a *prima facie* showing of authenticity, court may consider evidence of authenticity that otherwise might be objectionable, court only considers evidence offered by proponent and disregards contrary evidence, once court determines evidence is authenticated, ER 901, then opponent may object on the basis of other rules and may offer contradictory evidence to the trier of fact, *Rice v. Offshore Sys., Inc.,* 167 Wn.App. 77, 86 (2012), *State v. Young,* 192 Wn.App. 850 (2016); I.

***State v. Mohamed****,* 186 Wn.2d 235 (2016)

Defense diminished capacity expert testifies to statements made by defendant to the expert, defense declines limiting instruction stating that statements were only admitted for basis of opinion, trial court permits state to prove prior *crimen falsi* convictions, ER 609, 806; held: when a statement is admitted for a non-hearsay purpose, here basis of opinion, ER 703, 705, it may not be impeached as it is not offered as substantive evidence, *State v. Lucas,* 167 Wn.App. 100 (2012), but here because defense declined the instruction which would have limited the statement to a non-hearsay purpose it was admitted as substantive evidence and thus is subject to impeachment; reverses *State v. Mohamed,* 189 Wn.App. 533 (2015); 9-0.

***State v. Young****,* 192 Wn.App. 850 (2016)

Trial court admits text messages when witness testified she had personal knowledge the message came from defendant, messages came from a phone number that defendant had provided to witness, initials on message were those witness knew defendant used, context of

messages themselves were consistent with other evidence, defense offered evidence that someone else wrote the texts; held: *prima facie* evidence supports authentication, *State v. Bradford*, 175 Wn.App. 912 (2013), *State v. H.N.*, 188 Wn.App. 744 (2015), *cf.: State v. Blizzard*, 195 Wn.App. 717, 734-35 (2016), in determining authentication court considers only evidence offered by proponent and disregards contrary evidence offered by opponent, *Rice v. Offshore Sys., Inc.*, 167 Wn.App. 77, 86 (2012); II.

***State v. Gonzalez-Gonzalez***, 193 Wn.App. 683, 688-91 (2016)

Over objection, officer testifies that she found defendant's apartment as a result of a records check on defendant's alias, state argues that officer did not repeat what someone else had said and that it was elicited for the benign purpose of establishing why the officer approached the particular apartment; held: hearsay includes an implied statement offered for its truth; here, the implied statement is that police knew defendant based upon his alias and is thus inadmissible hearsay, *State v. Rocha*,21 Wn.App.2d 26 (2022)harmless here; standard of review of a hearsay ruling is *de novo*, *but see: State v. Woods*, 143 Wn.2d 561, 595 (2001); III.

***In re Detention of Peterson***, 197 Wn.App. 722 (2017)

State offers written and recorded statements of crime victim who testifies she recognizes her handwriting and remembers making recording but does not recall content of either, that it would have been accurate at the time, defense offers evidence of inconsistencies and that victim has a reputation for dishonesty, court admits statements as **past recollection recorded**, ER 803(a)(5); held: test for admissibility is that declarant doesn't disavow statements, avers that they were accurate at the time and that the recording *process* is reliable, witness' reliability goes to weight, *State v. Alvarado*, 89 Wn.App. 543, 551-53 (1998), *State v. Derouin*, 116 Wn.App. 38 (2003); II.

***State v. Wafford***, 199 Wn.App. 32 (2017)

*In limine* trial court excludes child victim's videotaped statement, defense counsel references the statement in opening claiming that victim denied the abuse, court allows state to play video to jury; held: an attorney's reference to a jury about suppressed evidence may be grounds for the court to admit the suppressed evidence as the door has been opened; the video was not hearsay as it was offered to rebut a claim of recent fabrication, ER 801(d)(1)(ii), *cf.: State v. Bargas*, 52 Wn.App. 700 (1988), *State v. Stark*, 48 Wn.App. 245, 249 (1987); a party may open the door to evidence that is otherwise inadmissible, subject to the trial court's discretion, at 41, n.1; I.

***State v. Duarte Vela***, 200 Wn.App. 306 (2017)

In homicide case with lawful use of force defense, defendant offers evidence that defendant was told that deceased had threatened to kill defendant's family, that deceased had abducted defendant's sister and defendant was aware of it, and that deceased had beaten his wife, defendant's sister, also known to defendant, trial court excludes it based upon relevance, remoteness, hearsay; held: evidence offered was not hearsay as it was offered to establish defendant's state of mind, not offered to prove the truth but to show reasonableness of defendant's fear of deceased, *State v. Cloud*, 7 Wn.App. 211, 218 (1972), *State v. Walker*, 13 Wn.App. 545, 549 (1975); III.

***State v. Hill***, 431 Wn.App.2d 1044 (2018)

Domestic violence victim texts defendant stating "you pulled my hair and I wet my pants," defendant responds "let's be adults about this," trial court admits victim's text as **adoptive admission** by silence, ER 801 (d)(2)(ii), *State v. Neslund*, 50 Wn.App. 531 (1988); held: while silence or acquiescence may be a party admission and thus not hearsay, if (1) the party-opponent heard the accusatory statement or incriminating statement, (2) the party-opponent was able to respond, and (3) the circumstances were such that it is reasonable to conclude the party-opponent would have responded had there been no intention to acquiesce; the circumstances must also be such that an innocent defendant would normally be induced to respond and, if admitted, the court must instruct the jury that it can consider accusatory or incriminating statements as adoptive admissions only if the jury first finds that the circumstances establish the party heard, understood, and acceded to the statement; here, defendant did not acquiesce, rather he deflected, thus trial court erred, *State v. Ta'afulisia,* 21 Wn.App.2d 914 (2022), albeit harmless; I.

***State v. Heutink***, 12 Wn.App.2d 336 (2020)

In stalking case court admits testimony of victim about contents of text messages defendant sent to her sister and that defendant's probation officer recommended she relocate and enter witness protection program; held: evidence of an out-of-court statement offered to prove the effect on the witness as the listener, here her reasonable fear, is not hearsay, *Henderson v. Tyrrell*, 80 Wn.App. 592, 620 (1996); I.

***State v. Martinez***, 196 Wn.2d 605 (2020)

In child rape case trial court admits four witness' testimony that victim reported the rape under "fact of complaint" doctrine contemporaneous with the abuse but long after the reporting period; held: fact of complaint or fresh complaint rule in sexual assault cases is an established judicially-created exception to the hearsay rules, not admissible for truth of the matter asserted but to demonstrate that victim reported it to someone, may include sufficient details to identify the nature of the offense but not to include identity of the perpetrator, *State v. Ferguson*, 100 Wn.2d 131 (1983); 8-1.

***State v. Kelly***, 19 Wn.App.2d 434 (2021)

In no contact order violation case a witness testifies, over a hearsay objection, that she was told by her son, a cellmate of the defendant, to contact the victim, which she did; held: son's direction to his mother was assertive in nature but was not assertive in the sense of declaring a fact or belief, the truthfulness of the request was irrelevant, the request was relevant simply by the fact that the son uttered the entreaty, thus it was not offered for the truth and was not hearsay, *State v. Collins*, 76 Wn.App. 496 (1995), *State v. Modest*, 88 Wn.App. 239, 248-9 (1997); III.

***State v. Rocha***, 21 Wn.App.2d 26 (2022)

In arson case court, over objection, admits officers' testimony that they went to a gas station foin response to a verbal argument between defendant and his father, fire occurred elsewhere, court states that it was admitting statement to show why the police went to the gas station and thus not hearsay; held: a hearsay statement not offered to prove the truth of the matter asserted is inadmissible if the purpose for which it is offered is irrelevant, *State v. Gonzalez-Gonzalez*, 193 Wn.App. 683, 688-91 (2016), *State v. Hudlow*, 182 Wn.App. 266 (2014), *State v.*

*Edwards*, 131 Wn.App. 611 (2006), *State v. Aaron*, 57 Wn.App. 277 (1990); "[w]e have consistently held that a hearsay statement not offered to prove the truth of the matter asserted is inadmissible ***32** under ER 801(c) if the purpose for which it is offered is irrelevant," at 31-32; III.

***State v. Ta'afulisia***, 21 Wn.App.2d 914 (2022)

At the behest of the police a relative secretly records a conversation with defendant and his co-defendant where, in response to inquiries, co-defendant confesses to homicide, states both were involved, defendant remains silent, trial court admits statement as **adoptive admission**; held: silence by itself is not an adoptive admission and thus admissible in trial without a confrontation clause analysis, *see: State v. Neslund*, 50 Wn.App. 531 (1988), *State v. Hill*, 431 Wn.App.2d 1044 (2018); I.

# EVIDENCE
## Impeachment

***State v. Thompson***, 88 Wn.2d 518 (1977), *overruled, on other grounds, State v. Thornton,* 119 Wn.2d 578 (1992)

Defendant's silence is admissible to impeach defendant's testimony that he made statement; 5-3.

***United States v. Havens***, 64 L.Ed.2d 559 (1980)

Suppressed physical evidence can be used to impeach defendant's testimony; 5-4.

***State v. Styles***, 93 Wn.2d 173 (1980)

Character witness may be crossed concerning personal knowledge of specific prior acts of misconduct by defendant; must be good faith of plaintiff to discredit witness, not defendant; 9-0.

***State v. Thacker***, 94 Wn.2d 276 (1980)

Where witness denies making prior inconsistent statement and the statement is not offered, court has discretion to disallow explanatory testimony on redirect; however, where the effect of the impeaching questioning gives the impression that the statement was admitted or appears to be substantive evidence, it is error to refuse explanatory testimony; rationale is that statement itself is not subject to cross-examination; 9-0.

***State v. Jones***, 25 Wn.App. 746 (1980)

Error to deny defendant right to establish bias of the chief prosecuting witness by an independent witness, *see: State v. Fisher*, 165 Wn.2d 727, 751-53 (2009); II.

***State v. Flowers***, 30 Wn.App. 718 (1981)

A party cannot offer impeaching evidence concerning a matter which the witness has admitted; I.

***State v. Smith***, 97 Wn.2d 856 (1982)

Where assault victim named another man as her attacker at trial, here her prior sworn statement to police is admissible as substantive evidence under ER 801(d)(1)(i) which permits the admission of statements given under penalty of perjury at an "other proceeding," *State v. Nelson*, 74 Wn.App. 380, 382-91 (1994), *State v. Binh Thach*, 126 Wn.App. 297, 307-09 (2005), *State v. Otton*, 185 Wn.2d 673 (2016), *State v. Phillips*, 431 Wn.App.2d 1056 (2018), *cf. State v. Sua*, 115 Wn.App. 29 (2003), *State v. Nieto*, 119 Wn.App. 157 (2003), *State v. McComas*, 186 Wn.App. 307 (2015); 9-0.

***State v. Acosta***, 34 Wn.App. 387 (1983), *rev'd, on other grounds,* 101 Wn.2d 612 (1984)

At omnibus hearing, defense counsel asserts alibi defense; at trial, defendant raised self-defense, whereupon state cross-examined defendant on his counsel's representation; held: statements by counsel in the presence of client constitute "quasi admissions" admissible to

discredit and impeach defendant's testimony, *State v. Dault*, 19 Wn.App. 709 (1978), *State v. Rivers*, 129 Wn.2d 697, 707-9 (1996), *but see: State v. Williams*, 79 Wn.App. 1 (1995), *State v. Johnson*, 90 Wn.App. 54, 63-7 (1998), at least where there had been a change in the plan of the defense after the representations were made but the defense had not notified the court or counsel, *State v. Garland*, 169 Wn.App. 869 (2012); II.

***State v. Carver***, 37 Wn.App. 122 (1984)

Defense seeks to impeach statutory rape victim with her prior inconsistent statement that only another person had abused her, trial court refuses as not inconsistent, collateral and barred by rape shield statute, RCW 9A.44.020; held: error, as statement was inconsistent, not collateral, prior inconsistent statements may be used to impeach a witness, ER 613, *State v. Horton*, 116 Wn.App. 909 (2003), *see: State v. Fankhouser*, 133 Wn.App. 689 (2006); II.

***State v. Barber***, 38 Wn.App. 758 (1984)

State may not call a witness for the primary purpose of eliciting testimony in order to impeach the witness with testimony which would otherwise be inadmissible, *State v. Denton*, 58 Wn.App. 251 (1990), *State v. Howard*, 127 Wn.App. 862, 869-70 (2005), *see also: State v. Ruiz*, 176 Wn.App. 623 (2013); I.

***State v. Davis***, 39 Wn.App. 916 (1985)

Where a witness is impeached with a prior inconsistent statement but no objection is interposed and no limiting instruction is sought, the jury may consider it as substantive evidence, and the out-of-court declaration may be used to establish a *prima facie* case; II.

***State v. Lavaris***, 106 Wn.2d 340, 344-45 (1986)

While state may not call a witness and then impeach the witness for the primary purpose of placing before the jury substantive evidence which is not otherwise admissible, *State v. Barber*, 38 Wn.App. 758 (1984), *State v. Howard*, 127 Wn.App. 862, 869-70 (2005), here state called severed co-defendant who was integrally involved in the events leading up to the murder and corroborated other witness's testimony, thus state did not call him for the primary purpose of eliciting his testimony in order to impeach him with evidence that would have been otherwise inadmissible, *reversing* holding in *State v. Lavaris*, 41 Wn.App. 856 (1985) but affirming decision; *accord*, *State v. Hancock*, 46 Wn.App. 672 (1987), *aff'd*, 109 Wn.2d 760 (1988); 9-0.

***State v. Dickenson***, 48 Wn.App. 457 (1987)

"Whole impression or effect" of a witness's testimony is that defendant killed victim, defense request to impeach witness with a prior statement that the police killed victim is refused by trial court as not inconsistent, collateral; held: test for inconsistency is not words or phrases alone but whole impression or effect, *i.e.*, on a comparison of the two utterances are they in effect inconsistent, or do they appear to have been produced by inconsistent beliefs?, *State v. Newbern*, 95 Wn.App. 277, 292-96 (1999); collateral test: could the fact have been brought into evidence for a purpose independent of the contradiction?, *State v. Fankhouser*, 130 Wn.App. 689 (2006); harmless here; *see: State v. Johnson*, 90 Wn.App. 54, 67-72 (1998); I.

***State v. Alexander***, 52 Wn.App. 897 (1988)

In self-defense case, victim's reputation for violence is admissible, ER 405(a), while specific acts of violence are not admissible, ER 405(b), as victim's character trait of violence is not an essential element of claim of self-defense, *State v. Stacy*, 181 Wn.App. 553, 565-66 (2014); thus, while victim's claim of peaceful character could be impeached by cross-examination regarding specific acts of violence, they are collateral to the principal issues being tried, *State v. Oswalt*, 62 Wn.2d 118, 121 (1963), and the examiner is bound by the denial and cannot offer independent to impeach; I.

***State v. Barnes***, 54 Wn.App. 536 (1989)

In drug case, defense seeks to impeach informant with 15-year old letters in which informant purports to threaten other witnesses to give false testimony, trial court rejects offer; held: within trial court's discretion to deny admission, *State v. York*, 28 Wn.App. 33, 36 (1980), *State v. O'Connor*, 155 Wn.2d 335, 348-56 (2005), *State v. Lile*, 188 Wn.2d 766, 781-87 (2017), *State v. Lee*, 188 Wn.2d 473, 485-96 (2017), *but see: State v. McSorley*, 128 Wn.App. 598, 610-14 (2005); inadmissible as intrinsic evidence to attack credibility, ER 608(b); proper to exclude under the compelling state interest of not discouraging witnesses from testifying because some prior misconduct may be revealed, *State v. Martinez*, 38 Wn.App. 421, 424 (1984); III, 2-1.

***State v. Wilson***, 60 Wn.App. 887 (1991)

In statutory rape trial, defendant calls victim's sister who testifies that she lived with defendant and victim and that no abuse occurred; on cross, victim admitted that she had previously stated under oath to DSHS that defendant did not live with her; held: ER 404(b) applies only to prior misconduct offered as substantive evidence; ER 608(b) permits cross-examination to specific instances that are relevant to veracity, *State v. Cummings*, 44 Wn.App. 146, 152 (1986) if germane to the issue, *State v. York*, 28 Wn.App. 33, 36 (1980), *State v. McSorley*, 128 Wn.App. 598, 610-14 (2005); II.

***State v. Carlson***, 61 Wn.App. 865 (1991)

Extrinsic evidence cannot be used to impeach a witness on collateral issues even where the extrinsic evidence may have some indirect bearing on motive, bias or prejudice, *State v. Reed*, 25 Wn.App. 46, 52 (1979), *State v. Roberts*, 25 Wn.App. 830, 834 (1980), *State v. Fankhouser*, 130 Wn.App. 689 (2006), *see: State v. Fisher*, 165 Wn.2d 727, 751-53 (2009); I.

***State v. Tigano***, 63 Wn.App. 336 (1991)

Evidence of drug use is admissible to impeach if there is a reasonable inference that witness was under influence at time of events or at time of testifying, *State v. Brown*, 48 Wn.App. 654, 658 (1987), *State v. Hall*, 46 Wn.App. 689, 692 (1987), *State v. Dault*, 19 Wn.App. 709 (1978); evidence of drug use on other occasions, or of drug addiction, is generally inadmissible as impermissibly prejudicial, *State v. Renneberg*, 83 Wn.2d 735, 737 (1974), *State v. Arredondo*, 190 Wn.App. 512, 532-34 (2015); II.

***State v. Babich***, 68 Wn.App. 438 (1993)

Prosecutor asks defense witnesses about prior inconsistent statements which witness denies making, state does not offer extrinsic evidence in rebuttal; held: where witness denies an alleged prior inconsistent statement, prosecutor must follow up with extrinsic evidence to prove

the existence of the statement, otherwise the foundation questions to the witness are mere innuendo, *State v. Yoakum*, 37 Wn.2d 137 (1950), *State v. Lopez*, 95 Wn.App. 842, 854-56 (1999), *State v. Miles*, 139 Wn.App. 879 (2007), *see also: State v. Ruiz*, 176 Wn.App. 623 (2013); III.

***State v. Nelson***, 74 Wn.App. 380, 382-91 (1994)

Witness is arrested for prostitution, provides a notarized statement naming defendant as her procurer, denies same at trial, court admits her statement as substantive evidence, ER 801(d)(1); held: a sworn statement made at an "other proceeding" is admissible at trial as substantive evidence where the witness testifies inconsistently thereto, and where the prior inconsistent statement was (1) made voluntarily, (2) there were minimal guaranties of truthfulness, (3) the statement was taken as a standard procedure in a method for determining the existence of probable cause, and (4) the witness is subject to cross-examination, *State v. Smith*, 97 Wn.2d 856, 861-3 (1982), *State v. Binh Thach*, 126 Wn.App. 297, 307-09 (2005), *State v. Otton*, 185 Wn.2d 673 (2016), *State v. Phillips*, 431 Wn.App.2d 1056 (/2018); an affidavit is a sworn statement, even absent an oath administered by a notary, *cf.: State v. Sua*, 115 Wn.App. 29 (2003), *State v. Nieto*, 119 Wn.App. 157 (2003), *cf.: State v. McComas*, 186 Wn.App. 307 (2015); police interrogation is an "other proceeding" where it is standard procedure, *State v. Smith*, *supra*, at 862-63, *State v. Nieto*, *supra*, at 162-64; I.

***State v. Lopez***, 74 Wn.App. 456 (1994)

Testifying defendant may be impeached with prior inconsistent statements he made to a psychiatrist in anticipation of a diminished capacity defense even if the defense is not ultimately raised at trial; III.

***United States v. Mezzanatto***, 130 L.Ed.2d 697 (1995)

Defendant and counsel meet with prosecutor in attempt to cooperate, prosecutor states that defendant must agree that any statements made during meeting could be used to impeach, defendant agrees, no deal is reached, defendant testifies and is impeached; held: Fed. R. Evid. 410 excluding statements made during plea negotiations may be waived; 7-2.

***State v. Buss***, 76 Wn.App. 780, 787-9 (1995)

Defendant receives letter from victim's attorney regarding lawsuit, seeks to impeach at trial, victim claims letter was unauthorized although he had discussed it with counsel, trial court excludes cross on issue; held: a victim's intention to commence a civil action for damages is a proper subject for impeachment, *State v. Whyde*, 30 Wn.App. 162 (1981), *State v. Smits*, 58 Wn.App. 333 (1990), *cf.: State v. Guizzotti*, 60 Wn.App. 289 (1991); because defense had undisputed evidence that a civil action had been contemplated, the impeachment evidence was not speculative, *see: State v. Roberts*, 25 Wn.App. 830, 834 (1980), trial court should not have weighed credibility in refusing the impeachment, harmless here; I.

***State v. Williams***, 79 Wn.App. 21 (1995)

At omnibus hearing, defense counsel submits "Omnibus Stipulation" which states that the nature of defense would be "general denial, entrapment," at trial defendant denies selling drugs, is impeached with counsel's statement that offense was entrapment; held: where alternative and inconsistent defenses are asserted in omnibus application, then the statement does not qualify as

a party admission, ER 801(c), and cannot be used to impeach defendant, *distinguishing* *State v. Acosta*, 34 Wn.App. 387 (1983), *rev'd on other grounds,* 101 Wn.2d 612 (1984), *State v. Dault*, 19 Wn.App. 709 (1978), *State v. Rivers*, 129 Wn.2d 697, 707-9 (1996), *cf.: State v. Garland*, 169 Wn.App. 869 (2012), *see: State v. Johnson*, 90 Wn.App. 54, 63-7 (1998); II.

***State v. Lubers***, 81 Wn.App. 614, 623-4 (1996)

Trial court precludes rape defendant from calling his girlfriend to testify to a feud between girlfriend's family and rape-victim as motive for victim to fabricate rape accusation; held: defense theory was wholly speculative, as victim's alleged hostility to girlfriend was not linked to a desire to frame defendant, *distinguishing* *State v. Whyde*, 30 Wn.App. 162 (1981), *State v. Roberts*, 25 Wn.App. 830, 834-5 (1980); II.

***State v. Simonson***, 82 Wn.App. 226, 234 n. 17 (1996)

While a continuance is not required to obtain evidence that is merely impeaching, *State v. Harris*, 12 Wn.App. 481, 496-7 (1975), there are circumstances in which impeachment testimony is so important as to require a continuance; II.

***State v. Myers***, 82 Wn.App. 435, 438-9 (1996)

In sexual exploitation of a minor case, RCW 9.68.040(1)(b), in which defendant videotaped his seven-year old daughter's vaginal area in bathtub, trial court admits tape made the same day by defendant of clothed buttocks and genital regions of adults and children; held: admissible to show motivation; absence of **limiting instruction** where not requested is not error, *State v. Hess*, 86 Wn.2d 51, 52 (1975), *State v. Wilcoxon,* 185 Wn.App. 534, 542 (2015), *affirmed, on other grounds,* 185 Wn.2d 324 (2016); II.

***State v. Rivers***, 129 Wn.2d 697, 707-9 (1996)

Defense counsel's opening statement raises identity as a defense, on direct examination defendant admits to theft but denies robbery, state cross-examines about counsel's opening; held: cross-examination was relevant to the extent that it would assist jury by clarifying the nature of the defense, *State v. Garland*, 169 Wn.App. 869 (2012), *see: State v. Dault*, 19 Wn.App. 709, 718-9 (1978), *State v. Acosta*, 34 Wn.App. 383 (1983), *rev'd on other grounds,* 101 Wn.2d 612 (1984); 9-0.

***State v. Smith***, 130 Wn.2d 215, 226-7 (1996)

Trooper stops defendant for DUI, administers portable breath test, does not record or remember result, trial court denies defense opportunity to cross on PBT; held: trial court erred in not permitting defense to cross-examine on PBT limited to testing trooper's recollection, harmless here; affirms *State v. Lewellyn*, 78 Wn.App. 788 (1995); 9-0.

***State v. McDaniel***, 83 Wn.App. 179 (1996)

Trial court precludes cross-examination of assault complainant that she lied under oath about her drug use in a related civil case; held: because complainant was on probation, her prior false testimony provided her a motive to lie as to recent drug use, thus the evidence was relevant; the state's interest of insuring a just trial and preventing an acquittal based on prejudice against the victim's history of drug abuse is compelling but, because other evidence of drug use was

admitted, the balance is in favor of admissibility, *see:* *State v. Hudlow*, 99 Wn.2d 1, 15-6 (1983), *State v. O'Connor*, 155 Wn.2d 335, 348-56 (2005), *State v. Gregory*, 158 Wn.2d 759, 781-801 (2006), *overruled, on other grounds, State v. W.R.*, 181 Wn.2d 757 (2014). *State v. Lee*, 188 Wn.2d 473, 485-96 (2017), *State v. Duarte Vela*, 200 Wn.App. 306 (2017), *State v. Fleeks*, ___ Wn.App.2d ___, 2023WL355082 (2023); I.

***State v. Hamlet***, 83 Wn.App. 350 (1996)

Trial court permits state to elicit from an expert who was called by the state that he was originally retained by the defense; held: within trial court's discretion; I.

***State v. Johnson***, 90 Wn.App. 54, 63-72 (1998)

Omnibus application states general nature of defense is "general denial and/or self-defense," four days before trial defense declares alibi with witnesses, court permits, as discovery sanction, state to impeach alibi witnesses with defense **omnibus declaration**; held: witnesses cannot be impeached by statements of others for which they are not responsible and which have not been approved by them, *State v. Williams*, 79 Wn.App. 21, 27 (1995), thus substantive use of the omnibus order was improper; further, pleadings of an alternative nature are directed primarily to giving notice and lack the essential character of an admission, *Williams, supra.*, at 29; fact that defendant signed the order does not make it admissible; **foundation** to impeach with a prior inconsistent statement or bias is sufficient if examiner gives declarant an opportunity to explain or deny the statement, either on cross-examination or after the introduction of extrinsic evidence, ER 613(b), a relaxed standard from pre-rule caselaw, *State v. Horton*, 116 Wn.App. 909 (2003), *Shaw v. Sjoberg*, 10 Wn.App. 328, 331 (1973), traditional foundation questions are now an optional tactic rather than a mandatory requirement, *see:* *State v. Spencer*, 111 Wn.App. 401, 407-11 (2002); impeachment with past **aliases** given to police is proper, ER 608(b), as use of false names indicates an intent to deceive and bears directly upon a general disposition with regard to truthfulness; impeachment with a prior **probation violation** is improper; II.

***State v. Israel***, 91 Wn.App. 846, 853-59 (1998)

Expert testimony of a witness's antisocial personality disorder relative to credibility is inadmissible, at least absent situations where a witness's mental impairment is clearly apparent and his competency is a central issue in the case, *State v. Froelich*, 96 Wn.2d 301, 306-7 (1981), *State v. Arredondo*, 190 Wn.App. 512, 532-34 (2015); I.

***State v. Newbern***, 95 Wn.App. 277, 292-96 (1999)

Where witness testifies she has no memory of making the statement, but does remember the prior event, then she can be impeached with her inconsistent, albeit unremembered, statement, *State v. Hancock*, 109 Wn.2d 760, 765 (1988); where witness testifies she has no memory of the event and thus gives no substantive testimony on the factual issue, the prior statement is inadmissible, as there is no testimony to impeach, *State v. Allen S.*, 98 Wn.App. 452 (1999), *see:* *State v. Clinkenbeard*, 130 Wn.App. 552, 568-72 (2006); victim testifies she was shot by accident, gives details which are partly consistent with prior statement in which she said she was shot intentionally, trial court may admit prior statement as inconsistent to impeach, as whole impression or effect of prior statement was inconsistent with testimony, *State v.*

*Dickenson*, 48 Wn.App. 457, 467-68 (1987); trial court is not obliged to provide limiting instruction to jury absent request, ER 105; II.

***State v. Lopez***, 95 Wn.App. 842, 854-56 (1999)

Prosecutor impeaches a defense witness with a conversation witness allegedly had with the prosecutor, witness denies the statement, prosecutor does not offer extrinsic evidence of the statement; held: prosecutor's impeachment by referring to extrinsic evidence never introduced is improper, may violate confrontation clause, *State v. Babich*, 68 Wn.App. 438, 444 (1993), *State v. Miles*, 139 Wn.App. 879 (2007), *see also: State v. Ruiz*, 176 Wn.App. 623 (2013), harmless here; III.

***State v. Kunze***, 97 Wn.App. 832, 858-60 (1999)

Trial court excludes cross-examination of jailhouse informer as to the fact that he had lied on employment and rental applications; held: specific instances of lying may be admitted, whether sworn or unsworn, to show bias, prejudice or interest, within trial court's discretion, ER 608(b), so exclusion is not an abuse of discretion, *State v. Lee*, 188 Wn.2d 473, 485-96 (2017), *see: State v. Clark*, 143 Wn.2d 731, 765-67 (2001), *State v. Lile*, 188 Wn.2d 766, 781-87 (2017), *but see: State v. McSorley*, 128 Wn.App. 598, 610-14 (2005); II.

***State v. Allen S.***, 98 Wn.App. 452 (1999)

Jailhouse informer tells police that defendant confessed, at trial informer testifies he remembers nothing, court allows state to impeach with prior statement to police; held: where a witness does not offer testimony "of consequence to the action," then the witness's credibility is not in issue and he may not be impeached, *State v. Robbins*, 25 Wn.2d 110, 113 (1946), *State v. Washburn*, 116 Wash. 97, 99 (1921), *State v. Stingley*, 163 Wash. 690 (1931); II.

***State v. Clark***, 143 Wn.2d 731, 765-67 (2001)

Jailhouse informant is impeached with prior convictions, court precludes defense from impeaching with specific instances of conduct underlying convictions; held: failure of a court to allow impeachment with specific instances of conduct, ER 608(b), is an abuse of discretion if the witness is crucial and the alleged misconduct is the only available impeachment, *State v. York*, 28 Wn.App. 33 (1980), *see: State v. Lile*, 188 Wn.2d 766, 781-87 (2017), *Pers. Restraint of Lui*, 188 Wn.2d 525, 549-51 (2016), *but see: State v. McSorley*, 128 Wn.App. 598- 610-14 (2005), but, once impeached, there is less need for further impeachment on cross, *State v. Martinez*, 38 Wn.App. 421, 424 (1984); here, because witness was impeached with priors, it was within trial court's discretion to preclude further impeachment; 9-0.

***State v. Huynh***, 107 Wn.App. 68, 74-76 (2001)

In drug case, defense offers medical report with defendant's statement to physician that he was beaten by police to show bias, trial court excludes on grounds that defense did not allow officer to view the report prior to testifying; held: extrinsic evidence of bias, other than prior inconsistent statements, may be introduced without first calling such acts or conduct to the witness' attention, *State v. Wilder*, 4 Wn.App. 850, 855 (1971), *State v. Spencer*, 111 Wn.App. 401, 407-11 (2002), ER 613(a); I.

***State v. Kilgore***, 107 Wn.App. 160, 177-82 (2001)

Where there is physical evidence of penetration in rape of a child case, evidence of prior sexual abuse of the child by another person is relevant, *State v. Horton*, 116 Wn.App. 909 (2003), *see: State v. Carver*, 37 Wn.App. 122 (1984); absent physical evidence, prior sexual abuse of a child may be relevant to prove the child's precocious sexual knowledge (detailed standards regarding admissibility, at 180-82); II.

***State v. Spencer***, 111 Wn.App. 401, 407-11 (2002)

No foundation is needed to impeach a witness' testimony with a prior statement as extrinsic evidence of bias, *State v. Ngo Tho Huynh*, 107 Wn.App. 68, 74 (2001), *State v. Wilder*, 4 Wn.App. 850, 855 (1971), *State v. Johnson*, 90 Wn.App. 54, 70 (1999); II.

***State v. Nordlund***, 113 Wn.App. 171, 187-90 (2002)

Evidence of defendant's refusal to provide a court-ordered hair sample is admissible as consciousness of guilt, akin to flight; II.

***State v. Sua***, 115 Wn.App. 29 (2003)

Complainant gives police an unsworn statement which trial court admits as substantive evidence when complainant testifies inconsistently with the statement; held: while a sworn affidavit or declaration is admissible as substantive evidence (1) where a witness testifies and the statement is voluntary, (2) there are guaranties of truthfulness and (3) the statement was taken during police interrogation, *State v. Nelson*, 74 Wn.App. 380, 382-91 (1994) or as part of a probable cause determination, *State v. Smith*, 97 Wn.2d 856, 861-63 (1982), where the statements are unsworn they are not admissible as substantive evidence, ER 801(d)(1)(i), *State v. McComas*, 186 Wn.App. 307 (2015), *cf.: State v. Nieto*, 119 Wn.App. 157 (2003); II.

***State v. Soh***, 115 Wn.App. 290 (2003)

Failure to disclose promises of leniency to a witness is misconduct, whether or not the promise was memorialized in writing or made by a police officer rather than a prosecutor; an offer of leniency that has any impeachment value must be disclosed; "it is difficult to imagine an offer of leniency in exchange for testimony that would not have impeachment value," at 295; where defense learns of the promise before trial, then dismissal is not a remedy, as defendant is not prejudiced; I.

***State v. Horton,*** 116 Wn.App. 909, 912-17 (2003)

To impeach by prior inconsistent statement, witness may either be asked to admit or deny the inconsistency on cross or after extrinsic evidence of the inconsistency is introduced, *State v. Johnson*, 90 Wn.App. 54, 70 (1998), ER 613(b); II.

***State v. Dolan***, 118 Wn.App.323, 327-28 (2003)

In child abuse case, defendant-father seeks to impeach witness-mother with evidence that they were engaged in custody dispute over victim at time of trial, court excludes evidence as collateral and arising after defendant was charged with assault; held: bias includes that which exists at the time of trial to impeach the witness' accuracy while testifying, *State v. Tigano*, 63 Wn.App. 336, 344-45 (1991), *State v. Harmon*, 21 Wn.2d 581, 590-91 (1944); II.

***State v. Nieto***, 119 Wn.App. 157 (2003)

Trial court admits, as substantive evidence, complainant's statement to police provided on a pre-printed form which states, at bottom of first page and at top of remaining pages, that it is a sworn declaration and that "the foregoing is true," complainant testifies at trial, denies she read oath; held: boilerplate language of oath is ambiguous as it is unclear to what "foregoing" refers, thus statement does not satisfy oath requirement of ER 801(d)(1)(i), *see:* *State v. Sua*, 115 Wn.App. 29 (2003); absent proof that witness was aware of oath language, reliability is not established, statement should not have been admitted as substantive evidence, *State v. McComas*, 186 Wn.App. 307 (2015), distinguishing *State v. Smith*, 97 Wn.2d 856 (1982), *State v. Nelson*, 74 Wn.App. 380 (1994); I.

***State v. O'Connor***, 155 Wn.2d 335 (2005)

In malicious mischief case, trial court admits fact that defendant paid victim for damages, excludes evidence that victim accepted money from defendant and her insurer for the damages; held: ER 408, precluding evidence of compromise, is inapplicable in criminal cases; trial court properly exercised discretion in excluding double payment evidence, as retention of money from defendant may have reflected dishonesty, but not relevant to witness' testimony on the witness stand, ER 608, *State v. McDaniel*, 83 Wn.App. 179 (1996), *State v. York*, 28 Wn.App. 33, 36 (1980), *see: State v. Lee*, 188 Wn.2d 473 (2017); affirms *State v. O'Connor*, 119 Wn.App. 530 (2003); 5-4.

***State v. Price***, 126 Wn.App. 617, 643-45 (2005)

In homicide case, evidence that defendant left state after murder with backpack full of grooming supplies and medications is relevant to prove flight and change of appearance, establishing a consciousness of guilt; evidence of flight is generally admissible, but inference of flight must be substantial and real, not speculative, conjectural or fanciful, *State v. Slater*, 197 Wn.2d 660 (2021), *State v. Bruton*, 66 Wn.2d 111, 112 (1965); II.

***State v. Howard***, 127 Wn.App. 862, 869-70 (2005)

Defense may not call a witness for the sole purpose of impeachment in order to place before the jury evidence which is not otherwise admissible, *State v. Barber*, 38 Wn.App. 758 (1984), *State v. Lavaris*, 106 Wn.2d 340, 344-45 (1986); I.

***State v. McSorley***, 128 Wn.App. 598, 610-14 (2005)

In child luring case, trial court declines to allow defense to cross-examine complainant that he had twice committed "pranks" by stopping cars pretending to be injured; held: it is an abuse of discretion to refuse to allow impeachment of a crucial witness where the alleged misconduct is the only available impeachment, ER 608(b), *State v. Clark*, 143 Wn.2d 731, 766 (2001), *State v. York*, 28 Wn.App. 33 (1980), *see: State v. Lile*, 188 Wn.2d 766, 781-87 (2017), although trial court, on remand, may exclude if remote; II.

***State v. Fisher***, 130 Wn.App. 1, 16-18 (2005)

In child abuse case, defense witness testifies defendant had a reputation for "almost being a teddy bear" around children, state inquires if witness' opinion would change if he knew

defendant spanked victim; held: character witness may be crossed concerning personal knowledge of specific prior acts of misconduct by defendant; must be good faith of plaintiff to discredit witness, not defendant, *State v. Styles*, 93 Wn.2d 173, 176-77 (1980), *State v. McFadden*, 63 Wn.App. 441, 450 n.25 (1991), within discretion of trial court; II.

***State v. Clinkenbeard***, 130 Wn.App. 552, 568-72 (2005)

Where only evidence to support an element of the crime is impeachment evidence to which there was an objection, then dismissal for insufficiency is the remedy; III.

***State v. French***, 157 Wn.2d 593, 603-06 (2006)

In child molestation case, after all parties rest but before closing argument, defense seeks to reopen to offer evidence that victim's mother told defendant and another that she wanted defendant to be acquitted and that she would sue defendant, trial court finds it could show motive or bias but declined to reopen testimony as the evidence did not relate directly to the molestation, would be misleading or confusing, would cause undue delay and waste the court's time, ER 403, and that record already contained evidence of motive or bias on the part of the witness; held: because defense already elicited evidence of bias, excluding evidence was not an abuse of discretion, distinguishing *Chambers v. Mississippi*, 35 L.Ed.2d 297 (1973), *Davis v. Alaska*, 39 L.Ed.2d 347 (1974), wherein defendants were wholly prevented from cross-examining key witnesses on subjects central to their defenses; 9-0.

***State v. Fankhouser***, 133 Wn.App. 689 (2006)

Police arrest witness for possession of drugs, witness informs police he bought drugs a week earlier from defendant, police set up controlled buy and arrest defendant, trial court excludes evidence that defendant did not sell to victim a week earlier as collateral, at trial prosecutor elicits testimony that witness bought from defendant at first occasion, trial court sustains objection but again declines to admit evidence that defendant did not sell to victim on first occasion as impeachment on a collateral matter; held: proof establishing the falsity of the initial accusation is relevant and admissible to show the accuser's ongoing bias or underlying motive for the current accusation, not impeachment on a collateral matter, *State v. Hall*, 10 Wn.App. 678, 680-82 (1974), *cf.: In re Welfare of Shope*, 23 Wn.App. 567, 568-69 (1979), *State v. Demos*, 94 Wn.2d 733, 736-37 (1980); once state contravened the pretrial ruling excluding the earlier buy, it was error not to allow defense to rebut, *State v. Gefeller*, 76 Wn.2d 449, 455 (1969), *State v. Gallagher*, 112 Wn.App. 601, 609-11 (2002); II.

***State v. Dixon***, 159 Wn.2d 65 (2006)

In child molestation case, victim admits having told a counselor that she thought it may have been a dream, but then testified that it wasn't a dream, defense seeks to call counselor to testify to the statement; defense also seeks to cross-examine victim about asking her aunt what she should do if she is lying about something, offer of proof establishes that while aunt believed victim was talking about molestation, victim did not say so, trial court excludes cross-examination about it; held: because ER 613 only allows extrinsic evidence of a prior inconsistent statement, where witness admits to the inconsistency, extrinsic evidence is inadmissible; absent evidence to support the claim that victim admitted she was lying about molestation, trial court properly exercised discretion to exclude the question about lying; 6-3.

***State v. Miles***, 139 Wn.App. 879 (2007)

State offers evidence that defendant drove to a drug deal, defendant claims he was incapacitated and disabled, state cross-examines about defendant participating in boxing matches during disability which defendant denies, state fails to offer evidence in support of impeachment; held: where a prosecutor's questions refer to extrinsic evidence that is never introduced and imparts evidence within the prosecutor's personal knowledge, then failure to prove the statements in rebuttal is misconduct, *State v. Lopez*, 95 Wn.App. 842, 855 (1999), *State v. Babich*, 68 Wn.App. 438, 445-46 (1993), *see also: State v. Ruiz*, 176 Wn.App. 623 (2013); defense counsel's failure to object is excused as defense could not have known state would not prove claim in rebuttal; II.

***State v. Fisher***, 165 Wn.2d 727, 751-53 (2009)

In child sex abuse case, trial court permits defense to inquire of victim's mother about her general bias against defendant because of a rancorous divorce, but precludes evidence about details of financial disputes arising during the divorce; held: while a defendant has a right to put specific reasons motivating a witness' bias before the jury, *State v. Bedada*, 13 Wn.App.2d 185 (2020), defendant does not have the right to prove specific facts behind the motivation, *State v. Brooks*, 25 Wn.App. 550, 551-52 (1980), and has the discretion to limit the evidence as speculative and remote; 9-0.

***State v. Lucas***, 167 Wn.App. 100 (2012)

Psychiatrist, in support of diminished capacity defense, testifies to defendant's statements during evaluation, defendant does not testify, trial court allows state to cross-examine psychiatrist as to defendant's prior felony conviction to impeach, ER 806; held: while the credibility of a hearsay statement may be attacked as if the declarant had testified, ER 806, a statement relied upon by an expert is not hearsay as not offered as substantive proof, thus does not expose declarant to impeachment under ER 806, *but see: State v. Mohamed*, 186 Wn.2d 235 (2016); II.

***State v. Garland***, 169 Wn.App. 869 (2012)

Defendant is tried for murder, two mistrials before defense began its case-in-chief, both defense counsel's opening statements assert defendant possessed and fired a gun, at third trial counsel reserves opening, defendant testifies that he did not possess a gun, that he wrestled with victim over victim's gun which discharged, trial court allows state to impeach with counsel's openings at mistried cases; held: an attorney's opening statement at a prior trial that is unambiguously inconsistent with defendant's testimony may be used for impeachment of defendant where defendant had time between the trials to "confirm or deny the assertions," and where no innocent explanation for the inconsistency of counsel's statement is apparent to the trial court, and where counsel's statement appears to be the equivalent of testimonial statements by defendant about the facts, *see: State v. Rivers*, 129 Wn.2d 297 (1996), *State v. Dault*, 19 Wn.App. 709 (1978), *State v. Acosta*, 34 Wn.App. 387 (1983), *rev'd, on other grounds,* 101 Wn.2d 612 (1984), distinguishing *State v. Williams*, 79 Wn.App. 21 (1995); II.

***State v. Sanchez***, 171 Wn.App. 518, 544-50 (2012)

Defense counsel participates, along with an investigator, in an interview of a witness and informs court that he has impeachment evidence, trial court disqualifies counsel for being a witness; held: presence of investigator obviates need for counsel to testify, court may order counsel to avoid improper implicit testimony by impartially phrasing questions to avoid subliminal vouching; III.

***State v. McComas***, 186 Wn.App. 307 (2015)

Police tape record assault victim's statement, at end ask if she declares under penalty of perjury that it is true and correct to which victim answers yes, at trial victim recants, trial court admits recorded statement as substantive evidence, ER 801(d)(1)(i), *State v. Smith,* 97 Wn.2d 856, 857 (1982), as an "other proceeding;" held: while a sworn affidavit or declaration is admissible as substantive evidence (1) where a witness testifies and the statement is voluntary, (2) there are guaranties of truthfulness and (3) the statement was taken during police interrogation, *State v. Nelson*, 74 Wn.App. 380, 382-91 (1994), a statement does not qualify as a sworn statement under RCW 9A.72.085 where the declarant did not review, sign and date the statement or a transcription, *State v. Nieto*, 119 Wn.App. 157 (2003), thus is inadmissible as substantive evidence; II.

***State v. Otton***, 185 Wn.2d 673 (2016)

Victim's sworn statement to police, given as part of investigation, that is inconsistent with her testimony may be admitted as substantive evidence, ER 801(d)(1)(i), *State v. Smith,* 97 Wn.2d 856 (1982), *State v. Binh Thach,* 126 Wn.App. 297 (2005), *State v. Phillips,* 431 Wn.App.2d 1056 (2018); 9-0.

***State v. Farnsworth***, 185 Wn.2d 768 (2016)

Robbery codefendant pleads guilty to robbery and theft, plea agreement is that robbery will be dismissed in exchange for testimony, codefendant testifies about substance of plea agreement but trial court excludes written plea agreement; held: lead opinion of four justices states plea agreement itself would not have added new information thus trial court did not abuse discretion, 4 dissenting justices would hold that it was reversible error, one concurrence would hold it was harmless error beyond a reasonable doubt.

***State v. Mohamed***, 186 Wn.2d 235 (2016)

Defense diminished capacity expert testifies to statements made by defendant to the expert, defense declines limiting instruction stating that statements were only admitted for basis of opinion, trial court permits state to prove prior *crimen falsi* convictions, ER 609, 806; held: when a statement is admitted for a non-hearsay purpose, here basis of opinion, ER 703, 705, it may not be impeached as it is not offered as substantive evidence, *State v. Lucas,* 167 Wn.App. 100 (2012), but here because defense declined the instruction which would have limited the statement to a non-hearsay purpose it was admitted as substantive evidence and thus is subject to impeachment; reverses *State v. Mohamed,* 189 Wn.App. 533 (2015); 9-0.

***State v. McBride***, 192 Wn.App. 859 (2016)

Where a prior conviction is admissible to impeach a witness, ER 609(a), the witness may not be questioned regarding the facts leading to the prior conviction, ER 608(b), *State v. Coles,*

28 Wn.App. 563 (1981)**,** *State v. Coe*, 101 Wn.2d 772 (1984), *State v. Copeland*, 130 Wn.2d 244, 283-35 (1996), even if the facts might have been admissible as impeachment had there been no prior conviction; III.

***State v. Hamilton***, 196 Wn.App. 461 (2016)

On cross defense psychiatrist is questioned about records that he possesses but does not testify that he relied upon the records of other professionals, over objection state is allowed to continue questioning about the records and reads them to the witness in order to impeach the witness with the other professionals opinions; held: while medical records that have been admitted into evidence may be used to question a medical expert about the contents here those records were not offered or admitted; while an expert may be cross-examined about records on which the expert relied, here the expert was not asked if he relied upon the records used to impeach; if state was seeking to argue that the witness should have relied upon the records then they were being offered for the truth and thus it was hearsay an improper impeachment; if the state was not offering the evidence for the truth then the entries were not relevant because an expert cannot be impeached based upon the expert's refusal to bas an opinion on a falsehood; I.

***State v. Lee***, 188 Wn.2d 473, 485-96 (2017)

In child sex abuse case defense seeks to cross-examine complainant who would admit that she made a prior false rape accusation against another, trial court limits cross to false accusation, precludes cross that the accusation was about rape; held: court had discretion to exclude as the accusation of rape against another has minimal probative value, *State v. Kunze*, 97 Wn.App. 832, 859, 988 P.2d 977 (1999); *see also State v. O'Connor*, 155 Wn.2d 335, 349, 119 P.3d 806 (2005), evidence intended to paint the witness as a liar is less probative than evidence demonstrating a witness' bias or motive to lie in a specific case, distinguishing *State v. McDaniel*, 83 Wn.App. 179, 186-87, 920 P.2d 1218 (1996); the prejudicial value in the state's interest to protect rape victims outweighs the probative value to the defendant in light of court admitting the fact that complainant made a false accusation, *cf.: State v. Jones*, 168 Wn.2d 713 (2010), *State v. McDaniel*, 83 Wn.App. 179 (1996) , *State v. Barnes*, 54 Wn.App. 536 (1989), *State v. Kunze*, 97 Wn.App. 832, 858-60 (1999),*State v. Blair*, 3 Wn.App.2d 343 (2018), *State v. Orn*, 197 Wn.2d 34300 (2021); 9-0.

***Pers. Restraint of Lui,*** 188 Wn.2d 525, 563-64 (2016)

Defendant's statement to police, admitted at trial, includes claim that his Mormon religion precludes sex with homicide victim outside of marriage, state elicits from another Mormon witness that defendant did have sex with other women in violation of Mormon tenets, defense counsel does not object, defendant on appeal claims ineffective assistance; held: CONST. art. 1, § 11 does not prohibit all questions about a defendant's religion, *see, e.g.*, *State v. Dhaliwal*, 150 Wn.2d 559, 579-80, 79 P.3d 432 (2003); 7-2.

***State v. Lile***, 188 Wn.2d 766, 781-86 (2017)

In assault/self-defense case victim testifies he is not a fighting person, defense seeks to impeach with a domestic violence harassment order, ER 608; held: door would only be opened to evidence directly contradicting his testimony and challenging his credibility, facts were sufficiently different such that refusal of court to permit impeachment was not an abuse of

discretion, distinguishing *State v. York*, 28 Wn.App. 33 (1980), *see: State v. Gefeller*, 76 Wn.2d 449, 455 (1969); affirms *State v. Lile*, 193 Wn.App. 179 (2017); 9-0.

***State v. Wafford***, 199 Wn.App. 32 (2017)

*In limine* trial court excludes child victim's videotaped statement, defense counsel references the statement in opening, court allows state to play video to jury; held: an attorney's reference to a jury about suppressed evidence may be grounds for the court to admit the suppressed evidence as the door has been opened; I.

***State v. Phillips***, 431 Wn.App.2d 1056 (2018)

At scene, domestic violence victim provides police with sworn declaration that she was choked, at trial testifies she did not remember being choked but remembers telling police she was choked, that some of the written statement was correct, that she did not read the statement, she did not write the statement and did not remember it being under oath, although officer who took the statement contradicted her, court admits sworn statement as substantive evidence, *State v. Smith*, 97 Wn.2d 856, 861 (1982); held: whole impression of victim's testimony was inconsistent with her sworn statement, *State v. Newbern*, 95 Wn.App. 277, 294 (1999), *State v. Dickenson*, 48 Wn.App. 457, 467 (1987), statement was under oath at an "other proceeding" to determine probable cause to detain, trial court did not abuse its discretion; III.

***State v. Romero-Ochoa***, 193 Wn.2d 341 (2019)

Trial court precludes defense from cross-examining victim about her application for a U visa which would have allowed victim to remain in United States to assist prosecution; held: while the structure of the U visa program might cause a complainant to embellish testimony and thus be proper for cross-examination, here the issue is not reached as harmless beyond a reasonable doubt; 9-0.

***State v. Lang***, 12 Wn.App.2d 481 (2020)

Defendant testifies at trial recanting a confession, on cross prosecutor asks if he has been diagnosed as a malingerer which defendant denies, on rebuttal state calls psychologist who evaluated defendant for competency, elicits opinion that defendant is a malingerer and that his testimony is consistent with antisocial personality disorder; held: substance of defendant's testimony did not open door or invite error to opinion testimony about credibility which is generally inadmissible, *cf.: State v. Kirkman*, 159 Wn.2d 918, 929-30, 932-33 (2007), *State v. Froehlich*, 96 Wn.2d 301, 306-07 (1981), and is prohibited vouching, invading the province of the jury; harmless here; III.

***State v. Riley***, 12 Wn.App. 714 (2020)

Trial court precludes defense witness who offered to testify that victim had previously made a false police report; held: while specific instances of misconduct may be established via cross-examination, the party is bound by a denial and extrinsic evidence is not admissible, ER 608(b), *State v. Harris*, 97 Wn.App. 647 (1999); 2-1.

***State v. Slater***, 197 Wn.2d 660 (2021)

A single failure to appear in court is not indicative of consciousness of guilt, thus it is error for a court to admit such evidence of **flight**, *State v. Bruton*, 66 Wn.2d 111, 112 (1965), *cf.*: *State v. Cobb*, 22 Wn.App. 221, 224 (1978), *State v. Jefferson*, 11 Wn.App. 566, 570 (1974); 9-0.

***State v. Fleeks***, ___ Wn.App.2d ___, 2023WL355082 (2023)

Trial court precludes defense from offering evidence that a witness was on probation for a DUI; held: absent evidence that witness was worried about his probation or that there was concern that state might be pressured to testify trial court's exclusion of evidence of a DUI probation was properly excluded, distinguishing *Davis v. Alaska*, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974), *State v. McDaniel*, 83 Wn.App. 179, 186 (1996); I.

# EVIDENCE
## Objections and Motions *in Limine*

***In re Lee***, 95 Wn.2d 357, 363 (1980), *overruled, in part, Hews v. Evans*, 99 Wn.2d 80 (1983)

Failure to object to admissibility of evidence precludes attacking the use of the evidence on appeal; however, if challenge is raised in a motion for new trial, issue is preserved, *State v. Fagalde*, 85 Wn.2d 730 (1975), *State v. Ray*, 116 Wn.2d 531 (1991), *but see: State v. Jones*, 71 Wn.App. 798, 807 n. 2 (1993), *State v. Whitaker*, 6 Wn.App.2d 1 (2018), *affirmed, on different grounds, State v. Whitaker*, 195 Wn.2d 333 (2020); 5-3.

***State v. Swan***, 114 Wn.2d 613 (1990)

"Lack of foundation" is a general objection which, if sustained, will be affirmed on appeal if there was any valid basis for excluding the evidence, *but see: Det. Of Pouncy*, 144 Wn.App. 609, 622-24 (2008), *aff'd, on other grounds,* 168 Wn.2d 382 (2010); where trial court sustains an objection but does not strike the testimony, then jury may consider the evidence, *State v. Stackhouse*, 90 Wn.App. 344, 361 (1998) , *State v. Embry*, 171 Wn.App. 714, 739-41 (2012), *State v. Mireles*, 16 Wn.App.2d 641, 658 (2021), *see: State v. Rushworth*, 12 Wn.App.2d 466 (2020); 9-0.

***State v. Casteñeda-Perez***, 61 Wn.App. 354 (1991)

Prosecutor asks defense witness if police are lying, defense counsel objects that question "calls for a comment on the evidence;" held: objection was too general to meet requirement that objections must state specific grounds so that court is informed on the issue and adversary has opportunity to correct it, *State v. Boast*, 87 Wn.2d 447, 451 (1976), *Coleman v. Montgomery*, 19 Wash. 610 (1898), *State v. Smith*, 67 Wn.App. 838 (1992); I.

***State v. Braham***, 67 Wn.App. 930 (1992)

An objection that the jury "could be seriously misled" is sufficient to invoke ER 403, as the basis for the objection is apparent from the context, *State v. Pittman*, 54 Wn.App. 58, 66 (1989), *see: State v. Jones*, 71 Wn.App. 798, 813 (1993); I.

***State v. Padilla***, 69 Wn.App. 295 (1993)

"Improper line of questioning" may be insufficient to preserve error, *see: State v. Casteñeda-Perez*, 61 Wn.App. 354, 363 (1991), subsequent request for sidebar conference and court's stating that it "just read the case" establishes that court understood grounds for the sidebar request and underlying objection, thus error preserved; I.

***State v. Roberts***, 73 Wn.App. 141 (1994)

In speeding infraction case, officer testifies, without objection, that his radar gun had clocked defendant above speed limit, after which defense moves to dismiss on grounds court could not consider radar testimony because state had not proved radar device was constructed and designed to determine speed, *Seattle v. Peterson*, 39 Wn.App. 524 (1985); held: while state was required to prove authentication, since evidence from a process or system must be authenticated before admission, ER 901(b)(9), where no authentication objection is made, the

requirement of authentication is waived, ER 103(a)(1), *Seattle v. Bryan*, 53 Wn.2d 321, 324 (1958); where evidence is admitted, trial court must consider it in light most favorable to nonmoving party in ruling on motion to dismiss; II.

***State v. Mathis***, 73 Wn.App. 341 (1994)

Where defendant does not object to admissibility of confession until after he has testified, then trial court may consider defendant's testimony in determining if *corpus delicti* has been established; II.

***State v. Cole***, 74 Wn.App. 571 (1994)

Where state challenges the sufficiency of the evidence in support of a defense, trial court must interpret evidence in a light most favorable to the defendant, and may not assess credibility or weigh the evidence, although it may determine admissibility; a motion *in limine* should be granted if (1) it describes the evidence objected to with sufficient specificity to enable the trial court to determine that it is clearly inadmissible, (2) the evidence is so prejudicial that the moving party should be spared the necessity of calling attention to it by objecting when it is offered, and (3) trial court is given a brief showing that the evidence is inadmissible, *Gammon v. Clark Equip. Co.*, 38 Wn.App. 274, 286-7 (1984), *aff'd,* 104 Wn.2d 613 (1985); II.

***State v. Florczak***, 76 Wn.App. 55, 72-3 (1994)

Failure to object to expert opinion or to inadequacy of foundation for the opinion waives error; I.

***State v. Powell***, 126 Wn.2d 244, 256-8 (1995)

Where orders *in limine* are neither tentative nor equivocal, then there is a standing objection to all of the evidence encompassed by the order, and no further objection need be made to preserve error, *State v. Koloske*, 100 Wn.2d 889, 895-6 (1984), *overruled on other grounds, State v. Brown*, 111 Wn.2d 124 (1988), 113 Wn.2d 520 (1989), *State v. Carlson*, 61 Wn.App. 865, 875 (1991), *see: State v. Finch*, 137 Wn.2d 792, 819-21 (1999), *State v. Fisher*, 165 Wn.2d 727, 748 n.4 (2009), *State v. Henson*, 11 Wn.App.2d 97 (2019), *State v. Roosma*, 19 Wn.App.2d 941 (2021); 9-0.

***Seattle v. Carnell***, 79 Wn.App. 400, 403-4 (1995)

"Lack of foundation" is a general objection which does not preserve error on appeal, *but see: Det. Of Pouncy*, 144 Wn.App. 609, 622-24 (2008), *reversed, on other grounds,* 168 Wn.2d 382 (2010), *State v. Embry*, 171 Wn.App. 714, 739-41 (2012); I.

***State v. Burnley***, 80 Wn.App. 571 (1996)

Motion to suppress for unlawful search is untimely if not made until evidence has been presented to jury and state has rested, *State v. Baxter*, 68 Wn.2d 416, 423 (1966), *State v. Lemons*, 53, Wn.2d 138, 141 (1958), *see: State v. Walton*, 76 Wn.App. 364, 368-70 (1994), *Johnson v. United States*, 87 L.Ed.2d 704 (1943), *but see: State v. McFarland*, 127 Wn.2d 322 (1995), *State v. Klinger*, 96 Wn.App. 619 (1999); III.

***State v. Henthorn***, 85 Wn.App. 235, 239 (1997)

Failure to object to sufficiency of evidence of a prior conviction to enhance punishment waives issue, *State v. Mak*, 105 Wn.2d 692, 718-9 (1986); I.

***State v. Thompson***, 90 Wn.App. 41, 44-7 (1998)

In vehicular assault case, court orders *in limine* that police witnesses not refer to defendant's driving as "reckless," detective violates order, defense motion for mistrial is denied, court instructs jury to disregard; held: to determine prejudicial effect, court must examine (1) seriousness, (2) whether the error involved cumulative evidence, and (3) whether trial court instructed jury to disregard, *State v. Johnson*, 124 Wn.2d 57, 76 (1994); here, violation of motion *in limine* was serious, *State v. Essex*, 57 Wn.App. 411 (1990), *State v. Escalona*, 49 Wn.App. 251 (1987), *State v. Babcock*, 145 Wn.App. 157 (2008), clearly cumulative, trial court's instruction to disregard was adequate, *State v. Gamble*, 168 Wn.2d 161, 175-80 (2010); III.

***State v. Gallagher***, 112 Wn.App. 601, 609-11 (2002)

In manufacturing methamphetamine case, defense motion *in limine* to preclude evidence of used and unused syringes is granted, defense elicits from detective about the lack of items associated with drugs at the house such as cash, baggies, pagers, packing materials, trial court allows state to produce syringes; held: defense opened the door, *State v. Gefeller*, 76 Wn.2d 448, 455 (1969), *State v. Fankhouser*, 133 Wn.App. 689, 695 (2006), distinguishing *State v. Stockton*, 91 Wn.App. 35 (1998), *State v. Avendano-Lopez*, 79 Wn.App. 706 (1995), *see: State v. Rushworth*, 12 Wn.App.2d 466 (2020), *cf.: State v. Jones*, 144 Wn.App. 284, 297-99 (2008); III.

***State v. Wilbur-Bobb***, 134 Wn.App. 627, 632-34 (2006)

In vehicular homicide trial, defense counsel objects to toxicologist's testimony about retrograde extrapolation of blood alcohol based upon the witness' lack of training, on appeal defense argues that court erred in not holding a *Frye* hearing; held: an objection to credentials cannot be tranformed into a *Frye* argument on appeal as it does not sufficiently call to the court's attention the basis of the objection, distinguishing *State v. Black*, 109 Wn.2d 336, 341 (1987); I.

***State v. Weber***, 159 Wn.2d 252, 270-79 (2006)

Where a motion *in limine* to exclude evidence is granted and the other party appears to violate the order, counsel must object to preserve the error, *State v. Finch*, 137 Wn.2d 819-21 (1999), *State v. Sullivan*, 69 Wn.App. 167 (1993), *State v. Powell*, 126 Wn.2d 244, 256 (1995), *State v. Koloske*, 100 Wn.2d 889, 895-96 (1984), *overruled, on other grounds, State v. Brown*, 111 Wn.2d 124 (1988), 113 Wn.2d 520 (1989), *cf.: State v. Ryna Ra*, 144 Wn.App. 688, 700-02 (2008), *State v. Henson*, 11 Wn.App.2d 97 (2019); where a party's motion *in limine* is denied, the party need not object to preserve error, *State v. Smith*, 189 Wash. 422 (1937); 5-4.

***State v. Mason***, 160 Wn.2d 910, 932-33 (2007)

An objection that proffered evidence is "prejudicial" is "adequate to preserve an appeal" of ER 404(b) evidence, *State v. Briejer*, 172 Wn.App. 209, 222-23 (2012), *cf.: DeHaven v. Gant*, 42 Wn.App. 666, 671 (1986), whereas an objection that the evidence is irrelevant is not; 5-4.

***State v. Ryna Ra***, 144 Wn.App. 688, 700-02 (2008)

While a party must object to preserve evidentiary error even where the court has excluded the evidence in a pretrial order, *State v. Weber*, 159 Wn.2d 252, 272 (2006), an exception to the objection requirement exists where an unusual circumstance exists that makes it impossible to avoid the prejudicial impact of evidence that had previously been ruled inadmissible, to include deliberate disregard of a trial court's ruling or an objection by itself that would be so damaging as to be immune from any curative instruction; here, prosecutor deliberately questioned a detective about gang evidence when it had been excluded; II.

***State v. Asaeli***, 150 Wn.App. 543, 686-87 (2009)

Where trial court states that a ruling on a motion *in limine* is tentative and preliminary and defense does not object or seek a final ruling when the evidence is admitted, then defendant has waived the issue, RAP 2.5(a), *State v. Riker*, 123 Wn.2d 351, 369 (1994), *State v. Carlson*, 61 Wn.App. 865, 875 (1991); II.

***State v. Lindsay***, 180 Wn.2d 423, 430-31 (2014)

A mistrial motion for prosecution misconduct following prosecutor's closing preserves error, *but see: State v. Brown*, 21 Wn.App.2d 541 (2022); 9-0.

***State v. Vassar***, 188 Wn.App. 251, 258 (2015)

"While the defense can object to the form of a State question, it cannot object to a nonresponsive answer to a proper question. On the other hand, the State can object to a nonresponsive answer to its question and ask that it be stricken. The same rules apply when the roles are reversed and the defense is cross-examining a State's witness," 5D Wash. Prac., Handbook Wash. Evid. OBJ 44 (2014-15 ed.); III.

***State v. Giles***, 196 Wn.App. 745, 764-69 (2016)

Witness violates order *in limine*, defense counsel states "objection, no foundation," trial court overrules objection, at recess counsel argues specifically about violation, trial court offers curative instruction which defense accepts, on appeal argues that court should have granted mistrial *sua sponte;* held: defense received the remedies requested and thus forfeited any other remedy, *see: State v. Swan*, 114 Wn.2d 613 (1990), *State v. Russell*, 125 Wn.2d 24, 93 (1994); I.

***State v. Wafford***, 199 Wn.App. 32 (2017)

*In limine* trial court excludes child victim's videotaped statement, defense counsel references the statement in opening, court allows state to play video to jury; held: an attorney's reference to a jury about suppressed evidence may be grounds for the court to admit the suppressed evidence as the door has been opened; I.

***State v. Jefferson***, 199 Wn.App. 772, 804-06 (2017), *reversed, on other grounds,* 192 Wn.2d 225 (2018)

"The Rules of Evidence neither authorize nor prohibit **speaking objections**. 5 Wash. Prac., Evidence Law and Practice § 103.8 (6th ed.). Instead, the trial court decides the propriety of a speaking objection. This trial court ruled that the State's objection was not improper. Jefferson has not demonstrated that any speaking objections were improper or prejudicial;" I.

***State v. Dillon***, 12 Wn.App. 133, 146 (2020)

In ruling on a motion *in limine* trial court stated that the ruling "may be subject to further action and objection as the testimony is actually taken," defense does not object; held: because trial court did not indicate that further objecions were necessary then the ruling was preserved for appeal, *but see: State v. Roosma*, 19 Wn.App.2d 941 (2021); I.

***State v. Rushworth***, 12 Wn.App.2d 466 (2020)

After sustaining an objection to testimony court must grant a motion to strike, *see: State v. Stackhouse*, 90 Wn.App. 344, 361 (1998) ("When an objection is sustained with no further motion to strike the testimony and no further instruction for the jury to disregard the testimony, the testimony remains in the record for the jury's consideration."), *State v. Mireles*, 16 Wn.App.2d 641, 658 (2021); **open door doctrine:** where irrelevant evidence or evidence that would be excluded for undue prejudice is offered by the party that would benefit from the exclusion then that party has waived protection from the forbidden topic and the subject matter is open for examination by the other party, however this only applies to relevance issues and may still preclude admissibility based upon constitutional requirements, pertinent statutes and the rules of evidence, ER 402, *State v. Gefeller*, 76 Wn.2d 449, 455, 458 (1969); **curative admissibility doctrine**: if defense offers inadmissible evidence, state's remedy is to object, and may not seize the opportunity to offer otherwise inadmissible evidence by failing to act; III.

***State v. Roosma***, 19 Wn.App.2d 941 (2021)

Defense moves pretrial to exclude cell phone evidence based upon foundation, trial court denies motion "at this time," at trial defense does not object; held: where a pretrial motion is "final," defense need not object to preserve error, *State v. Powell*, 126 Wn.2d 244, 256-58 (1995)**,** but where the trial court ruling is tentative defense must object, *State v. Koloske*, 100 Wn.2d 889, 895-96 (1984), *overruled, on other grounds, State v. Brown*, 111 Wn.2d 124 (1988), 113 Wn.2d 520 (1989), *but see: State v. Dillon*, 12 Wn.App. 133, 147 (2020); II.

***State v. Brown***, 21 Wn.App.2d 541 (2022)

A motion for a mistrial following prosecutor's closing argument does not preserve the issue absent a timely objection, *but see: State v. Lindsay*, 180 Wn.2d 423, 430-31 (2014); III.

# EVIDENCE
## Opinions

***State v. Kinard***, 39 Wn.App. 871 (1985)

Testimony that assailant "sounded like a black man" is proper lay opinion, ER 701; voice lineup not required; III.

***State v. Sargent***, 40 Wn.App. 340 (1985)

Police officer testified that he believed defendant's response to a question was "contrived"; held: lay witness who does not know defendant cannot assert such a conclusion, *State v. Haga*, 8 Wn.App. 481 (1973); *State v. Jamison*, 93 Wn.2d 794, 798 (1980), *State v. Wilber*, 55 Wn.App. 294 (1989), *State v. Barr*, 120 Wn.App. 370 (2004), *see State v. Wigley*, 5 Wn.App. 465, 467 (1971), *State v. Allen*, 50 Wn.App. 412 (1988), *State v. Day*, 51 Wn.App. 544 (1988), *cf.: State v. Craven*, 69 Wn.App. 581 (1993), *State v. Stenson*, 132 Wn.2d 668, 719-24 (1997); I.

***State v. Carlin***, 40 Wn.App. 698 (1985)

K-9 officer testifies that dog followed "guilt scent" in tracking defendant; held: expression of opinion regarding defendant's guilt invades the province of the trier of fact, *but see: Seattle v. Heatley*, 70 Wn.App. 573 (1993), *State v. Fisher*, 74 Wn.App. 804, 812-4 (1994), harmless here; I.

***State v. Rangitsch***, 40 Wn.App. 771 (1985)

In negligent homicide trial, pathologist is permitted to testify to the effects of cocaine on motor skills; held: physician may testify to the entire medical field, even if not a specialist in the particular field of which he speaks, *Kelly v. Carroll*, 36 Wn.2d 482, 491, 19 A.L.R.2d 1174 (1950); witness need not possess academic credentials of an expert as the modern trend is away from reliance on formal titles or degrees, *Harris v. Robert C. Groth, M.D., Inc., P.S.*, 99 Wn.2d 438, 449 (1983), ER 702; expert may read from a learned treatise on direct if expert has testified to its reliability as authority, ER 803(a)(18); I.

***State v. Strandy***, 49 Wn.App. 537 (1987)

Trained, experienced narcotics officer may testify that numbers on piece of paper were consistent with those commonly made in narcotics transactions; *see: State v. Simon*, 64 Wn.App. 948, *rev'd, in part, on other grounds*, 120 Wn.2d 196 (1992); II.

***State v. Allen***, 50 Wn.App. 412 (1988)

Police officer testifies that murder suspect's grief did not appear to be sincere due to lack of tears or redness in her face; held: because officer's testimony was based upon personal observations of suspect's conduct, then it logically supported his conclusion, and was thus not an opinion on guilt but was an explanation and summary of his personal observation, *distinguishing State v. Sargent*, 40 Wn.App. 340 (1985), *State v. Haga*, 8 Wn.App. 481 (1973); *accord*: *State v. Day*, 51 Wn.App. 544 (1988), *State v. Craven*, 69 Wn.App. 581 (1993), *State v. Stenson*, 132

Wn.2d 668, 719-24 (1997), *State v. Barr*, 123 Wn.App. 373 (2004), *State v. Rafay*, 168 Wn.App. 734, 805-11 (2012); I.

***State v. Collins***, 110 Wn.2d 263 (1988)

In rape case, battered woman syndrome evidence is admissible in state's case-in-chief to show why victim remained in violent relationship and why she did not report violent acts to police, *distinguishing* *State v. Black*, 109 Wn.2d 336 (1987); *cf.:* *State v. Riker*, 123 Wn.2d 351 (1994); 8-1.

***State v. Briggs***, 55 Wn.App. 44 (1989)

In rape case where victim claims rapist did not stutter, and defense maintains that defendant stutters, it was within trial court's discretion to allow speech expert to relate names of well-known personalities who stutter but not when performing and that there are situations in which there was a high probability that a person would not stutter, including the statistical percentage of that probability; I.

***State v. Lass***, 55 Wn.App. 300 (1989)

Truck driver may testify as to fuel consumption of his own truck as an expert and as lay opinion because it is based upon a rational perception of the witness, ER 701; III.

***State v. Contreras***, 57 Wn.App. 471 (1990)

Witness testifies, over objection, that assault victim had no doubt who assaulted him; held: a witness who is personally acquainted with declarant may give his opinion as to the state of mind of the declarant, *State v. Jamison*, 93 Wn.2d 794, 798 (1980), *distinguishing* *State v. Sargent*, 40 Wn.App. 340 (1985); I.

***State v. Jones***, 59 Wn.App. 744 (1990)

In child homicide case, doctors testify that there was no "plausible historical evidence" consistent with injuries; held: doctors opinion that injury was inflicted rather than accidental was not based upon their opinion of defendant's credibility, *State v. Warren*, 134 Wn.App. 44, 52-58 (2006), *aff'd, on other grounds,* 165 Wn.2d 17 (2008), nor did they opine that defendant committed crime; although opinion may touch on ultimate issue, it is admissible within discretion of trial court, ER 704; I.

***O'Neill v. Department of Licensing***, 62 Wn.App. 112 (1991)

Officer testifies that defendant's explanation about the cause of an accident was inconsistent with officer's conclusion; held: no abuse of discretion as discretion was not exercised on manifestly unfair, unreasonable or untenable grounds, *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26 (1971); I.

***State v. Lord***, 117 Wn.2d 829 (1991)

Expert testimony couched in terms of "could have," "possible," or "similar" is admissible when analyzing common sources of trace evidence, *State v. Batten*, 17 Wn.App. 428 (1977), *State v. Warness*, 77 Wn.App. 636, 642-3 (1995); 6-3.

***State v. Alexander***, 64 Wn.App. 147 (1992)

Counselor's testimony in child rape case that victim's description of abuse was very clear and consistent, and that she never gave any indication she was lying is error, as repetition is not generally a valid test for veracity, *State v. Harper*, 35 Wn.App. 855, 857 (1983), and expert opinion as to guilt invades jury's exclusive function to weigh evidence and determine credibility, *State v. Fitzgerald*, 39 Wn.App. 652, 657 (1985), *State v. Carlin*, 40 Wn.App. 698, 701 (1985), *State v. Jones*, 71 Wn.App. 798, 812 (1993), *State v. Carlson*, 80 Wn.App. 116 (1995), *State v. Dunn*, 125 Wn.App. 582, 589-95 (2005), *State v. Jungerts*, 125 Wn.App. 901 (2005), *rev. granted*, 155 Wn.2d 1014 (2005), *see also: State v. King*, 131 Wn.App. 789 (2006), *State v. Warren*, 134 Wn.App. 44, 52-58 (2006), *cf.: State v. Kirkman*, 159 Wn.2d 918 (2007); I.

***State v. Stumpf***, 64 Wn.App. 522 (1992)

Expert testimony is required to establish existence of a mental disorder and causal connection between disorder and diminished capacity; to supplement expert testimony, lay witness may testify to establish defendant's mental state in diminished capacity case where (1) witness had sufficient acquaintance with defendant or had sufficient time to observe defendant, (2) witness testifies, at least in a general way, as to the peculiar facts and circumstances on which her conclusion is based, (3) testimony refers to defendant's mental condition at or close to the time witness made observation and at or close to time of offense; III.

***State v. Ortiz***, 119 Wn.2d 294 (1992), *disapproved, on other grounds, State v. Condon,* 182 Wn.2d 307, 321-26 (2015)

Border Patrol tracker is permitted to testify as to his opinion, based upon track, of suspect's height, weight, mental state, familiarity with terrain, physical condition, suspect's interaction with a dog, and race; held: trial court did not abuse discretion in admitting evidence as lay opinion as perceptions in field formed a rational basis for the inferences presented, ER 701; evidence could also have been admitted as expert testimony, ER 702, based on experience; *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) standard is inapplicable as testimony did not involve new methods of proof or new scientific principles, *State v. Young*, 62 Wn.App. 895, 906 (1991), *State v. Sanders*, 66 Wn.App. 380 (1992); testimony was not so technical that jury could not judge reliability for itself; *see: State v. Jones*, 71 Wn.App. 798, 813-21 (1993); 5-4.

***State v. Simon***, 64 Wn.App. 948, *rev'd in part, on other grounds,* 120 Wn.2d 196 (1992)

In promoting prostitution case, testimony of police officer, with six years' experience investigating 50 pimping cases, as to general relationships between pimps and prostitutes, how pimps control prostitutes, types of pimps, personalities of prostitutes was properly admitted within trial court's discretion, *State v. Strandy*, 49 Wn.App. 537 (1987), even though trial court's reasons are "fairly debatable," *Walker v. Bangs*, 92 Wn.2d 854, 858 (1979), as witness had sufficient practical experience, *State v. Smith*, 88 Wn.2d 639, 647 (1977), *overruled on other grounds, State v. Jones*, 99 Wn.2d 735 (1983), was helpful to jury in understanding mores of pimp/prostitute world, *State v. Ciskie*, 110 Wn.2d 263, 273-4 (1988); I.

***State v. Sanders***, 66 Wn.App. 380 (1992)

Officer's opinion testimony that absence of drug user paraphernalia indicates residents are not users does not concern sophisticated or technical matters and is thus not subject to *Frye* analysis, *State v. Ortiz*, 119 Wn.2d 294, 310-1 (1992), *disapproved, on other grounds, , State v. Condon*, 182 Wn.2d 307, 321-26 (2015), *State v. Smith*, 88 Wn.2d 639, 647 (1977), *overruled on other grounds in State v. Jones*, 99 Wn.2d 735 (1983); expert opinions can be admitted without foundation except for testimony establishing the expert's qualifications, *Cornejo v. State*, 57 Wn.App. 314, 329 (1990); an opinion is not a comment on guilt unless it relates directly to the defendant, *State v. Carlin*, 40 Wn.App. 698, 703 (1985), *State v. Haga*, 8 Wn.App. 481, 490 (1973), *Seattle v. Heatley*, 70 Wn.App. 573 (1993), *State v. Hayward*, 152 Wn.App. 632, 648-52 (2009); inference based on physical evidence and experience is not an opinion as to defendant's guilt, *State v. Fisher*, 74 Wn.App. 804, 812-4 (1994); I.

***State v. Craven***, 69 Wn.App. 581 (1993)

In child abuse case, hospital social worker's testimony that defendant had difficulty making eye contact, stared at floor, didn't cry, was withdrawn, and that that behavior was unusual was properly admitted as it contained personal observations of conduct, factually recounted by witness that directly and logically supported the conclusion, *State v. Day*, 51 Wn.App. 544, 552 (1988), *State v. Allen*, 50 Wn.App. 412, 418-9 (1988), *State v. Stenson*, 132 Wn.2d 668, 719-24 (1997), *State v. Rafay*, 168 Wn.App. 734, 805-11 (2012), *see: State v. Barr*, 123 Wn.App. 373 (2004); I.

***State v. Halstien***, 122 Wn.2d 109 (1993)

Officer's testimony that a substance "might have been semen" was proper, as ER 701 allows a lay witness to testify to opinions or inferences if testimony is rationally based on witness's perception, within court's discretion, *State v. Ferguson*, 100 Wn.2d 131, 140 (1983), *State v. Everybodytalksabout*, 145 Wn.2d 456 (2002); overrules, in part, *State v. Halstien*, 65 Wn.App. 845, 850-1 (1992); 8-0.

***Seattle v. Heatley***, 70 Wn.App. 573 (1993)

In DUI case, officer's testimony, without objection, that in his opinion defendant was obviously intoxicated and affected by alcohol, and could not drive in a safe manner is an opinion encompassing an ultimate factual issue which supports the conclusion that defendant is guilty, but is not an improper opinion on guilt, and is admissible both as lay and expert opinion, *cf.: State v. Farr-Lenzini*, 93 Wn.App. 453, 459-66 (1999), within discretion of trial court, *State v. Smissaert*, 41 Wn.App. 813, 815 (1985), *State v. Fisher*, 74 Wn.App. 804, 812-4 (1994), *State v. Lewellyn*, 78 Wn.App. 788, 793-6 (1995), , *aff'd*, on other grounds, *State v. Smith*, 130 Wn.2d 215 (1996), *State v. Baird*, 83 Wn.App. 477, 484-6 (1996), *State v. We*, 138 Wn.App. 716 (2007), *State v. Olmedo*, 112 Wn.App. 525 (2002), *State v. Christopher*, 114 Wn.App. 858, 862-63 (2003), *see: State v. Cruz*, 77 Wn.App. 811 (1995); admission of evidence alleged to constitute opinion on guilt is not constitutional error, *see: State v. Warren*, 134 Wn.App. 44, 56-58 (2006), *but see: State v. Carlin*, 40 Wn.App. 698, 701-02 (1985), *State v. Olmedo, supra.*, at 533, *State v. Barr*, 123 Wn.App. 373 (2004), *State v. Borsheim*, 140 Wn.App. 357, 374-75 (2007) , *State v. Quaale*, 177 Wn.App. 603 (2013); I.

***State v. Hettich***, 70 Wn.App. 586 (1993)

Toxicologist's opinion testimony that person with a .14 blood alcohol level would lose at least a third of their normal driving ability, while without scientific foundation, was harmless, if it was error at all, in light of witness's proper testimony that person's ability to drive "would be significantly impaired," and in light of strong evidence of intoxication; testimony was probably not subject to *Frye* analysis since testimony was not based on novel scientific experimental procedures, but rather upon witness's own practical experience and acquired knowledge, *State v. Ortiz*, 119 Wn.2d 294, 311 (1992), *disapproved, on other grounds, State v. Condon*, 182 Wn.2d 307, 321-26 (2015); I.

***State v. Furman***, 122 Wn.2d 440 (1993)

In diminished capacity/voluntary intoxication case, pharmacologist is cross-examined about defendant's sexual history prior to offense and prior to taking drugs; held: otherwise inadmissible evidence may be admissible to explain an expert's opinion or to permit jury to determine what weight it should be given, ER 705, *Group Health Coop. of Puget Sound, Inc. v. Department of Rev.*, 106 Wn.2d 391, 400 (1986), *but see: State v. Acosta*, 123 Wn.App. 424, 435-39 (2004); 8-0.

***State v. Jones***, 71 Wn.App. 798, 812 (1993)

In child sex abuse case, expert testifies that, during interview with victim she told victim, "I believe you," and testifies "I felt [she] had been sexually molested by" defendant; held: "I believe you" was merely intended to reassure victim, thus, absent objection, not reversible error, *State v. Madison*, 53 Wn.App. 754, 760-3 (1989), *State v. King*, 131 Wn.App. 789 (2006); latter statement was an improper opinion on guilt, *State v. Fitzgerald*, 39 Wn.App. 652, 657 (1985), *State v. Alexander*, 64 Wn.App. 147, 154 (1992), *State v. Haga*, 8 Wn.App. 481, 492 (1973), *State v. Jungers*, 125 Wn.App. 895 (2005), *see: State v. Kirkman*, 159 Wn.2d 918 (2007), *see: State v. Kirkman*, 159 Wn.2d 918 (2007), harmless here; I.

***State v. Riker***, 123 Wn.2d 351, 358-66 (1994)

Trial court does not abuse its discretion by excluding battered-person syndrome evidence in duress case to explain defendant's behavior with a nonintimate, nonbattering person; 7-2.

***State v. Fisher***, 74 Wn.App. 804, 812-4 (1994)

In drug case, officer testifies defendant told accomplice to sell drugs and that more would be available later, which indicates defendant was involved in transaction and was running the show, something he was trained to look for; held: witness's testimony encompassed ultimate factual issue as to whether defendant was accomplice, but was not direct testimony on defendant's guilt, thus did not constitute an impermissible opinion as to defendant's guilt, *Seattle v. Heatley*, 70 Wn.App. 573, 578-9 (1993), *State v. Olmedo*, 112 Wn.App. 525 (2002), *State v. Nelson*, 152 Wn.App. 755 (2009) *cf.: State v. Montgomery*, 163 Wn.2d 577 (2008); I.

***State v. Florczak***, 76 Wn.App. 55, 73-5 (1994)

Testimony that symptoms could be correlated with a child who has been sexually abused is not a conclusion that child was abused, and does not invade jury's function, *State v. Jones*, 71 Wn.App. 798, 815 n. 6 (1993); testimony that a diagnosis of post-traumatic stress syndrome is secondary to sexual abuse of victim, and only defendants were implicated, then witness has

stated an opinion that defendants were guilty, which invades province of the jury, *Jones, supra,* at 813, manifest constitutional error, harmless here, *but see: State v. Warren,* 134 Wn.App. 44, 52-58 (2006), *aff'd, on other grounds,* 165 Wn.2d 17 (2008), *cf.: State v. Cruz,* 77 Wn.App. 811 (1995), *State v. Warren,* 134 Wn.App. 44, 56-58 (2006); I.

***State v. Brett***, 126 Wn.2d 136, 161-2 (1995)

Lay witness may testify as to her opinion that defendant did not appear to be under the influence of alcohol or drugs where witness had observed defendant twice for several minutes, was a former police officer familiar with effects of intoxicating substances, ER 701; 9-0.

***State v. Cruz***, 77 Wn.App. 811 (1995)

In VUCSA case, detective testifies about "typical" heroin transactions, including evidence about informants, controlled buys, how and where parties meet, prosecutor argues in closing that defendant's actions fit typical transaction; held: because witness did not render an opinion that directly implicated defendant, it was not an impermissible opinion on guilt, *State v. Aguirre,* 168 Wn.2d 350, 359-61 (2010), closing argument was proper, as attorneys may draw inferences from the evidence, *Seattle v. Heatley,* 70 Wn.App. 573 (1993), *distinguishing State v. Black,* 109 Wn.2d 336, 348 (1987), *State v. Florczak,* 76 Wn.App. 55 (1994), *cf.: State v. Olmedo,* 112 Wn.App. 525 (2002); I.

***State v. Martinez***, 78 Wn.App. 870, 878-81 (1995)

Defense arson expert is permitted by trial court to testify to his opinion that fire was not arson, but was precluded from testifying to statements others made to him during investigation if statement differed from the person's testimony at trial or if the person was not a witness at trial; held: an expert may base opinion on facts which are otherwise inadmissible, ER 703, trial court may allow disclosure of underlying data, but ER 705 should not act as a mechanism for admitting otherwise inadmissible evidence as an explanation for the expert's opinion, *State v. Anderson,* 44 Wn.App. 644, 652 (1986), *Washington Irrigation & Dev. Co. v. Sherman,* 106 Wn.2d 685, 687-8 (1986), *State v. Nation,* 110 Wn.App. 651, 661-67 (2002); II.

***State v. Carlson***, 80 Wn.App. 116 (1995)

In child sex abuse case, physician testifies that her physical findings are inconclusive, but based on her interview with complainant and a published study about interviews, her opinion is that the child was abused; held: published study did not meet *Frye* test, physician's opinion that the child was a victim of abuse based upon what the child said was improperly admitted, *State v. Fitzgerald,* 39 Wn.App. 652 (1985), *State v. Alexander,* 64 Wn.App. 147 (1992), *State v. Florczak,* 76 Wn.App. 55 (1994), *State v. Black,* 109 Wn.2d 336, 348 (1987), *State v. Jungers,* 125 Wn.App. 901 (2005), *State v. Dunn,* 125 Wn.App. 582, 589-95 (2005), *State v. Hudson,* 150 Wn.App. 646 (2009), *see: State v. Binh Thach,* 126 Wn.App. 297, 314 (2005), *State v. King,* 131 Wn.App. 789 (2006), *State v. Warren,* 134 Wn.App. 44, 52-58 (2006), *cf.: State v. Kirkman,* 159 Wn.2d 918 (2007); II.

***State v. Barnes***, 85 Wn.App. 638, 662-3 (1997)

Expert may testify in summary fashion when necessity dictates that it is the only proacticable way of presenting evidence, ER 1006, *Keen v. o'Rourke,* 48 Wn.2d 1, 5 (1955),

when summaries promote jury's convenience and proponent of the summary establishes that original records are too voluminous for easy use in court and make records available for examination by opposing party, *State v. Marshall*, 25 Wn.App. 240, 243 (1980), *State v. Kane*, 23 Wn.App. 107, 110-11 (1979); II.

***State v. Stenson***, 132 Wn.2d 668, 719-24 (1997)

Paramedic's testimony that he was surprised to learn that defendant was husband of gunshot victim, as defendant showed no grief, is admissible as a personal observation of defendant's conduct which supports his surprise, *State v. Craven*, 69 Wn.App. 581 (1993), *State v. Allen*, 50 Wn.App. 412 (1995), *State v. Rafay*, 168 Wn.App. 734, 805-11 (2012), distinguishing *State v. Haga*, 8 Wn.App. 481, 492 (1973), *State v. Sargent*, 40 Wn.App. 340, 351 (1985), *State v. Barr*, 123 Wn.App. 373 (2004); 8-0.

***State v. Farr-Lenzini***, 93 Wn.App. 453, 459-66 (1999)

In attempting to elude case, trooper testifies, over objection, that based upon the driving, defendant was attempting to get away from trooper, knew trooper was behind and refused to stop; held: no foundation established that trooper had specialized training or experience necessary to recognize difference between distracted speeding driver and eluding driver, distinguishing *Seattle v. Heatley*, 70 Wn.App. 573, 578-79 (1993), *State v. Olmedo*, 112 Wn.App. 525 (2002), nor is it helpful to the jury, ER 702, since a lay jury is capable of making the determination without expert testimony; evidence is not admissible lay opinion, ER 701, as it relates to a core element, and the state has not established a substantial factual basis supporting the opinion, *State v. Saunders*, 120 Wn.App. 800, 811-13 (2004), *see: Carr v. Deking*, 52 Wn.App. 880, 885-86 (1988), *State v. Thamert*, 45 Wn.App. 143, 148-49 (1986), *State v. Montgomery*, 163 Wn.2d 577 (2008), *State v. Fallentine*, 149 Wn.App. 614, 624-25 (2009), distinguishing *State v. Madison*, 53 Wn.App. 754, 760-65 (1989), *State v. Winborne*, 4 Wn.App.2d 147 (2018); II.

***State v. Lopez***, 95 Wn.App. 842, 856-57 (1999)

In molestation case, defendant-father, after *Miranda* waiver, tells police he doesn't believe his children would lie, "I must have done it," objected to as inadmissible opinion of veracity of a witness; held: because the opinion did not go to the veracity of the children at trial, it was admissible; III.

***State v. Kunze***, 97 Wn.App. 832, 857-58 (1999)

Police may offer an opinion that a burglary might have been "staged" based upon their experience, as they are testifying to inferences readily understandable by a jury, *State v. Halstien*, 122 Wn.2d 109, 128 (1993), *but see: State v. Everybodytalksabout*, 145 Wn.2d 456 (2002), *State v. Dolan*, 118 Wn.App. 323, 328-30 (2003); II.

***State v. Read***, 100 Wn.App. 776 (2000), *remanded*, 142 Wn.2d 1007 (2000), *affirmed*, 106 Wn.App. 138 (2001), *aff'd, on other grounds,* 147 Wn.2d 238 (2002)

Expert may express an opinion without recitation of the expert's factual data first, ER 703, 705, *Cornejo v. State*, 57 Wn.App. 314, 329 (1990); in homicide case, lay witness's opinion that defendant did not have to defend himself went directly to the validity of the defense and was

thus a comment on defendant's guilt, *State v. Olmedo*, 112 Wn.App. 525 (2002), harmless here; III.

***State v. Demery***, 144 Wn.2d 753 (2001)

Trial court admits taped confession in which interrogating officer states to suspect that he's lying and his story doesn't make sense; held: statements amount to accusations that defendant was lying, thus indicated the officer's inadmissible opinion as to guilt, *State v. Jones*, 117 Wn.App. 89, 91 (2003), *State v. Dolan*, 118 Wn.App. 323, 328-30 (2003), *State v. Sutherby*, 138 Wn.App. 609, 616-18 (2007), *aff'd, on other grounds*, 165 Wn.2d 870 (2009), *Vancouver v. Kaufman,* 10 Wn.App.2d 747 (2019), *see: State v. Notaro*, 161 Wn.App. 654 (2011), *but see: State v. Smiley*, 195 Wn.App. 185 (2016), *State v. Putman*, 21 Wn.App.2d 36 (2022), harmless here, *State v. Perez-Valdez*, 172 Wn.2d 808, 817-19 (2011); reverses, in part, *State v. Demery*, 100 Wn.App. 416, 420-23 (2000); (lead opinion holds otherwise but 4 justices in dissent plus concurring opinion hold it was error).

***State v. Nation***, 110 Wn.App. 651, 661-67 (2002)

Supervisor of crime lab testifies that, based upon notes of criminalist who tested the drugs, his opinion is that they are controlled substances; held: abuse of discretion to admit hearsay testimony of a subordinate who tested the drugs unless the expert establishes that he as well as others would act upon the information for purposes other than litigation; here, expert stated tests are prepared only for court testimony, *see: State v. Ecklund*, 30 Wn.App. 313 (1981); III.

***State v. Clausing***, 147 Wn.2d 620 (2002)

In legend drug case, trial court admits testimony of state Board of Pharmacy director that a physician's prescriptions are invalid after his license is revoked, instructs jury that it is not a legal opinion; held: only judges may instruct on the law, CONST., art. IV, § 16, cautionary instruction was not curative as the witness indeed instructed on the law; reverses *State v. Clausing*, 104 Wn.App. 76 (2000); 6-3.

***State v. Zunker***, 112 Wn.App. 130, 139-41 (2002)

Decision to qualify police detective as an expert in drug manufacturing process is within discretion of trial court; where detective claims to be the "resident expert," and testifies to on-the-job training, continuing education and participation in investigation of 40-60 meth labs in eight months, trial court did not abuse its "considerable" discretion, *State v. Liles*, 11 Wn.App. 166, 169 (1974), *State v. Montgomery*, 163 Wn.2d 577 (2008),; 2-1, III.

***State v. Olmedo***, 112 Wn.App. 525, 530-33 (2002)

In unlawful storage of anhydrous ammonia case, witness testifies that he did not believe that the tanks in question were approved by United States Department of Transportation for storage of anhydrous ammonia, an element of the crime; held: witness' opinion was an inadmissible legal conclusion, *Hyatt v. Sellen Constr. Co.*, 40 Wn.App. 893 (1985), *Everett v. Diamond*, 30 Wn.App. 787 (1981), *Stenger v. State*, 103 Wn.App. 393, 407 (2001), *cf.: State v. We*, 138 Wn.App. 716 (2007); permitting a witness to testify as to defendant's guilt raises a constitutional issue, *State v. Carlin*, 40 Wn.App. 698, 701-02 (1985), *but see: Seattle v. Heatley*, 70 Wn.App. 573 (1993), *State v. Warren*, 134 Wn.App. 44, 56-58 (2006); III.

***State v. Dolan***, 118 Wn.App. 323, 328-30 (2003)

In child abuse case in which defendant is blaming victim's mother, police officer's testimony that he believed mother could not have committed the crime and social worker's testimony that child was not at risk with the mother were improper lay opinions, not based upon personal knowledge which can be raised for first time on appeal as it violates right to jury trial, *State v. McFarland*, 127 Wn.2d 322, 332-33 (1995); II.

***State v. Saunders***, 120 Wn.App. 800, 811-13 (2004)

Police officer's testimony that defendant's statements to him were "inconsistent," "fluctuated," and that defendant told "four different stories" was permissible as it was based upon personal, direct knowledge of the witness; officer's testimony that defendant wasn't "truthful" is improper opinion testimony, *State v. Farr-Lenzini*, 93 Wn.App. 453, 459-60 (1999); II.

***State v. Barr***, 123 Wn.App. 373 (2004)

Police officer's testimony that during interrogation he used the "Reid Investigative Technique" and found verbal and nonverbal clues that defendant was being deceptive is manifest constitutional error, as an impermissible opinion on credibility, *State v. Sargent*, 40 Wn.App. 340 (1985), *State v. Hawkins,* 14 Wn.App.2d 182 (2020), *cf.: State v. Allen*, 50 Wn.App. 412 (1988), *State v. Craven*, 69 Wn.App. 581 (1993), *Seattle v. Heatley*, 70 Wn.App. 573 (1993), *State v. Warren,* 134 Wn.App. 44, 52-58 (2006), *aff'd on other grounds,* 165 Wn.2d 17 (2008); III.

***State v. Acosta***, 123 Wn.App. 424 (2004)

To rebut defense diminished capacity expert, court admits expert's testimony which includes a recitation of defendant's arrest and conviction record to support expert's opinion that defendant has antisocial personality disorder, not diminished capacity; held: an expert can testify regarding basis for opinion for limited purpose of showing how he reached his conclusion only if the probative value of the basis for that opinion is not substantially outweighed by its prejudicial nature, *State v. Furman*, 122 Wn.2d 440, 452-53 (1993); here, even if expert could reasonably rely on defendant's criminal history, jury should not have heard it, ER 403, as probative value is far outweighed by danger of unfair prejudice; II.

***State v. Dunn***, 125 Wn.App. 582, 589-95 (2005)

In child sex abuse case, physician's assistant testifies that, while there was not physical evidence of abuse, complainant's clear, concise, explicit and detailed disclosures establishes that sexual abuse was probable; held: the study on which the witness' testimony is based does not meet *Frye* test; an expert's opinion on an ultimate issue of fact that is based solely on the expert's perception of the witness' truthfulness is unfairly prejudicial, *State v. Carlson*, 80 Wn.App. 116 (1995), *State v. Fitzgerald*, 39 Wn.App. 652 (1985), *State v. Alexander*, 64 Wn.App. 147 (1992), *see: State v. Binh Thach*, 126 Wn.App. 297, 314 (2005), *State v. King*, 131 Wn.App. 789 (2006), *State v. Warren*, 134 Wn.App. 44, 52-58 (2006), *cf.: State v. Kirkman*, 159 Wn.2d 918 (2007); III.

***State v. King***, 131 Wn.App. 789 (2006)

In child sex abuse case, detective and CPS social worker testify that they begin child interviews by establishing ground rules to ensure child knows the difference between truth and a lie, that they know they are supposed to tell the truth and that they were satisfied that complainant understood the ground rules, that complainant agreed to tell the truth and that he asked basic questions to show that complainant is being truthful; held: victim's declarations that he would tell the truth was no different than victim's taking an oath in court to tell the truth, witnesses did not explicitly state to jury that they believed victim's account, *State v. Madison,* 53 Wn.App. 754 (1989), *State v. Jones,* 71 Wn.App. 798 (1993), *State v. Warren,* 134 Wn.App. 44, 52-58 (2006), *aff'd, on other grounds,* 165 Wn.2d 17 (2008), *see: State v. Kirkman,* 159 Wn.2d 918 (2007); I.

***State v. Warren*** , 134 Wn.App. 44, 52-58 (2006)**,** *aff'd, on other grounds,* 165 Wn.2d 17 (2008)

In child sex abuse case, interviewer testifies that she tells child importance of telling the truth and obtains promise from child that she will tell the truth, admitted without objection; held: because testimony does not expressly state a belief in victim's account, it does not infringe on jury's role, *State v. King,* 131 Wn.App. 789 (2006), nor is it manifest constitutional error which may be raised for first time on appeal, *State v. Kirkman,* 159 Wn.2d 918 (2007); officer's testimony that victim's mother seemed more protective of defendant and not so concerned about her daughter was admissible, ER 701, as rationally based upon his perception; I.

***State v. King***, 135 Wn.App. 662, 672-73 (2006)

In intimidating a witness trial, witness' testimony that defendant's statement "was a threat" was a proper lay opinion, ER 701; III.

***State v. Kirkman*****,** 159 Wn.2d 918 (2007)

In child sex assault cases, detective testifies that she interviewed complainant, determined her ability to tell the truth and obtained her promise to tell the truth, physician testifies that physical exam did not confirm victim's story but she described sexual touching "with appropriate affect," history given was "clear and consistent" with plenty of detail and that nothing in the physical examination made him doubt or confirm victim's explanation; in companion case, physician testifies to a lack of physical evidence of abuse but that is the "norm rather than the exception," that victim "had good language skills for her age, she spoke clearly," counsel does not object to any of this testimony; held: none of the testimony was a "clear" opinion on credibility or guilt, in the absence of "explicit or almost explicit witness statement on an ultimate issue of fact," there is no manifest constitutional error that will be reviewed for the first time on appeal, *State v. Jones,* 71 Wn.App. 798, 812 (1993), *State v. Madison,* 53 Wn.App. 754, 760-3 (1989), *State v. King,* 131 Wn.App. 789 (2006), *State v. Warren,* 134 Wn.App. 44, 52-58 (2006), *aff'd, on other grounds,* 165 Wn.2d 17 (2008), *State v. Borsheim,* 140 Wn.App. 357, 374-75 (2007), *State v. Montgomery,* 163 Wn.2d 577 (2008), *see: State v. Aguirre,* 168 Wn.2d 350, 359-61 (2010), *State v. Hawkins,* 14 Wn.App.2d 182 (2020); reverses *State v. Kirkman,* 126 Wn.App. 97 (2005); 8-1.

***State v. We***, 716 (2007)

In arson case, expert arson investigator's testimony that defendant burned her apartment for insurance fraud was a proper expert opinion on motive; 2-1, III.

***State v. Borsheim***, 140 Wn.App. 357, 374-75 (2007)

In child sex abuse case, medical expert testifies, without objection, that her findings regarding victim were consistent with victim's account, that her medical diagnosis based upon genital warts on victim was that victim had been sexually abused; held: opinion testimony relating only indirectly to defendant's guilt, where not objected to at trial, is not a manifest constitutional error, *State v. Kirkman*, 159 Wn.2d 918, 922 (2007); here, witness did not explicitly state that she believed victim; I.

***State v. Lewis***, 141 Wn.App. 367, 385-89 (2007)

In homicide trial, court excludes defense offer of medical examiner's testimony that at victim's level of methamphetamine in blood, some people can be aggressive and irrational; held: without evidence as to how the methamphetamine level in victim's blood "might have affected" this victim, at 389 ¶48, trial court's determination that testimony is speculative and irrelevant to lawful use of force was not an abuse of discretion, *State v. Richmond*, 3 Wn.App.2d 423 (2018), *see: State v. Cheatam*, 150 Wn.2d 626, 644-45 (2003); 2-1, II.

***State v. Montgomery***, 163 Wn.2d 577 (2008)

Officer's testimony that he believed defendants' actions were such that they were buying pseudoephedrine with intent to manufacture methamphetamine was an improper opinion of guilt but, because there was no objection, "did not establish actual prejudice," *State v. Perez-Valdez*, 172 Wn.2d 808, 817-19 (2011), *State v. Song Wang*, 5 Wn.App.2d 12, 28-30 (2018), *cf.: State v. Nelson*, 152 Wn.App. 755 (2009) , *State v. Quaale*, 177 Wn.App. 603 (2013); 7-2.

***State v. Francisco***, 148 Wn.App. 168, 176-78 (2009)

Experienced drug unit detective's testimony that "drugs are usually sold, not given away" is a proper expert opinion, *State v. Ortiz*, 119 Wn.2d 294, 310 (1992), *disapproved, on other grounds, State v. Condon*, 182 Wn.2d 307, 321-26 (2015); III.

***State v. Hudson***, 150 Wn.App. 646 (2009)

In rape case with consent defense, sexual assault nurse examiner testifies that victim's injuries were caused by nonconsensual sex; held: explicit, overt and unambiguous opinion that victim was raped, as opposed to an opinion that injuries were consistent with nonconsensual sex, at 653 n. 2, is an improper opinion of guilt, *State v. Black*, 109 Wn.2d 336, 348 (1987), *State v. Carlson*, 80 Wn.App. 116 (1995); 2-1, I.

***State v. Hayward***, 152 Wn.App. 632, 648-52 (2009)

In assault 2º trial, physician testifies over objection that victim "suffered a 'substantial loss or impairment of the function of a bodily part,'" almost a direct quote from the statutory definition, RCW 9A.04.110(4)(b), defense argues that the testimony is a statement of an ultimate issue and thus an opinion on guilt; held: an expert may testify to an ultimate issue as long as the testimony does not include an opinion as to guilt, *Seattle v. Heatley*, 70 Wn.App. 573, 579 (1993); here, witness did not directly discuss defendant's guilt as it did not include any discussion of defendant or his participation in the injury, *State v. Sanders*, 66 Wn.App. 380 (1992); II.

***State v. Nelson***, 152 Wn.App. 755 (2009)

In animal fighting case, RCW 16.52.117, trial court admits testimony of Humane Society investigator who studied the evidence that there was a dog fighting operation on the premises; held: trial court has discretion to admit expert opinion and the extent of the opinion, *State v. Swan*, 114 Wn.2d 613, 655 (1990), ER 702, which may embrace the ultimate issue to be decided as long as it is based upon the evidence and experience of the witness; here, the opinion, while on the ultimate issue, was not a comment on defendant's guilt, *cf.: State v. Black*, 109 Wn.2d 336, 348 (1987), *State v. Montgomery*, 163 Wn.2d 577 (2008) , *State v. Quaale*, 177 Wn.App. 603 (2013); III.

***State v. Johnson***, 152 Wn.App. 924, 929-34 (2009)

In child molestation trial, court admits evidence without an objection that victim described the defendant's penis to defendant's wife who then stated that the allegation was true; held: lay witness' opinion about a defendant's guilt is manifest error, prejudicial, has no probative value other than possibly impeachment on a collateral issue, *c.f.: State v. Bass*, 18 Wn.App.2d 760 (2021); III.

***State v. Aguirre***, 168 Wn.2d 350, 359-61 (2010)

Sex crimes investigator testifies in rape case about the general demeanor of victims of sexual assault and domestic violence and describes victim's demeanor during her interview, does not express an opinion; held: in considering testimony as to demeanor, court should consider (1) type of witness, (2) nature of testimony, (3) nature of charges, (4) type of defense and (5) other evidence before jury, *State v. Kirkman*, 159 Wn.2d 918, 928 (2007), *State v. Demery*, 144 Wn.2d 753, 759 (2001), if evidence meets these tests court may admit it, as long as witness does not comment on veracity or guilt, distinguishing *State v. Black*, 109 Wn.2d 336 (1987), *State v. Garrison*, 71 Wn.2d 312 (1967), *State v. Haga*, 8 Wn.App. 481 (1973); 9-0.

***State v. Perez-Valdez***, 172 Wn.2d 808, 817-19 (2011)

In child rape case, CPS worker testifies that the children knew what the bedroom looked like, defense asks "assuming they are telling you the truth," witness states "[t]hey are telling me the truth," defense moves for mistrial, court denies motion but immediately instructs jury to disregard; held: while the expression of personal belief about veracity of another witness is improper, *State v. Montgomery*, 163 Wn.2d 577, 591 (2008), *State v. Demery*, 144 Wn.2d 753, 759 (2001), *State v. Hawkins*, 14 Wn.App.2d 182 (2020), trial court's prompt instruction supports a proper exercise of discretion in denying the mistrial; 5-4.

***State v. Notaro***, 161 Wn.App. 654 (2011)

Detective testifies that during interrogation he told defendant he didn't believe his initial statements following which defendant confessed; held: police statement made during an interview regarding officer's belief is an interrogation tactic, not opinion testimony, *State v. Demery*, 144 Wn.2d 753 (2000), *State v. Curtiss*, 161 Wn.App. 673, 696-98 (2011), *State v. Smiley*, 195 Wn.App. 185 (2016), *see: State v. Putman*, 21 Wn.App.2d 36 (2022); II.

***State v. Rodriguez***, 163 Wn.App. 215, 230-33 (2011)

Victim testifies about gang culture she was exposed to, how gang members are elevated in status "by killing somebody," detective testifies to gang evidence in more detail; held: expert gang testimony is admissible if trial court finds it is helpful to jury, *State v. Campbell,* 78 Wn.App. 813, 821-24 (1995), *but see: State v. DeLeon,* 185 Wn.App. 171 (2014), 185 Wn.2d 478, 489-91 (2016); where lay witness' qualifications "were fairly debatable," admission of her testimony is not reversible error; III.

***State v. Rafay***, 168 Wn.App. 734, 781-97 (2012)

Trial court excludes testimony from defense experts regarding false confessions and coercive police interrogation methods and undercover police practices; held: absent evidence of a meaningful correlation between the specific interrogation methods and false confessions, trial court did not abuse its discretion; absent testimony that an undercover operation that failed to meet professional standards resulted in a "high likelihood" that the confessions were false or unreliable, trial court did not abuse discretion; excluding evidence while still permitting defense to present evidence of the circumstances surrounding the confessions does not deprive defendants of right to present a defense, *distinguishing Crave v. Kentucky*, 476 U.S. 683, 90 L.Ed.2d 636 (1986); I.

***State v. Blake***, 172 Wn.App. 515, 522-29 (2012)

Witness testifies he heard a bang, did not see a gun, defendant was the one person who could have made the bang from his position, defendant looked suspicious so witness concludes defendant was the shooter; held: challenged testimony was a permissible inference, not an opinion, as it did not concern veracity or express a belief of guilt, witness did not carry a special aura of reliability, inference was drawn from facts perceived by the witness, *State v. Montgomery*, 163 Wn.2d 577, 591 (2008), *State v. Demery,* 144 Wn.2d 753 (2001); I.

***State v. Smiley***, 195 Wn.App. 185, 188-90 (2016)

Detective testifies that during interview of defendant he told defendant that his explanation "didn't make sense to me;" held: a tactical interrogation statement designed to challenge defendant's initial story and elicit responses is not a comment on defendant's veracity, *State v. Notaro,* 161 Wn.App., 654, 662-65 (2011); 2-1, I.

***State v. Morales***, 196 Wn.App. 106, 122-25 (2016)

In child molestation case defense child interview expert testifies that the recorded interview "a poor-quality" interview of a child, court precludes expert from testifying that it was not possible for the expert to assess the credibility of the child's allegation due to the poor quality; held: trial court did not abuse it's discretion, having considered ER 702 factors; I.

***State v. Richmond,*** 3 Wn.App.2d 423 (2018)

In homicide/self-defense case defense offers testimony of expert that amount of methamphetamine in victim's blood meant that victim was acting aggressively, excluded by trial court; held: expert had no basis toassess how victim's body may have processed methamphetamine, increased aggression is only one possibility, thus it was speculation as to how it effected victim and was properly excluded, *State v. Lewis*, 141 Wn.App. 367, 385-89 (2007); I.

***State v. Winborne***, 4 Wn.App.2d 147, 176-78 (2018)

In felony eluding a police trial, defense motion *in limine* to preclude officer from testifying that defendant drove recklessly or eluded police, officers so testify; held: witness may not testify to opinions of elements of a crime, *State* v. *Farr-Lenzini*, 93 Wn.App. 453 (1999), trial court abused discretion in admitting testifmony; 2-1, III.

**State v. Song Wang**, 5 Wn.App.2d 12 (2018)

Detective testifies that he believes defendant is responsible for the murder; held: in context, the testimony was offered to explain the course of the investiagation and how the police arrived at defendant as the suspect, thus was not an improper opinion as to guilt, *but see: State v. Quaale*, 182 Wn.2d 191 (2014), *State v. Montgomery*, 163 Wn.2d 577 (2008); I.

***State v. Arndt***, 194 Wn.2d 784, 797-98 (2019)

In murder/arson case trial court excludes some of defense arson expert's testimony ruling that he did not follow the scientific method and did not follow well established scientific methodology; held: ER 702 requires trial court to engage in a gatekeeping role and trial court may exclude testimony it determines does not adhere to reliable methodology, which is reviewed for abuse of discretion; while there is a 6th amendment right to present a defense trial court remains gatekeeper, and ER 702 rulings are based upon abuse of discretion standard, *State v. Yates*, 161 Wn.2d 714, 762 (2007), *State v. Clark*, 187 Wn.2d 641, 648-56 (2017), although appellate court will look to the constitutional issue *de novo, State v. Jennings*, 14 Wn.App.2d 779, 788 (2020), 199 Wn.2d 53 (2022); 6-3.

***State v. Crow***, 8 Wn.App.2d 480 (2019)

In possessing stolen firearms case officer testifies (without objection) that a disqualified person will obtain a firearm by stealing it or buying it unlawfully on the street, illegally obtained firearms are typically stolen during burglaries and vehicle prowls, a disqualified person will obtain a firearm by stealing it or buying it unlawfully on the street, illegally obtained firearms are typically stolen during burglaries and vehicle prowls, a person who knows he possesses a stolen firearm commonly discards the gun and flees when approached by a law enforcement officer, the majority of disqualified people apprehended with a firearm have a stolen firearm. most or a high percentage of firearms in the hands of a disqualified person are stolen firearms; held: all inadmissible profile evidence, *but see: State v. Avendano-Lopez*, 79 Wn.App. 706 (1995), failure to object was ineffective assistance, could not have been reasonably strategic; 2-1, III.

***Vancouver v. Kaufman,*** 10 Wn.App.2d 747 (2019)

Officer testifies that it is evidence of intoxication when an arrestee refuses field sobriety tests and breath tests; held: opinion regarding guilt is inadmissible, *State v. Demery*, 144 Wn.2d 753, 759 (2001), *Seattle v. Heatley*, 70 Wn.App. 573, 577 (1993); III.

***State v. Caril***, 23 Wn.App.2d 416 (2022)

To support diminished capacity defense counsel seeks to inquire of psychologist about contents of competency evaluation that defense expert relied upon, court excludes it, although relevant its probative value was outweighed by unfair prejudice and confusion because of the difference between

competency versus capacity to form intent at time of the incident; held: when a party seeks to introduce otherwise inadmissible facts through an expert who has relied on them trial court has discretion to determine the extent to which the expert may relate the inadmissible information to the trier of fact, ER 705; court has discretion to exclude such evidence to prevent a mechanism for admitting otherwise inadmissible evidence, *State v. Anderson*, 44 Wn.App. 644, 652 (1986); an expert's testimony disclosing inadmissible facts or data to explain the expert's opinion "is not proof of them" as substantive evidence, *Grp. Health Co-op. of Puget Sound, Inc. v. State Through Dep't of Revenue*, 106 Wn.2d 391, 399 (1986), *State v. Wineberg*, 74 Wn.2d 372, 381 (1968); exclusion did not violate defendant's right to present a defense as the evidence was only marginally relevant; I.

***State v. Fleeks***, ___ Wn.App.2d ___, 2023WL355082 (2023)

Police officer referring to defendant as "cold-hearted" is an improper comment that defendant was not remorseful, effectually directing the jury not to believe defendant's self-defense theory; I.

# EVIDENCE
## Other Misconduct/ER 404(b)

***State v. Tarman***, 27 Wn.App. 645 (1980)

Defendant, arrested for DUI, fights with police and is charged with assault 3°, defense offers acquittal on DUI in evidence at assault trial; held: acquittal is inadmissible as irrelevant; might have been admitted if it was offered as ER 404(b) evidence but here, intoxication was an inseparable part of the entire episode *(dicta)*, *State v. Kassahun*, 78 Wn.App. 938 (1995); II.

***State v. Tharp***, 96 Wn.2d 591 (1981)

Uncharged collateral crimes produced to show common scheme or plan required to be proved by preponderance, *State v. Benn*, 120 Wn.2d 631, 653 (1993), modifying *State v. Tharp*, 27 Wn.App. 198 (1980), *see: State v. Castro*, 32 Wn.App. 559 (1982), *State v. DeJesus*, 7 Wn.App.2d 849 (2019); 9-0.

***State v. Fernandez***, 28 Wn.App. 944 (1981)

Evidence of other unrelated crimes may be admissible if such other crimes are so nearly identical in method as to earmark them as the "handiwork" of the defendant, as long as the evidence is relevant and necessary, to prove an essential element of the crime charged and is not outweighed by its prejudice; remoteness of prior misconduct may affect admissibility, but issue is within discretion of trial court, *see: State v. Roth*, 75 Wn.App. 808 (1994); I.

***State v. Mendez***, 29 Wn.App. 610 (1981)

In rape case, defense offered to prove that complainant had previously falsely accused her uncle of rape; held: within trial court's discretion to exclude, *see also: State v. Fankhouser*, 133 Wn.App. 689 (2006).

***State v. Fletcher***, 30 Wn.App. 58 (1981)

Evidence showing prior uncharged shoplifts to establish existence of defendant's participation in a professional shoplifting ring within discretion of trial court; court may instruct jury of limited purpose of ER 404(b) evidence even over objection of defendant; I.

***State v. Whyde***, 30 Wn.App. 162 (1981)

In rape trial, witness who was not the alleged victim testified that on the morning after the rape, defendant tried to kiss her, offered by state to prove defendant's "motives and intent towards the female tenants of his apartment building"; held: inadmissible under the "lustful disposition" exception because it was not connected with or directed toward the victim, *State v. Golladay*, 78 Wn.2d 121, 142 (1970), *cf.: State v. Gonzales*, 1 Wn.App.2d 809, 818-20 (2017), *see: State v. Crossguns*, 199 Wn.2d 282 (2022); I.

***State v. Ecklund***, 30 Wn.App. 313 (1981)

State, in murder trial, introduces testimony of ER 404(b) evidence regarding a prior unrelated shooting incident which court strikes and admonishes jury to disregard; mistrial denied; held: within court's discretion to determine whether corrective instruction cures error; II.

***State v. Brown***, 30 Wn.App. 344 (1981), *overruled, on other grounds*, *State v. Commodore*, 38 Wn.App. 244 (1984)

Approves use of prior prostitution convictions to prove prostitution loitering charge; I.

***State v. Funkhouser***, 30 Wn.App. 617 (1981)

Where a defendant is acquitted at trial, state may be barred by collateral estoppel from using the evidence adduced at first trial against defendant at a subsequent trial on different charges if the evidence sought to be used in the second trial was necessarily determined in defendant's favor by the previous acquittal; II.

***State v. Bouchard***, 31 Wn.App. 381 (1982)

Defendant, charged with indecent liberties of three-year-old granddaughter, claimed victim's perforated hymen was an accident; state calls defendant's 12-year-old son to testify that when he was nine years old, defendant masturbated him and performed anal intercourse; held: properly admitted as ER 404(b) evidence to defeat claim of accident, as prejudice is outweighed by relevance, remoteness goes to weight, not admissibility, *but see: State v. Sutherby,* 165 Wn.2d 870, 883 n.7 (2009); II.

***State v. Montague***, 31 Wn.App. 688 (1982)

Defendant, charged with rape, is cross-examined regarding investigation of another rape incident with which he was not charged and of which he was cleared; held: prosecutor's questioning was prejudicial mandating a mistrial; III.

***State v. Brush***, 32 Wn.App. 445 (1982)

Fourteen-year-old felony conviction held admissible where defendant offered testimony of his good character, ER 404(a)(1); *accord: State v. McFadden,* 63 Wn.App. 441 (1991); extensive discussion of "open door" policy and character evidence; III.

***State v. Platz***, 33 Wn.App. 345 (1982)

In stabbing-homicide case, witness testifies that defendant usually carries a knife; held: relevant, ER 401, to show defendant could have inflicted stab wounds; admissible to show habit, ER 406; I.

***State v. Ortiz***, 34 Wn.App. 694 (1982)

In murder case, defense presents evidence of defendant's developmental disability to establish defendant's inability to plan crime; in rebuttal, state elicits testimony that defendant had threatened other people, court gives cautionary instruction; held: prejudicial effect of rebuttal evidence outweighed probative value, disapproved cautionary instruction; I, 2-1.

***State v. Robtoy***, 98 Wn.2d 30 (1982)

In murder trial, court admits evidence of a prior unrelated murder allegedly committed by defendant ten months earlier as ER 404(b) evidence; held: trial court erred in admitting prior murder evidence as it failed to establish a motive or intent; prejudicial effect outweighed any relevance; harmless here.

***State v. Saltarelli***, 98 Wn.2d 358 (1982)

Prior uncharged rape improperly admitted to prove rape charge; where defendant admits to consensual intercourse, intent is not an issue and evidence of previous criminal activity is not admissible to prove intent; in rape case, evidence of previous sexual misconduct must be weighed very carefully in light of its great potential for prejudice, *State v. Slocum,* 183 Wn.App. 438 (2014), *State v. Gunderson,* 181 Wn.2d 916 (2014), *cf.:* *State v. Lough,* 70 Wn.App. 302 (1993), *aff'd,* 125 Wn.2d 847 (1995); 6-3.

***State v. Thomas***, 35 Wn.App. 598 (1983)

Defendant snatches natural daughter from mother; trial court admits evidence of prior assaults on mother, ER 404(b), to show identification and course of conduct; held: crime of unlawful imprisonment does not require proof of defendant's motive, identification was not in issue, defense did not attempt to discredit testimony of mother as to whether or not she acquiesced, thus prejudicial effect outweighs probative value; harmless here; I.

***State v. Kidd***, 36 Wn.App. 503 (1983)

Defendant is charged with arson in jail, which he denies; state seeks to admit prior reckless burning conviction, ER 404, because defendant also denied that offense; held: fact that defendant denied prior offense is not probative of his knowledge of present fire, facts and circumstances of the two fires were entirely unrelated; harmless here; I.

***State v. Ferguson***, 100 Wn.2d 131 (1983)

In indecent liberties trial, state introduces four-year-old photograph of defendant and family posing nude to corroborate wife's testimony that defendant, at time photograph was taken, told victim-step-daughter to commit oral sex; held: photograph was relevant to corroborate wife's testimony establishing lustful disposition of defendant toward victim, *State v. Gonzales,* 1 Wn.App.2d 809, 818-20 (2017), *see: State v. Crossguns,* 199 Wn.2d 282 (2022); remoteness is within discretion of trial court, *State v. Ray,* 116 Wn.2d 531, 546-48 (1991), *State v. Guzman,* 119 Wn.App. 176 (2003); 7-2.

***State v. Harris***, 36 Wn.App. 746 (1984)

Defendants charged with two rapes; state argued that they involved common scheme or plan, ER 404(b), since both victims entered vehicles with the defendants and both were driven to locations against their will; *dicta*: "common scheme or plan" are not "magic passwords whose mere incantation will open wide the courtroom doors to whatever evidence may be offered in their names"; at most, two rapes here show only a propensity to commit rape; I.

***State v. Bockman***, 37 Wn.App. 474 (1984)

Evidence of other crimes may be admitted as *res gestae* or same transaction exception, to complete the story of the crime charged or prove its immediate context, *State v. Jordan,* 79 Wn.2d 480 (1971), *State v. Tharp,* 27 Wn.App. 198 (1980), *aff'd,* 96 Wn.2d 591 (1981), *State v. Schaffer,* 63 Wn.App. 761, 767-70 (1991), *State v. Lillard,* 122 Wn.App. 422, 430-32 (2004), *see: State v. Grier,* 168 Wn.App. 635, 645-51 (2012), *but see: State v. Briejer,* 172

Wn.App. 209, 223-27 (2012), *State v. Trickler*, 106 Wn.App. 727, 733-34 )(2001), *see also*: *State v. Rahier*, 37 Wn.App. 571, 574 (1984); I.

***State v. Negrin***, 37 Wn.App. 516 (1984)

After shooting, defendant learns that victim had previously stated he was going to "cause someone to shoot him," excluded by trial court; held: properly excluded because, at time of shooting, defendant did not know who he was shooting at, thus the statement of decedent was not relevant to defendant's apprehension of danger; *but see*: *State v. Cloud*, 7 Wn.App. 211, 217-18 (1972), *Evans v. United States*, 277 F.2d 354, 1 ALR 3d 566 (D.C. Cir. 1960); I.

***State v. Hieb***, 39 Wn.App. 273 (1984)

State, in child homicide case, offers evidence of prior injuries to child caused by defendant; held: ER 404(b) permits such evidence to show intent and absence of accident, not for motive or common scheme or identity, *State v. Hernandez*, 99 Wn.App. 312, 321-23 (1999); I.

***State v. Laureano***, 101 Wn.2d 745 (1984)

Prior robbery by defendant held properly admitted in defendant's felony murder trial to prove identity; 9-0.

***State v. Coe***, 101 Wn.2d 772 (1984)

In rape case in which defendant committed oral sex on victims, court permits defendant's ex-girlfriend to testify to their consensual oral sex; held: where evidence is proposed to establish identity under ER 404(b), it must be so unusual and distinctive as to be like a signature, abuse of discretion here, *see: State v. Dawkins*, 71 Wn.App. 902, 908-10 (1993), *State v. Vy Thang*, 145 Wn.2d 630, 639-49 (2002), *State v. Fualaau*, 155 Wn.App. 347, 356-59 (2010), *Det. of Coe*, 175 Wn.2d 482, 491-501 (2012); 9-0.

***State v. Jackson***, 102 Wn.2d 689 (1984)

Defendant is charged with sexual assaults against two children; claimed alibi as to one count, admitted touching but no sexual assault in other count; trial court admits a seven-year-old incident in which defendant grabbed but did not sexually assault a juvenile, ER 404(b); held: trial court must state reason for admitting ER 404(b) evidence and balance probative vs. prejudicial effect on record, *see: State v. Binh Thach*, 126 Wn.App. 297, 310-11 (2005); here, lack of accident does not justify admission of prior act as defendant denied all sexual contact; motive does not justify admission, as nonsexual attack in prior act is not relevant to prove sexual motives in present case, *State v. Saltarelli*, 98 Wn.2d 358 (1982); modifies *State v. Jackson*, 36 Wn.App. 510 (1984); 8-1.

***State v. LeFever***, 102 Wn.2d 777 (1984), *overruled on other grounds, State v. Brown*, 111 Wn.2d 124, 113 Wn.2d 520 (1989)

Where identity is an issue and there is inconsistent testimony, evidence of defendant's heroin addiction is not admissible to prove motive to steal, *reversing State v. LeFever*, 35 Wn.App. 729 (1983); *cf.*: *State v. Suttle*, 61 Wn.App. 703 (1991), *State v. Matthews*, 75 Wn.App. 278 (1994); 8-1.

***State v. Fitzgerald***, 39 Wn.App. 652 (1985)

In statutory rape trial, state calls rebuttal witness to testify that she too was raped by defendant, to rebut defendant's claim that he touched the victim's vaginal area by accident and that he did not abuse other children; held: testimony was not admissible to rebut defendant's claim that he did not abuse other children, as evidence of prior misconduct is impermissible for impeachment on collateral issue, *State v. Goebel*, 36 Wn.2d 367, 368-70 (1950); testimony was admissible to show absence of mistake; court should instruct jury with a limiting instruction giving the specific reasons for the admission of the evidence rather than all ER 404(b) reasons; I.

***State v. Hall***, 40 Wn.App. 162 (1985)

In rape-robbery trial, state offered evidence that defendant committed indecent liberties on other victims to prove identity, ER 404(b); held: to show identity by prior misconduct, there must be a high degree of similarity as to mark it as the handiwork of the accused; harmless here; I.

***State v. Sargent***, 40 Wn.App. 340 (1985)

Trial court admits evidence that eight months prior to homicide defendant hit his wife; held: there is no relationship between proof of defendant's intent the night of the murder and an argument with the victim eight months earlier, ER 404(b); I.

***State v. Bernson***, 40 Wn.App. 729 (1985)

In murder case, decedent was found partially unclothed, at trial, court admits defendant's statement to a friend, "I'd really like to get" the victim; held: circumstances under which the victim's remains were discovered is sufficient to show a sexual motive for the homicide, permitting defendant's "lustful disposition" toward the victim, ER 404(b), *State v. Whalon*, 1 Wn.App. 785, 794 (1970), *State v. Gonzales*, 1 Wn.App.2d 809, 818-20 (2017), *see: State v. Crossguns*, 199 Wn.2d 282 (2022), *cf.*: *State v. Medcalf*, 58 Wn.App. 817 (1990); III.

***State v. Anderson***, 42 Wn.App. 659 (1986)

Defendant, accused of burglarizing a liquor store, alleges voluntary intoxication to show lack of intent; state introduces evidence that defendant had previously burglarized same liquor store to show intent and identity; held: while evidence of prior burglary was admissible to show intent, it was inadmissible to show identity since *modus operandi* of the two burglaries was not unique, *State v. Coe*, 101 Wn.2d 772 (1984), *State v. Vy Thang*, 145 Wn.2d 630, 639-49 (2002), *cf.*: *State v. Fualaau*, 155 Wn.App. 347, 356-59 (2010), *Det. of Coe*, 175 Wn.2d 482, 491-501 (2012); harmless, since it was admissible to show intent; I.

***State v. Burgess***, 43 Wn.App. 253 (1986)

Trial court admits evidence of two prior burglaries to establish identity in burglary case; first prior occurred at night in a dental office to steal drugs, window broken, rubber gloves used, defendant used wastepaper basket plastic liner to collect drugs; second prior was at same clinic as current burglary, at night to steal drugs; held: similarity of offenses was such that method employed was so unique the mere proof that accused committed the prior crime creates a higher

probability that accused was the one who committed the act charged, *State v. Irving*, 24 Wn.App. 370, 374 (1979); evidence that defendant obtained information in a prior crime that aided the commission of the current crime is relevant to prove knowledge and identity; time lapse between offenses affects weight, not admissibility, *State v. Bouchard*, 31 Wn.App. 381, 386 (1982), *overruled, on other grounds*, *State v. Sutherby*, 165 Wn.2d 870, 886 n.7 (2009); II.

***State v. Holmes***, 43 Wn.App. 397 (1986)

In attempted burglary trial, court admits two prior theft 2° convictions as proof that defendant intended to commit theft as the underlying crime; held: the only reason the prior convictions were admitted was to prove that since defendant once committed thefts, he intended to do so again, which is directly prohibited by ER 404(b), *State v. Wade*, 98 Wn.App. 328 (1999); III.

***State v. White***, 43 Wn.App. 580 (1986)

In possessing stolen credit card case, admission of another stolen card in possession of defendant was improper as it did not prove an essential ingredient of the crime, *State v. Laureano*, 101 Wn.2d 745, 764 (1984); harmless here; I.

***State v. Giedd***, 43 Wn.App. 787 (1986)

Defendant charged with negligent homicide/reckless and not DUI, RCW 46.61.520(1)(2), at trial, state proves defendant's blood alcohol level was .06; held: use of intoxicants was part of same transaction, proper for jury to decide what effect, if any, his drinking had on his driving, *State v. Birch*, 183 Wash. 670 (1935), *State v. Travis*, 1 Wn.App. 971 (1970), *State v. Amurri*, 51 Wn.App. 262 (1988); I.

***State v. Thamert***, 45 Wn.App. 143 (1986)

Defendant's confession to bank robbery admits prior bank robberies, trial court admits confession over objection without balancing; held: trial court must balance probative value vs. prejudicial effect on the record; harmless here; I.

***State v. Gogolin***, 45 Wn.App. 640 (1986)

Trial court's failure to apply probative/prejudicial balancing test on record, *State v. Tharp*, 96 Wn.2d 591, 597 (1981) is harmless where appellate court can decide issues of admissibility from the record without the aid of an articulated balancing process, *see: State v. Binh Thach*, 126 Wn.App. 297, 310-11 (2005); *accord*: *State v. McGhee*, 57 Wn.App. 457 (1990); I.

***State v. Ramirez***, 46 Wn.App. 223 (1986)

Defendant is charged with two counts of indecent liberties on two juvenile victims six months apart, testifies at trial that he accidently touched both victims, denies sexual contact; held: intent was not a material issue since intent is inherent in the accusation, thus evidence of other misconduct to prove intent is inadmissible; because defendant admitted to nonsexual contact by mistake or accident, the defense of mistake or accident does not require negating, thus evidence of one count was not admissible to prove the other, *but see: State v. Lough*, 70 Wn.App. 302 (1993), *aff'd*, 152 Wn.2d 847 (1995); II.

***State v. Terrovona***, 105 Wn.2d 632 (1986)

In homicide trial, defendant's probation officer is permitted to testify that defendant had asked him for a gun permit and that defendant believed decedent was skimming profits from an estate; held: P.O.'s testimony was admissible to prove motive, ER 404(b), and P.O.'s position was necessary to establish the relationship between defendant and the probation officer; 9-0.

***State v. Smith***, 106 Wn.2d 772 (1986)

During rape trial in which three victims were unable to positively identify defendant, trial court admits evidence of three burglaries which defendant committed purportedly to establish identity, ER 404(b), as there were some similarities between the burglaries and the rapes, although trial court did not make a record of balancing prejudice and relevancy; held: prior to admitting prior criminal acts, trial court must, on the record, state purpose for which evidence is admitted and determine relevancy by determining that (1) the purpose for which the evidence is offered is of consequence to the outcome of the action and (2) the evidence tends to make the existence of the identified fact more probable, *State v. Saltarelli*, 98 Wn.2d 358 (1982), and court must balance probative value against prejudicial effect, *State v. Binh Thach*, 126 Wn.App. 297, 310-11 (2005); in doubtful cases, scale should be tipped in favor of defendant, *State v. Bennett*, 36 Wn.App. 176, 180 (1983), *State v. Simon*, 64 Wn.App. 948, 964-5, *rev'd in part, on other grounds*, 120 *Wn.2d* 196 (1992); to admit evidence of a prior crime to prove identity, method employed in both crimes must be so unique that mere proof defendant committed one crime creates a high probability he also committed the charged offense, *State v. Laureano*, 101 Wn.2d 745 (1984); the device used must be so unusual and distinctive as to be like a signature, *State v. Coe*, 101 Wn.2d 772 (1984); *see*: *State v. Brown*, 113 Wn.2d 520 (1989), *State v. Colvin*, 50 Wn.App. 293 (1988), *State v. York*, 50 Wn.App. 446 (1988), *State v. Jenkins*, 53 Wn.App. 228 (1989), *State v. Essex*, 57 Wn.App. 411 (1990), *State v. Vy Thang*, 145 Wn.2d 630, 639-49 (2002), *State v. Fualaau*, 155 Wn.App. 347, 356-59 (2010), *Det. of Coe*, 175 Wn.2d 482, 491-501 (2012); 9-0.

***State v. Kendrick***, 47 Wn.App. 620 (1987)

Within court's discretion to admit photographs of defendant's tattoo of a skull being pierced by a needle as victims' heads were penetrated by sharp objects, indicating that the killer had some fascination with striking objects in heads; I.

***State v. Sammons***, 47 Wn.App. 762 (1987)

Within trial court's discretion to admit defendant's confession of prior sexual misconduct seven years earlier as a party admission, ER 801(d)(2); III.

***State v. Bowen***, 48 Wn.App. 187 (1987)

Physician is charged with two counts of indecent liberties for touching patients; at trial, two other patients testify about uncharged touchings; held: inadmissible to show motive, as motive means inducement, which is not relevant here; inadmissible to show common scheme or plan, as no showing of a larger criminal design of which the charged crime is only one part, *State v. Slocum*, 183 Wn.App. 438 (2014), *see: State v. Roth*, 75 Wn.App. 808, 820-3 (1994); inadmissible to show *modus operandi*, as other misconduct was not so distinctive as to be handiwork, *State v. Bacotgarcia* 59 Wn.App. 815 (1990); inadmissible to show identity, as this

was not an issue at trial, *State v. Sanford*, 128 Wn.App. 280, 285-87 (2005); inadmissible to show lack of accident, as defendant denied touching at all; inadmissible under "doctrine of chances" as that exception only applies to show absence of accident or mistake, *see: State v. Stanton*, 68 Wn.App. 855 (1993); inadmissible to show intent, as intent was not a material issue, *cf.: State v. Lough*, 125 Wn.2d 847 (1995), *State v. DeVincentis*, 150 Wn.2d 11 (2003); III.

***State v. Young***, 48 Wn.App. 406 (1987)

Trial court refuses to permit vehicular homicide defendant to prove that on four other occasions, deceased passenger had grabbed steering wheels to force car to swerve; held: ER 404(b) is equally available to a defendant to prove theory of defense; evidence was admissible to prove identity of the person responsible for the accident, that passenger was in control of the vehicle, and that passenger's intentional interference was the proximate cause of the accident; evidence should not have been refused under ER 403 as probative value was not substantially outweighed by prejudicial effect, balance should be in favor of admissibility, *State v. Duarte Vela*, 200 Wn.App. 306 (2017); III.

***State v. Myers***, 49 Wn.App. 243 (1987)

At custodial interference trial, court admits four prior noncriminal incidents of visitation problems; held: because incidents were noncriminal, court must use extreme caution to avoid prejudice; here, because the evidence was questionably relevant to prove intent, it should have been excluded; II.

***State v. Escalona***, 49 Wn.App. 251 (1987)

Despite order *in limine*, assault victim testifies defendant "has a record and stabbed someone," trial court strikes, denies mistrial; held: test for prejudice: (1) seriousness, (2) whether statement was cumulative or properly admitted evidence, and (3) curable by instruction, *State v. Weber*, 99 Wn.2d 158, 164-5 (1983); here, statement was serious, not cumulative, so prejudicial compared to weakness of state's case, thus reversed, *State v. Babcock*, 145 Wn.App. 157 (2008), *cf.*: *State v. Essex*, 57 Wn.App. 411 (1990), *State v. Gamble*, 168 Wn.2d 161, 175-80 (2010), *see: State v. Condon*, 72 Wn.App. 638, 647-50 (1993), *State v. Buss*, 76 Wn.App. 780, 789-91 (1995), *cf.: State v. Wade*, 186 Wn.App. 749, 773-75 (2015), *State v. Christian*, 18 Wn.App.2d 185 (2021); I.

***State v. Neslund***, 50 Wn.App. 531 (1988)

While evidence of ownership of firearms unrelated to the crime charged is inadmissible, *State v. Rupe*, 101 Wn.2d 664 (1984), evidence that homicide defendant knew how to fire a pistol is admissible; I.

***State v. Toennis***, 52 Wn.App. 176 (1988)

In child abuse case where defendant admits to striking victim but denies repeated hitting and claims some injuries were accidental, evidence of prior beatings is admissible to prove intent, lack of accident, and to show that victim was in an obviously battered condition which should have put defendant on notice that additional blows could result in grievous bodily harm; must be proved by preponderance; II.

***Huddleston v. United States***, 99 L.Ed.2d 771 (1988)

At defendant's trial for knowingly possessing and selling stolen videotapes, trial court admits evidence of uncharged acts of selling televisions and appliances at very low prices, Fed. R. Evid. 404(b); held: trial court need not make a preliminary determination that government can prove Rule 404(b) evidence by a preponderance, only that there is "sufficient evidence to support a finding by the jury that the defendant committed the similar act," *see: State v. DeJesus*, 7 Wn.App.2d 849 (2019); 9-0.

***State v. Cole***, 54 Wn.App. 93 (1989)

In assault 2° case, evidence that defendant purchased life insurance on victim is not relevant to establish motive where homicide or attempted homicide is not charged, *see*: *State v. Haley*, 39 Wn.App. 164 (1984); 2-1 (dissent on harmless error), II.

***State v. Mutchler***, 53 Wn.App. 898 (1989)

In assault 1° with intent to commit rape or indecent liberties trial, evidence that defendant followed another woman and stared at her crotch is inadmissible as *res gestae* as it does not help explain circumstances of the charged assault, *distinguishing* *State v. Tharp*, 27 Wn.App. 198 (1980), *aff'd*, 96 Wn.2d 591 (1981), *State v. Briejer*, 172 Wn.App. 209, 223-27 (2012), *see also:* *State v. Schaffer*, 63 Wn.App. 761 (1991), *State v. Warren*, 134 Wn.App. 44, 61-64 (2006); inadmissible to prove identity as defense offered to stipulate that defendant committed assault and argued no theory inconsistent with this stipulation; it is admissible to prove intent as intent is of consequence to action and evidence makes existence of intent to commit rape more probable; because the probative value of staring at other woman's crotch is not great, its prejudicial effect is minimal; I.

***State v. Bradford***, 56 Wn.App. 464 (1989)

ER 404(b) applies to evidence of other crimes or acts regardless of whether they occurred before or after the crime for which defendant is being tried; where identity was at issue, evidence that both the instant offense and an out-of-state offense were committed by two black males wearing baseball caps at night in mobile home display lot, suspects drove small blue pickup, used ChannelLock pliers to twist off doorknobs establish sufficient similarities in *modus operandi* to be relevant; III.

***State v. Allen***, 57 Wn.App. 134 (1990)

At arrest for indecent liberties, defendant gives false name, trial court admits said testimony; held: giving false name to officer suggests guilty knowledge and thus is relevant, within discretion of trial court, *State v. Cartwright*, 76 Wn.2d 259, 264 (1969), *State v. DeGaston*, 5 Wn.2d 73, 78 (1940), *see*: *State v. Chase*, 59 Wn.App. 501 (1990); I; .

***State v. McGhee***, 57 Wn.App. 457 (1990)

Evidence of a defendant's threat against a victim is relevant to establish consciousness of guilt and, here, ties defendant to victim, ER 404(b), probative value outweighs unfair prejudice; I.

***State v. Bythrow***, 114 Wn.2d 713 (1990)

Defendant's participation in prior robbery is admissible to prove guilty knowledge in robbery trial where defendant testifies he did not know co-defendant would commit the crime; 9-0.

***State v. Lynch***, 58 Wn.App. 83 (1990)

Admission of out-of-state robberies in which elements in common with charged offenses are wearing of brown wig, tampering with deposit box prior to victim's approach, each committed on a late Saturday afternoon, use of a red 10-speed bicycle, gun in waistband, obtaining car keys of victims establish relevance to prove identity per *modus operandi* exception, not proper to admit to prove common scheme or plan, *cf.:* *State v. Lough*, 125 Wn.2d 847 (1995); while evidence was extremely prejudicial to defendant, probative value outweighed prejudicial effect; "[i]t may have been preferable to keep out the evidence until the full strength of the state's case was revealed at trial," but since defense did not object to order of presentation of evidence, no error; I.

***State v. Gould***, 58 Wn.App. 175 (1990)

Where the grant of a continuance might not provide adequate relief because unfair prejudice would nonetheless result, ER 403 requires the trial court to weigh that risk in deciding whether the evidence should be admitted; "unfair prejudice" is that which is more likely to arouse an emotional response than a rational decision by the jury; it requires more than testimony which is simply adverse to the opposing party; I.

***State v. Heath***, 58 Wn.App. 320 (1990)

In kidnapping case, trial court admits evidence of a subsequent assault, which occurred after kidnap victim was released, as "*res gestae",* absence of mistake and intent; held: under *res gestae* theory, the collateral act should only be admitted to explain parts of the story that would otherwise have remained unexplained, *State v. Mutchler*, 53 Wn.App. 898, 902 (1989), *State v. Warren*, 134 Wn.App. 44, 61-64 (2006) "if it is so connected in time, place and circumstances or means employed that proof of such other misconduct is necessary for a complete description of the crime charged," and only as much of the collateral act should be admitted as is necessary to clarify the evidence relating to the charged crime, *State v. Briejer,* 172 Wn.App. 209, 223-27 (2012); since offense was complete, defendant's state of mind at the time of assault was irrelevant, *State v. Lillard*, 122 Wn.App. 422, 430-32 (2004); I.

***State v. Eastabrook***, 58 Wn.App. 805 (1990)

Rape and burglary counts are not "cross-admissible" to establish identity where (1) apartments entered were occupied by lone females gone during late evening or early morning hours, (2) clothing disrupted in each apartment, (3) suspect had similar physical characteristics, (4) rapist wore ring similar to one found in defendant's apartment after burglary, (5) rapist wore ski mask, similar ski mask with defendant when detained following burglary, (6) rapist had a knife, knife found near detained burglary defendant, and (7) rapist took a distinctive towel found in defendant's home; II.

***State v. Medcalf***, 58 Wn.App. 817 (1990)

In statutory rape case, court admits officer's testimony that he observed X-rated videotapes in defendant's home; held: evidence showing lustful disposition should be admitted in a sex offense case only when it tends to show such lustful inclination toward the victim, *State v. Sutherby*, 165 Wn.2d 870, 886 (2009), *see: State v. Gonzales*, 1 Wn.App.2d 809, 818-20 (2017), *State v. Crossguns*, 199 Wn.2d 282 (2022), *distinguishing State v. Ferguson*, 100 Wn.2d 131, 134 (1983), *State v. Bernson*, 40 Wn.App. 729, 737-38 (1985); II.

***State v. Salazar***, 59 Wn.App. 202 (1990)

In drug trial, court permits state to elicit evidence that drugs were seized pursuant to a warrant; held: evidence was relevant to avoid jury nullification, thus no error in light of limiting instruction; I.

***State v. Chase***, 59 Wn.App. 501 (1990)

Evidence that defendant gave a false name at arrest is not admissible to show that defendant, being one who would lie, was of bad character and thus more likely to have committed the crime charged, is admissible to show consciousness of guilt, *State v. Allen*, 57 Wn.App. 134, 143-44 (1990); II.

***State v. Bacotgarcia***, 59 Wn.App. 815 (1990)

In promoting prostitution case, state calls witness who testifies that she had also acted as defendant's prostitute, ER 404(b); Court of Appeals states that decision to admit witness's testimony was "questionable," differences in mode established that evidence did not qualify as a "signature crime," *State v. Smith*, 106 Wn.2d 772, 778 (1986), *State v. Bowen*, 48 Wn.App. 187 (1987) but, because trial court did not abuse its discretion in light of *State v. Bennett*, 36 Wn.App. 176 (1983), *State v. Hardy*, 37 Wn.App. 463 (1984), *State v. York*, 50 Wn.App. 446 (1987), affirmed; *see: State v. Dawkins*, 71 Wn.App. 902, 908-10 (1993); I.

***State v. Longuskie***, 59 Wn.App. 838 (1990)

In child molestation case, where defendant testifies to sexual dysfunction over 30 years, evidence of sexual contact with third parties nine years earlier is not too remote; III.

***State v. Hoffman***, 116 Wn.2d 51 (1991)

While mere possession of legal guns, unrelated to the crime charged, is constitutionally protected and inadmissible, *State v. Rupe*, 101 Wn.2d 664 (1984), if the guns have probative value, its use is not prohibited simply because constitutional provisions may also be implicated, *State v. Kendrick*, 47 Wn.App. 620, 627 (1987), *State v. Gregory*, 158 Wn.2d 759, 835-36 (2006), *overruled, on other grounds, State v. W.R.*, 181 Wn.2d 757 (2014); 9-0.

***State v. Perez-Arellano***, 60 Wn.App. 781 (1991)

Police testimony that they were watching defendant because he was in a "high narcotic area" is relevant, not unduly prejudicial and properly admitted to explain to jury why police were observing a particular area to explain the circumstances of an arrest, *distinguishing State v. Aaron*, 57 Wn.App. 277, 280-81 (1990); I.

***State v. Wilson***, 60 Wn.App. 887 (1991)

In statutory rape case, physical assaults not related to the rape were admissible to rebut evidence that the sexual abuse did not occur to establish why victim did not report abuse or leave, *State v. Grant*, 83 Wn.App. 98 (1996), *State v. Binh Thach*, 126 Wn.App. 297, 310-11 (2005), *State v. Nelson*, 131 Wn.App. 108, 114-16 (2006), *State v. Cook*, 131 Wn.App. 845 (2006), *State v. Magers*, 164 Wn.2d 174 (2008), *but see: State v. Gunderson*, 181 Wn.2d 916 (2014); II.

***State v. Suttle***, 61 Wn.App. 703 (1991)

In robbery case, defense calls witness who testifies that he committed the robbery with a third party, not defendant; state proves that defendant escaped from work release with the witness; held: once defense put on evidence, escape was admissible to prove motive, *i.e.*, defendant needed money to get out of Washington to avoid arrest for escape, and to prove identity, *State v. Pam*, 98 Wn.2d 748, 760 (1983), ER 404(b); I.

***State v. Billups***, 62 Wn.App. 122 (1991)

In attempted kidnap trial in which defendant is accused of leaning out of van and enticing juveniles into van, another juvenile testifies that a month earlier, defendant leaned out of van and greeted her; held: because statement did not display an intent to abduct and lacked any demonstration of criminal propensity, error to admit it to prove intent, ER 404(b); I.

***State v. Lord***, 117 Wn.2d 829, 872 (1991)

Police testify that murder defendant told them when he smoked marijuana and drank beer he becomes a different person and loses control, trial court admits evidence of defendant's marijuana use; held: marijuana use pertained to intent, preparation, opportunity and provided the jury a possible explanation for commission of the crime, thus admissible, ER 404(b).

***State v. McFadden***, 63 Wn.App. 441 (1991), *overruled, on other grounds, State v. Adel*, 136 Wn.2d 629 (1998)

In drug case, defendant testifies he is not "the kind of a guy who deals cocaine," that he hates cocaine, state introduces evidence in rebuttal that detective saw informant buy cocaine from defendant 15 months after the charged incident; held: by relating personal history supportive of good character, defendant opened door to character evidence rebutting same, ER 404(a)(1), *State v. Brush*, 32 Wn.App. 445, 450-1 (1982), *State v. Renneberg*, 83 Wn.App. 735 (1994), *State v. Warren*, 134 Wn.App. 44, 64-65 (2006), ER 404(b) is inapplicable, court properly weighed evidence, ER 403; I.

***State v. Schaffer***, 63 Wn.App. 761 (1991)

In trial for malicious mischief to tires, evidence that same evening defendant was involved in a wave of activity within a short span of time that began with knocking off mailboxes and escalated to slashing tires was admissible as *res gestae* to complete story of crime on trial by proving its immediate context of happenings near in time and place, *State v. Tharp*, 27 Wn.App. 198 (1980), *aff'd*, 96 Wn.2d 591 (1981), *State v. Bockman*, 37 Wn.App. 474 (1984), *State v. Lillard*, 122 Wn.App. 422, 430-32 (2004), *State v. Warren*, 134 Wn.App. 44, 61-64

(2006), *distinguishing* State v. Mutchler, 53 Wn.App. 898, 902 (1989), *cf.: State v. Briejer*, 172 Wn.App. 209, 223-27 (2012); I.

***Estelle v. McGuire***, 116 L.Ed.2d 385 (1991)

In child-homicide, evidence that child had been previously beaten, although not linked to the accused, was admissible to show intent even though defense did not allege accident; 8-0.

***State v. Simon***, 64 Wn.App. 948, *rev'd in part, on other grounds*, 120 Wn.2d 196 (1992)

In promoting prostitution case, defendant's threats to victim after charging period does not tend to make any fact of consequence more or less probable, *State v. Smith*, 106 Wn.2d 772, 776 (1986), thus was irrelevant as to whether victim felt threatened during charging period; even if relevant, "prejudicial effect outweighs any probative value," court erred in admitting evidence under ER 404(b); I.

***State v. Sanders***, 66 Wn.App. 878 (1992)

Evidence of defendant's attempt to induce rape complainant to absent self from jurisdiction is consistent with guilty knowledge, akin to flight, *State v. Etheridge*, 74 Wn.2d 102, 113 (1968), *State v. Cobb*, 22 Wn.App. 221, 224 (1978), *State v. Jefferson*, 11 Wn.App. 566, 570 (1974), *cf.: State v. Freeburg*, 105 Wn.App. 492, 497-502 (2001), and is thus admissible, ER 404(b); I.

***State v. Benn***, 120 Wn.2d 631 (1993)

Trial court's limitation of cross-examination of state's witness regarding his drug dealing after defendant's crime was committed was within scope of court discretion as the allegations of drug dealing were not relevant to his credibility as a witness, ER 608(b); extrinsic evidence of drug dealing was also inadmissible to attack credibility, ER 608(b), *State v. Stockton*, 91 Wn.App. 35 (1998), *State v. Cochran*, 102 Wn.App. 480, 486-87 (2000); 9-0.

***State v. Thomas***, 68 Wn.App. 268 (1992)

Evidence of defendant's apparent selling of drugs prior to arrest and seizure of drugs is relevant and admissible to prove defendant's intent to deliver; I.

***State v. Donald***, 68 Wn.App. 543 (1993)

In attempting to obtain drugs by fraud case, RCW 69.50.403(a)(3), testimony by doctor that defendant had previously been at the emergency room, using a different name to obtain drugs, is admissible to show the name used by defendant was false and guilty knowledge, intent and fraud, *State v. Thompson*, 95 Wn.2d 888, 890 (1981); III.

***State v. Stanton***, 68 Wn.App. 855 (1993)

At theft and UIBC trial of a contractor, court admits prior transaction with third parties establishing that defendant failed to complete jobs forcing creditors to recover against contractor's bond, and a subsequent dispute in which defendant failed to pay for materials; held: while evidence of financial trouble may be admissible, ER 401, to prove that contractor acted with criminal intent to deprive or defraud, the earlier disputes were for relatively small amounts of money more than a year before the charged transaction, thus they had little, if any, probative

value on the issue of whether defendant thought he was in financial trouble, but had great potential to show that defendant was generally a deadbeat, which gives rise to unfair prejudice outweighing slight probative value, ER 403; because common scheme or plan is not an element of the crime charged, trial court erred in admitting subsequent dispute as an ultimate fact, and failed to explain what element it thought common scheme or plan proved as an intermediate or evidentiary fact; doctrine of chances, *i.e.*, odds against an innocent person being repeatedly involved in similar suspicious circumstances increase with each incident, *State v. Bowen*, 48 Wn.App. 187, 194 (1987), *State v. Myers*, 49 Wn.App. 243, 248 n. 4 (1987), is not a basis for admissibility absent at least proof by a preponderance of criminal intent with respect to each prior bad act; II.

***State v. Halstien***, 122 Wn.2d 109, 125-7 (1993)

In trial for burglary with sexual motivation, RCW 13.40.135, trial court admits prior conversations between respondent and complainant regarding whether complainant had to dress to answer door; held: prior contacts did constitute prior "acts," ER 404(b), albeit not misconduct, relevant to proving motive or intent, *see: State v. Everybodytalksabout*, 145 Wn.2d 456 (2002); trial court should have balanced on the record, harmless here; overrules, in part, *sub silentio*, *State v. Halstien*, 65 Wn.App. 845 (1992); 8-0.

***State v. Lough***, 70 Wn.App. 302 (1993), *aff'd*, 125 Wn.2d 847 (1995), *infra*.

Defendant-paramedic is charged with serving a date a drink containing an unknown drug and raping her after she passes out; at trial, court admits evidence of other women who had been drugged and raped by defendant in a similar manner; held: ER 404(b) common scheme or plan analysis: (1) are the crimes at issue of the sort that necessarily require a relatively high degree of pre-planning and, if so, will the planning which served the defendant well at an earlier time suffice for the execution of a later crime?, (2) is there evidence of a concentrated, repetitive effort to orchestrate events or reduce likelihood of detection and, if so, is it logical to conclude that these orchestrations may be part of a systematic scheme?, (3) is there evidence that defendant repetitively utilized a particular skill or unusual technique?, (4) are there sufficient features in common from which a rational trier of fact could determine that the crimes at issue are all of the same class and are the work of a common scheme?; applying doctrine of chances, here the evidence reached such a point that the recurrence of the acts can not be viewed as coincidental, *State v. Fualaau*, 155 Wn.App. 347, 356-59 (2010); defendant's admission of sexual contact does not remove the knowledge element, *distinguishing* *State v. Ramirez*, 46 Wn.App. 223 (1986), *State v. Salterelli*, 98 Wn.2d 358 (1982); *see also:* *State v. Roth*, 75 Wn.App. 808, 820-3 (1994), *State v. Vy Thang*, 145 Wn.2d 630, 639-49 (2002), *Det. of Coe*, 175 Wn.2d 482, 491-501 (2012), *State v. Slocum*, 183 Wn.App. 438 (2014); 2-1, I.

***State v. Dawkins***, 71 Wn.App. 902, 908-10 (1993)

In child sex abuse case, where identity is not an issue, evidence of uncharged incidents of abuse to establish "lustful disposition" of defendant toward victim, while relevant, *State v. Ray*, 116 Wn.2d 531, 547 (1991), *State v. Ferguson*, 100 Wn.2d 131, 133-4 (1983), can properly be excluded by trial court due to the great prejudicial effect, ER 404(b), *State v. Coe*, 101 Wn.2d 772, 781 (1984), *State v. Bacotgarcia*, 59 Wn.App. 815, 819 (1990), *cf.:* *State v. Guzman*, 119 Wn.App. 176 (2003), *see:* *State v. Crossguns*, 199 Wn.2d 282 (2022); II.

***State v. Anderson***, 72 Wn.App. 453, 460-3 (1994)

Defendant assaults a guard in escaping from confinement, trial court admits prior felonies; held: trier of fact may permissibly infer that a defendant incarcerated on several serious felonies would have a greater motive and intent to cause serious bodily injury while attempting to escape than a defendant incarcerated on a single felony, thus priors were properly admitted, ER 404(b); I.

***State v. Condon***, 72 Wn.App. 638, 647-50 (1993)

In spite of order *in limine,* witness thrice states that defendant was in jail, mistrial denied, jury instructed; held: improprieties did not indicate a propensity to commit the crime in question, or even the reason defendant was in jail, evidence against defendant was strong, thus no abuse of discretion in denying mistrial, *State v. Buss*, 76 Wn.App. 760, 789-91 (1995), *State v. Gamble*, 168 Wn.2d 161, 175-80 (2010), *State v. Wade,* 186 Wn.App. 749, 773-75 (2015), *State v. Christian,* 18 Wn.App.2d 185 (2021), *distinguishing* *State v. Escalona*, 49 Wn.App. 251, 254 (1987), *State v. Wilburn*, 51 Wn.App. 827, 832 (1988); I.

***State v. Herzog***, 73 Wn.App. 34 (1994)

Evidence that an accused committed an uncharged crime is relevant to identity if it involves (1) general propensity (accused has a propensity to commit crimes), (2) specific propensity (same type of crime), or (3) signature or *modus operandi* crimes; when uncharged crime is relevant solely because of perpetrator's propensities, it must be excluded, ER 404(a), 404(b) (first sentence); when evidence of uncharged crime is relevant independent of propensities (here, to show identity), second sentence of ER 404(b) applies, court must balance on the record probative value vs. unfair prejudice, *see:* *State v. Binh Thach*, 126 Wn.App. 297, 310-11 (2005); II.

***State v. McBride***, 74 Wn.App. 460, 463-4 (1994)

In drug delivery trial, officer's observations of defendant engaging in what appeared to be drug deals just prior to the delivery in question is admissible, within discretion of trial court, to show jury whole sequence of events, what attracted police to defendant; III.

***State v. Russell***, 125 Wn.2d 24, 66-8 (1994)

Evidence was properly cross-admissible in consolidated murder counts where each count involved a victim killed by violent means who was then sexually assaulted and posed, naked, with the aid of props, all within a few weeks in a small geographic area, *State v. Laureano*, 101 Wn.2d 745 (1984), *State v. Fualaau*, 155 Wn.App. 347, 356-59 (2010), *cf.:* *State v. Vy Thang*, 145 Wn.2d 630, 639-49 (2002); 9-0.

***State v. Matthews***, 75 Wn.App. 278 (1994)

In murder case in which robbery is motive, evidence of defendant's recent bankruptcy and living beyond his means is admissible to show financial motive; bankruptcy itself, or mere poverty, should not be admitted to show motive, *State v. Jones*, 93 Wn.App. 166, 172-76 (1998), *State v. Kennard*, 101 Wn.App. 533, 540-43 (2000); I.

***State v. Lane***, 125 Wn.2d 825, 831-5 (1995),

Trial court admits a series of uncharged crimes committed within two days of the charged offenses as *res gestae,* or same transaction exception, ER 404(b), *cf.: State v. Grier,* 168 Wn.App. 635, 645-51 (2012); held: trial court found the evidence relevant because of its proximity in time and place to the crimes charged, *State v. Tharp*, 27 Wn.App. 198, 205-56 (1980), *aff'd,* 96 Wn.2d 591, 594 (1981), *State v. Thompson*, 47 Wn.App. 1, 10-12 (1987), *State v. Brown*, 132 Wn.2d 529, 569-76 (1997), *State v. Boot*, 89 Wn.App. 780, 790 (1998), *State v. Warren*, 134 Wn.App. 44, 61-65 (2006), *State v. Grier, supra. at* 648, and because it showed the degree of participation of the various defendants and their interaction and accountability, affirmed within trial court's discretion, *State v. Goebel*, 36 Wn.2d 367 (1950); once court finds *res gestae* evidence relevant for a purpose other than showing propensity and not unduly prejudicial, it is admissible if proved by a preponderance with no additional requirement that the evidence be relevant for an additional purpose, *but see: State v. Briejer,* 172 Wn.App. 209, 223-27 (2012); 7-2.

***State v. Roth***, 75 Wn.App. 808, 812-23 (1994)

Defendant is charged with murder of his wife for insurance proceeds, defense is accidental death, court admits circumstantial evidence that defendant had killed his first wife, which appeared to have been an accident; held: while the evidence of the prior homicide was not sufficiently similar to suffice as *modus operandi* evidence, it was admissible to prove lack of accident, *State v. Fernandez*, 28 Wn.App. 944, 953 (1981), *State v. Gogolin*, 45 Wn.App. 640, 646 (1986), *State v. Olsen,* 175 Wn.App. 269, 282 (2013), *affirmed, on other grounds,* 180 Wn.2d 468 (2014), and to prove a scheme or plan, *State v. Bowen*, 48 Wn.App. 187, 192 (1987), *State v. Lough*, 70 Wn.App. 302, 313-20, 125 Wn.2d 847 (1995); where trial court determines that prior misconduct is proved by preponderance, *State v. Benn*, 120 Wn.2d 631, 653 (1993), the finding will be affirmed if supported by substantial evidence; I.

***State v. Lough***, 125 Wn.2d 847 (1995)

Paramedic is charged with serving a date a drink containing an unknown drug and raping her after she passes out; at trial, court admits evidence of four other women who had been drugged and raped by defendant in a similar manner; held: to admit evidence of other crimes or wrongs, trial court must (1) identify the purpose for which the evidence is sought to be introduced, (2) determine whether evidence is relevant to prove an element, and (3) weigh probative value against prejudicial effect, at 853; "when a defendant's previous conduct bears such similarity in significant respects to his conduct in connection with the crime charged as naturally to be explained as caused by a general plan, the similarity is not merely coincidental but indicates that the conduct was directed by design," at 860; the prior conduct must demonstrate not merely similarity in results but such common features that the various acts are naturally to be explained as caused by a general plan of which the crime charged and the prior misconduct are the individual manifestations, *State v. DeVincentis*, 150 Wn.2d 11 (2003), *State v. Fualaau*, 155 Wn.App. 347, 356-59 (2010), *State v. Slocum,* 183 Wn.App. 438 (2014), *see: State v. Vy Thang*, 145 Wn.2d 630, 639-49 (2002), *Det. of Coe,* 175 Wn.2d 482, 491-501 (2012); here, evidence was relevant to prove that the conduct actually occurred rather than a fabrication or mistake by the victim, as defense contended, at 862, *State v. Griswold*, 98 Wn.App. 817, 823-27 (2000); *affirms State v. Lough*, 70 Wn.App. 302 (1993); *see also: State v. Krause*, 82 Wn.App. 688 (1996); 9-0.

***State v. Powell***, 126 Wn.2d 244 (1995)

In spousal murder case, prior assaults and quarrels are admissible to show motive where "of consequence to the action to justify its admission," particularly where only circumstantial proof of guilt exists, at 260; "evidence of quarrels between the victim and defendant preceding a crime, and evidence of threats by the defendant, are probative upon the question of defendant's intent," *State v. Parr,* 93 Wn.2d 95, 102 (1980), *State v. Olsen,* 175 Wn.App. 269 (2013), *affirmed, on other grounds,* 180 Wn.2d 468 (2014), if necessary to prove a material issue, *i.e.,* when necessary to prove intent when intent is at issue or when proof of the doing of the charged act does not itself conclusively establish intent, at 262, *State v. Stenson,* 132 Wn.2d 668, 698-703 (1997), *State v. Boot,* 89 Wn.App. 780, 787-90 (1998), *see: State v. Denham,* 197 Wn.2d 759 (2021), *res gestae* evidence is admissible when necessary for the jury to complete the story of the crime on trial by proving its immediate context of happenings near in time and place, where each act is a piece in the mosaic necessarily admitted in order that a complete picture be depicted for the jury, *State v. Tharp,* 27 Wn.App. 198, 204 (1980), *aff'd,* 96 Wn.2d 591, 594 (1981), *State v. Brown,* 132 Wn.2d 529, 569-76 (1997), *State v. Lillard,* 122 Wn.App. 422, 430-32 (2004), *State v. Warren,* 134 Wn.App. 44, 61-65 (2006) *cf.: State v. Briejer,* 172 Wn.App. 209, 223-27 (2012); 9-0.

***State v. Pirtle***, 127 Wn.2d 628, 648-51 (1995)

In murder 1° case, state offers prior assault conviction, ER 404(b), for which defendant had not yet been sentenced, as evidence of premeditation, under theory that defendant killed robbery victim to avoid enhanced sentence on assault; held: existence of motive to conceal is relevant to premeditation, *distinguishing State v. Tharp,* 96 Wn.2d 591, 595 (1981), trial court properly balanced, ER 403, thus within trial court's discretion; 9-0.

***State v. Campbell***, 78 Wn.App. 813, 821-24 (1995)

In homicide case where state presents evidence that killings were result of rival gang activity and victims had intruded on defendant's drug selling turf, trial court's admission of defendant's gang membership through lay witnesses, *Christensen v. Munsen,* 123 Wn.2d 234, 241 (1994), police officers' "gang expert" testimony, was proper where court exercised discretion after balancing, *State v. Dennison,* 115 Wn.2d 609, 628 (1990), *State v. Yarbrough,* 151 Wn.App. 66, 81-89 (2009), *State v. Saenz,* 156 Wn.App. 866, 872-74 (2010), *reversed, on other grounds,* 175 Wn.2d 167 (2012), *State v. Rodriguez,* 163 Wn.App. 215, 230-33 (2011), *State v. Embry,* 171 Wn.App. 714 (2012), *see: State v. Ryna Ra,* 144 Wn.App. 688 (2008), *cf.: State v. Asaeli,* 150 Wn.App. 543, 574-80 (2009), *State v. Scott,* 151 Wn.App. 520 (2009), *State v. McCreven,* 170 Wn.App. 444, 454-61 (2012), *but see: State v. DeLeon,* 185 Wn.App. 171 (2014), 185 Wn.2d 478, 489-91 (2016); II.

***State v. Binkin***, 79 Wn.App. 284 (1995) , *overruled, on other grounds, State v. Kilgore,* 147 Wn.2d 288 (2002)

In harassment case, prior threats are highly probative of objective reasonableness of victim's fear, *State v. Alvarez,* 74 Wn.App. 250, 261, *aff'd,* 128 Wn.2d 1 (1995), *State v. Ragin,* 94 Wn.App. 407 (1999), *State v. Barragan,* 102 Wn.App. 754, 758-60 (2000), *State v. Magers,* 164 Wn.2d 174 (2008), *State v. Johnson,* 172 Wn.App. 112 (2012), *reversed, in part, on other grounds, State v. Johnson,* 180 Wn.2d 295 (2014); I.

***State v. Krause***, 82 Wn.App. 688 (1996)

In child molestation case, court admits testimony of psychologist to whom defendant admitted, ten years earlier, to grooming and molesting children; held: evidence was more than mere predisposition to molest but that defendant had a systematic scheme for getting himself in a position where he had access to children, *State v. Lough*, 125 Wn.2d 847, 858-9 (1995), thus establishing a pattern sufficient to prove a plan, *State v. Sexsmith*, 138 Wn.App. 497 (2007), *State v. Kennealy*, 151 Wn.App. 861, 885-92 (2009), *State v. Scherner*, 153 Wn.App. 621, 656-59 (2009); because defendant denied the acts, the prior misconduct was admissible to disprove the defense that victim fabricated, *State v. Lough*, *supra*, at 862; trial court's weighing probative vs. prejudice was not an abuse of discretion, as defendant consistently followed the same pattern of abuse, need in sex abuse case is higher due to secrecy, vulnerability of victims, absence of physical proof of crime, general lack of confidence in ability of jury to assess credibility of child witnesses, *State v. Lough*, *supra*, at 859, *State v. DeVincentis*, 150 Wn.2d 11 (2003); I.

***State v. Grant***, 83 Wn.App. 98 (1996)

In felony no contact order violation case, RCW 10.99.040(4), -.050(2), trial court admits prior assault conviction by defendant on victim pursuant to ER 609, state cross-appeals; held: prior assaults on domestic violence victim by same defendant are admissible pursuant to ER 404(b) as relevant to assess victim's credibility to explain why she minimized the incident, *State v. Nelson*, 131 Wn.App. 108, 114-16 (2006), *State v. Magers*, 164 Wn.2d 174 (2008), *State v. Baker*, 162 Wn.App. 468 (2011), *State v. Ashley*, 186 Wn.2d 32 (2016), *but see: State v. Cook*, 131 Wn.App. 845 (2006), *see: State v. Gunderson*, 181 Wn.2d 916 (2014), as domestic violence victims fear retaliation by abusers, mistrust the judicial system, remain with abusers, so that jury will "evaluate credibility with full knowledge of the dynamics of a relationship marked by domestic violence and the effect such a relationship has on the victim," at 108, within discretion of trial court, *see: State v. Wilson*, 60 Wn.App. 887 (1991), *State v. Binh Thach*, 126 Wn.App. 297, 310-11 (2005), *State v. Woods*, 198 Wn.App. 453 (2017); I.

***Old Chief v. United States***, 136 L.Ed.2d 574 (1997)

In federal felon in possession of firearm trial, defense offers to stipulate that defendant was convicted of a felony, moves to exclude name of the crime, government declines to stipulate, trial court admits the name of the prior felony to prove the prior crime element; held: under Fed. R. Evid. 403 analysis, unfair prejudice of nature of prior conviction outweighs probative value, thus trial court abused discretion in not excluding the nature of the prior, even though the evidence was relevant; *accord: State v. Johnson*, 90 Wn.App. 54, 61-3 (1998), *State v. Rivera*, 95 Wn.App. 132 (1999), *cf.: State v. Gladden*, 116 Wn.App. 561 (2003), *State v. Taylor*, 193 Wn.2d 691 (2019), *see also: State v. Wolf*, 134 Wn.App. 196 (2006), *State v. Humphries*, 181 Wn.2d 708 (2014); 5-4.

***State v. Perrett***, 86 Wn.App. 312, 319-20 (1997)

In assault case, court admits defendant's statement to police that he wouldn't give up his gun because "the last time the sheriff took his guns, he didn't get them back" as evidence of defendant's uncooperative attitude on arrest; held: defendant's demeanor on arrrest was not relevant to any element of the crime charged, thus defendant's statement was abuse of discretion,

as it introduced irrelevant acts of misconduct, *State v. Bowen*, 48 Wn.App. 187, 196 (1987), *see also: State v. Sanford*, 128 Wn.App. 280 (2005); II.

***State v. Daniels***, 87 Wn.App. 149 (1997)

In reckless assault of a child 2°, evidence of uncharged abuse was properly admitted to prove that defendant's conduct was reckless, since it showed he should have learned that discipline of a young child can cause injury, that defendant intentionally disciplined the child excessively, and that defendant knew of the risk of harm; I.

***State v. Kimp***, 87 Wn.App. 281 (1997)

Where trial court rules *in limine* that state may impeach defendant's testimony with specific acts of misconduct, ER 608(b)(1), the issue is not preserved for appeal unless defendant actually testifies at trial, *State v. Brown*, 113 Wn.2d 520, 540 (1989); I.

***State v. Norlin***, 134 Wn.2d 570 (1998)

Evidence of other wrongful acts by a defendant may be admitted only if the state first establishes a connection between the defendant and those acts by a preponderance; in child abuse case, evidence of a child's prior injuries is admissible under ER 404(b) only if it is connected to the defendant, overruling *State v. Mercer*, 34 Wn.App. 654 (1983); here, evidence that prior injuries occurred when defendant was alone with child, plus nature of injuries is circumstantially sufficient to connect defendant to prior injuries by a preponderance; 9-0.

***State v. Baker***, 89 Wn.App. 726 (1997)

Defendant, accused of rubbing eight-year-old's back and, after she fell asleep, molesting her through her clothes, court admits testimony of defendant's adult daughter that when she was a child, defendant would sleep in bed with her, rub her back and, when she awoke, her underwear was off and his hand was between her legs; held: trial court's determination that prior misconduct was proved by preponderance is supported by substantial evidence, as credibility issues are for trial court, *State v. Benn*, 120 Wn.2d 631, 653 (1993), evidence was markedly similar against similar victim under similar circumstances, indicating design, not coincidence, *State v. Lough*, 125 Wn.2d 847, 860 (1995), *State v. DeVincentis*, 150 Wn.2d 11 (2003), *State v. Scherner*, 153 Wn.App. 621, 656-59 (2009), remoteness is a factor, but trial court's decision to admit was not an abuse of discretion; I.

***State v. Boot***, 89 Wn.App. 780 (1998)

In murder trial, court admits evidence that earlier defendant had pointed a gun at victim and was laughed at and told he was too much of a baby to shoot, plus defendant's gang affiliation; held: pointing gun is admissible to prove motive, *State v. Bowen*, 48 Wn.App. 187, 191 (1987), *State v. Powell*, 126 Wn.2d 244, 260 (1995), gang membership is admissible as testimony established that killing someone heightened a gang member's status, proving motive and premeditation, *State v. Saenz*, 156 Wn.App. 866, 872-74 (2009), *reversed, on other grounds*, 175 Wn.2d 167 (2012), *cf.: State v. Ryna Ra*, 144 Wn.App. 688 (2008), *State v. Asaeli*, 150 Wn.App. 543, 574-83 (2009), *State v. Yarbrough*, 151 Wn.App. 66, 81-89 (2009), *State v. Scott*, 151 Wn.App. 520 (2009), *see: State v. Embry*, 171 Wn.App. 714 (2012); evidence of another robbery, auto theft and discharging firearm were admissible as *res gestae*, to establish an

escalating chain of events of increasingly serious crimes, permitting jury to get whole picture out of a senseless crime, at 790, *State v. Lane*, 125 Wn.2d 825, 834-5 (1995) *cf.: State v. Briejer*, 172 Wn.App. 209, 223-27 (2012); II.

***State v. Stockton***, 91 Wn.App. 35 (1998)

In VUFA case with necessity defense, defendant testifies on direct that he was approached by strangers, and believed that they wanted to sell him drugs, on cross prosecutor, over objection, elicits defendant had previously bought drugs; held: passing reference to a prohibited topic does not open door for cross-examination about prior misconduct, *State v. Avendano-Lopez*, 79 Wn.App. 706, 715 (1995), *State v. Jones*, 144 Wn.App. 284, 297-99 (2008), *State v. Harstad*, 153 Wn.App. 10, 28-29 (2009), *cf.: State v. Gallagher*, 112 Wn.App. 601, 609-10 (2002), *see: State v. Rushworth*, 12 Wn.App.2d 466 (2020), as it is equally likely that someone who had never purchased drugs would understand an approach described by defendant to involve drugs; had defendant denied any knowledge about drugs, then he could have been impeached with prior drug use, did not happen here; I.

***State v. Wade***, 92 Wn.App. 885 (1998), *reversed on procedural grounds*, 138 Wn.2d 460 (1999)

In VUCSA case, trial court admits evidence of respondent's prior drug sales to prove intent to deliver; held: when state "offers evidence of prior acts to demonstrate intent, there must be a logical theory, *other than propensity*, demonstrating how the prior acts connect to the intent required to commit the charged offense," at 891, *State v. Saltarelli*, 98 Wn.2d 358, 364 (1982), *State v. Holmes*, 43 Wn.App. 397 (1986); II.

***State v. Jones***, 93 Wn.App. 166, 172-76 (1998)

At arrest after drug deal, defendant is found with $442 cash, state offers evidence from Department of Employment Security that defendant had no reported income; held: state is entitled to anticipate a defense that defendant acquired cash from a lawful source, trial court has discretion to admit evidence of defendant's unemployment where it properly balances probative value vs. unfair prejudice, *State v. Matthews*, 75 Wn.App. 278 (1994), although such evidence should be admitted with caution to avoid inference that poor people are more likely to sell drugs; I.

***State v. Finch***, 137 Wn.2d 792, 821-24 (1999)

Hostile declarations about a murder victim, even though expressed subsequent to the crime, may be admitted to show that the hostility existed at the time of the crime, where relevant to show motive or intent, *State v. Dillon,* 12 Wn.App.2d 133 (2020); 7-2.

***State v. Ragin***, 94 Wn.App. 407 (1999)

In felony harassment case, RCW 9A.46.020, trial court admits evidence that defendant had informed victim some months before the offense that he had been convicted of robbery, had been involved in domestic violence, suffered from episodic rages, two weeks before offense defendant said he had guns, bombs and could waste people; held: trial court exercised proper discretion in admitting prior acts, ER 404(b), *State v. Binkin*, 79 Wn.App. 284 (1995), *overruled, on other grounds, State v. Kilgore*, 147 Wn.2d 288 (2002), *State v. Alvarez*, 74 Wn.App. 250, 261, *aff'd,* 128 Wn.2d 1 (1995), as "reasonable fear that threat will be carried out" is an element

of harassment, *State v. Barragan*, 102 Wn.App. 754, 758-60 (2000), *State v. Magers*, 164 Wn.2d 174 (2008), *State v. Johnson*, 172 Wn.App. 112 (2012), *reversed, in part, on other grounds*, *State v. Johnson*, 180 Wn.2d 295 (2014), limiting instruction was given, state's argument contained a thorough balancing of prejudice vs. probative value which was assumedly adopted by the trial court although "a more explicit analysis from the court would have been preferable," at 413 n.12; I.

***State v. Burkins***, 94 Wn.App. 677, 686-91 (1999)

In murder case, defendant states to police that he smoked marijuana with victim, killed her and pinched her, police find body with rope; court admits evidence of rape of another woman, of which defendant had previously been convicted, in which rape victim testifies that they smoked marijuana, defendant tied her hands, pinched her, threatened to kill her if she did not submit, state's theory is that rape victim lived because she submitted, murder victim was killed because she did not; held: trial court properly exercised discretion in admitting other misconduct evidence, ER 404(b), to establish common scheme under doctrine of chances, *State v. Lough*, 70 Wn.App. 302, 321-33, *aff'd*, 125 Wn.2d 847 (1995), *State v. Krause*, 82 Wn.App. 688, 693-94 (1996), *State v. DeVincentis*, 150 Wn.2d 11 (2003); I.

***State v. Wade***, 98 Wn.App. 328, 333-34 (1999)

In VUCSA case, trial court admits evidence of respondent's prior drug sales to prove intent to deliver; held: when state "offers evidence of prior acts to demonstrate intent, there must be a logical theory, other than propensity, demonstrating how the prior acts connect to the intent required to commit the charged offense," at 891, *State v. Saltarelli*, 98 Wn.2d 358, 364 (1982), *State v. Holmes*, 43 Wn.App. 397 (1986); II.

***State v. Hernandez***, 99 Wn.App. 312, 321-23 (1999)

In murder case where defendant claims death was an accident and thus defendant had no intent to assault or kill his girlfriend, evidence of defendant's prior assaults on victim are relevant to rebut claim of accident and to establish an intentional killing, *State v. Hieb*, 39 Wn.App. 273 (1984), *State v. Gogolin*, 45 Wn.App. 640 (1986), *State v. Bell*, 10 Wn.App. 957, 961 (1974), *State v. Olsen*, 175 Wn.App. 269, 282 (2013), *affirmed, on other grounds*, 180 Wn.2d 468 (2014); I.

***State v. Griswold***, 98 Wn.App. 817, 823-27 (2000)

Defendant molests young girl after playing "truth or dare," trial court admits prior instances of defendant attempting to molest after playing "truth or dare"; held: unique use of "truth or dare" tended to show defendant's design to molest, *State v. Lough*, 125 Wn.2d 847, 855 (1995), which is atypical conduct, *but see: State v. DeVincentis*, 150 Wn.2d 11 (2003); III.

***State v. Pogue***, 104 Wn.App. 981 (2001)

Defendant testifies that he did not know the cocaine was in the car he was driving, and that it was planted by the police, trial court allows state to inquire of defendant if he has possessed cocaine in the past to demonstrate his knowledge about cocaine; held: where only relevancy of the prior misconduct is to show propensity, *State v. Wade*, 98 Wn.App. 238 (1999), then the evidence is inadmissible; defendant did not claim he didn't recognize the substance, thus

his knowledge about cocaine was solely to prove propensity, distinguishing *State v. Weiss*, 73 Wn.2d 372 (1968), *State v. Hall*, 41 Wn.2d 446 (1952); I.

***State v. Freeburg***, 105 Wn.App. 492, 497-502 (2001)

In 1994 homicide with firearm case, trial court admits evidence that at defendant's 1997 arrest, he possessed a firearm, as evidence akin to **flight**; held: while flight is admissible as circumstantial evidence of guilt, *State v. Nichols*, 5 Wn.App. 657, 660 (1971) it is marginally probative, *State v. Jefferson*, 11 Wn.App. 566, 571 (1974), *State v. McDaniel*, 155 Wn.App. 829, 853-55 (2010), *State v. Slater*, 197 Wn.2d 660 (2021), and possession of a weapon, by itself, is not indicative of consciousness of guilt; I.

***State v. Trickler***, 106 Wn.App. 727, 731-35 (2001)

At trial on possession of stolen credit card case, trial court allows state to offer evidence of other stolen property in defendant's possession when credit card was found under *res gestae* theory and for jury to hear how police discovered the stolen credit card; held: abuse of discretion as evidence was more prejudicial than probative, *State v. Briejer*, 172 Wn.App. 209, 223-27 (2012); 2-1, III.

***State v. Prestegard***, 108 Wn.App. 14 (2001)

In failure to register as sex offender case, court declines to admit testimony of clerks that sheriff's office routinely lost court documents and therefore lost defendant's registration; held: evidence of the routine practice of an organization, ER 406, is admissible without foundational requirements necessary for establishing a person's habit; II.

***State v. Everybodytalksabout***, 145 Wn.2d 456 (2002)

In murder case based upon accomplice liability, detective testifies that he has seen defendant and co-defendant on numerous occasions, defendant was the leader and more assertive of the two; held: prior acts, even if not misconduct, are inadmissible to show character or to prove that the person acted in conformance on a particular occasion, ER 404(b), *State v. Halstien*, 122 Wn.2d 109, 126 (1993), distinguishing *State v. Brown*, 132 Wn.2d 529, 571-79 (1997); fact that defendant was a leader previously is not relevant to establish that he was the leader at the time of the homicide; 9-0.

***State v. Vy Thang***, 145 Wn.2d 630, 639-49 (2002)

In burglary-murder case, trial court admits prior incident in which similarities are theft of purse, victims elderly, perpetrator said "the bitch is dead," both victims were kicked; dissimilarities are that they occurred 18 months apart in different parts of state, one victim was kicked three times, the other until she died, entry in one was through window, other through door, perpetrators fled in car in one, on foot in other; held: similarities were insufficient to establish **signature-like** features, thus prior incident should have been excluded, *cf.: State v. Fualaau*, 155 Wn.App. 347, 356-59 (2010), *Det. of Coe*, 175 Wn.2d 482, 491-501 (2012); when trial court admits prior misconduct *in limine*, defense may offer the evidence to mitigate and still preserve error, *see: Ohler v. United States*, 146 L.Ed.2d 826 (2000), *cf.: State v. Makela*, 66 Wn.App. 164, 171 (1992), *Garcia v. Providence Med. Ctr.*, 60 Wn.App. 635 (1991); 9-0.

***State v. Kilgore***, 147 Wn.2d 288 (2002)

Where existence of a prior bad act is contested, trial court may determine whether it was proved by preponderance, *State v. Pirtle*, 127 Wn.2d 628, 648-49 (1995), via offer of proof rather than a "mini-trial," *State v. Mee*, 168 Wn.App. 144, 154-55 (2012), *overruling, in part, State v. Binkin*, 79 Wn.App. 284, 290 (1995), *see: State v. DeJesus*, 7 Wn.App.2d 849 (2019); affirms *State v. Kilgore*, 107 Wn.App. 160 (2001); 6-3.

***State v. DeVries***, 199 Wn.2d 842, 848-49 (2003)

Respondent is charged with delivering amphetamines to another student, trial court admits evidence that respondent gave two dissimilar pills to another classmate three days before charged incident, no evidence that pills delivered earlier contained controlled substances; held: because prior incident had little or no probative value on the elements of the crime charged, it should have been excluded; "[i]n doubtful cases, the evidence should be excluded, *State v. Smith*, 106 Wn.2d 772, 776 (1986); 9-0.

***State v. Gladden***, 116 Wn.App. 561 (2003)

In communicating with a minor for immoral purposes case, RCW 9.68A.090, defendant offers to stipulate that defendant had been previously convicted of a felony sex offense to keep the prior from the jury, *Old Chief v. United States*, 136 L.Ed.2d 574 (1997), which prosecutor and trial court reject; held: because defendant did not offer to stipulate that he had a prior conviction for a felony sex offense but sought to exclude any evidence of the prior, trial court did not err in refusing stipulation, *State v. Ortega*, 134 Wn.App. 617, 623-25 (2006), *cf.: State v. Johnson*, 90 Wn.App. 54 (1998); III.

***State v. DeVincentis***, 150 Wn.2d 11 (2003)

In child sex abuse case, defendant induces victim to his home, wears bikini underwear, asks for massages, asks her to hold his penis, asks her whether his lack of dress bothers her and tells her not to tell anyone, trial court admits evidence that, fifteen years earlier, defendant did the same thing; held: common scheme or plan exception, ER 404(b), is used to prove that the conduct occurred, as opposed to *modus operandi* exception to prove identity, *State v. Foxhoven*, 161 Wn.2d 168, 179 (2007); common scheme or plan evidence requires substantial similarity between the prior acts and the crime charged; sufficient similarity is reached only when the trial court determines that the various acts are naturally to be explained as caused by a general plan, *State v. Lough*, 125 Wn.2d 847, 860 (1995), *State v. Carleton*, 82 Wn.App. 680 (1996), *State v. Krause*, 82 Wn.App. 688 (1996), *State v. Kennealy*, 151 Wn.App. 861, 885-92 (2009), *see also: State v. Sexsmith*, 138 Wn.App. 497 (2007), which is less than required when identity is at issue, *State v. Scherner*, 153 Wn.App. 621, 656-59 (2009), whereupon the commonalities must be unique, *State v. Vy Thang*, 145 Wn.2d 630, 643 (2002), *State v. Slocum*, 183 Wn.App. 438 (2014); overrules *State v. Dewey*, 93 Wn.App. 50 (1998), *State v. Griswold*, 98 Wn.App. 817, 823-27 (2000); affirms *State v. DeVincentis*, 112 Wn.App. 152 (2002); 9-0.

***State v. Guzman***, 119 Wn.App. 176 (2003)

In rape 3° case, trial court admits evidence that five years earlier defendant had touched breast of victim to establish lustful disposition toward victim; held: remoteness is a factor, but here trial court did

not abuse discretion, *State v. Ray*, 116 Wn.2d 531, 547 (1991), *see:* *State v. Crossguns*, 199 Wn.2d 282 (2022); III.

***State v. Moran***, 119 Wn.App. 197, 217-19 (2003)

Homicide defendant writes letter to friend asking him to contact a potential witness who was "behind me all the way now she's being a cunt," signs it "[y]our homie," trial court admits letter as probative to show defendant's "propensity to try to influence people so that they will be … more favorable to him," over defense argument that language in letter creates unfair prejudice and links him to gang violence; held: although not a threat, the letter may be interpreted as a request that the witness change her mind about defendant's guilt, *State v. Kosanke*, 23 Wn.2d 211, 215 (1945), admission was not abuse of discretion; I.

***State v. Lillard***, 122 Wn.App. 422, 430-32 (2004)

In "complex" possessing stolen property case, state offers evidence of a series of thefts committed by defendant to explain context of case; held: "a defendant cannot insulate himself by committing a string of connected offenses and then argue that the evidence of the other uncarged crimes is inadmissible because it shows the defendant's bad character, thus forcing the State to present a fragmented version of the events," at 431, *State v. Tharp*, 27 Wn.App. 198, 205, *aff'd,* 96 Wn.2d 591 (1981), *State v. Schaffer*, 63 Wn.App. 761 (1991); I.

***State v. Sanford***, 128 Wn.App. 280 (2005)

At arrest, police identify defendant by his booking photo after defendant gives a false name, trial court admits evidence that police looked at booking photo in spite of defendant's not challenging identity at trial; held: referring to booking photos may raise a prejudicial inference of criminal propensity, *State v. Henderson*, 100 Wn.App. 794, 803 (2000); where identity is not at issue evidence of prior misconduct to prove identity is not admissible, *State v. Bowen*, 48 Wn.App. 187, 193 (1987); II.

***State v. Mezquia***, 129 Wn.App. 118, 126-32 (2005)

Trial court rules that it will admit ER 404(b) evidence in rebuttal if defense presents other suspect evidence, defense decides not to introduce the evidence, so 404(b) evidence is not admitted, defense appeals; held: in order to preserve a 404(b) objection, the evidence must actually be presented, *Luce v. United States*, 83 L.Ed.2d 443 (1984), *State v. Phillips*, 160 Wn.App. 38 (2011); I.

***State v. Womac***, 130 Wn.App. 450, 455-57 (2005), *rev'd, on other grounds,* 160 Wn.2d 643 (2007)

In homicide of a child by abuse case, where defendant claims accident, evidence of other incidents involving defendant's treatment of children, including the deceased, may be relevant and admissible to rebut the claim of accident, within discretion of trial court, *State v. Terry*, 10 Wn.App. 874, 883 (1974); II.

***State v. Nelson***, 131 Wn.App. 108, 114-16 (2006)

In assault case, prior assaults by defendant on his wife are admissible to show that complainant was afraid of defendant and to explain her inconsistent reports to the police, ER

404(b), *State v. Grant*, 83 Wn.App. 98 (1996), *State v. Cook*, 131 Wn.App. 845 (2006), *State v. Magers*, 164 Wn.2d 174 (2008), *State v. Baker*, 162 Wn.App. 468 (2011), *State v. Johnson*, 172 Wn.App. 112 (2012), *reversed, in part, on other grounds, State v. Johnson*, 180 Wn.2d 295 (2014), *State v. Ashley*, 186 Wn.2d 32 (2016), *State v. Woods*, 198 Wn.App. 453 (2017), *see: State v. Gunderson*, 181 Wn.2d 916 (2014); III.

***State v. Cook***, 131 Wn.App. 845 (2006)

Victim recants at trial, claims she lied to police, trial court admits other acts of violence committed by defendant on victim, instructs jury that it may consider the prior incidents for the limited puspose of assessing credibility of victim; held: where victim recants, fails to timely report abuse or minizes accusations, then evidence of prior abuse is relevant and potentially admissible, ER 404(b), to illuminate the victim's state of mind at the time of the inconsistent act, including state of mind at the time of the witness' trial testimony, *State v. Wilson*, 60 Wn.App. 887 (1991), *State v. Nelson*, 131 Wn.App. 108, 114-16 (2006), *State v. Magers*, 164 Wn.2d 174 (2008), provided court gives an adequate limiting instruction telling jury it can consider abuse to assess an alleged victim's state of mind at the time of the inconsistent act, not to determine victim's credibility, *State v. Gunderson*, 181 Wn.2d 916 (2014), *State v. Ashley*, 186 Wn.2d 32, 47 (2016), *State v. Woods*, 198 Wn.App. 453 (2017), distinguishing *State v. Grant*, 83 Wn.App. 98 (1996), *State v. Baker*, 162 Wn.App. 468 (2011); II.

***Holmes v. South Carolina***, 164 L.Ed.2d 503 (2006)

Evidence rule that defendant may not introduce proof of third-party guilt if the prosecution has introduced forensic evidence that, if believed, strongly supports a guilty verdict is arbitrary, *Washington v. Texas*, 18 L.Ed.2d 1019 (1967), and violates defendant's right to present a complete defense, *Crane v. Kentucky*, 90 L.Ed.2d 636 (1986); 9-0.

***State v. Mason***, 160 Wn.2d 910, 932-33 (2007)

An objection that proffered evidence is "prejudicial" is "adequate to preserve an appeal" of ER 404(b) evidence, whereas an objection that the evidence is irrelevant is not; 5-4.

***State v. Foxhoven***, 161 Wn.2d 168 (2007)

In malicious mischief graffiti case, trial court admits photographs seized from defendants' homes of defendants painting other walls with the same signature tag and drawings from defendant's home of the same tag as *modus operandi* and to show common scheme or plan, along with police testimony that tags are akin to signatures; held: where a signature is provided, the signature alone is sufficiently distinctive to be admissible under the *modus operandi* exception to ER 404(b); the existence of a common scheme or plan is not relevant to show identity, but is relevant only to the extent that it shows the charged crime occurred, *State v. DeVincentis*, 150 Wn.2d 11 (2003), which was not at issue here; 9-0.

***State v. Yates***, 161 Wn.2d 714, 749-51 (2007)

In aggravated murder case, defining "common scheme or plan" for purposes of an aggravating factor as "a connection between the crimes in that one crime is done in preparation of the other [and] when a person devises an overarching criminal plan and uses it to perpetrate

separate but very similar crimes," *State v. Lough*, 125 Wn.2d 847, 854-55 (1995), was proper; 8-1.

***State v. Sexsmith***, 138 Wn.App. 497 (2007)

In child sex abuse case, trial court admits uncharged prior act where defendant was in a position of authority over both victims, was biological father of one and primary father figure of the other, both girls were about the same age when molested, defendant isolated both when abused, both abused in basement, in both he took nude photographs, showed pornography and had them fondle him; held: trial court did not abuse discretion as the similarity was clearly more than coincidental, while individual features were not unique in themselves, the cumulative similarity between the two suggests a common plan rather than coincidence, at ¶ 24, *State v. DeVincentis*, 150 Wn.2d 11, 17 (2003), *State v. Lough*, 125 Wn.2d 847, 854-55 (1995), *State v. Kennealy*, 151 Wn.App. 861, 885-92 (2009), *State v. Scherner*, 153 Wn.App. 621, 656-59 (2009), *but see: State v. Slocum*, 183 Wn.App. 438 (2014); even if uncharged conduct was inadmissible, in light of defendant's having videotaped his sex acts with victim, defendant admitted to sex on surreptitious tapes made by victim, error was harmless, *State v. Carleton*, 82 Wn.App. 680, 686 (1996); III.

***State v. Magers***, 164 Wn.2d 174 (2008)

In domestic violence assault case, evidence of prior acts of violence known to victim is admissible to prove the element of assault that victim reasonably feared bodily injury, *State v. Ragin*, 94 Wn.App. 407 (1999), *State v. Barragan*, 102 Wn.App. 754 (2000), even if defendant did not dispute the element, as state has burden of proving all elements; where victim recants, prior acts of violence against victim are admissible so jury can evaluate her credibility, *State v. Grant*, 83 Wn.App. 98 (1996), *State v. Cook*, 131 Wn.App. 845 (2006), *State v. Nelson*, 131 Wn.App. 108, 114-16 (2006), *State v. Baker*, 162 Wn.App. 468 (2011), *State v. Johnson*, 172 Wn.App. 112 (2012), *reversed, in part, on other grounds, State v. Johnson*, 180 Wn.2d 295 (2014), *State v. Gunderson*, 181 Wn.2d 916 (2014), *State v. Ashley*, 186 Wn.2d 32 (2016), *State v. Woods*, 198 Wn.App. 453 (2017); 6-3 (plurality opinion on these issues; *see:* Madsen, J., concurring).

***State v. Ryna Ra***, 144 Wn.App. 688 (2008)

Trial court excludes *in limine* evidence that defendant may have been a member of a gang, state elicits evidence from detective that he's on the gang unit, questions witnesses about gang-like behavior, argues about a culture of violence amongst defendant's "group;" held: trial court was not given the opportunity to weigh probative value against prejudicial effect due to indirect manner in which state presented the evidence, state did not provide any evidence that defendant was a gang member and what the gang mores were, *see: State v. Filitaula*, 184 Wn.App. 819, 824-25 (2014); state invited jury to make the "forbidden inference" underlying ER 404(b) that defendant's prior bad acts showed his propensity to commit the crimes charged, *State v. McCreven*, 170 Wn.App. 444, 454-61 (2012), *see: State v. Scott*, 151 Wn.App. 520 (2009); II.

***State v. Wilson***, 144 Wn.App. 166, 175-78 (2008)

In felony murder/burglary 1° case, trial court admits evidence of prior assaults between defendant and victim and defendant's statement to informants that she desired to get even with

victim, both to prove intent to kill in case state amended to intentional murder and to prove *mens rea* element of burglary, although state never amended; held: intent not being an element of felony murder, it was error to admit ER 404(b) evidence; III.

***State v. Babcock***, 145 Wn.App. 157 (2008)

In child rape case, trial court admits child hearsay, after which complainant refuses to testify, court strikes hearsay but denies mistrial; held: weighing factors to determine if "trial irregularity" deprived defendant of fair trial, (1) seriousness of irregularity, (2) whether challenged evidence was cumulative, (3) whether irregularity could be cured by instruction, the highly prejudice evidence was such that there was no guarantee that the jury could effectively disregard it, *State v. Suleski*, 67 Wn.2d 45 (1965), *State v. Escalona*, 49 Wn.App. 251 (1987), denial of mistrial was an abuse of discretion; III.

***Auburn v. Hedlund***, 165 Wn.2d 645, 654-57 (2009)

In DUI trial involving fatal crash, trial court admits 911 call in which excited caller describes gruesome scene including erroneous report of decapitation; held: gruesone nature of crash is not related to an element of the crime, thus admission of the call was an abuse of discretion, ER 403, *State v. Crenshaw*, 98 Wn.2d 789, 806-07 (1983), *State v. Sargent*, 40 Wn.App. 340, 348-49 (1985); 5-4.

***State v. Fisher***, 165 Wn.2d 727, 744-49 (2009)

In sex abuse case, trial court orders that prior acts by defendant upon victim's siblings known to victim are admissible if defense raises delay in reporting, state refers to abuse in opening, cross and closing, defense never raises issue, enters a standing objection which is overruled; held: while trial court properly found that the physical abuse was proved by a preponderance and had a proper purpose, court's limiting admission to rebut delayed reporting was correct, prosecutor's misconduct in offering the evidence in its case in chief was reversible misconduct; admission of CPS reports of defendant's physical abuse of other children was collateral, unrelated to delay in reporting; 9-0.

***State v. Powell***, 166 Wn.2d 73 (2009)

In attempted burglary case, trial court admits defendant's methamphetamine use immediately prior to offense to establish defendant's state of mind; held: absent expert testimony to explain how the use of the drug affects a person, the evidence should not have been admitted; four justices concur in opinion of the court which purports to hold that defense counsel failed to preserve ER 404(b) error, four justices hold that the error was preserved but was harmless, one justice holds the error was preserved and would reverse; reverses, in part, *State v. Powell*, 139 Wn.App. 808 (2007).

***State v. Asaeli***, 150 Wn.App. 543, 574-83 (2009)

Trial court admits, in homicide case, evidence that some witnesses believed that "Kushmen Blokk" was a gang, that there may have been a shooting by "Kushmen Blokk Bloods" five years earlier which did not involve defendants, no evidence is submitted that Kushmen Blokk engaged in gang related activity before or after the earlier shooting or that the Kushmen Blokk mentioned in relation to the current offense is the same group as the earlier one; held:

because there was no evidence that Kushmen Blokk is a gang, court abused its discretion in admitting gang-association evidence and police expert testimony about gangs, *cf.:* *State v. Campbell*, 78 Wn.App. 813, 821-24 (1995) *State v. Boot*, 89 Wn.App. 780 (1998), *State v. Ryna Ra*, 144 Wn.App. 688 (2008), *State v. Scott*, 151 Wn.App. 527 (2009), *State v. McCreven*, 170 Wn.App. 444, 454-61 (2012), *State v. Filitaula*, 184 Wn.App. 819, 824-25 (2014); II.

***State v. Yarbrough***, 151 Wn.App. 66, 81-89 (2009)

Gang evidence may be admissible to prove motive, *State v. Boot*, 89 Wn.App. 780 (1989), *State v. Campbell*, 78 Wn.App. 813, 822 (1995), *State v. Saenz*, 156 Wn.App. 866, 872-74 (2010), *reversed, on other grounds*, 175 Wn.2d 167 (2012), *State v. DeLeon*,185 Wn.App. 171 (2014) and mental state for murder 1º by extreme indifference, RCW 9A.32.030(1)(b), *State v. Mee*, 168 Wn.App. 144, 155-57 (2012), *State v. Embry*, 171 Wn.App. 714 (2012), but not to show identity absent a "unique signature," *State v. Lough*, 70 Wn.App. 302 (1993), *aff'd,* 125 Wn.2d 847 (1995); failure to request a limiting instruction for ER 404(b) evidence may be a legitimate tactical decision and thus is not ineffective assistance, *State v. Humphries*, 181 Wn.2d 708, 719-21 (2014); II.

***State v. Scott***, 151 Wn.App. 520 (2009)

Trial court rules *in limine* that state may present gang evidence where gang expert testifies to the importance of respect in gang culture and gang would respond with violence to a lack of respect, prosecutor offers evidence that defendant is in a gang but expert never testifies about respect; held: while court offered proper bases for ER 404(b) evidence, namely motive, connection between defendant and his co-defendants and to explain the interactions of parties and threats, evidence did not connect to the expressed motive, only reasonable inference for jury is that defendant is a bad person, prohibited by ER 404(b), not harmless, *see: State v. McCreven*, 170 Wn.App. 444, 454-61 (2012), *State v. DeLeon*, 185 Wn.App. 171 (2014), 185 Wn.2d 478, 489-91 (2016); III.

***State v. Kennealy***, 151 Wn.App. 861, 885-92 (2009)

Trial court admits four prior instances of uncharged sexual misconduct on children, finding common scheme or plan based upon defendant told one victim and some of the prior misconduct witnesses not to tell, committed the acts in a place that went unnoticed by others, committed the acts on children who were related to him or lived and played close to him, committed the acts after the children knew him and trusted him because of a relationship or because he gave gives and talked to them, chose victims whose ages ranged from 5-12 years, touched the girls under and outside clothing, committed sexual acts more than once; held: trial court did not abuse discretion, *State v. Sexsmith*, 138 Wn.App. 497 (2007), *State v. Krause*, 82 Wn.App. 688 (1996); II.

***State v. Nelson***, 152 Wn.App. 755, 771-72 (2009)

In dog fighting case, trial court did not abuse discretion in admitting evidence that defendant had a tattoo depicting dogs fighting; III.

***State v. Hartzell***, 153 Wn.App. 137, 149-54 (2009)

In shooting incident, evidence that defendant had shot the same gun as was used in the charged offense was not admitted to show that defendant had a propensity to use guns, but rather that it was the same gun; "[a] defendant may open the door to evidence that would otherwise be inadmissible, even if constitutionally protected, if the rebuttal evidence is relevant," at 154 ¶ 14; I.

***State v. Fualaau***, 155 Wn.App. 347, 356-59 (2010)

In assault 1° case, defendant endorses alibi defense, court admits evidence of defendant's testimony in a prior case revealing very similar acts of violence and torture against another, after which defense rests without presenting evidence; held: "[w]hen two crimes share a ritualistic quality, a defendant's description of his commission of one of the crimes is strongly probative of the defendant's identity as the perpetrator of the other," at 357 ¶ 22, *State v. Russell*, 125 Wn.2d 24, 66-68 (1994), *cf.: State v. Vy thang*, 145 Wn.2d 630, 642 (2002); I.

***State v. Venegas***, 155 Wn.App. 507, 525-27 (2010)

In child abuse case with numerous charged assaults, trial court admits evidence that defendant-step-grandmother refused to allow victim to enter gifted student program at trial and that she was angry about having to pay for foster care; held: while evidence does go to motive, trial court's failure to balance probative value against prejudicial effect was error, state already had powerful motive testimony from other charged assaults, evidence of other mistreatment adds little to the scale on motive; II.

***State v. McDaniel***, 155 Wn.App. 829, 853-55 (2010)

Defendant, wanted for attempted murder and unrelated warrants, is seen in a car being driven by his girlfriend, vehicle speeds away from attempted police stop, when rammed by police car and stopped defendant refuses order to lie down, is forced to the ground, at trial court admits this evidence as **flight**; held: flight evidence is only marginally probative as to the ultimate issue of guilt or innocence, so evidence of consciousness of guilt must be substantial and real, not speculative, conjectural or fanciful, *State v. Freeburg*, 105 Wn.App. 492, 498 (2001), *State v. Slater*, 197 Wn.2d 660 (2021); here, evidence did not establish that defendant's behavior caused the flight, as defendant was not driving the fleeing car, defendant's resistance is only admissible if jury can infer consciousness of guilt of the charged crime which occurred nine months earlier and defendant was wanted on other warrants; 2-1, II.

***State v. Williams***, 156 Wn.App. 482, 489-92 (2010)

In rape case with consent defense, trial court admits evidence of prior rape as common scheme involving women of similar age, involved in drugs, similar method (promise of drugs, attack from behind with forearm across throat, strangled into unconsciousness), no limiting instruction is requested or given; held: court properly exercised discretion in admitting prior misconduct, ER 404(b), limiting instruction only required if requested, *State v. Foxhoven*, 161 Wn.2d 168, 175 (2007); III.

***State v. Russell***, 171 Wn.2d 118 (2011)

Following admission of ER 404(b) evidence, trial court need not give a limiting instruction absent a request for such an instruction, *State v. Wilcoxon,* 185 Wn.App. 534, 542 (2015), *affirmed, on other grounds,* 185 Wn.2d 324 (2016), reversing *State v. Russell,* 154 Wn.App. 775 (2010); 9-0.

***State v. Perez-Valdez***, 172 Wn.2d 808, 814-17 (2011)

Defendant-father, accused of rape by his teenage daughters, offers evidence that, when the complainants were in a foster home they committed arson in order to be removed from the foster home as proof that they are lying about the rapes in order to be removed from father's home, trial court allows defense to argue that the children are lying in order to leave the home but precludes arson evidence; held: excluding the evidence of arson was a proper exercise of discretion; while the arson evidence is not properly excluded pursuant to ER 404(b) as it was not offered to show conformity of action with character, it was still within trial court's discretion to exclude it as irrelevant or unduly prejudicial; 5-4.

***State v. Johnson***, 159 Wn.App. 766, 772-73 (2011)

Defendant is caught stealing copper from a locomotive, trial court admits sales receipt showing defendant sold copper the day before his arrest; held: receipt was circumstantial evidence of motive or intent and, with limiting instruction, was properly admitted; 2-1, II.

***State v. Phillips***, 160 Wn.App. 36 (2011)

Trial court rules that ER 404(b) evidence would be admitted if defendant testifies that elderly theft victims consented to give him money, defendant does not testify; held: to preserve objection to ER 404(b) evidence when the admissibility is contingent on defendant testifying, defendant must testify and the evidence must be admitted, *State v. Mezquia,* 129 Wn.App. 118, 127-32 (2005), *Luce v. United States,* 469 U.S. 38, 43, 83 L.Ed.2d 443 (1984), does not deprive defendant of the right to present a defense; II.

***State v. Gresham***, 173 Wn.2d 405 (2012)

RCW 10.58.090 which directs that prior sex offenses are admissible irrespective of ER 404(b) analysis violates separation of powers doctrine, *State v. Gower,* 179 Wn.2d 851 (2014), reversing *State v. Gresham,* 153 Wn.App. 659 (2009); defendant, while on a trip with his granddaughter and her parents, fondles victim while parents are asleep, trial court admits evidence of molestation against other girls which occurred while their parents were asleep, both while defendant was on a trip with the other girls and at defendant's home; held: trial court did not abuse discretion in finding that the similarities established a common scheme or plan and that the differences are explained as "individual manifestations" of the same plan, *State v. Lough,* 125 Wn.2d 847, 860 (1995), commonality need not be a "unique method of committing the crime," *State v. DeVincentis,* 150 Wn.2d 11, 20-21 (2003), *see: Det. of Coe,* 175 Wn.2d 482, 491-501 (2012), *cf.: State v. Slocum,* 183 Wn.App. 438 (2014), *State v. Wilson,* 1 Wn.App.2d 73 (2017); defendant's proposed limiting instruction telling jury that the evidence admitted to show a common scheme or plan but could not be considered as evidence that defendant's conduct conformed with the conduct in the prior allegations is incorrect since conformity is the point of the relevance of the evidence and thus properly refused, but trial court erred in not correctly instructing the jury notwithstanding defendant's failure to propose a correct instruction, *State v.*

*Goebel,* 36 Wn.2d 367, 379 (1950), court is obliged to give a correct instruction *sua sponte,* harmless here; 7-2.

***State v. Mee***, 168 Wn.App. 144, 155-61 (2012)

Defendant fires a rifle into a house where a party was going on, kills victim, is convicted of murder 1° by extreme indifference, RCW 9A.32.030(1)(b) (1990), trial court admits evidence of gang membership to show motive, *State v. Yarbrough,* 151 Wn.App. 66 (2009), that gang members must assist other gang members in a fight; held: generalized gang evidence, absent (1) evidence showing adherence by defendant to behavior and (2) a finding that the evidence relating to gangs is relevant to prove elements of the crime, serves no purpose other than allowing the state to suggest that defendant is guilty because he is a criminal-type person, *State v. Foxhaven,* 161 Wn.2d 168, 175 (2007), *State v. McCreven,* 170 Wn.App. 444, 454-61 (2012), *cf.: State v. Boot,* 89 Wn.App. 780 (1998), *State v. DeLeon,* 185 Wn.App. 171 (2014), 185 Wn.2d 478, 489-91 (2016), *see: State v. Embry,* 171 Wn.App. 714 (2012), danger of unfair prejudice outweighs probative value, harmless here; II.

***State v. Fuller***, 169 Wn.App. 797, 828-32 (2012)

In murder case, evidence that defendant planned another robbery which didn't occur as motive that defendant was desperate for money is unfairly prejudicial motive evidence, not evidence of a past act; II.

***State v. Kipp***, 171 Wn.App. 14, 20-22 (2012), *reversed, on other grounds,* 179 Wn.2d 718 (2014)

In child molestation and rape trial involving one victim, court admits evidence that defendant also molested another, victims were of similar ages, both were defendant's nieces, both were molested in the same two homes, different sex acts; held: sufficient occurrence of common features supports court's discretion in determining that the acts showed a common scheme of plan; 2-1, II.

***State v. Embry***, 171 Wn.App. 714, 731-36 (2012)

Gang evidence is admissible, within discretion of trial court, where state proves by a preponderance that (1) defendant belonged to a gang and that there is a connection between the crime and gang activities, (2) that gang evidence establishes a motive, intent, plan or preparation, (3) gang evidence proves an element of the crime and a nexus between gang activity, the crime and gang members, and (4) probative value outweighs prejudice, *State v. Yarbrough,* 151 Wn.App. 66 (2009), *cf.: State v. DeLeon,* 185 Wn.App. 171 (2014), 185 Wn.2d 478, 489-91 (2016); 2-1, II.

***State v. Johnson***, 172 Wn.App. 112, 119-27 (2012), *reversed, in part, on other grounds, State v. Johnson,* 180 Wn.2d 295 (2014)

In harassment case, prior acts of domestic violence and domineering and controlling behavior by defendant against victim are admissible to support element that victim was in reasonable fear that the threat will be carried out, *State v. Magers,* 164 Wn.App. 174, 183 (2008),

*State v. Ashley*, 186 Wn.2d 32 (2016), *but see: State v. Gunderson*, 181 Wn.2d 916 (2014), also admissible to prove domestic violence aggravator; I.

***State v. Briejer***, 172 Wn.App. 209, 223-27 (2012)

Defendant, receives L&I benefits for back injury, state receives tip that defendant was mountain climbing, begins investigation and charges defendant with fraud that preceded his extreme sports activities, trial court admits mountain climbing evidence as *res gestae* to show the basis for the investigation; held: *res gestae* evidence should not be conflated with ER 404(b) evidence, should be analyzed under ER 401, 402 and 403 to determine if it is relevant and if its probative value is outweighed by unfair prejudice, *State v. Grier*, 168 Wn.App. 635, 645 (2012), *State v. Trickler*, 106 Wn.App. 727, 733-34 (2001); here, mountain climbing was not an "inseparable part" of the alleged fraud, not necessary to complete the crime story, highly prejudicial; III.

***State v. Olsen***, 175 Wn.App. 269 (2013) *affirmed, on other grounds*, 180 Wn.2d 468 (2014)

"[W]hen a defendant asserts that certain conduct is accidental, evidence of prior misconduct is *highly* relevant as it will tend to support rebut such a claim," at 282, *State v. Gogolin*, 45 Wn.App. 640 (1986); II.

***State v. Donald***, 178 Wn.App. 250 (2013)

Defense, seeking to blame other suspect who is not called as a witness, offers other suspect's criminal history and testimony that other suspect was mentally ill and experienced "command hallucinations" that ordered him to hurt other people or, alternatively, was malingering; held: a criminal defendant does not have the right to present third party propensity evidence, by way of a criminal record, to infer how the third party acted; precluding propensity evidence does not unreasonably restrict constitutional right to present a defense, *see: State v. Horn*, 3 Wn.App.2d 302 (2018); trial court did not abuse discretion in excluding mental illness evidence, as it was confusing, might lead to a "minicompetency trial" that would produce unreasonable delay, and defense did not show it was more than minimally relevant; I.

***State v. Gunderson,*** 181 Wn.2d 916 (2014)

In domestic violence no contact order case complainant testifies no violence occurred, no other statements of complainant are offered, trial court admits evidence of prior domestic violence episodes too impeach complainant's testimony; held: while evidence of prior misconduct may be admissible to enable jury to assess credibility of complainant who gave conflicting statements about defendant's conduct, *State v. Magers*, 164 Wn.2d 174, 186 (2008), absent conflicting statements by the witness probative value is outweighed by unfair prejudice, *State v. Saltarelli*, 98 Wn.2d 358, 363 (1982), *State v. Ashley*, 186 Wn.2d 32, 47 (2016); "we decline to extend *Magers* to cases where there is no evidence of injuries to the alleged victim and the witness neither recants nor contradicts prior statements," at 925 ¶ 16; 8-1.

***State v. Hecht***, 179 Wn.App. 497, 507-10 (2014)

In patronizing prostitute case where defendant maintained that he gave money to complainant for clothing, trial court's admitting evidence of other acts of patronizing as a common scheme or plan was not an abuse of discretion; I.

***State v. Mollett***, 181 Wn.App. 701, 713-15 (2014)

In rendering criminal assistance trial where defendant is accused of lying about knowing a murderer trial court admits a photograph of a desk in defendant's cell on which she wrote "White Power RIP" murderer; held: photo was admissible to show defendant's relationship to the slayer, trial court is not obliged to use the word "prejudice" or "prejudicial" in weighing probative value against prejudicial effect in performing a ER 403 balancing analysis; I.

***State v. Slocum***, 183 Wn.App. 438 (2014)

At child molestation and child rape trial evidence is that defendant sexually touched his granddaughter when she came to visit over many years, court admits evidence that defendant had molested victim's mother and aunt decades earlier in mother's home and when aunt came to visit; held: prior acts were "mostly opportunistic," only common plan was that, if given the opportunity defendant would molest girls which is inadmissible propensity evidence, *State v. Wilson*, 1 Wn.App.2d 73 (2017), distinguishing *State v. Lough*, 125 Wn.2d 847 (1995), *State v. DeVincentis*, 150 Wn.2d 11 (2003), *State v. Gresham*, 173 Wn.2d 405 (2012), *State v. Scherner*, 153 Wn.App. 621, 656-59 (2009); III.

***State v. Filitaula***, 184 Wn.App. 819, 824-25 (2014)

Court, *in limine*, excludes expert testimony about **gang** activity but allows witnesses to testify to words said at the time of the offense and explaining that they are gang-related; held: *res gestae* exception to ER 404(b) authorizes court to admit evidence that took place in the immediate timeframe of the offense if it is necessary to depict a complete picture for the jury; courts need not edit eyewitness testimony to sanitize the event being described; I.

***State v. DeLeon***, 185 Wn.App. 171 (2014), 185 Wn.2d 478, 489-91 (2016)

**Gang evidence** to prove motive where members of one gang shoot at members of another is admissible within discretion of trial court, *State v. Yarbrough*, 151 Wn.App. 66 (2009); photograph of a gang tattoo to prove affiliation is proper; detective's testimony that the tattoo means defendant had previously committed a crime would be improper but where the defendant obtained the tattoo after the instant offense it may have been a nonverbal admission, thus any error was harmless; evidence of how someone is initiated into a gang is not relevant where defendant is already a gang member when the offense occurred, as testimony on gang behavior must show both (1) adherence of defendant or defendant's gang to the relevant behavior and (2) tend to prove the elements of the charged crime, *see: State v. Mee*, 168 Wn.App. 144, 159 (2012); III.

***State v. DeLeon***, 185 Wn.2d 478 (2016)

Generalized **gang evidence** which suggests that defendants are part of a pervasive gang problem and are criminal-types with a propensity to commit charged crimes lacks probative value, is often highly prejudicial, at 486-89; where jail booking procedures require that an arrestee be asked about gang membership to avoid housing with rivals the admissions are not routine booking questions, *Pennsylvania v. Muniz*, 110 L.Ed.2d 528 (1990), but are involuntary; *reversed State v. DeLeon*, 185 Wn.App. 171 (2014), at 489-91; 9-0.

***State v. Farnsworth***, 185 Wn.2d 768, 786-87 (2016)

Pursuant to plea agreement codefendant testifies against defendant, trial court allows codefendant to testify that a reason he agreed to testify is that defendant was rude to him at Western State Hospital; held: evidence of rudeness was not to show dangerousness or conformity but to show motive to testify; 5-4.

***State v. Ashley***, 186 Wn.2d 32 (2016)

In unlawful imprisonment/domestic violence case prior acts of violence are admissible, ER 404(b), to prove lack of consent and intimidation, *State v. Fisher*, 165 Wn.2d 727, 744-45 (2009), *State v. Nelson*, 131 Wn.App. 108, 116 (2006), *State v. Magers*, 164 Wn.2d 174, 183 (2008), but not to bolster victim's credibility absent inconsistent testimony, at 47, *State v. Gunderson*, 181 Wn.2d 916 (2014); 9-0.

***State v. Feely***, 192 Wn.App. 751, 767-68 (2016)

In felony DUI case court gave a limiting instruction about prior DUIs that evidence is only to be considered to determine if defendant has the requisite priors, state's argument to jury that defendant fled because of the prior DUIs was improper as state did not seek a ruling from the trial court to allow other reasons for the priors, no prejudice here; I.

***State v. Arredondo***, 188 Wn.2d 244, 255-64 (2017)

In gang murder case trial court admits evidence of uncharged drive-by shooting by defendant involving none of the same people in the charged crimes as evidence of defendant's animosity towards the other gang who were victims of both; held: trial judge's finding that probative value outweighed prejudice to show motive and intent was not an abuse of discretion; trial court's holding that other incident was admissible to prove identity was error as there was no unique *modus operendi*, *State v. Smith*, 106 Wn.2d 772 (1986); affirms *State v. Arredondo*, 190 Wn.App. 512, 529-32 (2015); 5-4.

***State v. Jefferson***, 199 Wn.App. 772, 798-800 (2017), *reversed, on other grounds*, 192 Wn.2d 225 (2018)

Court excludes, *in limine*, **gang evidence** but allows witnesses to testify to defendant's nicknames "Little Shakes" and "Baby Shakes" where those witnesses only know defendant by those names; held: nicknames or street names don't implicate a gang; I.

***State v. Wilson***, 1 Wn.App.2d 73 (2017)

In rape of a child case with 4-year old complainant court admits evidence that sometime before the alleged rape defendant stated to complainant's 11-year old sister wearing a bathing suit that it gets him "excited," as evidence of a common scheme to molest children; held: to admit, prior misconduct must share a sufficient number of "markedly and substantially similar" features so that the similarities can naturally be explained as individual manifestations of a general plan, *State v. Gresham*, 173 Wn.2d 405, 420 (2012), *State v. Slocum*, 183 Wn.App. 438, 456 (2014), similarity of results is insufficient, there must be more than a general "plan" to molest children; "[i]n doubtful cases, the evidence should be excluded," *State v. Thang*, 145 Wn.2d 630, 642 (2002); I.

***State v. Rodriguez-Perez***, 1 Wn.App.2d 448, 467-71 (2017)

One joined co-defendant wants **gang evidence** admitted, the other moves to exclude it, court excludes; held: trial court properly exercised discretion excluding gang evidence entirely as it would have damaged one of the joined co-defendants (issue of improper consolidation was not raised on appeal), did not violate defendant's right to present a defense which is not absolute; III.

***State v. Riley***, 12 Wn.App.2d 714 (2020)

In telephone harassment case court admits evidence that defendant had previously slapped defendant and, in fits of rage, drove a car recklessly to frighten defendant and threw things at him; held: where trial court fails to make an adequate ER 404(b) record in admitting "other act" evidence appellate court may review the decision *de novo*, *State v. Jackson*, 102 Wn.2d 689, 694 (1984); while prior misconduct evidence to prove identity must have a high degree of similarity to mark the handiwork of the defendant, *State v. Coe*, 101 Wn.2d 772, 777 (1984), where the evidence is offered to prove a "true threat" the issue of similarity is not part of the analysis; here, the trial court properly exercised discretion in admitting the prior acts to establish that victim had a reasonable fear of harm, *State v. Ragin*, 94 Wn.App. 407 (1999); 2-1.

***State v. Denham***, 197 Wn.2d 759 (2021)

Defendant is charged with burglary of a jewelry store where alarms had been bypassed, at trial state offers statements defendant had made to police 8 years earlier discussing sophisticated methods of breaking into safes, how he bypassed alarms; held: trial court properly declined to admit the recordings for identity or *modus operandi*, but it was properly admitted to show that defendant had the skills to pull of a sophisticated burglary, evidence is relevant if it makes a fact of consequence more likely which is not limited to specific elements of the crime, distinguishing *State v. Vy Thang*, 145 Wn.2d 630, 639-49 (2002), *see: State v. Powell*, 126 Wn.2d 244 (1995); 5-4.

***State v. Sullivan***, 18 Wn.App.2d 225 (2021)

In robbery with a firearm trial court admits evidence that defendant was involved in a shooting 25 minutes after the robbery; held: evidence of the shooting tended to prove that defendant possessed a firearm during the robbery, evidence did not rise to the level of unfair prejudice, ER 403, *State v. Powell*, 126 Wn.2d 244 (1995), *State v. Bockman*, 37 Wn.App. 474 (1984); I.

***State v. Jennings***, 199 Wn.2d 53 (2022)

In murder/self-defense case defendant testifies he recognized that victim was high, court precludes defense toxicologist from testifying that victim had methamphetamine in his system; held: evidentiary ruling is reviewed for abuse of discretion but appellate court must consider *de novo* whether defendant was deprived of his 6th Amendment right to present a defense, *State v. Arndt*, 194 Wn.2d 784, 797-98 (2019); here, defendant's detailed testimony about his observations of victim being high was sufficient for defense to argue self-defense, thus exclusion of toxicology evidence did not violate right to present a defense, *State v. Ritchie*, ___ Wn.App.2d ___, 520 P.3d 1105 (2022), distinguishing *State v. Lewis*, 141 Wn.App. 367 (2007). *cf.: State v. Duarte Vela*, 200 Wn.App. 306, 326 (2017), *State v. Jones*, 168 Wn.2d 713, 721 (2010), *State v. Arndt*, 194 Wn.2d 784, 797-98 (2019);
affirms *State v. Jennings*, 14 Wn.App.2d 779 (2020); 7-2.

***State v. Crossguns,*** 199 Wn.2d 282 (2022)

While evidence of collateral misconduct relating to a specific victim, including prior uncharged acts of sexual conduct, remains admissible under ER 404(b), "lustful disposition" is not a separate purpose for admitting evidence; the phrase "lustful disposition" is "incorrect and harmful" even though the evidence that has come in under the doctrine remains admissible; overrules or modifies *State v. Medcalf,* 58 Wn.App. 817 (1990), *State v. Guzman,* 119 Wn.App. 176 (2003), *State v. Ferguson,* 100 Wn.2d 131 (1983), *State v. Dawkins,* 71 Wn.App. 902, 908-10 (1993); 8-1.

# EVIDENCE
## Other Suspects

***State v. Rehak***, 67 Wn.App. 157 (1992)

To argue third-party perpetrator theory, defense must show that the third party (1) had the ability to place himself at the scene of the crime and (2) that the third party took some step to act on that ability, *State v. Downs*, 168 Wash. 664, 667 (1932), *State v. Mak*, 105 Wn.2d 692, 716 (1986), *Leonard v. Territory*, 2 Wash.Terr. 381, 7 P. 872 (1885), *State v. Kwan*, 174 Wash. 528, 532-3 (1933), *State v. Russell*, 125 Wn.2d 24, 75-7 (1994), *State v. Hilton*, 164 Wn.App. 81, 98-103 (2011); here defense established third party could have travelled to the crime scene at the time, but failed to establish that he had any intent to act on that ability, thus properly excluded, *see: Pers. Restraint of Lord*, 123 Wn.2d 296, 315-6 (1994), *State v. Howard*, 127 Wn.App. 862, 866-69 (2005), *State v. Strizheus*, 163 Wn.App. 820 (2011), *State v. Rafay*, 168 Wn.App. 734, 797-804 (2012), *State v. Starbuck*, 189 Wn.App. 740, 750-57 (2015); II.

***State v. Condon***, 72 Wn.App. 638, 645-7 (1993)

Motive alone is insufficient to establish nexus between third party and crime, *State v. Mak*, 105 Wn.2d 692, 717 (1986), *State v. Kwan*, 174 Wash. 528, 532-3 (1933), *State v. Hilton*, 164 Wn.App. 81, 98-103 (2011), to allow cross-examination of the third party to impeach her testimony, *distinguishing Davis v. Alaska*, 39 L.Ed.2d 347 (1974); I.

***State v. Clark***, 78 Wn.App. 471 (1995)

Where state's case is largely circumstantial, then defendant may neutralize such evidence by presenting circumstantial evidence of the same character tending to identify another as the perpetrator, *Leonard v. The Territory of Washington*, 2 Wash. Terr. 381 (1885), *cf.: State v. Mezquia*, 129 Wn.App. 118 (2005), , *State v. Wade*, 186 Wn.App. 749, 763-68 (2015), *distinguishing State v. Rehak*, 67 Wn.App. 157 (1992); II.

***State v. Maupin***, 128 Wn.2d 918 (1996)

In felony murder-kidnap case, trial court excludes defense evidence that victim was seen with a third party the day after she was allegedly kidnapped by defendant, based upon purported lack of connection of the proffered testimony to the crime, *State v. Downs*, 168 Wash. 664 (1932); held: because the proffered evidence was neither evidence of another's motive nor mere speculation about the possibility that someone else committed the crime, trial court erred in excluding it; while the testimony would not necessarily have exculpated defendant, it could have brought into question state's version of the events, *State v. Franklin*, 180 Wn.2d 371 (2014), *see: Holmes v. South Carolina*,164 L.Ed.2d 503 (2006), *distinguishing State v. Clark*, 78 Wn.App. 471 (1995), *State v. Kwan*, 174 Wash. 528, 533 (1933), *State v. DeJesus*, 7 Wn.App.2d 849 (2019), *cf.: State v. Rafay*, 168 Wn.App. 734, 797-804 (2012), *State v. Wade*, 186 Wn.App. 749, 763-68 (2015), *State v. Starbuck*, 189 Wn.App. 740, 750-57 (2015); 9-0.

***State v. Hawkins***, 157 Wn.App. 739, 750-53 (2010)

Defendant, charged with possessing stolen property, presents evidence that he thought the property he had was his own but that he was framed by another who switched the property,

excluded by trial court; held: presenting evidence about others who might have framed defendant is not subject to the "other suspects" foundation, *State v. Downs*, 168 Wash. 664, 667 (1932), evidence of a framing would require showing that the specified person had some connection with the actions that framed the defendant, *see: State v. Hawkins*, 181 Wn.2d 170 (2014); III.

***State v. Strizheus***, 163 Wn.App. 820 (2011)

Defendant is charged with attempted murder of his wife, prior to trial defendant's son calls police intoxicated, tells police that "[i]t's my fault, arrest me, I should be in jail," trial court excludes the statement as other suspect evidence and holds that defense may not call the son for the sole purpose of impeaching him; held: absence of a nexus between son and the crime supports trial court's exercise of discretion to exclude the son's statement as other suspect evidence, *State v. Rehak*, 67 Wn.App. 157 (1992), *Holmes v. South Carolina*, 547 U.S. 319, 164 L.Ed.2d 503 (2006), *State v. Rafay*, 168 Wn.App. 734, 797-804 (2012), *State v. DeJesus*, 7 Wn.App.2d 849 (2019), distinguishing *State v. Maupin*, 128 Wn.2d 918 (1996); I.

***State v. Donald***, 178 Wn.App. 250 (2013)

Defense, seeking to blame other suspect who is not called as a witness, offers other suspect's criminal history and testimony that other suspect was mentally ill and experienced "command hallucinations" that ordered him to hurt other people or, alternatively, was malingering; held: a criminal defendant does not have the right to present third party propensity evidence, by way of a criminal record, to infer how the third party acted; precluding propensity evidence does not unreasonably restrict constitutional right to present a defense, *see: : State v. Horn*, 3 Wn.App.2d 302 (2018); trial court did no abuse discretion in excluding mental illness evidence, as it was confusing, might lead to a "minicompetency trial" that would produce unreasonable delay, and defense did not show it was more than minimally relevant; I.

***State v. Franklin***, 180 Wn.2d 371 (2014)

In cyberstalking case, defense offers evidence that his roommate committed the crime as the harassing emails were sent from roommate's computer, roommate had previously sent other threatening messages via email, texts and phone messages to victim expressing displeasure about victim's relationship with defendant, and had accessed defendant's email in the past, trial court excludes other suspect evidence based upon a "bar higher" than relevance and based upon its conclusion that the other proof of the defendant's guilt was great; held: court may not consider the strength or weakness of state's case in deciding whether to exclude defense-proffered other suspect evidence, *Holmes v. South Carolina*, 547 U.S. 319, 164 L.Ed.2d 503 (2006), distinguishing *State v. Downs*, 168 Wash. 664 (1932); other suspect evidence is admissible if "a train of facts or circumstances" clearly point out someone besides defendant is the guilty party, *State v. Kwan*, 174 Wash. 528, 533 (1933), circumstantial evidence that tends to connect someone other than the defendant supports admissibility, *cf.: State v. Wade*, 186 Wn.App. 749, 763-68 (2015), *State v. Starbuck*, 189 Wn.App. 740, 750-57 (2015), *State v. DeJesus*, 7 Wn.App.2d 849 (2019); proper inquiry focuses upon whether the evidence offered tends to create a reasonable doubt as to the defendant's guilt, not whether it establishes the guilt of the third party beyond a reasonable doubt, *see: State v. Giles*, 196 Wn.App. 745 (2016); 5-1.

***State v. Wade***, 186 Wn.App. 749, 763-68 (2015)

In murder case, absent physical evidence connecting another person to the murder and no evidence that the other person was anywhere near the scene of the crime, only evidence being that he had had a bad relationship with the victim, trial court properly exercised discretion in excluding other suspect evidence, *State v. Starbuck*, 189 Wn.App. 740, 750-57 (2015), *State v. DeJesus*, 7 Wn.App.2d 849 (2019), *distinguishing State v. Franklin*, 180 Wn.2d 371 (2014), *State v. Clark*, 78 Wn.App. 471 (1995), *Holmes v. South Carolina*, 547 U.S. 319, 164 L.Ed.2d 503 (2006); I.

***State v. Giles***, 196 Wn.App. 745 (2016)

Evidence as to ties between murder victim and co-owner of nightclub where murder victim worked did not tie co-owner to her killing and thus was inadmissible other suspect evidence; evidence connecting deputy sheriff to murder did not have a tendency to establish that he committed the murder and thus was inadmissible other suspect evidence; evidence connecting nightclub patron to murder victim merely showed that he was a patron and thus was inadmissible other suspect evidence; circumstantial evidence of another's motive, ability or opportunity may be admissible if there is an adequate nexus, *State v. Franklin*, 180 Wn.2d 371 (2014); there need not be evidence that other suspect actually committed the crime; I.

***State v. Ortuno-Perez***, 196 Wn.App. 771 (2016)

In murder case defense offers to prove that another specific person was at the scene with a gun, that that person claimed it was the only gun he owned but other evidence shows he owned more guns, that the other suspect had a motive, trial court appears to rule that the law prohibits a defendant from pointing the finger at another suspect, limits cross examination of witnesses about other suspect and precludes any closing argument blaming another suspect; held: defense was denied the right to present a complete defense; I.

***State v. DeJesus***, 7 Wn.App.2d 849 (2019)

Court excludes other suspect evidence, defense on appeal maintains that the state standard for other suspect evidence is unconstitutional, *Holmes v. South Carolina*, 547 U.S. 319, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006); held: trial court did not compare relative strength of evidence against defendant vs. evidence that another person committed the offense, thus court properly exercised discretion, *State v. Rafay*, 168 Wn.App. 734, 802-03 (2012), *State v. Franklin*, 180 Wn.2d 371, 382 (2014); I.

# EVIDENCE
## Physical

***State v. Johnson***, 40 Wn.App. 371 (1985)

Physical evidence is admissible against the accused as long as it has some bearing upon the facts at issue, *State v. Smith*, 74 Wn.2d 744, 709 (1968); the fact that witnesses do not positively identify evidence does not diminish its admissibility; *see:* *State v. Lord*, 117 Wn.2d 829, 872 (1991); III.

***State v. Stock***, 44 Wn.App. 467 (1986)

Defense moves to suppress handwriting exemplar provided by defendant after her attorney had requested that he be present during questioning, and after defendant had informed police she wanted her attorney present; held: while police action is to be "deplored," Sixth Amendment right to counsel is not the basis for suppression of nontestimonial evidence; I.

***State v. Mitchell***, 56 Wn.App. 610 (1990)

In felony flight case, RCW 46.61.024, defendant maintained he did not hear siren; trial court permitted state to demonstrate siren; held: siren activation was real or illustrative evidence, not an experiment or demonstration, *i.e.*, it is genuinely what it purports to be and its condition is unchanged; illustrative evidence is admissible upon a showing that it is relevant, and that it is substantially like, and similar in function and operation to, the thing in issue; police testimony that siren played to jury sounded the same as the one used established a foundation; I.

***State v. Powell***, 62 Wn.App. 914 (1991)

In child molestation case, victim is shown drawing of nude female, asked to name body parts, drawing is admitted; held: to be admissible for illustrative purposes, evidence must be substantially similar to "real thing," *State v. Barr*, 9 Wn.App. 891, 895 (1973), *King Cy. v. Farr*, 7 Wn.App. 600, 613 (1972); here, drawing was not offered as representation of any object involved in incidents, but as tool to demonstrate witness's vocabulary, inadmissible to prove any fact, thus error, although harmless by itself *[dictum];* I.

***State v. Lord***, 117 Wn.2d 829 (1991)

Summary chart used for illustrative or demonstrative purposes must be a substantially accurate summary of evidence properly admitted, *State v. Yates*, 161 Wn.2d 714, 772-74 (2007); instruction to jury that chart is not itself evidence but is only an aid in evaluating evidence should be given; summary chart should not go to jury room, but if it does reversal is required only if defendant is prejudiced; 6-3.

***State v. Rogers***, 70 Wn.App. 626 (1993)

Trial court admits video in vehicular homicide case in which tape made from inside vehicle driven at various speeds over path defendant's vehicle took, applying brakes as soon as driver saw a car parked in the approximate position of victim's truck, video taken in good weather in daylight while offense occurred in dark in mist, trial court instructs jury, "this videotape is...demonstrative evidence. It does not purport to be a recreation of the circumstances

or conditions that existed at the time of the event..."; held: differing conditions were not significant as tape was not admitted to show what defendant actually observed but rather to demonstrate what one would see at various speeds, instruction mitigated any unfair prejudice; II.

***State v. Savaria***, 82 Wn.App. 832, 842-3 (1996), *overruled, in part, on other grounds, State v. C.G.*, 150 Wn.2d 604, 611 (2003)

Witness uses transcripts of answering machine calls during testimony, defense offer of transcripts into evidence is denied; held: ER 612 gives an unqualified right to introduce writings used to refresh memory while testifying, assuming admission does not violate another rule of evidence, and assuming it is offered to impeach; I.

***State v. Picard***, 90 Wn.App. 890, 897-8 (1998)

Following fire, portable heater is placed by fire officials in storage locker to which many have access, at trial investigator testifies heater is in substantially same condition as when it was picked up; held: unbroken **chain of custody** is not required to admit evidence where it is satisfactorily identified and shown to be in substantially the same condition as when it was acquired, *State v. Campbell*, 103 Wn.2d 1, 21 (1984), *State v. DeCuir*, 19 Wn.App. 130, 135 (1978); II.

***State v. Burkins***, 94 Wn.App. 677, 693-94 (1999)

In murder case, court admits a rope found at the scene which state claims defendant planned to use to bind victim's hands, no decomposed tissue found on knot; held: to be relevant, evidence need only have a tendency to make the existence of a fact more probable, thus no abuse of discretion, *State v. Quigg*, 72 Wn.App. 828, 838 (1994); I.

***State v. Roche***, 114 Wn.App. 424, 436-38 (2002)

After drug trial, defense discovers that chemist at crime lab had been using heroin stolen from test samples and lied to police about it, new trial denied; held: chemist's credibility was "totally devastated" by his malfeasance such that a rational trier of fact could reasonably doubt his testing and preservation of chain of custody, *cf.: Pers. Restraint of Brennan*, 117 Wn.App. 797 (2003), *Pers. Restraint of Delmarter*, 124 Wn.App. 154 (2004), *Pers. Restraint of Woods*, 154 Wn.2d 400, 431-32 (2005); where evidence is not readily identifiable and is susceptible to alteration by tampering or contamination, proponent must establish chain of custody with sufficient completeness to render it improbable that the original has been contaminated or tampered with; factors include nature of item, circumstances surrounding preservation and custody, likelihood of tampering or alteration, *State v. Campbell*, 103 Wn.2d 1, 21 (1984); proponent need not identify evidence with absolute certainty and eliminate every possibility of alteration or substitution, minor discrepancies or uncertainty affect weight, not admissibility; I.

***State v. Hunter***, 152 Wn.App. 30, 40-42 (2009)

In homicide case, crime lab employee presents a "trigger pull measuring device" to demonstrate the feel of pulling the trigger on the recovered firearm, testifies to substantial differences between device and the firearm, trial court allows jurors to use the device; held: trial court abused its discretion in determining that the evidence was sufficiently similar to the facts

sought to be proved, *Jenkins v. Snohomish County Pub. Util. Dist. No. 1*, 105 Wn.2d 99, 107 (1986); II.

# EVIDENCE
## Preservation/*Brady*

***State v. Gerber***, 28 Wn.App. 214 (1981)

Police obtained then lost address of a witness; held: testimony of missing witness was "wholly corroborative at best and was not constitutionally material," thus no denial of due process; mere possibility that an item of undisclosed evidence might help defense does not establish "materiality" in the constitutional sense; I.

***State v. Nerison***, 28 Wn.App. 659 (1981)

In negligent homicide prosecution, state's expert lost a taillight filament after forming an opinion that light had been on at time of collision; trial court refused to dismiss or suppress expert's testimony; affirmed by Division II, as defense failed to establish that missing evidence (1) would have been favorable to him, and (2) would have created a reasonable doubt that did not otherwise exist, per *State v. Canaday*, 90 Wn.2d 808 (1978), *State v. Gilcrist*, 91 Wn.2d 603 (1979); II.

***State v. Renfro***, 28 Wn.App. 248 (1981), *aff'd, on other grounds,* 96 Wn.2d 902 (1982)

Murder of prostitute, state failed to test semen found in deceased's vagina; defense failed to move for tests; held state has no affirmative duty to test; "reasonable possibility" standard of *State v. Wright*, 87 Wn.2d 783 (1976), *overruled*, *State v. Ortiz*, 119 Wn.2d 294, 303-04 (1992), *disapproved, on other grounds*, , *State v. Condon,* 182 Wn.2d 307, 321-26 (2015), not satisfied here; II.

***State v. Boyd***, 29 Wn.App. 584 (1981)

Felony flight, defense requests 911 tapes by letter to prosecutor; tapes routinely destroyed by police after letter received by state; issue at trial was license plate number, about which there was conflicting testimony; Division I reversed and dismissed as tapes were "potentially material and favorable;" I.

***State v. Mounsey***, 31 Wn.App. 511 (1982)

Crime lab tests rape victim's secretion samples, consuming samples without result, as insufficient amount taken; defendant claimed that lab should have tested samples to see if they matched a contraceptive spermicidal cream which defendant claims victim used prior to consensual sex; held: no error, as police need not search for exculpatory evidence or conduct tests for defense; III.

***State v. Huxoll***, 38 Wn.App. 360 (1984)

Hospital obtains and tests vaginal fluid sample from rape victim; defense moved for production for further testing; hospital reported it used entire sample or lost it; held: destruction of evidence by a third party does not require dismissal where state did not know of or authorize the destruction and no reasonable possibility exists that the missing evidence will be exculpatory, *distinguishing* *State v. Vaster*, 99 Wn.2d 44 (1983), *overruled*, *State v. Ortiz*, 119 Wn.2d 294, 303-04 (1992), *disapproved, on other grounds, State v. Condon,* 182 Wn.2d 307, 321-26 (2015);

here, court determines that evidence of guilt was overwhelming, and thus destroyed evidence could not have helped; *accord*: *State v. Acheson*, 48 Wn.App. 630 (1987) ; III.

***State v. Judge***, 100 Wn.2d 706 (1984)

In negligent homicide case, defendant seeks dismissal alleging that police failed to measure and record skid marks; held: police have a duty to preserve exculpatory evidence, but need not seek it out, *State v. Jones*, 26 Wn.App. 551, 534 (1980); where the claim is one of good faith or negligent destruction of evidence, defendant has burden of showing that there is a reasonable possibility that the missing evidence would have affected her ability to present a defense, *State v. Vaster*, 99 Wn.2d 44 (1983), *overruled*, *State v. Orting*, 119 Wn.2d 294, 303-04 (1992), *State v. Romero*, 113 Wn.App. 779, 795-97 (2002), *but see: State v. Wittenbarger*, 124 Wn.2d 467 (1994), *see: State v. Johnston*, 143 Wn.App. 1, 11-13 (2007); 9-0.

***State v. Koloske***, 100 Wn.2d 889 (1984)

Defendant claims prosecutor failed to disclose a police report, indicating the arrest of another suspect; held: due process does not require the state to disclose every detail of all police investigatory work on a case; 9-0.

***State v. Laureano***, 101 Wn.2d 745 (1984)

Police destroy tape recording of a witness statement; held: destroyed tape recording was not material evidence in the constitutional sense, *Statev.Canaday*, 90 Wn.2d 808 (1978), *State v. Gilcrist*, 91 Wn.2d 603, 609 (1979); 9-0.

***California v. Trombetta***, 81 L.Ed.2d 413 (1984)

Police need not preserve breath samples of suspected drunk drivers in order for the results of breath-analysis tests to be admissible; 9-0.

***United States v. Bagley***, 87 L.Ed.2d 481 (1985)

Prosecutor fails to provide exculpatory impeachment evidence to defense; held: there is no distinction between impeachment evidence and substantive evidence where government fails to disclose it; test for appellate court is whether there is a reasonable probability that had evidence been disclosed, result of trial would have been different; case is not subject to automatic reversal for violation of confrontation clause; 5-3.

***State v. Robinson***, 44 Wn.App. 611 (1986)

In indecent liberties case, police fail to properly store a blanket containing semen stains such that blood typing tests could be performed; held: defense never moved to produce the sample for defense testing, thus defense failed to meet its burden of establishing a reasonable possibility that the lost evidence affected defendant's ability to present a defense, *State v. Huxoll*, 38 Wn.App. 360, 366 (1984), *State v. Vaster*, 99 Wn.2d 44, 52 (1983), *overruled*, *State v. Orting*, 119 Wn.2d 294, 303-04 (1992); III.

***Seattle v. Duncan***, 44 Wn.App. 735 (1986)

Police lose 911 tape which, defendant claims, would have corroborated his testimony; trial judge ruled that, even if the tape did so corroborate, she would have found defendant guilty;

held: the mere fact that the evidence was material and potentially favorable to the defense is not enough, as court must determine whether there was reasonable possibility that the destroyed evidence would be exculpatory; here, trial court ruled that it would not, thus appellate court need not speculate as to whether the tape had a reasonable possibility of exculpating defendant; I.

***State v. Coe***, 109 Wn.2d 832 (1988)

In rape case, state inadvertently or negligently destroyed semen samples; held: defense failed to establish that there was a reasonable possibility that the particular evidence destroyed was material and favorable, nor that it could be tested several years later, nor that the tests were improperly performed; *see*: *State v. Wall*, 52 Wn.App. 665, 676 *et. seq*. (1980); 9-0.

***State v. Howard***, 52 Wn.App. 12 (1988)

Police have no duty to preserve potentially exculpatory evidence when initial investigation establishes no crime occurred, even if later investigation results in charges; III.

***Arizona v. Youngblood***, 102 L.Ed.2d 281 (1988)

Following sexual assault, police fail to preserve trace evidence, resulting in an inability to test victim's clothing to compare it to defendant which may have exonerated defendant; held: absent a showing of bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process, *State v. Lord*, 117 Wn.2d 829 (1991), *State v. Ortiz*, 119 Wn.2d 294 (1992), *disapproved, on other grounds, State v. Condon*, 182 Wn.2d 307, 321-26 (2015)*State v. Wittenbarger*, 124 Wn.2d 467 (1994), *Illinois v. Fisher*, 157 L.Ed.2d 1060 (2004), *State v. Johnston*, 143 Wn.App. 1, 11-13 (2007), *State v. Armstrong*, 188 Wn.2d 333 393 (2017), *State v. Koeller*, 15 Wn.App.2d 245 (2020), *State v. Yusuf*, 21 Wn.App.2d 960 (2022); 6-3.

***Bellevue v. Ohlson***, 60 Wn.App. 485 (1991)

Destruction of simulator solution following DUI arrest does not violate due process, *Arizona v. Youngblood*, 102 L.Ed.2d 281 (1988), *California v. Trombetta*, 81 L.Ed.2d 413 (1984), *State v. Canaday*, 90 Wn.2d 808 (1978), nor does it violate statute mandating that "full information" about breath test be provided to counsel, RCW 46.61.506(6); I.

***State v. Straka***, 116 Wn.2d 859 (1991)

Breath test machines display error codes on screen, but police do not record information and computer does not preserve it, trial court suppresses for destruction of evidence; held: to meet standard of constitutional materiality, evidence must possess exculpatory value that was apparent before it was destroyed and be of a nature that defendant would be unable to obtain comparable evidence by other reasonably available means, *California v. Trombetta*, 81 L.Ed.2d 413 (1984), *State v. Martinez*, 78 Wn.App. 870, 875-8 (1995); unless defense can show bad faith, failure to preserve potentially useful evidence does not constitute a denial of due process, *Arizona v. Youngblood*, 102 L.Ed.2d 281 (1988), *State v. Johnston*, 143 Wn.App. 1, 11-13 (2007), *State v. Groth*, 163 Wn.App. 548 (2011), *State v. Armstrong*, 188 Wn.2d 333 (2017); because invalid sample messages are not directly related to guilt or innocence, then bad faith standard of *Youngblood* applies, not shown here; *State v. Wright*, 87 Wn.2d 783 (1976) and *State v. Vaster*, 99 Wn.2d 44 (1983) are supplanted insofar as they are inconsistent with United

States constitutional analysis; *see:* *State v. Ortiz*, 119 Wn.2d 294 (1992), *disapproved, on other grounds*, *State v. Condon*, 182 Wn.2d 307, 321-26 (2015), *State v. Hanna*, 123 Wn.2d 704 (1994), *State v. Kenyon*, 123 Wn.2d 720 (1994); *accord:* *State v. Wittenbarger*, 124 Wn.2d 467 (1994); 9-0.

***State v. Ortiz,*** 119 Wn.2d 294 (1992), *disapproved, on other grounds, State v. Condon,* 182 Wn.2d 307, 321-26 (2015)

Negligent destruction of semen samples, absent defense showing of bad faith by police, does not violate federal or state due process clauses, *State v. Armstrong*, 188 Wn.2d 333 (2017); *Arizona v. Youngblood*, 102 L.Ed.2d 281 (1988) provides proper standard for preservation of exculpatory evidence under CONST. art. 1, § 3, which is coextensive with federal requirements; *accord:* *State v. Wittenbarger*, 124 Wn.2d 467 (1994), *State v. Johnston*, 143 Wn.App. 1, 11-13 (2007); *see:* *State v. Hanna*, 123 Wn.2d 704 (1994), *State v. Kenyon*, 123 Wn.2d 720 (1994), *State v. Copeland*, 130 Wn.2d 244, 279-81 (1996), *Illinois v. Fisher*, 157 L.Ed.2d 1060 (2004), *State v. Yusuf*, 21 Wn.App.2d 960 (2022); 5-4.

***State v. Furman***, 122 Wn.2d 440 (1993)

Police inadvertently lose drug pipe which defendant maintains could support his diminished capacity claim; held: pipe held no apparent exculpatory value when it was lost, thus due process clause of Fourth Amendment is not violated, *California v. Trombetta*, 81 L.Ed.2d 413 (1984); although pipe was potentially useful to defendant, absent bad faith, there is no United States Constitutional due process violation, *State v. Wittenbarger*, 124 Wn.2d 467 (1994), *State v. Johnston*, 143 Wn.App. 1, 11-13 (2007), *State v. Armstrong*, 188 Wn.2d 333 (2017), *State v. Yusuf*, 21 Wn.App.2d 960 (2022); 8-0.

***State v. Hanna***, 123 Wn.2d 704, 713-15 (1994)

Failure of state patrol, in vehicular homicide case, to photograph or measure skid marks was neither done in bad faith nor did defense meet burden of establishing a reasonable possibility that the missing evidence affected ability to present a defense, *State v. Johnston*, 143 Wn.App. 1, 11-13 (2007), *State v. Armstrong*, 188 Wn.2d 333 (2017), *see:* *State v. Wittenbarger*, 124 Wn.2d 467 (1994); 6-3.

***State v. Wittenbarger***, 124 Wn.2d 467 (1994)

Lost maintenance and repair records of breath testing instruments are only potentially useful to the defense and was not material exculpatory evidence, *Arizona v. Youngblood*, 102 L.Ed.2d 281 (1988), as they are not directly related to the accuracy of a particular breath test, at 476, *State v. Straka*, 116 Wn.2d 859, 879 (1991); failure of state to keep previously maintained repair records does not establish bad faith, where logical and valid reasons for changes in record-keeping policies are established, at 477-79, *Illinois v. Fisher*, 157 L.Ed.2d 1060 (2004); State Toxicologist's meeting with prosecutors in drafting new protocols does not establish bad faith, as defense had opportunities to voice concerns regarding proposed protocol changes; due process clause as to preservation of evidence is coextensive under state and federal constitutions, at 479-81, re-overruling *State v. Vaster*, 99 Wn.2d 44 (1983) and *State v. Wright*, 87 Wn.2d 783 (1976); 6-3.

***Kyles v. Whitley***, 131 L.Ed.2d 490 (1995)

Analysis of state's failure to disclose exculpatory evidence turns on the cumulative effect of the evidence, not on item-by-item approach; test is whether, if evidence had been disclosed, there is a reasonable probability that the result would have been different, less than a preponderance, *United States v. Bagley*, 87 L.Ed.2d 481 (1985); prosecutor is responsible to gauge the likely net effect of all the evidence and make disclosure when the point of "reasonable probability" is reached; 5-4.

***State v. Martinez***, 78 Wn.App. 870, 875-8 (1995)

Physical evidence that was never in possession or control of police or prosecutor is outside scope of discovery rules, CrR 4.7(a)(4), *see: State v. Wasson*, 54 Wn.App. 156, 161 (1989); where evidence did not have an apparent exculpatory value before it was destroyed, it is not material, *State v. Straka*, 116 Wn.2d 859, 883-4 (1991), state does not have duty to seek out exculpatory evidence, *State v. Woolbright*, 57 Wn.App. 697, 701 (1990); II.

***State v. D.***, 89 Wn.App. 77, 92-4 (1997), *op. withdrawn, in part*, *State v. Carol M.D.*, 97 Wn.App. 355 (1999)

Police destruction of interview notes, even if in bad faith, do not mandate dismissal here, as trial court found notes were not potentially useful, *State v. Wittenbarger*, 124 Wn.2d 467, 475-7 (1994); II.

***State v. Potts***, 93 Wn.App. 82, 89 (1998)

Police seize used syringes and powder, destroy syringes which are not tested due to biohazards, defense seeks dismissal for failure to preserve; held: because the used syringes could have been inculpatory or exculpatory, they were only potentially useful to defense and, absent bad faith, destruction did not violate due process, *State v. Wittenbarger*, 124 Wn.2d 467, 474-75 (1994), *Illinois v. Fisher*, 157 L.Ed.2d 1060 (2004), *State v. Johnston*, 143 Wn.App. 1, 11-13 (2007), *State v. Groth*, 163 Wn.App. 548 (2011), *State v. Armstrong*, 188 Wn.2d 333 (2017); III.

***State v. Burden***, 104 Wn.App. 507 (2001)

In drug case, defendant testifies coat he was wearing in which drugs were found was not his, didn't fit, had a different name on it, following hung jury clerk loses coat, trial court dismisses; held: coat was key piece of evidence, fit of coat, name in it raised issues of ownership, exculpatory value was apparent before evidence was lost, defense is unable to obtain comparable evidence by other reasonably available means, evidence was more than merely "potentially useful" to the defense, thus dismissal is proper remedy; II.

***State v. Donahue***, 105 Wn.App. 67, 77-78 (2001)

In vehicular homicide case, failure of police to preserve blood sample after testing by out-of-state hospital, where the result was more than twice the *per se* limit, did not deny due process as the exculpatory value of the evidence was not apparent, *State v. Wittenbarger*, 124 Wn.2d 467 (1994); II.

***State v. Kinard***, 109 Wn.App. 428 (2001)

Informant testifies that defendant gave her paper with name and phone number, police lose paper, trial court admits testimony about contents; held: absent evidence of bad faith, witness may testify about contents of lost paper, ER 1004, *State v. Detrick*, 55 Wn.App. 501, 502-04 (1989), *State v. Armstrong*, 188 Wn.2d 333 (2017); III.

***Illinois v. Fisher***, 157 L.Ed.2d 1060 (2004)

Defendant is charged with drug offense, demands discovery of physical evidence, absconds, ten years later police, following procedures, destroy substance, later defendant is arrested, seeks dismissal; held: because substance was only potentially, not actually, useful to defense and because police did not act in bad faith, destruction of evidence does not constitute denial of due process, *Arizona v. Youngblood*, 102 L.Ed.2d 281 (1988); 9-0.

***State v. Thomas***, 160 Wn.2d 821, 850-53 (2004)

Prosecutor outlines, in opening, a witness' testimony, then does not call the witness, defense seeks mistrial for failure to disclose material evidence that state knew the witness would not testify; held: while perhaps defense may have changed tactics had it known the witness would not testify, the failure of the state to call the witness would not have changed the jurors' minds as to defendant's guilt, thus *Brady v. Maryland*, 10 L.Ed.2d 215 (1963) is inapplicable; 9-0.

***Cone v. Bell***, 173 L.Ed.2d 701 (2009)

State's withholding of evidence that might have mitigated capital sentencing violates due process clause; 6-3.

***State v. Valdez***, 158 Wn.App. 626 (2010)

Defendant is charged with shoplift of a laptop computer, police return computer to store, defendant testifies he bought the computer elsewhere, it didn't work, he was in the store to buy parts, seeks dismissal for destruction of evidence as claim that the computer did not work would corroborate his version; held: an item is not exculpatory merely because it may have made defendant's version of events more likely, *State v. Copeland*, 130 Wn.2d 244, 279-80 (1996); III.

***State v. Mullen***, 171 Wn.2d 881 (2011)

State expert witness in criminal case testifies at a deposition in a related civil case in which state is not a party, defense is aware of civil case, does not subpoena records, claims testimony was inconsistent; held: state is obliged to disclose material, exculpatory evidence in its possession, *Brady v. Maryland*, 373 U.S. 83, 10 L.Ed.2d 215 (1963), and in the possession of law enforcement, *Kyles v. Whitley*, 514 U.S. 419, 437, 131 L.Ed.2d 490 (1995), and in the possession of others working on the state's behalf, *State v. Lord*, 161 Wn.2d 276, 292 (2007), but is not obliged to volunteer information it does not possess or of which it is unaware; where defense has enough information to find the material on its own, there is no suppression by the government, *State v. Lord*, *supra. at* 293; evidence is material only if there is a reasonable probability the result would have been different, *United States v. Bagley*, 473 U.S. 667, 682, 87 L.Ed.2d 481 (1985), *Turner v. United States*, 137 S. Ct. 1885, 198 L. Ed. 2d 443 (2017), *see: Pers. Restraint of Stenson*, 174 Wn.2d 474 (2012), *Matter of Mulamba*, 199 Wn.2d 488 (2022),

which is an intermediate test which does not require defense to demonstrate that the evidence would have resulted in acquittal; 9-0.

***State v. Groth***, 163 Wn.App. 548 (2011)

Twelve years after homicide, police destroy most physical evidence except for weapon and photographs, ten years later defendant is convicted; held: destroyed evidence here was only potentially useful, thus defense must establish bad faith to prevail, *State v. Straka*, 116 Wn.2d 859 (1991), *Arizona v. Youngblood*, 102 L.Ed.2d 281 (1988); while destroying evidence of a crime pursuant to a police agency's own protocols establishes an absence of bad faith, *State v. Wittenbarger*, 124 Wn.2d 467, 477-79 (1994), destruction of evidence that is contrary to policy does not, *ipso facto*, establish bad faith, *see: State v. Armstrong*, 188 Wn.2d 333 (2017), *see: State v. Koeller*, 15 Wn.App.2d 245 (2020); I.

***Smith v. Cain***, 565 U.S. 73, 181 L.Ed.2d 571 (2012)

Single eyewitness testifies defendant committed crime, after conviction defense discovers police notes that eyewitness had said he could not identify anyone and would not know them if he saw them; held: while impeachment evidence may not be material if state's other evidence is strong enough to sustain confidence in verdict, *United States v. Agurs*, 427 U.S. 97, 112-113 and n. 21, 49 L.Ed.2d 342 (1976), here eyweitness' testimony was the only evidence linking defendant to the crime, thus undisclosed evidence requires *Brady* reversal, *cf.: Turner v. United States*, 137 S. Ct. 1885, 198 L. Ed. 2d 443 (2017); 8-1.

***State v. Davila***, 184 Wn.2d 55 (2015)

DNA evidence is introduced through a state crime lab forensic scientist who retested a swab and matched it to defendant, previously the DNA sample had been handled by a forensic scientist who was fired for incompetence which was not known to state but not disclosed to defense, neither party called the fired scientist to testify; held: defense could have cross-examined the testifying scientist about the reliability of the fired scientist and undermine the professionalism of the laboratory, thus the suppressed information was favorable to the accused; the information was known to the Washington State Patrol who was acting on behalf of the prosecution, state cannot compartmentalize evidence favorable to the defense, thus state had constructive possession of the information and wrongfully suppressed it; evaluating materiality and prejudice from the entire record, *United States v. Agurs*, 427 U.S. 97, 112-13, 49 L.Ed.2d 342 (1976), there was little likelihood that the fired scientist's handling of the evidence could have contaminated it and no evidence that she mishandled it, thus defendant received a fair trial, *but see: Seattle v. Lange*, 18 Wn.App.2d 139 (2021); affirms *State v. Davila*, 183 Wn.App. 154, 166-73 (2014); 9-0.

***Turner v. United States***, 582 U.S. ___, 137 S.Ct. 1885, 198 L.Ed.2d 443 (2017)

In robbery/murder case government's theory is that a group attacked victim, two of the group confess and testify for government, other witnesses testify they observed a group attack, one appellant's confession is admitted, after conviction defense discovers government withheld evidence of the identity of a person running toward the scene after the murder and some impeachment evidence; held: while the withheld evidence was favorable to the defense, it was "too little, too weak, or too distant" from the main evidentiary points, nor is it "reasonably

probable" that it would have led to a differing result at trial, cumulative effect of the withheld evidence is insufficient to undermine confidence in the verdict, *Smith v. Cain*, 565 U.S. 73, 75-76, 132 S.Ct. 627, 181 L.Ed.2d 571 (2012); regardless, better course is for government to disclose "any evidence favorable to the defendant," *United States v. Augurs*, 427 U.S. 98, 108, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976); 6-2.

***State v. Armstrong***, 188 Wn.2d 344-46 (2017)

Police neglect to collect store surveillance video which purports to show defendant committing the offense, store employee testifies to what video showed, *see:* *State v. Kinard*, 109 Wn.App. 428 (2001), (unclear from opinion if testimony was at trial or at pretrial hearing) and that, per store policy, video was destroyed; held: there being no evidence of bad faith by police nor that failure to obtain video violated policy, *see: State v. Groth*, 163 Wn.App. 548 (2011), due process clause was not violated, *State v. Wittenbarger*, 124 Wn.2d 467 (1994), *Arizona v. Youngblood*, 102 L.Ed.2d 281 (1988), *State v. Koeller*, 15 Wn.App.2d 245 (2020), *State v. Yusuf*, 21 Wn.App.2d 960 (2022); 6-3.

***Pers. Restraint of Lui,*** 188 Wn.2d 525, 565-67 (2016)

Defense is unable to obtain detective's personnel file via public records request, state does not disclose the file, some evidence of detective's history that is known is excluded at trial, defense claims on appeal that state has burden of producing file for, at least, *in camera* review; Court apparently holds that because defense did not seek to compel disclosure of the file pursuant to public records act, *Bainbridge Island Police Guild v. City of Puyallup*, 172 Wn.2d 398 (2011), and that there was no evidence presented here that the file would contain material impeachment or exculpatory evidence, then there is no error; 7-2.

***State v. Derri***, 17 Wn.App.2d 376 (2021), *aff'd on different grounds,* 199 Wn.2d 658 (2022)

During trial state discovers that the police had access to a video from outside the building where the offense occurred, defense seeks mistrial, court offers continuance which defense declines, claims it could have done further investigation based upon the video, trial court denies motion to dismiss, CrR 8.3(b), and mistrial for discovery violation; held: trial court's decision was not manifestly unreasonable or based on untenable grounds or reasons; destruction of a different video by a non-state actor pursuant to a video-retention policy did not entitle defense to a missing evidence instruction; I.

***Seattle v. Lange***, 18 Wn.App.2d 139 (2021)

In DUI case police disclose to city that blood test analyst had erred in another case that caused a false positive, city discloses it to defense "days before trial," trial court suppresses blood test results for discovery violation, city seeks writ; held: CrRLJ 47(a)(3) mandates disclosure of any information which tends to negate guilt, impeachment information meets that test, unlike a constitutional *Brady* issue the rules do not require proof of materiality before mandating disclosure as long as the information sought is discoverable under the rules, suppression is a proper remedy within discretion of the trial court, CrRLJ 4.7(g)(7)(i) does not require proof of prejudice; I.

***Matter of Mulamba***, 199 Wn.2d 488 (2022)

After conviction for child abuse defense discovers jail records of state's witness-codefendant regarding suicide attempts, contraband and statement by jail guard that the witness

is “untrustworthy,” and that prosecutor met with the witness in jail, counseling her that she would better off in prison than in the jail; held: the jail records have some potential impeachment value, prosecutor has access to confidential jail records, RCW 70.48.100(2) (2020), where state has designated an incarcerated individual as a witness state has a duty to disclose those records to defense where prosecution has some knowledge, actual or constructive, of records defense should receive; here, because the witness was not the sole basis for the state’s case and she was otherwise impeached there was no reasonable probability that the trial would have turned out differently had the material been disclosed, *cf.: In re Stenson*, 174 Wn.2d 474 (2012); 8-1.

# EVIDENCE
## Reputation and Character

***State v. Deach***, 40 Wn.App. 614 (1985)

Prosecutor's reviewing a defendant's version of an event on cross-examination without bringing out any inconsistencies is not an attack on his truthful character for purposes of ER 608(a)(2), which permits admission of a witness's truthful character after his truthfulness has been attacked by "reputation evidence or otherwise"; I.

***State v. Fondren***, 41 Wn.App. 17 (1985)

In homicide case, evidence of victim's **peaceful** character is only admissible to rebut evidence that the victim was the first aggressor, ER 404(a)(2), *State v. Bius*, 23 Wn.App. 807 (1979); evidence of **specific acts** are admissible for the limited purpose of showing whether the defendant had a reasonable apprehension of danger, ER 404; where defendant did not know who victim was, evidence of specific acts is not admissible, *State v. Walker*, 13 Wn.App. 545, 547-48 (1975); III.

***State v. Robinson***, 44 Wn.App. 611 (1986)

Where there is corroborating physical evidence in an indecent liberties case, then trial court does not abuse its discretion by preventing defense from inquiring into its primary witness's character for **truthfulness**, ER 608(b), *distinguishing* *State v. York*, 28 Wn.App. 33 (1980); where prosecutor does not attack defendant's reputation for truthfulness, then defendant's character trait for truthfulness is not pertinent to the charge of indecent liberties as his honesty makes it no less likely that he committed the crime, *State v. Harper*, 35 Wn.App. 855, 859-60 (1984), *distinguishing* *State v. Petrich*, 101 Wn.2d 566 (1984); III.

***State v. Jackson***, 46 Wn.App. 360 (1986)

Reputation for **moral decency** is not pertinent to whether one has committed indecent liberties or incest, *but see:* *State v. Griswold*, 98 Wn.App. 817, 827-30 (2000), *State v. Cox*, 17 Wn.App.2d 178 (2021); I.

***State v. Alexander***, 52 Wn.App. 897 (1988)

In self-defense case, victim's reputation for **violence** is admissible, ER 405(a), while specific acts of violence are not admissible, ER 405(b), as victim's character trait of violence is not an essential element of claim of self-defense, *State v. Stacy*, 181 Wn.App. 553, 565-66 (2014), *State v. Hutchinson*, 135 Wn.2d 863, 886-87 (1998); thus, while victim's claim of peaceful character could be impeached by cross-examination regarding specific acts of violence, they are collateral to the principal issues being tried, *State v. Oswalt*, 62 Wn.2d 118, 121 (1963), and the examiner is bound by the denial and cannot offer independent evidence to impeach, *State v. Heath*, 58 Wn.App. 320 (1990); I.

***State v. O'Neill***, 58 Wn.App. 367 (1990)

In DUI case, trial court properly suppressed defendant's proposed testimony that he had never been convicted of a crime, as the character trait that defendant was law-abiding was not offered in the form of reputation evidence, ER 405(a); 2-1, I.

***State v. Heath***, 58 Wn.App. 320 (1990)

In kidnapping case, defense witness testifies that defendant wouldn't hurt anyone; on cross, state asks if witness is aware of a prior kidnapping by defendant, witness denies believing it; witness is asked if she is aware of a prior assault on children, witness says she heard a different version; because character witness denied knowing about or believing the **specific instances of misconduct**, ER 405(a), the impeachment was "ineffective," thus state lacked a good faith basis for inquiry into the specific instances of conduct which should have been excluded by trial court; I.

***State v. Bell***, 60 Wn.App. 561 (1991)

In murder case, defense offers reputation evidence that victim was **homosexual** to support claim that defendant killed victim after victim grabbed defendant's crotch and tried to kiss him; held: while evidence of victim's reputation as a homosexual may tend to prove that he grabbed defendant's crotch, it is not "of consequence to the determination of the action," ER 401, because self-defense is only available to a defendant who is responding to a perceived threat of great bodily harm or to the victim's commission of a violent felony, *State v. Griffith*, 91 Wn.2d 572, 576 (1979), which is not present here; evidence of specific instances of homosexual behavior clearly inadmissible, ER 404(b), 405(a), *see: State v. Munguia*, 107 Wn.App. 328, 335-36 (2001); II.

***State v. Lord***, 117 Wn.2d 829 (1991)

Cellmates testify to incriminating statements made by defendant in jail, defense offer of reputation evidence as to **veracity** by cellmate's probation officer refused; held: the criminal justice system is not the "community in which [witness] resides," ER 608(a), as system is neither neutral enough nor generalized enough to be classed as a **community** and a probation officer is not equipped to provide an unbiased and reliable evaluation of an inmate's general reputation for truth telling, *see: State v. Callahan*, 87 Wn.App. 925, 934-5 (1997), *State v. Binh Thach*, 126 Wn.App. 297, 315 (2005), *State v. Gregory*, 158 Wn.2d 759, 804-05 (2006), *overruled, on other grounds, State v. W.R.*, 181 Wn.2d 757 (2014), *but see: State v. Land*, 121 Wn.2d 494 (1993).

***State v. Janes***, 64 Wn.App. 134 (1992), *rev'd on other grounds*, 121 Wn.2d 220 (1993)

In murder/self-defense case, defendant's reputation for **peacefulness** to support diminished capacity was properly excluded, since the only issue was defendant's mental state, and reputation is not probative of mental state; *but see: State v. Eakins*, 73 Wn.App. 271, 279 n. 9 (1994); I.

***State v. Land***, 121 Wn.2d 494 (1993)

Reputation evidence, ER 608, may include reputation in any substantial, neutral, general **community** of people among whom witness is well known, including business community, *State v. Callahan*, 87 Wn.App. 925, 935-6 (1997), *State v. D.*, 89 Wn.App. 77, 94-5 (1997), *op. withdrawn, in part*, 97 Wn.App. 355 (1999), overruling *State v. Swenson*, 62 Wn.2d 259 (1963);

Supreme Court adopts federal approach to ER 608; relevant factors include frequency of contact between members of community, amount of time a person is known in the community, role a person plays in the community and number of people in the community, *see:* *State v. Gregory*, 158 Wn.2d 759, 804-05 (2006), *overruled, on other grounds, State v. W.R.*, 181 Wn.2d 757 (2014); 5-3.

***State v. Eakins***, 127 Wn.2d 490 (1995)

In assault case, defendant admits the act charged but submits expert testimony in support of diminished capacity defense, trial court excludes character evidence of defendant's reputation as a **peaceful law-abiding citizen**; held: where specific intent is an element of the crime and defendant produces expert testimony demonstrating that defendant suffered from a mental condition that impaired his ability to form that intent, defendant's evidence of a pertinent character trait is admissible, ER 404(a)(1), to show circumstantially that the expert was correct, *see:* *State v. Arine*, 182 Wash. 697 (1935), *State v. Kelly*, 102 Wn.2d 188, 193 (1984), *State v. Allen*, 89 Wn.2d 651, 657 (1978), *Kennewick v. Day*, 142 Wn.2d 1 (2000), *distinguishing* *State v. Lewis*, 37 Wn.2d 540, 544 (1950), effectively overruling *State v. Janes*, 64 Wn.App. 134, 144-5 (1992), *rev'd on other grounds,* 121 Wn.2d 220 (1993); *affirms* *State v. Eakins*, 73 Wn.App. 271 (1994); 4-1-4.

***State v. Callahan***, 87 Wn.App. 925 (1997)

In self-defense case, defendant denies knowing victim before the shooting, offers police testimony as to victim's reputation acquired from past encounters with criminal justice system and testimony of a person who knew victim two years before, both excluded; defendant offers evidence of his own reputation for peacefulness in his workplace; held: reputation evidence must be based upon witness's personal knowledge of victim's reputation in community, defendant's lack of knowledge supports exclusion, *State v. Negrin*, 37 Wn.App. 516, 526 (1984); "criminal justice system" is neither neutral nor sufficiently generalized to be classified as a community, *State v. Lord*, 117 Wn.2d 829, 874 (1991), *State v. Binh Thach*, 126 Wn.App. 297, 315 (2005); trial court's exclusion of reputation testimony as remote is within proper discretion; defendant's reputation for peacefulness in work community is admissible, *State v. Land*, 121 Wn.2d 494, 498-501 (1993); II.

***State v. D.***, 89 Wn.App. 77, 94-5 (1997), *op. withdrawn, in part,* *State v. Carol M.D.*, 97 Wn.App. 355 (1999)

Boy Scouts is a sufficient community to admit evidence of a witness's poor reputation for truthfulness, *State v. Land*, 121 Wn.2d 494, 498 (1993); II.

***State v. Griswold***, 98 Wn.App. 817, 827-30 (2000)

Sexual morality is a pertinent character trait in rape case, *State v. Cox*, 17 Wn.App.2d 178 (2021), *but see:* *State v. Jackson*, 46 Wn.App. 360 (1986); "good moral character" is too broad; III.

***Kennewick v. Day***, 142 Wn.2d 1 (2000)

In drug possession case with unwitting possession defense, evidence of defendant's reputation for sobriety from drugs and alcohol is relevant, *State v. Eakins*, 127 Wn.2d 490 (1995); 9-0.

***State v. Munguia***, 107 Wn.App. 328, 335-36 (2001)

In murder case where defendant claims self-defense from homosexual advance, evidence of victim's homosexual internet sites on his computer does not tend to prove that he attempted to sexually assault defendant, and is thus inadmissible character evidence, *State v. Bell*, 60 Wn.App. 561, 564 (1991), ER 404(b), 405(a); III.

***State v. Woods***, 117 Wn.App. 278 (2003)

In rape of a child case, results of psychosexual evaluation opining that defendant has no predisposition to sexual attraction to children or sexual impulsivity is relevant, as sexual morality is a pertinent character trait in sex offenses, *State v. Griswold*, 98 Wn.App. 817, 823 (2000), but was properly excluded as opinion evidence is not admissible as proof of character, *State v. Kelly*, 102 Wn.2d 188, 195 (1984), ER 405(a); III.

***State v. Binh Thach***, 126 Wn.App. 297, 315 (2005)

In assault case, defendant's reputation for peacefulness within his family is insufficiently neutral and generalized to be classed as a community, *State v. Lord*, 117 Wn.2d 829, 874 (1991); II.

***State v. Mercer-Drummer***, 128 Wn.App. 625 (2005)

Evidence that defendant has never been convicted of a crime is not an essential element of assault, obstructing or resisting, thus is not admissible to show that defendant is a "law abiding citizen," ER 405(a), and was not offered in the form of reputation evidence, *State v. O'Neill*, 58 Wn.App. 367 (1990); 2-1, II.

***State v. Fisher***, 130 Wn.App. 1, 16-18 (2005)

In child abuse case, defense witness testifies defendant had a reputation for "almost being a teddy bear" around children, state inquires if witness' opinion would change if he knew defendant spanked victim; held: character witness may be crossed concerning personal knowledge of specific prior acts of misconduct by defendant; must be good faith of plaintiff to discredit witness, not defendant, *State v. Styles*, 93 Wn.2d 173, 176-77 (1980), *State v. McFadden*, 63 Wn.App. 441, 450 n.25 (1991), within discretion of trial court; II.

***State v. Gregory***, 158 Wn.2d 759, 804-05 (2006), *overruled, on other grounds, State v. W.R.*, 181 Wn.2d 757 (2014)

Poor reputation for truthfulness within a family is insufficiently neutral and generalized to be classed as a community, *State v. Lord*, 117 Wn.2d 829, 874 (1991), *State v. Binh Thach*, 126 Wn.App. 297, 315 (2005); 8-1.

***State v. Perez-Valdez***, 172 Wn.2d 808, 819-21 (2011)

In rape case, trial court admits, without objection, evidence that defendant is of good moral character, later grants state's motion to preclude reference to that evidence in closing

argument; held: general reputation for good character is not pertinent to a specific element of rape of a child, ER 404(a)(1); it is not error to bar argument about a nonpertinent trait of the defendant; 5-4.

***State v. Stacy***, 181 Wn.App. 553, 565-66 (2014)

In assault case trial court admits reputation evidence that defendant is **peaceful** but excludes evidence that defendant had not been in a fight since 8th grade; held: specific instances of conduct to prove peacefulness is properly excluded as character is not an essential element of the offense or defense, ER 405(b), *State v. Mercer-Drummer*, 128 Wn.App. 625, 632 (2005); I.

***State v. Riley***, 12 Wn.App.2d 714 460 P.3d 184 (2020)

Trial court prohibits defense from offering witnesses, in telephone harassment trial, to testify that defendant and victim did not have a violent relationship as rebuttal to evidence admitted that defendant committed prior acts of violence to prove a true threat and genuine fear; held: while evidence of defendant's peaceful character may have been admissible as reputation evidence, ER 404(a)(1), 405(a), recasting peaceful character evidence as rebuttal thus avoiding the need to establish a foundation for character evidence is not permitted; 2-1.

***State v. Cox,*** 17 Wn.App.2d 178 (2021)

In rape case defense offers witnesses to testify that they were friends of defendant, that they never heard anything negative about his sexual morality and that his reputation for sexual morality is good, trial court's excludes it as none of them had any actual knowledge of defendant's sexual morality; held exclusion was error as reputation evidence of good sexual morality is pertinent to a sex crime charge, *State v. Griswold*, 98 Wn.App. 817, 827-30 (2000), *but see: State v. Jackson*, 46 Wn.App. 360 (1986); proving a positive reputation by negative inference, the absence of bad information, is a proper method of establishing reputation, *State v. Underwood*, 35 Wash. 558, 572 (1904); III.

# EVIDENCE
## Scientific*

***Seattle v. Peterson***, 39 Wn.App. 524 (1985)

To have radar evidence admitted to prove speeding, plaintiff must establish, through expert testimony, that the radar unit was so designed and constructed that the results produced by proper operation are reliable; *Frye* test must be met, *State v. Canaday*, 90 Wn.2d 808 (1978); *see: State v. Roberts*, 73 Wn.App. 141 (1994), *Bellevue v. Lightfoot*, 75 Wn.App. 44 (1994); I.

***State v. Flett***, 40 Wn.App. 277 (1985)

Hair comparison analysis is admissible in discretion of trial court, 23 ALR 4th 1199 (1983); III.

***Tennant v. Roys***, 44 Wn.App. 305 (1986)

Blood test results in civil case are admissible where the blood sample was analyzed but once in spite of WAC 448-14-020 which states that blood analysis "should include . . . duplicate analysis", as "should" is directional, not mandatory; I.

***State v. Black***, 109 Wn.2d 336 (1987)

Expert testimony on "rape trauma syndrome" to prove that the victim did not consent is not sufficiently accepted in the scientific community to be admissible, and constitutes an opinion as to the guilt of the defendant, thereby invading the exclusive province of the jury, *State v. Jones*, 71 Wn.App. 798, 813-21 (1993), *see: State v. Hudson*, 150 Wn.App. 646 (2009), *but see*: *State v. Cleveland*, 58 Wn.App. 634 (1990).

***State v. Huynh***, 49 Wn.App. 192 (1987)

Scientific evidence that two samples of gasoline might or could have matched held not to meet standard of *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) due to questionable scientific method and lack of corroborative testing; I.

***Bellevue v. Mociulski***, 51 Wn.App. 855 (1988)

Speed measuring device (radar) affidavits are admissible in traffic infraction cases, CrRLJ 6.13, as an exception to the hearsay rule; I.

***State v. Toennis***, 52 Wn.App. 176 (1988)

Evidence of battered child syndrome is admissible, *State v. Mulder*, 29 Wn.App. 513 (1981), to explain continuing nature of abuse and to rebut any inference of accidental injury; II.

***State v. Briggs***, 55 Wn.App. 44 (1989)

In rape case where victim claims rapist did not stutter, and defense maintains that defendant stutters, it was within trial court's discretion to allow speech expert to relate names of well-known personalities who stutter but not when performing and that there are situations in

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* *See also:* **EVIDENCE/DNA**

which there was a high probability that a person would not stutter, including the statistical percentage of that probability, *see:* *State v. Russell*, 125 Wn.2d 24, 70 (1994); I.

***State v. Noltie***, 57 Wn.App. 21 (1990)

Colposcopy, a gynecological magnifier, is not subject to *Frye* test; *see also*: *State v. Young*, 62 Wn.App. 895 (1991); I.

***State v. Aaron***, 57 Wn.App. 277 (1990)

Police officer may explain that use of gloves, socks or handkerchiefs is a common reason for absence of fingerprints without meeting the rigors of a scientific theory as it is not sophisticated expert testimony; I.

***State v. Stevens***, 58 Wn.App. 478 (1990)

Expert's testimony as to behaviors consistent in sexually abused children that she had observed in working with such children in the field is admissible where expert does not testify that victims in this case fit a profile, *State v. Ciskie*, 110 Wn.2d 263, 279-80 (1988), *State v. Madison*, 53 Wn.App. 754, 764-65 (1989), *State v. Cleveland*, 58 Wn.App. 634 (1990), *see: State v. Hudson*, 150 Wn.App. 646 (2009), *State v. Case*, 13 Wn.App.2d 657 (2020), *distinguishing* *State v. Black*, 109 Wn.2d 336 (1987); I.

***State v. Hanson***, 58 Wn.App. 504 (1990)

Battered woman syndrome testimony is irrelevant to support accident defense or for purposes of enhancing defendant's credibility, *distinguishing* *State v. Allery*, 101 Wn.2d 591 (1984), *State v. Ciskie*, 110 Wn.2d 263 (1988); 2-1, I.

***State v. Cleveland***, 58 Wn.App. 634 (1990)

In statutory rape case, therapist, acknowledging inconsistencies in victim's testimony, states it is not unusual for victims to be reluctant to testify, common for victims not to tell whole story or to add or subtract facts; held: therapist did not espouse a theory proving guilt, *State v. Ciskie*, 110 Wn.2d 263 (1988), *distinguishing* *State v. Black*, 109 Wn.2d 336 (1987), *see: State v. Hudson*, 150 Wn.App. 646 (2009),; because therapist's testimony was based upon her personal observations and was not an explanatory theory, then state need not meet test of *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) or ER 702; *cf.: State v. Jones*, 71 Wn.App. 798, 813-21 (1993); I.

***State v. Graham***, 59 Wn.App. 418 (1990)

In statutory rape case, expert testifies that a delay in reporting abuse by young women is common, to rebut defense inference that delay demonstrated that victim was lying; held: testimony not offered to prove abuse, but merely that delay is not inconsistent with abuse, *State v. Madison*, 53 Wn.App. 754 (1989), *distinguishing* *State v. Black*, 109 Wn.2d 336 (1987); I.

***State v. Young***, 62 Wn.App. 895 (1991)

*Frye* standard does not apply to the expression of expert medical opinions concerning the cause of an injury, as there is a distinction between a new scientific technique and the development of a body of medical knowledge and expertise; I.

***State v. Hoffman***, 116 Wn.2d 51 (1991)

Defense motion to appoint psychiatrist to examine victim to assist in cross-examination properly denied as no compelling reason and no question as to competency to testify was shown, *State v. Demos*, 94 Wn.2d 733, 738 (1980), *State v. Tobias*, 53 Wn.App. 635, 637 (1989), *State v. Israel*, 91 Wn.App. 846, 849-53 (1998); denial of funds to hire experts, CrR 3.1(f), is proper where the witness's testimony is not a necessity, *State v. Kelly*, 102 Wn.2d 188, 200-01 (1984), within trial court's informed discretion, *State v. Melos*, 42 Wn.App. 638, 640 (1986), *State v. Young*, 125 Wn.2d 688 (1995); 9-0.

***State v. Lord***, 117 Wn.2d 829 (1991)

Electrophoresis blood typing, acid phosphate semen testing, infrared spectroscopy, x-ray fluorescent spectroscopy, epi-illumination microscopy and spectrophotometer evidence are admissible; expert testimony couched in terms of "could have," "possible," or "similar" is admissible when analyzing common sources of trace evidence, *State v. Batten*, 17 Wn.App. 428 (1977).

***State v. Becerra***, 66 Wn.App. 202 (1992)

Where lab reports are not provided to defense at least 15 days before trial, or less time upon good cause, they must be excluded, CrR 6.13(b); III.

***State v. Braham***, 67 Wn.App. 930 (1992)

In child molestation case, expert testimony about "grooming," *i.e.*, the dynamics of victim-offender relationships prior to the initiation of sexual abuse, is inadmissible "profile" testimony which impermissibly places defendant in a group more likely to commit the crime, *State v. Petrich*, 101 Wn.2d 566 (1984), *State v. Maule*, 35 Wn.App. 287, 293 (1983), *State v. Claflin*, 38 Wn.App. 847 (1985), *see: State v. Avenando-Lopez*, 79 Wn.App. 706 (1995), *but see: Pers. Restraint of Phelps*, 190 Wn.2d 155 (2018); I.

***State v. Jones***, 71 Wn.App. 798, 813-21 (1993)

In child sex abuse case, expert testimony that behavior of victim is common to sexually abused children, specifically sexual acting out and nightmares, no *Frye* standard applied; held: when personal experience is used as a basis for generalized statements regarding the behavior of sexually abused children as a class, the testimony crosses over to scientific testimony regarding a profile or syndrome, whether or not the term is used, and should be subject to the *Frye* standard, *State v. Ortiz*, 119 Wn.2d 294 (1992), *disapproved, on other grounds*, *State v. Condon*, 182 Wn.2d 307, 321-26 (2015), *State v. Maule*, 35 Wn.App. 287 (1983); when the testimony is limited to the witness's observations of a specific group, *Frye* is not applicable, *State v. Cleveland*, 58 Wn.App. 634, 646 (1990); because the use of testimony on general behavioral characteristics of sexually abused children is still in dispute among experts, its use as a general profile to prove existence of abuse is inappropriate, *State v. Black*, 109 Wn.2d 336 (1987),

although it is admissible to rebut allegations by defendant that victim's behavior is inconsistent with abuse; I.

***State v. Roberts***, 73 Wn.App. 141 (1994)

In speeding infraction case, officer testifies, without objection, that his radar gun had clocked defendant above speed limit, after which defense motion to dismiss on grounds court could not consider radar testimony because state had not proved radar device was constructed and designed to determine speed, *Seattle v. Peterson*, 39 Wn.App. 524 (1985); held: while state was required to prove authentication, since evidence from a process or system must be authenticated before admission, ER 901(b)(9), where no authentication objection is made, the requirement of authentication is waived, ER 103(a)(1), *Seattle v. Bryan*, 53 Wn.2d 321, 324 (1958); where evidence is admitted, trial court must consider it in light most favorable to nonmoving party in ruling on motion to dismiss; II.

***Bellevue v. Lightfoot***, 75 Wn.App. 214 (1994)

Radar evidence does not require expert testimony that the engineering design of the particular radar device is generally accepted as reliable in the scientific community, rather it is sufficient that, in addition to evidence that it was functioning properly, a qualified expert testify that the particular device passed the requisite tests and checks to ensure its operational accuracy, *Bellevue v. Mociulski*, 51 Wn.App. 855 (1988), *distinguishing Seattle v. Peterson*, 39 Wn.App. 524 (1985); I.

***State v. Copeland***, 130 Wn.2d 244 (1996)

*Frye* standard will continue to apply to novel scientific evidence in Washington, court declines to adopt *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 125 L.Ed.2d 469 (1993), *see: Kurmho Tire v. Carmichael*, 143 L.Ed.2d 238 (1999); 9-0.

***State v. Stenson***, 132 Wn.2d 668, 712-18 (1997)

Phenolphthalein test for blood, while presumptive because other materials other than blood can cause a positive reaction, is admissible where supported by forensic scientist's testimony that stains looked like blood by visual and microscopic inspection; 8-0.

***State v. Hayden***, 90 Wn.App. 100 (1998)

Enhanced digital imaging fingerprint analysis, performed by qualified experts using appropriate software, meets *Frye* test; I.

***State v. Greene***, 139 Wn.2d 64 (1999)

Dissociative Identity Disorder (DID), formerly called multiple personality disorder, meets *Frye* test, as it is accepted in DSM-IV; even if generally accepted in principle, scientific evidence is inadmissible unless helpful to trier of fact under particular facts of specific case, ER 702; here, the evidence failed to establish which personality the mental evaluation should focus upon, thus expert testimony is inadmissible, *see: State v. Wheaton*, 121 Wn.2d 347 (1993); reverses *State v. Greene*, 92 Wn.App. 80 (1998); 9-0.

***State v. Baity***, 140 Wn.2d 1 (2000)

Horizontal gaze nystagmus (HGN) testing satisfies *Frye* test, *State v. Cissne*, 72 Wn.App. 677 (1994); drug recognition evaluation (DRE) protocol and chart used to classify behavioral patterns associated with categories of drugs meet *Frye* standard where all 12 steps of protocol have been undertaken; officer may not testify in a fashion that casts an aura of scientific certainty to the testimony, *State v. Quaale,* 182 Wn.2d 191 (2014), nor may officer predict specific levels of drugs present; qualified officer may express opinion that suspect's behavior and physical attributes are or are not consistent with behavioral and physical signs associated with certain categories of drugs, at 17-18; to meet ER 702, DRE evidence must include a description of witness's training, education and experience together with a showing that test was properly administered; court may not refer to DRE witness as an "expert" until witness is qualified, at 4 n. 1; 9-0.

***State v. Kunze***, 97 Wn.App. 832 (1999)

Latent earprint identification does not meet *Frye* standard, although on retrial a comparison of latent earprints and an opinion of nonexclusion may be offered; II.

***State v. Roberts***, 142 Wn.2d 471, 520-22 (2000)

Blood splatter evidence based upon expert's viewing photographs is admissible; 6-3.

***State v. McPherson***, 111 Wn.App. 747, 761-62 (2002)

Police officer who completed 40-hour DEA course on meth labs, attended other conferences and a refresher course is qualified as an expert, within discretion of trial court, ER 702, *State v. Ortiz,* 119 Wn.2d 294, 310 (1992),*disapproved, on other grounds, State v. Condon,* 182 Wn.2d 307, 321-26 (2015); III.

***State v. Vermillion***, 112 Wn.App. 844, 862-64 (2002)

Bank teller hides radio tracking device in bait money which is used to find defendant, who demands a *Frye* hearing as predicate to admissibility of evidence of the device; held: tracking device does not involve novel scientific theory, employs common technology, thus no hearing was required, *see: State v. Ramirez,* 5 Wn.App.2d 118, 135-38 (2018); I.

***State v. Willis***, 113 Wn.App. 389 (2002), *aff'd,* 151 Wn.2d 265 (2004)

In child rape case, while propriety and effect of specific interviewing techniques on children may be a proper subject for expert testimony, distinguishing *State v. Swan*, 114 Wn.2d 613, 655 (1990), here the offer of proof established that without a verbatim report the expert could not evaluate the interview techniques thus, apparently, because the interviews weren't recorded, it was proper for trial court to exclude the testimony; I.

***State v. Phillips***, 123 Wn.App. 761 (2004)

In vehicular homicide case, trial court admits accident reconstruction expert's use of PC-Crash computer-assisted reconstruction calculations following *Frye* hearing; held: general acceptance in the relevant scientific, technical or specialized community may be found from testimony that asserts the general acceptance, from articles and publications, from widespread use or from holdings of other courts, *State v. Kunze*, 97 Wn.App. 832, 853 (1999); if there is a significant dispute between qualified experts as to the validity of scientific evidence, there is no

general acceptance, *State v. Cauthron*, 120 Wn.2d 879, 887 (1993), but mere disagreement as to the conclusions or weight given the results does not amount to a significant dispute, *State v. Russell*, 125 Wn.2d 24, 51 (1994), *see: State v. DeJesus*, 7 Wn.App.2d 849 (2019); decisions from other jurisdictions may be considered not as to whether the courts have accepted the evidence, but whether the scientific community accepts the evidence and whether other jurisdictions have found evidence of widespread use, *State v. Jones*, 130 Wn.2d 302, 307 (1996); here, because accident reconstruction software and computer simulations are based on the application of long-standing scientific principles, the evidence is admissible, *see also: State v. Sipin*, 130 Wn.App. 403 (2005); II.

***State v. Bashaw***, 169 Wn.2d 133, 140-44 (2010) , *overruled, on other grounds, State v. Guzman Nuñez*, 174 Wn.2d 707 (2012)

To prove a drug offense occurred within 1000 feet of a school bus stop, officer testifies that he used a rolling measuring device that he borrowed from the chief, that he hadn't used it before but they are commonly used by police, and explained how it works, defense foundation objection is overruled; held: authentication requires that the party offering the results make a prima facie showing that the device was functioning properly and produced accurate results, ER 901(a), which state failed to do; "[n]o comparison of results generated by the device to a known distance was made nor was there any evidence that it had ever been inspected or calibrated," at ¶ 15, *see also: State v. Pearson*, 180 Wn.App. 576 (2014); reverses *State v. Bashaw*, 144 Wn.App. 196 (2008); 6-3.

***State v. Weaville***, 162 Wn.App. 801, 823-25 (2011)

Forensic toxicologist who testifies she is educated in effects of drugs on humans is qualified to render opinions on effects of MDMA, *State v. Flett*, 40 Wn.App. 277, 285 (1985); I.

***State v. Groth***, 163 Wn.App. 548, 561-64 (2011)

Human tracking evidence, while not a scientific discipline, is admissible as expert testimony, within trial court's discretion where court is satisfied as to witness' skill and experience; I.

***Pers. Restraint of Morris,*** 176 Wn.2d 157, 168-71 (2012)

In child abuse case, expert testimony about the suggestibility of young children as it relates to specific interview techniques is helpful to the jury, distinguishing *State v. Swan*, 114 Wn.2d 613, 656 (1990), *see: State v. Willis*, 151 Wn.2d 255, 261 (2004); 9-0.

***State v. Brewczynski***, 173 Wn.App. 541, 554-57 (2013)

Expert testifies that defendant's boot matched bloody footprint embedded in a blanket by shaping clay around the sole of the boot and comparing it to the overlay of the bloody print; held: "[c]ourts typically reject the *Frye* test when the method used by the expert is a matter of physical comparison rather than a scientific test;" III.

***State v. Quaale,*** 182 Wn.2d 191 (2014)

At DUI investigation trooper does horizontal gaze nystagmus (HGN) test, at trial trooper testifies over objection that, based upon the test there was "no doubt" defendant was impaired;

held: to determine admissibility of challenged opinion testimony, factors are (1) type of witness, (2) specific nature of testimony, (3) charge, (4) defense and (5) other evidence before trier of fact, *State v. Montgomer*y, 163 Wn.2d 577 (2008); here, officer's opinion on the core disputed fact in the form of a conclusion from scientific evidence that the jury was not in a position to independently assess, testimony violated defendant's constitutional right to have a fact critical to his guilt determined by the jury, *State v. Baity*, 140 Wn.2d 1 (2000), *cf.: Seattle v. Heatley*, 70 Wn.App. 573 (1993), *State v. Song Wang*, 5 Wn.App.2d 12, 28-30 (2018); affirms *State v. Quaale*, 177 Wn.App. 603 (2013); 5-4.

***State v. Pigott***, 181 Wn.App. 247 (2014)

ACE-V fingerprint analysis technique is accepted in the scientific community and does not require a *Frye* hearing, *State v. Lizarraga*, 191 Wn.App. 530, 565-67 (2015); I.

***Pers. Restraint of Morris***, 189 Wn.App. 484 (2015)

Abusive head trauma, as a cause of assault of a child, is accepted in the scientific community and failure to challenge an expert on that causation testimony is not ineffective assistance; differential diagnosis methodology is a reliable method of ascertaining causation; I.

***State v. Ramirez***, 5 Wn.App.2d 118, 135-38 (2018)

Historic cell site analysis used to identify the approximate location of a cell phone at a given time meets the *Frye* test, *see:* *State v. Vermillion*, 112 Wn.App. 844, 862-64 (2002); III.

***State v. Arndt***, 194 Wn.2d 784 (2019)

In murder/arson case trial court excludes some of defense arson expert's testimony ruling that he did not follow the scientific method and did not follow well established scientific methodology; held: ER 702 requires trial court to engage in a gatekeeping role and trial court may exclude testimony it determines does not adhere to reliable methodology, which is reviewed for abuse of discretion; while there is a 6th amendment right to present a defense trial court remains gatekeeper, and ER 702 rulings are based upon abuse of discretion standard, *State v. Yates*, 161 Wn.2d 714, 762 (2007), *State v. Clark*, 187 Wn.2d 641, 648-56 (2017), although appellate court will look to the constitutional issue *de novo, State v. Jennings,* ___ Wn.2d ___, 502 P.3d 1255 (2022); 6-3.

***State v. DeJesus***, 7 Wn.App.2d 849 (2019)

Ballistics identification meets *Frye* test and does not require a "*Frye* hearing," reports upon which defense rely do not affect the general scientific acceptance of ballistic identification, rather the problems they espouse bear on the question of reliability of the individual test and tester at issue; I.

***Seattle v. Levesque,*** 12 Wn.App.2d 687 (2020)

Officer, not a drug recognition expert, testifies that defendant showed signs consistent with a central nervous system stimulant and was definitely impaired; held: officer was not qualified to opine as to whether defendant was affected by a specific category of drugs, *State v. Baity,* 140 Wn.2d 1 (2000), distinguishing *State v. McPherson*, 111 Wn.App. 747, 761-62 (2002); I.

***State v. Murry***, 13 Wn.App.2d 542 (2020), *overruled, on other grounds, State v. Canela,* ___ Wn.2d ___, 2022WL803396 (2022)

Trial court admits evidence of a Transmission Electronics Microscope (TEM), scientists testify at *Frye* hearing that TEM is used in the scientific community to examine nanoparticles, including asbestos fibers and viruses, defense argues that it was inadmissible as proper scientific community is the criminal forensic community; held: to admit expert testimony court must look to the scientific community familiar with the technology, not just forensics, *L.M. v. Hamilton,* 193 Wn.2d 113, 135 (2019); III.

***State v. Markovich***, 19 Wn.App.2d 137 (2021)

Defendant testifies at trial that he had a head injury, court precludes physician's testimony that defendant's head injury could compound existing encephalopathy and thus his statements to police were unreliable; held: trial court properly exercised discretion in excluding the testimony as there was no evidence that defendant was actually diagnosed with the effects of a head injury; I.

***State v. Heng***, 22 Wn.App.2d 717 (2022)

In felony murder/arson case fire marshal testifies as to her opinion of how many fires were set, concurs that she did not follow National Fire Protection Agency (NPFA) 921, trial court admits the testimony; held: admissibility is within trial court's discretion as witness was qualified as an expert, *Lakey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909 (2013), *State v. Arndt*, 194 Wn.2d 784, 802 (2019); I.

***State v. Caril***, 23 Wn.App.2d 416 (2022)

To support diminished capacity defense counsel seeks to inquire of psychologist about contents of competency evaluation that defense expert relied upon, court excludes it, although relevant its probative value was outweighed by unfair prejudice and confusion because of the difference between competency versus capacity to form intent at time of the incident; held: when a party seeks to introduce otherwise inadmissible facts through an expert who has relied on them trial court has discretion to determine the extent to which the expert my relate the inadmissible information to the trier of fact, ER 705; court has discretion to exclude such evidence to prevent a mechanism for admitting otherwise inadmissible evidence, *State v. Anderson*, 44 Wn.App. 644, 652 (1986); an expert's testimony disclosing inadmissible facts or data to explain the expert's opinion "is not proof of them" as substantive evidence, *Grp. Health Co-op. of Puget Sound, Inc. v. State Through Dep't of Revenue*, 106 Wn.2d 391, 399 (1986), *State v. Wineberg*, 74 Wn.2d 372, 381 (1968); I.

# EVIDENCE
## Sufficiency*

***State v. Green***, 94 Wn.2d 216 (1980)

Review on challenge to sufficiency of the evidence is no longer substantial evidence, but is now whether, after viewing the evidence most favorable to the state, any rational trier of fact could have found guilt beyond a reasonable doubt, per *Jackson v. Virginia*, 61 L.Ed.2d 560 (1979); *Moore v. Duckworth*, 61 L.Ed.2d 865 (1979); 6-3.

***State v. Ford***, 33 Wn.App. 788 (1983)

Defendant, charged with **taking and riding**, RCW 9A.56.070, admits he did not know who owned the car, which was stolen either that day or the day prior; held: court could infer defendant had knowledge that car was taken unlawfully, *see: State v. L.A.*, 82 Wn.App. 275 (1996), *State v. Womble*, 93 Wn.App. 599 (1999); I.

***State v. Kerry***, 34 Wn.App. 674 (1983)

Merely because defense puts on evidence does not preclude review for sufficiency, *State v. Portrey*, 102 Wn.App. 898, 903 n. 1 (2000); I.

***State v. Gerard***, 36 Wn.App. 7 (1983)

Witnesses testify they saw respondent near motorbike that had a "for sale" sign on it, they later saw respondent driving the bike, although they describe bike differently; held: respondent's proximity to bike establishes knowledge element for **taking and riding**; taking evidence in light most favorable to state, evidence is sufficient; I.

***State v. Baeza***, 100 Wn.2d 487 (1983)

Challenge to sufficiency of evidence may be raised for first time on appeal; 9-0.

***Richardson v. United States***, 82 L.Ed.2d 242 (1984)

Following a hung jury, defendant has no valid double jeopardy claim to prevent retrial, as there has been no termination of original jeopardy, regardless of sufficiency of the evidence; 7-2.

***State v. Howell***, 40 Wn.App. 49 (1985)

Where jury convicts, after which trial court arrests judgment and dismisses for failure to prove venue, appellate court can reinstate verdict, since defendant was already convicted and court is merely reinstating verdict, not retrying case, *see: Auburn v. Hedlund*, 137 Wn.App. 494 (2007), *rev'd, on other grounds,* 165 Wn.2d 645 (2009); III.

***State v. CLR***, 40 Wn.App. 839 (1985)

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* *See chapters on substantive crimes, e.g.*, ASSAULT, BURGLARY, DEADLY WEAPON/FIREARM, FORGERY, ROBBERY, SEX OFFENSES, VUCSA.

Defendant observes, does not hear, undercover officer speaking with a prostitute, shouts "he's vice," is charged with **obstructing**, RCW 9A.76.020(3); held: state failed to prove actual knowledge that the officer was engaged in official duties; *see also: State v. Graham*, 130 Wn.2d 711 (1996), *State v. Ware*, 111 Wn.App. 738 (2002); I.

***Seattle v. Camby***, 104 Wn.2d 49 (1985)

Intoxicated defendant repeatedly threatens bar bouncer who testified he was not provoked; defendant charged with **harassment**, SMC § 12A.06.040; held: proscription against fighting words is not violated by language directed against a civilian unless the language, evaluated in the context in which it was uttered, is of such a nature that it would be likely to provoke a violent reaction from an ordinary citizen; addressee's actual reaction is relevant; reverses *Seattle v. Camby*, 38 Wn.App. 442 (1984); *but see*: *State v. Allen*, 88 Wn.2d 394 (1977), *State v. Thomas*, 46 Wn.App. 723 (1987), *Elonis v. United States*, 575 U.S. 723, 135 S.Ct. 2001, 192 L.Ed.2d 1 (2015); 9-0.

***State v. Flieger***, 45 Wn.App. 667 (1986)

Where information and probable cause affidavit establish that state cannot make factual issue on each element, then the trial court may resolve the issue prior to trial; III.

***State v. Johnson***, 45 Wn.App. 794 (1986)

Situs or **venue** is not an element of the crime which may be proved by circumstantial evidence, *distinguishing dicta* in *State v. Marino*, 100 Wn.2d 719, 727 (1984); venue may be proved by reference to streets, buildings and other landmarks that the jury probably knows of, *State v. Kincaid*, 69 Wash. 273 (1912); II.

***State v. Knapstad***, 107 Wn.2d 346 (1986)

Where defense files an affidavit alleging that there are no material disputed facts, that the undisputed facts do not establish a *prima facie* case, and sets forth with specificity all facts and law relied upon, then state must file an affidavit denying the facts alleged in defendant's affidavit or allege other material facts, whereupon court must ascertain whether the facts which state relies upon establish a *prima facie* case and, if not, court must dismiss, apparently without prejudice; *affirms State v. Knapstad*, 41 Wn.App. 781 (1985); *see: State v. Brown*, 64 Wn.App. 606 (1992), *State v. Groom*, 80 Wn.App. 717, 728 (1996), *aff'd*, 133 Wn.2d 679 (1997), *Pers. Restraint of Yim*, 139 Wn.2d 581, 598-99 (1999), *State v. Lansdowne*, 111 Wn.App. 882 (2002), *State v. Freigang*, 115 Wn.App. 496 (2002), *State v. Carter*, 138 Wn.App. 350 (2007); 5-4.

***State v. Hall***, 46 Wn.App. 689 (1987)

Uncorroborated testimony of an accomplice who was on drugs at the time of the offense is sufficient to convict at a bench trial as long as the court, exercising due caution, believes the accomplice; III.

***State v. Plank***, 46 Wn.App. 728 (1987)

Merely being a passenger in a stolen vehicle is insufficient evidence, by itself, to convict of **possessing stolen property**; I.

***State v. Hendrix***, 50 Wn.App. 510 (1988)

Where victim picks defendant from montage but cannot make in-court identification, evidence is sufficient; I.

***State v. Coleman***, 54 Wn.App. 742 (1989)

In ruling on a motion to dismiss at end of state's case or in arrest of judgment, trial court must not weigh the evidence but must assume the truth of state's evidence, *State v. Randecker*, 79 Wn.2d 512, 517-18 (1971), in determining whether there was sufficient evidence to justify a rational trier of fact to find guilt beyond a reasonable doubt, *State v. Green*, 94 Wn.2d (1980); I.

***State v. Rempel***, 114 Wn.2d 77 (1990)

A request that a witness "drop charges" is not **witness tampering**, RCW 9A.72.120, where the defendant and witness knew each other, and the context is such that there was no attempt to induce the witness to withhold testimony, *reversing State v. Rempel*, 53 Wn.App. 799 (1989), *see also*: *State v. Jensen*, 57 Wn.App. 501 (1990), *State v. Gill*, 103 Wn.App. 435, 446-47 (2000), *cf.: State v. Williamson*, 131 Wn.App. 1 (2004), *State v. Thompson*, 153 Wn.App. 325, 328-35 (2009); 9-0.

***State v. Hudson***, 56 Wn.App. 490 (1990)

"[A]bsence of any explanation for use of what appears to have been a recently stolen automobile . . . and . . . flight" provide sufficient evidence to infer guilty knowledge, *but see: State v. Slater*, 197 Wn.2d 660 (2021), *cf.: State v. L.A.*, 82 Wn.App. 275 (1996), *State v. Womble*, 93 Wn.App. 599 (1999); fleeing from a police officer is **obstructing**, RCW 9A.76.020(3), *State v. Ware*, 111 Wn.App. 738 (2002); fleeing from a police officer effecting an arrest without probable cause is still obstructing as the officer is "engaged in the performance of his official duties provided he is not on a frolic of his own," *State v. Contreras*, 92 Wn.App. 307 (1998), *Spokane v. Hays*, 99 Wn.App. 653, 661 (2000), *see: State v. Mierz*, 127 Wn.2d 460 (1995), *State v. K.A.B.*, 14 Wn.App.2d 677 (2020), *see also: State v. Graham*, 130 Wn.2d 711 (1996), *State v. D.E.D.*, 200 Wn.App. 484, (2017), *but see: State v. Barnes*, 96 Wn.App. 217, 224-25 (1999), *disapproved, State v. D.E.D.*, 200 Wn.App. 484, 493-95 (2017); I.

***State v. Stearns***, 61 Wn.App. 224 (1991)

In determining sufficiency, circumstantial evidence is not to be considered any less reliable than direct evidence, and specific intent may be inferred where defendant's conduct plainly indicates intent as a matter of logical probability, *State v. Delmarter*, 94 Wn.2d 634, 638 (1980); I.

***State v. Brown***, 64 Wn.App. 606 (1992)

Pretrial motion to dismiss for insufficiency pursuant to *State v. Knapstad*, 107 Wn.2d 346 (1986) applies only to the entire case and not to aggravating circumstances in aggravated murder 1° case, *see also: State v. Meacham*, 154 Wn.App. 467 (2010); I.

***State v. Austin***, 65 Wn.App. 759 (1992)

Defendant stating, "come on let's fight" and pulling a knife is not a threat to do future harm, thus insufficient to prove **harassment**, RCW 9A.46.020, *Seattle v. Allen*, 80 Wn.App. 824

(1996), *but see:* *State v. Williams*, 98 Wn.App. 765, 775-76 (2000), 144 Wn.2d 197, 211-12 (2001); I.

***State v. Chiariello***, 66 Wn.App. 241 (1992)

In **burglary 1°** case by deadly weapon or assault, RCW 9A.52.020, insufficient evidence was submitted to jury on deadly weapon alternative, but defendant admitted assaulting complainant, thus appellate court could ascertain that conviction was based upon remaining ground for which sufficient evidence was presented, *see:* *State v. Maupin*, 63 Wn.App. 887, 894 (1992); III.

***State v. Johnson***, 66 Wn.App. 297 (1992)

Following conviction, trial court orders defendant to post bail or report to jail within 72 hours, defendant flees, is charged with bail jumping, RCW 9A.76.170; held: defendant cannot violate **bail jumping** statute unless he has been ordered to appear in court on a specific date, *State v. Rider*, 118 Wn.App. 734, 739-40 (2003), *State v. Cardwell*, 155 wn.App. 41, 47-48 (2010), *cf.:* *State v. Plank*, 47 Wn.App. 461 (1987), *State v. Aguilar*, 153 Wn.App. 265, 276-78 (2009) , *State v. Coleman*, 155 Wn.App. 951, 963-64 (2010); I.

***State v. Vermillion***, 66 Wn.App. 332 (1992)

ER 404(b) "handiwork" evidence can establish intent requirement of attempted burglary; III.

***State v. Ahlquist***, 67 Wn.App. 442 (1992)

In a trial *in absentia*, arresting officer can identify booking photo with name as that of person he arrested, *distinguishing* *State v. Hunter*, 29 Wn.App. 218 (1981); I.

***State v. Thompson***, 69 Wn.App. 436 (1993)

Evidence was sufficient to convict for **criminal trespass** where defendant admitted he did not live on apartment complex premises and had no permission from manager to be there, had been previously admonished by police, did not offer an excuse to justify presence, attempted to flee or hide from police, *cf.:* *State v. Blair*, 65 Wn.App. 64 (1992), *see:* *State v. Morgan*, 78 Wn.App. 208, 211 (1995), *Bremerton v. Widell*, 146 Wn.2d 561 (2002), *State v. Bellerouche*, 129 Wn.App. 912 (2005); I.

***State v. VanValkenburgh***, 70 Wn.App. 812 (1993)

In **malicious mischief** case, defendant's malice towards lessee of property rather than owner is sufficient to convict, since a lessee has a property interest, and thus property damaged is "property of another," RCW 9A.48.080, which is broader than fee ownership interest; even if intent to damage owner is required, doctrine of transferred intent supports conviction, *cf.:* *State v. Cogswell*, 54 Wn.2d 240, 244-5 (1959)*(dicta);* III.

***State v. Dyson***, 74 Wn.App. 237, 248-9 (1994)

In **harassment** case (anonymous telephone calls), RCW 9.61.230(2), multiple hang-up calls is sufficient; I.

***State v. Martinez***, 76 Wn.App. 1, 4-6 (1994)

To prove **extortion**, RCW 9A.56.110, communication of the extorsive threat completes the crime, whether or not victim complies or attempts to comply; I.

***Seattle v. Schurr***, 76 Wn.App. 82 (1994)

Using another's identification to return merchandise to a store for a refund, where there is no proof that the merchandise was stolen, is insufficient to convict of **criminal impersonation** ordinance, SMC § 12A.08.130(B)(1), as no economic interest is injured by the assumption of the false identity; I.

***State v. Myles***, 127 Wn.2d 807 (1995)

**Concealed weapons** statute, RCW 9.41.250, which prohibits "furtively carry[ing] with intent to conceal" a weapon does not require an overt movement to conceal, *reversing* *State v. Myles*, 75 Wn.App. 643 (1994); carrying a kitchen knife in an inner pocket at 1:00 a.m. "in the presence of other people in an inhospitable situation" is sufficient to convict; 6-3.

***State v. Alvarez***, 128 Wn.2d 1 (1995)

One threatening act is sufficient to support a **harassment** conviction, RCW 9A.46.020; where evidence is sufficient but trial court's findings are not, proper remedy is remand, *State v. Souza*, 60 Wn.App. 534 (1991); *affirms* *State v. Alvarez*, 74 Wn.App. 250 (1994); 6-3.

***State v. Gilbert***, 79 Wn.App. 383 (1995)

To prove **malicious mischief** 2°, sales tax may be included in repair cost to reach $250 threshold; III.

***State v. Aitken***, 79 Wn.App. 890, 897-901 (1995)

Defendant assumes name of dead person, opens bank account, deposits checks that bounce, submits withdrawal slip, is convicted of **money laundering**, RCW 9A.83.020(1); held: since there were no "proceeds" to manipulate, evidence is insufficient, *see:* *State v. McCarty*, 90 Wn.App. 195 (1998); II.

***State v. Pollard***, 80 Wn.App. 60 (1995)

Random encounter with a victim who is threatened because of race is sufficient to prove **malicious harassment**, former RCW 9A.36.080(1), *see:* *State v. Lynch*, 93 Wn.App. 716, 720-23 (1999); I.

***State v. Groom***, 80 Wn.App. 717, 723 (1996), *aff'd, on other grounds,* 133 Wn.2d 679 (1997)

The existence of a defense is not relevant to a motion to dismiss pursuant to *State v. Knapstad*, 107 Wn.2d 346 (1986); III.

***Seattle v. Allen***, 80 Wn.App. 824 (1996)

Defendant tells victim "he was going to shoot us if we didn't do what we was told" is insufficient to establish a threat to cause bodily injury in the future for purposes of **harassment**, Seattle Municipal Code § 12A.06.040, RCW 9A.46.020(1), as it is a threat to cause immediate bodily injury not future bodily injury, *State v. Austin*, 65 Wn.App. 759, 760-1 (1992), *see also:*

*State v. Gallaher*, 24 Wn.App. 819, 821-2 (1979), *State v. Edwards*, 84 Wn.App. 5 (1996), *State v. Young*, 83 Wn.App. 937 (1974), *but see: State v. Williams*, 98 Wn.App. 765, 775-76 (2000), 144 Wn.2d 192, 211-12 (2001), *State v. Cross*, 156 Wn.App. 568, 580-85 (2010); RCW 9A.46.020 amended by 1997 legislature to prohibit threat to cause immediate injury; I.

***State v. Dodgen***, 81 Wn.App. 487, 492-4 (1996)

Where defendant fails to make *corpus delicti* objection to a confession, moves instead to dismiss at close of state's case, then presents evidence on his behalf, reviewing court will look to evidence as a whole to determine whether *corpus* was established, *State v. Chavez*, 65 Wn.App. 602, 605 (1992), *State v. Smith*, 56 Wn.App. 909, 914 (1990), *State v. Liles-Heide*, 94 Wn.App. 569 (1999); I.

***State v. Dunn***, 82 Wn.App. 122 (1996)

Motion to dismiss pursuant to *State v. Knapstad*, 107 Wn.2d 346 (1986), may be heard where defense affidavit fails to include all of material facts as long as it is clear the material undisputed facts were before court; here, defense affidavit referred to police report which was not attached, but trial court's decision referred to all records, *cf.: Pers. Restraint of Yim*, 139 Wn.2d 581, 598-99 (1999); for purposes of **criminal mistreatment 2°**, RCW 9A.42.030(1), taking drugs by pregnant mother resulting in positive drug test for newborn infant is insufficient as fetus is not child; III.

***State v. L.A.***, 82 Wn.App. 275 (1996)

Fourteen-year old driving a stolen car with broken rear wing window is insufficient to find that respondent knew vehicle was taken unlawfully, *see: State v. Hudson*, 56 Wn.App. 490, 495 (1990), *State v. Ford*, 33 Wn.App. 788, 790 (1983), *State v. Couet*, 71 Wn.2d 773, 776 (1967), *cf.: State v. Womble*, 93 Wn.App. 599 (1999); I.

***State v. Lee***, 82 Wn.App. 298 (1996), *aff'd*, 135 Wn.2d 369 (1998)

In **stalking** case, former RCW 9A.46.110, evidence that defendant stalked victim over a three-month period despite her repeated requests to leave her alone plus defendant having abused victim in past and victim's testimony that she was terrified is sufficient to establish that defendant "intimidated, harassed, or placed [her] in fear" by his conduct; "without lawful authority: means authority found in 'readily ascertainable sources' of statutory or common law," at 303, *State v. Smith*, 111 Wn.2d 1, 11 (1988), not controlled by tort law on invasion of privacy; repeatedly appearing at victim's restaurant workplace, staring at her for up to ten hours at a time, leaving notes that he would "keep her in sight" is sufficient to establish the element "follows," [now defined, RCW 9A.46.110(6)(a)]; sufficiency of "reasonable fear" is one for the trier of fact from all the circumstances, including staring, repeated references in notes to victim's need for protection, and that victim had been warned by her mother, at 306; I.

***State v. Lively***, 130 Wn.2d 1, 14-18 (1996)

Test for sufficiency of an **affirmative defense**: considering evidence in light most favorable to state, could a rational trier of fact find that defendant failed to prove the defense by

preponderance?, *Spokane v. Beck*, 130 Wn.App. 481 (2005), *State v. Matthews*, 132 Wn.App. 936 (2006); 9-0.

***State v. Savaria***, 82 Wn.App. 832, 839-41 (1996), *overruled, in part, State v. C.G.*, 150 Wn.App. 604, 611 (2003)

Glaring at and exhibiting middle finger to victim is insufficient to establish attempt to influence the testimony of victim at trial for purposes of **intimidating a witness**, RCW 9A.72.110, *see: State v. King*, 135 Wn.App. 662 (2006); I.

***State v. Edwards***, 84 Wn.App. 5 (1996)

Defendant threatens to burn a store if employees harass his family, is convicted of **threatening a building**, RCW 9.61.160; held: a conditional threat to injure property is within the definition of threat that applies, RCW 9A.04.110(25), *see: State v. Young*, 83 Wn.2d 937, 942 (1974), *Seattle v. Allen*, 80 Wn.App. 824 (1996), *State v. Johnston*, 156 Wn.2d 355 (2006), *State v. Cross*, 156 Wn.App. 568, 580-85 (2010), *see also: State v. Williams*, 98 Wn.App. 765, 775-76 (2000), 144 Wn.2d 192, 211-12 (2001); intent to injure is not an element, *State v. Kepiro*, 61 Wn.App. 116, 121 (1991); II.

***State v. Barnes***, 85 Wn.App. 638, 665-8 (1997)

To prove **leading organized crime**, RCW 9A.82.060, state must prove that defendant intentionally organized, managed, directed, supervised or financed three or more persons with intent to engage in a pattern of criminal profiteering activity, defined as "engaging in at least three acts of criminal profiteering," RCW 9A.82.010(15), need not prove that any of those three people actually engage in any of the charged acts of criminal profiteering, as defendant may engage in some of the activities with others and perform others alone; II.

***State v. R.H.***, 86 Wn.App. 807 (1997)

In **criminal trespass** case, restaurant manager testifies he told a group of loiterers to leave parking lot, they remain, respondent arrives later, manager calls police who advise the group they must go, respondent planned to patronize restaurant, manager testifies patrons may remain, respondent returns to parking lot and is arrested; held: because the offense requires the state to prove "enters or remains unlawfully," RCW 9A.52.080(1), then state must disprove that "premises were . . . open to members of the public and the actor complied with . . . conditions imposed," RCW 9A.52.090(2), *State v. Finley*, 97 Wn.App. 129 (1999), *Bremerton v. Widell*, 146 Wn.2d 561 (2002), *State v. Green*, 157 Wn.App. 833 (2010), *State v. C.B.*, 195 Wn.App. 528 (2016); I.

***Seattle v. Edwards***, 87 Wn.App. 305 (1997), *overruled, on other grounds, State v. Miller*, 156 Wn.2d 23 (2005)

In **willful violation of a protective order** case, where the order states that it is effective "until one year from today or until further order of the court," contact after a year is insufficient to convict; prosecutor's failure to prove that the order was the last order entered is insufficient to convict, burden is not on defense to present a later order, *cf.: State v. Snapp*, 119 Wn.App. 614, 623-26 (2004); I.

***State v. Pesta***, 87 Wn.App. 515 (1997)

To prove **custodial interference 1°**, RCW 9A.40.060 (1998), a temporary parenting plan is sufficient, *see: State v. Veliz,* 176 Wn.2d 849, 859 n.5 (2013), only that portion of the parenting plan which addresses custody or visitation need be proved; I.

***State v. Jackson***, 87 Wn.App. 801, 807-9 (1997), *aff'd,* 137 Wn.2d 712, 727-30 (1999)

Delaying health care is an element of **criminal mistreatment 1°**, RCW 9A.42.020, but state must prove that the withholding of health care caused great bodily harm; I.

***State v. Dejarlais***, 87 Wn.App. 297 (1997)

Consent to contact is not a defense to **violation of a protective order**, RCW 26.50.110, distinguishing *Reed v. Reed*, 149 Wash. 352 (1928); victim's testimony that defendant had sexual intercourse with her is sufficient to prove **rape 3°**; II.2

***Brogan v. United States***, 139 L.Ed.2d 830 (1998)

Under federal **false statement** act, 18 USC § 1001, answering "no" to investigator's question whether union officer accepted illegal gifts is sufficient to convict, there is no **"exculpatory no" doctrine** which provides that simple denials of guilt are not criminal; 7-2.

***State v. Hickman***, 135 Wn.2d 97 (1998)

Where unnecessary elements are included, without objection, in the "to convict" instruction (here, venue), the **law of the case doctrine** obliges the state to prove the elements, and defense may challenge sufficiency of the added elements on appeal, *State v. Johnson,* 188 Wn.2d 742 (2017), *State v. Barringer*, 32 Wn.App. 882, 887-8 (1982), *State v. Hobbs*, 71 Wn.App. 419 (1993), *State v. Worland*, 20 Wn.App. 559, 566 (1978), *cf.: State v. Dent*, 123 Wn.2d 467, 479-81 (1994), *State v. Ford*, 33 Wn.App. 788 (1983) , *State v. Calvin,* 176 Wn.App. 1, 19-23 (2013), *State v. France,* 180 Wn.2d 809 (2014), *State v. Muñoz-Rivera,* 190 Wn.App. 870 (2015), *cf.: State v. Tyler,* 191 Wn.2d 205 (2018), *Musacchio v. United States,* 577 U.S. 237, 136 S.Ct. 709, 193 L.Ed.2d 639 (2016), *State v. Jusilla,* 197 Wn.App. 908 (2017); 5-4.

***State v. Bryant***, 89 Wn.App. 857, 869-71 (1998)

Proof of defendant's presence in court when judge told him to reappear in six days, plus defendant's signature on notice, plus posting of bond is sufficient to prove **bail jumping**, RCW 9A.76.170(1); I.

***State v. McCarty***, 90 Wn.App. 195 (1998)

Defendant borrows money knowing it was from drug sales and buys cars, is convicted of **money laundering**, RCW 9A.83.020(1)(a); held: mere knowledge that the proffered property is proceeds of unlawful activity is sufficient, state need not prove manipulation of proceeds in order to conceal criminal origin where the allegation is that defendant conducted a financial transaction, distinguishing attempting to conduct a financial transaction, *State v. Aitken*, 79 Wn.App. 890 (1995), *accord: State v. Casey*, 81 Wn.App. 524, 531 n.18 (1996); II.

***State v. Van Woerden***, 93 Wn.App. 110 (1998)

In **criminal mistreatment** 2º case, RCW 9A.42.030, causing post-traumatic stress disorder (PTSD) is insufficient, as a mental illness does not constitute "bodily injury," and PTSD is not an "impairment of physical condition," RCW 9A.42.010(2)(b) and (c); II.

***State v. Womble***, 93 Wn.App. 599 (1999)

Moving motor vehicle 5-40 feet within owner's driveway is sufficient to prove **taking and riding**, RCW 9A.56.070(1); passenger who flees scene, testifies he did not know where he had been earlier, that driver said she had parked "her" car half a mile from where he met her was sufficient to prove knowledge, as flight and absence of a plausible explanation are corroborative of guilty knowledge, *State v. Couet*, 71 Wn.2d 773, 776 (1967), *cf.: State v. L.A.*, 82 Wn.App. 275 (1996), *State v. Ford*, 33 Wn.App. 788 (1983), *State v. Slater*, 197 Wn.2d 660 (2021); I.

***State v. Alams***, 93 Wn.App. 754, 758-59 (1999)

Providing a bad check in payment of a pre-existing, past due debt is sufficient to prove **UIBC,** RCW 9A.56.060, *State v. Bradley*, 190 Wash. 538 (1937); I.

***State v. Jackson***, 137 Wn.2d 712, 727-30 (1999)

In **criminal mistreatment 1°**, RCW 9A.42.020, failure to protect a child from assault is insufficient to prove that defendant caused great bodily harm by withholding basic necessities of life by failing to provide shelter, affirming *State v. Jackson*, 87 Wn.App. 801, 807-09 (1997), *cf.: State v. Berube*, 150 Wn.2d 498, 509-10 (2003); 7-2.

***State v. Liles-Heide***, 94 Wn.App. 569 (1999)

Where defense introduces evidence following denial of a *corpus delicti* motion, defendant waives her challenge to the sufficiency of the evidence as it stood at the point she made her motion, court will then review the evidence as a whole to determine if there is sufficient evidence of the *corpus delicti;* I.

***State v. Rivera***, 95 Wn.App. 961 (1999)

To prove **bigamy**, state must prove that first marriage was valid, not merely that parties believe it was valid; to prove a foreign marriage, state must prove foreign law as a fact; III.

***State v. Ball***, 97 Wn.App. 534 (1999)

To prove **bail jumping**, RCW 9A.76.170(1), proof that defendant was aware of an obligation to appear in court at a scheduled hearing satisfies *mens rea* knowledge element, *State v. Carver*, 122 Wn.App. 300 (2004), *see also: State v. Malvern*, 110 Wn.App. 811 (2002), *but see:* 2001 amendments to RCW 9A.76.170; II.

***State v. Schloredt***, 97 Wn.App. 789, 792-94 (1999)

A credit card is an "access device" for purposes of **possessing stolen property**, RCW 9A.56.010(1), whether or not it was cancelled at the time it was possessed, *see: State v. Clay*, 144 Wn.App. 894 (2008), *State v. Sandoval*, 8 Wn.App.2d 267 (2019), *but see: State v. Rose*, 175 Wn.2d 10 (2012); I.

***Redmond v. Burkhart***, 99 Wn.App. 21 (2000)

**Telephone harassment**, RCW 9.61.230, which forbids a person to "make" a threatening call does not oblige proof that defendant initiated the telephone call intending to threaten, as the term "make" refers to the call in its entirety, *but see: State v. Lilyblad*, 134 Wn.App. 462 (2006), *Elonis v. United States*, 575 U.S. 723, 135 S.Ct. 2001, 192 L.Ed.2d 1 (2015); I.

***State v. Pope***, 100 Wn.App. 624 (2000)

**Bail jumping**, RCW 9A.76.170, can be proved where defendant fails to appear for a post-sentencing probation violation hearing; state must prove that defendant is held for or convicted of a specific crime, which must be reflected in instructions; II.

***State v. Avila***, 102 Wn.App. 882 (2000)

Student tells another student that he will blow off a teacher's head, which is reported to the teacher, respondent is charged with **intimidating a teacher**, RCW 28A.635.100; held: state must prove that respondent intended to make a threat, threatened force or violence, that the teacher was intimidated while peacefully discharging his teaching duties, but need not prove that respondent intended to carry out the threat or that he intended to communicate the threat, directly or indirectly, to the teacher, *see: State v. Edwards*, 84 Wn.App. 5, 9 (1996), *State v. Kepiro*, 61 Wn.App. 116, 123 (1991), *State v. Hansen*, 122 Wn.2d 712, 718 (1993), *State v. Johnston*, 156 Wn.2d 355 (2006), *cf.: State v. Ozuna*, 184 Wn.2d 238 (2015); III.

***State v. Ainslie***, 103 Wn.App. 1 (2000)

Defendant is seen in car near juvenile's house only when the juvenile is in the neighborhood, gets out of car and stands by it when juvenile approaches, enters juvenile's yard, returns after being chased away, is convicted of **stalking**, RCW 9A.46.110; held: evidence is sufficient to establish that defendant "repeatedly follows" victim, *State v. Kintz*, 144 Wn.App. 515 (2008), 169 Wn.2d 537 (2010), *State v. Whittaker*, 192 Wn.App. 395 (2016), and, in light of victim's age, her fear was objectively reasonable, *see: State v. Lee*, 135 Wn.2d 369 (1998); I.

***State v. Warfield***, 103 Wn.App. 152 (2000)

Defendants, as private citizens, "arrest" complainant on an out-of-state warrant, call police who verify the warrant and allow defendants to retake custody, defendants drive complainant to out-of-state jurisdiction, surrender him, are charged with **unlawful imprisonment**, RCW 9A.40.040; held: because statute prohibits "knowingly restrains another person," and defines restrain as "to restrict a person's movements without consent and without legal authority...", RCW 9A.40.010(1), state failed to prove that defendants knowingly acted without lawful authority, *see: State v. Johnson*, 180 Wn.2d 295, 303-04 (2014), *State v. Dillon*, 12 Wn.App.2d 133 (2020), thus dismissed; II.

***State v. Gill***, 103 Wn.App. 435, 445-47 (2000)

Demand that witness get the charges dropped or he will have criminal charges filed against witness and will be compelled to seek revenge is sufficient to prove **intimidating a witness**, RCW 9A.72.110(1), *see: State v. Williamson*, 131 Wn.App. 1 (2004), *State v. King*, 135 Wn.App. 662 (2006), distinguishing *State v. Rempel*, 114 Wn.2d 77, 83-84 (1990); II.

***State v. Williams***, 144 Wn.2d 197, 211-12 (2001)

"Don't make me strap your ass" is sufficient to prove threat to cause bodily harm in the future for purposes of **harassment**, RCW 9A.46.020, *cf.: State v. Austin*, 65 Wn.App. 759 (1992), *Seattle v. Allen*, 80 Wn.App. 824 (1996), *State v. Kilburn*, 151 Wn.2d 36 (2004), *State v. Hosier*, 124 Wn.App. 696, 708-11 (2004), *aff'd, on other grounds,* 157 Wn.2d 1 (2006), *State v. Kohonen*, 192 Wn.App. 567 (2016), *State v. D.R.C.,* 13 Wn.App.2d 818 (2020), *see also: Seattle v. Buford-Johnson*, ___ Wn.App.2d ___, 2021WL6112342 (2021); *reverses, on other grounds*, *State v. Williams*, 98 Wn.App. 765 (2000); 5-3.

***State v. J.M.***, 101 Wn.App. 716 (2000), *aff'd*, 144 Wn.2d 472 (2001)

Respondent tells a friend he wants to kill his teacher, friend reports threat which is told to the teacher who testifies he is afraid, respondent is convicted of **harassment**, RCW 9A.46.020(1)(a)(i); held: only *mens rea* of harassment is that perpetrator knowingly communicates a threat to cause bodily injury; state need not prove that perpetrator knew or should have known that the person threatened would learn of the threat, *State v. Kiehl*, 128 Wn.App. 88 (2005), but only that the person threatened did learn of it and was placed in reasonable fear, *cf.: Elonis v. United States*, 575 U.S. 723, 135 S.Ct. 2001, 192 L.Ed.2d 1 (2015); state must prove that respondent knew subjectively that the threat would be interpreted, by whomever received it, as a serious expression of intent to inflict harm and, in so assessing, trier of fact may consider whether a reasonable person could foresee that the statement would be so interpreted by whomever received it, *see: State v. Shipp*, 93 Wn.2d 510, 516-17 (1980), *State v. Ragin*, 94 Wn.App. 407 (1999), *State v. Knowles*, 91 Wn.App. 367, 393 (1998), *State v. Kilburn*, 151 Wn.2d 36 (2004), *State v. Hoosier*, 124 Wn.App. 696 (2004), *State v. Johnston*, 156 Wn.2d 355 (2006), *State v. Morales*, 174 Wn.App. 370 (2013), *State v. Boyle*,183 Wn.App. 1, 6-9 (2014), *State v. Kohonen*, 192 Wn.App. 567 (2016), *State v. D.R.C.*, 13 Wn.App.2d 818 (2020), *Seattle v. Buford-Johnson*, ___ Wn.App.2d ___, 2021WL6112342 (2021); *overrules, in part*, *State v. G.S.*, 104 Wn.App. 643 (2001); I.

***State v. Rodgers***, 146 Wn.2d 55 (2002)

Defendant drives to an area of town, leaves car, walks two blocks, shoots at a house, is convicted of **drive-by shooting**, RCW 9A.36.045(1); held: statute requires proof that shooting be from a car or from the immediate area of a motor vehicle, two blocks is insufficient, *State v. Vasquez*, 2 Wn.App.2d 632 (2018); affirms *State v. Locklear*, 105 Wn.App. 555 (2001); 9-0.

***Bremerton v. Widell***, 146 Wn.2d 561 (2002)

Police, with agreement of housing authority, issue trespass warning to individuals perceived to have violated rules of conduct, prohibiting them from returning to housing project for any reason; defendants are convicted of **criminal trespass** for entering project; held: state must prove absence of statutory defenses to criminal trespass, RCW 9A.52.090(3), *State v. R.H.*, 86 Wn.App. 807, 812 (1997), *State v. Finley*, 97 Wn.App. 129, 138 (1999); where defendant offers some evidence that he was invited, then state must disprove the invitation or prove that defendant exceeded the scope of the invitation, *State v. Thompson*, 69 Wn.App. 436 (1993), *State v. Green*, 157 Wn.App. 833 (2010), *see: State v. Blair*, 65 Wn.App. 64 (1992), *State v. Glover*, 116 Wn.2d 509 (1991); 9-0.

***State v. Seek***, 109 Wn.App. 876 (2002)

**Bigamy**, RCW 9A.64.010, is not a strict liability offense, state must prove wrongful intent; I.

***State v. Ware***, 111 Wn.App. 738, 745-46 (2002)

Fleeing from a police officer is **resisting arrest**, RCW 9A.76.040(1); statement by respondent "you're not going to take me" establishes *mens rea;* III.

***State v. Lansdowne***, 111 Wn.App. 882 (2002)

Complainant, in defendants' home, hears defendant state on telephone that complainant "is not leaving here alive…I pack a gun," trial court dismisses **unlawful imprisonment** with deadly weapon for insufficiency at *Knapstad* motion; on another occasion, defendant telephones school, informs secretary that she will send someone to beat up a teacher, uses words "shit" and "bitch," trial court dismisses **telephone harassment** at *Knapstad* hearing; held: even though evidence is contested, trial court erred in dismissing as a rational trier of fact could have found the elements, appellate court does not comment on deadly weapon allegation sufficiency; threatening a third party is sufficient to evidence intent to intimidate; curse words are indecent; III.

***State v. Coria***, 146 Wn.2d 631 (2002)

Husband who damages property owned by husband and his wife damages property of another for purposes of **malicious mischief** statute, RCW 9A.48..080(1)(a), *see: State v. Pike,* 118 Wn.2d 585 (1992), *State v. Webb,* 64 Wn.App. 480 (1992), *State v. Birch,* 36 Wn.App. 405 (1984), *Bellevue v. Jacke*, 96 Wn.App. 209 (1999), *State v. Wooten*, 178 Wn.2d 890 (2013); reverses *State v. Coria,* 105 Wn.App. 51 (2001); 8-1.

***State v. Wiggins***, 113 Wn.App. 209 (2002)

Defendant is arrested in possession of an empty gasoline can and a glass bottle with gauze stuffed into it, admits he was on his way to gas station to make a Molotov cocktail to throw on his ex-girlfriend's lawn, is convicted of **unlawful possession of explosives**, RCW 70.74.022(1); held: unambiguous language of statute requires a showing that defendant had all of the components necessary to assemble an explosive or improvised device, insufficient here; because statute is a strict liability offense, there can be no attempted unlawful possession of explosives; III.

***State v. Hepton***, 113 Wn.App. 673, 683-84 (2002)

In **reckless burning** case, evidence that defendant put beaker of methamphetamine-laced ether on a burner plus defendant's admission that he had experience with these chemicals is sufficient to prove that he "knowingly" caused a fire; III.

***State v. Wiggins***, 114 Wn.App. 478 (2002)

Defendant is arrested with empty gasoline can and glass bottle with gauze, tells police he was going to buy gas to throw Molotov cocktail at girlfriend's home, is convicted of **unlawful possession of explosives**, RCW 70.74.022(1); held: because statute requires possession all of the components necessary to make an explosive or "improvised device," evidence was insufficient to convict, as defendant lacked gasoline; III.

***State v. Freigang***, 115 Wn.App. 496 (2002)

To rule on *Knapstad* motion, trial court may consider an affidavit of a prosecuting attorney and is not bound by the limitations of CR 56(e), but court may only consider admissible evidence referenced in the affidavit, *see: State v. Carter*, 138 Wn.App. 350, 362-67 (2007); II.

***State v. Johnson***, 115 Wn.App. 890 (2003)

Female officer arrests defendant who threatens to stab her and uses female genital invective, defendant is convicted of **malicious harassment**, RCW 9A.36.080(1), based on gender; held: evidence was sufficient to find that defendant's conduct was motivated by officer's gender, *see: State v. Read*, 163 Wn.App. 853 (2011); III.

***State v. Berube***, 150 Wn.2d 498, 509-10 (2003)

In **homicide by abuse** case, instruction that states "there must be a causal connection between death…and…criminal conduct…so that the act done *or omitted* was a proximate cause" does not state that defendant had a legal duty to act, *see: State v. Jackson*, 137 Wn.2d 712, 727-30 (1999), and thus was proper; 6-3.

***State v. C.G.***, 150 Wn.2d 604 (2003)

Respondent threatens to kill her teacher, at **felony harassment** trial teacher testifies the threat caused him concern that respondent might harm him, does not testify that he was afraid he would be killed; held: RCW 9A.46.020(2) requires proof of reasonable fear that the threat to kill will be carried out, absent some evidence of fear of death is insufficient to sustain conviction of felony, reversing *State v. C.G.*, 114 Wn.App. 101 (2002); 9-0.

***State v. Liden***, 118 Wn.App. 734, 739-40 (2003)

Defendant is convicted of **bail jumping** for failure to appear for trial on 9 August, notice to defendant stated that trial was on the "[w]eek of August 6;" held: state failed to prove that defendant knew the exact date on when to appear, *State v. Cardwell*, 155 Wn.App. 41, 47-48 (2010), thus dismissed, *State v. Johnston*, 66 Wn.App. 297 (1992), *cf.:* 2001 amendments to RCW 9A.76.170, *State v. Aguilar*, 153 Wn.App. 265, 276-78 (2009); II.

***State v. Warfield***, 119 Wn.App. 871, 884-86 (2003)

Evidence is sufficient to establish knowing possession of unlawful firearm where state proves that defendant leased apartment where firearm was found in master bedroom closet, closet had defendant's clothes, defendant was sporadically residing there; II.

***State v. Kilburn***, 151 Wn.2d 36 (2004)

Student tells a friend in class that he'll bring a gun to school tomorrow and shoot everyone, at trial claims he was joking, is convicted of **felony harassment**; held: First Amendment does not require that state prove defendant actually intended to carry out the threat, *see: State v. J.M.*, 144 Wn.2d 472 (2001), *State v. Kiehl*, 128 Wn.App. 885; test of true threat: a statement made in a context wherein a reasonable person would foresee that the statement would be interpreted as a serious expression of intention to inflict bodily harm, *State v. Williams*, 144 Wn.2d 197, 208-09 (2001), *State v. Hosier*, 124 Wn.App. 696, 708-11 (2004), *aff'd, on other*

*grounds*, 157 Wn.2d 1 (2006), *State v. Johnston*, 156 Wn.2d 355 (2006), *State v. Brown*, 137 Wn.App. 587 (2007), *State v. Meneses*, 149 Wn.App. 707, 713-14 (2009), *aff'd,* 169 Wn.2d 586 (2010), *State v. Schaler*, 169 Wn.2d 274 (2010), *State v. Locke*, 175 Wn.App. 779 (2013), *State v. Boyle*, 183 Wn.App. 1 (2014), *State v. Trey M.*, 186 Wn.2d 884 (2016), *State v. Dawley*, 11 Wn.App.2d 527 (2019); here, considering context of respondent's past relationship with the listener, joking during class, laughing or giggling when comments were made, evidence is insufficient to establish a true threat, *State v. Kohonen*, 192 Wn.App. 567 (2016), *State v. D.R.C.*, 13 Wn.App.2d 818 (2020), *Seattle v. Buford-Johnson*, ___ Wn.App.2d ___, 2021WL6112342 (2021); 5-4.

***State v. Holt***, 119 Wn.App. 712, 722-24 (2004)

In **criminal mistreatment** case, RCW 9A.42.030(1), allowing juveniles to be in presence of meth lab, coupled with testimony of danger of fires and explosions, is sufficient to prove recklessness; II.

***State v. Munson***, 120 Wn.App. 103 (2004)

In **leading organized crime** case, RCW 9A.82.060, where information charges that defendant did intentionally "organize, manage, direct and finance" others with intent to engage in "forgery..., theft..., and possession of a controlled substance," prosecutor need not prove, at least at a bench trial, that defendant committed each of the alternatives, as statute lists alternatives in disjunctive, state may charge in conjunctive and prove disjunctive, *State v. Ford*, 33 Wn.App. 788, 789-90 (1983); III.

***State v. Hernandez***, 120 Wn.App. 389 (2004)

Spitting in patrol car, resulting in 15 minutes cleaning of the car, does not establish "tampering" or creating a substantial risk of interruption or impairment of officer's service to the public, RCW 9A.48.080(1)(b), thus evidence was insufficient to convict of **malicious mischief 2°**, distinguishing *State v. Gardner*, 104 Wn.App. 541 (2001), *cf.: State v. Turner*, 167 Wn.App. 871, 876-79 (2012); III.

***State v. Askham***, 120 Wn.App. 872, 881-85 (2004)

**Stalking**, RCW 9A.46.110, does not include snooping through complainant's trash, as that is not "following;" to prove stalking by harassment, state need not call an expert to testify that the conduct would cause a reasonable person to suffer emotional distress, as it is "within the ken" of the average fact finder, *State v. Marshall*, 39 Wn.App. 180, 184 (1984); III.

***State v. Downing***, 122 Wn.App. 185, 192-93 (2004)

Constitutional validity of underlying charge is not a defense to **bail jumping**, *see: State v. Gonzales*, 103 Wn.2d 564 (1985); II.

***State v. Carver***, 122 Wn.App. 300 (2004)

Forgetting to appear is not a defense to **bail jumping**, RCW 9A.76.170(1) since statute was amended in 2001, *cf.: State v. Bryant*, 89 Wn.App. 857, 873 (1998); II.

***State v. McGary***, 122 Wn.App. 308 (2004)

To prove **criminal mistreatment 2°**, RCW 9A.42.030(1), state must prove that defendant created an imminent and substantial risk of death or great bodily harm by withholding basic necessities of life; children in a drunk driver's car is insufficient; II.

***State v. Fredrick***, 123 Wn.App. 347 (2004)

In **bail jumping** case, affirmative defense of "uncontrollable circumstances," RCW 9A.76.170(2), 9A.76.010(4), does not negate *mens rea* element, thus state need not disprove the defense, *State v. Lively*, 130 Wn.2d 1, 10-11 (1996), *see also: State v. White*, 137 Wn.App. 227 (2007); II.

***State v. Gray***, 124 Wn.App. 322 (2004)

In assault 3° on **health care provider**, RCW 9A.36.031(1)(h), absence of evidence that victim, a nursing assistant, was certified under Title 18 RCW or that hospital was licensed under ch. 70.41 RCW, is insufficient to prove the crime; III.

***State v. Hosier***, 124 Wn.App. 696, 708-11 (2004), *aff'd, on other grounds*, 157 Wn.2d 1 (2006)

Leaving note expressing a desire to kidnap and abuse is sufficient to establish **harassment**, RCW 9A.46.020, where recipient of note changed her behavior to protect herself, establishing a "true threat," *State v. Williams*, 144 Wn.2d 197, 207-08 (2001), *State v. Trey M.*, 186 Wn.2d 884 (2016), *see: State v. J.M.*, 101 Wn.App. 716 (2000), *aff'd,* 144 Wn.2d 472 (2001), *State v. Schaler*, 169 Wn.2d 274 (2010), *State v. Locke*, 175 Wn.App. 779 (2013), *State v. Dawley*, 11 Wn.App.2d 527 (2019); II.

***State v. Williamson***, 131 Wn.App. 1 (2004)

Defendant asks one witness to tell child rape complainant that if she doesn't recant her parents will go to jail, is convicted of **witness tampering**, RCW 9A.72.120; held: because a person tampers with a witness if s/he attempts to alter the witness' testimony, *State v. Whitfield*, 132 Wn.App. 878, 897-98 (2006), asking one person to tell another to recant coupled with a false explanation of adverse consequences is sufficient to convict, *State v. Gill*, 103 Wn.App. 435, 445-47 (2000), distinguishing *State v. Rempel*, 114 Wn.2d 77 (1990); II.

***State v. Kiehl***, 128 Wn.App. 88 (2005)

Defendant tells his counselor that he will kill a judge, counselor informs judge, at trial jury is instructed that to convict state must prove defendant threatened to kill the judge, placing counselor in fear that the threat would be carried out, judge does not testify at trial; held: **harassment** statute requires that the person threatened must find out about the threat and the person threatened must be in fear, *State v. J.M.*, 144 Wn.2d 472 (2001), *see: State v. Morales*, 174 Wn.App. 370 (2013), thus evidence here was insufficient; III.

***State v. Berry***, 129 Wn.App. 59 (2005)

Defendant passes a check using identification of a fictitious person, is convicted of **identity theft**, former RCW 9.35.020, *amended by* LAWS OF 2004, ch. 272, § 2; held: to commit identify theft, the defendant must possess or use the means of identification of a real person, thus evidence is insufficient to convict, *cf.: State v. Sells*, 166 Wn.App. 918 (2012), *State v. Fedorov*, 181 Wn.App. 187, 193-96 (2014); I.

***State v. Huber***, 129 Wn.App. 499 (2005)

In **bail jumping** case, state offers documents, calls no witnesses to identify defendant; held: name identity alone is insufficient, *State v. Kelly*, 52 Wn.2d 676, 678 (1958), *State v. Brezillac*, 19 Wn.App. 11, 12 (1978), *State v. Ceja Santos*, 163 Wn.App. 780 (2011), *cf.: State v. Binder*, 106 Wn.2d 417, 419, 721 P.2d 967 (1986), *see: State v. Sapp*, 181 Wn.App. 910 (2014), *State v. Goggin*, 185 Wn.App. 59, 70-71 (2014), defense counsel's introduction of defendant to jury is not evidence; II.

***State v. Bellerouche***, 129 Wn.App. 912, 915-16 (2005)

Defendant is excluded from an apartment complex, is caught on driveway, convicted of **trespass**; held: while driveway may be impliedly open to the public for some other purpose, it is not open to defendant, who was excluded; I.

***State v. Presba***, 131 Wn.App. 47, 55-57 (2005)

Defendant gives name of friend to officer at traffic stop to avoid ticket and arrest, is convicted of **identity theft**, RCW 9.35.020(1); held: to convict of identity theft, state need not prove that defendant used financial information or sought monetary gain; while statement of legislative intent addresses "improperly obtaining financial information," RCW 9.35.001, that does not override unambiguous elements section of statute, *State v. Alvarez*, 74 Wn.App. 250, 258 (1994); I.

***State v. Johnston***, 156 Wn.2d 355 (2006)

Defendant threatens to blow up airport, is charged with **threat to bomb**, RCW 9.61.160, trial court fails to define "true threat;" held: while evidence was sufficient, trial court erred in not instructing jury that a "true threat" is a statement "in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted…as a serious expression of an intention to inflict bodily harm," *State v. Williams*, 144 Wn.2d 197, 207-08 (2001), *Watts v. United States*, 22 L.Ed.2d 664 (1969), *see: State v. Tellez*, 141 Wn.App. 479 (2007), *State v. Schaler*, 169 Wn.2d 274 (2010); whether a true threat is made is determined under an objective standard that focuses on the speaker, *State v. Kilburn*, 151 Wn.2d 36, 44 (2004), *State v. Trey M.*, 186 Wn.2d 884 (2016), *see: State v. Kohonen*, 192 Wn.App. 567 (2016), *State v. D.R.C.*, 13 Wn.App.2d 818 (2020); 8-1.

***State v. Godsey***, 131 Wn.App. 278, 290-91 (2006)

Defendant is asked by police if he is Ray Godsey, denies it, is convicted of making a false statement, RCW 9A.76.175; held: even though police know arrestee is who he says he's not, jury could reasonably infer defendant knew it was "reasonably likely" police would rely on this false information; III.

***State v. Paulson***, 131 Wn.App. 579, 585-88 (2006)

Shooting a dog multiple times with an arrow is sufficient to prove undue suffering and intent for purposes of **animal cruelty**, RCW 16.52.205(1); II.

***State v. Donery***, 131 Wn.App. 667 (2006)

**Persistent prison misbehavior**, RCW 9.94.070(1), requires that state prove that defendant lost all potential earned early release time in Department of Corrections; state need not prove that defendant lost all good time in the county jail prior to commitment to DOC, *see: Pers. Restraint of Williams*, 121 Wn.2d 655 (1993); DOC lacks power to take away good time awarded by a county jail; II.

***State v. Burke***, 132 Wn.App. 415 (2006)

Physical behavior such as a fighting stance is sufficient to prove a **threat**, RCW 9A.76.180(3)(a), *State v. Pinkney*, 2 Wn.App.2d 574 (2018); a fighting stance plus profanities directed at a police officer is insufficient to prove an intent to influence officer's behavior for purposes of proving **intimidating a public official**, RCW 9A.76.180(1), *State v. Montano*, 169 Wn.2d 872 (2010), *State v. Moncada*, 172 Wn.App. 364 (2012), *cf.: Seattle v. Meah*, 165 Wn.App. 453 (2011); an assault on a law enforcement officer does not, without more, imply an attempt to influence that officer's behavior; II.

***State v. Colquitt***, 133 Wn.App. 789 (2006)

Defendant agrees that, should he fail drug court, trial court can admit police report that included a field test, is terminated from drug court, RCW 2.28.170, is found guilty; held: defendant did not enter a "stipulation to the sufficiency of the evidence," did not confess, no lab test report was admitted, thus evidence was insufficient to convict, *State v. Roche*, 114 Wn.App. 424 (2002), *cf.: State v. Hernandez*, 85 Wn.App. 672, 675 (1997), *Pers. Restraint of Delmarter*, 124 Wn.App. 154 (2004), *see also: State v. Drum*, 168 Wn.2d 23, 33-38 (2010); 2-1, II.

***State v. Wolf***, 134 Wn.App. 196 (2006)

In unlawful **possession of firearm** case, defendant stipulates that he had previously been convicted of a serious offense, *Old Chief v. United States*, 136 L.Ed.2d 574 (1997), parties agree that fact of stipulation would be included in a jury instruction, stipulation is not read to jury during presentation of evidence, defense claims insufficiency; held: by stipulating, defense waived the right to put the state to its burden of proof on the element to which he stipulated, *State v. Stevens*, 137 Wn.App. 460, 466 (2007); I.

***State v. King***, 135 Wn.App. 662, 668-72 (2006)

After conviction in court, defendant slams books on table, blurts "this is bullshit," tells arresting officer "I'll see you but you won't see me," is convicted of **intimidating a witness**, RCW 9A.72.110(3)(a)(ii); held: in context, evidence was sufficient that defendant's statement was a true threat, *State v. Meneses*, 149 Wn.App. 707, 713-14 (2009), *aff'd*, 169 Wn.2d 586, 590-92 (2010), *see: State v. Kilburn*, 151 Wn.2d 36 (2004), *State v. D.R.C.*, 13 Wn.App.2d 818 (2020), jury instruction defining threat per RCW 9A.72.110(3)(a) is adequate, court need not define "true threat," *but see: State v. Schaler*, 169 Wn.2d 274 (2010), *State v. Atkins*, 156 Wn.App. 799-804-07 (2010), *State v. Dawley*, 11 Wn.App.2d 527 (2019); III.

***State v. O'Neal***, 159 Wn.2d 500 (2007)

Evidence is sufficient to find **firearm enhancement** to drug case where police find a loaded gun in an open bedroom closet, all three co-defendants lived in the trailer for two months,

more than twenty firearms were in the residence, some loaded, *State v. Simonson*, 91 Wn.App. 874, 883 (1998); 7-2.

***State v. Brown***, 137 Wn.App. 587 (2007)

In **intimidating a judge** case, RCW 9A.72.160, defendant tells third party that he has thought about shooting the judge; held: an expression of thoughts of harming a judge in the past is not a "true threat," *State v. Knowles*, 91 Wn.App. 367, 373 (1998), *State v. Johnston*, 157 Wn.2d 355, 360-61 (2006), to use force in the future, thus dismissed, *cf.: State v. Ozuna*, 184 Wn.2d 238 (2015); II.

***State v. Carter***, 138 Wn.App. 350, 362-67 (2007)

A pre-trial motion to dismiss, *State v. Knapstad*, 107 Wn.2d 346 (1986), requires a sworn statement in support and in response, *see: State v. Freigang*, 115 Wn.App. 496, 502 (2002), *State v. Jackson*, 82 Wn.App. 594, 608 (1996), trial court errs in considering unsworn e-mail; II.

***State v. Tellez***, 141 Wn.App. 479 (2007)

In telephone harassment case, trial court must define "**true threat**" in an instruction, *State v. Kilburn*, 151 Wn.2d 36, 43 (2004), *State v. Williams*, 144 Wn.2d 197, 207 (2001), *State v. Schaler*, 145 Wn.App. 628 (2008), but need not include it in to convict instruction nor must it be pled in information, *distinguishing State v. Johnston*, 156 Wn.2d 355 (2006), *see: State v. Warren*, 161 Wn.App. 727, 748-56 (2011); I.

***State v. Brown***, 162 Wn.2d 422, 428-30 (2007)

In witness intimidation case, victim testifies that defendant threatened her to prevent her from talking to police but information charged only that defendant threatened to influence her testimony, RCW 9A.72.110(a); held: evidence is insufficient to support the only alternative charged; 5-4.

***State v. Lilyblad***, 163 Wn.2d 1 (2008)

**Telephone harassment**, RCW 9.61.239 (2003), requires state to prove that at the time defendant made the telephone call he formed the intent to harass, *Elonis v. United States*, 575 U.S. 723, 135 S.Ct. 2001, 192 L.Ed.2d 1 (2015), overruling, in part, *Redmond v. Burkhart*, 99 Wn.App. 21 (2000), *State v. Alphonse*, 142 Wn.App. 417 (2008), *see: State v. Alphonse*, 147 Wn.App. 891 (2008), *cf.: State v. Meneses*, 169 Wn.2d 586, 590-92 (2010); affirms *State v. Lilyblad*, 134 Wn.App. 462 (2006); 9-0.

***State v. McReynolds***, 142 Wn.App. 941 (2008)

In **luring** case, RCW 9A.40.090, defendant following and signaling to a girl to come over to him, braking and continuing near her is insufficient, *cf.: State v. Homan*, 181 Wn.2d 102 (2014), 191 Wn.App. 759 (2015); after mistrial is granted, trial court dismisses for insuffiency, state appeals; held: oral declaration of a mistrial does not change posture of the case, dismissal acts as an acquittal, *State v. Matuszewski*, 30 Wn.App. 714, 717-18 (1981), *State v. Motycka*, 21 Wn.App. 798, 802 (1978), *State v. Dye*, 81 Wash. 388, 391 (1914); III.

***State v. O'Meara***, 143 Wn.App. 638 (2008)

Trial court grants pretrial motion to dismiss use of drug paraphernalia charge, RCW 69.50.412, finding that there was no evidence that defendant used a pipe found in a baggie along with marijuana and a playing card tin containing marijuana; held: a rational trier of fact could conclude that defendant used the tin for storage of marijuana and used the pipe to smoke marijuana, in violation of the statute, thus dismissal was error; II.

***State v. Clay***, 144 Wn.App. 894 (2008)

A credit card that has not been activated is an "access device," RCW 9A.56.010(1)(2006), *but see: State v. Rose,* 175 Wn.2d 10 (2012), *see: State v. Schloredt*, 97 Wn.App. 789 (1999), *State v. Sandoval,* 8 Wn.App.2d 267 (2019); I.

***State v. Vant***, 145 Wn.App. 592, 598-600 (2008)

Protection order forbids defendant from knowingly coming within one mile of his niece or her residence, defendant goes to niece's mother's home, testifies he "assumed" she lived there, niece testifies she lived there off and on but was not present when defendant was arrested; held: reasonable trier of fact could find defendant violated order; II.

***State v. Garcia***, 146 Wn.App. 821 (2008)

Defendant is observed shoplifting by security guards who chase him into another store where second store's security guard attempts to detain defendant who shoves that guard, is convicted of **assault 3º** with intent to resist lawful detention, RCW 9A.36.031(1)(a); held: absent agency relationship, second guard had no authority to lawfully detain shoplifter from another store, RCW 9A.16.080, 4.24.220; absent evidence of a breach of the peace, a private citizen has no authority to perform a citizen's arrest, *see: Stone Mach. Co., v. Kessler*, 1 Wn.App. 543750, 754-57 (1970), *Seattle v. Camby*, 104 Wn.2d 49, 53 (1985), remanded for judgment on lesser assault 4º; 2-1, III.

***State v. Chang***, 147 Wn.App. 490, 498-504 (2008)

A stolen check may be an **access device**, RCW 9A.56.010(1), to support a charge of possession of stolen checking account numbers; I.

***State v. Meneses***, 149 Wn.App. 707 (2009), *aff'd,* 169 Wn.2d 586 (2010)

In **telephone harassment** case, RCW 9.61.230, instruction that "a person commits the crime of telephone harassment when he, with intent to harass, makes a telephone call" clearly implies that defendant initiated the call with intent to harass, *State v. Lilyblad*, 163 Wn.2d 1 (2008); a threat to kill accompanied by racial slurs, derogatory statements is a "true threat."

***State v. Mitchell***, 149 Wn.App. 716, 719-24 (2009), 169 Wn.2d 437 (2010)

In **criminal mistreatment** case, RCW 9A.42.005, 9A.42.020(1), a severely malnourished 4-year old is both a dependent person and a child and has a physical disability because he was too weak to walk, state need not use the word "disability" during testimony; I.

***State v. Sloan***, 149 Wn.App. 736 (2009)

Defendant calls his estranged wife's home, another answers the phone, wife hears defendant threaten to kill her; held: state need not prove that the intended party answered the

telephone, merely that she heard the intended threat, thus evidence is sufficient to prove **telephone harassment**, RCW 9.61.230, *State v. Tellez*, 141 Wn.App. 479 (2007); II.

***State v. Haines***, 151 Wn.App. 428, 433-37 (2009)

**Stalking**, RCW 9A.46.110(1), requires two, not six, separate acts of harassment; I.

***State v. Lakotiy***, 151 Wn.App. 699, 713-15 (2009)

Sufficient evidence of **constructive possession** exists where (1) defendant is standing next to a stolen car in a small storage unit, (2) the car had been partially disassembled and ignition removed, (3) several parts of the car were on the ground next to the car, (4) another individual in the storage unit was working on the stolen care, and (5) when defendant saw the officers he reached back and placed a set of jiggler keys and an ignition on the rear of the vehicle, establishing more than mere proximity, *cf.:* *State v. Spruell*, 57 Wn.App. 383 (1990), *State v. Alvarez*, 105 Wn.App. 215 (2001), *State v. Cote*, 123 Wn.App. 546 (2004), *State v. Enlow*, 143 Wn.App. 463 (2008); I.

***State v. Aguilar***, 153 Wn.App. 265, 276-79 (2009)

In **bail jumping** case, defendant is ordered to appear on a certain date, warrant is issued for another reason before that date so court doesn't convene, defendant testifies that he didn't appear and did not intend to appear; held: evidence is sufficient to prove bail jumping when defendant is (1) held for, charged with or convicted, (2) has knowledge of a subsequent appearance and (3) fails to appear, *State v. Downing*, 122 Wn.App. 185, 192 (2004), whether or not court actually convened on date defendant was to appear is not an element, *cf.:* *State v. Liden*, 118 Wn.App. 734, 739-40 (2003), *State v. Cardwell*, 155 Wn.App. 41, 47-48 (2010), *State v. Slater*, 197 Wn.2d 660 (2021); to convict instruction should state the particular crime, but need not classify the charge; III.

***State v. Thompson***, 153 Wn.App. 325 (2009)

Defendants videotape incompetent vulnerable adult, coaching her to acknowledge that she gave her estate to defendants who present the tape at a guardianship hearing, state charges defendants with **witness tampering** and theft and uses the tape at the criminal trial without calling victim; defendants, knowing that victim suffered from dementia, had her sign over her estate; held: a witness need not be called as a witness nor need the witness be competent to support a charge of witness tampering, state need not prove that defendants knew victim was competent, video meets necessary definition of "witness" and "testimony;" I.

***State v. Drum***, 168 Wn.2d 23 (2010)

Defendant enters drug court, signing stipulation to police reports and agreeing that the facts in the reports are sufficient to establish guilt, when defendant opts out of drug court trial court finds him guilty; held: courts are not bound by stipulations to legal conclusions, thus stipulation to sufficiency is not binding, court must still determine if evidence establishes guilt beyond a reasonable doubt; 5-4.

***State v. Kintz***, 169 Wn.2d 537 (2010)

Defendant repeatedly drives up to complainants, stopping to talk or driving past, each time breaking contact and then repeating, is convicted of **stalking**, RCW 9A.46.110; held: conduct was sufficient to establish requirement of "two or more separate occasions," RCW 9A.46.110(6)(e), *cf.: Seattle v. Meah,* 165 Wn.App. 453 (2011), *State v. Johnson,* 185 Wn.App. 655, 666-70 (2015), and is sufficient to prove both "harassed" and "followed" alternatives, *State v. Haines,* 151 Wn.App. 428 (2009) , *State v. Whittaker,* 192 Wn.App. 395 (2016); affirms *State v. Kintz,* 144 Wn.App. 515 (2008); 7-2.

***State v. Montano***, 169 Wn.2d 872 (2010)

Absent evidence of an intent to influence police officers, threats by themselves are insufficient to prove **intimidating a public official**, RCW 9A.76.180, *State v. Burke,* 132 Wn.App. 415 (2006), *State v. Moncada,* 172 Wn.2d 364 (2012), *cf.: State v. Ozuna,* 184 Wn.2d 238 (2015); 6-3.

***State v. Coleman***, 155 Wn.App. 951, 963-64 (2010)

In **bail jumping** case, defendant is ordered to appear on a date at 9:00 a.m., state proves defendant did not appear as of 8:30 a.m.; held: nothing established that defendant was absent at the time specified on the notice, thus evidence is insufficient, *cf.: State v. Hart,* 195 Wn.App. 449, 460 (2016), *abrogated, on other grounds, State v. Burns,* 193 Wn.2d 190 (2019); I.

***State v. Cross***, 156 Wn.App. 568, 580-85 (2010)

Defendant tells officer "I would kick your ass if I wasn't in handcuffs," is convicted of **harassment**; held: a conditional threat is sufficient to prove harassment, RCW 9A.46.020(1), *State v. Edwards,* 84 Wn.App. 5 (1996); jury's finding that victim had a reasonable fear that bodily harm could have resulted is sufficient to prove misdemeanor harassment, distinguishing *State v. C.G.,* 150 Wn.2d 604 (2003); 2-1, II.

***State v. Koch***, 157 Wn.App. 20 (2010)

Defendant lives with elderly father who previously accused him of assault, father refuses medical assistance, defendant does not force unwanted care on father, who dies, defendant is convicted of **criminal mistreatment**, RCW 9A.42.020, and manslaughter 2° after trial court declines to instruct jury that use of physical force, absent consent, is assault even if purpose is to provide assistance; held: while the evidence was sufficient to support the conviction, defense was denied due process by failing to instruct jury that presented defendant's theory of the case; 2-1.

***State v. Green***, 157 Wn.App. 833 (2010)

Public school sends parent letter excluding her from the school, parent returns, is charged with **criminal trespass**, trial court declines to admit evidence of the reason for the trespass exclusion; held: exclusion order violated due process as it did not advise defendant of her right to appeal, *see: Mathews v. Eldridge,* 424 U.S. 319, 47 L.Ed.2d 18 (1976), *Bremerton v. Widell,* 146 Wn.2d 561 (2002); state had burden to prove defendant acted unlawfully when entering school property, RCW 9A.52.090(2) and thus had to prove that she had disrupted a classroom procedure or learning activity, RCW 28A.605.020, without which evidence was insufficient to convict; I.

***State v. Williams***, 171 Wn.2d 474 (2011)

Making a false statement to police by itself is insufficient to support a conviction for **obstructing**, RCW 9A.76.020, some conduct is required, *State v. E.J.J.*, 183 Wn.2d 497 (2015); reverses *State v. Williams*, 152 Wn.App. 937 (2009); 9-0.

***State v. Newcomb***, 160 Wn.App. 184 (2011)

Complainant has an easement through defendant's property, defendant bulldozes the easement, trial court dismisses malicious mischief charge; held: an easement is a property interest for purposes of "property of another," RCW 9A.48.010(1), thus damage to the easement is sufficient to prove malicious mischief; II.

***State v. Sweany***, 162 Wn.App. 223 (2011)

To prove arson 1° by causing a fire on "property valued at ten thousand dollars or more with intent to collect insurance," RCW 9A.48.020(1)(b), the value is insurance value not market value; in order to prove market value, evidence is sufficient if price paid exceeds threshold if not too remote in time, *State v. Melrose*, 2 Wn.App. 824, 831 (1970); III.

***State v. Ceja Santos***, 163 Wn.App. 780 (2011)

To prove priors for felony DUI, state offers certified copies of judgments without more; held: name identity alone is insufficient to prove a prior as an element of a crime, *State v. Huber*, 129 Wn.App. 499, 502 (2005), state must show that defendant was the person convicted of the prior offenses, *see: State v. Brezillic*, 19 Wn.App. 11 (1978), *State v. Sapp*, 181 Wn.App. 910 (2014), *State v. Goggin*, 185 Wn.App. 59, 70-71 (2014); III.

***State v. Read***, 163 Wn.App. 853 (2011)

Defendant, angry at receiving a ticket, aggressively advances toward parking lot attendant, yells racial slur, moves very close to her, says "I know where you work," is charged with **malicious harassment**, RCW 9A.36.080, argues that the court must find that victim's race was the primary motivating factor behind a threat; held: evidence is sufficient that defendant made a "true threat," *State v. Kilburn*, 151 Wn.2d 36 (2004), *see: State v. Locke*, 175 Wn.App. 779 (2013), *cf.: State v. Kohonen*, 192 Wn.App. 567 (2016), and that he threatened defendant "because of" her race, *State v. Pollard*, 80 Wn.App. 60 (1995), *State v. Johnson*, 115 Wn.App. 890 (2003); I.

***State v. Budik***, 173 Wn.2d 727 (2012)

Defendant is shot, companion killed, defendant tells police he doesn't know who shot him but names shooter to others, police testify investigation was delayed, is convicted of **rendering criminal assistance 1°**, RCW 9A.76.050, challenges sufficiency; held: deception contemplated by RCW 9A.76.050(4) requires an affirmative act or statement, not mere false disavowals of knowledge, *cf.: State v. Mollett*, 181 Wn.App. 701 (2014), reversing *State v. Budik*, 156 Wn.App. 123, 127-30 (2010); 7-2.

***State v. Steen***, 164 Wn.App. 789 (2011)

Police, lawfully exercising community caretaking function, pound on door of trailer, order anyone inside to come out with hands up, after no response enter through window, find defendant who says he was sleeping and didn't hear, order him to put his hands up, defendant complies, handcuff and place in patrol car, ask for his name which defendant refuses to provide, later find warrant and arrest, defendant is convicted of **obstructing**, RCW 9A.76.020(1); held: while refusal to provide name by itself is not a crime, *State v. Williams,* 171 Wn.2d 474, 484 (2011), a reasonable jury could find that defendant's failure to come out with hands up was willful, could infer that he heard and decided not to open door, which impeded officers performing their community caretaking duty, *see: Shoreline v. McLemore,* 193 Wn.2d 225 (2019); defendant does not have a First or Fifth Amendment privilege not to provide his name; while prosecutor should not have argued to jury that refusal to give his name is substantive evidence of obstructing, trial court's instruction that a defendant's mere refusal to answer question is not sufficient to arrest for obstructing cured the error; 2-1, II.

***State v. Stribling***, 164 Wn.App. 867, 872-77 (2011)

Asking a minor to take nude photos of herself, which she refuses to do, is insufficient to prove **sexual exploitation of a minor**, RCW 9.68A.040(1)(b) (1989); 2-1, II.

***Seattle v. Meah***, 165 Wn.App. 453 (2011)

Defendant bothers complainant on a bus, follows her when she disembarks and continues to bother her for two blocks, is convicted of **stalking**; held: stalking ordinance, SMC § 12A.06.03 (2008), requires proof that defendant "repeatedly harasses or follows another person," and defines repeatedly as "two or more separate occasions," here there was one following, thus evidence is insufficient, *State v. Johnson,* 185 Wn.App. 655, 666-70 (2015), *cf.: State v. Whittaker,* 192 Wn.App. 395 (2016), distinguishing *State v. Kintz,* 169 Wn.2d 537 (2010); 2-1, I.

***State v. Toscano***, 166 Wn.App. 546 (2012)

Defendant intentionally blocks an intersection to hinder a police officer chasing a relative, is convicted of **intimidating a public servant**, RCW 9A.76.180 (2011); held: blocking an intersection is not a form of communication, necessary to establish a true threat, distinguishing *State v. Burke,* 132 Wn.App. 415, 417-18 (2006); 2-1, III.

***State v. Kirwin***, 166 Wn.App. 659 (2012)

Defendant-mother removes children from jurisdiction, depriving father of court-ordered visitation, is charged with **custodial interference** under prong prohibiting denying access to parent having physical custody, RCW 9A.40.060(1) (1998), to convict instruction addresses only depriving parent of visitation, RCW 9A.40.060(2); held: where state presents sufficient evidence of the offense in the to convict instruction but not the crime charged in the information, remedy is dismissal with prejudice; 2-1, III.

***State v. Strong***, 167 Wn.App. 206 (2012)

Threat to disclose victim-correction officer's violation of non-fraternization policy, which could result in discharge, unless paid money is **extortion 2°**, RCW 9A.56.130 (2002), does not punish speech protected by First Amendment; III.

***State v. Thompson***, 169 Wn.App. 436, 475-77 (2012)

Victim is beaten by defendant when he intervenes in a sexual assault on another victim, jury finds beating of intervenor was for **sexual motivation**; held: trier of fact could have found that a purpose in beating intervenor was for sexual gratification in his conduct involving the women; I.

***State v. Wooten***, 178 Wn.2d 890 (2013)

For purposes of **malicious mischief**, purchaser of land under a real estate contract is not an exclusive owner, "property of another" is property in which the actor possesses anything less than exclusive ownership, RCW 9A.48.010(1)(c) (2002); 5-4.

***State v. Moncada***, 172 Wn.App. 364 (2012)

Threats plus resisting arrest are insufficient to prove **intimidating a public officer**, RCW 9A.76.180 (2011), *State v. Montano,* 169 Wn.2d 872, 879 (2010), *State v. Burke*, 132 Wn.App. 415, 422 (2006), as there must be some evidence independent of the threat itself to establish an attempt to influence the public servant's official action; III.

***State v. Morales***, 174 Wn.App. 370 (2013)

In **harassment** case, defendant tells Diaz that he will kill Farias, Diaz tells Farias, information accuses defendant of threatening Farias who was placed in fear, to convict instruction states that defendant placed "Diaz &/or Farias" in reasonable fear; held: while harassment may lie where either the person threatened or the person to whom defendant communicates the threat is placed in reasonable fear, *State v. J.M.*, 144 Wn.2d 472, 488 (2001), here the information does not charge defendant with placing Diaz in fear, thus he was tried on an uncharged alternative theory requiring reversal; 2-1, III.

***State v. Benitez***, 175 Wn.App. 116, 123-26 (2013)

In bench trial, state need not prove **surplusage** charged in information as law of the case doctrine does not apply to a bench trial, *State v. Hawthorne*, 48 Wn.App. 23, 27 (1984), *see: State v. Johnson,* 188 Wn.2d 742 (2017); II.

***State v. Locke***, 175 Wn.App. 779, 788-96 (2013)

In threats against governor case, RCW 9A.36.090 (2011), (1) an email identifying the sender's city as "Gregoiremustdie" and stating a desire for the governor to witness a family member raped and murdered and that governor had put the state in the toilet is not a **true threat** as it is "more in the nature of hyperbolic political speech," at 791 ¶20; (2) calling governor a "gender specific epithet" and stating she should be burned at the stake reaches only "the margins of a true threat" due to passive and impersonal phrasing, and is thus protected speech, *see: State v. Schaler,* 169 Wn.2d 274, 283-84 (2010), *State v. Kilburn,* 151 Wn.2d 36 (2004), *State v. Kohonen,* 192 Wn.App. 567 (2016), *State v. D.R.C.,* 13 Wn.App.2d 818 (2020); (3) message that governor must die and inviting public to her public execution, coupled with defendant's later acknowledgement of a recent shooting of a congresswoman, is sufficient to establish a true threat, *cf.: Seattle v. Buford-Johnson,* ___ Wn.App.2d ___, 2021WL6112342 (2021); 2-1, II.

***State v. Davis***, 176 Wn.App. 849 (2013)

Defendant Nelson places firearm in a bag, puts bag on counter in her own residence, makes firearm available for her nephew, who killed police officers and who she knows has been shot; held: defendant had dominion and control over her own residence and the firearm while in her residence, *State v. Cantabrana*, 83 Wn.App. 204 (1996), and physical custody, while brief, which is the definition of actual possession, *State v. Jones,* 146 Wn.App. 328, 333 (2002), sufficient for jury to find **possession of stolen firearm**; defendant Eddie, in response to killer's inquiry "where's the gun?" replies the gun is on a counter and hands it to slayer; held: sufficient to establish Eddie could immediately reduce the gun to actual possession, thereby exercising dominion and control and constructively possessing it in spite of brief actual possession, distinguishing *State v. Callahan,* 77 Wn.2d 27 (1969); defendant Douglas is in defendant Eddie's car and Nelson's home where the gun was located, no evidence that he handled it even momentarily; held: apart from proximity, no evidence established that Douglas had dominion and control over the car, premises or the gun, thus insufficient to establish possession, *State v. Jones, supra. at* 333, *State v. Callahan, supra.*, *State v. Spruell*, 57 Wn.App. 383 (1990), *State v. Cote*, 123 Wn.App. 546 (2004), *State v. Enlow*, 143 Wn.App. 463 (2008); 2-1, II.

***State v. Hendrickson***, 177 Wn.App. 67, 77-78 (2013)

A threat to blow up a person that does not target a particular location does not constitute a **threat to bomb**, RCW 9.61.160(1) (2003); III.

***State v. Quintanilla***, 178 Wn.App. 173 (2013)

A loan of money with expectation that it be repaid is sufficient to establish an extension of credit for purposes of **extortionate means to collect extensions of credit**, RCW 9A.82.040 (2001); III.

***State v. K.L.B.***, 180 Wn.2d 735 (2014)

A transit "Fare Enforcement Officer" employed by a private security firm, uniformed, authorized to issue civil citations is not a public servant for purposes of making a false statement to a public servant, RCW 9A.76.175 (2001), *cf.*: State v. Graham, 130 Wash.2d 711, 719 (1996), *State v. Stephenson*, 89 Wn.App. 794, 808–09, (1998), *State v. Hendrickson*, 177 Wn.App. 67, 75, 311 P.3d 41 (2013); 5-2.

***State v. France***, 180 Wn.2d 809 (2014)

Defendant threatens lawyers from jail, in felony harassment trial court defines "threat" to include "intent immediately to use force" as well as "threatened … to do any act … intended to harm …physical safety," RCW 9A.04.110(28) (2011), defendant could not have immediately used force, on appeal defendant maintains that definition became law of the case which state had to prove, *State v. Allen*, 176 Wn.2d 611, 626 (2013), *State v. Stevens*, 158 Wn.2d 304, 309–10 (2006); held: multiple definitions of statutory terms do not necessarily create either new elements or alternate means, *see: State v. Smith*, 159 Wn.2d 778, 785 (2007), *State v. Linehan*, 147 Wn.2d 638, 646 (2002); an instruction that provides for ten definitions of threat do not create ten alternative means, *State v. Marko*, 107 Wn.App. 215, 218–19 (2001), *State v. Makekau*, 194 Wn.App. 407 (2016), *State v. Tyler*, 191 Wn.2d 205 (2018); 9-0.

***State v. Bauer***, 180 Wn.2d 929 (2014)*)*

Defendant leaves loaded gun on dresser, 9-year old visitor takes gun to school and shoots another student, defendant is charged with assault 3° "[w]ith criminal negligence, causes bodily harm to another person by means of a weapon…," RCW 9A.36.031(1)(d) (2011), trial court denies *Knapstad* motion; held: legal cause in criminal cases is narrower than legal cause in tort cases, *cf.: State v. Harris,* 199 Wn.App. 137 (2017); where gun was taken without owner's permission or knowledge and later used to cause injury legal causation is not satisfied, *McGrane v. Cline,* 94 Wn.App. 925 (1999); reverses *State v. Bauer,* 174 Wn.App. 59 (2013); 6-3.

***State v. Homan***, 181 Wn.2d 102 (2014)

Defendant passes 9 year old on a bicycle, asks if he wants candy at his house, is convicted of **luring**, RCW 9A.40.090; held: invitation to come to a house is sufficient to prove luring, *State v. Dana,* 84 Wn.App. 166 (1996), distinguishing *State v. McReynolds,* 142 Wn.App. 941, 948 (2008), *State v. Homan,* 191 Wn.App. 759 (2015); reverses *State v. Homan,*172 Wn.App. 488 (2012); 7-1.

***State v. Federov***, 181 Wn.App. 187, 193-96 (2014)

At arrest defendant gives police someone else's name and a date of birth one day off for the other person, later give correct birth date, argues evidence is insufficient for identity theft, RCW 9.35.020(1) (2008); held: rational trier of fact could find that defendant used the name and birth date of a "specific, real person;" using fake name to a police officer making arrest is the crime of false statement, RCW 9A.76.175 (2001), which is sufficient to prove intent to commit a crime for purposes of identity theft; I.

***State v. Mollett***, 181 Wn.App. 701 (2014)

Defendant is present when a friend kills a trooper, before slayer is apprehended police interview defendant who says she does not know slayer, had not seen him on the property where she was interviewed that night and was helping a friend move at the time of the shooting, is convicted of **rendering criminal assistance 1º**, RCW 9A.76.050(1) and -.070(1) (2011); held: statements by a defendant that she knew nothing about the crime and did not know the criminal are "mere false disavowals of knowledge," insufficient by themselves to convict of rendering, *State v. Budik,*173 Wn.2d 727, 737 (2012); statements that defendant was not present at the shooting and had not seen defendant that night were affirmative misrepresentations concealing the shooter which are sufficient to convict of rendering; I.

***State v. Hudlow***, 182 Wn.App. 266, 284-89 (2014)

Defendant is charged with delivery of methamphetamine, to convict instruction states defendant knew the substance delivered was meth, no direct evidence establishes defendant's knowledge that the substance was meth; held: while knowledge of the nature of a controlled substance delivered is not an element of delivery, *State v. Nuñez-Martinez,* 90 Wn.App. 250, 255-56 (1998), its presence in the to convict instruction obliges the state to prove that defendant knew it was meth under law of the case doctrine, *State v. Johnson,* 188 Wn.2d 742 (2017), *State v. Hickman,* 135 Wn.2d 97, 102 (1998), *State v. Jusilla,* 197 Wn.App. 908 (2017), *cf.: Musacchio v. United States,* 577 U.S. 237, 136 S.Ct. 709, 193 L.Ed.2d 639 (2016) ; lack of direct

evidence requires reversal, but here there was sufficient circumstantial evidence to defeat a sufficiency dismissal; III.

***State v. Harrington***, 181 Wn.App. 805 (2014)

Defendant displays gun, shuts victim in bedroom, commands she sit on the floor and drink alcohol, shoves her and holds her at gunpoint; held: evidence is sufficient to prove kidnapping 1º, RCW 9A.40.020 (2011), "with intent…to inflict bodily injury" and "to inflict extreme mental distress," distinguishing *State v. Garcia*, 179 Wn.2d 828, 835-44 (2014); "extreme mental distress" is not vague; III.

***State v. Sapp***, 181 Wn.App. 910 (2014)

To prove a prior conviction to elevate communicating with a minor for immoral purposes to a felony, name identity by itself is insufficient, but name identity plus same sex, race and date of birth is sufficient, *State v. Goggin*, 185 Wn.App. 59, 70-71 (2014), distinguishing *State v. Huber*, 129 Wn.App. 499, 502 (2005), *State v. Ceja Santos*, 163 Wn.App. 780 (2011), *but see: State v. Priest*, 147 Wn.App. 662 (2008); III.

***State v. E.J.J.***, 183 Wn.2d 497 (2015)

Yelling at police, without conduct, is insufficient to prove obstructing, RCW 9A.76.020(1) (2001), *State v. Williams*, 171 Wn.2d 474, 485 (2011), *Mountlake Terrace v. Stone*, 6 Wn.App. 161 (1971), *State v. Grant*, 89 Wn.2d 678 (1978), *State v. Hoffman*, 35 Wn.App. 13, 16-17 (1983), "we cannot be certain that [defendant's] conviction was not based on speech alone," at 508, thus reversed and dismissed; 9-0.

***State v. Ozuna***, 184 Wn.2d 238 (2015)

Guards find letter written by defendant threatening a witness in defendant's jail cell, convicted of **intimidating a former witness**, RCW 9A.72.110 (2011); held: a defendant "directs a threat" when he communicates a threat to someone though not necessarily the intended victim, circumstantial evidence here establishes that the threat was communicated to a third party albeit not the corrections officer who confiscated it, *see: State v. Hansen*, 122 Wn.2d 712 (1993), *State v. Anderson*, 111 Wn.App. 317 (2002); 9-0.

***State v. Smith***, 185 Wn.App. 945, 956-58 (2015)

In **failure to register** bench trial, judge can compare signatures and conclude defendant signed letter, *Mitchell v. Mitchell*, 24 Wn.2d 701, 704 (1946); II.

***State v. Muñoz-Rivera***, 190 Wn.App. 870, 881-83 (2015)

In child rape case information alleges victim's initials and, in parentheses, date of birth, defendant maintains that date of birth must be proved per law of the case doctrine even though it's not an element of the crime as it was alleged in the charging document, *State v. Hickman*, 135 Wn.2d 97 (1998), *State v. Johnson*, 188 Wn.2d 742 (2017); held: by using parenthetical date of birth information state did not add the victim's birth date to elements to be proved at trial; III.

***State v. Rich***, 184 Wn.2d 897 (2016)

While proof of DUI alone does not necessarily establish proof of reckless endangerment, RCW 9A.36.050(1), *see: State v. Hanna,* 123 Wn.2d 704 (1994), *State v. Randhawa,* 133 Wn.2d 67 (1997), *State v. Birch,* 183 Wash. 670, 673 (1935), here DUI, defendant's admission she was "tipsy," child in front seat, speeding is sufficient to prove reckless endangerment even absent erratic or dangerous driving; reverses, in part, *State v. Rich,* 186 Wn.App. 632 (2015); 9-0.

***State v. Trey M.***, 186 Wn.2d 884 (2016)

During therapy sessions respondent expresses desire to kill other students, therapist reports it to police, respondent is convicted of **harassment**; held: objective "reasonable person" test remains in place to prove **true threat**, distinguishing *Elonis v. United States*, —– U.S. ——, 135 S.Ct. 2001, 192 L.Ed.2d 1 (2015) and *Virginia v. Black*, 538 U.S. 343, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003); 5-4.

***State v. Whittaker***, 192 Wn.App. 395, 401-09 (2016)

Looking into victim's window or door on two occasions separated by several minutes is sufficient for jury to find the "repeated" element of **stalking**, RCW 9A.46.110(1) (2013), *State v. Kintz,* 169 Wn.2d 537 (2010); I.

***State v. Kohonen***, 192 Wn.App. 567 (2016)

Teenager's tweet that she wants to punch complainant and that complainant must die is not a **true threat**, complainant was not frightened, context is that respondent desired to harm but did not intend to, *State v. Kilburn,* 151 Wn.2d 36, 54 (2004), *State v. Locke,* 175 Wn.App. 779 (2013), *State v. Dawley,* 11 Wn.App.2d 527 (2019), *State v. D.R.C.,* 13 Wn.App.2d 818 (2020), *Seattle v. Buford-Johnson,* ___ Wn.App.2d ___, 2021WL6112342 (2021); I.

***State v. C.B.***, 195 Wn.App. 528 (2016)

Respondent encourages two other teenagers to go to complainant's door, knock, shout racial slur and run away, is convicted of **criminal trespass 2°**; held: while a walkway and front porch is impliedly open to third parties to approach for a "customary purpose," that implied license does not extend to people "dingdong ditching" and yelling racist comments; III.

***State v. Johnson***, 188 Wn.2d 742 (2017)

Defendant is charged with theft 2° of access device, to convict instruction includes an element that requires proof that defendant intended to deprive victim of an access device, statute only requires proof that defendant intended to deprive of property, RCW 9A.56.020(1)(a) (2004); held: **law of the case doctrine** obliges the state to prove all elements contained in to convict instruction, even surplusage, *State v. Hickman,* 135 Wn.2d 97 (1988), *State v. Jusilla,* 197 Wn.App. 908 (2017), *see: State v. Tyler,* 191 Wn.2d 205 (2018); law of the case doctrine is grounded in state common law, thus Washington will not follow *Musacchio v. United States,* 577 U.S. 237,, 136 S.Ct. 709, 193 L.Ed.2d 639 (2016); 9-0.

***State v. Jusilla***, 197 Wn.App. 908 (2017)

In unlawful possession of firearm case to convict instruction includes serial numbers and make and model of guns, state offers no evidence to support serial numbers; held: **law of the case doctrine** requires state to prove what is in the to convict instruction even if they are not elements of the crime, *State v. Hickman,* 135 Wn.2d 97 (1998), *State v. Johnson,* 188 Wn.2d 742 (2017), *see: State v. Tyler,* 191 Wn.2d 205 (2018), *cf.: Musacchio v. United States,* 577 U.S. 237, 136 S.Ct. 709, 193 L.Ed.2d 639 (2016), unless the extra elements are in parenthesis, *State v. Muñoz-Rivera,* 190 Wn.App. 870 (2015); in burglary 1° case under deadly weapon prong evidence is sufficient to prove firearm where state offers photographs of guns, witnesses testify that they found loaded rifles, no one testified that the rifles were operable, but that can be inferred from photos and testimony, *State v. Mathé*, 35 Wn.App. 572 (1983),*State v. Emery,* 161 Wn.App. 172, 197-200 (2011), *affirmed, on other grounds,* 174 Wn.2d 741 (2012), *State v. Tasker,* 193 Wn.App. 575 (2016), *State v. Crowder,* 196 Wn.App. 861, 872-73 (2016); I.

***State v. Harris***, 199 Wn.App. 137 (2017)

Defendant shoots victim five times, ten weeks later victim dies, conflicting testimony is offered as to whether or not cause of death was homicide; held: while actual cause in fact ("but for") is the same in criminal and civil cases, legal causation is narrower than in tort cases, *see: State v. Bauer,* 180 Wn.2d 929 (2014); here, defendant committed an intentional act capable of causing harm which establishes legal causation, as opposed to *Bauer, id.*, where defendant committed a negligent act; I.

***State v. Disney***, 199 Wn.App. 422 (2017)

Defendant complains to police and other agencies that defense counsel in prior case sexually touched him under counsel table in court, after investigation state declines to file charge against defense counsel, charges defendant with **malicious prosecution**, RCW 9.62.010 (2003); held: lack of probable cause is an element of malicious prosecution which state must prove based upon an objective, not a subjective, determination; while defendant's belief in the righteousness of his complaint is evidence it is not dispositive, court may weigh defendant's belief along with other evidence, thus evidence was sufficient to support trial judge's determination; III.

***State v. McClure***, 200 Wn.App. 231 (2017)

Defendant damages property then threatens to damage property of victim further if victim doesn't write a letter stating that no charges would be filed, defendant is convicted of **extortion**, RCW 9A.56.120 (2011); held: "extortion" means knowingly to obtain or attempt to obtain by threat property or services of the owner," RCW 9A.56.110 (1999), because victim would have the ability to receive restitution following a criminal conviction the evidence is sufficient to prove defendant attempted to obtain property; II.

***State v. D.E.D.***, 200 Wn.App. 484, (2017)

Following unlawful detention respondent pulls his arms away to avoid being handcuffed, declines to put his hands behind his back, takes police officer two minutes to handcuff, is convicted of **obstructing**, RCW 9A.76.020 (2001); held: while criminal behavior following an unlawful arrest is not subject to suppression, the obstructing statute does not create an obligation to cooperate with a police investigation and not resist, passively resisting handcuffing when a

suspect is not under arrest does not constitute obstructing a public servant where it does not hinder or obstruct the investigation into whether he was the armed youth the officer was trying to find; 2-1, III.

***State v. Wilson***, 1 Wn.App.2d 73 (2017)

Defendant-stepparent asks five-year old, in bedroom, to "suck on his spot," victim says no, defendant says "go ahead," victim says no again, defendant say okay, is charged with attempted rape of a child; held: in the context of defendant being a caretaker of young victim who "directs" victim to have sexual contact in an isolated place evidence is sufficient to prove attempt, State v. Jackson, 62 Wn.App. 53, 57 (1991), distinguishing *State v. Grundy*, 76 Wn.App. 335 (1994); I.

***State v. Vasquez***, 2 Wn.App.2d 632 (2018)

Defendant runs 63 feet from his vehicle and shoots, is convicted of **drive-by shooting**, RCW 9A.36.045; held: to convict of drive-by shooting defendant must be in the immediate area of the vehicle, 63 feet is too far, *State v. Jameison*, 4 Wn.App.2d 184 (2018), *State v. Rodgers*, 146 Wn.2d 55 (2002); III.

***State v. Pinkney***, 2 Wn.App.2d 574 (2018)

"Threaten," RCW 9A.46.020, includes all threats whether or not verbalized, *State v. Burke*, 132 Wn.App. 415 (2006); here, clenching one's fist in another's face and growling conveys to a reasonable person the intention to cause bodily harm to that person; II.

***State v. Frahm***, 3 Wn.App.2d 812 (2018), *rev. granted*, 2018 WL 5730386

Defendant rear-ends another vehicle which is disabled, citizen seeks to aid injured driver of disabled vehicle, a third vehicle hits the disabled vehicle, propels it into the citizen who dies, defendant is convicted of vehicular homicide; held: intervening act of second collision resulting in death of good Samaritan was reasonably foreseeable and was not a superseding cause; "[i]n determining whether an intervening act is a superseding cause, we consider whether the intervening act (1) 'created a different type of harm,' (2) 'constituted an extraordinary act,' and (3) 'operated independently' of the defendant's actions," *State v. Roggenkamp*, 115 Wn. App. 927, 945 (2003), *aff'd*, 153 Wn.2d 614 (2005); whether an act is a proximate cause and whether there is a superseding, intervening cause are questions of fact for the jury, *State v. Meekins*, 125 Wn.App. 390, 397 (2005); II.

***Shoreline v. McLemore***, 193 Wn.2d 225 (2019)

Bystander calls 911 to report argument in a home, police arrive, hear argument, demand entry, defendant tells police to leave, police break down door, discover no evidence of domestic violence but arrest defendant for obstructing, RCW 9A.76.020; 4-4 decision, thus trial court is affirmed.

***State v. Sandoval***, 8 Wn.App.2d 267 (2019)

A cancelled credit card that was active at the time it was stolen is an access device, RCW 9A.56.010(1) (2017), *: State v. Schloredt*, 97 Wn.App. 789 (1999), *cf.: State v. Rose*, 175 Wn.2d 10 (2012); II.

***State v. Melland***, 9 Wn.App.2d 562 (2019)

Defendant is charged with assault 2°/RCW 9A.36.021(1)(a) (2011)/intentional assault and recklessly cause substantial bodily harm, evidence shows that he grabbed a phone complainant was holding and her finger broke; held: evidence is insufficient to show that defendant knew of a substantial risk and disregarded the risk that a wrongful act may occur, thus state failed to prove recklessness, RCW 9A.08.010(1)(c); I.

***State v. Wilson***, 10 Wn.App.2d 719 (2019)

Defendant observes a dog attacking his dog, shoots the attacker with an arrow, is convicted of animal cruelty after trial court declines to instruct jury as to statutory defense, RCW 16.08.020, holding that the defense only applies to livestock; held: defense of "reasonable necessity" does not apply where a person sees a dog chasing or biting his dog; II.

***State v. Dawley***, 11 Wn.App.2d 527 (2019)

Defendant telling police officer that he would use "Green Beret tactics," "what happens if I came to your house and I put you into killing range with a firearm," is convicted of **intimidating a public servant**, RCW 9A.76.180; held: statute implicates First Amendment but is not unconstitutionally overbroad if limited to a true threat, *see: State v. Stephenson*, 89 Wn.App. 794 (1998); here, defendant made no serious expression of intent to inflict bodily harm thus evidence is insufficient; I.

***State v. D.R.C.***, 13 Wn.App.2d 818 (2020)

In **harassment** case, RCW 9A.46.020(1) and (2)(a), respondent sent a series of text messages to her friends, indicating she wanted to kill her mother, texts were sent in the midst of a mother-daughter fight, were vaguely worded and peppered with smiling emojis and the initialism "LOL," no indication respondent ever meant for her mother to see the texts or that she ever threatened her mother directly, "given these circumstances, the state has not met its burden of proving a true threat," *State v. Kilburn*, 151 Wn.2d 36, 43 (2004), *State v. Kohonen*, 192 Wn.App. 567, 583 (2016), *Seattle v. Buford-Johnson*, ___ Wn.App.2d ___, 2021WL6112342 (2021); III.

***State v. Miller***, 14 Wn.App.2d 469 (2020)

In an attempt to steal from a woman defendant gives investment company his true name but lies and says he is victim's nephew, is convicted of **criminal impersonation,** RCW 9A.60.040(1)(a) (2004); held: falsely using a family relationship is sufficient to convict of criminal impersonation; III.

***State v. Majeed***, 14 Wn.App.2d 868 (2020)

Police officer poses as a minor on-line, defendant agrees to engage in sex, is convicted of **commercial sexual abuse of a minor**, RCW 9.68A.100(1)(b) (2013); held: to prove commercial sexual abuse of a minor state must offer evidence that defendant offered money for sex with a corporeal minor, thus evidence is insufficient, dismissed with prejudice; III.

***State v. Brake***, 15 Wn.App.2d 740 (2020)

2020 amendments to **bail jumping**, RCW 9A.76.170, are not retroactive to cases on direct appeal, *State v. Hoffman16* Wn.App.2d 563 (2021); II.

***State v. Peters***, 16 Wn.App.2d 454 (2021)

Defendant referred sex buyers to specific sex workers and agencies on a web site, scheduling appointments for sex buyers, vouching for would-be customers, and giving them detailed instructions about how to get through screening processes, advising enterprise owners with regard to specific apartment complexes to use and connecting individual sex workers with bookers, and agencies creating and running a website on which agencies and individual sex workers could post advertisements is sufficient to convict of **promoting prostitution 2°**, RCW 9A.88.080(1)(b); I.

***State v. Slater***, 197 Wn.2d 660 (2021)

A single failure to appear in court is not indicative of consciousness of guilt, thus it is error for a court to admit such evidence of **flight**, *State v. Bruton*, 66 Wn.2d 111, 112 (1965), *cf.: State v. Cobb*, 22 Wn.App. 221, 224 (1978), *State v. Jefferson*, 11 Wn.App. 566, 570 (1974); 9-0.

***State v. J.A.V.***, ___ Wn.App.2d ___, 501 P.3d 159 (2021)

To prove **malicious mischief** state need not show who owned the property damaged, just that respondent did not own the property, "property of another" is defined as property in which the actor possesses anything less than exclusive ownership, RCW 9A.48.010(1)(c); III.

***Seattle v. Buford-Johnson,*** ___ Wn.App.2d ___, 2021WL6112342 (2021)

Defendant drives past police officer, yells "fuck the police," point as if he had a gun, is convicted of **harassment**, SMC 12A.06.040a(A)(2); held: while evidence is sufficient to establish that the officer was placed "in objectively reasonable fear of bodily harm," defendant's statement and actions do not establish a **true threat**, rather it was a generalized and political statement of animosity as defendant did not stop driving, stopped immediately at a red light, thus more suggestive of a casual encounter or idle talk than a serious threat, *State v. Kilburn*, 151 Wn.2d 36 (2004), *State v. Kohonen*, 192 Wn.App. 567 (2016), *cf.: State v. King*, 135 Wn.App. 662, 668-72 (2006), *State v. Locke*, 175 Wn.App. 779, 788-96 (2013); I.

***State v. Braun***, ___ Wn.App.2d ___, 2022WL176424 (2022)

**Human trafficking**, RCW 9A.40.100, can be proved even when defendant did not personally use force, fraud or coercion as long as he knew someone would do so; methods of subjugating people's wills includes subtle forms of coercion; III.

***State v. Bergstrom,*** ___ Wn.2d ___, 2022WL244125 (2022)

In **bail jumping** case state need not prove that defendant "knowingly failed to appear," rather only that defendant received notice and had knowledge of the required court dates, reversing, in part, *State v. Bergstrom*, 15 Wn.App.2d 92 (2020); 9-0.

***State v. Meza***, 22 Wn.App.2d 514 (2022)

In felony murder/kidnap case victim is kidnapped, beaten and shot, left in a park after which accomplice returns in ten minutes and kills him, defense maintains kidnapping was complete before the murder; held: kidnapping is a continuing course of conduct crime, a killing that occurs before the victim reaches safety is "in the course of" the kidnapping, *State v. Leech*, 114 Wn.2d 700 (1990), *State v. Gilmer*, 96 Wn.App. 875 (1999), *State v. Dudrey*, 30 Wn.App. 447 (1981); here, a reasonable juror could find that victim was not in a place of safety; I.

***State v. Valdiglesias LaValle***, ___ Wn.App.2d ___, 518 P.3d 658 (2022)

Defendant asks her 10-year old son to poison her ex-husband so that they will be "together forever," is convicted of **criminal solicitation** to commit murder, RCW 9A.28,030(1) (2011); held: the element of criminal solicitation that the person "offers to give…money or other thing of value" to engage in conduct does not apply as a "thing of value" must include things, tangible or intangible, that have monetary value, thus dismissed; I.

***State v. Harrison***, ___ Wn.App.2d ___, 519 P.3d 244 (2022)

As a condition of entry into drug court defendant waives right to appeal sufficiency of facts in written reports, after revocation defendant appeals challenging sufficiency of the evidence contained in the stipulation (clearly insufficient here); held: where defendant knowingly and voluntarily waives the right to appeal he cannot challenge sufficiency on appeal, *but see: State v. Baeza*, 100 Wn.2d 487 (1983); II.

# EXPERT WITNESS
## Appointment

***State v. Griffith***, 91 Wn.2d 572 (1979)

For sanity evaluation, defense expert must be appointed if requested, but purpose of defense expert is not to prepare for examination by court appointed experts per RCW 10.77.060; 9-0.

***State v. Niemczyk***, 31 Wn.App. 803 (1982)

Court need not appoint polygraph expert where state declines to stipulate to admissibility of results and defense fails to lay any foundation on reliability of polygraph evidence; II.

***Seattle v. Gordon***, 39 Wn.App. 437 (1985)

Where defense counsel questions defendant's competency, trial court has considerable discretion to determine whether there was "reason to doubt" defendant's competency, giving considerable weight to counsel's opinion; here, defense counsel raised the competency issue for the first time at trial without an affidavit, making it appear that it was a trial tactic rather than a true concern; once court finds a reason to doubt, then court must appoint experts, RCW 10.77.060(1), *State v. Fedoruk*, 5 Wn.App.2d 317 (2018); *accord: State v. Lord*, 117 Wn.2d 829, 900-3 (1991); I.

***State v. Melos***, 42 Wn.App. 638 (1986)

Indigent sex crime defendant is not entitled to an expert at public expense for psychiatric evidence not necessary for the defense to the charge or to rebut adverse evidence presented by the state at sentencing, *cf.: State v. Young*, 125 Wn.2d 688 (1995); defendant has no right to the psychiatrist of his choice at state expense; I.

***State v. Hermanson***, 65 Wn.App. 450 (1992)

Sex deviancy expert must be appointed for indigent defendant where state agrees to plea bargain a charge so that defendant is eligible for sex offender sentencing alternative, RCW 9.94A.120(7), if amenable to treatment; not an abuse of discretion to deny public funds for expert solely for sentencing purposes, absent state's agreement to reduce the charge if defendant is amenable to treatment; *see: State v. Melos*, 42 Wn.App. 638 (1986), *State v. Tuffree*, 35 Wn.App. 243 (1983), *State v. Aamold*, 60 Wn.App. 175, 177 (1991), *see also State v. Young*, 125 Wn.2d 688 (1995); I.

***Mount Vernon v. Cochran***, 70 Wn.App. 517 (1993)

City appeals appointment of breath test expert for indigent; held: where an expert is appointed solely for trial testimony, and admissibility can be determined at the pre-appointment stage, then the expert services may not be "necessary," CrRLJ 3.1(f), if the evidence is inadmissible, *State v. Sandomingo*, 39 Wn.App. 709, 712 (1985), *State v. Niemczyk*, 31 Wn.App. 803 (1982); admissibility is not an issue, however, where the expert is sought for review and

consultation, *see:* *United States v. Sims*, 617 F.2d 1371, 1375 n. 3 (9th Cir. 1980), thus appointment was not an abuse of discretion; I.

***State v. Young***, 125 Wn.2d 688 (1995)

Decision to order a special sexual offender sentencing alternative sex deviancy expert at public expense is within trial court's discretion, *see:* *State v. Melos*, 42 Wn.App. 638 (1986), *State v. Tuffree*, 35 Wn.App. 243 (1983), *State v. Hermanson*, 65 Wn.App. 450 (1992); 9-0.

***State v. Adams***, 77 Wn.App. 50, 54-5 (1995)

At competency hearing to determine whether court will order antipsychotic medication, defendant requests appointment of a psychologist because state's witness "told a lot of lies," denied by trial court; held: defendant's failure to specify a reason for appointment of expert supports trial court's exercise of discretion; I.

***State v. D.***, 89 Wn.App. 77, 88-90 (1997), *op withdrawn, in part,* *State v. Carol M.D.*, 97 Wn.App. 355 (1999)

Alleged victim of child abuse is inconsistent as to whether she was abused, states at one time she could not remember if she was abused, trial court denies funds for expert testimony on false memory syndrome; held: because reliability of alleged victim's memory was crux of defense, trial court abused its discretion, *see:* *State v. Hoffman*, 116 Wn.2d 51, 90 (1991); III.

***State v. Baggett***, 103 Wn.App. 564, 571-72 (2000)

Defendant, charged with assault 2°, obtains appointed diminished capacity expert, is acquitted of assault but convicted of unlawful display of a weapon as a lesser, court imposes **costs** of expert; held: although defendant was acquitted of the offense for which he retained the expert, where conviction is linked both substantively and procedurally to the same prosecution, court did not exceed its authority, RCW 10.01.160(1), *see:* *State v. Buchanan*, 78 Wn.App. 648, 653 n.3 (1995); III.

***State v. Punsalan***, 156 Wn.2d 875 (2006)

Indigent defendants represented by private counsel may be entitled to expert assistance at public expense, CrR 3.1(f); 9-0.

***State v. French***, 157 Wn.2d 593, 606-09 (2006)

Trial court's refusal to authorize funds to translate an extradition document, CrR 3.1(f), was not an abuse of discretion; 9-0.

***State v. Cuthbert***, 154 Wn.App. 318, 326-36 (2010)

In theft case involving misuse of guardianship funds, court denies defense motion for a forensic accountant at public expense, CrR 3.1(f); held: "simply because defense counsel must rebut a prosecution case built on numbers or mathematical evidence," trial court exercised proper discretion in denying expert, *State v. Heffner*, 126 Wn.App. 803 (2009); here, defendant had an accounting degree and had worked as an auditor thus could have assisted in his own defense without an expert; II.

***State v. McEnroe***, 174 Wn.2d 795 (2012)

Where the court denies a motion to seal a document that is contemporaneously submitted along with the sealing motion, the party may withdraw the underlying document; 7-2.

***Hinton v. Alabama***, 571 U.S. 263, 134 S.Ct. 1081, 188 L.Ed.2d 1 (2014)

Defense counsel, erroneously believing that there was a cap on what could be appropriated to hire an expert retains a one-eyed firearms examiner who is badly impeached on cross; held: while selection of an expert witness is a strategic decision that is "virtually unchallengeable," counsel's error of law which caused him to retain an expert that counsel agreed was inadequate was ineffective assistance; *per curiam.*

***McWilliams v. Dunn***, ___ U.S. ___, 137 S.Ct. 1790, 198 L.Ed.2d 341 (2017)

Two days before capital sentencing hearing court appointed neuropsychologist (employed by the state Department of Mental Health) provides an evaluation and mental health records, defense seeks a recess and an expert to assist defense in evaluating the report and translate the data into a legal strategy, denied by trial court; held: *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985) requires, when threshold criteria are met, the government must provide an indigent defendant with access to a mental health expert who is sufficiently available to the defense, and independent of the prosecution, to effectively "assist in evaluation, preparation, and presentation of the defense, *id.*at 83, 105 S.Ct. 1087, which should include help in preparing direct or cross-examination, denied by trial court here, thus reversed; 5-4.

# FAILURE TO REGISTER AS A SEX/KIDNAPPING OFFENDER

***Pers. Restraint of Estavillo***, 69 Wn.App. 401 (1993)

Sexual offender registration statute, RCW 9A.44.130, is not an *ex post facto* enactment, *see: State v. Handran*, 113 Wn.2d 11, 14 (1989); 2-1, I.

***State v. Clark***, 75 Wn.App. 827 (1994)

Sex offender registration requirement is a collateral consequence of pleading guilty, and failure to advise is not grounds for withdrawal of plea, at 831; I.

***State v. S.M.H.***, 76 Wn.App. 550 (1995)

A juvenile convicted of burglary with sexual motivation, RCW 13.40.135, is not required to register as a sex offender, RCW 9A.44.130; I.

***State v. Heiskell***, 129 Wn.2d 113 (1996)

Juveniles must wait two years before first applying for waiver from sex offender registration requirement, RCW 9A.44.140(4), *see also: State v. Hooper*, 154 Wn.App. 428 (2010); reverses *State v. Heiskell*, 77 Wn.App. 943 (1995); 6-3.

***State v. Munds***, 83 Wn.App. 489 (1996)

Failure to include sex offender registration requirement in judgment and sentence, RCW 10.01.200, may be cured by subsequent notification, *State v. Clark*, 75 Wn.App. 827, 832-3 (1994); defendant need not be on supervision to be obliged to register; III.

***State v. Pray***, 96 Wn.App. 25 (1999)

Sex offender moves out of Seattle home to Bellingham where over seven days he stays with a friend in an apartment and then two motels, is convicted of failure to register, RCW 9A.44.030(1); held: rational trier of fact could find that temporary habitation is a residence, distinguishing *State v. Pickett*, 95 Wn.App. 475 (1999), *see: State v. Prestegard*, 108 Wn.App. 14, 20-22 (2001), *see: State v. Batson*, 194 Wn.App. 326 (2016), *but see: State v. Stratton*, 130 Wn.App. 760 (2005); I.

***State v. Vanderpool***, 99 Wn.App. 709, 712-14 (2000)

Inability to understand the sex offender registration statute is not a defense to failure to register, *State v. Reed*, 84 Wn.App. 379, 384 (1997); III.

***State v. Prestegard***, 108 Wn.App. 14 (2001)

In failure to register as sex offender case, court declines to admit testimony of clerks that sheriff's office routinely lost court documents and therefore lost defendant's registration; held: evidence of the routine practice of an organization, ER 406, is admissible without foundational requirements necessary for establishing a person's habit; II.

***State v. King***, 111 Wn.App. 430 (2002)

Due to apparent statutory numbering error, failure to register as a kidnapper is deemed a sex offense, failure to register as a sex offender is not; held: where inadvertent numbering error undermines express intent of statutes and renders them irrational, court may correct the error where legislative intent is clear and there is no ambiguity, *State v. Albright*, 144 Wn.App. 566 (2008), *see: State v. Taylor*, 97 Wn.2d 724, 729 (1982); I.

***Smith v. Doe***, 155 L.Ed.2d 165 (2003)

Alaska statute requiring sex offenders to register even if convicted of sex offense before sex offender registration statute was enacted does not violate *ex post facto* clause because registration is non-punitive, *State v. Ward,* 123 Wn.2d 488 (1994), *State v. Enquist,* 163 Wn.App. 41 (2011), *State v. Boyd,* 1 Wn.App.2d 501 (2017), *see: Kansas v. Hendricks*, 138 L.Ed.2d 501 (1997); 6-3.

***State v. Stratton***, 130 Wn.App. 760 (2005)

In failure to register case, RCW 9A.44.130, where defendant defaults on mortgage, returns keys but continues to use telephone and postal service at registered residence and lives in his car at the premises, he is not lacking a fixed residence and thus has not violated the statute, distinguishing *State v. Pickett*, 95 Wn.App. 475 (1999); II.

***State v. Nelson***, 131 Wn.App. 175 (2005)

Failure to register as a sex offender, RCW 9A.44.130, is not a sex offense for purposes or requiring a DOC presentence report, RCW 9.94A.500(1); evidence that defendant did not notify sheriff in the county he was last registered that he had ceased to live at his prior registered address is sufficient to convict; II.

***State v. Watson***, 160 Wn.2d 1 (2007)

Failure to register as a sex offender, RCW 9A.44.130(4)(a)(i), which requires that, when a defendant is released from jail following a probation violation and returns to the same home he was living in he must re-register regardless if he previously registered, is not vague, *State v. Smith,* 185 Wn.App. 945 (2015); affirms *State v. Watson*, 130 Wn.App. 376 (2005); 5-4.

***State v. Gossage***, 138 Wn.App. 298, 304-06 (2007)

When sex offender seeks relief from the duty to register, RCW 9A.44.140(3)(a), granting such a petition is wholly discretionary, statute does not specify a procedure, trial court need not hold an evidentiary hearing, *see also: State v. Hooper*, 154 Wn.App. 433 (2010); I.

***State v. Stewart***, 141 Wn.App. 791 (2007)

Evidence is sufficient to convict for failure to register as a sex offender where defendant moves to another county and fails to register within 24 hours even if he provides his CCO with his new county address; III.

***State v. Gossage***, 165 Wn.2d 1 (2008)

When sex offender seeks relief from the duty to register, RCW 9A.44.140(3), trial court must grant a certificate of discharge when there are no outstanding sentencing requirements and the ten year crime-free period has been met, even when there are expired but unpaid legal

financial obligations, RCW 9.94A.760(4), *see:* *State v. McMillan*, 152 Wn.App. 423 (2009), *State v. Porter*, 188 Wn.App. 735 (2015); reverses *State v. Gossage*, 138 Wn.App. 298 (2007); 9-0.

***State v. Albright***, 144 Wn.App. 566 (2008)

Failure to register as a sex offender is a sex offense even though legislature mis-numbered it, *State v. King*, 111 Wn.App. 430 (2002); court may correct to avoid an absurd result, *State v. Taylor*, 97 Wn.2d 724, 729 (1982); II.

***State v. Peterson***, 145 Wn.App. 672 (2008), *aff'd, on other grounds,* 168 Wn.2d 763 (2010)

Information charging failure to register as a sex offender, RCW 9A.44.130, must contain the *mens rea* element of "knowingly;" varying time requirements of when a sex offender must register if one is homeless or moving from a fixed address are not elements of the crime and do not create different means of committing the crime, *State v. Bennett*, 154 Wn.App. 202 (2010); I.

***State v. Werneth***, 147 Wn.App. 549 (2008)

To support a sex offense registration requirement, RCW 9A.44.130(11)(a) (2006), an out-of-state conviction must be legally or factually comparable to a Washington sex offense, *State v. Russell*, 104 Wn.App. 422, 440 (2001); III.

***State v. Drake***, 149 Wn.App. 88 (2009)

Proof of failure to pay rent and landlord's testimony that defendant "ceased to be a resident," is insufficient to establish failure to register as a sex offender, RCW 9A.44.130(1)(a), absent evidence that defendant received notice of termination of tenancy under landlord-tenant act, RCW 59.18.200; III.

***State v. Ramos***, 149 Wn.App. 266 (2009)

RCW 4.24.550(6), which delegates to county sheriffs the authority to assign risk level classifications for some sex offenders for purposes of sex offender registration, violates separation of powers doctrine, *cf.: State v. Brosius*, 154 Wn.App. 714, 718-21 (2010), *see also: State v. Caton,* 163 Wn.App. 659 (2011), *rev'd, on other grounds,* 163 Wn.App. 659 (2011); II.

***State v. Durrett***, 150 Wn.App. 402 (2009)

Homeless sex offender reports one week then fails to report then reports then fails to report again, is convicted of two counts of failure to register, RCW 9A.44.130 (2006); held: requirement that a homeless person report weekly is an ongoing duty rather than a collection of discrete actions, thus unit of prosecution only supports one count, *State v. Green*, 156 Wn.App. 96 (2010); had defendant not reported at all, he could only have been convicted of one count, his partial compliance cannot support more charges; 2-1, I.

***State v. Howe***, 151 Wn.App. 338 (2009)

In a failure to register case, RCW 9A.44.130(1)(a), where state fails to prove that a prior out-of-state conviction amounted to a sex offense in Washington, then the evidence at trial was insufficient and case must be dismissed with prejudice, *State v. Werneth*, 147 Wn.App. 549 (2008); 2-1, II.

***State v. Peterson***, 168 Wn.2d 763 (2010)

Failure to register, RCW 9A.44.130, is not an alternative means crime requiring jury unanimity, *but see: State v. Mason*, 170 Wn.App. 375 (2012); residential status, *e.g.* homelessness, is not an element of the crime; affirms *State v. Peterson*, 145 Wn.App. 672 (2008); 9-0.

***State v. Brosius***, 154 Wn.App. 714 (2010)

In failure to register case, while county sheriff's classification as a level III sex offender which determines frequency and nature of reporting violates separation of powers doctrine, *State v. Ramos*, 149 Wn.App. 266 (2009), Juvenile Rehabilitation Administration's classification, RCW 13.40.217(3), 4.24.5502, 72.09.345(3), is valid as statutes provide adequate procedural safeguards to prevent abuse of administrative discretion; failure to plead that defendant was a level III risk classification is sufficient for an information where challenged for the first time on appeal, *see also: State v. Peterson*, 145 Wn.App. 672, 677-78 (2008), *affirmed*, 168 Wn.2d 763 (2010); II.

***State v. Green***, 156 Wn.App. 96 (2010)

Defendant fails to register for a year, is charged with failure to register on a date 90 days after he last registered, is acquitted, state charges him with failure to register 90 days thereafter, trial court dismisses; held: failure to register is ongoing and continuing until defendant registers again, *State v. Durrett*, 150 Wn.App. 402 (2009); 2-1, II.

***State v. Williams***, 157 Wn.App. 689 (2010)

Sentencing court does not abuse discretion by prohibiting unsupervised contact with minors following conviction for failure to register, distinguishing *State v. Riles*, 135 Wn.2d 326, 352 (1998) , *abrogated on other grounds, State v. Valencia*, 169 Wn.2d 782 (2010); I.

***State v. Enquist***, 163 Wn.App. 41 (2011)

Failure to register/homeless, RCW 9A.44.130 (2006), does not violate *ex post facto* clause, *Smith v. Doe*, 583 U.S. 84, 155 L.Ed.2d 165 (2003), *State v. Ward*, 123 Wn.2d 488 (1994), *State v. Boyd*, 1 Wn.App.2d 501 (2017), or constitutional right to travel, *State v. Smith*, 185 Wn.App. 945, 953-54 (2015); II.

***State v. Caton***, 174 Wn.2d 239 (2012)

Sheriff's office fixes a date for which sex offender is to report, RCW 9.94A.130(7) (2008), *see:* RCW 9.94A.130(5)(b) (2011), defendant reports day after, is charged and convicted of failure to register and sentenced to fifty months; held: statute requires defendant to report every ninety days, not on date set by sheriff, thus evidence is insufficient, reversing *State v. Caton*, 163 Wn.App. 659 (2011); if statute can be read to make it a crime to not report on sheriff's specified date even if offender reports within the 90-day period, it is ambiguous; *per curiam.*

***State v. Smith***, 185 Wn.App. 945 (2015)

Failure to register, RCW 9A.44.130 (2011), is not vague, *State v. Watson*, 160 Wn.2d 1 (2007), and does not impair the constitutional right to travel, *State v. Enquist*, 163 Wn.App. 41, 50-51 (2011); II.

***State v. Batson***, 194 Wn.App. 326 (2016)

Defendant, having lived in a shelter, failed to report weekly to the sheriff, state charges him with failure to register as a sex offender, alleging that he lacked a fixed residence, RCW 9A.44.130(5) (2015), offers evidence about the shelter where defendant had been but offers no evidence that defendant did not have another fixed residence; held: state has the burden of proving that defendant lacked a fixed residence, thus evidence was insufficient; I.

***State v. Wilcox***, 196 Wn.App. 206 (2016)

Failure to register under former RCW 9A.44.030(46)(a)(v) (2015) is not a sex offense if defendant has not been previously convicted of failure to register in violation of RCW 9A.44.132(1) (2015); II.

***State v. Dollarhyde***, 9 Wn.App.2d 351 (2019)

Evidence is insufficient to prove failure to register/homeless, RCW 9A.44.130(6)(b) (2017), where there is no evidence that sheriff made a clear and specific request for an accounting of defendant's whereabouts for a specific week; III.

***State v. Gregg***, 9 Wn.App.2d 569 (2019), *rev. granted*, 194 Wn.2d 1002 (2019)

On plea form paragraph stating that because the offense is a felony firearm offense judge may require registration as a firearm offender, RCW 9.41.335, is crossed out even though it applies, defendant seeks to withdraw plea; held: registration as a firearm offender is a collateral consequence of a guilty plea, misinformation is not grounds to withdraw the plea; I.

***State v. Cathers***, 13 Wn.App.2d 29 (2020)

Sex offender lives at a residence, hires a cat sitter while he travels for twelve days, is convicted of failure to register, RCW 9A.44.130(6)(a) (2017), which obliges notification of the sheriff after three business days of lacking a fixed residence; held: being temporarily gone from a residence for twelve days does not establish that defendant lacks a fixed residence; III.

***State v. Batson***, 196 Wn.2d 670 (2020)

RCW 9A.44.128(10)(h) (2015), requiring a duty to register as a sex offender in Washington if required to register after having been convicted in another state is not an improper delegation, reversing *State v. Batson*, 9 Wn.App.2d 546 (2019); 6-3.

# FELONY FLIGHT/ELUDING

***State v. Sherman***, 98 Wn.2d 53 (1982)

Felony flight statute is not vague; defendant is entitled to instruction that the manner of driving creates only a rebuttable presumption of the mental state of willful and wanton disregard, *State v. Aamold*, 60 Wn.App. 175 (1991); felony flight statute does not violate equal protection, *State v. Zornes*, 78 Wn.2d 9 (1970); 9-0.

***State v. Stayton***, 39 Wn.App. 46 (1984)

Approves "to convict" instruction which does not require that defendant's willful failure to stop occurred while attempting to elude a pursuing police vehicle, *see also: State v. Flora*, 160 Wn.App. 549, 552-56 (2011); II.

***State v. Owens***, 39 Wn.App. 130 (1984)

Trier of fact may determine reasonableness of defendant's actions fleeing police following unlawful attempted traffic stop, *State v. Aydelotte*, 35 Wn.App. 125 (1983); III.

***State v. Brown***, 40 Wn.App. 91 (1985)

Avoiding an unlawful arrest is not a defense to felony flight; III.

***State v. Malone***, 106 Wn.2d 607 (1986)

Idaho police officer chases defendant into Washington, defendant attempts to elude Idaho officer in Washington, is charged with felony flight, RCW 46.61.1024; held: charge is proper, as statute does not restrict terms "police vehicle" or "police officer" to Washington vehicles or officers; 6-2.

***State v. Thomas***, 109 Wn.2d 222 (1987)

In felony flight case where defense was diminished capacity due to voluntary intoxication, failure of defense counsel to offer instruction that circumstantial evidence of defendant's manner of driving only creates rebuttable inference of wanton and willful disregard, *State v. Sherman*, 98 Wn.2d 53 (1982), is ineffective assistance; calling an alcohol counselor trainee who cannot qualify as an expert is ineffective assistance; 5-4.

***State v. Whitcomb***, 51 Wn.App. 322 (1988)

State need not prove that anyone else was endangered by defendant's conduct or that a high probability of harm actually existed; state need only show that defendant engaged in conduct from which a willful or wanton disregard for the lives or property of others may be inferred; I.

***State v. Mitchell***, 56 Wn.App. 610 (1990)

Defense is not entitled to instruction that defendant's objective conduct could be rebutted only by subjective evidence pertaining to defendant's mental state, *State v. Sherman*, 98 Wn.2d 53 (1982), *distinguishing State v. Thomas*, 109 Wn.2d 222 (1987); I.

***State v. Sampson***, 65 Wn.App. 9 (1992)

Defendant's testimony that he skidded 75 feet through intersection and drove three times speed limit but was always in control does not entitle him to *State v. Sherman*, 98 Wn.2d 53 (1982) instruction, as there is insufficient evidence to show that he had no subjective intent to drive in the manner in which he drove; I.

***State v. Delmarter***, 68 Wn.App. 770 (1993)

Instruction that jury may infer reckless driving from speeding is constitutional error, as no rational trier of fact could find, beyond a reasonable doubt, that driving 45 m.p.h. in a 25 m.p.h. zone, without more, is reckless driving, *Schwendeman v. Wallenstein*, 971 F.2d 313 (9th Cir. 1992); *see also: State v. Holcomb*, 31 Wn.App. 398 (1982); *but see: State v. Burt*, 24 Wn.App. 867 (1979); II.

***State v. Gallegos***, 73 Wn.App. 644 (1994)

Intent to elude is not an element of attempting to elude a pursuing police vehicle, RCW 46.61.024, as the word "attempt" in the statute has nothing to do with criminal attempt, at 648-50; refusal to cooperate, RCW 46.61.021, is a statutory lesser of felony flight, *State v. Brown*, 40 Wn.App. 91, 96 n. 3 (1985); here, trial court refused to so instruct, held: test is whether there is evidence supporting an inference that the defendant is guilty of the lesser offense instead of the greater one, *State v. Bergeson*, 64 Wn.App. 366, 369 (1992); I.

***State v. Hudson***, 85 Wn.App. 401 (1997)

Proof that officer was in uniform is a necessary element of attempting to elude, RCW 46.61.024, evidence that police were in a marked vehicle and that defendant knew they were police is insufficient to establish that they were in uniform, distinguishing *State v. Trowbridge*, 49 Wn.App. 360, 362-3 (1987); *accord: State v. Fussell*, 84 Wn.App. 126 (1996), *State v. Ritts*, 94 Wn.App. 784 (1999); I.

***State v. Duffy***, 86 Wn.App. 334, 339-41 (1997)

Lack of probable cause to stop is not a basis to dismiss a charge of attempting to elude, *State v. Mather*, 28 Wn.App. 700, 703 (1981); III.

***State v. Farr-Lenzini***, 93 Wn.App. 453 (1999)

Negligent driving 2º, RCW 46.61.525, is not a lesser of reckless driving, as an infraction cannot be a lesser of a crime, at 466-68; instruction that jury may infer recklessness from speeding was proper here, where evidence established that defendant traveled twice the speed limit, drove erratically, ran a four-way stop and cut across lanes to negotiate a corner, distinguishing *State v. Delmarter*, 68 Wn.App. 770 (1993), at 468-70, *State v. Randhawa*, 133 Wn.2d 67 (1997); II.

***State v. Ritts***, 94 Wn.App. 784 (1999)

Defendant flees from uniformed officers in vehicle with sirens and lights but not marked with lettering or a logo, trial court dismisses; held: RCW 46.61.024 requires that the pursuing vehicle be "appropriately marked," which must include lettering or a logo on the sides, RCW 46.08.065, distinguishing *State v. Trowbridge*, 49 Wn.App. 360, 362-63 (1987), *see: State v. Argueta*, 107 Wn.App. 532 (2001); III.

***State v. Flowers***, 99 Wn.App. 57 (2000)

In attempt to elude case, police observe motorcycle "doing donuts," signal to stop with lights and siren, rider looks at officer, speeds away and flees before apprehension at scene, defendant later confesses; held: evidence supports an inference that someone attempted to elude, thus establishing *corpus;* II.

***State v. Refuerzo***, 102 Wn.App. 341 (2000)

A marked police bicycle is an official police vehicle; I.

***State v. Treat***, 109 Wn.App. 419, 426-27 (2001)

Defendant fails to stop for pursuing police for ¼ mile, stops briefly, accelerates at a deputy and attempts to take off again is sufficient, *State v. Perez,* 166 Wn.App. 55, 60-61 (2012), to prove eluding; RCW 46.61.024 does not require that police vehicle remain moving; III.

***State v. Tandecki***, 153 Wn.2d 842 (2005)

Whether to stop "immediately" is an essential element of attempting to elude, RCW 46.61.024, but is not reversible error if missing from information but raised for the first time on appeal, *State v. Kjorsvik*, 117 Wn.2d 93 (1991); affirms *State v. Tandecki*¸120 Wn.App. 303 (2004); 9-0.

***State v. Ratliff***, 140 Wn.App. 12 (2007)

"Reckless manner" element of eluding, RCW 46.61.024(1) (2003), is properly defined as "a rash or heedless manner, indifferent to the consequences," the same as in vehicular homicide/assault, *State v. Roggenkamp*, 153 Wn.2d 614, 618 (2007), as amendment per LAWS OF 2003, ch. 101, § 1 substituted reckless manner for "wanton or willful disregard," *see: State v. Ridgley*, 141 Wn.App. 771 (2007); III.

***State v. Naillieux***, 158 Wn.App. 630, 643-45 (2010)

"Reckless manner" and "equipped with lights and sirens" are necessary elements of RCW 46.61.024 (2003) which must be pled in information and may be raised for first time on appeal, *but see: State v. Pittman,* 185 Wn.App. 614 (2015); III.

***State v. Flora***, 160 Wn.App. 549, 552-56 (2011)

In eluding case, "willfully" must be defined per RCW 9A.08.010(4); I.

***State v. Hunley***, 161 Wn.App. 919, 924-26 (2011), *affirmed, on other grounds,* 165 Wn.2d 901 (2012)

Reckless driving is not a lesser of attempting to elude per 2003 amendments to RCW 46.61.024, legislatively overruling, in part, *State v. Parker,* 35 Wn.App. 650 (1983), *State v. Gallegos,* 73 Wn.App. 644 (1994); 2-1, II.

***State v. Perez***, 166 Wn.App. 55, 61-63 (2012)

In eluding case, defendant testified that he did not see lights or hear a siren, defense counsel did not request an instruction on the affirmative defense that a reasonable person would not believe the signal to stop was given by a police officer, RCW 46.61.024(2) (2010); held:

defendant must show that counsel's failure to request the instruction was other than tactical, defendant would have had to prove the affirmative defense, state had to prove that conduct was willful; III.

***State v. Chouap***, 170 Wn.App. 114, 122-26 (2012)

Defendant is convicted of two counts of eluding a pursuing police vehicle for recklessly eluding Tacoma police who stop pursuit, later is pursued by Lakewood police and recklessly eludes them; held: each was a separate unit of prosecution; II.

***State v. Williams***, 178 Wn.App. 104 (2013)

Instruction for endangerment enhancement to eluding statute, RCW 9.94A.834 (2008), that uses the words "threatened with physical injury or harm" rather than "endangered" is sufficient; I.

***State v. Pittman***, 185 Wn.App. 614 (2015)

Information charging attempting to elude, RCW 46.61.024(1) (2010), need not include the method by which police signaled to stop regardless of statutory language that "signal…may be by hand, voice, emergency light, or siren," *distinguishing State v. Naillieux*, 158 Wn.App. 630, 643-45 (2010), where raised for the first time on appeal; II.

***State v. Feely***, 192 Wn.App. 751, 759-62 (2016)

Endangerment enhancement to eluding, RCW 9.94A.834 (2008), applies to endangering officers who were not following the defendant; I.

***State v. Winborne***, 4 Wn.App.2d 147, 176-78 (2018)

In felony eluding a police trial, defense motion *in limine* to preclude officer from testifying that defendant drove recklessly or eluded police is denied, officers so testify; held: witness may not testify to opinions of elements of a crime, *State* v. *Farr-Lenzini*, 93 Wn.App. 453 (1999), trial court abused discretion in admitting testifmony; 2-1, III.

***State v. Schilling***, 9 Wn.App.2d 115 (2019)

"Reckless" in eluding statute, RCW 46.61.024(1), is not vague; III.

# FORGERY

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***State v. Mark***, 94 Wn.2d 520 (1980)

Defendant-pharmacist billed DSHS for prescriptions where defendant had filled in physicians' names held not a forgery since it was not purported to be signatures of physicians, rather a false representation; must purport to be the writing of someone other than the true maker to be a forgery; 9-0.

***In re Keene***, 95 Wn.2d 203 (1980)

Unauthorized use of the proceeds of an instrument which was not falsely made or completed is theft, not forgery; 6-2.

***State v. Marshall***, 25 Wn.App. 240 (1980)

No forgery if defendant uses true or actual name; i.

***State v. Sullivan***, 28 Wn.App. 29 (1980)

Defendant cannot be convicted of forgery for offering a written instrument known to be forged if another person presented the instrument on defendant's behalf; presenting a stolen credit card is not forgery unless defendant signs slip; I.

***State v. Brown***, 29 Wn.App. 11 (1981)

State need not prove checks were forged in Washington if it proves they were altered there; I.

***State v. Edwards***, 51 Wn.App. 763 (1988)

Defendant-employee accepts a check from a customer with payee line blank, defendant asserts she will stamp in business name, instead fills in her own name and cashes check; held: forgery, *distinguishing* *In re Keene*, 95 Wn.2d 203 (1980); II.

***State v. Skorpen***, 57 Wn.App. 144 (1990)

Offering a check which defendant did not forge and which he did not know was forged, is not forgery, RCW 9A.60.020(1); a forged check does not, by itself, constitute evidence of a debt, as extrinsic evidence is necessary that payee in good faith paid the check or took it for value; II.

***State v. Scoby***, 117 Wn.2d 55 (1991)

A $1 bill altered to look like a $20 bill by cutting off and pasting corners is written instrument, RCW 9A.60.010; obviousness of alteration and defendant's possession of a $20 bill with identical corners torn off establishes corroborative evidence of guilty knowledge beyond mere possession, *State v. Douglas*, 71 Wn.2d 303 (1967), *State v. Ladely*, 82 Wn.2d 172 (1973); *affirms* *State v. Scoby*, 57 Wn.App. 809 (1990); 9-0.

***State v. Soderholm***, 68 Wn.App. 363 (1993)

While an element of forgery is that defendant lacked authority to sign an instrument, *State v. Conklin*, 79 Wn.2d 805, 808 (1971), "to convict" instruction requiring state to prove the instrument was "falsely made," defined as "the maker did not authorize the making" is sufficient; I.

***State v. Esquivel***, 71 Wn.App. 868 (1993)

Showing an inauthentic alien registration card to police which contains defendant's correct name and signature is sufficient to establish a false document and intent to defraud, *cf.: State v. Vasquez,* 178 Wn.2d 1 (2013), RCW 9A.60.020(1)(b); by showing the cards to officers, defendants misrepresented their legal status in United States, even though they did not misrepresent their legal names; intent to defraud specific officers is not required, *see:* RCW 10.58.040; because the documents' only value would be to falsely represent defendants' right to legally be in United States, there was sufficient evidence to establish forgeries, *State v. Tinajero*, 154 Wn.App. 745 (2009); III.

***State v. Smith***, 72 Wn.App. 237 (1993)

An unsigned check, even if accepted, lacks legal efficacy, and thus cannot support a charge of forgery, *State v. Taes*, 5 Wn.2d 51, 53 (1940); II.

***State v. Aitken***, 79 Wn.App. 890 (1995)

Defendant assumes name of dead person, opens bank account, deposits checks that bounce, submits withdrawal slip, is convicted of forgery; held: assuming a name intending to defraud is forgery, *State v. Lutes*, 38 Wn.2d 475, 480-1 (1951); a withdrawal slip is an instrument for purposes of forgery, *State v. Scoby*, 57 Wn.App. 809, 811 (1990), *aff'd,* 117 Wn.2d 55 (1991); II.

***State v. Sanders***, 86 Wn.App. 466 (1997)

Defendant **forges** ex-wife's signature on a proposed court order, argues that the order is consistent with the judge's ruling, thus state must prove materiality; held: offering a forged document for filing at a public office, RCW 40.16.030, does not require proof that document was not "materially false"; II.

***State v. Young***, 97 Wn.App. 235, 239-40 (1999)

Presenting a post-dated check can constitute forgery, RCW 62A.3-113, *State v. Love,* 176 Wn.App. 911, 922-24 (2013); I.

***State v. Daniels***, 106 Wn.App. 571 (2001)

Store receives telephone call purporting to authorize purchase of a gift certificate that would be picked up by a third party who was authorized to sign the credit card slip and pick up the gift certificate, defendant appears, signs false name, is arrested; held: unauthorized signature on a credit card charge slip is forgery, as the slip has legal efficacy even if not legally valid, *State v. Scoby,* 117 Wn.2d 55 (1991), *State v. Morse,* 38 Wn.2d 927 (1951); I.

***State v. Richards***, 109 Wn.App. 648 (2001)

Defendant signs false name to traffic citation; held: a signed traffic citation is a written instrument with legal efficacy that may be susceptible to forgery, *State v. Bradshaw*, 3 Wn.App.2d 187 (2018); II.

***State v. Simmons***, 113 Wn.App. 29 (2002)

Forgery statute, RCW 9A.60.020(1), which defines forgery as "intent to injure or defraud" does not create alternative means of committing forgery by injuring and defrauding, as the words are employed "in the same sense;" II.

***State v. Williams***, 118 Wn.App. 178 (2003)

Defendant, having been in a collision while impersonating another, retains counsel under false name, signs settlement checks, release of claims, a "client information sheet" for counsel and a chiropractor's patient history form all in false name, is convicted of multiple counts; held: unit of prosecution for forgery is each written instrument falsely made, not a single intent to defraud; II.

***State v. Lampley***, 136 Wn.App. 836, 840-43 (2006)

Defendant is found with a check made out to another with a forged endorsement, trial court instructs jury that the check is worth the face value, RCW 9A.56.010(18)(v)(i), even though the payor had written a replacement check to the payee; held: because the drawer actually signed the check, the check is genuine and the value is its face amount, *State v. Easton*, 69 Wn.2d 965 (1966), *State v. Love*, 176 Wn.App. 911, 922-24 (2013); II.

***State v. Tinajero***, 154 Wn.App. 745 (2009)

Following arrest on a warrant, defendant is found in possession of a forged Social Security card and permanent resident card with a different name, employer testifies that person named on Social Security card worked for him, trial court dismisses **unlawful possession of fictitious identification** charge, RCW 9A.56.320(4), finding that employer was not deprived of anything; held: because employer was obliged to ensure that employees had legal status to work, employer was deprived of information that may have been material to hiring, thus dismissal reversed, *see: State v. Esquival*, 71 Wn.App. 868 (1993), *State v. Vasquez*, 178 Wn.2d 1 (2013); III.

***State v. Vasquez***, 178 Wn.2d 1 (2013)

Defendant is detained for shoplifting, is found to possess fake social security card and fake permanent resident card, is convicted of forgery, Court of Appeals holds that court can infer intent to injure or defraud, asking "why else would [he] have them?," *State v. Vasquez*, 166 Wn.App. 50 (2012); held: while slight corroborating evidence is sufficient to convict a possessor of fake identity cards, *State v. Esquivel*, 71 Wn.App. 868, 870 (1993), *State v. Tinajero*, 154 Wn.App. 745 (2009), because intent to injure or defraud is an element of the crime, mere possession of forged documents is not enough to sustain a forgery conviction; 9-0.

***State v. Ring***, 191 Wn.App. 787 (2015)

In forgery case legal efficacy of the written instrument is not an essential element of the crime,

rather it is definitional, *State v. Johnson*, 180 Wn.2d 295, 300-02 (2014), *State v. Smith*, 13 Wn.App.2d 420 (2020) ,distinguishing *State v. Kuluris*, 132 Wash. 149 (1925); II.

***State v. Bradshaw***, 3 Wn.App.2d 187 (2018)

Escrow agent provides client with a copy of her certificate of insurance which was altered to show a higher amount of liability insurance than the one filed with the state, is convicted of forgery; held: a certificate of liability insurance is a document of "legal efficacy" as long as it is filed with a public office and has legal significant for the public office for purposes of forgery statute, RCW 9A.60.020(1) (2011), and need not be issued by the public office, *State v. Richards*, 109 Wn.App. 648, 650 (2001); a certificate of insurance, as a representation of limits of coverage, has legal efficacy as a foundation for legal liability; I.

***State v. Smith***, 13 Wn.App.2d 420 (2020)

Defendant applies for bank accounts using a social security number belonging to another, obtains money from the account from funds he did not have, is convicted of forgery; held: the "legal efficacy" of a bank account application is a question of law, *State v. Ring*, 191 Wn.App. 787 (2015); bank account application is a written instrument for purposes of forgery, RCW 9A.60.020(1) (2011); II.

***State v. Hillman***, ___ Wn.App.2d ___, 519 P.3d 593 (2022)

Court admits, over authenticity objection, a document where expert witnesses testify that the signature was forged by defendant; held: proponent need not rule out all possibilities inconsistent with authenticity, there need be only sufficient proof that would allow a reasonable juror to find in favor of authenticity, ER 901(b)(2), -(b)(4), a witness need not have been present at the creation of a document in order to authenticate its contents, *see: State v. Sapp*, 182 Wn.App. 910, 914-16 (2014); III.

# GUILTY PLEAS*

***State v. Martin***, 94 Wn.2d 1 (1980)

CrR 4.2(a) confers upon defendant the right to plead guilty at arraignment, unhampered by state's opinions or desires, *State v. Conwell*, 141 Wn.2d 901 (2000), *see: State v.Hubbard*, 106 Wn.App. 149 (2001), *but see*: *State v. Duhaime*, 29 Wn.App. 842 (1981), *State v. Thompson*, 60 Wn.App. 662 (1991), *State v. Ford*, 125 Wn.2d 919 (1995); 7-2.

***State v. Majors***, 94 Wn.2d 354 (1980)

Guilty plea to habitual criminal allegation waives review of sufficiency of the supplemental information (unless issue is jurisdictional), *State v. Hahn*, 100 Wn.App. 391, 394-97 (2000), *see: State v. DeRosia*, 124 Wn.App. 138, 144-45 (2004); *affirms, on different grounds*, *State v. Majors*, 24 Wn.App. 481 (1979); *see: State v. Hilyard*, 63 Wn.App. 413 (1991); 9-0.

***In re Keene***, 95 Wn.2d 203 (1980)

Factual basis for plea must be enough to show there is sufficient evidence for jury to conclude defendant is guilty; can challenge factual basis in personal restraint petition; 6-2.

***In re Teems***, 28 Wn.App. 631 (1981)

Trial court need not make oral inquiries of defendant to determine that he understands nature of offense and consequences of plea as long as a written statement is entered per CrR 4.2 and *In re Keene*, 95 Wn.2d 203 (1980), *State v. Codiga*, 162 Wn.2d 912, 923-24 (2008); factual basis for plea can be made by defense or state on the record; court should, but need not, get affirmance of facts from defendant; III.

***State v. Powell***, 29 Wn.App. 163 (1981)

Factual basis for plea must set forth defendant's conduct and state of mind in sufficient detail for a jury to have concluded that he was guilty of the charge; "I did participate in the first degree murder of Charles Allison" is insufficient; II.

***State v. Pouncey***, 29 Wn.App. 629 (1981)

An equivocal plea can be accepted as long as record establishes a factual basis; II.

***State v. Duhaime***, 29 Wn.App. 842 (1981)

No right to plead guilty to lesser included offense over state's objection, *distinguishing State v. Martin*, 94 Wn.2d 1 (1980); *see*: *State v. Bowerman*, 115 Wn.2d 794 (1990), *disapproved, on other grounds, State v. Condon*, 182 Wn.2d 307, 321-26 (2015), *State v. Hubbard*, 106 Wn.App. 149 (2001); I.

***State v. Haner***, 95 Wn.2d 858 (1981)

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* *See also:* **PLEA BARGAINING**

Pursuant to a plea bargain, state moves to amend information from assault 2° to assault 3° and to delete firearm allegation, trial court denies motion to amend; held: no abuse of discretion for trial court to deny state's motion to amend, as a motion to amend is not part of state's initial decision to prosecute but "implicates" the court, *State v. Lamb*, 175 Wn.2d 121, 130-32 (2012), *see: State v. Agustin*, 1 Wn.App.2d 911 (2018), *but see: State v. Westwood*, 10 Wn.App.2d 543 (2019); 6-3.

***In re Taylor***, 31 Wn.App. 254 (1982)

"I was directly involved in planning, carrying out plan and aftermath of murder of Myrtle Boston" is not adequate factual basis for plea of guilty to murder 1°; 2-1; III.

***State v. Luther***, 31 Wn.App. 589 (1982)

Defendant need not be advised jury must be unanimous for plea to be valid; I.

***State v. Pam***, 31 Wn.App. 692 (1982)

In defendant's habitual criminal trial, defendant's former attorneys are called to testify as to what advice they gave defendant when he pled guilty on the prior offenses; held: by pleading guilty, defendant waives the attorney-client privilege as to the attorney's advice regarding rights defendant waives by pleading guilty; I.

***State v. Perez***, 33 Wn.App. 258 (1982)

Prior to entry of plea, prosecutor agrees not to oppose intensive parole; at plea hearing, no record is made of this agreement; held: harmless here but prospectively noncompliance with CR 4.2(d) is grounds, *ipso facto*, for setting plea aside; II.

***In re Baca***, 34 Wn.App. 468 (1983)

Defendant, pleading guilty to robbery 1° with deadly weapon, informs court he has no prior felonies, court advises defendant of five-year mandatory minimum; after sentencing, court discovers defendant has prior felony, offers to permit defendant to withdraw plea which defendant declines to do, stating he would wait until Parole Board acts; held: no relief as difference between five and seven-and-one-half years is not "alarmingly disproportionate"; III.

***State v. Morley***, 35 Wn.App. 45 (1983)

Defendant pleads guilty to probation recommendation, prior to sentencing is arrested for two misdemeanors, at sentencing prosecutor equivocates, court, at sentencing, states that defendant "committed two more crimes," sentences to prison, motion to withdraw plea is denied; held: court failed to hold evidentiary hearing to permit defense to call witnesses and require state to prove defendant's alleged breach by a preponderance, *In re James*, 96 Wn.2d 847 (1982), *State v. Roberson*, 118 Wn.App. 151 (2003); remanded for a determination whether to allow withdrawal of plea or specific performance "with the defendant's preference to be accorded considerable weight"; court defines specific performance as resentencing before different judge with state bound to make an unequivocal recommendation, *cf.:* State v. Barber,170 Wn.2d 854 (2011); III.

***State v. Osborne***, 35 Wn.App. 751 (1983)

Neither a defendant's subjective fear of trial nor pressures beyond the control of the state will render a guilty plea involuntary; factual basis for plea may be established by the information and affidavit of probable cause; I.

***State v. Norval***, 35 Wn.App. 775 (1983)

Extensive discussion as to what it takes to withdraw an *Alford* plea, *see:* *State v. D.T.M.*, 78 Wn.App. 216 (1995); I.

***In re Hews***, 99 Wn.2d 80 (1983)

Pursuant to a plea bargain, defendant charged initially with felony murder 1° (robbery) pleads to murder 2°, but states in colloquy that he didn't intend to kill anyone; Supreme Court remands, finding *prima facie* case of an invalid plea; because plea was pre-*Wood v. Morris*, 87 Wn.2d 501 (1976), trial court is not limited to record, but may consider extrinsic evidence; 7-2; "I escaped from . . . work release" does provide adequate factual basis for plea, *reversing* *In re Evans*, 31 Wn.App. 330 (1982); 9-0.

***State v. Frazier***, 99 Wn.2d 180 (1983)

Juvenile may not plead guilty in juvenile court when decline hearing is pending; 9-0.

***State v. Malik***, 37 Wn.App. 414 (1984)

Failure to advise defendant prior to plea of guilty of specific immigration consequences is not grounds for withdrawal of plea and is not ineffective assistance of counsel where attorney advised suspect to seek private counsel regarding immigration problems, *see:* *State v. Ward*, 123 Wn.2d 488, 512-15 (1994), *Pers. Restraint of Yim*, 139 Wn.2d 581, 587-90 (1999), *State v. Martinez-Lazo*, 100 Wn.2d 869, 876-78 (2000), *State v. Jamison*, 105 Wn.App. 572, 589-96 (2001), *Pers. Restraint of Ramos*, 181 Wn.App. 743 (2014), *but see:* *Padilla v. Kentucky*, 559 U.S. 356, 176 L.Ed.2d 284 (2010), *State v. Holley*, 75 Wn.App. 191 (1994), *State v. Sandoval*, 171 Wn.2d 163 (2011), *State v. Chetty*, 167 Wn.App. 432 (2012), *Pers. Restraint of Yung-Cheng Tsai*, 183 Wn.2d 91 (2015), *Chaidez v. United States*, 568 U.S. 342, 133 S.Ct. 1103 185 L.Ed.2d 149 (2013), *State v. Littlefair*, 112 Wn.App. 749, 763-69 (2002), *State v. Chetty*, 184 Wn.App. 607 (2014), *Pers. Restraint of Garcia-Mendoza*, 196 Wn.2d 836 (2021); I.

***State v. Dixon***, 38 Wn.App. 74 (1984)

Motion to withdraw guilty plea must be based upon "manifest injustice," *State v. Taylor*, 83 Wn.2d 594, 595 (1974), *but see:* *State v. McDermond*, 112 Wn.App. 239 (2002); *dicta* that there may be somewhat relaxed standard to withdraw *Alford* plea; II.

***State v. Lujan***, 38 Wn.App. 735 (1984)

Where defendant challenges validity of prior plea, burden shifts to state; state meets its burden by offering facially valid plea statement, need not offer colloquy; written plea statement is sufficient for court to accept plea, *In re Keene*, 95 Wn.2d 203 (1980); II.

***In re Barr***, 102 Wn.2d 265 (1984)

Defendant is charged with two counts statutory rape, pleads to one count indecent liberties, at plea colloquy, it was established that victim was 14 years of age, while statute

requires that victim be less than 14; colloquy establishes that defendant was pleading pursuant to a plea bargain; held: where defendant pleads to a substituted charge as a result of a plea bargain, a factual basis for the original charge will suffice to validate the plea, *see*: *In re Hews*, 108 Wn.2d 579, 593 (1987), *State v. Hahn*, 100 Wn.App. 391, 394-97 (2000), *State v. Morreira*, 107 Wn.App. 450, 456 (2001), *State v. Bao Sheng Zhao*, 157 Wn.2d 188 (2006), *State v. Robinson*, 8 Wn.App.2d 629 (2019), *State v. Wilson*, 16 Wn.App.2d 537 (2021); 9-0.

***Ohio v. Johnson***, 81 L.Ed.2d 425 (1984)

Defendant charged with murder pleads guilty over state's objection to manslaughter, whereupon court dismisses murder charge as violation of double jeopardy; held: guilty plea to lesser included offense while charges on greater offense remain pending is not an implied acquittal implicating the double jeopardy clause; 7-2.

***State v. Smith***, 40 Wn.App. 67 (1985)

Factual basis for a plea may be based upon any reliable source, including defendant's statement and prosecutor's recitation of the facts as long as it is part of the record, *State v. Newton*, 87 Wn.2d 363 (1976); I.

***State v. Music***, 40 Wn.App. 423 (1985)

A guilty plea induced by prosecutor's threat to file additional charges is not necessarily impermissibly coercive; here, more severe charges were justified by evidence; prosecutor's offer of proof may establish factual basis for plea even if defendant's statement is insufficient; I.

***State v. Johnson***, 104 Wn.2d 338 (1985)

Defendant's stipulation to facts from which he is found guilty is not equivalent to guilty plea, and trial court need not ensure defendant understands nature of crime and consequences of stipulation, *State v. Mierz*, 127 Wn.2d 460 (1995), *see: State v. Humphries*, 181 Wn.2d 708 (2014); 9-0.

***State v. Austin***, 105 Wn.2d 511 (1986)

Defendant, charged with attempted violation of RCW 69.50.403(a)(3), a gross misdemeanor, but pleads guilty to violation of same statute, a felony, acknowledging that offense is felony; held: guilty plea is affirmed, as defendant knew consequences of plea, even though she pled guilty to an offense greater than that which was charged; 8-0.

***State v. James***, 108 Wn.2d 483 (1987)

While a defendant has an unconditional right to plead guilty at arraignment, *State v. Martin*, 94 Wn.2d 1 (1980), once a not guilty plea is entered, the court may permit state to amend the information irrespective of defendant's desire to change his plea to guilty to original charge, *see*: *State v. Bowerman*, 115 Wn.2d 794 (1990), *disapproved, on other grounds, State v. Condon*, 182 Wn.2d 307, 321-26 (2015), *State v. Thompson*, 60 Wn.App. 662 (1991), *State v. Hubbard*, 106 Wn.App. 149 (2001); 9-0.

***State v. Schaupp***, 111 Wn.2d 34 (1988)

Court grants state's motion to amend from murder 1° to manslaughter 2°, to which defendant pleads guilty; court later vacates plea, over defendant's objection, when it learns state misled court into believing crucial witness was not available; held: where defendant pleads guilty, s/he is entitled to specific enforcement of plea agreement to extent that guilty plea may not be set aside unless there is fraud or wrongdoing by defense, *see:* *State v. Malone*, 138 Wn.App. 587 (2007); 5-4.

***State v. Arko***, 52 Wn.App. 130 (1988)

It is not a breach of a plea bargain for the state to support, on appeal, an exceptional sentence even though the state recommended a sentence within the standard range, unless the parties so agreed as part of the initial plea bargain; I.

***State v. Pizzuto***, 55 Wn.App. 421 (1989)

Confessions to a police officer are not excludable as plea negotiations, ER 410, unless officer has express plea bargaining authority, *see:* *State v. Nowinski*, 124 Wn.App. 617 (2004); I.

***State v. Rhode***, 56 Wn.App. 69 (1989)

Where trial court accepts a guilty plea, it may not later withdraw the acceptance because it doesn't approve of the SRA sentence range; III.

***State v. Mendez***, 56 Wn.App. 458 (1990)

Defendant, without interpreter, enters guilty plea, responding in English to colloquy questions, following which defense counsel states he is satisfied defendant is pleading voluntarily and knowingly; defendant later seeks to withdraw plea, claiming he did not understand sufficient English; held: appointment of interpreter is within discretion of trial court, which has no affirmative obligation to appoint where lack of fluency is not apparent; defendant failed to meet his burden of demonstrating manifest injustice, *State v. Osborne*, 102 Wn.2d 87, 97 (1984), *State v. Teshome*, 122 Wn.App. 705, 714 (2004), CrR 4.2; I.

***State v. Bogart***, 57 Wn.App. 353 (1990)

Counsel, representing defendant charged with robbery 2°, is informed by prosecutor that if defendant doesn't plead by pretrial hearing, charge will be amended to robbery 1°; at time of pretrial hearing, counsel is on vacation, substitute counsel enters plea of not guilty; later, defendant tenders plea to robbery 2°, which is rejected, defendant is convicted of robbery 1°; held: in absence of detrimental reliance, state can revoke plea offer at any time, *State v. Wheeler*, 95 Wn.2d 799 (1981), *State v. Yates*, 161 Wn.2d 714, 740-41 (2007); defense must show defendant relied on bargain in such a way that a fair trial is no longer possible, *State v. Budge*, 125 Wn.App. 341 (2005); here, fair trial was not impeded; "'[t]he Due Process Clause is not a code of ethics for prosecutors; its concern is with the manner in which persons are deprived of their liberty,'" at 358; III.

***State v. Coppin***, 57 Wn.App. 866 (1990)

A prosecutor fulfills his or her duty under a plea agreement by simply making the promised recommendation, and need not advocate it, *State v. Hixson*, 94 Wn.App. 862, 868-69 (1999), *State v. Halsey*, 140 Wn.App. 313 (2007); Division II holds that *United States v.*

*Benchimol*, 85 L.Ed.2d 462 (1985) repudiates *State v. Peterson*, 97 Wn.2d 864 (1982); here, prosecutor recommended, in accordance with plea bargain, maximum end of standard range and referred to prior bad acts of defendant to support recommendation, following which court imposed exceptional sentence; prosecutor's argument did not cross the line in derogation of plea agreement, *In re Palodichuk*, 22 Wn.App. 107 (1978); where prosecutor responds with candor to questions of the judge, no breach of plea agreement occurs, RPC 3.3.

***State v. Skiggn***, 58 Wn.App. 831 (1990)

Where defense counsel errs in calculating sentence range and fills in erroneous prosecutor's recommendation, then defendant is only entitled to withdraw plea, and is not entitled to specific performance, *distinguishing* *State v. Miller*, 110 Wn.2d 528, 532 (1988), *State v. Cosner*, 85 Wn.2d 45 (1975), *State v. Adams*, 119 Wn.App. 373, 379-80 (2003), *see:* *State v. Wilson*, 102 Wn.App. 161 (2000), *State v. Bisson*, 156 Wn.2d 507 (2006), *Pers. Restraint of Murillo*, 134 Wn.App. 521 (2006); I.

***Pers. Restraint of Moore***, 116 Wn.2d 30 (1991)

The sentence imposed pursuant to a plea bargain must be statutorily authorized; a defendant cannot agree to be punished more than the legislature has allowed; 9-0.

***State v. Thompson***, 60 Wn.App. 662 (1991)

Where defendant pleads not guilty, and court later permits state to amend information, defendant does not obtain the unconditional right to plead guilty, *State v. Martin*, 94 Wn.2d 1 (1980), unless amended information is substantially different, *see:* *State v. Conwell*, 141 Wn.2d 901 (2000), *State v. Hubbard*, 106 Wn.App. 149 (2001); II.

***State v. Saas***, 118 Wn.2d 37 (1991)

In determining whether factual basis exists, trial court need not be convinced beyond a reasonable doubt that defendant is guilty, rather a factual basis exists if there is sufficient evidence for jury to conclude that defendant is guilty, *State v. Newton*, 87 Wn.2d 363 (1976), *see: State v. Zumwalt*, 79 Wn.App. 124 (1995), *disapproved, on other grounds, State v. Bisson*, 156 Wn.2d 507, 520 n.5 (2006); plea is voluntary as long as defendant is advised of all direct consequences of plea, need not be advised of collateral consequences, *State v. Barton*, 83 Wn.2d 301, 305 (1980); 9-0.

***State v. Hilyard***, 63 Wn.App. 413 (1991)

Defendant pleads guilty to lesser charge, as part of plea bargain stipulates to exceptional sentence, then appeals, arguing exceptional sentence was not supported by record or justified by law; held: stipulation to a sentence outside SRA standard range is an adequate reason for exceptional sentence by itself, RCW 9.94A.080(3), plea agreement is a waiver of defendant's right to argue for a sentence within sentence range; *see:* *State v. Majors*, 94 Wn.2d 354 (1980); II.

***State v. Watson***, 63 Wn.App. 854 (1992)

"Credit for time served" in a standard SRA plea bargain means credit for time served solely on offense for which defendant is being sentenced, RCW 9.94A.120(13) [recodified RCW

9.94A.505(6) (2010)], *Matter of Allery,* 6 Wn.App.2d 343 (2018); while defendant's misunderstanding of plea agreement, caused by significant mutual mistake between prosecutor and defense, would be grounds for withdrawal of plea, *State v. Miller*, 110 Wn.2d 528 (1988), defendant's misunderstanding of "concurrent" is unreasonable; I.

***State v. Hale***, 65 Wn.App. 752 (1992)

Defendant is misadvised in information as to maximum penalty, after trial she claims she "may have" pled guilty to prosecutor's offer of a lesser offense if she had been correctly advised; held: only on a plea of guilty is court required to advise of correct maximum penalty; defendant's claim that she "may have" pled guilty is insufficient to establish prejudice; III.

***Parke v. Raley***, 121 L.Ed.2d 391 (1992)

In challenge to validity of a guilty plea, defendant's prior experience with criminal justice system is relevant to question of whether he knowingly waived constitutional rights, *Marshall v. Lonberger*, 74 L.Ed.2d 646 (1983); 9-0.

***State v. Koivu***, 68 Wn.App. 869 (1993)

Defendant pleads to reduced charge on prosecutor's agreement to recommend sex offender sentencing option if presentence report indicates he is amenable to treatment and to obtain agreement not to file charges in another jurisdiction; defendant found not amenable to treatment, prosecutor recommends sentence greater than sentence range on original charge, prosecutor does get agreement not to file in other jurisdiction; held: no breach by state, as court was not bound by any recommendation, plea agreement was not illusory; III.

***State v. Olivas***, 122 Wn.2d 73 (1993)

Mandatory DNA blood draw, required by RCW 43.43.754 following plea or conviction of a sex or violent offense, where the result may be used for possible future punishment, does not violate due process, *State v. Surge*, 160 Wn.2d 65 (2007), *see also: State v. Freeman*, 124 Wn.App. 413 (2004), even where defendant was not advised during plea colloquy, as possible future punishment is not a definite or immediate consequence of the testing, and defendant did not seek to withdraw plea, *see: State v. Ward*, 123 Wn.2d 488, 512-15 (1994); 8-0.

***Godinez v. Moran***, 125 L.Ed.2d 321 (1993)

Competency standard for entering plea of guilty is same as competency to be tried, *i.e.*, sufficient present ability to consult with counsel with reasonable degree of rational understanding plus rational as well as factual understanding of proceedings; 7-2.

***Pers. Restraint of Ness***, 70 Wn.App. 817 (1993)

Loss of right to bear arms is a collateral consequence of pleading guilty to a felony about which defendant need not be advised at time of plea; a subsequent federal felon in possession of firearm charge, 18 U.S.C. § 922(g), is not grounds to withdraw prior plea, *cf.: State v. Barton*, 93 Wn.2d 301 (1980); an *Alford* plea is valid as long as the record contains "strong evidence of actual guilt," *In re Montoya*, 109 Wn.2d 270, 280 (1987), from any reliable source, including the prosecutor's statement, *State v. Saas*, 118 Wn.2d 37, 43, *State v. Osborne*, 102 Wn.2d 87, 95 (1984); III.

***State v. Stowe***, 71 Wn.App. 182 (1993)

Defendant enters *Alford* plea upon counsel's erroneous advice that such a plea would not automatically result in discharge from United States Army; held: while voluntary nature of a guilty plea is not automatically destroyed because of erroneous advice by counsel, *McMann v. Richardson*, 25 L.Ed.2d 763 (1970), here record reflects defendant specifically asked about the collateral consequence of dishonorable discharge and relied upon counsel's response in making his decision to plead, thus counsel's performance was deficient, defendant has shown prejudice, defendant's motion to withdraw plea must be granted; *cf.:* *State v. Holley*, 75 Wn.App. 191, 196-9 (1994); II.

***State v. Tracy***, 73 Wn.App. 386 (1994)

Sentencing court may not impose restitution upon a defendant who pleads guilty unless defendant is advised of that possibility prior to entering plea, *State v. Cameron*, 30 Wn.App. 229, 234 (1981), *State v. Raleigh*, 50 Wn.App. 248, 253 (1988); here, guilty plea form advised defendant court will order restitution if crime resulted in injury, but Division III finds that "[p]rior to entering his plea, however, Mr. Tracy was neither advised of the possibility of restitution nor that restitution might be ordered," case involved stabbing, defendant pled guilty to unlawful display of a weapon, RCW 9.41.270; remedy is to strike restitution order, *distinguishing* *State v. Cameron*, *supra*, at 234, *see also:* *State v. Acevedo*, 137 Wn.2d 179, 205-6 (1999).

***State v. Cortez***, 73 Wn.App. 838, 841 (1994)

Where plea form contains immigration consequences, RCW 10.40.200(2), trial court need not orally warn defendant of those consequences, at least where record reflects defendant has read form, *cf.:* *State v. Chervenell*, 99 Wn.2d 309, 314 (1983), *State v. Chetty*, 167 Wn.App. 432 (2012), *see:* *State v. Littlefair*, 112 Wn.App. 749, 763-69 (2002); III.

***State v. Smith***, 74 Wn.App. 844 (1994)

Neither information charging felony murder-assault nor plea statement contain a *mens rea* element, defendant seeks to withdraw plea; held: assault itself indicates an intentional act, *State v. Osborne*, 102 Wn.2d 87, 94 (1984), factual basis adopted at plea colloquy discloses defendant understood assault encompasses intentional conduct; II.

***State v. Clark***, 75 Wn.App. 827 (1994)

Sex offender registration requirement is a collateral consequence of pleading guilty, and failure to advise is not grounds for withdrawal of plea, at 831; motion to withdraw is timely if made within one year of plea, at 830-1, RCW 10.73.090, *State v. Brand*, 65 Wn.App. 166, 170-1, *rev'd on other grounds*, 120 Wn.2d 365, 370 (1992); I.

***State v. Ford***, 125 Wn.2d 919 (1995)

Defendant offers to plead guilty at arraignment, prosecutor's motion to continue in order to provide defense further discovery is granted over defense objection, before next hearing prosecutor amends to a greater charge; held: while defendant has right to plead guilty at arraignment, CrR 4.2(a), *State v. Martin*, 94 Wn.2d 354 (1980), trial court's concern the plea was

not knowing because of defendant's right to review *Brady* material is grounds for continuance, amendment to greater offense later was proper, *see:* *State v. Conwell*, 141 Wn.2d 901 (2000); 6-2.

***State v. D.T.M.***, 78 Wn.App. 216 (1995)

Where defendant enters an *Alford* plea and factual basis rests solely on statement of a witness who later recants by affidavit, trial court must hold a hearing to evaluate victim's credibility, *State v. Scott*, 150 Wn.App. 281, 294-99 (2009), and, if she adheres to facts in recantation under oath, subject to cross-examination, court must permit withdrawal of plea,, *Pers. Restraint of Spencer*, 152 Wn.App. 698 (2009), *see: State v. Rolax*, 84 Wn.2d 836, 838 (1974), *overruled on other grounds, Wright v. Morris*, 85 Wn.2d 899 (1975), *State v. Powell*, 51 Wash. 372 (1909), *State v. York*, 41 Wn.App. 538 (1985), *State v. Landon*, 69 Wn.App. 83 (1993), *State v. Arnold*, 81 Wn.App. 379 (1996), *Pers. Restraint of Crabtree*, 141 Wn.2d 577, 588-89 (2000), *see: Pers. Restraint of Clements*, 125 Wn.App. 634 (2005), *but see: State v. Eder*, 78 Wn.App. 352 (1995), *cf.: Pers. Restraint of Reise*, 146 Wn.App. 772 (2008); III.

***State v. Thomas***, 79 Wn.App. 32, 35-41 (1995)

Defendant pleads guilty to rendering criminal assistance, agrees to testify against co-defendant, state agrees to file no other charges, defendant refuses to testify, state submits defendant breached, defendant seeks to withdraw plea, state objects, insists upon enforcement of agreement and files robbery charge; held: where defendant breaches plea agreement, he has no right to have the agreement enforced, *In re James*, 96 Wn.2d 847, 850 (1982), *State v. Hall*, 32 Wn.App. 108, 110 (1982), *State v. Gilchrest*, 25 Wn.App. 427, 428 (1980); state may elect to enforce or rescind; here, because state chose to enforce the agreement in spite of defendant's breach, state could not properly charge robbery, which must be dismissed, *see: State v. Armstrong*, 109 Wn.App. 458 (2001); II.

***State v. Zumwalt***, 79 Wn.App. 124 (1995), *overruled, in part, State v. Bisson*, 156 Wn.2d 507, 520 n. 5 (2006)

Court should not accept plea statements that parrot the information, as essential facts underlying the elements must be included; defendant may introduce evidence that a facially valid guilty plea was involuntary, state may not rebut defendant's claim with extrinsic evidence unless defendant is raising a collateral attack, at 131 n. 7, *State v. Frederick*, 100 Wn.2d 550 (1983); I.

***In re Paschke***, 80 Wn.App. 439 (1996), *remanded, on other grounds*, 156 Wn.2d 1030 (2006)

A conviction's later use for confinement under the Sexually Violent Predator's Act is a collateral consequence to the prior guilty plea about which defendant need not be advised when he pleaded guilty, *State v. Ward*, 123 Wn.2d 488, 512 (1994), *State v. Gregg*, 9 Wn.App.2d 569, *rev. granted*, 194 Wn.2d 1002 (2019); II.

***State v. Harrell***, 80 Wn.App. 802 (1996)

Motion to withdraw guilty plea is a critical stage requiring counsel or valid waiver of counsel; implicit in trial court's decision to hold a hearing on a motion to withdraw plea is a finding that sufficient facts were alleged to warrant a hearing, *cf.: State v. Quy Dinh Nguyen*, 179

Wn.2d 271 (2014), *but see:* *State v. Winston*, 105 Wn.App. 318 (2001), *State v. Forest*, 125 Wn.App. 702 (2005); I.

***State v. Ross***, 129 Wn.2d 279 (1996)

Mandatory community placement, RCW 9.94A.120, constitutes a direct consequence of a guilty plea, failure to inform defendant renders plea invalid, CrR 4.2(f), *State v. Kissee*, 88 Wn.App. 817 (1997), *State v. Rawson*, 94 Wn.App. 293 (1999), *State v. Hurt*, 107 Wn.App. 816 (2001), *State v. Olivera-Avila*, 89 Wn.App. 320 (1997) (timeliness of motion to withdraw plea), *Pers. Restraint of Isadore*, 151 Wn.2d 294 (2004), *see:* *State v. Acevedo*, 137 Wn.2d 179 (1999), *State v. Aaron*, 95 Wn.App. 298 (1999), *cf.:* *Pers. Restraint of Fawcett*, 147 Wn.2d 298 (2002), *Pers. Restraint of Snively*, 180 Wn.2d 28 (2014), trial court reversed for failing to honor defendant's choice to withdraw plea as remedy; 9-0.

***State v. Arnold***, 81 Wn.App. 379 (1996)

Defendant pleads guilty to assault, factual basis states that defendant had bodily contact without consent, lacks *mens rea* element, victim later recants, defendant seeks withdrawal of plea; held: record establishes that trial court relied upon probable cause certificate in addition to guilty plea statement at time plea was taken, thus factual basis was sufficient, *distinguishing* *State v. Osborne*, 102 Wn.2d 87, 96 (1984); recanting victim is not grounds for withdrawing a non-*Alford* guilty plea, *Pers. Restraint of Crabtree*, 141 Wn.2d 577, 588-89 (2000), *Pers. Restraint of Reise*, 146 Wn.App. 772 (2008), *see also:* *State v. Ice*, 138 Wn.App. 744 (2007), *State v. Scott*, 150 Wn.App. 281 (2009), independent evidence corroborated victim's original allegation, *distinguishing* *State v. D.T.M.*, 78 Wn.App. 216 (1995), trial court may determine credibility of child-victim's recantation, *State v. Macon*, 128 Wn.2d 784 (1996), *Pers. Restraint of Clements*, 125 Wn.App. 634 (2005); I.

***State v. Branch***, 129 Wn.2d 635, 639-44 (1996)

Failure to sign plea form is not grounds to withdraw plea where record establishes fully colloquy and defendant orally ratifies plea; where plea statement is complete and defendant acknowledges in court that he had a copy in front of him, read it and went over it with his attorney, understood it, knew he was giving up the rights listed and had not been threatened or promised anything, then plea is valid, *see:* *In re Keene*, 95 Wn.2d 203, 206-7 (1980), *Wood v. Morris*, 87 Wn.2d 501, 508 (1976); 9-0.

***State v. Wakefield***, 130 Wn.2d 464, 471-5 (1996)

In colloquy prior to entry of plea to reduced charge, trial court tells defendant that, in her opinion, she would be sentenced within standard range, at sentencing court imposes exceptional sentence greater than standard range, defense moves for specific performance; held: where trial court promises a sentence and then reneges, plea is involuntary and defendant may withdraw it; specific performance is not a remedy, as prosecutor did not breach the plea agreement, *Pers. Restraint of Murillo*, 134 Wn.App. 521 (2006), *see: State v. Barber*, 170 Wn.2d 854 (2011); 6-3.

***State v. Kissee***, 88 Wn.App. 817 (1997)

Defendant pleads guilty to luring, RCW 9A.40.090, state agrees as part of bargain to recommend SSOSA, RCW 9.94A.120, if defendant is amenable to treatment, at sentencing court determines that luring is not a sex offense, thus defendant is ineligible for SSOSA, denies motion to withdraw plea; held: SSOSA is a direct sentencing consequence, where all parties erred as to eligibility, plea was not knowing and voluntary, thus defendant is entitled to withdraw plea; II.

***State v. McCollum***, 88 Wn.App. 977, 981-3 (1997)

Defendant seeks to withdraw guilty pleas, claiming ineffective assistance as he claims he only met with counsel twice, did not go over plea agreement, counsel did not investigate adequately, another attorney was present at plea; held: defendant failed to meet burden and overcome presumption that counsel provided reasonable assistance, *see: State v. Quy Dinh Nguyen,* 179 Wn.2d 271 (2014); II.

***State v. Holm***, 91 Wn.App. 429, 434-39 (1998)

Prosecutor mails defense counsel guilty plea offer expiring at omnibus hearing which, if accepted, would result in sentence range of one to three months, defense counsel does not receive offer, never discusses with defendant pleading nor does defense counsel initiate plea bargaining, defendant misses numerous appointments with defense counsel, following trial defendant is sentenced to 75 months; held: under the facts of this case, counsel was not ineffective in failing to negotiate a plea offer or discuss the possibility with defendant; "situations might arise in which defense counsel must engage in plea bargaining without first consulting with the client," at 439, but here, defendant's failure to keep appointments precluded discussions; I.

***Pers. Restraint of Breedlove***, 138 Wn.2d 298 (1999)

Defendant pleads guilty to lesser offense, agrees to exceptional sentence, appeals; held: where trial court approves a plea agreement as consistent with the interests of justice and in conformance with SRA, the stipulation to an exceptional sentence is a substantial and compelling reason justifying an exceptional sentence, *State v. Cooper*, 63 Wn.App. 8 (1991), *State v. Hilyard*, 63 Wn.App. 413 (1991), *but see: State v. Gaines*, 121 Wn.2d 687, 696-703 (2004), *State v. Gronnert*, 122 Wn.App. 214 (2004), trial court must still enter written findings; by agreeing to the sentence, defendant waives right to appeal, *State v. Dillon*, 142 Wn.App. 269 (2007); 5-1-3.

***State v. Stough***, 96 Wn.App. 480 (1999)

Defendant pleads guilty, year later seeks to withdraw plea, at hearing trial court finds that counsel who represented defendant at the plea had been involved in a sexual relationship with her and that she had not understood her plea in part because of the "inappropriate relationship"; held: "a lawyer performs deficiently by commencing a sexual relationship with an accused during the course of the representation," at 487, trial court's finding that defendant did not understand her plea is supported by substantial evidence, thus defendant showed a "manifest injustice" validating withdrawal of plea, CrR. 4.2(f), *State v. Taylor*, 83 Wn.2d 594 (1974), *cf.: State v. McDermond*, 112 Wn.App. 239 (2002); II.

***Pers. Restraint of Yim***, 139 Wn.2d 581, 587-90 (1999)

Where court, in guilty plea colloquy, advises defendant that if he is not a citizen a plea may subject him to deportation, advice is sufficient and subsequent deportation proceedings do not create grounds to withdraw plea, *State v. Malik*, 37 Wn.App. 414 (1984), *Pers. Restraint of Ramos*, 181 Wn.App. 743 (2014), *but see: State v. Sandoval*, 171 Wn.2d 165 (2011), *Padilla v. Kentucky*, 559 U.S. 356, 176 L.Ed.2d 284 (2010); 7-2.

***State v. Conwell***, 141 Wn.2d 901 (2000)

Defendant is charged with manslaughter in district court, negotiates an agreement with prosecutor that he would be charged in superior court with two misdemeanors and, upon a plea of guilty, state would recommend 90-day, concurrent sentences; at arraignment, superior court judge refuses to accept plea agreement, arraigns defendant on the two misdemeanors, court enters pleas of not guilty without objection, state subsequently is allowed to amend to manslaughter, defendant files interlocutory appeal; held: court had authority at arraignment to reject a plea agreement that is not "consistent with the interests of justice and with the prosecuting standards," RCW 9.94A.090, *see: State v. Ford*, 125 Wn.2d 919 (1995), distinguishing *State v. Martin*, 94 Wn.2d 1 (1980), however once court rejected plea agreement, it was obliged to give defendant opportunity to withdraw or maintain plea, entry of not guilty pleas *sua sponte* was error, *see: State v. Hubbard*, 106 Wn.App. 149 (2001); reverses *State v. Conwell*, 96 Wn.App. 457 (1999); 9-0.

***State v. Henderson***, 99 Wn.App. 369 (2000)

At plea, state agrees to recommend 26 months, low end of standard range, which court imposes; DOC requests resentencing due to error of law, parties determine that low end of range is 41 months, state recommends exceptional sentence of 26 months, court imposes 41 months, defendant demands specific performance sentence of 26 months; held: where defendant is not misled by the state and state is not responsible for the mistake, then trial court need not impose the recommended sentence in spite of a contrary statute, *State v. Morley*, 35 Wn.App. 45, 48 (1983), *In re Pers. Restraint of Powell*, 117 Wn.2d 175 (1991), *State v. Bisson*, 156 Wn.2d 507 (2006), *Pers. Restraint of Murillo*, 134 Wn.App. 521 (2006), *see: State v. Barber*, 170 Wn.2d 854 (2011); II.

***State v. Hahn***, 100 Wn.App. 391, 394-97 (2000)

Defendant pleads guilty to assault with deadly weapon enhancement, to wit: hands and feet, at sentencing defendant argues he cannot be sentenced for the enhancement because, under these facts, hands and feet do not meet the statutory definition of a deadly weapon, RCW 9.94A.125; held: where a guilty plea is entered knowingly and voluntarily, factual deficiencies underlying the agreement will not invalidate it, *In re Pers. Restraint of Barr*, 102 Wn.2d 265, 269-71 (1984), *State v. Majors*, 94 Wn.2d 354, 357-58 (1980), *State v. Morreira*, 107 Wn.App. 450, 456 (2001), where defendant receives some benefit from the bargain, *State v. Bao Sheng Zhao*, 157 Wn.2d 188 (2006), *State v. Wilson*, 16 Wn.App.2d 537 (2021), *see also: State v. Zumwalt*, 79 Wn.App. 124 (1995), , disapproved, on other grounds, *State v. Bisson*, 156 Wn.2d 507, 520 n.5 (2006), *but see: Pers. Restr. Of Call*, 144 Wn.2d 315 (2001), *State v. Robinson*, 8 Wn.App.2d 629 (2019); II.

***State v. S.M.***, 100 Wn.App. 401, 412-13 (2000)

Duty to register as a sex offender is a collateral consequence, thus constitution does not require that counsel advise a client about this duty before entering a plea, *State v. Ward*, 123 Wn.2d 488, 513-14 (1994); II.

***Pers. Restraint of Thompson***, 141 Wn.2d 712 (2000)

Defendant who pleads guilty to a crime that did not exist at the time the violation was alleged to have happened may withdraw the plea, remedy is dismissal without prejudice, even if defendant received some benefit of a plea bargain, distinguishing *State v. Majors*, 94 Wn.2d 354, 356-57 (1980); 9-0 (6-3 on remedy).

***State v. Walsh***, 143 Wn.2d 1 (2001)

A challenge to the voluntariness of a plea is not waived if defendant fails to move to withdraw plea and proceeds to sentencing after it becomes clear that the plea is based upon a misunderstanding of the sentence range, *In re Pers. Restraint of Hews*, 99 Wn.2d 80 (1983), *State v. Christen*, 116 Wn.App. 827, 832-33 (2003); 9-0.

***State v. Wilson***, 102 Wn.App. 161 (2000)

At plea, defendant is told by state that he is eligible for work ethic camp; at sentencing, state discovers that a prior VUCSA was for delivery rather than possession, thus defendant ineligible for work ethic camp, court grants specific performance; held: because defendant was aware that the prior VUCSA was for delivery and failed to correct the error, specific performance would be unjust to the state, *State v. Skiggn*, 58 Wn.App. 831, 838 (1990), *see: State v. Codiga*, 162 Wn.2d 912 (2008), *see: State v. Barber*, 170 Wn.2d 854 (2011), remanded for defendant to withdraw plea; I.

***State v. Paul***, 103 Wn.App. 487 (2000)

In written plea statement, sentence range is left blank, defendant acknowledges that there are disputed prior convictions, plea statement provides for prosecutor's recommendation, which was within range if all alleged priors counted, defendant orally acknowledges at plea that while there is a dispute, state will recommend high end and that new convictions may increase range; defendant moves to withdraw plea, prior to hearing pleads guilty in another county to a felony which, at sentencing, increased range; held: omission of range does not render plea involuntary where defendant knew of dispute, was informed of the highest possible range if all priors counted and that subsequent convictions before sentence could affect range, and that the ultimate sentence rested with trial judge; II.

***State v. Hubbard***, 106 Wn.App. 149 (2001)

Juvenile, charged in the alternative with two crimes, waives arraignment, at next hearing offers an *Alford* plea to one of the crimes, trial court finds the plea to be valid, but refuses to accept it because respondent should accept responsibility for his actions; held: because no court rule deems a juvenile arraignment waiver to be a not guilty plea, *cf.:* CrRLJ 4.1(d)(2), then respondent had the right to plead guilty, CrR 4.2(a), *State v. Conwell*, 141 Wn.2d 901, 907 (2000), *State v. Martin*, 94 Wn.2d 1, 4 (1980), and trial court erred in refusing to accept the plea; where charges are in the alternative, respondent may plead "as charged" to either one of the

crimes, distinguishing *State v. Bowerman*, 115 Wn.2d 794, 800 (1990) *disapproved, on other grounds*, *State v. Condon*, 182 Wn.2d 307, 321-26 (2015); III.

***State v. Holgren***, 106 Wn.App. 477, 480-81 (2001)

Where plea agreement indicates that at the time of the plea the sentencing consequences of prior convictions was uncertain and that defendant understands that prosecutor's recommendation could change and that standard range could be higher, then defendant is not entitled to specific performance; I.

***State v. Trickler***, 106 Wn.App. 727, 731-32 (2001)

During voir dire, defendant offers to plead guilty to one charge and proceed to trial on another, court declines to accept plea; held: once defendant has pleaded not guilty, trial court is not required to accept a change of plea, *State v. James*, 108 Wn.2d 483, 488 (1987); III.

***State v. Armstrong***, 109 Wn.App. 458 (2001)

In plea agreement, state agrees not to file other charges, defendant specifically agrees that if he fails to appear for sentencing, state is released from agreement but defendant is bound by plea; defendant fails to appear, court denies state's motion to add charges unless defendant is allowed to withdraw plea; held: where plea agreement is unambiguous and state proves defendant breached, then state is no longer bound by its obligations to forgo additional charges, defendant may not withdraw plea, distinguishing *State v. Thomas*, 79 Wn.App. 32 (1995); 2-1, II.

***United States v. Ruiz***, 153 L.Ed.2d 586 (2002)

Defendant is offered a reduced sentence on an early plea if, *inter alia*, she waives the right to receive impeachment information relating to government witneses, defendant declines, later pleads guilty without a bargain and demands same reduced sentence; held: while a defendant has the right to exculpatory impeachment material prior to a trial, the Fifth, Sixth and Fourteenth Amendments do not require that impeachment material be disclosed prior to a guilty plea, *Pers. Restraint of Delmarter*, 124 Wn.App. 154, 167-69 (2004), as the information is more closely related to the fairness of trial than to the voluntariness of the plea; 9-0.

***Pers. Restraint of Fawcett***, 147 Wn.2d 298 (2002)

At plea hearing, defendant is told he will have "at least" one year of community placement as condition of SSOSA, although law required two years; six months after sentencing, court revokes SSOSA, defendant seeks to withdraw plea; held: in PRP petitioner must show actual prejudice, *cf.: Pers. Restraint of Isadore*, 151 Wn.2d 294 (2004); here, could only have been prejudiced if SSOSA was revoked in the second year of community placement, thus PRP dismissed; 9-0.

***State v. McDermond***, 112 Wn.App. 239 (2002)

Before sentencing, parties discover that standard range is lower than was contemplated at time of guilty plea, trial court allows defendant to withdraw plea; held: trial court need not find a manifest necessity to allow withdrawal of plea, *see: State v. Mendoza*, 157 Wn.2d 582 (2006), *State v. Smith*, 137 Wn.App. 431, 436-39 (2007), *cf.: State v. Taylor*, 83 Wn.2d 594 (1974); test:

(1) was defendant incompletely or inaccurately advised about a consequence of the plea, (2) could the defective advice have materially affected defendant's decision to plead, (3) did the defective advice materially affect defendant's decision?, *see:* *United States v. Dominguez Benitez*, 159 L.Ed.2d 157 (2004), *State v. Weyrich*, 163 Wn.2d 554 (2008); court abolishes dispositive nature of collateral/direct consequence analysis; remanded for trial court to answer question (3) of test, *but see:* *Pers. Restraint of Isadore*, 151 Wn.2d 294 (2004), *see:* *State v. Moon*, 108 Wn.App. 59 (2001), *State v. Christen*, 116 Wn.App. 827 (2003), *State v. Adams*, 119 Wn.App. 373 (2003), *Pers. Restraint of Matthews*, 128 Wn.App. 267 (2005), *State v. Codiga*, 162 Wn.2d 912 (2008); II.

***State v. Littlefair***, 112 Wn.App. 749 (2002)

Counsel, contrary to instructions on plea form, CrR 4.2(g), strikes immigration consequences paragraph, defendant-resident alien pleads guilty, more than a year later, subject to deportation, seeks to withdraw plea; held: time limitation on collateral attack, RCW 10.73.090, can be equitably tolled, *In re Pers. Restraint of Hoisington*, 99 Wn.App. 423 (2000), *State v. Duvall*, 86 Wn.App. 871 (1997), *State v. Robinson*, 104 Wn.App. 657 (2001), *see:* *Bellevue v. Benyaminov*, 144 Wn.App. 755 (2008); *Pers. Restraint of Fowler*, 9 Wn.App.2d (2019), defendant has statutory right to be advised of deportation consequences of plea, RCW 10.40.200, where counsel errs, plea is to be vacated, *Padilla v. Kentucky*, 559 U.S. 356, 176 L.Ed.2d 284 (2010), *State v. Sandoval*, 171 Wn.2d 163 (2011), *Lee v. United States*, 137 S. Ct. 1958, 198 L. Ed. 2d 476 (2017), *Pers. Restraint of Yung-Cheng Tsai*, 183 Wn.2d 91 (2015), *Chaidez v. United States*, 568 U.S. 342, 133 S.Ct. 1103, 185 L.Ed.2d 149 (2013), *Pers. Restraint of Ramos*, 181 Wn.App. 743 (2014), *Lee v. United States*, 137 S. Ct. 1958, 198 L. Ed. 2d 476 (2017), *Pers. Restraint of Garcia-Mendoza*, 196 Wn.2d 836 (2021); 2-1, I.

***State v. Christen***, 116 Wn.App. 827 (2003)

At plea, defendant is told that indicated sentence range could go up or down "if they find additional criminal history," at sentencing range decreases, defendant seeks to withdraw plea; held: where defendant is accurately advised at plea, he assumes the risk that range may go up or down at sentencing, *State v. McDermond*, 112 Wn.App. 239, 248 (2002), *Pers. Restraint of Matthews*, 128 Wn.App. 267 (2005), *State v. Calhoun*, 134 Wn.App. 84, 91-94 (2006), *State v. Codiga*, 162 Wn.2d 912 (2008), and may not withdraw plea on that basis, *see:* *State v. Mendoza*, 157 Wn.2d 582 (2006), *but see: State v. Robinson*, 172 Wn.2d 783 (2011); II.

***State v. Hickman***, 116 Wn.App. 902 (2003)

By stipulating that an out-of-state drug offense is equivalent to a Washington felony, defendant waives the opportunity to challenge comparability on appeal, as defense is not agreeing to a punishment in excess of statutory authority, but rather is resolving a factual issue, *State v. Ross*, 152 Wn.2d 220 (2004), *State v. McDougall*, 132 Wn.App. 609, 612-13 (2006), *State v. Foster*, 140 Wn.App. 266 (2007), *State v. Collins*, 144 Wn.App. 547 (2008), *State v. Birch*, 151 Wn.App. 504, 515-20 (2009), distinguishing *In re Pers. Restraint of Goodwin*, 146 Wn.2d 861 (2002), *cf.:* *State v. Hodges*, 118 Wn.App. 668, 674 (2003), *State v. Malone*, 138 Wn.App. 587 (2007), *State v. Wilson*, 170 Wn.2d 682 (2010); upholds, after remand, *State v. Hickman*, 112 Wn.App. 187 (2002); court is not obliged to compare elements *sua sponte* in spite of stipulation; II.

***State v. Williams***, 117 Wn.App. 390 (2003)

A plea is not invalid if entered pursuant to a plea agreement that includes leniency for a third party or in response to a prosecutor's justifiable threat to prosecute a third party if the plea is not entered, *State v. Cameron*, 30 Wn.App. 229 (1981); prosecutor is obliged to inform the court that a plea bargain is a "package deal," whereupon court must specifically inquire whether defendant was pressured by co-defendant; mere fact that defendant felt pressure to plead guilty to assist the co-defendant is not a basis to withdraw the plea as long as the plea was voluntary and of defendant's own volition; I.

***State v. Adams***, 119 Wn.App. 373 (2003)

At plea, state agrees to recommend Special Sex Offender Sentencing Alternative (SSOSA) if defendant obtains evaluation; at sentencing, state concludes that evaluator was not qualified, defendant is sentenced to prison after which it is determined that defendant was never eligible for SSOSA, defendant seeks to withdraw plea; held: defendant was incorrectly advised about consequence of plea and the defective advice did materially affect decision to plead, *State v. McDermond*, 112 Wn.App. 239, 247 (2002), thus defendant must be allowed to withdraw plea unless state can show that withdrawal would be unfair, *State v. Miller*, 110 Wn.2d 528, 535 (1988), *abrogated, in part*, *State v. Barber*, 170 Wn.2d 854 (2011); because trial court is statutorily prohibited from imposing SSOSA, specific performance is not an option, *State v. Barber*,*supra*.; II.

***United States v. Dominguez Benitez***, 159 L.Ed.2d 157 (2004)

To withdraw a guilty plea because trial court failed to give one of the warnings required by Federal Rule of Criminal Procedure 11, defendant is obliged to show a reasonable probability that, but for the error, he would not have entered the plea, *State v. Aaron*, 95 Wn.App. 298 (1999), *but see: Pers. Restraint of Isadore*, 151 Wn.2d 294 (2004); 9-0.

***State v. Haydel***, 122 Wn.App. 365 (2004)

Trial court grants defendant's motion to withdraw guilty plea to attempted assault 1° because he was not told, at the time of plea, that state had burden to disprove self defense beyond a reasonable doubt; held: because defendant presented no evidence of self defense, state had no obligation to inform him of its burden of proof on his "purely hypothetical claim at the time" of the plea, even though defense had disclosed self defense in omnibus application; I.

***State v. Davis***, 125 Wn.App. 59 (2004)

For purposes of a motion to withdraw a plea, CrR 4.2(f), sentence is not imposed until the judgment and sentence is signed by the court, even if it is orally stated, *State v. Hampton*, 107 Wn.2d 403 (1986), *State ex. Rel. Echtle v. Card*, 148 Wash. 270 (1928); written statement on plea of guilty, CrR 4.2(g), is *prima facie* verification of a constitutional plea and, when supported by a court's oral inquiry on the record, "the presumption of voluntariness is well nigh irrefutable," at 68 ¶17, *State v. Perez*, 33 Wn.App. 258, 261-62 (1982); I.

***State v. Robinson***, 153 Wn.2d 689 (2005)

Defendant is not entitled to counsel at public expense at a motion to withdraw a guilty plea after sentencing, CrR 7.8, unless the trial court makes a preliminary finding that there are grounds for relief, *see: State v. Quy Dinh Nguyen,* 179 Wn.2d 271 (2014); 7-2.

***Pers. Restraint of Clements***, 125 Wn.App. 634 (2005)

Following *Alford* plea, victim recants, defendant moves to withdraw plea, trial court finds that independent evidence supported the plea, recantation was unreliable, denies motion; held: where a plea does not rest solely on retracted evidence, it is within discretion of trial court to allow withdrawal of plea, *see: State v. Rolax*, 84 Wn.2d 836 (1974)(new trial analysis), *cf.: Pers. Restraint of Reise*, 146 Wn.App. 772 (2008), *Pers. Restraint of Spencer*, 152 Wn.App. 698 (2009); an *Alford* plea is valid if it represents a voluntary and intelligent choice among alternative courses of action, *In re Montoya*, 109 Wn.2d 270, 280 (1987); here, if victim was deceitful in her original statement, defendant was aware of it and decided not to challenge it at trial, thus defendant had sufficient information about the facts to satisfy due process; I.

***State v. Forest***, 125 Wn.App. 702 (2005)

Motion to withdraw guilty plea, unaccompanied by an affidavit or sworn declaration, is not properly before the trial court; motion to withdraw a guilty plea is a collateral attack and is thus not a critical stage at which counsel must be appointed, *State v. Winston*, 105 Wn.App. 318 (2001), *but see: State v. Harrell*, 80 Wn.App. 802 (1996); II.

***Bradshaw v. Stumpf***, 162 L.Ed.2d 143 (2005)

Where counsel represents that defendant was advised of the elements of the crime and defendant confirms this as true, then a plea is valid, judge is not required to explain the elements of each charge on the record; 9-0.

***Pers. Restraint of Fonseca***, 132 Wn.App. 464 (2006)

Defendant pleads guilty with DOSA recommendation, at sentencing court determines defendant is ineligible due to prior violent crime; held: DOSA is a direct consequence, ineligibility is a mutual mistake, thus defendant may withdraw plea or "ask for specific performance," *but see: State v. Barber*, 170 Wn.2d 854 (2011); III.

***State v. Bao Sheng Zhao***, 157 Wn.2d 188 (2006)

Where defendant is advised that his plea to a lesser charge is not supported by a factual basis, and where there is a factual basis to support the greater charge, then the plea is valid and defendant's motion to withdraw the plea is properly denied, *Pers. Restraint of Barr*, 102 Wn.2d 265, 269-71 (1984), *State v. Hahn*, 100 Wn.App. 391, 394-97 (2000); 9-0.

***State v. Mendoza***, 157 Wn.2d 582 (2006)

Where a guilty plea is based upon misinformation regarding the direct consequences of a plea, including a miscalculated offender score resulting in a *lower* standard range than anticipated by the parties at the time of the plea, defendant may withdraw the plea based upon involuntariness unless defendant was informed of the miscalculation before sentencing and did not object or move to withdraw the plea, *State v. Moon*, 108 Wn.App. 59 (2001), *State v. Miller*, 110 Wn.2d 528 (1988), *State v. Murphy*, 119 Wn.App. 805 (2002), *see: State v. Blanks*, 139

Wn.App. 543 (2007), *State v. Weyrich*, 163 Wn.2d 554 (2008), *but see: Pers. Restraint of Matthews*, 128 Wn.App. 267 (2005), *State v. Calhoun*, 134 Wn.App. 84, 91-94 (2006), *State v. Knotek*, 136 Wn.App. 412 (2006), *State v. Codiga*, 162 Wn.2d 912 (2008), *see: Pers. Restraint of Toledo-Sotelo*, 176 Wn.2d 759 (2013), *cf.: Pers. Restraint of Stockwell*, 179 Wn.2d 588 (2014), *State v. Buckman*, 190 Wn.2d 51 (2018); 9-0.

***State v. R.L.D.***, 132 Wn.App. 699 (2006)

Respondent pleads guilty to theft of a car, factual basis only supports attempted theft, Division II sets aside plea and dismisses, relying upon *Pers. Restraint of Keene*, 95 Wn.2d 203 (1980), *see: State v. Taylor*, 4 Wn.App.2d 381. 389-91 (2018), *reversed, on other grounds*, 444 Wn.2d 1194 (2019), *but see: Keene, supra.*, at 213.

***State v. Kennar***, 135 Wn.App. 68 (2006)

Defendant pleads guilty to murder 2º, is advised maximum sentence is life, seeks to withdraw plea claiming he was misadvised because the maximum sentence is actually the top of the standard range; held: at a guilty plea, defendant must be advised of the statutory maximum, and the anticipated standard range based upon the criminal history known at the time of the plea; at sentencing, the court determines the offender score and sets the actual standard range, *see also: Pers. Restraint of McKiearnan*, 165 Wn.2d 777 (2009); I.

***State v. Knotek***, 136 Wn.App. 412 (2006)

Defendant pleads guilty to felonies, prior to sentencing *Blakely v. Washington*, 159 L.Ed.2d 403 (2004) is decided, defendant does not seek to withdraw plea, appeals claiming she was misinformed about maximum sentence since *Blakely* made it impossible to impose an exceptional sentence; held: when defendant enters a plea agreement under the erroneous belief that her standard ranges are higher than they are in fact, she is not entitled to withdraw her plea under a claim that it was invalidly entered, *Pers. Restraint of Matthews*, 128 Wn.App. 267, 273 (2005), *see: State v. Codiga*, 162 Wn.2d 912 (2008), *Pers. Restraint of Toledo-Sotelo*, 176 Wn.2d 759 (2013); II.

***State v. Malone***, 136 Wn.App. 545, 550-55 (2007)

Defendant pleads guilty pursuant to plea bargain, agreeing to offender score, at sentencing defendant questions offender score, state moves to vacate plea, defendant joins in motion, trial court grants it, at trial defendant is convicted of more counts, now seeks to set aside vacation of plea; held: "[i]f a defendant pleads guilty in the mistaken belief that he can renegotiate an agreed minimum offender score at sentencing, the court does not abuse its discretion in vacating the plea," at 555 ¶19; 2-1, III.

***State v. Smith***, 137 Wn.App. 431, 436-39 (2007)

Defendant pleads guilty to two counts, state agrees to recommend 14 months concurrent, range on count II was erroneously calculated at 0-12 months when in fact it was 14-18 months, defendant sentenced to 14 months, motion to withdraw plea denied; held: even though a plea agreement sets forth an incorrect range, where defendant receives the same punishment under the correct range, trial court properly exercised discretion in finding no manifest injustice, *Pers. Restraint of Toledo-Sotelo*, 176 Wn.2d 759 (2013); trial court cannon allow withdrawal of plea to

an individual count where the plea agreement is a package deal, *State v. Turley*, 149 Wn.2d 395 (2003), *Pers. Restraint of Bradley*, 165 Wn.2d 934 (2009), *State v. King*, 162 Wn.App. 234, 240-42 (2011), *State v. Chambers*, 176 Wn.2d 573 (2013), *but see: State v. Martin*, 149 Wn.App. 689 (2009), *State v. Coombes*, 191 Wn.App. 241, 255-58 (2015); II.

***State v. Malone***, 138 Wn.App. 587 (2007)

Pursuant to plea bargain, defendant and state sign an "understanding of defendant's criminal history" setting forth priors, at sentencing defense challenges offender score, state seeks to vacate plea for defendant's breach, judge gives defendant a choice of being sentenced under what defendant believed was an improperly calculated offender score or vacation, defendant agrees to vacation of plea, goes to trial, is convicted of more offenses, appeals seeking specific performance; held: trial court cannot vacate a plea agreement without finding a manifest injustice, CrR 4.2(f), and without finding a breach, thus trial court abused its discretion; defendant cannot by way of a negotiated plea agree to a sentence in excess of that authorized by law, *Pers. Restraint of Goodwin*, 146 Wn.2d 861, 872 (2002), *cf.: State v. Hickman*, 116 Wn.App. 902 (2003), *State v. Collins*, 144 Wn.App. 547 (2008), *but see: State v. Ross*, 152 Wn.App. 220 (2004); when court wrongfully grants state's motion to vacate a plea, defendant can choose remedy which, here, is specific performance, *State v. Tourtellotte*, 88 Wn.2d 579, 584 (1977); prior opinion, *State v. Malone*, 136 Wn.App. 545 (2007), withdrawn; III.

***State v. Blanks***, 139 Wn.App. 543, 548-50 (2007)

Defendant enters plea, argues that state incorrectly calculated offender score because priors were the same criminal conduct, trial court agrees and reduces score, defendant does not expressly move to withdraw plea at or before sentencing but seeks withdrawal of plea on appeal; held: where an offender score is miscalculated, defendant may withdraw his plea even if the range is lower, *State v. Mendoza*, 157 Wn.2d 582, 587 (2006), but only if defendant affirmatively seeks to withdraw his plea in the trial court; determination of same criminal conduct is a question for the trial court, not attorneys in plea negotiations and is not an error in computing the score that surprises defendant and renders his plea unknowing; II.

***State v. Codiga***, 162 Wn.2d 912, 923-24 (2008)

Where written statement of defendant on plea of guilty is complete and defendant acknowledges his understanding, trial court need not orally question defendant to ascertain his understanding of the elements of the crime and consequences of the plea, *Pers. Restraint of Keene*, 95 Wn.2d 203, 204-09 (1980), *Pers. Restraint of Stoudmire*, 145 Wn.2d 258, 266 (2001); 9-0.

***State v. Weyrich***, 163 Wn.2d 554 (2008)

Where defendant is misinformed of the maximum sentence and moves to withdraw his plea prior to sentencing, the motion must be granted even if the standard range was correctly calculated, *State v. Mendoza*, 157 Wn.2d 582, 587 (2006), *Pers. Restraint of Isadore*, 151 Wn.2d 294, 302 (2004); 9-0.

***State v. Collins***, 144 Wn.App. 547 (2008)

Defendant agrees to plead guilty to reduced charge, agrees that criminal history is accurate, before sentencing declares that he will challenge comparability of out-of-state convictions included in agreed criminal history, trial court vacates plea and reinstates original charge; held: where defendant affirmatively acknowledges that a foreign conviction is properly included in offender score, trial court need not require further proof of classification, *State v. Ford*, 137 Wn.2d 472, 483 n.5 (1999), *State v. Ross*, 152 Wn.2d 220 (2004), *State v. Hickman*, 116 Wn.App. 902 (2003), *State v. Birch*, 151 Wn.App. 504, 515-20 (2009); while one cannot waive a legal error in an offender score, *State v. Hunley*, 175 Wn.2d 901 (2012), *cf.: State v. Malone*, 138 Wn.App. 587 (2007), here the waiver addresses a factual matter, *i.e.*, proof of comparability as opposed to washed out priors, thus defendant breached and the court's decision to vacate was proper; I.

***Pers. Restraint of Reise***, 146 Wn.App. 772 (2008)

Defendant pleaded guilty to murder 2º, seeks to withdraw plea for newly discovered evidence; held: a defendant pleading guilty, not by *Alford* plea, generally bars a later collateral attack based upon newly discovered evidence, distinguishing *State v. D.T.M.*, 78 Wn.App. 216 (1995), *State v. Arnold*, 81 Wn.App. 379 (1996), *see: Pers. Restraint of Clements*, 125 Wn.App. 634 (2005), *see also: State v. Scott*, 150 Wn.App. 281 (2009); defendant's claim that defense counsel misinformed him of the sentence that would be imposed is not a basis to withdraw a plea where the guilty plea statement and the court at the time of entry of the plea correctly advised defendant of the range; II.

***Pers. Restraint of McKiearnan***, 165 Wn.2d 777 (2009)

Plea agreement states that maximum for robbery 1° is "twenty years to life," whereas actual maximum is life; held: because defendant was aware of the maximum time he could serve in confinement, the error was a mere technical misstatement that no actual effect on the rights of petitioner; 9-0.

***Pers. Restraint of Spencer***, 152 Wn.App. 698 (2009)

In a motion to vacate an *Alford* plea, a manifest injustice exists if new evidence, when viewed in light of the entire record, changes the factual basis of the plea, *see: State v. Dixon*, 38 Wn.App. 74, 77 (1984), *Pers. Restraint of Ice*, 138 Wn.App. 745, 748 (2007), distinguishing *Pers. Restraint of Clements*, 125 Wn.App. 634 (2005); II.

***Padilla v. Kentucky***, 559 U.S. 356, 176 L.Ed.2d 284 (2010)

Counsel's erroneous advice regarding immigration consequences of a plea is ineffective assistance, *State v. Sandoval*, 171 Wn.2d 163 (2011), *State v. Chetty*, 167 Wn.App. 432 (2012), *State v. Chetty*, 184 Wn.App. 607 (2014), *cf.: State v. Malik*, 37 Wn.App. 414 (1984), *State v. Martinez-Lazo*, 100 Wn.App. 869, 876-78 (2000), *State v. Littlefair*, 112 Wn.App. 749 (2002), *cf.: Chaidez v. United States,* 568 U.S. 342, 133 S.Ct. 1103 185 L.Ed.2d 149 (2013), *see:* RCW 10.40.200 (1983); counsel must inform defendant whether or not a plea carries a risk of deportation, *see: Lee v. United States*, 137 S. Ct. 1958, 198 L. Ed. 2d 476 (2017), *cf.: Pers. Restraint of Ramos*, 181 Wn.App. 743 (2014); 5-4.

***State v. A.N.J.***, 168 Wn.2d 91 (2010)

Twelve-year old respondent pleads guilty to child molestation 1°, counsel having erroneously advised respondent that he "believes" the conviction may be removed from his record, only speaks to respondent in the presence of his parents, does no investigation, trial court fails to ascertain if respondent understood that mere contact with the genitals of another is not sufficient to prove the crime; held: juvenile sex offenses never go away, RCW 9.94A.525(2)(2008), while failure to advise that the conviction would remain on respondent's record may not rise to a manifest injustice itself, where respondent is misinformed, he should be allowed to withdraw his plea; failure of counsel to consult with a client in a confidential manner is a factor that may be considered in deciding whether a plea is voluntary; public defense contract that requires counsel to pay investigative, expert and conflict fees out of the defender's fees is evidence of ineffective assistance; 9-0.

***Pers. Restraint of Clark***, 168 Wn.2d 581 (2010)

At plea, defendant is informed that he will be sentenced to community custody, judgment and sentence has boilerplate language which states defendant is sentenced to community custody for certain offenses which do not apply, court later amends, *ex parte*, J&S to delete the community custody language, ten years later defendant seeks to withdraw plea, claiming judgment and sentence is invalid on its face, RCW 10.73.090(1); held: PRP more than a year after sentencing may only be considered if J&S is invalid on its face, not whether plea documents are facially invalid, *Pers. Restraint of Hemenway*, 147 Wn.2d 529, 532-33 (2002), *see: Pers. Restraint of Toledo-Sotelo*, 176 Wn.2d 759 (2013); a J&S is not valid on its face when, without further elaboration, it "evidences an error," at 585 ¶ 11, *Pers Restraint of Thompson*, 141 Wn.2d 712, 718 (2000); here, J&S was not invalid, amendment may have violated due process but even if void, original J&S was not facially invalid, defendant's affidavit and reference to guilty plea are external documents which are beyond the face of the J&S, thus cannot overcome the one year time limit for PRP; 8-1.

***State v. Sandoval***, 171 Wn.2d 163 (2011)

At plea, counsel advises resident alien to accept plea bargain as he would not be immediately deported and could retain an attorney to ameliorate immigration consequences, after deportation proceedings begin defendant seeks to withdraw plea; held: erroneous immigration advice is ineffective assistance, *Padilla v. Kentucky*, 559 U.S. 356, 176 L.Ed.2d 284 (2010), *Lee v. United States*, 137 S. Ct. 1958, 198 L. Ed. 2d 476 (2017); where immigration law is "truly clear" that a conviction of the crime would subject defendant to deportation, a competent attorney must correctly advise or seek consultation to correctly advise, *State v. Martinez*, 161 Wn.App. 436 (2011), *Pers. Restraint of Ramos*, 181 Wn.App. 743 (2014), *Lee v. United States*, 137 S. Ct. 1958, 198 L. Ed. 2d 476 (2017), *see: State v. Chetty*, 167 Wn.App. 432 (2012), *Pers. Restraint of Yung-Cheng Tsai*, 183 Wn.2d 91 (2015), *State v. Chetty*, 184 Wn.App. 607 (2014), *cf.: Chaidez v. United States*, 568 U.S. 342, 133 S.Ct. 1103 185 L.Ed.2d 149 (2013); 9-0.

***State v. Robinson***, 172 Wn.2d 783 (2011)

Before plea, defendant accepts prosecutor's criminal history calculation, prior to sentencing parties discover undisclosed juvenile convictions which defendant believed had washed but, due to a law change in 2002, no longer wash, tripling standard range, defendant

immediately moves to withdraw plea, trial court finds that his failure to disclose priors was based upon a mistake of law, thus plea was not knowing, voluntarily and intelligent, state appeals; held: complicated SRA plus defendant's not knowing the legal impact of the law change impacting the offender score plus trial court's determination that plea was not knowing and thus allowing plea to stand would be a manifest injustice all support trial court's exercise of discretion, *see: State v. A.N.J.*, 168 Wn.2d 91 (2010), *State v. Codiga*, 162 Wn.2d 91 (2008); reverses *State v. Robinson*, 150 Wn.App. 934 (2009); 5-4.

***State v. Wilson***, 162 Wn.App. 409 (2011)

Defendant pleads guilty to VUCSA, prior to sentencing *Arizona v. Gant*, 556 U.S. 332, 173 L.Ed.2d 485 (2009) is decided, trial court denies motion to withdraw plea; held: a plea of guilty waives any search issue on appeal even if law changes, *State v. Brandenburg*, 153 Wn.App. 944, 947-48 (2009), *McMann v. Richardson*, 397 U.S. 759, 774, 25 L.Ed.2d 763 (1970), and even if defendant has not been sentenced; II.

***State v. Chambers***, 176 Wn.2d 573 (2013)

Defendant is charged in three informations with numerous crimes, prosecutor writes to counsel offering a plea bargain encompassing all informations, threatening to amend upwards absent a plea, defendant pleads guilty to some crimes on one day, is sentenced, pleads guilty to others another day, is sentenced consistent with the plea agreement, trial court allows defendant to withdraw pleas to some but not all charges; held: prosecutor's letter encompassing all of the charges which defendant acknowledged at sentencing establish that the plea agreement is indivisible and thus defendant must seek to withdraw pleas to all counts in all informations to obtain relief, *Pers. Restraint of Bradley*, 165 Wn.2d 934 (2009), *State v. Ermels*, 156 Wn.2d 528 (2006), *see: State v. Coombes*, 191 Wn.App. 241, 255-58 (2015); affirms *State v. Chambers*, 163 Wn.App. 54 (2011); 6-3.

***State v. Lamb***, 175 Wn.2d 121, 124-30 (2012)

Defendant is convicted and sentenced, as a juvenile, of indecent liberties and, on a separate occasion, burglary, after which legislature extends prohibition of possessing firearms to juvenile felony adjudications, moves to withdraw burglary plea after being charged with felon in possession of a firearm, RCW 9.41.040(2)(a)(i), trial court finds manifest injustice, CrR 4.2, because defendant had not been advised at time of plea that he would lose his right to possess a firearm, dismisses firearm charges; held: meeting only the manifest injustice standard of CrR 4.2(f) is insufficient when considering a post-judgment motion to withdraw a guilty plea; whether a plea is voluntary is determined by whether defendant was sufficiently informed of the direct consequences of the plea that existed at the time of the plea, loss of firearm right at time of plea was not a consequence, thus failure to advise defendant of loss of right does not render plea involuntary; reverses, in part, *State v. Lamb*, 163 Wn.App. 614 (2011); 9-0.

***State v. Gomez Cervantes***, 169 Wn.App. 428 (2012)

In a motion to vacate a judgment and sentence, CrR 7.8, a bare statement that "counsel did not inform him of the immigration implications of his plea" is insufficient to show the "deficient performance" prong to establish ineffective assistance, *see: Pers. Restraint of Rice*, 117 Wn.2d 876, 886 (1992); III.

***Chaidez v. United States***, 568 U.S. 342, 185 L.Ed.2d 149 (2013)

*Padilla v. Kentucky*, 559 U.S. 356, 176 L.Ed.2d 284 (2010), requiring counsel to provide advice about risk of deportation, is not retroactive, *State v. Martinez-Leon,* 174 Wn.App. 753 (2013), *but see: Pers. Restraint of Yung-Cheng Tsai*, 183 Wn.2d 91 (2015), *Pers. Restraint of Orantes,* 197 Wn.App. 737 (2017), *Pers. Restraint of Garcia-Mendoza,* 196 Wn.2d 836 (2021); 7-2.

***Pers. Restraint of Toledo-Sotelo***, 176 Wn.2d 759 (2013)

Seriousness level in plea is incorrect but court finds correct standard range, defendant files untimely PRP; held: while a judgment and sentence containing incorrect range or seriousness level may make the judgment facially invalid, *Pers. Restraint of Goodwin,* 146 Wn.2d 861 (2002), where defendant cannot show both facial invalidity and prejudice, *Pers. Restraint of Coats,* 173 Wn.2d 123, 13 (2011), *State v. Wheeler,* 183 Wn.2d 71, 77-80 (2015), an untimely PRP shall be dismissed; because standard range was correct, judgment and sentence was valid on its face; 9-0.

***State v. Martinez-Leon***, 174 Wn.App. 753 (2013)

In 2006 defendant pleads guilty to a felony and a gross misdemeanor, plea form contains "grounds for deportation" language, trial court engages in colloquy without specifically mentioning immigration consequences, finds defendant entered plea knowingly, voluntarily and intelligently, sentences defendant, *inter alia,* to 365 days suspended, in 2011 defendant seeks to withdraw plea, prior counsel declares she had a general discussion about possible immigration consequences and that she did not seek a sentence of 364 days because she was unaware that a 365 days sentence is considered an aggravated felony for immigration purposes; held: defendant's untimely motion to withdraw the plea, CrR 7.8, RCW 10.73.090, does not become timely per RCW 10.73.100(6) because there was no "significant change in the law," *Chaidez v. United States,* 568 U.S. 342, 133 S.Ct. 1103 185 L.Ed.2d 149 (2013), *but see: Pers. Restraint of Yung-Cheng Tsai,* 183 Wn.2d 91 (2015), *Pers. Restraint of Orantes,*197 Wn.App. 737 (2017); because trial counsel was aware defendant was not a citizen, discussed potential deportation consequences, and plea form advised of same, equitable tolling doctrine to the time limit is inapplicable, distinguishing *State v. Littlefair,* 112 Wn.App. 749 (2002); trial counsel's failure to advise that a 365 day sentence would result in definite deportation was not required before *Padilla v. Kentucky,* 559 U.S. 356, 176 L.Ed.2d 284 (2010), which does not apply retroactively, *but see: Pers. Restraint of Garcia-Mendoza,* 196 Wn.2d 836 (2021); II.

***Pers. Restraint of Stockwell***, 179 Wn.2d 588 (2014)

Defendant is advised at plea that maximum sentence is 20 years, actual maximum is life, defendant files PRP seeking to withdraw plea; held: while maximum sentence is a direct consequence of a plea, *Pers. Restraint of Bradley,* 165 Wn2d 934 (2009), defendant must show actual prejudice when challenging plea in PRP, *State v. Weyrich,* 163 Wn.2d 554 (2008), *Pers. Restraint of Yates,* 180 Wn.2d 33 (2014), *State v. Buckman,* 190 Wn.2d 51 (2018), challenging plea 21 years after completion of sentence does not establish prejudice where state concedes it is bound by the lower maximum; affirms *Pers. Restraint of Stockwell,* 161 Wn.App. 329 (2011); 9-0.

***Pers. Restraint of Snively***, 180 Wn.2d 28 (2014)

Plea agreement and sentence includes community custody which was not authorized, 17 years later defendant seeks to withdraw plea due to erroneous community placement; held: facially invalid judgment and sentence does not permit raising of other time-barred claims, RCW 10.73.100, *Pers. Restraint of Toledo-Sotelo*, 176 Wn.2d 759 (2013), *Pers. Restraint of Clark*,168 Wn.2d 581, 587 (2010), *State v. Wheeler*, 183 Wn.2d 71, 77-80 (2015), defendant's sole remedy is correction of sentence; *per curiam.*

***Pers. Restraint of Yates***, 180 Wn.2d 33 (2014)

To avoid death penalty, defendant pleads guilty and is sentenced to 408 year determinate sentences but law at time of the crimes required indeterminate life sentences, seeks to withdraw pleas 13 years later; held: a judgment and sentence invalid on its face permits challenge beyond one year time bar, RCW 10.73.090(1), -.100 (1989), but because under either sentence defendant would never be released as there is no practical difference between 408 year determinate sentence and a 408 year minimum sentence, defendant has not shown prejudice and PRP must be dismissed, *Pers. Restraint of Stockwell*, 179 Wn.2d 588 (2014); 8-1.

***State v. Kinnaman***, 180 Wn.2d 197 (2014)

Defendant pleads guilty to eluding a pursuing police vehicle and endangerment enhancement, RCW 9.94A.834 (2008), state's recommendation for the enhancement was 12 months, but statute, RCW 9.94A.533(11) (2013), requires 12 months and one day which court imposed, defendant moves to withdraw plea to the enhancement only; held: sentence was not in excess of statutory authority, defendant did not move to withdraw plea to the crime, rather only to the enhancement, a plea agreement may be divisible if there are multiple counts, *State v. Bisson*, 156 Wn.2d 507, 519 (2006), a plea to one crime is not divisible; *per curiam.*

***State v. Quy Dinh Nguyen***, 179 Wn.App. 271 (2014)

Defendant pleads guilty, before sentencing moves to withdraw plea claiming he was inadequately advised, court appoints new counsel to make threshold showing that plea was invalid, counsel moves for 4-6 month continuance to read 28,000 pages of discovery, investigate whether to advise defendant to withdraw plea, trial court denies continuance, holds a hearing with prior counsel testifying as to advice given defendant, denies motion and imposes sentence; held: trial court did not err by requiring defendant to produce something more than his mere allegations, *State v. Robinson*, 153 Wn.2d 689 (2005), lengthy continuance is not required without defendant first demonstrating any likelihood of establishing a manifest injustice, new counsel's role was not to advise defendant whether withdrawing his plea was an intelligent course of action, rather it was to demonstrate that the motion to withdraw the plea had a basis beyond defendant's self-serving allegations; I.

***Pers. Restraint of Ramos***, 181 Wn.App. 743 (2014)

Defendant pleads guilty to theft 1° in 1997, told in plea statement that a plea of guilty may resulted in deportation, filed PRP seeking to vacate plea maintaining counsel did not inquire as to immigration consequences and that he is subject to mandatory deportation; held: Court of

Appeals role is to decide "on our own" if defendant's conviction is one for an "aggravated felony," an immigration lawyer's opinion is not binding as questions of law are not the subject of expert testimony; as fraud and deceit "did not infect" defendant's theft per probable cause affidavit or plea, crime is not an aggravated felony nor does it involve moral turpitude, if the law is not succinct and straightforward, counsel must provide only a general warning of a risk of adverse immigration consequences, *Padilla v. Kentucky,* 559 U.S. 356, 369, 176 L.Ed.2d 284 (2010), *see: State v. Sandoval,* 171 Wn.2d 163 (2011), *cf.: Lee v. United States,* 137 S. Ct. 1958, 198 L. Ed. 2d 476 (2017), thus counsel was not ineffective, PRP denied; III.

***Pers. Restraint of Smalls***, 182 Wn.App. 381 (2014)

Defendant pleads guilty to murder and assault, files PRP more than a year later claiming statute of limitations for assault had passed, seeks withdrawal of pleas to both; held: while defendant's judgment and sentence is facially invalid because court lacked authority to convict for assault thus reducing offender score, he is only entitled to a remand to correct the invalidity but is not entitled to assert a time-barred challenge to the validity of the plea, *Pers. Restraint of Snively*, 180 Wn.2d 28 (2014), *Pers. Restraint of Yates,* 180 Wn.2d 33 (2014), *State v. Wheeler,* 183 Wn.2d 71, 77-80 (2015); I.

***United States v. Davila***, 569 U.S. 597, 133 S.Ct. 2139, 186 L.Ed.2d 139 (2013)

Defendant and defense counsel appear before magistrate judge *in camera,* to discuss defendant's dissatisfaction with counsel, magistrate judge urges defendant to plead guilty, three months later defendant pleads guilty, later moves to withdraw plea due to judge's involvement; held: although Fed R. Crim. P. 11(c)(1) reads "[t]he court must not participate in these discussions," violation of the rule does not mandate reversal, *see* RCW 9.94A.421 (1995); 9-0.

***State v. Wheeler***, 183 Wn.2d 71, 77-80 (2015)

A mere misstatement of the maximum sentence on the judgment and sentence does not by itself render it facially invalid, remedy through an untimely PRP is limited to technical correction, *Pers. Restraint of Coats,* 173 Wn.2d 123, 135, 143-44 (2011); 9-0.

***Pers. Restraint of Yung-Cheng Tsai***, 183 Wn.2d 91 (2015)

*Padilla v. Kentucky,* 559 U.S. 356, 176 L.Ed.2d 284 (2010), requiring counsel to provide advice about risk of deportation, is retroactive in Washington, *Pers. Restraint of Orantes,* 197 Wn.App. 737 (2017), *Pers. Restraint of Garcia-Mendoza,* 196 Wn.2d 836 (2021), distinguishing *Chaidez v. United States,* 568 U.S. 342, 185 L.Ed.2d 149 (2013); affirms *Pers. Restraint of Jagana,* 170 Wn.App. 32 (2012); 5-4.

***Lee v. United States***, 137 S. Ct. 1958, 198 L.Ed.2d 476 (2017)

Where defendant demonstrates a reasonable probability that he would not have pleaded guilty if he had known that it would lead to mandatory deportation, plea-counsel's erroneous advice as to deportation consequences of defendant's guilty plea prejudiced defendant and amounted to ineffective assistance; here, while the plea meant defendant would certainly be deported and at trial he would "almost certainly" be convicted, sentenced to more time and deported, it would not have been irrational for defendant to go to trial rather than plead guilty; 6-

2.

***State v. Manajeres***, 197 Wn.App. 798 (2017)

Defendant enters *Alford* plea to unlawful imprisonment in 2002, is deported, now seeks to withdraw plea because counsel did not advise that unlawful imprisonment is a crime of moral turpitude that will result in deportation; held: to determine whether or not a crime is an aggravated felony/crime of moral turpitude immigration court looks to the fact of conviction and the statutory definition, does the full range of conduct encompassed by the state statute constitute an aggravated felony, *Taylor v. United States*, 495 U.S. 575, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990); here, appellate counsel did not identify any federal aggravated felony into which unlawful imprisonment fits, thus defendant did not establish that his lawyer at plea provided deficient representation; it is not automatically deficient performance for a lawyer to advise a non-citizen client to enter an *Alford* plea; when a state statute is "divisible," *i.e.*, some conduct amounts to an aggravated felony and some does not, then immigration court can look to the factual basis for the plea which, in an *Alford* plea, will include documents outside the plea form which become part of the judgment of conviction, *Shepard v. United States,* 544 U.S. 13, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005), *Descamps v. United States,* 570 U.S. 254, 133 S.Ct. 2276, 186 L.Ed.2d 458 (2013); because the law was not fully clear in 2002 that unlawful imprisonment was an aggravated felony, defendant has not met his burden of showing that defense counsel "could have researched and discovered that Mr. Manajares's *Alford* plea carried a truly clear risk of adverse consequences," at 815, thus defendant has not established deficient representation, *see: Lee v. United States,* 137 S. Ct. 1958, 198 L. Ed.2d 476 (2017), court need not look to prejudice; III.

***State v. Buckman***, 190 Wn.2d 51 (2018)

Defendant commits rape of a child 2° at age 17, is charged after he turns 18, pleads guilty with a SSOSA recommendation after being told that the maximum sentence is life in prison which, pursuant to RCW 9.94A.507(b)(2) (2008), does not apply to a person who commits the crime under age 18, moves to withdraw plea after SSOSA is revoked, stating he would not have pleaded guilty had he been properly informed; held: defendant was misinformed as to maximum, thus plea was involuntary, however a motion to withdraw a plea is a collateral attack on the judgment and sentence requiring a showing, by a preponderance, of actual and substantial prejudice, *Personal Restraint of Riley,* 122 Wn.2d 772 (1993), *Personal Restraint of Stockwell,* 179 Wn.2d 588 (2014); defendant here made a bare claim that he would not have pleaded guilty but for the erroneous information but an objective, rational person test, rather than a subjective test, establishes, in light of the strength of the state's evidence, that he would not have risked a trial, *Pers. Restraint of Yates,* 180 Wn.2d 33, 41 (2014) and thus his motion to withdraw his plea is denied; 7-2.

***State v. Taylor,*** 4 Wn.App.2d 381, 389-91 (2018), *reversed, on other grounds,*193 Wn.2d 691 (2019)

Written plea statement sets out all elements of the crime, when court inquires defendant appears to deny willfulness, an element, trial court accepts plea; held: conflicting statement in a

factual basis for a plea obliges trial court to inquire further, remanded for court to question defendant further, *see:* *State v. R.L.D.*, 132 Wn.App. 699 (2006); III

***Pers. Restraint of Burlingame***, 3 Wn.App.2d 600 (2018)

Defendant is charged with rape 3°, defense counsel has discovery prior to arraignment, defendant wants to plead guilty but is advised not to because defense counsel thought state might amend to a gross misdemeanor, defendant declines to enter a plea, trial court enters plea of not guilty, state later is granted leave to amend to rape 2° to which defendant pleaded guilty and is sentenced to indeterminate life sentence; held: CrR 4.2(a) provides a defendant with the right to plead guilty at arraignment, *State v. Martin*, 94 Wn.2d 1, 4 (1980), "[g]iven the evident risk of an amendment to a higher charge, the strength of the State's evidence for the higher charge, its harsh consequences, and Mr. Burlingame's demonstrated interest in pleading guilty at arraignment, we conclude that competent counsel would have advised Mr. Burlingame of his one-time right to plead guilty as charged without the agreement of the prosecutor—even if the lawyer's recommendation was that Mr. Burlingame *not* plead guilty," at 610, *see:* *State v. Conwell*, 141 Wn.2d 901 (2000); III.

***State v. Robinson***, 8 Wn.App.2d 629 (2019)

Defendant is convicted of violation of a no contact order enhanced to a felony by two prior misdemeanor no contact order violations, RCW 26.50.110(5) (2017), to which he had pleaded guilty albeit the two stemmed from a single incident which was originally charged as a felony but through plea negotiations defendant agreed to plead to two counts, one straight plea, the other to take advantage of the plea bargain, acknowledging that there was no factual basis; held: while a defendant may plead guilty to an amended charge if there is no factual basis as long as there is a factual basis for the original charge, *State v. Bao Sheng Zhao*, 157 Wn.2d 188 (2006), *State v. Wilson*, 16 Wn.App.2d 537 (2021), however a defendant cannot be convicted of two crimes based on a single act and a single original charge as it violates the double jeopardy clause, *State v. Mutch*, 171 Wn.2d 646, 662 (2011); while a guilty plea precludes a collateral attack unless there is a double jeopardy violation; I.

***State v. Connors***, 9 Wn.App.2d 93 (2019)

An officer wearing a department-issued vest over civilian clothes is in uniform for purposes of RCW 46.61.024(1) (2010) which requires a driver to stop when signaled by an officer in uniform; III.

***State v. Gregg***, 9 Wn.App.2d 569 (2019), *rev. granted*, 194 Wn.2d 1002

On plea form paragraph stating that because the offense is a felony firearm offense judge may require registration as a firearm offender, RCW 9.41.335, is crossed out even though it applies, defendant seeks to withdraw plea; held: registration as a firearm offender is a collateral consequence of a guilty plea, misinformation is not grounds to withdraw the plea; I.

***State v. Wilson,*** 16 Wn.App.2d 537 (2021)

Defendant enters *Alford* plea to a greater offense in exchange for dismissal of 21 other counts, factual basis establishes sufficient evidence to support the lesser offense, defendant seeks to withdraw

plea; held: because the plea benefitted defendant court did not err in accepting the plea, *Personal Restraint of Barr*, 102 Wn.2d 265 (1984), *State v. Zhao*,157 Wn.2d 188, 199-200 (2006); II.

***State v. Snider***, 199 Wn.2d 435 (2022)

"A trial court must ensure a defendant understands the nature of a crime and the essential elements before accepting a guilty plea, but an otherwise valid guilty plea is not rendered illegitimate because the trial court does not detail every fact that could be relevant to every element;" 6-3.

# HIT AND RUN

***State ex rel. Fitch v. Roxbury District Court***, 29 Wn.App. 591 (1981)

Court has discretion to dismiss misdemeanor hit and run charge pursuant to compromise of misdemeanor statute, Ch. 10.22, RCW, *see: State v. Norton*, 25 Wash.App. 377 (1980), *cf.: State v. Hortwell*,38 Wn.App. 135 (1984); 2-1, I.

***State v. Vela***, 100 Wn.2d 636 (1983)

Knowledge of a collision is an element of felony hit and run, RCW 46.52.020; knowledge of injury is not an element, *State v. Martin*, 73 Wn.2d 616, 625 (1968); 7-2.

***State v. Hartwell***, 38 Wn.App. 135 (1984), *overruled, on other grounds, State v. Krall*, 125 Wn.2d 146, 149 (1994)

Restitution for damage to vehicle may not be ordered following hit and run conviction since the conduct of leaving the scene of an accident is not a proximate cause of damages occurring in the accident itself, *cf.: State ex. rel. Fitch v. Roxbury District Court*, 29 Wn.App. 591 (1981), *State v. Enstone*, 137 Wn.2d 675 (1999), *State v. Stalker*, 152 Wn.App. 805 (2009); I.

***State v. Komoto***, 40 Wn.App. 200 (1985)

*Corpus delicti* for felony hit and run, RCW 46.52.020, does not include identity, *distinguishing State v. Hamrick*, 19 Wn.App. 417, 420 (1978), as defendant's physical condition is not an element of the crime; I.

***Seattle v. Wandler***, 60 Wn.App. 309 (1991)

Seattle hit and run ordinance, SMC § 11.56.420, does not unconstitutionally conflict with state statute, RCW 46.52.020, as variances are insignificant; I.

***State v. Hughes***, 80 Wn.App. 196 (1995)

"Involved in an accident" for purposes of hit and run, RCW 46.52.020, can be proved even without physical contact between defendant's vehicle and victim vehicle, *State v. Perebeynos*, 121 Wn.App. 189 (2004); where defendant drag races another vehicle which crashes, defendant is involved in an accident; III.

***State v. Bourne***, 90 Wn.App. 970 (1998)

Defendant injures three people in same vehicle and flees, is charged with three counts of felony hit and run, RCW 46.52.020; held: number of counts should be based on number of times defendant is involved in an accident and fails to provide information, not on number of persons injured in victim-vehicle, *State v. Ustimenko*, 137 Wn.App. 109, 116-19 (2007), *see: State v. Clark*, 117 Wn.App. 281, 285-86 (2003), *aff'd*, 153 Wn.2d 614 (2005); II.

***Spokane v. Carlson***, 96 Wn.App. 279 (1999)

Hit and run ordinance, Spokane Municipal Code § 16.52.020, requires that only the driver of the vehicle which caused the accident resulting in damage stop and exchange information; III.

***State v. Wagner***, 97 Wn.App. 344 (1999)

Running over a dead body and leaving the scene is not felony hit and run, as RCW 46.52.020(1) requires proof that an accident resulted in injury to or the death of a person; II.

***State v. Sutherland***, 104 Wn.App. 122 (2001)

Knowledge of an accident is an essential element of felony hit and run, RCW 46.52.020(3), *State v. Bourne*, 90 Wn.App. 963, 969 (1998), even under the *Kjorsvik* "fair construction" rule, *State v. Cournyea*, 132 Wn.App. 347 (2006); II.

***State v. Silva***, 106 Wn.App. 586 (2001)

Officer reaches into car to turn off ignition, defendant drives off pulling officer along who ultimately pushes away and is injured, defendant continues to drive away, claims evidence is insufficient to prove "accident," RCW 46.52.020, since his acts were intentional; held: "accident" includes incidents arising from intentional conduct on the part of the driver and/or victim; I.

***State v. Perebeynos***, 121 Wn.App. 189 (2004)

Evidence is sufficient to prove felony hit and run, RCW 46.52.020, where defendant does not collide with another vehicle, *State v. Hughes*, 80 Wn.App. 196 (1995) and did not cause the collision or violate a rule of the road; knowledge of a collision may be inferred from circumstantial evidence, in this case defendant's behavior before and after the collision; I.

***State v. Stalker***, 152 Wn.App. 805 (2009)

Hit and run is subject to compromise of misdemeanor, ch. 10.22 RCW, *State ex rel. Fitch v. Roxbury Dist. Court*, 29 Wn.App. 591, 597 (1981); I.

# IDENTIFICATIONS

***United States v. Crews***, 63 L.Ed.2d 537 (1980)

In-court identification not suppressible due to illegal arrest, *State v. Tan Le*, 103 Wn.App. 354, 363-67 (2000); defendant's "face" is not a fruit of illegal arrest, *see: Frisbie v. Collins*, 96 L.Ed. 541 (1952); 8-0.

***State v. Scott***, 93 Wn.2d 8 (1980)

In determining fairness of identification, test is totality of circumstances; to suppress, court must find identification was so suggestive and conducive to misidentification as to amount to a denial of due process; 9-0.

***State v. Jamison***, 93 Wn.2d 794 (1980)

Lay witness can't testify to his or her opinion that photo is of defendant except where there is a change of appearance, *but see: State v. Collins*, 152 Wn.App. 429, 436-38 (2009); reverses: *State v. Jamison*, 23 Wn.App. 454 (1979); 9-0.

***State v. Agren***, 28 Wn.App. 1 (1980)

Assault victim shown two montages containing ten-year old photo of defendant, no pick, later is victim told that defendant grew beard, picks defendant in court; held: not impermissibly suggestive; II.

***State v. Springfield***, 28 Wn.App. 446 (1981)

One person showup okay under totality test, *Neil v. Biggers*, 34 L.Ed.2d 401 (1972), *State v. Hilliard*, 89 Wn.2d 430, 438-39 (1977), *State v. Scabbyrobe*, 16 Wn.App.2d 870 (2021), where victim is with defendant for six minutes, had previously picked defendant in montage, and showup occurred 17 hours after crime; no need for state to show independent basis for in-court ID on these facts; III.

***State v. Burrell***, 28 Wn.App. 606 (1981)

Victim and witness pick suspect from montage after police conclude there are insufficient matches in jail for lineup, although defendant is in custody; defendant's picture is only one on montage with "frizzy Afro" as described by witnesses; Division I holds that suggestiveness of montage is outweighed by reliability of witnesses; modifies *State v. Thorkelson*, 25 Wn.App. 615, *rev. den.* 94 Wn.2d 1001 (1980) to eliminate *per se* rule of exclusion; *see*: *State v. Poulos*, 31 Wn.App. 241 (1982); *accord*: *State v. Smith*, 37 Wn.App. 381 (1984); *see also: State v. Shea*, 85 Wn.App. 56 (1997); I.

***State v. Weddel***, 29 Wn.App. 461 (1981)

Division II holds that courts shall not suppress a montage merely because defendant is in custody, choosing not to follow *State v. Thorkelson*, 25 Wn.App. 615 (Div. I, 1980); will suppress photo montage only if impermissibly suggestive; factors include (1) showing one photo, (2) photo of single individual recurs or is in some way emphasized and (3) police indicate that they have other evidence that one of the persons pictured committed the crime; *see*: *Simmons v. United States*, 19 L.Ed.2d 1247 (1968).

***State v. King***, 31 Wn.App. 56 (1982)

Guidelines established by *Neil v. Biggers*, 34 L.Ed.2d 401 (1972) do not apply to a witness's identification of an article of clothing worn by a suspect at a showup, *State v. Johnson*, 132 Wn.App.454 (2006); II.

***State v. Cook***, 31 Wn.App. 165 (1982)

Montage and lineup identifications were "not entirely without suggestion," but do not violate due process; I.

***State v. Ammlung***, 31 Wn.App. 696 (1982)

Court may order a defendant to shave and cut his hair prior to appearing in a lineup, *State v. Smith*, 90 Wn.App. 857(1998); no abuse of discretion for trial court to refuse to allow other lineup participants to be called as witnesses in order for jury to determine whether identification procedure was suggestive; instruction based upon *United States v. Telfaire*, 469 F.2d 552 (D.C. Cir. 1972) properly rejected; II.

***State v. Haskins***, 33 Wn.App. 185 (1982)

Suspect's counsel is unavailable to witness lineup, so prosecutor finds substitute counsel, unassociated with suspect's counsel and unfamiliar with case, who witnesses lineup; held: no error, although court states it does not encourage substitute counsel; III.

***State v. Hebert***, 33 Wn.App. 512 (1982)

Upholds one-person showup, per *Manson v. Braithwaite*, 53 L.Ed.2d 140 (1977); I.

***State v. Booth***, 36 Wn.App. 66 (1983)

One-person showup of suspect in police car with his back to eyewitness was suggestive, but not impermissibly suggestive in light of witness's reliability, *State v. Springfield*, 28 Wn.App. 446, 447 (1981); II.

***State v. Smith***, 36 Wn.App. 133 (1983)

During a recess in trial, prosecutor brings witnesses into court and, in the absence of defense counsel, asks if he can identify defendant; held: while identification procedure violated Sixth Amendment, state established that in-court identification at trial had an origin independent of the improper identification, *State v. Redmond*, 75 Wn.2d 62, 64 (1968); court applies *Neil v. Biggers*, 34 L.Ed.2d 401 (1972) factors, *State v. Abernathy*, 31 Wn.App. 635, 637 (1982); I.

***In re Armed Robbery***, 99 Wn.2d 106 (1983)

Police, believing that a description of a robber fit a suspect, show montage to victim who states that suspect bore a "striking resemblance" to the robber; police obtain a show cause order to require suspect to appear in lineup; held: an individual may not be ordered to participate in a lineup where no probable cause exists to believe that the suspect has committed the offense; *dicta* that police may not seize a suspect to obtain physical evidence (such as eyewitness identification) on less than probable cause, at 111; *see*: *State v. Doleshall*, 53 Wn.App. 69 (1988); 9-0.

***State v. Vaughn***, 101 Wn.2d 604 (1984)

Where there is no allegation of an impermissibly suggestive identification procedure, the "reliability" of an identification goes to weight and not to admissibility, *Pers. Restraint of Salinas*, 169 Wn.App. 210, 224 (2012), *cf.: State v. Kloepper*, 179 Wn.App. 343 (2014), disapproving *State v. Abernathy*, 31 Wn.App. 635 (1982); 9-0.

***State v. Coe***, 101 Wn.2d 772 (1984)

Requiring rape defendant to repeat rapist's words in front of jury within discretion of court, *State v. Spadoni*, 137 Wash. 684, 691 (1926); 9-0.

***State v. Mathe***, 102 Wn.2d 537 (1984)

Police unlawfully seize and photograph defendant; based upon pick from montage which included his photograph, defendant is tried for robbery; held: in-court identification is not subject to suppression if police knew witness's identity before illegal search and in-court identification is based on a witness's observation of the crime; 9-0.

***State v. Jordan***, 39 Wn.App. 530 (1985)

Defendant has the right to have counsel present at the actual physical confrontation between the suspect and witnesses at a lineup, not at the brief witness preparation stage prior to the lineup; proper to exclude evidence that defendant was misidentified at lineup on other dismissed charges; I.

***State v. Kinard***, 39 Wn.App. 871 (1985)

Testimony that assailant "sounded like a black man" is proper lay opinion, ER 701; voice lineup not required; III.

***State v. Boot***, 40 Wn.App. 215 (1985)

Where defendant is in custody, lineup is preferred; court will not suppress photo montage unless defense establishes identification procedure was impermissibly suggestive; then court must balance corrupting effect of suggestive identification against factors indicating reliability of identification, *State v. Burrell*, 28 Wn.App. 606 (1981); I.

***State v. McDonald***, 40 Wn.App. 743 (1985)

Twenty-two hours after strongarm robbery, victim picks two suspects at lineup, after which police tell victim that another person in lineup was arrested, whereupon victim agrees it was "a toss up" between one whom he picked and the arrestee, trial court suppresses lineup, admits in-court identification; held: police statement to victim was impermissibly suggestive; due to limited opportunity of victim to view the criminal at time of crime and inaccuracy of descriptions, in-court identifications suppressed, *Manson v. Braithwaite*, 53 L.Ed.2d 140 (1977), *cf.*: *State v. Gould*, 58 Wn.App. 175 (1990), *State v. Maupin*, 63 Wn.App. 887, 895-7 (1992), *State v. Courtney*, 137 Wn.App. 376, 385-86 (2007), *cf.: State v. Kloepper*, 179 Wn.App. 343 (2014); I.

***State v. Traweek***, 43 Wn.App. 99 (1986)

Victim describes robber as blonde, victim picks defendant at lineup in which he is only blonde; held: in motion to suppress identification, defense must first show procedure was unnecessarily suggestive, *Foster v. California*, 22 L.Ed.2d 402 (1969), *Stovall v. Denno*, 18 L.Ed.2d 1199 (1967), after which court must review totality of circumstances to determine if suggestiveness created a substantial likelihood of irreparable misidentification, *Manson v. Brathwaite*, 53 L.Ed.2d 140 (1977), by applying *Neil v. Biggers*, 34 L.Ed.2d 401 (1972) factors of (1) opportunity of victim to view criminal at scene of crime, (2) victim's degree of attention, (3) accuracy of prior description, (4) level of certainty, and (5) length of time between crime and confrontation, *cf.: State v. Shea*, 85 Wn.App. 56 (1997), *overruled, on other grounds, State v. Vickers*, 107 Wn.App. 960, 967 n. 10 (2001); here, lineup was unnecessarily suggestive, but identification was reliable applying *Biggers* factors; II.

***State v. Hoffpauir***, 44 Wn.App. 195 (1986)

Suspect does not have right to counsel at pre-arrest one-person voice identification; while one-person voice identification is highly suggestive, the totality of the circumstances was such that the identification is admissible as it occurred shortly after the crime, suspect was brought promptly to the victim, met description, victim had adequate opportunity to know the voice; III.

***State v. Rogers***, 44 Wn.App. 510 (1986)

Factors to consider in determining reliability of one-person showup include: (1) opportunity of witness to view the criminal at time of crime, (2) witness's degree of attention, (3) accuracy of prior description by the witness, (4) level of certainty demonstrated at the showup, and (5) time between crime and confrontation, *Manson v. Brathwaite*, 53 L.Ed.2d 140 (1977), *State v. Bockman*, 37 Wn.App. 474, 482 (1984); *State v. Maupin*, 63 Wn.App. 887, 895-7 (1992); I.

***State v. Moon***, 45 Wn.App. 692 (1986)

Where (1) identification of defendant is principal issue at trial, (2) defendant presents alibi, *but see: State v. Cheatam*, 150 Wn.2d 626, 644-52 (2003), and (3) there is little or no other evidence linking defendant to the crime, it is an abuse of discretion to prohibit the defense from calling an expert to testify about eyewitness identification, *see: State v. Jaime*, 168 Wn.2d 857, 868-72 (2010)(Sanders, J., dissenting), *cf.*: *State v. Moon*, 48 Wn.App. 647 (1987); *accord*: *State v. Taylor*, 50 Wn.App. 481 (1988), *but see*: *State v. Hernandez*, 58 Wn.App. 793 (1990); I.

***State v. Knight***, 46 Wn.App. 57 (1986)

A suggestive pretrial photo montage presented by a private citizen does not invalidate a subsequent identification; II.

***State v. Pacheco***, 107 Wn.2d 59 (1986)

Trial court should not permit a look-alike to testify unless there is evidence that the look-alike could have committed the crime; 9-0.

***State v. Guzman-Cuellar***, 47 Wn.App. 326 (1987)

Being handcuffed and standing 15 feet from police car during showup are not sufficient to demonstrate unnecessary suggestiveness, *State v. Shea*, 85 Wn.App. 56 (1997), *overruled, on other grounds, State v. Vickers*, 107 Wn.App. 960, 967 n. 10 (2001), *see*: *State v. Gould*, 58 Wn.App. 175 (1990); I.

***State v. Taylor***, 50 Wn.App. 481 (1988)

A 29-photograph montage which contains suspect's photo twice is not impermissibly suggestive; I.

***State v. Coe***, 109 Wn.2d 832 (1988)

All post-hypnotic testimony is inadmissible; hypnosis acts as a time barrier after which no admissible identifications can be made; 6-3.

***United States v. Owens***, 98 L.Ed.2d 951 (1988)

Assault victim testifies he remembered identifying defendant as assailant in an interview with FBI, but does not remember assailant nor could he recall who assaulted him; held: inability of victim to recall does not violate confrontation clause, as defense counsel had opportunity to cross-examine; identification is admissible pursuant to Fed. R. Evid. 801(d)(1)(c); 6-2.

***State v. Doleshall***, 53 Wn.App. 69 (1988)

Once suspect has been lawfully arrested, police may place suspect in lineup for crimes unrelated to arrest, *distinguishing In re Armed Robbery*, 99 Wn.2d 106 (1983); reasonable force may be used to compel suspect to appear in lineup, *United States v. Parhms*, 424 F.2d 152, 154 (9th Cir., 1970); where defense fails to establish that a lineup was unnecessarily suggestive, *State v. Traweek*, 43 Wn.App. 99, 103 (1986), trial court need not engage in balancing test per *Manson v. Brathwaite*, 53 L.Ed.2d 140 (1977); I.

***State v. Briggs***, 55 Wn.App. 44 (1989)

Trial court properly excluded evidence of a look-alike suspect unless there is a train of facts or circumstances as tend clearly to point out look-alike as the guilty party, *State v. Jones*, 26 Wn.App. 551, 555 (1980); I.

***State v. Grover***, 55 Wn.App. 923 (1989)

Police testimony that victim stated defendant committed robbery is not hearsay, as it is prior statement of identification of person made after perceiving him, ER 801(d)(1)(iii), *State v. Jenkins*, 53 Wn.App. 228, 233 n. 3 (1989), *State v. Grover*, 55 Wn.App. 252 (1989), *State v. Stratton*, 139 Wn.App. 511, 516-18 (2007); ER 801(d)(1)(iii) is not limited to lineup, showup or montage identifications; I.

***State v. Bell***, 57 Wn.App. 447 (1990)

Where trial court's reasons for excluding expert eyewitness identification testimony are "fairly debatable," exercise of its discretion will not be reversed, *State v. Ward*, 55 Wn.App. 382 (1988); exclusion of testimony regarding unconscious transference, impact of eyewitness identification on juries, duration of observation and impact of chronic stress on individuals, while admitting expert testimony about how memory works, the effect of situational stress, the

effect of the passage of time and cross-racial identification affirmed, *see:* *State v. Jaime*, 168 Wn.2d 857, 868-72 (2010)(Sanders, J., dissenting); I.

***State v. Thomson***, 70 Wn.App. 200 (1993)

Defendant is absent during trial, police witnesses testify that person who committed the crime was defendant, that police handcuffed defense counsel's client, that the man he knew to be defendant had been present during a pretrial hearing; held: evidence was sufficient for a reasonable trier of fact to conclude that defendant was the man whom officers arrested; I.

***State v. Ross***, 71 Wn.App. 837 (1993)

At assault trial of identical twins, victim could not identify which defendant was which, one acquitted, one convicted; held: evidence at trial established identification card with defendant's name was taken from defendant, co-defendant referred to defendant by name, co-defendant identified himself by name, defendant identified himself at trial, thus evidence was sufficient; I.

***State v. Mahoney***, 80 Wn.App. 495, 498 (1996)

Police telephone defendant at home, defendant confesses, claims identity not authenticated, ER 901(b)(6); held: officer testified he had known defendant for years, was familiar with his voice, telephoned his residence and left message, defendant tried unsuccesfully to return call, officer called again to same number, defendant gave firsthand details about the crime, thus defendant was adequately identified to authenticate the conversation, *State v. Deaver*, 6 Wn.App. 216, 218-9 (1971); III.

***State v. Shea***, 85 Wn.App. 56, 58-61 (1997)

In determining admissibility of a showup, defense must prove, *State v. Gould*, 58 Wn.App. 175, 185 (1990), that under totality of circumstances the identification procedure leads to a substantial likelihood of irreparable misidentification, applying factors: (1) opportunity of witness to view the criminal at time of crime, (2) witness's degree of attention, (3) accuracy of the witness's prior description of the criminal, (4) level of certainty at the confrontation, and (5) time between crime and confrontation, modifying *State v. Traweek*, 43 Wn.App. 99 (1986), *see:* *State v. Vickers*, 107 Wn.App. 960, 969-71 (Morgan, concurring)(2001), *aff'd,* 148 Wn.2d 91, 118-19 (2002), *but see:* *State v. Linares*, 98 Wn.App. 397 (1999); I.

***State v. Smith***, 90 Wn.App. 857 (1998)

Trial court may order defendant to shave before lineup to conform to eyewitness's description, absent "irrefutable evidence that the defendant's appearance at that time differs from eyewitness descriptions of the perpetrator," *State v. Ammlung*, 31 Wn.App. 696 (1982); evidentiary hearing is not required; I.

***State v. Eacret***, 94 Wn.App. 282 (1999)

Eight-photo montage which contains three suspects is not impermissibly suggestive; I.

***State v. Linares***, 98 Wn.App. 397 (1999)

Where there is no evidence that an identification procedure was suggestive, there is no basis to suppress, and any uncertainty or inconsistency goes only to weight, *State v. Vaughn*, 101 Wn.2d 604 (1984), *State v. Eacret*, 94 Wn.App. 282 (1999), *State v. Salinas*, 169 Wn.App. 210, 224 (2012); Division I declines to follow *State v. Shea*, 85 Wn.App. 56, 60 (1997), *see: State v. Vickers*, 107 Wn.App. 960, 969-71 (Morgan, concurring)(2001), *aff'd,* 148 Wn.2d 91, 118-19 (2002); I.

***State v. Tan Le***, 103 Wn.App. 354 (2000)

Identification of suspect immediately following unlawful arrest must be suppressed absent attenuation of taint, *Brown v. Illinois*, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975), *State v. Mayfield*, 192 Wn.2d 871 (2019), *cf.: State v. Eserjose*, 171 Wn.2d 907 (2011), *State v. Mayfield*, 192 Wn.2d 871 (2019), *but see: Utah v. Strieff*, 579 U.S. 232, 136 S.Ct. 2056, 195 L.Ed.2d 400 (2016); in-court identification, absent unreliability, is admissible irrespective of lawfulness of arrest, *United States v. Crews*, 63 L.Ed.2d 537 (1980); I.

***State v. Kinard***, 109 Wn.App. 428, 432-35 (2001)

Witness reports that suspect has buck teeth, defendant is only one in montage with buck teeth; held: trial court's conclusion that montage is suggestive is supported by substantial evidence, *State v. Linares*, 98 Wn.App. 397, 403 (1999), as is its determination that the suggestive montage did not create a substantial likelihood of irreparable misidentification, *State v. Barker*, 103 Wn.App. 893 (2000), *State v. Ramires*, 109 Wn.App. 749, 760-63 (2002); III.

***State v. Vickers***, 148 Wn.2d 91 (2002)

In montage, defendant's is only photo not wearing coveralls; held: minor differences in photos are not suggestive enough to warrant further inquiry into the likelihood of misidentification, *State v. Eacret*, 94 Wn.App. 282, 285 (1999), *State v. Shea*, 85 Wn.App. 56, 58-61 (1997), *cf.: State v. Linares*, 98 Wn.App. 397 (1999); *affirms State v. Vickers*, 107 Wn.App. 960 (2003); II.

***State v. Cheatam***, 150 Wn.2d 626, 644-52 (2003)

In rape case, defense offers eyewitness identification expert to testify about the impact of stress and violence, weapon focus, lighting and cross-racial identification on perception and memory, refused by trial court; held: where eyewitness identification is a key element, trial court must consider whether expert testimony would assist the jury in assessing reliability, including factors such as whether victim and suspect are same race, display of weapon, effect of stress, within court's discretion; fact that expert did not meet victim and has no personal knowledge of the case is not a proper consideration, at 649, n. 5; whether or not defendant presents an alibi is irrelevant to admissibility, overruling *State v. Moon*, 45 Wn.App. 692 (1986), *see: State v. Hernandez*, 58 Wn.App. 793 (1990), *see: State v. Jaime*, 168 Wn.2d 857, 868-72 (2010)(Sanders, J., dissenting); 8-1.

***State v. Johnson***, 132 Wn.App. 454 (2006)

Trial court suppresses identification as impermissibly suggestive but allows victim to identify jacket defendant was wearing as victim testified that he remembered coat from robbery not from showup; held: independent source doctrine, *State v. Gaines*, 154 Wn.2d 711 (2005),

applies to identifications; guidelines established by *Neil v. Biggers*, 34 L.Ed.2d 401 (1972) do not apply to a witness's identification of an article of clothing worn by a suspect at a showup, *State v. King*,31 Wn.App. 56 (1982); II.

***State v. Courtney***, 137 Wn.App. 376, 385-86 (2007)

After witnesses pick out defendant from montage, police tell witnesses that they picked the same person who is in custody; held: suggestive statements by police after an identification is made may impermissibly reinforce an identification, *State v. McDonald*, 40 Wn.App. 743, 746 (1985), but absent evidence of a substantial likelihood of misidentification resulting from suggestiveness, suppression is not a remedy, *State v. Vickers*,148 Wn.2d 91, 118 (2002), *cf.: State v. Kloepper*, 179 Wn.App. 343 (2014); III.

***State v. Stratton***, 139 Wn.App. 511, 516-18 (2007)

Civilian witness testifies that he could not remember what color shirt defendant was wearing, officer then testifies that civilian told him that the defendant's shirt was yellow; held: prior statement of identification of a person made after perceiving him is admissible as a hearsay exception, ER 801(d)(1)(iii), *State v. Grover*, 55 Wn.App. 923 (1989), *State v. Jenkins*, 54 Wn.App. 228, 233 n.3 (1989), *State v. Grover*, 55 Wn.App. 252 (1989), which may include the various physical characteristics of a person perceived by the witness; III.

***State v. Birch***, 151 Wn.App. 504, 513-15 (2009)

Witness, who was not shown montage or lineup, sees defendant handcuffed outside courtroom, trial court denies motion to suppress in-court identification; held: one-party showup by itself does not demonstrate unnecessary suggestiveness, *State v. Guzman-Cuellar*, 47 Wn.App. 326 (1987); II.

***State v. Collins***, 152 Wn.App. 429 (2009)

Defendant is accused of killing a taxicab driver, camera in cab shows a person in back seat, family and friends of defendant identify him as the man in the photo, defense seeks suppression due to unduly suggestive procedures; held: suppression is not a remedy for suggestive procedures where a witness recognizes someone in a photograph, distinguishing situations where a person identifies a suspect whom the person has seen under the stress of a crime in progress, *State v. Hardy*, 76 Wn.App. 188 (1994), *aff'd, on other grounds, State v. Clark*, 129 Wn.2d 211 (1996), distinguishing *State v. Jamison*, 93 Wn.2d 794 (1980), *see: State v. Sanjurjo-Bloom*, 16 Wn.App.2d 120 (2021); I.

***Perry v New Hampshire***, 565 U.S. 228, 181 L.Ed.2d 694 (2012)

Absent evidence that police used unnecesarily suggetive identification procedures, eyewitness testimony identifying defendant is not subject to a pretrial hearing on suggestiveness and reliability of identification, *United States v. Wade*, 388 U.S. 218, 18 L.Ed.2d 1149 (1967) only applies to identification procedures arranged by police, *State v. Sanchez*, 171 Wn.App. 518, 571-83 (2012), *State v. Ramirez*, 5 Wn.App.2d 118, 129-35 (2018); 8-1.

***State v. Salinas***, 169 Wn.App. 210, 224 (2012)

Victim fails to pick defendant in montage, court denies motion to suppress in-court identification; held: where defendant does not claim that police used impermissibly suggestive

identification procedures, due process clause does not condition the admission of identification testimony upon proof of reliability, *State v. Vaughn,* 101 Wn.2d 604, 605 (1984), *Perry v. New Hampshire,* 565 U.S. 228, 181 L.Ed.2d 694 (2012), *State v. Ramirez,* 5 Wn.App.2d 118, 129-35 (2018); I.

***State v. Sanchez****,* 171 Wn.App. 518, 582 (2012)

Suppression of an identification procedure is only permitted where there is improper police conduct, intentional or not, *Perry v. New Hampshire,* 565 U.S. 228, 181 L.Ed.2d 694 (2012), *State v. Ramirez,* 5 Wn.App.2d 118, 129-35 (2018); presenting a picture to a witness twice is not improper, *State v. Smith,* 9 Wn.App. 279 (1973); III.

***State v. Allen****,* 176 Wn.2d 611, 616-26 (2013)

Cautionary cross-racial eyewitness identification instruction, *see: United States v. Telfaire,* 469 F.2d 552 (1972), is not required where witness' identification is based on identifying factors "unrelated to cross-race bias" (here apparel and sunglasses, not on facial appearance), but failure to give such an instruction in an appropriate case may be an abuse of discretion, *see also: State v. Laureano,* 101 Wn.2d 745, 767-69 (1984), *State v. Butler,* ___ Wn.2d ___, 2022WL17839530 (2022), *overruled on other grounds, State v. Brown,* 113 Wn.2d 520, 529 (1989); 7-2.

***State v. Kloepper****,* 179 Wn.App. 343, 349-52 (2014)

Victim fails to identify anyone in montage which includes defendant's photo, five days later is shown another montage with same photo, victim identifies another man but says she recognizes defendant who works in her building, DNA testing excludes man she identified, police tell her that the DNA matched defendant, victim decides defendant was attacker, when asked why she said "well the DNA thing," trial court denies motion to exclude in-court identification; held: in-court identification is not excluded because a witness had failed to identify the defendant during pretrial identification opportunities, *State v. Sanchez,* 171 Wn.App. 518 (2012), *State v. Salinas,* 169 Wn.App. 210, 224 (2012), although there no action by government tainted the identification; here, because the police suggestive behavior was not directed to victim's identification of her assailant but rather was made as an update of the case against the first man identified, it was not truly a suggestive identification procedure, here defendant "better fit" victim's description, other evidence established that defendant could have access to victim's home, thus there was not a substantial likelihood of misidentification, *see Perry v New Hampshire,* 565 U.S. 228, 181 L.Ed.2d 694 (2012); 2-1, III.

***State v. Henson****,* 11 Wn.App.2d 97 (2109)

At trial officer testifies that he observed a person buying drugs and identified him from his Facebook page; held: proper lay opinion, ER 701; I.

***State v. Sanjurjo-Bloom****,* 16 Wn.App.2d 120 (2021)

Over objection police officer testifies that defendant is the person depicted in a video that is in evidence, trial court orders that there be no mention that officer knew defendant from prior police contacts, during deliberations jury asks about defendant's prior criminal contact with the officer, trial court declines to respond; held: while an officer may state an opinion that a video depicts the defendant

where the officer has known the person for several years, *State v. Hardy*, 76 Wn.App. 188, 190 (1994), *aff'd sub nom*, *State v. Clark*, 129 Wn.2d 211 (1996), it is not helpful to the jury to allow opinion identification testimony where an officer has had limited prior contacts with the defendant, *State v. George*, 150 Wn.App. 110, 118 (2009); trial court's failure to provide a meaningful limiting instruction when it was clear that the jury was considering the evidence of the officer's knowledge of defendant for an improper purpose compounds the error, court was obliged to correct the jury's misunderstanding, *State v. Campbell*, 163 Wn.App. 394, 402 (2011); I.

***State v. Scabbyrobe***, 16 Wn.App.2d 870 (2021)

Defendant is observed by victim stealing his car, car crashes, victim opens door, orders defendant out, she runs, police arrive quickly, observe defendant wearing different clothes, not carrying what victim said she had, police stop defendant, victim is brought to scene and says he's 100% certain she is the thief, at trial defense counsel fails to move to suppress the identification, defendant claims ineffective assistance on appeal; held: a one-person showup is not unnecessarily suggestive, *State v. Bockman*, 37 Wn.App. 474 (1984), *State v. Springfield*, 28 Wn.App. 446 (1981); while police could have taken a photo of defendant and created a montage, the fact that a different procedure could have been used does not mean the procedure used was impermissibly suggestive; here, the reliability factors in *Neil v. Biggers*, 409 U.S. 188, 198, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972) support reliability of the identification; 2-1, III.

***State v. Derri***, 199 Wn.2d 658 (2022)

In deciding whether an identification procedure is suggestive court must consider current scientific understanding of the fallibility of eyewitness identification, including administering the procedure in double-blind fashion, present photomontages sequentially rather than simultaneously, give pre-identification admonitions informing the witness that the perpetrator may or may not be in the montage and that the witness need not make a selection, never show the same suspect to the same witness over the course of multiple identification procedures, construct montage so that suspect is not the only one pictured who matches the description of the perpetrator; here, defendant was the only one in the montage with a neck tattoo, but because the tattoo was not part of the description, thus tattoo, while suggestive, did not, under the totality of the circumstances, create "a very substantial likelihood of irreparable misidentification," *Manson v. Brathwaite*, 432 U.S. 98, 114, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977), *see also: State v. Butler*, ___ Wn.2d ___, 521 P.3d 931 (2022); affirms *State v. Derri*, 17 Wn.App.2d 376 (2021); 9-0.

***State v. Butler***, ___ Wn.2d ___, 521 P.3d 931 (2022)

In assault case by Black defendant on white victim trial court gives eyewitness identification instruction but declines to give the bracketed language on cross-racial identification, WPIC 6.52 (5th ed. 2021), ruling that there was no evidence regarding either the fallibility of cross-racial identification in general or the victim's familiarity or lack of familiarity with Black people; held: trial court's decision of whether or not to instruct on cross-racial eyewitness identification is reviewed for abuse of discretion, *State v. Allen*, 176 Wn.2d 611 (2013), here trial court did not abuse discretion because no evidence was presented supporting the language of that instruction; "[w]e leave for another day broader questions about what steps courts should take to mitigate the significant risk that eyewitness identifications are unreliable in the cross-racial context;" 9-0.

# IMMUNITY

***State v. Mannhalt***, 33 Wn.App. 696 (1983)

*Dicta* that defendant may have right to have witnesses immunized upon a showing of extreme prosecutorial misconduct or vital necessity in obtaining exculpatory, noncumulative testimony, *see:* *State v. Carlisle*, 73 Wn.App. 678, 681-82 (1994), *State v. Fish*, 99 Wn.App. 86, 93 (1999); I.

***State v. Runions***, 100 Wn.2d 52 (1983)

Where defendant is convicted and sentenced and, while his appeal is pending, he is compelled to testify against a co-defendant under a grant of immunity, the grant of immunity has no effect on the conviction and sentence, but would bar a retrial, *reversing* *State v. Runions*, 32 Wn.App. 669 (1982); 9-0.

***State v. McCullough***, 49 Wn.App. 546 (1987)

Where defendant is granted transactional immunity, CrR 6.14, after trial but before sentencing, he cannot be sentenced, and case must be dismissed, *distinguishing* *State v. Runions*, 100 Wn.2d 52 (1983); I.

***State v. Entz***, 58 Wn.App. 112 (1990)

A cautionary instruction is not required when a witness testifies under a grant of immunity; I.

***State v. Decker***, 68 Wn.App. 246 (1992)

Trial court has authority to grant use immunity absent prosecutor's motion, CrR 6.14, for compelled predisposition psychological interview of respondent, *cf.:* *Dependency of Q.L.M.*, 105 Wn.App. 532 (2001); I.

***State v. Bryant***, 97 Wn.App. 479 (1999)

Defendant, in exchange for cooperation, is given contractual use plus derivative use immunity, defendant provides information leading to a witness, state charges defendant with crimes, seeks to use witness to testify against defendant; held: state has the burden of proving that its evidence is untainted by defendant's immunized statements, that the prosecution be based on independent sources, but state need not negate all abstract possibility of taint, *Kastigar v. United States*, 32 L.Ed.2d 212 (1972), *United States v. Byrd*, 765 F.2d 1524, 1531 (11th Cir. 1985); trial court properly suppressed witness's testimony as state would not have obtained the witness's cooperation without defendant's immunized statements; while use plus fruits immunity does not bar all nonevidentiary use of immunized testimony, state may not use it as an investigatory lead; I.

***State v. Bryant***, 146 Wn.2d 90 (2002)

King County enters into informal immunity agreement with defendant for his testimony, written agreement does not limit immunity to King County crimes, Snohomish County, not a party to the agreement, charges defendant; held: "fundamental fairness" requires dismissal of

Snohomish County case, although collateral estoppel, contract and agency theories do not mandate dismissal; 2 justices in majority, 4 concur, 3 dissent.

***State v. Green***, 119 Wn.App. 15 (2003)

Until an immunized witness' credibility is attacked, immunity agreement should not be admitted, *State v. Jessup*, 31 Wn.App. 304 (1982), *see: State v. Bourgeois*, 133 Wn.2d 389, 402 (1997), *see: State v. Smith*, 162 Wn.App. 833, 848-51 (2011); when agreement is admitted, those portions that relate to the witness testifying truthfully should be redacted, *State v. Ish*, 170 Wn.2d 189 (2010), *State v. Coleman*, 155 Wn.App. 951 (2010); I.

***State v. Ish***, 170 Wn.2d 189 (2010)

Evidence that an immunized witness has agreed to testify truthfully should not be admitted in state's case-in-chief, *State v. Green*, 119 Wn.App. 15 (2003), *State v. Lozcano*, 188 Wn.App. 338, 368-70 (2015), but may be elicited by the state if the defense has attacked the witness' credibility on cross-examination, *see: State v. Smith*, 162 Wn.App. 833, 848-51 (2011); reverses *State v. Ish*, 150 Wn.App. 775 (2009); 5-4.

***State v. Smith***, 162 Wn.App. 833, 848-51 (2011)

At outset of trial, defense counsel announces his intent to attack immunized witness' credibility based upon his plea bargain requiring him to testify truthfully, prosecutor refers in opening and direct of the witness that he is obliged to testify truthfully without objection; held: while evidence that immunized witness agrees to testify truthfully should not be admitted until defense has attacked credibility, *State v. Ish*, 170 Wn.2d 189 (2010), *State v. Lozcano*, 188 Wn.App. 338, 368-70 (2015), it is not improper where there is "little doubt" that defendant will attack veracity during cross-examination; III.

# INFORMATION/COMPLAINT/CITATION

***State v. Theroff***, 95 Wn.2d 385 (1980)

Special allegations must be included in information or they cannot be used to enhance penalty; 6-3.

***State v. Hall***, 95 Wn.2d 536 (1981)

Where two victims are alleged in the same count, may be error to charge in the conjunctive and instruct in the disjunctive, but harmless here; 9-0.

***State v. Carr***, 97 Wn.2d 436 (1982)

To amend misdemeanor complaint, plaintiff may not charge different or additional crime, *State v. Lutman*, 26 Wn.App. 766 (1980), *but see*: CrRLJ 2.4(f) (1987); defendant must be given a written copy of the amended complaint or information if demanded, *State v. Newman*, 63 Wn.App. 841 (1992); 6-3.

***State v. Bonds***, 98 Wn.2d 1 (1982)

Information charging defendant with rape 1° failed to specify crime defendant intended to commit when he feloniously entered building; held: whereas defense failed to "request an order calling for amendment of the information," issue will not be considered on appeal; *see also*: *State v. Bargas*, 52 Wn.App. 700 (1988).

***McGuire v. Seattle***, 31 Wn.App. 438 (1982)

During trial, city's motion to amend from DUI to physical control held permissible as amended complaint does not charge a new crime, *State v. Lutman*, 26 Wn.App. 766 (1980), *State v. Olds*, 39 Wn.2d 258 (1951), but charges a lesser included offense, *see: State v. Nguyen*, 165 Wn.2d 428 (2008); I.

***State v. Mason***, 31 Wn.App. 680 (1982)

Defendant charged with multiple counts of promoting prostitution for having multiple prostitutes working for him may be convicted on each count but must receive concurrent sentences, *but see: State v. Barbee,* 187 Wn.2d 375 (2017); II.

***State v. Chelly***, 32 Wn.App. 916 (1982)

Defendant's argument that a burglary 2° information was defective in that it failed to specify the underlying crime he intended to commit in the building he entered was waived by his failure to object or to demand a bill of particulars per CrR 2.1(e); the state is required only to prove criminal intent at the time of the illegal entry, not the intent to commit a particular crime; possession of stolen property (PSP) is not a lesser of burglary 2°; the "inherent relationship" test for a lesser does not apply; I.

***State v. Gosser***, 33 Wn.App. 428 (1982)

State amends, on day of trial, from assault 2° with intent to commit a felony to assault 2° with a weapon, defense objects but does not request a continuance; held: defendant has burden

of showing prejudice; the fact that defense did not request a continuance is persuasive of lack of prejudice, *State v. Wilson*, 56 Wn.App. 63 (1989), *State v. Laureano*, 101 Wn.2d 745, 762 (1984), *see: State v. Gehrke*, 193 Wn.2d 1 (2019), where the principal element of new charge is inherent in the previous charge and no other prejudice is demonstrated, no abuse of discretion, *State v. Johnson*, 7 Wn.App. 527 (1972), *aff'd*, 82 Wn.2d 156 (1973); *State v. Schaffer*, 120 Wn.2d 616 (1993); II.

***State v. Ford***, 33 Wn.App. 788 (1983)

Where information charges in the conjunctive ("taking and riding"), state is only required to prove disjunctive, *see: State v. Munson*, 120 Wn.App. 103 (2004); I.

***State v. Powell***, 34 Wn.App. 791 (1983)

Defendant is charged with felony murder 1°, RCW 9A.32.030(1)(c)(5), pleads guilty, on appeal plea is reversed; upon remand state amends charge to premeditated murder 1°, RCW 9A.32.030(1)(a); defendant seeks dismissal for speedy trial violation because of failure to join a related offense, CrR 4.3(c); held: information may be amended to include an alternate means of committing a crime formerly charged without violating joinder or speedy trial rules; I.

***State v. Petrich***, 101 Wn.2d 566 (1984)

Defendant charged with one count each statutory rape and indecent liberties; victim-granddaughter testifies to numerous incidents; defense moves to require state to elect counts and to elect which incident is to be relied upon to convict; held: mere fact that victim is same is not enough to call the offense a continuing offense or transaction; state must elect or jury must be instructed that they must be unanimous as to which incident has been proved, modifying *State v. Workman*, 66 Wash. 292 (1911); 9-0.

***State v. Alferez***, 37 Wn.App. 508 (1984)

State amends information to add special allegations, sends copy to defense counsel but defendant is not arraigned on amended information; held: may not enhance penalty without actual notice, thus remanded for resentencing, *State v. Theroff*, 95 Wn.2d 385 (1980); III.

***State v. Brisebois***, 39 Wn.App. 156 (1984)

Trial court grants state's motion to amend information, during trial, to include a longer period of time of unlawful conduct; no written amendment was provided; held: information may be amended during trial without giving defendant a copy unless defense demands a copy or a different crime is charged, *distinguishing State v. Carr*, 97 Wn.2d 436 (1982); *accord: State v. Newman*, 63 Wn.App. 841 (1992); I.

***State v. Fitzgerald***, 39 Wn.App. 652 (1985)

While a continuing course of conduct may form the basis of one charge in an information, the mere fact that the rape victim is the same is not enough to find that the offenses contained in a single count constitute a single transaction, *State v. Petrich*, 101 Wn.2d 566 (1984); I.

***State v. Allyn***, 40 Wn.App. 27 (1985)

Where information is amended to change date of offense, and alibi is claimed, rearraignment and/or continuance were not required, *see: State v. DeBolt*, 61 Wn.App. 58 (1991), *State v. Downing*, 122 Wn.App. 185, 193-94 (2004), *State v. Becklin*, 133 Wn.App. 610, 614-15 (2006); III.

***State v. Fischer***, 40 Wn.App. 506 (1985)

Date of offense in information is outside statute of limitations, date in affidavit of probable cause is within statute, state's motion to amend information to change date of offense is denied, information dismissed; held: where charge is filed within statute of limitations but error is made in date crime is alleged to have occurred, state may amend information after the expiration of the limitations period if defendant had notice, amendment does not change the offense or alter a material element, and no prejudice is shown, *State v. DeBolt*, 61 Wn.App. 58 (1991), *see*: *State v. Peltier*, 181 Wn.2d 290 (2014); I.

***State v. Bryce***, 41 Wn.App. 802 (1985)

Where original information charged a crime beyond the statute of limitations, trial court may not amend information to bring case within the limitation period, *State v. Glover*, 25 Wn.App. 58 (1979), *but see*: *State v. Fischer*, 40 Wn.App. 508 (1985); II.

***State v. Holt***, 104 Wn.2d 315 (1985)

Where information fails to allege statutory element of crime, defense may move to dismiss at any time; failure of defense to request bill of particulars does not waive issue as bill of particulars is not part of information and cannot cure a fundamentally defective information; a complete jury instruction cannot cure a defective information; 9-0.

***State v. Royster***, 43 Wn.App. 613 (1986)

Failure to arraign a defendant on an amended information is error only where defendant fails to have sufficient notice and adequate opportunity to defend, *State v. Alferez*, 37 Wn.App. 508, 516 (1984), *State v. Allyn*, 40 Wn.App. 27, 35 (1985); where defendant fails to request a copy of an amended information, he waives his right to receive such a copy, *State v. Brisebois*, 39 Wn.App. 156, 162 (1984); I.

***State v. Flieger***, 45 Wn.App. 667 (1986)

Where information and probable cause affidavit establish that state cannot make factual issue on each element, then the trial court may resolve the issue prior to trial; III.

***State v. Purdom***, 106 Wn.2d 745 (1986)

State's motion to amend information on day of trial from conspiracy to deliver drugs to accomplice is granted, defense motion for continuance is denied; held: when information is amended on day of trial, continuance should be granted if requested, *State v. Jones*, 26 Wn.App. 1, 6 (1980); 6-3.

***State v. Hawthorne***, 48 Wn.App. 23 (1987)

Where information is vague concerning the state's theory of what constitutes a conspiracy, charge is not subject to dismissal where the information can be amended, there is no prejudice, there is time to continue case under speedy trial rule, and state never disobeyed an order to provide greater specificity; where information contains elements that are not elements of the statutory offense they need not be proved by the state in a bench trial, *State v. Benitez,* 175 Wn.App. 116, 123-26 (2013), *distinguishing* *State v. Worland*, 20 Wn.App. 559 (1978), *State v. Barringer*, 32 Wn.App. 882 (1982); I.

***State v. Baker***, 48 Wn.App. 222 (1987)

At trial, state is granted leave to amend information to name a different victim; defense demands a copy of amended information, which is denied; held: harmless error where defendant was fully informed of the change and the change was a technical formality which did not address elements of the crime; *but see*: *State v. Carr*, 97 Wn.2d 438 (1982); *accord:* *State v. Newman*, 63 Wn.App. 841 (1992); I.

***State v. Rivas***, 49 Wn.App. 677 (1987)

Surplusage in an information need not be proved unless incorporated in jury instructions, *State v. McGary*, 37 Wn.App. 856 (1984), *State v. Hickman*, 135 Wn.2d 97 (1998), *State v. Johnson,* 188 Wn.2d 742 (2017), *see: State v. France,* 180 Wn.2d 809 (2014), *cf.: Musacchio v. United States,* 577 U.S. 237, 136 S.Ct. 709, 193 L.Ed.2d 639 (2016), *distinguishing* *State v. Barringer*, 32 Wn.App. 882 (1982); I.

***State v. Pelkey***, 109 Wn.2d 484 (1987)

Information may not be amended to charge a different crime after state has rested its case-in-chief unless new charge is a lesser included offense or a lesser degree of original charge, *State v. Peterson*, 133 Wn.2d 885 (1997), CONST. Art. 1, § 22 (amend. 10), *State v. Cortes Aguilar*, 176 Wn.App. 264, 274-75 (2013), *State v. Gehrke,* 193 Wn.2d 1 (2019); defense need not show prejudice, *see:* *State v. Markle*, 118 Wn.2d 424 (1992), *cf.:* *State v. Schaffer*, 63 Wn.App. 761 (1991), *State v. Hakimi*, 124 Wn.App. 15, 26-28 (2004); 9-0 (5-4 on prejudice issue).

***State v. Bray***, 52 Wn.App. 30 (1988)

Where information charges one mode of committing crime, instructions may not allow jury to convict of alternative mode, *State v. Chino*, 117 Wn.App. 531, 538-41 (2003), *State v. Laramie*, 141 Wn.App. 332, 341-44 (2007), *see:* *State v. Doogan*, 82 Wn.App. 185 (1996), *State v. S.E.*, 90 Wn.2d 886 (1998), *State v. Boiko*, 131 Wn.App. 595 (2006), *State v. Brewczynski,* 173 Wn.App. 541 (2013); I.

***State v. Leach***, 113 Wn.2d 679 (1989)

Failure of criminal complaint in misdemeanor case to state every element of offense mandates automatic dismissal, need not be raised at trial court level, *State v. Holt*, 104 Wn.2d 315 (1985); I.

***State v. Nieblas-Duarte***, 55 Wn.App. 376 (1989)

"Unlawfully and feloniously" equals knowingly, *State v. Krajeski*, 104 Wn.App. 377, 384 (2001); I.

***State v. Warren***, 55 Wn.App. 645 (1989)
In rape 1° case with 11-year old victim, failure of information to allege nonmarriage as element is not grounds for dismissal where raised for first time on appeal, *see: State v. Stockwell*, 159 Wn.2d 394 (2007); I.

***State v. Delcambre***, 55 Wn.App. 681 (1989)
Intent to deprive is not an element of welfare fraud, RCW 74.08.331, which must be alleged in information; I.

***State v. Brown***, 55 Wn.App. 738 (1989)
Amendment of information on first day of trial from rape to indecent liberties based upon the same evidence where defendant did not show prejudice was not error; II.

***Seattle v. McKinney***, 58 Wn.App. 607 (1990)
"DUI" on citation, coupled with references to ordinance subsections, is adequate to charge under blood alcohol level theory, *State v. Leach*, 113 Wn.2d 679 (1989), *State v. Ortiz*, 80 Wn.App. 746 (1996), *State v. Grant*, 104 Wn.App. 715 (2001), *see: Seattle v. Norby*, 88 Wn.App. 545 (1997), *overruled, in part, State v. Robbins*, 138 Wn.2d 486 (1999); I.

***State v. Sly***, 58 Wn.App. 740 (1990)
Robbery information that fails to allege the nonstatutory element of intent is still sufficient as long as facts in the information support the element of intent, *State v. Strong*, 56 Wn.App. 715, 717 (1990); *see also*: *State v. Hernandez*, 58 Wn.App. 793 (1990), *State v. Mathews*, 60 Wn.App. 761 (1991), *but see: State v. Moavenzadeh*, 135 Wn.2d 359 (1998), ; I.

***Seattle v. Hein***, 115 Wn.2d 555 (1990)
Essential elements rule, *State v. Leach*, 113 Wn.2d 679 (1989), applies to citations; 40-word *per curiam* opinion appears to hold that citation which reads "physical control" is insufficient.

***State v. Weiding***, 60 Wn.App. 184 (1991)
Information which cites a statute that is not yet in effect is not fatally defective where defense admits having full notice of crime charged and jury instructions clearly set out correct elements.

***State v. Kjorsvik***, 117 Wn.2d 93 (1991)
Charging document must include all essential elements of the crime, statutory or common law, overruling *State v. Johnson*, 59 Wn.App. 867 (1990), *State v. Hernandez*, 58 Wn.App. 793 (1990), *State v. Sly*, 58 Wn.App. 740 (1990), *State v. Strong*, 56 Wn.App. 715 (1990), *State v. Smith*, 49 Wn.App. 596 (1987), *State v. Bower*, 28 Wn.App. 704 (1981), to the extent that those cases hold that common law elements need not be pled; where charging document is challenged

for the first time after verdict, *see:* *State v. Phillips*, 98 Wn.App. 936 (2000), it is sufficient where the necessary facts appear in any form, or by fair construction can be found within the terms of the charging document as long as all elements are present and there is no prejudice; thus, an apparently missing element may be fairly implied from language within the document; here, robbery information that does not allege "intent to steal" is sufficient, as information alleged that defendant unlawfully took money from cash register, against the will of victim by use of force while displaying a weapon, *distinguishing* *State v. Hicks*, 102 Wn.2d 182 (1984); insufficient charging document does not impact court's jurisdiction; 7-2.

***State v. Mitchell***, 117 Wn.2d 521 (1991)

State may amend aggravated murder complaint to add felony murder without being required to elect, *State v. Irizarry*, 111 Wn.2d 591 (1988), *State v. Bowerman*, 115 Wn.2d 794 (1990) *disapproved, on other grounds, State v. Condon,* 182 Wn.2d 307, 321-26 (2015); 9-0.

***State v. DeBolt***, 61 Wn.App. 58 (1991)

Amending information after state rests and after defendant testifies to change date of offense, where no alibi or other substantial prejudice is offered and where a continuance is granted, is not error, *State v. Downing*, 122 Wn.App. 185, 193-94 (2004), *State v. Becklin*, 133 Wn.App. 610, 614-15 (2006), *rev'd, on other grounds,* 163 Wn.2d 519 (2008), *State v. Goss*, 189 Wn.App. 571, 576-77 (2015), *affirmed, on other grounds,* 186 Wn.2d 372 (2016), *State v. Brooks,* 195 Wn.2d 91 (2020), *distinguishing* *State v. Pelkey*, 109 Wn.2d 484 (1987); I.).

***State v. Kitchen***, 61 Wn.App. 915 (1991)

Failure of information to allege guilty knowledge as an element of delivery of a controlled substance, RCW 69.50.401(a), *State v. Boyer*, 91 Wn.2d 342, 344 (1979), is grounds for dismissal, even if raised for the first time on appeal, *State v. Kjorsvik*, 117 Wn.2d 93, 101 (1991); III.

***State v. Sanchez***, 62 Wn.App. 329 (1991)

Vehicular homicide information fails to allege proof of causal relationship between death and driving, *State v. MacMaster*, 113 Wn.2d 226 (1989); during trial, defense counsel acknowledged that state had to prove proximate causation, jury was so instructed, defense did not challenge sufficiency of information until appeal; held: information alleged "some language" giving notice of missing element, no prejudice, *State v. Kjorsvik*, 117 Wn.2d 93 (1991); *see:* *State v. Tang*, 75 Wn.App. 475-8 (1994), *State v. Tang*, 77 Wn.App. 644 (1995); III.

***State v. Rhode***, 63 Wn.App. 630 (1991)

"Attempt" in information encompasses and is sufficient to inform defendant that "substantial step" is an element of the crime, *State v. Smith*, 49 Wn.App. 596, 599 (1987), *overruled, in part, State v. Moavenzadeh*, 135 Wn.2d 359 (1998), *State v. Borrero*, 97 Wn.App. 101 (1999), where no prejudice is shown, *State v. Kjorsvik*, 117 Wn.2d 93, 111 (1991); I.

***State v. Newman***, 63 Wn.App. 841 (1992)

State is granted leave to orally amend information to change charging period, defendant is not given copy; held: absent demand, defendant waives right to written information where no new crime is charged, *State v. Carr*, 97 Wn.2d 436 (1982), *State v. Brisebois*, 39 Wn.App. 156 (1985), *State v. Baker*, 48 Wn.App. 222 (1987); I.

***State v. Ferro***, 64 Wn.App. 195 (1992)

Complaint reads "RCW 9A.88.010 public indecency (see notes)"; held: for a complaint to adequately incorporate by reference, the incorporated document must be described with sufficient specificity that it can be readily and accurately identified as the document intended to be incorporated, here complaint is inadequate; I, 2-1.

***State v. Graham***, 64 Wn.App. 305 (1992)

Robbery 2° information that alleges defendant took property "unlawfully" but fails to allege common law element that defendant did not own property is sufficient where challenged for first time on appeal, *State v. Kjorsvik*, 117 Wn.2d 93 (1991), *State v. Phillips*, 98 Wn.App. 936, 944-45 (2000), *see: State v. Bacani*, 79 Wn.App. 701 (1995); I.

***State v. Davis***, 64 Wn.App. 511 (1992)

On morning of trial, court permits state to amend from assault 2° (bodily injury) to assault 2° (deadly weapon), defense moves for continuance "to prepare a defense," motion denied; held: because defense failed to indicate any defense to amended charge that was not available as a defense to prior charge, no prejudice was shown, thus continuance motion was properly denied; III.

***State v. Johnson***, 119 Wn.2d 143 (1992)

In delivery of controlled substance case, information alleged defendants "unlawfully" delivered cocaine, did not specify defendants knew identity of substance delivered, *State v. Boyer*, 91 Wn.2d 342 (1979), defense challenged informations prior to trial; held: "unlawful" does not include "knowledge," *State v. Armstrong*, 69 Wn.App. 430 (1993) and, where challenged before trial, information is deficient, *State v. Kjorsvik*, 117 Wn.2d 93 (1991); *see also: State v. Nuñez-Martinez*, 90 Wn.App. 250 (1998), *State v. Taylor*, 140 Wn.2d 229 (2000); 8-1.

***State v. Simon***, 64 Wn.App. 948, 120 Wn.2d 196 (1992)

In promoting prostitution 1° case, RCW 9A.88.070(1), where amended information charges defendant "knowingly profit[ed] by compelling [victim] by force to engage in prostitution**;** and did advance and profit from prostitution of a person who was less than 18 years," failure to allege *mens rea* element of knowingly to promoting prostitution of a minor is fatal, even where raised for first time on appeal, *State v. Kjorsvik*, 117 Wn.2d 93 (1991), irrespective of lack of prejudice; semicolon separating modes establishes that "knowingly" modifies only the first alternative means, as sentence structure and punctuation are the very means by which persons of common understanding are able to ascertain the meaning of written words, RCW 10.37.050; where information is amended, prior information is of no force and effect, even where it alleges all elements, *In re Behrens*, 24 Wn.2d 125, 133 (1945); Supreme

Court holds that appropriate remedy is dismissal without prejudice to the state refiling, *State v. Markle*, 118 Wn.2d 424, 440-1 (1992), *cf.: State v. Dallas*, 126 Wn.2d 324 (1995); I.

***State v. Sanders***, 65 Wn.App. 28 (1992)

Where information charges malicious mischief 3°, RCW 9A.48.090, but fails to allege amount of damage or whether crime charged is misdemeanor or gross misdemeanor, then information is sufficient to charge misdemeanor, *distinguishing State v. Leach*, 113 Wn.2d 679 (1989); *see: State v. Vangerpen*, 125 Wn.2d 782, 791-5 (1995); I.

***State v. Gallegos***, 65 Wn.App. 230 (1992)

An attempt is a lesser which need not be charged for trier of fact to convict; information which alleges that defendant, "by forcible compulsion did attempt to engage in sexual intercourse" sufficiently establishes elements of intent and substantial step where challenged for first time on appeal; I.

***State v. Hartz***, 65 Wn.App. 351 (1992)

In felony murder case, state need not allege in information the elements of the underlying felony, *State v. Medlock*, 86 Wn.App. 89, 101-2 (1997), *see: State v. Noltie*, 116 Wn.2d 831, 842 (1991); *but see: Kreck v. Spalding*, 721 F.2d 1229 (9th Cir. 1983); I.

***State v. Bryant***, 65 Wn.App. 428 (1992)

In felony murder case, state need not elect in information which alternative method of committing assault 1° will apply, *see: State v. Noltie*, 116 Wn.2d 831, 842 (1991); *but see: Kreck v. Spalding*, 721 F.2d 1229 (9th Cir. 1983); I.

***State v. Garcia***, 65 Wn.App. 681 (1992)

Drug delivery information alleges delivery to officer, prosecutor proves delivery to co-defendant, defense admits having full notice of actual charge against him and acknowledges case was tried and argued as if he had been charged with delivery to co-defendant; held: error in information was merely technical as it was not relied upon or even noticed by either party, *distinguishing State v. Brown*, 45 Wn.App. 571, 576 (1986); I.

***State v. Hale***, 65 Wn.App. 752 (1992)

Information which erroneously states maximum penalty is not defective; III.

***Auburn v. Brooke***, 119 Wn.2d 623 (1992)

Charging document, including citation, that recites no more than numerical code section and title of offense is insufficient unless it contains all essential elements of the crime charged; "disorderly conduct" and "Hit/Run; Attended" is insufficient; reverses *Auburn v. Brooke*, 60 Wn.App. 87 (1991) and *Seattle v. Wandler*, 60 Wn.App. 309 (1991); on collateral review, petitioners must show actual prejudice, as errors in charging documents do not constitute *per se* prejudicial error, *In re St. Pierre*, 118 Wn.2d 321, 329 (1992) *(dicta)*, ***State v . Wences,*** 189 Wn.2d 675 (2017); retrial is permitted after a conviction is reversed due to defect in charging document, *Montana v. Hall*, 95 L.Ed.2d 354 (1987), *Ball v. United States*, 41 L.Ed. 300 (1896),

*State v. Markle*, 118 Wn.2d 424, 441 (1992) *(dicta)*; "statutes of limitation usually do not bar recharging," *see:* RCW 9A.04.080(3) *(dicta); cf.: State v. Dallas*, 126 Wn.2d 324 (1995); 9-0.

***State v. Schaffer***, 120 Wn.2d 616 (1993)

Before resting during bench trial, state is permitted to amend malicious mischief information from "damage to tires" to "damage to tires and mailboxes;" held: absent specific evidence of prejudice, at least in bench trial, trial court may permit state to amend to different or additional manner of committing crime originally charged, CrR 2.1(e), *distinguishing State v. Pelkey*, 109 Wn.2d 484 (1987), *affirming State v. Schaffer*, 63 Wn.App. 761 (1991), *see: State v. Wilson*, 56 Wn.App. 63 (1989), *State v. Mahmood*, 45 Wn.App. 200 (1986), *State v. Gosser*, 33 Wn.App. 428, 435 (1982), *State v. Alvarado*, 73 Wn.App. 874 (1994), *State v. Vangerpen*, 125 Wn.2d 782 (1995), *State v. Aho*, 89 Wn.App. 842, 845-50 (1998), *aff'd, on other grounds,* 137 Wn.2d 736 (1999), *State v. Ziegler*, 138 Wn.App. 804 (2007), *State v. Hockaday*, 144 Wn.App. 918 (2008), 149 Wn.App. 521 (2009), *but see: State v. Rapozo*, 114 Wn.App. 321 (2002); 6-3.

***State v. Murbach***, 68 Wn.App. 509 (1993)

Amending information from burglary 2° to residential burglary on day of trial is proper where claimed prejudice is only that defendant is deprived of defense she would have had under prior information, or because sentence range is harsher, *State v. James*, 108 Wn.2d 483, 489-90 (1987); III.

***State v. Armstrong***, 69 Wn.App. 430 (1993)

After jury is sworn, defense counsel moves to dismiss VUCSA information for failure to allege *mens rea* element, *State v. Johnson*, 119 Wn.2d 143 (1992), court denies motion and then denies state's motion to amend to add element when defense objects; held: while trial court erred in denying motion to amend, error was invited as defense urged court to deny motion; "error being invited, the situation is the same as it would be if the motion to amend was granted," *see: State v. Lewis*, 15 Wn.App. 172 (1976); I.

***State v. Johnson***, 69 Wn.App. 935 (1993)

VUCSA information that alleges "unlawfully deliver" but fails to allege "guilty knowledge," *State v. Johnson*, 119 Wn.2d 143 (1992), *State v. Boyer*, 91 Wn.2d 342 (1979), is sufficient to withstand a post-trial challenge where defense is entrapment and defendant alleged no prejudice; *see: State v. Wallway*, 72 Wn.App. 407, 410-14 (1994); I.

***State v. Valdobinos***, 122 Wn.2d 270 (1993)

Guilty knowledge is not an element in a conspiracy to deliver case, *see: State v. Sims*, 119 Wn.2d 138, 142 (1992), *State v. Wilson*, 95 Wn.2d 828 (1981); in a charge of delivery, failure to include guilty knowledge in information is not fatal when challenged for first time on appeal, where other counts in the same information alleged possession with intent to deliver cocaine and conspiracy to deliver cocaine; 8-0.

***State v. VanValkenburgh***, 70 Wn.App. 812 (1993)

In malicious mischief case, naming lessee of damaged property rather than fee owner in information is sufficient where challenged for first time on appeal, and where no prejudice is alleged or proved; III.

***State v. Cozza***, 71 Wn.App. 252 (1993)

Information charges indecent liberties of child between 1984 and 1987; held: defendant does not have due process right to reasonable opportunity to raise alibi defense, thus information alleging crime that occurred over three-year period is valid; *see also:* *State v. Jordan*, 6 Wn.2d 719, 721 (1940), *State v. Warren*, 55 Wn.App. 645 (1989), *State v. Carver*, 37 Wn.App. 122, 126 (1984), *State v. Bailey*, 52 Wn.App. 42, 51 (1988), *aff'd*, 114 Wn.2d 340 (1990), *State v. Hayes*, 81 Wn.App. 425, 429-31 (1996); III.

***State v. Wallway***, 72 Wn.App. 407, 410-14 (1994)

Failure to allege guilty knowledge, *State v. Boyer*, 91 Wn.2d 342, 344 (1979), in manufacturing controlled substance information, RCW 69.50.401(a), is not error, *see:* *State v. Warnick*, 121 Wn.App. 737 (2004), where raised for first time on appeal, *State v. Kjorsvik*, 117 Wn.2d 93 (1991), where information does allege "unlawfully," *State v. Johnson*, 119 Wn.2d 143, 149-50 (1992); II.

***State v. Alvarado***, 73 Wn.App. 874 (1994)

State may not file an amended information absent approval of court, although defect is cured if approval is subsequently obtained; filing an amended information immediately prior to trial, even if it adds a count, is proper absent a specific showing of prejudice by the defense, *State v. James*, 108 Wn.2d 483, 489 (1987), *State v. Murbach*, 68 Wn.App. 509, 511 (1993); where accused fails to seek a continuance following late amendment, absence of surprise and prejudice is presumed, *State v. Schaffer*, 63 Wn.App. 761, 767 (1991), *aff'd*, 120 Wn.2d 616 (1993); III.

***State v. Arseneau***, 75 Wn.App. 747 (1994)

In incest 1°, RCW 9A.64.020(1), age of stepchildren and adopted children, RCW 9A.64.020(3), is defense, not element of crime; use of "stepdaughter" rather than "descendant" in information is sufficient when challenged for first time on appeal; I.

***State v. Roberts***, 76 Wn.App. 192 (1994)

In violation of drug burn statute, RCW 69.50.401(c), information alleging defendant negotiated delivery of cocaine and delivered another substance is sufficient even though it does not allege delivery of noncontrolled substance, where challenged on appeal; I.

***State v. Vangerpen***, 125 Wn.2d 782, 787-95 (1995)

In attempted murder 1° trial, allowing amendment after state rests to add premeditation element is an abuse of discretion even absent prejudice, *State v. Pelkey*, 109 Wn.2d 484, 491 (1987), *State v. Markle*, 118 Wn.2d 424, 433 (1992), *State v. Hull*, 83 Wn.App. 786, 799-803 (1996), *State v. Quismundo*, 164 Wn.2d 499 (2008), remedy is dismissal without prejudice to refile, *State v. Simon*, 120 Wn.2d 196, 199 (1992), *distinguishing* *State v. Sanders*, 65 Wn.App.

28 (1992); *affirms* *State v. Vangerpen*, 71 Wn.App. 94 (1993); *cf.:* *State v. Dallas*, 126 Wn.2d 324 (1995), *State v. Hockaday*, 149 Wn.App. 521 (2009); *see:* *State v. Tang*, 77 Wn.App. 644, 647 (1995), *State v. Phillips*, 98 Wn.App. 936 (2000); 9-0.

***State v. Ford***, 125 Wn.2d 919 (1995)

Defendant offers to plead guilty at arraignment, prosecutor's motion to continue in order to provide defense further discovery is granted over defense objection, before next hearing prosecutor amends to a greater charge; held: defendant was not prejudiced by the amendment as the prior plea offer could not be used at trial, ER 410; 6-2.

***State v. Dallas***, 126 Wn.2d 324 (1995)

Where trial court erroneously allows state to amend information to a different crime at the close of state's case, *State v. Vangerpen*, 125 Wn.2d 782 (1995), proper remedy is dismissal with prejudice under mandatory joinder analysis, CrR 4.3(c), *see:* *State v. Ramos*, 124 Wn.App. 334 (2004); 9-0.

***State v. Holland***, 77 Wn.App. 420, 426-7 (1995)

Defendant is charged with three counts of child molestation, each alleged to have occurred "between October 2 and November 2, 1991," defendant challenges sufficiency after verdict; held: liberally construed, *State v. Kjorsvik*, 117 Wn.2d 93 (1991), defendant was informed he was charged with three separate instances of molestation, state need not fix a precise time of the offense where it cannot intelligently do so, particularly where victim is a young girl who could not remember the date of each offense, defendant was not prejudiced, as defense was that the events did not occur, *State v. Carver*, 37 Wn.App. 122, 126 (1984); III.

***State v. Lee***, 128 Wn.2d 151 (1995)

Name of victim is not an element of larceny, at 158, *State v. Jefferson*, 74 Wn.2d 787, 790 (1968), *State v. Easton*, 69 Wn.2d 965, 967-8 (1966), *State v. Greathouse*, 113 Wn.App. 889, 899-906 (2002), although allegations of ownership must be sufficiently stated in an information to establish that the property was not that of the accused, at 159-60, need not be included in to convict instruction, at 160; reverses, in part, *State v. Lee*, 77 Wn.App. 119 (1995); 9-0.

***State v. Corrado***, 78 Wn.App. 612 (1995)

Due to missing witness, state seeks and obtains dismissal without prejudice; when witness is found, defendant is "rearraigned," but no new information is filed; held: superior court lacks subject matter jurisdiction without an information or indictment, *but see:* *State v. Franks*, 105 Wn.App. 950 (2001), conviction is void due to prosecutor's failure to refile, *State ex rel. Superior Court of Snohomish County v. Sperry*, 79 Wn.2d 69, 74 (1971), *see:* *State v. Barnes*, 146 Wn.2d 74 (2002), *State v. Eaton*, 164 Wn.2d 461 (2008); II.

***State v. Bacani***, 79 Wn.App. 701 (1995)

Robbery information that alleges, *inter alia,* that defendant "did unlawfully attempt to take personal property with intent to steal from the person" is insufficient, where challenged at

the end of state's case, *State v. Tang*, 77 Wn.App. 644 (1995), as it fails to allege that the property belonged to another, "steal" fails to cure defect, *State v. Morgan*, 31 Wash. 226 (1903), *State v. Dengel*, 24 Wash. 49 (1901), *State v. Ralph*, 85 Wn.App. 82 (1997), *see: State v. Graham*, 64 Wn.App. 305 (1992), *but see: State v. Phillips*, 98 Wn.App. 936, 944-45 (2000); I.

***State v. Smith***, 80 Wn.App. 462, 467-8 (1996)

Conspiracy information, RCW 9A.28.040, need not allege "substantial step," *State v. Dent*, 123 Wn.2d 467, 473-7 (1994); II.

***State v. Tunney***, 129 Wn.2d 336 (1996)

Assault 3° information, RCW 9A.36.031(1)(g), alleging that defendant "did assault officer who was performing official duties" is sufficient where challenged for first time after verdict, *State v. Kjorsvik*, 117 Wn.2d 93, 106 (1991), *State v. Allen*, 67 Wn.App. 824 (1992), *overruled, in part, State v. Brown*, 140 Wn.2d 456 (2000); *affirms State v. Tunney*, 77 Wn.App. 929 (1995); 6-3.

***State v. Hayes***, 81 Wn.App. 425, 429-31 (1996)

Defendant is charged with four counts of rape of a child over a two-year period, victim testifies defendant committed offense at least four times up to two-three times per week, allegations of each count are identical; held: if an information states each element but is vague as to some other matter, a bill of particulars can correct the defect, defendant who fails to demand a bill of particulars waives challenge to information as vague on appeal, *State v. Noltie*, 116 Wn.2d 831, 844 (1991); I.

***State v. Oestreich***, 83 Wn.App. 648 (1996)

Defendant is charged with robbery and burglary, pursuant to plea agreement state files amended information charging only robbery, to which defendant pleads guilty, later is granted leave to withdraw plea, state does not file second amended information or move to withdraw amended information, defendant later pleads guilty to both robbery and burglary, appeals burglary; held: defendant procured the amended information pursuant to plea bargain, thus rule that an amended information supersedes the original, *State v. Navone*, 180 Wash. 121, 123-4 (1934), *State v. Kinard*, 21 Wn.App. 587, 589-90 (1978), is inapplicable, *State v. Johansen*, 69 Wn.2d 187, 193-4 (1966); II.

***State v. Hull***, 83 Wn.App. 786, 799-803 (1996)

After state has rested, court may not permit amendment of information to add a required element even where the original information was deficient and charged no crime at all, *State v. Vangerpen*, 125 Wn.2d 782, 785-6 (1995); III.

***State v. Williamson***, 84 Wn.App. 37 (1996)

Information charges knowingly hinder, delay or obstruct an officer, former RCW 9A.76.020, state proves defendant gave false name; held: information is insufficient because the facts establish speech, not conduct which is what is prohibited by the former statute, *State v. White*, 97 Wn.2d 92, 101 (1982), *see: State v. Hoffman*, 35 Wn.App. 13, 16 (1983), *State v.*

*Swaite*, 33 Wn.App. 477, 483 (1982), *State v. E.J.J.*, 183 Wn.2d 497 (2015); court does not address sufficiency issue; II.

***State v. Chaten***, 84 Wn.App. 85 (1996)

Where defense challenges information after state rests, court should apply the pre-verdict strict standard, *State v. Kjorsvik*, 117 Wn.2d 93, 97 (1991), *but see: State v. Phillips*, 98 Wn.App. 936 (2000), *State v. Sullivan*, 196 Wn.App. 314 (2016), even though state cannot amend, *see: State v. Vangerpen*, 125 Wn.2d 782, 788 (1995); I.

***State v. Ralph***, 85 Wn.App. 82 (1997)

Where defendant moves to dismiss based upon insufficiency of charging document after state and defense have rested but before verdict, strict construction of information analysis applies, *State v. Vangerpen*, 125 Wn.2d 782, 788 (1995), *State v. Bacani*, 79 Wn.App. 701, 703 (1995), *State v. Tang*, 77 Wn.App. 644 (1995), *State v. Sullivan*, 196 Wn.App. 314 (2016), *but see: State v. Phillips*, 98 Wn.App. 936 (2000) not liberalized standard, *State v. Kjorsvik*, 117 Wn.2d 93 (1991); information which charges that defendant "did steal" is insufficient to allege theft, as theft necessarily involves property of another, RCW 9A.56.020(1)(a), but "steal" fails to include the ownership element, *State v. Morgan*, 31 Wash. 226, 228 (1903), *State v. Bacani*, *supra.* at 705; III.

***State v. Peterson***, 133 Wn.2d 885 (1997)

Defendant is charged with assault 1°, at bench trial following all the evidence, state is granted leave to amend to assault 2°, defendant is found guilty; held: state may amend at any time prior to verdict to an inferior degree crime, even if the elements are different, RCW 10.61.003, *State v. Foster*, 91 Wn.2d 466, 471 (1979), *State v. Ackles*, 8 Wash. 462, 464-5 (1894), distinguishing *State v. Pelkey*, 109 Wn.2d 484 (1987); even absent an amendment, trier of fact may find defendant guilty of any degree inferior to that charged in the information; 9-0.

***State v. Moavenzadeh***, 135 Wn.2d 359 (1998)

Information alleging that defendant "did **possess stolen property**" is insufficient as it lacks *mens rea* element, *State v. Khlee*, 106 Wn.App. 21 (2001), overruling, in part, language to the contrary in *State v. Sims*, 59 Wn.App. 127 (1990) and *State v. Smith*, 49 Wn.App. 596 (1987); while "**theft**" may be adequate to convey intentional, wrongful taking, *State v. Tresenriter*, 101 Wn.App. 486, 494 (2000), value element must be set forth in information, *cf.: State v. Tinker*, 155 Wn.2d 219 (2005), *State v. Leyda*, 157 Wn.2d 335, 340-42 (2006); **conspiracy** information must allege "substantial step"; *per curiam.*

***State v. Aho***, 89 Wn.App. 842, 845-50 (1998), *reversed, on other grounds*, 137 Wn.2d 736 (1999)

In sexual assault of a child case, state advises defense in trial brief that it might add a count of child molestation as an alternative to rape charge, depending upon victim's testimony, after state calls last witness but before resting, state is permitted to so amend; held: state had not formally rested, thus amendment is permitted absent prejudice, *State v. Pelkey*, 109 Wn.2d 484, 491 (1987), defense had sufficient notice of possible amendment, sole difference between

charges was whether or not penetration was proved, thus additional discovery or a continuance could not have benefited defendant, thus no prejudice has been established, *State v. Ziegler*, 138 Wn.App. 804 (2007), *State v. Martinez Platero*, 17 Wn.App.2d 716 (2021), *see: State v. Schaffer*, 120 Wn.2d 616 (1993), *but see: State v. Gehrke*, 193 Wn.2d 1 (2019), thus trial court did not abuse discretion, *see: State v. Rapozo*, 114 Wn.App. 321(2002); I.

***State v. S.E.***, 90 Wn.App. 886 (1998)

Where language of information charges one subsection of a crime, but statutory citation alleges the crime generally, court cannot convict of the uncharged alternative, *see: State v. Doogan*, 82 Wn.App. 185, 188 (1996); I.

***State v. Schloredt***, 97 Wn.App. 789, 794-95 (1999)

Information charging possessing a stolen credit card is sufficient to charge possession of a stolen access device, RCW 9A.56.160(1)(c); I.

***State v. Phillips***, 98 Wn.App. 936 (2000)

Where defense challenges information after state rests, liberal *State v. Kjorsvik*, 117 Wn.2d 93 (1991) standard applies, as state could no longer amend, *State v. Tang*, 75 Wn.App. 473, 477 n.3 (1994), distinguishing *State v. Vangerpen*, 125 Wn.2d 782, 789 (1995), *State v. Johnson*, 119 Wn.2d 143, 150 (1992), *but see: State v. Tang*, 77 Wn.App. 644 (1995), *State v. Sullivan*, 196 Wn.App. 314 (2016), *State v. Chaten*, 84 Wn.App. 85 (1996), robbery information alleging that defendant displayed what appeared to be a deadly weapon in immediate flight and unlawfully took personal property intending to steal is sufficient to inform defendant that he used force to retain property and that he stole property of another, under liberal construction, *State v. Graham*, 64 Wn.App. 305 (1992), distinguishing *State v. Morgan*, 31 Wash. 226 (1903), *State v. Bacani*, 79 Wn.App. 701 (1995), *State v. Ralph*, 85 Wn.App. 82, 85-86 (1997); II.

***State v. McCarty***, 140 Wn.2d 420 (2000)

Drug conspiracy information which fails to allege involvement of more than two people is insufficient, *State v. Miller*, 131 Wn.2d 78, 91 (1997), even where raised for the first time on appeal, *State v. Mendoza-Solorio*, 108 Wn.App. 823, 829-33 (2001), *cf.: State v. Morgan*, 163 Wn.App. 341 (2011); 5-4.

***State v. Johnston***, 100 Wn.App. 126, 132-34 (2000)

Trial court dismisses a count for insufficiency after state rests, then grants state leave to amend to an inferior degree crime; held: court may allow the state to amend to an inferior degree crime at the end of the state's case, *State v. Peterson*, 133 Wn.2d 885, 893 (1997), even after dismissal, *cf.: Hudson v. Louisiana*, 67 L.Ed.2d 30 (1981), *State v. LeFever*, 102 Wn.2d 777 (1984), *but see: Evans v. Michigan*, 568 U.S. 313, 133 S.Ct. 1069, 185 L.Ed.2d 124 (2013); III.

***State v. Tresenriter***, 101 Wn.App. 486, 490-94 (2000)

Burglary 1° information alleges that defendant intended to commit a crime against a person therein, omitting against property, "to convict" instruction requires proof of intent to commit a crime against a person or property, defense moves to dismiss with prejudice; held:

because an essential element is missing, and because other counts of theft in the information do not clearly relate to the burglary other than the date, even under liberal construction rule dismissal is mandated; because an uncharged crime is a nullity, jeopardy does not preclude refiling a proper information, thus dismissal without prejudice is proper remedy, distinguishing *State v. Hescock*, 98 Wn.App. 600 (1999); alleging "theft" is sufficient, under liberal construction, to charge theft, *State v. Moavenzadeh*, 135 Wn.2d 359, 364 (1998); II.

***State v. Krajeski***, 104 Wn.App. 377, 384-86 (2001)

Unlawful possession of firearm information, RCW 9.41.040(1)(b), which alleges that defendant "unlawfully and feloniously" possessed firearm, but which fails to allege "knowingly" is sufficient when raised after trial, *State v. Nieblas-Duarte*, 55 Wn.App. 376, 378 (1989), distinguishing *State v. Anderson*, 141 Wn.2d 357, 366-67 (2000), *see: State v. Jones*, 117 Wn.App. 221, 227-31 (2003); II.

***State v. Grant***, 104 Wn.App. 715 (2001)

Citation which alleges "driving while intoxicated" and includes statutory reference and BAC readings is sufficient for both BAC and "under the influence" means, *State v. Ortiz*, 80 Wn.App. 746 (1996), *Seattle v. McKinney*, 58 Wn.App. 607 (1990), where challenged after state has rested; "[w]hile the State must charge the elements of an offense, it need not charge the alternate means by which one might commit the offense," at 720; III.

***State v. Franks***, 105 Wn.App. 950 (2001)

Information names respondent in caption but charging language erroneously names co-respondent, raised for first time on appeal; held: while an information which is blank where defendant's name should be is sufficient, *State v. Maldonado*, 21 Wash. 653 (1899), *Port Angeles v. Fisher*, 130 Wash. 110 (1924), where the wrong name is used in charging language, a necessary fact is excluded, thus dismissed without prejudice; 2-1, I.

***State v. Mendoza-Solorio***, 108 Wn.App. 823, 829-33 (2001)

Drug conspiracy information which fails to allege involvement of more than two people is insufficient, *State v. Miller*, 131 Wn.2d 78, 91 (1997), even where raised for first time on appeal, *State v. McCarty*, 140 Wn.2d 420 (2000), *cf.: State v. Morgan*, 163 Wn.App. 341 (2011), and cannot be supplemented with the names of co-conspirators after trial; III.

***Bellingham v. Struthers***, 109 Wn.App. 864 (2001)

Citation charges "violation of no-contact order," cites RCW 10.99.040 prohibiting violation of pre-trial order, city proves violation of post-judgment order; held: erroneous reference to citation is a technical defect which does not require reversal, CrRLJ 2.1(a)(2); I.

***State v. Barnes***, 146 Wn.2d 74 (2002)

Defendant is charged by information with assault 3˚, later court grants leave to amend to add resisting arrest, defendant is arraigned, convicted, state neglects to file amended information; held: filing of original information conferred subject matter jurisdiction, distinguishing *State v. Corrado*, 78 Wn.App. 612 (1995); failure to file amended information has no impact upon

jurisdiction, defendant was not prejudiced, conviction of resisting arrest affirmed, *see:* *State v. Eaton*, 164 Wn.2d 461 (2008); 9-0.

***State v. Borrero***, 147 Wn.2d 353 (2002)

Attempted murder information fails to allege "substantial step," RCW 9A.28.020(1), defense moves to dismiss after state rests; held: "substantial step" is commonly understood from the word "attempt," thus defendant had sufficient notice, *see also:* *Pers. Restraint of Borrero*, 161 Wn.2d 532 (2007); 5-4.

***State v. Trujillo***, 112 Wn.App. 390, 408-12 (2002)

Defendants are charged with assault 1˚ or, alternatively, attempted murder 1˚, court allows jury to convict of both crimes although defendant is only sentenced for attempted murder; held: alternatively charging technically duplicative crimes does not violate due process or double jeopardy where sentenced only for one, *State v. Markle*, 118 Wn.2d 424, 437 (1992), *State v. Calle*, 125 Wn.2d 769, 773 (1995), distinguishing *State v. Gohl*, 109 Wn.App. 817 (2001), *State v. Womac*, 160 Wn.2d 643 (2007), *State v. Turner*, 169 Wn.2d 448 (2010), *State v. Fuller*, 169 Wn.App. 797, 832-35 (2012); II.

***State v. Rapozo***, 114 Wn.App. 321 (2002)

After opening statement, defense moves to dismiss because prosecutor had charged the wrong crime, state motion to amend information is denied by court which dismisses, state appeals; held: trial court's decision that state's motion to amend was untimely was not untenable; discretion is the standard, not prejudice, *see:* *State v. Schaffer*, 120 Wn.2d 616, 621-22 (1993), *State v. Aho*, 89 Wn.App. 842, 845-50 (1998), *aff'd, on other grounds,* 137 Wn.2d 736 (1999), *State v. Lamb*, 175 Wn.2d 121, 130-32 (2012), *State v. Agustin*, 1 Wn.App.2d 911 (2018), *State v. Martinez Platero*, 17 Wn.App.2d 716 (2021); II.

***State v. Spiers***, 119 Wn.App. 85, 89-91 (2003)

**Bail jumping** information that states the class of crime defendant was charged with and failed to appear for is sufficient even if it does not specifically state the crime, *State v. Anderson*, 3 Wn.App.2d 67 (2018), *see:* *State v. Gonzalez-Lopez*, 132 Wn.App. 622 (2006), *State v. Williams*, 162 Wn.2d 177 (2007); II.

***State v. Guzman***, 119 Wn.App. 176, 184-86 (2003)

Rape 3° information is deficient where it fails to allege that complainant expressed her lack of consent by actual words or conduct under either strict or liberal standard, *State v. Kjorsvik*, 118 Wn.2d 93 (1991); 2-1, III.

***State v. Goodman***, 150 Wn.2d 774 (2004)

Information charges possession of "meth," defense challenges sufficiency for first time on appeal; held: specific identity of the controlled substance is an essential element of possession with intent to deliver, *State v. Zillyette*, 178 Wn.2d 153 (2013), *State v. Gonzalez*, 2 Wn.App.2d 96 (2018), *State v. Clark-El*, 196 Wn.App. 614 (2016), *cf.:* *State v. Sibert*, 168 Wn.2d 306 (2010), *State v. Rivera-Zamora*, 7 Wn.App. 3d 824 (2019), *State v. Gardner,* 14 Wn.App.2d 207

(2020), where challenged for first time on appeal, under liberal standard, *State v. Kjorsvik*, 117 Wn.2d 93 (1991), defendant had due notice; affirms *State v. Goodman*, 114 Wn.App. 602 (2002); 9-0.

***State v. Munson***, 120 Wn.App. 103 (2004)

In leading organized crime case, RCW 9A.82.060, where information charges that defendant did intentionally "organize, manage, direct and finance" others with intent to engage in "forgery..., theft..., and possession of a controlled substance," prosecutor need not prove, at least at a bench trial, that defendant committed each of the alternatives, as statute lists alternatives in disjunctive, state may charge in conjunctive and prove disjunctive, *State v. Ford*, 33 Wn.App. 788, 789-90 (1983); III.

***State v. McGary***, 122 Wn.App. 308 (2004)

Information charging **criminal mistreatment 2°**, RCW 9A.42.030(1), must allege that defendant created an imminent and substantial risk of death or great bodily harm by withholding basic necessities of life, and failure to allege withholding necessities is insufficient; here, case was tried on defective information, even though evidence was insufficient, defective information results in dismissal without prejudice; II.

***State v. Winings***, 126 Wn.App. 75, 84-86 (2005)

In assault case, neither name of victim, *State v. Plano*, 67 Wn.App. 674 (1992), nor weapon used nor manner in which defendant used weapon are essential elements that need be alleged in information, *State v. Witherspoon*, 171 Wn.App. 271, 293-95 (2012), *affirmed, on other grounds*, 180 Wn.2d 875 (2014), *State v. Lindsey*, 177 Wn.App. 233, 239-48 (2013); where information is vague, a bill of particulars will resolve the vagueness, *State v. Leach*, 113 Wn.2d 679, 687 (1989); II.

***State v. Griffith***, 129 Wn.App. 482, 490-92 (2005)

After both parties rest, court allows state to amend information from dealing in child pornography, RCW 9.68A.050(1) to possession with intent to deal in child pornography, RCW 9.68A.050(2); held: possession with intent is not a lesser included offense of dealing in child porn, as "there are a myriad of situations in which one could publish, disseminate or finance child pornography without ever possessing it," at 491, thus amendment was improper; II.

***State v. Courneya***, 132 Wn.App. 347 (2006)

Where non-statutory element is missing from information (here, knowledge in hit and run, *State v. Sutherland*, 104 Wn.App. 122 (2001)), dismissal is remedy even where case was tried to a hung jury and instructions included the missing element; II.

***State v. Williams***, 162 Wn.2d 177 (2007)

**Bail jumping** information need not set forth the class of the underlying crime for which it is alleged defendant failed to appear, nor must the class appear in the to convict instruction, affirming *State v. Williams*,133 Wn.App. 714 (2006), *overruling State v. Ibsen*, 98 Wn.App. 214, 217 (1999), *see: State v. Anderson*, 3 Wn.App.2d 67 (2018); 9-0.

***State v. Ziegler***, 138 Wn.App. 804 (2007)

During prosecutor's case, court allows state to amend from child rape to child molestation and to add two counts of child rape; held: because there is no prejudice in amending from rape to molestation, the amendment was timely, *State v. Aho,* 89 Wn.App. 842, 845-50 (1990), *aff'd, on other grounds,* 137 Wn.2d 736 (1999), *State v. Schaffer*, 120 Wn.2d 616 (1993), *State v. Martinez Platero,* 17 Wn.App.2d 716 (2021); adding additional counts is prejudicial, affecting defendant's ability to prepare his defense as trial strategy and plea negotiations would likely have been different, thus those counts are dismissed; II.

***State v. Laramie***, 141 Wn.App. 332, 337-40 (2007)

Information alleging **interfering with reporting of domestic violence,** RCW 9A.36.150, need not identify victim and the underlying domestic violence crime where other counts in the information do so, *State v. Nonog*, 169 Wn.2d 220 (2010), *cf.: State v. Holcomb*, 200 Wn.App. 54 (2017), in challenging an information for the first time on appeal, reviewing court need not limit its inquiry to the specific count at issue; granting motion to amend information just prior to deliberations to conform to the instruction was error, *State v. Pelkey*, 109 Wn.2d 484, 490-91 (1987); III.

***State v. Tellez***, 141 Wn.App. 479 (2007)

In telephone harassment case, trial court must define "true threat" in an instruction, *State v. Kilburn*, 151 Wn.2d 36, 43 (2004), *State v. Williams*, 144 Wn.2d 197, 207 (2001), but need not include it in to convict instruction, *State v. Atkins*, 156 Wn.App. 799, 804-07 (2010), nor must it be pled in information, *State v. Warren,* 161 Wn.App. 727, 745-56 (2011), *State v. Rattana Keo Phuong*, 174 Wn.App. 494, 542-45 (2013), *distinguishing State v. Johnston*, 156 Wn.2d 355 (2006); I.

***State v. Eaton***, 164 Wn.2d 461 (2008)

Original information charges possession of amphetamine, is amended before trial to cocaine, although amended information "does not appear in the record," jury is hung, defendant is rearraigned for possession of amphetamine although amended information charges possession of cocaine, prior to second trial court advises defendant that the charge is cocaine, defendant is convicted; held: court has subject matter jurisdiction upon filing of any information, amendment was effective, CrR 2.1(d), once information is amended the original information is deemed "quashed, abandoned or superseded," *State v. Navone*, 180 Wash. 121, 123-34 (1934); following mistrial, rearraignment is unnecessary, *State v. Whelchel*, 97 Wn.App. 813, 819 (1999), defendant was aware of the actual charge, thus conviction affirmed; 8-1.

***State v. Quismundo***, 164 Wn.2d 499 (2008)

Information lacks an element, after state rests defense moves to dismiss with prejudice, trial court allows state to reopen and amend; held: court may not allow state to reopen and amend to add an essential element after state has rested, *State v. Vangerpen*, 125 Wn.2d 782, 787-95 (1995), *cf.: State v. Hockaday*, 144 Wn.App. 918 (2008), 149 Wn.App. 521 (2009), fact that proper remedy is dismissal without prejudice and defense asked for wrong remedy does not cure

the error as "[a] trial court's obligation to follow the law remains the same regardless of the arguments raised by the parties before it," *cf.:* *State v. Swan*, 114 Wn.2d 613 (1990); 9-0.

***State v. Hockaday***, 144 Wn.App. 918 (2008), 149 Wn.App. 521 (2009)

After state rests, prosecutor moves to amend information, advising court that she discussed amendment with defense counsel before resting and that defense had no problem with it; held: defendant's prior knowledge of and agreement to amendment eliminated the risk of prejudice, *see:* *State v. Schaffer*, 120 Wn.2d 616 (1993), distinguishing *State v. Pelkey*, 109 Wn.2d 484 (1987); II.

***State v. Brown***, 169 Wn.2d 195 (2010)

Where information is missing an element and wholly fails to allege the element by any fair construction, then prejudice to defendant need not be shown and remedy must be dismissal without prejudice even where raised for the first time on appeal; *per curiam.*

***State v. Nonog***, 169 Wn.2d 220 (2010)

One count in information charging **interfering with reporting of domestic violence**, RCW 9A.36.150, need not name the underlying domestic violence crime if other counts do so when challenged for first time on appeal, *State v. Laramie*, 141 Wn.App. 332, 337-40 (2007), overruling *State v. Clowes*, 104 Wn.App. 935, 940-42 (2001); affirms *State v. Nonog*, 145 Wn.App. 802 (2008); 9-0.

***State v. Deer***, 158 Wn.App. 854, 860-61 (2010)

After state rests, it is improper for court to allow state to amend an information from child molestation to rape of a child even where information cited the statute for rape of a child; I.

***Pers. Restraint of Cruz Benavidez***, 160 Wn.App. 165 (2011)

An information alleging a firearm allegation that cites to a former statute rather than its current codification where the language of the two statutes are identical provides sufficient notice to defend; III.

***State v. Gassman***, 160 Wn.App. 600, 616 (2011), *reversed, on other grounds*, 175 Wn.2d 208 (2012)

Amending information changing date of offense by two days is not prejudicial if time remains to prepare a defense, *State v. Murbach*, 68 Wn.App. 509, 512 (1993); 2-1, III.

***State v. Zillyette***, 173 Wn.2d 784 (2012)

When challenging information for first time on appeal, appellate court must first construe information to determine whether the facts appear in or could be fairly construed from the face of the document, *State v. Kjorsvik*, 117 Wn.2d 93 (1991), and then determine prejudice, reversing *State v. Zillyette*, 163 Wn.App. 124 (2011); *per curiam.*

***State v. Kosewicz***, 174 Wn.2d 683 (2012)

Defendants are charged with felony murder/kidnap and kidnapping 1°, Court of Appeals reverses kidnapping conviction because jury instruction contained a prong not charged in the kidnapping information, appellants argue that felony murder charge must be dismissed for the same reason even though jury instruction on felony murder only referred to the felony as kidnapping 1°, did not set out separate elements to include the uncharged prong, and no objection was made at trial; held: liberal construction of the information, to which no objection was made, was adequate to advise defendants of the elements of felony murder, state need not set out all of the elements of an underlying felony to convict of felony murder, *State v. Whitfield,* 129 Wash. 134, 139 (1924), just as state need not set forth aggravating circumstances in an information, *State v. Siers,* 174 Wn.2d 269 (2012), information does not need to specify the alternative means of committing the underlying felony, *State v. Hartz,* 65 Wn.App. 351, 354 (1992); 5-4.

***State v. Lamb***, 175 Wn.2d 121, 130-32 (2012)

Defendant is charged with felon in possession of a firearm based upon a prior juvenile adjudication of indecent liberties, trial court allows defendant to withdraw his juvenile plea, state moves to amend information to allege the predicate felony of a different burglary to which defendant had pleaded guilty in juvenile court, trial court denies motion to amend; held: trial court may deny a state's motion to amend "in the interests of justice," CrR. 2.1(d), whether or not there is prejudice to the defendant's right to a fair trial, *State v. Rapozo,* 114 Wn.App. 321, 322-24 (2002), *State v. Haner,* 95 Wn.2d 858 (1981), state has not established that trial court abused its discretion in denying motion to amend, *but see: State v. Numrich,* 197 Wn.2d 1 (2021), *cf.: State v. Agustin,* 1 Wn.App.2d 911 (2018); *reverses, in part, State v. Lamb,* 163 Wn.App. 614 (2011); 9-0.

***State v. Kiliona-Garramone***, 166 Wn.App. 16 (2011)

Statute uses phrase "true and correct as to every material matter," RCW 74.08.055 (1979, 2009), information charges "material," omits "matter," trial court dismisses at end of state's case; held: dismissal without prejudice is normally unappealable, *State v. Taylor,* 150 Wn.2d 599, 602 (2003), where state cannot refile due to statute of limitations, state may appeal; applying liberal analysis as state was unable to amend, *State v. Kjorsvik,* 117 Wn.2d 93 (1991), information was sufficient to inform defendant about the essence of the crime, no evidence of prejudice; 2-1, II.

***State v. Rivas***, 168 Wn.App. 882, 886-91 (2012)

Defendant is charged with one count of malicious mischief 2° for breaking windows of two vehicles with aggregate damage exceeding $750, information does not allege common scheme or plan; held: state may aggregate the value of damage to charge malicious mischief 2°, RCW 9A.48.100(2) (1984), but must allege common scheme in the information, failure to so allege is prejudicial even if challenged for first time on appeal, *see also: State v. Hassan,* 184 Wn.App. 140 (2014); II.

***State v. Rattana Keo Phuong***, 174 Wn.App. 494, 542-45 (2013)

Information charging unlawful imprisonment need not include the statutory definition of "restrain;" the definition of an element of an offense is not an essential element that must be alleged in an information, *State v. Allen,* 176 Wn.2d 611 (2013), *State v. Saunders,* 177 Wn.App. 259 (2013), *State v. Peters,* 16 Wn.App.2d 454 (2021); 2-1, I.

***State v. Peterson****,* 174 Wn.App. 828, 849-55 (2013)

In animal cruelty 1° charge, RCW 16.52.205(2), starvation, suffocation and dehydration are alternative means, *State v. St. Clare,* 198 Wn.App. 371 (2017), *cf.: State v. Makekau,* 194 Wn.App. 407 (2016), *but see: State v. Jallow,* 16 Wn.App.2d 625 (2021), *State v. Shoop,* 22 Wn.App.2d 242 (2022); I.

***State v. Benitez****,* 175 Wn.App. 116, 123-26 (2013)

In bench trial, state need not prove surplusage charged in information as law of the case doctrine does not apply to a bench trial, *State v. Hawthorne,* 48 Wn.App. 23, 27 (1984), *see: State v. Johnson,* 188 Wn.2d 742 (2017); II.

***State v. Owens****,* 180 Wn.2d 90 (2014)

Alternative means of committing trafficking stolen property 1°, RCW 9A.82.050 (2003), are facilitating theft of property so that it can be sold and facilitating the sale of property known to be stolen, *State v. Lindsey,* 177 Wn.App. 233, 239-48 (2013), overruling *dicta* in *State v. Strohm,* 75 Wn.App. 301, 307 (1994), *State v. Hayes,* 164 Wn.App. 459, 476 (2011), *cf.: State v. Makekau,* 194 Wn.App. 407 (2016); 9-0.

***State v. Goss****,* 189 Wn.App. 571, 576-77 (2015), *affirmed, on other grounds,* 186 Wn.2d 372 (2016)

Amendment of charging period is usually not a material element, amendment of date is a matter of form rather than substance and should be allowed absent alibi defense or other substantial prejudice, *State v. DeBolt,* 61 Wn.App. 58, 60-62 (1991); I.

***State v. Ring****,* 191 Wn.App. 787 (2015)

In **forgery** case legal efficacy of the written instrument is not an essential element of the crime, rather it is definitional, *State v. Johnson,* 180 Wn.2d 295, 300-02 (2014), *State v. Peters,* 16 Wn.App.2d 454 (2021), distinguishing *State v. Kuluris,* 132 Wash. 149 (1925); II.

***State v. Richie****,* 191 Wn.App. 916 (2015)

Before her shift begins store clerk observes defendant stealing wine, attempts to stop defendant who hits her with the bottle, defendant is convicted of robbery; held: to convict of robbery the state must prove that the theft was from one with ownership, representative capacity or possession, *State v. Latham,* 35 Wn.App. 862 (1983), *State v. Hall,* 54 Wash. 142, 143-44 (1909), *State v. Tvedt,* 153 Wn.2d 705 (2005), off-duty clerk was acting in her employee capacity thus evidence was sufficient, however failure to include the implied element that victim had an ownership, representative or possessory interest in the property was error even absent an objection; II.

***State v. Porter***, 186 Wn.2d 85 (2016)

Information charging possession of a stolen vehicle, RCW 9A.56.068 (2007) and 9A.56.140 (2004), need not allege that the defendant withheld or appropriated the vehicle for the use of a person other than the true owner as that is merely definitional, *State v. Rattana Keo Phuong*, 174 Wn.App. 494, 542-45 (2013), *State v. Peters*, 16 Wn.App.2d 454 (2021), overruling *State v. Satterthwaite*, 186 Wn.App. 359 (2015); 9-0.

***State v. Goss***, 186 Wn.2d 372, 376-82 (2016)

Information charging child molestation 2° stating victim was "less than 14 years old" rather than statutory language "at least twelve … but less than 14," RCW 9A.44.086, as sole purpose of age in charging document is to differentiate degrees of child molestation and is not an essential element, at 376-82, *see: State v. Smith*, 122 Wn.App. 294, 296 (2004), distinguishing *Alleyne v. United States*, 570 U.S. 99, 186 L.Ed.2d 314 (2013); affirms *State v. Goss*, 189 Wn.App. 571 (2015); 9-0.

***State v. Sullivan***, 196 Wn.App. 314 (2016)

Assault of a child information lacks "reckless" element, RCW 9A.36.021(l)(a), defense motion to dismiss when state rests is denied; held: Division III holds that liberal standard applies when challenge to information is made after state rests, *State v. Phillips*, 98 Wn.App. 936 (2000)(Division II), disagreeing with Division I, *State v. Chaten*, 84 Wn.App. 85 (1996), information is insufficient and thus dismissed without prejudice.

***State v. Jusilla***, 197 Wn.App. 908 (2017)

In unlawful possession of firearm case to convict instruction includes serial numbers and make and model of guns, state offers no evidence to support serial numbers; held: **law of the case doctrine** requires state to prove what is in the to convict instruction even if they are not elements of the crime, *State v. Hickman*, 135 Wn.2d 97 (1998), *State v. Johnson*, 188 Wn.2d 742 (2017), *see: State v. Tyler*, 191 Wn.2d 205 (2018), *cf.: Musacchio v. United States*, 577 U.S. 237, 136 S.Ct. 709, 193 L.Ed.2d 639 (2016), unless the extra elements are in parenthesis, *State v. Muñoz-Rivera*, 190 Wn.App. 870 (2015); III.

***State v. Holcomb***, 200 Wn.App. 54 (2017)

Information charging interfering with reporting of domestic violence, RCW 9A.36.150 (1996), must set forth the underlying crime of domestic violence, even when challenged for the first time on appeal, *cf.: State v. Nonog*, 169 Wn.2d 220 (2010), *State v. Laramie*, 141 Wn.App. 332, 337-40 (2007); III.

***State v. Gonzalez***, 2 Wn.App.2d 96, 105-14 (2018)

Information charges possession of methamphetamine, lab tech testifies substance taken from defendant contained meth and cocaine, to convict instruction omits reference to specific drug; held: while identify of a controlled substance is an essential element which must be included in the to convict instruction, *State v. Goodman*, 150 Wn.2d 774 (2004), , *State v. Zillyette*, 178 Wn.2d 153 (2013), error is harmless as uncontroverted testimony that substance

contained meth, however because different drugs have different maximum sentences defendant may only be sentenced for the lowest which is misdemeanor marijuana, *State v. Clark-El,* 196 Wn.App. 614 (2016), *State v. Barbarosh,* 10 Wn.App.2d 408 (2019), *see also: State v. Rivera-Zamora,* 7 Wn.App. 3d 824 (2019), *State v. Gardner,* 14 Wn.App.2d 207 (2020); 2-1, II.

***State v. Anderson***, 3 Wn.App.2d 67 (2018)

Name of the underlying crime is not an element of **bail jumping**, RCW 9A.76.170 (2001), *State v. Spiers,* 119 Wn.App. 85, 89-91 (2003), *State v. Gonzalez-Lopez,* 132 Wn.App. 622 (2006), *State v. Williams*, 162 Wn.2d 177 (2007); II.

***State v. Yallup***, 3 Wn.App.2d 546 (2018)

Information alleges two counts of rape of a child within three year charging period, child victim testifies that separate incidents occurred within a 16 month period but does not narrow incidents more specifically; held: when charging "on or about" proof is not limited to the delineated time period, where time is not a material element "on or about" is sufficient to admit proof of the act at any time within the statute of limitations unless alibi is the defense, *State v. Hayes,* 81 Wn.App. 425, 432 (1996), *State v. Osborne*, 39 Wash. 548 (1905); where defendant is a "resident child molester" alibi or misidentification are not genuine defenses, *State v. Brown,* 55 Wn.App. 738, 748-49 (1989), *Hayes, supra.* at 433; III.

***State v. Gehrke***, 193 Wn.2d 1 (2019)

Defendant is charged with felony murder/assault, at commencement of trial state informs court that it may amend to add manslaughter 1°, at end of state's case prosecutor informs court that it will rest after the court rules on its motion to amend, moves to amend to add manslaughter, defense objects, court grants motion, jury convicts of manslaughter; lead opinion (4 justices): amending to anything other than a lesser included or lesser degree offense when state has completed its case-in-chief, regardless of whether or not state has announced that it has rested, is *per se* prejudicial in violation of defendant's right to be informed of the charge, *State v. Pelkey,* 109 Wn.2d 484, 490 (1987), *State v. Markle*, 118 Wn.2d 424, 433 (1992), CrR 2.1(d), manslaughter is not a lesser of felony murder/assault, *State v. Gamble,* 154 Wn.2d 457, 469 (2005), failure of defense to seek a continuance during trial as opposed to before commencement of trial is not evidence of a lack of prejudice, distinguishing *State v. Brown,* 74 Wn.2d 799, 801 (1968); concurring opinion (2 justices): motion to amend is timely up until state formally rests, which did not occur here, thus while motion was timely defense here showed prejudice as self-defense to manslaughter involves a different strategy to self-defense to felony murder, *but see: State v. Martinez Platero,* 17 Wn.App.2d 716 (2021).

***State v. Merritt***, 193 Wn.2d 70 (2019)

Statute of limitations is not an element of a crime that must be included in an information; while RCW 10.37.050(5) (2010) does state that an information should include language that the crime was committed within the statute of limitations, it provides no remedy thus, at least absent an objection, an information that lacks that statement is still sufficient; affirms *State v. Merritt,* 200 Wn.App. 398, 405-06 (2017); 9-0.

***State v. Barboza-Cortez***, 194 Wn.2d 639 (2019)

Unlawful possession of a firearm 2°, RCW 9.41.040(2)(a), and identity theft 2°, RCW 9.35.020(1), are not alternative means crimes, *overruling, in part, State v. Barboza-Cortez*, 5 Wn.App. 86, 88-89 (2018); 9-0.

***State v. Pry***, 194 Wn.2d 745 (2019)

Information charging **rendering criminal assistance 1°**, RCW 9A.76.070(1), is insufficient, even if raised for first time on appeal, if it does not contain the elements set out in RCW 9A.76.050 which are not definitional, *State v. Budik*, 173 Wn.2d 727, 736-37 (2012), *cf.: State v. Peters*, 16 Wn.App.2d 454 (2021), *State v. Derri*, 17 Wn.App.2d 376 (2021), *aff'd, on different grounds*, 199 Wn.2d 658 (2022); 7-2.

***State v. Downey***, 9 Wn.App.2d 852 (2019)

Defendant is charged with vehicular assault, information alleges only the means of reckless driving, court, at defense request, instructs as to the alternative uncharged means of disregard for the safety of others, on appeal defense claims lack of notice per *State v. Pelkey*, 109 Wn.2d 484, 491 (1987); held: since defense requested the instruction defense had notice; I.

***State v. Brooks***, 195 Wn.2d 91 (2020)

After both parties rest trial court grants state's motion, over objection, to expand the time period in the information, defense does not seek a continuance; held: because the date of an offense is "usually" not a material element of the crime, *State v. DeBolt*, 61 Wn.App. 58, 61-62 (1991), and because the information alleged "on or about," *State v. Pelkey*, 109 Wn.2d 484, 490 (1987), does not apply, defense failed to show prejudice thus trial court did not abuse discretion; 9-0.

***State v. Numrich***, 197 Wn.2d 1 (2021)

Trial court's decision granting state's motion to amend is discretionary, defense has burden to establish specific prejudice to a substantial right, *State v. Thompson*, 60 Wn.App. 662, 666 (1991), *see: State v. Lamb*, 175 Wn.2d 121, 130-32 (2012); while there is a presumption of vindictiveness where state seeks to amend to a higher charge, defendant asserting prosecutorial vindictiveness in the pretrial context bears the burden of establishing either actual vindictiveness or "a realistic likelihood of vindictiveness which will give rise to a presumption of vindictiveness," *State v. Bonisisio*, 92 Wn.App. 783, 791 (1998), *United States v. Goodwin*, 73 L.Ed.2d 74 (1982), *State v. McKenzie*, 31 Wn.App. 450 (1981), *State v. Penn*, 32 Wn.App. 911 (1982), *State v. McDowell*, 102 Wn.2d 341 (1984), *State v. Lass*, 55 Wn.App. 300 (1989), *State v. Soderholm*, 68 Wn.App. 363 (1993), *State v. Lee*, 69 Wn.App. 31 (1993), *State v. Korum*, 157 Wn.2d 614 (2006); 6-3.

***State v. Peters***, 16 Wn.App.2d 454 (2021)

Information charging promoting prostitution, RCW 9A.88.080(1)(b), which does not define the element "advances prostitution" is not deficient as an information need not include definitions, *State v. Porter*, 186 Wn.2d 85, 91 (2016), *State v. Johnson*, 180 Wn.2d 295, 302, 325 (2014), *State v. Rattana Keo Phuong*, 174 Wn.App. 494, 545 (2013); definitions are not

transformed into essential elements even if they must ultimately be proved at trial to obtain a conviction, *State v. Allen*, 176 Wn.2d 611, 626-30 (2013); I.

***State v. Bacon***, 16 Wn.App.2d 603 (2021)

Information charging possession of a motor vehicle theft tool, RCW 9A.56.063(1), that lacks the element of intent is insufficient; III.

***State v. Martinez Platero***, 17 Wn.App.2d 716 (2021)

Defendant is charged with rape of a child, just before state rests court grants amendment to child molestation, defense objects arguing that counsel tailored cross based on original charge and amendment was not timely, defendant testifies that he did not penetrate or touch; held: state had not formally rested so motion was timely, while lead opinion in *State v. Gehrke*, 193 Wn.2d 1 (2019) would hold that "functional resting" is the test for timeliness of a motion to amend it is a plurality opinion and thus not binding; amendment to a different crime is permitted absence prejudice, *State v. Aho*, 89 Wn.App. 842, 845-50 (1998), *reversed, on other grounds*, 137 Wn.2d 736 (1999); I.

***State v. Briggs***, 18 Wn.App.2d 544 (2021)

Information charging **no contact order violation**, RCW 10.99.050(2)(a), that does not include *mens rea* element of "willfulness" is deficient even when raised for the first time on appeal; information alleging attempted violation of a no contact order must include *mens rea* element that defendant intended to commit the specific crime; I.

***State v. Level***, 19 Wn.App.2d 56 (2021)

Information charges defendant with "unlawfully" **possessing a stolen motor vehicle,** RCW 9A.56.068(1) and 9A.56.140 prohibit knowingly possessing a stolen motor vehicle, defense raises it for first time on appeal; held: "unlawfully" is insufficient to convey an inference that the conduct was done "knowingly," thus reversed without prejudice; III.

***State v. Derri***, 199 Wn.2d 1267 (2022)

That portion of robbery statute that states "[s]uch force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking, RCW 9A.56.190, is an essential element of the crime, *disapproving, in part, State v. Phillips*, 9 Wn.App.2d 368 (2019), but, where challenged after trial the element can be fairly implied by inclusion of the language "take…by…immediate force…and fear; affirms *State v. Derri*, 17 Wn.App.2d 376 (2021); 9-0.

***State v. Chambers***, ___ Wn.App.2d ___, 518 P.3d 649 (2022)

Information charging dissemination and possession of child pornography, RCW 9.68A.050(1) –(2) (2019) and RCW 9.68A.070(1) (2019), is sufficient, where challenged for the first time on appeal, although it does not allege that defendant was aware of the general nature of the material he possessed as it is implied; III.

# INSANITY

***State v. Griffith***, 91 Wn.2d 572 (1979)

At arraignment, defendant pleads not guilty by reason of insanity, moves for appointment of expert, trial court denies motion without prejudice, appoints court experts, defendant does not pursue insanity defense nor seek further appointment of defense psychiatrist; held: while it was error not to appoint a defense expert at arraignment, defendant's withdrawal of insanity defense results in harmless error; court need not appoint defense expert to assist defendant in preparing to be evaluated by state's expert; 9-0.

***State v. Wilcox***, 92 Wn.2d 610 (1979)

For disposition following insanity acquittal, state has burden of showing dangerousness by preponderance; 6-3.

***State v. Jamison***, 94 Wn.2d 663 (1980)

Psychologist testified defendant had a limited ability to perceive nature and quality of act; held that this is insufficient to support insanity instructions; insanity is available only to those who have lost contact with reality so completely that they are beyond any of the influences of the criminal law; 8-0.

***State v. Crenshaw***, 27 Wn.App. 326 (1980), *affirmed, on other grounds,* 98 Wn.2d 789 (1983)

Lay witness may testify as to opinion of defendant's sanity; 2-1, I.

***State v. Thompson***, 28 Wn.App. 728 (1981)

At conditional release revocation hearing, court may consider evidence presented at prior revocation hearings; I.

***State v. Stoudamire***, 30 Wn.App. 41 (1981)

Court need not instruct jury of consequences of an insanity acquittal; *accord: Shannon v. United States*, 129 L.Ed.2d 459 (1994); I.

***In re Herman***, 30 Wn.App. 321 (1981)

Commitment following acquittal by reason of insanity is not justified by a showing that defendant represents a danger only to a particular item of property; state has burden of showing by a preponderance that defendant is a danger to others or is likely to commit felonious acts jeopardizing public safety; here, defendant kept destroying the same statue, but committed no other felonious acts, thus commitment improper; II.

***State v. Jones***, 32 Wn.App. 359 (1982), *rev'd, on other grounds,* 99 Wn.2d 735 (1983)

Where jury returns special verdict finding that defendant does not present substantial likelihood of committing felonious acts but is a substantial danger to other persons, court may commit or conditionally release; I.

***State v. Bonds***, 98 Wn.2d 1 (1982)

Juvenile respondent retains court-appointed psychiatrist for decline hearing, JuCR 9.3(a); after decline, respondent raises insanity defense; held: where respondent raises insanity defense, statements uttered by respondent in the context of a psychiatric examination are removed from the reach of the Fifth Amendment and the attorney-client privilege, *see:* concurring opinion at 29, *State v. Carneh*, 153 Wn.2d 274 (2004), *Kansas v. Cheever*, 571 U.S. 87, 134 S.Ct. 596, 187 L.Ed.2d 519 (2013); *accord*: *State v. Jones*, 111 Wn.2d 239 (1988), *State v. Pawlyk*, 115 Wn.2d 457 (1990); 5-4.

***State v. Kolocotronis***, 34 Wn.App. 613 (1983)

A petition for final discharge filed within one year of a prior determination denying final discharge must be accompanied by an affidavit showing improvement in petitioner's mental condition; a petition filed pursuant to RCW 10.77.200(3) (without DSHS approval) triggers procedure set forth in RCW 10.77.200(2) (with DSHS approval); I.

***State v. Wicks***, 98 Wn.2d 620 (1983)

Where voluntary use of intoxicants is the direct and immediate cause of insanity, defense is not entitled to insanity instructions unless the influence of intoxicants triggers an underlying psychotic disorder of a settled nature, *State v. Thompson*, ___ Wn.App.2d ___, 498 P.3d 40 (2021); 7-2.

***State v. Keller***, 98 Wn.2d 725 (1983)

Revocation of conditional release may be based on a showing of either a violation of a condition of release or renewed dangerousness, irrespective of the statute's use of the conjunctive, former RCW 10.77.190(3); 9-0.

***State v. Crenshaw***, 98 Wn.2d 789 (1983)

Where defendant knew the illegality of the act, he does not meet *M'Naghten* test, *see:* *State v. Johnson*, 150 Wn.App. 663, 674-76 (2009), *State v. Chanthabouly*, 164 Wn.App. 104 (2011); only exception is where defendant knew the act is legally wrong but the act was "ordained by God," *State v. Applin*, 116 Wn.App. 818 (2003), *State v. Cameron*, 100 Wn.2d 520 (1983), *State v. Rice*, 110 Wn.2d 577 (1988), *but see: State v. Potter*, 68 Wn.App. 134 (1992); court should not define "wrong" in instructions to jury; legislature codified *M'Naghten* test in 1975, thus language in cases prior to codification is disapproved.

***State v. Jones***, 99 Wn.2d 735 (1983)

Court may "rarely, if ever" impose an insanity plea on a competent defendant over the defendant's objection, *State v. Coristine*, 177 Wn.2d 370 (2013), *reversing* *State v. Smith*, 88 Wn.2d 639 (1977), and reverses, in part, *State v. Jones*, 32 Wn.App. 359 (1982); *see also*: *State v. Hahn*, 41 Wn.App. 826 (1985), *State v. Hartley*, 56 Wn.App. 562 (1990), *State v. McSorley*, 128 Wn.App. 598, 604-05 (2005), *State v. Lynch*, 178 Wn.2d 487 (2013); 5-4.

***Jones v. United States***, 77 L.Ed.2d 694 (1983)

Statute which permits indefinite commitment to a mental hospital for a defendant acquitted by reason of insanity, where the commitment exceeds the maximum penalty had defendant been convicted, does not violate due process clause; 5-4.

***State v. Higa***, 38 Wn.App. 522 (1984)

Bizarre behavior in court is not enough for court to interpose NGI plea over defendant's objection; II.

***State v. Harris***, 39 Wn.App. 460 (1985)

Where accused is acquitted of multiple charges by reason of insanity, he cannot be detained for more than the maximum prison term for any single crime with which he was charged, *i.e.*, must assume terms were concurrent, *State v. Reanier*, 157 Wn.App. 194 (2010); I.

***State v. Hicks***, 41 Wn.App. 303 (1985)

Special verdict form, RCW 10.77.040, does not deny defendant due process rights by suggesting to jury that defendant might be released if acquitted on grounds of insanity; court need not instruct jury that, if acquitted by reason of insanity, he will be hospitalized, *State v. McDonald*, 89 Wn.2d 256 (1977); I.

***State v. Lover***, 41 Wn.App. 685 (1985)

Where defendant wishes to raise self-defense and insanity, defendant is not entitled to a bifurcated trial; trial court must establish whether or not defendant knowingly and voluntarily waived right to plead not guilty by reason of insanity and, in absence of proof that defendant understood the waiver, case is remanded for trial on insanity issue; I.

***Ake v. Oklahoma***, 470 U.S. 68, 83, 84 L.Ed.2d 53 (1985)

Where a defendant has made a preliminary showing that his sanity at the time of offense is likely to be a significant factor at trial, state must provide access to a psychiatrist's assistance if defendant is indigent, *McWilliams v. Dunn*, 137 S. Ct. 1790, 198 L. Ed. 2d 341 (2017); *dicta* that the motion should be *ex parte*, 84 L.Ed.2d at 66; 7-1-1.

***State v. Box***, 109 Wn.2d 320 (1987)

Requiring defendant to prove insanity by preponderance, RCW 10.77.030(2), does not violate due process, *State v. Haq,* 166 Wn.App. 221, 233-46 (2012); 7-2.

***State v. Rice***, 110 Wn.2d 577 (1988)

Where court instructs jury based on pattern instruction of *M'Naghten* test, RCW 9A.12.010, prosecutor may not argue to jury what that means based on caselaw interpreting the statute; harmless here; 9-0.

***State v. Jones***, 111 Wn.2d 239 (1988)

Statements to a psychologist with respect to competency are admissible at trial where defendant pleads not guilty by reason of insanity, even where the statements were made prior to the NGI plea, *State v. Jones*, 99 Wn.2d 735 (1983), *State v. Bonds*, 98 Wn.2d 1 (1982); 9-0.

***State v. Sommerville***, 111 Wn.2d 524 (1988)

Trial court must analyze a motion for acquittal by reason of insanity, RCW 10.77.080, on the merits and not merely to determine if there is a jury question, *State v. Wheaton*, 121 Wn.2d

347, 362 (1993), overruling *State v. McDonald*, 89 Wn.2d 256, 267 (1977); where defendant is acquitted by reason of insanity on one charge but convicted on another, he is to be committed to the hospital first, then, upon completion of that commitment, sent to prison; *see also: State v. Sommerville*, 86 Wn.App. 700 (1997); 8-1.

***State v. Jeppesen***, 55 Wn.App. 231 (1989)

In deciding whether to bifurcate guilt and insanity stages of trial, court should determine (1) if both insanity and defense on the merits is supported by the facts and the law, and, if they are, (2) determine likelihood of prejudice to defendant which may result if both defenses are presented in a unitary trial, *see: State v. Jones*, 32 Wn.App. 359 (1982), reversed, in part, 99 Wn.2d 735 (1983), *State v. Monschke*, 133 Wn.App. 313, 334-35 (2006); I.

***State v. Hartley***, 56 Wn.App. 562 (1990)

Defendant entered NGI plea, withdrew it, was convicted, then argued that he did not validly waive NGI plea; at hearing, state calls defense counsel regarding counsel's advice; held: voluntariness of waiver of NGI plea may be determined by extrinsic evidence; attorney-client privilege does not apply to calling defense counsel, as disclosure of the fact that counsel has advised a client of the advantages and disadvantages of an NGI plea is unlikely to indirectly disclose client communications, *State v. Chervenell*, 99 Wn.2d 309 (1983); I.

***Lee v. Hamilton***, 56 Wn.App. 880 (1990)

A person committed to state hospital following insanity acquittal is entitled to credit for time served at hospital for competency evaluation prior to acquittal; II.

***State v. Autrey***, 58 Wn.App. 554 (1990)

For trial court to accept a motion for acquittal by reason of insanity, RCW 10.77.080, due process requires that defendant be informed of and understand (1) elements of crime, (2) by making motion, he admits to committing the acts charged and cannot later contest this, (3) he waives right to remain silent, right to confront, right to jury trial,and (4) he can be committed for up to maximum term, *State v. Brasel*, 28 Wn.App. 303 (1981), *State v. Schwab*, 141 Wn.App. 85, 93-94 (2007); trial court should try to avoid questions that call for a simple "yes" or "no" response; I.

***State v. Pawlyk***, 115 Wn.2d 457 (1990)

Defense retains psychiatrist who interviews defendant for insanity defense; defense discloses that it will not call this psychiatrist, whereupon state seeks discovery of reports and serves psychiatrist with subpoena to testify at trial; held: attorney-client privilege does not extend to testimony of psychiatrist when defendant raises insanity as a defense, *State v. Bonds*, 98 Wn.2d 1, 20 (1982); psychiatric examination at defendant's request to prove insanity defense waives right to raise a Fifth Amendment challenge to state's use of evidence obtained through that examination to rebut the defense, *Powell v. Texas*, 106 L.Ed.2d 551, 556 (1989), *see: State v. Carneh*, 153 Wn.2d 274 (2004); right to counsel not violated by use of psychiatrist by state or by court-ordered disclosure of psychiatrist's reports, *Buchanan v. Kentucky*, 97 L.Ed.2d 336 (1987); CrR 4.7(b)(2)(x) authorizes court to order disclosure of written reports in possession of defense which have been prepared by defense psychiatrists who examine defendant on issue of

sanity where an insanity defense is raised, irrespective of defense decision not to call psychiatrist who prepared report; work product doctrine, in a criminal case, applies only to "opinions, theories or conclusions" of defense counsel, CrR 4.7(f)(1), and does not extend to reports and testimony of experts, as CR 26 does not apply to criminal cases, *see also: Kansas v. Cheever*, 571 U.S. 87, 134 S.Ct. 596, 187 L.Ed.2d 519 (2013); 7-2.

***Foucha v. Louisiana***, 118 L.Ed.2d 437 (1992)

Insanity acquittee is entitled to release when s/he is no longer mentally ill, irrespective of dangerousness, *Jones v. United States*, 77 L.Ed.2d 694 (1983), *State v. Sommerville*, 86 Wn.App. 700 (1997), *see also: Addington v. Texas*, 60 L.Ed.2d 323 (1979), *State v. Klein*, 156 Wn.2d 102 (2005); 6-3.

***State v. Paul***, 64 Wn.App. 801 (1992)

When Secretary of DSHS recommends conditional release, RCW 10.77.150(2), state has burden of persuasion by preponderance; III.

***State v. Potter***, 68 Wn.App. 134 (1992)

Deific decree which overcomes defendant's volitional control but does not overcome defendant's cognitive ability to know that his act is wrong is insufficient to establish insanity defense, *cf.: State v. Crenshaw*, 98 Wn.2d 789, 798 (1983), *State v. Cameron*, 100 Wn.2d 520, 527 (1983), *State v. Rice*, 110 Wn.2d 577, 604 (1988), *State v. Applin*, 116 Wn.App. 818 (2003); II.

***State v. Pepin***, 76 Wn.App. 196 (1994)

Where Secretary of DSHS opposes final discharge, defendant has burden of proof by preponderance, *State v. Kolocotronis*, 27 Wn.App. 883 (1980), *distinguishing Foucha v. Louisiana*, 118 L.Ed.2d 437 (1992); I.

***State v. Sunich***, 76 Wn.App. 202 (1994)

Commitment following insanity acquittal shall be for up to maximum penalty for crime, irrespective of SRA sentence range, RCW 10.77.020(3); II.

***In re Weaver***, 84 Wn.App. 290 (1996)

A juvenile acquitted by reason of insanity may not be committed pursuant to RCW 10.77, as a juvenile offense is not a felony, RCW 10.77.110, *In re Frederick*, 93 Wn.2d 28, 30 (1980); II.

***State v. Greene***, 139 Wn.2d 64 (1999)

Dissociative Identity Disorder (DID), formerly called multiple personality disorder, meets *Frye* test, as it is accepted in DSM-IV; even if generally accepted in principle, scientific evidence is inadmissible unless helpful to trier of fact under particular facts of specific case, ER 702; here, the evidence failed to establish which personality the mental evaluation should focus upon, thus expert testimony is inadmissible, *see: State v. Wheaton*, 121 Wn.2d 347 (1993); reverses *State v. Greene*, 92 Wn.App. 80 (1993); 9-0.

***State v. Platt***, 143 Wn.2d 242 (2001)

Where DSHS opposes conditional release, defendant has burden of proving lack of mental illness, , *see: State v. Howland,* 180 Wn.App. 196 (2014), *State v. Beaver,* 184 Wn.2d 321 (2015); affirms *State v. Platt*, 97 Wn.App. 494 (1999); I.

***State v. Applin***, 116 Wn.App. 818 (2003)

Where deific decree defense is presented, *State v. Crenshaw,* 98 Wn.2d 789 (1983), *State v. Potter*, 68 Wn.App. 134 (1992), court need not instruct jury defining and distinguishing moral from legal wrong, *State v. Cameron*, 100 Wn.2d 520, 526-27 (1983); I.

***State v. Barrows***, 122 Wn.App. 902 (2004)

Where trial court grants a motion for acquittal, RCW 10.77.080, trial has occurred for purposes of CrR 3.3, and court's failure to enter findings does not entitle defendant to a dismissal; III.

***State v. Carneh***, 153 Wn.2d 274 (2004)

Defendant raises insanity defense, at examination by state's experts refuses to answer questions which might be incriminating, state's experts report that they could not form an opinion as to sanity at time of the offense, state moves to exclude insanity defense, trial court denies state's motion but permits state to refer to defendant's silence at trial; held: defendant has statutory right to refuse to answer questions that may be incriminating, RCW 10.77.020(3), *State v. Pawlyk,* 115 Wn.2d 457, 460-66 (1990), *State v. Bonds,* 98 Wn.2d 1, 20 (1982), distinguishing *State v. Hutchinson*, 135 Wn.2d 863, 876-80 (1998); state may offer evidence of defendant's silence for the purpose of explaining why the state's experts were unable to form an opinion as to sanity, defense is entitled to an instruction that jury may not infer sanity from defendant's refusal to answer incriminating questions, distinguishing *State v. Easter*, 130 Wn.2d 228, 241 (1996); 6-3.

***State v. Matthews***, 132 Wn.App. 936 (2006)

A jury rejection of insanity defense is reviewable, standard is whether, considering the evidence in a light most favorable to the state, could a rational trier of fact have found that defendant failed to prove the defense by a preponderance, *State v. Lively*, 130 Wn.2d 1, 17 (1996), *State v. Chanthabouly*, 164 Wn.App. 104 (2011); here, while four experts testified defendant was insane, one testified he was sane and lay witnesses testified to defendant's demeanor, words and conduct at the time of the offense, thus evidence was sufficient to support verdict; I.

***Clark v. Arizona***, 165 L.Ed.2d 842 (2006)

State law which limits expert testimony about a defendant's mental incapacity to an insanity defense but not on the element of *mens rea* does not violate due process, *see also: Kahler v.. Kansas,* ___ U.S. ___, 140 S.Ct. 1021, 206 L.Ed.2d 312 (2020); 5-4.

***State v. Johnson***, 150 Wn.App. 696, 6773-76 (2009)

Where fetal alcohol syndrome expert never met defendant and testified in offer of proof that he had no knowledge how defendant was affected by the syndrome, trial court did not abuse

discretion by excluding his testimony that people with the syndrome have an impairment in reasoning about the right thing to do, *see:* *State v. Crenshaw*, 98 Wn.2d 789, 797-98 (1983); I.

***State v. Reanier***, 157 Wn.App. 194, 203-09 (2010)

Defendant agrees to insanity acquittal and commitment for ten years for two counts of assault 3°, after conditional release at revocation hearing, defendant challenges length of commitment; held: where accused is acquitted by reason of insanity, commitment period is limited to the maximum sentence for the most serious crime, *i.e.*, must treat commitment as if the sentences were concurrent, RCW 10.77.025(1) (2000), *State v. Harris*, 39 Wn.App. 460 (1985); I.

***State v. Chanthabouly***, 164 Wn.App. 104 (2011)

A defendant's psychotic delusion that he needed to kill victim in self defense may support an insanity defense but absent evidence supporting an objective self defense standard, defendant is not entitled to self defense instructions; II.

***State v. C.B.***, 165 Wn.App. 88 (2012)

Court may authorize forced medication to a defendant found not guilty by reason of insanity, as RCW 10.77.120 (2010) authorizes the department to "provide adequate care and individualized treatment;" II.

***State v. Haq***, 166 Wn.App. 221, 272-77 (2012)

When defendant raises insanity as a defense, court may order defendant to submit to an examination by a state psychiatrist, *State v. Hutchinson*, 111 Wn.2d 872, 188 (1989); trial court must balance defendant's Fifth Amendment rights and ability of state to gather information to contravene defendant's claim of insanity by weighing incriminating nature of statements defendant made to state's expert against its probative value; statement should not be ruled incriminating merely because it shows defendant was capable of committing the crime, but trial court should exclude defendant's statements that he committed the crime, *State v. Hutchinson*, 135 Wn.2d 863, 870 (1998); I.

***State v. Bao Dinh Dang***, 178 Wn.2d 868 (2013)

Failure to adhere to terms of a conditional release alone is not sufficient to revoke conditional release, court must first find dangerousness, *O'Connor v. Donaldson,* 422 U.S. 563, 575, 45 L.Ed.2d 396 (1975), *see: State v. Beaver*, 184 Wn.2d 321 (2015), by preponderance, not clear, cogent and convincing, distinguishing *Addington v. Texas*, 441 U.S. 418, 433, 60 L.Ed.2d 323 (1979); hearsay evidence is admissible at a revocation hearing only if there is good cause to forgo live testimony, *State v. Dahl*, 139 Wn.2d 678, 686 (1999), defined in terms of difficulty and expense of procuring witnesses in combination with demonstrably reliable or clearly reliable evidence; affirms *State v. Bao Dinh Dang*, 168 Wn.App. 480 (2012); 9-0.

***State v. Howland***, 180 Wn.App. 196 (2014)

Insanity acquittee petitions for conditional release, defendant's therapist and hospital Risk Review Board oppose release, defendant presents no expert evidence to support her petition, trial court denies a hearing; held: trial court has discretion whether or not to held a

hearing on applications recommended for disapproval by DSHS, RCW 10.77.150(3)(a), absent some evidence to support defendant's position trial court did not abuse discretion, there was no probable error thus discretionary review denied; I.

***State v. Derenoff***, 182 Wn.App. 458 (2014)

Insanity acquitee need not be restored to competency before or during a less restrictive alternative revocation hearing; II.

***State v. Beaver***, 184 Wn.2d 321 (2015)

Trial court, following insanity acquittal, finds acquittee dangerous and commits, at later conditional release revocation hearing evidence establishes that he is no longer mentally ill, court revokes based upon violation of conditions alone; held: where court finds an insanity acquittee mentally ill and dangerous, due process does not require that court find a current mental illness in order to revoke, distinguishing *State v. Bao Dinh Dang*, 178 Wn.2d 868 (2013), insanity is presumed to continue to exist until defense proves defendant has regained sanity, *State v. Platt*, 97 Wn.App. 494, 505, *aff'd,* 143 Wn.2d 242 (2001); *affirms State v. Beaver,* 184 Wn.App. 235 (2014); 9-0.

***State v. West***, 185 Wn.App. 625 (2015)

Failure to make a motion to acquit, RCW 10.77.080 (1998), is not ineffective assistance where, here, jury rejected defendant's insanity defense; III.

***McWilliams v. Dunn***, ___ U.S. ___, 137 S.Ct. 1790, 198 L.Ed.2d 341 (2017)

Two days before capital sentencing hearing court appointed neuropsychologist (employed by the state Department of Mental Health) who provides an evaluation and mental health records, defense seeks a recess and an expert to assist defense in evaluating the report and translate the data into a legal strategy, denied by trial court; held: *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985) requires, when threshold criteria are met, the government must provide an indigent defendant with access to a mental health expert who is sufficiently available to the defense, and independent of the prosecution, to effectively "assist in evaluation, preparation, and presentation of the defense, *id.*at 83, 105 S.Ct. 1087, which should include help in preparing direct or cross-examination, denied by trial court here, thus reversed; 5-4.

***State v. Fletcher***, 190 Wn.2d 219, 412 P.3d 285 (2017)

An insanity acquitee can choose between petitioning the court for conditional release, *State v. Reid*, 144 Wn.2d 621 (2001), RCW 10.77.200(50 (2010), or apply indirectly through DSHS, and in either circumstance, s/he is entitled to appointment of counsel, reversing *State v. Fletcher,* 198 Wn.App. 157 (2017); 9-0.

***State v. Coleman***, 6 Wn.App.2d 507 (2018)

An insanity acquitee's denial of final release, RCW 10.77.200, is appealable; I.

***Kahler v. Kansas***, ___ U.S. ___, 140 S.Ct. 1021, 206 L.Ed.2d 312 (2020)

Due process does not oblige a state to adopt an insanity defense; 6-3.

***State v. Thompson***, 19 Wn.App.2d 727 (2021)

Defense psychiatrist offers to testify that due to mental disease defendant was unable to perceive the nature and quality of the act and was unable to tell right from wrong which was aggravated by voluntary use of alcohol, trial court refuses to allow the evidence because defendant's mental state was also impacted by alcohol, ruling that RCW 10.77.030(3) precludes the insanity defense where the "condition of mind" was induced by alcohol; held: where insanity is proximately induced by voluntary acts of the defendant then it is not available as a defense, but here a preexisting mental condition may have been aggravated by intoxication but it was not caused by the intoxication, *State v. Wicks*, 98 Wn.2d 620 (1983), *State v. Huey*, 14 Wn.2d 387, 394 (1942), thus trial court abused its discretion in excluding the defense; II.

# INSTRUCTIONS
## Accomplice*

***State v. Willoughby***, 29 Wn.App. 828 (1981)

Defendant is entitled to cautionary accomplice instruction unless accomplice testimony is sufficiently corroborated, *Pers. Restraint of Sarausad*, 109 Wn.App. 824, 849-50 (2001); such instruction is not a comment on evidence; an unarmed accomplice of an armed principal may have his sentence enhanced by deadly weapon and firearm allegations, *State v. Silvernail*, 25 Wn.App. 185 (1980); I.

***State v. Castro***, 32 Wn.App. 559 (1982)

Where trial court finds "as a matter of fact" that a witness does not possess criminal intent, then accomplice cautionary instruction need not be given; I.

***State v. Harris***, 34 Wn.App. 649 (1983)

Where accomplice's testimony is corroborated as to some element or fact, court need not give cautionary accomplice instruction; *accord*: *State v. Jennings*, 35 Wn.App. 216 (1985), *State v. Lee*, 13 Wn.App. 900, 910 (1975), *State v. Johnson*, 40 Wn.App. 371 (1985), *State v. Harris*, 102 Wn.2d 148 (1984), *State v. Gross*, 31 Wn.2d 202 (1948); I.

***State v. Cirkovich***, 35 Wn.App. 134 (1983)

Uncorroborated testimony of accomplice should be regarded with skepticism and carefully scrutinized, but it is the exclusive province of the trier of fact to review the testimony and accord it the appropriate weight; I.

***State v. Bockman***, 37 Wn.App. 474 (1984)

State need not prove that an accomplice shared the same mental state as principal; accomplice liability is proved by showing that accomplice acted with knowledge that his acts will promote the crime, RCW 9A.08.020(3)(a), even if mental state for substantive offense is intent; I.

***State v. Laureano***, 101 Wn.2d 745 (1984)

WPIC 10.51 approved; 9-0.

***State v. Markham***, 40 Wn.App. 75 (1985)

Vicarious liability instruction approved where there is evidence that principal caused agent to commit acts which constitute a crime, *distinguishing* *Windsor v. United States*, 384 F.2d 535 (9th Cir. 1967); III.

***State v. Mannhalt***, 68 Wn.App. 757 (1992)

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* *See also:* **ACCOMPLICE**

While it is always the better practice for a trial court to give the cautionary instruction whenever accomplice testimony is introduced, *State v. Harris*, 102 Wn.2d 148, 155 (1984), it is not reversible error to refuse to so instruct where accomplice testimony is substantially corroborated by independent evidence, *State v. Sherwood*, 71 Wn.App. 481, 484-6 (1993); I.

***State v. Roberts***, 142 Wn.2d 471, 509-13 (2000)

Instruction which reads, "[a] person is legally accountable for the conduct of another person when he is an accomplice of such other person in the commission of *a crime,"* as distinguished from "*the* crime" is improper, *State v. Cronin*, 142 Wn.2d 568 (2000), *Pers. Restraint of Sarausad*, 109 Wn.App. 824, 849-50 (2001), *State v. Grendahl*, 110 Wn.App. 905 (2002), *State v. Williams*, 136 Wn.App. 486, 492-96 (2007); *for harmless error analysis, see: State v. Brown*, 147 Wn.2d 330 (2002), *State v. Trujillo*, 112 Wn.App. 390 (2002), *State v. Gallagher*, 112 Wn.App. 601, 607-09 (2002), *State v. King*, 113 Wn.App. 243, 264-67 (2002), *State v. Wren*, 115 Wn.App. 922 (2003), *Pers. Restraint of Sims*, 118 Wn.App. 471 (2003), *State v. Evans*, 154 Wn.2d 438, 449-57 (2005), *see also: State v. Whitaker*, 133 Wn.App. 199, 229-30 (2006), *Waddington v. Sarausad*, 172 L.Ed.2d 532 (2008); 6-3.

***State v. Stovall***, 115 Wn.App. 650 (2003)

Where jury instruction erroneously states that defendant is accountable when he is an "accomplice of such other person in the commission of a crime," *State v. Roberts*, 142 Wn.2d 471 (2000), and there is evidence before the jury of an uncharged crime and the prosecutor argues that the defendant's participation in such crime triggered liability for the specific crime charged, then the error is not harmless, *cf.: State v. Johnson*, 116 Wn.App. 851, 856-59 (2003), *Waddington v. Sarausad*, 172 L.Ed.2d 532 (2008), *State . Eplett*, 167 Wn.App. 660 (2012); I.

***State v. Mullin-Coston***, 115 Wn.App. 679, 690-92 (2003), *aff'd, on other grounds*, 152 Wn.2d 107 (2004)

Instruction which requires knowledge that defendant's participation would promote or facilitate the commission of the crime is adequate, *State v. Roberts*, 142 Wn.2d 471 (2000), *State v. Davis*, 101 Wn.2d 654, 656 (1984), court need not specify which crime, *Waddington v. Sarausad*, 172 L.Ed.2d 532 (2008); I.

***State v. Teal***, 152 Wn.2d 333 (2004)

Evidence establishes that defendant is an accomplice to robbery, to convict instruction does not state "defendant or accomplice," but accomplice definition is given; held: rule requiring that all elements of a crime be listed in a single instruction is not violated when accomplice liability is listed in a separate instruction, *State v. Haack*, 88 Wn.App. 423, 423-31 (1997), *see: State v. Emmanuel*, 42 Wn.2d 799 (1953), *State v. Mills*, 154 Wn.2d 1 (2005), *but see: State v. Spencer*, 111 Wn.App. 401 (2002), *cf.: State v. Fallentine*, 149 Wn.App. 614, 625-26 (2009); affirms *State v. Teal*, 117 Wn.App. 831, 835-42 (2003); 8-1.

***State v. Carter***, 154 Wn.2d 71 (2005)

Defendant plans, with others, a robbery but is not present at the robbery where the victim is slain, is convicted as an accomplice of felony murder after trial court erroneously instructs jurors that defendant is an accomplice in "the commission of a crime," *State v. Roberts*, 142

Wn.2d 471 (2000); held: where a defendant is charged with felony murder and has participated in the predicate felony, the co-participant clause of the felony murder statute, RCW 9A.32.030(1), imputes criminal liability for the homicide; where defendant has not participated directly in the commission of the predicate felony, state must establish accomplice liability; here, the accomplice liability instruction was harmless, *see: State v. Brown*, 147 Wn.2d 330 (2002), *see also: State v. Stovall*, 115 Wn.App. 650 (2003); affirms *State v. Carter*, 119 Wn.App. 221 (2003); 8-1.

***State v. Winterstein***, 140 Wn.App. 676, 685-87 (2007), *reversed, on other grounds*, 167 Wn.2d 620 (2009)

Where a landlord is present, aware of drug manufacturing and fails to take affirmative steps to stop it, *State v. Roberts*, 80 Wn.App. 342 (1996), trial court need not give special accomplice instructions, *State v. Roberts, supra.*, at 355-57, standard accomplice instruction is adequate; II.

***State v. Coleman***, 155 Wn.App. 951, 961 (2010)

Accomplice instruction need not require proof of an overt act as long as it requires the jury to find that defendant "knowingly, with specific criminal *mens rea*, stood ready to aid or aided" principal in the commission of the crime; I.

***Rosemond v. United States***, 572 U.S. 65, 134 S.Ct. 1240, 188 L.Ed.2d 248 (2014)

In federal case charging aiding and abetting a drug transaction while armed, 18 U.S.C. § 924(c), instruction "[he] knew his cohort used a firearm in the drug trafficking crime" is misleading as it does not require foreknowledge; 7-2.

***State v. Walker***, 182 Wn.2d 463, 481-85 (2015)

In murder 1° case, to convict instruction reads "defendant or an accomplice acted with intent to cause the death…[and] that the intent to cause the death was premeditated" is affirmed as accomplice liability law allows a jury to convict participants without unanimously determining which participants satisfied which elements of the crime, *State v. Haack*, 88 Wn.App. 423, 427 (1997), *State v. Holcomb*, 180 Wn.App. 583, 586-88 (2014); allowing the jury to convict by "splitting the elements of the crime" between accomplices is consistent with accomplice liability, *State v. Dreewes*, 192 Wn.2d (2019); *reverses, on other grounds, State v. Walker*, 178 Wn.App. 478 (2013); 9-0.

# INSTRUCTIONS
## Character Evidence

***State v. Mark***, 94 Wn.2d 520 (1980)

Approved instruction: "Evidence has been presented in this case which bears upon the good character and good reputation of the defendant. Such evidence should be considered by you along with all the other evidence, in determining the guilt or innocence of the defendant"; distinguishes *State v. Allen*, 89 Wn.2d 651 (1978); 9-0.

***State v. Robinson***, 44 Wn.App. 611 (1986)

Court need not instruct jury that evidence of good reputation alone may create a reasonable doubt of guilt; III.

***State v. Thomas***, 110 Wn.2d 859 (1988)

Where character evidence is admitted, jury should be instructed, upon request, "Any evidence which bears upon good character and good reputation of the defendant should be considered by you, along with all other evidence, in determining whether or not the defendant is guilty. However, even if you find that the defendant is a person of good character or reputation, you should not acquit if you are convinced beyond a reasonable doubt of the defendant's guilt," modifying *State v. Thomas*, 46 Wn.App. 280 (1986); 7-2.

# INSTRUCTIONS
## Defendant's Failure to Testify

***Carter v. Kentucky***, 67 L.Ed.2d 241 (1981)

If requested court must instruct jury that defendant need not testify and jury may not draw adverse inferences from defendant's failure to testify, per 5th and 14th amendments; 8-1.

***State v. Ortiz***, 34 Wn.App. 694 (1983)

Instructing jury that it is not to consider the fact that defendant did not testify, combined with instruction that "the law does not impose upon a defendant the burden or duty of calling any witnesses or producing any evidence," is sufficient; I.

***State v. Wheeler***, 108 Wn.2d 230 (1987)

Trial court may instruct jury that it must not consider defendant's failure to testify even if not requested by defense, *State v. Dauenhauer*, 103 Wn.App. 373, 374-77 (2000), *cf.*: *Lakeside v. Oregon*, 55 L.Ed.2d 319 (1978); 9-0.

***State v. Barnes***, 54 Wn.App. 536 (1989)

Instructing jury that "the fact that the defendant has not testified cannot be used to infer guilt and should not prejudice him" is adequate; III.

# INSTRUCTIONS
## Defining Terms

***State v. Tucker***, 32 Wn.App. 83 (1982)

**Direct/circumstantial** pattern instruction, WPIC 5.01, is not a comment on the evidence, *see: State v. Zunker*, 112 Wn.App. 130, 135 (2002); I.

***State v. Ratliff***, 46 Wn.App. 325 (1986)

In malicious mischief case, instruction that "**damages**, in addition to its ordinary meaning, includes any breaking, and includes any diminution in the value of any property or the reasonable value of necessary repairs to any property which was damaged as a consequence of an act" approved; I.

***State v. Ng***, 110 Wn.2d 32 (1988)

In **robbery** case, failure to define "**theft**" is not of constitutional magnitude; "theft" is a term of sufficient common understanding to allow jury to convict of robbery without further definition, *State v. Pawling*, 23 Wn.App. 226 (1979), *State v. Phillips*, 98 Wn.App. 936, 945-47 (2000), *State v. O'Donnell,* 142 Wn.App. 314, 324-25 (2007), *see*: *State v. VanVlask,* 53 Wn.App. 86 (1988), *State v. Campbell*, 59 Wn.App. 61 (1990); 9-0.

***State v. Peerson***, 62 Wn.App. 755 (1991)

"Common scheme or plan" as an aggravating factor need not be further defined in aggravated murder case, *State v. Jeffries*, 105 Wn.2d 398, 420 (1986); I.

***State v. Webb***, 64 Wn.App. 480 (1992)

In malicious mischief case in which victim is spouse, defendant is not entitled to a community property definition, as "property of another," RCW 9A.48.080(1)(a), includes property co-owned by defendant; further, here, victim had superior interest in property in her possession, *State v. Pike*, 118 Wn.2d 585, 590 (1992), *see: State v. Coria*, 146 Wn.2d 631 (2002), *State v. Wooten*, 178 Wn.2d 890 (2013); I.

***State v. Stearns***, 119 Wn.2d 247 (1992)

Where not objected to in trial court, defendant cannot challenge definition of "manufacture," RCW 69.50.101(m), for first time on appeal; as long as instructions properly inform jury of elements of the charged crime, any error in further defining terms used in the elements is not of constitutional magnitude, *but see: State v. O'Hara,* 167 Wn.2d 91, 104-09 (2009); *affirms State v. Stearns*, 59 Wn.App. 445 (1990); 9-0.

***State v. Rehak***, 67 Wn.App. 157 (1992)

Proposed instruction requiring "substantial" circumstantial evidence to support a finding of **premeditation** need not be given; II.

***State v. May***, 68 Wn.App. 491 (1993)

Vehicular homicide by operating in a reckless manner and vehicular homicide by operating with disregard for safety of others are distinct methods of committing the offense, with different SRA implications, and must be defined differently for the jury, *see:* *State v. Eike*, 72 Wn.2d 760 (1967), *State v. Jacobsen*, 78 Wn.2d 491 (1970); I.

***State v. Dent***, 123 Wn.2d 467, 473-7 (1994)

"Substantial step" requirement for conspiracy, RCW 9A.28.040(1), need not be limited to conduct which is more than mere preparation; definition of substantial step in conspiracy case is not the same as in attempt, RCW 9A.28.020(1), WPIC 100.05; I.

***State v. Brown***, 132 Wn.2d 529, 611-3 (1997)

In aggravated murder case, trial court properly exercised discretion in not defining "**in the course of**," **in furtherance of**," and "**in immediate flight**," even where jury asked for clarification, as they are words of common understanding; 9-0.

***State v. Vanoli***, 86 Wn.App. 643, 646-8 (1997)

**Knowledge** instruction with permissible inference does not violate due process, WPIC 10.02, *State v. Shipp*, 93 Wn.2d 510 (1980), *State v. Davis*, 39 Wn.App. 916 (1985), *State v. Gogolin*, 45 Wn.App. 640 (1986), *State v. Kees*, 48 Wn.App. 76 (1987), *State v. Barrington*, 52 Wn.App. 478 (1988), *State v. Leech*, 114 Wn.2d 700, 710 (1990), *State v. Hoffman*, 51, 107 (1991), distinguishing *United States v. Aguilar*, 80 F.3d 329 (9th Cir., 1996), *see:* *State v. Johnson*, 119 Wn.2d 167, 174-6 (1992), *State v. Bryant*, 89 Wn.App. 857, 871-2 (1998), *State v. Jones*, 13 Wn.App.2d 386 (2020), *see:* *State v. Peters*, 16 Wn.App.2d 454 (2021); I.

***State v. Daniels***, 87 Wn.App. 149 (1997)

In **assault of a child** 2°, RCW 9A.36.130, where the offense is committed by an actual **battery**, the definition of battery is not an element of the crime, thus failure to define battery to the jury is not reviewable for the first time on appeal, distinguishing *State v. Byrd*, 125 Wn.2d 707 (1995), *State v. Eastmond*, 129 Wn.2d 497 (1996); I.

***State v. Clark***, 143 Wn.2d 731, 770-71 (2001)

**Premeditation**, defined in WPIC 26.01.01 (2d ed. 1994), is sufficient, *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 317 (1994); 9-0.

***State v. David***, 134 Wn.App. 470 (2006)

Trial court's defining elements of a crime (here, proximate cause) does not violate separation of powers doctrine; II.

***State v. Yates***, 161 Wn.2d 714, 749-51 (2007)

In aggravated murder case, defining "common scheme or plan" for purposes of an aggravating factor as "a connection between the crimes in that one crime is done in preparation of the other [and] when a person devises an overarching criminal plan and uses it to perpetrate separate but very similar crimes," *State v. Lough*, 125 Wn.2d 847, 854-55 (1995), was proper; 8-1.

***State v. Atkins***, 156 Wn.App. 799, 804-07 (2010)

In harassment case, court must define **true threat**, *State v. Schaler*, 169 Wn.2d 274 (2010), *cf.: State v. Clark*, 175 Wn.App. 109 (2013), but it is not an essential element, thus need not be in to convict instruction, *State v. Tellez*, 141 Wn.App. 479 (2007), *State v. Warren*, 161 Wn.App. 727, 748-56 (2011), *State v. Allen*, 176 Wn.2d 611 (2013), *State v. Saunders*, 177 Wn.App. 259 (2013); I.

***State v. Gordon***, 172 Wn.2d 671 (2011)

Appellant may not challenge failure of the trial court to further define terms contained with an aggravating circumstance instruction for the first time on appeal as it is not of constitutional magnitude, *State v. Duncalf*, 164 Wn.App. 900 (2011), *affirmed, on other grounds*, 177 Wn.2d 289 (20130; reverses, in part, *State v. Gordon*, 153 Wn.App. 516 (2009); 9-0.

***State v. Allen***, 161 Wn.App. 727 (2011), 176 Wn.2d 611 (2013)

In harassment case, where court defines "true threat," it need not include it as an element in to convict instruction, *State v. Atkins*, 156 Wn.App. 799 (2010), *State v. Tellez*, 141 Wn.App. 479 (2007), *State v. Locke*, 175 Wn.App. 779, 796-801 (2013), *see: State v. Schaler*, 169 Wn.2d 279, 288 n. 6 (2010); I.

***State v. Harris***, 164 Wn.App. 377 (2011)

In assault of a child 1°, RCW 9A.36.120(1)(b)(1), defining "reckless" in instruction to include "wrongful act" is error as the crime requires proof that defendant recklessly disregarded that great bodily harm would occur, *State v. Gamble*, 154 Wn.App. 457 (2005), *State v. Johnson*, 180 Wn.2d 295, 304-07 (2014); II.

***State v. Ballew***, 167 Wn.App. 359 (2012)

In **threats to bomb** case, defining "**true threat**" per WPIC 2.24 (2008) properly establishes an objective test, *State v. Schaler*, 169 Wn.2d 274 (2010), *State v. Kilburn*, 151 Wn.2d 36, 43 (2004), does not conflict with *Virginia v. Black*, 538 U.S. 343, 155 L.Ed.2d 535 (2003), *State v. Trey M.*, 186 Wn.2d 884 (2016), court need not inform the jury that idle talk and jokes are not true threats, *State v. Clark*, 175 Wn.App. 109 (2013), at least where issue is raised for the first time on appeal; I.

***State v. Clark***, 175 Wn.App. 109 (2013)

In harassment case, court defining **true threat** as an attempt to induce victim not to report information relevant to a criminal investigation focuses on the statute's *mens rea* element, *State v. Schaler*, 169 Wn.App. 274 (2010), thus decision not to instruct that a reasonable person would foresee that statement would be interpreted as a serious expression rather than a jest or idle talk is not error; II.

***State v. Johnson***, 180 Wn.2d 295, 304-07 (2014)

In assault 2° case, defining "reckless" as including "a wrongful act" instead of the more charge-specific language "substantial bodily harm" was not error where the to convict instruction

identified the wrongful act as "substantial bodily harm," distinguishing *State v. Harris,* 164 Wn.App. 377, 385 (2011); *reverses, in part, State v. Johnson,* 172 Wn.App. 112 (2012) 7-2.

***State v. Boyle****,* 183 Wn.App. 1, 9-12 (2014)

In harassment of a criminal justice participant case, court's instruction that "it is not harassment if it is apparent to the criminal justice participant that the person does not have the ability to carry out the threat" was proper even though statute states that "the defendant does not have the present and future ability to carry out the threat," RCW 9A.46.020(2)(b) (2011); Division I substitutes "or" for "and."

# INSTRUCTIONS
## Generally

***State v. Pickens***, 27 Wn.App. 97 (1980)

When victim establishes exact time when act charged was committed and defense is alibi, jury should be instructed to determine whether act occurred at that particular time per *State v. Coffelt*, 33 Wn.2d 106 (1949), *State v. Severns*, 13 Wn.2d 542 (1942); II.

***State v. Duhaime***, 29 Wn.App. 842 (1981)

After deliberation began, court responded to several questions from the jury, held proper as long as the supplemental instructions or answers to jurors' interrogatories were correct, *State v. Frandsen*, 176 Wash. 558, 563 (1934); once verdict is received and filed a juror cannot change his/her mind, even if jury had not been discharged, *Belinger v. Shield*, 164 Wash. 147 (1931); I.

***State v. Bonds***, 98 Wn.2d 1 (1982)

In rape 1° case, jury instructions must specify which crime or crimes defendant intended to commit when s/he feloniously entered building, *cf.*, *State v. Franco*, 96 Wn.2d 816 (1982), *cf.: State v. Sandholm*, 184 Wn.2d 726, 732-36 (2015), harmless here; 5-4.

***State v. Russell***, 31 Wn.App. 715 (1982)

No error where court declines to instruct jury that where witness had willfully testified falsely you are at liberty to disregard the testimony of such witness entirely; I.

***State v. Gibson***, 32 Wn.App. 217 (1982)

Typographical error in "to convict" instruction which, if read literally completely eliminates an element is not error, as it is "inconceivable that the jury could have been misled"; I.

***State v. Mercer***, 34 Wn.App. 654 (1983)

Where defense in homicide case is excusable homicide, RCW 9A.16.030, court need not instruct jury state has burden of proving absence of excuse, *State v. Henderson*, 192 Wn.2d 508 (2018), as long as burden is not placed on defendant at least as to cases tried prior to decision in *State v. McCullum*, 98 Wn.2d 484 (1983); I.

***State v. Steward***, 35 Wn.App. 552 (1983)

In attempted rape case, reversible error to fail to instruct jury that attempt must include "intent" and "substantial step"; an instructional error is harmless only if it is trivial or formal or merely academic and in no way affected the final outcome, *see: State v. Brown*, 147 Wn.2d 330 (2002); instructions which relieve the state of its burden on an element constitute fundamental error which cannot be waived by a failure to except; I.

***State v. Wagner***, 36 Wn.App. 286 (1983)

Where tracking dog evidence is offered, defense is entitled to cautionary instruction prohibiting convicton upon such evidence alone, *State v. Salinas*, 169 Wn.App. 210, 223 (2012);

where evidence requires corroboration, the jury must be so informed, *State v. Crouch*, 60 Wash. 450 (1910), *State v. Hess*, 86 Wash. 240 (1915), *State v. Aton*, 67 Wash. 485, 486 (1912), *see*: *State v. Ellis*, 48 Wn.App. 333 (1987); I;

***State v. Watkins***, 99 Wn.2d 166 (1983)

Where a jury is potentially deadlocked, court may give supplemental instructions as long as they do not suggest need for agreement, consequences of no agreement or length of time jury will be required to deliberate, CrR 6.15(f)(2), *see: State v. Linton*, 156 Wn.2d 777 (2006); here, Supreme Court approved trial court giving supplemental instruction, after jury reported deadlock, that it need not be unanimous on greater offense before considering lesser included offense; 9-0.

***State v. Langdon***, 42 Wn.App. 715 (1986)

Once jury has begun deliberation, it is error for the court to respond to any jury request for clarification in the absence of the defendant and counsel, even if the instruction merely tells jury "you are bound by those instructions already given to you," CrR 6.15(f), *State v. Jasper*, 158 Wn.App. 518, 538-43 (2010), *affirmed, on other grounds*, *State v. Jasper*, 174 Wn.2d 96 (2012), *cf.: State v. McCarthy*, 178 Wn.App. 90, 96-102 (2013), harmless here; I.

***State v. Young***, 48 Wn.App. 406 (1987)

After deliberations have begun, it may be error for trial court to refuse to clarify or supplement an instruction upon juror's request; technical terms should be clarified if requested; III.

***Mathews v. United States***, 99 L.Ed.2d 54 (1988)

Defense is entitled to entrapment instructions whenever there is sufficient evidence to support defense even if defendant denies one or more elements of the crime; 7-2.

***State v. Nicholas***, 55 Wn.App. 261 (1989)

Where information alleges one mode of committing a crime, it is error to instruct jury as to an uncharged alternative, *State v. Severns*, 13 Wn.2d 542, 548 (1942), *State v. Chino*, 117 Wn.App. 531, 538-41 (2003), *State v. Laramie*, 144 Wn.App. 332, 341-44 (2007), *State v. Brewczynski*, 173 Wn.App. 541 (2013), *see also: State v. Boiko*, 131 Wn.App. 595 (2006), harmless here; I.

***State v. Ransom***, 56 Wn.App. 712 (1990)

In answer to a jury question after deliberations had begun, court gave accomplice instruction over objection; held: accomplice liability is a distinct theory of culpability, for which state must offer timely instructions to permit the defense to argue the issue, *State v. Davenport*, 100 Wn.2d 757 (1984); supplemental instructions should not go beyond matters that had been, or could have been, argued, *cf.: State v. Becklin*, 163 Wn.2d 519 (2008); II.

***State v. Bailey***, 114 Wn.2d 340 (1990)

Defendant, charged with statutory rape 1°, is convicted of indecent liberties as lesser, to which defense does not except; held: failure to except waives issue, *State v. Mak*, 105 Wn.2d

692, 748-9 (1986); even if instructing on the lesser involved the constitutional issue of notice of charge, harmless beyond a reasonable doubt; *affirms* *State v. Bailey*, 52 Wn.App. 42 (1988), *aff'd,* 114 Wn.2d 340 (1990); *but see*: *State v. Hodgson*, 44 Wn.App. 592 (1986); 5-4.

***State v. Hanson***, 59 Wn.App. 651 (1990)

Where "to convict" instruction omits element, failure of defense to object does not waive issue on appeal, *cf.*: *State v. Henderson*, 114 Wn.2d 867 (1990), *State v. Ahlquist*, 67 Wn.App. 442, 447-8 (1992), *State v. Sao*, 156 Wn.App. 67, 78-79 (2010); II.

***State v. Hoffman***, 116 Wn.2d 51 (1991)

In aggravated murder (police victims) case, trial court instructs jury that victims were law enforcement officers and determines lawfulness of arrest without submitting issues to jury; held: harmless as to instruction that victims were police (7-2), validity of arrest or search are determinations for court to make, *State v. John Doe*, 6 Wn.App. 978, 982 (1972), unless information makes it element of crime, as in resisting arrest (8-1); trial court is not required to give instruction which is erroneous in any respect, *State v. Camp*, 67 Wn.2d 363, 369 (1965), *State v. Robinson*, 92 Wn.2d 357, 361 (1979).

***State v. Bradford***, 60 Wn.App. 857 (1991)

"Separate crime" instruction, WPIC 3.01 (revised), should include language that all evidence is applicable on all counts absent a limiting instruction; 2-1, I.

***State v. Stearns***, 61 Wn.App. 224 (1991)

An instruction is not a comment on the evidence unless it has the effect of conveying to the jury the judge's view of the credibility, weight or sufficiency of the evidence, *State v. Eisner*, 95 Wn.2d 458, 461-2 (1981); where there is evidence in the record to support an instruction, and it is an accurate statement of law, it is not an impermissible comment, *State v. Hughes*, 106 Wn.2d 176, 193 (1986); I.

***State v. Ramirez***, 62 Wn.App. 301 (1991)

Limiting instruction can be given contemporaneously or at close of all the evidence, within trial court's discretion; I.

***State v. Jones***, 63 Wn.App. 703 (1992)

Party is entitled to instruction on his/her theory of the case only if party supplies instructions which accurately state the law, *State v. Goree*, 36 Wn.App. 205, 208 (1983); court is not required to give an instruction which is erroneous in any respect, *State v. Ellis*, 48 Wn.App. 333, 335 (1987), *State v. Dent*, 67 Wn.App. 656 (1992), *aff'd,* 123 Wn.2d 467 (1993), *State v. Staley*, 123 Wn.2d 794, 803 (1994), *State v. Jacobson*, 74 Wn.App. 715, 724 (1994); I.

***State v. Garcia***, 65 Wn.App. 681 (1992)

Information charges delivery of drugs to X, to convict instruction does not specify recipient of drugs, state proves delivery to Y; held: because no evidence of delivery to X existed, and defense proposed to convict instruction also did not specify recipient, no error or, at most, harmless error, *distinguishing* *State v. Brown*, 45 Wn.App. 571, 576 (1986); I.

***State v. Dent***, 67 Wn.App. 656 (1992), *aff'd,* 123 Wn.2d 467 (1994)

Trial court has no duty to rewrite incorrect statements of law contained in proposed instructions, *State v. Robinson*, 92 Wn.2d 357, 361 (1979); a request for an instruction that is in part erroneous is no request at all, *State v. Mayner*, 4 Wn.App. 549, 552 (1971); I.

***State v. Benn***, 120 Wn.2d 631 (1993)

Defense proposed instruction "if there [are] two equally reasonable inferences and under only one would defendant be guilty, you should adopt that which admits innocence" need not be given, *see: State v. Zunker*, 112 Wn.App. 130, 135 (2002), where court instructs "your deliberations must be based upon the evidence, and not upon speculation, guess or conjecture," *see: State v. Gosby*, 85 Wn.2d 758 (1975), *State v. Bencivenga*, 137 Wn.2d 703, 711 (1999); 6-3.

***State v. Dent***, 123 Wn.2d 467, 478-9 (1994)

Defense exception to instructions during court's reading of instructions to jury is untimely, *Nelson v. Mueller*, 85 Wn.2d 234, 238 (1975); *affirms State v. Dent*, 67 Wn.App. 656 (1992); 9-0.

***State v. Smith***, 131 Wn.2d 258 (1997)

Where "to convict" instruction is missing an element, reversal is mandated even where other instructions may supply the missing element, *State v. Emmanuel*, 42 Wn.2d 799, 819 (1953), *Seattle v. Norby*, 88 Wn.App. 545, 555-8 (1997), *overruled, in part, State v. Robbins*, 138 Wn.2d 486 (1999), *State v. Haberman*, 105 Wn.App. 926 (2001), *but see: Hedgpeth v. Pulido*, 172 L.Ed.2d 388 (2008), *State v. Oster*, 147 Wn.2d 141 (2002), *State v. Brown*, 147 Wn.2d 330 (2002), *State v. Mills*, 154 Wn.2d 1 (2005), reversing, in part, *State v. Smith*, 80 Wn.App. 462 (1996); 9-0.

***State v. Ong***, 88 Wn.App. 572, 577-8 (1997)

"To convict" instruction states that defendant knew substance delivered was morphine, state proves defendant gave a pain pill to victim; held: by failing to object to the instruction, state assumed burden of proving defendant knew the substance delivered was morphine (law of the case doctrine), *State v. Potts*, 93 Wn.App. 82, 86-88 (1998), *State v. Hudlow*, 182 Wn.App. 266, 284-87 (2014), *State v. Johnson*, 188 Wn.2d 742 (2017), *see: State v. Hunt*, 75 Wn.App. 795, 806 (1994), *State v. Salas*, 127 Wn.2d 173, 182 (1995), *State v. Barringer*, 32 Wn.App. 882, 887-8 (1982), *overruled on other grounds, State v. Monson*, 113 Wn.2d 833 (1989), here the evidence only shows defendant knew he delivered a controlled substance, not specifically morphine, thus insufficient, *cf.: State v. Sinrud*, 200 Wn.App. 643 (2017); court expressly does not decide whether a defendant accused of delivery must know the specific drug being delivered; II.

***State v. Hickman***, 135 Wn.2d 97 (1998)

Where unnecessary elements are included, without objection, in the "to convict" instruction (here, venue), the **law of the case doctrine** obliges the state to prove the elements, and defense may challenge sufficiency of the added elements on appeal, *State v. Johnson*, 188

Wn.2d 742 (2017), *State v. Barringer*, 32 Wn.App. 882, 887-8 (1982), *State v. Hobbs*, 71 Wn.App. 419 (1993), *State v. Worland*, 20 Wn.App. 559, 566 (1978), *cf.: State v. Dent*, 123 Wn.2d 467, 479-81 (1994), *State v. Benitez*, 175 Wn.App. 116, 123-26 (2013), *State v. Calvin*, 176 Wn.App. 1, 19-23 (2013), *State v. France*, 180 Wn.2d 809 (2014), *cf.: Musacchio v. United States*, 577 U.S. 237, 136 S.Ct. 709, 193 L.Ed.2d 639 (2016), *cf.: State v. Jusilla*, 197 Wn.App. 908 (2017); 5-4.

***State v. Potts***, 93 Wn.App. 82 (1998)

State charges possession of a controlled substance: methamphetamine, proves defendant possessed amphetamine; held: while state need not prove knowledge of a specific controlled substance, *State v. Cleppe*, 96 Wn.App. 373 (1981), where prosecutor charges a specific substance and court instructs that a specific substance was possessed, either at state's request or without exception from state, then instructions become law of the case, *State v. Ong*, 88 Wn.App. 572, 577 (1997), *State v. Johnson*, 188 Wn.2d 742 (2017), and state must prove the unnecessary element, *State v. Hudlow*, 182 Wn.App. 266, 284-87 (2014); here, because amphetamines and methamphetamine have different chemical compositions, state failed to prove identity of the charged drug; III.

***State v. Peterson***, 94 Wn.App. 1 (1998)

Defendant is charged with felony murder 1° and, as an alternative, felony murder 2°, court instructs jury to consider felony murder 1° first and, if it finds defendant not guilty or cannot reach a unanimous verdict, then consider felony murder 2°; held: proper procedure is for jury to consider more serious alternative crime first, then move to less serious crime if it does not convict of the more serious crime, which did not convert the less serious alternative crime to a lesser included offense, *cf.: State v. Labanowski*, 117 Wn.2d 405 (1991), *State v. Trujillo*, 112 Wn.App. 390, 408-12 (2002); I.

***State v. Studd***, 137 Wn.2d 533 (1999)

Defense may not request instruction and then, on appeal, challenge that instruction as constitutionally infirm, *State v. Henderson*, 114 Wn.2d 867 (1990), *Seattle v. Patu*, 147 Wn.2d 717 (2002), *State v. Winings*, 126 Wn.App. 75, 89 (2005), *cf.: State v. O'Hara*, 167 Wn.2d 91 (2009), *State v. Kyllo*, 166 Wn.2d 856 (2009), although where defense also submits a curative instruction that is not given, then the invited error doctrine does not apply, at 552, *State v. Ortiz-Triana*, 193 Wn.App. 769 (2016); 8-1.

***State v. Townsend,*** 142 Wn.2d 838 (2001), *overruled, State v. Pierce*, 195 Wn.2d 230 (2020)

In noncapital murder case, jury may not be informed that the case does not involve the death penalty, *State v. Murphy*, 86 Wn.App. 667 (1997), *State v. Hicks*, 163 Wn.2d 477 (2008), *State v. Mason*, 160 Wn.2d 910, 928-31 (2007), *reversing State v. Townsend*, 97 Wn.App. 25 (1999), *but see: State v. Rafay*, 168 Wn.App. 734, 774-81 (2012), *State v. Clark*, 187 Wn.2d 641 (2017), harmless here; 9-0.

***State v. Summers***, 107 Wn.App. 373, 380-83 (2001)

Where defense counsel proposes a to convict instruction that fails to include an essential element, invited error doctrine bars reversal, *State v. Studd*, 137 Wn.2d 533, 546-47 (1999), *State*

*v. Lucero*, 140 Wn.App. 782, 785-87 (2007), 152 Wn.App. 287, 293-94 (2009), *but see: State v. Rodriguez*, 121 Wn.App. 180 (2004), *State v. Kyllo*, 166 Wn.2d 856 (2009); where, at the time of trial, the missing element was not required by caselaw which changed after trial, then counsel was not ineffective, *Studd, supra.*, at 551; II.

***State v. Oster***, 147 Wn.2d 141 (2002)

In felony no contact order violation case, court used special verdict form for jury to decide whether or not defendant had committed two or more prior violations, necessary elements for the offense to be a felony; held: where element of a crime is prior criminal history, instructional bifurcation is the better practice, *State v. Davis,* 116 Wn.App. 81, 90-96 (2003), *aff'd,* 154 Wn.2d 291, *aff'd, on other grounds, Davis v. Washington,* 165 L.Ed.2d 224 (2006), *see: State v. Mills*, 154 Wn.2d 1 (2005), *cf.: State v. Smith*, 131 Wn.2d 258 (1997), *State v. Emmanuel*, 42 Wn.App. 799 (1953), *State v. Tysyachuk,* 13 Wn.App.2d 35 (2020); 9-0.

***State v. Brown***, 147 Wn.2d 330 (2002)

Instructional error which omits an element of a charged crime is subject to harmless error analysis to determine whether the error has not relieved state of burden, *State v. Borrero*, 147 Wn.2d 353 (2002), *State v. Jones*, 117 Wn.App. 221 (2003), *but see: State v. Smith*, 131 Wn.2d 258, 265 (1997), *State v. Eastmond*, 129 Wn.2d 497, 502 (1996), *State v. Byrd*, 125 Wn.2d 707, 713-14 (1995), *State v. Pope*, 100 Wn.App. 624, 630 (2000), *cf.: Hedgpeth v. Pulido*, 172 L.Ed.2d 388 (2008); 6-3.

***State v. Zunker***, 112 Wn.App. 130, 135 (2002)

Circumstantial evidence need not be inconsistent with any hypothesis of innocence, *State v. Gosby*, 85 Wn.2d 758, 764-65 (1975), *cf.: State v. Sewell*, 49 Wn.2d 244, 246 (1956); 2-1, III.

***State v. Atkinson***, 113 Wn.App. 661, 666-68 (2002)

In defining "substantial bodily harm" for assault 2°, RCW 9A.04.110(4)(b), court instructs that "disfigurement means that which impairs or injures the beauty, symmetry, or appearance of a person or thing; that which renders unsightly, misshapen, or imperfect, or deforms in some manner," defense claims definition is overbroad and eliminates distinction between assault 2° and assault 4°; held: trial courts have "considerable discretion in wording jury instructions," *State v. Castle*, 86 Wn.App. 48, 62 (1997), definition here was accurate and merely supplemented and clarified statutory language; III.

***Seattle v. Patu***, 147 Wn.2d 717 (2002)

**Invited error doctrine** prohibits defense from proposing an instruction that omits an element of the offense and then challenging that instruction on appeal, *State v. Studd*, 137 Wn.2d 533 (1999), *State v. Henderson*, 114 Wn.2d 867, 869 (1990), *State v. Summers*, 107 Wn.App. 373, 380-82 (2001), *State v. Smith*, 122 Wn.App. 294, 299-300 (2004), *rev'd, on other grounds*, 155 Wn.2d 496 (2005), *State v. Winings*, 126 Wn.App. 75, 89 (2005), *State v. Lucero*, 140 Wn.App. 782, 785-87 (2007), 152 Wn.App. 287, 293-94 (2009), *State v. O'Hara,* 167 Wn.2d 91 (2009), *cf.: State v. Ortiz-Triana,* 193 Wn.App. 769 (2016), *but see: State v. Rodriguez*, 121

Wn.App. 180 (2004), *State v. Kyllo*, 166 Wn.2d 856 (2009); affirms *Seattle v. Patu*, 108 Wn.App. 364 (2001); 6-3.

***State v. Davis,*** 116 Wn.App. 81, 90-96 (2003), 154 Wn.2d 291, *aff'd, on other grounds, Davis v. Washington*, 165 L.Ed.2d 224 (2006)

In felony no contact order violation case, court gave to convict instruction without assault language, defined assault separately, instructed about finding an assault in special verdict instruction and special verdict form; held: instructional bifurcation "benefits the defendant," and is better practice, *State v. Oster*, 147 Wn.2d 141 (2002), *cf.: State v. Tysyachuk*, 13 Wn.App.2d 35
(2020), *see: State v. Mills*, 154 Wn.2d 1 (2005); as long as all elements are properly instructed, they need not be included in a single to convict instruction; I.

***State v. Dolan***, 118 Wn.App. 323, 330-32 (2003)

In child abuse case, instructing jury that "the presence of bruising and and swelling can be sufficient evidence of substantial bodily harm" is immaterial, misleading and a comment on the evidence; II.

***State v. Sanchez***, 122 Wn.App. 579, 588-91 (2004)

While reading instructions to jury, trial court skips reading one instruction, no objection taken; held: failure to read an instruction, CrR 6.15(d), is constitutional error; III.

***State v. Mills***, 154 Wn.2d 1 (2005)

In felony harassment case, trial court puts "threat to kill" element in special verdict, not in to convict instruction; held: "where the legislature has established a statutory framework which defines a base crime which is elevated to a greater crime if a certain fact is present, a trial court may, consistent with the guaranties of due process and trial by jury, bifurcate the elevating fact into a special verdict form," at 10 ¶ 19, *State v. Oster*, 147 Wn.2d 141 (2002); here, because it was unclear that the threat to kill had to be proved beyond a reasonable doubt, felony conviction was in error; reverses *State v. Mills*, 116 Wn.App. 106 (2003); 9-0.

***State v. Chamroeum Nam***, 136 Wn.App. 698 (2007)

Where court instructs jury defining robbery as taking property from the victim's person and omits the language prohibiting taking property in a victim's presence, evidence that defendant took victim's purse from a seat next to her is insufficient, *see also: State v. O'Donnell*, 142 Wn.App. 314, 321-24 (2007);; II.

***State v. Becklin***, 163 Wn.2d 519 (2008)

Complainant testifies that, following issuance of no contact order, two people drive defendant's car past her home, two weeks later defendant follows her home, defendant is convicted of felony stalking, RCW 9A.46.110(1), after jury inquires whether a person can be stalked through a third party and court answers, "yes;" held: trial court's answer was a correct statement of the law, "course of conduct," as defined by legislature, contemplates that stalking could include direction or manipulation of third parties, RCW 10.14.020, both parties argued the theory to the jury, *cf.: State v. Ransom*, 56 Wn.App. 712, 714 (1990), *State v. Davenport*, 100

Wn.2d 757 (1984), thus trial court did not abuse discretion in further instructing the jury in response to the jury question; reverses *State v. Becklin*, 133 Wn.App. 610 (2006); 6-3.

***State v. Bache***, 146 Wn.App. 897, 904-06 (2008)

Where a prior conviction is a predicate that elevates a crime from a misdemeanor to a felony, the prior conviction must be proved and jury must be instructed either in to convict instruction or in a special verdict, *see: State v. Oster*, 147 Wn.2d 141 (2002), and failure to do so requires reversal; III.

***State v. Releford***, 148 Wn.App. 478, 493-94 (2009)

Unobjected-to jury instructions are not subject to constitutional vagueness challenges on appeal, *State v. Whitaker*, 133 Wn.App. 199, 233 (2006);

***State v. Jain***, 151 Wn.App. 117 (2009)

Defendant is charged with money laundering, RCW 9A.83.020, for using drug proceeds to buy specific named property, to convict instruction does not identify the specific property, evidence addresses other named property as well; held: instructions were insufficient, *State v. Brown*, 45 Wn.App. 571 (1986); I.

***State v. Sibert***, 168 Wn.2d 306, 311-13 (2010)

Information charges delivery of methamphetamine, to convict instruction does not refer to specific drug; held: because to convict instruction begins "[t]o convict the Defendant…of the crime of Delivery of a Controlled Substance as charged," the reference to the charging document impliedly incorporates the drug named in the information; where identity of the drug determines the maximum sentence it is an essential element, *see: State v. Goodman*, 150 Wn.2d 774 (2004), *State v. Zillyette*, 178 Wn.2d 153 (2013), *State v. Gonzalez*, 2 Wn.App.2d 96 (2018), *State v. Clark-El*, 196 Wn.App. 614 (2016), *State v. Barbarosh*, 10 Wn.App.2d 408 (2019), *State v. Gardner*, 14 Wn.App.2d 207 (2020), *cf.: State v. Rivera-Zamora*, 7 Wn.App. 3d 824 (2019); 4-1-4 [plurality opinion, *see: Barbarosh, supra. at* ¶¶ 25-26].

***State v. Schaler***, 169 Wn.2d 274 (2010)

In harassment case, failure to give "true threat" instruction is manifest error, *State v. Johnston*, 156 Wn.2d 355 (2006), *see: State v. Atkins*, 156 Wn.App. 799, 804-07 (2010), *State v. Warren*, 161 Wn.App. 727, 748-56 (2011), *State v. Clark*, 175 Wn.App. 109 (2013); 6-3.

***State v. Koch***, 157 Wn.App. 20 (2010)

Defendant lives with elderly father who previously accused him of assault, father refuses medical assistance, defendant does not force unwanted care on father, who dies, defendant is convicted of criminal mistreatment, RCW 9A.42.020, and manslaughter 2° after trial court declines to instruct jury that use of physical force, absent consent, is assault even if purpose is to provide assistance; held: while the evidence was sufficient to support the conviction, defense was denied due process by failing to instruct jury of defendant's theory of the case; "trial court should deny a requested jury instruction that presents a theory of the defendant's case only where the

theory is *completely* unsupported by evidence," at ¶ 26, *State v. Barnes*, 153 Wn.2d 378, 382 (2005); 2-1.

***State v. Gordon***, 172 Wn.2d 671 (2011)

Appellant may not challenge failure of the trial court to further define terms contained within an aggravating circumstance instruction for the first time on appeal as it is not of constitutional magnitude, *State v. Duncalf*, 164 Wn.App. 900 (2011), *affirmed, on other grounds*, 177 Wn.2d 289 (2013); reverses, in part, *State v. Gordon*, 153 Wn.App. 516 (2009); 9-0.

***State v. Jasper***, 158 Wn.App. 518, 538-43 (2010)

Trial court answers jury inquiry with instruction to reread instructions without notifying parties and in defendant's absence; held: because the questions did not raise issues involving disputed facts, court's response did not involve a critical stage, and thus defendant's Sixth Amendment right was not violated, *Pers. Restraint of Lord*, 123 Wn.2d 296, 306 (1994), *State v. McCarthy*, 178 Wn.App. 90, 96-102 (2013), but CrR 6.15(f)(1) requires defendant's presence during any communication between the court and the jury, *State v. Langdon*, 42 Wn.App. 715, 717 (1986); where the trial court's response is "negative in nature and conveys no affirmative information," *State v. Russell*, 25 Wn.App. 933, 948 (1980), *State v. Safford*, 24 Wn.App. 783, 794 (1979), *State v. Johnson*, 56 Wn.2d 700 (1960), then error is harmless; I.

***State v. O'Brien***, 164 Wn.App. 924 (2011)

In **bail jumping** case, state need not disprove statutory affirmative defense of uncontrollable circumstances, RCW 9A.76.172, as it does not negate an element of the crime; I.

***State v. Hummel***, 165 Wn.App. 749, 777-79 (2012)

Failure of trial court to give cautionary instruction that prison informant testimony is unreliable is not an abuse of discretion and may be a comment on the evidence; I.

***State v. Butler***, 165 Wn.App. 820, 834-36 (2012)

In robbery/kidnapping case, defendant is shot by homeowner, trial court instructs jury on homeowner's right to use deadly force; held: instruction accurately stated the law, is relevant to the issues at trial, is not a comment on the evidence, *see: State v. Malone*, 20 Wn.App. 712, 714 (1978); III.

***State v. Lynch***, 178 Wn.2d 487 (2013)

In rape 1° case where defendant denies forcible compulsion, trial court may not, over defendant's objection, instruct jury on the defense of consent with burden to prove consent on defendant, *State v. Coristine*, 177 Wn.2d 370 (2013); 9-0.

***State v. Calvin***, 176 Wn.App. 1, 19-23 (2013)

In assault on officer case that does not involve self defense, court defines assault as "an act, with unlawful force…," during deliberations jury asks for definition of unlawful force, court, over objection, submits supplemental instruction, CrR 6.15(f), removing unlawful force language, offers defense option to re-argue, defense declines and seeks a mistrial; held: while

**law of the case doctrine** holds that an instruction not objected to becomes the law of the case and thus where an unnecessary element is included the state must prove it anyway, *State v. Hickman,* 135 Wn.2d 97, 101-02 (1998), *State v. Johnson,* 188 Wn.2d 742 (2017), *State v. Ransom,* 56 Wn.App. 712 (1990), *State v. Hobbs,* 71 Wn.App. 419, 420-21 (1993), *see: State v. France,* 180 Wn.2d 809 (2014), *cf.: Musacchio v. United States,* 577 U.S. 237, 136 S.Ct. 709, 193 L.Ed.2d 639 (2016), *State v. Jusilla,* 197 Wn.App. 908 (2017), where defense did not adapt its trial strategy to the inclusion of the unlawful force language and defense was given the opportunity to reargue, trial court did not abuse its discretion; I.

***State v. Mendes***, 180 Wn.2d 188 (2014)

When state rests defense asks court whether it will instruct on self-defense based upon state's case, court declines, defendant testifies but claims he is being compelled to testify; held: trial court has discretion when to rule on jury instructions, defendant's testimony was not compelled, *State v. Foster,* 91 Wn.2d 466, 472-73 (1979); 9-0.

***State v. France***, 180 Wn.2d 809 (2014)

Defendant threatens lawyers from jail, in felony harassment trial court defines "threat" to include "intent immediately to use force" as well as "threatened … to do any act … intended to harm …physical safety," RCW 9A.04.110(28) (2011), defendant could not have immediately used force, on appeal defendant maintains that definition became law of the case which state had to prove, *State v. Allen*, 176 Wn.2d 611, 626 (2013), *State v. Stevens*, 158 Wn.2d 304, 309–10 (2006); held: multiple definitions of statutory terms do not necessarily create either new elements or alternate means, *see: State v. Smith,* 159 Wn.2d 778, 785 (2007), *State v. Linehan*, 147 Wn.2d 638, 646 (2002); an instruction that provides for ten definitions of threat do not create ten alternative means, *State v. Marko,* 107 Wn.App. 215, 218–19 (2001), *State v. Makekau,* 194 Wn.App. 407 (2016), *State v. Tyler,* 191 Wn.2d 205 (2018); 9-0.

***State v. Federov***, 181 Wn.App. 187, 196-99 (2014)

In identity theft to convict instruction, RCW 9.35.020 (2008), court need not identify the crime intended to be committed, *State v. Bergeron,* 105 Wn.2d 1, 6-16 (1985), *State v. Jeffries,* 105 Wn.2d 398, 419-20 (1986); I.

***State v. Barry***, 183 Wn.2d 297 (2015)

During deliberations jury inquires if it can consider "observations of the defendant" who didn't testify, trial court answers, over objection, "[e]vidence includes what you witness in the courtroom;" held: jury may not consider defendant's demeanor when he is not testifying as evidence, *see: State v. Klok,* 99 Wn.App. 81, 82 (2000), *State v. Smith,* 144 Wn.2d 665, 679 (2001), although lack of record as to what defendant's demeanor was makes it impossible to determine if defendant was prejudiced, thus affirmed; affirms *State v. Barry,* 179 Wn.App. 175, 178-83 (2014); 6-3.

***State v. Muñoz-Rivera***, 190 Wn.App. 870, 881-83 (2015)

In child rape case information alleges victim's initials and, in parentheses, date of birth, defendant maintains that date of birth must be proved per law of the case doctrine even though it's not an element of the crime as it was alleged in the charging document, *State v. Johnson,*

188 Wn.2d 742 (2017), *State v. Hickman*, 135 Wn.2d 97 (1998); held: by using parenthetical date of birth information state did not add the victim's birth date to elements to be proved at trial; III.

***State v. Hood***, 196 Wn.App. 127, 131-36 (2016)

Failure of defense to propose any jury instructions is not an affirmative assent to the state's proposed instructions, invited error doctrine is not applicable, although failure to preserve error by objecting generally operates as a waiver, RAP 2.5(a); defendant has no duty to propose instructions that will enable the state to convict him; I.

***State v. Clark***, 187 Wn.2d 641 (2017), *overruled, State v. Pierce*, 195 Wn.2d 230 (2020)

In non-capital murder case court invites counsel to handle issue of telling jury it's not a death penalty case as appropriate, state informs some jurors during individual voir dire, defense does not object; held: absent proof of prejudice informing jury that a murder case is not a death penalty case is not ineffective assistance, *but see: State v. Townsend*, 142 Wn.2d 838, 846-49 (2001); 5-4.

***State v. Johnson***, 188 Wn.2d 742 (2017)

Defendant is charged with theft 2° of access device, to convict instruction includes an element that requires proof that defendant intended to deprive victim of an access device, statute only requires proof that defendant intended to deprive of property, RCW 9A.56.020(1)(a) (2004); held: law of the case doctrine obliges the state to prove all elements contained in to convict instruction, even surplusage, *State v. Hickman*, 135 Wn.2d 97 (1988), *State v. Jusilla*, 197 Wn.App. 908 (2017), *see: State v. Tyler*, 191 Wn.2d 205 (2018); law of the case doctrine is grounded in state common law, thus Washington will not follow *Musacchio v. United States*, 577 U.S. 237, 136 S.Ct. 709, 193 L.Ed.2d 639 (2016); 9-0.

***State v. Jusilla***, 197 Wn.App. 908 (2017)

In unlawful possession of firearm case to convict instruction includes serial numbers and make and model of guns, state offers no evidence to support serial numbers; held: **law of the case doctrine** requires state to prove what is in the to convict instruction even if they are not elements of the crime, *State v. Hickman*, 135 Wn.2d 97 (1998), *State v. Johnson*, 188 Wn.2d 742 (2017), *cf.: Musacchio v. United States*, 577 U.S. 237, 136 S.Ct. 709, 193 L.Ed.2d 639 (2016), unless the extra elements are in parenthesis, *State v. Muñoz-Rivera*, 190 Wn.App. 870 (2015); III.

***State v. Sinrud***, 200 Wn.App. 643, 650-52 (2017)

In VUCSA possession with intent case court instructs jury "[m]ere possession of a controlled substance does not allow you to infer an intent to deliver a controlled substance. The law requires substantial corroborating evidence of intent to deliver in addition to the mere fact of possession. The law requires at least one additional corroborating factor," consistent with *State v. Hagler*, 74 Wn.App. 232, 236 (1994), argues on appeal that it is a comment on the evidence; held: trial court should not instruct jury based upon an appellate court's sufficiency holding as the sufficiency standard on appeal ("any rational jury") is lower than beyond a reasonable doubt,

*State v. Brush*, 183 Wn.2d 550, 557-58 (2015), *but see: State v. Sandoval*, 8 Wn.App.2d 267 (2019), thus instruction was a prejudicial judicial comment on the evidence; I.

***State v. St. Peter***, 1 Wn.App.2d 961 (2017)

Trial court need not instruct that all jurors must be present during deliberations, *State v. Sullivan*, 3 Wn.App.2d 376, 379-80 (2018), not error absent evidence that a juror left the jury room during deliberations; III.

***State v. Rivera-Zamora***, 7 Wn.App. 3d 824 (2019)

Defendant is charged with possession of methamphetamine, to convict instruction does not identify the drug but verdict form does; held: while the identity of the drug is an essential element, *State v. Goodman*, 150 Wn.2d 774 (2004)**,** *State v. Zillyette*, 178 Wn.2d 153 (2013), *State v. Gonzalez*, 2 Wn.App.2d 96 (2018), *State v. Clark-El*, 196 Wn.App. 614 (2016), *cf.: State v. Gardner,* 14 Wn.App.2d 207 (2020), here the jury found the specific controlled substance as it was stated in the verdict form thus the error is harmless; II.

***State v. Sandoval,*** 8 Wn.App.2d 267 (2019)

In possessing stolen property case instructing jury that a credit card is an access device is not a comment on the evidence, distinguishing " *State v. Brush*, 183 Wn.2d 550, 557 (2015). II.

***State v. Gorman-Lykken***, 9 Wn.App.2d 687 (2019)

To convict instruction that concludes "If you find from the evidence that *either* (1), (2), and (3), has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty" relieves that state of its burden to prove each element; II (Melnik, concurring).

***State v. Barbarosh***, 10 Wn.App.2d 408 (2019)

In drug case where to convict instruction fails to identify the controlled substance charged then sentence can only be for the lowest possible offense for possession of a controlled substance, *State v. Clark-El*, 196 Wn.App. 614 (2016). *State v. Gonzalez*, 2 Wn.App.2d 96 (2018), *cf.: State v. Rivera-Zamora*, 7 Wn.App.2d 824, 829-30 (2019), *State v. Sibert*, 168 Wn.2d 306 (2010), *State v. Gardner*, 14 Wn.App.2d 207 (2020); III.

***State v. Pierce,*** 195 Wn.2d 230 (2020)

In a murder case it is not error for the jury to be told that it is not a death penalty case, overruling *State v. Townsend*, 142 Wn.2d 838, 846-49 (2001); 5-4.

# INSTRUCTIONS
## Lesser Included Offense/Inferior Degree Crime*

***State v. Putnam***, 31 Wn.App. 156 (1982)

Permitting prostitution, RCW 9A.88.090 is not a lesser of **promoting prostitution** 2°, RCW 9A.88.080; I.

***State v. Watkins***, 99 Wn.2d 166 (1983)

Jury need not acquit defendant of greater offense before considering lesser; instruction that "it is not necessary that you agree on assault 1° before considering assault 2°" upheld, *see: State v. Labanowski*, 117 Wn.2d 405 (1991), *State v. Linton*, 156 Wn.2d 777 (2006); 9-0.

***State v. Krup***, 36 Wn.App. 454 (1984)

Although it is not necessary for jury to agree on acquittal of greater offense before considering lesser offense, *State v. Watkins*, 99 Wn.2d 166 (1983), jury need not be specifically instructed to that effect if that is fairly conveyed by instructions as whole; I.

***State v. Partosa***, 41 Wn.App. 266 (1985)

Lesser included offense need not be offered where lesser is merely an "inherent characteristic" of greater, *distinguishing State v. Workman*, 90 Wn.2d 443, 448 (1978); I.

***State v. Hansen***, 46 Wn.App. 292 (1986)

Whereas failure to instruct on a proper lesser is error, where the jury has rejected another lesser included offense by convicting on the greater offense, failure to instruct may be harmless, *State v. Guilliot*, 106 Wn.App. 355, 368-69 (2001), *distinguishing State v. Parker*, 102 Wn.2d 161 (1984); I.

***State v. Taylor***, 109 Wn.2d 438 (1987)

Where jury reports it is hung on greater yet convicts of lessers, this does not amount to acquittal on greater, and trial court may require further deliberations on greater offense, *distinguishing State v. Watkins*, 99 Wn.2d 166 (1983, *see: State v. Labanowski*, 117 Wn.2d 405 (1991), *State v. Ervin*, 158 Wn.2d 746 (2006), *but see: State v. Linton*, 156 Wn.2d 777 (2006); 5-4.

***State v. Peters***, 47 Wn.App. 854 (1987)

Defendant admits to **burglary**, claims duress, excepts to court's failure to instruct as to trespass as a lesser; held: unless the evidence supports an inference that only the lesser crime had been committed, defendant is not entitled to an instruction on the lesser, *distinguishing State v. Wilson*, 41 Wn.App. 397; *accord*: *State v. Speece*, 115 Wn.2d 360 (1990), *State v. Jacobson*, 74 Wn.App. 715, 725-6 (1994), *State v. Fernandez-Medina*, 141 Wn.2d 448 (2000), *but see: State v. Coryell*, 197 Wn.2d 397 (2021); I.

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* *See chapters on crimes, e.g.,* **ASSAULT/Lessers, ATTEMPT, BURGLARY, HOMICIDE, SEX OFFENSES, VEHICULAR HOMICIDE/ASSAULT, VUCSA**

***State v. Knight***, 54 Wn.App. 143 (1989)

Possessing stolen property is lesser of **attempted trafficking in stolen property** 1°; III.

***State v. Elliott***, 114 Wn.2d 6 (1990)

Being an **accomplice** is a distinct theory of criminal liability and cannot be a lesser included offense; 9-0.

***State v. Fowler,*** 114 Wn.2d 59 (1990), *disapproved on other grounds, State v. Blair,* 117 Wn.2d 479, 487 (1991) Although **unlawful display of a weapon**, RCW 9.41.270(1), is a lesser of **assault** 2°, where defendant did not offer evidence at trial that he intended to intimidate victim or that he displayed gun in a manner which would cause victim alarm, then defendant was not entitled to the instruction; "[i]t is not enough that the jury might simply disbelieve the State's evidence . . . some evidence must be presented which affirmatively establishes the defendant's theory on the lesser . . . before an instruction will be given," *State v. Rodriguez*, 48 Wn.App. 815, 820 (1987), *State v. Rogers*, 70 Wn.App. 626 (1993), *State v. Brown*, 127 Wn.2d 749, 754-57 (1995), *State v. Fernandez-Medina*, 141 Wn.2d 448 (2000), *State v. Prado*, 144 Wn.App. 227, 242-44 (2008), *cf.*, *State v. Wilson*, 41 Wn.App. 397 (1985); *State v. Peters*, 47 Wn.App. 854 (1987), *State v. Baggett*, 103 Wn.App. 564 (2000), *but see: State v. Corey*, 181 Wn.App. 272 (2014), *cf.: State v. Parks*, 190 Wn.App. 859, 867-69 (2015); 9-0.

***State v. Falco***, 59 Wn.App. 354 (1990)

Trial court may amend charge *sua sponte* where the amended charge is a lesser included offense, *State v. Jollo*, 38 Wn.App. 469, 474 (1984); communicating with a minor for immoral purposes, former RCW 9.68A.090, is not a lesser of statutory rape 1°, former RCW 9A.44.070; I.

***State v. Hoffman***, 116 Wn.2d 51 (1991)

Trial court need not *sua sponte* instruct on lessers over express objections of defendants, *State v. Scott*, 110 Wn.2d 682, 686 (1988), *State v. Kroll*, 87 Wn.2d 829, 843 (1976), *see: State v. Mullins*, 158 Wn.App. 360, 364-70 (2010); 9-0.

***State v. Labanowski***, 117 Wn.2d 405 (1991)

Jury must be instructed it is to first consider crime charged and if after full and careful consideration of the evidence it cannot agree on a verdict as to that crime, it may then proceed to arrive at a verdict on a lesser crime, *see: State v. Watkins*, 31 Wn.App. 485 (1982), *aff'd,* 99 Wn.2d 166 (1983), *State v. Taylor*, 109 Wn.2d 438 (1987); it is not reversible error to have given instruction which arguably requires jury unanimity on greater before reaching a verdict on lesser prior to 19 September 1991; *affirms State v. Labanowski*, 58 Wn.App. 860 (1990); *see: State v. Kirk*, 64 Wn.App. 788 (1992), *State v. Linton*,156 Wn.2d 777 (2006); 9-0.

***State v. Baldwin***, 63 Wn.App. 536 (1991)

Minor in possession of alcohol, RCW 66.44.270(2) is not a lesser of **minor purchasing or attempting to purchase liquor**, RCW 66.44.290, because a minor can attempt to purchase alcohol without obtaining possession of it, *State v. Jackson*, 112 Wn.2d 867 (1989); *cf.: State v. Gatalski*, 40 Wn.App. 601 (1985); I.

***State v. Kirk***, 64 Wn.App. 788 (1992)

Jury returns no verdict on greater offense, convicts of lesser, *State v. Labanowski*, 117 Wn.2d 405 (1991); trial court discharges jury without consent of defendant and without determination of "extraordinary and striking" circumstances (such as jury acknowledgment of hopeless deadlock on greater offense), *State v. Jones*, 97 Wn.2d 159, 162 (1982), state re-notes greater offense for trial, defense seeks discretionary review; held: mere acknowledgment jurors were unable to agree on greater offense is insufficient to allow discharge of jury, thus defendant's right to be protected from double jeopardy was violated, *Green v. United States*, 2 L.Ed.2d 199 (1957), *State v. Linton*, 156 Wn.2d 777 (2006), *but see: State v. Daniels*, 160 Wn.2d 256 (2007), 165 Wn.2d 627 (2009); III.

***State v. Gallegos***, 65 Wn.App. 230 (1992)

An **attempt** is a lesser which need not be charged for trier of fact to convict; I.

***State v. Liewer***, 65 Wn.App. 641 (1992)

Official misconduct, RCW 9A.80.010(1), misconduct of a public officer, RCW 42.20.010, and failure of duty of a public officer, RCW 42.20.100 are not lessers of **bribery**, RCW 9A.68.010(1)(b); I.

***State v. Donald***, 68 Wn.App. 543 (1993)

Criminal impersonation, RCW 9A.60.040, is not a lesser of **attempting to obtain drugs by fraud**, RCW 69.50.403(a)(3); III.

***State v. Bandura***, 85 Wn.App. 87, 94-7 (1997)

Defendant need not consent on the record to defense counsel's offering lesser included offense instructions, as court can give lessers on request of state, accused or on court's own initiative; defendant does not have the right to be tried only on the specific crime charged; II.

***State v. Peterson***, 133 Wn.2d 885 (1997)

Defendant is charged with assault 1°, at bench trial following all the evidence, state is granted leave to amend to assault 2°, defendant is found guilty; held: state may amend at any time prior to verdict to an inferior degree crime, even if the elements are different, RCW 10.61.003, *State v. Foster*, 91 Wn.2d 466, 471 (1979), *State v. Ackles*, 8 Wash. 462, 464-5 (1894), distinguishing *State v. Pelkey*, 109 Wn.2d 484 (1987); even absent an amendment, trier of fact may find defendant guilty of any degree inferior to that charged in the information; 9-0.

***Hopkins v. Reeves***, 141 L.Ed.2d 76 (1998)

In capital case, state law that precludes lesser included offenses is constitutional, distinguishing *Beck v. Alabama*, 65 L.Ed.2d 392 (1980).

***State v. Farr-Lenzini***, 93 Wn.App. 453, 466-68 (1999)

**Negligent driving** 2º, RCW 46.61.525, is not a lesser of **reck**less driving, as an infraction cannot be a lesser of a crime; II.

***State v. Newbern***, 95 Wn.App. 277, 285-88 (1999)

**Reckless endangerment**, RCW 9A.36.050(1), is not a lesser of **attempted murder,** *see: State v. Prado*, 144 Wn.App. 227, 242 (2008),; II.

***State v. Thomas***, 98 Wn.App. 422 (1999)

Assault 4° is not a lesser of **indecent liberties** as intent is not an element of indecent liberties, *but see: State v. Smith*, 56 Wn.App. 909, 913-14 (1990), *State v. Bluford,* 195 Wn.App. 570 (2016), *rev'd, on other grounds,* 188 Wn.2d 298 (2017), *State v. Stevens,* 158 Wn.2d 304, 310-11 (2006); III.

***State v. Hernandez***, 99 Wn.App. 312 (1999)

In murder trial, state offers defendant's statement that death was an accident, that he had not touched the gun when victim, who was holding the gun, was shot, defense objects to court's refusal to instruct on lesser manslaughters; held: because manslaughter requires that the accused caused the death of another, factual test fails, thus defense is not entitled to lessers, *State v. Guilliot*, 106 Wn.App. 355, 366-69 (2001); I.

***State v. Guilliot***, 106 Wn.App. 355 (2001)

In intentional murder 1° case, defense produces evidence that he showed gun to victim and it accidentally discharged after diabetic defendant had failed to monitor his blood sugar, causing hypoglycemia resulting in confusion, anxiety, trial court instructs on murder 2° but refuses manslaughter; held: jury could have rationally concluded defendant acted recklessly or with criminal negligence in failing to monitor his blood sugar or in not acting with appropriate caution in showing victim gun, thus it was error not to instruct on manslaughter lessers, *but see: State v. Hunter*, 152 Wn.App. 30, 43-48 (2009); because jury convicted of murder 1°, thus rejecting murder 2° lesser, then jury necessarily rejected the factual defense which might have supported a verdict as to manslaughter, thus error was harmless, *State v. Hansen*, 46 Wn.App. 292, 297-98 (1986), *State v. Barriault*, 20 Wn.App. 419, 427 (1978); II.

***State v. Porter***, 150 Wn.2d 732 (2004)

Defendant is charged with delivering cocaine to undercover police, testifies he was there to buy drugs, trial court declines to offer lesser included offense instructions for attempted possession of cocaine; held: because a lesser offense must arise from the same act or transaction supporting the greater charged offense, trial court properly denied instructions; 9-0.

***State v. Stevens***, 158 Wn.2d 304, 310-12 (2006)

Assault 4° is a lesser of child molestation 2°, as a touching may be unlawful because it was neither legally consented to nor otherwise privileged, *State v. Thomas*, 98 Wn.App. 422, 424 (1999), *State v. Bluford*, 195 Wn.App. 570, 583-86 (2016) (concluding that *Thomas, supra.*, was wrongly decided), , *rev'd, on other grounds,* 188 Wn.2d 298 (2017); here, defendant testified that the touching was accidental, which would not support the lesser, but state's evidence supported the possibility that a reasonable juror could find that defendant willfully touched victims' breasts but without the purpose of sexual gratification as defendant was drunk; 5-4.

***State v. Linton***, 156 Wn.2d 777 (2006)

In assault 1º trial, jury is instructed to first consider greater and then, if it acquits or is unable to reach a verdict as to greater it can then consider lesser, jury is silent as to greater, convicts of assault 2º, trial court inquires of jurors who respond they were hung on greater, state seeks to retry defendant on assault 1º, trial court refuses; held: where court instructs jury that, if they are unable to agree on greater offense, they may consider lesser, *State v. Labanowski*, 117 Wn.2d 405 (1991), *State v. Watkins*, 31 Wn.App. 485 (1982), *aff'd,* 99 Wn.2d 166 (1983), then it is error for court to inquire into jurors' thinking about the greater, and thus jury implicitly acquitted defendant of greater, *State v. Kirk*, 64 Wn.App. 788, 789-90 (1992), *but see: State v. Ervin*, 158 Wn.2d 746 (2006), *State v. Daniels*, 160 Wn.2d 256 (2007), 165 Wn.2d 627 (2009), *State v. Scott*, 145 Wn.App. 884 (2008); affirms *State v. Linton*, 122 Wn.App. 73 (2004); 9-0 on result.

***State v. Ervin***, 158 Wn.2d 746 (2006)

Defendant is charged with aggravated murder 1º, jury is instructed to first consider crime charged and, if it acquits or is unable to agree on greater, can move to lesser, jury leaves verdict form for aggravated murder blank, convicts of lesser felony murder/assault which is later vacated, *Pers Restraint of Andress*, 147 Wn.2d 602 (2002), state refiles aggravated murder; held: jurors leaving verdict form blank means on its face that the jury was unable to agree which is not an implied acquittal, thus jeopardy is not terminated and state may re-try defendant on the greater offense, *State v. Daniels*, 160 Wn.2d 256 (2007), 165 Wn.2d 627 (2009), *State v. Glasmann*, 183 Wn.2d 117 (2015), *State v. Linton*, 156 Wn.2d 777, 789 (2006)(Sanders, J., concurring), *State v. Scott*, 145 Wn.App. 884 (2008), *State v. Wright*, 165 Wn.2d 783 (2009); 9-0.

***State v. Crittenden***, 146 Wn.App. 361 (2008)

Taking a motor vehicle without permission of the owner is not a lesser of theft, *see also: State v. Richey*, 1 Wn.App.2d 387 (2017); I.

***State v. Nguyen***, 165 Wn.2d 428 (2008)

A lesser penalty is not a requirement for a crime to be a lesser included offense; physical control is a lesser of DUI; 9-0.

***State v. Hassan***, 151 Wn.App. 209 (2009)

In delivery of marijuana case, failure to request possession as a lesser is not ineffective assistance, as it was a legitimate trial strategy, *State v. Grier*, 171 Wn.2d 17 (2011), *State v. Conway*, ___ Wn.App.2d ___, 519 P.3d 257 (2022), *cf.: State v. Classen*, 4 Wn.App.2d 520,

539-43 (2018); Division I acknowledges that, in *State v. Ward,* 125 Wn.App. 243 (2004), the court failed to "properly take into consideration the strong presumption of effective assistance," ¶ 30, n. 6.

***State v. Hunter***, 152 Wn.App. 30, 43-48 (2009)

Defendant, accused of murder, testifies both that he didn't remember shooting victim and that he shot victim but it was an accident, trial court declines manslaughter lessers; held: testimony that shooting was an accident raised the inference that defendant was guilty only of manslaughter, thus court abused its discretion in declining lessers, distinguishing *State v. Hernandez*, 99 Wn.App. 312 (1999), *see: State v. Guillot*, 106 Wn.App. 355 (2001); II.

***State v. Meneses***, 169 Wn.App. 586, 595-97 (2010)

**Witness tampering**, RCW 9A.72.110(1)(d), is a legal lesser of **intimidating a witness**, RCW 9A.72.120(1)(c), the latter requiring evidence of a threat; here, defendant threatened victim, even if jury found the threat not to be a "true threat," *State v. J.M.*, 144 Wn.2d 472, 478 (2001), there is still no affirmative evidence that defendant committed the former but not the latter; affirms *State v. Meneses*, 149 Wn.App. 707 (2009); 9-0.

***State v. LaPlant***, 157 Wn.App. 685 (2010)

**Unlawful use of drug paraphernalia**, RCW 69.50.412(1), is not a lesser of possession of a controlled substance; II.

***State v. Mullins***, 158 Wn.App. 360, 364-70 (2010)

In this murder 1° case, it was not objectively unreasonable for counsel to pursue a strategy of acquittal only and not request a murder 2° lesser instruction, *State v. Grier*, 171 Wn.2d 17 (2011), *State v. Hassan*, 151 Wn.App. 209 (2009), distinguishing *State v. Ward*, 125 Wn.App. 243 (2004), *State v. Pittman*, 134 Wn.App. 376, 387-90 (2006); I.

***State v. Grier***, 171 Wn.2d 17 (2011)

In murder case, counsel submits manslaughter lessers then withdraws them, defendant agrees on the record upon inquiry of the court, counsel argues self defense and reasonable doubt, defendant is convicted, appeals claiming ineffective assistance for failure to request lessers; held: decision whether or not to seek lessers is a tactical decision by counsel with consultation with client, *State v. Witherspoon*, 180 Wn.2d 875, 885-87 (2014), *see: State v. Edwards*, 171 Wn.App. 379, 392-97 (2012), defendant's waiver does not preclude a claim of ineffective assistance; choosing not to request lessers is a tactical decision by counsel and is not ineffective assistance; counsel's decision to proceed with an all or nothing approach is a proper tactic regardless of the lesser penalty of the lesser, *State v. Conway*, ___ Wn.App.2d ___, 519 P.3d 257 (2022), *cf.: State v. Classen*, 4 Wn.App.2d 520, 539-44 (2018), reversing *State v. Grier*, 150 Wn.App. 619 (2009), overruling *State v. Ward*, 125 Wn.App. 243 (2004), *State v. Pittman*, 134 Wn.App. 376, 387-90 (2006); 9-0.

***Blueford v. Arkansas***, 566 U.S. 599, 132 S.ct. 2044, 182 L.Ed.2d 937 (2012)

Jury is instructed on charged offense and lessers, sends out a note saying it cannot agree "on any one charge," judge brings jurors into court, foreperson reports jury is unanimous "against" the charged offense, court orders more deliberations after which jury reports it has not reached a verdict, mistrial declared; at retrial, defendant is convicted of greater offense; held: oral report of foreperson was not a "final resolution of anything," thus double jeopardy clause does not preclude retrial; instructions that jury may convict on any one offense or acquit on all were proper under state law, trial court did not abuse discretion by refusing to instruct that jury could acquit on some but not others; 6-3.

***State v. Hahn***, 174 Wn.2d 126 (2012)

Defendant solicits informant to have complainant "disappear, make it look like she didn't exist," is charged with solicitation to commit murder, trial court refuses lesser of solicitation to commit assault 4°; held: while solicitation to commit assault is a legal lesser, and while "disappear" may have "nonhomicidal meaning, the inferential leap to mere fourth degree assault is too great even when the evidence is interpreted" in defendant's favor, reversing *State v. Hahn*, 162 Wn.App. 885 (2011); *per curiam.*

***State v. Edwards***, 171 Wn.App. 379, 393-400 (2012)

Where counsel does not submit instructions for a lesser included offense, defendant's assertion that counsel did not consult him and his post-trial declaration that he would have asked counsel to seek a lesser is hindsight, absent evidence in the record of a failure to consult, defense has not established the counsel's performance was deficient, *State v. Grier*, 171 Wn.2d 17 (2011); II.

***State v. Sharkey***, 172 Wn.App. 386 (2012)

Taking a motor vehicle 2°, RCW 9A.56.075(1) (2003), is not a lesser of robbery 1°; III.

***State v. Allen***, 178 Wn.App. 893, 912-14 (2014), *reversed, on other grounds,* 182 Wn.2d 364 (2015)

Rendering criminal assistance, RCW 9A.76.050, is not a lesser of accomplice to murder; II.

***State v. Henderson***, 180 Wn.App. 138 (2014), *aff'd, on other grounds,* 182 Wn.2d 734 (2015)

Defendant is convicted of murder 1° with extreme indifference to human life, RCW 9A.32.030(1)(b), for shooting into a party as a gang retaliation, argues at trial that another was the shooter, trial court refuses manslaughter 2° lesser; held: manslaughter 2° is not a lesser, as no rational jury could find that defendant shot into a crowd while failing to be aware that a homicide would occur; II.

***State v. Corey***, 181 Wn.App. 272 (2014)

In rape 2° case victim testifies defendant digitally penetrated her in a hot tub in spite of her persistently pushing him away, defendant apparently presents no evidence, defendant is acquitted of rape 2°, convicted of lesser degree offense of rape 3° having objected to the instruction; held: evidence supported a jury finding that defendant did not engage in forcible

compulsion to achieve his nonconsensual sexual intercourse with the victim as victim's testimony about force was "vague," thus jury could have believed victim's testimony but still have found that defendant's conduct did not amount to forcible compulsion, thus rape 3° instruction was not error, distinguishing *State v. Wright*, 152 Wn.App. 64, 72 (2009), *State v. Charles*, 126 Wn.2d. 353, 356 (1995), *State v. Hampton*, 182 Wn.App. 805, 828-31 (2014), *reversed, on other grounds*, 184 Wn.2d 656 (2015), *but see:* State v. Fowler, 114 Wn.2d 59 (1990), *disapproved on other grounds, State v. Blair*, 117 Wn.2d 479, 487 (1991), State v. Rodriquez, 48 Wn.App. 815, 820 (1987), State v. Rogers, 70 Wn.App. 626 (1993), State v. Brown, 127 Wn.2d 749, 754-57 (1995), State v. Fernandez-Medina, 141 Wn.2d 448 (2000), State v. Prado, 144 Wn.App. 227, 242-44 (2008), *cf.: State v. Parks*, 190 Wn.App. 859, 867-69 (2015); II.

***State v. Hampton***, 182 Wn.App. 805, 828-31 (2014), *reversed, on other grounds*, 184 Wn.2d 656 (2015)

In rape 2°/incapable of consent case victim testifies she told defendant "no," defendant testified that no intercourse occurred, trial court gives lesser degree rape 3° instructions, defendant is convicted of lesser; held: jury could find that the evidence affirmatively established that victim expressed her lack of consent, not that she was incapable of consent, thus lesser instruction was proper, *see: State v. Corey*, 181 Wn.App. 272 (2014), *cf.: State v. Charles*, 126 Wn.2d 353 (1995), *State v. Wright*, 152 Wn.App. 64 (2009); I.

***State v. Boswell***, 185 Wn.App. 321, 332-35 (2014)

Assault 3º is not a lesser of attempted murder, *State v. Harris*, 121 Wn.2d 317 (1993); II.

***State v. Henderson***, 182 Wn.2d 734 (2015)

Defendant is convicted of murder 1° with extreme indifference to human life, RCW 9A.32.030(1)(b), for shooting into a party as a gang retaliation, argues at trial that another was the shooter, trial court refuses manslaughter 1° and 2° lessers; held: manslaughter 1° meets the legal prong justifying a lesser, because manslaughter 1°'s recklessness element requires that defendant disregard a substantial risk of homicide rather than just a substantial risk of a wrongful act, *State v. Gamble*, 154 Wn.2d 457, 467-68 (2005), a rational jury could find that defendant shot into a crowd but that he did so with a disregard for a substantial risk of homicide rather than an extreme indifference that caused a grave risk of death, thus manslaughter 1° meets factual test, *Pers. Restraint of Sandoval*, 189 Wn.2d 811 (2018); *State v. Pettus*, 89 Wn.App. 688 (1998) and *State v. Pastrana*, 94 Wn.App. 463 (1999) no longer control due to *State v. Gamble, supra.;* affirms *State v. Henderson*, 180 Wn.App. 138 (2014); 6-3.

***State v. Glasmann***, 183 Wn.2d 117 (2015)

Where defendant is charged with greater and lesser offenses and jury is unable to agree regarding the greater but convicts of the lesser which is reversed on appeal, state may retry defendant for the greater without violating double jeopardy clause, *State v. Daniels*, 160 Wn.2d 256, 265 (2007), *adhered to on recons.*, 165 Wn.2d 627, 628 (2009); 6-3.

***State v. Bluford***, 195 Wn.App. 570, 583-86 (2016) , *rev'd, on other grounds,* 188 Wn.2d 298 (2017)

**Assault 4°** is a lesser of indecent liberties, *State v. Stevens,* 158 Wn.App. 304 (2006), distinguishing *State v. Thomas,* 98 Wn.App. 422 (1999); I.

***State v. Sandoval***, 189 Wn.2d 811 (2018)

Murder defendant, charged as an absent accomplice to a homicide where the shooter shot into a car killing an occupant, requests manslaughter lesser which is denied; held: sufficient evidence supported the reckless element of manslaughter 1°, thus court erred in refusing lesser, *State v. Henderson,* 182 Wn.2d 734 (2015); 5-4.

***State v. Ritchey***, 1 Wn.App.2d 387 (2017)

Taking a motor vehicle 2°, RCW 9A.56.075 (2003), is not a lesser of theft of a motor vehicle, RCW 9A.56.065 (2007); III.

***State v. Fluker***, 5 Wn.App.2d 374 (2018)

In murder case with lawful use of force defense defendant testifies he shot victim (8 times) intending to stop him, not to kill him, trial court instructs on lesser of manslaughter 1°, declines to instruct on manslaughter 2°; held: while evidence supports claim that defendant killed victim recklessly, no evidence exists to support a claim that defendant was unaware of the risk and thus acted negligently, thus court properly declined to instruct on manslaughter 2°; I.

***State v. Downey***, 9 Wn.App.2d 852 (2019)

An alternative mean of an offense cannot be a lesser included offense since a lesser must be a separate crime; for vehicular assault driving with disregard for the safety of others is not a lesser included offense of driving in a reckless manner; I.

***State v. Loos***, 14 Wn.App.2d 748 (2020)

Defendant is charged with assault of a child 3°, is convicted of assault 4° as an inferior degree offense; held: assault 4° is not an inferior degree offense of assault 3° by criminal negligence, RCW 9A.36.031(1)(f) (2013), as assault 4° requires proof of intent; I.

***State v. Coryell,*** 197 Wn.2d 397 (2021)

"[W]hen there is affirmative evidence from which the *jury* could conclude that only the lesser included offense occurred, a lesser offense instruction should be given. The word "only" is meant to suggest that a jury might have a reasonable doubt about whether the charged crime was committed but may find that, instead, the lesser crime was committed. Thus, the trial court should consider whether any affirmative evidence exists upon which a jury could conclude that the lesser included offense was committed. The test was never intended to require evidence that the greater, charged crime was *not* committed—only that a jury, faced with conflicting evidence, could conclude the prosecution had proved only the lesser or inferior crime," at ¶48, distinguishing *State v. Fernandez-Medina*, 141 Wn.2d 448 (2000), ; here, "the trial court erred in requiring evidence that would *exclude* the commission of the charged crime;" 9-0.

***State v. Conway***, ___ Wn.App.2d ___, 519 P.3d 257 (2022)

Foregoing a lesser-included offense instruction is a strategic decision and is thus not ineffective assistance, *State v. Grier*, 171 Wn.2d 17 (2011), *cf.: State v. Classen,* 4 Wn.App.2d 520, 539-44 (2018); III.

***State v. Avington***, 23 Wn.App.2d 847 (2022)

In murder by extreme indifference, RCW 9A.32.030(1)(b) (1990), evidence shows defendant shooting towards a bar entrance where victims were gathered, court refuses lesser instruction on manslaughter 1°, RCW 9A.32.060(1)(a) (2011); held: no reasonable jury would rationally find that defendant was acting recklessly as required for manslaughter rather than with extreme indifference; in order for defendant to be entitled to an instruction on a lesser included offense there must be some evidence which affirmatively establishes defendant's theory of the crime, *State v. Coryell*, 197 Wn.2d 397 (2021), *State v. Workman*, 90 Wn.2d 443 (1978); II.

# INSTRUCTIONS
## *Mens rea*

***State v. Simmons***, 28 Wn.App. 243 (1980)

**Malice** instruction as defined in statute may be constitutional presumption, distinguishing *State v. Johnson*, 23 Wn.App. 506 (1979); I.

***State v. Shipp***, 93 Wn.2d 510 (1980)

**Knowledge** instruction as defined in statute is unconstitutional; reverses *State v. Van Antwerp*, 22 Wn.App. 674 (1979); 6-3.

***State v. Gibson***, 32 Wn.App. 217 (1982)

Instruction that "**intent** may be established by inference" does not shift burden to defense, *State v. Caldwell*, 94 Wn.2d 614, 619-20 (1980); I.

***State v. MacReady***, 32 Wn.App. 928 (1982)

**Inference of intent** to commit a crime from unlawful entry into a building is not a shifting of the burden of proof because the inference is permissible, not mandatory; no explanatory instruction was necessary when the jury sent out a question about whether the inference was mandatory; I.

***State v. Bledsoe***, 33 Wn.App. 720 (1983)

In murder 1° case, failure to define "**intent**," where not proposed, is not error; I.

***Bellevue v. Kinsman***, 34 Wn.App. 786 (1983)

**Malice** instruction with inference is improper, *State v. Johnson*, 23 Wn.App. 605 (1979); I.

***State v. Allen***, 101 Wn.2d 355 (1984)

The level of culpability which must be proved for an attempted crime is that mental state which must be proved for the substantive offense; defense is entitled to have the mental state element defined for the jury; 5-4.

***In re Music***, 104 Wn.2d 189 (1985)

Instruction defining **intent** as prohibited by *Sandstrom v. Montana*, 61 L.Ed.2d 39 (1979) held not to violate due process in this case, where issue is raised in personal restraint petition; 9-0.

***State v. Tyler***, 47 Wn.App. 648 (1987), *overruled, on other grounds, State v. Delcambre*, 116 Wn.2d 648, 653 (1987)

Failure to define "**intent**" in theft case where defense was that defendant did not intend to deprive is not harmless; 2-1, I.

***State v. Scott***, 110 Wn.2d 682 (1988)

Failure to define "**knowledge**," RCW 9A.08.010(1)(b), is not constitutional error, effectively overruling language in *State v. Boot*, 40 Wn.App. 215 (1985); "knowledge" is not technical term which need be defined for the jury, overruling *dicta* in *State v. Allen*, 101 Wn.2d 355, at 360 (1984); *accord*: *State v. Fowler*, 114 Wn.2d 59 (1990); 6-3.

***Cheek v. United States***, 112 L.Ed.2d 617 (1991)

Defendant, in willful failure to file income tax case, testifies he sincerely believed tax laws were unconstitutional; trial court instructs jury that a persons opinion that tax laws violate rights is not a good faith misunderstanding of the law; held: because the term "**willfully**" as used in federal criminal tax statutes has been interpreted to mean specific intent to violate the law, *United States v. Murdock*, 78 L.Ed. 381 (1933), then court's instruction to disregard evidence of defendant's understanding that he was not required to file was error; 6-2.

***State v. Kepiro***, 61 Wn.App. 116 (1991)

**Intent** to harm or reasonably cause alarm is not an element of intimidating a judge, RCW 9A.72.160, *see also: State v. Brown*, 137 Wn.App. 587 (2007), *cf.: State v. Ozuna*, 184 Wn.2d 238 (2015); I.

***Staples v. United States***, 128 L.Ed.2d 608 (1994)

Federal statute prohibiting possession of an unregistered machine gun, 26 USC §§ 5861(d), 5845(a)(6), is silent as to whether government must prove defendant knew of weapon's automatic firing ability; held: common law rule requiring *mens rea* as an element of a crime requires proof of knowledge absent some indication of congressional intent, express or implied, to dispense with *mens rea*, *United States v. Balint*, 66 L.Ed. 604 (1922), *United States v. United States Gypsum Co.*, 57 L.Ed.2d 854 (1978), *see: United States v. X-Citement Video*, 130 L.Ed.2d 372, 380-5 (1994), *State v. Bash*, 130 Wn.2d 594 (1996), *Spokane County v. Bates*, 96 Wn.App. 893, 896-99 (1999), *but see: State v. Williams*, 158 Wn.2d 904 (2006); 7-2.

***Bryan v. United States***, 141 L.Ed.2d 197 (1998)

**Willful** means an act undertaken with a "bad purpose," *i.e.*, the government must prove that defendant acted with knowledge that his conduct was unlawful, *Ratzlaf v. United States*, 126 L.Ed.2d 615 (1994), does not require proof that defendant knew what the law was; 6-3.

***State v. Bryant***, 89 Wn.App. 857, 871-3 (1998)

**Knowledge** instruction with permissible inference, WPIC 10.02, may be given, *State v. Leech*, 114 Wn.2d 700, 710 (1990), but trial court must determine that inferred fact (knowledge) flows from proven fact (in bail jumping case, notice) by a preponderance unless the only basis for finding an element is the inference, *State v. Brunson*, 128 Wn.2d 98, 108-9 (1995), determined on a case-by-case basis, *State v. Hanna*, 123 Wn.2d 704, 712 (1994), *Stae v. Garbaccio*, 151 Wn.App. 716, 739-42 (2009), *see: State v. Rich*, 184 Wn.2d 897 (2016); I.

***State v. Goble***, 131 Wn.App. 194, 202-04 (2005)

Where instructions require that state prove that defendant knew victim was a law enforcement officer, a knowledge instruction which includes last paragraph of WPIC 10.02 "[a]cting knowingly…also is established if a person acts intentionally" is error as it relieves that

state of its burden of proving defendant knew victim's status if jury found the crime was intentional, *State v. Hayward*, 152 Wn.App. 632, 641-48 (2009), *State v. Boyd*, 137 Wn.App. 910, 924 (2007), *cf.: State v. Gerdts*, 136 Wn.App. 720 (2007), *State v. Boyd*, 137 Wn.App. 910, 924 (2007), *State v. Keend*, 140 Wn.App. 858, 863-68 (2007), *but see: State v. Holzknecht*, 157 Wn.App. 754 (2010), *State v. Sibert*, 168 Wn.2d 306 (2010), *State v. Nordgren*, 167 Wn.App. 653 (2012); 2-1, II.

***State v. Gerdts***, 136 Wn.App. 720 (2007)

In malicious mischief case, instruction that acting knowingly is also established by acting intentionally does not relieve state of its burden, *State v. Boyd*, 137 Wn.App. 910, 924 (2007), *State v. Coleman*, 155 Wn.App. 951, 962 (2010), *State v. Holzknecht*, 157 Wn.App. 754 (2010), distinguishing *State v. Goble*, 131 Wn.App. 194, 202-04 (2005), *but see: State v. Atkins*, 156 Wn.App. 799, 807-17 (2010); departure from statutory language "he is aware of a fact…described by a statute defining an offense," RCW 9A.08.010(1)(b), by instructing "described by law as being a crime" is not error; II.

***State v. Keend***, 140 Wn.App. 858, 863-68 (2007)

In assault 2°/recklessly inflicts case, RCW 9A.36.021(1)(a), defining reckless, WPIC 10.02, to include "recklessness also is established if a person acts intentionally or knowingly" is not error, *see also: State v. Sibert*, 168 Wn.2d 306 (2010), *State v. Holzknecht*, 157 Wn.App. 754 (2010), distinguishing *State v. Goble*, 131 Wn.App. 194, 202-04 (2005), *but see: State v. Hayward*, 152 Wn.App. 632, 641-48 (2009), *State v. Atkins*, 156 Wn.App. 799, 807-17 (2010), *cf.: State v. McKague*, 159 Wn.App. 489, 508-10 (2011), *State v. Nordgren*, 167 Wn.App. 653 (2012); II.

***State v. Hayward***, 152 Wn.App. 632, 641-48 (2009)

In assault 2º/reckless infliction case, RCW 9A.36.021(1)(a), where the *mens rea* elements are intentional assault and reckless infliction of substantial bodily harm, instruction defining reckless that includes "recklessness also is established if a person acts intentionally" is error as it relieves state of burden of proving that defendant acted recklessly if jury finds that defendant assaulted intentionally, *State v. Goble*, 131 Wn.App. 194, 202-04 (2005), *State v. Atkins*, 156 Wn.App. 799, 807-17 (2010), *see also: State v. Sibert*, 168 Wn.2d 306 (2010), effectively overruling *State v. Keend*, 140 Wn.App. 848, 863-68 (2007), *but see: State v. Holzknecht*, 157 Wn.App. 754 (2010), *State v. Nordgren*, 167 Wn.App. 653 (2012), *cf.: State v. McKague*, 159 Wn.App. 489, 508-10 (2011); II.

***State v. Sibert***, 168 Wn.2d 306, 315-17 (2010)

In drug delivery case, instruction that acting knowingly is also established by acting intentionally, WPIC 10.02, does not create a conclusive presumption, *State v. Gerdts*, 136 Wn.App. 720, 728 (2007), *State v. Holzknecht*, 157 Wn.App. 754 (2010), acknowledging that *State v. Goble*, 131 Wn.App. 194, 202-04 (2005) is limited to its particular facts, at 317 n. 7, *see: State v. Atkins*, 156 Wn.App. 799, 807-17 (2010); 5-4.

***State v. Atkins***, 156 Wn.App. 799, 807-17 (2010)

In assault 3° case where to convict instruction requires state to prove that defendant knew victim was a police officer, *but see:* *State v. Brown*, 140 Wn.2d 456, 470 (2000), and court defines assault as an intentional act, then the knowledge instruction that reads "acting knowingly…is established if a person acts intentionally" creates an impermissible mandatory presumption, *but see:* *State v. Sibert*, 168 Wn.2d 306 (2010); harmless here, *see:* *Yates v. Evatt*, 500 US 391, 403-06, 114 L.Ed.2d 432 (1991); I

***State v. Holzknecht***, 157 Wn.App. 754 (2010)

In assault of a child 2° case, instructions that make clear that a different mental state must be determined for each element, intent as to assault and recklessness as to infliction of substantial bodily harm, then instructions that also direct that recklessness is established if a person acts intentionally or knowingly do not create impermissible presumptions, *State v. Sibert*, 168 Wn.2d 306, 315-17 (2010), *State v. Gerdts*, 135 Wn.App. 720 (2007), *State v. Nordgren*, 167 Wn.App. 653 (2012), *but see:* *State v. Hayward*, 152 Wn.App. 632 (2009), *see also: State v. McKague*, 159 Wn.App. 489, 508-10 (2011) ; II.

***Elonis v. United States***, 575 U.S. 723, 135 S.Ct. 2001 192 L.Ed.2d 1 (2015)

In federal harassment case, 18 U.S.C. § 875(c) (1986), First Amendment obliges government to prove that defendant transmitted a communication with the purpose of communicating a threat or with knowledge that it would be viewed as a threat, instructing that defendant communicated what a reasonable person would view as a threat is insufficient, *State v. Lilyblad*, 163 Wn.2d 1 (2008), *see: State v. Trey M.*, 186 Wn.2d 884 (2016); court does not reach question of whether recklessness is sufficient; 7-2.

***State v. Wade***, 186 Wn.App. 749, 770-73 (2015)

In strangulation murder case, absent evidence that the strangulation was reckless or criminally negligent, defense is not entitled to manslaughter lessers; I.

***State v. Rudolph***, 199 Wn.App. 813 (2017)

In community custody violator/escape from community custody, RCW 72.09.310 (1992), defining element of "willful" as knowledge and not as a "purposeful act" is correct; III.

***State v. Yishmael***, 195 Wn.2d 155 (2020

**Unlawful practice of law** for holding oneself out as a lawyer, RCW 2.48.180(2)(a), is a strict liability crime; affirms *State v. Yishmael*, 6 Wn.App.2d 203 (2018); 6-3.

***State v. Jallow***, 16 Wn.App.2d 625 (2021)

Absence of causation element in animal cruelty, RCW 16.52.205(2), to convict instruction is reversible error; I.

***State v. Flores***, 18 Wn.App.2d 486 (2021)

Alien in possession of a firearm, RCW 9.41.171, which does not contain an explicit mental state element, requires proof of knowing possession, *State v. Bash*, 130 Wn.2d 594 (1996), *State v. Blake*, 197 Wn.2d 170 (2021), *State v. Bash*, 130 Wn.2d 594 (1996); I.

***State v. Weaver***, 198 Wn.2d 459 (2021)

Criminal trespass to convict instruction that reads, in part, that defendant "knew that the entry or remaining was unlawful" does not conflict with knowledge definition that reads, in part, "[i]t is not *necessary* that defendant know that the fact, circumstance, or result is defined by law as being unlawful or an element of a crime;" 6-3.

# INSTRUCTIONS
## Missing Witness

***State v. Bonner***, 21 Wn.App. 783 (1978)

For witness to be "available" to one party, there must be a community of interest; informant meets such a test, but absence can be explained by threats on an informant's life, whereupon no instruction should be given, *State v. Reed,* 168 Wn.App. 553, 571-74 (2012); II.

***State v. Dickamore***, 22 Wn.App. 851 (1979)

To get a missing witness instruction, testimony of uncalled witness must be important and necessary, not merely trivial or cumulative; III.

***State v. Lopez***, 29 Wn.App. 836 (1981)

Where police made immediate contact with witness on day of offense, informed witness he had a duty to stay in contact with prosecutor and, when trial date was set, made reasonable efforts to serve subpoena, defense is not entitled to missing witness instruction, *see*: *State v. Davis*, 116 Wn.App. 81, 88-90 (2003), *aff'd,* 154 Wn.2d 291 (2005), *aff'd, on other grounds, Davis v. Washington,* 165 L.Ed.2d 224 (2006), *State v. Clinton*, 25 Wn.App. 400 (1980)*State v. Reed,* 168 Wn.App. 553, 571-74; I.

***State v. Mark***, 34 Wn.App. 349 (1983)

Missing witness instruction should not be given unless defense establishes circumstances creating a reasonable probability that state failed to call the witness because his testimony would have damaged the state's case, *Wright v. Safeway Stores, Inc*., 7 Wn.2d 341 (1941); II.

***State v. Frazier***, 55 Wn.App. 204 (1989)

Absent a missing witness instruction, trial court may prohibit the defense from arguing to the jury that if the facts were not as stated by the defendant, the state would have called a certain witness to contradict, *see: State v. French,* 101 Wn.App. 380 (2000); I.

***State v. McGhee***, 57 Wn.App. 457 (1990)

To obtain missing witness instruction, defense need not prove that state deliberately suppressed unfavorable evidence, rather defendant must establish such circumstances which would indicate, as a matter of reasonable probability, that state would not knowingly fail to call the witness unless the witness's testimony would be damaging and when the witness is peculiarly available to the state, *State v. Reed,* 168 Wn.App. 553, 571-74; where both the defense and the state have connections with the witness, trial court can consider defendant's failure to compel the witness's testimony in determining whether instruction should be given; I.

***State v. Montgomery***, 163 Wn.2d 577 (2008)

In possession of precursor drugs/methamphetamine case, defendant testifies to innocent explanations of his pseudoephedrine and chemical purchases for his grandson and landlord, trial court gives missing witness instruction at request of state; held: missing grandson's testimony would have been cumulative, *State v. Dickamore,* 22 Wn.App. 851 (1979), absence was

explained as grandson was in school, *State v. Bonner*, 21 Wn.App. 783 (1978), his testimony was not "key," *cf.: State v. Contreras*, 57 Wn.App. 471, 475-76 (1990), thus instruction as to grandson was error; landlord was not under defendant's control, *State v. Blair*, 117 Wn.2d 479, 485-86 (1991), state did not raise issue until after both parties had rested, not giving defense the opportunity to explain the landlord's absence, *cf.: State v. Sundberg*, 185 Wn.2d 147 (2016); 9-0.

***State v. Reed***, 168 Wn.App. 553, 571-74 (2012)

Domestic violence victim fails to appear at trial, state does not seek material witness warrant (opinion is silent as to whether or not she was served with a subpoena), recorded telephone calls from jail show defendant urged victim to say she lied to police, victim's hearsay statements are admitted, court declines missing witness instruction; held: missing witness instruction is proper where a witness is peculiarly available to a party and circumstances at trial establish that it is reasonably probable that the party would not have knowingly failed to call the witness unless the witness' testimony would be damaging, *State v. Davis*, 73 Wn.2d 271, 280 (1968), *overruled on other grounds*, *State v. Abdulle*, 174 Wn.2d 411 (2012); here, victim was known to both parties, thus not peculiarly available only to state, defendant had the opportunity to call victim, plus her absence was explained by defendant's conduct instructing her to recant; I.

***State v. Houser***, 196 Wn.App. 486 (2016)

In DUI case defendant testifies another person who he can't find was driving and left the scene of the accident, over objection trial court gives missing witness instruction for state; held: missing witness instruction is error where the witness' testimony would necessarily be self-incriminating, *State v. Blair*, 117 Wn.2d 479, 489–90 (1991), *State v. Gregory*, 158 Wn.2d 759, 846 (2006), *overruled on other grounds*, *State v. W.R., Jr.*, 181 Wn.2d 757 (2014); I.

# INSTRUCTIONS
## Reasonable Doubt

***State v. Cox***, 94 Wn.2d 170 (1980)

Failure to give burden of proof instruction may be harmless error; 9-0.

***In re Lile***, 100 Wn.2d 224 (1983)

Failure to give presumption of innocence instruction may be harmless error under CONST. art. 1, § 3, *Kentucky v. Whorton*, 60 L.Ed.2d 640 (1979); 9-0.

***Sullivan v. Louisiana***, 124 L.Ed.2d 182 (1993)

Constitutionally defective reasonable doubt instruction, *Cage v. Louisiana*, 112 L.Ed.2d 339 (1990), cannot be harmless error, but not retroactive to cases on collateral review, *Tyler v. Cain*, 150 L.Ed.2d 632 (2001); 9-0.

***Victor v. Nebraska,*** 511 U.S. 1, 114 S. Ct. 1239, 127 L. Ed. 2d 583 (1994)

United States Constitution does not require trial court to define "reasonable doubt" for jury; instruction that defines reasonable doubt in part as "not a mere possible doubt [as] everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case which leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge" is sufficient; equating reasonable doubt with "a substantial doubt," while "somewhat problematic," at 599, is sufficient in a context which tells jurors that the doubt "is distinguished from a doubt arising from mere possibility, from bare imagination, or from fanciful conjecture"; 7-2.

***State v. Castle***, 86 Wn.App. 48 (1997)

"If…you are firmly convinced that the defendant is guilty…, you must find him guilty. If on the other hand, you think there is a real possibility that he is not guilty, you must give him the benefit of the doubt and find him not guilty" does not lower state's burden and is thus valid; instructing jury that it should find defendant guilty or not guilty based upon the evidence, but excluding "or lack of evidence," is not error, *State v. Dykstra*, 127 Wn.App. 1, 9-11 (2005), *State v. Hunt*, 128 Wn.App. 535 (2005), *but see: State v. Bennett*, 161 Wn.2d 303 (2007), *State v. Smith*, 174 Wn.App. 359 (2013), but preferable that lack of evidence language be included, *see: State v. Cleveland*, 58 Wn.App. 634 (1990); I.

***State v. Bennett***, 161 Wn.2d 303 (2007)

While instructing jury pursuant to *State v. Castle*, 86 Wn.App. 48 (1997) defining, in part, reasonable doubt to include "[t]here are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt" does not violate the constitution, *see: State v. Hatley*, 41 Wn.App. 789 (1985), *State v. Pirtle*, 127 Wn.2d 628, 656-68 (1995), *State v. Cervantes*, 87 Wn.App. 440 (1997), *State v. Meggyesy*, 90 Wn.App. 693, 697-706 (1998), *State v. Chenoweth*, 127 Wn.App. 444, 461-62 (2005), *aff'd, on other grounds*, 160 Wn.2d 454 (2007), *State v. Hunt*, 128 Wn.App. 535, 538-41

(2005), *State v. Jimenez Macias*, 171 Wn.App. 323 (2012), Supreme Court exercises it's "inherent supervisory powers" to direct that courts use WPIC 4.01, *State v. Castillo*, 150 Wn.App. 466 (2009), *State v. Lizarraga*, 191 Wn.App. 530, 567-68 (2015), *cf.: State v. Lundy*, 162 Wn.App. 865 (2011), *State v. Kalebaugh*, 183 Wn.2d 578 (2015), *see: State v. Osman*, 192 Wn.App. 355 (2016), *but see: State v. Chacon*, 192 Wn.2d 545 (2018); 5-4.

***State v. Smith***, 174 Wn.App. 359 (2013)

In to convict instruction, stating "if you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then you *should* return a verdict of guilty" is manifest constitutional error; III.

***State v. Wilson***, 176 Wn.App. 147 (2013)

Instructing jury "if you find…that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty" is proper, *State v. Mecham*, 181 Wn.App. 932, 947-48 (2014) , *rev., on other grounds*, 186 Wn.2d 128 (2016), *State v. Nicholas*, 185 Wn.App. 298 (2014), and instructing "in order to return a verdict of guilty, you must unanimously find from the evidence that each of these elements has been proved beyond a reasonable doubt" invites jury nullification, *State v. Meggyesy*, 90 Wn.App. 693, 698 (1998), *abrogated on other grounds, State v. Recuenco*, 154 Wn.2d 156 (2005), *State v. Brown*, 130 Wn.App. 767 (2005), *State v. Moore*, 179 Wn.App. 464 (2014); state constitution does not provide a broader right to a jury trial with respect to the instruction; III.

***State v. Federov***, 181 Wn.App. 187, 199-200 (2014)

"Abiding belief" in reasonable doubt instruction is not error, *State v. Price*, 33 Wn.App. 472 (1982), *State v. Manry*, 51 Wn.App. 24 (1988), *State v. Kinzle*, 181 Wn.App. 774, 784-85 (2014), *State v. Jenson*, 194 Wn.App. 900 (2016), *State v. Boyd*, 1 Wn.App.2d 501, 521-22 (2017), *see: State v. Osman*, 192 Wn.App. 355 (2016); I.

***State v. Kalebaugh***, 183 Wn.2d 578 (2015)

Preliminary instruction defining reasonable doubt as a "doubt for which a reason can be given" is not error where there was no objection and court correctly instructed after closing, *State v. Parnel*, 195 Wn.App. 325 (2016), distinguishing *State v. Bennett*, 161 Wn.2d 303 (2007); affirms *State v. Kalebaugh*, 183 Wn.App. 414 (2014); 9-0.

***State v. Osman***, 192 Wn.App. 355, 368-79 (2016)

Defense argument that abiding belief means you can't change your mind a year from now is proper, *see: Victor v. Nebraska*, 127 L.Ed.2d 583 (1994); I.

***State v. Jenson***, 194 Wn.App. 900 (2016)

"Abiding belief in the truth of the charge" accurately informs the jury its job is to determine whether state has proved the offense beyond a reasonable doubt, *State v. Federov*, 181 Wn.App. 187 (2014), does not encourage jury to undertake an impermissible search for the truth, *State v. Boyd*, 1 Wn.App.2d 501, 521-22 (2017), distinguishing *State v. Emery*, 174 Wn.2d 741, 760 (2012); II.

***State v. Parnel***, 195 Wn.App. 325 (2016)

"A reasonable doubt is one for which a reason exists" does not oblige the jury to articulate a reason for doubt, *State v. Kalebaugh,* 183 Wn.2d 578, 585-86 (2015); II.

***State v. Chacon***, 192 Wn.2d 545 (2018)

Omitting language that the defendant bears no burden of proving a reasonable doubt exists, does not violate the Sixth and Fourteenth Amendments and is not manifest constitutional error, defense did not object, *but see:* *State v. Bennett*, 161 Wn.2d 303 (2007); 5-4.

# INSTRUCTIONS
## Self-Defense

***State v. Fesser***, 23 Wn.App. 422 (1979)

Self-defense instructions must include essential element that person using force need only **reasonably believe that he or she is in danger**; III.

***State v. Crigler***, 23 Wn.App. 716 (1979)

Instruction limiting jury to only those acts and circumstances occurring at or immediately before killing is insufficient; jury must be permitted to consider all circumstances, including those occurring substantially before killing; II.

***State v. Fischer***, 23 Wn.App. 756 (1979)

Must instruct that the person using force need only **reasonably believe**, in light of what is known to her, that she or another person is in danger; also, one who acts in defense of others is justified in using force if she reasonably believes one being protected was an innocent party, even if in fact the party being protected was the aggressor; *State v. Penn*, 89 Wn.2d 63 (1977) II.

***State v. Theroff***, 95 Wn.2d 385 (1980)

Instruction that defendant can't use deadly weapon to eject a nonviolent trespasser is approved; affirms *State v. Theroff*, 25 Wn.App. 590 (1980); 5-1.

***State v. Bernardy***, 25 Wn.App. 146 (1980)

**Defense of other**: defendant reasonably believed other party was innocent and in danger, even if other party was in fact the aggressor; I.

***State v. Painter***, 27 Wn.App. 708 (1980)

Defining great bodily harm as "more than an ordinary striking with the hands or fists" is a comment on the evidence, and undermines the subjective standard; *accord: State v. Walden*, 131 Wn.2d 469 (1997), *State v. Corn*, 95 Wn.App. 41 (1999), *State v. Rodriguez*, 121 Wn.App. 180 (2004), *see: State v. Walker*, 136 Wn.2d 767 (1998), *see also: State v. Lucero*, 140 Wn.App. 782, 785-87 (2007); I.

***State v. Williams***, 27 Wn.App. 848 (1980)

Standard for probable cause to arrest by a citizen is same as for police; I.

***State v. Collins***, 30 Wn.App. 1 (1981)

At defendant's murder trial, defendant testifies that he does not remember what happened; detective testifies that defendant stated at arrest that he believed the victim went for a knife; court refused self-defense instructions; held: "it is not for the court to weigh the evidence in a jury case," thus reversed, *but see: State v. Walker*, 136 Wn.2d 767 (1998); III.

***State v. Castro***, 30 Wn.App. 586 (1981)

Slayer must use no more than reasonable force to repel a violent felony being committed upon the slayer; I.

***State v. Adams***, 31 Wn.App. 393 (1982)

Self-defense instructions are required when there is "any evidence" tending to prove self-defense, *State v. Redwine*, 72 Wn.App. 625, 630-1 (1994); in determining whether there is any evidence to support self-defense instructions, court must adopt subjective perspective of defendant, *State v. Janes*, 64 Wn.App. 134 (1992), *rev'd on other grounds,* 121 Wn.2d 220 (1993); *cf.*: *State v. Bell*, 60 Wn.App. 561 (1991), *see: State v. Walker*, 136 Wn.2d 767 (1998); I.

***State v. Heath***, 35 Wn.App. 269 (1983)

**First aggressor instruction**, former WPIC 16.04, may be given if there is any evidence defendant provoked fight even if victim threw first blow, *State v. Hawkins*, 89 Wash. 449 (1916), *State v. Currie*, 74 Wn.2d 197 (1968), *State v. Anderson*, 144 Wn.App. 85 (2008), *see: State v. Riley*, 137 Wn.2d 904 (1999), *State v. Wingate*, 123 Wn.App. 415 (2004), *State v. Stark*, 158 Wn.App. 952 (2010), *State v. Sullivan*, 196 Wn.App. 277, 289-91 (2016), *Pers. Restraint of Harvey*, 3 Wn.App.2d 204 (2018), *State v. Kee*, 6 Wn.App.2d 874 (2018), *State v. Hatt*, 11 Wn.App.2d 113 (2019); where the to convict instruction requires state to prove defendant "unlawfully" shot victim, it is deemed state has burden of disproving self-defense, satisfying *State v. McCullum*, 98 Wn.2d 484 (1983), *distinguishing State v. LeBlanc*, 34 Wn.App. 306 (1983), wherein instruction did not carry word "unlawfully" nor assign burden of proof as to self-defense; III, 2-1.

***State v. McCullum***, 98 Wn.2d 484 (1983)

State has **burden** of proving beyond a reasonable doubt the absence of self-defense in a murder case, modifying *State v. Savage*, 94 Wn.2d 569 (1980), *State v. Hanton*, 94 Wn.2d 129 (1980), *State v. Burt*, 94 Wn.2d 108 (1980), *State v. King*, 92 Wn.2d 541 (1979); 5-3.

***State v. Alferez***, 37 Wn.App. 508 (1984)

Where defendant testifies he was not in fear when he pulled his gun out, and that it discharged accidentally, he is not entitled to self-defense instruction; III.

***State v. Negrin***, 37 Wn.App. 516 (1984)

Self-defense instructions which direct that self-defense may only be employed when defendant is actually attacked are erroneous, *State v. Janes*, 64 Wn.App. 134 (1992), *rev'd on other grounds,* 121 Wn.2d 220 (1993), *State v. LeFaber*, 128 Wn.2d 896 (1996); *cf.*: *State v. Brenner*, 53 Wn.App. 367 (1989), *Pers. Restraint of Reed*, 137 Wn.App. 401 (2007); I.

***State v. Robinson***, 38 Wn.App. 871 (1984)

Failure to assign **burden** of disproving self-defense to state is harmless error here; 2-1; III.

***State v. Martineau***, 38 Wn.App. 891 (1984)

Court instructed jury that a person commits murder 1° by killing another with premeditation "unless the killing is justified," fails to assign burden to state; held: instructions, read as a whole, permit jury to infer state had burden of disproving self-defense; 2-1; III.

***State v. Allery***, 101 Wn.2d 591 (1984)

Error not to instruct that jury should consider self-defense from defendant's perspective in light of all she knew and had experienced with victim, *see:* *State v. Goodrich*, 72 Wn.App. 71, 76-7 (1993), defendant is entitled to **no duty to retreat** instruction, *State v. Hiatt*, 187 Wash. 226 (1936), *State v. Lewis*, 6 Wn.App. 38 (1971), *State v. Redmond*, 150 Wn.2d 489, 493-95 (2003), *but see: State v. Studd*, 137 Wn.2d 533, 549-50 (1999), *Pers. Restraint of Harvey*, 3 Wn.App.2d 204 (2018); 9-0.

***State v. Acosta***, 101 Wn.2d 612 (1984)

In assault 2° case, jury must be instructed that state has **burden** of proving the absence of self-defense, *reversing* *State v. Acosta*, 34 Wn.App. 387 (1983); *accord*: *State v. Despenza*, 38 Wn.App. 645 (1984); 5-4.

***State v. Sampson***, 40 Wn.App. 594 (1985)

Instructing jury that an assault is an act with "unlawful force," then defining "lawful force" adequately conveys to jury that state bears burden of proof on self-defense, *distinguishing* *State v. Acosta*, 101 Wn.2d 612 (1984); **first aggressor instruction**, WPIC 16.04, is not a comment on the evidence where supported by sufficient evidence, *but see*: *State v. Arthur*, 42 Wn.App. 120 (1985); II, 2-1.

***State v. Walker***, 40 Wn.App. 658 (1985)

Defendant stabs her husband in the back, claims that she acted in self-defense because she suffers from battered woman syndrome and "knew" victim would hit her, although no contemporaneous threats or acts of violence occurred; held: defendant is not entitled to self-defense instructions, as there was no evidence that there was imminent danger of an assault; fear alone, without more, is insufficient to establish the appearance of imminent danger to justify self-defense instructions; **battered woman syndrome** does not, by itself, establish a defense, *see:* *State v. Walker*, 136 Wn.2d 767 (1998); II.

***State v. Fondren***, 41 Wn.App. 17 (1985)

Better practice is to include lack of excuse or justification in to convict instructions, *State v. McCullum*, 98 Wn.2d 484 (1983); III.

***State v. Singleton***, 41 Wn.App. 721 (1985)

In **parental discipline** case, jury should be instructed using an objective standard rather than the subjective self-defense standard; I.

***State v. Arthur***, 42 Wn.App. 120 (1985)

**First aggressor instruction**, former WPIC 16.04, is unconstitutionally vague, *but see: State v. Grott*, 195 Wn.2d 256 (2020); to be constitutional, it must be directed to intentional acts which the jury could reasonably assume would provoke a belligerent response by the victim,

*State v. Birnel*, 89 Wn.App. 459, 472-4 (1998), *State v. Sullivan*, 196 Wn.App. 277, 289-91 (2016), *see also: State v. Washington*, 64 Wn.App. 118 (1992), *State v. Riley*, 137 Wn.2d 904 (1999); I.

***State v. Bennett***, 42 Wn.App. 125 (1985)

Absence of use of lawful force for **parental discipline** purposes, RCW 9A.16.020(5), must be proved by the state beyond a reasonable doubt and jury must be so instructed; I.

***State v. Brower***, 43 Wn.App. 893 (1986)

**First aggressor instruction** improper where there is no evidence that defendant was involved in wrongful or improper conduct which precipitated the charged offense, *see: State v. Stark*, 158 Wn.App. 952 (2010), *State v. Grott*, 195 Wn.2d 256 (2020); here, defendant had a CCW permit, only evidence that he was an aggressor was in terms of the charged assault, *see: State v. Wingate*, 155 Wn.2d 817 (2005), *State v. Douglas*, 128 Wn.App. 555 (2005), *State v. Richmond*, 3 Wn.App.2d 423 (2018); II.

***State v. Hardy***, 44 Wn.App. 477 (1986)

While a **first aggressor instruction**, WPIC 16.04, is appropriate where the evidence establishes that defendant is in the role of an aggressor and the cause of the affray is sufficient to raise a jury question on the issue, *State v. Thomas*, 63 Wn.2d 59, 65 (1963), the use in that instruction of the phrase "unlawful act" is impermissably vague, *State v. Arthur*, 42 Wn.App. 120 (1985), as the phrase was not defined with respect to the particular circumstances of the case, *distinguishing State v. Hughes*, 106 Wn.2d 176 (1986), *see: State v. Kee*, 6 Wn.App.2d 874 (2018), *but see: State v. Riley*, 137 Wn.2d 904 (1999); I.

***State v. Hughes***, 106 Wn.2d 176 (1986)

Claim that defendant manifested honest or good faith but unreasonable belief that self-defense was necessary ("**imperfect self-defense**") is not defense nor should trial court instruct jury to that effect; *see also: State v. Bergeson*, 64 Wn.App. 366 (1991); **first aggressor** instruction, WPIC 16.04, is appropriate where defendant fires first at police officers who had drawn their weapons first to effectuate a lawful arrest, *see: State v. Davis*, 119 Wn.2d 657 (1992), *State v. Anderson*, 144 Wn.App. 85 (2008), *distinguishing State v. Arthur*, 42 Wn.App. 120 (1985); 9-0.

***State v. Gogolin***, 45 Wn.App. 640 (1986)

Where defendant testifies he was trying to get away from victim who was attacking him, tried to push her off but does not know if he actually touched her, and denied telling police that he pushed her causing her to fall, then defense is not entitled to self-defense instructions, as the defendant is claiming **accident**, *but see: State v. Dyson*, 90 Wn.App. 433 (1998); I.

***State v. Thompson***, 47 Wn.App. 1 (1987)

**No duty to retreat** instruction, WPIC 16.08, is not required where the issue of whether or not defendant should have retreated was not an issue raised by either party, *distinguishing State v. Allery*, 101 Wn.2d 591 (1984), *accord*: *State v. Frazier*, 55 Wn.App. 204 (1989), *State v. Benn*, 120 Wn.2d 631, 658-9 (1993), *State v. Wooten*, 87 Wn.App. 821, 824-6 (1997), *State v.*

*Studd*, 137 Wn.2d 533, 549-50 (1999), *see: Pers. Restraint of Harvey*, 3 Wn.App.2d 204 (2018), *State v. Duarte Vela*, 200 Wn.App. 306, 328 (2017), *but see: State v. Williams*, 81 Wn.App. 738 (1996), *State v. Redmond*, 150 Wn.2d 489, 493-95 (2003); definition of necessary, WPIC 16.05, is proper as it does not single out escape or retreat as an alternative to be considered by jury, *distinguishing State v. Lewis*, 6 Wn.App. 38 (1971); **first aggressor** instruction, WPIC 16.04 is harmless error where the evidence of unlawful conduct was clear, *State v. Hughes*, 106 Wn.2d 176 (1986); I.

***Martin v. Ohio***, 94 L.Ed.2d 267 (1987)

State legislature may properly place burden of proving self-defense on defendant; 5-4.

***State v. Brigham***, 52 Wn.App. 208 (1988)

Defendant and victim are involved in a fight commenced by victim, whereupon defendant pulls a knife and stabs victim eight times in back, defendant charged with felony murder 2° (assault); trial court declines to instruct as to assault self-defense, RCW 9A.16.020(3), WPIC 17.02, but does instruct as to homicide self-defense, RCW 9A.16.050; held: stabbing victim eight times in back is excessive force as a matter of law and cannot be interjected as self-defense, *see: State v. Ferguson*, 131 Wn.App. 855 (2006); I.

***State v. Wasson***, 54 Wn.App. 156 (1989)

**First aggressor instruction**, WPIC 16.04, should not be given where there is no evidence that defendant acted intentionally to provoke an assault against the victim, *State v. Brower*, 43 Wn.App. 893 (1986), *State v. Birnel*, 89 Wn.App. 459, 472-4 (1998); "[f]ew situations come to mind where the necessity for an aggressor instruction is warranted," *State v. Arthur*, 42 Wn.App. 120, 125 n.1 (1985), *State v. Wingate*, 155 Wn.2d 817 (2005), *State v. Doluglas*, 128 Wn.App. 555 (2005), *State v. Stark*, 158 Wn.App. 952 (2010), *but see: State v. Grott*, 195 Wn.2d 256 (2020), *State v. Davis*, 119 Wn.2d 657 (1992), *State v. Bea*, 162 Wn.App. 570, 575-78 (2011), *State v. Sullivan*, 196 Wn.App. 277, 289-91 (2016), ), *State v. Kee*, 6 Wn.App.2d 874 (2018), *State v. Hatt*, 11 Wn.App.2d 113 (2019), *cf.: State v. Riley*, 137 Wn.2d 904 (1999), *State v. Ward*, 125 Wn.App. 138, 147-50 (2005), *State v. Richmond*, 3 Wn.App.2d 423 (2018); III.

***State v. Heggins***, 55 Wn.App. 591 (1989)

In felony murder (assault) case, jury need not be instructed that lawful use of force is a defense to both murder and assault; *dicta* at n. 4 suggests that self-defense is not a defense to felony murder 2°; I.

***State v. Kidd***, 57 Wn.App. 95 (1990)

**Reasonable but mistaken belief** instruction, WPIC 17.04, need not be given where jury is instructed that, in order for defendant to have acted lawfully, he must have reasonably believed that he was in danger, as it allows defense to argue that the defendant's reasonable belief could properly be a mistaken belief, *State v. Bius*, 23 Wn.App. 807, 810 (1979), *State v. Prado*, 144 Wn.App. 227, 247-48 (2008); **first aggressor instruction**, WPIC 16.04, while not favored, *but see: State v. Grott*, 195 Wn.2d 256 (2020), may be given when there was credible evidence from which the jury could reasonably have concluded that it was the defendant who provoked the need

to act in self-defense, *State v. Hughes*, 106 Wn.2d 176, 192 (1986), where the provoking act was intentional, *State v. Arthur*, 42 Wn.App. 120, 124 (1985), the provoking act was not the actual assault, *State v. Wasson*, 54 Wn.App. 156, 159 (1989), *State v. Bea*, 162 Wn.App. 570, 575-78 (2011), and was not an act directed toward one other than the actual victim, unless the act was likely to provoke a belligerent response from the actual victim, *State v. Anderson*, 144 Wn.App. 85 (2008), *State v. Sullivan*, 196 Wn.App. 277, 289-91 (2016), *see: State v. Birnel*, 89 Wn.App. 459, 472-4 (1998), *State v. Riley*, 137 Wn.2d 904 (1999), *State v. Wingate*, 155 Wn.2d 817 (2005), *State v. Ward*, 125 Wn.App. 138, 147-50 (2005), *State v. Stark*, 158 Wn.App. 952 (2010), *Pers. Restraint of Harvey*, 3 Wn.App.2d 204 (2018), *State v. Richmond*, 3 Wn.App.2d 423 (2018), *State v. Kee*, 6 Wn.App.2d (2018), *State v. Hatt*, 11 Wn.App.2d 113 (2019); I.

***State v. Baker***, 58 Wn.App. 222 (1990)

Where theory of defense case is accidental shooting, and there is no evidence that defendant or others were afraid of bodily harm by victim, then self-defense instructions need not be given, *State v. Kerr*, 14 Wn.App. 584 (1975), *State v. Brightman*, 155 Wn.2d 506, 518-27 (2005), *see: State v. Slaughter*, 143 Wn.App. 936 (2008); I.

***State v. Smits***, 58 Wn.App. 333 (1990)

Absent a threat of serious bodily injury to an arrestee, a person is prohibited from interfering with an unlawful arrest, *State v. Holeman*, 103 Wn.2d 426, 429-30 (1985), *State v. Valentine*, 132 Wn.2d 1 (1997); a third party may be justified in coming to the aid of an arrestee if she reasonably believes him to be in danger of serious bodily injury; I.

***State v. Dennison***, 115 Wn.2d 609 (1990)

Defendant, during burglary in which he was armed, confronts homeowner who is armed, defendant flees when gunfire ensues, homeowner is killed; held: lawful use of force is not available as a defense to felony-murder 1° (burglary), *State v. Bolar*, 118 Wn.App. 490, 506-10 (2003); self-defense is not revived, *State v. Craig*, 82 Wn.2d 777 (1973), *cf.: State v. Fleeks*, ___ Wn.App.2d ___, 2023WL355082 (2023),absent good faith intention to withdraw from burglary removing decedent's fear; even while fleeing from burglary scene, burglary is still in progress; *affirms State v. Dennison*, 54 Wn.App. 577 (1989); 7-2.

***State v. Bell***, 60 Wn.App. 561 (1991)

Defendant claims victim grabbed his crotch and tried to kiss him, so defendant killed victim; held: trial court's determination that there was no evidence that it was reasonable for defendant to believe he must use deadly force, from an objective standpoint, precludes the giving of justifiable homicide/self-defense instructions, *State v. Hughes*, 106 Wn.2d 176, 201 (1986), *cf.*: *State v. Adams*, 31 Wn.App. 393 (1982); trial court need not give excusable homicide instructions, RCW 9A.16.030, where court determines that victim's death resulted from an intentional act and that there is no evidence to establish that victim's death resulted from defendant's commission of a lawful act by lawful means or that the act was committed by accident or misfortune, *see: State v. Henderson*, 192 Wn.2d 508 (2018); I.

***State v. Bergeson***, 64 Wn.App. 366 (1992)

Murder 2° defendant is not entitled to manslaughter instructions if the only inferences available from evidence are that s/he (1) subjectively believed that there was imminent danger of

great personal injury, (2) subjectively intended to kill in self-defense, and (3) recklessly or negligently used more force than was objectively reasonable under the circumstances, *but see:* *State v. Jones*, 95 Wn.2d 616 (1981); inference needed to support manslaughter instruction is that without intent to kill, but with recklessness, defendant caused death of another; II.

***State v. Davis***, 64 Wn.App. 511 (1992)

Defendant drove to victim's home armed, broke in, victim saw gun, attempted to wrest it from defendant, is killed, trial court refuses self-defense instructions; held: self-defense is not available to defendant who is aggressor such that his actions precipitated or provoked the altercation which necessitated use of force, *State v. Currie*, 74 Wn.2d 197 (1968), *State v. Sampson*, 40 Wn.App. 594, 600 (1985), *State v. Stark*, 158 Wn.App. 952 (2010); III.

***State v. Davis***, 119 Wn.2d 657 (1992)

Evidence that defendant was first to strike others, after which defendant reemerged from his apartment with a knife and pushed victim is sufficient to support the giving of a **first aggressor instruction**, as they were intentional acts reasonably likely to provoke a belligerent response, *State v. Cyrus*, 66 Wn.App. 502, 508-10 (1992), *State v. Wasson*, 54 Wn.App. 156, 159 (1989), *State v. Hughes*, 106 Wn.2d 176, 191-3 (1986), *State v. Riley*, 137 Wn.2d 904 (1999), *State v. Wingate*, 155 Wn.2d 817 (2005), *State v. Douglas*, 125 Wn.App. 555 (2005); *affirms* *State v. Davis*, 60 Wn.App. 813 (1991); 9-0.

***State v. Janes***, 121 Wn.2d 220 (1993)

**Battered child syndrome** is admissible to support claim of self-defense so trier of fact can evaluate reasonableness of defendant's perception that s/he was in imminent danger at time of homicide, *State v. Allery*, 101 Wn.2d 591 (1984); imminence does not require actual physical assault, *State v. Walker*, 40 Wn.App. 658 (1985) and is not the same as immediate; a threat, or its equivalent, can support self-defense when there is reasonable belief threat will be carried out; "that the triggering behavior and the abusive episode are divided by time does not necessarily negate the reasonableness of defendant's perception of imminent harm," *see:* *State v. Walker*, 136 Wn.2d 767 (1998); reverses *State v. Janes*, 64 Wn.App. 134 (1992); 7-0.

***State v. Ross***, 71 Wn.App. 837, 840-3 (1993)

In **assault 3° on police officer**, RCW 9A.36.031(1)(g), lawful use of force instruction should read, "[t]he use of force upon or toward a uniformed police officer performing his official duties is only lawful when used by a person who is actually about to be seriously injured," *see:* *State v. Westlund*, 13 Wn.App. 460, 466-7, 77 A.L.R.3d 270 (1975), *State v. Holeman*, 103 Wn.2d 426, 430 (1985), *Seattle v. Cadigan*, 55 Wn.App. 30 (1989); instruction allowing use of force when defendant has reasonable belief that he is about to be injured, WPIC 17.04 (Supp. 1986) is not proper when dealing with uniformed officers, *State v. Valentine*, 132 Wn.2d 1 (1997), *State v. Bradley*, 141 Wn.2d 731 (2000), *State v. Garcia*, 107 Wn.App. 545 (2001), *State v. Calvin*,176 Wn.App. 1, 13-14 (2013); I.

***State v. Goodrich***, 72 Wn.App. 71, 76-77 (1993)

WPIC 17.02 (Supp. 1986), which reads, in part, "the person using the force may employ such force as a reasonably prudent person would use under the same or similar conditions as they

appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of and prior to the incident" is sufficient to set forth the *State v. Allery*, 101 Wn.2d 591 (1984) subjective factors, *State v. Prado*, 144 Wn.App. 227, 247-48 (2008); court need not instruct jurors to specifically place themselves in defendant's position; III.

***State v. Redwine***, 72 Wn.App. 625 (1994)

Self-defense instruction which does not assign burden to state is constitutional error which may be raised for the first time on appeal, *State v. McCullum*, 98 Wn.2d 484, 488 (1983), *cf.: State v. Lucero*, 152 Wn.App. 287, 292-93 (2009); III.

***State v. Valentine***, 75 Wn.App. 611, 618-9 (1994), *aff'd, on other grounds,* 132 Wn.2d 1 (1997)

In **assault on police officer** case, instruction which defines probable cause may properly state, "The officer need not be able to correctly articulate the proper or specific crime at the time the arrest is made," *State v. Goodman*, 42 Wn.App. 331, 337 (1985); III.

***State v. Kassahun***, 78 Wn.App. 938 (1995)

Defendant is charged with murder and assault, is acquitted of assault, hung on murder; at retrial on murder, defense offer of evidence of acquittal is refused, trial court gives **first aggressor** instruction, WPIC 16.04, which arguably referred to the previously acquitted assault; held: collateral estoppel doctrine requires that evidence of acquittal be admitted, *distinguishing State v. Tarman*, 27 Wn.App. 645, 652 (1980), and that jury receive an instruction as to the issue-preclusion consequences of the acquittal; first aggressor instruction must be crafted to preclude argument that defendant's aggression towards assault victim negates self-defense; I.

***State v. LeFaber***, 128 Wn.2d 896 (1996)

Homicide self-defense instruction which reads, "[h]omicide is justifiable when committed in the lawful defense of the defendant when the defendant reasonably believes that the person slain intends to inflict death or great personal injury and there is imminent danger of such harm being accomplished" is error, as jury could have believed that actual harm was required as opposed to the correct statement of law that defendant reasonably believed that there was imminent danger of such harm being accomplished, *reversing, in part*, *State v. LeFaber*, 77 Wn.App. 766 (1995); "[t]he structure of **WPIC 16.02** could mislead a jury because the imminent danger requirement is set off by a separate number and thus lacking connection to the reasonable belief qualifier," at 902, *see: State v. Studd*, 137 Wn.2d 533 (1999), *cf.: State v. Hutchinson*, 135 Wn.2d 863, 883-86 (1998), *State v. Cowen*, 87 Wn.App. 45 (1997), *Pers. Restraint of Reed*, 137 Wn.App. 401 (2007); 5-4.

***State v. Williams***, 81 Wn.App. 738 (1996)

**No duty to retreat** instruction, WPIC 16.08, should be given where a jury may conclude that flight is a reasonably effective alternative to the use of force in self-defense, *State v. Redmond*, 150 Wn.2d 489, 493-95 (2003), even if evidence establishes that defendant was indeed retreating, *State v. Wooten*, 87 Wn.App. 821 (1997), *distinguishing State v. Thompson*, 47 Wn.App. 1, 5-6 (1984), *see: State v. Studd*, 137 Wn.2d 533, 549-50 (1999), *Pers. Restraint of Harvey*, 3 Wn.App.2d 204 (2018; I.

***State v. Walden***, 131 Wn.2d 469 (1997)

Instructing the jury that "**great bodily injury**" means an injury of a more serious nature than an ordinary striking with the hands or fists injects an impermissible objective standard, as a simple battery may inflict great personal injury, depending upon the circumstances, *State v. Painter*, 27 Wn.App. 708 (1980), *State v. Rodriguez*, 121 Wn.App. 180 (2004), *State v. Marquez*, 131 Wn.App. 566 (2006), *State v. L.B.*, 132 Wn.App. 948 (2006), approving WPIC 2.04.01, distinguishing *State v. Foster*, 91 Wn.2d 466 (1979), *see: State v. Walker*, 136 Wn.2d 767 (1998), *State v. Ferguson*, 131 Wn.App. 855 (2006), *State v. Woods*, 138 Wn.App. 191 (2007), *State v. Lucero*, 140 Wn.App. 782, 785-87 (2007), 152 Wn.App. 287, 293-93 (2009); Supreme Court recommends use of "great personal injury" rather than "great bodily harm" or "great bodily injury," *State v. Freeburg*, 105 Wn.App. 492, 502-07 (2001); 8-1.

***State v. Valentine***, 132 Wn.2d 1 (1997)

In **assault on police officer,** arrestee may not use force against arresting officers if s/he is faced only with a loss of freedom, even if arrest is unlawful, *State v. Holeman*, 103 Wn.2d 426 (1985), *State v. Bradley*, 141 Wn.2d 731 (2000), *State v. Mann*, 157 Wn.App. 428 (2010), overruling *State v. Rousseau*, 40 Wn.2d 92 (1952); 7-2.

***State v. Cowen***, 87 Wn.App. 45 (1997)

In attempted murder self-defense case, deadly force is only justified if defendant perceived death or great personal injury, thus a modified WPIC 16.02, rather than WPIC 17.02, should be used, at 53, *State v. Ferguson*, 131 Wn.App. 855 (2006), *see: State v. Studd*, 137 Wn.2d 533 (1999), *Pers. Restraint of Reed*, 137 Wn.App. 401 (2007); I.

***State v. Birnel***, 89 Wn.App. 459 (1998), *rev'd, sub silentio, on other grounds, Pers. Restraint of Reed*, 137 Wn.App. 401, 408 (2007)

Defendant searches wife's purse for drugs, knowing she would not like it, asked if she was on drugs, is attacked with knife, kills wife, trial court gives **first aggressor** instruction, WPIC 16.04, over objection; held: to give first aggressor instruction, there must be evidence that it was defendant who provoked need to act in self-defense, *State v. Kidd*, 57 Wn.App. 95, 100 (1990), *State v. Wasson*, 54 Wn.App. 156, 159 (1989), provoking act must be intentional and one that would reasonably provoke a belligerent response, *State v. Wasson, supra. at* 159, *State v. Arthur*, 42 Wn.App. 120, 124 (1985), *State v. Wingate*, 155 Wn.2d 817 (2005), *State v. Douglas*, 128 Wn.App. 555 (2005), *State v. Anderson* 144 Wn.App. 85 (2008), *State v. Stark*, 158 Wn.App. 952 (2010), *State v. Sullivan*, 196 Wn.App. 277, 289-91 (2016), *State v. Hatt*, 11 Wn.App.2d 113 (2019), *see: State v. Grott*, 195 Wn.2d 256 (2020); here, a juror could not reasonably assume searching purse and questioning deceased would provoke a knife attack, thus reversed; III.

***State v. Schaffer***, 135 Wn.2d 355 (1998)

Defendant is charged with premeditated murder 1° and felony murder 2°, is acquitted of murder 1°, convicted of murder 2°, trial court declines to give manslaughter instructions as lessers; held: a defendant who reasonably believes he is in imminent danger and needs to act in self-defense, but recklessly or negligently uses more force than necessary is entitled to

instructions on manslaughter, *State v. Jones*, 95 Wn.2d 616, 628 (1981), *State v. Chamb*ers, 197 Wn.App.. 96, 119-22 (2016); *per curiam.*

***State v. Dyson***, 90 Wn.App. 433 (1998)

Defendant testifies during struggle with complainant, while acting to "dislodge" him by "passive resistance," complainant fell into a door and injured himself, court declines self-defense instructions; held: the inference from defendant's testimony is that he was acting to protect himself, which caused complainant's injuries, not that complainant was injured due to an accident, thus self-defense instructions were required, *State v. Hendrickson*, 81 Wn.App. 397 (1996), distinguishing *State v. Gogolin*, 45 Wn.App. 640 (1986), *see: State v. Walker*, 136 Wn.2d 767 (1998); I.

***State v. Hutchinson***, 135 Wn.2d 863, 884-86 (1998)

Ambiguity in former WPIC 16.02 which appears to require that defendant must be in actual danger to use lawful force is resolved when court also instructs pursuant to WPIC 16.07 that "a reasonably prudent person mistakenly" believing himself to be in danger may "defend himself . . . against apparent injury . . . *even if he is not actually in such danger,"* *State v. Ferguson*, 131 Wn.App. 855 (2006), *Pers. Restraint of Reed*, 137 Wn.App. 401 (2007), distinguishing *State v. LeFaber*, 128 Wn.2d 896, 902-03 (1996), reversing *State v. Hutchinson*, 85 Wn.App. 726 (1997); 6-3.

***State v. Walker***, 136 Wn.2d 767 (1998)

In homicide case, defendant, smaller than deceased, had a back injury, had been threatened with kicking by deceased, did not know deceased was violent, brought a knife to an anticipated fight, deceased swings and punches defendant repeatedly, defendant and deceased grapple, defendant stabs deceased five times, trial court declines self-defense instructions; held: trial court must apply a mixed subjective and objective analysis; subjective aspect requires court to place itself in defendant's shoes and view defendant's acts in light of facts known to defendant, *State v. Janes*, 121 Wn.2d 220, 238 (1993); objective aspect requires court to determine what a reasonable person in defendant's situation would have done, imminent threat of great bodily harm does not actually have to be present, as long as a reasonable person could have believed threat was present, *State v. Woods*, 138 Wn.App. 191 (2007); court must then determine whether defendant produced any evidence to support claimed good faith belief that deadly force was necessary and reasonable, *State v. Bell*, 60 Wn.App. 561, 567 (1991), *but see: State v. Thysell*, 194 Wn.App. 422 (2016); if trial court finds no reasonable person in defendant's shoes could have perceived a threat of **great bodily harm**, the court need not instruct on self-defense; factual finding that no evidence supports defendant's claimed belief of imminent danger of great bodily injury is reviewable only for abuse of discretion; here, number of stab wounds, absence of injuries to defendant, lack of bruising to deceased's fists supports trial court's finding that only an ordinary battery was intended, no reasonable person would believe s/he was going to be injured, thus deadly force was unjustified; 5-4.

***State v. Studd***, 137 Wn.2d 533 (1999)

Where defense offers erroneous self-defense instruction, WPIC 16.02, *State v. LeFaber*, 128 Wn.2d 896 (1996), defense is precluded from claiming on appeal that it was reversible error,

even if of constitutional magnitude, *State v. Henderson*, 114 Wn.2d 867, 870-72 (1990), *State v. Lucero*, 152 Wn.App. 287, 292-93 (2009), *State v. O'Hara*, 167 Wn.2d 91 (2009), *see also: Pers. Restraint of Reed*, 137 Wn.App. 401 (2007); absent an inference that defendant could have avoided use of force through a timely retreat, court need not give **no duty to retreat** instruction, *State v. Duarte Vela*, 200 Wn.App. 306 (2017), *but cf.: State v. Redmond*, 150 Wn.2d 489, 493-95 (2003); instruction that "right of self-defense does not permit action done in retaliation or revenge" is a correct statement of the law, at 550; reverses *State v. Studd*, 87 Wn.App. 385 (1997); affirms *State v. Bennett*, 87 Wn.App. 73 (1997), *State v. McLoyd*, 87 Wn.App. 66 (1997), *State v. Fields*, 87 Wn.App. 57 (1997); 8-1.

***State v. Riley***, 137 Wn.2d 904 (1999)

**First aggressor instruction**, WPIC 16.04 may not be given where words alone are the asserted provocation, as one is not entitled to respond with force when faced only with words, *State v. Wingate*, 123 Wn.App. 415 (2004), *State v. Stark*, 158 Wn.App. 952 (2010), ), *State v. Kee*, 6 Wn.App.2d 874 (2018), *see: State v. Anderson*, 144 Wn.App. 85 (2008), *State v. Grott*, 195 Wn.2d 256 (2020), *see also: State v. Whitfield*, 155 Wn.2d 817 (2005), *Pers. Restraint of Harvey*, 3 Wn.App.2d 204 (2018); 9-0.

***State v. Irons***, 101 Wn.App. 544 (2000)

Where defendant slays a member of a group who he alleges he is defending himself from, then instruction that requires that the defendant reasonably believed that the victim (rather than the victim and those whom defendant reasonably believed were acting in concert with the victim) intended to inflict death or great personal injury precludes the jury from considering the right to act upon reasonable appearances, *cf.: State v. Ferguson*, 131 Wn.App. 855 (2006), *State v. Sullivan*, 196 Wn.App. 277, 291-96 (2016), thus former WPIC 16.02 must be modified, *State v. Harris*, 122 Wn.App. 547, 553-55 (2004); instruction misstating law of self-defense is presumed prejudicial, *State v. Walden*, 131 Wn.2d 469, 473 (1997); I.

***State v. Bradley***, 141 Wn.2d 731 (2000)

In assault on custodial officer case, jury must be instructed that, to find lawful use of force defendant must have been in actual danger of serious injury under an objective standard, *State v. Valentine*, 132 Wn.2d 1, 20-21 (1997), *State v. Holeman*, 103 Wn.2d 426, 430 (1985), *State v. Ross*, 71 Wn.App. 837, 843 (1993), *State v. Garcia*, 107 Wn.App. 545 (2001), distinguishing *State v. Miller*, 89 Wn.App. 364 (1997); reverses *State v. Bradley*, 96 Wn.App. 678 (1999); 5-4.

***State v. Freeburg***, 105 Wn.App. 492, 502-07 (2001)

In justifiable homicide case, using and defining the "great bodily harm," WPIC 16.07, 2.04, as opposed to "great personal injury," WPIC 2.04.01, undercuts the subjective standard that the slayer may act on appearances, *State v. Walden*, 131 Wn.2d 469, 478 (1997), *State v. Woods*, 138 Wn.App. 191 (2007), *see: State v. Rodriguez*, 121 Wn.App. 180 (2004), *State v. Marquez*, 131 Wn.App. 566 (2006), *cf.: State v. Ferguson*, 131 Wn.App. 855 (2006), *State v. Lucero*, 140 Wn.App. 782, 785-87 (2007), 152 Wn.App. 287, 292-93 (2009); I.

***State v. Walther***, 114 Wn.App. 189 (2002)

Complainant borrows defendant's car, does not return it when promised, defendant finds complainant sleeping in the car, shoots into the car several times, complainant drives towards defendant who shoots again, complainant is injured by bullet fragments, trial court declines to instruct on lawful use of force; held: defendant was not "about to be injured" when he found victim sleeping, thus he was not entitled to use force to prevent her from driving away, car was not "in his…possession," rather it was in victim's possession at the time he fired; even if defendant met the "about to be injured" element of RCW 9A.16.020, "firing a gun multiple times at close range through the glass into the car was far more force than was necessary, *see:* *State v. Madry*, 12 Wn.App. 178, 181 (1974), *State v. Walker*, 136 Wn.2d 767 (1998), *State v. Brightman*, 155 Wn.2d 506, 523-24 (2005), *but see:* *State v. Collins*, 30 Wn.App. 1 (1981); II.

***State v. Redmond***, 150 Wn.2d 489, 493-95 (2003)

Where self defense instructions are given, court must include **no duty to retreat** instruction, *State v. Williams*, 81 Wn.App. 738, 744 (1996), *State v. Allery*, 101 Wn.2d 591 (1984), *but see:* *State v. Lucero*, 152 Wn.App. 287, 292 (2009), *Pers. Restraint of Harvey*, 3 Wn.App.2d 204 (2018), unless retreat is essentially impossible under the evidence, distinguishing *State v. Studd*, 137 Wn.2d 533, 549-50 (1999), *see:* *State v. Thompson*, 47 Wn.App. 1 (1987); 9-0.

***State v. Ward***, 125 Wn.App. 138, 147-50 (2005)

Defendant arrives at scene with another who engages in a fist fight with victim, defendant joins in fight and kills victim, claims self defense, court gives **first aggressor** instruction; held: aggressor instruction is particularly appropriate where there is conflicting testimony as to whether defendant or victim provoked altercation, *State v. Cyrus*, 66 Wn.App. 502, 508-09 (1992), *State v. Stark*, 158 Wn.App. 952 (2010), *State v. Sullivan*, 196 Wn.App. 277, 289-91 (2016), *State v. Hatt*, 11 Wn.App.2d 113 (2019); even though person with defendant started the fight, a person may reasonably perceive imminent danger when set upon by multiple assailants, thus it was not unreasonable for trial court to conclude that victim perceived a threat of imminent danger when faced off with both defendant and initial aggressor; I.

***State v. Bland***, 128 Wn.App. 511 (2005)

In defense of property case, instruction must make it manifestly clear such that it cannot be interpreted to require the jury to find that defendant reasonably believed that he was about to be injured before he could exert reasonable force to expel a malicious trespasser, as there is not requirement to fear injury to oneself, *Peasley v. Puget Sound Tug & Barge Co.*, 13 Wn.2d 485, 506 (1942); WPIC 17.02, as punctuated, is unclear relative to defense of property, *see:* *Peasley v. Puget Sound Tug & Barge, supra.* at 507, *State v. Murphy*, 7 Wn.App. 505, 513 (1972), *cf.:* *State v. Prado*, 144 Wn.App. 227, 244-45 (2008); I.

***State v. Douglas***, 128 Wn.App. 555 (2005)

Homicide victim threatens defendant in defendant's home, is ordered to leave, assaults defendant, defendant's gun discharges, kills victim, trial court declines justifiable homicide instruction and gives **first aggressor** instruction; held: because no evidence established that defendant was involved in any wrongful or unlawful conduct before the shooting or that his conduct precipitated the fight, first aggressor instruction was error, *see:* *State v. Wingate*, 155

Wn.2d 817 (2005); because defendant had revoked victim's privilege to remain, *State v. Crist*, 80 Wn.App. 511, 514 (1996), court should have instructed jury that homicide is justifiable in actual resistance of attempt to commit a felony in a dwelling, at 566 ¶ 35; II.

***State v. Wingate***, 155 Wn.2d 817 (2005)

Witness testifies that defendant drew a gun and aimed it at a person, after which defendant believed that victim had a gun and shot him, court gives **first aggressor instruction**; held: where there is conflicting evidence as to whether defendant's conduct precipitated the fight, *State v. Riley*, 137 Wn.2d 904, 910 (1999), *State v. Sullivan*, 196 Wn.App. 277, 289-91 (2016), and engaged in "aggressive conduct," a first aggressor instruction is proper, *State v. Richmond*, 3 Wn.App.2d 423 (2018), *see: State v. Kee*, 6 Wn.App.2d 874 (2018), reversing *State v. Wingate*, 123 Wn.App. 415 (2004), *State v. Stark*, 158 Wn.App. 952 (2010), *State v. Hatt*, 11Wn.App.2d 113 (2019); *per curiam.*

***State v. Marquez***, 131 Wn.App. 566 (2006)

In assault 1º/defense of others case, trial court instructs "[a] person is entitled to act on appearances in defending another if that person believes in good faith and on reasonable grounds that another is in actual danger of great bodily harm…[a]ctual danger is not necessary for the use of force to be lawful," does not further define "great bodily harm" except as defined for purposes of defining assault 1º; held: because the definition of great bodily harm for self defense excludes less serious injuries, the exclusion could have caused a reasonable juror to interpret the defense of another instruction as prohibiting consideration of defendant's subjective impressions of all the facts and circumstances, improperly undercutting defendant's claim of lawful force, *State v. Walden*, 131 Wn.2d 469, 473 (1997), *State v. Rodriguez*, 121 Wn.App. 180, 186 (2004), *State v. L.B.*, 132 Wn.App. 948 (2006), *State v. Kyllo*, 166 Wn.2d 856 (2009); error in self defense instruction is presumed prejudicial, *State v. Walden, supra.*, at 473; II.

***State v. Ferguson***, 131 Wn.App. 855 (2006)

In felony murder/assault case, WPIC 17.02 allowing use of force by a person who reasonably believes he is about to be injured is improper "because it can never be reasonable to use a deadly weapon in a deadly manner unless the person attacked had reasonable grounds to fear death or great bodily harm, *State v. Walden*, 131 Wn.2d 469, 475 (1997), *see: State v. Slaughter*, 143 Wn.App. 936, 946-47 (2008), *State v. McCreven*, 170 Wn.App. 444, 461-67 (2012); proper instructing for lawful use of force in murder case is WPIC 16.02, *State v. Irons*, 101 Wn.App. 544 (2000); II.

***State v. L.B.***, 132 Wn.App. 948 (2006)

In assault 4º bench trial, court relies upon WPIC 17.04 (2d ed. 1994) entitling a defendant to act in self defense if he had a good faith belief that we was in danger of great bodily harm, *State v. Miller*, 141 Wash. 104, 105-06 (1926); held: great bodily harm is not a test where non-deadly force is used, *State v. Kyllo*, 166 Wn.2d 856 (2009), proper standard is WPIC 17.02; harmless; I.

***Pers. Restraint of Reed***, 137 Wn.App. 401 (2007)

While instruction stating that, to use lawful force the defendant must be in actual danger of imminent harm is error, *State v. LeFaber*, 128 Wn.App. 896 (1996), where court also instructs that a right of self-defense exists if the person mistakenly believes he is in danger is sufficient and reversal is not required, *State v. Hutchinson*, 135 Wn.2d 863, 884-86 (1998), *State v. Studd*, 137 Wn.2d 533, 549 (1999); III.

***State v. Woods***, 138 Wn.App. 191 (2007)

WPIC 17.04, instructing that a person is entitled to act on appearances if that person believes that he is in danger of "great bodily harm" is error because it is inconsistent with WPIC 17.02 and must use the term "great personal injury," *State v. Walden*, 131 Wn.2d 469, 475 n.3 (1997), *see: State v. Kyllo*, 166 Wn.2d 856 (2009), even if instructions do not define "great bodily harm;" III.

***State v. Pottorff***, 138 Wn.App. 343, 349-50 (2007)

Failure of defense counsel to offer definition of "necessary," RCW 9A.16.010(1), is not ineffective assistance as ordinary use of the term is less complicated than the statutory definition, it's "possible" that the decision not to offer the instruction was tactical; III.

***State v. Slaughter***, 143 Wn.App. 936 (2008)

In a case where a defendant does something in self defense that leads to an accidental homicide, the applicable defense is excusable, not justifiable, homicide, *State v. Brightman*, 155 Wn.2d 506, 525 (2005), *see: State v. Callahan*, 87 Wn.App. 925 (1997), thus an act precipitating an accidental killing may amount to lawful self defense even if the accidental killing was not a justifiable homicide, *State v. Werner*, 170 Wn.2d 333 (2010); thus, instruction as to excusable homicide which places burden on state is proper, and the defining of lawful force, WPIC 17.02, which helps the defense explain the phrase in the excusable homicide instruction "doing any lawful act by any lawful means," WPIC 1501 (1994), need not include language placing burden on the state for lawful use of force, *see: State v. Henderson*, 192 Wn.2d 508 (2018); I.

***State v. Anderson***, 144 Wn.App. 85, 89-90 (2008)

Daughter observes defendant arguing with her mother, sees defendant "lean into" mother's face with his hands on the arms of her chair, daughter walks in with a steel bar in her hand and tells defendant to get away, defendant points shotgun at daughter, trial court gives **first aggressor** instruction; held: defendant's conduct was more than words, *see: State v. Riley*, 137 Wn.2d 904 (1999), *cf.: State v. Stark*, 158 Wn.App. 952 (2010), *State v. Sullivan*, 196 Wn.App. 277, 289-91 (2016), ), *State v. Kee*, 6 Wn.App.2d 874 (2018), *State v. Hatt*, 11 Wn.App.2d 113 (2019), and is thus sufficient to support a first aggressor instruction; III.

***State v. Kyllo***, 166 Wn.2d 856 (2009)

Where non-deadly force is at issue, instruction that states that defendant may act on appearances if he believes that he is in danger of "great bodily harm," as opposed to mere injury, is error, *see:* WPIC 17.04, *State v. L.B.*, 132 Wn.App. 948 (2006), RCW 9A.16.020(3); 9-0.

***State v. Lucero,*** 152 Wn.App. 287, 292-93 (2009)

Where defense proposes and court gives an erroneous self-defense instruction, the error is invited and may not be challenged for the first time on appeal, *State v. Studd*, 137 Wn.2d 533 (1999), *cf.: State v. Redwine*, 72 Wn.App. 625 (1994); trial court is not obliged to give **no duty to retreat** instruction *sua sponte, cf.: State v. Redmond*, 150 Wn.2d 489, 493-95 (2003); I.

***State v. Stark***, 158 Wn.App. 952, 959-61 (2010)

Defendant and son enter family home, complainant unexpectedly enters, son serves complainant with restraining order, complainant threatens defendant, makes a motion toward a knife, defendant shoots complainant numerous times, court gives **first aggressor instruction**; held: restraining order is insufficient provocation to justify first aggressor instruction as words alone are not enough, *State v. Riley*, 137 Wn.2d 904 (1999), ), *State v. Kee,* 6 Wn.App.2d 874 (2018), *cf.: State v. Anderson,* 144 Wn.App. 85, 89-90 (2008), *State v. Sullivan,* 196 Wn.App. 277, 289-91 (2016), *State v. Hatt,* 11 Wn.App.2d 113 (2019); III.

***State v. Jarvis***, 160 Wn.App. 111, 120-22 (2011)

Teacher drags mentally disabled student across the floor, jerks his arm when student tried to hold onto door jamb and swings him into bathroom where he slid 7 to 8 feet, at assault trial seeks instruction providing for lawful use of force to prevent a mentally disabled person from posing a danger to himself or others, RCW 9A.16.020(6); held: a "concrete, imminent danger," at 121 ¶ 18, may include a reasonable but mistaken belief of imminent danger, but here there was no evidence of danger; II.

***State v. Bea***, 162 Wn.App. 570 (2011)

Defendant and victim have a fistfight, break up, defendant reapproaches victim with a knife, they grapple, defendant stabs victim, court gives **first aggressor** instruction; held: state need only produce "some evidence" that defendant was the aggressor, *State v. Riley*, 137 Wn.2d 904, 909-10 (1999), and that the provoking act is intentional, *State v. Wasson*, 54 Wn.App. 156, 159 (1989), related to the eventual assault but not the actual assault to which self defense is claimed, *State v. Kidd,* 57 Wn.App. 95, 100 (1990); defendant is not entitled to invoke self defense if he provoked victim by initiating a fight after the first incident nor by use of unreasonable force; III.

***State v. McCreven***, 170 Wn.App. 444, 461-67 (2012)

In felony murder/assault case, because intent to kill or cause great or serious physical injury is an element, lawful use of force instruction that states that defendant reasonably believed that victim "intended to commit a felony or to inflict death or great personal injury" lessens state's burden and is manifest constitutional error, instruction should be pursuant to WPIC 16.02, not WPIC 17.02, *see: State v. Ferguson,* 131 Wn.App. 855, 856-59 (2006); II.

***State v. Mendes***, 180 Wn.2d 188 (2014)

When state rests defense asks court whether it will instruct on self-defense based upon state's case, court declines, defendant testifies but claims he is being compelled to testify; held: trial court has discretion when to rule on jury instructions, defendant's testimony was not compelled, *State v. Foster,* 91 Wn.2d 466, 472-73 (1979); 9-0.

***State v. Thysell***, 194 Wn.App. 422 (2016)

Defendant is entitled to self-defense instruction when, considering all of the evidence, jury could have a reasonable doubt as to whether defendant acted in self-defense; trial court' refusal to instruct on self-defense because only the state presented evidence of self-defense is error, distinguishing *State v. Janes*, 121 Wn.2d 220, 237 (1993), *State v. Walden*, 131 Wn.2d 469, 473-74 (1997), *State v. McCreven* 170 Wn.App. 444, 462 (2012); III.

***State v. Sullivan***, 196 Wn.App. 277 (2016)

Words, combined with physical acts, may support a **first aggressor** instruction where testimony conflicts about whether defendant's conduct provoked the fight, *State v. Stark*, 158 Wn.App. 952, 959 (2010), where a jury could reasonably determine that defendant provoked the fight, *State v. Hatt*, 11 Wn.App.2d 113 (2019); first aggressor instruction that requires jury to find an "intentional violent act: rather than just an "intentional act" is more favorable to defendant, distinguishing *State v. Wingate*, 155 Wn.2d 817, 821 (2005), *State v. Arthur*, 42 Wn.App. 120, 124-25 (1985), at 289-91; where there are potential multiple assailants court need not give a specific multiple assailant instruction, *State v. Irons*, 101 Wn.App. 544 (2000), as long as other instructions do not limit defendant's justification to a reasonable fear of one person, at 291-93; I.

***Pers. Restraint of Caldellis***, 187 Wn.2d 127, 140-43 (2016

In murder by extreme indifference case, RCW 9A.32.030(1)(b) (1990), defense counsel's failure to request self-defense instruction and instead arguing excusable homicide is a legitimate trial tactic; one cannot "kill by accident and claim that the homicide was justifiable." *State v. Brightman*, 155 Wn.2d 506, 525, 122 P.3d 150 (2005); 9-0.

***State v. Duarte Vela***, 200 Wn.App. 306, 328 (2017)

In murder case defendant's evidence is that he stepped out of a truck, backed up "a little bit," saw angry decedent go for a gun and shot him, trial court refuses **no duty to retreat** instruction; held: "[b]ecause the facts would not support retreat as an option to someone pulling a gun at close range and because the State did not argue that Duarte Vela could have retreated, the trial court did not err in refusing the instruction," *State v. Thompson*, 47 Wn.App. 1 (1987), *State v. Studd*, 137 Wn.2d 533 (1999), *but see: State v. Williams*, 81 Wn.App. 738 (1996), *State v. Redmond*, 150 Wn.2d 489, 493-95 (2003); 2-1, III.

***State v. Henderson***, 192 Wn.2d 508, 430 P.3d 637 (2018)

In murder case where defense claims self defense and accident trial court instructs on lawful use of force but declines to instruct on excusable homicide; held: excusable homicide/accident, RCW 9A.16.030 (1979), is not an affirmative defense, defendant can argue accident by asserting that state has not proved *mens rea* element, thus an instruction of excusable homicide is not required, *see: State v. Burt*, 94 Wn.2d 108, 110-11 (1980); court doubts "usefulness" of WPIC 15.01 (2016); 9-0.

***Pers. Restraint of Harvey***, 3 Wn.App.2d 204 (2018)

Defendant enters parking lot of another in attempt to recover a vehicle, shoots and kills victim, at trial defense successfully opposes **first aggressor** instruction, trial court deciding that

while it may be appropriate in the exercise of caution he won't give it, *see:* *State v. Arthur*, 42 Wn. App. 120, 125 n.1 (1985), claims ineffective assistance on direct appeal for not raising claim of error in failure to request **no duty to retreat** instruction; held: absent evidence that defendant had the right to be in the parking lot, and thus was not in a place he had the right to be, it was not ineffective for counsel not to request no duty to retreat instruction, *State v. Allery*, 101 Wn.2d 591, 598 (1984), *State v. Studd*, 137 Wn.2d 533, 549 (1999); there was no evidence that defendant, a non-resident, was invited or impliedly licensed to be in the parking lot, *see:* *State v. C.B.*, 195 Wn. App. 528, 538–41 (2016); while defendant may have had a right to possession of the vehicle in question, before one is impliedly licensed to enter real property to recover a chattel s/he must make a demand for delivery of the property, get permission to enter or establish that it would be futile to so demand or request, absent here, *Restatement (Second) of Torts* § 198; where a first aggressor instruction is supported by the evidence but the trial court decides not to so instruct, defense is not entitled to a no duty to retreat instruction, *State v. Benn*, 120 Wn.2d 631, 658–59 (1993), *aff'd in part on other grounds*, 161 Wn.2d 256 (2007), *State v. Frazier*, 55 Wn. App. 204, 207–08 (1989), *but see:* *State v. Redmond*, 150 Wn.2d 489, 493-95 (2003); "While words alone will not constitute sufficient provocation for the giving of a first aggressor instruction, the act constituting the provocation need not be the striking of a first blow," *State v. Hawkins*, 89 Wash. 449, 455 (1916), *State v. Bea*, 162 Wn.App. 570, 577 (2011); III.

***State v. Richmond,*** 3 Wn.App.2d 423 (2018)

Evidence at trial conflicts on whether defendant came out of his home with a 2x4 and clubbed victim to death vs. defendant's testimony that he only picked up the 2x4 when victim approached him with a knife, court gives **first aggressor instruction** over objection; held: a first aggressor instruction may be issued in circumstances where "(1) the jury can reasonably determine from the evidence that the defendant provoked the fight, (2) the evidence conflicts as to whether the defendant's conduct provoked the fight, or (3) the evidence shows that the defendant made the first move by drawing a weapon." *State v. Anderson*, 144 Wn. App. 85, 89, (2008); here, conflict in testimony justified first aggressor instruction, law no longer requires an unlawful act for a first aggressor instruction, *State v. Wingate*, 155 Wn.2d 817, 822 (2005); 2-1, I.

***State v. Kee***, 6 Wn.App.2d 847 (2018)

Where a **first aggressor instruction** is appropriate but there is some evidence that the words rather than physical acts first provoked the altercation then the instruction must include the language that words alone cannot be the provoking conduct, *State v. Riley*, 137 Wn.2d 904 (1999), *State v. Wingate*, 123 Wn.App. 415 (2004), *State v. Stark*, 158 Wn.App. 952 (2010), *see:* *State v. Anderson*, 144 Wn.App. 85 (2008), *see also:* *State v. Whitfield*, 155 Wn.2d 817 (2005), *Pers. Restraint of Harvey*, 3 Wn.App.2d 204 (2018), modifying 11 WPIC 16.04 (4th Ed); II.

***State v. Tullar***, 9 Wn.App.2d 151 (2019)

Defendant need not testify to his state of mind to be entitled to lawful use of force instruction where it is supported by sufficient evidence other than defendant's testimony; III.

***State v. Ackerman***, 11 Wn.App.2d 304 (2019)

At murder trial defendant testifies that he shot deceased while deceased was attempting to rob him with a gun, trial court modifies WPIC 16.03 (4th ed., 2016) to add that the slayer must be resisting a "violent felony" and reasonably believe he was in imminent danger of death or great personal injury, and declined to define robbery as a violent felony; held: instructions permit an erroneous interpretation that robbery is not necessarily a violent felony that could warrant deadly force in self-defense; adding that the slayer reasonably believed that the violent felony threatens imminent danger is error as RCW 9A.16.050(2) does not require that the slayer reasonably believe he is in imminent danger when resisting a felony; I.

***State v. Grott***, 195 Wn.2d 256 (2020)

Where defendant engaged in a course of aggressive conduct rather than a single aggressive act a **first aggressor** instruction is appropriate; where a defendant who is charged for firing a single shot, *State v. Wasson*, 54 Wn.App. 156, 159 (1989), or making a single threat with a gun, *State v. Brower*, 43 Wn.App. 893, 896 (1986) and claims self-defense a first aggressor instruction is not supported *[dicta];* first aggressor instructions are not "broadly disfavored," disapproving language in, *State v. Wasson*, 54 Wn.App. 156 (1989), *State v. Arthur*, 42 Wn.App. 120, 125 n.1 (1985); here, defendant engaged in a course of aggressive conduct, thus first aggressor instruction was appropriate; failure to object to a first aggressor instruction waives issue on appeal; 9-0.

***State v. Miller***, 14 Wn.App.2d 469 2020WL5200775 (2020)

Defendant is charged as principal, defense case lays blame on a state's witness, trial court over objection, gives accomplice instruction; held: when determining if the evidence at trial is sufficient to support the giving of an instruction, the court views the supporting evidence in the light most favorable to the party that requested the instruction." *State v. Fernandez-Medina*, 141 Wn.2d 448, 455-56 (2000);" here, because defendant could be viewed as an accomplice, even though the original state's theory was that he was the principal, the instruction was proper; III.

***State v. Fleeks***, ___ Wn.App.2d ___, 2023WL355082 (2023)

Defendant initiates a fight, arguably withdraws and disengages from it, victim follows defendant who has backed up against a wall, victim throws a "hard punch," defendant shoots and kills victim, court gives first aggressor instruction, defense counsel does not offer instruction on revived self-defense; held: "the right of self-defense is revived as to the aggressor if that person in good faith withdraws from the aggression in such time and manner as to clearly apprise the other person that they intend to disengage in further aggression," *State v. Dennison*, 115 Wn.2d 609 (1990), *State v. Craig*, 82 Wn.2d 777 (1973), counsel was ineffective for failing to propose such an instruction; I.

# INSTRUCTIONS
## Unanimity

***State v. Garvin***, 28 Wn.App. 82 (1980)

Where offense may be committed by various means, jury need only be unanimous as to guilt as long as there is substantial evidence to support each mode, *State v. Arndt*, 87 Wn.2d 374 (1976), *State v. Bland*, 71 Wn.App. 345, 352-8 (1993), *State v. Ortega-Martinez*, 124 Wn.2d 702 (1994), *State v. Thompson*, 169 Wn.App. 436, 473-75 (2012), *see: State v. Woodlyn*, 188 Wn.2d 157 (2017); II.

***State v. Green***, 94 Wn.2d 216 (1980)

Where the commission of a specific underlying crime is necessary to sustain a conviction for a more serious statutory offense, jury unanimity as to the underlying crime is imperative.

***State v. Osborn***, 28 Wn.App. 111 (1981)

Negligent homicide constitutes a single offense and there need not be unanimity of mode instruction if there is substantial evidence to support each mode; distinguishes *State v. Green*, 94 Wn.2d 216 (1980); *accord*: *State v. Sanchez*, 42 Wn.App. 225 (1985), *State v. Barefield*, 47 Wn.App. 444 (1987).

***State v. Petrich***, 101 Wn.2d 566 (1984)

Defendant charged with one count each statutory rape and indecent liberties, victim-granddaughter testifies to numerous incidents, defense moves to require state to elect counts and to elect which incident is to be relied upon to convict; held: mere fact that victim is the same is not enough to call the offense a continuing offense or transaction; state must elect or jury must be instructed that they must be unanimous as to which incident has been proved, modifying *State v. Workman*, 66 Wash. 292 (1911), *see*: *State v. Kitchen*, 110 Wn.2d 403 (1988), *State v. Bautista-Galdera*, 56 Wn.App. 186 (1989), *State v. Newman*, 63 Wn.App. 841 (1992), *State v. Coleman*, 159 Wn.2d 509 (2007), *State v. Borsheim*, 140 Wn.App. 357 (2007), *State v. Noltie*, 116 Wn.2d 831 (1991), *State v. Fisher*, 165 Wn.2d 727, 753-55 (2009), *State v. York*, 165 Wn.2d 727, 753-55 (2009), *cf.*: *State v. Crane*, 116 Wn.2d 315 (1991), *State v. Thompson*, 169 Wn.App. 436, 473-75 (2012), *State v. Locke*, 175 Wn.App. 779, 801-04 (2013), *State v. Carson*, 179 Wn.App. 961, 972-80 (2014), *State v. Shoop*, 22 Wn.App.2d 242, 255-57 (2022), *see also: State v. Berg*, 147 Wn.App. 923 (2008); 9-0.

***State v. Fitzgerald***, 39 Wn.App. 652 (1985)

Where defendant is charged with single count of criminal behavior, yet information alleges period of time over which this occurred, state must elect act upon which it will rely or jury must be instructed that all 12 must agree that the same act has been proved beyond a reasonable doubt, *State v. Petrich*, 101 Wn.2d 566 (1984); I.

***State v. Stark***, 48 Wn.App. 245 (1987)

It is sufficient for jury to be given instruction that it must be unanimous that the same act of sexual intercourse has been proved; need not require that the jury specify which act was proved, *distinguishing* *State v. Petrich*, 101 Wn.2d 566 (1984); I.

***State v. Southard***, 49 Wn.App. 59 (1987)

Alternative means of committing theft, RCW 9A.56.020, do not constitute separate and distinct offenses requiring jury unanimity, *State v. Makekau,* 194 Wn.App. 407 (2016), *State v. Tyler,* 191 Wn.2d 205 (2018); I.

***State v. Whitney***, 108 Wn.App. 506 (1987)

Alternative means of committing rape 1° (kidnap and deadly weapon) do not constitute separate and distinct offenses requiring jury unanimity, *distinguishing* *State v. Green*, 94 Wn.2d 216 (1980); I.

***State v. Noel***, 51 Wn.App. 436 (1988)

In one count statutory rape case with multiple acts, instruction reading, "[a]lthough the twelve of you need not agree that all the acts have been proved, you must unanimously agree that at least one particular act has been proved beyond a reasonable doubt" is adequate, *State v. Petrich*, 101 Wn.2d 566, 572 (1984), *see: State v. Ellis*, 71 Wn.App. 400 (1993), *State v. Moultrie*, 143 Wn.App. 387, 392-96 (2008), *State v. Fisher*, 165 Wn.2d 727, 753-55 (2009); 2-1, I.

***State v. Gooden***, 51 Wn.App. 615 (1988)

Promoting prostitution, RCW 9A.88.070, involving facilitating several acts of prostitution is a continuing course of conduct constituting a single crime, jury need not be unanimous that any specific act of prostitution occurred, *see*: *State v. Petrich*, 101 Wn.2d 566, 571 (1984), *United States v. Berardi*, 675 F.2d 894 (7th Cir. 1982); I; *accord*: *State v. Barrington*, 52 Wn.App. 478 (1988), *State v. Campbell*, 69 Wn.App. 302 (1993), *rev'd on other grounds*, 125 Wn.2d 797 (1995), *State v. Craven*, 69 Wn.App. 581 (1993), *State v. Love*, 80 Wn.App. 357 (1996).

***State v. Handran***, 113 Wn.2d 11 (1989)

Defendant breaks into ex-spouse's home, kisses her, pins her, jury is not instructed that it must be unanimous as to which act alleged constituted the assault element of burglary 1°; held: requirement of an instruction that jury must unanimously decide upon a distinct act is inapplicable where the evidence constitutes a continuing course of conduct, *see: State v. Craven*, 69 Wn.App. 581 (1993), *State v. Fiallo-Lopez*, 78 Wn.App. 717, 723-6 (1995), *State v. Love*, 80 Wn.App. 357 (1996), *State v. Brown*, 159 Wn.App. 1, 13-15 (2010), *State v. Howard*, 182 Wn.App. 91, 102-03 (2014), *State v. Rodriquez*, 187 Wn.App. 922 (2015), *State v. Lee*, 12 Wn.App.2d 378 (2020); where the evidence involves conduct at different times and places, then the evidence tends to show "several distinct acts," *State v. Naillieux*, 158 Wn.App. 630, 639-40 (2010); 9-0.

***State v. Brown***, 55 Wn.App. 738 (1989)

In child sex abuse case with multiple acts, instruction that jury must unanimously agree "that the same underlying criminal act has been proved beyond a reasonable doubt" approved; II.

***State v. Elliott***, 114 Wn.2d 6 (1990)

Defendant is charged with two counts of promoting prostitution 2°, RCW 9A.88.080(1)(a) and (b), by profiting from and advancing the prostitution of two women; state need not elect whether defendant promoted prostitution by advancing an enterprise or by advancing several individual acts of prostitution; two counts were continuing courses of conduct, *State v. Gooden*, 51 Wn.App. 615 (1988), *State v. Doogan*, 82 Wn.App. 185, 191 (1996), *State v. Simonson*, 91 Wn.App. 874, 883-84 (1998), *see: State v. Russell*, 69 Wn.App. 237 (1993); *affirms State v. Elliott*, 54 Wn.App. 532 (1989); 9-0.

***State v. Camarillo***, 115 Wn.2d 60 (1990)

Failure to give a unanimity instruction where prosecution presents evidence of several acts that could form the basis of one count charged is presumed prejudicial and is deemed harmless only if no rational juror could have a reasonable doubt as to whether each incident established the crime beyond a reasonable doubt, *State v. Kitchen*, 110 Wn.2d 403, 409 (1988), *State v. York*, 152 Wn.App. 92 (2009), *see: State v. Beasley*, 126 Wn.App. 670, 681-85 (2005), *State v. Coleman*, 159 Wn.2d 509 (2007), *State v. Locke*, 175 Wn.App. 779, 801-04 (2013), where defense is a broad denial of any incidents without any factual distinctions among them, then lack of instruction is harmless; *accord*: *State v. Allen*, 57 Wn.App. 134 (1990), *State v. Jones*, 71 Wn.App. 798, 821-2 (1993), *State v. Loehner*, 42 Wn.App. 408 (1986), *State v. Bobenhouse*, 143 Wn.App. 315, 324-28 (2008), 166 Wn.2d 881, 891-95 (2009); 9-0.

***State v. Hanson,*** 59 Wn.App. 651 (1990)

Test to determine if unanimity instruction is required, *State v. Petrich*, 101 Wn.2d 566 (1984): (1) what must be proven under statute, a single event or a continuing course of conduct?, (2) what does evidence disclose?, and (3) does evidence disclose more than one violation of statute; if more than one, then a *Petrich* instruction is required, *see: State v. Russell*, 69 Wn.App. 237 (1993), *State v. Williams*, 136 Wn.App. 486, 497-99 (2007); II.

***State v. Crane***, 116 Wn.2d 315 (1991)

State's evidence establishes that defendant rendered fatal injuries to a child over a two-hour period; to convict instruction alleges felony murder (assault) "on or between the 9th and 15th day of May"; held: a unanimous jury verdict, *State v. Petrich*, 101 Wn.2d 566 (1984), would not be required as to each incident of assault during a short (two-hour) period of time, as this would be a continuous course of conduct, *State v. Craven*, 69 Wn.App. 581 (1993), *State v. Love*, 80 Wn.App. 357 (1996), *State v. Marko*, 107 Wn.App. 215 (2001), *State v. Beasley*, 126 Wn.App. 670, 681-85 (2005), *State v. Monaghan*, 166 Wn.App. 521, 536-38 (2012), *State v. Locke*, 175 Wn.App. 779, 801-04 (2013), *State v. Gomez*, 7 Wn.App.2d 441 (2019); "to convict" instruction was erroneous, albeit harmless as the only evidence pointing to fatal assault was for the two-hour period; 7-2.

***State v. Newman***, 63 Wn.App. 841 (1992)

Unanimity instruction as opposed to election of specific acts is not error unless defense offers the court a specific indication as to how it would be hampered at presenting alibi; I.

***State v. Russell***, 69 Wn.App. 237 (1993)

In homicide by abuse case, RCW 9A.32.055, trial court need not give unanimity instruction with respect to particular cluster of assaultive incidents to prove "pattern or practice of assault or torture," as it is a continuing course of conduct, *State v. Hanson*, 59 Wn.App. 651 (1990), *State v. Elliott*, 114 Wn.2d 6 (1990), *State v. Monaghan,* 166 Wn.App. 521, 536-38 (2012); II.

***State v. Campbell***, 69 Wn.App. 302 (1993), *rev'd, on other grounds*, 125 Wn.2d 797 (1995)

Welfare fraud, RCW 74.08.33, contemplates a continuing course of conduct, so no unanimity instruction need be given, *State v. Gooden*, 51 Wn.App. 615 (1988), *State v. Fiallo-Lopez*, 78 Wn.App. 717, 723-6 (1995); I.

***State v. Craven***, 69 Wn.App. 581 (1993)

In child abuse case, where evidence establishes continuing assaults over a three-week period, there is a continuing course of conduct such that no unanimity instruction, *State v. Petrich*, 101 Wn.2d 566 (1984), is required, *State v. Locke*, 175 Wn.App. 779, 801-04 (2013), *see: State v. Gooden*, 51 Wn.App. 615, 618 (1988), *State v. Fiallo-Lopez*, 78 Wn.App. 717, 723-6 (1995), *State v. Crane*, 116 Wn.2d 315, 330 (1991), *State v. Marko*, 107 Wn.App. 215 (2001), *State v. Beasley*, 126 Wn.App. 670, 681-85 (2005), *State v. Monaghan*, 166 Wn.App. 521, 536-38 (2012), *State v. Gomez*, 7 Wn.App.2d 441 (2019); I.

***State v. Havens***, 70 Wn.App. 251 (1993)

In rape of child case where state presents evidence of several incidents of fellatio and declines to elect, then an instruction that reads, "[a]ll 12 jurors must agree that the same act of criminal conduct has been proved beyond a reasonable doubt for you to return a verdict" satisfies unanimity requirement of *State v. Petrich*, 101 Wn.2d 566 (1984); whether or not to submit a special interrogatory to jury identifying time and place of the proved event is within discretion of trial court; III.

***State v. Bland***, 71 Wn.App. 345, 350-2 (1993)

Where defendant is charged with assault 2° with a deadly weapon, and evidence establishes a punching and a shooting, unanimity instruction is not necessary where information charges deadly weapon mode only, special verdict forms clearly establish deadly weapon requirement and in closing state only argues deadly weapon mode, as state has effectively elected, *State v. Kitchen*, 110 Wn.2d 403, 411 (1988), *State v. Rivas*, 97 Wn.App. 349 (1999), *State v. Fleming*, 140 Wn.App. 132 (2007), *Pers. Restraint of Knight,* 196 Wn.2d 330 (2020), *State v. Smith*, 17 Wn.App. 146 (2021), *but see: State v. Smith*, 159 Wn.2d 778, 787 (2007), *cf.: State v. Kier*, 164 Wn.2d 798, 808-14 (2008); I.

***State v. Ellis***, 71 Wn.App. 400, 404-06 (1993)

Unanimity instruction that "[a]lthough twelve of you need not agree that all the acts have been proved, you must unanimously agree that at least one particular act has been proved...for each count" is marginally adequate, *State v. Noltie*, 116 Wn.2d 831, 843 (1991), *State v. Noel*,

51 Wn.App. 436, 440-1 (1988); Division II encourages use of *State v. Petrich*, 101 Wn.2d 566, 572 (1984) language, to wit: "all 12 jurors must agree that the same underlying criminal act has been proved beyond a reasonable doubt," and that jurors should be separately instructed that the same act cannot be used by the jury to convict on more than one count, *see:* *State v. Watkins*, 136 Wn.App. 240 (2006), *State v. Borsheim*, 140 Wn.App. 357 (2007), *State v. Moultrie*, 143 Wn.App. 387, 392-96 (2008).

***State v. Dyson***, 74 Wn.App. 237, 249-50 (1994)

Repeated telephone calls do not oblige a unanimity instruction, *State v. Monaghan*, 166 Wn.App. 521, 536-38 (2012), or election to convict for telephone harassment, RCW 9.61.230(2), as statute authorizes conviction for a continuing course of conduct; I.

***State v. King***, 75 Wn.App. 899, 902-4 (1994)

Two distinct instances of drug possession occurring at different times (albeit moments apart), in different places and involving different containers, in which one alleged possession was constructive, the other actual, do not constitute a continuing course of conduct, *but see:* *State v. Love*, 80 Wn.App. 357 (1996), *cf.:* *State v. Fiallo-Lopez*, 78 Wn.App. 717, 723-6 (1995), *State v. Brown*, 159 Wn.App. 1, 13-15 (2010); where state claims it will elect and later equivocates, trial court must remedy state's error by issuing a unanimity instruction; I.

***State v. Holland***, 77 Wn.App. 420 (1995)

Defendant is charged with three counts of child molestation, each alleged to have occurred "between October 2 and November 2, 1991," to convict instruction for each count states, "on an occasion other than one found to support Count 2;" victim testifies to "more than three" acts, but cannot pinpoint a time, defendant convicted of two counts; held: where it is impossible from the record to conclude that all jurors agreed on the same act to support convictions on each count, and because no unanimity instruction was given, reversal is mandated, *State v. Petrich*, 101 Wn.2d 566, 572 (1984), WPIC 4.25; 2-1, III.

***State v. Brooks***, 77 Wn.App. 516, 520-1 (1995)

Where burglary information alleges that defendant entered buildings, state must elect the building, or unanimity instruction must be given; III.

***State v. Tang***, 77 Wn.App. 644, 649-51 (1995)

Where alternative means have different penalties, jury need not be unanimous, but special interrogatories are required to determine seriousness level so defendant will be sentenced using the proper standard range, *State v. May*, 68 Wn.App. 491 (1993), *see:* *State v. Brown*, 145 Wn.App. 62, 77-81 (2008); I.

***State v. Fortune***, 128 Wn.2d 464 (1996)

Felony murder/robbery and premeditated murder are alternative means of committing murder 1°, jury need not be unanimous, *Schad v. Arizona*, 115 L.Ed.2d 555 (1991); *see also:* *State v. Tang*, 77 Wn.App. 644, 649-51 (1995); *affirms* *State v. Fortune*, 77 Wn.App. 628 (1995).

***State v. Lee***, 128 Wn.2d 151 (1995)

Where alternative victims of theft are alleged, and the crime involves alternative means, then unanimity instruction need not be given if evidence supports each alternative means charged, at 156-69, *State v. Thompson,* 169 Wn.App. 436, 473-75 (2012), *cf.: State v. Linehan,* 147 Wn.2d 638 (2002); victims' names need not be included in to convict instruction, at 160; reverses, in part, *State v. Lee,* 77 Wn.App. 119 (1995); 9-0.

***State v. Fiallo-Lopez***, 78 Wn.App. 717, 723-26 (1995)

Delivery of a small sample of cocaine followed by delivery of significantly larger amount a short time later to same buyer is a continuing course of conduct since both were intended for the same ultimate purpose, thus unanimity instruction not required, *State v. Handran,* 113 Wn.2d 11 (1989), *State v. Campbell,* 69 Wn.App. 302 (1993), *rev'd on other grounds,* 125 Wn.2d 797 (1995), *State v. Craven,* 69 Wn.App. 581 (1993), *distinguishing State v. King,* 75 Wn.App. 899, 902-04 (1994), *State v. Naillieux,* 158 Wn.App. 630, 639-40 (2010), *State v. Monaghan,* 166 Wn.App. 521, 536-38 (2012), *State v. Howard,* 182 Wn.App. 91, 102-03 (2014); I.

***State v. Love***, 80 Wn.App. 357 (1996)

Defendant is found with five rocks of cocaine in pocket, moments later police find 40 rocks in residence with cash, scale, packaging material, guns; held: evidence establishes an ongoing trafficking operation as a continuing course of conduct, *distinguishing State v. King,* 75 Wn.App. 899, 902-4 (1994); I.

***State v. Stockmyer***, 83 Wn.App. 77, 85-8 (1996)

Where assaults occur within a matter of seconds, they are a continuing course of conduct, and no special unanimity instruction is required, *State v. Crane,* 116 Wn.2d 315, 324-6 (1991)(assaults over two hours), *State v. Locke,* 175 Wn.App. 779, 801-04 (2013 *State v. Gomez,* 7 Wn.App.2d 441 (2019); II.

***State v. Kiser***, 87 Wn.App. 126 (1997)

Assault of a child 1°, RCW 9A.36.120(b)(ii), requiring proof of an assault which causes substantial bodily harm preceded by a pattern or practice of assaults, does not require a unanimity instruction absent more than one distinct episode of assault, *State v. Nason,* 96 Wn.App. 686, 695-97 (1999), *Matter of Mulamba,* ___ Wn.2d ___, 2022WL1256426 (2022); I.

***Seattle v. Norby***, 88 Wn.App. 545, 561-4 (1997), *overruled, in part, State v. Robbins,* 138 Wn.2d 486 (1999)

In DUI case, unanimity instruction requiring jury to agree whether to convict under two-hour rule or under the influence prong is not required, *State v. Franco,* 96 Wn.2d 816 (1982), *cf.: State v. Sandholm,* 184 Wn.2d 726, 732-36 (2015); I.

***State v. Stephenson***, 89 Wn.App. 217 (1997), *overruled, in part, State v. Linehan,* 147 Wn.2d 638 (2002)

To convict instruction names two types of theft victims (clients who lost property, business who lost either property or services) in disjunctive, no unanimity instruction is offered, nor is exception taken by defense; held: instructions which identify separate criminal acts must

be accompanied by unanimity instruction, distinguishing *State v. Lee*, 128 Wn.2d 151, 156-7 (1995), *see: State v. Stephens*, 93 Wn.2d 186, 190 (1980), *State v. Williams*, 136 Wn.App. 486, 497-99 (2007), *but see: State v. McNearney*, 193 Wn.2d 136 (2016); II.

***State v. Simonson***, 91 Wn.App. 874, 883-84 (1998)

Where jury is given option of finding defendant guilty as accomplice or principal, a unanimity instruction is not required, even if some jurors found he was principal and some found he was accomplice, all necessarily found he committed the same crime; II.

***Richardson v. United States***, 143 L.Ed.2d 985 (1999)

Federal statute, 21 USC § 848, prohibits a person from "engag[ing] in a continuing criminal enterprise," "continuing criminal enterprise" is defined as a violation of the drug statutes where "such violation is part of a continuing series of violations"; trial court refused to instruct jury that it must be unanimous as to which acts constituted the violation; held: jury must unanimously agree not only that the defendant committed some "continuing series of violations," but also about which specific violations make up that "continuing series"; 6-3.

***State v. Parra***, 96 Wn.App. 95, 102-103 (1999)

Defendant demands money from two bank tellers, is charged and convicted of one count of robbery, no unanimity instruction is given; held: because no rational juror could have had a reasonable doubt as to either act establishing the crime, failure to give unanimity instruction was harmless error beyond a reasonable doubt, *State v. Kitchen*, 110 Wn.2d 403, 411 (1988), *cf.: State v. Coleman*, 159 Wn.2d 509 (2007); I.

***State v. Rivas***, 97 Wn.App. 349 (1999)

Defendant is charged with assault 2° with a weapon, RCW 9A.36.021(1)(c), instruction defining assault lists three common law definitions (battery, attempted battery, assault), no unanimity instruction or special verdict is provided but all evidence establishes common law assault only; held: because evidence established only one of the alternative means and substantial evidence supported that alternative, unanimity instruction is not required, *State v. Bland*, 71 Wn.App. 345 (1993), *State v. Fleming*, 140 Wn.App. 132 (2007), *see also: State v. Nonog*, 145 Wn.App. 802, 811-13 (2008), *aff'd, on other grounds,* 169 Wn.2d 220 (2010), *but see: State v. Smith*, 159 Wn.2d 778, 787 (2007); I.

***State v. Laico***, 97 Wn.App. 759 (1999)

Where a definition statute, here RCW 9A.04.110(4)(c) defining "great bodily harm" for purposes of assault 1°, states methods of committing a crime in the disjunctive, it does not create alternative means of committing the crime for purposes of unanimity, *State v. Strohm*, 75 Wn.App. 301 (1994), *overruled, on other grounds, State v. Owens*, 180 Wn.2d 90 (2014), *State v. Marko*, 107 Wn.App. 215 (2001), *State v. Al-Hamdani*, 109 Wn.App. 599 (2001), *State v. Linehan*, 147 Wn.2d 638 (2002), , *State v. Winings*, 126 Wn.App. 75, 89-90 (2005), *State v. Lindsey*, 177 Wn.App. 233, 239-48 (2013), *State v. Makekau*, 194 Wn.App. 407 (2016), *State v. Tyler*, 191 Wn.2d 205 (2018), *see: State v. Smith*, 124 Wn.App. 417, 426-68(2004), 159 Wn.2d 738 (2007); I.

***State v. Garman***, 100 Wn.App. 307 (1999)

In a theft case, a unanimity instruction is not required where (1) defendant is charged with a single count of theft based on a common scheme or plan, (2) evidence indicates multiple incidents of theft from same victim, (3) multiple transactions are aggregated for charging purposes, (4) jury is instructed on the law of aggregation, and (5) to-convict instruction requires the jury to find that the multiple incidents are part of a "common scheme or plan, a continuing course of conduct and a continuing criminal impulse," *see: State v. Knutz,* 161 Wn.App. 395 (2011); I.

***State v. Al-Hamdani***, 109 Wn.App. 599 (2001)

Rape 2˚ "when the victim is incapable of consent by reason of being physically helpless or mentally incapacitated," RCW 9A.44.050(1)(b), states a single means of committing the offense, not alternative means, distinguishing *State v. Ortega-Martinez*, 124 Wn.2d 702, 707-09 (1994); I.

***State v. Linehan***, 147 Wn.2d 638 (2002)

Theft by embezzlement is not an alternative mean of committing the crime of theft, rather it is a way to define the alternative mean of theft by "wrongfully obtaining or exerting unauthorized control," RCW 9A.56.020(1)(a); definitions provided in RCW 9A.56.010 do not create additional alternative means of theft, *State v. Winings*, 126 Wn.App. 75, 89-90 (2005), *State v. Smith*, 159 Wn.2d 778 (2007), *State v. Makekau*, 194 Wn.App. 407 (2016), *State v. Tyler*, 191 Wn.2d 205 (2018); unanimity is not required as to whether a defendant embezzled money , former RCW 9A.56.010(7) or took the property or services of another, RCW 9A.56.010(7)(a), *State v. Perez*, 130 Wn.App. 505 (2005); 9-0.

***State v. Price***, 126 Wn.App. 617, 645-48 (2005)

Where multiple incidents are offered in support of aggravating factors for purposes of proving aggravated murder, jury should be instructed that it had to be unanimous as to which of the five alleged acts constituted the aggravating circumstance, *State v. Petrich*, 101 Wn.2d 566, 572 (1984), harmless here due to defendant's *Alford* plea to one of the incidents; II.

***State v. Howard***, 127 Wn.App. 862, 872-77 (2005)

Defendant enters house without permission, commits assault, in burglary 1° trial to convict instruction states "enters or remains unlawfully," no *Petrich* unanimity instruction is given; held: while "enters unlawfully" and "remains unlawfully" are alternative means, *State v. Allen*,127 Wn.App. 125 (2005), *cf.: State v. Thomson*, 71 Wn.App. 634, 636-40 (1993), *State v. Collins*, 110 Wn.2d 253 (1988), they are not necessarily repugnant and, where evidence establishes that both unlawful entry and remaining occurred, lack of unanimity instruction is not error; I.

***State v. Boiko***, 131 Wn.App. 595 (2006)

Where state charges witness intimidation by every statutory means, RCW 9A.72.110(1), and jury is so instructed, but one mean has no evidence to support it, lack of a unanimity instruction requires reversal, *see: State v. Chino*, 117 Wn.App. 531, 539 (2003), *State v. Ortega-Martinez*, 124 Wn.2d 702, 707 (1994); III.

***State v. Watkins***, 136 Wn.App. 240 (2006)

Unanimity instruction that reads, in part, "you must unanimously agree that at least one separate act…pertaining to each count has been proved beyond a reasonable doubt" is not error because it has been expressly approved by the Supreme Court, *State v. Noltie*, 116 Wn.2d 831 (1991), it does not protect defendant's right to a unanimous jury verdict, *see: State v. Ellis*, 71 Wn.App. 400, 404-6 (1993); I.

***State v. Williams***, 136 Wn.App. 486, 496-99 (2007)

Burglary 1° information charges that defendant assaulted "a person, to wit: Makeba Otis and Leslie Johnson," no unanimity instruction is given, state claims it elected; held: while state emphasized assault against one victim, it did not "expressly elect," at 497 ¶22, thus unanimity instruction was required, *State v. Petrich*, 101 Wn.2d 566, 569 (1984), *State v. Espinoza*, 14 Wn.App.2d 810 (2020), two assaults constitute only one mode of commission, distinct criminal acts, not alternative means, *see: State v. Hanson*, 59 Wn.App. 651, 657 (1990); I.

***State v. Boyd***, 137 Wn.App. 910, 922-23 (2007)

In voyeurism case, court admits two photographs of same victim to establish a single count, no unanimity instruction is given; held: because photos were taken of the same victim within a few moments of each other, the photos comprised a continual course of conduct, distinguishing *State v. Petrich*, 101 Wn.2d 566 (1984); II.

***State v. Fleming***, 140 Wn.App. 132 (2007)

In witness tampering case, jury is instructed as to all three modes, evidence only supports one mode, no unanimity instruction is given; held: where there is insufficient evidence to support charged modes such that the verdict could only have been based upon one of the alternative means and substantial evidence supports that alternative, there is no denial of the right to jury unanimity, *State v. Rivas*, 97 Wn.App. 349, 351-52 (1999), *overruled, on other grounds, State v. Smith*, 159 Wn.2d 778 (2007), *see: State v. Nonog*, 145 Wn.App. 802, 811-13 (2008), *aff'd, on other grounds*, 169 Wn.2d 220 (2010); II.

***State v. Lobe***, 140 Wn.App. 897 (2007)

In witness tampering case, RCW 9A.72.120, jury is instructed as to all three means but state fails to present evidence supporting each alternative, no unanimity instruction is given; held: absent a finding that substantial evidence supported each of the means and that jury relied only on the alternatives for which evidence was presented, reversal is mandated, *State v. Woodlyn*, 188 Wn.2d 157 (2017); 2-1, II.

***State v. Bobenhouse***, 143 Wn.App. 315, 324-28 (2008), 166 Wn.2d 881, 891-95 (2009)

In child rape and incest case, victim testifies defendant committed oral sex and anal sex, no unanimity instruction is offered, state does not elect; held: each of the methods of sexual intercourse constitutes a distinct criminal act, not alternative means, *see: State v. Williams*, 136 Wn.App. 486, 498 (2007), failure to give unanimity instruction is error; absent contravening evidence, plus general denial, similar acts, error is harmless, *State v. Camarillo*, 115 Wn.2d 60, 62-63 (1990); III.

***State v. York***, 152 Wn.App. 92 (2009)

Child victim testifies that defendant had molested her on three specific instances and many other times, state charges four counts, no unanimity instruction is given; held: unless an act is specified, a unanimity instruction is required, *State v. Coleman*, 159 Wn.2d 509, 511 (2007), "continuous conduct" exception, *State v. Crane*, 116 Wn.2d 315, 330 (1991), does not apply as victim testified to numerous separate rapes, each of which could have been the basis for count 4; II.

***State v. Peterson***, 168 Wn.2d 763 (2010)

Failure to register, RCW 9A.44.130, is not an alternative means crime requiring jury unanimity, *but see: State v. Mason*, 170 Wn.App. 375 (2012); affirms *State v. Peterson*, 145 Wn.App. 672 (2008); 9-0.

***State v. Furseth***, 156 Wn.App. 516 (2010)

Multiple images of child porn are found on defendant's computer, defendant is charged with one count of possession of child pornography, RCW 9.68A.070 (1990), trial court does not give unanimity instruction, state does not elect a single picture; held: unit of prosecution is one count per possession without regard to the number of images, *State v. Sutherby*, 165 Wn.2d 870 (2009), *but see: State v. Polk*, 187 Wn.App. 380 (2015), thus it is not a multiple act case, *State v. Bobenhouse*, 166 Wn.2d 881, 892 (2009), thus a unanimity instruction is not required; I.

***State v. Naillieux***, 158 Wn.App. 630, 639-40 (2010)

Taking steps in Washington and Oregon to prepare and produce methamphetamine is a continuous course of conduct thus no unanimity instruction is required, *State v. Fiallo-Lopez*, 78 Wn.App. 717, 723-26 (1995); III.

***State v. Brown***, 159 Wn.App. 1, 13-15 (2010)

Violations of no contact orders were a continuing course of conduct where the time separating the acts was short, involved same parties, same location, same ultimate purpose; I.

***State v. Hayes***, 164 Wn.App. 459, 473 (2011)

Possessing stolen property, RCW 9A.56.140, which prohibits possessing, concealing, retaining or disposing stolen property does not create alternative means, thus unanimity instruction is not required; definitional statutes do not generally create alternative means, *State v. Strohm*, 75 Wn.App. 301, 309 (1994), *State v. Lindsey*, 177 Wn.App. 233, 239-48 (2013), *State v. Makekau*, 194 Wn.App. 407 (2016), *State v. Tyler*, 191 Wn.2d 205 (2018), *see: State v. Owens*, 180 Wn.2d 90 (2014); I.

***State v. Locke***, 175 Wn.App. 779, 801-04 (2013)

Three threatening emails sent within four minutes from same location to same place is a continuous course of conduct, no multiple acts unanimity instruction is required, *State v. Crane*, 116 Wn.2d 315, 330 (1991), *State v. Marko*, 107 Wn.App. 215, 221 (2001); 2-1, II.

***State v. Huynh***, 175 Wn.App. 896 (2013)

Possession of a controlled substance with intent to manufacture or deliver is not an alternative means crime, as the only physical act involved is the act of possession, intent to manufacture or deliver address defendant's mental state, *State v. Peterson*, 168 Wn.2d 763, 769 (2010); major VUCSA aggravating factor, RCW 9.94A.535(3)(e) (2011) does not require unanimity on which statutory factor was proved; I.

***State v. Carson***, 184 Wn.2d 207 (2015)

In 3-count child rape case with identical to convict instructions defense counsel objects to unanimity instruction, *State v. Petrich*, 101 Wn.2d 566 (1984), *overruled on other grounds, State v. Kitchen*, 110 Wn.2d 403 (1988), arguing it's unnecessary and confusing, trial court doesn't so instruct, on appeal defense raises ineffective assistance; held: invited error doctrine precludes claiming error, *State v. Corbett*, 158 Wn.App. 576, 585-92 (2010), counsel's decision was a reasonable trial strategy; affirms *State v. Carson*, 179 Wn.App. 961, 972-80 (2014); 9-0.

***State v. Lizarraga***, 191 Wn.App. 530, 563-65 (2015)

Murder 2° is an alternative means crime, jury need not be unanimous where there is sufficient evidence to support each of the alternative means; III.

***State v. McNearney***, 193 Wn.App. 136 (2016)

Failure of defense to request unanimity instruction is constitutional error but not necessarily manifest, *cf.:* ***State v. Stephenson***, 89 Wn.App. 217 (1997), *overruled, in part, State v. Linehan*, 147 Wn.2d 638 (2002); III.

***State v. Makekau***, 194 Wn.App. 407 (2016)

Possession of a stolen vehicle, RCW 9A.56.068(1), is a single means crime as "receive, retain, possess, conceal or dispose," RCW 9A.56.140(1) are definitional, *State v. France*, 180 Wn.2d 809 (2014); use of disjunctive in to convict instruction does not transform them into alternative means, *State v. Tyler*, 191 Wn.2d 205 (2018); II.

***State v. Butler***, 194 Wn.App. 525 (2016)

Identity theft, RCW 9.35.020 (2008), in which one may not "knowingly obtain, possess, use or transfer a means of identification" is not an alternative means crime, *State v. Barboza-Cortes*, 194 Wn.2d 639 (2019); II.

***State v. Woodlyn***, 188 Wn.2d 157 (2017)

If jury is instructed on alternative means and there is no evidence to support one of the alternatives and jury is also instructed it need not be unanimous as to which means then case must be reversed, *State v. Joseph*, 3 Wn.App.2d 365, 369-70 (2018), *see: State v. Gomez*, 7 Wn.App.2d 441 (2019); 9-0.

***State v. Armstrong***, 188 Wn.2d 333, 339-44 (2017)

Felony violation of a domestic violence no contact order alleging both assault and two previous no contact order convictions, RCW 26.50.110(4), -(5) (2015), is an alternative means crime, jury need not be unanimous as to which means; 6-3.

***State v. Lambert***, 199 Wn.App. 51, 72-77 (2017)

Defendant is invited into home to visit victim, kills victim, goes to another home to steal gun, enters house then comes out, sees victim in driveway and demands keys to garage, victim refuses, defendant kills him in driveway, claims that insufficient evidence to support felony murder/burglary 1° as he did not remain unlawfully; held: a jury could reasonably infer that defendant's license to remain was revoked when defendant attacked first victim in home, *State v. Collins*, 110 Wn.2d 253 (1988); while, to prove felony murder, there must be evidence that the murder occurred in the course of or in furtherance of the burglary, RCW 10.95.020(11) (2003), there is insufficient evidence here that the second murder occurred in immediate flight from the burglary, *State v. Hacheney*, 160 Wn.2d 503, 506-20 (2007), distinguishing *State v. Irby*, 187 Wn.App. 183, 199-203 (2015); I.

***State v. Tyler***, 191 Wn.2d 205 (2018)

Possessing a stolen vehicle, RCW 9A.56.068(1). is not an alternative means crime, *State v. Makekau*, 194 Wn.App 407, 414 (2016), regardless of the fact that the statute prohibits a list of disjunctive terms; where the to convict instruction does not include the disjunctive (or), the **law of the case** doctrine does not require the state to prove all means; affirms *State v. Tyler*, 195 Wn.App. 385 (2016); 9-0.

***State v. Barboza-Cortez***, 194 Wn.2d 639 (2019)

Unlawful possession of a firearm 2°, RCW 9.41.040(2)(a), and identity theft 2°, RCW 9.35.020(1), are not alternative means crimes, overruling, in part, *State v. Barboza-Cortez,* 5 Wn.App. 86, 88-89 (2018); 9-0.

***State v. Lee***, 12 Wn.App.2d 378 (2020)

Defendant strangles victim in kitchen, they then go to bedroom where defendant strangles and rapes her digitally and with his penis, court does not give unanimity instruction, prosecutor argues in closing that the separate and distinct acts are in the living area and then the bedroom, jury sends out note asking for definition of separate and distinct, why there are separate counts and whether the separate counts were for kitchen and bedroom, trial court answers that jurors should reread instructions; held: "common sense" establishes that the acts were a single course of conduct, *State v. Handran*, 113 Wn.2d 11, 17 (1989), thus no unanimity instruction is required, state clearly elected during closing, jury was not confused; unanimity instruction was not necessary for the rape as it was a continuous course of conduct, *State v. Tili*, 139 Wn.2d 107 (1999); I.

***State v. Roy***, 12 Wn.App.2d 968 (2020)

**Animal cruelty 2°**, RCW 16.52.207(a) (2020), provides for a single means of committing the crime five different ways; II.

***State v. Espinoza***, 14 Wn.App.2d 810 (2020)

Defendant is charged in one count with harassing "Wilson and/or … Tappan," no unanimity instruction is given nor does state elect; held: either an election or unanimity

instruction is required to assure that a unanimous jury found defendant guilty, harassment, RCW 9A.46.020, is not an alternative means crime; I.

***State v. Jallow***, 16 Wn.App.2d 625 (2021)

Animal cruelty 1°, RCW 16.52.205(2), is not an alternative means crime, *State v. Shoop*, 22 Wn.App.2d 242 (2022), abrogating *State v. Peterson*, 174 Wn.App. 828, 849-55 (2013); I.

***State v. Christian***, 18 Wn.App.2d 185 489 P.3d 657 (2021)

Defendant is charged with assault 2°, RCW 9A.36.021(1)(g), by strangulation and suffocation, no evidence at trial discusses suffocation, jury is instructed on both; held: strangulation and suffocation are means within a means and not alternative means; I.

***State v. Smith,*** 17 Wn.App. 146 (2021)

Burglary ("enters or remains unlawfully") is not an alternative means offense; Division II rejects holdings to the contrary in *State v. Sony*, 184 Wn.App. 496, 500 (2014), *State v. Allen*, 127 Wn.App. 125, 131 (2005), *State v. Klimes*, 117 Wn.App. 758 (2003); even if burglary is an alternative means offense where the jury is instructed as to both entering and remaining unlawfully, there is no evidence of entering unlawfully, and prosecutor elects in closing only remaining, defendant's right to a unanimous verdict is not violated; II.

***Matter of Mulamba***, 199 Wn.2d 488 (2022)

Assault of a child 1° and 2° are alternative means crimes that do not require a unanimity instruction, *State v. Kiser*, 87 Wn.App. 126 (1997); 8-1.

***State v. Shoop***, 22 Wn.App.2d 242, 255-57 (2022)

In 8-count animal cruelty case involving starvation where jury is repeatedly told that there were eight counts, one for each bison, and because the offenses were a continuing course of conduct via starvation no unanimity instruction was required, *State v. Petrich*, 101 Wn.2d 566 (1984), *see: State v. Hanson*, 59 Wn.App. 651 (1990); II

# INTERPRETERS

***State v. Woo Won Choi***, 55 Wn.App. 895 (1989)

No right to interpreter if defendant's language skills are adequate to understand trial proceedings and present his defense; trial court need not engage in interpreter-waiver colloquy until court determines that an interpreter is necessary; court may rely upon counsel's representation that interpreter is not necessary, need not inquire directly of defendant until court has determined that an interpreter may be necessary; I.

***State v. Mendez***, 56 Wn.App. 458 (1989)

Trial court has no affirmative obligation to appoint an interpreter where defendant's lack of fluency or facility in English is not apparent (withdrawal of guilty plea case); I.

***State v. Bell***, 57 Wn.App. 447 (1990)

Trial court appoints a police victim advocate as interpreter for victim; held: whether a person is too interested in a proceedings to qualify as an interpreter is within discretion of trial court, *State v. Boulet*, 5 Wn.2d 654, 660 (1940); where there is no evidence of personal interest in outcome, wrongdoing or untrustworthiness, no difficulty in interpreting and an instruction from court that literal interpretation was required, then no abuse of discretion; I.

***State v. Cervantes***, 62 Wn.App. 695 (1991)

Police use of potential co-defendant as interpreter to translate *Miranda* warnings, waiver and interrogation violates due process; III.

***State v. Lopez***, 74 Wn.App. 264, 268-9 (1994)

Defendant seeks continuance of trial and signs time for trial waiver, no interpreter present but counsel represents defendant is sufficiently fluent to understand, defendant later claims waiver was involuntary; held: where defendant requests continuance, defense has the burden of showing an abuse of discretion in granting the continuance, *see:* *State v. Dowell*, 16 Wn.App. 583, 588 (1976), *State v. Livengood*, 14 Wn.App. 203, 209 (1975); trial court reasonably relied upon representations of counsel that defendant understood proceedings; I.

***State v. Pham***, 75 Wn.App. 626, 632-3 (1994)

In child abuse case with ESL victim, court permits uncertified interpreter when it learns that victim answers questions more openly with female interpreter (uncertified), directs that certified male interpreter remain present to ensure accuracy; held: no constitutional right to certified interpreter, although there is a constitutional right to a competent interpreter; RCW 2.43.030(1)(b) which allows uncertified interpreters for good cause, specifically that "services of certified interpreter are not reasonably available," is not exclusive, *see: State v. Aljaffar*, 198 Wn.App. 75 (2017); III.

***State v. Sengxay***, 80 Wn.App. 11, 15-16 (1995)

Failure to swear interpreter is not error absent objection; III.

***State v. Aquino-Cervantes***, 88 Wn.App. 699 (1997)

During CrR 3.5 hearing, interpreter testifies, over objection, that, based upon her observations of defendant during attorney-client interviews and in open court, defendant understands both Spanish and English; held: language interpreters may not testify about communications or observations made during confidential attorney-client interviews, but may testify about observations made during open court, independent of interpreting privileged communications, GR 11(e), RCW 2.43.080, harmless here; II.

***State v. Garcia-Trujillo***, 89 Wn.App. 203, 207-10 (1997)

Trial court suppresses officer's testimony about defendant's statements made through a police interpreter, state appeals; held: a witness may not testify to extrajudicial statements made by another when it was necessary to have the statement translated before it could be understood by the witness, the testimony is hearsay as the witness testifies to what the interpreter asserts the other party said, *State v. Huynh*, 49 Wn.App. 192, 203 (1987), *State v. Lopez*, 29 Wn.App. 836 (1981), *State v. Gonzales-Hernandez*, 122 Wn.App. 53 (2004); I

***State v. Marintorres***, 93 Wn.App. 442, 449-52 (1999)

Statutes which provide that hearing-impaired defendant is entitled to interpreter without cost to defendant, RCW 2.42.120(1), but that a non-English speaking defendant may be taxed costs of interpreters, RCW 2.43.040(4), violate equal protection rights of non-English speaking defendants, as there is no rational basis for the classification, *State v. Diaz-Farias*, 191 Wn.App. 512 (2015); II.

***State v. Gonzales-Morales***, 138 Wn.2d 374 (1999)

Use of defendant's interpreter to translate testimony of a state's witness does not violate Sixth Amendment right to counsel, affirming *State v. Gonzales-Morales*, 91 Wn.App. 420 (1998); 9-0.

***State v. Serrano***, 95 Wn.App. 700, 703-04 (1999)

Trial court's sole colloquy is to inquire whether Spanish-English interpreter is "certified or qualified," to which interpreter responds, "qualified," no objection made by defense; held: right to certified interpreter is not constitutional error, thus it may not be raised for the first time on appeal, RAP 2.5(a)(3), nothing in record suggested interpreter was incompetent, thus no error; III.

***State v. Harris***, 97 Wn.App. 647 (1999)

Deaf probationer is not entitled to an interpreter at meetings with his probation counselor where he can communicate in writing; RCW 2.42.120(3), which requires interpreters at court-ordered treatment programs, unconstitutionally violates the one-subject rule, CONST. Art. II, § 19; I.

***State v. Teshome***, 233 Wn.App. 705 (2004)

At plea hearing, trial court inquires of uncertified interpreter if she had interpreted in superior court before on criminal matters, interpreter says yes, court swears him in and proceeds with plea, defendant seeks to withdraw plea, submits another tinterpreter's translation of the plea hearing, which contains significant errors, trial court finds that defendant understood sufficient

English, denies motion; held: trial court erred in not determining, on the record, that proposed interepreter is capable of communicating effectively and understands code of ethics, RCW 2.43.030(2), however because court's finding that defendant spoke English was supported by substantial evidence, defendant is not entitled to withdraw plea; I.

***State v. Ramirez-Dominguez***, 140 Wn.App. 233 (2007)

Defendant's primary language is Mixteco but requests a Spanish interpreter, does not ask for clarification due to interpretation problems, communicated with family and friends in Spanish, asked a few times for definitions, responded appropriately to questions is sufficient to affirm trial court's finding that Spanish interpretation was adequate; II.

***Pers. Restraint of Khan***, 184 Wn.2d 679 (2015)

Petitioner files timely PRP accompanied by declaration stating he told his lawyer he does not speak much English, that counsel told him not to worry about it; held: petitioner is entitled to a reference hearing to determine whether he was prejudiced by not having an interpreter; 5-4.

***State v. Castillo-Murcia***, 188 Wn.App. 539, 547-49 (2015)

Defendant has an interpreter present at all pretrial hearings and trial, submits a jury waiver, court inquires in English, defendant answers in English, interpreter does not participate, during trial defendant testifies in English and has to be asked to await interpretation, at sentencing allocution is in English; held: an extended waiver discussion is not necessary as long as defendant personally expresses his desire to waive jury, inquiring whether defense counsel explained the right is a factor but lack of it is not fatal, *see: State v. Ramirez-Dominguez,* 140 Wn.App. 233, 239-40 (2007); II.

***State v. Aljaffar***, 198 Wn.App. 75 (2017)

At Spokane trial with Arabic-speaking defendant state informs court that only certified Arabic interpreter is in Seattle and that it would be "logistically difficult" to fly her to Spokane and house her during the trial, court finds good cause and approves uncertified interpreter, after colloquy deems him qualified; held: defendant has right to certified interpreter absent good cause, RCW 2.43.030 (2005), "[t]he fact the interpreter lived a few hours away and could not be made available on short notice did not provide the State good cause to excuse retaining a certified interpreter. The State as plaintiff is expected to anticipate the needs of its case and make necessary arrangements before the day of trial," at 86, harmless here; III.

***State v. Jieta***, 12 Wn.App.2d 227 (2020)

Court fails to provide an interpreter fifteen times over fifteen months, trial court dismisses for governmental misconduct, CrRLJ 8.3(b); held: CrRLJ 8.3(b) applies where court administration mismanages a case; I.

***State v. Cruz-Yon***, ___ Wn.App.2d ___, 498 P.3d 533 (2021)

On appeal an indigent non-English speaking defendant is entitled to a translation of the report of proceedings deemed necessary by the trial court for purposes of appeal and a translation of appellate counsel's brief; I.

***Pers. Restraint of Pheth***, ___ Wn.App.2d ___, 2021WL6690336 (2021)

Electronically recorded record need not include an audible recording of all statements made to and from interpreters; I.

***Matter of Pheth***, 20 Wn.App.2d 326 (2022)

Trial court need not make an audible recording of all statements made to and from interpreters in both languages as English interpretation is the official record; I.

# JOINDER, SEVERANCE AND CONSOLIDATION*

***State v. Townson***, 29 Wn.App. 433 (1981)

Denial of severance of counts is within trial court's discretion and will not be set aside as long as the counts are sufficiently "connected together" to warrant joinder per CrR 4.3; I.

***State v. Weddel***, 29 Wn.App. 461 (1981)

Where counts are joined, mere fact that a defendant states he wants to testify on one count and not on other is not grounds for a severance; impeachment by prior conviction is not a "strong need to refrain from testifying"; here, defendant failed to make any showing, thus conviction affirmed; *accord*: *State v. Watkins*, 53 Wn.App. 264 (1989), *State v. Russell*, 125 Wn.2d 24, 62-8 (1994); II.

***State v. Mitchell***, 30 Wn.App. 49 (1981)

Defendant charged with six burglaries several months after being arrested but not charged in a seventh burglary; speedy trial rule does not commence for six counts at arrest for a seventh permissibly joined offense, CrR 4.3(a) unless the offenses are related arising from the same criminal conduct and thus required to be joined, CrR 4.3(c); I.

***State v. Ammlung***, 31 Wn.App. 696 (1982)

Mere fact that one defendant's decision not to testify is inconsistent with or adversely affected by the defense presented by co-defendant is not grounds for severance; *see: Zaviro v. United States*, 122 L.Ed.2d 317 (1993); II.

***State v. Hentz***, 32 Wn.App. 186 (1982)

Defendant has heavy burden of demonstrating that denial of motion to sever counts was an abuse of discretion; defendant's claim that he wants to testify as to one count but not as to another joined count is not sufficient to require severance absent a showing that he had important testimony concerning the first count and a strong reason for not testifying as to the second; Division II adopts a broad joinder rule, CrR 4.3, to conserve judicial and prosecutorial resources.

***State v. Anderson***, 96 Wn.2d 739 (1982)

Defendant is convicted in 1977 of murder 1° by "extreme indifference," RCW 9A.32.030(1)(b), conviction is reversed on appeal by Supreme Court, defendant is then charged with murder 1° by premeditation; Supreme Court orders information dismissed without prejudice, as state failed to join related offenses of premeditated murder 1° with murder 1° by extreme indifference, CrR 4.3(c)(3), *but see: State v. Havens*, 70 Wn.App. 251 (1993); Supreme Court holds state is not barred by double jeopardy clause from charging defendant with any lesser included offense (murder 2°, manslaughter), as original reversal was not based upon insufficiency of evidence, but rather upon inapplicability of statute [extreme indifference does

* *See also:* MANDATORY JOINDER, MANDATORY SEVERANCE/*Bruton*

not apply where defendant intended death of particular victim], *State v. Anderson*, 94 Wn.2d 176 (1980)]; 6-3

***State v. Ben-Neth***, 34 Wn.App. 600 (1983)

Failure to renew severance motion at trial waives issue on appeal, CrR 4.4(a)(2), *State v. Henderson*, 48 Wn.App. 543, 551 (1987), *see: State v. Bryant*, 89 Wn.App. 857, 863-9 (1998), *State v. Bluford*, 188 Wn.2d 298, 306 (2017); I.

***State v. Holt***, 36 Wn.App. 224 (1983)

Where offenses are intimately related under the mandatory joinder rule, CrR 4.3(c), defendant does not waive his right to joinder by failing to so move if he was unaware of the charges at such a time as to afford him a reasonable opportunity to evaluate the situation; remedy is dismissal of second set of charges; II.

***State v. Thompson***, 36 Wn.App. 249 (1983)

Defendant is convicted of two counts of VUCSA on 4 May 1981; on 28 May 1981 state files information charging four more counts, alleging crimes occurred before crimes that were subject of 4 May conviction; held: while charges were subject to permissive joinder, CrR 4.3(a), as they were of "same or similar character," they were not "related offenses" requiring mandatory joinder, CrR 4.3(c), *State v. Mitchell*, 30 Wn.App. 49 (1981), *distinguishing State v. Dailey*, 18 Wn.App. 525 (1977); I.

***State v. Culver***, 36 Wn.App. 524 (1984)

Defendant is convicted at a single trial of theft, acquitted of conspiracy, seeks new trial due to prejudice from evidence of the conspiracy; held: no error, as no prejudice here, *distinguishing United States v. Branker*, 395 F.2d 881, 887-89 (2d Cir. 1968), *United States v. Donaway*, 447 F.2d 940, 943 (9th Cir. 1971); I.

***State v. Harris***, 36 Wn.App. 746 (1984)

Defendant charged with two rapes, two weeks apart, one in a residence and one in a vehicle, defense motion for severance during trial denied; held: where evidence of both offenses could not be admitted as ER 404(b) evidence, there is a strong likelihood of prejudice from joinder; failure to seek severance at omnibus hearing may constitute waiver, CrR 4.4(a), *State v. Hernandez*, 58 Wn.App. 793 (1990); I.

***State v. Gatalski***, 40 Wn.App. 601 (1985)

Counts may be joined where evidence in each count is admissible in trial of other count under ER 404(b); here, intent was an issue, thus evidence of two incidents of attempted sex offenses could be joined for trial, *distinguishing State v. Saltarelli*, 98 Wn.2d 358 (1982); trial court must exercise discretion and should make a record of balancing unfair prejudice against probative value, ER 403; *see: State v. Wilson*, 71 Wn.App. 880, 886-67 (1993), *disapproved, on other grounds, State v. Buford*, 188 Wn.2d 298, 307-09 (2017), *State v. Cotten*, 75 Wn.App. 669, 686-8 (1994); I.

***United States v. Lane***, 88 L.Ed.2d 814 (1986)

Misjoinder, Fed.R.Crim.Pro. 8, is subject to harmless error analysis.

***State v. Standifer***, 48 Wn.App. 119 (1987)

Even if a denied motion to sever was meritorious, where jury scrupulously follows instruction to treat each count as a separate trial by rendering different verdicts, then defense has failed to show prejudice; *but see*: *State v. Ramirez*, 46 Wn.App. 223 (1986); *accord*: *State v. York*, 50 Wn.App. 446 (1988); I.

***State v. York***, 50 Wn.App. 446 (1988)

In deciding whether or not to sever counts, trial court may consider judicial economy; I.

***State v. White***, 50 Wn.App. 858 (1988)

Married co-defendants are entitled to severance as a matter of right; III.

***State v. Thompson***, 55 Wn.App. 888 (1989)

Failure to sever felon in possession of firearm charge from assault is not constitutional error *per se*, *State v. Tully*, 198 Wash. 605, 608 (1939), *Pettus v. Cranor*, 41 Wn.2d 567, 568 (1952); failure to argue joinder prejudice issues in trial court precludes appellate review on those bases; I.

***State v. Lane***, 56 Wn.App. 286 (1989)

In joint trial, one defendant testifies that the other is a drug addict, although both defendants testified that they were unaware of presence of drugs; held: defenses were the same and not antagonistic or irreconcilable, thus no abuse of discretion in joining trials, *State v. McKinzy*, 72 Wn.App. 85, 89-90 (1993), *State v. Sublett*, 176 Wn.2d 58, 68-70 (2012); III.

***State v. Bythrow***, 114 Wn.2d 713 (1990)

Severance of counts is not automatically required when evidence of one count would not be admissible in a separate trial on the other count; defense must demonstrate undue prejudice resulting from a joint trial which outweighs concerns for judicial economy, effectively overruling *State v. Ramirez*, 46 Wn.App. 223 (1986), except for sex offenses; when issues are relatively simple and the trial lasts only "a couple of days," the jury can be reasonably expected to compartmentalize the evidence; when state's evidence is strong on each count, then there is less of a prejudicial effect, *State v. Kalakosky*, 121 Wn.2d 525 (1993), *see*: *State v. Eastabrook*, 58 Wn.App. 805 (1990), *State v. Markle*, 118 Wn.2d 424, 438-9 (1992), *State v. Sanders*, 66 Wn.App. 876 (1992), *State v. Craven*, 69 Wn.App. 581, 586-7 (1993), *State v. Wilson*, 71 Wn.App. 880, 886-7 (1993), *disapproved, on other grounds, State v. Buford*, 188 Wn.2d 298 (2017), *State v. Herzog*, 73 Wn.App. 34, 50-1 (1994), *State v. McDonald*, 122 Wn.App. 804, 814-15 (2004), *State v. Rodriguez*, 163 Wn.App. 215, 217-29 (2011), *State v. Wood*, ___ Wn.App.2d ___, 498 P.3d 968 (2021); 9-0.

***State v. Hernandez***, 58 Wn.App. 793 (1990)

Motion to sever counts made the day of trial is not made "before trial" as required by CrR 4.4(a)(1), *cf.: State v. Wood*, 94 Wn.App. 636, 640-44 (1999); renewing motion when state rests, however, is timely and preserves issue, CrR 4.4(a)(2), *State v. Harris*, 36 Wn.App. 746 (1984); in three-count robbery trial alleging crimes on different dates, counts one and two have a single eyewitness each, count three has three eyewitnesses; because evidence was "weak" on

first two counts, and evidence on each count would not have been admissible at separate trials, then denial of severance was manifest abuse of discretion, *State v. Harris, supra,* at 752; II.

***State v. Hoffman***, 116 Wn.2d 51 (1991)

Defendants seeking severance have the burden of demonstrating that a joint trial would be so manifestly prejudicial as to outweigh the concern for judicial economy, *State v. Philips,* 108 Wn.2d 627, 640 (1987); mutually antagonistic defenses is not alone sufficient to compel separate trials, *State v. Emery,* 174 Wn.2d 741, 752-54 (2012), *State v. Barry,* 25 Wn.App. 751 (1980), *State v. Davis,* 73 Wn.2d 271, 290 (1968), *overruled, on other grounds, State v. Abdulle,* 174 Wn.2d 411 (2012), rather the conflict must be shown to be so prejudicial that defenses are irreconcilable and the jury will unjustifiably infer that the conflict alone demonstrates that both are guilty, *State v. Grisby,* 97 Wn.2d 493, 507-8 (1982), *State v. McKinzy,* 72 Wn.App. 85, 89-90 (1993), *State v. Medina,* 112 Wn.App. 40, 51-54 (2002), *State v. Johnson,* 147 Wn.App. 276 (2008), *State v. Sublett,* 176 Wn.2d 58, 68-70 (2012), *cf.: Zafiro v. United States,* 122 L.Ed.2d 317 (1993), *see also: State v. Campbell,* 78 Wn.App. 813, 818-20 (1995); 9-0.

***State v. Vazquez***, 66 Wn.App. 573 (1992)

Where co-defendants are tried at the same time, but one has waived jury, they are effectively severed; II.

***Zafiro v. United States***, 122 L.Ed.2d 317 (1993)

Fed. R. Crim. Pro. 14 does not require severance when co-defendants present mutually antagonistic defenses; trial court should sever properly joined co-defendants only if there is a serious risk that a joint trial would compromise a specific trial right (*e.g.*, evidence suppressed against one defendant only), or would prevent jury from making a reliable judgment about guilt or innocence, *State v. Emery,* 174 Wn.2d 741, 752-54 (2012); defendants accusing each other of the crime do not require severance; 9-0.

***State v. Kalakosky***, 121 Wn.2d 525 (1993)

Denial of severance in five-count rape case is not abuse of discretion where crimes were not particularly difficult for jury to compartmentalize, state's evidence on each count was strong, jury instructed to consider crimes separately, *State v. Bythrow,* 114 Wn.2d 713 (1990), effectively overruling *State v. Ramirez,* 46 Wn.App. 223 (1986) for all crimes including sex offenses; fact that separate counts would not be cross-admissible in separate trials does not necessarily represent a sufficient ground to sever as matter of law, *State v. Cotten,* 75 Wn.App. 669, 686-8 (1994), *State v. Rodriguez,* 163 Wn.App. 215, 217-29 (2011); 8-0.

***State v. Wilson***, 71 Wn.App. 880, 884-87 (1993)

Charges of harassment and assault 1° of different victims are of same or similar character, and thus subject to joinder, CrR 4.3(a)(1), *see:* RCW 9A.46.060(4); propriety of joinder is a question of law, subject to full appellate review; once counts or defendants are properly joined, severance is subject to abuse of discretion standard, *State v. Hentz,* 32 Wn.App. 186, 189-90 (1982), *rev'd on other grounds,* 99 Wn.2d 538 (1983), *see: State v. Bryant,* 89 Wn.App. 857, 863-9 (1998),*but see: State v. Bluford,* 188 Wn.2d 298 (2017); II.

***State v. Russell***, 125 Wn.2d 24, 62-68 (1994)

In determining whether the potential for prejudice requires severance, court must consider (1) strength of state's evidence on each count, (2) clarity of defenses as to each count, (3) instruction to consider each count separately, and (4) cross-admissibility of evidence, *see:* *State v. Redd*, 51 Wn.App. 597 (1988), *State v. Sanders*, 66 Wn.App. 878 (1992), *State v. Eastabrook*, 58 Wn.App. 805, 811-2 (1990), *State v. Markle*, 118 Wn.2d 424, 439 (1992), *State v. Williams*, 156 Wn.2d 482, 499-500 (2010); likelihood that joinder will cause jury to be confused as to defenses is very small where the defense is identical on each charge, *State v. Hernandez*, 58 Wn.App. 793, 799 (1990); defendant's desire to testify only on one count requires severance only if defendant makes a convincing showing that he has important testimony to give concerning one count and a strong need to refrain from testifying about another, *State v. Watkins*, 53 Wn.App. 264, 270 (1989), *State v. Weddel*, 29 Wn.App. 461, 467 (1981), *see:* *State v. McDonald*, 122 Wn.App. 804, 814-15 (2004); 9-0.

***State v. Canedo-Astorga***, 79 Wn.App. 518, 527-9 (1995)

Trial court need not sever defendants merely because co-defendant is representing himself badly; II.

***State v. Bryant***, 89 Wn.App. 857, 863-69 (1998)

Robbery defendant fails to appear for omnibus hearing, state amends and adds **bail jumping** charge over objection, court denies motion to sever which is not renewed at trial; held: failure to renew motion to sever waives issue, *State v. Henderson*, 48 Wn.App. 543, 551 (1987), *State v. Ben-Neth*, 34 Wn.App. 600, 606 (1983), CrR 4.4(a)(2), but because offenses should not be joined if there is proof of prejudice, Division I will consider prejudice in determining propriety of joinder, *State v. Bluford*, 188 Wn.2d 298 (2017), *see:* *State v. Culver*, 36 Wn.App. 524, 529 (1984); when a defendant fails to appear on an underlying substantive charge, a charge of bail jumping is properly joined, absent a strong showing of prejudice to the accused, *but see:* *State v. Slater*, 197 Wn.2d 660 (2021), *see:* *State v. Nation*, 110 Wn.App. 651 (2002), *cf.: State v. Rodriguez*, 163 Wn.App. 215, 217-29 (2011), as state need not show that flight was in order to avoid prosecution; I.

***State v. Wood***, 94 Wn.App. 636, 640-44 (1999)

On day of trial, co-defendant's counsel discovers conflict of interest, state moves to sever, defendant objects; held: absent prejudice, defendant lacks right to have cases tried together; II.

***State v. Larry***, 108 Wn.App. 894 (2001)

Redacted confession that substitutes pronouns rather than blank spaces does not mandate severance as long as the redaction is facially neutral, *Bruton v. United States*, 20 L.Ed.2d 476 (1968), free of obvious deletions, *Gray v. Maryland*, 140 L.Ed.2d 294 (1998), and accompanied by a limiting instruction, *Richardson v. Marsh*, 95 L.Ed.2d 176 (1987), *State v. DeLeon*, 185 Wn.App. 171, 206-13 (2014), *reversed, on other grounds*, 185 Wn.2d 478 (2016), *State v. Moses*, 193 Wn.App. 341 (2016), redacting exculpatory statements as inadmissible hearsay is permitted as long as it does not distort the statement, *State v. Alsup*, 75 Wn.App. 128 (1994) or violate rule of completeness, ER 106, 611(a), *see:* *State v. Perez*, 139 Wn.App. 522, 530-31

(2007); test for rule of completeness: statement is necessary to (1) explain the admitted evidence, (2) place the admitted portions in context, (3) avoid misleading the trier of fact, (4) insure fair and impartial understanding of the evidence, at 910; II.

***State v. Medina***, 112 Wn.App. 40 (2002)

State offers redacted statement of co-defendant that refers to "other guys," "the guy," "one guy," and "they," from statement it is "impossible to track the activities of any particular 'guy' referenced, trial court twice cautions jury not to consider statement against defendant; held: redacted confession that omits all reference to defendant and can only be deemed incriminating when linked to other evidence later introduced at trial does not mandate severance, *Richardson v. Marsh,* 95 L.Ed.2d 176 (1987), *State v. Moses,* 193 Wn.App. 341 (2016), where jury is not provided statement that includes obvious or express deletions, *Gray v. Maryland,* 140 L.Ed.2d 294 (1998), *see: State v. Fisher,* 186 Wn.2d 836, 841-48 (2016); III.

***State v. MacDonald***, 122 Wn.App. 804, 814-15 (2004)

In two count rape case, defendant testifies as to one count but not another, one count is stronger than the other, thus severance should be granted, *State v. Russell,* 125 Wn.2d 24, 62-68 (1994), *State v. Bythrow*, 114 Wn.2d 713, 717-18 (1990); II.

***State v. Johnson***, 147 Wn.App. 276 (2008)

Mutually antagonistic defenses do not require reversal of a consolidated trial, even where one defendant testifies and blames a co-defendant, *State v. Sublett,* 176 Wn.2d 58, 68-70 (2012), *State v. Larry*, 108 Wn.App. 894, 911 (2001), *State v. McKinzy*, 72 Wn.App. 85, 90 (1993), *State v. Davis*, 73 Wn.App. 271, 290 (1968), *overruled, on other grounds, State v. Abdulle*, 174 Wn.2d 411 (2012), *State v. Emery,* 174 Wn.2d 741, 752-54 (2012); mandatory severance to avoid admission of a confession which inculpates a co-defendant does not apply to in-court testimony, *State v. Craig,* 82 Wn.2d 777, 788 (1973); II.

***State v. Sutherby***, 165 Wn.2d 870, 883-87 (2009)

Child rape and possession of child pornography counts are tried together without a severance motion, evidence of child porn was strong but child rape was weaker, defendant offered separate defenses, state argued that child porn proved defendant's sexual motivation for rape, child porn evidence would likely have been inadmissible in a separate trial since the pornography did not involve pictures of the rape victim, *see: State v. Ray*, 116 Wn.2d 531, 547 (1991); held: failure to move to sever was ineffective assistance as there was a reasonable likelihood that trial court would have granted a severance; 6-3.

***State v. Williams***, 156 Wn.App. 482, 499-500 (2010)

In ruling on joinder, CrR 4.3(a), trial court should consider (1) strength of state's evidence on each count, (2) clarity of defenses on each count, (3) instruction to consider each count separately and (4) cross-admissibility, *State v. Russell*, 125 Wn.2d 24, 62-68 (1994), *State v. Bluford,* 188 Wn.2d 298 (2017), omission here is harmless; III.

***State v. Rodrigue****z,* 163 Wn.App. 215, 227-29 (2011)

Witness tampering count need not be severed as tampering is admissible as evidence of consciousness of guilt in the trial of the charge to which the witness' testimony pertains; III.

***State v. Sublett***, 176 Wn.2d 58, 68-70 (2012)

In joint murder trial, one defendant does not testify but generally denied, other testifies he was not present at the homicide, motion to sever denied; held: while the two offenses here are irreconcilable, they do not reach the level where the jury would unjustifiably infer from the conflict that both are guilty; jury could have believed either or neither but not both, from verdict clearly jury believed neither, defense has not shown that this was due to the conflicting defenses rather than the evidence produced at trial; affirms *State v. Sublett*, 156 Wn.App. 160 (2010); 9-0.

***State v. Bluford***, 188 Wn.2d 298, 305-16 (2017)

Failure of defense to renew a motion to sever before or at the close of the evidence, CrR 4.4(b), waives the issue but court can consider propriety of state's motion to join, CrR 4.3(a), in determining prejudice to defendant, *State v. Bryant*, 89 Wn.App. 857, 863-69 (1998), overruling, in part, *State v. Wilson*, 71 Wn.App. 880, 886, 863 P.2d 116 (1993*), rev'd in part on other grounds*, 125 Wn.2d 212, 883 P.2d 320 (1994); where counts are joined in an original charging document then state need not move to join and severance rules apply; marked dissimilarities and the absence of any distinctive similarities which tilt against cross-admissibility is a basis to deny joinder due to prejudice; 9-0.

***State v. Linville***, 191 Wn.2d 513 (2018)

Defendant is convicted of one count of "leading organized crime," in violation of Washington's Criminal Profiteering Act (CPA), RCW 9A.82.060(l)(a), plus 137 other offenses, some of which were crimes listed in RCW 9A.82.010(4) as predicate offenses, which, when combined, form the requisite "pattern of criminal profiteering" on which the umbrella crime called "leading organized crime" is based but some of these 137 other offenses were not listed in RCW 9A.82.010(4) as predicate crimes, RCW 9A.82.085 ("joinder bar") prohibits joinder of non-predicate crimes in a single prosecution, defense does not move to sever, defendant claims ineffective assistance on appeal; held: while the statutory list of predicate profiteering crimes is exclusive and thus defendant would have had a right to a severance, the record fails to reflect why defense counsel failed to object, which could have been tactical to avoid separate convictions and sentencings which can only be established by collateral attack; reverses *State v. Linville*, 199 Wn.App. 461 (2017); 9-0.

***State v. Slater***, 197 Wn.2d 660 (2021)

A single failure to appear in court is not indicative of consciousness of guilt, thus it is error for a court to admit such evidence of flight, *State v. Bruton*, 66 Wn.2d 111, 112 (1965), *cf.: State v. Cobb*, 22 Wn.App. 221, 224 (1978), *State v. Jefferson*, 11 Wn.App. 566, 570 (1974); a bail jumping charge based upon a single failure to appear is unfairly prejudicial, court must sever; 9-0.

***State v. Martinez***, 22 Wn.App.2d 621 (2022)

Two brothers are joined for trial for serially raping another sibling, incriminating statements from both, admitted at trial, do not incriminate the other party, defendants seek severance in part because they did not know if the other defendant would testify; held: ER 404(b) does not prohibit

evidence of a crime committed by a defendant's family member where the defendant is not inculpated; factors for determining improper joinder of counts, *State v. Bluford*, 188 Wn.2d 298, (2017), do not apply to motion to sever defendants; III.

# JUDGES

(see also: Affidavits of Prejudice)

***State v. Eisner***, 95 Wn.2d 458 (1981)

Prosecutor could not get five-year-old statutory rape complainant to testify to penetration, so court examined witness in detail, resulting in conviction; held: questions of judge went beyond clarification so as to be a comment on the evidence; 9-0.

***State v. Peyton***, 29 Wn.App. 701 (1981)

Judge who takes plea from co-defendant may preside at jury trial of remaining defendants; II.

***State v. Wixon***, 30 Wn.App. 63 (1981)

Trial court has discretion to call a witness whom all parties may cross-examine; I.

***State v. Sain***, 34 Wn.App. 53 (1983)

Counsel and defendant must specifically consent in open court or in writing to have a judge *pro tem* hear a criminal case in Superior Court or court lacks jurisdiction, CONST. Art. 4, § 7, RCW 2.08.180, *but see*: *State v. Osloond*, 60 Wn.App. 584 (1991), *State v. Belgarde*, 62 Wn.App. 684 (1991), *State v. Robinson*, 64 Wn.App. 201 (1992), *Vancouver v. Boldt*, 21 Wn.App.2d 100 (2022); III.

***State v. Romano***, 34 Wn.App. 567 (1983)

Sentencing judge contacts individuals about defendant *ex parte* without revealing the fact prior to sentencing; held: judge may not make an *ex parte* undisclosed investigation, *see: State v. Watson*, 120 Wn.App. 521, 534-36 (2004); remanded for sentencing before a different judge; II.

***State v. Dagenais***, 47 Wn.App. 260 (1987)

Judge finds juvenile respondent guilty, stating that the respondent lied, proceeds to hear another trial on same respondent; held: having just stated his belief as to respondent's credibility, judge should have disqualified himself at second trial, as a fair trial requires absence of actual bias and the appearance of bias, *cf.: State v. Gamble*, 168 Wn.2d 161, 187-89 (2010); I.

***Ladenburg v. Campbell***, 56 Wn.App. 701 (1990)

District court lacks authority to appoint a special prosecutor; II.

***State v. Swan***, 114 Wn.2d 613 (1990)

Trial court's referring to state's witness as "an expert on that subject" in ruling on an objection is not a comment on the evidence, CONST. Art. 4, § 16; 9-0.

***State v. Hastings***, 115 Wn.2d 42 (1990)

In a court of limited jurisdiction, a defendant has neither a constitutional nor statutory right to withhold consent to the authority of a judge *pro tempore, Vancouver v. Boldt,* 21 Wn.App.2d 100 (2022) *State v. Sain*, 34 Wn.App. 53 (1983); 8-0.

***State v. Barnes***, 58 Wn.App. 465 (1990)

In diminished capacity case, defendant testifies that he "went crazy," judge *sua sponte* tells jury that this is not a mental irresponsibility case; held: not a comment on the evidence, CONST. Art. 4, § 16, as it does not address credibility, weight or sufficiency of evidence, *State v. Jacobsen*, 78 Wn.2d 491, 495 (1970), but was a statement of law; I.

***State v. Osloond***, 60 Wn.App. 584 (1991)

Where defense counsel stipulates in writing to appointment of a judge *pro tempore*, absence of defendant's written agreement or consent on the record is insufficient to challenge validity of the appointment absent defendant's argument that the stipulation was entered without his consent, *distinguishing State v. Sain*, 34 Wn.App. 553 (1983); I.

***State v. Kepiro***, 61 Wn.App. 116 (1991)

Intent to harm or reasonably cause alarm is not an element of intimidating a judge, RCW 9A.72.160, *cf.: State v. Ozuna,* 184 Wn.2d 238 (2015), ; I.

***Seattle v. Knutson***, 62 Wn.App. 31 (1991)

Dismissal for inconvenience and delay because of trial court's inability to provide a court clerk is an abuse of discretion, CrRLJ 8.3(b); I.

***State v. Bryant***, 65 Wn.App. 547 (1992)

Judge makes oral findings, imposes exceptional sentence, after appeal filed, commissioner signs findings of fact; held: only judge who has heard evidence has authority to find facts, CR 63(b), CrR 6.11, thus remanded for entry of findings by disposition judge or for new disposition hearing, *cf.: State v. Soto*, 45 Wn.App. 839 (1986), *State v. Ward,* 182 Wn.App. 574 (2014); I.

***State v. Belgarde***, 119 Wn.2d 711 (1992)

Acquiescent conduct alone is insufficient to support valid appointment of judge *pro tempore* to hear case in Superior Court, as there must be affirmative and knowing oral consent by party or his attorney where there is no written appointment signed by parties, *State ex rel. Cougill v. Sachs*, 3 Wash. 691, 694 (1892), *National Bank of Wash. v. McCrillis*, 15 Wn.2d 345, 356 (1942), *Vancouver v. Boldt,* 21 Wn.App.2d 100 (2022); retired judge who made discretionary rulings in a case before retirement may hear the case without consent of the parties, CONST. Art. 4, § 7 (amend. 80); *affirms State v. Belgarde*, 62 Wn.App. 684 (1991); 9-0.

***State v. Carlson***, 66 Wn.App. 909 (1992)

Appellate judge's participation in a program to prepare child sex abuse victims to testify is not grounds for disqualification from a case involving credibility of child witnesses; motion to disqualify appellate judge on grounds that prosecutor participated in her reelection campaign is

untimely where motion is made after opinion is filed; counsel has an obligation to check PDC information in timely fashion; I.

***Hanno v. Neptune Orient Lines***, 67 Wn.App. 681 (1992)

Pretrial orders which involve arranging calendars and setting hearings are not discretionary decisions precluding filing an affidavit of prejudice, RCW 4.12.040, -.050; *accord: Marriage of Henneman*, 69 Wn.App. 345 (1990), *but see: State v. Parra*, 122 Wn.2d 590 (1993), *State v. Lile*, 188 Wn.2d 766, 777-81 (2017); I.

***State v. Smith***, 68 Wn.App. 201 (1992)

Failure of Superior Court to enter findings following a CrR 3.6 hearing will result in dismissal absent compelling reasons, *State v. Peña*, 65 Wn.App. 711 (1992), *State v. Cruz*, 88 Wn.App. 905 (1997), *but see: State v. Pulido*, 68 Wn.App. 59 (1992), *cf.: State v. Head*, 136 Wn.2d 619 (1998); I.

***Yakima v. Irwin***, 70 Wn.App. 1 (1993)

In abortion protest case, instruction that "[a] moral objection to abortion will not justify the commission of a violation of law" is not a comment on the evidence, as it does not convey judge's personal attitudes toward the merits, *State v. Swan*, 114 Wn.2d 613 (1990); III.

***State v. Hansen***, 122 Wn.2d 712, 716-18 (1993)

Defendant calls an attorney to sue a judge, attorney tells defendant he won't represent him, defendant tells counsel he will "blow away" judge, attorney reports it, defendant is convicted of **intimidating a judge**, RCW 9A.72.160; held: statute prohibits threatening a judge through a third person because of an official decision of the judge, even if defendant did not intend that judge learn of threat, *State v. Side*, 105 Wn.App. 787 (2001), overruling, in part, *State v. Hansen*, 67 Wn.App. 511 (1992), *see: State v. Ozuna*, 184 Wn.2d 238 (2015); 5-4 (6-3 for result).

***State v. Cortez***, 73 Wn.App. 838 (1994)

Court may not vacate sentence to prevent deportation pursuant to CrR 7.8(b)(1), 7.8(b)(5), *see also: State v. Quintero Morelos*, 133 Wn.App. 591 (2006), or by writ of *audita querela;* III.

***State v. Lane***, 125 Wn.2d 825, 835-41 (1995)

Trial judge informs jury of the reason for a witness's early release from jail, which is contested by defense; held: the judge's statement to the jury was an opinion on a contested issue of fact, and thus was a comment on the evidence, CONST. Art. 4, § 16, *State v. Hansen*, 46 Wn.App. 292, 300 (1986), *State v. Trickel*, 16 Wn.App. 18, 25 (1976), *State v. Crotts*, 22 Wash. 245, 250-1 (1900), *State v. Eaker*, 113 Wn.App. 111 (2002), *State v. Ratliff*, 121 Wn.App. 642 (2004), *cf.: State v. Sivins*, 138 Wn.App. 52, 58-62 (2007); presumed prejudicial, *State v. Bogner*, 62 Wn.2d 247, 249 (1963), burden rests on state to show that no prejudice could have resulted, *State v. Stephens*, 7 Wn.App. 569, 573 (1972), *aff'd in part, rev'd in part,* 83 Wn.2d 485 (1974), harmless here; 7-2.

***State v. Martinez***, 76 Wn.App. 1, 6-8 (1994)

Trial court amending information *sua sponte* does not, by itself, violate appearance of fairness doctrine; *see:* *State v. Falco*, 59 Wn.App. 354 (1990); I.

***State v. Carter***, 77 Wn.App. 8, 11-12 (1995)

At sentencing on *Alford* plea, judge expresses belief in defendant's guilt, plea is later withdrawn, same judge presides at trial over defense objection under appearance of fairness doctrine; held: absent evidence of a judge's actual or potential bias, appearance of fairness doctrine is not violated, *State v. Post*, 118 Wn.2d 596, 618-9 (1992), *State v. Gamble*, 168 Wn.2d 161, 187-89 (2010), *State v. C.B.*, 195 Wn.App. 528, 544-47 (2016); here, judge's comments at original sentencing were relevant to his determining whether there were facts to support *Alford* plea, no evidence of prejudice or bias; 2-1, III.

***State v. Duran-Davila***, 77 Wn.App. 701 (1995)

To determine age of a witness, judge telephones juvenile court clerk who relates information from juvenile court file, court takes judicial notice that she is a minor; held: court may not take judicial notice of the existence of a juvenile court file without having viewed the actual file; age of witness was neither "generally known within the territorial jurisdiction" nor "capable of accurate and ready determination by resort to sources" of unquestionable accuracy, thus not an appropriate fact for judicial notice, ER 201(b); II.

***State v. Bilal***, 77 Wn.App. 720 (1995)

After verdict, defendant assaults trial judge in court, judge refuses to disqualify himself for sentencing; held: defendant should not benefit from his or her own misbehavior, recusal lies within the sound discretion of the trial court, which is not required to disqualify itself for threats or assaults which occur inside the courtroom; II.

***State v. Goss***, 78 Wn.App. 58 (1995)

Superior Court commissioner, CONST. art. 4, § 23, is authorized to issue search warrant; II.

***State v. Dominguez***, 81 Wn.App. 325 (1996)

Trial judge was both defense counsel and prosecuted defendant on prior cases, defendant claims he filed a lawsuit against the judge which was still pending, judge refuses to disqualify himself; held: bare oral assertion that defendant filed a lawsuit or disciplinary complaint is insufficient to prove potential bias, *State v. Post*, 118 Wn.2d 596 (1992), absent a specific showing of bias, a judge is not disqualified merely because he worked as a lawyer for or against a party in a previous, unrelated case, former CJC Canon 3(D)(1), *Pers. Restraint of Swenson*, 158 Wn.App. 812 (2010), *State v. Witherspoon*, 171 Wn.App. 271, 287-90 (2012), *affirmed, on other grounds*, 180 Wn.2d 875 (2014), *see:* *State v. Eastabrook*, 58 Wn.App. 805, 817 (1990); III.

***State v. Bourgeois***, 133 Wn.2d 389, 406-11 (1997)

During trial, juror reports to court that she saw an apparent friend of defendant glaring at witness and making threatening gesture, trial court does nothing until after verdict; held: failure

of trial court to notify counsel promptly was harmless error, *State v. Johnson*, 56 Wn.2d 700, 709 (1960), as no prejudice shown, reversing *State v. Bourgeouis*, 82 Wn.App. 314 (1996); 8-1.

***State v. Akers***, 88 Wn.App. 891 (1997), *affid, on other grounds,* 136 Wn.2d 641 (1998)

In proceeding to enhance penalty for sale of drugs within a school zone, special verdict form which does not state that the entity is a school is not a **comment on the evidence**, distinguishing *State v. Becker*, 132 Wn.2d 54 (1997); I.

***State v. Stephenson***, 89 Wn.App. 794 (1998)

A superior court judge is a "public servant," RCW 9A.04.110(22), for purposes of intimidating a public servant statute, RCW 9A.76.180, even if the judge has not filed his/her oath with the secretary of state, as required by RCW 2.08.080, *see: State v. Hendrickson*, 177 Wn.App. 67, 74-77 (2013), *State v. K.L.B.*, 180 Wn.2d 735 (2014); II.

***State v. Graham***, 91 Wn.App. 663 (1998)

During bench trial, judge realizes and discloses that he works for complainant, defense does not agree to allow judge to continue, judge disqualifies himself and declares a mistrial; held: mistrial necessitated by **recusal** in accordance with CJC 3(D)(1) constitutes a manifest necessity, *see: State v. Eldridge*, 17 Wn.App. 270, 276 (1977), *State v. Jones*, 26 Wn.App. 1 (1980), absent bad faith, *see: State v. Browning*, 38 Wn.App. 772 (1984), *State v. Rich*, 63 Wn.App. 743 (1992), jeopardy has not terminated and trial may proceed before a different judge; II.

***State v. Dewey***, 93 Wn.App. 50, 58-59 (1998), *overruled, on other grounds, State v. DeVencentis*, 150 Wn.2d 11 (2003)

In rape case, court's limiting instruction referring to prior misconduct as a "rape" was a comment on the evidence, CONST. Art. IV, § 16; II.

***State v. Turner***, 143 Wn.2d 715, 728 (2001)

Defendant curses at and threatens trial judge, then seeks disqualification; held: where trial court concludes, based upon its own observations, that defendant's behavior is intended to disrupt proceedings, it need not disqualify itself as defendant should not be allowed to benefit from his own misbehavior; 9-0.

***State v. Lown***, 116 Wn.App. 402 (2003)

When the superior court reviews a juvenile court commissioner's ruling, it must determine if the findings of fact are supported by substantial evidence, and reviews the conclusions of law *de novo*, RCW 2.24.050, *but see: State v. Wicker*, 105 Wn.App. 428 (2001); III.

***State v. Ratliff***, 121 Wn.App. 642 (2004)

Trial judge responds to jurors' questions without notifying parties, provides facts in response that were not established at trial; held: *ex parte* communications with jurors violates CrR 6.15(f)(1); providing facts to jurors is a comment on the evidence, violating CONST. art. IV, § 16; II.

***State v. Watson***, 155 Wn.2d 574 (2005)

Prosecutor submits memorandum to all judges in county opposing DOSA sentences, sends copies to public defender, at sentencing defense objects to *ex parte* communication; held: a general policy memo that does not address a specific case is not an improper *ex parte* communication, reversing, in part, *State v. Watson*, 120 Wn.App. 521 (2004); 6-3.

***State v. Zimmerman***, 130 Wn.App. 170, 180-83 (2005), *reaffirmed*, 135 Wn.App. 970 (2006)

In child molestation case, instruction to jury that testimony of victim need not be corroborated is not a comment on the evidence, *State v. Clayton*, 32 Wn.2d 571, 572 (1949), *State v. Malone*, 20 Wn.App. 712, 714-15 (1979), *but see: State v. Johnson*, 152 Wn.App. 924, 934-37 (2009); 2-1, II.

***State v. Jackman***, 156 Wn.2d 736, 742-45 (2006)

Where age is an element of an offense, a jury instruction which provides the date of birth of the complainant is a comment on the evidence, *State v. Becker*, 132 Wn.2d 54, 65 (1997), and is not harmless, *Neder v. United States*, 144 L.Ed.2d 35 (1999), *State v. Levy*, 156 Wn.2d 709 (2006), *but see: State v. Zimmerman*, 130 Wn.App. 170, 175-80 (2005), 135 Wn.App. 970, 975-76 (2006), *State v. Baxter*, 134 Wn.App. 587, 592-95 (2006); affirms *State v. Jackman*, 125 Wn.App. 552 (2005); 9-0.

***State v. Perala***, 132 Wn.App. 99, 114 (2006)

A motion to disqualify a judge is governed by CR 6, *see:* CrR 8.1, and must be served at least five days prior to the time when they are to be heard; III.

***State v. Levy***, 156 Wn.2d 709, 720-27 (2006)

To convict burglary instruction that reads "enters or remains unlawfully in a building to wit: the building…located at…" is a comment on the evidence, as it relieves that state of its burden of proving that defendant entered a building, *State v. Becker*, 132 Wn.2d 54, 64 (1997); instruction that states that, to convict, state must prove defendant "was armed with a deadly weapon, to wit: a .38 caliber revolver a crowbar" is a comment on the evidence, as it relieved the state of its burden of proving that the use of the crowbar caused it to be qualified as a deadly weapon, but is not a comment as to the revolver, as a revolver is a deadly weapon as a matter of law; robbery to convict instruction that reads, in part, that defendant unlawfully took personal property "to wit jewelry" is not a **comment on the evidence** as there is no dispute as to whether jewelry is personal property; naming victim is not a comment as it does not improperly suggest to the jury that it need not find that the property was taken from another; judicial comments are presumed prejudicial, distinguishing *Neder v. United States*, 144 L.Ed.2d 35 (1999), harmless here; 9-0.

***State v. Leon***, 133 Wn.App. 810 (2006)

Attorney who appears regularly before the judge as counsel appears as a witness in motion to withdraw guilty plea, court declines to disqualify itself; held: where judge declares that "he had no special relationship with [counsel] and that he could independently judge the matter at hand without any bias," then court's refusal to disqualify itself is not an abuse of discretion,

*see also: State v. Witherspoon*, 171 Wn.App. 271, 287-90 (2012), *affirmed, on other grounds*, 180 Wn.2d 875 (2014); I.

***State v. Baxter***, 134 Wn.App. 587, 592-95 (2006)

Including birth date of victim in instructions where age is an element is a manifest violation of CONST. art. IV, § 16, *State v. Jackman*, 156 Wn.2d 736, 742-45 (2006), is not a structural error or prejudicial *per se*, *State v. Levy*, 156 Wn.2d 709, 725 (2006), *State v. Zimmerman*, 135 wn.App. 970 (2006), but is presumed prejudicial, with burden of showing absence of prejudice unless the record affirmatively shows no prejudice; here, because defendant admitted to 911 operator that victim was below the threshhold age, the error was harmless; II.

***State v. Zimmerman,*** 135 Wn.App. 970 (2006)

In child molestation case, instruction to jury stating age of complainant is a comment on the evidence, *State v. Jackman*, 156 Wn.2d 736 (2006), but is not structural error, *Neder v. United States*, 144 L.Ed.2d 35 (1999); here, because there was no dispute regarding complainant's age, the comment was harmless; reaffirms *State v. Zimmerman*, 130 Wn.App. 170 (2005); II.

***State v. Chamberlin***, 161 Wn.2d 30, 36-41 (2007)

A judge who issues a search warrant is not obliged to disqualify him or herself from hearing a suppression motion; 9-0.

***State v. Brown***, 137 Wn.App. 587 (2007)

In **intimidating a judge** case, RCW 9A.72.160, defendant tells third party that he has thought about shooting the judge; held: an expression of thoughts of harming a judge in the past is not a "true threat," *State v. Knowles*, 91 Wn.App. 367, 373 (1998), *State v. Johnson*, 157 Wn.2d 355, 360-61 (2006), to use force in the future, thus dismissed, *cf.: State v. Ozuna*, 184 Wn.2d 238 (2015), *State v. Dawley*, 11 Wn.App.2d 527 (2019); II.

***State v. Sivins***, 138 Wn.App. 52, 58-62 (2007)

Trial court suppresses some evidence pretrial, then reads information to jury which refers to the evidence that was suppressed; held: because trial judge did nothing to convey his personal opinion of the facts or merits of the case during his inadvertent disclosure, court did not establish disputed facts, prove state's case or bear on credibility of witnesses, thus no art. IV, § 16 comment on the evidence violation, *see: State v. Eisner*, 95 Wn.2d 458 (1981); III.

***State v. Hermann***, 138 Wn.App. 596 (2007)

Defendant takes rings from his mother, pawns them, court admits evidence of purchase price 20 years earlier plus current wholesale price, court instructs jury "evidence of retail price may be sufficient to establish value," defendant is convicted of theft 1º and trafficking in stolen property, RCW 9A.82.050(1); held: by instructing jury that evidence of retail price could be sufficient to establish value, trial court improperly directed jury to give greater weight to that evidence than evidence of wholesale value, *Det. Of R.W.*, 98 Wn.App. 140, 144 (1999); II.

***State v. Lopez***, 142 Wn.App. 341, 353 (2007)

One judge hears pretrial testimony and makes factual and legal findings, case is then assigned to another judge for trial, defendant's motion for mistrial denied; held: CrR 6.11(a) does not require that, after a mistrial, a case must be assigned to the same judge who heard pretrial motions and testimony; I.

***State v. Ryna Ra***, 144 Wn.App. 688, 704-05 (2008)

Trial judge comments during instruction colloquy that he will not give self defense because, in part, defendant is "some distorted character who breeds and lives violently," scolds defendant for nodding "as if you are agreeing with me," provides state with proposal of theories for us in admitting improper ER 404(b) evidence, expresses concern at sentencing for victim's war record were all improper; II.

***State v. Boss***, 167 Wn.2d 710, 720-22 (2009)

In custodial interference case, instruction to jury that Child Protection Service had lawful right to custody is a comment on the evidence, *see: State v. Baxter*, 134 Wn.App. 587, 592-93 (2006); while trial court is to determine the validity of the order granting custody to CPS, it is for the jury to determine whether state proved that CPS had a right to physical custody, harmless here; affirms *State v. Boss*, 144 Wn.App. 878 (2008); 9-0.

***State v. Morgensen***, 148 Wn.App. 81, 90-91 (2008)

Trial judge discloses that he may have previously represented defendant, at sentencing judge further discloses his opinion about defendant; held: absent objection or affidavit of prejudice, defense waives objection, *In re Welfare of Carpenter*, 21 Wn.App. 814, 820 (1978), *State v. Bolton*, 23 Wn.App. 708, 714 (1979); II.

***State v. Francisco***, 148 Wn.App. 168, 178-80 (2009)

In drug possession case, defense counsel argues to jury that state failed to produce a dirty urinalysis from the jail, state responds in clsoing that jail must have a court order before it can produce a urinalysis, defense objection is overruled, judge in overruling objection states that jail must have an order; held: judge's statement was not a comment on the evidence as it was merely a response to an argument of counsel, trial court instructed jury to disregard it's statement so no error occurred; III.

***State v. Johnson***, 152 Wn.App. 924, 934-37 (2009)

In child molestation case, instruction to jury that testimony of victim need not be corroborated, RCW 9A.44.020(1), is not a comment on the evidence, *State v. Zimmerman*, 130 Wn.App. 170, 180-83 (2005), 135 Wn.App. 970 (2006), but Division II urges courts to "consider instructing the jury that it is to decide all questions of witness credibility as part of the instruction," ¶ 28.

***State v. Gamble***, 168 Wn.2d 161, 187-89 (2010)

Following reversal of 1991 murder case, new trial judge is assigned in 2005, defendant seeks disqualification because judge had represented defendant's wife in 1991 in dissolution, judge says she has no recollection of the case, reviews her dissolution file and states that representation was brief, never spoke to defendant; held: while potential bias is present,

remoteness of representation and lack of recollection by judge establishes that defendant has not established an appearance of unfairness; 8-1.

***State v. Tracer***, 155 Wn.App. 171 (2010), 173 Wn.2d 708, 723 (2012)

Due to conflict, prosecutor appoints special prosecutor who fails to appear at a hearing, defense counsel reports to court that special prosecutor had agreed to reduce charge, trial court appoints an attorney who happens to be in the courtroom as special prosecutor, orders attorney to move to reduce charge, takes plea to lesser charge, state appeals; held: judge lacks authority to amend information or accept plea to lesser, as court violated separation of powers doctrine by effectively amending *sua sponte;* trial judge has authority to appoint a special prosecutor when any prosecutor fails to attened court, RCW 36.27.030, appointing a criminal defense attorney creates a conflict of interest, plea taken was thus invalid; II.

***State v. Skuza***, 156 Wn.App. 886 (2010)

Having excluded witnesses, ER 615, trial judge overhears a defense witness speaking to the defendant outside the courthouse, excludes the witness from testifying, *see: State v. Rangitsch*, 40 Wn.App. 771 (1985); held: trial judge became a witness, defendant had no opportunity to question him about his observations, judge's description of the conversation was insufficient to warrant a finding that a violation occurred, court erred when it applied the harshest possible sanction of excluding evidence central to defense case; II.

***State v. Hartzell***, 156 Wn.App. 918, 935-41 (2010)

Limiting instruction that reads, "[e]vidence…has been admitted that you may or may not consider as establishing an association of the defendants to the crimes charged," while inartful, did not comment on the evidence due to the use of the word "may;" I.

***Pers. Restraint of Swenson***, 158 Wn.App. 812 (2010)

A year after sentencing, defendant files PRP demanding resentencing before a different judge because sentencing judge was a prosecutor in a prior juvenile case against defendant twenty years earlier; held: without a specific showing of actual or potential bias, a judge who has previously prosecuted the defendant need not be disqualified, at least where there is nothing to indicate that the judge was aware of her prior involvement, *State v. Dominguez,* 81 Wn.App. 325 (1996), *se also: State v. Witherspoon,* 171 Wn.App. 271, 287-90 (2012), *affirmed, on other grounds,* 180 Wn.2d 875 (2014); I.

***State v. Duran-Madrigal***, 163 Wn.App. 608 (2011)

A judge *pro tempore,* approved by the parties and sworn by the court, CONST., Art. IV, § 7, RCW 2.08.180, may accept a guilty plea, *Mitchell v. Kitsap County,* 59 Wn.App. 177, 185 (1990); I.

***State v. Hawkins***, 164 Wn.App. 705, 711-14 (2011)

A visiting judge is presumed to have received a request to sit in a different county even where the record is silent, CONST., art. IV, § 7, *State v. Holmes,* 12 Wash. 169 (1895); a ruling on a post-conviction motion to dismiss is a discretionary ruling, defendant has no right to an affidavit of prejudice as to that judge in a subsequent motion to modify or vacate a sentence, CrR

7.8(b), as it is not a new case arising from new facts that have occurred since the entry of final judgment, *State v. Belgarde,* 119 Wn.2d 711, 715 (1992), *State v. Clemons,* 56 Wn.App. 57, 59 (1989), distinguishing *State v. Torres,* 85 Wn.App. 231, 234 (1997); I.

***State v. Jones***, 171 Wn.App. 52, 54-55 (2012)

After witness identifies defendant, prosecutor asks if the record may reflect same, trial court states that it shall so reflect, defense does not object; held: judge stating an undisputed peripheral fact is not a comment on the evidence, *State v. Louie,* 68 Wn.2d 304, 314 (1966); II.

***State v. Witherspoon***, 171 Wn.App. 271, 287-90 (2012), *affirmed, on other grounds,* 180 Wn.2d 875 (2014)

Trial judge states he may have represented defendant fifteen years ago, denies disqualification; held: absent evidence that judge had actually represented defendant and absent evidence to overcome presumption that court performed its functions without bias or prejudice, judge's impartiality may not be reasonably questioned, *State v. Dominguez,* 81 Wn.App. 325, 327-29 (1996); II.

***State v. Hendrickson***, 177 Wn.App. 67, 74-77 (2013)

A candidate for judicial or other public office is not a "public servant" for purposes of intimidating a public servant, RCW 9A.76.180 (2011), *see: State v. K.L.B.,* 180 Wn.2d 735 (2014); a threat against a judicial candidate who is a sitting judge is insufficient to convict of intimidating a public servant where the threat is directed against candidacy rather than official judicial actions; III.

***State v. Ward***, 182 Wn.App. 574 (2014)

Following suppression hearing judge orally states findings, parties submit proposed written findings to the court, a different judge signs defendant's proposed findings, no objection below; held: a substitute judge may sign findings and conclusions based upon another judge's ruling when the parties do not object, after knowledge of the signature of the substitute judge, distinguishing *State v. Bryant,* 65 Wn.App. 547 (1992), *Marriage of Crosetto,* 101 Wn.App. 89, 95 (2000); III.

***State v. Brush***, 183 Wn.2d 550, 556-60 (2015)

Instruction regarding domestic violence aggravating factor, RCW 9.94A.535(3)(h)(i) (2008), that states that a "prolonged period of time means more than a few weeks" is a **comment on the evidence**, distinguishing *State v. Barnett,* 104 Wn.App. 191, 203 (2001), *cf.: State v. Hood,* 196 Wn.App. 127, 136-37 (2016), *State v. Sandoval,* 8 Wn.App.2d 267 (2019); 9-0.

***State v. Gentry***, 183 Wn.2d 749, 759-63 (2015)

A judge who worked as a prosecutor during a defendant's trial but had no involvement in the case is not obliged to disqualify herself from hearing a post-trial motion; a judge whose husband worked for the police during a defendant's trial is not obliged to disqualify herself; 9-0.

***State v. Blizzard***, 195 Wn.App. 717, 724-29 (2016)

County prosecutor writes judge a letter claiming bias and prejudice against the state, criticizing the case at bar and others, stating state cannot get a fair trial, deputy assigned to case does not move for disqualification nor does defense except on appeal; held: appearance of fairness doctrine is waived if not raised before the trial court, *Pers. Restraint of Swenson,* 158 Wn.App. 812, 818 (2010), *State v. Bolton,* 23 Wn.App. 708, 714 (1979); due process violation may be raised for first time on appeal, *Williams v. Pennsylvania,* 579 U.S. 1, 136 S.Ct. 1899, 1909-10, 195 L.Ed.2d 132 (2016), requires an objective analysis; unconstitutional judicial bias must be based upon (1) judge having a financial interest in the outcome, (2) judge previously participated in the case in an investigative or prosecutorial capacity, (3) individual with a stake in the case had a disproportionate role in placing the judge on the case, *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 881, 129 S.Ct. 2252, 173 L.Ed.2d 1208 (2009), and, possibly, when a judge is the recipient of personal criticisms that are highly offensive, *Ungar v. Sarafite,* 376 U.S. 575, 583, 84 S.Ct. 841, 11 L.Ed.2d 921 (1964); here the letter was professional, not personal; a rule requiring disqualification would enable the prosecutor to manipulate the judiciary; III.

***State v. Solis-Diaz,*** 187 Wn.2d 535 (2017)

Court of Appeals reverses and remands for resentencing because trial judge did not adequately consider defendant's youth and mitigating circumstances, at resentencing judge criticizes Court of Appeals decision and imposes the same sentence, Court of Appeals remands again but declines to order that judge be disqualified; held: record suggests that sentencing judge had already reached a firm conclusion and might not be amenable to considering mitigating evidence, thus another judge must hear the resentencing; reverses, in part, *State v. Solis-Diaz,* 194 Wn.App. 129 (2016); *per curiam.*

***Pers. Restraint of Caldellis***, 187 Wn.2d 127, 144-46 (2016)

Defense provides affidavits that spectators saw judge and jurors sleeping during part of the trial; held: sleeping judges and jurors is not structural error absent some evidence that demonstrate what testimony was missed, *Pers. Restraint of Lui,* 188 Wn.2d 525, 540-42 (2016); 9-0.

***Rippo v. Baker***, 137 S. Ct. 905, 197 L. Ed.2d 167 (2017)

At defendant's jury trial defense learns that judge is being investigated by the prosecutor for bribery, judge denies motion for disqualification; held: "the Due Process Clause may sometimes demand recusal even when a judge 'ha[s] no actual bias.' *Aetna Life Ins. Co. v. Lavoie,* 475 U.S. 813, 825, 106 S.Ct. 1580, 89 L.Ed.2d 823 (1986). Recusal is required when, objectively speaking, 'the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.'" *Withrow v. Larkin,* 421 U.S. 35, 47, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975); see *Williams v. Pennsylvania,* 579 U.S. ——,136 S.Ct. 1899, 1905, 195 L.Ed.2d 132 (2016)," *Bracy v. Gramley*, 520 U.S. 899, 117 S.Ct. 1793, 138 L.Ed.2d 97 (1997); *per curiam.*

***State v. Jefferson***, 199 Wn.App. 772, 786-92 (2017), *reversed, on other grounds,* 192 Wn.2d 225 (2018)

Trial judge admonishing defense counsel for unprofessional conduct in the absence of the jury does not violate appearance of fairness doctrine where defense counsel's conduct was unprofessional; I.

***State v. Sinrud***, 200 Wn.App. 643, 650-52 (2017)

In VUCSA possession with intent case court instructs jury "[m]ere possession of a controlled substance does not allow you to infer an intent to deliver a controlled substance. The law requires substantial corroborating evidence of intent to deliver in addition to the mere fact of possession. The law requires at least one additional corroborating factor," consistent with *State v. Hagler*, 74 Wn.App. 232, 236 (1994), defendant argues on appeal that it is a **comment on the evidence**; held: trial court should not instruct jury based upon an appellate court's sufficiency holding as the sufficiency standard on appeal ("any rational jury") is lower than beyond a reasonable doubt, *State v. Brush*, 183 Wn.2d 550, 557-58 (2015), *but see: State v. Sandoval*, 8 Wn.App.2d 267 (2019), thus instruction was a prejudicial judicial comment on the evidence; I.

***State v. Agustin***, 1 Wn.App.2d 911 (2018)

State moves to dismiss asserting that the evidence is insufficient, trial court denies motion, orders prosecutor to call witnesses and convicts; held: while the court has discretion to deny a state's motion to dismiss, CrR 8.3(a), *see: State v. Haner*, 95 Wn.2d 858 (1981), *State v. Lamb*, 175 Wn.2d 121, 130-32 (2012), a trial court may not deny a prosecutor's request to dismiss a charge the prosecutor believes is unsupported by sufficient evidence as it violates separation of powers doctrine, *see: State v. Rice*, 174 Wn.2d 884, 901-02 (2012), judge may only deny government's motion to dismiss when provided an "inappropriate reason;" III.

***State v. Backemeyer***, 5 Wn.App.2d 841 (2018)

During deliberations jury sends out questions which clearly establish that they did not understand the self defense instructions, defense counsel agrees with suggestion that court answer the questions with "read your instructions;" held: where a jury indicates that it does not understand a jury instruction, court must eliminate the confusion, . *Bollenbach v. United States*, 326 U.S. 607, 612-13, 66 S.Ct. 402, 90 L.Ed. 350 (1946), *cf.: State v. Sutton*, 18 Wn.App.2d 38 (2021), and counsel's failure to ask court to re-instruct to clear up the confusion is ineffective assistance; 2-1, III.

***State v. Lemke***, 7 Wn.App.2d 23 (2019)

Defendant flunks drug court, seeks DOSA, judge calls him, *inter alia*, "a fucking addict" and "just a criminal," denies DOSA; held: judge's manifestation of personal animosity toward a defendant is not something appellate court can write off as a byproduct of the informal and confrontational culture of drug court. A "fair trial in a fair tribunal is a basic requirement of due process," reversed and remanded for resentencing before a different judge; I.

***State v. N.B.***, 7 Wn.App.2d 831 (2019)

During judge's decision at bench trial court states that it is not uncommon for child witnesses to testify inconsistently, defense claims court improperly took judicial notice; held: judge may explain her reasoning based upon her experience, *State v. Grayson*, 154 Wn.2d 333, 339 (2005),which is not judicial notice; III.

***State v. Sandoval,*** 8 Wn.App.2d 267 (2019)

In possessing stolen property case instructing jury that a credit card is an access device is not a comment on the evidence, distinguishing " *State v. Brush*, 183 Wn.2d 550, 557 (2015). II.

***State v. Mansour,*** 14 Wn.App.2d 323 (2020)

In child molestation case use of victim's initials in information and to convict instruction does not deprive defendant of due process, is not a comment on the evidence, and does not amount to a court closure; I.

***State v. Bass,*** 18 Wn.App.2d 760 (2021)

Judge's answer to a juror's question during voir dire that the court would determine whether a witness had relevant information is not a comment on the evidence; I.

***Pers. Restraint of Ayerst***, 17 Wn.App.2d 356 (2021)

The fact that the judge who presided over petitioner's jury trial was subsequently charged with rape is not a basis, by itself, for reversal; III.

***Vancouver v. Boldt***, 21 Wn.App.2d 100 (2022)

Defense counsel can orally stipulate to a district court commissioner trying a case, RCW 3.42.020, *cf.: State v. Sain*, 34 Wn.App. 53 (1983), *State v. Hastings*, 115 Wn.2d 42 (1990); I.

# JURY
## *Batson*

***Batson v. Kentucky***, 90 L.Ed.2d 69 (1986)

Prosecutor may not peremptorily challenge a juror solely on the basis of race, *see: Johnson v. California*, 162 L.Ed.2d 129 (2005), *Seattle v. Erickson*, 188 Wn.2d 721 (2017), *State v. Saintcalle*, 178 Wn.2d 34 (2013); *see also*: *Teaque v. Lane*, 103 L.Ed.2d 334 (1989), *State v. Morales*, 53 Wn.App. 681 (1989), *State v. Burch*, 65 Wn.App. 828 (1992), *Georgia v. McCollum*, 120 L.Ed.2d 33 (1992), *Purkett v. Elem*, 131 L.Ed.2d 834 (1995), *Snyder v. Louisiana*, 170 L.Ed.2d 175 (2008), *State v. Rhone*, 168 Wn.2d 645 (2010), *State v. Jefferson*, 192 Wn.2d 225 (2018); 7-2.

***Holland v. Illinois***, 107 L.Ed.2d 905 (1990)

White defendant's Sixth Amendment right to impartial jury not violated by prosecutor's peremptory challenges to all black jurors, *cf.*: *Powers v. Ohio*, 113 L.Ed.2d 411 (1991); Sixth Amendment right to impartial jury does not assure that the jury will be representative, rather that the jury is drawn from a fair cross-section of the community, *see: Berhhuis v. Smith*, 559 U.S. 314, 176 L.Ed.2d 249 (2010); 7-2.

***State v. Burch***, 65 Wn.App. 828 (1992)

Male defendant may object to prosecutor's peremptory challenges to female jurors as violating equal protection, state ERA, CONST. art. 31, and court may require a gender-neutral explanation to uphold challenge, *Batson v. Kentucky*, 90 L.Ed.2d 69 (1986), *J.E.B. v. Alabama ex rel. TB.*, 128 L.Ed.2d 89 (1994), *State v. Beliz*, 104 Wn.App. 206, 213-14 (2001), *State v. Brown*, ___ Wn.App.2d ___, 37645-1-III, 37718-1-III (2022); I.

***Georgia v. McCollum***, 120 L.Ed.2d 33 (1992)

Defendant's exercise of a racially discriminatory peremptory challenge is state action, prohibited by equal protection clause, prosecutor has standing to raise equal protection claim on behalf of excluded jurors, *State v. Bennett*, 180 Wn.App. 484 (2014); 7-2.

***State v. Ashcraft***, 71 Wn.App. 444, 458-60 (1993)

Prosecutor's claim that challenge was due to juror's "nervousness and evasiveness" is a sufficient neutral explanation of exercising a peremptory challenge, as they are related to demeanor, which was supported by the record, *see: Purkett v. Elem*, 131 L.Ed.2d 834 (1995), *Snyder v. Louisiana*, 170 L.Ed.2d 175 (2008), *State v. Bennett*, 180 Wn.App. 484 (2014), *State v. Jefferson*, 192 Wn.2d 225 (2018), *State v. Brown*, ___ Wn.App.2d ___, 37645-1-III, 37718-1-III (2022); I.

***J.E.B. v. Alabama ex rel. T.B.***, 128 L.Ed.2d 89 (1994)

Gender discrimination in exercise of peremptory challenges violates equal protection rights of jurors and litigants, *State v. Beliz*, 104 Wn.App. 206, 213-14 (2001), *State v. Brown*, ___ Wn.App.2d ___, 37645-1-III, 37718-1-III (2022); 6-3.

***State v. Sanchez***, 72 Wn.App. 821 (1994)

To establish a *prima facie* case of purposeful discrimination in selection of jury, defense must first show that the use of the peremptory challenge to a member of a cognizable group (race or sex) raises an inference of discrimination, which may include a pattern of strikes and the questions during voir dire, *State v. Burch*, 65 Wn.App. 828, 840 (1992), *see: Johnson v. California*, 162 L.Ed.2d 129 (2005), *Seattle v. Erickson*, 188 Wn.2d 721 (2017), after which prosecutor must come forward with a neutral explanation, whereupon trial court enters a finding of fact based upon credibility, *Hernandez v. New York*, 500 U.S. 352, 114 L.Ed.2d 395 (1991), *State v. Rhone*, 168 Wn.2d 645 (2010); where trial court finds that state's challenges were nondiscriminatory, there is no need to decide whether defendant had established a *prima facie* case, *but see: State v. Jefferson*, 192 Wn.2d 225 (2018), *cf.: State v. Brown*, ___ Wn.App.2d ___, 37645-1-III, 37718-1-III (2022); III.

***Purkett v. Elem***, 131 L.Ed.2d 834 (1995)

Prosecutor's explanations for excusing two black jurors because one had long unkempt hair and facial hair, and the other because he had facial hair and had had a gun pointed at him in a robbery were satisfactory nondiscriminatory reasons which supported the trial court's finding of a nondiscriminatory motive, *see: State v. Bennett*, 180 Wn.App. 484 (2014), *but see: State v. Jefferson*, 192 Wn.2d 225 (2018); *accord: State v. Luvene*, 127 Wn.2d 690, 699-701 (1995), *State v. Brown*, ___ Wn.App.2d ___, 37645-1-III, 37718-1-III (2022); 7-2.

***State v. Wright***, 78 Wn.App. 93 (1995)

Prosecutor exercises peremptory challenge on only African-American juror, who states during defense voir dire that blacks are unfairly targeted by police; prosecutor challenges two Hispanics, one of whom said he had a personal experience with police who lied, the other expressed negative impression of prosecution stemming from another case he had sat on; held: prosecutors had legitimate explanations for excusing the jurors, no *prima facie* case of purposeful discrimination was established, *see: State v. Vreen*, 143 Wn.2d 923 (2001), *State v. Hicks*, 163 Wn.2d 477, 489-94 (2008), *State v. Rhone*, 168 Wn.2d 645 (2010), *State v. Meredith*, 178 Wn.2d 180 (2013), *State v. Brown*, ___ Wn.App.2d ___, 37645-1-III, 37718-1-III (2022), *but see: State v. Saintcalle*, 178 Wn.2d 34 (2013), *Seattle v. Erickson*, 188 Wn.2d 721 (2017), *State v. Jefferson*, 192 Wn.2d 225 (2018); absent court rules defining proper procedures for *Batson* challenges, they may be raised for the first time on appeal; I.

***State v. Rhodes***, 82 Wn.App. 192 (1996)

Sole black juror is excused by prosecutor over objection, juror stated on voir dire he had been improperly stopped by police but could be fair; held: where the sole member of a constitutionally cognizable racial group is challenged, trial court should, upon demand, ask prosecutor to articulate reason for challenge, *State v. Wright*, 78 Wn.App. 93, 101 (1995), *State v. Beliz*, 104 Wn.App. 206, 213 (2001), *State v. Hicks*, 163 Wn.2d 477, 489-94 (2008), *State v. Rhone*, 168 Wn.2d 645 (2010), *Seattle v. Erickson*, 188 Wn.2d 721 (2017), *but see: State v. Powell*, 55 Wn.App. 914 (1989), *State v. Vreen*, 143 Wn.2d 923 (2001); challenge to a juror who believes he was improperly stopped by police is a race-neutral explanation, *cf.: State v. Saintcalle*, 178 Wn.2d 34 (2013), *State v. Meredith*, 178 Wn.2d 180 (2013), *but see: State v. Jefferson*, 192 Wn.2d 225 (2018); I.

***Campbell v. Louisiana***, 140 L.Ed.2d 551 (1998)

White defendant has standing to raise equal protection and due process objections to alleged discrimination against black grand jurors; 7-2.

***State v. Evans***, 100 Wn.App. 757 (2000)

Trial judge may raise a *Batson* issue *sua sponte;* trial court should not elicit a party's race-neutral explanation before determining whether opposing party has established a *prima facie* case that the challenge was based upon membership of a constitutionally cognizable group by a pattern of strikes against members of the group or the particular questions asked, *State v. Wright* 78 Wn.App. 93, 100-101 (1995), *see: State v. Cook,* 175 Wn.App. 36 (2013), *but see: State v. Rhone*, 168 Wn.2d 645 (2010), *State v. Saintcalle*, 178 Wn.2d 34 (2013), *Seattle v. Erickson*, 188 Wn.2d 721 (2017); improper for trial court to require a race-neutral reason for every peremptory challenge to persons of color, *see: State v. Meredith*, 178 Wn.2d 180 (2013); I.

***State v. Jorden***, 103 Wn.App. 221, 229-30 (2000)

*Batson v. Kentucky*, 90 L.Ed.2d 69 (1986), is inapplicable to challenges for cause; II.

***Johnson v. California***, 162 L.Ed.2d 129 (2005)

State standard that establishes a preponderance of the evidence burden on defense to establish prosecutor's discriminatory peremptory challenges is at odds with the *prima facie* inquiry mandated by *Batson v. Kentucky*, 90 L.Ed.2d 69 (1986); 8-1.

***State v. Barajas***, 143 Wn.App. 24, 34-37 (2007)

Absent evidence of a systematic exclusion of members of defendant's own racial group from jury venire, *Batson v. Kentucky,* 90 L.Ed.2d 69, 85-86 (1986), *State v. Hilliard*, 89 Wn.2d 430, 440 (1977), trial court is not obliged to provide defense with a copy of the master jury pool list, *State v. Cienfuegos*, 144 Wn.2d 222, 232 (2001), GR 18, GR 31; III.

***State v. Hicks***, 163 Wn.2d 477, 489-94 (2008)

State exercises peremptory challenge to sole remaining African-American juror, trial court finds *prima facie* case of discrimination, prosecutor states challenge is because juror has a masters in education, is a social worker and a relative had served time, court grants challenge finding explanation is race-neutral; held: trial court has discretion to demand a race-neutral explanation following challenge to a single minority juror, *State v. Thomas*, 166 Wn.2d 380, 395-98 (2009), *see: State v. Rhone*, 168 Wn.2d 645 (2010), *Seattle v. Erickson*, 188 Wn.2d 721 (2017), lack of questioning prior to dismissing a juror can be evidence that the removal is race-based, *Miller-El v. Dretke*, 162 L.Ed.2d 196 (2005); where there is a race-neutral explanation, appeals court need not determine whether a *prima facie* case was properly found, *Hernandez v. New York*, 500 U.S. 352, 359, 114 L.Ed.2d 395 (1991), *State v. Bennett*, 180 Wn.App. 484 (2014), *cf.: State v. Meredith*, 178 Wn.2d 180 (2013), *but see: State v. Jefferson*, 192 Wn.2d 225 (2018), *cf.: State v. Brown*, ___ Wn.App.2d ___, 37645-1-III, 37718-1-III (2022); "dismissing teachers or social workers from jury service … are not race- or gender-based and thus constitutionally permitted," at 494 ¶ 40; 6-3.

***State v. Thomas,*** 166 Wn.2d 380, 395-98 (2009)

Sole black juror expresses concern about all-white makeup of venire, trial judge upholds prosecutor's argument that the juror was hostile to state as a race-neutral reason; held: while a

judge may, but need not, recognize a *prima facie* case on the basis of the state's strike of a lone juror of a constitutionally cognizable group, *State v. Hicks*, 163 Wn.2d 477, 489-94 (2008), *but see: Seattle v. Erickson*, 188 Wn.2d 721 (2017), the court's credibility ruling that the prosecutor's explanation is race-neutral eliminates the need to determine if the court properly found a *prima facie* case of discrimination, *State v. Luvene*, 127 Wn.2d 690, 699 (1995), *State v. Cook*, 175 Wn.App. 36 (2013), *State v. Bennett*, 180 Wn.App. 484 (2014), *see: State v. Rhone*, 168 Wn.2d 645 (2010), *State v. Meredith*, 178 Wn.2d 180 (2013), *State v. Brown*, ___ Wn.App.2d ___, 37645-1-III, 37718-1-III (2022), *but see: State v. Jefferson*, 192 Wn.2d 225 (2018); 6-3.

***Thaler v. Haynes***, 559 U.S. 43, 175 L.Ed.2d 1003 (2010)

Trial court need not observe a juror's demeanor to conclude that a prosecutor's explanation that juror's demeanor was "humorous" and "not serious" was a race-neutral explanation in denying a challenge pursuant to *Batson v. Kentucky*, 476 U.S. 79, 90 L.Ed.2d 69 (1986); *per curiam.*

***State v. Rhone***, 168 Wn.2d 645 (2010)

"A *prima facie* case of discrimination is established under *Batson* when the sole remaining venire member of the defendant's constitutionally cognizable racial group or the last remaining minority member of the venire is peremptorily challenged," at 661 ¶ 27; trial court's determination that there was no discriminatory motive is upheld by five justices, but concurring opinion by fifth justice agrees with dissent on the bright line rule: "a defendant establishes a *prima facie* case of discrimination when, as here, the record shows that the state exercised a peremptory challenge against the sole remaining venire member of the defendant's constitutionally cognizable racial group," at 659 ¶ 23, *but see: State v. Meredith*, 178 Wn.2d 180 (2013), *see: State v. Cook*, 175 Wn.App. 36 (2013), *State v. Saintcalle*, 178 Wn.2d 34 (2013), *Seattle v. Erickson*, 188 Wn.2d 721 (2017), *State v. Jefferson*, 192 Wn.2d 225 (2018); defendant's assertion of discriminatory peremptory challenge occurred after the last minority member was excused and jury panel was sworn, thus "had the trial court concluded that the prosecutor's peremptory challenge…was discriminatory…the trial court would be required to dismiss the entire jury, declare a mistrial," at 649 n. 1, *State v. Hillman*, ___ Wn.App.2d ___, 2022WL16642464 (2022), *but see: Seattle v. Erickson*, 188 Wn.2d 721 (2017).

***Felkner v. Jackson***, 562 U.S. 594, 179 L.Ed.2d 374 (2011)

Trial judge's credibility evaluation of prosecutor's "race-neutral" explanation of exercise of a peremptory challenge is entitled to "great deference" on appeal and must be sustained unless "clearly erroneous," *Snyder v. Louisiana*, 552 U.S. 472, 477, 170 L.Ed.2d 175 (2008), *see: State v. Bennett*, 180 Wn.App. 484 (2014), *State v. Jefferson*, 192 Wn.2d 225 (2018); *per curiam.*

***State v. Saintcall****e*, 178 Wn.2d 34 (2013)

Lead opinion strongly suggests that it is abandoning *Batson's* purposeful discrimination requirement with a requirement that necessarily accounts for and alerts trial courts to the problem of unconscious bias and that a *Batson* challenge is to be sustained if there is a reasonable probability that race was a factor in the exercise of the peremptory or where the judge finds it is more likely than not that, but for defendant's race, the peremptory would not have been exercised, at 54, *Seattle v. Erickson*, 188 Wn.2d 721 (2017), *but see: State v. Meredith*, 178

Wn.2d 180 (2013), *see: State v. Jefferson,* 192 Wn.2d 225 (2018); 8-1 (three concurring opinions).

***State v. Meredith***, 178 Wn.2d 180 (2013)

Regarding *Batson* procedure, Supreme Court rejects apparent bright-line rule in *State v. Rhone,* 168 Wn.2d 645 (2010) which appeared to hold that a *prima facie* case of discrimination is established when the sole remaining member of defendant's racial group is peremptorily challenged, returning to prior rule that requires "something more than a peremptory challenge against a member of a racially cognizable group" as set forth in *Rhone* lead opinion, *but see: Seattle v. Erickson,* 188 Wn.2d 721 (2017), *State v. Jefferson,* 192 Wn.2d 225 (2018); affirms *State v. Meredith,* 165 Wn.App. 704 (2011); 7-2.

***State v. Cook***, 175 Wn.App. 36 (2013)

State strikes one of two Black jurors, defense raises *Batson* challenge, state claims that Black defense counsel called juror "brother," and that juror stated he had been on a hung jury previously, record does not support claim that counsel called juror "brother" and that it was the other black juror who sat on a case unable to reach a unanimous verdict; held: reasons that are not legitimate because they are not supported by the record raise an inference that the remaining reasons are pretextual; a reason for challenging a juror may be deemed pretextual and not race-neutral if other unchallenged jurors made similar assertions; state's assertion that juror's statement that past conduct would not have a bearing on defendant's guilt is not valid as a race-neutral explanation as the statement is consistent with ER 404(b), 15 other jurors answered similarly of whom 5 were selected to serve; state's explanation that juror in question had said he had negative experiences with the police is belied by the fact that the juror also said he had positive experiences with the police and harbored no bias against police; while challenge to a single Black juror should require defense to set forth a *prima facie* case of purposeful discrimination, where state has proffered a race-neutral explanation and the trial court has ruled on the ultimate question of intentional discrimination, a *prima facie* showing is unnecessary, *State v. Luvene,* 127 Wn.2d 690, 699 (1995), *Hernandez v. New York,* 500 U.S. 352, 359, 114 L.Ed.2d 395 (1991), *cf.: State v. Saintcalle,* 178 Wn.2d 34 (2013), *see: State v. Jefferson,* 192 Wn.2d 225 (2018), *State v. Brown,* ___ Wn.App.2d ___, 37645-1-III, 37718-1-III (2022); prior opinion, *State v. Cook,* 173 Wn.App. 166 (2013), withdrawn,; I.

***State v. Bennett,*** 180 Wn.App. 484 (2014)

State raises *Batson* challenge to defense exercise of peremptory challenges to four Hispanic jurors, defense counsel offers reasons for striking, trial judge determines that two of the four were racially motivated and denies challenges; held: trial judge's decision on whether the "race-neutral explanations" are credible, like any other credibility determination, cannot be overturned by an appellate court, *cf.: Miller-El v. Cockrell,* 537 U.S. 322, 339, 154 L.Ed.2d 931 (2003), *State v. Thomas,* 166 Wn.2d 380, 395-98 (2009) **,** *Felkner v. Jackson,* 562 U.S. 594, 179 L.Ed.2d 374 (2011); III.

***Davis v. Ayala***, 576 U.S. 257, 135 S.Ct. 2187, 192 L.Ed.2d 323 (2015)

Defense interposes *Batson* objections, court allows prosecutor to make "race neutral" explanations *ex parte* so as not to disclose prosecution strategy, explanations do not disclose strategy and court finds all seven peremptory challenges striking all black and Hispanics were

race neutral; held: assuming that exclusion of defense counsel from hearing government's explanations for peremptory challenges was improper it was harmless error; 5-4.

***Seattle v. Erickson***, 188 Wn.2d 721 (2017)

City exercises peremptory challenge to sole Black juror, after juror is excused defense raises *Batson* challenge, trial court denies challenge because there were Hispanics on the panel; held: "the peremptory strike of a juror who is the only member of a cognizable racial group on a jury panel constitutes a *prima facie* showing of racial motivation. The trial court must ask for a race-neutral reason from the striking party and then determine, based on the facts and surrounding circumstances, whether the strike was driven by racial animus;" the fact that there were other minorities on the panel does not defeat the court's duty to determine if the peremptory challenge was based upon a race-neutral reason, *see: State v. Jefferson,* 192 Wn.2d 225 (2018), *State v. Omar,* 12 Wn.App.2d 747 (2020); challenge raised after the jury was empanelled but before any other motions were made or testimony heard is timely as court could declare a mistrial, *but see: State v. Rhone*, 168 Wn.2d 645, 649 n. 1 (2010), *State v. Hillman,* ___ Wn.App.2d ___, 2022WL16642464 (2022); overrules, *sub silentio., State v. Powell,* 55 Wn.App. 914 (1989); 9-0.

***State v. Jefferson***, 192 Wn.2d 225 (2018)

Three-step *Batson v. Kentucky*, 90 L.Ed.2d 69 (1986) analysis is modified: 1. defendant must establish a *prima facie* case of a discriminatory purpose to the peremptory challenge of a racially-cognizable juror and if the challenge is to the last such juror on the panel then the trial court must recognize a *prima facie* case of discriminatory purpose; 2. the burden shifts to the prosecution to provide a race-neutral reason for the challenge; 3. if there is a race-neutral explanation, the trial court must decide whether "an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge," and, if so, then the peremptory strike shall be denied, *see also: State v. Omar,* 12 Wn.App.2d 747 (2020), *State v. Brown,* ___ Wn.App.2d ___, 37645-1-III, 37718-1-III (2022); reverses, in part, *State v. Jefferson,* 199 Wn.App. 772 (2017); 6-3.

***Flowers v. Mississippi***, 588 U.S. ___ , 139 S.Ct. 2228, 204 L.Ed.2d 638 (2019)

In determining the credibility of a lawyer's attempt to provide a race-neutral explanation for exercising a peremptory challenge, court can consider challenges to Black jurors in prior trials of the same defendant, disparate questioning, comparing prospective jurors who were struck and not struck; 7-2.

***State v. Berhe***, 193 Wn.2d 647 (2019)

Following conviction a juror approaches defense counsel and reports racial bias during deliberations, both sides contact jurors and obtain declarations, trial court denies evidentiary hearing and new trial; held: "once a claim of racial bias is raised, investigations into allegations of racial bias are conducted on the record and with the oversight of the court. It is far too easy for counsel, in their role as advocates, to taint the jurors and impede the fact-finding process," court must instruct counsel to have no contact with jurors unless on the record; court must supervise the process and conduct a "sufficient inquiry" to determine if there is a *prima facie* basis to hold an evidentiary hearing; no-impeachment rule does not apply in cases involving possible racial bias of jurors, *Peña-Rodriguez v. Colorado,* 137 S. Ct. 855, 197 L. Ed. 2d 107 (2017); 9-0.

***State v. Pierce,*** 195 Wn.2d 230 (2020)

In fractured opinion three justices suggest that excusing an African American juror because the juror is opposed to the death penalty is an improper race-based peremptory challenge.

***State v. Omar***, 12 Wn.App.2d 747 (2020)

"Apparently" Asian juror states, in robbery case, that she had been present during a robbery, defense exercises peremptory challenge, trial court *sua sponte* asks for race-neutral reason for challenge, defense counsel states he didn't feel comfortable with her answer, court denies challenge; held: articulated reasons by defense counsel address juror's demeanor which "has historically been associated with improper discrimination in juror selection," "nebulous" reasons for the challenge offered by defense may be indicative of unconscious bias, thus denial of challenge is affirmed; appellate court reviews *Batson* challenges *de novo*, *State v. Jefferson*, 192 Wn.2d 225, 249-50 (2018); I.

***State v. Listoe***, 15 Wn.App.2d 308 (2020)

During voir dire prosecutor posits hypothetical that the law prohibits eating cookies, asks if anyone would have a problem convicting if there was overwhelming evidence that the accused ate a cookie, sole Black juror states he would have a problem convicting because of the law, prosecutor exercises peremptory challenge, defense objects, GR 37(e), trial court overrules and allows the peremptory challenge, finding that a race-neutral reason existed; held: juror's expression of distrust of the system and discomfort at the idea of convicting for a ridiculous law have historically been associated with discriminatory reasons for exclusion, an objective observer aware of implicit bias could conclude that race was a basis for exclusion, thus trial court erred in granting the peremptory challenge, *State v. Orozco*, --- Wn.App.2d ___, 496 P.3d 1215 (2021), *State v. Tesfasilasye*, ___ Wn.2d ___, 1001665 (2022); "we do not mean to suggest that the State, in exercising the challenge, acted with a discriminatory purpose or that the State acted with unconscious or implicit bias. Whereas the prior *Batson* formulation required the party contesting use of a preemptory challenge to prove such a discriminatory purpose, GR 37 represents a sweeping change that focuses instead on the perspective of an objective observer who is presumed to be aware that implicit, institutional, and unconscious bias, as well as purposeful discrimination, have all contributed to the unfair exclusion of jurors;" II.

***State v. Orozco***,___ Wn.App.2d ___, 496 P.3d 1215 (2021)

Prosecutor asks juror no questions, exercises peremptory, defense states that juror appears to be Black and the only person of color, objects, prosecutor states that he prosecuted the juror and she appears in police reports, court overrules *Batson* objection, on appeal state argues that there is insufficient evidence that the juror was Black; held: under GR 37, the record gives rise to a reasonable inference that an objective observer could have perceived the juror is a person of color, *State v. Lahman*, 17 Wn.App.2d 925, 935 n.6 (2021); striking the only member of a racially cognizable group establishes a *prima facie* case of discriminatory purpose, *Seattle v. Erickson*, 188 Wn.2d 721, 734 (2017); while prosecuting a juror is race neutral, recognizing the juror from police reports fits into GR 37(h)(i), (iii) as prior contacts with police is historically associated with improper racial discrimination in jury selection, thus state failed to rebut the presumption that its challenge was not for a discriminatory purpose; a *de novo* review on appeal establishes that an objective observer could view race as a factor, thus reversed; III.

***State v. Brown***, 21 Wn.App.2d 541 (2022)

While *Batson* applies to gender discrimination, *State v. Beliz*, 104 Wn.App. 206, 213-14 (2001), failing to raise the question of whether GR 37 and *State v. Jefferson*, 192 Wn.2d 225 (2018) apply to gender discrimination is not ineffective assistance as it is a novel theory, thus *Batson* test applies; here, court's finding that state's gender-neutral explanations for peremptory challenges are affirmed; III.

***State v. Booth***, 22 Wn.App.2d (2022)

Where court erroneously grants a GR 37 motion made by the state, thereby causing a juror to be wrongfully empaneled over a defense peremptory challenge, absent proof of prejudice defendant is not entitled to a new trial, *Pers. Restraint of Meredith*, 191 Wn.2d 300 (2018), *Rivera v. Illinois*, 556 U.SW. 148, 160-62, 129 S.Ct. 1443, 173 L.Ed.2d 320 (2009), *State v. Hillman*, ___ Wn.App.2d ___, 519 P.3d 593 (2022), distinguishing *State v. Vreen*, 143 Wn.2d 923, 932 (2001); I.

***State v. Lupastean***, 200 Wn.2d 26 (2022)

During *voir dire* juror fails to disclose, in response to questions, that her husband was involved in a similar matter, mistrial denied; held: mistrial or new trial is not required solely because a juror's nondisclosure in voir dire prevented a party from intelligently exercising a peremptory challenge, *effectively overruling State v. Simmons*, 59 Wn.2d 381, 390-92 (1962), *Robinson v. Safeway Stores, Inc.*, 113 Wn.2d 154, 1`60 (1989), rather the party seeking a new trial must show actual prejudice; 6-3.

***State v. Tesfasilasye***, 200 Wn.2d 345 (2022)

Peremptory challenge of an Asian juror who might be biased because her son had been treated unfairly by the criminal justice system is presumptively invalid, as an objective observer aware of implicit biases could view race as a factor; test is whether an objective observer could view race as a factor, not whether it would; appellate review is *de novo, see: State v. Hillman*, ___ Wn.App.2d ___, 519 P.3d 593 (2022); 9-0.

***Pers. Restraint of Rhone***, 23 Wn.App.2d 307 (2022)

*Seattle v. Erickson*, 188 Wn.2d 721 (2017) and *State v. Jefferson*, 192 Wn.2d 225, 230 (2018) changing the state's *Batson* inquiry to an "objective observer" standard are significant changes in the law, apply retroactively thus one-year time bar to PRP does not apply; 2-1, II.

***State v. Hillman***, ___ Wn.App.2d ___, 519 P.3d 593 (2022)

Defense counsel asks no questions of Black juror, exercises peremptory challenge after questioning was concluded, state objects, GR 37, defense argues juror seemed detached, not interested, court denies peremptory strike; held: reliance on juror demeanor has historically been associated with improper discrimination; because defense did not bring concerns to the attention of the court prior to the closing of questioning invalidated the purported justification for the strike, *State v. Rhone*, 168 Wn.2d 645, 649 n. 1 (2010), *but see: Seattle v. Erickson*, 188 Wn.2d 721 (2017); as there is no constitutional right to a peremptory challenge, *State v. Booth*, 22 Wn.App.2d 565, 581-84 (2022), *State v. Lupastean*, 200 Wn.2d 26, 30-31, 47-53 (2022), "it appears unlikely that the erroneous denial of a peremptory challenge is a matter that can be remedied on review;" III.

# JURY
# Misconduct

***State v. Cummings***, 31 Wn.App. 427 (1982)

Following conviction, jurors submitted conflicting affidavits as to whether or not jurors knew that defendant had a criminal record; outlines law on jury misconduct; held: where jury considered matters not admitted into evidence, a new trial should be granted where there is reasonable ground to believe defendant may have been prejudiced, *State v. Pete*, 152 Wn.2d 546 (2004); where jury considered defendant's record not in evidence, doubt should be resolved in favor of defendant; remanded for hearing to determine whether in fact jury misconduct occurred; III.

***State v. Wilmoth***, 31 Wn.App. 820 (1982)

During trial, juror gives rape victim-complaining witness aspirin; held: harmless error; III.

***State v. Booth***, 36 Wn.App. 66 (1983)

During deliberations, bailiff informs jurors that defendant and an absconded co-defendant jumped bail together; defendant testified at trial that he did not know co-defendant; held: bailiff's statement was not innocuous or neutral, *State v. Yonker*, 133 Wn.App. 627 (2006), and there was a strong likelihood the statements prejudiced the verdict, thus reversed; II.

***State v. Caliguri***, 99 Wn.2d 501 (1983)

Improper for court to replay tapes for jury during deliberations in absence of defendant, *but see: State v. Gregory*, 158 Wn.2d 759, 846-48 (2006), *overruled, on other grounds*, *State v. W.R.*, 181 Wn.2d 757 (2014), *cf.: State v. McCarthy,* 178 Wn.App. 90, 96-102 (2013), harmless here; 9-0.

***Rushen v. Spain***, 78 L.Ed.2d 267 (1983)

During trial of Black Panther, a juror who, during voir dire, stated she did not associate the Black Panthers with violence, spoke with trial judge to advise that she remembered a childhood friend had been murdered by a Black Panther; trial judge made no record of this communication; Ninth Circuit reverses; Supreme Court holds harmless error analysis applies, reverses summarily; 7-2.

***State v. Hall***, 40 Wn.App. 162 (1985)

During trial, juror telephoned a relative three times and stated things did not look good for defendant but defendant had not yet testified, and defendant was black and victim was white; trial court found juror misconduct, but denied new trial; held: mere possibility of prejudice, thus trial court did not abuse its discretion; *see*: *Gardner v. Malone*, 60 Wn.2d 830, 846 (1962), *State v. Crowell*, 92 Wn.2d 143, 147 (1979); I.

***Byerly v. Madsen***, 41 Wn.App. 495 (1985)

Affidavits of jurors may be considered by the court on the issue of the fact of jury misconduct, but not on the prejudicial effect of the misconduct on the verdict; latter is for the trial court alone to determine; III.

***State v. Hatley***, 41 Wn.App. 789 (1985)

After conviction, trial court grants new trial based upon testimony of a juror's acquaintance to the effect that juror expressed an opinion as to defendant's guilt during trial; held: evidence concerning mental process of juror's, including their opinions and when they made up their minds, inheres in the verdict and is inadmissible, *State v. Aker*, 54 Wash. 342, 345-346 (1909), *Hosner v. Olympia Shingle Co.*, 128 Wash. 152, 154-55 (1924), *see: Warger v. Shauers*, 574 U.S. 40, 190 L.Ed.2d 422 (2014), *but see: Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 197 L. Ed. 2d 107 (2017), *State v. Berhe*, 193 Wn.2d 647 (2019); even if juror had made up his mind before deliberations does not mean he was biased, *Tate v. Rommel*, 3 Wn.App. 933 (1970), *State v. Whitaker*, 6 Wn.App.2d 1 (2018), *affirmed, on different grounds, State v. Whitaker*, 195 Wn.2d 333 (2020); I.

***United States v. Gagnon***, 470 U.S. 522, 105 S.Ct.1482, 84 L.Ed.2d 486 (1985)

Juror becomes upset with defendant sketching jurors, judge holds *in camera* discussion with juror and one defense attorney, reassures juror that defendant's sketching was harmless; held: *in camera* discussion with a juror on a minor matter does not violate Fifth Amendment due process clause; failure of defense to object waives right to be present, Fed. R. Crim. Pro. 43; 6-2.

***State v. Murphy***, 44 Wn.App. 290 (1986)

During trial, juror solicits her daughter's opinion as to defendant's guilt, daughter states she believes defendant is guilty, trial court holds post-trial hearing during which it determines that misconduct occurred but initially juror voted to acquit, and did not disclose her conversation to other jurors; held: communications by jurors constitutes misconduct giving rise to a presumption of prejudice which state must overcome beyond a reasonable doubt, *Remmer v. United States*, 98 L.Ed. 654 (1954), harmless here; III.

***Tanner v. United States***, 97 L.Ed.2d 90 (1987)

Post-trial evidence from jurors regarding intoxication of jurors during the trial is inadmissible, Fed.R.Evid. 606(b), as intoxication is not an "outside influence;" 5-4.

***Adkins v. Aluminum Company***, 110 Wn.2d 128 (1988)

Bailiff provides jurors with a law dictionary; held: where jury misconduct can be demonstrated by objective proof without probing the jurors' mental processes, the effect the improper information may have had upon the jury is a question properly determined in the sound discretion of the trial court; if the trial court has any doubt about whether the misconduct affected verdict, it is obliged to grant a new trial, *State v. Pete*, 152 Wn.2d 546 (2004), *see: State v. Fry*, 153 Wn.App. 235 (2009); 9-0.

***State v. Wall***, 52 Wn.App. 665 (1988)

Trial court does not sequester jury, during trial publicity concerned evidence jury was not permitted to hear; held: test to evaluate whether error occurred in not sequestering jury is

probability of prejudice (not actual prejudice); here, there is no indication jurors read the news articles in question, thus harmless; III.

***State v. Carpenter***, 52 Wn.App. 680 (1988)

Photocopies of exhibits with highlighting and prosecutor's notes are inadvertently sent to jury; held: in the absence of actual or probable prejudice, *State v. Hicks*, 41 Wn.App. 303, 312 (1985), *State v. Lemieux*, 75 Wn.2d 89, 91 (1968), *State v. Rinkes*, 70 Wn.2d 854, 862 (1967), verdict will not be vitiated, *cf.: State v. Pete*, 152 Wn.2d 546 (2004); fact that material was not marked as an exhibit is proper consideration alleviating taint; I.

***State v. Jackman***, 113 Wn.2d 772 (1989)

Affidavit from juror that the jury rushed to verdict so that a juror could go on vacation is inadmissible to prove misconduct because it asserts matters inhering in the verdict; affidavit from bailiff that she heard same from a juror is inadmissible hearsay; jurors' own motives for haste is not misconduct, as distinguished from cases where jurors suffer outside influences on decision making, *State v. Crowell*, 92 Wn.2d 143 (1979), *State v. Boogard*, 90 Wn.2d 733 (1978); affidavit from juror stating that prosecutor's misrepresentation of evidence during closing argument was relied upon by jury is inadmissible to establish effect of misstatement on the jury's deliberation, *State v. Parker*, 25 Wash. 405, 415 (1901); 9-0.

***State v. Tigano***, 63 Wn.App. 336 (1991)

One juror fails to respond to voir dire question asking whether anyone had heard about the case when she had previous knowledge; another juror violates court's order not to read about case while trial is in progress, learning that defendant had previously been tried to hung jury, mentions to other jurors what she read; held: information known by jurors, while misconduct, was not prejudicial as substance came out at trial; prior hung jury did not point to defendant's guilt, attorneys referred repeatedly to prior "hearing" in examining witnesses; correct response from juror during voir dire would not have supported a challenge for cause, *McDonough Power Equip., Inc. v. Greenwood*, 78 L.Ed.2d 663 (1984), *State v. Briggs*, 55 Wn.App. 44, 52 (1989), inability to utilize withheld information to exercise peremptory challenge is not prejudicial as a matter of law, *State v. Carlson*, 61 Wn.App. 865, 878 (1991), *State v. Cho*, 108 Wn.App. 315 (2001), *but see: State v. Johnson*, 137 Wn.App. 862 (2007), *State v. Winborne*, 4 Wn.App.2d 147 (2018), *State v. Arndt*, 5 Wn.App.2d 341 (2018); II.

***United States v. Olano***, 123 L.Ed.2d 508 (1993)

Presence of alternate jurors in jury room during deliberations is not error absent proof of prejudice; 6-3.

***State v. Balisok***, 123 Wn.2d 114 (1994)

Jurors' reenactment of struggle based upon testimony is not misconduct, *State v. Everson*, 166 Wash. 534 (1932), *State v. Brown*, 139 Wn.2d 20, 23-25 (1999), *State v. Barker*, 103 Wn.App. 893, 904 (2000); reverses *State v. Balisok*, 68 Wn.App. 277 (1992); 9-0.

***State v. Jackson***, 75 Wn.App. 537 (1994)

No juror answers affirmatively to the general question, "is there any juror that knows of any reason why s/he would not be able to try this case impartially," after conviction of black

defendant, a juror files an affidavit that another juror expressed dismay at having to socialize with "coloreds"; defense moves for a new trial, denied; held: juror should have disclosed his feelings about African-Americans in voir dire, trial court should have held an evidentiary hearing to explore juror's bias and whether race played a role in deliberations; remanded for new trial due to time between trial and appeal (22 years), and because state did not request an evidentiary hearing as alternative relief (although defense objected to evidentiary hearing to trial court); 2-1; I.

***State v. Kell***, 101 Wn.App. 619 (2000)

Jurors use of cellular telephones during deliberations is not misconduct absent proof of prejudice; II.

***State v. Jorden***, 103 Wn.App. 221 (2000)

During trial with alternate juror who had not been identified, state moves to disqualify a juror for sleeping, at hearing state calls bailiff and a detective who was present in court who testify that juror is inattentive or sleeping, defense requests a hearing at which the juror can be questioned, court declines and excuses the juror; held: trial court has discretion to hear and resolve jury misconduct in a way that avoids tainting the juror, need not question or allow counsel to question the juror in question, *State v. Rafay*, 168 Wn.App. 734, 817-23 (2012), *see:* CrR 6.5, RCW 2.36.110, *State v. Hughes*, 106 Wn.2d 176, 204 (1986), distinguishing *State v. Ashcraft*, 71 Wn.App. 444, 461-62 (1993), *State v. Johnson*, 90 Wn.App. 54, 72 (1998); trial judge will inevitably act as both an observer and a decision maker, akin to deciding a challenge for cause, *Ottis v. Stevenson-Carson Sch. Dist. No. 303*, 61 Wn.App. 747, 753 (1991); II.

***Breckenridge v. Valley Gen. Hosp.***, 150 Wn.2d 197 (2003)

In medical negligence case in which an issue is whether physician should have ordered a CT scan for report of a severe headache, juror in deliberations recounts his wife's migraines and that they never got a CT scan, trial court grants new trial for misconduct; held: a juror's personal life experience used to evaluate evidence presented at trial inheres in the verdict and is what jurors are expected to do during deliberations," at 204, thus new trial was abuse of discretion, *see: Warger v. Shauers*, 574 U.S. 40, 135 S.Ct. 521, 190 L.Ed.2d 422 (2014); 9-0.

***State v. Tandecki***, 120 Wn.App. 303 (2004), *aff'd, on different grounds*, 153 Wn.2d 842 (2005)

At attempt to elude trial, forensic engineer testifies to likely injuries from collision, during deliberations, jurors discuss personal experiences about accidents and spectrum of injuries; held: no juror withheld information during *voir dire*, being in accidents is within common experience of jurors, no juror introduced some undisclosed and highly specialized information regarding car accidents, no misconduct occurred, *see: State v. Johnson*, 137 Wn.App. 862 (2007), distinguishing *State v. Briggs*, 55 Wn.App. 44 (1989); I.

***State v. Elmore***, 155 Wn.2d 758 (2004)

During deliberations, two jurors send out notes alleging that a third juror refused to follow instructions and disregarded every witness, trial judge inquires of all three jurors, accused juror says that it's a credibility dispute, judge dismisses juror and substitutes alternate; held: court should not inquire into a juror's mental processes; where there is a reasonable possibility that the impetus for a juror's dismissal stems from his views on the merits of the case, dismissal

is error, *State v. Johnson*, 125 Wn.App. 443, 456-61 (2005), *State v. Berniard*, 182 Wn.App. 106 (2014), distinguishing *State v. Jorden*, 103 Wn.App. 221 (2000), *State v. Sassen Van Elsloo*, 191 Wn.2d 798 (2018), *cf.:State v. Rafay*, 168 Wn.App. 734, 817-23 (2012); trial court should only apply "reasonable possibility" standard where a juror is accused of engaging in nullification, refusing to deliberate or refusing to follow the law, *see: State v. Depaz*, 165 Wn.2d 842 (2009), *State v. Hopkins*, 156 Wn.App. 468 (2010), *State v. Gaines*, 194 Wn.App. 892 (2016); affirms *State v. Elmore*, 121 Wn.App. 747 (2004); 8-1.

***State v. Boling*,** 131 Wn.App. 329 (2006)

In manslaughter case, juror does independent internet research on cause of death, trial court grants new trial; held: trial court's inability to rule out juror's misconduct impacting verdict establishes a proper exercise of discretion in granting new trial;, *see: State v. Arndt*, 5 Wn.App.2d 341 (2018); III.

***State v. Johnson***, 137 Wn.App. 862 (2007)

During rape case *voir dire*, jurors are asked if they or family members had a similar experience, 8 jurors say yes and were questioned individually, one juror who does not respond is seated and, during deliberations, discloses that her daughter had been a rape victim, motion for new trial is denied; held: nondisclosure during *voir dire* and injection of undisclosed information into deliberations is so prejudicial such that denial of new trial was an abuse of discretion, *State v. Briggs*, 55 Wn.App. 44, 53 (1989), *State v. Winborne*, 4 Wn.App.2d 147 (2018), *see: State v. Cho*, 108 Wn.App. 315 (2001), *State v. Arndt*, 5 Wn.App.2d 341 (2018); distinguishing *McDonough Power Equip., Inc. v. Greenwood*, 78 L.Ed.2d 663 (1984); II.

***State v. Earl***, 142 Wn.App. 768 (2008)

A personal, derogatory remark between jurors during a deliberation break is not juror misconduct if it does not involve the substance of the jury's deliberations; II.

***State v. Applegate***, 147 Wn.App. 166, 175-76 (2008)

During trial, one juror reports that he heard two other jurors express surprise that defendant did not plead guilty and speculate about cost of trial, court interviews the jurors, finds that conversation did not occur, instructs jurors to presume defendant innocent, also finds that if conversation did occur, instruction remedies harm; held: trial court determines credibility, decision was not an abuse of discretion; I.

***State v. Depaz***, 165 Wn.2d 842 (2009)

During deliberations, jurors report that juror 3 was overheard telling someone on telephone that the evidence was circumstantial and she was being badgered, juror 3 tells court that she did tell her husband that she was in the minority, her husband told her to stick to her guns, does not recall referring to circumstantial evidence, court declines to replace juror 3; jury later reports that it is hung, trial court reconsiders and replaces juror 3, jury convicts; held: while communication by a juror is misconduct, where trial court has knowledge of the substantive opinion of the juror, the court may replace the juror only if the court finds that the juror's misconduct is prejudicial, which may not be presumed, *State v. DeLeon*, 185 Wn.App. 171, 213-19 (2014), *reversed, on other grounds*, 185 Wn.2d 478 (2016); prejudice can be found only where the court determines that the misconduct has affected the juror's ability to deliberate, *see:*

*State v. Elmore*, 155 Wn.2d 758 (2005), *State v. Hopkins*, 156 Wn.App. 468 (2010), *State v. Gaines,* 194 Wn.App. 892 (2016), RCW 2.36.110; here, the misconduct could not reasonably have altered the juror's formulated opinion of the case, thus it was an abuse of discretion to replace the juror, *State v. Berniard,* 182 Wn.App. 106 (2014), *State v. Sassen Van Elsloo*, 191 Wn.2d 798 (2018); 9-0.

***State v. Fry***, 153 Wn.App. 235 (2009)

Following conviction, trial judge finds that a juror consulted a dictionary to look up the word "substantial," that the definition "had a little bit to do" with her verdict, and that she did not share the definition with other jurors, concludes juror's conduct did not influence verdict and denies new trial; held: trial court's determination that use of a dictionary did not affect the verdict was based upon tenable grounds, determination of credibility rests with trial court, *State v. Arndt,* 5 Wn.App.2d 341 (2018), *cf.: Adkins v. Aluminum Company*, 110 Wn.2d 128 (1988); III.

***Kuhn v. Schnall***, 155 Wn.App. 560 (2010)

"When jurors introduce extrinsic evidence into deliberations, the verdict cannot stand unless the trial court is satisfied the evidence had no effect upon the verdict. If the court has any doubt, it must order a new trial," at 573 ¶ 38, *Halverson v. Anderson*, 82 Wn.2d 746, 749-50 (1973); I.

***State v. Hopkins***, 156 Wn.App. 468 (2010)

During deliberations, jury submits a note stating that one of the jurors feels unable to continue because of being too emotional, cannot be fair, court consults with counsel, interviews presiding juror and juror in question who says she cannot be fair to both sides, court dismisses juror over objection, calls in alternate and orders jury to begin anew; held: where a juror is alleged to be committing misconduct or nullification, trial court may not excuse the juror if there is any reasonable possibility that the juror's views stem from an evaluation of the evidence, *State v. Elmore*, 155 Wn.2d 758, 778 (2005), *State v. Berniard*, 182 Wn.App. 106 (2014), *State v. Sassen Van Elsloo*, 191 Wn.2d 798 (2018), but here, there was only speculation that juror's decision that she could not be fair was related in any way to the evidence, thus trial court's decision to excuse was not an abuse of discretion, *see: State v. Depaz*, 165 Wn.2d 842 (2009); 2-1, II.

***Pers. Restraint of Crace***, 157 Wn.App. 81 (2010), *rev'd, on other grounds,* 174 Wn.2d 835 (2012);

Before voir dire, juror observes defendant in hall in shackles, is not asked about it during voir dire, does not volunteer information, after conviction writes a newspaper article describing what she saw; held: a juror is not required to volunteer information, *State v. Gilmore*, 59 Wn.2d 514, 515-16 (1962); 2-1, II.

***State v. Rafay***, 168 Wn.App. 734, 817-23 (2012)

During trial, before deliberations, jurors report that another juror repeated that she would do anything to get off the jury, appeared to be writing letters rather than taking notes, removed notes from notepad, appeared to be sleeping, over course of trial court changes jurors' seating, discusses issue with jurors and counsel, inquires of the juror in question who denies misconduct,

court excuses juror over objection; held: when determining whether circumstances establish juror misconduct, trial court need not follow any specific format, court acts as both observer and decision maker, *State v. Jorden,* 103 Wn.App. 221, 226-29 (2000), here court made every effort to resolve issues by means of seating adjustments, oral admonishments, carefully questioned jurors without use of leading questions and allowed counsel to inquire, court properly exercised discretion; I.

***State v. McCreven***, 170 Wn.App. 444, 481-82 (2012)

Jurors report that other jurors had discussed a witness' demeanor and attitude before deliberations, trial court interviews the jurors "privately" and finds they could continue to listen fairly and impartially; *dicta:* when jurors have been found to have violated their oath, correct inquiry is not whether the jurors can fairly weigh the evidence but whether the jurors are able to adhere to their oath in the future, CrR 6.6; II.

***State v. Morfin***, 171 Wn.App. 1 (2012)

During deliberations, presiding juror reports that another juror is no longer interested in voting or the process, refuses to deliberate, says "he's made up his mind," did not refuse to vote but won't speak, court declines to remove juror; held: if there is "any reasonable possibility" that an allegation against a juror is the result of the accused juror's views on the sufficiency of the evidence, court may not dismiss the juror, *State v. Elmore,* 155 Wn.2d 758 (2005), *State v. Berniard,* 182 Wn.App. 106 (2014), *State v. Sassen Van Elsloo*, 191 Wn.2d 798 (2018), when allegation is made, first step for trial court is to reinstruct the jury; if reinstruction fails to remedy the problem, further inquiry should remain as limited in scope as possible to protect secrecy and court should stop inquiring once it is satisfied that the juror is participating and does not intend to ignore the law; here, had trial court excused the juror without inquiring of the juror, there may have been error, but since trial court found that the accusation lacked merit, then there was no error; III.

***Warger v. Shauers***, 574 U.S. 40, 135 S.Ct. 521, 190 L.Ed.2d 422 (2014)

FRE 606(b) precludes a court from considering an affidavit of a juror stating that, based upon statements made by another juror during deliberations, the juror lied during voir dire, *but see: Peña-Rodriguez v. Colorado,* 580 U.S. 206, 137 S.Ct.855, 197 L.Ed.2d 107 (2017), *cf.:* ER 606, *State v. Berhe,* 193 Wn.2d 647 (2019); 9-0.

***State v. DeLeon***, 185 Wn.App. 171, 213-19 (2014), *reversed, on other grounds,* 185 Wn.2d 478 (2016)

As jury reports that it has reached a verdict bailiff discloses Twitter printout showing a juror tweeted complaints about the police and possibly suggesting the jury split at some point, neither defense counsel ask to interview juror but, after verdict, move for new trial; held: juror committed misconduct by communicating with a third party about the case, *State v. Depaz,* 165 Wn.2d 842, 859 (2009), but juror's negative attitudes about the justice system, length of jury service and lawyers did not necessitate a court inquiry, thus trial court did not abuse discretion in not *sua sponte* inquiring; III.

***State v. Gaines***, 194 Wn.App. 892 (2016)

During deliberations juror sends a note to court reporting that juror no. 2 said that he read that defendant had prior convictions, court inquires of jurors who state that they recognized the problem immediately and disregarded, court excuses juror no. 2, replaces with alternate and orders jury to recommence deliberations; held: while in a post-verdict motion where extrinsic evidence inheres in the verdict court must make an objective inquiry, asking whether the evidence could have affected the verdict, *State v. Johnson*, 137 Wn.App. 862, 870 (2007), *Breckenridge v. Valley Gen. Hosp.*, 150 Wn.2d 197, 204 (2003), *see: Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 197 L. Ed. 2d 107 (2017), *State v. Arndt*, 5 Wn.App.2d 341 (2018), court may inquire, before jury reaches a verdict, whether jurors may subjectively disregard extrinsic information as there is no verdict to impeach; II.

***Pers. Restraint of Caldellis***, 187 Wn.2d 127, 144-46 (2016)

Defense provides affidavits that spectators saw judge and jurors sleeping during part of the trial; held: sleeping judges and jurors is not structural error absent some evidence that demonstrate what testimony was missed; 9-0.

***Pers. Restraint of Lui***, 188 Wn.2d 525, 567-69 (2016)

Witness testifies about the existence of a mall, during deliberations one juror claims she knows the mall had not been constructed at the time, declaration of another juror says that the jury considered this statement; held: testimony about a witness' credibility inheres in the verdict, *Breckenridge v. Valley Gen. Hosp.*, 150 Wn.2d 197 (2003); 7-2.

***Peña-Rodriguez v. Colorado***, 137 S. Ct. 855, 197 L. Ed. 2d 107 (2017)

After conviction at sexual assault trial two jurors inform defense counsel that a third juror expressed belief during deliberations that Mexicans are physically controlling of women, they take whatever they want and that a defense witness was not credible because he was "an illegal," state courts deny new trial because the statements inhere in the verdict and the "no impeachment" rule, *Tanner v. United States*, 483 U.S. 107, 107 S.Ct. 2739, 97 L.Ed.2d 90 (1987); *Warger v. Shauers*, 574 U.S. ——, 135 S.Ct. 521, 190 L.Ed.2d 422 (2014); held: "where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee," *State v. Berhe*, 193 Wn.2d 647 (2019); 5-4.

***State v. Jefferson***, 199 Wn.App. 772, 792-97 (2017), *reversed, on other grounds*, 192 Wn.2d 225 (2018)

During trial a juror informs court that after the prior day's session she observed people who were in the gallery watching her and other jurors as they were getting into their cars and that it was "nerve wracking," court inquires of that juror and others who stated that they saw the same thing but were not in fear, court excuses first juror, denies mistrial; held: denial of mistrial was not manifestly unreasonable following a full hearing on the issue; I.

***State v. St. Peter***, 1 Wn.App.2d 961 (2017)

Speculation that a juror may not have been in the jury room during some of deliberations is insufficient to warrant review, RAP 2.5(a); trial court need not instruct that all jurors must be present during deliberations; III.

***State v. Winborne***, 4 Wn.App.2d 147 (2018)

During trial juror reports that he was a witness to some of the events testified to in court, trial judge declines to discharge or question juror; held: trial court was at least required to question the juror to determine if there is actual bias, *State v. Stentz*, 30 Wn. 134 (1902), *abrogated on other grounds by State v. Fire*, 145 Wn.2d 152 (2001), actual bias of a juror is structural error, *but see: State v. Tigano*, 63 Wn.App. 336 (1991); 2-1, III.

***State v. Arndt***, 5 Wn.App.2d 341 (2018)

Months after murder 1° trial a juror reports that she used the internet to search for the word "premeditation," at a hearing juror testifies that she learned that one of the definitions was that premeditation could be "short," did not remember sites she looked at, trial judge denies new trial, finding that the juror's research, while misconduct, was consistent with the jury instruction defining premeditation; held: while prejudice following jury misconduct is presumed, *State v. Boling*, 131 Wn.App. 329, 332-33 (2006), "[a] strong, affirmative showing of misconduct is necessary in order to overcome the policy favoring stable and certain verdicts and the secret, frank and free discussion of the evidence by the jury," *State v. Balisok*, 123 Wn.2d 114, 117-18 (1994), "great deference is due to the trial court's determination that no prejudice occurred, [but] greater deference is owed to a decision to grant a new trial than a decision not to grant a new trial." *State v. Johnson*, 137 Wn.App. 862, 871 (2007), trial court's decision here was not an abuse of discretion, *State v. Fry*, 153 Wn.App. 235, 238 (2009); 2-1, II.

***State v. Whitaker***, 6 Wn.App.2d 1 (2018), *affirmed, on different grounds, State v. Whitaker*, 195 Wn.2d 333 (2020)

During deliberations juror 2 leaves jury room, tells bailiff other jurors are hectoring him and he wants to be excused, then has a heart attack and is excused; before deliberations another juror told jurors that defendant is guilty and "I hope they fry" defendant; held: juror 2 was not excused because of the evidence, trial court's decision to excuse juror was not an abuse of discretion, fact that bailiff did not ask juror to write out his issue, CrR 6.15(f)(1), does not mandate reversal; conversation with bailiff in absence of defendant was not a violation of open courts doctrine or defendant's right to be present as there was no other way it could have been handled, distinguishing *State v. Tinh Trinh Lam*, 161 Wn.App. 299 (2011); "[T]he mere revealing of an opinion, as to the ultimate outcome of a trial by an otherwise unbiased juror, before submission of the case to the jury, based upon evidence properly received, while not to be condoned, does not, standing alone, constitute such misconduct as to justify the granting of a new trial," *Tate v. Rommel*, 3 Wn.App. 933, 937-38 (1970), *State v. Hatley*, 41 Wn.App. 789, 794 (1985); I.

***State v. Hill***, 19 Wn.App.2d 333 (2021)

Juror reports that another juror during deliberations said that karma should come back at the reporting juror and that someone should do that to me and that the other juror hopes that he is the next person that happens to if he doesn't agree, court finds a deadlock on one count, jurors convict on other counts; held: while the alleged threats did not inhere to the verdict as it did not probe in the jurors' mental process, a mere derogatory remark that does not involve the substance of the jury's deliberation is not misconduct, *State v. Earl*, 142 Wn.App. 768 (2008); trial court

properly exercised discretion in not conducting further inquiry, *State v. Elmore*, 155 Wn.2d 758, 773-75 (2004); II.

# JURY
## Other

***State v. Brown***, 29 Wn.App. 11 (1981)

Defendant need not be present when court gives jury additional instructions as long as counsel is present; I.

***State v. Wixon***, 30 Wn.App. 63 (1981)

Sequestering jury is necessary only upon a showing of probability of prejudice; individual voir dire is not necessary when news coverage was predominantly factual and nonsensational; I.

***Seattle v. Filson***, 98 Wn.2d 66 (1982)

Six-person jury approved for courts of limited jurisdiction; 9-0.

***Pasco v. Mace***, 98 Wn.2d 87 (1982)

Defendants charged with jailable misdemeanors are entitled to jury trials; 9-0.

***State v. Caliguri***, 99 Wn.2d 501 (1983)

Improper for court to replay tapes for jury during deliberations in absence of defendant, *but see: State v. Gregory*, 158 Wn.2d 759, 846-48 (2006), *overruled, on other grounds, State v. W.R.*, 181 Wn.2d 757 (2014), harmless here; 9-0.

***United States v. Gagnon***, 84 L.Ed.2d 486 (1985)

Juror becomes upset with defendant sketching jurors; judge holds *in camera* discussion with juror and one defense attorney, reassures juror that defendant's sketching was harmless; held: *in camera* discussion with a juror on a minor matter does not violate Fifth Amendment due process clause; failure of defense to object waives right to be present, Fed. R. Crim. Pro. 43; 6-2.

***State v. Standifer***, 48 Wn.App. 121 (1987)

A juror's letter to the judge stating that she changed her mind after conviction is not grounds for a new trial; I.

***State v. Pockert***, 49 Wn.App. 859 (1987)

Failure to poll jury following conviction, CrR 6.16(a)(3), is reversible error, *cf.: State v. Barnett*, 104 Wn.App. 191, 199-200 (2001), prejudice need not be shown; III.

***State v. Wall***, 52 Wn.App. 665 (1988)

Trial court does not sequester jury, during trial publicity concerned evidence jury was not permitted to hear; held: test to evaluate whether error occurred in not sequestering jury is probability of prejudice (not actual prejudice); here, there is no indication jurors read the news articles in question, thus harmless; III.

***Blanton v. North Las Vegas***, 103 L.Ed.2d 550 (1989)

United States constitution does not mandate jury trial for an offense which has a maximum penalty of six months in jail plus mandatory license suspension; *see also:* *Lewis v. United States*, 135 L.Ed.2d 590 (1996); 9-0.

***State v. Massey***, 60 Wn.App. 131 (1991)

Thirteen-year old tried as an adult is not entitled to have 13-year old jurors, *Carter v. Jury Comm'n*, 24 L.Ed.2d 549, 559 (1970); II.

***State v. Farmer***, 116 Wn.2d 414 (1991)

Trial court may deny discovery of jurors' prior verdicts; 9-0.

***State v. Rodriquez***, 61 Wn.App. 391 (1991)

After impanelment, juror reports his sister died in Germany, wanted to go to funeral, defense counsel "suggested a recess" but said his client wanted to get trial over with, rejected impaneling new juror or trial by 11, trial court declares mistrial; held: absent bad faith of judge or prosecutor, judge's finding of manifest necessity should be accorded deference where, as here, defense rejected alternatives; juror's need to go to Germany was an extraordinary and striking circumstance; III.

***State v. Brinkley***, 66 Wn.App. 844 (1992)

A juror's question to a witness should be in writing, submitted to counsel in the jury's absence so that objections can be taken, *see:* WPIC 4.66, *State v. Monroe*, 65 Wn.App. 245, 253 (1992); trial court has discretion to allow state to reopen after defense has rested to address a juror's question, *see:* *Estes v. Hopp*, 73 Wn.2d 263, 264-5 (1968), *Seattle v. Heath*, 10 Wn.App. 949 (1973), *State v. Vickers*, 18 Wn.App. 111, 113 (1977), *State v. Johnson*, 1 Wn.App. 602 (1969), *see also:* *State v. Muñoz*, 67 Wn.App. 533 (1992); I.

***Seattle v. Lewis***, 70 Wn.App. 715 (1993)

Obstructing a public officer ordinance which requires the judge to determine lawfulness of officer's action does not violate state constitutional right to a jury trial; I.

***State v. Gentry***, 125 Wn.2d 570, 614-6 (1995)

Where trial court erroneously allows an alternate juror to deliberate, with both parties' agreement, no constitutional error occurs, issue may not be raised for first time on appeal; 9-0.

***State v. Hobble***, 126 Wn.2d 283, 297-303 (1995)

Contemner held in summary or direct contempt in the presence of the court, RCW 7.21.050(1), for refusing to testify over an order to do so is not entitled to a jury trial under United States or state constitutions; 7-2.

***Lewis v. United States***, 135 L.Ed.2d 590 (1996)

In federal court, multiple offenses which could result in an aggregate penalty greater than six months does not entitle defendant to jury trial, *Blanton v. North Las Vegas*, 103 L.Ed.2d 550 (1989), *Duncan v. Louisiana*, 20 L.Ed.2d 491 (1968); 7-2.

***State v. Johnson***, 90 Wn.App. 54, 72-3 (1998)

During deliberations, one juror calls bailiff from home to say she was too nervous to continue, judge denies mistrial and substitutes alternate, directing jurors to recommence deliberation anew, CrR 6.5; held: while preferred method would have been to voir dire the juror in question and allow additional voir dire of the alternate, no error here; III.

***State v. Finch***, 137 Wn.2d 792, 866-68 (1999)

Trial court's order prohibiting attorneys from initiating contact with jurors after trial to protect jurors' privacy interests is proper, *State v. Blazina,* 174 Wn.App. 906 (2013), *remanded, on different grounds,* 182 Wn.2d 827 (2015); 7-2.

***State v. Twyman***, 143 Wn.2d 115 (2001)

District court need not summon jurors from the county as a whole, and may summon jurors from zip codes which permit empanelling some jurors from within the county but outside the division of the court, *see: Tukwila v. Garrett*, 165 Wn.2d 152 (2008), *cf.: Bothell v. Barnhart,* 172 Wn.2d 223 (2011); affirms *State v. Twyman*, 98 Wn.App. 508 (1999).

***State v. Barnett***, 104 Wn.App. 191, 199-200 (2001)

To poll jury, where judge asks jurors if anyone disagrees with verdicts signed by foreperson and goes through each verdict separately, asking jurors as a group if the verdict is unanimous and whether any juror disagrees or dissents, requirements of CrR 6.16(a)(3) are met; III.

***State v. Monroe***, 107 Wn.App. 637 (2001)

Jury asks to see transcript of two witness' testimony, trial court allowed jurors to view one witness' transcript in courtroom, declined to provide the other; held: while trial court has broad discretion to respond to a jury's request to view testimony during deliberations, *State v. Koontz*, 102 Wn.App. 309 (2000), *see: State v. Morgensen*, 148 Wn.App. 81, 86-90 (2008), it is error if court does not undertake measures to ensure jury does not improperly evaluate the testimony; here, trial court allowed jury to place undue emphasis on the testimony of one witness; I.

***State v. Koontz***, 145 Wn.2d 650 (2002)

During deliberations, jury reports that it is deadlocked, upon further inquiry from trial court, foreperson advises that jurors who are doubtful of guilt lack enough information, requests that videotaped testimony be replayed; over objection, trial court allows jury to view three witnesses' testimony, instructs that jury should not place undue emphasis on the testimony of those three witnesses; held: video record which moves between different trial participants provides a different view of the trial and increases the likelihood it will be given undue emphasis; determination to play back should balance need to provide relevant portions of testimony to answer a specific jury inquiry against danger of allowing witness to testify a second time; "it is seldom proper to replay the entire testimony of a witness," at 657 *but see: State v. Morgensen*, 148 Wn.App. 81, 86-90 (2008); in spite of trial court's precautions, abuse of discretion to replay here; reverses *State v. Koontz*, 102 Wn.App. 309 (2000); 9-0.

***State v. Oakley***, 117 Wn.App. 730 (2003)

State has the right to a jury trial in district court, RCW 3.66.010, 10.04.050, even over defendant's objection and waiver, CrRLJ 6.1.1; defendant does not have a constitutional right to a bench trial, *Singer v. United States*, 13 L.Ed.2d 630 (1965), *State v. Jones*, 70 Wn.2d 591, 594 (1967), *State v. Maloney*, 78 Wn.2d 922, 927 (1971), *State v. Thompson*, 88 Wn.2d 13 (1977), *State v. Rupe*, 108 Wn.2d 734, 753-54 (1987), *State v. McKague*, 159 Wn.App. 489, 500-01 (2011); I.

***State v. Morgensen***, 148 Wn.App. 81, 86-90 (2008)

During deliberations, jury requests transcript of witnesses' testimony, trial court consults with counsel, decides to play audiotape of testimony (35 minutes for all witnesses), instructs jurors that demeanor cannot be available for them during playing of audiotape, orders counsel not to react during process; held: with procedural precautions, *State v. Koontz*, 145 Wn.2d 650, 655-57 (2002), *State v. Monroe*, 107 Wn.App. 637 (2001), trial court properly exercised discretion to play audiotape as opposed to showing jury videotape, *Koontz, supra.;* 2-1, II.

***Tukwila v. Garrett***, 165 Wn.2d 152 (2008)

RCW 2.36.052 (1998) which allows a court of limited jurisdiction and a superior court to agree that superior court may issue summonses for the lower court and include jurors who do not live in the city does not deprive a defendant of his right to a proper jury pool, *see: Bothell v. Barnhart*, 172 Wn.2d 223 (2011); 7-2.

***State v. Lanciloti***, 165 Wn.2d 661 (2009)

RCW 2.36.055 (2005), which allows counties with two superior court facilities to divide the county jury assignment area, does not violate the constitutional guarantee to a jury of the county, CONST. art. I, § 22; 9-0.

***Bothell v. Barnhart,*** 172 Wn.2d 223 (2011)

A city located in two counties may only use jurors from the county where the crime is alleged to have occurred, CONST. art. I, § 22, distinguishing *Tukwila v. Garrett*, 165 Wn.2d 152 (2008), *State v. Lanciloti*, 165 Wn.2d 661 (2009); affirms *Bothell v. Barnhart*, 156 Wn.App. 531 (2010); I.

***State v. Campbell***, 163 Wn.App. 394, 401-02 (2011)

Where a jury's question to the court indicates an erroneous understanding of the applicable law, it is incumbent upon the court to issue a corrective instruction, *State v. Davenport*, 100 Wn.2d 757, 764 (1984), *State v. Sanjurjo-Bloom*, 16 Wn.App.2d 120 (2021); 2-1, II.

***State v. Blazina***, 174 Wn.App. 906 (2013), *remanded, on different grounds*, 182 Wn.2d 827 (2015)

After verdict, jurors tell counsel that they believed defendant's witnesses lied and thus he must have been guilty, defense demands disclosure of juror information to investigate misconduct, denied by trial court; held: juror information, other than name, is presumed private, GR 31(j), trial court may allow access to juror information upon showing of good cause, here jury's assessment of credibility is solely its province and inhere in the verdict, sound reasons support trial court's denial; II.

***State v. Booth***, ___ Wn.App.2d ___, 521 P.3d 196 (2022)

Before deliberations juror calls court to report she is ill, judge excuses the juror in defendant's absence without conferring with counsel; held: where alternate jurors remain the pre-deliberation *ex parte* dismissal of a seated juror who has become unable to perform her duties is not a critical state under defendant's right to counsel or right to be present, *State v. Jordan,* 103 Wn.App. 221, 227 (2000), *see: State v. Turpin,* 190 Wn.App. 815, 821 (2015), distinguishing *State v. Ashcraft,* 71 Wn.App. 444, 463 (1993), *State v. Rice*, 110 Wn.2d 577, 613 (1988); I.

***State v. Fleeks***, ___ Wn.App.2d ___, 2023WL355082 (2023)

Defense, using a 2015 study, shows that a study from three years prior to trial Blacks in the county represented 5.6% of the population but only 3.61% of jury pool, demands a jury drawn from a "fair cross-section of the community;" held: [t]o establish a prima facie case of a violation of the right to a fair cross-section, a defendant must establish "(1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to system exclusion of the group in the jury-selection process." *State v. Cienfuegos*, 144 Wn.2d 222, 230-32 (2001); held: defense failed to show that representation of Black persons is not fair and reasonable in relation to the number in the community, *Duren v. Missouri*, 439 U.S. 357, 364, 99 S. Ct. 664, 668, 58 L. Ed. 2d 579 (1979), nor that underrepresentation is systemic, *Cienfuegos, supra., at* 231-32, *Duren, supra., at* 439 U.S. at 364; I.

# JURY
## Verdict and Deliberations

***State v. Fisch***, 22 Wn.App. 381 (1979)

Juror became ill after unanimity reached, but before verdict announced; conviction affirmed; III.

***State v. Bellingham Municipal Court***, 26 Wn.App. 144 (1980)

Discharge of jury based solely upon length of deliberations operates as an acquittal; I.

***State v. Duhaime***, 29 Wn.App. 842 (1981)

After deliberation began, court responded to several questions from the jury, held proper as long as the supplemental instructions or answers to jurors' interrogatories were correct, *State v. Frandsen*, 176 Wash. 558, 563 (1934), *State v. Campbell*, 163 Wn.App. 394 (2011); once verdict is received and filed a juror cannot change his/her mind, even if jury had not been discharged, *Beglinger v. Shield*, 164 Wash. 147 (1931); I.

***State v. Jones***, 97 Wn.2d 159 (1982)

Judge inquires of a jury whether there is any possibility of reaching a verdict by 1:30 am, having deliberated since 11:10 am the previous day; jury reports there is no possibility, court declares a mistrial; held: "extraordinary and striking circumstances" must exist before a judge can declare a hung jury; jury's acknowledgement of a hopeless deadlock meets test; here, court's inquiries were insufficient to establish that jury was genuinely deadlocked, thus mistrial was improperly declared, and retrial is prohibited by double jeopardy clause; *see: State v. Kirk*, 64 Wn.App. 788 (1992), *State v. Barnes*, 85 Wn.App. 638, 656-8 (1997), *State v. Fish*, 99 Wn.App. 86, 90-92 (1999), *State v. Strine*, 176 Wn.2d 742 (2013); 9-0.

***State v. Hoff***, 31 Wn.App. 809 (1982)

Illness of a juror which may have weakened his/her resolve inheres in the verdict and may not be used to impeach the verdict, *State v. Reynoldson*, 168 Wn.App. 543 (2012); II.

***State v. Dykstra***, 33 Wn.App. 648 (1983)

After 13 ½ hours of deliberation, an indication from foreman that no progress had been made in two-and-one-half hours, and other factors indicating a breakdown in deliberation, court declares mistrial over objection; held: test of "extraordinary and striking" circumstances which indicate substantial justice cannot be obtained without declaring a mistrial was met, *State v. Fish*, 99 Wn.App. 86, 90-92 (1999), *State v. Strine*, 176 Wn.2d 742 (2013); II.

***State v. Simmons***, 35 Wn.App. 421 (1983)

Jury renders a guilty verdict but adds a note which appears to contradict the general verdict; held: if such a finding is susceptible of two constructions, one which supports the general verdict and one which does not, the court must adopt the construction which supports the general verdict, *see: State v. Peerson*, 62 Wn.App. 755 (1991), *State v. McNeal*, 145 Wn.2d 352 (2002); I.

***State v. Watkins***, 99 Wn.2d 166 (1983)

Where a jury is potentially deadlocked, court may give supplemental instructions as long as they do not suggest the need for agreement, the consequences of no agreement or the length of time a jury will be required to deliberate, CrR 6.15(f)(2); here, Supreme Court approved trial court giving supplemental instruction, after jury reported deadlock, that it need not be unanimous on greater offense before considering lesser included offense; 9-0.

***State v. Culver***, 36 Wn.App. 524 (1984)

Jury convicts defendant of theft, acquits of conspiracy to commit same theft; held: elements and proof of each crime were not the same, thus verdicts are not inconsistent, *State v. Fairfax*, 42 Wn.2d 777 (1953), *State v. O'Neil*, 24 Wn.2d 802, 809 (1946), *State v. Ng*, 110 Wn.2d 32, 45-48 (1988), *State v. Wilson*, 113 Wn.App. 122, 131-35 (2002); I.

***United States v. Powell***, 83 L.Ed.2d 461 (1984)

Defendant convicted on one count cannot attack that conviction because it was inconsistent with the verdict of acquittal on another count; *accord*: *State v. Ng*, 110 Wn.2d 32 (1988), overruling *State v. O'Neil*, 24 Wn.2d 802 (1946), *State v. Goins*, 151 Wn.2d 728; 9-0. ,

***State v. Jury***, 109 Wn.2d 438 (1987)

Jury reports that it has reached a verdict, and returns verdict forms indicating acquittal on greater, conviction on lessers; when court polls jury, two jurors state they did not agree with acquittal on greater; foreperson states that there is no reasonable possibility jury could be unanimous on greater charge, but other jurors disagree; trial court returns jurors to deliberate, who later convict of greater; held: within trial court's discretion to require further deliberations; "jury's own assessment that it is deadlocked, while helpful, is not itself sufficient grounds for declaring a mistrial"; 5-4.

***State v. Farmer***, 116 Wn.2d 414 (1991)

Trial court may deny discovery of jurors' prior verdicts; 9-0.

***State v. Peerson***, 62 Wn.App. 755 (1991)

Special verdict is not so inconsistent with general verdict to require reversal as long as they can be reconciled without doing violence to logic, *i.e.*, special finding will not control general verdict unless it is so irreconcilably inconsistent that it cannot otherwise be interpreted, *State v. Robinson*, 84 Wn.2d 42 (1974), *State v. Eker*, 40 Wn.App. 134, 139-40 (1985), *State v. Longworth*, 52 Wn.App. 453, 464 (1988), *State v. Ng*, 110 Wn.2d 32, 48 (1988), *State v. Burke*, 90 Wn.App. 378, 385-9 (1998), *State v. McNeal*, 145 Wn.2d 352 (2002), *cf.: State v. Goins*, 151 Wn.2d 728 (2004); I.

***State v. Kirk***, 64 Wn.App. 788 (1992)

Jury returns no verdict on greater offense, convicts of lesser, *State v. Labanowski*, 117 Wn.2d 405 (1991); trial court discharges jury without consent of defendant and without determination of "extraordinary and striking" circumstances (such as jury acknowledgment of a hopeless deadlock on greater offense), *State v. Jones*, 97 Wn.2d 159, 162 (1982), state re-notes greater offense for trial, defense seeks discretionary review; held: mere acknowledgment that jurors were unable to agree on greater offense is insufficient to allow discharge of jury, thus defendant's right to be protected from double jeopardy was violated, *Green v. United States*, 2

L.Ed.2d 199 (1957), *State v. Linton*,156 Wn.2d 777 (2006), *cf.: State v. Barnes*, 85 Wn.App. 638, 656-8 (1997), *but see: State v. Daniels*, 160 Wn.2d 256 (2007), 165 Wn.2d 627 (2009); III.

***State v. Ashcraft***, 71 Wn.App. 444, 460-67 (1993)

After deliberations have begun, a snowstorm delays deliberations, a juror with a ticket to Europe is excused by trial court and replaced by alternate without consultation with the parties, and without court ordering jury to disregard prior deliberations and recommence from the beginning; held: while planned vacation of juror is grounds to substitute a juror due to the weather delay, *see: State v. Hobson*, 61 Wn.App. 330, 336 (1991), failure to make a reasonable effort to contact counsel for input into the court's decision to excuse and replace a juror is constitutional error, *cf.: State v. Booth*, ___ Wn.App.2d ___, 521 P.3d 196 (2022); failure to instruct reconstituted jury on the record to disregard prior deliberations and begin anew, CrR 6.5, is reversible error, *State v. Stanley*, 120 Wn.App. 312 (2004); I.

***Schiro v. Farley***, 127 L.Ed.2d 47 (1994)

Defendant is charged with three counts of murdering one victim by different modes, two of which are capital offenses; jury convicts of one of the capital modes, returns blank verdicts with respect to other modes, defense maintains blank verdict to noncapital mode was a constructive acquittal under double jeopardy and collateral estoppel analysis; held: because instructions arguably required jury to find intentional (capital) murder to return any verdict, and because there was substantial evidence to support intentional murder, then the failure to return a verdict was not tantamount to an acquittal, *Green v. United States*, 2 L.Ed.2d 199 (1957), *Price v. Georgia*, 26 L.Ed.2d 300 (1970), *see: State v. Ervin*, 158 Wn.2d 746 (2006), *State v. Daniels*, 160 Wn.2d 256 (2007), 165 Wn.2d 627 (2009) , *State v. Glasmann*, 183 Wn.2d 117 (2015); because record does not establish that the issue was actually and necessarily resolved in defendant's favor, failure to return verdicts does not have collateral estoppel effect, *Ashe v. Swenson*, 25 L.Ed.2d 469 (1970); 7-2.

***State v. Baruso***, 72 Wn.App. 603, 615-19 (1993)

Defendant is charged with two counts of aggravated murder, is acquitted of one of the counts, special verdict finds that both victims died as a result of a common scheme or plan, an aggravating factor, RCW 10.95.020(8), defense claims verdicts are inconsistent; held: defendant cannot attack a conviction based on an acquittal on another count, *Dunn v. United States*, 76 L.Ed. 356, 80 A.L.R. 161 (1932), *State v. Wilson*, 113 Wn.App. 122, 131-35 (2002), *State v. Goins*, 151 Wn.2d 728 (2004); here, verdicts were not truly inconsistent; I.

***State v. Hunsaker***, 74 Wn.App. 209, 211-2 (1994)

Trial judge dismisses jury for early lunch and later directs it to continue deliberations, in absence of parties; held: while there should be no communication between the court and the jury in the absence of the defendant, *State v. Caliguri*, 99 Wn.2d 501, 508 (1983), to reverse defendant must establish a reasonably substantial possibility that the verdict was improperly influenced by trial court's intervention, none here; I.

***State v. Zwiefelhofer***, 75 Wn.App. 440 (1994)

Jury announces acquittal, is polled and is discharged, after which jurors state foreperson erred and should have written "guilty" on one count, court reverses verdict and sentences; held:

once acquittal is announced and jurors pass from trial court's control, "correction" of verdict violates defendant's double jeopardy rights; II.

State v. Lee, 77 Wn.App. 119, 125, *rev'd*, on other grounds, 128 Wn.2d 151 (1995)

Deliberating jury is asked if it wishes to continue deliberations into the evening or return, some jurors claim deadlock, trial court asks jurors individually if they think further deliberations would be beneficial and is there a reasonable probability of a verdict, jurors disagree, court requires further deliberation which results in conviction, juror files affidavit claiming she felt coerced to convict; held: trial court did not suggest a desired outcome nor nullify its instructions on the duty to deliberate, and did not impose time constraints, thus no coercion, distinguishing *State v. Boogaard*, 90 Wn.2d 733, 739-40 (1978), *cf.: State v. Ford*, 171 Wn.2d 185 (2011); III.

***State v. Perez***, 77 Wn.App. 372, 377 (1995)

Where only Hispanic juror is unable to get to court on day case is to be submitted to jury, trial court has discretion to seat an alternate; III.

***State v. Imhoff***, 78 Wn.App. 349 (1995)

Defendant is charged with attempted crime, instructions are correct but verdict form omits "attempted," defense fails to except; held: omitted word did not cause defendant to be unaware of the charge he was facing, nor did it misinstruct the jury, jury is presumed to follow instructions, thus error, if any, was harmless, *see: State v. Clements*, 4 Wn.App.2d 628 (2018), *but see: State v. Morales*, 196 Wn.App. 106, 112-22 (2016); I.

***State v. Barnes***, 85 Wn.App. 638, 656-8 (1997)

Jury reports twice that it is unable to reach a unanimous verdict, court declares mistrial without further inquiry; held: trial court had reason to believe jury was truly deadlocked, court is not required to conduct detailed inquiry due to finality implied by the two notes from the jury, distinguishing *State v. Jones*, 97 Wn.2d 159, 160-1 (1982), *State v. Kirk*, 64 Wn.App. 788, 793 (1992), *State v. Strine*, 176 Wn.2d 742 (2013), *see: State v. Fish*, 99 Wn.App. 86, 90-92 (1999); II.

***State v. Park***, 88 Wn.App. 910, 917 (1997)

Once a jury is discharged, it cannot be reconvened, *see: State v. Zwiefelhofer*, 75 Wn.App. 440, 444 (1994), *but see: State v. Clements*, 4 Wn.App.2d 628 (2018); III.

***State v. Marks***, 90 Wn.App. 980 (1998)

After speaking with jurors after verdict, trial court grants new trial based upon its perception that jurors were confused about the application of a missing witness instruction to both a defense and state's witness; held: the instruction was correct, how the jury interpreted the instruction can only be discovered by probing into the jurors' mental processes, which is improper as mental processes of jurors inhere in the verdict, *Ayers v. Johnson & Johnson Baby Prods. Co.*, 117 Wn.2d 747, 768-9 (1991), *see: Warger v. Shauers*, 547 U.S. 40, 135 S.Ct. 521, 190 L.Ed.2d 422 (2014), *State v. Berhe*, 193 Wn.2d 647 (2019); 2-1, III.

***State v. Holmes***, 106 Wn.App. 775 (2001)

Defendant is convicted of robbery 1º (deadly weapon prong) but jury rejects deadly weapon special verdict, defense seeks dismissal for inconsistency; held: special finding will not control general verdict unless irreconcilably inconsistent, *State v. Baruso*, 72 Wn.App. 603, 616 (1993); where guilty verdict is supported by sufficient evidence, inconsistent acquittal on another count does not support reversal, *State v. Wai-Chiu Ng*, 110 Wn.2d 32, 48 (1988), *Dunn v. United States*, 76 L.Ed. 356 (1932); here, difference in definitions of deadly weapon for substantive offense and enhancement establish that verdicts are not irreconcilably inconsistent; II.

***State v. McNeal***, 145 Wn.2d 352 (2002)

Defendant is convicted of vehicular homicide and vehicular assault for a single incident, jury returns special verdict on homicide that defendant was not under the influence but, having found defendant guilty of vehicular assault, must have found that he was under the influence for that charge, defense seeks dismissal of assault for inconsistent verdicts; held: because there was sufficient evidence to support the vehicular assault verdict, inconsistencies may be attributed to "considerations of jury lenity," thus defendant may not attack the conviction, *State v. Ng*, 110 Wn.2d 32, 45 (1988), *State v. Goins*, 151 Wn.2d 728 (2004); affirms *State v. McNeal*, 98 Wn.App. 585, 590-94 (1999); 6-3.

***State v. Goins***, 151 Wn.2d 728 (2004)

Jury finds defendant guilty of assault 2° with intent to commit indecent liberties, answers sexual motivation special verdict in the negative; held: where an inconsistency is between the general verdict and a special verdict relating to that same count, the general verdict will stand it if is supported by substantial evidence, *see: United States v. Powell*, 83 L.Ed.2d 461 (1984), *cf.: State v. Peerson*, 62 Wn.App. 755 (1991), *State v. Baruso*, 72 Wn.App. 603, 615-19 (1993); RCW 4.44.440 is inapplicable in criminal cases, *see: State v. McNeal*, 145 Wn.2d 352, 369 (2002); 7-2.

***State v. Stanley***, 120 Wn.App. 312 (2004)

Where a juror, during deliberations, becomes ill, trial court must inquire of alternate to determine continued impartiality, *but see: State v. Feliciano Chirinos*, 161 Wn.App. 844, 849-50 (2011), *State v. Dye*, 170 Wn.App. 349 (2012), and must instruct jurors to recommence deliberations anew, CrR 6.5, all in the presence of defendant and counsel, *State v. Ashcraft*, 71 Wn.App. 444, 460-67 (1993); I.

***State v. Wirth***, 121 Wn.App. 8 (2004)

Jury advises court it has reached a verdict but, before jurors are brought into court to announce verdict a juror becomes ill, trial court substitutes alternate and orders jury to commence deliberations anew, CrR 6.5, defense objects, asserts that jury had reached a verdict and thus substitution was improper; held: verdict is not final until rendered and received by the trial court, thus court did not abuse discretion to replace ill juror; 2-1, II.

***State v. Johnson***, 125 Wn.App. 443, 456-61 (2005)

During deliberations, presiding juror complains that juror 9 was distraught, would retreat to corner, cease communicating, impeding deliberations, juror 9 says she was crying and upset because she took a different view of the evidence; bailiff speaks with presiding juror, inquires how deliberations were proceedings and offers suggestions for making the process run more

smoothly; trial court finds foreperson credible and removes juror 9, substitutes alternate and directs that deliberations begin anew, denies mistrial for bailiff's involvement; held: bailiff's conversations with jurors was "highly improper," *State v. Booth*, 36 Wn.App. 66, 68 (1983);*State v. Hall*, ___ Wn.App.2d ___, 2022WL91685, 80996-2-I (2022), by finding that presiding juror was credible and juror 9 was not, court improperly intruded into deliberations by ruling on what the jurors said during deliberation, *State v. Elmore*, 155 Wn.2d 758 (2005), *see: State v. Depaz*, 165 Wn.2d 842 (2009), *State v. Gaines*, 194 Wn.App. 892 (2016), court may not enter into a jury's deliberations for the purpose of ruling on conflicting reports about jurors' discussions, *State v. Berniard*, 182 Wn.App. 106 (2014); because there was a reasonable probability that juror 9 was removed because of her views on the evidence, reversal is required; II.

***State v. Rooth***, 129 Wn.App. 761 (2005)

Defendant is charged with unlawful possession of two different firearms, counts I and II, verdict forms distinguish the two by count in the information not by description of the firearm, state concedes one count was insufficient, but jury appears to have erroneously convicted of the insufficient count and acquitted of the other, state seeks correction of "clerical error," CrR 7.8(a), and to change the verdicts; held: a judicial error, not a clerical error, occurred which cannot be corrected, *Wilson v. Henkle*, 45 Wn.App. 162, 167 (1986), nor can verdict be impeached as juror motives inhere in the verdict, *State v. Ng*, 110 Wn.2d 32, 43 (1988), *State v. Morales*, 196 Wn.App. 106, 112-22 (2016), *cf.: State v. Imhoff*, 78 Wn.App. 349, 352 (1995); II.

***State v. Ford***, 171 Wn.2d 185 (2011)

Presiding juror declares unanimous verdicts, as court is reading verdicts discovers one count is blank, sends jury back to jury room stating "[i]t must be filled in," jury returns guilty verdict in less than five minutes; held: to show judicial coercion, defendant must establish that jury was still deliberating and was undecided and that judicial action designed to compel a decision occurred and, if raised for the first time on appeal, interference actually prejudiced constitutional right to a fair trial; here, jury returned quickly and was later polled individually, thus insufficient evidence to establish improper judicial influence, *State v. Lee*, 77 Wn.App. 119, 125, *rev'd, on other grounds*, 128 Wn.2d 151 (1995), distinguishing *State v. Boogaard*, 90 Wn.2d 733 (1978); reverses *State v. Ford*, 151 Wn.App. 530 (2009); 6-3 (4 justices in lead opinion, 2 in concurring opinion).

***State v. Feliciano Chirinos***, 161 Wn.App. 844 (2011)

Alternate juror is "temporarily excused" with admonition not to discuss case, seated juror is excused during deliberations and alternate is brought back, jury is instructed to recommence deliberations but alternate is not questioned regarding continued impartiality; held: CrR 6.5 provides that the judge "may conduct brief voir dire before seating such alternate," thus court has discretion to do so but failure is not error, *State v. Dye*, 170 Wn.App. 340, 349 (2012), affirmed, on other grounds, 178 Wn.2d 541 (2013), overruling *dicta* in *State v. Stanley*, 120 Wn.App. 312, 318 (2004); I.

***Blueford v. Arkansas***, 566 U.S. 599, 182 L.Ed.2d 937 (2012)

Jury is instructed on charged offense and lessers, sends out a note saying it cannot agree "on any one charge," judge brings jurors into court, foreperson reports jury is unanimous "against" the charged offense, court orders more deliberations after which jury reports it has not

reached a verdict, mistrial declared; at retrial, defendant is convicted of cgreater offense; held: oral report of foreperson was not a "final resolution of anything," thus double jeopardy clause does not preclude retrial, *State v. Strine*, 176 Wn.2d 742 (2013); instructions that jury may convict on any one offense or acquit on all were proper under state law, trial court did not abuse discretion by refusing to instruct that jury could acquit on some but not others; 6-3.

***State v. Reynoldson***, 168 Wn.App. 543 (2012)

After verdict is announced and accepted, a juror reports she was coerced into voting guilty and lied when polled, later provides affidavit stating same, trial court grants new trial; held: while a juror's affidavit may provide facts of misconduct, trial court may not consider juror's statement as to how conduct affected deliberations, mental processes by which jurors reach conclusions inheres in the verdict, *State v. Marks*, 90 Wn.App. 980, 986 (1998), *Cox v. Charles Wright Acad., Inc.*, 70 Wn.2d 173, 179-80 (1967), *State v. Gay*, 82 Wash. 423 (1914), *see: Warger v. Shauers*, 574 U.S. 40, 190 L.Ed.2d 422 (2014), *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 197 L. Ed. 2d 107 (2017), *State v. Berhe*, 193 Wn.2d 647 (2019); II.

***State v. Strine***, 176 Wn.2d 742 (2013)

Jury returns verdict forms finding defendant not guilty, trial court polls jury believing it is obligatory, defense does not object, 6 jurors dissent, presiding juror states jury will be unable to reach unanimous verdict, court declares mistrial; held: polling jury is discretionary, CrR 6.16(a)(3), defense failure to object to polling waives review of decision to poll; appellate courts should defer to trial court's determination of a need for a mistrial, *Renico v. Lett*, 559 U.S. 766, 176 L.Ed.2d 678 (2010), *cf.: State v. Jones*, 97 Wn.2d 159 (1982), thus double jeopardy clause does not prevent retrial; 9-0.

***State v. Lamar***, 180 Wn.2d 576 (2014)

Jury deliberates, next day a juror is ill and parties agree to replace with an alternate, judge instructs reconstituted jury to review and recap for the alternate what had occurred, neither party objects; held: CrR 6.5 requires that when an alternate substitutes after deliberation have begun jury is to be instructed on the record to disregard all previous deliberations and begin anew; here, the court's supplemental instruction effectively barred the reconstituted jury from deliberating on all aspects of the case, thus court violated defendant's right to a unanimous jury, *State v. Blancaflor*, 183 Wn.App. 215, 220-29 (2014), *State v. Ashcraft*, 71 Wn.App. 444, 460-67 (1993), *State v. Stanley*, 120 Wn.App. 312 (2004), *State v. Blancaflor*, 183 Wn.App. 215, 220-29 (2014); 9-0.

***State v. Berniard***, 182 Wn.App. 106 (2014)

During deliberations court staff notices a juror in distress, refers her to a "juror debriefer" who testifies that the juror said she had considered harming herself because "everybody would be against her," court declines to question juror to determine if her distress was because she was in the minority, excuses juror and instructs jury to begin deliberations anew; held: where there is any reasonable possibility that the impetus for the complaint is the juror's views on the merits, court may only send jury back to continue deliberations or declare a mistrial, *State v. Elmore*, 155 Wn.2d 758, 776 (2005), as dismissal of a holdout juror implicates right to impartial jury and unanimous verdict, *State v. Johnson*, 125 Wn.App. 443 (2005), *State v. Sassen Van Elsloo*, 191

Wn.2d 798 (2018), trial court had a duty to conduct a balanced investigation and apply a heightened evidentiary standard, which court failed to do, structural error; II.

***State v. Morales***, 196 Wn.App. 106, 112-22 (2016)

Defendant is charged with child molestation 1°, verdict form states child molestation 2° (no lesser given), jury finds defendant guilty of 2°, jury is discharged, defense moves for new trial, trial court corrects verdict to 1°; held: while a judge may correct a clerical error after jury is discharged, *CrR 7.8, see: State v. Imhoff,* 78 Wn.App. 349, 352 (1995), *but see: State v. Rooth,* 129 Wn.App. 761 (2005), here, even if verdict was erroneous, jury trial right requires that sentence be authorized by the jury's verdict, *State v. Williams-Walker,* 167 Wn.App. 889, 896 (2010), court's authority after jury is discharged does not extend to impeaching a verdict or adversely impacting defendant, *cf.: State v. Clements,* 4 Wn.App.2d 628 (2018); I.

***State v. Clements***, 4 Wn.App.2d 628 (2018)

After verdict is read judge discharges jury, immediately discovers that one of the crimes in a verdict form was not the crime charged, jurors had not left the hallway, court brings jurors back, tells them an error occurred and that they were to deliberate further, gives them corrected verdict forms, jurors return another verdict; held: common law rule that once discharged a jury cannot be reconvened, *see: Beglinger v. Shield,* 164 Wash. 147, 152 (1931), is "too severe," where jurors have not separated and passed "from the sterility of the court's control," *State v. Edwards,* 15 Wn.App. 848, 850-51 (1976), court may allow a correction of the verdict, *cf.: State v. Morales,* 196 Wn.App. 106, 112-22 (2016); III.

***State v. Backemeyer***, 5 Wn.App.2d 841 (2018)

During deliberations jury sends out questions which clearly establish that they did not understand the self defense instructions, defense counsel agrees with suggestion that court answer the questions with "read your instructions;" held: where a jury indicates that it does not understand a jury instruction, court must eliminate the confusion, . *Bollenbach v. United States,* 326 U.S. 607, 612-13, 66 S.Ct. 402, 90 L.Ed. 350 (1946), *cf.: State v. Sutton,* 18 Wn.App.2d 38 (2021), and counsel's failure to ask court to re-instruct to clear up the confusion is ineffective assistance; 2-1, III.

***State v. Sutton***, 18 Wn.App.2d 38 (2021)

During deliberations jury sends out a question seeking clarification of an instruction, parties agree that the correct answer to the question is "yes," court directs jurors to refer to instructions; held: because the question did not create an inference that the entire jury was confused, question shows jury understood the instructions, thus trial court did not abuse its discretion, *State v. Ng,* 110 Wn.2d 32, 42-43 (1988), *cf.: State v. Backemeyer,* 5 Wn.App.2d 841 (2018); Division III urges trial courts to answer jury questions.

***State v. Hall***, ___ Wn.App.2d ___, 2022WL91685, 80996-2-I (2022)

After 8 days of deliberations a juror asked bailiff to be excused, bailiff tells jury that it would have to start over if juror was excused and "that's not what the alternate is for," jury then reaches a verdict, court denies mistrial; held: because it's possible that bailiff's comments resulted in juror who asked to be excused was pressured to reach a verdict bailiff's communication with jury was improper, RCW 4.44.300, *State v. Christensen,* 17 Wn.App. 922, 926 (1977); I.

# JURY
## Voir Dire/Challenges

***State v. Gladstone***, 29 Wn.App. 426 (1981)

Where population of county is 2.5% Hispanic and venire is 0.3%, disparity is not constitutionally significant, *see: Berhhuis v. Smith*, 559 U.S. 314, 176 L.Ed.2d 249 (2010); I.

***State v. Wixon***, 30 Wn.App. 63 (1981)

Sequestering jury is necessary only upon a showing of probability of prejudice; individual voir dire is not necessary when news coverage was predominantly factual and nonsensational; I.

***State v. Gosser***, 33 Wn.App. 428 (1982)

Challenge for cause to juror who was formerly a state patrolman and who testified that he would tend to believe a police officer over a defendant denied by trial court; held: no abuse of discretion, *State v. Gilcrist*, 91 Wn.2d 603 (1979), *State v. Griepsma*, 17 Wn.App.2d 606 (2021), *cf.: State v. Gonzales*, 111 Wn.App. 276, 277-82 (2002), RCW 4.44.170; II.

***State v. Latham***, 100 Wn.2d 59 (1983)

In arson case, fact that two jurors had firefighting experience and were acquainted with state's witnesses, but jurors agreed to evaluate case fairly supports court's denial of challenge for cause; use of peremptory challenge to remove a juror who should have been removed for cause cures the error in absence of proof by defendant that use of peremptory challenge actually prejudiced his case, *State v. Talbott*, ___ Wn.2d ___, 2022WL17839790 (2022), *State v. Fire*, 145 Wn.2d 152 (2001), *State v. Noltie*, 57 Wn.App. 21 (1990), *State v. Munzanreder*, 199 Wn.App. 162 (2017); trial court grants motion *in limine* to preclude impeachment of defendant by prior drug conviction, after voir dire, court reverses itself to permit impeachment; defense moves for mistrial, arguing defendant was precluded from questioning jurors on bias re: drug use; held: error for court to reverse its final ruling, harmless here; 7-2.

***Rushen v. Spain***, 78 L.Ed.2d 267 (1983)

During trial of Black Panther, a juror who, during voir dire, stated she did not associate the Black Panthers with violence, spoke with trial judge to advise that she remembered a childhood friend had been murdered by a Black Panther; trial judge made no record of this communication; Ninth Circuit reverses; Supreme Court holds harmless error analysis applies, reverses summarily; 7-2.

***State v. Laureano***, 101 Wn.2d 745 (1984)

Scope of voir dire, while in discretion of trial court, should afford defendant "every reasonable protection," *State v. Tharp*, 42 Wn.2d 494, 499 (1953), and so that defense may "determine the advisability of interposing their peremptory challenges," *State v. Hunter*, 183 Wash. 143, 153 (1935); 9-0.

***State v. Killen***, 39 Wn.App. 416 (1985)

Trial court temporarily withheld names of jurors who expressed that they would be inconvenienced, then placed them back into venire; held: as long as element of chance is not

removed from selection process, there is no prejudice; *see also:* *State v. Langford*, 67 Wn.App. 572, 582-4 (1992); III.

***State v. Sellers***, 39 Wn.App. 799 (1985)
Defendant has burden of proving discrimination in selection of jury panel, *see:* *Berhhuis v. Smith*, 559 U.S. 314, 176 L.Ed.2d 249 (2010); use of voter registration lists is best source to obtain a fair cross-section of the community, RCW 2.36.060; II.

***State v. Allyn***, 40 Wn.App. 27 (1985)
Jurors' knowledge via the press that defendant has a record is not sufficient by itself to disqualify juror or to change venue; III.

***State v. Reid***, 40 Wn.App. 319 (1985)
Paranoid schizophrenic juror is not *per se* "incapable of performing the duties of a juror," RCW 4.44.160; where defense fails to exercise available peremptory challenge, cannot later challenge a juror's inclusion, *State v. Johns*, 61 Wash. 636 (1911); II.

***State v. Bernson***, 40 Wn.App. 719 (1985)
A juror who works for a state juvenile correctional facility is not biased for purposes of a challenge for cause, RCW 4.44, where the juror agrees to lay aside opinions, has no specific knowledge about the case, and will decide the case solely on the evidence, *State v. Latham*, 100 Wn.2d 59, 63 (1983), *State v. Gosser*, 33 Wn.App. 428 (1982); III.

***State v. Frederiksen***, 40 Wn.App. 749 (1985)
Court prohibits voir dire question, "if court instructs you as to self-defense, will you follow the instruction;" held: on this record, court could prohibit the question; *dicta* that a blanket prohibition as to self-defense voir dire questions is unduly broad; to challenge trial court's ruling on voir dire, objection must be specific, too general here; I.

***State v. Johnson***, 42 Wn.App. 425 (1985)
Employment by the state does not automatically disqualify a juror in a criminal case unless the person's financial interest could be affected by the state's success or failure in the case, RCW 4.44.180(2); II.

***State v. Anderson***, 108 Wn.2d 188 (1987)
Aggravated murder 1° defendant is not entitled to 12 peremptory challenges where state does not seek death penalty, CrR 6.4(e); 7-2.

***State v. Coe***, 109 Wn.2d 832 (1988)
Trial court denied challenges for cause to jurors who were aware defendant had been convicted of these charges at an earlier trial; held: trial court may decide, as a question of fact, whether a juror's "protestation of impartiality" should be believed, *Patton v. Young*, 81 L.Ed.2d 847 (1984), *see*: *State v. Toennis*, 52 Wn.App. 176 (1988); 9-0;

***State v. Brenner***, 53 Wn.App. 367 (1989)

During voir dire, juror admits knowing police but, when asked if he has developed a bond with police, says no; later, defense discovers juror meets with a police officer daily, juror denies discussing case; held: juror did not lie, need not volunteer information not requested, *see:* *State v. Cho,* 108 Wn.App. 315 (2001), *State v. Johnson,* 137 Wn.App. 862 (2007), *State v. Boiko,* 138 Wn.App. 256 (2007); I.

***State v. Rempel***, 53 Wn.App. 799 (1989)

During voir dire, juror states she is not acquainted with name of complainant; when complainant is called to testify, juror discloses she knows complainant, but remains unbiased, trial court denies mistrial; held: unintentional failure of juror to disclose information does not mandate mistrial where trial court determines that juror can be fair and impartial, even if defense still had peremptory challenges to exercise; I.

***Robinson v. Safeway Stores***, 113 Wn.2d 154 (1989), *overruled, State v. Lupastean,* ___ Wn.2d ___, 99850-7 (2022)

Juror denies, during voir dire, bias against Californians, during deliberations expresses bias against same, plaintiff being from California; held: false answer during voir dire which materially deprives parties of intelligent exercise of a challenge is grounds for a new trial, *State v. Johnson,* 137 Wn.App. 862 (2007), *State v. Boiko,* 138 Wn.App. 256 (2007), *State v. Winborne,* 4 Wn.App.2d 147 (2018), *see:* *State v. Cho,* 108 Wn.App. 315 (2001); 9-0.

***State v. Briggs***, 55 Wn.App. 44 (1989)

In rape case where victim claims rapist did not stutter, and defense maintains that defendant stutters, counsel inquired of jurors in voir dire if any had a speech problem; specific juror does not answer that he did, but in deliberations discusses his personal speech problems with other jurors; held: when a juror withholds material information during voir dire and then later injects it into deliberations, court must inquire into the prejudicial effect of the misconduct, *State v. Winborne,* 4 Wn.App.2d 147 (2018); here, juror's withholding information deprived the defense of the opportunity to pursue the matter further to determine whether or not to exercise a challenge for cause and prejudiced defendant by the use of extraneous evidence during deliberations, *State v. Cho,* 108 Wn.App. 315 (2001), *State v. Johnson,* 137 Wn.App. 862 (2007), *State v. Boiko,* 138 Wn.App. 256 (2007), *cf.*: *Richards v. Overlake Hospital*, 59 Wn.App. 266 (1990); I.

***Cheney v. Grunewald***, 55 Wn.App. 807 (1989)

In DUI case, while actual bias is not presumed from an association with MADD, where juror states that if he were charged he would not want six jurors with his frame of mind on the jury, there is a reasonable suspicion of bias, *Rowley v. Group Health Coop.*, 16 Wn.App. 373, 377 (1976), and failure to grant a challenge for cause was error; III.

***State v. Noltie***, 57 Wn.App. 21 (1990)

Within trial court's discretion to deny challenge for cause to juror who said on voir dire that she "hoped" she would be fair and would try, but never said she would not be fair, distinguishing *State v. Moser,* 37 Wn.2d 911 (1951), wherein juror said he did not know if he would be fair; I.

***Richards v. Overlake Hospital***, 59 Wn.App. 266 (1990)

During voir dire in medical malpractice case, juror discloses her medical training, which, during deliberations, she imparts to other jurors in interpreting admitted medical records; held: although interpretation of evidence interjected by juror is outside realm of typical juror's general life experience, because juror fully disclosed background, denial of new trial by trial court was not an abuse of discretion, distinguishing *State v. Briggs*, 55 Wn.App. 44 (1989), *see: State v. Cho*, 108 Wn.App. 315 (2001), *State v. Johnson*, 137 Wn.App. 862 (2007), *State v. Boiko*, 138 Wn.App. 256 (2007); 2-1, I.

***Powers v. Ohio***, 113 L.Ed.2d 411 (1991)

White defendant may object to prosecutor's peremptory challenges to black jurors as violating equal protection, distinguishing *Holland v. Illinois*, 107 L.Ed.2d 905 (1990), *see* : *Batson v. Kentucky*, 90 L.Ed.2d 69 (1986), *Edmonson v. Leesville Concrete Co.*, 114 L.Ed.2d 660 (1991); 7-2.

***Mu'min v. Virginia***, 114 L.Ed.2d 493 (1991)

Criminal case engenders substantial local publicity; during voir dire, trial judge refused to ask (or permit) questions relating to content of news items which jurors may have seen, but did inquire of jurors who had seen any news items if they had formed opinions and excused those who indicated they had; held: trial court's voir dire must "cover the subject," *Aldridge v. United States*, 75 L.Ed.2d 1054 (1931), of pretrial publicity, but questions about content are not required by constitution; 5-4.

***State v. Tingdale***, 117 Wn.2d 595 (1991)

Clerk excuses jurors from panel because they were acquainted with petitioner, trial court denies defense request that they be recalled; held: acquaintance with a party is not, by itself, grounds for a challenge for cause; trial court's dismissal of jurors without factual basis in the record to base finding of actual or imputed bias is abuse of discretion, *cf.: State v. Langford*, 67 Wn.App. 572 (1992), *see: State v. Rice*, 120 Wn.2d 549 (1993), *State v. Sassen Van Elsloo*, 191 Wn.2d 798 (2018); 6-3.

***Ottis v. Stevenson-Carson Sch. Dist.***, 61 Wn.App. 747 (1991)

Procedural analysis of challenges for cause for actual and implied bias; II.

***State v. Tigano***, 63 Wn.App. 336 (1991)

One juror fails to respond to voir dire question asking whether anyone had heard about the case when she had previous knowledge; another juror violates court's order not to read about case while trial is in progress, learning that defendant had previously been tried to hung jury, mentions to other jurors what she read; held: information known by jurors, while misconduct, was not prejudicial as substance came out at trial; prior hung jury did not point to defendant's guilt, attorneys referred repeatedly to prior "hearing" in examining witnesses; correct response from juror during voir dire would not have supported a challenge for cause, *McDonough Power Equip., Inc. v. Greenwood*, 78 L.Ed.2d 663 (1984), *State v. Briggs*, 55 Wn.App. 44, 52 (1989), inability to utilize withheld information to exercise peremptory challenge is not prejudicial as a matter of law, *State v. Carlson*, 61 Wn.App. 865, 878 (1991), *State v. Cho*, 108 Wn.App. 315

(2001), *but see:* *State v. Johnson*, 137 Wn.App. 862 (2007), *State v. Boiko*, 138 Wn.App. 256 (2007), *State v. Winborne*, 4 Wn.App.2d 147 (2018); II.

***State v. Langford***, 67 Wn.App. 572 (1992)

Requests for excuses from summoned jurors may be granted by a clerk pursuant to standards developed by the court, where the standards are consistent with RCW 2.36.100, is not error, distinguishing *State v. Tingdale*, 117 Wn.2d 595 (1991), *see: State v. Killen*, 39 Wn.App. 416, 418-9 (1985).

***State v. Rice***, 120 Wn.2d 549 (1993)

Clerks have authority to excuse jurors for reasons set forth in RCW 2.36.100 (hardship, extreme inconvenience, etc.), distinguishing *State v. Tingdale*, 117 Wn.2d 595 (1991), *Pers. Restraint of Yates*, 177 Wn.2d 1, 20-25 (2013); where selection process is in substantial compliance with statute, defendant must show prejudice; 9-0.

***Brady v. Fibreboard Corp.***, 71 Wn.App. 280 (1993)

Judge excuses jurors based upon questionnaire without hearing from counsel, case is assigned to another judge for voir dire and trial; held: procedure destroyed randomness of panel, *State v. Tingdale*, 117 Wn.2d 595, 600 (1991) and abridged statutory procedures that govern challenges for cause, *State v. Noltie*, 116 Wn.2d 831, 838 (1991), *Ottis v. Stevenson-Carson Sch. Dist. 303*, 61 Wn.App. 747, 752-4 (1991), thus reversed; II.

***State v. Medrano***, 80 Wn.App. 108 (1995)

In diminished capacity case, peremptory challenge to an African-American juror had a race-neutral explanation where juror was a nurse who worked with alcoholics; juror's familiarity with the subject matter of anticipated expert testimony is a legitimate basis for a peremptory challenge; III.

***State v. Witherspoon***, 82 Wn.App. 634 (1996)

Juror states during voir dire that he is "a little bit prejudiced," sees Blacks dealing drugs, challenge for cause denied; held: unequivocal concession of prejudice against African-Americans, irrespective of juror's later agreement to presume black defendant innocent, obliges excusal for cause, *State v. Gonzales*, 111 Wn.App. 276, 277-82 (2002), *see: State v. Jackson*, 75 Wn.App. 537 (1994); I.

***State v. Stackhouse***, 90 Wn.App. 344, 350-2 (1998)

Trial court precludes evidence of defendant's prior murder conviction, two jurors state during voir dire that they are aware of the conviction and that they might be predisposed to believe defendant was involved, court denies challenges for cause, jurors were impaneled; held: court properly excluded prior murder due to prejudicial effect, thus jurors' knowledge of it was prejudicial, and denial of challenge was abuse of discretion, *State v. Parnell*, 77 Wn.2d 503, 505-8 (1969); 2-1, III.

***State v. Johnson***, 90 Wn.App. 54, 72-3 (1998)

During deliberations, one juror calls bailiff from home to say she was too nervous to continue, judge denies mistrial and substitutes alternate, directing jurors to recommence

deliberation anew, CrR 6.5; held: while preferred method would have been to voir dire the juror in question and allow additional voir dire of the alternate, no error here; III.

***State v. Alires***, 92 Wn.App. 931, 936-39 (1998)

In response to general question, "does anybody believe Hispanics are more likely to commit crimes," six jurors raise their hands, one of the jurors is questioned and is not seated, other five are not questioned individually, indicate they would be fair, defense counsel does not excuse the jurors, defendant claims ineffective assistance; held: jurors indicated they would be fair and impartial, counsel made a "trial decision" not to pursue the topic because it was unlikely court would excuse jurors for cause, and did not want to risk antagonizing jurors, thus counsel was effective; 2-1, III.

***United States v. Martinez-Salazar***, 145 L.Ed.2d 792 (2000)

Trial court erroneously denies challenge for cause, defendant exercises peremptory challenge to that juror, exhausts all challenges but does not object to any jurors seated; held: loss of a peremptory challenge does not constitute a violation of Sixth Amendment right to impartial jury, *State v. Fire*, 145 Wn.2d 152 (2001), *State v. Talbott*, ___ Wn.2d ___, 2022WL17839790 (2022), *see: Rivera v. Illinois*, 173 L.Ed.2d 320 (2009), *cf.:State v. Vreen*,143 Wn.2d 983 (2001); 9-0.

***State v. Williamson***, 100 Wn.App. 248, 252-55 (2000)

After first witness begins testimony, a juror informs the court that she knows the victim, state is allowed to exercise peremptory challenge over objection; held: trial court substantially complied with CrR 6.4(e)(2), RCW 4.44.210, absent prejudice, no abuse of discretion; III.

***State v. Jorden***, 103 Wn.App. 221, 229-30 (2000)

*Batson v. Kentucky*, 90 L.Ed.2d 69 (1986), is inapplicable to challenges for cause; II.

***State v. Clark***, 143 Wn.2d 731, 762-64 (2001)

Where defense fails to exercise all peremptory challenges, it cannot challenge on appeal trial court's rulings on challenges for cause, *State v. Tharp*, 42 Wn.2d 494, 500 (1953), *State v. Collins*, 50 Wn.2d 740, 744 (1957), *State v. Elmore*, 139 Wn.2d 250, 277 (1999), even under struck jury method, *State v. Talbott*, ___ Wn.2d ___, 2022WL17839790 (2022),; 9-0.

***State v. Nemitz***, 105 Wn.App. 205, 209-12 (2001)

There is no constitutional right to have non-English speaking persons on any jury, *State v. Marsh*, 106 Wn.App. 801 (2001); III.

***State v. Cienfuegos***, 144 Wn.2d 222, 230-32 (2001)

After conviction, defense moves for jury list to contact jurors to determine their ethnicity, arguing that county jurors did not fairly represent ethnic makeup of county, court denies discovery; held: party challenging panel has burden, CrR 6.4(a), of showing that (1) group alleged to be excluded is "distinctive," (2) representation is not fair in relation to the numbers in the community and (3) that underrepresentation is due to systematic exclusion in jury selection process, *Duren v. Missouri*, 58 L.Ed.2d 579 (1979), *Berhhuis v. Smith*, 559 U.S. 314, 130 S.Ct. 1382, 176 L.Ed.2d 249 (2010), *State v. Fleeks*, ___ Wn.App.2d ___, 2023WL355082 (2023); bare allegation is insufficient to "bring this issue into play," and require discovery, some

showing of actual disproportionality is required, *State v. Hilliard*, 89 Wn.2d 430 (1977), *Taylor v. Louisiana*, 42 L.Ed.2d 690 (1975), *State v. Barajas*, 143 Wn.App. 24, 34-37 (2007), *State v. Clar*, 167 Wn.App. 667, 673-76 (2012); 5-4.

***State v. Fire***, 145 Wn.2d 152 (2001)

If a defendant exercises a peremptory challenge against a juror who should have been excused for cause and exhausts his peremptory challenges, there is no prejudice because he has been convicted by a jury on which no biased juror sat, *United States v. Martinez-Salazar*, 145 L.Ed.2d 792 (2000), *State v. Roberts*, 142 Wn.2d 471, 517-18 (2000), *State v. Latham*, 100 Wn.2d 59 (1983), *State v. Bernson*, 40 Wn.App. 729 (1985), *State v. Munzanreder*, 199 Wn.App. 162 (2017), see: *State v. Talbott*, ___ Wn.2d ___, 2022WL17839790 (2022), *but see: State v. Parnell*, 77 Wn.2d 503, 508 (1969); reverses *State v. Fire*, 100 Wn.App. 722 (2000); 5-4.

***State v. Cho***, 108 Wn.App. 315 (2001)

Juror, while not directly asked, does not disclose that he is a former police officer, does not answer that he has police friends, after trial defense declares that, had it known, it would have exercised challenge for cause; held: misleading or false answers during voir dire require reversal only if accurate answers would have provided grounds for a challenge for cause, *McDonough Power Equipment, Inc. v. Greenwood*, 78 L.Ed.2d 663 (1984), *Pers. Restraint of Lord*, 123 Wn.2d 296, 313 (1994), *see: State v. Johnson*, 137 Wn.App. 862 (2007), *State v. Boiko*, 138 Wn.App. 256 (2007), *State v. Moen*, 4 Wn.App.2d 589 (2018), there is nothing inherent in the experience or status of a police officer that would support a finding of actual bias; here, however, because the juror stated he had been excluded before when it came out he was a former officer, there is a "troubling inference" of deliberate concealment, remanded for evidentiary hearing; I.

***State v. Rivera***, 108 Wn.App. 645, 648-52 (2001)

Erroneously denying a party a peremptory challenge to an alternate who does not deliberate is harmless error, *cf.: State v. Vreen*, 143 Wn.2d 923, 932 (2001), *see also: Rivera v. Illinois*, 173 L.Ed.2d 320 (2009),; I.

***State v. Brady***, 116 Wn.App. 143 (2003)

Trial court grants specific time to defense for voir dire but changes mind during voir dire eliminating a promised second segment to inquire, defense claims that it reserved some issues, including race bias, for second segment; held: defense established that the court's altered time allowance prejudiced defendants, thus court abused discretion; II.

***Miller-El v. Dretke***, 162 L.Ed.2d 196 (2005)

Prosecutor's excusing 91% of eligible African-American jurors plus implausible explanations plus history of discrimination by prosecutor's office establishes discriminatory peremptory challenges, *Batson v. Kentucky*, 90 L.Ed.2d 69 (1986), *Snyder v. Louisiana*, 170 L.Ed.2d 175 (2008), *but see: State v. Bennett*, 180 Wn.App. 484 (2014), *see: Seattle v. Erickson*, 188 Wn.2d 721 (2017); 6-3.

***State v. Bird***, 136 Wn.App. 127, 133-34 (2006)

Trial court deprives defense of a peremptory challenge, declaring that when a party accepts the panel that act counts as a challenge, juror whom defense wished to challenge

deliberates; held: acceptance of the jury panel is not a peremptory challenge; erroneous denial of a peremptory challenge cannot be harmless when the objectionable juror actually deliberates, *State v. Vreen*, 143 Wn.2d 923, 932 (2001), *but see: Rivera v. Illinois*, 173 L.Ed.2d 320 (2009), *State v. Booth*, ___ Wn.App.2d ___, 82039-7-I (2022), error may be raised in a motion for a new trial, *State v. Wicke*, 91 Wn.2d 638, 642 (1979); II.

***State v. Yates***, 161 Wn.2d 714, 747-49 (2007)

An individual's religious affiliations and beliefs are not proper subjects of inquiry during *voir dire*, CONST. art. I, § 11, unless the case involves religious issues or if a necessary predicate for a challenge for cause; 8-1.

***State v. Boiko***, 138 Wn.App. 256 (2007)

During voir dire, juror discloses she knows a witness, does not disclose she's married to the witness, trial court grants new trial; held: trial court did not abuse its discretion, *State v. Cho*, 108 Wn.App. 315 (2001), *State v. Moen*, 4 Wn.App.2d 589 (2018); III.

***State v. Wilson***, 141 Wn.App. 597, 606-08 (2007)

Trial court denies challenge for cause to a juror who previously worked at the store where the crime occurred and recognized but did not know a witness; held: party challenging the juror for actual bias bears the burden of demonstrating facts necessary to sustain challenge by a preponderance, *Ottis v. Stevenson-Carson Sch. Dist. No. 303*, 61 Wn.App. 747, 752-53 (1991); it is within trial judge's discretion to deny a challenge for cause where the judge evaluated juror's answers and demeanor and determined she could be fair, *cf.: State v. Fire*, 100 Wn.App. 722, 724-29, *rev'd on other grounds,* 145 Wn.2d 152 (2001); III.

***State v. Grenning***, 142 Wn.App. 518, 540-41 (2008), *aff'd, on other grounds,* 169 Wn.2d 47 (2010)

Juror acknowledges she saw a headline, recognized it might apply to case, did not read story, trial court denies challenge for cause; held: to excuse a juror for cause, party must prove actual bias, *State v. Noltie*, 116 Wn.2d 831, 838 (1991), *State v. Gosser*, 33 Wn.App. 428, 433 (1982), *State v. Birch*, 151 Wn.App. 504, 512-13 (2009), *see: State v. Sassen Van Elsloo*, 191 Wn.2d 798 (2018); II.

***State v. Barajas***, 143 Wn.App. 24, 34-37 (2007)

Absent evidence of a systematic exclusion of members of defendant's own racial group from jury venire, *Batson v. Kentucky*, 90 L.Ed.2d 69, 85-86 (1986), *State v. Hilliard*, 89 Wn.2d 430, 440 (1977), trial court is not obliged to provide defense with a copy of the master jury pool list, *State v. Cienfuegos*, 144 Wn.2d 222, 232 (2001), GR 18, GR 31; III.

***Rivera v. Illinois***, 173 L.Ed.2d 320 (2009)

Erroneous denial of a peremptory challenge may be harmless and does not require automatic reversal under United States Constitution, *State v. Booth*, ___ Wn.App.2d ___, 82039-7-I (2022), *but see: State v. Bird*, 136 Wn.App. 127, 133-34 (2006), *State v. Vreen*, 143 Wn.2d 923, 932 (2001); 9-0.

***Pers. Restraint of Crace***, 157 Wn.App. 81 (2010), *rev'd, on other grounds,* 174 Wn.2d 835 (2012)

Before voir dire, juror observes defendant in hall in shackles, is not asked about it during voir dire, does not volunteer information, after conviction writes a newspaper article describing what she saw; held: a juror is not required to volunteer information, *State v. Gilmore*, 59 Wn.2d 514, 515-16 (1962); passing glimpses of a defendant in restraints are insufficient to find prejudice, *State v. Early*, 70 Wn.App. 452, 462 (1993), *State v. Gosser*, 33 Wn.App. 428 435 (1982); 2-1, II.

***State v. Hyder***, 159 Wn.App. 234, 253-55 (2011)

Potential juror 25 arrives late and is sworn for voir dire in absence of defendant, no objection is taken, juror is seated, at end of testimony an alternate is excused; held: failure to swear a juror is trial error to which defense must object, defense could have requested that alternate juror replace juror 25, thus even if all peremptories were used defense waived issue, *State v. Tharp*, 42 Wn.2d 494, 499-51 (1953), *see: State v. Lloyd*, 138 Wash. 8 (1926); II.

***State v. Cleary***, 166 Wn.App. 43 (2012)

Juror answers questionnaire that he has been convicted of a felony, questionnaire does not inquire if civil rights have been restored, a statutory prerequisite to serving on a jury, RCW 2.36.070, court asks counsel if she wishes to inquire, declines, juror is seated, defendant is convicted and appeals; held: even if a juror is unqualified to sit due to felony conviction, the disqualification criterion is statutory, not constitutional, thus issue cannot be raised for first time on appeal; error, if any, was invited by counsel declining to address the issue; III.

***State v. Perez***, 166 Wn.App. 55, 63-69 (2012)

After conviction, defense counsel reports that a juror was acquainted with defendant, not disclosed during voir dire, trial court then reports that the juror told the bailiff that the juror said he might know defendant's family, trial judge did not inform the parties, juror is summoned and says he knew family, had read a police report that involved defendant "a long time ago" but did not remember it, new trial denied; held: absent a showing that would have supported a challenge for cause of implied bias, RCW 4.44.180, *State v. Cho*, 108 Wn.App. 315 (2001), trial court did not abuse discretion by denying new trial, *State v. Moen*, 4 Wn.App.2d 589 (2018), *see: State v. Winborne*, 4 Wn.App.2d 147 (2018); III.

***State v. Kloepper***, 179 Wn.App. 343, 352-54 (2014)

After being selected juror sends note that he has learned that his parents were friends of victim's parents, said he had not seen victim in 40 years, court denies challenge for cause; held: there were tenable grounds for denying challenge for cause, an acquaintance 40 years earlier did not amount to bias as a matter of law; 2-1, III.

***State v. Irby***, 187 Wn.App. 183, 190-97 (2015)

Defendant waives counsel and waives his presence at trial, one juror states she "would like to say he's guilty," another that she's predisposed to believe police but will try to decide on the evidence, court seats both; held: juror who states defendant is guilty cannot be seated as it is manifest constitutional error, court should have excused juror *sua sponte*,, *State v. Guevara Diaz*, 11 Wn.App.2d 843 (2020), *State v. Gutierrez*, ___ Wn.App.2d ___, 513 P.3d 812 (2022), *but see: State v. Lawler*, 194 Wn.App. 275 (2016), *see also: State v. Phillips*, 6

Wn.App.2d 651 (2018); "I will try" is within court's discretion to view an answer as an adequate assurance of impartiality; I.

***State v. Strange***, 188 Wn.App. 679, 684-87 (2015)

During general voir dire in child molestation case a potential juror states that molestation is not an easy accusation to make and in her experience people don't make the accusation for no reason, juror is later excused for hardship, for first time on appeal defense argues that the panel was tainted; held: because the juror did not profess expertise about child molestation and did not state that children never lie about abuse defendant was not denied an impartial jury; II.

***State v. Jones,*** 185 Wn.2d 412 (2016)

By agreement of the defense, during a recess, judicial assistant draws the names of sitting jurors who are alternates, court announces which jurors are alternates; held: randomly selecting the names of jurors to serve as alternates does not violate public trial right; selection of alternates off the record does not violate defendant's right to be present where defense does not object, distinguishing *State v. Irby,* 170 Wn.2d 874 (2011); *reverses, in part, State v. Jones,* 187 Wn.App. 87 (2013); 9-0.

***State v. Lawler***, 194 Wn.App. 275 (2016)

Juror expresses doubt that he can be objective, neither defense counsel nor court challenge for cause, defense does not exercise peremptory challenge; held: while trial judge has a duty to excuse an unfit or biased juror, RCW 2.36.110, CrR 6.4(c)(1), *State v. Davis*, 175 Wn.2d 287, 309-16 (2012), here there was some "slight equivocation" by the juror, court should be careful not to interfere with defense counsel's strategic decisions during jury selection, thus no abuse of discretion in failure to *sua sponte* excuse juror, distinguishing *State v. Irby*, 187 Wn.App. 183 (2015), *see: State v. Phillips*, 6 Wn.App.2d 651 (2018), *State v. Guevara Diaz,* 11 Wn.App.2d 843 (2020), *State v. Gutierrez*, ___ Wn.App.2d ___, 513 P.3d 812 (2022); II.

***State v. Sullivan***, 196 Wn.App. 277, 287-89 (2016)

Juror states he was confident he had met a witness, might be friends on social media but would not impact assessment of credibility; held: even if juror knows a witness if trial court is satisfied that juror can disregard it and decide issue impartially then court does not abuse discretion in declining to excuse the juror; I.

***State v. Munzanreder***, 199 Wn.App. 162, 176-180 (2017)

Defense challenges a juror for cause which is denied, defense has remaining peremptory challenges but does not use one on the juror in question; held: if trial court errs in denying a challenge for cause where the party elects not to use an allotted peremptory challenge or request additional peremptory challenges the issue is waived on appeal, *State v. Talbott*, ___ Wn.2d ___, 2022WL17839790 (2022), *State v. Fire*, 145 Wn.2d 152 (2001); III.

***Pers. Retraint of Meredith***, 191 Wn.2d 300 (2018)

Trial court seats two alternates but only provides seven peremptory challenges, no objection in trial court, not raised on direct appeal, petitioner claims ineffective assistance; held: failure to provide sufficient peremptory challenges as permitted by court rule is not structural error or a manifest error affecting a constitutional right, *State v. Booth*, ___ Wn.App.2d ___, 82039-7-I (2022); 9-0.

***State v. Sassen Van Elsloo*,** 191 Wn.2d 798 (2018)

Following testimony of crucial defense witness juror discloses that, having seen the witness in court, she was acquainted with the witness but had no opinion about the witness, state moves to replace juror over objection, court acknowledges that juror was not biased but replaced her anyway because of the importance of the defense witness and not because of bias by the juror; held: absent evidence of bias it is an abuse of discretion to excuse an impaneled juror for cause; while erroneous dismissal of a potential juror does not require reversal absent proof of prejudice, *State v. Noltie*, 116 Wash.2d 831, 839, 809 P.2d 190 (1991), erroneous dismissal of an empaneled juror requires reversal if it is based upon the juror's views of the merits of the case, *see: State v. Elmore*, 155 Wash.2d 758, 123 P.3d 72 (2005); *State v. Ashcraft*, 71 Wash. App. 444, 463, 859 P.2d 60 (1993); a juror's acquaintance with a witness, by itself, is not grounds for dismissal of that juror, *State v. Tingdale*, 117 Wash.2d 595, 601, 817 P.2d 850 (1991), here, the trial court's statement that the dismissal of the juror was due to the importance of the defense witness establishes that it was based on the merits, and thus reversal is mandated; 6-3.

***State v. Moen***, 4 Wn.App.2d 589 (2018)

During murder trial juror discloses that she was reminded that she had been contacted by defendant's family to advise on nursing care, that she was aware that he had shot himself sometime prior to the homicide, could keep an open mind and be fair; held: juror did not intentionally facts during voir dire, did not demonstrate bias, thus trial court did not abuse discretion in denying motion to excuse the juror, distinguishing *State v. Cho*, 108 Wn.App. 315 (2001)**;** II.

***State v. Phillips***, 6 Wn.App.2d 651 (2018)

In domestic violence case with African-American defendant, juror states that domestic violence occurred in his family and that he had been assaulted by a black man, that black men are more prone to violence, that he doesn't know what the "life of these emotional truths are" but will follow the law and decide case on the evidence, no challenge for cause or peremptory challenge is made; held: while trial court has an independent obligatiuon to excuse a juror regardless of inaction by counsel where bias is such that it is incompatible with proper jury service, *State v. Irby*, 187 Wn.App. 183, 193 (2015), here the record is clear that defense counsel was alert to the possibility of bias but chose not to disqualify the juror, thus it was a legitimate trial strategy; I.

***State v. Guevara Diaz***, 11 Wn.App.2d 843 (2020)

In juror questionnaire juror states she cannot be fair to both sides in sex assault case, court denies defense request to question her outside the presence of other jurors, defense does not exercise challenge for cause or peremptory challenge; held: juror's answer established actual bias which is manifest constitutional error, *State v. Irby*, 187 Wn.App. 183, 190-97 (2015), *State v. Gutierrez*, ___ Wn.App.2d ___, 513 P.3d 812 (2022), *cf.: State v. Lawler*, 194 Wn.App. 275 (2016), which can be raised for first time on appeal; I.

***State v. Roach***, 18 Wn.App.2d 98 (2021)

Juror states that if there is only one witness to a crime with no other corroborating evidence he would have to acquit, over objection trial court grants state's challenge for cause; held: not an abuse of discretion to excuse a juror who states that she could not convict based upon one witness' testimony

regardless of the content of the testimony or the witness' perceived credibility; even if the dismissal of the juror was improper defense failed to show that the dismissal resulted in an unqualified juror being impaneled, at n. 1, *State v. Sassen Van Elsloo*, 191 Wn.2d 798, 816-17 (2018); I.

***State v. Griepsma***, 17 Wn.App.2d 606 (2021)

Three jurors answer yes to general question "would anybody give more weight to…a police officer's testimony just because they were a police officer," one states he is not biased, another states he can decide based on the evidence, third states he has had negative experiences with police, trial court denies challenges for cause; held: trial court did not abuse discretion, *cf. State v. Gonzales*, 111 Wn.App. 276, 277-82 (2002); I.

***State v. Taylor***, 18 Wn.App.2d 568 (2921)

Juror states that he knows a state's witness, that he volunteered with the county emergency medical service where the witness works, that he might give the witness "a bit more credibility" than someone else but that he could put his own training and experience aside and would "trust the facts," challenge for cause denied; held: when viewed as a whole trial court did not abuse discretion as juror ultimately indicated his willingness and ability to be impartial, *State v. Wilson*, 141 Wn.App. 597, 606-08 (2007); I.

***State v. Talbott,*** ___ Wn.2d ___, 521 P.3d 948 (2022)

Trial court denies challenge for cause to a juror, defense allows the juror to sit even though it has remaining peremptory challenges; held: if a party allows a juror to be seated and does not exhaust peremptory challenges then the party cannot prevail on appeal on the grounds that the juror should have been excused for cause, at least absent racial or ethnic bias, *United States v. Martinez-Salazar*, 145 L.Ed.2d 792 (2000), *State v. Clark*, 143 Wn.2d 731, 762-64 (2001), *State v. Fire*, 145 Wn.2d 152 (2001), overruling *State v. Peña Salvador*, 17 Wn.App.2d 769 (2021), *State v. David*, 118 Wn.App.61 (2003), *State v. Gonzales*, 111 Wn.App. 276 (2002); 9-0.

***State v. Booth***, ___ Wn.App.2d ___, 521 P.3d 196 (2022)

Where court erroneously grants a GR 37 motion made by the state, thereby causing a juror to be wrongfully empaneled over a defense peremptory challenge, absent proof of prejudice defendant is not entitled to a new trial, *Pers. Restraint of Meredith*, 191 Wn.2d 300 (2018), *Rivera v. Illinois*, 556 U.SW. 148, 160-62, 129 S.Ct. 1443, 173 L.Ede.2d 320 (2009), distinguishing *State v. Vreen*, 143 Wn.2d 923, 932 (2001); state constitution does not create a right to the use of peremptory challenges, unless a biased juror is seated defense has no appellate argument I.

***State v. Meza***, 22 Wn.App.2d (2022)

Before voir dire defense objects to excusing jurors based on economic hardship and asks court to compensate jurors who would otherwise be so excused, court denies compensation and does excuse some jurors for economic hardship; held: while excluding jurors based on low economic status violates the right to a fair cross-section of the community, this applies to selection of the venire, not to the excusing of individual jurors, *Holland v. Illinois*, 493 U.S. 474, 480, 110 S. Ct. 803, 107 L. Ed. 2d 905 (1990), *see: Rocha v. King Cnty.*, 195 Wn.2d 412 (2020), jurors excused for financial hardship do not create a distinctive group, *Thiel v. S. Pac. Co.*, 328 U.S. 217, 224 (1946); prospective jurors cannot be systematically excluded due to poverty but individual jurors may be excused for undue hardship; ability to serve on a jury is not a fundamental right, *State v. Marsh*, 106 Wn.App. 801, 808-09 (2001),

implicating the equal protection clause, nor does it violate privilege and immunities clause, CONST. art. I, § 12; I.

***State v. Gutierrez***, 21 Wn.App.2d 815 (2022)

Juror inquires whether defendant is a citizen, counsel says he can't answer, juror responds that if he is not he's most likely committing an immigration fine, neither party challenges juror who is seated; held: juror expressed actual bias, court has an obligation to conduct an independent inquiry and excuse the juror if the court determines the juror is not impartial and without prejudice, *State v. Guevara Diaz*, 11 Wash. App. 2d 843 (2020), *State v. Irby*, 187 Wn.App. 183, 190-97 (2015), *cf.: State v. Lawler*, 194 Wn.App. 275 (2016); III.

***State v. McKnight***, ___ Wn.App.2d ___, 2023WL140979 (2023)

Prospective jurors are divided into three groups due to COVID, each group to be questioned separately, defense observes that third group had four Black jurors, first two groups had none, trial court denies defense to re-order the groups to increase likelihood of a Black juror being seated; held: fair cross section right applies to the selection of the jury venire, not to selection of individual jurors, *State v. Meza*, 22 Wn.App.2d 514 (2022), jurors actually chosen need not mirror the community, *Taylor v. Louisiana*, 419 U.S. 522, 530-31, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975); II.

# JURY
## Waiver

***State v. Downs***, 36 Wn.App. 143 (1983)

Written jury waiver, while not determinative of voluntariness, is "strong evidence" of effective waiver; court is not required to engage in colloquy with defendant, *State v. Castillo-Murcia,* 188 Wn.App. 539, 547-49 (2015); here, college graduate signs waiver as does counsel who, as officer of the court, represents that client voluntarily waived right to jury by signing waiver; *accord:* *State v. Lund*, 63 Wn.App. 553 (1991); I.

***Seattle v. Williams***, 101 Wn.2d 445 (1984)

Defendants in courts of limited jurisdiction are entitled to a jury trial unless they waive same; local rule which deems a jury waived unless demanded within ten days of arraignment is invalid; at arraignment, defendant must be advised of constitutional right to jury trial and, if waived, defendant must be given at least 10 days to change his mind; within courts discretion to grant jury trial after ten days; motion should be granted unless trial court finds motion was made for delay; 6-3.

***Bellevue v. Acrey***, 103 Wn.2d 102 (1984)

Post—*Seattle v. Williams*, 101 Wn.2d 445 (4/12/84), jury waivers must be written, reversing *Bellevue v. Acrey*, 37 Wn.App. 57 (1984); *but see:* *State v. Donahue*, 76 Wn.App. 695, 697-8 (1995), *State v. Ramirez-Dominguez,* 140 Wn.App. 233 (2007), *State v. Hos,* 154 Wn.App. 238, 249-52 (2010), *State v. Cham,* 165 Wn.App. 438, 445-49 (2011); 7-2.

***State v. Fleming***, 41 Wn.App. 33 (1985)

Local rule striking jury trial where defendant fails to appear for a pretrial conference is unconstitutional; III.

***Renton v. Willard***, 44 Wn.App. 525 (1986)

Written jury waiver, without a colloquy, held sufficient to waive jury where waiver advised defendant of right to change mind within 14 days, and advised defendant of right to consult with counsel before deciding; I.

***State v. Brand***, 55 Wn.App. 780 (1989)

Written jury waiver plus colloquy with defendant that he is aware of right to a jury trial, has discussed waiver with counsel and desires bench trial is sufficient, *State v. Lund,* 63 Wn.App. 553 (1991), *State v. Valdobinos,* 122 Wn.2d 270, 287-8 (1993), *State v. Pierce,* 134 Wn.App. 763, 769-72 (2006), *State v. Benitez,* 175 Wn.App. 116, 127-30 (2013), *State v. Castillo-Murcia,* 188 Wn.App. 539, 547-49 (2015); 2-1, I.

***State v. Stegall***, 124 Wn.2d 719 (1994)

For a felony to be tried with fewer than 12 jurors, record must demonstrate a knowing, intelligent and voluntary waiver, which must include more than silent acquiescence by defendant; record must reflect a personal expression from defendant or an indication that either counsel or the judge discussed the right with defendant; reverses *State v. Stegall*, 69 Wn.App.

750 (1993); *see:* *State v. Allman*, 19 Wn.App. 169, 172-3 (1977); 6-3.

***State v. Donahue***, 76 Wn.App. 695 (1995)

An oral jury waiver on the record is valid if made knowingly and voluntarily, *State v. Vasquez,* 109 Wn.App. 310 (2001), *aff'd, on other grounds,* 148 Wn.2d 303 (2002), *State v. Ramirez-Dominguez*, 140 Wn.App. 233 (2007), *see:* *State v. Rangel*, 33 Wn.App. 774, 775 (1983), *In re Reese*, 20 Wn.App. (1978), *aff'd sub nom.* *State v. Wicke*, 91 Wn.2d 638 (1979), *State v. Hos*, 154 Wn.App. 238, 249-52 (2010), *but see:* *Bellevue v. Acrey*, 103 Wn.2d 102 (1984), CrR 6.1(a); III.

***State v. Steele***, 134 Wn.App. 844 (2006)

In plea agreement, defendant waives jury and stipulates to existence of aggravating factors, after exceptional sentence imposed defendant challenges waiver; held: plea agreement and jury waiver cannot be separated, waiver was effective as to sentencing; II.

***State v. McKague,*** 159 Wn.App. 489, 500-01, *aff'd, on other grounds,* 172 Wn.2d 802 (2011)

Trial court has discretion to deny a jury waiver; defendant does not have the constitutional right to a bench trial; 2-1, II.

***State v. Bange***, 170 Wn.App. 843 (2012)

Defendant waives jury after which trial court dismisses for discovery violation, dismissal is reversed, upon remand defendant does not ask for a jury trial, parties proceed to bench trial; held: when defendant waives jury and charges are dismissed before trial, *cf.: Wilson v. Horsley,* 137 Wn.2d 500 (1999), jury waiver remains effective absent an attempt to revoke jury waiver; 2-1, II.

***State v. Benitez***, 175 Wn.App. 116, 126-30 (2013)

State constitution does not prohibit defendant from waiving jury; II.

***State v. Trebilcock,*** 184 Wn.App. 619, 631-36 (2014)

Defendant waives jury after which state adds aggravating factors, defendant claims she has right to jury on the factors; held: waiver covered aggravating factors where defendant did not move to rescind her jury waiver or request a jury; II.

***State v. Castillo-Murcia,*** 188 Wn.App. 539, 547-49 (2015)

Defendant has an interpreter present at all pretrial hearings and trial, submits a jury waiver, court inquires in English, defendant answers in English, interpreter does not participate, during trial defendant testifies in English and has to be asked to await interpretation, at sentencing allocution is in English; held: an extended waiver discussion is not necessary as long as defendant personally expresses his desire to waive jury, inquiring whether defense counsel explained the right is a factor but lack of it is not fatal, *see: State v. Ramirez-Dominguez,* 140 Wn.App. 233, 239-40 (2007); II.

# JUVENILES*

***Nelson v. Seattle Municipal Court***, 29 Wn.App. 7 (1981)

Where a juvenile willfully deceives an adult court into believing she is more than 18 years old she waives her right to be tried as a juvenile, *see:* *Dillenburg v. Maxwell*, 70 Wn.2d 331, 354-56 (1967), *State v. Mendoza-Lopez*, 105 Wn.App. 382 (2001); I.

***State v. Lawley***, 32 Wn.App. 337 (1982)

Where court commissioner issues a ruling, and state seeks revision, RCW 2.24.050, speedy trial rule is stayed pending decision by superior court judge; III.

***State v. Tidwell***, 32 Wn.App. 971 (1982)

Juvenile court lacks jurisdiction over federal crimes (civil rights violation cross burning); I.

***In re Smiley***, 96 Wn.2d 950 (1982)

Defendant, committed by juvenile court, escapes and commits a new offense, which juvenile court declines, and for which Superior Court sentences to jail, following which he is returned to the juvenile facility to complete the juvenile court commitment; held that decline does not nullify the former juvenile court commitment; adult sentence can run concurrent with prior juvenile court disposition; 7-2.

***State v. Hovland***, 34 Wn.App. 830 (1983)

For **speedy trial** purposes, start counting day after juvenile court enters order retaining jurisdiction; III.

***State v. Tuffree***, 35 Wn.App. 243 (1983)

Colloquy to determine **competency** of a child witness performed in presence of jury is "bothersome, but . . . not erroneous as a matter of law"; court cites with approval Stafford, *The Child as a Witness*, 37 Wash. L. Rev. 303 (1962).

***State v. Holland***, 98 Wn.2d 507 (1983)

While written findings must be entered for a **decline** order, a court's oral findings may supplement inadequate written findings;statements made by a juvenile to a mental health professional prior to a decline hearing are privileged but privilege is waived if defendant takes the stand at trial; affirms *State v. Holland*, 30 Wn.App. 366 (1981); 9-0.

***State v. Frazier***, 99 Wn.2d 180 (1983)

A juvenile may not plead guilty in juvenile court when a **decline** hearing is pending; 9-0.

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* *See also:* **JUVENILES /Delay in Filing, JUVENILES/Dispositions,** ***infra***

***State v. Sharon***, 100 Wn.2d 230 (1983)

Once juvenile court **declines** jurisdiction, juvenile court has lost jurisdiction for all subsequent offenses, RCW 13.40.020(10), *but see: State v. Mora*, 138 Wn.2d 43 (1999); *affirms State v. Sharon*, 33 Wn.App. 491 (1982); 9-0.

***State v. Lawson***, 37 Wn.App. 539 (1984)

Statutory defense to minor consuming alcohol, RCW 66.44.270, that defendant had permission to drink by his parents is an affirmative defense, not an element to be disproved by state; I.

***State v. Fellers***, 37 Wn.App. 613 (1984)

Juvenile court judge must enter written **findings** sufficiently specific to permit meaningful appellate review, RCW 13.40.130(4), JuCR 7.11(c), *State v. Witherspoon*, 60 Wn.App. 569 (1991), *State v. Peña*, 65 Wn.App. 711 (1992), *see: State v. Head*, 136 Wn.2d 619 (1998).

***State v. Freeman***, 38 Wn.App. 665 (1984)

A conflict in defense counsel's trial schedule is good cause for **continuance**, JuCR 7.8(d); CrR 3.3(f) requiring objection to trial date within ten days of trial setting applies to juvenile proceedings; I.

***State v. Bushnell***, 38 Wn.App. 809 (1984)

Defendant commits crime at 17 years, is charged as an adult at 19 years, Superior Court remands to juvenile court for trial, as defendant was on probation to age 21 for an unrelated offense; held: juvenile court has no jurisdiction to try a person who is more than 18 years old unless jurisdiction was extended in that case; III.

***State v. Toomey***, 38 Wn.App. 831 (1984)

Court may consider best interests of the public in deciding whether or not to **decline** jurisdiction, RCW 13.40.110(2), *State v. Furman*, 122 Wn.2d 440 (1993); II.

***State v. Marshall***, 39 Wn.App. 180 (1984)

Manslaughter 1° and 2° are not void for vagueness when applied to juveniles as definitions of reckless and negligence set standard of reasonable man “in the same situation”, RCW 9A.08.010(1)(c), thus permitting court to view acts in terms of respondent's age; III.

***State v. Steinbach***, 101 Wn.2d 460 (1984)

Juvenile files alternative residential placement petition, RCW 13.32A.150, is placed by court in alternative residence; parent tells respondent she could not live at home, but could visit; ARP order does not order respondent out of home; held: no unlawful entry, thus no **burglary of parent's home** is possible, *but see: State v. Cantu*, 156 Wn.2d 819 (2006); reverses *State v. Steinbach*, 35 Wn.App. 473 (1983); *see*: *State v. Walsh*, 57 Wn.App. 488 (1990); *but see*: *State v. Jensen*, 57 Wn.App. 501 (1990); 5-4.

***State v. McDowell***, 102 Wn.2d 341 (1984)

Juvenile accused of reckless endangerment rejects **diversion**, whereupon prosecutor files assault 2° for same incident; held: no presumption of vindictiveness or abuse of discretion, *United States v. Goodwin*, 73 L.Ed.2d 74 (1982), *State v. Korum*, 157 Wn.2d 614 (2006); 9-0.

***State v. Sandomingo***, 39 Wn.App. 709 (1985)

Defendant claimed he did not know how old he was, moves for remand to juvenile court; held: where there is reasonable basis for believing defendant to be adult and state has no means of verifying his claims, defendant has burden of proving his minority, *State v. Mendoza-Lopez*, 105 Wn.App. 382 (2001); II.

***State v. Cirkovich***, 41 Wn.App. 275 (1985)

Juvenile's commitment is stayed pending appeal, during which time he turns 18 years of age, argues that, in absence of a written order, juvenile court lacks jurisdiction upon appeal being affirmed, RCW 13.40.300(1)(c); held: stay pending appeal tolls age requirement and, if affirmed, court retains jurisdiction until offender's 21st birthday; I.

***State v. Mershon***, 43 Wn.App. 132 (1986)

State is barred by the double jeopardy clause from seeking revision from a commissioner's acquittal, RCW 2.24.050; II.

***State v. Royster***, 43 Wn.App. 613 (1986)

Where juvenile is being detained on new offense and also is being held on a prior commitment, 60-day rule applies, JuCR 7.8, as shorter time period only applies when defendant's pretrial detention is due solely to current charges, *State v. Brown*, 33 Wn.App. 843, 845-46 (1983), *State v. Nelson*, 26 Wn.App. 612, 616 (1980), *State v. Worland*, 20 Wn.App. 559, 564 (1978); I.

***State v. Tracy M.***, 43 Wn.App. 888 (1986)

Power of prosecutor to divert a juvenile offender, RCW 13.40.070, does not violate separation of powers doctrine, due process or equal protection; III.

***State v. Main***, 46 Wn.App. 356 (1986)

Defendant is charged in juvenile court while on escape status, turns 18 before warrant is served, charges filed in Superior Court; held: because defendant was on escape status, "presumably" knew that warrant had been issued, authorities had little or no information concerning his whereabouts, then state made a good faith and diligent effort to arrest defendant, and delay was justified. *State v. Perry* 25, Wn.App. 621 (1980), *distinguishing* *State v. Wirth*, 39 Wn.App. 550 (1985); I.

***State v. Hornaday***, 105 Wn.2d 120 (1986)

Police lack probable cause to arrest a juvenile for the crime of minor consuming or possessing alcohol, RCW 66.44.270, where the only evidence is respondent's obvious

intoxication and an odor of alcohol; presence of alcohol in the bloodstream is not possession or consumption, *State v. A.T.P.-R.*, 132 Wn.App. 181 (2006), *State v. Francisco*, 148 Wn.App. 168, 175-76 (2009), *but see: State v. Preston*, 66 Wn.App. 494 (1992), *State v. Dalton*, 72 Wn.App. 674 (1994), *State v. Fager*, 73 Wn.App. 617 (1994), *State v. Roth*, 131 Wn.App. 556, 563-66 (2006), RCW 10.31.100 (1987); 7-2.

***State v. Day***, 46 Wn.App. 882 (1987)

An available juvenile respondent must be arraigned within 14 days after information is filed; if the 14-day arraignment time plus the 60-day speedy trial time, JuCrR 7.8(b) is exceeded, charge must be dismissed, *State v. Chandler*, 143 Wn.2d 485 (2001); where juvenile keeps police, prosecutor or court advised of his address, but notice of arraignment is sent to wrong address, then **speedy arraignment** requirements may be violated, *see: State v. Hackett*, 122 Wn.2d 165 (1993), *State v. Hilderbrandt*, 109 Wn.App. 46 (2001); III.

***State v. Curwood***, 50 Wn.App. 228 (1987)

Where juvenile court has extended jurisdiction to a date beyond respondent's 18th birthday, and disposition occurs within the extended jurisdictional period, then state may retain custody over respondent during the full term of his confinement; I; *see also*: *State v. Forhan*, 59 Wn.App. 486 (1990).

***State v. Chavez***, 111 Wn.2d 548 (1988)

Local court rule permitting court to dismiss juvenile court case if there is more than 30-day delay between completion of police investigation and filing of information is valid, however trial court may only dismiss under rule if actual prejudice is established; 5-3.

***State v. Adamski***, 111 Wn.2d 574 (1988)

A mailed subpoena is a nullity, as it does not conform with JuCR 1.4, CR 45(c), CrR 4.8, and thus is not grounds for due diligence; a **continuance** beyond the expiration date, JuCR 7.8(b), to obtain a witness who was not properly served is an abuse of discretion, *State v. Hairychin*, 136 Wn.2d 862 (1998), *reversing State v. Adamski*, 49 Wn.App. 371 (1987); 5-3.

***State v. Cooley***, 53 Wn.App. 163 (1989)

Filing information in county where offense occurred amounts to "request" by prosecutor that charge be filed in county other than county where respondent resides, RCW 13.40.060(1); II.

***State v. Merz***, 54 Wn.App. 23 (1989)

A juvenile respondent's plea bargain with the prosecutor does not bind the probation counselor; *see*: *State v. Harris*, 57 Wn.2d 383 (1960); I.

***State v. Espinoza***, 112 Wn.2d 819 (1989)

A juvenile court commissioner is not disqualified by the filing of an affidavit of prejudice, since the ruling of a commissioner is subject to a de novo revision hearing, RCW 2.24.050, 13.04.021, *reversing State v. Espinoza*, 51 Wn.App. 719 (1988); 9-0.

***State v. Poupart***, 54 Wn.App. 440 (1989)

Probation counselors and caseworkers are not bound by a plea agreement and may make recommendations independent of the prosecutor, *see:* *State v. Harris*, 146 Wn.2d 339 (2002); I.

***State v. Getty***, 55 Wn.App. 152 (1989)

Police serve juvenile with municipal court citation but file it with county prosecutor in juvenile court, juvenile court judge orders state to obtain dismissal in municipal court (although citation never filed there), state fails to comply, trial court dismisses; held: municipal court lacked jurisdiction over juvenile, so no constitutional rights violation existed; no prejudice to respondent, thus trial court abused its discretion; I.

***State v. Witherspoon***, 60 Wn.App. 569 (1991)

Juvenile court fails to enter any written **findings** and conclusions following trial, JuCR 7.11(d), through oral argument on appeal; held: reversed and dismissed, as respondent's custody is prejudice plus permitting findings entered after appellant has framed issues in his brief has an appearance of unfairness, *State v. McGary*, 37 Wn.App. 856 (1984), *State v. Naranjo*, 83 Wn.App. 300 (1996), *see:* *State v. Commodore*, 38 Wn.App. 244 (1984), *State v. Fellers*, 37 Wn.App. 613 (1984), *State v. Charlie*, 62 Wn.App. 729 (1991), *State v. Bennett*, 62 Wn.App. 702 (1991), *State v. Royster*, 43 Wn.App. 613 (1986), *State v. Peña*, 65 Wn.App. 711 (1992), *but see:* *State v. Head*, 136 Wn.2d 619 (1998), *State v. Pray*, 96 Wn.App. 25, 30-31 (1999); II.

***State v. Howe***, 116 Wn.2d 466 (1991)

A parental order prohibiting minor child from entering parent's home is sufficient to revoke privilege for purposes of unlawful entry element of **burglary** where **parents** have provided some alternative means of assuring that the parents' statutory duty of care is met, *State v. Steinbach*, 101 Wn.2d 460 (1984), *see:* *State v. Cantu*, 156 Wn.2d 619 (2006); *affirms* *State v. Walsh*, 57 Wn.App. 488 (1990), *State v. Jensen*, 57 Wn.App. 501 (1990), reverses *State v. Howe*, 57 Wn.App. 63 (1990); 9-0; *see:* *State v. Woods*, 63 Wn.App. 588 (1991).

***State v. Truong***, 117 Wn.2d 63 (1991)

County ordinance which prohibits minors from appearing in a public place after having consumed alcohol unconstitutionally conflicts with RCW 70.96A.190, which preempts regulation of alcoholic beverage subject matter except, *inter alia*, for use of alcohol, since, once alcohol is consumed, the power to use it is at an end, *State v. Hornaday*, 105 Wn.2d 120 (1986); 7-2.

***State v. Smith***, 117 Wn.2d 263 (1991)

State may seek revision of any order or judgment entered by a juvenile court commissioner, RCW 2.24.050, 13.04.020(1), during which time speedy trial provisions are tolled, JuCR 7.8(d)(5), *see*: *State v. Lawley*, 32 Wn.App. 337 (1982), *State v. Hoffman*, 115 Wn.App. 91 (2003); 9-0.

***State v. Charlie***, 62 Wn.App. 729 (1991)

Following conviction by commissioner, respondent moves for revision, RCW 2.24.050, commissioner fails to enter findings; Superior Court judge remands to commissioner, who makes a verbal finding, from which respondent appeals; following submission of appellant's brief, commissioner enters written **findings**; held: commissioner must enter written findings and conclusions in cases that are appealed through revision, JuCR 7.11(c); Superior Court revision is *de novo*, and should not be remanded to commissioner; entry of written findings for appeal should have been by judge, not commissioner; filing of findings after respondent framed issues in brief, and errors committed throughout, compels reversal *cf.*: *State v. Bennett*, 62 Wn.App. 702 (1991), *State v. Royster*, 43 Wn.App. 613 (1986), *State v. McGary*, 37 Wn.App. 856 (1984), *State v. Fellers*, 38 Wn.App. 613 (1984), *State v. Harris*, 66 Wn.App. 636 (1992), *State v. Cowgill*, 67 Wn.App. 239 (1992), *accord: State v. Litts*, 64 Wn.App. 831 (1992), *see: State v. Peña*, 65 Wn.App. 711 (1992), *State v. Head*, 136 Wn.2d 619 (1998), *but see: State v. Pray*, 96 Wn.App. 25, 30-31 (1999); I.

***State v. Woods***, 63 Wn.App. 588 (1991)

Mother arranges for son to live with another family, grants permission to enter home only when mother is present; defendant and son break door and enter home, act surprised that mother is home from work ill, run off; held: manner of entry supports sufficient evidence of unlawful entry; I.

***State v. Austin***, 65 Wn.App. 759 (1992)

Where trial court fails to enter finding regarding *mens rea* element, and where record supports missing element, then remand is remedy, *State v. Royal*, 122 Wn.2d 413 (1993), *but see: State v. PeBa*, 65 Wn.App. 711 (1992); double jeopardy clause precludes remand only where record is devoid of any evidence to support omitted finding; I, 2-1.

***State v. Preston***, 66 Wn.App. 494 (1992)

Odor of alcohol plus observing defendant dispose of beer bottles plus confession is sufficient to convict of minor consumption, RCW 66.44.270(2), *State v. Walton*, 67 Wn.App. 127, 131 (1992), *State v. Little*, 116 Wn.2d 488, 491 (1991), *State v. Dalton*, 72 Wn.App. 674 (1994), *State v. Fager*, 73 Wn.App. 617 (1994), *cf.: State v. A.T.P.-R.*, 132 Wn.App. 181 (2006), *State v. Francisco*, 148 Wn.App. 168, 175-76 (2009), which need not be committed in presence of officer for conviction in light of 1987 amendment to RCW 10.31.100(1), *State v. Roth*, 131 Wn.App. 556, 563-66 (2006), *distinguishing State v. Hornaday*, 105 Wn.2d 120 (1986); II.

***State v. Decker***, 68 Wn.App. 246 (1992)

Trial court may order predisposition psychological evaluation of respondent, *State v. Escoto*, 108 Wn.2d 1 (1987), *State v. Jacobsen*, 95 Wn.App. 967 (1999), and may preclude counsel from attending, *cf.: State v. P.B.T.*, 67 Wn.App. 292 (1992), *State v. Diaz-Cardona*, 123 Wn.App. 477 (2004); trial court has authority to grant use immunity absent prosecutor's motion, CrR 6.14; I.

***State v. Halstien***, 122 Wn.2d 109 (1993)

Entering victim's home, taking vibrator and condoms, not taking valuable personal property is sufficient to establish burglary with a sexual motivation, RCW 13.40.135; juvenile sexual motivation statute is not vague or overbroad; *affirms* *State v. Halstien*, 65 Wn.App. 845 (1992); 8-0.

***State v. Royal***, 122 Wn.2d 413 (1993)

Where state fails to file **findings** of fact within 21 days of a notice of appeal, JuCR 7.11(d), dismissal is not a remedy unless petitioner shows prejudice resulting from late filing, *State v. Head*, 136 Wn.2d 619 (1998); prejudice includes additional incarceration; *see:* *State v. Bennett*, 62 Wn.App. 702 (1991), *State v. McGary*, 37 Wn.App. 856, 861 (1984), *State v. Cowgill*, 67 Wn.App. 239 (1992), *State v. Alvarez*, 128 Wn.2d 1 (1995), *State v. Naranjo*, 83 Wn.App. 300 (1996), *see:* *State v. Pray*, 96 Wn.App. 25, 30-31 (1999); 5-4.

***State v. Wilcox***, 71 Wn.App. 116 (1993)

Following an interlocutory stay, upon remand the juvenile time for trial rule does not start over with a new 60 days, but rather was tolled during the appellate review, applying CrR 3.3(g)(5) to JuCR 7.8, rather than the inconsistent CrR 3.3(d)(4); I.

***State v. Dalton***, 72 Wn.App. 674 (1994)

Evidence is sufficient to establish minor in possession of liquor, RCW 66.44.270(2), where officer observes defendant in house close to a keg and cups of beer, kegger in progress, signs of intoxication on defendant, smells of alcohol, *distinguishing* *State v. Hornaday*, 105 Wn.2d 120 (1986), *cf.:* *State v. Roth*, 131 Wn.App. 556, 563-66 (2006), *State v. A.T.P.-R.*, 132 Wn.App. 181 (2006) *State v. Francisco*, 148 Wn.App. 168, 175-76 (2009); III.

***State v. Schatmeier***, 72 Wn.App. 711 (1994)

Following a DUI arrest, police advise 16 and 17-year-old suspects, *inter alia*, that any statement they make may be used against them in juvenile court unless declined; district court has exclusive jurisdiction in criminal traffic cases, RCW 13.04.030(5); held: while advice was inaccurate, the warnings were sufficient to apprise suspects of the right to remain silent and that anything they say could be used in court, thus suppression reversed, *Dutil v. State*, 93 Wn.2d 84, 90 (1980); III.

***State v. Fager***, 73 Wn.App. 617 (1994)

Odor of beer plus watery, bloodshot eyes, coated tongue plus beer bottles in vehicle is sufficient to convict of minor in possession, RCW 66.44.270, *State v. Preston*, 66 Wn.App. 494 (1992), *State v. Dalton*, 72 Wn.App. 674 (1994), *cf.:* *State v. A.T.P.-R.*, 132 Wn.App. 181 (2006); where defendant testifies to consuming no beer but that he had taken cold medicine, and officer testifies on rebuttal that the odor was beer, not cold medicine, evidence is sufficient; III.

***State v. Oreiro***, 73 Wn.App. 868 (1994)

Respondent is charged in juvenile court with six counts, requests three charges be continued pending decline hearing on other three; juvenile court declines, three continued charges are dismissed, then refiled in superior court; held: once juvenile court **declines**

jurisdiction, it loses jurisdiction over challenged charges by dismissing them; delay in filing was due, in part, to defendant's request, thus no due process violation; II.

***State v. Linares***, 75 Wn.App. 404 (1994)

Statements obtained in violation of *Miranda* and RCW 13.40.140(10), while not admissible at trial, are admissible at a hearing to determine whether juvenile respondents are capable of committing the crimes charged; after-the-fact acknowledgment that a respondent understood that the conduct was wrong is insufficient, standing alone, to overcome a presumption of incapacity by clear and convincing evidence, *see:* *State v. K.R.L.*, 67 Wn.App. 721, 725 (1992), *State v. J.P.S.*, 135 Wn.2d 34 (1998), *State v. J.F.*, 87 Wn.App. 787 (1997), *State v. K.A.B.*, 14 Wn.App.2d 677 (2020); I.

***State v. Bastas***, 75 Wn.App. 882 (1994)

Counsel's motion to withdraw on appeal pursuant to *Anders v. California*, 18 L.Ed.2d 493 (1967), will be denied where the appeal concerns a motion for accelerated review from a manifest injustice disposition; I.

***State v. W.W.***, 76 Wn.App. 754 (1995)

When respondent appeals both a manifest injustice sentence and conviction, appeal is bifurcated, RAP 18.13, and respondent should be released pending appeal upon completion of standard range disposition; JuCR 7.13 takes precedence over conflicting provision's of RCW 13.40.230, but JuCR violates equal protection clause by creating two classes of juvenile appellants without a rational basis; I.

***State v. Alvarez***, 128 Wn.2d 1 (1995)

Where evidence is sufficient but trial court's **findings** are not, proper remedy is remand, not dismissal, *State v. Souza*, 60 Wn.App. 534 (1991), *State v. Royal*, 122 Wn.2d 413 (1993), overruling *State v. PeBa*, 65 Wn.App. 711 (1992), *State v. BJS*, 72 Wn.App. 368 (1994); *affirms* *State v. Alvarez*, 74 Wn.App. 250 (1994), *see:* *State v. Naranjo*, 83 Wn.App. 300 (1996), *State v. Mewes*, 84 Wn.App. 620 (1997); 6-3.

***State v. Werner***, 129 Wn.2d 485 (1996)

Superior court judge may issue arrest warrant for a juvenile, *reversing* *State v. Werner*, 79 Wn.App. 872 (1995); 9-0.

***In re Boot***, 130 Wn.2d 553 (1996)

Statute mandating adult criminal court jurisdiction for certain juveniles charged with violent offenses, RCW 13.04.030(1)(e)(iv), without a decline hearing does not violate due process or equal protection clauses, *State v. Stackhouse*, 88 Wn.App. 963 (1997), *State v. Gilmer*, 96 Wn.App. 875, 880-83 (1999), *see: State v. Houston-Sconiers*, 188 Wn.2d 1 (2017), *State v. Monschke*, 197 Wn.2d 305 (2021); 9-0.

***State v. Parker***, 81 Wn.App. 731 (1996)

Respondent is convicted of assault committed with sexual motivation, RCW 13.40.135, trial court does not enter oral or written **findings** of fact addressing special finding; held: because

appellate courts may not weigh evidence or enter findings, special allegation must be dismissed, *State v. BJS*, 72 Wn.App. 368, 372-3 (1994), *State v. PeBa*, 65 Wn.App. 711, 715-6 (1992), *State v. Naranjo*, 83 Wn.App. 300 (1996), *but see: State v. Head*, 136 Wn.2d 619 (1998); III.

***State v. Anderson***, 83 Wn.App. 515 (1996)

At arrest, defendant gives birthdate to police establishing that she is 18, during *voir dire* defense discloses defendant is 17, trial proceeds, defendant is convicted; held: disclosure of age before jury is sworn is timely, *State v. Mendoza-Lopez*, 105 Wn.App. 382 (2001), distinguishing *Nelson v. Seattle Municipal Court*, 29 Wn.App. 7 (1981); because defendant is now an adult, Superior Court must hold a hearing to determine whether she should have been tried as a juvenile and, if so, defendant must be retried in adult court, *Dillenburg v. Maxwell*, 70 Wn.2d 331, 355-6 (1967), *Sheppard v. Rhay*, 73 Wn.2d 734 (1968), *Pers. Restraint of Dalluge*, 152 Wn.2d 772 (2004), *State v. Quijas*, 12 Wn.App.2d 363 (2020). if not, original conviction should be reinstated; I.

***State v. E.C.***, 83 Wn.App. 523 (1996)

Juvenile court may dismiss with prejudice a case against an incompetent juvenile respondent in order to adequately respond to the needs of that offender as long as such dismissal poses no substantial danger to others; in general, RCW 10.77 should be followed for juveniles, although the Juvenile Justice Act takes precedence when a conflict arises; I.

***State v. Nicholson***, 84 Wn.App. 75 (1996)

With decline hearing pending, defendant turns 18, state obtains *ex parte* order of dismissal, juvenile court later determines state acted in bad faith and enters *nun pro tunc* order extending juvenile jurisdiction; held: juvenile court loses jurisdiction when defendant turns 18 unless juvenile court extends jurisdiction before that day, *State v. Calderon*, 102 Wn.2d 348, 352 (1984), *State v. Rosenbaum*, 56 Wn.App. 407 (1990), *but see: State v. Dion*, 160 Wn.2d 605 (2007); a *nunc pro tunc* order records some prior act of the court which was actually performed but not entered into the record, cannot correct something which was not done, *State v. Hendrickson*, 165 Wn.2d 473 (2009); II.

***In re Weaver***, 84 Wn.App. 290 (1996)

A juvenile acquitted by reason of insanity may not be committed pursuant to RCW 10.77, as a juvenile offense is not a felony, *In re Frederick*, 93 Wn.2d 28, 30 (1980); II.

***State v. D.R.***, 84 Wn.App. 832 (1997)

Fourteen-year old is summoned to principal's office, told by plainclothed detective that he did not have to answer questions, but not advised of *Miranda* rights, questioned and makes inculpatory statement; held: considering respondent's youth, naturally coercive nature of school and principal's office environment, accusatory nature of the interrogation and fact that respondent was not told he was free to go, he was in custody, thus trial court erred in admitting statements absent *Miranda* warnings, as a 14-year old in respondent's position would have reasonably supposed his freedom of action was curtailed to a degree associated with formal arrest, *Berkemer v. McCarty*, 82 L.Ed.2d 317 (1984), *State v. Short*, 113 Wn.2d 35, 41 (1989),

*State v. Sargent*, 111 Wn.2d 641, 649 (1988), *State v. Everybodytalksabout*, 161 Wn.2d 702 (2007), *but see: State v. S.J.W.*, 149 Wn.App. 912, 927-29 (2009), *aff'd, on other grounds,* 170 Wn.2d 92 (2010); III.

***State v. E.D.W.***, 85 Wn.App. 601 (1997)

To establish **capacity** of an 11-year old who is presumed incapable of committing child molestation, state must prove respondent understood that touching private parts was done for the purpose of gratifying sexual desire of either party, RCW 9A.44.010(2), state has a greater burden when it has to prove a child appreciates the illegality of certain sexual acts, *State v. Linares*, 75 Wn.App. 404, 414 n.12 (1994), *see: State v. J.P.S.*, 85 Wn.App. 586 (1997), *State v. K.A.B.*, 14 Wn.App.2d 677 (2020); III.

***State v. Murrin***, 85 Wn.App. 754 (1997)

Respondent on community supervision commits new offense, prosecutor files modification petition, court modifies and sanctions respondent, prosecutor files information charging same new offense, trial court dismisses; held: where prosecutor seeks modification of community supervision for a new crime, RCW 13.40.070(3) directs that prosecutor may not file an information based on the same conduct, *State v. Tinh Quoc Tran*, 117 Wn.App. 126 (2003), *State v. Brestoff*, 1 Wn.App.2d 923 (2018), *cf.: State v. Whisenhunt*, 96 Wn.App. 18 (1999), *In re J.J.*, 96 Wn.App. 452 (1999), *State v. Zimmerman*, 130 Wn.App. 122 (2005); holding may not apply where modification is filed by probation officer at the direction of the court, at 759 n.17; I.

***State v. J.D.***, 86 Wn.App. 501 (1997)

Bellingham curfew ordinance, BMC 10.62.030, violates juvenile's constitutional rights to freedom of movement and expression, and is vague; I.

***State v. Wright***, 88 Wn.App. 683 (1997)

Unlawful firearm possession statute, RCW 9.41.010, prohibits possession of a firearm by a juvenile previously convicted in juvenile court of a serious offense, *State v. Cheatham*, 80 Wn.App. 269 (1996), *State v. McKinley*, 84 Wn.App. 677 (1997); I.

***State v. Kells***, 134 Wn.2d 309 (1998)

Following guilty plea in adult court, declined juvenile retains right to appeal **decline** order, *State v. Pritchard*, 79 Wn.App. 14 (1995), state must demonstrate knowing, voluntary and intelligent waiver of right to appeal, *cf.: State v. Cater*, 186 Wn.App. 384 (2015); 9-0.

***State v. J.P.S.***, 135 Wn.2d 34 (1998)

To establish **capacity** of an 11-year old who is presumed incapable of committing rape, RCW 9A.04.050, state must prove that child knew the act was wrong, but not that the act was illegal or understand the legal consequences of the act, disapproving, in part, *State v. J.P.S.*, 85 Wn.App. 586 (1997); factors include (1) nature of crime, (2) age and maturity, (3) whether child showed a desire for secrecy, (4) whether child admonished victim not to tell, (5) prior conduct similar to that charged, (6) consequences that attached to the conduct, (7) acknowledgment that behavior was wrong and could lead to detention, *State v. Linares*, 75 Wn.App. 404 (1994), (8)

expert testimony, and (9) testimony of acquaintances; developmentally disabled respondent's acknowledging his conduct was "bad" after repeated *Miranda* warnings, interrogation, being shunned by neighbors and classmates is insufficient to overcome presumption of incapacity by clear and convincing evidence, *see:* *State v. E.D.W.*, 85 Wn.App. 601 (1997), *State v. K.R.L.*, 67 Wn.App. 721, 725 (1992), *State v. T.E.H.*, 91 Wn.App. 908 (1998), *State v. K.A.B.*, 14 Wn.App.2d 677 (2020); 9-0.

***State v. S.E.***, 90 Wn.App. 886 (1998)

Backyard patio is not a "public place," former RCW 66.04.010(23) [now RCW 66.04.010(27)], for purposes of **minor in possession of liquor**, RCW 66.44.270(2)(b); I.

***State v. Detrick***, 90 Wn.App. 939 (1998)

Where one consolidated respondent files an affidavit of prejudice, it may be imputed to corespondents, *LaMon v. Butler*, 112 Wn.2d 193 (1989); where judge is disqualified, time for trial period may be extended, applying CrR 3.3(d)(6) to juvenile court, distinguishing *State v. Sayers*, 29 Wn.App. 128, 130 (1981), *State v. Jacks*, 25 Wn.App. 141, 145 (1980); I.

***State v. Mora***, 138 Wn.2d 43 (1999)

Seventeen-year-old is charged in adult court with assault 2° pursuant to automatic decline statute, RCW 13.04.030(1)(e)(v), after which, pursuant to a plea agreement, court allows amendment to assault 3° and possession of firearm, which are not automatic decline offenses, defense motion to transfer to juvenile court is denied; held: nature of the charge dictates jurisdiction and, where the charge no longer comes within automatic decline statute, case must be remanded to juvenile court, *Pers. Restraint of Dalluge*, 152 Wn.2d 772 (2004), *State v. Posey*, 161 Wn.2d 638, 643-47 (2007), 174 Wn.2d 131 (2012), distinguishing *State v. Sharon*, 100 Wn.2d 230 (1983), *see also:* *State v. Carpenter*, 117 Wn.App. 673 (2003), *but see:* *State v. Manro*, 125 Wn.App. 165 (2005); 9-0.

***State v. Whisenhunt***, 96 Wn.App. 18, 20-22 (1999)

Respondent, on special sex offender disposition alternative (SSODA), has inappropriate contact with females, at revocation hearing court finds he failed to make progress in treatment and is revoked, prosecutor subsequently charges respondent with child molestation based upon an incident considered at revocation hearing, defense seeks dismissal; held: while prosecutor may not charge a new crime that was the subject of a previous modification hearing, RCW 13.40.070(3), *State v. Murrin*, 85 Wn.App. 754 (1997), *State v. Brestoff*, 1 Wn.App.2d 923 (2018), revocation of SSODA is not a modification of community supervision, thus statutory prohibition does not apply; revocation for failure to make progress in treatment, even if based in part upon a new offense, is not a revocation based upon the new offense, *see also:* *State v. J.J.*, 96 Wn.App. 452 (1999), *State v. Zimmerman*, 130 Wn.App. 122 (2005);, III.

***State v. J.J.***, 96 Wn.App. 452 (1999)

When a juvenile on a deferred disposition commits a new crime, state is not required to elect between revocation of deferred disposition and charging the new crime, RCW

13.40.070(3), *see:* *State v. Whisenhunt*, 96 Wn.App. 18 (1999), *State v. Zimmerman*, 130 Wn.App. 122 (2005), distinguishing *State v. Murrin*, 85 Wn.App. 754 (1997); I.

***State v. Graves***, 97 Wn.App. 55 (1999)

A juvenile charged with assaulting a parent may employ a claim of lawful force irrespective of the parent's right to use reasonable force for discipline; I.

***State v. B.P.M.***, 97 Wn.App. 294 (1999)

Failure to hold a capacity hearing within 14 days, JuCR 7.6(e), is not jurisdictional, and dismissal is not warranted absent proof of prejudice; I.

***State v. B.A.S.***, 103 Wn.App. 549 (2000)

Student in high school with closed campus policy is seen off-campus, is searched by attendance officer, drugs seized; held: while school authorities may search a student without a warrant if the search is justified at its inception and is reasonably related in scope to the circumstances that justified the interference in the first place, *New Jersey v. T.L.O.*, 83 L.Ed.2d 720 (1985), here there was no nexus between the violation (off-campus) and the search, thus evidence must be suppressed, *cf.:* *State v. Slattery*, 56 Wn.App. 820 (1990), *State v. A.S.*, 6 Wn.App.2d 264 (2018); I.

***State v. Chandler***, 143 Wn.2d 485 (2001)

Respondent requests trial date within 60 days of proper date of arraignment, court sets trial outside 60 days, finding that because no judge sits in the county within the time period, a date outside the 60 days is permitted "in the due administration of justice," and because no prejudice was shown, JuCR 7.8(e)(3); held: JuCR 7.8(e)(3) permits a continuance in the due administration of justice, but not an original case setting beyond the 60-day rule, court could have obtained a visiting judge, judge *pro tempore*, court commissioner or, possibly, continued the case if all of those avenues were unavailable, but original setting outside the rule violates the rule, thus dismissed, *see:* *State v. Day*, 46 Wn.App. 882 (1987); 9-0.

***State v. Gilman***, 105 Wn.App. 366 (2001)

Where capacity determination is required, RCW 9A.04.050, a hearing must he held within 14 days of juvenile's first appearance, JuCR 7.6(e), which includes a detention hearing, even if charges are not filed; dismissal should be the remedy only if other lesser sanctions will not remedy prejudice to respondent; III.

***State v. M.A.***, 106 Wn.App. 493 (2001)

Court may consider prior diversions and referrals in **decline hearing**, distinguishing *State v. Melton*, 63 Wn.App. 63, 72 (1991); I.

***State v. Garcia***, 107 Wn.App. 545 (2001)

Respondent using force against an officer in a juvenile facility must show that s/he was in actual, imminent danger of serious injury, *State v. Bradley*, 141 Wn.2d 731 (2000); II.

***State v. A.L.H.***, 116 Wn.App. 158 (2003)

A juvenile accused of violating an At Risk Youth order, ch. 13.32A, RCW, may only be charged with civil contempt, RCW 7.21.030, 13.32A.250(2), *Interest of M.B.*, 101 Wn.App. 425, 443-44 (2000), *but see: Dependency of A.K.*, 162 Wn.2d 632 (2007), which must contain a purge clause, *Interest of Rebecca K.*, 101 Wn.App. 309 (2000); state may not file criminal contempt charge; II.

***State v. Lown***, 116 Wn.App. 402 (2003)

When the superior court reviews a juvenile court commissioner's ruling, it must determine if the findings of fact are supported by substantial evidence, and reviews the conclusions of law *de novo*, RCW 2.24.050, *but see: State v. Wicker*, 105 Wn.App. 428 (2001); III.

***State v. H.O.***, 119 Wn.App. 549, 552-56 (2003)

Burden of proof for **decline** hearing is preponderance, *State v. Jacobson*, 33 Wn.App. 529 (1982), *Pers. Restraint of Hegney*, 138 Wn.App. 511, 528-31 (2007), *State v. Childress*, 169 Wn.App. 523 (2012), distinguishing *Apprendi v. New Jersey*, 147 L.Ed.2d 435 (2000); I.

***State v. Ramer***, 151 Wn.2d 106 (2004)

Appellate review of a trial court **capacity** decision is one of substantial evidence, not *de novo*, *State v. J.P.S.*, 135 Wn.2d 34, 37 (1998); while actual knowledge of the legal consequences of a sex offense is not necessary, when a juvenile is charged with a sex crime, the state carries a greater burden of proving capacity, and must present a higher degree of proof that the child understood the illegality of the act, *State v. J.P.S., supra.* at 38; 9-0.

***State v. Salavea***, 151 Wn.2d 133 (2004)

To invoke an automatic decline of jurisdiction, RCW 13.04.030(1)(e)(v), the age of the individual at the time of the proceedings controls, not the age at the time of the crime, *Sweet v. Porter*, 75 Wn.2d 869, 870 (1969), legislatively overruled, LAWS OF 2005, §1, RCW 13.04.030(1)(e)(v) (2005); affirms *State v. Salavea*, 115 Wn.App. 52 (2003); 9-0.

***State v. R.J.***, 121 Wn.App. 215 (2004)

Juvenile commits alcohol offense when he is 17, is adjudicated guilty at 18 years, court notifies Department of Licensing, RCW 66.44.365(1); held: juvenile's age on date of offense determines whether notification is required; I.

***Pers. Restraint of Dalluge***, 152 Wn.2d 772 (2004)

Juvenile is charged as an adult with a serious violent offense resulting in automatic decline, RCW 13.04.030(1)(e)(v)(A), plea bargains to a less serious offense which, by law, requires a decline hearing, no party requests one, defendant is sentenced as an adult; held: superior court erred when it failed to remand to juvenile court for decline hearing after charge was amended, *State v. Mora*, 138 Wn.2d 43 (1999), *State v. Posey*, 161 Wn.2d 638, 643-47 (2007), 174 Wn.2d 131 (2012), *but see: State v. Manro*, 125 Wn.App. 165 (2005); remedy is remand for a hearing on whether decline would have been appropriate and, if court finds it would

not, defendant is entitled to a new trial in adult court, *Dillenburg v. Maxwell*, 70 Wn.2d 331, 354-56 (1967), *State v. Mendoza-Lopez*, 105 Wn.App. 382 (2001), *State v. Anderson*, 83 Wn.App. 515 (1996), *State v. Meridieth*, 144 Wn.App. 47 (2008), *State v. Quijas*, 12 Wn.App.2d 383 (2020); 6-3.

***State v. K.N.***, 124 Wn.App. 875 (2004)

In minor in possession of alcohol case, juvenile court cannot take judicial notice, infer or presume age of respondent from the fact that the court is a juvenile court, nor is birth date on arraignment documents sufficient to establish age, *see: State v. Roth*, 131 Wn.App. 556 (2006), distinguishing *In re Welfare of Ward*, 22 Wn.App. 774 (1979); I.

***State v. Sweeney***, 125 Wn.App. 77 (2005)

A juvenile burglary conviction does not "wash" for purposes of serving as a predicate offense for an unlawful possession of a firearm 1° conviction, RCW 9.41.040(1)(a) even if it washes for purposes of the offender score; fact that at the time of the juvenile conviction it was not a crime to possess a firearm thereafter does not excuse to the crime enacted later and does not violate due process; III.

***State v. J.R.***, 127 Wn.App. 293 (2005)

A 10 inch dagger is sufficient to establish the offense of possession of a dangerous weapon on school grounds, RCW 9.41.280, which includes all weapons described in RCW 9.41.250, not limited to RCW 9.41.250(1); I.

***State v. Roth***, 131 Wn.App. 556 (2006)

In minor in possession of alcohol case, RCW 66.44.270(2)(a), testimony that there were no adults at a party plus officer's issuing citation after checking respondent's license plus respondent's not disputing that he was under the age of 21 is sufficient to prove element that respondent is a minor even absent evidence of date of birth, distinguishing *State v. K.N.*, 124 Wn.App. 875 (2004); absent proof that respondent consumed alcohol, presence in a roiom with a refrigerator full of beer is insufficient to prove constructive possession, distinguishing *State v. Dalton*, 72 Wn.App. 674, 675-77 (1994); III.

***State v. Dion***, 131 Wn.App. 729 (2006)

Three days before she turned 18, juvenile is arrested, court finds probable cause, releases her and extends juvenile court jurisdiction, later state files information charging her as an adult, trial court dismisses; held: because no information was filed in juvenile court prior to defendant's 18th birthday, juvenile court lacked authority to extend jurisdiction, RCW 13.40.300; probable cause determination, *County of Riverside v. McLaughlin*, 114 L.Ed.2d 49 (1991), does not confer jurisdiction to extend, release of juvenile establishes that there was no proceeding pending; I.

***State v. V.J.***, 132 Wn.App. 380 (2006)

Authority of court to enforce a disposition order is tolled when a warrant is outstanding, *Spokane v. Marquette*, 146 Wn.2d 124 (2002), *State v. D.D.-H.*, 196 Wn.App. 948 (2016); I.

***State v. Chavez***, 134 Wn.App.657, 662-65 (2006)

Juveniles are not entitled to a jury trial in juvenile court, *State v. J.H.*, 96 Wn.App.167 (1999), *State v. Schaaf*, 109 Wn.2d 1, 4 (1987), *McKeiver v. Pennsylvania*, 29 L.Ed.2d 647 (1971), *State v. Tai*, 127 Wn.App.733 (2005), *State v. Meade*, 129 Wn.App.918 (2005), RCW 13.04.021(2); II.

***State v. Dion***, 160 Wn.2d 605 (2007)

Following arrest at detention review hearing, court finds probable cause, extends jurisdiction for six months beyond 18th birthday, sets information filing deadline for 72 hours later, state does not file charges by deadline, court vacates conditions and release respondent unconditionally, state charges her as an adult, trial court dismisses adult charge, state appeals; held: juvenile court may extend jurisdiction beyond juvenile's 18th birthday if proceedings are pending, RCW 13.40.300(1)(a), where charges are not filed proceedings are not pending thus trial court lacked authority to extend jurisdiction; affirms *State v. Dion*, 131 Wn.App. 729 (2006); 9-0.

***State v. Posey***, 161 Wn.2d 638, 643-47 (2007)

Defendant is charged with assault 1°, automatically declined, RCW 13.04.030(1)(e)(v)(A), jury acquits but convicts of a lesser not specifically enumerated as an automatic decline offense, trial court sentences as an adult; held: any juvenile properly charged in adult court of an enumerated offense must be returned to juvenile court for a decline hearing or disposition as a juvenile if convicted of a nonenumerated offense, RCW 13.04.030(1)(e)(v)(E)(II), *State v. Mora*, 138 Wn.2d 43 (1999), *State v. Meridieth*, 144 Wn.App. 47 (2008), *State v. Posey*, 174 Wn.2d 131 (2012); reverses, in part, *State v. Posey*, 130 Wn.App. 262 (2005); 8-1.

***State v. Ramirez***, 140 Wn.App. 278 (2007)

Automatic decline statute amendment, LAWS OF 2005, ch. 290, § 1, RCW 13.04.030(1)(e)(v), making automatic decline applicable when juvenile is 16 or 17 years old on the date the alleged offense is committed, legislatively overruling *State v. Salavea*, 151 Wn.2d 133 (2004), is not retroactive; II.

***Pers. Restraint of Hegney***, 138 Wn.App. 511 (2007)

Evidence inadmissible at trial is admissible at a **decline** hearing, *In re Welfare of Harbert*, 85 Wn.2d 719 (1975); II.

***State v. Chavez***, 163 Wn.2d 262, 267-72 (2008)

Juveniles are not entitled to a jury trial in juvenile court; affirms *State v. Chavez*, 134 Wn.App. 657 (2006); 6-3.

***State v. Meridieth***, 144 Wn.App. 47 (2008)

Seventeen year old is charged with mandatory decline offenses, juvenile court enters automatic decline order absent probable cause that any of the offenses occurred after defendant

turned 16, RCW 13.04.030(1)(e)(v) (2005); held: statute requires that there be probable cause that an automatic decline offense was committed after offender turned 16, thus automatic decline was faulty, remedy is to remand for a decline hearing and, if court declines then conviction stands, if court denies decline, then defendant is entitled to a new trial in adult court, as he has turned 18, *Pers. Restraint of Dalluge*, 152 Wn.2d 772 (2004); 2-1.

***State v. Ramos***, 152 Wn.App. 684, 690-93 (2009)

Fourteen year old may waive decline hearing, RCW 13.34.110(1) (1990), and pursuant to a plea bargain agree to transfer to adult court; III.

***State v. Brown***, 158 Wn.App. 49 (2010)

School resource officer observes respondent asleep in a car during school hours, observes a knife on the floor, removes respondent, respondent agrees to officer removing the knife, officer searches car finds guns; held: weapon in a car on campus is an emergency under the school search exception, *New Jersey v. T.L.O.*, 469 U.S. 325, 83 L.Ed.2d 720 (1985), *State v. Slatterty*, 56 Wn.App. 8209 (1990), justifying search without a warrant, search beyond seizing the knife was linked to the initial intrusion; III.

***J.D.B. v. North Carolina***, 564 U.S. 261. 131 S.Ct. 2394, 180 L.Ed.2d 310 (2011)

In determining whether a juvenile is in custody requiring *Miranda* warnings prior to questioning, police and trial court must apply an objective standard, *i.e.*, would a reasonable person perceive that he or she is in custody, which includes consideration of the suspect's age, *cf.: Yarborough v. Alvarado*, 541 U.S. 652, 158 L.Ed.2d 938 (2004); 5-4.

***State v. Posey***, 174 Wn.2d 131 (2012)

Respondent is charged with rape and assault 1°, is auto-declined because assault 1° is a serious violent offense, RCW 13.04.030 (2009), jury acquits of assault, is sentenced under SRA, Supreme Court reverses and remands to juvenile court for disposition, *State v. Posey*, 161 Wn.2d 638 (2007), before disposition on remand respondent turns 21, court treats defendant as an adult in superior court but imposes juvenile sentence range, respondent appeals claiming neither juvenile nor superior court had jurisdiction; held: superior court always retains jurisdiction over felony cases, CONST. art. IV, § 6, legislation cannot alter constitutional jurisdiction, *see also: State v. Maynard*, 183 Wn.2d 253 (2015); 7-2.

***State v. Miller***, 165 Wn.App. 385 (2011)

Failure of police to advise a juvenile of the juvenile-specific language is not grounds for suppression, *State v. Prater*, 77 Wn.2d 526 (1970), *State v. Luoma*, 88 Wn.2d 28 (1977); III.

***State v. Childress***, 169 Wn.App. 523 (2012)

Decline standard is preponderance, not beyond a reasonable doubt, *State v. H.O.*, 119 Wn.App. 549, 552-56 (2003), respondent is not entitled to a jury determination of decline; I.

***State v. Bailey***, 179 Wn.App. 433 (2014)

To use an agreed declined juvenile conviction in offender score as an adult state must show defendant was informed, at time of the decline, that he was advised of the "rights and protections" available in juvenile court and that an adult strike conviction could be used in the future, *see: State v. Saenz*, 175 Wn.2d 167 (2012), *State v. Knippling*, 166 Wn.2d 93 (2009), *but see: State v. Inocencio*, 187 Wn.App. 765 (2015), *State v. Reynolds*, ___ Wn.App.2d ___, 505 P.3d 1174 (2022); 2-1, III.

***State v. S.J.C.***, 183 Wn.2d 408 (2015)

Where juvenile offender has met all the requirements of RCW 13.50.050 (2011) to seal the record court must seal and need not apply *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30 (1982) factors, *see: State v. Webster*, 69 Wn.App. 376 (1993), *see also: State v. J.C.*, 192 Wn.App. 122 (2016); 7-2.

***State v. Jimenez***, 200 Wn.App. 48 (2017)

In minor in possession of marijuana case, state need not prove that the marijuana had greater than 0.3% THC, RCW 69.50.4014 (2003), as a juvenile may not possess any concentration of marijuana, regardless of RCW 69.50.101(2)(w) (2017); III.

***State v. A.S.***, 6 Wn.App.2d 264 (2018)

Vice-principal of school searches non-student's backpack, finds drugs; held: school search exception, *State v. Brooks*, 43 Wn.App. 560 (1986), *New Jersey v. T.L.O.*, 83 L.Ed.2d 720 (1983), *State v. Brown*, 158 Wn.App. 49 (2010), *State v. E.K.P.*, 162 Wn.App. 675 (2011), applies only to students absent some emergency; I.

***State v. A.X.K.***, 12 Wn.App.2d 287 (2020)

Evidence at fact finding establishes that offense occurred prior to respondent's twelfth birthday, juvenile court fails to hold a capacity hearing, RCW 9A.04.050; held: capacity is not an element of a crime, *State v. Q.D.*, 102 Wn.2d 19, 24 (1984), but a capacity hearing is mandatory for respondents younger than twelve, thus remanded for capacity hearing; II.

***State v. Quijas***, 12 Wn.App.2d 363 (2020)

At discretionary **decline** hearing defense offers evidence that Hispanic youth are declined in Washington and in Skagit County at a rate disproportionate to their percentage of population, juvenile court declines without addressing disproportionality issue; held: vigilance is required when racial bias is alleged to undermine a criminal defendant's constitutional rights at any stage of a proceeding, where such a claim, supported by some evidence in the record, the trial court must rule, thus remanded for juvenile court to consider and rule on racial bias evidence; because defendant is now older than eighteen, if court determines that decline was not appropriate, remedy is a new trial in adult court, *Dillenburg v. Maxwell*, 70 Wn.2d 331 (1967), *Pers. Restraint of Dalluge*, 152 Wn.2d 772, 785-86 (2004); I.

***State v. K.A.B.***, 14 Wn.App.2d 677 (2020)

To prove juvenile capacity to commit a crime, although the state is not required to prove that the child had actual knowledge of the legal consequences of her conduct, the state must

show that the child is able to entertain criminal intent. *State v. Ramer*, 151 Wn.2d 106, 115 (2004), RCW 9A.04.050 (2011), *State v. J.P.S.*, 135 Wn.2d 34 (1998), the state must demonstrate, by clear and convincing evidence, that a child not only knew the act was wrong in a moral sense, but in a legal sense as well; II.

# JUVENILES
## Delay in Filing

***State v. Hodges***, 28 Wn.App. 902 (1981)

State delays three months before filing information in juvenile court, during which time defendant turned 18, whereupon case filed in Superior Court, which dismissed due to delay denying due process; held: *remanded* for evidentiary hearing to see if state can meet burden to justify delay; deliberate or negligent delay in filing violates due process; *see*: *State v. Lidge*, 49 Wn.App. 311 (1987); II.

***State v. McAllaster***, 31 Wn.App. 554 (1982)

Trial court has discretion to dismiss an information for delay in referral to prosecutor, per King County LJuCR 7.14(b); I.

***State v. Keller***, 32 Wn.App. 135 (1982)

Where court dismissed felony information for delay in referral, King County LJuCR 7.14(b), it is without prejudice and state may refile; I.

***State v. Jacobson***, 36 Wn.App. 446 (1983)

March 6, juvenile commits burglary; March 26, commits robbery; April 13, juvenile court declines jurisdiction on robbery; April 15, defendant turns 18 years of age; thereafter, burglary charge filed in Superior Court; defendant moves to dismiss, CrR 8.3(b); held: defendant was not prejudiced by delay; I.

***State v. Terrell***, 38 Wn.App. 187 (1984)

Trial court's decision not to dismiss, King County LJuCr 7.14(b), for delay in referral is within court's discretion where case was referred to prosecutor within two weeks but was returned to police for filing of a face sheet, referred back 28 days later; I.

***State v. Calderon***, 102 Wn.2d 348 (1984)

Five months prior to respondent's 18th birthday, burglary is committed, due to delay in lab, fingerprints are not compared until after respondent turns 18, information filed in Superior Court; held: while delay beyond 18th birthday establishes prejudice, *State v. Hodges*, 28 Wn.App. 902 (1981), court must balance prejudice with reason for state's delay, *United States v. Lovasco*, 52 L.Ed.2d 752 (1977), *State v. Oppelt*, 172 Wn.2d 285 (2011); here, police needed prints to charge, lab backlog excused investigatory delay, *State v. Salavea*, 151 Wn.2d 133, 146-47 (2004), *see*: *State v. Lidge*, 111 Wn.2d 845 (1989), *State v. Brandt*, 99 Wn.App. 184 (2000); 9-0.

***State v. Boseck***, 45 Wn.App. 62 (1986)

Delay of 21 months in charging defendant, resulting in juvenile court losing jurisdiction, was justified as state was proceeding sequentially against numerous defendants to obtain each defendant's testimony, *State v. Calderon*, 102 Wn.2d 348 (1984); I.

***State v. Robbers***, 46 Wn.App. 558 (1987)

Two-month delay in filing charges, resulting in juvenile court losing jurisdiction, does not mandate dismissal, *State v. Calderon*, 102 Wn.2d 348 (1984), where more arrests needed to be made in investigation, lab reports had not been received on some counts which were joined, it was not unreasonable to delay referral to police until sufficient evidence had been obtained for all counts; special procedures for juvenile suspects are not required; I.

***State v. Anderson***, 46 Wn.App. 565 (1987)

Prosecutor's established procedures for processing cases can justify delay in charging beyond respondent's 18th birthday; prosecutor need not expedite filing for a juvenile whose 18th birthday is imminent; *see*: *State v. Lidge*, 111 Wn.2d 845 (1989); I.

***State v. Cantrell***, 49 Wn.App. 917 (1987)

Juvenile court dismisses escape information for six-week delay in referral to court, King County LJuCR 7.14(b); held: state's justification for delay, obtaining evidence, is sufficient to establish no arbitrary action or governmental misconduct, CrR 8.3(b), *State v. Burri*, 87 Wn.2d 175 (1976), thus reversed; I.

***State v. Alvin***, 109 Wn.2d 602 (1987)

Police complete investigation into crime five weeks before defendant's 18th birthday but, due to vacation and training of detective, do not obtain criminal record or refer to prosecutor until after 18th birthday; held: police and prosecutor need not give special treatment to juvenile to assure juvenile court jurisdiction, *State v. Warner*, 125 Wn.2d 876, 891 (1995); sick leave, comp time, vacation and training courses are part of normal routine and are legitimate reasons for delay, *distinguishing* *State v. Calderon*, 102 Wn.2d 348 (1984); *accord*: *State v. Lidge*, 111 Wn.2d 845 (1989) , *see: State v. Oppelt*, 172 Wn.2d 285 (2011); 9-0.

***State v. Schifferl***, 51 Wn.App. 268 (1988)

Where state negligently fails to process a case resulting in loss of juvenile court jurisdiction, the negligent delay will weigh against the state in balancing the reasons for the delay vs. prejudicial effect on defendant; the prejudice must be more than mere loss of jurisdiction; here, the negligence was less culpable than the "routine" delays in *State v. Alvin*, 109 Wn.2d 601 (1987), thus dismissal reversed, *see: State v. Gidley*, 79 Wn.App. 205 (1995), *State v. Brandt*, 99 Wn.App. 184 (2000), *but see: State v. Frazier*, 82 Wn.App. 576 (1996); I.

***State v. Chavez***, 111 Wn.2d 548 (1988)

Local court rule permitting court to dismiss juvenile court case if there is more than 30-day delay between completion of police investigation and filing of information is valid, however trial court may only dismiss under rule if actual prejudice is established; 5-3.

***State v. Lidge***, 111 Wn.2d 845 (1989)

Eight-day delay in filing charges in juvenile court due to a need for further investigation, resulting in loss of juvenile court jurisdiction as defendant turned 18, does not deprive defendant of due process, *State v. Salavea*, 151 Wn.2d 133, 146-47 (2004), where defense never inquired

on cross-examination of prosecutor as to what investigation was necessary; the fact that one prosecutor filed charges against co-defendant yet other prosecutor delayed for further investigation does not establish negligence; reverses *State v. Lidge*, 49 Wn.App. 311 (1987); *see: State v. Frazier*, 82 Wn.App. 576 (1996), *State v. Brandt*, 99 Wn.App. 184 (2000), *see: State v. Oppelt*, 172 Wn.2d 285 (2011); 5-3.

***State v. Dixon***, 114 Wn.2d 857 (1990)

Delay in filing due to sequential prosecution to get testimony of co-defendants will justify juvenile court losing jurisdiction; only intentional or negligent delay by prosecution will justify dismissal, *State v. Warner*, 125 Wn.2d 876, 889-91 (1995), *State v. Gidley*, 79 Wn.App. 205 (1995), *State v. Frazier*, 82 Wn.App. 576 (1991); appellate court cannot substitute judgment or weigh strength of prosecutor's case in determining whether delay was justified, *reversing State v. Dixon*, 55 Wn.App. 221 (1989); 9-0.

***State v. Warner***, 125 Wn.2d 876, 889-91 (1995)

Juvenile sex offender, in state institution, while undergoing sex offender treatment, confesses to therapists to several offenses, authorities delay reporting offenses such that defendant turns 18 and is charged as an adult, seeks dismissal for delay; held: delay in reporting, even in violation of mandatory reporting provision's of RCW 26.44.030, does not establish negligence to justify dismissal *State v. Dixon*, 114 Wn.2d 857 (1990), as negligence *per se* has been largely abolished, RCW 5.40.050, and class of persons reporting statute was designed to protect was victims, not abusers; *see: State v. Frazier*, 82 Wn.App. 576 (1996); 9-0.

***State v. Frazier***, 82 Wn.App. 576 (1996)

Negligent delay in filing charges, resulting in juvenile court losing jurisdiction, is grounds for dismissal where court finds no credible reason for state's delay, *State v. Dixon*, 114 Wn.2d 857 (1990), *State v. Lidge*, 111 Wn.2d 845, 848 (1989), *State v. Warner*, 125 Wn.2d 876, 890 (1995); where no justification is provided for the negligent delay, trial court need not balance the interests of the state and defendant, *State v. Warner, supra*, at 889; II.

***State v. Hairychin***, 136 Wn.2d 862 (1998)

Prosecutor arranges for defense counsel to interview complainant, does not subpoena complainant who moves out of state, prosecutor obtains continuance beyond expiration date; held: a continuance may be granted if state's evidence is unavailable, prosecutor has exercised due diligence, and there are reasonable grounds to believe evidence will be available within reasonable time, JuCR 7.8(e)(2)(ii), due diligence requires proper issuance of subpoenas, *State v. Adamski*, 111 Wn.2d 574, 578 (1988), *State v. Duggins*, 121 Wn.2d 524, 525 (1993), *cf.: State v. Bible*, 77 Wn.App. 470 (1995), thus continuance was improperly granted; *per curiam.*

***State v. Brandt***, 99 Wn.App. 184 (2000)

Analysis of time period of delay halts with defendant's 18th birthday, since juvenile court loses jurisdiction at that point, after which defendant is not further prejudiced; defendant's confession to child molestation provides police with a lead to find victim, whose last name is unknown, police await contact from victim resulting in delay beyond defendant's 18th birthday, held: investigative delay was reasonable, within trial court's discretion, *State v. Gidley*, 79

Wn.App. 205, 210 (1995), *State v. Lidge*, 111 Wn.2d 845, 850 (1989), *State v. Dixon*, 114 Wn.2d 857, 866 (1990); trial court may consider likelihood of decline, *State v. Schifferl*, 51 Wn.App. 268, 273 (1988); II.

***State v. Francisco***, 148 Wn.App. 168, 175-77 (2009)

Police find respondent passed out in driveway, strong odor of alcohol, incoherent, difficult to rouse, convicted of minor possession/consumption of liquor, RCW 66.44.270(2)(a); held: evidence of assimilation of alcohol is circumstantial evidence of prior possession and, when corroborated, may support a conviction, *State v. Dalton*, 72 Wn.App. 674 (1994), *State v. Preston*, 66 Wn.App. 494 (1992), *see: State v. Hornaday*, 105 Wn.2d 120, 126 (1986), but absent nearby alcohol containers or confession, evidence is insufficient that respondent exercised any dominion and control over alcohol; III.

***State v. Wheeler***, 183 Wn.2d 71, 80-83 (2015)

Nine years after guilty plea respondent files PRP with new evidence showing state may have intentionally delayed filing until after he turned 18; held: respondent failed to show he acted with reasonable diligence, has not shown he could not have raised the delay claim at time he was charged, respondent knew his date of birth; 9-0.

***State v. Maynard***, 183 Wn.2d 253 (2015)

Charge filed before respondent turns 18, defense fails to seek extension of jurisdiction, court dismisses after respondent's birthday, charge is refiled in adult court which dismisses for ineffective assistance of counsel; held: because juvenile court did not lose jurisdiction because of pre-accusatorial delay, *State v. Dixon*, 114 Wn.2d 857, 860-61 (1990), here the charge was filed affording respondent opportunity to seek extension, thus delay is not a basis to dismiss; counsel was ineffective, defendant was prejudiced, remedy is to remand for further proceedings in accordance with Juvenile Justice Act, state is ordered to reoffer plea proposal of deferred disposition, trial court may impose a juvenile disposition, *State v. Posey*, 174 Wn.2d 131 (2012), distinguishing *Pers. Restraint of Dalluge*, 152 Wn.2d 772 (2004); reverses, in part, *State v. Maynard*, 178 Wn.App. 413 (2013); 5-4.

# JUVENILES
## Dispositions

***In re Trambitas***, 96 Wn.2d 324 (1981)

Juvenile respondents are entitled to credit for pretrial detention against the maximum term of confinement imposed under the standard range; 5-4.

***State v. Chatham***, 28 Wn.App. 580 (1981)

Diversion unit may reject a referral as long as the rejection is based on standardized safeguards and the decision to reject is fair and reasoned; fact that rejection is not in writing does not deny defendant due process; I.

***State v. Rice***, 98 Wn.2d 384 (1982)

Juveniles can be sentenced to more than maximum punishment for adults, *overruling, in part,* *State v. Rhodes*, 92 Wn.2d 755 (1979); 8-1.

***State v. Smith***, 33 Wn.App. 791 (1983)

Standard for establishing restitution in a juvenile proceeding is "evidence sufficient to afford a reasonable basis for estimating the loss"; *see:* *State v. Fambrough*, 66 Wn.App. 223 (1992); only tangible damages, such as those for injury to or loss of property, are allowed, 79 ALR 3d 976 (1977); juvenile restitution provisions, RCW 13.40.020(17), 13.40.190, are not vague; I.

***In re Hoffer***, 34 Wn.App. 82 (1983)

Juvenile court can commit to DSHS, extend jurisdiction to 21 and retain jurisdiction for purposes of enforcing restitution order; III.

***State v. Bush***, 34 Wn.App. 121 (1983)

RCW 12.40.020(17) requires court to set restitution that is "easily ascertainable"; fact that restitution is disputed does not prohibit court from setting restitution where "sufficient evidence" exists; co-defendants who are ordered to pay different amounts do not have equal protection claim; I.

***State v. Murphy***, 35 Wn.App. 658 (1983)

Manifest injustice finding is not limited to cases where defendant poses a clear threat of bodily harm; I.

***State v. Elmore***, 36 Wn.App. 38 (1983)

Without a plea bargain, respondent pleads guilty, but is misinformed as to the standard range, seeks specific performance; held: no right to specific performance in the absence of a plea bargain that is breached; sole remedy is withdrawal of plea; II.

***State v. Sargent***, 36 Wn.App. 463 (1984)

Crime victim penalty, RCW 7.68.010 *et seq.*, is mandatory in juvenile convictions; I.

***State v. Adcock***, 36 Wn.App. 699 (1984)

Failure of court to write in standard range in disposition order prior to imposing disposition is harmless error as long as respondent understands plea form; three offenses committed on one day count as three separate convictions for purposes of criminal history unless they are intimately related as part of a sequential plan; fact that there was no opportunity for reform or that respondent was sentenced on same day is not dispositive of issue of whether convictions are separate or from same course of conduct; I.

***State v. Cook***, 37 Wn.App. 269 (1984)

Juvenile respondent is constitutionally entitled to pre-trial detention credit against community service hours; I.

***State v. Fellers***, 37 Wn.App. 613 (1984)

At disposition hearing, respondent has the right to show he lacks ability to pay restitution, RCW 13.40.190(1); *see*: *State v. Commodore*, 38 Wn.App. 244 (1984), *reversing State v. Brown*, 30 Wn.App. 344 (1981); I.

***State v. P.***, 37 Wn.App. 773 (1984)

Once a finding of manifest injustice is made, court has broad discretion to determine the proper sentence, *State v. E.J.H.*, 65 Wn.App. 771 (1992), but merely following the probation counselor's recommendation, without more, is a clearly excessive sentence since it cannot be justified by any reasonable review of the record; *but see: State v. B.E.W.*, 65 Wn.App. 370 (1992); III.

***State v. Gutierrez***, 37 Wn.App. 910 (1984)

Court finds manifest injustice and increases disposition based upon respondent's criminal history alone, last conviction was more than a year prior to disposition; held: trial court abused its discretion; here, respondent's criminal history alone does not support a finding that respondent is a clear danger to society beyond a reasonable doubt; *accord: State v. S.S.*, 67 Wn.App. 800 (1992); III.

***State v. Martin***, 102 Wn.2d 300 (1984)

Where respondent is detained for failure to complete community service hours, court need not reduce the community service obligation by eight hours per day of confinement, RCW 13.40.200(3)(b); reverses *State v. Martin*, 36 Wn.App. 1 (1983).

***State v. McDowell***, 102 Wn.2d 341 (1984)

Disposition may exceed that allowed in a diversion agreement, *distinguishing* RCW 13.40.160(3), unless defense proves actual vindictiveness; 9-0.

***State v. Smith***, 40 Wn.App. 477 (1985)

In determining criminal history for disposition, each separate charge not arising out of the same course of conduct is a separate conviction even if respondent's disposition on each is contained in the same disposition order; I.

***State v. WS***, 40 Wn.App. 835 (1985)

Juvenile diversion may not categorically reject all prostitutes from acceptance into diversion, RCW 13.40.010(2)(g), *cf.: State v. Pulfrey*, 120 Wn.App. 270 (2004); I.

***State v. Ashley***, 40 Wn.App. 877 (1985)

Defendant assaults and injures victim, later assaults victim, no injuries; defendant is charged and convicted only with second assault, restitution ordered for first assault; held: restitution may only be ordered for the crimes charged and proved at trial, RCW 13.40.190(1), *State v. Mark*, 36 Wn.App. 428 (1984); I.

***State v. Malychewski***, 41 Wn.App. 488 (1985)

Where juvenile is sentenced for two crimes, one of which qualifies him as a serious offender, RCW 13.40.020(1), respondent may be sentenced for both crimes within the range for serious offenders; II.

***State v. Taylor***, 42 Wn.App. 74 (1985)

To exceed standard range, state must prove beyond a reasonable doubt that juvenile would present a serious and clear danger to society if standard range were imposed; one need not be a "serious offender," RCW 13.30.020(1), to pose a serious danger to society; II.

***State v. Cirkovich***, 42 Wn.App. 403 (1985)

A serious offender or a juvenile sentenced to greater than 30 days may not thereafter have his sentence modified by the trial court; I.

***State v. Calloway***, 42 Wn.App. 420 (1985)

To determine criminal history, RCW 13.40.020(6)(a), "two or more charges arising out of the same course of conduct" means that there was no substantial change in the nature of the criminal objective; here, two burglaries committed in one hour to buy drugs did not arise from the same course of conduct; *but see: State v. Adcock*, 36 Wn.App. 699 (1984); II.

***State v. Morse***, 45 Wn.App. 197 (1986)

Restitution following juvenile court conviction of negligent driving may not include travel, telephone expenses or attorney fees, RCW 13.40.190(17); trial court need not consider comparative negligence in determining restitution amount; I.

***State v. Huff***, 45 Wn.App. 479 (1986)

In computing criminal history, prior convictions of reckless burning and burglary, committed at the same residence within a brief time span are not within the "same course of

conduct,"RCW 13.40.020(6)(a), as there was not an objectively discernible relationship between the crimes such that they arose from a single criminal objective, and one of the crimes did not merely facilitate the other, *State v. Adcock*, 36 Wn.App. 699 (1984), *State v. Calloway*, 42 Wn.App. 420 (1985), thus for purposes of disposition, the priors were distinct offenses; I.

***In re Latson***, 45 Wn.App. 716 (1986)

Recent extensive criminal history is a proper aggravating factor, RCW 13.40.150(3)(i)(iv) to permit a manifest injustice finding; II.

***State v. Wall***, 46 Wn.App. 218 (1986)

Respondent placed his hand on crotches of 14 and 17-year-old females, convicted of simple assault; trial court sentenced respondent as middle offender to detention, RCW 13.40.160(4), finding victims were particularly vulnerable, RCW 13.40.150(3)(i)(iii); held: to confine a juvenile middle offender beyond standard range without finding a manifest injustice, court must find an aggravating factor; to find victim particularly vulnerable, court must use same definition as under Sentencing Reform Act, RCW 9.94A.309, to include age, disability, thus *remanded* for resentencing; I.

***State v. Quiroz***, 107 Wn.2d 791 (1987)

A diversion agreement, RCW 13.40.080, may be used to enhance sentence in a subsequent proceeding where the agreement stated the crimes charged, the respondent was given written notice of his right to counsel; juvenile need not be notified of all of the constitutional rights which would apply if he were to plead guilty; 9-0.

***State v. Brown***, 47 Wn.App. 729 (1987)

RCW 13.40.181(2), limiting court to a disposition of not more than 300% of term imposed for the most serious offense, applies to offenses contained in a single information and not to all offenses heard at a single disposition hearing; *accord*: *State v. Dodd*, 56 Wn.App. 257 (1989); I.

***State v. Escoto***, 108 Wn.2d 1 (1987)

Juvenile court may order a psychological evaluation of respondent for use in disposition where the court permits counsel to be present at the evaluation and where the respondent is aware of his right to remain silent; *see: State v. Decker*, 68 Wn.App. 246 (1992), *State v. Jacobsen*, 95 Wn.App. 967 (1999), *State v. Diaz-Cardona*, 123 Wn.App. 477 (2004); 5-4.

***State v. Perez***, 49 Wn.App. 45 (1987)

At disposition where standard range calls for community supervision but state is seeking manifest injustice finding and commitment, there is a right to confront and cross-examine witnesses, *State v. Whittington*, 27 Wn.App. 422 (1980); where respondent is middle offender, and confinement is within standard range, court may consider hearsay reports at disposition; I.

***State v. Curwood***, 50 Wn.App. 228 (1987)

Where juvenile court has extended jurisdiction to a date beyond respondent's 18th birthday, and disposition occurs within the extended jurisdictional period, then state may retain custody over respondent during the full term of his confinement; I; *see also*: *State v. Forhan*, 59 Wn.App. 486 (1990).

***State v. S.P.***, 110 Wn.2d 886 (1988)

At disposition hearing, juvenile has statutory right to confront author of a report that is relevant and material to the disposition if the author is reasonably available, RCW 13.40.151(1), *reversing* *State v. S.P.*, 49 Wn.App. 45 (1986); 8-0.

***State v. Bryant***, 51 Wn.App. 258 (1988)

Court may confine for up to 30 days for violation of an order of community supervision, RCW 13.40.200(3)(a); III.

***State v. Haaby***, 51 Wn.App. 771 (1988)

Juvenile court may not enhance penalty by use of diversion agreements signed before respondent was 12 unless it rebuts the statutory presumption of incapacity, RCW 9A.04.050, *distinguishing* *State v. Quiroz*, 107 Wn.2d 791 (1987); III.

***State v. Steward***, 52 Wn.App. 413 (1988)

Respondent is convicted of taking a motor vehicle without permission, RCW 9A.56.070; juvenile court finds that respondent abandoned vehicle, which was stripped, orders restitution for damages; held: RCW 13.40.190 authorizes restitution as the damages resulted from the respondent's offense, *distinguishing* *State v. Ashley*, 40 Wn.App. 877 (1985); I.

***State v. Yadon***, 53 Wn.App. 489 (1989)

A minor/first offender may be sentenced to community supervision of up to one year; I.

***State v. Horner***, 53 Wn.App. 806 (1989)

The value of a victim's labor in making repairs to property damaged by respondent may be included in a restitution order, RCW 13.40.020(17); court may base restitution order upon an estimate of the cost a professional would have charged; I.

***State v. Merz***, 54 Wn.App. 23 (1989)

A juvenile respondent's plea bargain with the prosecutor does not bind the probation counselor; *see*: *State v. Harris*, 57 Wn.2d 383 (1960); I.

***State v. Tauala***, 54 Wn.App. 81 (1989)

Where the record supports an exceptional disposition (here, an aggravated assault), a probation counselor's recommendation that the standard range would provide sufficient treatment is not binding on the court, *distinguishing* *State v. P.*, 37 Wn.App. 733 (1984); I.

***State v. Barrett***, 54 Wn.App. 178 (1989)

Juvenile passenger in stolen vehicle, convicted of taking and riding, RCW 9A.56.070, may be ordered to make restitution for damages to the vehicle pursuant to RCW 13.40.190(1); I.

***State v. Poupart***, 54 Wn.App. 440 (1989)

Probation counselors and caseworkers are not bound by a plea agreement and may make recommendations independent of the prosecutor, *see:* *State v. Harris*, 146 Wn.2d 339 (2002); I.

***State v. Miller***, 54 Wn.App. 763 (1989)

Juvenile offender may be sentenced to longer than an adult would receive for same crime under SRA; II.

***State v. Anderson***, 58 Wn.App. 107 (1990)

The aggregate of consecutive terms imposed for two or more offenses in the same information shall not exceed 300% of the actual term imposed by the judge, not the most serious term which could be imposed, RCW 13.40.180(2); I.

***State v. Richard***, 58 Wn.App. 357 (1990)

Where court does not expressly delegate to juvenile probation counselor authority to set a curfew, respondent's violation of curfew set by counselor is not a violation of the terms of community supervision, RCW 13.40.200, former RCW 13.40.020(3), *see also:* *State v. Clark*, 91 Wn.App. 581 (1998), *aff'd, on other grounds*, 139 Wn.2d 152 (1999); II.

***State v. Payne***, 58 Wn.App. 215 (1990)

Inflicting serious bodily injury cannot be an aggravating factor justifying a manifest injustice for murder as it inheres in the crime charged; where victim dies instantly, then heinous, cruel or depraved manner is not an aggravating factor, *State v. Melton*, 63 Wn.App. 63 (1991); victim is not "particularly vulnerable" where she is shot in the back at home, off guard, *State v. Wall*, 46 Wn.App. 218 (1986); I.

***State v. Radcliff***, 58 Wn.App. 717 (1990)

Written findings are not required for disposition hearings, JuCR 7.12; court is not limited to express statutory aggravating and mitigating factors in RCW 13.40.150, *State v. Strong*, 23 Wn.App. 789, 793 (1979); assaulting a staff member of a rehabilitation facility is an aggravating factor; I.

***State v. Forhan***, 59 Wn.App. 486 (1990)

Where disposition is imposed prior to a respondent's 18th birthday, jurisdiction is automatically extended to allow for execution and enforcement of the disposition order, RCW 13.40.300(1)(c), *cf.*: *State v. Curwood*, 50 Wn.App. 228 (1987), *State v. Dion*, 160 Wn.2d 605 (2007); I.

***State v. Melton***, 63 Wn.App. 63 (1991)

Pending criminal charges is not aggravating factor to support manifest injustice finding; recent criminal history, previous failure to comply with disposition orders, need of long-term residential treatment, danger to community are aggravating factors, *State v. Tuala*, 54 Wn.App. 81, 88 (1989), *see: State v. Halstien*, 122 Wn.2d 109 (1993); I.

***State v. Bennett***, 63 Wn.App. 530 (1991)

Juvenile on social security with representative payee is ordered to ask guardian for money to pay restitution; held: no abuse of discretion in ordering restitution and ordering respondent to ask payee for funds from social security checks; defendant has burden of establishing that she had proprietary interest in some of the property for which she is ordered to pay restitution, RCW 13.30.020(17); I.

***State v. J.N.***, 64 Wn.App. 112 (1992)

In child rape 1°, finding of a high risk to reoffend based upon evidence of denial, projection of responsibility on victim, planning of offense, is sufficient to support manifest injustice, *State v. S.H.*, 75 Wn.App. 1 (1994), *State v. Jacobsen*, 95 Wn.App. 967, 981-83 (1999), *State v. Roberson*, 118 Wn.App. 163 (2003); SRA cases on future dangerousness, *e.g.*, *State v. Pryor*, 115 Wn.2d 445 (1990), *State v. Barnes*, 117 Wn.2d 701 (1991), do not apply to juvenile dispositions; I.

***State v. B.E.W.***, 65 Wn.App. 370 (1992)

Where probation counselor recommends manifest injustice disposition, defense is on notice that one is possible; prosecutor need not seek manifest injustice and file supplemental information, *distinguishing Specht v. Patterson*, 18 L.Ed.2d 326 (1967), *State v. Whittington*, 27 Wn.App. 422 (1980).

***State v. Bryant***, 65 Wn.App. 547 (1992)

Judge makes oral findings, imposes exceptional sentence; after appeal filed, commissioner signs findings of fact; held: only judge who has heard evidence has authority to find facts, CR 63(b), CrR 6.11, thus remanded for entry of findings by disposition judge or for a new disposition hearing, *cf.: State v. Ward*, 182 Wn.App. 574 (2014); I.

***State v. Howell***, 119 Wn.2d 513 (1992)

Special Sex Offender Disposition Alternative (SSODA), RCW 13.40.0357, Schedule D-1, option C and RCW 13.40.160(2), authorize trial court to impose up to 30 days confinement upon minor/first offender without manifest injustice finding; 9-0.

***State v. E.J.H.***, 65 Wn.App. 771 (1992)

Written findings are not required to support manifest injustice finding, *see: State v. Bevins*, 85 Wn.App. 280 (1997); manifest injustice disposition is not clearly excessive where imposed for rehabilitation purposes and to remove respondent from society, *State v. F.T.*, 5 Wn.App,.2d 448 (2018), *distinguishing State v. P*, 37 Wn.App. 773 (1984); I.

***State v. Jackson***, 65 Wn.App. 856 (1992)

Contribution to interlocal drug fund may not be ordered by juvenile court, *distinguishing* *State v. Q.D.*, 102 Wn.2d 19, 29 (1984); I.

***State v. Landrum***, 66 Wn.App. 791 (1992)

Option B community service disposition is not appealable, RCW 13.40.160(2), 13.40.230; I.

***State v. Weese***, 67 Wn.App. 259 (1992)

Statute requiring juvenile court to notify Department of Licensing of minor in possession convictions for revocation of drivers licenses, RCW 13.40.265(1), 66.44.365(1), does not violate equal protection; II.

***State v. P.B.T.***, 67 Wn.App. 292 (1992)

Abuse of trust is an aggravating factor where a scout leader sexually abuses a younger scout, as respondent was both in a position of trust as well as a position of authority, *State v. Marcum*, 61 Wn.App. 611, 614-5 (1991), and there is circumstantial evidence that perpetrator abused the position of trust to facilitate the crime, *State v. Brown*, 55 Wn.App. 738, 754 (1989), *State v. Stevens*, 58 Wn.App. 478, 500 (1990), *State v. Grewe*, 117 Wn.2d 211, 218 (1991), *distinguishing* *State v. Stuhr*, 58 Wn.App. 660, 662-3 (1991); *see also:* *State v. J.S.*, 70 Wn.App. 659 (1993); I.

***State v. Foley***, 67 Wn.App. 324 (1992)

Diversion agreement, RCW 13.40.080, supersedes conditions of release; I.

***State v. S.S.***, 67 Wn.App. 800 (1992)

Court imposes manifest injustice disposition, relying in part upon social worker's written report, over objection, social worker being on vacation, state having made no effort to compel his attendance; held: confrontation clause did not bar admission of letter into evidence where the letter merely sought to add weight to identical recommendations of other professionals which defendant had the opportunity to rebut, *State v. Short*, 12 Wn.App. 125, 132 (1974), ER 1101(c)(3), *State v. Beard*, 39 Wn.App. 601, 607-8 (1985), *State v. S.P.*, 110 Wn.2d 886, 889 n. 1 (1988); *cf.:* *State v. Whittington*, 27 Wn.App. 422, 428-9 (1980); a witness who prepares a written report for disposition is not reasonably available for cross-examination if that witness has, before becoming aware of the date of the hearing, scheduled a vacation which cannot easily and conveniently be rescheduled, RCW 13.40.150(1); trial court, in finding manifest injustice, should not merely adopt probation officer's list of aggravating factors; habitual truancy and prior inadequate punishment are not aggravating factors; court's finding that respondent is highly likely to reoffend if not treated beyond the sentence range is a basis for manifest injustice, *State v. Halstien*, 122 Wn.2d 109 (1993)), *distinguishing* *State v. Barnes*, 117 Wn.2d 701 (1991); violation of previous dispositions, escalating criminal activity, lack of parental ability to control child's criminal behavior are proper aggravating factors, *see: State v. F.T.*, 5 Wn.App,.2d 448 (2018); I.

***State v. Decker***, 68 Wn.App. 246 (1992)

Trial court may order predisposition psychological evaluation of respondent, *State v. Escoto*, 108 Wn.2d 1 (1987), *State v. Jacobsen*, 95 Wn.App. 967, 981-83 (1999), and may preclude counsel from attending, *cf.:* *State v. P.B.T.*, 67 Wn.App. 292 (1992), *State v. Diaz-Cardona*, 123 Wn.App. 477 (2004),; trial court has authority to grant use immunity absent prosecutor's motion, CrR 6.14; I.

***In re A, B, C, D, E***, 121 Wn.2d 80 (1993)

Mandatory HIV testing for sex offenders, RCW 70.24.340(1)(a), applies to juveniles; 5-2.

***State v. Ferreira***, 69 Wn.App. 465 (1993)

Where juvenile is an accomplice to a drive-by shooting at a house in which five people are present, the offense is not a "single act or omission," RCW 13.40.180(1), applying *State v. Dunaway*, 109 Wn.2d 207 (1987), SRA-same criminal conduct analysis to juvenile dispositions; *accord:* *State v. Contreras*, 124 Wn.2d 741 (1994); III.

***State v. N.E.***, 70 Wn.App. 602 (1993)

Long-term untreated substance abuse, lack of parental control, depression, ongoing prostitution, failure to remain in treatment present a high risk to reoffend and a danger to society, justifying manifest injustice, *State v. Bevins*, 85 Wn.App. 280 (1997), *State v. F.T.*, 5 Wn.App,.2d 448, *see:* *State v. S.S.*, 67 Wn.App. 800 (1992), *cf.:* *State v. Gutierrez*, 37 Wn.App. 910 (1984); where defense fails to argue the impact of mitigating factors, then trial judge need not expressly state that she has considered them; I.

***State v. J.S.***, 70 Wn.App. 659 (1993)

In child molestation of four-year old stepsister, denial by defendant is grounds for a manifest injustice finding where treatment is unavailable due to the denial, as treatment is a goal of the juvenile justice system, *State v. Jacobsen*, 95 Wn.App. 967, 981-83 (1999) *distinguishing* *State v. Vermillion*, 66 Wn.App. 332, 348 (1992); familial relationship is sufficient by itself to establish trust relationship for abuse of trust aggravating factor, *State v. Overvold*, 64 Wn.App. 440, 447 (1992), *State v. Hamby*, 69 Wn.App. 131, 132 (1993), *State v. Jacobsen, supra.*, at 980-81 (1999); extreme youth may be an aggravating factor even if victim's age is an element, *State v. Fisher*, 108 Wn.2d 419 (1987); I.

***State v. Shawn P.***, 122 Wn.2d 553 (1993)

Mandatory driving privilege revocation for minor in possession of alcohol or drug conviction of juveniles, RCW 13.40.265(1(a) does not violate equal protection clause; *affirms* *State v. Preston*, 66 Wn.App. 494 (1992); 5-2.

***State v. Hayden***, 72 Wn.App. 27 (1993)

Respondent-sex offender's community supervision conditions are modified to prohibit contact with juveniles when he moves to a home with young children, no evidence of a violation

of previous conditions; held: court's authority to modify sex offender disposition can be implied from general structure of Juvenile Justice Act, *State v. T.E.C.*, 122 Wn.App. 9, 25-31 (2004); I.

***State v. Bourgeois***, 72 Wn.App. 650, 656-8 (1994)

Juvenile court may impose a maximum term beyond offender's 21st birthday, although respondent must be released at 21 years of age; possible early release by Department of Juvenile Rehabilitation is not a basis for a manifest injustice finding, *State v. Fisher*, 108 Wn.2d 419 (1987), *State v. S.H.*, 75 Wn.App. 1 (1994), *State v. Roberson*, 118 Wn.App. 163, 164-65 (2003), *see: State v. Sledge*, 133 Wn.2d 828 (1997); in assault 1° case, gunshot wounds not atypical of injuries by firearms do not establish particularly egregious injuries to justify manifest injustice, *see: State v. Nordby*, 106 Wn.2d 514 (1986), *State v. George*, 67 Wn.App. 217, 222 (1992); I.

***State v. Hefa***, 73 Wn.App. 865 (1994)

Restitution is ordered by juvenile court to burglary victim for lost wages to secure home; held: juvenile court may only order restitution for lost wages due to physical injury, RCW 13.40.020(21), *see: State v. Goodrich*, 47 Wn.App. 114 (1987); I.

***State v. Derr***, 74 Wn.App. 175 (1994)

Crime victim's penalty assessment, RCW 7.68.035(7), must be imposed at disposition, but may immediately be modified to community service or a lesser figure; III.

***State v. Michaelson***, 124 Wn.2d 364 (1994)

A juvenile's taking and riding diversion may not be forwarded to the Department of Licensing, as a diversion is not a conviction, and taking a motor vehicle without permission is a crime, not a violation of the vehicle operating laws, RCW 13.50.200; 9-0.

***State v. Contreras***, 124 Wn.2d 741 (1994)

Unlawful imprisonment, custodial assault and escape, all committed in course of escaping from detention facility, are single act limiting disposition to 150% of most serious offense, RCW 13.40.180(1), *reversing State v. Contreras*, 71 Wn.App. 1 (1993); test for determining whether "same course of conduct" used in juvenile justice act and "same criminal conduct" under SRA is essentially the same, at 748, *State v. S.S.Y.*, 150 Wn.App. 325, 333-37 (2009), 170 Wn.2d 322 (2010); 9-0.

***State v. S.H.***, 75 Wn.App. 1 (1994)

Age and "some degree of size disparity" are inherent in rape of a child 1°, and are thus not aggravating factors absent extreme differences, *State v. Garibay*, 67 Wn.App. 773, 779 (1992); sleeping victim supports victim vulnerability, *State v. Hicks*, 61 Wn.App. 923, 931 (1991); forcible and maniacally obsessive manner of committing offense and high risk to offend are aggravating factors, *State v. T.E.H.*, 92 Wn.App. 908, 918 (1998); I.

***State v. Acheson***, 75 Wn.App. 151 (1994)

Juvenile sex offender must comply with the Sex Offender Registration Act, RCW 9A.44.130, *see:* *State v. Heiskell*, 129 Wn.2d 113 (1996); registration requirements do not terminate at defendant's 21st birthday; II.

***State v. Bastas***, 75 Wn.App. 882 (1994)

Counsel's motion to withdraw on appeal pursuant to *Anders v. California*, 18 L.Ed.2d 493 (1967), will be denied where the appeal concerns a motion for accelerated review from a manifest injustice disposition; I.

***State v. S.M.H.***, 76 Wn.App. 550 (1995)

A juvenile convicted of burglary with sexual motivation, RCW 13.40.135, is not required to register as a sex offender, RCW 9A.44.130; I.

***State v. May***, 80 Wn.App. 711 (1996)

Juvenile court's authority to revoke community supervision terminates when community supervision period expires, *State v. Y.I.*, 94 Wn.App. 919 (1999), *State v. J.O.*, 165 Wn.App. 570 (2011), unless a violation proceeding is then pending before the court, *see: State v. Todd*, 103 Wn.App. 783 (2000), *but see: State v. Tucker*, 171 Wn.2d 50 (2011), *State v. D.D.-H.*, 196 Wn.App. 948 (2016); III.

***State v. Heiskell***, 129 Wn.2d 113 (1996)

Juveniles must wait two years before first applying for waiver from **sex offender registration** requirement, RCW 9A.44.140(4), *see also: State v. Hooper*, 154 Wn.App. 428 (2010); reverses *State v. Heiskell*, 77 Wn.App. 943 (1995); 6-3.

***State v. Ashbaker***, 82 Wn.App. 630 (1996)

Juvenile is entitled to credit for time spent in pretrial electronic home detention, *State v. Speaks*, 119 Wn.2d 204, 207-8 (1992), *see: State v. Dockens*, 156 Wn.App. 793 (2010); III.

***State v. Mollichi***, 132 Wn.2d 80 (1997)

Juvenile court must determine restitution at disposition hearing, RCW 13.40.150(3)(f), unless waived by respondent, reversing *State v. Mollichi*, 81 Wn.App. 474 (1996); 9-0.

***State v. J.W.***, 84 Wn.App. 808 (1997)

Denial of sex offender disposition alternative (SSODA), RCW 13.40.160(5), is not appealable, *State v. Hays*, 55 Wn.App. 13 (1989); I.

***State v. Kravchuk***, 86 Wn.App. 276 (1997)

Juvenile court may impose a fine for a traffic infraction, RCW 46.63.110(1), IRLJ 6.2, which is not an "offense" for purposes of a standard range disposition, RCW 13.40.020(19), -.020(27); I.

***State v. Sledge***, 133 Wn.2d 828 (1997)

Juvenile court imposes exceptional sentence, stating that respondent should be held until he is 18 years old, calculating length to consider good-time release; held: absent a need for confinement for a specific treatment program requiring a set duration to successfully complete, court may not take into consideration the possibility of early release, *State v. Wakefield*, 130 Wn.2d 464, 478 (1996), *State v. Fisher*, 108 Wn.2d 419, 429 n.6 (1987), *State v. Bourgeois*, 72 Wn.App. 650, 660 (1994), *State v. S.H.*, 75 Wn.App. 1, 15-16 (1994), *State v. Roberson*, 118 Wn.App. 151, 164-65 (2003), *Pers. Restraint of Crow*, 187 Wn.App. 414, 425-26 (2015), *but see: State v. Beaver*, 148 Wn.2d 338 (2002), *reversing State v. Sledge*, 83 Wn.App. 639 (1996); 9-0.

***State v. Robertson***, 88 Wn.App. 836, 847-9 (1997)

Malicious harassment, RCW 9A.36.080(1), and assault based upon same act is not a "single act" for purposes of the 150% rule, RCW 13.40.180(1), due to antimerger provision of malicious harassment, *State v. Lessley*, 118 Wn.2d 773, 781 (1992), *see: State v. Williams*, 176 Wn.App. 138 (2013), 181 Wn.2d 795 (2014); I.

***State v. Hartke***, 89 Wn.App. 143 (1997)

Juvenile court's extending jurisdiction over juvenile sentenced in 1988 to collect **restitution** pursuant to RCW 13.40.190 which, as of 1994, allowed extension of jurisdiction over juveniles for restitution to age 28 did not violate *ex post facto* clause, as restitution is not punishment, RCW 13.40.010, *State v. Rice*, 98 Wn.2d 384, 391-4 (1982), even though punishment may be imposed later for failure to pay, *see: In re Marriage of Haugh*, 58 Wn.App. 1, 5-6 (1990), accord: *State v. Bennett*, 92 Wn.App. 637 (1998); III.

***State v. M.L.***, 134 Wn.2d 657 (1997)

Ten-year-old pleads guilty to rape 1° and attempted rape 1°, prosecutor, defense and probation counselor recommend exceptional sentences, court sentences to ten times the longest recommended sentence, ordering confinement to age 21; held: sentence ten times as long as the longest sentence recommended is excessive when imposed upon a ten-year old boy, *cf.: State v. Minor*, 133 Wn.App. 636, 645-47 (2006), *rev'd, on other grounds*, 162 Wn.2d 796 (2008), remanded for resentencing before a different judge; *per curiam.*

***State v. Duncan***, 90 Wn.App. 809 (1998)

Juvenile court judge states that he cannot consider good time in disposition, then imposes manifest injustice sentence to include sufficient time beyond respondent's 21st birthday to keep him in custody until 21 years of age, adopting juvenile rehabilitation board's recommendation which expressly considered good time; held: length of sentence did consider good time, which is an improper factor, *State v. Sledge*, 133 Wn.2d 828 (1997), *State v. Roberson*, 118 Wn.App. 151, 164-65 (2003), absent specific need for specific treatment program; III.

***State v. Clark***, 91 Wn.App. 581 (1998), *aff'd, on other grounds*, 139 Wn.2d 152 (1999)

Juvenile court judge may not suspend detention time absent express statutory authority, RCW 13.40.160; juvenile court may not delegate to a probation officer the authority to find a

probation violation and place respondent in custody, *see:* *State v. Richard*, 58 Wn.App. 357 (1990); II.

***State v. Edgley***, 92 Wn.App. 478 (1998), *overruled, on other grounds, State v. Nolan*, 141 Wn.2d 620 (2000)

Court may impose consecutive 30-day sentences for each violation of separate community supervision orders, *State v. Veazie*, 123 a92 (2004), irrespective of whether underlying dispositions ran concurrently, *see:* *State v. Taplin*, 55 Wn.App. 668, 670 (1989), *State v. Barker*, 114 Wn.App. 504 (2002); II.

***State v. Martin***, 137 Wn.2d 149 (1999)

Failure to hold disposition hearing within 14 or 21 days of adjudication, RCW 13.40.130(8), JuCR 7.12(a), is error, but is not grounds for dismissal absent proof of prejudice, *State v. Eugene W.*, 41 Wn.App. 758 (1985), *State v. Carlson*, 65 Wn.App. 153, 164-65 (1992), *see also:* *State v. Johnson*, 100 Wn.2d 607, 629-30 (1983), *overruled on other grounds, State v. Bergeron*, 105 Wn.2d 1 (1985); party may seek writ of mandamus to compel disposition, *State ex rel. Burgunder v. Superior Court*, 180 Wash. 311 (1935); 7-2.

***State v. Tejada***, 93 Wn.App. 907 (1999)

Juvenile court has jurisdiction to collect **restitution** until the offender is 28 years old, RCW 13.40.190(1); III.

***State v. Mora***, 138 Wn.2d 43 (1999)

Seventeen-year-old is charged in adult court with assault 2° pursuant to automatic decline statute, RCW 13.04.030(1)(e)(v), after which, pursuant to a plea agreement, court allows amendment to assault 3° and possession of firearm, which are not automatic decline offenses, defense motion to transfer to juvenile court is denied; held: nature of the charge dictates jurisdiction and, where the charge no longer comes within automatic decline statute, case must be remanded to juvenile court, *Pers. Restraint of Dalluge*, 152 Wn.2d 772 (2004), *State v. Posey*, 161 Wn.2d 638, 643-47 (2007), *State v. Posey*, 174 Wn.2d 131 (2012), distinguishing *State v. Sharon*, 100 Wn.2d 230 (1983), *see also:* *State v. Carpenter*, 117 Wn.App. 673 (2003), *but see:* *State v. Manro*, 125 Wn.App. 165 (2005);9-0.

***State v. Evans***, 97 Wn.App. 273 (1999)

Where legislature sets standard range for a crime regardless of offender's criminal history, former RCW 13.40.0357, then lack of history is not a valid basis for manifest injustice disposition, *cf.:* *State v. Lewis*, 114 Wn.App. 205 (2002); juvenile court may find a manifest injustice and impose a downward exceptional sentence where it finds that standard range is not needed to rehabilitate the offender or protect the public, *see:* *State v. M.L.*, 114 Wn.App. 358 (2002), and may consider a lack of criminal history; voluntary use of alcohol and drugs is not a mitigating factor; I.

***State v. W.CF.***, 97 Wn.App. 401 (1999)

Upon finding violation of disposition, juvenile court may extend period of community supervision at a modification hearing beyond maximum statutory period without finding a manifest injustice, *In re Welfare of Hoffer*, 34 Wn.App. 82, 86-87 (1983), *State v. Martin*, 102 Wn.2d 300, 303 (1984); I.

***State v. J.A.B.***, 98 Wn.App. 662 (2000)

Probation counselor's statement of criminal history in predisposition report is sufficient evidence of history absent objection at disposition, *State v. Descoteaux*, 94 Wn.2d 31, 35-37 (1980), *State v. Thiefault*, 160 Wn.2d 409, 417 n.4 (2007), *cf.: State v. Mendoza*, 165 Wn.2d 913 (2009), *Pers. Restraint of Adolph*, 170 Wn.2d 556, 565-71 (2010), distinguishing *State v. Ford*, 137 Wn.2d 472 (1999), *see: State v. Rivers*, 130 Wn.App. 689 (2005) , *but see: State v. Hunley*, 175 Wn.2d 901 (2012), *State v. Cate*, 194 Wn.2d 909 (2019); I.

***State v. Ford***, 99 Wn.App. 682 (2000)

Compromise of misdemeanor statute, RCW 10.22.010, is inapplicable in juvenile court, RCW 13.04.450, *see: State v. Norton*, 25 Wn.App. 377 (1980), *State v. Johnson*, 39 Wn.App. 295 (1984), *State v. Barry*, 184 Wn.App. 790 (2014); I.

***State v. T.C.***, 99 Wn.App. 701 (2000)

In imposing a manifest injustice disposition, juvenile court may consider uncharged but admitted criminal conduct in support of a **high risk to reoffend** aggravating factor, *State v. J.N.*, 64 Wn.App. 112 (1992); I.

***State v. L.W.***, 101 Wn.App. 595 (2000)

Time spent pretrial in a group home pursuant to court order does not count as credit for time served even if restrictions are functionally equivalent to detention-type confinement; I.

***State v. H.E.J.***, 102 Wn.2d 84 (2000)

Respondent, convicted of a nonsex offense felony (indecent liberties), may be ordered to have a sexual deviancy evaluation and may be ordered to have no unsupervised contact with minors younger than himself; I.

***State v. D.H.***, 102 Wn.App. 620, 628-29 (2000)

Respondent is convicted of one count of sexual exploitation of a minor, acquitted of another, court orders respondent to have no contact with complainant of acquitted count; held: juvenile court could reasonably find that prohibiting contact with complainant of acquitted count would facilitate respondent's rehabilitation, thus no abuse of discretion; I.

***State v. Lopez***, 105 Wn.App. 688 (2001)

Trial court may not defer disposition, RCW 13.40.127, after trial, nor may a deferred disposition be granted pursuant to manifest injustice, *State v. Mohamoud*, 159 Wn.App. 753 (2011); III.

***State v. J.A.***, 105 Wn.App. 879 (2001)

During period of deferred disposition, RCW 13.40.127, respondent commits a new crime, juvenile court dismisses absent "full compliance," RCW 13.40.127(9), state appeals; held: juvenile court has discretion to determine what constitutes lack of compliance and, upon finding no lack of compliance, then court may find full compliance and dismiss; I.

***State v. A.K.B.***, 107 Wn.App. 209 (2001)

Where juvenile court defers disposition, RCW 13.40.127, and orders that it will set restitution during the deferral period but fails to do so, it may not set a restitution amount after the deferral period and, if other conditions are met, must dismiss; II.

***State v. A.M.***, 109 Wn.App. 325 (2001)

Juvenile court must impose a victim penalty assessment "for each case or cause of action," RCW 7.68.035 (1)(b), *see: State v. Q.D.*, 102 Wn.2d. 19, 29 (1984); here, trial court "consolidated" three unrelated charges, brought under separate cause numbers, for disposition, but is still obliged to impose VPA for each; I.

***State v. H.J.***, 111 Wn.App. 298 (2002)

Court sentences respondent to what it believes is a standard range sentence, state later moves to modify sentence on grounds that court erred as to length of community supervision, court imposes manifest injustice disposition over defense double jeopardy objection; held: except where a sentencing is more like a trial, as in death penalty, *Bullington v. Missouri*, 68 L.Ed.2d 270 (1981), or habitual criminal proceedings, *State v. Hennings*, 100 Wn.2d 379 (1983), double jeopardy clause does not bar the court from resentencing and finding manifest injustice, *State v. Strauss*, 119 Wn.2d 401, 410-12 (1992), at least where court rejects state's initial request for manifest injustice; I.

***State v. Watson***, 146 Wn.2d 947 (2002)

Juvenile court may not impose two deferred dispositions, RCW 13.40.127, for separate offenses, as once the first order is signed, respondent has a prior deferred disposition; affirms *State v. Watson*, 107 Wn.App. 540 (2001); 5-4.

***State v. A.M.R.***, 147 Wn.2d 91 (2002)

Juvenile court must order restitution, including that owed insurers; affirms *State v. A.M.R.*, 108 Wn.App. 9 (2001); 9-0.

***State v. Beaver***, 148 Wn.2d 338 (2002)

Trial court finds manifest injustice, commits respondent to confinement until age 21 without possibility of early release; held: while only DSHS is authorized to set a release date, former RCW 13.40.210 (1994), *State v. Sledge*, 133 Wn.2d 828 (1997), *State v. S.H.*, 75 Wn.App. 1 (1994), *State v. Bourgeois*, 72 Wn.App. 650 (1994), it is the function of the juvenile court to set a minimum term, RCW 13.40.030, which may equal the maximum term; reverses *State v. Beaver*, 110 Wn.App. 519 (2002); 9-0.

***State v. Lewis***, 114 Wn.App. 205 (2002)

Escape 2° is amenable to manifest injustice disposition, *cf.: State v. K.E. [Evans],* 97 Wn.App. 273 (1999); III.

***State v. M.L.***, 114 Wn.App. 358 (2002)

Juvenile court is not required to impose manifest injustice disposition downward when it finds that less time would adequately rehabilitate the offender, *cf.: State v. K.E. [Evans],* 97 Wn.App. 273 (1999); while court must consider on the record aggravating or mitigating circumstances, it need not impose a lesser disposition based upon them, RCW 13.40.150, *State v. Malychewski,* 41 Wn.App. 488, 489 (1985), *State v. N.E.*, 70 Wn.App. 602, 607 (1993); respondent may appeal a standard range disposition on grounds that juvenile court failed to apply correct legal standard and procedure, *State v. Mail,* 121 Wn.2d 707, 712 (1993); I.

***State v. Barker***, 114 Wn.App. 504 (2002)

Juvenile court may not impose more than 30 days for multiple probation violations of a single disposition order, RCW 13.40.200(3), distinguishing *State v. Edgley,* 92 Wn.App. 478 (1998), *overruled, on other grounds, State v. Nolan,* 141 Wn.2d 620 (2000); II.

***State v. O'Brien***, 115 Wn.App. 599 (2003)

Juvenile court has authority to issue no-contact order as part of disposition order; III.

***State v. J.P.***, 149 Wn.2d 444 (2003)

Restitution for counseling may only be ordered for sex offenses in juvenile court, RCW 13.40.020(22), *see: State v. Landrum,* 66 Wn.App. 791 (1992), reversing *State v. J.P.*, 149 Wn.2d 444 (2003); 9-0.

***State v. A.S.***, 116 Wn.App. 309 (2003)

Special Sex Offense Disposition Alternative, RCW 13.40.160(3), in not available for assault 4°, juvenile court may not suspend sentence, RCW 13.40.160(6), *State v. Bacon,* 190 Wn.2d 458 (2018); I.

***State v. Lown***, 116 Wn.App. 402, 408-11 (2003)

Respondent, on deferred disposition, RCW 13.40.127, is found to have used drugs, juvenile court reinstates deferred disposition; held: court is not obliged to revoke deferred disposition even if new crime is found, RCW 13.40.020(4); III.

***State v. Crabtree***, 116 Wn.App. 536 (2003), *disapproved, on other grounds, State v. Bacon,* 190 Wn.2d 458 (2018)

**Extreme youth**, **absence of effective treatment in institutions**, **good progress in community, underlying purposes of juvenile justice act, negative effect on community of institutionalizing 12 year old** are all tenable grounds for manifest injustice downward;

suspended sentence under Chemical Dependency Disposition Alternative, RCW 13.40.165, is proper where court enters disposition outside standard range; rehabilitation is a proper factor, distinguishing *State v. Bridges*, 104 Wn.App. 98 (2001); III.

***State v. E.A.J.***, 116 Wn.App. 777, 789-94 (2003)

**Heinous, cruel or depraved** aggravating factor, RCW 13.40.150(3)(h)(i)(ii), is not void for vagueness, *Walton v. Arizona*, 111 L.Ed.2d 511 (1990), *overruled, on other grounds*, *Ring v. Arizona*, 153 L.Ed.2d 556 (2002), *distinguishing* *Maynard v. Cartwright*, 100 L.Ed.2d 372 (1988) and *Godfrey v. Georgia*, 64 L.Ed.2d 398 (1980), *see:* *State v. Baldwin*, 150 Wn.2d 448, 457-61 (2003); I.

***State v. Moro***, 117 Wn.App. 913 (2003)

**Escalating pattern of criminal behavior** justifies manifest injustice; as long as respondent is told at plea hearing that the court need not follow anyone's recommendation, then a *sua sponte* manifest injustice finding does not violate due process notice requirement, *but see:* *State v. Gutierrez*, 37 Wn.App. 910, 916 (1984), *State v. Falling*, 50 Wn.App. 47, 51-52 (1987); III.

***State v. Haws***, 118 Wn.App. 36 (2003)

Court may consider the facts of an offense in deciding to deny a **deferred disposition**, RCW 13.40.127; II.

***State v. T.E.C.***, 122 Wn.App. 9 (2004)

Court imposes manifest injustice sentence upward, suspends it on condition of SSODA, RCW 13.40.160, directing that respondent be placed within secure treatment facility, five months later when no placement was obtained, revokes; held: following an evaluation, a "**moderate to high risk of reoffense**" is a proper aggravating factor, *see:* *State v. T.E.H.*, 91 Wn.App. 908, 917-18 (1998), *State v. T.C.*, 99 Wn.App. 701, 707 (2000), *State v. S.H.*, 75 Wn.App. 1, 7-8 (1994), *State v. Halstien*, 65 Wn.App. 845, 853 (1992), *aff'd*, 122 Wn.2d 109 (1993); **need for treatment** is a valid aggravating factor, *State v. S.H.*, *supra.*, at 12, *State v. J.V.*, 132 Wn.App. 533, 541-42 (2006); court may impose a conditional SSODA subject to placement being available within a reasonable time, at 27, which may be revoked if placement is not found, distinguishing RCW 13.40.150(5); I.

***State v. T.A.D.***, 122 Wn.App. 290 (2004)

Juvenile convicted of shoplifting can be ordered to reimburse his father for paying the store a civil penalty, RCW 4.24.230(2); father's unsworn statement is admissible at a juvenile disposition hearing, *State v. Fambrough*, 66 Wn.App. 22, 227 (1992), ER 1101(c)(3); II.

***State v. S.S.***, 122 Wn.App. 725 (2004)

Statute requiring provision of DNA sample following conviction of a felony, RCW 43.43.754, does not constitute a search requiring a warrant, *State v. Olivas*, 122 Wn.2d 73

(1993), *State v. Surge*, 160 Wn.2d 65 (2007); WAC 446.75-060 authorizing cheek swab as opposed to blood draw is valid; I.

***State v. Diaz-Cardona***, 123 Wn.App. 477 (2004)

Juvenile court may not require a juvenile who has pled guilty to participate in a sexual deviency evaluation, even with a protective order, where the juvenile objects, *see: State v. Decker*, 68 Wn.App. 246 (1992), *State v. Jacobsen*, 95 Wn.App. 967 (1999), *State v. Escoto*, 108 Wn.2d 1, 6 (1987), *see: State v. N.B.*, 127 Wn.App. 776, 780-82 (2005), as it would violate respondent's privilege against self incrimination, RCW 13.40.180(8); I.

***Redmond v. Bagby***, 155 Wn.2d 59 (2005)

Statutes which mandate suspension of drivers' licenses following convictions for reckless driving, RCW 46.61.500, driving while license invalidated, RCW 46.20.342, vehicular homicide, RCW 46.61.520 and minor in possession of alcohol, RCW 66.44.270(2), do not violate due process, distinguishing *Redmond v. Moore*, 151 Wn.2d 664 (2004), due to a heightened government interest in highway safety and a decreased likelihood of erroneous deprivation; 7-2.

***State v. Tai N.***, 127 Wn.App. 733 (2005)

Respondent is convicted of possession with intent to deliver 108 pounds of marijuana, receives manifest injustice sentence; held: quantity alone is not a basis to impose an exceptional sentence on a juvenile, distinguishing *State v. Hrycenko*, 85 Wn.App. 543, 548 (1997), since a juvenile court must find, beyond a reasonable doubt (clear and convincing equals beyond a reasonable doubt in this context), *State v. N.B.*, 127 Wn.App. 776 (2005), *but see: State v. T.J.S.-M.*, 193 Wn.2d 450 (2019), that the standard range for this offense and this respondent presents a danger to society, *State v. Rhodes*, 92 Wn.2d 755, 760 (1979), *overruled, on other grounds, State v. Baldwin*, 150 Wn.2d 448 (2003); juvenile court's imposition of manifest injustice to "send a message" is not a valid basis; I.

***State v. N.B.***, 127 Wn.App. 776 (2005)

Following guilty plea, respondent submits to deviancy evaluation and admits to other sex offenses, court imposes manifest injustice; held: respondent's failure to invoke his Fifth Amendment privilege is a waiver, *State v. Jacobsen*, 95 Wn.App. 967, 973-75 (1999), *see: State v. Diaz-Cardona*, 123 Wn.App. 477 (2004); I.

***State v. Meade***, 129 Wn.App. 918 (2005)

Juvenile court must focus on offender's circumstances and consider numerous factors not relevant to adult sentencing, *State v. Tai N.*, 127 Wn.App. 733, 744 (2005); recent criminal history, failure to follow treatment programs, failure to comply with conditions of recent disposition or diversion order, offending while release pending, failure to follow probation, risk to reoffend are all aggravating factors justifying manifest injustice; respondent is not entitled to a jury trial on aggravating factors in juvenile court, *State v. Minor*, 133 Wn.App. 636, 647-48 (2006), *rev'd, on other grounds*, 162 Wn.2d 796 (2008), distinguishing *Blakely v. Washington*, 159 L.Ed.2d 403 (2004); proof of aggravating factors by clear and convincing evidence, RCW

13.40.160(2), is the equivalent of beyond a reasonable doubt, *State v. Rhodes*, 92 Wn.2d 755, 760 (1979), *overruled, on other grounds, State v. Baldwin*, 150 Wn.2d 448, 461 (2003), *but see: State v. T.J.S.-M.*, 193 Wn.2d 450 (2019); II.

***State v. Zimmerman***, 130 Wn.App. 122 (2005)

State files modification petition alleging new theft, withdraws it over objection and files new charge, defense motion to dismiss is denied; held: while state must elect between a modification based upon a new crime and a new charge, RCW 13.40.070(3), *State v. Tinh Quoc Tran*, 117 Wn.App. 126 (2003), *State v. Murrin*, 85 Wn.App. 754 (1997), respondent has no right to plead to a modification petition, state's initial decision to file a motion for a violation hearing does not bar it from withdrawing the allegation and separately prosecuting; III.

***State v. Linssen***, 131 Wn.App. 292 (2006)

When imposing a special sex offender disposition alternative (SSODA), RCW 13.40.160, trial court must impose a determinate sentence within the standard range and suspend it; III.

***State v. J.V.***, 132 Wn.App. 533 (2006)

Respondent signs contract with state to enter treatment court, setting forth treatment conditions and agreement that court may impose sanctions including termination and sentence, upon revocation juvenile court imposes manifest injustice disposition; held: treatment court contract need not expressly advise respondent that minifest injustice disposition was a possibility as statutes provide notice that satisfies due process; need for treatment is a proper aggravating factor, *State v. S.H.*, 75 Wn.App. 1, 12 (1994); poor performance in treatment prior to revocation is a basis for manifest injustice disposition; where contract provides that what respondent says in treatment about drug and alcohol use cannot be used in court, it is error to use it for manifest injustice; failing to meet statutory mitigating factor of more than one year between current offense and a prior offense, RCW 13.40.150(3)(h)(v), cannot be considered an aggravating factor; I.

***State v. R.L.D.***, 132 Wn.App. 699, 707-08 (2006)

Following filing of charge, juvenile probation counselor files notice of intent to seek manifest injustice, respondent pleads guilty to standard range recommendation by prosecutor, court imposes manifest injustice disposition; held: notice was sufficient, probation counselor was not obliged to include basis of manifest injustice in notice in juvenile court; II.

***State v. G.A.H.***, 133 Wn.App. 567 (2006)

In a juvenile offender proceeding, court may not order DSHS to place respondent in foster care, as DSHS is not a party; I.

***State v. C.D.C.,*** 145 Wn.App. 621 (2008)

Maximum community supervision for assault 4º with sexual motivation is 12 months, as it is not a felony sex offense, RCW 9.94A.030; II.

***State v. M.C.***, 148 Wn.App. 968 (2009)

Trial court may not impose victim penalty assessment, RCW 7.68.035(1)(b), as a condition of a deferred disposition, RCW 13.40.127, *see: State v. C.R.H.*, 107 Wn.App. 591 (2001); I.

***State v. S.S.Y.***, 150 Wn.App. 325, 329-32 (2009), 170 Wn.2d 322 (2010)

Juvenile offenses of robbery and assault do not merge as legislature expressed its intent to punish the offenses separately, RCW 13.40.180, distinguishing *State v. Freeman*, 153 Wn.2d 765 (2005); to apply 150% rule, disposition court must determine if offenses constitute same criminal conduct, *State v. Contreras*, 124 Wn.2d 741 (1994), and if one offense is an element of the other; II.

***Graham v. Florida,*** 560 U.S.48, 176 L.Ed.2d 825 (2010)

Eighth Amendment precludes sentence of life without parole of a juvenile tried in adult court for a non-homicide offense, *Miller v. Alabama*, 567 U.S. 460, 183 L.Ed.2d 407 (2012), *Montgomery v. Louisiana*, 577 U.S. 190, 136 S.Ct. 718, 193 L.Ed.2d 599 (2016), *see: State v. Ramos*, 189 Wn.App. 431 (2015), 187 Wn.2d 420 (2017), *State v. Houston-Sconiers*, 188 Wn.2d 1 (2017), *Virginia v. LeBlanc*, 137 S. Ct. 1726, 198 L. Ed. 2d 186 (2017), *State v. Scott*, 190 Wn.2d 586 (2018), *State v. Monschke*, 197 Wn.2d 305 (2021); 6-3.

***Pers. Restraint of Brady***, 154 Wn.App. 189 (2010)

In 1996 Juvenile Court enters restitution order, in 2007 court, by *ex parte* order, *State v. Hotrum*, 120 Wn.App. 681 (2004), extends jurisdiction for an additional ten years and imposes a $200 "extension fee;" held: because state waited more than ten years to apply for extension, judgments were unenforceable even though respondent had not turned 28 years old, RCW 13.40.190(1), -192, 6.17.020; extension of judgment fee, RCW 36.18.016(15), does not apply to juvenile court; generally, no right to counsel for post-conviction proceedings, *State v. Winston*, 105 Wn.App. 318, 321 (2001); III.

***State v. Tucker***, 171 Wn.2d 50 (2011)

Before end of deferred disposition, probation officer files a report which recommends that revocation hearing be set if defendant doesn't prove payment of LFOs, after end of deferred disposition period prosecutor notes revocation hearing and court revokes; held: while a juvenile court maintains jurisdiction to enforce conditions if a violation proceeding is instituted before termination of the period of community custody, *State v. Todd*, 103 Wn.App. 783, 789-90 (2000), *see also: State v. J.O.*, 165 Wn.App. 570 (2011), report by probation officer did not seek current relief and state the basis for relief, CR 7(b), thus there was no timely written motion and court therefore lost jurisdiction when period of supervision expired; reverses, in part, *State v. N.S.T.*, 156 Wn.App. 444 (2010); 9-0.

***State v. Mohamoud***, 159 Wn.App. 753 (2011)

Parties negotiate reduction of charge on condition defendant does not seek a deferred disposition, RCW 13.40.127, trial court *sua sponte* defers disposition, state appeals; held: statute

which requires a motion for deferred disposition be made at least fourteen days before commencement of trial precludes a deferred disposition after a plea or trial where no timely motion was made, *State v. Lopez,* 105 Wn.App. 688 (2001); because statute requires parental consultation, consideration of benefit to community and respondent, absence of these findings precludes deferred disposition; juvenile court judge lacks authority to order deferred disposition on its own initiative; I.

***State v. I.K.C.***, 160 Wn.App. 660 (2011)

Juvenile court may not impose detention as a condition of a deferred disposition, RCW 13.40.127; II.

***State v. J.O.***, 165 Wn.App. 570 (2011)

Respondent receives deferred disposition on condition of pay restitution and provide DNA sample, RCW 43.43.754, before end of deferral period state files motion to revoke for failure to pay, court continues hearing beyond deferral period, at the hearing state withdraws motion to revoke as respondent would pay restitution that day, defense asks to strike DNA sample requirement, court later denies and orders respondent to supply DNA sample; held: court loses authority to enforce a condition of community supervision when a violation of the condition is not alleged by written motion prior to the end of the deferral period, *State v. Tucker,* 171 Wn.2d 50, 53 (2011), *State v. Y.I.,* 94 Wn.App. 919, 923-24 (1999), *State v. May,* 80 Wn.App. 711 (1996), even if condition is mandatory; here, state's motion to revoke filed within the deferral period did not allege failure to provide DNA sample, thus court lacked authority to order it after the deferral period; I.

***Miller v. Alabama***, 567 U.S. 460, 183 L.Ed.2d 407 (2012)

Mandatory life without parole for defendants under 18 at the time of the offense violates Eighth Amendment, *Graham v. Florida,* 560 U.S.48, 176 L.Ed.2d 825 (2010), *Montgomery v. Louisiana,* 577 U.S. 190, 136 S.Ct. 718, 193 L.Ed.2d 599 (2016), *see: State v. Ramos,* 189 Wn.App. 431 (2015), 187 Wn.2d 420 (2017), *State v. Ronquillo,* 190 Wn.App. 765 (2015), *State v. Houston-Sconiers,* 188 Wn.2d 1 (2017), *State v. Scott,* 190 Wn.2d 586 (2018), *State v. Bassett,* 192 Wn.2d 67 (2018), *State v. Monschke,* 197 Wn.2d 305 (2021); 5-4.

***State v. Villano***, 166 Wn.App. 142 (2012)

Order that a juvenile not possess "gang paraphernalia" is vague, *State v. Weatherwax,* 193 Wn.App. 667, 676-81 (2016), *reversed, on other grounds*, 188 Wn.2d 139 (2017); III.

***State v. D.P.G.***, 169 Wn.App. 396 (2012)

Following imposition of **deferred disposition**, court shall not dismiss unless restitution is paid in full, RCW 13.40.127(9) (2009) [2012 amendment allows dismissal following good faith effort to pay restitution in full]; II.

***State v. Sanchez***, 177 Wn.2d 835 (2013)

Following granting of special sex offender disposition alternative (SSODA), RCW 13.40.160, -.162 (2007), juvenile court must send evaluation to sheriff to establish risk assessment, RCW 4.24.550(6) (2008); affirms *State v. Sanchez*, 169 Wn.App. 405 (2012); 9-0.

***State v. R.G.P.***, 175 Wn.App. 131 (2013)

Juvenile court must order full restitution and may not consider respondent's ability to pay, *State v. A.M.R.*, 147 Wn.2d 91, 96 (2002), including a restitution order following a deferred disposition; II.

***State v. W.S.***, 176 Wn.App. 231 (2013)

Following adjudication, juvenile court may issue a domestic violence no contact order for the maximum period of the offense which may extend beyond respondent's 18th or 21st birthday; I.

***State v. Hamedian***, 188 Wn.App. 560 (2015)

Court may not seal a juvenile court record unless restitution has been paid in full regardless of whether or not the restitution order is enforceable as a money judgment, RCW 13.50.050(12) (2012); I.

***State v. K.H.-H.***, 185 Wn.2d 745 (2016)

Requiring a respondent to write a letter of apology following adjudication of assault with sexual motivation doesn't violate the First Amendment or CONST. Art I, § 5; affirms *State v. K.H.-H.*, 188 Wn.App. 413 (2015); 5-4.

***State v. Flores***, 194 Wn.App. 29 (2016)

Disrupting school activities, RCW 28A.635.030 (1984), which states that the charge is "a misdemeanor, the penalty for which shall be a fine…not more than fifty dollars" authorizes only a fine and cannot be construed to authorize general misdemeanor penalties such as detention or community supervision; III.

***State v. D.D.-H.***, 196 Wn.App. 948 (2016)

Authority of court to enforce a disposition order is tolled when a warrant is outstanding, *State v. V.J.*, 132 Wn.App. 380 (2006), *Spokane v. Marquette*, 146 Wn.2d 124 (2002), *State v. D.D.-H.*, 196 Wn.App. 948 (2016); I.

***State v. Ramos***, 187 Wn.2d 420 (2017)

Auto-declined homicide defendant who was sentenced to a *de facto* life without parole term is entitled to an individualized hearing and for the court to "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison," *Miller v. Alabama*, 567 U.S. 460, 183 L.Ed.2d 407 (2012), *State v. Monschke*, 197 Wn.2d 305 (2021); the record here establishes that resentencing court adequately applied *Miller, supra.*, in affirming 85-year sentence, *see: State v. Scott*, 190 Wn.2d 586 (2018), *Pers. Restraint of Light-Roth*, 191 Wn.2d 328 (2018), *Matter of Meippen*, 193 Wn.2d 310 (2019), *State v. Gregg*, 196 Wn.2d 473 (2020), *Jones v. Mississippi*, ___ U.S. ___, 141 S.Ct. 1307, 209 L.Ed.2d

390 (2021), *cf.: State v. Delbosque,* 195 Wn.2d 106 (2020), *but see: State v. Bassett,* 192 Wn.2d 67 (2018); court declines to apply state constitutional analysis; 9-0.

***State v. Houston-Sconiers***, 188 Wn.2d 1 (2017)

Because "children are different" under the Eighth Amendment and hence "criminal procedure laws" must take the defendants' youthfulness into account, sentencing courts must have absolute discretion to depart as far as they want below otherwise applicable SRA ranges and/or sentencing enhancements when sentencing juveniles in adult court, regardless of how the juvenile got there," *State v. Bassett,* 192 Wn.2d 67 (2018), *cf.: Virginia v. LeBlanc,* 137 S. Ct. 1726, 198 L. Ed. 2d 186 (2017), *State v. Brown,* 13 Wn.App.2d 288 (2020), *see: Pers. Restraint of Light-Roth,* 191 Wn.2d 328 (2018), *Matter of Meippen,* 193 Wn.2d 310 (2019), *Matter of Williams,* ___ Wn.2d ___, 520 P.3d 533 (2022), *State v. Gregg,* 196 Wn.2d 473 (2020), *Jones v. Mississippi,* ___ U.S. ___, 141 S.Ct. 1307, 209 L.Ed.2d 390 (2021); reverses *State v. Houston-Sconiers,* 191 Wn.App. 436 (2015); 8-0.

***State v. Cofield***, 1 Wn.App.2d 49 (2017)

Where there is an objection to an administrative record sealing hearing the court is obliged to set a contested record sealing hearing, RCW 13.50.260(1) (2015); II.

***State v. H.Z.-B.***, 1 Wn.App.2d 364 (2017)

Juvenile court must seal the file following full completion and dismissal of a deferred disposition, RCW 13.40.127; I.

***State v. Brestoff***, 1 Wn.App.2d 923 (2018)

Respondent on probation commits a new offense, state files modification petition, respondent is sanctioned, state then files new information based upon same conduct; held: because the state had already modified the community supervision based on certain conduct, it could not also charge respondent for the same conduct, RCW 13.40.070(3) (2017), *State v. Murrin*, 85 Wn.App. 754, 758-59 (1997), *State v. Tran*, 117 Wn.App. 126, 132 (2003); II.

***State v. Scott***, 190 Wn.2d 586 (2018)

While a *de facto* life without parole disposition for a crime committed while defendant is a juvenile is unconstitutional absent consideration of defendant's youth, *Miller v. Alabama,* 567 U.S. 460, 183 L.Ed.2d 407 (2012), RCW 9.94A.730 (2015) providing for review of sentence by Indeterminate Sentence Review Board after 20 years cures the error, *but see: State v. Bassett,* 192 Wn.2d 67 (2018), *Montgomery v. Louisiana,* 577 U.S. 190, 136 S.Ct. 718, 736, 193 L.Ed.2d 599 (2016), *Virginia v. LeBlanc,* 137 S. Ct. 1726, 198 L. Ed. 2d 186 (2017), *State v. Delbosque,* 195 Wn.2d 106 (2020), and thus defendant is not entitled to a new sentencing hearing before a judge, *see: State v. Ramos,* 187 Wn.2d 420, 435-36 (2016), *see also* 2021 WL 923319 (2021); affirms *State v. Scott,* 196 Wn.App. 961 (2016); 9-0.

***State v. Bacon***, 190 Wn.2d 778 (2018)

Court imposes manifest injustice upward and suspends sentence on conditions; held: absent specific statutory authority juvenile court cannot suspend a sentence even with manifest

injustice finding, *State v. A.S.*, 116 Wn.App. 309 (2003), *affirming State v. Bacon*, 197 Wn.App. 772 (1997); 9-0.

***Pers. Restraint of Light-Roth***, 191 Wn.2d 328 (2018)

While youth is a mitigating factor, *State v. O'Dell*, 183 Wn.2d 680 (2015), it is not a new mitigating factor, RCW 9.94A.535(1)(e) (2016), and thus an untimely PRP is time-barred, *Matter of Meippen*, 193 Wn.2d 310 (2019), *State v. Marshall*, 10 Wn.App.2d 626 (2019), *see: Pers. Restraint of. Young*, ___ Wn.App.2d ___, 51385-4-II; reverses *Pers. Restraint of Light-Roth*, 200 Wn.App. 149 (2017); 9-0.

***State v. Bassett***, 192 Wn.2d 67 (2018)

Sentencing a juvenile to life without parole is cruel punishment *per se* under the state constitution, *see: State v. Gregg,* 9 Wn.App.2d 569 (2019), *affirmed on different grounds,* 196 Wn.2d 473 (2020); affirms *State v. Bassett*, 198 Wn.App. 714, 744 (2017); 5-4.

***State v. F.T.***, 5 Wn.App,.2d 448 (2018)

While the fact that respondent is in a dependency is not a proper aggravating factor, RCW 13.40.150(4)(e) (1998), court may consider the child's behavior during the dependency; here use of drugs and alcohol, presence at serious crime scenes, drug overdoses, refusal to enter treatment, persistent running from placements is behavior justifying a commitment to JRA for this first offense misdemeanor theft, *State v. E.J.H.*, 65 Wn.App. 771 (1992), *State v. N.E.*, 70 Wn.App. 602 (1993); III.

***State v. Gilbert***, 193 Wn.2d 169 (2019)

In 1992 defendant is sentenced to life without parole for aggravated murder and consecutive sentences for other offenses, at resentencing pursuant to RCW 10.95.035 (2015) court imposes lesser sentence for aggravated murder but concludes it lacks discretion to mitigate other offenses; held: mitigating factors related to youth are applicable to all offenses, *State v. Houston-Sconiers*, 188 Wn.2d 1 (2017), thus remanded for trial court to exercise discretion; 9-0.

***State v. T.J.S.-M.***, 193 Wn.2d 450 (2019)

Respondent has the right to appeal a manifest injustice SSODA suspended sentence, RCW 13.40.162 (2011), need not wait until it is revoked, disapproving *State v. J.B.*, 102 Wn.App. 583 (2000), *cf.: State v. Langland*, 42 Wn.App. 287 (1985); manifest injustice disposition must be supported by clear and convincing evidence which is not the equivalent of beyond a reasonable doubt, *disapproving, in part*, *In re Levias*, 83 Wn.2d 253 (1973), *State v. Tai N.*, 127 Wn.App. 733 (2005), *State v. Meade*, 129 Wn.App. 918 (2005); 9-0.

***State v. B.O.J.***, 194 Wn.2d 314 (2019)

Respondent pleads guilty to two counts of theft 3°, juvenile court decides that standard range of local sanctions would not allow sufficient time to complete treatment services and that range is too lenient in light of dismissed and uncharged cases, imposes manifest injustice of 42-

52 weeks; held: need for treatment is not a proper basis for a manifest injustice disposition; while "overleniency" can support a manifest injustice disposition, RCW 13.40.150(i)(vii), (viii) (1998), trial court's findings relied upon need for treatment, if case was not moot Supreme Court would remand for a new disposition hearing; 7-2.

***State v. P.M.P.,*** 7 Wn.App.2d 633 (2019)

Juvenile court must seal a file if statutory conditions are met, RCW 13.50.260 (2015), *State v. Garza,* ___ Wn.2d ___, 518 P.3d 1029 (2022); II.

***State v. S.M.G., Jr.***, 9 Wn.App.2d 340 (2019)

A pending deferred disposition, RCW 13.40.020(8)(b) (2018), is excluded from a juvenile criminal history; I.

***State v. Gregg,*** 9 Wn.App.2d 569 (2019)

Burden of proving youth as a mitigating factor is on the defense; I.

***State v. I.N.A.***, 9 Wn.App.2d 422 (2019)

Following manifest injustice disposition, Court of Appeals grants expedited review, prosecutor neglects to submit findings and conclusions in support of manifest injustice, court orders prosecutor to do so, prosecutor submits findings to trial court *ex parte,* respondent objects; held: the state should not be allowed to deprive an incarcerated juvenile offender of the benefit of expedited review simply by violating applicable rules of procedure, thus remanded for standard range disposition; I.

***State v. S.G.,*** 11 Wn.App.2d 74 (2019)

A dismissed juvenile deferred disposition remains a conviction for purposes of restoration of firearm rights, RCW 9.41.040(3); I.

***State v. Delbosque***, 195 Wn.2d 106 (2020)

In resentencing a respondent who was sentenced to life without parole for a crime committed when s/he was a juvenile, *Miller v. Alabama,* 567 U.S. 460, 183 L.Ed.2d 407 (2012), respondent does not have the burden of proof and does have the right to appeal the new sentence; here, substantial evidence did not support the trial court's conclusion that crime was a reflection of "irreparable corruption, permanent incorrigibility, and irretrievable depravity" or that respondent continues to exhibit an ongoing attitude toward others that is reflective of the murder based upon an old prison infraction, *see also: State v. Backstrom,* 15 Wn.App.2d 103 (2020), *but see: State v. Monschke,* 197 Wn.2d 305 (2021), *Jones v. Mississippi,* ___ U.S. ___, 141 S.Ct. 1307, 209 L.Ed.2d 390 (2021); 9-0.

***State v. D.L.W.,*** 14 Wn.App.2d 649 (2020)

Juvenile court has discretion to order less than full amount of restitution although court cannot impose zero restitution; I.

***State v. Backstrom,*** 15 Wn.App.2d 103 (2020)

Juvenile is convicted of aggravated murder, sentenced to life without parole, on remand from Supreme Court pursuant to *State v. Delbosque*, 195 Wn.2d 106 (2020), court enters findings and resentences to 42 years, defendant appeals; held: trial court properly considered *Miller v. Alabama*, 567 U.S. 460, 183 L.Ed.2d 407 (2012) factors, *see: Jones v. Mississippi*, ___ U.S. ___, 141 S.Ct. 1307, 209 L.Ed.2d 390 (2021), *but see: State v. Monschke*, 197 Wn.2d 305 (2021); I.

***State v. I.A.S.***, 15 Wn.App.2d 634 (2020)

Juvenile granted a deferred disposition, RCW 13.40.127, must provide a DNA sample, RCW 43.43.754 (2019), *State v. M.Y.G.*, 15 Wn.App.2d 641 (2020); III.

***Jones v. Mississippi***, ___ U.S. ___, 141 S.Ct. 1307, 209 L.Ed.2d 390 (2021)

At age 15 defendant is sentenced to mandatory life without parole, after remand for resentencing pursuant to *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012) court acknowledges its discretion but resentences to life without parole without a finding of incorrigibility; held: on resentencing, as long as the court exercises discretion in imposing another life without parole sentence it need not make a finding of facts as to incorrigibility or make any explanation about the sentence, *see: State v. Delbosque*, 195 Wn.2d 106 (2020); 6-3.

***Pers. Restraint of Brooks,*** 197 Wn.2d 94 (2021)

A juvenile sentenced to a lengthy sentence in 1998, prior to adoption of the SRA, who has served twenty years is entitled to a release hearing before the Indeterminate Sentencing Review Board with a presumption of release, RCW 9.94A.730, regularly held parole hearings are not an adequate substitute for a "*Miller*-fix" hearing, *Miller v. Alabama*, 567 U.S. 460, 480, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012); *State v. Bassett*, 192 Wn.2d 67, 81-82 (2018); *State v. Houston-Sconiers*, 188 Wn.2d 1, 18 (2017); 9-0.

***State v. D.L.***, 197 Wn.2d 509 (2021)

Respondent pleads guilty to one count, apparently an *Alford* plea, agrees court can consider probable cause affidavit, probation counselor submits disposition report informing court that victim had a cognitive disability, respondent "refused accountability," and would not cooperate with treatment, court imposes manifest injustice; in fractured opinion, supreme court held that due process requires the state to give notice of the facts that will be used to justify a manifest injustice disposition before respondent pleads guilty, *see also: State v. J.A.V.*, ___ Wn.App.2d ___, 2021WL6069075 (2021); lead opinion, with four justices, would hold that court cannot consider facts arising after the plea (here denial of responsibility and refusal of treatment).

***State v. M.S.***, 197 Wn.2d 453 (2021)

Respondent pleads guilty after he is advised of standard range, is granted deferred disposition on condition he enter a treatment program, deferred disposition is later revoked and court imposes manifest injustice based upon respondent's failure in the program, using statutory and non-statutory aggravating factors, RCW 13.40.150 (1998); held: due process requires that a respondent be notified of facts and aggravating factors supporting a manifest injustice before pleading guilty, *State v. J.A.V.*, ___

Wn.App.2d ___, 2021WL6069075 (2021); court may consider non-statutory factors to support manifest injustice; 5-4.

***State v. Haag***, 198 Wn.2d 309 (2021)

At 17 defendant is sentenced to mandatory life without parole; at a subsequent *Miller*-fix resentencing, *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), RCW 10.95.030, sentencing court finds defendant is not "irretrievably depraved or irreparably corrupt" but resentences to 46 years; held: 46 years is a *de facto* life sentence, sentencing judge placed more emphasis on retribution than on mitigation due to heinous nature of the crime, abused his discretion because its finding lacked substantial evidence that defendant had not "overcome the factors that led to the murder, *but see: Jones v. Mississippi,* ___ U.S. ___, 141 S.Ct. 1307, 209 L.Ed.2d 390 (2021), *State v.. Anderson*, 200 Wn.2d 266 (2022), ; 8-1.

***State v. D.K.V.***, 16 Wn.App.2d 938 (2021)

When respondent is committed to DJA court has no authority to impose no contact orders; III.

***State v. J.C. M-O***, 17 Wn.App.2d 89 (2021)

Juvenile court is not obliged to consider respondent's youth in imposing disposition as ch. 13.40 RCW incorporates offender's youth into the disposition schedule, *State v. S.D.H.*, 17 Wn.App.2d 123 (2021), *see: State v. Nevarez*, ___ Wn.App.2d ___, 519 P.3d 252 (2022), distinguishing *State v. Houston-Sconiers*, 188 Wn.2d 1, 8 (2017); III.

***State v. S.D.H.***, 17 Wn.App.2d 123 484 P.3d 538 (2021)

The fact that the Juvenile Justice Act requires the court to find mitigating factors by clear and convincing evidence, RCW 13.40.160(2), but the SRA has the lesser standard of a preponderance of the evidence, RCW 9.94A.535(1), does not violate the equal protection clause; II.

***State v. Rogers***, 17 Wn.App.2d 466 (2021)

Juvenile is sentenced to 106 months for murder 1°, state appeals; held: while judges possess broad discretion when sentencing juveniles convicted in adult court, *State v. Houston-Sconiers*, 188 Wn.2d 1, 8 (2017), appellate review is needed to prevent arbitrary sentencing decisions regardless of Supreme Court's use of phrase "absolute discretion;" Division I will apply standard of review that pre-dates SRA: abuse of discretion exists only where it can be said that no reasonable judge would have taken the view adopted by the trial court, *see: State v. Hall*, 35 Wn.App. 302 (1983); when sentencing judge determines that youth is a mitigating factor court must explain reasons and they must be rationally related to evidence adduced at trial or sentencing, *but see: Jones v. Mississippi*, ___ U.S. ___, 141 S.Ct. 1307, 209 L.Ed.2d 390 (2021).

***Pers. Restraint of Williams***, 18 Wn.App.2d 707 (2021)

Petitioner is sentenced as a persistent offender, filed PRP alleging that because one of his strikes was committed as a juvenile that the life sentence is unconstitutional, *State v. Bassett*, 192 Wn.2d 67 (2018); held: caselaw that forbids life without parole sentence to offenders who committed the crime when s/he was a

juvenile only applies to the current offense, *State v. Reynolds*, ___ Wn.App.2d ___, 505 P.3d 1174 (2022), *Pers. Restraint of Williams*, 18 Wn.App.2d 707 (2021), *see: Pers. Restraint of Monschke*, 197 Wn.2d 305 (2021); II.

***State v. P.M.E.***, 19 Wn.App.2d 93 (2021)

Respondent is charged with gross misdemeanors, juvenile court grants respondent's motion to decline and transfer to adult court, state appeals; held: decline hearings are not permitted for misdemeanors thus a juvenile may not waive juvenile court jurisdiction, RCW 13.40.110; III.

***State v. M.N.H.***, 19 Wn.App.2d 281 (2021), *reversed, on other grounds*, ___ Wn.2d ___, 505 P.3d 548 (2022)

State must prove violations of conditions of supervision by a preponderance, not beyond a reasonable doubt, *United States v. Haymond*, 588 U.S, ___ , 139 S.Ct. 2369, 204 L.Ed.2d 897 (2019), *Aberdeen v. Regan*, 170 Wn.2d 103 (2010); III.

***State v. J.A.V.***, ___ Wn.App.2d ___, 501 P.3d 159 (2021)

After fact finding hearing court imposes manifest injustice disposition without advance notice; held: due process requires the state or the court to give notice of the facts that will be used to justify a manifest injustice disposition before disposition hearing; III.

***State v. M.Y.G.***, 199 Wn.2d 528 (2022)

Deferred disposition, RCW 13.40.127 (2016) is a conviction, *see: Det of Anderson*, 185 Wn.2d 79, 86 (2016), for purposes of DNA sample collection; DNA collection only applies to a juvenile convicted of a felony in superior court or a juvenile offense listed in RCW 43.43.754 (2022); fractured opinion.

***Matter of Kennedy***, 200 Wn.2d 19 (2022), ***Matter of Davis***, 200 Wn.2d 75 (2022)

At age 19 petitioner is convicted of homicide by abuse in 2007, sentenced to 380 months, files PRP based upon newly discovered evidence of advancements in science about adolescent brain development, and that the PRP is timely due to significant change in the law per *In re Pers. Restraint of Monschke*, 197 Wn.2d 305 (2021); held: new research into brain development does not meet the standard of newly discovered evidence as petitioner could have sought a mitigated sentence on youth grounds at the time of sentencing, *Pers. Restraint of Light-Roth*, 191 Wn.2d 328 (2018); because petitioner was not sentenced to mandatory life without parole, *Monschke, supra.*, is not a change in the law justifying an untimely PRP; affirms *In re Pers. Restraint of Kennedy*, 16 Wn.App. 2d 423, 480 P.3d 498 (2021); 9-0.

***State v. Anderson,*** 200 Wn.2d 266 (2022)

In 2000 defendant is sentenced to 61 years for two murders committed when he was 17, at resentencing in 2018 pursuant to *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012), trial court considers mitigating evidence and denies mitigated sentence; held: *State v. Haag*, 198 Wn.2d 309 (2021) does not establish a bright line rule that no juvenile offender can receive a sentence of 46 years or longer, trial court properly considered evidence regarding mitigating qualities of defendant's

youth and rehabilitation and properly exercised discretion in finding that the crimes do not reflect youthful immaturity; 5-4.

***State v. Garza***, 200 Wn.2d 449 (2022)

Trial courts have authority to vacate and seal a juvenile's adjudication as well as diversions, RCW 13.50.260(3) (2021); 6-3.

***Matter of Miller***, 21 Wn.App.2d 257 (2022)

Failure of defense counsel and the court to "meaningfully consider" auto-declined juvenile's youth at her sentencing results in actual and substantial prejudice; II.

***Matter of Forcha-Williams***, ___ Wn.2d ___, 520 P.3d 939 (2022)

*State v. Houston-Sconiers*, 188 Wash.2d 1, 8 (2017) "does not give judges the discretion to impose a determinate sentence where the legislature has mandated an indeterminate sentence. Rather, *Houston-Sconiers* gives judges the discretion to impose an indeterminate sentence with a minimum term below the minimum term set by the legislature when required by the mitigating qualities of the offender's youth;" while *Houston-Sconiers, supra,* is a significant and material change in the law, defendant must still show by a preponderance that he would have received a lower sentence, thus PRP here is untimely, *Matter of Meippen,* 193 Wn.2d 310 (2019), *Matter of Williams,* ___ Wn.2d ___, 520 P.3d 933 (2022); reverses *Pers. Restraint of Forcha-Williams,* 18 Wn.App.2d 167 (2021); 5-4.

***State v. Meza***, 22 Wn.App.2d 514 (2022)

While a 50 year sentence is confinement without the possibility of parole, *State v. Haag*, 198 Wn.2d 309, 327 (2021), there is no bright line rule of age, *State v. Monschke,* 197 Wn.2d 305, 326 (2021), trial judge has discretion to apply youthfulness principles on a case by case basis, *see: State v. Nevarez,* ___ Wn.App.2d ___, 519 P.3d 252 (2022), but here trial judge did consider youthfulness and declined to impose an exceptional sentence; I.

# KIDNAPPING/UNLAWFUL IMPRISONMENT/CUSTODIAL INTERFERENCE

***State v. Ingham***, 26 Wn.App. 45 (1980)

Kidnapping merges into rape 1° (kidnap), per *State v. Johnson*, 82 Wn.2d 671 (1979); II.

***State v. LaCaze***, 95 Wn.2d 760 (1981)

Parent, on escape status from prison, snatches his natural children; held: unless there is a court order depriving defendant of legal custody, he cannot be convicted of kidnapping his own children, irrespective of his status as an inmate or an escapee; 6-3.

***State v. Price***, 33 Wn.App. 472 (1982)

To prove "restraint," RCW 9A.40.010(1), state need not prove that defendant knew that victim was less than 16 years old; I.

***State v. Vladovic***, 99 Wn.2d 413 (1983)

Kidnapping does not merge into robbery 1°, *State v. Grant*, 172 Wn.App. 496 (2012), disavowing *dicta* in *State v. Allen*, 94 Wn.2d 860 (1980), *State v. Rattana Keo Phuong*, 174 Wn.App. 494 (2013), *but see: State v. Korum*, 120 Wn.App. 686 (2004), 157 Wn.2d 614 (2006), *see: State v. Berg*, 181 Wn.2d 857 (2014); 5-4.

***State v. Thomas***, 35 Wn.App. 598 (1983)

Where natural father takes child from custodial parent, state must charge custodial interference, RCW 9A.40.050(1) and not unlawful imprisonment, RCW 9A.40.040(1); I.

***State v. Arnett***, 38 Wn.App. 527 (1984)

Kidnap 1° (with intent to commit indecent liberties) and indecent liberties do not merge as indecent liberties is not a lesser of kidnap 1°; II.

***State v. Gatalski***, 40 Wn.App. 601 (1985)

Unlawful imprisonment may be a lesser included offense of attempted kidnapping; *but see: State v. Baldwin*, 63 Wn.App. 536 (1991), *State v. Jackson*, 112 Wn.2d 867 (1982), *State v. Harris*, 121 Wn.2d 317 (1993); I.

***State v. Stubsjoen***, 48 Wn.App. 139 (1987)

Taking a child from its parent and acting as though the child is the defendant's is sufficient to convict of kidnapping; I.

***State v. Dove***, 52 Wn.App. 81 (1988)

A defendant who is not involved in actual planning or abduction but who assists in collecting ransom is accomplice to kidnapping 1°, as kidnapping continues until victim is released; I.

***State v. Worrell***, 111 Wn.2d 537 (1988)

Kidnapping 1° is not vague; 8-0.

***State v. Billups***, 62 Wn.App. 122 (1991)

Defendant leans out of his van window and says to juvenile, "I'll pay you a dollar if you'll come down to [a park] with me," hides when police approach; held: sufficient to convict of attempted kidnap 2°, *cf.: State v. Dillon,* 163 Wn.App. 101 (2011); I, 2-1.

***State v. Lund***, 63 Wn.App. 553 (1991)

In custodial interference 1°, RCW 9A.40.060(1), it is not a defense to intent to deny access element that child is only being held as bait until demands of defendant are met; I.

***State v. Ohrt***, 71 Wn.App. 721 (1993)

Custodial interference 1°, RCW 9A.40.060(1)(a) and (c), is committed when a minor child's relative takes the child from a parent or other lawful custodian with intent to hold the child permanently or remove it from the state, irrespective of the defendant's right to custody or knowledge of a restraining order; II.

***State v. Majors***, 82 Wn.App. 843, 846-7 (1996)

In attempted kidnapping 1° case, defendant points BB gun at victim, orders her into car or he would blow her head off, victim testifies she doubted that the gun could shoot bullets; held: while a BB gun is not capable of causing death or serious injury, the threat to use deadly force is sufficient to establish a substantial step, victim's disbelief does not negate substantial step; I.

***State v. Ong,*** 88 Wn.App. 572, 576-77 (1997)

Defendant has permission to drive unrelated seven-year-old girl to school, four blocks from girl's home, instead drives her to a remote location defendant describes as a "good hiding place," victim stays with defendant for several hours, defense claims insufficient evidence; held: kidnapping 2°, RCW 9A.40.030(1), requires that defendant "abduct" another, RCW 9A.40.010(2), meaning "to restrain a person by secreting or holding him in a place where he is not likely to be found," "restrain" means to restrict movements without consent and without legal authority which interferes substantially with liberty, RCW 9A.40.010(1); here, the defendant materially deviated, in time and distance, from the permission granted, jury could reasonably have found that victim was taken to a place she was not likely to be found, and that she was under defendant's control, which substantially interfered with her liberty, *see: State v. Dillon,* 163 Wn.App. 101 (2011); II.

***State v. Kinchen***, 92 Wn.App. 442 (1998)

A parent can be guilty of unlawful imprisonment, RCW 9A.40.040(1), of his own children where the restrictions on the child's movements, viewed objectively, are excessive, immoderate or unreasonable, but where the victim has and uses a means of escape, here a window and a sliding glass door, evidence is insufficient, *c.f: State v. Scanlan,* 193 Wn.2d 753 (2019), *but see: State v. Dillon,* 12 Wn.App.2d 133 (2020); I.

***State v. Simms***, 95 Wn.App. 910 (1999)

Defendant drives 93-year-old man away over man's daughter's objection, state offers no evidence that defendant was incompetent; held: to convict of kidnapping 2°, RCW 9A.40.030, state must prove victim was incompetent at the time of the crime to consent to a car ride, statute requires that if incompetency exists, then a legal guardian having lawful control capable of giving consent must have been appointed and have failed to give consent; here, no guardian was appointed, thus there was no kidnapping; II.

***State v. Ayala***, 108 Wn.App. 480 (2001)

Defendant is accused of kidnapping for ransom, offers evidence that 14-year old victim was part of extortion plot against his father, trial court precludes defense and cross-examination; held: acquiescence of a kidnap victim less than 16 years old is statutorily excluded as a defense, RCW 9A.40.020(2)(b); confrontation clause does not oblige a court to allow cross-examination on irrelevant issues: 2-1, III.

***State v. Liden***, 118 Wn.App. 734 (2003)

Defendant's conviction in 1996 of unlawful imprisonment does not oblige him to register as a kidnapping offender, RCW 9A.44.130, where he was only on monetary supervision when legislature created the failure to register offense, RCW 9.94A.130; II.

***State v. Korum***, 120 Wn.App. 686, 700-07 (2004), *reversed*, on other grounds, 157 Wn.2d 614 (2006)

During home invasion robberies, victims are restrained with duct tape, moved into another room and robbed, state charges robbery and kidnapping; held: kidnapping charges were incidental to the robberies because restraints were for the sole purpose of facilitating the robberies, forcible restraint of victims was inherent in the robberies, victims were not transported away from their homes to some remote spot where they were not likely to be found, duration of restraint was not substantially longer than that required for commission of the robberies, restraints did not create a significant danger independent of that posed by the robberies themselves, *State v. Green*, 94 Wn.2d 216, 227 (1980), *State v. Ingham*, 26 Wn.App. 45, 49 (1980), *see: State v. Allen*, 94 Wn.2d 860 (1980), *State v. Berg*, 181 Wn.2d 857 (2014), *but see: State v. Vladovic*, 99 Wn.2d 413 (1983), *State v. Louis*, 155 Wn.2d 563 (2005), *State v. Grant*, 172 Wn.App. 496 (2012), *State v. Rattana Keo Phuong*, 174 Wn.App. 494, 503-42 (2013), *cf.: State v. Elmore*, 154 Wn.App. 885, 901-03 (2010), *Whitfield v. United States*, 574 U.S. 265, 135 S.Ct. 785, 190 L.Ed.2d. 656 (2015), thus kidnapping charges are dismissed; III.

***State v. Saunders***, 120 Wn.App. 800, 815-19 (2004)

Victim voluntarily enters defendant's home, is then bound, gagged and killed, defendant is convicted, *inter alia*, of kidnapping; held: initial voluntary action by victim does not preclude a successful kidnapping claim, *see: State v. Harris*, 36 Wn.App. 746, 753 (1984), *State v. Johnson*, 92 Wn.2d 671 (1979); fact that victim's car was outside does not defeat proof that she was secreted in a place where she was not likely to be found, RCW 9A.40.020, distinguishing

*State v. Green*, 94 Wn.2d 216 (1980); kidnapping was not incidental to rape, *State v. Rattana Keo Phuong*, 174 Wn.App. 494, 503-42 (2013), *see: State v. Harris, supra.* at 752, *State v. Whitney*, 44 Wn.App. 17, 20-21 (1986), *State v. Brett*, 126 Wn.2d 136, 166 (1995), *State v. Johnson, supra.* at 676, *State v. Elmore*, 154 Wn.App. 885, 901-03 (2010); here, predicate crimes are not sufficiently intertwined to apply merger doctrine, *State v. Peyton*, 29 Wn.App. 701, 720 (1981); 2-1, II.

***State v. Louis***, 155 Wn.2d 563 (2005)

Kidnapping and robbery convictions for robbing victim and binding him up in bathroom of store do not violate double jeopardy nor do they merge, *State v. Vladovic*, 99 Wn.2d 413 (1983), *Pers. Restraint of Fletcher*, 113 Wn.2d 42, 50 (1989), *State v. Johnson*, 96 Wn.2d 926 (1982), *State v. McFarland*, 73 Wn.App. 66-69 (1994), *State v. Grant*, 172 Wn.App. 496 (2012), *State v. Rattana Keo Phuong*, 174 Wn.App. 494 (2013), *see: State v. Korum*, 120 Wn.App. 686, *reversed, on other grounds*, 157 Wn.2d 614 (2006), *see: State v. Berg*, 181 Wn.2d 857 (2014); 5-4.

***State v. Davis***, 133 Wn.App. 415, 424-25 (2006), *rev'd, on other grounds,* 163 Wn.2d 606 (2008)

Adult grabs a child's arm, pulls her to the ground, tells her to sit in a room, she testifies she was afraid to leave, satisfies definition of **restraint**, RCW 9A.40.040(1),where there are no alternative ways to leave, *State v. Scanlan,* 193 Wn.2d 753 (2019), distinguishing *State v. Kinchen*, 92 Wn.App. 442, 452 (1998); III.

***State v. Washington***, 135 Wn.2d 42, 49-50 (2006)

Defendant orders victim into car, victim leaves door open, defendant orders victim to shut door, she tries to leave, defendant grabs her and punches her, is convicted of unlawful imprisonment, RCW 9A.40.040(1); held: restraint was not incidental to the assault, *see: State v. Rattana Keo Phuong*, 174 Wn.App. 494, 503-42 (2013), rather the assault was a reaction to victim's resistance to the restraint; by physically forcing victim back inside, defendant defeated any means of escape, distinguishing *State v. Kinchen*, 92 Wn.App. 442, 452 n. 16 (1998); I.

***State v. Lopez***, 142 Wn.App. 341, 348-51 (2007)

A parent can be convicted of kidnapping 2º of his own child, even where his parental rights have not been limited, where the parent engages in misconduct affecting the child's well-being, *State v. La Caze*, 95 Wn.2d 760, 761 (1981), *State v. Tuitasi*, 46 Wn.App. 206 (1986); where a parent threatens to take the child with the sole intent to compel the other parent to do something against her will, the statutory right to equal custody does not give a parent legal authority to engage in such conduct; I.

***State v. Boss,*** 167 Wn.2d 710 (2009)

In custodial interference case, RCW 9A.40.060 (1988), validity of a court order giving Child Protective Services temporary custody is an issue of law, not one for the jury, *see: State v. Miller*, 156 Wn.2d 23 (2005), *Seattle v. May*, 171 Wn.2d 847 (2011), *State v. Ingram*, 9 Wn.App.2d 482 (2019);

defendant's knowledge of the custody order's validity is not an element of the crime; whether CPS had a lawful right to physical custody is a matter for the jury; defendant's knowledge of CPS' right to custody is not an element of the offense; affirms *State v. Boss*, 144 Wn.App. 878 (2008); 9-0.

***State v. Elmore***, 154 Wn.App. 885, 901-03 (2010)

Kidnapping is never incidental to a conviction for conspiracy to commit robbery, as the conspiracy is completed before the actual robbery; kidnapping is not incidental to burglary where burglary was completed when defendants entered the victims' home with intent to commit a crime, distinguishing *State v. Korum*, 120 Wn.App. 686, 700-07 (2004), *reversed*, on other grounds, 157 Wn.2d 614 (2006), *see: State v. Rattana Keo Phuong*, 174 Wn.App. 494 (2013); II.

***State v. Dillon***, 163 Wn.App. 101 (2011)

Defendant meets 13 year old in a chat service, picks him up in his car, takes him to his home, has sex and, upon complainant's request, drives him home, is convicted of kidnapping 1°; held: state proved the "without consent" element of restraint, RCW 9A.40.010(1) (1975) [amended in 2011 to add gender neutral language] due to complainant's age, but absent evidence that complainant's liberty was compromised or that defendant intended to restrict his movements, evidence is insufficient, distinguishing *State v. Billups*, 62 Wn.App. 122 (1991), *State v. Ong*, 88 Wn.App. 572, 576-77 (1997); II.

***State v. Kirwin***, 166 Wn.App. 659 (2012)

Defendant-mother removes children from jurisdiction, depriving father of court-ordered visitation, is charged with custodial interference under prong prohibiting denying access to parent having physical custody, RCW 9A.40.060(1) (1998), to convict instruction addresses only depriving parent of visitation, RCW 9A.40.060(2); held: where state presents sufficient evidence of the offense in the to convict instruction but not the crime charged in the information, remedy is dismissal with prejudice; 2-1, III.

***State v. Grant***, 172 Wn.App. 496 (2012)

Defendant pushes into victim's home with gun, ties her up, drags her downstairs, ransacks house, is convicted of robbery and kidnapping; held: separate convictions for robbery 1° and kidnapping 1° do not violate double jeopardy or merge, state does not have to prove that one crime was not incidental to the other, *State v. Vladovic*, 99 Wn.2d 413, 422-23 (1983), *State v. Rattana Keo Phuong*, 174 Wn.App. 494 (2013), *but see: State v. Korum*, 120 Wn.App. 686 (2004), *rev'd, on other grounds,* 157 Wn.2d 614 (2006), *see: State v. Berg*, 181 Wn.2d 857 (2014); 2-1, I.

***State v. Veliz***, 176 Wn.2d 849 (2013)

A domestic violence protection order with a child visitation provision is not a "court-ordered parenting plan" required to prove custodial interference 1°, RCW 9A.40.060(2) (1998), *see: State v. Pesta*, 87 Wn.App. 515 (1997); only a document created under ch. 26.09 RCW qualifies; reverses *State v. Veliz*, 160 Wn.App. 396 (2011); 5-4.

***State v. Phuong***, 174 Wn.App. 494, 403-45 (2013)

Defendant drags victim upstairs, attempts to rape her, is convicted of unlawful imprisonment and attempted rape, maintains on appeal that unlawful imprisonment was incidental to the attempted rape; held: "a defendant's conviction of a restraint-based offense is not subject to reversal on…due process grounds based upon a claim that the restraint in the offense was 'incidental' to another charged offense;" kidnapping does not merge into rape, defendant may be punished for both, *State v. Grant,* 172 Wn.App. 496 (2012), *but see: State v. Elmore,* 154 Wn.App. 885 (2010), *Pers. Restraint of Bybee,* 142 Wn.App. 260 (2007), *State v. Saunders,* 120 Wn.App. 800 (2004), *State v. Korum,* 120 Wn.App. 686, *reversed,* on other grounds, 157 Wn.2d 614 (2006), *see: State v. Berg,* 181 Wn.2d 857 (2014*)*; 2-1, I.

***State v. Garcia***, 179 Wn.2d 828, 835-44 (2014)

Defendant enters an occupied mobile home, awakens resident, remains for two hours, complainant frightened, talks to complainant, briefly picks up a knife and holds it two feet from complainant but does not threaten her, leaves, is convicted of kidnapping 1°, RCW 9A.40.020 (2011), by modes of holding her as a hostage or shield and to inflict extreme mental distress; held: hostage/shield mode requires proof of intent to use victim as security for performance of some action by another or prevention of action by another, neither present here; extreme mental distress prong requires intent to cause mental distress above that of an abduction, otherwise there would be no difference between that mode and kidnapping 2°, evidence was thus insufficient for both modes, *cf.: State v. Harrington,* 181 Wn.App. 805 (2014); 9-0.

***State v. Johnson***, 180 Wn.2d 295, 300-04 (2014)

Unlawful imprisonment information which alleges that defendant knowingly restrained victim need not include definition of "restrain" in the information, as the definition of "restrain" defines and limits the scope of the essential elements but is not itself an essential element, *State v. Allen,* 176 Wn.2d 611, 626-27 (2013), distinguishing *State v. Warfield,* 103 Wn.App. 152 (2000), *see: State v. Dillon,* 12 Wn.App.2d 133 (2020); reverses, in part, *State v. Johnson,* 172 Wn.App. 112 (2012); 7-2.

***State v. Berg***, 181 Wn.2d 857 (2014)

Whether or not a kidnapping is incidental to another crime does not impact sufficiency of the evidence for the kidnapping; if the elements of kidnapping are established *prima facie,* then there is sufficient evidence regardless of merger analysis, *State v. Rattana Keo Phuong,* 174 Wn.App. 494 (2013), *State v. Grant,* 172 Wn.App. 496 (2012), *State v. Butler,* 165 Wn.App. 820 (2012); reverses *State v. Berg,* 177 Wn.App. 119 (2013); 9-0.

***State v. Cline***, 180 Wn.App. 644 (2014)

Taking child from custodial parent without authority for a weekend is sufficient to prove "a protracted period" for purposes of custodial interference 1°, RCW 9A.40.060(3) (1998); III.

***State v. Harrington***, 181 Wn.App. 805 (2014)

Defendant displays gun, shuts victim in bedroom, commands she sit on the floor and drink alcohol, shoves her and holds her at gunpoint; held: evidence is sufficient to prove kidnapping 1º, RCW 9A.40.020 (2011), "with intent…to inflict bodily injury" and "to inflict extreme mental distress," distinguishing *State v. Garcia*, 179 Wn.2d 828, 835-44 (2014); "extreme mental distress" is not vague; III.

***State v. Classen***, 4 Wn.App.2d 520, 531-34 (2018)

Kidnapping 1°, RCW 9A.40.020 (1)(c), (d), is a continuing course of conduct crime that continues until the victim's liberty is restored; here, defendant restrained victim in her car and, after she escaped, pursued her and tried to kidnap her again, is convicted of kidnapping and attempted kidnapping, because there were two separate course of conduct the convictions do not violate double jeopardy clause; II.

***State v. Dillon***, 12 Wn.App.2d 133 (2020)

In unlawful imprisonment case, RCW 9A.40.040 (2011), trial court need not instruct jury that defendant acted knowingly without legal authority, RCW 9A.40.010(6) (2014), *State v. Warfield*, 103 Wn.App. 152 (2000), unless there is some evidence that defendant had a good faith belief that s/he had legal authority, *State v. Johnson*, 180 Wn.2d 295, 300-04 (2014); having a means of escape is a defense to unlawful imprisonment, not an element of the offense, *see: State v. Kinchen*, 92 Wn.App. 442 (1998); I.

# LAWFUL USE OF FORCE/SELF-DEFENSE

(see: INSTRUCTIONS/Self-Defense)

***State v. Manuel***, 94 Wn.2d 695 (1980)

In self-defense case, where seeking attorneys fees and costs pursuant to RCW 9.01.200, procedure is to bifurcate trial; following acquittal, jury should be instructed to answer interrogatories as to whether defendant proved, by a preponderance, his/her acts were reasonably necessary to defend him/herself against an attack s/he did not provoke or invite; *see*: *State v. Huntley*, 99 Wn.2d 27 (1983).

***State v. Huntley***, 99 Wn.2d 27 (1983)

Former RCW 9.01.200 [now RCW 9.16.110], providing for **attorney's fees** where a defendant is acquitted in self-defense cases, is constitutional, *State v. Manuel*, 94 Wn.2d 695 (1980); 9-0.

***State v. Negrin***, 37 Wn.App. 516 (1984)

After shooting, defendant learns victim had previously stated he was going to "cause someone to shoot him," excluded by trial court; held: properly excluded because, at time of shooting, defendant did not know who he was shooting at, thus statement of decedent was not relevant to defendant's apprehension of danger; *but see*: *State v. Cloud*, 7 Wn.App. 211, 217-18 (1972), *Evans v. United States*, 277 F.2d 354, 1 ALR 3d 566 (D.C. Cir. 1960); I.

***State v. Allery***, 101 Wn.2d 591 (1984)

**Battered woman syndrome** may be proved by expert testimony where appropriate, *but see*: *State v. Hanson*, 58 Wn.App. 504 (1990), *State v. Riker*, 123 Wn.2d 351, 358-66 (1994), *see also: State v. Janes*, 121 Wn.2d 220 (1993); 9-0.

***State v. Kelly***, 102 Wn.2d 188 (1984)

Where **battered woman syndrome** is offered to explain lawful use of force, state may not then use prior aggressive acts by defendant, even against decedent, to rebut, as character is not an essential element of the self-defense claim, thus evidence of defendant's aggressive acts was irrelevant character evidence, ER 405(b), *State v. Stacy*, 181 Wn.App. 553, 565-66 (2014), *reversing State v. Kelly*, 33 Wn.App. 541 (1982); 8-1.

***State v. Ekkelkamp***, 42 Wn.App. 375 (1985)

When a police officer executes a facially valid warrant, there should be no justification to assault the arresting officer, *State v. Belleman*, 70 Wn.App. 778 (1993); "[a] person may use only reasonable force to **resist an unlawful arrest**. *State v. Rousseau*, 40 Wn.2d 92 (1952). It is unreasonable to use any force to resist an unlawful arrest, when the only apparent threat to the

arrestee is the loss of freedom. *Rousseau*. *State v. Goree*, 36 Wn.App. 205, 209 (1983)," *see:* *State v. Ross*, 71 Wn.App. 837, 840-3 (1993), *State v. Valentine*, 75 Wn.App. 611 (1994); I.

***State v. Alexander***, 52 Wn.App. 897 (1988)

In self-defense case, victim's **reputation for violence** is admissible, ER 405(a), while specific acts of violence are not admissible, ER 405(b), *see:* *State v. LeFaber*, 77 Wn.App. 765 (1995), *rev'd, on other grounds,* 128 Wn.2d 896 (1996), *State v. Stacy*, 181 Wn.App. 553, 565-66 (2014), as victim's character trait of violence is not an essential element of claim of self-defense; thus, while victim's claim of peaceful character could be impeached by cross-examination regarding specific acts of violence, they are collateral to the principal issues being tried, *State v. Oswalt*, 62 Wn.2d 118, 121 (1963), and the examiner is bound by the denial and cannot offer independent evidence to impeach; I.

***Seattle v. Cadigan***, 55 Wn.App. 30 (1989)

An individual who is **illegally arrested** may resist arrest with an amount of force that is reasonable and proportioned to the injury about to be received, *State v. Rousseau*, 40 Wn.2d 92 (1952), *State v. Crider*, 72 Wn.App. 815, 820 (1994); the use of force to prevent even an unlawful arrest which threatens only a loss of freedom is not reasonable, *State v. Goree*, 36 Wn.App. 205, 209 (1983), *State v. Crider*, *supra*, *State v. Mierz*, 127 Wn.2d 460, 478-9 (1995); in a **lawful arrest**, the arrestee may not use force unless the use of **excessive force** by the officer places the arrestee in actual danger of serious injury, *State v. Valentine*, 75 Wn.App. 611, 616 (1994) whereupon the force used cannot exceed that reasonably necessary to protect the arrestee, *State v. Westlund*, 13 Wn.App. 460, 77 A.L.R.3d 270 (1975), *State v. Ross*, 71 Wn.App. 837, 840-3 (1993); *see also:* *State v. Belleman*, 70 Wn.App. 778 (1993); I.

***State v. Watson***, 55 Wn.App. 320 (1989)

When seeking **attorneys fees** following acquittal, former RCW 9.01.200 [now RCW 9A.16.110], jury must be instructed that burden is on defense to prove by a preponderance that the acts were in self-defense and justified, and the parties must have the opportunity to present further evidence, *see:* *State v. Park*, 88 Wn.App. 910 (1997); II.

***State v. Dennison***, 115 Wn.2d 609 (1990)

Defendant, during burglary in which he was armed, confronts homeowner who is armed, defendant flees when gunfire ensues, homeowner is killed; held: lawful use of force is not available as a defense to **felony murder** 1° (burglary), *State v. Bolar*, 118 Wn.App. 490, 506-10 (2003); self-defense is not revived, *State v. Craig*, 82 Wn.2d 777 (1973), *cf.: State v. Fleeks*, ___ Wn.App.2d ___, 2023WL355082 (2023), absent good faith intention to **withdraw** from burglary removing decedent's fear; even while fleeing from burglary scene, burglary is still in progress; *affirms* *State v. Dennison*, 54 Wn.App. 577 (1989); 7-2.

***State v. Bell***, 60 Wn.App. 561 (1991)

In murder case, defense offers reputation evidence that victim was homosexual to support claim that defendant killed victim after victim grabbed defendant's crotch and tried to kiss him; held: while evidence of **victim's reputation as a homosexual** may tend to prove he grabbed defendant's crotch, it is not "of consequence to the determination of the action," ER 401, because

self-defense to murder is only available to a defendant who is responding to perceived threat of great bodily harm or to victim's commission of violent felony, *State v. Griffith*, 91 Wn.2d 572, 576 (1979), which is not present here, *State v. Brightman*, 155 Wn.2d 506 (2005); evidence of specific instances of homosexual behavior clearly inadmissible, ER 404(b), 405(a), *State v. Munguia*, 107 Wn.App. 328, 335-36 (2001); II.

***State v. Jones***, 63 Wn.App. 703 (1992)

Where shoplifter is charged with assault on security guards, instruction that detention by merchant is lawful if merchant has reasonable grounds to believe detainee committed theft, RCW 9A.16.080, is proper as consistent with common law citizen arrest; instruction regarding **right to resist unlawful arrest** must be qualified that amount of force used to resist "must be reasonable and proportioned to the injury about to be received," *State v. Rousseau*, 40 Wn.2d 92, 95 (1952), and force may not be used to resist unlawful arrest "which threatens only a loss of freedom," *State v. Goree*, 36 Wn.App. 205, 209 (1983); I.

***State v. Janes***, 121 Wn.2d 220 (1993)

**Battered child syndrome** is admissible to support a claim of self-defense so trier of fact can evaluate reasonableness of defendant's perception that s/he was in imminent danger at time of homicide, *State v. Allery*, 101 Wn.2d 591 (1984), *cf.: State v. Riker*, 123 Wn.2d 351, 358-66 (1994); imminence does not require actual physical assault, *State v. Walker*, 40 Wn.App. 658 (1985) and is not the same as immediate; a threat, or its equivalent, can support self-defense when there is a reasonable belief that the threat will be carried out; "that the triggering behavior and the abusive episode are divided by time does not necessarily negate the reasonableness of defendant's perception of imminent harm"; reverses *State v. Janes*, 64 Wn.App. 134 (1992); 7-0.

***State v. Belleman***, 70 Wn.App. 778 (1993)

In assault 3° on police officer, where arrest is lawful but defendant does not know he is being **lawfully arrested**, he does not have right to self-defense nor to such an instruction, *see: State v. Goree*, 36 Wn.App. 205 (1983), *Seattle v. Cadigan*, 55 Wn.App. 30, 37 (1989), *State v. Lile*, 193 Wn.App. 179, 210-13 (2016), *affirmed, on other grounds*, 188 Wn.2d 766 (2017); I.

***State v. Joswick***, 71 Wn.App. 311 (1993)

**Attorney fee** reimbursement statute, RCW 9A.16.110, does not apply where charge is dismissed on motion of state, rather only applies to an acquittal on the merits, *Rismon v. State*, 75 Wn.App. 289 (1994); II.

***State v. Ross***, 71 Wn.App. 837, 840-3 (1993)

In **assault 3° on police officer**, RCW 9A.36.031(1)(g), lawful use of force instruction should read, "[t]he use of force upon or toward a uniformed police officer performing his official duties is only lawful when used by a person who is actually about to be seriously injured," *see: State v. Westlund*, 13 Wn.App. 460, 466-7, 77 A.L.R.3d 270 (1975), *State v. Holeman*, 103 Wn.2d 426, 430 (1985), *Seattle v. Cadigan*, 55 Wn.App. 30 (1989); instruction allowing use of force when defendant has a reasonable belief that he is about to be injured, WPIC 17.04 (Supp. 1986) is not proper when dealing with uniformed officers; *see: State v. Valentine*, 132

Wn.2d 1 (1997), *State v. Mierz*, 127 Wn.2d 460 (1995), *State v. Lile*, 193 Wn.App. 179, 210-13 (2016), *affirmed, on other grounds*, 188 Wn.2d 766 (2017); I.

***State v. Anderson***, 72 Wn.App. 253 (1993)

Compensation for "loss of time" following self-defense acquittal, RCW 9.16.110, is limited to earnings defendant would actually have received but for prosecution, and not for loss of earning capacity; **attorney fees** are limited to those defendant has paid or is legally obliged to pay, thus where counsel is paid by government, no legal fees may be awarded; II.

***State v. LeFaber***, 77 Wn.App. 766 (1995), *rev'd, on other grounds,* 128 Wn.2d 896 (1996)

Evidence of **specific instances of violence** of homicide victim is not admissible in support of self-defense claim absent evidence defendant knew of the conduct, *State v. Alexander*, 52 Wn.App. 897 (1988), *State v. Callahan*, 87 Wn.App. 925, 934-5 (1997), *State v. Kelly*, 102 Wn.2d 188, 197 (1984), ER 405(b); III.

***Seattle v. Fontanilla***, 128 Wn.2d 492 (1996)

RCW 9A.16.110 authorizing **attorneys fees** following acquittal on self-defense grounds applies to municipal prosecutions, *State v. Lee*, 96 Wn.App. 336 (1999), but authorizes reimbursement from the state, not the city, municipal court lacks authority to order reimbursement from the state, defendant must seek fees through sundry claims process, RCW 4.92.040; 9-0.

***State v. Valentine***, 132 Wn.2d 1 (1997)

In **assault on police officer,** arrestee may not use force against arresting officers if s/he is faced only with a loss of freedom, even if arrest is unlawful, *State v. Holeman*, 103 Wn.2d 426 (1985), *State v. Kolesnik*, 146 Wn.App. 790, 809-10 (2008), *overruling State v. Rousseau*, 40 Wn.2d 92 (1952); 7-2.

***State v. Callahan***, 87 Wn.App. 925, 929-34 (1997)

In assault 2° case, victim testifies defendant pointed gun at him, victim attempted to grab gun, it discharged and shot him; defendant testifies he displayed gun in fear of assault but did not point it, and it discharged accidentally, trial court declines to instruct on self-defense; defendant denies knowing victim before the shooting, offers police testimony as to victim's reputation acquired from past encounters with criminal justice system and testimony of a person who knew victim two years before, both excluded; defendant offers evidence of his own reputation for peacefulness in his workplace; held: accident and self-defense are not necessarily mutually exclusive, *State v. Werner*, 170 Wn.2d 333 (2010), *see: State v. Slaughter*, 143 Wn.App. 936 (2008); evidence which comes from prosecution and which is based upon facts inconsistent with defendant's own testimony may support a self-defense instruction, *State v. Gogolin*, 45 Wn.App. 640, 643 (1986), *State v. Fondren*, 41 Wn.App. 17 (1985), *see: State v. Brightman*, 112 Wn.App. 260 (2002), *rev'd, on other grounds,* 155 Wn.2d 506 (2005); reputation evidence must be based upon witness's personal knowledge of victim's reputation in community, defendant's lack of knowledge supports exclusion, *State v. Negrin*, 37 Wn.App. 516, 526 (1984); II.

***State v. Thiessen***, 88 Wn.App. 827 (1997)

When ordering **attorney fees** following acquittal, RCW 9A.16.110(2), trial court may not award interest, *State v. Lee*, 96 Wn.App. 336, 345 (1999), *see also: State v. Villanueva*, 177 Wn.App. 251 (2013); II.

***State v. Park***, 88 Wn.App. 910 (1997)

In proceedings for **attorney fees**, RCW 9A.16.110, the same jury which acquitted must enter the special verdict, or counsel must seek reimbursement from the legislature under the sundry claims process, *State v. Sims*, 92 Wn.App. 125 (1998), *see: State v. Watson*, 55 Wn.App. 320, 323 (1989).

***State v. Jones***, 92 Wn.App. 555 (1998)

Following hung jury, defendant is acquitted at retrial, jury returns self-defense special verdict, trial court denies **attorney fees** for first trial; held: RCW 9A.16.110 entitled defendant to fees and costs related to the entire prosecution process if, after the last trial, trier of fact acquitted and entered the required finding; defendant is also entitled to fees for prevailing on appeal of the denial of attorneys' fees, *State v. Lee*, 96 Wn.App. 336, 345-46 (1999),; II.

***State v. Graves***, 97 Wn.App. 55 (1999)

A juvenile charged with assaulting a parent may employ a claim of lawful force irrespective of the parent's right to use reasonable force for discipline; I.

***State v. Read***, 100 Wn.App. 776, 783-89 (2000), *remanded*, 142 Wn.2d 1007, *reaffirmed*, 106 Wn.App. 138 (2001), *aff'd, on different grounds,* 147 Wn.2d 238 (2002)

Lay witness may not testify that defendant did not need to defend himself, as it is an opinion of defendant's guilt, harmless here; I.

***State v. Munguia***, 107 Wn.App. 328, 335-36 (2001)

In murder case where defendant claims self-defense from homosexual advance, evidence of victim's homosexual internet sites on his computer does not tend to prove that he attempted to sexually assault defendant, and is thus inadmissible character evidence, *State v. Bell*, 60 Wn.App. 561, 564 (1991), ER 404(b), 405(a); III.

***State v. Garcia***, 107 Wn.App. 545 (2001)

Respondent using force against an officer in a juvenile facility must show that s/he was in actual, imminent danger of serious injury, *State v. Bradley*, 141 Wn.2d 731 (2000); II.

***State v. Read***,147 Wn.2d 238 (2002)

At bench trial, defendant testifies that unarmed victim, during argument, verbally threatened defendant, jumped off a bed and rushed him, defendant shoots and kills victim, other witnesses testify that defendant had no reason to defend himself and no reason to pull out gun; held: even if defendant reasonably believed he could get hurt, it does not authorize deadly force; defendant failed to produce evidence demonstrating he reasonably believed he was in imminent danger of death or great personal injury, thus failing to satisfy subjective element of self defense; while lay opinion of the need to defend oneself is inadmissible, *see: State v. Read*, 100 Wn.App.

776, 106 Wn.App. 138 (2001), it is presumed trial court, in bench trial, did not consider the erroneously admitted evidence, *State v. Miles*, 77 Wn.2d 593 (1970); 7-2.

***State v. Walther***, 114 Wn.App. 189 (2002)

Complainant borrows defendant's car, does not return it when promised, defendant finds complainant sleeping in the car, shoots into the car several times, complainant drives towards defendant who shoots again, complainant is injured by bullet fragments, trial court declines to instruct on lawful use of force; held: defendant was not "about to be injured" when he found victim sleeping, thus he was not entitled to use force to prevent her from driving away, car was not "in his…possession," rather it was in victim's possession at the time he fired; even if defendant met the "about to be injured" element of RCW 9A.16.020, "firing a gun multiple times at close range through the glass into the car was far more force than was necessary, *see: State v. Madry*, 12 Wn.App. 178, 181 (1974), *State v. Walker*, 136 Wn.2d 767 (1998), *State v. Brightman*, 155 Wn.2d 506, 523-24 (2005), *cf.: State v. George*, 161 Wn.App. 86 (2011), *but see: State v. Collins*, 30 Wn.App. 1 (1981); II.

***State v. Arth***, 121 Wn.App. 205 (2004)

Lawful use of force statute may apply to a charge of malicious mischief where the property damaged was used to threaten the accused with bodily harm; I.

***State v. Haydel***, 122 Wn.App. 365 (2004)

Trial court grants defendant's motion to withdraw guilty plea to attempted assault 1° because he was not told, at the time of plea, that state had burden to disprove self defense beyond a reasonable doubt; held: because defendant presented no evidence of self defense, state had no obligation to inform him of its burden of proof on his "purely hypothetical claim at the time" of the plea, even though defense had disclosed self defense in omnibus application; I.

***State v. Brightman***, 155 Wn.2d 506, 518-27 (2005)

Defendant gives money to victim for marijuana, victim does not provide drugs, defendant fights victim, defendant's gun discharges accidentally, killing victim, court refuses defense offer of justifiable homicide instructions, RCW 9A.16.050; held: while victim's attempt to retain money may have been a robbery, at 521 n. 9, trial court's decision that, as a matter of law, the use of deadly force was unreasonable where defendant was attempting to recover a small amount of money from someone whom defendant did not fear was proper, *see: State v. Madry*, 12 Wn.App. 178, 181 (1974), *State v. Brenner*, 53 Wn.App. 367 (1989), *overruled, on other grounds, State v. Wentz*, 149 Wn.2d 342 (2003) *State v. Castro*, 30 Wn.App. 586, 588-89 (1981), *State v. Nyland*, 47 Wn.2d 240 (1955), *State v. Brown*, ___ Wn.App.2d ___, 37645-1-III, 37718-1-III (2022); on remand, defendant may be entitled to excusable homicide instruction, RCW 9A.16.030, *but see: State v. Henderson*, 192 Wn.2d 508 (2018), *cf.: State v. Callahan*, 87 Wn.App. 925, 932-33 (1997); reverses, on other grounds, *State v. Brightman*, 112 Wn.App. 260 (2002); 9-0.

***State v. Werner***, 170 Wn.2d 333 (2010)

Defendant is being menaced by dogs, asks dog owner to call them off, owner declines, defendant points gun, then lowers it, it discharges into ground, court declines to give self defense instructions; held: self defense and accident are not necessarily mutually exclusive, *State v.*

*Callahan*, 87 Wn.App. 925. 931-33 (1997), *State v. Fondren*, 41 as17 (1985); here, evidence that complainant refused to call off dogs could reasonably have led defendant to believe that complainant personally posed a threat to him through the dogs, leads to sufficient evidence of both accident and self defense; *per curiam.*

***State v. Lewis***, 156 Wn.App. 230, 238-39 (2010)

In robbery case, state does not have the burden to prove the absence of self- defense; II.

***State v. George***, 161 Wn.App. 86 (2011)

To get self defense instructions in homicide case, defendant must produce some evidence that (1) the killing occurred in circumstances amounting to defense of life and (2) defendant had a reasonable apprehension of great bodily harm and imminent danger; imminent threat need not actually be present so long as a reasonable person in defendant's position would have believed threat was present; imminent threat does not require any actual physical assault or attempted lethal assault, need not be immediate, *State v. Janes*, 121 Wn.2d 220, 241 (1993); trial court should deny self defense instructions only where defense theory is completely unsupported by evidence, *State v. Barnes*, 153 Wn.2d 378, 382 (2005), *State v. Thysell*, 194 Wn.App. 422 (2016); 2-1, II.

***State v. Walker***, 164 Wn.App. 724 (2011)

In defense of other case, prosecutor arguing that the standard would be met if the jury would have taken the same action in defense of another is error, as test is not for jury to substitute its subjective belief about how a juror would respond, rather test is objective, *State v. Janes*, 121 Wn.2d 220, 238 (1993); II.

***State v. McCreven,*** 170 Wn.App. 444, 468-71 (2012)

Where court gives self defense instructions, prosecutor's argument that defense has a burden to prove self defense to the jury is burden-shifting error; II.

***State v. Villanueva***, 177 Wn.App. 251 (2013)

Self defense reimbursement, RCW 9A.16.110 (1995), includes lost wages from the time of arrest; III.

***State v. Duarte Vela***, 200 Wn.App. 306 (2017)

In homicide case with lawful use of force defense, defendant offers evidence that defendant was told that deceased had threatened to kill defendant's family, that deceased had abducted defendant's sister and defendant was aware of it, and that deceased had beaten his wife, defendant's sister, also known to defendant, trial court excludes it based upon relevance, remoteness, hearsay; held: evidence offered was not hearsay as it was offered to establish defendant's state of mind, not offered to prove the truth but to show reasonableness of defendant's fear of deceased, *State v. Cloud*, 7 Wn.App. 211, 218 (1972), *State v. Walker*, 13 Wn.App. 545, 549 (1975); "ER 403 balancing of probative value versus unfair prejudice is weighed differently when the defense seeks to admit evidence that is central to its defense, at 320," weak or false evidence is not a basis to exclude such evidence as it can be tested on cross, *but see: State v. Burnam*, 4 Wn.App.2d 368 (2018); evidence central to the defense should be

admitted regardless of remoteness, distinguishing *State v. Adamo*, 120 Wash. 268 (1922); 2-1, III.

***State v. Yelovich,*** 191 Wn.2d 774 (2018)

No contact order issued, defendant assaults victim, is charged with felony violation of a no contact order enhanced by the assault, claims she stole his phone from his car and he chased her to recover it, court declines to instruct on defense of property, RCW 9A.16.020(3) (1986); held: a no contact order must be followed, *State v. Dejarlais*, 136 Wn.2d 939, 969 (1998), defense of property is not available as a defense regardless of the fact that assault is an element of the crime; affirms *State v. Yelovich*, 1 Wn.App.2d 38 (2017); 9-0.

***State v. Burnam,*** 4 Wn.App.2d 368 (2018)

Defense proffer that defendant knew that homicide victim had previously assisted a boyfriend in hiding a homicide weapon is refused; held: mere fact that victim dated a man accused of murder and hid the weapon does not "strongly imply" that victim was violent, prejudice from excluding this "questionable evidence" is minimal, trial court did not violate defendant's right to present a defense, distinguishing *State v. Duarte Vela*, 200 Wn.App. 306 (2017); III.

***State v. K.A.B.***, 14 Wn.App.2d 677, 702-03 (2020)

In a bench trial judge need not *sua sponte* consider self-defense; II.

***State v. Jennings***, 199 Wn.2d 53 (2022)

In murder/self-defense case defendant testifies he recognized that victim was high, court precludes defense toxicologist from testifying that victim had methamphetamine in his system; held: evidentiary ruling is reviewed for abuse of discretion but appellate court must consider *de novo* whether defendant was deprived of his 6th Amendment right to present a defense, *State v. Arndt*, 194 Wn.2d 784, 797-98 (2019); here, defendant's detailed testimony about his observations of victim being high was sufficient for defense to argue self-defense, thus exclusion of toxicology evidence did not violate right to present a defense, *State v. Ritchie*, ___ Wn.App.2d ___, 520 P.3d 1105 (2022), distinguishing *State v. Lewis*, 141 Wn.App. 367 (2007). *cf.: State v. Duarte Vela*, 200 Wn.App. 306, 326 (2017), *State v. Jones*, 168 Wn.2d 713, 721 (2010), *State v. Arndt*, 194 Wn.2d 784, 797-98 (2019); affirms *State v. Jennings*, 14 Wn.App.2d 779 (2020); 7-2.

***State v. Fleeks***, ___ Wn.App.2d ___, 2023WL355082 (2023)

Defendant initiates a fight, arguably withdraws and disengages from it, victim follows defendant who has backed up against a wall, victim throws a "hard punch," defendant shoots and kills victim, court gives first aggressor instruction, defense counsel does not offer instruction on revived self-defense; held: "the right of self-defense is revived as to the aggressor if that person in good faith withdraws from the aggression in such time and manner as to clearly apprise the other person that they intend to disengage in further aggression," *State v. Dennison*, 115 Wn.2d 609 (1990), *State v. Craig*, 82 Wn.2d 777 (1973),

counsel was ineffective for failing to propose such an instruction; I.

# MANDATORY JOINDER*

***State v. Mitchell***, 30 Wn.App. 49 (1981)

Defendant charged with six burglaries several months after being arrested but not charged in a seventh burglary; speedy-trial rule does not commence for six counts at arrest for seventh permissibly joined offense, CrR 4.3(a) unless offenses are related arising from the same criminal conduct and thus required to be joined, CrR 4.3(c); I.

***State v. Anderson***, 96 Wn.2d 739 (1982)

Defendant is convicted in 1977 of murder 1° by "extreme indifference," RCW 9A.32.030(1)(b); conviction is reversed on appeal by Supreme Court; defendant is then charged with murder 1° by premeditation; Supreme Court orders information dismissed without prejudice, as state failed to join related offenses of premeditated murder 1° with murder 1° by extreme indifference, CrR 4.3(c)(3), *but see: State v. Havens*, 70 Wn.App. 251 (1993); Supreme Court holds state is not barred by double jeopardy clause from charging defendant with any lesser included offense (murder 2°, manslaughter), as original reversal was not based upon insufficiency of evidence, but rather upon inapplicability of statute [extreme indifference does not apply where defendant intended death of particular victim, *State v. Anderson*, 94 Wn.2d 176 (1980)]; 6-3.

***State v. Holt***, 36 Wn.App. 224 (1983)

Where offenses are intimately related under the mandatory joinder rule, CrR 4.3(c), defendant does not waive his right to joinder by failing to so move if he was unaware of the charges at such a time as to afford him a reasonable opportunity to evaluate the situation; remedy is dismissal of second set of charges; II.

***State v. Thompson***, 36 Wn.App. 249 (1983)

Defendant is convicted of two counts of VUCSA on 4 May 1981; on 28 May 1981 state files information charging four more counts, alleging that crimes occurred before crimes that were subject of the 4 May conviction; held: while the charges were subject to permissive joinder, CrR 4.3(a), as they were of the "same or similar character," they were not "related offenses" requiring mandatory joinder, CrR 4.3(c), *State v. Mitchell*, 30 Wn.App. 49 (1981), *State v. Lee*, 132 Wn.2d 498 (1997), *distinguishing State v. Dailey*, 18 Wn.App. 525 (1977); I.

***State v. Bradley***, 38 Wn.App. 597 (1984)

Following a chase, defendant is cited for misdemeanor marijuana, which charge is dismissed in district court; later, felony flight charge is filed; held: marijuana and felony flight do not arise from same conduct, thus charges are not subject to mandatory joinder, CrR 4.3(c), *State v. Kindsvogel*, 149 Wn.2d 488 (2003), *see: State v. Downing*, 122 Wn.App. 185 (2004), *distinguishing State v. Erickson*, 22 Wn.App. 38 (1978), *but see: State v. Harris*, 130 Wn.2d 35 (1996), *State v. Lee*, 132 Wn.2d 498 (1997); I.

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* *See also:* **JOINDER, SEVERANCE AND CONSOLIDATION**

***State v. Dixon***, 42 Wn.App. 315 (1985)

Defendant is charged in district court with aiming or discharging a firearm, on day of trial state could not prove the charge, and it was dismissed; later, state charged defendant in Superior Court with felon in possession of firearm, RCW 9.41.040 for identical incident; held: the offenses were related, were within the jurisdiction and venue of the Superior Court, were based on the same conduct, thus defendant was harassed by successive prosecutions, and the felon in possession charge must be dismissed, CrR 4.3(c), *State v. Harris*, 130 Wn.2d 35 (1996); the fact that jeopardy had not attached to first trial is inconsequential, since state had initiated legal proceedings, was unable to proceed because it had not subpoenaed a witness, defendant was present and ready to defend; I.

***State v. Fladebo***, 53 Wn.App. 116 (1988), *aff'd on different grounds*, 113 Wn.2d 388 (1989)

At DUI arrest, police find drugs on defendant; defendant is charged with DUI immediately in municipal court, VUCSA charge filed in superior court four months later, seeks dismissal of VUCSA arguing both offenses arose from same conduct, *State v. Peterson*, 90 Wn.2d 423 (1978); held: because municipal court had exclusive jurisdiction over DUI as violation of municipal ordinance and had no jurisdiction over felony charge, and because conduct proscribed by each offense was unrelated, offenses were not within the jurisdiction and venue of the same court and were not based upon the same conduct, CrR 4.3(c), *State v. Kindsvogel*, 149 Wn.2d 477 (2003), *but see*: RCW 35.20.250, *State v. Harris*, 130 Wn.2d 35 (1996), *cf.: State v. Duffy*, 86 Wn.App. 334, 344-6 (1997), *State v. Lee*, 132 Wn.2d 498 (1997); further, it was reasonable for prosecutor to wait for crime lab tests on drugs before filing charges, *distinguishing State v. Erickson*, 22 Wn.App. 38 (1978); I.

***State v. Carter***, 56 Wn.App. 217 (1989)

Following hung jury on robbery 1° charge, state is allowed to amend to assault 1°, defense counsel neglects to raise mandatory joinder objection, CrR 4.3(c)(3); held: robbery and assault are based upon same conduct and are thus related, CrR 4.3(c)(1), hung jury is a trial for purposes of CrR 4.3, *State v. Russell*, 101 Wn.2d 349 (1984); failure to join assault before first trial mandates dismissal; because amendment after trial invoked an uncharged, not joined related offense, then a "substantial right of the defendant" was prejudiced, irrespective of trial court's granting of state's motion to amend, CrR 2.2(e); "ends of justice" exception, CrR 4.3(c)(3), is inapplicable, as state has not shown "extraordinary circumstances" warranting its application, *see: State v. Ramos*, 124 Wn.App. 334 (2004), *State v. Wright*, 165 Wn.2d 783 (2009); defense counsel's failure to move to dismiss was ineffective assistance, depriving defendant of fair trial; I, 2-1.

***State v. Havens***, 70 Wn.App. 251 (1993)

Conviction of rape of a child alleged to have occurred on a specific date is reversed on appeal, information is then amended to allege that the offense occurred over a seven month period, defendant maintains the amendment violates mandatory joinder, CrR 4.3(c)(3); held: because amendment did not charge defendant with a different offense or a higher degree, *State v. Anderson*, 96 Wn.2d 739, 742 (1982), nor increase the number of counts, *State v. Courville*, 63 Wn.2d 498, 500 (1963), nor charge an alternative means of committing the crime, *State v.*

*Russell*, 101 Wn.2d 348. 352 (1984), no mandatory joinder violation occurred; the amendment affected only the date, a matter of form rather than substance, *State v. DeBolt*, 61 Wn.App. 58, 62 (1991), *State v. Goss*, 189 Wn.App. 571, 576-77 (2015), *affirmed, on other grounds*, 186 Wn.2d 372 (2016); III.

***State v. Dallas***, 126 Wn.2d 324 (1995)

Where trial court erroneously allows state to amend information to a different crime at the close of state's case, *State v. Vangerpen*, 125 Wn.2d 782 (1995), proper remedy is dismissal with prejudice under mandatory joinder analysis, CrR 4.3(c), *see: State v. Ramos*, 124 Wn.App. 334 (2004); theft and PSP based on same conduct are related charges, *see: State v. Downing*, 122 Wn.App. 185 (2004), *State v. Canfield*, 13 Wn.App.2d 410 (2020); 9-0.

***State v. Harris***, 130 Wn.2d 35 (1996)

Defendant is arrested in stolen car, cited in district court for driving without a license, pleads guilty, 139 days later is charged with taking and riding in juvenile court, motion to dismiss is denied; held: offenses arose from same criminal conduct, thus under 2 *American Bar Ass'n, Standards for Criminal Justice Std.* 12-2.2 (2d ed. 1980), which is applicable in juvenile court, *State v. Peterson*, 90 Wn.2d 423, 431 (1978), when multiple charges stem from the same criminal conduct or criminal episode, state must prosecute all related charges within the speedy trial time limits, even when the charges were split between district and juvenile or superior courts, *Peterson, supra.*, *see: State v. Bradley*, 38 Wn.App. 597, 599 (1984), *State v. Wilke*, 28 Wn.App. 590, 594 (1981), distinguishing *State v. Fladebo*, 53 Wn.App. 116 (1988), *aff'd on different grounds*, 113 Wn.2d 388 (1989), where charges were prosecuted by different prosecutorial authorities in different courts with exclusive jurisdictions; accord: *State v. Lee*, 132 Wn.2d 498 (1997), , *but see: State v. Keltner*, 102 Wn.App. 396 (2000) re: infractions; 9-0.

***State v. Lee***, 132 Wn.2d 498 (1997)

Defendant is convicted of theft for obtaining money from another as rent for a residence he did not own, is later charged with theft for same scheme from a different victim, trial court dismisses, holding that crimes part of a common scheme or plan are related offenses subject to mandatory joinder, CrR 4.3(A)(b); held: offenses are "related" for purposes of mandatory joinder if they are based on the same conduct, but not a common scheme, as occurred here, which is subject to permissive joinder, CrR 4.3(a)(2), *State v. Downing*, 122 Wn.App. 185 (2004); whether state is aware of additional charges is not the dispositive inquiry, at 505, *see: State v. Kindsvogel*, 149 Wn.2d 477 (2003), *State v. Canfield*, 13 Wn.App.2d 410 (2020); reverses *State v. Lee*, 81 Wn.App. 609 (1996); 9-0.

***State v. Duffy***, 86 Wn.App. 334, 341-6 (1997)

Police book defendant and file citation charging DUI, city declines to prosecute but does not seek order of dismissal, defendant is charged with DUI and hit-and-run in superior court four months later; held: dismissal of DUI was necessary to toll speedy trial period, CrRLJ 3.3(g)(4), defendant had no obligation to assert right to speedy trial when city has indicated it will not prosecute and state has not filed charge, distinguishing *State v. Rock*, 65 Wn.App. 654 (1992), *State v. Carson*, 128 Wn.2d 805 (1996), *disavowed, on other grounds, State v. Walker*, ___ Wn.2d ___, 99813-2 (2022); hit-and-run charge arose from same criminal episode and transaction, *State v. Erickson*, 22 Wn.App. 38, 44 (1978), thus speedy-trial period must begin

from time defendant was held to answer any charge with respect to that conduct or episode, *State v. Peterson*, 90 Wn.2d 423, 431 (1978), where all evidence was available to the prosecutor at the time the first charge was filed, *but see: State v. Kindsvogel*, 149 Wn.2d 477 (2003); III.

***State v. Guttierrez***, 92 Wn.App. 343 (1998)

Following hung jury mistrial, *State v. Carter*, 56 Wn.App. 217 (1989), court allows amendment to add allegation that drug delivery occurred within 1000 feet of school bus stop zone, defense seeks dismissal for failure to join prior to first trial; held: enhancements are not offenses for purposes of CrR 4.3A(b)(3), thus amendment was proper; I.

***State v. Downing***, 122 Wn.App. 185 (2004)

Defendant bounces checks, is charged in district court and superior court with UIBC for different checks, thus joinder was not mandatory, *State v. Lee*, 132 Wn.2d 498, 501 (1997), distinguishing *State v. Dallas*, 126 Wn.2d 324, 329 (1995); II.

***State v. Kenyon***, 150 Wn.App. 826 (2009)

Defendant is convicted of unlawful possession of a firearm in 2004, state charges him with unlawful possession of the same firearm in 2005, maintaining that it withheld the second charge for tactical reasons; held: offenses were related and should have been charged at the same time, CrR 4.3(a)(1), -(2), 4.3.1, and thus dismissal is mandated as state was aware of the facts constituting the second "artificially separated" prosecution, *see also: State v. Mata*, 180 Wn.App. 108 (2014); II.

***State v. Gamble***, 168 Wn.2d 161, 167-75 (2010)

In consolidated cases, defendants' convictions for felony murder 2°/assault are reversed, *Pers. Restraint of Andress*, 147 Wn.2d 602 (2002), on remand trial court permits amendments to different homicide charges; held: "ends of justice" exception to the mandatory joinder rule, CrR 4.3.1(b)(3), applies where there are reasons extraneous to the action of the court, out of the ordinary and not within the control of the state, *State v. Ramos*, 124 Wn.App. 334 (2004), *State v. Dallas*, 126 Wn.2d 324, 333 (1995), *State v. Carter*, 56 Wn.App. 217, 223 (1989), *see: State v. Wright*, 131 Wn.App. 474, 487-88 (2006), 165 Wn.2d 783 (2009); here, because the Supreme Court abandoned an unbroken line of precedent after 25 years, extraneous to the prosecutions, state filed charges and sought instructions in accordance with long-standing interpretations of state law, state may try defendant for other homicides, *see: State v. Ramos*, 163 Wn.2d 654 (2008); affirms *State v. Gamble*, 137 Wn.App. 892 (2007); 8-1.

***State v. Canfield***, 13 Wn.App.2d 410 (2020)

Defendant is convicted of obstructing a public servant, reversed and remanded on direct appeal, at retrial state adds, without objection, two counts arising from the same conduct; held: while different offenses arising at the same time are not subject to the mandatory joinder rule, CrR 4.3.1(b)(3), where new charges arise from the same conduct as the original charge and the prosecutor was aware of the facts then the mandatory joinder rule bars a second prosecution, *State v. Peterson*, 90 Wn.2d 423 (1978), *State v. Anderson*, 96 Wn.2d 739 (1982), *State v. Dallas*, 126 Wn.2d 324 (1995) *State v. Holt*, 36 Wn.App. 224 (1983). *State v. Kindsvogel*, 149 Wn.2d 477, 482-83 (2003) *State v. McNeil*, 20 Wn.App. 527, 532 (1978), *State v. Lee*, 132 Wn.2d 498, 503 (1997); III.

# MANDATORY SEVERANCE
## ***Bruton***

***State v. Vannoy***, 25 Wn.App. 464 (1980)

Where co-defendant's confessions are redacted, "we" does not cure *Bruton* error where confession clearly refers to defendant, *Gray v. Maryland*, 149 L.Ed.2d 294 (1998), *State v. Vincent*, 131 Wn.App. 147 (2005), *State v. Fisher*, 186 Wn.2d 836, 841-48 (2016), *cf.: State v. Medina*, 112 Wn.App. 40 (2002), ; I.

***State v. Samsel***, 39 Wn.App. 564 (1985)

Unless co-defendant's statement expressly or by direct inference refers to or incriminates defendant, severance is not mandatory, CrR 4.4(c); discretionary severance may require an offer of proof as to defendant's testimony; III.

***State v. Anderson***, 41 Wn.App. 85 (1985), *rev'd on other grounds*, 107 Wn.2d 745 (1987)

Trial court admits statement of co-defendant in joint trial as a co-conspirator's statement, ER 801(d)(2)(v); appellate court determines statement was not admissible as exception to hearsay; held: severance is mandated, CrR 4.4(c)(1), *Bruton v. United States*, 20 L.Ed.2d 476 (1968), *Gray v. Maryland*, 140 L.Ed.2d 294 (1998) *cf.: State v. Wilcoxon*, 185 Wn.2d 324 (2016); II.

***Richardson v. Marsh***, 95 L.Ed. 176 (1987)

Confrontation clause is not violated where, at a joint trial, co-defendant's confession is admitted, even though the defendant is linked to the confession by other evidence as long as the co-defendant's confession is redacted to eliminate not only the defendant's name and any reference to the defendant's existence, *see: State v. Marsh*, 112 Wn.App. 40 (2002), but also the jury is instructed not to use the co-defendant's confession against the defendant, *State v. DeLeon*, 185 Wn.App. 171, 206-13 (2014), *reversed, on other grounds*, 185 Wn.2d 478 (2016), *State v. Moses*, 193 Wn.App. 341 (2016); 6-3.

***State v. Mitchell***, 117 Wn.2d 521 (1991), *overruled, in part, State v. Dent*, 123 Wn.2d 467, 484-6 (1994)

Co-defendants need not be severed under mandatory severance rule, CrR 4.4(c)(1), where unredacted confession is admissible as declaration against penal interest, *see also: State v. Wilcoxon*, 185 Wn.2d 324 (2016); statement of defendant, offered by co-defendant, may be improperly admitted in joint trial even if it would have been admissible if offered by state; harmless here; 9-0.

***State v. Alsup***, 75 Wn.App. 128 (1994)

To avoid mandatory severance of co-defendant, CrR 4.4(c)(1), trial court redacts defendant's statement to replace "we" with "I," defendant objects claiming emendation deprived him of a "mere presence" defense and violates the "rule of completeness;" held: under these facts, changes to statement were no more prejudicial than original; rule of completeness: where part of written or recorded statement has been introduced, party is entitled to seek admission of

remainder of the statement, ER 106; rule of completeness is violated, and severance is required, only where admission of the statement in its edited form distorts meaning of the statement or excludes information substantially exculpatory to declarant, *United States v. Kaminski*, 692 F.2d 505, 522 (8th Cir. 1982), *State v. Larry*, 108 Wn.App. 894, 908-10 (2001); I.

***State v. Cotten***, 75 Wn.App. 669, 690-2 (1994)

Where co-defendant's statement does not name or acknowledge existence of defendant as accomplice but defendant is implicated by out-of-court statements through linkage with other evidence, severance is not required, *Richardson v. Marsh*, 95 L.Ed.2d 176 (1987), *State v. Moses*, 193 Wn.App. 341 (2016), *distinguishing Bruton v. United States*, 20 L.Ed.2d 476 (1968), *cf.: Gray v. Maryland*, 140 L.Ed.2d 294 (1998), *State v. Marsh*, 112 Wn.App. 40 (2002), *State v. Fisher*, 186 Wn.2d 836, 841-48 (2016); II.

***State v. Campbell***, 78 Wn.App. 813, 818-20 (1995)

Severance of co-defendants should be required only when testimony includes powerfully incriminating extrajudicial statements of a co-defendant, *State v. Dent*, 123 Wn.2d 467, 486 (1994), *State v. Jones*, 93 Wn.App. 166, 170-72 (1998), *cf.: State v. Wilcoxon*, 185 Wn.2d 324 (2016); II.

***Gray v. Maryland***, 140 L.Ed.2d 294 (1998)

Where a redacted confession substitutes blank spaces where the confession refers to the co-defendant, protective rule of *Bruton v. United States*, 20 L.Ed.2d 476 (1968), applies, and case must be severed, *State v. Vincent*, 131 Wn.App. 147 (2005), *see: State v. Larry*, 108 Wn.App. 894 (2001), *State v. Medina*, 112 Wn.App. 40 (2002), *State v. Fisher*, 186 Wn.2d 836, 841-48 (2016); 5-4.

***State v. Vincent***, 131 Wn.App. 147 (2005)

Where the only reasonable inference from a redacted confession is that the "other guy" is the joined co-defendant, then the redaction failed in its purpose and the admission of the confession violates co-defendant's confrontation rights, *State v. Vannoy*, 25 Wn.App. 464 (1980), *Gray v. Maryland*, 140 L.Ed.2d 294 (1998), *State v. Fisher*, 186 Wn.2d 836, 841-48 (2016), *cf.: State v. Wilcoxon*, 185 Wn.2d 324 (2016), distinguishing *State v. Medina*, 112 Wn.App. 40 (2002), *State v. Herd*, 14 Wn.App. 959, 964 (1976), *State v. Ferguson*, 3 Wn.App. 898, 905-06 (1970), harmless here; I.

***State v. Wilcoxon***, 185 Wn.2d 324 (2016)

In joint trial civilian testifies that codefendant bragged that he and "a friend" burglarized a business, motion to sever denied but not renewed, no objection made to statement; held: because statement was not testimonial *Bruton* doctrine was not violated as statement is outside the scope of the confrontation clause, trial court apparently instructed jury not to use statement of codefendant against defendant, severance was not required; affirms *State v. Wilcoxon*, 185 Wn.App. 534 (2015); 5-4.

***State v. Fisher***, 186 Wn.2d 836, 841-48 (2016)

Witness testifies there were three participants in crime one of whom remained

unidentified, court admits redacted confession substituting "first guy" for name of defendant, evidence extrinsic of confession makes it obvious that "first guy" is defendant; held: where a redacted co-defendant's statement obviously refers to defendant and only reasonable inference jury could have drawn is that "first guy" is the defendant, severance is mandatory regardless of limiting instruction, *Gray v. Maryland,* 523 U.S. 185, 140 L.Ed.2d 294 (1998), *State v. Vincent,* 131 Wn.App. 147 (2005), *State v. Vannoy,* 25 Wn.App. 464 (1980), *cf.: State v. Cotton,* 75 Wn.App. 669, 690-02 (1994), *see: Richardson v. Marsh,* 481 U.S. 200 95 L.Ed.2d 176 (1987), harmless here; affirms *State v. Fisher,* 184 Wn.App. 766 (2014); 6-3.

# MERGER*

***State v. Ticeson***, 26 Wn.App. 876 (1980)

Assault 2° (with intent to commit indecent liberties) and indecent liberties merge; I.

***Whalen v. United States***, 63 L.Ed.2d 715 (1980)

While holding that, in this case, felony-murder (rape) and rape of same victim merge, majority leaves open possibility that legislatures could permit double punishment; 7-2.

***State v. Regan***, 28 Wn.App. 680 (1981)

Assault 1° and kidnap 1° merge into rape 1°.

***State v. Peyton***, 29 Wn.App. 701 (1981)

Robbery and felony-murder based upon same robbery do not merge, *State v. McJimpson*, 79 Wn.App. 164, 175-7 (1995), *overruled, on other grounds, State v. Fernandez-Medina,* 141 Wn.2d 448 (2000), *but see: State v. Fagundes,* 26 Wn.App. 477 (1980), *State v. Muhammad,* 194 Wn.2d 577 (2019), *cf.: State v. Heng,* ___ Wn.App.2d ___, 83280-8-I (2022); II,

***State v. Prater***, 30 Wn.App. 512 (1981)

During a robbery, one defendant shoots a victim, other defendant jabs at a victim with a gun; held: the shooting was no part of the robbery, thus an assault charge does not merge into the robbery, *State v. Freeman,* 118 Wn.App. 365 (2003), *State v. Knight,* 176 Wn.App. 936, 950-56 (2013), the jabbing was not separate and distinct from the robbery, thus that assault charge merges with the robbery; I.

***State v. Birgen***, 33 Wn.App. 1 (1982)

Rape and statutory rape statutes define a single crime of rape, *see: State v. Calle,* 125 Wn.2d 769 (1995), *cf.: State v. Chenoweth,* 185 Wn.2d 218 (2016); I.

***State v. Johnson***, 96 Wn.2d 926 (1982), *overruled, in part, State v. Calle,* 125 Wn.2d 769 (1995)

Statutory rape and indecent liberties do not merge where the evidence establishes separate incidents, *see: State v. Sweet,* 138 Wn.2d 466 (1999), *State v. Lynch,* 93 Wn.App. 716, 723-27 (1999); extensive discussion of merger and remedies; 9-0.

***State v. Bonds***, 98 Wn.2d 1 (1982), *overruled, in part, sub nom., State v. Calle,* 125 Wn.2d 769 (1995)

Rape 1° and burglary 1° do not merge, RCW 9A.52.050; *State v. Hoyt,* 29 Wn.App. 372 (1981).

***State v. Schneider***, 36 Wn.App. 237 (1983)

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* *See also:* **DOUBLE JEOPARDY/COLLATERAL ESTOPPEL**

Solicitation to commit murder, RCW 9A.08.020(3), and attempted murder of same victim do not merge; I.

***State v. Vladovic***, 99 Wn.2d 413 (1983)

Kidnapping does not merge into robbery 1°, *State v. Johnson*, 96 Wn.2d 926 (1982), *State v. McFarland*, 73 Wn.App. 57, 66-9 (1994), *State v. Grant*, 172 Wn.App. 496 (2012), *cf.*, *State v. Allen*, 94 Wn.2d 860, 864 (1980) (*dicta* to contrary reversed), *see: State v. Rivera*, 85 Wn.App. 296, 301-3 (1997), *State v. Rattana Keo Phuong*, 174 Wn.App. 494 (2013), *State v. Berg*, 181 Wn.2d 857 (2014), *but see: State v. Korum*, 120 Wn.App. 686 (2004), 157 Wn.2d 614 (2006); double jeopardy does not prohibit consecutive sentences for robbery 1° and kidnapping; 5-4.

***State v. Hudlow***, 36 Wn.App. 630 (1984)

Kidnapping and assault merge into rape 1° where all are based on same incident, same victim; *but see: State v. Larkin*, 70 Wn.App. 349 (1993); II.

***State v. Arnett***, 38 Wn.App. 527 (1984)

Kidnap 1° (with intent to commit indecent liberties) and indecent liberties do not merge as indecent liberties is not a lesser of kidnap 2°; II.

***State v. Davis***, 47 Wn.App. 91 (1987)

When an offense is proven which elevates another crime to a higher degree, an additional conviction for that offense cannot be allowed to stand unless it involves a separate and distinct injury not merely incidental to crime of which it forms an element; here, assault 1° merges into robbery 1°, *State v. Johnson*, 92 Wn.2d 671 (1979), *but see: State v. Cole*, 117 Wn.App. 870, 873-78 (2003), *State v. Freeman*, 153 Wn.2d 365 (2005), *State v. Saunders*, 120 Wn.App. 800, 820-24 (2004), *State v. Wade*, 133 Wn.App. 855, 870-72 (2006), *State v. Leming*, 133 Wn.App. 875 (2006); I.

***Pers. Restraint of Fletcher***, 113 Wn.2d 42 (1989)

Double jeopardy clause does not prohibit consecutive sentences unless the offenses are the same in law and in fact; if there is an element in each offense which is not included in the other, and proof of one offense would not necessarily prove the other, then the offenses are not constitutionally the same, *State v. Vladovic*, 99 Wn.2d 413 (1983), *State v. Jones*, 155 Wn.2d 563 (2005), *In re Jones*, 71 Wn.App. 798, 824-6 (1993); doctrine of merger does not prohibit consecutive sentences for crimes arising from a single act unless one of the crimes is an element of the other; here, robbery and kidnapping do not merge since kidnapping does not require proof of robbery but only an intent to commit robbery, *State v. McFarland*, 73 Wn.App. 57, 66-9 (1994), *State v. Vaughn*, 83 Wn.App. 669, 681 (1996); 7-2.

***State v. Lass***, 55 Wn.App. 300 (1989)

Vehicle prowl 1°, RCW 9A.52.100, and taking and riding, RCW 9A.56.070, merge, *but see: State v. L.U.*, 137 Wn.App. 410, 415-17 (2007), *aff'd, on other grounds,* 165 Wn.2d 95 (2008); III.

***State v. Garcia***, 65 Wn.App. 681 (1992)

Defendant is convicted of delivery of drugs and possession with intent to deliver, evidence having established that defendant delivered drugs, possessed more drugs upon arrest; held: because jury was not instructed that the possession with intent to deliver charge could only apply to the drugs still in defendant's possession at arrest and not to the actual delivery, the offenses merge, *see: State v. Vladovic*, 99 Wn.2d 413, 421 (1983), *State v. Burns*, 114 Wn.2d 314, 319 (1990), *but see: State v. Carter*, 74 Wn.App. 320, 333-4 (1994), *rev'd, in part, on other grounds*, 127 Wn.2d 836 (1995), *State v. Fisher*, 74 Wn.App. 804, 816-8 (1994), thus remanded for new trial on possession with intent charge; concurrent sentences doctrine does not apply since SRA offender score on delivery increased due to possession with intent conviction, sentence imposed was not within standard range for delivery alone; I.

***State v. Larkin***, 70 Wn.App. 349 (1993)

Defendants commit residential robbery, stealing property of both husband and wife, charged with two counts; held: no double jeopardy violation where defendant robs from husband and wife; deprivation of any ownership interest, including an undivided share, will support a robbery conviction, as will a taking from one having custody or possession, *State v. Turner*, 31 Wn.App. 843 (1982), *State v. Rupe*, 101 Wn.2d 664 (1984), *distinguishing State v. Johnson*, 48 Wn.App. 531 (1987); doctrine of merger only applies where one offense is a statutory lesser of the other, *State v. Johnson*, 92 Wn.2d 671, 677 n. 4 (1979); crimes against multiple victims are not subject to doctrine of merger, *State v. Hudlow*, 36 Wn.App. 630, 633 (1984), *State v. Clapp*, 67 Wn.App. 263, 275 (1992); I.

***State v. Jones***, 71 Wn.App. 798, 824-6 (1993)

Child molestation 1°, RCW 9A.44.083, and rape of a child 1°, RCW 9A.44.073, are not the same offense, since each requires the state to prove an element that the other does not, *In re Fletcher*, 113 Wn.2d 42, 47 (1989), and do not merge, as the latter is not a lesser of the former, *State v. Speece*, 115 Wn.2d 360, 362 (1990); where two offenses are legally and factually distinct, even though both may have occurred during the same incident, failure to provide a unanimity instruction does not violate double jeopardy clause or doctrine of merger; I.

***State v. McFarland***, 73 Wn.App. 57, 66-9 (1994)

Attempted robbery and kidnapping do not merge and do not violate double jeopardy clause where tried together, as the offenses are not the same in law and in fact, *State v. Vladovic*, 99 Wn.2d 413, 423-3 (1983), *State v. Louis*, 155 Wn.2d 563 (2005), *State v. Grant*, 172 Wn.App. 496 (2012), *see: State v. Rattana Keo Phuong*, 174 Wn.App. 494 (2013); II.

***State v. Bartlett***, 74 Wn.App. 580, 588 (1994), *aff'd, on other grounds*, 128 Wn.2d 323 (1995)

Assault and homicide do not merge for purposes of felony murder, *State v. Crane*, 116 Wn.2d 315 (1991), *State v. Wanrow*, 91 Wn.2d 301 (1978), *State v. Goodrich*, 72 Wn.App. 71, 77 (1993), *State v. Leonard*, 183 Wn.App. 532 (2014), *remanded, on other grounds*, 184 Wn.2d 505 (2015); I.

***State v. Worl***, 74 Wn.App. 605, 611-3 (1994), *rev'd, on other grounds*, 129 Wn.2d 416 (1996)

Attempted murder 2° and malicious harassment do not merge; no modified merger test will apply merely because one of the offenses is an anticipatory offense, *see:* *State v. Harris*, 121 Wn.2d 317, 322 (1993); III.

***State v. McJimpson***, 79 Wn.App. 164, 167-71 (1995), *overruled, on other grounds, State v. Fernandez-Medina,* 141 Wn.2d 448 (2000),

Felony murder (assault) and assault 2° are the same in law, *State v. Vladovic*, 99 Wn.2d 413, 423 (1983), but here are not the same in fact even though they arise from same transaction, *Vladovic, supra*, at 423, thus double jeopardy clause does not bar conviction and punishment for both, *State v. Calle*, 125 Wn.2d 769, 777 (1995), *distinguishing* *State v. Johnson*, 48 Wn.App. 531 (1987), assault is not a lesser included offense of felony murder, *State v. Davis*, 121 Wn.2d 1, 6 (1993); charges do not merge, *State v. Wanrow*, 91 Wn.2d 301, 312 (1978), *State v. Goodrich*, 72 Wn.App. 71, 78-9 (1993), *State v. Leonard,* 183 Wn.App. 532 (2014) , *remanded, on other grounds,* 184 Wn.2d 505 (2015); I.

***State v. Eaton***, 82 Wn.App. 723, 727-32 (1996)

Felony harassment and rape 1° do not merge, as legislature did not clearly indicate that in order to prove rape 1°, state must prove not only rape but also that the rape was accompanied by the harassment, *State v. Vladovic*, 99 Wn.2d 413, 420-1 (1983); I.

***State v. Vaughn***, 83 Wn.App. 669, 681-2 (1996)

Kidnapping and rape do not merge, *In re Fletcher*, 113 Wn.2d 42, 52-3 (1989), *see:* *State v. Contreras*, 124 Wn.2d 741, 745 (1994); I.

***State v. Michielli***, 132 Wn.2d 229, 237-9 (1997)

Merger doctrine is inapplicable pretrial, can only apply where defendant is convicted of multiple counts; 9-0.

***State v. Rivera***, 85 Wn.App. 296 (1997)

Assault and reckless endangerment do not merge as assault does not require proof of reckless endangerment, *see:* *State v. Vladovic*, 88 Wn.2d 413, 421 (1983), *State v. Eaton*, 82 Wn.App. 723, 729 (1996), *State v. Aronhalt*, 99 Wn.App. 302, 311-12 (2000); III.

***State v. Taylor***,90 Wn.App. 312, 319-20 (1998)

Kidnapping 2° and assault 2° do not merge as the crimes arise in different chapters of the penal code, their purposes are different, and neither statute contains language indicating that the legislature clearly intended one crime to be an element of the other, *but see: State v. Davis*, 177 Wn.App. 454 (2013); II.

***State v. Lynch***, 93 Wn.App. 716, 723-27 (1999)

Malicious harassment and assault 4° merge in spite of malicious harassment's antimerger clause, as legislature did not intend to punish twice for malicious harassment and misdemeanor assault, which is an element of malicious harassment, distinguishing *State v. Calle*, 125 Wn.2d 769 (1995), *State v. Worl*, 74 Wn.App. 605, 611-12 (1994), *State v. Robertson*, 88 Wn.App. 836, 847-49 (1997); I.

***State v. Sweet***, 138 Wn.2d 466 (1999)

Assault does not merge in burglary 1º, *State v. Frohs*, 83 Wn.App. 803 (1996), *State v. Davison*, 56 Wn.App. 554 (1990), *State v. Fryer*, 36 Wn.App. 312 (1983), *State v. Hunter*, 35 Wn.App. 708 (1983), *State v. Hoyt*, 29 Wn.App. 372, 378 (1981); effectively overrules *State v. Ortiz*, 77 Wn.App. 790, 794 (1995), *State v. Johnson*, 92 Wn.2d 671, 677 (1979), *see: State v. Cole*, 117 Wn.App. 870, 873-78 (2003); affirms *State v. Sweet*, 91 Wn.App. 612 (1998); 9-0.

***State v. Tili***, 139 Wn.2d 107, 125-26 (1999)

Defendant is convicted of rape and, based upon same evidence, assault as well as burglary; held: rape and assault merge, burglary and assault do not merge, *State v. Collicott*, 118 Wn.2d 649, 657-58 (1992), *see: State v. Lee,* 12 Wn.App.2d 378 (2020); assault may not be counted in offender score for rape, but may be counted in offender score for burglary; 9-0.

***State v. Johnston***, 100 Wn.App. 126, 137-39 (2000)

Attempted murder 2° and robbery 1° do not merge; III.

***State v. Beals***, 100 Wn.App. 189, 193-95 (2000)

Assault 2° and attempted robbery 1° of same victim do not merge, *State v. Tauberg*, 121 Wn.App. 134 (2004), *State v. Wade*, 133 Wn.App. 855, 870-72 (2006), *State v. S.S.Y.*, 150 Wn.App. 325, 329-32 (2009), 170 Wn.2d 322 (2010), *Pers. Restraint of Knight*, 196 Wn.2d 330 (2020), *but see: State v. Freeman*, 153 Wn.2d 765 (2005), *State v. Kier*, 164 Wn.2d 798 (2008); I.

***State v. Parmelee***, 108 Wn.App. 702, 709-11 (2001)

Defendant is convicted of felony stalking, RCW 9A.46.110 for repetitive protection order violations and three counts of misdemeanor violation of protection orders; held: violation of a protection order is an element of felony stalking which merges; because stalking requires repetitive behavior, *State v. Johnson*, 185 Wn.App. 655, 666-70 (2015), two of the three protection order violations must be dismissed, *State v. DeRyke*, 110 Wn.App. 815 (2002), *aff'd, on different grounds*, 149 Wn.2d 906 (2003), *see: State v. Haines*, 151 Wn.App. 428, 440-44 (2009), *State v. Whittaker*, 192 Wn.App. 395, 409-17 (2016); I.

***State v. DeRyke***, 110 Wn.App. 815 (2002), *aff'd, on different grounds,* 149 Wn.2d 906 (2003)

Instruction defines rape 1˚ as rape where perpetrator uses or threatens to use a deadly weapon or kidnaps victim, defendant is also convicted of kidnapping; held: because no separate instruction required jury to specify which act it chose to reach its verdict on the rape charge, principle of lenity requires that rape and kidnap merge, as kidnap is an element of rape, *see: State v. Parmelee*, 108 Wn.App. 702, 710 (2001), *cf.: State v. Freeman*, 153 Wn.2d 765 (2005), *see: State v. Kier*, 164 Wn.2d 798, 808-14 (2008), *Pers. Restraint of Knight,* 196 Wn.2d 330 (2020), *State v. Heng,* ___ Wn.App.2d ___, 83280-8-I (2022); I.

***State v. Cole***, 117 Wn.App. 870, 873-78 (2003)

Defendant robs with a knife, cuts victim, is convicted of assault 2° and attempted robbery 1°; held: because the legislature did not clearly indicate it is necessary to prove one of the crimes in order to prove the other and the assault was not incidental to the attempted robbery, the crimes do not merge, *State v. Tauberg*, 121 Wn.App. 134 (2004), *State v. Wade*, 133 Wn.App. 855, 870-72 (2006), *see: State v. Johnson*, 92 Wn.2d 671, 679-80, *disapproved, on other grounds, State v. Sweet*, 138 Wn.2d 466 (1999), *State v. Potter*, 31 Wn.App. 883, 887-88 (1982), *State v. Valentine*, 108 Wn.App. 24, 28-29 (2001), *State v. Leming*, 130 Wn.App. 875 (2006), *State v. S.S.Y.*, 150 Wn.App. 325, 329-32 (2009), 170 Wn.2d 322 (2010), *Pers. Restraint of Knight,* 196 Wn.2d 330 (2020), *but see: State v. Freeman*, 153 Wn.2d 765 (2005), *State v. Kier*, 164 Wn.2d 798 (2008); I.

***State v. Saunders***, 120 Wn.App. 800, 820-24 (2004)

Victim is bound, raped and killed in defendant's home, defendant is convicted of murder, rape, robbery, kidnapping; held: here, robbery occurred after murder, evidence established that the defendant did not commit robbery to facilitate the murder, *State v. Peyton*, 29 Wn.App. 701, 720 (1981); kidnapping was separate and distinct from the murder, distinguishing *State v. Johnson*, 92 Wn.2d 671, 681 (1979), rape was not merely incidental to the murder, thus no offense merged, *see: State v. Muhammad*, 194 Wn.2d 577 (2019), *State v. Heng,* ___ Wn.App.2d ___, 83280-8-I (2022), *cf.: State v. Williams*, 131 Wn.App. 488, 497-500 (2006); 2-1, II.

***State v. Tanberg***, 121 Wn.App. 134 (2004)

Robbery 1° and assault 2° do not merge, *State v. Cole*, 117 Wn.App. 870 (2003), *State v. S.S.Y.*, 150 Wn.App. 325, 329-32 (2009), 170 Wn.2d 322 (2010), *see: Pers. Restraint of Knight,* 196 Wn.2d 330 (2020), *but see: State v. Freeman*, 153 Wn.2d 765 (2005); I.

***State v. Leyda***i 122 Wn.App. 633, 638-39 (2004)

Identify theft, former RCW 9.35.020 (2000) and possessing stolen property of same credit card do not merge; I.

***State v. Freeman***, 153 Wn.2d 765 (2005)

To determine if different crimes based on the same conduct violate double jeopardy clause, court must see if (1) statutes authorize separate punishments, *State v. Calle*, 125 Wn.2d 769, 777-78 (1995), *State v. S.S.Y.*, 150 Wn.App. 325, 329-32 (2009), 170 Wn.2d 322 (2010), (2) are the two crimes, as charged and proved, the same in law and in fact, *Blockburger v. United States*, 76 L.Ed. 306 (1932), (3) do the crimes merge, *State v. Vladovic*, 99 Wn.2d 413, 419 (1983), and (4) did the commission of the "included" crime have an independent purpose or effect from the other crime?, *State v. Frohs*, 83 Wn.App. 803 (1996); legislature intended to punish assault 1° and robbery 1° separately, but not robbery 1° and assault 2°; assault 2° and robbery 1° will generally merge unless the offenses have an independent purpose or effect, *State v. Leming*, 133 Wn.App. 875 (2006), *State v. Kier*, 164 Wn.2d 798 (2008), *see: State v. Ralph*, 175 Wn.App. 814 (2013), *Pers. Restraint of Knight,* 196 Wn.2d 330 (2020), *cf.: State v. Wade*, 133 Wn.App. 855, 870-72 (2006), *State v. Hancock*, 17 Wn.App.2d 113, 484 P.3d 514 (2021), *but see: State v. Esparza*, 135 Wn.App. 54, 64-67 (2006); affirms *State v. Freeman*,118 Wn.2d 365 (2003) and *State v. Zumwalt*, 119 Wn.App. 126 (2003); 9-0.

***State v. Louis***, 155 Wn.2d 563 (2005)

Kidnapping and robbery convictions for robbing victim and binding him up in bathroom of store do not violate double jeopardy nor do they merge, *State v. Vladovic*, 99 Wn.2d 413 (1983), *Pers. Restraint of Fletcher*, 113 Wn.2d 42, 50 (1989), *State v. Johnson*, 96 Wn.2d 926 (1982), *State v. McFarland*, 73 Wn.App. 66-69 (1994), *State v. Leming*, 133 Wn.App. 875 (2006), *State v. Grant*, 172 Wn.App. 496 (2012), *see: State v. Korum*, 120 Wn.App. 686 (2004), *reversed*, on other grounds,157 Wn.2d 614 (2006), *see: State v. Berg*, 181 Wn.2d 857 (2014); 5-4.

***State v. Atkins***, 130 Wn.App. 395 (2005)

Rape by forcible compulsion and unlawful imprisonment for the same incident do not merge, even if the unlawful imprisonment was incidental to and an aid in effecting the rape, *State v. Rattana Keo Phuong*, 174 Wn.App. 494 (2013); III.

***State v. Williams***, 131 Wn.App. 488, 497-500 (2006)

Defendant robs and shoots victim, is convicted of murder and robbery; held: robbery was integral to the killing, shooting had no purpose or intent outside of accomplishing the robbery and facilitating defendant's departure from the scene, thus crimes merge, distinguishing *State v. Vladovic*, 99 Wn.2d 413 (1983); III.

***State v. Esparza***, 135 Wn.App. 54, 64-67 (2006)

When a firearm is used to commit an attempted robbery 1º, it does not merge into an assault 2º, distinguishing *State v. Freeman*, 153 Wn.2d 765 (2005), *see: State v. Kier*, 164 Wn.2d 798, 807 (2008); I.

***State v. L.U.***, 137 Wn.App. 410, 415-17 (2007), *aff'd, on other grounds,* 165 Wn.2d 95 (2008)

Vehicle prowl and taking a motor vehicle without permission do not merge, *but see: State v. Lass*, 55 Wn.App. 300 (1989); I.

***State v. S.S.Y.***, 150 Wn.App. 325, 329-32 (2009), 170 Wn.2d 322 (2010)

Juvenile offenses of robbery and assault do not merge as legislature expressed its intent to punish the offenses separately, RCW 13.40.180, distinguishing *State v. Freeman*, 153 Wn.2d 765 (2005); II.

***State v. Elmore***, 154 Wn.App. 885, 899-901 (2010)

Burglary and felony murder/burglary may be punished separately even where the burglary is the predicate offense, per burglary antimerger statute, RCW 9A.52.050; II.

***State v. Grant***, 172 Wn.App. 496 (2012)

Defendant pushes into victim's home with gun, ties her up, drags her downstairs, ransacks house, is convicted of robbery and kidnapping; held: separate convictions for robbery 1° and kidnapping 1° do not violate double jeopardy or merge, state does not have to prove that one crime was not incidental to the other, *State v. Vladovic*, 99 Wn.2d 413, 422-23 (1983), *but*

*see: State v. Korum*, 120 Wn.App. 686 (2004), *rev'd, on other grounds*, 157 Wn.2d 614 (2006), *see: State v. Berg*, 181 Wn.2d 857 (2014); 2-1, I.

***State v. Moreno***, 173 Wn.App. 479, 497-99 (2013)

Unlawful possession of a firearm and assault 1° with a firearm do not merge; III.

***State v. Denny***, 173 Wn.App. 805 (2013)

Defendant steals drugs, is convicted of theft of the drugs and possession of the same drugs; held: theft and possession of the same drugs do not merge; II.

***State v. Berg***, 181 Wn.2d 857 (2014)

Whether or not a kidnapping is incidental to another crime does not impact sufficiency of the evidence for the kidnapping; if the elements of kidnapping are established *prima facie*, then there is sufficient evidence regardless of merger analysis, *State v. Rattana Keo Phuong*, 174 Wn.App. 494 (2013), *State v. Grant*, 172 Wn.App. 496 (2012), *State v. Butler*, 165 Wn.App. 820 (2012); reverses *State v. Berg*, 177 Wn.App. 119 (2013); 9-0.

***State v. Davis***, 177 Wn.App. 454 (2014)

Defendant points gun at victims, same act threatened use of deadly force, thus, here, assault 2º and kidnapping merge, distinguishing *State v. Taylor*, 90 Wn.App. 312 (1998), *see: State v. Freeman*, 153 Wn.2d 765 (2005), *Pers. Restraint of Knight,* 196 Wn.2d 330 (2020); I.

***State v. Whittaker***, 192 Wn.App. 395, 409-17 (2016)

Defendant is convicted of felony violation of a court order and felony stalking, RCW 9A.46.110 (2013), verdict is ambiguous as to which improper contacts supported the stalking conviction and prosecutor did not elect thus violation of court order merges into stalking, *State v. Parmelee*, 108 Wn.App. 702 (2001), *State v. DeRyke*, 110 Wn.App. 815 (2002), *aff'd, on different grounds*, 149 Wn.2d 906 (2003), *State v. Kier*, 164 2798 (2008); I.

***State v. Thompson***, 192 Wn.App. 733 (2016)

Defendant makes false statements to Medicaid and obtains money, is convicted of Medicaid false statement, RCW 74.09.230, and theft 1°, argues that they merge; held: intent of Medicaid false statement offense is to protect public health while intent of theft is to protect property, thus they do not merge; I.

***Pers. Restraint of Knight,*** 196 Wn.2d 330 (2020)

Two robberies do not merge here as there were separate forcible takings from the same victim, distinguishing *State v. Tvedt*, 153 Wn.2d 705, 714 (2005), *State v. Freeman*, 153 Wn.2d 765 (2005); while jury instructions did not distinguish between crimes, prosecutor's election in closing argument was adequate, *State v. Carson*, 184 Wn.2d 207, 227 (2015), *State v. Bland*, 71 Wn.App. 345, 350-2 (1993) *State v. Smith*, 17 Wn.App. 146 (2021); 5-4.

***State v. Hancock***, 17 Wn.App.2d 113 (2021)

Defendant is convicted of rape of a child 1° and child molestation 1° over the same time period, prosecutor in closing explains that rape involves instances of penetration, molestation doesn't rise to the level of sexual intercourse; held: where it is clear that two convictions of different crimes over the same period are not based upon the same evidence, *State v. Freeman*, 153 Wn.2d 765 (2005), and where the merger doctrine does not apply there is no double jeopardy violation; even when two statutory violations appear to merge on an abstract level they may be punished separately if defendant's conduct demonstrations an independent purpose or effect of each offense, *State v. Kier,* 164 Wn.2d 798, 804 (2008); III.

***State v. Heng****,* 22 Wn.App.2d 717 (2022)

Defendant is charged with intentional murder and felony murder/arson, jury returns general verdicts of guilty of murder and arson, defense argues that double jeopardy precludes punishment for both crimes; held: the rule of lenity requires that the court must assume defendant was convicted of felony murder, *State v. Deryke*, 110 Wn.App. 815, 824 (2002), *aff'd, on different grounds*, 149 Wn.2d 906 (2003), but here the arson had an effect independent of the murder as the owners of the building were victims in addition to the deceased, so the two offenses do not merge, *State v. Arndt*, 194 Wn.2d 784 (2019), *distinguishing State v. Muhammad*, 194 Wn.2d 577 (2019); I.

***State v. Booth***, ___ Wn.App.2d ___, 521 P.3d 196 (2022)

Defendant is convicted of felony violation of a no contact order, elevated to a felony due to reckless conduct, RCW 26.50.110 (2006) [repealed and re-enacted, LAWS OF 2021, ch. 215, § 170], and attempting to elude a police vehicle, RCW 46.61.024, argues offenses merge since both require reckless conduct; held: legislature intended that the offenses be punished separately even when arising from the same underlying acts, *see: State v. Moreno*, 132 Wn.App. 663, 667-68 (2006); I.

***State v. Gonzalez****,* ___ Wn.App.2d ___, 2023WL365507 (2023)

DUI and vehicular assault from the same incident merge; in a subsequent DUI sentencing court must merge the two in determining offender score even though original trial court did not; III.

# MURDER/MANSLAUGHTER/HOMICIDE*

***State v. Fagundes***, 26 Wn.App. 477 (1980)

Kidnap and rape merges with first degree felony murder, *but see: State v. Muhammad*, 194 Wn.2d 577 (2019); I.

***State v. Von Zante***, 26 Wn.App. 739 (1980)

Provocation defense is not available in homicide prosecution; I.

***State v. Parr***, 93 Wn.2d 95 (1980)

State must prove knowing infliction of grievous harm for felony murder-assault; 9-0.

***State v. Anderson***, 94 Wn.2d 176 (1980)

Murder 1° "under circumstances manifesting an extreme indifference to human life," RCW 9A.32.030(1)(b) does not apply where the act was aimed at a specific individual and no other, *see: State v. Dunbar*, 117 Wn.2d 587 (1991) ; 9-0.

***State v. Green***, 94 Wn.2d 216 (1980)

Kidnap, as an element of aggravated murder 1°, must involve more than the mere incidental restraint and movement of the victim which would occur in the course of the homicide to meet a challenge to sufficiency of the evidence, *State v. Korum*, 120 Wn.App. 686 (2004), 157 Wn.2d 614 (2006), *see: State v. Rattana Keo Phuong*, 174 Wn.App. 494 (2013), *State v. Berg*, 181 Wn.2d 857 (2014); 6-3.

***State v. Collins***, 30 Wn.App. 1 (1981)

Manslaughter 2° is a lesser of **murder** 2°, *but see: State v. Red*, 105 Wn.App. 62 (2001); III.

***State v. Dudrey***, 30 Wn.App. 447 (1981)

Felony-murder is proved if the homicide is within the *res gestae* of the felony, *i.e.*, if there is a close proximity in terms of time and distance between the felony and the homicide, *State v. Golladay*, 78 Wn.2d 121 (1970), *State v. Meza*, ___ Wn.App.2d ___, 512 P.3d 608 (2022)*see: State v. Leech*, 114 Wn.2d 700 (1990); abandonment is not available as defense to felony-murder if death occurred during the commission of the felony, some phase of which defendant participated in; III.

***State v. Hansen***, 30 Wn.App. 702 (1981)

Where physical evidence conclusively establishes defendant held cocked gun to victim's head, then defendant knowingly accepted risk that conduct might result in injury, and thus defendant was properly convicted of manslaughter 1°, not entitled to manslaughter 2° instructions.

***State v. Jones***, 95 Wn.2d 616 (1981)

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* *See also:* **VEHICULAR HOMICIDE, SELF DEFENSE**

Manslaughter 1° is a lesser of intentional murder 2°, *State v. Berlin*, 133 Wn.2d 541 (1997); jury could find that a defendant used self-defense but recklessly or negligently used more force than was necessary; *but see: State v. Bergeson*, 64 Wn.App. 366 (1992); generally approves WPIC 16.02; *see also: State v. Warden*, 80 Wn.App. 448 (1996); 9-0.

***State v. Anderson***, 96 Wn.2d 739 (1982)

Defendant is convicted in 1977 of murder 1° by "extreme indifference," RCW 9A.32.030(1)(b), conviction is reversed on appeal by Supreme Court; defendant is then charged with murder 1° by premeditation; Supreme Court orders information dismissed without prejudice, as state failed to join the related offenses of premeditated murder 1° with murder 1° by extreme indifference, CrR 4.3(c)(3); Supreme Court holds that state is not barred by double jeopardy clause from charging defendant with any lesser included offense (murder 2°, manslaughter), as the original reversal was not based upon insufficiency of the evidence, but rather upon inapplicability of the statute [extreme indifference does not apply where the defendant intended the death of the particular victim, *State v. Anderson*, 94 Wn.2d 176 (1980)]; 6-3.

***State v. Smith***, 31 Wn.App. 226 (1982)

Definitions of reckless and criminal negligence (manslaughter 1° and manslaughter 2°) are clearly distinguishable, *State v. Burley*, 23 Wn.App. 881 (1979); III.

***State v. Beel***, 32 Wn.App. 437 (1982)

Negligent homicide, former RCW 46.61.520, is a lesser of **murder** 2°; III.

***State v. McCullum***, 98 Wn.2d 484 (1983)

State has burden of proving beyond reasonable doubt the absence of self-defense in murder case, modifying *State v. Savage*, 94 Wn.2d 569 (1980); *State v. Hanton*, 94 Wn.2d 129 (1980); *State v. Burt*, 94 Wn.2d 108 (1980); *State v. King*, 92 Wn.2d 541 (1979); 5-3.

***State v. Powell***, 34 Wn.App. 791 (1983)

Defendant is charged with felony-murder 1°, RCW 9A.32.030(1)(c)(5), pleads guilty, on appeal plea is reversed; upon remand state amends to charge premeditated murder 1°, RCW 9A.32.030(1)(a); defendant seeks dismissal for speedy-trial violation because of failure to join a related offense, CrR 4.3(c); held: information may be amended to include an alternate means of committing a crime formerly charged without violating joinder or speedy-trial rules; I.

***State v. Caliguri***, 99 Wn.2d 501 (1983)

State elicits evidence that defendant conspired to burn building and knew that a janitor would die in fire, no direct evidence adduced that defendant intended to kill janitor; held: intent to kill may be inferred from defendant's knowledge that a death would occur; 9-0.

***Kreck v. Spalding***, 721 F.2d 1229 (9th Cir. 1983)

For information to properly charge felony-murder, must specify underlying felony, *but see: State v. Hartz*, 65 Wn.App. 351 (1992), *State v. Medlock*, 86 Wn.App. 89, 101-2 (1997), *State v. Noltie*, 116 Wn.2d 831, 842 (1991).

***State v. Ellison***, 36 Wn.App. 564 (1984)

The time required for premeditation may be very short, provided that it is an "appreciable" period of time within which the defendant may form an intent, *State v. Griffith*, 91 Wn.2d 572, 577 (1979), *State v. Allen*, 159 Wn.2d 1 (2006), *State v. Barajas*, 143 Wn.App. 24, 35-37 (2007), *State v. Sherrill*, 145 Wn.App. 473, 483-87 (2008), *State v. Condon*, 182 Wn.2d 307, 314-15 (2015); jury need not be unanimous where defendant is charged alternatively with premeditated murder 1° and felony-murder 1°, *State v. Arndt*, 87 Wn.2d 374 (1976), *distinguishing* *State v. Green*, 94 Wn.2d 216 (1980); I.

***State v. Bockman***, 37 Wn.App. 474 (1984)

Statutory defense to felony murder as set forth in WPIC 19.01 does not relieve state of burden of proving each element, *distinguishing* *State v. McCullum*, 98 Wn.2d 484 (1984); I.

***State v. Commodore***, 38 Wn.App. 244 (1984)

Diminished capacity is defense to both intent and premeditation elements in murder 1°; I.

***State v. Gamboa***, 38 Wn.App. 409 (1984)

Statutory defense to felony-murder, RCW 9A.32.030(1)(c) does not shift the burden of proof of any element of the crime of felony-murder to the defense, *see also: State v. Fisher*, 185 Wn.2d 836, 848-52 (2016); an accomplice may be obliged to prove lack of knowledge as to a principal being armed when such knowledge is not an element of the underlying charge; I.

***State v. Haley***, 39 Wn.App. 164 (1984)

Where facts support either manslaughter or negligent homicide charge, state must charge negligent homicide where an automobile is involved; III.

***State v. Sellers***, 39 Wn.App. 799 (1985)

*Corpus delicti* for homicide is (1) fact of death and (2) responsibility of a criminal agency for death; causal connection between defendant and crime is not required; no body need be found; II.

***State v. Rupe***, 101 Wn.2d 664 (1984)

In capital case penalty phase, state introduced evidence that defendant legally owned numerous firearms; held: state may not comment on defendant's exercise of a constitutionally protected right, thus *remanded* for a new penalty phase; 9-0.

***State v. Dictado***, 102 Wn.2d 277 (1984)

Mandatory life without parole for noncapital aggravated murder, RCW 10.95.030(1), is constitutional; 9-0.

***State v. Edwards***, 104 Wn.2d 63 (1985)

That death occur within a year and a day of the offense is a common law element of murder; statute which expands that to three years is an *ex post facto* enactment as to acts which occurred prior to the effective date; 9-0.

***State v. Bingham***, 40 Wn.App. 553 (1985), *affirmed*, 105 Wn.2d 820 (1986)

Manual strangulation which took at least three minutes is not, by itself, sufficient evidence to prove premeditation; evidence must be sufficient to support inference that defendant not only had the time to deliberate, but that he actually did so; *cf.*: *State v. Bushey*, 46 Wn.App. 570 (1987), *State v. Gibson*, 47 Wn.App. 309 (1987), *State v. Massey*, 60 Wn.App. 131, 145 (1991), *State v. Rehak*, 67 Wn.App. 157 (1992), *State v. Gentry*, 125 Wn.2d 573, 596-604 (1995), *State v. Clark*, 143 Wn.2d 731, 769-70 (2001), *State v. Allen*, 159 Wn.2d 1 (2006), *State v. Barajas*, 143 Wn.App.24, 35-37 (2007), *State v. Sherrill*, 145 Wn.App. 473, 483-87 (2008), *State v. Notaro*, 161 Wn.App. 654, 670-73 (2011), *State v. Condon*, 182 Wn.2d 307, 314-15 (2015); II.

***State v. Bernson***, 40 Wn.App. 729 (1985)

Circumstantial evidence alone is sufficient to prove who killed victim, when and where he was killed, *State v. Fasick*, 149 Wash. 92, 95 (1928); III.

***State v. Martin***, 41 Wn.App. 133 (1985)

Where state seeks to prove burglary as the aggravating factor to enhance penalty in aggravated murder case, jury must be instructed regarding the crime the defendant intended to commit within the premises; harmless here; III.

***State v. Guloy***, 104 Wn.2d 412 (1985)

To prove aggravated murder 1° by common scheme, RCW 10.95.020(8), state must prove nexus between the killings, not the killers, *State v. Grisby*, 97 Wn.2d 493 (1982); 9-0.

***State v. Carey***, 42 Wn.App. 840 (1986)

Aggravated murder statute, Ch. 10.95, RCW, does not violate equal protection clause; aggravating factors, RCW 10.95.020, are constitutional, *State v. Bartholomew*, 101 Wn.2d 631, 635-6 (1984), and do not violate separation of powers doctrine; I.

***State v. Ollens***, 107 Wn.2d 848 (1987)

Multiple stabbings with a knife, where victim was struck from behind and evidence of motive are sufficient to submit the issue of **premeditation** to the jury, *distinguishing* *State v. Bingham*, 105 Wn.2d 820 (1986); *see*: *State v. Neslund*, 50 Wn.App. 531 (1988), *State v. Longworth*, 52 Wn.App. 453 (1988), *State v. Woldegiorgis*, 50 Wn.App. 92 (1988), *State v. Massey*, 60 Wn.App. 131, 145 (1991), *State v. Hoffman*, 116 Wn.2d 51 (1991), *State v. Ortiz*, 119 Wn.2d 294 (1992), *disapproved, on other grounds, State v. Condon*, 182 Wn.2d 307 (2015), *State v. Rehak*, 67 Wn.App. 157 (1992), *State v. Gentry*, 125 Wn.2d 573, 596-604 (1995), *State v. Pirtle*, 127 Wn.2d 628, 643-8 (1995), *State v. Millante*, 80 Wn.App. 237, 248 (1995), *State v.Clark*, 143 Wn.2d 701, 769-70 (2001), *State v. Gregory*, 158 Wn.2d 759, 816-18 (2006), *overruled, on other grounds, State v. W.R.*, 181 Wn.2d 757 (2014), *State v. Allen*, 159 Wn.2d 1 (2006), .*State v. Elmi*, 138 Wn.App. 306, 313-14 (2007), *aff'd, on other grounds,* 166 Wn.2d 209 (2009), *State v. Barajas*, 143 Wn.App. 24, 35-37 (2007), *State v. Sherrill*, 145 Wn.App. 473 (2008), *State v. Notaro*, 161 Wn.App. 654, 670-73 (2011), *State v. Monaghan*, 166 Wn.App. 521, 535-36 (2012), *State v. Cortes Aguilar*, 176 Wn.App. 264, 272-74 (2013), *State v. Condon*, 182 Wn.2d

307, 314-15 (2015), *State v. DeJesus,* 7 Wn.App.2d 849 (2019), *c;f.: State v. Hummel,* 196 Wn.App. 329 (2016); 9-0.

***State v. Anderson***, 108 Wn.2d 188 (1987)

Aggravated murder 1° defendant is not entitled to 12 peremptory challenges where state does not seek death penalty, CrR 6.4(e); 7-2.

***Martin v. Ohio***, 94 L.Ed.2d 267 (1987)

State may properly place burden of proving self-defense on defendant; 5-4.

***State v. Brigham***, 52 Wn.App. 208, 210 (1988)

In felony murder 2° case, where victim and defendant were in a fight, victim was not a participant in the crime, thus the exclusion in RCW 9A.32.050(1)(b) is not available as a defense, *State v. Goodrich*, 72 Wn.App. 71, 75-6 (1993); *see: State v. Langford*, 67 Wn.App. 572 (1992); I.

***State v. Longworth***, 52 Wn.App. 453 (1988)

In aggravated murder 1° case, where aggravating factor is concealment of a crime, RCW 10.95.020, state need not specify the crime, *State v. Jeffries*, 105 Wn.2d 398, 419 (1986), nor need jury be so instructed, *State v. Ortiz*, 119 Wn.2d 294 (1992), *disapproved, on other grounds*, *State v. Condon,* 182 Wn.2d 307, (2015), *State v. Federov,* 181 Wn.App. 187, 196-99 (2014); I.

***State v. Irizarry***, 111 Wn.2d 592 (1988)

Felony murder is not a lesser included offense of aggravated murder 1°, *State v. Pirtle*, 127 Wn.2d 628, 658-60 (1995); for retroactivity and harmless error analysis, *see: Pers. Restraint of St. Pierre*, 118 Wn.2d 321 (1992), *State v . Wences***,** 189 Wn.2d 675 (2017); 5-3.

***State v. Woldegiorgis***, 53 Wn.App. 92 (1988)

In defining premeditation, a proposed instruction adding to WPIC 26.01, "[h]owever, time alone is not enough. The evidence must be sufficient to support the inference that the defendant not only had time to deliberate, but that he actually did so," is a comment on the evidence; I.

***State v. Creekmore***, 55 Wn.App. 852 (1989)

Felony murder 2° can be established by proof of criminal mistreatment, RCW 9A.42.030(2), plus causing death of another; I.

***State v. Leech***, 114 Wn.2d 700 (1990)

A death that is caused by an arson fire before it is extinguished occurs "in furtherance of" the arson, RCW 9A.32.030(1)(c), and renders the arsonist liable of felony murder, *reversing State v. Leech*, 54 Wn.App. 597 (1989), *see: State v. Millante*, 80 Wn.App. 237, 249-50 (1995); foreseeability is not an element of proximate cause, approving WPIC 25.02; 9-0.

***State v. Entz***, 58 Wn.App. 112 (1990)

Where defendant expresses a wish that victim were dead, following which person to whom defendant expressed wish kills victim, is insufficient to establish manslaughter 1°, thus manslaughter would not be a factual lesser of murder, since the evidence fails to support an inference that *only* manslaughter was committed, *State v. Robinson*, 12 Wash. 349 (1895); I.

***State v. Baker***, 58 Wn.App. 222 (1990)

In manslaughter 1° case, where "to convict" instruction requires state to prove recklessness, then failure to instruct that state must prove lack of excuse beyond a reasonable doubt is not error, as lack of excuse is proved by proof of recklessness; I.

***State v. Dennison***, 115 Wn.2d 609 (1990)

Defendant, during burglary in which he was armed, confronts homeowner who is armed, defendant flees when gunfire ensues, homeowner is killed; held: lawful use of force is not available as a defense to felony-murder 1° (burglary), *State v. Bolar*, 118 Wn.App. 490, 506-10 (2003); self-defense is not revived, *State v. Craig*, 82 Wn.2d 777 (1973), absent good faith intention to withdraw from burglary removing decedent's fear, *cf.: State v. Fleeks*, ___ Wn.App.2d ___, 2023WL355082 (2023); even while fleeing from burglary scene, burglary is still in progress; *affirms* *State v. Dennison*, 54 Wn.App. 577 (1989); 7-2.

***State v. Bowerman***, 115 Wn.2d 794 (1990)

Murder 2° is not a lesser of **aggravated murder** 1° where defendant asserts she did not intend to kill, *see: State v. Condon*, 182 Wn.2d 307 (2015); 9-0.

***State v. Massey***, 60 Wn.App. 131 (1991)

Planned presence of weapon necessary to facilitate a killing is sufficient to prove premeditation, *State v. Bingham*, 105 Wn.2d 820, 827 (1986), *State v. Pirtle*, 127 Wn.2d 628, 643-8 (1995), *State v. Allen*, 159 Wn.2d 1 (2006), *State v. Ryna Ra*, 144 Wn.App. 688, 702-04 (2008), *State v. Notaro*, 161 Wn.App. 654, 670-73 (2011), *State v. Condon*, 182 Wn.2d 307, 314-15 (2015), *see:* *State v. Finch*, 137 Wn.2d 831-35 (1999); II.

***State v. Hoffman***, 116 Wn.2d 51 (1991)

In aggravated murder (police victims) case, trial court instructs jury that victims were law enforcement officers and determines lawfulness of arrest without submitting issues to jury; held: harmless as to instruction that victims were police (7-2), validity of arrest or search are determinations for the court to make, *State v. John Doe*, 6 Wn.App. 978, 982 (1972), unless the information makes it an element of the crime, as in resisting arrest (8-1).

***State v. Thompson***, 60 Wn.App. 662 (1991)

Aggravated murder 1° and felony murder are alternative ways of committing first degree murder, *State v. Ellison*, 36 Wn.App. 564, 565 (1984), and not a greater and lesser, *State v. Irizarry*, 111 Wn.2d 591, 594-95 (1988); *dicta* that a defendant charged alternatively with both may plead guilty to felony murder but will not escape trial on aggravated murder; II.

***State v. Norman***, 61 Wn.App. 16 (1991)

Failure to procure medical care for sick son is not protected by freedom of religion provisions of First Amendment or CONST. Art. 1, § 11, *State v. Baxter*, 134 Wn.App. 587 (2006); III.

***State v. Peerson***, 62 Wn.App. 755 (1991)

In two-count aggravated murder case, jury enters special verdicts in count I that there was not more than one victim and in count II that there was more than one victim, RCW 10.95.020(8); held: because verdicts, on these facts, could be logically reconciled, affirmed; I.

***State v. Dunbar***, 117 Wn.2d 587 (1991)

Murder 1° by creation of a grave risk of death, former RCW 9A.32.030(1)(b), lacks element of intent, thus attempted murder is not a lesser, as attempted murder requires the specific intent to cause the death of another person, *see: Pers. Restraint of Knight*,4 Wn.App.2d 248 (2018); 9-0.

***State v. Maupin***, 63 Wn.App. 887 (1992)

In felony murder (rape or kidnap) case, absent special verdict, where there is insufficient evidence to establish one of the alternative methods, verdict must be set aside; III, 2-1.

***State v. Yates***, 64 Wn.App. 345 (1992)

Homicide defendant lacks standing to challenge removal of life supports from victim; removing life supports, including food and water, is not an intervening cause of death, independent of the homicide, requiring an instruction to jury, *see: State v. Perez-Cervantes,* 141 Wn.2d ; II.

***State v. Bergeson***, 64 Wn.App. 366 (1992)

Murder 2° defendant is not entitled to manslaughter instructions if the only inferences available from evidence are that s/he (1) subjectively believed there was imminent danger of great personal injury, (2) subjectively intended to kill in self-defense, and (3) recklessly or negligently used more force than objectively reasonable under the circumstances, *but see: State v. Jones*, 95 Wn.2d 616 (1981); inference needed to support manslaughter instruction is that without intent to kill, but with recklessness, defendant caused death of another; *see also: State v. Warden*, 80 Wn.App. 448 (1996); II.

***State v. Hale***, 65 Wn.App. 752 (1992)

Defendant gives children 40 times sleeping pill dose, states she did it so they would go to sleep and never wake up; held: sufficient to establish substantial step for attempted murder 1° as it is no defense that true facts render commission of a completed crime legally or factually impossible, RCW 9A.28.020(2), *State v. Townsend*, 147 Wn.2d 666, 679-80 (2002), physician testified that dose could have been lethal; III.

***State v. Howland***, 66 Wn.App. 586 (1992)

To prove aggravated murder 1°, RCW 10.95.020(9)(c), state need not prove an intent to murder plus an independent intent to commit the aggravating felony, *State v. Haq*, 166 Wn.App. 221, 277-280 (2012),; II.

***State v. Rehak***, 67 Wn.App. 157 (1992)

Proposed instruction requiring "substantial" circumstantial evidence to support a finding of premeditation need not be given; II.

***State v. Langford***, 67 Wn.App. 572 (1992)

In felony murder 2° case, RCW 9A.32.050(1)(b), victim's participation in a fistfight prior to his stabbing does not entitle defendant to a participation-exclusion instruction, as it was the stabbing, not the fistfight, that caused victim's death, *State v. Brigham*, 52 Wn.App. 208 (1988), *State v. Goodrich*, 72 Wn.App. 71, 75-6 (1993); further, "participant" does not encompass a victim who was acting in self-defense, at 579; accomplice may be convicted of felony-murder 2° (assault) even if he did not know means by which principal intended to accomplish the assault or that principal was armed, *State v. Davis*, 101 Wn.2d 654, 658-9 (1984); III.

***State v. Davis***, 121 Wn.2d 1 (1993), *overruled, in part, State v. Tamalini*, 134 Wn.2d 725, 729 n. 1 (1998)

Manslaughter 1° and 2° are not lessers of **felony murder** 2°, *State v. Gilmer*, 96 Wn.App. 875, 885-89 (1999), *reversing State v. Davis*, 64 Wn.App. 511 (1992), *cf.: State v. Berlin*, 133 Wn.2d 541, 550 (1997), *State v. Lyon*, 96 Wn.App. 447 (1999), *State v. Gamble*, 154 Wn.2d 457 (2005), 137 Wn.App. 892 (2007); 7-0.

***State v. Harris***, 121 Wn.2d 317 (1993)

Assault 1° is not a lesser of attempted murder 1°, *State v. Turner*, 143 Wn.2d 715, 729-30 (2001), *State v. Boswell*, 185 Wn.App. 321, 332-35 (2014), although state may charge in the alternative, *but see: State v. Lyon*, 96 Wn.App. 447 (1999); 7-0.

***State v. Vangerpen***, 71 Wn.App. 94 (1993), *overruled on other grounds*, 125 Wn.2d 782 (1995)

Detained driver with a loaded, cocked revolver hidden under leg which he attempted to reach when questioned by police establishes *corpus* for attempted murder 1°, *State v. Smith*, 115 Wn.2d 775, 780 (1990); assuming that there must be corroborative evidence of each element of the crime to establish the *corpus*, *Smith v. United States*, 99 L.Ed.192 (1954), the cocked gun is sufficient to establish premeditation, *State v. Ryna Ra*, 144 Wn.App. 688, 702-04 (2008), *State v. Barajas*, 143 Wn.App. 24, 35-37 (2007), *State v. Condon*, 182 Wn.2d 307, 314-15 (2015); failure to allege premeditation in information is fatal to attempted murder 1° charge where brought to court's attention during trial; I.

***State v. Goodrich***, 72 Wn.App. 71, 75-6 (1993)

Victim is not an excluded participant for purposes of the felony murder rule, RCW 9A.32.050(1)(b), *State v. Langford*, 67 Wn.App. 572, 579 (1992), *State v. Brigham*, 52 Wn.App. 208, 210 (1988), even if victim started the fight which led to his death; I.

***State v. Baruso***, 72 Wn.App. 603, 615-19 (1993) Defendant is charged with two counts of aggravated murder, is acquitted of one of the counts, special verdict finds that both victims died as a result of a common scheme or plan, an aggravating factor, RCW 10.95.020(8), defense claims verdicts are inconsistent; held: defendant cannot attack a conviction based on an acquittal on another count, *Dunn v. United States*, 76 L.Ed. 356, 80 A.L.R. 161 (1932); here, verdicts were not truly inconsistent; I.

***State v. Thompson***, 73 Wn.App. 654 (1994)

To prove *corpus* in murder case where no body is found, state may offer evidence of victim's habit and character to establish circumstantial evidence of the fact of death by a criminal agency, as it is not being introduced to show that victim acted in conformity with a particular character or habit trait on a particular occasion, ER 404(a); where character and habit evidence established that victim never missed appointments, never had been gone for more than 24 hours, was a good housekeeper, took care of her pets, and other evidence established that she was missing, did not feed her cat, house was messy, a strong inference is raised that she died and that her death was sudden and caused by criminal means; *see:* *State v. Neslund*, 50 Wn.App. 531 (1988), *State v. Lung*, 70 Wn.2d 365, 371 (1967); I.

***State v. Smith***, 74 Wn.App. 844 (1994)

Neither information charging felony murder-assault nor plea statement contain a *mens rea* element, defendant seeks to withdraw plea; held: assault itself indicates an intentional act, *State v. Osborne*, 102 Wn.2d 87, 94 (1984); II.

***State v. Gentry***, 125 Wn.2d 570, 601-4 (1995)

In aggravated murder 1° case, aggravating factor that crime was committed to protect or conceal identity of person committing a crime is proved by evidence that victim was struck in head numerous times, shirt pulled over face, final blow was a place where body was found behind log in dense underbrush; while the crime which motivates the killing to conceal identity cannot be the murder itself, the predicate crime need not be identified by the jury, *State v. Jeffries*, 105 Wn.2d 398, 419-20 (1986); 9-0.

***State v. Burnette***, 78 Wn.App. 952 (1995)

In felony murder case, proof of underlying robbery is not part of the *corpus* to admit confession, *State v. Medlock*, 86 Wn.App. 89, 100-1 (1997), *see:* *State v. Mason*, 31 Wn.App. 41, 48 (1982); even if robbery is an element of *corpus*, evidence that victim had money and had purchased items an hour before he was stabbed and had no money on his body establishes that money was lost through criminal agency; I.

***State v. Millante***, 80 Wn.App. 237, 249-50 (1995)

To prove felony murder/robbery, mere lack of intent to rob at the moment of killing is not a defense, *State v. Craig*, 82 Wn.2d 777, 782-3 (1973); the fact that the final act of robbery is preceded by the homicide does no fragment the transaction, *State v. Temple*, 5 Wn.App. 1, 708 (1971); I.

***State v. Fortune***, 128 Wn.2d 464 (1996)

Felony murder/robbery and premeditated murder are alternative means of committing murder 1°, jury need not be unanimous, *Schad v. Arizona*, 115 L.Ed.2d 555 (1991); *affirms State v. Fortune*, 77 Wn.App. 628 (1995); I.

***State v. Warden***, 80 Wn.App. 448 (1996)

In murder trial, where there is sufficient evidence that defendant had diminished capacity to intend to cause death of victim, then defendant is entitled to instructions on lesser included offenses of manslaughter 1° and manslaughter 2°, *State v. Colwash*, 15 Wn.App. 530 (1976), *aff'd*, 88 Wn.2d 468 (1977), *State v. Berge*, 25 Wn.App. 433 (1980), *State v. Jones*, 95 Wn.2d 616 (1981); I.

***State v. Berlin***, 133 Wn.2d 541 (1997)

**Manslaughter** is a lesser included offense of intentional **murder 2°**, but is not a lesser of **felony murder**, *State v. Gamble*, 154 Wn.2d 457 (2005), 137 Wn.App. 892 (2007), *State v. Gilmer*, 96 Wn.App. 875, 885-89 (1999); where evidence establishes murder defendant's drinking potentially impaired ability to form intent to kill, then factual test is satisfied, *State v. Warden*, 133 Wn.2d 559 (1997); to establish that an offense is a lesser, (1) each element of the lesser must be a necessary element of the charged offense, and (2) the evidence must support an inference that the lesser crime was committed, *State v. Workman*, 90 Wn.2d 443, 447-8 (1978); a lesser is not precluded whenever a crime may be statutorily committed by alternative means, overruling *State v. Lucky*, 128 Wn.2d 727 (1996), reversing *State v. Berlin*, 80 Wn.App. 734 (1996), *see: State v. Condon*, 182 Wn.2d 307, 321-26 (2015), *State v. Boswell*, 185 Wn.app. 321, 332-35 (2014), *see also: State v. Tamalini*, 134 Wn.2d 725 (1998), *State v. Lyon*, 96 Wn.App. 447 (1999), *State v. Ramos*, 163 Wn.2d 654 (2008); 7-2.

***State v. Morgan***, 86 Wn.App. 74 (1997)

Failure to provide medical care and summon medical aid for spouse whom defendant assisted use dangerous quantity of cocaine is manslaughter 1°, *see: State v. Norman*, 61 Wn.App. 16 (1997), controlled substances homicide is not an obligatory more specific crime under these circumstances, *see: State v. Sill*, 47 Wn.2d 647 (1955); III.

***State v. Medlock***, 86 Wn.App. 89, 100-1 (1997)

To prove felony murder, *corpus delicti* rule does not require that underlying felony be established independent of a confession, *State v. Burnette*, 78 Wn.App. 952, 957 (1995); information charging felony murder need not set out all elements of the predicate felony, *State v. Bryant*, 65 Wn.App. 428, 438 (1992), *State v. Hartz*, 65 Wn.App. 351, 354 (1992), *but see: Kreck v. Spalding*, 721 F.2d 1229 (9th Cir. 1983); III.

***State v. Tamalini***, 134 Wn.2d 725 (1998)

**Manslaughters** are not inferior degrees of felony murder 1° or 2°, *State v. Gamble*, 154 Wn.2d 457 (2005), *State v. McJimpson*, 79 Wn.App. 164, 171-73 (1995), *overruled, on other grounds, State v. Fernandez-Medina*, 141 Wn.2d 448 (2000), *cf.: State v. Lyon*, 96 Wn.App. 447 (1999); 6-3.

***State v. Schaffer***, 135 Wn.2d 355 (1998)

Defendant is charged with premeditated murder 1° and felony murder 2°, is acquitted of murder 1°, convicted of murder 2°, trial court declines to give **manslaughter** instructions as lessers; held: a defendant who reasonably believes he is in imminent danger and needs to act in self-defense, but recklessly or negligently uses more force than necessary is entitled to instructions on manslaughter, *State v. Jones*, 95 Wn.2d 616, 628 (1981); *State v. Chambers*, 197 Wn.App.. 96, 119-22 (2016), although manslaughter is not a lesser of felony murder, it is a lesser of murder 1° and, although defendant was acquitted of that charge, he is still entitled to have the jury so instructed on retrial; *per curiam.*

***State v. McDonald***, 90 Wn.App. 604, 612-7 (1998), *aff'd, on other grounds*, 138 Wn.2d 680 (1999)

Victim is fatally shot in head by co-defendant, defendant shoots him again "to put him out of his misery," claims his shooting could not have been proximate cause of death as victim would have died anyway; held: factual causation is proved not by a "but for" test but by the "substantial factor" test: where either one of two causes would have produced the identical harm, thus making it impossible for plaintiff to prove the "but for" test, all parties whose actions contributed to the outcome are liable, *Allison v. Housing Auth.*, 118 Wn.2d 79 (1991), *Daugert v. Pappas*, 104 Wn.2d 254, 262 (1985), *State v. Dennison*, 115 Wn.2d 609, 624 n.15 (1990); II.

***State v. Edwards***, 92 Wn.App. 156 (1998)

In homicide by abuse, RCW 9A.32.055(1), "extreme indifference to human life" pertains to a specific victim, trial court should not define it pursuant to the murder 1º "extreme indifference" standard, RCW 9A.32.030(1)(b), which applies to indifference to life generally; I.

***State v. Barstad***, 93 Wn.App. 553 (1999)

Intoxicated defendant kills two women speeding through red light at busy intersection, is convicted of murder 1° by extreme indifference to human life, RCW 9A.32.030(1)(b), contends vehicular homicide supersedes murder statute when homicide occurs through reckless or impaired driving; held: because prosecutor chose to increase his proof requirement, general/specific analysis is inapplicable, distinguishing *State v. Collins*, 55 Wn.2d 469 (1960), which precludes prosecutor from charging manslaughter under these circumstances, *see: State v. Aamold*, 60 Wn.App. 175 (1991); court need not define "extreme indifference" for jury; III.

***State v. Newbern***, 95 Wn.App. 277, 285-88 (1999)

**Reckless endangerment**, RCW 9A.36.050(1), is not a lesser of **attempted murder**, *see: State v. Prado*, 144 Wn.App. 227, 242 (2008); II.

***State v. Lyon***, 96 Wn.App. 447 (1999)

In felony murder/assault case, where there is evidence that defendant assaulted victim but another person independently caused victim's death, defendant is entitled to lesser included offense instruction for assault 2°, *State v. Berlin*, 133 Wn.2d 541, 548 (1997), distinguishing *State v. Tamalini*, 134 Wn.2d 725 (1998), *State v. Davis*, 121 Wn.2d 1 (1993), *see also: State v. Gamble*, 154 Wn.2d 457 (2005); I.

***State v. Gilmer***, 96 Wn.App. 875 (1999)

In felony murder, the term "in furtherance of" requires that the death be sufficiently close in time and place of the felony to be part of the *res gestae* of the felony, *State v. Leech*, 114 Wn.2d 700, 706 (1990), *State v. Meza*, ___ Wn.App.2d ___, 512 P.3d 608 (2022), instruction that "it is not required that death furthered a crime, but rather that the crime itself was being furthered and this furtherance itself is a proximate cause of a death" is correct, at 883-84; court need not instruct that death was a foreseeable consequence of the predicate felony, at 885; manslaughter 1° is not a lesser of felony murder 2° by reckless endangerment or any other predicate felony, at 888, *State v. Berlin*, 133 Wn.2d 541 (1997), *State v. Davis*, 121 Wn.2d 1 (1993); III.

***State v. Schwab***, 98 Wn.App. 179 (1999)

Convictions for both felony murder 2° and manslaughter 1° for a single homicide violate double jeopardy clauses, *see: State v. Ward*, 125 Wn.App. 138 (2005), *State v. Schwab*, 134 Wn.App. 635 (2006), 163 Wn.2d 664 (2008); I.

***State v. Hernandez***, 99 Wn.App. 312 (1999)

In murder trial, state offers defendant's statement that death was an accident, that he had not touched the gun when victim, who was holding the gun, was shot, defense objects to court's refusal to instruct on lesser manslaughters; held: because manslaughter requires that the accused caused the death of another, factual test fails, thus defense is not entitled to lessers, *cf.: State v. Guilliot*, 106 Wn.App. 355, 366-69 (2001), *State v. Hunter*, 152 Wn.App. 30 (2009); I.

***State v. Perez-Cervantes***, 141 Wn.2d 468 (2000)

Defendant stabs victim who is treated and released, later uses cocaine, dies of internal bleeding, medical examiner testifies cause of death was the stabbing, drug use and emphysema were "contributing factors," trial court prohibits defense from arguing that drug use was the cause of death; held: even if drug use or failure to seek medical attention was an intervening proximate cause of death, absent evidence of a superseding cause of death, there was insufficient evidence that death was proximately caused by drug use, thus trial court properly restricted defense closing argument; 5-4.

***State v. Townsend,*** 142 Wn.2d 838 (2001), *overruled, State v. Pierce*, 195 Wn.2d 230 (2020)

In noncapital murder case, jury may not be informed that the case does not involve the death penalty, *State v. Murphy*, 86 Wn.App. 667 (1997), *State v. Mason*, 160 Wn.2d 910, 928-31 (2007), *State v. Hicks*, 163 Wn.2d 477, 486-89 (2008), reversing *State v. Townsend*, 97 Wn.App. 25 (1999), *but see: State v. Rafay*, 168 Wn.App. 734, 774-81 (2012), *State v. Clark*, 187 Wn.2d 641 (2017), harmless here; 9-0.

***State v. Price***, 103 Wn.App. 845, 851-54 (2000)

Firing a gun once into a vehicle with two people in it is sufficient to prove two counts of attempted murder, even if there is no evidence that defendant knew the car was occupied by more than one person, *State v. Jefferson*, 199 Wn.App. 772, 807-08 (2017), *reversed, on other grounds*, 192 Wn.2d 225 (2018); II.

***State v. Red***, 105 Wn.App. 51 (2001)

Because **manslaughter** is not a specific intent crime, then attempted manslaughter is not a lesser of attempted murder; II.

***Rogers v. Tennessee***, 149 L.Ed.2d 697 (2001)

State supreme court's abolishing common law rule that time between act and death is limited to a year and a day does not violate *ex post facto* clause; 5-4.

***Pers. Restraint of Howerton***, 109 Wn.App. 494, 498-505 (2001)

In aggravated murder case, instruction on aggravating factor that "defendant or an accomplice committed the murder to conceal commission of a crime" is improper, as a sentence enhancement must depend on defendant's own misconduct, *see:* *State v. McKim*, 98 Wn.2d 111 (1982), *State v. Roberts*, 142 Wn.2d 471 (2000), *but see:* *State v. Whitaker*, 133 Wn.App. 199, 230-31 (2006); I.

***Pers. Restraint of Andress***, 147 Wn.2d 602 (2002)

Legislature did not intend assault as a predicate felony for purposes of felony murder, RCW 9A.32.050(1)(b), *see:* *State v. Gamble*, 154 Wn.2d 457 (2005), *State v. Hanson*, 151 Wn.2d 783 (2004), *State v. Ramos*, 124 Wn.App. 334 (2004), *see also:* *Pers. Restraint of Bowman*, 162 Wn.2d 325 (2007); retroactive, per *Pers. Restraint of Hinton*, 152 Wn.2d 853 (2004); superceded by RCW 9A.36.021(1)(a) (2003), *State v. Leonard*, 183 Wn.App. 532 (2014) , *remanded, on other grounds,* 184 Wn.2d 505 (2015); 5-4.

***Pers. Restraint of Percer***, 150 Wn.2d 41 (2003)

Felony murder 2° and vehicular homicide and, stemming from the same death, do not violate double jeopardy clause, distinguishing *State v. Schwab*, 98 Wn.App. 179 (1999); reverses *Pers. Restraint of Percer*, 111 Wn.App. 843 (2002); 8-1.

***State v. Hughes***, 118 Wn.App. 713, 730-34 (2003)

Following vacation of felony murder assault conviction, *Pers. Restraint of Andress*, 147 Wn.2d 602 (2002), remedy where assault 2° definition did not include elements required for manslaughter 1° is remand for entry of judgment and sentence for lesser included assault 2°, *see:* *State v. Gamble*, 154 Wn.2d 457 (2005), *State v. Schwab*, 134 Wn.App. 635 (2006), 163 Wn.2d 664 (2008); II.

***State v. DeRosia***, 124 Wn.App. 138 (2004)

Defendant pleads guilty, *North Carolina v. Alford*, 27 L.Ed.2d 162 (1970), as charged to felony murder 2°/assault, seeks vacation and withdrawal of plea, *Pers. Restraint of Andress*, 147 Wn.2d 602 (2002); held: because defendant received no plea bargain benefit, having pled as charged, state could not hold him to his plea, distinguishing *State v. Majors*, 94 Wn.2d 354(1980); because an *Alford* plea provides no factual basis for any crime, *but see:* *State v. Smith*, 40 Wn.App. 67 (1985), and because defendant did not know, at plea, that assault could not serve as predicate felony for murder, he could not have knowingly and intelligently appraised the state's evidence, and thus his plea was not valid; because there were no "guilty admissions of fact," court cannot sentence defendant for manslaughter, *see:* *State v. Gamble*, 154 Wn.2d 457

(2005), 137 Wn.App. 892 (2007), *cf.:* *State v. Ramos*, 124 Wn.App. 334 (2004), 163 Wn.2d 654 (2008); II.

***State v. Ramos***, 124 Wn.App. 334 (2004)

Defendant's conviction for felony murder 2°/assault is reversed, *Pers. Restraint of Andress*, 147 Wn.2d 602 (2002), on remand trial court permits amendment to manslaughter 1°; held: "ends of justice" exception to the mandatory joinder rule, CrR 4.3.1(b)(3), applies where there are reasons extraneous to the action of the court or go to the regularity of its proceedings, *State v. Dallas*, 126 Wn.2d 324, 333 (1995), *State v. Carter*, 56 Wn.App. 217, 223 (1989), *State v. Gamble*, 137 Wn.App. 892 (2007), *aff'd*, 168 Wn.2d 161 (2010), *see:* *State v. Wright*, 165 Wn.2d 783 (2009); here, because the Supreme Court abandoned an unbroken line of precedent after 25 years was extraneous to the prosecutions, state filed charges and sought instructions in accordance with long-standing interpretations of state law, state may try defendant for manslaughter, *see:* *State v. Ramos*, 163 Wn.2d 654 (2008); I.

***State v. Musgrave***, 124 Wn.App. 733 (2004)

Mandatory minimum of 20 years for murder 1° is constitutional, distinguishing *State v. Cloud*, 95 Wn.App. 606 (1999); I.

***State v. Daniels***, 124 Wn.App. 830 (2004), *rev'd, on other grounds*, 160 Wn.2d 256 (2007)

Criminal mistreatment, RCW 9A.42.020(1), can serve as a predicate to felony murder 2°, distinguishing *Pers. Restraint of Andress*, 147 Wn.2d 606 (2002), *see:* *Pers. Restraint of Bowman*, 162 Wn.2d 325 (2007); I.

***State v. Ward***, 125 Wn.App. 138, 141-47 (2005)

Defendant is convicted of felony murder/assault and, alternatively, manslaughter, trial court does not sentence on manslaughter, *State v. Johnson*, 113 Wn.App. 482 (2002), upon reversal of felony murder, *Pers. Restraint of Andress*, 147 Wn.2d 606 (2002), defense argues double jeopardy precludes conviction of manslaughter because absence of a finding equates to a negative finding, *In re Marriage of Olivares*, 69 Wn.App. 324, 334 (1993); held: jury verdict of manslaughter is a finding of fact, *State v. Willoughby*, 29 Wn.App. 828, 835 (1981), thus remedy is to enter judgment on manslaughter, *see:* *State v. Schwab*, 134 Wn.App. 635 (2006), 163 Wn.2d 664 (2008); I.

***State v. Carter***, 154 Wn.2d 71 (2005)

Defendant plans, with others, a robbery but is not present at the robbery where the victim is slain, is convicted as an accomplice of felony murder after trial court erroneously instructs jurors that defendant is an accomplice in "the commission of a crime," *State v. Roberts*, 142 Wn.2d 471 (2000); held: where a defendant is charged with felony murder and has participated in the predicate felony, the co-participant clause of the felony murder statute, RCW 9A.32.030(1), imputes criminal liability for the homicide; where defendant has not participated directly in the commission of the predicate felony, state must establish accomplice liability; here, the accomplice liability instruction was harmless, *see:* *State v. Brown*, 147 Wn.2d 330 (2002), *see also:* *State v. Stovall*, 115 Wn.App. 650 (2003); affirms *State v. Carter*, 119 Wn.App. 221 (2003); 8-1.

***State v. Price***, 126 Wn.App. 617, 645-48 (2005)

Where multiple incidents are offered in support of aggravating factors for purposes of proving aggravated murder, jury should be instructed that it had to be unanimous as to which of the five alleged acts constituted the aggravating circumstance, *State v. Petrich*, 101 Wn.2d 566, 572 (1984), harmless here due to defendant's *Alford* plea to one of the incidents; II.

***State v. Gamble***, 154 Wn.2d 457 (2005)

Manslaughter 1° is not a lesser included offense of felony murder 2° where assault 2°, as defined in RCW 9A.36.021(1)(a) is the predicate felony, *State v. Tamalini*, 134 Wn.2d 725 (1998); reverses *State v. Gamble*, 118 Wn.App. 332 (2003), *see: State v. Gamble*, 137 Wn.App. 892 (2007), 168 Wn.2d 161 (2010); 9-0.

***Pers. Restraint of Mayer***, 128 Wn.App. 694 (2005)

Defendant pleads guilty to a single charge of murder 2° under intent and felony murder/assault alternatives, seeks to withdraw plea pursuant to *Pers. Restraint of Andress*, 147 Wn.2d 606 (2002); held: because defendant pled to two separate crimes in the alternative rather than alternative ways of committing a single crime, *State v. Hubbard*, 106 Wn.App. 149 (2001), and because the factual basis for plea was sufficient to support intentional murder, defendant's plea is valid, *Pers. Restraint of Richey*, 162 Wn.2d 865 (2008), *Pers. Restraint of Fuamaila*, 131 Wn.App. 908 (2006); III.

***Pers. Restraint of Candelario***, 129 Wn.App. 1 (2005)

Defendant is charged with alternative counts of murder 2°, jury returns special verdict that it is hung on intentional murder, guilty of felony murder/assault, latter is reversed, *Pers. Restraint of Andress*, 147 Wn.2d 606 (2002), defense argues implied acquittal of intentional murder, *State v. Ramos*, 124 Wn.App. 334 (2004), *State v. Hescock*, 98 Wn.App. 600, 611 (1999); held: while conviction on a lesser included offense is an implied acquittal of the greater, *State v. Linton*, 156 Wn.2d 777 (2006), *but see: State v. Ervin*, 158 Wn.2d 746 (2006), *State v. Daniels*, 160 Wn.2d 256 (2007), 165 Wn.2d 627 (2009), here the jury did not find petitioner guilty of a lesser nor did it find the state failed to prove an element of the alternative intentional murder charge, and jury was not silent as to why it failed to convict on the alternative, thus defendant can be retried on intentional murder, as jury was hung, *State v. Despenza*, 38 Wn.App. 645, 654 (1984), *see also: State v. Wright*, 131 Wn.App. 474 (2006), 165 Wn.2d 783 (2009), *State v. Ramos*, 163 Wn.2d 654 (2008); II.

***State v. Whitaker***, 133 Wn.App. 199, 230-31 (2006)

In murder 1º case, to convict instruction that defendant or an accomplice acted with intent to kill is adequate, whereas it is not proper to prove an aggravating factor in a capital case, *Pers. Restraint of Howerton*, 109 Wn.App. 494, 498-505, *State v. Roberts*, 142 Wn.2d 471, 505 (2000); I.

***State v. Monschke***, 133 Wn.App. 313 (2006)

White supremacy is an identifiable group as an aggravating circumstance that murder was committed "to obtain or maintain his membership…in the hierarchy of an organization,

association or identifiable group," RCW 10.95.020(6); aggravating circumstance is not overbroad, distinguishing *Wisconsin v. Mitchell*, 124 L.Ed.2d 436 (1993), or vague; bifurcation of the aggravated circumstance is not required, within discretion of trial court, *State v. Kelley*, 64 Wn.App. 755, 762 (1992); II.

***State v. Ervin***, 158 Wn.2d 746 (2006)

Defendant is charged with aggravated murder 1º, jury is instruction to first consider crime charged and, if it acquits or is unable to agree on greater, can move to lesser, jury leaves verdict form for aggravated murder blank, convicts of lesser felony murder/assault which is later vacated, *Pers Restraint of Andress*, 147 Wn.2d 602 (2002), state refiles aggravated murder; held: jurors leaving verdict form blank means on its face that the jury was unable to agree which is not an implied acquittal, thus jeopardy is not terminated and state may re-try defendant on the greater offense, *State v. Daniels,* 160 Wn.2d 256 (2007), 165 Wn.2d 627 (2009), *State v. Linton*, 156 Wn.2d 777, 789 (2006)(Sanders, J., concurring), *State v. Scott*, 145 Wn.App. 884 (2008), *State v. Wright*, 165 Wn.2d 783 (2009), *State v. Glasmann,* 183 Wn.2d 117 (2015); 9-0.

***State v. Schwab***, 134 Wn.App. 635 (2006), 163 Wn.2d 664 (2008)

Defendant is convicted of felony murder/assault and manslaughter for same homicide, Court of Appeals vacates manslaughter conviction, *State v. Schwab*, 98 Wn.App.179 (1999), murder conviction is later vacated, *Pers. Restraint of Andress*, 147 Wn.2d 602 (2002), on remand trial court reinstates manslaughter conviction; held: validity of jury's verdict on manslaughter remains unimpaired, original vacation was to avoid double punishment, thus trial court properly reinstated manslaughter conviction when the erroneous charge of felony murder was set aside, *see: State v. Ward*, 125 Wn.App. 138 (2005); I.

***State v. Gamble***, 137 Wn.App. 892 (2007), 168 Wn.2d 161 (2010)

Defendant admits to kicking and intentionally punching homicide victim in head, is convicted of manslaughter 1º, excepts to failure to instruct on lesser manslaughter 2º; held: no reasonable jury could conclude that someone would be unaware that beating a person to unconsciousness and then kicking him in the head would potentially kill victim, thus manslaughter 2º is not a factual lesser, *State v. Burley*, 23 Wn.App. 881, 885 (1979); II.

***State v. Hacheney***, 160 Wn.2d 503, 506-20 (2007)

Victim is suffocated to death after which defendant burns house and her body, is convicted of aggravated murder in the course of arson; held: in order for a death to have occurred in the course of a felony, there must be a causal connection such that the death was a probable consequence of that felony, *State v. Golladay*, 78 Wn.2d 121, 131 (1970), *overruled, on other grounds*, *State v. Arndt,* 87 Wn.2d 374, 378 (1976), *State v. Diebold*, 152 Wash. 68, 72 (1929), *State v. Haq*, 166 Wn.App. 277-80 (2012), *State v. Irby,* 187 Wn.App. 183, 199-203 (2015), *State v. Song Wang*, 5 Wn.App.2d 12 (2018), thus evidence here is insufficient to establish that the murder was in the course of an arson; 7-2.

***State v. Mason***, 160 Wn.2d 910 (2007)

Where trial court finds by clear, cogent and convincing evidence that defendant was responsible for a declarant's unavailability, here by murder, **doctrine of forfeiture by**

**wrongdoing** results in defendant forfeiting his right of confrontation of the declarant's testimonial hearsay, *State v. DeJesus Hernandez,* 192 Wn.App. 673 (1992), *see: State v. Dobbs,* 180 Wn.2d 1 (2014), *but see: Giles v. California*, 171 L.Ed.2d 488 (2008), *State v. Fraser,* 170 Wn.App. 13, 19-24 (2012); 5-4.

***State v. Feeser***, 138 Wn.App. 737 (2007)

While murder 2º is defined as "[w]ith intent to cause death of another person but without premeditation, he or she causes the death of such person," "without premeditation" is not an essential element, *State v. Ward*, 148 Wn.2d 803, 812 (2003); II.

***Pers. Restraint of Bowman***, 162 Wn.2d 325 (2007)

Drive-by shooting, RCW 9A.36.045, can serve as a predicate to felony murder 2°, distinguishing *Pers. Restraint of Andress*, 147 Wn.2d 606 (2002); 7-2.

***Giles v. California***, 171 L.Ed.2d 488 (2008)

Where trial judge finds that defendant committed a wrongful act that resulted in unavailability of witness at trial, here homicide, doctrine of **forfeiture by wrongdoing** does not overcome confrontation clause preclusion of victim's unconfronted out of court testimony unless evidence establishes that defendant engaged in conduct designed to prevent the witness from testifying, *State v. Fraser,* 170 Wn.App. 13, 19-24 (2012), *but see: State v. Mason*, 160 Wn.2d 910 (2007); 6-3.

***Pers. Restraint of Richey***, 162 Wn.2d 865 (2008)

Attempted felony murder is not a crime; 9-0.

***State v. Ramos***, 163 Wn.2d 654 (2008)

Defendant is tried for murder 1° with intentional murder 2° and felony murder 2°/assault as lessers, jury is silent as to murder 1°, answers interrogatories that jury is not unanimous as to intentional murder 2° but is unanimous guilty for felony murder/assault, which is reversed, *Pers. Restraint of Andress*, 147 Wn.2d 602 (2002); on remand trial court permits amendment to manslaughter 1°; held: when a jury renders a guilty verdict as to a single crime, but one of the alternative means for committing that crime is later held invalid on appeal, even if for insufficient evidence, double jeopardy does not bar retrial on the remaining valid alternative mean, *State v. Joy*, 121 Wn.2d 333, 345-46 (1993); because intentional murder and felony murder are alternative means of committing murder 2° and jury was not unanimous as to intentional murder, and because manslaughter is a lesser of intentional murder, defendant may be retried for manslaughter, *State v. Fuller,* 185 Wn.2d 30 (2016), *see also: State v. Ramos,*124 Wn.App. 334 (2004); 8-1.

***State v. Armstrong***, 143 Wn.App. 333 (2008)

Felony murder/assault, RCW 9A.32.050 (2003), does not violate equal protection clause, *State v. Wanrow,* 91 Wn.2d 301, 311-12 (1978), *State v. Gordon,* 153 Wn.App. 516, 524-29 (2009), *reversed, on other grounds,* 172 Wn.2d 671 (2011), *State v. Leonard,* 183 Wn.App. 532 (2014) , *remanded, on other grounds,* 184 Wn.2d 505 (2015), *State v. McDaniel,* 185 Wn.app. 932 (2015); I.

***State v. Scott***, 145 Wn.App. 884 (2008)

Defendant is charged with murder 2º by alternative means of intentional or felony murder/assault, jury convicts, in special interrogatory jury checks box next to felony murder, leaves intentional murder box blank, conviction is reversed, *Pers. Restraint of Andress*, 147 Wn.2d 602 (2002), at retrial defendant is charged and convicted of manslaughter 1º, on appeal claims double jeopardy precludes conviction; held: failure to check box next to intentional murder is not an applied acquittal, *State v. Ervin*, 158 Wn.2d 746 (2006), reversal was on legal grounds, *State v. Berlin*, 133 Wn.2d 541, 550-51 (1997), distinguishing *State v. Hescock*, 98 Wn.App. 600 (1999), thus defendant was properly charged and convicted of manslaughter; I.

***State v. Wright***, 165 Wn.2d 783 (2009)

Defendants are charged with intentional murder and felony murder as alternatives, jury returns general verdict of guilt after receiving instructions only on felony murder which is later vacated, *Pers. Restraint of Andress*, 147 Wn.2d 602 (2002), on remand trial court rules that renewed prosecution placed defendants in double jeopardy but permits retrial on lessers; held: because defendants' convictions were reversed because the conviction was on a non-existent invalid charge, they may be retried for the same offense, *Montana v. Hall*, 95 L.Ed.2d 354 (1987), *State v. Gamble*, 137 Wn.App. 892, 901 (2007), *aff'd,* 168 Wn.2d 161 (2010); because defendants were charged by alternative means and not separate offenses, failure to reach a verdict on one of the means is not an applied acquittal, *State v. Ramos,* 163 Wn.2d 654, 661 (2008), *State v. Fuller,* 185 Wn.2d 30 (2016); 6-3.

***State v. Hunter***, 152 Wn.App. 30, 43-48 (2009)

Defendant, accused of murder, testifies both that he didn't remember shooting victim and that he shot victim but it was an accident, trial court declines manslaughter lessers; held: testimony that shooting was an accident raised the inference that defendant was guilty only of manslaughter, thus court abused its discretion in declining lessers, distinguishing *State v. Hernandez*, 99 Wn.App. 312 (1999), *see: State v. Guillot*, 106 Wn.App. 355 (2001); II.

***State v. Ramos***, 152 Wn.App. 684, 693-96 (2009)

Unit of prosecution for felony murder/robbery where there was only one robbery but multiple homicides is each person killed, *State v. Graham*, 153 Wn.2d 400 ((2005), *State v. Clark*, 117 Wn.App. 281 (2003), *aff'd,* 153 Wn.2d 614 (2005); III.

***State v. Elmore***, 154 Wn.App. 885, 899-901 (2010)

Burglary and felony murder/burglary may be punished separately even where the burglary is the predicate offense, per burglary antimerger statute, RCW 9A.52.050; II.

***State v. Christman***, 160 Wn.App. 741 (2011)

To prove **controlled substances homicide**, RCW 69.50.415(1), state must prove that defendant's delivery of a drug was a proximate cause of death, but not that it was the sole cause of death; a defendant's conduct is not a proximate cause if some other conduct is a sole or superseding cause, but it can be a proximate cause if another cause is "merely a concurrent

cause," at 756 ¶ 11, *State v. Meekins,* 125 Wn.App. 390, 398-99 (2005); statute which uses language "resulting in" death is not vague; III.

***State v. Peters***, 163 Wn.App. 836 (2011)

Trial court instructs jury that in order to convict for manslaughter 1°, state must prove that defendant knew of and disregarded "a substantial risk that a wrongful act may occur;" held: the *mens rea* instruction defining reckless for manslaughter 1° must state that defendant disregarded a substantial risk of death, WPIC 10.03, *State v. Gamble,* 154 Wn.2d 457 (2005); I.

***State v. Kosewicz***, 174 Wn.2d 683 (2012)

Defendants are charged with felony murder/kidnap and kidnapping 1°, Court of Appeals reverses kidnapping conviction because jury instruction contained a prong not charged in the kidnapping information, appellants argue that felony murder charge must be dismissed for the same reason even though jury instruction on felony murder only referred to the felony as kidnapping 1°, did not set out separate elements to include the uncharged prong, and no objection was made at trial; held: liberal construction of the information, to which no objection was made, was adequate to advise defendants of the elements of felony murder, state need not set out all of the elements of an underlying felony to convict of felony murder, *State v. Whitfield,* 129 Wash. 134, 139 (1924), just as state need not set forth aggravating circumstances in an information, *State v. Siers,* 174 Wn.2d 269 (2012), information does not need to specify the alternative means of committing the underlying felony, *State v. Hartz,* 65 Wn.App. 351, 354 (1992), *State v. Brewczynski,* 173 Wn.App. 541 (2013); 5-4.

***State v. Besabe***, 166 Wn.App. 872, 875-79 (2012)

Defendant shoots woman in the head, at hospital woman delivers a child who lives two days, dies, woman dies, defendant is convicted of two counts of murder; held: status of a murder victim is time of death not the time defendant commits homicidal act, thus child was a person, distinguishing *State v. Dunn,* 82 Wn.App. 122 (1996); I.

***State v. Allen***, 178 Wn.App. 893, 912-14 (2014), *reversed, on other grounds,* 182 Wn.2d 364 (2015)

Rendering criminal assistance, RCW 9A.76.050, is not a lesser of accomplice to murder; II.

***State v. Condon***, 182 Wn.2d 307 (2015)

Defendant enters home with loaded gun intending to rob, is convicted of murder 1º as alternative to felony murder 1º, claims evidence is insufficient to prove premeditation, trial court denies murder 2º lesser instruction; held: a person can form a premeditated design to kill for the purpose of better enabling him to rob the person, at 314-15, *State v. Miller,* 164 Wash. 441, 447 (1931), *State v. Evans,* 145 Wash. 4, 11 (1927), *State v. Luvene,* 127 Wn.2d 690, 713 (1995); a lesser included offense instruction need only satisfy the legal prong as to one of multiple charged offenses, *State v. Workman,* 90 Wn.2d 443, 447-48 (1978), *State v. Berlin*, 133 Wn.2d 541, 545 (1997); while evidence was sufficient for jury to infer premeditation, it could have inferred that it was lacking, at 319-21; a defendant charged with both intentional murder and felony murder is

entitled to a lesser instruction if it satisfies legal and factual test as to intentional murder, at 321-26, *State v. Berlin, supra. at* 551-52, *State v. Warden,* 133 Wn.2d 559, 561-64 (1997), disapproving, in part, *State v. Ortiz,* 119 Wn.2d 294 (1992), *State v. Bowerman,* 115 Wn.2d 794 (1990); 5-4.

***State v. Henderson***, 182 Wn.2d 734 (2015)

Defendant is convicted of murder 1° with extreme indifference to human life, RCW 9A.32.030(1)(b), for shooting into a party as a gang retaliation, argues at trial that another was the shooter, trial court refuses manslaughter 1° and 2° lessers; held: manslaughter 1° meets the legal prong justifying a lesser, because manslaughter 1°'s recklessness element requires that defendant disregard a substantial risk of homicide rather than just a substantial risk of a wrongful act, *State v. Gamble,* 154 Wn.2d 457, 467-68 (2005), a rational jury could find that defendant shot into a crowd but that he did so with a disregard for a substantial risk of homicide rather than an extreme indifference that caused a grave risk of death, thus manslaughter 1° meets factual test, *Pers. Restraint of Sandoval,* 189 Wn.2d 811 (2018); *State v. Pettus,* 89 Wn.App. 688 (1998) and *State v. Pastrana,* 94 Wn.App. 463 (1999) no longer control due to *State v. Gamble, supra.;* affirms *State v. Henderson,* 180 Wn.App. 138 (2014); 6-3.

***State v. Boswell***, 185 Wn.App. 321, 332-35 (2014)

Assault 3º is not a lesser of attempted murder, *State v. Harris,* 121 Wn.2d 317 (1993); to convict instruction for attempted murder 1º need not include premeditation as an element, *State v. Reed,* 150 Wn.App. 761, 772-75 (2009); II.

***State v. Elkins***, 188 Wn.App. 386, 408-11 (2015)

Felony murder/assault, RCW 9A.32.050(1)(b) (2003), is not vague; II.

***State v. Lizarraga***, 191 Wn.App. 530, 563-65 (2015)

Murder 2° is an alternative means crime, jury need not be unanimous where there is sufficient evidence to support each of the alternative means; III.

***State v. Fisher***, 185 Wn.2d 836, 848-52 (2016)

Statutory defense to felony murder, RCW 9A.32.030(1)(c), puts burden of proof by a preponderance on defendant to establish she did not commit the homicide, was not armed, had no reason to believe that other participant was armed and no reasonable grounds to believe that no participant intended to engage in conduct likely to result in death, defense need not call witnesses to be entitled to an instruction if there is other evidence to support the defense, *State v. Gabryschak,* 83 Wn.App. 249, 253 (1996); here, defendant's statement to police which was offered by state was sufficient to entitle her to an instruction; because defense has burden defense may not point to the state's absence of evidence to satisfy that burden; 5-4.

***State v. Hummel***, 196 Wn.App. 329 (2016)

At defendant's first premeditated murder trial jailhouse informer testifies defendant admitted premeditation, conviction is reversed for open court violation, at second trial state does not call informer, evidence establishes motive and that defendant killed victim, defense motion

to dismiss at end of state's case is denied, trial court does not give lesser murder ° instruction; held: circumstantial evidence was insufficient to establish premeditation, *cf.: State v. Pirtle*, 127 Wn.2d 628, 656-68 (1995); evidence that defendant concealed victim's death and disposed of her body is insufficient to prove premeditation; because no lessers were submitted to jury remedy is dismissal with prejudice, *Pers. Restraint of Heidari*, 174 Wn.2d 288 (2012); I.

***Pers. Restraint of Caldellis***, 187 Wn.2d 127, 132-40 (2016)

In murder by extreme indifference case, RCW 9A.32.030(1)(b) (1990), court need not instruct jury that defendant "knew of and disregarded the grave risk of death," distinguishing WPIC 26.06, at 373 (3d ed., 2008); 9-0.

***State v. Lambert***, 199 Wn.App. 51, 72-77 (2017)

Defendant is invited into home to visit victim, kills victim, goes to another home to steal gun, enters house then comes out, sees victim in driveway and demands keys to garage, victim refuses, defendant kills him in driveway, claims insufficient evidence to support felony murder/burglary 1° as he did not remain unlawfully; held: a jury could reasonably infer that defendant's license to remain was revoked when defendant attacked first victim in home, *State v. Collins*, 110 Wn.2d 253 (1988); while, to prove felony murder, there must be evidence that the murder occurred in the course of or in furtherance of the burglary, RCW 10.95.020(11) (2003), there is insufficient evidence here that the second murder occurred in immediate flight from the burglary, *State v. Hacheney*, 160 Wn.2d 503, 506-20 (2007), distinguishing *State v. Irby*, 187 Wn.App. 183, 199-203 (2015); I.

***State v. Harris***, 199 Wn.App. 137 (2017)

Defendant shoots victim five times, ten weeks later victim dies, conflicting testimony is offered as to whether or not cause of death was homicide; held: while actual cause in fact ("but for") is the same in criminal and civil cases, legal causation is narrower than in tort cases, *see: State v. Bauer*, 180 Wn.2d 929 (2014); here, defendant committed an intentional act capable of causing harm which establishes legal causation, as opposed to *Bauer, id.*, where defendant committed a negligent act; I.

***State v. Sandoval***, 189 Wn.2d 811 (2018)

Murder defendant, charged as an absent accomplice to a homicide where the shooter shot into a car killing an occupant, requests manslaughter lesser which is denied; held: sufficient evidence supported the reckless element of manslaughter 1°, thus court erred in refusing lesser, *State v. Henderson*, 182 Wn.2d 734 (2015); conspiracy to commit murder by extreme indifference, RCW 9A.32.030(l)(b), is a cognizable crime; 5-4.

***State v. Schierman***, 192 Wn.2d 577 ¶¶ 168-190 (2018)

In capital murder case defense presents evidence that defendant was in an alcoholic blackout, court gives voluntary intoxication instruction but declines to instruct on manslaughter as lesser; held: evidence of a lack of premeditation and intent due to voluntary intoxication or diminished capacity in a murder case establishes a factual basis to instruct the jury on the lesser

offense of manslaughter, *State v. Colwash*, 88 Wn.2d 468 (1977), *State v. Berlin*, 133 Wn.2d 541, 549 (1997), harmless here.

***State v. Gregory***, 192 Wn.2d 1 427 P.3d 621 (2018)

Washington death penalty statute is unconstitutional; 9-0.

***State v. Henderson***, 192 Wn.2d 508 (2018)

In murder case where defense claims self defense and accident trial court instructs on lawful use of force but declines to instruct on excusable homicide; held: excusable homicide/accident, RCW 9A.16.030 (1979), is not an affirmative defense, defendant can argue accident by asserting that state has not proved *mens rea* element, thus an instruction of excusable homicide is not required, *see: State v. Burt*, 94 Wn.2d 108, 110-11 (1980), *State v. Mercer*, 34 Wn.App. 654 (1983); court doubts "usefulness" of WPIC 15.01 (2016); 9-0.

***Pers. Restraint of Knight***,4 Wn.App.2d 248 (2018)

Attempted manslaughter 1° is not a crime as one cannot attempt a non-intent crime, *see: State v. Dunbar*, 117 Wn.2d 587 (1991); even though defendant entered a negotiated plea the judgment is invalid on its face; II.

***State v. Song Wang,*** 5 Wn.App.2d 12 (2018)

Evidence was sufficient to prove felony murder/robbery where state proves that defendant was broke, at murder scene items were stolen from victim-prostitute, property was strewn around her stabbed body, defendant attempted to pawn her property and a witness testified that he could target prostitutes who were unlikely to call police, *State v. Stearns*, 61 Wn.App. 224 (1991), evidence was sufficient to prove an "intimate connection" between the murder and the robbery, at 18-23, *State v. Brown*, 132 Wn.2d 529, 607-08 (1997), *cf.: State v. Hacheney*, 160 Wn.2d 503, 506-20 (2007), *State v. Jennings,* 14 Wn.App.2d 779 (2020), *affirmed, on other grounds, State v. Jennings*, ___ Wn.2d ___, 502 P.3d 1255 (2022); jury instruction stating "The taking constitutes robbery, even if death precedes the taking, whenever the taking and a homicide are part of the same transaction," WPIC 37.50 (2016), is confusing, as "'[t]he State must present evidence that the death was a probable consequence of the felony and must specifically prove that the felony began before the killing," *State v. Irby*, 187 Wn.app. 183 (2015), but not manifest constitutional error here, at 23-26; I.

***State v. Fluker***, 5 Wn.App.2d 374 (2018)

In murder case with lawful use of force defense defendant testifies he shot victim (8 times) intending to stop him, not to kill him, trial court instructs on lesser of manslaughter 1°, declines to instruct on manslaughter 2°; held: while evidence supports claim that defendant killed victim recklessly, no evidence exists to support a claim that defendant was unaware of the risk and thus acted negligently, thus court properly declined to instruct on manslaughter 2°; I.

***State v. Arndt***, 194 Wn.2d 784 (2019)

Defendant is convicted of aggravated murder with arson 1° as aggravator and substantive crime of arson 1°; held: while an aggravating factor involves multiple prosecutions and thus is affected by the

double jeopardy clause, *State v. Allen,* 192 Wn.2d 526 (2018), enhancing murder to aggravated murder involves multiple punishments and thus is not a violation of double jeopardy, *see: State v. Heng,* ___ Wn.App.2d ___, 83280-8-I (2022); 6-3.

***State v. DeJesus***, 7 Wn.App.2d 849 (2019)

Four characteristics or factors that are particularly relevant to establish premeditation: motive, procurement of a weapon, stealth, and the method of killing. *State v. Hummel*, 196 Wn.App. 329, 355 (2016); I.

***State v. Pierce,*** 195 Wn.2d 230 (2020)

In a murder case it is not error for the jury to be told that it is not a death penalty case, overruling *State v. Townsend,* 142 Wn.2d 838, 846-49 (2001); 5-4.

***State v. Canela***, 199 Wn.2d 321 (2022)

Attempted murder 1° information alleges that defendant did an act that was a substantial step toward the commission of murder 1° and that the act was done with intent to commit murder 1°, jury also instructed on the definition of murder 1° including premeditation, defense argues for the first time on appeal that premeditation is an essential element that must be included in the charging document; held: premeditation is not an essential element that must be included in the charging document for attempted first degree murder, *State v. Orn*, 197 Wn.2d 343 (2021), *overruling, in part, State v. Murry,* 13 Wn.App.2d 542 (2020); 9-0.

***State v. Meza***, 22 Wn.App.2d 514 (2022)

In felony murder/kidnap case victim is kidnapped, beaten and shot, left in a park after which accomplice returns in ten minutes and kills him, defense maintains kidnapping was complete before the murder; held: kidnapping is a continuing course of conduct crime, a killing that occurs before the victim reaches safety is "in the course of" the kidnapping, *State v. Leech,* 114 Wn.2d 700 (1990), *State v. Gilmer,* 96 Wn.App. 875 (1999), *State v. Dudrey,* 30 Wn.App. 447 (1981); here, a reasonable juror could find that victim was not in a place of safety; I.

***State v. Heng***, 22 Wn.App.2d 717 (2022)

Defendant is charged with intentional murder and felony murder/arson, jury returns general verdicts of guilty of murder and arson, defense argues that double jeopardy precludes punishment for both crimes; held: the rule of lenity requires that the court must assume defendant was convicted of felony murder, *State v. Deryke,* 110 Wn.App. 815, 824 (2002), *aff'd, on different grounds*, 149 Wn.2d 906 (2003), but here the arson had an effect independent of the murder as the owners of the building were victims in addition to the deceased, so the two offenses do not merge, *State v. Arndt,* 194 Wn.2d 784 (2019), *distinguishing State v. Muhammad,* 194 Wn.2d 577 (2019); I.

***State v. Avington***, 23 Wn.App.2d 847 (2022)

In murder by extreme indifference, RCW 9A.32.030(1)(b) (1990), evidence shows defendant shooting towards a bar entrance where victims were gathered, court refuses lesser instruction on manslaughter 1°, RCW 9A.32.060(1)(a) (2011); held: no reasonable jury would rationally find that

defendant was acting recklessly as required for manslaughter rather than with extreme indifference; in order for defendant to be entitled to an instruction on a lesser included offense there must be some evidence which affirmatively establishes defendant's theory of the crime, *State v. Coryell,* 197 Wn.2d 397 (2021), *State v. Workman,* 90 Wn.2d 443 (1978); II.

# NECESSITY DEFENSE

***State v. Diana***, 24 Wn.App. 908 (1979)

Necessity is available as a defense when physical forces of nature or the pressure of circumstances cause defendant to take unlawful action to avoid a harm which social policy deems greater than the harm resulting from violation of law, *State v. Kurtz,* 178 Wn.2d 466 (2013), *see also: State v. Pittman,* 88 Wn.App. 188 (1997); must be proved by preponderance of evidence.

***State v. Niemczyk***, 31 Wn.App. 803 (1982)

Defendant, charged with escape, is not entitled to necessity defense instructions where defendant did not make a bona fide effort to return to custody or surrender as soon as he reached a position of safety; II.

***State v. Turner***, 42 Wn.App. 242 (1985)

In order to instruct on the necessity defense, the evidence must show that the pressure came from the physical forces of nature rather than from other human beings, W. LaFave & A. Scott, *Criminal Law* ' 50, at 381 (1972); III.

***State v. Aver***, 109 Wn.2d 303 (1987)

Necessity defense and international law have no bearing in prosecution of nuclear war protesters blocking a train carrying nuclear warheads, *Pennsylvania v. Berrigan,* 501 A.2d 226 (1987), *but see: State, ex rel. Haskell, v. Spokane County District Court,* 198 Wn.2d 1 (2021); 7-2.

***State v. Gallegos***, 73 Wn.App. 644, 650-1 (1994)

In felony flight case, defendant's need to flee from police to help a friend who was being harassed does not support a necessity defense instruction, as the "pressure" to take the unlawful act must come from physical forces of nature, not from other human beings, *State v. Diana,* 24 Wn.App. 908, 913-4 (1979), *State v. Turner,* 42 Wn.App. 242, 247 (1985), *cf.: State v. Niemczyk,* 31 Wn.App. 803 (1982); I.

***State v. Cole***, 74 Wn.App. 571 (1994)

In marijuana case, to establish necessity, defendant must prove by a preponderance that (1) defendant reasonably believed his use of marijuana was necessary to minimize the effects of a specific disease, (2) the benefits derived from its use are greater than the harm sought to be prevented by the controlled substances law, and (3) no drug is as effective in minimizing the effects of the disease, *State v. Diana,* 24 Wn.App. 908, 916 (1979), *State v. Kurtz,* 178 Wn.2d 466 (2013), *see also: State v. Pittman,* 88 Wn.App. 188 (1997), *State v. Ruelas,* 7 Wn.App.2d 887 (2019); where defense presents some admissible evidence to support each of the elements of necessity defense, trial court may not weigh the evidence and preclude it, as such analysis usurps the jury's function; II.

***State v. Jeffrey***, 77 Wn.App. 222 (1995)

Necessity is a defense to felon in possession of a firearm, RCW 9.41.040(1), where

defendant demonstrates (1) he reasonably believed he was under unlawful and present threat of death or serious injury, (2) he did not recklessly place himself in a situation where he would be forced to engage in criminal conduct, (3) he had no reasonable alternative, and (4) there was a direct causal relationship between criminal action and avoidance of the threatened harm; here, defendant had possession of the gun before the perceived threat, no evidence that defendant was threatened with death or injury, phone call to police was, by itself, an adequate remedy due to an earlier quick police response, thus instruction properly refused by trial court, accord: *State v. Stockton*, 91 Wn.App. 35, 41-43 (1998), *State v. Parker*, 127 Wn.App. 352 (2005); III.

***State v. Bailey***, 77 Wn.App. 732 (1995)

Necessity defense not available for violation of game animal laws for killing of wildlife, even in mercy killing context, *but see: State v. Vander Houwen*, 163 Wn.2d 25 (2008); III.

***State v. Pittman***, 87 Wn.App. 188, 193-7 (1997)

In necessity defense to marijuana delivery, defense must prove, and jury must be instructed, that "no legal alternative is available which is as effective as marijuana" in minimizing effects of the disease in question, *State v. Diana*, 24 Wn.App. 908 (1979), *State v. Kurtz*, 178 Wn.2d 466 (2013), *State v. Ruelas*, 7 Wn.App.2d 887 (2019); I.

***State v. Parker***, 127 Wn.App. 352 (2005)

In felon in possession of firearm case, defendant testifies that he had been shot 9 months previously, shooter was not apprehended, carried gun for self defense, trial court refuses necessity instruction; held: absent evidence of present threat of death or serious bodily injury, *State v. Stockton*, 91 Wn.App. 35, 38 (1998), and that defendant tried reasonable legal alternative to carrying a gun, defendant is not entitled to necessity instruction, *see: State v. Gallegos*, 73 Wn.App. 644, 650 (1994), *State v. Jeffrey*, 77 Wn.App. 222, 224-25 (1995); II.

***State v. White***, 137 Wn.App. 227 (2007)

Affirmative defense of "uncontrollable circumstances," RCW 9A.76.170(2), to **bail jumping** displaces the need to give a general necessity defense instruction; defendant's failing to report to jail because he feared he would have back pain does not support necessity instructions; III.

***State v. Vander Houwen***, 163 Wn.2d 25 (2008)

Where defense to killing wildlife that is damaging defendant's property may be necessity, a specialized necessity instruction rather than WPIC 18.02 (2005) is required, *State v. Burk*, 114 Wash. 370, 376 (1921), reversing *State v. Vander Houwen*, 128 Wn.App. 806 (2005); 9-0.

***State v. Kurtz***, 178 Wn.2d 466 (2013)

Common law medical necessity defense, *State v. Diana*, 24 Wn.App. 908, 916 (1979), remains available and has not been pre-empted by the medical marijuana act, ch. 69.51A RCW, overruling *State v. Butler*, 126 Wn.App. 741 (2005), overruling, in part, *State v. Williams*, 93 Wn.App. 340 (1998); 5-4.

***State v. Ruelas,*** 7 Wn.App.2d 887 (2019)

Common law marijuana necessity defense, *State v. Kurtz*, 178 Wn.2d 466 (2013), requires a medical witness, *State v. Pittman*, 87 Wn.App. 188, 193-7 (1997); III.

***State v. Ward***, 8 Wn.App.2d 365 (2019)

Defendant is convicted of burglary for breaking into a facility and turning off a pipe stopping the flow of tar sands oil, trial court denies necessity defense; held: trial court erred in precluding defendant from offering evidence that his actions were reasonably calculated to be effective in averting imminent harm of climate change, were reasonable; for purposes of necessity defense, it is question for jury in prosecution of defendant for burglary after defendant broke into pipeline facility and turned off a valve, which stopped the flow of Canadian tar sands oil to refineries, *State, ex rel. Haskell, v. Spokane County District Court*, 198 Wn.2d 1 (2021); I.

***State, ex rel. Haskell, v. Spokane County District Court***, 198 Wn.2d 1 (2021)

Defendant blocks train to protest climate change, having protested, sought legislation to mitigate risks of coal and oil trains, is convicted of trespass and obstruction of a train after trial court allows necessity defense, state seeks writ of review; held: necessity defense is available where defense proffers enough evidence that the harm he sought to avoid is "far greater" than the harm caused by the acts of the defendant, jury can determine if there were reasonable effective alternatives in avoiding the purported harm, *State v. Ward*, 8 Wn.App.2d 365 (2019), *but see: State v. Aver*, 109 Wn.2d 303 (1987); reverses *State, ex rel. Haskell, v. Spokane County Dist. Court*, 13 Wn.App.2d 573 (2020); 7-2.

# NEW TRIAL

***State v. Hayden***, 28 Wn.App. 935 (1981)

State's witness breaking defendant's alibi **recants** after trial, trial court determines it would not have changed result; held: no abuse of discretion, *State v. Gassman,* 160 Wn.App. 600 (2011), *reversed, on other grounds,* 175 Wn.2d 208 (2012); I.

***State v. Castro***, 30 Wn.App. 586 (1981)

**Cumulative** new evidence which is unlikely to change the result of a trial is not grounds for a new trial, *cf.*: *State v. Slanaker*, 58 Wn.App. 161 (1990), *Pers. Restraint of Fero,* 190 Wn.2d 1 (2018); I,.

***State v. Cummings***, 31 Wn.App. 427 (1982)

Following conviction, jurors submitted conflicting affidavits as to whether or not jurors knew that defendant had a criminal record; outlines law on jury misconduct; held: where jury considered matters not admitted into evidence, a new trial should be granted where there is reasonable ground to believe defendant may have been prejudiced; where jury considered defendant's record not in evidence, doubt should be resolved in favor of defendant; *remanded* for hearing to determine whether in fact jury misconduct occurred; III.

***State v. Keller***, 32 Wn.App. 135 (1982)

Judgment of dismissal may not be vacated simply because judge decides to reconsider; CR 60(b) does not authorize vacation of judgments except for reasons extraneous to the action of the court or for matters affecting the regularity of the proceedings; I.

***State v. Hentz***, 32 Wn.App. 193 (1982)

State's failure to volunteer information about an impeachment witness favorable to defense is not error where defendant failed to move for a new trial, CrR 7.6(a)(2); II.

***State v. Castro***, 32 Wn.App. 559 (1982)

Co-defendant, arrested after defendant is convicted of murder, confesses to crime and absolves defendant, new trial motion denied; held: statement of co-defendant would not have been admissible as a statement against penal interest, as co-defendant had subsequently repudiated his confession; trial court is vested with broad discretion in ruling on motion for new trial based upon newly discovered evidence; I.

***State v. Goforth***, 33 Wn.App. 405 (1982)

Trial court may weigh credibility of newly-discovered evidence to determine whether the evidence will probably change the result if a new trial is granted, *cf.: State v. West*, 139 Wn.2d 37 (1999); *accord*: *State v. Barry*, 25 Wn.App. 751 (1980), *State v. Eder*, 78 Wn.App. 352 (1995), *see: State v. Smith*, 80 Wn.App. 462, 469-73 (1996); I.

***State v. Koloske***, 100 Wn.2d 889 (1984)

After robbery conviction, defendant moves for new trial alleging he obtained a police report which asserted that another person had been arrested near the scene with a gun; held: new evidence would not probably have changed the result, as victim knew defendant, *State v. Williams*, 96 Wn.2d 215 (1981); *see*: *State v. Harris*, 106 Wn.2d 784 (1986); 9-0.

***State v. York***, 41 Wn.App. 538 (1985)

Where defendant is convicted solely on testimony of a witness who later **recants**, new trial is mandatory; *see also: State v. Landon*, 69 Wn.App. 83 (1993), *but see: State v. Eder*, 78 Wn.App. 352 (1995), *State v. D.T.M.*, 78 Wn.App. 216 (1995), *State v. Smith*, 80 Wn.App. 462 (1996), *cf.: State v. Gassman*, 160 Wn.App. 600 (2011), *reversed, on other grounds*, 175 Wn.2d 208 (2012); no abuse of discretion by allowing motion for new trial beyond CrR 7.6(b) time limits if motion is based upon evidence not discovered until after the time limit expired; II.

***State v. Evans***, 45 Wn.App. 611 (1986)

Following conviction, arson defendant hires a new expert who evaluates the physical evidence and submits an affidavit stating that the fire was caused by an electrical system defect and not arson; trial court grants new trial, CrR 7.6(a)(3) and (8), state appeals; held: trial court erred in determining that the new evidence would probably change the result of the trial, *State v. Williams*, 96 Wn.2d 215, 223 (1981), *cf.: State v. Hawkins*, 181 Wn.2d 170 (2014), *Pers. Restraint of Fero*, 190 Wn.2d 1 (2018), and that there were no objectively assessable reasons or facts to establish that defendant did not get a fair trial, *State v. Harper*, 64 Wn.App. 283 (1992); 2-1, II.

***State v. Standifer***, 48 Wn.App. 121 (1987)

A juror's letter to the judge stating that she changed her mind after conviction is not grounds for a new trial; I.

***State v. Jackman***, 113 Wn.2d 772 (1989)

Defense counsel mailed subpoena to defense witness, obtained material witness warrant but did not request continuance; following conviction, witness is found; held: service by mail is not authorized by Criminal Rules *[cf.*: CrRLJ 4.8(c)], failure to request continuance to obtain witness's appearance establishes lack of due diligence,; new trial should be granted only when new evidence (1) will probably change the result of the trial, (2) was discovered since trial, (3) could not have been discovered before trial by the exercise of due diligence, (4) is material, and (5) is not merely cumulative or impeaching, *State v. Williams*, 96 Wn.2d 215, 223 (1981), *State v. Swan*, 114 Wn.2d 613 (1990), *but see*: *State v. Slanaker*, 58 Wn.App. 161 (1990); 5-4.

***State v. Slanaker***, 58 Wn.App. 161 (1990)

After conviction, defense locates two alibi witnesses, trial court grants new trial, finding that defense exercised due diligence, state appeals; held: where a witness probably cannot be found prior to trial, it is not necessary for defense to seek a continuance to preserve new trial motion, *distinguishing State v. Jackman*, 113 Wn.2d 772 (1989); a previously known witness's testimony is "newly discovered" when the witness cannot be located before trial with due diligence; an order granting a new trial should be upheld where additional apparently impartial

alibi witnesses are located, *State v. Dinas*, 129 Wash. 75, 83 (1924), *distinguishing* *State v. Fellers*, 37 Wn.App. 613, 617 (1984), *State v. Edwards*, 23 Wn.App. 893, 898 (1979); I.

***State v. Carlson***, 61 Wn.App. 865 (1991)

General objection to hearsay testimony waives error and is not grounds for a new trial, *State v. Bauers*, 23 Wn.2d 462, 466-7 (1945), *overruled on other grounds, Larson v. Seattle*, 25 Wn.2d 291 (1946); *but see:* *In re Lee*, 95 Wn.2d 357, 363 (1980), *cf.:* *State v. Jones*, 71 Wn.App. 798, 807 n.2 (1993).

***State v. Hutcheson***, 62 Wn.App. 282 (1991)

Severed co-defendant claims Fifth Amendment privilege at defendant's trial, later testifies at her own trial exculpating defendant; held: while co-defendant's testimony was material and newly discovered, trial judge's weighing of her credibility and determining that it would not have changed result due to her inconsistencies, plus co-defendant's jury having necessarily disbelieved her since it convicted, supports trial court's ruling denying motion for new trial, *State v. Williams*, 96 Wn.2d 215 (1981), *State v. Eder*, 78 Wn.App. 352 (1995), *see: State v. Smith*, 80 Wn.App. 462, 469-73 (1996); when state's evidence is strong, should not grant new trial based on uncorroborated testimony of co-defendant or accomplice, *State v. Peele*, 67 Wn.2d 724 (1966); new trial should not be granted when the only purpose of new evidence is to impeach, *State v. Sellers*, 39 Wn.App. 799, 807 (1985), *State v. Pierce*, 155 Wn.App. 701, 712 (2010), *overruled, on other grounds, , State v. Olsen*, 10 Wn.App.2d 731 (2019), *but see:* *State v. Savaria*, 82 Wn.App. 832, 837-39 (1996), *overruled, in part, on other grounds*, *State v. C.G.*, 150 Wn.2d 604, 611 (2003), *State v. Roche*, 114 Wn.App. 424 (2002); I.

***State v. Brand***, 120 Wn.2d 365 (1992)

Trial court may not consider a CrR 7.8(b) motion if defendant has previously brought a collateral attack on similar grounds, RCW 10.73.140; in the context of newly discovered evidence, a collateral attack is based upon similar grounds unless the current evidence is significantly different in either quantum or quality from the evidence presented in a previous collateral attack; *affirms, in part*, *State v. Brand*, 65 Wn.App. 166 (1992); 9-0.

***State v. Landon***, 69 Wn.App. 83 (1993)

Where a defendant is convicted solely on testimony that is later recanted in a written statement, then remand for a hearing in trial court to see if victim will **recant** in open court is proper remedy, *State v. D.T.M.*, 78 Wn.App. 216 (1995), *State v. Smith*, 80 Wn.App. 462, 469-73 (1996), *cf.: State v. Gassman*, 160 Wn.App. 600 (2011), *reversed, on other grounds*, 175 Wn.2d 208 (2012); II.

***State v. Eder***, 78 Wn.App. 352 (1995)

Where defendant is convicted solely on testimony of witness who later **recants**, trial court may weigh credibility of recanting witness in determining whether or not to grant new trial, *State v. Rolax*, 84 Wn.2d 836 (1974), *overruled on other grounds, Wright v. Morris*, 85 Wn.2d 899 (1975), *State v. Davis*, 25 Wn.App. 134 (1980), *State v. Macon*, 128 Wn.2d 784 (1996), *State v. Ieng*, 87 Wn.App. 873 (1997), *cf.: State v. Gassman*, 160 Wn.App. 600 (2011), *reversed, on other grounds*, 175 Wn.2d 208 (2012), *but see:* *State v. York*, 41 Wn.App. 538 (1985)

(Division II), *State v. Landon*, 69 Wn.App. 83 (1993) (Division II), *State v. D.T.M.*, 78 Wn.App. 216 (1995)(Division III), *State v. Smith*, 80 Wn.App. 462, 469-73 (1996); I.

***State v. Macon***, 128 Wn.2d 784 (1996)

When defendant is convicted upon testimony of a witness who later recants, trial court must first determine whether recantation is reliable before considering motion for new trial, independent corroborating evidence to support recanting witness' original testimony is not a controlling factor, as recantations are inherently suspect; when defendant's conviction is based solely upon the testimony of a recanting witness, trial court does not abuse discretion if it determines recantation is unreliable and denies motion for new trial, but if trial court determines recantation is reliable, it must grant new trial, *State v. Rolax*, 84 Wn.2d 836, 838 (1974), *overruled on other grounds*, *Wright v. Morris*, 85 Wn.2d 899 (1975), *State v. Eder*, 78 Wn.App. 352 (1995), *State v. Ieng*, 87 Wn.App. 873 (1997), *State v. West*, 139 Wn.2d 37 (1999), *cf.: State v. Gassman*, 160 Wn.App. 600 (2011), *reversed, on other grounds*, 175 Wn.2d 208 (2012), *but see: State v. Smith*, 80 Wn.App. 462 (1996), *State v. York*, 41 Wn.App. 538 (1985), *State v. Landon*, 69 Wn.App. 83 (1993), *State v. D.T.M.*, 78 Wn.App. 216 (1995); 9-0.

***State v. Smith***, 80 Wn.App. 462, 469-73 (1996), *rev'd, on other grounds*, 131 Wn.2d 258 (1997)

After trial, witness recants and pleads guilty to perjury; held: where defendant is convicted solely on basis of a recanting witness, new trial is mandatory, *State v. Rolax*, 84 Wn.2d 836, 838 (1974), *overruled on other grounds*, *Wright v. Morris*, 85 Wn.2d 899 (1975), *but see: State v. West*, 139 Wn.2d 37 (1999), but where there is corroborating evidence, decision to grant a new trial is discretionary, *State v. Rhinehart*, 70 Wn.App. 649 (1967); test for trial court at reference hearing is whether recantation evidence would probably cause the trier of fact at a new trial to reach a different outcome, *State v. D.T.M.*, 78 Wn.App. 216 (1995), *State v. Scott*, 150 Wn.App. 281 (2009), *cf.: State v. Gassman*, 160 Wn.App. 600 (2011), *reversed, on other grounds*, 175 Wn.2d 208 (2012); trial court must consider recantation in context of the other evidence of the crime and in light of the circumstances surrounding the recantation, *State v. Eder*, 78 Wn.App. 352, 361 (1995); trial court should not subjectively determine credibility of recanting witness, rather should decide whether recantation would be persuasive to a reasonable juror in light of all of the evidence, *cf.: State v. Eder*, 78 Wn.App. 352 (1995), *State v. York*, 41 Wn.App. 538, 543-5 (1985), *but see: State v. Macon*, 128 Wn.2d 784 (1996), *State v. Ieng*, 87 Wn.App. 873 (1997); II.

***State v. Savaria***, 82 Wn.App. 832, 837-39 (1996), *overruled, in part, on other grounds*, *State v. C.G.*, 150 Wn.2d 604, 611 (2003)

Trial court abuses discretion in denying new trial for newly discovered evidence where the evidence "devastates a witness's uncorroborated testimony establishing an element of the offense," as the new evidence is not merely impeaching but critical, *State v. Roche*, 114 Wn.App. 424 (2002), *cf.: Pers. Restraint of Delmarter*, 124 Wn.App. 154 (2004), distinguishing *State v. Hutcheson*, 62 Wn.App. 282, 300 (1991), *State v. Sellers*, 39 Wn.App. 799, 807 (1985); I.

***State v. Ieng***, 87 Wn.App. 873 (1997)

Where witness **recants**, trial court is to make its own determination of the credibility of the witness, whether or not there is corroborating evidence and without regard to whether a jury might find the witness credible, *State v. Eder*, 78 Wn.App. 352 (1995), *State v. West*, 139 Wn.2d 37 (1999), *cf.: State v. Gassman*, 160 Wn.App. 600 (2011), *reversed, on other grounds*, 175 Wn.2d 208 (2012); Division I declines to follow Division II, *State v. Smith*, 80 Wn.App. 462, 469-70 (1996), *rev'd, on other grounds*, 131 Wn.2d 258 (1997).

***State v. Marks***, 90 Wn.App. 980 (1998)

After speaking with jurors after verdict, trial court grants new trial based upon its perception that jurors were confused about the application of a missing witness instruction to both a defense and state's witness; held: the instruction was correct, how the jury interpreted the instruction can only be discovered by probing into the jurors' mental processes, which is improper as mental processes of jurors inhere in the verdict, *Ayers v. Johnson & Johnson Baby Prods. Co.*, 117 Wn.2d 747, 768-9 (1991); 2-1, III.

***State v. Corn***, 95 Wn.App. 41, 51-56 (1999)

Trial court gives an erroneous self-defense instruction, state discovers error during deliberations, court substitutes erroneous instruction with correct instruction, defense counsel states that he may move for a mistrial upon consultation with his client, jury convicts, trial court grants new trial; held: original instruction created error of constitutional magnitude, court's conclusion that the erroneous instruction may have affected the verdict in spite of the change and grant of new trial was not an abuse of discretion; III.

***State v. West,*** 139 Wn.2d 37 (1999)

Defendant does not testify at trial, counsel fails to move to exclude prior murder conviction, ER 609, Court of Appeals remands, trial court at reference hearing finds defendant's testimony was not credible, would not have been believed by a jury, thus there was not a reasonable probability that verdict would have been different; held: in deciding whether or not to grant a new trial based upon new evidence not offered at trial due to ineffective assistance, where trial court finds new evidence is not credible and thus would not have effected outcome of trial, no abuse of discretion, *see: State v. Maurice*, 79 Wn.App. 544 (1995), *Dorsey v. King County*, 51 Wn.App. 664 (1988), *State v. Hendrickson*, 129 Wn.2d 61, 80 (1996); 5-4.

***Pers. Restraint of Crabtree***, 141 Wn.2d 577, 588-89 (2000)

Witness's recantation following a non-*Alford* guilty plea does not justify withdrawal of plea and new trial, *State v. Macon*, 128 Wn.2d 784, 803 (1996), *State v. Arnold*, 81 Wn.App. 379, 386-87 (1996), *see also: State v. Ice*, 138 Wn.App. 744 (2007); 7-2.

***State v. Roche***, 114 Wn.App. 424, 436-38 (2002)

After drug trial, defense discovers that chemist at crime lab who tested drugs in these cases had been using heroin stolen from test samples and lied to police about it, new trial denied; held: chemist's malfeasance is more than merely impeaching, it is critical with respect to his credibility, validity of testing and chain of custody, thus denial of new trial was abuse of discretion, *State v. Savaria*, 82 Wn.App. 832, 837-39 (1996), *overruled, in part, on other grounds*, *State v. C.G.*, 150 Wn.2d 611 (2003), *cf.: Pers. Restraint of Brennan*, 117 Wn.App. 797

(2003) *Pers. Restraint of Delmarter*, 124 Wn.App. 154 (2004), *Pers. Restraint of Woods*, 154 Wn.2d 400, 431-32 (2005); I.

***Pers. Restraint of Brennan***, 117 Wn.App. 797 (2003)

Two years after petitioner pleaded guilty to possession of methamphetamine, state chemist who tested his drugs was exposed as a drug user and convicted of evidence tampering, defendant seeks to withdraw plea claiming he had no reason to contest lab reports; held: because defendant pled guilty, drugs defendant possessed were field tested positive, defendant confessed and defendant failed to provide temporal connection between malfeasance of chemist and the testing of defendant's drugs, PRP is denied, *Pers. Restraint of Delmarter*, 124 Wn.App. 154 (2004), distinguishing *State v. Roche*, 114 Wn.App. 424 (2002); I.

***State v. Boling***, 131 Wn.App. 329 (2006)

In manslaughter case, juror does independent internet research on cause of death, trial court grants new trial; held: trial court's inability to rule out juror's misconduct impacting verdict establishes a proper exercise of discretion in granting new trial, *see: State v. Arndt*, 5 Wn.App.2d 341 (2018); III.

***State v. Larson***, 160 Wn.App. 577, 586-90 (2011)

Co-defendant pleads guilty, implicating defendant in plea statement, is not called to testify, after conviction co-defendant provides a statement exculpating defendant, defense moves for a new trial alleging new evidence; held: co-defendant was an available witness, as he was in jail during defendant's trial, failure to call him was not an absence of diligence as co-defendant's attorney prohibited defense counsel from speaking with him, co-defendant's inculpatory statements were not used at trial, thus trial court did not abuse its discretion in denying new trial; 2-1, III.

***State v. Gassman***, 160 Wn.App. 600, 608-13 (2011), *reversed, on other grounds*, 175 Wn.2d 208 (2012)

Before trial, co-defendant inculpates defendant, pleads guilty, apparently recants, counsel advises counsel for defendant that co-defendant will not testify based on Fifth Amendment, co-defendant is not called, after conviction co-defendant recants by affidavit, trial court denies new trial; held: test for newly discovered evidence: (1) will evidence probably change result, (2) was it discovered since the trial, (3) could it have been discovered by due diligence, (4) is it material, (5) is it merely cumulative or impeachment?, *State v. Williams*, 96 Wn.2d 215, 223 (1981), *Pers. Restraint of Fero*, 190 Wn.2d 1 (2018); here, trial court found that co-defendant could easily have been impeached, thus outcome of new trial would not be different, *State v. Statler*, 160 Wn.App. 622 (2011), defense was aware of co-defendant's testimony before trial but chose not to call him, trial court would likely not have sustained privilege because he was no longer in jeopardy, thus trial court did not abuse discretion; counsel's decision not to call co-defendant was likely tactical and would not have changed result, thus not ineffective assistance; 2-1, III.

***Pers. Restraint of Copland***, 176 Wn.App. 432, 450-51 (2003)

"A new expert opinion, based on facts available to the trial experts, does not constitute newly discovered evidence that could not, with due diligence, have been discovered before trial.

*State v. Harper,* 64 Wn.App. 283, 293 (1992)," at 451 ¶ 16, *State v. Davis,* 25 Wn.App. 134, 138 (1980), *cf.: Pers. Restraint of Fero,* 190 Wn.2d 1 (2018); III.

***Pers. Restraint of Faircloth****,* 177 Wn.App. 161 (2013)

Petitioner's claim of recovered memory of self defense 17 years after conviction would not change result thus does not meet requirement for newly discovered evidence; II.

***State v. Hawkins****,* 181 Wn.2d 170, 179-82 (2014)

Defense witness testifies at trial, after conviction defense submits declaration from the witness with exculpatory evidence, trial court finds that there was no reason for defense to have known when the witness testified that the exculpatory evidence existed nor was the witness aware that it was exculpatory, grants new trial, state appeals; held: trial court granting of a new trial is entitled to a "heightened level of deference," much stronger showing of an abuse of discretion will ordinarily be required to set aside an order granting a new trial than one denying a new trial, *State v. Brent,* 30 Wn.2d 286, 290 (1948), *see: State v. Lopez,* 190 Wn.2d 104, 116-18 (2018); 9-0.

***Pers. Restraint of Fero****,* 190 Wn.2d 1 (2018)

Newly discovered medical evidence regarding shaken baby syndrome would not probably change the outcome, *Matter of Reyes,* ___ Wn.App.2d ___, 505 P.3d 1234 (2022), *State v. Gassman,* 160 Wn.App. 600, 609 (2011), *State v. Williams,* 96 Wn.2d 215, 223 (1981); reverses *Pers. Restraint of Fero,* 192 Wn.App. 138 (2016); 4-3-2 (four justices join lead opinion, three justices dissent, two justices dissent on a different issue, not addressing the lead).

***Matter of Reyes****,* 21 Wn.App.2d 353 (2022)

In shaken baby syndrome/abusive head trauma case medical evidence raising questions about the diagnosis was available to the defense, could have been discovered with reasonable diligence before trial, thus PRP was untimely, *Pers. Restraint of Fero,* 190 Wn.2d 1 (2018); II.

# PERJURY

***State v. Olson***, 92 Wn.2d 134 (1979)

Literal truth controls even if response is misleading, *cf.: State v. Miller,* 179 Wn.App. 91, 105-06 (2014); reverses *State v. Olson*, 19 Wn.App. 885 (1978); 5-4.

***Nessman v. Sumpter***, 27 Wn.App. 18 (1980)

Court must instruct that to convict there must be direct testimony plus corroborating circumstances, *State v. Rutledge*, 37 Wash. 523, 528, (1905); II .

***State v. White***, 31 Wn.App. 655 (1982)

In order to prove perjury, state must present (1) the testimony of at least one credible witness which is positive and directly contradictory of the defendant's oath and (2) another such direct witness or independent evidence of corroborating circumstances of such a character as clearly could turn the scale and overcome the oath of the defendant and the legal presumption of innocence; where there is no testimony presented that directly and positively contradicts the defendant's testimony, the information must be dismissed; I, 2-1.

***State v. Dial***, 44 Wn.App. 11 (1986)

Even though judge and prosecutor disbelieved defendant's testimony that became the subject of perjury prosecution, it still "could have affected the course or outcome of the proceeding," RCW 9A.72.010(1); credibility of witnesses in perjury case is for jury to determine; I.

***State v. Hovrud***, 60 Wn.App. 573 (1991)

Defendant lies in statement given under oath required by a fire insurance policy; held: **false swearing,** RCW 9A.72.040, does not apply as the statement under oath was not required by "statute or regulatory provision," RCW 9A.72.010(3); 2-1, II.

***State v. Stump***, 73 Wn.App. 625 (1994)

Defendant is asked under oath, "have you ever been involved in drugs?," answers no, soon thereafter pleads guilty to delivery of drugs, is convicted later of perjury; held: question was unclear whether it was intended to cover use or any contact with drugs; in order to sustain a perjury conviction, questions and answers must demonstrate both that the defendant was fully aware of the actual meaning and that defendant knew his answers were not the truth, and must be interpreted in the context of what immediately preceded and succeeded them, *see: State v. Olson*, 92 Wn.2d 134, 136 (1979), *State v. Singh*, 167 Wn.App. 971 (2012); here, questions before dealt with usage or addiction; III.

***State v. Jacobson***, 74 Wn.App. 715, 724-6 (1994)

An affidavit submitted for litigation will support a perjury 1° conviction, RCW 9A.72.020(1), as an "official proceeding" does not require live testimony in open court;

false swearing, RCW 9A.72.040(1) is not a lesser of perjury 1° where the false statement was made in an official proceeding, since no rational trier of fact could conclude the evidence supported an inference that the lesser but not the greater offense was committed, *State v. Workman*, 90 Wn.2d 443, 447-8 (1978), *State v. Rodriguez*, 48 Wn.App. 815, 818-9 (1987); I.

***State v. Abrams***, 163 Wn.2d 277 (2008)

That portion of perjury statute, RCW 9A.72.010(1), which declares that the materiality of a false statement must be determined by the judge is unconstitutional, *United States v. Gaudin*, 132 L.Ed.2d 444 (1995), *Johnson v. United States*, 137 L.Ed.2d 718 (1997), materiality is a jury question; 9-0.

***State v. Singh***, 167 Wn.App. 971 (2012)

While common law requires heightened proof for a perjury conviction and testimony of one witness or circumstantial evidence alone is insufficient, *State v. Wallis*, 50 Wn.2d 350, 353 (1957), a single witness' testimony plus a tape recording of the defendant's statement corroborating that she knew she was lying is sufficient to convict; III.

***State v. Arquette***, 178 Wn.App. 273 (2013)

To prove perjury, state must present testimony of at least one witness which is positive and directly contradictory of the defendant's oath and there must be corroborating evidence, *State v. Olson*, 92 Wn.2d 134, 136 (1979), that is inconsistent with defendant's innocence, and may not merely support the direct witness' testimony; II.

# PERSISTENT OFFENDER/HABITUAL CRIMINAL

***State v. Murdock***, 91 Wn.2d 336 (1979)

Institutional packets are admissible only to prove identity, not the conviction, *see:* *State v. Clark*, 18 Wn.App. 831 (1977).

***State v. Holsworth***, 93 Wn.2d 148 (1980)

State has burden of proving beyond a reasonable doubt that pre-*Boykin* pleas were valid, *cf.:* *Parke v. Raley*, 121 L.Ed.2d 391 (1992), *but see:* *Custis v. United States*, 128 L.Ed.2d 517 (1994), *State v. Manussier*, 129 Wn.2d 652 (1996), *State v. Thorne*, 129 Wn.2d 736 (1996), *Daniels v. United States*, 149 L.Ed.2d 590 (2000), *see:* *Lackawanna County Dist. Attorney v. Coss*, 149 L.Ed.2d 608 (2001); 9-0.

***State v. Fain***, 94 Wn.2d 387 (1980)

Life sentence following habitual criminal determination where defendant's prior crimes amounted to nonviolent thefts, totaling $470 is cruel punishment, per CONST. Art. I, § 9, *see:* *State v. Whitfield*, 132 Wn.App.878, 900-02 (2006), *cf.: State v. Witherspoon*, 180 Wn.2d 875 (2014), *State v. Hart*, 188 Wn.App. 453, 460-65 (2015), *State v. Moen*, 4 Wn.App.2d 589 (2018), *State v. Ritchie*, ___ Wn.App.2d ___, 520 P.3d 1105 (2022); 5-4.

***Rummel v. Estelle***, 63 L.Ed.2d 382 (1980)

Not cruel and unusual to sentence defendant to life for three property-related felonies, *Ewing v. California*,155 L.Ed.2d 108 (2003); 5-4.

***State v. Ross***, 30 Wn.App. 324 (1981)

Use of a rubber stamp for clerk's certification of a judgment and sentence is adequate, ER 901, 902.

***State v. Johnson***, 33 Wn.App. 534 (1982)

Photographs in prison packet are enough to establish identity for purposes of habitual criminal statute; I.

***State v. Chervenell***, 99 Wn.2d 309 (1983)

State must establish at habitual criminal trial that defendant had been aware of his right not to testify when entering prior plea of guilty, *reversing* *State v. Chervenell*, 28 Wn.App. 805; *dicta* that extrinsic evidence of defendant's awareness of Fifth Amendment privilege is admissible, including defense counsel's testimony as to advice; 5-4.

***State v. Warriner***, 100 Wn.2d 459 (1983)

Failure of state to prove defendant was aware of his privilege not to testify when plea was entered is fatal to habitual criminal allegation; state may prove defendant's knowledge of 5th Amendment privilege by prior trial in which defendant did not testify; 9-0.

***State v. Bowman***, 36 Wn.App. 798 (1984)

Failure to advise defendant of 5th Amendment privileges precludes use of prior; reversal on this ground goes to sufficiency requiring dismissal; I.

***State v. Lujan***, 38 Wn.App. 735 (1984)

Where defendant challenges validity of prior plea, burden shifts to state, *cf.: Parke v. Raley,* 121 L.Ed.2d 391 (1992); state meets its burden by offering a facially valid plea statement, need not offer colloquy; written plea statement is sufficient for court to accept plea, *In re Keene,* 95 Wn.2d 203 (1980); II.

***State v. LeFever***, 102 Wn.2d 777 (1984)

Dismissal of habitual criminal proceedings for insufficiency may not be reconsidered unless it was initially tentative or subject to further consideration, *Evans v. Michigan,* 568 U.S. 313, 185 L.Ed.2d 124 (2013); 8-1.

***State v. Johnson***, 104 Wn.2d 338 (1985)

Defendant's stipulation to facts from which he is found guilty is not the equivalent to a guilty plea, and trial court need not ensure defendant understands the nature of the crime and the consequences of the stipulation; I.

***State v. Rigsby***, 49 Wn.App. 912 (1987)

State's failure to prove that defendant was advised of elements of the offense, *In re Keene,* 95 Wn.2d 203, 209 (1980), or factual basis for the plea, *State v. Hystad,* 36 Wn.App. 42 (1983), is fatal to prosecution; state need not prove that defendant was advised that state had burden of proof beyond reasonable doubt; I.

***Parke v. Raley***, 121 L.Ed.2d 391 (1992)

Kentucky law which places burden of production on habitual criminal defendant to show prior pleas were invalid does not violate due process clause, *cf.: State v. Chervenell*, 99 Wn.2d 309 (1983); where no transcripts of prior plea exist, government's burden of proof by preponderance meets due process requirements; 9-0.

***State v. Summers***, 120 Wn.2d 801 (1993)

In VUFA trial, defense may challenge present use of prior conviction, *State v. Gore,* 101 Wn.2d 481 (1984); initial defense burden is to offer a colorable, fact-specific argument supporting the claim of constitutional error in prior conviction, after which state bears burden of proving that predicate conviction is constitutionally sound, even where prior conviction was based upon a jury verdict affirmed on appeal; 9-0.

***State v. Manussier,*** 129 Wn.2d 652 (1996)

"Three strikes" law, Initiative 593, does not require prosecutor to file a separate information alleging the status, defendant is not entitled to jury trial on issue, *State v. Smith,* 150 Wn.2d 135 (2003), *State v. Lewis,* 141 Wn.App. 367, 391-97 (2007), *State v. Witherspoon,* 180 Wn.2d 875, 891-94 (2014), *State v. Ritchie,* ___ Wn.App.2d ___, 520 P.3d 1105 (2022), status need not be proved beyond a reasonable doubt, *State v. Vickers,* 148 Wn.2d 91, 119-21 (2002), *see: State v. Carpenter,* 117 Wn.App.

673 (2003), *State v. Ben*, 114 Wn.App. 148 (2002), *State v. Ortega*, 120 Wn.App. 165 (2004), *vacated, on other grounds*, 131 Wn.App. 591 (2006), *State v. Rudolph*, 141 Wn.App. 59 (2007), distinguishing *State v. Holsworth*, 93 Wn.2d 148 (1980), *State v. Powell*, 172 Wn.App. 455, 459-62 (2012); *accord: State v. Thorne*, 129 Wn.2d 736 (1996); 6-3.

***State v. Mutch***, 87 Wn.App. 433 (1997)

Test for consideration of foreign convictions in three strikes sentence, RCW 9.94A.120, is same as for any SRA prior, *i.e.*, compare elements to Washington statutes and, if they are the same, the prior conviction is included, *State v. Russell*, 104 Wn.App. 422, 439-52 (2001), *see: State v. Robinson*, 114 Wn.App. 800 (2003), *but see: State v. Delgado*, 148 Wn.2d 723 (2003); if they are not or the foreign statute is broader, sentencing court may look at defendant's conduct as evidenced by the indictment to determine whether the conduct would have violated a Washington statute, *State v. Duke*, 77 Wn.App. 532, 535 (1995), *State v. Bunting*, 115 Wn.App. 135 (2003), *State v. Freeburg*, 120 Wn.App. 192 (2004); I.

***State v. Ollens***, 89 Wn.App. 437 (1998)

Out-of-state adult conviction obtained before defendant turned 18 is not a conviction, RCW 9.94A.030(27), absent a decline hearing, RCW 13.40.110, 9.94A.030(25), for purposes of persistent offender statute; III.

***State v. Morley***, 134 Wn.2d 588 (1998)

General **courts-martial** are prior convictions for Persistent Offender Accountability Act; 5-4.

***State v. Angehrn***, 90 Wn.App. 339 (1998)

Persistent Offender Accountability Act (POAA/Three Strikes does not constitute *ex post facto* punishment where it was enacted effective prior to defendant's current offense, *State v. Nordlund*, 113 Wn.App. 171, 191-93 (2002); I.

***State v. Bridges***, 91 Wn.App. 102 (1998)

POAA is narrowly drawn, serves a compelling state interest, does not violate due process; I.

***State v. Burton***, 92 Wn.App. 114 (1998)

Once state establishes two prior convictions by a preponderance, it must prove the constitutional validity of only those convictions previously declared constitutionally invalid on their face, *State v. Manussier*, 129 Wn.2d 652, 682 (1996); here, although prior plea forms did not include express waiver of right to testify, trial court's conclusion that pleas were not facially invalid is affirmed, *In re Pers. Restraint of Runyan*, 121 Wn.2d 432, 449-50 (1993), *State v. Ammons*, 105 Wn.2d 175, 188-89 (1986), *but see: State v. Carpenter*, 117 Wn.App. 673 (2003); III.

***State v. Russ***, 93 Wn.App. 241, 247-48 (1998)

POAA does not violate International Covenant on Civil and Political Rights; I.

***State v. Cloud***, 95 Wn.App. 606, 616-18 (1999)

Those portions of Persistent Offender Accountability Act that apply to first-time offenders (here, no good time for murder) are void as violative of the one-subject requirement of CONST. Art. II § 19; I.

***State v. Cruz***, 139 Wn.2d 186 (1999)

Washout provisions to SRA apply prospectively only and 1990 amendments do not revive a previously washed out conviction; reverses *State v. Cruz*, 91 Wn.App. 389 (1998); *see also: State v. Aronhalt*, 99 Wn.App. 302 (2000), *accord: State v. Smith*, 144 Wn.2d 665, 670-75 (2001), *State v. Deon*, 113 Wn.App. 691 (2002), *but see: State v. Varga*, 151 Wn.2d 179 (2004), *cf.: State v. Swecker*, 154 Wn.2d 660 (2005); 5-4.

***State v. Aronhalt***, 99 Wn.App. 302 (2000)

To determine if prior sex offenses have washed out, *State v. Cruz*, 139 Wn.2d 186 (1999), trial court must accurately determine the classification and parole date for each prior offense, *see: State v. McCorkle*, 137 Wn.2d 490, 498 (1999); III.

***State v. Morin***, 100 Wn.App. 25 (2000)

Life without parole for second strike indecent liberties by forcible compulsion is not cruel punishment under these facts, *State v. Gimarelli*, 105 Wn.App. 370, 380-82 (2001), *State v. Flores*, 114 Wn.App. 218 (2002), *State v. Hart*, 188 Wn.App. 453, 460-65 (2015); I.

***State v. Berry***, 141 Wn.2d 121 (2000)

A "stayed" California conviction counts as a strike, as it remains a valid conviction; 7-1.

***State v. Keller***, 143 Wn.2d 267 (2001)

Prior "most serious offenses" served concurrently "count" in the offender score, former RCW 9.94A.360(6)(c) [RCW 9.94A.525 (2013)], and thus are strikes for purposes of POAA, RCW 9.94A.030(25); affirms *State v. Keller*, 98 Wn.App. 381 (1999); 5-4.

***State v. Russell***, 104 Wn.App. 422, 439-52 (2001)

Detailed analysis determining sentencing consequences of an out-of-state conviction; II.

***State v. Wheeler***, 145 Wn.2d 116 (2001)

To prove that a defendant is a persistent offender, state need not charge, submit to jury and prove beyond a reasonable doubt prior convictions, *State v. Vickers*, 148 Wn.2d 91, 119-21 (2002), *State v. Smith*, 150 Wn.2d 135 (2003), *State v. Lewis*, 141 Wn.App. 367, 391-97 (2007), *State v. Brinkley*, 192 Wn.App. 456 (2016), distinguishing *Apprendi v. United States*, 147 L.Ed.2d 435 (2000), *see: Almendarez-Torres v. United States*, 140 L.Ed.2d 350 (1998), *State v. Ortega*, 120 Wn.App. 165 (2004), *vacated, on other grounds*, 131 Wn.App. 591 (2006), *State v. Rivers*, 130 Wn.App. 689 (2005); 7-2.

***State v. Lawrence***, 108 Wn.App. 226, 239-42 (2001)

"Two strikes" statute, RCW 9.94A.030(29)(b), requires state to prove that prior offense be the equivalent of a named Washington sex offense, *see:* *State v. Delgado*, 148 Wn.2d 723 (2003), *see:* RCW 9.94A.030(31)(b)(ii) as amended in 2001, does not violate *ex post facto* or bill of attainder clauses; I.

***State v. Lopez***, 147 Wn.2d 515 (2002)

At sentencing, defense counsel objects to failure of state to prove priors, state offers to obtain copies of judgments and sentences, trial court declines and sentences defendant to life without parole; held: upon objection, state was obliged to prove prior convictions, *State v. Ford*, 137 Wn.2d 472, 480-82 (1999), *State v. Rivers*, 130 Wn.App. 689 (2005), *State v. Mendoza*, 165 Wn.2d 913 (2009), *State v. Hunley*, 175 Wn.2d 901 (2012), failure to do so, even where trial court stated it would proceed anyway, precludes remand to allow state a further opportunity to meet its burden, *State v. McCorkle*, 137 Wn.2d 490, 497 (1999), *see: State v. Thiefault*, 160 Wn.2d 409, 417 n.4 (2007), *State v. Bergstrom*, 162 Wn.2d 87 (2007), *but see:* RCW 9.94A.530(2) (2008), *State v. Jones*, 182 Wn.2d 1 (2014); affirms *State v. Lopez*, 107 Wn.App. 270 (2001); 6-3.

***State v. Nordlund***, 113 Wn.App. 171, 190-93 (2002)

Clarifying amendments to POAA which direct that court treat anticipatory priors the same as completed offenses apply retroactively, as courts will apply curative amendments that clarify or technically correct an ambiguous statute, *In re F.D. Processing, Inc.* 119 Wn.2d 461 (1992), distinguishing *State v. Cruz*, 139 Wn.2d 186, 191-92 (1999); II.

***State v. Delgado***, 148 Wn.2d 723 (2003)

Even though elements of the crimes are identical, where legislature changes the name of a crime (here, rape of a child from statutory rape) but does not change the name as a strike for purposes of persistent offender statute, then it is not a strike, reversing, in part, *State v. Delgado*, 109 Wn.App. 61 (2001), *see: State v. Ortega*, 120 Wn.App. 165 (2004), *vacated, on other grounds*, 131 Wn.App. 591 (2006), *State v. Stockwell*, 159 Wn.2d 394 (2007); 6-3.

***State v. Robinson***, 114 Wn.App. 800 (2003)

Trial court finds that California offense proscribing "lewd and lascivious acts with a child" is equivalent to rape of a child, and is thus a strike; held: where factual inquiry into the elements of a crime shows that the underlying conduct would be a strike in Washington, then the offense is indeed a strike, *State v. Lawrence*, 108 Wn.App. 226 (2001), *cf.: State v. Delgado*, 148 Wn.2d 723 (2003); here, defendant's out-of-state conviction involved performing fellatio on a child; II.

***State v. Bunting***, 115 Wn.App. 135 (2003)

Illinois robbery that does not require specific intent to steal or deprive is not equivalent to Washington robbery, thus is not a strike, at 140-41; while court should look to the record to see if the conduct would have violated the comparable Washington statute, *see: State v. Morley*, 134 Wn.2d 588, 606 (1998), *State v. Mutch*, 87 Wn.App. 433 (1997), the complaint and "official statement of facts" cannot be considered, as they are allegations never proven at trial because

defendant pled guilty, *State v. Freeburg*, 120 Wn.App. 192 (2004), *State v. Thomas*, 135 Wn.App. 474 (2006); while the indictment may be considered, here it does not establish intent to deprive as an element, at 142-43; I.

***State v. Carpenter***, 117 Wn.App. 673 (2003)

Defendant is sentenced as a persistent offender, one 1996 strike was originally charged as assault 1°, resulting in automatic decline of the defendant who was under 18, but defendant pleaded to assault 2°, not an automatic decline offense, prior to sentencing here, court holds a decline hearing for the 1996 case and declines "*nunc pro tunc,"* thus using the prior as a strike; held: while a decline hearing may be held after a conviction in adult court, *State v. Mora*, 138 Wn.2d 43 (1999), because the decline hearing did not actually occur until after defendant committed the new crime, he was not properly convicted twice before of crimes of violence; because state bears burden of proving by preponderance that two applicable prior convictions exist when seeking a POAA sentence, *State v. Manussier*, 129 Wn.2d 652, 681-82 (1996), *State v. Powell*, 172 Wn.App. 455, 459 (2012), defendant may challenge the prior, as it is the present use of a prior conviction and not a collateral attack, *State v. Holsworth*, 93 Wn.2d 148 (1980), *State v. Knippling*, 166 Wn.2d 93 (2009); II.

***State v. Smith***, 150 Wn.2d 135 (2003)

State constitution does not require that persistent offender status be submitted to jury, *State v. Manussier*, 129 Wn.2d 652 (1996), *see: Almendarez-Torres v. United States*, 140 L.Ed.2d 350 (1998), *State v. Rivers*, 130 Wn.App. 689 (2005), *State v. Ortega*, 120 Wn.App. 165 (2004), *vacated, on other grounds*, 131 Wn.App. 591 (2006), *State v. Brinkley*, 192 Wn.App. 456 (2016), distinguishing *State v. Furth*, 5 Wn.2d 1 (1940), *Apprendi v. New Jersey*, 147 L.Ed.2d 435 (2000), *cf. Blakely v. Washington*, 159 L.Ed.2d 400 (2004), *State v. McDougall*, 132 Wn.App. 609, 613-14 (2006); 5-4.

***State v. Varga***, 151 Wn.2d 179 (2004)

Washout provisions to SRA apply retroactively, 2002 amendments to RCW 9.94A.525 and 9.94A.030 may require courts to revive a previously washed out conviction, *but see: Pers. Restraint of LaChapelle*, 153 Wn.2d 1 (2004), *distinguishing State v. Cruz*, 139 Wn.2d 186 (1999), *State v. Smith*, 144 Wn.2d 655 (2001), *cf.: State v. Swecker*, 154 Wn.2d 660 (2005); 8-0.

***State v. Ortega***, 120 Wn.App. 165 (2004), *review granted and remanded, ,* 154 Wn.2d 1031 (2005), vacated, on other grounds, 131 Wn.App. 591 (2006)

Following child molestation 1° conviction, state introduces out-of-state indictment and judgment and sentence establishing that defendant was convicted of indecency with a child under 17, calls a witness to testify that police files show victim was under 12, to which defense objects, trial court finds state has not proved a prior strike; held: while existence of a prior conviction need not be determined beyond a reasonable doubt, *State v. Smith*, 150 Wn.2d 135, 141-35 (2003), underlying facts of a prior conviction cannot be considered unless proved to trier of fact beyond a reasonable doubt, *Apprendi v. New Jersey*, 147 L.Ed.2d 435 (2000), to enhance penalty beyond maximum; III.

***State v. Freeburg***, 120 Wn.App. 192 (2004)

Federal bank robbery, 18 USC. § 2113(a), is not comparable to robbery 2° because robbery requires proof of intent to steal while federal offense is a general intent crime, *see: State v. Bunting*, 115 Wn.App. 135 (2003); I.

***Pers. Restraint of Lavery***, 154 Wn.2d 249 (2005)

Federal bank robbery, 18 USC § 2113, is not comparable to robbery 2° as the federal statute requires only general intent, state robbery requires specific intent, *State v. Freeburg*, 120 Wn.App. 192 (2004); 9-0.

***State v. Ball***, 127 Wn.App. 956 (2005)

Persistent offender priors need not be submitted to a jury, distinguishing *Blakely v. Washington*, 159 L.Ed.2d 403 (2004), as it is not a sentence enhancement, *State v. Magers*, 164 Wn.2d 174, 193 (2008), *State v. Rudolph*, 141 Wn.App. 59 (2007), *State v. Lewis*, 141 Wn.App. 367, 391-97 (2007); II.

***Pers. Restraint of Cadwallader***, 155 Wn.2d 867 (2005)

Defendant pleads guilty, not pursuant to a plea agreement, to an apparent third strike offense, does not object to priors, later files PRP alleging that one prior washed, Court of Appeals allows state to reopen and prove an out-of-state prior that was not previously included that would unwash the other prior; held: unless a defendant is convicted pursuant to a plea agreement, he has no obligation to disclose priors and no obligation to object to state's failure to include priors, as state has full burden, and state is not permitted to prove a prior on collateral review that it failed to allege at sentencing; 6-3.

***State v. Rivers***, 130 Wn.App. 689 (2005)

Where defendant objects and state does not offer a court certified judgment and sentence to prove a strike offense nor does state offer an explanation why it failed to do so, *State v. Lopez*, 147 Wn.2d 515, 519 (2002), *but see: Pers. Restraint of Adolph*, 170 Wn.2d 556, 565-71 (2010), then state has failed to meet its burden; other certified documents that reference the prior conviction are insufficient, distinguishing *State v. Descoteaux*, 94 Wn.2d 31 (1980), *overruled, on other grounds, State v. Danforth*, 97 Wash.2d 255 (1982), and *State v. J.A.B.*, 98 Wn.App. 662 (2000); because there was no specific objection and where state offered some supporting evidence to support the prior conviction, remedy is remand to permit state to meet its burden of proof, distinguishing *State v. Lopez, supra.*, *see: State v. Thiefault*, 160 Wn.2d 409, 417 n.4 (2007), RCW 9.94A.530(2) (2008)*;* I.

***State v. Crawford***, 159 Wn.2d 86 (2006)

Neither prosecutor nor defense counsel were aware that prior convictions were strikes, defendant is convicted at trial and sentenced to life without parole; held: procedural due process does not require that a criminal defendant receive pretrial notice of a possible life sentence under POAA, *Olyer v. Boles*, 7 L.Ed.2d 446 (1962); reverses *State v. Crawford*, 128 Wn.App. 376 (2005); 5-4.

***State v. Stockwell***, 159 Wn.2d 394 (2007)

Rape of a child 1° and statutory rape 1° are legally comparable crimes, RCW 9.94A.030(33)(b), *but see: State v. Delgado*, 148 Wn.2d 723 (2003); nonmarriage was an implied element of statutory rape; *affirms State v. Stockwell*, 129 Wn.App. 230 (2005); 8-1.

***State v. O'Connell***, 137 Wn.App. 81 (2007)

Neither the fact of a prior conviction, *State v. Ball*, 127 Wn.App. 956, 957-60 (2005), nor the date of the prior conviction need be submitted to a jury, *State v. Magers*, 164 Wn.2d 174, 193 (2008);; III.

***State v. Moncrief***, 137 Wn.App. 729 (2007)

At sentencing, state offers military conviction for sodomy with a child under 16 years plus a certified stipulation signed by defendant in the prior military proceeding stating that the victim was six years old, trial court finds prior is comparable to Washington rape of a child 1°; held: where a prior was resolved by guilty plea, statement of factual basis for the charge, shown by transcript or by plea agreement or by comparable findings adopted by the defendant upon entering plea, constitute evidence of facts of the offense upon which subsequent sentencing court could properly rely, *Shepard v. United States*, 161 L.Ed.2d 205, 213-15 (2005); III.

***State v. Rudolph***, 141 Wn.App. 59, 68-72 (2007)

Defendant does not have the right to have a jury decide whether or not he is the same defendant who committed the crimes resulting in his prior convictions, *State v. Jones*, 159 Wn.2d 231 (2006); 2-1, II.

***State v. Lewis***, 141 Wn.App. 367, 394-97 (2007)

Possibility of a future POAA status is not a direct consequence of a guilty plea about which a defendant must be informed before pleading guilty to a strike offense; when challenging a guilty plea to be used at a later sentencing, it is defendant's burden to show that his prior judgments and accompanying guilty pleas, *Pers. Restraint of Goodwin*, 146 Wn.2d 861, 866 (2002), on their face did not provide constitutional safeguards, *State v. Gimarelli*, 105 Wn.App. 370, 376 (2001); "'[c]onstitutionally invalid on its face means a conviction which without further elaboration evidences infirmities of a constitutional magnitude,'" *State v. Ammons*, 105 Wn.2d 175, 188 (1986); 2-1, II.

***State v. Magers***, 164 Wn.2d 174, 189-90 (2008)

Where jury has no sentencing function, trial court may preclude informing jury of possible sentence in persistent offender case, *Shannon v. United States*, 129 L.Ed.2d 459 (1994), *State v. Bunting*, 115 Wn.App. 135, 138-40 (2003); 6-3.

***State v. Crumble***, 142 Wn.App. 798 (2008)

Court lacks authority to impose consecutive sentences of life without parole; II.

***State v. Knippling***, 166 Wn.2d 93 (2009)

Defendant maintains that he was a juvenile at the time he was convicted of a predicate conviction, state offers no evidence that juvenile court declined, trial court rejects the prior; held: a waiver of any right under the Juvenile Justice Act of 1977, ch. 13.40 RCW, must be an express waiver which state must show from the record, or show a decline order, *State v. Saenz*, 175 Wn.2d 167 (2012), *State v. Bailey*, 179 Wn.App. 433 (2014), *State v. Reynolds*, ___ Wn.App.2d ___, 505 P.3d 1174 (2022); defense has no burden to collaterally attack a prior conviction as it is the present use of a prior conviction, *State v. Carpenter*, 117 Wn.App. 673, 678 (2003); affirms *State v. Knippling*, 141 Wn.App. 50 (2007); 8-0.

***State v. Johnson***, 150 Wn.App. 663, 676-79 (2009)

A conviction is a valid prior in Washington if it is valid under the U.S. constitution and the constitution of the jurisdiction in which it was obtained; an Oregon conviction counts as a strike even though Oregon does not require a unanimous jury; life without parole is not cruel and unusual punishment for a defendant with developmental disability, *State v. Moen*, 4 Wn.App.2d 589 (2018), *see: State v. Hart*, 188 Wn.App. 453, 460-65 (2015), distinguishing *Atkins v. Virginia*, 153 L.Ed.2d 553 (2002); I.

***State v. Birch***, 151 Wn.App. 540, 515-20 (2009)

Where three strikes defendant affirmatively agrees to an out-of-state conviction as comparable, state need not provide further proof, extending *State v. Ross*, 152 Wn.App. 220, 230 (2004), *State v. Ford*, 137 Wn.2d 472, 483 n.5 (2006), to POAA cases; III.

***Pers. Restraint of Cruze***, 169 Wn.2d 422 (2010)

A finding that a defendant used a firearm is a "deadly weapon verdict," RCW 9.94A.030(31)(t) (2010), and thus a strike offense, even if jury used a deadly weapon as opposed to a firearm verdict; 7-2.

***State v. Langstead***, 155 Wn.App. 448 (2010)

State need not prove prior convictions to a jury for purposes of POAA, RCW 9.94A.570, *State v. McvKague*, 159 Wn.App. 489, 513-19 (2011), where the prior is not an element of the substantive crime; where judgment and sentence is valid on its face, an invalid plea document is not to be considered, *State v. Johnson*, 150 Wn.App. 663, 678 (2009), *Pers. Restraint of Hemenway*, 147 Wn.2d 529, 532-33 (2002); I.

***State v. Williams***, 156 Wn.App. 482, 496-98 (2010)

Equal protection clause does not require that prior convictions be submitted to a jury and proved beyond a reasonable doubt, *State v. Thiefault*, 160 Wn.2d 409, 418 (2007), *State v. McvKague*, 159 Wn.App. 489, 513-19 (2011), *State v. Reyes-Brooks*, 165 Wn.App. 193, 206-07 (2012), *State v. Powell*, 172 Wn.App. 455, 459-62 (2012), distinguishing *State v. Roswell*, 165 Wn.2d 186, 192 (2008); III.

***Pers. Restraint of Carrier***, 173 Wn.2d 791 (2012)

Defendant may challenge the inclusion of a prior conviction considered by the sentencing court beyond the one year collateral attack period, RCW 10.73.090(1), as the invalidity of a judgment and

sentence "on its face" is not limited to the four corners of the judgment and sentence, *Pers. Restraint of Coats,* 173 Wn.2d 123, 138 (2011); in determining whether a judgment and sentence is valid on its face, the court may consider documents that bear on the trial court's authority to impose a valid judgment and sentence, including, but not limited to, charging documents, verdicts, *Pers. Restraint of Scott,* 173 Wn.2d 911 (2012), plea statements and, here, an order of dismissal following completion of probation, former RCW 9.95.240; a vacated conviction cannot be used as criminal history, distinguishing *State v. Braithwaite,* 92 Wn.2d 624 (1979), disavowing *State v. Moore,* 75 Wn.App. 166 (1994), *State v. Wade,* 44 Wn.App. 154 (1986), *but see: State v. Haggard,* 195 Wn.2d 544 (2020), *State v. Fletcher,* ___ Wn.App. ___, 497 P.3d 886 (2021). *State v. Conaway,* ___ Wn.2d ___, 512 P.3d 526 (2022); 6-3.

***State v. Saenz***, 175 Wn.2d 167 (2012)

Defendant's prior strike resulted from defendant's stipulation to a decline of juvenile court jurisdiction, record shows juvenile court commissioner approved the stipulation and transfer, did not enter findings regarding decline, no evidence of valid waiver of juvenile court jurisdiction by defendant, trial court rejects use of prior, state appeals; held: to use a prior conviction as a strike where the prior resulted from a juvenile decline, state must show that either there was a decline hearing or the hearing was properly waived and juvenile court entered written findings that decline was in either defendant's or public's best interests, *State v. Knippling*, 166 Wn.2d 93 (2009), *State v. Bailey,* 179 Wn.App. 433 (2014), *cf: State v. Reynoles,* ___ Wn.App.2d ___, 505 P.3d 1174 (2022); reverses, in part, *State v. Saenz,* 167 Wn.App. 866 (2010); 7-2.

***State v. Salinas***, 169 Wn.App. 210, 225-27 (2012)

Fingerprints on prior judgement and sentence are of poor quality such that expert can't testify to the match, evidence is sufficient to prove prior conviction where state presents judgment and sentence with defendant's name and calls victim of prior offense to identify defendant; I.

***State v. Witherspoon***, 180 Wn.2d 875, 887-95 (2014)

Life without parole for robbery 2° does not violate Eighth Amendment or CONST., art I, § 14, *cf.: State v. Fain,* 94 Wn.2d 387 (1980), *State v. Ritchie,* ___ Wn.App.2d ___, 520 P.3d 1105 (2022), nor may sentencing court reject such a sentence based upon the pettiness of the offense or the characteristics of the offender, distinguishing *Graham v. Florida,* 560 U.S. 48, 176 L.Ed.2d 825 (2010), *Miller v. Alabama,* 567 U.S. 460, 183 L.Ed.2d 407 (2012), *State v. Moen,* 4 Wn.App.2d 589 (2018); prior strike offenses need not be proved to a jury beyond a reasonable doubt, *State v. Manussier*, 129 Wn.2d 652 (1996), , *State v. Brinkley,* 192 Wn.App. 456 (2016), *distinguishing Alleyne v. United States,* 570 U.S. 99, 186 L.Ed.2d 314 (2013); 5-4.

***State v. Webb***, 183 Wn.App. 242, 247-52 (2014)

1982 assault 2º conviction is not a valid strike: prior to 1986 injury element was "substantial bodily harm," current version, RCW 9A.36.020(1)(b), requires grievous bodily harm which is broader, thus not legally comparable, only facts in the record from 1982 conviction were in the information which is insufficient, *State v. Failey,* 165 Wn.2d 673, 677 (2009), *State v. Morley,* 134 Wn.2d 588, 605-06 (1998); 1992 assault 2º conviction is invalid on its face as

statute charged was repealed at the time of the offense, court may look at statutory history, *Pers. Restraint of Thompson,* 141 Wn.2d 712, 719 (2000); II.

***State v. Latham***, 183 Wn.App. 390 (2014)

Nevada battery statute is not legally comparable to assault 2° because Nevada defines substantial bodily harm as substantial risk of death or serious permanent disfigurement or prolonged physical pain, plea colloquy for prior establishes only that defendant hit victim and cause substantial bodily harm, Washington statute does not include prolonged physical pain, thus factual comparability fails; to prove manslaughter in Nevada a defendant who committed a misdemeanor assault that caused a death is guilty, Washington felony murder requires proof of a predicate felony, thus the two are not legally comparable; II.

***State v. Bluford,*** 195 Wn.App. 570, 586-91 (2016)

Where elements of out-of-state conviction are not substantially similar, court may look at the record to see if conduct was identical to what is required for a comparable Washington conviction, but court can only look at charging document, cannot consider facts that were neither admitted or stipulated to nor proved beyond a reasonable doubt, *State v. Jones*, 183 Wn.2d 327, 345-46 (2005); here, New Jersey robbery statute contains a prong broader than Washington's robbery, state failed to produce the information for the charge defendant pleaded to in New Jersey and failed to present any facts admitted or stipulated or proved; where defendant pleaded guilty to two counts on the same day Washington may only consider one of them, RCW 9.94A.030(38)(a)(ii) (2016); I.

***State v. Miller***, 197 Wn.App. 180 (2016)

Idaho aggravated assault elements: intend to threaten violence, create a well-founded fear of harm with a deadly weapon or instrument is comparable to Washington assault 2° elements: intend to create apprehension of harm, induce a reasonable apprehension that violence is imminent with a deadly weapon; III.

***State v. Bluford,*** 195 Wn.App. 570, 586-91 (2016), 188 Wn.2d 298, 316-20 (2017)

Where elements of out-of-state conviction are not substantially similar, court may look at the record to see if conduct was identical to what is required for a comparable Washington conviction, but court can only look at charging document, cannot consider facts that were neither admitted or stipulated to nor proved beyond a reasonable doubt, *State v. Jones*, 183 Wn.2d 327, 345-46 (2005); here, New Jersey robbery statute contains a prong broader than Washington's robbery, state failed to produce the information for the charge defendant pleaded to in New Jersey and failed to present any facts admitted or stipulated or proved; where defendant pleaded guilty to two counts on the same day Washington may only consider one of them, RCW 9.94A.030(38)(a)(ii) (2016); I.

***State v. Estes***, 188 Wn.2d 450 (2017)

Defense counsel, unaware that conviction of any felony with a deadly weapon enhancement is a strike offense, RCW 9.94A.030(33)(t) (2000), -.570 (2016), does not plea bargain, defendant is convicted of lesser assault 3° with a deadly weapon, sentenced to life

without parole; held: where failure to plea bargain is based on ignorance of the law and failure to advise of the potential consequences of failing to negotiate, prejudice is demonstrated and counsel is ineffective, *State v. James*, 48 Wn.App. 353 (1987), *Pers. Restraint of James*, 190 Wn.2d 686 (2018), *cf.: State v. Edwards*, 171 Wn.App. 379 (2012), *State v. Crawford*, 159 Wn.2d 86, 100 (2006), *see: State v. Drath*, 7 Wn.App.2d 255 (2018); affirms *State v. Estes*, 193 Wn.App. 479 (2016); 9-0.

***State v. Moretti,*** 193 Wn.App.2d 809 (2019)

Life without parole is constitutional where the predicate offenses were committed when defendants were young adults; 9-0.

***State v. Teas***, 10 Wn.App.2d 111 (2019)

Life without parole for a second sex offense is constitutional when the predicate offense was committed by defendant as a juvenile, *State v. Reynolds*, ___ Wn.App.2d ___, 505 P.3d 1174 (2022), *see: State v. Moretti*, 193 Wn.App.2d 809 (2019); II.

***State v. Jenks***, 197 Wn.2d 708 (2021), *legislatively overruled*, RCW 9.94A.647,

Defendant is sentenced as a persistent offender after conviction of robbery 1° based upon prior conviction of robbery 2°, while appeal is pending legislature amends POAA to remove robbery 2° as a strike; held: 2019 amendments are not retroactive, *see: State v. Hoffman*, 16 Wn.App. 563 (2021), *State v. Molia*, 12 Wn.App.2d 895 (2020), *but see: State v. Caril*, ___ Wn.App.2d ___, 515 P.3d 1036 (2022); Supreme Court defers constitutional issues; affirms *State v. Jenks*, 12 Wn.App.2d 588 (2020); 8-1.

***Pers. Restraint of Williams***, 18 Wn.App.2d 707 (2021)

Petitioner is sentenced as a persistent offender, filed PRP alleging that because one of his strikes was committed as a juvenile that the life sentence is unconstitutional, *State v. Bassett*, 192 Wn.2d 67 (2018); held: caselaw that forbids life without parole sentence to offenders who committed the crime when s/he was a juvenile only applies to the current offense, *see: Pers. Restraint of Monschke*, 197 Wn.2d 305 (2021); II.

***State v. Reynolds***, 21 Wn.App.2d 179 (2022)

Prior strike occurred when defendant was a juvenile and was declined; certified copy of decline order plus other documents showing he was represented by counsel is sufficient to establish the prior strike, *cf.: State v. Knippling*, 166 Wn.2d 93 (2009); life without parole is not precluded by a prior committed when the defendant was a juvenile, *State v. Teas*, 10 Wn.App.2d 111 (2019), does not violate equal protection or constitute cruel and unusual punishment; I.

***State v. Caril***, 23 Wn.App.2d 416 (2022)

Where persistent offender sentence is based upon prior robbery 2° defendant is entitled to a resentencing hearing, RCW 9.94A.647 (2021); I

***State v. Ritchie***, ___ Wn.App.2d ___, 520 P.3d 1105 (2022)

Life without parole for assault 2° is not cruel and unusual punishment, *see: State v. Witherspoon*, 180 Wn.2d 875, 887-95 (2014), *State v. Fain*, 94 Wn.2d 387 (1980); plea offer of a lower sentence that

was rejected does not mean that life without parole following conviction is cruel, *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978); I.

# PHOTOGRAPHS

***State v. Jamison***, 93 Wn.2d 794 (1980)

Lay witness may not testify photo is of defendant, invades province of jury, *but see: State v. Hardy*, 76 Wn.App. 188 (1994)**,** *see: State v. Sanjurjo-Bloom,* 16 Wn.App.2d 120 (2021); I.

***State v. Jones***, 95 Wn.2d 616 (1981)

Test for admissibility of gruesome photos is whether probative value outweighs probable prejudicial effect; within discretion of court; *see*: *State v. Adams*, 76 Wn.2d 650, 655 (1969), *State v. Oughton*, 26 Wn.App. 74 (1980), *State v. Toennis*, 52 Wn.App. 176 (1988), *State v. Hoffman*, 116 Wn.2d 51 (1991), *State v. Gentry*, 125 Wn.2d 570, 607-9 (1995), *State v. Pirtle*, 127 Wn.2d 628, 653-5 (1995), *State v. Finch*, 137 Wn.2d 792, 812-13 (1999), *State v. Whitaker*, 133 Wn.App. 199 (2006), *State v. Yates*, 161 Wn.2d 714, 767-69 (2007), *State v. Whitaker*, 6 Wn.App.2d 1 (2018), *affirmed, on different grounds, State v. Whitaker,* 195 Wn.2d 333 (2020); 9-0.

***State v. Crenshaw***, 98 Wn.2d 789 (1983)

Admissibility of gruesome photographs within court's discretion, but Supreme Court "warns" prosecutors to avoid admission of repetitious, inflammatory photographs; "where proof of the criminal act may be amply proven through testimony and uninflammatory evidence," prosecutors must use restraint; *see*: *State v. Daniels*, 56 Wn.App. 646 (1990), *State v. Finch*, 137 Wn.2d 792, 812-13 (1999), *Auburn v. Hedlund*, 165 Wn.2d 645, 655-57 (2009), *State v. Whitaker*, 6 Wn.App.2d 1 (2018), *affirmed, on different grounds, State v. Whitaker,* 195 Wn.2d 333 (2020); 6-3.

***State v. Sargent***, 40 Wn.App. 340 (1985)

Gruesome autopsy photographs should be excluded where diagrams reveal same information, ER 403, *State v. Crenshaw*, 98 Wn.2d 789, 807 (1983), *State v. Adams*, 76 Wn.2d 650, 681 (1969) (Rosellini, J., dissenting), *see also: Auburn v. Hedlund*, 165 Wn.2d 645, 654-57 (2009), *State v. Whitaker*, 6 Wn.App.2d 1 (2018), *affirmed, on different grounds, State v. Whitaker,* 195 Wn.2d 333 (2020); I.

***State v. Newton***, 42 Wn.App. 718 (1986)

Mug shots should be avoided to establish identity due to potential for prejudice; even clipping off identification numbers and not using phrase "mug shot" will not necessarily disguise the fact that the photograph is, in fact, a mug shot, *State v. Butler*, 9 Wn.App. 347 (1973), *State v. Tate*, 74 Wn.2d 261 (1968), *see: State v. Rivers*, 129 Wn.2d 697, 711-2 (1996), *State v. McCreven*, 170 Wn.App. 444, 485 (2012), harmless here; II.

***State v. Rice***, 110 Wn.2d 577 (1988)

"In-life" photographs of murder victims are admissible to prove identity, *State v. Furman*, 122 Wn.2d 440, 452 (1993), *State v. Brett*, 126 Wn.2d 136, 159-60 (1995), *State v. Pirtle*, 127 Wn.2d 628, 653-5 (1995), *State v. Finch*, 137 Wn.2d 792, 812-13 (1999), *State v. Yates*, 161 Wn.2d 714, 769-71 (2007), *State v. Brown*, ___ Wn.App.2d ___, 37645-1-III, 37718-1-III (2022); 9-0.

***State v. Ahlquist***, 67 Wn.App. 442 (1992)

In a trial *in absentia*, arresting officer can identify booking photo with name as that of person he arrested, *distinguishing* *State v. Hunter*, 29 Wn.App. 218 (1981); I.

***State v. Salamanca***, 69 Wn.App. 817 (1993)

Within court's discretion to exclude a photograph where there is a variance between lighting and weather conditions between victim's testimony and that portrayed in photograph, *see: Fabio v. Diesel Oil Sales Co.*, 1 Wn.2d 234, 238 (1939), as photo was not adequate for purpose for which it was being offered, *i.e.*, to show whether a driver could be seen at night by occupants of victim's vehicle; III.

***State v. Hardy***, 76 Wn.App. 188 (1994), *aff'd, on other grounds, State v. Clark*, 129 Wn.2d 211 (1996)

Lay witness may testify that person pictured in a videotape is defendant where the witness has known the defendant before, ER 701, *see: State v. George*, 150 Wn.App. 110 (2009), *State v. Collins*, 152 Wn.App. 429, 436-38 (2009), *distinguishing* *State v. Jamison*, 93 Wn.2d 794 (1980), *but see: State v. Sanjurjo-Bloom*, 16 Wn.App.2d 120 (2021); I.

***State v. Stockmyer***, 83 Wn.App. 77, 82-5 (1996)

In homicide self-defense case, defense **videotape reenactment** is excluded by trial court because "film speed is not subject to cross-examination,… actual events were faster than the video,… the gun was not dropped, as she testified it was, and the people were very, very different"; held: trial court raised justifiable concerns over factual inaccuracies and potential prejudicial effect, admissibility is within sound discretion of trial court, *State v. Finch*, 137 Wn.2d 792, 812-13 (1999), *see, e.g., State v. Strandy*, 49 Wn.App. 537, 541 (1987); II.

***State v. Finch***, 137 Wn.2d 792, 813-19 (1999)

Videos admitted for demonstrative purposes need not exactly portray the event in question and are admissible subject to abuse of discretion standard, *Jenkins v. Snohomish County Pub. Util. Dist. No.1*, 105 Wn.2d 99, 107 (1986), *DiPangrazio v. Salamonsen*, 64 Wn.2d 720, 727 (1964), lack of similarity goes to weight, *State v. Rogers*, 70 Wn.App. 626, 633 (1993); **video reenactments** may be held to a higher standard, *State v. Stockmyer*, 83 Wn.App. 77, 82-85 (1996), *see: State v. Hultenschmidt*, 125 Wn.App. 259, 268-69 (2004); 7-2.

***State v. Iverson***, 126 Wn.App. 329 (2005)

In no contact order violation case, victim does not appear at trial, court admits victim's booking photo on officer's testimony that although he does not work for the jail and has no control over the accuracy of entries by other officers, he regularly uses the booking records system, enters pictures into the system and routinely relies upon the photos; held: a photograph is not an oral or written assertion, and is thus not hearsay; I.

***State v. George***, 150 Wn.App. 110 (2009)

Police officer testifies, over objection, that defendants are the people shown in a surveillance photograph; held: a lay witness may not express an opinion that a photographic likeness is the defendant unless "the witness has had sufficient contacts with the person or when the person's appearance before

the jury differs from his or her appearance in the photograph," ¶ 23 at 118, , *State v. Jamison*, 93 Wn.2d 794 (1980), *see: State v. Hardy*, 76 Wn.App. 188, 190 (1994), *affirmed, on other grounds, State v. Clark*, 129 Wn.2d 211 (1996), *State v. Collins*, 152 Wn.App. 429, 436-38 (2009), *State v. Sanjurjo-Bloom*, 16 Wn.App.2d 120 (2021); II.

***State v. Collins***, 152 Wn.App. 429 (2009)

Defendant is accused of killing a taxicab driver, camera in cab shows a person in back seat, family and friends of defendant identify him as the man in the photo, defense seeks suppression due to unduly suggestive procedures; held: suppression is not a remedy for suggestive procedures where a witness recognizes someone in a photograph, distinguishing situations where a person identifies a suspect whom the person has seen under the stress of a crime in progress, *State v. Hardy*, 76 Wn.App. 188 (1994), *aff'd, on other grounds, State v. Clark*, 129 Wn.2d 211 (1996), distinguishing *State v. Jamison*, 93 Wn.2d 794 (1980), *State v. Sanjurjo-Bloom*, 16 Wn.App.2d 210 (2021); I.

***State v. Sapp***, 182 Wn.App. 910 (2014)

"An authenticating witness does not necessarily have to have been present at the recording of the exhibit in order to know 'when, where, and under what circumstances the recording was made.' A witness with prior knowledge of the people and places depicted in the exhibit could still establish when the exhibit was created based on the age of people in the exhibit or things depicted in the background," at ¶11, distinguishing *Saldivar v. Momah*, 145 Wn.App. 365 (2008); "silent witness theory" of photographic admissibility dispenses with the requirement that a verifying witness be present when the picture is taken, *see; State v. Tatum*, 58 Wn.2d 73, 75 (1961); III.

***State v. Brown***, 21 Wn.App.2d 541, 566-67 (2022)

In murder case in-life photograph of victim with her minor child is not an abuse of discretion, *State v. Finch*, 137 Wn.2d 792, 812-13 (1999)**;** III.

# PLEA BARGAINS

(see also: **GUILTY PLEAS**)

***State v. Giebler***, 22 Wn.App. 640 (1979)

Change in circumstances (new offense) may justify state changing recommendation at sentencing; I.

***State v. Wheeler***, 95 Wn.2d 799 (1981)

State may withdraw a plea "proposal" any time before a guilty plea or some other detrimental reliance occurs; 8-0.

***State v. Haner***, 95 Wn.2d 858 (1981)

Pursuant to a plea bargain, state moves to amend information from assault 2° to assault 3° and to delete firearm allegation, trial court denies motion to amend; held: no abuse of discretion for trial court to deny state's motion to amend, as a motion to amend is not part of state's initial decision to prosecute but "implicates" the court, *State v. Lamb*, 175 Wn.2d 121, 130-32 (2012), *see: State v. Agustin*, 1 Wn.App.2d 911 (2018), *but see: State v. Westwood*, 10 Wn.App.2d 543 (2019); 6-3.

***In re James***, 96 Wn.2d 847 (1982)

Defendant pleads guilty to felony, with probation recommendation by state, prior to sentencing, defendant is arrested for two misdemeanors, based upon these arrests, state recommends prison; held: *remanded* for withdrawal of plea or specific performance of plea bargain, as state did not prove misdemeanors, *State v. Roberson*, 118 Wn.App. 151 (2003); 5-4.

***State v. Peterson***, 97 Wn.2d 864 (1982)

At plea, state agrees to recommend no jail time, at sentencing, defense counsel asks prosecutor to speak in support of state's recommendation, court refuses to permit prosecutor to speak, although court acknowledges state's recommendation and sentences defendant to jail; held: court abused discretion by refusing to grant defendant's request to allow prosecutor to explain the recommendation and remands for resentencing before a different trial judge; *but see*: *United States v. Benchimol*, 85 L.Ed.2d 462 (1985), *State v. Coppin*, 57 Wn.App. 866 (1990), *State v. Hixson*, 94 Wn.App. 862 (1999); 5-4.

***State v. Hall***, 32 Wn.App. 108 (1982)

Defendant pleaded guilty to probation recommendation by state, receives deferred sentence, after sentencing, state determines that defendant gave false name and had a record, sentence is vacated and defendant is sent to prison; held: defendant's giving **false name** to induce a plea bargain is fraud justifying rescission of plea agreement and vacation of original sentence, CR60(b), and/or revocation of probation, RCW 9.95.230, *see: State v. Hardesty*, 129 Wn.2d 303 (1996); I.

***State v. Perez***, 33 Wn.App. 258 (1982)

Prior to entry of plea, prosecutor agrees not to oppose intensive parole; at plea hearing, no record is made of this agreement; held: harmless here but prospectively noncompliance with CR 4.2(d) is grounds, *ipso facto*, for setting plea aside; II.

***State v. Morley***, 35 Wn.App. 45 (1983)

Defendant pleads guilty to probation recommendation, prior to sentencing is arrested for two misdemeanors; at sentencing prosecutor equivocates; court, at sentencing, states that defendant "committed two more crimes," sentences to prison, motion to withdraw plea is denied; held: court failed to hold evidentiary hearing to permit defense to call witnesses and require state to prove defendant's alleged breach by a preponderance, *In re James*, 96 Wn.2d 847 (1982), *State v. Roberson*, 118 Wn.App. 151 (2003), remanded for a determination whether to allow withdrawal of plea or specific performance "with the defendant's preference to be accorded considerable weight"; court defines specific performance as resentencing before different judge with state bound to make an unequivocal recommendation, *State v. E.A.J.*, 116 Wn.App. 777, 786 n.5 (2003), *see:* State v. Barber, 179 Wn.2d 854 (2011); III.

***State v. Peterson***, 37 Wn.App. 309 (1984)

Defendant pleads guilty on state's no jail recommendation, at sentencing, defendant demands that prosecutor state reason for recommendation; prosecutor states that co-defendants were only charged with obstructing, but that this defendant was the "star," and that county lacked a jail; held: no breach of plea bargain, prosecutor adequately advocated his agreement, *State v. Peterson*, 97 Wn.2d 865 (1982), *see: State v. Sledge*, 133 Wn.2d 828, 838-43 (1997); III, 2-1.

***State v. Jollo***, 38 Wn.App. 469 (1984)

Pursuant to plea negotiations, statutory rape defendant obtains psychological evaluation, a copy of which is provided the state; when no plea is entered, state uses defendant's admissions to psychologist in its case-in-chief; held: statements to psychologist made at state's request during plea negotiations are inadmissible even if defendant "breaches" plea bargain, ER 410, *State v. Hatch*, 165 Wn.App. 212 (2011); I.

***State v. Dibley***, 38 Wn.App. 824 (1984)

Division II cautions against plea bargains wherein state agrees not to call defendant as a witness against co-defendant as likely to be against public policy.

***Mabry v. Johnson***, 81 L.Ed.2d 437 (1984)

Acceptance of a plea offer which is withdrawn by prosecutor before plea is entered does not create a constitutional right to have the bargain specifically enforced; 9-0.

***State v. Hall***, 104 Wn.2d 486 (1985)

Defendant pleads guilty on prosecutor's promise, *inter alia*, to inform press defendant is not part of certain drug ring, months later, but before defendant moved to withdraw plea, prosecutor writes to press as agreed; held: while full and wholehearted compliance with a plea bargain is required, *In re Palodichuk*, 22 Wn.App. 107 (1978), *State v. Sledge*, 133 Wn.2d 828, 838-43 (1997), fact that prosecutor complied prior to filing of motion to withdraw plea establishes no breach; 9-0.

***State v. Perkins***, 108 Wn.2d 212 (1987)

As part of a plea bargain, a defendant can waive the right to appeal if done knowingly, voluntarily and intelligently; 9-0.

***State v. Balkin***, 48 Wn.App. 1 (1987)

Where a defendant plea bargains to submit to specific treatment, then an evaluation by the organization intended to provide that treatment is not privileged; I.

***State v. Schaupp***, 111 Wn.2d 34 (1988)

Court grants state's motion to amend from murder 1° to manslaughter 2°, to which defendant pleads guilty, court later vacates plea, over defendant's objection, when it learns that state misled court into believing that a crucial witness was not available; held: where defendant pleads guilty, s/he is entitled to specific enforcement of the plea agreement to the extent that the guilty plea may not be set aside unless there is fraud or wrongdoing by the defense, *State v. Malone*, 138 Wn.App. 587 (2007); 5-4.

***State v. Arko***, 52 Wn.App. 130 (1988)

It is not a breach of a plea bargain for the state to support, on appeal, an exceptional sentence even though the state recommended a sentence within the standard range, unless the parties so agreed as part of the initial plea bargain; I.

***State v. Merz***, 54 Wn.App. 23 (1989)

A juvenile respondent's plea bargain with the prosecutor does not bind the probation counselor, *see*: *State v. Harris*, 57 Wn.2d 383 (1960), *State v. Sledge*, 133 Wn.2d 828, 843 (1997); I.

***State v. Pizzuto***, 55 Wn.App. 421 (1989)

Confessions to a police officer are not excludable as plea negotiations, ER 410, unless officer has express plea bargaining authority, *see: State v. Nowinski*,124 Wn.App. 617 (2004); I.

***State v. Bogart***, 57 Wn.App. 353 (1990)

Counsel, representing defendant charged with robbery 2°, is informed by prosecutor that if defendant doesn't plead by pretrial hearing, charge will be amended to robbery 1°; at time of pretrial hearing, counsel is on vacation, substitute counsel enters plea of not guilty; later, defendant tenders plea to robbery 2°, which is rejected, defendant is convicted of robbery 1°; held: in absence of detrimental reliance, state can revoke plea offer at any time, *State v. Wheeler*, 95 Wn.2d 799 (1981), *State v. Yates*, 161 Wn.2d 714, 740-41 (2007); defense must show that defendant relied on the bargain in such a way that a fair trial is no longer possible, *State v. Budge*, 125 Wn.App. 341 (2005); here, fair trial was not impeded; "'[t]he Due Process Clause is not a code of ethics for prosecutors; its concern is with the manner in which persons are deprived of their liberty,'" at 358; III.

***State v. Coppin***, 57 Wn.App. 866 (1990)

A prosecutor fulfills his or her duty under a plea agreement by simply making the promised recommendation, and need not advocate it, *State v. Halsey*, 140 Wn.App. 313 (2007); Division II holds that *United States v. Benchimol*, 85 L.Ed.2d 462 (1985) repudiates *State v. Peterson*, 97 Wn.2d 864 (1982); here, prosecutor recommended, in accordance with plea bargain, maximum end of standard range and referred to prior bad acts of defendant to support recommendation, following which court imposed exceptional sentence; prosecutor's argument did not cross the line in derogation of plea agreement, *In re Palodichuk*, 22 Wn.App. 107 (1978), *State v. Jerde*, 93 Wn.App. 774 (1999), *State v. Hixson*, 94 Wn.App. 862 (1999), *State v. Julian*, 102 Wn.App. 296 (2000), *State v. Blakely*, 111 Wn.App. 851, 862-67 (2002), *State v. Lindahl*, 114 Wn.App. 1 (2002), *cf.: State v. Correno-Maldonado*, 135 Wn.App. 77 (2006), *State v. Neisler*, 191 Wn.App. 259 (2015), *but see: State v. MacDonald*, 183 Wn.2d 1 (2015); where prosecutor responds with candor to questions of the judge, no breach of plea agreement occurs, RPC 3.3, *accord: State v. Talley*, 134 Wn.2d 176 (1998), *State v. Ramos*, 187 Wn.2d 420, 455-58 (2017), *State v. Molnar*, 198 Wn.2d 500 (2021), *see: State v. Sledge*, 133 Wn.2d 828, 838-43 (1997), *State v. Van Buren*, 101 Wn.App. 206 (2000), *State v. Williams*, 103 Wn.App. 231 (2000), *Pers. Restraint of Lord*, 152 Wn.2d 182 (2004); II.

***Pers. Restraint of Moore***, 116 Wn.2d 30 (1991)

The sentence imposed pursuant to a plea bargain must be statutorily authorized; a defendant cannot agree to be punished more than the legislature has allowed; 9-0

***State v. Hilyard***, 63 Wn.App. 413 (1991)

Defendant pleads guilty to lesser charge, as part of plea bargain stipulates to exceptional sentence, then appeals, arguing exceptional sentence was not supported by record or justified by law; held: stipulation to a sentence outside SRA standard range is an adequate reason for exceptional sentence by itself, RCW 9.94A.080(3), plea agreement is a waiver of defendant's right to argue for a sentence within sentence range; *see: State v. Majors*, 94 Wn.2d 354 (1980); II.

***State v. Watson***, 63 Wn.App. 854 (1992)

"Credit for time served" in a standard SRA plea bargain means credit for time served solely on the offense for which defendant is being sentenced, RCW 9.94A.120(13) [recodified RCW 9.94A.505(6) (2010)]; while defendant's misunderstanding of plea agreement, caused by significant mutual mistake between prosecutor and defense, would be grounds for withdrawal of plea, *State v. Miller*, 110 Wn.2d 528 (1988), defendant's misunderstanding of "concurrent" is unreasonable; I.

***State v. Koivu***, 68 Wn.App. 869 (1993)

Defendant pleads to reduced charge on prosecutor's agreement to recommend sex offender sentencing option if presentence report indicates he is amenable to treatment and to obtain agreement not to file charges in another jurisdiction; defendant found not amenable to treatment, prosecutor recommends sentence greater than sentence range on original charge, prosecutor does get agreement not to file in other jurisdiction; held: no breach by state, as court was not bound by any recommendation, plea agreement was not illusory; III.

***State v. Crider***, 78 Wn.App. 849 (1995)

At plea, state recommends six months followed by sexual deviancy treatment (SSOSA), RCW 9.94A.670, at sentencing state offers testimony, without objection, of probation counselor that defendant had had other sex offenses and uncharged involvement with other juveniles, state argues that in case before the court, it was victim's first sexual experience the fear and coercion of which she will have to live for the rest of her life; court imposes prison sentence; held: in context, state's argument focused on length of jail sentence rather than a breach of plea bargain, *State v. Coppin*, 57 Wn.App. 866, 873-4 (1990), *distinguishing In re Palodichuk*, 22 Wn.App. 107 (1978); 2-1, III.

***State v. Thomas***, 79 Wn.App. 32, 35-41 (1995)

Defendant pleads guilty to rendering criminal assistance, defendant agrees to testify against co-defendant, state agrees to file no other charges, defendant refuses to testify, state submits defendant breached, defendant seeks to withdraw plea, state objects, insists upon enforcement of agreement and files robbery charge; held: where defendant breaches plea agreement, he has no right to have the agreement enforced, *In re James*, 96 Wn.2d 847, 850 (1982), *State v. Hall*, 32 Wn.App. 108, 110 (1982), *State v. Gilchrest*, 25 Wn.App. 427, 428 (1980): state may elect to enforce or rescind; here, because state chose to enforce the agreement in spite of defendant's breach, state could not properly charge robbery, which must be dismissed, *see: State v. Armstrong*, 109 Wn.App. 458 (2001); II.

***State v. Wakefield***, 130 Wn.2d 464, 471-5 (1996)

In colloquy prior to entry of plea to reduced charge, trial court tells defendant that, in her opinion, she would be sentenced within standard range, at sentencing court imposes exceptional sentence greater than standard range, defense moves for specific performance; held: where trial court promises a sentence and then reneges, plea is involuntary and defendant may withdraw it; specific performance is not a remedy, as prosecutor did not breach the plea agreement, *Pers. Restraint of Murillo*, 134 Wn.App. 521 (2006), *see: State v. Barber*, 170 Wn.2d 854 (2011); 6-3.

***State v. Halgren***, 87 Wn.App. 525 (1997), *rev'd, on other grounds,* 137 Wn.2d 341 (1999)

State agrees to recommend standard range sentence in exchange for guilty plea, defendant instead waives jury and proceeds with stipulated facts trial, is found guilty, state recommends exceptional sentence; held: defendant did not keep his part of the bargain by pleading guilty, thus lost any right to require state to recommend standard range sentence, jury waiver was valid following full colloquy with court; I.

***State v. Sledge***, 133 Wn.2d 828, 838-43 (1997)

Respondent pleads guilty to standard range recommendation, prosecutor convenes disposition hearing, calls witnesses, elaborates during examination and argument aggravating factors, calls parole officer who recommends exceptional sentence, then tells court state recommends standard range; held: while state need not advocate its recommendation "enthusiastically," *State v. Coppin*, 57 Wn.App. 866, 874 (1990), *United States v. Benchimol*, 85 L.Ed.2d 462 (1985), *State v. Hixson*, 94 Wn.App. 862 (1999), *State v. Julian*, 102 Wn.App. 296 (2000), prosecutor may not undercut terms of agreement explicitly or by conduct evidencing an intent to circumvent the terms, *In re Palodichuk*, 22 Wn.App. 107 (1978), although prosecutor

may participate in a fact-finding hearing at sentencing to help the court make its decision, *State v. Talley*, 134 Wn.2d 176, 186 (1998), *State v. Blakely*, 111 Wn.App. 851, 862-67 (2002), *Pers. Restraint of Lord*, 152 Wn.2d 182 (2004); here, prosecutor violated its duty of good faith and fair dealing, thereby breaching plea agreement, *State v. Jerde*, 93 Wn.App. 774 (1999), *State v. Van Buren*, 101 Wn.App. 206 (2000), *State v. Williams*, 103 Wn.App. 231 (2000), *State v. Carreno-Maldonado*, 135 Wn.App. 77 (2006), *remanded*, 142 P.3d 172 and reconsidered, on other grounds, 135 Wn.App. 880 (2006), *see: State v. Lindahl*, 114 Wn.App. 1 (2002), *State v. Monroe*, 126 Wn.App. 435, 439-40 (2005), *State v. Halsey*, 140 Wn.App. 313 (2007), *State v. MacDonald*, 183 Wn.2d 1 (2015), *cf.: State v. Ramos*, 189 Wn.App. 431, 461-65 (2015), *State v. Neisler*, 191 Wn.App. 259 (2015), *State v. Molnar*, 198 Wn.2d 500 (2021); 9-0.

***State v. Kissee***, 88 Wn.App. 817 (1997)

Defendant pleads guilty to luring, RCW 9A.40.090, state agrees as part of bargain to recommend SSOSA, RCW 9.94A.670, if defendant is amenable to treatment, at sentencing court determines that luring is not a sex offense, thus defendant ineligible for SSOSA, denies motion to withdraw plea; held: SSOSA is a direct sentencing consequence, where all parties erred as to eligibility, plea was not knowing and voluntary, thus defendant is entitled to withdraw plea; II.

***State v. Talley***, 134 Wn.2d 176 (1998)

Pursuant to *Alford* plea agreement, state recommends standard range, court indicates its intent to impose exceptional sentence, prosecutor proposes to participate in evidentiary hearing; held: state's participating in evidentiary hearing to "help the court make its decision" is not a breach of plea agreement, *see: State v. Coppin*, 57 Wn.App. 866, 871-4 (1990), *State v. Jerde*, 93 Wn.App. 774 (1999), *State v. Hixson*, 94 Wn.App. 862 (1999), *State v. Van Buren*, 112 Wn.App. 585 (2002), *State v. Lindahl*, 114 Wn.App. 1 (2002), *State v. Ramos*, 187 Wn.2d 420, 455-58 (2017), *State v. Molnar*, 198 Wn.2d 500 (2021); affirms *State v. Talley*, 83 Wn.App. 750 (1996); 9-0.

***State v. Jerde***, 93 Wn.App. 774 (1999)

Prosecutor agrees to recommend standard range sentence, CCO files report recommending exceptional sentence, at sentencing prosecutor unnecessarily comments on PSI, underscores aggravating factors and, while maintaining that state was adhering to plea agreement, clearly behaved otherwise, breaching plea agreement, *State v. Sledge*, 133 Wn.2d 828 (1997), *In re Palodichuk*, 22 Wn.App. 107, 109-10 (1978), *State v. Coppin*, 57 Wn.App. 866 (1990), *State v. Julian*, 102 Wn.App. 296 (2000), *State v. Williams*, 103 Wn.App. 231 (2000), *State v. Xavier*, 117 Wn.App. 196 (2003), *see: State v. Carrero-Maldonado*, 135 Wn.App. 77 (2006), *State v. Blakely*, 111 Wn.App. 851, 862-67 (2002), *State v. Sanchez*, 146 Wn.2d 339 (2002), *State v. Van Buren*, 112 Wn.App. 585 (2002), *State v. Monroe*, 126 Wn.App. 435, 439-40 (2005), *remanded*, 157 Wn.2d 1016, *and reconsidered on other grounds*, 135 Wn.App. 880 (2006), *State v. Halsey*, 140 Wn.App. 313 (2007), *State v. MacDonald*, 183 Wn.2d 1 (2015), distinguishing *State v. Talley*, 134 Wn.2d 176 (1998), *cf.: State v. Neisler*, 191 Wn.App. 259 (2015), *State v. Molnar*, 198 Wn.2d 500 (2021); remedy is remand for defendant to choose whether to withdraw plea or "specifically enforce the State's agreement," *State v. Miller*, 110 Wn.2d 528, 535 (1988), *State v. Henderson*, 99 Wn.App. 369 (2000), *see: State v. Morley*, 35 Wn.App. 45 (1983), *State v. Barber*, 170 Wn.2d 854 (2011); II.

***State v. Shineman***, 94 Wn.App. 57 (1999)

Plea agreement provides that if defendant complies with probation, state would recommend dismissal of the charge and expungement; at end of probation period, charge is dismissed but state objects to an order of expungement as court lacks authority to order state agencies to expunge, RCW 10.97.060, *State v. Gilkinson*, 57 Wn.App. 861 (1990); held: where due process dictates, specific terms of a plea agreement may be enforced despite explicit conflicting terms of a statute, *State v. Miller*, 110 Wn.2d 528, 532 (1988), thus trial court may order state to expunge in spite of statute, *see: State v. McRae*, 96 Wn.App. 298 (1999), although court records are not expunged; records need not be destroyed, merely kept from public view; II.

***State v. Hixson***, 94 Wn.App. 862, 868-69 (1999)

State agrees to recommend exceptional sentence based upon mitigating factors that victim was the "initiator, aggressor or provoker," and that defendant was "under duress, coercion or threat which affected his conduct," at sentencing defendant claims he was in danger, prosecutor argues defendant was not in danger, defense claims prosecutor undercut plea agreement; held: if a prosecutor in good faith perceives defendant misrepresenting the record, s/he has an obligation not to hold back a relevant correction, *see: State v. Sledge*, 133 Wn.2d 828, 840 (1998); III.

***State v. Conwell***, 141 Wn.2d 901 (2000)

Defendant is charged with manslaughter in district court, negotiates an agreement with prosecutor that he would be charged in superior court with two misdemeanors and, upon a plea of guilty, state would recommend 90-day concurrent sentences; at arraignment, superior court judge refuses to accept plea agreement, arraigns defendant on the two misdemeanors, court enters pleas of not guilty without objection, state subsequently is allowed to amend to manslaughter, defendant files interlocutory appeal; held: court had authority at arraignment to reject a plea agreement that is not "consistent with the interests of justice and with the prosecuting standards," RCW 9.94A.090, *see: State v. Ford*, 125 Wn.2d 919 (1995), distinguishing *State v. Martin*, 94 Wn.2d 1 (1980), however once court rejected plea agreement, it was obliged to give defendant opportunity to withdraw or maintain plea, entry of not guilty pleas *sua sponte* was error, reversing *State v. Conwell*, 96 Wn.App. 457 (1999), *see: State v. Hubbard*, 106 Wn.App. 149 (2001), *Pers. Restraint of Burlingame*, 3 Wn.App.2d 600 (2018), *State v. Westwood*, 10 Wn.App.2d 543 (2019); 9-0.

***State v. Nason***, 96 Wn.App. 686, 690-92 (1999)

Defendant pleads guilty to property and drug crimes, plea agreement states, "[n]o other charges will be filed," defendant is later charged with a pre-existing child molestation case, seeks specific performance and dismissal; held: under contract law, where there is no mutual assent as to a material term, the court may find that no contract was formed; where there is uncertainty of meaning, the contract is fatally ambiguous and void; court may look to parol evidence to explain ambiguity and, if meaning remains unclear, no contract is formed; state's position that the promise of no other charges applied solely to those cases that related to the present charges conflicts with defendant's plausible claim that "no other charges" is literal; because there was no mutual intent or assent to the terms, there was no contract, thus defendant is not entitled to specific performance; III.

***State v. Henderson***, 99 Wn.App. 369 (2000)

At plea, state agrees to recommend 26 months, low end of standard range, which court imposes; DOC requests resentencing due to error of law, parties determine that low end of range is 41 months, state recommends exceptional sentence of 26 months, court imposes 41 months, defendant demands specific performance sentence of 26 months; held: where defendant is not misled by the state and state is not responsible for the mistake, then trial court need not impose the recommended sentence in spite of a statute, *State v. Barber*, 170 Wn.2d 854 (2011); II.

***Pers. Restraint of McCready***, 100 Wn.App. 259 (2000)

Defendant rejects plea offer to a lesser charge, is convicted of greater, proves that counsel did not advise him that mandatory minimum sentence after trial would be ten years, although he was advised that standard range would be more than ten years; held: because defendant might have accepted the plea offer had he known that he could not have obtained an exceptional sentence less than ten years, he was prejudiced by the insufficient advice of counsel, thus remanded for retrial; 2-1, III.

***State v. Hahn***, 100 Wn.App. 391, 394-97 (2000)

Defendant pleads guilty to assault with deadly weapon enhancement, to wit: hands and feet, at sentencing defendant argues he cannot be sentenced to the enhancement because, under these facts, hands and feet do not meet the statutory definition of a deadly weapon, RCW 9.94A.125; held: where a guilty plea is entered knowingly and voluntarily, factual deficiencies underlying the agreement will not invalidate it, *In re Pers. Restraint of Barr*, 102 Wn.2d 265, 269-71 (1984), *State v. Majors*, 94 Wn.2d 354, 357-58 (1980), *State v. Morreira*, 107 Wn.App. 450, 458 (2001), where defendant receives some benefit from the bargain, *State v. Bao Sheng Zhao*, 157 Wn.2d 188 (2006), *see also: State v. Zumwalt*, 79 Wn.App. 124 (1995), , disapproved, on other grounds, *State v. Bisson*, 156 Wn.2d 507, 520 n. 5 (2006), *but see: Pers. Restr. Of Call*, 144 Wn.2d 315 (2001), *State v. Robinson*, 8 Wn.App.2d 629 (2019); II.

***State v. Van Buren***, 101 Wn.App. 206 (2000)

A breach of a plea agreement is a due process violation which may be raised for the first time on appeal, *State v. Walsh*, 143 Wn.2d 1 (2001); apply objective standard in determining whether state breached, irrespective of prosecutorial motivations or justifications, *State v. Jerde*, 93 Wn.App. 774, 780 (1999); here, state downplayed its bargain, focused the court's attention on aggravating factors contained in the presentence report, proposed an aggravating factor not specifically cited within the report and argued the validity of an aggravating factor, thus undermining the plea agreement and breaching the bargain, distinguishing *State v. Coppin*, 57 Wn.App. 866, 875 (1990), *State v. Williams*, 103 Wn.App. 231 (2000), *State v. Xavier*, 117 Wn.App. 196 (2003), *State v. Carrero-Maldonado*, 135 Wn.App. 77 (2006), *see: State v. Van Buren*, 112 Wn.App. 585 (2002), *Pers. Restraint of Lord*, 152 Wn.2d 182 (2004), *State v. Monroe*, 126 Wn.App. 435, 439-40 (2005), *remanded*, 142 P.3d 172 *and reconsidered, on other grounds*, 135 Wn.App. 880 (2006), *State v. Halsey*, 140 Wn.App. 313 (2007), *State v. MacDonald*, 183 Wn.2d 1 (2015), *cf.: State v. Neisler*, 191 Wn.App. 259 (2015), *State v. Molnar*, 198 Wn.2d 500 (2021); II.

***State v. Julian***, 102 Wn.App. 296, 301-04 (2000)

Prosecutor's mere acquiescence to defense argument in favor of a plea bargain ("I don't have an awful lot to add") is not a breach where state's recommendation is presented in writing and court is aware of it, *State v. Coppin*, 57 Wn.App. 866, 874 (1990); 2-1, III.

***State v. Williams***, 103 Wn.App. 231 (2000)

In plea agreement, state recommends high end of standard range, at sentencing makes unsolicited references to statutory aggravating factors, argued for "at least" the high end as "the minimum" that should be imposed, that high end is "the most leniency" that should be afforded, court adopts all proposed aggravating factors and imposes statutory maximum sentence; held: while prosecutor may reference prior bad acts in support of an argument that defendant should get high end of standard range, *State v. Coppin*, 57 Wn.App. 866, 875 (1990), here prosecutor advocated factors beyond what was necessary in dispute over standard range, thereby undercutting plea agreement "in a transparent attempt to sustain an exceptional sentence," *State v. Jerde*, 93 Wn.App. 774, 782 (1999), *State v. Van Buren*, 101 Wn.App. 206 (2000), *State v. Xavier*, 117 Wn.App. 196 (2003), *Pers. Restraint of Lord*, 152 Wn.2d 182 (2004), *State v. Carrero-Maldonado*, 135 Wn.App. 77 (2006), *see also: State v. MacDonald*, 183 Wn.2d 1 (2015), *cf.: State v. Neisler*, 191 Wn.App. 259 (2015), *State v. Molnar*, 198 Wn.2d 500 (2021), thus remanded for withdrawal of plea or sentencing before a different judge at which state must present agreed recommendation without equivocation, although new judge need not accept the recommendation; II.

***State v. Lake***, 107 Wn.App. 227 (2001)

After state breaches plea agreement and defendant is sentenced and files notice of appeal, state offers to seek leave from appellate court, RAP 7.3, to agree to withdrawal of plea or specific performance, defense declines offer insisting that it will continue with its appeal; held: because defense had the opportunity to withdraw plea shortly after sentencing and declined, defense may have waived that remedy, remanded for a hearing on whether state lost significant evidence due to time between offer and appellate decision, *State v. Van Buren*, 101 Wn.App. 206, 212 n.2 (2000); II.

***State v. Armstrong***, 109 Wn.App. 458 (2001)

In plea agreement, state agrees not to file other charges, defendant specifically agrees that if he fails to appear for sentencing, state is released from agreement but defendant is bound by plea; defendant fails to appear, court denies state's motion to add charges unless defendant is allowed to withdraw plea; held: where plea agreement is unambiguous and state proves defendant breached, then state is no longer bound by its obligations to forgo additional charges, defendant may not withdraw plea, distinguishing *State v. Thomas*, 79 Wn.App. 32 (1995); 2-1, II.

***Pers. Restraint of Sarausad***, 109 Wn.App. 824, 846-48 (2001)

Offering leniency to witnesses in exchange for their testimony is not bribery, *United States v. Singleton*, 165 F.3d 1297 (10th Cir., 1999); I.

***State v. Sanchez***, 146 Wn.2d 339 (2002)

Prosecutor agrees to standard range recommendations, investigating police officer and CCO recommends higher sentence; held: investigating police officer, as investigating arm of prosecutor, is bound by prosecutor's recommendation, *State v. MacDonald,* 183 Wn.2d 1 (2015); CCO, as an agent of the court, may make an independent recommendation; 5-4.

***State v. Cox***, 109 Wn.App. 937 (2002)

Defendant rejects offer to plead to assault 4˚, is convicted of assault 3˚, claims that counsel failed to advise him that community placement for assault 3˚ was mandatory and, if he knew, he would have pled guilty to the gross misdemeanor; held: defendant's bare assertion is insufficient to establish prejudice; III.

***State v. Moen***, 110 Wn.App. 125, 131-33 (2002)

Prosecutor's refusing to plea bargain where defendant demands disclosure of confidential informant at a civil forfeiture hearing is arguably unethical but, because defendant has no right to a plea bargain, *State v. Wheeler*, 95 Wn.2d 799, 804 (1981), *State v. Shelmidine,* 166 Wn.App. 107 (2012), failure of trial court to dismiss, CrR 8.3(b), is not an abuse of discretion; III.

***State v. Lindahl***, 114 Wn.App. 1, 11-13 (2002)

State agrees to make standard range recommendation and to oppose an exceptional sentence if court *sua sponte* considers an exceptional sentence, trial court, with prosecutor's approval, allows attorney for homicide victim's family to present written and oral argument in support of exceptional sentence, defense raises breach issue for first time on appeal; held: failure to adhere to a plea bargain implicates due process and may be raised for the first time on appeal, *State v. Sanchez*, 146 Wn.2d 339, 346 (2002); prosecutor's declining to argue against victim's attorney's appearance and asking court to hear from victim's attorney did not breach plea bargain or establish that prosecutor deliberately set up the scenario whereby a third party would recommend an exceptional sentence, *State v. Halsey*, 140 Wn.App. 313 (2007), *see: State v. Hixson*, 94 Wn.App. 862, 866 (1999), *State v. MacDonald,* 183 Wn.2d 1 (2015); II.

***State v. Harrison***, 148 Wn.2d 550 (2003)

Defendant receives exceptional sentence, on appeal Court of Appeals reverses, holding that state breached plea bargain and orders specific performance; on remand, different judge holds that he is bound by the exceptional sentence previously imposed, although he reduces offender score in accordance with mandate; held: when state breaches, neither collateral estoppel nor "law of the case" doctrine prevent trial court from independently determining whether an exceptional sentence is warranted, *see: State v. White*, 123 Wn.App. 106 (2004); 9-0.

***State v. Turley***, 149 Wn.2d 395 (2003)

Where defendant pleads guilty to multiple counts at the same time in the same document, the plea agreement is indivisible and, where there are grounds to withdraw plea to one count, he may withdraw his plea to all counts, *Pers. Restraint of Bradley*, 165 Wn.2d 934 (2009), *State v. King*, 162 Wn.App. 234, 240-42 (2011), *State v. Charles,* 163 Wn.App. 54 (2011), *see: State v. Bisson*, 156 Wn.2d 507 (2006), *State v. Smith*, 137 Wn.App. 431, 438 (2007), *Pers. Restraint of Shale*, 160 Wn.2d 489, 492-94 (2007), *but see: Pers. Restraint of Francis,* 170 Wn.2d 517, 532 n.7 (2010), *State v. Coombes*, 191 Wn.App. 241, 255-58 (2015); 9-0.

***State v. E.A.J.***, 116 Wn.App. 777, 781-86 (2003)

Where plea agreement is ambiguous and interpretation depends on credibility of extrinsic evidence or a choice among reasonable inferences to be drawn from extrinsic evidence, and is raised for first time on appeal, remand is necessary for evidentiary hearing, *Berg v. Hudesman,* 115 Wn.2d 657, 668 (1990); I.

***State v. Williams***, 117 Wn.App. 390 (2003)

A plea is not invalid if entered pursuant to a plea agreement that includes leniency for a third party or in response to a prosecutor's justifiable threat to prosecute a third party if the plea is not entered, *State v. Cameron,* 30 Wn.App. 229 (1981); prosecutor is obliged to inform the court that a plea bargain is a "package deal," whereupon court must specifically inquire whether defendant was pressured by co-defendant; mere fact that defendant felt pressure to plead guilty to assist the co-defendant is not a basis to withdraw the plea as long as the plea was voluntary and of defendant's own volition; I.

***State v. Oliva***, 117 Wn.App. 773 (2003)

State agrees to recommend special sex offender sentencing alternative if defendant is amenable, court orders presentence investigation and evaluation at Eastern State Hospital, PSI reflects that defendant is not amenable, defense requests evaluation by certified sex offender treatment provider, state opposes, court sentences to prison; held: trial court properly exercised discretion in denying SSOSA evaluation, *State v. Koivu,* 68 Wn.App. 869 (1993), state did not breach plea agreement even though RCW 18.155.030(2)(a) provides that question of amenability is necessarily determined by certified provider; 2-1, I.

***State v. Moen***, 150 Wn.2d 221 (2003)

Defendant contests civil forfeiture and, in discovery, demands name of confidential informant, prosecutor advises that if the name is disclosed prosecutor's policy is to refuse to plea bargain the criminal case, defense persists, name is disclosed and prosecutor refuses to bargain; held: because the state has a legitimate interest in protecting confidential informants, state's policy which requires a defendant to forgo the right of disclosure does not violate due process; 7-2.

***Pers. Restraint of Lord***, 152 Wn.2d 182 (2004)

On plea to sex offenses, state agrees to recommend suspended sentence "on condition...successfully *[sic]* treatment per SSOSA," RCW 9.94A.670(2), defendant obtains three evaluations only third of which finds amenability to treatment, prosecutor at sentencing recommends prison; held: neither statute nor plea agreement specified number of unfavorable evaluations defendant could receive before state could revoke recommendation, thus prosecutor breached plea agreement; remedy is remand for withdrawal of plea or specific performance requiring state to present agreed-upon recommendation without equivocation, although court may hear from all evaluators and need not impose SSOSA, *State v. Sledge,* 133 Wn.2d 828, 838-43 (1997), *State v. Van Buren,* 101 Wn.App. 206 (2000); 9-0.

***State v. Budge***, 125 Wn.App. 341 (2005)

State offers plea to six counts, calculates offender score at 6, informs defense that if defendant does not plead it will add charges, defense counsel advises state that offender score is actually 7, state still insists on plea to six counts, defense objects, trial court finds detrimental reliance and orders specific performance, state appeals; held: fact that defendant may face more charges if he goes to trial does not affect his ability to receive a fair trial, only reliance defendant has shown is psychological which is insufficient to compel specific performance, *State v. Wheeler*, 95 Wn.2d 799, 805 (1981), *State v. Bogart*, 57 Wn.App. 353, 357 (1990); II.

***State v. Lathrop***, 125 Wn.App. 353 (2005)

Defendant is charged with murder, agrees to plead to manslaughter, state's recommendation is "90 months...which is 5 months below the low end," court follows plea bargain, later defendant moves for resentencing because, due to a miscalculation, the 90 month sentence is actually within the standard range, not below it; held: because the agreement was 90 months, not 5 months below the range, defendant may not withdraw plea, *see: State v. Walsh*, 143 Wn.2d 1 (2001); III.

***State v. McInally***, 125 Wn.App. 854 (2005)

In plea agreement, defendant agrees that the attached criminal history is accurate and complete, state agrees to recommend suspended sentence, prior to sentencing DOC discovers a juvenile felony in another state, prosecutor recommends prison, defendant alleges breach by state; held: defendant's agreement as to his criminal history was a condition precedent to state's agreement which defendant breached by failing to disclose a conviction, thus state was not bound by the agreement; I.

***State v. Monroe***, 126 Wn.App. 435, 439-40 (2005), *remanded*, 142 P.3d 172, *and reconsidered, on other grounds*, 135 Wn.App. 580 (2006)

Plea agreement is for top of range, at sentencing prosecutor argues that facts would have supported additional counts if case had gone to trial, crimes committed were one of the most significant crime sprees prosecutor had seen, murder cases have less victim impact; held: state's argument did not undercut bargain, distinguishing *State v. Sledge*, 133 Wn.2d 828, 838-43 (1997), *State v. Jerde*, 93 Wn.App. 774 (1999), *State v. Van Buren*, 101 Wn.App. 206 (2000), *State v. Neisler*, 191 Wn.App. 259 (2015), as argument advocated top of range, presentation was "not unduly inflammatory," *cf.: State v. Carrero-Maldonado*, 135 Wn.App. 77 (2006), *State v. MacDonald*, 183 Wn.2d 1 (2015), *State v. Molnar*, 198 Wn.2d 500 (2021); II.

***State v. Bisson***, 156 Wn.2d 507 (2006)

Defendant pleads guilty to robberies and 5 weapon enhancements, plea statement advises that enhancements will be consecutive to any other sentence but is silent as to running consecutive to each other, after sentencing court follows statute and runs enhancements consecutively to each other, defendant seeks specific enforcement to have them run concurrently or, alternatively, to withdraw plea to enhancements only; held: a defendant may only withdraw a plea to the entire plea agreement, not enhancement only, *Pers. Restraint of Bradley*, 165 Wn.2d 934 (2009), *State v. Turley*, 149 Wn.2d 394 (2003), *State v. Kinnamin*, 180 Wn.2d 197 (2014), disapproving, in part, *State v. Zumwalt*, 79 Wn.App. 124 (1995); where a plea agreement is ambiguous as opposed to erroneous, specific performance is not available as a remedy, *Pers.*

*Restraint of Murillo*, 134 Wn.App. 521 (2006), *State v. Yates*, 161 Wn.2d 714, 734-41 (2007); 7-2.

***State v. Ermels***, 156 Wn.2d 528 (2006)

Defendant pleads guilty, stipulates to facts supporting an exceptional sentence based on victim vulnerability, stipulates that there is a legal basis for exceptional sentence, waives right to appeal, then appeals after *Blakely v. Washington*, 159 L.Ed.2d 403 (2004), is decided and seeks standard range sentence; held: because stipulation to facts supporting exceptional sentence and agreement that there was a legal basis for the exceptional sentence are indivisible parts of the plea agreement, defendant cannot challenge the exceptional sentence without challenging the entire plea, *State v. Turley*, 149 Wn.2d 395 (2003), *State v. Bisson*, 156 Wn.2d 507 (2006), *State v. Steele*, 134 Wn.App. 844 (2006), *Pers. Restraint of Shale*, 160 Wn.2d 489, 492-94 (2007), *State v. Poston*, 138 Wn.App. 898 (2007), *State v. Dillon*, 142 Wn.App. 269 (2007) , *Pers. Restraint of Bradley*, 165 Wn.2d 934 (2009), *State v. Chambers*, 176 Wn.2d 573 (2013), *State v. Kinnaman*, 180 Wn.2d 197 (2014), *but see: Pers. Restraint of Francis*, 170 Wn.2d 517, 531-32 (2010); 9-0.

***State v. Hagar***, 158 Wn.2d 369 (2006)

Defendant pleads guilty, stipulates to certification for determination of probable cause as real facts, trial court considers facts and imposes exceptional sentence, finding major economic offense; held: even assuming that defendant's stipulation was an integral part of the plea agreement and not divisible, a *Blakely* violation occurrred, requiring resentencing within standard range, *State v. Suleiman*, 158 Wn.2d 280 (2006), *Pers. Restraint of Beito*, 167 Wn.2d 497 (2009); reverses *State v. Hagar*, 126 Wn.App. 320 (2005); 9-0.

***State v. Carreno-Maldonado***, 135 Wn.App. 77 (2006)

State agrees to recommend low end on some counts, mid-range on some, high end on others, at sentencing prosecutor, purporting to speak on behalf of victims, argues, over objection, that crimes are heinous and violent, trial court sentences to high end on all counts; held: because plea bargain was for low end on counts which carried the highest sentences, there was no need for prosecutor to recite potentially aggravating facts; when prosecutor is recommending mid-range, it may be necessary to recount aggravating facts to safeguard against a lower sentence, but prosecutor must use great care and facts presented must not be of the type that make the crime more egregious than a typical crime of the same class; here, state went beyond what was necessary to support mid-point recommendation, *see: State v. Jerde*, 93 Wn.App. 774 (1999), *State v. Van Buren*, 101 Wn.App. 206 (2000), *State v. Williams*, 103 Wn.App. 231 (2000), *cf.: State v. Molnar*, 198 Wn.2d 500 (2021); while a prosecutor may help a victim exercise her right to communicate information to sentencing court, CONST., Art. I, § 35, RCW 7.69.030, without breaching a plea bargain, *State v. Halsey*, 140 Wn.App. 313 (2007), here the remarks were unsolicited advocacy, victims were present and able to speak or ask for assistance if they so desired, *State v. MacDonald*, 183 Wn.2d 1 (2015); breach of plea bargain is not subject to harmless error review, *Pers. Restraint of James*, 96 Wn.2d 847, 849-50 (1982), *Santobello v. New York*, 30 L.Ed.2d 427 (1971), *cf.: State v. Neisler*, 191 Wn.App. 259 (2015); II.

***State v. Yates***, 161 Wn.2d 714, 734-41 (2007)

Defense claims state offered plea to aggravated murder in lieu of death penalty, then withdrew offer; held: a plea proposal is unenforceable absent detrimental reliance by defendant, *State v. Wheeler*, 95 Wn.2d 799 (1981); doctrine of fundamental fairness is inapplicable to proposals made in the context of plea negotiations; doctrine of equitable estoppel is inapplicable in criminal prosecutions; 8-1.

***Pers. Restraint of Bradley***, 165 Wn.2d 934 (2009)

Defendant pleads guilty to two counts, later learns that offender score for one count was miscalculated, seeks withdrawal of plea as to both counts; held: length of sentence is a direct consequence of a plea, *see: Pers. Restraint of Stockwell*, 161 Wn.App. 329 (2011), *affirmed, on different grounds*, 179 Wn.2d 588 (2014), *State v. Mendoza*, 157 Wn.2d 582, 590 (2006), court may not speculate as to what defendant would have done had he been correctly advised, *Pers. Restraint of Isadore*, 151 Wn.2d 294, 302 (2004), *overruling, in part*, *State v. Osequero Acevedo*, 137 Wn.2d 179 (1999); withdrawal of a plea is available where, as part of a package deal, the defendant was correctly informed of the consequences of one charge but not of another charge, *State v. Turley*, 149 Wn.2d 395, 399-401 (2003), *State v. King*, 162 Wn.App. 234, 240-42 (2011); here, while there were separate plea agreements which might support divisibility, each document referenced the other, *Pers. Restraint of Shale*, 160 Wn.2d 489, 493-94 (2007), one charge was reduced on the day of sentencing evidencing a package deal, thus defendant may withdraw pleas to both charges, *State v. Chambers*, 176 Wn.2d 573 (2013), *cf.: State v. Coombes*, 191 Wn.App. 241, 255-58 (2015); 7-2.

***Missouri v. Frye***, 566 U.S. 134, 132 S.Ct.1399, 182 L.Ed.2d 379 (2012)

Where prosecutor makes a formal plea offer, favorable to the defendant, with a fixed expiration date, counsel's failure to communicate the offer to the client is ineffective assistance; to get relief, defendant must show a reasonable probability he would have accepted the plea offer and that there is a reasonable probability that the prosecutor would not have withdrawn it and that the trial court would have accepted the offer; formal plea offers may be made part of the record; 6-3.

***Lafler v. Cooper***, 566 U.S. 156, 163, 132 S.Ct. 1376, 182 L.Ed.2d 398 (2012)

Counsel communicates a favorable plea offer to client and advises client to reject it, defendant is convicted and receives a harsher sentence, parties conced on appeal that counsel's advice to reject the plea offer was based upon an erroneous reading of the law and thus was ineffective; held: where ineffective advice leads to a plea offer's rejection, conviction at trial and a harsher sentence, defendant must show that there is a reasonable probability that defendant would have pleaded guilty and that the sentence would have been less; remedy may be resentencing or, if the plea offer was to a lesser charge, court may order prosecutor to reoffer the plea proposal; court leaves open the scenario that, after the plea is rejected, prosecutor learns of new information about defendant's culpability; 5-4.

***State v. MacDonald***, 183 Wn.2d 1 (2105)

State agrees to recommend suspended sentence in 1978 cold case homicide plea, at sentencing advises court that detective wishes to speak on behalf of victim's family, RCW 9.94A.500 (2008), prosecutor says she doesn't know what detective will say, defense objection

overruled, detective attacks plea agreement, judge imposes maximum sentence; held: investigating officers cannot make sentence recommendations contrary to a plea agreement, *State v. Sanchez,* 146 Wn.2d 339 (2002), victims' rights laws, CONST. art. I, § 35, ch. 7.69, RCW, do not permit investigating officer acting as a victim's advocate to undermine plea agreement, *State v. Carreno-Maldonado,* 135 Wn.App. 77, 86-87 (2006), *cf.: State v. Neisler,* 191 Wn.App. 259 (2015); 6-3.

***State v. Neisler***, 191 Wn.App. 259 (2015)

In plea bargain defendant pleads guilty to vehicular assault and an aggravating factor, prosecutor agrees to defer to court as to sentence, at sentencing victim makes strong statement without recommending a sentence, prosecutor states, *inter alia,* "how much time is enough?," and that this is more severe than vehicular homicide, defense recommends sentence 2-4 years above standard range, court imposes sentence six times standard range; held: applying objective standard of whether state's words contradict state's recommendation state did not breach, state was not prohibited from arguing facts in support of exceptional sentence where defendant agreed to an exceptional sentence, distinguishing *State v. Carreno-Maldonado,* 135 Wn.App. 77, 83-85 (2006), *State v. Xavier,* 117 Wn.App. 196, 200-02 (2003), *State v. Williams,* 103 Wn.App. 231, 236-39 (2000), *State v. Van Buren,* 101 Wn.App. 206, 217 (2000), *State v. Jerde,* 93 Wn.App. 774,782 (1999), *State v. Sledge,* 133 Wn.2d 828 (1997); III.

***State v. Ramos***, 187 Wn.2d 420, 455-58 (2017)

State agrees to recommend low end of standard range, argues at sentencing that the crime would have a basis for an exceptional aggravated sentence because defendant knew victim was particularly vulnerable, standard range sentence is imposed, defense argues on appeal that state undercut the possibility of a mitigated sentence; held: in context state's argument "had both the intention and effect of providing the court a full picture of the facts," *State v. Talley,* 134 Wn.2d 176 (1998), *State v. Molnar,* 198 Wn.2d 500 (2021), *cf.: State v. Jerde,* 93 Wn.App. 774 (1999), distinguishing *State v. Sledge,* 133 Wn.2d 828 (1997); 9-0.

***State v. Estes***, 188 Wn.2d 450 (2017)

Defense counsel, unaware that conviction of any felony with a deadly weapon enhancement is a strike offense, RCW 9.94A.030(33)(t) (2000), -.570 (2016), does not plea bargain, defendant is convicted of lesser assault 3° with a deadly weapon, sentenced to life without parole; held: where failure to plea bargain is based on ignorance of the law and failure to advise of the potential consequences of failing to negotiate, prejudice is demonstrated and counsel is ineffective, *State v. James,* 48 Wn.App. 353 (1987), *cf.: State v. Edwards,* 171 Wn.App. 379 (2012), *State v. Crawford,* 159 Wn.2d 86, 100 (2006), *Pers. Restraint of James,* 190 Wn.2d 686 (2018), *see: State v. Drath,* 7 Wn.App.2d 255 (2018); affirms *State v. Estes,* 193 Wn.App. 479 (2016); 9-0.

***State v. Robinson***, 8 Wn.App.2d 629 (2019)

While a defendant may plead guilty to an amended charge if there is no factual basis as long as there is a factual basis for the original charge, *State v. Bao Sheng Zhao,* 157 Wn.2d 188 (2006), *State v. Wilson,* 16 Wn.App.2d 537 (2021), a defendant cannot be convicted of two

crimes based on a single act and a single original charge as it violates the double jeopardy clause, *State v. Mutch*, 171 Wn.2d 646, 662 (2011); while a guilty plea precludes a collateral attack unless there is a double jeopardy violation; I.

***State v. Westwood***, 10 Wn.App.2d 543 (2019)

Defendant agrees to plead guilty to negotiated reduced charges, trial court declines to accept plea ruling that it does not comport with prosecution standards, RCW 9.94A.401 *et seq.*, defendant is convicted of original charges at trial, both parties appeal claiming court abused discretion; held: trial court is not authorized to reject a plea based upon disagreement with the terms of the plea agreement, distinguishing *State v. Haner*, 95 Wn.2d 858 (1981), *see: State v. Conwell*, 141 Wn.2d 901 (2000); state articulated a tenable justification for the plea agreement, court cannot reject a plea agreement as inconsistent with prosecutorial standards; 2-1.

***State v. Wiatt,*** 11 Wn.App.2d 107 (2019)

In exchange for reduction of charges to gross misdemeanors defendant agrees that court can enter lifetime anti-harassment orders, seven years later defendant moves to vacate anti-harassment orders; held: by moving to vacate the orders defendant breached plea agreement, thus trial court properly ordered specific performance of the anti-harassment orders; I.

***State v. Salazar***, 13 Wn.App.2d 880 (2020)

Defendant's standard range is 22-29 months, prosecutor, pursuant to plea bargain, recommends prison-based DOSA of 25.5 months with 12.25 months in prison and 12.25 months community custody, defendant violates conditions of community custody, prosecutor recommends 29 months, court revokes, RCW 9.94A.660(7)(c) (2020), and imposes 29 months, defendant maintains state violated plea agreement; held: plea agreement did not address possible sanction state would recommend upon revocation, prosecutor cannot violate an agreement it didn't make; III.

***State v. D.L.W.***, 14 Wn.App.2d 649 (2020)

In plea agreement respondent agrees to pay full restitution, at restitution hearing argues that he should not be obliged to pay restitution to the insurer of the victim, state argues breach of plea agreement; held: respondent did not waive his right to argue for lesser restitution, plus agreement is ambiguous as it did not address restitution to insurance company, ambiguities in plea agreement are construed against the state, *State v. Bisson*, 156 Wn.2d 507, 521-22 (2006); I.

***State v. Molnar***, 198 Wn.2d 500 (2021)

Plea agreement states that state will recommend mid-range and that defense doesn't agree, at sentencing state submits a presentence report setting out stipulated facts and that the recommendation is "appropriate given the egregious nature of this offense and the victim's obvious vulnerability," and that the vulnerable victim aggravator and domestic violence designation were dismissed as part of the plea agreement, and informed the court that "[h]ad this case gone to trial, the State would have added an additional sentencing aggravator of abuse of trust and an additional count of Rape in the Second Degree," court imposes high end of the range, defendant moves trial court for resentencing four years after judgment and sentence became final, claiming state breached the plea agreement by arguing aggravating sentencing

factors, trial court denies motion, defendant appeals; held: motion for resentencing was an untimely collateral attack, RCW 10.73.090, thus superior court should have transferred it to the court of appeals, CrR 7.8(c)(2); because court of appeals ruled on the merits *State v. Molnar*, 13 Wn.App.2d 1072 (2020)(unpublished), supreme court grants review on the merits, holding that state did not breach the plea agreement, it was entitled to file a report which properly summarized the original charge and the plea negotiations, *State v. Ramos*, 187 Wn.2d 420, 455-58 (2017), distinguishing *State v. Talley*, 134 Wn.2d 176, 186 (1998), *State v. Sledge*, 133 Wn.2d 828, 840 (1997), *State v. Correno-Maldonado*, 135 Wn.App. 77, 83 (2006), *State v. Van Buren*, 101 Wn.App. 206, 216 (2000), *State v. Jerde*, 93 Wn.App. 774, 782 (1999); 9-0.

***Matter of Sylvester***, ___ Wn.App.2d ___, 520 P.3d 1123 (2022)

Defendant pleads guilty to reduced charge to avoid third strike sentence, stipulates to offender score which includes drug possession conviction, plea agreement states that defendant agrees not to file a CrR 7.8 motion, files PRP due to invalidity of drug possession *State v. Blake*, 197 Wn.2d 170 (2021), state maintains that defendant breached plea agreement; held: state may seek a hearing in superior court on remand to have court decide if defendant breached; II.

# POLYGRAPH

***State v. Boileau***, 21 Wn.App. 259 (1978)

Unstipulated polygraph is inadmissible to impeach a stipulated polygraph; I.

***State v. Agren***, 28 Wn.App. 1 (1980)

Prosecutor asks defense witness on stand if he would take a polygraph, objection sustained, mistrial denied; held: within court's discretion to deny mistrial; II.

***State v. Descoteaux***, 94 Wn.2d 31 (1980), *overruled, on other grounds, State v. Danforth,* 97 Wn.2d 255 (1982)

Evidence that defendant took polygraph should be admitted only when clearly relevant and unmistakably nonprejudicial; II.

***State v. Sutherland***, 94 Wn.2d 527 (1980)

No mention of polygraph taken by a witness is permissible unless defense opens door; here, defense cross of police did not open door; reverses *State v. Sutherland,* 24 Wn.App. 719 (1979); 9-0.

***State v. Niemczyk***, 31 Wn.App. 803 (1982)

Court need not appoint polygraph expert where state declines to stipulate to admissibility of results and defense fails to lay any foundation on reliability of polygraph evidence; II.

***State v. Griggs***, 33 Wn.App. 496 (1982)

Limiting instruction regarding stipulated polygraph must be given, *State v. Renfro,* 96 Wn.2d 902 (1982); *State v. Ross*, 7 Wn.App. 62, 53 ALR 3d 997 (1972); II.

***State v. Renfro***, 96 Wn.2d 902 (1982)

Stipulated polygraph is admissible; court must instruct jury that polygraph does not prove or disprove element of offense but at most indicates that, at time of examination, defendant was not telling the truth; but, if defense fails to request instruction, no error; *see*: *State v. Trader,* 54 Wn.App. 479 (1989); 7-2.

***State v. Ahlfinger***, 50 Wn.App. 466 (1988)

Polygraph does not meet *Frye* standard; no due process violation for failure to admit unstipulated polygraph, *distinguishing Rock v. Arkansas*, 97 L.Ed.2d 37 (1987); I.

***United States v. Scheffer***, 140 L.Ed.2d 413 (1998)

*Per se* rule excluding polygraph evidence from court martial proceedings does not violate Fifth and Sixth Amendment rights to present evidence; 5-4.

***State v. Riles***, 135 Wn.2d 326 (1998) , *abrogated on other grounds, State v. Valencia,* 169 Wn.2d 782 (2010)

Requiring polygraph testing to monitor compliance with other conditions of community

placement, RCW 9.94A.120(9)(c), is valid, affirming, in part, *State v. Riles*, 86 Wn.App. 10 (1997), overruling *State v. Holland*, 80 Wn.App. 1 (1995); *accord: State v. Combs*, 102 Wn.App. 949 (2000), *State v. Castro*, 141 Wn.App. 485, 493-94 (2007), *State v. Vant*, 145 Wn.App. 592, 603 (2008); 7-2.

***State v. Jacobsen***, 95 Wn.App. 967, 975-77 (1999)

Court orders juvenile to attend psychosexual evaluation prior to disposition, admits polygraph results; held: trial court was authorized to order unstipulated polygraph testing of a juvenile as part of psychological evaluation, *see: State v. Cherry*, 61 Wn.App. 301 (1991), *State v. Riles*, 135 Wn.2d 326, 342 (1998) , *abrogated on other grounds*, *State v. Valencia*, 169 Wn.2d 782 (2010); II.

***State v. Clark***, 143 Wn.2d 731, 749-50 (2001)

Polygraph evidence may be considered in a magistrate's probable cause determination, *State v. Cherry*, 61 Wn.App. 301, 305 (1991); 9-0.

***State v. Justesen***, 121 Wn.App. 83 (2004)

Defendant-mother believes father sexually abused 3-year old, CPS and police investigate, father passes polygraph, no charges filed, temporary parenting plan orders shared custody, mother leaves state with child, is arrested 18 months later in another state, charged with custodial interference, RCW 9A.40.060(2); at trial, defense raises affirmative defense that defendant reasonably believed that child was in danger, RCW 9A.40.080, trial court admits fact that defendant knew of polygraph results, gave limiting instruction that polygraph goes only to reasonable belief of defendant and not to whether father committed abuse; held: polygraph evidence is inadmissible irrespective of limiting instruction, *State v. Sutherland*, 94 Wn.2d 527, 530 (1980), distinguishing *State ex rel. Taylor v. Reay*, 61 Wn.App. 141 (1991); I.

# PREEMPTION

***State v. Mason***, 34 Wn.App. 514 (1983)

Defendant challenges felony promoting prostitution conviction, argues there is a municipal ordinance making identical offense a misdemeanor; held: where a statute and ordinance define the same elements, but former is a felony and latter a misdemeanor, defendant's right to equal protection is violated, *but see:* *State v. Kirwin*, 165 Wn.2d 818 (2009); however, the legislature intended to make the punishment of "serious criminal offenses" a matter of state control, thus state statute conflicts with and preempts ordinance; I.

***Pasco v. Ross***, 39 Wn.App. 480 (1985)

A municipal ordinance which permits what a state statute forbids or prohibits what a statute permits is in conflict with the state statute and is preempted; city ordinance prohibiting willful use of force or violence against another not in self-defense conflicts with state assault statute which prohibits unlawful force; III.

***State v. Rabon***, 45 Wn.App. 832 (1986)

Where a statute expressly prohibits an act but does not expressly permit a similar act, then a municipal ordinance prohibiting the similar act is not in conflict with the statute; SMC § 12A.14.080, prohibiting possession of chako sticks does not conflict with RCW 9.41.270 which only prohibits display of such weapons in certain circumstances; review of law of preemptpreemption; I.

***Seattle v. Shin***, 50 Wn.App. 218 (1988)

Contributing to dependency of minor, SMC § 12A.18.020, is not preempted by state law; I.

***Seattle v. Taylor***, 50 Wn.App. 384 (1988)

Simple assault ordinance, SMC § 12A.06.015(A), is not preempted and does not conflict with state law; I.

***Brown v. Yakima***, 116 Wn.2d 556 (1991)

PreemptPreemption occurs when legislature states its intention either expressly or by necessary implication to preempt the field; if legislature is silent as to intent, court may look to purposes of statute and to facts and circumstances upon which statute was intended to operate; absent legislative intent, ordinance may violate CONST. Art. 11, § 11 if it directly and irreconcilably conflicts with the statute; ordinance does not conflict with statute merely because ordinance prohibits a wider scope of activity; 9-0.

***Seattle v. Wandler***, 60 Wn.App. 309 (1991)

Seattle hit and run ordinance, SMC § 11.56.420, does not unconstitutionally conflict with state statute, RCW 46.52.020, as variances are insignificant; RCW 46.08.020, 030 do not require local ordinances be identical to state traffic laws, *Bellingham v. Schampera*, 57 Wn.2d 106, 110 (1960); I.

***Tacoma v. Luvene***, 118 Wn.2d 826 (1992)

Tacoma drug loitering ordinance, TMC § 8.72.010, is not preempted by Uniform Controlled Substances Act, *State v. Fisher*, 132 Wn.App. 26, 30-32 (2006); absent evidence of falsehood or dissimulation, an emergency clause is valid, *State ex rel. Hamilton v. Martin*, 173 Wash. 249 (1933); 8-0.

***Seattle v. Lewis***, 70 Wn.App. 715 (1993)

Obstructing a public officer ordinance, SMC § 12A.16.010, does not conflict with state obstructing statute, RCW 9A.76.020, since both prohibit the same behavior regardless of whether judge or jury determine lawfulness of police conduct; I.

***Seattle v. Ballsmider***, 71 Wn.App. 159 (1993)

Ordinance prohibiting discharging a firearm, SMC § 12A.28.050, may set maximum penalty of one year in jail, RCW 9.41.290, 9.41.300(2)(a); I.

***Seattle v. Williams***, 128 Wn.2d 341 (1995)

City ordinance prohibiting driving with a breath alcohol level of 0.08 grams/210 liters of breath is in contravention of RCW 46.08.020, .030 which requires traffic laws to be "uniform throughout this state"; 6-3.

***State v. Greene***, 97 Wn.App. 473 (1999)

Seattle pedestrian interference ordinance, SMC § 12A.12.015, prohibiting intentional obstructing vehicular traffic, does not conflict with state jaywalking statute; I.

***Spokane v. White***, 102 Wn.App. 955 (2000)

Assault ordinance which reads "no person may willfully use or threaten to use…unlawful physical force" is not preempted, as willful equates with knowingly, thus ordinance does not conflict with state assault statute; III.

***State v. Fisher***, 132 Wn.App. 26, 30-32 (2006)

Snohomish County drug paraphernalia ordinance, SCC 10.48.020, is not preempted by Uniform Controlled Substances Act, which contemplates local ordinances consistent with the act, *Tacoma v. Luvene*, 118 Wn.2d 826, 834 (1992), RCW 69.50.608; I.

***State v. Kirwin***, 165 Wn.2d 818 (2009)

An ordinance which is virtually identical to a state statute but which imposes a harsher penalty (here, a misdemeanor vs. an infraction), does not unconstitutionally conflict, CONST., Art. XI, § 11; affirms *State v. Kirwin*, 137 Wn.App. 387 (2007); 8-1.

***Seattle v. Wilson***, 151 Wn.App. 624 (2009)

City ordinance criminalizing negligently causing death or substantial bodily harm by operating a motor vehicle negligently is void as it conflicts with RCW 46.63.020 decriminalizing most traffic offenses; I.

***State v. Finch***, 181 Wn.App. 387 (2014), *State v. A.W.*, 181 Wn.App. 400 (2014)

Trial court grants defense motion to order a juvenile who is on probation for a sex offense to take a polygraph, state seeks interlocutory relief; held: court lacks authority to order a polygraph in the context of the pending criminal case, ordering juvenile to take polygraph where it was not designed to ensure compliance with treatment, *State v. Murbach*, 68 Wn.App. 509 (1993), exceeded scope of juvenile's SSODA probation conditions; II.

# PRESENCE OF DEFENDANT

***State v. Jury***, 19 Wn.App. 256 (1978)

Presence of defendant during supplemental instructions not required, *cf.: State v. Irby,* 170 Wn.2d 874 (2011); II.

***State v. DeWeese***, 117 Wn.2d 369 (1991)

Removal of defendant from courtroom for disruptive behavior is within discretion of trial court, *Illinois v. Allen*, 25 L.Ed.2d 353 (1970), *State v. Davis*, 195 Wn.2d 571 (2020), CrR 3.4(b), least severe remedy to maintain order is preferable, *Burgess v. Towne*, 13 Wn.App. 954, 960 (1975); 9-0.

***State v. Ahern***, 64 Wn.App. 731 (1992)

Defendant does not have constitutional right to be present at all meetings between court and counsel, "unless his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge," *State v. Rice*, 110 Wn.2d 577, 616 (1988), *Pers. Restraint of Pirtle*, 136 Wn.2d 467, 483-84 (1998), *Pers. Restraint of Woods*, 154 Wn.2d 400, 432-33 (2005), *State v. Wilson*, 141 Wn.App. 597, 604-04 (2007), *State v. Sublett*, 176 Wn.2d 58, 68-70 (2012); III.

***State v. Hammond***, 121 Wn.2d 585 (1993)

Trial may not commence in defendant's absence, CrR 3.4, *Crosby v. United States*, 122 L.Ed.2d 25 (1993), *cf.: State v. Brown*, 178 Wn.App. 70, 75-78 (2013); *affirms State v. Hammond*, 65 Wn.App. 585 (1992), *accord: State v. Jackson*, 124 Wn.2d 359 (1994); 8-0.

***State v. Crafton***, 72 Wn.App. 98 (1993)

Where defendant is present when jury is sworn at the beginning of voir dire, and later absents herself, then trial may continue, CrR. 3.4, *State v. Thomson*, 123 Wn.2d 877 (1994), *State v. Hammond*, 65 Wn.App. 585 (1992), *aff'd*, 121 Wn.2d 787 (1993); Division II establishes a bright line rule when trial may commence in defendant's absence, *see: , State v. Brown*, 178 Wn.App. 70, 75-78 (2013).

***Pers. Restraint of Lord***, 123 Wn.2d 296, 305-07 (1994)

Defendant's right to be present extends only to times when evidence is presented and "whenever his presence has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge," *United States v. Gagnon*, 84 L.Ed.2d 486 (1985), *Snyder v. Massachusetts*, 78 L.Ed. 674, 90 A.L.R. 575 (1934); defendant does not have the right to be present during in-chambers or bench conferences on legal matters which do not require a resolution of disputed facts, *State v. Bremer*, 98 Wn.App. 832 (2000), *Pers. Restraint of Pirtle*, 136 Wn.2d 467, 483-84 (1998), *Pers. Restraint of Woods*, 154 Wn.2d 400, 432-33 (2005), *State v. Wilson*, 141 Wn.App. 597, 604-04 (2007), *State v. Sublett*, 176 Wn.2d 58 (2012), *State v. Wilson*, 174 Wn.App. 328, 333-47 (2013), *State v. Miller*, 179 Wn.App. 91,102-03 (2014); 8-1.

***State v. Thomson***, 123 Wn.2d 877 (1994)

Where defendant has failed to appear after trial has commenced, trial court may determine, from totality of circumstances, whether waiver of presence was voluntary, CrR 3.4(b); "complex of issues" approach, weighing public interest vs. voluntary absence, is expressly rejected, *see:* *State v. Hammond*, 65 Wn.App. 585 (1992), *aff'd,* 121 Wn.2d 787 (1993), *Crosby v. United States*, 122 L.Ed.2d 25 (1993), *State v. Garza*, 150 Wn.2d 360 (2003), *State v. Cobarruvias*, 179 Wn.App. 523 (2014); state constitutional issues not addressed, at 884; here, upon apprehension defendant made no attempt to explain reason for absence, thus trial court did not abuse discretion in denying motion for new trial, *see: State v. Thurlby*, 184 Wn.App. 918 (2014), 184 Wn.2d 618 (2015); 9-0.

***State v. Corbin***, 79 Wn.App. 446 (1995)

Defendant has no right to be present at presentation of findings and conclusions that formalize court's decision that was announced in defendant's presence, *cf.:* *State v. Pruitt*, 145 Wn.App. 784, 797-801 (2008); I.

***State v. Krause***, 82 Wn.App. 688, 698 (1996)

Defendant does not have right to be present for consideration of a motion to extend speedy trial expiration date, *Pers. Restraint of Benn*, 134 Wn.2d 868, 920-1 (1998); I.

***State v. Berrysmith***, 87 Wn.App. 268 (1997)

Trial court holds *in camera* hearing with defense counsel, following which court allows counsel to withdraw because counsel believed that defendant would commit perjury at trial; held: because the question for the court is whether the lawyer reasonably believes defendant will commit perjury and not whether client in fact intends to commit perjury, defendant's presence is not required at such a hearing, *see:* *State v. Rooks*, 130 Wn.App. 787, 795-801 (2005); I.

***State v. Atherton***, 106 Wn.App. 783 (2001)

Defendant fails to appear on last day of trial, court finds voluntary absence and concludes trial, during closing argument court learns defendant is incarcerated on unrelated matter, after conviction defendant claims he asked the jail to call the court, trial court denies new trial; held: while incarcerated defendant has a duty to make reasonable efforts to inform court of his situation, *State v. Garza*, 150 Wn.2d 360 (2003), here there is unrefuted evidence that defendant tried to call but failed, thus trial court should have retracted its proper preliminary finding of voluntary waiver and grant mistrial, *see: State v. Thurlby*, 184 Wn.App. 918 (2014), 184 Wn.2d 618 (2015); I.

***State v. Francisco***, 107 Wn.App. 247, 255-56 (2001)

Defendant does not have right to be present at a jury view, *State v. Perkins*, 32 Wn.2d 810, 861 (1949), as a jury view is not part of the trial and has no evidentiary value, *State v. Much*, 156 Wash. 403, 413-14 (1930); I.

***State v. Chapple***, 145 Wn.2d 310 (2001)

Disruptive defendant may be excluded from courtroom at trial and sentencing where trial court warns that continued behavior would lead to removal, disruption warrants removal, trial court considers

alternatives to complete removal; court may rely upon counsel to convey to defendant that he can reclaim his right to be present upon assurances of proper behavior and that he may waive his right to testify by refusing to properly conduct himself during trial, *Illinois v. Allen*, 25 L.Ed.2d 353 (1970), *State v. Hemenway*, 122 Wn.App. 787, 797 (2004); affirms *State v. Chapple*, 103 Wn.App. 299 (2000), *State v. Thompson*, 190 Wn.App. 838 (2015), *State v. Davis*, 195 Wn.2d 571 (2020); 9-0.

***State v. Garza***, 150 Wn.2d 360 (2003)

Defendant fails to appear during trial, calls to say he was on his way, court waits five minutes then makes preliminary determination of voluntary absence and proceeds to trial, after verdict court learns defendant was incarcerated, defendant claims he asked arresting officer to advise court he "can't make it in;" held: trial court's preliminary determination of voluntary absence was an abuse of discretion as defendant's telephone call and subsequent failure to appear established that "the judge could reasonably have presumed that something outside [defendant's] control was delaying him," at 369; incarceration does not establish a *per se* involuntary absence; where an incarcerated defendant establishes that s/he "genuinely tried but failed to contact the court," and defendant's efforts were reasonable, court must retract its preliminary finding of voluntary waiver and grant a mistrial *(dicta)*, *State v. Atherton*, 106 Wn.App. 783 (2001), *State v. Cobarruvias*, 179 Wn.App. 523 (2014), *State v. Thurlby*, 184 Wn.App. 918 (2014), 184 Wn.2d 618 (2015); where preliminary determination of voluntary absence was in error, subsequent determination of failure to make reasonable efforts to contact the court does not cure error; reverses *State v. Garza*, 112 Wn.App. 312 (2002); 9-0.

***State v. Rooks***, 130 Wn.App. 787, 795-801 (2005)

*Ex parte* chambers conference for defense counsel to seek withdrawal due to conflict of interest is not a critical stage requiring defendant's presence, *see: State v. Berrysmith*, 87 Wn.App. 268 (1997); I.

***State v. Wilson***, 141 Wn.App. 597, 603-06 (2007)

Chambers conference with counsel and a juror to inquire about her impartiality does not require defendant's presence, *United States v. Gagnon*, 84 L.Ed.2d 486 (1985), *State v. Bremer*, 98 Wn.App. 832, 834-35 (2000), *State v. Berrysmith*, 87 Wn.App. 268, 273 (1997), *Pers. Restraint of Lord*, 123 Wn.2d 296, 306 (1994), *but see: State v. Irby*, 170 Wn.2d 874 (2011), *State v. Sublett*, 176 Wn.2d 58 (2012), *State v. Slert*, 181 Wn.2d 598 (2014), 189 Wn.App. 821 (2015); III.

***State v. Pruitt***, 145 Wn.App. 784 (2008)

Drug court defendant waives jury, confrontation, right to call witnesses, right to challenge admissibility of evidence, following termination trial court, in defendant's absence, conducts bench trial; held: finding defendant guilty is not a mere formalization of a decision, distinguishing *State v. Corbin*, 79 Wn.App. 446 (1995), procedure in absence of defendant is "simply unfair," at 800 ¶ 47; I.

***State v. Anene***, 149 Wn.App. 944 (2009)

During trial recess, defendant attempts suicide, is comatose, trial court resumes trial claiming defendant voluntarily absented himself; held: trial court was not obliged to order

competency evaluation since comatose person is clearly incompetent, but continuing with trial of an incompetent person was a due process violation, *Drope v. Missouri*, 43 L.Ed.2d 103 (1975); II.

***State v. Rodriguez Ramos***, 171 Wn.2d 46 (2011)

Where appellate court remands for sentencing court to state the specific term of community placement, remand hearing is ministerial since length of community placement is dictated by statute and defendant need not be present, but where sentencing court is directed to specify the "special terms" of community placement, then court is to exercise discretion and defendant has right to be present and to be heard; 9-0.

***State v. Jasper***, 158 Wn.App. 518, 538-43 (2010)

Trial court answers jury inquiry with instruction to reread instructions without notifying parties and in defendant's absence; held: because the questions did not raise issues involving disputed facts, court's response did not involve a critical stage, and thus defendant's Sixth Amendment right was not violated, *Pers. Restraint of Lord*, 123 Wn.2d 296, 306 (1994), *State v. McCarthy*, 178 Wn.App. 90, 96-102 (2013), *cf.: State v. Koss*, 158 Wn.App. 8, 16-19 (2010), 181 Wn.2d 493 (2014), but CrR 6.15(f)(1) requires defendant's presence during any communication between the court and the jury, *State v. Langdon*, 42 Wn.App. 715, 717 (1986); where the trial court's response is '"negative in nature and conveys no affirmative information,'" *State v. Russell*, 25 Wn.App. 933, 948 (1980), *State v. Safford*, 24 Wn.App. 783, 794 (1979), *State v. Johnson*, 56 Wn.2d 700 (1960), *State v. Burdette*, 178 Wn.App. 183, 198-202 (2013), then error is harmless, *State v. Miller*, 184 Wn.App. 637, 646-48 (2014); I.

***State v. Irby***, 170 Wn.2d 874 (2011)

Trial court communicates with counsel by e-mail regarding hardship excuses of jurors, defense agrees, by e-mail, to excuse jurors without questioning them, no evidence established that counsel consulted with defendant, trial court excuses jurors; held: jury selection is a critical stage, *Gomez v. United States*, 490 U.S. 858, 873, 104 L.Ed.2d 923 (1989), questioning jurors whom the court excused might have revealed that one or more were not prevented by reasons of hardship from participating, defendant had a right to consult with counsel regarding jury selection, *cf.: State v. Slert*, 181 Wn.2d 598 (2014), *State v. Miller*, 184 Wn.App. 637 (2014), *State v. Jones*, 185 Wn.2d 412, 426-27 (2016), *but see: State v. Wilson*, 174 Wn.App. 328, 347-50 (2013), *State v. Slert*, 186 Wn.2d 869 (2016), error was not harmless; 5-4.

***State v. Hyder***, 159 Wn.App. 234, 253-55 (2011)

Potential juror 25 arrives late and is sworn for voir dire in absence of defendant, no objection is taken, juror is seated, at end of testimony an alternate is excused; held: failure to swear a juror is trial error to which defense must object, defense could have requested that alternate juror replace juror 25, thus even if all peremptories were used defense waived issue, *State v. Tharp*, 42 Wn.2d 494, 499-51 (1953), *see: State v. Lloyd*, 138 Wash. 8 (1926); II.

***Det. of Morgan***, 161 Wn.App. 66 (2011), 180 Wn.2d 312 (2014)

Two years before SVP trial, court holds chambers conference, on the record, in absence of defendant to discuss the process of deciding a forced medication hearing; held: respondent

does not have the right to be present at a chambers meeting in which only legal matters are discussed; II.

***State v. Applegate***, 163 Wn.App. 460 (2011), 181 Wn.2d 452 (2014)

Trial court proposes to conduct individual voir dire in chambers, defense counsel states he has no objection, court asks if his client agrees, counsel says he's speaking for himself as counsel, counsel then speaks with defendant and states defendant has no objection, on appeal argues that court is still obliged to engage in *Boneclub* analysis on the record; held: defendant's statement, through counsel, that he personally had no objection to the closure after discussion with counsel constitutes a knowing, voluntary and intelligent waiver of defendant's right to public proceeding; I.

***State v. Bennett***, 168 Wn.App. 197, 201-07 (2012)

At close of evidence, judge and counsel meet in chambers to finalize instructions, after which court states on record that parties went over instructions, defense takes no objections to instructions; held: defendant's right to be present exists where s/he may actively contribute to his or her defense, *State v. Irby,* 170 Wn.2d 874, 883 (2011), *Snyder v. Massachusetts,* 291 U.S. 97, 105-07, 78 L.Ed. 674 (1934), *overruled on other grounds, Malloy v. Hogan,* 378 U.S. 1, 12 L.Ed.2d 653 (1964), right to a public trial exists so that public's mere presence passively contributes to the fairness of the proceedings; while a defendant's right to be present may not be necessary for ministerial or administrative matters, *State v. Irby, supra. at* 881, public's presence may insure the fairness of such proceedings, *but see: Det. Of Ticeson,* 159 Wn.App. 374, 383-86 (2011); some chambers conferences may be ministerial, others may involve disputed issues including asking the court to rule on instructions; here, sparse record indicates that the chambers conference was merely ministerial that did not give rise to defendant's or public's right to open proceedings, *see: State v. Wilson,* 174 Wn.App. 328, 347-50 (2013); II.

***State v. Wilson***, 174 Wn.App. 328, 333-47 (2013)

Before being brought to court, jurors fill out questionnaire which, apparently, includes hardship queries, two jurors report illnesses and injuries, bailiff, pursuant to trial court's written policy allowing administrative staff to excuse jurors pretrial for illness, excuses them, trial court offers to bring them into court for voir dire, defense "did not pursue this offer;" held: applying the *State v. Sublett,* 176 Wn.2d 58, 70-78 (2012) "experience and logic test," the public trial right historically has not attached to statutory hardship excuses, RCW 2.36.100(1), public access does not play a significant positive role in hardship excuses, openness during pre-voir-dire juror excusal proceedings would not enhance the basic fairness and the appearance of fairness essential to public confidence in the system; II.

***State v. Frawley***, 181 Wn.2d 452 (2014)

Consolidated cases: defendant Frawley waives right to be present for individual voir dire in chambers and waives right to have public present during general voir dire in courtroom, no *Boneclub* analysis; in *State v. Applegate,* court asks courtroom if any party or member of the public objects to some juror questioning in chambers, no one objects, counsel asserts that defendant himself does not object, judge announces that public can come to chambers and leaves outer door open, questions one juror in chambers, no *Boneclub* analysis; in lead opinion, two

justices rule that defendant can waive both right to be present and public trial right if it's in writing and court engages in *Boneclub* analysis, thus trial court is reversed in both cases; two justices concur, writing that defendant can waive without *Boneclub* analysis if waiver is knowing, voluntary and intelligent and, apparently, need not be written; three justices would hold that defendant can waive without *Boneclub* analysis; one justice dissents and would hold that failure to object to closure is a waiver; affirms *State v. Frawley,* 140 Wn.App. 713 (2007) and *State v. Applegate,* 163 Wn.App. 460 (2011), *but see: State v. Hernandez,* 6 Wn.App.2d 422 (2018).

***State v. Brown***, 178 Wn.App. 70, 75-78 (2013)

Defendant is present when jurors are sworn to answer questions, case is then continued to a date certain and venire is stricken, three weeks later defendant fails to appear for trial, court swears and seats a new venire which convicts defendant *in absentia,* nine years later defendant is apprehended and sentenced; held: trial may be held without defendant's presence as long as defendant was present when the jury panel is sworn for voir dire, *State v. Crafton,* 72 Wn.App. 98, 103 (1993) so that defendant "is given an unambiguous and readily discernible sign that trial is beginning," which need not refer to the same panel; defendant witnesses the swearing of the first venire and received notice that a new panel would be called on a date certain, thus trial had commenced, CrR 3.4; 2-1, II.

***State v. McCarthy***, 178 Wn.App. 90, 96-102 (2013)

During deliberations, jury asks for masking tape and a tape measure, trial court provides them without consulting counsel; held: responding to a jury request for non-evidentiary materials is not a critical stage of a trial at which defendant must be present, *State v. Jasper*, 158 Wn.App. 518, 538-39, *aff'd,* 174 Wn.2d 96, 121-24 (2012), *see: State v. Fehr,* 185 Wn.App. 505, 512-13 (2015), *but see: State v. Caliguri,* 99 Wn.2d 501, 508-09 (1983); II.

***State v. Burdette***, 178 Wn.App. 183, 198-202 (2013)

Jury reports it is deadlocked, judge sends note telling them to continue deliberations, apparently in the absence of defendant and counsel; held: while defendant had the right to be present to consider whether or not to move for a mistrial, the jury note did not say it was hopelessly deadlocked, thus error was harmless; II.

***State v. Cobarruvias***, 179 Wn.App. 523 (2014)

Chronically late defendant fails to appear for morning session, court waits 28 minutes and concludes defendant was voluntarily absent and trial proceeds, later man in audience says defendant took his son to the hospital, after conviction defendant is arrested on warrant, documents that he was at hospital, moves for a new trial, court concludes he made no effort to contact counsel or court, confirms absence was voluntary; held: court must apply a presumption against waiver of presence, *State v. Garza*, 150 Wn.2d 360, 367-68 (2003), to each of three factors: (1) sufficient inquiry to justify finding voluntary absence, (2) preliminary finding of voluntariness, (3) afford defendant adequate opportunity to explain before sentencing, *State v. Thomson,* 123 Wn.2d 877, 881 (1994), *State v. Washington,* 34 Wn.App. 410, 414 (1984), *but see: State v. Thurlby,* 184 Wn.App. 918 (2014), 184 Wn.2d 618 (2015); here, trial court had sufficient basis for initial finding of voluntary absence as it was unexplained, but because trial

court erred in not expressly considering defendant's showing "in light of the 'overarching' presumption against waiver," court abused discretion in denying new trial; III.

***State v. Miller***, 184 Wn.App. 637, 646-48 (2014)

Judge discovers that a juror had inadvertently sat through the preceding legal argument and, before voir dire, excuses the juror during recess in absence of defendant; held: no chance court would have allowed juror to remain on this jury, both counsel agreed, even if defendant had right to be present it was harmless beyond a reasonable doubt, *State v. Irby*, 170 Wn.2d 874, 885 (2011); II.

***State v. Thurlby***, 184 Wn.2d 618 (2015)

Defendant fails to appear on second day of trial, court issues warrant, officers search, court checks with hospitals and jails, after waiting a half day court makes preliminary finding that defendant was voluntarily absent and proceeds, after conviction defendant is arrested, at sentencing she explains that her mother had surgery, she tried to call the clerk, judge finds voluntary waiver of right to be present; held: court properly inquired into circumstances of defendant's nonappearance and made preliminary finding of voluntariness, provided defendant opportunity to explain, indulged "every reasonable presumption against waiver" when performing each step, determined that reason for failure to appear was a "product of choice" and thus voluntary, trial court need not expressly state that it is considering the presumption against waiver, *State v. Garza*, 150 Wn.2d 360 (2003), *State v. Thomson*, 123 Wn.2d 877, 881 (1994), *but see: State v. Cobarruvias*, 179 Wn.App. 523 (2014); affirms *State v. Thurlby*, 184 Wn.App. 918 (2014); 9-0.

***State v. Love***, 183 Wn.2d 598 (2015)

Exercise of for cause challenges orally on the record at the bench and peremptory challenges silently by exchanging a list and striking names in open court with defendant at counsel table does not violate defendant's right to be present, *State v. Anderson*, 194 Wn.App. 547 (2016), *State v. Effinger*, 194 Wn.App. 554, 564-65 (2016), *see also: State v. Marks*, 185 Wn.2d 143 (2016); affirms *State v. Love*, 176 Wn.App. 911 (2013); 9-0.

***State v. Fehr***, 185 Wn.App. 505, 512-13 (2015)

Jury asks to rehear audio that had been admitted and heard during trial, counsel but not defendant are present when court agrees, without objection, to allow jury to rehear it; held: where audio evidence was admitted at trial and played to the jury with defendant present a subsequent proceeding to determine whether to replay it during deliberations is not a time where defendant's substantial rights may be affected so right to be present is not violated; II.

***State v. Fort***, 190 Wn.App. 202, 225-26 (2015)

Waiver of right to be present during chambers voir dire is not a waiver of public trial right, *State v. Frawley*, 181 Wn.2d 452 (2014), *Pers. Restraint of Morris*, 176 Wn.2d 157 (2012); III.

***State v. Thompson***, 190 Wn.App. 838 (2015)

Where defendant is removed from courtroom due to disruptive behavior and has been informed

he may return if he agrees that conduct will improve, *State v. Chapple*, 145 Wn.2d 310 (2001), trial court need not inform him at the beginning of each trial day that he may return upon a promise of appropriate behavior, *see: State v. Davis,* 195 Wn.2d 571 (2020); II.

***State v. Jones,*** 185 Wn.2d 412 (2016)

Selection of alternates off the record does not violate defendant's right to be present where defense does not object, *State v. Slert,* 186 Wn.2d 869 (2016), distinguishing *State v. Irby,* 170 Wn.2d 874 (2011); *reverses, on other grounds, State v. Jones,* 187 Wn.App. 87 (2013); 9-0.

***State v. Slert***, 186 Wn.2d 869 (2016)

During voir dire of defendant's third trial counsel and court go over jury questionnaire regarding pretrial publicity and excuse some jurors in chambers without defendant's presence, defendant raises issue for first time on appeal; held: defendant waived error by not objecting in the trial court, distinguishing *State v. Irby,* 170 Wn.2d 874 (2011); since the excused jurors would have been disqualified anyway error, if any, was harmless beyond a reasonable doubt; reverses *State v. Slert,* 189 Wn.App. 821 (2015); 5-4.

***State v. Effinger***, 194 Wn.App. 554 (2016)

Sidebar peremptory and for cause challenges not on the record do not violate defendant's right to be present, *State v. Love,* 183 Wn.2d 598 (2016), *State v. Anderson,* 194 Wn.App. 547 (2016); 2-1, II.

***State v. Schierman***, 192 Wn.2d 577 (2018)

For cause challenges in chambers without defendant is constitutional error, harmless here as defendant was present during questioning of the jurors, did not object to chambers conference, although one juror challenged by defense actually sat on the jury defense does not show prejudice, at ¶¶ 38-41, *State v. Slert,* 181 Wn.2d 598 (2014), distinguishing, *State v. Irby,* 170 Wn.2d 874 (2011).

***State v. Hernandez,*** 6 Wn.App.2d 422 (2018)

Defense counsel sends sealed *ex parte* motion to withdraw which is granted by trial court *in camera,* defense does not include letter in clerk's papers on appeal; held: "gap in the record" is a litigation strategy, and thus there is an inadequate record to establish error; *dicta:* not all motions to withdraw require the client's consultation and opportunity to object, defendant's presence is not requied when trial counsel is obliged to withdraw under rules of professional conduct, *State v. Rooks,* 130 Wn.App. 787, 799-800 (2005); III.

***State v. Davis***, 195 Wn.2d 571 (2020)

At trial, after court denies *pro se* defendant's motions for continuance and standby counsel, defendant becomes extremely disruptive, demands to leave, after court cautions defendant and informs him that if he leaves he will not be able to cross-examine state's witnesses defendant continues to disrupt and leaves courtroom, trial proceeds, on appeal defendant claims right to be present was violated and he was denied right to counsel to cross-examine witnesses; held: " trial judges who are confronted with disruptive, 'contumacious, stubbornly defiant defendants must be given sufficient discretion to meet the circumstances of each case. *No one formula* for maintaining the appropriate courtroom

atmosphere will be best in all situations,'" *Illinois v. Allen*, 397 U.S. 337, 343, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970), *State v. Chapple*, 145 Wn.2d 310, 318 (2001); while court would have been justified in removing defendant due to his disruptive behavior, here defendant's repeated demands to absent himself amounts to a waiver of the right to be present, *see: State v. DeWeese*, 117 Wn.2d 369, 381 (1991); reverses *State v. Davis*, 6 Wn.App. 43 (2018); 6-3.

***State v. Wright***, 18 Wn.App.2d 725 (2021)

During deliberations jury inquired "if we are unable to reach a verdict on a count, what happens," court meets with counsel, absent defendant, who agree to tell the jury to read two instructions; held: because the jury question did not amount to a declaration of deadlock, the parties did not discuss how long the court will allow deliberations before declaring a mistrial, *State v. Burdette*, 178 Wn.App. 183, 198-202 (2013), defendant's presence "had no relation. reasonably substantial, to his opportunity to defend," thus court did not violate right to be present, *Pers. Restraint of Lord*, 123 Wn.2d 296, 305-07 (1994); 2-1, I.

***State v. Anderson***, ___ Wn.App.2d ___, 497 P.3d 880 (2021)

Defendant appears by video at sentencing, does not object, raises constitutional right to be present for the first time on appeal; held: failure to object waives right to be physically present, *State v. Jones*, 185 Wn.2d 412 (2016); III.

# PRESUMPTIONS/INFERENCES*

***State v. Burt***, 24 Wn.App. 867 (1979)

Instruction that speeding equals **reckless driving** is approved as long as it is permissive because presumed fact follows proven fact beyond a reasonable doubt in this case, *State v. Hanna*, 123 Wn.2d 704, 709-13 (1994); *but see: State v. Holcomb*, 31 Wn.App. 398 (1982), *Schwendeman v. Wallenstein*, 971 F.2d 313 (9th Cir. 1992), *see: State v. Brunson*, 128 Wn.2d 98 (1995), *: State v. Rich*, 184 Wn.2d 897 (2016).

***In re Gilbert***, 27 Wn.App. 286 (1980)

Statutory presumption in RCW 9.41.030 that being **armed** without a concealed weapons permit is *prima facie* evidence of intent to commit crime of violence is unconstitutional, *State v. Rogers*, 83 Wn.2d 553 (1974), retroactively.

***State v. Simmons***, 28 Wn.App. 243 (1980)

**Malice** instruction, as defined in statute, may be constitutional presumption; distinguishes *State v. Johnson*, 23 Wn.App. 506 (1979).

***State v. Savage***, 94 Wn.2d 569 (1980)

Whenever a presumption is employed in a criminal case, jury must be instructed (1) defendant has no more than a burden of producing "some evidence" to rebut, (2) ultimate burden of proving every element is on state, thus jury is free to reject the presumption of intent to kill from proof of assault with a weapon if jury is properly instructed as to the workings of a presumption, *but see: State v. Washington*, 66 Wn.App. 228 (1992).

***Bellevue v. Kinsman***, 34 Wn.App. 786 (1983)

**Malice** instruction with inference is improper, *State v. Johnson*, 23 Wn.App. 605 (1979); I.

***Seattle v. Smiley***, 41 Wn.App. 189 (1985)

Jury is instructed, pursuant to Seattle prostitution loitering ordinance, SMC § 12A.10.010, that it may consider whether the actor repeatedly beckoned to passersby, stopped motor vehicles, etc.; held: not a comment on the evidence, and is a permissive presumption which does not unconstitutionally shift burden to city, *County Court of Ulster Cy. v. Allen*, 60 L.Ed.2d 777 (1979); I.

***Seattle v. Gellein***, 112 Wn.2d 58 (1989)

DUI jury instruction that city must prove that defendant "had 0.10 percent . . . alcohol in his blood as shown by chemical analysis of his breath" creates an unconstitutional mandatory presumption, *reversing Seattle v. Gellein*, 48 Wn.App. 341 (1987); 7-2.

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* *See:* **BURGLARY** for "inference of intent" cases

***Carella v. California***, 105 L.Ed.2d 865 (1989)

Jury instructions that intent to commit theft is presumed if one who has leased property fails to return it within 20 days violate due process, *In re Winship*, 25 L.Ed.2d 368 (1970), *Sandstrom v. Montana*, 61 L.Ed.2d 39 (1979), *see: State v. Fleming*, 155 Wn.App. 489, 503-05 (2010); 9-0.

***Seattle v. Slack***, 113 Wn.2d 850 (1989)

Circumstances set forth in Seattle **prostitution loitering** ordinance, SMC § 12A.10.010(B), which trier of fact may consider (beckoning, waving, circling area in motor vehicle, is known prostitute) do not create mandatory presumption, as nothing required defendant to explain conduct, *State v. VJW*, 37 Wn.App. 428 (1984); 9-0.

***State v. Washington***, 64 Wn.App. 118 (1992)

In **reckless endangerment** 1°/drive-by shooting case, RCW 9A.36.045, inference of reckless conduct from unlawful discharge of a firearm from moving vehicle is rationally related to unlawful discharge of a firearm, *distinguishing State v. Jackson*, 112 Wn.2d 867 (1989); I.

***State v. Washington***, 66 Wn.App. 228 (1992)

Inference instruction which states (1) that inference may be rebutted by evidence satisfactory to the trier of fact and (2) that with or without such evidence, the jury is free to disregard the inference, is proper, *State v. Handran*, 113 Wn.2d 11, 19 (1989), *distinguishing State v. Savage*, 94 Wn.2d 569 (1980); I.

***State v. Hanna***, 123 Wn.2d 704, 709-13 (1994)

Inference that speeding equals **reckless driving** does not violate due process where state's evidence established speed of 80-100 m.p.h., tailgating, racing, *State v. Farr-Lenzini*, 93 Wn.App. 453, 468-70 (1999), *but see: Schwendeman v. Wallenstein*, 971 F.2d 313 (9th Cir. 1992), *Hanna v. Riveland*, 87 F.3d 1034 (9th Cir. 1996), *cf.: State v. Randhawa*, 133 Wn.2d 67 (1997), *see also: State v. Rich*, 184 Wn.2d 897 (2016); where an inference is not the sole and sufficient basis for finding of guilt, test is whether presumed fact flows from proven fact by a preponderance, whether inference meets this standard must be determined on a case-by-case basis, *see: County Court of Ulster Cy. v. Allen*, 60 L.Ed.2d 777 (1979) *State v. Reid*, 74 Wn.App. 281, 284-9 (1994), *State v. Brunson*, 128 Wn.2d 98 (1995); 6-3.

***State v. Kenyon***, 123 Wn.2d 720 (1994)

Inference that speeding equals **reckless driving** does not violate due process where state's evidence established speed of 43-60 m.p.h. in a 30 m.p.h. zone on wet road with a flat tire and two over-inflated tires plus loss of control, swaying, *State v. Hanna*, 123 Wn.2d 704, 709-13 (1994), *State v. Farr-Lenzini*, 93 Wn.App. 453, 468-70 (1999), *cf.: State v. Randhawa*, 133 Wn.2d 67 (1997), *see also: State v. Rich*, 184 Wn.2d 897 (2016); 6-3.

***State v. Reid***, 74 Wn.App. 281, 284-9 (1994)

Complainant gives defendant money to pay expenses, defendant pays some back, is charged with theft after four years; at trial, court instructs, "fraudulent intent may be inferred

from the retention for a long period of time of property to which one has no right"; held: because the instruction allowed the jury to infer, as the sole source of evidence, that defendant had a fraudulent intent, state was relieved of its burden of proving an element, thus inference, under these facts, was improper, *distinguishing* State v. Bryant, 73 Wn.2d 168 (1968), State v. Sullivan, 129 Wash. 42, 51 (1924); III.

***State v. Randhawa***, 133 Wn.2d 67 (1997)

Inference that speeding equals **reckless driving** is improper where evidence establishes that defendant traveling 10-20 mph over speed limit of 50 mph, distinguishing *State v. Hanna*, 123 Wn.2d 704, 709-13 (1994), *State v. Kenyon*, 123 Wn.2d 720 (1994); "it will . . . be the rare case where speed alone will justify the giving of the permissive inference instruction," *but see: State v. Farr-Lenzini*, 93 Wn.App. 453, 468-70 (1999), *see: State v. Rich*, 184 Wn.2d 897 (2016); 9-0.

***State v. Bryant***, 89 Wn.App. 857, 871-3 (1998)

**Knowledge** instruction with permissive inference, WPIC 10.02, may be given, *State v. Leech*, 114 Wn.2d 700, 710 (1990), but trial court must determine that inferred fact (knowledge) flows from proven fact (in bail jumping case, notice) by a preponderance unless the only basis for finding an element is the inference, *State v. Brunson*, 128 Wn.2d 98, 108-9 (1995), determined on a case-by-case basis, *State v. Hanna*, 123 Wn.2d 704, 712 (1994), *State v. Garbaccio*, 151 Wn.App. 716, 739-42 (2009); I.

***State v. Bencivenga***, 137 Wn.2d 703 (1999)

Defendant is observed in dark clothing at 3:30 am in snowstorm prying open door of restaurant, tells police he sought to win a bet that he could remove a pin on the door, is convicted of attempted burglary; held: if finder of fact concludes there is an alternative reasonable explanation for defendant's actions, then evidence is insufficient, but here trial court discarded one possible inference when it concluded that the inference was unreasonable under the circumstances; nothing forbids a court from logically inferring intent from proven facts as long as it is satisfied the state has proved intent; trial court's finding that defendant's story was not believable and that defendant acted with intent was a rational inference based on the evidence, *State v. Chacky*, 177 Wash. 694, 696 (1934), *State v. Brunson*, 128 Wn.2d 98, 102 (1995), *State v. Bergeron*, 105 Wn.2d 1, 10-11 (1985), *see: State v. Cantu*, 156 Wn.2d 819 (2006); 9-0.

***State v. Farr-Lenzini***, 93 Wn.App. 453, 468-70 (1999)

Instruction that jury may infer recklessness from speeding was proper where evidence established that defendant traveled twice the speed limit, drove erratically, ran a four-way stop and cut across lanes to negotiate a corner, distinguishing *State v. Delmarter*, 68 Wn.App. 770 (1993), *State v. Randhawa*, 133 Wn.2d 67 (1997), *see: State v. Rich*, 184 Wn.2d 897 (2016); II.

***State v. Mertens***, 148 Wn.2d 820 (2003)

Commercial fishing statute, former RCW 77.15.500, prohibits taking shellfish while acting for commercial purposes without a license, "commercial purposes" is defined as exceeding bag limit by possession of more than three times the amount of fish allowed, former RCW 77.15.110, appellant claims this creates an impermissible presumption; held: because

statute merely equates conduct (possession of more than three times limit) with an element (commercial purposes), no presumption is created, rather the offense is a strict liability crime; the statute does not presume, it defines, *State v. Franco*, 96 Wn.2d 816, 823 (1982), *State v. Crediford*, 130 Wn.2d 747 (1996); reverses *State v. Mertens*, 109 Wn.App. 291 (2001); 6-3.

***State v. Cantu***, 156 Wn.2d 819 (2006)

Juvenile, who sometimes lives at mother's home but was not living there on day in question, is seen breaking mother's locked bedroom door, items are found to be missing from bedroom, no evidence produced that mother expressly forbade son from entering bedroom, trial court finds respondent "failed to rebut the statutory presumption that he broke into his mother's bedroom with the intent to commit some crime;" held: trial court treated the statutory inference of intent, RCW 9A.52.040, as mandatory, shifting burden to respondent, *State v. Deal*, 128 Wn.2d 693 (1996), thus reversed; reverses *State v. Cantu*, 123 Wn.App. 404 (2004); 8-1.

***State v. Sibert***, 168 Wn.2d 306, 315-17 (2010)

In drug delivery case, instruction that acting knowingly is also established by acting intentionally, WPIC 10.02, does not create a conclusive presumption, *State v. Gerdts*, 136 Wn.App. 720, 728 (2007), acknowledging that *State v. Goble*, 131 Wn.App. 194, 202-04 (2005) is limited to its particular facts, at 317 n. 7, *see: State v. Atkins*, 156 Wn.App. 799, 807-17 (2010); 5-4.

***State v. Atkins***, 156 Wn.App. 799, 807-17 (2010)

In assault 3° case where to convict instruction requires state to prove that defendant knew victim was a police officer, *but see: State v. Brown*, 140 Wn.2d 456, 470 (2000), and court defines assault as an intentional act, then the knowledge instruction that reads "acting knowingly…is established if a person acts intentionally" creates an impermissible mandatory presumption, *but see: State v. Sibert*, 168 Wn.2d 306 (2010); harmless here, *see: Yates v. Evatt*, 500 US 391, 403-06, 114 L.Ed.2d 432 (1991); I

# PRETRIAL RELEASE/BAIL/BOND

***Westerman v. Cary***, 125 Wn.2d 277 (1994)

Superior court general order directing that all domestic violence arrestees be detained without bail until a first appearance does not violate CONST. art. I, § 20; 8-0.

***State v. Paul***, 95 Wn.App. 775 (1999)

Defendant posts cash bail, appears at revocation hearing, court forfeits bail and applies it to restitution; held: an appearance discharges bail; when a defendant satisfies bail conditions by appearing, the bail may not be forfeited; "if the state wants bail to serve a dual purpose, it must express such purpose on the record," *State v. Ransom*, 34 Wn.App. 819, 824 (1983); III.

*Matter of Marriage of Bralley*, 70 Wn.App. 646 (1993)

Court issues civil contempt warrant for failure to appear at child support hearing, cash bail is posted by third party, respondent fails to appear again, trial court forfeits bail without notice to the poster; held: cash bail is conclusively presumed to be the property of the accused and thus may be forfeited without notice; I.

***Butler v. Kato***, 137 Wn.App. 515 (2007)

Trial court cannot require AA meetings and alcohol treatment as conditions of release in DUI case absent evidence that defendant would fail to appear, CrRLJ 3.2(b)(7), or commit a violent crime, CrRLJ 3.2(a)(2), -(e), *see also: State v. Rose*, 146 Wn.App. 439 (2008); I.

***State v. Rose***, 146 Wn.App. 439 (2008)

Trial court imposes urinalysis as condition of pretrial release; held: absent evidence that drug use is a good indicator that defendant would fail to appear, court may not require a UA as a condition of release, *see: Butler v. Kato*, 137 Wn.App. 515 (2007), *cf.: State v. Olsen*, 189 Wn.2d 118 (2017); II.

***State v. Barton***, 181 Wn.2d 148 (2014)

For purposes of pretrial release court may not set cash-only bail, must provide option of surety bond, CONST., art. 1, § 20; 9-0.

***State v. Huckins***, 5 Wn.App.2d 457 (2018)

In domestic violence case, trial court sets bond at $1000 finding that there is a prior domestic violence case and thus there is a danger defendant will commit a violent crime but has no reason to believe defendant won't appear; held: court properly exercised discretion by concluding that there was a substantial danger defendant would commit a violent crime if released but erred in not making a finding that less-restrictive conditions, other than monetary bail, would not protect the safety of the community, CrR 3.2(d); money bail may only be imposed if no less restrictive condition or combination of conditions would reasonably assure the safety of the community, CrR 3.2(d)(6), *see: State v. Smith*, 84 Wn.2d 498, 505 (1974), *State v. Ingram*, 9 Wn.App.2d 482 (2019); II.

***State v. Stevens County District Court Judge***, 194 Wn.2d 898 (2019)

Superior Court may conduct preliminary appearance hearings for misdemeanors filed in District Court regardless of District Court's objection, CrR 3.2.1(d)(1); 9-0.

***State v. Ingram***, 9 Wn.App.2d 482 (2019)

Court need not enter written findings regarding pretrial release but must make a record that it considered less restrictive alternatives and defendant's financial resources, CrR 3.2(b)(7), (d)(6), *State v. Huckins,* 5 Wn.App.2d 457 (2018); here, victim's statement that defendant had held a gun to her head, defendant's escape history, lack of employment and "mental health issues" support denial of personal recognizance and finding of dangerousness; II.

***State v. Jeglum***, 8 Wn.App.2d 960 (2019)

Court has discretion to forfeit cash bail upon a failure to appear even after entry of judgment and sentence; III.

***State v. Reisert***, 16 Wn.App.2d 321 (2021)

CrR 3.2.1 requiring a preliminary appearance within 48 hours after arrest only applies to an accused arrested without a warrant; I.

***Pers. Restraint of Sargent***, 20 Wn.App.2d 186 (2021)

Court may detain a defendant without bail if charged with any class A felony regardless of SRA sentence range as maximum penalty is life, CONST. art. I, § 20, RCW 10.21.040; facts of the alleged crime itself may be sufficient to establish by clear and convincing evidence a propensity for violence; II.

# PRIOR CONVICTIONS/ER609

***State v. Eaton***, 24 Wn.App. 143 (1979)

Convictions for a subsequent crime can be used to impeach if defendant is brought to trial in the order in which the offenses were committed; II.

***State v. Safford***, 24 Wn.App. 783 (1979)

Can't impeach witness with prior where it was deferred and dismissed, *see*: *Blevins v. Department of Labor and Industries*, 21 Wn.App. 366 (1978); I.

***State v. Roberts***, 25 Wn.App. 830, 837-38 (1980)

Where prior conviction is a burglary reduced to trespass, cannot impeach with burglary; I.

***State v. Meyer***, 26 Wn.App. 119 (1980)

Canadian convictions are admissible unless defendant can show he was sentenced to jail and that counsel was required under Canadian law; II.

***State v. Alexis***, 95 Wn.2d 15 (1980)

In ruling on the admissibility of a prior conviction, court must weigh length of record, remoteness of prior, nature of prior, age and circumstances of defendant, centrality of the credibility issue, impeachment value of the prior crime; 8-0.

***State v. Coles***, 28 Wn.App. 563 (1981)

Details of crimes of which defendant has been previously convicted are not admissible; limited to fact of convictions, type of crime, and punishment imposed, *State v. McBride,* 192 Wn.App. 859 (2016); II.

***State v. Thompson***, 95 Wn.2d 888 (1981) , *overruled, on other grounds, State v. Calegar,* 133 Wn.2d 718 (1997)

State need not prove validity of guilty plea to use conviction to impeach, distinguishing *State v. Holsworth*, 93 Wn.2d 148 (1980); a conviction is improper impeachment where the offering party does not produce the record of conviction showing on its face that the witness had counsel, *State v. Weygandt*, 20 Wn.App. 599 (1978), *see: State v. Phillips*, 94 Wn.App. 313 (1999), *Lackawanna County Dist. Attorney v. Coss*, 149 L.Ed. 2d 608 (2001), *Daniels v. United States*, 149 L.Ed.2d 590 (2001), *but see: State v. Perrett*, 86 Wn.App. 312, 320-1 (1997), *State v. Gimarelli*, 105 Wn.App. 370, 375 n. 3 (2001); 9-0.

***State v. Tharp***, 96 Wn.2d 591 (1981)

Evidence of a prior conviction as *Goebel* evidence is admissible, but trial court must make a record of weighing probative vs. prejudicial value; harmless here.

***State v. Anderson***, 31 Wn.App. 352 (1982)

Murder 1° defendant may be impeached by prior **murder** 2° convictions; I.

***State v. White***, 31 Wn.App. 655 (1982)

At defendant's theft trial, defendant is impeached with prior perjury conviction which is subsequently reversed and dismissed; held: it is error to impeach the defendant by evidence of a prior conviction which is subsequently reversed because of insufficient evidence, error was not harmless; I, 2-1.

***State v. Gibson***, 32 Wn.App. 217 (1982)

Within court's discretion to permit impeachment by prior **burglary** and **taking and riding** convictions, and that defendant had previously been determined to be an **habitual criminal**; I.

***State v. Brush***, 32 Wn.App. 445 (1982)

Fourteen-year-old felony conviction held admissible where defendant offered testimony of his good character, ER 404(a)(1); extensive discussion of "open door" policy and character evidence; III.

***State v. Moore***, 33 Wn.App. 55 (1982)

On remand per *State v. Moore*, 29 Wn.App. 354 (1981), the trial court reaffirmed its earlier conclusion that defendant's prior **robbery** conviction was admissible to impeach his testimony in the present robbery trial; held: pre-trial motion *in limine* leading to final ruling that robbery conviction would be admissible at trial and offer of proof as to what defendant's testimony would have been at trial if the prior had been excluded properly preserved record; trial court abused its discretion because no tenable ground exists for allowing impeachment; three factors weigh against impeachment: (1) identity of present and prior offenses, (2) robbery has slight probative value re: truthfulness of defendant, and (3) defendant's defense could be presented only through his testimony; on remand, trial court may consider permitting impeachment of defendant by unnamed prior, *cf.:* *State v. King*, 75 Wn.App. 899, 904-13 (1994); I.

***State v. Renfro***, 96 Wn.2d 902 (1982)

Where defense opens door to prior conviction on direct of defendant, further inquiry is proper on cross.

***State v. Davenport***, 33 Wn.App. 704 (1983)

**Burglary** conviction may be used to impeach in burglary case; court may instruct jury that prior conviction may be considered to determine credibility, even over defendant's objection, *see also: State v. Dow*, 162 Wn.App. 324, 332-35 (2011); I.

***State v. Harvey***, 34 Wn.App. 737 (1983)

Within discretion of court to permit impeachment by prior **robbery** conviction in robbery trial; I.

***State v. Henderson***, 34 Wn.App. 865 (1983)

Prior **burglary** may be used to impeach in robbery trial; III.

***State v. Turner***, 35 Wn.App. 192 (1983)

**Robbery** is a crime involving dishonesty, and is thus admissible to impeach under ER 609(a)(2); declines to follow *State v. Zibell*, 32 Wn.App. 158 (1982); I.

***State v. Delker***, 35 Wn.App. 346 (1983)

**Intimidating a witness** is a crime involving dishonesty, admissible to impeach, ER 609(a)(2); I.

***State v. Johnson***, 35 Wn.App. 380 (1983)

**Grand larceny** involves dishonesty, ER 609(a)(2); I.

***State v. Hunter***, 35 Wn.App. 708 (1983)

**Promoting prostitution** may be admitted to impeach defendant in burglary trial; I.

***State v. Gerard***, 36 Wn.App. 7 (1983)

**Juvenile** convictions, ER 609(d), are admissible only if party seeking their admission presents reasons other than impeachment; I.

***State v. Kidd***, 36 Wn.App. 503 (1983)

Arson defendant is impeached with prior **reckless burning**; held: trial court failed to make any record to establish how prior conviction is probative of defendant's credibility; further, similarity of offenses is prejudicial, *State v. Renfro*, 96 Wn.2d 902, 908 (1982); harmless here; I.

***State v. Pam***, 98 Wn.2d 748 (1983)

There is a "strong presumption" against the admissibility of a prior conviction identical to that for which defendant is on trial; 5-4.

***State v. Latham***, 100 Wn.2d 59 (1983)

Trial court grants motion *in limine* to preclude impeachment of defendant by prior drug conviction, after voir dire, court reverses itself to permit impeachment, defense moves for mistrial, arguing defendant was precluded from questioning jurors on bias re: drug use; held: error for court to reverse its final ruling, harmless here; 7-2.

***Luce v. United States***, 83 L.Ed.2d 443 (1984)

Pursuant to Fed. R. Evid. 609(a), defendant must testify at trial to preserve issue; *accord*: *State v. Brown*, 113 Wn.2d 520 (1989), *see: State v. Phillips*, 160 Wn.App. 36 (2011); 9-0.

***State v. Saldano***, 36 Wn.App. 344 (1984)

**Robbery** is a crime of dishonesty, ER 609(a)(2), *distinguishing* *State v. Moore*, 33 Wn.App. 55, 60 (1982), *State v. Zibell*, 32 Wn.App. 158, 164 (1982), and is admissible to impeach defendant charged with assault 2°; I; *but see:* *State v. Burton*, 101 Wn.2d 1 (1984).

***State v. Porter***, 36 Wn.App. 451 (1984)

At trial, defendant moves *in limine* to prohibit impeachment by prior conviction, ER 609; trial court refuses to rule until it hears defendant's testimony; defendant testifies, is impeached without objection; held: defendant is entitled to a ruling on priors before he takes the stand, *State v. Hill*, 83 Wn.2d 558 (1974), *State v. Teal*, 117 Wn.App. 831, 843 (2003), *aff'd, on other grounds*, 152 Wn.2d 333 (2004), waived here, *State v. Vy Thang*, 145 Wn.2d 630, 646-49 (2002), *see: Ohler v. United States*, 146 L.Ed.2d 826 (2000); I.

***State v. Bonefield***, 37 Wn.App. 878 (1984)

**Forgery** is a *crimen falsi* offense, ER 609(a)(2); *accord*: *State v. McLean*, 58 Wn.App. 422 (1990); III.

***State v. Martinez***, 38 Wn.App. 421 (1984)

Trial court prohibits defense from impeaching assault victim's testimony with 18-year-old **UIBC** conviction; held: excluding impeachment evidence of a prosecution witness's stale prior conviction does not violate defendant's right of confrontation; Division I creates a balancing test, permitting court to consider state's interest in ensuring that witnesses are not discouraged from testifying for fear of having a prior conviction brought forward, *cf.: State v. Perrett*, 86 Wn.App. 312, 320-1 (1997).

***State v. Koloske***, 100 Wn.2d 889 (1984)

A pre-trial motion *in limine* seeking to preclude impeachment by prior convictions, ER 609, is preserved for appellate purposes, *reversing State v. Austin*, 34 Wn.App. 625 (1983), *State v. Vy Thang*, 145 Wn.2d 630, 646-49 (2002), *see: Ohler v. United States*, 146 L.Ed.2d 826 (2000), *but see: State v. Teal*, 117 Wn.App. 831, 843 (2003) *aff'd, on other grounds*, 152 Wn.2d 333 (2004); issue may be determined by trial court and need not be determined at omnibus hearing, disapproving *State v. Koloske*, 34 Wn.App. 882 (1982); 9-0.

***State v. Jones***, 101 Wn.2d 113 (1984), *overruled on other grounds, State v. Brown*, 113 Wn.2d 520 (1989)

Court must weigh probative vs. prejudicial effect of priors on the record, specifying factors considered, *reversing* contrary language in *State v. Thompson*, 95 Wn.2d 888 (1981); factors to be weighed are: (1) necessity of hearing defendant's side of the story; (2) type of crime, (3) remoteness, (4) similarity, (5) age and circumstances of defendant, (6) whether defendant testified at prior trial, and (7) length of defendant's record; state has burden to show probative value exceeds inherent prejudicial effect; reverses *State v. Jones*, 33 Wn.App. 372 (1982); 9-0; *see*: *State v. Begin*, 59 Wn.App. 755 (1990), *State v. King*, 75 Wn.App. 899, 904-13 (1994), *State v. Hardy*, 133 Wn.2d 701 (1997).

***State v. Coe***, 101 Wn.2d 772 (1984)

Where prior conviction is deemed admissible, inquiry is limited to fact of conviction, type of crime and punishment, *State v. Coles*, 28 Wn.App. 563 (1981), cross-examination exceeding these bounds is irrelevant and prejudicial, *State v. McBride*, 192 Wn.App. 859 (2016); 9-0.

***State v. Johnson***, 42 Wn.App. 425 (1985)

Felony **marijuana** conviction is not admissible under ER 609(a)(2) as it does not qualify as *crimen falsi*, but may be admissible under ER 609(a)(1); II.

***State v. Pfeifer***, 42 Wn.App. 459 (1985)

Filing **fraudulent proof of insurance** claim, RCW 48.30.230, is *crimen falsi* offense, admissible to impeach, ER 609(a)(2), *State v. Burton*, 101 Wn.2d 1, 4-5 (1984); I.

***State v. Burgess***, 43 Wn. App 253 (1986)

Where evidence of prior offense is admissible pursuant to ER 404, there is little additional prejudice from allowing admission of the convictions to impeach, ER 609; *see*: *State v. Brown*, 113 Wn.2d 520 (1989); II.

***State v. Harris***, 44 Wn.App. 401 (1986)

Trial court should balance, on the record, probative value vs. prejudicial effect of prior convictions to impeach a defense ***witness***, ER 609, harmless here; I.

***State v. Newton***, 109 Wn.2d 69 (1987)

Trial court may not look to facts of prior crime to determine if it is admissible as impeachment, ER 609(a)(2), but may only consider statutory elements to determine if offense involved dishonesty, *but see: State v. Schroeder*, 67 Wn.App. 110 (1992), *State v. Black*, 86 Wn.App. 791 (1997), *State v. Garcia*, 179 Wn.2d 828, 846-50 (2014); 5-4.

***State v. Allen***, 50 Wn.App. 412 (1988)

Where defendant seeks to impeach state's witness with prior conviction, court may not consider prejudice to state, ER 609; trial court may exclude reference to the specific crime; I.

***State v. Hopson***, 113 Wn.2d 273 (1989)

Where witness testifies as to prior convictions and said testimony is stricken, within discretion of trial court to deny mistrial if irregularity was not serious enough to materially affect the result, *State v. Garcia*, 177 Wn.App. 769 (2013), *see: State v. Mathes*, 22 Wn.App. 33 (1978), *cf.: State v. Young*, 129 Wn.App. 468 (2005); 9-0.

***State v. Brown***, 113 Wn.2d 520 (1989)

Not all convictions admissible under ER 404(b) are also automatically admissible under ER 609, overruling, in part, *State v. Laureano*, 101 Wn.2d 745, 766 (1984); to preserve an ER 609 issue, defendant must testify, *Luce v. United States*, 83 L.Ed.2d 443 (1984), *see: State v. Phillips*, 160 Wn.App. 36 (2011), overruling, in part, *State v. Pam*, 98 Wn.2d 748 (1983), *State v. Lefever*, 102 Wn.2d 777, 35 Wn.App. 729 (1984), *State v. Koloske*, 100 Wn.2d 889 (1984), *see also: State v. Kimp*, 87 Wn.App. 281 (1997); harmless error standard for ER 609(a) issues is nonconstitutional, overruling *State v. Jones*, 101 Wn.2d 113 (1984), *State v. Harris*, 102 Wn.2d 148 (1984); 9-0.

***State v. Smith***, 56 Wn.App. 909 (1990), *aff'd, on other grounds*, 123 Wn.2d 51 (1993)

**UIBC** is a theft offense, and therefore is *per se* admissible for impeachment, ER 609(a)(2), citing *State v. Brown*, 113 Wn.2d 520 (1989); *see*: *State v. McLean*, 58 Wn.App. 422 (1990), *State v. Gomez*, 75 Wn.App. 648 (1994); III.

***State v. Ray***, 116 Wn.2d 531 (1991)

Crimes of **theft** involve dishonesty and are *per se* admissible for impeachment, ER 609(a)(2), overruling *State v. Burton*, 101 Wn.2d 1 (1984), and overruling, in part, *State v. Newton*, 109 Wn.2d 69 (1987); 6-3; retroactive, *State v. Eisenman*, 62 Wn.App. 640 (1991).

***State v. McKinsey***, 116 Wn.2d 911 (1991)

**Possessing stolen property** is a crime of dishonesty, ER 609(a)(2), overruling *State v. Harris*, 102 Wn.2d 148 (1984), *State v. Zibell*, 32 Wn.App. 158 (1982); *but see: State v. Mitchell*, 117 Wn.2d 521, 536 (1991); 7-2.

***State v. Watkins***, 61 Wn.App. 552 (1991)

**Burglary** 2° is not *per se* admissible to impeach, *State v. Ray*, 116 Wn.2d 531 (1991), unless the information or judgment and sentence unambiguously reveal that defendant's criminal intent was to commit theft, *State v. Garcia*, 179 Wn.2d 828, 846-50 (2014), *cf.: State v. Schroeder*, 67 Wn.App. 110 (1992); fact that defendant testified on direct about the prior conviction, after trial court ruled that the burglary is admissible, does not invoke invited error doctrine; harmless here; I.

***State v. Smith***, 67 Wn.App. 81 (1992)

Admission of nine-year-old **burglary** convictions to impeach in burglary case is not error where defendant's credibility was crucial, state had no direct evidence to impeach it, and priors were introduced as unnamed felonies; I.

***State v. Schroeder***, 67 Wn.App. 110 (1992)

A prior **burglary** is admissible to impeach as a *crimen falsi* offense, ER 609(a)(2), where crime intended to be committed following unlawful entry or remaining was theft, *State v. Watkins*, 61 Wn.App. 552, 557 (1991); trial court may look to underlying facts in a prior burglary case to determine if underlying crime was theft, *State v. Black*, 86 Wn.App. 791 (1997), *distinguishing State v. Newton*, 109 Wn.2d 69, 71 (1987), *but see: State v. Garcia*, 179 Wn.2d 828, 846-50 (2014); II.

***State v. O'Dell***, 70 Wn.App. 560 (1993)

Parole revocation is "confinement imposed for that conviction" for purposes of the ten-year washout provision of ER 609(a); I.

***State v. Hettich***, 70 Wn.App. 586 (1993)

**Forgery** convictions which were subsequently dismissed (presumably following deferred sentence) are admissible to impeach absent an express "pardon, annulment, certificate of rehabilitation, or other equivalent procedure," ER 609(c), *but see: State v. Safford*, 24 Wn.App. 783 (1979); I.

***State v. Trepanier***, 71 Wn.App. 372 (1993)

**Taking and riding** a motor vehicle, RCW 9A.56.070, is a *crimen falsi* offense, whether committed by the taker or the rider; I.

***State v. Roche***, 75 Wn.App. 505-9 (1994)

Trial court must weigh all factors, *State v. Alexis*, 95 Wn.2d 15, 19 (1980), to admit priors under ER 609(a)(1); failure to balance prejudice vs. probative value is error; unnecessarily cumulative prior convictions are more prejudicial, *State v. Jones*, 101 Wn.2d 113, 121-2 (1984); harmless here; I.

***State v. Gomez***, 75 Wn.App. 648 (1994)

Analysis of *Alexis* factors: (1) a long record favors exclusion, as "unnecessarily cumulative" priors could lead jury to convict based on history rather than charge, *State v. Jones*, 101 Wn.2d 113, 120-2 (1984), *overruled on other grounds, State v. Brown*, 111 Wn.2d 124, *adhered to on reh'g,* 113 Wn.2d 520 (1989), (2) the older a conviction, the less probative it is of defendant's credibility, *Jones, supra,* at 121; court should evaluate each prior conviction and examine its remoteness in time from the current charge and the other convictions to determine its bearing on credibility, (3) greater the similarity of crimes to charge, greater the prejudice, (4) the younger the defendant was at prior convictions, the more likely it is that prejudicial effect will outweigh probative value or that there may be extenuating circumstances the trial court should consider; defendant should present extenuating circumstances, (5) centrality of credibility is an unclear factor, and (6) impeachment value of prior: defendant's character may not be considered; limiting state to using unnamed priors to impeach may reduce prejudice, *State v. White*, 43 Wn.App. 580 (1986), *State v. Smith*, 67 Wn.App. 81 (1992), *aff'd on other grounds,* 123 Wn.2d 51 (1993), *State v. Teal*, 117 Wn.App. 831, 843 (2003), *aff'd, on other grounds,* 152 Wn.2d 333 (2004), but is not a substitute for *Alexis* balancing, *State v. Jones*, 75 Wn.App. 899, 904-13 (1994), *State v. Gonzales*, 83 Wn.App. 587, 592-6 (1996), *State v. Hardy*, 133 Wn.2d 701, 712 (1997); I.

***State v. Copeland***, 130 Wn.2d 244, 283-35 (1996)

Under ER 609(1), cross-examination regarding prior convictions is limited to the fact of conviction, type of crime and punishment, *State v. Coe*, 101 Wn.2d 772, 776 (1984), cross exceeding these bounds is irrelevant and likely to be unduly prejudicial, *State v. McBride*, 192 Wn.App. 859 (2016), harmless here in light of curative instruction; 9-0.

***State v. Wilson***, 83 Wn.App. 546 (1996)

The fact that prior convictions will increase the sentence range on the current offense is not a factor to be considered in admitting priors to impeach, ER 609(a)(1); here, **VUCSA** prior should not have been admitted as there was a theft conviction, ER 609(a)(2), and eyewitness testimony as sufficient alternative bases to impeach, *State v. Millante*, 80 Wn.App. 237, 246 n.3 (1995), *State v. Stockton*, 91 Wn.App. 35, 42 (1998), *but see: State v. Thompson*, 95 Wn.2d 888, 892 (1981); 2-1, I.

***State v. Gonzales***, 83 Wn.App. 587 (1996)

Once court has balanced *Alexis* factors in favor of admissibility of a prior conviction to impeach, then court may consider unnaming the convictions as a means to lessen the prejudice arising from the similarity of the prior and current crimes, *State v. King*, 75 Wn.App. 899, 908 (1994), *State v. Teal*, 117 Wn.App. 831, 843 (2003), *aff'd, on other grounds,* 152 Wn.2d 333 (2004), *but see: State v. Hardy*, 133 Wn.2d 701, 712 (1997); I.

***Old Chief v. United States***, 136 L.Ed.2d 574 (1997)

In federal felon in possession of firearm trial, defense offers to stipulate that defendant was convicted of a felony, moves to exclude name of the crime, government declines to stipulate, trial court admits the name of the prior felony to prove the prior crime element; held: under Fed. R. Evid. 403 analysis, unfair prejudice of nature of prior conviction outweighs probative value, thus trial court abused discretion in not excluding the nature of the prior, even though the evidence was relevant; accord: *State v. Johnson*, 90 Wn.App. 61-3 (1998), *State v. Rivera*, 95 Wn.App. 132 (1999), *cf.: State v. Gladden*, 116 Wn.App. 56 (2003), *State v. Ortega*, 134 Wn.App. 617, 623-25 (2006), *State v. Taylor,* 193 Wn.2d 691 (2019), s*ee: State v. Humphries*, 181 Wn.2d 708 (2014); 5-4.

***State v. Perrett***, 86 Wn.App. 312, 320-1 (1997)

During interview with defense and prosecutor, state's witness admits to a prior shoplift conviction in another state, trial court excludes it absent certified copy of conviction, ER 609(a)(2); held: where nonparty witness admits to a prior *crimen falsi* conviction, trial court may not exclude it even without record of conviction, as there can be no prejudice to defendant, distinguishing *State v. Martz*, 8 Wn.App. 192, 195-6 (1973); *see: State v. Thompson*, 95 Wn.2d 888 (1981), *cf.: State v. Martinez*, 38 Wn.App. 421 (1984); II.

***State v. Clarke***, 86 Wn.App. 447 (1997)

Defendant is charged with murder in 1986, flees, is apprehended and tried in 1995, seeks suppression of 1983 robbery conviction as it is more than ten years old, ER 609(b); held: a defendant who has been a fugitive should receive no benefit from fleeing, fugitive status tolls the time limitation; I.

***State v. Hardy***, 133 Wn.2d 701, 706-13 (1997)

**VUCSA** convictions are not crimes of dishonesty, thus ER 609(a)(2) does not apply, *State v. Jones,* 101 Wn.2d 113, 122-23 (1984), *overruled on other grounds*, *State v. Ray*, 116 Wn.2d 531, 546 (1991), and, in general, are not probative of a witness's veracity under ER 609(a)(1), at 710, *State v. Calegar*, 133 Wn.2d 718 (1997), *State v. Saunders*, 91 Wn.App. 575 (1998); to admit prior convictions under ER 609(a)(1), trial court must state, for the record, the factors to assess whether probative value outweighs prejudice and how the proffered evidence is probative of veracity, *State v. King*, 75 Wn.App. 899, 913 (1994); unnaming the felony is not a substitute for the balancing process, *State v. Rivers*, 129 Wn.2d 697, 706 (1996), courts should not admit unnamed felonies unless the court can articulate how unnaming the felony still renders it probative of veracity, at 712, *State v. Teal*, 117 Wn.App. 831, 843 (2003), *aff'd, on other grounds*, 152 Wn.2d 333 (2004); 6-3.

***State v. Jackson***, 91 Wn.App. 488 (1998)

A guilty plea or verdict of guilty is a conviction, RCW 9A.46.100, for purposes of enhancement of a willful violation of a court order from a misdemeanor to a felony, RCW 10.99.040(4), even before judgment and sentence is entered; I.

***Ohler v. United States***, 146 L.Ed.2d 826 (2000)

Trial court rules *in limine* that prior conviction is admissible, defendant testifies and, on direct, admits the prior, seeks review of order *in limine*; held: where a defendant tactically offers a prior conviction in direct examination, she cannot challenge the admission of such evidence on appeal, *but see: State v. Vy Thang*, 145 Wn.2d 630, 646-49 (2002), *State v. Teal*, 117 Wn.App. 831, 843 (2003), *aff'd, on other grounds,* 152 Wn.2d 333 (2004); 5-4.

***State v. Bankston***, 99 Wn.App. 266 (2000)

**Witness tampering**, RCW 9A.72.120, is a crime of dishonesty; III.

***State v. Russell***, 104 Wn.App. 422, 430-39 (2001)

Where prior convictions are more than ten years old, trial court must make specific findings on the record as to the particular facts and circumstances it has considered in determining that probative value substantially outweighs prejudicial impact, ER 609(b), even if convictions were for crimes of dishonesty; II.

***Seattle v. Patu***, 108 Wn.App. 364, 376-78 (2001), *aff'd, on other grounds,* 147 Wn.2d 717 (2002)

Where defendant is impeached with a prior conviction, limiting instruction, WPIC 5.05, must be given if requested, *State v. Brown*, 113 Wn.2d 520 (1989), *State v. Newton*, 109 Wn.2d 69, 74 (1987), *see also: State v. Dow*, 162 Wn.App. 324, 332-35 (2011); I.

***State v. Jones***, 117 Wn.App. 221, 231-34 (2003)

Trial court denies defense request to impeach state's witness with 20-year old forgery, ER 609, defense maintains on appeal that ruling violates right to confront; held: prior conviction more than ten years old is presumed irrelevant absent specific facts or circumstances from which trial court can determine that the conviction has probative value that outweighs its prejudicial effect, *State v. Hudlow*, 99 Wn.2d 1, 15 (1983), *cf.: State v. McDaniel*, 83 Wn.App. 179, 186 (1996), alleged constitutional error was not manifest as not "unmistakable, evident or indisputable" *State v. Lynn*, 67 Wn.App. 339, 345 (1992); I.

***State v. Teal***, 117 Wn.App. 831, 843-44 (2003), *aff'd, on other grounds,* 152 Wn.2d 333 (2004)

Where the prior conviction is the same as the current offense, referring to the prior as an unnamed crime of dishonesty will be sufficient to render it probative on the issue of defendant's veracity, *State v. Hardy*, 133 Wn.2d 701, 711-12 (1997), *State v. Rivers*, 129 Wn.2d 697, 707 (1996), but it is within the trial court's discretion; I.

***State v. Young***, 129 Wn.App. 468, 471-79 (2005)

In murder and VUFA trial, court agrees to stipulation that jury would not be told that defendant had been previously convicted of a violent crime, *Old Chief v. United States*, 136 L.Ed.2d 574 (1997), trial court reads information to jury which includes language that defendant

was convicted of assault 2º, denies mistrial; held: disclosure of a prior conviction of a violent crime in a violent crime trial is inherently prejudicial, failure of court to offer curative instruction was error, *State v. Hopson*, 113 Wn.2d 273, 284 (1989), *see: State v. Garcia*, 177 Wn.App. 769 (2013); I.

***State v. Nelson***, 131 Wn.App. 108, 116-17 (2006)

State must give advanced written notice of intent to use a prior more than ten years old to impeach a witness, harmless here; III.

***State v. Ortega***, 134 Wn.App. 617 (2006)

In felony violation of protection order case, trial court declines defendant's stipulation that, if he is convicted, the conviction will be a felony in an attempt to keep from the jury the two prior no contact order convictions; when defendant testifies, trial court instructs that priors are admissible solely to determine credibility; defendant testifies briefly on direct, in response to open ended question on cross, defendant asserts he had been falsely arrested for assault, trial court admits conviction of assault; held: statutory language requiring proof of two prior no contact order convictions to enhance to a felony cannot be unfairly prejudicial, thus neither *State v. Johnson*, 90 Wn.App. 54, 63 (1998) nor *Old Chief v. United States*, 136 L.Ed.2d 574 (1997) require the trial court to accept a stipulation to avoid statutory language, *State v. Gladden*, 116 Wn.App. 561 (2003), *see: State v. Taylor*, 193 Wn.2d 691 (2019), while the limiting instruction here was not wholly accurate, the prior convictions were considered by the jury for purpose of proving the predicate offenses, so evidence was sufficient to convict; open-door rule may apply where defendant makes statements on cross that are not directly responsive to question, *see: State v. Avendano-Lopez*, 79 Wn.App. 706, 714 (1995); I.

***State v. Roswell***, 165 Wn.2d 186 (2008)

Where a crime is raised to a felony due to a prior conviction, here communicating with a minor for immoral purposes, RCW 9.68.090, trial court does not abuse its discretion by refusing to bifurcate and permit a jury waiver on the prior conviction element, *State v. Tysyachuk*, 13 Wn.App.2d 35 (2020), distinguishing *Old Chief v. United States*, 136 L.Ed.2d 574 (1997), *State v. Gladden*, 116 Wash.App. 561, 566, 66 P.3d 1095 (2003); 9-0.

***State v. Dow***, 162 Wn.App. 324, 332-36 (2011)

Trial court need not *sua sponte* give limiting instruction when priors are admitted to impeach, *see also: State v. Davenport*, 33 Wn.App. 704 (1983), *Seattle v. Patu*, 108 Wn.App. 364, 376-78 (2001), *aff'd, on other grounds,* 147 Wn.2d 717 (2002); defense counsel's failure to request limiting instruction may be tactical and thus not ineffective assistance, *State v. Embry*, 171 wn.App. 714, 762-63 (2012), *State v. Humphries*, 181 Wn.2d 708, 719-21 (2014); II.

***State v. Garcia***, 179 Wn.2d 828, 846-50 (2014)

Trial court admits prior burglary 2° to impeach as a crime of dishonesty, finding crime defendant intended to commit was theft based upon police report as information, certification for determination of probable cause, statement of defendant on plea of guilty and judgment and sentence are silent as to defendant's intent; held: court may not go beyond the court file when

determining the predicate crime of a prior burglary conviction and may not rely upon hearsay, *State v. Watkins*, 61 Wn.App. 552 (1991), *State v. Black*, 86 Wn.App. 791 (1987), *State v. Newton*, 109 Wn.2d 69 (1987), *cf.: State v. Schroeder*, 67 Wn.App. 110 (1992); 9-0.

***State v. Humphries***, 181 Wn.2d 708 (2014)

Failure of defense counsel to request a limiting instruction regarding a prior conviction is presumed to be a reasonable tactical decision; 6-3.

***State v. McBride***, 192 Wn.App. 859 (2016)

Where a prior conviction is admissible to impeach a witness, ER 609(a), the witness may not be questioned regarding the facts leading to the prior conviction, ER 608(b), *State v. Coles*, 28 Wn.App. 563 (1981), *State v. Coe*, 101 Wn.2d 772 (1984), *State v. Copeland*, 130 Wn.2d 244, 283-35 (1996), even if the facts might have been admissible as impeachment had there been no prior conviction; III.

***State v. Jones***, 12 Wn.App.2d 677 (2020)

Trial judge permits state to impeach defendant's testimony with two prior unlawful possession of firearms (VUFA) convictions; held: state did not prove that VUFA convictions are probative of truthfulness, trial court failed to state why the priors were probative of truthfulness or how priors outweighed prejudicial effect, " *State v. Hardy*, 133 Wn.2d 701, 706 (1997); few convictions not involving dishonesty have probative value, *State v. Jones*, 101 Wn.2d 113, 118-19 (1984), *overruled on other grounds by State v. Brown*, 113 Wn.2d 520, 554 (1989); II.

# PRIVILEGES

***State v. Anderson***, 94 Wn.2d 176 (1980)

No **physician-patient** or **psychotherapist-patient privilege** applies where child abuse is involved; *see*: *State v. Fagalde*, 95 Wn.2d 730 (1975), RCW 5.60.060(4), *State v. Warner*, 125 Wn.2d 876, 892 (1995), *State v. Ackerman*, 90 Wn.App. 477, 485-7 (1998), *State v. Hyder*, 159 Wn.App. 234 (2011); 9-0.

***State v. Eaton***, 30 Wn.App. 288 (1981)

Court required defendant to testify before psychiatrist could testify as to intoxication defense as opinion was based upon defendant's recounting of incident; held: reversed, as violates intent of ER 703 and possibly defendant's Fifth Amendment rights; II.

***State v. Dorman***, 30 Wn.App. 351 (1981)

No **attorney-client privilege** where no legal advice was sought or given, no fee was paid, attorney merely acting as co-signer; test is client's belief that s/he is consulting with a lawyer in that capacity and his manifested intention to seek professional legal advice.

***State v. Holland***, 30 Wn.App. 366 (1981)

Statements made to a psychiatrist for a juvenile decline hearing may not be used against defendant at trial, but waived by defense here; "**governmental information privilege**," RCW 5.60.060(5), applies to defendants in criminal cases; I.

***State v. Bouchard***, 31 Wn.App. 381 (1982), *overruled, on other grounds, State v. Sutherby*, 165 Wn.2d 870, 886 n.7 (2009)

**Marital privilege/spousal testimonial privilege**, RCW 5.60.060(1) does not apply where wife is testifying about crimes committed by husband against a child of which wife is parent or guardian; wife acting as babysitter, even briefly, meets tests of guardianship, *State v. Waleczek*, 90 Wn.2d 746 (1978), *State v. McKinney*, 50 Wn.2d 56 (1987), *State v. Wood*, 52 Wn. 159 (1988), *see: State v. Martinez*, 2 Wn.App.2d 55, 72-75 (2018); II.

***State v. Bonds***, 98 Wn.2d 1 (1982)

Juvenile retains court-appointed psychiatrist for decline hearing, JuCR 9.3(a); after decline, defendant raises insanity defense; held: where defendant raises insanity defense, statements uttered by defendant in the context of a psychiatric examination are removed from the reach of the Fifth Amendment and the **attorney-client privilege**, *State v. Pawlyk*, 115 Wn.2d 457 (1990), *see* concurring opinion at 29, *State v. Carneh*, 153 Wn.2d 274 (2004), *Kansas v. Cheever*, 571 U.S. 87, 187 L.Ed.2d 519 (2013); 5-4.

***State v. Bonaparte***, 34 Wn.App. 285 (1983)

**Marital privilege** does not bar a spouse's statements offered to demonstrate probable cause; II.

***State v. Mines***, 35 Wn.App. 932 (1983)

Defense moved for production of psychiatric records of a state's witness who was committed to a mental hospital before trial; court reviewed records *in camera* and ruled they did not justify disclosure and that there was nothing therein inconsistent with the witness's testimony; held: **physician-patient** privilege, RCW 5.60.060(4), protects the records; I.

***State v. Jones***, 99 Wn.2d 735 (1983)

Communications between a defendant and a defense psychiatrist are protected by the **attorney-client privilege**, which is waived when an insanity defense is raised, *State v. Pawlyk*, 115 Wn.2d 457 (1990); disclosure of defense psychiatrist's report to the prosecutor does not waive the privilege at trial, and testimony is still excludable.

***State v. Jollo***, 38 Wn.App. 469 (1984)

Pursuant to plea negotiations, statutory rape defendant obtains psychological evaluation, a copy of which is provided the state; when no plea is entered, state uses defendant's admissions to psychologist in its case-in-chief; held: statements to **psychologist** made at state's request during plea negotiations are inadmissible even if defendant "breaches" plea bargain, ER 410; I.

***State v. Davis***, 38 Wn.App. 600 (1984)

Trial court's reliance upon defendant's post-arrest silence as evidence of guilt or to impeach defendant's testimony violates defendant's right to due process; Division I declines to follow *Fletcher v. Weir*, 61 L.Ed.2d 490 (1982) on state due process grounds; 2-1.

***State v. Rinaldo***, 102 Wn.2d 749 (1984)

Qualified **journalist-source privilege** exists in criminal cases; 5-4.

***United States v. Doe***, 79 L.Ed.2d 552 (1984)

Grand jury subpoenas business records of sole proprietorship; held: while the contents of voluntarily-prepared records are not privileged under the **Fifth Amendment**, the act of producing documents may be privileged and can only be compelled pursuant to grant of use immunity; 6-3.

***State v. Espinosa***, 47 Wn.App. 85 (1987)

Denial of discovery of **rape crisis center**'s interviewing notes with victim following *in camera* review will only be reversed for abuse of discretion, RCW 70.125.065; presence of a police officer during the interview does not waive the privilege, *State v. Gibson*, 3 Wn.App. 596 (1970), RCW 70.125.060, *distinguishing State v. Wilder*, 12 Wn.App. 296 (1975); I.

***State v. Kilponen***, 47 Wn.App. 912 (1987)

In burglary case, victim-**wife** may testify against defendant-husband if state proves that the underlying crime intended by defendant was a crime of personal violence against wife; III.

***State v. Balkin***, 48 Wn.App. 1 (1987)

Where a defendant plea bargains to submit to specific treatment, then an evaluation by the organization intended to provide that treatment is not privileged; I.

***State v. Lougin***, 50 Wn.App. 376, 381 (1988)

Where nonparty witness expresses intent to claim **Fifth Amendment privilege**, trial court may not permit the witness to refuse to testify altogether; proper procedure is to allow questioning, and for court to rule on each claim of privilege to individual questions, *State v. Levy*, 156 Wn.App. 709, 731-33 (2006), *see: State v. Delgado*, 105 Wn.App. 839 (2001); I.

***State v. Ahlfinger***, 50 Wn.App. 466 (1988)

Where **rape crisis center** employee uses notes to refresh recollection while testifying, ER 612 does not mandate disclosure to defense counsel absent *in camera* review, RCW 70.125.065, nor does failure to disclose violate confrontation clause; I.

***State v. Coe***, 109 Wn.2d 832 (1988)

Where defendant makes admissions to a **psychiatrist** for purposes of sentencing, anticipating that the communication will be revealed in court, it is not privileged, *State v. Sullivan*, 60 Wn.2d 214, 223-24 (1962).

***State v. Maxon***, 110 Wn.2d 564 (1988)

No **parent-child** testimonial privilege for confidential communications exists, *see: State v. Sanders*, 66 Wn.App. 878 (1992); 9-0.

***State v. Harris***, 51 Wn.App. 807 (1988)

There is no **mental health counselor-client** privilege conferred by RCW 71.24.035(4)(h), at least where client was expressly informed that statements were not confidential, and client does not claim that he believed that they were confidential, *State v. Side*, 105 Wn.App. 787 (2001); I.

***State v. Sheppard***, 52 Wn.App. 707 (1988)

Identity of client and fee arrangements are generally not protected by **attorney-client privilege**, RCW 5.60.060(2), unless the person invoking the privilege can show that a strong probability exists that disclosure would implicate the client in the very criminal activity for which legal advice was sought, *Baird v. Koerner*, 279 F.2d 623, 95 A.L.R.2d 303 (9th Cir., 1960), *Seventh Elect Church v. Rogers*, 102 Wn.2d 527 (1984); I.

***State v. Nuss***, 52 Wn.App. 735 (1988)

As soon as defendant asserts diminished capacity as a defense, state is entitled to **psychiatric** reports from defense, court may order defendant to be interviewed by a state's expert; *see also: Pers. Restraint of Rice*, 118 Wn.2d 876, 894 (1992); defense counsel may be present at the interview, *but see: State v. Cochran*, 102 Wn.App. 480, 483-86 (2000), but may not participate; defendant may not claim Fifth Amendment privilege at interview as it is waived by raising the defense, although may be reclaimed if defense withdraws diminished capacity defense and does not call experts; *but see: State v. Hutchinson*, 111 Wn.2d 879 (1989); III.

***State v. Hartley***, 56 Wn.App. 562 (1990)

Defendant entered NGI plea, withdrew it, was convicted, then argued that he did not validly waive NGI plea; at hearing, state calls defense counsel regarding counsel's advice;

**attorney-client privilege** does not apply to calling defense counsel, as disclosure of the fact that counsel has advised a client of the advantages and disadvantages of an NGI plea is unlikely to indirectly disclose client communications, *State v. Chervenell*, 99 Wn.2d 309 (1983); I.

***State v. Cahoon***, 59 Wn.App. 606 (1990)

**Emergency medical technician** (EMT) is informed by defendant, during examination for overdose, that drugs are in her kitchen, EMT calls police who seize drugs; held: information provided to EMTs and paramedics, in the absence of a physician, is not privileged, *distinguishing* *State v. Gibson*, 3 Wn.App. 596 (1970), RCW 5.60.060(4); *see*: *State v. McCoy*, 70 Wn.2d 964 (1967); **physician-patient privilege** of a statement does not preclude its use in furnishing probable cause for issuance of warrant, *State v. Bonaparte*, 34 Wn.App. 285, 289 (1983); III.

***State v. Post***, 118 Wn.2d 598 (1992)

Where psychologist advised defendant that interview was not confidential, and only one interview occurred, then the **psychologist-patient privilege**, RCW 18.83.110, is inapplicable, as defendant's subjective belief that he might receive treatment from psychologist was unrealistic, *distinguishing* *State v. Sullivan*, 60 Wn.2d 214, 222-26 (1962); *accord:* *State v. King*, 130 Wn.2d 517, 531-3 (1996), *cf.:* *State v. Bankes*, 114 Wn.App. 280 (2002) ; 9-0.

***State v. Stark***, 66 Wn.App. 423 (1992)

County Health Officer, learning from HIV-positive defendant that he was engaging in unsafe sex, issues cease and desist order, RCW 70.24.024(3)(b), and, when defendant did not cease and desist, sought judicial enforcement through prosecutor, who filed criminal charges of assault 2°, RCW 9A.36.020(1)(e); defense motion to suppress physician's testimony and all information learned by prosecutor from physician is denied; held: RCW 70.24.034(1) authorizes public health officer to inform prosecutor of a person infected with a **sexually transmitted disease** who violates cease and desist order, *distinguishing* RCW 70.24.105, which prosecutor may use to enforce the civil order or to file criminal charges; II.

***State v. Sanders***, 66 Wn.App. 878 (1992)

**Spousal privileges**, RCW 5.60.060(1), do not apply in a witness tampering case where the purpose of the tampering was to frustrate effective prosecution of a child sexual abuse case, *see:* *State v. Maxon*, 110 Wn.2d 564, 576 (1988); I.

***State v. Hansen***, 122 Wn.2d 712, 719-21 (1993)

Defendant calls an attorney to sue a judge, attorney tells defendant he won't represent him, defendant tells counsel he will "blow away" judge, attorney reports it, defendant is convicted of intimidating a judge, RCW 9A.72.160; held: no **attorney-client** relationship existed after counsel told defendant to find another lawyer, *In re McGlothlen*, 99 Wn.2d 515. 522 (1983); even if there was a relationship, privilege does not apply to client's remarks concerning the furtherance of a crime, fraud or contemplation of a future crime, *State v. Richards*, 97 Wash. 587 (1917), *State v. Metcalf*, 14 Wn.App. 232 (1975); counsel has an affirmative duty to warn judges of "true threats" made by clients, *distinguishing* *Hawkins v. King Cy.*, 24 Wn.App. 338 (1979); *affirms, in part,* *State v. Hansen*, 67 Wn.App. 511 (1992); 7-2.

***State v. Berkley***, 72 Wn.App. 12 (1993)

Defendant may not be forced to testify to indigency to determine if breath test is admissible in DUI case; **Fifth Amendment** applies not only to the discovery of evidence but also to the admission of evidence already at hand; I.

***State v. Tinkham***, 74 Wn.App. 102 (1994)

**Fifth Amendment** privilege applies in presentence interview with sexual deviancy expert to determine future dangerousness, *Estelle v. Smith*, 68 L.Ed.2d 359 (1981), *State v. Bankes*, 114 Wn.App. 280 (2002); I.

***State v. Lopez***, 74 Wn.App. 456 (1994)

Testifying defendant may be impeached with prior inconsistent statements he made to a **psychiatrist** in anticipation of a diminished capacity defense even if the defense is not ultimately raised at trial; III.

***State v. Buss***, 76 Wn.App. 760, 784-7 (1995)

Confession to a **nonordained Catholic counselor** is not privileged, RCW 5.60.060(3); confession outside a definitive confessional procedure, where the church has such a procedure, is not privileged, *but see: State v. Martin*, 91 Wn.App. 621 (1998); I.

***State v. Hobble***, 126 Wn.2d 283, 290-1 (1995)

To sustain a witness's claim of **Fifth Amendment** privilege, court must determine that danger of incrimination is substantial and real, not speculative; unless the answer would obviously and clearly incriminate the witness, the witness must establish a factual predicate from which the court can, by use of reasonable judicial imagination, conceive of a sound basis for the claim, *Eastham v. Arndt*, 28 Wn.App. 524, 531-32 (1981), *State v. Lougin*, 50 Wn.App. 376 (1988), *see: Ohio v. Reiner*, 149 L.Ed.2d 158 (2001); the answer need only furnish a link in the chain of evidence needed to prosecute, *Seventh Elect Church v. Rogers (Gerald Rogers)*, 34 Wn.App. 96, 100 (1983), *Hoffman v. United States*, 95 L.Ed. 1118 (1951), *see: State v. Fish*, 86 Wn.App. 86-92 (1999); vague and speculative claims of counsel *in camera* that an admission on the use of an alias could be brought back to haunt defendant down the road if some possible unspecified crime were uncovered at some unspecified time in the future do not support the claim of privilege, *Mason v. United States*, 61 L.Ed. 1198 (1917); 7-2.

***Jaffee v. Redmond***, 135 L.Ed.2d 337 (1996)

Common law **psychotherapist-patient** privilege applies in federal court to a licensed social worker-counselor, Fed. R.Evid. 501; 7-2.

***State v. Smith***, 84 Wn.App. 813 (1997)

Following injury collision, defendant goes to hospital on his own for medical treatment where blood is drawn, prosecutor seeks to compel production of blood sample and medical records; held: **physician-patient privilege**, RCW 5.60.060(4), applies in civil actions and, here, public's interest outweighs benefits of the privilege, thus privilege does not apply to blood sample nor report of its alcohol content, *State v. Stark*, 66 Wn.App. 423, 438 (1992), *In re*

*Juveniles A, B, C, D, E*, 121 Wn.2d 80, 92 (1993); because defendant testified about how much he drank, injuries received and denied impairment at first trial (hung jury), he waived his privilege to conceal the records that could disprove his claims that he was not intoxicated; once a privilege is waived at a first trial, it cannot be regained on retrial; I.

***State v. Modest***, 88 Wn.App. 239, 246-8 (1997)

Defendant's wife testifies that defendant called her from jail and directed her to prostitute juveniles living in her home, defendant objects claiming **marital privilege**; held: an exception for the marital privilege is an action for a crime committed by a spouse against any child for whom the spouse is guardian, RCW 5.60.060(1), *State v. Waleczek*, 90 Wn.2d 746, 749 (1978), *see: State v. Chenoweth*, 188 Wn.App. 521, 525-31 (2015), *State v. Martinez*, 2 Wn.App.2d 55, 72-75 (2018), "guardian" should be interpreted liberally to include acts *in loco parentis*, assuming parental character or discharging parental duties, even for a short period of time to protect children from further mistreatment, thus exception applies here; III.

***State v. Aquino-Cervantes***, 88 Wn.App. 699 (1997)

During CrR 3.5 hearing, interpreter testifies, over objection, that, based upon her observations of defendant during attorney-client interviews and in open court, defendant understands both Spanish and English; held: language interpreters may not testify about communications or observations made during confidential **attorney-client** interviews, but may testify about observations made during open court, independent of interpreting privileged communications, GR 11(e), RCW 2.43.080, harmless here; II.

***State v. Linden***, 89 Wn.App. 184 (1997)

During defendant's testimony in which he denied using cocaine, state informs court it received a police report one day before confirming defendant was arrested for possession of cocaine, defense motion for suppression and mistrial denied; held: in spite of prosecutor's discovery violation, defendant's decision to testify was voluntary and intelligent, fact that he was unaware of the risk of impeachment does not invalidate the waiver of his Fifth Amendment privilege, *Dutil v. State*, 93 Wn.2d 84, 90 (1980); I.

***State v. Ross***, 89 Wn.App. 302 (1997)

Statement to **paramedic** in aid car is not privileged, as paramedic is not covered by RCW 5.60.060(4), *State v. Vietz*, 94 Wn.App. 870 (1999), *see:* RCW 10.58.010, and was not acting as agent of physician at time defendant made admission; I.

***Swidler & Berlin v. United States***, 141 L.Ed.2d 379 (1998)

**Attorney-client** privilege survives client's death; 6-3.

***United States v. Balsys***, 141 L.Ed.2d 575 (1998)

Fear of prosecution by a foreign government is not a basis to claim **Fifth Amendment** privilege against self-incrimination; 7-2.

***Mitchell v. United States***, 143 L.Ed.2d 424 (1999)

Defendant pleads guilty, at sentencing co-defendant testifies for government, defendant does not testify, court notes defendant's failure to testify as a factor persuading court to rely upon testimony of co-defendant; held: guilty plea is not a waiver of the right not to testify at sentencing, as under the Fifth Amendment, incrimination is not complete until sentence is imposed and judgment is final, thus court may not draw adverse inference from defendant's silence at sentencing; 5-4.

***State v. Martin***, 137 Wn.2d 774 (1999)

Confession to an **ordained minister** is privileged, RCW 5.60.060(3), where the clergyman considers the statement to be confession within the meaning of the member of the clergy's religion and the member of the clergy feels enjoined by religion to receive defendant's penitential communications, irrespective of whether or not the communicant is a member of the faith, *State v. Glenn*, 115 Wn.App. 540 (2003), *cf.: State v. Buss*, 76 Wn.App. 780, 784-87 (1995); presence of a third party (here, defendant's mother) during confession will defeat the privilege (unless the person present is another member of the clergy or the person's presence is necessary for the communication), remanded to trial court to determine which statements were made when defendant and pastor were alone; fact that pastor discussed portions of defendant's confession does not vitiate the privilege, as only the communicant can waive it; affirms *State v. Martin*, 91 Wn.App. 621 (1998); 9-0.

***State v. Vietz***, 94 Wn.App. 870 (1999)

Statements to a **licensed practical nurse** are not privileged under the nurse-patient privilege statute, RCW 5.62.020, as privilege statutes should be strictly construed, *State v. Ross*, 89 Wn.App. 302 (1997); II.

***Pers. Restraint of Ecklund***, 139 Wn.2d 166 (1999)

In a pre-SRA case, parole board may consider denial of guilt in denying parole, does not violate prisoner's privilege against **self-incrimination**, as criminal proceedings were terminated, *State v. King*, 130 Wn.2d 517, 529 (1996), distinguishing *State v. Garibay*, 67 Wn.App. 773 (1992); reverses *Pers. Restraint of Ecklund*, 91 Wn.App. 440 (1998); 8-1.

***State v. Denton***, 97 Wn.App. 267 (1999)

**Marital privilege** may be invoked where spouses were married in a church ceremony but never obtained a marriage license, absent a statute which declares a marriage invalid without a license; I.

***Ohio v. Reiner***, 149 L.Ed.2d 158 (2001)

Even though a witness denies all culpability, she may still have a valid **Fifth Amendment** privilege, *Hoffman v. United States*, 95 L.Ed. 1118 (1951), as one of the Fifth Amendment's "basic functions . . . is to protect *innocent* men . . . who otherwise might be ensnared by ambiguous circumstances," *Grunewald v. United States*, 1 L.Ed.2d 931 (1957), *see: State v. Hobble*, 126 Wn.2d 283, 290-1 (1995); 9-0.

***State v. Donahue***, 105 Wn.App. 67, 70-72 (2001)

Vehicular homicide defendant has collision in Washington but blood is drawn in Oregon hospital, physician-patient privilege is inapplicable in Oregon criminal proceedings; held: because Oregon was the state with the most significant relation to the communication, then Oregon's privilege law controls; II.

***State v. Side***, 105 Wn.App. 787 (2001)

At court-ordered anger management intake interview, defendant threatens judge; held: **mental health program confidentiality provisions**, RCW 71.05.390, do not create a testimonial privilege, *State v. Harris*, 51 Wn.App. 807, 813 (1988); statute provides for exception to report threats to law enforcement agencies; III.

***State v. Delgado***, 105 Wn.App. 839 (2001)

Defense calls severed co-defendant, who claims **Fifth Amendment** privilege, trial court does not require witness to claim privilege to each question, rather accepts witness's claim that he will refuse to answer all questions; held: while nonparty witness must normally claim privilege to each question, *State v. Lougin*, 50 Wn.App. 376, 381 (1988), *but see: State v. Levy*, 156 Wn.2d 709, 731-33 (2006), where trial court has sufficient knowledge of the case and anticipated testimony, it may conclude that the witness could legitimately refuse to answer all relevant questions; II.

***State v. Darden***, 145 Wn.2d 612 (2002)

In drug case, surveillance officer testifies to his height from street and location relative to transaction observed but court overrules defendant's objection to the specific location; held: there is no **surveillance location privilege**, court's restriction violated defendant's right to confront, *see: State v. Reed*, 101 Wn.App. 704 (2000); reverses *State v. Darden*, 103 Wn.App. 368 (2000); 9-0.

***State v. Crawford***, 147 Wn.2d 424 (2002), *rev'd, Crawford v. Washington,* 158 L.Ed.2d 177 (2004)

Where defendant invokes **marital testimonial privilege**, RCW 5.60.060(1), his spouse's hearsay statements may still be admitted against him, *State v. Burden*, 120 Wn.2d 371 (1992), *see: State v. Kosanke*, 23 Wn.2d 211 (1945), *but see: State v. Clark*, 26 Wn.2d 160, 168 (1946); 9-0.

***State v. Glenn***, 115 Wn.App. 540 (2003)

Defendant confesses to child molestation to church elder, who passes information on to pastor, then defendant attends meeting with church Council of Elders with both ordained and nonordained individuals, at their advice, defendant writes apology letters; held: for **clergy-penitent privilege** to apply, trial court must determine preliminarily, ER 104(a), if statements were made to a member of the clergy as a confession, RCW 5.60.060(3), *State v. Martin*, 91 Wn.App. 621, 632 (1998), *aff'd,* 137 Wn.2d 774 (1999); where evidence shows that elder had performed a marriage ceremony, trial court's determination that he is clergy is supported by a preponderance; if religious organization considers statement to be a confession, then trial court can reasonably so find; even if defendant knows that church reports child abuse, if statement was given as a confession, it is inadmissible; if defendant authorized his attorney to depose the elder

in presence of prosecutor, then he waived any privilege, *Martin v. Shaen*, 22 Wn.2d 505, 513 (1945); letters which defendant wrote and sent were not confessions, thus privilege does not attach, *Dietz v. Doe*, 131 Wn.2d 835, 844 (1997); II.

***McKune v. Lili***, 153 L.Ed.2d 47 (2002)

Prison sex treatment program, which obliges prisoners to accept responsibility for the crime for which they were sentenced and to complete a sexual history form detailing prior uncharged criminal offenses on pain of losing privileges and being transferred to a maximum security facility but does not extend sentence or deny good time does not violate **Fifth Amendment**, *cf.: State v. Warner*, 125 Wn.2d 876 (1995), *State v. King*, 130 Wn.2d 517, 523-29 (1996), *but see: State v. Powell*, 193 Wn.App. 112 (2016); 5-4.

***State v. Wheat***, 118 Wn.App. 435 (2003)

Drug court defendant's case is dismissed, trial court is informed that defendant had flunked a urine test, sets aside dismissal and convicts; held: confidentiality statutes, RCW 70.96A.150, 42 U.S.C. § 290dd, and regulations, 42 CF.R. § 2.35, preclude admissibility of treatment information absent a waiver; here, defendant waived for period of drug court involvement, upon dismissal that waiver expired, thus treatment records were inadmissible, dismissal must be reinstated; II.

***State v. Godsey***, 131 Wn.App. 278, 284-86 (2006)

Defendant, under arrest, is taken to hospital where medical personnel ask about drug use, defendant acknowledges using drugs; held: response to medical personnel was within **physician-patient privilege**, law officers present "were effectively hospital agents," admission of those statements to support possession of drug paraphernalia charge was error, *State v. Gibson*, 3 Wn.App. 596, 598-600 (1970); III.

***State v. Shuffelen***, 150 Wn.App. 244, 257-59 (2009)

In violation of no contact order case, trial court upholds wife's claim of **marital privilege** against her husband; held: spousal incompetency rule does not apply to a criminal action for a crime committed by one spouse against the other, RCW 5.60.060(1), *State v. Thornton*, 119 Wn.2d 578 (1992), no contact order violation is a crime committed by one spouse against another even if protected party consented to the contact; I.

***State v. Epefanio***, 156 Wn.App. 378, 384-89 (2010)

Defendant testifies in defense case-in-chief, on cross court sustains objection to question as beyond the scope, permits prosecutor to call defendant in rebuttal; held: waiver of Fifth Amendment privilege extends only to cross-examination, *see: State v. Robideau*, 70 Wn.2d 994, 1001 (1967), *State v. Hart*, 180Wn.App. 297 (2014), error for court to allow state to call defendant, harmless here; III.

***State v. Hyder***, 159 Wn.App. 234, 245-53 (2011)

An admission to a sex offense treatment provider is admissible at trial, mandatory reporting statute, RCW 26.44.030, trumps client-psychologist privilege statute, RCW 18.83.110;

privileges are disfavored in criminal cases, particularly in child sex abuse cases, *State v. Warner,* 125 Wn.2d 876, 892-93 n.8 (1995); court should conduct an *in camera* review of complainant's CPS records before disclosing, *Pennsylvania v. Ritchie,* 480 U.S. 39, 94 L.Ed.2d 40 (1987), but harmless where defense agrees that the parties may read the records without court view; obtaining a search warrant for counseling records without notice is not an abuse of process, Uniform Health Care Information Act, ch. 70.02, RCW, is not the exclusive means of obtaining medical records; II.

***State v. Hart***, 180 Wn.App. 297 (2014)

Defendant, charged with assault on police and harassment for sending threatening texts, testifies on direct about the assault but says nothing about texts, state is permitted to cross-examine about texts over objection that the cross was beyond the scope of direct, ER 611(b), does not object on **Fifth Amendment** grounds; held: allowing cross-examination on a joined count about which defendant does not testify on direct violates defendant's right to remain silent, *see: State v. Epefanio,* 156 Wn.App. 378, 388 (2010); here, text messages were not relevant to the assault on the police; II.

***Kansas v. Cheever,*** 571 U.S. 87, 187 L.Ed.2d 519 (2013)

Pursuant to statute court orders psychiatric evaluation, defense raises voluntary intoxication defense and calls expert, state calls court-ordered expert to rebut; held: where defendant puts his mental state at issue state may call a court-ordered expert to rebut which does not violated defendant's Fifth Amendment privilege, *Buchanan v. Kentucky,* 483 U.S. 402, 423–424, 97 L.Ed.2d 336 (1987); 9-0.

***State v. Chenoweth***, 188 Wn.App. 521, 525-31 (2015)

**Spousal privilege** exception, RCW 5.60.060(1) (2012), permitting testimony in proceedings involving a crime against "any child" of either spouse is not limited to minor children; II.

***State v. Powell***, 193 Wn.App. 112 (2016)

A condition of sentence requires defendant to enter sexual deviancy treatment, provider demands defendant's sexual history, defendant refuses claiming **Fifth Amendment** privilege, court sanctions with jail; held: penalty imposed in an effort to compel disclosure of incriminating information is a violation of defendant's Fifth Amendment rights where parties do not dispute that the disclosure would incriminate defendant, *see: McKune v. Lili,* 153 L.Ed.2d 47 (2002)**,** *: State v. Warner,* 125 Wn.2d 876 (1995), *State v. King,* 130 Wn.2d 517, 523-29 (1996); II.

***State v. Martinez***, 2 Wn.App.2d 55, 72-75 (2018)

Teenage child sex victim sometimes babysat defendant and his wife's child, sometimes stayed overnight, trial court admits defendant's statement to his wife under guardian exception to **spousal privilege** statute, RCW 5.60.060(1); held: "guardian" is liberally construed under the marital privilege statute, *State v. Bouchard,* 31 Wn.App. 381 (1982), *overruled, on other grounds, State v. Sutherby,* 165 Wn.2d 870, 886 n.7 (2009), *State v. Waleczek,* 90 Wn.2d 746 (1978), *State v. Wood,* 52 Wn. 159 (1988), *State v. Modest,* 88 Wn.App. 239, 246-68 (1997),

even with older children or defendants who act as guardians for a short period of time, *State v. Waleczek*, 90 Wn.2d 746, 749 (1978); I.

***State v. Rogers***, 3 Wn.App.2d 1 (2018)

Defendant sends letter of apology and offer to pay her to drop charges to complainant's daughter who gives letter to complainant who gives the letter to defense counsel and tells prosecutor that she did so, counsel is then removed from case, court serves that lawyer with a subpoena *duces tecum* to produce the letter, lawyer moves to quash arguing that he learned of the letter from his client and thus the letter is privileged and that it is a confidence or secret, RPC 1.6, refuses to comply with subpoena, is held in contempt; held: lawyer did not obtain the letter as a result of direct or confidential communication with his client, even if client had some discussion with counsel about the letter it is not privileged, is not a confidence and even if it is a secret RPC 1.6(b) authorizes disclosure pursuant to a court order, distinguishing *State ex. rel. Sowers v. Olwell*, 64 Wn.2d 828 (1964); because the claim of privilege was made in good faith contempt is vacated, *Seventh Elect Church in Israel v. Roger*, 102 Wn.2d 527 (1984), *Dike v. Dike*, 75 Wn.2d 1, 448 (1968); I.

***State v. Roach***, 18 Wn.App.2d 98 (2021)

Husband and wife are co-defendants in severed trial, husband declines to invoke **marital testimonial privilege**, RCW 5.60.060(1) (2020), then, immediately before trial husband seeks to reassert the privilege, trial court allows wife to testify based upon state's detrimental reliance, having offered wife a plea bargain; held: the purpose of the privilege is marital harmony, nothing in the record indicates that there was a change in the spouses' marital harmony, nothing husband argues suggests that the reason for seeking to revoke the waiver had anything to do with the marital relationship, wife testified that they were separated, thus not allowing revocation of the waiver was not an abuse of discretion; I.

***State v. Meza***, 22 Wn.App.2d 514, 527-28 (2022)

A witness who has pleaded guilty and been sentenced generally gives up his or her privilege against self-incrimination, however a pending timely personal restraint petition that objectively gives rise to a good faith argument for postconviction relief extends the Fifth Amendment privilege; I.

# PROBATION AND PAROLE/COMMUNITY CUSTODY

***State v. Cyganowski***, 21 Wn.App. 119 (1978)

No right to have trial before revocation hearing; II.

***State v. Hultman***, 92 Wn.2d 736 (1979)

If petition for revocation is filed within probation period, revocation hearing may be beyond probation period if it is pursued diligently, *see: State v. Tucker*, 171 Wn.2d 50 (2011); no credit for probation time is permitted; for SRA application, *see*: *State v. Johnson*, 54 Wn.App. 489 (1989), *State v. Beer*, 93 Wn.App. 539, 541-45 (1999); 5-4.

***State v. Dupard***, 93 Wn.2d 268 (1980)

Parole Board finding of not guilty does not bar prosecution in court, *see: State v. Vasquez*, 148 Wn.2d 303 (2002).

***State v. Lawrence***, 28 Wn.App. 435 (1981)

Court cannot consider unproved allegation at revocation hearing and must permit defendant to present evidence at both fact-finding and disposition stages, *see: State v. Dahl*, 139 Wn.2d 678 (1999); I.

***State v. Murray***, 28 Wn.App. 897 (1981)

Where probation is revoked, court must enter written findings or an oral opinion indicating the evidence relied upon as well as the reasons for the revocation, *but see: State v. Dahl*, 139 Wn.2d 678 (1999); II.

***State v. Campbell***, 95 Wn.2d 954 (1981)

Defendant, pending revocation hearing, is committed for competency determination, during which probation appears to expire; state obtains extension of probation *ex parte*; held: probation period is tolled pending competency determination, thus it did not have to be extended; absent exigent circumstances, probationer must be given notice of a proposed extension of probation and of his/her right to a hearing with counsel; 9-0.

***Avlonitis v. Seattle District Court***, 97 Wn.2d 131 (1982)

District Court's jurisdiction is limited to the term of sentence actually imposed; where court sentences defendant to 30 days suspended, court cannot revoke probation after 30 days; district court can defer for one year and revoke and impose a jail term within that year; municipal courts may not impose probation for more than six months; overridden, RCW 3.66; *see*: *State v. Alberts*, 51 Wn.App. 450 (1988), *State v. Holmberg*, 53 Wn.App. 609 (1989); 8-0.

***In re Phelan***, 97 Wn.2d 590 (1982)

Where defendant is sentenced to prison, s/he is entitled to credit for time served against maximum sentence for all time served prior to imposition of sentence, including pre-trial detention, presentence detention and time served in jail as a condition of probation, *State v. Poston*, 117 Wn.App. 925 (2003), *see: Pers. Restraint of King*, 146 Wn.2d 658 (2002); overrules in part

*State v. Wills*, 68 Wn.2d 903 (1966) and *State v. Monday*, 12 Wn.App. 429, *aff'd on other grounds*, 85 Wn.2d 906 (1975); court should specify on judgment and sentence amount of credit to which defendant is entitled, *but see: Postsentence Review of Combs*, 176 Wn.App. 112 (2013); defendant is not entitled to credit against maximum sentence for nondetention probation time; parole board may not rewrite a sentence because it believes it was erroneous; 9-0.

***State v. Hall***, 35 Wn.App. 302 (1983)

Three-hour deferred sentence for robbery 2° conviction is invalid, as too short to permit rehabilitation; when probation is granted court must order defendant to report to probation officer, RCW 9.95.210; I.

***Bearden v. Georgia***, 76 L.Ed.2d 221 (1983)

In revocation proceedings for failure to pay fine or restitution, court must inquire into reasons for failure to pay and, if probationer made bona fide efforts to acquire resources to pay, court must consider alternative measures of punishment other than imprisonment; 9-0.

***State v. Mahoney***, 36 Wn.App. 499 (1984)

In 1976, defendant is sentenced to three years probation and appeals; 1978, conviction is affirmed; 1981, state files petition to revoke probation, trial court determines it lost jurisdiction in 1979; held: an appeal tolls the commencement of a probationary period until the mandate is issued, thus trial court had jurisdiction to revoke, *State v. Robinson*, 142 Wn.App. 649 (2008); II.

***State v. Gann***, 36 Wn.App. 516 (1984)

A defendant who has been committed as a sexual psychopath, RCW 71.06, pursuant to a petition, is entitled to due process protections, including counsel, in an extension of probation proceeding, *distinguishing* *State v. Campbell*, 95 Wn.2d 954 (1981); trial court maintains jurisdiction to civilly commit even after criminal jurisdiction lapses, RCW 71.06.030, 71.06.091; I.

***State v. Campbell***, 103 Wn.2d 1 (1984)

Parole officers may search a parolee's vehicle without a warrant to the extent necessitated by the legitimate demands of the parole process, *see: State v. Rainford*, 86 Wn.App. 431 (1997), *PA. Bd. Of Parole v. Scott*, 141 L.Ed.2d 344 (1998); 9-0.

***In Re Boone***, 103 Wn.2d 224 (1984)

Court cannot consider secret probation report, as defendant is entitled to notice and confrontation; court must enter findings of the evidence relied upon and the reasons for its decision; 7-0.

***State v. Nelson***, 103 Wn.2d 760 (1985)

In probation revocation hearing, probationer's right to confront and cross-examine is balanced against any good cause for not allowing confrontation, which may include official reports, probation reports, or other clearly reliable hearsay, *State v. Badger*, 64 Wn.App. 904 (1992), *State v. Anderson*, 88 Wn.App. 541 (1997), *see: State v. Riddell*, 75 Wn.2d 85 (1968), *State v. S.S.*, 67 Wn.App. 800 (1992), *State v. Dahl*, 139 Wn.2d 678 (1999), *State v. Abd-*

*Rahmaan*, 154 Wn.2d 280 (2005), defense, at revocation hearing, does not object to hearsay, defense may not later claim a due process violation; failure of trial court to enter written findings is not error where trial court states findings on the record; 9-0.

***State v. Davis***, 43 Wn.App. 832 (1986)

Court reinstates defendant's probation believing he was to be extradited to another state, which subsequently declined to extradite, whereupon court revokes; held: extradition was an implied condition of probation, the nonoccurrence of which constitutes grounds for revocation; III.

***Kelly v. Robinson***, 93 L.Ed.2d 216 (1986)

Conditions imposed as part of a criminal sentence, including restitution, are not dischargeable in bankruptcy; 7-2; *see*: *State v. Eyre*, 39 Wn.App. 141 (1984).

***State v. Lampman***, 45 Wn.App. 228 (1986)

Exclusionary rule applies in probation revocation proceedings, CONST. Art. 1, § 7; probationer may be searched without a warrant where the police or probation officer has a well-founded suspicion that a probation violation has occurred, *but see: State v. Winterstein*, 168 Wn.2d 620 (2010), *cf.: Samson v. California*, 165 L.Ed.2d 250 (2006); flight from pursuing probation officer plus P.O.'s knowledge of defendant's drug problems equals a well-founded suspicion to search, *but see: State v. Proctor*, 16 Wn.App. 228 (1986); *see*: *Griffin v. Wisconsin*, 97 L.Ed.2d 709 (1987), *PA. Bd. Of Parole v. Scott*, 141 L.Ed.2d 344 (1998), *United States v. Knights*, 151 L.Ed.2d 497 (2001); II.

***State v. Johnson***, 105 Wn.2d 92 (1986)

Where probation is a condition of defendant's release pending appeal, trial court may hold a revocation hearing pending appeal and, if defendant is revoked, defendant will remain in the county jail until the outcome of appeal, RCW 9.95.062, and will not be transported to prison, *In re Norris*, 26 Wash. 323 (1901); where trial court does not impose conditions of release pending appeal, the court is without power to order defendant to appear at a revocation hearing, although he "still is subject to the trial court's jurisdiction to revoke," (?); 9-0.

***State v. Conlin***, 49 Wn.App. 593 (1987)

Probationer has a procedural, not a constitutional, right to counsel at revocation hearing, CrR 7.5(b), thus need not knowingly, voluntarily and intelligently waive counsel; trial court should hold a brief colloquy regarding right to counsel, risks of self-representation and penalty; II.

***Griffin v. Wisconsin***, 97 L.Ed.2d 709 (1987)

Where probationer, by statute, is in legal custody of state, then probation officer may search probationer's home without a warrant on "reasonable grounds," less than probable cause, *cf.: State v. Winterstein*, 168 Wn.2d 620 (2010); tip from police that there "were or might be," guns in probationer's home establishes reasonable grounds; *see also: PA. Bd. Of Parole v. Scott*, 141 L.Ed.2d 344 (1998), *United States v. Knights*, 151 L.Ed.2d 497 (2001); 5-4.

***State v. Patterson***, 51 Wn.App. 202 (1988)

Warrantless search of a parolee's vehicle, while the parolee is in custody, by a parole officer acting in a supervisory capacity (although assisting police in their investigative capacity) is valid upon a reasonable suspicion, *see:* *Samson v. California*, 165 L.Ed.2d 250 (2006); III.

***State v. Alberts***, 51 Wn.App. 450 (1988)

Defendant sentenced to a one-year deferred sentence; one year plus two weeks later, state files notice of revocation, court revokes thereafter; held: trial court maintains jurisdiction to revoke at any time prior to entry of an order terminating probation irrespective of the period of probation set forth in the original sentence, RCW 9.95.230, *State v. Hoffman*, 67 Wn.App. 132 (1992), legislatively overruling *State v. Mortrud*, 89 Wn.2d 720 (1978); *see also*: RCW 9.95.210, *State v. Ludwig*, 92 Wn.2d 109 (1979), *State v. Robinson*, 142 Wn.App. 649 (2008); I.

***In re George***, 52 Wn.App. 135 (1988)

At revocation for pre-SRA conviction, trial court may consider uncharged crimes in determining minimum term; insufficient rehabilitation is grounds for exceptional sentence for pre-SRA offense; I.

***State v. Holmberg***, 53 Wn.App. 609 (1989)

Trial court may not revoke probation for misconduct that occurred after the expiration of the probation period although court has jurisdiction to entertain petitions to revoke until an order terminating probation is granted, RCW 9.95.230; *accord:* *State v. Hoffman*, 67 Wn.App. 132 (1992); *see:* *State v. Ludwig*, 92 Wn.2d 109 (1979), *State v. Robinson*, 142 Wn.App. 649 (2008); II.

***Seattle v. Lea***, 56 Wn.App. 859 (1990)

An arrest by itself is not grounds for revocation of probation; probationer must be given the opportunity to contest the allegations of the underlying charge; I.

***State v. Bower***, 64 Wn.App. 227 (1992)

Defendant's burden to show inability to pay costs and V.P.A. due to poverty, RCW 9.94A.200(2), is constitutional, *Bearden v. Georgia*, 76 L.Ed.2d 221 (1983), *State v. Sleater*, 194 Wn.App. 470, 474 (2016); a defendant who claims indigency as a defense to incarceration for failure to pay must show income, expenses, efforts to find employment, efforts to acquire resources to pay court-ordered obligations; plea of poverty alone is insufficient, *see:* *Smith v. District Court*, 147 Wn.2d 981 (2002); *accord:* *State v. Gropper*, 76 Wn.App. 882 (1995); I.

***State v. Badger***, 64 Wn.App. 904 (1992)

Probationer is ordered to have no unsupervised contact with minors; at revocation hearing, state offers report of probation officer that P.O. spoke with a minor who said defendant had contact with her, defendant cross-examines P.O., objects to hearsay of minor; held: good cause for admitting hearsay at revocation hearing includes difficulty and expense of procuring witnesses in combination with demonstrably or clearly reliable evidence; hearsay evidence from state probation reports is sufficiently reliable, *United States v. Miller*, 514 F.2d 41, 42 (9th Cir.

1975), *State v. Nelson*, 103 Wn.2d 760, 765 (1985), *State v. Anderson*, 88 Wn.App. 541 (1997), *Gagnon v. Scarpelli*, 36 L.Ed.2d 656 (1973), *Morrissey v. Brewer*, 33 L.Ed.2d 484 (1972), *see: State v. S.S.*, 67 Wn.App. 800 (1992), *State v. Abd-Rahmaan*, 154 Wn.2d 280 (2005), *cf.: State v. Dahl*, 139 Wn.2d 678 (1999), *State v. Riddell*, 75 Wn.2d 85 (1968); III.

***State v. Hoffman***, 67 Wn.App. 132 (1992)

Court retains jurisdiction to revoke or modify a pre-SRA probation until an express order terminating probation is entered, RCW 9.95.230, *State v. Holmberg*, 53 Wn.App. 609, 611 (1989), *State v. Alberts*, 51 Wn.App. 450 (1988), *see: State v. Robinson*, 142 Wn.App. 649 (2008); III.

***State v. Peterson***, 69 Wn.App. 143 (1993)

Sex offender is sentenced to prison followed by community supervision, to include crime-related treatment; upon release, defendant is sent to only treatment provider in the area, which rejects defendant as not amenable to treatment, court imposes 60 days for noncompliance; held: RCW 9.94A.120(5) permits a sentence condition of "available outpatient treatment," since counselor determined defendant was not amenable, treatment was not available to defendant; where corrections officer directs defendant to a particular program which will not accept offender, no volitional act of noncompliance occurs, thus no failure to comply was proved; III.

***State v. Parsley***, 73 Wn.App. 666 (1994)

In pre-SRA case, probation period cannot exceed maximum term of sentence, former RCW 9.95.210, *distinguishing Pitts v. Rhay*, 64 Wn.2d 481 (1964), *State v. Alberts*, 51 Wn.App. 450 (1988); thus, where a deferred sentence is imposed and subsequently revoked, court cannot then stack a suspended sentence such that total period of probation exceeds maximum sentence; I.

***State v. Kessler***, 75 Wn.App. 634, 636-41 (1994)

In a pre-prosecution diversion supervised by the prosecutor, court's role in reviewing prosecutor's decision to terminate and prosecute is to determine whether state has proved a breach of the agreement by a preponderance, and whether the decision by the prosecutor to terminate was reasonable, *State v. Marino*, 100 Wn.2d 719, 723-7 (1984), *State v. Varnell*, 137 Wn.App. 925 (2007). *State v. Harrison*, ___ Wn.App.2d ___, 2022WL10225188 (2022), deliberately choosing to make treatment payments a low priority is a willful violation, as distinguished from hardship and inability; violation of no-contact provision is not a breach where there were previous contacts which had been approved by the treatment provider, a subsequent deceptive, secret contact was a breach of the treatment regimen; I.

***State v. Gropper***, 76 Wn.App. 882 (1995)

Defendant, following sentencing, signs "Conditions of Supervision" form requiring him to notify Department of Corrections (DOC) prior to address change, pay legal financial obligations, report to DOC; defendant moves for more than a week, fails to report, fails to pay; held: court need not consider willfulness before incarcerating for violation of nonfinancial condition, RCW 9.94A.200(2)(c); where state proves by preponderance defendant has not paid a financial obligation, burden shifts to defendant to prove a "real effort" to pay, *State v. Bower*,

64 Wn.App. 227, 231 (1992), counsel's statement that defendant has not been employed is insufficient to establish a nonwillful inability to pay, thus trial court need not consider alternatives to incarceration, *see: Smith v. District Court*, 147 Wn.2d 981 (2002); I.

***State v. Massey***, 81 Wn.App. 198 (1996)

Probation condition that defendant submit to searches by probation officer is lawful, although searches themselves must be based upon a well-founded suspicion, *State v. Campbell*, 103 Wn.2d 1, 22 (1984), *State v. Lucas*, 56 Wn.App. 236, 243-5 (1989), *State v. Jardinez*, 184 Wn.App. 518 (2014), ), *State v. Livingston*, 197 Wn.App. 590 (2017), *see: Samson v. California*, 165 L.Ed.2d 250 (2006), *see also: State v. Fisher*, 145 Wn.2d 209 (2001), *but see: PA. Bd. Of Parole v. Scott*, 141 L.Ed.2d 344 (1998), *State v. Winterstein*, 168 Wn.2d 620 (2010); probationer can't appeal a condition of probation as unconstitutional until harmfully affected, *State v. Langland*, 42 Wn.App. 287, 292 (1985), *State v. Phillips*, 65 Wn.App. 239, 244 (1992), *State v. J.B.*, 102 Wn.App. 583 (2000), *State v. Autrey*, 136 Wn.App. 460, 470-71 (2006), *State v. Zimmer*, 146 Wn.App. 405, 414-17 (2008), *State v. Cates*, 183 Wn.2d 531 (2015), *but see: State v. Armstrong*, 91 Wn.App. 635 (1998), *see: State v. Jones*, 118 Wn.App. 199 (2003), *State v. Motter*, 139 Wn.App. 797 (2007), *but see: State v. Warnock*, 174 Wn.App. 608, 611 ¶ 8 (2013), *State v. T.J.S.-M.*, 193 Wn.2d 450 441 P.3d 1181 (2019), *cf.: State v. Bahl*, 164 Wn.2d 739 (2008), *State v. Valencia*, 169 Wn.2d 782, 786-91 (2010), *State v. Irwin*, 191 Wn.App. 644 (2015), *State v. Peters*, 10 Wn.App.2d 574 (2019); I.

***State v. Monson***, 84 Wn.App. 703, 712 (1997)

Probation period is tolled where defendant fails to report to probation officer and leaves jurisdiction without permission, *Gillespie v. State*, 17 Wn.App. 363, 366 (1977), *Spokane v. Marquette*, 146 Wn.2d 124 (2002), *State v. Robinson*, 142 Wn.App. 649 (2008), *State v. D.D.-H.*, 196 Wn.App. 948 (2016); probation revocation hearing may be heard after trial on criminal charges, apparently beyond probation jurisdiction period, *State v. Valentine*, 20 Wn.App. 511, 514-5 (1978); III.

***State v. Prado***, 86 Wn.App. 573 (1997)

Defendant, on SRA community supervision with condition of no new crimes, is charged with a felony and admits to the community supervision violation, which is later stricken; held: a community supervision violation is not a criminal prosecution for double jeopardy purposes, *State v. Grant*, 83 Wn.App. 98, 111 (1996), distinguishing *United States v. Dixon*, 125 L.Ed.2d 556 (1993), *see: State v. Dupard*, 93 Wn.2d 268, 276 (1980), *Standlee v. Smith*, 83 Wn.2d 405, 407 (1974), *State v. Collins*, 121 Wn.App. 16 (2004); I.

***State v. Guy***, 87 Wn.App. 238 (1997), *aff'd*, 136 Wn.2d 453 (1998)

Defendant is sentenced to partial confinement to report to a work crew, fails to report, court "converts" his partial confinement to total confinement, defendant is later prosecuted for escape; held: double jeopardy is not implicated as the converted sentence was not punishment for the later events but was punishment owed for the earlier crime, *see: Standlee v. Smith*, 83 Wn.App. 405, 407 (1974); II.

***State v. Anderson***, 88 Wn.App. 541 (1997)

Urinalysis lab report showing cocaine and letter from lab stating that none of the prescription drugs defendant claimed to have used would test positive for cocaine are admissible at a revocation hearing as reliable hearsay, where trial court determines that expense of live testimony is outweighed by neutral role of laboratory, *State v. Nelson*, 103 Wn.2d 760, 763-5 (1985), *State v. Badger*, 64 Wn.App. 904, 907-8 (1992); II.

***PA. Bd. Of Parole v. Scott***, 141 L.Ed.2d 344 (1998)

Federal exclusionary rule does not apply at parole revocation hearings, only applies at criminal trials, *United States v. Janis*, 49 L.Ed.2d 1046 (1976), *United States v. Calandra*, 38 L.Ed.2d 561 (1974), *INS v. Lopez-Mendoza*, 82 L.Ed.2d 778 (1984), *cf.: State v. Proctor*, 16 Wn.App. 865 (1977), *State v. Campbell*, 103 Wn.2d 1 (1984), *State v. Lampman*, 45 Wn.App. 228 (1986); 5-4.

***State v. Armstrong***, 91 Wn.App. 635 (1998)

Defendant does not waive right to appeal conditions of community placement by failing to object in trial court, *State v. Paine*, 69 Wn.App. 873, 884 (1993), *State v. Moen*, 129 Wn.2d 535, 547 (1996), *State v. Bahl*, 164 Wn.2d 739 (2008), *but see: State v. Massey*, 81 Wn.App. 198 (1996), *State v. Langland*, 42 Wn.App. 287, 292 (1985), *State v. Phillips*, 65 Wn.App. 239, 244 (1992), *State v. Autrey*, 136 Wn.App. 460, 470-71 (2006), *State v. Casimiro*, 8 Wn.App.2d (2019), *cf.: State v. Peters*, 10 Wn.App.2d 574 (2019); I.

***Pers. Restraint of Ecklund,*** 139 Wn.2d 166 (1999)

In a pre-SRA case, parole board may consider denial of guilt in denying parole, *Pers. Restraint of Dyer*, 175 Wn.2d 186 (2012), does not violate prisoner's privilege against self-incrimination, as criminal proceedings were terminated, *State v. King*, 130 Wn.2d 517, 529 (1996), distinguishing *State v. Garibay*, 67 Wn.App. 773 (1992); reverses *Pers. Restraint of Ecklund*, 91 Wn.App. 440 (1998); 8-1.

***State v. Dahl***, 139 Wn.2d 678 (1999)

Notice to defendant that alleges failure to make progress in sexual deviancy treatment plus defendant receiving violation report detailing incidents of indecent exposure is sufficient to meet due process notice requirement; evidence of exposure reported to police who report it to CCO who reports it to treatment provider who includes incident in a treatment report considered by the court is insufficient to establish good cause for admissibility of hearsay at revocation hearing, absent proof of difficulty or expense in obtaining victims' testimony or sworn affidavits, *State v. Nelson*, 103 Wn.2d 760, 765 (1985), *State v. Abd-Rahmaan*, 154 Wn.2d 280 (2005), *cf.: State v. Badger*, 64 Wn.App. 904 (1992), *Pers. Restraint of Price*, 157 Wn.App. 889 (2010); trial courts are encouraged but not required to enter written findings at revocation, *see: State v. Lawrence*, 28 Wn.App. 435 (1981), *State v. Murray*, 28 Wn.App. 897 (1981); 6-3.

***Pers. Restraint of Addleman***, 139 Wn.2d 751 (2000)

ISRB may not deny parole because a prisoner litigates and grieves; 9-0.

***State v. Williams***, 97 Wn.App. 257, 262-63 (1999)

Ordering an 18-year old to abstain from alcohol and drugs is merely an extension of the requirement that a probationer commit no crimes, even if alcohol and drugs were not directly related to his crimes, *see:* *State v. Summers*, 60 Wn.2d 702, 707 (1962); where probation officer sets treatment conditions not stated at sentencing, providing probationer the opportunity to object, and court later ratifies the terms, there is no due process violation or improper delegation of judicial function, *see:* *State v. Wilkerson*, 107 Wn.App. 748 (2001), *but see:* CrRLJ 7.2(a), 7.3, *cf.:* *State v. Sansome*, 127 Wn.App. 630, 641-43 (2005); I.

***State v. Harris***, 97 Wn.App. 647 (1999)

Deaf probationer is not entitled to an interpreter at meetings with his probation counselor where he can communicate in writing; RCW 2.42.120(3), which requires interpreters at court ordered treatment programs, unconstitutionally violates the one-subject rule, CONST. Art. II, § 19; I.

***State v. Johnson***, 97 Wn.App. 679 (1999)

When defendant is sentenced under first-time offender option, RCW 9.94A.030(22), he may be ordered to enter treatment even if it is not related to the offense; II.

***State v. Kistner***, 105 Wn.App. 967 (2001)

Department of Corrections administratively sanctions, RCW 9.94A.205(2)(a), sex offender on SSOSA suspended sentence, RCW 9.94A.505, for violating condition, later trial court revokes sentence based upon same violation, RCW 9.94A.120(8)(a)(vi); held: trial court has statutory authority to revoke even after administrative sanction is imposed; I.

***Pers. Restraint of Capello***, 106 Wn.App. 576 (2001)

At sentencing, trial court did not impose "special condition" of community placement that defendant get prior approval of residence from Community Corrections Officer, DOC refuses to release defendant without pre-approved address; held: because statute provided that sentencing court could order special conditions, former RCW 9.94A.120(8)(b), DOC cannot impose those conditions where court did not; I.

***State v. Wilkerson***, 107 Wn.App. 748 (2001)

District court may, at time of sentencing, delegate to probation department authority to set evaluation and treatment conditions so long as probationer has a right to a hearing if he disagrees, court need not state all conditions at time of sentencing, *State v. Williams*, 97 Wn.App. 257, 262-63 (1999), *see:* *State v. Sansome*, 127 Wn.App. 630, 641-43 (2005); sentencing court may impose new conditions even where defendant has not violated a condition originally imposed; I.

***United States v. Knights***, 151 L.Ed.2d 497 (2001)

Condition of probation obliges defendant to submit to searches without a warrant or reasonable cause, police search defendant's home without a warrant with reasonable cause; held: probationer may be searched without a warrant on reasonable cause, *Griffin v. Wisconsin*, 97 L.Ed.2d 709 (1987), *State v. Lampman*, 45 Wn.App. 228 (1986), *cf.:* *Samson v. California*, 165

L.Ed.2d 250 (2006), *but see: State v. Winterstein*, 168 Wn.2d 620 (2010), search need not relate to a "probationary purpose;" 9-0.

***Spokane v. Marquette***, 146 Wn.2d 124 (2002)

Defendant is sentenced to two years probation on gross misdemeanor, former RCW 3.66.068, during which warrant is issued, more than two years after sentencing probation is revoked; held: probationary period is tolled while a probationer is sought on a warrant, *State v. V.J.*, 132 Wn.App. 380 (2006), *State v. Robinson*, 142 Wn.App. 649 (2008), *State v. D.D.-H.*, 196 Wn.App. 948 (2016), *see: State v. Campbell*, 95 Wn.2d 954, 957 (1981), *State v. Haugen*, 22 Wn.App. 785 (1979), *Gillespie v. State*, 17 Wn.App. 363 (1977), *State v. D.D.-H.*,196 Wn.App. 948 (2016); reverses *Spokane v. Marquette*, 103 Wn.App. 792 (2000); 6-3.

***State v. Poston***, 117 Wn.App. 925 (2003)

A revoked drug court offender is entitled to credit for time served in jail and electronic home detention pursuant to the drug court's order, RCW 9.94A.505(6); II.

***State v. Robinson***, 120 Wn.App. 294 (2004)

Failure to object at sentence modification hearing to hearsay and lack of notice waives appellate review; I.

***State v. Collins***, 121 Wn.App. 16 (2004)

Defendant, while on community custody, commits new crimes, DOC sanctions defendant to jail, RCW 9.94A.737, after which prosecutor moves to modify sentence, trial court imposes more jail time, RCW 9.94A.634(3)(c) based upon same violations; held: neither double jeopardy clause nor collateral estoppel preclude trial court from imposing a sanction for acts already punished by DOC, *see: State v. Prado*, 86 Wn.App. 573 (1997), *In re Pers. Restraint of Mayner*, 107 Wn.2d 512, 521 (1986), *Standlee v. Smith*, 83 Wn.2d 405, 407 (1974); II.

***State v. Cassill-Skilton***, 122 Wn.App. 652 (2004)

Trial court terminates defendant from drug court without a record that she had notice of violations and a hearing to resolve disputed facts and findings; held: to terminate drug court, RCW 2.28.170, defendant must be given notice of allegations, a hearing at which she may contest alleged violations and trial court must state evidence it relied upon, *State v. Harrison*, ___ Wn.App.2d ___, 2022WL10225188 (2022), *see: State v. Marino*, 100 Wn.2d 719 (1984), *State v. Varnell*, 137 Wn.App. 925 (2007); II.

***State v. Abd-Rahmaan***, 154 Wn.2d 280 (2005)

At SRA sentence modification hearing, right to confront witnesses exists unless good cause as to both reliability and necessity for hearsay is found and articulated by the trial court, *State v. Dahl*, 139 Wn.2d 678 (1999), *see: Pers. Restraint of Price*, 157 Wn.App. 889 (2010) ; *Crawford v. Washington*, 158 L.Ed.2d 177 (2004), does not apply to sentence modification hearings; reverses *State v. Abd-Rahmaan*, 120 Wn.App. 284 (2004); 9-0.

***State v. Canfield***, 154 Wn.2d 698 (2005)

At a SSOSA revocation hearing, defendant has a limited right to **allocution** but denial of that right must be raised at the revocation hearing to preserve the issue for appeal, reversing *State v. Canfield*, 120 Wn.App. 729 (2004); 9-0.

***State v. Sansone***, 127 Wn.App. 630 (2005)

Community custody condition that defendant may not possess pornography as defined by CCO is both vague and an improper delegation, *State v. Alcocer,* 2 Wn.App.2d 918 (2018), *State v. Padilla,* 190 Wn.2d 672 (2018), *see: State v. Williams*, 97 Wn.App. 257, 262-63 (1999), *State v. Wilkerson*, 107 Wn.App. 748 (2001), *State v. Bahl*, 164 Wn.2d 739 (2008), *State v. Johnson,* 4 Wn.App.2d 352 (2018), *but see: State v. Nguyen,* 191 Wn.2d 671 (2018), *State v. Smith*, 130 Wn.App. 721 (2005); I.

***State v. Smith***, 130 Wn.App. 721, 724-28 (2005)

Following sex offense conviction, defendant is ordered by DOC not to "possess…any pornography, catalogs or material which can be read or viewed for sexual gratification" and which "involved children," defendant is sanctioned for possessing Brooke Shield film *Blue Lagoon;* held: because an ordinary person would know, without having to consult a specialist, that the film was prohibited, then the restriction was not vague, distinguishing *State v. Sansone*, 127 Wn.App. 630 (2005), *but see: State v. Bahl*, 164 Wn.2d 739 (2008), *State v. Alcocer,* 2 Wn.App.2d 918 (2018), *State v. Padilla,* 190 Wn.2d 672 (2018), *State v. Johnson,* 4 Wn.App.2d 352 (2018), *see: State v. Nguyen,* 191 Wn.2d 671 (2018); I.

***State v. J.V.***, 132 Wn.App. 533 (2006)

Respondent signs contract with state to enter treatment court, setting forth treatment conditions and agreement that court may impose sanctions including termination and sentence, upon revocation juvenile court imposes manifest injustice disposition; held: treatment court contract need not expressly advise respondent that manifest injustice disposition was a possibility as statutes provide notice that satisfies due process; poor performance in treatment prior to revocation is a basis for manifest injustice disposition; where contract provides that what respondent says in treatment about drug and alcohol use cannot be used in court, it is error to use it for manifest injustice; I.

***Samson v. California***, 165 L.Ed.2d 250 (2006)

State statute that requires parolees to agree, in writing, to be subject to search or seizure with or without a warrant and with or without cause does not violate Fourth Amendment, as a parolee's status is a variation on imprisonment and state's interests in supervising parolees, who are more likely than members of the general public to commit crimes, is substantial, distinguishing *United States v. Knights,* 151 L.Ed.2d 497 (2001)(probationers); 6-3.

***State v. Acrey***, 135 Wn.App. 938 (2006)

Defendant, convicted of theft for draining the retirement account of an elderly man, is ordered as a condition of sentence not to work as a caretaker for the elderly or disabled; held: sentencing court has authority to impose crime-related prohibitions, RCW 9.94A.505(8), even if not specifically authorized by some other provision of ch. 9.94A RCW; prohibition here was directly related to the crime; court is authorized to impose crime-related prohibitions even if no

community custody is authorized or ordered, RCW 9.94A.634(1), *State v. Armendariz,* 160 Wn.2d 106 (2007); I.

***State v. Varnell***, 137 Wn.App. 925 (2007)

In response to trial court's stating to drug court defendant that a termination hearing would be set, defendant states he wants out, counsel states that defendant waives "any rights that he might have to a termination hearing," trial court conducts bench trial on record, terminates and sentences, defendant appeals; held: drug court agreement granted defendant a unilateral right to terminate participation which defendant knowingly and voluntarily invoked, distinguishing *State v. Cassill-Skilton*, 122 Wn.App. 652 (2004), *see: State v. Kessler*, 75 Wn.App. 634 (1994); defense counsel has implied authority to waive procedural matters on client's behalf; II.

***State v. Motter***, 139 Wn.App. 797 (2007)

Court may order drug treatment as a condition of community custody, RCW 9.94A.030(13), 9.94A.715(2)(a), *see: State v. Powell*, 139 Wn.App. 808, 818-20 (2007), *reversed, on other grounds*, 166 Wn.2d 72 (2009), where evidence establishes that defendant used heroin the night of the crime, counsel argues at sentencing that defendant's problems revolve around drugs and burglary of a doctor's office "is often motivated by a desire to steal drugs," at, ¶12; court may order that defendant notify his community corrections officer when a drug has been prescribed, as affirmative conduct may be ordered for a crime against a person, violent offense, sex offense or drug offense, RCW 9.94A.715(2)(a), *State v. Kolesnik*,146 Wn.App. 790, 806-08 (2008); 2-1, II.

***Pers. Restraint of Dalluge***, 162 Wn.2d 814 (2008)

Defendant, on community custody, is arrested and in jail commits a crime, Department of Corrections imposes sanction; held: while community custody is statutorily tolled during incarceration, RCW 9.94A.625(3), DOC may still enforce community custody conditions during confinement and tolling; 6-3.

***State v. Bahl***, 164 Wn.2d 739 (2008)

As condition of community custody, defendant is ordered not to possess pornography, appeals; held: vagueness challenges to conditions of community custody may be raised for the first time on appeal, at 745, *State v. Valencia*, 169 Wn.2d 782, 786-91 (2010); restriction on accessing or possessing pornographic materials is unconstitutionally vague, *State v. Alcocer,* 2 Wn.App.2d 918 (2018), *State v. Padilla,* 190 Wn.2d 672 (2018), *State v. Johnson,* 4 Wn.App.2d 352 (2018); condition that defendant not enter a place whose primary business pertains to sexually explicit material is not vague; condition that defendant "not possess or control sexual stimulus material for your particular deviancy as defined" by CCO is vague, *but see: State v. Nguyen,* 191 Wn.2d 671 (2018); 9-0.

***State v. Alphonse***, 142 Wn.App. 417, 439 (2008), 147 Wn.App. 891, 909-11 (2008)

An order banishing defendant from Everett does not survive strict scrutiny absent repeated offenses or previous violations of orders restricting contact, *State v. Schimelpfenig*, 128 Wn.App. 224 (2005), *State v. Sims*, 152 Wn.App. 526 (2009), *rev'd, on other grounds,* 171 Wn.2d 436 (2011), *see: Pers. Restraint of Martinez,* 2 Wn.App.2d 904 (2018); I.

***State v. Brooks***, 142 Wn.App. 842, 849-52 (2008)

Court holds competency hearing, finds defendant competent, at sentencing court imposes mental health treatment as condition of community custody; held: to order mental health treatment, court must find that reasonable grounds exist that defendant is mentally ill and that the condition most likely influenced the offense, RCW 9.94A.505(9), *State v. Shelton,* 194 Wn.App. 660, 675-76 (2016), *State v. Jones,* 118 Wn.App. 199, 208-11 (2003); where the trial court does not find defendant is a mentally ill person, it may not order treatment; II.

***State v. O'Cain***, 144 Wn.App. 772 (2008)

Community custody provision following rape conviction prohibited internet access; held: absent evidence that defendant accessed the internet before the rape or that the internet contributed to the crime, prohibiting internet access is not crime-related, RCW 9.94B.050(5)(e), internet access is not affirmative conduct reasonably related to the circumstances of the offense, *State v. Johnson,* 180 Wn.App. 318, 330-31 (2014), thus RCW 9.94A.712(6)(a) (2006) [recodified as 9.94A.507 (2008)] is inapplicable; I.

***State v. Vant***, 145 Wn.App. 592 (2008)

Community placement condition that defendant not possess or consume drugs is mandatory unless waived, RCW 9.94A.700(4)(c) (2003) [recodified, effective August 2009, as RCW 9.94B.050], which implies that court may order urinalysis to assure compliance, at 603-04; II.

***State v. C.D.C.***, 145 Wn.App. 621, 626-28 (2008)

At sentencing, court orders twelve months community supervision and a psychosexual evaluation without setting time limit, respondent obtains evaluation shortly before expiration of supervision, trial court finds violation and extends supervision; held: respondent did not violate conditions, as he complied within probation period, thus court erroneously found a violation; II.

***State v. Zimmer***, 146 Wn.App. 405 (2008)

Absent evidence that defendant used a cell phone to facilitate drug possession, trial court cannot prohibit possession of a cell phone as a condition of community custody; II.

***State v. Kolesnik,*** 146 Wn.App. 790, 807-08 (2008)

Ordering, as a condition of community custody, that defendant notify his CCO when he is prescribed a controlled substance is a permissible condition of affirmative conduct reasonably related to the offense, the offender's risk of reoffending or the safety of the community, *State v. Motter,* 139 Wn.App. 797, 805 (2007) following conviction of a serious violent offense, former RCW 9.94A.715(2); II.

***State v. Gamble***, 146 Wn.App. 813 (2008)

Courts have authority to enforce sentences with sentence modifications concurrent with DOC's statutory enforcement powers, RCW 9.94A.634(1), *State v. Johnson,* 54 Wn.App. 489 (1989), *State v. Neal,* 54 Wn.App. 760 (1989), *but see: State v. Bigsby,* 189 Wn.2d 210 (2017); I.

***Pers. Restraint of Brooks***, 166 Wn.2d 664 (2009)

When a defendant is sentenced to confinement and community custody that has the potential to exceed the maximum for the crime, remedy is to remand to amend the sentence to state that the combination of confinement and community custody shall not exceed the maximum, *State v. Sloan*, 121 Wn.App. 220, 222 (2004), *State v. Linerud*, 147 Wn.App. 944, 948 (2008), *see: State v. Zavala-Reynoso*, 127 Wn.App. 119, 121 (2005), *State v. Torngren*, 147 Wn.App. 556, 566 (2008), *overruled, on other grounds, State v. Aldana Graciano*, 176 Wn.2d 531 (2013), *State v. Winkle*, 159 Wn.App. 323 (2011), *State v. Franklin*, 171 Wn.2d 831 (2011), *cf.: State v. Winborne*, 167 Wn.App. 320 (2012), RCW 9.94A.701(9) (2010), *but see: State v. Boyd*, 174 Wn.2d 470 (2012); 9-0.

***State v. Erickson***, 168 Wn.2d 41 (2010)

Defendant is on probation, fails to appear for a hearing, bench warrant issued, upon arrest drugs found; held: returned summons establishes a well-founded suspicion that defendant did not notify court of address change, thus warrant was valid; court must find a well-founded suspicion that a probation violation occurred for warrant to be valid, distinguishing *State v. Parks*, 136 Wn.App. 232 (2006); 9-0.

***State v. Valencia***, 169 Wn.2d 782 (2010)

Condition of community custody that defendant "shall not possess or use any paraphernalia that can be used for…controlled substances" is vague as it is broader than "drug paraphernalia;" reverses *State v. Valencia*, 148 Wn.App. 302 (2009); 9-0.

***Aberdeen v. Regan***, 170 Wn.2d 103 (2010)

Condition of probation is "no criminal violations of the law," defendant is charged with new crimes, is acquitted, same judge finds that they were proved by preponderance and revokes; held: standard for revocation of probation is preponderance of the evidence, not beyond a reasonable doubt, even when the violation is a new crime, *Habeas Corpus of Standlee*, 83 Wn.2d 405 (1974); affirms *Aberdeen v. Regan*, 147 Wn.App. 538 (2008); 8-1.

***State v. Reichert***, 158 Wn.App. 374 (2010)

Police, acting on tip that probationer was selling drugs, ask CCO to see if probationer was in violation of community custody by not living where he had reported he lived, accompany CCO to residence where probationer was believed to be living, CCO arrests outside, opens door, smells marijuana, police obtain warrant, defendant claims unlawful pretext; held: probation officer warrantless search is valid even if based upon a tip from law enforcement as long as CCO had probable cause to believe probationer lived at the residence searched, *State v. Winterstein*, 167 Wn.2d 620 (2009), *but see: United States v. Knights*, 534 U.S. 112, 151 L.Ed.2d 497 (2001); II.

***State v. Acevedo***, 159 Wn.App. 221, 231-34 (2010)

When sentenced to a **first time offender** waiver, RCW 9.94A.650 (2006), court can order as conditions of community custody that defendant maintain employment, former RCW 9.94A.650(2), 9.94A.700(4)(b), not associate with persons on probation or parole, former RCW 9.94A.700(5)(b), not possess drugs, former RCW 9.94A. 700(5)(d), not consume alcohol in

excess, participate in drug treatment, take polygraph to monitor compliance, *State v. Combs,* 102 Wn.App. 949, 952 (2000), former RCW 9.94A.715(2), but may not order him not to possess deadly weapons other than firearms; III.

***State v. Barker***, 162 Wn.App. 858 (2011)

Defendant is arrested pursuant to DOC warrant, drugs found; held: an administrative warrant issued by the Department of Corrections pursuant to RCW 9.94A.740 (1999) [recodified as 9.94A.716 (2008)] need not be issued by a neutral magistrate based upon oath, *State v. Olson*, 164 Wn.App. 187 (2011); II.

***State v. Parris***, 163 Wn.App. 110 (2011)

Defendant is on community custody for failure to register as a sex offender, conditions include no contact with minors, no alcohol, no possession of sexually explicit materials, CCO learns he was seen by a police officer with an underage woman, goes to his home, knocks, no answer, looks in window, sees defendant and young female hiding, orders them to exit, arrests defendant, searches room, observes syringes, alcohol, pornography, seizes storage media, later views it and observes defendant having sex with 17 year old, defendant is convicted of child porn; held: probationers and sex offenders have reduced privacy rights, *Det. Of Campbell*, 139 Wn.2d 341, 355-56 (1999), *State v. Lucas*, 56 Wn.App. 236, 239-40 (1989); CCO may search an offender's personal property without a warrant, RCW 9.94A.631(1) (2009), thus search of memory cards was lawful as CCO had reasonable suspicion that they contained evidence of additional violations based upon defendant's mother's report that he was out of control and threatened to shoot CCO, *cf.: State v. Jardinez*, 184 Wn.App. 518 (2014) ), *State v. Livingston*, 197 Wn.App. 590 (2017); because memory card was apparently not password-protected, it was not a locked container; II.

***State v. Mahone***, 164 Wn.App. 146 (2011)

Defendant is sentenced to community custody on two cases, violates terms, is sentenced to consecutive terms; held: community custody on multiple sentences must run consecutively, RCW 9.94A.589(2)(a), violations are limited to sixty days for each violation, RCW 9.94A.200 (1994), 9.94B.040(1), -(3)(c) (2002), thus court may only impose terms for violation on the current community custody; II.

***State v. Parent***, 164 Wn.App. 210 (2011)

Court may not impose consecutive gross misdemeanor probationary sentences, *State v. Rice*, 180 Wn.App. 308 (2014), *but see: Mortell v. State*, 118 Wn.App. 846 (2003), *State v. Davis*, 133 Wn.App. 415, 431 (2006), *rev'd, on other grounds,* 163 Wn.2d 606 (2008), as RCW 9.95.210(1) is ambiguous; I.

***State v. Pannell***, 173 Wn.2d 222 (2011)

Defendant whose SSOSA, RCW 9.94A.670, is revoked is not entitled to credit against his maximum prison sentence for non-custodial time spent while sentence was suspended; 9-0.

***State v. Winborne***, 167 Wn.App. 320 (2012)

To ensure that a sentence of confinement plus community custody does not exceed the maximum sentence, sentencing court must impose the term of confinement, the term of community custody, then reduce the term of community custody if necessary, RCW 9.94A.701(9) (2010), distinguishing *Pers. Restraint of Brooks,* 166 Wn.2d 664, 675 (2009), *State v. Franklin,* 172 Wn.2d 831 (2011), *State v. Winkle,* 158 Wn.App. 323 (2011); III.

***Pers. Restraint of Golden****,* 172 Wn.App. 426 (2012)

Defendant is convicted of robbery, having previously been convicted of rape, DOC imposes sex offender conditions of community custody; held: while a court is limited to imposing crime related prohibitions, RCW 9.94A.030(10) (2012), DOC may impose additional conditions based upon the risk to community safety, RCW 9.94A.704(2)(b) (2012), *State v. Ortega*, ___ Wn.App.2d. ___, 506 P.3d 1287 (2022); III.

***State v. Land****,* 172 Wn.App. 593, 604-06 (2013)

Following conviction of child rape, condition that defendant not possess drug paraphernalia is not crime related, is not a monitoring tool; plethysmograph testing at discretion of CCO is an improper condition, although it can be ordered incident to crime-related treatment, *see: Matter of Brettell,* 6 Wn.App.2d 161 (2018); I.

***State v. Johnson****,* 180 Wn.App. 318 (2014)

Following child molestation conviction, trial court imposes community custody condition that defendant have no contact with "vulnerable individuals," and not use internet; held: "vulnerable" is vague, *State v. Sanchez Valencia,* 169 Wn.2d 782, 793-95 (2010), *State v. Irwin,* 191 Wn.App. 644 (2015); internet prohibition lacks a nexus to the crime and must be stricken, *State v. O'Cain,* 144 Wn.App. 772, 774-75 (2008), *cf.: State v. Johnson,* 12 Wn.App.2d 201 (2020), *rev. granted,* 196 Wn.2d 1001 (2020); II.

***State v. Kinzle****,* 181 Wn.App. 774, 785 (2014)

In child molestation case where defendant came into contact with victim through a social contact with parents, condition of community custody that defendant not date women who have minor children is reasonably crime related; where evidence at trial "suggested" that defendant had been drinking alcohol before the charged incidents, trial court may order alcohol evaluation and treatment but not chemical dependency evaluation and treatment, *State v. Warnock,* 174 Wn.App. 608 (2013): I.

***State v. Jardinez****,* 184 Wn.App. 518 (2014)

Defendant misses meeting with CCO, two weeks later they meet, defendant admits he used marijuana, CCO orders defendant to empty pockets, seizes and searches iPod, finds video from that day showing defendant with shotgun, search his home, find shotgun, at felon in possession trial court suppresses, state appeals; held: while a CCO is authorized to search a probationer's person and property without a warrant if there is reasonable cause or a well-founded suspicion, RCW 9.94A.631(1) (2012), *State v. Masey,* 81 Wn.App. 198, 200 (1996), the suspicion must relate to the suspected violation of a condition of community custody, *State v. Reichert,* 158 Wn.App. 374 (2010), *State v. Livingston,* 197 Wn.App. 590 (2017), distinguishing *State v. Parris,* 163 Wn.App. 110 (2011); here there was no relationship between the failure to report and the device, trial court affirmed; III.

***State v. Bruch***, 182 Wn.2d 854 (2015)

To avoid a sentence that exceeds the maximum, court may impose a standard range sentence plus community custody of at least x months plus all accrued earned early release time, which does not create an indeterminate sentence, *Pers. Restraint of Brooks*, 166 Wn.2d 664, 668 (2009), *State v. Winkle*, 159 Wn.App. 323 (2001), *State v. LaBounty*, 17 Wn.App.2d 576 (2021), distinguishing *State v. Boyd*, 174 Wn.2d 470 (2012); 7-2.

***State v. McClinton***, 186 Wn.App. 826 (2015)

Where court imposes a geographical limitation as a condition of a sex offender's sentence DOC may require that the offender submit to GPS monitoring; I.

***State v. Irwin***, 191 Wn.App. 644 (2015)

Community custody conditions that require further definition from CCOs are unconstitutionally vague, *State v. Bahl*, 164 Wn.2d 739 (2008), *State v. Sansone*, 127 Wn.App. 630, 638 (2005), *see: State v. Nguyen*, 191 Wn.2d 671 (2018), *State v. Padilla*, 190 Wn.2d 672 (2018); here, "do not frequent areas where minor children are known to congregate, as defined by" CCO is vague; following child pornography conviction where defendant possessed depictions on a digital camera, condition that defendant not access a computer unless authorized by CCO is related to the offense and is thus valid, *cf.: State v. Charlton*, ___ Wn.App.2d ___, 515 P.3d 537 (2022); I.

***State v. Powell***, 193 Wn.App. 112 (2016)

A condition of sentence requires defendant to enter sexual deviancy treatment, provider demands defendant's sexual history, defendant refuses claiming Fifth Amendment privilege, court sanctions with jail; held: penalty imposed in an effort to compel disclosure of incriminating information is a violation of defendant's Fifth Amendment rights where parties do not dispute that the disclosure would incriminate defendant, *see: McKune v. Lili*, 153 L.Ed.2d 47 (2002), *State v. Warner*, 125 Wn.2d 876 (1995), *State v. King*, 130 Wn.2d 517, 523-29 (1996); II.

***State v. Weatherwax***, 193 Wn.App. 667, 676-81 (2016), *reversed, on other grounds*, 188 Wn.2d 139 (2017)

Condition of community custody that defendant not wear clothing "indicative of a gang lifestyle" is vague, *State v. Villano*, 166 Wn.App. 142 (2012); prohibiting defendant from having any association of contact with felons or gang members *or their associates* is vague; 2-1, III.

***State v. Shelton***, 194 Wn.App. 660, 675-76 (2016)

To order a mental health evaluation as a condition of community custody court must find that defendant is a mentally ill person, RCW 9.94B.080) (2008) as defined in RCW 71.24.025, and that mental illness likely influenced the offense; I.

***State v. Hood***, 196 Wn.App. 127, 138-41 (2016)

Where a crime is both a violent offense that is not a serious violent offense and is a crime against persons (here, burglary 1°) community custody term is 18 months, RCW 9.94A.701 (2010), statute is not ambiguous; I.

***State v. Bigsby***, 189 Wn.2d 210 (2017)

Courts do not have authority to punish an offender with sentence modifications concurrent with DOC's statutory enforcement powers, RCW 9.94B040(1) (2008), except for crimes committed before 2000, *cf.: State v. Gamble,* 146 Wn.App. 813, 820 (2008), RCW 9.94A.6332 (2008), *State v. Petterson,* 190 Wn.2d 92 (2018), *State v. Hubbard,* ___ Wn.App.2d ___, 55584-1-II (2022); reverses *State v. Bigsby,* 196 Wn.App. 803 (2016); 9-0.

***State v. Weller***, 197 Wn.App. 731 (2017)

With consecutive exceptional sentences court may impose no contact orders for the maximum of each crime consecutively; II.

***State v. Nguyen***, 191 Wn.2d 671 (2018)

Following child molestation conviction, community custody provisions that defendant not possess sexually explicit material is not vague, *State v. Frederick,* 20 Wn.App. 1081, 506 P.3d 690 (2022), and is crime related as defendant had sent complainant a scantily-clad photo, ; provision that defendant inform CCO of any "dating relationship" is not unconstitutionally vague; order that defendant not enter sex-related businesses is reasonably related to the offense, *State v. Magana,* 197 Wn.App. 189, 201 (2016); reverses, in part, *State* v. *Norris,* 1 Wash. App. 2d 87, 404 P.3d 83 (2017); 9-0.

***Pers. Restraint of Schley***, 191 Wn.2d 278 (2018)

To revoke DOSA sentence government must prove violation by a preponderance of evidence, *Pers. Restraint of McKay,* 127 Wn.App. 165, 170 (2005); Department of Corrections must advise defendant subject to revocation that he has the right to request appointment of counsel, which is to be determined on a case-by-case basis, *Grisby v. Herzog,* 190 Wn.App. 786, 362 P.3d 763 (2015); affirms *Pers Restraint of Schley,* 197 Wn.App. 852 (2017); 5-4.

***Pers. Restraint of Martinez***, 2 Wn.App.2d 904 (2018)

CCO orders petitioner to stay out of Thurston County without approval of CCO due to "victim concerns," petitioner seeks modification to live with parents, CCO says it will never change; held: while CCO has authority to impose geographical restrictions, RCW 9.95.420(3) (2009), order here is not narrowly tailored to protect right to travel, *State v. Schimelpfenig,* 128 Wn.App. 224 (2005), there must be a readily available mean to seek modification of the condition, *see also: Matter of McMurtry,* ___ Wn.App.2d ___, 502 P.3d 906 (2022); II.

***State v. Johnson***, 4 Wn.App.2d 352 (2018)

Following child molestation conviction, conditions of community custody that defendant not possess or view material that includes images of nude adults and children and not possess images of children wearing underwear or swimsuits and not possess material that shows adults or children engaging in sex with each other, themselves or objects or animals and not attend x-rated movies or adult book stores are invalid, overbroad and not crime-related, *State v. Padilla,* 190 Wn.2d 672 (2018); condition that defendant avoid places where children congregate including libraries, playgrounds, schools, daycare centers, skating rinks and video arcades is not vague, *State v. Wallmuller,* 194 Wn.2d 234 (2019), *but see: State v. Norris,* 1 Wn.App.2d 87 (2017),

*reversed, in part, on other grounds, State v. Nguyen*, 191 Wn.2d 671 (2018), but must be limited to children under age 16; 2-1, III.

***Matter of Brettell***, 6 Wn.App.2d 161 (2018)

Petitioner is convicted of sex offenses with minors to whom he gave alcohol and drugs; condition of community custody that petitioner not possess or consume controlled substances is a "waivable" condition, RCW 9.94A.703(2)(c) (2018), thus court has authority to impose it even if it is not crime related; condition that he not associate with known users of drugs is crime related, *State v. Houck*, 9 Wn.App.2d 636 (2019); I.

***State v. Wallmuller***, 194 Wn.2d 234 (2019)

Community custody provision that defendant not frequent places where children congregate is not vague, reversing *State v. Wallmuller*, 4 Wn.App.2d 698 (2018); 5-4.

***State v. Houck***, 9 Wn.App.2d 636 (2019)

Community custody condition that prohibits defendant from associating with known drug users/sellers except in treatment settings is not vague, *Matter of Brettell*, 6 Wn.App.2d 161 (2018); II.

***State v. McClinton***, 10 Wn.App.2d 236 (2019)

For crimes committed before July 1, 2000 the court has authority to sanction for violation of community custody conditions, RCW 9.94B.010(1) (2009), 9.94B.040(1) (2018) while for crimes committed after that date DOC has authority to sanction, RCW 9.94A.6332(7) (2014), does not violate equal protection; I.

***State v. Peters***, 10 Wn.App.2d 574 (2019)

Lifetime no contact order with defendant's children whom he raped is constitutional at least where defendant did not object below; III.

***State v. Lee***, 12 Wn.App.2d 378 (2020)

Following rape conviction, conditions of community custody (1) that defendant is required to disclose his offender status prior to any sexual contact, (2) that defendant is prohibited from having "sexual contact in a relationship" until a treatment provider approves, and (3) that defendant is required to complete a MRT program to receive cognitive behavioral therapy are all crime related; I.

***State v. Johnson***, 12 Wn.App.2d 201 (2020), *rev. granted,* 196 Wn.2d 1001 (2020)

Police post internet advertisement purporting to be a juvenile seeking sex with an adult, defendant responds with explicit desires, is convicted of attempted rape of a child, court orders as condition of community custody, that defendant not use web unless authorized by CCO with approved filters; held: condition does not violate First Amendment, distinguishing *Packingham v. North Carolina*, 137 S. Ct. 1730, 1731, 198 L. Ed. 2d 273 (2017), is sufficiently tailored to defendant's crime as he committed the crime partially via the internet, *cf.: State v. O'Cain,* 144 Wn.App. 772 (2008), *but see: State v. Forler*, 9 Wn.App.2d 1020 (unpublished, 2019); II.

***Seattle v. Makasini***, 16 Wn.App.2d 148 (2021)

Court issues an *ex parte* bench warrant for failure to comply with conditions of probation, warrant is served beyond the probation period, trial court finds tolling; held: RCW 35.20.255 (2013) only allows tolling if a defendant fails to appear at a hearing, not the issuance of a warrant, *distinguishing State v. V.J.*, 132 Wn.App. 380 (2006), *Spokane v. Marquette*, 146 Wn.2d 124 (2002); holding only applies to Seattle Municipal Court; I.

***State v. Frederick***, 20 Wn.App. 890 (2022)

Condition that defendant not engage in "sexual communication" with minors is not vague; condition that defendant obtain CCO's permission before entering a "romantic relationship" is vague; Indeterminate Sentencing Review Board can impose conditions that are reasonably related to the offender's risk of reoffending, condition that defendant submit to drug monitoring in sex offense is proper where defendant was under the influence of marijuana at time of sex offense; condition that defendant not access the internet without a monitoring device at defendant's expense is proper where defendant used the internet to contact victim, *State v. Johnson*, 197 Wn.2d 740 (2021), *cf.: Packingham v. North Carolina*, ––– U.S. ––––, 137 S. Ct. 1730, 198 L. Ed. 2d 273 (2017); condition that defendant not possess "sexually explicit material" is not vague, *State v. Nguyen*, 191 Wn.2d 671 (2018); condition that defendant not engage in a romantic or dating or sexual relationship with anyone with minor children without CCO permission is not vague, *but see: State v. Geyer*, 19 Wn.App.2d 321 (2021); condition that defendant inform potential partners of his sexual offense history does not violate his Fifth Amendment rights; condition that defendant not remain overnight in a residence (as opposed to "premises") without CCO approval is not vague, *State v. Breidt*, 187 Wn.App. 534 (2015); III.

***Matter of Rodriguez***, 21 Wn.App.2d 585 (2022)

Court cannot impose 12 months community custody for **first time offender waiver** if no treatment is ordered, RCW 9.94A.650; III.

***State v. Hubbard***, 21 Wn.App.2d 834, *rev. granted*, 200 Wn.2d 1001 (2022)

Trial court has authority to modify condition of community custody that he have no contact with children when has a new child, which is newly discovered evidence, *State v. McGuire*, 12 Wn.App.2d 88 (2020); II.

***State v. Harrison***, ___ Wn.App.2d ___, 519 P.3d 244 (2022)

Defendant is terminated from drug court without notice of the specific grounds for termination, without notice that he had the right to contest the termination at an evidentiary hearing, without the court stating that it found violations by a preponderance and without written or oral findings; held: drug court termination requires due process, not present here, so reversed, *State v. Cassill-Skilton*, 122 Wn.App. 652 (2004), *State v. Kessler*, 75 Wn.App. 634, 636-41 (1994), *c.f.: State v. Marino*, 100 Wn.2d 719, 723-7 (1984), *State v. Varnell*, 137 Wn.App. 925 (2007); II.

***State v. Smalley*** ___ Wn.App.2d ___, 2023WL195252 (2023)

A no-contact order may be entered for the maximum penalty of the crime from the date of sentencing, defendant is not entitled to credit for time served; III.

# PROSECUTION & GOVERNMENT MISCONDUCT

***State v. Lampshire***, 74 Wn.2d 888 (1968)

Rebuttal testimony does not include a material part of the state's case that tends to establish defendant's commission of a crime; restricted to evidence made necessary by defendant's case, *State v. White*, 74 Wn.2d 386, 394-95 (1968), *State v. Coe*, 109 Wn.2d 832 (1988), *State v. Burns*, 53 Wn.App. 849 (1989), *State v. Epefanio*, 156 Wn.App. 378 (2010), *see*: *State v. Swan*, 114 Wn.2d 613, 652-5 (1990); 5-4.

***State v. Torres***, 16 Wn.App. 254 (1976)

Suggestion to jury that defendant could have been charged with other crimes is misconduct; reference to race of defendant is misconduct; comment that defendant failed to testify at preliminary hearing is misconduct; comment on exercise of a privilege is misconduct; comment that defendant may get probation is misconduct.

***State v. Charlton***, 90 Wn.2d 657 (1978)

Comment on exercise of privilege is misconduct when flagrant and ill-intentioned; 9-0.

***State v. Johnson***, 23 Wn.App. 490 (1979)

State enters into plea bargain directly with defendant; defendant, informing prosecutor that he wanted to see his attorney first, did not breach plea agreement and state is bound; III.

***State v. Sutherland***, 24 Wn.App. 719 (1979), *rev'd, on other grounds,* 94 Wn.2d 527 (1980)

State may comment on the fact that state's evidence is undenied; I.

***State v. Reed***, 25 Wn.App. 46 (1979)

Plaintiff's comment on defendant's failure to take stand is reversible error; III.

***State v. Hale***, 26 Wn.App. 211 (1980)

Prosecutor arguing his belief that defendant is a liar is misconduct, *but see: State v. McKenzie*, 157 Wn.2d 44, 59-60 (2006), *cf.: State v. Lopez*, 142 Wn.App.341, 354 (2007), *Pers. Restraint of Lui*, 188 Wn.2d 525, 557-63 (2016), but denial of motion for mistrial is within discretion of court; no abuse of discretion here; I.

***State v. Agren***, 28 Wn.App. 1 (1980)

Prosecutor asks defense witness on stand if he would take a polygraph, objection sustained, mistrial denied; held: within court's discretion to deny mistrial; II.

***State v. Dailey***, 93 Wn.2d 454 (1980)

CrR 8.3(b) motion may be granted for simple mismanagement by plaintiff, even if not evil or dishonest, *State v. Martinez*, 121 Wn.App. 21 (2004), *State v. Brooks*, 149 Wn.App. 373 (2009); trial court dismissed for failure to provide witness list until three days before trial and for failure to provide bill of particulars; *cf.*: *State v. Cantrell*, 111 Wn.2d 385, 390 (1988); *see*: *State v. Sherman*, 59 Wn.App. 753 (1990); 9-0.

***State v. Price***, 94 Wn.2d 810 (1980)

To sustain a claim of discriminatory prosecution defendant must prove that the prosecutor's conduct was without reasonable justification and constituted intentional or purposeful systematic discrimination in the enforcement of the law; *see*: *State v. Johnson*, 78 Wn.2d 491, 499 (1970), *State v. Alonzo*, 45 Wn.App. 256 (1986), *State v. Sherman*, 59 Wn.App. 753 (1990), *State v. Ramos*, 83 Wn.App. 622, 634-9 (1996); 8-0.

***State v. Coles***, 28 Wn.App. 563 (1981)

Examining defendant on details of prior crimes is misconduct; questioning defendant about political and religious beliefs is misconduct; II.

***State v. Brown***, 29 Wn.App. 770 (1981)

Co-defendant agrees to testify for state in exchange for reduction in charge; at defense counsel's request, co-defendant does not plead until after he testifies so that his plea agreement is only good if there is a conviction; held: if state had withheld benefits of bargain until after witness performed, it might be contrary to public policy and due process, but here defense requested delayed plea, thus no error; I.

***State v. Wixon***, 30 Wn.App. 63 (1981)

Prosecutor should not read probable cause affidavit to press, but harmless here; I.

***State v. Evans***, 96 Wn.2d 1 (1981)

Police twice testify that defendant declined to make a statement after advice of rights, held to be harmless error beyond a reasonable doubt; 9-0.

***Oregon v. Kennedy***, 72 L.Ed.2d 416 (1982)

Where defendant's motion for mistrial is granted for prosecutorial or judicial misconduct, retrial is not barred by double jeopardy clause except where the conduct was intended to provoke the defendant into moving for mistrial; *accord*: *State v. Sargent*, 49 Wn.App. 64 (1987), *see: State v. Martinez*, 121 Wn.App. 21 (2004); 9-0.

***United States v. Goodwin*, 73 L.Ed.2d 74 (1982)**

Defendant, charged with misdemeanor, demands a jury trial, whereupon United States Attorney indicts and convicts him of felony arising from same fact situation; held: a presumption of prosecutorial vindictiveness, *Blackledge v. Perry*, 40 L.Ed.2d 628, (1974), is not warranted, as the nature of the right asserted by defendant (jury trial) is unlikely to lead to the possibility that a prosecutor would respond by bringing charges not in the public interest, *State v. Korum*, 157 Wn.2d 614 (2006); defendant has burden of showing improper prosecutorial motive; 7-2.

***State v. Bartholomew***, 98 Wn.2d 173 (1982)

Defense discovers after trial that state's star witness took and flunked a polygraph; held: where undisclosed evidence demonstrates that the state's case included perjury and that the prosecution knew or should have known of the perjury, reversal should be granted if there is any reasonable likelihood that the perjured testimony could have affected the verdict, *United States v.*

*Agurs*, 49 L.Ed.2d 342 (1976), however polygraph evidence is not reliable, so this test was not met here; where a pretrial request is made for "specific evidence" which was not disclosed, test is whether the evidence withheld "could have affected the outcome," *Agurs, supra*; here, no request was made, thus test is whether defendant can establish if new evidence would establish a reasonable doubt which did not otherwise exist; 8-1.

***State v. McKenzie***, 31 Wn.App. 450 (1982)

Following a motion to suppress drugs, state amends and adds a VUFA charge; held: test for prosecutorial vindictiveness is "reasonable likelihood of vindictiveness," not "appearance of vindictiveness," *State v. Bonisisio*, 92 Wn.App. 783, 790-92 (1998), *State v. Parmelee*, 121 Wn.App. 707 (2004), *cf.: State v. Lee*, 69 Wn.App. 31 (1993), *see: State v. Korum*, 157 Wn.2d 614 (2006); I.

***State v. Montague***, 31 Wn.App. 688 (1982)

Defendant, charged with rape, is cross-examined regarding investigation of another rape incident with which he was not charged and with which he was cleared; held: prosecutor's questioning was prejudicial mandating a mistrial; III.

***State v. Hentz***, 32 Wn.App. 193 (1982)

State's failure to volunteer information about an impeachment witness favorable to defense is not error where defendant failed to move for a new trial, CrR 7.6(a)(2), *see: State v. Martinez*, 121 Wn.App. 21 (2004); II.

***State v. Penn***, 32 Wn.App. 911 (1982)

Prosecutor adds additional counts of robbery 1° on the day of trial, but since no proof was presented of vindictiveness, no misconduct existed, *State v. Bonisisio*, 92 Wn.App. 783, 790-92 (1998), *see: State v. Korum*, 157 Wn.2d 614 (2006); I.

***State v. Vavra***, 33 Wn.App. 142 (1982)

Prosecutor fails to reveal to defense that a witness had informal immunity and that prosecutor would appear at witness' sentencing in another county and speak on his behalf is prejudicial error; III.

***State v. Price***, 33 Wn.App. 472 (1982)

Prosecutor's stating in front of jury that victim was "upset" and would not be called in rebuttal due to her "condition" is misconduct but harmless here; I.

***State v. Russell***, 33 Wn.App. 579 (1982), *rev'd, on other grounds*, 101 Wn.2d 349 (1984)

"[A]rgument based on what juries in other cases have done when confronted with similar facts or comparable instructions tends to needlessly inject collateral matters in a case. Such argument is subject to abuse and should be discouraged," at 589 n. 8; I.

***State v. Ortiz***, 34 Wn.App. 694 (1982)

In murder case, defense presents evidence of defendant's develop[mental disability to establish defendant's inability to plan crime; in rebuttal, state elicits testimony that defendant had

threatened other people, court gives cautionary instruction; held: prejudicial effect of rebuttal evidence outweighed probative value, disapproved cautionary instruction; I, 2-1.

***State v. Underwood***, 33 Wn.App. 833 (1983)

After state re-notes case for trial following a hung jury, trial court dismisses, CrR 8.3(b), ruling that state's action was arbitrary since defendant would be acquitted or jury would be hung anew; held: trial court's belief that retrial would not result in conviction is not grounds for dismissal; in order to dismiss pursuant to CrR 8.3(b), there must be evidence of arbitrary prosecutorial action or governmental misconduct, including mismanagement of the case; *see*: *State v. Cantrell*, 111 Wn.2d 385, 390 (1988); III.

***State v. Jones***, 33 Wn.App. 865 (1983)

Court grants mistrial, with consent of defense, for failure of state to provide discovery; held: where defendant consents to mistrial, jeopardy will not bar a second trial unless prosecutor's conduct was motivated in bad faith in order to goad defense into requesting mistrial or to prejudice his prospects for acquittal, *United States v. Dmitz*, 47 L.Ed.2d 267 (1976), *see: State v. Martinez*, 121 Wn.App. 21 (2004); I.

***State v. Papadopoulos***, 34 Wn.App. 397 (1983)

Prosecutor may not argue questions of law not covered by the instructions, *State v. Estill*, 80 Wn.2d 196 (1972), *State v. Brown*, 35 Wn.2d 397 (1949); comment on marital privilege, where no instructions cover it, is improper; arguing that an accomplice's plea bargain was fair for a first offense was error as not in evidence, *State v. Rose*, 62 Wn.2d 309 (1983), *State v. Reeder*, 46 Wn.2d 888 (1983); both harmless; I.

***State v. Serr***, 35 Wn.App. 5 (1983)

Threat to file habitual criminal allegation if defendant does not plead to underlying charge is not vindictive, *United States v. Goodwin*, 73 L.Ed.2d 74 (1982), *see also: State v. Miller*, 92 Wn.App. 693, 702-3 (1998), *State v. Korum*, 157 Wn.2d 614 (2006); I.

***State v. Hunter***, 35 Wn.App. 708 (1983)

Where burglary defendant is impeached with prior promoting prostitution charge, it is not misconduct to call defendant a pimp in closing, as a reasonable inference from the evidence; I.

***State v. Jacobson***, 36 Wn.App. 446 (1983)

March 6, juvenile commits burglary; March 26, commits robbery; April 13, juvenile court declines jurisdiction on robbery; April 15, defendant turns 18 years of age; thereafter, burglary charge filed in Superior Court; defendant moves to dismiss, CrR 8.3(b); held: defendant was not prejudiced by delay; I.

***United States v. Hasting***, 76 L.Ed.2d 96 (1983)

Prosecutor's comment in argument "I'm going to tell you what the defendants did not do" in trial held harmless error.

***Thigpen v. Roberts***, 82 L.Ed.2d 23 (1984)

Defendant is convicted by Justice of the Peace of DUI and reckless driving, appeals *de novo*, whereupon defendant is indicted for manslaughter for same incident; held: "presumption of vindictiveness" prohibits trial on greater charge as punishment of defendant's exercise of right to appeal, *but see:* *State v. Bonisisio*, 92 Wn.App. 783, 790-92 (1998), *State v. Parmelee*, 121 Wn.App. 707 (2004), *State v. Korum*, 157 Wn.2d 614 (2006), *see:* *State v. Miller*, 92 Wn.App. 693, 702-3 (1998),; 6-3.

***State v. Judge***, 100 Wn.2d 706 (1984)

Prosecutor's charging decisions to charge defendant-driver with negligent homicide but not her companion-passenger who purchased the alcohol is not discriminatory prosecution as the decision was not deliberately based upon race, religion or other arbitrary classification, *Oyler v. Boler*, 7 L.Ed.2d 446 (1962), *State v. Terrovonia*, 64 Wn.App. 417 (1992); 9-0.

***State v. Davenport***, 100 Wn.2d 757 (1984)

Witnesses testify that burglary defendant carried property to a car from a residence that was burglarized, but no one saw him enter or exit the residence; prosecutor does not offer accomplice instructions but argued, over objection, that accomplice is as liable as principal; held: prosecutor may not argue law which conflicts with the court's instructions, *State v. Whitaker,* 6 Wn.App.2d 1 (2018), *affirmed, on different grounds, State v. Whitaker,* 195 Wn.2d 333 (2020); reversal is necessary where there is substantial likelihood that the argument affected the verdict; *see*: *State v. Scott*, 48 Wn.App. 561 (1987), *State v. Rice*, 110 Wn.2d 577 (1988), *State v. Huckins*, 66 Wn.App. 213 (1992), *State v. Classen*, 143 Wn.App. 45, 63-65 (2008); *reverses* *State v. Davenport*, 33 Wn.App. 704 (1983);9-0.

***State v. Coe***, 101 Wn.2d 772 (1984)

Cross-examination of a rape defendant about the details of a book he wrote regarding sexual matters was irrelevant, ER 611(b) and prejudicial; 9-0.

***State v. McDowell***, 102 Wn.2d 341 (1984)

Juvenile accused of reckless endangerment rejects diversion, whereupon prosecutor files assault 2° for same incident; held: no presumption of vindictiveness or abuse of discretion, *United States v. Goodwin*, 73 L.Ed.2d 74 (1982), *State v. Soderholm*, 68 Wn.App. 363 (1993), *State v. Korum*, 157 Wn.2d 614 (2006); disposition may exceed that allowed in a diversion agreement, *distinguishing* RCW 13.40.160(3), unless defense proves actual vindictiveness, *see:* *State v. Bonisisio*, 92 Wn.App. 783, 790-92 (1998); 9-0.

***State v. Campbell***, 103 Wn.2d 1 (1984)

Burden of showing bad faith of state in making opening statement is on defendant; 9-0.

***State v. Claflin***, 38 Wn.App. 847 (1984)

In rape case, prosecutor's reading a poem to jury, during closing, which described the effect of rape on its victims was so prejudicial as to require reversal; II.

***State v. Fitzgerald***, 39 Wn.App. 652 (1985)

Rebuttal evidence is admissible if not cumulative and if it answers new points raised by the defense, *State v. White*, 74 Wn.2d 386, 394-95 (1968); I.

***State v. Sargent***, 40 Wn.App. 340 (1985), *rev'd, on other grounds,* 111 Wn.2d 641 (1988)

Prosecutor, in closing, stated he believed testimony of state's witness; held: test is not whether remarks were invited by defense argument, but whether taken in context the remarks unfairly prejudiced defendant, *United States v. Young*, 84 L.Ed.2d 1 (1985); vouching for credibility of witness is error, *State v. Reed*, 102 Wn.2d 140 (1984), *State v. Horton*, 116 Wn.App. 909, 921 (2003), *cf.: State v. Brett*, 126 Wn.2d 136, 175 (1995) , *State v. Calvin*, 176 Wn.App. 1, 18-19 (2013), *State v. Robinson*, 189 Wn.App. 877, 892-95 (2015); comment in closing that defendant did not tell anyone about what happened is misconduct, *but see: State v. Scott*, 58 Wn.App. 50 (1990); I.

***State v. Boldt***, 40 Wn.App. 798 (1985)

Trial court may not dismiss case "in the furtherance of justice", CrR 8.3(b), because court finds that a police officer assaulted the defendant who was charged with assault 3°; to dismiss, there must be governmental misconduct or arbitrary action, *State v. Starrish*, 86 Wn.2d 200 (1975), *State v. Whitney*, 96 Wn.2d 578 (1981); *State v. Burri*, 87 Wn.2d 175 (1976), *State v. Cantrell*, 111 Wn.2d 385, 390 (1988); II.

***State v. Martin***, 41 Wn.App. 133 (1985)

Prosecutor's impugning defense witness's credibility in closing argument is misconduct, even if qualified by "the evidence shows," *United States v. Bess*, 593 F.2d 749 (1985); prosecutor may not term defense testimony "lie" or "fabrication, *State v. Riley*, 69 Wn.App. 349 (1993); III.

***United States v. Young***, 84 L.Ed.2d 1 (1985)

Prosecutor's expression of his personal opinion of defendant's guilt and exhorting jury to "do its job" is improper, *cf.: State v. Finch*, 137 Wn.2d 792, 839-42 (1999), but where not objected to is not "plain error" such that appellate court can overlook failure of defense to object; 5-4.

***Wayte v. United States***, 84 L.Ed.2d 547 (1985)

Government's decision to prosecute only those who fail to register with Selective Service and who report themselves as nonregistrants held not to violate equal protection clause as defense failed to show that passive enforcement policy had a discriminatory effect and that it was motivated by a discriminatory purpose, nor does it violate First Amendment; 7-2.

***United States v. Bagley***, 87 L.Ed.2d 481 (1985)

Prosecutor fails to provide exculpatory impeachment evidence to defense; held: there is no distinction between impeachment evidence and substantive evidence where government fails to disclose it, *see: Banks v. Dretke*, 157 L.Ed.2d 1166 (2004); test for appellate court is whether there is a reasonable probability that had the evidence been disclosed, the result of the trial would have been different, *State v. Benn*, 120 Wn.2d 631 (1993); case is not subject to automatic reversal for violation of confrontation clause; 5-3.

***State v. Traweek***, 43 Wn.App. 99 (1986), *disapproved, on other grounds, State v. Blair,* 117 Wn.2d 479 (1991)

Comment in closing that defense could put on other witnesses if they have explanations for the evidence improperly shifts burden of proof to defense where defense called no witnesses, *State v. Fleming*, 83 Wn.App. 209 (1996), *State v. Dixon*, 150 Wn.App. 46 (2009), *cf.*: *State v. Contreras*, 57 Wn.App. 471 (1990), *State v. Cheatam*, 150 Wn.2d 626, 652-55 (2003), *State v. Barrow*, 60 Wn.App. 869 (1991), *State v. Sundberg*, 185 Wn.2d 147 (2016), *but see: State v. Blair*, 117 Wn.2d 479 (1991), *State v. Johnson*, 132 Wn.App. 400 (2006), *State v. Davis*, 133 Wn.App. 415, 421-22 (2006), *rev'd, on other grounds,* 163 Wn.2d 606 (2008), *State v. Gregory*, 158 Wn.2d 759, 845-46 (2006), *overruled, on other grounds, State v. W.R.*, 181 Wn.2d 757 (2014), *State v. Jackson*, 150 Wn.App. 877, 885-86 (2009); prosecutor should not refer to the fact that defendant did not testify in closing; harmless here; II.

***Darden v. Wainwright***, 91 L.Ed.2d 144 (1986)

Prosecutor commenting in closing that the death penalty is only guarantee against future similar acts, calling defendant an animal, and expressing the opinion that he wished someone had blown defendant's face off were misconduct, but were harmless; 5-4.

***State v. Stephans***, 47 Wn.App. 600 (1987)

Prosecutor's encouragement to victim to disobey a court order permitting the victim to be interviewed by a defense expert, thereby frustrating the defense in its attempt to evaluate credibility of the victim, is grounds for dismissal, CrR 8.3(b), for prosecution mismanagement; II.

***State v. Ramirez***, 49 Wn.App. 332 (1987)

Prosecutor's "hypothetical" comment in closing that defendant didn't testify because he's guilty is misconduct and not invited even though defense counsel argued reasons why a defendant might not testify, harmless here; I.

***State v. Strandy***, 49 Wn.App. 537 (1987)

Prosecutor inviting jury to conduct memory experiments during deliberations is misconduct, may be cured by admonition; II.

***State v. Cochran***, 51 Wn.App. 116 (1988)

Following conviction, state concedes that police intentionally withheld exculpatory evidence from defense, new trial is ordered; defense motion to dismiss is denied; held: in order to invoke the protections of the double jeopardy clause under the Fifth Amendment and CONST. art. 1, § 9, defense must show that misconduct was committed with the intent to provoke or goad a mistrial request, *Oregon v. Kennedy*, 72 L.Ed.2d 416 (1982); because there was no misconduct regarding the trial itself, the *Kennedy* test is not met; denial of motion to dismiss under CrR 8.3(b) was not an abuse of discretion, since defendant can receive a fair trial on remand, *cf.: State v. Martinez*, 121 Wn.App. 21 (2004); I.

***State v. Ciskie***, 110 Wn.2d 263 (1988)

Where defendant denies having threatened rape victim, state may call, in rebuttal, a witness to whom defendant communicated such threats; 8-1.

***State v. Belgarde***, 110 Wn.2d 504 (1988)

At murder trial, two state's witnesses explain that they did not tell police their stories for three weeks because defendant had threatened to use American Indian Movement (AIM) against them, defendant testifies that he had some affiliation with AIM, in closing, prosecutor argued that AIM is violent, referring to Wounded Knee, no objection by defense; held: prosecutor testified in the guise of argument; the argument was highly inflammatory, flagrant, ill intentioned and not harmless, irrespective of defense failure to object or request a curative instruction, *reversing* *State v. Belgarde*, 46 Wn.App. 441 (1986); *accord:* *State v. Powell*, 62 Wn.App. 914 (1991), *State v. Stith*, 71 Wn.App. 14 (1993), *see:* *State v. Klok*, 99 Wn.App. 81 (2000), *State v. Dhahwal*, 150 Wn.2d 559, 576-81 (2003); 7-2.

***State v. Day***, 51 Wn.App. 544 (1988)

Prosecutor's referring in closing to defendant's testimony as a "pack of lies" and "preposterous" and referring to state's witness as "believable" are not prohibited expressions of personal belief where context establishes that the argument asked the jury to draw inferences from the evidence; *cf.:* *State v. Riley*, 69 Wn.App. 349 (1993); III.

***State v. Stenger***, 111 Wn.2d 516 (1988)

In aggravated murder case, where prosecuting attorney had previously given legal advice to defendant about defendant's antisocial behavior and other criminal activity, then the prosecuting attorney and deputies are disqualified from prosecuting the murder charge, RPC 1.9(a), *see:* *State v. Tolias*, 135 Wn.2d 133 (1998), *State v. Bland*, 90 Wn.App. 677 (1998), *State v. Schmitt*, 124 Wn.App. 662 (2004), *State v. Nickels*, 195 Wn.2d 132 (2020); "[w]here the previous case is not the same case (or one closely interwoven therewith) that is being prosecuted, and where, for some other ethical reason the prosecuting attorney may be totally disqualified from the case, if that prosecuting attorney separates himself or herself from all connection with the case and delegates full authority and control over the case to a deputy prosecuting attorney, we perceive no persuasive reason why such a complete delegation of authority and control and screening should not be honored if scrupulously maintained," at 522-23; 8-0.

***State v. Hopson***, 113 Wn.2d 273 (1989)

Double jeopardy clauses of state and federal constitutions do not bar retrial following mistrial granted where a government investigator, who was not an officer of the court, twice violated an order *in limine* prohibiting testimony about defendant's prior record, as the misconduct was inadvertent and not consciously designed to prejudice defendant, *Oregon v. Kennedy*, 72 L.Ed.2d 416 (1982); *cf.*: *Oregon v. Rathbun*, 600 P.2d 392 (1979); *see:* *State v. Lewis*, 78 Wn.App. 739 (1995); where witness testifies as to prior convictions and said testimony is stricken, within discretion of trial court to deny mistrial if irregularity was not serious enough to materially affect the result; 9-0.

***State v. Coleman***, 54 Wn.App. 742 (1989)

Prosecutor's providing telephone numbers for witnesses on the day of trial is not grounds for dismissal, CrR 8.3(b), as a continuance was still a possible remedy; while state is obligated to fulfill its discovery responsibilities, the defendant also has a responsibility to investigate and prepare, *State v. Wilson*, 149 Wn.2d 1 (2003), *but see: State v. Sherman*, 59 Wn.App. 763 (1990); I.

***State v. Getty***, 55 Wn.App. 152 (1989)

Police serve a juvenile with a municipal court citation but file it with county prosecutor in juvenile court; juvenile court judge orders state to obtain dismissal in municipal court (although citation never filed there), state fails to comply, trial court dismisses; held: municipal court lacked jurisdiction over juvenile, so no constitutional rights violation existed; no prejudice to respondent, thus trial court abused its discretion; I.

***State v. Lass***, 55 Wn.App. 300 (1989)

Prosecutor's filing a more serious charge after defendant sets case for trial does not violate due process clause unless prosecutor acts with intent of retaliating, *State v. Soderholm*, 68 Wn.App. 363 (1993), *State v. Korum*, 157 Wn.2d 614 (2006); appearance of vindictiveness is insufficient to establish due process violation, *State v. Bockman*, 37 Wn.App. 474 (1984), *State v. McKenzie*, 31 Wn.App. 450 (1981), *State v. Lee*, 69 Wn.App. 31 (1993), *State v. Bonisisio*, 92 Wn.App. 783, 790-92 (1998), *State v. Aguilar*, 153 Wn.App. 265, 279-80 (2009); III.

***State v. Grover***, 55 Wn.App. 923 (1989)

State examines recanting victim as to alleged threats from defendant and asks whether victim told police about threats; victim denies threats, prosecutor does not call police to establish threats; held: misconduct, as prosecutor has duty to refrain from using statements which are not supported by evidence and which tend to prejudice defendant, *State v. Hamilton*, 47 Wn.App. 15, 18 (1987); because defense failed to object, and because prosecutor's comments were not so flagrant and ill intentioned that no curative instruction would have been effective, deemed harmless; I.

***State v. Bautista-Caldera***, 56 Wn.App. 186 (1989)

Exhorting jury in closing to send a message to society about the problem of child sex abuse is misconduct, *State v. Perez-Mejia*, 134 Wn.App. 907 (2006), *State v. Ramos*, 164 Wn.App. 327 (2011), *but see: State v. Finch*, 137 Wn.2d 792, 839-42 (1999), *State v. Smith*, 124 Wn.App. 417, 430-31 (2004), *aff'd, on other grounds,* 159 Wn.2d 778 (2007), *State v. Gauthier*, 189 Wn.App. 30 (2015); urging jury to enforce the law on behalf of victim is misconduct; because prejudice could have been neutralized by a curative instruction, and because defense failed to object, harmless, *see: State v. Jones*, 71 Wn.App. 798, 807-8 (1993); I.

***State v. Fowler***, 114 Wn.2d 59 (1990)

Prosecutor's argument that "anyone can call and subpoena witnesses if defendant's story is true and if he had a friend in his car where is that person?" is misconduct, *see: State v. Cheatam*, 150 Wn.2d 626, 652-55 (2003), *State v. Dixon*, 150 Wn.App. 46 (2009), *but see: State v. Contreras*, 57 Wn.App. 471 (1990), *State v. Davis*, 133 Wn.App. 415, 421-22 (2006),

*rev'd, on other grounds,* 163 Wn.2d 606 (2008), *State v. Gregory*, 158 Wn.2d 759, 845-46 (2006), *overruled, on other grounds, State v. W.R.*, 181 Wn.2d 757 (2014), *cf.: State v. Sundberg*, 185 Wn.2d 147 (2016), but not so flagrant and ill-intentioned to warrant a mistrial, at least in absence of a motion for one; could be cured by an instruction had one been requested in a timely fashion; *accord*: *State v. Perez-Arellano*, 60 Wn.App. 781 (1991); *but see: State v. Blair*, 117 Wn.2d 479 (1991); 9-0.

***State v. Bogart***, 57 Wn.App. 353 (1990)

Counsel, representing defendant charged with robbery 2°, is informed by prosecutor that if defendant doesn't plead by pretrial hearing, charge will be amended to robbery 1°; at time of pretrial hearing, counsel is on vacation, substitute counsel enters plea of not guilty; later, defendant tenders plea to robbery 2°, which is rejected, defendant is convicted of robbery 1°; held: in absence of detrimental reliance, state can revoke plea offer at any time, *State v. Wheeler*, 95 Wn.2d 799 (1981), *State v. Yates*, 161 Wn.2d 714, 740-41 (2007); defense must show defendant relied on bargain in such a way that fair trial is no longer possible, *State v. Budge*, 125 Wn.App. 341 (2005); here, fair trial was not impeded; "'[t]he Due Process Clause is not a code of ethics for prosecutors; its concern is with the manner in which persons are deprived of their liberty,'" at 358; III.

***State v. Swan***, 114 Wn.2d 613 (1990)

Rebuttal evidence, while not a reiteration of evidence in chief, will frequently overlap or coalesce with evidence in chief; error can be predicated only upon a manifest abuse of discretion, *State v. White*, 74 Wn.2d 386, 394-5 (1968), *State v. Price*, 126 Wn.App. 617, 641-42 (2005); while prosecutor may not express a personal opinion about credibility of witnesses during closing argument, *State v. Reed*, 102 Wn.2d 140, 145 (1984), *State v. Robinson*, 44 Wn.App. 611, 624 (1986), *State v. Lindsay*, 180 Wn.2d 423, 437-38 (2014), prejudicial error does not occur until it is clear that the prosecutor is not arguing an inference from the evidence but is expressing a personal opinion, *State v. Papadopoulos*, 34 Wn.App. 397, 399 (1983), *State v. Copeland*, 130 Wn.2d 244, 290-2 (1996), *State v. McKenzie*, 157 Wn.2d 44 (2006), *see: State v. Millante*, 80 Wn.App. 237, 250-1 (1995) ; 9-0.

***State v. Marks***, 114 Wn.2d 724 (1990)

Dismissal, CrR 8.3(b), is unwarranted where suppression of evidence may eliminate whatever prejudice is caused by governmental misconduct, *Seattle v. Orwick*, 113 Wn.2d 823 (1989), *Seattle v. Holifield*, 170 Wn.2d 230, 236-39 (2010); dismissal is inappropriate when there is credible and admissible evidence obtained that is untainted by governmental misconduct, *State v. Prok*, 107 Wn.2d 153, 157 (1986), even where misconduct involved a reckless disregard for defendant's rights or gross mismanagement, *cf.: State v. Martinez*, 121 Wn.App. 212 (2004); 9-0.

***State v. Contreras***, 57 Wn.App. 471 (1990)

Assault defendant testifies to alibi, says he was with a third party during the assault, alibi witness not called; in cross-examination and closing, prosecutor comments about defendant's failure to call witness; held: in cross-examination, prosecutor may establish close relationship between defendant and uncalled witness to avoid being faulted by jury for witness's absence; in

closing, prosecutor may comment on defendant's failure to call an alibi witness so long as it is clear that defendant was able to produce the witness and the defendant's testimony unequivocally implies the uncalled witness's ability to corroborate his theory of the case, *State v. Blair*, 117 Wn.2d 479 (1991), *State v. Davis*, 133 Wn.App. 415, 421-22 (2006), *rev'd, on other grounds*, 163 Wn.2d 606 (2008), *distinguishing* *State v. Traweek*, 43 Wn.App. 99 (1986), *State v. Fowler*, 114 Wn.2d 59 (1990), *State v. Cheatam*, 150 Wn.2d 626, 652-55 (2003), *cf.:* *State v. Gregory*, 158 Wn.2d 759, 845-46 (2006), *overruled, on other grounds, State v. W.R.*, 181 Wn.2d 757 (2014), *State v. Dixon*, 150 Wn.App. 46 (2009), *cf.: State v. Sundberg*, 185 Wn.2d 147 (2016); *accord*: *State v. Barrow*, 60 Wn.App. 869 (1991); I.

***State v. Cleveland***, 58 Wn.App. 634 (1990)

Prosecutor's rebuttal argument that defendant "has a good . . . attorney . . . [who] would not have overlooked any opportunity to present admissible, helpful evidence to you" is misconduct, *State v. Traweek*, 43 Wn.App. 99 (1986), *but see:* *State v. Blair*, 117 Wn.2d 479 (1991), but, because no other evidence could have been found, harmless, *cf.*: *State v. Barrow*, 60 Wn.App. 869 (1991), *State v. Sundberg*, 185 Wn.2d 147 (2016); I.

***State v. Graham***, 59 Wn.App. 418 (1990)

In statutory rape case, not improper for prosecutor to cross-examine defendant as to lack of reasons for victim to lie ("why would [victim] say something that is not true? does [she] have any reason to lie?") where defense repeatedly portrayed victim as untruthful, *State v. Stith*, 71 Wn.App. 14 (1993); *cf.:* *State v. Stover*, 67 Wn.App. 228 (1992), *State v. Ramos*, 164 Wn.App. 327 (2011); I.

***State v. Delarosa-Flores***, 59 Wn.App. 514 (1990)

Rape victim, on direct, denied "any other kind of sex act"; prosecution request for recess and consultation granted, following which victim testifies to forced oral sex; held: no evidence prosecutor did anything more than refresh victim's recollection; no evidence prosecutor improperly influenced testimony; defense could have cross-examined as to "coaching" during recess, *Geders v. United States*, 47 L.Ed.2d 592 (1976), failed to do so; leading questions are prohibited except "as may be necessary to develop [witness's] testimony," ER 611(c), within discretion of trial court; III.

***State v. Sherman***, 59 Wn.App. 763 (1990)

State agrees in omnibus order to provide defense IRS records in victim's possession; after expiration date is extended seven times, state still had not provided records, trial court dismisses; held: dismissal was appropriate, CrR 8.3(b), as defendant had to choose between right to speedy trial or prepared defense, *State v. Price*, 94 Wn.2d 810 (1980), *distinguishing* *State v. Coleman*, 54 Wn.App. 742 (1989), *but see:State v. Woods*, 143 Wn.2d 561, 578-85 (2001); state's late amendment of information, failure to produce ordered witness list, adding expert witness on day of trial demonstrate mismanagement, denying defendant right to effective assistance of counsel, *State v. Dailey*, 93 Wn.2d 454 (1980), *State v. Burri*, 87 Wn.2d 175 (1976), *State v. Brooks*, 149 Wn.App. 373 (2009), *cf.:* *State v. Hanna*, 123 Wn.2d 704, 715-6 (1994), *State v. Ramos*, 83 Wn.App. 622, 634-9 (1996), *State v. Wilson*, 149 Wn.2d 1 (2003), *State v. Martinez*, 121 Wn.App. 21 (2004); I.

*State v. Barrow*, 60 Wn.App. 869 (1991)

In VUCSA trial in which evidence consisted of defendant's possession of a pipe with cocaine residue, defendant testified that pipe belonged to his brother and that defendant did not know drugs were in it; in closing, prosecutor repeatedly asked, "where is the brother" who could testify for defendant; held: a prosecutor can question a defendant's failure to provide corroborative evidence if the defendant testifies about an exculpatory theory that could have been corroborated by an available witness, *State v. Davis,* 133 Wn.App. 415, 421-22 (2006), *rev'd, on other grounds,* 163 Wn.2d 606 (2008), *State v. Blair*, 117 Wn.2d 479 (1991), *State v. Contreras*, 57 Wn.App. 471 (1990), *State v. Bebb*, 44 Wn.App. 803, 815 (1986), *State v. Cheatam*, 150 Wn.2d 626, 652-55 (2003), *cf.: State v. Traweek*, 43 Wn.App. 99, 106-08 (1986), *State v. Cleveland*, 58 Wn.App. 634, 647-49 (1990), *State v. Gregory*, 158 Wn.2d 759, 845-46 (2006), *overruled, on other grounds, State v. W.R.,* 181 Wn.2d 757 (2014), *State v. Sundberg,* 185 Wn.2d 147 (2016); prosecutor's arguing that, to acquit, jurors must believe that police are lying is misconduct, *State v. Brown*, 35 Wn.2d 379 (1949), *State v. Stith*, 71 Wn.App. 14 (1993), *State v. Carter*, 74 Wn.App. 323, 330-2 (1994), *rev'd, in part, on other grounds,* 127 Wn.2d 836 (1995), *State v. Fleming*, 83 Wn.App. 209 (1996), *State v. Wheless*, 103 Wn.App. 749, 757-59 (2000), *State v. Miles*, 139 Wn.App. 879, 889-90 (2007), *State v. Rich*, 186 Wn.App. 632, 648-50 (2015), *reversed, on other grounds,* 184 Wn.2d 897 (2016), *cf.: State v. Jackson*, 150 Wn.App. 877, 888 (2009) , *State v. Calvin*, 176 Wn.App. 1, 15-16 (2013), *but see: State v. Wood,* ___ Wn.App.2d ___, 498 P.3d 968 (2021); prosecutor's cross-examination attempt to get defendant to call state's witnesses liars is misconduct (*dicta*), *State v. Green*, 71 Wn.2d 372, 380-81 (1967), harmless here; *see*: *State v. Casteñeda-Perez*, 61 Wn.App. 354 (1991), *State v. Smith*, 67 Wn.App. 838 (1992), *State v. Suarez-Bravo*, 72 Wn.App. 359, 365-8 (1994), *but see: State v. Vassar,* 188 Wn.App. 251 (2015); 2-1, I.

***State v. Casteñeda-Perez***, 61 Wn.App. 354 (1991)

Asking a witness to express an opinion as to whether or not another witness is lying is misconduct, *State v. Barrow*, 60 Wn.App. 869 (1991), *State v. Stover*, 67 Wn.App. 228 (1992), *State v. Smith*, 67 Wn.App. 838 (1992), *State v. Walden*, 69 Wn.App. 183 (1993), *State v. Stith*, 71 Wn.App. 14 (1993), *State v. Suarez-Bravo*, 72 Wn.App. 359, 365-8 (1994), *State v. Wheless*, 103 Wn.App. 749, 757-59 (2000), *see: State v. Wright*, 76 Wn.App. 811, 819-26 (1995), *State v. Neidigh*, 78 Wn.App. 71, 74-80 (1995), *State v. Rodriguez*, 103 Wn.App. 693, 701-03 (2000), *aff'd, on other grounds,* 146 Wn.2d 260 (2002), *State v. Stevens*, 127 Wn.App. 269, 275-76 (2005), *State v. Ramos,* 164 Wn.App. 327 (2011), *State v. Cook,* 17 Wn.App.2d 96 (2021), *cf.: State v. Vassar,* 188 Wn.App. 251 (2015), harmless here due, in part, to inadequate grounds for objection by defense counsel, *State v. Davis*, 133 Wn.App. 415, 422-24 (2006), *rev'd, on other grounds*, 163 Wn.2d 606 (2008); I.

***Seattle v. Knutson***, 62 Wn.App. 31 (1991)

Dismissal for inconvenience and delay because of trial court's inability to provide a court clerk is an abuse of discretion, CrRLJ 8.3(b); I.

***State v. Powell***, 62 Wn.App. 914 (1991)

In child molestation case, prosecutor's closing argument that a not guilty verdict would send message that children won't be believed and would declare "open season on children" is flagrant, prejudicial appeal to jury's passions which could not have been cured by an instruction even if defense had requested one, *State v. Swan*, 114 Wn.2d 613, 661 (1990), *State v. Belgarde*,

110 Wn.2d 504, 507-8 (1988)*[dictum]*, *State v. Perez-Mejia*, 134 Wn.App. 907 (2006), *State v. Thierry*, 190 Wn.App. 680 (2015), *see: State v. Ramos*, 164 Wn.App. 327 (2011), *State v. Smiley*, 195 Wn.App. 185, 191-97 (2016), *cf.: State v. Gauthier*, 189 Wn.App. 30 (2015); I.

***State v. Blair***, 117 Wn.2d 479 (1991)

Defendant testifies he knew how to locate people who could exculpate him; in closing, prosecutor argues defendant could have brought witnesses in to testify but failed to do so; held: it is not misconduct for prosecutor to argue that because evidence referred to by defendant was within control of defendant, whose interest it would naturally be to produce it, jury should draw inference that failure to produce evidence is unfavorable to defendant, *State v. Davis*, 133 Wn.App. 415, 421-22 (2006), *rev'd, on other grounds,* 163 Wn.2d 606 (2008), *State v. Cheatam*, 150 Wn.2d 626, 652-55 (2003), *State v. Sundberg*, 185 Wn.2d 147 (2016), overruling *State v. Traweek*, 43 Wn.App. 99 (1986), disapproving *State v. Fowler*, 114 Wn.2d 59 (1990), *see: State v. Johnson*, 132 Wn.App. 403, 414 (2006), *State v. Dixon*, 150 Wn.App. 46 (2009); missing witness doctrine does not apply unless it would be natural for party to produce witness if facts known by witness would be favorable, if witness is unimportant or cumulative, if the witness's absence can be satisfactorily explained, *State v. Lopez*, 29 Wn.App. 836 (1981), *State v. Richards*, 3 Wn.App. 382 (1970), *State v. Carter*, 74 Wn.App. 320, 330-2 (1994), *rev'd, in part, on other grounds*, 127 Wn.2d 836 (1995), *see: State v. French*, 101 Wn.App. 380 (2000), if witness is incompetent or privilege applies to witness's testimony, *see: State v. Gregory*, 158 Wn.2d 759, 845-46 (2006), *overruled, on other grounds, State v. W.R.*, 181 Wn.2d 757 (2014), or witness is equally available to all parties, or witness's testimony would be self-incriminatory (however, the fact that the testimony might be self-incriminatory if adverse to the party not calling the witness does not preclude use of the inference); 9-0.

***State v. McNallie***, 64 Wn.App. 101 (1992)

Arguing that jurors are "representatives of this whole community [who will determine if] defendant will be set free or held to account" is not misconduct; I.

***State v. Alexander***, 64 Wn.App. 147 (1992)

Prosecutor repeatedly asking the same question has the effect of telling the jury the answer even when all of defense objections are sustained, is misconduct; arguing evidence which was ruled inadmissible is flagrant and ill intentioned misconduct; I.

***Wade v. United States***, 118 L.Ed.2d 524 (1992)

Where statute provides authority for a court to impose a lesser sentence only if government files a motion, 18 USC § 3553(e), court has authority to review refusal to file a motion and to grant a remedy if court finds that the refusal was based on an unconstitutional motive, *see, e.g.: Wayte v. United States*, 84 L.Ed.2d 547 (1985), none here; 9-0.

***United States v. Williams***, 118 L.Ed.2d 352 (1992)

District court may not dismiss an indictment because government failed to disclose to a grand jury substantial exculpatory evidence in its possession; 5-4.

***State v. Stark***, 66 Wn.App. 423 (1992)

Prosecutor may file criminal charges or seek civil remedy where information provided by public health officer shows defendant engaged in unsafe sex knowing he was HIV-positive, State v. Whitfield, 132 Wn.App. 878 (2006); II.

***State v. Stover***, 67 Wn.App. 228 (1992)

Prosecutor may not cross-examine defendant as to whether other witnesses have lied, irrespective of whether the other witnesses are police officers, *State v. Casteñeda-Perez*, 61 Wn.App. 354 (2007), *distinguishing* *State v. Graham*, 59 Wn.App. 418 (1990); harmless here, absent objection, *State v. Stith*, 71 Wn.App. 14 (1993); counsel may comment in closing on a witness's veracity as long as counsel does not express a personal opinion, *Graham*, *supra*, at 429, *State v. Millante*, 80 Wn.App. 237, 250-1 (1995), *State v. Montgomery*, 95 Wn.2d 192, 201-2 (1999), *State v. Jordan*, 106 Wn.App. 291, 295-96 (2001), *see:* *State v. Wright*, 76 Wn.App. 811, 821-6 (1994); I.

***State v. Smith***, 67 Wn.App. 838 (1992)

While training and experience of a police officer are relevant to reinforce basis of knowledge of witness, evidence of awards and commendations is irrelevant and not admissible to support credibility, ER 608(a), *State v. Jones*, 144 Wn.App. 284-294 (2008), harmless here; I.

***State v. Craven***, 67 Wn.App. 921 (1992)

Cross-examination of defendant and defense witnesses regarding the fact that they wear black clothing and that a certain gang wears black is within discretion of trial court, *State v. Blackwood*, 103 Wash. 529 (1918), *see:* *State v. Asaeli*, 150 Wn.App. 543, 574-83 (2009); I.

***State v. Soderholm***, 68 Wn.App. 363 (1993)

Defendant rejects expedited plea in district court, prosecutor obtains dismissal without notice, refiles felony in superior court; held: evidence of actual vindictiveness is required to invalidate a prosecutor's adversarial decisions made prior to trial, *State v. McDowell*, 102 Wn.2d 341, 342-7 (1984), *Bordenkircher v. Hayes*, 54 L.Ed.2d 604 (1978), *United States v. Goodwin*, 73 L.Ed.2d 74 (1982), *State v. Bonisisio*, 92 Wn.App. 783, 790-92 (1998), *distinguishing* *Blackledge v. Perry*, 40 L.Ed.2d 628 (1974), *State v. Korum*, 157 Wn.2d 614 (2006); state need not notify defense of a motion to dismiss, CrRLJ 8.3(a); I.

***State v. Lee***, 69 Wn.App. 31 (1993)

State is granted leave to amend from robbery 2° to robbery 1° when case is set for trial; held: statutory prosecution charging standards, RCW 9A.94A.440, are not intended to create liberty interests, *see:* *Vitek v. Jones*, 63 L.Ed.2d 552 (1980), and are not subject to judicial review; absent proof of actual vindictiveness, a mere opportunity for vindictiveness is not grounds for limiting prosecution discretion, *State v. Bonisisio*, 92 Wn.App. 783, 790-92 (1998), *State v. Korum*, 157 Wn.2d 614 (2006), *State v. Aguilar*, 153 Wn.App. 265, 279-80 (2009); I.

***State v. Walden***, 69 Wn.App. 183 (1993)

Asking witness whether another witness is mistaken (as opposed to lying) is misconduct, *State v. Casteñeda-Perez*, 61 Wn.App. 354 (1991), *State v. Chavez*, 76 Wn.App. 293 (1994), *State v. Cook*, 17 Wn.App.2d 96 (2021), *but see:* *State v. Wright*, 76 Wn.App. 811, 821-6 (1995),

*State v. Vassar*, 188 Wn.App. 251 (2015), harmless here; it is proper to point out inconsistency and ask whether, in view of that, witness wishes to modify or retract his or her testimony *(dicta)*; I.

***State v. Padilla***, 69 Wn.App. 295 (1993)

Asking defendant, over objection, whether officer was lying is reversible error, *State v. Ramos*, 164 Wn.App. 327 (2011), *State v. Cook*, 17 Wn.App.2d 96 (2021), *but see: , State v. Vassar*, 188 Wn.App. 251 (2015), where defendant was provoked to testify affirmatively, prosecutor in closing argues comparative credibility, little corroboration to officer's testimony, *State v. Suarez-Bravo*, 72 Wn.App. 359, 365-8 (1994); I.

***State v. Martin***, 69 Wn.App. 686 (1993)

In DUI case, argument that defendant may have been a "condition drunk *[sic]*," absent evidence of same, is misconduct; arguing why there is no breath test, absent evidence of the reason, is misconduct; 2-1 (dissent: harmless), III.

***State v. Stith***, 71 Wn.App. 14 (1993)

Where defense counsel, in closing, states police might not be telling truth because one of them was experienced deceiver in undercover work, prosecutor may make some remark about veracity of police officers in rebuttal, *State v. Graham*, 59 Wn.App. 418, 428-29 (1990); comment by prosecutor that court had previously determined probable cause and defendant had previously been convicted of drug offense and was doing it again is misconduct mandating reversal in spite of strong curative instruction, where objections were entered, *see: State v. Powell*, 62 Wn.App. 914, 919 (1991), *State v. Belgarde*, 110 Wn.2d 504, 508 (1988), *aff'd*, 119 Wn.2d 711 (1992), *cf.: State v. Neidigh*, 78 Wn.App. 71, 74-5 (1995), *State v. Fiallo-Lopez*, 78 Wn.App. 717, 727-8 (1995); I.

***State v. Echevarria***, 71 Wn.App. 595 (1993)

Prosecutor's references in opening to war on drugs, enemy and battlefield, over objection, was egregious misconduct containing argument and inflammatory remarks, *State v. Campbell*, 103 Wn.2d 1, 15-6 (1984), *State v. Kroll*, 87 Wn.2d 829, 835 (1976), appealed to passion and prejudice, *State v. Claflin*, 38 Wn.App. 847, 850 (1984), *State v. Huson*, 73 Wn.2d 660, 663 (1968), and was so flagrant and ill-intentioned that no curative instruction could have erased their prejudicial effect, *State v. Loughbom*, 196 Wn.2d 64 (2020), *State v. Belgarde*, 110 Wn.2d 504, 507-8 (1988); I.

***State v. Jones***, 71 Wn.App. 798 (1993)

In child sex abuse case, prosecutor's comment in closing that defendant stared at victim during trial is an unconstitutional comment on defendant's right of confrontation, *but see: State v. Klok*, 99 Wn.App. 81 (2000), harmless here, at 809-12; prosecutor's reference in closing to general societal problem of concern for children and how the judicial system can be frightening is misconduct, but is not flagrant requiring reversal absent objection, at 807-8, *State v. Bautista-Caldera*, 56 Wn.App. 186, 195 (1989); failure to object to misconduct precludes appellate review even if raised in motion for new trial, at 807 n.2, *distinguishing State v. Ray*, 116 Wn.2d

531, 540 (1991), *In re Lee*, 95 Wn.2d 357, 363 (1980), *State v. Fagalde*, 85 Wn.2d 730, 731 (1975); I.

***State v. Negrete***, 72 Wn.App. 62, 67 (1993)

Closing argument that defense counsel "is being paid [by defendant] to twist the words of the witnesses" is misconduct, *State v. Thorgerson*, 172 Wn.2d 438, 450-52 (2011), *State v. Lindsay*, 180 Wn.2d 423 (2014), *see: State v. Lile*, 193 Wn.App. 179, 205-09 (2016), *affirmed, on other grounds*, 188 Wn.2d 766 (2017); defense objection was sustained but, absent mistrial motion or request for curative instruction, misconduct did not deprive defendant of fair trial, *State v. Calvin*, 176 Wn.App. 1, 16-18 (2013); III.

***State v. Suarez-Bravo***, 72 Wn.App. 359 (1994)

Prosecutor's questions to drug defendant as to whether he lived in high crime area sought irrelevant profile evidence; questions as to whether farmworkers see cocaine in fields were improper; prosecutor's misrepresenting testimony in cross-examining defendant to create conflict that did not exist, plus asking defendant to judge whether another witness is lying, *State v. Casteñeda-Perez*, 61 Wn.App. 354, 362 (1991), *State v. Ramos*, 164 Wn.App. 327 (2011), *State v. Stevens*, 127 Wn.App. 269, 275-76 (2005), is misconduct, requiring reversal even absent objections, *State v. Jerrels*, 83 Wn.App. 503 (1996), *State v. Jones*, 117 Wn.App. 89 (2003), *but see: State v. Rodriguez*, 103 Wn.App. 693, 702-03 (2000) , *aff'd, on other grounds,* 146 Wn.2d 260 (2002), *State v. Hughes*, 118 Wn.App. 713, 725-26 (2003), *State v. Davis*, 133 Wn.App. 415, 422-24 (2006), *rev'd, on other grounds,* 163 Wn.2d 606 (2008), *State v. Vassar*, 188 Wn.App. 251 (2015), *State v. Cook*, 17 Wn.App.2d 96 (2021); III.

***State v. Carlisle***, 73 Wn.App. 678 (1994)

Prosecutor tells counsel for defense witness, a potential accomplice, if he testifies and incriminates himself, she would relay information to her office for appropriate action, witness takes the Fifth; held: where defense witness is threatened and those threats keep witness off stand, defense is deprived of due process, *Webb v. Texas*, 34 L.Ed.2d 330 (1972); here, however, prosecutor merely advised witness, through counsel, to an accurate warning, thus no misconduct, *State v. Larson*, 160 Wn.App. 577, 590-91 (2011), *State v. Statler*, 160 Wn.App. 622, 636-38 (2011); I.

***State v. Carter***, 74 Wn.App. 320, 330-2 (1994), *rev'd, in part, on other grounds,* 127 Wn.2d 836 (1995)

Defendant's general denial on stand does not invite prosecutor's argument that defendant is characterizing officers as liars and conspirators, which is misconduct, *see: State v. Barrow*, 60 Wn.App. 869, 875 (1991), *State v. Wright*, 76 Wn.App. 811, 821-6 (1995), *State v. Cheatam*, 150 Wn.2d 626, 652-55 (2003), *cf.: State v. Davis*, 133 Wn.App. 415, 421-22 (2006), *rev'd, on other grounds*, 163 Wn.2d 606 (2008); where defense has satisfactorily explained a witness's absence by seeking continuances and a material witness warrant, state may not refer to witness's absence in closing, *State v. Blair*, 117 Wn.2d 479, 488 (1991); harmless here; I.

***State v. Russell***, 125 Wn.2d 24, 90-1 (1994)

State establishes that murder victim's ring was given by defendant to another, on cross-defense brings out that defendant had told donee that he got the ring in Canada, defendant does not testify, state argues in closing that defense could have called a witness from Canada to show where defendant got the ring; held: because the comments were based on testimony elicited by defense and pointed to logical support of the defense theory that was missing, the comments were justifiable under the missing witness doctrine, *State v. Blair*, 117 Wn.2d 479, 485-6 (1991), *State v. Cheatam*, 150 Wn.2d 626, 652-55 (2003), *State v. Davis*, 133 Wn.App. 415, 421-22 (2006), *rev'd, on other grounds,* 163 Wn.2d 606 (2008), *State v. Gregory*, 158 Wn.2d 759, 845-46 (2006), *overruled, on other grounds, State v. W.R.*, 181 Wn.2d 757 (2014), *see: State v. Sundberg*, 185 Wn.2d 147 (2016); 9-0.

***State v. Coleman***, 74 Wn.App. 835 (1994)

Arguing that in order to accept the defense theory of the case the jury would have to violate their oath as jurors is misconduct, *State v. Finch*, 137 Wn.2d 792, 839-42 (1999), harmless here; 2-1, I.

***State v. Hofstetter***, 75 Wn.App. 390 (1994)

It is misconduct for counsel to instruct or advise a witness not to speak with opposing counsel except when counsel is present; it is improper for a prosecutor to plea bargain in such a way as to impose such instructions or advice on a witness; prosecutor may inform a witness of the right to choose whether to be interviewed or who shall be present at an interview; absent prejudice, reversal is not warranted, *see: State v. Wilson*, 149 Wn.2d 1 (2003); II.

***State v. Reed***, 75 Wn.App. 742 (1994)

Defendant is arrested for selling drugs, signs agreement with police to assist in making narcotics arrests, police would "drop charges"; defendant sets up one transaction which fails, defendant refuses to assist further, claiming his safety was compromised, defendant is charged, moves to dismiss on contract theory; held: because prosecutor was not a party to the agreement, it cannot be binding on the prosecutor absent detrimental reliance which would no longer make a fair trial possible, or police misconduct or arbitrary action, CrR 8.3(b), *see: State v. Hull*, 78 Wn.2d 984, 989 (1971), *State v. Bogart*, 57 Wn.App. 353, 357 (1990); I.

***State v. Wright***, 76 Wn.App. 811, 821-6 (1995)

Asking witness on cross-examination whether another witness "got it wrong" or is mistaken, where no conflict exists, is objectionable, *State v. Castañeda-Perez*, 61 Wn.App. 354, 362 (1991), but is not misconduct, *see: State v. Neidigh*, 78 Wn.App. 71, 74-80 (1995), *but see: State v. Walden*, 69 Wn.App. 183 (1993), distinguishing asking witness whether another witness is lying, which is misconduct, *State v. Ramos*, 164 Wn.App. 327 (2011), *cf.: State v. Vassar*, 188 Wn.App. 251 (2015); questions of one witness whether she believes another is mistaken, where discrepancies exist, is proper; closing argument that to believe defendant jury would need to believe prosecution witnesses were mistaken (as opposed to lying) is not objectionable and does not constitute misconduct, *State v. Rafay*, 168 Wn.App. 734, 835-37 (2012), *distinguishing State v. Barrow*, 60 Wn.App. 869, 875-6 (1991); it is misconduct to argue that, in order to acquit, jury must find prosecution witnesses are either lying or mistaken, *State v. Fleming*, 130 Wn.2d 244, 290-2 (1996), *State v. Miles*, 139 Wn.App. 879, 889-90 (2007), *State v. Rich*, 186 Wn.App. 632, 648-50 (2015), *reversed, on other grounds*, 184 Wn.2d 897 (2016), *but see: State v. Wood*, ___ Wn.App.2d ___, 498 P.3d 968 (2021); I.

***State v. Brett***, 126 Wn.2d 136, 175-180 (1995)

Arguing why jury should believe a witness, based upon facts and inferences of the case, is not vouching for credibility, *State v. Millante*, 80 Wn.App. 237, 250-1 (1995), *State v. Copeland*, 130 Wn.2d 244, 290-2 (1996), *State v. Jackson*, 150 Wn.App. 877, 883-85 (2009), *State v. Robinson*, 189 Wn.App. 877, 892-95 (2015), *see:* *State v. Sargent*, 40 Wn.App. 340, 344 (1985); prosecutor's stating that there is no evidence to support a defense argument is not an improper comment on defendant's failure to testify where there were other potential witnesses who could have testified in support of the defense argument, *see:* *State v. Ashby*, 77 Wn.2d 33, 38 (1969), *State v. Crawford*, 21 Wn.App. 146 (1978), *State v. Jackson, supra.*, at 887-88, *State v. Morris*, 150 Wn.App. 927 (2009); 9-0.

***State v. Perez***, 77 Wn.App. 372 (1995)

Deputy prosecutor's personal relationship with a relative of victim, absent "improper conduct," does not violate appearance of fairness doctrine, *see:* *State v. Finch*, 137 Wn.2d 792, 808-10 (1999); 2-1, III.

***State v. Fortune***, 77 Wn.App. 628, 635-6 (1995), *aff'd, on other grounds,* 128 Wn.2d 464 (1996)

Closing argument that jury should acquit rather than convict of lesser is not misconduct; I.

***State v. Neidigh***, 78 Wn.App. 71 (1995)

Argument that state was "relying on truth," and that defendant had concocted a fairy tale is a permissible comment on the credibility of witnesses, *State v. Kwan Fair Mak*, 105 Wn.2d 692, 726 (1986), and not a personal opinion of witness's veracity, *State v. Stith*, 71 Wn.App. 14, 19 (1993); while questioning defendant as to whether a state's witness is lying is generally harmless error where no objection is taken, *State v. Stover*, 67 Wn.App. 228, 231 (1992), *State v. Casteñeda-Perez*, 61 Wn.App. 354, 362-3 (1991), *State v. Davis*, 133 Wn.App. 415, 421-22 (2006), *rev'd, on other grounds,* 163 Wn.2d 606 (2008), *but see: State v. Vassar*, 188 Wn.App. 251 (2015), trial court should consider interrupting and admonishing *sua sponte,* calling counsel to the bench to inquire if defense wishes an instruction, or entering an order *in limine,* followed by contempt, RCW 7.21.050; I.

***State v. Fiallo-Lopez***, 78 Wn.App. 717 (1995)

Comment that defendant is an experienced drug dealer is not improper where defendant's actions in the charged transaction plus other evidence the jury considered permitted them to draw inference that he was experienced, at 728, *distinguishing* *State v. Stith*, 71 Wn.App. 14 (1993); argument that the facts indicated that police were truthful is not a personal statement about prosecutor's belief that officers were telling the truth, not misconduct, *Stith, supra*, at 21; I.

***State v. Lewis***, 78 Wn.App. 739 (1995)

Following mistrial, in ruling on a motion to dismiss for intentional misconduct, *State v. Hopson*, 113 Wn.2d 273 (1989), trial court may infer findings as to the intent of the prosecutor from the objective facts and circumstances, which will not be disturbed by appellate court if supported by substantial evidence, *State v. Martinez*, 121 Wn.App. 21 (2004); here, misconduct

neither meets the federal intentional provocation of mistrial test, *Oregon v. Kennedy*, 72 L.Ed.2d 416 (1982), nor the Oregon standard of indifference, *Oregon v. Kennedy*, 666 P.2d 1316 (1983); I.

***State v. Kassahun***, 78 Wn.App. 938, 952 (1995)

Where court denies defense discovery motion for victim's gang membership evidence, it is misconduct for prosecutor to argue that defendant's testimony about his belief in victim's gang membership is untruthful because he failed to offer evidence to support it; I.

***State v. Binkin***, 79 Wn.App. 284, 293-4 (1995), *overruled, on other grounds, State v. Kilgore,* 147 Wn.2d 288 (2002)

Prosecutor's argument that it's easy for defendant to deny the charge on the stand but it wasn't easy for victim to do so is a proper comment on credibility rather than a burden-shifting remark in light of victim's detailed testimony and defendant's flat denial; failure of defense to request a curative instruction waives error; I.

***State v. Avendano-Lopez***, 79 Wn.App. 706, 712-23 (1995)

Prosecutor's cross-examination question of defendant in drug case, "you have on occasion sold heroin haven't you?" is misconduct, door not opened as defendant did not testify to a trait of character or paint a picture of a person unlikely to commit the crime, *State v. Stockton*, 91 Wn.App. 35, 40 (1998), *State v. Jones*, 144 Wn.App. 284, 297-99 (2008), *see: State v. Brush*, 32 Wn.App. 445 (1982), *State v. Renneberg*, 83 Wn.2d 735, 736-8 (1974); asking defendant if he is "legal in this country" is misconduct, door not opened by defendant's direct testimony that he was born in Mexico, harmless; II.

***State v. Simonson***, 82 Wn.App. 226, 231-4 (1996)

Prosecutor subpoenas officer, defense counsel informs prosecutor he wants to call the officer, officer arrives outside court, prosecutor sees officer and tells officer he won't be calling her, defense is unaware she leaves, trial court denies continuance to obtain the witness; held: prosecutor had an obligation to advise the court and counsel of the witness's presence because he knew defense wanted to call her, trial court erred in denying continuance, harmless here; II.

***State v. Smith***, 82 Wn.App. 327 (1996)

Where defendant testifies to an alibi involving his wife, state may not cross-examine or argue about the failure to call the spouse as a witness, at 336-37, *State v. Blair*, 117 Wn.2d 479, 489 (1991), *State v. Charlton*, 90 Wn.2d 657, 663 (1978), *State v. Swan*, 25 Wn.2d 319, 327 (1946), *State v. Gant*, 6 Wn.App. 263 (1971), *cf.: State v. Contreras*, 57 Wn.App. 471, 476 (1990), *State v. Gregory*, 158 Wn.2d 759, 845-46 (2006), *overruled, on other grounds, State v. W.R.*, 181 Wn.2d 757 (2014), *but see: State v. Martin*, 171 Wn.2d 521, 532 (2011), harmless here; I.

***State v. Copeland***, 130 Wn.2d 244, 290-4 (1996)

Prosecutor's argument that defendant lied or was a liar, when the comments relate to evidence contradicting defendant's testimony and statements, is not misconduct, as prosecutor is not merely calling defendant a liar or expressing a personal opinion, *State v. Swan*, 114 Wn.2d

613, 664 (1990), *State v. Brett*, 126 Wn.2d 136, 175-80 (1995), *State v. Adams*, 76 Wn.2d 650, 660, *rev'd on other grounds,* 29 L.Ed.2d 855 (1971), *State v. Jefferson*, 11 Wn.App. 566 (1974), *Pers. Restraint of Benn*, 134 Wn.2d 868, 912 (1998), *State v. Jordan*, 106 Wn.App. 291, 295-99 (2001), *State v. McKenzie*, 157 Wn.2d 44, 53-60 (2006), *State v. Lopez*, 142 Wn.App. 341, 354 (2007), *Pers. Restraint of Lui*, 188 Wn.2d 525, 557-63 (2016), *cf.: State v. Miles*, 139 Wn.App. 879, 889-90 (2007) , *State v. Calvin*, 176 Wn.App. 1, 18-19 (2013); product rule, assigning probabilities to events or inviting jury to consider the possible rarity of each of the circumstances and then multiply them together, where the events are not shown to be independent, is misconduct, as it suggests an infallibility, particularly inappropriate where eyewitness testimony is concerned, waived here absent objection and request for curative instruction; 9-0.

***State v. Savaria***, 82 Wn.App. 832, 841-2 (1996), *disapproved, in part, State v. C.G.*, 150 Wn.2d 604, 611 (2003)

While evidence of prior abuse is relevant to establish victim's reasonable fear in harassment case, prosecutor's argument that the acts were typical of defendant's behavior and characterization of the parties' relationship as a cycle of violence was improper; I.

***State v. Fleming***, 83 Wn.App. 209 (1996)

Argument that to convict jury would have to find that complainant lied or was confused is misconduct, *State v. Castañeda-Perez*, 61 Wn.App. 354, 362-3 (1991), *State v. Wright*, 76 Wn.App. 811, 826 (1995), *State v. Barrow*, 60 Wn.App. 869, 874-5 (1991), *State v. Rich*, 186 Wn.App. 632, 648-50 (2015), *reversed, on other grounds,* 184 Wn.2d 897 (2016), *cf.: State v. Jackson*, 150 Wn.App. 877, 888 (2009), *State v. Calvin*, 176 Wn.App. 1, 15-16 (2013), *but see: State v. Vassar*, 188 Wn.App. 251, 259-61 (2015), and is reversible error even absent contemporaneous objection, *State v. Wheless*, 103 Wn.App. 749, 757-59 (2000) as it is flagrant and ill-intentioned since it was made more than two years after the opinion in *State v. Castañeda-Perez, supra., cf.: State v. Johnson*, 158 Wn.App. 677, 685 (2010)*;* argument that there is no evidence to support defense theories, and that if there is a reasonable doubt defendants would explain the evidence improperly shifted burden to defense, *State v. Traweek*, 43 Wn.App. 99, 107 (1986), *disapproved on other grounds, State v. Blair*, 117 Wn.2d 479, 491 (1991) *cf.: State v. Jackson, supra.*, at 885-86 (2009), *State v. Vassar, supra.*, at 261, *State v. Sundberg*, 185 Wn.2d 147 (2016); I.

***State v. Jerrels***, 83 Wn.App. 503 (1996)

In child sex abuse case, asking child's mother her opinion as to her child's veracity thrice is misconduct mandating reversal even absent objection, *State v. Suarez-Bravo*, 72 Wn.App. 359 (1994), *State v. Hawkins*, 14 Wn.App.2d 182 (2020), where credibility plays a crucial role, *see: State v. Rodriguez*, 103 Wn.App. 696, 702-03 (2000), *aff'd, on other grounds,* 146 Wn.2d 260 (2002), *State v. Saunders*, 120 Wn.App. 800, 811-13 (2004), *State v. Stevens*, 127 Wn.App. 269, 275-76 (2005), *see also: State v. Warren*, 134 Wn.App. 44, 52-58 (2006), *aff'd, on other grounds*, 165 Wn.2d 17 (2008), *State v. Perez-Valdez*, 172 Wn.App. 808, 817-19 (2011); II.

***State v. Michielli***, 132 Wn.2d 229, 239-46 (1997)

Defendant is accused of stealing items and pawning them, is charged with theft, three days before trial state adds charges of trafficking in stolen property, trial court dismisses; held:

state's delay in adding new charges when it had all the evidence necessary to file those charges months earlier, forcing defendant to waive speedy trial to answer the new charges, justifies dismissal in the interests of justice, CrR 8.3(b), *State v. Price*, 94 Wn.2d 810 (1980), *State v. Teems*, 89 Wn.App. 385 (1997), *State v. Brooks*, 149 Wn.App. 373 (2009); 5-4.

***State v. Koerber,*** 85 Wn.App. 1 (1997)

Before trial begins, prosecutor tells judge that a witness is ill, unknown when witness will be available, judge dismisses with prejudice for "want of prosecution"; held: dismissal is unwarranted for minor acts of negligence by third parties beyond state's direct control absent prejudice, *State v. Duggins*, 68 Wn.App. 396, 402, *aff'd,* 121 Wn.2d 524 (1993), *State v. Marks*, 114 Wn.2d 724, 731 (1990), *State v. McPherson*, 64 Wn.App. 705, 709-10 (1992), *State v. Wilson*, 149 Wn.2d 1 (2003), *cf.: State v. Chichester*, 141 Wn.App. 446 (2007), *Kent v. Sandhu*, 159 Wn.App. 836 (2011), *see: Seattle v. Clewis*, 159 Wn.App. 842 (2011); I.

***State v. Brown***, 132 Wn.2d 529, 566 (1997)

Referring to a defense argument as "ludicrous" is not misconduct; 9-0.

***State v. Bourgeois***, 133 Wn.2d 389 (1997)

Prosecutor asks state's witnesses, over objection, if they wanted to be in court, elicits that a witness had to be arrested on material witness warrant, witnesses testified they were in fear of being injured; held: absent an attack on credibility from opposing counsel, evidence intended to fortify or corroborate credibility of a witness is inadmissible, at 319, *State v. Kosanke*, 23 Wn.2d 211, 215 (1945), *State v. McGhee*, 57 Wn.App. 457, 460-1 (1990), *State v. Froehlich*, 96 Wn.2d 301 (1981), *cf.: State v. Hakimi*, 124 Wn.App. 15, 24-26 (2004); fears and threats to witnesses, where not linked to defendant, is irrelevant; *reverses State v. Bourgeois*, 82 Wn.App. 314 (1996) as harmless error; I.

***State v. Teems***, 89 Wn.App. 385 (1997)

Forty days after mistrial, state "refiles" and notifies a lawyer who had withdrawn, notifies defendant 12 days before time for trial expiration date, trial court dismisses; held: state caused delay through simple mismanagement, within trial court's discretion to find that defendant was impermissibly forced into choosing between speedy trial and a fair trial with adequately prepared counsel, *State v. Michielli*, 132 Wn.2d 229, 239-46 (1997), *State v. Price*, 94 Wn.2d 810, 814 (1980), *State v. Ralph G.*, 90 Wn.App. 16 (1998), *State v. Earl*, 97 Wn.App. 408 (1999), *State v. Brooks*, 149 Wn.App. 373 (2009); III.

***State v. Copeland***, 89 Wn.App. 492, 496-9 (1998)

Prosecutor fails to disclose local impeachable conviction of witness; held: where conviction record is in prosecutor's office, accessible to all members of the staff, then deputy's failure to disclose is misconduct, regardless of inadvertence, *State v. Dunivin*, 65 Wn.App. 728, 733 (1992), *see: State v. Martinez*, 121 Wn.App. 21 (2004), distinguishing *State v. Frederick*, 32 Wn.App. 624 (1982), *rev'd on other grounds,* 100 Wn.2d 550 (1983); II.

***State v. Granacki***, 90 Wn.App. 598 (1998)

During trial recess, detective who is permitted to remain in court as part of witness exclusion order, ER 615, is observed reading top page of defense counsel's notes on counsel table, trial court dismisses following hearing in which court determines that detective's testimony that he had only read his own name was not credible; held: dismissal is a proper discretionary remedy for eavesdropping on privileged communication between attorney and client, *State v. Cory,* 62 Wn.2d 371, 5 A.L.R.3d 1352 (1963), *State v. Perrow,* 156 Wn.App. 322 (2010), *see: State v. Peña Fuentes,* 179 Wn.2d 808 (2014), CrR 8.3(b), *State v. Irby,* 3 Wn.App.2d 247 (2018), *cf.: State v. Hunter,* 100 Wn.App. 198 (2000), *State v. Koeller,* 15 Wn.App.2d 245 (2020); lesser remedies of excluding detective's testimony, banning him from courtroom and prohibiting him from discussing case would also have been within court's discretion; I.

***State v. Bland***, 90 Wn.App. 677 (1998)

Deputy prosecutor who also works as a hospital social worker testifies in rape trial about her observations of victim, over objection that entire prosecutor's office should have been disqualified, RPC 3.7; held: because prosecutors do not represent clients, a more flexible approach is appropriate; trial court should consider if witness can be objective, whether dual positions artificially bolster witness's credibility, and whether dual role raises an appearance of unfairness; here, witness testified only in her capacity as a social worker, had no personal interest, thus disqualification was unnecessary, *see also: State v. Stenger,* 111 Wn.2d 516 (1988), *State v. Schmitt,* 124 Wn.App. 662 (2004); I.

***State v. Miller***, 92 Wn.App. 693, 702-3 (1998)

After defendant declines plea offer, state moves to amend to more serious charge, trial court denies motion, finding **vindictiveness**, defense motion to dismiss all charges denied; held: court's denial of motion to amend results in no prejudice to defendant, thus denial of motion to dismiss, CrR 8.3(b), was not an abuse of discretion, *see: Thigpen v. Roberts,* 82 L.Ed.2d 23 (1984), *State v. Marks,* 114 Wn.2d 724, 730-32 (1990); II.

***State v. Bonisisio***, 92 Wn.App. 783, 790-92 (1998)

Defendant, charged with one count, declines to plead, state moves to add ten additional counts, defense demands hearing, alleging **vindictiveness**, court denies motion; held: there is no presumption of vindictiveness in pretrial setting, *United States v. Goodwin,* 73 L.Ed.2d 74 (1982), *State v. Korum,*157 Wn.2d 614 (2006), defendant has burden to prove either actual vindictiveness or realistic likelihood of vindictiveness which will give rise to a presumption of vindictiveness, *State v. Numrich,* 197 Wn.2d 1 (2021); defense counsel's claim that he had never seen charges this severe when no one was harmed is insufficient to require discovery, *United States v. Armstrong,* 134 L.Ed.2d 687 (1996), or to require a fact-finding hearing, *see: State v. McKenzie,* 31 Wn.App. 450 (1981), *State v. Penn,* 32 Wn.App. 911 (1982), *State v. McDowell,* 102 Wn.2d 341 (1984), *State v. Lass,* 55 Wn.App. 300 (1989), *State v. Soderholm,* 68 Wn.App. 363 (1993), *State v. Lee,* 69 Wn.App. 31 (1993); II.

***State v. Farr-Lenzini***, 93 Wn.App. 453, 470-71 (1999)

In attempt to elude case, defense argues defendant doesn't fit profile of eluder, state, over objection, responds in rebuttal argument that Ted Bundy didn't fit profile of a killer; held: in

context, jury would see the remark as a "rhetorical overreaction to a defense argument," thus did not deprive defendant of fair trial; II.

***State v. Finch***, 137 Wn.2d 792 (1999)

Following killing of police officer, prosecutor states that lawyers in prosecutor's office are taking the death as hard as the sheriff's, defense moves to disqualify prosecutor's office; held: appearance of fairness doctrine is only applicable to judges or quasi-judicial decisionmakers, at 808-10, *Carrick v. Locke*, 125 Wn.2d 129, 143 n.8 (1994), *cf.: State v. Perez*, 77 Wn.App. 372, 376 (1995), *State v. Ladenburg*, 67 Wn.App. 749, 754 (1992); appeals to the jury to act as the conscience of the community do not rise to the level of misconduct unless specifically designed to inflame the jury, at 839-42, *but see: State v. Bautista-Caldera*, 56 Wn.App. 186, 193 (1989), *State v. Coleman*, 74 Wn.App. 835, 838 (1994), *United States v. Young*, 84 L.Ed.2d 1 (1985), *State v. Smith*, 124 Wn.App. 417, 430-41 (2004), *aff'd, on other grounds*, 159 Wn.2d 778 (2007), *State v. Ramos*, 164 Wn.App. 327, 337-41 (2011); 7-2.

***State v. Rivers***, 96 Wn.App. 672 (1999)

In assault trial, defense character witnesses appear in jail garb, prosecutor in closing argues that defendant and his friends are "predators," "jackals," that jailed witnesses are the "pajama crowd" and that they would be assaulted in the shower if they did not testify for defendant, defense objections overruled; held: highly inflammatory, unprofessional comments aimed squarely at jury's passions were misconduct mandating reversal, *cf.: State v. Barajas*, 143 Wn.App. 24, 39-41 (2007), *Pers. Restraint of Richmond*, 16 Wn.App.2d 751 (2021); I.

***Portuondo v. Agard***, 146 L.Ed.2d 47 (2000)

Argument that defendant, unlike other witnesses, gets to sit through trial, hear witnesses and "think what am I going to say and how am I going to say it" does not violate Fifth or Sixth Amendment or due process clause, *State v. Miller*, 110 Wn.App. 283 (2002), *State v. Martin*, 171 Wn.2d 521 (2011), *but see: State v. Wallin*, 166 Wn.App. 364 (2012); 7-2.

***State v. Klok***, 99 Wn.App. 81 (2000)

Without objection, prosecutor argues that defendant "has been laughing through about half of this trial;" held: while commenting on defendant's demeanor and inviting jury to draw a negative inference about defendant's character is improper, *see: State v. Barry*, 183 Wn.2d 297 (2015), reversal despite a lack of objection is not required because the statement was not so flagrant and ill-intentioned that a curative instruction from the court could not have obviated the prejudice, *State v. Belgarde*, 110 Wn.2d 504, 507 (1988), *State v. French*, 101 Wn.App. 380 (2000), *State v. Jordan*, 106 Wn.App. 291, 295-99 (2001), *State v. Smith*, 144 Wn.2d 665, 678-80 (2001), distinguishing *State v. Jones*, 71 Wn.App. 798, 809-12 (1993); I.

***State v. Garza***, 99 Wn.App. 291 (2000)

Following escape attempt, jail guards seize legal materials from inmates, trial court concludes that documents were read, finds no prejudice and that state acted in good faith, denies dismissal; held: remanded for trial court to enter findings as to whether security concerns justified reading legal materials, precise articulation of what guards were looking for and why it might have been contained in legal materials and why reading was required; if security concerns

did not justify specific level of intrusion, there is a presumption of prejudice *State v. Peña Fuentes,* 179 Wn.2d 808 (2014), *State v. Irby*, 3 Wn.App.2d 247 (2018); even if there is no presumption of prejudice, defense may prove prejudice by demonstrating that evidence gained will be used at trial or that prosecution is using confidential information pertaining to defense strategies or that intrusions destroyed defendants' confidence in counsel or that intrusion will otherwise give state unfair advantage; even if prejudice is established, dismissal is not necessarily the appropriate remedy, *e.g.*, suppression may resolve the prejudice; *see:* *State v. Cory*, 62 Wn.2d 371, 373-74, 5 A.L.R.3rd 1352 (1963), *State v. Granacki*, 90 Wn.App. 598, 601-2 (1998), *State v. Perrow*, 156 Wn.App. 322 (2010), *cf.: State v. Blizzard,* 195 Wn.App. 717, 732-33 (2016); III.

***Pers. Restraint of McNeal***, 99 Wn.App. 617 (2000)

At a **community custody revocation hearing**, respondent is entitled to due process rights provided in a parole revocation hearing, *Morrissey v. Brewer*, 33 L.Ed.2d 484 (1972), *State v. Abd-Rahmaan*, 154 Wn.2d 280 (2005), but is not entitled to appointed counsel; 2-1, I.

***State v. French***, 101 Wn.App. 380 (2000)

Defense argues to jury that state failed to call witnesses, prosecutor rebuts that defense can call them as well, defense objects, prosecutor abandons argument; held: because missing witnesses here were cumulative or unimportant, defense invocation of the missing witness doctrine was improper, *see:* *State v. Frazier*, 55 Wn.App. 204, 211-12 (1989), *State v. Blair*, 117 Wn.2d 479, 490 (1991), thus prosecutor's response was provoked or invited and prosecutor's reply was properly pertinent, *State v. Davenport*, 100 Wn.2d 757, 760 (1984), *State v. LaPorte*, 58 Wn.2d 816, 822 (1961), *see: State v. Johnson*, 132 Wn.App. 403, 414 (2006); in companion case, prosecutor argued that defense has given no reason to conclude that defendant didn't commit crime, defense sought mistrial after verdict; held: shifting burden argument, while touching on a constitutional right, can still be curable by a timely instruction, *State v. Klok*, 99 Wn.App. 81, 84 (2000), untimely objection precludes mistrial, *but see:* *State v. Dixon*, 150 Wn.App. 46, 57 n. 4 (2009); III.

***State v. Beliz***, 104 Wn.App. 206, 211-12 (2001)

State notifies defense of witnesses just before trial, defense motion to dismiss, CrR 8.3(b), is denied but court excludes witnesses' testimony; held: remedy short of dismissal was not an abuse of discretion, *Seattle v. Holifield*, 170 Wn.2d 230, 236-39 (2010), *cf.:* *State v. Thacker*, 94 Wn.2d 276 (1980), *State v. Hutchinson*, 135 Wn.2d 863, 879-84 (1998), *State v. Wilson*, 149 Wn.2d 1 (2003); III.

***State v. Smith***, 144 Wn.2d 665, 678-80 (2001)

In closing, prosecutor argues that defendant looked like he "has an attitude," and a "chip on his shoulder," defense does not object but argues back that state's comments were "character assassination;" held: while comments about defendant's demeanor are "likely improper," *see: State v. Barry,* 183 Wn.2d 297 (2015), failure to object and defense argument was apparently tactical, comments by prosecutor were curable, *State v. Klok*, 99 Wn.App. 81, 85 (2000).

***State v. Mendoza-Solorio***, 108 Wn.App. 823, 834-35 (2001)

Officer testifies that another witness is a "reliable informant," and has been honest and never lied to him, no objection by defense; held: witness' testimony was improper vouching, *State v. Camarillo*, 115 Wn.2d 60, 71 (1990), *see: State v. Perez-Valdez*, 172 Wn.2d 808, 817-19 (2011), harmless here; III.

***State v. Gonzales***, 111 Wn.App. 276, 282-84 (2002)

Over objection, prosecutor argues that she does not have a client, that she does not have an obligation to convict, but that she took an oath and an obligation to see that justice is done; held: prosecutor invoking cloak of righteousness is misconduct; impugning integrity of defense counsel is misconduct; I.

***State v. Mitchell***, 114 Wn.App. 713 (2002)

Sentence which provides for community custody for 9 to 12 months or amount of early earned release time, whichever is longer, is sufficiently precise, distinguishing *State v. Broadaway*, 133 Wn.2d 118, 135-36 (1997), *State v. Nelson*, 100 Wn.App. 226, 230-31 (2000), *State v. Pharris*, 120 Wn.App. 661 (2004); I.

***State v. Soh***, 115 Wn.App. 290 (2003)

Failure to disclose promises of leniency to a witness is misconduct, whether or not the promise was memorialized in writing or made by a police officer rather than a prosecutor; an offer of leniency that has any impeachment value must be disclosed; "it is difficult to imagine an offer of leniency in exchange for testimony that would not have impeachment value," at 295; where defense learns of the promise before trial, then dismissal is not a remedy, as defendant is not prejudiced, *State v. Martinez*, 121 Wn.App. 21 (2004); I.

***State v. Wilson***, 149 Wn.2d 1 (2003)

Defense obtains court order, shortly before expiration date, for prosecutor to arrange for interview with state's witnesses, interviews do not occur prior to deadline, trial court dismisses, CrR 8.3(b); held: while defense has the right to interview a witness in advance of trial, *State v. Burri*, 87 Wn.2d 175, 181 (1976), here no misconduct occurred due to short time period for prosecutor to seek deposition or material witness warrant, *State v. Hoffman*, 115 Wn.App. 91 (2003), *see: State v. Hoffman*, 115 Wn.App. 91 (2003); trial court ignored "intermediate remedial steps," *State v. Koerber*, 85 Wn.App. 1, 4 (1996) of releasing defendant to extend time for trial expiration date or suppression of evidence, *State v. Hutchinson*, 135 Wn.2d 863, 880-84 (1998), *aff'd*, 147 Wn.2d 197, 202-06 (2002), *Seattle v. Holifield*, 170 Wn.2d 230, 236-39 (2010), *see also: State v. Brooks*, 149 Wn.App. 373 (2009); affirms *State v. Wilson*, 149 Wn.2d 1 (2003); 8-1.

***State v. Rohrich***, 149 Wn.2d 647 (2003)

A long delay in filing a charge is not grounds for dismissal, CrR 8.3(b), absent proof of actual prejudice to defendant, *State v. Stein*, 140 Wn.App. 43, 56-60 (2007); speculation that witnesses' memories could have faded is insufficient, reversing *State v. Rohrich*, 110 Wn.App. 832 (2002); 9-0.

***State v. Jones***, 118 Wn.App. 199 (2003)

As a condition of community custody, court may order that offender obey all laws, RCW 9A.94A.715(2)(b), overuling *State v. Barclay*, 51 Wn.App. 404 (1988) and overruling, in part, *State v. Raines*, 83 Wn.App. 312, 315-16 (1996), abstain from alcohol even if the case is not alcohol-related, former RCW 9.94A.120(8)(a) [may have been repealed, *see:* RCW 9.94A.505 and this case, at n. 19], *cf.: State v. Norris*, 1 Wn.App.2d 87 (2017), *rev., in part*, 191 Wn.2d 671 (2018), may not order alcohol treatment if alcohol did not relate to the crime, *State v. Warnock*, 174 Wn.App. 608 (2013), *State v. Kinzle*, 181 Wn.App. 774, 786 (2014), may not order mental health counseling if not crime-related, *State v. Brooks*, 142 Wn.App. 842, 849-52 (2008), *see: State v. Muñoz-Rivera*, 190 Wn.App. 870, 890-94 (2015); II.

***State v. Moran***, 119 Wn.App. 197, 219-20 (2003)

In homicide case, prosecutor's closing that victim's spirit awaits verdict in order to be quieted is misconduct as it appeals to emotion, but was not flagrant and ill-intentioned and, absent objection, was not reversible error; I.

***State v. Cheatam***, 150 Wn.2d 626, 652-54 (2003)

Prosecutor's comment in closing that defense could have called a witness who was referred to by another defense witness as someone who could have provided a partial alibi to defendant was not misconduct, as the witness was peculiarly available to defendant who, evidence established, was a good friend of defendants; availability is to be determined by the witness' relationship to the parties, not mere physical presence or accessibility, *State v. Davis*, 133 Wn.App. 415, 421-22 (2006), *rev'd, on other grounds,* 163 Wn.2d 606 (2008), *State v. Blair*, 117 Wn.2d 479, 490 (1991); while satisfactory explanation of absence will preclude prosecutor arguing absence, *State v. Blair, supra. at* 488, *State v. Carter*, 74 Wn.App. 320, 330-32 (1994), *rev'd, on other grounds,* 127 Wn.2d 836 (1995), here defense explanation that the missing witness had day care issues but could be called the next day, but defense did not call her was not satisfactory, as defense did not seek a recess to allow the witness to testify; 8-0.

***State v. Martinez***, 121 Wn.App. 21 (2004)

During trial, state discloses to defense exculpatory evidence that defendant did not possess the firearm in question at the time of the crime; even after disclosure, state cross-examines defendant to infer that he is lying about the time of possession; jury hangs, court declares mistrial, state re-notes case for trial, amends information to allege more serious charges from same incident, trial court finds prejudicial misconduct and dismisses, state appeals; held: trial court's finding that untimely revelation of exculpatory evidence constituted misconduct and a due process violation, *In re Pers. Restraint of Gentry*, 137 Wn.2d 378, 396 (1999) was not an abuse of discretion; government misconduct may be so outrageous that it exceeds the bounds of fundamental fairness, barring subsequent prosecution, *State v. Lively*, 130 Wn.2d 1, 18 (1996), *State v. Solomon*, 3 Wn.App.2d 895 (2018), *see: State v. Markwart*, 182 Wn.App. 335, 347-52 (2014); had defendant moved for a mistrial when the exculpatory evidence was revealed, he could not have argued that retrial would be barred by double jeopardy unless he could have proved state intended to provoke a mistrial, *Oregon v. Kennedy*, 72 L.Ed.2d 416 (1982), *State v. Juarez*, 115 Wn.App. 881, 888 (2003), thus dismissal was appropriate; III.

***State v. Schmitt***, 124 Wn.App. 662 (2004)

Deputy prosecuting attorney's investigation and discussion with complainant results in deputy having material information useful to defense, trial court disqualifies entire prosecutor's office, RPC 3.7; held: where a deputy prosecutor can be effectively screened and separated from participation and discussion of matters concerning which the deputy is disqualified then disqualification of the entire prosecutor's office "is neither necessary nor wise," *State v. Stenger*, 111 Wn.2d 516, 523 (1988), distinguishing *State v. Bland*, 90 Wn.App. 677 (1998); II.

***State v. O'Neal***, 126 Wn.App. 395, 408-10 (2005), *aff'd, on other grounds,* 159 Wn.2d 500 (2007)

Defense counsel inquires of state's witness whether detective didn't believe him, witness agrees then explains he changed his testimony, prosecutor then calls detective and elicits that detective did tell witness he didn't believe him; held: while a witness may not give an opinion as to credibility, *State v. Casteñeda-Perez*, 61 Wn.App. 354, 360 (1991), here defense opened the door, placing the detective's opinion of the witness' veracity at issue, *State v. Vassar*, 188 Wn.App. 251 (2015), *see: State v. Gallagher*, 112 Wn.App. 601, 609-10 (2002); II.

***State v. Dykstra***, 127 Wn.App. 1, 7-8 (2005)

Co-defendants plead guilty and testify against defendant, in closing defense counsel argues that numerous people were involved in the crime but only defendant was charged, prosecutor rebuts that all of the people were charged, trial court overrules defense objection; held: defendant's argument that the jury should not convict because other culpable people were not charged was improper, state's rebuttal was appropriate, *State v. La Porte*, 58 Wn.2d 816, 822 (1961), as state may reply to defense arguments even if the remarks might otherwise be improper if they do not go beyond what is necessary to respond and do not bring before the jury matters not in the record, *State v. Francisco*, 148 Wn.App. 168, 178-89 (2009), or be so prejudicial that an instruction cannot cure them; III.

***State v. Stevens***, 127 Wn.App. 269, 275-76 (2005)

Asking a witness whether two victims' statements were consistent is relevant only on the issue of the truthfulness of the victims, equivalent to asking whether another witness is truthful, *State v. Jerrels*, 83 Wn.App. 503, 507 (1996), *State v. Suarez-Bravo*, 72 Wn.App. 359, 366 (1994), *State v. Casteñeda-Perez*, 61 Wn.App. 354 (1991), which is misconduct; allowing a witness to review her prior statements before testifying is not misconduct; II.

***State v. Boehning***, 127 Wn.App. 511 (2005)

In child molestation case, arguing that victim's inadmissible statements to police were consistent with her testimony is flagrant misconduct, *cf.: State v. Thorgerson*, 172 Wn.2d 4348 (2011); arguing that victim had disclosed more serious allegations, not admitted at trial, is flagrant misconduct; drawing attention to dismissed charges and arguing that victim's statements, not admitted, would have supported them, is flagrant misconduct; asking defendant on cross if the victim made it all up is misconduct; II.

***State v. McKenzie***, 157 Wn.2d 44 (2006)

Calling defendant "guilty" in closing is not a "clear and unmistakable" expression of the prosecutor's personal opinion, at 56-57. *State v. Papadopoulos*, 34 Wn.App. 397, 400 (1983);

"[i]f the evidence indicates that the defendant is a murderer or killer [or rapist], it is not prejudicial to so designate him," *State v. Buttry*, 199 Wash. 228, 250 (1939); referring to child rape victim's "lost innocence" is improper but, absent objection, is not flagrant and ill-intentioned; 6-3.

***State v. Borboa***, 157 Wn.2d 108, 122-24 (2006)

Prosecutor calling a crime "horrible" in closing, when the crime was horrible, is not misconduct, *State v. Fleetwood*, 75 Wn.2d 80, 84 (1968); prosecutor's passing reference to the lack of defense evidence is not a comment on the defendant's failure to testify, *State v. Pavelich*, 150 Wash. 411, 420 (1928); 8-1.

***State v. Moreno***, 132 Wn.App. 663, 671-74 (2006)

Prosecutor states in closing that proof of defendant's controlling behavior is established by his representing himself, no objection; held: prosecutor may not comment on defendant's Sixth Amendment right to represent himself, harmless here; I.

***State v. Slone***, 133 Wn.App. 120, 129-30 (2006)

District court suppresses evidence of field tests in DUI case, trooper testifies he asked defendant to take some physical tests, objection sustain, mistrial denied; held: trial court properly exercised discretion in denying mistrial for violation of an order *in limine* after finding there was no prejudice; II.

***State v. Korum***, 157 Wn.2d 614 (2006)

Prosecutor writes to defense offering a plea to robberies with ten year recommendation but stating that if case goes to trial, state will add kidnappings and recommend 100 years, defendant pleads guilty, is later granted leave to withdraw pleas, state amends to add kidnappings, defendant is convicted and sentenced to 117 years, claims **vindictiveness**; held: mere filing of additional charges and the consequent increase in sentence, regardless of the magnitude, cannot support a presumption of vindictiveness without proving additional facts, *State v. Bonisisio*, 92 Wn.App. 783, 790-92 (1998), *State v. Lee*, 69 Wn.App. 31, 35-38 (1993), *State v. Lass*, 55 Wn.App. 300, 306 (1989), *United States v. Goodwin*, 73 L.Ed.2d 74 (1982), *State v. Aguilar*, 153 Wn.App. 265, 279-80 (2009), *State v. Brown*, 193 Wn.2d 280 (2019); mere fact that co-defendants, who pleaded guilty, received much shorter sentences is not vindictive or cruel and unusual; reverses *State v. Korum*, 120 Wn.App. 686 (2004); 5-4.

***State v. Perez-Mejia***, 134 Wn.App. 907 (2006)

In gang shooting case, argument that jurors should send a message is misconduct, *State v. Powell*, 62 Wn.App. 914 (1991), *State v. Ramos*, 64 Wn.App. 327 (2011), *State v. Bautista-Caldera*, 56 Wn.App. 186 (1989), *cf.: State v. Gauthier*, 189 Wn.App. 30 (2015); I.

***State v. Gregory***, 158 Wn.2d 759 (2006), *overruled, on other grounds, State v. W.R.*, 181 Wn.2d 757 (2014)

Asking rape victim how she feels about testifying and being cross-examined is not misconduct or an appeal to sympathy, at 805-11; arguing in closing that defense could have called a witness whom defense suggested had actually committed the crime is misconduct, as the

witness' testimony would necessarily be self-incriminatory, *State v. Blair*, 117 Wn.2d 479, 489-90 (1991) but, absent request for curative instruction is harmless here, at 845-46, *see: State v. Warren*, 165 Wn.2d 17, 26 n. 3 (2008); 8-1.

***State v. Weber***, 159 Wn.2d 252, 270-79 (2006)

Where a motion *in limine* to exclude evidence is granted and the other party appears to violate the order, counsel must object to preserve the error, *State v. Finch*, 137 Wn.2d 819-21 (1999), *State v. Sullivan*, 69 Wn.App. 167 (1993), *State v. Powell*, 126 Wn.2d 244, 256 (1995), *State v. Koloske*, 100 Wn.2d 889, 895-96 (1984), *overruled, on other grounds, State v. Brown*, 111 Wn.2d 124 (1988), 113 Wn.2d 520 (1989), *cf.: State v. Ryna Ra*, 144 Wn.App. 688, 700-02 (2008); where a party's motion *in limine* is denied, the party need not object to preserve error, *State v. Smith*, 189 Wash. 422 (1937); 5-4.

***State v. Sandoval***, 138 Wn.App. 532, 540-45 (2007)

In domestic violence case in which victim did not appear and court admitted hearsay naming defendant under medical exception, prosecutor argues in closing, over objection, that exceptions to the hearsay rules are allowed because they have been deemed reliable; held: while argument about points of law that are not included in instructions may be error and could be viewed as vouching, it is not prejudicial here; 2-1, III.

***State v. Miles***, 139 Wn.App. 879 (2007)

State offers evidence that defendant drove to a drug deal, defendant claims he was incapacitated and disabled, state cross-examines about defendant participating in boxing matches during disability which defendant denies, state fails to offer evidence in support of impeachment; held: where a prosecutor's questions refer to extrinsic evidence that is never introduced and imparts evidence within the prosecutor's personal knowledge, then failure to prove the statements in rebuttal is misconduct, *State v. Lopez*, 95 Wn.App. 842, 855 (1999), *State v. Babich*, 68 Wn.App. 438, 445-46 (1993); defense counsel's failure to object is excused as defense could not have known state would not prove claim in rebuttal; arguing in closing that jury could find defendant not guilty only if they believed his evidence is flagrant misconduct, *State v. Barrow*, 60 Wn.App. 869 (1991); II.

***State v. Laramie***, 141 Wn.App. 332, 344-46 (2007)

Arguing that jury should consider totality of the circumstances in determining whether state has proved its case beyond a reasonable doubt is not misconduct where instructions properly define reasonable doubt; III.

***State v. Barajas***, 143 Wn.App. 24, 39-41 (2007)

Analogy in closing that Hispanic defendant is like a "mangie [*sic*] mongrel mutt is improper, *State v. Rivers*, 96 Wn.App. 672, 673 (1999) but, absent objection, is not reversible error, *cf.: Pers. Restraint of Richmond*, 16 Wn.App.2d 751 (2021); III.

***State v. Classen***, 143 Wn.App. 45, 63-65 (2008)

Prosecutor argues, without objection, that "manslaughter is an accident;" held: assuming prosecutor's misstatement of law was misconduct, *State v. Davenport*, 100 Wn.2d 757, 758-59

(1984), it was not so flagrant and ill-intentioned that a curative instruction could not have remedied it's prejudicial effect; 2-1, II.

***State v. Orozco***, 144 Wn.App. 17 (2008)

Where prosecutor's office assists a victim in obtaining an anti-harassment order, it is not precluded from prosecuting the defendant for violation of that order, *but see:* RCW 36.27.050; I.

***State v. Puapuaga***, 164 Wn.2d 515 (2008)

Defendant is sent to state hospital for competency evaluation, hospital staff inventory his possessions upon arrival, find unredacted discovery and note containing possible threat to a witness, advise prosecutor who obtains *ex parte* seizure order, trial court holds hearing and appoints special master to view documents denies CrR 8.3(b) motion to dismiss; held: by appointing a special master and allowing defendant to challenge state's action in a hearing, trial court acted within its authority to regulate discovery, dismissal is not an appropriate remedy; 9-0.

***State v. Warren***, 165 Wn.2d 17, 23-31 (2008)

State concedes on appeal that prosecutor's argument that beyond a reasonable doubt doesn't mean give defendant benefit of the doubt is error, curative instruction obviated prejudice; state concedes that prosecutor's derogatory comment in closing that defense counsel's argument is "an example of what people go through…when they deal with defense attorneys" and "a classic example of taking these facts and completely twisting them to their own benefit" is improper, *State v. Thorgerson*, 172 Wn.2d 438, 450-52 (2011), *State v. McCreven*, 170 Wn.App. 444, 472-73 (2012), *State v. Lindsay*, 180 Wn.2d 423, 431-34 (2014), but, absent objection, was not flagrant and ill-intentioned, *State v. Calvin*, 176 Wn.App. 1, 16-18 (2013); prosecutor's arguing that details in victim's testimony gave it a "badge of truth" is not misconduct where defense attacked credibility as not an explicit statement of personal opinion of credibility and a reasonable inference from the facts, *State v. Lewis*, 156 Wn.App. 230, 239-42 (2010), *State v. Allen*, 176 Wn.2d 611 (2013); affirms *State v. Warren*, 134 Wn.App. 44 (2006); 5-4.

***State v. Jones***, 144 Wn.App. 284 (2008)

Closing argument that police would suffer professional repercussions if they used an untrustworthy informant, would have discontinued using an informant if they doubted his trustworthiness, that informants can be trusted, that when "police say something happens, it happens," is improper bolstering; "it is generally improper for prosecutors to bolster a police witness's good character even if the record supports such argument," at 293, *State v. Smith*, 67 Wn.App. 838, 844-45 (1992); speculation during closing that an informant didn't testify because he was frightened, in the hospital, defendant was a threat, informant was a friend of the police, all not supported by evidence, is misconduct; defense counsel's eliciting from officer that informant had a warrant outstanding, while arguably relevant to consideration of a missing witness instruction, did not open the door to prosecutor seizing the opportunity to admit inadmissible and inflammatory hearsay evidence, *State v. Avendano-Lopez*, 79 Wn.App. 706, 712-23 (1995), *see also: State v. Brush*, 32 Wn.App. 445 (1982),); II.

***State v. Fisher***, 165 Wn.2d 727, 744-49 (2009)

In sex abuse case, trial court orders that prior acts by defendant upon victim's siblings known to victim are admissible if defense raises delay in reporting, state refers to abuse in opening, cross and closing, defense never raises issue, enters a standing objection which is overruled; held: while trial court properly found that the physical abuse was proved by a preponderance had had a proper purpose, court's limiting admission to rebut delayed reporting was correct, prosecutor's misconduct in offering the evidence in its case in chief was reversible misconduct; 9-0.

***State v. Francisco***, 148 Wn.App. 168, 178-80 (2009)

In drug possession case, defense counsel argues to jury that state failed to produce a dirty urinalysis from the jail, state responds in closing that jail must have a court order before it can produce a urinalysis, defense objection is overruled, judge in overruling objection states that jail must have an order; held: even if improper, a prosecutor's remarks that are in direct response to a defense argument are not grounds for reversal as long as the remarks do not go beyond what is necessary to respond to the defense and do not bring before the jury matters not in the record, *State v. Dykstra*, 127 Wn.App. 1, 8 (2005), *State v. La Porte*, 58 Wn.2d 816, 822 (1961); III.

***State v. Brooks***, 149 Wn.App. 373 (2009)

Dismissal, CrR 8.3(b), is a remedy where state inexcusably fails to provide discovery, trial court grants continuances as an alternative to dismissal but discovery is still not forthcoming, state has burden of considering other alternatives besides continuances before trial court dismisses, *State v. Chichester*, 141 Wn.App. 446 (2007); II.

***State v. Dixon***, 150 Wn.App. 46 (2009)

Police arrest defendant in car for possession of drugs, do not get name of passenger, only evidence at trial as to who passenger is was officer's testimony that he "gathered" he was defendant' friend, defendant does not testify, defense counsel argues that there is doubt because there was an unknown person in car, prosecutor rebuts that defense could have called the witness, defendant did not make statements or testify that passenger put drugs in her purse, no objection; held: prosecutor may only comment on defendant's failure to call a witness where "it is clear the defendant was able to produce the witness and the defendant's testimony unequivocally implies the uncalled witness' ability to corroborate his theory of the case," at 55, *State v. Contreras*, 57 Wn.App. 471, 476 (1990); prosecutor shifted burden when he implied she should have presented evidence to support her defense; test is (1) whether prosecutor's conduct was improper and (2) whether there is a substantial likelihood that the misconduct affected the verdict, *State v. Warren*, 165 Wn.2d 17, 26 n.3 (2008), *State v. Gregory*, 158 Wn.2d 759, 809 (2006), *overruled, on other grounds, State v. W.R.*, 181 Wn.2d 757 (2014), not harmless error analysis; II. 2-1.

***State v. Asaeli***, 150 Wn.App. 543, 587-98 (2009)

During closing, prosecutor uses slides to "explain the law," some of which arguably mis-state the instructions and add law not instructed, defense objects to two slides but not others; held: as to the slides objected to, because both parties repeatedly reminded the jury to rely upon the court's instructions, and trial court instructed jury that argument is not the law, the arguable

error was harmless; as to slides shown without objection, error, if any, was not flagrant and ill-intentioned, could have been neutralized by an admonition to the jury; II.

***State v. Jackson***, 150 Wn.App. 877 (2009)

Argument that police accurately reported what they observed and police testimony was "accurate and true" is not vouching where prosecutor reminds jury that jury is the judge of credibility and context of the entire argument was that evidence supported credibility of police, at 883-85, *State v. Brett*, 126 Wn.2d 136, 175 (1995), *State v. Robinson*, 189 Wn.App. 877, 892-95 (2015); arguing that there is no evidence to corroborate defense witness' story and that jury should compare defendant's evidence with state's evidence to determine credibility of defense witness does not shift burden, at 885-86, *State v. Osman*, 192 Wn.App. 355 (2016), distinguishing *State v. Fleming*, 83 Wn.App. 209, 215 (1996), *State v. Traweek*, 43 Wn.App. 99, 106-07 (1986), *overruled on other grounds*, *State v. Blair*, 117 Wn.2d 479 (1991), and is not a comment on privilege against self-incrimination where argument focuses on the fact that police testimony contradicts testimony of defense witness, *State v. Brett, supra.;* arguing "what possible reason would [t]rooper…have to lie" is not misconduct, as it is not saying that the jury could acquit only if it disbelieves the officers; prosecutor arguing "I think" witness may have ulterior motives, while "highly problematic," at 889, is not misconduct where no objection was taken, *see: State v. Hoffman*, 116 Wn.2d 51, 94-95 (1991); II.

***State v. Ish***, 170 Wn.2d 189 (2010)

Evidence that an immunized witness has agreed to testify truthfully should not be admitted in state's case-in-chief, *State v. Green*, 119 Wn.App. 15 (2003), but may be elicited by the state if the defense has attacked the witness' credibility on cross-examination; reverses *State v. Ish*, 150 Wn.App. 775 (2009), *cf.: State v. Smith*, 162 Wn.App. 833, 848-51 (2011); 5-4.

***State v. Anderson***, 153 Wn.App. 417 (2009)

Closing argument that jury should return a "just verdict" is not misconduct; argument, over objection, that jury should "declare the truth" from the Latin word "veredictum" is misconduct as jury's job is not to solve the case, *State v. Evans*, 163 Wn.App. 635 (2011), *State v. Walker*, 164 Wn.App. 724 (2011), harmless here; "in order to find the defendant not guilty, you have to say 'I don't believe the defendant is guilty because" and then you have to fill in the blank" is improper as jury need not "find a reason" to acquit, at 431 ¶ 14, *State v. Venegas*, 155 Wn.App. 507, 523-25 (2010), *State v. Johnson*, 158 Wn.App. 677 (2010), *State v. Sakellis*, 164 Wn.App. 170 (2011), *State v. Emery*, 174 Wn.2d 741, 759-65 (2012; discussing the reasonable doubt standard in the context of everyday decision making (leaving children with babysitter, changing lanes on freeway, dental surgery) is misconduct as it trivializes and ultimately fails to convey gravity of state's burden, at 431 ¶ 15, *State v. Lindsay*, 180 Wn.2d 423 (2014), harmless absent objection; discussing "common decisions in which one might choose to act or refrain from acting, focusing on the degree of certainty the jurors would have to have to be *willing* to act, rather than that which would cause them to *hesitate* to act" is misconduct because it confuses jury's duty to acquit unless state proves it's case with the idea it should convict unless jury finds a reason not to, at 432 ¶ 16, harmless absent objection; II.

***State v. O'Connor***, 155 Wn.App. 282, 288-90 (2010)

During drug and harassment trial, jurors observe display set out by prosecutor's office outside courthouse of shoes in memory of violent crime victims, trial judge questions jurors, dismisses one juror who says seeing empty children's shoes affected her, denies mistrial; held: display here was not improper contact with jurors, distinguishing *Remmer v. United States*, 98 L.Ed.2d 654 (1954), nor was it prosecution misconduct; III.

***State v. Venegas***, 155 Wn.App. 507, 523-326 (2010)

Arguing that jury should fill in the blank with the reason for doubt is misconduct, *State v. Anderson*, 153 Wn.App. 417, 431 (2009), *State v. Johnson*, 158 Wn.App. 677 (2010), *State v. Sakellis*, 164 Wn.App. 170 (2011), *State v. Walker*, 164 Wn.App. 724 (2011), *State v. Emery*, 174 Wn.2d 741, 759-65 (2012); argument that presumption of innocence erodes every time state offers evidence against defendant is a misstatement of the law and flagrant misconduct, as presumption of innocence continues and may be overcome, if at all, during deliberations;, *State v. Evans*, 163 Wn.App. 635 (2011) II.

***State v. Coleman***, 155 Wn.App. 951, 956-60 (2010)

Without objection, prosecutor offers co-defendant's plea agreement which obliges co-defendant to testify truthfully and agrees state can terminate agreement if testimony is deceptive, untruthful or incomplete; held: while plea agreement requiring witness to testify truthfully may be improper vouching, it is vouching because "the State knew the witness's testimony and entered the agreement to 'secure' it," at 959 ¶ 14, *State v. Green*, 119 Wn.App. 15, 24 (2003), *State v. Smith*, 162 Wn.App. 833, 848-51 (2011), but where the witness' promise to testify truthfully stands alone it is not vouching, *see: State v. Ish*, 170 Wn.2d 189 (2010), admission of plea statement is improper until witness' credibility is attacked, harmless here; I.

***State v. Lewis***, 156 Wn.App. 230, 239-42 (2010)

Prosecutor, in closing, asking jurors whom they believed, victim or defendant, is not misconduct, *State v. Warren*, 165 Wn.2d 17, 30 (2009); II.

***State v. Larios-Lopez***, 156 Wn.App. 257 (2010)

Arguing that jury must have an abiding belief in a vote of guilty or not guilty is a misstatement of law *[dicta]*, as jury does not need an abiding belief in innocence to acquit, *see: State v. Osman*, 192 Wn.App. 355 (2016); II.

***State v. Perrow***, 156 Wn.App. 322 (2010)

Defendant consults with counsel who asks him to prepare a narrative for counsel, police serve search warrant on defendant's home, seize narrative, defendant informs police that it is privileged, police take narrative to precinct, read and analyze, give it to prosecutor who charges defendant with child molestation, trial court dismisses; held: seized writings were privileged, RCW 5.60.060(2)(a), regardless of whether defendant was charged or not when prepared, *Dietz v. John Doe*, 131 Wn.2d 835, 843 (1997), thus seizure was a violation of the privilege and dismissal was a proper remedy, *State v. Cory*, 62 Wn.2d 371 (1963), in light of egregious violation, police were informed that the materials were privileged but seized and analyzed them anyway, trial court's conclusion that suppression is inadequate is properly within its discretion,

*see: State v. Peña Fuentes*, 179 Wn.2d 808 (2014), *State v. Irby*, 3 Wn.App.2d 247 (2018), *cf.: State v. Koeller*, 15 Wn.App.2d 245 (2020); 2-1, III.

***State v. Epefanio***, 156 Wn.App. 378, 384-89 (2010)

Defendant testifies in defense case-in-chief, on cross court sustains objection to question as beyond the scope, permits prosecutor to call defendant in rebuttal; held: waiver of Fifth Amendment privilege extends only to cross-examination, *see: State v. Robideau*, 70 Wn.2d 994, 1001 (1967), *State v. Hart*, 180 Wn.App. 297 (2014), error for court to allow state to call defendant, harmless here; III.

***State v. Hartzell***, 156 Wn.App. 918, 941-43 (2010)

In closing, *pro se* defendant argues that state did not call certain witnesses because their testimony would have contradicted the state's evidence, prosecutor rebuts that the witnesses could have been called by the defense, although defendants don't have to; held: "prosecutor may encourage the jury to draw an unfavorable inference from a defendant's failure to produce evidence that is properly part of the case and is within the control of the defendant in whose interest it would be to produce it, unless the prosecutor's comments infringe on the defendant's constitutional rights," *State v. Blair*, 117 Wn.2d 479, 485-91 (1991), *but see: State v. Traweek*, 43 Wn.App. 99 (1986), *State v. Fowler*, 114 Wn.2d 59 (1990); I.

***State v. Edvalds***, 157 Wn.App. 517 (2010)

Asking defendant questions that begin, "You expect the jury to believe…" is not misconduct absent an objection or request for a limiting instruction after an objection was sustained; violating an order *in limine* prohibiting the use of the word "surveillance" was not prejudicial misconduct; II.

***State v. Koss***, 158 Wn.App. 8, 20-22 (2010), *affirmed, on other grounds*, 181 Wn.2d 493 (2014)

Closing argument that jury was brought here "to determine whether or not the defendant violated [complainant's] right to be secure in her home" is not misconduct where prosecutor also argues that state has the burden of proving each element; arguing "a reasonable doubt [is] not beyond all possible doubt; it's okay if there are some questions that are unanswered so long as the information you have…leads you to believe that the defendant committed this crime" is not burden shifting, at least absent an objection, as it is not flagrent or ill intentioned; III.

***State v. Martin***, 171 Wn.2d 521 (2011)

During cross-examination of defendant, prosecutor asks if he has had the advantage of reading discovery, watching witnesses testify, tailor his testimony; held: asking a defendant on cross if he had tailored his testimony to conform to the testimony of other witnesses does not violate state confrontation clause, CONST. art. I, § 22, overruling, in part, *State v. Smith*, 82 Wn.App. 327 (1996) and *State v. Johnson*, 80 Wn.App. 337 (1996), although art. I, § 22 is not co-extensive with Sixth Amendment, *but see: State v. Wallin*, 166 Wn.App. 364 (2012); affirms *State v. Martin*, 151 Wn.App. 98 (2009); accord: *State v. Hilton*, 164 Wn.Ap. 81, 93-98 (2011); 7-2.

***State v. Monday***, 171 Wn.2d 667 (2011)

Prosecutor states to jury that "black folk don't testify against black folk," pronounces, police "po-leese," argues that "the word of a criminal defendant is inherently unreliable,...proven time and time again;" held: appeal to racial bias is flagrant misconduct, requiring reversal unless state establishes on appeal beyond a reasonable doubt that the impropriety did not affect verdict, *State v. McKenzie*, 21 Wn.App.2d 722 (2022), *cf.: Pers. Restraint of Gentry*, 179 Wn.2d 614 (2014), *State v. Sandoval*, 189 Wn.2d 811 (2018), *State v. Bagby*, ___ Wn.2d ___, 2023WL309012 (2023); 7-1.

***State v. Thorgerson***, 172 Wn.2d 438 (2011)

Prosecutor's opening statement that jury won't hear all of what child victim told a witness "because the rules don't allow it" is disapproved, *State v. Monaghan*, 166 Wn.App. 521, 540 (2012), but not misconduct, *State v. Teas*, 10 Wn.App.2d 111 (2019); where defense theory and cross-examination of victim addresses inconsistency and credibility, prosecutor's reference to other witnesses who were not called but to whom victim possibly made consistent statements was possibly bolstering but harmless, distinguishing *State v. Boehning*, 127 Wn.App. 511 (2005); closing argument that defense counsel used "slight of hand" and defense counsel's presentation was "bogus" is improper disparaging of defense counsel, *State v. Warren*, 165 Wn.2d 17, 29-30 (2008), *State v. Negrete*, 72 Wn.App. 62, 67 (1993), *State v. McCreven*, 170 Wn.App. 444, 472-73 (2012), *State v. Lindsay*, 180 Wn.2d 423, 431-34 (2014), *cf.: State v. Ritchie*, ___ Wn.App.2d ___, 520 P.3d 1105 (2022), *see: State v. Lile*, 193 Wn.App. 179, 205-09 (2016), *affirmed, on other grounds*, 188 Wn.2d 766 (2017), but, absent objection, might have been cured by an instruction thus not preserved, *State v. Calvin*, 176 Wn.App. 1, 16-18 (2013); arguing that if jury believes victim it must find defendant guilty unless there is a reason to doubt her based upon the evidence is not burden shifting; 5-4.

***State v. Corbett***, 158 Wn.App. 576, 594-97 (2010)

In child sex abuse case, argument, over objection, to rebut defense counsel's argument that it's a strange set of facts that "you guys haven't read hundreds of police reports about sexual assaults," that "it's not uncommon for a child…to wait to tell what happened," and "it's not uncommon for that child to give different facts along the way" was proper rebuttal argument; argument that "[y]ou have to be able to sleep with that decision at night for both the [d]efendant and" victim is not misconduct absent objection; II.

***State v. Johnson***, 158 Wn.App. 677 (2010)

In unwitting possession defense, prosecutor's argument that to convict you have to believe the defendant's testimony that he didn't know the cocaine was in the borrowed sweatshirt was proper because burden is on defendant, *but see: McFadden v. United States*, 576 U.S. 186, 135 S.Ct. 2298, 192 L.Ed.2d 260 (2015), and defendant was only witness to support unwitting possession; argument that to find reasonable doubt, you have to fill in the blank is **flagrant** and ill intentioned misconduct, overcoming failure to object, as it trivializes the state's burden, implies jury had a duty to convict without a reason not to do so, *State v. Venegas*, 155 Wn.App. 507, 523-26 (2010), *State v. Walker*, 164 Wn.App. 724 (2011), *cf.: State v. Emery*, 174 Wn.2d 741, 759-65 (2012); Division II holds that it is always flagrant and ill intentioned and incurable even by an objection and instruction if the argument undercuts the presumption of innocence but further concludes that in *State v. Fleming*, 83 Wn.App. 209 (1996), where Division I held that any argument that is covered by a published opinion is flagrant and ill intentioned, goes too far.

***State v. Larson***, 160 Wn.App. 577, 590-91 (2011)

Co-defendant pleads guilty, states in plea statement that defendant committed crime with him, later recants, police caution him against perjury and advise him of the consequences of perjury, defense contends that threat deprived him of a fair trial; held: when a defense witness is threatened which keeps the witness from testifying, accused is deprived of due process, *Webb v. Texas,* 409 U.S. 95, 98, 34 L.Ed.2d 330 (1972), but providing a witness with a "truthful warning" does not violate constitution, *State v. Carlisle,* 73 Wn.App. 678, 679 (1994), *State v. Statler,* 160 Wn.App. 636-38 (2011); 2-1, III.

***State v. Curtiss***, 161 Wn.App. 673, 698-702 (2011)

Prosecutor stating in closing that reasonable doubt is not magic, that jurors should imagine a jigsaw puzzle where even with pieces missing you can say what the puzzle depicts is not misconduct, *State v. Fuller,* 169 Wn.App. 797, 823-28 (2012), *cf.: State v. Lindsay,* 180 Wn.2d 423, 434-36 (2014), distinguishing *State v. Anderson,* 153 Wn.App. 417 (2009); referring to a trial as a "search for truth," and defining verdict as "to speak the truth" is not misconduct, *but see: State v. Anderson, supra.* at 424, *State v. Emery,* 174 Wn.2d 741 (2012), *State v. Lindsay, supra. at* 436-37; telling jurors that they know in their gut that defendant is guilty is not misconduct, *but see: State v. Craven,* 15 Wn.App.2d 380 (2020),at least where no objection is taken; II.

***State v. Allen***, 161 Wn.App. 727 (2011), 176 Wn.2d 611, 630-32 (2013)

Arguing that harassment victim is "not a flake...not some derelict," as he is a special education teacher is not vouching for credibility, *State v. Jackson,* 150 Wn.App. 877, 884 (2009), *State v. Warren,* 165 Wn.2d 17, 30 (2008), as victim testified about his job, argument was properly inferred from the evidence, even where court excluded victim's attempted vehicular assault conviction; I.

***State v. Bea***, 162 Wn.App. 585, 579-85 (2011)

Closing argument that the jury can presume intent from the assault itself is misconduct, as there is a difference between a legitimate inference or permissive presumption and an unconstitutional conclusive presumption but, absent objection, is not reversible error; III.

***State v. Smith***, 162 Wn.App. 833, 848-51 (2011)

At outset of trial, defense counsel announces his intent to attack immunized witness' credibility based upon his plea bargain requiring him to testify truthfully, prosecutor refers in opening and direct of the witness that he is obliged to testify truthfully without objection; held: while evidence that immunized witness agrees to testify truthfully should not be admitted until defense has attacked credibility, *State v. Ish,* 170 Wn.2d 189 (2010), it is not improper where there is "little doubt" that defendant will attack veracity during cross-examination; III.

***State v. Evans***, 163 Wn.App. 635 (2011)

Arguing that the presumption of innocence "kind of stops once you start deliberating" is misconduct as the presumption persists until the jury is satisfied the state has proved the charge beyond a reasonable doubt, *State v. Venegas,* 155 Wn.App. 507, 524 (2010); exhorting jury to "peel back different layers of the onion to get to the truth" is misconduct, *State v. Anderson,* 153

Wn.App. 417 (2009); arguing that the jury will always wish it had more evidence is misconduct as it suggests that jurors disregard weaknesses in the state's case; arguing that jurors should fill in the blank with the reason for doubt is misconduct, *State v. Anderson, infra.* At 431, *State v. Emery,* 174 Wn.2d 741, 759-65 (2012), even where the closing "cleverly mixed requests for the jury to" hold the state to its burden of proof; while "fill in the blank" and "declare the truth" arguments are not inherently flagrant and ill-intentioned, *State v. Sakellis,* 164 Wn.App. 170 (2011), *but see: State v. Fleming,* 83 Wn.App. 209 (1996), several errors plus questionable strength of state's case require reversal, *State v. Walker,* 164 Wn.App. 724 (2011); II.

***State v. Sakellis***, 164 Wn.App. 170 (2011)

"Fill in the blank" argument asking jury to find a reason to doubt is misconduct, *State v. Anderson,* 153 Wn.App. 417 (2009), *State v. Vanegas,* 155 Wn.App. 507, 523-26 (2010), *State v. Walker,* 164 Wn.App. 724 (2011); where defense objects to misconduct, appellate court determines whether prejudice had a substantial likelihood of affecting the verdict, *State v. Anderson, supra.* At 417; if defense fails to object, appellate court determines whether misconduct was so flagrant and ill intentioned that it caused an enduring and resulting prejudice incurable by an instruction, *State v. Gregory,* 158 Wn.2d 759, 841 (2006), *overruled, on other grounds*, *State v. W.R.*, 181 Wn.2d 757 (2014), *State v. Emery,* 174 Wn.2d 741, 759-65 (2012), *State v. Espey,* 184 Wn.App. 360 (2014); II.

***State v. Ramos***, 164 Wn.App. 327 (2011)

In drug case, prosecutor asking defendant if acquaintances to whom defendant referred on direct examination have drug problems and convictions is misconduct; closing argument that jury should convict to protect the community from drug dealing is misconduct, *State v. Bautista-Caldera,* 56 Wn.App. 186 (1989); argument that police witnesses "were just telling you what they saw and they are not being anything less than 100 percent candid" is improper vouching, at 341 n.4, *see: State v. Robinson,* 189 Wn.App. 877, 892-95 (2015); I

***Smith v. Cain***, 565 U.S. 73, 132 S.Ct. 627, 181 L.Ed.2d 571 (2012)

Single eyewitness testifies defendant committed crime, after conviction defense discovers police notes that eyewitness had said he could not identify anyone and would not know them if he saw them; held: while impeachment evidence may not be material if state's other evidence is strong enough to sustain confidence in verdict, *United States v. Agurs*, 427 U.S. 97, 112-113 and n. 21, 49 L.Ed.2d 342 (1976), here eyewitness' testimony was the only evidence linking defendant to the crime, thus undisclosed evidence requires *Brady* reversal; 8-1.

***State v. Emery***, 174 Wn.2d 741, 756-65 (2012)

Prosecutor's argument that "verdictum" *[sic]* is the Latin root for verdict and that the translation is to speak the truth, that jury's verdict should "speak the truth," is misconduct, *State v. Anderson,* 153 Wn.App. 417, 424-49 (2009), because jury's job is not to solve the crime; prosecutor's argument that in order to convict jurors should "fill in the blank" with a reason is improper, *State v. Anderson, supra.*, at 432, *State v. Venegas,* 155 Wn.App. 507, 523-26 (2010), *State v. Johnson,* 158 Wn.App. 677, 679-81 (2010); here defense failed to establish prejudice, *State v. Berube,* 171 Wn.App. 103, 120-21 (2012), *cf.: State v. Espey,* 184 Wn.App. 360 (2014); affirms *State v. Emery,* 161 Wn.App. 172 (2011); 9-0.

***State v. Gassman***, 175 Wn.2d 208 (2012)

Two months after learning that police believed the offense date was two days after the charge in the original information, state moves to amend, knowing that defense had planned an alibi defense for the original date, trial court denies motion to dismiss but imposes $2000 sanction on prosecutor, state appeals; held: while trial court need not make a specific finding of bad faith, *State v. S.H.*, 102 Wn.App. 468, 479 (2000), a finding that state's conduct was "careless and not purposeful," plus concessions of defense at oral argument that defendant was aware of possible amendment, did not need a continuance, is insufficient to impose sanction, *see: In re Firestorm 1991*, 129 Wn.2d 130, 139 (1996), *State v. Numrich*, 197 Wn.2d 1 (2021); *reverses, in part, State v. Gassman*, 160 Wn.App. 12 (2011); 9-0.

***State v. Walker***, 164 Wn.App. 724 (2011)

In defense of other case, prosecutor arguing that the standard would be met if the jury would have taken the same action in defense of another is error, as test is not for jury to substitute its subjective belief about how a juror would respond, rather test is objective, *State v. Janes*, 121 Wn.2d 220, 238 (1993); II.

***Pers. Restraint of Glasmann***, 175 Wn.2d 696 (2012)

Showing jury during closing a booking photo of defendant looking unkempt and bloody with captions that read "do you believe him?," "why should you believe anything he says?," "guilty," and "guilty, guilty, guilty" is flagrant misconduct, *State v. Hecht*, 179 Wn.App. 497 (2014), *State v. Fedoruk*, 184 Wn.App. 866, 884-90 (2014), *State v. Walker*, 182 Wn.2d 463, 475-81 (2015), *cf.: State v. Rodriguez-Perez*, 1 Wn.App.2d 448, 457-67 (2017), *State v. Salas*, 1 Wn.App.2d 931 (2018), *State v. Brown*, 21 Wn.App.2d 541 (2022); prosecutor's argument that in order to reach a verdict jury must decide whether defendant told the truth is misconduct but not egregious, *State v. Fleming*, 83 Wn.App. 209, 213-14 (1996); 5-4.

***State v. Killingsworth***, 166 Wn.App. 283, 290-92 (2012)

Argument that there is no reasonable explanation for events other than defendant's guilt is not improper as prosecutor did not argue or imply that the defense had failed to offer other reasonable explanations, at least absent objection; I.

***State v. Wallin***, 166 Wn.App. 364 (2012)

Prosecutor's cross-examination of defendant that he tailored his testimony to conform to other evidence he heard in court, where there was no evidence from defendant that he did tailor his testimony, violates defendant's right "to appear and defend in person," CONST., art. I, § 22, distinguishing *State v. Martin*, 171 Wn.2d 521, 536-38 (2011), wherein defendant testified that he relied on prior testimony, *but see: Portuondo v. Agard*, 529 U.S. 61, 146 L.Ed.2d 47 (2000), *State v. Miller*, 110 Wn.App. 283 (2010); III.

***State v. Reed***, 168 Wn.App. 553, 577-80 (2012)

Argument that the presumption of innocence lasts "all the way until you walk into that [jury] room and start deliberation" is incorrect as it continues *during* deliberations, it was curable by an instruction, thus failure to object waives the error; I.

***State v. Pierce***, 169 Wn.App. 533, 551-58 (2012)

In closing, prosecutor uses first person singular, imagines what defendant was thinking at the time of the crime, what the murder victims were thinking, *State v. Whitaker,* 6 Wn.App.2d 1 (2018), *affirmed, on different grounds, State v. Whitaker*, 195 Wn.2d 333 (2020), invites jury to imagine themselves in the position of being murdered in their own homes, all inflammatory appeals to jury's passion and prejudice and arguments outside the evidence; analogy between jurors' oath and oath of marriage or oath not to overthrow the government was improper implication that jurors' oath was akin to adultery or treason; argument that the case was brought on behalf of the victims, victims' family and police was improper as prosecutor does not represent victims or police; II.

***State v. Fuller***, 169 Wn.App. 797 (2012)

It is not misconduct for prosecutor to ask jury to return a "just verdict," *State v. Anderson,* 153 Wn.App. 417 (2009), distinguished from asking jury to "send a message to society," *State v. Bautista-Caldera,* 56 Wn.App. 186, 194-95 (1989), at 820-23; using jigsaw puzzle analogy is not misconduct where it does not minimize or quantify state's burden of proof, *State v. Curtiss,* 161 Wn.App. 673, 700-01 (2011), *cf.: State v. Lindsay,* 180 Wn.2d 423, 434-36 (2014), distinguishing *State v. Johnson,* 158 Wn.App. 677, 682-86 (2010), at 823-38; II.

***State v. McCreven,*** 170 Wn.App. 444, 468-76 (2012)

Where court gives self defense instructions, prosecutor's argument that defense has a burden to prove self defense to the jury is burden-shifting error; argument that jury "must determine if it has an abiding belief in the truth of the charge" is error as jury is not deciding the truth, *State v. Walker,* 164 Wn.App. 724, 733 (2011), *see: State v. Osman,* 192 Wn.App. 355 (2016); argument that "truth doesn't involve game play or loopholes or trickery" is improper impugning of defense counsel, *State v. Thorgerson,* 172 Wn.2d 438 (2011); II.

***State v. Berube***, 171 Wn.App. 103 (2012)

Where evidence establishes a lack of witness cooperation, prosecutor's argument about a "snitch code" not accompanied by racial comments is not misconduct, even where the witnesses are black, distinguishing *State v. Monday,* 171 Wn.2d 667 (2011); prosecutor's argument that defendant's testimony conforming to that of other witnesses is because he sat throughout the trial and listened is not impermissible tailoring, *State v. Martin,* 171 Wn.2d 521, 534-36 (2011); where defendant testifies that he knows people who could corroborate his testimony but refuses to name them, prosecutor may argue that defendant could have provided the names, does not shift burden; arguing that jury should search for the truth because "verdict" means to speak the truth is misconduct, *State v. Emery,* 174 Wn.2d 741, 751 (2012), but not flagrant, so absent objection, not reversible error; argument that the trial is like a puzzle but the pieces all fit together does not trivialize the state's burden, distinguishing *State v. Johnson,* 158 Wn.App. 677, 682 (2010), *cf.: State v. Lindsay,* 180 Wn.2d 423, 434-36 (2014); I.

***State v. Embry,*** 171 Wn.App. 714, 750-51 (2012)

After advice of rights and making some statements and after being shown crime video, defendant states "that is what it is…can't do anything but go to trial with that," detective testifies that defendant

made it clear that the code would not allow him to cooperate or testify against others, prosecutor argues to jury "code of the street: don't cooperate with the police…don't talk to the police…;" held: defendant never clearly and unequivocally invoked his right to remain silent, *see: State v. Hodges,* 118 Wn.App. 668 (2003); failure to object to prosecutor's argument waived error as statement was not flagrant and ill intentioned, distinguishing *State v. Monday,* 171 Wn.2d 667 (2011); prosecutor's argument that law enforcement did a great job is not improper vouching, at least absent objection; calling defendants a "pack of wolves" may be ill intentioned and flagrant, *State v. Gregory,* 158 Wn.2d 759, 863-64 (2006), *overruled, on other grounds, State v. W.R.,* 181 Wn.2d 757 (2014), *Darden v. Wainwright*, 91 L.Ed.2d 144 (1986), but here a single characterization within a lengthy trial is curable by an instruction, had defense objected, *Pers. Restraint of Richmond,* 16 Wn.App.2d 751 (2021); 2-1, II.

***State v. Gauthier****,* 174 Wn.App. 257 (2013)

Comment on defendant's refusal to consent to a DNA swab as evidence of guilt or impeachment violates defendant's right to refuse to consent to a warrantless search, manifest constitutional error; I.

***State v. Ruiz****,* 176 Wn.App. 623 (2013)

Co-defendant pleads guilty without an agreement to testify, is sentenced, does not appeal, at defendant's trial state calls co-defendant who claims a Fifth Amendment privilege, trial court declines to sustain the privilege and orders co-defendant to testify, prosecutor asks many questions in front of the jury, all of which co-defendant refuses to answer; held: allowing the state to call a witness who asserts a non-existent privilege is not error and is not misconduct, distinguishing *State v. Nelson,* 72 Wn.2d 269 (1967), *State v. Charlton,* 90 Wn.2d 657 (1978), *State v. Jackson,* 83 Wash. 514 (1915), wherein witnesses had valid privileges, as a witness has a duty to testify; where a prosecutor's questions imply the existence of prejudicial facts, the prosecutor must be able to prove the facts, *State v. Miles,* 139 Wn.App. 879, 886 (2007), but here there was a factual basis in the record for the questions, and those questions that lacked a factual basis were "not significant," at 641-643; Division III criticizes the repetitive and argumentative questioning, defense did not make an ER 403 objection, thus no relief is available on appeal.

***State v. Peña Fuentes***, 179 Wn.2d 808, 818-23 (2014)

After conviction victim recants and then recants the recantation, motion for new trial pending, detective records and listens to defendant's jail phone calls to his lawyer, prosecutor refuses to listen, removes detective from case, notifies defense counsel who moves to dismiss, trial court denies motion to dismiss because the misconduct could not have affected the trial, which had concluded, or the motion for a new trial after which defense moves for discovery of the recording; held: eavesdropping on a conversation between counsel and client is presumptively prejudicial, *State v. Cory,* 62 Wn.2d 371 (1963), state may rebut by showing an absence of prejudice beyond a reasonable doubt, *see: Weatherford v. Bursey,* 429 U.S. 545, 557-58, 51 L.Ed.2d 30 (1977), *State v. Blizzard,* 195 Wn.App. 717, 732-33 (2016), *State v. Irby,* 3 Wn.App.2d 247 (2018), *State v. Koeller,* 15 Wn.App.2d 245 (2020), remanded for trial court to consider whether state has proved absence of prejudice and discovery; 9-0.

***State v. Lindsay****,* 180 Wn.2d 423 (2014)

Calling defense counsel's argument and defendant's testimony "a crock" is improper impugning, *State v. Thorgerson,* 172 Wn.2d 438, 451-52 (2011), *State v. Boyd,* 1 Wn.App.2d 501, 517-21 (2017), *cf.: State v. Ritchie,* ___ Wn.App.2d ___, 520 P.3d 1105 (2022); argument that reasonable doubt is akin to a jigsaw puzzle, if picture is "halfway done…you know beyond a reasonable doubt" is improper misstatement of burden of proof, *State v. Johnson,* 158 Wn.App. 677, 682 (2010), distinguishing *State v. Curtiss,* 161 Wn.App. 673 (2011), *see: State v. Fuller,* 169 Wn.App. 797, 825-28 (2012); arguing that reasonable doubt is comparable to safely crossing in a crosswalk improperly compares reasonable doubt to everyday decision making, minimizes and trivializes the gravity; telling jury that its job is to "speak the truth" or "find the truth" misstates the burden of proof, *State v. Anderson,* 135 Wn.App. 417, 429 (2009), *State v. Walker,* 164 Wn.App. 724, 733 (2011), disapproving, in part, *State v. Curtiss, supra. at* 701-02; stating that defendant's testimony is a lie and "the most ridiculous thing I've ever heard" is an improper expression of personal opinion as to credibility; whispering to jury is improper; 9-0.

***State v. Davila****,* 183 Wn.App. 154, 173-76 (2014)

At co-defendant's separate trial prosecutor argues that co-defendant hit deceased victim with a baseball bat, subsequently DNA evidence links defendant to bat, at defendant's trial state argues inconsistently that defendant killed victim with bat; held: while the use of inconsistent theories to obtain convictions against separate defendants for the same crime violate due process clause if prosecutor uses false evidence or acts in bad faith, where new evidence between the trials result in different arguments, no misconduct occurs; III.

***State v. Espey****,* 184 Wn.App. 360 (2014)

Argument that defendant consulted with counsel and thus had time to figure out a story is an improper comment on the right to counsel; because the error was incurable by an instruction, defendant's failure to object is excused; in determining whether misconduct is flagrant and ill-intentioned, court should focus on whether the prejudice could have been cured, *State v. Emery,* 174 Wn.2d 741, 762 (2012); II.

***State v. Fedoruk****,* 184 Wn.App. 866, 884-90 (2014)

In murder case, showing photograph of deceased's body with "Murder 2" in red letters during closing is misconduct; stating defendant is "guilty guilty guilty" while flashing the word "guilty" in large red letters on a screen that says "Murder 2" is misconduct, *Pers. Restraint of Glasmann,* 175 Wn.2d 696 (2012), *cf.: State v. Salas,* 1 Wn.App.2d 931 (2018), *State v. Brown,* 21 Wn.App.2d 541 (2022); discussing deceased's virtues invites jury to decide case on sympathy and effectively expresses prosecutor's personal opinion and is, thus, misconduct; telling jury that defendant's family members' intuition led them to believe defendant is guilty is misconduct as it is urging the jury to decide not based upon "probative evidence and sound reason," *State v. Castañeda-Perez,* 61 Wn.App. 354 (1991); characterizing the parties to be in "agreement" about facts because defense presented no evidence to rebut them is comment on defense lack of evidence and, thus, improper, *State v. Cheatam,* 150 Wn.App. 626, 652 (2003); II.

***State v. Allen****,* 182 Wn.2d 364, 374-82 (2015)

Court gives knowledge instruction including "If a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he or she acted with knowledge of that fact," prosecutor argues, over objection, that

defendant-accomplice "should have known" what principal had done, during deliberations jury asks if they find defendant "should have known," does that make him an accomplice, trial court instructs jury to reread instructions; held: arguing that "should have known" as a shortcut for "knowledge" is improper as it unconstitutionally subjects a defendant to accomplice liability under a theory of constructive knowledge, *State v. Shipp,* 93 Wn.2d 510, 516-17 (1980), *State v. Jones,* 13 Wn.App.2d 386 (2020); defendant was prejudiced because prosecutor misstated a key issue in the case, repeated it multiple times and used a slide show, court overruled objection in jury's presence, jury query shows it was influenced by the error, misstating the law is "particularly egregious," *see: State v. Peters,* 16 Wn.App.2d 454 (2021); reverses *State v. Allen,* 178 Wn.2d 893 (2014); 9-0

***State v. Walker****,* 182 Wn.2d 463, 475-81 (2015)

Slides showing exhibits that were altered with inflammatory captions, superimposed text suggesting that defendant should be convicted because he is callous and greedy who spent robbery proceeds on games and lobster, juxtaposed photographs of victim with those of defendant and his family, some altered with racially inflammatory text is egregious misconduct; slide of photo of money seized by police with the heading "money is more important than human life" when no evidence showed anyone actually said the words is misconduct; slides depicting statements of the prosecutor's belief as to defendant's guilt is misconduct, *Pers. Restraint of Glasmann,* 175 Wn.2d 696 (2012), *cf.: State v. Rodriguez-Perez,* 1 Wn.App.2d 448, 457-67 (2017), *State v. Salas,* 1 Wn.App.2d 931 (2018), *State v. Brown,* 21 Wn.App.2d 541 (2022); 9-0.

***State v. Vassar****,* 188 Wn.App. 251 (2015)

Defendant, on stand, non-responsively calls a police witness and a civilian witness liars, prosecutor follows up; held: follow-up questions where defendant raises issue of credibility of witnesses is not misconduct, distinguishing *State v. Casteñeda-Perez,* 61 Wn.App. 354 (1991), *State v. Padilla,* 69 Wn.App. 295, 299 (1993), *State v. Suarez-Bravo,* 72 Wn.App. 359, 367 (1994); prosecutor arguing in closing that to believe defendant jury would need to believe that state's witnesses were "mistaken" is not misconduct as it was provoked by defendant's testimony, distinguishing *State v. Fleming,* 83 Wn.App. 209, 214 (1996); where defendant testifies, prosecutor's comment on whether defendant's version of events was supported is not misconduct, distinguishing *State v. Fleming, supra;* III.

***State v. Lozcano****,* 188 Wn.App. 338, 368-70 (2015)

While state may not vouch for a witness by referencing promises the witness made with the state to testify truthfully, *State v. Ish,* 170 Wn.2d 189, 199 (2010), failure to object waives the issue; III.

***State v. Gauthier****,* 189 Wn.App. 30, 35-40 (2015)

In rape case prosecutor argues, in response to defense counsel's argument that victim was a prostitute, "[t]his is why people don't report, because they are called sluts, whores, and prostitutes," no objection; held: while "send a message" comments may be improper, *State v. Powell,* 62 Wn.App. 914, 918-19 (1991), here the argument was in answer to a defense argument and thus was not flagrant or ill intentioned, could have been cured, *State v. Bautista-Caldera,* 56 Wn.App. 186 (1989), *cf.: State v. Perez-Mejia,* 134 Wn.App. 907 (2006); I.

***State v. Robinson***, 189 Wn.App. 877, 892-95 (2015)

Prosecutor arguing that what "we know" from victim's testimony is he had no reason to lie is not improper vouching, *cf.: State v. Sargent*, 40 Wn.App. 340 (1985), *rev'd, on other grounds*, 111 Wn.2d 641 (1988), *State v. Brett*, 126 Wn.2d 136, 175-180 (1995), *State v. Ramos*, 64 Wn.App. 327 (2011), *State v. Jackson*, 150 Wn.App. 877, 883-85 (2009), *State v. Allen*, 161 Wn.App. 727 (2011), 176 Wn.2d 611, 630-32 (2013), *State v. Ramos*, 164 Wn.App. 327, at 341 n.4 (2011); I.

***State v. Thierry***, 190 Wn.App. 680 (2015)

In child rape case arguing that if only direct evidence was permitted or if more was required than complainant's testimony the state could never prosecute these types of cases is an appeal to passion or prejudice, *State v. Powell*, 62 Wn.App. 914 (1991), akin to exhorting jury to send a message, *State v. Bautista-Caldera*, 56 Wn.App. 185, 195 (1989), *see: State v. Smiley*, 195 Wn.App. 185, 191-97 (2016), requiring reversal; II.

***State v. Sundberg***, 185 Wn.2d 147 (2016)

In drug case defendant testifies he did not know the drugs were in his pants which were worn by another person earlier, prosecutor argued in closing why didn't defense call the other person; held: prosecutor may properly comment on defendant's failure to call a witness where the defense has the burden of proof, here unwitting possession of drugs, *State v. Blair*, 117 Wn.2d 479 (1991), *State v. Barrow*, 60 Wn.App. 869 (1991), or where defendant testifies and fails to present corroborating testimony, *State v. Contreras*, 57 Wn.App. 471 (1990), *but see:* ***State v. Gregory***, 158 Wn.2d 759, 845-46 (2006), *overruled, on other grounds, State v. W.R.*, 181 Wn.2d 757 (2014); 9-0.

***State v. Osman***, 192 Wn.App. 355 (2016)

During closing prosecutor states "how did she break those fingernails if…a struggle did not occur?" is not burden shifting, rather it is a proper argument that the evidence did not support any other reasonable explanation, *State v. Russell*, 125 Wn.2d 24, 87 (1994); I.

***State v. Feely***, 192 Wn.App. 751, 762-68 (2016)

Argument that it "can be very frustrating to have a juror come back and say we all knew he was guilty, but you didn't prove it beyond a reasonable doubt. Those are inconsistent" trivializes the burden of proof but absent objection and in light of the rest of the prosecutor's explanation of reasonable doubt there is insufficient prejudice to warrant reversal; in felony DUI case court gave a limiting instruction about prior DUIs that evidence is only to be considered to determine if defendant has the requisite priors, state's argument to jury that defendant fled because of the prior DUIs was improper as state did not seek a ruling from the trial court to allow other reasons for the priors, no prejudice here; I.

***State v. Williams***, 193 Wn.App. 906 (2016)

Charges involving a high speed chase in two counties are filed in one county, defendant gets appointed counsel, prosecutors decide to change venue because events began in first county where charges were refiled, which results in defendant obtain a different appointed counsel who could not prepare within 60-day time for trial, trial court dismisses, CrR 8.3(b), concluding

arbitrary action forcing defendant to choose between speedy trial and competently prepared counsel; held: prosecutor's explanation was reasoned and thus not arbitrary, thus dismissal is reversed; III.

***State v. Cardenas-Flores***, 194 Wn.App. 496, 515-16 (2016), *affirmed, on other grounds*, 189 Wn.2d 243 (2017)

In assault on child case, where defendant testifies, prosecutor's argument that defense never gave a plausible explanation for how victim was injured was not burden shifting; III.

***State v. Smiley***, 195 Wn.App. 185, 191-97 (2016)

In child sex case prosecutor's argument that the fact that if corroboration and physical evidence was required children wouldn't be believed and abusers would be prosecuted is misconduct, an improper emotional appeal inviting the jury to rely on a threatened impact on other cases rather than the merits of the case at bar, *State v. Thierry*, 190 Wn.App. 680 (2015), *State v. Powell*, 62 Wn.App. 914 (1991), but lack of objection waived the issue as an instruction could have cured it; 2-1, I.

***Pers. Restraint of Caldellis***, 187 Wn.2d 127, 142-44 (2016)

In closing defense counsel suggests a number of reasons why defendant did not testify including immaturity, nervousness, prosecutor in rebuttal argues that defense counsel "forgot a big reason," and that he could "think of one more," defense objects and then withdraws objection; held: defense argument invited the fair response thus it was not an unconstitutional comment on failure to testify; 9-0.

***State v. Sandoval***, 189 Wn.2d 811 (2018)

Defendant is properly identified as a gang member, detective testifies that old gang members (OGs) have elevated status, trial court rules that defendant's longevity is sufficient to establish he is an OG, which prosecutor argues; held: no evidence identified the defendant as an OG, thus evidence was insufficient to so identify him, harmless here; referring to defendant's race to support the argument that defendant was a member of a specific gang was not misconduct, distinguishing *State v. Monday*, 171 Wn.2d 667 (2011), *cf.: State v. McKenzie*, 21 Wn.App.2d 722 (2022); 5-4.

***State v. Rodriguez-Perez***, 1 Wn.App.2d 448, 457-67 (2017)

In closing slide showing photograph of defendant slumped in a chair looking dazed with caption "GOOD TIMES" is improper, *see: Pers. Restraint of Glasmann*, 175 Wn.2d 696 (2012), *see: State v. Salas*, 1 Wn.App.2d 931 (2018), *State v. Brown*, 21 Wn.App.2d 541 (2022), but harmless here; other slides generally reflected the evidence or reasonable inferences and were thus proper; III.

***State v. Boyd***, 1 Wn.App.2d 501, 517-21 (2017)

Arguing "[c]ounsel talks about chaos in [defendant's] life, barriers, bla, bla, bla. No evidence of that" is improper impugning, *State v. Lindsay*, 180 Wn.2d 423, 433-34 (2014), harmless here; 2-1, I.

***State v. Salas***, 1 Wn.App.2d 931 (2018)

Defendant is charged with murder, jury is instructed on manslaughter lessers, in closing prosecutor argues that to convict of manslaughter would be "a cop-out;" prosecutor uses PowerPoint slides showing a photograph of smiling victim surrounded by Smurfs under the words "bandleader, saxophone player, customer service representative" next mug shot of defendant under the words "football player, fighter, outdoorsman;" another slide shows victim on a Ferris wheel ride, photo had been admitted for in-life identification; held: "[w]hen there is evidence that the homicide was neither premeditated nor intentional and the trial court has properly put the issue of manslaughter before the jury, it is improper to argue that manslaughter is a 'cop-out,'" at 939; juxtaposing a happy photograph of the victim with an unappealing one of defendant is intended to inflame the passion of the jury and is thus misconduct, at 940-47, *Pers. Restraint of Glasmann*, 175 Wn.2d 696 (2012), *State v. Walker*, 182 Wn.2d 463, 476-77 (2015), *State v. Rodriguez-Perez*, 1 Wn.App.2d 448, 457-67 (2017); I.

***State v. Irby***, 3 Wn.App.2d 247 (2018)

Jail guards read letters defendant wrote to counsel, trial court denies motion to dismiss placing burden of proving prejudice on defendant, distinguishing between investigating state actors and custodial state actors; held: misconduct by law enforcement and misconduct by jail guards is an artificial distinction, where any state actor eavesdrops on attorney-client communication there is a presumption of prejudice which state must overcome beyond a reasonable doubt, *State v. Cory*, 62 Wn.2d 371, 378 (1963), *State v. Peña Fuentes*, 179 Wn.2d 808, 811 (2014), *State v. Perrow*, 156 Wn. App. 322, 332 (2010), *State v. Garza*, 99 Wn. App. 291, 301 (2000), *State v. Granacki*, 90 Wn.App. 598, 603-04 (1998), on remand if court finds prejudice then remedy may be dismissal, suppression of evidence, disqualification of specific prosecutors or entire office or exclusions of witnesses tainted by the misconduct; I.

***State v. Solomon***, 3 Wn.App.2d 895 (2018)

Police officer publishes anonymous advertisement saying she is a young female seeking sex, defendant responds, officer then assumes the guise of a 14 year old, sends more than 100 messages with graphic sexualized language, defendant rejects solicitations seven times, officer persists, defendant finally agrees, is arrested at address given by officer, charged with attempted rape of a child, trial court dismisses for outrageous government misconduct, *State v. Lively*, 130 Wn.2d 1, 18-28 (1996); held: factors to be considered by trial court: whether the police conduct instigated a crime or merely infiltrated ongoing criminal activity, whether the defendant's reluctance to commit a crime was overcome by pleas of sympathy, promises of excessive profits, or persistent solicitation, whether the government controls the criminal activity or simply allows for the criminal activity to occur, whether the police motive was to prevent crime or protect the public, and whether the government conduct itself amounted to criminal activity or conduct repugnant to a sense of justice, *cf.: State v. Glant*, 16 Wn.App.2d 356 (2020); here, trial court properly exercised discretion by dismissing for violation of defendant's due process rights; I.

***Detention of Urlacher***, 6 Wn.App.2d 725, 745-46 (2018)

In sexually violent predator case where evidence at trial showed that respondent groomed victims argument that "you should not be subject to his grooming" is misconduct as arguing that jurors should not be victims appeals to passion and prejudice, *Pers Restraint of Glasmann*, 175 Wn.2d 696, 704 (2012), but, absent objection, error is waived; II.

***State v. Song Wang,*** 5 Wn.App.2d 12, 30 (2018)

Prosecutor's argument that "I'm confident you will do the right thing" may be misconduct but not flagrant and ill-intentioned; I.

***State v. Whitaker****,* 6 Wn.App.2d 1 (2018), *affirmed, on different grounds, State v. Whitaker,* 195 Wn.2d 333 (2020)

In murder case prosecutor argues to jury that they should imagine what victim was thinking and feeling in the hours before her death; in defense closing counsel argues that defendant did not intend the crime because he was afraid of the co-defendant, prosecutor then rebuts that duress is not a defense to murder; held: invitation to jury to imagine feelings of victim was an improper appeal to passion and prejudice, *State v. Pierce*, 169 Wn.App. 533, 552 (2012); prosecutor's arguing law that is not included in the instructions is misconduct, *State v. Davenport*, 100 Wn.2d 757 (1984); defense counsel did not object to either instance which were not flagrant and ill-intentioned thus issue is waived, although defense did move for a mistrial and a new trial, *see: In re Lee*, 95 Wn.2d 357, 363 (1980), *State v. Lindsay,* 180 Wn.2d 423, 430-31 (2014); I.

***State v. Gorman-Lykken,*** 9 Wn.App.2d 687 (2019)

Defense counsel argues a fact from testimony, in rebuttal argument prosecutor falsely states that defense counsel made an inaccurate statement in argument, defense counsel argues that victim was not credible due to drug use, prosecutor in rebuttal states that according to defense a drug addict cannot be raped; Judge Melnik, in concurring opinion, would hold that prosecutor improperly impugned defense counsel and misrepresented defense counsel's argument, mischaracterizing what defense counsel said, cumulative error would require reversal even if the prosecutor's arguments were not flagrant and ill-intentioned; II.

***State v. Teas****,* 10 Wn.App.2d 111 (2019)

Prosecutor argues that defendant testified because he saw the overwhelming evidence against him, that he tailored his testimony to explain away the evidence, that the weapon defendant used was like those that were used by the 9/11 terrorists, that complainant's testimony was consistent where defense maintained it was not, in opening prosecutor said that a stain was blood although evidence at trial showed it was not blood; held: (1) it is misconduct for prosecutor to speculate why a defendant testified, *State v. Rupe*, 101 Wn.2d 664, 705 (1984), but there was no objection and it was not flagrant and ill-intentioned; (2) while a general tailoring argument may be improper, *see: State v. Martin*, 171 Wn.2d 521, 535-36 (2011), *Portuondo v. Agard*, 529 U.S. 61, 120 S. Ct. 1119, 146 L. Ed. 2d 47 (2000), *State v. Berube*, 171 Wn.App. 103, 116 (2012), here the context of the closing is that defendant's testimony differed from the statements he made to police, thus the argument was proper; (3) referencing 9/11 was an improper appeal to passion but absent objection it is not reversible; (4) while prosecutor's statement regarding blood stain in opening was wrong, a witness' anticipated testimony is a permissible subject for opening statement, *State v. Thorgerson*, 172 Wn.2d 438, 455 (2011); II.

***State v. Nickels****,* 195 Wn.2d 132 (2020)

Counsel is retained to represent defendant in murder case which, after conviction, is reversed, counsel is elected county prosecuting attorney who disqualifies himself, defense moves to disqualify entire prosecutor's office; held: where, as here, the elected prosecutor has represented defendant in the same case and has been privy to confidential information then ordinarily the entire prosecutor's office must be disqualified, *State v. Stenger*, 111 Wn.2d 516 (1988); there may be extraordinary circumstances which allow the elected prosecutor to be screened; affirms *State v. Nickels*, 7 Wn.App. 491 (2019); 5-4.

***State v. Loughbom***, 194 Wn.2d 64 (2020)

Prosecutor's referring to "war on drugs" during voir dire, opening statement and closing argument is flagrant and ill-intentioned misconduct, *State v. Echevarria*, 71 Wn.App. 595 (1993); 9-0.

***State v. Jieta***, 12 Wn.App.2d 227 (2020)

Court fails to provide an interpreter fifteen times over fifteen months, trial court dismisses for governmental misconduct, CrRLJ 8.3(b); held: CrRLJ 8.3(b) applies where court administration mismanages a case; I.

***State v. Lang***, 12 Wn.App.2d 481 (2020)

Defendant testifies at trial recanting a confession, on cross prosecutor asks if he has been diagnosed as a malingerer which defendant denies, on rebuttal state calls psychologist who evaluated defendant for competency, elicits opinion that defendant is a malingerer and that his testimony is consistent with antisocial personality disorder; held: substance of defendant's testimony did not open door or invite error to opinion testimony about credibility which is generally inadmissible, *cf.: State v. Kirkman*, 159 Wn.2d 918, 929-30, 932-33 (2007), *State v. Froehlich*, 96 Wn.2d 301, 306-07 (1981), and is prohibited vouching, invading the province of the jury; harmless here; III.

***State v. Jones***, 13 Wn.App.2d 386 (2020)

Defendant is arrested in stolen vehicle, ignition removed, no license plate, shaved keys in car, is charged with possessing a stolen vehicle, prosecutor argues in closing, without objection, that jury can convict if it finds that defendant "should have known" that car was stolen; held: while jury was instructed as to actual and constructive knowledge, RCW 9A.08.010(1)(ii), a jury cannot convict based solely on constructive knowledge, "confusingly a jury cannot convict the accused based on constructive knowledge, but may determine constructive knowledge to be evidence of subjective knowledge," *State v. Allen*, 182 Wn.2d 364, 374-82 (2015), thus argument was misconduct; in determining whether or not an argument is flagrant and ill-intentioned, the court "should not focus on the prosecutor's subjective intent in committing misconduct, but instead on whether the defendant received a fair trial in light of the prejudice caused by the violation of existing prosecutorial standards and whether that prejudice could have been cured with a timely objection," *State v. Walker*, 182 Wn.2d 463, 478 (2015), *State v. Emery*, 174 Wn.2d 741, 762 (2012); where a court, in a published opinion, has held a similar argument to be misconduct, here *State v. Allen*, 182 Wn.2d 364 (2015), the failure to object is not fatal to the determination of prejudice; III.

***State v. Glant***, 13 Wn.App.2d 356 (2020)

Police department accepts money from a private non-profit to help fund child-sex sting operations, defendant is convicted, claims outrageous government misconduct; held: absent a direct link between the private funding and defendant's arrest and prosecution there is no outrageous conduct, *see:* *State v. Lively*, 130 Wn.2d 1, 18-28 (1996); II.

***State v. Hawkins***, 14 Wn.App.2d 182 (2020)

Prosecutor elicits from police officer that he would not refer a case for prosecution or make an arrest if he did not believe the complainant is an improper elicitation of the witness' opinion on the credibility of another witness; I.

***State v. Mansour,*** 14 Wn.App.2d 323 (2020)

In child molestation case use of victim's initials in information and to convict instruction does not amount to a court closure; I.

***State v. Craven***, 15 Wn.App.2d 380 (2020)

Prosecutor's argument that a verdict should "feel right" or "make sense emotionally and morally" and viscerally is an improper appeal to emotional as opposed to intellectual consideration, but is harmless as trial court, in overruling defense objection, instructed the jury to reach the decision based upon facts and law and not sympathy, prejudice or personal preference; Division I disagrees, in part, with *State v. Curtiss,* 161 Wn.App. 673, 698-702 (2011).

***State v. Koeller***, 15 Wn.App.2d 245 (2020)

Prosecutor's argument to jury that victim was credible because she testified under penalty of perjury and that she recalled the crime very well is not improper vouching; I.

***State v. Numrich***, 197 Wn.2d 1 (2021)

In an attempt to moot pending discretionary review state moves to amend, trial court grants motion but imposes sanctions on state; held: trial court has discretion to impose sanctions, *cf.: State v. Gassman*, 175 Wn.2d 208 (2012); 6-3.

***State v. Cook,*** 17 Wn.App.2d 96 (2021)

Having detective "clearly imply" that he believes victim is misconduct, *State v. Chavez,* 76 Wn.App. 293, 299 (1994); having forensic examiner testify that the procedure she uses has been extensively tested to produce truthful and accurate information, and that children who disclose sexual abuse are truthful is misconduct; asking defendant on cross to explain why victim would lie is misconduct, *State v. Vassar*, 188 Wn.App. 251, 257 (2015), *State v. Casteneda-Perez,* 61 Wn.App. 354, 363 (1991); eliciting from police officer that, post-arrest, he did not speak to the police is misconduct, *State v. Curtis*, 110 Wn.App. 6, 11-12 (2002), *State v. Palmer,* 18 Wn.App.2d 825 (2021), *reconsideration granted*, 2022WL2965811; prosecutor's argument that "[t]he defense counsel interview is not looking for the truth, because that's not what defense lawyers need to know to do their ethical duty to represent their client" disparages counsel and is misconduct, *State v. Lindsay*, 180 Wn.2d 423 (2014); the cumulative effect of repetitive prosecutorial misconduct may be so flagrant that no instruction or series of instructions could erase their combined prejudicial effect regardless of whether or not defense objects; III.

***State v. Wood***, 19 Wn.App.2d 743 (2021)

In trial in which defendant testifies prosecutor argues to jury that if defendant is telling the truth then several witnesses must be lying, defense does not object; held: while it is a false choice to argue that to acquit the jury must find that defendant is truthful and that witnesses are lying, *State v. Barrow*, 60 Wn.App. 869 (1991), *State v. Brown*, 35 Wn.2d 379 (1949), *State v. Stith*, 71 Wn.App. 14 (1993), *State v. Carter*, 74 Wn.App. 323, 330-2 (1994), *rev'd, in part, on other grounds*, 127 Wn.2d 836 (1995), *State v. Fleming*, 83 Wn.App. 209 (1996), *State v. Wheless*, 103 Wn.App. 749, 757-59 (2000), *State v. Miles*, 139 Wn.App. 879, 889-90 (2007), *State v. Rich*, 186 Wn.App. 632, 648-50 (2015), *reversed, on other grounds*, 184 Wn.2d 897 (2016), "when the parties present the jury 'with conflicting versions of the facts and the credibility of witnesses is a central issue, there is nothing misleading or unfair in stating the obvious: that if the jury accepts one version of the facts, it must necessarily reject the other'" *State v. Rafay*, 168 Wn.App. 734, 837 (2012); I.

***State v. Crossguns***, 199 Wn.2d 282 (2022)

Prosecutor's argument that it is jurors' job to determine who was lying and who was telling the truth is misconduct, *State v. Barrow*, 60 Wn.App. 869 (1991), *State v. Brown*, 35 Wn.2d 379 (1949), *State v. Stith*, 71 Wn.App. 14 (1993), *State v. Carter*, 74 Wn.App. 323, 330-2 (1994), *rev'd, in part, on other grounds*, 127 Wn.2d 836 (1995), *State v. Fleming*, 83 Wn.App. 209 (1996), *State v. Wheless*, 103 Wn.App. 749, 757-59 (2000), *State v. Miles*, 139 Wn.App. 879, 889-90 (2007), *State v. Rich*, 186 Wn.App. 632, 648-50 (2015), *reversed, on other grounds*, 184 Wn.2d 897 (2016), but absent objection here it is not reversible error; 8-1.

***State v. Zamora***, 199 Wn.2d 698 (2022)

In assault 3° of a police officer case, during voir dire prosecutor asks jurors their opinions about border security, illegal immigration, crimes committed by undocumented immigrants, no objection by defense; held: an objective observer could understand that the prosecutor's questions were a flagrant or apparently intentional appeal to jurors' potential racial or ethnic bias, race based misconduct is incurable and requires reversal, *State v. Monday*, 171 Wn.2d 667 (2011), *State v. Ibarra-Erives*, 22 Wn.App.2d 596 (2022); 9-0.

***State v. Bagby***, 198 Wn.2d 1031 (2023)

During trial of Black defendant claiming self-defense, prosecutor repeatedly refers to defendant's "nationality" but refers to white witnesses as "citizens," refers to defendant punching "the white guy," states that white guy did not hit the Black guy, in closing refers to white witnesses who intervened as "Good Samaritans" but does not identify a Black witness who intervened as a Good Samaritan, no objections by defense; held: "when a prosecutor flagrantly or apparently intentionally appeals to racial bias in a way that undermines the defendant's credibility or the presumption of innocence, their improper conduct is considered per se prejudicial, and reversal of the defendant's convictions is required;" when alleged misconduct involves race court need not determine if unobjected-to conduct is so flagrant and ill-intentioned such that no instruction could cure it, *State v. Monday*, 171 Wn.2d 667 (2011); an objective observer would find that use of word "nationality' in reference to a Black citizen and calling white witnesses Good Samaritans are racial tropes; 9-0.

***State v. Lucas-Vicente***, 22 Wn.App.2d 212 (2022)

In assault case, arguing that defendant could have killed victim is not misconduct inflaming the jury where defendant bit, punched, choked, strangled victim and told her to hurry up and die; arguing that victim was truthful is not vouching where pointing out that her testimony at trial is consistent with what he told 911 operator; I.

***State v. Meza***, 22 Wn.App.2d 514 (2022)

In murder case, during opening statement, prosecutor shows video of defendant holding a pistol and pointing it at the camera, with caption by defendant "yeah am crazy…bitch," during trial court finds state has laid foundation for the video but finds that the caption is unduly prejudicial, defense motion for mistrial denied; held: during opening a prosecutor may present anticipated evidence in good faith, video was admitted in part, a good faith presentation of anticipated evidence does not become improper because it was later not introduced, distinguishing *Pers. Restraint of Glasmann*, 175 Wn.2d 696 (2012) and *State v. Pete*, 152 Wn.2d 546 (2004) which deal with extrinsic evidence offered during closing argument; I.

***State v. Ibarra-Erives***, 23 Wn.App.2d 596 (2022)

In drug case with Hispanic defendant officer testifies that 25 grams is called a "Mexican ounce," in closing prosecutor twice refers to "Mexican ounce" without objection; held: an objective observer could view prosecutor's statements as an appeal to jury's prejudice, *State v. Zamora*, 199 Wn.2d 698 (2022), *State v. Monday*, 171 Wn.2d 667 (2011); I.

***State v. McKenzie***, 21 Wn.App.2d 722 (2022)

In attempted rape of a child case of an African American defendant, prosecutor elicits from detective, without objection, that a "gorilla pimp" is an aggressive one; held: use of animal analogies often operate as a racist code, *Pers. Restraint of Richmond*, 16 Wn.App.2d 751, 752 (2021), analogizing Black people to primates has an odious historical context, state failed its burden of proving that this did not improperly infect the trial, thus reversed, *State v. Monday*, 171 Wn.2d 667 (2011); III.

***State v. Ritchie***, ___ Wn.App.2d ___, 520 P.3d 1105 (2022)

Prosecutor's argument that defense counsel mistakenly argued facts that, she claimed, did not occur is not misconduct, as she did not claim that counsel deliberately misstated facts; argument that defense counsel "lawyers" language is not misconduct, unlike using words like "crock," "bogus," and "sleight of hand" that imply defense counsel is lying, *see: State v. Lindsay*, 180 Wn.2d 423, 433-34 (2014), *State v. Thorgerson*, 172 Wn.2d 438, 451-52 (2011); I.

# PUBLIC TRIAL
(see also: **PRESENCE OF DEFENDANT)**

***State v. Bone-Club***, 128 Wn.2d 254 (1995)

Where state moves to close a CrR 3.5 hearing to protect an undercover officer's identity, trial court must perform a weighing test: (1) proponent of **closure** must make a showing of a compelling interest and, where that need is based on something other than defendant's right to a fair trial, must show a serious and imminent threat to fair trial, (2) anyone present when closure motion is made must be given opportunity to object, (3) method of closure must be least restrictive, (4) court must weigh competing interests of proponent of closure and public, and (5) order must be no broader in application or duration than necessary, *Allied Daily Newspapers v. Eikenberry*, 121 Wn.2d 205, 210 (1993), lacking such a record, remedy is reversal for new trial, *Pers. Restraint of Orange*, 152 Wn.2d 795 (2004), *State v. Brightman*, 155 Wn.2d 523, 514-18 (2005), *State v. Easterling*, 157 Wn.2d 167 (2006), *see: Weaver v. Massachusetts*, 137 S. Ct. 1899, 1905, 198 L. Ed. 2d 420 (2017), *Pers. Restraint of Salinas*, 189 Wn.2d 747 (2018); reverses *State v. Boneclub [sic]*, 76 Wn.App. 872 (1995); *see: State v. Loukaitis*, 82 Wn.App. 460 (1996), *State v. Castro*, 141 Wn.App. 485, 490-91 (2007), *State v. Momah*, 167 Wn.2d 140 (2009), *State v. Sadler*, 147 Wn.App. 97 (2008); 8-0.

***State v. Loukaitis***, 82 Wn.App. 460 (1996)

Closing a juvenile court decline hearing is error where trial court fails to make specific factual findings on questions of how and why an open hearing would prejudice respondent's right to a fair trial, *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30 (1982), *Press-Enterprise Co. v. Superior Court*, 92 L.Ed.2d 1 (1986), *see: State v. McEnry*, 124 Wn.App. 918 (2004); III.

***State v. Rivera***, 108 Wn.App. 645, 652-53 (2001)

While erroneously barring the public is reversible error even absent objection, *State v. Bone-Club*, 128 Wn.2d 254, 257 (1995), *Pers. Restraint of Orange*, 152 Wn.2d 795 (2004), *State v. Brightman*, 155 Wn.2d 506, 514-18 (2005), *but see: State v. Herron*, 177 Wn.App. 96 (2014), 183 Wn.2d 737 (2015), a hearing addressing a juror's complaint about another juror's hygiene is a ministerial matter, not an adversarial proceeding, thus defendant's right to a public trial is not implicated, *see: State v. Momah*, 167 Wn.2d 140 (2009), *State v. Bremer*, 98 Wn.App. 832, 835 (2000), *State v. Vega*, 144 Wn.App. 914 (2008), *State v. Sadler*, 147 Wn.App. 97 (2008), *State v. Njonge*, 181 Wn.2d 546 (2014), *State v. Slert*, 181 Wn.2d 598 (2014), *State v. Halverson*, 176 Wn.App. 972 (2013); I.

***Pers. Restraint of Orange***, 152 Wn.2d 795 (2004)

Trial court excludes public from beginning of *voir dire* because jury pool would fill the courtroom; held: closure of court without weighing the five required guidelines, *State v. Bone-Club*, 128 Wn.2d 254, 258-59 (1995), is reversible error, *Presley v. Georgia*, 558 U.S. 209, 175 L.Ed.2d 675 (2010), *State v. Brightman*, 155 Wn.2d 506, 514-18 (2005), *State v. Frawley*, 140 Wn.App. 713 (2007), 181 Wn.2d 452 (2014), *State v. Duckett*, 141 Wn.App. 797 (2007), *State v. Erickson*, 146 Wn.App. (2008), *State v. Sadler*, 147 Wn.App. 97 (2008), *Pers. Restraint of*

*D'Allesandro,* 178 Wn.App. 457 (2013), *State v. Wise*, 176 Wn.2d 1 (2012), *cf.:* *State v. Castro,* 141 Wn.App. 485, 490-91 (2007), *State v. Vega,* 144 Wn.App. 914 (2008), *State v. Hummel,* 165 Wn.App. 749 (2012), *Pers. Restraint of Copland,* 176 Wn.App. 432 (2013), *see:* *State v. Momah,* 167 Wn.2d 140 (2009), *State v. Sublett,* 176 Wn.2d 58 (2012), *but see: Weaver v. Massachusetts,* 137 S. Ct. 1899, 1905, 198 L. Ed. 2d 420 (2017), *Pers. Restraint of Salinas,* 189 Wn.2d 747 (2018), court could have used fewer jurors, allowing some members of public inside; 8-1.

***State v. Easterling***, 157 Wn.2d 167 (2006)

Closing courtroom and excluding co-defendant during a motion to dismiss and sever is reversible error, at least absent weighing *State v. Bone-Club*, 128 Wn.2d 254 (1995) factors, *State v. Heath*, 150 Wn.App. 121 (2009), *see: State v. Sadler*, 147 Wn.App. 97 (2008), *cf.: State v. Momah*, 167 Wn.2d 140 (2009); 9-0.

***State v. Castro***, 141 Wn.App. 485, 490-91 (2007)

Defendant and defense counsel agree on the record to allow some voir dire in chambers; held: defendant may validly waive his right to a public trial, *State v. Frawley*, 140 Wn.App. 713 (2007), 181 Wn.2d 452 (2014), *State v. Applegate*, 163 Wn.App. 460 (2011), 181 Wn.2d 452 (2014), *State v. Herron*, 177 Wn.App. 96 (2014), 183 Wn.2d 737 (2015), *State v. Fort*, 190 Wn.App. 202, 225-26 (2015), *see: State v. Momah*, 167 Wn.2d 140 (2009), *State v. Hummel*, 165 Wn.App. 749 (2012), *Pers. Restraint of Copland*, 176 Wn.App. 432 (2013), *Pers. Restraint of D'Allesandro,* 178 Wn.App. 457 (2013), distinguishing *State v. Bone-Club*, 128 Wn.2d 254, 256-59 (1995), *Pers. Restraint of Orange*, 152 Wn.2d 795, 804-05 (2004); III.

***State v. Duckett***, 141 Wn.App. 797 (2007)

Holding voir dire in chambers without a waiver of defendant's right to a public trial is reversible error, *Presley v. Georgia*, 558 U.S. 209, 175 L.Ed.2d 675 (2010), *Pers. Restraint of D'Allesandro,* 178 Wn.App. 457 (2013), *cf.: State v. Applegate*, 103 Wn.App. 460 (2011), *State v. Hummel*, 165 Wn.App. 749 (2012), *State v. Halverson*, 176 Wn.App. 972 (2013), in spite of GR 31's presumption of juror information privacy, *State v. Heath*, 150 Wn.App. 121 (2009), *State v. Erickson*, 146 Wn.App. 200 (2008), *State v. Bowen*, 157 Wn.App. 821, 828-33 (2010), *State v. Slert*, 181 Wn.2d 598 (2014), *cf.: State v. Sublett,* 176 Wn.2d 58 (2012); 2-1, III.

***State v. Vega***, 144 Wn.App. 914 (2008)

Individual juror questioning in open court outside the presence of other prospective jurors does not violate right to public trial, *cf.:* *State v. Erickson*, 146 Wn.App. 200, 205 n.2 (2008), *State v. Sadler*, 147 Wn.App. 97 (2008), *State v. Halverson*, 176 Wn.App. 972 (2013); III.

***State v. Sadler***, 147 Wn.App. 97, 109-18 (2008)

Holding a hearing on peremptory challenges based upon race, *Batson v. Kentucky*, 90 L.Ed.2d 69 (1986), in chambers absent *State v. Bone-Club*, 128 Wn.2d 254 (1995) factors violates defendant's right to public trial even absent objection, *Presley v. Georgia*, 558 U.S. 209, 175 L.Ed.2d 675 (2010), *State v. Whitlock*, 188 Wn.2d 511 (2017), *cf.: State v. Momah*, 167 Wn.2d 140 (2009), *State v. Castro*, 141 Wn.App. 485, 490-91 (2007), *State v. Russell*, 183 Wn.2d 720 (2015), *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1905, 198 L. Ed. 2d 420 (2017), *Pers. Restraint of Salinas,* 189 Wn.2d 747 (2018); 2-1, II.

***State v. Momah***, 167 Wn.2d 140 (2009)

In high publicity case, defense requests individual voir dire, court and both counsel question jurors in chambers, no specific findings entered; held: defendant "affirmatively assented to the closure, argued for its expansion, had the opportunity to object but did not, actively participated in it, and benefited from it. Moreover, the trial judge in this case not only sought input from the defendant, but he closed the courtroom after consultation with the defense and the prosecution. Finally, and perhaps most importantly, the trial judge closed the courtroom to safeguard Momah's constitutional right to a fair trial by an impartial jury, not to protect any other interests. Where, as here, a defendant's other constitutional rights are implicated, the trial court is required to give due consideration to those rights in determining whether closure is appropriate," at 151-52 ¶ 20, thus reversal not required, *State v. Slert*, 181 Wn.2d 598 (2014), *State v. Chouap*, 170 Wn.App. 114, 128 n.5 (2012), *Pers. Restraint of Copland*, 176 Wn.App. 432 (2013), *State v. Herron*, 177 Wn.App. 96 (2014), 183 Wn.2d 737 (2015), *see: Weaver v. Massachusetts*, 137 S. Ct. 1899, 1905, 198 L. Ed. 2d 420 (2017), *Pers. Restraint of Salinas*, 189 Wn.2d 747 (2018), *cf.: State v. Savoie*, 164 Wn.App. 156 (2011), *but see: State v. Paumier*, 176 Wn.2d 29 (2012), *Presley v. Georgia*, 558 U.S. 209, 175 L.Ed.2d 675 (2010), *State v. Hummel*, 165 Wn.App. 749 (2012), *Pers. Restraint of D'Allesandro,* 178 Wn.App. 457, 475 ¶ 30-31 (2013); 7-2.

***State v. Strode***, 167 Wn.2d 222 (2009)

In rape case, jurors who said they were victims are questioned in chambers in the presence of both counsel and defendant, trial court makes no findings; held: public's right to be present is violated even where defendant makes no objection, *cf.: State v. Applegate*, 103 Wn.App. 460 (2011), *State v. Whitlock*, 188 Wn.2d 511 (2017), *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1905, 198 L. Ed. 2d 420 (2017); four justice lead opinion does not distinguish *State v. Momah*, 167 Wn.2d 140 (2009), two justice concurring opinion concludes that judge in *Momah, supra.*, weighed competing interest but trial judge here did not, so reversal is required, *cf.: State v. Savoie*, 164 Wn.App. 156 (2011), *State v. Herron*, 177 Wn.App. 96 (2014), 183 Wn.2d 737 (2015), *Pers. Restraint of Salinas*, 189 Wn.2d 747 (2018), *but see: State v. Halverson*, 176 Wn.App. 972 (2013), *State v. Slert*, 181 Wn.2d 598 (2014).

***Pers. Restraint of Wiatt***, 151 Wn.App. 22 (2009)

Where defense counsel agrees to courtroom closure, defendant cannot complain of it on collateral attack, *but see: State v. Erickson*, 146 Wn.App. 200, 208 n.5 (2008) , *Pers Restraint of D'Allesandro,* 178 Wn.App. 457 (2013); 2-1, II.

***State v. Coleman***, 151 Wn.App. 614 (2009)

Sealing juror questionnaires requires a *State v. Bone-Club*, 128 Wn.2d 254 (1995) analysis, *see: State v. Waldon*, 148 Wn.App. 952, 967 (2009), *but see: State v. Smith*, 162 Wn.App. 833, 846-48 (2011), *State v. Chouap*, 170 Wn.App. 114, 128 n.5 (2012); failure to do so is not structural error, remedy is remand for reconsideration of the closing order, *State v. Lee*, 159 Wn.App. 795, 801-13 (2011), *but see: State v. Beskurt*, 176 Wn.2d 441 (2013), *Waller v. Georgia*, 467 U.S. 39, 81 L.Ed.2d 31 (1984), *Pers. Restraint of Stockwell*, 160 Wn.App. 172 (2011), *affirmed, on different grounds*, 179 Wn.2d 588 (2014); I.

***State v. White***, 152 Wn.App. 173, 179-83 (2009)

At trial, a witness "pleaded the Fifth Amendment," trial court appoints counsel, convenes an *in camera* hearing excluding spectators and defendant, after consultation with counsel witness agrees to testify, court reopens courtroom; held: in determining whether a witness is entitled to the privilege against self-incrimination, use of *in camera* proceeding or sealed record is appropriate, *State v. Bone-Club*, 128 Wn.2d 254 (1995) factors "would serve little purpose, because proper *in camera* proceedings would always satisfy them;" I.

***State v. Price***, 154 Wn.App. 480, 485-89 (2009)

Individual voir dire in open court apart from other jurors is not a courtroom closure, *State v. Vega*, 144 Wn.App. 914 (2008); where prosecutor asks a spectator to leave and the court does not order it, the courtroom is not closed; I.

***State v. O'Connor***, 155 Wn.App. 282, 291-93 (2010)

Routine screening and searching of members of the public entering courthouse does not amount to a closure, thus trial court was not obliged to address *State v. Bone-Club*, 1289 Wn.2d 254 (1995) factors; II.

***State v. Paumier***, 155 Wn.App. 673 (2010), 176 Wn.2d 29 (2012)

Voir dire of some jurors in chambers, even if record is made, violates right to public trial, *State v. Bone-Club*, 128 Wn.2d 254, 256-59 (1995), *Presley v. Georgia*, 558 U.S. 209, 175 L.Ed.2d 675 (2010), *Press-Enter. Co. v. Superior Court*, 464 U.S. 501, 78 L.Ed.2d 629 (1984), *State v. Bowen*, 157 Wn.App. 821, 828-33 (2010), *Pers Restraint of D'Allesandro,* 178 Wn.App. 457 (2013), *State v. Whitlock*, 188 Wn.2d 511 (2017), *cf.: State v. Russell*, 183 Wn.2d 720 (2015), *State v. Jones*, 185 Wn.2d 412 (2016), unless party seeking to close advances an overriding interest, *Waller v. Georgia*, 467 U.S. 39, 81 L.Ed.2d 31 (1984), *cf.: State v. Momah*, 167 Wn.2d 140 (2009), *State v. Strode*, 167 Wn.2d 222 (2009), *State v. Halverson*, 176 Wn.App. 972 (2013), *Pers. Restraint of Copland*, 176 Wn.App. 432 (2013), *State v. Herron*, 177 Wn.App. 96 (2014), 183 Wn.2d 737 (2015), *but see: State v. Slert*, 181 Wn.2d 598 (2014); 2-1, II.

***State v. Bowen***, 157 Wn.App. 821 (2010)

Trial court proposes individual in-chambers voir dire, court asks all the questions, does not make a record of defendant's right to or desire for chambers questioning; held: defendant's right to a public trial, absent *Bone-Club* analysis, is violated where defendant does not waive, *State v. Strode*, 167 Wn.2d 222 (2009), *Pers Restraint of D'Allesandro,* 178 Wn.App. 457 (2013), *but see: State v. Slert,* 181 Wn.2d 598 (2014), distinguishing *State v. Momah*, 167 Wn.2d 140 (2009); II.

***State v. Leyerle***, 158 Wn.App. 474 (2010)

During voir dire, a juror states he cannot be impartial, judge asks counsel and juror to join him in hallway, asks defense counsel if defendant wants to join them, defendant does not, court later makes a record that "there were no spectators who waived their right to be here" and defendant did not want to be there, conference is recorded, juror is excused; held: conducting a portion of voir dire outside the public forum of the courtroom without first considering alternatives to closure and making appropriate findings violates defendant's and public's right to

an open proceeding, *State v. Paumier*, 176 Wn.2d 29 (2012), *Presley v. Georgia*, 558 U.S. 209, 175 L.Ed.2d 675 (2010), *Pers Restraint of D'Allesandro,* 178 Wn.App. 457 (2013), *cf.: State v. Jones,* 185 Wn.2d 412 (2016), *but see: State v. Applegate*, 163 Wn.App. 460 (2011), 181 Wn.2d 452 (2014), *State v. Halverson*, 176 Wn.App. 972 (2013), *State v. Slert*, 181 Wn.2d 598 (2014), *State v. Love*, 183 Wn.2d 598 (2015), *State v. Marks*, 185 Wn.2d 143 (2016), *State v. Anderson*, 194 Wn.App. 547 (2016), *State v. Effinger*, 194 Wn.App. 554 (2016); Division II concludes that *Presley v. Georgia, supra.*, "eclipses" *State v. Momah*, 167 Wn.2d 140 (2009) and *State v. Strode*, 167 Wn.2d 222 (2009); 2-1.

***Tacoma News, Inc. v. Cayce***, 172 Wn.2d 58 (2011)

Newspaper seeks access to a deposition of a witness that took place in a closed courtroom, with judge present, deposition was not introduced at trial and did not become part of court's decision making process; held: presence of judge and location of deposition in courtroom does not convert discovery deposition into a public court proceeding requiring, before closing, *Seattle Times v. Ishikawa*, 97 Wn.2d 30 (1982) analysis; judge ruling on objections at time of deposition is no different than judge ruling at time deposition is offered; 7-2.

***State v. Lormor***, 172 Wn.2d 85 (2011)

Trial court excludes from courtroom defendant's 4-year old daughter on ventilator based upon her age and the fact that court could hear the ventilator; held: exclusion of a single person is not a closure, *State v. Berg*, 177 Wn.App. 119, 125-30 (2013), *reversed, on other grounds,* 181 Wn.2d 857 (2014), *State v. Njonge*, 181 Wn.2d 546 (2014), court's removal was not an abuse of discretion; Supreme Court rejects Court of Appeals holding that exclusion was a "trivial closure," *State v. Lormor*, 154 Wn.App. 386 (2010), suggesting that trivial means inadvertent; 9-0.

***State v. Castro***, 159 Wn.App. 340 (2011)

Judge meets with counsel in chambers on first day of trial, decides defense motions *in limine* in defendant's favor, later places rulings on the record in open court and entertains objections of which there were none, defense claims violation of right to public trial; held: defendant does not have right to have public present for in-chambers or bench conferences where the court and counsel address legal matters, those not requiring the resolution of disputed facts, *State v. Rivera*, 108 Wn.App. 645, 653 (2001), *State v. Sadler*, 147 Wn.App. 97, 114 (2008), *Det. of Ticeson*, 159 Wn.App. 374, 379-87 (2011), *State v. Russell*, 183 Wn.2d 720 (2015), *cf.: State v. Slert*, 181 Wn.2d 598 (2014), *State v. Miller*, 179 Wn.App. 91,102-03 (2014), *but see: State v. Whitlock*, 188 Wn.2d 511 (2017); motions to exclude witnesses and determination whether state could impeach with prior crimes are legal issues thus no violation of right to public trial; III.

***Det. of Ticeson***, 159 Wn.App. 374 (2011)

SVP respondent is a member of the public and thus has standing to assert right to a public trial pursuant to CONST., art. I, § 10, *see: Det. of Reyes*, 176 Wn.App. 821 (2013), *but see: State v. Herron*, 177 Wn.App. 96 (2014), 183 Wn.2d 737 (2015); right of a criminal defendant to a public trial, CONST., art. I, § 22, does not extend to a civil SVP respondent, *see also: Det. of Black*, 189 Wn.App. 641 (2015); in-chambers conference to discuss admissibility of deposition

testimony is not an adversary proceeding, public does not have the right to be present during discussion of legal or trial management issues; I.

***Det. of Morgan***, 161 Wn.App. 66 (2011)

Two years before SVP trial, court holds chambers conference, on the record, in absence of defendant to discuss the process of deciding a forced medication hearing; held: public trial rights are not violated during discussion of ministerial and legal matters, *State v. Sublett*, 176 Wn.2d 58, 68-70 (2012*), State v. Miller,* 179 Wn.App. 91,102-03 (2014); II.

***State v. Tinh Trinh Lam***, 161 Wn.App. 299 (2011)

Judge, prosecutor and defense counsel meet in chambers, on the record, with a juror who expresses safety concerns; held: absent *Boneclub* analysis on the record, in-chambers inquiry with juror violates defendant's right to a public trial, no *de minimis* or trivial closing will excuse the violation, *State v. Easterling*, 157 Wn.2d 267 (2006), *cf.: State v. Applegate*, 163 Wn.App. 460 (2011), 181 Wn.2d 452 (2014), *State v. Wilson*, 174 Wn.App. 328 (2013), *State v. Jones*, 185 Wn.2d 412 (2016), *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1905, 198 L. Ed. 2d 420 (2017), *State v. Whitaker,* 6 Wn.App.2d 1 (2018), *affirmed, on different grounds, State v. Whitaker*, 195 Wn.2d 333 (2020), *but see: State v. Slert*, 181 Wn.2d 598 (2014), *State v. Halverson*, 176 Wn.App. 972 (2013), *State v. Miller*, 184 Wn.App. 637 (2014), new trial is only remedy, *but see: Pers. Restraint of Salinas*, 189 Wn.2d 747 (2018); I.

***State v. DeLauro***, 163 Wn.App. 290 (2011)

Documents considered by a judge to make a decision in a court proceeding (here, competency evaluation) must be filed, subject to a motion to seal, *State v. Chao Chen*, 178 Wn.2d 350 (2013); I.

***State v. Applegate***, 163 Wn.App. 460 (2011), 181 Wn.2d 452 (2014)

Trial court proposes to conduct individual voir dire in chambers, defense counsel states he has no objection, court asks if his client agrees, counsel says he's speaking for himself as counsel, counsel then speaks with defendant and states defendant has no objection, on appeal argues that court is still obliged to engage in *Boneclub* analysis on the record; held: defendant's statement, through counsel, that he personally had no objection to the closure after discussion with counsel constitutes a knowing, voluntary and intelligent waiver of right to public proceeding, defendant's waiver precludes him from raising issue of the need to state *Boneclub* factors on the record; where defendant's right to a public trial has been safeguarded or waived, he cannot obtain a new trial by asserting the public's right to be present, *State v. Herron*, 177 Wn.App. 96 (2014), 183 Wn.2d 737 (2015); I.

***State v. Savoie***, 164 Wn.App. 156 (2011)

In homicide trial, court appoints counsel for victim's parents who persuades court to close the courtroom during argument on whether or not parents' medical records should be disclosed, defense objects to both appointment of counsel for third party and closure; held: closure absent *Boneclub* analysis is structural error, *State v. Strode*, 167 Wn.2d 222, 231 (2009), and, absent assent by defense, *State v. Momah*, 167 Wn.2d 140, 150-52 (2009), mandates automatic reversal, *see: Weaver v. Massachusetts*, 137 S. Ct. 1899, 1905, 198 L. Ed. 2d 420

(2017), *Pers. Restraint of Salinas,* 189 Wn.2d 747 (2018); court lacked authority to appoint counsel for family of victim and to allow counsel for family to intervene; II.

***State v. Bennett***, 168 Wn.App. 197, 201-07 (2012)

At close of evidence, judge and counsel meet in chambers to finalize instructions, after which court states on record that parties went over instructions, defense takes no objections to instructions; held: defendant's right to be present exists where s/he may actively contribute to his or her defense, *State v. Irby,* 170 Wn.2d 874, 883 (2011), *Snyder v. Massachusetts,* 291 U.S. 97, 105-07, 78 L.Ed. 674 (1934), *overruled on other grounds, Malloy v. Hogan,* 378 U.S. 1, 12 L.Ed.2d 653 (1964), right to a public trial exists so that public's mere presence passively contributes to the fairness of the proceedings; while a defendant's right to be present may not be necessary for ministerial or administrative matters, *State v. Irby, supra. at* 881, public's presence may insure the fairness of such proceedings, *but see: Det. Of Ticeson,* 159 Wn.App. 374, 383-86 (2011); some chambers conferences may be ministerial, others may involve disputed issues including asking the court to rule on instructions; here, sparse record indicates that the chambers conference was merely ministerial that did not give rise to defendant's or public's right to open proceedings, *see: State v. Wilson,* 174 Wn.App. 328 (2013); II.

***State v. Wise***, 176 Wn.2d 1 (2012)

Voir dire in chambers is a closure that requires *Bone-Club* findings, defendant's failure to object is not a waiver, remedy is new trial, *State v. Paumier,* 176 Wn.2d 29 (2012), *Pers. Restraint of D'Allesandro,* 178 Wn.App. 457 (2013), *see: State v. Herron,* 177 Wn.App. 96 (2013), 183 Wn.2d 737 (2015), *cf.: State v. Russell,* 183 Wn.2d 720 (2015), *cf.: Weaver v. Massachusetts,* 137 S. Ct. 1899, 1905, 198 L. Ed. 2d 420 (2017), *Pers. Restraint of Salinas,* 189 Wn.2d 747 (2018); reverses *State v. Wise,* 148 Wn.App. 425 (2009); 5-4.

***State v. Sublett***, 176 Wn.2d 58, 70-78 (2012)

Jury sends out a question regarding an instruction, counsel and court meet in chambers and agree that court will tell jury to reread instructions, no objection was taken; test to determine whether the public trial right attaches to a particular proceedings is whether the place and process have historically been open to the press and public and whether public access plays a significant positive role in the functioning of the particular process in question ("experience and logic test"), *Press-Enterprise Co. v. Superior Court,* 478 U.S. 1, 8-10, 92 L.Ed.2d 1 (1986); test is not to draw a line with legal and ministerial issues on one side and resolution of disputed facts on the other, as resolution of legal issues is often accomplished in an adversarial proceeding, effectively overruling, in part, *In re Det. of Morgan,* 161 Wn.App. 66 (2011), 180 Wn.2d 312, 324-26 (2014), *In re Det. of Ticeson,* 159 Wn.App. 374, 386 (2011), *State v. Koss*, 158 Wn.App. 8, 17–18 (2010), 181 Wn.2d 493 (2014), *State v. Rivera,* 108 Wn.App. 645, 652–53 (2001); here, historically, discussing jury questions have not necessarily been conducted in open court, *State v. Burdette*, 178 Wn.App. 183, 197-98 (2013), *State v. Stacy,* 181 Wn.App. 553, 574-76 (2014), *see: State v. Miller,* 179 Wn.App. 91,102-03 (2014); 9-0, but plurality opinion.

***State v. Beskurt***, 176 Wn.2d 441 (2013)

Trial court seals jury questionnaire without *Bone-Club* analysis; lead opinion (4 justices) holds that sealing jury questionnaire is not a closure where it is used by the lawyers during voir

dire as a screening tool and not as a substitute for oral voir dire, *cf.: State v. Coleman*, 151 Wn.App. 614 (2009); concurring opinion (4 justices) would hold that review is barred for lack of objection; concurring opinion (1 justice) would hold that because defendant only sought a new trial, and sealing a jury questionnaire is not a closure, no further analysis is necessary; affirms *State v. Beskurt*, 159 Wn.App. 819 (2010).

***State v. Chao Chen***, 178 Wn.2d 350 (2013)

Once a competency evaluation is filed it is presumed open to the public subject to individualized findings that the *Ishikawa* factors weigh in favor of sealing or redacting, *State v. DeLauro*, 163 Wn.App. 290 (2011), *see also: John Doe G v. Department of Corrections*, 197 Wn.App. 609 (2017); CONST. art. I, § 10 trumps RCW 10.77.210; 9-0.

***State v. Wilson***, 174 Wn.App. 328, 333-47 (2013)

Before being brought to court, jurors fill out questionnaire which, apparently, includes hardship queries, two jurors report illnesses and injuries, bailiff, pursuant to trial court's written policy allowing administrative staff to excuse jurors pretrial for illness, excuses them, trial court offers to bring them into court for voir dire, defense "did not pursue this offer;" held: applying the *State v. Sublett*, 176 Wn.2d 58, 70-78 (2012) "experience and logic test," the public trial right historically has not attached to statutory hardship excuses, RCW 2.36.100(1), *State v. Russell*, 183 Wn.2d 720 (2015), public access does not play a significant positive role in hardship excuses, openness during pre-voir dire juror excusal proceedings would not enhance the basic fairness and the appearance of fairness essential to public confidence in the system; II.

***Pers. Restraint of Copland***, 176 Wn.App. 432, 437-50 (2013)

Defense counsel moves to close courtroom for voir dire, trial court denies motion, both parties agree to private questioning of jurors in chambers, judge addresses certain factors, *State v. Wise*, 176 Wn.2d 1 (2012), without specifically using the words "right to public trial" or *"Bone-Club,"* on direct appeal defense does not raise public trial issues, challenges them here on PRP; held: reviewing the record, appeals court can find that the *Bone-Club* factors were considered by the trial court even though specific findings are not entered, defendant's assent to chambers voir dire, active participation and benefits, plus fact that court discussed it with the press preclude reversal, *State v. Momah*, 167 Wn.2d 140 (2009), *but see: Pers Restraint of D'Allesandro,* 178 Wn.App. 457 (2013); III.

***Det. of Reyes***, 176 Wn.App. 821 (2013)

In a civil sexually violent predator proceeding, where court hears oral argument it must be in open court; structural error does not apply in a civil proceeding, defendant's failure to object to a hearing in chambers cannot be raised for first time on appeal, *Det. of Ticeson*, 159 Wn.App. 374, 383 (2011); in a civil case a party lacks standing to assert the public's right to attend a hearing, *State v. Herron*, 177 Wn.App. 96 (2014), 183 Wn.2d 737 (2015), where raised for the first time on appeal; III.

***State v. Halverson***, 176 Wn.App. 972 (2013)

Bailiff reports that a juror used a dictionary during deliberations, court questions juror in chambers with counsel present, later makes record of chambers conference and replaces juror

with alternate; held: under experience prong, public trial right does not attach to "preliminary individual questioning" of a deliberating juror suspected of misconduct, *State v. Wilson,* 141 Wn.App. 597, 601-05 (2007), *United States v. Gagnon,* 470 U.S. 522, 527, 83 L.Ed.2d 486 (1985), *State v. Rivera,* 108 Wn.App. 645, 652-53 (2001), *but see: State v. Strode,* 167 Wn.2d 222 (2009), *State v. Leyerle,* 158 Wn.App. 474 (2010), *State v. Tinh Trinh Lam,* 161 Wn.App. 299 (2011); II.

***State v. Berg***, 177 Wn.App. 119, 125-30 (2013), *reversed, on other grounds,* 181 Wn.2d 857 (2014)

Police and security officers order a spectator to leave court and "trespass" him from the courtroom, when brought to judge's attention by defense judge orders that spectator is free to return, although he declines fearing arrest; held: exclusion of a single spectator is not a closure, *State v. Lormor,* 172 Wn.2d 85, 92-93 (2011); police banning a spectator from a trial usurps trial court's authority over courtroom operations, nullifying the exercise of the trial court's discretion which is improper and erroneous but, because there was not prejudice, harmless; II.

***State v. McCarthy***, 178 Wn.App. 90, 94-96 (2013)

During deliberations, jury asks for masking tape and a tape measure, trial court provides them without consulting counsel; held: experience prong of experience and logic test, *State v. Sublett,* 176 Wn.2d 58, 71 (2012), shows that court's response to a jury request for these types of materials has not historically been open to the public, *cf.: State v. Koss,* 181 Wn.2d 493 (2014); II.

***Pers. Restraint of Speight***, 182 Wn.2d 103 (2014)

A petitioner claiming a public trial right violation for the first time on collateral review must show actual and subtantial prejudice by a preponderance, *Pers. Restraint of Coggin,* 182 Wn.2d 115 (2014), *Pers. Restraint of Schreiber,* 189 Wn.App. 110 (2015), *Weaver v. Massachusetts,* 137 S. Ct. 1899, 1905, 198 L. Ed. 2d 420 (2017), *Pers. Restraint of Salinas,* 189 Wn.2d 747 (2018); here, motions *in limine* and some voir dire were held in chambers without *Boneclub* analysis but petitioner did not argue prejudice, nor do the facts suggest he was prejudiced, *Pers. Restraint of Mines,* 190 Wn.App. 554, 562-69 (2015), *see: State v. Karas,* 6 Wn.App.2d 610 (2018); ineffective assistance of appellate counsel on direct appeal will result in a presumption of prejudice, *Pers. Restraint of Morris,* 176 Wn.2d 157, 166 (2012), *but see: Pers. Restraint of Eagle,* 195 Wn.App. 51, 66-73 (2016); 5-4.

***State v. Sykes***, 182 Wn.2d 168 (2014)

Closed adult drug court staffings do not violate CONST. art. I, § 10; 6-3.

***Det. of Morgan***, 180 Wn.2d 312, 324-27 (2014)

Counsel and judge meet in chambers, absent SVP respondent, to discuss procedure for hearing evidence regarding need for forced medication; held: status conference where no evidence or testimony is presented, no substantive decisions are made, no orders are entered does not require a public hearing under experience prong, public access would have made little difference to the function of the conference or the involuntary medication proceedings under logic prong, thus public trial rights were not violated; 6-3.

***State v. Frawley***, 181 Wn.2d 452 (2014)

Consolidated cases: defendant Frawley waives right to be present for individual voir dire in chambers and waives right to have public present during general voir dire in courtroom, no *Boneclub* analysis; in *State v. Applegate*, court asks courtroom if any party or member of the public objects to some juror questioning in chambers, no one objects, counsel asserts that defendant himself does not object, judge announces that public can come to chambers and leaves outer door open, questions one juror in chambers, no *Boneclub* analysis; in lead opinion, two justices rule that defendant can waive both right to be present and public trial right if it's in writing and court engages in *Boneclub* analysis, thus trial court is reversed in both cases; two justices concur, writing that defendant can waive without *Boneclub* analysis if waiver is knowing, voluntary and intelligent and, apparently, need not be written; three justices would hold that defendant can waive without *Boneclub* analysis; one justice dissents and would hold that failure to object to closure is a waiver, *see: State v. Fort,* 190 Wn.App. 202, 225-26 (2015); affirms *State v. Frawley,* 140 Wn.App. 713 (2007) and *State v. Applegate,* 163 Wn.App. 460 (2011), *but see: State v. Hernandez,* 6 Wn.App.2d 422 (2018).

***State v. Koss***, 181 Wn.2d 493 (2014)

In-chambers discussion of jury instructions without *Boneclub* findings, where a record is made of what occurred in chambers, does not violate the constitutional right to a public trial, *State v. Sublett,* 176 Wn.2d 58 (2012); affirms *State v. Koss,* 158 Wn.App. 8 (2010); 9-0.

***State v. Smith***, 181 Wn.2d 508 (2014)

Sidebar conference with counsel to discuss evidentiary matters on the record does not implicate the public trial right, *see also: State v. Love,* 183 Wn.2d 598 (2015), *State v. Marks,* 185 Wn.2d 143 (2016), *State v. Anderson,* 194 Wn.App. 547 (2016), *State v. Effinger,* 194 Wn.App. 554 (2016), *cf.: State v. Whitlock,* 188 Wn.2d 511 (2017), *State v. Crowder,* 196 Wn.App. 861, 866-67 (2016); 6-3.

***State v. Njonge***, 181 Wn.2d 546 (2014)

Excluding some members of the public from voir dire due to space limitations is not a closure (here the record was unclear but it appears there was room for some), *State v. Gomez,* 183 Wn.2d 29 (2015); excluding victim family members during voir dire is not a closure, *State v. Lormor,* 172 Wn.2d 85 (2011), *cf.:* ER 615, "a court should articulate reasons for the discretionary decision," at 559; exclusion of television camera crew from voir dire is not a closure as long as all press are not excluded; 9-0.

***State v. Shearer***, 181 Wn.2d 564 (2014)

Without objection or *Boneclub* findings, judge questions a juror in chambers with defendant present; in lead opinion, four justices decide that questioning a juror in private without findings is structural error; one justice would hold that a defendant can waive the public's right to be present when a juror is questioned in private, but that defendant did not waive here; three justices concurred, writing that if the court states a valid reason for questioning a juror in private and there is no objection, and the court gives the public the opportunity to object, then *Boneclub* findings are not necessary, but record here fails to show a reason for closure or that public could have objected; one justice dissents because defendant did not object.

***State v. Slert***, 181 Wn.2d 598 (2014)

Judge and counsel discuss jury questionnaire and agree to excuse four jurors due to knowledge about the case in chambers; lead opinion, with four justices, decides that because it is "pre-voir dire" no error occurred, *State v. Miller,* 184 Wn.App. 637 (2014), *see also: State v. Marks,* 185 Wn.2d 143 (2016), *State v. Russell,* 183 Wn.2d 720 (2015); one justice joins because there was no objection and thus the issue was waived; four dissenting justices would hold that excusing jurors and discussing juror questionnaires is voir dire and is thus structural error absent *Boneclub* findings; reverses *State v. Slert,* 169 Wn.App. 766 (2012).

***State v. Rainey***, 180 Wn.App. 830 (2014)

A witness' assertion of a Fifth Amendment privilege on the witness stand must be in open court or court must weigh *Boneclub* factors on the record; I.

***State v. Magnano***, 181 Wn.App. 689 (2014)

During deliberations jury asks to re-hear admitted 911 call, bailiff plays it in closed courtroom; held: "[t]o allow the public to participate in the jury's review of admitted evidence invites the public to influence jury deliberations," closed courtroom does not implicate the values served by the public trial right; I.

***State v. Reeder***, 181 Wn.App. 897, 919-20 (2014), *affirmed,* 184 Wn.2d 805 (2015)

**Special inquiry proceedings**, ch. 10.27, RCW, are properly held in secret; I.

***State v. Rocha***, 181 Wn.App. 833 (2014)

Defense counsel informs court and prosecutor that he has another client that could result in disqualification of counsel or the judge, court closes courtroom, at hearing counsel informs court that he represents judge's daughter, no motion or decision is made; held: a disqualification/recusal motion must be in open court under experience and logic test, but here there was only information provided to the court which need not be in an open hearing as no action was requested; *dicta:* recusals handled administratively need not take place in the courtroom; III.

***State v. Stark***, 183 Wn.App. 893, 900-03 (2014)

Judge asking spectators not to come or go during closing argument is not a court closure, *State v. Gomez,* 183 Wn.2d 29 (2015); 2-1, III.

***State v. Herron***, 183 Wn.2d 737 (2015)

Defendant waives his right to public trial, CONST. art. I, § 22, so that individual voir dire may take place in chambers, on appeal claims he did not waive public's right to public trial, CONST. art. I, § 10; held: waiver of the § 22 right to a public trial is also a waiver of § 10 public's right to public trial, defendant lacks standing to assert public's § 10 right, *Detention of Reyes,* 176 Wn.App. 821, 845 (2013), as he did not suffer "injury in fact," *Powers v. Ohio,* 499 U.S. 400, 411, 113 L.Ed.2d 411 (1991), lacks a particularly close relationship with the public, no reason to believe public could not have asserted its own interests, *State v. Momah,* 167 Wn.2d

140, 153-56 (2009), *State v. Applegate,* 163 Wn.App. 460 (2011), 181 Wn.2d 452 (2014); affirms *State v. Herron,* 177 Wn.App. 96, 104-11 (2014**)**; 9-0.

***State v. Russell***, 183 Wn.2d 720 (2015)

Reviewing jury questionnaires for hardship in chambers with counsel does not violate public trial right, but "we strongly encourage trial courts to conduct all proceedings in open court;" "[d]etermining whether a juror is able to serve at a particular time or for a particular duration (as in hardship and administrative excusals) is qualitatively different from challenging a juror's ability to serve as a neutral factfinder in a particular case (as in peremptory and for-cause challenges)," at 731; 9-0.

***State v. S.J.C.***, 183 Wn.2d 408 (2015)

Where juvenile offender has met all the requirements of RCW 13.50.050 (2011) to seal the record court must seal and need not apply *Seattle Times Co. v. Ishikawa,* 97 Wn.2d 30 (1982) factors, *see:* *State v. Webster*, 69 Wn.App. 376 (1993); 7-2.

***State v. Gomez***, 183 Wn.2d 29 (2015)

Judge announces "[w]e do not allow people to come into the courtroom after it is in session," no record is made as to whether or not the court took any action to enforce the statement, issue is raised for the first time on appeal; held: the record fails to establish the courtroom was actually closed, judge's comment is not a conclusive showing that spectators were totally excluded, *State v. Njonge,* 181 Wn.2d 546, 550 (2014), *State v. Stark,* 183 Wn.App. 893, 903 (2014); even if the comment was enforced the judge's rule does not constitute a closure, *see: State v. Lormor,* 172 Wn.2d 85, 93-94 (2011); 9-0.

***State v. Love,*** 183 Wn.2d 598, 601 (2015)

"At the conclusion of voir dire questioning, counsel exercised for cause challenges orally at the bench and subsequently exercised peremptory challenges silently by exchanging a list of jurors and alternatively striking names from it. All of voir dire, including the juror challenges, occurred in open court, on the record, and in full view of any observer in the courtroom. We hold the juror challenges in this case were exercised in a manner consistent with the minimum safeguards of the public trial right and affirm," *State v. Marks,* 185 Wn.2d 143 (2016), *State v. Anderson,* 194 Wn.App. 547 (2016), *State v. Effinger,* 194 Wn.App. 554 (2016); affirms *State v. Love,* 176 Wn.App. 911, 915-20 (2013); 9-0.

***State v. Miller***, 184 Wn.App. 637, 641-46 (2014)

Judge discovers that a juror had inadvertently sat through the preceding legal argument and, before voir dire, excuses the juror during recess; held: public trial right does not extend to juror dismissal before voir dire begins, *State v. Wilson,* 174 Wn.App. 328 (2013), *State v. Slert,* 171 Wn.2d 598 (2014); II.

***State v. Fort***, 190 Wn.App. 202 (2015)

Waiver of right to be present during chambers voir dire is not a waiver of public trial right, at 225-26, *State v. Frawley,* 181 Wn.2d 452 (2014), *Pers. Restraint of Morris,* 176 Wn.2d 157 (2012); agreeing to individual voir dire does not invite error of in-chambers voir dire, at 227,

*Pers. Restraint of Coggin,* 182 Wn.2d 115 (2014); when raising public trial violation in a PRP petitioner must show prejudice but by arguing counsel was ineffective by not asserting public trial rights during an appeal petitioner need not prove prejudice, at 238, *but see: Pers. Restraint of Eagle,* 195 Wn.App. 51, 66-73 (2016); III.

***State v. Arredondo****,* 190 Wn.App. 512, 525-29 (2015), *aff'd, on other grounds,* 188 Wn.2d 244 (2017)

Courthouse door is locked at 4:00 p.m., sign says courthouse is open until 4:00 p.m., officer are present to admit public to late trial, at reference hearing judge finds that sign did not deter public; held: substantial evidence supports court's finding that court was open, *State v. Andy,* 182 Wn.2d 294 (2014); III.

***State v. Turpin****,* 190 Wn.App. 815 (2015)

Excusing a juror who reports as ill while court is not in session is not a violation of public trial right; I.

***State v. Parks****,* 190 Wn.App. 859, 864-67 (2015)

Swearing in jurors to answer questions in a possibly closed jury assembly room does not violate right to public trial; III.

***State v. Jones,*** 185 Wn.2d 412 (2016)

By agreement of the defense, during a recess, judicial assistant draws the names of sitting jurors who are alternates, court announces which jurors are alternates; held: randomly selecting the names of jurors to serve as alternates does not violate public trial right; selection of alternates off the record does not violate defendant's right to be present where defense does not object, *State v. Anderson,* 19 Wn.App.2d 556 (2021), distinguishing *State v. Irby,* 170 Wn.2d 874 (2011); *reverses, in part, State v. Jones,* 187 Wn.App. 87 (2013); 9-0.

***State v. Anderson****,* 194 Wn.App. 547 (2016)

Sidebar challenges for cause not on the record after which court makes a public record of what occurred does not violate right to public trial, *State v. Love,* 183 Wn.2d 598 (2015), *State v. Effinger,* 194 Wn.App. 554 (2016), *see also: State v. Crowder,* 196 Wn.App. 861, 866-67 (2016); II.

***State v. Effinger****,* 194 Wn.App. 554 (2016)

Sidebar peremptory and for cause challenges not on the record do not violate the right to public trial, *State v. Love,* 183 Wn.2d 598 (2016), *State v. Anderson,* 194 Wn.App. 547 (2016), *see also: State v. Crowder,* 196 Wn.App. 861, 866-67 (2016); 2-1, II.

***Pers. Restraint of Eagle****,* 195 Wn.App. 51 (2016)

Arraignment on amended information in chambers violates public trial right absent *Boneclub* findings but on collateral review defense must show prejudice, *Pers. Restraint of Speight,* 182 Wn.2d 103 (2014), *Weaver v. Massachusetts,* 137 S. Ct. 1899, 1905, 198 L. Ed. 2d 420 (2017), *Pers. Restraint of Salinas,* 189 Wn.2d 747 (2018), absent here; while failure to raise a public trial issue on direct appeal is ineffective assistance and prejudice need not be proved by

defense, *Pers. Restraint of Speight,* 182 Wn.2d 103 (2014), *Pers. Restraint of Morris,* 176 Wn.2d 157, 166 (2012), remedy is not automatically a new trial unless the public trial right was violated during the trial itself, *State v. Rainey,* 180 Wn.App. 830, 843 (2014), *Waller v. Georgia*, 467 U.S. 39, 81 L.Ed.2d 31 (1984), most defendant is entitled to is a public arraignment; I.

***State v. Crowder***, 196 Wn.App. 861, 866-67 (2016)

Defense challenges a juror for cause, state concurs, parties hold an unreported sidebar conference after which court excuses the juror; held: substance of the juror challenge occurred entirely in open court, no showing that anything substantive occurred during the sidebar; while it would have been "preferable" for the sidebar to have been recorded, *State v. Smith*, 181 Wn.2d 508, 518 (2014), constitutional public trial right was not violated; 2-1, III.

***Weaver v. Massachusetts***, 137 S. Ct. 1899, 1905, 198 L. Ed. 2d 420 (2017)

While violation of open courts doctrine is structural error, when raised in the context of ineffective assistance because it was not preserved defense must prove prejudice, *State v. Salinas*, 189 Wn.2d 747 (2018); 7-2.

***State v. Whitlock***, 188 Wn.2d 511 (2017)

State asks for sidebar to discuss evidentiary issue, court orders chambers conference with counsel, hears argument and rules in chambers, later making a record; held: chambers conference, as opposed to a sidebar, violates public trial right as evidentiary arguments and rulings have always occurred in open court, albeit sometimes at sidebar, *State v. Smith,* 181 Wn.2d 508 (2014), *State v. Wise,* 176 Wn.2d 1, 5 (2012); public cannot watch a chambers conference to ensure that the adversarial process is in fact adversarial, *State v. Karas*, 6 Wn.App.2d 610 (2018); affirms *State v. Whitlock,* 195 Wn.App. 745 (2016); 9-0.

***Pers. Restraint of Salinas***, 189 Wn.2d 747 (2018)

Trial counsel seeks some voir dire in chambers, court agrees, issue is not raised on direct appeal, defendant files timely PRP, raises ineffective assistance of appellate counsel; held: courtroom closure issues raised in the context of ineffective assistance in a PRP do not require reversal where there is invited error and defense does not establish prejudice, *Weaver v. Massachusetts,* 137 S. Ct. 1899, 1905, 198 L. Ed. 2d 420 (2017), *State v. Momma,* 167 Wn.2d 140 (2009), *Pers. Restraint of Speight,* 182 Wn.2d 103 (2014), *see: Pers. Restraint of Morris,* 176 Wn.2d 157, 165-68 (2012); structural error does not automatically result in a new trial; 6-3.

***State v. Schierman***, 192 Wn.2d 577 (2018)

Court holds a ten-minute chambers conference, on the record with counsel, ruling on challenges for cause, defendant does not object, court makes a record in open court as to what occurred; held: while a chambers conference in which the judge rules, on the record, on challenges for cause is a constitutional violation, where there was no questioning of jurors or presentation of evidence, the conference was recorded and the court memorializes the conference in open court the violation is "a limited *de minimis* exception," automatic reversal is not the remedy, at 608-15, *cf.: State v. Karas,* 6 Wn.App.2d 610 (/2018); fractured opinion.

***Doe G v., Dep't of Corrections***, 190 Wn.2d 185, (2018)

Unredacted SSOSA evaluations are not exempt from Public Disclosure Act per Uniform Health Care Information Act, RCW 70.02.020 (2014), *cf.: State v. Chao Chen*, 178 Wn.2d 350 (2013); reverses *John Doe G v. Dep't of Corrections,* 197 Wn.App. 609 (2017); 7-2.

***State v. Small***, 1 Wn.App.2d 254 (2017)

Peremptory challenges are taken on paper, *State v. Love*, 183 Wn.2d 598, 605-06 (2015), clerk misfiles document and informs appellate counsel that it is not on file, clerk later finds the document; held: a member of the public could have requested the document and it would eventually have been provided so no public trial violation occurred; III.

***State v. Karas***, 6 Wn.App.2d 610 (2018)

At unreported chambers conference court excludes witnesses and, after argument, rules *in limine,* that one witness' hearsay testimony is excluded and another witness' testimony about what a person said was not offered for the truth and thus denies the motion to exclude; Division III reverses, 3 Wn.App.2d 223, then withdraws opinion on reconsideration in light of *State v. Schierman*, 192 Wn.2d 577 (2018); on reconsideration, held: motion to exclude witnesses, ER 615, is "mundane," need not be in open court, , *State v. Whitlock*, 188 Wn.2d 511, 513-14 (2017), *State v. Smith*, 181 Wn.2d 508, 515 (2014); contested motions *in limine*, absent *Bone-Club* factors, must be in open court; here, at least one of the motions to exclude testimony was not *de minimis* as it was important evidence, thus reversed, *see: Pers. Restraint of Speight*, 182 Wn.2d 103, 106 (2014).

***State v. Whitaker***, 6 Wn.App.2d 1 (2018), *affirmed, on different grounds, State v. Whitaker*, 195 Wn.2d 333 (2020)

During deliberations juror 2 leaves jury room, tells bailiff other jurors are hectoring him and he wants to be excused, then has a heart attack and is excused; held: conversation with bailiff in absence of defendant was not a violation of open courts doctrine or defendant's right to be present as there was no other way it could have been handled, distinguishing *State v. Tinh Trinh Lam*, 161 Wn.App. 299 (2011); I.

***State v. Hernandez***, 6 Wn.App.2d 422 (2018)

Defense counsel expressly declines to move for a mistrial following possible public trial violation; held: an attorney's decision to decline to seek a remedy for a public trial violation is tactical and thus precludes reversal; because this is not a waiver of the right to a public trial, rather is a decision to forfeit a remedy, defendant need not knowingly, voluntarily and intelligently waive, *see: State v. Frawley*, 181 Wn.2d 452 (2014); III.

# RESTITUTION/LEGAL FINANCIAL OBLIGATIONS

***In re Gardner***, 94 Wn.2d 489 (1980)

Defendant can be sentenced to prison and ordered to pay restitution in lieu of a fine, RCW 9A.20.030, up to twice victim's loss, but limited to victims in convicted counts; 8-1.

***State v. Rogers***, 30 Wn.App. 653 (1981)

Court can set restitution at actual loss, and is not limited to the amount necessary for conviction ($9500 restitution for PSP 2°); *accord: State v. Selland*, 54 Wn.App. 122 (1989), *State v. Mead*, 67 Wn.App. 486, 490 (1992), *State v. Griffith*, 136 Wn.App. 885 (2007); I.

***State v. Smith***, 33 Wn.App. 791 (1983)

Standard for establishing restitution in a juvenile proceeding is "evidence sufficient to afford a reasonable basis for estimating the loss"; *see: State v. Fambrough*, 66 Wn.App. 223 (1992); only tangible damages, such as those for injury to or loss of property, are allowed, 79 ALR 3d 976 (1977); juvenile restitution provisions, RCW 13.40.020(17), 13.40.190, are not vague; I.

***State v. Moreau***, 35 Wn.App. 688 (1983)

Distinguishes restitution ordered pursuant to RCW 9A.20.030 from RCW 9.95.210; III.

***State v. Barr***, 99 Wn.2d 75 (1983)

A person convicted of negligent homicide can, as a condition of probation, be ordered to pay restitution to the victim's spouse and minor child, *State v. Donahoe*, 105 Wn.App. 97 (2001), *see: State v. Young*, 63 Wn.App. 324 (1991), *State v. Cosgaya-Alvarez*, 172 Wn.2d 785 (2013); 9-0.

***State v. Mark***, 36 Wn.App. 428 (1984)

Restitution may not exceed amount stolen for specific offense as charged, *State v. Eilts*, 94 Wn.2d 484 (1980), absent agreement by defendant at a plea of guilty, RCW 9.95.210; trial court does not have discretion to award restitution for general criminal conduct of the defendant; restitution in a criminal case need not be proven with specific accuracy; test is "reasonable basis for estimating loss"; *see: State v. Fambrough*, 66 Wn.App. 223 (1992); criminal defendant is not entitled to a civil jury trial to determine damages, *State v. Barr*, 99 Wn.2d 75 (1983); I.

***State v. Barnett***, 36 Wn.App. 560 (1984)

Court may order restitution paid to victim's insurer, *State v. Sanchez*, 73 Wn.App. 486, 488-90 (1994), *cf.: State v. Martinez*, 78 Wn.App. 870, 881-5 (1995), *State v. Ewing*, 102 Wn.App. 349 (2000); I.

***State v. Hartwell***, 38 Wn.App. 135 (1984), *overruled, on other grounds, State v. Krall*, 125 Wn.2d 146, 149 (1994)

Restitution for damage to vehicle may not be ordered following hit and run conviction since the conduct of leaving the scene of an accident is not a proximate cause of damages occurring in the accident itself, *see also: State v. Mead*, 67 Wn.App. 486 (1992), *State v. Coe*, 86

Wn.App. 841 (1997), *cf.: State ex rel. Fitch v. Roxbury Dist. Court*, 29 Wn.App. 591 (1981), *State v. Enstone*, 137 Wn.2d 675 (1999), *State v. Thomas*, 138 Wn.App. 78 (2007); I.

***State v. Perdang***, 38 Wn.App. 141 (1984)

Abuse of discretion for district court to refuse to grant compromise of misdemeanor, RCW 10.22.010-020, except under unique or extraordinary circumstances; court must consider a defendant's "individual circumstances"; *see*: *State v. Cunningham*, 96 Wn.2d 31, 35 (1981); I.

***State v. Eyre***, 39 Wn.App. 141 (1984)

Chapter 7 bankruptcy filing will not discharge criminal restitution, *Kelly v. Robinson*, 93 L.Ed.2d 216 (1986); III.

***State v. Ashley***, 40 Wn.App. 877 (1985)

Defendant assaults and injures victim, later assaults victim, no injuries; defendant is charged and convicted only with second assault, restitution ordered for first assault; held: restitution may only be ordered for the crimes charged and proved at trial, RCW 13.40.190(1), *State v. Mark*, 36 Wn.App. 428 (1984), *but see: State v. Donahoe*, 105 Wn.App. 97 (2001); I.

***State v. Jeffries***, 42 Wn.App. 142 (1985)

Assault defendant may be ordered to make restitution to Department of Labor and Industries for damages paid to victim under Crime Victims' Compensation Act, RCW 7.68.010 *et seq.*, *distinguishing State v. Theroff*, 33 Wn.App. 741 (1983); III.

***State v. Smith***, 42 Wn.App. 399 (1985)

Court may order restitution in an amount greater than the fair market value, *i.e.*, replacement value of used property with new property, *see: State v. Hughes*, 154 Wn.2d 118, 153-56 (2005),*abrogated, on other grounds, Washington v. Recuenco,* 548 U.S. 212, 165 L.Ed.2d 466 (2006), ; I.

***Seattle v. Stokes***, 42 Wn.App. 498 (1986)

Compromise of misdemeanor statute, RCW 10.22, is inapplicable to a charge of reckless driving, since property damage or personal injury is not a necessary element of the charge, *State ex rel. Fitch v. Roxbury Dist. Court*, 29 Wn.App. 591 (1981), *cf.: State v. Stalker*, 152 Wn.App. 805 (2009); I.

***State v. Forbes***, 43 Wn.App. 793 (1986)

Sentence directed restitution be made in an amount set by prosecutor's office; held: trial court may not delegate the responsibility of setting the amount of restitution to another agency; I.

***State v. Morse***, 45 Wn.App. 197 (1986)

Restitution following juvenile court conviction of negligent driving may not include travel, telephone expenses or attorney fees, RCW 13.40.190(17); trial court need not consider comparative negligence in determining restitution amount; I.

***State v. Goodrich***, 47 Wn.App. 114 (1987)

Superior court may not order restitution for victim's medical expenses which have not yet been incurred, *State v. C.A.E.*, 148 Wn.App. 720 (2009), although court maintains jurisdiction for ten years to modify restitution order, *State v. Vinyard*, 50 Wn.App. 888 (1988); I.

***State v. Raleigh***, 50 Wn.App. 248 (1988)

Defendant is entitled to a restitution hearing at which state must offer evidence to establish the amount of loss; where defendant pleads guilty, court may only order restitution for that to which defendant pleaded guilty unless defendant is informed prior to the plea that he could be ordered to pay more, *State v. Osborne*, 140 Wn.App. 38 (2007), *see*: *State v. Tindal*, 50 Wn.App. 401 (1988), *State v. Pockert*, 53 Wn.App. 491 (1989), *State v. Miszak*, 69 Wn.App. 426 (1993); I.

***State v. Halsen***, 111 Wn.2d 121 (1988)

In custodial interference case, restitution for travel expenses to recover a child is not "treatment," RCW 9.94A.140(1), *reversing* *State v. Halsen*, 50 Wn.App. 30 (1987), but may be awarded under RCW 9A.40.080(1); 9-0.

***State v. Steward***, 52 Wn.App. 413 (1988)

Respondent is convicted of taking a motor vehicle without permission, RCW 9A.56.070; juvenile court finds that respondent abandoned vehicle, which was stripped, orders restitution for damages; held: RCW 13.40.190 authorizes restitution as the damages resulted from the respondent's offense, *distinguishing* *State v. Ashley*, 40 Wn.App. 877 (1985); *accord*: *State v. Blair*, 56 Wn.App. 209 (1989), *State v. Donahoe*, 105 Wn.App. 97 (2001), *cf.: State v. Woods*, 90 Wn.App. 904 (1998), *State v. Blanchfield*, 126 Wn.App. 235 (2005); I.

***State v. Nelson***, 53 Wn.App. 128 (1988)

In the absence of statutory authority, court may not order sale of defendant's property in police custody to satisfy restitution order; I.

***State v. Horner***, 53 Wn.App. 806 (1989)

The value of a victim's labor in making repairs to property damage by respondent may be included in a restitution order, RCW 13.40.020(17); court may base restitution order upon an estimate of the cost a professional would have charged; I.

***State v. Barrett***, 54 Wn.App. 178 (1989)

Juvenile passenger in stolen vehicle, convicted of taking and riding, RCW 9A.56.070, may be ordered to make restitution for damages to the vehicle pursuant to RCW 13.40.190(1); I.

***State v. Harrington***, 56 Wn.App. 176 (1989)

Defendant, convicted of possessing a stolen car, is ordered to pay restitution for damage to the car; held: because defendant admitted illegally possessing the vehicle during the entire period during which victim was out of possession, and because evidence established that damage occurred in that period, then restitution order was valid, *see*: *State v. Blair*, 56 Wn.App. 209 (1989), *but see: State v. Tetters*, 81 Wn.App. 478 (1996), *State v. Woods*, 90 Wn.App. 904

(1998), *cf.:* *State v. Blanchfield*, 126 Wn.App. 235 (2005), *see:* *State v. S.T.*, 139 Wn.App. 915 (2007); I.

***Pa. Welfare Dept. v. Davenport***, 109 L.Ed.2d 588 (1990)

Criminal restitution is dischargeable under Chapter 13 of the Bankruptcy Code, *distinguishing* *Kelly v. Robinson*, 93 L.Ed.2d 216 (1986); 7-2.

***State v. Lewis***, 57 Wn.App. 921 (1990)

Restitution, RCW 9.94A.142, may not be imposed for future earnings losses or the loss of future retirement, *cf.: State v. Cosgaya-Alvarez,* 172 Wn.2d 785 (2013); I.

***State v. Johnson***, 59 Wn.App. 867 (1990)

Trial court orders $700 recoupment where counsel is paid $4000 for 15 indigent defense cases (average $266.67 per case); held: because the negotiated fee for each defendant was not $266.67, it is reasonable to conclude that some cases would be disposed of summarily and others would take time; in light of the time spent on this case, as reflected in the record, apportioning $700 to this defendant was reasonable, RCW 10.01.160; III.

***State v. Davison***, 116 Wn.2d 917 (1991)

Defendant is ordered to pay, pursuant to restitution statute, RCW 9.94A.142, assault victim's employer for wages employer paid victim while victim was unable to work due to injuries caused by assault, absent proof that employer was legally obliged to pay said wages; held: employer is within statutory definition of victim, RCW 9.94A.030(28), as it sustained financial injury as a direct result of crime charged; if employer had not paid victim, then defendant would have owed victim lost wages, thus restitution to employer was proper, *distinguishing* *State v. Vinyard*, 50 Wn.App. 888 (1988); 9-0.

***State v. Eisenman***, 62 Wn.App. 640 (1991)

Trial court denies recoupment but imposes $70 costs and $100 victim assessment without determining ability to pay; held: by disallowing recoupment of attorney's fees, court impliedly concluded that defendant could pay $170 over ten years' jurisdiction, *distinguishing* *State v. Earls*, 87 Wn.2d 814 (1976), *State v. Hayes*, 56 Wn.App. 451 (1989), *State v. Woodward*, 116 Wn.App. 697 (2003); requiring formal findings for a "few hundred dollars" is unnecessary as long as defendant is not later incarcerated if unable to pay, *State v. Barklind*, 87 Wn.2d 814 (1976), *State v. Ring*, 134 Wn.App. 716, 720-21 (2006), *see:* *State v. Curry*, 118 Wn.2d 911 (1992), *State v. Bower*, 64 Wn.App. 808 (1992), *State v. Crook*, 146 Wn.App. 24 (2008), *but see:* *State v. Bertrand*, 165 Wn.App. 393, 403-05 (2011), *State v. Calvin*, 176 Wn.App. 1, 24-26 (2013), *State v. Duncan*, 185 Wn.2d 430 (2016); I.

***State v. Young***, 63 Wn.App. 324 (1991)

Following vehicular homicide conviction, court may order defendant to pay, as restitution, child support to victim's child where said support has been previously reduced to a judgment, RCW 9.94A.140, *State v. Barr*, 99 Wn.2d 75 (1983), *State v. Cosgaya-Alvarez,* 172 Wn.2d 785 (2013); allocation of insurance payments against victim's loss is within discretion of

trial court, and may be applied first against items of loss not recoverable as restitution to maximize victim's recovery; II.

***State v. Bennett***, 63 Wn.App. 530 (1991)

Juvenile on Social Security with representative payee is ordered to ask guardian for money to pay restitution; held: no abuse of discretion in ordering restitution and ordering respondent to ask payee for funds from social security checks; defendant has burden of establishing that she had proprietary interest in some of the property for which she is ordered to pay restitution, RCW 13.30.020(17); I.

***State v. Smith***, 119 Wn.2d 385 (1992)

Funds spent to develop film and to unload, reload and reset surveillance cameras following a burglary are property lost as a result of the burglary and thus compensable under restitution statute, former RCW 9.94A.142(1), *State v. Davison*, 116 Wn.2d 917 (1991), *State v. Wilson*, 100 Wn.App. 44 (2000), *reversing State v. Smith*, 61 Wn.App. 277 (1991); *cf.: State v. Martinez*, 78 Wn.App. 870, 881-5 (1995); 9-0.

***State v. Fambrough***, 66 Wn.App. 223 (1992)

Unsworn estimate of damages is sufficient to establish restitution in juvenile court, RCW 13.40.150(1), ER 1101(c)(3), *State v. Smith*, 33 Wn.App. 791 (1983), *State v. Horner*, 53 Wn.App. 806, 807 (1989), *State v. Mark*, 36 Wn.App. 428, 434 (1984), *State v. Tobin*, 132 Wn.App. 161, 174-77 (2006), *aff'd, on other grounds*, 161 Wn.2d 517 (2007); defense does not have the right to confront witnesses at restitution hearing; I.

***State v. Pollard***, 66 Wn.App. 779, *rev. den.*, 120 Wn.2d 1015 (1992)

Rules of Evidence do not apply at a restitution hearing, ER 1101; due process requires that evidence be reliable and that defendant be given the opportunity to refute the evidence presented; police reports alone that record what banks say they lost in UIBC cases is insufficient to order restitution; *accord: State v. Awawdeh*, 72 Wn.App. 373, 378-9 (1994); I.

***State v. Landrum***, 66 Wn.App. 791 (1992)

Restitution for victim's counseling costs is proper under Juvenile Justice Act, RCW 13.40.190, *State v. J.P.*, 149 Wn.2d 444 (2003); where underlying facts allege an assault of a sexual nature, medical examination restitution is proper even if respondent ultimately pleads guilty to a lesser offense; I.

***State v. Clapp***, 67 Wn.App. 263 (1992)

Restitution ordered against defendant is proper even though crime partner was granted immunity, as defendant may seek contribution through a separate proceeding; II.

***State v. Kisor***, 68 Wn.App. 610 (1993)

Affidavit which contains hearsay declarations establishing a rough estimate of costs, with no indication where affiant obtained figures is not substantial credible evidence, offending due process where court sets restitution based entirely upon said affidavit, *cf. State v. Tobin*, 132 Wn.App. 161, 174-77 (2006), *aff'd, on other grounds*, 161 Wn.2d 517 (2007); II.

***State v. Johnson***, 69 Wn.App. 189 (1993)

Defendant is charged with theft by embezzlement of checks and money, in guilty plea form defendant admits she stole cash, checks, "& other items," trial court orders restitution for tool and photographs and for costs of auditing and investigation; held: because plea form does not describe items taken with specificity, court cannot assume for restitution purposes that defendant admitted to stealing tool and photographs, *see:* *State v. Miszak*, 69 Wn.App. 426 (1993); investigating records was a reasonable consequence of the embezzlement, *State v. Tobin*, 161 Wn.2d 517 (2007), even though part of investigation was done by victim's friends, who were not proven to be qualified to review business records, and even though victim may not have been obliged to pay for their services, *State v. Wilson*, 100 Wn.App. 44 (2000), *see:* *State v. Davison*, 116 Wn.2d 917, 922-3 (1991), *cf.:* *State v. Martinez*, 78 Wn.App. 870, 881-5 (1995); I.

***State v. Shannahan***, 69 Wn.App. 512 (1993)

Misdemeanors outside RCW Title 9A are subject to restitution provisions of RCW 9A.20.030, *State v. Stephan*, 35 Wn.App. 889 (1983), *cf.:* *State v. Kelley*, 77 Wn.App. 66, 71-2 (1995); I.

***State v. Hunotte***, 69 Wn.App. 670 (1993)

Respondent breaks car window, steals speakers, flees as passenger in another vehicle which is pursued by car prowl victim, driver of respondent's vehicle rams victim's vehicle, trial court orders restitution for damage to victim's vehicle incurred during chase; held: but for the criminal act, damage would not have occurred, *State v. Enstone*, 137 Wn.2d 675 (1999), *see:* *State v. Blair*, 56 Wn.App. 209, 215 (1989), plus a reasonable person would foresee the loss as a consequence of the criminal act, *State v. Harrington*, 56 Wn.App. 176, 180 (1989), *State v. Woods*, 90 Wn.App. 904 (1998), *State v. Keigan C.*, 120 Wn.App. 604 (2004), *aff'd, State v. Hiett*, 154 Wn.2d 560 (2005); it is highly likely that when a vehicle owner sees someone smashing a window, s/he will try to apprehend the offender; 2-1, II.

***State v. Awawdeh***, 72 Wn.App. 373, 378-9 (1994)

Trial court, absent a hearing, sets restitution, stating, "[t]hat's what I believe...to be probable out-of-pocket expenses for the investigation;" held: an evidentiary hearing is required where restitution amount is contested, *State v. Pockert*, 53 Wn.App. 491, 498 (1989); while damages need not be proved with certainty, evidence must be sufficient to afford a reasonable basis for estimating the loss and must not be mere speculation or conjecture, *State v. Pollard*, 66 Wn.App. 779, 785 (1992), *cf.:* *State v. Tobin*, 132 Wn.App. 161, 174-77 (2006), 161 Wn.2d 517 (2007); III.

***State v. Tracy***, 73 Wn.App. 386 (1994)

Sentencing court may not impose restitution upon a defendant who pleads guilty unless defendant is advised of that possibility prior to entering plea, *State v. Cameron*, 30 Wn.App. 229, 234 (1981), *State v. Raleigh*, 50 Wn.App. 248, 253 (1988); here, guilty plea form advised defendant that court will order restitution if crime resulted in injury, but court holds that "[p]rior to entering his plea, however, Mr. Tracy was neither advised of the possibility of restitution nor that restitution might be ordered," case involved a stabbing, defendant pled guilty to unlawful

display of a weapon, RCW 9.41.270; remedy is to strike restitution order, *distinguishing* *State v. Cameron, supra*, at 234; III.

***State v. Sanchez***, 73 Wn.App. 486 (1994)

Juvenile court may order restitution paid to a victim's insurer, at 488-90, *State v. Barnett*, 36 Wn.App. 560 (1984); burden of establishing inability to pay restitution rests with a juvenile respondent, hearing must be requested or issue is waived, at 490-1, *State v. Fellers*, 37 Wn.App. 613, 620 (1984), *In re Erickson*, 24 Wn.App. 808, 811 (1979), *but see: State v. Duncan,* 185 Wn.2d 430 (2016), *see: State v. Bertrand,* 165 Wn.App. 393, 403-05 (2011); III.

***State v. Hefa***, 73 Wn.App. 865 (1994)

Restitution is ordered by juvenile court to burglary victim for lost wages to secure home; held: juvenile court may only order restitution for lost wages due to physical injury, RCW 13.40.020(21), *see: State v. Goodrich*, 47 Wn.App. 114 (1987), *cf.: State v. Gonce,* 200 Wn.App. 847 (2017); I.

***State v. Krall***, 125 Wn.2d 146 (1994)

Failure of superior court to set restitution within 60 days of sentencing, RCW 9.94A.142(1) [amended, 1995, to 180 days, RCW 9.94A.753 (2003)], precludes a restitution order, overruling *State v. Hartwell*, 38 Wn.App. 135 (1984) insofar as it is inconsistent; *accord*: *State v. Duback*, 77 Wn.App. 330 (1995), *State v. Johnson*, 96 Wn.App. 813 (1999); *see: State v. Ryan*, 78 Wn.App. 758 (1995), *State v. Hennings*, 129 Wn.2d 512 (1996), *but see: State v. Duvall*, 84 Wn.App. 439, 441-5 (1996), *State v. Halsey*, 140 Wn.App. 313, 326-27 (2007), *cf.: State v. Barbee,* 193 Wn.2d 581 (2019); 9-0.

***State v. Kuhn***, 74 Wn.App. 787, 792-3 (1994)

Expenses of an indigent's appeal may not be imposed on defendant other than statutory attorney fees and expenses actually incurred by the prevailing party, RAP 14.3(a); II.

***State v. Fleming***, 75 Wn.App. 270 (1994)

Court may impose restitution for the appreciated value of the item stolen at the time of the restitution hearing, and is not bound by the value at the time of the theft, *see: State v. Hughes*, 154 Wn.2d 118, 153-56 (2005), *abrogated, on other grounds, Washington v. Recuenco,* 548 U.S. 212, 165 L.Ed.2d 466 (2006); failure to object to restitution and affirmatively admitting to theft of property for which restitution is ordered effectively agrees to restitution order; I.

***State v. Wiens***, 77 Wn.App. 651 (1995)

RCW 9.94A.145(4), which authorizes victims of crime to enforce criminal restitution orders as if they were civil judgments, is valid; I.

***State v. Angulo***, 77 Wn.App. 657 (1995)

After conviction, defendant moves for return of cash in evidence, which is denied; judgment and sentence requires restitution to be set at a subsequent hearing, which is held, defendant ordered to pay upon release from prison; while still in prison, court modifies payment schedule to require payment of restitution and authorizes payment from cash in evidence, from

which defendant appeals; held: no statute authorizes modification of restitution payment schedule except for change in circumstances, RCW 9.94A.142(1), or upon a violation, RCW 9.94A.200(1), (2), neither of which occurred here, thus court's modification is vacated; defendant is entitled to return of exhibit, *State v. Alaway*, 64 Wn.App. 796, 798 (1992), CrR 2.3(e); I.

***State v. Ryan***, 78 Wn.App. 758 (1995)

Trial court enters *ex parte* restitution order, procedure advises defendant he may object and schedule restitution hearing but does not set deadline by which offender must object or be considered to have acknowledged the amount, no hearing is held within 60-day [now 180 day, RCW 9.94A.753 (2003)] statutory period, RCW 9.94A.142; held: where defendant objects to amount set in *ex parte* order, hearing must be set within statutory period or restitution is barred, *State v. Krall*, 125 Wn.2d 146 (1994), *State v. Saunders*, 132 Wn.App. 592, 608 (2006), *cf.: State v. Duvall*, 84 Wn.App. 439, 441-45 (1996), *State v. Burmaster*, 96 Wn.App. 36 (1999) *State v. Barbee*, 193 Wn.2d 581 (2019); I.

***State v. Martinez***, 78 Wn.App. 870, 881-85 (1995)

Insurance company's expenses in investigating fire are not recoverable as restitution, as insurer was not victim, nor did any victim get subrogated compensation, *distinguishing State v. Davison*, 116 Wn.2d 917 (1991), *State v. Barnett*, 36 Wn.App. 560 (1984), *State v. Smith*, 119 Wn.2d 385, 389 (1992), *State v. Johnson*, 69 Wn.App. 189 (1993), *but see: State v. Wilson*, 100 Wn.App. 44 (2000), *State v. Tobin*, 161 Wn.2d 517 (2007); insurer's attorneys fees and costs incurred in separate civil action brought by arson-defendant are not recoverable, *State ex rel. Macri v. Bremerton*, 8 Wn.2d 93, 102 (1941), *State v. Vinyard*, 50 Wn.App. 888, 894 (1988), *but see: State v. Christenson*, 100 Wn.App. 504 (2000), *State v. Kinneman*, 155 Wn.2d 272, 286-89 (2005); II.

***State v. Hennings***, 129 Wn.2d 512 (1996)

Statutory amendments expanding the time during which court may order restitution, RCW 9.94A.753, 9.94A.142, may apply retroactively, do not violate due process, *ex post facto*, bill of attainder or double jeopardy clauses; 9-0.

***Pers. Restraint of Fleming***, 129 Wn.2d 529 (1996)

Timeliness of restitution order may not be raised for the first time in a personal restraint petition; 9-0.

***State v. Moen***, 129 Wn.2d 535 (1996)

Timeliness of restitution order may be raised for the first time on appeal; 5-4.

***State v. Hunsicker***, 129 Wn.2d 554 (1996)

Where plea agreement specifies an amount of restitution, entry of the restitution order after the statutory 60-day period [now 180 days, RCW 9.94A.753] does not preclude restitution; 7-2.

***State v. Tetters***, 81 Wn.App. 478 (1996)

Respondent pleads guilty to possessing stolen property, a vehicle, is ordered to pay restitution for loss of personal property taken from the vehicle; held: because no evidence was presented that respondent was in possession of the vehicle either from the time it was taken or when the items were taken from the vehicle, there is insufficient causal relationship between the crime proven and victim's damages, *State v. Romish,* 7 Wn.App.2d 510 (2019), *distinguishing* *State v. Blair*, 56 Wn.App. 209, 214-5 (1989), *State v. Harrington*, 56 Wn.App. 176, 179-80 (1989), *State v. Mead*, 67 Wn.App. 486, 491 (1992), *but see: State v. Keigan C.,* 120 Wn.App. 604 (2004), *aff'd, State v. Hiett,* 154 Wn.2d 560 (2005), *State v. S.T.*, 139 Wn.App. 915 (2007); I.

***State v. Kisor***, 82 Wn.App. 175 (1996), *overruled, in part, State v. Enstone,* 137 Wn.2d 675 (1999)

Defendant killed police dog, state seeks restitution for replacing fully trained police dog with wages for trainer; held: although officer-trainer would have been paid anyway, government was deprived of his services, thus his wages during training were compensable as restitution, *State v. Davison*, 116 Wn.2d 917, 921 (1991); officer's personal vehicle expenses used during training were properly awarded at rate-per-mile paid by county; officer's off-duty time caring for dog are not proper as he was not victim and this time did not have an "easily ascertainable value," at 183-4; citizen's donation of funds to replace the dead dog do not offset defendant's obligation, *Wheeler v. Catholic Archdiocese*, 124 Wn.2d 634, 640 (1994), *State v. Davison*, *supra*, at 922; II.

***State v. Branch***, 129 Wn.2d 635, 651 (1996)

Defendant cannot challenge the amount of restitution ordered where he failed to raise the issue at the trial court and agreed to pay restitution, *see: State v. Young*, 63 Wn.App. 324, 330 (1991), *State v. Harrington*, 56 Wn.App. 176, 181 (1989), *State v. Osborne*, 140 Wn.App. 38 (2007); 9-0.

***State v. Duvall***, 84 Wn.App. 439, 441-5 (1996) , 86 Wn.App 871 (1997)

Time limit for entering restitution order, RCW 9.94A.753, is not jurisdictional, but operates like a statute of limitations subject to equitable tolling; here, defense counsel signed a restitution order which was set aside on defendant's motion based upon lack of notice and authority, thus neither trial court nor prosecutor were negligent, there was no prejudice, *but see: State v. Johnson*, 96 Wn.App. 813 (1999); I.

***State v. Campbell***, 84 Wn.App. 596 (1997)

Where defendant fails to pay restitution, defendant has the burden of showing that a violation was not willful, *State v. Gropper*, 76 Wn.App. 882, 887 (1995), RCW 9.94A.200(2)(a), *State v. Woodward*, 116 Wn.App. 697 (2003), *State v. N.S.T.*, 156 Wn.App. 444 (2010), *rev'd, on other grounds, State v. Tucker,* 171 Wn.2d 50 (2011) *State v. Sleater,* 194 Wn.App. 470, 474 (2016); incarceration for failure to pay does not violate due process or equal protections clauses, *State v. Barklind*, 87 Wn.2d 814 (1976), *State v. Curry*, 118 Wn.2d 911 (1992), *see: State v. Nason*, 168 Wn.2d 936 (2010); II.

***State v. Mollichi***, 132 Wn.2d 80 (1997)

Juvenile court must determine restitution at disposition hearing, RCW 13.40.150(3)(f), unless waived by respondent, *State v. Kerow*, 192 Wn.App. 843 (2016), reversing *State v. Mollichi*, 81 Wn.App. 474 (1996); 9-0.

***State v. Bunner***, 86 Wn.App. 158 (1997)

Following rape of a child conviction, trial court sets restitution for medical services based upon a DSHS medical recovery report, without finding a causal connection; held: absent proof of why medical services were provided, restitution order was invalid as state must prove a causal connection between crime and damages, *State v. Vinyard*, 50 Wn.App. 888, 891 (1988), *State v. Enstone*, 137 Wn.2d 675 (1999), *State v. Hahn*, 100 Wn.App. 391, 397-400 (2000), *see: State v. Blanchfield*, 126 Wn.App. 235, 242 (2005), *State v. Anderson*, 9 Wn.App.2d 430 (2019), *State v. Velezmoro*, 196 Wn.App. 552 (2016), a presentence report which purports to establish the connection which is admitted at sentencing but not referenced at restitution hearing is insufficient to support restitution order as defense lacked opportunity to rebut or challenge it; I.

***State v. Taylor***, 86 Wn.App. 442 (1997), *overruled, in part, State v. Enstone*, 137 Wn.2d 675 (1999)

Defendant is charged with welfare fraud 1°, state alleges theft of $9074, jury convicts of lesser welfare fraud 2°, court imposes restitution of $9074; held: while court may impose restitution for actual loss proved irrespective of degree of crime, *State v. Rogers*, 30 Wn.App. 653 (1981), *State v. Mead*, 67 Wn.App. 486, 490 (1992), jury's verdict here does not establish an underlying criminal act that could serve as the basis for a restitution award greater than $1500, *cf.: State v. Thomas*, 138 Wn.App. 78 (2007), since jury must have found defendant eligible for some of the welfare benefits he received, thus remanded for order of restitution in an amount reflecting loss to state from crime of conviction; I.

***State v. Coe***, 86 Wn.App. 841 (1997)

Defendant pleads guilty to manufacturing marijuana, is ordered to pay restitution to homeowner for damage to house that occurred during grow operation; held: damage would not have occurred but for the marijuana grow operation, thus there is a causal connection between the crime charged and the victim's damage, distinguishing *State v. Hartwell*, 38 Wn.App. 135 (1984); II.

***State v. Duvall***, 86 Wn.App. 871, 874-76 (1997)

Court signs agreed restitution order within 60-day statutory period (now 180 days, RCW 9.94A.753), defendant later objects claiming counsel lacked authority, court sets aside original order and holds a restitution hearing after the 60-day period, signs second restitution order; held: 60-day period operates as a statute of limitations, not a jurisdictional period, *State v. Moen*, 129 Wn.2d 535 (1996), thus doctrine of equitable tolling is applicable and second order is thus valid; I.

***State v. Hartke***, 89 Wn.App. 143 (1997)

Juvenile court's extending jurisdiction over juvenile sentenced in 1988 to collect restitution pursuant to RCW 13.40.190 which, as of 1994, allowed extension of jurisdiction over juveniles for restitution to age 28 did not violate *ex post facto* clause, as restitution is not

punishment, RCW 13.40.010, *State v. Rice*, 98 Wn.2d 384, 391-4 (1982), even though punishment may be imposed later for failure to pay, *see: In re Marriage of Haugh*, 58 Wn.App. 1, 5-6 (1990), accord: *State v. Bennett*, 92 Wn.App. 637 (1998); III.

***State v. Woods***, 90 Wn.App. 904 (1998)

Defendant is convicted of possessing a stolen vehicle in September, trial court imposes restitution for loss of personalty in the truck when it was stolen in August based upon defendant's admission she stole the truck in August; held: absent plea agreement, *State v. Miszak*, 69 Wn.App. 426, 429 (1993), court cannot order restitution for losses which go beyond the crime charged, loss of personal property was not a foreseeable consequence of later possession of stolen truck, *State v. Romish*, 7 Wn.App.2d 510 (2019), *State v. Tetters*, 81 Wn.App. 478, 479 (1996), *see: State v. Hunotte*, 69 Wn.App. 670, 675-6 (1993), *State v. Steward*, 52 Wn.App. 413, 416 (1988), *State v. Blanchfield*, 126 Wn.App. 235 (2005), *but see: State v. Harrington*, 56 Wn.App. 176 (1989), *State v. Keigan C.*, 120 Wn.App. 604 (2004), *aff'd, State v. Hiett*, 154 Wn.2d 560 (2005), *State v. S.T.*, 139 Wn.App. 915 (2007), *distinguishing State v. Blair*, 56 Wn.App. 209 (1989), *State v. Mead*, 67 Wn.App. 486, 491-2 (1992); II.

***State v. Enstone***, 137 Wn.2d 675 (1999)

Lack of foreseeability of extent of injuries from an assault is not a factor to be determined in setting restitution; as long as there is a causal connection between the crime and the injuries, restitution is appropriate, *State v. Thomas*, 138 Wn.App. 78 (2007), *affirming State v. Enstone*, 89 Wn.App. 882 (1998), *overruling Walla Walla v. Ashby*, 90 Wn.App. 560, 565 (1998), *State v. Taylor*, 86 Wn.App. 442, 444-45 (1997), *State v. Kisor*, 82 Wn.App. 175, 180 (1996), *State v. Velezmoro*, 196 Wn. App. 552 (2016); 9-0.

***State v. Tejada***, 93 Wn.App. 907 (1999)

Juvenile court has jurisdiction to collect restitution until the offender is 28 years old, RCW 13.40.190(1); III.

***Pers. Restraint of Sappenfield***, 138 Wn.2d 588 (1999)

Court has authority to collect restitution for ten years following release from confinement for the crime for which restitution was ordered, RCW 9.94A.142, *see: State v. Olson*, 148 Wn.App. 238 (2009), *Pers. Restraint of Spires*, 151 Wn.App. 236 (2009), affirming *Pers. Restraint of Sappenfield*, 92 Wn.App. 729 (1998); 8-0.

***State v. Shultz***, 138 Wn.2d 638 (1999)

Legislation extending the period of time during which restitution may be collected, RCW 9.94A.753, is applicable retroactively to a defendant who had been sentenced prior to the amendment, does not violate *ex post facto*, *see: State v. Morgan*, 107 Wn.App. 153 (2001), due process, bill of attainder or double jeopardy clauses, *State v. Serio*, 97 Wn.App. 586 (1999); 8-0.

***State v. Marks***, 95 Wn.App. 537 (1999)

Statutory requirement that restitution be determined within 180 days of sentencing, RCW 9.94A.753, does not apply to misdemeanors; III.

***State v. Paul***, 95 Wn.App. 775 (1999)

Defendant posts cash bail, appears at revocation hearing, court forfeits bail and applies it to restitution; held: an appearance discharges bail; when a defendant satisfies bail conditions by appearing, the bail may not be forfeited; "if the state wants bail to serve a dual purpose, it must express such purpose on the record," *State v. Ransom*, 34 Wn.App. 819, 824 (1983); III.

***State v. Johnson***, 96 Wn.App. 813 (1999)

After 180-day time limit for setting restitution, RCW 9.94A.753, trial court may not exercise discretion and grant a continuance, *State v. Tetreault*, 99 Wn.App. 435 (2000), *State v. Grantham*, 174 Wn.App. 399 (2013), *see: State v. Chipman*, 176 Wn.App. 615 (2013), *State v. Jones*, 20 Wn.App.2d 552 (2021); failure to transport defendant from prison where it is not ordered within the 180-day time limit is not good cause; III.

***State v. Edelman***, 97 Wn.App. 161 (1999)

A restitution order may be modified upon death of victim to require payments to victim's estate; I.

***State v. Serio***, 97 Wn.App. 586 (1999)

Legislation allowing court to extend jurisdiction for collection of restitution, RCW 9.94A.753, does not violate *ex post facto* clause for a defendant sentenced before enactment, *State v. Shultz*, 138 Wn.2d 638 (1999); III.

***State v. Dedonado***, 99 Wn.App. 251 (2000)

To challenge causal connection between crime and damages alleged, *State v. Bunner*, 86 Wn.App. 158, 160 (1997), defense need not inform the state prior to restitution hearing that it would object, thus entry of a restitution order without proof of causal connection because defendant did not notify state of objection in advance is abuse of discretion, *see also: State v. Osborne*, 140 Wn.App. 38, 41 (2007); I.

***State v. Wilson***, 100 Wn.App. 44 (2000)

Victim's cost of investigating embezzlement may properly be ordered as restitution where causally connected and consequential to the crime, *State v. Johnson*, 69 Wn.App. 189 (1993), *State v. Smith*, 119 Wn.2d 385 (1992), *State v. Tobin*, 161 Wn.2d 517 (2007), *but see: State v. Martinez*, 78 Wn.App. 870, 882 (1995); victim's attorney's fees may be included as restitution where they are the direct result of embezzlement rather than a consequence of a separate action, *State v. Kinneman*, 155 Wn.App. 272, 286-89 (2005), distinguishing *State v. Vinyard*, 50 Wn.App. 888 (1988), *see: State v. Christensen*, 100 Wn.App. 534 (2000); III.

***State v. Christensen***, 100 Wn.App. 534 (2000)

Before sentencing, victim settles a civil suit against defendant based upon same facts as criminal case, sentencing judge orders defendant to pay victim's civil attorney's fees; held: restitution was proper because the attorney's fees were a direct result of the offense, *see: State v. Wilson*, 100 Wn.App. 44 (2000), *State v. Kinneman*, 155 Wn.2d 272, 286-89 (2005); I.

***State v. Dennis***, 101 Wn.App. 223 (2000)

Letter from prosecutor's victim assistance unit stating that victim was treated at hospital for injury and letter from workers compensation referencing amount of damages and that victim's injuries occurred on date of crime is sufficient to sustain restitution order; letter establishing that victim was treated at hospital on an unknown date is insufficient to establish causal connection; if state fails to establish causal connection, remedy is vacation of the order, *State v. Dedonado*, 99 Wn.App. 251 (2000), not remand; I.

***State v. Ewing***, 102 Wn.App. 349 (2000)

Court may order restitution to insurer, *State v. Barnett*, 36 Wn.App. 560, 562 (1984), even where insurer has waived civil subrogation interest against defendant, as civil doctrines such as subrogation have no place in interpretation of criminal statutes, *see also: State v. Kinneman*, 122 Wn.App. 850 (2004), *aff'd,* 155 Wn.2d 272 (2005); I.

***State v. Reed***, 103 Wn.App. 261 (2000)

Department of Labor and Industries may petition for restitution within a year of sentencing even if court fails to order restitution within initial 180 days, RCW 9.94A.753; I.

***State v. Dauenhauer***, 103 Wn.App. 373, 377-80 (2000)

Following burglaries, defendant is chased, car hits another car, defendant is charged and convicted only of burglaries, at sentencing defense counsel agrees that court can order restitution for collision; held: counsel's incorrect concession to liability for damages is not akin to a guilty plea, *see: State v. Osborne*, 140 Wn.App. 38, 41 (2007), and agreement to pay for uncharged acts; since there was no causal connection between the offenses charged and the damages from the collision, restitution is vacated, distinguishing *State v. Enstone*, 137 Wn.2d 675 (1999), *but see: State v. S.T.*, 139 Wn.App. 915 (2007); III.

***State v. Donahoe***, 105 Wn.App. 97 (2001)

Twelve-year-old respondent pops ignition with screwdriver and joyrides, leaves car with his nine-year-old brother inside, engine running, brother takes wheel and hits a garage, respondent is convicted of possessing stolen property, court orders restitution for garage; held: where damage occurs as a direct result of respondent's conduct, is causally connected to the crime, *State v. Enstone*, 137 Wn.2d 675, 682 (1999), and is reasonably related to the crime, *State v. Mark*, 36 Wn.App. 428, 432 (1984), restitution may be ordered to collateral victims of the charged conduct even if not a named victim, *State v. Barr*, 99 Wn.2d 75, 78 (1983), distinguishing *State v. Ashley*, 40 Wn.App. 877 (1985); III.

***State v. Pierson***, 105 Wn.App. 160 (2001)

Where trial court orders that restitution hearing be within 60 days, it is authorized to continue the hearing as long as it is heard within the statutory 180-day limit, RCW 9.94A.753, *see: State v. Johnson*, 96 Wn.App. 813 (1999); II.

***State v. Claypool***, 111 Wn.App. 473 (2002)

Trial court may not defer interest on financial obligations, RCW 10.82.090; III.

***State v. A.M.R.***, 147 Wn.2d 91 (2002)

Juvenile court must order restitution, including that owed insurers; state may appeal a restitution order, *State v. Kinneman*, 155 Wn.2d 272, 283-84 (2005); affirms *State v. A.M.R.*, 108 Wn.App. 9 (2001); 9-0.

***State v. King***, 113 Wn.App. 243, 298-300 (2002)

Where a defendant is convicted of conspiracy, he must be ordered to pay restitution to all victims of the conspiracy, regardless of the defendant's knowledge or complicity in the particular injury; I.

***State v. Dorenbos***, 113 Wn.App. 494 (2002)

Seven years after untimely restitution order is entered, defendant moves to vacate; held: statutory time limit on setting restitution is not jurisdictional, *State v. Moen*, 129 Wn.2d 535, 545 (1996), thus collateral attack is barred if brought more than one year after judgment and sentence becomes final, RCW 10.73.090; I.

***State v. Turner***, 114 Wn.App. 653, 659-61 (2002)

Where defendant pays fines and costs on a case that is reversed, he is entitled to reimbursement but, because state has not waived sovereign immunity, he is not entitled to interest; II.

***State v. J.P.***, 149 Wn.2d 444 (2003)

Restitution for counseling may only be ordered for sex offenses in juvenile court, RCW 13.40.020(22), *see: State v. Landrum*, 66 Wn.App. 791 (1992), reversing *State v. J.P.*, 149 Wn.2d 444 (2003); 9-0.

***State v. Woodward***, 116 Wn.App. 697 (2003)

Failure to pay a token amount is grounds to incarcerate; III.

***State v. Cunningham***, 116 Wn.App. 946 (2003)

Interest on fines, RCW 10.82.090, is not dischargable in bankruptcy; III.

***State v. Wood***, 117 Wn.App. 207 (2003)

Fine following methamphetamine conviction, RCW 69.50.401(2)(b) (2005), is discretionary, *State v. Corona*, 164 Wn.App. 76 (2011), *see: State v. Cowin*, 116 Wn.App. 752, 760 (2003); III.

***State v. Hotrum***, 120 Wn.App. 681 (2004)

*Ex parte* extension of jurisdiction to enforce restitution order does not violate due process clause, *Pers. Restraint of Brady*, 154 Wn.App. 189, 201 (2010); III.

***State v. Mayer***, 120 Wn.App. 720 (2004)

Absent finding of indigence at the time of sentencing, court must impose mandatory $1000 drug fine, RCW 69.50.430(1), *State v. Cowin*, 116 Wn.App. 752, 760 (2003), *but see: State v. Wood*, 117 Wn.App. 207 (2003); indigence is determined as of the date of sentencing, not as it will be as a result of incarceration, *but see: State v. Blazina*, 182 Wn.2d 827 (2015); III.

***State v. T.A.D.***, 122 Wn.App. 290 (2004)

Juvenile convicted of shoplifting can be ordered to reimburse his father for paying the store a civil penalty, RCW 4.24.230(2); father's unsworn statement is admissible at a juvenile disposition hearing, *State v. Fambrough*, 66 Wn.App. 22, 227 (1992), ER 1101(c)(3); II.

***State v. Moon***, 124 Wn.App. 190 (2004)

Defendant is convicted of burglary, acquitted of rape, court orders lab fees for DNA testing; held: because lab fees related solely to rape, acquittal precludes imposition of fees, RCW 43.43.690, on another charge; III.

***State v. Adams***, 153 Wn.2d 746 (2005)

Defendant is ordered to pay crime victim penalty assessment at sentencing in 1990, is released from prison in 1993 on that offense, state seeks to collect VPA in 2002; held: LFOs, other that restitution, may be enforced within ten years of sentence or within ten years of release from total confinement, former RCW 9.94A.145(4), recodified RCW 9. 94A.760(4), *see: Pers. Restraint of Spires*, 151 Wn.App. 236 (2009); reverses *State v. Adams*, 121 Wn.App. 438 (2004); *per curiam.*

***State v. Blanchfield***, 126 Wn.App. 235 (2005)

Domestic violence victim decides to move to hotel following which defendant assaults her, trial court awards hotel rent and moving expenses as restitution; held: hotel stay and moving expenses were not causally connected to the assault, thus restitution order vacated, *State v. Woods*, 90 Wn.App. 904, 907 (1998); where victim testifies that medical bills arose from the assault, court does not abuse discretion in ordering restitution, distinguishing *State v. Bunner*, 86 Wn.App. 158 (1997), *State v. Hahn*, 100 Wn.App. 391, 397-400 (2000); II.

***State v. Hughes***, 154 Wn.2d 118, 153-56 (2005), *abrogated, on other grounds, Washington v. Recuenco*, 548 U.S. 212, 165 L.Ed.2d 466 (2006)

Restitution is not limited to market value; here, in theft of trees case, while market value was $4465, forest expert's testimony as to a specific ecological and monetary value, beyond speculation or conjecture, permitted trial court to order $145,000 restitution, *State v. Tobin*, 161 Wn.2d 517 (2007); 9-0.

***State v. Hiett***, 154 Wn.2d 560 (2005)

Respondents-passengers jump from stolen car and flee after which police chase car which crashes, respondents plead guilty to taking a motor vehicle, RCW 9A.56.070(2)(a), trial court imposes restitution for property missing from the car and for damages to car from crash; held: but for the taking of the vehicle, the personal property would not have gone missing nor would the crash occur; driver's attempt to elude and crash was a foreseeable intervening act, thus does not break the causal chain; affirms *State v. Keigan C.*, 120 Wn.App. 604 (2004); 6-3.

***State v. Kinneman***, 155 Wn.2d 272 (2005)

Defendant is not entitled to a jury trial on amount of restitution, at 277-82; state may appeal restitution order, at 283-84; attorneys fees and costs may be ordered as restitution if they

are a direct result of the crime, *State v. Smith*, 119 Wn.2d 385 (1992), *State v. Davison*, 116 Wn.2d 917, 921-22 (1991), *State v. Wilson*, 100 Wn.App. 44 (2000), *State v. Christensen*, 100 Wn.App. 534 (2000), at 286-89; overrules, in part, *State v. Martinez*, 78 Wn.App. 870, 881-85 (1995), affirms *State v. Kinneman*, 122 Wn.App. 850 (2004); 9-0.

***Pers. Restraint of Martin***, 129 Wn.App. 135 (2005)

DOC may collect restitution from an inmate's account even where judgment and sentence orders that restitution be paid on a schedule set by defendant's community correction's officer, where defendant does not have a CCO because he is still in prison, RCW 9.94A.772, *see also: State v. Crook*, 146 Wn.App. 24 (2008); I.

***State v. Lohr***, 130 Wn.App. 904 (2005)

Defendant lights a candle in her hotel room which causes a fire burning two hotels and several vehicles, pleads guilty to reckless burning, is ordered to pay restitution for all damage; held: foreseeability is not required to be proved to order restitution, *State v. Enstone*, 137 Wn.2d 675 (1999), contributory negligence principles need not reduce restitution, here but for defendant's act the damage would not have occurred, thus more than $1,000,000 restitution is affirmed; by ordering defendant to pay $250 per month, trial court impliedly considered defendant's ability to pay, *see: State v. Bertrand,* 165 Wn.App. 393, 403-05 (2011); III.

***State v. Ring***, 134 Wn.App. 716 (2006)

Trial court need not consider ability to pay restitution at the time of sentencing, *State v. Bower*, 64 Wn.App. 808 (1992), *State v. Curry*, 118 Wn.2d 911 (1992), *State v. Jeffries*, 42 Wn.App. 142, 146-47 (1985), *State v. Eisenman*, 61 Wn.App. 246 (1991), *cf.:* RCW 9.94A.753(1), State v. Campbell, 84 Wn.App. 596 (1997), *State v. Crook*, 146 Wn.App. 24 (2008), *State v. Bertrand,* 165 Wn.App. 393, 403-05 (2011), *State v. Calvin*, 176 Wn.App. 1, 24-26 (2013); III.

***State v. Tobin***, 161 Wn.2d 517 (2007)

Cost of investigating theft of clams and crabs by Washington Department of Fish and Wildlife may be included in restitution order when it is established that but for defendant's thefts, the investigative and administrative costs would not have been incurred, *State v. Johnson*, 69 Wn.App. 189, 190 (1993); affirms *State v. Tobin*, 132 Wn.App. 161 (2006); 9-0.

***State v. Thomas***, 138 Wn.App. 78 (2007)

Defendant is charged with vehicular assault, jury finds defendant guilty of lesser DUI, trial court imposes restitution for injuries to passenger; held: because restitution is established by a preponderance, not beyond a reasonable doubt, jury's verdict is not a bar to trial court imposing restitution based upon finding that defendant probably caused injuries, distinguishing *State v. Taylor*, 86 Wn.App. 442 (1997), *overruled on other grounds, State v. Enstone*, 137 Wn.2d 675, 680-81 (1999); II.

***State v. We***, 138 Wn.App. 716, 727-28 (2007)

Trial court need not consider ability to pay in the setting of the amount of restitution, only as to the minimum monthly payment, RCW 9.94.753(1), *State v. Huddleston*, 80 Wn.App. 916,

928-29 (1996), *cf.: State v. Bertrand,* 165 Wn.App. 393, 403-05 (2011), *see: State v. Blazina,* 182 Wn.2d 827 (2015); 2-1, III.

***State v. S.T.***, 139 Wn.App. 915 (2007)

Two days after car is stolen, respondent is found in driver's seat, is charged with taking a motor vehicle, pleads guilty to attempted taking a motor vehicle, is ordered to pay restitution for personal property that disappeared from the vehicle after the taking; held: but for the taking, the property would not have been lost, thus there is a causal connection between the acts of respondent and the loss; crime charged was a completed taking, available proof, per certification of probable cause, supported the completed crime, conviction for the lesser occurred as a result of a plea bargain, the crime was not a mere possessory offense, distinguishing *State v. Woods*, 90 Wn.App. 904 (1998), *State v. Tetters*, 81 Wn.App. 478 (1996), restitution may be ordered for all damages arising from the crime as a whole, not just those directly caused by the respondent's individual conduct, *State v. Hiett*, 154 Wn.2d 560, 564-66 (2005), *but see: State v. Dauenhauer*, 103 Wn.App. 373, 378 (2000), *State v. Romish,* 7 Wn.App.2d 510 (2019); I.

***State v. Osborne***, 140 Wn.App. 38 (2007)

Pursuant to a plea agreement, court dismisses counts relating to a victim to whom court orders defendant to pay restitution, defense enters an objection to any restitution; held: a general objection to restitution is sufficient to preserve issue on appeal; absent specific agreement to pay, court cannot order restitution for acts that are only connected with the charged crime when those acts are not part of the charge, *State v. Dauenhauer*, 103 Wn.App. 373, 378 (2000); III.

***State v. Halsey***, 140 Wn.App. 313, 326-27 (2007)

Trial court sets restitution within 180 days of sentencing, after 180-day limit expires, court grants state's request for modification to include more restitution; held: a restitution order may be modified anytime within court's jurisdiction, including beyond the 180 day period, RCW 9.94A.753(4), *but see: State v. Krall*, 125 Wn.2d 146 (1994), *cf.: State v. Duvall*, 84 Wn.App. 439, 441-5 (1996), *State v. Barbee,* 193 Wn.2d 581 (2019); III.

***State v. Griffith***, 164 Wn.2d 960 (2008)

Defendant pleads guilty to possessing stolen property 2º for jewelry stolen in a burglary, victim testifies she lost $11,000 in jewelry at burglary, pawnshop owner testifies he saw defendant with jewelry similar to that described by victim, court sets restitution at $11,500; held: substantial evidence does not support restitution order, *cf.: State v.Romish,* 7 Wn.App.2d 510 (2019), remanded for restitution hearing but trial court is limited to evidence previously presented as introducing new evidence would conflict with 180 day restitution hearing limit, RCW 9.94A.753(1) (2003), *cf.: State v. Barbee,* 193 Wn.2d 581 (2019); reverses *State v. Griffith,* 136 Wn.App. 885 (2007); 7-2.

***State v. Crook***, 146 Wn.App. 24 (2008)

Prisoner moves for remission of legal financial obligations, trial court denies motion without a hearing; held: DOC deductions from inmate wages do not oblige a superior court to hold a hearing or grant a motion to remit, distinguishing, RCW 10.01.160(3), *State v. Wilson,* 198 Wn.App. 632, 635 (2017), *see: State v. Ring,* 134 Wn.App. 716, 720-21 (2006), *State v.*

*Woodward*, 116 Wn.App. 697 (2003), *State v. Mahone*, 98 Wn.App. 342, 348 (1999), *State v. Blank*, 131 Wn.2d 230, 242 (1997), *State v. Curry*, 62 Wn.App. 676, 681 (1991), *but see: State v. Williams*, 65 Wn.App. 456 (1992), *State v. Shirts*, 195 Wn.App. 849 (2016); III.

***State v. Olson***, 148 Wn.App. 238 (2009)

A restitution order that is not extended establishes jurisdiction for ten years after offender's release from the initial period of incarceration, RCW 9.94A.753(4), and is not extended following subsequent incarcerations for revocation or modification of the sentence, *Pers. Restraint of Spires*, 151 Wn.App. 236 (2009), *see: Pers. Restraint of Sappenfield*,138 Wn.2d 588 (1999); III.

***State v. C.A.E.***, 148 Wn.App. 720 (2009)

Juvenile court cannot order restitution for future expenses, nor may juvenile court extend or modify restitution to cover later-incurred expenses, distinguishing *State v. Goodrich*, 47 Wn.App. 114 (1987); 2-1, II.

***State v. M.C.***, 148 Wn.App. 968 (2009)

Trial court may not impose victim penalty assessment, RCW 7.68.035(1)(b), as a condition of a deferred disposition, RCW 13.40.127; I.

***State v. Gonzalez***, 168 Wn.2d 256 (2010)

After restitution is set it may be modified by the court to pay for medical expenses accrued after the original amount was set, RCW 9.94A.753(4), amendment does not violate double jeopardy, *State v. Halsey*, 140 Wn.App. 313, 326-27 (2007), *see also: State v. Goodrich*, 47 Wn.App. 114 (1987), *cf.: State v. C.A.E.*, 148 Wn.App. 720 (2009), *State v. Burns*, 159 Wn.App. 74 (2010); 7-2.

***State v. Nason***, 168 Wn.2d 936 (2010)

Court orders defendant to pay money monthly on LFOs and, if defendant has not paid nor filed a motion for a stay by a certain date, he is to serve 60 days in jail; held: before incarcerating for failure to pay, due process requires the court to inquire into the reason for nonpayment, thus "auto-jail" provision is invalid, *see also: State v. Sleater*, 194 Wn.App. 470, 474 (2016); jail sentence for nonpayment need not be credited against the amount owed as the imprisonment is for contempt, RCW 10.01.180 is inapplicable, jail sentence is a modification of the original sentence, *State v. Watson*, 160 Wn.2d 1, 8-9 (2007); reverses *State v. Nason*, 146 Wn.App. 744 (2008); 9-0.

***Pers. Restraint of Brady***, 154 Wn.App. 189 (2010)

In 1996 Juvenile Court enters restitution order, in 2007 court, by *ex parte* order, *State v. Hotrum*, 120 Wn.App. 681 (2004), extends jurisdiction for an additional ten years and imposes a $200 "extension fee;" held: because state waited more than ten years to apply for extension, judgments were unenforceable even though respondent had not turned 28 years old, RCW 13.40.190(1), -192, 6.17.020; extension of judgment fee, RCW 36.18.016(15), does not apply to juvenile court; generally, no right to counsel for post-conviction proceedings, *State v. Winston*, 105 Wn.App. 318, 321 (2001); III.

***State v. Burns***, 159 Wn.App. 74 (2010)

While restitution may be modified beyond the statutory 180 day limit, *State v. Gonzalez*, 168 Wn.2d 256 (2010), setting original restitution beyond 180 days of sentencing is error, *State v. Grantham*, 174 Wn.App. 399 (2013), *see: State v. Chipman*, 176 Wn.App. 615 (2013), *State v. Kerow*, 192 Wn.App. 843 (2016), *cf.: State v. Barbee,* 193 Wn.2d 581 (2019); I.

***State v. Acevedo***, 159 Wn.App. 221, 229-31 (2010)

Defendant is convicted of possessing a stolen vehicle consisting of a car with no front end, engine or transmission, tells police he bought it in that condition, trial court orders restitution for full value of the car before it was stolen; held: because the evidence shows the car was stripped before defendant bought it and no evidence showed he stole the car or possessed it before it was damaged, there was no causal connection between the crime and the damage, thus remanded, *see: State v. Romish,* 7 Wn.App.2d 510 (2019); III.

***State v. Milton***, 160 Wn.App. 656 (2011)

At sentencing, defendant waives his right to appear at restitution hearing, at that hearing neither defendant nor counsel appear, court signs order setting restitution; held: restitution is an integral part of sentencing, absent waiver counsel must be present, CrR 3.1(b)(2), restitution order is vacated irrespective of prejudice; II.

***State v. Hathaway***, 161 Wn.App. 634, 651-53 (2011)

Jury fees imposed following conviction are limited to $250 for a 12 person jury, RCW 10.01.160(1), 36.18.016(3)(b), *State v. Bunch,* 168 Wn.App. 631 (2012), *see: State v. Magana*, 197 Wn.App. 189, 199-200 (2017)(only one fee may be imposed even if earlier trial resulted in a mistrial); II.

***State v. Gray***, 174 Wn.2d 920 (2012)

Court has authority to modify a restitution order more than 180 days after sentencing, including expenses that were incurred before the trial court issued its original restitution order, RCW 9.94A.753 (2003), *see: State v. Chipman*, 176 Wn.App. 615 (2013); 9-0.

***State v. Bertrand***, 165 Wn.App. 393, 403-05 (2011)

Sentencing court imposes LFOs, specifically finding, without inquiry, that defendant "has the ability or likely future ability to pay;" held: to enter a finding of ability to pay, record must reflect that court took into account defendant's resources and burden on defendant, issue is ripe for challenge even though state has not sought to collect, *but see: State v. Duncan,* 185 Wn.2d 430 (2016), thus remanded for trial court to strike the finding, which forecloses DOC's ability to collect until after a future determination of ability to pay, *State v. Blazina*, 182 Wn.2d 827 (2015), *State v. Earls*, 51 Wn.App. 192 (1988), *State v. Calvin*, 176 Wn.App. 1, 24-26 (2013), *but see: State v. Eisenman*, 62 Wn.App. 640 (1991), *State v. Sanchez*, 73 Wn.App. 486 (1994), *State v. Lohr,* 130 Wn.App. 904 (2005), *State v. Ring,* 134 Wn.App. 716 (2006), *State v. We*, 138 Wn.App. 716, 727-28 (2007), *State v. Lundy,* 176 Wn.App. 96 (2013), *see: State v. Baldwin*, 63 Wn.App. 303 (1991), *State v. Ramirez*, 191 Wn.2d 732, 749 (2018); II.

***State v. Stone***, 165 Wn.App. 796 (2012)

At a hearing addressing failure to pay LFOs that may result in incarceration, defendant is entitled to counsel and court may not impose jail time without inquiring into defendant's ability to pay and without finding a willful failure to pay; 2-1, II.

***State v. Havens***, 171 Wn.App. 220 (2012)

Defendant is sentenced to serve 12 months and pay restitution on 5 October 1992, warrant for failure to pay issued 1999, 31 December 2002 court extends jurisdiction for LFOs for ten years, defendant moves to strike extension order; held: warrant does not toll restitution as statute, RCW 9.94A.760(4) (2008), does not provide for tolling; LFO period can be extended if done within ten years of judgment and sentence or offenders release from confinement; here, record on appeal does not establish date of defendant's release, so counting from date of sentencing, extension was improper; 2-1, II.

***State v. Ashenberner***, 171 Wn.App. 237 (2012)

Clerk's office may require offender to provide income information to collect restitution, RCW 9.94A.760(7) (2011), and court may enforce the condition, RCW 9.94B.040 (2002), with incarceration if defendant refuses; I.

***State v. Cosgaya-Alvarez***, 172 Wn.2d 785 (2013)

Following murder conviction, court may order, as restitution, payment of future child support for victim's children, *State v. Young*, 63 Wn.App. 324 (1991); I

***Seattle v. Fuller***, 177 Wn.2d 263 (2013)

Municipal courts can order restitution, RCW 9.92.060, 9.95.210; 7-2.

***State v. Grantham***, 174 Wn.App. 399 (2013)

When a restitution hearing is set beyond the 180 day limit, RCW 9.94A.753(1), due to miscalculation by the court, defendant is not obliged to object to preserve the error, *State v. Moen*, 129 Wn.2d 535, 547 (1996), *cf.: State v. Kerow*, 192 Wn.App. 843 (2016); 2-1, II.

***State v. Peterson***, 174 Wn.App. 828, 855-56 (2013)

Following animal cruelty conviction, court is authorized to order restitution for the cost of caring for the animals, RCW 16.52.200(5) (2011); I.

***State v. R.G.P.***, 175 Wn.App. 131 (2013)

Juvenile court must order full restitution and may not consider respondent's ability to pay, *State v. A.M.R.*, 147 Wn.2d 91, 96 (2002), including a restitution order following a deferred disposition; II.

***State v. Calvin***, 176 Wn.App. 1, 24-26 (2013)

Court imposes costs and a fine, boilerplate language in judgment and sentence finds ability to pay, no evidence is offered to support finding; held: where court enters findings that defendant is able to pay without evidence to support the finding, costs must be stricken, *State v. Blazina*, 182 Wn.2d 827 (2015), *State v. Ramirez*, 191 Wn.2d 732, 749 (2018)), *see: State v.*

*Lundy*, 176 Wn.App. 96 (2013), *but see: State v. Leonard*, 184 Wn.2d 505 (2015), *State v. Duncan*, 185 Wn.2d 430 (2016); a fine may be imposed, RCW 9A.20.021, without entering findings; I.

***State v. Lundy***, 176 Wn.App. 96 (2013)

Court imposes discretionary legal financial obligations (here, court costs, jury fees and witness costs) and finds an ability to pay absent a discussion at sentencing, record reflects that defendant earned more than $100,000 annually before becoming an addict, that defendant hoped to work after treatment and that his wife would pay; held: burden for establishing present or likely future ability to pay "is a low one," *see: State v. Baldwin*, 63 Wn.App. 303, 311 (1991) (self-described "employable" in presentence report suffices), showing of indigency is defendant's burden, nothing in the record here suggests defendant's indigency would extend indefinitely, distinguishing *State v. Bertrand*, 165 Wn.App. 393 (2011), *see: State v. Blazina*, 182 Wn.2d 827 (2015), *State v. Ramirez*, 191 Wn.2d 732, 749 (2018); court need not consider ability to pay at time of sentencing for mandatory fees, here victim assessment, RCW 7.68.035(1)(a) (2011), DNA fee, RCW 43.43.7541 (2011), and $200 criminal filing fee, RCW 36.18.020(2)(h) (2013), *State v. Mathers*, 193 Wn.App. 913 (2016), *State v. Seward*, 196 Wn.App. 579 (2016), *State v. Gonzales*, 198 Wn.App. 151 (2017), *cf.: State v. Duncan*, 185 Wn.2d 430 (2016); II.

***State v. Chipman***, 176 Wn.App. 615 (2013)

Sentencing court sets restitution for one victim within 180 days of sentencing and sets restitution for another victim beyond 180 days; held: while a court may modify a restitution order after the 180 day limit, RCW 9.94A.753(1) (2003), *State v. Gray*, 174 Wn.2d 920, 926-28 (2012), setting restitution for a different victim, even if part of the same general incident, is precluded, *see: State v. Burns*, 159 Wn.App. 74, 78-80 (2010); II.

***State v. Deskins***, 180 Wn.2d 68, 82-84 (2014)

Following animal cruelty conviction district court imposes restitution to reimburse government for caring for the animals based upon bills detailing the costs; held: rules of evidence do not apply at sentencing or restitution hearing, ER 1101(c)(3), actual amounts billed are not speculation or conjecture, distinguishing *State v. Kisor*, 68 Wn.App. 610 (1993); denial of continuance of restitution hearing is not an abuse of discretion where defendant was on notice months before trial that costs of caring for animals would be substantial and defense failed to object to restitution amount when it was presented to the court; 5-4.

***State v. Quintanilla***, 178 Wn.App. 173, 182 (2013)

Failure of sentencing judge to add up LFOs imposed, RCW 9.94A.760(1) (2011), is clerical, not manifest error; III.

***State v. McCarthy***, 178 Wn.App. 290 (2013)

Regardless of causal connection, trial court must order restitution to Department of Labor and Industry Crime Victim Compensation Fund, RCW 9.94A.753(7) (2003), 7.68.120 (1995); 2-1, II.

***State v. Cawyer***, 182 Wn.App. 610 (2014)

Sentencing court may order defendant to pay extradition expenses as a court cost, RCW 10.01.160, but not as restitution; II.

***State v. Blazina***, 182 Wn.2d 827 (2015)

Before imposing discretionary legal financial obligations, sentencing court must make an individualized inquiry into defendant's current and future ability to pay, including such factors as incarceration and other debts, *see: Richland v. Wakefield,* 186 Wn.2d 596 (2016), although failure to object at sentencing waives the issue, at 830; remedy on appeal is for remand to reconsider discretionary LFOs, *but see: State v. Ramirez,* 191 Wn.2d 732, 749 (2018), *State v. Leonard,* 184 Wn.2d 505 (2015), *State v. Arredondo,* 190 Wn.App, 512, 536-38 (2015), *aff'd, on other grounds,* 188 Wn.2d 244 (2017), *see: State v. Duncan,* 185 Wn.2d 430 (2016), *cf.: Pers. Restraint of Flippo,* 187 Wn.2d 106 (2017), abrogating, in part, *State v. Calvin,* 176 Wn.App. 1, 24-26 (2013), *State v. Gonzalez-Gonzalez,* 193 Wn.App.. 683, 691-94 (2016); *reverses, in part, State v. Blazina,* 174 Wn.App. 906 (2013); 9-0.

***State v. Hardtke***, 183 Wn.2d 475 (2015)

Court may impose costs of SCRAM bracelet ordered pretrial, but limited to $150, RCW 10.01.160(2) (2010), *but see:* 2015 amendments; 9-0.

***State v. Thornton***, 188 Wn.App. 371 (2015)

$100 DNA fee, RCW 43.43.7541 (2011), is mandatory regardless of whether defendant had previously submitted a DNA sample for a prior conviction, *State v. Johnson,* 194 Wn.App. 304 (2016), *State v. Lewis,* 194 Wn.App. 709 (2016); III.

***State v. Lyle***, 188 Wn.App. 848 (2015)

Failure to object to imposition of LFOs at sentencing waives issue on appeal, *State v. Blazina,* 182 Wn.2d 827, 830 (2015), *State v. Stoddard,* 192 Wn.App. 222 (2016), *but see: State v. Leonard,* 184 Wn.2d 505 (2015), *State v. Duncan,* 185 Wn.2d 430 (2016), *State v. Ramirez,* 191 Wn.2d 732, 749 (2018) while defense counsel's failure to object is deficient, defense has not established prejudice; 2-1, II.

***State v. Diaz-Farias***, 191 Wn.App. 512 (2015)

Sentencing court may not impose juror costs, RCW 10.01.160(2) (2010), or interpreter costs, *State v. Marintorres,* 93 Wn.App. 443, 450 (1999); III.

***Richland v. Wakefield***, 186 Wn.2d 596 (2016)

In deciding a motion to remit discretionary legal financial obligations the court must consider whether payment of costs would cause defendant "manifest hardship," RCW 10.01.160(4) (2015), must consider whether defendant can meet her own basic needs, *State v. Blazina,* 182 Wn.2d 827 (2015), *State v. Ramirez,* 191 Wn.2d 732, 749 (2018), GR 34; where social security disability (SSI) is a defendant's sole income states cannot order individuals to pay LFOs (apparently including mandatory LFOs), 42 U.S.C. § 407(a), *Philpott v. Essex County Welfare Board,* 409 U.S. 413, 417, 93 S.Ct. 590, 34 L.Ed.2d 608 (1973), *see: State v. Catling,* 2 Wn.App.2d 819 (2018); 9-0.

***State v. Stoddard***, 192 Wn.App. 222 (2016)

Where defendant agrees to restitution amount he is precluded from challenging it on appeal, *State v. Young*, 63 Wn.App. 324, 330 (1991); III.

***State v. Kerow***, 192 Wn.App. 843 (2016)

Court holds restitution hearing within 180 days of sentencing, RCW 9.94A.753(1), after making initial determination sets the hearing over to a date that counsel agree to which is beyond 180 period; held: where defense voluntarily accommodates a continuance beyond the limitation period when not obligated to do so defendant waives statutory requirement, *State v. Mollichi*, 132 Wn.App. 80, 90-94 (1997), *see: State v. Jones*, 20 Wn.App.2d 552 (2021); I.

***State v. Sleater***, 194 Wn.App. 470, 474 (2016)

Defendant is ordered to pay LFOs, enters "pay or appear" program requiring monthly payments or appear and schedule a hearing to explain why she could not pay, defendant misses payment, fails to schedule hearing, warrant is issued, upon arrest police find drugs; held: court cannot place onus on defendant to schedule her own hearing, *State v. Klinker*, 85 Wn.2d 509 (1975), *State v. Fisher*, 145 Wn.2d 209 (2001), *State v. Nason*, 168 Wn.2d 936 (2010), summons or prior court order requiring defendant to attend a specific hearing before a warrant can issue is necessary, thus drugs must be suppressed; III.

***State v. Tedder***, 194 Wn.App. 753 (2016)

Sentencing court must "fully inquire into … ability to pay" mandatory LFOs where defendant "suffers from a mental health condition," RCW 9.94A.777(1) (2010) [although statute states "other than restitution or the victim penalty assessment]; II.

***State v. Shirts***, 195 Wn.App. 849 (2016)

DOC prisoner moves to remit discretionary LFOs because he is denied classes and classification advances, state maintains defendant is not an aggrieved party as government is not attempting to collect, *State v. Crook*, 146 Wn.App. 24 (2008); held: denial of classification advances in prison is sufficient to establish that defendant is an aggrieved party, *State v. Blazina*, 182 Wn.2d 827, 830, 832 n.1 (2015), overruling *sub nom. State v. Mahone*, 98 Wn.App. 342 (1999); superior court must consider a motion to remit discretionary LFOs, RCW 10.01.160(4) (2015), *see: State v. Wilson*, 198 Wn.App. 632 (2017), but need not hold an evidentiary hearing; II.

***State v. Clark***, 195 Wn.App. 868 (2016)

$100 crime lab fee, RCW 43.43.690(1), where there was crime lab analysis, is a mandatory LFO, *State v. Johns*, 15 Wn.App.2d 775 (2020); III.

***Pers. Restraint of Dove***, 196 Wn.App. 148 (2016)

PRP challenging discretionary legal financial obligations more than a year after sentencing is untimely as judgment and sentence is valid on its face, RCW 10.73.090(1) (1989), where it expressly states that trial court considered financial circumstances and found defendant

had ability to pay, and *State v. Blazina*, 182 Wn.2d 827 (2015) did not make a significant material change in the law, RCW 10.73.100(6) (1989); II.

***State v. Velezmoro***, 196 Wn.App. 552 (2016)

In child pornography case where defendant possessed depictions also possessed by others, known and unknown, court need not use a "but for" test for determining restitution amount, *Paroline v. United States*, 572 U.S. 434, 134 S.Ct. 1710, 188 L.Ed.2d 714 (2014), while a causal connection is necessary an alternative analysis to "but for" is proper; trial court may determine a reasonable apportionment, here $5000 where victim proved more than $1,000,000, need not limit apportionment to victimization in Washington alone; I.

***Pers. Restraint of Flippo***, 187 Wn.2d 106 (2016)

Failure of sentencing judge to make individualized inquiry before imposing discretionary LFOs does not invalidate the judgment and sentence and a PRP filed more than a year after finality is not timely, *Pers. Restraint of Pang*, 197 Wn.App. 576 (2017); 9-0.

***Nelson v. Colorado***, 581 U.S. 128, 137 S.Ct. 1249, 197 L.Ed.2d 611 (2017)

Defendant is convicted, LFOs imposed, reversed on appeal and acquitted, state law that obliges her to bring civil action and prove actual innocence by clear and convincing evidence violates due process clause; 8-1.

***State v. Gonzales***, 198 Wn.App. 151 (2017)

$200 criminal "filing fee," RCW 36.18.020(2)(h) (2015), is a mandatory legal financial obligation; II.

***State v. Gonce***, 200 Wn.App. 847 (2017)

Restitution may be ordered for lost wages due to emotional distress, not limited to wages lost due to physical injury, RCW 9.94A.750(3) (2003); I.

***State v. Ramirez,*** 191 Wn.2d 732, 749 (2018)

"Trial courts must meaningfully inquire into the mandatory factors established by [*State v.*] *Blazina*, [182 Wn.2d 827 (2015)] such as a defendant's incarceration and other debts, or whether a defendant meets the GR 34 standard for indigency. Trial courts must also consider other 'important factors' relating to a defendant's financial circumstances, including employment history, income, assets and other financial resources, monthly living expenses, and other debts. Under this framework, trial courts must conduct an on-the-record inquiry into the mandatory *Blazina* factors and other "important factors" before imposing discretionary LFOs," *State v. Glover*, 4 Wn.App.2d 690 (2016); RCW 10.01.160 (2018) applies prospectively, *see: State v. Van Wolvelaere*, 8 Wn.App.2d 705 (2019), *reversed, on other grounds*, 195 Wn.2d 597 (2020); 9-0.

***State v. Catling***, 2 Wn.App.2d 819 (2018), *reversed, in part*, 193 Wn.2d 252 (2019)

While mandatory LFOs can be imposed on a defendant whose sole income is Social Security disability, court should order that they cannot be satisfied from those funds, 42 U.S.C. § 407(a), *see: City of Richland v. Wakefield*, 186 Wn.2d 596 (2016); 2-1, III.

***State v. Hill***, 6 Wn.App.2d 629 (2018)

Court is not obliged to consider indigency and ability to pay mandatory LFOs; on review, remanded to trial court on DNA collection fee only, in light of *State v. Ramirez,* 191 Wn.2d 732 (2018) and 2018 amendments to LFO statute, 193 Wn.2d 1002); I.

***Timbs v. Indiana***, ___ U.S. ___, 139 S.Ct. 682, 203 L.Ed.2d 11 (2019)

Eighth Amendment excessive fines clause applies to civil forfeitures in state courts; 9-0.

***State v. Catling***, 193 Wn.2d 252 (2019)

Mandatory LFOs should be imposed but judgment and sentence must reflect that repayment order to comport with RCW 10.01.180 (2018) and to indicate that this LFO may not be satisfied out of any funds subject to the Social Security Act's anti-attachment statute, 42 U.S.C. § 407(a), *see: State v. Ramirez,* 191 Wn.2d 732, 749 (2018); reverses, in part, *State v. Catling,* 2 Wn.App.2d 819 (2018); 6-1.

***State v. Barbee***, 193 Wn.2d 581 (2019)

When a case is remanded for resentencing the 180 period for setting restitution begins anew at the resentencing date, not the original sentencing date, *but see: State v. Jones,* 20 Wn.App.2d 552 (2021); 9-0.

***State v. Romish,*** 7 Wn.App.2d 510 (2019)

Defendant pleads guilty to possessing stolen property, court orders restitution for damage to the property; held: absent evidence that "but for" defendant's possession the property was damaged restitution cannot be ordered, *State v. Acevedo,* 159 Wn.App. 221, 229-31 (2010), *State v. Griffith*, 164 Wn.2d 960, 965 (2008); 2-1, III.

***State v. Conway***, 8 Wn.App.2d 538 (2019)

Prior to adoption of RCW 9.94A.6333 (2018) trial court lacked authority to remit mandatory LFOs, *see: State v. Lacy,* 9 Wn.App.2d 1003 (2019)(unpublished); II.

***State v. Smith***, 9 Wn.App.2d 122 (2019)

Domestic violence penalty assessment, RCW 10.99.080(1) (2015), is discretionary and not subject to indigency determination of defendant but may be subject to indigency determination of the victim which may include defendant's family; defendant's medical expenses while incarcerated pending sentencing, RCW 70.48.130(5) (2015), are discretionary but court must consider defendant's indigence; III.

***State v. Vandervort***, 11 Wn.App.2d 300 (2019)

One-year time period to seek review of LFOs begins at sentencing, not revocation; II.

***State v. Dillon,*** 12 Wn.App.2d 133 (2020)

Supervision fees are discretionary, RCW 9.94A.703(2), so court must determine ability to pay before ordering them, *State v. Lundstrom*, 6 Wn.App.2d 388, 396 n.3 (2018); I.

***State v. Heutink****,* 12 Wn.App.2d 336 (2020)

Upon finding of indigency, jury demand fee and criminal filing fee may not be imposed, *State v. Ramirez,* 191 Wn.2d 732 (2018); domestic violence assessment, RCW 10.99.080(1) (2015), is discretionary; I.

***State v. Gaines***, 16 Wn.App.2d 50 (2021)

Court has authority to order clerk to remove a delinquent LFO account from a collection agency regardless of clerk's contract with the agency; II.

***State v. Jones***, 20 Wn.App.2d 552 (2021)

Upon remand the statutory time period for setting restitution, RCW 9.94A.753(1) (2018), commences on date mandate is issued; here, the state obtained numerous continuances beyond the 180th day which the defense did not "accommodate," thus restitution claims are dismissed, *State v. Grantham*, 174 Wn.App. 399 (2013), *State v. Mollichi*, 132 Wn.2d 80 (1997), *State v. Moen*, 129 Wn.2d 535 (1996), *cf.: State v. Kerow*, 192 Wn.App. 843 (2016); III.

***State v. Long***, 21 Wn.App.2d 238 (2022)

Restitution for vacation and sick leave taken by the victim due to her injuries is proper; I.

***State v. Kopperdahl***, 22 Wn.App.2d 708 (2022)

In a court of limited jurisdiction where fines and penalties are not assessed the court cannot impose a public safety education assessment (PSEA), RCW 3.62.090; I.

***State v. Tatum***, 23 Wn.App.2d 123 (2022)

Victim penalty assessment, RCW 7.68.035(1)(a) (2018), is constitutional, *State v. Curry*, 118 Wn.2d 911 (1992), is constitutional as applied to indigent defendants; DNA fee, RCW 43.43.7541 (2018), is constitutional, *State v. Brewster*, 152 Wn.App. 856, 861 (2009); excessive fines clause, CONST. art. 1 § 14, is co-extensive with 8th Amendment, *State v. Ramos,* ___ Wn.App.2d ___, 2022WL16734383 (2022), *cf.: Seattle v. Long,* 198 Wn.2d 136, 159 (2021); I.

***State v. Ramos***, ___ Wn.App.2d ___, 520 P.3d 65 (2022)

Interest on restitution is not punitive thus is not subject to excessive fines clause analysis under Eighth Amendment and CONST. art. I, §14, *State v. Tatum,* 23 Wn.App.2d 123 (2022); restitution and interest must be ordered "unless extraordinary circumstances exist which make restitution inappropriate in the court's judgment and the court sets forth such circumstances in the record," RCW 9.94A.753(5), restitution award based upon victim's actual losses is inherently proportional to the crime that caused the losses; 2-1, I.

# ROBBERY

***State v. Dowell***, 26 Wn.App. 629 (1980)

Unlawfully carrying a weapon, RCW 9.41.270, is a lesser of robbery 1°.

***State v. Corwin***, 32 Wn.App. 493 (1982)

Robbery is a specific intent crime, as intent to deprive is an element, *State v. Faucett*, 22 Wn.App. 869 (1979); I.

***State v. Henderson***, 34 Wn.App. 865 (1983)

Robber puts hand in pocket and threatens "I have this" to get money from victim who believes pocket contains a firearm; held: evidence was sufficient to establish element "displays what appears to be a firearm," RCW 9A.56.200(1)(b), *State v. Kennard*, 101 Wn.App. 533 (2000), *Pers. Restraint of Bratz*, 101 Wn.App. 662, 674-77 (2000), *but see.: State v. Scherz*, 107 Wn.App. 427 (2001), *State v. Jennings*, 111 Wn.App. 54, 62-66 (2002); III.

***State v. Hicks***, 36 Wn.App. 244 (1983), 102 Wn.2d 184 (1984)

Defense of good faith claim of title, RCW 9A.56.020(2) is only available where defendant is seeking to recover the specific property in question, not to collect a debt out of another's money with no pretense of rights to the specific coins and bills, *State v. Martin*, 516 P.2d 753, 755 (Or.C.of.App., 1973); retaking specific property by force is a defense, *State v. Larson*, 23 Wn.App. 218 (1979); I; *accord*: *State v. Self*, 42 Wn.App. 654 (1986); 9-0.

***State v. Blewitt***, 37 Wn.App. 397 (1984)

Division I approves jury instruction, "[a] taking from the presence of another can occur . . . even though that person was not immediately present, where that person, by force or fear, had been removed from or prevented from approaching the place from which the taking occurred," *State v. McDonald*, 74 Wn.2d 141 (1968); I.

***State v. Davis***, 101 Wn.2d 654 (1984)

Accomplice to robbery 1° may be convicted even if s/he did not know that the principal was armed, affirming *State v. Davis*, 35 Wn.App. 506 (1983), *reversing State v. Plakke*, 31 Wn.App. 262, 266 (1982) and *State v. McKeown*, 23 Wn.App. 582, 591-93 (1979); to enhance with special allegations, accomplice must know principal was armed; 5-4.

***State v. Rupe***, 101 Wn.2d 664 (1984)

Defendant is convicted of two bank robberies for forcibly taking bank money from two tellers at same time; held: possession or custody is the requirement, not ownership, thus no double jeopardy violations; *see: Watkins v. Florida*, 513 So.2d 1275 (Fla. D.C. App. 1982); 9-0.

***State v. Mahoney***, 40 Wn.App. 514 (1985)

Suspect assaults, injures wife, then robs husband by threatening wife; held: no double jeopardy violation, since assault and robbery were distinct acts; insufficient evidence to convict

of robbery 1°, as no injury occurred during the commission of the robbery and no weapon was involved; I.

***State v. Manchester***, 57 Wn.App. 765 (1990)

Defendant shoplifts then, when apprehended outside store, menaces security guard with a weapon to escape; held: sufficient to prove robbery 1°, RCW 9A.56.190-200, *State v. Handburgh*, 119 Wn.2d 284 (1992), *cf.: State v. Robinson*, 73 Wn.App. 851 (1994), *State v. McIntyre*, 112 Wn.App. 478 (2002), *State v. Truong*, 168 Wn.App. 529 (2012), *State v. Thomas*, 192 Wn.App. 721 (2016), *State . Phillips*, 9 Wn.App.2d 368 (2019), *overruled, on other grounds*, *State v. Derri***,** 199 Wn.2d 658 (2022), *but see: State v. Johnson*, 155 Wn.2d 609 (2005); I.

***State v. Sly***, 58 Wn.App. 740 (1990)

Robbery information that fails to allege the nonstatutory element of intent is still sufficient as long as facts in the information support the element of intent, *State v. Strong*, 56 Wn.App. 715, 717 (1990); *see also*: *State v. Hernandez*, 58 Wn.App. 793 (1990); I.

***State v. Kjorsvik***, 117 Wn.2d 93 (1991)

Robbery information that does not allege "intent to steal" is sufficient, as information alleged that defendant unlawfully took money from cash register, against the will of victim by use of force while displaying a weapon, *distinguishing State v. Hicks*, 102 Wn.2d 182 (1984); *see: State v. Bacani*, 79 Wn.App. 701 (1995); 9-0.

***State v. Stearns***, 61 Wn.App. 224 (1991)

Defendant attempts to rape victim, drags her 12 blocks, force causes her to lose property and leave vicinity of it, defendant goes back and takes same; held: sufficient evidence for robbery, as there is circumstantial evidence that rapist formed secondary intent to take property at some point before assault terminated, *State v. Song Wang*, 5 Wn.App.2d 12 (2018), *State v. Allen*, 159 Wn.2d 1, 9-11 (2006); instruction that a taking can occur in the presence of victim even though victim was removed by force or fear is not a comment and is proper, *State v. McDonald*, 74 Wn.2d 141, 144-5 (1968); I.

***State v. Graham***, 64 Wn.App. 305 (1992)

Robbery 2° information that alleges defendant took property "unlawfully" but fails to allege common law element that defendant did not own property is sufficient where challenged for first time on appeal, *State v. Kjorsvik*, 117 Wn.2d 93 (1991), *State v. Phillips*, 98 Wn.App. 936 (2000), *see: State v. Bacani*, 79 Wn.App. 701 (1995); I.

***State v. Handburgh***, 119 Wn.2d 284 (1992)

Respondent takes bicycle in absence of victim, demands money for return of bicycle, abandons bicycle and, when victim retrieves it, throws rocks at victim and assaults her; held: force necessary to support a robbery conviction need not be used in the initial acquisition of the property, rather the forcible retention of property initially taken peaceably or outside the presence of the property owner, is robbery, *State v. Manchester*, 57 Wn.App. 765 (1990), *State v. McIntyre*, 112 Wn.App. 478 (2002), *reversing State v. Handburgh*, 61 Wn.App. 763 (1991),

*State v. Truong,* 168 Wn.App. 529 (2012), *State v. Thomas,* 192 Wn.App. 721 (2016), *see: State v. Phillips,* 9 Wn.App.2d 368 (2019), *overruled, on other grounds, State v. Derri,* 199 Wn.2d 658 (2022), *but see: State v. Johnson,* 155 Wn.2d 609 (2005); any force or threat, no matter how slight, which induces an owner to part with property is sufficient to sustain robbery conviction, *State v. Ammlung,* 31 Wn.App. 696, 704 (1982), *State v. Redmond,* 122 Wash. 392 (1922); *cf.: State v. Robinson,* 73 Wn.App. 851 (1994), *State v. Brightman,* 112 Wn.App. 260, 266-67 (2002), 155 Wn.2d 521 n. 9 (2005); 9-0.

***State v. Robinson***, 73 Wn.App. 851 (1994)

Defendant-driver observes passenger leave vehicle, grab a purse from a pedestrian, struggle over the purse, passenger returns to vehicle, defendant drives off, is convicted of robbery under accomplice theory; held: once passenger possessed purse and returned to car, robbery was complete, *see: State v. Manchester,* 57 Wn.App. 765, 770 (1990), *State v. Handburgh,* 119 Wn.2d 284, 288-94 (1992), *State v. Johnson,* 155 Wn.2d 609 (2005), thus defendant neither associated himself with the robbery, participated in it with the desire to bring it about, nor sought to make the crime succeed by any actions of his own, *In re Wilson,* 91 Wn.2d 487, 491 (1979), *State v. Galisia,* 63 Wn.App. 833, 839 (1992), *cf.: State v. Handburgh,* 119 Wn.2d 284 (1992), thus evidence is insufficient to convict of robbery; driving away did not aid and abet the passenger, as the crime was complete; I.

***State v. Roche***, 75 Wn.App. 500, 509-11 (1994)

Theft 1° is not a lesser of **robbery**, as alternative means of committing robbery is by taking property in presence of another, which is not element of theft 1°, *State v. Davis,* 121 Wn.2d 1, 5-6 (1993), *see also: State v. Todd,* 200 Wn.App. 879 (2017), *but see: State v. Berlin,* 133 Wn.2d 541 (1997), and value in excess of $1500 is not element of robbery; I.

***State v. Bacani***, 79 Wn.App. 701 (1995)

Robbery information that alleges, *inter alia,* that defendant "did unlawfully attempt to take personal property...with intent to steal from the person" is insufficient, where challenged at the end of state's case, *State v. Tang,* 77 Wn.App. 644 (1995), as it fails to allege that the property belonged to another, "steal" fails to cure defect, *State v. Morgan,* 31 Wash. 226 (1903), *State v. Dengel,* 24 Wash. 49 (1901), *see: State v. Graham,* 64 Wn.App. 305 (1992), *but see: State v. Phillips,* 98 Wn.App. 936, 944-45 (2000); I.

***State v. Molina***, 83 Wn.App. 144 (1996)

Defendants order a cook, who has no money responsibility, to open cash registers and turn over money; held: an employee has implied responsibility for exercising control over the employer's property as against all others, thus sufficient to prove robbery, *State v. Blewitt,* 37 Wn.App. 397, 399 (1984); I.

***State v. Collinsworth***, 90 Wn.App. 546 (1997)

Defendant tells bank teller to "give me your hundreds, no dye packs," does not display a weapon, argues at trial that crime was theft, not robbery; held: an unequivocal demand for the immediate surrender of money, unsupported by a pretext of entitlement, is fraught with the implicit threat to use force, any force, no matter how slight, which induces owner to part with

property is sufficient to sustain a robbery conviction, *State v. Redmond*, 122 Wash. 392, 393 (1922), *State v. Parra*, 96 Wn.App. 95, 100-102 (1999), *State v. Shcherenkov*, 146 Wn.App. 619 (2008), *State v. Witherspoon*, 171 Wn.App. 271, 298-99 (2012), 180 Wn.2d 875 (2014), *State v. Clark*, 190 Wn.App. 736 (2015), *State v. Farnsworth*, 185 Wn.2d 768 (2016); I.

***Holloway v. United States***, 143 L.Ed.2d 1 (1999)

Carjacking, 18 USC §2119, requires government to prove "intent to cause death or serious bodily harm," government need not prove that defendant's intent to kill was unconditional, irrespective of the cooperation of the victim, rather government must prove only a deliberate threat of violence; 7-2.

***State v. Herrera***, 95 Wn.App. 328 (1999)

Assault 3° (resist lawful apprehension), RCW 9A.36.031(1)(a), is not a lesser of robbery; III.

***State v. Kennard***, 101 Wn.App. 533, (2000)

Instruction defining "what appears to be a firearm" as "exhibit or show what appears to be a firearm to the view of the victim or to otherwise manifest by words and actions the apparent presence of a firearm even though it is not actually seen by the victim" is accurate, at 537-39, *State v. Henderson*, 34 Wn.App. 865, 868-69 (1983), *see: Pers. Restraint of Bratz*, 101 Wn.App. 662, 674-77 (2000), and is not a comment on the evidence; stating "I have a gun" and patting hip is sufficient, at 540, *cf.: State v. Scherz*, 107 Wn.App. 427 (2001), *State v. Jennings*, 111 Wn.App. 54, 62-66 (2002); I.

***Pers. Restraint of Bratz***, 101 Wn.App. 662, 674-77 (2000)

"I have nitroglycerine in my coat…give me money or I'll blow up the bank" is insufficient to prove "displays what appeared to be a … deadly weapon" as a threat without any physical manifestation indicating a weapon is robbery 2°, not robbery 1°, *State v. Scherz*, 107 Wn.App. 427 (2001), *State v. Jennings*, 111 Wn.App. 54, 62-66 (2002), *but see: State v. Kennard*, 101 Wn.App. 533, (2000), *State v. Henderson*, 34 Wn.App. 865, 868-69 (1983); II.

***State v. Holmes***, 106 Wn.App. 775 (2001)

Defendant is convicted of robbery 1º (deadly weapon prong) but jury rejects deadly weapon special verdict, defense seeks dismissal for inconsistency; held: special finding will not control general verdict unless irreconcilably inconsistent, *State v. Baruso*, 72 Wn.App. 603, 616 (1993); where guilty verdict is supported by sufficient evidence, inconsistent acquittal on another count does not support reversal, *State v. Wai-Chiu Ng*, 110 Wn.2d 32, 48 (1988), *Dunn v. United States*, 76 L.Ed. 356 (1932); here, difference in definitions of deadly weapon for substantive offense and enhancement establish that verdicts are not irreconcilably inconsistent; II.

***State v. Scherz***, 107 Wn.App. 427 (2001)

Defendant tells teller "I have a hand grenade in my pocket and I need a thousand dollars," defendant is convicted of robbery 1° for "displaying what appeared to be a … deadly weapon;" held: verbal threat without any physical display is insufficient to prove "display," *Pers. Restraint*

*of Bratz*, 101 Wn.App. 662, 674-77 (2000), *cf.: State v. Kennard*, 101 Wn.App. 533 (2000), *State v. Henderson*, 34 Wn.App. 865 (1983); III.

***State v. Tvedt***, 116 Wn.App. 316 (2003)

Defendant forces owner and cashier of store to get money contained in a deposit bag, also takes keys to owner's truck, is convicted of two counts of robbery; held: unit of prosecution for robbery is each forcible taking of property from the person or presence of the owner or possessor of the property, *State v. Rupe*, 101 Wn.2d 664 (1984), *State v. Turner*, 31 Wn.App. 843 (1982); test is number of forcible takings, not number of persons present, *State v. Latham*, 35 Wn.App. 862, 864-65 (1983), *but see: State v. Molina*, 83 Wn.App. 144 (1996), *State v. Johnson*, 48 Wn.App. 531 (1987), or number of items taken or characterization of the event as a single transaction; here, taking of store's money and owner's keys were distinct units of prosecution, thus separate counts are appropriate; II, 2-1.

***State v. Korum***, 120 Wn.App. 686, 708-20 (2004), *reversed, on other grounds*, 157 Wn.2d 614 (2006)

During home invasion robberies, victims are restrained with duct tape, moved into another room and robbed, state charges robbery and kidnapping; held: kidnapping charges were incidental to the robberies because restraints were for the sole purpose of facilitating the robberies, forcible restraint of victims was inherent in the robberies, victims were not transported away from their homes to some remote spot where they were not likely to be found, duration of restraint was not substantially longer than that required for commission of the robberies, restraints did not create a significant danger independent of that posed by the robberies themselves, *State v. Green*, 94 Wn.2d 216, 227 (1980), *State v. Ingham*, 26 Wn.App. 45, 49 (1980), *see: State v. Allen*, 94 Wn.2d 860 (1980), *State v. Berg*, 181 Wn.2d 857 (2014), *but see: State v. Vladovic*, 99 Wn.2d 413 (1983), *State v. Louis*, 155 Wn.2d 563 (2005), *State v. Grant*, 172 Wn.App. 496 (2012), *State v. Rattana Keo Phuong*, 174 Wn.App. 494 (2013), thus kidnapping charges are dismissed; III.

***State v. Decker***, 127 Wn.App. 427 (2005)

Defendant steals from convenience store, gets in car, clerk places arm on driver's window and asks for property back, defendant grabs clerk's arm, car begins rolling, clerk flails about to free himself and is injured, defendant is convicted of robbery 1°; held: intent to injure is not an element of robbery 1°, *State v. McCorkle*, 88 Wn.App. 486, 501 (1997), *aff'd*, 137 Wn.2d 490 (1999), defendant's holding victim's arm was proximate cause of injury during flight, no intervening cause existed to relieve defendant of responsibility as defendant continued to hold victim's arm when car moved; I.

***State v. Johnson***, 155 Wn.2d 609 (2005)

Following shoplift and confrontation by security guards, defendant abandons stolen property, then struggles and punches guard, is convicted of robbery; held: robbery may include force used to either obtain or retain property or to overcome resistance to the taking, but once property is abandoned and thief is no longer attempting to retain property but is attempting to escape, no robbery occurs, *see: State v. Handburgh*, 119 Wn.2d 284 (1992), *State v. Robinson*, 73 Wn.App. 851 (1994), *State v. Manchester*, 57 Wn.App. 765 (1990), *State v. Truong*, 168

Wn.App. 529 (2012), *cf.:* *State v. Handburgh*, 119 Wn.2d 284 (1992), *State . Phillips,* 9 Wn.App.2d 368 (2019), *overruled, on other grounds, State v. Derri,* 199 Wn.2d 658 (2022), *but see: State v. Thomas,* 192 Wn.App. 721 (2016), ; 9-0.

***State v. Chamroeum Nam***, 136 Wn.App. 698 (2007)

Where court instructs jury defining robbery as taking property from the victim's person and omits the language prohibiting taking property in a victim's presence, evidence that defendant took victim's purse from a seat next to her is insufficient, *see also: State v. O'Donnell,* 142 Wn.App. 314, 321-24 (2007);; II.

***State v. Liden***, 138 Wn.App. 110 (2007)

Defendant robs bank using a counter check on back of which is printed "reserved for financial institution use," trial court dismisses after conviction, holding that evidence was insufficient to establish robbery 1º of a financial institution, RCW 9A.56.200(1)(b); held: circumstantial evidence was sufficient to establish that the bank was a financial institution as defined by statute; II.

***State v. Sparling***, 141 Wn.App. 542 (2007)

Defendant steals gasoline from station, when confronted by manager drives her car at and grazes manager's leg, is convicted of robbery 1° with a deadly weapon; held: a vehicle may be a deadly weapon by virtue of the manner of its use, RCW 9A.04.110(6); II.

***State v. O'Donnell***, 142 Wn.App. 314 (2007)

Where "to convict" instruction neglects to include "from the presence of" but evidence establishes that defendant took property from victim's person, there is no error, *see also: State v. Chamroeum Nam*, 136 Wn.App. 698, 705 (2007); "theft" is not a technical term which requires definition, *State v. Ng,* 110 Wn.2d 32, 44 (1988); III.

***State v. Shcherenkov***, 146 Wn.App. 619 (2008)

Defendant hands bank tellers notes which state that this is a robbery, asking for money, "I will be watching you," keeps hands in pockets, trial court instructs jury that force may be "explicit or implied;" held: because a threat may be direct or indirect, RCW 9A.04.110(27) (2007), instruction was proper, *State v. Collinsworth*, 90 Wn.App. 546 (1997); rational trier of fact could find that defendant's notes were an indirect communication to use force, *State v. Witherspoon,* 171 Wn.App. 271, 298-99 (2012), 180 Wn.2d 875 (2014), *State v. Clark,* 190 Wn.App. 736 (2015), *State v. Farnsworth,* 185 Wn.2d 768 (2016); II.

***State v. Lewis***, 156 Wn.App. 230, 238-39 (2010)

In robbery case, state does not have the burden to prove the absence of self- defense; II.

***State v. Truong***, 168 Wn.App. 529 (2012)

Respondent, along with others, grabs victim's MP3 player, passes it to another, then hits victim when victim tries to recover it, is convicted of robbery 1°; held: transactional view of robbery makes it an ongoing offense if force is used to take, retain or escape, *State v.*

*Manchester,* 57 Wn.App. 765 (1990), *State v. Handburgh,* 119 Wn.2d 284 (1992), *State v. Thomas,* 192 Wn.App. 721 (2016), distinguishing *State v. Johnson,* 155 Wn.2d 609 (2005), where defendant had abandoned the stolen property and used force to try to escape, *cf.: State . Phillips,* 9 Wn.App.2d 368 (2019), *overruled, on other grounds, State v. Derri***,** 199 Wn.2d 658 (2022); I.

***Pers. Restraint of Brocken****,* 178 Wn.2d 532, 538 (2013)

Robbery 1° by means of displaying what appears to be a weapon, RCW 9A.56.200(1)(a)(ii) (2002), is an alternative mean to robbery while actually armed with a weapon, RCW 9A.56.200(1)(a)(i); 9-0.

***State v. Witherspoon****,* 180 Wn.2d 875 (2014)

Defendant breaks into home, victim drives up, sees defendant walking from the side of her home with his hand behind his back, victim asks what he has, defendant says a pistol and drives away, found with items belonging to victim, defendant is convicted of robbery; held: an "ordinary person" in victim's position could reasonably infer a threat of bodily harm from defendant's acts thus evidence was sufficient to convict of robbery, *State v. Collinsworth*, 90 Wn.App. 546 (1997), *State v. Shcherenkov*, 146 Wn.App. 619 (2008), even though victim did not know defendant had taken any of her property at the time she confronted defendant; 5-4.

***State v. Berg****,* 181 Wn.2d 857 (2014)

Whether or not a kidnapping is incidental to another crime does not impact sufficiency of the evidence for the kidnapping; if the elements of kidnapping are established *prima facie,* then there is sufficient evidence regardless of merger analysis, *State v. Rattana Keo Phuong,* 174 Wn.App. 494 (2013), *State v. Grant,* 172 Wn.App. 496 (2012), *State v. Butler,* 165 Wn.App. 820 (2012); reverses *State v. Berg,* 177 Wn.App. 119 (2013); 9-0.

***State v. Clark****,* 190 Wn.App. 736 (2015)

Principal enters bank wearing dark sunglasses, mask, dressed all in black, orders teller not to push alarm buttons, hands note "no dye packs or transmitter," after teller gives him money demands more money, sufficient to convict of robbery, *State v. Farnsworth,* 185 Wn.2d 768 (2016); I.

***State v. Richie****,* 191 Wn.App. 916 (2015)

Before her shift begins store clerk observes defendant stealing wine, attempts to stop defendant who hits her with the bottle, defendant is convicted of robbery; held: to convict of robbery the state must prove that the theft was from one with ownership, representative capacity or possession, *State v. Latham,* 35 Wn.App. 862 (1983), *State v. Hall,* 54 Wash. 142, 143-44 (1909), *State v. Tvedt,* 153 Wn.2d 705 (2005), off-duty clerk was acting in her employee capacity thus evidence was sufficient, however failure to include the implied element that victim had an ownership, representative or possessory interest in the property was error even absent an objection; II.

***State v. Farnsworth****,* 185 Wn.2d 768, 775-80 (2016)

Defendant, wearing wig, enters bank, hands teller a note "no die packs, no tracking devices, put the money in the bag," teller testifies she was frightened, Court of Appeals reverses robbery conviction for insufficiency, *State v. Farnsworth,* 184 Wn.App. 305 (2014); held: demand note for money at a bank can carry an implied threat of harm causing an ordinary person to reasonably infer threat of force, thus evidence is sufficient; 5-4.

***State v. Thomas***, 192 Wn.App. 721 (2016)

Defendant eats meal in restaurant, leaves without paying, when waiter seeks payment menaces waiter with knife, is convicted of robbery; held: transactional analysis of robbery holds that the taking of property is ongoing until assailant has effected an escape, *State v. Truong,* 168 Wn.App. 529, 535-36 (2012); where force is unrelated to the taking or retention or not used to prevent or overcome resistance to the taking then evidence is insufficient, *State v. Johnson,* 155 Wn.2d 609, 610-11 (2005); here, while the meal was consumed the food was converted and, when defendant displayed a knife to prevent resistance to the taking without paying the evidence is sufficient to prove robbery; II.

***State v. Todd***, 200 Wn.App. 879 (2017)

"Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking," in robbery definition, RCW 9A.56.190 (2011), is an element of the crime that must be included in to convict instruction, *State v. Allen*, 159 Wn.2d 1, 9 (2006), *but see: State v. Ralph,* 175 Wn.App. 814, 824 (2013), *State v. Truong,* 168 Wn.App. 529, 537 (2012), *State . Phillips,* 9 Wn.App.2d 368 (2019), *but see: State v. Derri***,** 199 Wn.2d _658 (2022); taking property "from the person" and "in the presence" are not alternative means, *but see: State v. Roche*, 75 Wn.App. 500, 509-11 (1994); I.

***State v. Nelson***, 191 Wn.2d 61 (2018)

Defendant enters pharmacy, at gunpoint demands drugs and money from pharmacist who says he lacks access to either, defendant leaves, is charged with attempted robbery, argues to trial court that an element of attempted robbery is that victim had ownership, representative, or possessory interest in the property, court declines to so instruct; held: elements in a prosecution of criminal attempt are (1) intent to commit a specific crime, and (2) any act which is a substantial step toward the commission of that crime, forcibly taking personal property from the person or his or her presence implies that that person, and not the defendant, has a superior possessory right to the item being taken, overruling *State v. Richie,* 191 Wn.App. 916 (2015); 9-0.

***State . Phillips***, 9 Wn.App.2d 368 (2019)

Robbery information need not include language that defendant used force or fear to obtain or retain possession or control, RCW 9A.56.190 (2011), as that language is definitional, *State v. Handburgh*, 119 Wn.2d 284, 293 (1992), *State v. Truong*, 168 Wn.App. 529, 535-36 (2012), *but see: State v. Todd,* 200 Wn.App. 879 (2017), *State v. Derri*, 199 Wn.2d 658 (2022), at least when raised for the first time on appeal; trial court is not obliged to instruct jury as to good faith claim of title if not requested by a party; good faith claim of title is only available where defendant uses self-help to recover specific property, *State v. Brown*, 36 Wn.App. 549 (1984); I.

***State v. Derri***, 199 Wn.2d 658 (2022)

That portion of robbery statute that states "[s]uch force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking, RCW 9A.56.190, is an essential element of the crime, *disapproving, in part, State v. Phillips*, 9 Wn.App.2d 368 (2019), but, where challenged after trial the element can be fairly implied by inclusion of the language "take…by…immediate force…and fear; affirms *State v. Derri,* 17 Wn.App.2d 376 (2021); 9-0.

# SEARCH
## Airport/Border

***State v. Sweet***, 23 Wn.App. 97 (1979)

Search by airline employees alone is private; anti-hijacking program does not provide link to government search.

***United States v. Mendenhall***, 64 L.Ed.2d 497 (1980)

Where defendant meets "drug courier profile" and voluntarily accompanies police and consents to search, evidence is admissible (5-4, but no majority opinion).

***Reid v. Georgia***, 65 L.Ed.2d 890 (1980)

Drug courier profile based upon (1) suspect arrived from Fort Lauderdale, known to be principal place of origin for drugs, (2) suspect arrived in early morning when police activity is diminished, (3) suspect's shoulder bag was similar to that of another passenger who appeared to be concealing fact that they were travelling together, and (4) they had no other luggage held insufficient to support a finding of reasonable, articulable suspicion of illegal activity; leaves open question of whether stop here was a "seizure"; 8-1.

***State v. Rodriguez***, 32 Wn.App. 758 (1982)

Defendant is observed by Drug Enforcement Administration agents at Sea-Tac Airport to meet drug courier profile; DEA calls Clallam County Sheriff to advise that defendant is flying to Port Angeles and meets profile; in Port Angeles, sheriff sees defendant use phone, observes that he is nervous, identifies himself and requests that defendant accompany him to police car; held: no probable cause nor articulable suspicion that defendant was engaged in criminal activity; II.

***State v. Davis***, 35 Wn.App. 724 (1983)

Police receive information from informant that suspect would arrive on flight from L.A. to Seattle on a date certain to deliver drugs to a man whom police confirm was involved in drugs; suspect arrives without luggage, has traffic warrant; held: (1) traffic warrant is enough to search incident to arrest, (2) even without warrant, totality of circumstances is enough to search on probable cause since informant's tip is corroborated, suspect had no luggage and came from a primary drug source city, *Illinois v. Gates*, 76 L.Ed.2d 527 (1983); absence of search warrant, as existed in *Gates*, does not affect validity of search as totality of circumstances test applies with or without warrant; I.

***Florida v. Royer***, 75 L.Ed.2d 229 (1983)

Suspect who fit drug courier profile is approached by police who request his ticket and license; without oral consent, suspect surrenders documents, whereupon police ask suspect to accompany them to a small room 40 feet away; suspect goes with police; without consent, police retrieve luggage; when asked if he would consent to search, suspect produced a key; plurality held that police action exceeded the permissible bounds of an investigative stop, and suspect's consent was tainted by the illegal detention; 6-3.

***United States v. Place***, 77 L.Ed.2d 110 (1983)

Airline passenger's behavior arouses suspicion of police, who discover that tags on luggage do not match, addresses are false; police seize bags, hold for 90 minutes until dog sniffs outside of luggage, reacts positively for narcotics, police obtain warrant, find drugs; held: canine sniff is not a search, *but see: State v. Dearman*, 92 Wn.App. 630 (1998), *Rodriguez v. United States*, 575 U.S. 348, 135 S.Ct. 1609, 191 L. Ed. 2d 492 (2015); where police have reasonable belief luggage contains drugs, they may detain luggage temporarily to investigate and permit dog to sniff outside; here, 90-minute detention exceeded permissible scope, *see: Illinois v. Caballes*, 160 L.Ed.2d 842 (2005), exacerbated by fact that police lied about where luggage was to be taken; 9-0.

***Florida v. Rodriguez***, 83 L.Ed.2d 165 (1984)

Police, observing suspects at airport act suspiciously, show badges, ask if they might talk, request consent to search bags, get consent and find drugs; held: asking suspects if they would step aside and talk implicates no Fourth Amendment interest; strange movements and contradictory answers to trained narcotics officers provide articulable suspicion for a seizure; 6-3.

***United States v. Montoya de Hernandez***, 87 L.Ed.2d 381 (1985)

Defendant, upon arrival at airport from Columbia, is strip searched and found to have "firm fullness" in abdomen, is detained for 24 hours for bowel movement; ultimately magistrate issues order for rectal exam, drugs found; held: detention of traveler at border, beyond routine customs inspection, is justified if customs agents, considering all of the facts of traveler and her trip, reasonably suspect traveler is smuggling contraband in her alimentary canal; 7-2.

***State v. Bradley***, 105 Wn.2d 898 (1986)

Evidence lawfully obtained via a border search by federal officials is admissible in state court even if the search would have violated state law, *cf.: State v. Escalante*, 195 Wn.2d 526 (2020); 9-0.

***United States v. Sokolow***, 104 L.Ed.2d 1 (1989)

Airline passenger whom police know paid cash for ticket, traveled under a name that did not match telephone number which passenger gave, had an original destination of Miami, a drug source city, stayed in Miami for 48 hours even though flight took 20 hours, appeared nervous, checked no luggage is stopped by DEA, detained, after drug dog reacted positively is arrested, searched; held: irrespective of drug courier profile, all factors together lead to reasonable suspicion to believe that suspect was transporting drugs even though each factor alone is consistent with innocent travel; 7-2.

***State v. Quick***, 59 Wn.App. 228 (1990)

Defendant, in motor vehicle, boards Sydney, B.C.-Anacortes, WA ferry at intermediate stop of Friday Harbor, WA, at customs in Anacortes is searched, drugs found; held: customs officials can search at border without a warrant, 19 USC § 1467; if not at actual border, other legal justification is required, *United States v. Ramsey*, 52 L.Ed.2d 617 (1977), which include a showing of reasonable certainty that traffic was international in character and that no more than a

negligible number of domestic travelers are intercepted; even if Anacortes is subject to extended border doctrine or is functional equivalent of border, state must show to a reasonable certainty that defendants or contraband crossed a border; Anacortes is not a "fixed checkpoint," *United States v. Martinez-Fuerte*, 49 L.Ed.2d 1116 (1976); I.

***United States v. Flores-Montano***, 158 L.Ed.2d 311 (2004)

Removal and search of automobile gas tank at border does not require reasonable suspicion; 9-0.

# SEARCH
## Auto*

***State v. Hehman***, 90 Wn.2d 45 (1978)

If person **signs citation** for minor traffic offense, custodial arrest is impermissible; reverses *State v. Hehman*, 14 Wn.App. 770 (1976), *see: State v. Johnson*, 65 Wn.App. 716 (1992), *State v. Terrazas*, 71 Wn.App. 873 (1993), *cf.: State v. Nelson*, 81 Wn.App. 249, 256 (1996).

***State v. Marcum***, 24 Wn.App. 441 (1979)

If police take keys to vehicle, vehicle is no longer inherently mobile and thus no exigent circumstances.

***State v. Silvernail***, 25 Wn.App. 185 (1980), *overruled, in part, on other grounds, State v. McKim*, 98 Wn.2d 111 (1982)

Roadblock and search of all vehicles is approved where crime is serious and there is probable cause to believe felony was committed, *cf.: Illinois v. Lidster*, 157 L.Ed.2d 843 (2004); police may search trunk for other suspects, not contraband.

***State v. Coahran***, 27 Wn.App. 664 (1980)

Vehicle owned and operated by parolee is stopped and searched by police on less than probable cause; defendant, passenger in vehicle, is frisked; police find marijuana behind passenger's seat, arrest defendant, search him and find other drugs on his person; held: vehicle search approved as parolee's property may be searched by parole officer or police as agent of parole officer upon well-founded suspicion; finding marijuana in truck, in proximity of passenger, provided probable cause to search him.

***State v. Simpson***, 95 Wn.2d 170 (1980)

Police arrest suspect on unrelated felony warrant, determine that suspect's car is improperly licensed, open door, check VIN and determine car was stolen, impound car; held: individuals have limited privacy interest in VIN that is exposed to view; here, police seized key to car from jail property box and opened car to get VIN; court held this was an unlawful search, as (1) police did not have probable cause that car was stolen, (2) not within **community caretaker** function; no exigent circumstances as car was lawfully parked and immobile, *see: State v. Zakel*, 119 Wn.2d 563 (1992), *State v. Lynch*, 84 Wn.App. 467, 477-9 (1996), *but see: State v. Cheatam*, 112 Wn.App. 778 (2002), *aff'd, on other grounds,* 150 Wn.2d 626 (2003); 5-3.

***Colorado v. Bannister***, 66 L.Ed.2d 1 (1980)

Police observe vehicle speeding, lose sight of it, police then receive report of theft of lug nuts, police then spot same vehicle at gas station, approach it to cite driver, observe, from outside of vehicle, lug nuts in glove compartment, defendant meets description of thief, police arrest and

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* *See also:* **SEARCH/Impound**

seize lug nuts; held: no warrant needed per *Carroll v. United States*, 69 L.Ed.2d 543 (1925), *Arkansas v. Sanders*, 61 L.Ed.2d 255 (1979), automobile exception.

***State v. Young***, 28 Wn.App. 412 (1981)

Use of a **flashlight** to observe contents of a vacant car is not a search, *see: State v. Rose*, 128 Wn.2d 388 (1996); seizure of evidence observed in car is reasonable where defendant is "at large," as an exigent circumstance.

***State v. Carner***, 28 Wn.App. 439 (1981)

Juvenile defendant who evades police, speeds, and has no **license** may be arrested, *distinguishing State v. Hehman*, 90 Wn.2d 45 (1978); *see: State v. Nelson*, 81 Wn.App. 249, 256 (1996).

***State v. Shoemaker***, 28 Wn.App. 787 (1981)

Police, having probable cause but without a warrant, search car and seize closed suitcases from trunk, search suitcases, find drugs; held: once suitcases are seized, exigent circumstance of mobility no longer exists, and thus police needed a warrant to open suitcase; 2-1.

***State v. Hayden***, 28 Wn.App. 935 (1981)

Police stop vehicle for traffic infraction, see that license is wired on and see occupants place something in glove compartment; suspect consents to search of glove compartment, police find a purse, which they search; held: reasonable to search purse to find vehicle registration.

***State v. Keyser***, 29 Wn.App. 120 (1981)

Police stop suspect's vehicle, arrest defendant for suspicion of robbery, place him in patrol car, leaving passengers in suspect vehicle, police then search under driver's seat, find drugs; held: search beyond scope of search incident to arrest, as suspect in police car; search exceeded protective search for weapons as police officer testified that what he felt under seat was not a weapon, *State v. Hobart*, 94 Wn.2d 437 (1980); no probable cause to search vehicle, thus automobile exception does not apply.

***State v. Davis***, 29 Wn.App. 691 (1981)

Store security guard observes suspect remove toy car from vehicle and enter store where suspect seeks to return it for cash, store is aware toy car had been charged to a fraudulent account, arrest suspect who is taken to police station, police **impound** vehicle from store lot, vehicle had other items of merchandise in it, and it had no door handles or locks, police inventory vehicle and seize other evidence; held: impound was improper, per *State v. Houser*, 95 Wn.2d 143 (1980), as no probable cause existed to believe vehicle was stolen or used in commission of felony and there was a reasonable alternative to impoundment; however, search held lawful, as probable cause and exigent circumstances (car was accessible, as it did not have door handles) existed; interruption of initial search of car did not taint later search.

***State v. Stroud***, 30 Wn.App. 392 (1981)

"Unfamiliar" vehicle parked in high crime area, police put on lights, order suspect from car, smell marijuana, search, find cocaine; held: initial stop was a seizure as a reasonable person

would have believed s/he was not free to go, *State v. Gantt*, 163 Wn.App. 133 (2011), insufficient objective facts that suspect was involved in criminal activity, fruits suppressed; III.

***State v. Roth***, 30 Wn.App. 740 (1981)

Following traffic stop on interstate highway, police smell marijuana and see roach clips in ash tray, search vehicle, find rifle used in a homicide; held: probable cause to arrest, lawful search incident to arrest, lawful **impound** as state established reasonable cause for impound, *State v. Houser*, 95 Wn.2d 143 (1980); I.

***United States v. Ross***, 72 L.Ed.2d 572 (1982)

Where police have probable cause to search a vehicle they may search every part of the vehicle, including compartments and containers, as if a warrant had been issued, *Maryland v. Dyson*, 144 L.Ed.2d 442 (1999); scope of search is defined by the object of the search and the places in which there is probable cause to believe it may be found, *see: State v. Witkowski*, 3 Wn.App.2d 318 (2018); overrules *Robbins v. California*, 69 L.Ed.2d 744; overrules, in part, *Arkansas v. Sanders*, 61 L.Ed.2d 235; 6-3.

***Michigan v. Thomas***, 73 L.Ed.2d 750 (1982)

Where police are justified in making an **inventory** search of a vehicle, they may search every part of the vehicle, and need not have exigent circumstances; fact that car was "immobilized" does not prohibit complete inventory search; *per curiam*.

***United States v. Knotts***, 75 L.Ed.2d 55 (1983)

Police secrete **beeper** in can of chloroform which was then purchased by defendant, police follow defendant's vehicle to a cabin, secure warrant based upon beeper and other information, and bust a drug laboratory; held: beeper merely served to scientifically enhance police visually tracking defendant's car, thus, there was no invasion of privacy, *cf.: Carpenter v. United States*, ___ U.S. ___ , 138 S.Ct. 2206, 2-1 L.Ed.2d 507 (2018); 9-0.

***Texas v. Brown***, 75 L.Ed.2d 502 (1983)

Police stop vehicle at routine license checkpoint, ask for license, shine flashlight in car, see knotted balloon fall from suspect's hand, observe vials and powder in glove compartment; after suspect stated that he had no license, officer seizes balloon which "seemed to contain a powdery substance"; plurality of four held initial stop valid, *see: Illinois v. Lidster*, 157 L.Ed.2d 843 (2004), shining **flashlight** did not violate Fourth Amendment, *State v. Rose*, 128 Wn.2d 388 (1996); the "immediately apparent" language in *Coolidge v. New Hampshire*, 29 L.Ed.2d 564 (1971) does not require police to "know" that items are evidence or contraband, *i.e.*, police may seize a suspicious object if the initial intrusion is lawful, *see: State v Muñoz Garcia*, 140 Wn.App. 609 (2007); 9-0.

***Michigan v. Long***, 77 L.Ed.2d 1201 (1983)

Police stop vehicle that was driving erratically, sole occupant gets out of car, police observe knife in car, search car, find drugs; held: where police, in roadside encounter, have a reasonable articulable belief that suspect poses a danger and may gain immediate control of weapons, they may conduct a *Terry* search of car's interior and may seize contraband found

therein, *Thornton v. United States*, 158 L.Ed.2d 905 (2004), *see: Arizona v. Gant*, 173 L.Ed.2d 485 (2009), *State v. Valdez*, 167 Wn.2d 761 (2009), *State v. Snapp*, 174 Wn.2d 177 (2012), for state constitutional analysis; 6-3.

***State v. Ringer***, 100 Wn.2d 686 (1983)

Police stop defendant's van, order him out, arrest him on a felony warrant, observe that no one else is in van, smell marijuana, search van, which was lawfully parked, as inventory and for weapons, find drugs; in companion case, police stop defendant's car, arrest him on previously established probable cause, search car incident to arrest, find drugs; held: based upon CONST. Art. 1, § 7, when a lawful arrest is made, officers may search the person arrested and the area within his immediate control for weapons or to prevent destruction of evidence but may go no further; search of suspect's vehicle where suspect has been removed, is not permitted except where exigent circumstances are shown, *see: Arizona v. Gant*, 173 L.Ed.2d 485 (2009); court must consider time to obtain a telephonic warrant, CrR 2.3(c), in determining whether exigent circumstances exist to justify an exception to the warrant requirement, *State v. Inman*, 2 Wn.App.2d 281 (2018), *see: State v. Hinshaw*, 149 Wn.App. 747 (2009), *Seattle v. Pearson*, 192 Wn.App. 802, 811-17 (2016), *State v. Anderson*, 9 Wn.App.2d 430 (2019), *State v. Rawley*, 13 Wn.App.2d 474 (2020), *but see: State v. Snapp*, 174 Wn.2d 177 (2012); Washington will not follow *United States v. Ross*, 72 L.Ed.2d 572 (1982) and *New York. v. Belton*, 69 L.Ed.2d 768 (1981), *see: Thornton v. United States*, 158 L.Ed.2d 905 (2004); prior Washington caselaw is reversed; not retroactive, *State v. Jordan*, 39 Wn.App. 530 (1985), *State v. Goodman*, 42 Wn.App. 331 (1985), *overruled, in part, State v. Stroud*, 106 Wn.2d 144 (1986), *see: Maryland v. Dyson*, 144 L.Ed.2d 442 (1999); 7-2.

***State v. Grinier***, 34 Wn.App. 164 (1983)

Informants advise police that a shipment of drugs will arrive at a residence; police observe the suspected "delivery truck" arrive at residence, see luggage moved into residence, then see luggage moved from residence to defendant's vehicle, police stop vehicle, find drugs in luggage; held: police had no evidence to establish that drugs were in luggage, no exigent circumstances applied; where the suspected locus of contraband is luggage being transported at the time of the stop, and not the car in which it is being carried, the relationship between the car and the luggage is coincidental, and the automobile exception does not apply; 2-1; II.

***State v. Claflin***, 38 Wn.App. 847 (1984)

Where a warrant authorizes search of "premises", police may properly search defendant's car parked on the premises, *State v. Huff*, 33 Wn.App. 304 (1984), *but see: State v. Rivera*, 76 Wn.App. 519 (1995); II.

***State v. Williams***, 102 Wn.2d 733 (1984)

Police, responding to burglar alarm, approach residence, observe vehicle parked in front, turn lights on and begin to move, block vehicle, remove and cuff driver, investigate and verify that a burglary occurred, question suspect, inventory vehicle and find parts; held: factors to determine if investigative stop exceeds permissible scope include degree of intrusion upon liberty, length of detention, and whether purpose of stop was related to suspect's detention, *reversing State v. Williams*, 34 Wn.App. 662 (1983), overruling in part *State v. Byers*, 88 Wn.2d

1 (1977); drawn guns and cuffs are permissible only when police have a legitimate articulable fear of danger *(dicta)*, *see: State v. Mitchell*, 80 Wn.App. 143 (1995), *State v. Pines*, 17 Wn.App.2d 483 (2021); impoundment not authorized where suspect rejects it, *but see: State v. Huff*, 64 Wn.App. 641 (1992), *State v. Tyler*, 177 Wn.2d 690 (2013); 5-4.

***State v. Donohoe***, 39 Wn.App. 778 (1985)

Report of theft plus description of suspect vehicle by color and make plus observations by officers of the tracks indicating snow tires plus observing suspect vehicle meeting description containing "numerous articles of property" justifies search of vehicle on probable cause; because defense cited Fourth Amendment and not Article I, § 7, defense has waived state constitutional issues, permitting the warrantless search of the vehicle to stand, *United States v. Ross*, 72 L.Ed.2d 572, 583 (1982); 2-1, II.

***State v. Chisholm***, 39 Wn.App. 864 (1985)

Police stop truck driver to tell him his hat may blow out of the bed of the truck, observe open beer in front seat, knows that driver and passenger are minors, search passenger, find drugs; held: where a stop is for noncriminal noninvestigatory purpose, court must determine whether stop is reasonable using balancing test of individual's interest in proceeding without police interference vs. public's interest in having police perform **community caretaking** functions in addition to traditional enforcement of laws, thus *remanded* to apply test, *see: State v. Lynch*, 84 Wn.App. 467, 477-9 (1996), *State v. Kinzy*, 141 Wn.2d 373 (2000); 2-1, II.

***State v. White***, 40 Wn.App. 490 (1985)

**Passenger** in front seat of car does not have legitimate expectation of privacy in unoccupied rear passenger compartment of the car; II.

***State v. Reynoso***, 41 Wn.App. 113 (1985)

Suspect is stopped by police for license plate infraction, lacks a drivers license, is arrested, requests that vehicle's owner remove vehicle; police call owner, who agrees to pick up vehicle; police decide to **impound** anyway, inventory vehicle, find drugs, discover VIN does not match registration; held: vehicle may be impounded if there is probable cause to believe it is stolen or used in felony, *State v. Houser*, 95 Wn.2d 143 (1980); here, no evidence vehicle was stolen, fact that VIN did not correspond to registration is only evidence of a licensing violation, *State v. Simpson*, 95 Wn.2d 170, 189 (1980); vehicle may be impounded for **community caretaking** function if there is a threat to public safety or impeded traffic and no one is available to remove it, thus not justified here, *Houser, supra*, at 150, *Simpson, supra*, at 189, *State v. Hardman*, 17 Wn.App. 910 (1978); vehicle may be impounded if authorized by statute ***and*** there is reasonable cause to impound under the constitution, *see*: *State v. Stortroen*, 53 Wn.App. 654, 658 (1989), *State v. Clifford*, 57 Wn.App. 124 (1990); *State v. Johnson*, 65 Wn.App. 716 (1992), *State v. Coss*, 87 Wn.App. 891, 898-900 (1997); III.

***State v. Perez***, 41 Wn.App. 481 (1985)

Police stop suspect for traffic **infraction**, detect odor of alcohol, give suspect field sobriety tests 18-20 feet from car, other officer looks in car window, sees unattached car speaker and what appears to be a gun barrel beneath a jacket, reaches in open door, seizes sawed-off

rifle; held: observation of gun was lawful under open view doctrine, *State v. Seagull*, 95 Wn.2d 898 (1981), as there was no intrusion of privacy into the interior of the car which can be viewed from outside the car, *Texas v. Brown*, 75 L.Ed.2d 502 (1983); entry into car and seizure of gun was lawful even in absence of a threatening gesture as suspect "might be dangerous" due to apparent attempt to conceal weapon under jacket by intoxicated suspect who could have made a move for the weapon from 18-20 feet away, *but see: State v. Snapp*, 174 Wn.2d 177 (2012), *State v. Duncan*, 185 Wn.2d 430, 438-41 (2016); I.

***State v. Marchand***, 104 Wn.2d 434 (1985)

State patrol license and equipment **roadblock** checks, RCW 46.64.070, violate Fourth Amendment, Delaware v. *Prouse*, 59 L.Ed.2d 660 (1979), *City of Indianapolis v. Edmond*, 148 L.Ed.2d 333 (2000), *see: Illinois v. Lidster*, 157 L.Ed.2d 843 (2004); reverses *State v. Marchand*, 37 Wn.App. 741 (1984); 6-3.

***United States v. Johns***, 83 L.Ed.2d 890 (1985)

Police seize vehicles on probable cause without a warrant, remove packages and place in warehouse, three days later search packages; held: police may search containers discovered in the course of a lawful vehicle search and need not search contemporaneous with the seizure, expanding *United States v. Ross*, 72 L.Ed.2d 572 (1982); 7-2.

***New York v. Class***, 89 L.Ed.2d 81 (1986)

Police stop suspect for minor traffic offense, suspect exits car; police open passenger door to record VIN on door jamb, can't find VIN, reach into vehicle to move papers on dashboard covering VIN, discover gun under seat, seize gun; held: no reasonable expectation of privacy in VIN since federal law requires that VIN be visible from outside of car, police authorized to enter to see VIN; 5-4.

***State v. Kennedy***, 107 Wn.2d 1 (1986)

Police, while stopping a vehicle with driver and passenger on a well-founded suspicion observe defendant-driver make a **furtive gesture**; police remove defendant from vehicle, reach under seat, seize baggie of drugs; held: where suspect has been removed from a vehicle that was subject to a lawful investigative stop and officer has an objective reason for believing that a weapon is in vehicle (furtive gesture here), *see: State v. Horace*, 144 Wn.2d 386 (2001), police may make a limited search of the passenger compartment for weapons within the area of control of suspect and passenger and, if contraband is observed, police may seize it as in plain view, *State v. Stroud*, 106 Wn.2d 144 (1986), *State v. Watkins*, 76 Wn.App. 726, 729-31 (1995), *State v. Larson*, 88 Wn.App. 849 (1997), *State v. Chang*, 147 Wn.App. 490, 494-98 (2008), *cf.: State v. Bradley*, 105 Wn.App. 30, 36-38 (2001), *but see: State v. Snapp*, 174 Wn.2d 177 (2012), *State v. Duncan*, 185 Wn.2d 430, 438-41 (2016); 5-4.

***State v. McIntosh***, 42 Wn.App. 573 (1986)

Police observe equipment violation, stop defendant's vehicle, defendant states he lacks a **license** or any identification; police arrest driver, pat him down, find fruits of burglary; other officer, while talking to passenger, observes possible weapon, removes passenger, searches vehicle, finds burglary tools, patdown passenger, finds fruits of burglary; held: absence of

identification permits arrest for no valid license, *distinguishing* State v. Hehman, 90 Wn.2d 45 (1978); *see also:* State v. Johnson, 65 Wn.App. 716 (1992); full search of suspect's person, following arrest, is permissible, *distinguishing* Terry v. Ohio, 20 L.Ed.2d 889 (1968); because passenger was not yet arrested when officer searched vehicle, State v. Ringer, 100 Wn.2d 686 (1983), is inapposite, since passenger "could return to the car;" further, the early morning hour, fact that driver had a knife, appearance of a weapon in car justifies a *Terry* "quick check" of the vehicle for a weapon, *but see:* State v. Parker, 139 Wn.2d 486 1999), *cf.:* State v. Barwick, 66 Wn.App. 706 (1992), State v. Cole, 73 Wn.App. 844 (1994), State v. Valdez, 167 Wn.2d 761 (2009); I.

***State v. Burgess***, 43 Wn.App. 253 (1986)

Police, investigating a burglary, find suspect vehicle lawfully parked across from burglary, run registration and discover that owner had previously burglarized the same business, deflate tires; two hours later, police arrest suspect, seize incriminating evidence, impound and search vehicle; held: **impound** and inventory was improper as police had an affirmative duty to explore reasonable alternatives to impound, State v. Williams, 102 Wn.2d 733, 743 (184), State v. Houser, 95 Wn.2d 143, 153 (1980); search of vehicle was, however, proper under automobile exception, State v. Davis, 29 Wn.App. 691, 699 (1981), since State v. Ringer, 100 Wn.2d 686 (1983) is not retroactive; *accord*: In re Taylor, 105 Wn.2d 683 (1986), *superseded, on other grounds, Pers. Restraint of St. Pierre,* 118 Wn.2d 321 (1992); II.

***State v. Niedergang***, 43 Wn.App. 656 (1986)

Warrant authorizes search of residence and curtilage, police seize drugs from car parked in front of residence; held: curtilage is the area to which extends the intimate activity associated with the sanctity of the home, Oliver v. United States, 80 L.Ed.2d 214, 225 (1984), and depends upon the circumstances, including proximity to home, use and expectations of privacy; here, parked car was not within **curtilage**, as it was set off from residence by curb, and anyone could have parked there, thus evidence suppressed, State v. Graham, 78 Wn.App. 44, 51-2 (1995), *see: Collins v. Virginia,* 584 U.S. ___, 138 S.Ct. 1663 (2018); II.

***State v. Stortroen***, 53 Wn.App. 654 (1989)

Police stop vehicle for speeding, driver lacks a **license**, officer, intending to cite and release, searches vehicle, finds drugs; held: a custodial arrest for driving without a license should not be made unless there are grounds to believe that arrestee will fail to appear in court; where a custodial arrest is not justified, no warrantless search pursuant to that arrest may be upheld, State v. McKenna, 91 Wn.App. 554 (1998), *see*: State v. Carner, 28 Wn.App. 439 (1981), State v. Radka, 120 Wn.App. 43 (2004), *cf.*: State v. Brantigan, 59 Wn.App. 481 (1990), State v. Reeb, 63 Wn.App. 678 (1992), State v. Johnson, 65 Wn.App. 716 (1992), State v. O'Neill, 110 Wn.App. 604 (2002), State v. Clausen, 113 Wn.App. 657 (2002), State v. Balch, 114 Wn.App. 55 (2002); 2-1.

***State v. Patterson***, 112 Wn.2d 731 (1989)

Police, investigating burglary, observe vehicle going wrong way on one-way street two blocks from burgled store, five minutes later find vehicle parked six blocks from store, treads wet, observe possible proceeds of burglary in vehicle, search vehicle without warrant, find

identification, arrest suspect who confesses; held: search of a **parked, immobile, unoccupied vehicle** must be authorized by a warrant or exigent circumstances other than the potential mobility of the vehicle, *Oregon v. Kock*, 725 P.2d 1285 (1986), *State v. Kypreos*, 110 Wn.App. 612, 624-28 (2002), 115 Wn.App. 207 (2002), *State v. Gibson*, 152 Wn.App. 945, 953-58 (2009), *see: Collins v. Virginia*, 584 U.S. ___, 138 S.Ct. 1663 (2018); Supreme Court declines to follow *California v. Carney*, 85 L.Ed.2d 406 (1985); here, immediacy of time between crime and location of vehicle, evidence of recent flight from vehicle (wet treads, presence of evidence in vehicle) showing fresh pursuit establish exigent circumstances, *see: State v. Ozuna*, 80 Wn.App. 684, 688 (1996), *State v. Hendrickson*, 129 Wn.2d 61, 72-77 (1996), *cf.: State v. Tibbs*, 169 wn.2d 364 (2010), *but see: State v. Snapp*, 174 Wn.2d 177 (2012), *cf.: State v. Duncan*, 185 Wn.2d 430, 438-41 (2016); 9-0.

***State v. Mennegar***, 114 Wn.2d 304 (1990)

Police stop vehicle for speeding, determine driver is drunk, ask passenger if he wishes to drive vehicle from scene in lieu of impound, passenger agrees, officer orders passenger to return to and remain in vehicle, requests driver's license from passenger, runs computer check, finds warrant, arrests passenger, searches, finds drugs; held: directing passenger to remain in vehicle was not a detention, *reversing State v. Mennegar*, 53 Wn.App. 257 (1989), as a reasonable person would not have believed himself to be detained, *State v. Mote*, 129 Wn.App. 276 (2005), *State v. Rathbun*, 124 Wn.App. 372 (2004), *but see: State v. Rankin*, 151 Wn.2d 689 (2004), *State v. Brown*, 154 Wn.2d 787 (2005), *overruled on other grounds, State v. Jasper*, 174 Wn.2d 96 (2012), *Brendlin v. California*, 168 L.Ed.2d 132 (2007), *Arizona v. Johnson*, 172 L.Ed.2d 694 (2009), *State v. Harrington*, 167 Wn.2d 656 (2009), *cf.: State v. Pettit*, 160 Wn.App. 716 (2011), as passenger had agreed to drive the vehicle away; requesting passenger's license was reasonable, as passenger was free to refuse; within **community caretaking function** to call in to determine if license was valid, *see: State v. Kinzy*, 141 Wn.2d 373 (2000); 9-0.

***State v. Wilkinson***, 56 Wn.App. 812 (1990)

Police, knowing driver lacked **license**, follow vehicle with emergency lights on, which does not immediately pull over, observe defendant-passenger move around considerably as though trying to hide something, begins patdown of defendant-passenger, who gives officer syringe with drugs; held: "an officer who properly stops a car may conduct a search for weapons within the immediate control of the driver and passengers when one of the persons in the car moves as if to hide a weapon," at 815, *State v. Kennedy*, 107 Wn.2d 1 (1986), *State v. Watkins*, 76 Wn.App. 726, 729-31 (1995), *State v. Bradley*, 105 Wn.App. 30, 36-38 (2001), *cf.: State v. Snapp*, 174 Wn.2d 177 (2012), *State v. Duncan*, 185 Wn.2d 430, 438-41 (2016); I.

***State v. Slattery***, 56 Wn.App. 820 (1990)

**School** officials may search a student's car, locked trunk and a locked briefcase within that trunk without a warrant on reasonable suspicion, *State v. Brown*, 158 Wn.App. 49 (2010), *overruled on other grounds, State v. Jasper*, 174 Wn.2d 96 (2012), *State v. Brooks*, 43 Wn.App. 560 (1986), *New Jersey v. T.L.O.*, 83 L.Ed.2d 720 (1983); , *cf.: State v. Meneese*, 174 Wn.2d 937 (2012), *State v. A.S.*, 6 Wn.App.2d 264 (2018), where car was parked in school parking lot; reliable student-informant's information of drug dealing plus discovery of large amount of cash on respondent plus pager provide reasonable grounds to search car; I.

***State v. Sistrunk***, 57 Wn.App. 210 (1990)

Police officer approaches vehicle parked with hood raised, driver and passengers state that there is no problem, officer observes numerous dirty beer cans in back seat, advise suspects of open container law, suspects reply they were collecting for recycling, police observe no drinking nor smell intoxicants, search vehicle for intoxicants, find that visible beer cans were empty, then find syringe under seat; held: search for cans in back seat was improper under open view doctrine as cans were dirty, no apparent wetness, consistent with suspects' explanation, thus it was not immediately apparent he had seizable evidence; a mere traffic stop is not grounds for a *Terry* weapons search, *State v. Larson*, 93 Wn.2d 638 (1980); no evidence existed to lead officer to believe that suspects were armed and dangerous, thus seizure of syringe was unlawful; III.

***State v. Barajas***, 57 Wn.App. 556 (1990)

**Impoundment** and inventory search of vehicle improper based solely upon arrest for driving without a valid license, *State v. Simpson*, 95 Wn.2d 170 (1980), *State v. Reynoso*, 41 Wn.App. 113 (1985), *State v. Greenway*, 15 Wn.App. 216 (1976), *State v. Bales*, 15 Wn.App. 834 (1976), *State v. Tarica*, 59 Wn.App. 368 (1990), *State v. Terrazas*, 71 Wn.App. 873 (1993); *cf.: State v. Johnson*, 65 Wn.App. 716 (1992); RCW 46.20.435(1), which authorizes impoundment when police determine that driver lacked license, is discretionary, not mandatory, *see: State v. Villela*, 194 Wn.2d 451 (2019); III.

***Florida v. Wells***, 109 L.Ed.2d 1 (1990)

Absent police policies with respect to opening closed containers found during **inventory** search, the opening of such a container is insufficiently regulated, and thus evidence suppressed, *State v. Wisdom*, 187 Wn.app. 652, 676-78 (2015); 9-0.

***State v. Smith***, 115 Wn.2d 775 (1990)

Police observe vehicle in closed park, see three men in car, no one in driver's seat, ask for identification, find concealed weapons permit on one suspect who says he has a gun in vehicle, all three removed from vehicle, patted down, knife found strapped to one suspect, police search passenger compartment for gun, find numerous weapons; held: whereas driver's seat was empty and police thus had reasonable suspicion that a fourth person was in the vicinity, one passenger was agitated and uncooperative, time of night, weapon found during patdown, police were reasonably suspicious that suspects were dangerous, might try to gain access to weapon in vehicle, thus search of passenger compartment was valid, *State v. Williams*, 102 Wn.2d 733, 738-30 (1984), *State v. Wheeler*, 108 Wn.2d 230 (1987), *but see: State v. Valdez*, 167 Wn.2d 761 (2009), *Arizona v. Gant*, 173 L.Ed.2d 485 (2009); 6-3.

***State v. Quintero-Quintero***, 60 Wn.App. 902 (1991)

Police knowledge that defendant had revoked **license** 22 weeks earlier plus weaving is grounds for stop and search of vehicle, *distinguishing State v. Strotroen*, 53 Wn.App. 654 (1989), *see: State v. Perea*, 85 Wn.App. 339 (1997); III.

***California v. Acevedo***, 114 L.Ed.2d 619 (1991)

Police, with probable cause to search a **container** within a vehicle, may search the container without a warrant under automobile exception, overruling *Arkansas v. Sanders,* 61 L.Ed.2d 235 (1979), *but see: State v. Snapp,* 174 Wn.2d 177 (2012); 6-3.

***State v. Zakel***, 61 Wn.App. 805 (1991)

Police observe parked vehicle, run plates, discover plates are stolen, enter vehicle and open hood to find VIN, discover vehicle is stolen, arrest defendant when he gets in vehicle; held: defendant, by his wrongful presence in the stolen car, had no legitimate expectation of privacy in the area searched, and lacks standing to contest search; II.

***State v. Klump***, 61 Wn.App. 911 (1991)

Defendant is stopped for infraction, DOL records reflect a failure to respond two years earlier, defendant is arrested, car searched, drugs found; held: custodial arrest for failure to appear or respond, RCW 46.64.060(2)(k), 46.64.020(2), is not permitted absent filing of criminal complaint, RCW 10.31.100; further, statute of limitations had expired; III.

***State v. Reeb***, 63 Wn.App. 678 (1992)

Where police have probable cause to believe suspect has two or more failures to appear with DOL, former RCW 46.64.020(3), then custodial arrest, and search of vehicle incident to arrest, is proper, *distinguishing State v. Stortroen*, 53 Wn.App. 654 (1989); III.

***State v. Vandover***, 63 Wn.App. 754 (1992)

Police receive anonymous phone tip that man in gold Maverick brandished shotgun, stop green Maverick, seize guns, drugs; held: because record is devoid of information whether informant was eyewitness, there is no basis of knowledge or reliability established, *State v. Lesnick*, 84 Wn.2d 940 (1975), *Campbell v. Department of Licensing*, 31 Wn.App. 833 (1982), *State v. Z.U.E.*, 178 Wn.App. 769 (2014), 183 Wn.2d 610 (2015), nor other indicia of reliability, *State v. Saggers*, 182 Wn.App. 832 (2014); although potential danger to public may be factor to consider, it cannot substitute for reliability of informant, *State v. Saggers*, 182 Wn.App. 832 (2014), *distinguishing State v. Franklin*, 41 Wn.App. 409 (1985), *see: Florida v. J.L.*, 146 L.Ed.2d 254 (2000), *State v. Cardenas-Muratalla*, 179 Wn.App. 307 (2013), *but see: State v. Lee*, 147 Wn.App. 912 (2008), *Navarette v. California*, 572 U.S. 393, 188 L.Ed.2d 680 (2014); II.

***State v. Huff***, 64 Wn.App. 641 (1992)

Probable cause to arrest the occupants of a car for possession of a controlled substance exists when a trained officer detects that the odor of a controlled substance is emanating from the vehicle, *State v. Hammond*, 24 Wn.App. 596, 600 (1979), irrespective of whether the smell emanates from the person or car, *State v. Ramirez*, 49 Wn.App. 814, 819 (1987), *but see: State v. Grande*, 164 Wn.2d 135 (2008); when police have probable cause to believe that car contains evidence of a crime, police may secure or tow it to obtain a warrant; II.

***State v. Johnson***, 65 Wn.App. 716 (1992)

Police observe vehicle involved in what appears to be drug activity, follow it, vehicle commits **infraction**, upon stop driver states he has no license, no identification, gives false name, is arrested, vehicle searched, drugs found; held: lack of license plus false name plus respondent's claim to have a prior arrest under the false name which officer could not verify is grounds for arrest as officer had sufficient reason to believe respondent would not honor a promise to appear, *State v. Jordan*, 50 Wn.App. 170 (1987), *State v. McIntosh*, 42 Wn.App. 573 (1986), *see: State v. Weber*, 159 Wn.App. 779, 787-91 (2011); distinguishes *State v. Michaels*, 60 Wn.2d 638, 645 (1962), wherein Supreme Court found a **pretext** stop because police can no longer search a vehicle incident to a minor traffic infraction absent circumstances justifying custodial arrest, *State v. Hehman*, 90 Wn.2d 45 (1978); *see: State v. Chapin*, 75 Wn.App. 460, 464-9 (1994), *Whren v. United States*, 135 L.Ed.2d 89 (1996), *State v. Ladson*, 138 Wn.2d 343 (1999), *State v. DeSantiago*, 97 Wn.App. 446 (1999), *State v. Montes-Malindas*, 144 Wn.App. 254 (2008); III.

***State v. Zakel***, 119 Wn.2d 563 (1992)

Defendant's testimony that he lived in allegedly stolen vehicle is insufficient to establish defendant's possession of vehicle where it was found by police unattended, illegally parked, unlocked, window open, defendant had no relationship to businesses where vehicle found; defendant did not possess vehicle at time of search, thus he cannot invoke automatic standing doctrine; Supreme Court overrules portion of *State v. Zakel*, 61 Wn.App. 805 (1991), which purports to abandon automatic standing doctrine; *see: State v. Simpson*, 95 Wn.2d 170 (1980); 9-0.

***State v. Barwick***, 66 Wn.App. 706 (1992)

Passenger is stopped for open container violation, RCW 46.61.519(2), a traffic **infraction**, police demand identification, defendant hands officer a Costco card, officer asks for more identification, defendant denies he has any, acts furtively as if to stop officer from looking in wallet, officer asks defendant to place wallet on hood of car, observes bindle in wallet, seizes it, finds drugs; held: passenger has no obligation to carry identification, *see: State v. Rankin*, 151 Wn.2d 689 (2004), defendant's concealing of contents of wallet does not support custodial arrest for an infraction where police lack a reasonable belief that suspect would fail to appear, thus drugs suppressed, *distinguishing State v. McIntosh*, 42 Wn.App. 579 (1986); *accord: State v. Cole*, 73 Wn.App. 844 (1994), *State v. Henry*, 80 Wn.App. 544 (1995), *see: Maryland v. Wilson*, 137 L.Ed.2d 41 (1997), *State v. Mendez*, 137 Wn.2d 208 (1999), *cf.: State v. Horrace*, 144 Wn.2d 386 (2001), *but see: State v. Chelly*, 94 Wn.App. 254 (1999); III.

***Seattle v. Yeager***, 67 Wn.App. 41 (1992)

Statute authorizing stop of a vehicle which has tab on license plate indicating that owner had been cited for driving without a license, RCW 46.16.710(3), does not violate Fourth Amendment or CONST. Art. 1, § 7, where sole purpose of stop is to ascertain if driver has a valid license, *State v. Phillips*, 126 Wn.App. 584 (2005), *distinguishing Seattle v. Mesiani*, 110 Wn.2d 454 (1988), *Delaware v. Prouse*, 59 L.Ed.2d 660 (1979), *United States v. Brignoni-Ponce*, 45 L.Ed.2d 607 (1975), *see also: State v. Penfield*, 106 Wn.App. 157 (2001), *City of Indianapolis v. Edmond*, 148 L.Ed.2d 333 (2000); I.

***State v. Thorp***, 71 Wn.App. 175 (1993)

Police stop truck to check if it had a "specialized forest products permit," discover warrant, find marijuana; held: forest products industry is not a pervasively regulated industry, which would permit a search without a warrant, *United States v. Biswell*, 32 L.Ed.2d 87 (1972), *Colonnade Catering Corp. v. United States*, 25 L.Ed.2d 60 (1970), *Washington Massage Found. v. Nelson*, 87 Wn.2d 948 (1976), *see: State v. Miles*, 160 Wn.2d 236, 250 (2007), thus stop was invalid; II.

***State v. Terrazas*,** 71 Wn.App. 873 (1993)

Police stop vehicle for weaving, ask driver for license, defendant says he has none, trooper asks for name and birthdate, suspects false name, pats down driver, finds nothing, arrests driver for driving without license, observes passenger with blanket on lap, suspects weapon, removes passengers from car, searches, finds guns, drugs; held: an arrest solely for driving without a **license**, without other reasonable grounds, is improper, *State v. Hehman*, 90 Wn.2d 45 (1978), *State v. Barajas*, 57 Wn.App. 556 (1990), *State v. Watson*, 56 Wn.App. 665 (1990), *see: State v. Reding*, 119 Wn.2d 685 (1992), *State v. Pulfrey*, 154 Wn.2d 517 (2005); mere suspicion that driver gave a false name is not enough; search of vehicle for officer safety was improper, as blanket on passenger's lap does not rise to an articulable suspicion that passenger was dangerous or armed, *see: State v. Collins*, 121 Wn.2d 168, 173 (1993), *State v. McIntosh*, 42 Wn.App. 573, 578-9 (1986), *State v. Henry*, 80 Wn.App. 544 (1995), *Maryland v. Wilson*, 137 L.Ed.2d 41 (1997), *State v. Larson*, 88 Wn.App. 849 (1997), *State v. Mendez*, 137 Wn.2d 208 (1999), *State v. Reynolds*, 144 Wn.App. 282 (2001), *State v. Rankin*, 151 Wn.2d 689 (2004), *State v. Brown*, 154 Wn.2d 787 (2005), *overruled on other grounds, State v. Jasper*, 174 Wn.2d 96 (2012), *State v. Carriero*, 8 Wn. App. 2d 641 (2019), *cf.: State v. Horrace*, 144 Wn.2d 386 (2001), *State v. Pettit*, 160 Wn.App. 716 (2011); III.

***State v. Flores-Moreno***, 72 Wn.App. 733, 740-42 (1994)

Detaining a vehicle for 45 minutes while obtaining a warrant is reasonable, *United States v. Sharpe*, 84 L.Ed.2d 605 (1985), *State v. Lund*, 70 Wn.App. 437, 446 (1993); II.

***State v. Cole***, 73 Wn.App. 844 (1994)

Police stop vehicle for infraction, observe passenger not wearing seat belt, ask passenger for identification, passenger lacks written identification but provides name and birthdate, police remove passenger from vehicle, patdown **passenger**, later observe passenger drop drugs while being detained outside of vehicle; held: passengers need only provide name and address and sign citation, RCW 46.61.020(3), need not carry identification, *State v. Barwick*, 66 Wn.App. 706, 709 (1992), *cf.: State v. Chelly*, 94 Wn.App. 254 (1999); removing passenger from car converted infraction investigation to an unwarranted *Terry* stop, as officer had no suspicions nor a reasonable belief that defendant was armed and presently dangerous, *State v. Collins*, 121 Wn.2d 168, 173 (1993), *State v. Mendez*, 137 Wn.2d 208 (1999), *State v. Horrace*, 144 Wn.2d 386 (2001), *State v. Adams*, 144 Wn.App. 100 (2008), *see: Spokane v. Hays*, 99 Wn.App. 653 (2000), *but see: Maryland v. Wilson*, 137 L.Ed.2d 41 (1997), thus evidence obtained as result of seizure is suppressed; *cf.: State v. McIntosh*, 42 Wn.App. 573 (1986), *State v. Reynolds*, 144 Wn.App. 282 (2001), *State v. Reichenbach*, 153 Wn.2d 126 (2004); III.

***State v. Cantrell*,** 124 Wn.2d 183 (1994)

**Consent** to search a motor vehicle given by passenger with common authority over it supports search of vehicle where driver does not object, and where driver is a permissive driver and not a mere passenger, *distinguishing* *State v. Leach*, 113 Wn.2d 735 (1989), as privacy interest in automobile is less than in an office or home; overrules, in part, *State v. Cantrell*, 70 Wn.App. 340 (1993); *see:* *United States v. Matlock*, 38 L.Ed.2d 242 (1974), *Schneckloth v. Bustamonte*, 36 L.Ed.2d 854 (1973), *State v. Vanhollebeke*, 190 Wn.2d 315 (2018); 9-0.

***State v. Chapin***, 75 Wn.App. 460, 462-9 (1994)

Police stop vehicle for license plate **infraction**, passenger not wearing seat belt, ask for identification, find warrant, arrest passenger, search vehicle, find drugs; officer testifies that the traffic stop was made because he wanted to talk to passengers about why vehicle was behind a closed garage; held: but for the stop, the warrant would not have been found, no intervening events to dispel taint, *State v. Aranguren*, 42 Wn.App. 452, 457 (1985); test to determine if stop was **pretextual**: would a reasonable officer have made the stop in the absence of an improper purpose, *but see:* *State v. Ladsen*, 86 Wn.App. 822 (1997), *cf.:* *State v. Goodin*, 67 Wn.App. 623 (1992), *State v. Meckelson*, 133 Wn.App. 431 (2006); here, the stop would have been made whether or not the officer wanted to investigate why the vehicle was behind the garage, thus no pretext; *accord:* *State v. Blumenthal*, 78 Wn.App. 82 (1995) (CONST. Art I, § 7), *but see:* *State v. Coutier*, 78 Wn.App. 239 (1995), *Whren v. United States*, 135 L.Ed.2d 89 (1996), *see: State v. Weber*, 159 Wn.App. 779, 787-91 (2011); defendant has burden of proof as to invalidity of warrant; I.

***State v. Graham***, 78 Wn.App. 44, 51-2 (1995)

Affidavit asserts that informants heard one suspect in a residence tell another suspect to "go out to the truck and get the 'weed,' which he did," no further reference to truck, warrant authorizes search of premises and a specific pickup truck parked next to and slightly in the public street at the house, which police find and search; held: vehicle parked in a space that lawfully could be used by anyone coming to the house is not within **curtilage**, *State v. Niedergang*, 43 Wn.App. 656, 661-2 (1986); II.

***State v. Coutier***, 78 Wn.App. 239 (1995)

Police stop vehicle for **infraction**, defendant doesn't produce registration, officer asks defendant to search glove box, defendant is hesitant, does so but tries to block officer's view of contents of glove compartment, officer, with flashlight, perseveres, sees drugs, testifies he was not in fear; held: because officer saw no cause for alarm, there is no basis for applying an objective test to conclude that a hypothetical reasonable officer would have reacted differently; defendant's blocking view of glove box was not a furtive gesture, rather it was communication of no consent, thus search was improper; *see also:* *State v. Henry*, 80 Wn.App. 544 (1996); III.

***State v. Mitzlaff***, 80 Wn.App. 184 (1995)

Police arrest defendant for DUI, find drugs in cab of truck, find duct tape, search under hood, find more drugs; held: search incident to arrest does not extend to **engine compartment** as it is not within arrestee's immediate control from which he might obtain a weapon or destroy evidence, *State v. Stroud*, 106 Wn.2d 144, 152 (1986), *see:* *State v. Johnson*, 128 Wn.2d 431 (1996), *State v. Vrieling*, 144 Wn.2d 489 (2001); II.

***State v. Henry***, 80 Wn.App. 544 (1995)

Police stop defendant for traffic **infraction**, obtain permission to search vehicle, observe scanner in car, defendant nervous, patdown defendant and seize drugs; held: while initial stop for infraction was lawful, defendant's nervousness did not justify further detention beyond what was necessary to cite, RCW 46.61.021, *State v. Tijerina*, 61 Wn.App. 626, 628-9 (1991), *State v. Coutier*, 78 Wn.App. 239 (1995), *State v. Terrazas*, 71 Wn.App. 873 (1993), *State v. Barwick*, 66 Wn.App. 706 (1992), *State v. Glossbrener*, 146 Wn.2d 670 (2002), *State v. Veltri*, 136 Wn.App. 818 (2007), *State v. Gatewood*, 163 Wn.2d 534 (2008), *State v. Cruz*, 195 Wn.App. 120 (2016), *review dismissed,, on other grounds* 189 Wn.2d 588 (2017), *cf.: State v. Larson*, 88 Wn.App. 849 (1997); III.

***State v. Johnson***, 128 Wn.2d 431 (1996)

Incident to arrest for driving while license suspended, police search sleeping area of Peterbilt semi-truck, find drugs; held: sleeping area is readily accessible from passenger compartment and is thus subject to a lawful search incident to arrest under 4th Amendment, *New York v. Belton*, 69 L.Ed.2d 768 (1981), and CONST. Art. 1, § 7, *State v. Stroud*, 106 Wn.2d 144, 152 (1986), *State v. Vrieling*, 144 Wn.2d 489 (2001), *see also: State v. Mitzlaff*, 80 Wn.App. 184 (1995), *Thornton v. United States*, 158 L.Ed.2d 905 (2004), *cf.: State v. Kypreos*, 110 Wn.App. 612, 624-28 (2002), 115 Wn.App. 207 (2002), *Arizona v. Gant*, 173 L.Ed.2d 485 (2009), *State v. Valdez*, 167 Wn.2d 761 (2009), *but see: State v. Snapp*, 174 Wn.2d 177 (2012), *State v. Duncan*, 185 Wn.2d 430, 438-41 (2016); *affirms State v. Johnson*, 77 Wn.App. 441 (1995); III.

***State v. Ozuna***, 80 Wn.App. 684 (1996)

Police receive report of car prowl, while searching neighborhood, officer observes car parked behind bushes near area of report, car registered to person whom officer knows has a record, officer looks into car with flashlight, sees expensive-looking briefcase, opens door, seizes briefcase with identification, calls owner of briefcase who reports it stolen; held: an unoccupied car is not subject to a *Terry* stop absent arrest of an occupant; search of a parked, unoccupied vehicle must be pursuant to a warrant or exigent circumstances, *State v. Patterson*, 112 Wn.2d 731 (1989), *State v. Gibson*, 152 Wn.App. 945, 953-58 (2009), *cf.: State v. Barnes*, 158 Wn.App. 602 (2010), here no probable cause existed to tie the car to the vehicle prowl, *see: State v. Gwinner*, 59 Wn.App. 119, 121-4 (1990), *State v. Young*, 28 Wn.App. 412 (1981), no exigencies exist as there was no evidence that connected any suspects to this car such that police would believe that evidence might be removed or car was mobile, *Gwinner, supra*, at 124, *Patterson, supra*, at 736, *Young, supra*, at 419; illegally parked car does not obviate a reasonable expectation of privacy absent a trespass, *see: State v. Cleator*, 71 Wn.App. 217 (1993), *but see: State v. Pippin*, 200 Wn.App. 826 (2017); III.

***Whren v. United States***, 135 L.Ed.2d 89 (1996)

Police may stop vehicles upon probable cause that a traffic law has been violated irrespective of motive of officers, *Arkansas v. Sullivan*, 149 L.Ed.2d 994 (2001), or **pretextual** nature of the stop, *but see: State v. Ladson*, 138 Wn.2d 343 (1999); selective enforcement based on race may be challenged under the equal protection clause, not the Fourth Amendment; *but*

*see:* *State v. Michaels*, 60 Wn.2d 638, 645 (1962), *State v. Blumenthal*, 78 Wn.App. 82 (1995); 9-0.

***Ohio v. Robinette***, 136 L.Ed.2d 347 (1996)

Police stop defendant for speeding, obtain license, warn him, return license, then ask permission to search car, defendant agrees, drugs found; held: police are not obliged to inform detainees that they are free to go before a consent to search may be deemed voluntary, *Schneckloth v. Bustamonte*, 36 L.Ed.2d 854 (1973); 8-1.

***State v. Nelson***, 81 Wn.App. 249 (1996)

Police may make a custodial arrest, and search incident to that arrest, for **negligent driving**, a nonjailable misdemeanor, former RCW 46.61.525, where the driving was "truly dangerous," at 256, pursuant to RCW 10.31.100(3)(f), 46.64.015(2) and constitutions, *see: State v. Walker*, 157 Wn.2d 307 (2006); II.

***State v. Lynch***, 84 Wn.App. 467, 477-9 (1996)

Police receive report of car prowl, respond to vehicle, find it unlocked, open door, look for ownership documents, pick up checkbook, find drugs; held: search of van was reasonable under **community caretaking function**, *State v. Mennegar*, 114 Wn.2d 304 (1990), *State v. Hutchison*, 56 Wn.App. 863 (1990), *see:* *State v . Peck,* 194 Wn.2d 148 (2019); less intrusive alternative of checking ownership via license plate is "apparent from the advantage of hindsight, but is not necessarily a proper 'gauge by which to judge the officer's actions'"; III.

***Maryland v. Wilson***, 137 L.Ed.2d 41 (1997)

Following stop for traffic infraction, police may order driver and passengers to exit vehicle, *Pennsylvania v. Mimms*, 54 L.Ed.2d 331 (1977), *but see: State v. Mendez*, 137 Wn.2d 208 (1999), *State v. Parker*, 139 Wn.2d 486 (1999), *State v. Rankin*, 151 Wn.2d 689 (2004), *State v. Brown*, 154 Wn.2d 787 (2005), *overruled on other grounds, State v. Jasper*, 174 Wn.2d 96 (2012), *see: Spokane v. Hays*, 99 Wn.App. 653 (2000), *State v. Nelson*, 108 Wn.App. 918 (2001), *Brendlin v. California*, 168 L.Ed.2d 132 (2007), *see also: State v. Flores*, 186 Wn.2d 506 (2016); 7-2.

***State v. Rife***, 133 Wn.2d 140 (1997)

Following a traffic stop (here, jaywalking), police may not detain for a warrant check as RCW 46.61.020 authorizes detention only for time necessary to identify, check license status and issue citation; reverses *State v. Rife*, 81 Wn.App. 258 (1996); legislatively overruled, RCW 46.61.020; 7-2.

***State v. Perea***, 85 Wn.App. 342 (1997)

Police observe defendant driving, know that his license was suspended from a records check seven days earlier, activate emergency lights, defendant exits, closes door and walks away, is ordered to return to vehicle, defendant refuses, is arrested, police confiscate keys, search car, find illegal gun; held: seven-day-old information about **suspended license** constitutes articulable facts to support a detention, *State v. Pressley*, 64 Wn.App. 591, 595 (1992), *State v. Quintero-Qunitero*, 60 Wn.App. 902 (1991), *State v. Marcum*, 116 Wn.App. 526, 531-33 (2003); custodial

arrest for DWLS is proper, see: *State v. Reding*, 119 Wn.2d 685 (1992); defendant was not seized before he locked his door because seizure does not occur until suspect submits to a show of authority or is touched by officer, *California v. Hodari D.*, 113 L.Ed.2d (1991), *Torres v. Madrid*, ___ U.S. ___, 141 S.Ct. 989, 209 L.Ed.2d 190 (2021), *but see:* *State v. Young*, 135 Wn.2d 498 (1998), *State v. Patton*, 167 Wn.2d 379, 387-88 (2009), locking of car was a lawful act, search of vehicle incident to arrest does not extend to a car locked before seizure of defendant, thus gun suppressed, *State v. Stroud*, 106 Wn.2d 144 (1986), *State v. Johnston*, 107 Wn.App. 280 (2001), *State v. Turner*, 114 Wn.App. 653 (2002), *State v. Webb*, 147 Wn.App. 264 (2008), *State v. Quinlivin*, 142 Wn.App. 960 (2008), *State v. Adams*,169 Wn.2d 487 (2010); II.

***State v. Seitz***, 86 Wn.App. 865 (1997)

Police observe defendant-passenger in vehicle speaking with a man on a sidewalk, do not observe drugs, money or anything else change hands, stop vehicle for traffic infraction, ask passenger to get out, she removes her purse, police tell her not to leave, police find drugs in driver's purse, ask passenger if she has drugs, she says she does, police look in passenger's purse; held: valid arrest of driver does not justify search of a purse known to belong to passenger where purse is not in the car but rather is on passenger's person outside the car, *State v. Parker*, 139 Wn.2d 486 (1999), *State v. Nelson*, 89 Wn.App. 179 (1997), *State v. O'Day*, 91 Wn.App. 244 (1998), *see also: State v. Flores*, 186 Wn.2d 506 (2016), *cf.:* *State v. Jackson*, 107 Wn.App. 646 (2001), distinguishing *State v. Fladebo*, 113 Wn.2d 388 (1989); police telling passenger she could not leave is a seizure, here without any basis, *Brendlin v. California*, 168 L.Ed.2d 132 (2007); II.

***State v. Armenta***, 134 Wn.2d 1 (1997)

Officer provides mechanical assistance to two men, asks to see identification, observes large amount of cash, asks where the money came from, is told by one he earned it on a ranch but doesn't remember where, other says he sold a car, lacks bill of sale but still has title, officer calls in names, discovers one has suspended license, other has no driving record at all, takes money and locks it in patrol car, obtains permission to search, finds drugs; held: request for identification and questioning relating to identity is not a seizure, *State v. Aranguren*, 42 Wn.App. 452, 455 (1985), *Immigration & Naturalization Serv. V. Delgado*, 80 L.Ed.2d 247 (1984), *State v. Ellwood*, 52 Wn.App. 70, 73 (1988), *State v. O'Neill*, 148 Wn.2d 564 (2003), *State v. Cerrillo*, 122 Wn.App. 341 (2004), *State v. Afana*, 147 Wn.App. 843 (2008), *aff'd, on other grounds*, 169 Wn.2d 169 (2010), *cf.:* *State v. Cook*, 104 Wn.App. 186 (2001); once police placed money in patrol car, defendants were seized; officer did not arrest driver for driving with suspended license, thus search was not incident to arrest, distinguishing *State v. Reding*, 119 Wn.2d 685, 691 (1992), there was no hope of discovering information about the driving offense from the search, *State v. Cantrell*, 70 Wn.App. 340 (1993), *aff'd on other grounds,* 124 Wn.2d 183 (1994), there was no articulable suspicion, *State v. Tijeriña*, 61 Wn.App. 626 (1991), consent occurred immediately after the seizure, thus not vitiated, *State v. O'Day*, 91 Wn.App. 244 (1998); reverses *State v. Armenta*, 83 Wn.App. 118 (1996); 6-3.

***State v. Larson***, 88 Wn.App. 849 (1997)

While stopping vehicle for speeding, police observe driver/sole occupant leaning forward and making movements towards floorboard, have defendant get out, trooper puts head in cab through open door, sees and seizes drugs under driver's seat; held: furtive gestures justify search limited to the area defined by the suspicious movements for safety of the officer, as driver will ultimately have access to cab to look for documents for traffic stop, *Michigan v. Long*, 77 L.Ed.2d 1201 (1983), *State v. Horrace*, 144 Wn.2d 386 (2001), *State v. Kennedy*, 107 Wn.2d 1 (1986), *State v. Wilkinson*, 56 Wn.App. 812 (1990), *State v. Chang*, 147 Wn.App. 490, 499-98 (2008), *see: State v. Bradley*, 105 Wn.App. 30, 36-38 (2001), distinguishing *State v. Terrazas*, 71 Wn.App. 873, 879 (1993), *cf.: State v. Valdez*, 167 Wn.2d 761 (2009), *State v. Snapp*, 174 Wn.2d 177 (2012), *State v. Duncan*, 185 Wn.2d 430, 438-41 (2016); I.

***State v. Nelson***, 89 Wn.App. 179 (1997)

Police stop vehicle for infraction, passenger has warrant, order driver to exit car, leave purse, search purse, find drugs; held: police had no authority to order driver to leave purse in car, search of purse not in car was not justified absent articulable suspicion, *State v. Parker*, 139 Wn.2d 486 (1999), *State v. Seitz*, 86 Wn.App. 865, 869 (1997), *cf.: State v. Jackson*, 107 Wn.App. 646 (2001), *see also: State v. Flores*, 186 Wn.2d 506 (2016), purse was not voluntarily in car thus suppression affirmed; III.

***State v. White***, 135 Wn.2d 761 (1998)

Police lawfully impound vehicle, open trunk by a trunk release button in unlocked glove compartment, find drugs; held: police may not examine the locked trunk of an impounded vehicle in the course of an **inventory** search, absent manifest necessity, whether a key or interior release button is used to unlock the trunk, *State v. Houser*, 95 Wn.2d 143 (1980), *State v. VanNess*, 186 Wn.App. 148 (2015), *State v. Wisdom*, 187 Wn.App. 652 (2015), *cf.: State v. Ferguson*, 131 Wn.App. 694 (2006), *State v . Peck*, 194 Wn.2d 148 (2019), *reversing State v. White*, 83 Wn.App. 770 (1996); 7-2.

***State v. Takesgun***, 89 Wn.App. 608 (1998)

Trooper stops vehicle for infraction, illegally detains driver and searches trunk, finds drugs, arrests passenger, finds drugs on passenger's person, trial court holds passenger lacks standing to challenge search; held: unlawful stop or detention of driver and vehicle is an unlawful detention of the passenger, who can challenge the lawfulness of the stop, *Brendlin v. California*, 168 L.Ed.2d 132 (2007); III.

***Wyoming v. Houghton***, 143 L.Ed.2d 408 (1999)

Where there is probable cause to search a readily-mobile vehicle, police may search containers belonging to passengers, *but see: State v. Parker*, 139 Wn.2d 486 (1999), *State v. Jones*, 146 Wn.2d 328 (2002), *State v. Reichenbach*, 153 Wn.2d 126 (2004); 6-3.

***Florida v. White***, 143 L.Ed.2d 748 (1999)

Police seize vehicle parked in public place without a warrant pursuant to civil forfeiture act, search vehicle, find drugs; held: where there is probable cause to seize a vehicle parked in public, no warrant is necessary, and the vehicle may be searched without a warrant; 7-2.

***Maryland v. Dyson***, 144 L.Ed.2d 442 (1999)

If a car is readily mobile and probable cause exists to believe it contains contraband, it may be searched without a separate exigency requirement, *Pennsylvania v. Labron*, 135 L.Ed.2d 1031 (1996), *United States v. Ross*, 72 L.Ed.2d 572 (1982), *but see: State v. Snapp*, 174 Wn.2d 177 (2012), *State v. Duncan*, 185 Wn.2d 430, 438-41 (2016), *Collins v. Virginia*, 584 U.S. ___, 138 S.Ct. 1663 (2018); 7-2.

***State v. Mendez***, 137 Wn.2d 208 (1999)

Police stop vehicle for infraction, order passenger to stay in vehicle, passenger runs away, is convicted of obstructing, RCW 9A.76.020(1); held: absent reasonable suspicion or danger to officer, police may not detain passenger by obliging him/her to remain in vehicle, CONST. art. I, § 7, distinguishing *Maryland v. Wilson*, 137 L.Ed.2d 41 (1997), reversing *State v. Mendez*, 88 Wn.App. 785 (1997), *see: Spokane v. Hays*, 99 Wn.App. 653 (2000), *State v. Reynolds*, 144 Wn.2d 282 (2001), *State v. Rankin*, 151 Wn.2d 689 (2004), *State v. Reichenbach*, 153 Wn.2d 126 (2004), *State v. Brown*, 154 Wn.2d 787 (2005), *overruled on other grounds, State v. Jasper*, 174 Wn.2d 96 (2012), *State v. Adams*, 144 Wn.App. 100 (2008), *cf.: State v. Horrace*, 144 Wn.2d 386 (2001), *State v. Nelson*, 108 Wn.App. 918 (2001), *Brendlin v. California*, 168 L.Ed.2d 132 (2007), *Arizona v. Johnson*, 172 L.Ed.2d 694 (2009); 9-0.

***State v. Ladson***, 138 Wn.2d 343 (1999)

Gang-unit officers who do not make routine traffic stops tail suspected gang member's car seeking justification to stop the car, observe infraction, pull over suspect vehicle, discover driver's license is suspended, arrest driver, search, find guns and drugs; held: **pretextual** traffic stops violate CONST. Art. I, § 7, *but see: Whren v. United States*, 135 L.Ed.2d 89 (1996); in determining whether stop is pretextual, court should consider totality, including subjective intent of officer and objective reasonableness of the officer's behavior; reverses *State v. Ladson*, 86 Wn.App. 822 (1997); *see: State v. Chapin*, 75 Wn.App. 460, 462-69 (1994), *State v. DeSantiago*, 97 Wn.App. 446 (1999), *State v. Rainey*, 107 Wn.App. 129, 138-39 (2001), *State v. Myers*, 117 Wn.App. 93 (2003), *State v. Meckelson*, 133 Wn.App. 131 (2006), *State v. Nichols*, 161 Wn.2d 1 (2007), *State v. Montes-Malindas*, 144 Wn.App. 254 (2008), *State v. Gibson*, 152 Wn.App. 945, 951-53 (2009), *State v. Johnson*, 155 Wn.App. 270 (2010), *overruled, on other grounds, State v. Byrd*, 162 Wn.App. 612 (2011), *reversed, on other grounds*, 178 Wn.2d 611 (2013), *State v. Weber*, 159 Wn.App. 779, 787091 (2011), *but see: State v. Hoang*, 101 Wn.App. 732 (2000), *State v. McLean*, 178 Wn.App. 236 (2014), *State v. Arreola*, 176 Wn.2d 284 (2012), *Matter of Pleasant*, 21 Wn.App.2d 320 (2022); 5-4.

***State v. Parker***, 139 Wn.2d 486 (1999)

Police stop vehicle for infraction, lawfully arrest driver, passenger exits vehicle, police search purse they know belongs to passenger, find drugs; held: full-blown search incident to arrest does not apply to an unarrested passenger or to personal belongings which police know or should know belong to the passenger who is not independently suspected of criminal activity, reversing *State v. Parker*, 88 Wn.App. 273 (1997) and *State v. Hunnel*, 89 Wn.App. 638 (1998); *accord: State v. Jones*, 146 Wn.2d 328 (2002), *State v. Reichenbach*, 153 Wn.2d 126 (2004), *State v. Flores*, 186 Wn.2d 506 (2016), *cf.: State v. Horrace*, 144 Wn.2d 386 (2001), *State v. Jackson*, 107 Wn.App. 646 (2001), *State v. Bello*, 142 Wn.App. 930 (2008), *see: Pers. Restraint of Isadore*, 151 Wn.2d 294, 302 (2004); (4 justices concur; 1 justice would hold that passenger's

belongings may be searched for weapon only; 1 justice would hold that police may not search items that they actually know belong to passenger; 2 dissents).

***State v. Chelly***, 94 Wn.App. 254 (1999)

Police stop vehicle for infraction, passenger is not wearing seat belt, lacks identification and states he never had identification, officer testifies at suppression hearing that in his experience it is unusual for an adult to state he never had identification and that he was likely to give a false name to conceal his identity, probably due to warrants, passenger is removed from vehicle, gives false name, false birthdate, correct social security number, police run warrant information, discover warrants, arrest passenger, search vehicle, find drugs; held: police had specific articulable facts to detain to ascertain true identity, as one stopped for infraction (seat belt violation) must identify self, RCW 46.61.021, officer had reason to believe passenger would give a false name, thus detention was proper, *State v. Cook*, 104 Wn.App. 186 (2001), distinguishing *State v. Cole*, 73 Wn.App. 844 (1994), *State v. Barwick*, 66 Wn.App. 706 (1992); I.

***State v. DeSantiago***, 97 Wn.App. 446 (1999)

Police suspect defendant was involved in a drug transaction, follow him until he commits a traffic violation, discover warrant, search, find drugs; held: even though officer does make routine traffic stops, here he was watching for narcotic activity, thus stop was a **pretext** and evidence must be suppressed, *State v. Ladson*, 138 Wn.2d 343 (1999), *State v. Myers*, 117 Wn.App. 93 (2003), *State v. MeKelson*, 133 Wn.App. 431 (2006), *State v. Montes-Malindas*, 144 Wn.App. 254 (2008), *see: State v. Rainey*, 107 Wn.App. 128, 138-39 (2001), *State v. Nichols*, 161 Wn.2d 1 (2007), *State v. Gibson*, 152 Wn.App. 945, 951-53 (2009), *cf.: State v. Weber*, 159 Wn.App. 779, 787-91 (2011), *State v. McLean*, 178 Wn.App. 236 (2014), *State v. Arreola*, 176 Wn.2d 284 (2012), *Matter of Pleasant*, 21 Wn.App.2d 320 (2022); III.

***Spokane v. Hays***, 99 Wn.App. 653 (2000)

Police stop car for infraction, observe **passenger** manipulating an article of clothing, order passenger to open window, which he refuses, pull passenger from car who then refuses to cooperate with search, is convicted of obstructing; held: whether it is reasonable to order a passenger to get out or remain in a car depends upon relative numbers of officers vs. vehicle occupants, behavior of occupants, time and place of stop, traffic at scene, officer's familiarity with occupants, *State v. Mendez*, 137 Wn.2d 208, 220-21 (1999), *see: State v. Rankin*, 151 Wn.2d 689 (2004), *State v. Pettit*, 160 Wn.App. 716 (2011); here, passenger's behavior justified ordering him out of car, *State v. Reynolds*, 144 Wn.2d 282 (2001), *State v. Horrace*, 144 Wn.2d 386 (2001); even if initial traffic stop was unjustified, obstructing charge is valid, as citizen must comply and rely on legal recourse, *State v. Hudson*, 56 Wn.App. 490, 496-97 (1990), *State v. Barnes*, 96 Wn.App. 217, 224-25 (1999), *State v. Valentine*,132 Wn.2d 1, 19 (1997); III.

***State v. Hoang***, 101 Wn.App. 732 (2000)

Patrol officer observes likely drug transaction, then sees driver involved in transaction turn without a signal, stops vehicle, driver's license is suspended, officer arrests and finds drugs, trial court finds that officer would have stopped defendant for infraction even if he did not observe the transaction, defense does not challenge finding of fact; held: under totality of

circumstances, the trial court's unchallenged finding of fact supports conclusion that stop was not an unconstitutional **pretext**, distinguishing *State v. Ladson*,138 Wn.2d 343 (1999), *State v. DeSantiago*, 97 Wn.App. 446 (1999), *but see: State v. Myers*, 117 Wn.App. 93 (2003), *State v. Mekelson*, 133 Wn.App. 431 (2006), *State v. Montes-Malindas*, 144 Wn.App. 254 (2008), *see: State v. Nichols*, 161 Wn.2d 1 (2007); fact that officer did not cite for turn signal violation or for DWLS is a nondispositive factor, police need not issue every conceivable citation as a hedge against pretext allegation; I.

***City of Indianapolis v. Edmond***, 148 L.Ed.2d 333 (2000)

Police set up drug roadblock, stop a predetermined number of vehicles, ask for identification, look for signs of impairment, conduct open-view examination of cars, drug dog walks around vehicles, search if particularized suspicion develops; held: because primary purpose of stop is to detect evidence of ordinary criminal wrongdoing, as opposed to border, *United States v. Martinez-Fuerte*, 49 L.Ed.2d 1116 (1976), or sobriety checkpoints, *Michigan Dept. of State Police v. Sitz*, 110 L.Ed.2d 412 (1990), drug roadblock violates Fourth Amendment, *see: Delaware v. Prouse*, 59 L.Ed.2d 660 (1979), *Illinois v. Lidster*, 157 L.Ed.2d 843 (2004), *Illinois v. Caballes*, 160 L.Ed.2d 842 (2005); 6-3.

***State v. Reynolds***, 144 Wn.2d 282 (2001)

Lone officer lawfully stops vehicle, observes coat in vehicle, lawfully arrests driver, passenger leaves car, officer asks passenger to stay in car, when officer returns to suspect's car and observes coat stuffed underneath car, searches it, finds drugs; held: police may order passenger into or out of vehicle only if officer has legitimate safety concerns, *State v. Mendez*, 137 Wn.2d 208 (1999), factors include (1) number of officers vs. number of occupants, (2) time of day, (3) location of stop, (4) traffic at scene, (5) officer knowledge of occupants, and (6) whether officer arrested driver, *State v. Parker*, 139 Wn.2d 486 (1999), *State v. Horrace*, 144 Wn.2d 386 (2001); here, passenger abandoned coat without a causal nexus to alleged unlawful conduct by police, thus seizure of drugs from coat was lawful, *cf.: State v. Reichenbach*, 153 Wn.2d 126 (2004), *State v. Hamilton*, 179 Wn.App. 870 (2014); 9-0.

***State v. Horrace***, 144 Wn.2d 386 (2001)

Police stop vehicle for speeding, driver has suspended license, while doing radio check trooper observes driver "doing something between seats," arrests driver, pats down passenger, finds weapon and drugs; held: furtive gesture of driver, *State v. Wilkinson*, 56 Wn.App. 812 (1990), *State v. Larson*, 88 Wn.App. 849 (1997), in close proximity to passenger wearing bulky closed jacket justified patdown of passenger, *State v. Kennedy*, 107 Wn.2d 1, 11 (1986), distinguishing *State v. Parker*, 139 Wn.2d 486 (1999), *State v. Mendez*, 137 Wn.2d 208 (1999), *State v. Reichenbach*, 153 Wn.2d 126 (2004), *cf.: State v. Adams*, 144 Wn.App. 100 (2008), *State v. Flores*, 186 Wn.2d 506 (2016); 6-3.

***State v. Vrieling***, 144 Wn.2d 489 (2001)

Incident to arrest, police may search living quarters of a motor home, not serving as a fixed residence, where such quarters are accessible from the passenger compartment, *State v. Johnson*, 128 Wn.2d 431 (1996), CONST. Art I, § 7, *but see: State v. Kypreos*, 110 Wn.App. 612, 624-28 (2002), 115 Wn.App. 207 (2002), *Arizona v. Gant*, 173 L.Ed.2d 485 (2009), *State v.*

*Snapp*, 174 Wn.2d 177 (2012), *State v. Duncan*, 185 Wn.2d 430, 438-41 (2016); affirms *State v. Vrieling*, 97 Wn.App. 152 (1999); 6-3.

***State v. Cook***, 104 Wn.App. 186 (2001)

During traffic stop, police ask passenger for name, passenger gives a name which officer knows is wrong, demands identification, passenger opens cigarette box where he keeps his license, drugs fall out; held: an officer's request for passenger's identification is "unlikely to constitute a Fourth Amendment seizure," *State v. Armenta*, 134 Wn.2d 1, 11 (1997), *State v. Afana*, 147 Wn.App. 843 (2008), *aff'd, on other grounds,* 169 Wn.2d 169 (2010), *but see: State v. Rankin*, 151 Wn.2d 689 (2004), *State v. Brown*, 154 Wn.2d 787 (2005), *overruled on other grounds, State v. Jasper,* 174 Wn.2d 96 (2012), officer placing himself outside the passenger door so passenger couldn't leave is not a seizure where passenger never testifies that he wanted to leave, thus his freedom of movement was not restrained, *but see: State v. Byrd*, 110 Wn.App. 259 (2002), *Brendlin v. California*, 168 L.Ed.2d 132 (2007), *Arizona v. Johnson*, 172 L.Ed.2d 694 (2009), officer was justified in demanding identification when passenger lied about his identity, *State v. Chelly*, 94 Wn.App. 254, 261 (1999), *cf.: State v. Barwick*, 66 Wn.App. 706 (1992); II.

***State v. Penfield***, 106 Wn.App. 157 (2001)

Officer runs license check, finds female owner's license is suspended, stops vehicle, discovers driver is male, asks for license, driver states his license is suspended, is arrested, searched, drugs found; held: while police may stop a vehicle when they learn owner's privilege to drive is suspended, RCW 46.20.349, *Seattle v. Yeager*, 67 Wn.App. 41 (1992), *State v. Phillips*, 126 Wn.App. 585 (2005), *Kansas v. Glover,* ___ U.S. ___, 140 S.Ct. 1183, 206 L.Ed.2d 412 (2020), *cf.: State v. Vanderpool*, 145 Wn.App. 81-85 (2008), once police determine that driver is not the owner, they may not, absent more, continue to detain, *State v. Creed*, 179 Wn.App. 534 (2014); III.

***State v. Jackson***, 107 Wn.App. 646 (2001)

Police lawfully stop vehicle, arrest driver for warrant, passenger asks for his jacket on back seat, police ask driver who owns jacket, driver says it's his, police search jacket for identification, find drugs, arrest passenger; held: where there is genuine confusion over whether an item in vehicle belongs to nonarrested passenger or driver, police may investigate the item, *see: State v. Parker*, 139 Wn.2d 486, 505 (1999); I.

***State v. Jones***, 146 Wn.2d 328 (2002)

Police lawfully arrest driver, ask passenger for identification which she produces from her purse, passenger is told to leave purse in her car and is placed in patrol car but told she is not under arrest, police search purse, find stolen gun, driver says it's his, driver is charged; held: because there is a direct relationship between the challenged police action (search of purse) and the evidence used against defendant, and because possession is an element, driver has automatic standing to challenge the search, *State v. Simpson*, 95 Wn.2d 170, 180 (1980); search of purse was impermissible as police knew the purse belonged to unarrested passenger, was not in driver's control, *State v. Parker*, 139 Wn.2d 486 (1999), contents suppressed as to driver, *State v. Bello*, 142 Wn.App. 930 (2008); reverses *State v. Jones*, 104 Wn.App. 966 (2001); 9-0.

***State v. Byrd***, 110 Wn.App. 259 (2002)

Police observe vehicle with expired tabs, observe trip permit in back window, pull over car to see if permit is valid, after stop officer observes equipment violation and that passenger is not wearing seat belt, discovers that permit is valid, finds warrant for passenger, arrests, searches, finds drugs; held: passenger has standing to challenge traffic stop, stopping vehicle to verify validity of trip permit is impermissible, equipment violation cannot justify stop since it was seen after the stop; I.

***State v. Kypreos***, 110 Wn.App. 612, 624-28 (2002) ,115 Wn.App. 207 (2002)

A trailer on private property not attached to a motor vehicle is a dwelling, not a vehicle for purposes of the automobile exception, *see: California v. Carney*, 85 L.Ed.2d 406 (1985), *State v. Johnson*, 128 Wn.2d 431 (1996), *State v. Vrieling*, 144 Wn.2d 489 (2001), *Collins v. Virginia*, 584 U.S. ___, 138 S.Ct. 1663 (2018); I.

***State v. Glossbrener***, 146 Wn.2d 670 (2002)

Officer stops defendant, alone in vehicle, for infraction, observes defendant reach toward passenger side, smells alcohol, leaves defendant in car while he checks for warrants, defendant then passes field tests, officer calls for backup, searches car, finds drugs; held: while furtive gesture is often a basis to search vehicle for weapons, *State v. Kennedy*, 107 Wn.2d 1 (1986), even where suspect is outside the vehicle, *State v. Larson*, 88 Wn.App. 849 (1997), *but see: Arizona v. Gant*, 173 L.Ed.2d 485 (2009), here where officer allowed suspect to remain in vehicle, *see: State v. Horace*, 144 Wn.2d 386, 388-89 (2001), had completed his investigation and had decided not to cite or arrest, officer did not have an objectively reasonable belief that defendant was armed and dangerous, *State v. Cruz*, 195 Wn.App. 120 (2016), *reversed, on other grounds*, 189 Wn.2d 588 (2017); 9-0.

***State v. McKinney***, 148 Wn.2d 20 (2002)

In consolidated cases, police run license plate number in DOL database, discover that (1) driver's license is suspended, (2) a no-contact order exists and passenger is protected party, (3) driver has a warrant, all are arrested; held: drivers have no protected privacy interest in DOL driver's record pursuant to Fourth Amendment reasonable expectation of privacy analysis nor art. I, § 7 expectation of privacy which a citizen should be entitled to hold, *State v. Myrick*, 102 Wn.2d 506, *State v. McCready*, 123 Wn.2d 260, 270 (1994), *State v. Harlow*, 85 Wn.App. 557 (1997), *State v. Hathaway*, 161 Wn.App. 634, 641-45 (2011), distinguishing *State v. Maxfield;* affirms *State v. Martin*, 106 Wn.App. 850 (2001); 9-0.

***State v. Balch***, 114 Wn.App. 55 (2002)

Officer stops defendant for infraction, determines his license is suspended, arrests, searches, finds container with marijuana, officer's supervisor directs officer to cite and release; held: because police had probable cause to arrest and did arrest, search incident to arrest was proper, irrespective of subsequent decision to cite and release, distinguishing *State v. McKenna*, 91 Wn.App. 554 (1998), *see: State v. O'Neill*, 148 Wn.2d 564 (2003), *but see: State v. Radka*,120 Wn.App. 43 (2004), *Arizona v. Gant*, 173 L.Ed.2d 485 (2009), *State v. Snapp*, 174 Wn.2d 177 (2012); II.

***State v. Turner***, 114 Wn.App. 653, 657-59 (2002)

Police observe suspect urinating in public standing near open driver's side door of truck, arrest, search truck, find illegal weapon; held: because evidence at hearing fails to establish distance between defendant and truck, trial court could not find that the vehicle was under defendant's immediate control, a finding necessary to rely on search of vehicle incident to arrest, *see: Arizona v. Gant*, 173 L.Ed.2d 485 (2009), *State v. Valdez*, 167 Wn.2d 761 (2009), *State v. Adams*, 169 Wn.2d 487 (2010); II.

***Maryland v. Pringle***, 157 L.Ed.2d 769 (2003)

Police stop car, search, find $763 cash in glove compartment, drugs in back-seat armrest accessible to driver and two passengers, ask three suspects about ownership of drugs and money, all three offer no information, arrest all three, defendant-passenger confesses; held: reasonable officer could conclude that all in vehicle possessed drugs, thus arrest was lawful, *but see: State v. Grande*, 164 Wn.2d 135 (2008); 9-0.

***State v. O'Neill***, 148 Wn.2d 564 (2003)

Officer observes car in parking lot of recently burglarized business, approaches, defendant says he drove there until his car broke, officer asks for identification, driver responds his license is suspended, officer asks defendant to step out of car, observes "cook spoon" on floor, asks repeatedly for consent to search which is eventually granted, police find drugs; held: approaching and asking for identification is not a seizure, *State v. Young*, 135 Wn.2d 498 (1998), *State v. Armenta*, 134 Wn.2d 1, 11 (1997), *aff'd, on other grounds,* 169 Wn.2d 169 (2010), *State v. Cerillo*, 122 Wn.App. 341 (2004), *State v. Afana*, 147 Wn.App. 843 (2008), effectively overruling *State v. Markgraf*, 59 Wn.App. 509 (1990); when asking defendant to step outside, officer had probable cause to arrest for driving while license suspended, thus defendant was seized at that point; observation of cook spoon meets plain view test; pursuant to CONST. art. I, § 7, a custodial arrest is a prerequisite to a search incident to arrest, because defendant was not arrested, drugs must be suppressed, overruling *State v. Brooks*, 57 Wn.2d 422 (1960), *State v. Smith*, 88 Wn.2d 127, 138 (1977), effectively overruling, in part, *State v. Garcia*, 35 Wn.App. 174 (1983), *State v. McIntosh*, 42 Wn.App. 573 (1986), *State v. Brantigan*, 59 Wn.App. 481 (1990), *State v. Harrell*, 83 Wn.App. 393 (1996); reverses *State v. O'Neill,* 104 Wn.App. 850 (2001); 5-4.

***State v. O'Neill***, 110 Wn.App. 604 (2002)

Following traffic stop, police arrest defendant for driving while license suspended, return to defendant's truck to search, find it locked, observe glass pipe, tow truck operator, pursuant to impound, opens truck, drugs seized, at suppression hearing, jail officer testifies that jail does not accept bookings for suspended license absent a request for a booking exception which has never been denied; held: booking into jail is not a necessary element of custodial arrest to justify search incident to arrest, *see: State v. Thomas*, 89 Wn.App. 774 (1998), *State v. Brantigan*, 59 Wn.App. 481 (1990), *State v. Perea*, 85 Wn.App. 339, 341-42 (1997), *State v. Radka*, 120 Wn.App. 43 (2004), *cf.: State v. McKenna*, 91 Wn.App. 554 (1998), *Knowles v. Iowa*, 142 L.Ed.2d 492 (1998), *State v. Balch*, 114 Wn.App. 55 (2002); III.

***State v. Myers***, 117 Wn.App. 93 (2003)

Officer, knowing that defendant had a suspended license a year before, observes defendant driving, runs license check, follows car, before he gets radio reply observes infraction, stops defendant, after stop learns over radio of a warrant, arrests, finds drugs; held: driving with a suspended license is a criminal offense unrelated to the driving, thus the stop for the infractions was an impermissible **pretext**, *State v. Ladson*, 138 Wn.2d 343 (1999), *State v. DeSantiago*, 97 Wn.App. 446 (1999), *State v. Meckelson*, 133 Wn.App. 431 (2006), *cf.: State v. Hoang*, 101 Wn.App. 732 (2000), *State v. Nichols*, 161 Wn.2d (2007), *State v. Arreola*, 176 Wn.2d 284 (2012), *but see: State v. Johnson*, 155 Wn.App. 270 (2010), *abrogated, on other grounds, State v. Byrd*, 162 Wn.App. 612 (2011), *reversed, on other grounds*, 178 Wn.2d 611 (2013), *State v. Weber*, 159 Wn.App. 779, 787-91 (2011), *State v. McLean*, 178 Wn.App. 236 (2014), *Matter of Pleasant*, 21 Wn.App.2d 320 (2022); 2-1, III.

***State v. Brown***, 119 Wn.App. 473 (2003) , *overruled on other grounds, State v. Jasper*, 174 Wn.2d 96 (2012)

Police stop car for failing to signal when it turned right from a private driveway, passenger has warrant, search vehicle, find drugs; held: because no statute requires a signal from a parking lot into a public street, police had no basis for the traffic stop, , *cf. State v. Brown*, 194 Wn.2d 972 (2019), thus evidence suppressed; II.

***Illinois v. Lidster***, 157 L.Ed.2d 843 (2004)

A week after hit-and-run fatality, police set up checkpoint at place of collision, stop all cars for 10-15 seconds to ask drivers if they saw anything, hand out flyer, officer smells alcohol on defendant's breath, detain, perform tests, arrest; held: purpose of stop was not to determine if occupants were committing a crime, distinguishing *City of Indianapolis v. Edmond*, 148 L.Ed.2d 333 (2000), "special law enforcement concerns will sometimes justify highway stops without individualized suspicion," at 851, *Michigan Dept. of State Police v. Sitz*, 110 L.Ed.2d 412 (1990), stops involved minimal intrusion and thus provided "little reason for anxiety or alarm," at 853, detention was thus valid under Fourth Amendment, *State v. Silvernail*, 25 Wn.App. 185 (1980), overruled, in part, on other grounds, *State v. McKim*, 98 Wn.2d 111 (1982), *but see: State v. Marchand*, 104 Wn.2d 434 (1985); 6-3.

***Thornton v. United States***, 158 L.Ed.2d 905 (2004)

Police discover that vehicle's license does not match make and model, follow vehicle to parking lot, before police have opportunity to pull car over driver parks and gets out of vehicle, police arrest, search defendant, find drugs, search vehicle, find weapon; held: under Fourth Amendment, police may search entire passenger compartment of a vehicle whether or not the arrestee was in the car when the stop was made as long as he was a "recent occupant," at 914, *New York v. Belton*, 69 L.Ed.2d 768 (1981), *but see: State v. Parker*, 138 Wn.2d 486 (1999), *State v. Snapp*, 174 Wn.2d 177 (2012), *State v. Duncan*, 185 Wn.2d 430, 438-41 (2016); 7-2.

***State v. Green***, 150 Wn.2d 740 (2004)

Police stop defendant for failure to transfer title of car, search, seize drugs; held: failure to transfer title is a misdemeanor not committed in officer's presence, RCW 10.31.100, not a continuing offense, *State v. Klump*, 61 Wn.App. 911, 914 (1991), *but see:* RCW 46.12.101(6)

(2008), *State v. Bonds*, 174 Wn.App. 553 (2013), *cf.: State v. Holmes*, 135 Wn.App. 588 (2006), thus arrest was unlawful, drugs suppressed, *State v. Walker*, 129 Wn.App. 572 (2005); 9-0.

***State v. Rankin***, 151 Wn.2d 689 (2004)

Police may not request a vehicle passenger's identification "for investigative purposes" unless there is an independent reason that justifies the request, CONST. art I, § 7, *State v. Mendez*, 137 Wn.2d 808 (1999), *State v. Brown*, 154 Wn.2d 787 (2005), *overruled on other grounds, State v. Jasper*, 174 Wn.2d 96 (2012), *see: State v. Brockob*, 159 Wn.2d 311, 347 (2006), *but see: State v. Mota*, 129 Wn.App. 276 (2005), *cf. State v. Pettit*, 160 Wn.App. 716 (2011); reverses *State v. Rankin*, 108 Wn.App. 948 (2001); 6-3.

***State v. Thompson***, 151 Wn.2d 793, 803-09 (2004)

Defendant lives in trailer on property owned and occupied by his parents, boathouse between parents' home and trailer contains personal items owned by defendant and parents, defendant's access to boathouse was contingent on parents' permission, father consents to search of boathouse, police find drugs; held: because defendant did not have authority to permit a search of the boathouse in his own right, he did not possess common authority and thus his consent was not necessary to validity of the search, *see: United States v. Matlock*, 38 L.Ed.2d 242 (1974), *State v. Mathe*, 102 Wn.2d 537 (1984); reverses, on other grounds, *State v. Thompson*, 112 Wn.App. 787 (2002); 6-3.

***State v. Gaddy***, 152 Wn.2d 64 (2004)

Driver is stopped for infraction, DOL reports license suspended, police arrest, search car, find drugs; held: applying *Aguilar-Spinelli* test to DOL records establishes that they are presumptively reliable, *cf.: State v. Creed*, 179 Wn.App. 534 (2014); defendant's offering evidence that her record was inaccurate fails, as she did not show that DOL records are *prima facie* inaccurate; affirms *State v. Gaddy*, 114 Wn.App. 702 (2002); 9-0.

***State v. Reichenbach***, 153 Wn.2d 126 (2004)

Owner of car consents to police stopping car and searching it, police stop car at gunpoint, order hands up, defendant-passenger is seen dropping hand to his hip area then raising hands, police remove passenger, find drugs below passenger seat; held: consent to search did not extend to search of passenger who reasonably believed he was under arrest, *State v. Lorenz*, 152 Wn.2d 22, 36-37 (2004); absent probable cause to arrest, defendant was unlawfully seized, *State v. Parker*, 139 Wn.2d 486 (1999), *see also: State v. Flores*, 186 Wn.2d 506 (2016), abandoned drugs were not voluntarily relinquished, *State v. Reynolds*, 144 Wn.2d 282, 288 (2001), *State v. Dugas*, 109 Wn.App. 592, 595-96 (2001), thus seizure was unlawful, CONST., art. I, § 7; 9-0.

***State v. Radka***, 120 Wn.App. 43 (2004)

After stop for infraction and discovery of suspended license, defendant is placed in patrol car, not cuffed, police search defendant's vehicle, find drugs, at suppression hearing officer testifies he did not intend to book for just suspended license, trial court suppresses; held: test to determine whether an arrest qualifies as a cite-and-release or custodial is an objective determination of what a reasonable detainee would consider to be the extent of the detention, *State v. Clausen*, 113 Wn.App. 657, 660-61 (2002), *State v. Craig*, 115 Wn.App. 191, 196

(2002), *but see:* *State v. McKenna*, 91 Wn.App. 554, 555 (1998); here, because defendant was not cuffed, allowed to use cell phone in patrol car support conclusion that arrest was noncustodial, thus suppression affirmed, *State v. O'Neill,* 148 Wn.2d 564 (2003), *see:* *State v. Gering*, 146 Wn.App. 564 (2008), *but see:* *State v. Balch*, 114 Wn.App. 55 (2002); 2-1, III.

***Illinois v. Caballes***, 160 L.Ed.2d 842 (2005)

Following stop for traffic infraction, police bring in drug dog to sniff car, reacts positively, police open trunk, seize marijuana; held: where duration of traffic stop was justified by the traffic offense and the ordinary inquiries to such a stop, *see:* *United States v. Jacobsen*, 80 L.Ed.2d 85 (1984), a lawful canine sniff, *United States v. Place*, 77 L.Ed.2d 110 (1983), *but see:* *State v. Dearman*, 92 Wn.App. 630 (1998), does not implicate legitimate privacy interests, *cf.:* *Florida v. Jardines*, 569 U.S. 1, 185 L.Ed.2d 495 (2013), *Rodriguez v. United States*, 575 U.S. 348, 135 S.Ct. 1609, 191 L. Ed. 2d 492 (2015); 5-3.

***State v. Pulfrey***, 154 Wn.2d 517 (2005)

Defendant is stopped for infraction, officer arrests for suspended license 3°, searches incident to arrests, finds drugs; officer testifies he always arrests and searches on suspended license cases, irrespective of CrRLJ 2.1(b)(2); held: police may arrest and search incident to arrest and then exercise discretion to cite and release or book, *State v. Brockob*, 159 Wn.2d 311, 346-47 (2006), *but see: State v. Snapp*, 174 Wn.2d 177 (2012); driving while suspended is a "nonminor offense" for which police may arrest, distinguishing *State v. Hehman*, 90 Wn.2d 45 (1978), *State v. Stortroen*, 53 Wn.App. 654 (1989), *State v. WS*, 40 Wn.App. 835 (1985), *State v. Pettitt*, 93 Wn.2d 288 (1980), *see:* *State v. Reding*, 119 Wn.2d 685 (1992); *affirms* *State v. Pulfrey*, 120 Wn.App. 270 (2004); 9-0.

***State v. Brown***, 154 Wn.2d 787 (2005), *overruled on other grounds, State v. Jasper*, 174 Wn.2d 96 (2012)

Absent articulable suspicion of wrongdoing, police may not ask a passenger his name, *State v. Rankin*, 151 Wn.2d 689 (2004), *cf.:* *State v. N.M.K.*, 129 Wn.App. 155, 158-61 (2005), *aff'd, on other grounds, State v. Kirkpatrick*, 160 Wn.2d 873 (2007), *State v. Mote*, 129 Wn.App. 276 (2005); 9-0.

***State v. Mote***, 129 Wn.App. 276 (2005)

Police officer approaches lawfully parked vehicle, asks driver and passenger for identification, both comply, warrant check reveals warrant for passenger who is arrested, searched, police find drugs; held: occupants of vehicles parked in public places, not stopped for an infraction, should be treated as pedestrians and may be asked questions by police, *State v. Thorn*, 129 Wn.2d 347 (1996), *overruled, in part, State v. O'Neill,* 148 Wn.2d 564, 571 (2003), *State v. Afana*, 147 Wn.App. 843 (2008), *aff'd, on other grounds,* 169 Wn.2d 169 (2010), distinguishing *State v. Rankin*, 151 Wn.2d 689 (2004), *cf.: State v. Butler*, 2 Wn.App. 2d 549, 560-61 (2018), *State v. Johnson*, 8 Wn.App.2d 728 (2019), *but see:* *State v. Brown*, 154 Wn.2d 787 (2005); I.

***State v. Holmes***, 135 Wn.App. 588 (2006)

Police stop defendant for operating a vehicle with an expired trip permit, RCW 46.16.160(1), search, find drugs; held: unlike failure to transfer title, *State v. Green*, 150 Wn.2d 740 (2004), *but see: State v. Bonds*, 174 Wn.App. 553 (2013), operating a vehicle with an expired trip permit requires driving, thus the misdemeanor occurred in officer's presence, *cf.: State v. Magee*, 167 Wn.2d 639 (2009); II.

***State v. Brockob***, 159 Wn.2d 311, 347 (2006)

Police observe but do not stop defendant driving vehicle with cracked windshield, later stop vehicle with defendant in passenger seat, discover registration is expired, driver at stop has valid license, police ask defendant for license, discover it's suspended; held: while police may not request passenger's identification where passenger has done nothing to invite suspicion, *State v. Rankin*, 151 Wn.2d 689 (2004), here police had an independent reason to justify the request for a license, *State v. Pettit*, 160 Wn.App. 716 (2011); 7-2,

***Brendlin v. California*, 168 L.Ed.2d 132 (2007)**

When a police officer makes a traffic stop, the passenger is seized, *Arizona v. Johnson*, 172 L.Ed.2d 694 (2009), and may challenge the constitutionality of the stop, *State v. Takesgun*, 89 Wn.App. 608 (1998), *State v. Byrd*, 110 Wn.App. 259 (2002), *but see: State v. Mennegar*, 114 Wn.2d 304 (1990), *State v. Cook*, 104 Wn.App. 186 (2001), *State v. Rehn*, 117 Wn.App. 142 (2003), *cf.: State v. Mendez*, 137 Wn.2d 208 (1999); 9-0.

***State v. Nichols***, 161 Wn.2d 1 (2007)

Officer observes vehicle commit infraction and concurrently observes that the driver is appearing to avoid him, stops vehicle, driver's license suspended, searches, finds drugs, defense counsel does not raise pretext stop before trial court, but is raised as ineffective assistance of counsel on appeal; held: defendant has burden to show stop was not justified by the commission of traffic infractions since it is being raised in context of ineffective assistance; here, because observation of the infraction was concurrent with officer's observation and belief that defendant was seeking to avoid him, no **pretext** has been shown, *State v. Arreola*, 176 Wn.2d 284 (2012), *Matter of Pleasant*, 21 Wn.App.2d 320 (2022), distinguishing *State v. Meckelson*, 133 Wn.App. 431 (2006), ; 9-0.

***State v. Moore***, 161 Wn.2d 880 (2007)

Officer stops vehicle, recognizes passenger who has a pit bull on his lap but does not recall his name, asks him his name, passenger gives a name, arrests for possession of dangerous dog, searches, finds drugs, learns passenger gave a false name, later files a report stating that passenger was not wearing a seat belt, state concedes no probable cause to arrest for the dog; held: because the crime of failing to correctly identify one's self, RCW 46.61.021(3), requires that an officer must ask an individual for identification pursuant to an investigation of a traffic infraction, and because the officer here was not in the process of investigating the seat belt violation, probable cause to arrest and search incident to arrest was not present; 6-3.

***State v. Day***, 161 Wn.2d 889 (2007)

Police observe car illegally parked, approach and see defendant in driver's seat, holster on floor, defendant admits to a gun in car, police remove defendant, frisk, cuff, find gun in car,

discover gun is stolen, search further and find drugs; held: where police merely suspect a civil infraction, there is no ground for a *Terry* stop and no grounds to frisk, *State v. Larson*, 93 Wn.2d 638 (1980), *State v. Duncan*, 146 Wn.2d 166 (2002); reverses *State v. Day*, 130 Wn.App. 622 (2005); 6-3.

***State v. Allen***, 138 Wn.App. 463 (2007)

Police lawfully stop vehicle for traffic offense, obtain driver's license and registration, learn that driver was protected party of a no-contact order, observe that passenger is male, observe passenger reach under front seat, ask driver to leave vehicle, driver tells officer that passenger is the no-contact order respondent, police arrest passenger, search, find drugs; held: detention of passenger was unlawful, *State v. Rankin*, 151 Wn.2d 689, 699 (2004), identity of passenger obtained from driver does not meet **independent source** doctrine as removing her from car exceeded lawful scope of traffic stop, *State v. Reding*, 119 Wn.2d 685 (1992), RCW 46.64.015, standing analysis is inapplicable, *State v. Gaines*, 154 Wn.2d 711, 718 (2005), *but see: State v. Shuffelen*, 150 Wn.App. 244 (2009), *cf.: State v. Miles*, 159 Wn.App. 282 (2011), *State v. Pettit*, 160 Wn.App. 716 (2011), *State v, Alexander*, 5 Wn.App.2d 154 (2018); 2-1, II.

***State v. Glenn***, 140 Wn.App. 627, 633-39 (2007)

Seven year old boy tells his mother that man in passing car pointed gun, mother gets plate number, police arrive, boy points at a car and says that's the one, police pull over car, defendant is removed, complies with order to get down, police smell marijuana from car, search, find drugs, no gun; held: a stop based upon a report of a "weapon sighting" from a legitimate citizen's report will justify a search of the car for a weapon, *see: State v. Chang*, 147 Wn.App. 490, 494-98 (2008);; I.

***State v. Carney***, 142 Wn.App. 197 (2007)

Police, investigating a report of reckless driving by a motorcyclist, approach a man meeting the operator's description standing by a car and a motorcycle, man jumps on motorcycle and flees, officers order two women in car to show hands, request identity, discover warrant, arrest, search, find drugs; held: ordering citizen to show hands, demanding identification is a seizure as a reasonable person would not have felt free to ignore the officer's "request to identify herself after being seized," *see: State v. O'Neill*, 148 Wn.2d 564 (2003), *State v. Butler*, 2 Wn.App. 2d 549, 560-61 (2018); police belief that a citizen may be able to provide information material to the investigation of a crime does not justify a warrantless seizure absent reasonable suspicion based on objective facts that the individual is involved in criminal conduct, *State v. Dorey*, 145 Wn.App. 423 (2008), *cf.: State v. Rubio*, 185 Wn.App. 387 (2015); 2-1, II.

***State v. Grande***, 164 Wn.2d 135 (2008)

Trooper stops a vehicle, smells marijuana, arrests driver and passengers, finds drugs on passenger; held: while smell of drug will justify search of a vehicle, *see: State v. Huff*, 64 Wn.App. 641 (1992), *State v. Ramirez*, 49 Wn.App. 814, 819 (1987), *but see: State v. Snapp*, 174 Wn.2d 177 (2012), arrest of occupants without individualized probable cause violated state constitution, *cf.: Maryland v. Pringle*, 157 L.Ed.2d 769 (2003); here, trooper arrested passenger before determining individual probable cause, thus arrest and subsequent search was unlawful; 9-0.

***State v. Bello***, 142 Wn.App. 930 (2008)

Police stop car for speeding, see defendant-passenger "duck out of sight" in rear seat for four seconds, discover warrant for defendant-passenger who is arrested, bring narcotics dog which alerts on rear seat, police search unlocked container found on rear seat, find drugs, arrest driver who is convicted and appeals; held: a vehicle subject to a traffic stop is not immune from the automobile exigency exception if the arrested party is a passenger rather than the driver; personal possessions known to belong to a specific vehicle occupant may not be searched incident to the arrest of another occupant unless the possessions were in the span of control of the arrested person, *State v. Parker*, 139 Wn.2d 486 (1999), *State v. Jones*, 146 Wn.2d 328 (2002); here, no basis existed for police to conclude that the container belonged to the driver, container was in passenger's immediate control prior to arrest, thus search was proper; I.

***State v. Quinlivan***, 142 Wn.App. 960 (2008)

Sheriff stops defendant for seat belt and suspended license, deputy returns to his vehicle, defendant asks if his car will be impounded, deputy says it will, defendant leaves vehicle, locks it, sits on curb, refuses to give keys absent warrant, deputy arrests, takes keys searches car, finds drugs; held: because defendant had not been arrested, had no access to passenger compartment of the car at time of arrest, police needed a warrant, thus evidence suppressed, *Arizona v. Gant*, 173 L.Ed.2d 485 (2009), *State v. Stroud*, 106 Wn.2d 144 (1986), *State v. Adams*, 169 Wn.2d 487 (2010), *see: State v. Villela*, 194 Wn.2d 451 (2019); III.

***State v. Adams***, 144 Wn.App. 100 (2008)

Police stop stolen car, handcuff defendant-passenger, patdown, find drugs; held: "[m]erely being a passenger in a stolen car does not alone justify" a search of the passenger absent articulable facts that would lead a reasonable person to believe the passenger could be armed and dangerous, distinguishing *State v. Horrace*, 144 Wn.2d 386 (2001), thus drugs suppressed; 2-1, III.

***State v. Gering***, 146 Wn.App. 564 (2008)

Police stop defendant for driving while license suspended, cuff, search incident to arrest, find drugs on his person, defendant maintains that because jail would not accept a DWLS booking, custodial arrest was improper; held: manifestation of the arresting officer's intent was full custodial arrest, *State v. Radka*, 120 Wn.App. 43, 49 (2004), reasonable detainee would under these circumstances consider himself under arrest, *id., at* 49-50, *State v. O'Neill*, 110 Wn.App. 604 (2002), thus search was proper, *cf.: Arizona v. Gant*, 173 L.Ed.2d 485 (2009); III.

***State v. Chang***, 147 Wn.App. 490, 494-98 (2008)

Police respond to forgery in a bank, suspect in bank states that person who drove him is in car outside, gun in car, police detain driver, remove him, seize gun from floorboard of car; held: protective search exception to warrant requirement applies when a valid *Terry* stop includes a vehicle search to ensure officer safety, *State v. Kennedy*, 107 Wn.2d 1, 12 (1986), *State v. Larson*, 88 Wn.App. 849, 853 (1997); had police discovered that driver was not part of forgery, police would have released him, giving him access to weapon in car, thus seizure was

proper, *State v. Glenn*, 140 Wn.App. 627, 633-39 (2007), *cf.: State v. Snapp*, 174 Wn.2d 177 (2012), *State v. Duncan*, 185 Wn.2d 430, 438-41 (2016); I.

***State v. Neth***, 165 Wn.2d 177 (2008)

Defendant is stopped for infraction, has no identification, has clear plastic bags, admits he has more than $2500 in car, police bring drug dog which reacts positively, impound car, obtain warrant, , drugs found, at suppression hearing trial court disregards dog evidence as affidavit did not establish reliability; held: without the dog evidence, while the evidence is suspicious, it does not rise to probable cause; 9-0.

***State v. Afana***, 147 Wn.App. 843 (2008), *aff'd*, 169 Wn.2d 169 (2010)

Officer approaches legally parked car, asks driver and passenger for identification, records information and suggests they go elsewhere, car begins to leave, officer discovers warrant, stops car, arrests, searches, finds drugs; held: "[b]ecause the purpose of making a social contact with…pedestrians is the same as making a social contact with people inside a parked car, it does not automatically constitute a seizure when an officer asks people in a car for their identification," at 848 ¶ 12, *State v. Mote*, 129 Wn.App. 276 (2005), *State v. O'Neill*, 148 Wn.2d 564 (2003), *cf.*, *State v. Ibarra Guevara*, 172 Wn.App. 184 (2012); III.

***Arizona v. Johnson***, 172 L.Ed.2d 694 (2009)

In a traffic-stop setting, the first *Terry* condition – a lawful investigatory stop – is met whenever it is lawful for police to detain an automobile and its occupants pending inquiry into a vehicular violation; police need not have, in addition, cause to believe any occupant of the vehicle is involved in criminal activity; to justify a patdown of driver or passenger, police must harbor reasonable suspicion that the person frisked is armed and dangerous; a traffic stop communicates to a passenger that he is not free to terminate the encounter with the police and move about at will, *Brendlin v. California*, 168 L.Ed.2d 132 (2007), *but see: State v. Mennegar*, 114 Wn.2d 304 (1990), *State v. Mendez*, 137 Wn.2d 208 (1999), *State v. Cook*, 104 Wn.App. 186 (2001), *State v. Rehn*, 117 Wn.App. 142 (2003); 9-0.

***Arizona v. Gant***, 173 L.Ed.2d 485 (2009)

Defendant is arrested for driving with a suspended license, cuffed, locked in police vehicle, police search defendant's car and find drugs; held: police may search passenger compartment of vehicle incident to arrest only if it is reasonable to believe that the arrestee might access the vehicle at the time of the search of if vehicle contains evidence of the offense of arrest, *State v. Wright*, 155 Wn.App. 537 (2010), essentially modifying *New York v. Belton*, 69 L.Ed.2d 768 (1981) and *Thornton v. United States*, 158 L.Ed.2d 905 (2004), *see: State v. Valdez*, 167 Wn.2d 761 (2009), *but see: State v. Snapp*, 174 Wn.2d 177 (2012), *State v. Duncan*, 185 Wn.2d 430, 438-41 (2016); 5-4.

***State v. Shuffelen***, 150 Wn.App. 244 (2009)

Police stop vehicle for infraction, arrest driver for suspended license, discover that driver is protected party for no contact order, ask driver who passenger is, driver discloses that passenger is the no contact order respondent, arrest passenger, trial court suppresses; held: passenger lacked automatic standing to challenge answers of driver as NCO violation is not a

possessory offense, *State v. Simpson*, 95 Wn.2d 170 (1980), and automatic standing doctrine only applies when defendant is asserting that his own rights were violated, *State v. Williams*, 142 Wn.2d 17, 23 (2000), *State v. Pettit*, 160 Wn.App. 716 (2011), *but see: State v. Allen*, 138 Wn.App. 463 (2007); I.

***State v. Grib***, 152 Wn.App. 885 (2009)

Police chase defendant who jumps out of car, swims across canal and is arrested, police find drugs in car; held: vehicle was not in defendant's control at time of arrest, thus search was invalid, *Arizona v. Gant*, 173 L.Ed.2d 485 (2009), *see also: State v. Bliss*, 153 Wn.App. 197 (2009); III.

***State v. Afana***, 169 Wn.2d 169 (2010)

Police arrests passenger pursuant to an arrest warrant, orders defendant-driver out of car, searches car, finds drugs; held: absent a belief that the car contained evidence of the crime for which a person in the car was arrested or that arrestee poses a safety risk, police may not search vehicle incident to arrest, *Arizona v. Gant*, 173 L.Ed.2d 485 (2009), *State v. Valdez*, 167 Wn.2d 761 (2009), *see: State v. Abuan*, 161 Wn.App. 135 (2011), *State v. Snapp*, 174 Wn.2d 177 (2012), *State v. Duncan*, 185 Wn.2d 430, 438-41 (2016); there is no good faith exception to the exclusionary rule in Washington, *State v. Adams*, 169 Wn.2d 487 (2010), *State v. Brown*, 193 Wn.2d 280 (2019), effectively overruling *State v. Riley*, 154 Wn.App. 433 (2010); affirms *State v. Afana*, 147 Wn.App. 843 (2008); 9-0.

***State v. Tibbles***, 169 Wn.2d 364 (2010)

Trooper stops car for infraction, smells marijuana, searches car and finds marijuana, cites defendant; held: while odor of marijuana establishes probable cause, *State v. Grande*, 164 Wn.2d 135, 146 (2008), no exigent circumstance, no need for "particular haste" existed, no evidence that imminent destruction of evidence was established, no evidence that trooper could not have procured a telephonic warrant, no evidence that trooper or anyone else was in danger, no evidence that driver was impaired, *cf.: State v. Patterson*, 112 Wn.2d 731 (1989), *State v. Hendrickson*, 129 Wn.2d 61, 72-77 (1996), *State v. Smith*, 165 Wn.2d 511, 517-18 (2009), *State v. Snapp*, 174 Wn.2d 177 (2012); "merely because one of these [exigent] circumstances exists does not mean that exigent circumstances justify a warrantless search," at 370 ¶ 9; 5-4.

***State v. Morales***, 154 Wn.App. 26, 45-49 (2010), *rev'd on other grnds*, 173 Wn.2d 560 (2012)

Following vehicular assault arrest, police observe beer cans in front seat, seize them, then impound vehicle; held: because impound was lawful pursuant to DUI statute, RCW 46.55.113(1), *but see: State v. Villela*, 194 Wn.2d 451 (2019), and there was probable cause that vehicle had been used in a felony, *State v. Clark*, 143 Wn.2d 731, 755 (2001), beer cans were admissible in evidence even if search incident to arrest was improper and even if inevitable discovery doctrine is inapplicable in Washington, *State v. Winterstein*, 167 Wn.2d 620 (2009); 2-1, II.

***State v. Wright***, 155 Wn.App. 537 (2010), *reversed, on other grounds, State v. Snapp*, 174 Wn.2d 177 (2012)

Defendant is stopped for driving without headlights although sun had set less than 30 minutes before the stop, RCW 46.37.020, evidence establishes it was dark, cold and icy, officer smells marijuana, arrests defendant for marijuana, searches, finds drugs; held: test for lawfulness of the traffic stop is not whether defendant actually violated the code but rather whether officer had reasonable suspicion which justifies the stop here; because officer initiated the stop based on the infraction, "had virtually no opportunity to form an ulterior motive," stop was not a pretext; I.

***State v. Whitney***, 156 Wn.App. 405 (2010)

Police stop vehicle for infraction, discover defendant's license is suspended, arrest, search defendant, find drugs in pocket; held: *Arizona v. Gant*, 173 L.Ed.2d 485 (2009), does not extend to a search incident to arrest; III.

***State v. Chesley***, 158 Wn.App. 36, 44-47 (2010)

Police arrest and detain defendant for vehicle prowl, observe burglary tools in defendant's car, seize tools; held: absent evidence that search is necessary to preserve officer safety or prevent conealment or destruction of evidence of the crime of arrest, police may not search a vehicle incident to arrest without a warrant, *State v. Valdez*, 167 Wn.2d 761, 777 (2009), *State v. Patton*, 167 Wn.2d 379, 394-95 (2009), *State v. Afana*, 169 Wn.2d 169, 177-78 (2010), *State v. Snapp*, 174 Wn.2d 177 (2012), *State v. Duncan*, 185 Wn.2d 430, 438-41 (2016), *State v. Swetz*, 160 Wn.App. 122 (2011), *State v. Aubuan*, 161 Wn.App. 135 (2011); 2-1, II.

***Davis v. United States,*** 564 U.S. 229, 131 S.Ct. 2419, 180 L.Ed.2d 285 (2011)

Federal exclusionary rule is inapplicable to cases decided before *Arizona v. Gant*, 556 U.S. 332, 173 L.Ed.2d 485 (2009), even if on direct appeal when *Gant* was decided, as sole purpose of federal rule is deterrence and police, relying upon precedent, act in good faith, thus deterrence is meaningless; 7-2.

***State v. Robinson***, 171 Wn.2d 292 (2011)

Appellant may raise motion to suppress pursuant to *Arizona v. Gant*, 556 U.S. 332, 173 L.Ed.2d 485 (2009) for the first time on appeal, *Pers. Restraint of Nichols*, 171 Wn.2d 370, 373-76 (2011), reversing *State v. Millan*, 151 Wn.App. 492 (2009), where defendant's trial was completed prior to *Gant, but see: Davis v. United States*, 564 U.S. 229, 131 S.Ct. 2419, 180 L.Ed.2d 285 (2011), even if no motion to suppress was made below, *State v. Nyegaard*, 164 Wn.App. 625 (2011); 7-2.

***State v. Weber***, 159 Wn.App. 779, 787-91 (2011)

Trooper sees defendant commit infraction, follows and stops when he observes another infraction, defendant appears intoxicated, arrests for DUI, trial court suppresses as a **pretext**; held: trooper was not conducting an investigation unrelated to traffic offenses, *State v. Minh Hoang*, 101 Wn.App. 732 (2000), *State v. Nichols*, 161 Wn.2d 1 (2007), where traffic violation is committed in police presence which results in a prompt stop is not a pretext, *State v. Arreola*, 176 Wn.2d 284 (2012), *Matter of Pleasant*, 21 Wn.App.2d 320 (2022); 2-1, III.

***State v. Swetz***, 160 Wn.App. 122 (2011)

Officer pulls next to defendant's vehicle, defendant exits and speaks to officer who smells marijuana on defendant's breath, walks with defendant back to his vehicle, observes marijuana on passenger seat, arrests, searches, finds additional drugs; held: absent a threat to officer safety or a threat to preservation of evidence, police must obtain a warrant to search a vehicle even for evidence of the crime of arrest per CONST., art. I, § 7, *State v. Valdez,* 167 Wn.2d 761 (2009); open view of the marijuana requires a warrant to seize it absent an exception to the warrant requirement if in a constitutionally protected area, *State v. Kennedy,* 107 Wn.2d 1, 9-10 (1986), *State v. Myrick,* 102 Wn.2d 506, 514-15 (1984), *State v. Snapp,* 174 Wn.2d 177 (2012), *State v. Duncan,* 185 Wn.2d 430, 438-41 (2016); here there were no exigent circumstances to justify the warrantless seizure, *but see: State v. Louthan,* 158 Wn.App. 732 (2010); 2-1, II.

***State v. Pettit***, 160 Wn.App. 716 (2011)

Police stop vehicle for infraction, records check shows no contact order with a 16 year old girl, passenger appears to be 16, provides a name other than that of protected person, further records check shows specific tattoo on hand of protected person which is on passenger, driver is arrested for violation of no contact order; held: while a passenger cannot be asked for identification without an independent reason, *State v. Rankin,* 151 Wn.2d 689 (2004), here police knew that protected person was a juvenile and passenger was a juvenile, thus police were justified in asking for identification, distinguishing *State v. Allen,* 138 Wn.App. 463 (2007), driver lacks standing to challenge the passenger's questioning, passenger was a minor who had been reported missing, *see: State v. Sadler,* 147 Wn.App. 97, 123-24 (2008), *State v. Raines,* 55 Wn.App. 459, 463 (1989), *cf.: State v, Alexander,* 5 Wn.App.2d 154 (2018), thus exigent circumstances justified her brief detention leading to evidence of her identity; II.

***State v. Abuan***, 161 Wn.App. 135, 146-54 (2011)

Police arrest driver for suspended license, ask passenger-defendant to leave car for search of the car, officer tells passenger that he wanted to search for weapons, as he begins patdown passenger states he has marijuana, officer handcuffs defendant, finds marijuana, finds gun in car, later questions defendant in custody who provides incriminating statements to felony assault, defendant challenges patdown and arrest for first time on appeal; held: had motion been made to trial court, it would likely have suppressed defendant's statement about marijuana, the marijuana itself and subsequent statements by defendant and gun in car, as there was no reason to search the vehicle to preserve officer safety or prevent concealment or destruction of evidence of the crime of arrest, *State v. Afana,* 169 Wn.2d 169 (2010), *State v. Chesley,* 158 Wn.App. 36, 44-47 (2010); 2-1, II.

***State v. Wilson***, 162 Wn.App. 409 (2011)

Defendant pleads guilty to VUCSA, prior to sentencing *Arizona v. Gant,* 556 U.S. 332, 173 L.Ed.2d 485 (2009) is decided, trial court denies motion to withdraw plea; held: a plea of guilty waives any search issue on appeal even if law changes, *State v. Brandenburg,* 153 Wn.App. 944, 947-48 (2009), *McMann v. Richardson,* 397 U.S. 759, 774, 25 L.Ed.2d 763 (1970), and even if defendant has not been sentenced; II.

***State v. Lee***, 162 Wn.App. 852 (2011)

Failure to move to suppress an auto search after *Arizona v. Gant,* 556 U.S. 332, 173 L.Ed.2d 485 (2009) is a waiver of the right to have the evidence excluded, *State v. Mierz,* 72 Wn.App. 783, 789 (1994), *cf.: State v. Jones,* 163 Wn.App. 354 (2011); here, ineffective assistance was not addressed on direct appeal; II.

***State v. Gantt***, 163 Wn.App. 133 (2011)

Police observe van stopped, later see it again in front of a driveway with man walking towards residence, officer activates emergency lights and pull up behind van, after further investigation observe through van window property that had been stolen that night in a burglary, arrest, search; held: while illumination by a spotlight is not a sufficient show of authority, *State v. Young,* 135 Wn.2d 498 (1998), use of emergency lights constitutes a display of authority such that a reasonable person would believe he was seized, *State v. DeArman,* 54 Wn.App. 621 (1989), *State v. Stroud,* 30 Wn.App. 392, 396 (1981), *State v. Ibarra Guevara,* 172 Wn.App. 184 (2012), more authority than a social contact, distinguishing *State v. Harrington,* 167 Wn.2d 656 (2009); 2-1, III.

***State v. Jones***, 163 Wn.App. 354 (2011)

Police stop defendant for infraction, observe drugs in car, arrest and handcuff defendant, search vehicle, find drugs, defendant moves to suppress claiming pretext, raises warrantless search of vehicle for first time on appeal; held: a motion to suppress preserves search issue even if it was on different grounds, *cf.: State v. Lee,* 162 Wn.App. 852, 857 (2011); while drugs observed from outside the car were in open view, *State v. Gibson,* 152 Wn.App. 945, 954 (2009), *State v. Kennedy,* 107 Wn.2d 1, 10 (1986), open view doctrine does not provide authority to enter constituionally protected areas without a warrant, *State v. Posenjak,* 127 Wn.App. 41, 52-53 (2005), *cf.: State v. Barnes,* 158 Wn.App. 602 (2010); 2-1, II.

***State v. Snapp***, 174 Wn.2d 177 (2012)

Police stop defendant for infraction, observe what might be drugs in car, defendant lacks license, arrest defendant who says there is a meth pipe in car, place him in patrol car, disover warrant, search car, find drugs; in companion case, police stop vehicle for infraction, smell marijuana, arrest and place him in patrol car, admits smoking marijuana, police search defendant's car, find drugs; held: under CONST., art. I, § 7, when arrestee is secured police must obtain a warrant to search vehicle even when it is reasonable to believe evidence relevant to the crime of arrest might be found, *State v. Duncan,* 185 Wn.2d 430, 438-41 (2016), rejecting Fourth Amendment analysis in *Arizona v. Gant,* 556 U.S. 332, 173 L.Ed.2d 485 (2009), *Thornton v. United States,* 541 U.S. 615, 158 L.Ed.2d 905 (2004); reverses *State v. Snapp,* 153 Wn.App. 485 (2009), and reversing, in part, *State v. Wright,* 155 Wn.App. 537 (2010); 8-1.

***State v. Quezadas-Gomez***, 165 Wn.App. 593 (2011)

Police, with probable cause to arrest defendant although they do not know his name stop defendant's car, identify defendant and release him, later obtain warrant, search defendant's cars and residence, find drugs, trial court suppresses finding initial stop was a **pretext**; held: where police have probable cause to arrest, then stopping suspect's car, identifying him and releasing him is not a pretext, as stop was not based on a traffic code pretext, police could make a full

arrest or effect some lesser intrusion, distinguishing *State v. Ladson,* 138 Wn.2d 343 (1999); 2-1, II.

***State v. Arreola****,* 176 Wn.2d 284 (2018)

"[A] mixed-motive traffic stop is not pretextual so long as the desire to address a suspected traffic infraction (or criminal activity) for which the officer has a reasonable articulable suspicion is an actual, conscious, and independent cause of the traffic stop. So long as a police officer actually, consciously, and independently determines that a traffic stop is reasonably necessary in order to address a suspected traffic infraction, the stop is not pretextual," distinguishing *State v. Ladson,* 138 Wn.2d 343 (1999), *see: Matter of Pleasant,* 21 Wn.App.2d 320 (2022); reverses *State v. Chacun Arreola,* 163 Wn.App. 787 (2011); 7-2.

***State v. Monaghan****,* 165 Wn.App. 782 (2012)

Defendant consents to search of car trunk, police find locked container, open it, seize drugs; held: a consensual search cannot exceed the scope of the consent which, here, did not extend to a locked container within the trunk of the car, distinguishing *State v. Mueller,* 63 Wn.App. 720 (1992); I.

***State v. Campbell****,* 166 Wn.App. 464 (2011)

Police stop a vehicle, remove occupants, obtain search warrant to search the vehicle, defendant-passenger asks for her purse from the vehicle, police refuse, search vehicle, find drugs in purse; held: warrant for search of entire vehicle includes search of purse (parties do not dispute validity of warrant), distinguishing *State v. Worth,* 37 Wn.App. 889, 893-94 (1984); III.

***State v. Snapp****,* 174 Wn.2d 177, 197-99 (2012)

Police stop vehicle for no headlights after dark, smell marijuana, search, find drugs, at hearing officer testifies it was dark, cold and icy, stop occurred 24 minutes after sunset, RCW 46.37.020 requires lights 30 minutes after sunset; held: officer reasonably believed an infraction was committed, thus *Terry* stop was valid, *cf.: State v. Creed,* 179 Wn.App. 534 (2014); 8-1.

***State v. Byrd****,* 178 Wn.2d 611 (2013)

Officer stops vehicle with stolen plates, arrests driver on warrant, driver tells officer that car belongs to defendant-passenger who is ordered out of car, officer removes purse from her lap, arrests defendant, places her in patrol car, searches purse, finds drugs; held: "[a] search of the arrestee's immediate area must be justified by concerns for officer safety or evidence preservation, while a search of the arrestee's person and articles of his or her person is justified by the authority of a lawful arrest," at 625 ¶ 27, *State v. Ellison,* 172 Wn.App. 710 (2013), *State v. Smith,* 119 Wn.2d 675 (1992); exigencies are presumed when an officer searches an arrestee's person, at 620 ¶ 17, here "the purse was unquestionably an article immediately associated with her person," at 623 ¶ 10; reverses *State v. Byrd,* 162 Wn.App. 612 (2011); "[w]e caution that the proper scope of the time of arrest rule is narrow… It does not extend to all articles in an arrestee's constructive possession, but only those personal articles in the arrestee's actual and exclusive possession at or immediately preceding the time of arrest," at 623 ¶ 9, *State v. Brock,* 182 Wn.App. 680 (2014), *State v. Alexander,* 9 Wn.App.2d 430 (2019); 5-4.

***State v. McLean***, 178 Wn.App. 236 (2013)

Trooper observes defendant weave within lane, cross fog line three times, pulls defendant over, smells alcohol, defendant performs field sobriety tests, is arrested for DUI, defense maintains **pretext**, *State v. Ladson*, 138 Wn.2d 343 (1999), claims trooper had reasonable suspicion only of weaving and lacked reasonable suspicion of DUI; held: from training and experience, *State v. Doughty*, 170 Wn.2d 57, 62 (2010), it was rational for trooper to infer defendant was under the influence, *see: State v. Arreola*, 176 Wn.2d 284 (2012), *State v. Tysyachuk*, 13 Wn.App.2d 35 (2020); II.

***Heien v. North Carolina***, 574 U.S. 54, 135 S.Ct. 530, 190 L.Ed.2d 475 (2014)

Defendant is driving with one burnt out brake light, sheriff asks to search car, finds drugs, state law does not require two brake lights; held: a reasonable mistake of law by a police officer (here, there was some ambiguity and inconsistency in the equipment code, *see:* Kagan, J., concurring) may constitutionally establish reasonable suspicion to stop a car, *see also: Michigan v. DeFillippo*, 443 U.S. 31, 61 L.Ed.2d 343 (1979), *but see: State v. Brown*, 193 Wn.2d 280 (2019); 8-1.

***Navarette v. California***, 572 U.S. 393, 134 S.Ct. 1683, 188 L.Ed.2d 680 (2014)

Anonymous citizen calls 911, reports a specific vehicle ran her off the road, provides license plate, police stop the vehicle, smell marijuana, search, find drugs; held: while an anonymous tip alone cannot justify an investigative stop, *Florida v. J.L.*, 529 U.S. 266, 146 L.Ed.2d 254 (2000), caller's detailed eyewitness account establishes basis of knowledge, relaying a startling event supports veracity as does police corroborating that the vehicle was where the caller predicted, *Alabama v. White*, 496 U.S. 325, 110 L.Ed.2d 310 (1990), use of 911 supports veracity as it is traceable to the caller, thus stop was proper, *see: State v. Howerton*, 187 Wn.App. 357, 372-73 (2015), *but see: State v. Saggers*, 182 Wn.App. 832 (2014); 5-4.

***State v. MacDicken***, 179 Wn.2d 936 (2014)

Defendant is arrested for robbery with gun, cuffed, standing outside patrol car, laptop and duffel bag car length away from defendant, police search, find evidence of robbery; held: officer safety was a substantial concern based upon nature of crime, public area, several people associated with defendant nearby, bags "still within reaching distance," justify search incident to arrest, *State v. Byrd*, 178 Wn.2d 611 (2013), *cf.: State v. Alexander*, 10 Wn.App.2d 682 (2019); affirms *State v. MacDicken*, 171 Wn.App. 169 (2012); 7-2.

***State v. Creed***, 179 Wn.App. 534 (2014)

Officer runs defendant's license plate, enters wrong letter, computer shows vehicle stolen, stops car, before approaching runs correct plate and discovers it was not stolen, approaches to tell her she can go but observes her toss item behind seat, uses flashlight, sees drugs; held: while police may reasonably but erroneously believe a violation occurred based upon objective facts, *State v. Snapp*, 174 Wn.2d 177 (2012), and may reasonably rely on incorrect information provided by third parties, *State v. Gaddy*, 152 Wn.2d 64 (2004), they may not reasonably rely on their own mistaken assessment of material facts, *State v. Mance*, 82 Wn.App. 539 (1996), *State v. Penfield*, 106 Wn.App. 157 (2001), to justify an investigation; here, after realizing his error officer ordered driver to remain in car, held her for several seconds

while he checked the proper number, never turned off overhead lights, used flashlight to look in vehicle, all of which were improper; 2-1, III.

***State v. Witherrite***, 184 Wn.App. 859 (2014)

Police need not provide warnings pursuant to *State v. Ferrier*, 136 Wn.2d 103 (1998) to obtain consent to search a car, *see: State v. Khounvichai*, 149 Wn.2d 557 (2003); III.

***Rodriguez v. United States***, 575 U.S. 348, 135 S.Ct. 1609, 191 L.Ed. 2d 492 (2015)

Absent reasonable suspicion, police extension of a traffic stop in order to conduct a dog sniff violates Fourth Amendment, *see: State v. Dearman*, 92 Wn.App. 630 (1998), *cf.: United States v. Place*, 77 L.Ed.2d 110 (1983), *Illinois v. Caballes*, 160 L.Ed.2d 842 (2005); 6-3.

***State v. Wisdom***, 187 Wn.App. 652 (2015)

Defendant is arrested in a stolen vehicle, search incident to arrest discloses drugs on his person, officer asks if there are drugs in the vehicle, defendant replies there are drugs on front seat, officer sees closed black bag, through mesh side sees currency, opens bag, finds drugs; held: when a search of a closed bag seized incident to arrest can be delayed without endangering officer or destruction of evidence then a warrant must be obtained, *State v. Snapp*, 174 Wn.2d 177, 189 (2012); when a closed piece of luggage in a vehicle gives no indication of dangerous contents it cannot be searched in the course of an inventory, *State v. Houser*, 95 Wn.2d 143, 158 (1980), *State v. White*, 135 Wn.2d 761 (1998), *distinguishing State v. Smith*, 76 Wn.App. 9 (1994), *cf.: State v . Peck*, 194 Wn.2d 148 (2019); III.

***Utah v. Strieff***, 579 U.S. 232, 136 S.Ct. 2056, 195 L.Ed.2d 400 (2016)

During unlawful investigative stop of vehicle police learn of arrest warrant, defendant is arrested for the warrant, search incident to arrest yields drugs; held: discovery of arrest warrant during the unconstitutional detention breaks the causal chain thus **attenuation doctrine** applies, *Brown v. Illinois*, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975), *but see: State v. Mayfield*, 192 Wn.2d 871 (2019), and drugs are admissible; attenuation doctrine analysis: (1) look to the "temporal proximity" between the unconstitutional conduct and the discovery of evidence to determine how closely the discovery of evidence followed the unconstitutional search(2) consider the presence of intervening circumstances; (3) and "particularly" significant, examine "the purpose and flagrancy of the official misconduct;" 6-3.

***State v. Duncan***, 185 Wn.2d 430, 438-41 (2016)

Following a report of someone in a white car shooting into a home police stop white car, remove occupants at gunpoint, handcuff and secure in police cars, open car's doors, find gun, remove gun, tow car, subsequently obtain search warrant; held: warrantless search of vehicle for evidence once vehicle's occupants are detained in police cars is improper, *State v. Snapp*, 174 Wn.2d 177, 197-201 (2012); where there is reasonable suspicion that there is an unsecured gun in a vehicle that will be impounded and towed, police may make a limited sweep of the vehicle to obtain the gun to avoid accidental discharge under community caretaking function; 9-0.

***State v. Samalia***, 186 Wn.2d 262 (2016)

Vehicle driven by defendant is stopped by police as stolen, defendant escapes on foot,

officer finds cell phone in car, without a warrant uses contents of cell phone to identify driver who moves to suppress; held: defendant abandoned privacy interest in cell phone and its data by voluntarily leaving it in the stolen vehicle; *State v. Kealey*, 80 Wn.App. 162 (1995); affirms *State v. Samalia*, 186 Wn.App. 224 (2015); 6-3.

***State v. Cruz***, 195 Wn.App. 120 (2016), *review dismissed,, on other grounds*, 189 Wn.2d 588 (2017)

Officer arrests and cuffs defendant at defendant's truck for fishing misdemeanor, places him in patrol car intending to cite and release, inquires if there are weapons in the truck, defendant says guns, officer enters truck, removes guns, discovers defendant has a felony record, charged with unlawful possession a firearm; held: *Terry* frisk extends to a car if there is a reasonable suspicion that suspect is dangerous and may gain access to a weapon in the vehicle, *State v. Glossbrener*, 146 Wn.2d 670, 680-81 (2002), both components must be present, here there was no indication of dangerousness thus seizure of guns was improper, distinguishing *State v. Kennedy*, 107 Wn.2d 1 (1986), no exigent circumstance justifying search without a warrant existed as there was no true emergency, *State v. Hinshaw*, 149 Wn.App. 747, 753 (2009), even though only one officer was present; III.

***Collins v. Virginia,*** 584 U.S. ___, 138 S.Ct. 1663 (2018)

Police, with probable cause to believe motorcycle is stolen and is in defendant's driveway alongside his house enter the driveway, remove tarp from the motorcycle, observe that it is the stolen motorcycle, arrest defendant; held: automobile exception extends no further than the automobile itself, does not extend to warrantless entry of home or curtilage to search a vehicle therein, distinguishing *Scher v. United States*, 305 U.S. 251, 59 S.Ct. 174, 83 L.Ed. 151 (1938); 8-1.

***State v. Vanhollebeke***, 190 Wn.2d 315, 412 P.3d 1274 (2018)

Defendant in vehicle is stopped for infraction, police observe punched ignition and drug paraphernalia, defendant leaves vehicle and locks it, does not have a key, refuses consent to search, police contact owner, obtain key, search, seize gun, defendant charged with unlawful possession of a firearm; held: driver of a vehicle does not ordinarily assume the risk that the owner will consent to search, *State v. Mathe*, 102 Wn.2d 537 (1984), but where the police have good cause to believe that the vehicle is stolen, based here upon punched ignition and lack of a key, then the driver has assumed the risk that the absent owner may consent, thus motion to suppress is properly denied; affirms *State v. Vanhollebeke*, 197 Wn.App. 66 (2016); 9-0.

***State v. Hendricks***, 4 Wn.App.2d 135 (2018)

"A traffic stop is not pretextual even where the officer has an additional motivation for conducting the stop apart from a suspected traffic violation, so long as the officer's purported motive in investigating a suspected traffic violation was an actual, conscious, and independent reason for the stop. *State v. Arreola*, 176 Wn.2d 284, 299-300 (2012)," at 145, *Matter of Pleasant*, 21 Wn.App.2d 320 (2022); II.

***State v. Mayfield,*** 192 Wn.2d 871 (2019)

Police unlawfully seize defendant, advise him of his right to refuse a search, defendant consents to search of his vehicle, police find drugs, trial court denies suppression under **attenuation doctrine**, *Utah v. Strieff*, 579 U.S. ——, 136 S.Ct. 2056, 2061, 195 L.Ed.2d 400 (2016), concluding that consent attenuated the unlawful seizure; held: under the state constitution the attenuation doctrine must be narrowly applied such that "[t}he State must prove that intervening circumstances gave rise to a superseding cause that genuinely severed the causal connection between official misconduct and the discovery of evidence. If the State fails to meet its burden then the attenuation doctrine cannot apply, regardless of whether the official misconduct was flagrant and purposeful, and regardless of whether suppression is likely to deter similar misconduct in the future;" here, the requested consent occurred while the illegal seizure was ongoing and the consent was not an independent act of free will sufficient to establish a superseding cause, *State v. Armenta*, 134 Wn.2d 1 (1997); 9-0.

***State v . Peck***, 194 Wn.2d 148 (2019)

Defendant is arrested by a stolen car parked on private property, police impound, during inventory search open small zippered nylon CD case, find drugs; held: while a warrantless inventory search of closed luggage or a car trunk is impermissible, *State v. Houser*, 95 Wn.2d 143, 155 (1980), *State v. Wisdom*, 187 Wn.App. 652, 675-76 (2015), "a nylon case that looked like it contained CDs does not possess the same aura of privacy as a purse, shaving kit, or personal luggage," at 159, at least where the case is found in a stolen vehicle; 5-4.

***State v. Lee***, 7 Wn.App.2d 692 (2019)

Police stop vehicle for infraction, arrest driver for suspended license, run defendant-passenger's name to see if she is licensed to drive the car away, discover she has a drug conviction, ask her if she will consent to search her purse left in car, advising her she can refuse, defendant consents, drugs found; held: during a traffic stop the driver and passengers are all lawfully seized, *State v. Marcum*, 149 Wn.App. 894, 910 (2009), *Brendlin v. California*, 168 L.Ed.2d 132 (2007), *but see: State v. Mennegar*, 114 Wn.2d 304 (1990), *State v. Mendez*, 137 Wn.2d 208 (1999), running passenger's name was reasonable as she had agreed to drive car, *id.*, asking a lawfully seized person if she would consent to a search of an item left in a car after she knew officers would search the car was reasonable, *cf.: State v. O'Day*, 91 Wn.App. 244 (1998), officer's mention of defendant's drug conviction does not vitiate consent; I.

***Kansas v. Glover***, ___ U.S. ___, 140 S.Ct. 1183, 206 L.Ed.2d 412 (2020)

Sheriff runs license plate check, discovers owner of vehicle's license is suspended, stops car, determines that driver is owner who is convicted of driving while an habitual traffic offender; held: police may pull over a car when the officer has learned that the owner's license is suspended, absent other evidence that negates the inference that the owner is driving, *State v. Lyons*, 85 Wn.App. 268 (1997), *Seattle v. Yeager*, 67 Wn.App. 41 (1992), *State v. Phillips*, 126 Wn.App. 584 (2005), *see: State v. Penfield*, 106 Wn.App. 157 (2001), *State v. Creed*, 179 Wn.App. 534 (2014); 8-1.

# SEARCH
## By Citizens

***State v. Morgan***, 32 Wn.App. 764 (1982)

Private courier searches envelope, finds white powder, turns it over to police who search envelope and test it; held: police were obliged to obtain a warrant before searching the envelope, irrespective of the fact that it had previously been inspected by a private party; II.

***United States v. Jacobsen***, 80 L.Ed.2d 85 (1984)

Where employees of a private freight carrier examine a cardboard box and find drugs, there is no Fourth Amendment violation, even when package is resealed then reopened by police, *see: State v. Agee*, 15 Wn.App. 709 (1976).

***State v. Ludvik***, 40 Wn.App. 257 (1985)

From his residence, state game agent observed drug activity in residence across street, reports it to police who obtain warrant; held: the fact that person conducting search is a state employee does not lend an element of state action to search if search is not related to employee's official duties and search is done solely in the capacity of a private citizen, *see: State v. Eisfeldt,* 163 Wn.2d 628 (2008); III.

***New Jersey v. T.L.O.***, 83 L.Ed.2d 720 (1985)

Fourth Amendment applies to searches by public school authorities as representatives of the state; school officials may search a student on reasonable suspicion, short of probable cause, without a warrant; *see: State v. McKinnon*, 88 Wn.2d 75 (1977), *cf.: State v. Meneese*, 174 Wn.2d 937 (2012), *State v. A.S.*, 6 Wn.App.2d 264 (2018); 7-2.

***State v. Dold***, 44 Wn.App. 519 (1986)

Police receive an envelope addressed to police, open envelope, find another envelope addressed to defendant marked "delivered and opened in error"; inner envelope was open, police read letter, learn that defendant had access to drugs, investigate and arrest defendant for VUCSA; held: where a private citizen, acting without governmental authority, searches property, then a subsequent warrantless search by the government that does not exceed the bounds of the prior private search does not violate the Fourth Amendment, *State v. Swenson*, 104 Wn.App. 744, 753-56 (2000), *but see: State v. Eisfeldt*, 163 Wn.2d 628 (2008); burden is on the defense to establish collusion between the citizen informant and the police; I.

***State v. Sweeney***, 56 Wn.App. 42 (1989)

Job Corps student leader informs dormitory supervisor that defendant sells drugs, supervisor previously suspected defendant due to other students entering defendant's room at unusual hours, pats down defendant, finds unidentified leaf, strip searches, finds drugs in underwear; held: patdown was justified, as quasi-school officials had reasonable grounds to believe the search was necessary to maintain school discipline and order, *State v. Brooks*, 43 Wn.App. 560 (1986), no additional operative facts existed to justify expansion of the initial

search to a strip search, *cf.: Florence v. Bd. of Chosen Freeholders*, 566 U.S. 3187, 132 S.Ct. 1510, 182 L.Ed.2d 566 (2012); further, strip search violated Job Corps rules; III.

***State v. McWatters***, 63 Wn.App. 911 (1992)

Fire department paramedic, while giving medical assistance to injured motorcyclist, hands drugs to police at scene; held: no evidence that police knew of and acquiesced in search, even if paramedic recognized vial as drugs, *State v. Clark*, 48 Wn.App. 850 (1987), *cf.: State v. Heritage*, 152 Wn.2d 210 (2004); search and seizure rules do not apply to paramedic employed by fire department, *distinguishing Michigan v. Tyler*, 56 L.Ed.2d 486 (1978), *State v. Bell*, 108 Wn.2d 193 (1987); III.

***State v. Walter***, 66 Wn.App. 862 (1992)

Photo lab manager processes film showing juveniles standing in front of Tennessee state emblem, fears liability for preparation of counterfeit driver's licenses, calls police who requests copies of prints, manager complies; held: absent evidence of encouragement by police that would render manager an agent, lab manager's contact with police and delivery of prints constitute private action, *State v. Clark*, 48 Wn.App. 850, 856 (1987), *State v. Krajeski*, 104 Wn.App. 377, 382-84 (2001), *State v. Bass*, 18 Wn.App.2d 760 (2021); I.

***Pers. Restraint of Maxfield***, 133 Wn.2d 332 (1997)

PUD employee volunteers to police that defendant's power usage is high, after further investigation, police obtain warrant, seize drugs; held: there is a privacy interest in public power records (plurality of four justices holds pursuant to state constitution), PUD employee lacked statutory authority to disclose record to police, thus suppressed, *State v. Orick*, 129 Wn.App. 654 (2005), *see: State v. Gunwall*, 106 Wn.2d 54, 67-8 (1986), *cf.: State v. McKinney*, 148 Wn.2d 20 (2002); RCW 42.17.314 authorizes police to demand power records only after setting forth in writing a reasonable suspicion, *State v. Maxwell*, 114 Wn.2d 761 (1990); *overrules, on state grounds*, *State v. Maxfield*, 125 Wn.2d 378 (1994), *reverses Pers. Restraint of Maxfield*, 81 Wn.App. 705 (1996); 5-4.

***State v. Krajeski***, 104 Wn.App. 377, 382-84 (2001)

Police, with knowledge that stolen property is in an apartment, are told by landlord that a dog in the apartment might damage property, ask officer if he wants to search, officer declines, having been refused consent by lessee, tells landlord he could not authorize him to search and that whatever lessor does is of his own free will, landlord searches, tells police he found stolen bicycle, police get warrant; held: defendant has burden of showing that search was government action, *State v. Clark*, 48 Wn.App. 850, 856 (1987), factors determining whether private party is acting as a government agent: (1) whether government knew of and acquiesced in the intrusive conduct, (2) whether party performing the search intended to assist law enforcement efforts or further his own ends, *State v. Bass*, 18 Wn.App.2d 760 (2021), *State v. Clark, supra.;* here, officer did not ask or authorize landlord to search, did not acquiesce in the search; II.

***State v. Swenson***, 104 Wn.App. 744, 753-56 (2000)

Homicide victim's father, having provided police information and having expressed frustration with perceived police inaction, obtains inculpatory telephone records which police

could not have legally obtained without a warrant, gives information to police; held: critical factors in determining if citizen is acting as state's instrumentality include (1) whether government knew of and acquiesced in intrusive conduct, and (2) whether citizen intended to assist law enforcement efforts or to further his own ends, *State v. Clark*, 48 Wn.App. 850, 856 (1987); mere knowledge that a citizen might conduct an illegal private search without government taking deterrent action is insufficient to turn the private search into a governmental one, *State v. Smith*, 110 Wn.2d 658, 666 (1988); since state did not instigate, encourage, counsel, direct or control the conduct, then there was no state action, *State v. Wolken*, 103 Wn.2d 823, 830 (1985); here, police encouraged citizen to help with their investigation but did not encourage citizen to obtain phone records; I.

***State v. Heritage***, 152 Wn.2d 210 (2004)

Park security guards, employed by city, who approach individuals smoking marijuana, detain and call police, are state officers; 9-0.

***State v. Eisfeldt***, 163 Wn.2d 628 (2008)

Contractor, given key to home by owner, discovers drugs, calls police who enter with contractor's permission, make same observations as contractor, then obtain warrant; held: private search doctrine under which a warrantless search by police does not offend the Fourth Amendment if the search does not expand beyond the private search, *Walter v. United States*, 65 L.Ed.2d 410 (1980), *United States v. Jacobsen*, 80 L.Ed.2d 85 (1984), is inapplicable under CONST., art. I, § 7, overruling, in part, *State v. Dold*, 44 Wn.App. 519 (1986), *State v. Walter*, 66 Wn.App. 862 (1992); since contractor had no authority to grant consent, police entry was invalid; 9-0.

***State v. E.K.P.***, 162 Wn.App. 675 (2011)

Assistant principal hears from unnamed "reliable" student that respondent smells of alcohol and might possess alcohol, assistant principal approaches respondent in parking lot, asks her to come to office, sees her try to hide backpack, in office does not smell alcohol, searches backpack, finds alcohol; held: informant's report and attempt to hide backpack gave school official reasonable grounds to suspect that a search of backpack would find alcohol, *New Jersey v. T.L.O.*, 469 U.S. 325, 341-42, 83 L.Ed.2d 720 (1985), *State v. B.A.S.*, 103 Wn.App. 549, 553-54 (2000); *Aguilar-Spinelli* test is inapplicable unless search is by a police officer, *see: State v. Sieler*, 95 Wn.2d 43, 47-48 (1980); II.

***State v. Harrier***, 14 Wn.App.2d 17 (2020)

Cloud storage company discovers child porn, reports it to police as required, 18 U.S.C. § 2258A, police open images, obtain search warrants which are served on cloud storage company for name of customer, then obtain warrant for defendant's computer, observe child porn; held: customer has no privacy interest in images held by a third party *State v. Eisfeldt*, 163 Wn.2d 628, 636 (2008); child porn is contraband and there is no privacy interest in contraband, citing *State v. Carter*, 151 Wn.2d 118, 126-27 (2004); II.

***State v. Bass***, 18 Wn.App.2d 760 (2021)

Detective, seeking touch DNA evidence from defendant to see if it matches semen found in homicide victim, contacts defendant-truck driver's employer, asks for defendant's route so he could collect discarded material, employer gives the information and indicates she would seek anything he discarded at work, detective says okay but that he's not asking her to do anything for him, employer obtains cup and soda can, gives them to detective, match found, defense at suppression hearing maintains that employer was acting as agent of police; held: an agency relationship requires more than knowledge and acquiescence in a private citizen's action, *State v. Krajeski*, 104 Wn.App. 377, 382-84 (2001), *State v. Clark*, 48 Wn.App. 850, 856 (1987), *State v. Wolken*, 103 Wn.2d 823, 830 (1985), *State v. Smith*, 110 Wn.2d 658, 666 (1988), *State v. Swenson*, 104 Wn.App. 744, 753-56 (2000), trial court's finding that police did not direct, entice or control employer is supported by substantial evidence; I.

# SEARCH
## Consent

***State v. Collins***, 30 Wn.App. 1 (1981)

Suspect, arrested at home, advised of rights, told police he did not wish to make statement, police tell suspect it would be helpful if they had the gun, suspect gives police gun; held: police did not scrupulously honor defendant's request to remain silent, turning over gun was in response to police statement, thus equivalent to confession, thus suppressed, *Rhode Island v. Innis*, 64 L.Ed.2d 297 (1980), *Michigan v. Mosely*, 46 L.Ed.2d 313 (1975), *State v. Dennis*, 16 Wn.App. 417 (1976), *State v. Chambers*, 197 Wn.App.. 96, 128-35 (2016); II.

***State v. Jordan***, 30 Wn.App. 335 (1981)

Police need not specifically advise suspect of his right to refuse consent to search, *State v. Johnson*, 104 Wn.App. 409, 420-22 (2001), *see: State v. Khounvichai*, 149 Wn.2d 557 (2003), *State v. Tagas*, 121 Wn.App. 872 (2004), *but see: State v. Ferrier*, 136 Wn.2d 103 (1998); specifies standards to determine voluntariness of consent, *State v. Shoemaker*, 85 Wn.2d 207 (1975), *cf.: State v. Russell*, 180 Wn.2d 860, 871-72 (2014); I.

***State v. Cole***, 31 Wn.App. 501 (1982)

Suspect consents to search of car, disclaims ownership of suitcases therein, which police search; held: search exceeded scope of consent; III; *cf.*: *State v. Jensen*, 44 Wn.App. 485 (1986).

***State v. Rodriguez***, 32 Wn.App. 758 (1982)

Evidence seized during a consensual search preceded by an illegal detention need not be suppressed if consent was voluntarily given and free of taint of prior detention, *but see: State v. Soto-Garcia*, 68 Wn.App. 20 (1992), *overruled, in part, State v. Thorn*, 129 Wn.2d 347 (1996), *State v. Harrington*, 167 Wn.2d 656 (2009); II.

***State v. Counts***, 99 Wn.2d 54 (1983)

Merely opening door to residence when police knock is not the equivalent of consent to search or arrest in the home; 9-0.

***Florida v. Royer***, 75 L.Ed.2d 229 (1983)

Suspect who fit drug courier profile is approached by police who request his ticket and license; without oral consent, suspect surrenders documents, whereupon police ask suspect to accompany them to a small room 40 feet away; suspect goes with police; without consent, police retrieve luggage; when asked if he would consent to search, suspect produced a key; plurality held that police action exceeded the permissible bounds of an investigative stop, and suspect's consent was tainted by the illegal detention, *Kaupp v. Texas*, 155 L.Ed.2d 814 (2003); 6-3.

***State v. Dresker***, 39 Wn.App. 136 (1984)

Police, having previously decided to enter a residence, encounter the resident at the front door, say “let's step inside;” resident says nothing, but complies; held: in light of officer's

decision to enter, his statement to resident was a command, and resident's silence and compliance were not consent; III.

***State v. Mathe***, 102 Wn.2d 537 (1984)

Owner-occupant of residence consents to search, defendant rents room from owner, police throw open door, see defendant asleep in his room, enter and arrest him; held: lessor lacked authority to consent to search of defendant's room, police entry into room was unlawful, *Seattle v. McCready*, 124 Wn.2d 300, 304-6 (1994), *reversing* *State v. Mathe*, 35 Wn.App. 572 (1983); *see:* *State v. Thompson*, 151 Wn.2d 793 (2004), *see also:* *State v. Birdsong*, 66 Wn.App. 534 (1992), *cf.:* *State v. Haapala*, 139 Wn.App. 424 (2007), *State v. Vanhollebeke*, 190 Wn.2d 315 (2018. *Seattle v. McCready*, 124 Wn.2d 300, 304-6 (1994); 9-0.

***State v. Williamson***, 42 Wn.App. 208 (1985)

Undercover officers in civilian attire are invited into home where they arrest the defendant without warrant; held: where invited, undercover police may effectuate a warrantless arrest in the home, *distinguishing* *Payton v. N.Y.*, 63 L.Ed.2d 639 (1980); knowing and voluntary waiver analysis does not apply to Fourth Amendment issues, *Schneckloth v. Bustamonte*, 36 L.Ed.2d 854 (1973), *State v. McCrorey*, 70 Wn.App. 103 (1993); II.

***State v. Jensen***, 44 Wn.App. 485 (1986)

Defendant is arrested for criminal traffic offense, police unlawfully search a bag in trunk of defendant's vehicle, advise defendant of *Miranda* warnings, obtain consent to search entire vehicle, find drugs in a jacket in the vehicle; held: in determining whether consent was voluntary, trial court should consider, *inter alia*, (1) whether *Miranda* warnings were given, (2) education and intelligence of suspect, and (3) whether suspect was advised of right to refuse search, *State v. Shoemaker*, 85 Wn.2d 207, 212 (1975); here, prior illegal search did not taint consent, *but see:* *State v. Tijerina*, 61 Wn.App. 626 (1991), *State v. Soto-Garcia*, 68 Wn.App. 20 (1992), *overruled, in part, State v. Thorn*, 129 Wn.2d 347 (1996), *State v. Avila-Avina*, 99 Wn.App. 9 (2000), *State v. Mayfield*, 192 Wn.2d 871 (2019); factors for determining attenuation include (1) temporal proximity of illegal search and consent, (2) presence of intervening circumstances, (3) purpose of flagrancy of police misconduct, and (4) *Miranda* warnings; search of defendant's jacket within the vehicle was within the scope of the consent as the consent permitted a complete search of the vehicle, *State v. Mueller*, 63 Wn.App. 720 (1992), *distinguishing* *State v. Cole*, 31 Wn.App. 504 (1982); *cf.:* *State v. Cantrell*, 70 Wn.App. 340 (1993), *aff'd on other grounds,* 124 Wn.2d 183 (1994), *but see: State v. Monaghan*, 165 Wn.App. 782 (2012); III, 2-1.

***State v. Gonzales***, 46 Wn.App. 388 (1986)

After unlawful arrest, suspect consents to search of his home; held: because defendant volunteered to have his home searched, was told he need not consent and police misconduct in illegally arresting suspect was "minor" and nonflagrant, absence of an attempt to exploit the arrest and spontaneity of consent alleviate any taint to the consent, *Brown v. Illinois*, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975), *Utah v. Strieff*, 579 U.S. 232, 136 S.Ct. 2056, 195 L.Ed.2d 400 (2016), *but see:* *State v. Soto-Garcia*, 68 Wn.App. 20 (1992), *overruled, in part, State v. Thorn*, 129 Wn.2d 347 (1996), *cf.:* *State v. Cantrell*, 70 Wn.App. 340 (1993), *aff'd on*

*other grounds,* 124 Wn.2d 183 (1994), *State v. Eserjose,* 171 Wn.2d 907 (2011), *State v. Mayfield,* 192 Wn.2d 871 (2019); during search pursuant to the consent to look for stolen property, police pick up a paper bag, recognize it by weight as not containing stolen property, enter bag, find drugs; held: exceeds scope of consent; III.

***State v. Nelson***, 47 Wn.App. 157 (1987)

Where arrestee asks to return to his home to get a coat due to cold weather, and knows that he need not do so, then officer's entry accompanying arrestee is consensual, *State v. Lyons,* 76 Wn.2d 343, 346-7 (1969); III.

***State v. Koepke***, 47 Wn.App. 897 (1987)

Lessee may validly consent to search his guest's bedroom where (1) guest did not pay rent, (2) guest had only planned on staying two-three weeks and lessee was going to ask guest to leave, (3) no lock on door, (4) lessee stored goods in room, (5) no indication when guest would return, *State v. Haapala,* 139 Wn.App. 424 (2007), *distinguishing* *State v. Mathe,* 102 Wn.2d 537 (1984), *cf.:* *Seattle v. McCready,* 124 Wn.2d 300, 303-6 (1994), *State v. Vy Thang,* 145 Wn.2d 630, 635-39 (2002), *State v. Thompson,* 151 Wn.2d 793 (2004), *State v. Morse,* 156 Wn.2d 1 (2005), *see: State v. Vanhollebeke,* 190 Wn.2d 315 (2018), a second search following a consensual search is valid where time elapsed is short, second search had same objective and is conducted by same officers; III.

***State v. Summers***, 52 Wn.App. 767 (1988)

Adult sister of juvenile respondent, acting as head of household while parent was away, consents to search of respondent's bedroom, respondent having exclusive use of that room; held: a person acting as the responsible adult has the same authority to consent as the parent would have had, had the parent been present; a parent may consent to the search of a dependent child's room irrespective of the parent's prior agrement to tolerate the child's desire for exclusive domain of his/her room; issue of whether the relationship is that of a dependent child or that of landlord-tenant is a factual question to be decided by trial court; I.

***State v. Leach***, 113 Wn.2d 735 (1989)

Where police have obtained consent to search for an individual possessing at best equal control over premises, that consent remains valid against a co-habitant, who also possesses equal control, only while the cohabitant is absent; should the cohabitant be present and able to object, police must obtain cohabitant's consent, *State v. White,* 141 Wn.App. 128, 134-40 (2007), *State v. Williams,* 148 Wn.App. 678, 688-89 (2009), *see:* *State v. Walker,* 136 Wn.2d 678 (1998), *State v. Hoggatt,* 108 Wn.App. 257 (2001), *State v. Morse,* 156 Wn.2d 1 (2005), *State v. Rooney,* 190 Wn.App. 653 (2015), *cf.:* *State v. Cantrell,* 124 Wn.2d 183 (1994) (*Leach* does not apply to motor vehicle searches), *State v. Haapala,* 139 Wn.App. 424 (2007), *State v. Hamilton,* 179 Wn.App. 870 (2014), *see:* *State v. Thompson,* 151 Wn.2d 793, 803-09 (2004); *affirms* *State v. Leach,* 52 Wn.App. 490 (1988), *State v. Vanhollebeke,* 190 Wn.2d 315 (2018); effectively overrules *State v. Chichester,* 48 Wn.App. 257 (1987).

***State v. Raines***, 55 Wn.App. 459 (1989)

Police respond to domestic violence call, observe male through window, knock on door, female answers, denies problem, police ask to speak to male, female denies male is present, police ask to enter, female does not object, steps back, police enter; female shuts inside door, states it is her room, police state they will investigate, female does not object, police open door, see suspect, drugs; held: failure to object and stepping aside is more than mere acquiescence, *but see: State v. Schultz*, 170 Wn.2d 746, 756-59 (2011); failure to object is an implied waiver; entry of bedroom was justified by exigent circumstance in response to domestic violence report in light of fact that police knew suspect was violent; 2-1, I.

***State v. Flowers***, 57 Wn.App. 636 (1990)

Police testify suspect, being held at gunpoint, not advised of *Miranda* rights or right to withhold consent, consents to search, defendant denies consenting; held: defendant was sophisticated, not "totally naive in criminal matters," did not claim to feel coerced, thus defendant's consent was not product of coercion or duress and his will was not overborne, *distinguishing State v. Werth*, 18 Wn.App. 530 (1977); *accord: State v. Cyrus*, 66 Wn.App. 502 (1992); *cf.: State v. Cantrell*, 124 Wn.2d 183 (1994); I.

***Illinois v. Rodriguez*** 111 L.Ed.2d 148 (1990)

Where police reasonably but erroneously believe that a third party has common authority to consent to search of premises, then the search is valid, as long as the facts available to the officer at the moment would warrant a person of reasonable caution in the belief that the consenting party had authority over the premises; *but see: State v. Ryland*, 65 Wn.App. 806 (1992), *State v. Birdsong*, 66 Wn.App. 534 (1992), *State v. Rose*, 75 Wn.App. 28, 34-6 (1994); 6-3.

***State v. Smith***, 115 Wn.2d 775 (1990)

Police advise of *Miranda* rights, ask for consent to search car trunk, defendant asks what happens if he refuses, police state they will impound and seek a warrant, defendant signs consent to search which includes specific language that documented right to refuse; held: defendant "voluntarily acquiesced" to search, *State v. Cherry*, 191 Wn.App. 456, 472-73 (2015), *distinguishing Bumper v. North Carolina*, 20 L.Ed.2d 797 (1968), wherein police lied that they had a warrant, whereas here police said they would *request* a warrant, thus no coercion, *see: State v. Schultz*, 170 Wn.2d 746, 756-59 (2011); 6-3.

***State v. Curran***, 116 Wn.2d 174 (1991)

Taking blood over objection from vehicular homicide suspect does not violate CONST. Art. 1, § 7 where there is clear indication it would reveal evidence of intoxication and it was a reasonable test performed in a reasonable manner, *State v. Judge*, 100 Wn.2d 706, 711-12 (1984); 9-0.

***State v. Tijerina***, 61 Wn.App. 626 (1991)

Police stop defendant's vehicle for infraction, decide not to cite, observe motel soap in glove box, suspect, because defendant is Hispanic, that he may have been involved in motel drug trade in Spokane, ask to search trunk, granted, find drugs; held: detention after decision not to cite must be based on articulable facts, which don't exist here, *State v. Glossbrener*, 146 Wn.2d

670 (2002), *State v. Veltri*, 136 Wn.App. 818 (2007), *see:* *State v. Henry*, 80 Wn.App. 544 (1995); absence of intervening circumstances between illegal detention and consent and absence of *Miranda* warnings taint consent, *Taylor v. Alabama*, 73 L.Ed.2d 314 (1982), *State v. Jensen*, 44 Wn.App. 485, 490 (1986), *State v. Soto-Garcia*, 68 Wn.App. 20 (1992), *overruled, in part, State v. Thorn*, 129 Wn.2d 347 (1996), *State v. Cantrell*, 70 Wn.App. 340 (1993), *aff'd on other grounds*, 124 Wn.2d 183 (1994), *State v. O'Day*, 91 Wn.App. 244 (1998); III.

***Florida v. Bostick***, 115 L.Ed.2d 389 (1991)

Police routinely board bus at scheduled stop and ask passengers for permission to search luggage, defendant grants permission, police seize drugs; held: no seizure where a reasonable innocent person would feel free to say no, *United States v. Drayton*, 153 L.Ed.2d 242 (2002), *but see:* *State v. Rankin*, 151 Wn.2d 689 (2004); cramped confines of bus is but one factor in determining if consent is voluntary; *see:* *State v. Thorn*, 129 Wn.2d 347 (1996), *State v. Johnson*, 8 Wn.App.2d 728 (2019); 6-3.

***State v. Mueller***, 63 Wn.App. 720 (1992)

Suspect consents to search of car for guns and drugs, trooper finds gym bag in car, searches it, finds drugs; held: consent was general and unqualified, thus search of gym bag did not exceed scope of consent, *State v. Jensen*, 44 Wn.App. 485 (1986), *Florida v. Jimeno*, 114 L.Ed.2d 297 (1991), *but see: State v. Monaghan*, 165 Wn.App. 782 (2012); I.

***State v. Rodriguez***, 65 Wn.App. 409 (1992)

Police, with consent of lessee, enter apartment, arrest defendant, a temporary resident, in bathroom; held: defendant's expectation of privacy was qualified by possibility that lessee would consent to search, *State v. Vy Thang*, 145 Wn.2d 630, 635-39 (2002); defendant's presence in bathroom does not provide a separate privacy right from that of lessee, as consent to search apartment included bathroom, *distinguishing* *State v. Berber*, 48 Wn.App. 583 (1987), *State v. Leach*, 113 Wn.2d 735, 744 (1989); *see also:* *Tukwila v. Nalder*, 53 Wn.App. 746 (1989), *State v. Haapala*, 139 Wn.App. 424 (2007); III.

***State v. Cyrus***, 66 Wn.App. 502 (1992)

Police, investigating assault and having been told suspect was armed, knock on door, suspect angry, refuses to come out, demands that police come in, police at first wait, then enter, defendant points a gun at them, is convicted of assault on the officers; held: defendant's statement to police, "you come in" was voluntary, not a submission to police authority after arrest, *State v. Flowers*, 57 Wn.App. 636, *review denied*, 115 Wn.2d 1009 (1990), *State v. Jones*, 22 Wn.App. 447 (1979), defendant's intoxication does not vitiate consent; I.

***State v. Birdsong***, 66 Wn.App. 534 (1992)

During tenancy period, lessor asks police to enter house with him to see vandalism, police arrive with lessor, before entering defendant-lessee arrives, police enter without defendant's permission, find drugs; held: defendant was present before search, his property was in the premises, he retained keys, police did not ask for his consent, thus entry was unlawful, *State v. Mathe*, 102 Wn.2d 537 (1984), *United States v. Matlock*, 39 L.Ed.2d 242 (1974), *Seattle v. McCready*, 124 Wn.2d 300, 303-6 (1994), *State v. Williams*, 148 Wn.App. 678, 688-89

(2009), *State v. Rooney*, 190 Wn.App. 653 (2015), *see:* *State v. Hoggatt*, 108 Wn.App. 257 (2001), *State v. Thompson*, 151 Wn.2d 793 (2004), *State v. Morse*, 156 Wn.2d 1 (2005), *State v. White*, 141 Wn.App. 128, 134-40 (2007), *State v. Vanhollebeke*, 190 Wn.2d 315 (2018), *distinguishing* *Illinois v. Rodriguez*, 111 L.Ed.2d 148 (1990) (no apparent authority, as defendant was present); I.

***State v. Browning***, 67 Wn.App. 93 (1992)

Building inspector informs resident that inspection had been requested, resident goes back into house without stating that inspector cannot enter, inspector enters, finds drugs, calls police who obtains warrant; held: mere acquiescence to a show of authority is insufficient to support a free and voluntary consent to search, *Bumper v. North Carolina*, 20 L.Ed.2d 797 (1968), *State v. Schultz*, 170 Wn.2d 747 (2011), particularly where Uniform Building Code § 202(c) requires inspectors to request entry; even if inspector believed that contractor had authorized entry, where resident is at home, inspector must request entry, *State v. Smith*, 88 Wn.2d 127, 156 (Horowitz, J., dissenting) (1977); I.

***State v. Ryland***, 120 Wn.2d 325 (1992)

Without warrant, police knock on apartment door, house guest answers door, police ask to see defendant, guest admits police who arrest defendant, who confesses to burglary; *per curiam* decision adopts reasoning of the dissent in *State v. Ryland*, 65 Wn.App. 806, 810 (1992) (Agid, J., dissenting), and remands to the trial court to determine whether officer reasonably believed houseguest had authority to consent to entry.

***State v. Soto-Garcia***, 68 Wn.App. 20 (1992), *overruled, on other grounds, State v. Thorn*, 129 Wn.2d 347 (1996)

Police observe defendant, who looks away, patrol car stops, defendant approaches, police ask where he is going, defendant answers appropriately, police ask for name, defendant produces identification, police run radio check, ask if he has drugs, defendant says no, ask if they may search, defendant says yes, police find drugs; held: consent to search obtained through exploitation of prior illegality may be invalid even if voluntary, *Taylor v. Alabama*, 73 L.Ed.2d 314 (1982); factors to be considered in determining whether consent is tainted: (1) temporal proximity of the illegality and the subsequent consent, (2) the presence of significant intervening circumstances, (3) the purpose and flagrancy of police misconduct, and (4) *Miranda* warnings, *State v. Gonzales*, 46 Wn.App. 388, 398 (1986); one factor alone is generally not dispositive, *State v. Jensen*, 44 Wn.App. 485, 490 (1986); here, defendant was not told he could withhold consent, misconduct was more intrusive than in *Gonzales, supra*, there was no basis for a stop, no *Miranda* warnings, thus suppressed; *accord*: *State v. O'Day*, 91 Wn.App. 244 (1998), *State v. Avila-Avina*, 99 Wn.App. 9 (2000), *State v. Harrington*, 167 Wn.App. 656 (2009); II.

***State v. McCrorey***, 70 Wn.App. 103 (1993)

Police, with probable cause but without a warrant, knock on defendant's door, ask him to come out, defendant refuses, police ask to come in, defendant says police cannot enter if they intend to arrest, police respond that if admitted to residence they'll talk about it, defendant admits police who arrest defendant, who confesses; held: voluntariness standard, *Schneckloth v. Bustamonte*, 36 L.Ed.2d 854 (1973), is to be applied under state constitution, *distinguishing*

*State v. Greco*, 62 Wn.2d 265 (1958), *McNear v. Rhay*, 65 Wn.2d 530 (1965); while ruse entries may be permissible, *State v. Hashman*, 46 Wn.App. 211, 214 (1986), *State v. Myers*, 102 Wn.2d 548 (1984), *State v. Williamson*, 42 Wn.App. 208 (1985), nonundercover police acting in their official capacity may not actively misrepresent their purpose to gain entry or exceed scope of consent given; here, consent was limited in scope to talking, not arresting, police exceeded the scope, thus confession suppressed; I.

***State v. Cantrell***, 70 Wn.App. 340 (1993), *aff'd, on other grounds,* 124 Wn.2d 183 (1994)

Police stop vehicle, owned by passenger's father, for speeding, ask passenger for consent to search, granted by passenger, find drugs, charge driver; held: after citing for infraction, police had no right to detain occupants further, *State v. Tijerina*, 61 Wn.App. 626 (1991), *State v. Henry*, 80 Wn.App. 544 (1995), *State v. Glossbrener*, 146 Wn.2d 670 (2002), *State v. Veltri*, 136 Wn.App. 818 (2007), *see: State v. King*, 89 Wn.App. 612, 623-4 (1998); no intervening circumstances alleviate the taint, *distinguishing State v. Gonzales*, 46 Wn.App. 388, 397-9 (1986), *State v. Flowers*, 57 Wn.App. 636, 645 (1990), *State v. Jensen*, 44 Wn.App. 485, 489 (1986), *State v. Armenta*, 134 Wn.2d 1 (1997); II.

***State v. Cantrell*,** 124 Wn.2d 183 (1994)

Consent to search a motor vehicle given by passenger with common authority over it supports search of vehicle where driver does not object, and where driver is a permissive driver and not a mere passenger, *distinguishing State v. Leach*, 113 Wn.2d 735 (1989), as privacy interest in automobile is less than in an office or home; overrules, in part, *State v. Cantrell*, 70 Wn.App. 340 (1993); *see: United States v. Matlock*, 38 L.Ed.2d 242 (1974), *Schneckloth v. Bustamonte*, 36 L.Ed.2d 854 (1973), *State v. Vanhollebeke*, 190 Wn.2d 315 (2018); 9-0.

***Seattle v. McCready***, 124 Wn.2d 300, 303-308 (1994)

Tenant has sole authority to consent or refuse consent to search of apartment; tenant and lessor have common authority to consent to search of common areas, *State v. Mathe*, 102 Wn.2d 537, 543-4 (1984); 8-0.

***State v. Rose***, 75 Wn.App. 28, 32-36 (1994)

Landlord has no authority to consent to a search on behalf of a tenant where tenant is in undisputed possession of property unless tenancy has expired, will not be renewed and tenant has been notified landlord will be on premises, *State v. Christian*, 95 Wn.2d 655, 659 (1981); landlord's limited permission to enter does not translate into a general waiver of privacy; while police may reasonably rely upon a belief of common authority, *Illinois v. Rodriguez*, 111 L.Ed.2d 148, 161 (1990), a search premised upon an erroneous view of the law will not be validated by the doctrine of apparent authority, *see: Stoner v. California*, 11 L.Ed.2d 856 (1964); I.

***State v. Cotten***, 75 Wn.App. 669 (1994)

FBI, investigating bombing, go to suspect's home, suspect's mother signs general consent to search but orally consents to a search for evidence of bombing, agents enter suspect's bedroom, observe shotgun, unload it, take it to mother who agrees they can take it, shotgun is later linked to homicide, the *res* of this appeal; held: removing shotgun from bedroom and

unloading it is a seizure, at 680-02, *distinguishing* *Coolidge v. New Hampshire*, 29 L.Ed.2d 564 (1971); seizure of shotgun was reasonable, as police conducting a search may briefly seize and secure any weapon for safety, at 682-85, *Michigan v. Summers*, 452 U.S. 692, 69 L.Ed.2d 340 (1981), *State v. King*, 89 Wn.App. 612, 620 (1998); person who maintains common authority over residence can consent to seizure and removal of any item, even if it was owned by another and not suspected of being evidence of a crime, at 685; *but see:* *State v. Ryland*, 120 Wn.2d 325 (1992), *State v. Mathe*, 102 Wn.2d 537 (1984); II.

***State v. Coutier***, 78 Wn.App. 239 (1995)

Police stop vehicle for infraction, defendant doesn't produce registration, officer asks defendant to search glove box, defendant is hesitant, does so but tries to block officer's view of contents of glove compartment, officer, with flashlight, perseveres, sees drugs; held: defendant's blocking view of glove box was not a furtive gesture, rather it was communication of no consent, thus search was improper; III.

***State v. Faford***, 128 Wn.2d 476, 489 (1996)

*Miranda* warnings are not a prerequisite to establish consent; state must prove that consent was freely and voluntarily made by clear and convincing evidence, totality of circumstances, *State v. Rodriguez*, 20 Wn.App. 876 (1978).

***State v. Hendrickson***, 129 Wn.2d 61, 71-3 (1996)

Defendant signs consent to search his vehicle while he participates in work release program, is arrested and removed from work release, police search vehicle, find drugs; held: consent to search terminated upon defendant's termination from work release without necessity for him to take specific action to revoke consent; 9-0.

***Ohio v. Robinette***, 136 L.Ed.2d 347 (1996)

Police stop defendant for speeding, obtain license, warn him, return license, then ask permission to search car, defendant agrees, drugs found; held: police are not obliged to inform detainees that they are free to go before a consent to search may be deemed voluntary, *Schneckloth v. Bustamonte*, 36 L.Ed.2d 854 (1973); 8-1.

***State v. Davis***, 86 Wn.App. 414 (1997)

Police enter room, find video camera focussed on bed, juvenile in bed with defendant, drugs present, defendant signs consent to "take...any letters, papers, materials or any other propery," police seize videotapes, watch them, discover other crimes; held: defendant gave police authority to seize virtually any materials they reasonably believed to be evidence of criminal activity, in light of other evidence of illegal activity in room, police reasonably believed that videotapes might contain incriminating images; II.

***State v. Sondergaard***, 86 Wn.App. 656 (1997)

Police ask apparently hallucinating person for consent to search purse, she agrees, drugs found, trial court suppresses; held: lack of capacity, by itself, is a sufficient basis on which to find a consent to search involuntary, court need not find an element of police coercion to suppress, distinguishing *Colorado v. Connelly*, 93 L.Ed.2d 473 (1986); 2-1, I.

***State v. King***, 89 Wn.App. 612 (1998)

Police obtain consent to search apartment for a gun used in a homicide, enter a bedroom, see defendant in bed covering an item with a sheet which looks like a gun, defendant says it's a gun, police handcuff defendant, seize gun, ask if gun is his, defendant says it is, police call in serial number and discover gun is stolen, advise of *Miranda* warnings, defendant admits he knows gun is stolen; held: entry of bedroom was within scope of consent, seizure of defendant and gun was reasonable to minimize risk of harm to officers, *State v. Cotten*, 75 Wn.App. 669 (1994), briefly holding gun to check serial number was reasonable, *see; State v. Cantrell*, 70 Wn.App. 340, 344 (1993), *aff'd in part,* 124 Wn.2d 183 (1994); II.

***State v. Ferrier***, 136 Wn.2d 103 (1998)

Where police, without a warrant, seek consent to search a home ("knock and talk"), they must, prior to entering, inform the person from whom consent is sought that s/he may lawfully refuse to consent to the search and that s/he can revoke the consent and limit the scope of the consent at any time, CONST. Art. 1, § 7, *State v. Freepons,* 147 Wn.App. 689 (2008), *State v. Budd,* 185 Wn.2d 566 (2016), distinguishing *State v. Shoemaker*, 85 Wn.2d 207, 212 (1975), *Schneckloth v. Bustamonte*, 36 L.Ed.2d 854 (1973), *cf.: State v. Bustamante-Davila*, 138 Wn.2d 964 (1999), *State v. Williams*, 142 Wn.2d 17, 23-28 (2000), *State v. Johnson*, 104 Wn.App. 4409, 420-22 (2001), *State v. Johnson*, 104 Wn.App. 489, 504-06 (2001) *State v. Kennedy*, 107 Wn.App. 972 (2001), *State v. Khounvichai*, 149 Wn.2d 557 (2003), *State v. Tagas*, 121 Wn.App. 872 (2004), *State v. Dancer*, 174 Wn.App. 666 (2013), *State v. Ruem*, 179 Wn.2d 195 (2013), *State v. Witherrite*, 184 Wn.App. 859 (2014), *State v. Blockman*, 190 Wn.2d 651 (2018); 7-2.

***State v. Walker***, 136 Wn.2d 678 (1998)

Wife consents to search of home, husband arrives before search begins, does not consent, police search, find drugs; held: where police have consent from an individual possessing equal control over premises, that consent remains valid against a cohabitant who also possesses equal control only while the cohabitant is absent, *State v. Leach*, 113 Wn.2d 735, 744 (1989), but where cohabitant is present and does not consent, where police execute search it is valid only against the consenting cohabitant, here the wife, *State v. Hoggatt*, 108 Wn.App. 257 (2001), *State v. White*, 141 Wn.App. 128, 134-40 (2007), *State v. Williams*, 148 Wn.App. 678, 688-89 (2009), *State v. Rooney*, 190 Wn.App. 653 (2015), *see: State v. Thompson*, 151 Wn.2d 793, 803-09 (2004), *State v. Morse*, 156 Wn.2d 1 (2005), *State v. Haapala*, 139 Wn.App. 424 (2007), *State v. Hamilton*, 179 Wn.App. 870 (2014); reverses *State v. Walker*, 86 Wn.App. 857 (1997); 7-2.

***State v. O'Day***, 91 Wn.App. 244 (1998)

Police arrest driver, passenger told to leave vehicle, passenger's purse placed on hood, passenger is not suspected of a crime but police testify that officer would not leave defendant in remote area, police ask if she has drugs and ask if they may search purse, she consents, police find drugs; held: since purse was not in vehicle, it was not subject to search incident to arrest, *State v. Parker*, 139 Wn.2d 486 (1999), *State v. Seitz*, 86 Wn.App. 865 (1997), *State v. Nelson*, 89 Wn.App. 179 (1997; police having told defendant to get out of car, placed purse outside her reach, asked if she had drugs, ask for consent to search, reasonable person would believe she was

not free to leave, thus defendant was seized, *State v. Soto-Garcia*, 68 Wn.App. 20, 22-25 (1992), *overruled, on other grounds, State v. Thorn*, 129 Wn.2d 347 (1996), *State v. Armenta*, 134 Wn.2d 1 (1997), *State v. Harrington*, 167 Wn.2d 656 (2009), *State v. Ibarra Guevara*, 172 Wn.App. 184 (2012), *State v. Johnson*, 8 Wn.App.2d 728 (2019), without legal basis, consent was tainted by seizure, *cf.: State v. Lee*, 7 Wn.App.2d 692 (2019); III.

***State v. Bustamante-Davila***, 138 Wn.2d 964 (1999)

INS agent, accompanied by local police, go to home to arrest defendant, asks permission to enter which is granted, police enter as well, accompany defendant to bedroom to pack, see rifle, defendant is convicted of unlawful possession of a firearm; held: police did not go to house for "knock and talk" procedure to seek consent to search, so defendant need not be informed of his right to refuse entry, *State v. Dancer*, 174 Wn.App. 666 (2013), *State v. Blockman*, 190 Wn.2d 651 (2018), distinguishing *State v. Ferrier*, 136 Wn.2d 103 (1998), *see: State v. Williams*, 142 Wn.2d 17, 23-28 (2000), *State v. Overholt*, 147 Wn.App. 92 (2008), *State v. Kennedy*, 107 Wn.App. 972 (2001), *State v. Khounvichai*, 149 Wn.2d 557 (2003), *State v. Freepons*, 147 Wn.App. 689 (2008), *State v. Ruem*, 179 Wn.2d 195 (2013), *State v. Westvang*, 184 Wn.App. 1 (2014), *State v. Witherrite*, 184 Wn.App. 859 (2014), trial court's conclusion that under totality of circumstances state met burden of establishing voluntariness of consent affirmed, *State v. Shoemaker*, 85 Wn.2d 207, 210-12 (1975), *State v. Hastings*, 119 Wn.2d 229, 234 (1992), *State v. Johnson*, 104 Wn.App. 409, 420-22 (2001), *cf.: State v. Russell*, 180 Wn.2d 860, 871-72 (2014); 5-4.

***State v. Leupp***, 96 Wn.App. 324 (1999)

Police receive 911 hangup call, go to residence, ask for and receive permission to enter and look for injured person, enter house, one resident hurries towards back room, officer follows, enters room, sees drugs; held: no evidence of coercion, no reason to read *Miranda* warnings since no one was suspected of a crime, search was within scope of consent, distinguishing *State v. Werth*, 18 Wn.App. 530 (1977); police had no obligation to advise defendant of his right to decline to consent, as this was not a "knock and talk" situation, *State v. Johnson*, 104 Wn.App. 409, 420-22 (2001), *State v. Tagas*, 121 Wn.App. 872 (2004), *State v. Overholt*, 147 Wn.App. 92 (2008), *State v. Dancer*, 174 Wn.App. 666 (2013), *State v. Blockman*, 190 Wn.2d 651 (2018), distinguishing *State v. Ferrier*, 136 Wn.2d 103 (1998), *see: State v. Kennedy*, 107 Wn.App. 972 (2001); II.

***State v. Avila-Avina***, 99 Wn.App. 9 (2000)

Police lawfully stop defendant to investigate shooting, quickly determine he was not a suspect, detain him for four hours, obtain consent to search, find unlawful gun; held: police exploited the extended illegal detention without intervening circumstances and without *Miranda* warnings, tainting consent, *Brown v. Illinois*, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975), *State v. Gonzales*, 46 Wn.App. 388, 397-98 (1986); I.

***State v. Coyne***, 99 Wn.App. 566 (2000)

Police are given a coat found by a citizen, defendants in car contact officer, one says that the coat is his, officer states he needs identification of both driver and passenger, officer testifies he was satisfied with driver's identification and ownership of coat, finds warrant for passenger,

while retaining coat and driver's identification asks permission to search trunk which is granted, finds drugs; held: retaining coat and license was a seizure without authority, *State v. Ellwood*, 52 Wn.App. 70 (1988), *State v. Barnes*, 96 Wn.App. 217 (1999), *State v. O'Day*, 91 Wn.App. 244 (1998), **community caretaking function** was complete when police were satisfied of ownership, *State v. Markgraf*, 59 Wn.App. 509, 513 (1990), consent was tainted by the seizure, *State v. Soto-Garcia*, 68 Wn.App. 20 (1992), *overruled, in part, State v. Thorn*, 129 Wn.2d 347 (1996); III.

***State v. Williams***, 142 Wn.2d 17, 23-28 (2000)

In serving an arrest warrant, police need not inform homeowner or lessor that s/he may refuse consent to enter, *State v. Johnson*, 104 Wn.App. 489, 504-06 (2001), *State v. Ruem*, 179 Wn.2d 195 (2013), *State v. Westvang*, 184 Wn.App. 1 (2014), distinguishing *State v. Ferrier*, 136 Wn.2d 103 (1998), *see: State v. Kennedy*, 107 Wn.App. 972 (2001), *State v. Khounvichai*, 149 Wn.2d 557 (2003), *State v. Witherrite*, 184 Wn.App. 859 (2014), *State v. Blockman*, 190 Wn.2d 651 (2018), which is limited to those situations where police seek to conduct a search for contraband or evidence of a crime without obtaining a warrant, *State v. Overholt*, 147 Wn.App. 92 (2008); 5-4.

***State v. Johnson***, 104 Wn.App. 409, 420-22 (2001)

Arrested suspect is advised of *Miranda* warnings, told he could refuse search of house, asks police if they need probable cause to search, is told (accurately) they have probable cause, police threaten to get warrant, suspect signs consent, police find drugs; held: an arrestee can consent, *State v. Werth*, 18 Wn.App. 530, 535-36 (1977), under totality of circumstances, consent was voluntary; in a non-"knock and talk" context, police need not advise suspect of right to refuse, revoke or limit consent, *State v. Leupp*, 96 Wn.App. 324 (1999), *State v. Bustamante-Davila*, 138 Wn.2d 964 (1999), *State v. Johnson*, 104 Wn.App. 489, 504-06 (2001), *State v. Khounvichai*, 149 Wn.2d 557 (2003), *State v. Tagas*, 121 Wn.App. 872 (2004), *see: State v. Kennedy*, 107 Wn.App. 972 (2001), *State v. Ruem*, 179 Wn.2d 195 (2013), *State v. Witherrite*, 184 Wn.App. 859 (2014), *State v. Blockman*, 190 Wn.2d 651 (2018), distinguishing *State v. Ferrier*, 136 Wn.2d 103, 118 (1998); II.

***State v. Johnson***, 104 Wn.App. 489, 504-06 (2001)

Where police have a search warrant, they may nevertheless seek consent and not reveal they have the warrant to minimize violence, *State v. Myers*, 102 Wn.2d 548, 554 (1984); where police have a warrant but seek consent, they need not follow "knock and talk" procedure, distinguishing *State v. Ferrier*, 136 Wn.2d 103, 118 (1998); II.

***State v. Kennedy***, 107 Wn.App. 972 (2001)

Police, investigating complaint about drugs in motel room, listen from outside, hear references to "razor" and "smooth," knock, identify themselves and ask to come in, occupant waves officers in, police observe, seize drugs; held: police lacked a warrant, no emergency was being investigated, defendant has same expectation of privacy in motel room as in a home, *State v. Davis*, 86 Wn.App. 414, 419 (1997), seeking consent to enter is no different from seeking consent to search, thus police were obliged to advise occupants of their right to refuse consent, *State v. Ferrier*, 136 Wn.2d 103 (1998), *State v. Budd*, 185 Wn.2d 566 (2016), *but see: State v.*

*Khounvichai*, 149 Wn.2d 557 (2003), distinguishing *State v. Bustamante-Davila*, 138 Wn.2d 964 (1999), *State v. Williams*, 142 Wn.2d 17 (2000), *cf.:* *State v. Overholt*, 147 Wn.App. 92 (2008), *State v. Ruem*, 179 Wn.2d 195 (2013), *State v. Witherrite*, 184 Wn.App. 859 (2014); 2-1, II.

***State v. Hoggatt***, 108 Wn.App. 257 (2001)

Housemate consents to police entry of kitchen where defendant is present, police arrest defendant, seize gun they know is stolen; held: one of two cohabitants can validly admit police to a common area with or without the other being present, distinguishing *State v. Leach*, 113 Wn.2d 735 (1989), *State v. Walker*, 136 Wn.2d 678 (1998); test: does one cohabitant of a home assume the risk that an officer will enter that part of the home customarily used to receive guests based only on the consent of a different cohabitant?, *United States v. Matlock*, 39 L.Ed.2d 242 (1974), *State v. Thompson*, 151 Wn.2d 793, 803-09 (2004), *see:* *State v. Morse*, 156 Wn.2d 1 (2005), *State v. White*, 141 Wn.App. 128, 134-40 (2007), *Fernandez v. California*, 571 U.S. 292, 188 L.Ed.2d 25 (2014), *State v. Rooney*, 190 Wn.App. 653 (2015); II.

***State v. Holmes***, 108 Wn.App. 511 (2001)

Police arrest a woman for drugs, arrestee offers to turn in her dealer with whom she lives, she shows police an old bill with an address, computer check shows some contact between arrestee and the address, police take her to the address, she lacks a key, police knock, arrestee consents to entry when door is opened by a third party, police enter, find defendant, seize drugs, later learn arrestee did not live in searched premises; held: while police may rely upon a reasonable belief in the authority of a person giving consent, *Illinois v. Rodriguez*, 111 L.Ed.2d 148 (1990), *but see:* *State v. Morse*, 156 Wn.2d 1 (2005), here all of the circumstances, particularly where arrestee had no means of access, establish that it was not objectively reasonable for police to believe arrestee had authority, *see also:* *State v. Rison*, 116 Wn.App. 955 (2003); I.

***United States v. Drayton***, 153 L.Ed.2d 242 (2002)

Police board bus, state they are looking for drugs, ask defendant "mind if I check you?," defendant agrees, patdown reveals drugs; held: police are not obliged to advise bus passengers of their right to refuse search as they were not seized, were free to leave, nothing said would suggest to a reasonable person that he was barred from leaving or refusing, *Florida v. Bostick*, 115 L.Ed.2d 389 (1991), *State v. Rankin*, 151 Wn.2d 689 (2004); 6-3.

***State v. Vy Thang***, 145 Wn.2d 630, 635-39 (2002)

Police, with arrest warrant, obtain permission from lessee to enter apartment to arrest prison escapee, make arrest, seize evidence; held: defendant-guest's expectation of privacy is vitiated by lessee's consent, *State v. Rodriguez*, 65 Wn.App. 409, 414-15 (1992), distinguishing *State v. Leach*, 113 Wn.2d 735 (1989); evidence found was in "communal garbage," consent by host is always effective against a guest within the common areas of the premises; affirms, on different grounds, *State v. Thang*, 103 Wn.App. 660 (2000); 9-0.

***State v. O'Neill***, 148 Wn.2d 564, 587-91 (2003)

Initial refusal to consent followed by repeated requests for consent to search are indicators that consent was not voluntary; reverses *State v. O'Neill,* 104 Wn.App. 850 (2001); 9-0.

***State v. Khounvichai***, 149 Wn.2d 557 (2003)

Police, looking for a "person of interest," knock, ask if they can talk to resident, person who answers door says come in, police enter, follow person who answers to bedroom, smell marijuana, see drugs, arrest respondent; held: police were not engaged in a "knock and talk," as they were looking for a specific person, thus did not have to advise of right to refuse consent, *State v. Williams*, 142 Wn.2d 17 (2000), *State v. Dancer*, 174 Wn.App. 666 (2013), *State v. Westvang*, 184 Wn.App. 1 (2014), *State v. Witherrite*, 184 Wn.App. 859 (2014), *but see: State v. Freepons*, 147 Wn.App. 689 (2008), distinguishing *State v. Ferrier*, 136 Wn.2d 103 (1998), *State v. Kennedy*, 107 Wn.App. 972 (2001), *see: State v. Overholt*, 147 Wn.App. 92 (2008); affirms *State v. Khounvichai*, 110 Wn.App. 722 (2002); 7-2.

***State v. Rison***, 116 Wn.App. 955 (2003)

Police smell marijuana outside apartment, knock, read tenant *Ferrier* warnings, tenant consents to search, police find eyeglass case belonging to guest, open it, find drugs; held: defendant, as a guest, has legitimate expectation of privacy, *Minnesota v. Carter*, 142 L.Ed.2d 373 (1998), *cf.: State v. Boot*, 81 Wn.App. 546 (1996); closed container is protected under Fourth Amendment, *State v. Kealey*, 80 Wn.App. 162, 170 (1995); tenant did not have actual authority to consent to search of guest's eyeglass case, *State v. Mathe*, 102 Wn.App. 537 (1984); while police may rely upon apparent authority of person given consent, *Illinois v. Rodriguez*, 111 L.Ed.2d 148 (1990), *but see: State v. Morse*, 156 Wn.2d 1 (2005), here police ordered all guests other than tenant to leave the apartment prior to search, did not seek consent or ask them to remove their personal, property, thus police failed to make reasonable inquiries having found themselves in an ambiguous circumstance, *see: State v. Holmes*, 108 Wn.App. 511 (2001), thus evidence suppressed; 2-1, III.

***State v. Tagas***, 121 Wn.App. 872 (2004)

Police stop vehicle on freeway, driver and passenger are not arrested but informed they may not drive further, officer offers a ride, ask to search passenger's purse which is granted, find drugs; held: absent "knock and talk" circumstance in home, police need not advise of right to refuse search, distinguishing *State v. Ferrier*, 136 Wn.2d 103 (1998), *cf.: State v. Rankin*, 151 Wn.2d 689 (2004), *State v. Brown*, 154 Wn.2d 787 (2005); I.

***State v. Cole***, 122 Wn.App. 319 (2004)

Defendant signs general consent to search her apartment so that her roommate will qualify for electronic home detention; police, having determined that roommate tested positive for drugs and that defendant sold drugs from the apartment and another apartment, search and find drugs; held: defendant validly waived her right to be free from warrantless search; II.

***State v. Reichenbach***, 153 Wn.2d 126 (2004)

Citizen informs police that defendant is forcing him to drive him to buy drugs, asks police to stop and search his vehicle, police stop vehicle at gunpoint, order defendant-passenger

to put hands up, observe defendant drop hand to hip area, then raise hands, police find drugs under passenger seat; held: citizen's consent was voluntary, but scope of consent could not extend to seizure of passenger, *State v. Parker*, 139 Wn.2d 486 (1999), abandoned drugs were not voluntarily relinquished, *State v. Reynolds*, 144 Wn.2d 282, 288 (2001), *cf.: State v. Evans*, 159 Wn.2d 402 (2007), as police lacked probable cause to arrest passenger, *State v. Flores*, 188 Wn.App. 305 (2015); 9-0.

***State v. Morse***, 156 Wn.2d 1 (2005)

Police, seeking to serve an arrest warrant upon a woman who they believed was staying at an apartment, knock on apartment door, get permission to enter from a temporary guest, enter master bedroom where defendant-tenant, not the subject of the warrant, is sitting on bed, observe drugs, arrest defendant for drugs, then obtain consent to search from defendant, seize drugs; held: police may not rely upon "apparent authority" granted by temporary guest, CONST. art. I, § 7, *cf.: State v. Holmes*, 108 Wn.App. 511 (2001), *State v. Rison*, 116 Wn.App. 955 (2003), *Illinois v. Rodriguez*, 111 L.Ed.2d 148 (1990), *State v. Mathe*, 102 Wn.2d 537 (1984), distinguishing Fourth Amendment analysis which focuses on the reasonableness of government action rather than the rights of the individual; when a cohabitant who has equal or greater authority to control the premises is present, his consent must be obtained, *State v. White*, 141 Wn.App. 128, 134-40 (2007), *State v. Rooney*, 190 Wn.App. 653 (2015), and the consent of another of equal or lesser authority is ineffective against the nonconsenting cohabitant; a person is not absent just because the police fail to inquire, are unaware, or are mistaken about the person's presence within the premises; 9-0.

***Georgia v. Randolph***, 164 L.Ed.2d 208 (2006)

Wife calls police to report her husband's drug possession in family home, when police arrive husband-defendant refuses consent, wife grants consent, police enter and seize drugs; held: physically present inhabitant's express refusal of consent to a police search is dispositive as to him, regardless of the consent of a fellow occupant, *Fernandez v. California*, 571 U.S. 292, 188 L.Ed.2d 25 (2014), *cf.: State v. Vanhollebeke*, 190 Wn.2d 315 (2018), distinguishing *United States v. Matlock*, 30 L.Ed.2d 242 (1974), *Illinois v. Rodriguez*, 111 L.Ed.2d 148 (1990); 5-3.

***State v. Veltri***, 136 Wn.App. 818 (2007)

Police observe truck with mismatched plates, identify driver who lacks a license, officer detains but decides not to cite, passenger consents to search of vehicle, drugs found; held: having dispelled suspicion that truck was stolen and having decided not to issue an infraction, purposes of stop were resolved, police lacked further reasonable articulable suspicion, continued questioning was unlawful thus consent was not validly obtained, *State v. Henry*, 80 Wn.App. 544, 553 (1995), *State v. Cantrell*, 70 Wn.App. 340, 344 (1993), *aff'd, on other grounds*, 124 Wn.2d 183 (1994); III.

***State v. Haapala***, 139 Wn.App. 424 (2007)

Lessee, under eviction notice of lessor, consents to search of home, defendant is found in a bedroom with drugs, defendant claims he is a co-habitant with equal rights to control over common areas; held: because defendant was told by lessor that she would not lease to him after the eviction he was a guest not a co-tenant or sub-lessee, and thus lacked equal rights of control

and thus he consent was not needed to search, *State v. Koepke*, 47 Wn.App. 897 (1987), *see:* *State v. Mathe*, 102 Wn.2d 537 (1984), *cf.:* *State v. Leach*, 113 Wn.2d 735 (1989), *State v. Walker*, 136 Wn.2d 678 (1998); 2-1, II.

***State v. Muñoz Garcia***, 140 Wn.App. 609, 625-27 (2007)

Police obtain written consent to search before advising defendant of *Miranda* rights, defendant testifies at suppression hearing that he was deprived of sleep, no inquiry is made as to education or intelligence, trial court finds consent based upon signature on consent form; held: state did not prove by clear and convincing evidence that consent was voluntary, *State v. Bustamante-Davila*, 138 Wn.2d 964, 981 (1999), *State v. O'Neill*, 148 Wn.2d 564, 588-89 (2003); III.

***State v. Eisfeldt***, 163 Wn.2d 628, 638-39 (2008)

Contractor, given key to home by owner, discovers drugs, calls police who enter with contractor's permission, make same observations as contractor, then obtain warrant; held: because a resident does not assume the risk that a contractor would invite others into the house, contractor's consent was invalid; police officer's reasonable belief that contractor had authority to consent to search is irrelevant; 9-0.

***State v. Overholt***, 147 Wn.App. 92 (2008)

Wildlife Officer follows trail from cow elk gut piles to defendant's home, observes blood on floor of carport, defendant approaches officer in driveway, officer asks about elk guts, blood, tracks, asks to see elk, defendant leads officer to shed, opens door, shows elk, defendant is charged with game violation; held: because officer was in fresh pursuit of criminal activity, did not enter property with intent of obtaining consent to search to evade a warrant, did not even enter home, thus was not obliged to advise of right to refuse consent, distinguishing *State v. Ferrier*, 136 Wn.2d 103, 118 (1998); III.

***State v. Freepons***, 147 Wn.App. 689 (2008)

Police, investigating an accident and possible DUI, go to a house looking for the registered owner, knock, advise person who answers of *Miranda* warnings, occupant denies owner is present, police ask to search for owner, occupant agrees, police enter, find drugs; held: where police are investigating a crime, they are obliged to advise of right to refuse consent, *State v. Ferrier*, 136 Wn.2d 103 (1998), *State v. Budd*, 185 Wn.2d 566 (2016), *but see:* *State v. Khounvichai*, 149 Wn.2d 557 (2003), *State v. Witherrite*, 184 Wn.App. 859 (2014); III, 2-1.

***State v. Harrington***, 167 Wn.2d 656 (2009)

Officer observes defendant walking, approaches, asks to talk, defendant says he's coming from his sister's house, doesn't know address, bulges in pockets, fidgety, hands in pocket, trooper approaches, officer asks to pat defendant down, telling him he is not under arrest, defendant agrees, officer feels hard cylinder, asks what it is, defendant responds it's his meth pipe, defendant is arrested, drugs found; held: while initial contact was not a seizure, sudden arrival of second officer, request to remove hands from pockets, request to frisk would all lead a reasonable person to feel he was not free to leave, *State v. Gantt*, 163 Wn.App. 133 (2011), *State v. Butler*, 2 Wn.App. ad 549, 560-61 (2018), *State v. Johnson*, 8 Wn.App.2d 728 (2019), *cf.:*

*State v. Smith*, 154 wn.App. 695 (2010), thus consent to search was obtained through exploitation of a prior illegal seizure requiring suppression; reverses *State v. Harrington* 144 Wn.App. 558 (2008), *see: State v. Young*, 135 Wn.2d 498 (1998), *United States v. Mendenhall*, 64 L.Ed.2d 497 (1980), *State v. Soto-Garcia*, 68 Wn.App. 20 (1992), *overruled, on other grounds*, *State v. Thorn*, 129 Wn.2d 347 (1996), *cf.: State v. Nettles*, 70 Wn.App. 706, 712 (1993); 9-0.

***State v. Schultz***, 170 Wn.2d 746 (2011)

Police respond to call about neighbors yelling, arrive at apartment, hear man and woman with raised voices, knock, defendant-woman answers, appears agitated and flustered, denies anyone is there, when challenged she calls for man who emerges from bedroom, defendant steps aside and opens door wider, police enter, notice neck is red and blotchy, defendant denies anything physical, fidgets and picks up things, is warned not to, continues to pick up things, officer notices handgun and marijuana pipe, asks to search for drugs, defendant agrees, is arrested for use of drug paraphernalia, revokes consent to search, police obtain warrant, seize drugs; held: mere acquiescence is not consent, citizens do not waive right to privacy by failing to object, *State v. Browning*, 67 Wn.App. 93 (1992); 5-4.

***State v. Monaghan***, 165 Wn.App. 782 (2012)

Defendant consents to search of car trunk, police find locked container, open it, seize drugs; held: a consensual search cannot exceed the scope of the consent which, here, did not extend to a locked container within the trunk of the car, distinguishing *State v. Mueller*, 63 Wn.App. 720 (1992); I.

***State v. Libero***, 168 Wn.App. 612 (2012)

Police receive consent of one of two inhabitants present to search, find drugs, charge defendant-guest who maintains that he has automatic standing to assert non-consenting inhabitant's right to privacy; held: while guest who is charged with possession has automatic standing to challenge the search, *State v. Simpson*, 95 Wn.2d 170 (1980), the search's invalidity as to the inhabitant is not rendered invalid as to the guest, *State v. Shuffelen*, 160 Wn.App. 244, 255 (2009); II.

***State v. Dancer***, 174 Wn.App. 666 (2013)

Police, seeking a domestic violence suspect, ask defendant's permission to search without providing *Miranda* warnings or warnings per *State v. Ferrier*, 136 Wn.2d 103 (1998), enter home, find drugs; held: *Ferrier* rule does not apply where police seek consent to search for a person whom the police believe is on the premises and trial court finds voluntary consent to enter, *State v. Bustamante-Davila*, 138 Wn.2d 964, 982-83 (1999), *State v. Khounvichai*, 149 Wn.2d 557 (2003), *State v. Westvang*, 184 Wn.App. 1 (2014), *State v. Blockman*, 190 Wn.2d 651 (2018), *cf.: State v. Ruem*, 179 Wn.2d 195 (2013); II.

***Fernandez v. California***, 571 U.S. 292, 188 L.Ed.2d 25 (2014)

Investigating domestic violence police knock, bloody woman answers, defendant comes to door and orders police away, defendant is arrested for domestic violence and removed, woman consents to search an hour later, evidence of a robbery is found; held: where there are two or

more occupants of a home one occupant may consent to a search unless an objecting occupant is physically present and expressly refuses consent, *Georgia v. Randolph*, 547 U.S. 103, 164 L.Ed.2d 208 (2006), *United States v. Matlock*, 415 U.S. 164, 39 L.Ed.2d 242 (1974); while removal of the objecting resident, if objectively unreasonable, *e.g.*, for the purpose of defeating consent, could preclude entry and search, here the arrest was objectively reasonable, and an occupant who has been properly arrested is in the same shoes as an occupant who is not present for any other reason; the fact that defendant objected earlier does not defeat the later consent; 6-3.

***State v. Russell***, 180 Wn.2d 860 (2014)

Officer stops defendant for a bicycle infraction, recognizes him as a week earlier defendant denied he had a weapon but during prior stop officer found a loaded derringer, officer frisks, feels small hard container that he knew was not a gun, asks "do you mind if I take it out?", defendant says okay, removes box, opens it, finds drugs; held: none of the consent factors (1) *Miranda* warnings, (2) education and intelligence, (3) advice of right not to consent, *State v. Shoemaker*, 85 Wn.2d 207, 212 (1975), were established at suppression hearing, no evidence consent was voluntary, trial court's finding of consent lacks substantial evidence, *cf.:* *State v. Bustamante-Davila*, 138 Wn.2d 964 (1999); 9-0.

***State v. Hamilton***, 179 Wn.App. 870 (2014)

Defendant-wife is served with no contact order in her home, police arrive and ask her to come outside, husband-protected party hands purse to police saying that it contains drugs, police search and find drugs; held: husband had no possessory interest in the purse other than that it was left in his house, had no authority to consent to search the purse, particularly when defendant was present, *cf.: State v. Morse*, 156 Wn.2d 1, 13-14 (2005); II.

***State v. Westvang***, 184 Wn.App. 1 (2014)

Police, looking to serve an arrest warrant on a third party, ask defendant for permission to look, defendant consents to enter, police do not inform defendant she can terminate search at any time, *State v. Ferrier*, 136 Wn.2d 103 (1998), find drugs; held: knock and talk warnings are not required when police request consent to execute an arrest warrant, *State v. Ruem*, 179 Wn.2d 195 (2013), *see: State v. Blockman*, 190 Wn.2d 651 (2018); on remand Division II reconsiders and reverses *State v. Westvang*, 174 Wn.App. 913 (2013).

***State v. Witherrite***, 184 Wn.App. 859 (2014)

Police need not provide warnings pursuant to *State v. Ferrier*, 136 Wn.2d 103 (1998) to obtain consent to search a car, *see:* *State v. Khounvichai*, 149 Wn.2d 557 (2003); III.

***State v. Rooney***, 190 Wn.App. 653 (2015)

CCO with DOC warrant enter a home with police, enter bedroom of subject of the warrant, arrest subject, defendant is co-habitant of the room who objects to search, police search and find drugs and sees lots of swords and knives, defendant asks to dress, police search pants before defendant puts them on, finds a gun which defendant may not possess, is charged with drugs and VUFA; held: a probationer may be searched without a warrant not as an exception to the warrant requirement, but because a probationer must consent to a search, RCW

9.94A.631(1), but a cohabitant with common authority over the premises who is present and who objects has the right to require a warrant, *State v. Morse,* 156 Wn.2d 1 (2005), thus drugs suppressed; frisk of defendant's pants was valid for safety reasons due to weapons in room; II.

***State v. Cherry***, 191 Wn.App. 456, 469-71 (2015)

Defendant is arrested, advised of *Miranda* warnings, invokes, is later asked for consent to search his car which defendant grants stating that there were no drugs in the car; held: because *Miranda* warnings are not required before asking for consent to search, *State v. Silvernail,* 25 Wn.App. 185, 191 (1980), *but see: State v. Wethered,* 110 Wn.2d 466 (2009), request for consent to search after defendant invokes right to remain silent does not violate defendant's Fifth Amendment rights; statement about drugs was not made in response to questioning likely to elicit an incriminating response; III.

***State v. Budd***, 185 Wn.2d 566 (2016)

Police, without probable cause, confront defendant outside his home, inform him they want to seize and search his computer for child pornography, defendant agrees and consents to entry, inside police provide *State v. Ferrier* warnings, defendant acknowledges and agrees, police take computer; held: a knock and talk requires that the police advise defendant of *Ferrier* warnings prior to entry thus computer must be suppressed; affirms *State v. Budd*, 186 Wn.App. 184 (2015); 5-4.

***State v. Vanhollebeke***, 190 Wn.2d 315, 412 P.3d 1274 (2018

Defendant in vehicle is stopped for infraction, police observe punched ignition and drug paraphernalia, defendant leaves vehicle and locks it, does not have a key, refuses consent to search, police contact owner, obtain key, search, seize gun, defendant charged with unlawful possession of a firearm; held: driver of a vehicle does not ordinarily assume the risk that the owner will consent to search, *State v. Mathe,* 102 Wn.2d 537 (1984), but where the police have good cause to believe that the vehicle is stolen, based here upon punched ignition and lack of a key, then the driver has assumed the risk that the absent owner may consent, thus motion to suppress is properly denied; affirms *State v. Vanhollebeke,* 197 Wn.App. 66 (2016); 9-0.

***State v. Blockman***, 190 Wn.2d 651 (2018)

Police receive report of assault in a home, at door of home officers advise that they are seeking information about an assault, tenant invites them in, says they can search anything, officers do protective sweep, observe defendant with drugs, seize and arrest; held: police only intended to question about the assault, not to do a consensual search for evidence thus "knock and talk" warnings, *State v. Ferrier,* 136 Wn.2d 103 (1998), need not be given, *State v. Khounvichai*, 149 Wn.2d 557 (2003); tenant's unambiguous consent allowed full sweep of apartment, so supreme court need not determine whether protective sweep, *Maryland v. Buie,* 494 U.S. 325, 110 S.Ct. 1093, 108 L.Ed. 2d 276 (1990), was proper; affirms *State v. Blockman*, 198 Wn.App. 34, 39 (2017), which held that an arrest is not a prerequisite for conducting a protective sweep, *but see: State v. Hopkins,* 113 Wn.App. 954, 959-60 (2002); 9-0.

***State v. Lee***, 7 Wn.App.2d 692 (2019)

Police stop vehicle for infraction, arrest driver for suspended license, run defendant-passenger's name to see if she is licensed to drive the car away, discover she has a drug conviction, ask her if she will consent to search her purse left in car, advising her she can refuse, defendant consents, drugs found; held: during a traffic stop the driver and passengers are all lawfully seized, *State v. Marcum*, 149 Wn.App. 894, 910 (2009), *Brendlin v. California*, 168 L.Ed.2d 132 (2007), *but see: State v. Mennegar*, 114 Wn.2d 304 (1990), *State v. Mendez*, 137 Wn.2d 208 (1999), running passenger's name was reasonable as she had agreed to drive car, *id.*, asking a lawfully seized person if she would consent to a search of an item left in a car after she knew officers would search the car was reasonable, *cf.: State v. O'Day*, 91 Wn.App. 244 (1998), officer's mention of defendant's drug conviction does not vitiate consent; I.

***State v. Bowman***, 198 Wn.2d 609 (2021)

Homeland Security agent arrests a drug dealer who gives them permission to search his cell phone, discover texts between arrestee and defendant regarding drugs, agent uses his own cell phone to contact defendant posing as arrestee, defendant agrees to meet, is arrested, drugs found; held: while defendant had a privacy interest in the text messages he sent to the arrestee, texts sent to defendant by agent did not "physically invade" defendant's cell phone, ruse merely capitalized on validly obtained information from the consenting arrestee, distinguishing *State v. Hinton*, 179 Wn.2d 862, 876-77 (2014); while defendant has a privacy interest in the texts he sent to the arrestee, *Hinton, supra., at* 865; agent's ruse in posing as the arrestee does not violate defendant's privacy rights under U.S. or state constitution, *Hoffa v. United States*, 385 U.S. 293, 302, 87 S. Ct. 408, 17 L. Ed. 2d 374 (1966), *State v. Goucher*, 124 Wn.2d 778 (1994); sending uninvited text messages as a ruse is not a trespass on defendant's cell phone as there is no physical invasion; reverses *State v. Bowman,* 14 Wn.App.2d 562 (2020); 9-0.

***State v. Meredith***, 18 Wn.App.2d 499, *rev. granted,* 198 Wn.2d 1026 (2021)

Defendant boards bus, officer requires proof of payment which defendant lacks, is removed from bus and provides false name, is convicted of making a false statement to a public servant; held: by boarding a public bus defendant consented to conditions of ridership, including paying bus fare and complying with a request for proof, RCW 81.112.210; I.

# SEARCH
## Emergency/Community Caretaking Function

***State v. Lynd***, 54 Wn.App. 18 (1989)

Police, responding to a 911 hang-up call, contact defendant outside residence, observe cut on defendant's head, defendant states he had a fight with his wife who was not in residence, refuses officer's request to enter; officer enters, finds marijuana; held: emergency exception requires state to prove (1) the searching officer subjectively believed an emergency existed and (2) a reasonable person in the same circumstances would have thought an emergency existed, *State v. Loewen*, 97 Wn.2d 562, 568 (1982), *State v. Downey*, 53 Wn.App. 543 (1989), *State v. McAlpin*, 36 Wn.App. 707, 716 (1984), *State v. Swenson*, 59 Wn.App. 586 (1990), *State v. Muir*, 67 Wn.App. 149 (1992), *State v. Lourimore*, 67 Wn.App. 949 (1992), *State v. Angelos*, 86 Wn.App. 253 (1997), *State v. Davis*, 86 Wn.App. 414, 420-3 (1997), *State v. Hos*, 154 Wn.App. 238, 246-49 (2010); here, officer's concern for safety of wife justified entry without warrant, *cf.*: *State v. Morgavi*, 58 Wn.App. 733 (1990); *see: State v. Gocken*, 71 Wn.App. 267 (1993), *State v. Dempsey*, 88 Wn.App. 918 (1997), *State v. Johnson*, 104 Wn.App. 409 (2001), *State v. Link*, 136 Wn.App. 685, 695 (2007), *State v. Schultz*, 170 Wn.2d 746 (2011); I.

***State v. Mennegar***, 114 Wn.2d 304 (1990)

Police stop vehicle for speeding, determine driver is drunk, ask passenger if he wishes to drive vehicle from scene in lieu of impound, passenger agrees, officer orders passenger to return to and remain in vehicle, requests driver's license from passenger, runs computer check, finds warrant, arrests passenger, searches, finds drugs; held: directing passenger to remain in vehicle was not a detention, *reversing State v. Mennegar*, 53 Wn.App. 257 (1989), as a reasonable person would not have believed himself to be detained, *State v. Thorn*, 129 Wn.2d 347 (1996), *State v. Nettles*, 70 Wn.App. 706 (1993), *but see: State v. Gleason*, 70 Wn.App. 13 (1993), *State v. Ibarra Guevara*, 172 Wn.App. 184 (2012), *State v. Johnson*, 8 Wn.App.2d 728 (2019), as passenger had agreed to drive vehicle away; requesting passenger's license was reasonable, as passenger was free to refuse, *State v. Mote*, 129 Wn.App. 276 (2005), *but see: State v. Rankin*, 151 Wn.2d 689 (2004), *State v. Brown*, 154 Wn.2d 787 (2005); within community caretaking function to call in to determine if license was valid; *see: Maryland v. Wilson*, 137 L.Ed.2d 41 (1997), *see also: State v. Mendez*, 137 Wn.2d 208 (1999), *State v. Kinzy*, 141 Wn.2d 373 (2000); 9-0.

***State v. Hutchison***, 56 Wn.App. 863 (1990)

Police officer, finding defendant lying in a parking lot in a stupor, doesn't believe he needs medical attention but concludes he would be in danger if left in lot, searches pockets for identification, finds drugs; held: because officer reasonably believed defendant would be in danger if left, search for identification to determine what should be done with defendant was reasonable under community caretaking function, *State v. Chisholm*, 39 Wn.App. 864 (1985), *State v. Lynch*, 84 Wn.App. 467, 477-9 (1996), *State v. Angelos*, 86 Wn.App. 253 (1997), *see: State v. Kinzy*, 141 Wn.2d 373 (2000), *cf.: State v. Harris*, 9 Wn.App.2d 625 (2019), *State v. Boisselle*, 194 Wn.2d 1 (2019); reasonable, good faith search by police of persons not in need of immediate professional medical treatment but who are in danger and in need of help is

permissible, *State v. Menz*, 75 Wn.App. 351 (1994), *see: State v. Lawson*, 135 Wn.App. 430 (2006), *State v. Williams*, 148 Wn.App. 678 (2009); II.

***State v. Barbosa***, 57 Wn.App. 822 (1990)

Police receive complaint of armed kidnapping from residence, observe bullet hole in car; complainant tells police that kidnappers left and they should not enter the home; police enter, observe drugs; held: emergency doctrine to make sure no one had been shot and no assailant was in the house justifies entry in spite of complainant's claim that no one was there, *State v. Johnson*, 104 Wn.App. 409 (2001), *see: State v. Schultz*, 170 Wn.2d 746 (2011), as complainant "may have been upset and confused, or there may have been someone there unbeknownst to her"; I.

***State v. Markgraf***, 59 Wn.App. 509 (1990)

Police receive report of a vehicle parked for hours occupied by a female who might be in trouble; at scene, police observe vehicle, two males inside, inquire, driver states "we're looking at the [city] lights"; police observe dazed expression, ask for identification, police observe drug paraphernalia, search, find drugs; held: initial inquiry was minimal and reasonable under community caretaking function, *State v. Chisholm*, 39 Wn.App. 864 (1985); further intrusion of request for identification, while minimal, was based solely upon "dazed expression," and was thus unreasonable, *but see: State v. Armenta*, 134 Wn.2d 1, 11 (1997), *State v. O'Neill*, 148 Wn.2d 564 (2003), *State v. Afana*, 147 Wn.App. 843 (2008), *aff'd,* 169 Wn.2d 169 (2010), as no crime had been reported, no investigation was in progress, *State v. Williams*, 102 Wn.2d 733 (1984), *State v. Coyne*, 99 Wn.App. 566 (2000), *State v. Kinzy*, 141 Wn.2d 373 (2000), *State v. Lawson*, 135 Wn.App. 430 (2006), *State v. Harris*, 9 Wn.App.2d 625 (2019), *see also: State v. White*, 141 Wn.App. 128, 140-43 (2007); III.

***State v. Swenson***, 59 Wn.App. 586 (1990)

Police, responding to neighbor's call reporting that defendant's front door is open at 2:30 a.m., enter residence looking for burglar, find drugs; held: while probable cause under the **emergency exception** is not required, here there were no facts upon which the officer could conclude that a person was inside needing medical care, nor that a crime had been or was being committed, thus suppressed, *State v. Lynd*, 54 Wn.App. 18, 21 (1989), *State v. Bakke*, 44 Wn.App. 830, 834 (1987), *State v. Campbell*, 15 Wn.App. 98 (1976), *State v. Muir*, 67 Wn.App. 149 (1992), *State v. Leffler*, 142 Wn.App. 175 (2007), *State v. Williams*, 148 Wn.App. 678 (2009), *see: State v. Menz*, 75 Wn.App. 351 (1994), *State v. Davis*, 86 Wn.App. 414, 420-3 (1997); I.

***State v. Cahoon***, 59 Wn.App. 606 (1990)

Defendant calls ambulance, informs emergency medical technicians (EMT) she took "crank," and it was in the kitchen; EMTs search kitchen, find crank and other drugs, call police; held: warrantless search was reasonable as (1) officer was motivated by perceived need to render aid and (2) a reasonable person would have thought emergency existed, *State v. Loewen*, 97 Wn.2d 562 (1982), *State v. Muir*, 67 Wn.App. 149 (1992), *State v. Menz*, 75 Wn.App. 351 (1994); III.

***State v. Lowrimore***, 67 Wn.App. 949 (1992)

Dispatch reports that suspect fought with her mother, possessed knives, threatened suicide; police arrive at scene, find defendant upset, denies intent to kill herself, detain defendant, search, find drugs; held: information and observation of defendant's highly unstable state justifies belief that she was suffering from a mental disorder, information about knives justifies belief that there was an imminent likelihood of serious harm permitting detention for possible civil commitment, RCW 71.05.150, *State v. Lynd*, 54 Wn.App. 18 (1989); search for weapons in purse was lawful, as limitations on a patdown incident to a *Terry* stop do not control in emergency noncriminal investigation situation, *Lynd, supra., at* 21, *State v. Dempsey,* 88 Wn.App. 918, 924-5 (1997), *cf.: State v. A.A.,* 187 Wn.App. 475 (2015); upon finding drug paraphernalia in purse, officer had probable cause to search a closed pouch within purse, *State v. Smith*, 119 Wn.2d 675 (1992), *but see: State v. McKenney*, 91 Wn.App. 554 (1998); I.

***State v. Hill***, 68 Wn.App. 300 (1993)

Police stop vehicle for no headlight, smell intoxicants, see open container of alcohol, arrest passenger for felony warrants, determine defendant-driver is not legally intoxicated, ask to search vehicle, which is denied, impound vehicle, find drugs; held: vehicle was neither abandoned, nor impeding traffic, but was partially blocking a sidewalk, police did not seek to determine if someone was available to take responsibility for vehicle, thus community caretaking function does not authorize impoundment; III.

***State v. Gocken***, 71 Wn.App. 267, 274-8 (1993)

Police, investigating report from relative of missing elderly woman, enter victim's apartment without warrant, smell decaying flesh from closed room, enter room belonging to defendant, find body; held: under emergency medical exception, police (1) subjectively believed someone likely needed assistance for health or safety reasons, (2) reasonable person would so similarly believe, and (3) there was a reasonable basis to associate need for assistance with the place searched, *State v. Weller,* 185 Wn.App. 913 (2015), *State v. Lynd*, 54 Wn.App. 18, 20-1 (1989), *State v. Menz*, 75 Wn.App. 351 (1994), *State v. Angelos*, 86 Wn.App. 253 (1997), *State v. Sadler*, 147 Wn.App. 97, 123-25 (2008), *see: State v. Loewen*, 97 Wn.2d 562, 568 (1982), *State v. Link*, 136 Wn.App. 685, 695 (2007), *State v. Williams*, 148 Wn.App. 678 (2009); discovery of odor emanating from closed room falls within plain view exception; I.

***State v. Lynch***, 84 Wn.App. 467, 477-9 (1996)

Police receive report of car prowl, respond to vehicle, find it unlocked, open door, look for ownership documents, pick up checkbook, find drugs; held: search of van was reasonable under community caretaking function, *State v. Mennegar*, 114 Wn.2d 304 (1990), *State v. Hutchison*, 56 Wn.App. 863 (1990); less intrusive alternative of checking ownership via license plate is "apparent from the advantage of hindsight, but is not necessarily a proper 'gauge by which to judge the officer's actions' "; III.

***State v. Angelos***, 86 Wn.App. 253 (1997)

Defendant calls 911, reports drug overdose, police accompany EMTs into home and, upon learning children live in home, search for and find drugs in bathroom after defendant is taken to hospital; held: officer reasonably believed drugs might present a safety hazard to children, reasonable person would similarly so believe, reasonable basis to associate need for

assistance with place to be searched under emergency medical exception, *State v. Gocken*, 71 Wn.App. 267, 274-8 (1993), *State v. Hutchison*, 56 Wn.App. 863 (1990), *State v. Lynd*, 54 Wn.App. 18, 21 (1989), *State v. Johnson*, 104 Wn.App. 409 (2001), *State v. Gibson*, 104 Wn.App. 792 (2001), *State v. Smith*, 165 Wn.2d 511 (2009), *see: State v. Link*, 136 Wn.App. 685, 695 (2007), distinguishing *State v. Loewen*, 97 Wn.2d 562 (1982); I.

***State v. Davis***, 86 Wn.App. 414 (1997)

Defendant in motel for several days, pays each day hours after checkout time, after checkout time does not respond to knocks or phone calls, manager calls police, police knock, hear dog sniffing but no response, enter with pass key, find defendant who consents to search of room, police find drugs and videos, police view videos which contain evidence of other crimes; held: defendant had reasonable expectation of privacy in room in light of the fact that he was present, had paid late before, it was only an hour after checkout time, at 419, distinguishing *State v. Christian*, 95 Wn.2d 655, 660-1 (1981); police entry is minimally sufficient for application of medical emergency exception, at 420-3. distinguishing *State v. Swenson*, 59 Wn.App. 586, 588-90 (1990); II.

***State v. Dempsey***, 88 Wn.App. 918 (1997)

Distraught, out of control defendant is taken into custody by police for possible civil commitment, search of pocket finds knife and drugs; held: state must prove both subjective and objective motivation by police to render aid, *State v. Angelos*, 86 Wn.App. 253, 256 (1997), *State v. Loewen*, 97 Wn.2d 562, 568 (1982), primary motivation must not be to arrest and seize evidence, thus pretext doctrine remains viable for medical emergency exception, distinguishing *Whren v. United States*, 135 L.Ed.2d 89 (1996); search incident to a civil commitment is broader than a *Terry* patdown, emergency situation exception permits search to whatever extent is objectively reasonable, *State v. Lynd*, 54 Wn.App. 18, 21-2 (1989), *State v. Lowrimore*, 67 Wn.App. 949, 956-7 (1992); here, police reasonably believed defendant was a threat to himself and others, search for weapons and drugs with which defendant might harm himself was lawful, *cf.: State v. A.A.*, 187 Wn.App. 475 (2015); III.

***State v. Kinzy***, 141 Wn.2d 373 (2000)

Police observe girl whom they believe to be 11-13 years old in high crime area late at night with adults known to be associated with drugs, hail her, she walks away, restrain her, observe drugs; held: community caretaking function may not be used as a pretext for a criminal investigation; balancing a citizen's privacy interest in freedom from police intrusion against public interest in having police perform caretaking, privacy must prevail, *State v. Harris*, 9 Wn.App.2d 625 (2019); police may conduct noncriminal investigation as long as it is necessary and strictly relevant to performance of caretaking function, *State v. Boisselle*, 194 Wn.2d 1 (2019), *State v. Lawson*, 135 Wn.App. 430 (2006), *State v. Leffler*, 142 Wn.App. 175 (2007), *cf.: State v. Acrey*, 148 Wn.2d 738 (2003), *see: State v. Smith*, 177 Wn.2d 533 (2013), *State v. A.A.*, 187 Wn.App. 475 (2015), *State v. Martin,* 13 Wn.App.2d 625 (2020); 5-4.

***State v. Coyne***, 99 Wn.App. 566 (2000)

Police are given a coat found by a citizen, defendants in a car contact officer, one says that the coat is his, officer states he needs identification of both driver and passenger, officer testifies he was satisfied with driver's identification and ownership of coat, finds warrant for

passenger, while retaining coat and driver's identification asks permission to search trunk which is granted, finds drugs; held: retaining coat and license was a seizure without authority, *State v. Ellwood*, 52 Wn.App. 70 (1988), *State v. Barnes*, 96 Wn.App. 217 (1999), *State v. O'Day*, 91 Wn.App. 244 (1998), *cf.: State v. Hansen*, 99 Wn.App. 575 (2000), community caretaking function was complete when police were satisfied of ownership, *State v. Markgraf*, 59 Wn.App. 509, 513 (1990), consent was tainted by the seizure, *State v. Soto-Garcia*, 68 Wn.App. 20 (1992), *overruled, in part, State v. Thorn*, 129 Wn.2d 347 (1996); III.

***State v. Johnson***, 104 Wn.App. 409 (2001)

Police respond to domestic violence call, defendant exits the house, is arrested, officers knock on door, bloody victim answers and appears to be about to exit, officer tells her to remain and enters, smells marijuana, asks defendant for consent, defendant is advised of *Miranda* warnings and told he can refuse but police say they will get warrant, defendant consents, drugs found; held: state constitution does not provide greater protection under emergency exception, *State v. Gocken*, 71 Wn.App. 267, 276-77 (1993), *State v. Hos*, 154 Wn.App. 238, 246-49 (2010), *see: Brigham City v. Stuart*, 164 L.Ed.2d 650 (2006); after accounting for one victim of violence, police may search for additional victims, *State v. Lynd*, 54 Wn.App. 18, 19 (1989), police were not obliged to ask victim if other victims were present before entering because domestic violence victims are sometimes uncooperative fearing retribution, *State v. Jacobs*, 101 Wn.App. 80, 84 (2000), thus officer's subjective belief that an emergency existed was objectively reasonable, *cf.: State v. Williams*, 148 Wn.App. 678 (2009), *State v. Schultz*, 170 Wn.2d 746 (2011); II.

***State v. Gibson***, 104 Wn.App. 792 (2001)

Police respond to report that babysitter was smoking marijuana, knock, defendant comes onto porch, closes door behind her, police smell marijuana, defendant admits smoking marijuana, police enter house to ensure children's safety, find marijuana and a child, ask defendant for other drugs, she goes into a back bedroom and, after five minutes, officer enters bedroom, sees more marijuana; held: emergency exception justified entry as police had a legitimate concern that defendant was unfit to care for children and that children may have had access to drugs, *State v. Angelos*, 86 Wn.App. 253(1997); officer going to back bedroom was proper as exigency was continuing and officer's conduct was "aimed at controlling these circumstances," at 799; II.

***State v. Thompson***, 112 Wn.App. 787, 797-99 (2002), *rev'd, on other grounds,* 151 Wn.2d 793 (2004)

Following arrest of suspect and observation by arresting officer of possible meth lab, "clandestine lab investigator" is called to property, looks in burn barrel and burn piles, observes evidence of meth lab, determines property is "fairly safe," secures it and obtains warrant; held: given investigator's experience and potential danger, limited search of barrel and piles were reasonable, *State v. Downey*, 53 Wn.App. 543 (1989); 2-1, II.

***State v. Acrey***, 148 Wn.2d 738 (2003)

Police are called to report of juveniles fighting at 12:40 a.m., spot five boys, determine they have not been fighting, get home telephone number from 12-year old respondent, call mother who asks police to drive respondent home, police patdown respondent before putting him in car, find drugs; held: community caretaking

function justifies intrusion beyond initial investigative contact, balancing respondent's interest in freedom with public's interest in caretaking juvenile, detention was valid, distinguishing *State v. Kinzy*, 141 Wn.2d 373 (2000), *but see: State v. A.A.*, 187 Wn.App. 475 (2015), *State v. Boisselle*, 194 Wn.2d 1 (2019), *State v. Martin*, 13 Wn.App.2d 625 (2020); I.

***State v. Schlieker***, 115 Wn.App. 264 (2003)

Police, investigating report of a gunshot, are informed by residents where shot was reported that people in trailer on property were involved in drug activity; police go towards trailer, two men leave in a car and attempt to flee, police enter trailer, handcuff two people inside, find meth lab; held: police claim that they entered trailer because someone might be injured was a pretext for a search without a warrant, no substantial evidence supports claim that police subjectively believed someone inside needed assistance, *State v. Lawson*, 135 Wn.App. 430 (2006), *State v. Leffler*, 142 Wn.App. 175 (2007), *State v. White*, 141 Wn.App. 128, 140-43 (2007); II.

***State v. Moore***, 129 Wn.App. 870 (2005)

Officer checks license plate of a vehicle that almost collided with her, finds from database that owner is "missing/endangered," stops vehicle, all in car state that they are not the registered owner, officer asks for identification of driver and passengers, defendant-passenger gives an alias, officer runs name and discovers that name given is an alias for defendant who has a felony warrant and that he has described tattoos, officer demands defendant show his forearms, see matching tattoos, arrest, search, find drugs; held: initial stop and checking identification, while a seizure, was proper as a **health and safety check** as police were entitled to fully dispel concerns about the owner, *see: State v. Weller*, 185 Wn.App. 913 (2015), distinguishing *State v. Kinzy*, 141 Wn.2d 373 (2000); demanding exposure of defendant's forearms was a minimal intrusion designed to confirm the identity of a person with a warrant, thus was proper, *see: State v. Wheeler*, 108 Wn.2d 230 (1987); I.

***Brigham City v. Stuart***, 164 L.Ed.2d 650 (2006)

Police respond to call of loud party, observe from outside juvenile strike an adult who spits blood, adults struggling with the juvenile, enter, arrest for contributing to the delinquency of a minor, disorderly conduct and intoxication, trial court and Utah appellate courts hold that injury caused by punch was insufficient to meet emergency aid doctrine because it did not give rise to an objectively reasonable belief that an unconscious, semi-conscious or missing person feared injured or dead was in the home and because oficers had not entered to assist the injured adult but had acted in their law enforcement capacity; held: subjective motivation of police is irrelevant, *see: Bond v. United States*, 146 L.Ed.2d 365 (2000), *Graham v. Connor*, 104 L.Ed.2d 443 (1989); test under Fourth Amendment is whether the circumstances, viewed objectively, justify the action, *Michigan v. Fisher*, 558 U.S.46, 175 L.Ed.2d 410 (2009); here, officers were confronted with ongoing violence within the home, thus entry was lawful as officers had an objectively reasonable basis for believing both that the injured adult might need help and that the violence was just beginning; 9-0.

***State v. Lawson***, 135 Wn.App. 430 (2006)

Anonymous caller reports chemical smell from defendant's residence, police arrive, see defendant near a shed, explain about odor, ask to search shed, defendant says yes, as they approach shed smell odor, enter, discover meth lab, arrest, find drugs on defendant; held: police were acting on "a potential danger the community" rather than on a specific belief that someone needed immediate help, a necessary step in authorizing an emergency entry into the shed, *State v. Kinzy*, 141 Wn.2d 373 (2000), *State v. Schlieker*, 115 Wn.App. 264 (2003), absence of "knock and talk" warnings, *State v. Ferrier*, 136 Wn.2d 103, 118-19 (1998) vitiates consent; 2-1, III.

***State v. Link***, 136 Wn.App. 685, 696 (2007)

Officer approaches apartment to investigate meth lab, smells acetone and hears fan, knocks on front door, two children arrive behind him and open door, officer enters, announces presence, sees drugs, trial court finds that primary motivation was to search for evidence; held: community caretaking function must be divorced from a criminal investigation, *State v. Kypreos*, 115 Wn.App. 207, 217 (2002), where officer's primary motive is to search for evidence, even if a secondary motive is safety, there is no exception to warrant requirement; II.

***State v. Leffler***, 142 Wn.App. 175 (2007)

Police receive anonymous complaint of strong chemical smells at a trailer, police arrive, smell harsh chemical smell, knock, defendant exits trailer and shuts door behind him, police discover warrant and arrest, defendant states that there is meth manufacturing in trailer, police call defendant's CCO who says he is authorized to search as a DOC condition, defendant refuses consent, police call in Clandestine Lab Team who enter and find drugs; held: to invoke emergency exception to warrant requirement, state must show that there is a substantial risk of serious injury to persons or property, *State v. Schlieker*, 115 Wn.App. 264, 272 (2003) and that the risk to persons or property must be imminent, *State v. Downey*, 53 Wn.App. 543, 544-45 (1989); here, because police had no information indicating presence of other persons on the property and no reason to believe that any person or property was under imminent threat, police should have obtained a warrant, emergency exception does not apply; prior op. at 140 Wn.App. 223 withdrawn; II.

***State v. Ibarra-Raya***, 145 Wn.App. 516 (2008), *rev'd, on other grounds,* 172 Wn.2d 880 (2011)

Police receive report that a house that "looked vacant during the day" was noisy, officers arrive, observe truck with a temporary permit, VIN check comes back "stolen," police knock, order people who respond to remain in the house, enter, see drugs, then learn that it was the license plates that had been stolen, not the truck and that defendant was leasing the house, obtain warrant, seize drugs; held: absent an immediate risk to health or safety, police had no legal basis to enter the house, thus evidence suppressed; III.

***State v. Sadler***, 147 Wn.App. 97, 123-35 (2008)

Knowledge by police that a 14-year old girl was missing for some time, suspected to be involved in sadomasochistic sex, inside home of older man who came slowly to the door, sweating and surprised support subjective belief that minor was in danger, justifying emergency entry, *State v. Gocken*, 71 Wn.App. 267, 276-77 (1993); 2-1, II.

***State v. Smith***, 165 Wn.2d 511 (2009)

Police, investigating theft of tanker truck containing anyhdrous ammonia, discover truck near house, see rifle through window, arrest occupants, police then see that rifle is missing, enter house for "safety sweep," search for places where a person could be hiding, observe evidence of meth lab, obtain warrant, seize drugs and lab; held: exigent circumstances of danger to police and public, fear that a person hiding in the house whould shoot officers or shoot the tanker of ammonia support entry and search under community caretaking function, *State v. Cardenas*, 146 Wn.2d 400, 406 (2002), *State v. Gibson*, 152 Wn.App. 945, 953-58 (2009); affirms *State v. Smith*, 137 Wn.App. 262 (2007); 6-3.

***State v. Williams***, 148 Wn.App. 678 (2009)

Police respond to disturbance call outside hotel, speak with a man who says his nephew was "being violent" with him and wanted him removed from his hotel room, police approach room, enter with complainant, find drugs; held: emergency exception justifies a warrantless entry when (1) officer subjectively believes there is an immediate risk to health or safety, (2) a reasonable person would come to same conclusion and (3) there is a reasonable basis to associate the emergency situation with the place searched, *State v. Gocken*, 71 Wn.App. 267 (1993); here, there was no concern that somebody inside the room was in immediate danger, thus emergency exception is inapplicable, entry was unlawful; 2-1, II.

***State v. Hos***, 154 Wn.App. 238, 246-49 (2010)

Officers accompanying CPS social worker knock, look through window, see defendant sitting, eyes closed, head on chest, pound on door louder, no response, enters unlocked front door, yell, no response, enter, find drugs; held: community caretaking function is valid, CONST., art. I § 7, *cf.: State v. Harris*, 9 Wn.App.2d 625 (2019); police need not use least intrusive means, *State v. Johnson*, 104 Wn.App. 409, 415 (2001); II.

***Michigan v. Fisher***, 558 U.S. 45, 175 L.Ed.2d 410 (2009)

Police, responding to disturbance call of man "going crazy," see smashed truck, damaged property, windows broken from the inside, blood on truck, on clothes in the truck and on door to house, see defendant inside screaming and throwing things, knock on door, are ignored, observe blood on defendant, enter and find defendant pointing a gun, trial court suppresses officers' observation of defendant pointing rifle; held: police do not need proof of serious, life-threatening injury to invoke emergency aid exception, *Brigham City v. Stuart*, 547 U.S. 398, 164 L.Ed.2d 650 (2006); test is whether there was an objectively reasonable basis of believing that medical assistance was needed or persons were in danger, *Mincey v. Arizona*, 437 U.S. 385, 392, 57 L.Ed.2d 1068 (2004); fact that police did not summon medical personnel has no bearing upon their need to assure that defendant was not endangering someone else; 7-2.

***State v. Schultz***, 170 Wn.2d 746 (2011)

Police respond to call about neighbors yelling, arrive at apartment, hear man and woman with raised voices, knock, defendant-woman answers, appears agitated and flustered, denies anyone is there, when challenged she calls for man who emerges from bedroom, defendant steps aside and opens door wider, police enter, notice neck is red and blotchy, defendant denies anything physical, fidgets and picks up things, is warned not to, continues to pick up things, officer notices handgun and marijuana pipe, asks to search for drugs, defendant agrees, is

arrested for use of drug paraphernalia, revokes consent to search, police obtain warrant, seize drugs; held: domestic violence is an important factor in evaluating subjective belief of officer that someone needs assistance and in assessing reasonableness of belief of an imminent threat of injury, *see: State v. Johnson,* 104 Wn.App. 409 (2001), *State v. Menz,* 75 Wn.App. 351 (1994), here there was insufficient evidence that an emergency existed, *cf.: State v. Weller,* 185 Wn.App. 913 (2015), thus warrantless entry was improper, acquiescence is not consent; 5-4.

***State v. Smith***,177 Wn.2d 533 (2013)

Police unlawfully run names in a motel registry to check for warrants, *State v. Jorden,* 160 Wn.2d 121 (2007), arrest defendant at threshold of motel room, see bloodied victims in room, enter room, rescue victims who tell police about evidence in a dumpster which police search and seize without warrants, trial court admits evidence under inevitable discovery doctrine, later invalidated, *State v. Winterstein,* 167 Wn.2d 620 (2009), Court of Appeals affirms under attenuation and independent source doctrine, *State v. Smith,* 165 Wn.App. 296 (2011); held: police presence at room door was the fruit of the unlawful motel registry search, thus independent source doctrine does not justify entry, but community caretaking and need to render emergency aid do justify entry, *State v. Acrey,* 148 Wn.2d 738, 748 (2003), search was not motivated by any investigatory purpose, victims were in plain view, *State v. Lynd,* 54 Wn.App. 18, 19-23 (1989), *State v. Stevenson,* 55 Wn.App. 725 (1989), evidence in dumpster was discovered from victim's information volunteered contemporaneous with efforts to render aid; willing victim's testimony is not amenable to suppression; 8-1.

***State v. Weller***, 185 Wn.App. 913 (2015)

Teenage twins report abuse to therapists who reports it to CPS who interview twins at home, assess that they are unsafe, call police who knock, advise defendant-parent they wish to perform welfare check and ask to come in, mother steps back from door, officers enter, ask twins to speak with them privately, go to garage, twins advise they were beaten with a board, officer sees board in garage, ask if that is the board with which they were beaten, victim says it is, observe what appears to be dried blood, seize board; held: **health and safety check exception** to warrant requirement obliges state to show (1) officer subjectively believed someone needed health or safety assistance, (2) reasonable person would believe there was a need for assistance, (3) there was a reasonable basis to associate the need for assistance with the place searched, *State v. Thompson,* 151 Wn.2d 793 (2004), *State v. Gocken*, 71 Wn.App. 267, 277-9 (1993), *State v. Moore*, 129 Wn.App. 870 (2005); here, trained CPS investigator relayed opinion that children were not safe, were in the residence, there was no pretextual purpose in entering garage, entry was "totally divorced from a criminal investigation," at 924 ¶ 9, police were in garage lawfully, board was in plain view thus properly seized; II.

***State v. A.A.***, 187 Wn.App. 475 (2015)

Mother reports 15 year old son ran away, officer finds him, detains intending to take him to secure facility for juveniles pursuant to Family Reconciliation Act, RCW 13.32A.050(2), knows facility requires full search so on street searches and finds drugs; held: unlike detention pursuant to involuntary treatment act, ch. 13.32A RCW, *State v. Dempsey,* 88 Wn.App. 918 (1997), detainee here did not pose imminent threat of harm thus pat-down strictly for weapons

was sufficient to protect officer, *State v. Kinzy*, 141 Wn.2d 373 (2000) *cf.: State v. Acrey*, 148 Wn.2d 738 (2003); III.

***State v. Duncan***, 185 Wn.2d 430, 438-41 (2016)

Following a report of someone in a white car shooting into a home police stop white car, remove occupants at gunpoint, handcuff and secure in police cars, open car's doors, find gun, remove gun, tow car, subsequently obtain search warrant; held: warrantless search of vehicle for evidence once vehicle's occupants are detained in police cars is improper, *State v. Snapp*, 174 Wn.2d 177, 197-201 (2012); where there is reasonable suspicion that there is an unsecured gun in a vehicle that will be impounded and towed, police may make a limited sweep of the vehicle to obtain the gun to avoid accidental discharge under community caretaking function; 9-0.

***State v. Boisselle***, 194 Wn.2d 1 (2019)

Police receive anonymous phone call stating that someone was shot at an address, previously police had information that identified defendant-resident as a homicide suspect, at house no one answers, police smell foul odor, neighbors say no one has been there for days, observe disarray through window, realize they lack time or sufficient information to get a warrant, no one available to consent, force entry, find body, then obtain warrant; held: warrantless "emergency" search was a pretext for a criminal investigation, officer's entry under emergency exception must be "totally divorced" from the detection and investigation of criminal activity, *State v. Kinzy*, 141 Wn.2d 373, 385 (2000); reverses *State v. Boisselle*, 3 Wn.App.2d 266 (2018); 5-4.

***State v. Harris***, 9 Wn.App.2d 625 (2019)

Citizen informs police that there are two people "passed out" in a car, police approach, observe two people either asleep or unconscious, open doors without seeking to arouse occupants first, awoke occupants, observe drug paraphernalia, arrest occupant who is charged with various crimes arising from the arrest; held: absent a reasonable, objective belief that defendant was specifically in need of immediate assistance, community caretaking exception is not a basis for a search; suspected unconsciousness alone does not support an objective, reasonable belief, *cf.: State v. Hutchison*, 56 Wn.App. 863 (1990), *State v. Markgraf*, 59 Wn.App. 509 (1990), *State v. Kinzy*, 141 Wn.2d 373 (2000), *State v. Hos*, 154 Wn.App. 238, 246-49 (2010); I.

***State v. Martin***, 13 Wn.App.2d 625 (2020)

Police are called about a man sleeping in a coffee shop, officer approaches, attempts to awaken defendant, notices the end of a metal utensil sticking out of his pocket, removes the utensil which is a cook spoon with residue, continues searching, finds drugs; held: there was no evidence that a crime had been committed justifying a stop and frisk, coffee shop had not stated that defendant was trespassing, officer's belief that awakening sleeping person might cause a safety concern to other patrons is without support from the record, could have asked other customers to move away; even if the officer was conducting a criminal investigation, the removal of the spoon exceeded the scope of a limited pat-down, *State v. Setterstrom*, 163 Wn.2d 621 (2008), *State v. Horton*, 136 Wn.App. 29 (2006), *State v. Russell*, 180 Wn.2d 860 (2014), *State v. Garvin*, 166 Wn.2d 242 (2009), *State v. Broadnax*, 98 Wn.2d 289 (1982); because officer's actions were not "totally divorced" from a criminal investigation, *State v. Boisselle*, 194

Wn.2d 1, 14 (2019), no evidence that officer was conducting a routine check on health and safety or rendering emergency aid, even if emergency exception applied a simple pat-down would have elevated concern that the item was a weapon or sharp object, *State v. A.A.*, 187 Wn.App. 475 (2015), *State v. Acrey*, 148 Wn.2d 738 (2003); I.

***Caniglia v. Strom, et al.***, ___ U.S. ___, 141 S.Ct. 1596, 209 L.Ed.2d 604 (2021)

Police see petitioner sitting on his porch, he agrees to be transported for psychiatric evaluation, police enter his home and seize firearms; held: while an impounded vehicle may be searched for firearms without a warrant, *Cady v. Dombrowski*, 413 U.S. 433, 93 S.Ct. 2523, 37 L.Ed.2d 706 (1973), community caretaking function does not justify entering a home without a warrant; 9-0.

# SEARCH
## Impound

***State v. Cuzick***, 21 Wn.App. 501 (1978)

**Parking** violation is not grounds for impound; III.

***State v. Houser***, 95 Wn.2d 143 (1980)

Mere suspicion that a vehicle is stolen or has been used in commission of a felony is not sufficient to justify impound; must be probable cause to impound or may be impounded under **community caretaker** capacity, *i.e.*, vehicle was abandoned, impeding traffic, *State v. Ferguson*, 131 Wn.App. 694 (2006), or threatened public safety, per *South Dakota v. Opperman*, 49 L.Ed.2d 1000 (1976), *Cady v. Dombrowski*, 37 L.Ed.2d 706 (1973); where suspect is arrested, it is unreasonable to impound when there is no probable cause to seize car and where a reasonable alternative to impoundment exists; *cf.: State v. Huff*, 64 Wn.App. 641 (1992); police cannot examine the locked trunk of an impounded vehicle in the course of an inventory search absent a manifest necessity, *State v. White*, 135 Wn.2d 761 (1998), *State v. VanNess*, 186 Wn.App. 148 (2015); where a closed piece of luggage in a vehicle gives no indication of dangerous contents police cannot search contents in course of inventory absent consent; reverses *State v. Houser*, 21 Wn.App. 30 (1980), *cf.: State v . Peck*, 194 Wn.2d 148 (2019); 6-2.

***State v. Davis***, 29 Wn.App. 691 (1981)

Store security guard observes suspect remove toy car from vehicle and enter store where suspect seeks to return it for cash; store is aware toy car had been charged to a fraudulent account; arrest suspect who is taken to police station; police impound vehicle from store lot; vehicle had other items of merchandise in it, and it had no door handles or locks; police inventory vehicle and seize other evidence; held: impound was improper, per *State v. Houser*, 95 Wn.2d 143 (1980), as no probable cause existed to believe vehicle was stolen or used in commission of felony and there was a reasonable alternative to impoundment; however, search held lawful, as probable cause and exigent circumstances (car was accessible, as it did not have door handles) existed; interruption of initial search of car did not taint later search.

***State v. Roth***, 30 Wn.App. 740 (1981)

Following traffic stop on interstate highway, police smell marijuana and see roach clips in ash tray, search vehicle, find rifle used in a homicide; held: probable cause to arrest, lawful search incident to arrest, lawful impound as state established reasonable cause for impound, *State v. Houser*, 95 Wn.2d 143 (1980), *but see: State v. Duncan*, 185 Wn.2d 430, 438-41 (2016); I.

***Michigan v. Thomas***, 73 L.Ed.2d 750 (1982)

Where police are justified in making an inventory search of a vehicle, they may search every part of the vehicle, and need not have exigent circumstances; fact that car was "immobilized" does not prohibit complete inventory search; *per curiam*.

***State v. Sweet***, 36 Wn.App. 377 (1984)

Arrested felony suspect passes out in patrol car and is thus unable to arrange for safekeeping of his car which is parked in front of a private business, impound is proper; I.

***State v. Reynoso***, 41 Wn.App. 113 (1985)

Suspect is stopped by police for license plate infraction, lacks a drivers license, is arrested, requests that vehicle's owner remove vehicle, police call owner, who agrees to pick up vehicle, police decide to impound anyway, inventory vehicle, find drugs, discover VIN does not match registration; held: vehicle may be impounded if there is probable cause to believe it is stolen or used in felony, *State v. Houser*, 95 Wn.2d 143 (1980); here, no evidence vehicle was stolen, fact that VIN did not correspond to registration is only evidence of a licensing violation, *State v. Simpson*, 95 Wn.2d 170, 189 (1980); vehicle may be impounded for **community caretaking** function if there is a threat to public safety or impeded traffic and no one is available to remove it, *State v. Ferguson*, 131 Wn.App. 694 (2006), *State v. Froelich*, 197 Wn.App. 831 (2017), thus not justified here, *Houser*, *supra*, at 150, *Simpson*, *supra*, at 189, *State v. Hardman*, 17 Wn.App. 910 (1978); vehicle may be impounded if authorized by statute and there is reasonable cause to impound under the constitution, *see*: *State v. Stortroen*, 53 Wn.App. 654, 658 (1989), *State v. Clifford*, 57 Wn.App. 124 (1990); *State v. Johnson*, 65 Wn.App. 716 (1992), *State v. Peterson*, 92 Wn.App. 899 (1998); III.

***State v. Burgess***, 43 Wn.App. 253 (1986)

Police, investigating a burglary, find suspect vehicle lawfully parked across from burglary, run registration and discover that owner had previously burglarized the same business, deflate tires; two hours later, police arrest suspect, seize incriminating evidence, impound and search vehicle; held: impound and inventory was improper as police had an affirmative duty to explore reasonable alternatives to impound, *State v. Williams*, 102 Wn.2d 733, 743 (1984), *State v. Houser*, 95 Wn.2d 143, 153 (1980); search of vehicle was, however, proper under automobile exception, *State v. Davis*, 29 Wn.App. 691, 699 (1981), since *State v. Ringer*, 100 Wn.2d 686 (1983) is not retroactive; *accord*: *In re Taylor*, 105 Wn.2d 683 (1986), *superseded, on other grounds, Pers. Restraint of St. Pierre*, 118 Wn.2d 321 (1992); II.

***State v. Terrovona***, 105 Wn.2d 632 (1986)

Defendant's automobile is found outside his home, tire treads match impression at scene of homicide, police impound vehicle; held: a car may be lawfully impounded if officer had probable cause to believe it was stolen or used in the commission of a felony; 9-0.

***Colorado v. Bertine***, 93 L.Ed.2d 739 (1987)

Police arrest DUI suspect, impound vehicle and, pursuant to departmental regulations, inventory a closed backpack, finding drugs; held: an inventory search of a closed pack in a fully impounded vehicle is permissible under the Fourth Amendment where performed in accordance with departmental procedures, and where there is no showing of bad faith or for the sole purpose of investigation; 7-2.

***State v. Clifford***, 57 Wn.App. 124 (1990)

Vehicle may be impounded where police are aware of a continuing violation of RCW 46.20.021, driving without valid license, *distinguishing* *State v. Reynoso*, 41 Wn.App. 113, 119 (1985); III.

***State v. Barajas***, 57 Wn.App. 556 (1990)

Impoundment and inventory search of vehicle improper based solely upon arrest for driving without a valid license, *State v. Simpson*, 95 Wn.2d 170 (1980), *State v. Reynoso*, 41 Wn.App. 113 (1985), *State v. Greenway*, 15 Wn.App. 216 (1976), *State v. Bales*, 15 Wn.App. 834 (1976), *State v. Tarica*, 59 Wn.App. 368 (1990), *State v. Terrazas*, 71 Wn.App. 873 (1993); *cf.: State v. Johnson*, 65 Wn.App. 716 (1992); RCW 46.20.435(1), which authorizes impoundment when police determine that driver lacked license, is discretionary, not mandatory, *see: State v. Villela*, 194 Wn.2d 451 (2019); III.

***Florida v. Wells***, 109 L.Ed.2d 1 (1990)

Absent police policies with respect to opening closed containers found during inventory search, the opening of such a container is insufficiently regulated, and thus evidence suppressed; 9-0.

***State v. McFadden***, 63 Wn.App. 441 (1991), *overruled, on other grounds, State v. Adel*, 136 Wn.2d 629 (1999)

Vehicle properly seized pursuant to forfeiture statute, RCW 69.50.505, on probable cause that it is used to facilitate a drug transaction, is subject to inventory search and evidence found therein is admissible under state and federal constitutions; *cf.: State v. Hendrickson*, 129 Wn.2d 61, 72-7 (1996), *see: State v. Perea*, 85 Wn.App. 339 (1997); I.

***State v. Hill***, 68 Wn.App. 300 (1993)

Police stop vehicle for no headlight, smell intoxicants, see open container of alcohol, arrest passenger for felony warrants, determine defendant-driver is not legally intoxicated, ask to search vehicle, which is denied, impound vehicle, find drugs; held: vehicle was neither abandoned, nor impeding traffic, but was partially blocking a sidewalk, police did not seek to determine if someone was available to take responsibility for vehicle, thus **community caretaking** function does not authorize impoundment, *State v. Froelich*, 197 Wn.App. 831 (2017); RCW 46.32.060, which authorizes impoundment for defective equipment, is discretionary, officer testified he would not have impounded for a light violation alone; under CONST. Art. 1, § 7, impoundment is inappropriate when reasonable alternatives exist, *State v. Greenway*, 15 Wn.App. 216, 219 (1976), although police are not required to exhaust all possible alternatives, *State v. Hardman*, 17 Wn.App. 910, 914 (1977); here, police made no attempt to determine reasonable alternatives, no departmental impoundment procedures are in the record, *distinguishing* *Colorado v. Bertine*, 93 L.Ed.2d 739 (1987), thus impoundment was unreasonable, *State v. Reynoso*, 41 Wn.App. 113, 116-9 (1985), *State v. Coss*, 87 Wn.App. 891, 898-900 (1997); while arrest of passenger would authorize search of vehicle incident thereto, *State v. Stroud*, 106 Wn.2d 144, 152 (1986), police did not search as a result of passenger's arrest; III.

***State v. Mireles***, 73 Wn.App. 605, 609-14 (1994)

DSHS Office of Support Enforcement seizes truck pursuant to lien, during inventory pursuant to written standards discovers drugs; held: under United States and Washington constitutions, inventory search of properly seized vehicle performed pursuant to written standards is reasonable, *Florida v. Wells*, 109 L.Ed.2d 1, 5 (1990), *State v. Houser*, 95 Wn.2d 143, 149 (1980); III.

***State v. Hendrickson***, 129 Wn.2d 61, 72-77 (1996)

Defendant's vehicle is seized pursuant to civil forfeiture statute, RCW 69.50.505, inventory search reveals nothing, four days later after anonymous tip police search anew without warrant, discover drugs; held: second search was an investigatory, not inventory, search, which must be based upon probable cause, *cf.: State v. McFadden*, 63 Wn.App. 441 (1991), *overruled, on other grounds, State v. Adel*, 136 Wn.2d 629 (1999), lacking here, *see: Florida v. J.L.*, 146 L.Ed.2d 254 (2000); until civil forfeiture court enters judgment of forfeiture, title resides in person from whom property was seized; *accord: State v. Patterson*, 112 Wn.2d 731, 734 (1989); Court declines to follow line of federal cases, *see: Cooper v. California*, 17 L.Ed.2d 730 (1967), holds CONST. Art. 1, § 7 requires a more restrictive view of investigatory searches; 9-0.

***State v. Coss***, 87 Wn.App. 891, 898-900 (1997)

Police stop vehicle for infraction, driver's license was suspended, police impound vehicle pursuant to departmental policy, as department did not book individuals for misdemeanors, discover drugs belonging to passenger; held: impoundment for driving with a suspended license is authorized, RCW 46.20.435A(1), but discretionary ["officer may immediately impound"], police must consider alternatives to impound, including another driver to remove the vehicle; here, police did not inquire if any passenger had a license, thus no reasonable alternative to impound was considered, thus impound was unlawful, and inventory search was improper, *State v. Hill*, 68 Wn.App. 300, 305 (1993), *State v. Reynoso*, 41 Wn.App. 113, 116-9 (1985) *State v. Froelich*, 197 Wn.App. 831 (2017),*see: State v. Peterson*, 92 Wn.App. 899 (1998); 2-1, III.

***State v. White***, 135 Wn.2d 761 (1998)

Police lawfully impound vehicle, open trunk by a trunk release button in unlocked glove compartment, find drugs; held: police may not examine the locked trunk of an impounded vehicle in the course of an inventory search, absent manifest necessity, whether a key or interior release button is used to unlock the trunk, *State v. Houser*, 95 Wn.2d 143 (1980), *State v. VanNess*, 186 Wn.App. 148 (2015), *cf.: State v. Ferguson*, 131 Wn.App. 694 (2006), *reversing State v. White*, 83 Wn.App. 770 (1996) 7-2.

***State v. Peterson***, 92 Wn.App. 899 (1998)

Defendant, sole occupant of vehicle, is stopped for vehicle tab expiration, police determine license is suspended, defendant lacks registration, vehicle belongs to another whom police do not try to contact, impound vehicle, find drugs; held: absent other licensed passengers or authorization of owner to leave vehicle, police properly exercised discretion to impound, *State v. Reynoso*, 41 Wn.App. 113, 119 (1985), distinguishing *State v. Coss*, 87 Wn.App. 891 (1997); 2-1, III.

***All Around Underground v. WSP***, 148 Wn.2d 145 (2002)

WAC 205-96-010 requiring impound upon arrest for driving with a suspended license is invalid as it conflicts with RCW 46.55.113 which authorizes but does not mandate impound, obliging exercise of discretion, *cf.: State v. Pulfrey*, 154 Wn.2d 517 (2005); 5-4.

***State v. Ferguson***, 131 Wn.App. 694 (2006)

Police stop vehicle for traffic violation, driver has outstanding warrant, is arrested, pasenger lacks identification, car is blocking intersection, trooper calls for impound, begins search, discovers meth lab items, opens trunk with inside trunk latch to see if there were dangerous chemicals inside, finds white gas and Coleman stove, shuts trunk, tows, gets warrant; held: impound decision was proper as vehicle was blocking street and passenger lacked license, *State v. Houser*, 95 Wn.2d 143 (1980), state proved manifest necessity for limited warrantless search of trunk to remove hazardous materials, distinguishing *State v. White*, 135 Wn.2d 761 (1998); III.

***State v. Morales***, 154 Wn.App. 26, 45-49 (2010) *rev'd on other grnds*, 173 Wn.2d 560 (2012)

Following vehicular assault arrest, police observe beer cans in front seat, seize them, then impound vehicle; held: because impound was lawful pursuant to DUI statute, RCW 46.55.113(1), *but see: State v. Villela*, 194 Wn.2d 451 (2019), and there was probable cause that vehicle had been used in a felony, *State v. Clark*, 143 Wn.2d 731, 755 (2001), beer cans were admissible in evidence even if search incident to arrest was improper and even if inevitable discovery doctrine is inapplicable in Washington, *State v. Winterstein*, 167 Wn.2d 620 (2009); 2-1, II.

***State v. Tyler***, 177 Wn.2d 690 (2013)

Following a lawful impound, police need not obtain consent to perform an inventory search of unlocked containers and trunks, effectively overruling *dicta* in *State v. Williams*, 102 Wn.2d 733, 743 (1984), *State v. White*, 135 Wn.2d 761, 771 n.11 (1998); e-mail from searching officer to other sheriffs stating "[t]he obvious way to circumvent this [*Arizona v. Gant*, 556 U.S. 332, 173 L.Ed.2d 485 (2009)] is impounding the vehicle" does not establish that the impound was pretextual; affirms *State v. Tyler*, 166 Wn.App. 202 (2012); 8-1.

***State v. Green***, 177 Wn.App. 332 (2013)

Police arrest defendant for vehicular homicide, impound and inventory vehicle, in a paper bag find and seize suspicious gift card receipts, obtain warrant to search for evidence of vehicular homicide without mentioning what was seized in the bag, warrant authorizes seizure of evidence of drug and alcohol use and papers of dominions and control, during execution of warrant police find credit cards, put them back and obtain a warrant for identity theft and seize cards which were false or stolen; held: police did not recognize the gift card receipts as inventory items or as evidence of a crime, looking in the paper bag was proper to see if anything of value was present but seizure was for investigatory purposes and thus improper, distinguishing *State v. Montague*, 73 Wn.2d 381, 382-85 (1968); independent source doctrine, *State v. Gaines*, 154 Wn.2d 711 (2005), *State v. Miles*, 159 Wn.App. 282 (2011), does not justify seizure of receipts as they were not found while executing first search warrant, belief that they would have been found had they not been seized during the initial search is speculative, inevitable discovery

doctrine is not valid in Washington, *State v. Smith,* 165 Wn.App. 296, 310, *aff'd,* 177 Wn.2d 533 (2013); I.

***State v. Duncan****,* 185 Wn.2d 430, 438-41 (2016)

Following a report of someone in a white car shooting into a home police stop white car, remove occupants at gunpoint, handcuff and secure in police cars, open car's doors, find gun, remove gun, tow car, subsequently obtain search warrant; held: warrantless search of vehicle for evidence once vehicle's occupants are detained in police cars is improper, *State v. Snapp,* 174 Wn.2d 177, 197-201 (2012); where there is reasonable suspicion that there is an unsecured gun in a vehicle that will be impounded and towed, police may make a limited sweep of the vehicle to obtain the gun to avoid accidental discharge under community caretaking function; 9-0.

***State v. Froelich,*** 197 Wn.App. 831 (2017)

Defendant, driving another's car, collides with another car, defendant's car on shoulder, defendant is taken to hospital, police decide to impound, inventory search yields drugs; held: before impounding and inventorying police must ask driver if she, spouse or friends can remove the car, even if the car is undrivable and must be towed, *State v. Reynoso,* 41 Wn.App. 113 (1985), *State v. Coss,* 87 Wn.App. 891, 898-900 (1997); while RCW 46.55.113(2) (2011) authorizes an impound of an unattended vehicle police still must consider alternatives to impound; 2-1, III.

***State v. Villela****,* 164 Wn.2d 451 (2019)

RCW 46.55.360 authorizing summary impoundment following DUI arrest violates state constitution, *State v. Tyler,* 177 Wn.2d 690, 698 (2013); 9-0.

# SEARCH
## Incident to Arrest*

***Michigan v. Summers***, 452 U.S. 692, 69 L.Ed.2d 340 (1981)

Police, executing warrant, encounter defendant leaving his residence, require him to return to house, detain him while searching, find drugs in house, then search defendant and find drugs on his person; held: existence of warrant justified detention of occupant of home while search is conducted, *Muehler v. Mora*, 161 L.Ed.2d 299 (2005), *but see: Bailey v. United States*, 568 U.S. 186, 185 L.Ed.2d 19 (2013), and, upon finding contraband in house, justifies arrest and search of occupant on probable cause; this type of detention is "less intrusive than an arrest"; 6-3.

***State v. Garcia***, 35 Wn.App. 174 (1983)

Defendant is lawfully arrested, taken to station, before it was decided whether or not to place defendant in jail, he was booked and, in searching his wallet, police seize razor and drugs; held: search was pursuant to lawful arrest, it was reasonable to search his wallet as an inventory search, *distinguishing* *State v. Carner*, 28 Wn.App. 439 (1981), wherein police had already decided to release defendant, whereas here that decision had not been made, *cf.*: *State v. Smith*, 61 Wn.App. 482 (1991), *but see: State v. O'Neill*, 148 Wn.2d 564 (2003); III.

***State v. White***, 44 Wn.App. 276 (1986)

Defendant, properly arrested for DUI, is patted down, police feel something they believe is a knife, remove a cosmetic case from defendant's pocket, open it, find drugs; held: personal possessions closely associated with person's clothing may be seized pursuant to a lawful arrest, and may be opened by the police, *State v. Gammon*, 61 Wn.App. 858 (1991), *State v. Jordan*, 92 Wn.App. 25, 29-31 (1998), *State v. Whitney*, 156 Wn.App. 405 (2010), *State v. Bonds*, 174 Wn.App. 553, 568-71 (2013), *distinguishing* *State v. Ringer*, 100 Wn.2d 686 (1983); III.

***State v. LaTourette***, 49 Wn.App. 119 (1987)

Police arrest for reckless driving, find baggie in defendant's pants, open it, find drugs; held: search and seizure of evidence from suspect's person incident to lawful arrest may include possessions other than weapons, *State v. White*, 44 Wn.App. 276 (1986), *State v. Gammon*, 61 Wn.App. 858 (1991), *State v. Jordan*, 92 Wn.App. 25, 29-31 (1998), *State v. Bonds*, 174 Wn.App. 553, 568-71 (2013); I.

***Maryland v. Buie***, 108 L.Ed.2d 276 (1990)

Police obtain arrest warrant for armed robber who wore red running suit, serve warrant in home, arrest suspect emerging from basement, police enter basement to look for other people, observe and seize red running suit in plain view; held: a "protective sweep" of premises in conjunction with a home arrest is permissible, *State v. Hopkins*, 113 Wn.App. 954 (2002), *State v. Sadler*, 147 Wn.App. 97, 125-26 (2008), incident to the arrest, limited to a cursory visual

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* *See*: **SEARCH/Auto**

inspection of those places in which a person might be hiding, where police possess a reasonable belief based on specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant an officer in believing that the area swept harbored an individual posing a danger to officers or others, *State v. Smith*, 137 Wn.App. 262, 268 (2007), 165 Wn.2d 511 (2009), *State v. Blockman*, 190 Wn.2d 651 (2018), *cf.: State v. Boyer*, 124 Wn.App. 593 (2004), *State v. Chambers*, 197 Wn.App.. 96, 122-28 (2016); police do not need probable cause to believe that a serious and demonstrable potentiality for danger existed; 7-2.

***Smith v. Ohio***, 108 L.Ed.2d 464 (1990)

Police, without probable cause or a well-founded suspicion, search paper bag, find drugs, arrest defendant; held: search of paper bag could not be justified as incident to arrest of accused as there was no basis to arrest before the search; 8-1.

***State v. Brantigan***, 59 Wn.App. 481 (1990)

Police stop defendant's vehicle for littering, observe drug paraphernalia in car, patdown defendant, find drugs; at suppression hearing, officer testifies he would not have taken defendant into custody only on the paraphernalia charge; held: officer had made merely a conditional decision to release dependent on the result of the patdown, *distinguishing State v. Carner*, 28 Wn.App. 439 (1981), *but see: State v. McKenna*, 91 Wn.App. 554 (1998), *State v. Radka*, 120 Wn.App. 43 (2004), *see: State v. Balch*, 114 Wn.App. 55 (2002); where probable cause to arrest exists, it is irrelevant whether the search incident to the arrest occurs before or after the arrest, *Rawlings v. Kentucky*, 65 L.Ed.2d 633 (1980), *State v. Harrell*, 83 Wn.App. 393, 400 (1996), *State v. O'Neill*, 110 Wn.App. 604 (2002), *but see: State v. O'Neill*, 148 Wn.2d 564 (2003); I.

***State v. Gammon***, 61 Wn.App. 858 (1991)

Following lawful arrest, police find prescription pill bottle on defendant, open it, discover cocaine; held: defendant had diminished expectation of privacy in bottle because it was found on his person akin to a wallet, *State v. White*, 44 Wn.App. 276 (1986), *State v. LaTourette*, 49 Wn.App. 119 (1987), thus allowing detailed inspection incident to arrest, *State v. Jordan*, 92 Wn.App. 25, 29-31 (1998), *State v. Whitney*, 156 Wn.App. 405 (2010); I.

***State v. Smith***, 119 Wn.2d 675 (1992)

Defendant is lawfully arrested following struggle with police, fanny pack falls off during struggle, defendant is handcuffed, placed in patrol car, officer places fanny pack on front seat, searches fanny pack 9-17 minutes later, finds drugs; held: object is within control of arrestee for purposes of search incident to arrest as long as object is within arrestee's reach immediately prior to, or at moment of, arrest, *New York v. Belton*, 69 L.Ed.2d 768 (1981), *see: State v. Parker*, 139 Wn.2d 486 (1999), *State v. Ellison*, 172 Wn.App. 710 (2013), *State v.Byrd*, 178 Wn.2d 611 (2013), *State v. Alexander*, 10 Wn.App.2d 682 (2019), *but see: Arizona v. Gant*, 173 L.Ed.2d 485 (2009), *State v. Valdez*, 167 Wn.2d 761 (2009), *State v. Brock*, 182 Wn.App. 680 (2014); handcuffing arrestee, who had resisted, and placing him in patrol car for safety reasons does not make subsequent search unreasonable, *United States v. Turner*, 926 F.2d 883 (9th Cir.), *cert. denied*, 116 L.Ed.2d 73 (1991); 17 minutes between arrest and search is not *per se* unreasonable, *United States v. Porter*, 738 F.2d 622 (4th Cir.)(1984) (15 minutes), *State v. Boursaw*, 94 Wn.App. 629 (1999) (10 minutes), *cf.: United States v. Chadwick*, 53 L.Ed.2d 538 (1977) (more

than one hour is unreasonable), *United States v. Vasey*, 834 F.2d 782 (9th Cir. 1987) (30-45 minutes is unreasonable), where delay results solely from officer's reasonable actions to secure premises and protect herself and public; reverses *State v. Smith*, 61 Wn.App. 482 (1991); 9-0.

***State v. Smith***, 76 Wn.App. 9, 13-16 (1994)

Defendant is arrested in her car on warrant, asks for purse, police comply, during booking police search purse, find drugs; held: established and consistent practice of "inventorying" arrestee's personal possessions as part of booking procedures is an exception to the warrant requirement under the Fourth Amendment and CONST. Art. 1, § 7, *Illinois v. Lafayette*, 77 L.Ed.2d 65 (1983), *South Dakota v. Opperman*, 49 L.Ed.2d 1000 (1976), *State v. Garcia*, 35 Wn.App. 174 (1983), *State v. Gluck*, 83 Wn.2d 424, 428 (1974), *State v. Houser*, 95 Wn.2d 143 (1980), *cf.: State v. Rankin*, 151 Wn.2d 689 (2004), *State v. Dunham*, 194 Wn.App. 744 (2016), *but see: State v. Wisdom*, 187 Wn.App. 652 (2015); I.

***State v. Harrell***, 83 Wn.App. 393 (1996)

As long as probable cause exists at the time of search, the search may be considered a search incident to arrest even if it occurs shortly before the arrest, *State v. Ward*, 24 Wn.App. 761 (1979), *State v. Brantigan*, 59 Wn.App. 481 (1990), *but see: State v. O'Neill*, 148 Wn.2d 564 (2003), even if the officer did not subjectively consider suspect to be under arrest, *see: State v. Balch*, 114 Wn.App. 55 (2002), *but see: State v. McKenna*, 91 Wn.App. 554 (1998); I.

***State v. McKenna***, 91 Wn.App. 554 (1998)

Driver is stopped for infraction, lacks license and has traffic warrant but officer, aware that jail is not accepting nonviolent misdemeanors, cites and releases, decides to impound vehicle, allows defendant to remove chattels, offers ride home if defendant will consent to search of bag, officer finds drug paraphernalia [not a crime, *see:* RCW 69.50.412, 69.50.102, *State v. Neeley*, 113 Wn.App. 100, 107 (2002)], directs defendant to empty pockets, finds drugs; held: the search was not accompanied by a contemporaneous arrest, and thus is not justified even though police could have arrested, as search incident to arrest can only be justified when the search and arrest are reasonably contemporaneous, *Rawlings v. Kentucky*, 65 L.Ed.2d 633 (1980), *State v. Smith*, 119 Wn.2d 675, 679 (1992), *State v. Carner*, 28 Wn.App. 439 (1981), *State v. O'Neill*, 148 Wn.2d 564 (2003), *cf.: State v. Brantigan*, 59 Wn.App. 481 (1990), *State v. Morgan*, 78 Wn.App. 208, 211 (1995), *State v. Lowrimore*, 67 Wn.App. 949 (1992), *State v. O'Neill*, 110 Wn.App. 604 (2002), *State v. Clausen*, 113 Wn.App. 657 (2002), *State v. Balch*, 114 Wn.App. 55 (2002), *State v. Craig*, 115 Wn.App. 191 (2002), *State v. Radka*, 120 Wn.App. 43 (2004), *see: State v. Gering*, 146 Wn.App. 564 (2008); II, 2-1.

***State v. Jordan***, 92 Wn.App. 25 (1998)

Defendant is arrested on a warrant, during search incident to arrest at scene before transport to jail, drugs found; held: police may search incident to arrest on a warrant or on probable cause; mere fact that police are serving a warrant does not oblige them to allow defendant to post bail before search incident to arrest, *State v. Salinas*, 169 Wn.App. 210, 222 (2012), police are not limited to a patdown for weapons when serving a warrant, distinguishing *State v. Caldera*, 84 Wn.App. 527 (1997), *State v. Smith*, 56 Wn.App. 145 (1989), RCW 10.31.030, *see: State v. Ross*, 106 Wn.App. 876 (2001); search of suspect's pocket and opening

container found in pocket was within scope of search incident to arrest, *State v. Gammon*, 61 Wn.App. 858, 860 (1991), *State v. White*, 44 Wn.App. 276 (1986), *State v. Whitney*, 156 Wn.App. 405 (2010), *State v. Bonds*, 174 Wn.App. 553, 568-71 (2013); II.

***State v. Parker***, 139 Wn.2d 486 (1999)

Police stop vehicle for infraction, lawfully arrest driver, passenger exits vehicle, police search purse they know belongs to passenger, find drugs; held: full-blown search incident to arrest does not apply to an unarrested passenger or to personal belongings which police know or should know belong to the passenger who is not independently suspected of criminal activity, reversing *State v. Parker*, 88 Wn.App. 273 (1997) and *State v. Hunnel*, 89 Wn.App. 638 (1998); *accord: State v. Jones*, 146 Wn.2d 328 (2002), *State v. Adams*, 144 Wn.App. 100 (2008), *cf.: State v. Horrace*, 144 Wn.2d 386 (2001); (4 justices concur; 1 justice would hold that passenger's belongings may be searched for weapon only; 1 justice would hold that police may not search items that they actually know belong to passenger; 2 dissents).

***State v. Cormier***, 100 Wn.App. 457 (2000)

Police, serving a warrant, observe defendant at night ride by on bicycle several times, stop and stare, police approach, ask him to remove hands from pockets, defendant refuses, is told he will be arrested for obstructing, officers try to take him in custody, defendant strikes police who search and find drugs; held: police had no reasonable belief that defendant was armed, thus had no basis to stop; once defendant assaulted the officer, police had probable cause to arrest, *State v. Mierz*, 127 Wn.2d 460, 50 A.L.R.5th 921 (1995), *State v. Valentine*, 132 Wn.2d 1, 21-22 (1997), *State v. McKinlay*, 87 Wn.App. 394, 398-99 (1997), and may search incident to that arrest, irrespective of the legality of the initial encounter, *see: State v. D.E.D.*, 200 Wn.App. 484, (2017); 2-1, III.

***State v. Bradley***, 105 Wn.App. 30 (2001)

Police hear gunshots, observe defendant run down alley, lean into vehicle then walk away, does not respond to officers' commands to stop, is forced to ground, handcuffed, placed in police van, defendant's car is searched, gun found; held: because there was no danger to officers, defendant would not have to re-enter car to get registration, *State v. Larson*, 88 Wn.App. 849 (1997), and because no one else was in the vehicle, *State v. Kennedy*, 107 Wn.2d 1, 11 (1986), *State v. Watkins*, 86 Wn.App. 726, 730 (1995), then search of vehicle was beyond scope of investigatory stop, *cf.: State v. Chang*, 147 Wn.App. 490, 494-98 (2008), however because police had probable cause to arrest, the search of the car was proper incident to arrest, *cf.: State v. Porter*, 102 Wn.App. 327 (2000), *State v. Turner*, 114 Wn.App. 653 (2002), *see: State v. Rathbun*, 124 Wn.App. 372 (2004); I.

***State v. Ross***, 106 Wn.App. 876 (2001)

Defendant is arrested on misdemeanor warrant, patted down by arresting officer, turned over to police from warrant jurisdiction who search incident to arrest and find drugs, defense seeks suppression because defendant was not taken "directly and without delay" to post bail, RCW 10.31.030; held: while RCW 10.31.030 precludes inventory searches at time of booking where a defendant is not given the opportunity to post bail, *State v. Smith*, 56 Wn.App. 145 (1989), *State v. Caldera*, 84 Wn.App. 527 (1997), police are not precluded from searching incident to arrest, *State v. Jordan*, 92 Wn.App. 25 (1998); *State v. Salinas*, 169 Wn.App. 210,

222 (2012), initial arresting officers were not obliged to take defendant immediately to jail to post bail; I.

***State v. Dugas***, 109 Wn.App. 592 (2001)

During detention, suspect removes his jacket and puts it on his car hood; following arrest, police take jacket and, during inventory find closed key pouch, open it, find drugs; held: while police were authorized to impound the jacket for safekeeping, it is not reasonable for police to search the contents of closed containers found in the jacket incident to impound, *State v. VanNess*, 186 Wn.App. 148 (2015), *State v. Dunham*, 194 Wn.App. 744 (2016), *see: State v. Houser*, 95 Wn.2d 143 (1980), *State v. Wisdom*, 187 Wn.App. 652 (2015), *cf.: State v . Peck*, 194 Wn.2d 148 (2019); I.

***State v. O'Neill***, 110 Wn.App. 604 (2002)

Following traffic stop, police arrest defendant for driving while license suspended, return to defendant's truck to search, find it locked, observe glass pipe, tow truck operator, pursuant to impound, opens truck, drugs seized, at suppression hearing, jail officer testifies that jail does not accept bookings for suspended license absent a request for a booking exception which has never been denied; held: booking into jail is not a necessary element of custodial arrest to justify search incident to arrest, *State v. Craig*, 115 Wn.App. 191 (2002), *State v. Gering*, 146 Wn.App. 564 (2008), *see: State v. Thomas*, 89 Wn.App. 774 (1998), *State v. Brantigan*, 59 Wn.App. 481 (1990), *State v. Perea*, 85 Wn.App. 339, 341-42 (1997), *State v. Balch*, 114 Wn.App. 55 (2002), *State v. O'Neill,* 148 Wn.2d 564 (2003), *State v. Radka*, 120 Wn.App. 43 (2004), *cf.: State v. McKenna*, 91 Wn.App. 554 (1998), *Knowles v. Iowa*, 142 L.Ed.2d 492 (1998); III.

***State v. Hopkins***, 113 Wn.App. 954 (2002)

Police, with an arrest warrant for defendant and a search warrant to search for the defendant "including outbuildings…and documents" arrest defendant, do a "security check" and "protective sweep" in shed, find meth lab; held: because search warrant was issued only on the basis of the arrest warrant, its scope is no greater than the arrest warrant; to justify a "protective sweep," state has burden of proving that the sweep was reasonable for security purposes and limited to a cursory visual inspection of places where a person may be hiding, *Maryland v. Buie*, 108 L.Ed.2d 276 (1990), *State v. Smith*, 137 Wn.App. 262, 268 (2007), 165 Wn.2d 511 (2009), *see: State v. Sadler*, 147 Wn.App. 97, 123-25 (2008); here, there were no articulable facts warranting a reasonably prudent officer in believing that the area to be swept harbored an individual posing a danger, thus drugs suppressed, *State v. Chambers*, 197 Wn.App.. 96, 122-28 (2016), *cf.: State v. Blockman*, 198 Wn.App. 34 (2017), 190 Wn.2d 651 (2018); III.

***State v. Balch***, 114 Wn.App. 55 (2002)

Officer stops defendant for infraction, determines his license is suspended, arrests, searches, finds container with marijuana, officer's supervisor directs officer to cite and release; held: because police had probable cause to arrest and did arrest, search incident to arrest was proper, irrespective of subsequent decision to cite and release, distinguishing *State v. McKenna*, 91 Wn.App. 554 (1998), *see: State v. O'Neill,* 148 Wn.2d 564 (2003); II.

***State v. Craig***, 115 Wn.App. 191 (2002)

Defendant is arrested for suspended license, police follow county policy which requires that arrestee be taken to police department, processed, cited and released, police find drugs; held: booking into jail is not required for a search incident to arrest, distinguishing *State v. McKenna*, 91 Wn.App. 554, 561 (1998), *see: State v. O'Neill,* 148 Wn.2d 564 (2003), *State v. O'Neill,* 110 Wn.App. 604 (2002), *State v. Radka*, 120 Wn.App. 43 (2004), *State v. Gering*, 146 Wn.App. 564 (2008); II.

***State v. O'Neill***, 148 Wn.2d 564 (2003)

Officer observes car in parking lot of recently burglarized business, approaches, defendant says he drove there until his car broke, officer asks for identification, driver responds his license is suspended, officer asks defendant to step out of car, observes "cook spoon" on floor, asks repeatedly for consent to search which is eventually granted, police find drugs; held: approaching and asking for identification is not a seizure, *State v. Young*, 135 Wn.2d 498 (1998), *State v. Armenta*, 134 Wn.2d 1, 11 (1997), *aff'd, on other grounds,* 169 Wn.2d 169 (2010), *State v. Cerrillo*, 122 Wn.App. 341 (2004), *State v. Afana*, 147 Wn.App. 843 (2008), effectively overruling *State v. Markgraf,* 59 Wn.App. 509 (1990); when asking defendant to step outside, officer had probable cause to arrest for driving while license suspended, thus defendant was seized at that point; observation of cook spoon meets plain view test; pursuant to CONST. art. I, § 7, a custodial arrest is a prerequisite to a search incident to arrest, because defendant was not arrested, drugs must be suppressed, overruling *State v. Brooks*, 57 Wn.2d 422 (1960), *State v. Smith*, 88 Wn.2d 127, 138 (1977), effectively overruling, in part, *State v. Garcia*, 35 Wn.App. 174 (1983), *State v. McIntosh*, 42 Wn.App. 573 (1986), *State v. Brantigan*, 59 Wn.App. 481 (1990), *State v. Harrell*, 83 Wn.App. 393 (1996), *cf.: State v. Balch*, 114 Wn.App. 55 (2002), *State v. Radka*, 120 Wn.App. 43 (2004), *see: State v. Gering*, 146 Wn.App. 564 (2008); **inevitable discovery** doctrine is inapplicable because it would undermine holding requiring a lawful custodial arrest, *see: State v. Winterstein*, 167 Wn.2d 620, 631-36 (2009); reverses *State v. O'Neill,* 104 Wn.App. 850 (2001); 5-4.

***State v. Boyer***, 124 Wn.App. 593 (2004)

Police, serving search warrant on basement apartment, discover unlocked door into a storage area, perform "protective sweep," find drugs; held: unlike an arrest warrant, a protective sweep incident to execution of a search warrant is unjustified absent specific articulable facts that would support a prudent officer's belief that the area harbored a dangerous person, *see: State v. Chambers*, 197 Wn.App.. 96, 122-28 (2016), *cf.: State v. Blockman*, 190 Wn.2d 651 (2018), distinguishing *Maryland v. Buie*, 108 L.Ed.2d 276 (1990), *State v. Hopkins*, 113 Wn.App. 954 (2002), *State v. Smith*, 137 Wn.App. 262, 268 (2007), 165 Wn.2d 511 (2009); III.

***State v. Gering***, 146 Wn.App. 564 (2008)

Police stop defendant for driving while license suspended, cuff, search incident to arrest, find drugs on his person, defendant maintains that because jail would not accept a DWLS booking, custodial arrest was improper; held: manifestation of the arresting officer's intent was full custodial arrest, *State v. Radka*, 120 Wn.App. 43, 49 (2004), reasonable detainee would under these circumstances consider himself under arrest, *id., at* 49-50, *State v. O'Neill,* 110 Wn.App. 604 (2002), thus search was proper; III.

***State v. Sadler***, 147 Wn.App. 97, 123-27 (2008)

Police enter defendant's home on legitimate emergency, seeking a minor with whom defendant is alleged to be engaged in sadomasochistic sex, arrest defendant, engage in cursory visual inspection of places in home where someone could be hiding, then return later to seek evidence for use in a search warrant affidavit; held: initial protective sweep was lawful, *State v. Hopkins*, 113 Wn.App. 954, 959-60 (2002), but second warrantless entry was improper as it was an entry to investigate a possible crime; remanded to allow inquiry into independent source doctrine, *State v. Gaines*, 154 Wn.2d 711 (2005); 2-1, II.

***State v. Bishop***, 149 Wn.App. 439 (2009)

Following sentencing, defendant fails to report to work crew, court issues arrest warrant based upon unsworn letter from work crew staff, defendant is arrested, searched, drugs found; held: once court finds probable cause to detain for the original crime, it may issue bench warrants on the same oath that supported the original arrest warrant, *State v. Erickson*, 143 Wn.App. 660, *review granted*, 164 Wn.2d 1030 (2008); II.

***State v. Erickson***, 168 Wn.2d 41 (2010)

Defendant is on probation, fails to appear for a hearing, bench warrant issued, upon arrest drugs found; held: returned summons establishes a well-founded suspicion that defendant did not notify court of address change, thus warrant was valid; court must find a well-founded suspicion that a probation violation occurred for warrant to be valid, distinguishing *State v. Parks*, 136 Wn.App. 232 (2006); 9-0.

***State v. Morales***, 154 Wn.App. 26, 45-49 (2010), *rev'd on other grnds*, 173 Wn.2d 560 (2012)

Following vehicular assault arrest, police observe beer cans in front seat, seize them, then impound vehicle; held: because impound was lawful pursuant to DUI statute, RCW 46.55.113(1), and there was probable cause that vehicle had been used in a felony, *State v. Clark*, 143 Wn.2d 731, 755 (2001), beer cans were admissible in evidence even if search incident to arrest was improper and even if inevitable discovery doctrine is inapplicable in Washington, *State v. Winterstein*, 167 Wn.2d 620 (2009); 2-1, II.

***State v. Johnson***, 155 Wn.App. 270 (2010)

Officer, on routine patrol, runs "routine check" of defendant's plate, dispatch advises license of registered owner is suspended, stops vehicle, defendant-owner exits with her purse, is arrested for suspended license, cuffed, placed in patrol car, officer searches purse and vehicle, finds drugs in purse; held: search of purse was properly incident to arrest thus not subject to suppression under *Arizona v. Gant*, 173 L.Ed.2d 485 (2009), *State v.Byrd*, 178 Wn.2d 611 (2013), *cf.: State v. Brock*, 182 Wn.App. 680 (2014); III.

***State v. Whitney***, 156 Wn.App. 405 (2010)

Police stop vehicle for infraction, discover defendant's license is suspended, arrest, search defendant, find pill bottle in pocket, open bottle, find illegal drugs; held: *Arizona v. Gant*, 173 L.Ed.2d 485 (2009), does not extend to an search incident to arrest; scope of search incident to arrest includes search of contents of vial, *State v. Gammon*, 61 Wn.App. 858, 863-65 (1991); III.

***State v. Barker***, 162 Wn.App. 858 (2011)

Defendant is arrested pursuant to DOC warrant, drugs found; held: an administrative warrant issued by the Department of Corrections pursuant to RCW 9.94A.740 (1999) [recodified as 9.94A.716 (2008)] need not be issued by a neutral magistrate based upon oath, *State v. Olson,* 164 Wn.App. 187 (2011); II.

***State v. Salinas***, 169 Wn.App. 210, 219-22 (2012)

Following lawful arrest for rape, seizure of clothing without a warrant to see if it contains victim's DNA is a proper exercise of a search incident to arrest, *State ex rel. Murphy v. Brown,* 83 Wash. 100, 105-06 (1914), *State v. Nordstrom,* 7 Wash. 506 (1893), *State v. Cheatam,* 150 Wn.2d 626, 654-55 (2003); while defendant must be given opportunity to post bail following arrest on a warrant before being subject to inventory search, RCW 10.31.030, *State v. Smith,* 56 Wn.App. 145 (1989), the rule does not apply to a search incident to arrest, *State v. Jordan,* 92 Wn.App. 25, 28 (1998), *see: State v. Bonds,* 174 Wn.App. 553, 568-71 (2013); I.

***State v. Byrd***, 178 Wn.2d 611 (2013)

Officer stops vehicle with stolen plates, arrests driver on warrant, driver tells officer that car belongs to defendant-passenger who is ordered out of car, officer removes purse from her lap, arrests defendant, places her in patrol car, searches purse, finds drugs; held: "[a] search of the arrestee's immediate area must be justified by concerns for officer safety or evidence preservation, while a search of the arrestee's person and articles of his or her person is justified by the authority of a lawful arrest," at 625 ¶ 27, *State v. Ellison,* 172 Wn.App. 710 (2013), *State v. Smith*, 119 Wn.2d 675 (1992), *State v. MacDicken,* 179 Wn.2d 936 (2014); exigencies are presumed when an officer searches an arrestee's person, at 620 ¶ 17, here "the purse was unquestionably an article immediately associated with her person," at 623 ¶ 10; reverses *State v. Byrd,* 162 Wn.App. 612 (2011); "[w]e caution that the proper scope of the time of arrest rule is narrow… It does not extend to all articles in an arrestee's constructive possession, but only those personal articles in the arrestee's actual and exclusive possession at or immediately preceding the time of arrest," at 623 ¶ 9, *State v. Brock,* 182 Wn.App. 680 (2014), *State v. Alexander,* 10 Wn.App.2d 682 (2019); 5-4.

***State v. Ellison***, 172 Wn.App. 710 (2013)

Police find defendant under a blanket outside a home, backpack between his legs, arrest on warrants, handcuff, search backpack, find evidence of identity theft; held: an object is within the control of an arrestee for search incident to arrest as long as it was within arrestee's reach immediately prior to or at the moment of arrest, *State v. Smith,* 119 Wn.2d 675, 681-82 (1992); even if *Arizona v. Gant,* 566 U.S. 332, 173 L.Ed.2d 485 (2009) applies to a non-automobile search, the concern for officer safety justifies the search of the backpack, *State v. Byrd,* 178 Wn.2d 611 (2013), *cf.*: *State v. Brock,* 182 Wn.App. 680 (2014), *State v. Alexander,* 10 Wn.App.2d 682 (2019); III.

***State v. Bonds***, 174 Wn.App. 553, 568-71 (2013)

Police may search contents of pockets incident to arrest, scope is not limited to a weapons frisk, *Chimel v. California,* 395 U.S. 752, 762-63, 23 L.Ed.2d 685 (1969), *State v. Jordan,* 92 Wn.App. 25, 31 (1998); II.

***Riley v. California,*** 573 U.S. 373 134 S.Ct. 2473, 189 L.Ed.2d 430 (2014)

Incident to arrest, police seize and search cell phone; held: absent a search warrant or exigent circumstances police may not search a cell phone seized incident to arrest, *see: Carpenter v. United States,* ___ U.S. ___ , 138 S.Ct. 2206, 201 L.Ed.2d 507 (2018); 9-0.

***State v. Roden****,* 179 Wn.2d 893 (2014)

Incident to drug arrest of Lee, police seize smartphone, detective looks through the phone, sees a text message offering to sell drugs, posing as arrestee Lee replies, arranges to buy drugs, arrest defendant Roden; held: a text message to an individual, as opposed to a group texting function, manifests a subjective intent of privacy, illicit subject matter indicates a belief in privacy, thus text messages were private communications protected by privacy act, RCW 9.73.030(1), detective reading the texts intercepted the messages, police should have obtained a warrant, thus evidence must be suppressed, *State v. Hinton,* 179 Wn.2d 862 (2014),*cf.: State v. Bowman,* 198 Wn.2d 609 (2021), *see also: State v. Faford,* 128 Wn.2d 476 (1996), *cf.: State v. Townsend,* 147 Wn.2d 666 (2002), *State v. Wojtyna,* 70 Wn.App. 689 (1993), *but see: State v. Roden,* 179 Wn.2d 893 (2014); 5-4.

***State v. MacDicken****,* 179 Wn.2d 936 (2014)

Defendant is arrested for robbery with gun, cuffed, standing outside patrol car, laptop and duffel bag car length away from defendant, police search, find evidence of robbery; held: officer safety was a substantial concern based upon nature of crime, public area, several people associated with defendant nearby, bags "still within reaching distance," justify search incident to arrest, *State v. Byrd,* 178 Wn.2d 611 (2013), *cf.: State v. Brock,* 182 Wn.App. 680 (2014), *State v. Alexander,* 10 Wn.App.2d 682 (2019); affirms *State v. MacDicken,* 171 Wn.App. 169 (2012); 7-2.

***State v. Brock****,* 182 Wn.App. 680 (2014)

Officer detains suspect for park trespass, puts suspect's backpack in patrol car, suspect gives name which doesn't show up in database, officer searches backpack for identification, finds drugs; held: pack searched ten minutes after seizing it, pack neither on defendant's person nor within area of control at time of arrest, search of backpack was not a valid search incident to arrest, *State v. Alexander,* 10 Wn.App.2d 682 (2019), distinguishing *State v. Byrd,* 178 Wn.2d 611 (2013), *State v. MacDicken,* 179 Wn.2d 936 (2014); 2-1, I.

***State v. VanNess****,* 186 Wn.App. 148 (2015)

Police lawfully arrest defendant wearing a backpack, search backpack incident to arrest, find locked container, pry open container, observe drugs, obtain warrant; held: neither inventory nor search incident to arrest authorize search of a locked box absent a warrant, *cf.: State v. Dunham,* 194 Wn.App. 744 (2016), *State v . Peck,* 194 Wn.2d 148 (2019), warrant issued here was based upon unlawful search, *State v. Dugas,* 109 Wn.App. 592 (2001), *State v. Houser,* 95 Wn.2d 143, 155-56 (1980); II.

***State v. Wisdom****,* 187 Wn.App. 652 (2015)

Defendant is arrested in a stolen vehicle, search incident to arrest discloses drugs on his person, officer asks if there are drugs in the vehicle, defendant replies there are drugs on front seat, officer sees closed black bag, through mesh side sees currency, opens bag, finds drugs; held: when a search of a closed bag seized incident to arrest can be delayed without endangering

officer or destruction of evidence then a warrant must be obtained, *State v. Snapp,* 174 Wn.2d 177, 189 (2012); III.

***State v. Flores***, 188 Wn.App. 305 (2015)

Police receive anonymous report that a named person assaulted another with a gun, officer observes the suspect walking with defendant, order both down on their knees, both comply, after suspect is cuffed police order defendant to walk backwards towards them, defendant complies and states he has a gun, police seize gun, defendant is charged with felon in possession; held: police had reason to seize defendant to secure scene and assure defendant did not interfere with arrest of the suspect, but once suspect was safely in custody officer's rationale for seizing defendant evaporated, could no longer be detained and searched due to lack of reasonable suspicion that defendant had committed or was about to commit a crime, *State v. O'Day,* 91 Wn.App. 244 (1998), *State v. Parker,* 139 Wn.2d 486, 497 (1999), *State v. Mendez,* 137 Wn.2d 208 (1999), *abrogated, on other grounds, Brendlin v. California,* 551 U.S. 249, 168 L.Ed.2d 132 (2007), distinguishing *State v. Horrace,* 144 Wn.2d 386 (2001); III.

***State v. Dunham***, 194 Wn.App. 744 (2016)

Loss prevention officers arrest defendant, discover knives in backpack, police arrive and arrest for theft, search defendant and find knives on his person, search backpack at jail for inventory, policies require holding knives in secure containers, feel what appears to be a knife in locked pocket, open lock, find pipe and drugs; held: while an inventory search of a locked container, absent a safety issue, is invalid, *State v. VanNess,* 186 Wn.App. 148 (2015), *State v. Dugas,* 109 Wn.App. 592 (2001), the fact that several knives were found on defendant and in his backpack, one of which was unsheathed, and belief that item in locked pocket was a knife based upon feel, plus inventory policy of keeping knives separate justifies opening locked pocket; II.

***State v. Cruz***, 195 Wn.App. 120 (2016), *review dismissed,, on other grounds,* 189 Wn.2d 588 (2017)

Officer arrests and cuffs defendant at defendant's truck for fishing misdemeanor, places him in patrol car intending to cite and release, inquires if there are weapons in the truck, defendant says guns, officer enters truck, removes guns, discovers defendant has a felony record, charged with unlawful possession a firearm; held: *Terry* frisk extends to a car if there is a reasonable suspicion that suspect is dangerous and may gain access to a weapon in the vehicle, *State v. Glossbrener,* 146 Wn.2d 670, 680-81 (2002), both components must be present, here there was no indication of dangerousness thus seizure of guns was improper, distinguishing *State v. Kennedy,* 107 Wn.2d 1 (1986), no exigent circumstance justifying search without a warrant existed as there was no true emergency, *State v. Hinshaw,* 149 Wn.App. 747, 753 (2009), even though only one officer was present; III.

***State v. Chambers***, 197 Wn.App.. 96, 122-28 (2016)

Police arrest defendant for homicide on porch of home, door remains open, woman inside, officers do a "cursory sweep" for other suspects, observe gun, obtain warrant, seize gun; held: arrest outside the home does not authorize a warrantless entry unless police have an articulable suspicion that an individual poses a danger to those at the arrest scene, *distinguishing*

*Maryland v. Buie*, 494 U.S. 325, 110 S.Ct. 1093, 108 L.Ed.2d 276 (1990), *State v. Hopkins*, 113 Wn.App. 954, 959 n.3, 55 P.3d 691 (2002), harmless here; I.

***State v. Nelson***, 7 Wn.App.2d 588 (2019)

Breath sample can be obtained as a search incident to arrest under state constitution, *State v. Baird*, 187 Wn.2d 210 (2016); 2-1, III.

***Vancouver v. Kaufman***, 10 Wn.App.2d 747 (2019)

Defendant is arrested on a warrant and not for DUI, at station officer asks defendant to take PBT (preliminary breath test), defendant refuses, trial court admits refusal as evidence of guilt; held: where an arrest is based on an offense unrelated to DUI a search of the arrestee's breath for alcohol does not fall within the search incident to arrest rule, arrestee thus has a constitutional right to refuse the PBT which is inadmissible in court, distinguishing *State v. Baird*, 187 Wn.2d 210 (2016), *State v. Mecham*, 186 Wn.2d 128 (2016), *Birchfield v. North Dakota*, —— U.S. ——, 136 S. Ct. 2160, 2185, 195 L. Ed. 2d 560 (2016), *State v. Cohen*, 125 Wn.2d 220 (2005); Division II disagrees with *State v. Sosa*, 198 Wn.App. 176, 185 (2017); *dicta:* a search that precedes an arrest cannot be justified as a search incident to arrest exception to the warrant requirement, thus it is questionable whether PBT refusal is admissible, *id.*, n. 8.

***State v. Richards***, 11 Wn.App.2d 84 (2019)

Police lawfully arrest defendant, search purse, open closed zippered pouch in purse, find drugs; held: while police may not, incident to arrest, open a locked container, *State v. VanNess*, 186 Wn.App. 148, 156-62 (2015), *Riley v. California*, 573 U.S. 373, 134 S. Ct. 2473, 189 L. Ed. 2d 430 (2014), a closed but unlocked pouch may be searched incident to arrest; II.

***State v. Alexander***, 10 Wn.App.2d 682 (2019)

Defendant is arrested on a warrant, behind her is a backpack which she says is hers, police search backpack, find drugs; held: unlike a search of an arrestee's person including personal effects immediately associated with the arrestee such as purses, a search of the area within an arrestee's immediate control, a "grab bag search," requires justification based upon officer safety or evidence preservation, *State v. Brock*, 184 Wn.2d 148, 154 (2015); whether an item is part of an arrestee's person is determined by applying the time of arrest rule: did the person have actual and exclusive possession at or immediately preceding the time of arrest, *State v. Byrd*, 178 Wn.2d 611 (2013), *State v. MacDicken*, 179 Wn.2d 936 (2014), *cf.: State v. Smith*, 119 Wn.2d 675 (1992); here, there is no evidence that defendant had actual and exclusive possession, not merely constructive possession, thus search was unlawful; I.

# SEARCH
## Informers

***State v. Sainz***, 23 Wn.App. 532 (1979)

Where an informant testifies under oath before a magistrate, this alone provides indicia of reliability; III.

***State v. Higbey***, 26 Wn.App. 457 (1980)

Unnamed informant saw marijuana in residence, affidavit states informant is reliable; held insufficient; distinguished from *State v. Northness*, 20 Wn.App. 551 (1978); II.

***State v. Larson***, 29 Wn.App. 669 (1981)

Affidavit fails to establish reliability of informant, states no dates when "recent purchases" of drugs were made, alleges that a named person was arrested with marijuana in his possession after leaving defendant's residence without indicating that he did not have marijuana on his person when he entered, all fatally defective.

***State v. Duhaime***, 29 Wn.App. 842 (1981)

Personal relationship between police and disclosed informant may establish "veracity" test; "basis of knowledge" prong may be established by hearsay if there is a "substantial basis for crediting the hearsay"; here, father of suspect provided information to informant which father received from suspect, thus establishing a "substantial basis;" I.

***State v. Jordan***, 30 Wn.App. 335 (1981)

*Aguilar-Spinelli* test can apply to a warrantless arrest and search; police investigation can supply corroboration to informant's tip.

***State v. Lair***, 95 Wn.2d 706 (1981)

Statement against penal interest by informant is a factor to be considered in establishing veracity prong of *Aguilar-Spinelli* test; conclusory statements of a reliable informant may be considered to bolster veracity of another informant; fact that informant is named in affidavit is a factor which may bolster veracity of informant, *State v. Lopez*, 70 Wn.App. 259 (1993); failure to challenge veracity of affidavit pretrial waives issue.

***State v. Maffeo***, 31 Wn.App. 198 (1982)

Undercover officer meets with intermediary A who advised officer that B will get cocaine from defendant's home; B is followed to defendant's home and then back to A; B tells A that he got drugs from defendant; A delivers drugs to police, who obtain warrant and find drugs at defendant's home; held: information obtained from A and B meet *Aguilar-Spinelli* test; II.

***State v. Hett***, 31 Wn.App. 849 (1982)

Where affiant is named, appears before magistrate, makes statements against penal interest, and provides details, veracity prong of *Aguilar-Spinelli* test is met, *State v. Estorga*,

60 Wn.App. 298 (1991); fact that informant actually appeared before magistrate means veracity need not be established, as *Aguilar-Spinelli* does not apply; III.

***State v. Huff***, 33 Wn.App. 304 (1982)

Affidavit states "informant . . . observed . . . marijuana" held sufficient for basis of knowledge prong of *Aguilar-Spinelli*; III.

***State v. Helfrich***, 33 Wn.App. 338 (1982)

Three "reliability" purchases plus self-verifying information about the instant offense satisfies *Aguilar-Spinelli* test; mere allegation by defense that disclosure of informant's identity is necessary to establish entrapment is insufficient to trigger an *in camera* hearing; I.

***State v. Fisher***, 96 Wn.2d 962 (1982)

Where affidavit states that the informant had given affiant information proven to be true and correct in the past, this is a factual statement, not a conclusion of the affiant, and thus the veracity prong of *Aguilar* is met, *reversing* *State v. Fisher*, 28 Wn.App. 890 (1981); *accord*: *State v. Smith*, 110 Wn.2d 658 (1988), *State v. Colin*, 61 Wn.App. 111 (1991), *State v. Selander*, 65 Wn.App. 134 (1992); 6-3.

***State v. Mannhalt***, 33 Wn.App. 696 (1983)

Informant personally appears before magistrate and testifies under oath making statements against penal interest; police verify a portion of informant's testimony; magistrate finds testimony credible, meeting *Aguilar-Spinelli* credibility prong; where informant lies to magistrate, but police are unaware of this, court will not suppress, as good faith reliance by government officials on knowing and materially false statements of a nongovernmental affiant does not call for use of the exclusionary rule, *United States v. Damitz*, 495 F.2d 50, 55 (9th Cir., 1974); *State v. Vegas*, 20 Wn.App. 535 (1978).

***State v. Riley***, 34 Wn.App. 529 (1983)

Named informant states he knows defendant has stolen computer but does not know its location; another named informant states he knows defendant has Apple computer; police state in affidavit that an Apple computer was stolen from a school; held: *Aguilar-Spinelli* tests are met; III.

***State v. Myers***, 35 Wn.App. 543 (1983)

Affidavit states that informant has made five reliable buys and provided information leading to one search warrant, and that informant was in suspect's home, knew suspect, observed what he believed to be heroin, that he is familiar with heroin through use; held: meets both *Aguilar-Spinelli* tests; I.

***State v. Davis***, 35 Wn.App. 724 (1983)

Police receive information from informant that suspect would arrive on flight from L.A. to Seattle on a date certain to deliver drugs to a man whom police confirm was involved in drugs; suspect arrives without luggage, has traffic warrant; held: (1) traffic warrant is enough to search incident to arrest (2) even without warrant, totality of circumstances is enough to search on

probable cause since informant's tip is corroborated, suspect had no luggage and came from a primary drug source city, *Illinois v. Gates*, 76 L.Ed.2d 527 (1983); absence of search warrant, as existed in *Gates*, does not affect validity of search as totality of circumstances test applies with or without warrant; I.

***State v. Bowers***, 36 Wn.App. 119 (1983)

Informant tells police defendant was on street with Ritalin; police observe defendant standing on corner contacting two drivers, arrest him, find drugs; held: information was conclusory only, with no factual basis; defendant's approaching two vehicles without police observations of an exchange fails to establish probable cause, thus evidence suppressed; II.

***State v. Woodall***, 100 Wn.2d 74 (1983)

A "reliable informant who has proven to be reliable in the past" is a mere conclusion which fails to meet veracity requirement of *Aguilar-Spinelli* or *Illinois v. Gates* test; reverses *State v. Woodall*, 32 Wn.App. 407 (1982); *cf.*: *State v. Colin*, 61 Wn.App. 111 (1991); *see: State v. Salinas*, 119 Wn.2d 192 (1992), *State v. Selander*, 65 Wn.App. 134 (1992); 9-0.

***Illinois v. Gates***, 76 L.Ed.2d 527 (1983)

Police receive anonymous letter detailing drug transaction to occur; police verify and substantiate some of the information and obtain a warrant based upon the anonymous letter and the corroboration; held: two-pronged *Aguilar-Spinelli* test is abandoned, replaced with totality of circumstances test; veracity and basis of informant's knowledge are relevant, but a deficiency in one may be compensated for by a strong showing as to the other; magistrate must determine whether there is a fair probability that evidence will be found in a particular place; 5-4.

***State v. Patterson***, 37 Wn.App. 275 (1984)

Unnamed juvenile testifies before magistrate that he burglarized defendant's home, stole psilocybin mushrooms two days earlier; warrant issued, drugs seized; held: fact that informant is unnamed does not necessarily make his information unreliable, *distinguishing State v. Hett*, 31 Wn.App. 849, 851 (1982); I.

***State v. Morehouse***, 38 Wn.App. 191 (1984)

Affidavit establishes reliability of informant but not of a middleman whose actions are corroborated by the informant; held: under totality of circumstance test, *Illinois v. Gates*, 76 L.Ed.2d 527 (1983), informant and police corroboration of middleman's actions is sufficient to uphold warrant; I.

***State v. Steenerson***, 38 Wn.App. 722 (1984)

Affidavit states informant is reliable, made a prior controlled buy, is familiar with marijuana, and observed marijuana in suspect's home; held: affidavit failed to sufficiently establish reliability under *Illinois v. Gates*, 76 L.Ed.2d 527 (1983); II.

***State v. O'Connor***, 39 Wn.App. 113 (1984)

Veracity prong of *Aguilar-Spinelli* test may be met without corroboration where informant is named, arrested, advised of rights, made statements against interest and provided

details, *see*: *State v. Hall*, 53 Wn.App. 296 (1989), *State v. Gross*, 57 Wn.App. 549, 553 (1990), *overruled, on other grounds, State v. Thein*, 138 Wn.2d 133 (1999), *State v. Estorga*, 60 Wn.App. 298 (1991), *but see: State v. Morrell*, 16 Wn.App.2d 695 (2021); I.

***State v. Casto***, 39 Wn.App. 229 (1984)

Properly executed controlled buy (search before and after, marked money) will establish both *Aguilar-Spinelli* prongs; *accord*: *State v. Lane*, 56 Wn.App. 286 (1989); II.

***State v. Jackson***, 102 Wn.2d 432 (1984)

Washington rejects *Illinois v. Gates*, 76 L.Ed.2d 527 (1983), returning to *Aguilar-Spinelli*; here there was insufficient evidence in affidavit to establish basis of knowledge prong but independent police investigation corroborated the tip sufficiently to support missing element, *Ker v. California*, 10 L.Ed.2d 726 (1963), *see: State v. McCord*, 125 Wn.App. 888 (2005); *accord*: *State v. Smith*, 102 Wn.2d 449 (1984); *but see: State v. Randall*, 73 Wn.App. 225, 228-9 (1994), *State v. Lee*, 147 Wn.App. 912 (2008), *State v. Marcum*, 149 Wn.App. 894, 904 (2009); 7-2.

***Massachusetts v. Upton***, 80 L.Ed.2d 721 (1984)

Search warrant issued based upon telephone tip from purported acquaintance of suspect who did not identify herself but whose voice police officer recognized; held: under totality of circumstances test, there was sufficient information provided the magistrate to support a determination that there was a "fair probability" that evidence would be found; 7-2.

***State v. McPherson***, 40 Wn.App. 298 (1985)

Anonymous tip that defendant was growing marijuana in his home plus police observation of condensation on windows, potting soil, black plastic over windows plus two to threefold increase in power consumption is insufficient to establish probable cause, as observations were consistent with lawful behavior, informant was neither reliable nor credible, *State v. Ferguson*, 131 Wn.App. 694, 704-06 (2006), *see: Florida v. J.L.*, 146 L.Ed.2d 254 (2000), *State v. Saggers*, 182 Wn.App. 832 (2014), *cf.: Navarette v. California*, 572 U.S. 393, 188 L.Ed.2d 680 (2014); I.

***State v. Franklin***, 41 Wn.App. 409 (1985)

Unnamed citizen tells officer that a man in a bus station restroom stall has a gun, describes suspect; officer enters restroom, sees man who meets description, holds him at gun point, is told by suspect that suspect has a blank gun in his rucksack, handcuffs suspect, searches rucksack, finds starter pistol and handcuffs in rucksack; officer recalls a police bulletin concerning a crime committed with handcuffs, arrests defendant who, following further investigation, is charged and convicted of a robbery; held: investigatory stop was proper where an anonymous informant of undetermined reliability states he observed suspect carrying or displaying a gun in a public place, *Navarette v. California*, 572 U.S. 393, 188 L.Ed.2d 680 (2014), *but see: Florida v. J.L.*, 146 L.Ed.2d 254 (2000), *cf.: State v. Boyer*, 124 Wn.App. 593, 605-07 (2004), *State v. Saggers*, 182 Wn.App. 832 (2014); where officer is told by suspect he has a gun in a container, officer may search container since releasing it to suspect would put officer in danger, *United States v. McClinnhan*, 660 F.2d 500 (D.C. Cir. 1981); arrest was

unlawful as officer at best only suspected suspect of committing a crime, and recollection of police bulletin was too vague to support probable cause; I.

***State v. Paradiso***, 43 Wn.App. 1 (1986)

Affidavit in support of warrant states that informant has "provided verifiable [*sic*] information and assistance in drug purchases" and has seen marijuana in the house in question; held: veracity prong is met, as statement is more than a mere conclusion, *State v. Fisher*, 96 Wn.2d 962, 965 (1982); *but see*: *State v. Woodall*, 100 Wn.2d 74 (1983); 2-1, III.

***State v. Stock***, 44 Wn.App. 467 (1986)

Reliability prong of *Aguilar-Spinelli* test is met where disclosed citizen informant provides detailed description of the underlying circumstances of the crime observed, *State v. Riley*, 34 Wn.App. 529 (1983), *State v. Northness*, 20 Wn.App. 551 (1978), *State v. Howerton*, 187 Wn.App. 357 (2015); I.

***State v. Gunwall***, 106 Wn.2d 54 (1986)

Undercover police buy drugs from seller four times, each time seller tells police she obtained drugs from "Laurie" at defendant's address; police obtain warrant based on this information; held: seller's veracity is established by her statements against penal interest with no motive to lie plus police having watched seller go to and from defendant's residence with officer's money and return with drugs, *State v. Maffeo*, 31 Wn.App. 198 (1982); 9-0.

***State v. Huft***, 106 Wn.2d 206 (1986)

Affidavit states that confidential informant told police defendant was growing marijuana, no basis of knowledge or reliability established, citizen informant reports defendant growing marijuana, not identified, police independently verify defendant lived at address, observed bright light in basement, determine that power consumption had increased 46%; held: although informant's tip does not establish either *Aguilar-Spinelli* test, *State v. Ibarra*, 61 Wn.App. 695 (1991), independent police investigation which points to suspicious activities along lines suggested by informant may establish probable cause, *State v. Jackson*, 102 Wn.2d 432 (1984), *State v. Merkt*, 124 Wn.App. 607 (2004); here, police investigation only corroborated innocuous facts, *State v. McCord*, 125 Wn.App. 888 (2005); increased power consumption plus bright light is insufficient, *State v. McPherson*, 40 Wn.App. 298 (1985), *State v. Crawley*, 61 Wn.App. 29 (1991); unnamed citizen informant's information which does not provide a basis for knowledge is insufficient, *see*: *State v. White*, 44 Wn.App. 215 (1986), *State v. Duncan*, 81 Wn.App. 70 (1996), *State v. Morrell*, 16 Wn.App.2d 695 (2021); 9-0.

***State v. Kennedy***, 107 Wn.2d 1 (1986)

Following warrantless stop of vehicle and seizure of drugs, officer testifies at suppression hearing that he had received tips from an informer for several months, that the informant is reliable, that one tip resulted in a warrant and conviction, establishing reliability prong; in addition officer testified informer told him that defendant purchased drugs from a certain house, that defendant usually drove a specific car, that defendant only went to that house to purchase drugs, that officer had received complaints of frequent foot traffic at the house, officer saw defendant leave the house and drive off in the car described by the informant; held: corroboration

established a well-founded suspicion to stop defendant, *see:* *State v. Lee*, 147 Wn.App. 912 (2008), *State v. Marcum*, 149 Wn.App. 894, 904 (2009), *cf.: State v. Z.U.E.*, 178 Wn.App. 769 (2014), 183 Wn.2d 610 (2015); 5-4.

***State v. Berlin***, 46 Wn.App. 587 (1987)

Affidavit states that three citizens reported a marijuana grow operation, that citizens wished to remain anonymous for fear of retaliation, that they gave names and identifying information to affiant-officer, have no records, were interviewed by the affiant and appeared honest; held: although identity was not revealed to the magistrate, *State v. Stock*, 44 Wn.App. 467 (1986), identity was revealed to officer, unlike *State v. Chatmon*, 9 Wn.App. 741 (1973), and there was a legitimate reason for anonymity, thus reliability prong was met, *cf.*: *State v. Franklin*, 49 Wn.App. 106 (1987), *State v. Mickle*, 53 Wn.App. 39 (1988), *State v. Payne*, 54 Wn.App. 240 (1989), *State v. Dice*, 55 Wn.App. 489 (1989), *State v. Dobyns*, 55 Wn.App. 609 (1989), *State v. Ibarra*, 61 Wn.App. 695 (1991), *State v. Bauer*, 98 Wn.App. 870 (2000), *State v. Ferguson*, 131 Wn.App. 694, 704-06 (2006), *see: State v. Boyer*, 124 Wn.App. 593, 605-07 (2004); I.

***State v. Thetford***, 109 Wn.2d 3092 (1987)

When an informant's involvement with and control by the police is so great that he is a *de facto* police officer, then he is no longer protected by the informer's privilege, RCW 5.60.060(5), CrR 4.7(f)(2); merely paying the informant does not remove the informant from the informant's privilege; where the defense has correctly identified the informant, then the informant is no longer protected by the informant's privilege, *Rovario v. United States*, 1 L.Ed.2d 639, 644-645 (1957); where a *de facto* police officer-informant makes reckless or false statements to police officer-affiant, then those statements shall be excised from the affidavit in support of warrant; 9-0.

***State v. Freeman***, 47 Wn.App. 870 (1987)

Affidavit which states that informant introduced police to a subject "where that individual was subsequently arrested and charged with delivery of [drugs] and also a quantity of [drugs] were seized" satisfied reliability prong; 2-1, I.

***State v. Franklin***, 49 Wn.App. 106 (1987)

Affidavit states that police received information from a confidential citizen informer who asked to remain anonymous, and who was "an upstanding citizen with no criminal record" held not to meet reliability prong, as credibility of informer was based entirely upon officer's conclusion without corroboration, *distinguishing* *State v. Berlin*, 49 Wn.App. 106 (1987), *accord*: *State v. Mickle*, 53 Wn.App. 39 (1988), *State v. Ferguson*, 131 Wn.App. 694, 704-06 (2006), *but see*: *State v. Payne*, 54 Wn.App. 240 (1989), *State v. Dobyns*, 55 Wn.App. 609 (1989), *cf.: State v. Cole*, 128 Wn.2d 262, 285-9 (1995), *State v. Bauer*, 98 Wn.App. 870 (2000); 2-1, III.

***State v. Smith***, 110 Wn.2d 658 (1988)

Where informant suggests to police that he could go onto suspect's property and police tell informant that he could not do so without a legitimate reason and could not trespass, then informant is not an agent of the state, even if informant is not an innocent volunteer; 6-3.

***State v. Murray***, 110 Wn.2d 706 (1988)

Affidavit states tipster told reliable informant that tipster saw marijuana growing in basement of a house, and police obtained power records establishing double average power consumption, police heard exhaust fan operating in basement at 11 p.m. with no steam escaping thus inconsistent with showering, and use of infrared viewing device established high heat in basement area consistent with grow lights; held: tipster meets basis of knowledge prong as he saw marijuana, *see*: *State v. Wilke*, 55 Wn.App. 470 (1989), *State v. Creelman*, 75 Wn.App. 490 (1994); police corroboration establishes basis of knowledge prong, *State v. Cowin*, 116 Wn.App. 752, 758-60 (2003); failure of defense counsel to cite authority in support of argument that obtaining power records without warrant and failure to elicit evidence that police trespassed when using infrared viewing device precludes review on those issues; 9-0.

***State v. Carver***, 51 Wn.App. 347 (1988)

Eight- and ten-year-old children tell police that a six-year-old neighbor gave them marijuana which she got from her parents, marijuana tests positive; held: six-year-old's possession of the marijuana, statement she got it from her parents plus her lack of access to drug sources establishes basis of knowledge prong; eight- and ten-year-olds' mutual corroboration, specific detail, and fact that they immediately gave it to their mother plus six-year-old's very young age support reliability prong as identified citizen informants, *State v. Northness*, 20 Wn.App. 551 (1978); court asserts that this option does not accord blanket approval to double hearsay; III.

***State v. Ortiz***, 52 Wn.App. 523 (1988)

Where informant is a victim or eyewitness, reliability requirement is relaxed, *State v. Chatmon*, 9 Wn.App. 741, 748 n.4 (1973), veracity analysis is of diminished importance, *State v. Berlin*, 46 Wn.App. 587 (1987), corroboration is not always essential, *State v. Sheldon*, 38 Wn.App. 195 (1984), *State v. Wakeley*, 29 Wn.App. 238 (1981), *State v. Wilke*, 55 Wn.App. 470 (1989), *State v. Randall*, 73 Wn.App. 225 (1994); I.

***State v. Mickle***, 53 Wn.App. 39 (1988)

Affidavit states that citizen informant, known to police but not disclosed to magistrate, is a long-time resident and business owner of county, has no record, is familiar with marijuana having seen it before, had been to suspect's home, observed marijuana growing, police verified that electric power is on; held: facts used to establish informant's credibility were not related to the issue of credibility, affidavit fails to establish reason for informant's desire for anonymity or why informant was at suspect's home, nor is there a "wealth of collateral detail" corroboration, thus suppressed, *State v. Franklin*, 49 Wn.App. 106 (1987), *State v. Chatmon*, 9 Wn.App. 741 (1973), *State v. Huft*, 106 Wn.2d 206 (1986), *State v. Ferguson*, 131 Wn.App. 694, 704-06 (2006), *cf.: State v. Bauer*, 98 Wn.App. 870 (2000); III.

***State v. Mejia***, 111 Wn.2d 892 (1989)

Affidavit states police search reliable informant, establish he is drug-free, observe informant speak to unknown middleman, follow middleman to defendant's residence, observe middleman enter residence, then observe middleman meet with informant who gets drugs from

middleman and turns them over to police; held: *Aguilar-Spinelli* does not apply to middleman's nonassertive conduct, magistrate could reasonably infer that middleman acquired drugs from defendant's house from middleman's conduct alone, overruling *State v. Smith*, 28 Wn.App. 387 (1981) and *State v. Morehouse*, 41 Wn.App. 334 (1985); *accord*, *State v. Gonzales*, 51 Wn.App. 242 (1988); 9-0.

***State v. Hall***, 53 Wn.App. 296 (1989)

Police arrest a drug suspect who then gives police name of supplier; police go to supplier-defendant's residence, observe a bong through window, obtain warrant; held: where informant has been arrested and provides details against his own interest, and police corroborate information by observing bong, then informer is reliable, *State v. Bean*, 89 Wn.2d 467 (1978), *see: State v. Chamberlin*, 161 Wn.2d 30, 41-42 (2007); III.

***State v. Rodriguez***, 53 Wn.App. 571 (1989)

Affidavit states that a mechanic, while working on a vehicle, found drugs, called police who obtained warrant; drugs placed back in car, car turned over to suspect who drives it away, police stop vehicle, arrest defendant, search and find drugs; held: while citizen-informant was unnamed in affidavit, he obtained his information in entirely unsuspicious circumstances and description in warrant makes him readily identifiable, thus credibility prong met, *State v. McReynolds*, 104 Wn.App. 560, 572-73 (2000), *cf.*: *State v. Ibarra*, 61 Wn.App. 695 (1991); defendant's driving car provided probable cause to arrest; *see: State v. Mance*, 82 Wn.App. 539, 542-3 (1996); III.

***State v. Moore***, 54 Wn.App. 211 (1989)

Disclosed citizen informant tells magistrate that, to clear his conscience, he is informing on suspect who had employed him to tend a marijuana farm, warrant is issued, drugs found, defendant files affidavit stating that informant admitted that he was forced to lie by police pressure, informant denies saying this, defendant's demand for evidentiary hearing to show informant was a dissembling government agent, *Franks v. Delaware*, 57 L.Ed.2d 667 (1978), *State v. Thetford*, 109 Wn.2d 392 (1987), denied; held: uncorroborated claim by defense that informant was a liar is insufficient to overcome the presumption favoring the warrant, *cf.: State v. Atchley*, 142 Wn.App. 147, 157-60 (2007); I.

***State v. Payne***, 54 Wn.App. 240 (1989)

Informant is apparently known to police, has no record, had been at scene of marijuana grow operation, appeared voluntarily, police corroborate with a six-month-old tip from another police agency; trial court suppresses, holding affidavit is conclusory, insufficient evidence of credibility; held: identity was known to police, *distinguishing State v. Franklin*, 49 Wn.App. 106 (1987), desire for anonymity was self-protection, *distinguishing State v. Mickle*, 53 Wn.App. 39 (1988), additional corroboration establishes probable cause, *State v. Bauer*, 98 Wn.App. 870 (2000); III, 2-1.

***State v. Dobyns***, 55 Wn.App. 609 (1989)

Where affidavit states that citizen informant who wishes to remain anonymous has no record, did not give information in return for leniency, asked for no money and was motivated by

an interest in justice, veracity prong is met, *State v. Berlin*, 46 Wn.App. 587 (1987), *State v. Franklin*, 49 Wn.App. 106 (1987) (Green, J., dissenting), *State v. Bauer*, 98 Wn.App. 870 (2000); affidavit need not state why informant wishes to remain anonymous unless informant withheld identity from police, *State v. Chatmon*, 9 Wn.App. 741 (1973), *cf.: State v. Boyer*, 124 Wn.App. 593, 604-07 (2004), *State v. Ferguson*, 131 Wn.App. 694, 704-06 (2006); I.

***State v. Stone***, 56 Wn.App. 153 (1989)

Warrant to obtain unlisted telephone number is based in part upon license plate number obtained by an unidentified person; held: where a citizen provides nonaccusatory information which does not describe criminal activity, and the nature of the information strongly suggests it was obtained by personal observation, then credibility and reliability need not be demonstrated, *United States v. Melvin*, 596 F.2d 492 (1st Cir. 1979), *State v. Nordlund*, 113 Wn.App. 171, 181 (2002); III.

***State v. Lane***, 56 Wn.App. 286 (1989)

Controlled buy is sufficient to establish probable cause without establishing reliability of informant where informant is strip searched prior to entry, upon return informant has drugs but not the money given by police, police surveil place during buy, and had previously observed known drug dealers and users go in on several occasions, *State v. Casto*, 39 Wn.App. 229 (1984); III.

***State v. Conner***, 58 Wn.App. 90 (1990)

Crime victim pointing out suspect is inherently reliable for purposes of *Aguilar-Spinelli* analysis, *State v. Northness*, 20 Wn.App. 551 (1978), *State v. Chatmon*, 9 Wn.App. 741, 748 n.4 (1973), *State v. Howerton*, 187 Wn.App. 357 (2015); victim need not first explain how he knows he was victimized or why he believes suspect is the perpetrator; once police have sufficient evidence that a crime has been committed, along with an identification of the suspect by the victim, there is probable cause for an arrest; I.

***State v. Medcalf***, 58 Wn.App. 817 (1990)

Where numerous explicit details about crime are set forth in affidavit, such that there is a strong suggestion that informant is crime victim, then reliability is established and no independent corroboration is required, *State v. Northness*, 20 Wn.App. 551 (1978); I.

***State v. Rice***, 59 Wn.App. 23 (1990)

Radio broadcast of shots fired at a specific location is deemed reliable as information from a citizen informant justifying detention, *State v. Conner*, 58 Wn.App. 90 (1990), *State v. Kennedy*, 107 Wn.2d 1, 8 (1986), *State v. Howerton*, 187 Wn.App. 357 (2015), *see: State v. Z.U.E.*, 178 Wn.App. 769 (2014), 183 Wn.2d 610 (2015); I.*:*

***Alabama v. White***, 110 L.Ed.2d 301 (1990)

Police receive anonymous telephone tip that suspect would leave a particular apartment at a particular time in a certain vehicle, would go to a specific place and would possess drugs; police follow suspect, who acts in accordance with tip, detain her, she consents to search, drugs found; held: tip plus police corroboration, *Illinois v. Gates*, 76 L.Ed.2d 527 (1983), establish a

well-founded suspicion to detain, *Adams v. Williams*, 32 L.Ed.2d 612 (1972), *Navarette v. California*, 572 U.S. 393, 188 L.Ed.2d 680 (2014), *but see: Florida v. J.L.*, 146 L.Ed.2d 254 (2000), *State v. Saggers*, 182 Wn.App. 832 (2014); 6-3.

***State v. Estorga***, 60 Wn.App. 298 (1991)

Informer's statement against penal interest to police officer alone is a factor to be considered, *State v. Hett*, 31 Wn.App. 849, 851 (1982), although it may add little or nothing to credibility; greater reliability may be attached to admissions against penal interest in post-arrest situations, particularly where the information is given in exchange for a promise of leniency, *State v. Bean*, 89 Wn.2d 467, 471 (1978), *State v. Lopez*, 70 Wn.App. 259 (1993), *State v. Ollivier*, 161 Wn.App. 397 (2011), 178 Wn.2d 813, 851 (2013), *see: State v. Chamberlin*, 161 Wn.2d 30, 41-42 (2007), *State v. Marcum*, 149 Wn.App. 894, 908 (2009); II.

***State v. Crawley***, 61 Wn.App. 29 (1991)

Anonymous informant calls police, states she saw marijuana at defendant's residence, that defendant told her what it was, that she is a friend of defendant's mother, whom she names and whom officer knows, and that high intensity light is shining from residence; police corroborate high intensity light, obtain warrant, seize drugs; held: observation of marijuana and confirmation by defendant satisfy basis of knowledge element; presence of high intensity light, even when coupled with evidence of increase in electrical consumption, is insufficient, *State v. Huft*, 106 Wn.2d 206 (1986); III.

***State v. Colin***, 61 Wn.App. 111 (1991)

Affidavit states that based upon information provided by informant, one arrest has resulted "in this investigation" and informant has provided information in other narcotics investigations that have been proven accurate by other detectives is sufficient, *State v. Wolken*, 103 Wn.2d 823, 827 (1985), *State v. Fisher*, 96 Wn.2d 962, 965 (1982), *State v. Lopez*, 70 Wn.App. 259 (1993), *distinguishing State v. Woodall*, 100 Wn.2d 76 (1983); III.

***State v. Ibarra***, 61 Wn.App. 695 (1991)

Affidavit: citizen informer, known to police, identity not revealed to magistrate, reports as civic duty that s/he observed cocaine in defendant's home, informer has never used but knows what cocaine looks like; held: credibility prong: state's burden of demonstrating unidentified citizen informer's credibility is heightened, *State v. Rodriguez*, 53 Wn.App. 571, 575-6 (1989) due to danger that informer is an anonymous troublemaker; here, nothing establishes credibility or explanation why informer was at crime scene; basis of knowledge: affidavit fails to establish how informer gained knowledge, nor a description, nor how informer came by information, thus insufficient, *State v. Boyer*, 124 Wn.App. 593, 605-07 (2004), *State v. Ferguson*, 131 Wn.App. 694, 704-06 (2006), *but see: State v. Bauer*, 98 Wn.App. 870 (2000), *cf.: State v. Cole*, 128 Wn.2d 262, 285-9 (1995), *State v. Atchley*, 142 Wn.App. 147, 160-64 (2007); II.

***State v. Garcia***, 63 Wn.App. 868 (1992)

Motel manager observes bindles in room, smells diesel fuel, provides that information to officer who states in affidavit that bindles and diesel fuel are used in cocaine; held: basis of

knowledge prong is met where informant provides facts to officer-affiant who links information to criminal activity, *State v. Berlin*, 46 Wn.App. 587, 592 (1987); III.

***State v. Salinas***, 119 Wn.2d 192 (1992)

Recency of informant's assistance in drug investigations resulting in arrests, seizure of drugs, charges filed is more than mere conclusion, *distinguishing* *State v. Woodall*, 100 Wn.2d 74, 76 (1983), sufficient to establish veracity and reliability prong; 9-0.

***State v. Selander***, 65 Wn.App. 134 (1992)

Reliability is established where informant provided information that resulted in one conviction, *see:* *State v. Fisher*, 96 Wn.2d 962 (1982); *cf.:* *State v. Woodall*, 100 Wn.2d 74 (1983); II.

***State v. Hart***, 66 Wn.App. 1 (1992)

Police approach vehicle, observe open container, occupants state that a man dressed in black on a motorcycle nearby is selling drugs, respondent appears as described, occupant points out respondent, police stop respondent, patdown, find drugs; held: an informant's tip possesses sufficient indicia of reliability where (1) the informant is reliable and (2) the informant's tip contains enough objective facts to justify pursuit and detention *or* the noninnocuous details of the tip have been corroborated by the police thus suggesting that the information was obtained in a reliable fashion, *State v. Sieler*, 95 Wn.2d 43, 47-8 (1980), *State v. Lesnick*, 10 Wn.App. 281, 285 (1973), *aff'd*, 84 Wn.2d 940 (1975), *State v. Lee*, 147 Wn.App. 912 (2008); while informant here could be deemed reliable as he was unlikely to make his situation worse by giving false information to police and because he was not entirely anonymous (although officer did not have his name at suppression hearing, he testified he did record his name), the tip lacked any objective facts to justify respondent's detention, and police observation of respondent only corroborate innocuous details, *State v. Z.U.E.*, 178 Wn.App. 769 (2014), 183 Wn.2d 610 (2015), *State v. Saggers*, 182 Wn.App. 832 (2014), *State v. Morrell*, 16 Wn.App.2d 695 (2021, thus suppressed; I.

***State v. Bittner***, 66 Wn.App. 541 (1992)

Affidavit states informant was with a friend who stopped at defendant's home, told informant he purchased drugs and showed drugs to informant; held: single unobserved transaction by an unidentified friend of informant uncorroborated by evidence with no effort to establish friend's reliability is insufficient to support search; I.

***State v. Lopez***, 70 Wn.App. 259 (1993)

Where affidavit states that informant "has assisted the...[p]olice...by posing as a seller of controlled substances...to individuals he has had prior dealings with involving" drugs, reliability prong is satisfied, *State v. Wolken*, 103 Wn.2d 823 (1985), *State v. Colin*, 61 Wn.App. 111 (1991); naming informant in affidavit supports reliability prong, *State v. Lair*, 95 Wn.2d 706 (1981), *State v. Estorga*, 60 Wn.App. 298 (1991); lack of report in affidavit to a pending criminal charge against informant is not fatal, as pending charges further support reliability and veracity, *State v. Bean*, 89 Wn.2d 467 (1978), *State v. Estorga*, *supra;* promises of leniency in exchange for information which includes statements against penal interest enhances reliability, *State v.*

*O'Connor*, 39 Wn.App. 113, 121 (1984), *State v. Merkt*, 124 Wn.App. 607 (2004), *State v. Marcum*, 149 Wn.App. 894, 908 (2009), *see: State v. Chamberlin*, 161 Wn.2d 30, 41-42 (2007), *but see: State v. Morrell*, 16 Wn.App.2d 695 (2021); III.

***State v. Randall***, 73 Wn.App. 225 (1994)

Radio broadcasts armed robbery with description of two robbers, ten minutes later officer observes two males fitting description six blocks from robbery, suspects leave area upon observing police, officer finds suspect, stops him, pats down, feels hard object, seizes it, finds pipe and drugs; held: where an investigatory stop is based on information given by another person, the stop is valid if under totality of circumstances officer had reasonable suspicion that defendant was engaged in criminal activity, rejecting *Aguilar-Spinelli* and *State v. Jackson*, 102 Wn.2d 432 (1984) in *Terry* stop situations, *State v. Lee*, 147 Wn.App. 912 (2008), *State v. Marcum*, 149 Wn.App. 894, 904 (2009); since reported offense was a violent, armed crime, requiring an in-depth analysis of reliability of the information by the officer would increase threat to public safety, *State v. Franklin*, 41 Wn.App. 409 (1985), *see: State v. Lesnick*, 84 Wn.2d 940, 944-5 (1975), *cf.: State v. Z.U.E.*, 178 Wn.App. 769 (2014), 183 Wn.2d 610 (2015), *State v. Saggers*, 182 Wn.App. 832 (2014), *State v. Morrell*, 16 Wn.App.2d 695 (2021); here, investigatory stop and frisk was reasonable; *but see: State v. Vandover*, 63 Wn.App. 754 (1992); I.

***State v. Taylor***, 74 Wn.App. 111 (1994)

Where police deliberately or recklessly omit drug informer's criminal status relationship to defendant and other facts that might identify informer, it is not material to a finding of probable cause, at 117-9, *see: State v. Lane*, 56 Wn.App. 286, 294-5 (1989); ulterior motive of informer need not be disclosed to magistrate, since informants frequently have records and self-serving motives; I.

***State v. Garcia***, 125 Wn.2d 239 (1994)

Citizen tells officer that defendant said he had drugs, officer had heard other officers describe citizen as a frequent visitor who often pointed out persons carrying drugs, few months earlier citizen had identified to the officer a person carrying drugs which resulted in arrest, officer asks defendant to talk, defendant consents to talk and to search, police find drugs; held: citizen tip does not require a showing of the same degree of reliability as from a "professional" informant, *State v. Kennedy*, 107 Wn.2d 1, 8 (1986), *State v. Howerton*, 187 Wn.App. 357 (2015), *see: State v. Lee*, 147 Wn.App. 912 (2008), intrusion was minimal, consent to search was freely given, thus there were sufficient indicia of reliability to provide an objective measure of reasonableness; *per curiam.*

***State v. Creelman***, 75 Wn.App. 490 (1994)

Affidavit states that concerned citizen informant whose name is known to police observed marijuana growing in residence and that he is familiar with it; held: deferring to magistrate's determination of probable cause, citizen informant's observation and assertion of familiarity with marijuana is sufficient, *State v. Murray*, 110 Wn.2d 706, 711 (1988), *State v. Smith*, 110 Wn.2d 658, 663 (1988), *State v. Wolken*, 103 Wn.2d 823, 827 (1985), *State v.*

*Vickers*, 148 Wn.2d 91, 111-13 (2002), *but see:* *State v. Matlock*, 27 Wn.App. 152, 155-6 (1980); I.

***State v. Cole***, 128 Wn.2d 262, 285-9 (1995)

Informant known to affiant but not disclosed to magistrate is reliable where affidavit establishes he was a neighbor of house searched for several years, worked in community, had an extended family, no record, volunteered, did not request compensation, *distinguishing* *State v. Ibarra*, 61 Wn.App. 695 (1991), *State v. Franklin*, 49 Wn.App. 106 (1987), *State v. Bauer*, 98 Wn.App. 870 (2000), *see:* *State v. Boyer*, 124 Wn.App. 593, 605-07 (2004); 6-3.

***State v. Duncan***, 81 Wn.App. 70, 76-8 (1996)

Affidavit states suspect's girlfriend, following domestic dispute, observed suspect take marijuana from a storage unit, storage unit records establish suspect rented the unit and had visited unit when girlfriend said he did, suspect had previously grown marijuana; held: girlfriend's veracity was not established, police did not check her identity, address, employment, residence, family history, *State v. Wilke*, 55 Wn.App. 470, 479 (1989), police investigation corroborated only innocuous facts, *State v. Young*, 123 Wn.2d 173, 196 (1994), *State v. Huft*, 106 Wn.2d 206, 211 (1986), *State v. McCord*, 125 Wn.App. 888 (2005), rather than criminal activity, *State v. Jackson*, 102 Wn.2d 432, 438 (1984), prior criminal history is insufficient, *see:* *State v. Sterling*, 43 Wn.App. 846, 851 (1986), *State v. Hobart*, 94 Wn.2d 437, 446 (1980), *State v. Morrell*, 16 Wn.App.2d 695 (2021), thus veracity prong not satisfied; III.

***State v. Jones***, 85 Wn.App. 797 (1997)

Driver of a truck with a company name on it indicates with hand signals to officer that car in front weaved, office observes no infractions but stops car, after tests arrests defendant for DUI; held: name written on side of truck is not qualitatively different from a named but unknown telephone caller, insufficient to establish reliability of citizen informer, *Campbell v. Department of Licensing*, 31 Wn.App. 833, 835 (1982), *State v. Sieler*, 95 Wn.2d 43, 47-9 (1980), *State v. Z.U.E.*, 178 Wn.App. 769 (2014), 183 Wn.2d 610 (2015), *cf.* *State v. Lee*, 147 Wn.App. 912 (2008), distinguishing *State v. Anderson*, 51 Wn.App. 775 (1988), 2-1; III.

***Pers. Restraint of Maxfield***, 133 Wn.2d 332 (1997)

PUD employee volunteers to police that defendant's power usage is high, after further investigation, police obtain warrant, seize drugs; held: there is a privacy interest in public power records (plurality of four justices holds pursuant to state constitution), PUD employee lacked statutory authority to disclose record to police, thus suppressed, *State v. Orick*, 129 Wn.App. 654 (2005), *see:* *State v. Gunwall*, 106 Wn.2d 54, 67-8 (1986); RCW 42.17.314 authorizes police to demand power records only after setting forth in writing a reasonable suspicion, *State v. Maxwell*, 114 Wn.2d 761 (1990); *overrules, on state grounds,* *State v. Maxfield*, 125 Wn.2d 378 (1994), *reverses* *Pers. Restraint of Maxfield*, 81 Wn.App. 705 (1996); 5-4.

***State v. Bauer***, 98 Wn.App. 870 (2000)

Affidavit in support of search warrant states that citizen informant had lived in a house with growing marijuana in the past, had observed a marijuana grow within thirty days at defendant's home, that informant was afraid of retaliation, wanted hotline reward money, was

concerned about drugs, police confirm informant had no record, was a citizen of Washington for nine years, and was a registered voter; held: basis of knowledge satisfied by observation, verification by police established credibility and no motive to falsify, thus *Aguilar-Spinelli* prongs were met, distinguishing *State v. Ibarra*, 61 Wn.App. 695, 700 (1991), *State v. Mickle*, 53 Wn.App. 39 (1988), *State v. Franklin*, 49 Wn.App. 106 (1987); 2-1, II.

***Florida v. J.L.***, 146 L.Ed.2d 254 (2000)

Anonymous call to police reports young black male at a bus stop wearing plaid shirt carrying a gun, police respond to specific bus stop, see black male in plaid shirt, frisk, find gun; held: anonymous tip that a person is carrying a gun, without more, is insufficient to justify a stop and frisk, distinguishing *Alabama v. White*, 110 L.Ed.2d 301 (1990), *State v. Saggers*, 182 Wn.App. 832 (2014), *cf.: State v. Franklin*, 41 Wn.App. 409 (1985), *Navarette v. California*, 572 U.S. 393, 188 L.Ed.2d 680 (2014); 9-0.

***State v. Tarter***, 111 Wn.App. 336 (2002)

Motel owner tells police that tenant paid cash, 20 calls came to room within an hour, high traffic to room, people from room crossed street to truck stop for brief encounters, police obtain warrant, find drugs; held: basis of knowledge established from motel owner's firsthand observations, *State v. Duncan*, 81 Wn.App. 70, 76 (1996), veracity is established as informer is a named citizen, *State v. Ibarra*, 61 Wn.App. 695, 699 (1991), *State v. Northness*, 20 Wn.App. 551, 557-58 (1978), *but see: State v. McCord*, 125 Wn.App. 888, 893 (2005); III.

***State v. Boyer***, 124 Wn.App. 593, 605-07 (2004)

Affidavit states that citizen informant not disclosed to magistrate had seen stolen goods and drugs in an apartment; held: veracity prong is not met, as nothing addresses informant's background, standing in community, reasons for being present at scene of crime, motivation in providing information to police, *State v. Cole*, 128 Wn.2d 262, 287-88 (1995), *State v. Dobyns*, 55 Wn.App. 609, 618 (1989); absent information as to how informant can identify cocaine or basis for belief that the items were stolen, basis of knowledge prong fails; III.

***State v. McCord***, 125 Wn.App. 888 (2005)

Merely naming a person in affidavit is insufficient to determine reliability, *State v. Duncan*, 81 Wn.App. 70, 78 (1996), *cf.: State v. Tarter*, 111 Wn.App. 336 (2002); corroboration of an informant's tip with information discovered through an independent police investigation may cure a deficiency, *State v. Taylor*, 74 Wn.App. 111, 116 (1994), but investigation must verify more than innocuous facts, *State v. Huft*, 106 Wn.2d 206. 210 (1986), corroboration must suggest probative indications of criminal activity along the lines suggested by the informant, *State v. Jackson*, 102 Wn.2d 432, 438 (1984), *State v. Morrell*, 16 Wn.App.2d 695 (2021); III.

***State v. Orick***, 129 Wn.App. 654 (2005)

Police, suspicious of marijuana grow operation, ask Public Utility District to check for possible power diversion, two PUD employees enter property past no trespassing signs and determine diversion, police obtain warrant; held: while Fourth Amendment and art I, § 7 generally do not apply to PUD employees, here employees acted at express request of, and thus

jointly and in concert with, police, who lacked probable cause, thus evidence suppressed, *Pers. Restraint of Maxfield*, 133 Wn.2d 332, 337-38 (1997); III.

***State v. Atchley***, 142 Wn.App. 147, 160-64 (2007)

Where affidavit establishes that citizen informant whose name is not given to magistrate received no compensation, gave name and contact information to affiant, affiant states a background check revealed nothing to suspect the information provided was false and informant said he came forward to rid the community of drugs, credibility is established, *cf.: State v. Ibarra*, 61 Wn.App. 695 (1991); III.

***State v. Nelson***, 152 Wn.App. 755, 772-73 (2009)

Where affidavit states that anonymous citizen informants are neighbors of a dog fighting operation, without criminal records who had visited the property, informants' credibility is established; III.

***State v. Saggers***, 182 Wn.App. 832 (2014)

911 caller at 2:45 a.m. asks for civil standby at defendant's residence to recover property, told to call back at a more reasonable hour, 13 minutes later 911 caller says he witnessed a man threaten woman with a shotgun in front of defendant's residence, gives a name and describes a specific car parked outside residence, says he's at a gas station, police drive by house, no lights, go to gas station, no one present, return to house, use loudspeaker, defendant exits, is handcuffed and placed in patrol car, says no women have been present, says 911 caller had been there earlier, denies waving a shotgun, police sweep house, no women present, officer asks defendant if he has a shotgun, defendant says yes and consents to search, police find shotgun, defendant is charged with felon in possession; held: while a 911 phone call from an unknown caller who gives a contemporaneous eyewitness account of a serious offense presenting an exigent threat to public safety may provide a valid basis for a *Terry* stop, *Navarette v. California*, 572 U.S. 393, 188 L.Ed.2d 680 (2014), here police had good reason to question reliability of the 911 call, suspicion of exigent circumstances dissipated before officer asked if defendant had a gun and would consent, thus admission and consent were not within the scope of a valid *Terry* stop, *State v. Gaddy*, 152 Wn.2d 64, 72-73 (2004), *State v. Wakely*, 29 Wn.App. 288, 241 (1981), *State v. Sieler*, 95 Wn.2d 42, 48 (1980), *State v. Hopkins*, 128 Wn.App. 855, 858-59 (2005), *Florida v. J.L.*, 529 U.S. 266, 270, 146 L.Ed.2d 254 (2000), *State v. Lesnick*, 84 Wn.2d 940 (1975), *cf.: State v. Howerton*, 187 Wn.App. 357 (2015); I.

***State v. Morrell***, 16 Wn.App.2d 695 (2021)

Police serve arrest warrant on a woman, find drugs, unsolicited she states she bought the drugs from defendant who uses the nickname "Duffles," drives a specific car and will have drugs on him and in his hotel room, later officer observe a car meeting informant's description, performs a traffic stop, orders defendant out of car, frisks for weapons, observes drugs in car, obtains search warrant, seizes drugs, a month later police observe defendant driving, stop car, arrest defendant an a warrant, drug dog alerts, search warrant obtained; held: an informant's tip is insufficient for a *Terry* stop absent circumstances establishing informant's reliability or corroborative observation that shows criminal activity or that informer's information was obtained in a reasonable fashion; while an informant is more credible if s/he makes a statement against penal interest, *State v. Jackson*, 102 Wn.2d 432, 437 (1984),

*State v. Lair*, 95 Wn.2d 706, 710 (1981), a criminal informant is not presumed to be acting out of civic responsibility; "[t]he real question is not whether the informant has technically made a statement against interest, but whether the statement against interest was made under circumstances suggestive of reliability," at ¶19; here, informer's statement was not the type of statement against interest that carries an aura of reliability, the information was not amenable to corroboration, police only corroborated innocuous facts, *State v. Z.U.E.*, 183 Wn.2d 610, 618-19 (2015); because both stops had a direct causal connection to the informer's information, thus both seizures suppressed; III.

# SEARCH
## Informer, Disclosure

***State v. Larson***, 26 Wn.App. 564 (1980)

Won't disclose unless evidence sought bears on guilt or innocence; seems to say need not disclose to address issue of probable cause in affidavit; evidence that informant lied to police is not enough to get *in camera* hearing.

***State v. Allen***, 27 Wn.App. 41 (1980)

*In camera* hearing is required where defendant makes a preliminary showing that informant may have evidence relevant to defendant's innocence; here, informant might testify as to possession of drugs by persons other than defendant; request for disclosure or *in camera* hearing is of constitutional stature and may be raised for the first time on appeal; *but see: State v. Frederick*, 45 Wn.App. 916 (1986).

***State v. Mathiesen***, 27 Wn.App. 261 (1980)

Trial court may excise portions of affidavit in support of a warrant to prevent disclosure of informant, but must release the remainder of affidavit to defense; court may not seal entire affidavit.

***State v. Cleppe***, 96 Wn.2d 373 (1981)

Search warrant affidavit states informant tells police he had been in residence, observed defendant's girlfriend use heroin, that girlfriend said that heroin belonged to her, and that she said "they" had cocaine for sale; held: court should hold *in camera* hearing with informant to determine whether informant would be helpful to defense.

***State v. Haywood***, 38 Wn.App. 117 (1984)

Defense sought disclosure of informant alleging that informant lied to police because the only place informant could have been was in jail at the time he allegedly saw drugs in defendant's home; prosecutor stated jail records reflected that informant was not in jail; held: while disclosure may be appropriate where defense shows information was false or that police knew information was patently unreliable, *United States v. Danesi*, 342 F.Supp. 889 (D.Conn. 1972), *State v. Wright*, 511 P.2d 1223, 1225 (OR. 1973), decision to disclose is within discretion of trial court, *United States v. Anderson*, 509 F.2d 724 (9th Cir. 1974); III.

***State v. Casal***, 103 Wn.2d 812 (1985)

Police obtain warrant based upon confidential informant's information, search residence, seize drugs; defendant provides affidavit naming a person alleged to be informant and stating that informant told him affidavit misrepresented the story informant gave police; held: when defendant's allegations cast reasonable doubt on veracity of material representations in affidavit, trial court shall conduct *in camera* hearing, on the record, to determine whether defendant's identification of informant is correct, whether affiant truthfully reported facts; reverses *State v. Casal*, 38 Wn.App. 310 (1984); *see also: State v. Wolken*, 103 Wn.2d 823 (1985), *but see*:

*State v. Harris*, 44 Wn.App. 401 (1986), *State v. Stansbury*, 64 Wn.App. 601 (1992), *State v. Atchley*, 142 Wn.App. 147 (2007); *accord*: *State v. White*, 50 Wn.App. 858 (1988), *State v. Selander*, 65 Wn.App. 134 (1992); 9-0.

***State v. Harris***, 44 Wn.App. 401 (1986)

Defense is not entitled to disclosure of informant's identity or *in camera* hearing where defense provides evidence that the informant lied to the affiant, but presents no evidence that affiant lied, *McCray v. Illinois*, 18 L.Ed.2d 62 (1967), *distinguishing* *State v. Casal*, 103 Wn.2d 812 (1985); I.

***State v. Unthoff***, 45 Wn.App. 261 (1986)

Trial court may consider informant's safety in determining whether or not disclosure should be ordered, *United States v. Ward*, 703 F.2d 1062 (8th Cir. 1983), *State v. Harris*, 91 Wn.2d 145, 150-1 (1978); I.

***State v. Enriquez***, 45 Wn.App. 580 (1986)

Defendant's motion for *in camera* hearing on issue of disclosure of informant is denied; at trial, defendant raises entrapment defense; held: where defendant's testimony at trial establishes that entrapment is not available as a defense as a matter of law, then appellate court need not remand for *in camera* hearing even though trial judge gave entrapment instructions; *see*: *State v. Vargas*, 58 Wn.App. 391 (1990); 2-1, I.

***State v. Fredrick***, 45 Wn.App. 916 (1986)

Affidavit states that informant saw drugs in the residence; defendant seeks *in camera* hearing to determine if informant would establish that drugs were in constructive possession of co-defendant only; trial court declines *in camera* hearing; held: where defense fashions no specific exculpatory scenario, and drugs were found in defendant's personal belongings, no *in camera* hearing is necessary; Division I declines to follow *State v. Allen*, 27 Wn.App. 41 (1980), another Division I case to the contrary.

***State v. White***, 50 Wn.App. 858 (1988)

Where defendant correctly identifies informant and raises a reasonable doubt as to veracity of material representations made by affiant, trial court must hold *in camera* hearing with informant present; if trial court finds that probable cause was questionable, there must be an open evidentiary hearing, *State v. Casal*, 103 Wn.2d 812 (1985); III.

***State v. Lane***, 56 Wn.App. 286 (1989)

Trial court orders informant disclosed, investigator searches for informant for five days unsuccessfully, court denies continuance to find informant; held: where continuance is requested to locate witness, accused must show that the witness can probably be found if granted and that due diligence has been used; test on appeal is whether defendant was denied a fair trial because defendant would not have been convicted had the witness testified; III.

***State v. Vargas***, 58 Wn.App. 391 (1990)

Informant and police officer are present at sale of drugs; police then arrest wrong person, following which defendant is arrested; court holds *in camera* hearing, determines that informer could aid defense by identifying another person who was present at the sale who could perhaps implicate one other than defendant as the one who delivered the drugs; held: *in camera* hearing is necessary where informant was present at scene and could identify seller, as his testimony has a direct bearing on defendant's guilt or innocence, *distinguishing* *State v. Enriquez*, 45 Wn.App. 580 (1986), *State v. Redd*, 51 Wn.App. 597, 606 (1988); because a police officer was at the scene of the sale, the informer's testimony would be cumulative, defense has failed to meet burden of establishing that informer's testimony would be helpful to defense, *State v. Unthoff*, 45 Wn.App. 261 (1986), *State v. Salazar*, 59 Wn.App. 202, 217 (1990); III.

***State v. Sanchez***, 60 Wn.App. 687 (1991)

Where state inquires during trial into the substance of communication made by an unidentified informant, the conditional privilege against disclosure may be waived, *State v. McCoy*, 10 Wn.App. 807, 810-11 (1974), where the informant's statements reveal specific personal knowledge about the criminal activity; here, informer merely alerted police to possibility of criminal activity, crime was committed in presence of officer without informer, thus identity of informer could serve no material purpose to the defense, *State v. Vasquez*, 66 Wn.App. 573 (1992), *State v. Kennedy*, 72 Wn.App. 244, 250-2 (1993); I.

***State v. Stansbury***, 64 Wn.App. 601 (1992)

Where defendant correctly identifies informant and challenges veracity of informant's information, court shall hold *in camera* hearing to determine if affiant truthfully reported the facts stated by informant and, if probable cause is found to have existed, court need not reveal identity, *State v. Casal*, 103 Wn.2d 812 (1985), *distinguishing* *State v. Thetford*, 109 Wn.2d 392, 397 (1987); mere fact that defense correctly identifies informant is not grounds for revealing identity by court unless court finds that informant is an agent of the police; a finding that informant would not be a witness for either party is appropriate absent evidence that informant is a significant participant in the transaction; I.

***State v. Vazquez***, 66 Wn.App. 573 (1992)

Informant sets up telephone call between police and suspect for a drug transaction, which is consummated without informant's presence, trial court denies *in camera* hearing for disclosure; held: defense failed to establish that a person who defendant claimed entrapped him was the informant who set up phone call or that the informant was a material witness to the drug transaction or, in support of entrapment defense, that informant was a government agent, thus informant was not a material witness, and trial court did not abuse discretion in failing to hold hearing, *State v. Smith*, 101 Wn.2d 36, 42 (1984), *State v. Sanchez*, 60 Wn.App. 687 (1991); II.

***State v. Petrina***, 73 Wn.App. 779 (1994)

Affidavit states that informant observed a third party place drugs in defendant's home, trial court orders disclosure without an *in camera* hearing, state refuses to disclose, court dismisses; held: informant must be disclosed if the defense has established either that the informant has relevant and helpful evidence or is essential to a fair determination, *Roviaro v. United States*, 1 L.Ed.2d 639 (1957), *State v. Harris*, 91 Wn.2d 145, 149 (1978); whereas

defendant is claiming unwitting possession, informant's testimony is essential to the determination of guilt or innocence; trial court cannot substitute its judgment for the defendant's as to the benefit of the testimony; where trial court orders disclosure, it need not hold an *in camera* hearing; II.

***State v. Atchley***, 142 Wn.App. 147, 154-57 (2007)

Where informant provides information relating only to probable cause and not to defendant's guilt or innocence, disclosure is not required, *State v. Casal*, 103 Wn.2d 812 (1985), where there is no evidence that the informant provided false information; III.

# SEARCH
## Knock and Announce

***State v. Lomax***, 24 Wn.App. 541 (1979)

Police need only wait a reasonable time between knocking and entering; *accord*: *State v. Amezola*, 49 Wn.App. 78 (1987), *overruled, on other grounds, State v. McDonald*, 138 Wn.2d 680 (1999), *United States v. Banks*, 157 L.Ed.2d 343 (2003); I.

***State v. Russell***, 25 Wn.App. 933 (1980)

Apparently holds that where police are invitees, they need not knock and announce on inner door to arrest people in another room; I.

***State v. Coyle***, 95 Wn.2d 1 (1980)

Police must knock and announce even if door is open; the mere possibility of escape is not an exigent circumstance; to establish exigent circumstance, state must show either (1) police have specific prior information that suspect has resolved to act in a manner which would create an exigency or (2) police are confronted with sound or activity alerting them to exigency, *State v. Ortiz*, 196 Wn.App. 301 (2016), *but see: United States v. Banks*, 157 L.Ed.2d 343 (2003); useless gesture exception only applies where police are virtually certain occupants are aware of police presence; reverses *State v. Coyle*, 25 Wn.App. 349 (1980), *see: State v. Alldredge*, 73 Wn.App. 171 (1994), *cf.: State v. Richards*, 136 Wn.2d 361 (1998), *but see: State v. Garcia-Hernandez*, 67 Wn.App. 492 (1992); 8-0.

***State v. Jeter***, 30 Wn.App. 360 (1981)

Police learn from a named informant that defendant has drugs and a firearm near his bed; warrant obtained with a "no knock" authorization; police use pass key, search, find drugs but no weapon; held: no exigent circumstances, thus evidence suppressed; a belief that drugs will be destroyed must be based upon sounds or activity at scene or specific prior knowledge that suspect has propensity to destroy contraband; mere fact that suspect has a weapon is not enough to enter without knocking; police must have prior knowledge that suspect has a weapon and a known propensity to use it; no-knock authorization in warrant has no significance, *State v. Spargo*, 30 Wn.App. 949 (1982); 2-1; II.

***State v. Roth***, 30 Wn.App. 740 (1981)

Police, with bench warrant and probable cause to arrest for murder, use ruse to get defendant to come to door; defendant opens door 12 inches, sees police, tries to slam door; held: defendant was aware of police identification when he tried to slam door; to permit closing of door would have risked further violence and "loss of element of surprise," therefore exigent circumstances found, *State v. Ellis*, 21 Wn.App. 123 (1978); I.

***State v. Spargo***, 30 Wn.App. 949 (1982)

"No-knock" authorization in a search warrant is invalid; reviewing court may consider all facts, and is not limited to the affidavit presented to the magistrate who issued the warrant; II.

***State v. Woodall***, 32 Wn.App. 407 (1982), *rev'd, on other grounds*, 100 Wn.2d 74 (1983)

Police, serving warrant, knock, wait three-four seconds, enter; police testify they "believed" eight-ten people were conducting a party and might cause violent acts; held: trial court's determination that three-four seconds was reasonable is upheld, *United States v. Banks*, 157 L.Ed.2d 343 (2003), *see*: *State v. Berlin*, 46 Wn.App. 587 (1987), *but see: State v. Ortiz*, 196 Wn.App. 301 (2016); III.

***State v. Myers***, 35 Wn.App. 543 (1983)

Police, with search warrant, create a dummy arrest warrant to gain entry into defendant's home, whereupon they serve search warrant; held: ruse is permissible to gain entry as exception to knock and announce rule, *State v. Ellis*, 21 Wn.App. 123 (1978), *cf.: State v. McCrorey*, 70 Wn.App. 103 (1993); dummy arrest warrant does not violate due process, is not "shocking to the universal sense of justice," *State v. Emerson*, 10 Wn.App. 235 (1973), *aff'd*, 101 Wn.2d 548 (1984); 9-0.

***State v. Reid***, 38 Wn.App. 203 (1984)

Police arrest homicide suspect outside building, seize keys; police don't know if door to building leads to residence or common hallway, open door, announce presence; held: substantial compliance with RCW 10.31.040; 2-l, I.

***State v. Allyn***, 40 Wn.App. 27 (1985)

Prior knowledge by police that there are weapons in residence and suspects had a propensity to use them is exigent circumstance permitting forcible entry to search without prior announcement, *State v. Coyle*, 95 Wn.2d 1, 10 (1980); III.

***State v. Williamson***, 42 Wn.App. 208 (1985)

A peaceful consensual entry by undercover police, even if obtained by deception, does not violate knock and announce statute, RCW 10.31.040; II.

***State v. Sturgeon***, 46 Wn.App. 181 (1986)

Police knock, defendant says "Yeah," police enter, serve warrant, search, find drugs; held: "Yeah", construed objectively, is not an invitation to enter, thus RCW 10.31.040 was violated; III.

***State v. Chichester***, 48 Wn.App. 257 (1987)

Wife consents to search, tells police they can expect a fight from husband, police knock, yell "police," hear a noise and movement; officer testifies he did not know if defendant was getting a weapon; held: prior warning by wife plus noise inside provides specific articulable facts for exigent circumstance; II.

***State v. Schmidt***, 48 Wn.App. 639 (1987)

Police, serving warrant, knock on partially opened door, announce "sheriff's office, search warrant," wait less than three seconds, enter; held: failure to demand admittance, RCW 10.31.040, did not increase likelihood of physical destruction of property, as door was open, did not impact right to privacy since it can be implied from the announcement that police

intended to enter, wait of only three seconds was reasonable in light of sounds from inside, dogs barking, small size of building; *accord: State v. Garcia-Hernandez,* 67 Wn.App. 492 (1992), *State v. Richards,* 136 Wn.2d 361 (1998), *State v. Johnson,* 94 Wn.App. 882, 890-91 (1999)*, cf.: State v. Ortiz,* 196 Wn.App. 301 (2016); III.

***State v. Garcia-Hernandez***, 67 Wn.App. 492 (1992)

Police, with search warrant, approach open door of apartment, yell "police" twice to no response, wait five seconds, enter; held: trial court's determination that five seconds was reasonable, as people outside apartment may have alerted suspect, is upheld as supported by substantial evidence, *State v. Jones*, 15 Wn.App. 165, 167 (1976), *State v. Schmidt*, 49 Wn.App. 639 (1987), *State v. Johnson,* 94 Wn.App. 882, 890-91 (1999), *see: United States v. Banks,* 157 L.Ed.2d 343 (2003), *cf.: State v. Ortiz,* 196 Wn.App. 301 (2016); I.

***Wilson v. Arkansas***, 131 L.Ed.2d 976 (1995)

Knock and announce requirement is an element in the reasonableness inquiry under the Fourth Amendment; in individual cases, law enforcement interests may establish the reasonableness of an unannounced entry; 9-0.

***State v. Schimpf***, 82 Wn.App. 61 (1996)

Police, with warrant, enter vacant yard through unlocked back gate without knocking and announcing, seize marijuana plant; held: because no one was present, there was no risk of violence, knocking on gate would have been an empty gesture, thus police acted lawfully; III.

***Richards v. Wisconsin***, 137 L.Ed.2d 615 (1997)

Police seek no-knock warrant for drugs, magistrate issues warrant but deletes no-knock portion, police knock on door, claim they are maintenance workers, defendant opens door, sees police, slams door, police break in and seize drugs; held: a *per se* exception to the knock and announce requirement would make meaningless the reasonableness inquiry under the Fourth Amendment; here, once officers reasonably believed defendant knew who they were, it was reasonable for them to force entry; 9-0.

***United States v. Ramirez***, 140 L.Ed.2d 191 (1998)

Validity of exigent circumstances justifying a no-knock entry are not impacted by whether or not property is damaged by the police at the time of entry, *see: Richards v. Wisconsin,* 137 L.Ed.2d 615 (1997), *Wilson v. Arkansas,* 131 L.Ed.2d 976 (1995); 9-0.

***State v. Richards***, 136 Wn.2d 361 (1998)

Plain-clothed police with warrant find glass door open, screen door closed, observe suspect and call his name, open screen door, shout "police, we have a warrant" and enter; held: calling defendant's name is equivalent of knocking, where defendant is aware of presence and purpose, requirements of knock and wait rule, RCW 10.31.040, are met, as there is no unannounced entry, no danger of violence, defendant was given reasonable warning, warrant authorized entry so there is no purpose to wait for a response to a demand or request for admittance, distinguishing *State v. Ellis,* 21 Wn.App. 123 (1978), *State v. Coyle*, 95 Wn.2d 1 (1980); affirms *State v. Richards,* 87 Wn.App. 285 (1997); 5-4.

***State v. Cardenas***, 146 Wn.2d 400 (2002)

Police, seeking armed robbery suspects in motel, observe suspects through window dash to rear of room, open window, point gun, shout "get your hands up," jump through window; held: because police reasonably believed suspects were armed, had used force against victims, observed suspects rush toward back, did not destroy property, then knocking and announcing is excused, *State v. Carson*, 21 Wn.App. 318 (1978), *see: State v. Edwards*, 20 Wn.App. 648 (1978), *State v. Mueller*, 15 Wn.App. 667 (1976); 5-4.

***United States v. Banks***, 157 L.Ed.2d 343 (2003)

Police, with drug warrant, knock, announce, wait 15-20 seconds, break in, at suppression hearing defendant testifies he was in shower, heard nothing until battering ram broke door; held: after 15-20 seconds without a response, police "could fairly suspect" that drugs would be flushed without entry, at 353; fact that defendant was in shower is irrelevant, as it was unknown to police in judging reasonable waiting time; it is imminent disposal of drugs, not travel time to door, that governs when police may enter, *cf.: State v. Coyle*, 95 Wn.2d 1 (1980); "[a]ttention to cocaine rocks and pianos tells a lot about the chances of their respective disposal and its bearing on reasonable time," at 356; 9-0.

***State v. Thompson***, 151 Wn.2d 793, 800-02 (2004)

Police may not forcibly enter a building to serve a civil arrest warrant issued in a civil contempt procedure, reversing *State v. Thompson*, 112 Wn.App. 787, 793-96 (2002); 9-0.

***Hudson v. Michigan***, 165 L.Ed.2d 56 (2006)

Violation of knock and announce rule does not require suppression of the evidence seized in the subsequent search, *but see: State v. Coyle*, 95 Wash.2d 1, 14 (1980), *State v. Ibarra-Cisneros*, 172 Wn.2d 880 n. 7 (2011); 5-4.

***State v. Ortiz***, 196 Wn.App. 301 (2016)

Knocking and announcing "police search warrant" three times within 6-9 seconds then breaking down door at night violates the knock and announce rule, lacking a reasonable waiting period, remedy is suppression, *State v. Coyle*, 95 Wn.2d 1 (1980), *State v. Richards*, 136 Wn.2d 361, 370-72 (1998), *State v. Allredge*, 73 Wn.App. 171 (1994), *cf.: State v. Garcia-Hernandez*, 67 Wn.App. 492, 495 (1992), *State v. Lomax*, 24 Wn.App. 541 (1979), *State v. Johnson*, 94 Wn.App. 882 (1999), *State v. Schmidt*, 48 Wn.App. 639 (1987), *State v. Jones*, 16 Wn.App. 165 (1976); III.

# SEARCH
## Plain and Open View

***State v. Legas***, 20 Wn.App. 535 (1978)

After police find what they are looking for, search must stop or it becomes general.

***State v. Daugherty***, 22 Wn.App. 442 (1979)

Observation of evidence from a constitutionally unprotected area is not a search, therefore, plain view doctrine does not apply (presupposes an intrusion); but, where police then intrude into a protected area, they need a warrant or exigent circumstances.

***State v. Gerry***, 23 Wn.App. 166 (1979)

Police overhearing conversations of defendant from adjoining motel room analogous to plain view.

***State v. Vaster***, 24 Wn.App. 405 (1979)

Third test of "probable cause to believe that what police are viewing is incriminating evidence" is met by (1) valuable camera, (2) knowing that similar camera recently stolen, (3) suspect known to be in area of search, and (4) incongruous to have valuable camera in "modest home."

***State v. Daugherty***, 94 Wn.2d 263 (1980)

Driveway is generally not within the legitimate expectation of privacy, but where defendant blocks and obscures part of driveway, there is a subjective expectation, *State v. Dyreson*, 104 Wn.App. 703 (2001); 5-4.

***State v. Jordan***, 29 Wn.App. 924 (1981)

Police, investigating complaint of a loud party, peek through mostly closed curtains, see marijuana; held: by drawing curtains, residents demonstrated reasonable expectation of privacy; fact that occupants had not completely succeeded in shutting the curtains does not diminish the reasonableness, thus suppressed, *cf.: State v. Rose*, 128 Wn.2d 388 (1996), *State v. Cardenas*, 146 Wn.2d 400, 408-11 (2002); distinguishes *State v. Brown*, 9 Wn.App. 937 (1973) involving peering through closed curtains of a motel room, as occupant of motel has less expectation of privacy than resident of private home; 2-l.

***State v. Lair***, 95 Wn.2d 706 (1981)

Exigent circumstances is not an element of the plain view doctrine; police, searching for marijuana with a warrant, find bindle, open it, discover white powder; held: since cops "knew" bindles contained drugs, they had a right to seize it; search for marijuana, pursuant to a warrant, can be virtually a general search, and police can seize any drugs found unless it is shown police knew in advance they would find drugs not specified in warrant; 6-3.

***State v. Seagull***, 95 Wn.2d 898 (1981)

Police officer, investigating an unrelated matter, knocks on door, receives no response, knows from prior experience that occupants can't hear knock on front door, proceeds toward back door, observes what he believes to be marijuana plant but which turned out to be tomatoes, gets warrant, seizes marijuana in a greenhouse; held: officer had the right to go toward back door as curtilage may be impliedly open to public, *State v. Maxfield*, 125 Wn.2d 378, 397-9 (1994), *rev'd, on other grounds, Pers. Restraint of Maxfield,* 133 Wn.2d 332 (1997) *State v. Chausee*, 72 Wn.App. 704 (1994), *cf.: Florida v. Jardines*, 569 U.S. 1, 185 L.Ed.2d 495 (2013), *but see: Collins v. Virginia*, 584 U.S. ___, 138 S.Ct. 1663, 1670 (2018), tomato plants were in "open view" (distinguished from plain view, wherein there is an invasion; here there is no invasion), *accord*: *State v. Myers*, 117 Wn.2d 332 (1991), *State v. Creegan*, 123 Wn.App. 718 (2004), *cf.: State v. Ferro*, 64 Wn.App. 181 (1992), *State v. Browning*, 67 Wn.App. 93 (1992), *State v. Hoke*, 72 Wn.App. 869 (1994), *State v. Dykstra*, 84 Wn.App. 186 (1996), *State v. Dyreson*, 104 Wn.App. 703 (2001), *State v. Boethin*, 126 Wn.App. 695 (2005), *State v. Posenjak*, 127 Wn.App. 41, 50-53 (2005); innocent but mistaken belief that tomatoes are marijuana does not invalidate warrant (affidavit claimed officer had eight years' experience observing marijuana).

***State v. Alger***, 31 Wn.App. 244 (1982)

Police, having received rape complaint and having been told that victim was raped under a sleeping bag and that victim was in her menstrual cycle, enter defendant's home to arrest defendant, see and seize sleeping bag and tampon; held: evidence was in plain view and obvious that it was evidence, thus seizure without warrant was proper; I.

***State v. Roberts***, 31 Wn.App. 375 (1982)

Police, investigating a disturbance at an apartment building, contact a juvenile runaway in hall and take her into custody, whereupon she asks to go into an apartment to get her belongings; police accompany her into apartment, observe defendant in apartment with a large quantity of cheese; on learning that a dairy had been burglarized, police arrest defendant; ten minutes later, police search and find a coat with a padlock and bolt cutters; held: pre-arrest seizure was lawful as police could remain "at the elbow" of the juvenile, *Washington v. Chrisman*, 70 L.Ed.2d 778 (1982); seizure of coat, lock and cutters was unlawful as beyond the scope of search incident to arrest, but harmless here; II.

***State v. Callahan***, 31 Wn.App. 710 (1982)

Police officer walks over to car parked in a dark parking lot at 3:00 a.m., observes through window a white powdery substance on a piece of paper on suspect's lap; officer asks for paper, suspect slips it between front seat and console; officer orders suspect out of car into patrol car, goes into store and questions clerk, who states that suspect attempted to sell him cocaine; officer then searches car and finds coke, searches unlocked glove compartment, finds more coke; held: plain view requirement that officer's observation be "inadvertent" does not mean that the officer must act with a completely neutral and benign attitude when investigating suspicious activities; the term "inadvertent" means that the officer discovered the evidence from a position that does not infringe upon any reasonable expectation of privacy and does not take any further unreasonable steps to find evidence from that position, *Horton v. California*, 109 L.Ed.2d 112 (1990), *but see: State v. Morgan*, 193 Wn.2d 365 (2019); I.

***State v. Cross***, 32 Wn.App. 193 (1982)

Police officer's view of interior of vehicle from place where officer has right to be is not search, even though officer expresses desire to look inside vehicle, where the officer does not enter the vehicle and the exposure of the vehicle's interior is not triggered by any act of the officer; II.

***State v. Alexander***, 33 Wn.App. 271 (1982)

Police pull over van for DUI, an officer, in securing van, enters cab and sees drugs; held: officer had right to enter cab to secure van under community caretaking function of the automobile exception, *Cady v. Dombrowski*, 37 L.Ed.2d 706 (1973), *State v. Lynch*, 84 Wn.App. 467, 477-9 (1996), and could seize what he inadvertently discovered and immediately knew was contraband, *Coolidge v. N.H.*, 29 L.Ed.2d 564 (1971), *State v. Daugherty*, 94 Wn.2d 263, 267-68 (1980); III.

***State v. Jones***, 33 Wn.App. 275 (1982)

Use of binoculars by police to observe that which was in the open and could be seen by naked eye from same location does not violate the Fourth Amendment, *State v. Ludvik*, 40 Wn.App. 257, n.1 (1985), *State v. Manley*, 85 Wn.2d 120 (1975), *State v. Rose*, 128 Wn.2d 388 (1996), *cf.: Florida v. Jardines*, 569 U.S. 1, 133 S.Ct. 1409, 185 L.Ed.2d 495 (2013); I.

***State v. Broadnax***, 98 Wn.2d 289 (1982)

Police, serving search warrant on a residence, patdown all persons present; officer feels bulge on defendant which he knows is not a weapon but, based on his experience, knew it was a balloon of heroin; held: a person's mere presence at a private residence being searched pursuant to a warrant does not justify a frisk by police, *Ybarra v. Illinois*, 62 L.Ed.2d 238 (1979) in the absence of "particular facts from which he reasonably inferred that the individual was armed and dangerous," *Sibron v. N.Y.*, 20 L.Ed.2d 917 (1968); even if patdown was justified, "once it is ascertained that no weapon is involved, the government's limited authority to invade the individual's right to be free of police intrusion is spent, *State v. Allen*, 93 Wn.2d 170 (1980), *State v. Garvin*, 166 Wn.2d 242 (2009), *State v. Martin,* 13 Wn.App.2d 625 (2020); plain feel is not an exception to warrant requirement, *but see: State v. Hudson*, 124 Wn.2d 107 (1994); reverses *State v. Broadnax*, 29 Wn.App. 433, 25 Wn.App. 704; reaffirms *State v. Hobart*, 94 Wn.2d 437 (1980), *but see: Minnesota v. Dickerson*, 124 L.Ed.2d 334 (1993); 5-3.

***Washington v. Chrisman***, 70 L.Ed.2d 778 (1982)

Police officer arrests defendant for minor in possession of alcohol, accompanies defendant to his dorm room where defendant's identification is, observes drugs and seizes them; held: police may remain "at the elbow" of a person under arrest, thus police were properly in dorm room, and drugs were in plain view; reverses *State v. Chrisman*, 94 Wn.2d 711 (1980), *suppressed on independent state grounds*, 100 Wn.2d 814 (1984); 6-3.

***Texas v. Brown***, 75 L.Ed.2d 502 (1983)

Police stop vehicle at routine license checkpoint, ask for license, shine flashlight in car, see knotted balloon fall from suspect's hand, observe vials and powder in glove compartment; after suspect stated that he had no license, officer seizes balloon which "seemed to contain a powdery substance"; plurality of four held initial stop valid, shining flashlight did not violate

Fourth Amendment, *State v. Rose*, 128 Wn.2d 388 (1996); the "immediately apparent" language in *Coolidge v. New Hampshire*, 29 L.Ed.2d 564 (1921), does not require police to "know" that items are evidence or contraband, *i.e.*, police may seize a suspicious object if the initial intrusion is lawful, *see: State v. Muñoz Garcia*, 140 Wn.App. 609, 624-25 (2007); 9-0.

***State v. Henry***, 36 Wn.App. 530 (1984)

Police, serving a search warrant for drugs, seize several firearms, police officer testifies he was searching for drugs and weapons; held: "inadvertent" element of plain view doctrine means that police discovered items while in a position that does not infringe upon privacy, *State v. Hoggatt*, 108 Wn.App. 257, 270 n. 32 (2001), *but see: State v. Morgan*, 193 Wn.2d 365 (2019); where weapons are found in places where police may legitimately search for drugs, they are in plain view, *State v. Lair*, 95 Wn.2d 706 (1981), *State v. Callahan*, 31 Wn.App. 710, 712 (1982); I.

***State v. Drumhiller***, 36 Wn.App. 592 (1984)

Police, called to burglary in progress, walk to front of residence, look through window with open drapes, see drug activity, ring bell, arrest occupants, seize drugs; held: defendants had no legitimate expectation of privacy due to open drapes, *Rakas v. Illinois*, 58 L.Ed.2d 387 (1978), *State v. Wolohan*, 23 Wn.App. 810, 817 (1979), *State v. Creegan*, 123 Wn.App. 718 (2004), *cf.: State v. Young*, 123 Wn.2d 173, 187-8 (1994), *State v. Cardenas*, 146 Wn.2d 400 (2002); police had right to enter curtilage area impliedly open to public, *State v. Seagull*, 95 Wn.2d 989, 902-3 (1981), *State v. Chausee*, 72 Wn.App. 704 (1994), *cf.: Florida v. Jardines*, 569 U.S. 1, 185 L.Ed.2d 495 (2013), *Collins v. Virginia*, 584 U.S. ___, 138 S.Ct. 1663, 1670 (2018); III.

***State v. McAlpin***, 36 Wn.App. 707 (1984)

Defendant calls for medical assistance for his wife who stopped breathing; medics and police arrive, medics discover drugs, police obtain warrant; held: police were justified in being on premises for medical emergency, inadvertently see drugs, thus search warrant was based upon properly viewed evidence, *State v. Myers*, 117 Wn.2d 332 (1991),*see: State v. Morgan*, 193 Wn.2d 365 (2019); I.

***State v. Chrisman***, 100 Wn.2d 814 (1984)

Police officer arrests defendant for minor in possession of alcohol, accompanies him to his dormitory so defendant can obtain identification, observes drugs, enters and seizes them; held: under CONST. Art. 1, § 7, officer who has taken into custody a person arrested for a misdemeanor may not make a warrantless entry into arrestee's residence absent exigent circumstances (safety, destruction of evidence, escape), *see: State v. Anderson*, 105 Wn.App. 223 (2001), *State v. Kull*, 155 Wn.2d 80 (2005), *State v. Link*, 136 Wn.App. 685 (2007), *State v. Hatchie*, 161 Wn.2d 390 (2007), *see also: State v. Ruem*, 179 Wn.2d 195 (2013); absent a justification for an intrusion, a plain view seizure is not permissible; court finds independent state grounds to suppress, and declines to follow *Washington v. Chrisman*, 70 L.Ed.2d 778 (1982); 6-3.

***State v. Myrick***, 102 Wn.2d 506 (1984)

Aerial surveillance of open fields at an altitude of 1500 feet does not constitute a search, *State v. Wilson*, 97 Wn.App. 572 (1999); where warrant specifically excludes buildings, and police, in serving warrant, peer in window or inadvertently see contraband, police may not enter the building in absence of exigent circumstances; 9-0.

***State v. Cockrell***, 102 Wn.2d 561 (1984)

While aerial surveillance is permissible without a warrant, the conduct may be so intrusive such that it would become a search necessitating a warrant; here, 800 feet is not intrusive, *State v. Wilson*, 97 Wn.App. 578 (1999); 9-0.

***United States v. Jacobsen***, 80 L.Ed.2d 85 (1984)

Private carrier employees examine a damaged box, observe white powder, return same to box, call DEA; DEA removes powder, field tests a trace, obtain warrant to search the place to which the package was addressed; held: because DEA already knew that the contents were a white powder, reopening the box and inspecting contents did not invade any legitimate privacy interest; field test which consumed a trace of the powder was a reasonable invasion of defendant's privacy interest; 7-2.

***State v. Crandall***, 39 Wn.App. 849 (1985)

A police officer's warrantless trespass on unoccupied undeveloped land which is not posted, frequented by hunters, not part of the curtilage, part of which is fenced, does not offend the Fourth Amendment or CONST. Art. I, § 7, as there is no privacy interest in open fields; 2-1; III.

***State v. Dorsey***, 40 Wn.App. 459 (1985)

Police, while detaining suspect for investigation, observe suspect shaking an envelope out of his jacket, seize envelope, feel credit cards, open it and seize them; held: in course of *Terry* stop, police who inadvertently discover evidence may seize it and look at it to confirm suspicions, *see: State v. Morgan,* 193 Wn.2d 365 (2019), *State v. Elwell,* 199 Wn.2d 256 (2022); I.

***State v. Perez***, 41 Wn.App. 481 (1985)

Police stop suspect for traffic infraction, detect odor of alcohol, give suspect field sobriety tests 18-20 feet from car; other officer looks in car window, sees unattached car speaker and what appears to be a gun barrel beneath a jacket, reaches in open door, seizes sawed-off rifle; held: observation of gun was lawful under open view doctrine, *State v. Seagull*, 95 Wn.2d 898 (1981), as there was no intrusion of privacy into the interior of the car which can be viewed from outside the car, *Texas v. Brown*, 75 L.Ed.2d 502 (1983); entry into car and seizure of gun was lawful even in absence of a threatening gesture as suspect "might be dangerous" due to apparent attempt to conceal weapon under jacket by intoxicated suspect who could have made a move for the weapon from 18-20 feet away; I.

***State v. Hansen***, 42 Wn.App. 755 (1986)

Fourth Amendment and CONST. Art. I, § 7 provide no recognized privacy interest in the cultivation of crops, including marijuana, in rural areas, *Oliver v. United States*, 80 L.Ed.2d 214 (1984), *State v. Crandall*, 39 Wn.App. 849 (1985); III.

***State v. Bell***, 108 Wn.2d 193 (1987)

Fire fighters enter home to extinguish fire, observe marijuana, call police who seize marijuana; held: fire fighters, as government officials, had prior justification for the intrusion, discovery was inadvertent, *see: State v. Morgan*, 193 Wn.2d 365 (2019), they immediately recognized contraband; once governmental official who is not a police officer legally discovers incriminating evidence, police may enter without a warrant to seize it; 9-0.

***California v. Ciraolo***, 90 L.Ed.2d 210 (1986)

Police flew in airplane over defendant's fenced backyard, observed marijuana growing from 1000 feet with naked eye, obtained warrant; held: mere fact that individual has taken measures to restrict some views of his activities by building fence does not preclude police observation from public vantage point where police have right to be and which renders activities clearly visible; 5-4.

***Dow Chemical Co. v. United States***, 90 L.Ed.2d 226 (1986)

Aerial photography of a manufacturing plant by EPA does not require warrant, as open areas of an industrial plant complex are not analogous to curtilage of a dwelling, but are closer to an open field; 5-4.

***State v. Gonzales***, 46 Wn.App. 388 (1986)

Defendant consents to search for stolen property; during search, police find glass vial containing pills; held: "immediately apparent" prong of plain view exception requires less than certain knowledge; held: vial viewed in context with other evidence of drug use found in the home rises to probable cause to seize even without firm knowledge that vial contained illegal drugs; III.

***State v. Kennedy***, 107 Wn.2d 1 (1986)

Police, while stopping a vehicle with driver and passenger on a well founded suspicion observe defendant-driver make a furtive gesture; police remove defendant from vehicle, reach under seat, seize a baggie of drugs; held: where suspect has been removed from a vehicle that was subject to a lawful investigative stop and officer has an objective reason for believing that a weapon is in vehicle (furtive gesture here), police may make a limited search of the passenger compartment for weapons within the area of control of suspect and passenger and, if contraband is observed, police may seize it as in plain view, *State v. Stroud*, 106 Wn.2d 144 (1986), *see: State v. Swetz*, 160 Wn.App. 122 (2011); 5-4.

***United States v. Dunn***, 94 L.Ed.2d 326 (1987)

Peering into a barn from open fields does not violate privacy expectations where barn is not within curtilage of house; *see also: State v. Rose*, 128 Wn.2d 388 (1996); 7-2.

***Arizona v. Hicks***, 94 L.Ed.2d 347 (1987)

Police, while lawfully in an apartment investigating a shooting, observe expensive stereo in a squalid room, move it to record serial numbers, determine stereo was stolen; held: moving stereo was a search for which police lacked probable cause to believe it was stolen, *see: State v. Johnson*, 104

Wn.App. 489, 500-02 (2001), *State v. Murray*, 84 Wn.2d 527, 534 (1974), *State v. Haggard*, 9 Wn.App.2d 98 (2019), *affirmed, on other grounds, State v. Haggard,* 195 Wn.2d 544 (2020); 6-3.

***State v. Nelson***, 47 Wn.App. 157 (1987)

Police, aware that defendant was a suspected drug dealer and that drug dealers are frequently armed, knock on defendant's house door, defendant comes to porch, is served with misdemeanor arrest warrant, asks for permission to enter house to get coat as it is cold, is accompanied by officers who observe, seize drugs; held: police may accompany arrestee into residence without a search warrant if police are aware of specific articulable facts demonstrating possibility of threat, *distinguishing* *State v. Chrisman*, 100 Wn.2d 814 (1984), *State v. Anderson*, 105 Wn.App. 283 (2001), *State v. Kull*, 155 Wn.2d 80 (2005); III.

***State v. Courcy***, 48 Wn.App. 326 (1987)

Police, lawfully requesting identification, observe bindle in wallet, testify that from experience recognized it as a drug container, open bindle, find cocaine; held: as bindle was seen without an intrusion, it was in open view and thus could be seized; because of the unique shape of the bindle and the officers' experience, it was proper to open it without a warrant under the single purpose container doctrine, *Arkansas v. Sanders*, 61 L.Ed.2d 235, n. 13 (1979); III.

***State v. McKinney***, 49 Wn.App. 850 (1987)

Police knock on apartment door, defendant answers, is known to police to have a warrant for driving while license suspended, known to have fled from police, defendant attempts to close door, police push through, observe drugs; held: officers' knowledge of defendant's propensity to flee plus defendant's attempt to shut door justifies police entry, *distinguishing* *State v. Chrisman*, 100 Wn.2d 814 (1984), *State v. Anderson*, 105 Wn.App. 283 (2001), *see: State v. Kull*, 155 Wn.2d 80 (2005), *State v. Hatchie*, 161 Wn.2d 390 (2007); additionally, shutting door meets hot pursuit exigency; III.

***State v. Vonhof***, 51 Wn.App. 33 (1988)

Where a tax appraiser enters property to revalue it, the Fourth Amendment and CONST. Art. 1, § 7 are implicated, *distinguishing* *State v. Ludvick*, 40 Wn.App. 257 (1985); however, where the appraiser is legitimately on the property, does not exceed the scope of his appraisal, and his route is a normal one, no search has occurred, *State v. Seagull*, 95 Wn.2d 898 (1981), *State v. Myers*, 117 Wn.2d 332 (1991); *but see: State v. Browning*, 66 Wn.App. 541 (1992), *State v. Hoke*, 72 Wn.App. 869 (1994); III.

***Tukwila v. Nalder***, 53 Wn.App. 746 (1989)

Police officer looks over locked public restroom stall, observes defendant masturbating, arrests for lewd conduct; held: sitting in a closed restroom stall provides a high expectation of privacy, irrespective of the height of the stall door; officer looking over the door was impermissibly intrusive, thus observations suppressed, *distinguishing* *State v. Berber*, 48 Wn.App. 583 (1987); I.

***State v. Yoder***, 55 Wn.App. 632 (1989)

Juvenile calls police to report her mother being assaulted by mother's boyfriend, upon arrival, mother says she was not assaulted, police enter to speak with juvenile, observe drugs; held: police were obliged to investigate and take a complete report under domestic violence law, RCW 10.99.030; mother's claim she was not assaulted was not dispositive, police required to investigate further, thus police were justified in the intrusion, inadvertently discovered drugs, *see: State v. Morgan,* 193 Wn.2d 365 (2019); II.

***State v. Stevenson***, 55 Wn.App. 725 (1989)

Where police lawfully come upon evidence in plain view, they need not seize it immediately as long as the ultimate seizure does not exceed the scope of the earlier intrusion, *see: State v. Gocken,* 71 Wn.App. 267, 277-9 (1993); II.

***State v. Sistrunk***, 57 Wn.App. 210 (1990)

Police officer approaches vehicle parked with hood raised, driver and passengers state that there is no problem, officer observes numerous dirty beer cans in back seat, advise suspects of open container law, suspects reply they were collecting for recycling, police observe no drinking nor smell intoxicants, search vehicle for intoxicants, find that visible beer cans were empty, then find syringe under seat; held: search for cans in back seat was improper under open view doctrine as cans were dirty, no apparent wetness, consistent with suspects' explanation, thus it was not immediately apparent he had seizable evidence, thus suppressed; III.

***State v. Ridgway***, 57 Wn.App. 915 (1990)

Tax assessor observes marijuana, returns to take photograph which he gives to police who walk around closed gate and up drive to house not visible from road, circle around dogs, observe marijuana; held: closed gate, isolated setting, barking dogs establish a subjective expectation of privacy, *State v. Daugherty*, 94 Wn.2d 263, 269 (1980), *State v. Mierz*, 127 Wn.2d 460 (1995), *State v. Hoke*, 72 Wn.App. 869 (1994), and not areas of curtilage impliedly open to public, *State v. Seagull*, 95 Wn.2d 898, 902 (1981), *State v. Jesson*, 142 Wn.App. 852 (2008), *cf.: State v. Chausee*, 72 Wn.App. 704 (1994), *State v. Boethan*, 126 Wn.App. 695 (2005), *Collins v. Virginia,* 584 U.S. ___, 138 S.Ct. 1663, 1670 (2018); II.

***Horton v. California***, 109 L.Ed.2d 112 (1990)

Police, with a warrant to seize stolen property discover and seize, during search, weapons which police were hoping to find, in plain view; held: inadvertent discovery is not a necessary condition of a legitimate plain view seizure, *State v. Morgan,* 193 Wn.2d 365 (2019), *distinguishing Coolidge v. New Hampshire*, 29 L.Ed.2d 564 (1971); the fact that an officer is interested in an item and fully expects to find it should not invalidate its seizure if the search is confined in area and duration by a warrant's terms; *accord: State v. Goodin,* 67 Wn.App. 623 (1992); *but see*: *State v. Myers,* 117 Wn.2d 332 (1991), which appears to maintain inadvertence requirement, *but see: State v. Hoggatt*, 108 Wn.App. 257, 270 n. 32 (2001), *State v. Morgan, supra*; 7-2.

***State v. Wright***, 61 Wn.App. 819 (1991)

Police, executing warrant to search for and seize vibrator and to "photograph crime scene" seize vibrator and, while photographing, observe bag which appears to be handgun case,

open it, observe gun; held: opening gun case was "no more than a *de minimis* invasion of right to privacy" and not a general search that exceeds scope of warrant, *Coolidge v. New Hampshire*, 29 L.Ed.2d 564 (1971); photographs taken during a search pursuant to a warrant is not a seizure any more than the knowledge the officers gained during execution of the warrant as long as the observation was otherwise legally made and the officers did not exceed the scope of the warrant by taking the photographs; I.

***State v. Myers***, 117 Wn.2d 332 (1991)

Police walk to front porch, knock, smell marijuana, observe, from porch, rolling machine, are invited in, observe marijuana; held: approaching residence from a common access route does not violate resident's reasonable expectation of privacy, *State v. Petty*, 48 Wn.App. 615, 619-20 (1987), *State v. Chausee*, 72 Wn.App. 704 (1994), *State v. Graffius*, 74 Wn.App. 23 (1994), *State v. Jesson*, 142 Wn.App. 852 (2008); front porch is not a constitutionally protected area, what police observe from a nonintrusive vantage point is in open view, *State v. Seagull*, 95 Wn.2d 898 (1981), *State v. Lemus*, 104 Wn.App. 94, 101-03 (2000); factors to determine if police exceeded scope of open view doctrine include (1) spying into house, (2) acting secretly, (3) daylight, (4) normal, direct access route, (5) attempt to talk to resident, (6) artificial vantage point, and (7) accidental discovery, *Seagull, supra*, at 905, *see: State v. Hoggatt*, 108 Wn.App. 257, 270 n. 32 (2001), *cf.: State v. Ferro*, 64 Wn.App. 181 (1992), *State v. Dykstra*, 84 Wn.App. 186 (1996), *State v. Ross*, 141 Wn.2d 304 (2000), *State v. Boethan*, 126 Wn.App. 695 (2005), *State v. Littlefair*, 129 Wn.App. 330 (2005), *State v. Ague-Masters*, 138 Wn.App. 86 (2007); 9-0.

***State v. Ferro***, 64 Wn.App. 181 (1992)

Police in helicopter observe marijuana in field, advise police on ground who enter defendant's driveway, walk across her property to plants, seize same; held: open view doctrine applies to visual intrusions, not to physical intrusions such as entries onto premises without warrant, *State v. Bell*, 108 Wn.2d 193, 206 (1987); here, police substantially departed from curtilage impliedly open to public, *State v. Hoke*, 72 Wn.App. 869 (1994), failed to seek telephonic warrant, thus suppressed, *but see: State v. Chausee*, 72 Wn.App. 704 (1994); III.

***State v. Browning***, 67 Wn.App. 93 (1992)

Where building inspector enters a residence, plain as opposed to open view doctrine applies, *distinguishing State v. Vonhof*, 51 Wn.App. 33 (1988), *State v. Seagull*, 95 Wn.2d 898 (1981); I.

***Minnesota v. Dickerson***, 124 L.Ed.2d 334 (1993)

Police, during *Terry* frisk, feel no weapons but feel a lump in pocket, examine it with fingers, conclude it's crack cocaine, seize it; held: police may seize nonthreatening contraband during a lawful frisk if the officer feels an object whose contour or mass makes its identity immediately apparent; here, while officer could lawfully feel the lump, his continued exploration of the pocket after he concluded it was not a weapon exceeded the scope of the *Terry* frisk, thus suppressed, *State v. Garvin*, 166 Wn.2d 242 (2009), *see: State v. Rodriguez-Torres*, 77 Wn.App. 687 (1995), *State v. Alcantara*, 79 Wn.App. 362 (1995); 9-0.

***State v. Gocken***, 71 Wn.App. 267, 277-79 (1993)

Police, investigating report from relative of missing elderly woman, enter victim's apartment without warrant, smell decaying flesh from closed room, enter room belonging to defendant, find body; held: discovery of odor from closed room falls within plain view exception, as initial entry was justified by **health and safety emergency exception**, *State v. Angelos*, 86 Wn.App. 253 (1997), *see: State v. Weller,* 185 Wn.App. 913 (2015), odor established immediate knowledge of evidence; officer's leaving apartment and reentry with other officers in an hour was a continuation of the first entry, thus lack of warrant did not invalidate resulting seizure, *State v. Stevenson*, 55 Wn.App. 725, 731 (1989), *Michigan v. Tyler*, 56 L.Ed.2d 486 (1978); I.

***State v. Chausee***, 72 Wn.App. 704 (1994)

Police drive up a common access road, past numerous "no trespassing" signs and open gate to residence, knock at door, observe marijuana, obtain warrant; held: "no trespassing" signs alone do not create a legitimate expectation of privacy, *State v. Vonhof*, 51 Wn.App. 33, 40 (1988), *see: Oliver v. United States*, 80 L.Ed.2d 214 (1984), *Hester v. United States*, 68 L.Ed. 898 (1924), police remained on areas impliedly open to the public, *State v. Seagull*, 95 Wn.2d 898, 902-3 (1981), *State v. Ferro*, 64 Wn.App. 181, 183 (1992), *State v. Hornback*, 73 Wn.App. 738 (1994), *State v. Maxfield*, 125 Wn.2d 378, 397-9 (1994), *rev'd, on other grounds, Pers. Restraint of Maxfield*, 133 Wn.2d 332 (1997), *distinguishing State v. Ridgway*, 57 Wn.App. 915 (1990); *see: State v. Hoke*, 72 Wn.App. 869 (1994), *State v. Boethan*, 126 Wn.App. 695 (2005), *but see: State v. Jesson*, 142 Wn.App. 852 (2008); III.

***State v. Tzintzun-Jimenez***, 72 Wn.App. 852 (1994)

Police officer, with fingers (presumably) lawfully in suspect's pocket, feels a "slippery material," pulls out baggie with drugs; held: absent evidence that officer knew by training or experience that a slippery material was likely to be cocaine, immediate recognition prong of plain feel exception is not met, as there was no evidence that officer had probable cause to believe he was touching a baggie of cocaine, *Minnesota v. Dickenson*, 124 L.Ed.2d 334 (1993); II.

***State v. Hoke***, 72 Wn.App. 869 (1994)

Police knock on front door then walk around to yard which is partially obstructed by stacked wood, broken vehicle, wheelbarrow, tools, yard covered with grass, no pathway, thick foliage borders yard, officer forced to deviate from direct access route, smells growing marijuana; held: yard was not an area of curtilage impliedly open to public, thus officer exceeded scope of implied invitation, *State v. Ridgway*, 57 Wn.App. 915, 920 (1990), *State v. Ross*, 141 Wn.2d 304 (2000), *State v. Boethan*, 126 Wn.App. 695 (2005), *State v. Littlefair*, 129 Wn.App. 330 (2005), *State v. Jesson*, 142 Wn.App. 852 (2008), *see: State v. Rose*, 128 Wn.2d 388 (1996), *cf.: State v. Ague-Masters*, 138 Wn.App. 86 (2007), *distinguishing State v. Seagull*, 95 Wn.2d 898, 902-3 (1981), *State v. Ferro*, 64 Wn.App. 181, 183 (1992); homeowner need not take overt steps signalling that area of curtilage is private; *see: State v. Chausee*, 72 Wn.App. 704 (1994), *State v. Hornback*, 73 Wn.App. 738 (1994); I.

***State v. Hudson***, 124 Wn.2d 107 (1994)

At suppression hearing, officer testifies that, following valid *Terry* stop, during weapons patdown, he felt an item which he "knew immediately from feeling it that [it] was likely one large chunk of a hard substance, which was likely cocaine"; held: plain feel is a corollary to the plain view doctrine under United States Constitution, *distinguishing* *State v. Broadnax*, 98 Wn.2d 289, 298 (1982), *see: Minnesota v. Dickerson*, 124 L.Ed.2d 334 (1993), overruling *State v. Hudson*, 69 Wn.App. 270 (1993); remanded for trial court to determine whether the nature of the object is such that there can be a credible claim of recognition by touch, *see: State v. Fowler*, 76 Wn.App. 168 (1994), *State v. Acrey*, 110 Wn.App. 769, 777 (2002), 148 Wn.2d 738, 754 (2003), *State v. Garvin*, 166 Wn.2d 242 (2009); 9-0.

***State v. Graffius***, 74 Wn.App. 23 (1994)

Police officer, in curtilage impliedly open to public, intentionally looks into open trash can, observes marijuana, obtains warrant; held: while citizens have a privacy right in garbage, *State v. Boland*, 115 Wn.2d 571 (1990), where can is left open exposing contraband, police view it from a nonintrusive vantage, intentional look down into garbage is not a particularly intrusive means of viewing it, thus it was an open view and did not violate CONST. Art. 1, § 7, *see: State v. Petty*, 48 Wn.App. 615, 619-20 (1987), *State v. Patterson*, 37 Wn.App. 275, 281 (1984) *State v. Ross*, 141 Wn.2d 304 (2000), *State v. Hepton*, 113 Wn.App. 673, 678-81 (2002), *cf.: State v. Sweeney*, 125 Wn.App. 881 (2005), *Florida v. Jardines*, 569 U.S. 1, 185 L.Ed.2d 495 (2013); I.

***State v. Gave***, 77 Wn.App. 333 (1995)

Police, with permission from owner of private road, drive up road past "no trespassing" signs which were not posted by defendant, go to defendant's front door, knock, speak with defendant using a ruse, smell marijuana, obtain warrant; held: defendant cannot rely upon signs he did not post, police did nothing more than approach residence within curtilage impliedly open to public, thus no search occurred, *State v. Hornback*, 73 Wn.App. 738 (1994), *distinguishing State v. Johnson*, 75 Wn.App. 696 (1994), *cf.: State v. Ross*, 141 Wn.2d 304 (2000), *State v. Ague-Masters*, 138 Wn.App. 86 (2007), *cf.: Florida v. Jardines*, 569 U.S. 1, 185 L.Ed.2d 495 (2013), *Collins v. Virginia*, 584 U.S. ___, 138 S.Ct. 1663, 1670 (2018); II.

***State v. Rose***, 128 Wn.2d 388 (1996)

Police enter property, walk to shed behind premises, smell marijuana, approach front porch, knock, peer through window with **flashlight**, see marijuana, obtain warrant; held: absent signs or fences, front porch is impliedly open to public, *State v. Seagull*, 95 Wn.2d 898, 902 (1981), thus police lawfully on porch can intentionally look through unobstructed window beside front door without leaning, bending or straining, at 396, *State v. Manly*, 85 Wn.2d 120, 124 (1975), *State v. Drumhiller*, 36 Wn.App. 592, 595-6 (1984), *cf.: State v. Ross*, 141 Wn.2d 304 (2000), *State v. Cardenas*, 146 Wn.2d 400 (2002), use of flashlight "does not transform an observation...within the open view doctrine during daylight into an impermissible search simply because darkness falls," at 398-9, *State v. Young*, 28 Wn.App. 412 (1981), *State v. Cagle*, 5 Wn.App. 644 (1971), *State v. Regan*, 76 Wn.2d 331 (1969), *United States v. Lee*, 71 L.Ed. 1202 (1927), *United States v. Dunn*, 94 L.Ed.2d 326 (1987), *Texas v. Brown*, 75 L.Ed.2d 502 (1983), *distinguishing State v. Young*, 123 Wn.2d 173, 182-3 (1994), *reversing State v. Rose*, 75 Wn.App. 28 (1994), *see: State v. Dykstra*, 84 Wn.App. 186 (1996), *State v. Creegan*, 123

Wn.App. 718 (2004), *State v. Boethan*, 126 Wn.App. 695 (2005), *State v. Posenjak*, 127 Wn.App. 41, 50-53 (2005), *State v. Littlefair*, 129 Wn.App. 330 (2005); 5-4.

***State v. Dykstra***, 84 Wn.App. 186 (1996)

Police arrest defendant for DUI, insist upon driving him home, defendant tells police to leave upon arrival, police refuse and accompany defendant to porch, defendant states he will not go inside, police state they won't leave until he enters, defendant opens door, police observe drugs; held: open view doctrine permits law enforcement to observe from a legitimate nonintrusive vantage point, *State v. Myers*, 117 Wn.2d 332, 345 (1991), including curtilage, *State v. Rose*, 128 Wn.2d 388, 391-2 (1996), *but see: Collins v. Virginia*, 584 U.S. ___, 138 S.Ct. 1663, 1670 (2018), however where a resident has clearly manifested an objection, then the back porch of a private residence is not impliedly open to the public, distinguishing *State v. Seagull*, 95 Wn.2d 898 (1981); II.

***State v. Wilson***, 97 Wn.App. 578 (1999)

Aerial surveillance of open fields at 500 feet, within FAA regulations, is not a search, does not violate CONST. art. I, § 7, *State v. Cockrell*, 102 Wn.2d 561 (1984), *State v. Myrick*, 102 Wn.2d 506 (1984); III.

***State v. Thorson***, 98 Wn.App. 528 (1999)

Police, serving a warrant on another property on a rural island, cross defendant's property, observe and seize marijuana; held: court must look to (1) nature of the property, (2) expectation of privacy it reasonably supports, and (3) nature of the intrusion, *State v. Myrick*, 102 Wn.2d 506 (1984); here, rural property on an uncommercial island rarely visited establishes reasonable expectation of privacy even absent fences and boundary markers; paths police used were not impliedly open to the public, leaving property authorized by warrant establishes that police were not in a place they had the right to be, thus suppressed, *State v. Dyreson*, 104 Wn.App. 703 (2001), *State v. Littlefair*, 129 Wn.App. 330 (2005); I.

***Bond v. United States***, 146 L.Ed.2d 365 (2000)

Agent boards bus, squeezes defendant's soft luggage, feels "brick-like object," asks passenger if he could open it, passenger agrees, agent finds drugs; held: physical manipulation of luggage is a search, violates Fourth Amendment; 7-2.

***State v. Bobic***, 140 Wn.2d 250, 257-60 (2000)

Officer views goods in defendant's storage unit through a hole in a common wall from a contiguous storage unit where officer had permission to be, thus no search occurred under open view doctrine, *State v. Rose*, 128 Wn.2d 388, 392 (1996), *State v. Creegan*, 123 Wn.App. 718 (2004), affirming, in part, *State v. Bobic*, 94 Wn.App. 702, 712-14 (1999); 9-0.

***State v. Ross***, 141 Wn.2d 304 (2000)

Police enter defendant's property for sole purpose of searching for evidence of marijuana grow in order to obtain search warrant, 12:10 a.m., had no intention of contacting residents, smell marijuana, obtain warrant; held: police were not conducting legitimate business at an hour

when no reasonably respectful citizen would be welcome absent actual invitation or emergency, thus were not lawfully on the property, evidence must be suppressed, *State v. Johnson*, 75 Wn.App. 692, 704-5 (1994), *State v. Boethan*, 126 Wn.App. 695 (2005), *State v. Littlefair*, 129 Wn.App. 330 (2005), *State v. Jesson*, 142 Wn.App. 852 (2008), *cf.: State v. Ague-Masters*, 138 Wn.App. 86 (2007); affirms *State v. Ross*, 91 Wn.App. 814 (1998); 4-2-2.

***State v. Johnson***, 104 Wn.App. 489, 500-02 (2001)

Police, executing warrant for a vibrator, observe a videotape, play it, discover child pornography; held: nothing about the exterior of the tape gave probable cause to believe the tapes were evidence of a crime, thus viewing was an unauthorized search, *Arizona v. Hicks*, 94 L.Ed.2d 347 (1987), *State v. Murray*, 84 Wn.2d 527, 534 (1974); II.

***State v. Dyreson***, 104 Wn.App. 703 (2001)

Police go to residence to talk to property owner, renter tells detectives to look in the garage to see if owner is there, detective approaches garage, hears loud music, knocks, no response, enters garage, sees drugs, obtains warrant; held: interior of garage was not an area of curtilage impliedly open to public, *State v. Daugherty*, 94 Wn.2d 263 (1980), as no "reasonably respectful citizen would feel free to enter the garage without the owner's consent," *State v. Thorson*, 98 Wn.App. 528, 536-37 (1999), *State v. Boethan*, 126 Wn.App. 695 (2005), *State v. Jesson*, 142 Wn.App. 852 (2008), even with loud music playing such that citizen believes that occupant would not hear knocking; III.

***State v. Hoggatt***, 108 Wn.App. 257, 269-71 (2001)

Officer, with probable cause that defendant is a felon in possession of a gun, sees defendant in kitchen from porch, is invited in by cohabitant, sees gun in kitchen, seizes it and arrests defendant; held: officer viewed the item without an unlawful intrusion, reached the gun with consent and seized it on probable cause, thus plain view test is met; II.

***State v. Cardenas***, 146 Wn.2d 400 (2002)

With exigent circumstances, police on bended knees peer through partially opened curtains of motel room, observe robbery suspects dash to back of room, enter and arrest; held: when exigent circumstances justify a warrantless entry, police are justified in taking reasonable action to secure their safety, thus need not apply open or plain view analysis, *cf.: State v. Jordan*, 29 Wn.App. 924 (1981), *State v. Brown*, 9 Wn.App. 937 (1973); 5-4.

***State v. Carter***, 151 Wn.2d 118 (2004)

Private firearms instructor brings illegal machine gun to class, invites students to handle it, investigators in class seize it, defendant is charged with possession of a machine gun, RCW 9.41.190(1); held: presenting firearm in open view of students precludes any expectation of privacy; 8-1.

***State v. Kull***, 155 Wn.2d 80 (2005)

Police arrest defendant outside her apartment for a misdemeanor warrant, cuff her, discuss bail, defendant is taken into apartment where she asks someone inside to get her purse, police follow person inside to defendant's bedroom, observe and seize drugs; held: because trial

court's findings do not support its conclusion that the plain view exception is justified by a need for officer safety, *see:* *State v. Chrisman*, 100 Wn.2d 814 (1984), *State v. Anderson*, 105 Wn.App. 223 (2001), court erred in failing to suppress; 9-0.

***State v. Posenjak***, 127 Wn.App. 41, 50-53 (2005)

Police enter driveway which is exposed to the street, observe poached elk in open garage, enter and seize elk; held: a reasonably respectful citizen would have taken the driveway to enter the curtilage which was impliedly open to the public, *State v. Seagull*, 95 Wn.2d 898, 902 (1981), distinguishing *State v. Ridgway*, 57 Wn.App. 915 (1990), *see also:* *State v. Boethan*, 126 Wn.App. 695 (2005); while entering garage and seizing elk without a warrant did intrude upon defendant's privacy, error was harmless; III.

***State v. Littlefair***, 129 Wn.App. 330 (2005)

Police, using outdated assessor's map, trespass onto rural property, smell marijuana, obtain warrant; held: state has burden to demonstrate open view, defendant's rural property was not open to public, , *State v. Thorson*, 98 Wn.App. 528 (1999), issue is not whether police made a mistake in good faith but rather whether they had a lawful basis for presence in the specific location from which officer spied something incriminating, *see:* *State v. White*, 97 Wn.2d 92, 107-08 (1982); police here did not act in the same manner as a reasonably respectful citizen, thus suppressed, *State v. Ross*, 141 Wn.2d 304 (2000), *State v. Jesson*, 142 Wn.App. 852 (2008); II.

***State v. Link***, 136 Wn.App. 685, 696 (2007)

Officer approaches apartment to investigate meth lab, smells acetone and hears fan, knocks on front door, two children arrive behind him and open door, officer enters, announces presence, sees drugs; held: plain view only applies where officer is lawfully standing in the place when he sees something that he immediately knew was incriminating evidence, *State v. Kull*, 155 Wn.2d 80, 85 (2005); here, officer had no right to pass threshold; II.

***State v. Muñoz Garcia***, 140 Wn.App. 609, 624-25 (2007)

Police, serving drug warrant, observe jewelry on defendant that an officer immediately knew was stolen, one item still had price tag on it; held: plain view doctrine requiring prior justification for intrusion, inadvertent discovery, *but see:* *Horton v. California*, 109 L.Ed.2d 112 (1990), *State v. Morgan*, 193 Wn.2d 365 (2019), and immediate knowledge that material in plain view is evidence of a crime was met, *State v. Lair*, 95 Wn.2d 706, 714 (1981); III.

***State v. Jesson***, 142 Wn.App. 852 (2008)

Police, investigating a theft, drive past "no trespassing" and "keep out" signs via primitive driveway in secluded location, open closed gate, observe growing marijuana, obtain warrant; held: a reasonable, respectful citizen would not believe that he could enter the property, thus evidence must be suppressed, *State v. Ross*, 141 Wn.2d 304 (2000), *State v. Dyreson*, 104 Wn.App. 703 (2001), *cf.:* *State v. Ague-Masters*, 138 Wn.App. 86, 97-101 (2007), *but see:* *State v. Chausee*, 72 Wn.App. 704 (1994); III.

***State v. Garvin***, 166 Wn.2d 242 (2009)

During patdown, once police ascertain that there is no weapon, they may not continue squeezing and seize what they determine is contraband; as soon as the officer knows there is no weapon, further search exceeds the lawful bounds of *Terry*, *State v. Broadnax*, 98 Wn.2d 289 (1982), *Minnesota v. Dickerson*, 124 L.Ed.2d 334 (1993), *State v. Hudson*, 124 Wn.2d 107 (1994), *State v. Martin,* 13 Wn.App.2d 625 (2020); 9-0.

***State v. Jones***, 163 Wn.App. 354 (2011)

Police stop defendant for infraction, observe drugs in car, arrest and handcuff defendant, search vehicle, find drugs; held: while drugs observed from outside the car were in open view, *State v. Gibson*, 152 Wn.App. 945, 954 (2009), *State v. Kennedy*, 107 Wn.2d 1, 10 (1986), open view doctrine does not provide authority to enter constitutionally protected areas without a warrant, *State v. Posenjak*, 127 Wn.App. 41, 52-53 (2005), *cf.: State v. Barnes*, 158 Wn.App. 602 (2010); 2-1, II.

***Florida v. Jardines***, 569 U.S. 1, 185 L.Ed.2d 495 (2013)

Police bring drug dog to front door of home, dog alerts, obtain warrant, find drugs; held: curtilage of home is constitutionally protected and, while knocking on front door is not a privacy violation, *Breard v. Alexandria*, 341 U.S. 622, 95 L.Ed. 1233 (1951), *Kentucky v. King*, 563 U.S. 452, 179 L.Ed.2d 865 (2011), *Collins v. Virginia*, 584 U.S. ___, 138 S.Ct. 1663, 201 L.Ed.2d 9 (2018), because there is a "customary invitation" for citizens to do so, introducing a trained police dog exceeds that invitation and is a search, *Kyllo v. United States*, 533 U.S. 27, 150 L.Ed.2d 94 (2001); 5-4.

***State v. Weller***, 185 Wn.App. 913 (2015)

Teenage twins report abuse to therapists who reports it to CPS who interview twins at home, assess that they are unsafe, call police who knock, advise defendant-parent they wish to perform welfare check and ask to come in, mother steps back from door, officers enter, ask twins to speak with them privately, go to garage, twins advise they were beaten with a board, officer sees board in garage, ask if that is the board with which they were beaten, victim says it is, observe what appears to be dried blood, seize board; held: police were in garage lawfully pursuant to health and safety exception, trained CPS investigator relayed opinion that children were not safe, were in the residence, there was no pretextual purpose in entering garage, entry was "totally divorced from a criminal investigation," at 924 ¶ 9, board was in plain view thus properly seized; II.

***State v. Morgan***, 193 Wn.2d 365 (2019)

Police officer, investigating a stabbing, enters defendant's hospital room, sees clothing in a bag, seizes it believing it may have blood evidence on it; held: while exigent circumstances do not justify seizure as there was no urgency, it was reasonably apparent that the evidence was associated with a crime, thus seizure under plain view doctrine was lawful, *cf.: State v. Elwell*, 199 Wn.2d 256 (2022); inadvertent discovery is not an element of the plain view doctrine, *Horton v. California*, 496 U.S. 128, 130, 110 S.Ct. 2301, 110 L.Ed.2d 112 (1990), *overruling, in part*, *State v. Kull*, 155 Wn.2d 80, 85 & n.4 (2005), *State v. Muñoz Garcia*, 140 Wn.App. 609, 624-25 (2007); 7-2.

***State v. Elwell***, 199 Wn.2d 256 (2022)

Defendant is observed on surveillance video removing a Pac-Man machine from a building, police observe defendant with a large item like the stolen machine covered by a blanket, recognize him from the video, without consent lift the blanket, find machine, seize it and arrest defendant; held: for the open view doctrine to apply, the evidentiary value of the object need not be certain so long as it is immediately apparent that the object is associated with criminal activity, but the identity of the object must be unambiguous; here, because the police removed the blanket, which would not have been necessary if the object's identity was unambiguous, even though it was highly likely that the object was the stolen machine; for the open view doctrine to apply there must be no ambiguity as to the identity of the object, the officer must be able to determine what the object is with certainty without manipulating the object, distinguishing *State v. Morgan*, 193 Wn.2d 365, 372 (2019); harmless here; 9-0.

# SEARCH
## Standing

***United States v. Salucci***, 65 L.Ed.2d 619 (1980)

In contraband possession cases defendants do not have automatic standing to challenge legality of search without regard to defendant's expectation of privacy, *reversing* *Jones v. United States*, 4 L.Ed.2d 697 (1960); *see*: *Rawlings v. Kentucky*, 65 L.Ed.2d 633 (1980); 7-2.

***State v. Simpson***, 95 Wn.2d 170 (1980)

Washington will not abandon automatic standing rule (plurality decision); a defendant charged with a crime which has possession as an element automatically has standing to challenge search if it was in his possession at the time of search, CONST. Art. 1, § 7, *State v. Carter*, 127 Wn.2d 836 (1995), *State v. Libero*, 168 Wn.App. 612, 616-17 (2012), *State v . Peck*, 194 Wn.2d 148 (2019), *but see: State v. Jones*, 68 Wn.App. 843 (1993), *cf.: State v. Williams*, 142 Wn.2d 17, 20-23 (2000), *State v. Shuffelen*, 150 Wn.App. 244 (2009); 5-3.

***United States v. Payner***, 65 L.Ed. 468 (1980)

Feds burglarize third party's home and illegally seize evidence used to convict defendant; held that evidence is admissible as defendant lacks standing to challenge unlawful search of third party's home; 6-3.

***State v. Hayden***, 28 Wn.App. 935 (1981)

Police stop vehicle for traffic infraction, get consent to search glove compartment, find a purse which suspect says belongs to his "old lady"; held: defendant lacked standing to object to search of purse as he did not have a subjective expectation of privacy, having told police purse was not his, per *Rakas v. Illinois*, 58 L.Ed.2d 387 (1978); automatic standing rule does not apply as possession is not an element of robbery; I.

***State v. Selvidge***, 30 Wn.App. 406 (1981)

Police are called to burglary, observe footprints with distinctive tread; 90 minutes later, police observe car parked in high crime area three blocks from burglary scene; car had been seen "prowling" several houses before burglary; police stop car, ask defendants what they are doing, recognize one defendant from prior burglaries, ask to see their shoes, release defendants; upon further investigation, police determine that suspects' shoe treads match footprints; held: police had sufficient articulable facts to support a well-founded suspicion to detain; suspects had no reasonable expectation of privacy in the tread pattern of shoes they wear in public; II.

***State v. Morgan***, 32 Wn.App. 764 (1982)

Package is sent by private courier in Los Angeles to defendants in Washington; in California, package is searched; held: defendants have standing to object to the Los Angeles search; II.

***State v. Aydelotte***, 35 Wn.App. 125 (1983)

Evidence of post-entry assaults on police officers are outside the scope of the exclusionary rule, *State v. Mierz*, 127 Wn.2d 460 (1995), *State v. D.E.D.*, 200 Wn.App. 484, (2017); I.

***State v. White***, 40 Wn.App. 490 (1985)

Passenger in front seat of car does not have legitimate expectation of privacy in unoccupied rear passenger compartment of the car; II.

***State v. Goodman***, 42 Wn.App. 331 (1985)

Denial of ownership does not eliminate standing as long as defendant was in possession of the item at the time it was seized or searched, *State v. Allen*, 93 Wn.2d 170, 172 (1980); *cf.: State v. Foulkes*, 63 Wn.App. 643 (1991), *State v. Zakel*, 119 Wn.2d 563 (1992); II.

***State v. Pittman***, 49 Wn.App. 889 (1987)

Defendant and passenger are unlawfully stopped by police investigating a robbery, passenger provides police with information incriminating defendant; held: defendant lacks standing to object to evidence obtained from an illegal stop of the passenger, *State v. Smith*, 104 Wn.2d 497, 509 (1985), *cf.: Brendlin v. California*, 168 L.Ed.2d 132 (2007); I.

***State v. Belieu***, 50 Wn.App. 834 (1988)

Passenger in front seat of car does have standing to challenge seizure of property under passenger seat, *distinguishing State v. White*, 40 Wn.App. 490 (1985); III.

***State v. Davis***, 53 Wn.App. 502 (1989)

Possession of child pornography, RCW 9.68A.070, does not impermissibly infringe on the right to privacy, *distinguishing Stanley v. Georgia*, 22 L.Ed.2d 542 (1969); I.

***State v. Stone***, 56 Wn.App. 153 (1989)

Guest in home lacks standing to challenge warrant for unlisted telephone number of that home, *State v. McKinney*, 49 Wn.App. 850 (1987), *State v. Williams*, 142 Wn.2d 17, 20-23 (2000), *see: Minnesota v. Carter*, 142 L.Ed.2d 373 (1998), *distinguishing State v. Butterworth*, 48 Wn.App. 152 (1987); III.

***United States v. Verdugo-Urquidez***, 108 L.Ed.2d 222 (1990)

Fourth Amendment does not apply to search by United States agents of property owned by a nonresident alien located in a foreign country; 6-3.

***State v. Estorga***, 60 Wn.App. 298 (1991)

A "target" defendant may not raise a possible violation of the rights of a third party in order to invoke the exclusionary rule under the Fourth Amendment and CONST. Art. 1, § 7; II.

***California v. Hodari D.***, 113 L.Ed.2d 690 (1991)

Suspect sees police and runs, police chase without reasonable suspicion, suspect throws drugs while fleeing, is stopped and arrested, police recover drugs; held: absent the application of physical force or submission to a show of authority, no seizure for purposes of the Fourth

Amendment occurs, *Michigan v. Chesternut*, 100 L.Ed.2d 565 (1988), *see*: *State v. Young*, 135 Wn.2d 498 (1998), *United States v. Mendenhall*, 64 L.Ed.2d 497 (1980), *State v. Perea*, 85 Wn.App. 339, 344 (1997), *see: Torres v. Madrid*, ___ U.S. ___, 141 S.Ct. 989, 209 L.Ed.2d 190 (2021); here, suspect was not seized until he was tackled; 7-2.

***State v. Foulkes***, 63 Wn.App. 643 (1991)

Burglary defendant denies at suppression hearing that he owned car that was searched, did not drive it to site of search and did not know who did, thus defendant lacked expectation of privacy in the car or its contents at search and lacks standing, *Rakas v. Illinois*, 58 L.Ed.2d 387 (1978), *see: State v. Gocken*, 71 Wn.App. 267, 279-80 (1993), as crime charged does not have possession as element, *State v. Simpson*, 95 Wn.2d 170, 181 (1980); I.

***State v. Pentecost***, 64 Wn.App. 656 (1992)

Area surrounding a trespasser's campsite is not analogous to curtilage of a residence, thus trespasser has no reasonable expectation of privacy, *but see: State v. Pippin*, 200 Wn.App. 826 (2017), *United States v. Ross*, 456 U.S. 798, 822, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982), *see also: State v. Cleator*, 71 Wn.App. 217 (1993); III.

***State v. Zakel***, 119 Wn.2d 563 (1992)

Defendant's testimony that he lived in allegedly stolen vehicle is insufficient to establish defendant's possession of vehicle where it was found by police unattended, illegally parked, unlocked, window open, defendant had no relationship to businesses where vehicle found; defendant did not possess vehicle at time of search, thus he cannot invoke automatic standing doctrine; Supreme Court overrules that portion of *State v. Zakel*, 61 Wn.App. 805 (1991), which purports to abandon automatic standing doctrine, *but see: State v. Jones*, 68 Wn.App. 843 (1993); *see: State v. Simpson*, 95 Wn.2d 170 (1980), *State v. Carter*, 127 Wn.2d 836 (1995), *State v. Barnes*, 85 Wn.App. 638, 658-9 (1997), *State v. Kypreos*, 110 Wn.App. 612 (2002), 115 Wn.App. 207 (2002); 9-0.

***State v. Walter***, 66 Wn.App. 862 (1992)

Photo lab manager processes film showing juveniles standing in front of Tennessee state emblem, fears liability for preparation of counterfeit driver's licenses, calls police who requests copies of prints, manager complies; held: delivery of film to processor establishes a lack of a reasonable expectation of privacy in photos or in disclosure of the fact that negatives existed, *State v. Duncan*, 81 Wn.App. 70, 74-6 (1996); any implied contract of confidentiality is of no consequence; First Amendment scrutiny need not be applied to photographs, *see: New York v. P.J. Video, Inc.*, 89 L.Ed.2d 871 (1986), *Heller v. New York*, 37 L.Ed.2d 745 (1973); I.

***State v. Jones***, 68 Wn.App. 843 (1993)

Police observe defendant in apartment and hallway engaging in drug transactions, seize drugs, arrest defendant; at suppression hearing, defense presents no evidence establishing defendant's relationship to the apartment; held: defense has the burden to establish a subjective and reasonable expectation of privacy; mere legitimate presence in an apartment with permission of the owner fails to sustain burden of showing an invasion of Fourth Amendment rights, *Minnesota v. Carter*, 142 L.Ed.2d 373 (1998), *see: State v. Carter*, 127 Wn.2d 836 (1995),

*distinguishing* *Minnesota v. Olson*, 109 L.Ed.2d 85 (1990) (overnight guest has reasonable expectation of privacy); *but see:* *State v. Simpson*, 95 Wn.2d 170 (1980), *State v. Zakel*, 119 Wn.2d 563 (1992), *State v. Rison*, 116 Wn.App. 955 (2003), *cf.:* *State v. Magneson*, 107 Wn.App. 221 (2001), *State v. Link*, 136 Wn.App. 685 (2007); I.

***State v. Cleator***, 71 Wn.App. 217 (1993)

Owner of a tent erected without permission on public land not in a campsite has no legitimate expectation of privacy in the contents of the tent other than his personal belongings, *but see: State v. Pippin*, 200 Wn.App. 826 (2017), *United States v. Ross*, 456 U.S. 798, 822, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982), *see also:* *State v. Pentecost*, 64 Wn.App. 656 (1992); I, 2-1.

***State v. Goucher***, 124 Wn.2d 778 (1994)

During search of residence pursuant to warrant, phone rings, police answer, caller asks to buy drugs, police agree, defendant arrives, is sold drugs by police and arrested; held: automatic standing is inapplicable, as defendant was not in possession at the time of the contested search (telephone call), *State v. Zakel*, 119 Wn.2d 563, 568 (1992), defendant lacks standing to challenge police answering telephone as beyond scope of warrant; 9-0.

***State v. Carter***, 127 Wn.2d 836 (1995)

Defendant, charged with possession of drugs, is arrested in a motel room which police enter without a warrant, at hearing defendant testifies she was just visiting; held: automatic standing is not applicable under United States Constitution, *United States v. Salvucci*, 65 L.Ed.2d 619 (1980), but is not abandoned under Washington Constitution, *State v. Williams*, 142 Wn.2d 17, 20-23 (2000), *reversing, in part*, *State v. Carter*, 74 Wn.App. 320 (1994), as defendant's testimony establishes she lacked a reasonable expectation of privacy under either constitution, *see;* *Minnesota v. Carter*, 142 L.Ed.2d 373 (1998); 5-4.

***State v. Kealey***, 80 Wn.App. 162 (1995)

Defendant, while shopping, leaves purse in store, clerk opens it and finds drugs, clerk tells police who search purse for identification, police "set up a sting operation," defendant recovers purse, is arrested; held: owner of misplaced, as opposed to abandoned, property maintains reasonable expectation of privacy; searches of **misplaced property** for identification are an exception to the warrant requirement, thus police search here was proper; II.

***State v. Farmer***, 80 Wn.App. 795, 801 (1996)

Defendant provides store receipts to insurance company to claim reimbursement following flood, police investigating insurance fraud obtain original receipts from stores, defense objects to warrantless seizure; held: assuming, *arguendo,* a customer has a legitimate expectation of privacy in a transaction with a business, that expectation ceases to exist once the customer discloses evidence of the transaction to a third party, as occurred by giving altered receipts to insurance company, *see:* *State v. Wojtyna*, 70 Wn.App. 689, 694 (1993); I.

***State v. Duncan***, 81 Wn.App. 70, 74-6 (1996)

Renter does not have reasonable expectation of privacy in storage facility's business records identifying renter, *State v. McCray*, 15 Wn.App. 810, 816-7 (1976), *State v. Walter*,

66 Wn.App. 862 (1992), *State v. Faydo*, 68 Wn.App. 621, 625 (1993), *State v. Jeffries*, 105 Wn.2d 398 (1986), absent rental agreement requiring that information be kept private; III.

***State v. Boot***, 81 Wn.App. 546 (1996)

Defendant's presence in basement of house with permission at a party does not establish a legitimate expectation of privacy under Fourth Amendment, as he was not a temporary or overnight guest, *State v. Rodriguez*, 65 Wn.App. 409, 414 (1992), basement area does not give rise to a privacy expectation, *State v. Jones*, 68 Wn.App. 843, 851 (1993); casual presence alone does not establish standing, *Minnesota v. Carter*, 142 L.Ed.2d 373 (1998), *see: State v. Rison*, 116 Wn.App. 955 (2003), *State v. Link*, 136 Wn.App. 685 (2007); III.

***State v. Jackson***, 82 Wn.App. 594, 603-4 (1996)

Police officer advises Federal Express he will obtain a warrant for a package, Federal Express delivers package to sheriff's office, officer picks it up later, holds it until drug dog reacts positively, obtains warrant and searches it; held: defendant has burden of proof to establish whether and when defendant is entitled to constitutional protection, delivery by Federal Express was without governmental participation, seizure did not occur when Federal Express delivered package to sheriff as there is no evidence counter clerk was authorized to make seizure; seizure occurred when officer arrived and took control of package, *cf.: Florida v. Jardines*, 569 U.S. 1, 133 S.Ct.1409, 185 L.Ed.2d 495 (2013); II.

***State v. Barnes***, 85 Wn.App. 638, 658-09 (1997)

Police search residence where defendant does not reside, find drugs, defendant "made no claim that he was in possession" of the drugs, thus lacks automatic standing, *State v. Zakel*, 119 Wn.2d 563, 568 (1992); II.

***State v. Takesgun***, 89 Wn.App. 608 (1998)

Trooper stops vehicle for infraction, illegally detains driver and searches trunk, finds drugs, arrests passenger, finds drugs on passenger's person, trial court holds passenger lacks standing to challenge search; held: unlawful stop or detention of driver and vehicle is an unlawful detention of the passenger, who can challenge the lawfulness of the stop, *Brendlin v. California*, 168 L.Ed.2d 132 (2007); III.

***State v. Picard***, 90 Wn.App. 890, 895-7 (1998)

After house fire is extinguished, fire officials take a heater from defendant's mother's bedroom without a warrant, evidence establishes that defendant lived in premises but did not reside in mother's bedroom, would knock before entering; held: defendant has burden of showing privacy or possessory interest was invaded and that he has standing, *State v. Jackson*, 82 Wn.App. 594, 601-2 (1996), residence in premises does not confer standing to challenge seizure from a room to which defendant lacks access; II.

***Minnesota v. Carter***, 142 L.Ed.2d 373 (1998)

Police observe through gap in closed blind of apartment window three men bagging cocaine, at hearing trial court finds that defendant was a visitor and not an overnight social guest; held: an overnight guest in a home may claim the protection of the Fourth Amendment, *State v.*

*Magneson*, 107 Wn.App. 221 (2001), but one who is merely present with consent of householder may not, *Rakas v. Illinois*, 58 L.Ed.2d 387 (1978), *cf.: State v. Rison*, 116 Wn.App. 955 (2003), *State v. Link*, 136 Wn.App. 685 (2007), *Byrd v. United States*, ___ U.S. ___ , 138 S.Ct. 1518, 200 L.Ed.2d 805 (2018), distinguishing *Jones v. United States*, 4 L.Ed.2d 697 (1960), *Minnesota v. Olson*, 109 L.Ed.2d 85 (1990); 6-3.

***State v. Walker***, 136 Wn.2d 678 (1998)

Wife consents to search of home, husband arrives before search begins, does not consent, police search, find drugs; held: where police have consent from an individual possessing equal control over premises, that consent remains valid against a cohabitant who also possesses equal control only while the cohabitant is absent, *State v. Leach*, 113 Wn.2d 735, 744 (1989), *cf.: State v. Haapala*, 139 Wn.App. 424 (2007), but where cohabitant is present and does not consent and where police execute search, it is valid only against the consenting cohabitant, here the wife, thus evidence against husband is suppressed; reverses *State v. Walker*, 86 Wn.App. 857 (1997); 7-2.

***Bond v. United States***, 146 L.Ed.2d 365 (2000)

Agent boards bus, squeezes defendant's soft luggage, feels "brick-like object," asks passenger if he could open it, passenger agrees, agent finds drugs; held: physical manipulation of luggage is a search, violates 4th Amendment; 7-2.

***State v. Jacobs***, 101 Wn.App. 80 (2000)

Defendant, prohibited by no contact order from contacting victim, is found inside victim's home after victim tells police that they may not enter victim's home, defendant challenges validity of search; held: while defendant kept clothing at residence and, with victim's permission, showered there, he had no legitimate expectation of privacy, and thus lacks standing to challenge police entry, *Rakas v. Illinois*, 58 L.Ed.2d 387 (1978), *California v. Ciraolo*, 90 L.Ed.2d 210 (1986), *see: State v. Link*, 136 Wn.App. 685 (2007); because defense did not engage in state constitutional analysis, *State v. Gunwall*, 106 Wn.2d 54, 61-67 (1986), court will not consider CONST. Art. I, § 7 claims, *but see: State v. Mayfield*, 192 Wn.2d 871 (2019); II.

***State v. Williams***, 142 Wn.2d 17, 20-23 (2000)

Police enter third party's home, serve arrest warrant on defendant, find drugs on defendant in search pursuant to arrest, defendant challenges lawfulness of entry; held: while automatic standing is applicable under Washington Constitution, *State v. Simpson*, 95 Wn.2d 170, 182 (1980), the purpose of the rule is so that a defendant is not faced with the risk that statements made at suppression hearing will later be used to incriminate him, albeit under the guise of impeachment, *Simpson*, 95 Wn.2d at 180; here, defendant's ability to challenge the entry into the home does not depend upon his admission to possession of drugs, thus automatic standing does not apply, *cf.: State v. Jones*, 146 Wn.2d 328 (2002), *see also: State v. Kypreos*, 110 Wn.App. 612 (2002), 115 Wn.App. 207 (2002); 5-4.

***State v. Francisco***, 107 Wn.App. 247, 251-55 (2001)

Adult son who resides elsewhere but is a "welcome visitor" in mother's home and occasionally stays there overnight lacks standing to challenge mother's consent to search; I.

***State v. Byrd***, 110 Wn.App. 259 (2002)

Passenger has standing to challenge traffic stop, *Brendlin v. California*, 168 L.Ed.2d 132 (2007); I.

***State v. Kypreos***, 110 Wn.App. 612 (2002), 115 Wn.App. 207 (2002)

Automatic standing applies if (1) possession is an element, (2) defendant was in possession of contraband, (3) contraband bears a direct relationship to the search sought to be contested, and (4) defendant reasonably believe he was legitimately on the premises searched, *cf.: State v . Peck*, 194 Wn.2d 148 (2019); I.

***State v. Evans***, 159 Wn.2d 402 (2007)

Police, with consent to search defendant's car, see briefcase, defendant denies it's his, police take briefcase from car, defendant objects, police obtain warrant, seize drugs; held: defendant had automatic standing to challenge seizure and search of briefcase as possession was an element of the crime and defendant "was in possession of the contraband at the time of the" seizure, at 407 ¶ 9, *State v. Simpson*, 95 Wn.2d 170, 181 (1980); defendant had a reasonable expectation of privacy in the contents of the briefcase as he exhibited a subjective expectation of privacy and because society recognizes a general expectation of privacy in briefcases, *State v. Kealey*, 80 Wn.App. 162, 168-70 (1995), *State v. Hamilton*, 179 Wn.App. 870 (2014); a defendant who denies ownership of an item, located in an area in which he has a privacy interest, has not voluntarily abandoned the property, *State v. Goodman*, 42 Wn.App. 331 (1985); reverses, in part, *State v. Evans*, 129 Wn.App. 211, 221-24 (2005); 9-0.

***State v. Link***, 136 Wn.App. 685, 692-95 (2007)

Defendant and lessor are in romantic relationship, defendant visits lessor's apartment, previously spent the night and kept some clothing there, enters apartment to assist lessor in moving, takes a shower, police officer enters without a warrant and observes defendant with drugs; held: test for less-than-overnight social guest standing: (1) defendant's relationship with tenant, (2) context and duration of visit during which search took place, (3) frequency and duration of defendant's previous visits, (4) whether defendant kept personal effects in the home; here, all four factors indicate legitimate expectation of privacy; II.

***Brendlin v. California***, 168 L.Ed.2d 132 (2007)

When a police officer makes a traffic stop, the passenger is seized and may challenge the constitutionality of the stop, *State v. Takesgun*, 89 Wn.App. 608 (1998), *State v. Byrd*, 110 Wn.App. 259 (2002), *but see: State v. Mennegar*, 114 Wn.2d 304 (1990), *State v. Cook*, 104 Wn.App. 186 (2001), *State v. Rehn*, 117 Wn.App. 142 (2003), *cf.: State v. Mendez*, 137 Wn.2d 208 (1999); 9-0.

***State v. Shuffelen***, 150 Wn.App. 244 (2009)

Police stop vehicle for infraction, arrest driver for suspended license, discover that driver is protected party for no contact order, ask driver who passenger is, driver discloses that passenger is the no contact order respondent, arrest passenger, trial court suppresses; held: passenger lacked automatic standing to challenge answers of driver as NCO violation is not a possessory offense, *State v. Simpson*, 95 Wn.2d 170 (1980), and automatic standing doctrine

only applies when defendant is asserting that his own rights were violated, *State v. Williams*, 142 Wn.2d 17, 23 (2000), *State v. Pettit*, 160 Wn.App. 716 (2011), *but see: State v. Allen*, 138 Wn.App. 463 (2007); a person does not have standing to raise a violation of another's Fifth Amendment rights; I.

***State v. Lakotiy,*** 151 Wn.App. 699, 706-13 (2009)

Lessee of storage locker admits police to common area of storage facility where police observe another lessee committing a crime, defendant argues he has a right of privacy in common area; held: under state and federal constitutions, a person has no protected privacy interest in the common area of a gated commercial storage facility, distinguishing *Seattle v. McCready*, 123 Wn.2d 260 (1994); I.

***State v. Pettit***, 160 Wn.App. 716 (2011)

Police stop vehicle for infraction, records check shows no contact order with a 16 year old girl, passenger appears to be 16, provides a name other than that of protected person, further records check shows specific tattoo on hand of protected person which is on passenger, driver is arrested for violation of no contact order; held: driver lacks standing to challenge the passenger's questioning, *State v. Shuffelen*, 150 Wn.App. 244 (2009), *but see: State v. Allen*, 138 Wn.App. 463 (2007); II.

***State v. Hamilton***, 179 Wn.App. 870 (2014)

Protected party with protection order finds respondent-defendant in his house where defendant had lived, calls police who ask defendant to come out, protected party finds purse with drugs and hands it to police, defendant tells police it is not her purse but she found it, her rings were in it, she decided to keep it, police search and seize drugs; held: purse was in defendant's home where she had a privacy interest and had her property in the purse so, in spite of her denial of ownership she had a privacy interest, *State v. Evans*, 159 Wn.2d 402, 409 (2007); judicial estoppel does not preclude defendant from raising a privacy interest because she denied ownership at trial is not material as the evidence should have been suppressed pretrial, defendant did not argue she had no privacy interest, she argued she had no ownership interest; II.

***Byrd v. United States***, ___ U.S. ___ , 138 S.Ct. 1518, 200 L.Ed.2d 805 (2018)

Mere fact that a driver in lawful possession or control of a rental car is not listed as an authorized driver on rental agreement will not defeat his or her otherwise reasonable expectation of privacy under the Fourth Amendment, *cf.: Minnesota v. Carter*, 142 L.Ed.2d 373 (1998); 9-0.

***State v. Chase***, 1 Wn.App.2d 799 (2017)

Prior to theft trial defendant, shareholder and principal officer of corporation, seeks suppression of corporation's bank records; held: shareholder and officer does not have a privacy interest in a corporation's bank records; I.

***State v . Peck***, 194 Wn.2d 148 (2019)

Defendant in a stolen truck has automatic standing to challenge the search and seizure of drugs, *State v. Simpson*, 95 Wn.2d 170, 175 (1980), *State v. Evans*, 159 Wn.2d 402, 406-07 (2007); 5-4.

# SEARCH
## *Terry* Stop and Frisk

***Ybarra v. Illinois***, 62 L.Ed.2d 238 (1979)

Warrant to search bar and bartender does not extend to customers.

***State v. Hobart***, 94 Wn.2d 437 (1980)

Stop-and-frisk is limited only to a search for weapons; where police discover "spongy" objects in suspect's pocket by squeezing them while patting down for weapons, search reaches beyond scope permitted by *Terry v. Ohio*, and fruits must be suppressed; 9-0.

***State v. Keyser***, 29 Wn.App. 120 (1981)

Weapons search must cease when police are aware that they have not found a weapon, even if searching a vehicle, *see*: *State v. Hobart*, 94 Wn.2d 437 (1980).

***Michigan v. Summers***, 69 L.Ed.2d 340 (1981)

Police, executing warrant, encounter defendant leaving his residence, require him to return to house, detain him while searching, find drugs in house, then search defendant and find drugs on his person; held: existence of warrant justified detention of occupant of home while search is conducted, *Muehler v. Mena*, 544 U.S. 93, 161 L.Ed.2d 299 (2005), *but see: Bailey v. United States*, 568 U.S. 186, 185 L.Ed.2d 19 (2013), and, upon finding contraband in house, justifies arrest and search of occupant on probable cause; this type of detention is "less intrusive than an arrest," *Illinois v. McArthur*, 148 L.Ed.2d 838 (2001); 6-3.

***State v. Quaring***, 32 Wn.App. 728 (1982)

Police lawfully stop defendant's vehicle and have defendant step outside; defendant asks for his jacket from inside vehicle; police search jacket, find evidence; held: police had "reasonable concern" that jacket might contain a weapon, per *Terry*; I.

***State v. Swaite***, 33 Wn.App. 477 (1982)

Police respond to burglary scene, get description of suspect, detain defendant after flight, seize knife from belt, patdown, find two cigarette holders, ask defendant his name, then learn cigarette holders did not belong to burglary victim; police then determine defendant gave false name and arrest him for obstructing, later learn that cigarette holders were stolen from another nearby burglary; held: since obstructing statute, RCW 9A.76.020 (1975), is unconstitutional, *State v. White*, 97 Wn.2d 92 (1982), cigarette holders are suppressed, but police may testify that they found holders on defendant, as they were seen before the obstruction arrest; I.

***State v. Harper***, 33 Wn.App. 507 (1982)

Detained suspect who repeatedly thrusts his hands in his pockets may be patted down; I.

***State v. Loewen***, 97 Wn.2d 562 (1982)

Defendant is injured in automobile accident; police find CCW permit in wallet, patdown defendant, find "cocaine sniffer"; at hospital, police search defendant's purse for identification, find drugs; held: patdown exceeded scope of stop and frisk, as coke sniffer was clearly not a weapon; search of purse exceeded scope of "medical emergency exception," as state failed to prove that a reasonable person would have thought that an emergency existed; *see:* *State v. Gocken*, 71 Wn.App. 267 (1993); 7-2.

***State v. Broadnax***, 98 Wn.2d 289 (1982)

Police, serving search warrant on residence, patdown all persons present; officer feels bulge on defendant which he knows is not weapon but, based on his experience, knew it was a balloon of heroin; held: person's mere presence at private residence being searched pursuant to warrant does not justify a frisk by police, *Ybarra v. Illinois*, 62 L.Ed.2d 238 (1979) in absence of "particular facts from which he reasonably inferred that the individual was armed and dangerous," *Sibron v. N.Y.*, 20 L.Ed.2d 917 (1968), *State v. Lennon*, 94 Wn.App. 573 (1999); even if patdown was justified, "once it is ascertained that no weapon is involved, the government's limited authority to invade the individual's right to be free of police intrusion is spent," *State v. Allen*, 93 Wn.2d 170 (1980), *State v. Garvin*, 166 Wn.2d 242 (2009), *State v. Horton*, 136 Wn.App. 29 (2006), *State v. Russell*, 180 Wn.2d 860 (2014), *State v. Martin,* 13 Wn.App.2d 625 (2020); plain feel is not an exception to warrant requirement, *State v. Hudson*, 69 Wn.App. 270 (1993); reverses *State v. Broadnax*, 29 Wn.App. 433, 25 Wn.App. 704; reaffirms *State v. Hobart*, 94 Wn.2d 437 (1980); *but see:* *State v. Pimentel*, 55 Wn.App. 569 (1989), *Minnesota v. Dickerson*, 124 L.Ed.2d 334 (1993); 5-3.

***State v. Holbrook***, 33 Wn.App. 692 (1983)

Police stop suspect's vehicle for infraction, radio registration, another officer hears broadcast, recognizes vehicle from a "hot sheet" which states that an informant claims suspect keeps drugs and gun under dashboard,police remove suspect from vehicle, search under dash, find drugs, no gun; held: where police have made a reasonable investigatory stop and have information that suspect carries a gun, officer may search for gun even if information is not established as reliable, *see:* *State v. Lee*, 147 Wn.App. 912 (2008), *but see: State v. Z.U.E.*, 178 Wn.App. 769 (2014), 183 Wn.2d 610 (2015), *State v. Russell,* 180 Wn.2d 860 (2014), *State v. Saggers,* 182 Wn.App. 832 (2014); distinguishes *State v. Sieler*, 95 Wn.2d 43 (1980); *see:* *State v. Collins*, 121 Wn.2d 168 (1993); I.

***Michigan v. Long***, 77 L.Ed.2d 1201 (1983)

Police stop vehicle that was driving erratically; sole occupant gets out of car; police observe knife in car, search car, find drugs; held: where police, in roadside encounter, have a reasonable articulable belief that suspect poses a danger and may gain immediate control of weapons, they may conduct a *Terry* search of car's interior and may seize contraband found therein; 6-3.

***State v. Adame***, 37 Wn.App. 94 (1984)

Police, serving search warrant, patdown resident about whom they had information that he was armed, feel a bulge which they could not identify, find a bag of marijuana; held: police

officer, in conducting patdown, may remove an unidentifiable item producing a bulge to satisfy himself it was not a weapon; II.

***State v. Worth***, 37 Wn.App. 889 (1984)

Warrant authorizes search of premises and person of owner of premises; police serve warrant, arrest owner, search purse belonging to nonowner occupant, find bindle of cocaine; held: search of purse exceeded scope of warrant, *State v. Campbell*, 166 Wn.App. 464 (2011); police may detain occupants not listed in warrant and may, if suspicious activities justify it, search for weapons, but may not be more intrusive; *c.f:* *State v. Hill*, 123 Wn.2d 641 (1994); II.

***State v. Smith***, 102 Wn.2d 449 (1984)

Police, searching for an escapee, approach defendant, ask to speak with him and because it is a high crime area and they did not know defendant, pat him down and discover concealed weapon; further investigation establishes defendant is not escapee; held: patdown was unlawful as police lacked a reasonable suspicion that the defendant was armed or dangerous, *cf.:* *State v. Collins*, 66 Wn.App. 157 (1992); suspicion of dangerousness must focus particularly on the individual searched, not simply upon the area in which s/he is found, *State v. Broadnax*, 98 Wn.2d 289 (1982); 7-2.

***State v. Franklin***, 41 Wn.App. 409 (1985)

Unnamed citizen tells officer that a man in a bus station rest room stall has a gun, describes suspect, officer enters restroom, sees man who meets description, holds him at gun point, is told by suspect that suspect has a blank gun in his rucksack, handcuffs suspect, searches rucksack, finds starter pistol and handcuffs in rucksack, officer recalls a police bulletin concerning a crime committed with handcuffs, arrests defendant who, following further investigation, is charged and convicted of a robbery; held: investigatory stop was proper where an anonymous informant of undetermined reliability states he observed suspect carrying or displaying a gun in a public place, *see:* *State v. Randall*, 73 Wn.App. 225 (1994), *see also:* *State v. Lee*, 147 Wn.App. 912 (2008), *but see:* *State v. Vandover*, 63 Wn.App. 754 (1992), *Florida v. J.L.*, 579 U.S. 266, 272, 146 L.Ed.2d 254 (2000), *State v. Cardenas-Muratalla*, 179 Wn.App. 307 (2013), *State v. Saggers*, 182 Wn.App. 832 (2014), *State v. Tarango*, 7 Wn.App.2d 425 (2019); where officer is told by suspect he has a gun in a container, officer may search container since releasing it to suspect would put officer in danger, *United States v. McClinnhan*, 660 F.2d 500 (D.C. Cir. 1981); arrest was unlawful as officer at best only suspected suspect of committing a crime, and recollection of police bulletin was too vague to support probable cause; I.

***State v. Douglas S.***, 42 Wn.App. 138 (1985)

"John Doe" warrant cannot authorize the search of any individual who resides in the premises described in the warrant; where a person is present at a location police are searching pursuant to a valid warrant, that person may be frisked only if police have reasonable grounds to believe he is armed and dangerous, *State v. Broadnax*, 98 Wn.2d 289 (1982), *State v. Lennon*, 94 Wn.App. 573 (1999), *State v. Smith*, 145 Wn.App. 268 (2008); III.

***State v. Pimintel***, 55 Wn.App. 569 (1989)

Warrant authorizes search of premises and "Juan Doe, Mexican Male," 21-years old, 5'10", 165 pounds; police serve warrant, defendant enters room, is secured, reaches toward his left shirt pocket, police search, find drugs in pocket, officer testifies he did not believe defendant had weapon; held: defendant matched "Juan Doe," drugs found on premises, thus detention was valid; once detained person acts in a manner to arouse suspicion he is destroying evidence, then seizure of that evidence is permitted, *State v. Dorsey*, 40 Wn.App. 459, 473 (1985), *State v. Pressley*, 64 Wn.App. 591 (1992), *distinguishing* *Ybarra v. Illinois*, 62 L.Ed.2d 238 (1980), *State v. Broadnax*, 98 Wn.2d 289 (1982), *see:* *State v. Smith*, 145 Wn.App. 268 (2008); III.

***State v. Lucas***, 56 Wn.App. 236 (1989)

A defendant released on conditions of probation supervision pending appeal has the same diminished expectation of privacy as a probationer serving his sentence; well-founded suspicion is sufficient, *State v. Patterson*, 51 Wn.App. 202 (1988); observation by probation officer of suspected drugs in residence four days before search plus defendant's nervousness when officers arrived plus defendant's demand for warrant even though officers had not conveyed a desire to search establish well-founded suspicion, *State v. Lampman*, 45 Wn.App. 228 (1986); I.

***State v. Wilkinson***, 56 Wn.App. 812 (1990)

Police, knowing driver lacked license, follow vehicle, which does not immediately pull over, with emergency lights on, observe defendant-passenger move around considerably as though trying to hide something, begins patdown of defendant-passenger, who gives officer syringe with drugs; held: "an officer who properly stops a car may conduct a search for weapons within the immediate control of the driver and passengers when one of the persons in the car moves as if to hide a weapon," at 815, *State v. Kennedy*, 107 Wn.2d 1 (1986), *State v. Watkins*, 76 Wn.App. 726, 729-31 (1995), *State v. Larson*, 88 Wn.App. 849 (1997), *State v. Laskowski*, 88 Wn.App. 858 (1997), *see:* *State v. Bradley*, 105 Wn.App. 30, 36-38 (2001), *State v. Horrace*, 144 Wn.2d 386 (2001); I.

***State v. Biegel***, 57 Wn.App. 192 (1990)

Police observe defendant in high crime area drive up, park, converse with one of several persons standing on corner for 30 seconds, follow person into apartment building; police testify that was the normal mode of conduct for a drug transaction, detain defendant, search wallet without consent, call in identification, find warrant, patdown defendant, find drugs; held: police had sufficient evidence to make a *Terry* stop to identify defendant but seizing wallet was not a weapons search, which was the extent of the *Terry* search, thus drugs suppressed; III.

***State v. Sistrunk***, 57 Wn.App. 210 (1990)

Police officer approaches vehicle parked with hood raised, driver and passengers state that there is no problem, officer observes numerous dirty beer cans in back seat, advise suspects of open container law, suspects reply they were collecting for recycling, police observe no drinking nor smell intoxicants, search vehicle for intoxicants, find that visible beer cans were empty, then find syringe under seat; held: a mere traffic stop is not grounds for a *Terry* weapons search, *State v. Larson*, 93 Wn.2d 638 (1980); no evidence existed to lead officer to believe that suspects were armed and dangerous, thus seizure of syringe was unlawful; III.

***State v. Conner***, 58 Wn.App. 90 (1990)

Investigatory stop deemed valid where police knew that radio dispatch received call from person identified as an employee of a business at a certain location, that a wallet had been stolen nearby within the hour, that suspect was at the business office being stalled by other employees, upon arrival, defendant met description, *distinguishing* *State v. Sieler*, 95 Wn.2d 43 (1980), in that person calling reported a crime, not just suspicious activity, *but see: State v. Saggers*, 182 Wn.App. 832 (2014); citizen informant is inherently reliable even if calling on the telephone, *State v. Howerton*, 187 Wn.App. 357 (2015); patdown and removal of papers was reasonably related in scope to the reason for the stop; I.

***State v. Rice***, 59 Wn.App. 23 (1990)

Responding to call of shots fired, police arrive at scene, observe group of juveniles walking through parking lot, some run upon approach of police, defendant ordered to walk toward police, defendant hesitates, moves hands toward pockets, police patdown defendant, find drugs in hand; held: seizure of defendant was lawful even though he was not suspected of a crime, as police had to investigate shooting report, defendant was only person available at the time to talk to, crime detection and prevention are legitimate purposes of investigative stops, police can do more if suspected misconduct endangers life or personal safety, *State v. McCord*, 19 Wn.App. 250, 253 (1978), *State v. Kennedy*, 107 Wn.2d 1 (1986); patdown was lawful due to defendant's fidgeting toward pocket, as police may conduct a limited, self-protective search of someone whom they have lawfully stopped for investigation and reasonably believe to be armed, *State v. Malbeck*, 15 Wn.App. 871, 873 (1976); I.

***State v. Smith***, 115 Wn.2d 775 (1990)

Police observe vehicle in closed park, see three men in car, no one in driver's seat, ask for identification, find concealed weapons permit on one suspect who says he has a gun in vehicle, all three removed from vehicle, patted down, knife found strapped to one suspect, police search passenger compartment for gun, find numerous weapons; held: whereas driver's seat was empty and police thus had reasonable suspicion that a fourth person was in the vicinity, one passenger was agitated and uncooperative, time of night, weapon found during patdown, police were reasonably suspicious that suspects were dangerous, might try to gain access to weapon in vehicle, thus search of passenger compartment was valid, *State v. Williams*, 102 Wn.2d 733, 738-30 (1984), *State v. Wheeler*, 108 Wn.2d 230 (1987), *State v. Mitchell*, 80 Wn.App. 143 (1995), *cf.: State v. Pines*, 17 Wn.App.2d 483 (2021); 6-3.

***Seattle v. Hall***, 60 Wn.App. 645 (1991)

Defendant approaches officer, becomes "sort of hostile, antsy, nervous, bobbed around, talking defensively," kept hands in pocket, police frisk, find unlawful weapons; held: when an individual voluntarily approaches an officer and behaves in a manner that causes the officer a legitimate concern for safety, the officer is entitled to take immediate protective measures; suspect's behavior would lead reasonable person to believe that his safety was in danger, *State v. Harper*, 33 Wn.App. 507 (1982); I.

***State v. Feller***, 60 Wn.App. 678 (1991)

Stop for minor traffic violation does not justify patdown absent reasonable grounds that person is presently armed and dangerous, *Terry v. Ohio*, 20 L.Ed.2d 889 (1968), *State v. Broadnax*, 98 Wn.2d 289 (1982); III.

***State v. Barber***, 118 Wn.2d 335 (1992)

"Racial incongruity," *i.e.*, a person of any race being out of place in a particular area, should never constitute a finding of reasonable suspicion of criminal behavior; 7-2.

***State v. Vandover***, 63 Wn.App. 754 (1992)

Police receive anonymous phone tip that man in gold Maverick brandished shotgun, police stop green Maverick, seize guns, drugs; held: because record is devoid of information whether informant was eyewitness, there is no basis of knowledge or reliability established, *State v. Lesnick*, 84 Wn.2d 940 (1975), *Campbell v. Department of Licensing*, 31 Wn.App. 833 (1982), *State v. Z.U.E.*, 178 Wn.App. 769 (2014), 183 Wn.2d 610 (2015), *State v. Saggers*, 182 Wn.App. 832 (2014), *cf.: State v. Howerton*, 187 Wn.App. 357 (2015), nor other indicia or reliability; although potential danger to public may be factor to consider, it cannot substitute for reliability of informant, *State v. Cardenas-Muratalla*, 179 Wn.App. 307 (2013), , *Florida v. J.L.*, 579 U.S. 266, 272, 146 L.Ed.2d 254 (2000), *distinguishing* *State v. Franklin*, 41 Wn.App. 409 (1985); *but see:* *State v. Randall*, 73 Wn.App. 225 (1994), *State v. Lee*, 147 Wn.App. 912 (2008); II.

***State v. Pressley***, 64 Wn.App. 591 (1992)

Police observe respondent and another female in high drug area both looking and pointing at an object in respondent's hand; upon observing officer, respondent says, "Oh shit," two females separate and walk in different directions, respondent closes hand and puts it in pocket, police ask her to remove her hand and give him what is in it, she says nothing is in hand, officer motions to give it to him, she hands him drugs; held: while observed behavior itself is insufficient to justify *Terry* stop, respondent's reaction to officer's presence prior to the actual stop was sufficiently consistent with behavior suggesting that a drug buy was taking place to justify the stop, *but see:* *State v. Alcantara*, 79 Wn.App. 362 (1995), *cf.:* *State v. Setterstrom*, 163 Wn.2d 621 (2008); scope of search after stop was properly expanded because actions of respondent gave rise to reasonable suspicion she possessed evidence in danger of being destroyed, or a weapon, *State v. Pimintel*, 55 Wn.App. 569 (1989), *State v. Dorsey*, 40 Wn.App. 459, 473 (1985); respondent's denial of having anything in her hand further justifies expanded intrusion, *State v. Glover*, 116 Wn.2d 509, 515 (1991); *see also:* *State v. Rodriguez-Torres*, 77 Wn.App. 687, 691-3 (1995); I, 2-1.

***State v. Richardson***, 64 Wn.App. 693 (1992)

Police observe a suspect involved in apparent drug activity, later see defendant walking with original suspect, asks if he can talk to defendant, has him empty his pockets, asks if officer can search pockets, defendant agrees, finds drugs; held: while initial encounter was not a seizure, *State v. Aranguren*, 42 Wn.App. 452, 455 (1985), direction to empty pockets is a show of

authority which transformed the encounter to a seizure because objective facts would lead any reasonable person to believe he was not free to leave, irrespective of officer's statement that they were free to go, *State v. Ellwood*, 52 Wn.App. 70, 73 (1988), *State v. Coyne*, 99 Wn.App. 566 (2000); mere proximity to others involved in criminal activity do not warrant a reasonable suspicion to seize, *State v. Doughty*, 170 Wn.2d 57 (2010), *State v. Diluzio*, 162 Wn.App. 585 (2011), *State v. Fuentes*, 183 Wn.2d 149, 161 (2015), *State v. Weyand*, 188 Wn.2d 804 (2017); III.

***State v. Walker***, 66 Wn.App. 622 (1992)

Police radio reports individuals going door-to-door asking for people who do not live in area, police observe defendant who matches description, appears startled by police, stops on request, states he was looking for an apartment, is patted down, fruits of burglary found; held: even if stop was valid, patdown was not, as frisk occurred on a residential sidewalk in the middle of the afternoon, suspect alone with two police officers, thus facts do not support officer's safety concerns, *State v. Williams*, 102 Wn.2d 733 (1984), *State v. Mitchell*, 80 Wn.App. 143 (1995), *State v. Pines*, 17 Wn.App.2d 483 (2021), *distinguishing* *State v. Sweet*, 44 Wn.App. 226 (1986); I.

***Minnesota v. Dickerson***, 124 L.Ed.2d 334 (1993)

Police, during *Terry* frisk, feel no weapons but feel lump in pocket, examine it with fingers, conclude it's crack cocaine, seize it; held: police may seize nonthreatening contraband during a lawful frisk if officer feels an object whose contour or mass makes its identity immediately apparent; here, while officer could lawfully feel lump, his continued exploration of the pocket after he concluded it was not a weapon exceeded the scope of the *Terry* frisk, thus suppressed, *State v. Garvin*, 166 Wn.2d 242 (2009), *see:* *State v. Rodriguez-Torres*, 77 Wn.App. 687 (1995), *State v. Alcantara*, 79 Wn.App. 362 (1995); 9-0.

***State v. Collins***, 121 Wn.2d 168 (1993)

Police stop vehicle at night for traffic infraction, recognize driver as someone whom officer had, 2 months earlier, arrested on a felony warrant during which bullets, holster and handcuffs but no gun were found, patdown, find drugs; held: time of day, prior felony, presence of ammunition at prior felony arrest justify *Terry* frisk, *see:* *State v. Miller*, 91 Wn.App. 181 (1998); prior felony is a factor to justify a frisk after a valid stop, but not a factor to justify a stop, *distinguishing* *State v. Hobart*, 94 Wn.2d 437 (1980); reliable information that suspect may have a gun plus "other circumstances that contribute to a reasonable safety concern" will justify a frisk, *see*: *State v. Holbrook*, 33 Wn.App. 692 (1983), *State v. Russell*, 180 Wn.2d 860 (2014), *but see:* *State v. Terrazzas*, 71 Wn.App. 873 (1994), *State v. Martin*, 13 Wn.App.2d 625 (2020); 8-0.

***State v. Galbert***, 70 Wn.App. 721 (1993)

Police, executing search warrant on residence, find defendant inside, cuff and frisk him, find drugs near defendant, re-frisk and find drugs on defendant; held: record establishes no reason why first frisk was insufficient, defendant did nothing to raise suspicions, there was no evidence that defendant was presently dangerous, defendant's presence and proximity to drugs does not justify search incident to arrest, *State v. Broadnax*, 98 Wn.2d 289, 303 (1982), *State v.*

*Lennon*, 94 Wn.App. 573 (1999), *State v. Smith*, 145 Wn.App. 268 (2008), *State v. Bee Xiong*, 164 Wn.2d 506 (2008), thus suppressed; I.

***State v. Terrazas***, 71 Wn.App. 873 (1993)

Trooper stops vehicle for weaving, asks driver for license, defendant says he has none, trooper asks for name and birthdate, suspects false name, pats down driver, finds nothing, arrests driver for driving without license, observes passenger with blanket on lap, suspects weapon, removes passengers from car, searches, finds guns, drugs; held: an arrest solely for driving without a license, without other reasonable grounds, is improper, *State v. Hehman*, 90 Wn.2d 45 (1978), *State v. Barajas*, 57 Wn.App. 556 (1990), *State v. Watson*, 56 Wn.App. 665 (1990), *see: State v. Reding*, 119 Wn.2d 685 (1992), *State v. Pulfrey*, 154 Wn.2d 517 (2005); mere suspicion that driver gave a false name is not enough; search of vehicle for officer safety was improper, as blanket on passenger's lap does not rise to an articulable suspicion that passenger was dangerous or armed, *see: State v. Collins*, 121 Wn.2d 168, 173 (1993), *State v. McIntosh*, 42 Wn.App. 573, 578-9 (1986), *State v. Mendez*, 137 Wn.2d 238 (1998), *State v. Adams*, 144 Wn.App. 100 (2008), *State v. Cruz*, 195 Wn.App. 120 (2016), *review dismissed, on other grounds*, 189 Wn.2d 588 (2017), *but see: Maryland v. Wilson*, 137 L.Ed.2d 41 (1997), *State v. Reynolds*, 144 Wn.2d 282 (2001), *cf.: State v. Horrace*, 144 Wn.2d 386 (2001); III.

***State v. Cotten***, 75 Wn.App. 669 (1994)

FBI, investigating bombing, go to suspect's home, suspect's mother signs general consent to search but orally consents to a search for evidence of bombing, agents enter suspect's bedroom, observe shotgun, unload it, take it to mother who agrees they can take it, shotgun is later linked to homicide, the *res* of this appeal; held: removing shotgun from bedroom and unloading it is a seizure, *distinguishing Coolidge v. New Hampshire*, 29 L.Ed.2d 564 (1971); seizure of shotgun was reasonable, as police conducting a search may briefly seize and secure any weapon for safety, *Michigan v. Summers*, 69 L.Ed.2d 340 (1981); II

***State v. Fowler***, 76 Wn.App. 168 (1994)

Police officer stops vehicle for traffic infraction, observes furtive movements, frisks defendant, feels hard object and soft objects, removes a pager and a package containing drugs; held: because officer had ample time and opportunity to retrieve the hard object without disturbing the others, the seizure of the package was unlawful, *State v. Garvin*, 166 Wn.2d 242 (2009), *see: State v. Hudson*, 124 Wn.2d 107, 113 (1994), *cf.: State v. Collins*, 121 Wn.2d 168, 173 (1993), *State v. Miller*, 91 Wn.App. 181 (1998); III.

***State v. Olsson***, 78 Wn.App. 202, 207-8 (1995)

Police stop vehicle for infraction, is told by driver he has a knife, which driver produces, officer observed "a heightened awareness to his surroundings. His pupils would not react and were fixed at midrange. He had glassy eyes with redness around the membrane," police patdown, find drugs; held: officer had sufficient and specific facts leading him to believe driver was under the influence of drugs, also had legitimate safety concerns prompting patdown search; III.

***State v. Alcantara***, 79 Wn.App. 362 (1995)

Police officer observes defendant intently looking at a plastic bag in his hand, when defendant sees officer he turns away and makes shoving motions into pants, officer stops defendant and pats him down, seizing bag with drugs; held: stop was made to search pocket where officer suspected he might find evidence, not a weapon, thus search exceeded scope of *Terry* stop, *distinguishing* *State v. Rodriguez-Torres*, 77 Wn.App. 687 (1995), *State v. Pressley*, 64 Wn.App. 591 (1992); I.

***State v. Laskowski***, 88 Wn.App. 858 (1997)

Officer, dispatched to vehicle prowl, sees six suspects matching description, some hesitate to remove hands from pockets, defendant is nervous, officer knows one suspect has a weapon history, patdown of all suspects discloses shotgun shell, officer then pats down defendant's backpack, feels long hard object, opens pack and finds shotgun; held: any reasonable basis supporting an inference that the investigatee or a companion is armed will justify a protective search for weapons, at 860, *State v. Wilkinson*, 56 Wn.App. 812, 818 (1990); totality of suspicious circumstances supported officer's belief that respondent was armed and dangerous, protective frisk may extend beyond a person to his area of immediate control if there is reasonable suspicion that suspect is dangerous and may gain access to weapon, *State v. McIntosh*, 42 Wn.App. 579, 582 (1986), *State v. Bray*, 143 Wn.App. 148 (2008), *cf.: State v. Martinez*, 135 Wn.App. 174 (2006); I.

***State v. Miller***, 91 Wn.App. 181 (1998)

Police observe two men yelling at each other at night in high crime area, defendant's finger pointing at other man's face, police approach, defendant walks away, is told to stop, defendant attempts to enter building, officer tells defendant to show hands, defendant puts hands in pocket, officer frisks, feels what he believes to be a knife, seizes 3x4" canister, opens it to look for a weapon, finds drugs; held: stop of defendant was proper to "maintain the status quo" and determine whether or not violence was about to erupt, *Adams v. Williams*, 32 L.Ed.2d 612 (1972), frisk was "prudent" as defendant attempted to flee and refuse to turn or show hands, *State v. Collins*, 121 Wn.2d 168, 173 (1993), officer may withdraw object s/he believes may be a weapon, *State v. Hudson*, 124 Wn.2d 107, 113 (1994), officer's belief that canister could contain a Derringer justifies opening, *State v. Belieu*, 112 Wn.2d 587, 601-2 (1989), *but see: State v. Horton*, 136 Wn.App. 29 (2006), *State v. Garvin*, 166 Wn.2d 242 (2009), *State v. Russell*, 180 Wn.2d 860 (2014), *State v. Martin*, 13 Wn.App.2d 625 (2020); II.

***State v. Lennon***, 94 Wn.App. 573, 579-82 (1999)

During search pursuant to warrant, defendant (not subject of warrant) knocks on door, enters, is acquainted with police who pat him down and find drugs; held: generalized suspicion of police that they often find weapons on premises searched for drugs does not justify patdown as there was no evidence that defendant was armed or dangerous, defendant did not act in any furtive or suspicious manner, thus suppressed, *State v. Broadnax*, 98 Wn.2d 289 (1982), *State v. Douglas S.*, 42 Wn.App. 138 (1985), *State v. Galbert*, 70 Wn.App. 721 (1993), *State v. Smith*, 145 Wn.App. 268 (2008), *State v. Bee Xiong*, 164 Wn.2d 506 (2008), *cf.: State v. Miller*, 91 Wn.App. 181, 185 (1998), *but see: State v. Styles*, 93 Wn.2d 173 (1980); III.

***Florida v. J.L.***, 579 U.S. 266, 272, 146 L.Ed.2d 254 (2000)

Anonymous call to police reports young black male at a bus stop wearing plaid shirt carrying a gun, police respond to specific bus stop, see black male in plaid shirt, frisk, find gun; held: anonymous tip that a person is carrying a gun, without more, is insufficient to justify a stop and frisk, *State v. Cardenas-Muratalla*, 179 Wn.App. 307 (2013), *State v. Saggers*, 182 Wn.App. 832 (2014), *State v. Tarango*, 7 Wn.App.2d 425 (2019), distinguishing *Alabama v. White*, 110 L.Ed.2d 301 (1990), *cf.: State v. Franklin*, 41 Wn.App. 409 (1985), *Navarette v. California*, 572 U.S. 393, 188 L.Ed.2d 680 (2014); 9-0.

***State v. Cormier***, 100 Wn.App. 457 (2000)

Police, serving a warrant, observe defendant at night ride by on bicycle several times, stop and stare, police approach, ask him to remove hands from pockets, defendant refuses, is told he will be arrested for obstructing, officers try to take him in custody, defendant strikes police who search and find drugs; held: police had no reasonable belief that defendant was armed, thus had no basis to stop; once defendant assaulted the officer, police had probable cause to arrest, *State v. Mierz*, 127 Wn.2d 460, 50 A.L.R.5th 921 (1995), *State v. Valentine*, 132 Wn.2d 1, 21-22 (1997), *State v. McKinlay*, 87 Wn.App. 394, 398-99 (1997), *State v. D.E.D.*, 200 Wn.App. 484, (2017), and may search incident to that arrest, irrespective of the legality of the initial encounter; 2-1, III.

***State v. Bradley***, 105 Wn.App. 30, 36-38 (2001)

Police hear gunshots, observe defendant run down alley, lean into vehicle then walk away, does not respond to officers' commands to stop, is forced to ground, handcuffed, placed in police van, defendant's car is searched, gun found; held: because there was no danger to officers, defendant would not have to re-enter car to get registration, *State v. Larson*, 88 Wn.App. 849 (1997), *State v. Wilkinson*, 56 Wn.App. 812 (1990), and because no one else was in the vehicle, *State v. Kennedy*, 107 Wn.2d 1, 11 (1986), *State v. Watkins*, 86 Wn.App. 726, 730 (1995), then search of vehicle was beyond scope of investigatory stop, *State v. Turner*, 114 Wn.App. 653 (2002), *State v. Swetz*, 160 Wn.App. 122 (2011); I.

***State v. Bailey***, 109 Wn.App. 1 (2000)

Police observe suspect in school parking lot next to two liquor bottles, frisk suspect, find gun; held: police were outnumbered, suspect was near bottles which could have been used as weapons, patdown for possible liquor violation was valid; I.

***State v. Duncan***, 146 Wn.2d 166 (2002)

Police observe defendant in a park next to open alcohol container, possession of an open container is a civil infraction (although police apparently believed it was a crime, at 173), pat him down, find contraband; held: police may not patdown a suspect for a non-criminal infraction, *Terry v. Ohio* is inapplicable for a non-traffic infraction, *State v. Day*, 161 Wn.2d 889 (2007); because defendant did not actually possess the container, the infraction did not occur in the presence of the officer, so police had no basis to stop defendant, RCW 7.80.050(2); 9-0.

***State v. Acrey***, 110 Wn.App. 769, 777 (2002), *aff'd*, 148 Wn.2d 738, 754 (2003)

An officer is entitled to frisk for weapons before placing an individual in a patrol car, *State v. Wheeler*, 108 Wn.2d 230, 235-36 (1987), even if transport is for non-criminal community caretaking function, *but see: State v. A.A.*, 187 Wn.App. 475 (2015); I.

***Hiibel v. Sixth Judicial Dist. Ct.***, 159 L.Ed.2d 292 (2004)

State statute which requires one who has been lawfully detained on reasonable suspicion to identify himself does not violate Fourth Amendment, *see also: State v. Stratton*, 139 Wn.App. 511, 516-17 (2007); 5-4.

***State v. Jacobs***, 121 Wn.App. 669 (2004), *rev'd, on other grounds*, 154 Wn.2d 596 (2005)

Police approach trailer, smell chemicals which become stronger as door is opened, question defendant who admits using meth, having acetone and pressure cooker, police observe "weapon-shaped bulge" in defendant's pants pocket, ask defendant to turn out pocket, defendant complies, knife and canister with white powder fall out; held: police had reasonable and articulable suspicion of drug lab, unknown object in defendant's pocket gave rise to police concern for safety, allowing a *Terry* search; II.

***State v. Santacruz***, 132 Wn.App. 615 (2006)

Police stop vehicle for infraction, defendant has no license, officer observes eyes dilated, asks if defendant used drugs, defendant acknowledges using meth that day, officer asks if he has drugs or paraphernalia, defendant says he has syringes in pocket and consents to search, police find meth; held: lawful scope of a *Terry* stop may be enlarged or prolonged as needed to investigate unrelated suspicions that crop up during the stop, at 619; observation of dilation is a specific, articulable reason to inquire further, distinguishing *State v. Armenta*, 134 Wn.2d 1 (1997) *State v. Henry*, 80 Wn.App. 544 (1995), *State v. Tijerina*, 61 Wn.App. 626 (1991), extended detention was lawful; III.

***State v. Martinez***, 135 Wn.App. 174 (2006)

Officer, patrolling apartment complex where vehicle prowling had occurred in the past, observes defendant near cars, defendant walks quickly away, officer asks if he lives there, defendant says no, officer detains, pats down, finds drugs; held: no crime was reported, there was no particularized suspicion that criminal conduct had occurred or was about to occur, general inchoate suspicion was insufficient here, distinguishing *State v. Laskowski*, 88 Wn.App. 858 (1997), *State v. Ozuna*, 80 Wn.App. 684 (1996), *cf.: State v. Bray*, 143 Wn.App. 148 (2008); III.

***State v. Horton***, 136 Wn.App. 29 (2006)

Sheriff's deputy stops vehicle for traffic infractions, observes meth manufacturing items in back seat, arrests driver, orders defendant-passenger out of vehicle, pats him down, finds open cigarette pack, searches it, finds drugs; held: even though deputy had probable cause to arrest passenger, he did not do so, thus search was a *Terry* frisk as defendant had not been arrested and thus could not be searched incident to arrest, *State v. O'Neill*, 148 Wn.2d 564 (2003); a *Terry* frisk is limited to a "superficial patdown of the outer clothing for weapons," at 38, once officer determines that an item is not a weapon, the justification for the intrusion ends, *State v. Allen*, 93 Wn.2d 170, 172 (1980), *State v. Broadnax*,

98 Wn.2d 289 (1982), *State v. Russell*, 180 Wn.2d 860 (2014), *State v. Martin*, 13 Wn.App.2d 625 (2020); III.

***State v. Setterstrom***, 163 Wn.2d 621 (2008)

Officer receives report of a man under the influence of drugs in welfare office, approaches defendant who gives two names, is "nervous and fidgeting," office believes defendant was on methamphetamine, pats down, finds drugs; held: police may frisk for weapons only if (1) suspect is justifiably stopped, (2) officer has a reasonable concern of danger, and (3) the frisk's scope is limited to finding weapons, *State v. Collins*, 121 Wn.2d 168, 173 (1993); here, while the initial stop was conceded by the defense as justified, there was not some basis from which the court could determine that the detention was not arbitrary or harassing, *State v. Belieu*, 112 Wn.2d 587, 601-02 (1989); no threatening gestures or words were present, "[t]his is not a situation where the officers encountered [defendant] in a dark alley in a crime-ridden area," *see: State v. Glover*, 116 Wn.2d 509, 514 (1991), *State v. Bee Xiong*, 164 Wn.2d 506 (2008), *State v. Russell*, 180 Wn.2d 860 (2014), *State v. Martin*, 13 Wn.App.2d 625 (2020); 9-0.

***State v. Bee Xiong***, 164 Wn.2d 506 (2008)

Police, serving a warrant on Kheng Xiong at his residence, defendant drives up, officer thinks he is Kheng Xiong, defendant is immediately handcuffed, frisked, tells police he is Bee Xiong, brother of Kheng Xiong, officer notices a bulge, touches the bulge, defendant pulls away and says he doesn't wish to be searched, police squeeze bulge, decide it is a "potential weapon," pull out drug pipe with drugs; held: because no specific facts support a reasonable belief that defendant was armed and presently dangerous, as defendant was handcuffed and made no suspicious movements, the frisk was unlawful, *see: State v. Setterstrom*, 163 Wn.2d 621 (2008), *State v. Smith*, 145 Wn.App. 268 (2008), reversing *State v. Bee Xiong*, 137 Wn.App. 720 (2007); 9-0.

***State v. Smith***, 145 Wn.App. 268 (2008)

Police are about to serve a search warrant on a house, car drives into driveway, two men approach door, two women remain in car, police order women out at gunpoint, "women smelled of methamphetamine," retrieve defendant's purse from car, find drugs; held: while an occupant may be detained during execution of a residential search warrant, those merely present may not be detained or frisked absent independent factors, other than arrival at the scene, tying the person to the illegal activities or raising a reasonable suspicion that the person is armed and dangerous, *State v. Bee Xiong*, 164 Wn.2d 506 (2008), *State v. Broadnax*, 98 Wn.2d 289, 300-04 (1982), *overruled, on other grounds, Minnesota v. Dickerson*, 124 L.Ed.2d 334 (1993), overruling *State v. Howard*, 7 Wn.App. 668 (1972); III.

***State v. Chang***, 147 Wn.App. 490, 494-98 (2008)

Police respond to forgery in a bank, suspect in bank states that person who drove him is in car outside, gun in car, police detain driver, remove him, seize gun from floorboard of car; held: protective search exception to warrant requirement applies when a valid *Terry* stop includes a vehicle search to ensure officer safety, *State v. Kennedy*, 107 Wn.2d 1, 12 (1986), *State v. Larson*, 88 Wn.App. 849, 853 (1997), *State v. Swetz*, 160 Wn.App. 122 (2011); had police discovered that driver was not part of forgery, police would have released him, giving him

access to weapon in car, thus seizure was proper, *State v. Glenn*, 140 Wn.App. 627, 633-39 (2007); I.

***State v. Lee***, 147 Wn.App. 912 (2008)

Police observe pedestrian approached by a car, speak to occupants and walk away looking frightened, officer approaches woman who identifies herself and says occupants of car asked her to smoke crack with them, showing her bag of crack and pipe, police stop car, order passenger to exit, pipe falls from his person, arrest for drug parephernalia, search, find drugs; held: *Aguilar-Spinelli* test is inapplicable to a *Terry* stop, distinguishing *State v. Jackson*, 102 Wn.2d 432 (1984), totality of circumstances here was sufficient for police to stop car, *State v. Morrell,* 16 Wn.App.2d 695 (2021); I.

***State v. Garvin***, 166 Wn.2d 242 (2009)

During patdown, once police ascertain that there is no weapon, they may not continue squeezing and seize what they determine is contraband; as soon as the officer knows there is no weapon, further search exceeds the lawful bounds of *Terry*, *State v. Broadnax*, 98 Wn.2d 289 (1982), *Minnesota v. Dickerson*, 124 L.Ed.2d 334 (1993), *State v. Hudson*, 124 Wn.2d 107 (1994), *State v. Martin,* 13 Wn.App.2d 625 (2020); 9-0.

***State v. Ibrahim***, 164 Wn.App. 503, 508-10 (2011)

Police, with well-founded suspicion to detain, stop defendants who keep putting their hands in their pockets, turning sideways, repeatedly come "into the officer's space" despite repeated requests not to, police patdown, find weapon; held: while *Terry v. Ohio* uses the words "armed and presently dangerous" to justify a patdown on less then probable cause, "the actual measure appears to be more modest," deference to the officer on the street trying to protect himself justifies the patdown; III.

***State v. Russell***, 180 Wn.2d 860 (2014)

Officer stops defendant for a bicycle infraction, recognize him as a week earlier defendant denied he had a weapon but during prior stop officer found a loaded derringer, officer frisks, feels small hard container that he knew was not a gun, opens it, finds syringe with drugs; held: initial frisk was justified as police could point to specific and articulable facts that supported a belief that defendant could be armed and dangerous, *State v. Collins*, 121 Wn.2d 168 (1994), state need not establish validity of the prior encounter but once officer determined that the item seized did not contain a weapon the scope exceeded a lawful *Terry* stop, *State v. Horton*, 136 Wn.App. 29, 38-39 (2006), *State v. Broadnax,* 98 Wn.2d 289 (1982); 9-0.

***State v. Saggers***, 182 Wn.App. 832 (2014)

911 caller at 2:45 a.m. asks for civil standby at defendant's residence to recover property, told to call back at a more reasonable hour, 13 minutes later 911 caller says he witnessed a man threaten woman with a shotgun in front of defendant's residence, gives a name and describes a specific car parked outside residence, says he's at a gas station, police drive by house, no lights, go to gas station, no one present, return to house, use loudspeaker, defendant exits, is handcuffed and placed in patrol car, says no women have been present, says 911 caller had been there earlier, denies waving a shotgun, police sweep house, no women present, officer asks defendant

if he has a shotgun, defendant says yes and consents to search, police find shotgun, defendant is charged with felon in possession; held: while a 911 phone call from an unknown caller who gives a contemporaneous eyewitness account of a serious offense presenting an exigent threat to public safety may provide a valid basis for a *Terry* stop, *Navarette v. California,* 572 U.S. 393, 188 L.Ed.2d 680 (2014), here police had good reason to question reliability of the 911 call, suspicion of exigent circumstances dissipated before officer asked if defendant had a gun and would consent, thus admission and consent were not within the scope of a valid *Terry* stop, *State v. Gaddy,* 152 Wn.2d 64, 72-73 (2004), *State v. Wakely,* 29 Wn.App. 288, 241 (1981), *State v. Sieler,* 95 Wn.2d 42, 48 (1980), *State v. Hopkins,* 128 Wn.App. 855, 858-59 (2005), *Florida v. J.L.*, 529 U.S. 266, 270, 146 L.Ed.2d 254 (2000), *State v. Lesnick,* 84 Wn.2d 940 (1975); I.

***State v. Rooney***, 190 Wn.App. 653 (2015)

CCO with DOC warrant enter a home with police, enter bedroom of subject of the warrant, arrest subject, defendant is co-habitant of the room who objects to search, police search and find drugs and sees lots of swords and knives, defendant asks to dress, police search pants before defendant puts them on, finds a gun which defendant may not possess, is charged with drugs and VUFA; held: a probationer may be searched without a warrant not as an exception to the warrant requirement, but because a probationer must consent to a search, RCW 9.94A.631(1), but a cohabitant with common authority over the premises who is present and who objects has the right to require a warrant, *State v. Morse,* 156 Wn.2d 1 (2005), thus drugs suppressed; frisk of defendant's pants was valid for safety reasons due to weapons in room; II.

***State v. Cruz***, 195 Wn.App. 120 (2016), *review dismissed,, on other grounds,* 189 Wn.2d 588 (2017)

Officer arrests and cuffs defendant at defendant's truck for fishing misdemeanor, places him in patrol car intending to cite and release, inquires if there are weapons in the truck, defendant says guns, officer enters truck, removes guns, discovers defendant has a felony record, charged with unlawful possession a firearm; held: *Terry* frisk extends to a car if there is a reasonable suspicion that suspect is dangerous and may gain access to a weapon in the vehicle, *State v. Glossbrener,* 146 Wn.2d 670, 680-81 (2002), both components must be present, here there was no indication of dangerousness thus seizure of guns was improper, distinguishing *State v. Kennedy,* 107 Wn.2d 1 (1986), no exigent circumstance justifying search without a warrant existed as there was no true emergency, *State v. Hinshaw,* 149 Wn.App. 747, 753 (2009), even though only one officer was present; III.

***State v. Weyand***, 188 Wn.2d 804 (2017)

Police observe defendant leave a known drug house at 2:30 a.m., looks up and down the street twice then drives off, stopped, drugs found; held: a reasonable observer would not have grounds to believe that a crime was occurring or was about to occur, reliance upon "furtive movements" is "problematic;" reasonable suspicion must be individualized to the person being stopped, leaving a known drug house is no more than being located in a high crime area which is insufficient, *State v. Larson,* 93 Wn.2d 638, 645 (1980), *State v. Fuentes,* 183 Wn.2d 149 (2015), *State v. Richardson,* 64 Wn.App. 693 (1992), *State v. Doughty,* 170 Wn.2d 57 (2010), *State v.*

*Diluzio*, 162 Wn.App. 585 (2011), *State v. Johnson*, 8 Wn.App.2d 728 (2019), *cf.:* *State v. Kennedy*, 107 Wn.2d 1 (1986); 9-0.

***State v. Muhammad***, 4 Wn.App.2d 31 (2018)

Following homicide police view surveillance video, see a "distinctive" car approached by the victim shortly after which her body is found, three days later officer observes the distinctive car, identified defendant-driver and released him, resulting in further investigation and ultimately arrest and conviction; held: a *Terry* stop of a car is permitted where there is a substantial possibility that criminal conduct has occurred, is not limited to a crime in progress, *State v. Snapp*, 174 Wn.2d 177, 198 (2012), a temporary seizure of property based on a reasonable and articulable suspicion of criminal activity and the object's connection to a crime is lawful, *United States v. Van Leeuwen*, 397 U.S. 249, 25 L.Ed.2d 282 (1970), *State v. Jackson*, 82 Wn.App. 594, 605-06 (1996); *reversed, in part, on other grounds, State v. Muhammad*, 194 Wn.2d 577 (2019); III.

***State v. Tarango***, 7 Wn.App.2d 425 (2019)

Citizen calls 911, identifies himself, reports that there is a man with a gun in a car in a parking lot, police observe car which drives off, police stop car, find gun, learn that defendant has a felony conviction, defendant is convicted of felon in possession of a firearm; held: possession of a firearm in public is insufficient, standing alone, to support an investigatory stop, *Florida v. J.L.*, 529 U.S. 266, 146 L.Ed.2d 254 (2000), *State v. Cardenas-Muratalla*, 179 Wn.App. 307 (2013); III.

***State v. Martin***, 13 Wn.App.2d 625 (2020)

Police are called about a man sleeping in a coffee shop, officer approaches, attempts to awaken defendant, notices the end of a metal utensil sticking out of his pocket, removes the utensil which is a cook spoon with residue, continues searching, finds drugs; held: there was no evidence that a crime had been committed justifying a stop and frisk, coffee shop had not stated that defendant was trespassing, officer's belief that awakening sleeping person might cause a safety concern to other patrons is without support from the record, could have asked other customers to move away; even if the officer was conducting a criminal investigation, the removal of the spoon exceeded the scope of a limited pat-down, *State v. Setterstrom*, 163 Wn.2d 621 (2008), *State v. Horton*, 136 Wn.App. 29 (2006), *State v. Russell*, 180 Wn.2d 860 (2014), *State v. Garvin*, 166 Wn.2d 242 (2009), *State v. Broadnax*, 98 Wn.2d 289 (1982); because officer's actions were not "totally divorced" from a criminal investigation, *State v. Boisselle*, 194 Wn.2d 1, 14 (2019), **community caretaking function** does not justify the search and seizure; I.

***State v. Pines***, 17 Wn.App.2d 483 (2021)

Officer recognizes defendant and was aware of a bulletin a month earlier stating he had a warrant, three officers follow him into a restaurant, tackle and handcuff him, observe his hand move towards his waistline, defendant says he has a gun, police seize gun, verify warrant, defendant is convicted of unlawful possession of a firearm; held: police did not see a weapon, did not testify they feared for their safety, *Terry* stop requires a reasonable safety concern to justify a protective frisk, *State v. Duncan*, 146 Wn.2d 166, 172 (2002), *State v. Walker*,

66 Wn.App. 622 (1992), seizure exceeded scope of valid *Terry* stop, distinguishing *State v. Mitchell*, 80 Wn.App. 143 (1995); I.

# SEARCH
## Use of Force

***State v. Young***, 15 Wn.App. 581 (1976)

Police may use reasonable, but not excessive, force in preventing destruction or concealment of evidence; police may constrict throat, pinch nose of arrested suspect attempting to swallow balloons.

***State v. Williams***, 16 Wn.App. 868 (1977)

Choking, preventing breathing, or obstructing blood supply to head is excessive force, *cf.:* *State v. Young*, 15 Wn.App. 581 (1976).

***State v. Taplin***, 36 Wn.App. 664 (1984)

Police order defendant to spit out balloons, he refuses; officer grabs defendant's nose, other officer chokes defendant; held: as long as suspect can breathe, force is not excessive, *State v. Young*, 15 Wn.App. 581 (1976), *State v. Williams*, 16 Wn.App. 868 (1977); I.

***Winston v. Lee***, 84 L.Ed.2d 662 (1985)

State seeks court order to permit operation on defendant under general anesthesia, to remove a bullet from defendant's body to use as evidence of attempted robbery; held: applying balancing test of medical risks versus state's compelling need to obtain evidence, operation in this case would violate defendant's right to privacy; 9-0.

# SEARCH
## Warrant

***State v. Trinidad***, 23 Wn.App. 418 (1979)

Search pursuant to arrest warrant which had previously been quashed is improper even if police reasonably believe warrant is extant, *but see:* *Arizona v. Evans*, 131 L.Ed.2d 34 (1995); III.

***Ybarra v. Illinois***, 62 L.Ed.2d 238 (1979)

Warrant to search bar does not extend to search of patrons; 6-3.

***State v. Frye***, 26 Wn.App. 276 (1980), *overruled, on other grounds, State v. Rivera*, 76 Wn.App. 519 (1995)

To attack affidavit, must show deliberate falsehood or reckless disregard for truth; search of vehicle okay even if affidavit did not concern vehicle, only residence, *but see*: *State v. Niedergang*, 43 Wn.App. 656 (1986); II.

***State v. Higby***, 26 Wn.App. 457 (1980)

Affidavit establishes one sale two weeks prior to application for warrant; held: stale, no probable cause, *State v. Young*, 62 Wn.App. 895, 903 (1991), *see*: *State v. Spencer*, 9 Wn.App. 95 (1973), *State v. Maddox*, 152 Wn.2d 499 (2004), *but see: State v. Perez*, 92 Wn.App. 1, 8-9 (1999); affidavit further stated that unnamed informant who was known to officer to be reliable saw marijuana six months previously, held does not meet *Aguilar* test as unnamed, insufficient indicia of reliability; II.

***Seattle v. See***, 26 Wn.App. 891 (1980)

Inspection warrant (fire department) may be issued upon finding of probable cause based upon a showing that reasonable legislative or administrative standards for conducting an inspection are satisfied with respect to a particular establishment; *see*: *Camara v. Municipal Court*, 18 L.Ed.2d 930 (1967); *See v. Seattle*, 18 L.Ed.2d 943 (1967); administrative warrant cannot be used once inspectors focus their attention on assembling proof of a crime; *see*: *Michigan v. Tyler*, 59 L.Ed.2d 486 (1978); I.

***State v. Mathiesen***, 27 Wn.App. 257 (1980)

Trial court may excise portions of affidavit in support of a warrant to prevent disclosure of informant, but must release the remainder of affidavit to defense; court may not seal entire affidavit; I.

***State v. Melin***, 27 Wn.App. 589 (1980)

Police, executing a search warrant on a residence, stop a car which approaches residence and search it; held: police may stop vehicle approaching scene to prevent interference, but may not search, therefore evidence suppressed; I.

***State v. Parker***, 28 Wn.App. 425 (1981)

Fact that copy of warrant served on defendant was unsigned and undated, when original had been signed and dated, is not grounds to suppress absent showing of prejudice, *State v. Temple*, 170 Wn.App. 156, 161-62 (2012), *cf.: State v. Linder*, 190 Wn.App. 638 (2015); III.

***Seattle v. Leach***, 29 Wn.App. 81 (1981)

Administrative search warrant affidavit must include either specific evidence of an existing violation of health or safety codes or a description of a general inspection program; I.

***State v. Larson***, 29 Wn.App. 669 (1981)

Affidavit fails to establish reliability of informant, states no dates when "recent purchases" of drugs were made, alleges that a named person was arrested with marijuana in his possession after leaving defendant's residence without indicating that he did not have marijuana on his person when he entered, all fatally defective; III.

***State v. Seagull***, 95 Wn.2d 898 (1981)

Police officer, investigating an unrelated matter, knocks on door, receives no response, knows from prior experience that occupants can't hear knock on front door, proceeds toward back door, observes what he believes to be marijuana plant but which turned out to be tomatoes, gets warrant, seizes marijuana in a greenhouse; held: officer had the right to go toward back door as curtilage may be impliedly open to public, *see:* *State v. Chausee*, 72 Wn.App. 704 (1994), *cf.: Florida v. Jardines*, 569 U.S. 1, 185 L.Ed.2d 495 (2013), *Collins v. Virginia*, 584 U.S. ___, 138 S.Ct. 1663, 1670 (2018); tomato plants were in "open view" (distinguished from plain view, wherein there is an invasion; here there is no invasion), *see:* *State v. Creegan*, 123 Wn.App. 718 (2004); innocent but mistaken belief that tomatoes are marijuana does not invalidate warrant (N.B. affidavit claimed officer had eight years' experience observing marijuana); *affirms* *State v. Seagull*, 26 Wn.App. 58 (1980); 9-0.

*Michigan v. Summers*, 452 U.S.692, 69 L.Ed.2d 340 (1981)

Police, executing warrant, encounter defendant leaving his residence, require him to return to house, detain him while searching, find drugs in house, then search defendant and find drugs on his person, held: existence of warrant justified detention of occupant of home while search is conducted, *Muehler v. Mena*, 544 U.S. 93, 161 L.Ed.2d 299 (2005), *but see: Bailey v. United States*, 568 U.S. 186, 185 L.Ed.2d 19 (2013), and, upon finding contraband in house, justifies arrest and search of occupant on probable cause; this type of detention is "less intrusive than an arrest," *Illinois v. McArthur*, 148 L.Ed.2d 838 (2001); 6-3.

***State v. Maffeo***, 31 Wn.App. 198 (1982)

A recent sale of drugs supports an inference that more drugs will be found at the place of sale; II.

***State v. Lingo***, 32 Wn.App. 638 (1982)

Warrant specifying "any and all evidence of assault and rape including but not limited to bedding . . ." does not authorize a general search, *State v. Clark*, 143 Wn.2d 701, 753-55 (2001), *State v. Askham*, 120 Wn.App. 872, 877-80 (2004); II.

***State v. Van Pilon***, 32 Wn.App. 944 (1982)

Purse containing items taken from victim was found in a van which was searched pursuant to a warrant authorizing a search for items showing ownership and control of the van; held: search was within the scope of the warrant, since the purse was a logical repository for such items.

***State v. Huff***, 33 Wn.App. 304 (1982)

60 hours between informants' observations and service of warrant is not stale; warrant authorizing search of residence and search of "John Doe" is adequate to search resident; III.

***State v. Fisher***, 96 Wn.2d 962 (1982)

Where warrant incorrectly lists address of place to be searched, it is sufficient if the description is such that the officer can, with reasonable effort, ascertain and identify the place intended, *State v. Bohan*, 72 Wn.App. 335 (1993), *State v. Dodson* 110 Wn.App. 112, 124-25 (2002), *State v. Lane*, 56 Wn.App. 286 (1989); 6-3.

***State v. Broadnax***, 98 Wn.2d 289 (1982)

Warrant to search residence does not authorize search of all persons present, *State v. Smith*, 145 Wn.App. 268 (2008); extends *Ybarra v. Illinois*, 62 L.Ed.2d 238 (1979); 5-3.

***State v. Mannhalt***, 33 Wn.App. 696 (1983), *reversed, on other grounds, Mannhalt v. Reed,* 847 F.2d 576 (1998)

Police appear before magistrate who hears and electronically records testimony and issues search warrant; held: signed affidavit is not required to support a warrant, *see also: State v. Ettenhofer*, 119 Wn.App. 300 (2003); use of sworn testimony, contemporaneously recorded, is substantial compliance with CrR 2.3(c); I.

***State v. Bonaparte***, 34 Wn.App. 285 (1983)

Marital privilege does not bar a spouse's statements offered to demonstrate probable cause; II; *see*: *State v. Cahoon*, 59 Wn.App. 606 (1990).

***State v. Kuberka***, 35 Wn.App. 909 (1983)

Information relied upon by a magistrate in issuing a search warrant need not be recorded contemporaneously with the issuance of the warrant, JCrR 2.10, *distinguishing* Fed. R. Crim. Pro. 41(c), *but see*: *State v. Myers*, 117 Wn.2d 332 (1991), *see: State v. Munoz Garcia*, 140 Wn.App. 609 (2007); where affidavit establishes that suspect obtained travelers checks from one bank under one name and then tried to do the same thing 45 minutes later at a bank in another town, when police question suspect he gives another false name, police search suspect and find car keys that fit a car parked nearby, warrant is proper to search car as there was a "fair probability" that suspect drove to second bank and that redemption receipts from first bank would be in car; II.

***State v. Hightower***, 36 Wn.App. 536 (1984)

Warrant affidavit stated victim identified defendant as person who shot her, witnesses described defendant's car, bullets smashed victim's side window, glass fragments were gathered

at scene, FBI lab said similar glass fragment could have been transferred to defendant's car via his shoes, held: sufficient to raise "inference of probable cause" to search car; I.

***State v. Stephens***, 37 Wn.App. 76 (1984)

Officer states in affidavit that he observed defendant water marijuana plants, at suppression hearing, officer testified he did not observe it, but saw defendant approach plants, then later observed that plants had been watered; held: statement in warrant was either a deliberate falsehood requiring excision, *Franks v. Delaware*, 57 L.Ed.2d 667 (1978), *State v. Larson*, 26 Wn.App. 564 (1980) or a conclusion without the facts leading to the conclusion, *United States v. Ventresca*, 13 L.Ed.2d 684 (1965); fact that magistrate would have issued warrant if he had been given basis for officer's conclusion is irrelevant as reviewing court may consider only information that was before the magistrate, *Seattle v. Leach*, 29 Wn.App. 81 (1981), *cf.: State v. Gore*, 143 Wn.2d 288, 295-302 (2001) ; 2-1; III.

***State v. Anderson***, 37 Wn.App. 157 (1984)

Affidavit asserts that residents of searched premises were customers of the store burglarized, smoked cigarettes of the type stolen and that police observed soda pop, in a refrigerator outside of the premises, similar to that stolen, held: no substantial basis for probable cause, *cf.: State v. Condon*, 72 Wn.App. 638, 642-4 (1993); I.

***State v. Worth***, 37 Wn.App. 889 (1984)

Warrant authorizes search of premises and person of owner of premises; police serve warrant, arrest owner, search purse belonging to nonowner occupant, find bindle of cocaine; held: search of purse exceeded scope of warrant, *State v. Campbell*, 166 Wn.App. 464 (2011); police may detain occupants not listed in warrant and may, if suspicious activities justify it, search for weapons, but may not be more intrusive, *c.f: State v. Hill*, 123 Wn.2d 641 (1994), *State v. Carter*, 79 Wn.App. 154 (1995); II.

***State v. Weaver***, 38 Wn.App. 17 (1984)

Police serve warrant for drugs and papers "showing dominion and control," seize paraphernalia, pick up a cardboard box to carry seized items, discover defendant's name on box, later discover drugs hidden in box; held: box was "paper" pursuant to warrant and was properly seized; 2-1; I.

***State v. Reid***, 38 Wn.App. 203 (1984)

Police obtain warrant for specific items "and any other evidence of a homicide," seize photographs not specified nor clearly evidence of homicide; held: "any other evidence" is sufficiently specific to limit officers' discretion, *State v. Lingo*, 32 Wn.App. 638, 641 (1982), *State v. Clark*, 143 Wn.2d 731, 753-55 (2001), *State v. Askham*, 120 Wn.App. 872, 877-80 (2004); photos were properly seized although not described in warrant as they would aid in apprehension or conviction, *State v. Turner*, 18 Wn.App. 727, 729 (1977); 2-1, I.

***State v. Neslund***, 103 Wn.2d 79 (1984)

Special inquiry judge, RCW 10.27, is not precluded from issuing a search warrant, *State v. Reeder*, 184 Wn.2d 805 (2015); 7-2.

***United States v. Leon***, 82 L.Ed.2d 677 (1984)

Good faith exception: the Fourth Amendment exclusionary rule should not be applied to bar the use of evidence seized pursuant to officer's reasonable reliance on a warrant issued by a neutral magistrate even if warrant is determined to be invalid; suppression remains a remedy if the magistrate was misled by an affidavit that affiant knew was false or acted with reckless disregard for truth, or if magistrate abandoned his detached and neutral judicial role, or if affiant so lacked indicia of probable cause to render official belief in its existence entirely unreasonable, or if the warrant was facially defective; *accord*: *Massachusetts v. Sheppard*, 82 L.Ed.2d 737 (1984), *Herring v. United States*, 172 L.Ed.2d 496 (2009), *but see: State v. Afana*, 169 Wn.2d 169, 179-84 (2010); 6-3.

***State v. Christiansen***, 40 Wn.App. 249 (1985)

Affidavit asserts aerial surveillance disclosed growing marijuana, legal description of plot where marijuana observed, warrant authorized search of 60 acres, marijuana found at other locations; held: reasonable to conclude that marijuana would be found at other locations on the premises, *cf.: State v. Klinger*, 96 Wn.App. 619, 623-29 (1999); legal description is sufficient; 2-1; III.

***State v. Ludvik***, 40 Wn.App. 257 (1985)

Heavy traffic at a residence plus observation of a baggie containing a dark substance exchanged for money plus another person leaving residence with baggie with dark substance equals probable cause, *see*: *State v. Gross*, 57 Wn.App. 549 (1990), *overruled, on other grounds*, *State v. Thein*, 138 Wn.2d 133 (1999); III.

***State v. Rangitsch***, 40 Wn.App. 771 (1985)

Affidavit asserts that, five days previously, defendant appeared to be under influence of drugs, a witness saw defendant shoot up, officer's opinion is that drug users commonly have drugs in their homes and cars held insufficient to establish probable cause, *State v. Thein*, 138 Wn.2d 133 (1999), *State v. Dalton*, 73 Wn.App. 132 (1994), *State v. Klinger*, 96 Wn.App. 619, 623-29 (1999), *State v. G.M.V.*, 135 Wn.App. 366 (2006), *cf.: State v. Condon*, 72 Wn.App. 638, 644 (1993), *State v. Dunn*, 186 Wn.App. 889 (2015); I.

***State v. Rollie M.***, 41 Wn.App. 55 (1985)

Warrant authorizing search of "John Doe," without other identifying information such as occupation, personal appearance, peculiarities or place of residence, lacks particularity and is invalid, *see: State v. Carter*, 79 Wn.App. 154 (1995), *Groh v. Ramirez*, 157 L.Ed.2d 1068 (2004); III.

***State v. Alexander***, 41 Wn.App. 152 (1985)

Police serve valid warrant on single family dwelling; upon execution of warrant, police learn that persons other than suspect lives in dwelling, search two bedrooms, obtain drugs; held: ***multiple unit exception***: if building appears to be a single occupancy structure, and neither the affiant nor officers knew or had reason to know of the multiple occupancy until execution of warrant was underway, reasonable efforts must be made to limit the search to the subunit most

likely connected to the activity described in the warrant; ***community living exception***: where several persons share the premises in common but have separate bedrooms, a single warrant describing the entire premises is valid and will justify a search of the entire premises; here, community living exception should have been applied by trial court, thus search is valid; *see*: W. LaFave, *Search and Seizure* ' 4.5(d)(1978); 11 ALR 3d 1330; II.

***State v. Douglas S.***, 42 Wn.App. 138 (1985)

"John Doe" warrant cannot authorize the search of any individual who resides in the premises described in the warrant, *see: State v. Carter*, 79 Wn.App. 154 (1995), *State v. Muñoz Garcia*, 140 Wn.App. 609 (2007); where a person is present at a location police are searching pursuant to a valid warrant, that person may be frisked only if police have reasonable grounds to believe he is armed and dangerous, *State v. Broadnax*, 98 Wn.2d 289 (1982), *State v. Smith*, 145 Wn.App. 268 (2008); where a minor lives in his parents' home, dominion and control is not established by mere residence; III.

***State v. Cord***, 103 Wn.2d 361 (1985)

Affidavit asserted that sheriff had previously identified marijuana from an airplane ten times and that he flew over defendant's property and identified marijuana; affidavit failed to state altitude (3500 ft.); held: negligent omission of a material fact does not invalidate warrant if affidavit establishes probable cause and omission was neither intentional nor reckless, *State v. Clark*, 124 Wn.2d 90, 105-6 (1993); 7-2.

***State v. O'Neill***, 103 Wn.2d 853 (1985)

Local police may use information obtained by federal officers from electronic eavesdropping conducted by them in accordance with federal law, even if the information would be inadmissible in state courts, to establish probable cause to obtain a state court order authorizing electronic eavesdropping, *distinguishing State v. Williams*, 94 Wn.2d 531 (1980); 5-2.

***State v. Hansen***, 42 Wn.App. 755 (1986)

Where marijuana is found growing outside the premises, warrant may authorize search inside premises, *State v. Helmka*, 86 Wn.2d 91 (1975), *State v. Klinger*, 96 Wn.App. 619, 623-29 (1999); III.

***State v. Chasengnou***, 43 Wn.App. 379 (1986)

Affidavit is sufficient if it establishes that a prior warrantless search was a valid border search; border searches are not subject to Fourth Amendment analysis, *United States v. Ramsey*, 52 L.Ed.2d 617 (1977); where affidavit establishes probable cause to search premises for a parcel containing drugs, warrant may authorize search of entire premises, *State v. Olson*, 32 Wn.App. 555 (1982); I.

***State v. Irwin***, 43 Wn.App. 553 (1986)

Requirement of RCW 9.73.130(3)(f) that warrant for surreptitious tape recording contain particular statement showing that normal investigative procedures have failed or reasonably appear to be unlikely to succeed met here where property enclosed by fence, guard dogs

protected area, and previous attempts to gain access to neighboring property failed; suppression is not a remedy for failure to give notice to persons whose conversations were recorded within 30 days, RCW 9.73.140; suppression is not a remedy for failure of judge authorizing warrant to give notice to Administrator for the Courts, RCW 9.73.120; I.

***State v. Niedergang***, 43 Wn.App. 656 (1986)

Warrant authorizes search of residence and curtilage; police seize drugs from car parked in front of residence; held: curtilage is the area to which extends the intimate activity associated with the sanctity of the home, *Oliver v. United States*, 80 L.Ed.2d 214, 225 (1984), and depends upon the circumstances, including proximity to home, use and expectations of privacy; here, parked car was not within curtilage, as it was set off from residence by curb, and anyone could have parked there, thus evidence suppressed; *accord*: *State v. Kelley*, 52 Wn.App. 581 (1988); II.

***State v. Sterling***, 43 Wn.App. 846 (1986)

Affidavit alleging anonymous tip of marijuana growing operation plus police observation of blacked out windows in garage plus vent on roof of garage plus sound of loud electric motor plus observation that garage door had not been opened for some time plus observation that garage was walled off from rest of house plus 400-500% increase in power consumption plus defendant's prior drug convictions plus officer's experience that power consumption history is indicative of marijuana growing operation established probable cause, *distinguishing* *State v. McPherson*, 40 Wn.App. 298 (1985); *but see*: *State v. Whik*, 44 Wn.App. 215 (1986), *State v. Rakosky*, 79 Wn.App. 229 (1995), *Pers. Restraint of Maxfield*, 133 Wn.2d 332 (1997); *cf.*: *State v. Huft*, 106 Wn.2d 206 (1986); I.

***State v. Stock***, 44 Wn.App. 467 (1986)

Even though an information is filed in superior court, district court judge has jurisdiction to issue a search warrant; I.

***State v. Unthoff***, 45 Wn.App. 261 (1986)

District court judge has jurisdiction to issue a search warrant anywhere within the county, with or without the prosecutor's approval, but not outside county, *State v. Davidson*, 26 Wn.App. 623 (1980); I.

***State v. Hashman***, 46 Wn.App. 211 (1986)

Smell of growing marijuana plus bluish light around a covered window plus mold and mildew along the ceiling of the wall adjacent to locked room establishes probable cause for warrant, *State v. Johnson*, 79 Wn.App. 776 (1995); II.

***Maryland v. Garrison***, 94 L.Ed.2d 72 (1987)

Police obtain a warrant to search the third floor apartment in a building; after serving warrant, searching an apartment and seizing drugs, police discover that there were two apartments on third floor and they searched the wrong one; held: warrant was valid when issued, albeit it was determined later that it was ambiguous; because the facts available to the officers reasonably led them to believe that there was only one apartment on the third floor and warrant was executed in a reasonable manner, the motion to suppress was properly denied; 6-3.

***State v. Coates***, 107 Wn.2d 882 (1987)

Where illegally obtained information is included in an affidavit, but, when excised, there is still probable cause to search, then the warrant is valid; 9-0.

***State v. Petty***, 48 Wn.App. 615 (1987)

Informant's information is not fatally stale where informant observed growing marijuana two weeks prior to search and police verify by odor day before search, *see:* *State v. Patterson*, 37 Wn.App. 275 (1984), *State v. Hett*, 31 Wn.App. 849 (1982); I.

***State v. Pourtes***, 49 WnApp. 579 (1987)

Warrant authorizing search of residence, outbuildings and real and personal property on the property does not authorize search of a vehicle parked on the shoulder in front of the residence as the street and its shoulder are not within the curtilage of the residence; police moving vehicle onto the property does not validate the search; III.

***State v. Thetford***, 109 Wn.2d 392 (1987)

When an informant's involvement with and control by the police is so great that he is a *de facto* police officer, then he is no longer protected by the informer's privilege, RCW 5.60.060(5), CrR 4.7(f)(2); merely paying the informant does not remove the informant from the informant's privilege; where the defense has correctly identified the informant, then the informant is no longer protected by the informant's privilege, *Rovario v. United States*, 1 L.Ed.2d 639, 644-645 (1957); where a *de facto* police officer-informant makes reckless or false statements to a police officer-affiant, then those statements shall be excised from the affidavit in support of the warrant; 9-0.

***State v. Vonhof***, 51 Wn.App. 33 (1988)

Affiant states that he smelled growing marijuana, specifically described the odor, and stated that he had smelled it ten times before held to establish probable cause, *State v. Johnson*, 79 Wn.App. 776 (1995); *cf.:* *State v. Rose*, 75 Wn.App. 28, 39-41 (1994); III.

***State v. Murray***, 110 Wn.2d 706 (1988)

Affidavit states that tipster told reliable informant that tipster saw marijuana growing in basement of a house, and that police obtained power records establishing double average power consumption, police heard exhaust fan operating in basement at 11 p.m. with no steam escaping thus inconsistent with showering, and that use of an infrared viewing device established high heat in basement area consistent with grow lights; held: tipster meets basis of knowledge prong as he saw marijuana, *State v. Creelman*, 75 Wn.App. 490 (1994); police corroboration establishes basis of knowledge prong, *State v. Corvin*, 116 Wn.App. 752, 758-601 (2003), *State v. Atchley*, 142 Wn.App. 147, 160-64 (2007), *cf.:* *State v. Rakosky*, 79 Wn.App. 229 (1995); failure of defense counsel to cite authority in support of argument that obtaining power records without a warrant and failure to elicit evidence that police trespassed when using infrared viewing device precludes review on those issues; *see:* *Pers. Restraint of Maxfield*, 133 Wn.2d 332 (1997); 9-0.

***State v. Martinez***, 51 Wn.App. 397 (1988)

Warrant authorizes search of (1) "Mex/male 20's, 5'8", med build, curly blk hair" and (2) "Mex/male 20's, 5'6", heavy build, blk hair" at specific residence; police serve warrant at residence, search defendant who meets description; held: because warrant limited search to described persons who lived at particular address, then descriptions were adequate and reasonable; 2-1, III.

***State v. Smith***, 52 Wn.App. 27 (1988)

Search warrant is issued by an arguably unqualified court commissioner; held: because the commissioner was in actual possession of his office, exercising its functions and discharging its duties under color of title, he is a *de facto* officer and can only be challenged through a quo warranto proceeding, thus warrant was valid, *State v. Franks*, 7 Wn.App. 594 (1972); I.

***State v. Kelley***, 52 Wn.App. 581 (1988)

Warrant authorizing search of house and carport is insufficient to support search of outbuildings, *State v. Niedergang*, 43 Wn.App. 656 (1986), *State v. Gebaroff*, 87 Wn.App. 11 (1997), *cf.: State v. Llamas-Villa*, 67 Wn.App. 448 (1992), *State v. Witkowski*, 3 Wn.App.2d 318 (2018), where affidavit supports probable cause to search outbuildings, it does not then follow that probable cause exists to search the house; II.

***State v. J-R Distributors***, 111 Wn.2d 764 (1988)

A search warrant affidavit for purported First Amendment materials is tested under the same probable cause standard as for other types of materials; a large scale seizure of allegedly obscene materials constitutes an impermissible prior restraint unless preceded by an adversary hearing on the issue of obscenity; 9-0.

***State v. Stanphill***, 53 Wn.App. 623 (1989)

Where a federal warrant is served, apply totality of the circumstances standard, *Illinois v. Gates*, 76 L.Ed.2d 527 (1983), even though evidence is used in state court; II.

***State v. Morse***, 55 Wn.App. 188 (1989)

Affidavit states that police obtained a photograph depicting a marijuana grow operation inside a metal building, at suppression hearing defendant testifies that photographs were of another operation; trial court suppresses, ruling that affidavit contained material misstatement of fact; held: remand for court to determine if misstatement was made deliberately or recklessly and, if so, does remainder of warrant affidavit still establish probable cause; III.

***State v. Dobyns***, 55 Wn.App. 609 (1989)

Six weeks between informant's observations and service of warrant is not stale for marijuana growing operation where affidavit states that it takes four months for plants to mature, *see: State v. Hall*, 53 Wn.App. 296 (1989); I.

***State v. Stone***, 56 Wn.App. 153 (1989)

Warrant to obtain unlisted telephone number is based in part upon license plate number obtained by an unidentified person; held: where a citizen provides nonaccusatory information

which does not describe criminal activity, and the nature of the information strongly suggests it was obtained by personal observation, then credibility and reliability need not be demonstrated, *United States v. Melvin*, 596 F.2d 492 (1st Cir. 1979), *State v. Nordlund*, 113 Wn.App. 171, 181 (2002), *see: State v. Howerton,* 187 Wn.App. 357 (2015); affidavit stated that a burglary occurred, jewelry taken, named neighbors observed a specifically described vehicle adjacent to residence on day of crime, later same vehicle is observed at another address from which defendant departed, police are aware that defendant had prior burglary convictions, had previously employed same method of operation, woman's jewelry observed in defendant's vehicle; held: a reasonably prudent person would conclude evidence of burglary would be found in vehicle and residence; III.

***State v. Lane***, 56 Wn.App. 286 (1989)

Controlled buy is sufficient to establish probable cause without establishing reliability of informant where informant is strip searched prior to entry, upon return informant has drugs but not the money given by police, police surveil place during buy, and had previously observed known drug dealers and users go in on several occasions, *State v. Casto*, 39 Wn.App. 229 (1984); even though address on warrant is incorrect, police may consider other descriptive factors as long as a reasonable officer would know which place to search, *State v. Bohan*, 72 Wn.App. 335 (1993), *State v. Dodson*, 110 Wn.App. 112, 124-25 (2002); III.

***State v. Maxwell***, 114 Wn.2d 761 (1990)

Search warrant affidavit states that police telephoned public utility district and obtained power records of defendant; held: magistrate should not have considered this information, as public utility records may only be obtained by police if request is in writing, and if written request states that it is suspected that a particular person has committed a crime and that police have a reasonable belief that the records could determine whether the suspicion may be true, RCW 42.17.314, *In re Rosier*, 105 Wn.2d 606 (1986), *Pers. Restraint of Maxfield*, 133 Wn.2d 332 (1997), *reversing State v. Maxwell*, 55 Wn.App. 446 (1989); *cf.: State v. Maxfield*, 125 Wn.2d 378 (1994), *State v. Cole*, 128 Wn.2d 262, 289-91 (1995), *State v. Harlow*, 85 Wn.App. 557, 561-3 (1997); application for search warrant is a criminal proceeding for purpose of RCW 42.17.314; 9-0.

***State v. Gross***, 57 Wn.App. 549 (1990), *overruled, on other grounds, State v. Thein*, 138 Wn.2d 133 (1999)

Letter from suspect revealing ongoing drug trafficking is a basis for believing that drugs are in suspect's home/place of business, *distinguishing State v. Rangitsch*, 40 Wn.App. 771 (1985), as a drug trafficker is a greater evil than mere drug user, increasing governmental justification to search, and if homes of drug users could be searched as readily as traffickers, a much greater invasion of privacy would result, *but see: State v. Dalton*, 73 Wn.App. 132, 139-40 (1994), *State v. Klinger*, 96 Wn.App. 619, 623-29 (1999); I.

***State v. Ridgway***, 57 Wn.App. 915 (1990)

Tax assessor observes marijuana, returns to take photograph which he gives to police; warrant states that police, trained in identifying marijuana, believe photo to be of marijuana; held: ambiguity was insufficient to issue warrant; II.

***State v. Salazar***, 59 Wn.App. 202 (1990)

Warrant describes a particular duplex and "a newer white GM car with temporary license sticker in the rear window"; affidavit recites that informant observed cocaine in vehicle; vehicle stopped near duplex, drugs found; held: implicit from affidavit and warrant that there was a nexus between duplex and vehicle, thus description of vehicle was not overbroad, *State v. Smith*, 39 Wn.App. 642, 648-49 (1984); even if description was insufficient, police acted in good faith in serving warrant, *Massachusetts v. Sheppard*, 82 L.Ed.2d 737 (1984), *United States v. Leon*, 82 L.Ed.2d 677 (1984), *State v. Afana*, 169 Wn.2d 169, 179-84 (2010); I.

***State v. Myers***, 117 Wn.2d 332 (1991)

Recording in support of telephonic warrant, CrR 2.3(c), was either erased or erroneously not recorded, magistrate does not clearly recall the grounds he used to issue warrant; held: parties may reconstruct recording if omission in contemporaneous recording does not impair reviewing court's ability to ascertain what magistrate considered, *State v. Muñoz Garcia*, 140 Wn.App. 609 (2007); entire sworn statement may only be reconstructed if detailed and specific evidence of a disinterested person, like the magistrate or a court clerk, corroborates the reconstruction; accord: *State v. Smith*, 87 Wn.App. 254 (1997).

***State v. Young***, 60 Wn.App. 95 (1991)

Affidavit's information that items were seen one year before warrant is signed is stale, *State v. Higby*, 26 Wn.App. 457 (1980), *State v. Young*, 62 Wn.App. 895, 903-4 (1991), *cf.: State v. Garbaccio*, 151 Wn.App. 716, 727-30 (2009); I.

***State v. Smith***, 60 Wn.App. 592 (1991)

Affidavit establishes "pedophile profile," that defendant had written letters describing his possession of child pornography 14-16 years previously, and that defendant's name was on a list seized by Portuguese police from a raid on a child porn distributor in Lisbon; held: when letters were written, child pornography was not illegal, inference is that citizens obeyed the law and destroyed materials when made unlawful; "fellow officer" rule probably does not apply to foreign police; affidavit fails to establish a specific date of defendant's possession or receipt of child porn, thus information stale, *cf.: State v. Hosier*, 124 Wn.App. 696, 711-16 (2004), *aff'd, on other grounds*, 157 Wn.2d 1 (2006), *State v. Garbaccio*, 151 Wn.App. 716, 727-30 (2009); nothing establishes that defendant fits pedophile profile, as there is no evidence of defendant's recent criminal conduct; I.

***State v. Colin***, 61 Wn.App. 111 (1991)

Warrant is executed authorizing search of man meeting defendant's description, police conduct strip search without touching defendant in private room, observed by officers of same sex, find drugs in defendant's underwear; held: search did not exceed limitations of RCW 10.79.080, 10.79.100(1), (2), (3) and, while strip search was not authorized by warrant, was justified by state's interest in obtaining evidence, *see: State v. Hampton*, 114 Wn.App. 486 (2002); III.

***State v. Wright***, 61 Wn.App. 819 (1991)

Police, executing warrant to search for and seize vibrator and to "photograph crime scene," seize vibrator and, while photographing, observe bag which appears to be handgun case, open it, observe gun; held: opening gun case was "no more than a de minimis invasion of right to privacy" and not a general search that exceeds scope of warrant, *Coolidge v. New Hampshire*, 29 L.Ed.2d 564 (1971); photographs taken during a search pursuant to a warrant is not a seizure any more than the knowledge the officers gained during execution of the warrant as long as the observation was otherwise legally made and the officers did not exceed the scope of the warrant by taking the photographs; I.

***State v. Bohannon***, 62 Wn.App. 462 (1991)

Affiant claims suspect took obscene photos, put them in locker, six months later suspect said photos still there, two months later warrant is issued and executed, held: keeping photos in locker for six months supports logical inference they were still there two months thereafter, thus not stale, *see also: State v. Garbaccio*, 151 Wn.App. 716, 727-30 (2009); II.

***State v. Garcia***, 63 Wn.App. 868 (1992)

Informant's report of bindles plus odor of diesel fuel plus numerous phone calls during all hours establish probable cause to search for cocaine where officer testifies diesel fuel is used in manufacture and transport of cocaine, and defense presents no evidence to contrary, *State v. Courcy*, 48 Wn.App. 326, 329 (1987), *State v. Lair*, 95 Wn.2d 706, 716-7 (1981); III.

***State v. Remboldt***, 64 Wn.App. 505 (1992)

Affidavit states officer smelled what he recognized from experience and training as marijuana; at suppression hearing, officer testified he had obtained many warrants based on smell, never wrong; defense chemist testifies that, based upon immaturity of plants seized, officer could not have smelled marijuana; court suppresses, determining that officer believed he smelled marijuana but was wrong; held: where trial court believed officer's testimony but adopted a subjective standard of probable cause based on technical information unavailable to issuing magistrate, magistrate did not abuse discretion, *see: State v. Lyons*, 160 Wn.App. 100 (2011), thus suppression reversed, *State v. Vonhof*, 51 Wn.App. 33, 41 (1989); *cf.: State v. Rose*, 75 Wn.App. 28, 39-41 (1994), *State v. Weller*, 76 Wn.App. 165, 168 (1994); III.

***State v. Garrison***, 118 Wn.2d 870 (1992)

37-page affidavit leaves out informant's statement that contraband had been moved; held: court cannot infer from the content of an omission that the omission was deliberate or reckless, even if omitted fact was crucial to finding of probable cause, disapproving *State v. Jones*, 55 Wn.App. 343 (1989); defense must prove deliberate falsehood or deliberate omission or reckless disregard of the truth, *Franks v. Delaware*, 57 L.Ed.2d 667 (1978), *State v. Chenoweth*, 160 Wn.2d 454, 479-81 (2007), *State v. Martinez*, 2 Wn.App.2d 55, 69-71 (2018), *see: State v. Atchley*, 142 Wn.App. 147, 157-60 (2007), after which court determines whether challenged information is necessary to finding of probable cause; fact that omitted statement tends to negate probable cause is not the proper inquiry, *see: State v. Clark*, 124 Wn.2d 90, 105-6 (1994), *State v. Gore*, 143 Wn.2d 388, 295-302 (2001), *State v. Clark*, 143 Wn.2d 731, 751-53 (2001), *State v. Jackson*, 111 Wn.App. 660, 678-80 (2002), 150 Wn.2d 251 (2003); 7-0.

***State v. Perrone***, 119 Wn.2d 538 (1992)

Affidavit establishes probable cause to search for child pornography, warrant authorizes seizure of child and adult pornography, police seize films, magazines, drawings and books, some involving children, trial court suppresses; held: "child pornography" in warrant is too broad, leaving too much to discretion of officer in deciding what to seize, as greater particularity is required where First Amendment considerations are concerned, *State v. Nordlund,* 113 Wn.App. 171, 181-86 (2002), *State v. Reep,* 161 Wn.2d 808 (2007), *State v. Besola,* 184 Wn.2d 605 (2015), *see: Fort Wayne Books, Inc. v. Indiana*, 103 L.Ed.2d 34 (1989), *State v. Barnes*, 85 Wn.App. 638, 659-62 (1997), *State v. Martinez,* 2 Wn.App.2d 55, 65-67 (2018), *State v. McKee,* 3 Wn.App.2d 11 (2018), *remanded, on other grounds,* 193 Wn.2d 271 (2019), *State v. Vance,* 9 Wn.App.2d 357 (2019), *cf.: State v. Friedrich,* 4 Wn.App.2d 945, 960-62 (2018); where warrant is found to be an unconstitutional general warrant, invalidity due to unlimited language of warrant taints all items seized without regard to whether they were specifically named, and thus redaction is inappropriate; here, extensive editing would be required to obtain potentially valid parts of warrant, which should not be done under severability doctrine; reverses *State v. Perrone*, 59 Wn.App. 687 (1990); 9-0.

***State v. Solberg***, 66 Wn.App. 66 (1992), *rev'd, on other grounds,* 122 Wn.2d 688 (1993)

Affidavit: increased power consumption consistent with four or five halide lamps, *State v. Dice*, 55 Wn.App. 489, 494 (1989), plus odor of marijuana outside residence based upon distinctive odor from past arrests and training, *State v. Wilke*, 55 Wn.App. 470, 476 (1989), *State v. Johnson,* 79 Wn.App. 776 (1995), plus windows blacked out plus mildew consistent with marijuana grow operation establish probable cause; *cf.: Pers. Restraint of Maxfield,* 133 Wn.2d 332 (1997); I.

***State v. Bittner***, 66 Wn.App. 541 (1992)

Affidavit states informant was with a friend who stopped at defendant's home, told informant he purchased drugs and showed drugs to informant; held: single unobserved transaction by an unidentified friend of informant uncorroborated by evidence with no effort to establish friend's reliability is insufficient to support search; I.

***State v. Llamas-Villa***, 67 Wn.App. 448 (1992)

Warrant authorizes search of apartment for drugs, police serve warrant, seize keys from suspect, leave apartment, observe door marked "storage" next to defendant's apartment door, enter locker with same number as defendant's apartment using keys seized, find drugs; held: locker was in same building, came with apartment, was not intentionally excluded from warrant, would have been included in warrant if police had known layout of building, thus locker was within scope of warrant, *State v. Witkowski*, 3 Wn.App.2d 318 (2018), *distinguishing State v. Kelley*, 52 Wn.App. 581 (1988), *cf.: State v. Boyer*, 124 Wn.App. 593 (2004); I.

***State v. Goodin***, 67 Wn.App. 623 (1992)

Police lack probable cause to search defendant's home for drugs, serve an arrest warrant on a co-occupant, find drugs in plain view; held: a pre-existing warrant may be served regardless of police motives; pretext search rule does not apply where there is a valid warrant, *State v.*

*Davis*, 35 Wn.App. 724, 727 (1983), *State v. Busig*, 119 Wn.App. 381 (2003), *cf.:* *State v. Chapin*, 75 Wn.App. 460, 464-9 (1994); II.

***State v. Riley***, 121 Wn.2d 22 (1993)

Warrant which permits seizure of broad categories of material that is not limited by reference to any specific crime is overbroad and invalid, *State v. Keodara*, 191 Wn.App. 305 (2015), *cf.:* *State v. Askham*, 120 Wn.App. 872, 877-80 (2004), *State v. McKee*, 3 Wn.App.2d 11 (2018), *State v. Scherf* 192 Wn.2d (2018), *State v. Hatt*, 11 Wn.App.2d 113 (2019); executing officer's personal knowledge of the crime being investigated may cure a warrant's description of the place to be searched, *State v. Smith*, 39 Wn.App. 642, 648-9 (1984), but may not cure an inadequacy in the things to be seized; an overbroad warrant that is not executed overbroadly does not validate the warrant; a specific affidavit that is not incorporated by reference in the warrant and is not attached to the warrant will not cure the warrant even if the executing officer has a copy of the affidavit, *State v. Higgins*, 136 Wn.App. 87 (2006), *see:* *State v. Kelley*, 52 Wn.App. 581 (1988), *State v. Stenson*, 132 Wn.2d 668, 695-96 (1997), *State v. Chambers*, 88 Wn.App. 640 (1997); 7-0.

***State v. Thomas***, 121 Wn.2d 504 (1993)

Search warrants for drugs must be executed within ten days of issuance under CrR 2.3 [and CrRLJ 2.3, *State v. Wallway*, 72 Wn.App. 407, 414-5 (1994)] and returned within three days of execution, RCW 69.50.509, affirming *State v. Thomas*, 65 Wn.App. 347 (1992); *cf.:* *State v. Kern*, 81 Wn.App. 308 (1996), *State v. Linder*, 190 Wn.App. 638 (2015); 8-0.

***State v. Kalakosky***, 121 Wn.2d 525 (1993)

A valid search warrant based upon probable cause is sufficient to obtain a blood sample from a suspect, no adversarial hearing is necessary; 9-0.

***State v. Kennedy***, 72 Wn.App. 244 (1993)

Affidavit: informant, meeting neither *Aguilar-Spinelli* test, claims defendant is a dealer plus defendant displaying at hotel large amount of cash plus drives car reported by informant plus shades on hotel window closed plus maids refused entrance plus strong chemical odor plus person who answered door appeared stoned plus presence of several cars and different people using hotel room are sufficiently probative to corroborate informant's information, and thus are not merely innocuous facts consistent with innocence; 2-1, II.

***State v. Bohan***, 72 Wn.App. 335 (1993)

In controlled buy, police watch informant enter apt. A-8, informant tells police it is apt. D-8, warrant authorizes search of D-8, when police arrive to serve warrant, they notice the error, serve warrant on A-8; held: information concerning location of premises based on officer's personal knowledge of location may be considered when a correct address is missing, *State v. Fisher*, 96 Wn.2d 962, 967 (1982), *State v. Lane*, 56 Wn.App. 286 (1989), *State v. Dodson*, 110 Wn.App. 112, 124-25 (2002); burden of proving reasonable probability of mistaken search lies with moving party, *Fisher* at 967, *State v. Trasvina*, 16 Wn.App. 519, 623 (1976); here, detective's knowledge was sufficient to cure defect.

***State v. Condon***, 72 Wn.App. 638, 642-4 (1993)

Affidavit consisting of statements from murder victim's wife that there were physical conflicts between defendant and victim, defendant was upset with victim on day of homicide, defendant was watching ranch where homicide occurred, defendant stayed at ranch for several days after homicide in spite of the fact that he was usually fearful of confrontations with victim, and defendant told victim's wife that she would have to say they were together night of homicide establishes probable cause, as magistrate could reasonably infer that defendant had a strong motive for the crime and his behavior demonstrated guilty knowledge, *distinguishing* *State v. Anderson*, 37 Wn.App. 157 (1984); where object of search is a weapon, it is reasonable to infer that the weapon may be found at the perpetrator's residence, *distinguishing* *State v. Rangitsch*, 40 Wn.App. 771, 772 (1985), *see: State v. Davis*, 182 Wn.App. 625, 632-34 (2014), *but see:* *State v. Thein*, 138 Wn.2d 133 (1999), *State v. Dalton*, 73 Wn.App. 132 (1994), *State v. Klinger*, 96 Wn.App. 619, 623-29 (1999), *cf.:* *State v. G.M.V.*, 135 Wn.App. 366 (2006), *State v. Dunn*, 186 Wn.App. 889 (2015); I.

***State v. Young***, 123 Wn.2d 173 (1994)

Anonymous tip that defendant was growing marijuana plus confirmation of address and telephone number given by informer plus high electricity consumption plus dramatic increase in consumption over three years plus observed absence of utilities such as hot tubs plus covered basement windows is insufficient to establish probable cause; *see:* *State v. Duncan*, 81 Wn.App. 70, 76-8 (1996), *Pers. Restraint of Maxfield*, 133 Wn.2d 332 (1997), *State v. Orick*, 129 Wn.App. 654 (2005); 9-0.

***Seattle v. McCready***, 123 Wn.2d 260 (1994)

Absent a statute or court rule, a superior court judge is not authorized to issue a search warrant to enforce building safety codes on less than probable cause, *see:* *State v. Lansden*, 144 Wn.2d 654 (2001); exclusive jurisdiction to issue warrants to enforce municipal ordinances is vested in municipal courts, RCW 3.46.030, 35.20.030, *but see:* *Seattle v. McCready*, 124 Wn.2d 300, 308-12 (1994), *Exendine v. Sammamish*, 127 Wn.App. 574 (2005); 8-0.

***State v. Hill***, 123 Wn.2d 641 (1994)

Police, serving premises warrant for drugs, find defendant, who did not appear to be a mere visitor, naked, defendant asks for his pants, police patdown pants on floor which were not obviously associated with defendant, feel nothing, then search pants, find drugs; held: premises warrant authorizes search of household objects, pants here were not sufficiently associated with a visitor to preclude search; reverses *State v. Lee*, 68 Wn.App. 253 (1992); 9-0.

***State v. Flores-Moreno***, 72 Wn.App. 733, 738-42 (1994)

Where police watch suspect conduct a drug deal which calls for suspect to return with drugs, follow suspect, observe suspect put something in trunk of car, drug dog reacts positively to trunk, *see:* *State v. Dearman*, 92 Wn.App. 630 (1998), *Rodriguez v. United States*, 575 U.S. 348, 135 S.Ct. 1609, 191 L.Ed.2d 492 (2015), probable cause for warrant is established, *cf.:* *Florida v. Jardines*, 569 U.S. 1, 185 L.Ed.2d 495 (2013); 50 minute detention of vehicle to get warrant is reasonable; II.

***State v. Dalton***, 73 Wn.App. 132 (1994)

Unconfirmed statements of unidentified informants that defendant was trafficking in drugs plus package of marijuana addressed to defendant's post office box with return address from another person is insufficient to support probable cause for a warrant, *State v. Thein*, 138 Wn.2d 133 (1999), *State v. Rangitsch*, 40 Wn.App. 771, 772 (1985), *State v. Klinger*, 96 Wn.App. 619, 623-29 (1999); while there may have been sufficient evidence to support conclusion that defendant was about to possess marijuana from his post office box, probable cause to believe that defendant committed a crime on the street does not necessarily give rise to probable cause to search his home, *cf.: State v. G.M.V.*, 135 Wn.App. 366 (2006), *State v. Dunn*, 186 Wn.App. 889 (2015); II.

***State v. Olson***, 73 Wn.App. 348, 356-57 (1994)

A trained, experienced officer who detects the odor of marijuana establishes probable cause to justify a search, *State v. Huff*, 64 Wn.App. 641, 647-8 (1992), *State v. Cole*, 128 Wn.2d 262, 289 (1995), *State v. Jacobs*, 121 Wn.App. 669, 677-79 (2004), *rev'd, on other grounds,* 154 Wn.2d 596 (2005), *cf.: State v. Grande*, 164 Wn.2d 135 (2008); officer's assertion that, based upon experience individuals who cultivate marijuana hide marijuana and records in safe houses is insufficient to establish probable cause to search a different house, *State v. Thein*, 138 Wn.2d 133 (1999), *State v. Klinger*, 96 Wn.App. 619, 623-29 (1999), *see: State v. Perez*, 92 Wn.App. 1 (1998), *State v. Davis*, 182 Wn.App. 625, 632-34 (2014), *State v. Constantine*, 182 Wn.App. 635, 645-48 (2014); II.

***State v. Clark***, 124 Wn.2d 90, 105-6 (1994)

Where exculpatory information is not deliberately or recklessly withheld from affidavit in support of a warrant, then the additional information need not be included in the record for a new determination of whether probable cause exists, *State v. Jones*, 55 Wn.App. 343, 345 (1989); 9-0.

***State v. Taylor***, 74 Wn.App. 111 (1994)

Where police deliberately or recklessly omit drug informer's criminal status relationship to defendant and other facts that might identify informer, it is not material to a finding of probable cause, at 117-9, *see: State v. Lane*, 56 Wn.App. 286, 294-5 (1989); ulterior motive of informer need not be disclosed to magistrate, since informants frequently have records and self-serving motives; I.

***State v. Olson***, 74 Wn.App. 126 (1994), *aff'd, on other grounds,* 126 Wn.2d 315 (1995)

Affidavit that details officer's training and experience in drug seminars and investigations need not explicitly state that officer was trained to identify the smell of marijuana where odor was basis for probable cause, at 129-131, *cf.: State v. Remboldt*, 64 Wn.App. 505, 507 (1992), *State v. Seagull*, 95 Wn.2d 898, 907 (1981); estimate of normal power consumption to suspect's power consumption that turns out to have been wrong does not establish reckless misstatement by itself to require excision, at 131-3, *State v. Garrison*, 118 Wn.2d 870, 872 (1992), *but see: State v. Thein*, 138 Wn.2d 133 (1999); I.

***Seattle v. McCready***, 124 Wn.2d 300, 308 (1994)

Municipal courts lack authority to issue administrative inspection warrants supported by probable cause to believe a civil infraction, rather than a crime, has occurred, *State v. Lansden*, 144 Wn.2d 654 (2001), *see: Seattle v. McCready*, 123 Wn.2d 260 (1994), *Exendine v. Sammamish*, 127 Wn.App. 574 (2005); 8-0.

***State v. Goucher***, 124 Wn.2d 778 (1994)

During search of residence pursuant to warrant, phone rings, police answer, caller asks to buy drugs, police agree, defendant arrives, is sold drugs by police and arrested; held: no reasonable privacy interest under state or United States constitutions for a person to disclose information to an acknowledged stranger on the telephone, *State v. Bowman*, 198 Wn.2d 609 (2021); defendant lacks standing to challenge police answering telephone as beyond scope of warrant; 9-0.

***State v. Sanchez***, 74 Wn.App. 763 (1994)

Affidavit states that named informant obtained drugs from Joe at a certain house at some undisclosed time, that the house had been raided seven months earlier with drugs found, house had been marred by shotgun blasts, unidentified citizens had complained about drug activity at the house; held: while probable cause to believe that informant obtained drugs from the house existed, there was not enough to believe, under these facts, that "some means more"; while "some may mean more," *State v. Mejia*, 111 Wn.2d 892, 894-6 (1989), *State v. Maffeo*, 31 Wn.App. 198, 199 (1982), *State v. Helmka*, 86 Wn.2d 91, 93 (1975), here there is only a showing of a single delivery made by a largely unidentified individual ("Joe"), at an unknown time, who may or may not have resided at the house, *State v. Klinger*, 96 Wn.App. 619, 623-29 (1999); III.

***State v. Rose***, 75 Wn.App. 28, 39-41 (1994), *rev'd, on other grounds*, 128 Wn.2d 388 (1996)

Bare assertion that citizen smelled marijuana is insufficient to support a warrant, *distinguishing State v. Remboldt*, 64 Wn.App. 505, 510 (1992), *State v. Vonhof*, 51 Wn.App. 33 (1988); I.

***State v. Gentry***, 125 Wn.2d 570, 604-7 (1995)

Affidavit states that white girl was sexually assaulted and beaten to death in woods, significant amount of blood at scene, two Negroid hairs on body, two witnesses had seen a black male within a mile of body near time of murder, one witness took police to home of man she saw, defendant met description, was in jail on rape charge at time warrant was sought, prior homicide conviction; held: probable cause existed to search and seize bloodstained shoes; 9-0.

***State v. Chapin***, 75 Wn.App. 460, 469-70 (1994)

Where defendant is searched incident to arrest on a warrant, defense has burden of proof to challenge the validity of the facially valid warrant, *State v. Fisher*, 96 Wn.2d 962, 968 (1982); I.

***State v. Johnson***, 75 Wn.App. 692, 709-10 (1994)

Tip from a concerned citizen of marijuana growing plus corroboration of some details provided from the citizen plus utility records showing low electricity consumption consistent

with indoor grow operation (?) is insufficient to provide probable cause, *State v. Atchley*, 142 Wn.App. 147, 160-64 (2007); II.

***State v. Rivera***, 76 Wn.App. 519 (1995)

Warrant authorizes search of any vehicle on the property, police search defendant-visitor's vehicle, find drugs; held: warrant authorizing search of any vehicle violates particularity requirement and is overbroad, overruling, in part, *State v. Frye*, 26 Wn.App. 276, 280-2 (1980); distinguishes *State v. Claflin*, 38 Wn.App. 847, 853 (1984); *see: State v. Carter*, 79 Wn.App. 154 (1995), *State v. Muñoz Garcia*, 140 Wn.App. 609 (2007); II.

***State v. Hunt***, 76 Wn.App. 625 (1995)

Defendant is released pending appeal; upon issuing of mandate affirming conviction, court clerk issues a warrant, police serve warrant and, in search incident to arrest, find drugs; held: as soon as mandate is filed, the judgment and sentence is self-executing, RCW 10.70.020, and arrest and search incident thereto are proper; I.

***Arizona v. Evans***, 131 L.Ed.2d 34 (1995)

Police search and find drugs pursuant to an arrest warrant which had been ordered quashed by a judge, but court clerk failed to notify police; held: exclusionary rule is intended to deter improper police behavior, not clerical errors; since police acted in good faith in serving warrant, *United States v. Leon*, 82 L.Ed.2d 677 (1984), motion to suppress should be denied,*Herring v. United States*, 172 L.Ed.2d 496 (2009), *cf.: State v. Trinidad*, 23 Wn.App. 418 (1979); 7-2.

***State v. Cole***, 128 Wn.2d 262, 285-92 (1995)

Where power records are obtained via search warrant, law enforcement need not comply with RCW 42.17.314, *distinguishing State v. Maxwell*, 114 Wn.2d 761 (1990); 6-3.

***State v. Graham***, 78 Wn.App. 44 (1995)

Affidavit asserts that informants heard one suspect in a residence tell another suspect to "go out to the truck and get the 'weed,' which he did," no further reference to a truck, warrant authorizes search of premises and a specific pickup truck which police find parked next to and slightly in the public street at the house; held: affidavit does not show that informant saw truck or drugs in truck or ownership of truck, thus a reasonable person would not think that drugs likely would be found in the specific truck, thus no probable cause for issuance of warrant to search truck, at 50-1; vehicle parked in a space that lawfully could be used by anyone coming to the house is not within curtilage, at 51-52, *State v. Niedergang*, 43 Wn.App. 656, 661-2 (1986); II.

***State v. Goss***, 78 Wn.App. 58 (1995)

Superior court **commissioner**, CONST. Art. 4, § 23, is authorized to issue a search warrant; II.

***State v. Gonzales***, 78 Wn.App. 976 (1995)

Police, serving search warrant, answer ringing telephone, defense moves to suppress conversation; held: answering phone falls within scope of warrant, no legitimate expectation of privacy in incoming calls; I.

***State v. Carter***, 79 Wn.App. 154 (1995)

Warrant authorizes search of residence and all persons at residence at the time warrant is served; held: "search all persons present" warrant is overbroad, at least absent a showing that only illegal conduct occurs on the site, *see: State v. Worth*, 37 Wn.App. 889 (1984), *State v. Rollie M.*, 41 Wn.App. 55 (1985), *State v. Douglas S.*, 42 Wn.App. 138 (1985), *State v. Rivera*, 76 Wn.App. 519 (1995), *State v. Muñoz Garcia*, 140 Wn.App. 609, 622-24 (2007); while warrant is severable, premises warrant does not authorize search of a sleeping resident, *see: State v. Halverson*, 21 Wn.App. 35 (1978); II.

***State v. Rakosky***, 79 Wn.App. 229 (1995)

Affidavit establishes that game officers observe security fence, guard dogs, windowless outbuilding, police determine nonresident owner has drug conviction, uses false name, electricity use three-four times previous owner, outbuilding consumes electricity, no snow accumulation on outbuilding held insufficient to establish probable cause for warrant, *State v. Huft*, 106 Wn.2d 206, 209-11 (1986), *State v. Jackson*, 102 Wn.2d 432, 436-8 (1984), *State v. Mickle*, 53 Wn.App. 39, 44 (1988), *State v. McPherson*, 40 Wn.App. 298, 301 (1985), *but see: State v. Murray*, 110 Wn.2d 706, 713 (1988), *State v. Patterson*, 83 Wn.2d 49, 61 (1973); 2-1, III.

***State v. Johnson***, 79 Wn.App. 776 (1995)

Affidavit states that anonymous informant says defendant grows marijuana and drives a specific car, car registered to defendant, roof of defendant's home has no snow while neighbors have two feet, higher electric usage than other months, infrared scans show high temperatures in basement and roof, agents smell marijuana from street in front of house; held: excluding infrared scan, *State v. Young*, 123 Wn.2d 173 (1994), affidavit establishes sufficient evidence of agent's experience and expertise in smelling marijuana, *State v. Hansen*, 42 Wn.App. 755, 761 *aff'd*, 107 Wn.2d 331 (1986), *State v. Hashman*, 46 Wn.App. 211 (1986), *State v. Vonhof*, 51 Wn.App. 33 (1988); 2-1, III.

***State v. Werner***, 129 Wn.2d 485 (1996)

Superior court judge may issue arrest warrant for a juvenile, *reversing State v. Werner*, 79 Wn.App. 872 (1995); 9-0.

***State v. Kern***, 81 Wn.App. 308 (1996)

Police serve search warrant for bank records on bank within authorized ten days, bank officials retrieve records and mail them to police beyond ten days; held: search begins before warrant expires, thus service on bank within warrant period was sufficient, completion of search beyond ten days does not warrant suppression where probable cause continued to exist, *see: State v. Thomas*, 121 Wn.2d 504 (1993), *distinguishing State v. Gonzalez*, 71 Wn.App. 715 (1993); police presence is not necessary for bank officials to search for records purusuant to a warrant, *distinguishing* CrRLJ 2.3(c); police need not provide defendant with inventory when searching bank records, *distinguishing* CrRLJ 2.3(d); police filing inventory before records were

seized violates CrRLJ 2.3(d), but is ministerial and harmless, *cf.: State v. Linder*, 190 Wn.App. 638 (2015).

***State v. Jackson***, 82 Wn.App. 594, 603-4 (1996)

An "alert" by a trained **drug dog** is sufficient to establish probable cause for the presence of a controlled substance, *State v. Stanphill*, 53 Wn.App. 623 (1989), *State v. Wolohan*, 23 Wn.App. 813 (1979), *Illinois v. Caballes*, 160 L.Ed.2d 842 (2005), *Florida v. Harris*, 568 U.S. 237, 185 L.Ed.2d 61 (2013), *see: State v. Dearman*, 92 Wn.App. 630 (1998), *but see: Florida v. Jardines*, 569 U.S. 1, 185 L.Ed.2d 495 (2013), *cf.: Rodriguez v. United States*, 575 U.S. 348, 135 S.Ct. 1609, 191 L.Ed.2d 492 (2015); II.

***State v. Barnes***, 85 Wn.App. 638, 660-2 (1997)

Because leading organized crime is a broad offense which state must prove income sources and uses, a broad warrant permitting seizure of "all records pertaining to finances" is not overbroad, distinguishing *State v. Perrone*, 119 Wn.2d 538 (1992); II.

***State v. Stenson***, 132 Wn.2d 668 (1997)

Where a warrant authorizes search for documents that relate to a business relationship, police executing the warrant who read documents to determine if they are covered by the warrant may seize other documents if they will "aid in a particular apprehension or conviction, or ha[ve] a sufficient nexus with the crime under investigation," *State v. Terrovona*, 105 Wn.2d 632, 648 (1986), *State v. Turner*, 18 Wn.App. 727, 729 (1977); an overbroad warrant may be cured where affidavit is attached and the warrant expressly refers to the affidavit and incorporates it with suitable words of reference, *State v. Riley*, 121 Wn.2d 22 (1983), *State v. Kelley*, 52 Wn.App. 581, 585 (1988), *cf.: State v. Higgins*, 136 Wn.App. 87 (2006), *State v. Scherf,* 192 Wn.2d 350 (2018); 8-0.

***Pers. Restraint of Maxfield***, 133 Wn.2d 332 (1997)

PUD employee volunteers to police that defendant's power usage is high, after further investigation, police obtain warrant, seize drugs; held: there is a privacy interest in public power records (plurality of four justices holds pursuant to state constitution), *cf. State v. McKinny*, 148 Wn.2d 20 (2002), PUD employee lacked statutory authority to disclose record to police, thus suppressed, *State v. Orick*, 129 Wn.App. 654 (2005), *see: State v. Gunwall*, 106 Wn.2d 54, 67-8 (1986); RCW 42.17.314 authorizes police to demand power records only after setting forth in writing a reasonable suspicion, *State v. Maxwell*, 114 Wn.2d 761 (1990); *overrules, on state grounds*, *State v. Maxfield*, 125 Wn.2d 378 (1994), *reverses Pers. Restraint of Maxfield*, 81 Wn.App. 705 (1996); 5-4.

***State v. Gebaroff***, 87 Wn.App. 11 (1997)

Affidavit states that informant walked to a residence, describing it with nonspecific directions from a highway, gave his friend money who knocks on a door and is greeted by a woman, buys drugs, police have tips of a methamphetamine lab in the area, obtain warrant; held: affidavit is insufficient to describe the premises to be searched; II.

***State v. Smith***, 87 Wn.App. 254 (1997)

Where telephonic affidavit recording fails, testimony of officer from notes he claims he read to the magistrate is insufficient to reconstruct the affidavit where the judge's recollection is "foggy," as there must be detailed and specific evidence of a disinterested person, which the police are not, *State v. Myers*, 117 Wn.2d 332 (1991), *State v. Muñoz Garcia*, 140 Wn.App. 609 (2007); II.

***State v. Goble***, 88 Wn.App. 503 (1997)

Telephonic declaration claims that, following a valid search, drugs are in a package in defendant's post office box, magistrate authorizes search of defendant's home if he picks up package and takes it to his home, police observe defendant take package to his property and enter his house, serve warrant, seize drugs; held: probable cause requires a nexus between the items to be seized and the place to be searched at the time the warrant issues, not based upon some future act; here, magistrate had no reason to believe drugs were in house when he issued the warrant, thus suppressed, *see: State v. Thein*, 138 Wn.2d 133 (1999) *cf.: State v. Dunn*, 186 Wn.App. 889 (2015); II.

***State v. Chambers***, 88 Wn.App. 640 (1997)

Affidavit establishes probable cause to search for marijuana, warrant allows police to search for "any and all controlled substances," trial court suppresses, finding warrant was not sufficiently specific; held: in a drug case, "controlled substances" is sufficient in warrant to seize marijuana, *State v. Christiansen*, 40 Wn.App. 249, 254 (1985), *State v. Olson*, 32 Wn.App. 555 (1982), distinguishing *State v. Riley*, 121 Wn.2d 22, 28 (1993), *but see: State v. Thein*, 138 Wn.2d 133 (1999); II, 2-1.

***State v. Perez***, 92 Wn.App. 1 (1998)

Affidavit: reliable informant provided defendant's pager number, when defendant is paged he will bring drugs to customer, police complete controlled buy, then follow defendant to residence, observe defendant leave residence on more than one occasion after being paged and go to customer; police serve warrant on house from which defendant is seen to leave before transactions; held: reasonable inference that house is a "safe house" establishing nexus between defendant and house searched, distinguishing *State v. Olson*, 73 Wn.App. 348, 357 (1994); evidence of ongoing drug dealing will defeat **staleness** argument where affidavit establishes drugs in premises three-four days prior to issuance and execution of warrant, distinguishing *State v. Higby*, 26 Wn.App. 457, 460 (1980); I.

***State v. Thein***, 138 Wn.2d 133 (1999)

Affidavit establishes that defendant is a drug trafficker, magistrate issues warrant to search defendant's home based upon officer's experience and training that drug traffickers store drugs in their residence; held: officer's general conclusions and conclusory predictions and inferences do not establish the necessary specific underlying circumstances that establish evidence of illegal activity to authorize search of home, *State v. Johnson*, 104 Wn.App. 489, 497-502 (2001), *State v. Keodara*, 191 Wn.App. 305 (2015); probable cause to believe that a person has committed a crime does not necessarily give rise to probable cause to search his home, *State v. Rangitsch*, 40 Wn.App. 771 (1985), *State v. Dalton*, 73 Wn.App. 132, 136 (1994), *State v. Olson*, 73 Wn.App. 348, 357 (1994), *State v. Goble*, 88 Wn.App. 503, 509 (1997), *State v. Klinger*, 96 Wn.App. 619, 623-29 (1999), *cf.: State v. McGovern*, 111

Wn.App. 495 (2002), *State v. Denham*, 197 Wn.2d 759 (2021), *overruling State v. O'Neil*, 74 Wn.App. 820 (1994) *State v. Davis*, 182 Wn.App. 625, 632-34 (2014), *State v. Constantine*, 182 Wn.App. 635, 645-48 (2014), *overruling, in part*, *State v. Gross*, 57 Wn.App. 549 (1990), *State v. McReynolds*, 104 Wn.App. 560, 568-70 (2000), *State v. Dunn*, 186 Wn.App. 889 (2015); reverses *State v. Thein*, 91 Wn.App. 476 (1998), *State v. G.M.V.*, 135 Wn.App. 366 (2006); 9-0.

***State v. Klinger***, 96 Wn.App. 619, 623-29 (1999)

Police, serving arrest warrant, observe defendant smoking hand-rolled cigarette in house, smell marijuana, obtain warrant to search house and outbuildings, seize drugs in shed behind house; held: where there is probable cause to believe defendant possesses drugs but no evidence of trafficking, then warrant to search premises where drugs were seen does not extend to other buildings on the premises, *State v. Thein*, 138 Wn.2d 133 (1999), distinguishing *State v. Gross*, 57 Wn.App. 549 (1990), *see: State v. Christiansen*, 40 Wn.App. 249 (1985), *State v. Rangitsch*, 40 Wn.App. 771 (1985), *State v. Hansen*, 42 Wn.App. 755 (1986), *State v. Dalton*, 73 Wn.App. 132 (1994), *State v. Olson*, 73 Wn.App. 348, 356-57 (1994), *State v. Sanchez*, 74 Wn.App. 763 (1994), *State v. Davis*, 182 Wn.App. 625, 632-34 (2014); II.

***State v. Walker***, 101 Wn.App. 1 (2000)

Municipal court clerk issues bench warrant without prior approval by a judge, on service of warrant police find drugs; held: a clerk may not order the issuance of a warrant of arrest absent a statute, court rule or ordinance; remedy for all violations of CONST. Art. I, § 7 is suppression, *see: State v. Parks*, 136 Wn.App. 232 (2006); 2-1.

***Illinois v. McArthur***, 148 L.Ed.2d 838 (2001)

Police, with probable cause to believe drugs are inside house, prevent resident from entering for two hours awaiting warrant; held: police had "good reason" to believe that defendant would destroy drugs, restrained, but did not arrest, defendant for limited period of time, thus there were exigent circumstances justifying the restraint, *State v. Ng*, 104 Wn.2d 763 (1985), *Michigan v. Summers*, 69 L.Ed.2d 340 (1981), *Warden, Md. Penitentiary v. Hayden*, 18 L.Ed.2d 782 (1967), *Segura v. United States*, 82 L.Ed.2d 599 (1984), *cf. Welsh v. Wisconsin*, 80 L.Ed.2d 732 (1984), *Bailey v. United States*, 568 U.S. 186, 185 L.Ed.2d 19 (2013); 8-1.

***State v. Gore***, 143 Wn.2d 288, 295-302 (2001)

Affidavit in support of warrant for blood sample omits fact that victim picked out another person from montage, trial court denies hearing to determine material misrepresentation, *Franks v. Delaware*, 57 L.Ed.2d 667 (1978), finding lack of materiality of the omitted facts; held: where omitted facts are immaterial and nothing in the affidavit is alleged to be false, then *Franks* does not require a hearing, *see: State v. Atchley*, 142 Wn.App. 147, 157-60 (2007); even if the omitted facts were material and were included in the affidavit, if they do not negate probable cause, then no hearing is necessary, *State v. Jackson*, 111 Wn.App. 660, 678-80 (2002), 150 Wn.2d 251 (2003), *see also: State v. Stephens*, 37 Wn.App. 76 (1984), *State v. Garrison*, 118 Wn.2d 870 (1992); 9-0.

***State v. Clark***, 143 Wn.2d 731, 746-56 (2001)

Magistrate may consider **prior convictions**, *State v. Stone*, 56 Wn.App. 153, 158 (1989), and **polygraph** results, *State v. Cherry*, 61 Wn.App. 301, 305 (1991); polygrapher's *curriculum vitae* need not be included in affidavit to support basis of knowledge, *State v. Lair*, 95 Wn.2d 706, 712 (1981); where there are omitted facts from affidavit, to invalidate warrant court must find deliberate material omission or statements made in reckless disregard of truth, *State v. Garrison*, 118 Wn.2d 870, 872 (1992), reckless disregard means that affiant in fact entertained serious doubts as to the truth of facts or statements in the affidavit, *State v. O'Connor*, 39 Wn.App. 113, 117-19 (1984), which are shown by (1) actual deliberation or (2) the existence of obvious reasons to doubt veracity of the informant or accuracy of informant's reports, *State v. Chenoweth*, 160 Wn.2d 454 (2007); warrant authorizing search for "trace evidence" is not overbroad, *State v. Reid*, 38 Wn.App. 203, 211-12 (1984), *State v. Lingo*, 32 Wn.App. 638, 640-42 (1982); 9-0.

***State v. Johnson***, 104 Wn.App. 489, 497-500 (2001)

Affidavit states that child victims were raped with a vibrator in suspect's home, officer adds that based upon training and experience, child rapists have porn, police serve warrant, seize dildo, view videotapes which contain scenes of minors engaged in sexually explicit conduct; held: general statements regarding common habits of child abusers are not alone sufficient to establish probable cause, *State v. Thein*, 138 Wn.2d 133 (1999), *State v. Keodara*, 191 Wn.App. 305 (2015); II.

***State v. Anderson***, 105 Wn.App. 223 (2001)

Police observe a man watering plants outside defendant's home, determine that the man was wanted on a misdemeanor escape warrant, obtain search warrant to search defendant's home, find drugs; held: existence of a misdemeanor arrest warrant and the belief that the subject may be a guest in a third party's home is insufficient legal authority to enter the third party's home, *State v. Chrisman*, 100 Wn.2d 814, 820-22 (1984), *State v. Kull*, 155 Wn.2d 80 (2005), *see: State v. McKinney*, 49 Wn.App. 850, 857 (1987), *State v. Vy Thang*, 145 Wn.2d 630, 635-39 (2002), *State v. Winterstein*, 167 Wn.2d 620 (2009), *cf.: State v. Hatchie*, 161 Wn.2d 390 (2007), *see also: State v. Ruem*, 179 Wn.2d 195 (2013); III.

***State v. Crane***, 105 Wn.App. 301 (2001), *overruled, on other grounds, State v. O'Neill,* 148 Wn.2d 564 (2003)

Police are maintaining status quo on a house while awaiting a warrant, car drives up, defendant is passenger, defendant exits, is told to stop, police request identification , defendant complies, officer uses hand-held radio to call, discovers warrant, arrests defendant, finds drugs; held: while police may stop and question persons approaching a place to be searched to determine their business at the location and to prevent them from interfering with the search, *State v. Melin*, 27 Wn.App. 589, 592 (1980), there is no authority allowing police to question persons approaching a scene where police have not yet obtained a warrant; even with a warrant, such a stop is not a license to detain and frisk all who approach, absent a reasonable articulable suspicion; while the initial request for identification was not a detention, *State v. Armenta*, 134 Wn.2d 1 (1997), *State v. Aranguren*, 42 Wn.App. 452, 455 (1985), *State v. Hansen*, 99 Wn.App. 575, 576 (2000), *State v. Afana*, 147 Wn.App. 843 (2008), *aff'd, on other grounds*, 169 Wn.2d 169 (2010), retaining identification during a warrants check is a seizure, *State v. Coyne*, 99

Wn.App. 566, 572 (2000), *State v. Ellwood*, 52 Wn.App. 70, 73 (1988), *State v. Carriero*, 8 Wn.App.2d 641 (2019), *but see: State v. Vanderpool*, 145 Wn.App. 81 (2008); here, defendant complied with all police requests, there was no basis to suspect him, thus drugs suppressed; 2-1, II.

***State v. Lansden***, 144 Wn. 2d. 654 (2001)

Absent statute or court rule, district court judge has no authority to issue a warrant for civil nuisance, zoning and building violations, *Seattle v. McCready*, 124 Wn.2d 300, 309 (1994), *see: Exendine v. Sammamish*, 127 Wn.App. 574 (2005); 9-0.

***State v. Fisher***, 145 Wn.2d 209 (2001)

Before sentencing, court issues bench warrant based upon affidavit from CCO stating that another client overheard defendant say she would not appear and that she was high on drugs, and that she was spending time with a drug dealer, upon arrest, police find drugs; held: a post-conviction bench warrant may issue on less than probable cause, CrR 3.2(j)(1), 3.2(f), *State v. Lucas*, 56 Wn.App. 236 (1989), distinguishing Fourth Amendment; here, affidavit was insufficient for well-founded suspicion, thus drugs suppressed; reverses *State v. Fisher*, 104 Wn.App. 772 (2001); 9-0.

***State v. Dodson***, 110 Wn.App. 112 (2002)

Police provide telephonic information to judge to search for meth, judge finds probable cause, authorizes police to sign warrant, police do not read warrant to judge, warrant calls for seizure of marijuana, does not specify time for execution; held: clerical error calling for search for wrong drug does not defeat probable cause, detective changing word on warrant to read meth rather than marijuana was valid, no prejudice; CrR 2.3(c) does not require officer to read warrant into record, *see:* FRCP 41; absent prejudice, failure to specify time is not error; III.

***State v. Tarter***, 111 Wn.App. 336 (2002)

Motel owner tells police that tenant paid cash, 20 calls came to room within an hour, high traffic to room, people from room crossed street to truck stop for brief encounters, police determine that tenant has prior drug arrests, obtain warrant, find drugs; excluding evidence of prior arrests, commonsense approach supports probable cause; III.

***State v. McGovern***, 111 Wn.App. 495 (2002)

Following traffic stop, police lawfully seize 182 grams of marijuana from car, defendant states that he bought more than he needed for own use in Oregon and was intending to sell some, that he was on his way from home, denied growing at home, refused consent to search home, saying that he had stuff he doesn't want police to see, a gun, police obtain telephonic warrant, search, seize growing marijuana; held: defendant's statements that he was selling marijuana, has too much for own use, that there's stuff he doesn't want police to find plus fact that 182 grams "is not an extraordinarily large amount" leading magistrate to believe defendant had more elsewhere, establish probable cause, distinguishing *State v. Thein*, 138 Wn.2d 133 (1999), *see: State v. Davis*, 182 Wn.App. 625, 632-34 (2014); II.

***State v. Wible***, 113 Wn.App. 18 (2002)

Warrant need not specify the crime under investigation where particularity requirement is otherwise met, *State v. Askham*, 120 Wn.App. 872, 877-80 (2004), distinguishing *State v. Riley*, 121 Wn.App. 22, 26 (1993), *see: State v. Ollivier,* 161 Wn.App. 307 (2011), *affirmed, on other grounds,* 178 Wn.2d 813 (2013), *State v. Henson,* 11 Wn.App.2d 97 (2019); affidavit which asserts that citizen saw files on defendant's computer that were named "11 year old" and "8 year old rape" plus images of young girls "sexual of nature" establishes probable cause for issuance of warrant to search for images depicting children engaged in sexually explicit activity; where warrant for child pornography limits "seizable" items to images of child pornography, the warrant is not overbroad; II.

***State v. Nordlund***, 113 Wn.App. 171 (2002)

Where affidavit is unsigned but magistrate indicates on affidavit that it is "acknowledged and sworn to before me," warrant is valid, at 180-81; in analyzing a warrant for seizure of a computer, court must closely scrutinize compliance with particularity and probable cause requirements due to First Amendment concerns, *State v. Perrone*, 119 Wn.2d 538, 547 (1992), *State v. McKee,* 3 Wn.App.2d 11 (2018); affidavit that describes noncriminal computer use of suspect and conclusion that scrutiny of hard disk will show when suspect was at his residence is insufficiently particular to demonstrate required nexus between computer and evidence of crimes under investigation, *see: State v. Thein*, 138 Wn.2d 133, 140 (1999), *State v. Grenning*, 142 Wn.App. 518, 533-35 (2008), *aff'd, on other grounds*, 169 Wn.2d 47 (2010), *State v. Keodara*, 191 Wn.App. 305 (2015), *State v. McKee*, 3 Wn.App.2d 11 (2018); II

***State v. Hampton***, 114 Wn.App. 486 (2002)

Affidavit establishes informant's reliability, states that informant had seen defendant dealing cocaine ten times and that defendant keeps rocks in a container "on his person," police obtain warrant, arrest and search defendant in van with tinted windows, find drugs between penis and scrotum; held: a warrant which authorizes a search of a suspect's person automatically authorizes a strip search, *see:* RCW 10.79.070; II.

***State v. Maddox***, 116 Wn.App. 796, 805-10 (2003), *aff'd,* 152 Wn.2d 499 (2004)

Following controlled buy of meth from residence, police obtain a warrant for drugs and records showing identity of co-conspirators, do two more controlled buys 3 and 9 days after issuance of warrant, at last buy suspect tells informant that he is out of meth, next day police search and seize marijuana, ecstasy, cash and papers, find no meth; held: warrant was overbroad as there was no probable cause to search for records of co-conspirators, but severability doctrine applies, *State v. Perrone*, 119 Wn.2d 538 (1992), where (1) warrant lawfully authorized entry into premises, (2) warrant lists items for which there was probable cause, (3) the part of the warrant that includes proper items is significant when compared to warrant as a whole, (4) police must find and seize disputed items while executing valid part of warrant, (5) police must not have conducted a general search in which they flagrantly disregard the warrant's scope, *State v. Temple*, 170 Wn.App. 156, 162-65 (2012); I.

***State v. McReynolds***, 117 Wn.App. 309, 331 (2003)

Analysis of the validity of a warrant is not limited to the four corners of the officer's affidavit, CrR 2.3(c), *State v. Jansen*, 15 Wn.App. 348, 350 (1976), *but see: State v. O'Connor*, 39 Wn.App. 113, 119 (1984), *State v. Martin*, 169 Wn.App. 620, 631 (2012); III.

***State v. Jackson***, 150 Wn.2d 251, 259-69 (2003)

Police seize vehicle pursuant to valid warrant, obtain a second warrant to place global positioning system device (GPS) in vehicle, return vehicle to suspect, track vehicle, find evidence; held: placing GPS device in a vehicle requires a warrant, as it involves a more intrusive method of viewing than binoculars, *State v. Manley*, 85 Wn.2d 120, 124 (1975) or flashlight, *State v. Rose*, 128 Wn.2d 388, 400-01 (1996), *see: State v. Young*, 123 Wn.2d 173 (1994), CONST., art. I, § 7, *United States v. Jones*, 565 U.S. 400, 132 S.Ct. 945,181 L.Ed.2d 911 (2012), *Grady v. North Carolina*, 575 U.S. 306, 135 S.Ct. 1368, 191 L.Ed.2d 459 (2015); while claim in affidavit that perpetrators return to crime scenes is a generalization that cannot establish probable cause, *State v. Thein*, 138 Wn.2d 133 (1999), there was sufficient other facts set forth to establish probable cause for placing the GPS device; travel pattern of suspect's truck and location of suspect's movements are sufficiently particular such that the search was not general, *see: United States v. Karo*, 82 L.Ed.2d 530 (1984); affirms *State v. Jackson*, 111 Wn.App. 660 (2002); 9-0.

***State v. Ettenhofer***, 119 Wn.App. 300 (2003)

Police call judge who swears officer, judge finds probable cause, CrR 2.3(c), authorizes search but neither judge nor police execute a written warrant, drugs seized; held: absent a written warrant, search is invalid under state constitution; II.

***State v. Busig***, 119 Wn.App. 381 (2003)

Police obtain search warrant to search for a person who had arrest warrants for drugs, warrant form signed by magistrate authorized search for drugs for which there was no probable cause, police enter, arrest suspect, observe meth lab, obtain another telephonic warrant, seize lab and drugs; held: the first warrant form was a clerical error, *State v. Wible*, 113 Wn.App. 18, 25-26 (2002), the defect in which may be cured by reference to the affidavit attached to the warrant, *State v. Stenson*, 132 Wn.2d 668, 696 (1997); a warrant is not subject to pretext analysis, *State v. Goodin*, 67 Wn.App. 623, 625-26 (1992), *State v. Lansden*, 144 Wn.2d 654, 662 (2001), distinguishing *State v. Ladson*, 138 Wn.2d 343, 353 (1999); III.

***Groh v. Ramirez***, 157 L.Ed.2d 1068 (2004)

Application and affidavit in support of warrant set forth weapons ATF is seeking, warrant signed by magistrate fails to identify any items agents intended to seize, did not incorporate by reference itemized list in application; held: warrant was invalid, as Fourth Amendment requires that no warrant shall issue unless "particularly describing...the things to be seized," application does not save warrant from facial invalidity, *see: Massachusetts v. Sheppard*, 82 L.Ed.2d 737 (1984); 5-4.

***State v. Aase***, 121 Wn.App. 558 (2004)

Handing suspect a search warrant minutes into the search, as opposed to the outset, is sufficient, *see:* *State v. Parker*, 28 Wn.App. 425 (1981), *cf.: State v. Linder*, 190 Wn.App. 638 (2015); II.

***State v. Jacobs***, 121 Wn.App. 669 (2004), *rev'd, on other grounds,* 154 Wn.2d 596 (2005)

Affidavit: manager of trailer park smells chemical odor from defendant's space, received information that defendant was manufacturing methamphetamine, police corroborate iodine smell which increases as trailer door opens, defendant admits living there, having chemicals, film canister with white powder which field tests for meth falls from defendant's pocket; held: all establish probable cause, *see:* *State v. Olson*, 73 Wn.App. 348, 356 (1994); II.

***State v. Maddox***, 152 Wn.2d 499 (2004)

Following controlled buy of methamphetamine, police obtain a warrant but, before serving, do two more controlled buys, 3 and 9 days after warrant issued, at last buy suspect tells informant he is out of meth, next day police serve warrant, seize other drugs, no meth; held: police were not required to return to magistrate for redetermination of probable cause because after-acquired information did not negate probable cause; affirms *State v. Maddox*, 116 Wn.App. 796 (2003); 5-4.

***State v. Merkt***, 124 Wn.App. 607, 614 (2004)

Affidavit states that one witness had purchased drugs four months prior to warrant, the other one month prior, defendant's vehicle was used to purchase drug precursors three months prior; held: because police knew defendant had a past criminal drug history, totality of information establishes probable cause that drug sales were current, not stale, deferring to trial court's decision and resolving doubts in favor of the warrant, *but see:* *State v. Higby*, 26 Wn.App. 457, 463 (1980); 2-1, III.

***State v. Hosier***, 124 Wn.App. 696, 711-16 (2004), *aff'd, on other grounds*, 157 Wn.2d 1 (2006)

Defendant leaves notes threatening to tie up young girls, warrant seeks writing materials, police seize rope; held: evidence not described in a warrant is properly seized where it has a nexus with the crime under investigation, *State v. Gonzales*, 78 Wn.App. 976, 983 (1995); II.

***State v. Nusbaum***, 126 Wn.App. 160 (2005)

Affidavit establishes that a controlled substance was to be delivered to defendant's home, having been intercepted by U.S. customs inspectors, that search would occur upon delivery of the substance to defendant's residence, warrant merely authorizes search without addressing anticipated delivery, police knock, on porch hold out package, defendant's fingers touch package, defendant is arrested, police search house, find drugs; held: nexus between drugs and residence was dependent on delivery and acceptance into the residence without which there was no probable cause, *see:* *State v. Gonzalez*, 77 Wn.App. 479, 484 (1995); II.

***State v. Spring***, 128 Wn.App. 398 (2005)

When a warrant is based in part on illegally obtained information, warrant is nonetheless valid if affidavit contains otherwise sufficient facts to establish probable cause independent of the illegally obtained information, *Murray v. United States*, 101 L.Ed.2d 472 (1988), *State v.*

*Maxwell*, 114 Wn.2d 761, 769 (1990), and prosecutor proves that police would have sought the warrant in the absence of the unlawfully obtained evidence, *State v. Hall*, 53 Wn.App. 296 (1989), *State v. Miles*, 159 Wn.App. 282 (2011); I.

***State v. Evans***, 129 Wn.App. 211, 219-21 (2005), *rev'd, on other grounds,* 159 Wn.2d 402 (2007)

Defense seeks hearing to challenge affidavit, *Franks v. Delaware*, 57 L.Ed.2d 667 (1978), as police did not disclose to magistrate that informer had forgery convictions, trial court denies hearing; held: while police could or perhaps should have known of informer's criminal history, failure to discover it does not rise to the level of intentional or reckless disregard, negligence fails to meet the preliminary showing, *State v. Garrison*, 118 Wn.2d 870, 872-73 (1992); II.

***State v. Griffith***, 129 Wn.App. 482, 485-89 (2005)

Affidavit: defendant hosted a party, 16-year old girl allowed defendant to take nude photos of her with a digital camera, puts photos on computer; magistrate issues search warrant for child pornography, authorizing seizure of computers, all cameras, videotapes, unprocessed film and storage media; held: warrant was overbroad, but severing those portions for which there was no probable cause, state was properly permitted to use evidence seized from computer; while not all nude photos of minors are illegal, *State v. Grannis*, 84 Wn.App. 546, 548-49 (1997), given deferential standard of review, affidavit contains facts sufficient to establish a crime; 2-1, II.

***State v. Orick***, 129 Wn.App. 654 (2005)

Police, suspicious of marijuana grow operation, ask Public Utility District to check for possible power diversion, two PUD employees enter property past no trespassing signs and determine diversion, police obtain warrant; held: while Fourth Amendment and art I, § 7 generally do not apply to PUD employees, here employees acted at express request of, and thus jointly and in concert with, police, who lacked probable cause, thus evidence suppressed, *Pers. Restraint of Maxfield*, 133 Wn.2d 332, 337-38 (1997); III.

***United States v. Grubbs***, 164 L.Ed.2d 195 (2006)

Defendant orders pornographic videotape, police obtain anticipatory warrant wherein affidavit asserts warrant would be served after videotape was delivered, warrant itself does not contain anticipatory language; held: where affidavit establishes that if the triggering condition occurs, there is a fair probability that the *res* of the warrant will be found and that there is probable cause that the triggering condition will occur, warrant is valid; particularity requirement of a search warrant only addresses the place to be searched and the things or persons to be seized, need not set forth the triggering condition; 8-0.

***State v. G.M.V.***, 135 Wn.App. 366, 371-72 (2006)

Affidavit establishes defendant left from and returned to residence before and after he sold drugs establishes nexus that defendant had drugs in house, *State v. Davis*, 182 Wn.App. 625, 632-34 (2014), distinguishing *State v. Thein*, 138 Wn.2d 133 (1999); III.

***State v. Higgins***, 136 Wn.App. 87 (2006)

Warrant authorizes seizure of "evidence of a crime, to-wit: Assault 2nd DV," attached affidavit specifies items; held: where warrant does not describe items to be seized and does not incorporate affidavit by reference, then the fact that the affidavit is attached does not cure overbreadth of the warrant, *State v. Riley*, 121 Wn.2d 22, 29-30 (1983), *State v. Stenson*, 132 Wn.2d 668, 696 (1997), *cf.: State v. Temple*, 170 Wn.App. 156, 163-65 (2012); III.

***State v. Parks***, 136 Wn.App. 232 (2006)

Municipal court issues bench warrant without finding probable cause to detain, police serve warrant, find drugs; held: a pre-conviction bench warrant is not valid unless the record establishes that the court made a finding of probable cause at some point in the history of the case; where a warrant lacking probable cause is served, a search pursuant to that warrant is invalid and the evidence must be suppressed, *see State v. Walker*, 101 Wn.App. 1 (2000), *State v. Erickson*, 168 Wn.2d 41 (2010); I.

***State v. Hatchie***, 161 Wn.2d 390 (2007)

Police with misdemeanor warrant for 3rd person find that person's two trucks at a residence, neighbors say they see the 3rd person at the house, one says he lives there, police knock, person who answers says that the 3rd person is home, police enter, see drugs, find 3rd person, charge defendant with drug offenses; held: an arrest warrant allows police limited power to enter a residence for an arrest as long as (1) the entry is reasonable, (2) the entry is not a pretext for conducting a search or other investigation, *State v. Michaels*, 60 Wn.2d 638, 644 (1962), (3) police have probable cause to believe the person named in the warrant is a resident, *see: State v. Winterstein*, 167 Wn.2d 620, 628-31 (2009), and (4) the named person is actually present at the time of the entry, *State v. McKague*, 143 Wn.App. 531 (2008), *cf.: Stegald v. United States*, 68 L.Ed.2d 38 (1981), *State v. Anderson*, 105 Wn.App. 223, 232 (2001); here, despite mistaking named person as a resident, police had probable cause to believe that 3rd person resided at home because his two cars were at the scene, neighbor said he lived there, even though 3rd person's cars were not registered at that home, *but see: State v. Ruem*, 179 Wn.2d 195 (2013); 9-0.

***State v. Reep***, 161 Wn.2d 808 (2007)

Warrant authorizing seizure "of any evidence supporting the suspected criminal activity of …'Child Sex'" is overbroad, *State v. Perrone*, 119 Wn.2d 538 (1992), as child pornography is presumptively protected by the First Amendment and thus the particularity requirement must be followed with scrupulous exactitude; 9-0.

***State v. Ague-Masters***, 138 Wn.App. 86, 100-01 (2007)

Affidavit provides that a man on defendant's property had an existing warrant, possessed a pill container with pseudoephedrine prescribed for a female, responded evasively and furtively to police questions, propane tanks on back porch, strong smell of propane establish probable cause to search property; II.

***State v. Muñoz Garcia***, 140 Wn.App. 609 (2007)

Officer calls magistrate with telephonic warrant, CrR 2.3(c), reads affidavit which states that confidential informant observed drugs in motel room, informs magistrate that informant provided a written statement, was familiar with drugs based on personal experience, known to officer for 8 years, no criminal history, recording fails, magistrate and officer testify at suppression hearing, warrant calls for search of all persons present; held: because both officer and magistrate testified that officer read affidavit to magistrate, reconstructed record was adequate, distinguishing *State v. Smith*, 87 Wn.App. 254 (1997), *State v. Myers*, 117 Wn.2d 332 (1991); although search of all persons present was overbroad, *State v. Carter*, 79 Wn.App. 154, 158 (1995), that portion of warrant is severable, *State v. Halverson*, 21 Wn.App. 35, 37 (1978); III.

***State v. Grenning***, 142 Wn.App. 518, 530-35 (2008), *aff'd, on other grounds,* 169 Wn.2d 47 (2010)

Police seize computer pursuant to warrant, take more than ten days to search hard drive and find evidence; held: 10-day limit of CrR 2.3(c) does not limit police to only ten days viewing the information on the computer where probable cause does not lapse, delay is reasonable, no prejudice, no bad faith; II.

***State v. McKague***, 143 Wn.App. 531 (2008)

Police have a DOC warrant to arrest Jay McKague, warrant cites Jay's address, police go to a different address where they had arrested Jay before, are told Jay is not there but that Ken McKague may be in an out-building, police enter out-building, find drugs; held: to search for a probationer, police may enter probationer's home as long as the search was reasonable and police had specific and articulable facts which, taken together with rational inferences from those facts, support that the searched residence was the probationers, *State v. Hatchie*, 161 Wn.2d 390 (2007), *but see: State v. Winterstein*, 167 Wn.2d 620 (2009), *State v. Cornwell*, 190 Wn.2d 296 (2018); here, evidence was not sufficient to persuade a rational person that probationer's last known address was the one searched; II.

***State v. Smith***, 145 Wn.App. 268 (2008)

Police are about to serve a search warrant on a house, car drives into driveway, two men approach door, two women remain in car, police order women out at gunpoint, "women smelled of methamphetamine," retrieve defendant's purse from car, find drugs; held: while an occupant may be detained during execution of a residential search warrant, those merely present may not be detained or frisked absent independent factors, other than arrival at the scene, tying the person to the illegal activities or raising a reasonable suspicion that the person is armed and dangerous, *State v. Broadnax*, 98 Wn.2d 289, 300-04 (1982), *overruled, on other grounds, Minnesota v. Dickerson*, 124 L.Ed.2d 334 (1993), overruling *State v. Howard*, 7 Wn.App. 668 (1972); III.

***Herring v. United States***, 172 L.Ed.2d 496 (2009)

Police serve arrest warrant, search, find drugs, later discover warrant had been recalled but it was not entered by police into database; held: exclusionary rule does not apply where police mistakes leading to an unlawful search are the result of isolated negligence attenuated from the search, far removed from the deterrent impact of the exclusionary rule, *Arizona v.*

*Evans*, 131 L.Ed.2d 34 (1995), *United States v. Leon*, 82 L.Ed.2d 677 (1984), *but see: State v. Trinidad*, 23 Wn.App. 418 (1979); 5-4.

***State v. Neth***, 165 Wn.2d 177 (2008)

Defendant is stopped for infraction, has no identification, has clear plastic bags, admits he has more than $2500 in car, police bring drug dog which reacts positively, impound car, obtain warrant, at suppression hearing trial court disregards dog evidence as affidavit did not establish reliability, drugs found; held: without the dog evidence, while the evidence is suspicious, it does not rise to probable cause, *c.f.: State v. Denham*, 197 Wn.2d 759 (2021); 9-0.

***State v. Garbaccio***, 151 Wn.App. 716, 727-31 (2009)

Warrant is not stale where five months lapse between police discovery of child porn and issuance of the warrant where affidavit states that in affiant's experience collectors of child porn retain it, distinguishing child pornography from drugs; I.

***State v. Collins***, 152 Wn.App. 429, 438-42 (2009)

A warrant for defendant to provide a voice exemplar for purposes of identification is permissible, *United States v. Dionisio*, 35 L.Ed.2d 67 (1973); where defendant refuses to provide the exemplar in the face of a court order, that refusal may be admitted as evidence of consciousness of guilt; I.

***State v. Fry***, 168 Wn.2d 1 (2010)

Police smell marijuana at residence, defendant hands deputies medical marijuana authorization, police obtain warrant, seize drugs; held: medical use certificate cannot negate probable cause to search, *McBride v. Walla Walla County*, 95 Wn.App. 33, 40 (1999), State v. Ellis, 178 Wn.App. 801 (2014), *State v. Reis*, 180 Wn.App. 438 (2014), 183 Wn.2d 197 (2015), *State v. Davis*, 182 Wn.App. 625 (2014); III.

***State v. Lyons***, 160 Wn.App. 100 (2011)

Affidavit: "[w]ithin the last 48 hours a reliable...source...contacted...Detectives and stated he/she observed narcotics" at a house, Superior Court reverses, finding that affidavit is ambiguous as to whether informant saw narcotics within 48 hours or reported what he saw to the police within 48 hours; held: hypertechnical analysis of an affidavit for search warrant that does not give great weight and deference to magistrate is improper, *State v. Walcott*, 72 Wn.2d 959, 962 (1967), *United States v. Ventresca*, 380 U.S. 102, 109, 13 L.Ed.2d 684 (1965); affidavit should be "seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement," *United States v. Cortez*, 449 U.S. 411, 418, 66 L.Ed.2d 621 (1981); 2-1, III.

***State v. Emery***, 161 Wn.App. 172, 201-03 (2011), *aff'd, on other grounds,* 174 Wn.2d 741 (2012)

Affidavit states that anonymous informant said defendant admitted rapes and robberies and provided an address, defendant resembled sketch of suspect and that defendant was associated with a "Samoan" male, police verify home address and that defendant is a suspect described as and "Asian/Pacific Islander;" held: veracity prong can be corroborated by

independent police investigation, *State v. Vickers,* 148 Wn.2d 91, 112 (2002), which here is sufficient to establish probable cause; II.

***State v. Lyons***, 174 Wn.2d 354 (2012)

Affidavit: "[w]ithin the last 48 hours a reliable...source...contacted...Detectives and stated he/she observed narcotics" at a house, trial court suppresses, finding that affidavit is ambiguous as to whether informant saw narcotics within 48 hours or reported what he saw to the police within 48 hours; held: because affidavit for warrant did not relate when CI observed the drugs, it did not provide sufficient support for magistrate's finding of timely probable cause, reversing *State v. Lyons,* 160 Wn.App. 110 (2011); overrules, in part, *State v. Partin,* 88 Wn.2d 899 (1977); 9-0.

***State v. Lohr***, 164 Wn.App. 414 (2011)

Police serve search warrant on residence, tell defendant-visitor she is free to leave, defendant requests her purse, police search purse, find drugs; held: police serving a warrant may search the personal effects of the owner and may detain others present, but they may not conduct a personal search of other individuals found on the premises or property that is "readily recognizable" as belonging to a visitor, *State v. Hill,* 123 Wn.2d 641 (1994), *State v. Worth,* 37 Wn.App. 889 (1984); here, although the purse was some feet from defendant, it was with her clothing and was clearly associated with her, thus search was improper; II.

***State v. Campbell***, 166 Wn.App. 464 (2011)

Police stop a vehicle, remove occupants, obtain search warrant to search the vehicle, defendant-passenger asks for her purse from the vehicle, police refuse, search vehicle, find drugs in purse; held: warrant for search of entire vehicle includes search of purse (parties do not dispute validity of warrant), distinguishing *State v. Worth,* 37 Wn.App. 889, 893-94 (1984); III.

***State v. Temple***, 170 Wn.App. 156 (2012)

Error in caption describing a non-existent court does not invalidate a warrant where it is signed by a judge authorized to issue the warrant, at 160-61; failure to file a warrant and warrant return does not invalidate the warrant, at 161-62, *State v. Parker,* 28 Wn.App. 425, 426-27 (1981), *cf.: State v. Linder,* 190 Wn.App. 638 (2015); I.

***Bailey v. United States***, 568 U.S. 186, 185 L.Ed.2d 19 (2013)

Police, about to serve a search warrant, observe defendant, meeting description of suspect, leave residence to be searched, follow him for a mile, detain him, patdown, find evidence; held: while police may detain individuals incident to a search warrant, *Michigan v. Summers,* 452 U.S. 692, 69 l340 (1981), once an individual has left the immediate vicinity of premises to be searched, detention must be justified by some other rationale; 6-3.

***State v. Clark***, 178 Wn.2d 19 (2013)

Absent federal pre-emption or a tribe's regulation of the manner in which state agents could execute search warrants on an Indian reservation, a state court may issue a search warrant and state agents can execute the warrant on a reservation, *Nevada v. Hicks,* 533 U.S. 353, 150 L.Ed.2d 398 (2001); affirms *State v. Clark,* 167 Wn.App. 667 (2012); 9-0.

***State v. Ollivier***, 161 Wn.App. 307 (2011), 178 Wn.2d 813 (2013)

Named informant, in exchange for leniency, tells police that he observed child pornography on defendant's computer, search warrant issued; held: where information is exchanged for a promise of leniency, reliability prong is established, *State v. Estorga,* 60 Wn.App. 298 (1991), *State v. Bean,* 89 Wn.2d 467, 469-71 (1978), citizen informants are presumptively reliable, *State v. Gaddy,* 152 Wn.2d 64, 73 (2004), *State v. Howerton,* 187 Wn.App. 357 (2015), *cf.: State v. Saggers,* 182 Wn.App. 832 (2014); informer's observations satisfies basis of knowledge prong, *State v. Wolken,* 103 Wn.App. 823, 827 (1985); fact that informant "was under psychiatric care" does not rebut credibility; warrant that specifies computers is sufficiently particular to justify seizing computers, search of computer system is sufficiently particular where warrant cites the statute defendant is accused of violating, *see: State v. Riley,* 121 Wn.2d 22, 28 (1993), *State v. Wible,* 113 Wn.App. 18 (2002), *State v. Scherf* 192 Wn.2d (2018); failure to show warrant to defendant before search as required by CrR 2.3(d) does not invalidate the warrant, *State v. Aase,* 121 Wn.App. 558, 567 (2004), *see: United States v. Banks,* 540 U.S. 31, 157 L.Ed.2d 243 (2003), *see also: Groh v. Ramirez,* 540 U.S. 551, 157 L.Ed.2d 1068 (2004), *cf.: State v. Linder,* 190 Wn.App. 638 (2015), rule does not require that copy of warrant must be provided before the search is begun; 5-4.

***State v. Higgs***, 177 Wn.App. 414 (2013)

Informant tells police she observed defendant smoke meth in his home and that she recognized it because she had smoked before, police obtain warrant authorizing search for meth, items used for "distribution and packaging and for records related to a 'distribution operation,'" police seize meth residue, amphetamine pills, rental agreement for the house, defendant's driver's license and another DOL document; held: probable cause existed to seize meth and packaging, *cf.: State v. Davis,* 79 Wn.App. 591, 595-96 (1995), warrant did not refer to items of dominion and control over premises rather authorized seizure of items evidencing dominion and control over assets, not supported by probable cause as informant did not report distribution, only possession and use; **severability doctrine** requirements that "the part of the warrant that includes particularly described items supported by probable cause must be significant when compared to the warrant as a whole," *State v. Maddox*, 116 Wn.App. 796, (2003), *aff'd*, 152 Wn.2d 499 (2004), was met as the significant part of the warrant was a search for meth; severability requirement that police seized disputed items while executing the valid part of the warrant that was supported by probable cause and described with particularity, *Maddox, supra.*, at 807-08, did not support seizure of the documents, as they were not contraband, *State v. Temple,* 170 Wn.App. 156, 164 (2012), and should have been suppressed; II.

***State v. Powell***, 181 Wn.App. 716 (2014)

Trial court need not enter written CrR 3.6 findings if there is no evidentiary hearing; II.

***State v. Davis***, 182 Wn.App. 625, 632-34 (2014)

Helicopter flyover reveals growing marijuana in greenhouse, police obtain warrant for greenhouse, house and shed; held: close proximity of greenhouses to home and shed, single entrance for both house and greenhouses provide probable cause to believe that house and shed

were related to the marijuana growing, *State v. Constantine,* 182 Wn.App. 635, 645-48 (2014), distinguishing *State v. Thein,* 138 Wn.2d 133 (1999); III.

***State v. Figeroa Martines****,* 184 Wn.2d 83 (2015)

A search warrant authorizing taking a blood sample for DUI is sufficient to authorize the testing of that sample, *cf.: State v. Fairley,* 12 Wn.App.2d 315 (2020); reverses *State v. Figeroa Martines,* 182 Wn.App. 519 (2014); 9-0.

***State v. Brock****,* 184 Wn.2d 148 (2015)

Defendant, wearing backpack, is detained, told to remove backpack, lawfully frisked, told to accompany officer to patrol car, officer carries backpack, arrests defendant, searches backpack, finds drugs; held: when an officer removes an item from an arrestee's person during a *Terry* stop which ripens into an arrest, passage of time does not negate a lawful search of the item incident to arrest, *State v. Byrd,* 178 Wn.2d 611 (2013), *State v. MacDicken,* 179 Wn.2d 936 (2014), *State v. Smith*, 119 Wn.2d 675 (1992); *see: State v. Alexander,* 10 Wn.App.2d 682 (2019); reverses *State v. Brock,* 182 Wn.App. 680 (2014); 8-1.

***State v. Besola****,* 184 Wn.2d 605 (2015)

Search warrant for child pornography that authorizes seizure of "[a]ny and all printed pornographic materials [and] [a]ny photographs, but particularly of minors" is overbroad as it authorizes seizure of legal items including adult pornography, *State v. Perrone,* 119 Wn.2d 538 (1992), *cf.: State v. Martinez,* 2 Wn.App.2d 55, 65-67 (2018), *State v. Vance,* 9 Wn.App.2d 357 (2019); citation at top of warrant to child pornography statute does not narrow the warrant, *State v. McKee,* 3 Wn.App.2d 11, 25-27 (2018); 9-0.

***State v. Dunn****,* 186 Wn.App. 889 (2015)

While probable cause to believe a person has committed a crime does not necessarily give rise to probable cause to search his or her home, *State v. Thein,* 138 Wn.2d 133 (1989), it may be proper to infer that stolen property is at the person's residence if the property is bulky (here an ATV) and perpetrator had an opportunity to return home before apprehension by the police, *State v. McReynolds,* 194 Wn.App. 560, 569-70 (2000); III.

***State v. Peppin****,* 186 Wn.App. 901 (2015)

Police remotely access, without a warrant, child pornography that defendant shared via peer to peer software, obtain warrant to search defendant's computer; held: images files shared with the public do not create a constitutionally protected privacy right; III.

***State v. Linder****,* 190 Wn.App. 638 (2015)

Police officer obtains a warrant and, working alone, opens container and finds drugs; held: CrR 2.3(d) requires that service of warrant be in presence of the person from whom the property was taken or in the presence of at least one person other than the officer, there being no other remedy for violation of the rule other than suppression, suppression is the remedy, distinguishing *State v. Bowman,* 8 Wn.App. 148 (1972), *State v. Smith,* 15 Wn.App. 716 (1976), *State v. Wraspir,* 20 Wn.App. 626 (1978), *State v. Parker,* 28 Wn.App. 425, 426 (1981), *State v.*

*Kern*, 81 Wn.App. 308 (1996), *State v. Aase*, 121 Wn.App. 558 (2004), *State v. Temple*, 179 Wn.App. 156 (2012); III.

***State v. Reeder***, 184 Wn.2d 805, 813-25 (2015)

**Special Inquiry Judge**, ch. 10.27, RCW, may issue a subpoena *duces tecum* for bank records based upon a reason to suspect crime or corruption, less than probable cause; affirms *State v. Reeder*, 181 Wn.App. 897 (2014); 7-2.

***State v. Keodara***, 191 Wn.App. 305 (2015)

Police arrest defendant, impound car, obtain warrant for car, find drugs and cell phone, obtain second warrant to search cell phone, affidavit asserts that detective is a gang expert, common for gang members to take pictures with firearms, often text each other about drugs, magistrate authorizes search of everything on the phone; held: general statements about what gang members do is not sufficient to establish probable cause, *State v. Thein*, 138 Wn.2d 133 (1989), warrant was overbroad and failed to satisfy particularity requirement, *State v. Riley*, 121 Wn.2d 22 (1993), *State v. McKee*, 3 Wn.App.2d 11 (2018), *cf.: State v. Scherf*, 192 Wn.2d 350 (2018); I.

***In re Search Warrant***, 194 Wn.App. 365 (2016)

Superior Court has jurisdiction to hear a motion for return of property, CrR 2.3, seized pursuant to a municipal court search warrant; I.

***State v. Sleater***, 194 Wn.App. 470, 474 (2016)

Defendant is ordered to pay LFOs, enters "pay or appear" program requiring monthly payments or appear and schedule a hearing to explain why she could not pay, defendant misses payment, fails to schedule hearing, warrant is issued, upon arrest police find drugs; held: court cannot place onus on defendant to schedule her own hearing, *State v. Klinker*, 85 Wn.2d 509 (1975), *State v. Fisher*, 145 Wn.2d 209 (2001), *State v. Nason*, 168 Wn.2d 936 (2010), summons or prior court order requiring defendant to attend a specific hearing before a warrant can issue is necessary, thus drugs must be suppressed; III.

***State v. Blizzard***, 195 Wn.App. 717, 729-32 (2016)

Affidavit: Mendez confesses to conspiracy to murder, admits knowing defendant, her phone records show texts with defendant on day of murder, bad blood between defendant and victim, defendant is beneficiary of life insurance on victim; held: reasonable to infer that evidence about the murder would be found on defendant's cell phone; III.

***State v. Betancourth***, 190 Wn.2d 357, 413 P.3d 566 (2018)

District court issues search warrant to Verizon for cell phone records, Verizon provides records to police, prosecutor realizes that only Superior Court can issue warrants for out of state records, RCW 10.96.060 (2008), obtains same warrant from Superior Court judge referencing the fact that District Court had previously issued the warrant, Verizon declines to re-supply the same records as they had already provided them; held: the first unlawful search did not contribute to the issuance of the lawful warrant, nothing in the substance of the evidence seized contributed to the issuance of the second warrant, the law does not require the police to return the

evidence and then re-seize it, thus **independent source doctrine** applies and the evidence is admissible, *State v. Miles,x* 159 Wn.App. 282, 286-87 (2011); 9-0.

***State v. Martinez***, 2 Wn.App.2d 55, 65-67 (2018)

Warrant authorizing seizure of photographs of minors engaged in "sexually explicit conduct as defined in RCW 9.68A.011(3)" is not overbroad, *State v. Perrone,* 119 Wn.2d 538 (1992), *State v. Vance,* 9 Wn.App.2d 357 (2019), *cf.: State v. Besola,* 184 Wn.2d 605 (2015); warrant is not overbroad merely because it authorizes seizure of "lawful items" as they may be relevant to a crime; affidavit in support of warrant does not disclose that another state chose not to indict defendant on same material, that child victim had denied having sex with defendant before admitting it does not invalidate warrant as detective did not deliberately or recklessly omit it, at 69-71, *State v. Garrison,* 118 Wn.2d 870 (1992), *Franks v. Delaware,* 57 L.Ed.2d 667 (1978); I.

***State v. McKee***, 3 Wn.App.2d 11 (2018)

Affidavit establishes probable cause to search cell phone for depictions of exploitation of a minor, warrant authorizes search of phone for "images, video, documents, text messages, contacts, audio recordings, call logs, calendars, note, tasks, data/internet usage" and authorize a "physical dump" of the memory, police find depictions of minors engaged in sexually explicit conduct, defendant is so charged; held: warrant authorized search of cell phone without limitation, was overbroad and did not meet particularity requirement of Fourth Amendment, *State v. Perrone,* 119 Wn.2d 538, 547 (1992), *State v. Heutink,* 12 Wn.App.2d 336 (2020), *cf.: State v. Stenson,* 132 Wn.2d 668 (1997), warrant did not set out objective standards by which executing officers could differentiate items subject to seizure from those which are not, *State v. Keodara,* 191 Wn.App. 305 (2015), because warrant violated particularity requirement all evidence must be suppressed, *see: Carpenter v. United States,* 585 U.S. ___ , 138 S.Ct. 2206, 201 L.Ed.2d 507 (2018);. I.

***State v. Witkowski***, 3 Wn.App.2d 318 (2018)

Police serve search warrant for stolen property in a residence, observe locked gun safe, knowing defendant is a felon obtain addendum authorizing search for firearms although affidavit and addendum warrant do not specifically reference locked safe, seize guns; held: warrant authorizing search of premises for firearms includes locked gun safe, *State v. Simonson,* 91 Wn.App. 874, 886-87 (1998), under Fourth Amendment and state constitution, failure to specifically include reference to locked safe does not exclude search of the safe by "negative implication;" II.

***State v. Friedrich***, 4 Wn.App.2d 945 (2018)

Microsoft, pursuant to 18 U.S.C. § 2258A which requires computer companies to report child pornography, informs police that it has found depictions that it became aware of, police obtain warrant, seize computers; held: the fact that the depictions were found when Microsoft "became aware" of it rather than when it was uploaded did not make the warrant stale as detective, in affidavit, pointed out that items remain on hard disks even after deletion; while the police may have seized more than authorized by the warrant, the severability doctrine prevails as the only evidence introduced was within the scope of probable cause; III.

***State v. Vance***, 9 Wn.App.2d 357 (2019)

Depictions warrant authorizing search for "evidence of the crime(s) of: RCW 9.68.050 Dealing in depictions of a minor engaged in sexually explicit conduct and RCW 9.68A.070 Possession of depictions of a minor engaged in sexually explicit conduct" which authorizes a search for computers or various devices "capable of being used to commit or further the crimes outlined above, or to create, access, or store the types of evidence, contraband, fruits, or instrumentalities of such crimes," is sufficiently particular, *State v. Martinez*, 2 Wash. App. 2d 55 (2018), distinguishing *State v. Perrone*, 119 Wn.2d 538, 545 (1992), *State v. McKee*, 3 Wn.App.2d 11 (2018), *rev'd on other grounds*,, 193 Wn.2d 271 (2019), *State v. Besola*, 184 Wn.2d 605 (2015); II.

***State v. Hatt***, 11 Wn.App.2d 113 (2019)

Warrant authorizes search for digging equipment and biological trace evidence, police serving warrant dig, find a body, defense argues search exceeded scope; held: finding more evidence than expected does not exceed the scope of a warrant; because police were authorized to seize digging equipment it was proper to search areas that appeared to have been dug; I.

***State v. Fairley***, 12 Wn.App.2d 315 (2020)

Police obtain warrant authorizing search of residence and seizure of cell phone, pursuant to warrant police search cell phone, seize text messages that are offered at trial; held: a cell phone warrant must specify the types of data to be seized to distinguish between material for which there is probable cause from information that should remain private, and might limit search to specific areas of the phone, *e.g.*, text messages between target and victim, time frame and set out a protocol to minimize intrusion, *Riley v. California*, 573 U.S. 373, 385-86, 134 S. Ct. 2473, 189 L. Ed. 2d 430 (2014), *see: State v. McKee*, 3 Wn.App.2d 11 (2018), distinguishing *State v. Figeroa Martines*, 184 Wash.2d 83, 355 P.3d 1111 (2015); 2-1, III.

***State v. Denham***, 197 Wn.2d 759 (2021)

Affidavit asserts that burglary of jewelry store occurred, defendant had pawned jewelry stolen at burglary, probation officer informed police of defendant's phone number, that a purchaser of jewelry reached defendant at the phone number, boilerplate language in affidavit describing role of cell phones, warrant authorizes seizure of subscriber information, billing records, call records, images over five months, state concedes at suppression hearing that some of it was overbroad both in time and scope; held: affidavit is sufficient to support reasonable grounds to believe that the phone belonged to defendant based on his use of the phone with his probation officer, that defendant had the phone at the time of the burglary, used it to arrange sale of diamond, all sufficient to raise a reasonable inference that evidence of burglary would be found in cell site location information, *State v. Neth*, 165 Wn.2d 177 (2008), *State v. Thein*, 138 Wn.2d 133 (1999), no overbreadth challenge was made on appeal; 5-4.

***State v. Gudgell***, 20 Wn.App.2d 162 (2021)

In unlawful fishing case district court issues search warrant for names of passengers so that investigators can interview them to determine if there is evidence to charge captains; held: records of who was on the fishing trips is evidence of the crime justifying issuance of the warrant; evidence of a crime is broader than evidence proving a crime was committed, it also includes evidence relating to or connected with or concerning a crime, *State v. Scherf*, 192 Wn.2d 350, 364 (2018); II.

***Matter of Pleasant***, 21 Wn.App.2d 320 (2022)

Police, following K-9 hit, obtain search warrant for defendant's car, find drugs, defense maintains police did not have probable cause that a crime was committed as possession of drugs is not a crime, *State v. Blake*, 197 Wn.2d 170 (2021); held: because police could not have perceived that Supreme Court would hold that statute prohibiting possession of drugs is unconstitutional probable cause existed to justify the warrant; III.

***State v. Moses***, 22 Wn.App.2d 550 (2022)

Officer observes drug paraphernalia in car, K-9 dog alerts to drugs, obtains search warrant for VUCSA possession and paraphernalia, seizes drugs, pipe and firearm, subsequently Supreme Court invalidates VUCSA possession, *State v. Blake*, 197 Wn.2d 170 (2021), trial court suppresses and dismisses; held: officer relied upon an apparently valid statute in obtaining the warrant, *Michigan v. DeFillippo*, 443 U.S. 31, 37 99 S.Ct. 2627, 61 L.Ed.2d 343 (1979), *State v. Potter*, 156 Wn.2d 835 (2006), *State v. Brockob*, 159 Wn.2d 311 (2006), VUCSA statute was not flagrantly unconstitutional, *State v. White*, 97 Wn.2d 92, 103 (1982), thus warrant was valid; that portion of the warrant seeking drug paraphernalia was enough to validate the search; I.

***State v. Chambers***, 23 Wn.App.2d 917 (2022)

Washington sheriff obtains and serves search warrant seeking evidence of child pornography accompanied by an Idaho detective who investigated the case and who, per the Washington sheriff, is an expert in the field; held: Washington police are authorized to use an out-of-state officer in a search where the Idaho officer was not arresting the suspect or otherwise enforcing the law but assisted in forensic examination of the evidence, *cf.*: *State v. Bartholomew*, 56 Wn.App. 617 (1990), *see:* *Wilson v. Layne*, 526 U.S. 603, 614, 119 S. Ct. 1692, 143 L. Ed. 2d 818 (1999); III.

# SEARCH
# Warrantless

***United States v. Allard***, 634 F.2d 1182 (9th Cir. 1980)

Police "secure" defendant's hotel room and curtail defendant's movement following which they obtain valid warrant; held: unlawfully securing room taints subsequent search in spite of warrant, thus evidence suppressed; *accord*: *United States v. Griffin*, 502 F.2d 959 (6th Cir. 1974).

***State v. Carner***, 28 Wn.App. 439 (1981)

Police arrest juvenile for traffic violations, pat him down, decide to release him to parents, then do a full search discovering cocaine; held: once decision was made to release defendant, any further intrusion on his privacy was unreasonable, *State v. McKennon*, 91 Wn.App. 554 (1998), *cf.*: *State v. Brantigan*, 59 Wn.App. 581 (1990), *State v. O'Neill*, 110 Wn.App. 604 (2002).

***State v. Jordan***, 30 Wn.App. 335 (1981)

*Aguilar-Spinelli* test can apply to a warrantless search; police investigation can supply corroboration to informant's tip.

***State v. Christian***, 95 Wn.2d 655 (1981)

**Tenant** partially vacates apartment at end of rental period telling landlord he was vacating; landlord enters, finds drugs in apartment, calls police who seize drugs; held: defendant had no reasonable expectation of privacy, *cf.:* *State v. Rose*, 75 Wn.App. 28 (1994), *State v. Davis*, 86 Wn.App. 414 (1997).

***State v. Grinier***, 34 Wn.App. 164 (1983)

Informants advise police that a shipment of drugs will arrive at a residence; police observe the suspected delivery truck arrive at residence, see luggage moved into residence, then see luggage moved from residence to defendant's vehicle, police stop vehicle, find drugs in luggage; held: police had no evidence to establish that drugs were in luggage, no exigent circumstances applied; where the suspected locus of contraband is luggage being transported at the time of the stop, and not the car in which it is being carried, the relationship between the car and the luggage is coincidental, and the automobile exception does not apply; 2-1; II.

***State v. Garcia***, 35 Wn.App. 174 (1983)

Defendant is lawfully arrested, taken to station; before it was decided whether or not to place defendant in jail, he was booked and, in searching his wallet, police seize razor and drugs; held: search was pursuant to lawful arrest, it was reasonable to search his wallet as an inventory search, *distinguishing* *State v. Carner*, 28 Wn.App. 439 (1981), wherein police had already decided to release defendant, whereas here that decision had not been made, *State v. McKennon*, 91 Wn.App. 554 (1998); III.

***State v. Childress***, 35 Wn.App. 314 (1983)

California police unlawfully search defendant's home, seize nude photograph of minor girl; photograph delivered to Everett police, who find girl's parents who ask girl if she has any secrets, she admits to sex with defendant; defense moves to suppress witness's testimony as fruit of unlawful search; held: testimony was sufficiently attenuated from search to dissipate taint, *United States v. Ceccolini*, 55 L.Ed.2d 268 (1978); I.

***State v. Keller***, 35 Wn.App. 455 (1983)

Defendant is sentenced to **probation**, a condition being that he submit to searches by probation officer; defendant appeals, is ordered to be supervised by probation pending appeal; P.O. and police search residence without warrant, seize drugs; held: warrantless searches of probationers are permitted where reasonable, *Hocker v. Woody*, 95 Wn.2d 822, 926 (1981), *State v. Cochran*, 27 Wn.App. 664, 666 (1980), *State v. Simms*, 10 Wn.App. 75, 85 (1973), *United States v. Knights*, 151 L.Ed.2d 497 (2001), *cf.*: *Griffin v. Wisconsin*, 97 L.Ed.2d 709 (1987), *see: State v. Cornwell*, 190 Wn.2d 296 (2018), but here defendant was released pending appeal without an explicit condition of release permitting searches, thus suppressed; III.

***Jacobsen v. Seattle***, 98 Wn.2d 668 (1983)

Intensive patdown searches by police of patrons attending rock concerts are unconstitutional; 9-0.

***United States v. Villamonte-Marquez***, 77 L.Ed.2d 22 (1983)

Pursuant to 19 USC § 1581(a), **customs** officials may validly board any vessel at any place in the United States and examine documents without any suspicion of wrongdoing where the vessel is located in waters providing ready access to the open sea; 6-3.

***Illinois v. Lafayette***, 77 L.Ed.2d 65 (1983)

Police may search any container or article in possession of an arrestee without a warrant as **inventory** search "in accordance with established inventory procedures," *State v. Dunham,* 194 Wn.App. 744 (2016); 9-0.

***United States v. Place***, 77 L.Ed.2d 110 (1983)

Airline passenger's behavior arouses suspicion of police, who discover that tags on luggage do not match, addresses are false; police seize bags, hold for 90 minutes until dog sniffs outside of luggage, reacts positively for narcotics, police obtain warrant, find drugs; held: **canine sniff** is not a search, *Illinois v. Caballes*, 160 L.Ed.2d 842 (2005), *see: Florida v. Harris*, 568 U.S. 237, 185 L.Ed.2d 61 (2013), *but see: State v. Dearman*, 92 Wn.App. 630 (1998), *Rodriguez v. United States*, 575 U.S. 348, 135 S.Ct. 1609, 191 L. Ed. 2d 492 (2015); where police have reasonable belief luggage contains drugs, they may detain luggage temporarily to investigate and permit dog to sniff outside; here, 90 minute detention exceeded permissible scope, exacerbated by fact that police lied about where luggage was to be taken; 9-0.

***Illinois v. Andreas***, 77 L.Ed.2d 1003 (1983)

Customs officers lawfully open a container, find drugs, call DEA agent, who seals package and delivers it to defendant's home; defendant accepts delivery, takes container inside for 30-45 minutes; when defendant leaves home with container, he is arrested and container is re-opened without a warrant; held: act of re-sealing lawfully searched container does not restore privacy rights, thus no search occurred when it was re-opened; gap in surveillance such that police are not 100% sure that contents were not removed is insufficient to recreate privacy interest; 6-3.

***State v. Drumhiller***, 36 Wn.App. 592 (1984)

Police observe drug activity through window of house, arrest occupants, search house, seize drugs; held: police can seize evidence of a crime committed in officer's presence in open view without warrant, *State v. Mueller,* 15 Wn.App. 667 (1976), *State v. Rose,* 128 Wn.2d 388 (1996); III.

***State v. Taplin***, 36 Wn.App. 664 (1984)

Police, without warrant but with probable cause, force defendant to spit out balloons full of heroin; held: possibility that swallowed balloons would not pass through digestive tract establish exigent circumstance due to possible destruction of evidence; I.

***State v. McAlpin***, 36 Wn.App. 707 (1984)

Suspect, after traffic accident, takes a satchel and runs to a restaurant, police arrive, leave with suspect, who appeared high, remind him of satchel, suspect rushes for it, struggles with police, is handcuffed, patrons of restaurant tell police suspect had been waving gun around, police open satchel, find drugs, gun; held: **emergency** search for the gun which could have fallen into "untrained or malicious hands" establishes exigency for warrantless search, *State v. Lowen*, 97 Wn.2d 562, 568 (1982); I.

***State v. Welker***, 37 Wn.App. 628 (1984)

Rape victim reports she scratched suspect's face, police enter suspect's home without warrant or consent, arrest suspect; held: exigent circumstance to avoid **destruction of evidence**, *State v. Counts*, 99 Wn.2d 54 (1983), excuses nonconsensual entry into home to arrest; containing premises to obtain warrant would take too long, defendant could destroy trace evidence, *United States v. Minick*, 455 A.2d 874 (D.C. 1983); *cf.: State v. Muir*, 67 Wn.App. 149 (1992); II.

***State v. Reid***, 38 Wn.App. 203 (1984)

Police arrest homicide suspect outside his home and knowing co-suspect is at large and may be in suspect's home, enter without warrant, arrest co-defendant and seize evidence; held: concern for safety by police plus lack of time to obtain telephonic warrant justify exigency of warrantless arrest in home; 2-1, I.

***State v. Arnett***, 38 Wn.App. 527 (1984)

Police, looking for missing child, enter suspect's home with consent, hear scraping sound and walk through house; held: potential **life-threatening danger** to victim is exigent circumstance justifying warrantless "walk-through" search, *State v. Welker*, 37 Wn.App. 628 (1984); II.

***State v. Dresker***, 39 Wn.App. 136 (1984)

Police, believing some minors may be drinking at a party, enter residence and find drugs; held: mere **possibility of escape** is not sufficient exigent circumstance to enter residence without warrant; police must observe specific person commit specific misdemeanor to justify a warrantless arrest for a misdemeanor being committed in the presence of the officer, RCW 10.31.100, *see: State v. Bravo Ortega*, 177 Wn.2d 116 (2013); III.

***Michigan v. Clifford***, 78 L.Ed.2d 477 (1984)

After residential fire is extinguished, arson investigators enter house, seize evidence; held: where reasonable expectations of privacy remain in fire-damaged premises, **administrative searches** into the cause or origin of fire are subject to the warrant requirement; 5-4.

***United States v. Jacobsen***, 80 L.Ed.2d 85 (1984)

Private carrier employees examine damaged box, observe white powder, return same to box, call DEA; DEA removes powder, field tests a trace, obtain warrant to search place to which package was addressed; held: because DEA already knew contents were a white powder, reopening box and inspecting contents did not invade any legitimate privacy interest; field test

which consumed trace of the powder was reasonable invasion of defendant's privacy interest; 7-2.

***Welsh v. Wisconsin***, 80 L.Ed.2d 732 (1984)

Police enter suspect's home without warrant and arrest for DUI, claiming hot pursuit; held: warrantless home arrest for minor offense is not justified by **hot-pursuit** doctrine where there was no continuous pursuit, no threat to public safety, *cf.*: *State v. Griffith*, 61 Wn.App. 35 (1991), *State v. Bessette*, 105 Wn.App. 793 (2001), *Stanton v. Sims*, 571 U.S. 3, 187 L.Ed.2d 341 (2013); 7-2.

***Nix v. Williams***, 81 L.Ed.2d 377 (1984)

Where police unlawfully obtain evidence as a result of an unlawfully obtained confession, the evidence is admissible if court determines by preponderance that it **inevitably would have been discovered** by lawful means, *State v. Richman*, 85 Wn.App. 568 (1997), *see: State v. Reyes*, 98 Wn.App. 925 (2000), *State v. Avila-Avina*,99 Wn.App. 9 (2000); state need not prove the absence of bad faith; 7-2.

***Hudson v. Palmer***, 82 L.Ed.2d 393 (1984)

**Prison inmates** have no Fourth Amendment protection against unreasonable search in their individual cells, *Pers. Restraint of Benn*, 134 Wn.2d 868, 909 (1998), *see also: State v. Rainford*, 86 Wn.App. 431 (1997); 5-4.

***United States v. Karo***, 82 L.Ed.2d 530 (1984)

Monitoring of a **beeper** in a private residence not open to visual surveillance violates Fourth Amendment rights of those who have a justifiable interest in the privacy of the residence, *distinguishing United States v. Knotts*, 75 L.Ed.2d 55 (1983); placing beeper in a closed container and then transferring container to suspect is neither a search nor a seizure; 6-3.

***Segura v. United States***, 82 L.Ed.2d 599 (1984)

Police, with probable cause to search but without warrant, arrest defendants just outside their apartment, enter and secure apartment, observing drug accouterments, obtain search warrant 19 hours later; held: while initial seizure of the apartment was unlawful, the information on which the warrant was secured came from sources unconnected with the initial entry, thus the ultimate seizure of the evidence was so attenuated as to dissipate the taint; *see*: *State v. Solberg*, 122 Wn.2d 688 (1993), *cf.: Illinois v. McArthur*, 148 L.Ed.2d 838 (2001); 5-4.

***Thompson v. Louisiana***, 83 L.Ed.2d 246 (1984)

No "murder scene exception" to the warrant requirement, *Mincey v. Arizona*, 57 L.Ed.2d 290 (1978); 9-0.

***State v. Crandall***, 39 Wn.App. 849 (1985)

A police officer's warrantless trespass on unoccupied **undeveloped land** which is not posted, frequented by hunters, not part of the curtilage, part of which is fenced, does not offend the Fourth Amendment or Article I, § 7 as there is no privacy interest in open fields; 2-1; III.

***State v. Komoto***, 40 Wn.App. 200 (1985)

Police, having probable case to believe suspect was involved in hit and run and had been drinking, and believing that victim was dying, arrest defendant in his home without a warrant and take blood sample; held: "natural and inexorable **dissipation" of blood alcohol**, plus gravity of underlying offense (negligent homicide) are sufficient exigencies to permit warrantless arrest in home, *distinguishing* *Welsh v. Wisconsin*, 80 L.Ed.2d 732 (1984); need for immediate blood sample justified proceeding without telephonic warrant, as any delay creates risk that suspect would consume additional intoxicants; I.

***State v. Williamson***, 42 Wn.App. 208 (1985)

Undercover officers in civilian attire are invited into home where they arrest defendant without warrant; held: where invited, **undercover police** may effectuate a warrantless arrest in home, *distinguishing* *Payton v. N.Y.*, 63 L.Ed.2d 639 (1980); knowing and voluntary waiver analysis does not apply to Fourth Amendment issues, *Schneckloth v. Bustamonte*, 36 L.Ed.2d 854 (1973); II.

***State v. Ng***, 104 Wn.2d 763 (1985)

Police enter a residence with consent, post officer in front of a bedroom door to secure it while other officers obtain a warrant to search the bedroom; held: police needed only probable cause to "impound" the bedroom while a warrant was being secured; because the warrant was obtained expeditiously, the seizure was reasonable; *Segura v. United States*, 82 L.Ed.2d 599 (1984), *State v. Solberg*, 122 Wn.2d 688 (1993), *Illinois v. McArthur*, 148 L.Ed.2d 838 (2001); 9-0.

***New Jersey v. T.L.O.***, 83 L.Ed.2d 720 (1985)

Fourth Amendment applies to searches by public **school** authorities as representatives of the state; school officials may search a student on reasonable suspicion, short of probable cause, without a warrant, *State v. Brown*, 158 Wn.App. 49 (2010), *see also: Safford U. Sch. Dist. v. Redding*, 174 L.Ed.2d 354 (2009), *cf.: State v. Meneese,* 174 Wn.2d 937 (2012), *State v. A.S.*, 6 Wn.App.2d 264 (2018); 7.2.

***Hayes v. Florida***, 84 L.Ed.2d 705 (1985)

Absent probable cause police may not take a suspect to the station for fingerprinting; *dicta* that an investigative detention for fingerprinting in the field is lawful; 8-0 (holding), 6-2 (*dicta*).

***United States v. Montoya de Hernandez,*** 473 U.S. 531, 87 L.Ed.2d 381 (1985)

Defendant, upon arrival at airport from Columbia, is strip searched and found to have "firm fullness" in abdomen, is detained for 24 hours for bowel movement; ultimately magistrate issues order for rectal exam, drugs found; held: detention of traveler at **border**, beyond routine customs inspection, is justified if customs agents, considering all of the facts of traveler and her trip, reasonably suspect traveler is smuggling contraband in her alimentary canal; 7-2.

***California v. Ciraolo***, 90 L.Ed.2d 210 (1986)

Police fly in **airplane** over defendant's fenced backyard, observe marijuana growing from 1000 feet with naked eye, obtain warrant; held: mere fact that individual has taken measures to restrict some views of his activities by building a fence does not preclude police observation from a public vantage point where he has a right to be and which renders activities clearly visible, *see also: State v. Davis*, 182 Wn.App. 625 (2014); 5-4.

***Dow Chemical Co. v. United States***, 90 L.Ed.2d 226 (1986)

**Aerial photography** of a manufacturing plant by EPA does not require warrant, as open areas of an industrial plant complex are not analogous to curtilage of a dwelling, but are closer to an open field; 5-4.

***State v. Jeffries***, 105 Wn.2d 398 (1986)

Police seize and search possessions hidden in woods, not on defendant's property; held: no reasonable expectation of privacy, as defendant could not have expected to keep anybody who discovered the items from looking at them; 9-0.

***State v. Terrovona***, 105 Wn.2d 632 (1986)

Exigent circumstances for warrantless arrest in home, *distinguishing* *Payton v. New York*, 63 L.Ed.2d 573 (1980); *accord*: *State v. McIntyre*, 39 Wn.App. 1 (1984); 9-0.

***State v. Bradley***, 105 Wn.2d 898 (1986)

United States **Customs** Officer's search of defendant's vehicle without a warrant is not unlawful under state constitution as long as it complied with federal law on border searches; 9-0.

***State v. Gunwall***, 106 Wn.2d 54 (1986)

Long distance **telephone records** may only be obtained by police through a search warrant or subpoena, *see also: State v. Miles*, 160 Wn.2d 236 (2007); a **pen register** may only be placed on a telephone line pursuant to a search warrant or court order obtained in accordance with RCW 9.73; 9-0.

***State v. Carey***, 42 Wn.App. 840 (1986)

Right to challenge warrantless search and investigation of fire-damaged premises requires showing of objective, reasonable expectation of privacy, including whether property is defendant's home, extent of fire damage, whether defendant attempted to secure premises after fire; I.

***State v. Brooks***, 43 Wn.App. 560 (1986)

Search of student's **school locker** upheld where school official learns from informant that respondent was selling drugs from locker, informant had locker near respondent's, respondent was believed to be a drug user based on three observations by teachers, and respondent frequented a location believed to be site of drug trafficking; CONST. Art. 1, § 7 provides no more demanding a standard than Fourth Amendment,, *New Jersey v. T.L.O.*, 83 L.Ed.2d 720 (1985); I.

***State v. Dold***, 44 Wn.App. 519 (1986)

Police receive an envelope addressed to police, open envelope, find another envelope addressed to defendant marked "delivered and opened in error"; inner envelope was open, police read letter, learn that defendant had access to drugs, investigate and arrest defendant for VUCSA; held: where a **private citizen**, acting without governmental authority, searches property, then a subsequent warrantless search by the government that does not exceed the bounds of the prior private search does not violate the Fourth Amendment, *but see:* *State v. Eisfeldt*, 163 Wn.2d 628 (2008); burden is on the defense to establish collusion between the citizen informant and the police; I.

***State v. Boyce***, 44 Wn.App. 724 (1986)

**Canine sniff** of safe deposit box is not a search under CONST. Art. 1, § 7 where the defendant has no reasonable expectation of privacy and the sniff is minimally intrusive, *State v. Hartzell*, 153 Wn.App. 137, 148-49 (2009), *State v. Hartzell*, 156 Wn.App. 918, 928-30 (2010), *cf.: Rodriguez v. United States*, 575 U.S. 348, 135 S.Ct. 1609, 191 L. Ed. 2d 492 (2015); court declines to hold that a canine sniff is never a search, *distinguishing* *United States v. Place*, 77 L.Ed.2d 110 (1983), *see also:* *State v. Young*, 123 Wn.2d 173, 187-8 (1994), *State v. Dearman*, 92 Wn.App. 630 (1998); I.

***State v. Bakke***, 44 Wn.App. 830 (1986)

Police respond to a burglary call, observe evidence of forced entry, occupant not present, police enter to look for suspect and safeguard residence, find drugs; held: entry into residence without a warrant to secure it following a burglary report does not violate Fourth Amendment or CONST. Art. 1, § 7 as long as the intrusion is not greater than necessary to check for intruders and safeguard property, *State v. Johnson*, 104 Wn.App. 409 (2001), *cf.*: *State v. Morgavi*, 58 Wn.App. 733 (1990); I.

***State v. Lampman***, 45 Wn.App. 228 (1986)

Exclusionary rule applies in **probation revocation** proceedings, CONST. Art. 1, § 7; probationer may be searched without a warrant where the police or probation officer has a well founded suspicion that a probation violation has occurred, *see:* *United States v. Knights*, 151 L.Ed.2d 497 (2001), *State v. Cornwell*, 190 Wn.2d 296 (2018); flight from pursuing probation officer plus P.O.'s knowledge of defendant's drug problems equals a well founded suspicion to search; *cf.*: *Griffin v. Wisconsin*, 97 L.Ed.2d 709 (1987); II.

***State v. Wood***, 45 Wn.App. 299 (1986)

In making an arrest for a felony parole violation, police may accompany the arrestee into his residence without a warrant, *distinguishing* *State v. Chrisman*, 100 Wn.2d 814 (1984), *see:* *State v. Kull*, 155 Wn.2d 80 (2005), *Samson v. California*, 165 L.Ed.2d 250 (2006); I.

***Illinois v. Krull***, 94 L.Ed.2d 364 (1987)

Police seize evidence during a warrantless administrative search; subsequently, the law permitting the administrative search is declared unconstitutional; held: because the police reasonably relied upon the statute, then the evidence is admissible; 5-4.

***O'Connor v. Ortega***, 94 L.Ed.2d 714 (1987)

Searches of government **employees'** workplaces by their employers are subject to limited Fourth Amendment restraints.

***New York v. Burger***, 96 L.Ed.2d 601 (1987)

Warrantless search of automobile junkyard pursuant to state statute authorizing inspection of **pervasively regulated industries** does not violate Fourth Amendment even though purpose of statute and search is to enforce penal laws, *Donovan v. Dewey*, 69 L.Ed.2d 262 (1981), *cf.: City of Indianapolis v. Edmond*, 148 L.Ed.2d 333 (2000), *but see: State v. Miles*, 160 Wn.2d 236, 250 (2007); 6-3.

***Griffin v. Wisconsin***, 97 L.Ed.2d 709 (1987)

Where **probationer**, by statute, is in legal custody of the state, then probation officer may search probationer's home without warrant on "reasonable grounds," less than probable cause, *United States v. Knights*, 151 L.Ed.2d 497 (2001), *but see: State v. Cornwell*, 190 Wn.2d 296 (2018), tip from police there "were or might be," guns in probationer's home establishes reasonable grounds; 5-4.

***State v. Butterworth***, 48 Wn.App. 152 (1987)

Police may not obtain **telephone listing** from phone company where customer has requested the number be unlisted without a warrant or other valid legal process; *cf.: State v. Maxwell*, 114 Wn.2d 761 (1990), *State v. Dice*, 55 Wn.App. 489 (1989), *State v. Faydo*, 68 Wn.App. 621 (1993), *Pers. Restraint o. Maxfield*, 133 Wn.2d 332 (1997); I.

***State v. Courcy***, 48 Wn.App. 326 (1987)

**Single purpose container doctrine**: a container found by police during the course of a search which, by its very nature cannot support any reasonable expectation of privacy because its contents can be inferred from the outward appearance may, if properly seized, be searched without a warrant; here, a bindle of a type known to police to contain drugs, may be opened without a warrant, *Arkansas v. Sanders*, 61 L.Ed.2d 235 n. 13 (1979); III.

***State v. Berber***, 48 Wn.App. 583 (1987)

Police enter tavern restroom, observe defendant standing in partially partitioned **toilet stall** with hands at his chest, look over his shoulder, observe drugs; held: stall was partially opened, placement of defendant's hands were such that it was obvious he was not using the area for its customary purpose, thus no reasonable expectation of privacy; *see also: State v. Rodriguez*, 65 Wn.App. 409 (1992); 2-1, III.

***State v. Petty***, 48 Wn.App. 615 (1987)

Police approach residence, knock on door, when opened smell marijuana, use that observation to obtain warrant; held: no reasonable expectation of privacy in approaching residence by access route impliedly open to public irrespective of motivation of police, *State v. Maxfield*, 125 Wn.2d 378, 399 (1994), *rev'd, on other grounds, Pers. Restraint of Maxfield*, 133 Wn.2d 332 (1997), *see: State v. Graffius*, 74 Wn.App. 23 (1994), *State v. Ross*, 141 Wn.2d 304 (2000), *cf.: State v. Ague-Masters*, 138 Wn.App. 86 (2007); I.

***State v. Ramirez***, 49 Wn.App. 814 (1987)

Police smell marijuana smoke emanating from hotel room, enter without warrant and seize drugs; held: exigent circumstance of destruction of evidence does not apply where the crime is a misdemeanor, *Welch v. Wisconsin*, 80 L.Ed.2d 732 (1984), *Johnson v. United States*, 92 L.Ed. 436 (1948), *State v. Bessette*, 105 Wn.App. 793 (2001), thus evidence suppressed; RCW 10.31.100(1), permitting arrest without a warrant where police have probable cause for a marijuana offense, only applies to an arrest in a public place or an automobile, not a residence, *Samson v. California*, 165 L.Ed.2d 250 (2006); III.

***State v. Vonhof***, 51 Wn.App. 33 (1988)

Where a tax appraiser enters property to revalue it, the Fourth Amendment and CONST. Art. 1, § 7 are implicated, *distinguishing State v. Ludvick*, 40 Wn.App. 257 (1985); however, where the appraiser is legitimately on the property, does not exceed the scope of his appraisal, and his route is a normal one, no search has occurred, *State v. Seagull*, 95 Wn.2d 898 (1981), *see: State v. Creegan*, 123 Wn.App. 718 (2004); III.

***State v. Patterson***, 51 Wn.App. 202 (1988)

Warrantless search of a **parolee's** vehicle, while the parolee is in custody, by a parole officer acting in a supervisory capacity (although assisting police in their investigative capacity) is valid upon a reasonable suspicion, *see: Samson v. California*, 165 L.Ed.2d 250 (2006); anonymous tip verified by tentative identification by victim who said robber had a gun plus information from the owner of the lot where the vehicle was stored that there may be a gun in the car is sufficient, *cf.: Florida v. J.L.*, 579 U.S. 266, 272, 146 L.Ed.2d 254 (2000); III.

***California v. Greenwood***, 100 L.Ed.2d 30 (1988)

**Garbage bags** left for collection on curb outside home may be searched without a warrant under Fourth Amendment; *but see*: *State v. Boland*, 115 Wn.2d 571 (1990) for contrary state constitution analysis; 6-2.

***Murray v. United States***, 101 L.Ed.2d 472 (1988)

Police observe drug traffickers driving in and out of a warehouse, lawfully seize vehicles elsewhere, find drugs, enter warehouse without warrant, observe bales, leave, obtain warrant for warehouse without disclosing their entry, serve warrant, find drugs; held: because obtaining warrant was wholly independent of the unlawful entry, then evidence is admissible, *Segura v. United States*, 82 L.Ed.2d 599 (1984), *State v. Gaines*, 154 Wn.2d 711 (2005); 4-3.

***State v. Summers***, 52 Wn.App. 767 (1988)

Adult sister of juvenile respondent, acting as head of household while parent was away, consents to search of respondent's bedroom, respondent having exclusive use of that room; held: a person acting as the responsible adult has the same authority to consent as the parent would have had, had the parent been present; a **parent** may consent to the search of a dependent child's room irrespective of the parent's prior agreement to tolerate the child's desire for exclusive domain of his/her room; issue of whether the relationship is that of a dependent child or that of landlord-tenant is a factual question to be decided by trial court; I.

***State v. Hall***, 53 Wn.App. 296 (1989)

Police, having probable cause but no warrant, approach residence, observe bong in window, knock, ask for consent to search, which is denied; police enter residence to secure home, remain for 22 hours until warrant arrives, search, find drugs; held: no exigencies for the entry existed, however the information provided in support of the warrant was independent of the entry, bong having been seen prior to entry, thus evidence admissible; III.

***Seattle v. Altschuler***, 53 Wn.App. 317 (1989)

Defendant is observed by police running a red light, police follow with lights on, defendant does not stop, drives into garage, officer runs into garage as door is closing, defendant is charged with resisting arrest; held: **hot pursuit** and **fleeing suspect** alone are not exigent circumstances that would justify warrantless entry of home to arrest for minor offense, *State v. Bessette*, 105 Wn.App. 793 (2001), particularly where police had blocked defendant's vehicle in garage, *Welsh v. Wisconsin*, 80 L.Ed.2d 732 (1984), *Lange v California*, __ U.S. ___, 141 S.Ct. 2011, 210 L.Ed.2d 486 (2021), *cf.*: *State v. Griffith*, 61 Wn.App. 35 (1991), *Stanton v. Sims*, 571 U.S. 3, 187 L.Ed.2d 341 (2013), *see: State v. Wolters*, 133 Wn.App. 297 (2006); I.

***State v. Downey***, 53 Wn.App. 543 (1989)

Police smell strong ether odor coming from residence, learn it is dangerous, enter residence without warrant to ensure no one is inside, find drug lab; held: emergency justified entry as an exigent circumstance, *State v. Thompson*, 112 Wn.App. 787, 797-99 (2002), *rev'd, on other grounds*, 151 Wn.2d 793 (2004), *see: State v. Muir*, 67 Wn.App. 149 (1992); I.

***State v. Stanphill***, 53 Wn.App. 623 (1989)

Police receive information that defendant will receive a package containing drugs in the mail, notify USPS who calls police when package arrives in post office, police bring dope dog to post office, dog reacts positively to package, postal inspector holds package for three nonjudicial days until federal warrant is obtained; held: release of information by **USPS** does not violate privacy rights, *distinguishing* *State v. Gunwall*, 106 Wn.2d 54 (1986) (pen register), *State v. Butterworth*, 48 Wn.App. 152 (1987) (unlisted phone number), *but see: State v. Miles*, 160 Wn.2d 236 (2007); **delay in delivering mail** was not unreasonable to obtain warrant, *State v. Jackson*, 82 Wn.App. 594, 604-7 (1996), *distinguishing* *State v. Ringer*, 100 Wn.2d 686 (1983); **canine sniff** did not invade reasonable expectation of privacy, *State v. Hartzell*, 156 Wn.App. 918, 928-30 (2010), *see: State v. Young*, 123 Wn.2d 173, 187-8 (1994), *State v. Dearman*, 92 Wn.App. 630 (1998), *Illinois v. Caballes*, 160 L.Ed.2d 842 (2005), *Florida v. Harris*, 568 U.S. 237, 185 L.Ed.2d 61 (2013), *Rodriguez v. United States*, 575 U.S. 348, 135 S.Ct. 1609, 191 L.Ed.2d 492 (2015); *accord*: *State v. Gross*, 57 Wn.App. 549 (1990), *overruled, on other grounds*, *State v. Thein*, 138 Wn.2d 133 (1999), *State v. Hartzell*, 153 Wn.App. 137, 148-49 (2009); III.

***Tukwila v. Nalder***, 53 Wn.App. 746 (1989)

Police officer looks over locked **public restroom stall**, observes defendant masturbating, arrests for lewd conduct; held: sitting in closed restroom stall provides high expectation of privacy, irrespective of height of the stall door; officer looking over the door was impermissibly

intrusive, thus observations suppressed, *distinguishing* *State v. Berber*, 48 Wn.App. 583 (1987); *see also:* *State v. Rodriguez*, 65 Wn.App. 409 (1992); *but see:* *State v. White*, 129 Wn.2d 105 (1996); I.

***State v. Patterson***, 112 Wn.2d 731 (1989)

Police, investigating burglary, observe vehicle going wrong way on one-way street two blocks from burgled store, five minutes later find vehicle parked six blocks from store, treads wet, observe possible proceeds of burglary in vehicle, search vehicle without warrant, find identification, arrest suspect who confesses; held: search of a **parked, immobile, unoccupied vehicle** must be authorized by a warrant or exigent circumstances other than the potential mobility of the vehicle, *Oregon v. Kock*, 725 P.2d 1285 (1986), *State v. Kypreos*, 110 Wn.App. 612, 624-28 (2002), 115 Wn.App. 207 (2002), *see: Collins v. Virginia*, 584 U.S. ___, 138 S.Ct. 1663 (2018); Supreme Court declines to follow *California v. Carney*, 85 L.Ed.2d 406 (1985); here, immediacy of time between crime and location of vehicle, evidence of recent flight from vehicle (wet treads, presence of evidence in vehicle) showing fresh pursuit establish exigent circumstances; 9-0.

***State v. Steinbrunn***, 54 Wn.App. 506 (1989)

Unconscious vehicular homicide suspect is taken from accident scene in Washington to Oregon hospital where Washington police officer directs drawing of blood sample; held: taking of blood from unconscious suspect pursuant to implied consent statute, RCW 46.20.308, can only be done if suspect is lawfully arrested; Washington officer was in **fresh pursuit** even though he lacked probable cause to arrest until he arrived in Oregon and smelled defendant's breath, Uniform Act on Fresh Pursuit, 10.89 RCW, *but see:* *Clarkston v. Stone*, 63 Wn.App. 500 (1991), *see:* *License Suspension of Richie*, 127 Wn.App. 935 (2005); III.

***State v. Raines***, 55 Wn.App. 459 (1989)

Police respond to domestic violence call, observe male through window, knock on door, female answers, denies problem, police ask to speak to male, female denies male is present, police ask to enter, female does not object, steps back, police enter; female shuts inside door, states it is her room, police state they will investigate, female does not object, police open door, see suspect, drugs; held: failure to object and stepping aside is more than mere **acquiescence**; **failure to object** is an implied waiver, *but see: State v. Schultz*, 170 Wn.2d 746, 756-59 (2011); entry of bedroom was justified by exigent circumstance in response to domestic violence report in light of fact that police knew suspect was violent, *State v. Menz*, 75 Wn.App. 351 (1994); 2-1, I.

***State v. Sweeney***, 56 Wn.App. 42 (1989)

Job Corps student leader informs dormitory supervisor that defendant sells drugs; supervisor previously suspected defendant due to other students entering defendant's room at unusual hours, pats down defendant, finds unidentified leaf, strip searches, finds drugs in underwear; held: patdown was justified, as quasi-school officials had reasonable grounds to believe the search was necessary to maintain school discipline and order, *State v. Brooks*, 43 Wn.App. 560 (1986); no additional operative facts existed to justify expansion of the initial

search to a strip search, *cf.: Florence v. Bd. of Chosen Freeholders*, 566 U.S. 318, 132 S.Ct. 1510, 182 L.Ed.2d 566 (2012); further, strip search violated Job Corps rules; III.

***State v. Smith***, 56 Wn.App. 145 (1989)

Police arrest defendant on $25 bench warrant; at jail, without advising defendant of right to post bail, search purse, find drugs; held: **inventory** search before giving defendant opportunity to post bail is unlawful, RCW 10.31.030, *State v. Caldera*, 84 Wn.App. 527 (1997), *see also: State v. Ward*, 65 Wn.App. 900 (1992); *distinguishes State v. Stroud*, 106 Wn.2d 144 (1986), as no search incident to arrest was undertaken immediately subsequent to defendant's arrest, *State v. Boyce*, 52 Wn.App. 274, 279 (1988), *but see: State v. Harris*, 66 Wn.App. 636 (1992), *see also: State v. Jordan*, 92 Wn.App. 25 (1998), *State v. Ross*, 106 Wn.App. 876 (2001), *State v, Salinas*, 169 Wn.App. 210, 222 (2012); III.

***State v. Lucas***, 56 Wn.App. 236 (1989)

A defendant released on conditions of **probation** supervision pending appeal has the same diminished expectation of privacy as a probationer serving his sentence, thus a warrantless search of defendant's home by a probation officer is permissible where defendant signed an agreement that a condition of release was to submit to a search by a community corrections officer, well-founded suspicion is sufficient, *State v. Patterson*, 51 Wn.App. 202 (1988), *see: State v. Cornwell*, 190 Wn.2d 296 (2018), observation by probation officer of suspected drugs in residence four days before search plus defendant's nervousness when officers arrived plus defendant's demand for warrant even though officers had not conveyed a desire to search establish well-founded suspicion, *State v. Lampman*, 45 Wn.App. 228 (1986); I.

***Maryland v. Buie***, 108 L.Ed.2d 276 (1990)

Police obtain arrest warrant for armed robber who wore red running suit, serve warrant in home, arrest suspect emerging from basement, police enter basement to look for other people, observe and seize red running suit in plain view; held: a **protective sweep** of premises in conjunction with a home arrest is permissible, incident to the arrest, limited to a cursory visual inspection of those places in which a person might be hiding, where police possess a reasonable belief based on specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant an officer in believing that the area swept harbored an individual posing a danger to officers or others, *State v. Hopkins*, 113 Wn.App. 954 (2002), *State v. Smith*, 137 Wn.App. 262, 268 (2007), 165 Wn.2d 511 (2009), *State v. Sadler*, 147 Wn.App. 97, 123-25 (2008), *cf.: State v. Boyer*, 124 Wn.App. 593 (2004), *State v. Chambers*, 197 Wn.App.. 96, 122-28 (2016), *State v. Blockman*, 190 Wn.2d 651 (2018); police do not need probable cause to believe that a serious and demonstrable potentiality for danger existed; 7-2.

***State v. Mennegar***, 114 Wn.2d 304 (1990)

Police stop vehicle for speeding, determine driver is drunk, ask passenger if he wishes to drive vehicle from scene in lieu of impound, passenger agrees, officer orders passenger to return to and remain in vehicle, requests driver's license from passenger, runs computer check, finds warrant, arrests passenger, searches, finds drugs; held: directing passenger to remain in vehicle was not a detention, *reversing State v. Mennegar*, 53 Wn.App. 257 (1989), as a reasonable person would not have believed himself to be detained, as passenger had agreed to drive the

vehicle away; requesting passenger's license was reasonable, as passenger was free to refuse, *State v. Mote,* 129 Wn.App. 76 (2005), *but see: State v. Rankin,* 151 Wn.2d 689 (2004), *State v. Brown,* 154 Wn.2d 787 (2005), *cf.: State v. Pettit,* 160 Wn.App. 716 (2011); within **community caretaking function** to call in to determine if license was valid, *see: State v. Kinzy,* 141 Wn.2d 373 (2000); 9-0.

***State v. Maxwell***, 114 Wn.2d 761 (1990)

Search warrant affidavit states police telephoned public utility district and obtained **power records** of defendant; held: magistrate should not have considered this information, as public utility records may only be obtained by police if request is in writing, and if written request states that it is suspected a particular person has committed a crime and that police have a reasonable belief that the records could determine whether the suspicion may be true, RCW 42.17.314, *In re Rosier*, 105 Wn.2d 606 (1986), *reversing State v. Maxwell*, 55 Wn.App. 446 (1989); *cf.: Pers. Restraint of. Maxfield*, 133 Wn.2d 332 (1997), *State v. Rakosky*, 79 Wn.App. 229, 237-8 (1995); 9-0.

***State v. Slattery***, 56 Wn.App. 820 (1990)

**School** officials may search a student's car, locked trunk and a locked briefcase within that trunk without a warrant on reasonable suspicion, *State v. Brooks*, 43 Wn.App. 560 (1986); *New Jersey v. T.L.O.*, 83 L.Ed.2d 720 (1983), *State v. Brown*, 158 Wn.App. 49 (2010), *State v. E.K.P.*, 162 Wn.App. 675 (2011), *cf.: State v. Meneese,* 174 Wn.2d 937 (2012), where car was parked in school parking lot, *cf.: State v. A.S.*, 6 Wn.App.2d 264 (2018); reliable student-informant's information of drug dealing plus discovery of large amount of cash on respondent plus pager provide reasonable grounds to search car, *cf.: State v. B.A.S.*, 103 Wn.App. 549 (2000); I.

***State v. Gross***, 57 Wn.App. 549 (1990), *overruled, on other grounds, State v. Thein,* 138 Wn.2d 133 (1999)

**Canine-conducted narcotics search** will be upheld where evidence establishes that dog was trained, certified by Washington State Police Canine Association and Criminal Justice Training Commission, had detected narcotics on other occasions, *Florida v. Harris,* 568 U.S. 237, 185 L.Ed.2d 61 (2013), *see: State v. Dearman,* 92 Wn.App. 630 (1998); I.

***State v. Barbosa***, 57 Wn.App. 822 (1990)

Police receive complaint of armed kidnapping from residence, observe bullet hole in car; complainant tells police that kidnappers left and they should not enter the home; police enter, observe drugs; held: **emergency doctrine** to make sure no one had been shot and no assailant was in the house justifies entry in spite of complainant's claim that no one was there, as complainant "may have been upset and confused, or there may have been someone there unbeknownst to her"; I.

***Minnesota v. Olson***, 109 L.Ed.2d 85 (1990)

Warrantless, nonconsensual entry into residence to arrest an overnight guest violates the guest's Fourth Amendment rights, *Payton v. New York,* 63 L.Ed.2d 639 (1980); *but see: State v. Rodriguez,* 65 Wn.App. 409 (1992); 7-2.

***State v. Morgavi***, 58 Wn.App. 733 (1990)

Police drive to residence to investigate resident's possible involvement in unrelated crime, observe garage open, hinge on door broken, vehicle in driveway, other door open, suspect burglary, enter garage, see marijuana; held: while police subjectively believed a burglary may have occurred, *State v. Lynd*, 54 Wn.App. 18, 21 (1989), state must also prove an objectively reasonable belief that **emergency** existed; here, officers were following their own hunch, not responding to report of a third party who witnessed crime, emergency was not apparent, thus no exigent circumstance, *distinguishing* *State v. Campbell*, 15 Wn.App. 98 (1976), *State v. Bakke*, 44 Wn.App. 830 (1986); *accord:* *State v. Muir*, 67 Wn.App. 149 (1992); *see:* *State v. Goodin*, 67 Wn.App. 623 (1992); II.

***State v. Whitaker***, 58 Wn.App. 851 (1990)

Officers testify that they know defendant, regularly talk to him in park area and regularly pat him down; in instant case, police walk toward defendant in park, he drops bottle, they seize it, find drugs; held: because defendant failed to demonstrate that prior patdowns were not based upon reasonable suspicion, he failed to establish that he had involuntarily abandoned the drugs, thus police may retrieve voluntarily abandoned drugs, *State v. Serrano*, 14 Wn.App. 462, 464 (1975), *State v. Young*, 135 Wn.2d 498 (1998), *State v. Reynolds*, 144 Wn.2d 282 (2001), police walking toward defendant was not a seizure, *State v. Aranguren*, 42 Wn.App. 452, 455-56 (1985), *State v. Machado*, 54 Wn.App. 771, 775 (1989); whether a seizure occurred depends on objective facts surrounding the encounter, not suspect's subjective perceptions, *State v. Ellwood*, 52 Wn.App. 70, 73 (1988), *see:* *State v. Coyne*, 99 Wn.App. 566 (2000); 2-1, I.

***State v. Gwinner***, 59 Wn.App. 119 (1990)

Evidence lawfully seized by federal officers in violation of Washington constitution is admissible in state courts as long as federal officers did not act as agents of state or under color of state law, pursuant to "silver platter" doctrine, *Pers. Restraint of Teddington*, 116 L.Ed.2d 761 (1991) *State v. Brown*, 132 Wn.2d 529, 583-91 (1997), *State v. Martinez*, 2 Wn.App.2d 55, 63 (2018); telephone call from Washington police officer to DEA providing federal probable cause does not establish agency; *but see:* *State v. Johnson*, 75 Wn.App. 692, 698-701 (1994); I.

***State v. Boland***, 115 Wn.2d 571 (1990)

**Garbage** can left for collection on curb outside home may not be searched by police without warrant under CONST. Art. 1, § 7, *reversing* *State v. Boland*, 55 Wn.App. 657 (1989), *State v. Sweeney*, 125 Wn.App. 881 (2005), *cf.:* *State v. Hepton*, 113 Wn.App. 673, 678-81 (2002); for contrary holding under United States Constitution, *see:* *California v. Greenwood*, 100 L.Ed.2d 30 (1988); *but see:* *State v. Rodriguez*, 65 Wn.App. 409 (1992); 5-4.

***State v. Brantigan***, 59 Wn.App. 481 (1990)

Police stop defendant's vehicle for littering, observe drug paraphernalia in car, patdown defendant, find drugs; at suppression hearing, officer testifies he would not have taken defendant into custody only on paraphernalia charge; held: officer had made merely a conditional decision to release defendent on result of patdown, *distinguishing* *State v. Carner*, 28 Wn.App. 439 (1981), *see:* *State v. McKenna*, 91 Wn.App. 554 (1998), *State v. Balch*, 114 Wn.App. 55 (2002);

where probable cause to arrest exists, it is irrelevant whether search incident to arrest occurs before or after arrest, *Rawlings v. Kentucky*, 65 L.Ed.2d 633 (1980), *see: State v. Ward*, 24 Wn.App. 761 (1979), *State v. O'Neill*, 110 Wn.App. 604 (2002), *but see: State v. O'Neill*, 148 Wn.2d 564 (2003), *see: State v. Rankin*, 120 Wn.App. 43 (2004); I.

***State v. Swenson***, 59 Wn.App. 586 (1990)

Police, responding to neighbor's call reporting that defendant's front door is open at 2:30 a.m., enter residence looking for burglar, find drugs; held: while probable cause under the **emergency exception** is not required, here there were no facts upon which the officer could conclude that a person was inside needing medical care, nor that a crime had been or was being committed, thus suppressed, *State v. Lynd*, 54 Wn.App. 18, 21 (1989), *State v. Bakke*, 44 Wn.App. 830, 834 (1987), *State v. Campbell*, 15 Wn.App. 98 (1976), *State v. Muir*, 67 Wn.App. 149 (1992), *State v. Leffler*, 142 Wn.App. 175 (2007), *see: State v. Menz*, 75 Wn.App. 351 (1994), *State v. Davis*, 86 Wn.App. 414, 420-3 (1997); I.

***Pers. Restraint of Teddington***, 116 Wn.2d 761 (1991)

Member of armed forces is arrested for civilian offense, sergeant performs routine inventory search of his locker, discovers letter in which petitioner states he will commit robbery; held: because petitioner was under arrest and thus would be away from his unit, routine inventory search of locker was valid, reading of letter was appropriate to determine ownership; evidence lawfully seized by federal officials under Fourth Amendment is admissible in state court even if obtained in violation of CONST. Art. 1, § 7, *State v. Brown*, 132 Wn.2d 529, 583-91 (1997), *State v. Martinez*, 2 Wn.App.2d 55, 63 (2018), *cf.: State v. Johnson*, 75 Wn.App. 692, 698-70 (1994); 9-0.

***State v. Griffith***, 61 Wn.App. 35 (1991)

Police observe suspect commit traffic infractions and strike a sign, follow with emergency lights, at residence suspect jumps out, runs toward residence, officer calls to stop, suspect proceeds to front door, enters, officer prevents door from closing, smells alcohol, has suspect take sobriety tests, arrests for DUI; held: suspect's presence inside her home requires analysis of exigent circumstances, *State v. Holeman*, 103 Wn.2d 426 (1985), *Payton v. New York*, 63 L.Ed.2d 639 (1980), although rationale diminishes considerably when suspect is fleeing to the home to avoid arrest; exigencies include (1) grave offense, (2) armed, (3) reasonably trustworthy information suspect is guilty, (4) strong reason to believe suspect is present, (5) suspect likely to escape if not swiftly apprehended, (6) entry is peaceable, *State v. Hoffman*, 116 Wn.2d 51, 101 (1991), (7) hot pursuit, (8) fleeing suspect, (9) danger to officer, (10) mobility of vehicle, (11) mobility or destruction of evidence, *State v. Terrovona*, 105 Wn.2d 632 (1986); here, there was **hot pursuit**, as officer did not enter home and there was more than a mere infraction, *distinguishing Seattle v. Altschuler*, 53 Wn.App. 317 (1989) plus fleeing suspect, **destruction of evidence**, *Welsh v. Wisconsin*, 80 L.Ed.2d 732 (1984), *cf.: State v. Bessette*, 105 Wn.App. 793 (2001), *State v. Wolters*, 133 Wn.App. 297 (2006), *Lange v California*, __ U.S. ___, 141 S.Ct. 2011, 210 L.Ed.2d 486 (2021); III.

***California v. Hodari D.***, 113 L.Ed.2d 690 (1991)

Suspect sees police and runs, police chase without reasonable suspicion, suspect throws drugs while fleeing, is stopped and arrested, police recover drugs; held: absent the application of physical force or submission to a show of authority, no seizure for purposes of the Fourth

Amendment occurs, *Michigan v. Chesternut*, 100 L.Ed.2d 565 (1988), *see*: *United States v. Mendenhall*, 64 L.Ed.2d 497 (1980), *State v. Perea*, 85 Wn.App. 339, 344 (1997), *Torres v. Madrid*, ___ U.S. ___, 141 S.Ct. 989, 209 L.Ed.2d 190 (2021); here, suspect was not seized until he was tackled; *but see: State v. Young*, 135 Wn.2d 498 (1998), *State v. Carriero*, 8 Wn.App.2d (2019); 7-2.

***Florida v. Bostick***, 115 L.Ed.2d 389 (1991)

Police routinely board bus at scheduled stop and ask passengers for permission to search luggage, defendant grants permission, police seize drugs; held: no seizure where a reasonable innocent person would feel free to say no, *United States v. Drayton*, 153 L.Ed.2d 242 (2002), *but see: State v. Rankin*, 151 Wn.2d 689 (2004); cramped confines of bus is but one factor in determining if consent is voluntary; 6-3.

***Clarkston v. Stone***, 63 Wn.App. 500 (1991)

Washington police chase speeding vehicle into Idaho, arrest for DUI; held: **Uniform Act on Fresh Pursuit**, RCW 10.89 (and identical Idaho counterpart) only applies to felony, *but see: License Suspension of Richie*, 127 Wn.App. 935 (2005); because Washington officer did not have authority to arrest for misdemeanor in Idaho, fruits must be suppressed; III.

***State v. Barber***, 118 Wn.2d 335 (1992)

"Racial incongruity," *i.e.*, a person of any race being out of place in a particular area, should never constitute a finding of reasonable suspicion of criminal behavior.

***State v. McWatters***, 63 Wn.App. 911 (1992)

Fire department paramedic, while giving medical assistance to injured motorcyclist, hands drugs to police at scene; held: no evidence that police knew of and acquiesced in search, even if paramedic recognized vial as drugs, *State v. Clark*, 48 Wn.App. 850 (1987), *State v. Krajeski*, 104 Wn.App. 377, 382-84 (2001); search and seizure rules do not apply to **paramedic** employed by fire department, *distinguishing Michigan v. Tyler*, 56 L.Ed.2d 486 (1978), *State v. Bell*, 108 Wn.2d 193 (1987), *cf.: State v. Heritage*, 152 Wn.2d 210, 214-17 (2004); III.

***State v. Hastings***, 119 Wn.2d 229 (1992)

Undercover police, after receiving complaints, knock on residence door, state they wish to buy drugs, are admitted, buy drugs, obtain warrant; held: there is no reasonable expectation of privacy in a home where illegal business is openly conducted, thus it is not entitled to Fourth Amendment protection, *Lewis v. United States*, 17 L.Ed.2d 312 (1966); police do not need a justifiable and reasonable basis to suspect criminal activity before they may effect a **ruse entry**, *State v. Weller*, 76 Wn.App. 165, 167 (1994), effectively overruling *State v. Hashman*, 46 Wn.App. 211 (1986); *affirms State v. Hastings*, 57 Wn.App. 836 (1990); 9-0.

***State v. Rodriguez***, 65 Wn.App. 409 (1992)

Police, with consent of lessee, enter apartment, arrest defendant, a temporary resident, in bathroom, search community dumpster outside apartment, find evidence; held: defendant's expectation of privacy was qualified by possibility that **lessee** would consent to search; defendant's presence in bathroom does not provide a separate privacy right from that of lessee,

*distinguishing* *State v. Berber*, 48 Wn.App. 583 (1987), *see also:* *Tukwila v. Nalder*, 53 Wn.App. 746 (1989); search of **garbage** in a community dumpster does not violate privacy rights, *State v. Hepton*, 113 Wn.App. 673, 678-81 (2002), *see:* *State v. Sweeney*, 125 Wn.App. 881 (2005), *distinguishing* *State v. Boland*, 115 Wn.2d 571 (1990); III.

***State v. Ward***, 65 Wn.App. 900 (1992)

Following arrest on warrant, defendant informs police officer he lacks funds to post $325 bail, is booked, drugs found; held: trial court's finding defendant was given opportunity to post bail is supported by substantial evidence, *distinguishing* *State v. Smith*, 56 Wn.App. 145 (1989); III.

***State v. Harris***, 66 Wn.App. 636 (1992)

Juvenile is arrested on warrants, told amount of warrants, does not indicate "desire to post bail," is taken to precinct prior to booking and, prior to being placed in holding cell, strip searched because respondent was a gang member and police had prior experience with gang members taping razor blades to skin, drugs found; held: exigent circumstances justified search due to police knowledge of gang behavior, *see:* *Zehrung v. State*, 569 P.2d 189, *modified*, 573 P.2d 858, 859 (Alaska 1978), *distinguishing* *State v. Smith*, 56 Wn.App. 145 (1989), *see:* *State v. Caldera*, 84 Wn.App. 527 (1997), *Florence v. Bd. of Chosen Freeholders*, 566 U.S. 318, 132 S.Ct. 1510, 182 L.Ed.2d 566 (2012); suppression is not a remedy for failure to obtain statutorily-required written approval of a supervisor before a strip search, RCW 10.79.140(2), as long as oral approval was obtained, *cf.: State v. Barron*, 170 Wn.App. 742 (2012); reasonable suspicion may support a **strip search**; here, knowledge of gang activity plus respondent's holding buttocks tightly together during frisk plus request to be taken directly to youth center plus request to use bathroom establish reasonable suspicion to strip search; I.

***State v. Muir***, 67 Wn.App. 149 (1992)

Police, responding to broadcast of burglary of empty residence, find evidence of burglary, smell marijuana, enter residence, see marijuana plants, leave, obtain warrant; held: police entered house to search for evidence, not to render aid or assistance, unjustified either by exigent circumstances or emergency exception; **emergency exception** applies where police enter building if they subjectively and reasonably believe persons are in imminent danger of death or harm or where objects are likely to burn or explode, *State v. Sanders*, 8 Wn.App. 306, 310 (1973), *State v. Nichols*, 20 Wn.App. 462, 465 (1978), *State v. Lynd*, 54 Wn.App. 18, 21 (1989), *State v. Cahoon*, 59 Wn.App. 606, 608 (1990), *State v. Downey*, 53 Wn.App. 543, 545 (1989), *State v. Welker*, 37 Wn.App. 628 (1984), *State v. Swenson*, 59 Wn.App. 586 (1990); *cf.:* *State v. Morgavi*, 58 Wn.App. 733 (1990); **exigent circumstances** involve a law enforcement emergency as opposed to medical one; I.

***State v. Goodin***, 67 Wn.App. 623 (1992)

Police with arrest warrant ask suspect to step out of house, arrest him, observe a juvenile inside bolt into bathroom, flush toilet; police enter bathroom, seize drugs; police had, two days earlier, found drugs in house; held: police knowledge of drugs in house earlier plus juvenile's behavior typical of an attempt to destroy contraband plus knowledge of defendant's drug convictions would lead a reasonable person to believe juvenile possessed drugs and was trying to

destroy them, thus exigent circumstances to search existed, *distinguishing* State v. Hobart, 94 Wn.2d 437, 446-7 (1980), *State v. Morgavi*, 58 Wn.App. 733 (1990), *see:* *State v. Thierry*, 60 Wn.App. 445, 448 (1991), *State v. Hall*, 53 Wn.App. 296 (1989); II.

***State v. Faydo***, 68 Wn.App. 621 (1993)

A **published telephone number** may be obtained by police from a telephone company without a warrant, where suspect has not requested that the company not release it, *distinguishing* *State v. Butterworth*, 48 Wn.App. 152 (1987), *State v. Gunwall*, 106 Wn.2d 54 (1986), *but see:* *State v. Miles*, 160 Wn.2d 236 (2007); III.

***State v. Lund***, 70 Wn.App. 437 (1993)

With well-founded suspicion, jailers detain paralegal for smuggling drugs, seize her purse, move her to reception area for four minutes, whereupon she produces drugs; held: where police make valid seizure of a purse, then desire to obtain a search warrant, they may retain the purse for the time reasonably needed to secure a warrant, *see:* *State v. Huff*, 64 Wn.App. 641, 653 (1992); II.

***State v. Wojtyna***, 70 Wn.App. 689 (1993)

Police seize a **telepager** from third party, defendant calls in, police return call and set up drug deal; held: by transmitting his number to telepager, defendant did not reasonably expect confidentiality, police did not intercept a private communication, thus no violation of CONST. Art. 1, § 7, Fourth Amendment, or RCW 9.73, *State v. Bowman*, 198 Wn.2d 609 (2021), *cf.: State v. Hinton*, 179 Wn.2d 862 (2014), *see:* *State v. Gunwall*, 106 Wn.2d 54 (1986), *State v. Riley*, 121 Wn.2d 22 (1993), *State v. Farmer*, 80 Wn.App. 795 (1996); II.

***State v. Cleator***, 71 Wn.App. 217 (1993)

Owner of tent erected without permission on public land not in campsite has no legitimate expectation of privacy in the contents of the tent other than his personal belongings under United States and Washington constitutions, *but see: State v. Pippin*, 200 Wn.App. 826 (2017), *United States v. Ross*, 456 U.S. 798, 822, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982), *see also:* *State v. Pentecost*, 64 Wn.App. 656 (1992); I, 2-1.

***State v. Solberg***, 122 Wn.2d 688 (1993)

Police may make a warrantless arrest on probable cause when suspect voluntarily exits residence to speak to officers on unenclosed front porch, *State v. Carlow*, 44 Wn.App. 821, 826 (1986), *State v. Bockman*, 37 Wn.App. 474, 481 (1984), *State v. Griffith*, 61 Wn.App. 35, 40 n.2 (1991), *State v. Holeman*, 103 Wn.2d 426, 429 (1985), *see:* *State v. White*, 129 Wn.2d 105 (1996), *reversing State v. Solberg*, 66 Wn.App. 66, 79 (1992); 9-0.

***State v. Young***, 123 Wn.2d 173 (1994)

Police use of **infrared thermal detection device** to detect heat distribution patterns in a home, undetectable by naked eye or other senses, violates, CONST. Art. 1, § 7, Kylo v. United States, 150 L.Ed.2d 94 (2001), *Florida v. Jardines*, 569 U.S. 1, 185 L.Ed.2d 495 (2013), *distinguishing* *State v. Manley*, 85 Wn.2d 120, 124 (1975), *State v. Ludvik*, 40 Wn.App. 257, 264 n.1 (1985)(**binoculars** confirm what could otherwise lawfully be seen with naked eye, *but see:*

*Florida v. Jardines, supra, at* 185 L.Ed.2d 505 (Kagan, concurring), and Fourth Amendment; *cf.:* *State v. Rose*, 128 Wn.2d 388 (1996), *see:* *State v. Dearman*, 92 Wn.App. 630 (1998)(drug dog), *accord:* *Kyllo v. United States*, 150 L.Ed.2d 94 (2001), *State v. Jackson*, 150 Wn.2d 251, 259-69 (2003); 9-0.

***State v. Hoke***, 72 Wn.App. 869 (1994)

Police knock on front door then walk around to yard which is partially obstructed by stacked wood, broken vehicle, wheelbarrow, tools, yard covered with grass, no pathway, thick foliage borders yard, officer forced to deviate from direct access route, smells growing marijuana; held: yard was not an area of **curtilage** impliedly open to public, thus officer exceeded scope of implied invitation, *State v. Ridgway*, 57 Wn.App. 915, 920 (1990), *distinguishing* *State v. Seagull*, 95 Wn.2d 898, 902-3 (1981), *State v. Ferro*, 64 Wn.App. 181, 183 (1992); homeowner need not take overt steps signalling that an area of curtilage is private; *see:* *State v. Chausee*, 72 Wn.App. 704 (1994), *State v. Hornback*, 73 Wn.App. 738 (1994); I.

***State v. Hornback***, 73 Wn.App. 738 (1994)

Police drive up driveway and stop in parking area, use ruse to speak with defendant, smell marijuana; held: within **curtilage** impliedly open to public, *distinguishing* *State v. Ridgway*, 57 Wn.App. 915, 918 (1990), *State v. Gave*, 77 Wn.App. 333 (1995), *cf.*: *Florida v. Jardines,* 569 U.S. 1, 185 L.Ed.2d 495 (2013); I.

***State v. Johnson***, 75 Wn.App. 692 (1994)

DEA agents receive a tip of a marijuana grow operation, go with state officer to defendant's property, stop at gate, leave, DEA returns later without state officers, open gate, enter property, smell marijuana, aim **Thermal Imaging Device** and obtain readings consistent with marijuana grow operation, obtain power records, warrant, seize marijuana with state officers who prosecute in state court; held: federal and state officials were cooperating to an extent sufficient to trigger state constitutional protection, *see:* *State v. Gwinner*, 59 Wn.App. 119, 124-6 (1990), *In re Teddington*, 116 Wn.2d 761, 772-4 (1991), *State v. Brown*, 132 Wn.2d 529, 583-91 (1997); agents **trespassed** on private property, never attempted to approach the house or contact occupants, furtively entered property in darkness to look for operation, access was not open, no trespassing signs plus fence manifest that area was not impliedly open, *distinguishing* *State v. Seagull*, 95 Wn.2d 898 (1981), *State v. Vonhof*, 51 Wn.App. 33 (1988), *State v. Hornback*, 73 Wn.App. 738 (1994), *State v. Chausee*, 72 Wn.App. 704 (1994), accord: *State v. Ross*, 144 Wn.2d 304 (2000); police entry into defendant's posted, fenced "open field" was unreasonable, Washington having rejected **open fields doctrine** of *Oliver v. United States*, 80 L.Ed.2d 214 (1984), *see:* *State v. Myrick*, 102 Wn.2d 506, 512 (1984); *cf.:* *State v. Gave*, 77 Wn.App. 333 (1995); II.

***State v. Jones***, 76 Wn.App. 592 (1995)

Police removing vial that is partially protruding from defendant's anus without touching defendant's body have engaged in a strip search, RCW 10.79.070(1), and not a body cavity search, RCW 10.79.070(2), thus no warrant is required where defendant is being booked into jail, RCW 10.79.130(1)(a), 10.79.130(2)(c), *Florence v. Bd. of Chosen Freeholders,* 566 U.S. 318, 132 S.Xt. 1510, 182 L.Ed.2d 566 (2012); I.

***State v. Gave***, 77 Wn.App. 333 (1995)

Police, with permission from owner of private road, drive up road past "no trespassing" signs which were not posted by defendant, go to defendant's front door, knock, speak with defendant using a ruse, smell marijuana, obtain warrant; held: defendant cannot rely upon signs he did not post, police did nothing more than approach residence within curtilage impliedly open to public, thus no search occurred, *State v. Hornback*, 73 Wn.App. 738 (1994), *distinguishing State v. Johnson*, 75 Wn.App. 696 (1994), *but see: State v. Ross*, 144 Wn.2d 304 (2000), *cf.: Florida v. Jardines*, 569 U.S. 1, 185 L.Ed.2d 495 (2013); II.

***State v. Rodriguez-Torres***, 77 Wn.App. 687 (1995)

Officer observes man give defendant money, defendant shows man object cupped in his hand, someone yells "police" when officer approaches, defendant and companion leave scene quickly, police stop defendant and search pockets, find drugs; held: police had probable cause to believe defendant had committed offense of possession with intent to deliver drugs, *State v. White*, 76 Wn.App. 801, 804-5 (1995), *aff'd*, 129 Wn.2d 105 (1996), *but see: State v. Alcantara*, 79 Wn.App. 362 (1995), thus search incident to arrest was valid, *State v. Ward*, 24 Wn.App. 761, 765 (1979); I.

***State v. Audley***, 77 Wn.App. 897 (1995)

Defendant is arrested for delivery of drugs, police having observed him reach into his pants and retrieve what police suspect is rock cocaine, at precinct police perform **strip search**, RCW 10.79.130, find drugs; held: crime for which defendant was arrested plus his conduct prior to the arrest were sufficient to establish reasonable suspicion that he might have been carrying drugs that would be uncovered during a strip search, *cf.: State v. Barron*, 170 Wn.App. 742 (2012), *Florence v. Bd. of Chosen Freeholders*, 566 U.S. 318, 132 S.Ct. 1510, 182 L.Ed.2d 566 (2012); RCW 10.79.130(1)(a) does not violate Fourth Amendment or CONST. Art. 1, § 7; I.

***State v. Carter***, 127 Wn.2d 836 (1995)

Defendant sells drugs to undercover officer in motel room, officer leaves, following which police approach room with weapons drawn, another woman opens door, sees police, tries to flee away from room, police force door open and seize drugs in room; held: exigent circumstances exist (no analysis); *affirms, in part*, *State v. Carter*, 74 Wn.App. 320 (1994); 5-4.

***State v. Alcantara***, 79 Wn.App. 362 (1995)

Police officer observes defendant intently looking at a plastic bag in his hand, when defendant sees officer he turns away and makes shoving motions into pants, officer stops defendant and pats him down, seizing bag with drugs; held: stop was made to search pocket where officer suspected he might find evidence, not a weapon, thus search exceeded scope of *Terry* stop, *distinguishing State v. Rodriguez-Torres*, 77 Wn.App. 687 (1995), *State v. Pressley*, 64 Wn.App. 591 (1992); I.

***State v. Kealey***, 80 Wn.App. 162 (1995)

Defendant, while shopping, leaves purse in store, clerk opens it and finds drugs, clerk tells police who search purse for identification, police "set up a sting operation," defendant

recovers purse, is arrested; held: owner of misplaced, as opposed to abandoned, property maintains reasonable expectation of privacy; searches of **misplaced property** for identification are an exception to the warrant requirement, thus police search here was proper; II.

***State v. Rose***, 128 Wn.2d 388 (1996)

Police enter property, walk to shed behind premises, smell marijuana, approach front porch, knock, peer through window with flashlight, see marijuana, obtain warrant; held: absent signs or fences, front porch is impliedly open to public, *State v. Seagull*, 95 Wn.2d 898, 902 (1981), thus police lawfully on porch can intentionally look through unobstructed window beside front door without leaning, bending or straining, at 396, *State v. Manly*, 85 Wn.2d 120, 124 (1975), *State v. Drumhiller*, 36 Wn.App. 592, 595-6 (1984), *see: State v. Creegan*, 123 Wn.App. 718 (2004), *cf.: State v. Ross*, 144 Wn.2d 304 (2000), *State v. Cardenas*, 146 Wn.2d 400 (2002), use of **flashlight** "does not transform an observation...within the open view doctrine during daylight into an impermissible search simply because darkness falls," at 398-9, *State v. Young*, 28 Wn.App. 412 (1981), *State v. Cagle*, 5 Wn.App. 644 (1971), *State v. Regan*, 76 Wn.2d 331 (1969), *United States v. Lee*, 71 L.Ed. 1202 (1927), *United States v. Dunn*, 94 L.Ed.2d 326 (1987), *Texas v. Brown*, 75 L.Ed.2d 502 (1983), *cf.: State v. Jackson*, 150 Wn.2d 251, 259-69 (2003), *distinguishing State v. Young*, 123 Wn.2d 173, 182-3 (1994), *reversing State v. Rose*, 75 Wn.App. 28 (1994); 5-4.

***Whren v. United States***, 135 L.Ed.2d 89 (1996)

Police may stop vehicles upon probable cause that traffic law has been violated irrespective of the motive of the officers, *Arkansas v. Sullivan*, 149 L.Ed.2d 994 (2001), or the **pretext**ual nature of the stop, *but see: State v. Ladson*, 138 Wn.2d 343 (1999); selective enforcement based on race may be challenged under the equal protection clause, not the Fourth Amendment; *but see: State v. Michaels*, 60 Wn.2d 638, 645 (1962), *State v. Blumenthal*, 78 Wn.App. 82 (1995); 9-0.

***State v. White***, 129 Wn.2d 105 (1996)

Police, with probable cause but without warrant, follow suspect into public restroom, look over stall, observe suspect sitting on toilet with pants below knees, inform suspect he is under arrest and order him out of stall; held: a **toilet stall** is not entitled to the same "place" protection as a home, at 111, police limited intrusion into the stall to effect a warrantless arrest based on probable cause offends neither United States nor state constitutions, *distinguishing Tukwila v. Nalder*, 53 Wn.App. 746 (1989), *State v. Solberg*, 122 Wn.2d 688 (1993); *affirms State v. White*, 76 Wn.App. 801 (1995); 9-0.

***State v. Jackson***, 82 Wn.App. 594, 604-7 (1996)

Police officer is told by another officer that an informant, known to the reporting officer, had given information that led to arrests previously, that suspect received weekly packages from Federal Express containing drugs, police independently verify address and fact that packages are delivered weekly, and that Federal Express presently possessed a package addressed to suspect; officer advises Federal Express he will obtain warrant for package, Federal Express delivers package to police, drug dog reacts positively, *see: State v. Dearman*, 92 Wn.App. 630 (1998), police obtain warrant; held: police had well-founded suspicion to detain package, **temporary**

**seizure of mail** is justified if police have reasonable and articulable suspicion of criminal activity, *United States v. Van Leeuwen*, 25 L.Ed.2d 282 (1970), *Arkansas v. Sanders*, 61 L.Ed.2d 235 (1979), *overruled on other grounds in California v. Acevedo*, 114 L.Ed.2d 619 (1991), *State v. Stanphill*, 53 Wn.App. 623 (1989); holding package for time necessary to bring in drug dog is reasonable, *see: Illinois v. Caballes*, 160 L.Ed.2d 842 (2005), *Florida v. Jardines*, 569 U.S. 1, 133 S.Ct. 1409, 185 L.Ed.2d 495 (2013); II.

***State v. Caldera***, 84 Wn.App. 527 (1997)

Police arrest defendants on warrants, take to jail, search and find drugs before giving them the opportunity to post bail; held: RCW 10.31.030 requires police to give persons arrested on warrants opportunity to post bail before **inventory** search, *State v. Smith*, 56 Wn.App. 145 (1989), *but see: State v. Ross*, 106 Wn.App. 876 (2001), thus evidence suppressed; police may search incident to arrest first, *State v. Jordan*, 92 Wn.App. 25 (1998), *State v, Salinas*, 169 Wn.App. 210, 222 (2012); III.

***State v. Davis***, 86 Wn.App. 414 (1997)

Defendant in motel for several days, pays each day hours after checkout time, after checkout time does not respond to knocks or phone calls, manager calls police, police knock, hear dog sniffing but no response, enter with pass key, find defendant who consents to search of room, police find drugs and videos, police view videos which contain evidence of other crimes; held: defendant had reasonable expectation of privacy in room in light of the fact that he was present, had paid late before, it was only an hour after checkout time, at 419, distinguishing *State v. Christian*, 95 Wn.2d 655, 660-1 (1981); police entry is minimally sufficient for application of **medical emergency exception**, at 420-3, distinguishing *State v. Swenson*, 59 Wn.App. 586, 588-90 (1990); II.

***State v. Rainford***, 86 Wn.App. 431 (1997)

**Dry cell search** in a prison initiated on reasonable articulable suspicion conducted in a nonabusive manner is reasonable under state and United States constitutions, *see: State v. Campbell*, 103 Wn.2d 1, 23 (1984), *State v. Baker*, 28 Wn.App. 423 (1981); II.

***State v. Dane***, 89 Wn.App. 226, 231-2 (1997)

**Prison** officials receive anonymous note that defendant-visitor may smuggle drugs for her prisoner-husband who associates with inmates known to have drug problems in prison, defendant is nervous when questioned; held: officials had well founded suspicion to detain and question defendant, *but see: Florida v. J.L.*, 579 U.S. 266, 272, 146 L.Ed.2d 254 (2000) , but because WAC §§ 275-80-905, -915, -925 require prison investigators to ask for consent, expel if consent refused and allow local police to handle searches, which were not followed here, drugs suppressed; II, 2-1.

***State v. Young***, 135 Wn.2d 498 (1998)

Police observe suspect in high crime area, make a "social contact" and get name, run records check, find drug priors, shine spotlight on suspect who discards materials, detain suspect, find imitation controlled substance; held: shining flashlight on suspect did not constitute such a show of authority that a reasonable person would not believe himself free to leave, *cf.: State v.*

*Gantt*, 163 Wn.App. 133 (2011), spotlight did not illuminate anything suspect sought to keep private as he was in the open on a public street, spotlight did not reveal the contraband he had concealed on his person, thus suspect was not seized, *cf.:* *State v. Smith*, 154 Wn.App. 695 (2010); Washington declines to adopt United States Supreme Court test that because suspect did not submit to authority, no seizure occurred, *California v. Hodari D.*, 113 L.Ed.2d 690 (1991), *Torres v. Madrid,* ___ U.S. ___, 141 S.Ct. 989, 209 L.Ed.2d 190 (2021); 7-2.

***State v. King***, 89 Wn.App. 612 (1998)

Police obtain consent to search apartment for a gun used in a homicide, enter a bedroom, see defendant in bed covering an item with a sheet which looks like a gun, defendant says it's a gun, police handcuff defendant, seize gun, ask if gun is his, defendant says it is, police call in serial number and discover gun is stolen, advise of *Miranda* warnings, defendant admits he knows gun is stolen; held: entry of bedroom was within scope of consent, seizure of defendant and gun was reasonable to minimize risk of harm to officers, *State v. Cotten*, 75 Wn.App. 669 (1994), briefly holding gun to check serial number was reasonable, *see; State v. Cantrell*, 70 Wn.App. 340, 344 (1993), *aff'd in part,* 124 Wn.2d 183 (1994); II.

***State v. Dearman***, 92 Wn.App. 630 (1998)

**Drug dog** reacts positively to garage adjacent to private residence, police obtain warrant, find marijuana; held: like infrared thermal detection devices, using narcotics dog goes beyond merely enhancing natural human senses, allows police to "see through walls" of a home, *State v. Young*, 123 Wn.2d 173 (1994), thus, to use the dog, a warrant is required, CONST. Art. 1, § 7, *Florida v. Jardines*, 569 U.S. 1, 133 S.Ct. 1409, 185 L.Ed.2d 495 (2013), *Rodriguez v. United States*, 575 U.S. 348, 135 S.Ct. 1609, 191 L.Ed.2d 492 (2015), *see: Kylo v. United States*, 150 L.Ed.2d 94 (2001), *cf.: United States v. Place*, 77 L.Ed.2d 110 (1983), *Illinois v. Caballes*, 160 L.Ed.2d 842 (2005), *but see: State v. Boyce*, 44 Wn.App. 724 (1986), *State v. Stanphill*, 53 Wn.App. 623 (1989), *State v. Gross*, 57 Wn.App. 549 (1990), *State v. Jackson*, 82 Wn.App. 594, 604-7 (1996), *State v. Hartzell*, 153 Wn.App. 137, 148-49 (2009), 156 Wn.App. 918, 928-30 (2010), *Florida v. Harris*, 568 U.S. 237, 185 L.Ed.2d 61 (2013); I.

***State v. Ladson***, 138 Wn.2d 343 (1999)

Gang-unit officers who do not make routine traffic stops tail suspected gang member's car seeking justification to stop the car, observe infraction, pull over suspect vehicle, discover driver's license is suspended, arrest driver, search, find guns and drugs; held: **pretextual** traffic stops violate CONST. Art. I, § 7, *but see: Whren v. United States*, 135 L.Ed.2d 89 (1996); in determining whether stop is pretextual, court should consider totality, including subjective intent of officer and objective reasonableness of the officer's behavior; reverses *State v. Ladson*, 86 Wn.App. 822 (1997); *see: State v. Chapin*, 75 Wn.App. 460, 462-69 (1994), *State v. Rainey*, 107 Wn.App. 129, 138-39 (2001), *State v. Myers*, 117 Wn.App. 93 (2003), *State v. Meckelson*, 133 Wn.App. 431 (2006), *State v. Nichols*, 161 Wn.2d 1 (2007), *State v. Montes-Malindas*, 144 Wn.App. 254 (2008), *State v. Gibson*, 152 Wn.App. 945, 951-53 (2009), *State v. Johnson*, 155 Wn.App. 270 (2010), *abrogated, on other grounds, State v. Byrd*, 162 Wn.App. 612 (2011), *reversed, on other grounds*, 178 Wn.2d 611 (2013), *State v. McLean*, 178 Wn.App. 236 (2013), *but see: State v. Hoang*, 101 Wn.App. 732 (2000); *cf.: State v. Arreola*, 176 Wn.2d 284 (2012), *Matter of Pleasant*, 21 Wn.App.2d 320 (2022); 5-4.

***Flippo v. West Virginia***, 145 L.Ed.2d 16 (1999)

Police find defendant outside cabin, murdered wife inside, "process crime scene" and seize evidence from cabin; held: there is no "homicide crime scene" exception to the warrant requirement, *Mincey v. Arizona*, 57 L.Ed.2d 290 (1978); *per curiam.*

***State v. Rulan C.***, 97 Wn.App. 884 (1999)

Police, serving search warrant, take phone call from defendant who offers to sell drugs, when defendant arrives he is strip searched, drugs found in shoe; held: because it was not impractical to obtain a telephonic warrant, no exigent circumstance applies, *see: State v. Johnson,* 128 Wn.2d 431, 447 (1996), *State v. Hinshaw,* 149 Wn.App. 747 (2009), *Seattle v. Pearson,* 192 Wn.App. 802, 811-17 (2016), *State v. Anderson,* 9 Wn.App.2d 430 (2019), drugs were found during the course of the strip search, thus suppressed; strip search statute is inapplicable as the search did not occur at a detention facility, RCW 10.79.060; I.

***Bond v. United States***, 146 L.Ed.2d 365 (2000)

Agent boards bus, squeezes defendant's soft luggage, feels "brick-like object," asks passenger if he could open it, passenger agrees, agent finds drugs; held: physical manipulation of luggage is a search, violates Fourth Amendment; 7-2.

***State v. Coyne***, 99 Wn.App. 566 (2000)

Police are given a coat found by a citizen, defendants in car contact officer, one says that the coat is his, officer states he needs identification of both driver and passenger, officer testifies he was satisfied with driver's identification and ownership of coat, finds warrant for passenger, while retaining coat and driver's identification asks permission to search trunk which is granted, finds drugs; held: retaining coat and license was a seizure without authority, *State v. Ellwood,* 52 Wn.App. 70 (1988), *State v. Barnes,* 96 Wn.App. 217 (1999), *State v. O'Day,* 91 Wn.App. 244 (1998), *State v. Crane*, 105 Wn.App. 301 (2001), *State v. Beito,* 147 Wn.App. 504 (2008), *State v. Carriero,* 8 Wn. App. 2d 641 (2019), **community caretaking function** was complete when police were satisfied of ownership, *State v. Markgraf,* 59 Wn.App. 509, 513 (1990), consent was tainted by the seizure, *State v. Soto-Garcia,* 68 Wn.App. 20 (1992), *overruled, in part*, *State v. Thorn*, 129 Wn.2d 347 (1996); III.

***State v. Kinzy***, 141 Wn.2d 373 (2000)

Police observe girl whom they believe to be 11-13 years old in high crime area late at night with adults known to be associated with drugs, hail her, she walks away, restrain her, observe drugs; held: **community caretaking function** may not be used as a pretext for a criminal investigation; balancing a citizen's privacy interest in freedom from police intrusion against public interest in having police perform caretaking, privacy must prevail, *State v. Lawson,* 135 Wn.App. 430 (2006); police may conduct noncriminal investigation as long as it is necessary and strictly relevant to performance of caretaking function, *cf.: State v. Acrey,* 110 Wn.App. 769 (2002), 148 Wn.2d 738 (2003), *see: State v. A.A.*, 187 Wn.App. 475 (2015); reverses *State v. L.K.,* 95 Wn.App. 686 (1999); 5-4.

***City of Indianapolis v. Edmond***, 148 L.Ed.2d 333 (2000)

Police set up drug roadblock, stop a predetermined number of vehicles, ask for identification, look for signs of impairment, conduct open-view examination of cars, drug dog walks around vehicles, search if particularized suspicion develops; held: because primary purpose of stop is to detect evidence of ordinary criminal wrongdoing, as opposed to border, *United States v. Martinez-Fuerte*, 49 L.Ed.2d 1116 (1976), or sobriety checkpoints, *Michigan Dept. of State Police v. Sitz*, 110 L.Ed.2d 412 (1990), drug roadblock violates Fourth Amendment, *see: Delaware v. Prouse*, 59 L.Ed.2d 660 (1979), *Illinois v. Lidster*, 157 L.Ed.2d 843 (2004), *Illinois v. Caballes*, 160 L.Ed.2d 842 (2005); 6-3.

***Ferguson v. City of Charleston***, 149 L.Ed.2d 205 (2001)

State hospital drug tests urine of obstetric patients, turns over positive results to police for prosecution; held: urine test is a search, because hospital turned results over to police without knowledge or consent of patient, "special need" does not justify warrantless search or lack of individualized suspicion, *Chandler v. Miller*, 137 L.Ed.2d 513 (1997), *cf.: Vernonia School Dist. 47J v. Acton*, 132 L.Ed.2d 564 (1995), *Board of Education v. Earls*, 153 L.Ed.2d 735 (2002); 6-3.

***Kylo v. United States***, 150 L.Ed.2d 94 (2001)

Use of **thermal imaging device** to detect relative amounts of heat within a home is a search and, absent warrant, violates Fourth Amendment, *State v. Young*, 123 Wn.2d 173 (1994); 5-4.

***State v. Bessette***, 105 Wn.App. 793 (2001)

Police observe juvenile holding beer, chase him to defendant's home, demand entry, defendant refuses absent warrant, defendant is convicted of obstructing; held: minor in possession of alcohol is a minor offense, no indication juvenile was armed or likely to escape, was not a threat, telephonic warrant could have been obtained, *State v. Hinshaw*, 149 Wn.App. 747 (2009), *Seattle v. Pearson*, 192 Wn.App. 802, 811-17 (2016), *cf.: State v. Anderson*, 9 Wn.App.2d 430 (2019), thus insufficient exigent circumstances to enter without a warrant, thus defendant did not obstruct, *see: State v. Ramirez*, 49 Wn.App. 814 (1987), *State v. Griffith*, 61 Wn.App. 35 (1991), *Seattle v. Altschuler*, 53 Wn.App. 317, 321 (1989), *State v. Wolters*, 133 Wn.App. 297 (2006); III.

***State v. Ross***, 106 Wn.App. 876 (2001)

Defendant is arrested on misdemeanor warrant, patted down by arresting officer, turned over to police from warrant jurisdiction who search incident to arrest and find drugs, defense seeks suppression because defendant was not taken "directly and without delay" to post bail, RCW 10.31.030; held: while RCW 10.31.030 precludes inventory searches at time of booking where a defendant is not given the opportunity to post bail, *State v. Smith*, 56 Wn.App. 145 (1989), *State v. Caldera*, 84 Wn.App. 527 (1997), police are not precluded from searching incident to arrest, *State v. Jordan*, 92 Wn.App. 25 (1998), *State v, Salinas*, 169 Wn.App. 210, 222 (2012); initial arresting officers were not obliged to take defendant immediately to jail to post bail; I.

***State v. Schroeder***, 109 Wn.App. 30 (2001)

Police are called to residence to investigate suicide, find deceased and defendant who identifies deceased, police search body for identification, find none, search house for identification, find drugs; held: because identity of deceased was provided by defendant, the search of identification was not so compelling under **community caretaking function**, that it overshadowed privacy of homeowner, other less-intrusive methods of confirming identification existed, no emergency existed; II.

***United States v. Knights***, 151 L.Ed.2d 497 (2001)

Condition of probation obliges defendant to submit to searches without a warrant or reasonable cause, police search defendant's home without a warrant with reasonable cause; held: probationer may be searched without a warrant on reasonable cause, *Griffin v. Wisconsin*, 97 L.Ed.2d 709 (1987), *State v. Lampman*, 45 Wn.App. 228 (1986), *but see: State v. Cornwell*, 190 Wn.2d 296 (2018), search need not relate to a "probationary purpose"; 9-0.

***State v. Dugas***, 109 Wn.App. 592 (2001)

During detention, suspect removes his jacket and puts it on his car hood, following arrest, police take jacket and, during inventory find closed key pouch, open it, find drugs; held: while police were authorized to impound the jacket for safekeeping, it is not reasonable for police to search the contents of closed containers found in the jacket incident to impound, *State v. VanNess*, 186 Wn.App. 148 (2015), *see: State v. Houser*, 95 Wn.2d 143 (1980) , *State v. Wisdom*, 187 Wn.aApp. 652 (2015), *cf.: State v. Dunham*, 194 Wn.App. 744 (2016), *State v . Peck*, 194 Wn.2d 148 (2019); I.

***State v. Cardenas***, 146 Wn.2d 400 (2002)

Police receive report of armed residential robbery in progress, two suspects flee in large vehicle with a different color passenger door, "possibly orange," suspect vehicle in motel parking lot, upon arrival police observe brown car with blue door in front of a room, car hood warm, items matching items taken in rear, officers bend knees, look through partially opened curtains, see two males sorting papers, knock without announcing "police," men "dart" to back of motel, police enter, arrest; held: 6 exigent circumstance factors: (1) gravity of offense, here robbery; (2) armed; (3) trustworthy information that suspect is guilty; (4) strong reason to believe suspect is on premises; (5) likelihood of escape if not apprehended; (6) entry is peaceable, *State v. Terrovona*, 105 Wn.2d 632, 644 (1986), *State v. Wolters*, 133 Wn.App. 297, 304-05 (2006), *State v. Smith*, 137 Wn.App. 262, 268-70 (2007), 165 Wn.2d 511 (2009); not every factor need be met to find exigent circumstances, only that factors are sufficient to show that police needed to act quickly, *State v. Patterson*, 112 Wn.2d 731, 736 (1989); looking through window did not violate open view doctrine, as sufficient exigent circumstances existed before police looked; 5-4.

***State v. Hepton***, 113 Wn.App. 673, 678-81 (2002)

Police look in garbage can found next to abandoned house, next door to defendant, find evidence, obtain warrant; held: there is no right to privacy in the contents of a neighbor's trash can, *see: State v. Graffius*, 74 Wn.App. 23 (1994), *State v. Rodriguez*, 65 Wn.App. 409 (1992), *cf.: State v. Sweeney*, 125 Wn.App. 881 (2005), distinguishing *State v. Boland*, 115 Wn.2d 571 (1990); III.

***State v. Smith***, 113 Wn.App. 846 (2002)

Police observe marijuana plants from adjoining property, one officer leaves to get warrant, others walk about the property, beyond curtilage, but don't enter marijuana patch, when warrant arrives, marijuana is seized; held: while officer's wandering on property was unlawful, the evidence was seized pursuant to the warrant, **an independent source** akin to inevitable discovery, *see: State v. Hall*, 53 Wn.App. 296 (1989), *State v. Bean*, 89 Wn.2d 467 (1978), *State v. Spring*, 128 Wn.App. 398 (2005), *State v. Johnson*, 132 Wn.App. 454, 459-60 (2006), *State v. Gaines*, 154 Wn.2d 718 (2005), *State v. Betancourth*, 190 Wn.2d 357 (2018), *but see: State v. Winterstein*, 167 Wn.2d 620, 631-36 (2009), thus suppression is not required; II.

***State v. Hopkins***, 113 Wn.App. 954 (2002)

Police, with an arrest warrant for defendant and a search warrant to search for the defendant "including outbuildings…and documents" arrest defendant, do a "security check" and "protective sweep" in shed, find meth lab; held: because search warrant was issued only on the basis of the arrest warrant, its scope is no greater than the arrest warrant; to justify a "protective sweep," state has burden of proving that the sweep was reasonable for security purposes and limited to a cursory visual inspection of places where a person may be hiding, *Maryland v. Buie*, 108 L.Ed.2d 276 (1990), *State v. Smith*, 137 Wn.App. 262, 268 (2007), 165 Wn.2d 511 (2009), *State v. Sadler*, 147 Wn.App. 97, 123-25 (2008), *State v. Blockman*, 190 Wn.2d 651 (2018); here, there were no articulable facts warranting a reasonably prudent officer in believing that the area to be swept harbored an individual posing a danger, thus drugs suppressed, *State v. Chambers*, 197 Wn.App.. 96, 122-28 (2016); III.

***United States v. Drayton***, 153 L.Ed.2d 242 (2002)

Police board bus, state they are looking for drugs, ask defendant "mind if I check you?," defendant agrees, patdown reveals drugs; held: police are not obliged to advise bus passengers of their right to refuse search as they were not seized, were free to leave, nothing said would suggest to a reasonable person that he was barred from leaving or refusing, *Florida v. Bostick*, 115 L.Ed.2d 389 (1991), *but see: State v. Rankin*, 151 Wn.2d 689 (2004); 6-3.

***State v. Cheatam***, 150 Wn.2d 626, 634-43 (2003)

Police seize defendant's shoes from jail property box without a warrant; held: once police have conducted a valid inventory search of inmate's property at booking, inmate has no privacy interest in the items that have already been lawfully exposed to police view, per Fourth Amendment, *United States v. Edwards*, 39 L.Ed.2d 771 (1974) and CONST., art. I, § 7, *State v. Salinas*, 169 Wn.App. 210, 216-22 (2012), *see also: State v. Puapuaga*, 164 Wn.2d 515, 520-24 (2008); affirms *State v. Cheatam*, 112 Wn.App. 778 (2002); 7-2.

***State v. Ettenhofer***, 119 Wn.App. 300 (2003)

Police call judge who swears officer, judge finds probable cause, CrR 2.3(c), authorizes search but neither judge nor police execute a written warrant, drugs seized; held: absent a written warrant, search is invalid under state constitution; II.

***State v. Carter***, 151 Wn.2d 118 (2004)

Private firearms instructor brings illegal machine gun to class, invites students to handle it, investigators in class seize it, defendant is charged with possession of a machine gun, RCW

9.41.190(1); held: presenting firearm in open view of students precludes any expectation of privacy, exigent circumstance existed for seizure due to apparent attempt to destroy evidence and endanger others, *State v. Hendrickson*, 129 Wn.2d 61, 70-71 (1996); 8-1.

***State v. Gaines***, 154 Wn.2d 711 (2005)

Police, with probable cause but without a warrant, unlawfully open locked trunk of car, observe evidence, other police later obtain warrant, seize evidence; held: **independent source exception** to the exclusionary rule complies with U.S. and state constitutions where police would have sought a warrant for the trunk even absent the initial, illegal search, *Murray v. United States*, 101 L.Ed.2d 472 (1988), *State v. Coates*, 107 Wn.2d 882, 886-89 (1987), *State v. Spring*, 128 Wn.App. 398 (2005), *State v. Johnson*, 132 Wn.App. 454, 459-60 (2006), *State v. Hilton*, 164 Wn.App. 81, 89-93 (2011), *see: State v. Miles*, 159 Wn.App. 282 (2011), *State v. Smith*,177 Wn.2d 533 (2013), *State v. Betancourth*, 190 Wn.2d 357 (2018); 9-0.

***State v. Wallin***, 125 Wn.App. 648 (2005)

Trial court, without objection, extends community custody without legal authority, probation officer searches defendant's home on well-founded suspicion, seizes child porn; held: absolute exclusionary rule of CONST., art. I, § 7 precludes admissibility of evidence seized without a warrant or lawful exception to the warrant requirement; no good faith exception applies to state constitutional analysis, *State v. Afana*, 169 Wn.2d 169, 173-84 (2010), *but see: State v. Riley*, 154 Wn.App. 433 (2010); *State v. Brown*, 193 Wn.2d 280 (2019); I.

***State v. Sweeney***, 125 Wn.App. 881 (2005)

Police instruct city refuse collector to obtain defendant's garbage can, dump it in a clean truck and drive the truck down the block, police search hopper, find evidence, obtain warrant, seize drugs from defendant's home; held: under state constitution, an individual has a privacy interest in garbage collected from the curb by a municipal garbage collector that is intentionally kept separate from other garbage and then made available to police, *State v. Boland*, 115 Wn.2d 571 (1990); II.

***Illinois v. Caballes***, 160 L.Ed.2d 842 (2005)

Following stop for traffic infraction, police bring in drug dog to sniff car, reacts positively, police open trunk, seize marijuana; held: where duration of traffic stop was justified by the traffic offense and the ordinary inquiries to such a stop, *see: United States v. Jacobsen*, 80 L.Ed.2d 85 (1984), a lawful canine sniff, *United States v. Place*, 77 L.Ed.2d 110 (1983), *Florida v. Harris*, 568 U.S. 237, 185 L.Ed.2d 61 (2013), *but see: State v. Dearman*, 92 Wn.App. 630 (1998), *Florida v. Jardines*, 569 U.S. 1, 185 L.Ed.2d 495 (2013), does not implicate legitimate privacy interests; 5-3.

***State v. Spring***, 128 Wn.App. 398 (2005)

When a warrant is based in part on illegally obtained information, warrant is nonetheless valid if affidavit contains otherwise sufficient facts to establish probable cause independent of the illegally obtained information, *Murray v. United States*, 101 L.Ed.2d 472 (1988), *State v. Maxwell*, 114 Wn.2d 761, 769 (1990), and prosecutor proves that police would have sought the

warrant in the absence of the unlawfully obtained evidence, *State v. Hall*, 53 Wn.App. 296 (1989); I.

***State v. Walker***, 157 Wn.2d 307 (2006)

Statutory expansion of common law rule allowing for warrantless misdemeanor arrests only when the misdemeanor occurs in the officer's presence, RCW 10.31.100(1), does not violate CONST. art I, § 7, *see: State v. Hornaday*, 105 Wn.2d 120, 130 (1986), *Staats v. Brown*, 139 Wn.2d 757, 766-67 (2000), or Fourth Amendment, *see: Atwater v. City of Lago Vista*, 149 L.Ed.2d 549 (2001); legislature may provide exceptions to the common law "in the presence" rule for warrantless misdemeanor arrests; 9-0.

***State v. Williams***, 135 Wn.App. 915 (2006)

Staff at McNeil Island Special Commitment Center discover nude photo in common area belonging to defendant who was being detained pending trial as a sexually violent predator, staff search defendant's computer, find child pornography; held: involuntarily committed resident has reduced expectation of privacy in both his room and computer, residents are on notice that their possessions are subject to search without notice, thus warrantless search was valid; II.

***State v. Jorden***, 160 Wn.2d 121 (2007)

Police random check of a motel guest registry which identifies defendant's whereabouts violates CONST., art. 1, § 7, *Los Angeles v. Patel*, 576 U.S. 409, 135 S.Ct. 2443, 192 L.Ed.2d 435 (2015), *cf.: Pers. Restraint of Nichols*, 171 Wn.2d 370, 376-79 (2011); reverses *State v. Jorden*, 126 Wn.App. 70 (2005); 7-2.

***State v. Ague-Masters***, 138 Wn.App. 86, 97-101 (2007)

Police, knowing a vehicle registered to a man with a warrant is located on defendant's property, drive up driveway past a no trespassing sign, knock on front door, hear noise from rear of property, follow noise, observe propane tanks with valves turned open being purged, detain and search a man finding pill bottle with pseudoephedrine pills, release the man when they discover it's not the wanted man, obtain warrant, search premises, find drugs; held: substantial evidence supports trial court's finding that a reasonable, respectful citizen would believe he could drive down driveway to where deputies stopped, despite the sign, *State v. Ross*, 141 Wn.2d 304 (2000), *cf.: State v. Jesson*, 142 Wn.App. 852 (2008); defendant has no standing to challenge search of man in yard; II.

***State v. Carney***, 142 Wn.App. 197 (2007)

Police, investigating a report of reckless driving by a motorcyclist, approach a man meeting the operator's description standing by a car and a motorcycle, man jumps on motorcycle and flees, officers order two women in car to show hands, request identity, discover warrant, arrest, search, find drugs; held: ordering citizen to show hands, demanding identification is a seizure as a reasonable person would not have felt free to ignore the officer's "request to identify herself after being seized," *see: State v. O'Neill*, 148 Wn.2d 564 (2003); police belief that a citizen may be able to provide information material to the investigation of a crime does not justify a warrantless seizure absent reasonable suspicion based on objective facts that the

individual is involved in criminal conduct, *State v. Dorey*, 145 Wn.App. 423 (2008), *cf.: State v. Rubio*, 185 Wn.App. 387 (2015); 2-1, II.

***State v. Puapuaga***, 164 Wn.2d 515 (2008)

Defendant is sent to state hospital for competency evaluation, hospital staff inventory his possessions upon arrival, find unredacted discovery and note containing possible threat to a witness, advise prosecutor who obtains *ex parte* seizure order; held: pretrial detainee lacks a protectable privacy interest in property inventoried, seized and held by state officials under state and U.S. constitutions, *State v. Cheatam*, 150 Wn.2d 626 (2003); 9-0.

***State v. Houvener***, 145 Wn.App. 408 (2008)

College dormitory resident reports burglary, police enter dorm hallway, listen at defendant's door, hears incriminating statements, knocks and orders door to open, defendant opens, comes out, is questioned, confesses; held: because university housing rules preclude the general public from accessing residence floors without permission of a resident, there is a reasonable privacy interest in the hallway, which is not the equivalent of curtilage, *see: State v. Ross*, 141 Wn.2d 304, 312 (2000), thus search was unlawful; III.

***State v. Dorey***, 145 Wn.App. 423 (2008)

Police get report of "disturbance" involving a man in a black shirt, observe a man in a black shirt nearby, order him to "hold on a minute," ask for identification, record information, release man, find warrant, follow man who tosses a bag into bushes, arrest for warrant, find drugs in bag; held: there is no authority to detain a witness, *State v. Carney*, 142 Wn.App. 197, 203 (2007), *cf.: State v. Rubio*, 185 Wn.App. 387 (2015)no crime was being investigated, the stop was not reasonable, the recordation of defendant's identity was improper, but for the recording the warrant would not have been discovered nor would the drugs have been seized, thus evidence should have been suppressed; III.

***State v. Rose***, 146 Wn.App. 439 (2008)

Trial court imposes urinalysis as condition of pretrial release; held: absent evidence that drug use is a good indicator that defendant would fail to appear, court may not require a UA as a condition of release, *see: Butler v. Kato*, 137 Wn.App. 515 (2007), *cf.: State v. Olsen*, 189 Wn.2d 118 (2017); II.

***State v. Sadler***, 147 Wn.App. 97, 123-27 (2008)

Police enter defendant's home on legitimate emergency, seeking a minor with whom defendant is alleged to be engaged in sadomasochistic sex, arrest defendant, engage in cursory visual inspection of places in home where someone could be hiding, then return later to seek evidence for use in a search warrant affidavit; held: initial protective sweep was lawful, *State v. Hopkins*, 113 Wn.App. 954, 959-60 (2002), but second warrantless entry was improper as it was an entry to investigate a possible crime; remanded to allow inquiry into **independent source** doctrine, *State v. Gaines*, 154 Wn.2d 711 (2005); 2-1, II.

***State v. Smith***, 165 Wn.2d 511 (2009)

Police, investigating theft of tanker truck containing anyhdrous ammonia, discover truck near house, see rifle through window, arrest occupants, police then see that rifle is missing, enter house for "safety sweep," search for places where a person could be hiding, observe evidence of meth lab, obtain warrant, seize drugs and lab; held: exigent circumstances of danger to police and public, fear that a person hiding in the house would shoot officers or shoot the tanker of ammonia support entry and search under community caretaking function, *State v. Cardenas*, 146 Wn.2d 400, 406 (2002), , *State v. Gibson*, 152 Wn.App. 945, 953-58 (2009); affirms *State v. Smith*, 137 Wn.App. 262 (2007); 6-3.

***State v. Hinshaw***, 149 Wn.App. 747 (2009)

Police, with probable cause to arrest for DUI, go to defendant's home, smell alcohol through screen door which defendant leaves shut, open door, grab defendant and arrest; held: absent evidence of a "major crisis demanding immediate entry," and failure of state to make a showing that destruction of evidence (alcohol dissipation) was imminent or that arresting officers could not have obtained a warrant, *see: State v. Bessette*, 105 Wn.App. 793 (2001), *State v. Ringer*, 100 Wn.2d 686 (1983), *Seattle v. Pearson*, 192 Wn.App. 802, 811-17 (2016), *cf.: State v. Anderson*, 9 Wn.App.2d 430 (2019), no exigent circumstance existed for a warrantless arrest in the home; no exigency is created simply because there is probable cause to believe that a serious crime has been committed, *Payton v. New York*, 63 L.Ed.2d 639 (1980); III.

***Safford U. Sch. Dist. v. Redding***, 174 L.Ed.2d 354 (2009)

School official is told by one student that another student delivered contraband ibuprofen or naproxen, official searches student's bag, then engages in strip search; held: "[i]f a student is reasonably suspected of giving out contraband pills, she is reasonably suspected of carrying them on her person," at 363, thus search of her bag and outer clothing is valid, *New Jersey v. T.L.O.*, 83 L.Ed.2d 720 (1985); because the type of pills sought lacked an indication of danger to other students and because there was no reason to believe the pills were in the student's underwear, the strip search was unreasonable; 6-3.

***State v. Winterstein***, 167 Wn.2d 620 (2009)

Probationer informs DOC that he had moved to a trailer next door to his previous address, CCO and police search previous address, erroneously believe that it was the last address he had reported, find meth lab; held: probation officers are required to have probable cause to believe that their probationers live at the residence they seek to search, *State v. Reichert*, 158 Wn.App. 374, 388 (2010), trial court's determination that CCO only needed reasonable suspicion is reversed; **inevitable discovery** exception to the exclusionary rule is inapplicable under CONST., art. I, § 7, reversing *State v. Winterstein*, 140 Wn.App. 676 (2007), overruling *State v. Avila-Avina*, 99 Wn.App. 9, 17 (2000), *State v. Reyes*, 98 Wn.App. 923, 930-33 (2000), *State v. Richman*, 85 Wn.App. 568, 577 (1997), not retroactive on collateral review, *Pers. Restraint of Haghighi*, 167 Wn.App. 712 (2012), 178 Wn.2d 435 (2013), intent of framers of state constitution was to protect personal rights rather than curb government actions, whenever the right is unreasonably violated suppression must follow; 9-0.

***State v. Hartzell***, 156 Wn.App. 918, 928-30 (2010)

Defendant is arrested, removed from his vehicle, K-9 dog jumps on vehicle, sniffs at window, then runs away and finds a gun police were looking for; held: canine sniff from an area where defendant does not have a reasonable expectation of privacy is not a search, defendant did not have an expectation of privacy in air coming from open window of car, *State v. Stanphill*, 53 Wn.App. 623, 630-32 (1989), *but see: State v. Boyce*, 44 Wn.App. 724 (1986), *State v. Dearman*, 92 Wn.App. 630 (1998); I.

***State v. Reichert***, 158 Wn.App. 374 (2010)

Police, acting on tip that probationer was selling drugs, ask CCO to see if probationer was in violation of community custody by not living where he had reported he lived, accompany CCO to residence where probationer was believed to be living, CCO arrests outside, opens door, smells marijuana, police obtain warrant, defendant claims unlawful pretext; held: probation officer's warrantless search is valid even if based upon a tip from law enforcement as long as CCO had probable cause to believe probationer lived at the residence searched, *State v. Winterstein*, 167 Wn.2d 620 (2009), *but see: United States v. Knights*, 534 U.S. 112, 151 L.Ed.2d 497 (2001), *State v. Cornwell*, 190 Wn.2d 296 (2018); II.

***Kentucky v. King***, 563 U.S. 452, 131 S.Ct. 1849, 179 L.Ed.2d 865 (2011)

Police, without a warrant, follow a suspected drug dealer to an apartment, smell marijuana, knock and announce, hear noises of people inside moving and things being moved, believe drug-related evidence was about to be destroyed, kick in door, enter seize drugs; held: imminent destruction of evidence is an exigency justifying a warrantless search, *Brigham City v. Stuart*, 547 U.S. 398, 403, 164 L.Ed.2d 650 (2006); where police conduct causes the exigency, the warrantless search is justified as long as the police conduct is objectively reasonable; knocking loudly, shouting "police" in order to see if occupants will open the door or consent to a search is reasonable; court rejects bad faith, reasonable foreseeability that suspects would destroy evidence if police knock and announce as tests; 8-1.

***State v. Miles***, 159 Wn.App. 282 (2011)

State obtains evidence pursuant to an administrative subpoena which is deemed invalid by Supreme Court, *State v. Miles*, 160 Wn.2d 236 (2007), because bank records are protected under CONST., art. I, § 7, as a "pervasively regulated industry," state obtains search warrant for same records, trial court suppresses, holding that **independent source doctrine,** *State v. Gaines*, 154 Wn.2d 711, 717 (2005), *Murray v. United States*, 487 U.S. 533, 101 L.Ed.2d 472 (1988), does not allow warrant because state would not have sought the warrant but for the original flawed subpoena; held: while the inevitable discovery doctrine is rejected in Washington, *State v. Winterstein*, 167 Wn.2d 620, 636 (2009), test for independent source is (1) whether information improperly obtained is not included in the affidavit in support of the later search warrant and thus did not impact the decision to issue the warrant and (2) were the officers motivated to seek the warrant by the earlier unlawful entry?; here, while evidence exists that shows the Supreme Court's invalidation of the administrative subpoena prompted the state to seek the warrant, trial court must determine as a question of fact whether this motivation prong is met, *see: State v. Spring*, 128 Wn.App. 398 (2005), *State v. Betancourth*, 190 Wn.2d 357 (2018); I.

***Pers. Restraint of Nichols***, 171 Wn.2d 370, 376-79 (2011)

Police informant buys drugs at a motel, police ask desk clerk who is registered in a room, clerk shows registration form, after further investigation police arrest petitioner; held: while random checking of a motel guest registry violates CONST., art. I, § 7, *State v. Jorden,* 160 Wn.2d 121 (2007), *Los Angeles v. Patel,* 576 U.S. 409, 135 S.Ct. 2443, 192 L.Ed.2d 435 (2015), an examination of a registry as a result of individualized suspicion does not violate the constitution; 5-4.

***State v. E.K.P.***, 162 Wn.App. 675 (2011)

Assistant principal hears from unnamed "reliable" student that respondent smells of alcohol and might possess alcohol, assistant principal approaches respondent in parking lot, asks her to come to office, sees her try to hide backpack, in office does not smell alcohol, searches backpack, finds alcohol; held: informant's report and attempt to hide backpack gave school official reasonable grounds to suspect that a search of backpack would find alcohol, *New Jersey v. T.L.O.,* 469 U.S. 325, 341-42, 83 L.Ed.2d 720 (1985), *State v. B.A,S.,* 103 Wn.App. 549, 553-54 (2000); *Aguilar-Spinelli* test is inapplicable unless search is by a police officer, *see: State v. Sieler,* 95 Wn.2d 43, 47-48 (1980); II.

***State v. Parris***, 163 Wn.App. 110 (2011)

Defendant is on community custody for failure to register as a sex offender, conditions include no contact with minors, no alcohol, no possession of sexually explicit materials, CCO learns he was seen by a police officer with an underage woman, goes to his home, knocks, no answer, looks in window, sees defendant and young female hiding, orders them to exit, arrests defendant, searches room, observes syringes, alcohol, pornography, seizes storage media, later views it and observes defendant having sex with 17 year old, is convicted of child porn; held: probationers and sex offenders have reduced privacy rights, *Det. Of Campbell,* 139 Wn.2d 341, 355-56 (1999), *State v. Lucas,* 56 Wn.App. 236, 239-40 (1989); CCO may search an offender's personal property without a warrant, RCW 9.94A.631(1) (2009), *see: State v. Cornwell,* 190 Wn.2d 296 (2018), thus search of memory cards was lawful as CCO had reasonable suspicion that they contained evidence of additional violations based upon defendant's mother's report that he was out of control and threatened to shoot CCO, *cf.: State v. Jardinez,* 184 Wn.App. 518 (2014), *State v. Livingston,* 197 Wn.App. 590 (2017); because memory card was apparently not password-protected, it was not a locked container; II.

***State v. Hilton,*** 164 Wn.App. 81, 89-93 (2011)

Homicide victim is shot, nearby are shell casings of the same caliber as gunshots but an unusual brand, police begin contacting local ammunition sellers, seize pursuant to a warrant used shell casings which testing shows were fired from the murder weapon, ammo seller is found who sold that type of bullet to defendant, Court of Appeals suppresses evidence seized by warrant, on retrial trial court admits seller's testimony that he sold that type of ammo to defendant; held: because police had recognized unusual nature of the ammunition and had begun tracing it before seeking the warrant, **independent source doctrine** justifies admission at trial, *State v. Gaines,* 154 Wn.2d 711 (2005), *State v. Smith,*177 Wn.2d 533 (2013), *State v. Betancourth,* 190 Wn.2d 357 (2018), distinguished from inevitable discovery which is not recognized in Washington; III.

***United States v. Jones***, 565 U.S. 400, 132 S.Ct. 945, 181 L.Ed.2d 911 (2012)

Placing a GPS device on a car is a search which requires a warrant, *State v. Jackson*, 150 Wn.2d 251, 259-69 (2003), *Grady v. North Carolina*, 575 U.S. 306, 135 S.Ct. 459, 191 L.Ed.2d 459 (2015); 9-0.

***Florence v. Bd. of Chosen Freeholders***, 566 U.S. 318, 132 S.Ct. 1510, 182 L.Ed.2d 566 (2012)

Defendant is arrested for failing to appear at a hearing regarding nonpayment of a fine, booked into jail and, before being placed in general population, strip searched; held: strip search of an arrestee commmitted to general population does not violate Fourth Amendment; 5-4.

***State v. Meneese***, 174 Wn.2d 937 (2012)

Uniformed police officer assigned as a school resource officer observes respondent in bathroom with marijuana, takes him to principal's office, searches respondent's locked backpack, finds weapon; held: school search exception, *New Jersey v. T.L.O.*, 469 U.S. 325, 83 L.Ed.2d 720 (1985), does not apply where officer is a fully commissioned law enforcement officer employed by a police department who has no ability to discipline students, officer was seeking to obtain evidence for criminal prosecution not school discipline, search was not to maintain order as respondent was being removed from school regardless of the search; reverses *State v. J.M.*, 162 Wn.App. 27 (2011); 7-2.

***State v. Barron***, 170 Wn.App. 742 (2012)

Police respond to residence on assault with knife call, find defendant outside bleeding and crying, she tells police she was chased out at knife point, police ask her to sit in patrol car, she agrees, take her purse, speak to other witnesses, arrest defendant for disorderly conduct, search purse, find drug residue, take defendant to police station, observe nervousness, strip search and find drugs; held: when defendant was placed in patrol car, she was a witness, not a suspect, *State v. Dorey*, 145 Wn.App. 423, 429 (2008), *State v. Carney*, 142 Wn.App. 197 (2007), but exigency of report of assault with a weapon, defendant's acknowledgement she was in an altercation are sufficient to justify brief detention, *State v. Rubio*, 185 Wn.App. 387 (2015); arrest for misdemeanor not committed in officer's presence was justified as officers had probable cause that physical harm and theft occurred, thus warrantless arrest for misdemeanor was proper, RCW 10.31.100 (2010); **strip search** based upon nervousness alone, where arrest was not for a violent offense, escape, burglary, use of a deadly weapon or drug offense, is unlawful absent written approval from jail supervisor RCW 10.79.130 (1986), *cf.: State v. Audley*, 77 Wn.App. 897, 905-08 (1995), *Florence v. Bd. of Chosen Freeholders*, 566 U.S. 318, 182 L.Ed.2d 566 (2012); III.

***Florida v. Harris***, 568 U.S. 237, 185 L.Ed.2d 61 (2013)

Evidence of a **drug dog's** satisfactory performance in a certification or training program can itself provide sufficient reason to trust his alert; "[i]f a bona fide organization has certified a dog after testing his reliability in a controlled setting, a court can presume (subject to any conflicting evidence offered) that the dog's alert provides probable cause to search. The same is true, even in the absence of formal certification, if the dog has recently and successfully completed a training program that evaluated his proficiency in locating drugs;" 9-0.

***Florida v. Jardines***, 569 U.S. 1. 185 L.Ed.2d 495 (2013)

Police bring **drug dog** to front door of home, dog alerts, obtain warrant, find drugs; held: curtilage of home is constitutionally protected and, while knocking on front door is not a privacy violation, *Breard v. Alexandria*, 341 U.S. 622, 95 L.Ed. 1233 (1951), *Kentucky v. King*, 563 U.S. 452, 131 S.Ct. 1849, 179 L.Ed.2d 865 (2011), because there is a "customary invitation" for citizens to do so, introducing a trained police dog exceeds that invitation and is a search, *Kyllo v. United States*, 533 U.S. 27, 150 L.Ed.2d 94 (2001); 5-4.

***Missouri v. McNeely***, 569 U.S. 141, 185 L.Ed.2d 696 (2013)

In DUI investigations, natural dissipation of alcohol in bloodstream does not constitute an exigency in every case sufficient to justify a blood test without a warrant, whether a warrantless blood test is reasonable must be determined case by case based upon totality of the circumstances, *Schmerber v. California*, 384 U.S. 757, 771, 16 L.Ed.2d 908 (1966), *Seattle v. Pearson*, 192 Wn.App. 802, 811-17 (2016), *see: State v. Baird*, 187 Wn.2d 210 (2016), , *State v. Inman*, 2 Wn.App.2d 281 (2018), *State v. Anderson*, 9 Wn.App.2d 430 (2019), *but see: Birchfield v. North Dakota*, 579 U.S. 438, 136 S.Ct. 2160, 195 L.Ed.2d 560 (2016), state's proposed *per se* rule fails to account for advances that allow for the more expeditious processing of warrant applications; 5-4.

***State v. Smith***,177 Wn.2d 533 (2013)

Police unlawfully run names in a motel registry to check for warrants, *State v. Jorden*, 160 Wn.2d 121 (2007), arrest defendant at threshold of motel room, see bloodied victims in room, enter room, rescue victims who tell police about evidence in a dumpster which police search and seize without warrants, trial court admits evidence under inevitable discovery doctrine, later invalidated, *State v. Winterstein*, 167 Wn.2d 620 (2009), Court of Appeals affirms under attenuation and independent source doctrine, *State v. Smith*, 165 Wn.App. 296 (2011); held: police presence at room door was the fruit of the unlawful motel registry search, thus **independent source doctrine** does not justify entry, but **community caretaking** and need to render emergency aid do justify entry, *State v. Acrey*, 148 Wn.2d 738, 748 (2003), search was not motivated by any investigatory purpose, victims were in plain view, *State v. Lynd*, 54 Wn.App. 18, 19-23 (1989), *State v. Stevenson*, 55 Wn.App. 725 (1989), evidence in dumpster was discovered from victim's information volunteered contemporaneous with efforts to render aid; willing victim's testimony is not amenable to suppression; 8-1.

***State v. Green***, 177 Wn.App. 332 (2013)

Police arrest defendant for vehicular homicide, impound and inventory vehicle, in a paper bag find and seize suspicious gift card receipts, obtain warrant to search for evidence of vehicular homicide without mentioning what was seized in the bag, warrant authorizes seizure of evidence of drug and alcohol use and papers of dominions and control, during execution of warrant police find credit cards, put them back and obtain a warrant for identity theft and seize cards which were false or stolen; held: police did not recognize the gift card receipts as inventory items or as evidence of a crime, looking in the paper bag was proper to see if anything of value was present but seizure was for investigatory purposes and thus improper, distinguishing *State v. Montague*, 73 Wn.2d 381, 382-85 (1968); **independent source doctrine**, *State v. Gaines*, 154 Wn.2d 711 (2005), *State v. Miles*, 159 Wn.App. 282 (2011), does not justify seizure of receipts as they were not found while executing first search warrant, belief that they would have been

found had they not been seized during the initial search is speculative, inevitable discovery doctrine is not valid in Washington, *State v. Smith,* 165 Wn.App. 296, 310, *aff'd,* 177 Wn.2d 533 (2013); I.

***Heien v. North Carolina***, 574 U.S. 54, 135 S.Ct. 530, 190 L.Ed.2d 475 (2014)

Defendant is driving with one burnt out brake light, sheriff asks to search car, finds drugs, state law does not require two brake lights; held: a reasonable mistake of law by a police officer (here, there was some ambiguity and inconsistency in the equipment code, *see:* Kagan, J., concurring) may constitutionally establish reasonable suspicion to stop a car, *see also: Michigan v. DeFillippo,* 443 U.S. 31, 61 L.Ed.2d 343 (1979), *but see: State v. Brown,* 193 Wn.2d 280 (2019); 8-1.

***State v. Hinton***, 179 Wn.2d 862 (2014)

Officer is handed a smartphone that was seized from an arrestee, defendant sends text message thinking recipient is the arrestee, officer replies, defendant asks to buy drugs, is convicted of attempted possession; held: a text message is a "private affair," protected from warrantless search, CONST. art. I, § 7, a person does not lose all privacy interest in text messages merely because they are disclosed to a recipient, *State v. Bowman,* 198 Wn.2d 609 (2021), reversing *State v. Hinton,* 169 Wn.App. 28 (2012); 6-3.

***State v. Roden***, 179 Wn.2d 893 (2014)

Incident to drug arrest of Lee, police seize smartphone, detective looks through the phone, sees a text message offering to sell drugs, posing as arrestee Lee replies, arranges to buy drugs, arrest defendant Roden; held: a text message to an individual, as opposed to a group texting function, manifests a subjective intent of privacy, illicit subject matter indicates a belief in privacy, thus text messages were private communications protected by privacy act, RCW 9.73.030(1), detective reading the texts intercepted the messages, police should have obtained a warrant, thus evidence must be suppressed, *State v. Hinton,* 179 Wn.2d 862 (2014), *but see: State v. Bowman,* 198 Wn.2d 609 (2021), *see also: State v. Faford,* 128 Wn.2d 476 (1996), *cf.: State v. Townsend,* 147 Wn.2d 666 (2002), *State v. Wojtyna,* 70 Wn.App. 689 (1993); reverses *State v. Roden,* 169 Wn.App. 59 (2012); 5-4.

***State v. Allen,*** 178 Wn.App. 893, 910-13 (2014), *reversed, on other grounds,* 182 Wn.2d 364 (2015)

Police learn from several informants that accomplice to murder of four police officers is in motel room, check register, see known alias on motel register, don't know if defendant is armed, knock, announce, door is opened, defendant says he knew they were "coming and coming hard," see him appear to reach towards a pillow, SWAT team enters, arrests, apparently evidence seized is offered at trial; held: crime was extremely violent, entry was "relatively peaceable," hands were not visible thus exigent circumstances justified warrantless entry; II.

***State v. Hamilton***, 179 Wn.App. 870 (2014)

Protected party with protection order finds respondent-defendant in his house where defendant had lived, calls police who ask defendant to come out, protected party finds purse with drugs and hands it to police, defendant tells police it is not her purse but she found it, her rings were in it, she decided to keep it, police search and seize drugs; held: purse was in defendant's

home where she had a privacy interest and had her property in the purse so, in spite of her denial of ownership she had a privacy interest, *State v. Evans*, 159 Wn.2d 402, 409 (2007); judicial estoppel does not preclude defendant from raising a privacy interest because she denied ownership at trial is not material as the evidence should have been suppressed pretrial, defendant did not argue she had no privacy interest, she argued she had no ownership interest; leaving purse in her house is not consistent with abandonment, distinguishing *State v. Reynolds*, 144 Wn.2d 282, 291 (2001); II.

***State v. Jardinez***, 184 Wn.App. 518 (2014)

Defendant misses meeting with CCO, two weeks later they meet, defendant admits he used marijuana, CCO orders defendant to empty pockets, seizes and searches iPod, finds video from that day showing defendant with shotgun, search his home, find shotgun, at felon in possession trial court suppresses, state appeals; held: while a CCO is authorized to search a probationer's person and property without a warrant if there is reasonable cause or a well-founded suspicion, RCW 9.94A.631(1) (2012), *State v. Masey*, 81 Wn.App. 198, 200 (1996), the suspicion must relate to the suspected violation of a condition of community custody, *State v. Reichert*, 158 Wn.App. 374 (2010), *State v. Livingston*, 197 Wn.App. 590 (2017), *see also: State v. Cornwell*, 190 Wn.2d 296(2018), distinguishing *State v. Parris*, 163 Wn.App. 110 (2011); here there was no relationship between the failure to report and the device, trial court affirmed; III.

***Grady v. North Carolina***, 575 U.S. 306, 135 S.Ct. 1368, 191 L.Ed.2d 459 (2015)

Requiring a sex offender to be subjected to satellite-based monitoring implicates the Fourth Amendment, court must first determine if it is a reasonable search, *see: United States v. Jones*, 565 U.S. 400, 132 S.Ct. 945,181 L.Ed.2d 911 (2012), *State v. Jackson*, 150 Wn.2d 251, 259-69 (2003); *per curiam*.

***Rodriguez v. United States***, 575 U.S. 348, 135 S.Ct. 1609, 191 L. Ed. 2d 492 (2015)

Absent reasonable suspicion, police extension of a traffic stop in order to conduct a dog sniff violates Fourth Amendment, *see: State v. Dearman*, 92 Wn.App. 630 (1998), *cf.: United States v. Place*, 77 L.Ed.2d 110 (1983), *Illinois v. Caballes*, 160 L.Ed.2d 842 (2005); 6-3.

***City of Los Angeles v. Patel***, 576 U.S. 409 135 S.Ct. 2443, 192 L.Ed.2d 435 (2015)

Ordinance which requires hotel operators to provide the police with guest information upon demand violates Fourth Amendment as it does not provide for precompliance review; 5-4.

***State v. Brock***, 184 Wn.2d 148 (2015)

Defendant, wearing backpack, is detained, told to remove backpack, lawfully frisked, told to accompany officer to patrol car, officer carries backpack, arrests defendant, searches backpack, finds drugs; held: when an officer removes an item from an arrestee's person during a *Terry* stop which ripens into an arrest, passage of time does not negate a lawful search of the item incident to arrest, *State v. Byrd*, 178 Wn.2d 611 (2013), *State v. MacDicken*, 179 Wn.2d 936 (2014), *State v. Smith*, 119 Wn.2d 675 (1992), *see: State v. Alexander*, 9 Wn.App.2d 430 (2019); reverses *State v. Brock*, 182 Wn.App. 680 (2014); 8-1.

***State v. Rubio***, 185 Wn.App. 387 (2015)

Police, investigating a domestic violence offense, knowing that the apparent suspect has fled, enters apartment, observes defendant on couch, to "check on his welfare and to find out what happened" ask for identification, find warrants, arrest, at jail find drugs; held: detention was reasonable due to exigent circumstances, imperative that police locate victim, had reasonable cause to believe crime was just committed at the address involving injury, that defendant had knowledge that would aid in investigating and request for identification was "necessary to determine the true identity," *State v. Dorey*, 145 Wn.App. 423 (2008), *State v. Barron*, 170 Wn.App. 712 (2012), *but see: State v. Carney*, 142 Wn.App. 197 (2007); III.

***State v. VanNess***, 186 Wn.App. 148 (2015)

Police lawfully arrest defendant wearing a backpack, search backpack incident to arrest, find locked container, pry open container, observe drugs, obtain warrant; held: neither inventory nor search incident to arrest authorize search of a locked box absent a warrant, *cf.: State v. Dunham,* 194 Wn.App. 744 (2016), *State v . Peck*, 194 Wn.2d 148 (2019), warrant issued here was based upon unlawful search, *State v. Dugas,* 109 Wn.App. 592 (2001), *State v. Houser*, 95 Wn.2d 143, 155-56 (1980); II.

***State v. A.A.***, 187 Wn.App. 475 (2015)

Mother reports 15 year old son ran away, officer finds him, detains intending to take him to secure facility for juveniles pursuant to Family Reconciliation Act, RCW 13.32A.050(2), knows facility requires full search so on street searches and finds drugs; held: unlike detention pursuant to involuntary treatment act, ch. 13.32A RCW, *State v. Dempsey*, 88 Wn.App. 918 (1997), detainee here did not pose imminent threat of harm thus pat-down strictly for weapons was sufficient to protect officer, *State v. Kinzy*, 141 Wn.2d 373 (2000), *State v. Martin,* 13 Wn.App.2d 625 (2020), *cf.: State v. Acrey*, 148 Wn.2d 738 (2003); III.

***State v. Rooney***, 190 Wn.App. 653 (2015)

CCO with DOC warrant enter a home with police, enter bedroom of subject of the warrant, arrest subject, defendant is co-habitant of the room who objects to search, police search and find drugs and sees lots of swords and knives, defendant asks to dress, police search pants before defendant puts them on, finds a gun which defendant may not possess, is charged with drugs and VUFA; held: a probationer may be searched without a warrant not as an exception to the warrant requirement, but because a probationer must consent to a search, RCW 9.94A.631(1), but a cohabitant with common authority over the premises who is present and who objects has the right to require a warrant, *State v. Morse,* 156 Wn.2d 1 (2005), thus drugs suppressed; frisk of defendant's pants was valid for safety reasons due to weapons in room; II.

***State v. Mitchell***, 190 Wn.App. 919 (2015)

Defendant departs public bus, fare enforcement officer (FEO) asks for proof of payment, RCW 35.58.580, defendant says he paid but lacks proof, RCW 35.58.020(16), FEO is authorized to write a civil infraction, RCW 35.58.585(2)(b)(ii), asks for identification which defendant lacks, detains and calls for police, RCW 7.80.060, who discover warrant, arrest, find gun, defendant is convicted of VUFA; held: FEO is authorized to request proof of fare after passenger leaves bus and can detain absent identification if passenger lacks proof of fare; I.

***State v. Mecham***, 186 Wn.2d 128 (2016)

A field sobriety test is not a search, defendant has no constitutional right to refuse, refusal may be used at trial, per four justices in lead opinion; four justices in dissent hold that FSTs are a seizure, defendant has the right to refuse; concurrence would hold that FSTs following a traffic stop based on evidence of impaired driving or following a stop for an unrelated offense where officer immediately discovers signs of impairment but suspect is not yet under arrest, are a seizure that may be justified as a *Terry* stop; thus, per Justice Wiggins lead opinion, "five justices hold that an FST is a seizure but not a search as long as the suspect has not already been arrested for an unrelated offense and the seizure is justified under *Terry*, *cf.: Vancouver v. Kaufman,* 10 Wn.App.2d 747 (2019)*;* reverses *State v. Mecham*, 181 Wn.App. 932 (2014).

***State v. Samalia***, 186 Wn.2d 262 (2016)

Vehicle driven by defendant is stopped by police as stolen, defendant escapes on foot, officer finds cell phone in car, without a warrant uses contents of cell phone to identify driver who moves to suppress; held: defendant abandoned privacy interest in cell phone and its data by voluntarily leaving it in the stolen vehicle; fleeing establishes abandonment as opposed to misplaced property, *cf.: State v. Kealey,* 80 Wn.App. 162 (1995); affirms *State v. Samalia,* 186 Wn.App. 224 (2015); 6-3.

***State v. Gutierrez-Meza***, 191 Wn.App. 849 (2015)

Following the filing of a theft charge court enters an *ex parte* order requiring a bank to freeze defendant's bank account; held: the order entered was not a search warrant nor the functional equivalent of a search warrant, *State v. Garcia-Salgado*, 170 Wn.2d 176 (2010), *see: State v. Phillip*, 9 Wn.App.2d 464 (2019) *Carpenter v. United States*, ___ U.S. ___ , 138 S.Ct. 2206, 201 L.Ed.2d 507 (2018), and was thus error; III.

***Utah v. Strieff***, 579 U.S. 232, 136 S.Ct. 2056, 195 L.Ed.2d 400 (2016)

During unlawful investigative stop of vehicle police learn of arrest warrant, defendant is arrested for the warrant, search incident to arrest yields drugs; held: discovery of arrest warrant during the unconstitutional detention breaks the causal chain thus attenuation doctrine applies, *Brown v. Illinois,* 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975), *but see: State v. Mayfield*, 192 Wn.2d 871 (2019), and drugs are admissible; attenuation doctrine analysis: (1) look to the "temporal proximity" between the unconstitutional conduct and the discovery of evidence to determine how closely the discovery of evidence followed the unconstitutional search(2) consider the presence of intervening circumstances; (3) and "particularly" significant, examine "the purpose and flagrancy of the official misconduct;" 6-3.

***Seattle v. Pearson***, 192 Wn.App. 802, 811-17 (2016)

Defendant is arrested for DUI, admits to smoking marijuana, police obtain warrantless blood test, at suppression hearing officers testify that it would take up to 1½ hours to obtain a warrant by email but could have obtained a telephonic warrant, toxicologist testifies that marijuana dissipates, trial court holds that this was an exigent circumstance justifying warrantless seizure; held: government has burden of proving, by clear and convincing evidence that a warrant could not have been obtained within a reasonable period of time, natural dissipation is a factor but is not a *per se* exigent circumstance; here blood test results should have been suppressed on different grounds, *State v. Hinshaw*, 149 Wn.App. 747 (2009), *State v. Rulan*

*C.*, 97 Wn.App. 884 (1999), *State v. Bessette*, 105 Wn.App. 793 (2001), *Missouri v. McNeely*, 569 U.S. 141, 133 S.Ct. 1552, 185 L.Ed.2d 696 (2013), *State v. Inman*, 2 Wn.App.2d 281 (2018), *cf.: State v. Anderson*, 9 Wn.App.2d 430 (2019), *State v. Rawley*, 13 Wn.App.2d 474 (2020); I.

***State v. Olsen***, 189 Wn.2d 118 (2017)

Following DUI conviction in district court probation condition of random UAs is authorized, RCW 3.66.067 (2013), 46.61.5055 (2016), and does not violate state or U.S. constitutions, where ordered to monitor compliance with a condition of abstention; probation officer need not have a well-founded suspicion to demand UA; affirms *State v. Olsen*, 194 Wn.App. 264 (2016); 6-3.

***State v. Blockman***, 198 Wn.App. 34, 38-40 (2017) , *aff'd, on other grounds,* 190 Wn.2d 651 (2018)

Police, investigating a report of assault in an apartment, contact resident of apartment who invites them in, informs officer that there were two other people in apartment, agrees to protective sweep, officer "had concerns for his safety," officer enters room, observes drug transaction, arrests defendant [facts are unclear]; held: a protective sweep need not be preceded by an arrest, police were investigating a violent crime in an apartment, told about two other people, thus had an articulable, reasonable belief that people might "jump out and surprise him," thus protective sweep was valid, *State v. Smith*, 137 Wn.App. 262, 268 (2007), 165 Wn.2d 511 (2009); I.

***State v. Pippin***, 200 Wn.App. 826 (2017)

A "tent-like structure" on public land without permission is entitled to CONST. art. I § 7 protection from search without a warrant; Division II declines to follow *State v. Cleator*, 71 Wn.App. 217 (1993).

***Collins v. Virginia,*** 584 U.S. ___, 138 S.Ct. 1663, 201 L.Ed.2d 9 (2018)

Police, with probable cause to believe motorcycle is stolen and that it is located in driveway alongside defendant's house enter driveway, remove tarp from motorcycle; held: a driveway is part of the curtilage, when a law enforcement officer physically intrudes on the curtilage to gather evidence, a search within the meaning of the Fourth Amendment has occurred. *Florida v. Jardines*, 569 U.S. 1, 6, 133 S.Ct. 1409, 185 L.Ed.2d 495 (2013) and thus is presumptively unreasonable absent a warrant; 8-1.

***Carpenter v. United States***, ___ U.S. ___ , 138 S.Ct. 2206, 201 L.Ed.2d 507 (2018)

Police obtain court order for cell phone site location information on "reasonable grounds" based upon 18 U.S.C. § 2703(d) (2018); held: cell site location information is protected by the Fourth Amendment and can only be obtained, even from a third party, on probable cause with a warrant, *State v. Phillips*, 9 Wn.App.2d 368 (2019), *overruled, on other grounds, State v. Derri***,** 199 Wn.2d 658 (2022); 5-4.

***State v. Cornwell***, 190 Wn.2d 296 (2018)

Driver, on probation, is stopped for a warrant, arresting officer calls CCO who searches car and finds drugs; held: while a probationer may be searched by a probation officer without a warrant if s/he suspects that the probationer has violated probation, *State v. Winterstein*, 167 Wn.2d 620, 628 (2009), *Griffin v. Wisconsin* 97 L.Ed.2d 709 (1987), there must be a nexus between the property searched and the probation violation; here, the only known violation of probation was failure to report, thus there was no nexus with the vehicle; 7-1.

***State v. Martinez***, 2 Wn.App.2d 55, 63 (2018)

Texas police seize defendant's computer pursuant to search warrant, make a mirror image and send it to Washington State Patrol which searches it without another warrant, observes child porn; held: under "silver platter" doctrine evidence seized in another state is admissible in Washington even if the manner in which the evidence was seized would violate Washington law as long as the forum state's officers were not acting as agents of Washington law enforcement, *State v. Fowler*, 157 Wn.2d 387 (2006), *State v. Brown*, 132 Wn.2d 529, 587-88 (1997), *State v. Mezquia*, 129 Wn.App. 118, 132-34 (2005), *State v. Gwinner*, 59 Wn.App. 119 (1990), *Pers. Restraint of Teddington*, 116 Wn.2d 761 (1991); I.

***State v. Inman***, 2 Wn.App.2d 281, 290-95 (2018)

Defendant is found near motorcycle crash, smells of alcohol, admits drinking and driving, before medivac takes defendant to hospital deputy draws blood at scene, at suppression hearing testifies that he lacked cell phone coverage and a warrant takes 45 minutes, telephone warrant process is "problematic" and hasn't worked in the past, court admits blood test results; held: obtaining a warrant for blood draw was "not practical," medical treatment may have impacted efficacy of blood sample, delay in obtaining blood at hospital might have resulted in dissipation of alcohol, thus exigent circumstances existed for warrantless search, *State v. Anderson*, 9 Wn.App.2d 430 (2019), *State v. Rawley*, 13 Wn.App.2d 474 (2020), distinguishing *Seattle v. Pearson*, 192 Wn.App. 802, 811-17 (2016), *Missouri v. McNeely*, 569 U.S. 141, 133 S.Ct. 1552 185 L.Ed.2d 696 (2013); II.

***State v. A.S.***, 6 Wn.App.2d 264 (2018)

Vice-principal of school searches non-student's backpack, finds drugs; held: school search exception, *State v. Brooks*, 43 Wn.App. 560 (1986), *New Jersey v. T.L.O.*, 83 L.Ed.2d 720 (1983), *State v. Brown*, 158 Wn.App. 49 (2010), *State v. E.K.P.*, 162 Wn.App. 675 (2011), applies to students absent some emergency; I.

***Mitchell v. Wisconsin***, 588 U.S. ___, 139 S.Ct. 2525, 204 L.Ed.2d 1040 (2019)

Defendant is arrested for DUI, is too lethargic for a breath test at the scene, police drive him to station to take a more reliable breath test but on the way defendant becomes unconscious, is taken to hospital where blood is drawn; held: exigent circumstances "almost always" permits a blood draw without a warrant where a driver suspected of drunk driving is unconscious and therefore cannot be given a breath test; while the time required to obtain a warrant has shrunk with technology, it has not disappeared, and with an unconscious driver, forcing police to put off other tasks justify a blood draw without a warrant, distinguishing *Birchfield v. North Dakota*, 579 U.S. 438, 136 S.Ct. 2160, 195 L.Ed.2d 560 (2016); 5-4.

***State v. Mayfield,*** 192 Wn.2d 871 (2019)

Police unlawfully seize defendant, advise him of his right to refuse a search, defendant consents to search of his vehicle, police find drugs, trial court denies suppression under **attenuation doctrine**, *Utah v. Strieff*, 579 U.S. ——, 136 S.Ct. 2056, 2061, 195 L.Ed.2d 400 (2016), concluding that consent attenuated the unlawful seizure; held: under the state constitution the attenuation doctrine must be narrowly applied such that "[t}he State must prove that intervening circumstances gave rise to a superseding cause that genuinely severed the causal connection between official misconduct and the discovery of evidence. If the State fails to meet its burden then the attenuation doctrine cannot apply, regardless of whether the official misconduct was flagrant and purposeful, and regardless of whether suppression is likely to deter similar misconduct in the future;" here, the requested consent occurred while the illegal seizure was ongoing and the consent was not an independent act of free will sufficient to establish a superseding cause, *State v. Armenta*, 134 Wn.2d 1 (1997); 9-0.

***State v . Peck***, 194 Wn.2d 148 (2019)

Defendant is arrested by a stolen car parked on private property, police impound, during inventory search open small zippered nylon CD case, find drugs; held: while a warrantless inventory search of closed luggage or a car trunk is impermissible, *State v. Houser*, 95 Wn.2d 143, 155 (1980), *State v. Wisdom*, 187 Wn.App. 652, 675-76 (2015), "a nylon case that looked like it contained CDs does not possess the same aura of privacy as a purse, shaving kit, or personal luggage," at 159, at least where the case is found in a stolen vehicle; 5-4.

***State v. Phillip***, 9 Wn.App.2d 464 (2019)

Trial court issues a subpoena *duces tecum* for cell site location information; held: cell site location information may only be obtained via a warrant on probable cause, regardless if there is probable cause for issuance of a subpoena, *Carpenter v. United States*, ___ U.S. ___ , 138 S.Ct. 2206, 201 L.Ed.2d 507 (2018), *but see: State v. Garcia-Salgado*, 170 Wn.2d 176 (2010); op. at 9 Wn.App.2d 464 is withdrawn and superseded; I.

***State v. Anderson***, 9 Wn.App.2d 430 (2019)

Following collision with multiple deaths and injuries defendant is transported to hospital for his own injuries, blood test taken without a warrant; held: state proved by clear and convincing evidence that exigent circumstances existed for warrantless blood draw because of defendant's need for medical treatment which "could impair the integrity of the blood sample, officer testified that it would take 40 to 90 minutes to obtain a warrant for blood, delay caused by obtaining a warrant would result in destruction of evidence or postponing defendant's receipt of necessary medical care, *State v. Inman*, 2 Wn.App.2d 281, 290-95 (2018), *State v. Rawley*, 13 Wn.App.2d 474 (2020), distinguishing *Seattle v. Pearson*, 192 Wn.App.802 (2016), *but see: Birchfield v. North Dakota,* 579 U.S. 438, 136 S.Ct. 2160, 195 L.Ed.2d 560 (2016); I.

***State v. Muhammad***, 194 Wn.2d 577 (2019)

Following homicide police view surveillance video, see a "distinctive" car approached by the victim shortly after which her body is found, three days later officer observes the distinctive car, identified defendant-driver, informed him of the homicide and releases him, obtain warrant to search the car but cannot locate it, three days later police ask defendant's cell phone carrier to

"ping" his phone, discover that he is in a field in Idaho, police there seize the car, inculpatory evidence is found in the car; held: while a cell phone ping is a search pursuant to state and U.S. constitutions, *Carpenter v. United States,* ___ U.S. ___, 138 S.Ct. 2206, 201 L.Ed.2d 507 (2018), fear that defendant would flee or otherwise act such as to dissipate the evidence that the car might contain evidence justify a warrantless "ping," exigent circumstances doctrine is not abrogated here even though police might have been able to obtain a telephonic warrant; (fractured opinion, 6 justices affirm *State v. Muhammed,* 4 Wn.App.2d 31 (2018).

***State v. Griffith***, 11 Wn.App.2d 661 (2019)

Defendant enters courthouse, is screened for weapons, screener may have felt a cellphone in pocket, told to empty pockets, screener finds drugs; held: special needs doctrine authorizes courthouse area-entry searches, *see: York v. Wahkiakum Sch.Dist. No. 200,* 163 Wn.2d 297 (2008), *State v. Bradley*, 105 Wn.2d 898, 902 (1986), *Jacobsen v. City of Seattle*, 98 Wn.2d 668, 672 (1983), but case is remanded for trial court to determine whether or not screener felt a cellphone and, if not, then search was not properly "cabined" to the scope of the permissible administrative search; III.

***State v. Harrier***, 14 Wn.App.2d 17 (2020)

Cloud storage company discovers child porn, reports it to police as required, 18 U.S.C. § 2258A, police open images, obtain search warrants which are served on cloud storage company for name of customer, then obtain warrant for defendant's computer, observe child porn; held: customer has no privacy interest in images held by a third party *State v. Eisfeldt*, 163 Wn.2d 628, 636 (2008); child porn is contraband and there is no privacy interest in contraband, citing *State v. Carter*, 151 Wn.2d 118, 126-27 (2004); II.

***Lange v California***, __ U.S. ___, 141 S.Ct. 2011, 210 L.Ed.2d 486 (2021)

Officer observes defendant-driver listening to loud music, repeatedly honking horn, turns on overhead lights, defendant drives 100 feet to his own driveway, enters his garage, officer follows him in, observes signs of intoxication, processes and arrests for DUI, California Court of Appeal concludes that an officer's hot pursuit into a house to prevent suspect from frustrating the arrest is always permissible; held: while entry into a home to chase a fleeing felon is always permissible, *United States v. Santana*, 427 U.S. 38, 96 S.Ct. 2406, 49 L.Ed.2d 300 (1976), pursuit of a fleeing misdemeanant does not trigger a categorical rule allowing a warrantless home entry, *Welsh v. Wisconsin*, 466 U.S. 740, 742–743, 104 S.Ct. 2091, 80 L.Ed.2d 732 (1984), rather gravity of the offense must be considered in a case-by-case analysis, *Seattle v. Altschuler*, 53 Wn.App. 317 (1989), *State v. Griffith*, 61 Wn.App. 35 (1991); 9-0.

***Caniglia v. Strom, et al.***, ___ U.S. ___, 141 S.Ct. 1596, 209 L.Ed.2d 604 (2021)

Police see petitioner sitting on his porch, he agrees to be transported for psychiatric evaluation, police enter his home and seize firearms; held: while an impounded vehicle may be searched for firearms without a warrant, *Cady v. Dombrowski*, 413 U.S. 433, 93 S.Ct. 2523, 37 L.Ed.2d 706 (1973), community caretaking function does not justify entering a home without a warrant; 9-0.

***State v. Bowman***, 198 Wn.2d 609 (2021)

Homeland Security agent arrests a drug dealer who gives them permission to search his cell phone, discover texts between arrestee and defendant regarding drugs, agent uses his own cell phone to contact defendant posing as arrestee, defendant agrees to meet, is arrested, drugs found; held: while defendant had a privacy interest in the text messages he sent to the arrestee, texts sent to defendant by agent did not "physically invade" defendant's cell phone, ruse merely capitalized on validly obtained information from the consenting arrestee, distinguishing *State v. Hinton*, 179 Wn.2d 862, 876-77 (2014); while defendant has a privacy interest in the texts he sent to the arrestee, *Hinton, supra., at* 865; agent's ruse in posing as the arrestee does not violate defendant's privacy rights under U.S. or state constitution, *Hoffa v. United States*, 385 U.S. 293, 302, 87 S. Ct. 408, 17 L. Ed. 2d 374 (1966), *State v. Goucher*, 124 Wn.2d 778 (1994); sending uninvited text messages as a ruse is not a trespass on defendant's cell phone as there is no physical invasion; reverses *State v. Bowman,* 14 Wn.App.2d 562 (2020); 9-0.

# SENTENCING*

***State v. Blight***, 89 Wn.2d 38 (1977)

Court may consider **arrests** that have not resulted in convictions; 9-0.

***In Re George***, 90 Wn.2d 90 (1978)

**Escape** starts maximum sentence anew; *accord*: *In re Mayner*, 107 Wn.2d 512 (1986); 9-0.

***State v. Gibler***, 22 Wn.App. 640 (1979), *disapproved, in part, State v. Sanchez*, 146 Wn.2d 339 (2002)

Defense must object when state **breaches plea bargain** or no specific performance or withdrawal of plea, *see: State v. Crider*, 78 Wn.App. 849 (1995); **new offense** may justify breach of plea bargain; I.

***State v. Sterling***, 23 Wn.App. 171 (1979)

Where substantial **delay** between verdict and sentencing, apply balancing test; I.

***State v. Bolton***, 23 Wn.App. 708 (1979)

Court may consider unsworn statement on matters not directly related to the crime if defendant has opportunity to rebut; II.

***State v. Scott***, 92 Wn.2d 209 (1979)

Court can vacate sentence per CR 60(b); *see also*: *State v. Duncan*, 21 Wn.App. 323 (1978); 9-0.

***State ex rel. Schillberg v. Cascade Dist. Ct.***, 94 Wn.2d 772 (1980)

Court can **defer prosecution**, RCW 10.05, on defendant's motion over state's objection; 9-0.

***Roberts v. United States***, 63 L.Ed.2d 622 (1980)

Sentencing judge can consider defendant's refusal to cooperate with officials conducting investigation in imposing penalty, but Fifth Amendment claim or expression of fear of retaliation may limit trial court's ability to enhance if raised in timely fashion; 8-1.

***Whalen v. United States***, 63 L.Ed.2d 715 (1980)

While holding that, in this case, felony-murder (rape) and rape of same victim merge, majority leaves open possibility that legislatures could permit double punishment; 7-2.

***State v. Dorosky***, 28 Wn.App. 128 (1981)

Change in circumstances occurring after entry of judgment is not grounds for modification of sentence under CR 60(b)(11); modifies *State v. Scott*, 92 Wn.2d 209 (1979);

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* *See also:* **GUILTY PLEAS, PLEA BARGAINS**

*accord*: *State v. Cirkovich*, 42 Wn.App. 403 (1985), *see: State v. Snapp*, 119 Wn.App. 614, 626-27 (2004), *but see: State v. White*, 123 Wn.App. 106, 113-15 (2004; I.

***In re Shriner***, 95 Wn.2d 541 (1981)

Sentences for multiple convictions arising from same act shall run concurrently unless, at the time of sentencing, the court expressly orders consecutive sentences, per RCW 9.92.080(2), *see: State v. King*, 149 Wn.App. 96(2009); thus, where court suspends sentence, and is silent as to concurrent or consecutive sentences, court cannot impose consecutive sentences upon revocation, *see: State v. Mahone,* 164 Wn.App. 146 (2011); 9-0.

***State v. Cunningham***, 96 Wn.2d 31 (1981)

Trial judge sentenced defendant to prison for robbery 1° while armed with a firearm, stating that it always sentences defendants to prison for armed robbery, held: court properly exercised discretion; no constitutional right to individualized sentencing determinations except in death penalty cases; 7-2.

***Albernaz v. United States***, 67 L.Ed.2d 275 (1981)

Where a defendant is convicted of two counts of conspiracy, which arise from a single conspiracy having multiple objectives, consecutive sentences may be imposed; 9-0.

***State v. Russell***, 31 Wn.App. 646 (1982)

Defendant pleads guilty to possession with intent to deliver marijuana; presentence report alleges that defendant was involved in major marijuana activities after the plea was entered, whereupon defendant requests and is granted an opportunity to controvert the presentence report in an evidentiary hearing; at hearing, police testify that a reliable, confidential informant observed defendant load large quantities of marijuana into a truck; defendant requests disclosure of informant's identities; court continues sentencing, holds *in camera* interview with police and informants and declares that informant's identity should not be disclosed and that informant's information is reliable, sentences defendant to prison; held: defendant was granted opportunity to rebut, informants were examined under oath, defendant does not have right to submit written questions for judge to ask informant, affirmed; I.

***State v. Mason***, 31 Wn.App. 680 (1982)

Defendant charged with multiple counts of promoting prostitution for having multiple prostitutes working for him may be convicted on each count but must receive concurrent sentences; *but see*: *State v. Song*, 50 Wn.App. 325 (1988), *State v. Barbee,* 187 Wn.2d 375 (2017); II.

***State v. Delange***, 31 Wn.App. 800 (1982)

Sentencing judge discloses intended sentence, then grants defendant right of **allocution**, held: no error, *cf.: State v. Gonzales*, 90 Wn.App. 853 (1998), *but see: State v. Crider*, 78 Wn.App. 849 (1995), *State v. Aguilar-Rivera*, 83 Wn.App. 199 (1996); III.

***State v. Hall***, 32 Wn.App. 108 (1982)

Defendant pleaded guilty to probation recommendation by state, receives deferred sentence; after sentencing, state determines that defendant gave false name and had a record; sentence is vacated and defendant is sent to prison; held: defendant's giving **false name** to induce a plea bargain is fraud justifying rescission of plea agreement and vacation of original sentence, CR60(b), and/or revocation of probation, RCW 9.95.230, *see:* *State v. Hardesty*, 129 Wn.2d 303 (1996); I.

***In re James***, 96 Wn.2d 847 (1982)

Defendant pleads guilty to felony, with probation recommendation by state; prior to sentencing, defendant is arrested for two misdemeanors; based upon these arrests, state recommends prison; held: *remanded* for withdrawal of plea or specific performance of plea bargain, as state did not prove misdemeanors, *State v. Roberson*, 118 Wn.App. 151 (2003); 5-4.

***Avlonitis v. Seattle District Court***, 97 Wn.2d 131 (1982)

District court's jurisdiction is limited to the term of sentence actually imposed; where court sentences defendant to 30 days suspended, court cannot revoke probation after 30 days; district court can defer for one year and revoke and impose a jail term within that year; municipal courts may not impose probation for more than six months; reverses *Avlonitis v. Seattle District Court*, 27 Wn.App. 606; 8-0.

***In re Phelan***, 97 Wn.2d 590 (1982)

Where defendant is sentenced to prison, s/he is entitled to **credit for time served** against maximum sentence for all time served prior to imposition of sentence, including pre-trial detention, presentence detention and time served in jail as a condition of probation, *State v. Poston*, 117 Wn.App. 925 (2003), *cf.*: *State v. Williams*, 59 Wn.App. 379 (1990), *State v. Speaks*, 119 Wn.2d 204 (1992), *State v. Vasquez*, 75 Wn.App. 896 (1994), *Pers. Restraint of Costello*, 131 Wn.App. 828 (2006), *State v. Enriquez-Martinez,* 198 Wn.2d 98 (2021), *see:* *Pers. Restraint of King*, 146 Wn.2d 658 (2002); *overrules, in part*, *State v. Wills*, 68 Wn.2d 903 (1966) and *State v. Monday*, 12 Wn.App. 429, *aff'd on other grounds*, 85 Wn.2d 906 (1975); court should specify on judgment and sentence amount of credit to which defendant is entitled, *but see: Postsentence Review of Combs*, 176 Wn.App. 112 (2013); defendant is not entitled to credit against maximum sentence for nondetention probation time; 9-0.

***State v. Peterson***, 97 Wn.2d 864 (1982)

At plea, state agrees to recommend no jail time; at sentencing, defense counsel asks prosecutor to speak in support of state's recommendation; court refuses to permit prosecutor to speak, although court acknowledges state's recommendation and sentences defendant to jail; held: court abused discretion by refusing to grant defendant's request to allow prosecutor to explain the recommendation and remands for resentencing before a different trial judge; *but see*: *United States v. Benchimol*, 85 L.Ed.2d 462 (1985), *State v. Coppin*, 57 Wn.App. 866 (1990); 5-4.

***Hutto v. Davis***, 70 L.Ed.2d 556 (1982)

Sentence of consecutive 20 year prison terms and $20,000 fine for possession and distribution of 9 oz. of marijuana held not to be **cruel and unusual**, *see:* *Ewing v. California*, 155 L.Ed.2d 108 (2003), *Lockyear v. Andrade*, 155 L.Ed.2d 144 (2003); 6-3.

***State v. Theroff***, 33 Wn.App. 741 (1983)

Court can defer sentence for murder 2°; court may not condition probation upon paying money to a private **charity**; III.

***State v. Romano***, 34 Wn.App. 567 (1983)

Sentencing judge contacts individuals about defendant *ex parte* without revealing the fact prior to sentencing; held: judge may not make an *ex parte***,** undisclosed investigation, *see: State v. Watson*, 120 Wn.App. 521, 534-36 (2004); remanded for resentencing before a different judge; II.

***State v. Morley***, 35 Wn.App. 45 (1983)

Defendant pleads guilty to probation recommendation, prior to sentencing is arrested for two misdemeanors; at sentencing prosecutor equivocates; court, at sentencing, states that defendant "committed two more crimes," sentences to prison, motion to withdraw plea is denied; held: court failed to hold evidentiary hearing to permit defense to call witnesses and require state to prove defendant's alleged breach by a preponderance, *In re James*, 96 Wn.2d 847 (1982), *State v. Roberson*, 118 Wn.App. 151 (2003); *remanded* for a determination whether to allow withdrawal of plea or specific performance "with the defendant's preference to be accorded considerable weight"; court defines specific performance as resentencing before different judge with state bound to make an unequivocal recommendation, *State v. Barber*, 170 Wn.2d 854 (2011); III.

***State v. Niemann***, 35 Wn.App. 89 (1983)

Defendant does not have right to presentence report, CrR 7.2(a)(5) or time for defense counsel to prepare written report; III.

***State v. Thomas***, 35 Wn.App. 161 (1983)

Defendant receives suspended sentence, RCW 9.92.060, for assault, completes probation and has civil rights restored, RCW 9.92.066; defendant is charged with felon in possession of pistol, RCW 9.41.040; held: restoration of civil rights following suspended sentence will not prevent subsequent conviction of Uniform Firearms Act prosecution, RCW 9.41.040, *Dickeson v. New Banner Institute, Inc.*, 74 L.Ed.2d 845 (1983); I.

***State v. Hall***, 35 Wn.App. 302 (1983)

Three-hour deferred sentence for robbery 2° conviction is invalid, as too short to permit rehabilitation; when probation is granted court must order defendant to report to probation officer, RCW 9.95.210; I.

***State v. Elmore***, 36 Wn.App. 38 (1983)

Without a plea bargain, respondent pleads guilty, but is misinformed as to the standard range, seeks specific performance; held: no right to specific performance in the absence of a plea bargain that is breached; sole remedy is withdrawal of plea; II.

***Harris v. Kastama***, 98 Wn.2d 765 (1983)

Prisoners sentenced under repealed statute sought habeas corpus relief alleging that their sentences were cruel and unusual since legislature had subsequently reduced the maximum terms for the class of crime; held: under these facts (sex abuse of children), sentences were not unconstitutionally disproportionate; 8-0.

***State v. Phelan***, 100 Wn.2d 508 (1983)

All jail incarceration in connection with a charge must be credited against the maximum, mandatory minimum and discretionary minimum term set by Parole Board; reverses *In re Quinlivan*, 22 Wn.App. 240, 243-245 (1978); judgment and sentence must reflect this **credit**; *cf.*: *State v. Williams*, 59 Wn.App. 379 (1990), *State v. Speaks*, 119 Wn.2d 204 (1992); 6-3.

***Missouri v. Hunter***, 74 L.Ed.2d 535 (1983)

Defendant is convicted of robbery and "armed criminal action" on same facts in one trial; state statute mandates sentences shall run consecutively; held: with respect to cumulative sentences imposed in single trial, double jeopardy does no more than prevent sentencing court from prescribing greater punishment than legislature intended; 7-2.

***Solem v. Helm***, 77 L.Ed.2d 637 (1983)

Defendant, convicted of his seventh nonviolent felony, is sentenced as a recidivist to life without parole; held: Eighth Amendment requires proportionality analysis, to include gravity of offense and harshness of penalty, sentences imposed on other criminals in the same jurisdiction, and the sentences imposed for commission of same crime in other jurisdictions; here, life sentence was **cruel and unusual**, *see: State v. Moen*, 4 Wn.App.2d 589 (2018), *but see*: *Harmelin v. Michigan*, 115 L.Ed.2d 836 (1991), *Ewing v. California*, 155 L.Ed.2d 108 (2003), *Lockyear v. Andrade*, 155 L.Ed.2d 144 (2003); 5-4.

***State v. Mahoney***, 36 Wn.App. 499 (1984)

In 1976, defendant is sentenced to three years probation and appeals; 1978, conviction is affirmed; 1981, state files petition to revoke probation, trial court determines it lost jurisdiction in 1979; held: an appeal tolls the commencement of a probationary period until mandate is issued, thus trial court had jurisdiction to revoke, *State v. Robinson*, 142 Wn.App.649 (2008); II.

***State v. Glasser***, 37 Wn.App. 131 (1984)

Court cannot **defer prosecution**, RCW 10.05, after conviction; I.

***State v. Peterson***, 37 Wn.App. 309 (1984)

Defendant pleads guilty on state's no jail recommendation; at sentencing, defendant demands that prosecutor state reason for recommendation; prosecutor states that co-defendants were only charged with obstructing, but that this defendant was the "star," and that county lacked a jail; held: no breach of plea bargain, prosecutor adequately advocated his agreement, *State v. Peterson*, 97 Wn.2d 865 (1982); III, 2-1.

***State v. Perdang***, 38 Wn.App. 141 (1984)

Abuse of discretion for district court to refuse to grant **compromise of misdemeanor**, RCW 10.22.010-020, except under unique or extraordinary circumstances; court must consider a defendant's "individual circumstances"; *see*: *State v. Cunningham*, 96 Wn.2d 31, 35 (1981); I.

***State v. McDowell***, 102 Wn.2d 341 (1984)

Juvenile accused of reckless endangerment rejects diversion, prosecutor files assault 2° for same incident; held: no **presumption of vindictiveness** or abuse of discretion, *United States v. Goodwin*, 73 L.Ed.2d 74 (1982); disposition may exceed that allowed in a diversion agreement, *distinguishing* RCW 13.40.160(3), unless defense proves actual vindictiveness *State v. Korum*, 157 Wn.2d 614 (2006); 9-0.

***In re Knapp***, 102 Wn.2d 466 (1984)

As condition of probation, petitioner was ordered to enter a state mental hospital for treatment, following hospitalization, petitioner's probation was revoked; held: criminal defendants are entitled to **credit** for time served for involuntary treatment in a mental hospital; 9-0.

***Wasman v. United States***, 82 L.Ed.2d 424 (1984)

After retrial and conviction following a defendant's successful appeal, court may justify increased sentence by identifying conduct or events that occurred subsequent to the original sentencing; here, defendant was convicted of another offense while this case was on appeal even though the offense occurred prior to the original sentencing on this case, the subsequent conviction justifies increased sentence, 9-0.

***State v. Smissaert***, 103 Wn.2d 636 (1985)

Defendant convicted of murder 1° is sentenced to 20 years; two years later, court corrects sentence to mandatory life; held: court properly resentenced defendant, who is entitled to credit against minimum and maximum; new sentence must not be *nunc pro tunc;* 7-1.

***Seattle v. Stokes***, 42 Wn.App. 498 (1986)

**Compromise of misdemeanor** statute, RCW 10.22, is inapplicable to a charge of reckless driving, since property damage or personal injury is not a necessary element of the charge, *State ex rel. Fitch v. Roxbury Dist. Court*, 29 Wn.App. 591 (1981), *cf.: State v. Stalker*, 152 Wn.App. 805 (2009); where court finds that the elements of an offense have been proved, court may not **defer a finding**, and must impose sentence, JCrR 5.03(b); I.

***State v. Soto***, 45 Wn.App. 839 (1986)

Defendant is not entitled to same sentencing judge as the one who heard the trial, *State v. Sims*, 67 Wn.App. 50 (1992); *cf.: State v. Bryant*, 65 Wn.App. 547 (1992); I.

***Texas v. McCullough***, 89 L.Ed.2d 104 (1986)

Defendant, convicted of murder, chooses to be sentenced by jury, receives 20 years; trial judge grants new trial, after which defendant is convicted again, chooses to be sentenced by judge, receives 50 years; held: **presumption of vindictiveness**, *North Carolina v. Pearce*, 23 L.Ed.2d 656 (1969), where greater sentence is imposed after retrial, is inapplicable here since

the judge who granted the retrial is the judge who increased the sentence, *see*: *Alabama v. Smith*, 104 L.Ed.2d 865 (1989), *State v. Ameline*, 118 Wn.App. 128 (2003), *State v. Parmelee*, 121 Wn.App. 707 (2004); 6-3.

***McMillan v. Pennsylvania***, 91 L.Ed.2d 67 (1986)

State statute which mandates a minimum five year sentence if judge finds by preponderance that accused visibly possessed firearm while committing a felony does not violate due process or right to jury trial, *Harris v. United States*, 153 L.Ed.2d 524 (2002), *but see: Alleyne v. United States*, 570 U.S. 99, 186 L. Ed.2d 314 (2013); 6-3.

***In re Chapman***, 105 Wn.2d 211 (1986)

Pre-SRA, where judge revokes a suspended sentence following conviction and sentencing in another county, the judge who revoked may order that sentences run concurrently, overruling *In re Jenkins*, 32 Wn.App. 269 (1982), approving *State v. Lopez*, 37 Wn.App. 248 (1984); 9-0.

***In re Mayner***, 107 Wn.2d 512 (1986)

Murder defendant who escapes and is recaptured is not entitled to credit for time served prior to **escape**; RCW 9.95.115 does not violate equal protection clause, *reversing In re Mayner*, 41 Wn.App. 598 (1985); 9-0.

***State v. Quiroz***, 107 Wn.2d 791 (1987)

A **diversion** agreement, RCW 13.40.080, may be used to enhance sentence in a subsequent proceeding where the agreement stated the crimes charged, the respondent was given written notice of his right to counsel; juvenile need not be notified of all of the constitutional rights which would apply if he were to plead guilty, *see: State v. Phillips*, 94 Wn.App. 313 (1999); 9-0.

***State v. Escoto***, 108 Wn.2d 1 (1987)

Juvenile court may order a psychological evaluation of respondent for use in disposition where the court permits counsel to be present at the evaluation and where the respondent is aware of his right to remain silent, *see: State v. Decker*, 68 Wn.App. 246 (1993), *State v. Jacobsen*, 95 Wn.App. 967 (1999), *State v. Diaz-Cardona*, 123 Wn.App. 477 (2004); 5-4.

***State v. Jorgenson***, 48 Wn.App. 205 (1987)

Where a district court imposes a **fine** as a condition of probation, the court's jurisdiction to collect the fine expires upon expiration of the probationary period, *but see: Smith v. Dist. Court*, 147 Wn.2d 98, 108-110 (2002); I.

***State v. Clinton***, 48 Wn.App. 671 (1987)

Where co-defendants are sentenced to **disparate sentences** for the same crime, there must be a rational basis established for the disparity to survive equal protection analysis, *see: State v. Caffee*, 117 Wn.App. 470 (2003); different sentencing judges is not a rational basis; *but see*: *State v. Handley*, 115 Wn.2d 275 (1990), *State v. Conners*, 90 Wn.App. 48 (1998); I.

***State v. Bowen***, 51 Wn.App. 42 (1988)

A defendant convicted of a lesser included misdemeanor may be sentenced to more than the sentence range for the greater felony; III.

***Seattle v. Hogan***, 53 Wn.App. 387 (1989)

Where a city ordinance provides for a greater punishment than a state statute having the same elements, then the city may not impose a greater punishment than provided by state law; I.

***State v. Ankney***, 53 Wn.App. 393 (1989)

Legislation which permits the state to seek either criminal or civil penalties or both does not violate equal protection, *Yakima Cy. Clean Air Auth. v. Glascam Builders, Inc.*, 85 Wn.2d 255 (1975); I.

***State v. Pepper***, 54 Wn.App. 583 (1989)

Trial court lacks authority to grant **good time**; III.

***State v. Wright***, 54 Wn.App. 638 (1989)

Court cannot impose jail as a condition of a **deferred prosecution**, RCW 10.05; II.

***State v. Linnemeyer***, 54 Wn.App. 767 (1989)

A felony sentence of less than a year cannot be combined with a misdemeanor sentence to justify a prison term; II.

***Alabama v. Smith***, 104 L.Ed.2d 865 (1989)

Defendant pleads guilty, is sentenced, later obtains vacation of guilty plea, goes to trial, is convicted, receives greater sentence; held: no **presumption of vindictiveness** following vacated guilty plea, *distinguishing North Carolina v. Pearce*, 23 L.Ed.2d 656 (1969), *State v. Korum*, 157 Wn.2d 614 (2006), *State v. Brown*, 193 Wn.2d 280 (2019); 8-1.

***State v. Shattuck***, 55 Wn.App. 131 (1989)

Where **deferred prosecution**, RCW 10.05.020, is revoked, defendant's stipulation to police report waives all defenses, *State v. Melick*, 131 Wn.App. 835, 844-45 (2006), *but see: State v. Drum*, 168 Wn.2d 23 (2010); I.

***State v. Brown***, 55 Wn.App. 738 (1989)

Defendant is entitled to **credit** for time served in another state while fighting extradition; II.

***State v. Gettman***, 56 Wn.App. 51 (1989)

Trial court may not **defer prosecution** on two misdemeanors which occur more than seven days apart, RCW 10.05.010; III.

***State v. Larson***, 56 Wn.App. 323 (1989)

Defendant receives consecutive sentences totalling 363 months, appeals; appellate court remands for findings supporting exceptional sentence; on remand, trial court imposes concurrent

sentences one of which, 360 months, exceeded that imposed at first sentencing on that count; held: because aggregate sentence is less severe than original sentence, and because "increase" in original sentence was fully explained by trial court's original sentencing intent, *State v. Parmelee*, 121 Wn.App. 707, 712-13 (2004), no **presumption of vindictiveness**, *Alabama v. Smith*, 104 L.Ed.2d 865 (1989), *State v. Brown*, 193 Wn.2d 280 (2019), *distinguishing North Carolina v. Pearce*, 23 L.Ed.2d 656 (1969); no double jeopardy violation, because defendant appealed original case; legal sentence on multiple count charge may be increased to effectuate trial court's original sentencing scheme when scheme is upset by successful legal action of defendant, *Pennsylvania v. Goldhammer*, 88 L.Ed.2d 183 (1985), *Jones v. Thomas*, 105 L.Ed.2d 322 (1989); I.

***In re Borders***, 114 Wn.2d 171 (1990)

Defendants committed to Western State Hospital as sexual psychopaths, RCW 71.06, who are subsequently revoked are not entitled to good time **credit** for time served at hospital; 9-0.

***State v. Handley***, 115 Wn.2d 275 (1990)

To establish an equal protection violation due to **disparate sentence** from that of co-defendant, defendant must (1) establish that he is similarly situated by virtue of near identical participation in the crime; if there is no rational basis for the differentiation, then there is an equal protection violation, *see: State v. George*, 67 Wn.App. 217 (1992); or (2) if defendant is a member of a suspect class and can establish that she received disparate treatment because of that membership, then there is an equal protection violation; distinguishes *State v. Clinton*, 48 Wn.App. 671 (1987); here, co-defendants' roles differed significantly, thus defendant cannot establish that he was similarly situated *State v. Conners*, 90 Wn.App. 48 (1998); *affirms State v. Handley*, 54 Wn.App. 377 (1989); *see also*: *State v. Entz*, 58 Wn.App. 112 (1990), *State v. Caffee*, 117 Wn.App. 470 (2003); 9-0.

***State v. Gutierrez***, 58 Wn.App. 70 (1990)

Defendant is not entitled to counsel at a presentence interview where defendant pled guilty and defense counsel was given notice and did not choose to attend, *distinguishing State v. Sargent*, 111 Wn.2d 641, 645-46 (1988); I.

***State v. Anderson***, 58 Wn.App. 107 (1990)

A challenge to sentence contrary to law may be raised on appeal for the first time, *State v. Loux*, 69 Wn.2d 855 (1966), *State v. Paine*, 69 Wn.App. 873 (1993), *State v. Armstrong*, 91 Wn.App. 635 (1998), *State v. Bahl*, 164 Wn.2d 739 (2008), *State v. Valencia*, 169 Wn.2d 782, 786-91 (2010), *State v. Irwin*, 191 Wn.App. 644 (2015); I.

***State v. Vinge***, 59 Wn.App. 134 (1990)

Twenty-five months after **deferred prosecution** is granted, court revokes for failure to complete treatment, defense claims court lost jurisdiction after two years; held: because RCW 10.05.120 provides that court shall dismiss "upon proof of successful completion of the two-year" program, then district court maintains authority to revoke beyond the two years, *State v. Skrobo*, 17 Wn.App.2d 197 (2021); I.

***State v. Friend***, 59 Wn.App. 365 (1990)

District court cannot impose court costs on a **deferred prosecution** petitioner, RCW 10.05, absent statutory authority; RCW 10.01.160 allows costs to be imposed only upon convicted defendants; legislatively overruled, RCW 10.01.160(1), (2); II.

***State v. Williams***, 59 Wn.App. 379 (1990)

Where defendant is detained on parole suspension warrant and a new charge, then at sentencing on the new charge, defendant is not entitled to **credit** for time served, as he is not being held "solely" on the new charge, RCW 9.94A.120(13) [recodified as RCW 9.94A.505 (2010)], *Pers. Restraint of Schillereff*, 159 Wn.2d 649 (2007), *State v. Lewis*, 185 Wn.App. 338 (2014), *Matter of Allery*, 6 Wn.App.2d 343 (2018), *distinguishing State v. Phelan*, 100 Wn.2d 508 (1983), *see: Pers. Restraint of Costello*, 131 Wn.App. 828 (2006), *State v. Enriquez-Martinez,* 198 Wn.2d 98 (2021); I.

***State v. Johnson***, 59 Wn.App. 867 (1990)

$700 **recoupment** ordered where counsel is paid $4000 for 15 indigent defense cases (average $266.67 per case), held: because negotiated fee for each defendant was not $266.67, it is reasonable to conclude some cases would be disposed of summarily and others would take time; in light of time spent on this case, as reflected in the record, apportioning $700 to this defendant was reasonable, RCW 10.01.160; III.

***State v. Massey***, 60 Wn.App. 131 (1991)

Life without parole for 13-year old is not **cruel and unusual**; II.

***State v. Farmer***, 116 Wn.2d 414 (1991)

Trial court orders HIV test prior to sentencing to corroborate testimony that defendant had AIDS at time he solicited juvenile prostitutes; held: absent a legitimate compelling state interest, nonconsensual HIV testing may not be ordered, except as required by RCW 70.24.330; because the results of HIV testing could not be related back in time, the order requiring the test is reversed; 9-0.

***State v. Lua***, 62 Wn.App. 34 (1991)

Enhanced penalties for delivery of drugs within 1000 feet of school grounds, RCW 9.94A.310(5), former RCW 69.50.435, are constitutional, *cf.: State v. Coria*, 62 Wn.App. 44 (1991); III.

***State v. Williams***, 62 Wn.App. 336 (1991)

Proof of insurance is not a prerequisite to eligibility for **deferred prosecution** where defendant states he won't drive during term, RCW 10.05.141, -.160; II.

***Harmelin v. Michigan***, 115 L.Ed.2d 836 (1991)

Mandatory life sentence for possessing 672 grams of cocaine not **cruel and unusual**, *distinguishing Solem v. Helm*, 77 L.Ed.2d 637 (1983), *see: Ewing v. California*, 155 L.Ed.2d 108 (2003), *Lockyear v. Andrade*, 155 L.Ed.2d 144 (2003); 5-4.

***State v. Saas***, 118 Wn.2d 37 (1991)

Imposing suspended sentence rather than deferred is not abuse of discretion where trial court states it is seeking to achieve consistency between its treatment of pre- and post-SRA defendants, thus is not manifestly unreasonable, *State v. Cunningham*, 96 Wn.2d 31, 34 (1981); 9-0.

***State v. Watson***, 63 Wn.App. 854 (1992)

Absent mandatory joinder, a defendant has no right to have all crimes sentenced at same time to preclude overlapping sentences; failure to join for purposes of allowing concurrent sentences does not support dismissal for preaccusatorial delay; I.

***State v. Curry***, 118 Wn.2d 911 (1992)

Imposition of court costs, former RCW 10.01.160, and victim penalty assessment, RCW 7.68.035(1), do not require entry of formal findings of **ability to pay**, *State v. Lundy*, 176 Wn.App. 96 (2013), *State v. Mathers*, 193 Wn.App. 913 (2016), *State v. Seward*, 196 Wn.App. 579 (2016), *affirming State v. Curry*, 62 Wn.App. 676 (1991), *see also: State v. Bower*, 64 Wn.App. 808 (1992), *State v. Crook*, 146 Wn.App. 24 (2008); 8-0.

***State v. Speaks***, 119 Wn.2d 204 (1992)

Defendant is statutorily entitled to **credit** for time served on electronically-monitored pre-trial home detention, RCW 9.94A.120(13), 9.94A.030(7), (31), *State v. Swiger*, 159 Wn.2d 224 (2006), *reversing State v. Speaks*, 63 Wn.App. 5 (1991), *cf.: State v. Vasquez*, 75 Wn.App. 896 (1994), *State v. Anderson*, 132 Wn.2d 203 (1997), *Harris v. Charles*, 151 Wn.2d 455 (2011), *State v. Dockens*, 156 Wn.App. 793 (2010), *State v. Alejandro Medina*, 180 Wn.2d 282 (2014), *State v. Sullivan*, 196 Wn.App. 277, 297-300 (2016), *State v. Wheeler*, 14 Wn.App.2d 571 (2020), *State v. Shelley*, 19 Wn.App.2d 451 (2021), *but see:* RCW 10.21.030(2)(d) (2010); 9-0.

***State v. Sims***, 67 Wn.App. 50 (1992)

Judge other than one who heard trial is empowered to impose exceptional sentence, *State v. Soto*, 45 Wn.App. 839 (1986), *Jaime v. Rhay*, 59 Wn.2d 58, 61-2 (1961), *State v. Lindsey*, 194 Wash. 129, 132-3 (1938), where no mitigating factors were presented at trial, and even if trial judge is available; I.

***State v. George***, 67 Wn.App. 217 (1992)

Prior convictions posit a rational basis for **disparity of sentences** for co-defendants similarly situated by near identical participation in the crime, *State v. Handley*, 115 Wn.2d 275 (1990); I.

***State v. Decker***, 68 Wn.App. 246 (1992)

Trial court may order predisposition psychological evaluation of respondent, *State v. Escoto*, 108 Wn.2d 1 (1987), *State v. Jacobsen*, 95 Wn.App. 967 (1999), and may preclude counsel from attending, *cf.: State v. P.B.T.*, 67 Wn.App. 292 (1992), *State v. Diaz-Cardona*, 123 Wn.App. 477 (2004); trial court has authority to grant use immunity absent prosecutor's motion, CrR 6.14; I.

***United States v. Dunnigan***, 122 L.Ed.2d 445 (1993)

Enhancement of sentence for willful **perjury** based upon impeding or obstructing administration of justice, USSG § 3C1.1, does not undermine the constitutional right to testify; *cf.: State v. Houf*, 64 Wn.App. 580 (1992); 9-0.

***State v. Riley***, 121 Wn.2d 22 (1993)

Conditions of sentence on computer trespass defendant that he not own a computer, associate with computer hackers or communicate with computer bulletin boards are reasonably related to defendant's conviction, *see also: State v. Hearn*, 131 Wn.App. 601, 607-09 (2006); 7-0.

***State v. Davis***, 69 Wn.App. 634 (1993)

When concurrent sentences are imposed, defendant is not entitled to **credit** for time served on other sentences, only credit for time served on the instant case, RCW 9.94A.120(14), *see: Pers. Restaint of Costello*, 131 Wn.App. 828 (2006); I.

***State v. Olivas***, 122 Wn.2d 73 (1993)

Statute requiring blood draw for DNA identification analysis following conviction of sex or violent offense, RCW 43.43.754, does not violate search and seizure provisions of United States and Washington Constitutions, *State v. Surge*, 160 Wn.2d 65 (2007), *State v. S.S.*, 122 Wn.App. 725 (2004), is not vague, does not violate equal protection, *see also: State v. Freeman*, 124 Wn.App. 413 (2004); 8-0.

***Wisconsin v. Mitchell***, 124 L.Ed.2d 436 (1993)

Penalty enhancement for hate-crime motive does not violate First Amendment; *accord: State v. Talley*, 122 Wn.2d 192 (1993); 9-0.

***State v. Havens***, 70 Wn.App. 251 (1993)

Defendant is sentenced to 60 months, prevails on appeal, is retried, convicted and sentenced to an exceptional sentence of 136 months; held: trial judge's denial that the sentence was in retaliation for appealing rebuts the **presumption of vindictiveness**, *distinguishing North Carolina v. Pearce*, 23 L.Ed.2d 656 (1969), *State v. Franklin*, 56 Wn.App. 915 (1989), *see: State v. Lass*, 55 Wn.App. 300, 306 (1989), *State v. Ameline*, 118 Wn.App. 128 (2003), *State v. Korum*, 157 Wn.2d 614 (2006), *State v. Parmelee*, 121 Wn.App. 707 (2004), *State v. Brown*, 193 Wn.2d 280 (2019); III.

***State v. Mireles***, 73 Wn.App. 605, 616-7 (1994)

Consecutive sentence is within successive sentencing court's discretion, RCW 9.94A.400(3), now 9.94A.589 (2015), )*see: Setser v. United States*, 566 U.S. 231, 182 L.Ed.2d 455 (2012), *State v. King*, 149 Wn.App. 96 (2009), absent deliberate delay or manipulation of sequence of trials; III.

***State v. Parsley***, 73 Wn.App. 666 (1994)

In pre-SRA case, probation period cannot exceed maximum term of sentence, former RCW 9.95.210, *distinguishing* *Pitts v. Rhay*, 64 Wn.2d 481 (1964), *State v. Alberts*, 51 Wn.App. 450 (1988); thus, where a deferred sentence is imposed and subsequently revoked, court cannot then stack a suspended sentence such that total period of probation exceeds maximum sentence; I.

***State v. Aguirre***, 73 Wn.App. 682 (1994)

Court may not vacate sentence, CrR 7.8(b)(5), to prevent deportation, *State v. Quintero Morelos,* 133 Wn.App. 591 (2006), *accord:* *State v. Cortez*, 73 Wn.App. 838 (1994); I.

***State v. Kuhn***, 74 Wn.App. 787 (1994)

Defendant, on **deferred prosecution**, RCW 10.05, is convicted of new DUI and appeals, claims new DUI is not conviction requiring mandatory revocation, RCW 10.05.100, until appeal is terminated; held: conviction is judgment that accused is guilty as charged, trial court may not await appellate determination before revoking; II.

***Custis v. United States***, 128 L.Ed.2d 517 (1994)

In federal sentencing proceeding, defendant may not collaterally attack prior convictions to avoid enhancement, except convictions obtained in violation of the right to counsel, *Baldasar v. Illinois*, 64 L.Ed.2d 169 (1980), *State v. Torngren*, 147 Wn.App. 556, 560 (2008), *rev'd, on other grounds, State v. Aldana Graciano,* 176 Wn.2d 531 (2013), *see: State v. Ammons*, 105 Wn.2d 175 (1986), *State v. Holsworth*, 93 Wn.2d 148 (1980), *Lackawanna County Dist. Attorney v. Coss*, 149 L.Ed.2d 608 (2001), *Daniels v. United States*, 149 L.Ed.2d 590 (2001); 6-3.

***Nichols v. United States***, 128 L.Ed.2d 745 (1994)

A prior uncounseled misdemeanor conviction in which no jail time was imposed may be used to enhance punishment at a subsequent conviction, *Scott v. Illinois*, 59 L.Ed.2d 383 (1979), overruling *Baldasar v. Illinois*, 64 L.Ed.2d 169 (1980); *but see: McInturff v. Horton*, 56 Wn.2d 704 (1975); 6-3.

***State v. Kessler***, 75 Wn.App. 634, 636-41 (1994)

In pre-prosecution **diversion** supervised by prosecutor, court's role in reviewing prosecutor's decision to terminate and prosecute is to determine whether state has proved breach of agreement by a preponderance, and whether decision by the prosecutor to terminate was reasonable, *State v. Marino*, 100 Wn.2d 719, 723-27 (1984), *State v. Harrison*, ___ Wn.App.2d ___, 519 P.3d 244 (2022), *see: State v. Varnell*, 137 Wn.App. 925 (2007), *State v. Ashue*, 145 Wn.App. 491 (2008); I.

***State v. Ellis***, 76 Wn.App. 391 (1994)

Sentencing is delayed for two years through no fault of defendant, who turns life around, trial court dismisses on grounds that lengthy delay is oppressive; held: no abuse of discretion, two year **delay** is presumptively prejudicial, *cf.: State v. Modest*, 106 Wn.App. 660 (2001); III.

***State v. Kelley***, 77 Wn.App. 66 (1995)

Department of Corrections may not draw blood for DNA analysis except for inmates convicted of sex offenses or violent offenses, former RCW 43.43.754; possession with intent to deliver is not subject to the DNA statute; II.

***State v. Shilling***, 77 Wn.App. 166, 175 n.5 (1995)

"The defendant's action or reaction at sentencing should not ordinarily determine whether consecutive sentences are ordered;" I

***Reno v. Koray***, 132 L.Ed.2d 46 (1995)

Defendant awaiting sentencing in a treatment center to which he was ordered confined 24-hours a day is not entitled to **credit** against his sentence under Sentencing Reform Act of 1984, 18 USC § 3585(b); 8-1.

***State v. Pierce***, 78 Wn.App. 1 (1995)

Sentence enhancement for manufacturing drugs within 1000 feet of a school bus stop, RCW 69.50.435(a), applies to marijuana; III.

***State v. Buchanan***, 78 Wn.App. 648 (1995)

Following hung jury, defendant pleads guilty to lesser charge, is ordered to pay **costs** for mistried jury trial; held: because plea was prosecuted in same cause on same facts as mistrial, trial court was authorized to impose the costs for the prior mistrial, *see: State v. Baggett*, 103 Wn.App. 564, 571-72 (2000); I.

***State v. Crider***, 78 Wn.App. 849 (1995)

At plea, state recommends six months followed by sexual deviancy treatment (SSOSA), RCW 9.94A.120(7), at sentencing state offers testimony, without objection, of probation counselor that defendant had had other sex offenses and uncharged involvement with other juveniles, state argues that in case before the court, it was victim's first sexual experience the fear and coercion of which she will have to live for the rest of her life; court imposes prison sentence, then offers allocution; held: in context, state's argument focused on length of jail sentence rather than a breach of **plea bargain**, *State v. Coppin*, 57 Wn.App. 866, 873-4 (1990), *see: State v. Hixson*, 94 Wn.App. 862 (1999), *distinguishing In re Palodichuk*, 22 Wn.App. 107 (1978); right to **allocution** before sentence is imposed is mandatory, *State v. Happy*, 94 Wn.2d 791, 793-4 (1980), *State v. Roberson*, 118 Wn.App. 151 (2003), former RCW 9.94A.110 [now 9.94A.500], *but see: State v. Delange*, 31 Wn.App. 800, 802-3 (1982), *State v. Gonzales*, 90 Wn.App. 853 (1998), *Pers. Restraint of Echeverria*, 141 2323 (2000), *State v. Lathrop*, 125 Wn.App. 353, 358-59 (2005), *State v. Hatchie*, 161 Wn.2d 390, 405-06 (2007), *State v. Ague-Masters*, 138 Wn.App. 86, 109-10 (2007), *cf.: State v. Hughes*, 154 Wn.2d 118, 152-53 (2005), *abrogated, on other grounds, Washington v. Recuenco*, 548 U.S. 212, 165 L.Ed.2d 466 (2006), remedy is remand for resentencing before different judge; 2-1, III.

***State v. Sandefer***, 79 Wn.App. 178 (1995)

Trial judge is asked by defendant why sentence is at top of range after trial when he was offered low end on a plea, court responds that it often imposes more lenient sentence on guilty plea because it saves victims some grief; held: judge's remarks do not indicate improper consideration of defendant's right to stand trial; I.

***Abad v. Cozza***, 128 Wn.2d 575 (1996)

Local court rule and forms that oblige a defendant to waive jury and waive presentation of evidence in order to obtain **deferred prosecution** is consistent with RCW 10.05.020, *reversing Abad v. Cozza*, 77 Wn.App. 762 (1995); 7-2.

***State v. Klump***, 80 Wn.App. 391 (1996)

Defendant receives a sentence consecutive to a federal sentence, which is later reversed and remanded, whereupon defendant receives the identical federal sentence; more than a year after state sentencing, defendant moves for relief from judgment, CrR 7.8, trial court deems it time-barred, RCW 10.73.090(1); held: reversal of federal sentence occurring after judgment entered qualifies as an "extraordinary circumstance," thus one-year time limit does not apply; III.

***State v. Besio***, 80 Wn.App. 426 (1995)

Defendant sentenced to prison for a felony must serve a consecutive gross misdemeanor sentence in county jail; I.

***State v. Eaton***, 82 Wn.App. 723, 732-5 (1996)

Trial court may order sex offender to enter into and cooperate in counseling or therapy as condition of community placement, RCW 9.94A.120(9), *see: State v. Riles*, 135 Wn.2d 326 (1998) , *abrogated on other grounds, State v. Valencia*, 169 Wn.2d 782 (2010); defendant may not challenge trial court's order that defendant make reasonable progress in treatment until after a revocation or modification hearing, *State v. Langland*, 42 Wn.App. 287, 292 (1985), *State v. Phillips*, 65 Wn.App. 239, 244 (1992), *State v. , but see: Valencia*, 169 Wn.2d 782, 786-91 (2010), *State v. Armstrong*, 91 Wn.App. 635 (1998), *State v. Bahl*, 164 Wn.2d 739 (2008), *State v. Irwin*, 191 Wn.App. 644 (2015); I.

***State v. Manussier*,** 129 Wn.2d 652 (1996)

"Three strikes" law, Initiative 593, does not require prosecutor to file a separate information alleging the status, defendant is not entitled to jury trial on issue, *State v. Ben*, 114 Wn.App. 148 (2002), status need not be proved beyond a reasonable doubt, *State v. Powell*, 172 Wn.App. 455, 459-62 (2012), distinguishing *State v. Holsworth*, 93 Wn.2d 148 (1980), is not a bill of attainder, does not violate separation of powers doctrine, does not violate guarantee of a republican form of government, does not violate equal protection or cruel and unusual punishment clauses, *State v. Johnson*,150 Wn.App. 663, 679-81 (2009); *accord: State v. Thorne*, 129 Wn.2d 736 (1996), *State v. Davis*, 133 Wn.2d 187 (1997), *see: State v. Carpenter*, 117 Wn.App. 673 (2003); 6-3.

***State v. Aguilar-Rivera***, 83 Wn.App. 199 (1996)

When the right of **allocution** is omitted until after the court has orally announced the sentence it intends to impose, remedy is to send defendant before a different judge for a new sentencing hearing, *State v. Crider*, 78 Wn.App. 849, 861 (1995), *State v. Roberson*, 118 Wn.App. 151, 160-62 (2003), *but see: State v. Delange*, 31 Wn.App. 800 (1982), *State v. Gonzales*, 90 Wn.App. 853 (1998), *State v. Hatchie*, 161 Wn.2d 390, 405-06 (2007), *State v. Ague-Masters*, 138 Wn.App. 86, 109-10 (2007), *cf.: State v. Hughes*, 154 Wn.2d 118, 152-53 (2005), *abrogated, on other grounds, Washington v. Recuenco*, 548 U.S. 212, 165 L.Ed.2d 466 (2006); I.

***State v. Britton***, 84 Wn.App. 146 (1996)

**Compromise of misdemeanor** statute, RCW 10.22, applies to gross misdemeanors; I.

***Bellevue v. Hard***, 84 Wn.App. 453 (1996)

Defendant receives one year **deferred sentence** on condition of five days in jail, which is revoked and court imposes 365 days in jail with 335 suspended, defense claims subsequent sentence cannot be harsher than the deferred sentence; held: pursuant to RCW 3.66.067, a deferred sentence means no sentence is imposed although jail may be a condition of probation, RCW 9.95.210; when deferred sentence is revoked he can be ordered to serve the maximum term less what he has served, *State v. Parsley*, 73 Wn.App. 666 (1994); I.

***United States v. Watts***, 136 L.Ed.2d 554 (1997)

Defendant is convicted on one count, acquitted on another, sentencing court finds facts on acquitted count by preponderance and adds points based on that count in imposing sentence; held: acquittal does not preclude government from relitigating an issue in a subsequent action governed by a lower standard of proof, *Dowling v. United States*, 107 L.Ed.2d 708 (1990), *McMillan v. Pennsylvania*, 91 L.Ed.2d 67 (1986), *but see: Alleyne v. United States*, 570 U.S. 99, 186 L. Ed. 2d 314 (2013), *Williams v. New York*, 93 L.Ed. 1337 (1949); 7-2.

***State v. Anderson***, 132 Wn.2d 203 (1997)

Defendant is sentenced to prison, appeals, is granted **electronic home detention** pending appeal, conviction affirmed; held: equal protection clause requires that defendant receive credit against his prison sentence for electronic home detention pending appeal, *see: State v. Swiger*, 159 Wn.2d 224 (2006), *cf.: Harris v. Charles*, 171 Wn.2d 455 (2011), *State v. Dockens*, 156 Wn.App. 793 (2010), *State v. Min Sik Kim*, 7 Wn.App.2d 839 (2019), *but see:* RCW 10.21.030(2)(d) (2010); 8-1.

***State v. Campbell***, 84 Wn.App. 596 (1997)

Where defendant fails to pay **financial obligations**, defendant has the burden of showing that a violation was not willful, *State v. Gropper*, 76 Wn.App. 882, 887 (1995), RCW 9.94A.200(2)(a); incarceration for failure to pay does not violate due process or equal protections clauses, *State v. Barklind*, 87 Wn.2d 814 (1976), *State v. Curry*, 118 Wn.2d 911 (1992); II.

***State v. Henthorn***, 85 Wn.App. 235 (1997)

State need not provide notice of a prior conviction to increase mandatory minimum sentence under 1994 DUI statutory scheme, as first offense sentencing statute, RCW 46.61.5051, is inapplicable to a person with a prior conviction within five years, RCW 46.64.5053, *In re Bush*, 95 Wn.2d 551, 554 (1981), distinguishing *State v. Frazier*, 81 Wn.2d 628 (1972), *State v. Theroff*, 95 Wn.2d 385 (1980); failure to object to sufficiency of evidence of a prior to enhance waives issue, *State v. Mak*, 105 Wn.2d 692, 718-9 (1986); I.

***State v. Gomez-Florencio***, 88 Wn.App. 254 (1997)

After sentencing, state discovers additional prior convictions under different names, defendant is then resentenced; held: absent proof of fraud, CrR 7.8(b)(3), which state did not prove, *State v. Hardesty*, 129 Wn.2d 303, 316-9 (1996), only basis for resentencing would be excusable neglect, CrR 7.8(b)(1), state did not offer evidence why the priors were not discovered before the original sentencing, thus no factual support; "extraordinary circumstances," CrR 7.8(b)(5), does not apply when the circumstances allegedly justifying the relief existed at the

time the judgment was entered, *State v. Cortez*, 73 Wn.App. 838 (1994), *see: State v. Quintero Morelos*, 133 Wn.App. 591 (2006); 2-1, III.

***Monge v. California***, 114 L.Ed.2d 615 (1998)

At sentencing, trial court finds defendant previously was convicted of assault with a deadly weapon, thus imposes "three strikes" sentence, appellate court reverses sentence based upon insufficiency of evidence of deadly weapon, state seeks remand for "retrial" on issue of deadly weapon; held: in a noncapital sentencing, double jeopardy clause does not preclude remand and rehearing on a prior conviction allegation, distinguishing *Bullington v. Missouri*, 68 L.Ed.2d 270 (1981); 8-1.

***State v. Riles***, 135 Wn.2d 326 (1998) , *abrogated on other grounds, State v. Valencia*, 169 Wn.2d 782 (2010)

Requiring **polygraph** testing to monitor compliance with other conditions of community placement, RCW 9.94A.120(9)(c), is valid, *State v. Combs*, 102 Wn.App. 949 (2000), *State v. Vant*, 145 Wn.App. 592, 603 (2008); **plethysmograph** testing may be imposed by sentencing court as part of a treatment program, RCW 9.94A.120(9)(c)(iii), but may not order it unless it also requires crime-related treatment for sexual deviancy, *State v. Land*, 172 Wn.App. 593, 605-06 (2013), *State v. Johnson*, 184 Wn.App. 777 (2014), *State v. Alcocer*, 2 Wn.App.2d 918 (2018), *Matter of Brettell*, 6 Wn.App.2d 161 (2018); affirms, in part, *State v. Riles*, 86 Wn.App. 10 (1997), overruling *State v. Holland*, 80 Wn.App. 1 (1995), *State v. Flores-Moreno*, 72 Wn.App. 733, 742-5 (1994); *accord: State v. Castro*, 141 Wn.App. 485, 493-94 (2007); 7-2.

***State v. Conners***, 90 Wn.App. 48 (1998)

Disparate sentences for nonsuspect class co-defendants are justified by one defendant's not being a "kingpin" in drug operation, being directed by the other defendant, cooperating with authorities and pleading guilty, *see: State v. Handley*, 115 Wn.2d 275, 290-1 (1990), *State v. Clinton*, 48 Wn.App. 671 (1987), *State v. Entz*, 58 Wn.App. 112 (1990); III.

***State v. Angehrn***, 90 Wn.App. 339 (1998)

Persistent Offender Accountability Act (POAA/Three Strikes) does not constitute *ex post facto* punishment where it was enacted effective prior to defendant's current offense; I.

***State v. Burke***, 90 Wn.App. 378, 383-5 (1998)

"Hard Time for Armed Crime" Act, Initiative 159, relative to burglary of a building as opposed to a residence, RCW 9A.52.020, does not violate single subject rule, CONST. Art. II, §19, *see: State v. Holm*, 91 Wn.App. 429, 439-40 (1998), *State v. Miller*, 92 Wn.App. 693, 699-702 (1998); I.

***State v. Gonzales***, 90 Wn.App. 853 (1998)

Where defendant does not seek an exceptional sentence downward and court imposes low end of sentence range, failure to allow for **allocution** is harmless, *State v. Hatchie*, 133 Wn.App. 100, 117-18 (2006), *aff'd*, 161 Wn.2d 390, 405-06 (2007), distinguishing *State v. Aguilar-Rivera*, 83 Wn.App. 199, 202 (1996), *State v. Crider*, 78 Wn.App. 849 (1995), *see: State v. Roberson*,

118 Wn.App. 151, 160-62 (2003), *State v. Hughes*, 154 Wn.2d 118, 152-53 (2005), *abrogated, on other grounds, Washington v. Recuenco,* 548 U.S. 212, 165 L.Ed.2d 466 (2006); I.

***State v. Jackson***, 91 Wn.App. 488 (1998)

A guilty plea or verdict of guilty is a conviction, RCW 9A.46.100, for purposes of enhancement of a willful violation of a court order from a misdemeanor to a felony, RCW 10.99.040(4), even before judgment and sentence is entered; I.

***State v. Armstrong***, 91 Wn.App. 635 (1998)

Defendant does not waive right to appeal conditions of community placement by failing to object in trial court, *State v. Paine*, 69 Wn.App. 873, 884 (1993), *State v. Moen*, 129 Wn.2d 535, 547 (1996), *State v. Rasmussen*, 109 Wn.App. 279, 283 (2001), *but see: State v. Massey*, 81 Wn.App. 198 (1996), *State v. Langland*, 42 Wn.App. 287, 292 (1985), *State v. Phillips*, 65 Wn.App. 239, 244 (1992), *State v. Bahl*, 164 Wn.2d 739 (2008), *cf.: State v. Peters*, 10 Wn.App.2d 574 (2019); I.

***State v. Anderson***, 92 Wn.App. 54, 57-61 (1998)

Absent proof of prejudice, delay of sentencing beyond 40 day statutory period, former RCW 9.94A.110 [9.94A.500], is not grounds for dismissal, distinguishing *State v. Krall*, 125 Wn.2d 146 (1994); I.

***Mitchell v. United States***, 143 L.Ed.2d 424 (1999)

Defendant pleads guilty, at sentencing co-defendant testifies for government, defendant does not testify, court notes defendant's failure to testify as a factor persuading court to rely upon testimony of co-defendant; held: guilty plea is not a waiver of the right not to testify at sentencing, as under the Fifth Amendment, incrimination is not complete until sentence is imposed and judgment is final, thus court may not draw adverse inference from defendant's silence at sentencing; 5-4.

***State v. Phillips***, 94 Wn.App. 313 (1999)

Juvenile diversion agreement that does not on its face reflect that a respondent waived his right to counsel, JuCR 6.3, *State v. Quiroz,* 107 Wn.2d 791 (1987), is invalid on its face and may not be used to enhance disposition of a subsequent offense, *State v. Ammons*, 105 Wn.2d 175, 187-89 (1986), *but see: State v. Gimarelli*, 105 Wn.App. 370, 375 n. 3 (2001); III.

***Alwood v. Harper***, 94 Wn.App. 396 (1999)

Court grants **deferred prosecution,** later reviews file, sets hearing, vacates order as improvidently granted, suppresses statements made at original hearing and sets for trial; held: deferred prosecution is an interlocutory order, not a judgment, thus trial court is free to vacate it as long as due process considerations are met; I.

***State v. Hixson***, 94 Wn.App. 862, 866-68 (1999)

In homicide case, evidence of victim's prior bad acts and character unknown to defendant at time of offense are irrelevant to establish mitigating factors, *see: State v. Bell*, 60 Wn.App. 561, 564 n.1 (1991); III.

***State v. Humphrey***, 139 Wn.2d 53 (1999)

Victim penalty assessment increase from $100 to $500 is prospective to offenses committed after effective date of statute, reversing *State v. Humphrey*, 91 Wn.App. 677 (1998); 9-0.

***State v. Letourneau***, 100 Wn.App. 424 (2000)

Following guilty plea to rape of a child, trial court orders defendant, as a condition community custody, to have no unsupervised contact with children, including her own who were not the victim, and not to profit from publishing or commercializing the story of her crime; held: prosecutor failed to demonstrate that the no-contact order was reasonably necessary to protect those children, nor was the order a crime-related prohibition, thus it is stricken, *State v. Ancira*, 107 Wn.App. 650 (2001), *State v. Sanford*, 128 Wn.App. 280, 288-89 (2005), *State v. Torres*, 198 Wn.App. 685 (2017), *State v. DeLeon*, 11 Wn.App.2d 837 (2020), *State v. McGuire*, 12 Wn.App.2d 88 (2020), *State v. Martinez Platero*, 17 Wn.App.2d 716 (2021), *cf.: State v. Warren*, 165 Wn.2d 17, 31-35 (2008), *State v. Berg*, 147 Wn.App. 923, 941-44 (2008); financial gain prohibition was not directly related to defendant's crimes, thus it is an improper condition of community custody, *see:* RCW 7.68.310; I.

***Apprendi v. New Jersey***, 147 L.Ed.2d 435 (2000)

State statute provides that following conviction of a crime, if trial judge finds by preponderance that the offense was a "hate crime," maximum penalty becomes 20 years, defendant is convicted of a substantive offense with maximum of ten years, increased to 20 with court's finding; held: any fact that increases a penalty beyond the prescribed maximum, other than the fact of a prior conviction, *State v. Holgren*, 106 Wn.App. 477, 482-83 (2001), must be submitted to a jury and proved beyond a reasonable doubt, *Blakely v. Washington*, 159 L.Ed.2d 403 (2004), *see: State v. Wheeler*, 145 Wn.2d 116 (2001), *State v. Hopkins*, 109 Wn.App. 558 (2001), *State v. Ortega*, 120 Wn.App. 165 (2004), *rev. granted and remanded*, 154 Wn.2d 1031 (2005), *revised on remand*, 131 Wn.App. 591 (2006); 5-4.

***State v. Julian***, 102 Wn.App. 296, 304-06 (2000)

Ordering abstention from alcohol in the absence of a finding that use of alcohol contributed to the offense exceeds statutory authority, *State v. Parramore*, 53 Wn.App. 527, 530 (1989); III.

***State v. Combs***, 102 Wn.App. 949, 954 (2000)

Under SRA, court cannot order, as a condition of community placement, no possession of any weapon, as opposed to firearm; III.

***State v. Chapple***, 103 Wn.App. 299 (2000), *aff'd*, 145 Wn.2d 310 (2001)

Disruptive defendant may be excluded from courtroom during sentencing; II.

***State v. Baggett***, 103 Wn.App. 564, 571-72 (2000)

Defendant, charged with assault 2°, obtains appointed diminished capacity expert, is acquitted of assault but convicted of unlawful display of a weapon as a lesser, court imposes **costs of expert**; held: although defendant was acquitted of the offense for which he retained the

expert, where conviction is linked both substantively and procedurally to the same prosecution, court did not exceed its authority, RCW 10.01.160(1), *see: State v. Buchanan*, 78 Wn.App. 648, 653 n.3 (1995); III.

***State v. Piñeda-Guzman***, 103 Wn.App. 759 (2000)

Trial court declines to "conditionally release" drug offender for deportation, RCW 9.94A.280, stating that to do so would put defendant in a better position than a United States citizen and that he had a recent prior drug conviction; held: statute allowing conditional release pending deportation is discretionary, court's denying based upon recent prior conviction is a valid exercise of discretion, although dissatisfaction with statute is not; III.

***State v. Gallaher***, 103 Wn.App. 842 (2000)

Successful completion of conditions of a deferred sentence, RCW 3.66.067, may result in dismissal whether defendant went to trial or pled guilty, although dismissal does not equate to expungement, 1997 Op. Att'y Gen. 1 at *3 (10 Jan. '97), *see: State v. Noel*, 101 Wn.App. 623, 627 (2000), *but see:* GR 15; III.

***State v. Chance***, 105 Wn.App. 291, 299 (2001)

Court may not consider a court-ordered competency evaluation in determining future dangerousness unless defendant was warned prior to the evaluation that it might be used at sentencing, *Estelle v. Smith*, 68 L.Ed.2d 359 (1981), *see: State v. Bankes*, 114 Wn.App. 280 (2002); II.

***State v. Montgomery***, 105 Wn.App. 442 (2001)

Trial court denies sex offender a SSOSA sentence, RCW 9.94A.670, because by taking his case to trial, defendant indicated his unwillingness to acknowledge his problem, thus was not amenable to treatment; held: "[a] defendant may not be subjected to more severe punishment for exercising his constitutional right to stand trial," at 446; I.

***Pers. Restraint of Garcia***, 106 Wn.App. 625 (2001)

Ordering prisoner to attend religious-based treatment program violates Establishment Clause unless there are nonreligious alternatives available; I.

***State v. Modest***, 106 Wn.App. 660 (2001)

Defendant is sentenced to 30 years, sentence reversed on appeal, state errs and waits two years to bring defendant back for resentencing; held: if sentencing delay is "purposeful or oppressive," *Pollard v. United States*, 1 L.Ed.2d 393 (1957), it violates speedy sentencing; here, defendant was not prejudiced, thus no violation, *State v. Bratton*, 193 Wn.App. 561 (2016), distinguishing *State v. Ellis*, 76 Wn.App. 391 (1994), *see: State v. Braithwaite*, 34 Wn.App. 715 (1983), *cf.: State v. Rich*, 160 Wn.App. 647 (2011); III.

***State v. Ancira***, 107 Wn.App. 650 (2001)

Defendant is convicted of violating a no contact order against his wife, children present during offense, sentencing court orders no contact with wife and children; held: state failed to demonstrate that the order prohibiting defendant form contacting his children was reasonably

necessary to prevent the children from witnessing domestic violence, thus order deprived defendant of his fundamental right to parent, , *State v. Torres,* 198 Wn.App. 685 (2017), *State v. DeLeon,* 11 Wn.App.2d 837 (2020), *State v. Martinez Platero,* 17 Wn.App.2d 716 (2021)*but see: State v. Warren,* 165 Wn.2d 17, 31-36 (2008), *State v. Armendariz,* 160 Wn.2d 106 (2007), *State v. Berg,* 147 Wn.App. 923, 941-44 (2008), *State v. Cortes Aguilar,* 176 Wn.App. 264, 277-78 (2013); while supervised visitation may have been appropriate as a condition of sentence, generally a criminal sentencing court is not a proper forum; I.

***Pers. Restraint of Waggy***, 111 Wn.App. 511 (2002)

As long as defendant is advised at plea that there is a period of mandatory community placement, *State v. Ross,* 129 Wn.2d 279, 284-87 (1996), he need not be informed of the specific restrictions to be associated with that placement; in child sex offense, court may limit defendant's association with children, *State v. Letourneau,* 100 Wn.App. 424, 439 (2000), *State v. Berg,* 147 Wn.App. 923, 941-44 (2008), and may require defendant to advise CCO of "romantic/sexual relationships with women;" III.

***Smith v. Dist. Court***, 147 Wn.2d 98 (2002)

District court has subject matter jurisdiction to enforce a **fine** by jailing defendant for nonpayment, limited to ten years, not two years, former RCW 3.66.068 (1999), distinguishing *State v. Jorgenson*, 48 Wn.App. 205 (1987); "pay or stay" is civil contempt; due process clause requires that defendant be given notice that failure to pay may be contempt that may result in incarceration, defendant is entitled to a public defender, court must at least inquire into ability to pay, although defendant has burden to prove inability to pay, *State v. Bower,* 64 Wn.App. 227, 234 (1992), *State v. Sleater,* 194 Wn.App. 470, 474 (2016), *see: State v. Gropper,* 76 Wn.App. 882 (1995), record must show that all less restrictive alternatives to jail have failed, *In re Pers. Restraint of King,* 110 Wn.2d 793, 802 (1988); 9-0.

***State v. Phelps***, 113 Wn.App. 347 (2002)

In plea bargain, defendant agrees to a sentence excluding him from four counties for a year, and agrees to extend statute of limitations for a count that is dismissed with prejudice; held: invited error doctrine precludes defendant's complaint that the trial court erred in excluding him from counties, *but see: State v. Hockaday,* 144 Wn.App. 918, 924 n.5 (2008), since there is no statute that prohibits such a condition of community custody; because statute of limitations is statutory, a defendant cannot grant a court authority to punish him more severely than the sentencing statutes allow, *cf.: State v. Peltier,* 181 Wn.2d 290 (2014); II.

***State v. Harrison***, 148 Wn.2d 550 (2003)

Defendant receives exceptional sentence, on appeal Court of Appeals reverses, holding that state breached plea bargain and orders specific performance; on remand, different judge holds that he is bound by the exceptional sentence previously imposed, although he reduces offender score in accordance with mandate; held: when state breaches, neither collateral estoppel nor "law of the case" doctrine prevent trial court from independently determining whether an exceptional sentence is warranted, *see: State v. White,* 123 Wn.App. 106 (2004), *State v. Amos,* 147 Wn.App. 217, 232 (2008); 9-0.

***State v. Caffee***, 117 Wn.App. 470 (2003)

Defendant goes to trial, is found guilty of murder 1°, co-defendant pleads guilty to murder 2°, cooperates with police and testifies at defendant's trial, defendant is sentenced to lesser term, trial court finding equal protection violation; held: disparate sentences between co-defendants satisfy rational basis analysis where one pleads guilty to a lesser crime and cooperates with police while a second is convicted at trial of a more serious offense, *State v. Handley*, 115 Wn.2d 275 (1990), distinguishing *State v. Clinton*, 48 Wn.App. 671 (1987); I.

***State v. Poston***, 117 Wn.App. 925 (2003)

A revoked drug court offender is entitled to credit for time served in jail and electronic home detention pursuant to the drug court's order, RCW 9.94A.505(6), *see: State v. Wheeler*, 14 Wn.App.2d 571 (2020); II.

***State v. Ameline***, 118 Wn.App. 128 (2003)

After trial and standard range sentence, defendant wins appeal, is convicted anew and receives standard range sentence, appeals again and prevails, trial court imposes exceptional sentence; held: because trial court did not identify specific objective facts drawn from the record of the thrid trial and not known when the standard range sentences were imposed, **presumption of vindictiveness**, *North Carolina v. Pearce*, 23 L.Ed.2d 656 (1969), requires vacation of sentence and remand for resentencing, *but see: State v. Korum*, 157 Wn.2d 614 (2006), *State v. Parmelee*, 121 Wn.App. 707 (2004), *State v. Brown*, 193 Wn.2d 280 (2019), reserving power in sentencing court to justify exceptional sentence; II.

***Mortell v. State***, 118 Wn.App. 846 (2003)

District court has authority to impose consecutive sentences which, in the aggregate, exceed one year, *cf.: State v. Parent*, 164 Wn.App. 210 (2011), *State v. Rice*, 180 Wn.App. 308 (2014); I.

***State v. Snapp***, 119 Wn.App. 614, 626-27 (2004)

At sentencing, trial court discusses need for treatment, after sentencing discovers treatment was not included in judgment and sentence so court modifies sentence; held: where record establishes court's original intention to include a provision, its omission is a clerical error which court is authorized to correct, CrR 7.8(a), CR 60(a), *cf.: State v. Dorosky*, 28 Wn.App. 128 (1981), *State v. Cirkovich*, 42 Wn.App. 403 (1985); II.

***State v. Parmelee***, 121 Wn.App. 707 (2004)

Defendant is convicted of one felony and three misdemeanors, is sentenced to 12 months for each to run consecutively, after remand order requiring merger of two counts new judge imposes higher exceptional sentence, setting forth aggravating factors; held: because a different judge imposed sentence, *Texas v. McCullough*, 89 L.Ed.2d 104 (1986), and because sentencing court exercised independent sentencing discretion setting forth non-vindictive reasons, *Alabama v. Smith*, 104 L.Ed.2d 865 (1989), *State v. Havens*, 70 Wn.App. 251, 259 (1993), the presumption of **vindictiveness** does not arise, distinguishing *State v. Ameline*, 118 Wn.App. 128 (2003), *see.: State v. Korum*, 157 Wn.2d 614 (2006), *State v. Brown*, 193 Wn.2d 280 (2019); I.

***State v. White***, 123 Wn.App. 106, 111-13 (2004)

Defendant is convicted of a felony and a misdemeanor, is sentenced at a single proceeding with two judgment and sentence forms, Court of Appeals reverses felony sentence due to error in offender score, at resentencing trial court imposes additional conditions on misdemeanor; held: because this was one combined trial under a single cause number, the sentencings were interrelated and court was not collaterally estopped from resentencing on the misdemeanor as well as the reversed felony sentencing; III.

***State v. Diaz-Cardona***, 123 Wn.App. 477 (2004)

Juvenile court may not require a juvenile who has pled guilty to participate in a sexual deviency evaluation, even with a protective order, where the juvenile objects, *see: State v. Decker*, 68 Wn.App. 246 (1992), *State v. Jacobsen*, 95 Wn.App. 967 (1999), *State v. Escoto*, 108 Wn.2d 1, 6 (1987), *see: State v. N.B.*, 127 Wn.App. 776, 780-82 (2005), as it would violate respondent's privilege against self incrimination, RCW 13.40.180(8); I.

***State v. Freeman***, 124 Wn.App. 413 (2004)

DNA sample is not required following conviction for attempted harassment even though it is required for felony harassment, RCW 43.43.754(1); I.

***State v. Davis***, 125 Wn.App. 59 (2004)

For purposes of a motion to withdraw a plea, CrR 4.2(f), sentence is not imposed until the judgment and sentence is signed by the court, even if it is orally stated, *State v. Hampton*, 107 Wn.2d 403 (1986), *State ex. rel. Echtle v. Card*, 148 Wash. 270 (1928); written statement on plea of guilty, CrR 4.2(g), is *prima facie* verification of a constitutional plea and, when supported by a court's oral inquiry on the record, "the presumption of voluntariness is well nigh irrefutable," at 68 ¶17, *State v. Perez*, 33 Wn.App. 258, 261-62 (1982); a cheek swab for DNA collection is valid, *State v. S.S.*, 122 Wn.App. 725 (2004); I.

***State v. Felix***, 125 Wn.App. 575 (2005)

A judicial finding that a crime constituted domestic violence need not be submitted to a jury, *Blakely v. Washington*, 159 L.Ed.2d 403 (2004), as it does not increase punishment, *see: State v Winston*, 135 Wn.App. 400 (2006), *see: State v. Ortega*, 131 Wn.App. 591, 595 (2006); firearm prohibition following misdemeanor domestic violence conviction is not punishment, *State v. Schmidt*, 143 Wn.2d 658 (2001); I.

***State v. Hughes,***154 Wn.2d 118, 152-53 (2005)

Where defendant does not object to trial court's failure to provide for **allocution**, error need not be addressed by appellate court, as allocution is a non-constitutional issue, *State v. Hatchie*, 161 Wn.2d 390, 405-06 (2007), *State v. Ague-Masters*, 138 Wn.App. 86, 109-10 (2007); 9-0.

***Pers. Restraint of West***, 154 Wn.2d 204 (2005)

In a plea bargain to avoid persistent offender sentence, defendant agrees to a ten year term without good time, trial court notes on judgment and sentence that defendant stipulated to ten years without earned early release, DOC treats trial court's notation as an order, defendant

files PRP more than a year after sentencing; held: irrespective of the trial court's intent, noting defendant's agreement on the judgment and sentence and DOC's belief that it is an order gives the note the "imprimatur of the trial court," *State v. Phelps*, 113 Wn.App. 347 (2002), requires remand to trial court to strike the note, as good time may only be addressed by the Department of Corrections, *Pers. Restraint of Mota*, 114 Wn.2d 465, 478 (1990), RCW 9.94A.728(1); 7-2.

***State v. Sansone***, 127 Wn.App. 630 (2005)

Community custody condition that defendant may not possess pornography as defined by CCO is both vague and an improper delegation, *State v. Padilla*, 190 Wn.2d 672 (2018), *see: State v. Williams*, 97 Wn.App. 257, 262-63 (1999), *State v. Wilkerson*, 107 Wn.App. 748 (2001), *State v. Bahl*, 164 Wn.2d 729 (2008), *but see: State v. Smith*, 130 Wn.App. 721 (2005),; I.

***State v. Schimelpfenig***, 128 Wn.App. 224 (2005)

Banishing murder defendant from residing in county where victim's family lives violates his right to travel, *State v. Sims*, 152 Wn.App. 526 (2009), *rev'd, on other grounds,* 171 Wn.2d 436 (2011), *see: Pers. Restraint of Martinez*, 2 Wn.App.2d 904 (2018); II.

***State v. Smith***, 130 Wn.App. 721, 724-28 (2005)

Following sex offense conviction, defendant is ordered by DOC not to "possess…any pornography, catalogs or material which can be read or viewed for sexual gratification" and which "involved children," defendant is sanctioned for possessing Brooke Shield film *Blue Lagoon;* held: because an ordinary person would know, without having to consult a specialist, that the film was prohibited, then the restriction was not vague, distinguishing *State v. Sansone*, 127 Wn.App. 630 (2005), *see: State v. Nguyen*, 191 Wn.2d 671 (2018), *but see: State v. Bahl*, 164 Wn.2d 729 (2008), *State v. Alcocer*, 2 Wn.App.2d 918 (2018), *State v. Padilla*, 190 Wn.2d 672 (2018); I.

***State v. Swiger***, 159 Wn.2d 224 (2006)

Release pending appeal on GPS monitoring must be applied as credit for time served, RCW 9.95.062(3) (1996), *State v. Anderson*, 132 Wn.2d 203 (1997), *State v. Wheeler*, 14 Wn.App.2d 571, 579-80 (2020), *cf.: Harris v. Charles*, 171 Wn.2d 455 (2011), *State v. Shelley*, 19 Wn.App.2d 451 (2021), *but see:* RCW 10.21.030(5) (2010), *State v. Min Sik Kim*, 7 Wn.App.2d 839 (2019); reverses *State v. Swiger*, 130 Wn.App. 222 (2005); 9-0.

***Pers. Restraint of Williams,*** *59* Wn.App. 828 (2006)

Where sentences are consecutive, defendant is only entitled to **credit for time served** against one of the sentences, *see: State v. Davis*, 69 Wn.App. 634 (1993), *Pers. Restraint of Schillerett*, 159 Wn.2d 649 (2007); I.

***State v. Melick***, 131 Wn.App. 835, 844-45 (2006)

Defendant, having stipulated to police reports, is terminated from drug court, challenges evidence in reports claiming one was not properly signed, testimony was inconsistent and hearsay; held: by stipulating to police reports, defendant waives all legal challenges, *State v. Shattuck*, 55 Wn.App. 131, 13 (1989), *but see: State v. Drum*, 168 Wn.2d 23 (2010); deferred

prosecution principles, ch. 10.05 RCW, apply to drug court prosecutions, *see also: State v. Daniels*, 8 Wn.App.2d 160 (2019); I.

***State v. Dalseg***, 132 Wn.App. 854 (2006)

Defendants are sentenced to work release at Nisqually Tribal Jail which, unbeknownst to the court and prosecutor, release defendants each night to sleep at home, trial court revokes and orders full sentence in traditional partial confinement work release facility; held: equitable doctrine of credit for time spent at liberty: "a convicted person is entitled to credit against his sentence for time spent erroneously at liberty due to the State's negligence, provided that the convicted person has not contributed to the release, has not absconded legal obligations while at liberty, and has had no further criminal convictions," *Pers. Restraint of Roach*, 150 Wn.2d 29, 37 (2003); *cf.: State v. Shelley*, 19 Wn.App.2d 451 (2021); II.

***State v. Davis***, 133 Wn.App. 415, 431 (2006), *rev'd, on other grounds*, 163 Wn.2d 606 (2008)

Consecutive misdemeanor sentences can be structured to require more than two years' probation, *see: Mortell v. State*, 118 Wn.App. 846 (2003), *but see: State v. Parent*, 164 Wn.App. 210 (2011), *State v. Rice*, 180 Wn.App. 308 (2014); III.

***State v. Quintero Morelos***, 133 Wn.App. 591 (2006)

One day after court imposes 365 day suspended misdemeanor sentence, defense moves to modify sentence to 364 days to avoid deportation, 8 U.S.C. § 1227(a)(2)(A)(iii), - § 1101(a)(43)(F), granted by trial court, state appeals; held: court may resentence based upon defense counsel's excusable neglect, CrR 7.8(b)(1), distinguishing *State v. Gomez-Florencio*, 88 Wn.App. 254, 259 (1997), *State v. Cortez*, 73 Wn.App. 838 (1994), *see: State v. Aguirre*, 73 Wn.App. 682 (1994), *State v. Smith*, 159 Wn.App. 694 (2011); 2-1, III.

***State v. Hatchie***, 133 Wn.App. 100, 117-19 (2006)

Trial judge states he is "ready to rule" and will impose a 55-month sentence "unless your client has something else to add," defendant addresses the court and gets 55 months; held: oral expression of informal opinion as to sentence and "premature statement of … contemplated sentence" is not an imposition of sentence depriving defendant of right of allocution, *State v. Delange*, 31 Wn.App. 800 (1982), *State v. Gonzales*, 90 Wn.App. 852 (1998), *State v. Hughes*, 154 Wn.2d 118, 152-53 (2005), *abrogated, on other grounds, Washington v. Recuenco*, 548 U.S. 212, 165 L.Ed.2d 466 (2006), *but see: State v. Crider*, 78 Wn.App. 849, 860-61 (1995), *State v. Aguilar-Rivera*, 83 Wn.App. 199, 203 (1996); II.

***State v. Acrey***, 135 Wn.App. 938 (2006)

Defendant, convicted of theft for draining the retirement account of an elderly man, is ordered as a condition of sentence no to work as a caretaker for the elderly or disabled; held: sentencing court has authority to impose crime-related prohibitions, RCW 9.94A.505(8), *State v. Armendariz*, 160 Wn.2d 106 (2007), even if not specifically authorized by some other provision of ch. 9.94A RCW; prohibition here was directly related to the crime; I.

***State v. Surge***, 160 Wn.2d 65 (2007)

Requiring DNA sample following conviction, RCW 43.43.754, does not violate Fourth Amendment or CONST., art. I, § 7; affirms *State v. Surge*, 122 Wn.App. 448 (2004); 7-2.

***State v. Armendariz***, 160 Wn.2d 106 (2007)

As part of any felony sentence, a crime-related prohibition may include orders prohibiting contact with victims or witnesses for the statutory maximum term, *State v. Acrey*, 135 Wn.App. 938 (2006), *State v. Duran*, 16 Wn.App.2d 583 (2021); 9-0.

***State v. Gailus***, 136 Wn.App. 191 (2006)

A misdemeanor sentence that purports to impose a suspended sentence and probation on condition of 12 months in jail is erroneous; probation is not authorized when the maximum jail sentence is imposed; I.

***Pers. Restraint of Schillereff***, 159 Wn.2d 649 (2007)

Prisoner who is held on a Texas sentence, transported to Washington, sentenced to consecutive terms is not entitled to **credit** for time served before Washington sentencing as he is not held solely for his Washington offense, RCW 9.94A,505(6); *per curiam.*

***State v. Davenport***, 140 Wn.App. 925, 932 (2007)

Defendant is sentenced to life without parole, court of appeals reverses and remands for a new sentencing, dismissing one count, trial court imposes same sentence in defendant's absence, declining to hear challenges to the sentence that were not raised at first sentencing; held: where a case is reversed and remanded for resentencing, trial court has discretion to consider issues defendant did not raise at his initial sentencing or in his first appeal, *State v. Wheeler,* 183 Wn.2d 71 (2015), *see: State v. Parmalee,* 172 Wn.App. 899 (2013), *State v. Gleim,* 200 Wn.App. 40 (2017); where trial court exercises discretion at a resentencing, defendant has the right to be present, *State v. Rodriguez,* 171 Wn.2d 46 (2011); here, trial court exercised discretion by declining to hear motions, thus defendant's presence is required; II.

***State v. Warren***, 165 Wn.2d 17, 31-35 (2008)

As a condition of sentence in child sex abuse case, trial court orders no contact with his wife, victim's mother, who was a witness against defendant; held: because spouse is mother of victims, testified against defendant who attempted to induce her not to cooperate, and defendant having a prior murder conviction and had previously been convicted of beating his wife, and wife did not object, the order is reasonably related to the crime, *Stte v. Pablo Navarro,* 188 Wn.App. 550, 556-57 (2015), *see: State v. Letourneau*, 100 Wn.App. 424 (2000), *State v. Armendariz*, 160 Wn.2d 106 (2007), *cf.: State v. Ancira*, 107 Wn.App. 650 (2001), *State v. DeLeon,* 11 Wn.App.2d 837 (2020); 5-4.

***State v. Kolesnik***, 146 Wn.App. 790, 802-06 (2008)

Enhancement for an offense committed against a **law enforcement officer**, RCW 9.94A.535(3)(v), applies to assault 1º; 240 months is not clearly excessive for knowingly and violently assaulting an officer with a deadly weapon; II.

***State v. Alphonse***, 142 Wn.App. 417, 439 (2008), 147 Wn.App. 891, 909-11 (2008)

An order banishing defendant from Everett does not survive strict scrutiny absent repeated offenses or previous violations of orders restricting contact, *State v. Schimelpfenig*, 128 Wn.App. 224 (2005), *State v. Sims*, 152 Wn.App. 526 (2009), *reversed, on other grounds,* 171 Wn.2d 436 (2011), *see: State v. Martinez,* 2 Wn.App.2d 904 (2018); I.

***State v. Berg***, 147 Wn.App. 923, 941-44 (2008)

Defendant is convicted of molesting a child with whom he lived, sentencing court orders no contact with any female minors, defendant's request for an exception for other children in the household denied; held: an order prohibiting contact with one's own children is valid where, as here, defendant engaged in abuse by exploiting a child's trust in defendant as a parent figure, distinguishing *State v. Letourneau*, 100 Wn.App. 424 (2000); I.

*State v. Coucil,* 170 Wn.2d 704 (2010)

Defendant is charged with felony harassment and felony bail jumping, is convicted of lesser misdemeanor harassment and felony bail jumping, claims bail jumping must be reduced; held: classification of bail jumping depends upon the classification of the underlying charge at the time defendant failed to appear, not at verdict; affirms *State v. Coucil*, 151 Wn.App. 1312 (2009); 9-0.

***Harris v. Charles,*** 171 Wn.2d 455 (2011)

A misdemeanant is not constitutionally entitled to credit for time served for electronic home monitoring, *Bremerton v. Bradshaw*, 121 Wn.App. 410 (2004), distinguishing *State v. Anderson*, 132 Wn.2d 203 (1997), *see:* RCW 10.21.030(2)(d), *State v. Min Sik Kim,* 7 Wn.App.2d 839 2019), *cf.: State v. Wheeler,* 14 Wn.App.2d 571 (2020); 9-0.

***State v. Barber***, 170 Wn.2d 854 (2011)

Defendant pleads guilty to felony DUI, plea agreement states no community custody, trial court does not impose community custody, DOC notifies court that community custody is mandatory, at resentencing defendant is offered option of withdrawal of plea or specific performance, defendant chooses the latter, trial court imposes same sentence with community custody, defendant argues on appeal that he is entitled to the original agreed sentence in spite of the statute; held: where a plea agreement contains a mutual mistake, only remedy available to defendant is withdrawal of plea, not specific performance of a sentence unpermitted by statute, abrogating *State v. Miller*, 152 Wn.2d 223 (1988), *effectively overruling Personal Restraint of Hoisington*, 99 Wn.App. 423 (2010), *Personal Restraint of Fonseca*, 132 Wn.App. 464 (2006), *Personal Restraint of Hudgens*, 156 Wn.App. 411 (2010); affirms *State v. Barber*, 152 Wn.App. 223 (2009); 9-0.

***Pers. Restraint of Talley***, 172 Wn.2d 642 (2011)

Pretrial detainee is statutorily entitled to earn good-time credits, RCW 9.92.151 (2004); 9-0.

***State v. Lee***, 158 Wn.App. 513 (2010)

After felony sentencing, trial court's oral advisement that defendant could not be "anywhere near a firearm" or "in the same house or the same car with a firearm" misstates law of constructive possession; I.

***State v. Smith***, 159 Wn.App. 694 (2011)

Defendants are sentenced to partial confinement, RCW 9.94A.505, county eliminates its partial confinement programs, court modifies sentences to low end of range so that they are released, state appeals; held: after sentencing, the court's power to modify the sentence, CrR 7.8(b)(5), is limited to "extraordinary circumstances [that] relate to fundamental, substantial irregularities in the court's proceedings or to irregularities extraneous to the court's action," *State v. Olivera-Avila,* 89 Wn.App. 313, 319 (1997), *Postsentence Review of Wandell,* 175 Wn.App. 447 (2013), *see; State v. Shove,* 113 Wn.2d 83 (1989), *State v. Dana,* 59 Wn.App. 667 (1990), *State v. Murray,* 118 Wn.App. 518 (2003); here, defunding partial confinement programs was unforeseeable and unanticipated when defendants were sentenced, thus court properly exercised discretion; III.

***State v. Rich***, 160 Wn.App. 647 (2011)

State and trial court delay resentencing after remand for three years, over objection, resulting in change of law detrimental to defendant who received exceptional sentence; held: delay was lengthy, defendant asserted his right to speedy sentencing, reason for delay was anticipation of favorable law change for state, defendant was prejudiced by losing standard range sentence, *State v. Ellis,* 76 Wn.App. 391, 394 (1994), *Pollard v. United States,* 352 U.S. 354, 361, 1 L.Ed.2d 393 (1957), *cf.: State v. Bratton,* 193 Wn.App. 561 (2016); II.

***State v. Parent***, 164 Wn.App. 210 (2011)

Court may not impose consecutive gross misdemeanor probationary sentences, *State v. Rice,* 180 Wn.App. 308 (2014), *but see: Mortell v. State,* 118 Wn.App. 846 (2003), *State v. Davis,* 133 Wn.App. 415, 431 (2006), *rev'd, on other grounds,* 163 Wn.2d 606 (2008), as RCW 9.95.210(1) is ambiguous; I.

***Setser v. United States***, 566 U.S. 231, 182 L.Ed.2d 455 (2012)

Federal court may impose a sentence consecutive to an anticipated but not yet imposed state sentence; 6-3.

***State v. Villano***, 166 Wn.App. 142 (2012)

Juvenile disposition order that respondent not possess "gang paraphernalia" is vague, *State v. Weatherwax,* 193 Wn.App. 667, 676-81 (2016), *reversed, on other grounds,* 188 Wn.2d 139 (2017); III.

***State v. Jones***, 171 Wn.App. 52, 55-56 (2012)

Defendant seeks drug offender sentencing alternative, RCW 9.94A.660 (2009), court notes defendant has another case and defers until disposition, sentences to standard range, on appeal defense claims court refused to consider DOSA; held: where defendant asks for an alternative authorized by statute, court's categorical refusal to consider it is a failure to exercise discretion, *State v. Grayson,* 154 Wn.2d 333, 342 (2005), but here court considered several

factors and therefore did exercise discretion, *see: State v. Hender,* 180 Wn.App. 895 (2014), *State v. Williams,* 199 Wn.App. 99 (2017); II.

***Alleyne v. United States***, 570 U.S. 99, 186 L. Ed. 2d 314 (2013)

Facts that increase the mandatory minimum sentence are elements and must be submitted to the jury and found beyond a reasonable doubt, *United States v. Haymond,* 588 U.S, ___ , 139 S.Ct. 2369, 204 L.Ed.2d 897 (2019), overruling *Harris v. United States,* 536 U.S. 545, 153 L.Ed.2d 524 (2002) and *McMillan v. Pennsylvania,* 477 U.S. 79, 91 L.Ed.2d 67 (1986); 5-4.

***Peugh v. United States***, 569 U.S. 530, 186 L.Ed.2d 84 (2013)

Sentencing guidelines adopted after the offense cannot be applied as a violation of *ex post facto* clause; 5-4.

***State v. Parmelee***, 172 Wn.App. 899 (2013)

Mandate from Supreme Court vacates exceptional sentence based solely on lack of jury finding, *Blakely v. Washington,* 542 U.S. 296, 159 L.Ed.2d 403 (2004), at resentencing defendant argues that his offender score was wrongly calculated, judge allows argument but expressly declines to consider it, stating that the "offender score is 13," the same as it was at original sentencing; held: where sentencing court declines to consider an issue that was not remanded, and merely states what the score is, the court has not independently reviewed the issue (rejecting state's concession) and thus may not be appealed, *State v. Barberio,* 121 Wn.2d 48, 50 (1993), *State v. Wheeler,* 183 Wn.2d 71 (2015); I.

***Postsentence Review of Wandell***, 175 Wn.App. 447 (2013)

Community custody condition prohibits defendant from living with minor children, after transfer of supervision out-of-state court modifies condition to allow other state's DOC to modify conditions, Washington DOC appeals, RCW 9.94A.585(7) (2002); held: modification of a sentence may only be entered if permitted by SRA which does not provide for the post-sentence addition of a community custody provision of the sort added here, *State v. Shove,* 113 83, 86 (1989); I.

***State v. Locke***, 175 Wn.App. 779, 804 (2013)

Court may not order a mental health evaluation and treatment as a condition of community custody absent a presentence report and findings that offender is mentally ill and mental illness impacted the offense, RCW 9.94B.080 (2008), *State v. Halverson,* 176 Wn.App. 972 (2013); 2-1, II.

***Postsentence Review of Combs***, 176 Wn.App. 112 (2013)

Following DOSA revocation, sentencing court orders 42 days credit for time served while defendant was in jail for an unrelated felony, DOC seeks review after asking trial court to modify, RCW 9.94A.587(7) (2002), to which state objected since the credit was part of a plea bargain; held: following revocation of a DOSA sentence, trial court may order that defendant is entitled to credit, but DOC determines amount of credit following revoked DOSA; since state acted in good faith in agreeing to the plea bargain defendant is not entitled to specific performance of an illegal sentence; II.

***State v. McWilliams***, 177 Wn.App. 139, 150-55 (2013)

Sentencing judge, after trial, orders forfeiture of unclaimed property seized, and orders defendant to comply with "conditions per DOC;" held: because defendant did not move for return of seized property, CrR 2.3(e), court did not abuse its discretion, *see also: Walla Walla v. $401,333.44*, 150 Wn.App. 360 (2009), 164 Wn.App. 236 (2011), *State v. Card*, 48 Wn.App. 781 (1987), *State v. Marks*, 114 Wn.2d 724, 734-35 (1990), *but see: State v. Roberts*, 185 Wn.App. 94 (2014), *State v. Rivera*, 198 Wn.App. 128 (2017); DOC may establish conditions of community custody, RCW 9.94A.704(2)(a) (2012), *State v. Ortega*, 21 Wn.App.2d. 488 (2022); II.

***State v. Alejandro Medina***, 180 Wn.2d 282 (2014)

A pretrial condition of release that a murder defendant report to a non-residential day reporting program (King County CCAP enhanced) does not entitle defendant to credit for time served in that program, former RCW 9.94A.030(26) (1991), *State v. Sullivan*, 196 Wn.App. 277, 297-300 (2016), *State v. Shelley*, 19 Wn.App.2d 451 (2021), nor does equal protection clause mandate credit, *cf.* RCW 9.94A.680 (2009) authorizing courts to grant credit for nonviolent offenders, *see also: State v. Speaks*, 119 Wn.2d 204 (1992); 9-0.

***State v. Deskins***, 180 Wn.2d 68, 77-82 (2014)

Following animal cruelty convictions, district court has authority to impose condition of probation that defendant not live with or own animals, RCW 2.66.067, -.068 (2001, 2013), distinguishing RCW 16.52 200(3) (2011); denying motion to continue sentencing "to prepare" is not an abuse of discretion; 5-4.

***State v. Mercado***, 181 Wn.App. 624 (2014)

Following drug conviction sentencing court may only order HIV testing if it finds that defendant's possession "entailed use of a hypodermic needle," RCW 70.24.340 (2011); III.

***State v. Button***, 184 Wn.App. 442 (2014)

Trial court lacks authority under SRA to order defendant to hold a sign saying "I stole money…;" II.

***State v. Trebilcock***, 184 Wn.App. 619 (2014)

Sentencing judge making a biblical reference to underscore a secular principle has not violated due process clause, at 627-3; defendant waives jury after which state adds aggravating factors, defendant claims she has right to jury on the factors; held: waiver covered aggravating factors where defendant did not move to rescind her jury waiver or request a jury, at 631-34; II.

***State v. Johnson***, 184 Wn.App. 777 (2014)

Sentencing court may order CCO to order plethysmograph testing for the purpose of sexual deviance treatment and not for monitoring purposes, *State v. Riles*, 135 Wn.2d 326 (1998), *abrogated on other grounds, State v. Valencia*, 169 Wn.2d 782 (2010), *State v. Alcocer*, 2 Wn.App.2d 918 (2018), *Matter of Brettell*, 6 Wn.App.2d 161 (2018); II.

***State v. Barry***, 184 Wn.App. 790 (2014)

Trial court may not decline to consider a **compromise of misdemeanor**, ch. 10.22, RCW, because it was sought the day of trial in violation of a local rule; superior court has authority to grant a compromise of misdemeanor, *cf.: State v. Ford*, 99 Wn.App. 682 (2000); III.

***State v. Roberts***, 185 Wn.App. 94 (2014)

Trial court lacks authority to order forfeiture of lawfully seized property, distinguishing CrR 2.3(e), *State v. McWilliams*, 185 Wn.App. 94 (2014), *State v. Rivera*, 198 Wn.App. 128 (2017); II.

***State v. Lewis***, 184 Wn.2d 201 (2015)

Defendant is detained pretrial for burglary and assault, while jailed is charged with failure to register, pleads guilty and is sentenced for the latter, later pleads guilty and is sentenced for the former charges, trial court grants **credit for time served** for all charges since original arrest, state appeals; held: defendant is only entitled to credit for confinement *solely* in regard to the sentenced offense, RCW 9.94A.505(6) (2010), *State v. Williams*, 59 Wn.App. 379, 381-82 (1990), *Matter of Allery*, 6 Wn.App.2d 343 (2018), *State v. Enriquez-Martinez,* 198 Wn.2d 98 (2021), thus defendant gets credit for time served up to the filing of and detention on the failure to register charge, after which he was serving time on the failure to register and thus not detained solely on the burglary and assault charges, *Pers. Restraint of Schillereff*, 159 Wn.2d 649, 651-52 (2007); *affirms, in part, State v. Lewis*, 185 Wn.App. 338 (2014); *per curiam*.

***State v. Ellison***, 186 Wn.App. 780 (2015)

Allocution is intended to provide a plea for mercy and to allow defendant to present mitigation information, *State v. Canfield*, 154 Wn.2d 698, 701 (2005), but trial court may cut off allocution where defendant disputes facts or complains about counsel, *State v. Lord*, 117 Wn.2d 829, 897-98 (1991); II.

***State v. Dyson***, 189 Wn.App. 215 (2015)

Defendant is convicted of assault 1°, sentencing judge finds defendant's conduct qualified for mandatory five-year minimum because force could likely have resulted in death, RCW 9.94A.540 (2014); held: fact-finding triggering a mandatory minimum must be submitted to the jury, *Alleyne v. United States*, 570 U.S. 99, 186 L.Ed.2d 314 (2013), *but see: State v. McChristian*, 158 Wn.App. 392 (2010); 2-1, III.

***State v. Schmeling***, 191 Wn.App. 795 (2015)

Eighth Amendment cruel and unusual clause does not require state to prove intent to possess a controlled substance, *see: State v. Cleppe*, 96 Wn.2d 373 (1981), *McFadden v. United States*, 576 U.S. 186, 135 S.Ct. 2298, 192 L.Ed.2d 260 (2015), *but see: State v. Blake*, 197 Wn.2d 170 (2021); II.

***State v. Bratton***, 193 Wn.App. 561 (2016)

Pending appeal sentence is stayed, 18 months after mandate affirming conviction defendant is sentenced; held: defendant is not entitled to dismissal for violation of **speedy sentencing** where delay is between pronouncement of sentence and enforcement of sentence, *cf.: State v. Rich*, 160 Wn.App. 647 (2011), *State v. Modest*, 106 Wn.App. 660 (2001); III.

***State v. Rivera,*** 198 Wn.App. 128 (2017)

Sentencing court lacks authority to order forfeiture of "all property," *State v. Roberts,* 185 Wn.App. 94 (2014); II.

***State v. Torres***, 198 Wn.App. 685 (2017)

Defendant persuades his son to lie, is convicted of witness tampering, sentencing court orders no contact with son for five years; held: court must consider a defendant's constitutional right to parent in imposing a no contact order with his or her children, *State v. Ancira,* 107 Wn.App. 650, 654-55, 27 P.3d 1246 (2001), *State v. Letourneau*, 100 Wn.App. 424 (2000), *State v. Armendariz*, 160 Wn.2d 106 (2007), *State v. DeLeon,* 11 Wn.App.2d 837 (2020), *State v. McGuire,* 12 Wn.App.2d 88 (2020), *State v. Martinez Platero,* 198 Wn.App.2d 98 (2021); III.

***State v. Gleim***, 200 Wn.App. 40 (2017)

At original sentencing state recommends, per plea agreement, exceptional sentence below standard range, judge imposes standard range, on appeal sentence is reversed due to excessive community custody and LFOs, at resentencing state advises court that it may adjust original sentence or do a full resentencing, *State v. Davenport,* 140 Wn.App. 925, 932 (2007), defense moves to withdraw plea maintaining that state did not adhere to the original plea bargain, court declines to resentence and adjusts prior sentence pursuant to the remand; held: prosecutor merely presented the court with its remand options, thus did not undercut plea agreement; had the court decided to resentence then prosecutor would have been obliged to advocate the plea agreement; III.

***State v. Martell***, 200 Wn.App. 293 (2017)

Where defendant has a prior rape conviction, a conviction for possession of depictions of minors engaged in sexually explicit conduct 2° requires an indeterminate life sentence, RCW 9.94A.507(1)(b) (2008), code revisers note is inaccurate; II.

***State v. Bassett***, 192 Wn.2d 67 (2018)

Sentencing a juvenile to life without parole is cruel punishment *per se* under the state constitution; affirms *State v. Bassett*, 198 Wn.App. 714, 744 (2017); 5-4.

***State v. Moen***, 4 Wn.App.2d 589, 597-604 (2018)

Sentencing man with dementia to life without parole is not cruel and unusual, *State v. Johnson,* 150 Wn.App. 663, 676-79 (2009); II.

***United States v. Haymond***, 588 U.S, ___ , 139 S.Ct. 2369, 204 L.Ed.2d 897 (2019)

Defendant is convicted of possession of child pornography, is sentenced to prison followed by supervised release during which defendant is found with child pornography, federal statute provides for a five-year mandatory minimum for new child porn, 18 U.S.C. § 3583(k), district court finds by a preponderance that defendant violated supervised release by possessing child porn and sentences him to five years; held: while a judge can revoke supervised release and impose a sentence up to the remaining maximum, where there is a mandatory minimum a jury must find the facts to invoke it beyond a reasonable doubt, *Apprendi v. New Jersey,* 530 U.S.

466, 477, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), *Blakely v. Washington*, 542 U.S. 296, 309, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004); 5-4.

***State v. Min Sik Kim***, 7 Wn.App.2d 839 (2019)

RCW 9.994A.505(7) (2015) which forbids credit for time served for pretrial electronic home monitoring for, *inter alia*, violent offenses does not violate double jeopardy or equal protection clauses, *cf.: State v. Anderson*, 132 Wn.2d 203, 213 (1997), *Harris v. Charles*, 171 Wn.2d 455 (2011); II.

***State v. Daniels***, 8 Wn.App.2d 160 (2019)

Entry into a therapeutic court must be approved by prosecutor, RCW 2.30.030 (2018), *see: State v. DiLuzio*, 121 Wn.App. 822 (2004); I.

***State v. DeLeon,*** 11 Wn.App.2d 837 (2020)

At sentencing for rape of a child other than his own child court orders no contact with all minors, including his own children; held: sentencing court did not consider on the record defendant's constitutional right to parent, *State v. McGuire*, 12 Wn.App.2d 88 (2020), *State v. Letourneau*, 100 Wn.App. 424 (2000), *State v. Ancira*, 107 Wn.App. 650 (2001), *State v. Martinez Platero*, 198 Wn.App.2d 98 (2021), or how the order was reasonably necessary to protect his own children from harm, thus remanded for court to conduct analysis on the record; II.

***State v. Wheeler***, 14 Wn.App.2d 571 (2020)

Work crew is partial confinement, RCW 9.94A.030(57) (2020), which entitles a defendant to credit for time served on work crew if later revoked, *cf:.: State v. Shelley*, 19 Wn.App.2d 451 (2021), *Harris v. Charles*, 171 Wn.2d 455 (2011); I.

***Pers. Restraint of Brooks,*** 197 Wn.2d 94 (2021)

A juvenile sentenced to a lengthy sentence in 1998, prior to adoption of the SRA, who has served twenty years is entitled to a release hearing before the Indeterminate Sentencing Review Board with a presumption of release, RCW 9.94A.730, regularly held parole hearings are not an adequate substitute for a "*Miller*-fix" hearing, *Miller v. Alabama*, 567 U.S. 460, 480, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012); *State v. Bassett*, 192 Wn.2d 67, 81-82 (2018); *State v. Houston-Sconiers*, 188 Wn.2d 1, 18 (2017); 9-0.

***Pers. Restraint of Monschke***, 197 Wn.2d 305 (2021)

Judges must exercise discretion in sentencing defendants who committed crimes when they were 20 years or younger regardless of mandatory life without parole statutes, *see Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455, 183 L. Ed.2d 407 (2012), *State v. Houston-Sconiers*, 188 Wn.2d 1 (2017), *State v. Meza*, 22 Wn.App.2d 514 (2022); 5-4 (fractured opinion on timeliness issue).

***State v. Enriquez-Martinez,*** 198 Wn.2d 98 (2021)

Defendant is arrested, charged with a crime in Oregon, while in custody in Oregon he is charged with a crime in Washington where court issues a no bail warrant, he is transferred to Washington where he pleads guilty and is sentenced, then is returned to Oregon where he pleads

guilty and is sentenced to concurrent terms, DOC declines to give him credit for the time served in Oregon; held: defendant is entitled to credit for all the time confined on charges prior to sentencing, reversing *State v. Enriquez-Martinez,* 14 Wn.App.2d 192 (2020), but an offender is not entitled to credit for time held on a pending charge if simultaneously is serving time on a sentence already imposed in another case, *State v. Lewis,* 184 Wn.2d 201, 206 (2015), nor is defendant entitled to credit on a charge for time served on a parole or probation violation; 9-0.

***State v. Haag***, 198 Wn.2d 309 (2021)

At 17 defendant is sentenced to mandatory life without parole; at a subsequent *Miller*-fix resentencing, *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), RCW 10.95.030, sentencing court finds defendant is not "irretrievably depraved or irreparably corrupt" but resentences to 46 years; held: 46 years is a *de facto* life sentence, sentencing judge placed more emphasis on retribution than on mitigation due to heinous nature of the crime, abused his discretion because its finding lacked substantial evidence that defendant had not "overcome the factors that led to the murder; 8-1.

***Pers. Restraint of Richmond***, 16 Wn.App.2d 751 (2021)

Prosecutor's use, during closing, of an animal analogy, here comparing defendant to a hornet's nest, is "problematic" but absent objection, and absent some indication that the analogy is a racist or dehumanizing code, is not error, *cf.: State v. Barajas*, 143 Wn.App. 24, 39 (2007), *State v. Embry*, 171 Wn.App. 714, 754-55 (2012), *State v. Rivers*, 96 Wn.App. 672, 673 (1999) *State v. Wilson*, 16 Wn.App. 348, 357 (1976), *State v. Perry,* 24 Wn.2d 764, 769-70 (1946), *State v. McKenzie*, 21 Wn.App.2d 722 (2022); 2-1, III.

***State v. Duran***, 16 Wn.App.2d 583 (2021)

Defendant pleads guilty to unlawful imprisonment (5 year maximum) for kidnapping a man and forcing him to drive her to a residence, and burglary (10 year maximum) for burglarizing that residence, court imposes ten year no contact order as to the kidnap victim; held: court may impose no contact orders as to witnesses as well as victims, *State v. Armendariz,* 160 Wn.2d 106 (2007), *State v. Warren,* 165 Wn.2d 17, 31-35 (2008), kidnap victim was a witness to the burglary; II.

***State v. Skrobo***, 17 Wn.App.2d 197 (2021)

**Deferred prosecution** for DUI can be revoked anytime within five years, *State v. Vinge*, 59 Wn.App. 134 (1990); II.

***State v. Geyer***, 19 Wn.App.2d 321 (2021)

Defendant is convicted of attempted rape of a child for seeking sexual contact with a fictitious juvenile via a sting operation, court orders no contact with minors, not be in a romantic relationship with a partner who has minors, not use the internet and not use photo equipment including cell phones, all without permission of CCO; held: broad restrictions on defendant's right to interact with children and intimate partners was not shown to be reasonably necessary as it includes his own children and wife, *State v. Letourneau*, 100 Wn.App. 424 (2000); internet restriction is overbroad, a filter will meet the need, *State v. Johnson,* 197 Wn.2d 740 (2021), *State v. Fredeerick,* 20 Wn.App.2d 1081 (2022); since the instant crime did not involve

defendant taking photographs the restriction on photo equipment and cell phones is overbroad; III.

***State v. Shelley***, 21 Wn.App.2d 514 (2021)

Defendant, serving time, is granted temporary release to attend birth of child, extended due to COVID, demands credit for time served while he was released; held: absent monitoring or home detention, a person on temporary release is not entitled to credit, *State v. Swiger*, 159 Wn.2d 224 (2006), *State v. Speaks*, 119 Wn.2d 204 (1992); I.

***State v. Greenfield***, 21 Wn.App.2d 878 (2022)

Defendant seeks a Parent Offender Sentencing Alternative, RCW 9.94A.655, court fails to order a current report from DCYF as required in statute, denies POSA; held: while a POSA is discretionary with the sentencing court the court abuses its discretion if it fails to follow a statutory procedure; I.

***State v. Zwede***, 21 Wn.App.2d 843 (2022)

Defendant was 19-years old when he pleaded guilty to a sex offense, court imposed a SSOSA, as agreed to by the parties, when defendant was 24 court revoked the SSOSA and imposed ten years to life, which had been previously suspended; held: when court revokes a SSOSA, RCW 9.94A.670(11), it must impose the entire sentence that had been suspended, RCW 9.94A.670(4); at sentencing defendant did not seek an exceptional sentence, was not a youthful offender when he violated the conditions, court did not violate his rights when it declined to consider his youthfulness at the time of the crime at his revocation hearing; 2-1, I.

***State v. Peluso***, 22 Wn.App.2d 282 (2022)

Defendant is convicted of numerous offenses occurring before and after the legislature amended the Parent Offender Sentencing Alternative, RCW 9.94A.655; under prior statute a person was eligible if s/he had physical custody of his or her child, defendant did not have physical custody thus trial court erred in granting the POSA; under the more recent statute an offender is eligible if he is an expectant parent, but while defendant was an expectant parent at the time of the offenses, he was not at the time he was sentenced and thus was not eligible for a POSA; court cannot grant a POSA on any count unless it grants the alternative on all counts; in *dicta* Division I suggests that an exceptional sentence may be appropriate on remand, distinguishing *State v. Amo,* 76 Wn.App. 129, 134 (1994), *State v. Hodges,* 70 Wn.App. 621, 623 (1993), *State v. Law*, 154 Wn.2d 85, 102-03 (2005).

***State v. Paniuaga***, 22 Wn.App.2d 350 (2022)

Defendant was charged with possession of drugs and convicted of bail jumping on that case, in subsequent sentencing seeks reduction of offender score for the bail jumping because it arose from a VUCSA possession, ruled unconstitutional; held: like escape, *State v. Gonzales*, 103 Wn.2d 564 (1985), bail jumping is not vacated because the charge for which defendant jumped bail is deemed unconstitutional, *State v. Downing,* 122 Wn.App.. 185 (2004), distinguishing *State v. French,* 21 Wn.App.2d 891 (2022); III.

***State v. Booker***, 22 Wn.App.2d 80 (2022)

Following sentencing law enforcement, not the court, has discretion to take a DNA sample regardless of whether it has previously been done, RCW 42.43.754(4); I.

# SENTENCING REFORM ACT
## Aggravating Factors -Exceptional Sentences

***State v. Baker***, 40 Wn.App. 845 (1985)

**Well-planned** attempted escape does not, by itself, justify sentence outside standard range, RCW 9.94A.120(2); use of **weapons, injuries, hostage-taking** or destruction of property could be a substantial and compelling reason for an exceptional sentence; court may consider degree of **sophistication** and planning as an aggravating factor for any crime, RCW 9.94A.390; II.

***State v. Hartley***, 41 Wn.App. 669 (1985)

**Criminal history** is not a factor which justifies an exceptional sentence, former RCW 9.94A.210 [recodified ast 9.94A.585]; II.

***State v. Wood***, 42 Wn.App. 78 (1985)

Where the **victim's age** is an element of the offense (indecent liberties), then age will generally not provide justification for exceeding the standard range, unless the victim is particularly vulnerable due to extreme youth; where court finds that victim was particularly vulnerable due to age, court may consider a prior crime as an aggravating factor, even though the prior is already factored into the standard range, if the prior crime involved a vulnerable victim; II.

***State v. Harp***, 43 Wn.App. 340 (1986)

Defendant pleaded guilty to statutory rape, alleged to have occurred during a two month period; trial court found, as an aggravating factor, additional incidents, with no stipulation to the incidents, RCW 9.94A.370, exceeded standard range; trial court also found defendant was not amenable to treatment and had not shown remorse: held: absent a stipulation, court may not consider **uncharged criminal activity** when deciding whether to impose a sentence outside the standard range; II.

***State v. Taatjes***, 43 Wn.App. 109 (1986)

Manufacturing controlled substances for distribution to others establishes that the defendant occupies a **high position in the drug distribution hierarchy**, RCW 9.94.390(4)(e), justifying an exceptional sentence; II.

***State v. Payne***, 45 Wn.App. 528 (1986)

In the absence of corroboration of a history of similar acts, a psychological report predicting that the defendant is **dangerous** is insufficient to support an exceptional sentence, *State v. Pryor*, 115 Wn.2d 445 (1990), *State v. Stuhr*, 58 Wn.App. 660 (1990); a finding that a crime was committed with **deliberate cruelty** without an explanation on the record will not support an exceptional sentence, RCW 9.94A.390; *see: State v. George*, 67 Wn.App. 217 (1992); II.

***State v. Swanson***, 45 Wn.App. 712 (1986)

Following conviction of taking and riding a motor vehicle, court imposes exceptional sentence, finding that defendant caused **unusual economic damage** by destroying the vehicle; held: court may not depart from sentence range by relying on facts which constitute a separate, uncharged crime, RCW 9.94A.370; *accord*: *State v. Tunnell*, 51 Wn.App. 274 (1988), *State v. Grewe*, 59 Wn.App. 141, 145-46 (1990), *see: State v. Randoll*, 111 Wn.App. 578, 582-84 (2002); II.

***State v. Dennis***, 45 Wn.App. 893 (1986)

**Multiple penetration by multiple persons** of rape victim is aggravating circumstance justifying exceptional sentence; *see: State v. Herzog*, 69 Wn.App. 521 (1993); III.

***State v. Weaver***, 46 Wn.App. 35 (1986)

In vehicular assault case, court may consider as aggravating factors **history of alcohol abuse, disdain for rehabilitation**, *see: State v. Quiros*, 78 Wn.App. 134, 140-1 (1995), *but see: State v. Bolton*, 68 Wn.App. 211 (1992), driving without insurance, contempt of court for driving while license suspended, level of intoxication, driving as establishing that the offense was more onerous than contemplated by the legislature in setting sentence range; *accord*: *State v. Roberts*, 55 Wn.App. 573 (1989), *State v. Thomas*, 57 Wn.App. 403 (1990), *overruled, on other grounds, State v. Parker*, 132 Wn.2d 182 (1997), *State v. Perez*, 69 Wn.App. 132 (1993); *but see*: *State v. Dunivan*, 57 Wn.App. 332 (1990); III.

***State v. Ratliff***, 46 Wn.App. 325 (1986)

**Misdemeanor convictions** are aggravating factors justifying an exceptional sentence, *State v. Roberts*, 55 Wn.App. 573 (1989), *State v. Smith*, 58 Wn.App. 621 (1990), *State v. Vasquez*, 95 Wn.App. 12, 17 (1998), *State v. Teuber*, 109 Wn.App. 640 (2001), *State v. Atkinson*, 113 Wn.App. 661, 669 (2002), *see also*: *State v. Dunivan*, 57 Wn.App. 332 (1990); I.

***State v. Gonzales***, 46 Wn.App. 388 (1986)

Defendant is convicted of one count of burglary, search immediately after arrest discloses some property stolen from residence; victim testifies at real facts hearing, RCW 9.94A.370, that she lost much property not recovered, and that defendant's family members had worked in her home, court finds **major economic offense and breach of trust** in imposing exceptional sentence; held: no evidence that defendant stole the additional property, no evidence that defendant obtained or used inside information, thus findings not supported by the record, *see*: *State v. Jackson*, 55 Wn.App. 562 (1989), *cf.*: *State v. Harding*, 62 Wn.App. 245 (1991); court's additional finding that because SRA at the time required that defendant's priors count as one offense as they ran concurrently, former RCW 9.94A.360(11) [RCW 9.94A.525 (2013)] was too lenient was improper; III.

***State v. Nordby***, 106 Wn.2d 514 (1986)

In a vehicular assault case, RCW 46.61.522, striking a pedestrian is grounds for an exceptional sentence, as victim was **particularly vulnerable**, *State v. Thomas*, 57 Wn.App. 403 (1990), *overruled, on other grounds, State v. Parker*, 132 Wn.2d 182 (1997), *State v.*

*Chadderton*, 119 Wn.2d 390, 396 (1992), *State v. Cardenas*, 129 Wn.2d 1, 10-12 (1996), *see: State v. Barnett*, 104 Wn.App. 191, 204-05 (2001); fact that defendant intentionally turned steering wheel and turned it in direction of victim establishes a **higher mental state** (intent) than necessary to prove the offense (reckless or intoxication), justifying an exceptional sentence, *State v. Roberts*, 55 Wn.App. 573 (1989), *State v. Morris*, 87 Wn.App. 654, 663-5 (1997); **severity of injuries** may not justify an exceptional sentence, as serious bodily injury is an element of the offense, *State v. Bourgeois*, 72 Wn.App. 650, 661-4 (1994), *Cardenas*, *supra*, at 7, *State v. E.A.J.*, 116 Wn.App. 777, 789 (2003), *State v. Stubbs*, 170 Wn.2d 117 (2010); 6-3.

***State v. Oxborrow***, 106 Wn.2d 525 (1986)

A properly imposed exceptional sentence does not violate the "clearly excessive" standard, former RCW 9.94A.210(4)(b) [recodified as 9.94A.585], unless the length of the sentence is an abuse of discretion, taking into consideration the aggravating circumstances, RCW 9.94A.390, *see*: *State v. Dyer*, 61 Wn.App. 685 (1991), *State v. Halsey*, 140 Wn.App. 313, 324-26 (2007); **consecutive sentences** may be imposed if concurrent sentences would be "clearly too lenient," RCW 9.94A.390(4)(h), and the length of each sentence may exceed the presumptive range, subject to review for abuse of discretion, *see: State v. Vance*, 168 Wn.2d 754 (2010); 6-3.

***State v. Armstrong***, 106 Wn.2d 547 (1986)

Inflicting **multiple injuries** on a single victim is grounds for an exceptional sentence, former RCW 9.94A.390(3), *State v. Worl*, 58 Wn.App. 443 (1990), *State v. Crane*, 116 Wn.2d 315, 334 (1991), *State v. Hicks*, 61 Wn.App. 923 (1991), *State v. McClure*, 64 Wn.App. 528 (1992), *State v. Buckner*, 74 Wn.App. 889, 896-7 (1994), *aff'd, on other grounds*, 133 Wn.2d 63 (1997), *overruled, on other grounds*, *State v. Thomas*, 138 Wn.2d 630 (1999); **assaulting an infant** is grounds for exceptional sentence, former RCW 9.94A.390(2); **absence of aggravating circumstances**, former RCW 9.94A.390(1) is not a mitigating circumstance; five years for assault 2°, where sentence range is 12-14 months, is not an abuse of discretion here; *see: State v. George*, 67 Wn.App. 217 (1992); 5-4.

***State v. Olive***, 47 Wn.App. 147 (1987)

While **future dangerousness** itself is not grounds for an exceptional sentence, *State v. Payne*, 45 Wn.App. 528 (1986), here it is corroborated by other similar, prior sexually deviant acts and is thus a proper factor to consider, *but see*: *State v. Pryor*, 115 Wn.2d 445 (1990); **prior misdemeanors** may be grounds to enhance sentence as long as they are not factored into the sentence range, *State v. Ratliff*, 46 Wn.App. 325 (1986), *State v. Smith*, 58 Wn.App. 621 (1990), *State v. Teuber*, 109 Wn.App. 640 (2001); II.

***State v. Fisher***, 108 Wn.2d 419 (1987)

In indecent liberties case with 5½ year old victim, **age** is proper aggravating factor even though element of offense is that victim was less than 14 years, *State v. Garibay*, 65 Wn.App. 919 (1992), *State v. Russell*, 69 Wn.App. 237 (1993), *State v. J.S.*, 70 Wn.App. 659 (1993), *State v. Bedker*, 74 Wn.App. 87, 94-5 (1994), *State v. Rotko*, 116 Wn.App. 230, 242-43 (2003), *see also*: *State v. Tunell*, 51 Wn.App. 274 (1988); whereas defendant was convicted of two counts, **multiplicity of incidents** is not proper aggravating factor, *State v. Tunell*, *supra*, *State v.*

*Pittman*, 54 Wn.App. 58 (1989), *State v. Smith*, 67 Wn.App. 81 (1992), *State v. Morris*, 87 Wn.App. 654, 660-3 (1997), *but see*: *State v. Brown*, 55 Wn.App. 738 (1989), *State v. Tili*, 148 Wn.2d 350 (2003), *State v. Harris*, 123 Wn.App. 906, 914-16 (2004), *overruled, on other grounds, State v. Hughes*, 154 Wn.2d 118 (2005), *abrogated, on other grounds, Washington v. Recuenco*, 548 U.S. 212, 165 L.Ed.2d 466 (2006); if multiple offenses resulted in multiple harms to multiple victims or increasingly severe harm to one victim, then multiple offense policy, RCW 9.94A.400, may apply, *State v. Holt*, 63 Wn.App. 226 (1991), *State v. Brown*, 91 Wn.App. 361 (1998), *see: State v. Smith*, 123 Wn.2d 51, 55-6 (1993), not here; no remand for resentencing, as Supreme Court finds that one factor affirmed justified exceptional sentence; 6-3.

***State v. Clinton***, 48 Wn.App. 671 (1987)

**Age** of rape victim (67 years) is sufficient by itself to justify exceptional sentence under "**particularly vulernable**" aggravating factor, *State v. Vandervlugt*, 56 Wn.App. 517 (1990), *State v. Sims*, 67 Wn.App. 50 (1992), *State v. Butler*, 75 Wn.App. 47, 52-3 (1994); use of a carrot to commit rape 1° does not justify exceptional sentence, as penetration by an object is already factored into grid; where one co-defendant is sentenced within sentence range and one gets exceptional sentence, state must justify disparity by setting forth a rational basis; I.

***State v. Hernandez***, 48 Wn.App. 751 (1987)

Abducting rape victim from her own front porch is not a substantial and compelling reason for exceptional sentence; **abduction, physical blows, verbal threats to life, threats with weapon** over two hours are not circumstances contemplated by rape 1° and are grounds for exceptional sentence; III.

***State v. Woody***, 48 Wn.App. 772 (1987)

A seven-year old indecent liberties victim is not **particularly vulnerable**, *State v. Garibay, 65 Wn.App.* 919 (1992); *but see*: *State v. Brown*, 55 Wn.App. 738 (1989) *State v. Overvold*, 64 Wn.App. 440 (1992); defendant, having been in treatment and thus being aware of psychological consequences of sexual acts on children, may be sentenced to exceptional sentence, *State v. Pryor*, 115 Wn.2d 445 (1990); **use of knife and threat of death** cannot be used to enhance for indecent liberties, as forcible compulsion is an element; II.

***State v. Dunaway***, 109 Wn.2d 207 (1987)

Because **planning** is already included in premeditation element, it is not an aggravating factor for murder 1°; shooting a victim, leaving room then returning and shooting again is **deliberate cruelty** and multiple incidents, *State v. Lindahl*, 114 Wn.App. 17 (2002), *see also: State v. Smith*, 82 Wn.App. 153, 164 (1996), *State v. Faagata*, 147 Wn.App. 236, 248-51 (2008), *see*: *State v. Worl*, 58 Wn.App. 443 (1990), *State v. George*, 67 Wn.App. 217 (1992); 9-0.

***State v. Holyoak***, 49 Wn.App. 691 (1987)

**Vulnerability** of victim is an aggravating factor where victim's size makes her more defenseless than ordinary to the type of assault perpetrated, *State v. Gore*, 143 Wn.2d 288, 316-18 (2001); *dicta* that assault with a gun makes victim's size irrelevant; repeated striking of victim with a rock plus strangulation plus repeated pounding of victim's head against cement establish **deliberate cruelty**, *State v. Harmon*, 50 Wn.App. 755 (1988), *State v. McClure*, 64 Wn.App.

528 (1992), *State v. Sims*, 67 Wn.App. 50 (1992), *State v. Faagata*, 147 Wn.App. 236, 248-51 (2008); a prior conviction that is factored into standard range may not be used to predict future dangerousness, *State v. Pryor*, 115 Wn.2d 445 (1990); *but see*: *State v. Roberts*, 55 Wn.App. 573 (1989); III.

***State v. Falling***, 50 Wn.App. 47 (1987)

In rape case, threatening to injure or kill victim, penetrating twice and repeatedly calling her a "bitch" is **deliberate cruelty** justifying exceptional sentence, *State v. Talley*, 83 Wn.App. 756, 761-3 (1996), *aff'd*, 134 Wn.2d 176 (1998), *overruled, in part sub nom.*, *State v. Taitt*, 93 Wn.App. 783, 790-91 (1999), *State v. Garnica*, 105 Wn.App. 762, 768-70 (2001), *State v. Tili*, 148 Wn.2d 350, 369-72 (2003), *State v. Monroe*, 135 Wn.App. 880 (2006), *but see*: *State v. Delarosa-Flores*, 59 Wn.App. 514 (1990), *State v. Barnett*, 104 Wn.App. 191, 205 (2001); raping victim twice is **multiple incidents**, justifying exceptional sentence, *State v. Herzog*, 69 Wn.App. 521 (1993); committing rape in victim's bedroom invades her **zone of privacy**, an aggravating circumstance, *State v. Hicks*, 61 Wn.App. 923 (1991), *State v. Lough*, 70 Wn.App. 302 (1993), *State v. Coleman*, 152 Wn.App. 552, 565-66 (2009), *aff'd*, 125 Wn.2d 847 (1995), *but see*: *State v. Post*, 59 Wn.App. 389 (1990), *State v. Campas*, 59 Wn.App. 568 (1990); I.

***State v. Tunell***, 51 Wn.App. 274 (1988)

In statutory rape case, very **serious psychological effects** from the crime and injury beyond the usual are grounds for an exceptional sentence; *State v. Wilson*, 96 Wn.App. 382, 387-89 (1999), *see: State v. George*, 67 Wn.App. 217 (1992); I.

***State v. Cook***, 52 Wn.App. 416 (1988)

Defendant's **lies** to court about name and criminal history are aggravating factors, *but see: State v. Martinez*, 66 Wn.App. 53 (1992); defendant's being on escape status, even if no escape charge is filed, is proof of future dangerousness and is thus an aggravating factor, *State v. Woody*, 48 Wn.App. 772, 779 (1987) *but see: State v. Pryor*, 115 Wn.2d 445 (1990), *State v. Hammond*, 65 Wn.App. 585 (1992); assaulting a custody officer while awaiting trial is an aggravating factor; **washed out juvenile convictions** may be used as aggravating factors; II.

***State v. Garnier***, 52 Wn.App. 657 (1988)

Committing burglaries on Sunday or on second stories of buildings do not establish a high degree of **sophistication**, RCW 9.94A.390(2)(c)(iii); where offender score grossly exceeds the maximum set forth in statute, RCW 9.94A.310 (here, 29 vs. 9+), exceptional sentence is appropriate, *see*: *State v. Stephens*, 116 Wn.2d 238 (1991), *State v. Whitehead*, 51 Wn.App. 841 (1988) *State v. Holt*, 63 Wn.App. 226 (1991); III.

***State v. Shephard***, 53 Wn.Ap. 194 (1988)

Familial relationship with indecent liberties victim is grounds for exceptional sentence, as victim is **particularly vulnerable**, RCW 9.94A.390(2); *accord*: *State v. Pryor*, 56 Wn.App. 107 (1989); *see*: *State v. Grewe*, 117 Wn.2d 211 (1991), *but see*: *State v. Brown*, 60 Wn.App. 60 (1990); post-SRA sentences for pre-SRA crimes may be based in part upon uncharged acts, *In re George*, 52 Wn.App. 135 (1988); III.

***State v. Davis***, 53 Wn.App. 306 (1989)

**Injuring others** in an accident resulting in vehicular homicide is an aggravating factor even though defendant was not charged with vehicular assault, as the injuries were a consequence of the charged crime, *see: State v. Bourne*, 90 Wn.App. 963 (1998); **prior alcohol offenses** plus numerous failures to complete treatment supports a finding of **future dangerousness**, *In re George*, 52 Wn.App. 135, 148 (1988), *State v. Thomas*, 57 Wn.App. 403 (1990), *but see: State v. Barnes*, 117 Wn.2d 701 (1991), *State v. Campas*, 59 Wn.App. 561 (1990); I.

***State v. Pockert***, 53 Wn.App. 491 (1989)

In arson 1° case, "getting even" with victim is not **deliberate cruelty** as malice is an element of the offense, *but see: State v. Tierney*, 74 Wn.App. 346, 354-6 (1994), *see: State v. Goodman*, 105 Wn.App. 355, 363-64 (2001); $100,000 damage is not a **major economic offense**; great potential for harm is not an aggravating factor as manifestly dangerous to human life is an element of the offense; III.

***State v. Bissell***, 53 Wn.App. 499 (1989)

Former employee who uses knowledge gained during employment to burglarize business uses position of trust, making offense **major economic offense**, an aggravating factor, RCW 9.94A.390(2)(c)(iv), *see*: *State v. Jackson*, 55 Wn.App. 562 (1989), *State v. Elza*, 87 Wn.App. 336, 340-2 (1997); II.

***State v. Edwards***, 53 Wn.App. 907 (1989)

In a pre-SRA rape case, **future dangerousness** is an aggravating factor where defendant flunks out of in-patient sexual psychopathy treatment program, *In re George*, 52 Wn.App. 135 (1988); I.

***State v. Crutchfield***, 53 Wn.App. 916 (1989), *overruled, in part, State v. Chadderton*, 119 Wn.2d 390, 396 (1992)

Defendant's **use of drugs** during homicide is not aggravating factor under real facts doctrine; **concealing body** after homicide is not aggravating factor as it is an additional uncharged crime and would violate defendant's privilege against self-incrimination, *see: State v. Vaughn*, 83 Wn.App. 669 (1996); **impact on victim's family** may be aggravating factor where impact is of such a distinctive nature that it is not normally associated with commission of the offense in question and where the impact is foreseeable to the defendant, *State v. Tuitoelau*, 64 Wn.App. 65 (1992), *State v. Cuevos-Dias*, 61 Wn.App. 902, 906 (1991), *State v. Johnson*, 69 Wn.App. 528 (1993), *aff'd*, 124 Wn.2d 57, 73-6 (1994),; trial court's belief that defendant acted intentionally is not an aggravating factor where defendant was convicted of reckless manslaughter, *but see: State v. Chadderton*, 119 Wn.2d 390 (1990); expectation of good time is not an aggravating factor; I.

***In re King***, 54 Wn.App. 50 (1989)

**Presence of a young child** during a sexual assault is an aggravating factor, *State v. Tuitoelau*, 64 Wn.App. 65 (1992); I.

***State v. Pittman***, 54 Wn.App. 58 (1989)

In assault 2° case, **use of firearm** and creating apprehension inhere in the offense and do not support an exceptional sentence; where multiple charges are filed, multiple victims does not support an exceptional sentence, *State v. Kidd*, 57 Wn.App. 95 (1990), *State v. Smith*, 67 Wn.App. 81 (1992); I.

***State v. Strauss***, 54 Wn.App. 408 (1989)

In rape case, holding victim by throat and telling her it was worth her life to cooperate is not **deliberate cruelty**, defined as "gratuitous violence, or other conduct which inflicts physical, psychological or emotional pain as an end in itself," *State v. George*, 67 Wn.App. 217 (1992); multiple penetrations without a weapon over a limited time is not deliberate cruelty, *distinguishing* *State v. Falling*, 50 Wn.App. 47 (1987), *see: State v. Strauss*, 119 Wn.2d 401 (1992), *but see: State v. Talley*, 83 Wn.App. 750, 761-3 (1996), *aff'd*, 134 Wn.2d 176 (1998), *overruled, in part, sub nom.*, *State v. Taitt*, 93 Wn.App. 783, 790-91 (1999), *State v. Tili*, 148 Wn.2d 350, 369-72 (2003); III.

***State v. Jackmon***, 55 Wn.App. 562 (1989)

To establish a disability as **victim vulnerability** for an exceptional sentence, state must prove that defendant knew or should have known of disability and that disability must have rendered the victim more vulnerable to the particular offense than a nondisabled victim, *State v. Mitchell*, 149 Wn.App. 716, 724-25 (2009), *aff'd, on other grounds*, 169 Wn.2d 437 (2010), *see also*: *State v. Grewe*, 117 Wn.2d 211 (1991), *State v. Serrano*, 95 Wn.App. 700, 712 (1999).

***State v. Roberts***, 55 Wn.App. 573 (1989)

In vehicular homicide case, trial court may consider prior negligent driving convictions as aggravating factors, *State v. Ratliff*, 46 Wn.App. 325 (1986); negligent driving where record reflects a certain blood-alcohol level may be considered alcohol-related conviction as aggravating factor; negligent driving that had been reduced from DUI may not, by itself, be considered alcohol-related conviction; **likelihood of reoffending** is proper aggravating factor where there had been frequent adverse contacts with law enforcement, lack of remorse, failure in alcohol treatment, *distinguishing* *State v. Holyoak*, 49 Wn.App. 691 (1987), *but see: State v. Barnes*, 117 Wn.2d 701 (1991), *State v. Bolton*, 68 Wn.App. 211 (1992); *cf.*: *State v. Dunivan*, 57 Wn.App. 332 (1990), *State v. Atkinson*, 113 Wn.App. 661, 669 (2002); I.

***State v. Brown***, 55 Wn.App. 738 (1989)

In statutory rape case, **age** of victim alone is not sole basis to consider vulnerability; where defendant abused victim from early age and perpetuated abuse by psychological means designed to keep her within cycle of abuse, court may find aggravating factor of vulnerability; primary caretaker abusing child is an abuse of trust, justifying exceptional sentence, *State v. Grewe*, 117 Wn.2d 211 (1991), *State v. P.B.T.*, 67 Wn.App. 292 (1992); where defendant is convicted of more than one count, **multiple incidents** may be an aggravating factor where defendant is a "resident child molester," *distinguishing* *State v. Fisher*, 108 Wn.2d 419 (1987); II.

***State v. Creekmore***, 55 Wn.App. 852 (1989)

Multiple assaults against deceased on the day of a homicide where only one specific blow could have caused death establish **multiple incidents** as an aggravating factor; lack of mitigating factors is not an aggravating factor; anticipated earned good time is not a proper factor for an exceptional sentence; I.

***State v. Pryor***, 56 Wn.App. 107 (1989), *aff'd*, 115 Wn.2d 445 (1990), *overruled, on other grounds, State v. Ritchie*, 126 Wn.2d 388 (1995)

To support a finding of **future dangerousness** or predatory behavior as an aggravating factor in sex offense, court must find both a history of similar acts and evidence that defendant is not amenable to treatment, *distinguishing* *State v. Wood*, 42 Wn.App. 78 (1985); *see*: *State v. Shephard*, 53 Wn.App. 194, 201-2 (1988), *State v. Holyoak*, 49 Wn.App. 696, 696 (1987), *State v. Tunell*, 51 Wn.App. 274, 283 (1988), *State v. DeMara*, 62 Wn.App. 23 (1991), *State v. Strauss*, 119 Wn.2d 401 (1992), *Pers. Restraint of Rama*, 73 Wn.App. 503 (1994); an eight-year old is not **particularly vulnerable** due to extreme youth, *State v. Woody*, 48 Wn.App. 772 (1987), however because defendant was in care-giver role, victim was particularly vulnerable, *State v. Harp*, 43 Wn.App. 340, 343 (1986), *State v. Mitchell*, 149 Wn.App. 716, 724-25 (2009), *aff'd, on other grounds*, 169 Wn.2d 437 (2010), *but see*: *State v. Brown*, 60 Wn.App. 60 (1990); death threat by care-giver to particularly vulnerable child to assure silence supports a finding of **deliberate cruelty,** *cf.*: *State v. Strauss*, 54 Wn.App. 408 (1989); *see: State v. Barnes*, 117 Wn.2d 701 (1991), *State v. James*, 65 Wn.App. 58 (1992), *State v. George*, 67 Wn.App. 217 (1992); III.

***State v. Vandervlugt***, 56 Wn.App. 517 (1990)

**Consecutive sentences** as an exceptional sentence to protect the community affirmed where Western State Hospital reports that defendant is dangerous, prognosis for change is poor, RCW 9.94A.400(1)(a); I.

***State v. Daniels***, 56 Wn.App. 646 (1990)

**Multiple incidents** of child abuse over a long period of time is grounds for an exceptional sentence, does not violate real facts doctrine, RCW 9.94A.390(2)(e), *State v. Brown*, 55 Wn.App. 738 (1989), *State v. Overvold*, 64 Wn.App. 440 (1992), *State v. Quigg*, 72 Wn.App. 828, 840-1 (1994), "because it would be unrealistic for the [s]tate to charge a separate count for each particular instance of abuse," at 654; I.

***State v. Franklin***, 56 Wn.App. 915 (1990)

A second stab in attempted murder case establishes **deliberate cruelty**, *State v. Worl*, 58 Wn.App. 443 (1990), *State v. Lindahl*, 114 Wn.App. 1, 16 (2002), *State v. Faagata*, 147 Wn.App. 236, 248-51 (2008), *see: State v. Valentine*, 108 Wn.App. 24, 29-30 (2001), does not inhere in premeditation element, *State v. Scott*, 72 Wn.App. 207, 215-7 (1994); "deliberate cruelty" is not vague; III.

***State v. Kidd***, 57 Wn.App. 95 (1990)

Shooting at police is not an aggravating factor in absence of evidence that defendant knew he was shooting at police, *see:* *State v. Anderson*, 72 Wn.App. 453, 465 (1994); unprovoked assault on unarmed victims is not, by itself, **deliberate cruelty**; shooting a person

two times in rapid succession is not deliberate cruelty, *distinguishing* *State v. Dunaway*, 109 Wn.2d 207, 219 (1987), *State v. Faagata*, 147 Wn.App. 236, 248-51 (2008); shooting point blank is an unusually severe injury, not deliberate cruelty; I.

***State v. Dunivan***, 57 Wn.App. 332 (1990)

In vehicular homicide case, court may consider **washed-out** DUI convictions as aggravating factor in determining whether offender is a significantly more active criminal than the score itself suggests, *State v. McAlpin*, 108 Wn.2d 458 (1987), *State v. Ratliff*, 46 Wn.App. 466 (1987), *State v. Oksoktaruk*, 70 Wn.App. 768 (1993), *State v. Souther*, 100 Wn.App. 701, 720-21 (2000), *State v. Rawls*, 114 Wn.App. 719 (2002); here, two prior washed-out DUIs do not demonstrate a callous disregard of the consequences of alcohol abuse, thus exceptional sentence reversed, *distinguishing* *State v. Roberts*, 55 Wn.App. 573, 583 (1989); *State v. Weaver*, 46 Wn.App. 35, 43 (1986); II.

***State v. Thomas***, 57 Wn.App. 403 (1990), *overruled, on other grounds, State v. Parker*, 132 Wn.2d 182 (1997)

To find **future dangerousness due to alcohol abuse**, court must find both history of similar offenses and evidence defendant is not amenable to treatment, *State v. Pryor*, 115 Wn.2d 445 (1990), *State v. Davis*, 53 Wn.App. 306, 314-5 (1989); *but see:* *State v. Barnes*, 117 Wn.2d 701 (1991), *State v. Bolton*, 68 Wn.App. 211 (1992); III.

***State v. Wood***, 57 Wn.App. 792 (1990)

Aggravated or egregious **lack of remorse** is aggravating factor, *State v. Ross*, 71 Wn.App. 556, 563 (1993), *State v. Lindahl*, 114 Wn.App. 1, 18 (2002), *see also:* *State v. Garibay*, 65 Wn.App. 919 (1992), *see:* *Pers. Restraint of Ecklund*, 139 Wn.2d 166 (1999); **sophistication** of a kind not usually associated with commission of offense is aggravating factor, *State v. Vermillion*, 66 Wn.App. 332 (1992), *State v. Ross*, *supra*, at 564-5; II.

***State v. Handley***, 115 Wn.2d 275 (1990)

A defendant's lack of intent that victim not be injured is not controlling when defendant knew or should have known that victim was **particularly vulnerable** and that it was likely victim would be injured; defendant need not be physically present at scene to have abused a position of trust; *affirms, on somewhat different grounds*, *State v. Handley*, 54 Wn.App. 377 (1989); 9-0.

***State v. Gutierrez***, 58 Wn.App. 70 (1990)

Imposing exceptional sentence because sentence range is insufficient due to release on good time credit is improper; sentencing judge must specify facts and reasons relied upon in arriving at the imposition of each exceptional sentence on each count, even if counts run concurrently; I.

***State v. Payne***, 58 Wn.App. 215 (1990)

Inflicting **serious bodily injury** cannot be aggravating factor for **murder** as it inheres in crime charged; where victim dies instantly, then heinous, cruel or depraved manner is not an

aggravating factor; victim is not **particularly vulnerable** where she is shot in the back at home, off guard, *State v. Wall*, 46 Wn.App. 218 (1986); I.

***State v. Stevens***, 58 Wn.App. 478 (1990)

**Abuse of trust** is an aggravating factor for a babysitter convicted of statutory rape, *State v. Chadderton*, 119 Wn.2d 390 (1992), *State v. P.B.T.*, 67 Wn.App. 292 (1992); absent a special first-time offender sentence or sexual offender option, court cannot order defendant to enter a program upon release; I.

***State v. Smith***, 58 Wn.App. 621 (1990), *rev'd sub nom., State v.Barnes*, 117 Wn.2d 701 (1991)

Sniper shoots a stranger; held: (1) **random, senseless irrational violent act** committed without warning is an aggravating factor, (2) **history of violent crimes**, including misdemeanors not included in offender score, justify departure from sentence range, *State v. McAlpin*, 108 Wn.2d 458, 464 (1987), *State v. Olive*, 47 Wn.App. 147, 150 (1987), *State v. Rawls*, 114 Wn.App. 719 (2002), (3) where present conviction could affect parole status independently of the sentence, then **parole status** is not an aggravating factor, *cf.: State v. George*, 67 Wn.App. 217 (1992), (4) **multiple offense policy**, RCW 9.94A.390(2)(g) applies only to the determination of whether *current* offenses should be served concurrently or consecutively, does not apply to adjust for prior felony convictions, (5) **psychological disorder** with low probability of success may justify an exceptional sentence; *but see: State v. Barnes*, 117 Wn.2d 701 (1991) re: last factor, *see also: State v. Perez*, 69 Wn.App. 133 (1993); I.

***State v. Stuhr***, 58 Wn.App. 660 (1990)

Merely being a guest in murder victim's home is not a **position of trust**, RCW 9.94A.390(2)(c)(iv), to justify exceptional sentence, *see: State v. P.B.T.*, 67 Wn.App. 292 (1992); **lack of remorse** is an aggravating factor, *State v. Creekmore*, 55 Wn.App. 852, 862 (1989), *State v. Lindahl*, 114 Wn.App. 1, 18-19 (2002); II.

***State v. Sly***, 58 Wn.App. 740 (1990)

Failure to object to finding of vulnerability based upon size of victim who appeared in court, *State v. Payne*, 45 Wn.App. 528 (1986), precludes review of issue, *but see: State v. Paine*, 69 Wn.App. 873 (1993); throwing rock at robbery 2° victim while she was getting money for robber is **deliberate cruelty**, *State v. Strauss*, 54 Wn.App. 408, 418 (1989), however the fact of rock throwing establishes uncharged crime of robbery 1°, thus not a proper aggravating factor, *State v. Crutchfield*, 53 Wn.App. 916 (1989), *, overruled, on other grounds, State v. Chadderton*, 119 Wn.2d 390, 396 (1992), RCW 9.94A.370(2); *see also: State v. Tierney*, 74 Wn.App. 346, 350-4 (1994); I.

***State v. Post***, 59 Wn.App. 389 (1990), *aff'd*, 118 Wn.2d 596 (1992)

In rape 1° and burglary 1° case, choking to exact compliance, multiple attempts at vaginal penetration with one actual penetration over as much as one hour is not **deliberate cruelty**, *State v. Strauss*, 54 Wn.App. 408 (1989), *distinguishing State v. Falling*, 50 Wn.App. 47 (1987), *but see: State v. Talley*, 83 Wn.App. 750, 761-3 (1996), *aff'd*, 134 Wn.2d 176 (1998), *overruled, in part, sub nom., State v. Taitt*, 93 Wn.App. 783, 790-91 (1999), *State v. Tili*, 148 Wn.2d 350, 369-72 (2003), *State v. Monroe*, 135 Wn.App. 880 (2006); invasion of victim's **zone**

**of privacy** is not an aggravating factor where unlawful entry into victim's home is an element of offense (here, burglary), *distinguishing* *State v. Falling, supra*; *see*: *State v. Hicks*, 61 Wn.App. 923 (1991), *State v. Harding*, 62 Wn.App. 245, 249-50 (1991), *but see:* *State v. Lough*, 70 Wn.App. 302 (1993), *aff'd,* 125 Wn.2d 847 (1995), *State v. Coleman*, 152 Wn.App. 552, 565-66 (2009); I.

***State v. Delarosa-Flores***, 59 Wn.App. 514 (1990)

Vaginal, anal, oral rape of 67-year old, slapping more than once, calling victim "stupid lady," holding scissors is not **deliberate cruelty**, as trauma was not significantly more serious than is typical, *distinguishing* *State v. Falling*, 50 Wn.App. 47, 55 (1987), *but see:* *State v. Herzog*, 69 Wn.App. 521 (1993), *State v. Vaughn*, 83 Wn.App. 669, 677-8 (1996), *State v. Garnica*, 105 Wn.App. 762, 768-70 (2001)` *State v. Monroe*, 135 Wn.App. 880 (2006); mere claim of innocence is insufficient to establish **lack of remorse**, *distinguishing* *State v. Ratliff*, 46 Wn.App. 466, 470 (1987), *State v. Creekmore*, 55 Wn.App. 852, 861-62 (1989)(opinion is silent as to whether defendant testified at trial); III.

***State v. Campas***, 59 Wn.App. 561 (1990), *remanded*, 118 Wn.2d 1014 (1992), *for reconsideration in light of* *State v. Barnes*, 117 Wn.2d 701 (1991)

Expert testimony that defendant's drug use can lead to uncontrolled behavior, that condition is deteriorating, and defendant was unwilling or unable to complete treatment support **future dangerousness** finding, *State v. Davis*, 53 Wn.App. 306 (1989); murder may be **deliberately cruel**; catching victim by surprise, attacking from rear is not **abuse of trust**; Division II doubts that invasion of **zone of privacy** supports an exceptional sentence, *State v. Lough*, 70 Wn.App. 302 (1993), *aff'd,* 125 Wn.2d 847 (1995), [N.B.: Division I holds that this *dicta* was overruled in *State v. Collicott*, 118 Wn.2d 649, 662 (1992)], *State v. Coleman*, 152 Wn.App. 552, 565-66 (2009), *but see:* *State v. Falling*, 50 Wn.App. 47 (1987), *State v. Hicks*, 61 Wn.App. 923 (1991).

***State v. Jones***, 59 Wn.App. 744 (1990)

In child manslaughter case, *mens rea* element has no bearing upon whether defendant **abused trust** and knew of **victim's vulnerability**; victim vulnerability is an aggravating factor where father kills four-month old child; extreme **youth** is an aggravating factor in imposing exceptional sentence for manslaughter; *see:* *State v. Chadderton*, 119 Wn.2d 390 (1992), *State v. Cardenas*, 129 Wn.2d 1, 11-12 (1996); I.

***State v. Hobbs***, 60 Wn.App. 19 (1990)

Trial court's finding that **extreme emotional distress** justified exceptional sentence is unsupported by expert testimony that defendant's condition significantly impaired his capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the law, thus reversed, *State v. Rogers*, 112 Wn.2d 180 (1989); in domestic violence case, subsequent reconciliation is not a mitigating factor; I.

***State v. Brown***, 60 Wn.App. 60 (1990)

Father is convicted of assault 2° for beating his 11-year old son, trial court finds **abuse of trust and vulnerability** as aggravating factors; held: a natural parent's use of unreasonable force

is not abuse of trust, *distinguishing* State v. Harp, 43 Wn.App. 340 (1986)(stepfather), *State v. Shephard*, 53 Wn.App. 194 (1988)(uncle), *State v. Pryor*, 56 Wn.App. 107 (1989), *aff'd*, 115 Wn.2d 445 (1990)(baby-sitter), *but see: State v. Chadderton*, 119 Wn.2d 390 (1992), nor is victim particularly vulnerable as age, size and condition are built into the offense, RCW 9A.16.100, *see*: *State v. Grewe*, 117 Wn.2d 211 (1991); 90-month sentence based upon trial court's desire to incarcerate defendant until child reaches majority was clearly excessive; even where imposing exceptional sentence, trial court must calculate standard range, *distinguishing* *State v. Thomas*, 57 Wn.App. 403, 411 (1990); I.

***State v. Stephens***, 116 Wn.2d 238 (1991), *overruled, in part, State v. Hughes*, 154 Wn.2d 118, 140 (1991), *abrogated, on other grounds, Washington v. Recuenco*, 548 U.S. 212, 165 L.Ed.2d 466 (2006)

Where standard sentence range would result in there being no additional punishment for one or more of the current convictions because offender score is higher than maximum statutory offender score, then an exceptional sentence may be appropriate, *State v. Stewart*, 125 Wn.2d 893, 898 (1995), *reversing State v. Stephens*, 57 Wn.App. 748 (1990); *see: State v. Garnier*, 52 Wn.App. 657 (1988), *State v. Coats*, 84 Wn.App. 623, 627-9 (1997), *State v. Holt*, 63 Wn.App. 226 (1991), *State v. Modest*, 88 Wn.App. 239, 253 (1997), *State v. McCollum*, 88 Wn.App. 977, 985 (1997), *State v. Brown*, 91 Wn.App. 361 (1998), *State v. McNeal*, 98 Wn.App. 585, 597-99 (1999), *aff'd, on other grounds,* 145 Wn.2d 352 (2002), *State v. Borg*, 145 Wn.2d 329, 336-40 (2001) , *State v. France*, 176 Wn.App. 463, 468-73 (2013); 9-0.

***State v. Crane***, 116 Wn.2d 315 (1991)

Multiple bruises and burns inflicted upon an already sick and injured child demonstrate **deliberate cruelty**, *State v. Buckner*, 74 Wn.App. 889, 896-7 (1994), *aff'd, on other grounds,* 133 Wn.2d 1997), *overruled, on other grounds, State v. Thomas,* 138 Wn.2d 630 (1999), *State v. Copeland*, 130 Wn.2d 244, 295-7 (1996).

***State v. Farmer***, 116 Wn.2d 414 (1991)

Knowingly patronizing a juvenile prostitute while infected with AIDS is **deliberate cruelty,** *cf.: State v. Ferguson*, 142 Wn.2d 631 (2001); 9-0.

***State v. Miller***, 60 Wn.App. 914 (1991)

Prior sex offense followed by treatment is insufficient by itself to justify finding of **future dangerousness** based upon a lack of amenability to treatment, *but see*: *State v. Jackson*, 62 Wn.App. 53, 61 (1991); while a mental health evaluation may not be required to find a lack of amenability to treatment, *State v. Stewart*, 72 Wn.App. 885, 896 (1994), *see: State v. McNallie*, 123 Wn.2d 585 (1994), *cf.: State v. Pryor*, 115 Wn.2d 445, 454 (1990), nothing in record here indicates whether defendant's prior treatment was successful or whether he currently is amenable to treatment, *Pers. Restraint of Rama*, 73 Wn.App. 503 (1994); **washed-out prior** can be considered in determining future dangerousness; I.

***State v. Batista***, 116 Wn.2d 777 (1991)

"**Clearly too lenient**" factor, RCW 9.94A.390(2)(f), can be remedied by either lengthening concurrent sentences or by imposing consecutive sentences if there are (1) egregious

effects of defendant's multiple offenses and (2) the level of culpability is beyond what is accounted for in presumptive sentence, *State v. Smith*, 123 Wn.2d 51, 55-6 (1993); conclusory statement that presumptive sentence is clearly too lenient without supporting factual basis is inadequate, *State v. Fisher*, 108 Wn.2d 419 (1987), *State v. DeMara*, 62 Wn.App. 23 (1991); where exceptional concurrent sentences are not justified, then neither is an exceptional consecutive sentence, as standard is the same; reverses *State v. Hernandez*, 54 Wn.App. 323 (1989); *see: State v. McClure*, 64 Wn.App. 528 (1992); 9-0.

***State v. Harper***, 62 Wn.App. 69 (1991)

Where standard range is greater than one year, trial court cannot order defendant into **drug treatment** merely because crimes were caused by addiction, *State v. Gaines*, 122 Wn.2d 502 (1993), *State v. Pennington*, 112 Wn.2d 606, 610 (1989), *State v. Estrella*, 108 Wn.2d 527 (1987), *State v. Laik*, 62 Wn.App. 734 (1991), *State v. Paine*, 69 Wn.App. 873 (1993), *distinguishing State v. Bernhard*, 108 Wn.2d 527 (1987); I.

***State v. Henshaw***, 62 Wn.App. 135 (1991)

Exerting pressure on victim to get her to recant is not an aggravating factor, as it constitutes an additional crime (witness tampering or intimidating a witness), RCW 9.94A.370, *distinguishing State v. Cook*, 52 Wn.App. 416, 421 (1988); difficulty in prosecution of uncharged crime does not excuse breach of real facts doctrine; I.

***State v. Harding***, 62 Wn.App. 245 (1991)

Rape defendant, entrusted with a key to victim's apartment to clean it, abused trust, supporting exceptional sentence, *distinguishing State v. Gonzales*, 46 Wn.App. 388, 406 (1986); I.

***State v. Guerin***, 63 Wn.App. 117 (1991)

An exceptional sentence in sex offense may include more than a year of community placement following release, RCW 9.94A.120(8), *State v. Bernhard*, 108 Wn.2d 527, 533, (1987), *overruled on other grounds*, *State v. Shove*, 113 Wn.2d 83 (1989), *Postsentence Review of Smith*, 139 Wn.App. 599 (2007), *see: State v. Williamson*, 72 Wn.App. 619, 622 n. 6 (1994), *State v. Schmeck*, 98 Wn.App. 647 (1999); II.

***State v. Barnes***, 117 Wn.2d 701 (1991)

**Future dangerousness** is not aggravating factor in nonsexual offense cases absent specific legislation, *distinguishing State v. Pryor*, 115 Wn.2d 445 (1990); *reverses, in part, State v. Barnes*, 58 Wn.App. 465 (1990), *State v. Smith*, 58 Wn.App. 621 (1990), *State v. Worl*, 58 Wn.App. 443 (1990), *State v. Stark*, 66 Wn.App. 423 (1992); *see: Pers. Restraint of Rama*, 73 Wn.App. 503 (1994), *State v. Post*, 118 Wn.2d 596, 615 (1992); 6-3.

***State v. Soderquist***, 63 Wn.App. 144 (1991)

**Abuse of trust** and **victim vulnerability** are aggravating factors for rape 2° by forcible compulsion, RCW 9A.44.050(1)(a), *State v. Grewe*, 117 Wn.2d 211 (1991); III.

***State v. Warren***, 63 Wn.App. 477 (1991)

Defendant is acquitted of attempted murder 2°, convicted of lesser assault 3° by criminal negligence, receives exceptional sentence; held: because injuries were more serious than typically involved in crime, **seriousness and multiplicity of injuries** are proper aggravating factors, *State v. Quiros*, 78 Wn.App. 134, 141-2 (1995), *see: State v. Cowen*, 87 Wn.App. 45, 53-6 (1997), *see also: State v. Stubbs*, 170 Wn.2d 117 (2010), irrespective of absence of finding of intent; "alcohol-firearms milieu" is unlikely aggravating factor; II.

***State v. Collicott***, 118 Wn.2d 649 (1992)

Upon remand, trial court may impose exceptional sentence even though one was not imposed at the prior sentencing, *State v. Brown*, 193 Wn.2d 280 (2019), *see: State v. Lessley*, 118 Wn.2d 773 (1992), *State v. Tili*, 148 Wn.2d 350 (2003), *State v. White*, 123 Wn.App. 106 (2004), *but see: State v. Ameline*, 118 Wn.App. 128 (2003); 9-0.

***State v. Tuitoelau***, 64 Wn.App. 65 (1992)

Psychological **trauma** to rape victim due to rape occurring in victim's child's presence is an aggravating factor, *but see: State v. Cuevas-Diaz*, 61 Wn.App. 902, 906-7 (1991); prosecutor's assertion of a fact, adopted by trial court in findings and not objected to by defense, may be considered at sentencing, *State v. Handley*, 115 Wn.2d 275, 282-3 (1990), *State v. Herzog*, 112 Wn.2d 419, 430-1 (1989); I.

***State v. Overvold***, 64 Wn.App. 440 (1992)

In indecent liberties case, while **age** of child at offense alone does not establish particular vulnerability, *State v. Woody*, 48 Wn.App. 772, 777 (1987), trial court may consider the fact that abuse started at an extremely young age in terms of consequent psychological **vulnerability**, *State v. Brown*, 55 Wn.App. 738, 754 (1989), *State v. Jennings*, 106 Wn.App. 532 (2001); while defendant being victim's father does not require a finding of vulnerability, length of relationship within household may establish particular vulnerability, *State v. Fisher*, 108 Wn.2d 419, 427 (1987), *State v. Hamby*, 69 Wn.App. 131 (1993), *State v. J.S.*, 70 Wn.App. 659 (1993); promises to stop abuse is not an aggravating factor; where defendant agrees that court may consider a witness statement to support *Alford* plea, then in absence of objection court may consider same at sentencing, *see: State v. Bell*, 116 Wn.App. 678 (2003), *distinguishing State v. Young*, 51 Wn.App. 517, 521-2 (1988); I.

***State v. McClure***, 64 Wn.App. 528 (1992)

**Multiple blows** in which injuries vastly exceed those of most assault 2° victims in number and severity is an aggravating factor, *State v. Armstrong*, 106 Wn.2d 547 (1986), *State v. Harmon*, 50 Wn.App. 755 (1988), *State v. Holyoak*, 49 Wn.App. 691 (1987); evidence of a brief interruption between infliction of injuries is not required; a single aggravating factor which applies to only one of two offenses is insufficient to support both an exceptional sentence and consecutive sentences, at 534, *Pers. Restraint of Holmes*, 69 Wn.App. 282 (1993); *see: State v. Quigg*, 72 Wn.App. 828, 895 (1994), *but see: State v. Smith*, 123 Wn.2d 51, 58 (1993), *State v. Flake*, 76 Wn.App. 174, 181-3 (1994), *State v. Worl*, 91 Wn.App. 88, 94-6 (1998); III.

***State v. Chadderton***, 119 Wn.2d 390 (1992)

Nursing home employee thrusts 87-year old woman into chair, breaking her hip which causes death, pleads guilty to manslaughter 1°, receives exceptional sentence; held: **victim vulnerability** is aggravating factor, as victim vulnerability is not inherent in reckless manslaughter, *State v. Stevens*, 58 Wn.App. 478 (1990), *State v. Nordby*, 106 Wn.2d 514 (1986), disapproving, in part, *State v. Crutchfield*, 53 Wn.App. 916 (1989); where caretaker commits crime against someone in his care, conduct may constitute reckless **abuse of trust** regardless of whether defendant used position of trust to facilitate commission of the crime, disapproving *State v. Crutchfield*, *supra*, *State v. Brown*, 60 Wn.App. 60, 76-77 (1990), affirming *State v. Chadderton*, 60 Wn.App. 907 (1991); *accord: State v. Wakefield*, 130 Wn.2d 464, 475-7 (1996); *remanded* for further fact finding to determine whether aggravating factors are sufficiently substantial and compelling to justify enhanced sentence; 9-0.

***State v. Strauss***, 119 Wn.2d 401 (1992)

Following reversal on appeal of exceptional sentence, trial court is not barred from imposing new exceptional sentence by double jeopardy clause, *United States v. DiFrancesco*, 66 L.Ed.2d 328 (1980), *Bullington v. Missouri*, 68 L.Ed.2d 270 (1981), *see: State v. Stewart*, 72 Wn.App. 885, 891-3 (1994); trial court may not reenter findings previously invalidated by appellate court, RAP 12.5; Rules of Evidence do not strictly apply at SRA sentencing hearings, ER 1101(c)(3), although due process clause requires that evidence be reliable and defendant be given opportunity to refute; to enhance for future dangerousness, a mental health care professional's evaluation is mandatory, *State v. Pryor*, 115 Wn.2d 445 (1990), *Pers. Rrestraint of Rama*, 73 Wn.App. 503 (1994), *but see: State v. McNallie*, 123 Wn.2d 585 (1994); report from community correction officer is insufficient; 9-0.

***State v. Smith***, 64 Wn.App. 620 (1992)

Murder committed to further the criminal enterprise of a gang is an aggravating factor, although **gang membership** by itself may not be, *State v. Riley*, 69 Wn.App. 349 (1993), *State v. Bluehorse*, 159 Wn.App. 410, 423-31 (2011), *but see: State v. Johnson*, 124 Wn.2d 57, 73-6 (1994), *cf.: State v. DeLeon*, 185 Wn.App. 171, 211-13 (2014), 185 Wn.2d 478, 489-91 (2016), *State v. Arredondo*, 190 Wn.App, 512, 534-36 (2015), *aff'd, on other grounds,* 188 Wn.2d 244 (2017); II.

***State v. James***, 65 Wn.App. 58 (1992)

In rape case, **threatening victim with death of her nearby sleeping child** is aggravating factor, which is not element of rape 1° where state proved defendant already threatened to kill victim of rape; failure of court to articulate reasons for number of months imposed in exceptional sentence is preferable and, in some instances necessary, *State v. Pryor*, 56 Wn.App. 107 (1989), *aff'd on other grounds*, 115 Wn.2d 445 (1990), but not fatal here, as sentence is not so excessive that no reasonable person would impose it; I.

***State v. Hammond***, 65 Wn.App. 585 (1992)

**Particular vulnerability/position of authority** was an aggravating factor for indecent liberties for 14 year old victim, former RCW 9A.44.100(1)(b), but not for 16 year old victim, former RCW 9A.44.100(1)(c); bail jumping is not an aggravating factor, *distinguishing State v. Cook*, 52 Wn.App. 416 (1988); I.

***State v. Garibay***, 65 Wn.App. 919 (1992)

**Particular vulnerability** due to extreme youth of four-year old child rape victim is a proper aggravating factor, *State v. Fisher*, 108 Wn.2d 419 (1987)(52 years old), *State v. Stevens*, 58 Wn.App. 478 (1990)(three-years old), *distinguishing State v. Woody*, 48 Wn.App. 772, 777 (1987)(seven-years old); **abuse of trust** is not an aggravating factor where there is no evidence that defendant used trust to facilitate commission of crime, *State v. Brown*, 60 Wn.App. 60, 74-6 (1990); absent evidence that defendant was symptomatic with gonorrhea at time of offense, insufficient evidence to support aggravating factor of **deliberate cruelty**; trial court may not use **defendant's silence** or continued denial of guilt as a basis for justifying exceptional sentence for **lack of remorse**, *cf.: Pers. Restraint of Ecklund*, 139 Wn.2d 166 (1999), *State v. Strauss*, 93 Wn.App. 691, 698-70 (1999), *State v. Serrano*, 95 Wn.App. 700, 708-9 (1999), nor is "mundane lack of remorse found in run-of-the-mill criminals" sufficient to aggravate, as lack of remorse must be aggravated or egregious, *State v. Vermillion*, 66 Wn.App. 332, 348 (1992), *see: State v. Wood*, 57 Wn.App. 792, 800 (1990), *State v. Lindahl*, 114 Wn.App. 1, 18-19 (2002); III.

***State v. Martinez***, 66 Wn.App. 53 (1992)

**Lying** under oath about identity and prior record does not justify an exceptional sentence under real facts doctrine, RCW 9.94A.370(2), as perjury is a separate offense; *but see: State v. Cook*, 52 Wn.App. 416 (1988); III.

***State v. Vermillion***, 66 Wn.App. 332 (1992)

Seeking out victims, assuming false identity and history, selecting suitably remote location of crime, carrying no identification, using car which could not be traced, possessing items to be used to tie up victims establish high degree of **sophistication** and planning not usually associated with commission of offense in question, *State v. Wood*, 57 Wn.App. 792, 801 (1987), *cf.: State v. Gore*, 143 Wn.2d 288, 318-21 (2001); creating a condition of trust does not establish a position of trust where relationship with victims was brief, defendant is not a caregiver, victims were not particularly vulnerable to trust; female real estate agents, working alone showing clients vacant houses, does not establish **particular vulnerability**; III.

***State v. Stark***, 66 Wn.App. 423 (1992)

**Future dangerousness** is not an aggravating factor to assault 2° by intentionally exposing sexual partners to HIV, RCW 9A.36.021(1)(e), as it is not a sexual offense, *State v. Barnes*, 117 Wn.2d 701 (1991), *but see: Pers. Restraint of Rama*, 73 Wn.App. 503 (1994); II.

***State v. Vazquez***, 66 Wn.App. 573 (1992)

Delivery of $20,000 worth of cocaine and $3000 worth of heroin justifies exceptional sentence as transfer was a quantity "substantially larger than for personal use," RCW 9.94A.390(2)(d); prior deportations and threats to kill if sent to prison do not support exceptional sentence, as future dangerousness is not a basis for exceptional sentence in nonsexual offense; II.

***State v. Hillman***, 66 Wn.App. 770 (1992)

**Murder of a "Good Samaritan"** is an aggravating factor, *see: Pers. Restraint of Crow,* 187 Wn.App. 414, 421-25 (2015); I.

***State v. Smith***, 67 Wn.App. 81 (1992), *aff'd on other grounds,* 123 Wn.2d 51 (1993)

**Multiple victims** is not proper aggravating factor where multiple charges are filed, *State v. Pittman*, 54 Wn.App. 58, 62-3 (1989), *State v. Fisher*, 108 Wn.2d 419, 426 (1987), *but see: State v. Tili*, 148 Wn.2d 350 (2003); consistent re-offending after release from prison is invalid aggravating factor, as it supports future dangerousness, *State v. Barnes*, 117 Wn.2d 701, 711 (1991); I.

***State v. George***, 67 Wn.App. 217 (1992), *overruled, in part, State v. Ritchie*, 126 Wn.2d 388, 395 (1995), *further overruled, in part, State v. Cardenas*, 129 Wn.2d 1, 7 (1996)

**Parole status** is an aggravating factor, *see: State v. Smith*, 58 Wn.App. 621, 627 (1990), *rev'd on other grounds, sub nom. State v. Barnes*, 117 Wn.2d 701 (1991); brutality of assault perpetrated on an elderly, defenseless victim qualifies as a worst case of robbery, assault and rape, justifying maximum sentence, *State v. Armstrong*, 106 Wn.2d 547, 555 (1986), *State v. Pryor*, 56 Wn.App. 107, 119 (1988), *State v. Woody*, 48 Wn.App. 772, 778 (1987); I.

***State v. P.B.T.***, 67 Wn.App. 292 (1992)

**Abuse of trust** is aggravating factor where scout leader sexually abuses younger scout, as respondent was both in position of trust as well as position of authority, *State v. Marcum*, 61 Wn.App. 611, 614-5 (1991), and there is circumstantial evidence that perpetrator abused position of trust to facilitate crime, *State v. Brown*, 55 Wn.App. 738, 754 (1989), *State v. Stevens*, 58 Wn.App. 478, 500 (1990), *State v. Grewe*, 117 Wn.2d 211, 218 (1991), *distinguishing State v. Stuhr*, 58 Wn.App. 660, 662-3 (1991); I.

***State v. Houf***, 120 Wn.2d 327 (1992)

Trial judge's belief that defendant **lied** under oath is not an aggravating factor due to real facts doctrine, RCW 9.94A.370(2), and because an exceptional sentence should be related to crime with which defendant is charged; *affirms State v. Houf*, 64 Wn.App. 580 (1992); *but see: United States v. Dunnigan*, 122 L.Ed.2d 445 (1993), *State v. Tierney*, 74 Wn.App. 346, 350-4 (1994); 9-0.

***State v. Bolton***, 68 Wn.App. 211 (1992)

In vehicular homicide case, callous disregard for effects of alcohol is equivalent of **future dangerousness**, and is thus not an aggravating factor, *State v. Barnes*, 117 Wn.2d 701 (1991), *State v. Bartlett*, 74 Wn.App. 580, 591-3 (1994), *aff'd, on other grounds,* 128 Wn.2d 323 (1995), *cf.: State v. Weaver*, 46 Wn.App. 35, 43 (1986), *State v. Roberts*, 55 Wn.App. 573 (1989), *State v. Thomas*, 57 Wn.App. 403 (1990), *but see: State v. Quiros*, 78 Wn.App. 134, 140-1 (1995), *State v. McNeal*, 98 Wn.App. 585, 599-600(1999), *aff'd, on other grounds,* 145 Wn.2d 352 (2002), *State v. Souther*, 100 Wn.App. 701 (2000); **pending charges** are not an aggravating factor, even if a violation of a condition of pretrial release; 2-1, I.

***United States v. Dunnigan***, 122 L.Ed.2d 445 (1993)

Enhancement of sentence for willful **perjury** based upon impeding or obstructing administration of justice, USSG § 3C1.1, does not undermine the constitutional right to testify; *cf.:* *State v. Houf*, 64 Wn.App. 580 (1992); 9-0.

***State v. Nguyen***, 68 Wn.App. 906 (1993)

Particular **vulnerability** of juveniles robbed at gunpoint support exceptional sentence when supported by evidence of cultural and social dynamics within the victims' immigrant community; high degree of **sophistication** is supported by defendants coming from California, obtaining weapons, identifying immigrant victims who own a jewelry store and speak same language as defendants, following them home, tying them up, standing guard, using threats to extort information; terrorizing victims to an extent unnecessary to achieve the criminal purpose establishes **deliberate cruelty**, *State v. Faagata*, 147 Wn.App. 236, 248-51 (2008); I.

***State v. Perez***, 69 Wn.App. 133 (1993)

**Exceptionally egregious facts** is a nonstatutory basis for an exceptional sentence, *see:* *State v. Weaver*, 46 Wn.App. 35, 43 (1986), *State v. Smith*, 58 Wn.App. 621, 624, 626-7 (1990), *rev'd on other grounds sub nom.* *State v. Barnes*, 117 Wn.2d 701, 712 (1991); in vehicular homicide case, high BAC, high speeds at night, weaving, headlights deliberately turned off, striking victim head on in opposite lane, previous DUIs make present offense more egregious than typical, justifying exceptional sentence; *accord:* *State v. Oksoktaruk*, 70 Wn.App. 768 (1993), *State v. Quiros*, 78 Wn.App. 134 (1995); *cf.:* *State v. Cardenas*, 129 Wn.2d 1, 9-10 (1996); 2-1, II.

***State v. Sanchez***, 69 Wn.App. 195 (1993)

Delivery of one kilogram of cocaine supports a **major VUCSA** finding, RCW 9.94A.390(2)(d), *State v. Gunther*, 45 Wn.App. 755 (1986), *State v. McCollum*, 88 Wn.App. 977, 983-7 (1997); where defendant is charged with and pleads to one count of delivery, and state proves three deliveries by a preponderance at sentencing, then trial court may find a major VUCSA, as real facts doctrine does not apply to uncharged crimes that are used for purposes of establishing an aggravating factor pursuant to former RCW 9.94A.390(2)(c), (d)(i), *cf.:* *State v. Henshaw*, 62 Wn.App. 135 (1991), *State v. Houf*, 120 Wn.2d 327 (1992); I.

***State v. Russell***, 69 Wn.App. 237 (1993)

In homicide by abuse case, RCW 9A.32.055, preventing medical aid, hiding pain-inflicted victim, partying after death of victim supports **lack of remorse** as aggravating factor, *State v. Creekmore*, 55 Wn.App. 852 (1989); 20-month old victim is **particularly vulnerable** even though statute defines age of victim up to 16 as an element, *State v. Fisher*, 108 Wn.2d 419 (1987); **abuse of trust** and **deliberate cruelty** are aggravating factors; 69 years in prison is not clearly excessive where court relied on prosecutor's recommendation of 60 years to life plus sentence imposed in another reported case, *Creekmore, supra;* II.

***State v. Elsberry***, 69 Wn.App. 793 (1993), *overruled, in part, State v. Ritchie,* 126 Wn.2d 388, 394-5 (1995)

Defendant is acquitted of assault 1° on two-year old, is convicted of lesser assault 2°, court imposes exceptional sentence eight times high end of standard range, which is within

standard range of greater offense; held: while exceptional sentence is supported, here there is no reasonable connection between reasons and duration, *State v. Chadderton*, 119 Wn.2d 390, 399 (1992); sentence is excessive, as reckless conduct is not so heinous or egregious that it justifies sentence meant for intentional conduct, plus court failed to consider mitigating factors that defendant summoned help, related well previously; 2-1, III.

***State v. Paine***, 69 Wn.App. 873 (1993)

State's failure to object to exceptional sentence based on drug addiction does not preclude state from appealing; when sentencing court acts without statutory authority, error can be addressed for first time on appeal, *State v. Anderson*, 58 Wn.App. 107 (1990), *State v. Loux*, 69 Wn.2d 855 (1966), *State v. Akin*, 77 Wn.App. 575, 578 (1995); *but see: State v. Danis*, 64 Wn.App. 814 (1992), *State v. Sly*, 58 Wn.App. 740 (1990), *State v. Wiley*, 63 Wn.App. 480 (1991); I.

***State v. Lough***, 70 Wn.App. 302 (1993), *aff'd on other grounds,* 125 Wn.2d 847 (1995)

Rape in victim's living room is an invasion of victim's **zone of privacy**, *State v. Falling*, 50 Wn.App. 47 (1987), *State v. Collicott*, 118 Wn.2d 649, 662 (1992), *but see: State v. Campas*, 59 Wn.App. 561, 568 (1990), *State v. Post*, 59 Wn.App. 389 (1990), *aff'd,* 118 Wn.2d 596, 614 (1992), *State v. Coleman*, 152 Wn.App. 552, 565-66 (2009); raping a physically helpless victim by drugging her supports a finding of planning and **sophistication** beyond that which is encompassed in the charge; 2-1, I.

***State v. Oksoktaruk***, 70 Wn.App. 768 (1993)

**Washed-out priors** which demonstrate a far-reaching history of criminal activity meriting treatment differently from defendants with similar offender scores is a proper aggravating factor, *State v. McAlpin*, 108 Wn.2d 458, 463 (1987), *State v. Dunivan*, 57 Wn.App. 332, 337 n. 1 (1990), *State v. Rawls*, 114 Wn.App. 719 (2002); in vehicular homicide case, **high blood alcohol level and egregious driving** are aggravating factors, *State v. Perez*, 69 Wn.App. 133, 139 (1993), *State v. Quiros*, 78 Wn.App. 134 (1995), *cf.: State v. Cardenas*, 129 Wn.2d 1, 9-10 (1996); **multiple victims** is an aggravating factor even if they encompass the same criminal conduct, *but see: State v. Morris*, 87 Wn.App. 654, 660-3 (1997); I.

***State v. Solberg***, 122 Wn.2d 688 (1993)

Whether drug case is **major VUCSA** violation, *i.e.*, more onerous than the "typical offense of its statutory definition," RCW 9.94A.390(2)(d), should not be determined by comparing the instant facts to other published appellate decisions, *reversing State v. Solberg*, 66 Wn.App. 66 (1992), *cf.: State v. Ermels*, 125 Wn.App. 195, 201 (2005), *aff'd, on other grounds*, 156 Wn.2d 528 (2006); 316 mature marijuana plants, 180 starter plants, 473 grams of cut marijuana, four halide lights plus irrigation equipment supports trial court's finding of a high degree of sophistication, justifying exceptional sentence, *see: State v. Hrycenko*, 85 Wn.App. 549 (1997); 6-3.

***State v. Smith***, 123 Wn.2d 51 (1993)

Exceeding by one point the maximum offender score set by SRA is sufficient to support the "**clearly too lenient**" criteria for an exceptional sentence, *State v. Fisher*, 108 Wn.2d 419,

423 (1987), *see: State v. Brown*, 91 Wn.App. 361 (1998); burglarizing occupied residences is an aggravating factor; *affirms State v. Smith*, 67 Wn.App. 81 (1992); trial court may impose an exceptional sentence consisting of lengthening of the term and consecutive terms, *State v. Flake*, 76 Wn.App. 174, 181-3 (1994), *State v. Worl*, 91 Wn.App. 88, 94-96 (1998); 6-3.

***State v. Ross***, 71 Wn.App. 556 (1993)

100 stab wounds justifies **deliberate cruelty** conclusion, *State v. Harmon*, 50 Wn.App. 755, 761 (1988), *State v. Faagata*, 147 Wn.App. 236, 248-51 (2008); trial court's disbelief of defendant's claim of remorse may establish a **lack of remorse**, *State v. Lindahl*, 114 Wn.App. 1, 18 (2002); picking robbery victims who are alone in their offices which are open to public establishes **vulnerability**, *cf.: State v. Barnett*, 104 Wn.App. 191, 204-05 (2001), which can be result of characteristics other than victim's physical condition or stature, *see: State v. Nguyen*, 68 Wn.App. 906 (1993), *State v. Cardenas*, 129 Wn.2d 1, 11-12 (1996); public place of business does not qualify as **zone of privacy**; "escalation of violence," on this record, is not aggravating factor; extraordinary danger to women is tantamount to **future dangerousness**, not a proper aggravating factor absent sex offense and mental health evidence, *State v. Pryor*, 115 Wn.2d 445, 454 (1990); trial court may use future dangerousness to determine length of an exceptional sentence, *State v. George*, 67 Wn.App. 217, 227 (1992), *State v. Hillman*, 66 Wn.App. 770-777-8 (1992), *State v. McCune*, 74 Wn.App. 395 (1994); length of exceptional sentence is proper unless it is based upon an impermissible reason or shocks the conscience of the reviewing court, *State v. Atkinson*, 113 Wn.App. 661 (2002); use of actuarial tables to determine what the length of a life sentence should be is proper; taking potential earned good time into account in setting length of sentence is improper, *State v. Fisher*, 108 Wn.2d 419, 429 (1987), State v. Buckner, 74 Wn.App. 889, 898-9 (1994), *aff'd, on other grounds*, 133 Wn.2d 63 (1997), *overruled, on other grounds, State v. Thomas*, 138 Wn.2d 630 (1999) *State v. Wakefield*, 130 Wn.2d 464, 477-8 (1996), *State v. Sledge*, 133 Wn.2d 828, 843-6 (1997), *Pers. Restraint of Crow*, 187 Wn.App. 414, 425-26 (2015); I.

***State v. Negrete***, 72 Wn.App. 62, 68-71 (1993)

Delivery of one oz. of cocaine, where evidence at sentencing establishes one gram is typical amount for personal use, is sufficient for an exceptional sentence due to size of transaction, RCW 9.94A.390(2)(d)(ii), *State v. McCollum*, 88 Wn.App. 977, 983-7 (1997); trial court may not use testimony at CrR 3.5 hearing, which does not focus on a statement's content, to enhance sentence, at 70; an offer to sell a large quantity of drugs is not sufficient evidence of an agreement or attempt to deliver to justify an exceptional sentence, at 70 n. 8; III.

***State v. Scott***, 72 Wn.App. 207 (1993), *aff'd,* 126 Wn.2d 388 (1995)

Prolonged attack, lingering suffering by murder victim, physical and sexual assault followed by strangulation establishes **deliberate cruelty**, at 214-5, *State v. Harmon*, 50 Wn.App. 755, 757-9 (1988), *State v. Copeland*, 130 Wn.2d 244, 295-7 (1996), *State v. Faagata*, 147 Wn.App. 236, 248-51 (2008); **multiple injuries** which may establish premeditation may also be used to justify an exceptional sentence in murder 1° case, at 215-7, *State v. Franklin*, 56 Wn.App. 915, 919 (1990), *State v. Drummer*, 54 Wn.App. 751, 759 (1989); 78-year old victim with Alzheimer's disease who walks with a cane, needs daily care and supervision, all known to defendant, establish **particular vulnerability**, at 217, RCW 9.94A.390(2)(b), *State v.*

*George*, 67 Wn.App. 217, 221-2 (1992), *State v. Hicks*, 61 Wn.App. 923, 930 (1991), *State v. Barnett*, 104 Wn.App. 191, 204-05 (2001); defendant's access to home to do chores for elderly victim establishes violation of a **position of trust;** defendant's **youth** (17 years) by itself does not establish mitigating factor, RCW 9.94A.535(1)(e), *State v. Ha'mim,* 132 Wn.2d 834 (1997), *overruled, in part, State v. O'Dell,* 183 Wn.2d 680, 688-99 (2015), *but see: State v. Ronquillo,* 190 Wn.App. 765 (2015), *State v. Solis-Diaz,* 194 Wn.App. 129 (2016), *reversed, on other grounds,* 187 Wn.2d 535 (2017); sentence is not clearly excessive where trial court relies solely on valid aggravating factors, duration does not shock appellate court's conscience, at 219-222, *State v. Halsey*, 140 Wn.App. 313, 324-26 (2007); (2-1 on duration); I.

***State v. McNallie***, 123 Wn.2d 585 (1994)

Current evaluation of sex offender states he is not amenable to treatment because he does not admit guilt, case being on appeal; prior history establishes reoffenses after treatment, trial court imposes exceptional sentence based on future dangerousness, *State v. Pryor*, 115 Wn.2d 445 (1990); held: without addressing due process/self-incrimination issue, a therapist's report indicating nonamenability is not necessary if there are other objective indications showing that defendant is not a candidate for successful rehabilitation, effectively modifying *State v. Strauss*, 119 Wn.2d 401, 420-1 (1992); *see: State v. Bedker*, 74 Wn.App. 87, 98-100 (1994), *State v. Cannon*, 130 Wn.2d 313, 333-4 (1996); 9-0.

***State v. Anderson***, 72 Wn.App. 453, 463-6 (1994)

Consecutive sentences for two or more current offenses is an exceptional sentence, RCW 9.94A.400(1)(a), 9.94A.120(15); "pattern of assault against police" is not an aggravating factor where prior assaults were factored into sentence range, *State v. McAlpin*, 108 Wn.2d 458, 463 (1987); knowingly **assaulting police** is an aggravating factor, *State v. Ramires*, 109 Wn.App. 749, 763-67 (2002), *see: State v. Kidd*, 57 Wn.App. 95, 104 (1990); I.

***State v. Bourgeois***, 72 Wn.App. 650, 656-8 (1994)

In assault 1° case, gunshot wounds not atypical of injuries by firearms do not establish particularly egregious injuries to justify juvenile court manifest injustice, *see: State v. Nordby*, 106 Wn.2d 514 (1986), *State v. George*, 67 Wn.App. 217, 222 (1992), *State v. Stubbs*, 170 Wn.2d 117 (2010); I.

***State v. Flores-Moreno***, 72 Wn.App. 733, 742-5 (1994)

Simple possession of a very large quantity of heroin is "**more onerous or egregious**" than is typical for that crime, justifying an exceptional sentence; II.

***State v. Quigg***, 72 Wn.App. 828 (1994)

Ongoing pattern of sexually abusing the same minor victim, involving **multiple incidents** over a prolonged time, is an exception to the real facts doctrine where there is proof of multiple incidents per count, at 840, *State v. Daniels*, 56 Wn.App. 646, 653-4 (1990), *State v. Brown*, 55 Wn.App. 738, 755-6 (1990); sexual contact over three days is insufficient to demonstrate an ongoing pattern, at 841, *State v. Barnett*, 104 Wn.App. 191, 204-05 (2001), *but see: State v. Epefanio*, 156 Wn.App. 378, 390-92 (2010); to establish **future dangerousness**, state must show (1) the offender has a history of similar acts of sexual deviancy, *State v. Post*, 118 Wn.2d 596,

615 (1992), *State v. DeMara*, 62 Wn.App. 23, 28-9 (1991), which may be with same victim of instant offense and (2) opinion of a mental health professional establishes defendant would not likely be amenable to treatment; exceptional sentences on two counts run consecutively involve multiple exceptional sentences which must be supported by more than one aggravating factor, *see:* *State v. McClure*, 64 Wn.App. 528, 534 (1992), *In re Holmes*, 69 Wn.App. 282, 292-3 (1993), *State v. Stewart*, 72 Wn.App. 885, 901 (1994); III.

***State v. Johnson***, 124 Wn.2d 57 (1994)

A defendant who discharges a deadly weapon at persons fleeing in cars near a public school in session should reasonably foresee impact on children and parents, thus **community impact**, where proved, justifies exceptional sentence, *State v. Jackson*, 150 Wn.2d 251, 273-76 (2003), *cf.:* *State v. Cuevas-Diaz*, 61 Wn.App. 902, 905 (1991), *State v. Talley*, 83 Wn.App. 750, 760 (1996), *aff'd*, 134 Wn.2d 176 (1998), *State v. Morris*, 87 Wn.App. 654, 665-6 (1997), *State v. Way*, 88 Wn.App. 830 (1997); **gang motivation** may support an exceptional sentence, although mere membership may be insufficient, *see:* *Dawson v. Delaware*, 117 L.Ed.2d 309 (1992), *State v. DeLeon*, 185 Wn.App. 171 (2014), 185 Wn.2d 478, 489-91 (2016), *State v. Arredondo*, 190 Wn.App, 512, 534-36 (2015) , *aff'd, on other grounds,* 188 Wn.2d 244 (2017); here, expert testimony established that the instant offense involved violent gang behavior; 9-0.

***Pers. Restraint of Rama***, 73 Wn.App. 503 (1994)

**Future dangerousness** is a factor in a nonsex crime where the motivation for the offense was sexual, *State v. Stewart*, 125 Wn.2d 893, 900 (1995), at 506-8; where defendant is treated and reoffends, evidence is still required to establish a lack of amenability to treatment, *State v. Miller*, 60 Wn.App. 914 (1991), thus remanded for sentence within standard range; I, 2-1.

***State v. Bedker***, 74 Wn.App. 87, 94-102 (1994)

Age of victim and prior victimization known to sex assault-defendant establish **victim vulnerability**, at 94-5, *State v. Fisher*, 108 Wn.2d 419, 423-5 (1987), *see:* *State v. Barnett*, 104 Wn.App. 191, 204-05 (2001); family relationship between victim and predator, where crimes occurred at the home of victim and defendant's father, establish **abuse of trust**, at 95-6, *State v. Garnica*, 105 Wn.App. 762, 771-72 (2001), *distinguishing* *State v. Stuhr*, 58 Wn.App. 660 (1991); to establish **future dangerousness**, *State v. Pryor*, 115 Wn.2d 445, 454 (1990), court may consider prior uncharged sexual offenses as an objective basis for establishing defendant's history of similar conduct, which does not violate real facts doctrine, *see:* *State v. Barnes*, 117 Wn.2d 701, 708 (1991); opinion of a mental health professional, to establish future dangerousness, may be based upon the record where defendant refuses to participate in an evaluation, *State v. McNallie*, 123 Wn.2d 585 589-91 (1994), *see:* *State v. Tinkham*, 74 Wn.App. 102 (1994), *State v. Bankes*, 114 Wn.App. 280 (2002); I.

***State v. Tierney***, 74 Wn.App. 346 (1994)

At arson and burglary sentencing, trial court enhances for **cruelty** based upon threats to victim and use of obscene language in a letter, all of which were admitted at trial; held: "real facts doctrine does not preclude reliance on facts that establish elements of additional uncharged crimes to enhance when those facts are part and parcel of the current offense. The real facts doctrine only bars reliance on those facts wholly unrelated to the current offense or those facts

which would elevate the degree of crime charged to a *greater* offense than charged," at 352, *distinguishing* *State v. Houf*, 120 Wn.2d 327, 331-4 (1992), *see:* *State v. Sly*, 58 Wn.App. 740, 749 (1990), *State v. Reynolds*, 80 Wn.App. 851, 856-8 (1996), *State v. Taitt*, 93 Wn.App. 783, 789-92 (1999), *State v. Randoll*, 111 Wn.App. 578, 582-84 (2002), *State v. Van Buren*, 112 Wn.App. 585 (2002); ongoing harassment justifies an exceptional sentence as deliberate cruelty for arson, *distinguishing* *State v. Pockert*, 53 Wn.App. 491, 497 (1989), *see:* *State v. Goodman*, 109 Wn.App. 355, 363-64 (2001); I.

***State v. McCune***, 74 Wn.App. 395 (1994)

Once court has determined that an exceptional sentence for **future dangerousness** is appropriate, then in setting the length of the exceptional sentence, the court may rely upon factors that could not be considered in determining the appropriateness of an exceptional sentence, such as similar prior offenses and minimal time between release from last offense and the commission of the current offense, *State v. Hillman*, 66 Wn.App. 770, 778 (1992), *State v. Ross*, 71 Wn.App. 556, 566-7 (1993), *State v. George*, 67 Wn.App. 217, 227 (1992); "worst case scenario" may support an exceptional sentence of less than the maximum sentence; III.

***State v. Buckner***, 74 Wn.App. 889, 897-9 (1994), *aff'd, on other grounds,* 133 Wn.2d 63 (1997), *overruled, in part, State v. Thomas,* 138 Wn.2d 630 (1999)

Trial court may not consider good time credits in imposing exceptional sentence, *State v. Ross*, 71 Wn.App. 556, 573 (1993), *State v. Wakefield*, 130 Wn.2d 464, 477-8 (1996), *State v. Sledge*, 133 Wn.2d 828, 843-6 (1997), *Pers. Restraint of Crow*, 187 Wn.App. 414, 425-26 (2015); III.

***State v. Butler***, 75 Wn.App. 47, 53 (1994)

In attempted rape case, advanced **age** (89 years) by itself is an aggravating factor, *State v. Hicks*, 61 Wn.App. 923, 930 (1991), *State v. Clinton*, 48 Wn.App. 671, 676 (1987), *distinguishing* *State v. Chadderton*, 119 Wn.2d 390 (1992); **rapid recidivism** (here, same day as release from prison) is an aggravating factor, *State v. Saltz*, 137 Wn.App. 576 (2007), *State v. Murray*, 190 Wn.2d 727 (2018), *see:* *State v. George*, 67 Wn.App. 217, 224 (1992), *State v. Goodman*, 109 Wn.App. 355, 360 (2001), *State v. Combs*, 156 Wn.App. 502 (2010); I.

***State v. Flake***, 76 Wn.App. 174 (1994)

Lengthened sentence and consecutive sentences may be imposed where more than one aggravating factor is proved, at 181-83, *State v. Smith*, 123 Wn.2d 51, 58 (1993), *distinguishing* *State v. McClure*, 64 Wn.App. 528, 534 (1992); seriousness of injuries and effect of injuries on family is a single aggravating factor, *State v. George*, 67 Wn.App. 217, 223 (1992), *State v. Tunell*, 51 Wn.App. 274, 279-80 (1988), *overruled on other grounds, State v. Batista*, 116 Wn.2d 777, 788 (1991); more than one victim of vehicular assault may support **multiple victim** aggravating factor, *State v. Quiros*, 78 Wn.App. 134, 141-2 (1995), even if only one is charged in information where fact that there were multiple victims was both acknowledged and proved at sentencing, does not violate real facts doctrine, *see:* *State v. Bourne*, 90 Wn.App. 963 (1998); driving without insurance is aggravating factor for vehicular assault; I.

***State v. Stewart***, 125 Wn.2d 893 (1995)

Where presumptive sentence is the same for one or two counts, trial court may find presumptive sentence to be **clearly too lenient** because defendant committed two crimes, *State v. Smith*, 123 Wn.2d 51, 56 (1993), *State v. Stephens*, 116 Wn.2d 238, 244-5 (1991), *State v. Reynolds*, 80 Wn.App. 851, 861 (1996), *State v. Brown*, 91 Wn.App. 361 (1998), *but see: State v. Morris*, 87 Wn.App. 654 (1997), *State v. Wilson*, 96 Wn.App. 382, 391-93 (1999), *State v. Borg*, 145 Wn.2d 329, 336-40 (2001); *affirms State v. Stewart*, 72 Wn.App. 885 (1994).

***State v. Ritchie***, 126 Wn.2d 388 (1995)

Once court properly decides to impose an exceptional sentence above the standard range, court need not state reasons for length, nor must length be proportionate to sentences in similar cases, review is limited to abuse of discretion standard, *State v. Ross*, 71 Wn.App. 556, 573 (1993), *State v. Hovig*, 149 Wn.App. 1, 14-16 (2009), *State v. Sao*, 156 Wn.App. 67, 79-82 (2010); overrules, in part, *State v. Elsberry*, 69 Wn.App. 793, 796 (1993), *State v. Pryor*, 56 Wn.App. 107 (1989), *aff'd on other grounds,* 115 Wn.2d 445 (1990), *State v. George*, 67 Wn.App. 217, 227 (1992), *see: State v. Smith*, 82 Wn.App. 153, 164 (1996), *State v. Baldwin*, 111 Wn.App. 631, 646 (2002), *aff'd, on other grounds,* 150 Wn.2d 448 (2003); 6-3.

***State v. Hicks***, 77 Wn.App. 1 (1995)

In possession of child pornography case, **victim vulnerability** is not an aggravating factor where there is not evidence that two-year old depicted in photographs knew photos were taken or that defendant possessed them; before one can be vulnerable victim, he or she must first be victim, at four; using washed-out priors, *State v. Oksoktaruk*, 70 Wn.App. 768, 773-4 (1993), to find defendant has proclivity to commit sex offenses effectively applies **future dangerousness** standard in disguise, which is not proper absent expert testimony, *State v. Pryor*, 115 Wn.2d 445, 455 (1990), at 5-6, *cf.: State v. Souther*, 100 Wn.App. 701, 720-21 (2000); possession of child pornography is not an enumerated sex offense, RCW 9.94A.030(29); III.

***State v. Akin***, 77 Wn.App. 575 (1995)

Trial court may not recommend work ethic camp sentencing alternative, RCW 9.94A.137, if it imposes an exceptional sentence; while a defendant may not appeal the length of a presumptive sentence, s/he may challenge the court's authority to impose a sentencing alternative, *State v. Onefrey*, 119 Wn.2d 572, 574 n. 1 (1992); it is a mitigating factor for an escapee to voluntarily **surrender** before threat of capture; sanctions imposed by the institution upon the escapee may not be considered as mitigating factors; I.

***State v. Roberts***, 77 Wn.App. 678 (1995)

A defendant's **good conduct after crime** cannot support an exceptional sentence; court cannot delay sentencing to see if law will change to permit a reduced sentence; I.

***State v. Bartlett***, 128 Wn.2d 323 (1995)

While the fact of a prior conviction alone may not justify an exceptional sentence, trial court may depart from sentence range based upon the facts within a prior conviction if they relate to the present case to show extraordinary circumstances; in child homicide case where defendant was previously convicted of assault on a child, defendant's special knowledge about infant **vulnerability** due to his prior conviction is an aggravating factor based upon defendant's state of

mind, *State v. Nordby*, 106 Wn.2d 514, 518-9 (1986), *State v. McNeal*, 98 Wn.App. 585, 599-600 (1999), *State v. Souther*, 100 Wn.App. 701 (2000); 9-0.

***State v. Quiros***, 78 Wn.App. 134 (1995)

In **vehicular assault** case, failure of defendant to submit to alcohol evaluation is a proper aggravating factor and is not the equivalent of future dangerousness, *State v. McNeal*, 98 Wn.App. 585, 599-600 (1999), *aff'd, on other grounds,* 145 Wn.2d 352 (2002), *State v. Souther*, 100 Wn.App. 701 (2000), *but see: State v. Bolton*, 68 Wn.App. 211, 215 (1992); **multiple victims** in only car hit by defendant and **seriousness of injuries** are aggravating factors, *see: State v. Davis*, 64 Wn.App. 814 (1992), *State v. Flake*, 76 Wn.App. 174, 183 (1994); III.

***State v. Cardenas***, 129 Wn.2d 1 (1996)

In **vehicular homicide** case, **severity of injuries and multiple injuries** are inherent in the offense, thus not an aggravating factor, overruling, in part, *State v. George*, 67 Wn.App. 217 (1992), *overruled on other grounds*, *State v. Ritchie*, 126 Wn.2d 388 (1995), *cf.: State v. Cowen*, 87 Wn.App. 45, 53-7 (1997), *State v. Stubbs*, 170 Wn.2d 117 (2010); reckless driving that is not identified as particularly egregious is not an aggravating factor, *see: State v. Oksoktaruk*, 70 Wn.App. 768 (1993), *State v. Perez*, 69 Wn.App. 133 (1993); pedestrian is particularly vulnerable where she is struck in her own back yard, *State v. Morris*, 87 Wn.App. 654, 666-9 (1997); reverses, in part, *State v. Cardenas*, 77 Wn.App. 112 (1995); 6-3.

***State v. Hendrickson***, 129 Wn.2d 61, 80-3 (1996)

Enhanced penalty for **delivery of drugs in a jail** includes steps leading into county courthouse in which jail was housed, RCW 9.94A.310(5); 9-0.

***State v. Worl***, 129 Wn.2d 416, 426-8 (1996)

**Multiple injuries** and **deliberate cruelty** are valid aggravating factors for malicious harassment, RCW 9A.36.080, where defendant is also convicted of attempted murder, *see: State v. Worl*, 58 Wn.App. 443 (1990); reverses *State v. Worl*, 74 Wn.App. 605 (1994); 5-3.

***State v. Reynolds***, 80 Wn.App. 851 (1996)

In drug sale case, enhancement for defendant's negotiations to sell additional drugs are part and parcel of current offense, not barred by real facts doctrine, *State v. Tierney*, 74 Wn.App. 346, 352 (1994); bragging that she "walked" on a prior charge establishes **lack of remorse and lack of respect for criminal justice system**, which are grounds for an exceptional sentence, does not violate real facts doctrine as punishment is not for prior dismissed case; III.

***State v. Smith***, 82 Wn.App. 153 (1996)

Efforts to **conceal crime** is an aggravating factor for attempted murder where victim would likely have died, at 165; **random extreme violence** is an aggravating factor, at 166-7; I.

***State v. Branch,*** 129 Wn.2d 635, 644-51 (1996)

Theft from limited partnership containing 180 partners establishes **multiple victims**; a sentence 16 times standard range for theft of $400,000 is not **clearly excessive**; 9-0.

***State v. Cannon***, 130 Wn.2d 313, 330-5 (1996)

Trial court using a presentence report prepared for a prior conviction does not violate **real facts** doctrine, as court may consider current crime and criminal history, *State v. Houf*, 120 Wn.2d 327, 333 (1992); in rape case, rough treatment, hitting in head with fist, multiple penetrations, verbal humiliation demonstrate **deliberate cruelty**, *State v. Garnica*, 105 Wn.App. 762, 768-70 (2001); 9-0.

***State v. Baird***, 83 Wn.App. 477, 486-9 (1996)

Asleep victim is **particularly vulnerable** *State v. Ogden*, 102 Wn.App. 357, 365-69 (2000); cutting off victim's nose and carefully slicing eyelids is **deliberate cruelty,** *see: State v. Barnett*, 104 Wn.App. 191, 205 (2001), *State v. Zatkovich*, 113 Wn.App. 70, 81-83 (2002); I.

***State v. Vaughn***, 83 Wn.App. 669, 679-80 (1996)

Efforts to **conceal crime** is an aggravating factor, distinguishing *State v. Crutchfield*, 53 Wn.App. 916, 926-7 (1989), *overruled, on other grounds, State v. Chadderton*, 119 Wn.2d 390, 396 (1992); 2-1, I.

***State v. Talley***, 83 Wn.App. 750, 761-3 (1996), *aff'd,* 134 Wn.2d 176 (1998), *overruled, in part, State v. Taitt*, 93 Wn.App. 783, 790-91 (1999)

Calling rape victim names after the offense may establish **deliberate cruelty**, *State v. Strauss*, 54 Wn.App. 408, 418 (1989), if it manifests cruelty and is a continuation of the crime; **multiple penetrations or sexual acts** is an aggravating factor, *State v. Herzog*, 69 Wn.App. 521 (1993), *State v. Vaughn*, 83 Wn.App. 669, 678 (1996), *but see: State v. State v. Strauss, supra. at 419*, *State v. Post*, 59 Wn.App. 389 (1990), *aff'd,* 118 Wn.2d 596 (1992); I.

***State v. Duvall***, 84 Wn.App. 439, 446-7 (1996)

Statutory aggravating factor of "**ongoing pattern of sexual abuse of same victim**," RCW 9.94A.390(2)(f), can apply to instances of abuse in other states; I.

***State v. Hrycenko***, 85 Wn.App. 543 (1997)

Statute defining **major VUCSA violation** as "more onerous than typical," "larger than personal use," "broad geographic area," RCW 9.94A.390(2)(d), is not vague; I.

***State v. Duvall***, 86 Wn.App. 871, 877 (1997)

**Multiple incidents** is a proper aggravating factor even where the other acts occurred in another state; I.

***State v. Cowen***, 87 Wn.App. 45, 53-7 (1997)

**Seriousness of injuries** is an aggravating factor for attempted murder, as the crime could involve no injury at all, *cf.: State v. Cardenas*, 129 Wn.2d 1 (1996); I.

***State v. Mulligan***, 87 Wn.App. 261 (1997)

**Victim impact** is not a proper aggravating factor solely where one parent murders the other parent, distinguishing *State v. Cuevas-Diaz*, 61 Wn.App. 902, 905-7 (1991); I.

***State v. Elza***, 87 Wn.App. 336 (1997)

**Abuse of trust** is an aggravating factor where former employee (here, 5-6 years prior to crime) uses knowledge gained during employment to commit crime, at 341-2, *State v. Bissell,* 53 Wn.App. 499, 500-1 (1989); where defendant is acquitted of felony murder but convicted of lesser robbery, death of victim cannot be an aggravating factor under **real facts doctrine**, at 342-3, *see: State v. Wakefield*, 130 Wn.2d 464, 476-7 (1996); II.

***State v. Morris***, 87 Wn.App. 654 (1997)

Vehicular homicide defendant strikes several bicyclists in succession; held: where multiple offense policy, RCW 9.94A.400, is fulfilled by increased offender score, and trial court does not find extraordinarily serious harm left unpunished by presumptive sentence, then **multiple victims and offenses** is not a proper aggravating factor, at 660-3, distinguishing *State v. Fisher,* 108 Wn.2d 419 (1987), *State v. Oksoktaruk,* 70 Wn.App. 768 (1993), *see: State v. Stewart*, 125 Wn.2d 893, 897 (1995), *but see: State v. Tili*, 148 Wn.2d 350 (2003); absent intentional conduct, **deliberate cruelty** is not a proper aggravating factor for vehicular homicide or assault, distinguishing *State v. Nordby*, 106 Wn.2d 514, 518-9 (1986); bicyclists are **particularly vulnerable**, *State v. Cardenas*, 129 Wn.2d 1, 12 (1996); I.

***State v. Modest***, 87 Wn.App. 239, 251-3 (1997)

"Despicable" crime is an opinion, not an aggravating factor; where state files charges for each victim, **multiple victims** is not an aggravating factor; in promoting prostitution case, where evidence establishes that prostitutes engaged in "far more acts of prostitution than were reflected in the charges," **multiple incidents** is an aggravating factor, *State v. Brown,* 55 Wn.App. 738, 756 (1989); III.

***State v. Jeannotte***, 133 Wn.2d 847 (1997)

Failed **entrapment** defense may constitute a mitigating factor supporting an exceptional sentence below the standard range, *State v. Hutsell,* 120 Wn.2d 913, 921 (1993), *State v. Nelson,* 108 Wn.2d 491, 499 (1987), *State v. Ha'mim,* 132 Wn.2d 834, 843 (1997), *overruled on other grounds, State v. O'Dell,* 183 Wn.2d 680, 688-99 (2015) *State v. Flett*, 98 Wn.App. 799, 806-08 (2000); 9-0.

***State v. Way***, 88 Wn.App. 830 (1997)

Shooting and killing victim in front of many college students does not justify an exceptional sentence for **community impact** as defendant's actions were not sufficiently distinctive, **psychological trauma** is common following violent crimes, distinguishing *State v. Johnson*, 124 Wn.2d 57, 74-5 (1994), *State v. Cuevas-Diaz*, 61 Wn.App. 902, 903-6 (1991), *State v. Jackson*, 150 Wn.2d 251, 273-76 (2003), *cf.: State v. Chanthabouly,* 164 Wn.App. 134, 142-45 (2011); I.

***State v. McCollum***, 88 Wn.App. 977, 983-7 (1997)

Trial court imposes exceptional sentence for delivery of four grams of methamphetamine as a **quantity of drugs** substantially larger than for personal use; held: while record contains no information regarding "normal quantity," defense offered no support for claim that the amount was for personal use, thus failed to show that court's reasoning was clearly erroneous; *cf.: State v. Sanchez*, 69 Wn.App. 195 (1993), *State v. Negrete*, 72 Wn.App. 62, 68-71 (1993); multiple

transactions over lengthy period of time are statutory aggravating factors, former RCW 9.94A.390(2); II.

***State v. Bourne***, 90 Wn.App. 970, 974-80 (1998)

In felony hit and run case, injuring more than one person in a single victim-vehicle is grounds for exceptional sentence under **multiple victim** factor, *State v. Flake*, 76 Wn.App. 174, 184-6 (1994); II.

***State v. Brown***, 91 Wn.App. 361 (1998)

Where the range for an **unranked** offense, RCW 9.94A.120(7) [here, stalking] is found by the court to be clearly too lenient such that defendant would be awarded "free crimes," then an exceptional sentence may be imposed, *State v. Fisher*, 108 Wn.2d 419, 428 (1987), *State v. Stephens*, 116 Wn.2d 238, 243 (1991), *State v. Stewart*, 125 Wn.2d 893, 897-99 (1995); III.

***State v. Jacobson***, 92 Wn.App. 958 (1998)

In vehicular homicide case, intentionally driving wrong way with lights off at night while fleeing police is **more egregious than typical**; I.

***State v. Halgren***, 137 Wn.2d 341 (1999)

**Future dangerousness** is an aggravating factor only where the crime is a sex offense or the state has pleaded and proved sexual motivation, RCW 9.94A.030(33)(a), *State v. Thomas*, 138 Wn.2d 630 (1999), overruling *dicta* in *State v. Stewart*, 125 Wn.2d 893 (1995); reverses, in part, *State v. Halgren*, 87 Wn.App. 525 (1997); 5-4.

***State v. Strauss***, 93 Wn.App. 691 (1999)

Prior to rape sentencing at which state is seeking exceptional sentence for **future dangerousness**, defendant refuses to participate in evaluation, trial court enhances based upon testimony of certified sex offender treatment provider who bases his evaluation upon discovery, evidence of priors, lack of accountability, refusal to acknowledge any level of culpability, continued denial of crimes and problem and refusal to seek treatment; held: denials of current offense and **silence** with respect to current offense are not proper bases to justify exceptional sentence, *State v. Garibay*, 67 Wn.App. 773, 782 (1992), *cf.: In re Pers. Restraint of Ecklund*, 139 Wn.2d 166 (1999); denial of guilt for prior offenses in spite of guilty pleas and past refusals to participate in or seek treatment have no Fifth Amendment implications, *Reina v. United States*, 5 L.Ed.2d 249, 255 (1960), and may be considered at sentencing; I.

***State v. Taitt***, 93 Wn.App. 783 (1999)

In rape 2° case, court finds choking to unconsciousness is **deliberate cruelty**, defense argues that force and serious injury establish rape 1°, thus **real facts doctrine** violated; held: because the injuries do not establish infliction of serious injury as a matter of law, whether the acts constitute deliberate cruelty or rise to the level of serious physical injury under rape 1° is a factual decision for the trial court, thus not clearly erroneous; justifying an exceptional sentence by relying on facts that elevate the seriousness of the crime violates the real facts doctrine, reconsidering *State v. Talley*, 83 Wn.App. 750, 761-62, *aff'd, on other grounds*, 134 Wn.2d 176 (1998), *see: State v. Randoll*, 111 Wn.App. 578, 582-84 (2002); I.

***Pers. Restraint of Breedlove***, 138 Wn.2d 298 (1999)

Defendant pleads guilty to lesser offense, agrees to exceptional sentence, appeals; held: where trial court approves a plea agreement as consistent with the interests of justice and in conformance with SRA, the stipulation to an exceptional sentence is a substantial and compelling reason justifying an exceptional sentence, *State v. Cooper*, 63 Wn.App. 8 (1991), *State v. Hilyard*, 63 Wn.App. 413 (1991), *but see: State v. Gaines*, 121 Wn.App. 687, 696-703 (2004), *State v. Gronnert*, 122 Wn.App. 214 (2004), trial court must still enter written findings; by agreeing to the sentence, defendant waives right to appeal; 5-1-3.

***State v. Thomas***, 138 Wn.2d 630 (1999)

Felony murder/rape is not a sex offense, RCW 9.94A.030(33)(a), thus **sexual motivation** is a proper aggravating factor, *State v. Halgren*, 137 Wn.2d 340, 349-50 (1999), overruling, in part, *State v. Buckner*, 74 Wn.App. 889 (1994), *aff'd, on other grounds*, 133 Wn.2d 63 (1997); 9-0.

***State v. Burkins***, 94 Wn.App. 677, 696-702 (1999)

Mere fact that victim smoked marijuana, without evidence of impairment, does not support **victim vulnerability**, *State v. Crutchfield*, 53 Wn.App. 916, 923-34 (1989), *overruled on other grounds, State v. Chadderton*, 119 Wn.2d 390, 396 (1992); statements by defendant to police that he was glad victim was dead establishes **lack of remorse**; I.

***State v. Owens***, 95 Wn.App. 619 (1999)

In assault 2° case, defendant's serial beatings in addition to pointing a firearm establish that the crime was **more egregious than necessary**; **clearly too lenient** factor only applies due to the operation of the multiple offense policy, *see: State v. Brown*, 91 Wn.App. 361, 366 (1998); I.

***State v. Serrano***, 95 Wn.App. 700 (1999)

Victim is shot five times in back while in a device suspended above the ground for apple picking: **victim vulnerability** was improper, as the vulnerability was not a "substantial factor in the accomplishment of the crime," at 712, *State v. Jackmon*, 55 Wn.App. 562, 566-67 (1989), *State v. Batista*, 116 Wn.2d 777, 790 n.8 (1991), *State v. Barnett*, 104 Wn.App. 191, 205 (2001); shooting victim five times, by itself, does not suggest gratuitous infliction of pain, thus not **deliberate cruelty**, at 712-13, distinguishing *State v. Ross*, 71 Wn.App. 556 (1993), *State v. Drummer*, 54 Wn.App. 751 (1989), *State v. Harmon*, 50 Wn.App. 755 (1988), *cf.: State v. Lindahl*, 114 Wn.App. 1, 16-17 (2002), *State v. Faagata*, 147 Wn.App. 236, 248-51 (2008); defendant being friend and coworker of victim is insufficient for **abuse of trust**, at 713-14, distinguishing *State v. Grewe*, 117 Wn.2d 211 (1991), *State v. Stuhr*, 58 Wn.App. 660 (1990), *State v. Fisher*, 108 Wn.2d 419, 426-27 (1987); III.

***State v. Wilson***, 96 Wn.App. 382 (1999)

In assault 2°, victim's finger is broken causing surgery and possible permanent injury, victim's knowledge that defendant had sexually assaulted another shortly before, caused "psychological injury," establishing **injuries significantly more serious than typical**, justifying

exceptional sentence, *State v. Flake*, 76 Wn.App. 174, 183 (1994), *State v. Tunell*, 51 Wn.App. 274, 279 (1988), *overruled, on other grounds, State v. Batista*, 116 Wn.2d 777 (1991), *State v. Randoll*, 111 Wn.App. 578, 584-85 (2002), *but see: State v. E.A.J.*, 116 Wn.App. 777, 789 (2003); **unscored misdemeanor** failure to register as sex offender is a proper aggravating factor, *State v. Ratliff*, 46 Wn.App. 325 (1986), RCW 9.94A.390(2)(j), where court finds that presumptive sentence is clearly too lenient; even where offender score is less than the maximum such that defendant is not receiving a "free crime," *State v. Stewart*, 125 Wn.2d 893, 897 (1995), court may impose an exceptional sentence upward if it concludes that the **multiple offenses policy** of RCW 9..94A.400 would result in presumptive sentence that was clearly too lenient, RCW 9.94A.390(2)(i), *State v. Garnica*, 105 Wn.App. 762, 773-74 (2001); I.

***State v. McNeal***, 98 Wn.App. 585, 599-600 (1999), *aff'd, on other grounds*, 145 Wn.2d 352 (2002)

In vehicular homicide case, defendant's extensive **history of drug abuse**, placing defendant on notice that he had a drug problem that led to violations of law which he failed to correct establishes he was "especially culpable" when he drove, amounting to **callous disregard**, a proper aggravating factor, *State v. Bartlett*, 128 Wn.2d 323, 334 (1995), *State v. Quiros*, 78 Wn.App. 134 (1995), *but see: State v. Bolton*, 68 Wn.App. 211, 214-15 (1992); II.

***State v. Hooper***, 100 Wn.App. 179 (2000)

Assaulting a known disabled individual establishes **particular vulnerability** as an aggravating factor; assaulting witness because they call 911 to report a crime is a valid aggravating factor; assaulting a victim while she is on the telephone is not a valid aggravating factor; I.

***State v. Souther***, 100 Wn.App. 701 (2000)

In **vehicular homicide** case, **special knowledge and increased awareness of the consequences of DUI** are proper aggravating factors where defendant had a prior DUI/manslaughter conviction and prior alcohol treatment, *State v. Quiros*, 78 Wn.App. 134 (1995), *State v. McNeal*, 98 Wn.App. 585, 599-600 (1999), *aff'd, on other grounds*, 145 Wn.2d 352 (2002), *but see: State v. Bolton*, 68 Wn.App. 211, 213 (1992); I.

***State v. Ferguson***, 142 Wn.2d 631 (2001)

Defendant is convicted of assault 2° (transmitting HIV to another with intent to inflict bodily harm), former RCW 9A.36.021(1)(e), trial court finds **deliberate cruelty**; held: because intent to harm by exposing HIV is an element of the crime, it cannot serve as an aggravating factor, distinguishing *State v. Farmer*, 116 Wn.2d 414 (1991), *cf.: State v. Hyder*, 159 Wn.App. 234, 260-62 (2011); 9-0.

***State v. Bridges***, 104 Wn.App. 98 (2001)

Defendant sells drugs to informant twice, trial court finds **multiple offense policy** results in standard range that is clearly excessive because difference between offense is trivial, imposes exceptional sentence below standard range for one delivery; held: while *State v. Sanchez*, 69 Wn.App. 255 (1993) authorizes an exceptional sentence where the state does not identify any purpose for the second purchase other than to increase the presumptive sentence, the sentence is

**clearly too lenient** where the sentence imposed is below the standard range for a single offense, *State v. Kinneman*, 120 Wn.App. 327, 341-48 (2003), *see: State v. Solis-Diaz*, 194 Wn.App. 129 (2016), *reversed, on other grounds*, 187 Wn.2d 535 (2017; III.

***State v. Barnett***, 104 Wn.App. 191 (2001)

**Domestic violence pattern of abuse**, RCW 9.94A.390(2), requires multiple incidents over a substantial period of time, *see also: State v. Osalde*, 109 Wn.App. 94 (2001), *State v. Blakely*, 111 Wn.App. 851, 869-71 (2002), more than two weeks, at 203, *see: State v. Schmeck*, 98 Wn.App. 647, 651 (1999), *State v. Duvall*, 86 Wn.App. 871, 877 (1997), *State v. Quigg*, 72 Wn.App. 828, 841 (1994), *State v. Goodman*, 108 Wn.App. 355, 360-64 (2001), *State v. Atkinson*, 113 Wn.App. 661 (2002), *but see: State v. Epefanio*, 156 Wn.App. 378, 390-92 (2010; violating protection order immediately after issuance is not an aggravating factor, at 204-04; where victim did not suffer because of age, disability or ill health, *State v. Bedker*, 74 Wn.App. 87, 94 (1994), *State v. Scott*, 72 Wn.App. 207, 217 (1993), nor was she incapacitated by the attack, *State v. Ogden*, 102 Wn.App. 357, 367-68 (2000), nor was she selected as a victim because she was home alone, *State v. Ross*, 71 Wn.App. 556, 565-66 (1993), then victim was not **particularly vulnerable**, at 204-05; where defendant did not inflict pain as an end in itself, *State v. Serrano*, 95 Wn.App. 700, 712-13 (1999), **deliberate cruelty** is not an aggravating factor, at 205; II.

***State v. Johnson***, 104 Wn.App. 489, 507 (2001)

Sentencing court may not order that defendant register as a sex offender where not specifically authorized by statute, even if court finds grounds for an exceptional sentence; II.

***State v. Chance***, 105 Wn.App. 291 (2001)

**Retaliation** against a prosecutor for his actions in his official capacity is an aggravating factor, *see: State v. Riley*, 69 Wn.App. 349, 355 (1983); court may not consider a court-ordered competency evaluation in determining future dangerousness unless defendant was warned prior to the evaluation that it might be used at sentencing, *Estelle v. Smith*, 68 L.Ed.2d 359 (1981), *see: State v. Bankes*, 114 Wn.App. 280 (2002); retaliation, by itself, is not grounds for an enhanced sentence for felony stalking, RCW 9A.46.110(5)(e), as the crime is enhanced to a felony if the victim is an attorney and the stalking was to retaliate, however here the prolonged duration of the stalking and defendant's flagrant disregard for police efforts to prevent it justify an exceptional sentence; II.

***State v. Garnica***, 105 Wn.App. 762 (2001)

Multiple penetrations, positioning of victim across car hood, threats to kill, victim's begging for mercy is "significantly more egregious and well beyond the force and violence typically associated" with rape 3°, thus constitutes **deliberate cruelty**, at 768-70, *State v. Cannon*, 130 Wn.2d 313, 333 (1996), *State v. Herzog*, 69 Wn.App. 521, 526 (1993), *State v. Falling*, 50 Wn.App. 47, 55 (1987), *State v. Monroe*, 135 Wn.App. 880 (2006), *but see: State v. Delarosa-Flores*, 59 Wn.App. 514, 519 (1990); raping and ejaculating twice, repositioning victim supports **multiple incidents**; raping juvenile sister-in-law while driving her home is **abuse of trust**, *State v. Bedker*, 74 Wn.App. 87, 95-96 (1994), but is not **domestic violence**, RCW 9.94A.390(2)(h), as not within definition, RCW 10.99.020(1); III.

***State v. Gore***, 143 Wn.2d 288 (2001)

Victim's small stature supports **vulnerability** factor, *State v. Sweet*, 138 Wn.2d 466, 482 (1999), *State v. Sly*, 58 Wn.App. 740, 748-49 (1990), *State v. Holyoak*, 49 Wn.App. 691, 695 (1987); **planning** and **sophistication** are aggravating factors only where done to a high degree, *see: State v. Vaughn*, 83 Wn.App. 669, 679-80 (1996), *State v. Vermillion*, 66 Wn.App. 332 (1992); 9-0.

***State v. Goodman***, 108 Wn.App. 355, 358-64 (2001)

Defendant violates protection order and conditions of release, burns down wife's home, killing dog; held: **extraordinary disregard for the law** is an aggravating factor, *see: State v. Butler*, 75 Wn.App. 47, 54-55 (1994), *State v. George*, 67 Wn.App. 217, 224 (1992), *overruled on other grounds, State v. Ritchie*, 126 Wn.2d 388 (1995), not the equivalent of future dangerousness or concern for public safety; II.

***State v. Osalde***, 109 Wn.App. 94 (2001)

Repeated threats to kill domestic partner and testimony at sentencing from victim about psychological abuse is sufficient to establish aggravating factor of **ongoing pattern of domestic violence involving psychological abuse,** *see: State v. Barnett*, 104 Wn.App. 191 (2001); I.

***State v. Borg***, 145 Wn.2d 329, 336-40 (2001)

Defendant is convicted of six counts of unlawful possession of a firearm, trial court finds same criminal conduct, RCW 9.94A.589(1)(a), concludes that multiple incidents are "more egregious than possessing only one firearm," imposes consecutive sentences; held: where defendant is sentenced for multiple current convictions which are same criminal conduct, *see: Pers. Restraint of Delgado*, 149 Wn.App. 223 (2009), an exceptional sentence is not justified solely because those convictions number more than one, must be some extraordinarily serious harm or culpability which would not otherwise be accounted for in determining the presumptive sentencing range, *see: State v. Fisher*, 108 Wn.2d 419, 427-29 (1987), *but see: State v. Tili*, 148 Wn.2d 350 (2003); 9-0.

***State v. Teuber***, 109 Wn.App. 640 (2001)

In felony hit and run, unscored **infractions** are grounds for an exceptional sentence, *see: State v. Ratliff*, 46 Wn.App. 325 (1986), *State v. Olive*, 47 Wn.App. 147 (1987); I.

***State v. Ramires***, 109 Wn.App. 749 (2002)

Knowingly **shooting police officer** acting in his official duty is an aggravating factor, *State v. Anderson*, 72 Wn.App. 453, 466 (1994); officer is not in a **particularly vulnerable** position when making a traffic stop; **failed defense** shifting blame to another is not an aggravating factor, nor does it establish **egregious lack of remorse**; III.

***State v. Baldwin***, 111 Wn.App. 631, 644-49 (2002), *aff'd, on other grounds,* 150 Wn.2d 448 (2003)

Tying up victims' credit via forgeries and identity theft for "thousands and thousands of dollars" is a **major economic offense** and **high degree of sophistication**; I.

***State v. Zatkovich***, 113 Wn.App. 70, 77-83 (2002)

An exceptional sentence for **stalking** is authorized where there is **domestic violence** and an ongoing pattern of psychological, physical or sexual abuse, RCW 9.94A.535(2)(h)(I), 10.99.020(3)(v), even though repeated harassment and intimidation are elements of a separate stalking charge, RCW 9A.46.110; I.

***State v. Atkinson***, 113 Wn.App. 661 (2002)

**Greater mental culpability** is an aggravating factor where court finds that defendant had been made aware by a prior conviction that a predictable consequence of alcohol abuse was a proclivity for violence against women, at 669-70; unprovoked hitting, knocking to floor, tearing clothes off, locking victim outside in rain and cold while naked, telling victim to prostitute herself, threatening to kill establishes **domestic violence manifesting deliberate cruelty, intimidation and ongoing pattern of abuse**, at 670-72, *see: State v. Barnett*, 104 Wn.App. 191, 205 (2001), three incidents of abuse requiring medical attention over 7-10 months establishes a pattern, *see: State v. Harris*, 123 Wn.App. 906, 914-16 (2004), *overruled, on other grounds, State v. Hughes*, 154 Wn.2d 118 (2005), *abrogated, on other grounds, Washington v. Recuenco*, 548 U.S. 212, 165 L.Ed.2d 466 (2006); III.

***State v. Jackson***, 150 Wn.2d 251, 273-76 (2003)

Defendant murders his elementary school age daughter, creates false abduction story to cover up, trial court imposes exceptional sentence; held: **community impact** is grounds for an exceptional sentence where it is of a destructive nature not normally associated with the offense in question and was reasonably foreseeable to the defendant, *State v. Johnson*, 124 Wn.2d 57, 73-76 (1994), *State v. Cuevas-Diaz*, 61 Wn.App. 902 (1991), distinguishing *State v. Way*, 88 Wn.App. 830 (1997); here, impact on children at victim's school justifies exceptional sentence; affirms *State v. Jackson*, 111 Wn.App. 660 (2002); 9-0.

***State v. Tili***, 148 Wn.2d 350 (2003)

At resentencing following reversal, *State v. Tili*, 139 Wn.2d 107 (1999), court imposes exceptional sentence, concluding multiple penetrations over a short period of time constitutes **deliberate cruelty**; held: because the issue of whether to impose an exceptional sentence was not identical as between the two sentencings because of the change from separate and distinct conduct to the same conduct, **collateral estoppel** will not bar an exceptional sentence, *State v. White*, 123 Wn.App. 106 (2004), *State v. Brown*, 193 Wn.2d 280 (2019), *see: State v. Collicott*, 118 Wn.2d 649 (1992); threat to kill, demand that rape victim say she "liked it" establish deliberate cruelty, *State v. Falling*, 50 Wn.App. 47 (1987), *State v. Cannon*, 130 Wn.2d 313, 332-24 (1996), *State v. Monroe*, 135 Wn.App. 880 (2006); multiple penetrations where each is charged and run concurrently may not support deliberate cruelty, *see: State v. Vaughn*, 83 Wn.App. 669 (1996); **multiple offense policy** may justify an exceptional sentence, even where multiple offenses are charged, where the sentences run concurrently, they are the same criminal conduct thus do not increase offender score, "a rapist should not be rewarded with the same sentence for multiple rapes that he would have received for a single penetration," at 375, distinguishing *State v. Fisher*, 108 Wn.2d 419, 427-29 (1987), *State v. Borg*, 145 Wn.2d 329, 336-40 (2001); affirms *State v. Tili*, 108 Wn.App. 289 (2001); 6-3.

***State v. Baldwin***, 150 Wn.2d 448, 457-61 (2003)

Sentencing guidelines statutes do not create a protected liberty interest, overruling *State v. Rhodes*, 92 Wn.2d 755 (1979), and thus are not subject to vagueness analysis, *State v. Chanthabouly*, 164 Wn.App. 134, 141-42 (2011), *State v. Burrus*, 17 Wn.App.2d 162 (2021), *see: State v. DeVore*, 2 Wn.App.2d 651 (2018); affirms, on other grounds, *State v. Baldwin*, 111 Wn.App. 631 (2002); 9-0.

***State v. Harrison***, 148 Wn.2d 550 (2003)

Defendant receives exceptional sentence, on appeal Court of Appeals reverses, holding that state breached plea bargain and orders specific performance; on remand, different judge holds that he is bound by the exceptional sentence previously imposed, although he reduces offender score in accordance with mandate; held: when state breaches, neither collateral estoppel nor "law of the case" doctrine prevent trial court from independently determining whether an exceptional sentence is warranted, *State v. White*, 123 Wn.App. 106 (2004), *State v. Amos*, 147 Wn.App. 217, 232 (2008); 9-0.

***State v. Rawls***, 114 Wn.App. 719 (2002)

**Washed-out juvenile priors** may justify an exceptional sentence, *State v. McAlpin*, 108 Wn.2d 458 (1987), *State v. Dunivan*, 57 Wn.App. 332 (1990), *State v. Smith*, 58 Wn.App. 621 (1990), *State v. Oksoktaruk*, 70 Wn.App. 768 (1993), distinguishing *State v. Smith*, 144 Wn.2d 665 (2001); I.

***State v. Hudnall***, 116 Wn.App. 190 (2003)

For a Class C felony, trial court imposes exceptional sentence of 36 months confinement and 24 months community custody where statute mandates 36 months of community custody, defendant seeks reduction of confinement and increase of community custody; held: court may impose an exceptional reduction of community custody, *Postsentence Review of Smith*, 139 Wn.App. 599 (2007), to allow a defendant to complete her sentence before expiration of the maximum sentence, even where court has increased confinement beyond the standard range, *see also: State v. Davis*, 146 Wn.App. 714 (2008); II.

***State v. Rotko***, 116 Wn.App. 230 (2003)

In criminal mistreatment 1° case, RCW 9A.42.020(1), starving an 11-month old child is subject to an exceptional sentence for **extreme youth** of victim making victim **particularly vulnerable**, even though statute applies to a class of victims under 18 years old, *State v. Stevens*, 58 Wn.App. 478 (1990), *State v. Fisher*, 108 Wn.2d 419, 423-24 (1987); withholding food over a **protracted period of time** is an aggravating factor; II.

***State v. E.A.J.***, 116 Wn.App. 777, 789-94 (2003)

**Heinous, cruel or depraved** aggravating factor, RCW 13.40.150(3)(h)(i)(ii), is not void for vagueness, *Walton v. Arizona*, 111 L.Ed.2d 511 (1990), *overruled, on other grounds, Ring v. Arizona*, 153 L.Ed.2d 556 (2002), *distinguishing Maynard v. Cartwright*, 100 L.Ed.2d 372 (1988) and *Godfrey v. Georgia*, 64 L.Ed.2d 398 (1980); I.

***State v. Ameline***, 118 Wn.App. 128 (2003)

After trial and standard range sentence, defendant wins appeal, is convicted anew and receives standard range sentence, appeals again and prevails, trial court imposes exceptional sentence; held: because trial court did not identify specific objective facts drawn from the record of the thrid trial and not known when the standard range sentences were imposed, *State v. Parmelee*, 121 Wn.App. 707 (2004), **presumption of vindictiveness,** *North Carolina v. Pearce*, 23 L.Ed.2d 656 (1969), requires vacation of sentence and remand for resentencing, *but see: State v. Brown*, 193 Wn.2d 280 (2019), reserving power in sentencing court to justify exceptional sentence; II.

***State v. Kinneman***, 120 Wn.App. 327, 341-48 (2003)

Lawyer makes 67 unauthorized withdrawals from trust account over 16 months, is convicted of 67 counts of felony theft resulting in an offender score of 66, trial court finds **multiple offense policy**, fact that defendant used a single scheme and cumulative effect of the crimes was virtually nonexistent, thus standard range was clearly excessive; held: because later offenses resulted in foreclosures of property which would not have occurred with the first theft, cumulative effect of the crimes cannot be said to be nonexistent, trivial or trifling, distinguishing *State v. Sanchez*, 69 Wn.App. 255 (1993), *State v. Calvert*, 79 Wn.App. 569 (1995), *cf.: State v. Solis-Diaz*, 194 Wn.App. 129 (2016), *reversed, on other grounds*, 187 Wn.2d 535 (2017), thus remanded for standard range sentence; I.

***Blakely v. Washington***, 159 L.Ed.2d 403 (2004)

Aggravating factors, other than prior convictions, must be submitted to a jury unless defendant waives jury on the issue, not retroactive to cases not on direct review, *State v. Evans*, 154 Wn.2d 438, 443-48 (2005), *see: State v. Pillatos*, 159 Wn.2d 459 (2007); not structural error, *Washington v. Recuenco*, 165 L.Ed.2d 466 (2006), *but see: State v. Womac*, 160 Wn.2d 643, 663-64 (2008); 5-4.

***State v. Gronnert***, 122 Wn.App. 214 (2004)

Defendant pleads guilty to standard range recommendation for VUCSA, is released pending sentencing, agrees that, if he violates conditions of release he will accept an exceptional sentence, defendant violates, court imposes exceptional sentence without objection; held: because trial court failed to find that the plea agreement itself is a substantial and compelling reason to depart from the standard range, considering the purposes of the SRA, RCW 9.94A.010, and because the exceptional sentence was not related to the crime, sentence is reversed and remanded for sentence within standard range, distinguishing *In re Pers. Restraint of Breedlove*, 138 Wn.2d 298 (1999), *see: State v. Gaines*, 121 Wn.App. 687, 696-703 (2004); I.

***State v. Van Buren***, 123 Wn.App. 634 (2004), *overruled, in part*, 136 Wn.App. 577 (2007)

**Lack of remorse** is an aggravating factor that must be submitted to the jury, *Blakely v. Washington*, 159 L.Ed.2d 403 (2004); offender score and criminal history are not jury questions; exceptional sentence under "free crime" analysis, *see: State v. Smith*, 123 Wn.2d 51, 56 (1993), is not a jury question; because defendant's score exceeds maximum of 9, it is for the judge, not a jury to determine exceptional sentence, *State v. Alkire*, 124 Wn.App. 169 (2004), *State v.*

*Brundage*, 126 Wn.App. 55 (2005), *but see: State v. Hughes*, 154 Wn.2d 118 (2005) , *abrogated, on other grounds, Washington v. Recuenco,* 548 U.S. 212, 165 L.Ed.2d 466 (2006); trial court's miscalculation of offender score (14 as opposed to 15) was harmless where exceptional sentence is imposed because court sentenced defendant to more time because his score was "higher than 9," thus did not rely on the 15 calculation; II.

***State v. Harris***, 123 Wn.App. 906 (2004), *overruled, on other grounds, State v. Hughes,* 154 Wn.2d 118 (2005), *abrogated, on other grounds, Washington v. Recuenco,* 548 U.S. 212, 165 L.Ed.2d 466 (2006)

Defendant enters into stipulated facts trial, court *sua sponte* imposes exceptional sentence; held: while defendant stipulated to facts for purposes of trial and a standard range sentence, he did not waive his right to a jury trial for purposes of an exceptional sentence, *Blakely v. Washington*, 159 L.Ed.2d 403 (2004), *see: State v. Trebilcock,* 184 Wn.App. 619, 631-36 (2014), as he did not voluntarily relinquish a known right, *see: State v. Ermels*, 156 Wn.2d 528 (2006), *State v. Saltz*, 137 Wn.App. 576 (2007); I.

***State v. Maestas***, 124 Wn.App. 352 (2004) , *reversed, sub nom., State v. Hughes,* 154 Wn.2d 118 (2005), *abrogated, on other grounds, Washington v. Recuenco,* 548 U.S. 212, 165 L.Ed.2d 466 (2006)

When an exceptional sentence is reversed because it was not based upon a jury determination of aggravating factors, *Blakely v. Washington*, 159 L.Ed.2d 403 (2004), double jeopardy clause does not preclude state from submitting those factors to a jury and imposing an exceptional sentence on remand, *see: State v. Pillatos*, 159 Wn.2d 459 (2007), *State v. Mann*, 146 Wn.App. 349 (2008); I.

***State v. Smith***, 124 Wn.App. 417, 435-38 (2004), *aff'd, on other grounds,* 159 Wn.2d 778 (2007)

Defendant fires one bullet into vehicle with three people, no injury, defendant is convicted of three counts of assault 2° with three firearm enhancements, trial court imposes one day for each assault plus three consecutive 36 month sentences for enhancements, state appeals; held: a single act against three individuals allows court to exercise discretion in determining that the **multiple offense policy** results in an excessive presumptive sentence, RCW 9.94A.535(1)(g), (2016), *State v. Solis-Diaz,* 194 Wn.App. 129 (2016), *reversed, on other grounds,* 187 Wn.2d 535 (2017); 2-1, II.

***State v. Kinney***, 125 Wn.App. 778 (2005)

**Consecutive sentence** based upon separate and distinct criminal conduct for two or more serious violent felonies, RCW 9.94A.589(1)(b), is not subject to a jury determination, *Oregon v. Ice*, 172 L.Ed.2d 517 (2008), *State v. Vance*, 168 Wn.2d 754 (2010), *Pers. Restraint of Finstad,* 177 Wn.2d 501, 508 n. 7 (2013), distinguishing *Blakely v. Washington*, 159 L.Ed.2d 403 (2004), *cf.: State v. Washington*, 135 Wn.App. 42, 51-53 (2006), *State v. Cubias*, 155 Wn.2d 549, 556 (2005), *see also: Pers. Restraint of Delgado*, 149 Wn.App. 223 (2009); I.

***State v. Brundage***, 126 Wn.App. 55 (2005)

Exceptional sentence under "free crimes" analysis is not a jury question, *State v. Van Buren*, 123 Wn.App. 634 (2004), distinguishing *Blakely v. Washington*, 159 L.Ed.2d 403 (2004),

*but see: State v. Hughes*, 154 Wn.2d 118 (2005), *abrogated, on other grounds, Washington v. Recuenco*, 548 U.S. 212, 165 L.Ed.2d 466 (2006), overruled, in part, *State v. VanBuren*, 136 Wn.App. 577 (2007); II.

***Washington v. Recuenco***, 165 L.Ed.2d 466 (2006)

Failure to submit a sentencing factor to the jury, *Blakely v. Washington*, 159 l03 (2004), like failure to submit an element to the jury, *Neder v. United States*, 144 L.Ed.2d 35 (1999), is not structural error and is thus subject to harmless error analysis, reversing, in part, *State v. Recuenco*, 154 Wn.2d 156 (2005), *but see: Pers. Restraint of Hall*, 163 Wn.2d 346 (2008), *State v. Pleasant*, 148 Wn.App. 408 (2009), *see also: State v. Recuenco*, 163 Wn.2d 428 (2008); 5-4.

***State v. Clarke***, 156 Wn.2d 880 (2006)

Following rape convictions subject to "determinate sentence plus," RCW 9.94A.712, trial court imposes exceptional minimum terms based upon unscored misdemeanors; held: sex assault convictions that are subject to RCW 9.94A.712 [recodified as RCW 9.94A.507 (2008)] are indeterminate sentences, thus *Blakely v. Washington*, 159 L.Ed.2d 403 (2004) does not apply, as trial court is not enhancing the maximum sentence the judge can impose solely based upon facts reflected in the jury verdict or admitted by defendant, ISRB sets actual release date, *State v. Borboa*, 157 Wn.2d 108 (2006), *State v. Halsey*, 140 Wn.App. 313, 323-26 (2007), *State v. Hughes*, 166 Wn.2d 675, 686-89 (2009), overruling *State v. Borboa*, 124 Wn.App. 779 (2004), overruling, in part, *State v. Monroe*, 126 Wn.App. 435, 441-52 (2005), *State v. Bobenhouse*, 166 Wn.2d 881, 895-97 (2009), *see: State v. Woodruff*, 137 Wn.App. 127 (2007); affirms *State v. Clarke*, 124 Wn.App. 893 (2004); 7-2.

***State v. Korum***, 157 Wn.2d 614, 636-37 (2006)

After defendant withdraws guilty plea, state adds charges resulting in a standard range more than ten times the plea range, trial court declines to impose exceptional sentence; held: while trial court had the discretion to consider a downward departure in light of defendant's criminal history and the seriousness of his offenses, RCW 9.94A.535(1)(g), 9.94A.010(1), declining to do so is not reviewable; reverses *State v. Korum*, 120 Wn.App. 686 (2004); 5-4.

***State v. Suleiman***, 158 Wn.2d 280 (2006)

At plea, defendant stipulates to certification for determination of probable cause without stipulating that those facts are a legal basis for an exceptional sentence, trial court imposes exceptional sentence for particular vulnerability of victim; held: the factual conclusion to support an exceptional sentence based on victim vulnerability must be determined by a jury, *Blakely v. Washington*, 159 L.Ed.2d 403 (2004), unless defendant specifically stipulates to it, which did not occur here, *State v. Hagar*, 158 Wn.2d 369 (2006), *Pers. Restraint of Beito*, 167 Wn.2d 497 (2009), *cf.: State v. Burrus*, 17 Wn.App.2d 162 (2021); remanded to trial court for determination of harmlessness, *Washington v. Recuenco*, 165 L.Ed.2d 466 (2006); 6-3.

***State v. Ortega***, 131 Wn.App. 591, 595 (2006)

Domestic violence with multiple incidents of sexual abuse over a prolonged period of time is a jury question, *Blakely v. Washington*, 159 l03 (2004), *see: State v. Felix*, 125 Wn.App. 575 (2005); III.

***State v. Washington***, 135 Wn.App. 42, 51-53 (2006)

Trial court cannot impose consecutive sentences for crimes that are not serious violent offenses, as it is an exceptional sentence requiring fact finding by a jury, *but see: Oregon v. Ice*, 172 L.Ed.2d 517 (2008), distinguishing *State v. Cubias*, 155 Wn.2d 549, 556 (2005), *State v. Kinney*, 125 Wn.App. 778 (2005); I.

***State v. Woodruff***, 137 Wn.App. 127 (2007)

Following child rape convictions subject to "determinate sentence plus," RCW 9.94A.712 [recodified as 9.94A.507 (2008)], trial court imposes consecutive sentences without finding aggravating factors; held: while exceptional sentences for indeterminate sentences need not be submitted to a jury, *State v. Clarke*, 156 Wn.2d 880 (2006), *State v. Bobenhouse*, 166 Wn.2d 881, 895-97 (2009), trial court must still specify aggravating circumstances and enter findings of fact consistent with RCW 9.94A.535; II.

***State v. Saltz***, 137 Wn.App. 576 (2007)

Where defendant keys victim's car, having been released from custody for a no contact order violation a month earlier, same victim, trial court's imposition of exceptional sentence was proper, *State v. Butler*, 75 Wn.App. 47 (1994); 2-1, III.

***State v. Gamble***, 137 Wn.App. 892, 907-10 (2007), *aff'd, on other grounds,* 168 Wn.2d 161 (2010)

Punching victim to ground then kicking him in the head until he dies is sufficient for a jury to find victim **particularly vulnerable**; II.

***State v. Poston***, 138 Wn.App. 898 (2007)

As part of plea agreement, defendant stipulates to an exceptional sentence upward, trial court finds that defendant so stipulated and finds other aggravating factors but concludes that any of the factors would be grounds for an exceptional sentence, defendant appeals; held: defendant received substantial benefits from the plea (counts dismissed), thus waived right to appeal the exceptional sentence, *State v. Ermels*, 156 Wn.2d 528, 541 (2006), *State v. Dillon*, 142 Wn.App. 269 (2007), trial court's finding that any factor is grounds for the sentence makes analysis of other grounds unnecessary; where court fails to include a statement that "the sentence is consistent with the purposes of the SRA," *Pers. Restraint of Breedlove*, 138 Wn.2d 298, 310 (1999), appellate court can conclude that such a finding is implicit in the record; I.

***Postsentence Review of Smith***, 139 Wn.App. 599 (2007)

Trial court has authority to impose an exceptional sentence of a longer term of community custody, *State v. Hudnall*, 116 Wn.App. 190 (2003), *State v. Davis*, 146 Wn.App. 714 (2008); I.

***State v. Grenning***, 142 Wn.App. 518, 544-45 (2008), *aff'd, on other grounds*, 169 Wn.2d 247 (2010)

Defendant is convicted of multiple sex offenses, one of which includes a jury determination that it was committed with sexual motivation, trial court imposes exceptional

sentences; held: because sexual motivation is an aggravating factor, RCW 9.94A.535(3)(f) (2008), trial court properly imposed exceptional sentence; II.

***State v. Newlun***, 142 Wn.App. 730 (2008)

Judge may impose exceptional sentence without a finding of fact by a jury where court finds defendant "has committed multiple current offenses and the defendant's **high offender score** results in some of the current offenses going unpunished," RCW 9.94A.535(2), because the aggravating factor is wholly based upon prior convictions, *State v. Mutch*, 171 Wn.2d 6346, 656-61 (2011), *State v. Alvarado*, 164 Wn.2d 556 (2008), *State v. Hughes*, 154 Wn.2d 118, 134 (2005) , *abrogated, on other grounds, Washington v. Recuenco*, 548 U.S. 212, 165 L.Ed.2d 466 (2006), *Almendarez-Torres v. United States*, 140 L.Ed.2d 530 (1998), *Jones v. United States*, 143 L.Ed.2d 311, 329-30 (1999), *see: State v. Vance*, 168 Wn.2d 754 (2010); III.

***State v. Gonzales Flores***, 164 Wn.2d 1, 20-24 (2008)

Major VUCSA aggravating factor, RCW 9.94A.535(2)(e), must be determined by a jury, *State v. Hagar*, 158 Wn.2d 369, 374 (2006); 6-3.

***Oregon v. Ice***, 172 L.Ed.2d 517 (2008)

Where state law permits a judge to impose **consecutive** sentences upon finding certain statutorily defined facts, United States Constitution does not require that those facts be found by a jury, distinguishing *Blakely v. Washington*, 159 L.Ed.2d 403 (2004), *State v. Vance*, 168 Wn.2d 754 (2010); 5-4.

***State v. Mitchell***, 149 Wn.App. 716. 724-25 (2009), *aff'd, on other grounds,* 169 Wn.2d 437 (2010)

In criminal mistreatment case, RCW 9A.42.005, 9A.42.020(1), withholding food from a 4-year old knowing that victim was preoccupied with food, had an eating disorder supports **victim vulnerability**; I.

***State v. Yarbrough***, 151 Wn.App. 66, 94-96 (2009)

Aggravating factors, do not violate double jeopardy clause as legislature intended additional punishment; II.

***State v. Gordon***, 153 Wn.App. 516, 529-40 (2009), *rev'd, on other grounds,* 172 Wn.2d 671 (2011)

Aggravating factors are elements of the aggravated version of the crime, *Ring v. Arizona*, 536 U.S. 584, 609, 153 L.Ed.2d 556 (2002), *State v. Allen*, 192 Wn.2d 526 (2018), *State v. Arndt*, 194 Wn.2d 784 (2019), *Alleyne v. United States*, 570 U.S. 99, 186 L.Ed.2d 314 (2013), for purposes of jury instructions, *see: State v. Duncalf*, 164 Wn.App. 900 (2011), *aff'd,* 177 Wn.2d 289 (2013), *Matter of Fernandez*, 20 Wn.App.2d 883 (2022); I.

***State v. Vance***, 168 Wn.2d 754 (2010)

Defendant is convicted of 8 sex offenses which are not serious violent offenses, has two prior sex offenses, trial court finds that multiple offense policy results in a presumptive sentence that is clearly too lenient, imposes consecutive sentences; held: Sixth Amendment does not require a jury finding of aggravating circumstances to impose consecutive exceptional sentence,

*Oregon v. Ice*, 172 L.Ed.2d 517 (2009), *Pers. Restraint of Finstad*, 177 Wn.2d 501, 508 n. 7 (2013), *overruling Pers. Restraint of VanDelft*, 158 Wn.2d 731 (2006); 9-0. ,

***State v. Stubbs***, 170 Wn.2d 117 (2010)

**Severity of injuries** cannot be an aggravating factor for assault 1°, as no injury can substantially exceed "great bodily harm" short of death, *State v. Bourgeois*, 72 Wn.App. 650, 662 (1994); reverses *State v. Stubbs*, 144 Wn.App. 644 (2008); 8-1.

***State v. Hylton***, 154 Wn.App. 945 (2010)

Adding a statutory aggravating factor that was previously a nonstatutory aggravator, **abuse of trust**, RCW 9.94A.535(3)(n) (2008), after a crime was committed may apply retroactively and is not an *ex post facto* law; II.

***State v. Sao***, 156 Wn.App. 67, 77-82 (2010)

Presumption of innocence does not apply to the penalty phase in a special sentencing proceeding to consider aggravating factors, jury need not be so instructed, *State v. Benn*, 120 Wn.2d 631, 668 (1993); II.

***State v. McNeal***, 156 Wn.App. 340 (2010)

Where the legislature has directed the court, without a jury, to determine aggravating factors, RCW 9.94A.535(2) (free crimes, unscored misdemeanors), trial court may not impanel a jury to consider those factors; state is not precluded from seeking an exceptional sentence where a case has been remanded for resentencing and defendant had not been given pretrial notice of the aggravating factors, *State v. Powell*, 167 Wn.2d 672, 679-80 (2009); II.

***State v. Epefanio***, 156 Wn.App. 378, 390-92 (2010)

Aggravating factor of sexual abuse for "a prolonged period of time," RCW 9.94A.535(3)(g), is a jury question even where the time was only 5-6 weeks, distinguishing *State v. Barnett*, 104 Wn.App. 191, 203 (2001); II.

***State v. Combs***, 156 Wn.App. 502 (2010)

Eluding a pursuing police officer committed six months after release from prison for a drug offense is not **rapid recidivism**, as attempting to elude is an impulse crime, there was no planning, distinguishing *State v. Butler*, 75 Wn.App. 47 (1994), *State v. Saltz*, 137 Wn.App. 576 (2007), *see: State v. Murray*, 190 Wn.2d 727 (2018); III.

***State v. Mann***, 157 Wn.App. 428, 441-42 (2010)

"[W]hile the jury must find the facts supporting an exceptional sentence, the court must determine whether the facts found were sufficient to warrant an exceptional sentence," at 441 ¶ 42, *State v. Suleiman*, 158 Wn.2d 280, 292-93 (2006); III.

***State v. Edvalds***, 157 Wn.App. 517, 529-35 (2010)

State need not give notice that it will seek an exceptional sentence based upon the multiple current offenses/free crimes aggravator, RCW 9.94A.535(2)(c) (2010); I.

***State v. Gordon***, 172 Wn.2d 671 (2011)

Appellant may not challenge failure of the trial court to further define terms contained with an aggravating circumstance instruction for the first time on appeal as it is not of constitutional magnitude; reverses, in part, *State v. Gordon,* 153 Wn.App. 516 (2009); 9-0.

***State v. Hyder***, 159 Wn.App. 234, 258-69 (2011)

Defendant admitting to therapist that he had sexual contact with juvenile over six years is sufficient to find **multiple incidents over a long period of time**; sexual contact with daughter, persuasive pleading, anger, violence is sufficient to find **position of trust**; because a single act is all that is required for conviction, the elements in the charged sex crimes do not preclude an aggravating factor of multiple incidents, fact that defendant is victim's father does not preclude position of trust factor, distinguishing *State v. Ferguson,* 142 Wn.2d 631 (2001); jury need not determine that, in addition to aggravating factors, there are substantial and compelling reasons for exceptional sentence, *State v. Alvarado,* 164 Wn.2d 556, 567 (2008); II.

***State v. Williams***, 159 Wn.App. 298, 308-15 (2011)

While **rapid recidivism** is a question for the jury, the issue of whether or not to impose an exceptional sentence upon a finding by the jury is for the court, similarity of the current offense the offense immediately preceding release is a factor for the sentencing judge, not the jury, determines the effect of the similarity, *cf.: State v. Gordon,* 153 Wn.App. 516, 534 (2009), *reversed, on other grounds,* 172 Wn.2d 671 (2011); once jury finds an aggravating factor, trial court is not obliged to enter findings to support the exceptional sentence, *but see: State v. Friedlund,* 182 Wn.2d 388 (2015); "shortly after" release in rapid recidivism statute, RCW 9.94A.535(3)(t) is not vague; jury need not be re-instructed on presumption of innocence in aggravating circumstances portion of bifurcated trial; I.

***State v. Bluehorse***, 159 Wn.App. 410, 423-31 (2011)

Defendant is convicted of drive-by shooting with **gang aggravator**, detective as gang expert testifies that gang members retaliate, gang members throwing gang signs might provoke retaliation and gang members often wear bandannas in gang color when committing violent crimes, only evidence regarding defendant's potential retaliatory motive is trading of gang signs some years earlier, no evidence is produced that defendant announced gang status or otherwise committed the crime to obtain, maintain or advance gang membership, RCW 9.94A.535(3)(s) (2011), 9.94A.537(3); held: generalizations from law enforcement are insufficient to satisfy state's burden to prove gang aggravator beyond a reasonable doubt, *see: State v. Thein,* 138 Wn.2d 133, 136-39 (1999), *State v. Moreno,* 173 Wn.App. 479 (2013), *State v. DeLeon,* 185 Wn.App. 171 (2014), 185 Wn.2d 478, 489-91 (2016), *State v. Arredondo,* 190 Wn.App, 512, 534-36 (2015) , *aff'd, on other grounds,* 188 Wn.2d 244 (2017); trial court's stated reason that it imposed an exceptional sentence equivalent to assault 1° because the facts here resembled that crime violates **real facts** doctrine; imposing sentence to achieve parity with co-defendant with higher offender score's sentence violates real facts doctrine and is **clearly excessive**; II.

***State v. Webb***, 162 Wn.App. 195, 205-08 (2011)

Defendant robs store with his 9-year old daughter present, video of robbery shows daughter "shocked," victim says she was "absolutely stunned," friend of defendant says daughter was "stunned" 1½ hours after robbery, no other evidence presented, jury finds aggravating factor of **destructive and foreseeable impact on persons other than the victim**, RCW 9.94A.535(3)(r); held: absent a lasting destructive impact, evidence is insufficient to establish the aggravating factor, *cf.: State v. Cuevas-Diaz,* 61 Wn.App. 902, 904 (1991), *State v. Jackson,* 150 Wn.2d 251, 275-76 (2003); 2-1, III.

***State v. Chanthabouly***, 164 Wn.App. 104, 142-45 (2011)

Shooting and killing a student in front of other high school students is sufficient to support a finding of **destructive and foreseeable impact on persons other than the victim**, RCW 9.94A.535(3)(r) (2011), distinguishing *State v. Way,* 88 Wn.App. 830 (1997); II.

***State v. Griffin***, 173 Wn.2d 467 (2012)

At a fact finding hearing to determine the existence of an aggravating factor, evidence rules apply, ER 1101(c)(3) only applies to the sentencing itself; 9-0.

***State v. Rowland***, 174 Wn.2d 150 (2012)

Before *Blakely v. Washington,* 542 U.S. 296, 159 L.Ed.2d 403 (2004), trial judge finds an aggravating factor and imposes an exceptional sentence, on collateral review appellate court finds an error in offender score, *Pers. Restraint of Rowland,* 149 Wn.App. 496, 512 (2009), at resentencing court concludes *Blakely* is inapplicable, *State v. Evans,* 154 Wn.2d 438, 443-48 (2005), changes offender score, re-imposes exceptional sentence; held: because no new exceptional sentence was imposed, judge was authorized to reimpose sentence without a jury finding; 9-0.

***State v. Siers***, 174 Wn.2d 269 (2012)

An aggravating factor need not be charged in the information, overruling *State v. Powell,* 167 Wn.2d 672 (2009), reversing *State v. Siers,* 158 Wn.App. 656 (2010); 9-0.

***State v. Guzman Nuñez***, 174 Wn.2d 707 (2012)

Jury must be unanimous to find that state did not prove aggravating factors, overruling *State v. Bashaw,* 169 Wn.2d 133 (2010), *State v. Goldberg,* 149 Wn.2d 888, 894 (2003); 9-0.

***State v. Cham***, 165 Wn.App. 438, 449-50 (2011), *rev. granted,* 175 Wn.2d 1022 (2012)

**Rapid recidivism**, RCW 9.94A.535(3)(t) (2011), does not require a finding of a pattern of prior similar offenses showing heightened culpability and a greater disregard and disdain for the law, *State v. Williams,* 159 Wn.App. 298, 314 (2011), reoffending an hour after release from jail is sufficient, *see: State v. Murray,* 190 Wn.2d 727 (2018); 2-1, II.

***State v. Zigan***, 166 Wn.App. 597 (2012)

Evidence in vehicular homicide case that defendant smiled, laughed and joked about hitting a motorcyclist with a car establishes **egregious lack of remorse**, *State v. Erickson,* 108 Wn.App. 732, 739-40 (2001), *State v. Wood,* 57 Wn.App. 792, 795 (1990); vehicular homicide

two months after release on an unrelated crime is sufficient to establish **rapid recidivism**, *State v. Saltz*, 137 Wn.App. 576 (2007); III.

***State v. Duncalf***, 177 Wn.2d 289 (2013)

For the same incident defendant is charged with assault 1° (great bodily harm) and alternatively assault 2° (substantial bodily harm) and, with respect to the latter, an aggravating factor that the injury substantially exceeded the level of bodily harm necessary to satisfy substantial bodily harm, defense does not ask for a definition of "substantially exceed," jury acquits of assault 1°, convicts of assault 2° and finds the aggravator; held: while the "substantially exceeds" aggravator cannot apply to assault 1°, *State v. Stubbs*, 170 Wn.2d 117 (2010), these verdicts can be reconciled because the *mens rea* elements differ (assault 1°: intent to inflict great bodily harm; assault 2°: the assault itself must be intended but not the resulting bodily harm); failure to define "substantially exceed" is "merely definitional," *State v. Gordon*, 172 Wn.2d 671, 677-80 (2011) and not an element and thus cannot be challenged for the first time on appeal, *but see: Alleyne v. United States*, 570 U.S. 99, 186 L.Ed.2d 314 (2013); affirms *State v. Duncalf*, 164 Wn.App. 900 (2011); 9-0.

***Pers. Restraint of Finstad***, 177 Wn.2d 501 (2013)

Trial court imposes consecutive sentence without finding aggravating factor, three years later defendant files PRP seeking concurrent sentences; held: while the court had the authority to impose consecutive sentence without a jury finding of an aggravating factor, *State v. Vance*, 168 Wn.2d 754, 762 (2010), thus the judgment and sentence here is not valid on its face, a procedural violation as occurred here does not establish prejudice, *State v. Chambers*, 176 Wn.2d 573 (2013), thus PRP is dismissed; 6-3.

***State v. Parmelee***, 172 Wn.App. 899 (2013)

Judge, not a jury, may find facts and impose exceptional **consecutive** sentences, *State v. Vance*, 168 Wn.2d 754, 762-63 (2010); I.

***State v. Moreno***, 173 Wn.App. 479, 494-97 (2013)

In assault 1° case, evidence showing that defendant had ties to gang, defendant is in rival gang territory, police expert testifies that the two gangs are uniquely territorial, acts of violence in opposing gang territory improves status in gang, defendant called out gang name just before shooting is sufficient to prove **gang** aggravator, RCW 9.94A.535(3)(s) (2011), *State v. Arredondo*, 190 Wn.App, 512, 534-36 (2015) , *aff'd, on other grounds,* 188 Wn.2d 244 (2017), *but see: State v. Bluehorse*, 159 Wn.App. 410 (2011), *State v. DeLeon*, 185 Wn.App. 171, 196 (2014), 185 Wn.2d 478, 489-91 (2016); 2-1, III.

***State v. Douglas***, 173 Wn.App. 849 (2013)

Defendant is charged with crimes with an aggravating factor, is convicted, at sentencing receives a 61- month standard range sentence (opinion is unclear as to whether jury found the aggravator), conviction is reversed, state adds more aggravators, jury convicts and finds that the aggravators were proved, court imposes 480 month exceptional sentence; held: RCW 9.94A.537(2) (2007), which permits a jury to be impanelled to consider aggravating factors after

a reversal due to *Blakely v. Washington,* 542 U.S. 296, 159 L.Ed.2d 403 (2004), does not bar the state from seeking an exceptional sentence in a case that has been remanded even if an exceptional sentence was requested but not imposed following the previous trial; II.

***State v. Huynh***, 175 Wn.App. 896 (2013)

**Major VUCSA** aggravating factor, RCW 9.94A.535(3)(e) (2011) does not require unanimity on which statutory factor was proved; I.

***State v. Davis***, 176 Wn.App. 849 (2013)

Decedent murders police officers, defendants withhold details when speaking with police which delay investigation and place families of deceased police officers in fear, defendant convicted of rendering criminal assistance and possession of stolen firearm, state alleges aggravators of **destructive and foreseeable impact on persons other than the victim**, RCW 9.94A.535(3)(r), and **offense was committed against a law enforcement officer**, RCW 9.94A.535(3)(v); held: destructive and foreseeable impact factor may apply to rendering but evidence did not support it to firearm possession; law enforcement victim aggravator is legally inapplicable to rendering as the aggravator requires that the offense be committed against a law enforcement officer; because the slain officer was dead by the time defendants' possessed the gun stolen from him, the law enforcement victim aggravator cannot apply as the victim is the owner of the firearm, *State v. Haddock,* 141 Wn.2d 103, 111 (2000); 2-1, II.

***Alleyne v. United States***, 570 U.S. 99, 186 L. Ed. 2d 314 (2013)

Facts that increase the mandatory minimum sentence are therefore elements and must be submitted to the jury and found beyond a reasonable doubt, overruling *Harris v. United States,* 536 U.S. 545, 153 L.Ed.2d 524 (2002) and *McMillan v. Pennsylvania,* 477 U.S. 79, 91 L.Ed.2d 67 (1986); 5-4.

***State v. Sweat***, 180 Wn.2d 156 (2014)

In domestic violence case, aggravating factor of **pattern of psychological, physical or sexual abuse**, RCW 9.94A.535(h)(i) (2011), does not require proof that the prior incidents of abuse involved the same victim; affirms *State v. Sweat,* 174 Wn.App. 126 (2013); 9-0.

***State v. Kinnaman***, 180 Wn.2d 197 (2014)

Defendant pleads guilty to eluding a pursuing police vehicle and endangerment enhancement, RCW 9.94A.834 (2008), state's recommendation for the enhancement was 12 months, but statute, RCW 9.94A.533(11) (2013), requires 12 months and one day which court imposed, defendant moves to withdraw plea to the enhancement only; held: sentence was not in excess of statutory authority, defendant did not move to withdraw plea to the crime, rather only to the enhancement, a plea agreement may be divisible if there are multiple counts, *State v. Bisson,* 156 Wn.2d 507, 519 (2006), a plea to one crime is not divisible; *per curiam.*

***State v. Allen***, 182 Wn.2d 364, 382-85 (2015)

Aggravating sentencing factor that victim was a police officer, RCW 9.94A.535(3)(v) (2008), applies to an accomplice if the jury finds the required elements based on the accomplices

own misconduct, *State v. McKim*, 98 Wn.2d 111, 117 (1982), *State v. Davis*, 101 Wn.2d 654, 658 (1984); reverses, in part, *State v. Allen*, 178 Wn.App. 893 (2014); 9-0.

***State v. Brush***, 183 Wn.2d 550, 556-60 (2015)

Instruction regarding **domestic violence aggravating factor**, RCW 9.94A.535(3)(h)(i) (2008), that states that a "prolonged period of time means more than a few weeks" is a comment on the evidence, distinguishing *State v. Barnett*, 104 Wn.App. 191, 203 (2001); 9-0.

***State v. Trebilcock***, 184 Wn.App. 619 (2014)

**Ongoing pattern of abuse** and **abuse of trust** may apply to criminal mistreatment 1°, RCW 9A.42.020 (2006), and domestic violence crimes; II.

***State v. Friedlund***, 182 Wn.2d 388 (2015)

Written findings are mandatory when an exceptional sentence is imposed; 9-0.

***State v. Hayes***, 182 Wn.2d 556 (2015)

While an accomplice may have his sentence enhanced as a **major economic offense**, RCW 9.94A.535(3)(d)(i), -(ii) (2010), jury must return a special verdict finding that accomplice had knowledge that the offense would have multiple victims or multiple incidents per victim or that it involved a high degree of sophistication or planning or would occur over a lengthy period of time, *State v. McKim*, 98 Wn.2d 111, 119 (1982), *State v. Piñeda-Piñeda*, 154 Wn.App. 653 (2010); affirms *State v. Hayes*, 177 Wn.App. 801 (2013); 5-4.

***State v. Weller***, 185 Wn.App. 913, 927-31 (2015)

**Deliberate cruelty** aggravating factor applies to two co-defendants where special verdict asks "[d]id *the defendant's conduct*…manifest deliberate cruelty to the victim?," *State v. Allen*, 182 Wn.2d 364, 382-85 (2015); **ongoing pattern of abuse** aggravating factor could not apply to co-defendants where special verdict asks "[w]as the *crime* part of an ongoing pattern…of…abuse," as jury did not specifically find that either co-defendant engaged in an ongoing pattern of abuse or that either knew the other had done so, *State v. Hayes*, 182 Wn.2d 556, 564-65 (2015); II.

***State v. Manlove***, 186 Wn.App. 433 (2015)

**Deliberate cruelty** can apply to a property crime, here burglary, where the cruelty is directed to the victim, not the property; III.

***Pers. Restraint of Crow***, 187 Wn.App. 414, 421-25 (2015)

**Good Samaritan** aggravating factor, RCW 9.94A.535(3)(w), applies to bystanders who are harmed while providing immediate aid to someone in peril, not to someone who reported an assault a week earlier and was subject to retaliation; II.

***State v. Dyson***, 189 Wn.App. 215 (2015)

Defendant is convicted of assault 1°, sentencing judge finds defendant's conduct qualified for mandatory five-year minimum because force could likely have resulted in death,

RCW 9.94A.540 (2014); held: fact-finding triggering a mandatory minimum must be submitted to the jury, *Alleyne v. United States*, 570 U.S. 99, 186 L.Ed.2d 314 (2013), *but see: State v. McChristian*, 158 Wn.App. 392 (2010); 2-1, III.

***State v. Gipson***, 191 Wn.App. 780 (2015)

**Public official** aggravator, RCW 9.94A.535(3)(x) (2013), does not include a law enforcement officer as an element of assault 3° as charged, RCW 9A.36.031(1)(g) (2013), is that victim is a police officer; II.

***State v. Weller***, 197 Wn.App. 731 (2017)

With consecutive exceptional sentences court may impose no contact orders for the maximum of each crime consecutively; II.

***State v. Murray***, 190 Wn.2d 727 (2018)

**Sexual motivation aggravator**, RCW 9.94A.535(3)(f), can enhance a conviction of indecent exposure, RCW 9A.88.010 (2003), *State v. Thomas*, 138 Wn.2d 630, 636 (1999), as indecent exposure lacks an inherent sexual motive; **rapid recidivism aggravator**, RCW 9.94A.535(3)(t) (2003), is not void for vagueness as applied here as a person of reasonable understanding would not have to guess that reoffending 16 days after being incarcerated is within a "short time," *see: State v. Cham*, 165 Wn. App. 438, 450 (2011), *State v. Butler*, 75 Wn.App. 47, 54 (1994), *State v. Saltz*, 137 Wn.App. 576, 584–85 (2007), *State v. Combs*, 156 Wn.App. 502, 505 (2010); 7-2.

***State v. Shelley***, 3 Wn.App.2d 196 (2018)

Defendant lives with girlfriend and her minor son, assaults girlfriend's son, is convicted of assault with domestic violence enhancement; held: for purposes of sentence enhancement RCW 9.94A.525(21) (2013) limits domestic violence as defined in RCW 9.94A.030(20) (2015) which includes children in common or children 16 years or older residing in the same household, RCW 9.94A.030(3) (2004); while victim's age here is not disclosed in opinion, by context it is less than 16 and thus domestic violence aggravator was improper; I.

***State v. Brush***, 5 Wn.App.2d 40 (2018)

**Domestic violence/ongoing pattern of psychological abuse** aggravator, RCW 9.94A.535(3)(h), is not overbroad; sentence aggravators are not subject to vagueness challenges, *State v. Baldwin*, 150 Wn.2d 448, 461 (2003), *State v. Burrus*, 577 Wn.App.2d 190 (2021); seven weeks is a "prolonged period of time" for purposes of domestic violence aggravator, *State v. Epefanio*, 156 Wn.App. 378, 391 (2010); II

***State v. Brown***, 193 Wn.2d 280 (2019)

Defendant is convicted of seven crimes, offender score is greater than nine, trial court declines to impose exceptional sentence based upon **free crimes** aggravator, following appeal four counts are dismissed, at resentencing offender score remains above nine, state recommends exceptional sentence which trial court imposes, albeit less than original sentence; held: **collateral estoppel** does not bar the exceptional sentence, *State v. Collicott*, 118 Wn.2d 649 (1992), *State*

*v. Harrison*, 148 Wn.2d 550, 561 (2003), *State v. Tili*, 148 Wn.2d 350, 361 (2003); **judicial and prosecutorial vindictiveness**, *North Carolina v. Pearce*, 395 U.S. 711, 723, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969**),** is inapplicable as new sentence was less than first one, *State v. Larson*, 56 Wn.App. 323 (1989), *see: State v. Ameline*, 118 Wn.App. 128 (2003), *State v. Korum*, 157 Wn.2d 614 (2006); 8-1.

***State v. Smith***, 7 Wn.App.2d 304 (2019)

Defendant is convicted of two non-violent offenses, offender score is 21, court imposes exceptional sentence based upon **free crimes** aggravator, RCW 9.94A.535(2)(c) (2016); held: an exceptional sentence based upon free crimes aggravator is permitted even where "only one conviction would go unpunished;" III.

***State v. Butterfield***, 10 Wn.App.2d 399 (2019)

Charging document alleges a statutory aggravating factor but omits language in statute that the offense involved domestic violence, court instructs jury per the charging document, also omitting domestic violence language, imposes exceptional sentence; held: because the jury did not find all of the elements of the aggravating factor sentence is reversed, cannot be harmless error, *State v. Williams-Walker*, 167 Wn.2d 889, 902 (2010); II.

***State v. Marjama***, 14 Wn.App.2d 803 (2020)

Aggravator of domestic violence in the presence of **minor children**, RCW 9.94A.535(h)(2) (2019), applies if only one child is present; II.

***State v. Burrus,*** 17 Wn.App.2d 162 (2021)

When **deliberate cruelty** is submitted to a jury the state need not provide comparative evidence of typical attempted first degree murders, distinguishing *State v. Suleiman*, 158 Wn.2d 280 (2006); "deliberate cruelty" is not vague; I.

***State v. Fletcher***, 20 Wn.App.2d 476 (2021)

In vehicular homicide case where victim-passengers were drinking with the defendant-driver court imposes exceptional sentence for aggravating factor of severity of injuries, defense does not request exceptional sentence for mitigating factor of "willing participants;" held: sentencing court need not balance mitigating factors against aggravating factors, *State v. Davis*, 47 Wn.App. 91 (1987), nor need it consider mitigating factors when imposing an exceptional sentence upwards; II.

# SENTENCING REFORM ACT
## Mitigating Factors -Exceptional Sentences

***State v. Pascal***, 108 Wn.2d 125 (1987)

Permitting state to appeal sentence below presumptive range does not violate double jeopardy (9-0); 30 days for manslaughter 1° affirmed as there were substantial and compelling reasons relating to particular circumstances of defendant's crime; 7-2.

***State v. Nelson***, 108 Wn.2d 491 (1987)

Trial court may consider the **absence of any criminal record**, including misdemeanors, as evidence of a lack of predisposition as a mitigating factor, RCW 9.94A.390, *State v. Baucham*, 76 Wn.App. 749, 752-3 (1995), *but see: State v. Freitag*, 127 Wn.2d 141 (1995), *State v. Ha'mim*, 132 Wn.2d 834 (1997), *overruled, in part, State v. O'Dell,* 183 Wn.2d 680, 688-99 (2015), *cf.: State v. Powers*, 78 Wn.App. 264 (1995); **cooperation of the defendant** is a mitigating factor, *see: State v. Garcia*, 162 Wn.App. 678 (2011); holding the bag in a robbery is not a secondary role, *State v. Calvert*, 79 Wn.App. 569, 579-80 (1995); reverses *State v. Nelson*, 43 Wn.App. 871 (1986); *see also: State v. Moore*, 73 Wn.App. 789, 798-800 (1994); 9-0.

***State v. Ward***, 49 Wn.App. 427 (1987), *overruled, on other grounds, State v. Mail*, 121 Wn.2d 707 (1993)

**Alcoholism** is not a mitigating factor; I.

***State v. Pennington***, 112 Wn.2d 606 (1989)

**Drug addiction** is not grounds for exceptional sentence to effectuate treatment, *State v. Gaines*, 122 Wn.2d 502 (1993), *State v. Estrella*, 115 Wn.2d 350 (1990), *State v. Harper*, 62 Wn.App. 69 (1991), *State v. Laik*, 62 Wn.App. 734 (1991), *State v. Paine*, 69 Wn.App. 873 (1993); *see*: *State v. Allert*, 58 Wn.App. 200 (1990); 9-0.

***State v. Estrella***, 115 Wn.2d 350 (1990)

Trial court's "finding" that defendant should be afforded an opportunity at gradual release and reintegration into society is a legal conclusion that should not be considered in support of exceptional sentence; I.

***State v. Allert***, 117 Wn.2d 156 (1991)

Trial court finds that combined effects of alcoholism, depression and compulsive personality impaired defendant's capacity to appreciate wrongfulness of conduct, imposed exceptional sentence below standard range; held: because **voluntary use of alcohol** is an improper factor to consider, *State v. Pennington*, 112 Wn.2d 606 (1989), and the record here does not bear out that absent alcohol abuse defendant would have been impaired, exceptional sentence was improper, *reversing State v. Allert*, 58 Wn.App. 200 (1990); *accord: State v. Hutsell*, 120 Wn.2d 913 (1993); fact that defendant is not a threat to the public does not support an exceptional sentence; 6-3.

***State v. Grewe***, 117 Wn.2d 211 (1991)

**Abuse of trust** is an aggravating factor for indecent liberties of a person less than 14 years old, RCW 9A.44.100(1)(b), *reversing* *State v. Grewe*, 59 Wn.App. 141 (1990); *accord:* *State v. Soderquist*, 63 Wn.App. 144 (1991); *see*: *State v. Marcum*, 61 Wn.App. 611 (1991); where defendant knew eight-year old victim for four months, victim frequently visited defendant's home where she played, there is sufficient evidence to establish abuse of trust, *State v. Fisher*, 108 Wn.2d 419, 427 (1987)(duration and degree of relationship are factors), *State v. Jackmon*, 55 Wn.App. 562 (1989), *State v. P.B.T.*, 67 Wn.App. 292 (1992), *State v. Jacobsen*, 95 Wn.App. 967, 978-81 (1999), *State v. Jennings*, 106 Wn.App. 532, 547-50 (2001), *see also:* *State v. Hammond*, 65 Wn.App. 585 (1992); 9-0.

***State v. Dyer***, 61 Wn.App. 685 (1991)

Defendant gives drugs to 11-year old who dies; defendant pleads guilty to controlled substances homicide, RCW 69.50.415(a), court finds aggravating factors of **vulnerability** and **abuse of trust**, imposes exceptional sentence equal to maximum sentence; held: where court properly finds aggravating factors, then standard of review of length of exceptional sentence is abuse of discretion, *State v. Oxborrow*, 106 Wn.2d 525, 530 (1986), *State v. Pryor*, 56 Wn.App. 107 (1989), *aff'd on other grounds*, 115 Wn.2d 445 (1990); here, facts establish "worst case scenario in which circumstances of the crime distinguish it from other crimes of the same statutory category"; 2-1, III.

***State v. Cuevas-Diaz***, 61 Wn.App. 902 (1991)

**Impact of offense on victim and community** is not grounds for an exceptional sentence, as both are foreseeable and exist in any case, *but see:* *State v. Tuitoelau*, 64 Wn.App. 65 (1992), *State v. Johnson*, 69 Wn.App. 528 (1993), *aff'd,* 124 Wn.2d 73-6 (1994), *State v. Jackson*, 150 Wn.2d 251, 273-76 (2003), *cf.:* *State v. Way*, 88 Wn.App. 830 (1997); **severe traumatization of minor children** who witnessed assault against mother is grounds for exceptional sentence where impact on other persons is of destructive nature not normally associated with offense in question and is foreseeable to defendant; committing assault in private residence results in foreseeable trauma to children, *State v. Barnes*, 58 Wn.App. 465, 475 (1990), *rev'd, in part,* 117 Wn.2d 701 (1991), *State v. Crutchfield*, 53 Wn.App. 916 (1989), *overruled, on other grounds, State v. Chadderton*, 119 Wn.2d 390, 396 (1992), *see also:* *State v. Mulligan*, 87 Wn.App. 261 (1997), *cf.: State v. Webb,* 162 Wn.App. 195, 205-08 (2011); II.

***State v. Hicks***, 61 Wn.App. 923 (1991)

Defendant pleads guilty to burglary 1° and rape 1°; beating and threatening victims is **deliberate cruelty** beyond the assault element of burglary 1°, *State v. Clinton*, 48 Wn.App. 671 (1987); rape in victim's bedroom invades **zone of privacy** for purposes of rape sentence, *State v. Falling*, 50 Wn.App. 47 (1987), but not for burglary, *State v. Post*, 59 Wn.App. 389 (1990); rendering sleeping victim incapable of resisting by pushing pillow on her face, then raping her, establishes exceptional **vulnerability**; running exceptional sentences consecutively for multiple rapes is permissible, RCW 9.94A.390, -.400(1)(b); III.

***State v. Wiley***, 63 Wn.App. 480 (1991)

Failure of state to object to exceptional sentence precludes appellate review absent sentence in excess of jurisdiction, *cf.:* *State v. Paine*, 69 Wn.App. 873 (1993), *State v. Hortman*, 76 Wn.App. 454, 459 (1994); I.

***State v. Collicott***, 118 Wn.2d 649 (1992)

Upon remand, trial court may impose exceptional sentence even though one was not imposed at the prior sentencing, *State v. Brown*, 193 Wn.2d 280 (2019), *see:* *State v. Lessley*, 118 Wn.2d 773 (1992), *State v. Tili*, 148 Wn.2d 350 (2003), *State v. White*, 123 Wn.App. 106 (2004), *but see:* *State v. Ameline*, 118 Wn.App. 128 (2003); 9-0.

***State v. Hale***, 65 Wn.App. 752 (1992)

Attempted murder 1° does not carry a mandatory minimum sentence precluding consideration of mitigating circumstances; where consecutive sentences are "standard," more than one mitigating factor may include shortening sentence and concurrent sentences, *State v. Oxborrow*, 106 Wn.2d 525 (1986); III.

***State v. Hutsell***, 120 Wn.2d 913 (1993)

**Drug addiction or intoxication** at time of offense is not mitigating factor absent proof it was induced by fraud or force, *State v. Allert*, 117 Wn.2d 159 (1991); 9-0.

***State v. Sanchez***, 69 Wn.App. 255 (1993)

Defendant sells 1/16 oz. cocaine over nine days to same informant, court sentences below sentence range; held: where **multiple offense policy**, RCW 9.94A.400, results in standard range that is "clearly excessive" because the difference between the offenses is nonexistent, **trivial** or trifling, court may grant exceptional sentence downward, RCW 9.94A.390(1)(g), *State v. Hortman*, 76 Wn.App. 454 (1994), *State v. Calvert*, 79 Wn.App. 569, 581-3 (1995), *State v. Fitch*, 78 Wn.App. 546 (1995), *State v. Solis-Diaz*, 194 Wn.App. 129 (2016), *reversed, on other grounds*, 187 Wn.2d 535 (2017), *State v. Meza* , 22 Wn.App.2d 514 (2022), *see:* *State v. Batista*, 116 Wn.2d 777 (1991), *State v. Bridges*, 104 Wn.App. 98 (2001), *State v. McGill*, 112 Wn.App. 95 (2002), *cf.:* *State v. Kinneman*, 120 Wn.App. 327, 341-48 (2003), *State v. McKee*, 141 Wn.App. 22, 33 (2007), *distinguishing* *State v. Lewis*, 115 Wn.2d 294 (1990); **learning disability** or **education level** is not a mitigating factor where it does not impair capacity to conform conduct to law, *State v. Rogers*, 112 Wn.2d 180, 185 (1989), *State v. Altum*, 47 Wn.App. 495, 505-6 (1987); II.

***State v. Hodges***, 70 Wn.App. 621 (1993)

In drug delivery case, community support, efforts at self-improvement, criminal behavior "to put food on the table," irreparable harm to relationship with defendant's children are not mitigating factors, *State v. Pascal*, 108 Wn.2d 125, 137-8 (1987), *State v. Alexander*, 70 Wn.App. 608 (1993), *State v. Fowler*, 145 Wn.2d 400, 411 (2002), *State v. Laws*, 154 Wn.2d 85 (2005), *but see: State v. Peluso*, 22 Wn.App.2d 282 (2022); I.

***State v. Gaines***, 122 Wn.2d 502 (1993)

**Drug addiction** and its causal role in an addict's offense is not justification for a durational departure from standard range, *State v. Allert*, 117 Wn.2d 156, 163 (1991), *State v. Hutsell*, 120 Wn.2d 913 (1993), *State v. Amo*, 76 Wn.App. 129, 133-4 (1994), *distinguishing* *State v. Bernhard*, 108 Wn.2d 527 (1987), *overruled in part*, *State v. Shove*, 113 Wn.2d 83

(1989); trial court can require in-patient drug treatment as a condition of an exceptional sentence where the exceptional sentence is for one year or less, *overruling, in part*, *State v. Harper*, 62 Wn.App. 69 (1991); reverses *State v. Gaines*, 65 Wn.App. 790 (1992); 5-3.

***State v. Moore***, 73 Wn.App. 789, 798-800 (1994)

**Minimal involvement** by an accomplice is a mitigating factor, at least where it is "significantly out of the ordinary for the crime," *State v. Nelson*, 108 Wn.2d 491, 501 (1987), *cf.: State v. Evans*, 80 Wn.App. 806 (1996); here, **multiple offense policy** resulted in a presumptive sentence that was clearly excessive in light of defendant's minimal involvement, RCW 9.94A.390(1)(g), *State v. Nelson, supra*, at 502, *State v. Solis-Diaz*, 194 Wn.App. 129 (2016), *reversed, on other grounds*, 187 Wn.2d 535 (2017); II.

***State v. Amo***, 76 Wn.App. 129, 133-4 (1994)

Having a young child is not a mitigating factor, *but see: State v. Peluso*, 22 Wn.App.2d 282 (2022); III.

***State v. Alexander***, 125 Wn.2d 717 (1995)

Delivery of an extraordinarily **small amount of cocaine** and defendant's low level of involvement or sophistication in executing the crime are mitigating factors, *reversing State v. Alexander*, 70 Wn.App. 608 (1993), *see: State v. Thomason*, 199 Wn.2d 780 (2022), *cf.: State v. Evans*, 80 Wn.App. 806 (1996), *State v. Garcia*, 162 Wn.App. 678 (2011); defendant's peripheral participation in the drug hierarchy is not a basis for a downward departure; 7-2.

***State v. Powers***, 78 Wn.App. 264 (1995)

**Lack of record**, including misdemeanors, does not, by itself, constitute a mitigating factor, rather it may be evidence of a lack of predisposition to commit crime, *State v. Nelson*, 108 Wn.2d 491, 497-8 (1987); trial court may not deviate from guidelines merely because it believes the standard range is excessively low or high, *but see: State v. Gassman*, 160 Wn.App. 600, 613-15 (2011), *reversed, on other grounds*, 175 Wn.2d 208 (2012); where defendant pleads guilty, remand may be appropriate to determine defendant's role in crime regarding predisposition; III.

***State v. Clemens***, 78 Wn.App. 458 (1995)

In rape of a child 3° case, victim's **willing participation** is a valid mitigating factor, RCW 9.94A.390(1)(a); 2-1, II.

***State v. Fitch***, 78 Wn.App. 546 (1995)

Defendant sells two grams marijuana to undercover officer, later that day defendant sells one gram cocaine, four days later defendant sells a bud of marijuana and a gram of cocaine, is convicted of two counts of delivery of marijuana, two counts delivery of cocaine, trial court sentences below standard range, finding it "clearly excessive," RCW 9.94A.390(1)(g); held: 1989 amendments to RCW 9.94A.320, *et al.*, do not conflict with *State v. Sanchez*, 69 Wn.App. 255 (1993), trial court's determination that **multiple offenses policy** results in a **clearly excessive** sentence range authorizes an exceptional sentence; III.

***State v. Calvert***, 79 Wn.App. 569 (1995)

One who deposits checks knowing they were forged and uses the proceeds does not establish a **secondary role significantly out of the ordinary for the crime** in question, thus does not qualify as a mitigating factor, at 579-80, *State v. Nelson*, 108 Wn.2d 491, 501 (1987); mere fact that forgery victims were family members is not a mitigating factor, at 580; **nonviolent prior offenses** is not a mitigating factor; several forgeries over several days that results in a **multiple offense policy** resulting in a clearly excessive sentence range authorizes exceptional sentence, at 581-83, *State v. Sanchez*, 69 Wn.App. 255, 262 (1993), *State v. Kinneman*, 120 Wn.App. 327, 341-48 (2003), *State v. Solis-Diaz,* 194 Wn.App. 129 (2016), *reversed, on other grounds*, 187 Wn.2d 535 (2017); III.

***State v. Medrano***, 80 Wn.App. 108, 112 (1995)

Good behavior after offense is not a valid mitigating factor, *State v. Hodges*, 70 Wn.App. 621, 625-6 (1993); III.

***State v. Freitag***, 127 Wn.2d 141, 144 (1995)

**Lack of prior record** is not a mitigating factor, *State v. Ha'mim,* 132 Wn.2d 834 (1997), *overruled,on other grounds, State v. O'Dell,* 183 Wn.2d 680, 688-99 (2015), *State v. Rogers*, 112 Wash.2d 180, 183 (1989), *State v. Pascal*, 108 Wash.2d 125, 137 (1987), *State v. Fowler*, 145 Wn.2d 400, 406-07 (2002), *cf.: State v. Garcia,* 162 Wn.App. 678 (2011), *reversing State v. Freitag*, 74 Wn.App. 133, 138-46 (1994); 6-3.

***State v. Evans***, 80 Wn.App. 806 (1996)

In drug delivery cases, motive to obtain drugs for personal use as opposed to making money is not a mitigating factor, *distinguishing State v. Alexander*, 125 Wn.2d 717 (1995), *see: State v. Thomason*, 199 Wn.2d 780 (2022); facilitating a drug transaction by making contact with buyer and setting up the deal is not minimal involvement, *distinguishing State v. Moore*, 73 Wn.App. 789, 798-800 (1994); acting as "middle man" by actually obtaining drugs from a third party and delivering them to police is not minor involvement justifying exceptional sentence; "go-between" is not a minor participant.

***State v. Hinds***, 85 Wn.App. 474 (1997)

In vehicular homicide case, where deceased provided defendant-minor with alcohol and permitted him to drive her car, then victim was a **willing participant** if on remand trial court finds that there was a causal connection between defendant's reckless driving and victim's conduct; I.

***State v. Ha'mim***, 132 Wn.2d 139 (1997), *overruled, in part, State v. O'Dell,* 183 Wn.2d 680, 688-99 (2015)

**Lack of prior police contacts** is not a mitigating factor, *State v. Freitag*, 127 Wn.2d 141, 144 (1995), *cf.: State v. Nelson*, 108 Wn.2d 491 (1987), *State v. Garcia*, 162 Wn.App. 678 (2011); **lack of predisposition** alone is not a mitigating factor absent inducement, *State v. Freitag, supra., see: State v. Jeannotte*, 133 Wn.2d 847 (1997); affirms *State v. Ha'mim,* 82 Wn.App. 139 (1996), *see: State v. Law*, 154 Wn.2d 85 (2005), *State v. Solis-Diaz*, 194 Wn.App. 129 (2016), *reversed, on other grounds*, 187 Wn.2d 535 (2017); 6-3.

***State v. Fuller***, 89 Wn.App. 136 (1997)

**Home detention** is not permitted for assault 3°, RCW 9.94A.185, nor for a deadly weapon enhancement, RCW 9.94A.310(4)(e), even as an exceptional sentence; III.

***State v. Brown***, 139 Wn.2d 20, 25-29 (1999)

Deadly weapon enhancement, RCW 9.94A.310(4), is mandatory, not subject to an exceptional sentence downward, *State v. Flett*, 98 Wn.App. 799, 805-08 (2000), *State v. Mandefero,* 14 Wn.App.2d 825 (2020), *but see: State v. Houston-Sconiers,* 188 Wn.2d 24-25, (2017); 5-4.

***State v. Schmeck***, 98 Wn.App. 647 (1999)

Once trial court finds grounds for exceptional sentence, it may impose **treatment** conditions which are related to the crime, *State v. Guerin*, 63 Wn.App. 117, 120 (1991); here, because court did not find that offense was related to substance abuse, it was improper to impose drug treatment, finding that defendant had unresolved anger towards victim justifies anger management program; III.

***State v. Flett***, 98 Wn.App. 799, 807-08 (2000)

Failed defense of lawful use of force is a mitigating factor, *State v. Jeannotte*, 133 Wn.2d 847, 851 (1997); III.

***State v. Whitfield***, 99 Wn.App. 331 (1999)

Assault victim's **verbal provocation** is a mitigating factor, distinguishing *State v. Riley*, 137 Wn.2d 904, 911 (1999); where victim provokes an assault "to a significant degree, RCW 9.94A.390(1)(a), then trial court need not find that defendant's assault was proportional to the victim's provocation to impose an exceptional sentence; I.

***State v. McClarney***, 107 Wn.App. 256 (2001)

**Extreme remorse** is not a mitigating factor, *cf.: State v. Wood*, 57 Wn.App. 792 (1990); I.

***State v. Fowler***, 145 Wn.2d 400 (2002)

Defendant's behavior during crime as **aberrational and isolated** is not a mitigating factor, at 407-09; **low risk to reoffend** is not a mitigating factor, *State v. Estrella*, 115 Wn.2d 350, 356 (1990), *State v. Pascal*, 108 Wn.2d 125, 137 (1987), at 409, *cf.: State v. Garcia*, 162 Wn.App. 678 (2011); **sleep deprivation caused by drugs and alcohol** is not a mitigating factor, RCW 9.94A.390(1)(e); **strong family support** is not a mitigating factor, *State v. Hodges*, 70 Wn.App. 621, 626 (1993), *State v. Law*, 154 Wn.2d 85 (2005); 5-4.

***State v. McGill***, 112 Wn.App. 95 (2002)

Trial court imposes standard range sentence, stating that it has no option, defense fails to cite to trial court a legal basis for an exceptional sentence; held: because sentencing judge was deprived of ability to make an informed decision, it did not exercise discretion, thus reversed for resentencing, *cf.: State v. Knight*, 176 Wn.App. 936, 957-58 (2013); I.

***State v. Law***, 154 Wn.2d 85 (2005)

Personal factors unrelated to the crime cannot support a sentence below the standard range, *State v. Freitag*, 127 Wn.2d 141, 145 (1995), *State v. Pascal*, 108 Wn.2d 125, 137-38 (1987), *State v. Ha'mim,* 132 Wn.2d 834, 836-37 (1997), *cf.: State v. Garcia,* 162 Wn.App. 678 (2011), *but see: State v. O'Dell,* 183 Wn.2d 680, 688-99 (2015), *State v. Ronquillo,* 190 Wn.App. 765 (2015), *State v. Solis-Diaz,* 194 Wn.App. 129 (2016), *reversed, on other grounds,* 187 Wn.2d 535 (2017), *State v. Peluso*, 22 Wn.App.2d 282 (2022); purposes of SRA, RCW 9.94A.010, by themselves, do not support exceptional sentences; recovery from substance abuse, church activities, positive impact on others, bond with children are not mitigating factors; 6-3.

***State v. Murray***, 128 Wn.App. 718 (2005)

Trial court may not impose a downward departure and a drug offender sentencing alternative; III.

***State v. Korum***, 157 Wn.2d 614, 636-37 (2006)

After defendant withdraws guilty plea, state adds charges resulting in a standard range more than ten times the plea range, trial court declines to impose exceptional sentence; held: while trial court had the discretion to consider a downward departure in light of defendant's criminal history and the seriousness of his offenses, RCW 9.94A.535(1)(g), 9.94A.010(1), declining to do so is not reviewable; reverses *State v. Korum*, 120 Wn.App. 686 (2004); 5-4.

***State v. Stevens***, 137 Wn.App. 460, 469-70 (2007)

In felon in possession of firearm case, mitigating factors including no predisposition to break the law, no concealing of the firearms, 2 of the 4 firearms were rifles defendant won as prizes at a rodeo justify exceptional sentence downward; III.

***Pers. Restraint of Mulholland***, 161 Wn.2d 322 (2007)

Trial court has discretion to impose, as an exceptional sentence, concurrent terms for serious violent offenses, RCW 9.94A.589(1)(b) (2002), -.535 (2008), *State v. Miller,* 181 Wn.App. 201 (2014), *reversed, on other grounds,* 185 Wn.2d 111 (2016), *State v. Graham,*181 Wn.2d 878 (2014), *see also: State v. McFarland,* 189 Wn.2d 47 (2017), *cf.: State v. Brown,* 13 Wn.App.2d 288 (2020); 9-0.

***State v. McKee***, 141 Wn.App. 22, 32-34 (2007)

Trial court grants exceptional sentence downward for separate rapes of prostitutes; held: **multiple offense policy** cannot serve as a mitigating factor for two rapes committed at different times against different women, *see: State v. Hortman*, 76 Wn.App. 454, 463-64 (1994); fact that victims were willing to have sex for money does not mean that the victims were **willing participants**, thus trial court abused its discretion; I.

***State v. Bunker***, 144 Wn.App. 406, 421-22 (2008), *aff'd, on other grounds,* 169 Wn.2d 571 (2010)

In no contact order case, victim's willingness to be in defendant's presence is grounds for a mitigated sentence; I.

***State v. Davis***, 146 Wn.App. 714 (2008)

Where standard range and community custody exceed maximum sentence, trial court may impose an exceptional sentence for less prison time so that there can be a maximum period of community custody, *see: State v. Hudnall*, 116 Wn.App. 190 (2003) *but see: State v. Thibodeaux*, 6 Wn.App.2d 223 (2018), RCW 9.94A.701(9) (2010); I.

***State v. Gassman***, 160 Wn.App. 600, 613-14 (2011), *reversed, on other grounds*, 175 Wn.2d 208 (2012)

Defendant is convicted of robbery 1°, two counts of assault 1°, two counts of drive-by shooting for one incident, defendant has prior attempted robbery conviction and prior juvenile "residential robbery," trial court finds 46 year presumptive sentence is clearly excessive and that defendant was induced by others to commit the crimes and victim initiated the contact, imposes 129 month mitigated exceptional sentence; held: sentencing judge's consideration of **defendant's age (21) and criminal history**, substantial evidence supports exceptional sentence; 2-1, III.

***State v. Statler***, 160 Wn.App. 622, 639-40 (2011)

Defendant's **young age (21), lack of serious injuries** to victims, lengthy presumptive sentence compared to co-defendants who pleaded guilty justify mitigated exceptional sentence; 2-1, III.

***State v. Garcia***, 162 Wn.App. 678 (2011)

Homeless sex offender, required to report weekly, calls sheriff to report that his ride failed to show and that he would surrender to DOC at county jail for a warrant, upon arrival at jail after sheriff's office closed, jail turns him away due to time of day, is charged with failure to register as a sex offender, trial court imposes mitigated sentence based upon transportation difficulties, attempts to comply, *de minimis* nature of violation, state appeals; held: sentencing court may not (and did not) base the exceptional sentence on mitigating factors necessarily considered by legislature in setting the standard range; **cooperation with state authorities** is a valid mitigating factor, *State v. Nelson*, 108 Wn.2d 491, 500-01 (1987); ***de minimis*** nature of violation is not a proper mitigating factor, *State v. Fowler*, 108 Wn.2d 400, 405 (2002), nor are "personal characteristics" such as drug use and family support; defendant's transportation difficulties and attempt to comply are mitigating factors as neither relate to defendant's personal conditions, rather are specifically focused on the elements of the crime; crime of failure to register is intended to address location of sex offenders and availability of such information to local authorities, defendant's behavior met both of these factors, thus mitigated sentence affirmed; III.

***Pers. Restraint of Green***, 170 Wn.App. 328 (2012)

Defendant, while serving time on a no contact order violation calls the same victim and is charged with a new NCO violation, trial court enters exceptional sentence and runs time concurrently; held: although RCW 9.94A.589 requires that when a person under sentence of a felony commits another felony the time shall be consecutive, trial court may run time concurrently if it finds mitigating circumstances; in-custody portion of DOSA sentence was to be consecutive with his non-DOSA sentence, deemed not to be a hybrid sentence because court

imposed an exceptional sentence, distinguishing *State v. Grayson,* 130 Wn.App. 782 (2005), *State v. Smith,* 142 Wn.App. 122 (2007); 2-1,

***State v. Graham***, 181 Wn.2d 878 (2014)

Sentencing court may impose an exceptional sentence downward and/or concurrent sentences for multiple current serious violent offenses if it finds that the presumptive sentence is clearly excessive in light of the purposes of the SRA listed in RCW 9.94A.010, *Pers. Restraint of Mulholland,* 161 Wn.2d 322 (2007), *State v. Ronquillo,* 190 Wn.App. 765 (2015), *State v. Solis-Diaz,* 194 Wn.App. 129 (2016), *reversed, on other grounds,* 187 Wn.2d 535 (2017), *State v. McFarland,* 189 Wn.2d 47 (2017), *State v. Meza,* 22 Wn.App.2d 514 (2022), *cf.: State v. Brown,* 13 Wn.App.2d 288 (2020); reverses *State v. Graham,* 178 Wn.App. 580 (2013); 9-0.

***State v. O'Dell***, 183 Wn.2d 680, 688-99 (2015)

**Youth** alone can be a mitigating factor, *State v. Solis-Diaz,* 194 Wn.App. 129, 137-141 (2016), overruling, in part, *State v. Ha'mim,* 132 Wn.2d 139 (1997), *State v. Ronquillo,* 190 Wn.App. 765 (2015), *reversed, on other grounds,* 187 Wn.2d 535 (2017); 5-4.

***State v. Friedlund***, 182 Wn.2d 388 (2015)

Written findings are mandatory when an exceptional sentence is imposed; 9-0.

***State v. Ronquillo***, 190 Wn.App. 765 (2015)

Sixteen year old is convicted of murder and other violent crimes, receives consecutive sentences, sentencing judge believes he lacks discretion to impose mitigated sentences; held: diminished culpability of **youth** may serve as a mitigating factor, *Miller v. Alabama,* 567 U.S. 460, 183 L.Ed.2d 407 (2012), *State v. O'Dell,* 183 Wn.2d 680, 688-99 (2015), *Montgomery v. Louisiana,* 577 U.S. 190, 136 S.Ct. 718, 193 L.Ed.2d 599 (2016), *State v. Monschke,* 197 Wn.2d 305 (2021), *see: State v. Ramos,* 187 Wn.2d 420 (2017), *State v. Scott,* 190 Wn.2d 586 (2018); court can find that consecutive sentences for serious violent offenses is clearly excessive, *State v. Graham,* 181 Wn.2d 878 (2014), *State v. Solis-Diaz,* 194 Wn.App. 129 (2016), *reversed, on other grounds,* 187 Wn.2d 535 (2017); I.

***State v. Solis-Diaz***, 194 Wn.App. 129 (2016), *reversed, on other grounds,* 187 Wn.2d 535 (2017)

For an auto-declined juvenile sentencing court must take into account observations that generally show a reduced sense of responsibility, increased impetuousness, increased susceptibility to outside pressures including peer pressure and a great claim to forgiveness and time of amendment of live, *Miller v. Alabama,* 567 U.S. 460, 183 L.Ed.2d 407 (2012), *Graham v. Florida,* 560 U.S. 48 (2010), *Roper v. Simmons,* 543 U.S. 551, 161 L.Ed.2d 1 (2005), *State v. O'Dell,* 183 Wn.2d 680 (2015), *see: State v. Ramos,* 187 Wn.2d 420 (2017), *State v. Monschke,* 197 Wn.2d 305 (2021); II.

***State v. Ramos***, 187 Wn.2d 420 (2017)

Auto-declined homicide defendant who was sentenced to a *de facto* standard range life without parole term is entitled to an individualized hearing and for the court to "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison," *Miller v. Alabama,* 567 U.S. 460, 183 L.Ed.2d 407 (2012), the record here establishes that resentencing court adequately applied *Miller, supra.,* in affirming 85-year sentence, *cf.: State v. Delbosque,* 195 Wn.2d 106 (2020), *State v. Monschke,* 197 Wn.2d 305 (2021); Court declines to apply state constitutional analysis; 9-0.

***State v. Houston-Sconiers***, 188 Wn.2d 1 (2017)

" Because "children are different" under the Eighth Amendment and hence "criminal procedure laws" must take the defendants' youthfulness into account, sentencing courts must have absolute discretion to depart as far as they want below otherwise applicable SRA ranges and/or sentencing enhancements when sentencing juveniles in adult court, regardless of how the juvenile got there," *see also: State v. Monschke,* 197 Wn.2d 305 (2021); reverses *State v. Houston-Sconiers,* 191 Wn.App. 436 (2015); 8-0.

***State v. McFarland***, 189 Wn.2d 47 (2017)

Defendant is convicted of burglary, ten counts of theft of a firearm and three counts of unlawful possession of a firearm, is sentenced to standard range sentences concurrent to the burglary but the firearm convictions consecutive to each other, defendant claims on appeal that court failed to recognize its power to impose concurrent mitigated sentences; held: pursuant to *Pers. Restraint of Mulholland,* 161 Wn.2d 322 (2007), *State v. Graham,* 181 Wn.2d 878 (2014), trial court had discretion to impose mitigated concurrent sentences, regardless of language in RCW 9.412.040(6) that firearm sentences shall run consecutively "notwithstanding any other law," *cf.: State v. Mille**r**,* 185 Wn.2d 111 (2016), *State v. Brown,* 13 Wn.App.2d 288 (2020), *State v. Meza,* 22 Wn.App.2d 514 (2022), if the court finds that the presumptive sentence is clearly excessive; 6-3.

***Pers. Restraint of Light-Roth***, 191 Wn.2d 328 (2018)

While **youth** is a mitigating factor, *State v. O'Dell,* 183 Wn.2d 680 (2015), it is not a new mitigating factor, RCW 9.94A.535(1)(e) (2016), and thus an untimely PRP is time-barred, *Matter of Meippen,* 193 Wn.2d 310 (2019), *see also: Matter of Young,* 21 Wn.App.2d 826; reverses *Pers. Restraint of Light-Roth,* 200 Wn.App. 149 (2017); 9-0.

***State v. Alltus***, 10 Wn.App.2d 193 (2019)

Trial court's refusal to order a presentence report and permit time for defense to present mitigation evidence related to youth of defendant who committed murder at age 16 is abuse of discretion; III.

***State v. Brown***, 13 Wn.App.2d 288 (2020)

Sentencing court does not have the authority to impose, as an exceptional sentence, concurrent firearm enhancements, RCW 9.94A.533(3)(e) (2018), for an adult, *State v. Brown,* 120 Wn.2d 20, 29 (1999) distinguishing *Pers Restraint of Mulholland,* 161 Wn.2d 322 (2007), *State v. Houston-Sconiers*, 188 Wn.2d 1 (2017), *see: State v. Monschke,* 197 Wn.2d 305 (2021); I.

***State v. Mandefero***, 14 Wn.App.2d 825 (2020)

While court may have discretion to impose mitigated sentence based upon youth even if defendant is over 18 at the time of the crime, *State v. O'Dell,* 183 Wn.2d 680 (2015), *State v. Nevarez,* ___ Wn.App.2d ___, 519 P.3d 252 (2022), and thus can impose an exceptional sentence for a firearms related offense, it may not impose an exceptional sentence for firearm enhancements, RCW 9.94A.533(3)(e) (2019), *State v. McFarland,* 189 Wn.2d 47, 55 (2017), *State v. Brown,* 139 Wn.2d 20, 25-29 (1999), *but see: State v. Houston-Sconiers,* 188 Wn.2d 1, 24-25 (2017); I.

***State v. Rogers***, 17 Wn.App.2d 466 (2021)

Juvenile is sentenced to 106 months for murder 1°, state appeals; held: while judges possess broad discretion when sentencing juveniles convicted in adult court, *State v. Houston-Sconiers*, 188 Wn.2d 1, 8 (2017), appellate review is needed to prevent arbitrary sentencing decisions regardless of Supreme Court's use of phrase "absolute discretion;" Division I will apply standard of review that pre-dates SRA: abuse of discretion exists only where it can be said that no reasonable judge would have taken the view adopted by the trial court, *see: State v. Hall*, 35 Wn.App. 302 (1983); when sentencing judge determines that youth is a mitigating factor court must explain reasons and they must be rationally related to evidence adduced at trial or sentencing.

***State v. Fletcher***, 20 Wn.App.2d 476 (2021)

In vehicular homicide case where victim-passengers were drinking with the defendant-driver court imposes exceptional sentence for aggravating factor of severity of injuries, defense does not request exceptional sentence for mitigating factor of "willing participants;" held: sentencing court need not balance mitigating factors against aggravating factors, *State v. Davis*, 47 Wn.App. 91 (1987), nor need it consider mitigating factors when imposing an exceptional sentence upwards; II.

***State v. Thomason***, 199 Wn.2d 780 (2022)

Defendant steals food, punches security guard, is convicted of robbery 2°, trial court finds that crime is *de minimis* but lacks discretion to impose sentence below standard range; held: *de minimis* nature of a crime can be a mitigating factor, *State v. Alexander*, 125 Wn.2d 717 (1995), but where legislature considered the *de minimis* nature of the crime then it cannot support an exceptional sentence; here, legislature did consider a defendant's *de minimis* use of force when it defined robbery 2° by stating that "the degree of force is immaterial," RCW 9A.56.190; 9-0.

***State v. Meza***, 22 Wn.App.2d 514 (2022)

Sentencing judge states that he does not have the authority to impose an exceptional sentence but if he did he wouldn't; defendant was 21 years old at the time of the murders; held: the court has authority to impose concurrent sentences for serious violent offenses, *State v. Graham*, 181 Wn.2d 878 (2014), *Pers. Restraint of Mulholland*, 161 Wn.2d 322 (2007), *State v. Ronquillo*, 190 Wn.App. 765 (2015), *State v. Solis-Diaz*, 194 Wn.App. 129 (2016), *reversed, on other grounds*, 187 Wn.2d 535 (2017), *State v. McFarland*, 189 Wn.2d 47 (2017), thus judge erred but because he made it clear that he wouldn't, not reversible error; while the 50 year sentence is confinement without the possibility of parole, *State v. Haag*, 198 Wn.2d 309, 327 (2021), there is no bright line rule of age, *State v. Monschke*, 197 Wn.2d 305, 326 (2021), trial judge has discretion to apply youthfulness principles on a case by case basis, *State v. Nevarez*, ___ Wn.App.2d ___, 519 P.3d 252 (2022), but here trial judge did consider youthfulness and declined to impose an exceptional sentence; I.

***State v. Nevarez***, ___ Wn.App.2d ___, 519 P.3d 252 (2022)

Where defendant is 18 years old at time of murder trial court is permitted but not required to consider the mitigating qualities of youth; 2-1, II.

***Matter of Forcha-Williams***, ___ Wn.2d ___, 520 P.3d 939 (2022)

*State v. Houston-Sconiers*, 188 Wash.2d 1, 8 (2017) "does not give judges the discretion to impose a determinate sentence where the legislature has mandated an indeterminate sentence. Rather, *Houston-Sconiers* gives judges the discretion to impose an indeterminate sentence with a minimum term below the minimum term set by the legislature when required by the mitigating qualities of the offender's youth;" while *Houston-Sconiers, supra,* is a significant and material change in the law, defendant must still show by a preponderance that he would have received a lower sentence, thus PRP here is untimely, *Matter of Meippen,* 193 Wn.2d 310 (2019), *Matter of Williams,* ___ Wn.2d ___, 520 P.3d 533 (2022); reverses *Pers. Restraint of Forcha-Williams,* 18 Wn.App.2d 167 (2021); 5-4.

# SENTENCING REFORM ACT
## Procedure

***State v. Harris***, 41 Wn.App. 561 (1985)

Defendant, at time of guilty plea, is informed that sentence range is 43-56 months; at sentencing court re-calculates and determines sentence range is 54-72 months, and sentences defendant to 72 months; held: absent exceptional circumstances, former RCW 9.94A.210 [recodified as 9.94A.585], defendant is entitled to standard range which he was informed would be applied when he pled guilty or he must be permitted to withdraw his plea; *but see*: *State v. Miller*, 48 Wn.App. 625, 629 (1987) ; III.

***State v. Hartley***, 41 Wn.App. 669 (1985)

Multiple prior convictions shall count as one offense only if their sentences are judicially ordered to run concurrently, former RCW 9.94A.360(11) [RCW 9.94A.525 (2013)]; *accord*: *State v. Johnson*, 48 Wn.App. 531 (1987), *State v. Hartley*, 51 Wn.App. 442 (1988), *cf.*: *State v. Roberts*, 117 Wn.2d 576 (1991), *State v. Lara*, 66 Wn.App. 927 (1992), *see: Pers. Restraint of Sietz*, 124 Wn.2d 645 (1994), *State v. Mehaffey*, 125 Wn.App. 595, 599-601 (2005); II.

***State v. Stalker***, 42 Wn.App. 1 (1985)

The fact that sentence is greater than twice the standard range is not evidence that the sentence was clearly excessive; III.

***State v. Wood***, 42 Wn.App. 78 (1985)

Where defendant disputes aggravating factor, court must either hold a hearing to determine "real facts" or not consider factor, RCW 9.94A.370; remedy for failure to hold hearing may be remand for hearing rather than remand for resentencing within standard range; where court finds that victim was particularly vulnerable due to age, court may consider a prior crime as an aggravating factor, even though the prior is already factored into the standard range, if the prior crime involved a vulnerable victim; II.

***State v. Ammons***, 105 Wn.2d 175 (1986)

SRA, RCW 9.94A, does not violate separation of powers doctrine; RCW 9.94A.100 and 9.94A.370 do not violate defendant's privilege against self-incrimination; state need prove existence of priors by a preponderance, not beyond a reasonable doubt; state need not prove validity of prior conviction unless the judgment and sentence, on its face, is constitutionally invalid, *distinguishing* *State v. Holsworth*, 93 Wn.2d 148 (1980), *see: Custis v. United States*, 128 L.Ed.2d 517 (1994), *State v. Cruz*, 91 Wn.App. 389, 399-400 (1998), *rev'd, on other grounds,* 139 Wn.2d 186 (1999), *State v. Phillips*, 94 Wn.App. 313 (1999), *Lackawanna County Dist. Attorney v. Coss*, 149 L.Ed.2d 608 (2001), *State v. Payne*, 117 Wn.App. 99 (2003), *State v. Thompson*, 143 Wn.App. 861, 865-68 (2008), *cf.: State v. Gimarelli*, 105 Wn.App. 370, 375 n. 3 (2001); identity of names is sufficient proof, *State v. Rivers*, 130 Wn.App. 689, 700-01 (2005), *State v. Derri*, 17 Wn.App.2d 376 (2021, )which may be rebutted by defendant's declaration, under oath, that he is not the same person named in the prior conviction, *State v. Binder*, 106 Wn.2d 417 (1986), *State v. Randle*, 47 Wn.App. 232 (1987), *State v. Priest*, 147 Wn.App. 662, 669-700 (2008), *State v. Powell*, 172 Wn.App. 455, 459-62 (2012); *accord*: *In re Williams*, 111 Wn.2d 353 (1988), *State v. Chavez*, 65 Wn.App. 602 (1992); 9-0.

***State v. Andrews***, 43 Wn.App. 49 (1986)

A defendant's contention that erroneous sentencing range was applied is subject to accelerated appellate review, RAP 18.12, 18.15, distinguishing former RCW 9.94A.210(1)

[recodified as 9.94A.585]; defendant on parole for pre-SRA felony is not denied equal protection by being required to complete the prior sentence before commencing the SRA sentence; III.

***State v. Harp***, 43 Wn.App. 340 (1986)

Defendant pled guilty to statutory rape, alleged to have occurred during a two month period; trial court found, as aggravating factor, additional incidents, with no stipulation to incidents, RCW 9.94A.370, exceeded standard range; trial court also found defendant was not amenable to treatment and had not shown remorse: held: absent a stipulation, court may not consider uncharged criminal activity when deciding whether to impose a sentence outside standard range; counsel's general objection to remorse issue was not specific enough to preserve issue for appeal; *remanded* for trial court to sentence and not consider other criminal activity; II.

***State v. Southerland***, 43 Wn.App. 246 (1986)

Where defendant contends that his sentence was outside the standard range, accelerated review is appropriate, even if the trial court found that the sentence was within the standard range; where the value of property actually stolen for an out-of-state conviction is sufficient to constitute felony theft in Washington, then the court may correctly accept the prior as a felony even if the out-of-state crime has a lesser threshold monetary amount than in Washington, *see: State v. Duke*, 77 Wn.App. 532 (1995); trial court may consider presentence report in prior case to determine if prior conviction should count as criminal history; where defense fails to object to the contents of a presentence report, then the information is deemed acknowledged, RCW 9.94A.370; discharge from parole is not a vacation of a conviction, RCW 9.94A.220; III.

***State v. Welty***, 44 Wn.App. 281 (1986)

A defendant who is simultaneously sentenced on multiple nonviolent felonies may be sentenced as a **first time offender**, RCW 9.94A.120(5) if he otherwise qualifies as a first time offender, RCW 9.94A.030(12); II.

***State v. Huntley***, 45 Wn.App. 658 (1986)

When convictions are obtained in separate proceedings, the latter sentence may be required to run consecutively, RCW 9.94A.400 [now 9.94A.589 (2002)], *State v. King*, 149 Wn.App. 96 (2009), *but see: State v. Smith*, 74 Wn.App. 844, 851-4 (1994), *State v. Rasmussen*, 109 Wn.App. 279 (2001), *see also: State v. Elmore*, 143 Wn.App. 185 (2008), *see:* RCW 9.94A.589 (2002); II.

***State v. Swanson***, 45 Wn.App. 712 (1986)

Following conviction of taking and riding a motor vehicle, court imposes exceptional sentence, finding that defendant caused unusual economic damage by destroying the vehicle; held: court may not depart from sentence range by relying on facts which constitute a separate, uncharged crime, RCW 9.94A.370; *accord*: *State v. Tunnell*, 51 Wn.App. 274 (1988), *State v. Grewe*, 59 Wn.App. 141, 145-46 (1990), *see: State v. Randoll*, 111 Wn.App. 578, 582-84 (2002); II.

***State v. Gunther***, 45 Wn.App. 755 (1986)

State is not required to give notice prior to trial that it may seek an exceptional sentence; failure of defense to request an evidentiary hearing amounts to an admission or acknowledgement of material facts stated by the prosecutor, RCW 9.94A.370; I.

***State v. Garrison***, 46 Wn.App. 52 (1986)

Trial court may consider any valid conviction which exists prior to the date of sentencing in computing the offender score, *see: State v. Amos*, 147 Wn.App. 217 (2008), *State v. Argo*, 81 Wn.App. 552, 569 (1996); I.

***State v. Franklin***, 46 Wn.App. 84 (1986), *overruled, on other grounds, State v. Dunaway*, 109 Wn.2d 207 (1987)

In determining prior convictions, trial court should compare an **out-of-state offense's** elements and the evidence supporting the conviction to a Washington offense; the sentence imposed by the out-of-state court is not relevant; III.

***State v. Bembry***, 46 Wn.App. 288 (1986)

A facially valid prior guilty plea may not be attacked by defendant's testimony or other evidence; collateral relief must be sought by appellate process, and may not be litigated at sentencing on new charge, *State v. Thompson*, 143 Wn.App. 861, 865-68 (2008); I.

***State v. Perkins***, 46 Wn.App. 333 (1986)

After plea is accepted, state informs defense that due to clerical error, sentence range was miscalculated, and the correct sentence range was higher; trial court sentences defendant to lower incorrect sentence range, state appeals; held: *remanded* to allow defendant to withdraw plea or sentencing within correct sentence range; defendant not entitled to specific performance, *State v. Barber*, 170 Wn.2d 854 (2011); I.

***State v. Gonzales***, 46 Wn.App. 388 (1986)

Defendant is convicted of one count of burglary, search immediately after arrest discloses some property stolen from residence, victim testifies at real facts hearing, RCW 9.94A.370, that she lost much property not recovered, and that defendant's family members had worked in her home, court finds major economic offense and breach of trust in imposing exceptional sentence; held: no evidence that defendant stole the additional property, no evidence that defendant obtained or used inside information, thus findings not supported by the record, *see*: *State v. Jackson*, 55 Wn.App. 562 (1989), *cf.*: *State v. Harding*, 62 Wn.App. 245 (1991); court's additional finding that because SRA at the time required that defendant's priors count as one offense as they ran concurrently, former RCW 9.94A.360(11) [RCW 9.94A.525 (2013)] was too lenient was improper; III.

***State v. Knowles***, 46 Wn.App. 426 (1986)

In vehicular homicide case, a prior DUI which was prosecuted in district court but occurred before defendant was 18 years old must be treated as a **juvenile conviction**; I.

***State v. Ratliff***, 46 Wn.App. 466 (1986)

Post-trial conduct which constitutes a new crime should not be considered by court in deciding whether or not to exceed the sentence range; I.

***State v. Oxborrow***, 106 Wn.2d 525 (1986)

A properly imposed exceptional sentence does not violate "**clearly excessive**" standard, RCW 9.94A.585, unless length of sentence is an abuse of discretion, taking into consideration aggravating circumstances, RCW 9.94A.535, *State v. Halsey*, 140 Wn.App. 313, 324-26 (2007), *see*: *State v. Dyer*, 61 Wn.App. 685 (1991); consecutive sentences may be imposed if concurrent sentences would be "clearly too lenient," RCW 9.94A.390(4)(h), and length of each sentence may exceed presumptive range, subject to review for abuse of discretion; 6-3.

***State v. Sullivan***, 47 Wn.App. 81 (1987)

An unloaded firearm is a deadly weapon, RCW 9.94A.125, for purposes of sentence enhancement, RCW 9.94A.310(3); II.

***State v. Davis***, 47 Wn.App. 91 (1987)

Trial court need not balance mitigating factors vs. aggravating factors in imposing a sentence outside the sentence range, *State v. Fletcher*, 20 Wn.App.2d 476 (2021); I.

***State v. Taylor***, 47 Wn.App. 118 (1987)

A conviction entered prior to the date of sentencing is a prior conviction regardless of when the crime occurred, former RCW 9.94A.360 [RCW 9.94A.525 (2013)]; III.

***State v. Olive***, 47 Wn.App. 147 (1987)

While disputed facts should be subject of evidentiary hearing, RCW 9.94A.370, failure to hold a hearing is harmless where the parties are given the opportunity to present information and evidence; prior misdemeanors may be grounds to enhance sentence as long as they are not factored into the sentence range, *State v. Ratliff*, 46 Wn.App. 325 (1986), *State v. Smith*, 58 Wn.App. 621 (1990); II.

***State v. Marsh***, 47 Wn.App. 219 (1987)

A judgment and sentence which does not reflect counsel or waiver of counsel may not be used to establish criminal history unless state establishes by other documents of record that defendant had or waived counsel, *Burgett v. Texas*, 19 L.Ed.2d 319 (1969), *but see: Pers. Restraint of Williams*, 111 Wn.2d 353, 368 (1988), *State v. Booker*, 143 Wn.App. 138, 143-47 (2008); I.

***State v. Caldwell***, 47 Wn.App. 317 (1987)

**Deadly weapon** finding may be used to enhance penalty of burglary 1°, even though being armed is element of offense, *State v. Nguyen*, 134 Wn.App. 863 (2006), *State v. Toney*, 149 Wn.App. 787, 797-98 (2009), *State v. Kelley*, 168 Wn.2d 72 (2010), *distinguishing State v. Hansen*, 46 Wn.App. 292 (1986); II.

***State v. Brown***, 47 Wn.App. 565 (1987)

The mere fact defendant was sentenced as "youth offender" under federal law does not make his prior crime a juvenile conviction for purposes of calculating sentence range; I.

***State v. Pascal***, 108 Wn.2d 125 (1987)

Permitting state to appeal sentence below presumptive range does not violate double jeopardy (9-0); 30 days for manslaughter 1° affirmed as there were substantial and compelling reasons relating to particular circumstances of defendant's crime; 7-2.

***State v. McAlpin***, 108 Wn.2d 458 (1987)

Failure of defense to timely challenge or request an evidentiary hearing to challenge prior record waives issue, *cf.: State v. Roche*, 75 Wn.App. 500, 513 n. 9 (1994); court may consider pre-age-15 **juvenile** convictions as aggravating factors, *State v. Dunivan*, 57 Wn.App. 332 (1990), *State v. Smith*, 58 Wn.App. 621 (1990), *State v. Oksoktaruk*, 70 Wn.App. 768 (1993), *State v. Rawls*, 114 Wn.App. 719 (2002); court may not consider arrests handled informally or crimes to which defendant confessed but was not charged; 9-0.

***State v. Bernhard***, 108 Wn.2d 527 (1987), *overruled, in part, State v. Shove*, 113 Wn.2d 83 (1989)

For defendants sentenced to confinement of one year or less, trial court may select which county facility, RCW 70.48.020, best suits defendant's situation if facility has a contract with county, RCW 70.48.210(4) and meets standards in Ch. 289 WAC; exceptional sentence may include treatment as condition of community supervision;; *see*: *State v. Skillman*, 60 Wn.App. 837 (1991), *State v. Paine*, 69 Wn.App. 873 (1993); 9-0.

***State v. Holyoak***, 49 Wn.App. 691 (1987)

Neither state nor court need give notice of intent to seek exceptional sentence as it is inherent in statute and defendant's statement on plea of guilty; *accord*, *State v. Falling*, 50 Wn.App. 47 (1987), *see also: Irizarry v. United States*, 171 L.Ed.2d 28 (2008), *but see*: *Burns v. United States*, 115 L.Ed.2d 123 (1991); III.

***State v. Jones***, 110 Wn.2d 74 (1988)

The fact that prior convictions had been deemed invalid in prior habitual criminal proceeding is not dispositive that they cannot be used as criminal history, *distinguishing State v. Ammons*, 105 Wn.2d 175, 186 (1986); each current conviction must be separately counted even if all current convictions will be served concurrently, *State v. King*, 47 Wn.App. 38 (1987), *overruling, in part*, *State v. Taylor*, 47 Wn.App. 118 (1987); 9-0.

***State v. Bates***, 51 Wn.App. 251 (1988)

Where a defendant is convicted of more than one crime charged in more than one information at a single proceeding, sentences must run concurrently, former RCW 9.94A.400; I.

***State v. Young***, 51 Wn.App. 517 (1988)

An *Alford* plea which incorporates the police reports and certification of probable cause for purposes of establishing a factual basis for the plea does not incorporate the facts contained in those documents for sentencing purposes where the facts are denied by the defendant, thus

*remanded* for fact finding hearing, RCW 9.94A.370(2), *State v. Talley*, 134 Wn.2d 176, 182-3 (1998), *cf.: State v. Overvold*, 64 Wn.App. 440, 448 n.10 (1992), *State v. Morreira*, 107 Wn.App. 450 (2001), *State v. Bell*, 116 Wn.App. 678 (2003); I.

***State v. Redd***, 51 Wn.App. 597 (1988)

Current drug convictions count two points each as prior convictions when the current offense is also a felony drug conviction, former RCW 9.94A.360(8) [RCW 9.94A.525 (2013)]; I.

***State v. Whitaker***, 51 Wn.App. 745 (1988)

When revoking a pre-SRA probationary sentence, convictions which occurred after the original sentencing but before the revocation hearing count in offender score; I.

***State v. Kenney***, 52 Wn.App. 193 (1988)

In escape 2°, where legislature amended RCW 9.96A.360(15) to count all priors in criminal history, but failed to amend matrix, RCW 9.94A.330, the matrix is amended by implication as a clear indication of legislative intent, not controlled by rule of lenity; II.

***State v. Rogers***, 112 Wn.2d 180 (1989)

Trial court cannot grant an early release except as specifically set forth in RCW 9.94A.150; 9-0.

***State v. Herzog***, 112 Wn.2d 419 (1989)

When imposing sentence within the standard range, trial court may not consider a constitutionally invalid conviction, *United States v. Tucker*, 30 L.Ed.2d 592 (1972), *see: State v. Mail*, 121 Wn.2d 707 (1993), but may consider the undenied facts underlying the invalid conviction; *dicta* that court may enhance through reliance upon illegally obtained evidence, mere fact of arrest, facts underlying a dismissed charge, facts underlying a charge upon which defendant is acquitted; 9-0.

***State v. Shove***, 113 Wn.2d 83 (1989)

Trial court may not modify (here, reduce) a sentence that has been imposed merely because it appears that a different decision might have been preferable, *State v. Murray*, 118 Wn.App. 518 (2003), *State v. Harkness*, 145 Wn.App. 678 (2008), overruling, in part, *State v. Bernhard*, 108 Wn.2d 527, 535 (1987); *see*: RCW 9.94A.150, 9.94A.260, CrR 7.8(b), CR 60(b), *State v. Ibanez*, 62 Wn.App. 628 (1991), *State v. Brown*, 108 Wn.App. 960 (2001), *Postsentence Review of Wandell*, 175 Wn.App. 447 (2013), *cf.*: *State v. Dana*, 59 Wn.App. 667 (1990), *see: State v. Smith*, 159 Wn.App. 694 (2011); trial court may not suspend or defer a sentence, *In re Chatman*, 59 Wn.App. 258 (1990), even for one year or less; reverses *State v. Shove*, 51 Wn.App. 538 (1988); 9-0.

***State v. Parramore***, 53 Wn.App. 527 (1989)

VUCSA defendant may be required, as a condition of community supervision, to undergo **urinalysis** but may not be obliged to take breath alcohol tests; I.

***State v. Johnson***, 54 Wn.App. 489 (1989)

Defendant may be sanctioned for 60 days in jail after community supervision ends, as court has jurisdiction under SRA until all conditions are completed, *distinguishing* *State v. Mortrud*, 89 Wn.2d 720 (1978), *accord*: *State v. Neal*, 54 Wn.App. 760 (1989), *State v. Beer*, 93 Wn.App. 539 (1999), *State v. Acrey*, 135 Wn.App. 938, 945-46 (2006), *State v. Gamble*, 146 Wn.App. 813 (2008), *cf.: State v. Ibanez*, 62 Wn.App. 628 (1991), *see also:State v. Badger*, 64 Wn.App. 904, 909-10 (1992) ; II.

***State v. Drummer***, 54 Wn.App. 751 (1989)

FBI rap sheets are admissible to prove priors absent challenge to contents, *see: State v. Reinhart*, 77 Wn.App. 454, 456-7 (1995), *State v. Gill*, 103 Wn.App. 435, 447-50 (2000); I.

***State v. Hays***, 55 Wn.App. 13 (1989)

Where trial court declines to invoke special Sexual Offender Sentencing Alternative, RCW 9.94A.120(7)(a), review on appeal is abuse of discretion, *State v. J.W.*, 84 Wn.App. 808 (1997), *see: State v. Conners*, 90 Wn.App. 48, 53-4 (1998); I.

***State v. Taplin***, 55 Wn.App. 668 (1989)

Where sentences are concurrent, court may impose 60 days in jail for each violation of community supervision order, RCW 9.94A.200, not for each concurrent sentence; *cf.: State v. Hughes*, 63 Wn.App. 401 (1991), *State v. Hughes*, 70 Wn.App. 142 (1993); *see: State v. McDougal*, 120 Wn.2d 334 (1992); I.

***State v. Zabroski***, 56 Wn.App. 263 (1989)

Defendant is sentenced to confinement converted to community service plus 12 months community supervision; after expiration of one year, sentence is modified for failure to complete community service; held: court retains jurisdiction over defendant until it affirmatively discharges him, whether sentenced to prison, jail or community supervision, *State v. Neal*, 54 Wn.App. 760 (1989), *State v. Gamble*, 146 Wn.App. 813 (2008), *but see: State v. Bigsby*, 189 Wn.2d 210 (2017); I.

***State v. Goss***, 56 Wn.App. 541 (1990)

Under Special Sexual Offender Sentencing Alternative (SSOSA), RCW 9.94A.505, court cannot run terms concurrently and conditions consecutively; exceptional sentences are not permitted for SSOSA; I.

***State v. Franklin***, 56 Wn.App. 915 (1990)

Where defendant is sentenced within standard range, appeals, achieves remand for resentencing, and is then sentenced to same sentence but outside standard range, no presumption of vindictiveness is raised, as sentence was not increased, *Wasman v. United States*, 82 L.Ed.2d 424 (1984); III.

***State v. Handley***, 115 Wn.2d 275 (1990)

State offers autopsy report for consideration at sentencing, defendant objects whereupon state calls medical examiner to testify; held: RCW 9.94A.370(2) does not limit sources to

presentence reports or plea statements, *see:* *State v. Morreira*, 107 Wn.App. 450, 456 (2001); *affirms, on somewhat different grounds*, *State v. Handley*, 54 Wn.App. 377 (1989); 9-0.

***State v. Gutierrez***, 58 Wn.App. 70 (1990)

Imposing exceptional sentence because sentence range is insufficient due to release on **good-time** credit is improper; sentencing judge must specify facts and reasons relied upon in arriving at the imposition of each exceptional sentence on each count, even if counts run concurrently; I.

***State v. Sly***, 58 Wn.App. 740 (1990)

Failure to object to finding of vulnerability based upon size of victim who appeared in court, *State v. Payne*, 45 Wn.App. 528 (1986), precludes review of issue, *but see:* *State v. Paine*, 69 Wn.App. 873 (1993), *see also:* *State v. Tierney*, 74 Wn.App. 346, 350-4 (1994); I.

***In re Chatman***, 59 Wn.App. 258 (1990)

Trial court lacks authority to designate location of confinement for sentences of more than one year, *State v. Bernhard*, 108 Wn.2d 527, 544 (1987), or to order community supervision (here, drug treatment) for other than first-time offenders, RCW 9.94A.030(4), (7), 9.94A.383, *State v. Harper*, 62 Wn.App. 69 (1991), *State v. Laik*, 62 Wn.App. 734 (1991), or to suspend a portion of a sentence, *State v. Shove*, 113 Wn.2d 83, 89 (1989), or to forbid or grant good time, RCW 9.94A.150(1), *In re Mota*, 114 Wn.2d 465, 477-78 (1990), *but see: Pers. Restraint of Williams*, 121 Wn.2d 655 (1993), *see: Pers. Restraint of Talley*, 172 Wn.2d 642 (2011); defendant is entitled to **credit for time served** in mandatory in-patient drug treatment program imposed under SRA, *see also:* *State v. Poston*, 117 Wn.App. 925 (2003); I.

***State v. Estrella***, 115 Wn.2d 350 (1990)

Trial court's "finding" that defendant should be afforded an opportunity at gradual release and reintegration into society is a legal conclusion that should not be considered in support of exceptional sentence; I.

***State v. Dana***, 59 Wn.App. 667 (1990)

Sentencing court has authority to grant furloughs and order partial confinement after sentence imposed, RCW 9.94A.150(3), *cf.:* *State v. Brown*, 108 Wn.App. 960 (2001), *distinguishing* *State v. Shove*, 113 Wn.2d 83 (1989), *but see* 1990 amendments to RCW 9.94A.150, *State v. Murray*, 118 Wn.App. 518 (2003), *see: State v. Smith*, 159 Wn.App. 694 (2011); III.

***Burns v. United States***, 115 L.Ed.2d 123 (1991)

Under federal Sentencing Reform Act, trial court must give notice that it is considering departing from sentence range and the grounds upon which it is considering an upward departure absent notice from government; *cf.*: *State v. Holyoak*, 49 Wn.App. 691 (1987), *State v. Falling*, 50 Wn.App. 47 (1987), *but see:* *Irizzary v. United States*, 171 L.Ed.2d 28 (2008); 5-4.

***State v. Stephens***, 116 Wn.2d 238 (1991)

Where standard sentence range would result in there being no additional punishment for one or more of the current convictions because offender score is higher than maximum statutory offender score, then an exceptional sentence may be appropriate, State v. Stewart, 125 Wn.2d 893, 898 (1995), reversing *State v. Stephens*, 57 Wn.App. 748 (1990), *see:* *State v. Garnier*, 52 Wn.App. 657 (1988), *State v. Holt*, 63 Wn.App. 226 (1991), *State v. Borg*, 145 Wn.2d 329, 336-40 (2001),*State v. France*, 176 Wn.App. 463, 466-73 (2013); 9-0.

***State v. Ziegler***, 60 Wn.App. 529 (1991)

Trial court need not find defendant to be sexually deviant to apply **sex offender sentencing alternative**, RCW 9.94A.120(7)(a); II.

***State v. Skillman***, 60 Wn.App. 837 (1991)

Where community placement is not required by RCW 9.94A.120(8)(a), then neither community placement nor community supervision is permitted following a prison commitment, *distinguishing* *State v. Bernhard*, 108 Wn.2d 527 (1987); II.

***State v. Jackson***, 61 Wn.App. 86 (1991)

Special **sexual offender sentencing alternative**, former RCW 9.94A.120(7)(a), is available to defendant convicted of attempted rape 2°; I.

***Pers. Restraint of Long***, 117 Wn.2d 292 (1991)

Where defendant commits a crime, having previously been sentenced for another felony, then the sentence for the new crime must run consecutively to the previous sentence; where a crime is committed but defendant is not under sentence for another felony, then the terms are presumed to be concurrent unless court orders that they run consecutively, irrespective of whether defendant is on parole, RCW 9.94A.589 (2007), *In re Caley*, 56 Wn.App. 853 (1990), *State v. King*, 149 Wn.App. 96 (2009), *see:* *State v. Moore*, 63 Wn.App. 466 (1991), *State v. Russell*, 84 Wn.App. 1, 4-5 (1996), *State v. Champion*, 134 Wn.App. 483 (2006), *State v. Jones*, 137 Wn.App. 119 (2007), *see also:* *State v. Elmore*, 143 Wn.App. 185 (2008); 9-0.

***State v. Harper***, 62 Wn.App. 69 (1991)

Where standard range is greater than one year, trial court cannot order defendant into drug treatment merely because crimes were caused by addiction, *State v. Gaines*, 122 Wn.2d 502 (1993), *State v. Pennington*, 112 Wn.2d 606, 610 (1989), *State v. Estrella*, 108 Wn.2d 527 (1987), *State v. Laik*, 62 Wn.App. 734 (1991), *State v. Paine*, 69 Wn.App. 873 (1993), *distinguishing* *State v. Bernhard*, 108 Wn.2d 527 (1987); I.

***State v. Ibanez***, 62 Wn.App. 628 (1991)

Court lacks authority to extend community supervision beyond two years for SSOSA, former RCW 9.94A.120)(7)(a), *State v. Shove*, 113 Wn.2d 83, 89 (1989), *distinguishing* *State v. Johnson*, 54 Wn.App. 489 (1989), *but see: State v. Price*, 169 Wn.App. 652 (2012); I.

***Sentence of Hilborn***, 63 Wn.App. 102 (1991)

Former RCW 9.94A.210(7) [recodified as 9.94A.585(7)], requiring that Department of Corrections make reasonable, timely efforts to resolve SRA dispute at superior court level and

file certification attesting to same with petition for review is mandatory, and failure to comply will cause petition to be dismissed, *see: State v. Griepsma,* 17 Wn.App.2d 606 (2021); I.

***State v. Mitchell***, 117 Wn.2d 576 (1991)

Pre-SRA convictions count as one offense, former RCW 9.94A.360(6)(c) [RCW 9.94A.525 (2013)], where they were served concurrently; sentences were concurrent when latter sentence refers to former and record establishes judicial intent that they be served concurrently, even if they do not begin and end at the same time, *reversing State v. Roberts*, 58 Wn.App. 389 (1990), *distinguishing State v. Hartley*, 41 Wn.App. 669 (1985), *State v. Hartley*, 51 Wn.App. 442 (1988); *accord: Pers. Restraint of Sietz*, 124 Wn.2d 645 (1994); 9-0.

***State v. Mendoza***, 63 Wn.App. 373 (1991)

Conspiracy to deliver a controlled substance, RCW 69.50.407, lacks a sentence range in sentencing grid, RCW 9.94A.310, thus standard range is one year, RCW 9.94A.120(6); *accord: State v. Hebert*, 67 Wn.App. 836 (1992), *State v. Pacheco*, 70 Wn.App. 27 (1993); I.

***State v. Hughes***, 63 Wn.App. 401 (1991)

Where consecutive sentences are imposed, which include confinement followed by community supervision provisions, confinement on consecutive sentences must be served before other sentence conditions are performed, RCW 9.94A.400(5); community supervision provisions remain consecutive upon release from jail; violation of community supervision provision cannot violate conditions of both sentences, only one being served at the time of the violation, *see: State v. Taplin*, 55 Wn.App. 668, 670-71 (1989), *State v. Mahone,* 164 Wn.App. 146 (2011); III.

***State v. Moore***, 63 Wn.App. 466 (1991)

In 1987, defendant fails to appear for sentencing for burglary; in 1990, defendant commits and is convicted of assault 2°; at sentencing, court runs sentences consecutively; held: RCW 9.94A.400 does not preclude consecutive sentences as trial court effectuated what would have been done on burglary case had defendant appeared for sentencing, *see: State v. Rasmussen*, 109 Wn.App. 279 (2001); cases were not "current offenses," RCW 9.94A.400(1)(a), merely because they were sentenced in same jurisdiction at same hearing where defendant absconded; I.

***State v. Wiley***, 63 Wn.App. 480 (1991), *rev'd, in part, on other grounds,* 135 Wn.2d 326 (1998)

Failure of state to object to exceptional sentence precludes appellate review absent sentence in excess of jurisdiction, *cf.: State v. Paine*, 69 Wn.App. 873 (1993), *State v. Hortman*, 76 Wn.App. 454, 459 (1994), *State v. Riles*, 86 Wn.App. 10, 15 (1997); I.

***State v. Allyn***, 63 Wn.App. 592 (1991)

Where prior multiple sentences are suspended without reference to one another and then, upon revocation, ordered to be served concurrently, then the priors are separate offenses for determination of offender score, former RCW 9.94A.360(6), [RCW 9.94A.525 (2013)]*State v. Chavez*, 52 Wn.App. 796 (1988), *see also: State v. Harper*, 50 Wn.App. 578, 582 (1988), *State v. Hartley*, 41 Wn.App. 669, 673-4 (1985), *State v. Harltey*, 51 Wn.App. 442, 447-9 (1988), *cf.: State v. Roberts*, 117 Wn.2d 576 (1991); trial court has power and duty to correct

erroneous sentence upon discovery, *State v. Smissaert*, 103 Wn.2d 636, 639 (1985), *State v. Roche*, 75 Wn.App. 500, 512-3 (1994); I.

***State v. Overvold***, 64 Wn.App. 440 (1992)

Where defendant agrees that court may consider a witness statement to support *Alford* plea, then in absence of objection court may consider same at sentencing, *distinguishing State v. Young*, 51 Wn.App. 517, 521-2 (1988), *see: State v. Morreira*, 107 Wn.App. 450 (2001), *State v. Bell*, 116 Wn.App. 678 (2003); I.

***State v. Strauss***, 119 Wn.2d 401 (1992)

Following reversal on appeal of exceptional sentence, trial court is not barred from imposing new exceptional sentence by double jeopardy clause, *United States v. DiFrancesco*, 66 L.Ed.2d 328 (1980), *Bullington v. Missouri*, 68 L.Ed.2d 270 (1981), *see: State v. Stewart*, 72 Wn.App. 885, 891-3 (1994); trial court may not reenter findings previously invalidated by appellate court, RAP 12.5; Rules of Evidence do not strictly apply at SRA sentencing hearings, ER 1101(c)(3), although due process clause requires that evidence be reliable and defendant be given opportunity to refute; to enhance for future dangerousness, a mental health care professional's evaluation is mandatory, *State v. Pryor*, 115 Wn.2d 445 (1990), *Pers. Rrestraint of Rama*, 73 Wn.App. 503 (1994), *but see: State v. McNallie*, 123 Wn.2d 585 (1994); report from community correction officer is insufficient; 9-0.

***State v. Hale***, 65 Wn.App. 752 (1992)

Attempted murder 1° does not carry a mandatory minimum sentence precluding consideration of mitigating circumstances; where consecutive sentences are "standard," more than one mitigating factor may include shortening sentence and concurrent sentences, *State v. Oxborrow*, 106 Wn.2d 525 (1986); III.

***State v. Garibay***, 65 Wn.App. 919 (1992)

Absent objection or assertion of prejudice, extending sentencing beyond 40 days after conviction, former RCW 9.94A.110 [recodified as 9.94A.500], is discretionary with trial court; trial court may not use defendant's silence or continued denial of guilt as a basis for justifying exceptional sentence, *cf.: Pers. Restraint of Ecklund*, 139 Wn.2d 166 (1999), for **lack of remorse**, nor is "mundane lack of remorse found in run-of-the-mill criminals" sufficient to aggravate, as lack of remorse must be aggravated or egregious, *State v. Vermillion*, 66 Wn.App. 332, 348 (1992), *see: State v. Wood*, 57 Wn.App. 792, 800 (1990), *State v. Lindahl*, 114 Wn.App. 1, 18-19 (2002); III.

***State v. Vermillion***, 66 Wn.App. 332 (1992)

Credit cards in different names, even if victims are married, constitute separate offenses, *State v. Dunaway*, 109 Wn.2d 207 (1987); unlawful imprisonment does not further commission of burglary 1° or indecent liberties of same victim; III.

***State v. Miles***, 66 Wn.App. 365 (1992)

Adding one point to offender score where crime is committed while defendant is on community placement, former RCW 9.94A.360(17) [RCW 9.94A.525 (2013)], does not violate equal protection or due process; III.

***State v. Decker***, 66 Wn.App. 604 (1992)

Where California convictions were actually served concurrently and where it appears second sentencing judge knew of first offense, then they count as one pre-7/1/86 conviction, former RCW 9.94A.360(6) RCW 9.94A.360(6), *see: State v. Luckett*, 73 Wn.App. 182, 188-89 (1994); I.

***State v. Sims***, 67 Wn.App. 50 (1992)

Judge other than one who heard trial is empowered to impose exceptional sentence, *State v. Soto*, 45 Wn.App. 839 (1986), *Jaime v. Rhay*, 59 Wn.2d 58, 61-2 (1961), *State v. Lindsey*, 194 Wash. 129, 132-33 (1938), where no mitigating factors were presented at trial, even if trial judge is available, *distinguishing* RCW 2.28.030(2); absent request for evidentiary hearing or a specific dispute to material facts, defendant is not entitled to an evidentiary hearing at sentencing, RCW 9.94A.370(2), *distinguishing State v. Olson*, 47 Wn.App. 514, 519 (1987); sentencing judge is not a trier of fact; I.

***State v. Llamas-Villa***, 67 Wn.App. 448 (1992)

Community placement condition that defendant not associate with persons using drugs is valid, *State v. Hearn*, 131 Wn.App. 601, 607-09 (2006), although at revocation hearing defendant may assert he was unaware of their drug use, *see:* RCW 9.94A.205, *State v. Parramore*, 53 Wn.App. 527 (1989), *State v. Riles*, 135 Wn.2d 326 (1998), *abrogated on other grounds, State v. Valencia*, 169 Wn.2d 782 (2010); I.

***State v. Langford***, 67 Wn.App. 572 (1992)

Misdemeanor sentence may run consecutively to SRA felony sentences without aggravating factors, *State v. Whitney*, 78 Wn.App. 506, 517 (1995); III.

***State v. McDougal***, 120 Wn.2d 334 (1992)

A first-time offender on community supervision, RCW 9.94A.030, may be sentenced to 60 days for each violation of a condition of sentence, even if it exceeds the original sentence range, former RCW 9.94A.200; reverses *State v. McDougal*, 61 Wn.App. 847 (1991); 6-3.

***United States v. Dunnigan***, 122 L.Ed.2d 445 (1993)

Enhancement of sentence for willful perjury based upon impeding or obstructing administration of justice, USSG § 3C1.1, does not undermine the constitutional right to testify; *cf.: State v. Houf*, 64 Wn.App. 580 (1992); 9-0.

***State v. Kisor***, 68 Wn.App. 610 (1993)

Community placement may only be ordered following conviction for a specified "serious violent offense," RCW 9.94A.030(27), *see: State v. Barnett*, 139 Wn.2d 462 (1999), *but see: State v. Drew*, 77 Wn.App. 339 (1995); II.

***State v. Peterson***, 69 Wn.App. 143 (1993)

Sex offender is sentenced to prison followed by community supervision, to include crime-related treatment; upon release, defendant is sent to only treatment provider in the area, which rejects defendant as not amenable to treatment, court imposes 60 days for noncompliance; held: RCW 9.94A.120(5) permits a sentence condition of "available outpatient treatment," since counselor determined defendant was not amenable, treatment was not available to defendant; where corrections officer directs defendant to a particular program which will not accept offender, no volitional act of noncompliance occurs, thus no failure to comply was proved; III.

***State v. Gurrola***, 69 Wn.App. 152 (1993)

Current offenses count for three points of criminal history only for those crimes listed in former RCW 9.94A.360(10) [RCW 9.94A.525 (2013)], which does not include rape of a child 1°; where offense is charged to have occurred when seriousness level is 10, subsequent amendment to increase seriousness level still requires court to use lower level, *but see: State v. Parker*, 82 Wn.App. 130 (1996), *see: State v. Parker*, 132 Wn.2d 182, 192 n.14 (1997); where information charges period of time which overlaps effective date of amendment, state must prove by a preponderance, *State v. Jones*, 110 Wn.2d 74, 77 (1988), that offense occurred after that date to increase seriousness level, *State v. Putman*, 21 Wn.App.2d 36 (2022); III.

***State v. Cook***, 69 Wn.App. 412 (1993)

For sentence enhancement, RCW 9.94A.310(3), court must define a **deadly weapon** as one capable of producing death, RCW 9.94A.125, WPIC 2.07, inflicting injury is insufficient, *State v. Thompson*, 88 Wn.2d 546, 549 (1977), harmless here; I.

***State v. Mail***, 121 Wn.2d 707 (1993)

Trial court, in imposing standard range sentence, states it has considered report that was not disclosed to defense, motion to vacate is denied, defense appeals; held: method by which trial court decides standard range sentence in unappealable, former RCW 9.94A.210(1) [recodified as 9.94A.585(1)], except where it is shown that sentencing court had duty to follow some specific procedure required by SRA and failed to do so, *see: State v. M.L.*, 114 Wn.App. 358, 361 (2002); in order to bypass prohibition on appeals, petitioner must show court failed to consider information mandated by former RCW 9.94A.110 [recodified as 9.94A.500], or that petitioner objected to information and no evidentiary hearing was held, *see: State v. Garza*, 121 Wn.2d 885, 890 (1994), *but see: State v. Crockett*, 118 Wn.App. 853 (2003); *affirms State v. Mail*, 65 Wn.App. 295 (1992), overrules, to extent that it is inconsistent, *State v. Ward*, 49 Wn.App. 427 (1987); *accord: State v. Friederich-Tibbets*, 123 Wn.2d 250 (1994), *see: State v. McNeair*, 88 Wn.App. 331 (1997); 8-0.

***State v. Paine***, 69 Wn.App. 873 (1993)

State's failure to object to exceptional sentence based on drug addiction does not preclude state from appealing; when sentencing court acts without statutory authority, error can be addressed for first time on appeal, *State v. Anderson*, 58 Wn.App. 107 (1990), *State v. Loux*, 69 Wn.2d 855 (1966), *State v. Akin*, 77 Wn.App. 575, 578 (1995); *but see: State v. Danis*,

64 Wn.App. 814 (1992), *State v. Sly*, 58 Wn.App. 740 (1990), *State v. Wiley*, 63 Wn.App. 480 (1991); I.

***State v. Hughes***, 70 Wn.App. 142 (1993)

Where underlying sentences of community supervision are consecutive, an act of noncompliance can only violate the conditions of the sentence which is active, *see: State v. Taplin*, 55 Wn.App. 668, 670-1 (1989); III.

***State v. Larkin***, 70 Wn.App. 349 (1993)

Where jurisdiction is declined by juvenile court, prior conviction is adult felony for all purposes, including washout after age 23, *see: State v. Sharon*, 100 Wn.2d 230 (1983); I.

***State v. Williams***, 70 Wn.App. 567 (1993)

Delivery of drugs within 1000 feet of school, RCW 9.94A.310(5), 69.50.401(a)(1)(i), mandates a 24-month enhancement of sentence if proved beyond a reasonable doubt; enhanced penalty is added to both lower and upper end of sentence range; I.

***State v. Morrison***, 70 Wn.App. 593 (1993)

Where trial court revokes after suspending sentence under SSOSA, RCW 9.94A.120(a)(ii), court may then impose year of community supervision even if not included in original suspended sentence; *accord: State v. Daniels*, 73 Wn.App. 734 (1994); I.

***State v. Cameron***, 70 Wn.App. 598 (1993)

Defendant is sentenced to 14 months for count I, 4 months for count II, both within standard range, concurrent, with one year of community supervision for count II, defense maintains community supervision may only be imposed if total confinement is 12 months or less, RCW 9.94A.383; held: community supervision applies to the offense, not to the sentencing; because the actual sentence for count II was less than a year, then community supervision was proper, although it is only tolled during the four month confinement, and not during the remaining eight months on count I; I.

***State v. Sherwood,*** 71 Wn.App. 481, 486-9 (1993)

Where prior pleas to attempted VUCSA are treated as gross misdemeanors at sentencing on those pleas, sentencing court cannot convert them to felonies to increase offender score even if they fit within RCW 69.50.407; II.

***State v. Cameron***, 71 Wn.App. 653 (1993)

Defendant is sentenced to 14 months for count I, 4 months for count II, both within standard range, concurrent, with one year of community supervision for count II, defense maintains community supervision may only be imposed if total confinement is 12 months or less; held: community supervision applies to the offense, not to the entire sentencing, RCW 9.94A.383; community supervision on the shorter sentence is tolled during incarceration on the longer sentence, RCW 9.94A.170(3); opinion in *State v. Cameron*, 70 Wn.App. 598 (1993) is withdrawn; I.

***Pers. Restraint of Caudle***, 71 Wn.App. 679 (1993)

Where one year of community supervision is imposed following confinement, as required by RCW 9.94A.120(8)(a), trial court need not reduce confinement period by a year and, if defendant was sentenced to high end of sentence range, community supervision does not convert sentence to an exceptional sentence requiring findings; III.

***State v. Villegas***, 72 Wn.App. 34 (1993)

Prior federal felony conviction that has no comparable Washington offense (reentry of a deported alien) should not be computed in the offender score; I.

***State v. Friderich-Tibbets***, 123 Wn.2d 250 (1994)

Refusal of trial court to impose sentence below standard range is not appealable, RCW 9.94.210(1), *State v. Mail*, 121 Wn.2d 707 (1993), *State v. Rousseau*, 78 Wn.App. 774 (1995), *State v. M.L.*, 114 Wn.App. 358, 361 (2002), *reversing State v. Friderich-Tibbets*, 70 Wn.App. 93 (1993); 9-0.

***State v. Awawdeh,*** 72 Wn.App. 373, 379-80 (1994)

Following conviction for sale of counterfeit audio tapes, RCW 19.25.040, defendant is ordered to sell no tapes, lawful or not; held: where defendant acknowledges at sentencing he won't do it anymore, an SRA sentence that prohibits lawful activity is overbroad; III.

***State v. Cabrera***, 73 Wn.App. 165 (1994)

To prove **out-of-state priors**, state offers, over objection, Washington judgments which contain findings of fact that out-of-state convictions were part of defendant's criminal history; held: where defense does not challenge criminal history, use of prior Washington judgments and sentences satisfies state's burden, *see:* *State v. Ammons*, 105 Wn.2d 175, 190 (1986); where defense challenges documents, state is required to present additional evidence that the priors were felonies, at 168-9, *State v. Roche*, 75 Wn.App. 500, 514 (1994), *State v. McCorkle*, 88 Wn.App. 485, 493 (1997), *aff'd,* 137 Wn.2d 490 (1999); collateral estoppel does not bar defendant from challenging priors, as there was no evidence defendant objected at prior proceeding, thus court cannot conclude that the identical issue was raised, at 169-70, *State v. Wilson*, 113 Wn.App. 122, 136-39 (2002); I.

***State v. Luckett***, 73 Wn.App. 182, 187-9 (1994)

Trial court cannot use probation report to determine that prior out-of-state robbery was armed where elements of prior robbery do not establish he was armed, *see: State v. Freeburg*, 120 Wn.App. 192 (2004), *see also: State v. Mutch*, 87 Wn.App. 433 (1997); II.

***State v. Garza***, 123 Wn.2d 885 (1994)

Where presentence report contains defendant's and victim's versions of the crime, and defendant makes no specific challenge to victim's versions nor requests an evidentiary hearing, then trial court may rely upon victim's version in imposing exceptional sentence, *State v. Halgren*, 87 Wn.App. 525, 532-3 (1997), *rev'd, on other grounds,* 137 Wn.2d 341 (1999), *State v. Zatkovich*, 113 Wn.App. 70, 75-77 (2002), *see: State v. Mail*, 121 Wn.2d 707, 712 (1993), *State v. Butler*, 75 Wn.App. 47, 51 (1994), *State v. Morreira*, 107 Wn.App. 450, 456 (2001),

*State v. Crockett*, 118 Wn.App. 853 (2003), *but see: State v. Crockett*, 118 Wn.App. 853 (2003); 9-0.

***State v. Tinkham***, 74 Wn.App. 102 (1994)

Fifth Amendment privilege applies in presentence interview with sexual deviancy expert to determine future dangerousness, *Estelle v. Smith*, 68 L.Ed.2d 359 (1981), *State v. Bankes*, 114 Wn.App. 280 (2002); I.

***Pers. Restraint of Sietz***, 124 Wn.2d 645 (1994)

Pre-SRA sentences that are judicially ordered to run concurrently count as one offense even if they were revoked, suspended or deferred sentences, *State v. Roberts*, 117 Wn.2d 576 (1991), overruling *State v. Allyn*, 63 Wn.App. 592 (1991) and *State v. Chavez*, 52 Wn.App. 796 (1988); 6-3.

***State v. Wiley***, 124 Wn.2d 679 (1994)

Trial court uses prior grand larceny ($75 line between felony and misdemeanor) as prior felony; held: where, as here, elements of prior crime have changed, prior status remains the same, thus trial court was correct in using prior as felony, *reversing State v. Wiley*, 71 Wn.App. 244 (1993); reclassification of entire crime from a felony to a misdemeanor applies retroactively to calculation of the offender score; *accord: State v. Johnson*, 51 Wn.App. 836, 840 (1988), *State v. Frederick*, 100 Wn.2d 550 (1983); 9-0.

***State v. Wilson***, 125 Wn.2d 212, 219-21 (1994)

Defendant fires gun into tavern, missing intended victims but striking two unintended victims, is convicted of four counts of assault 1°, RCW 9A.36.011, trial court imposes concurrent sentences; held: four assaults involving four victims involve four separate and distinct criminal acts, one for each victim, *State v. Smith*, 124 Wn.App. 417, 431-33 (2004), *aff'd, on other grounds*, 159 Wn.2d 778 (2007), *see: State v. elmi*, 166 Wn.2d 209 (2009), requiring consecutive sentences under the "serious violent" exception to former RCW 9.94A.400(1)(b), *State v. Salamanca*, 69 Wn.App. 817, 827-8 (1993), *State v. Godwin*, 57 Wn.App. 760, 763-4 (1990), *Pers. Restraint of Sarausad*, 109 Wn.App. 824, 853-55 (2001), *see:* Boerner, *Sentencing in Washington* § 5.8(b), at 5-19 (1985); 9-0.

***State v. Buckner***, 74 Wn.App. 889, 897-9 (1994), *aff'd, on other grounds,* 133 Wn.2d 63 (1997), *overruled, in part, State v. Thomas*, 138 Wn.2d 630 (1999)

Trial court may not consider **good time** credits in imposing exceptional sentence, *State v. Ross*, 71 Wn.App. 556, 573 (1993); III.

***State v. Moore***, 75 Wn.App. 166, 170-1 (1994), *dissavowed, in part, Pers. Restraint of Carrier,* 173 Wn.2d 791 (2012)

A pre-SRA deferred sentence that has been dismissed is properly included in defendant's offender score, *State v. Wade*, 44 Wn.App. 154, 160 (1986), *overruled, on other grounds, Pers. Restraint of Carrier,* 173 Wn.2d 791 (2012), *State v. Partida*, 51 Wn.App. 760, 762 (1988), *State v. Haggard,* 195 Wn.2d 544 (2020), *State v. Conaway,* 199 Wn.2d 742 (2022); where prosecutor and defendant at time of plea believed that a prior dismissed deferred sentence did not count,

defendant should be permitted to choose whether to withdraw plea or specific performance of the plea agreement, *see:* *State v. Walsh*, 143 Wn.2d 1 (2001), *State v. Barber*, 170 Wn.2d 854 (2011); II.

***State v. Roche***, 75 Wn.App. 500, 511-4 (1994)

Sentencing errors of law may be raised for first time on appeal, *State v. Hunley*, 175 Wn.2d 901 (2012), *distinguishing* *State v. McAlpin*, 108 Wn.2d 458, 462 (1987), *State v. Ford*, 137 Wn.2d 472 (1999), *cf.:* *State v. Hodges*, 118 Wn.App. 668, 674 (2003), *State v. Birch*, 151 Wn.App. 504, 515-20 (2009), *State v. Lucero*, 152 Wn.App. 287, 293-96 (2009), thus calculation of offender score is reviewed *de novo*, *Pers. Restr. Of Call*, 144 Wn.2d 315 (2001)*;* state has the burden of establishing the classification of an out-of-state prior conviction; where record is devoid of facts of prior such that classification can be determined, it must not be counted in criminal history; I.

***State v. Clark***, 76 Wn.App. 150 (1994), *aff'd, on different grounds,* 129 Wn.2d 211 (1996)

**First time offender** waiver, RCW 9.94A.120(5), which excludes delivery of a schedule I or II controlled substance, RCW 9.94A.030(20)(a), does not violate equal protection clauses; I.

***State v. Roberts***, 76 Wn.App. 290 (1994)

Where defendant commits a crime while on community supervision, defendant is "under sentence of felony," RCW 9.94A.400(2), and thus new sentence begins after defendant completes term of confinement for prior offense; III.

***State v. White***, 76 Wn.App. 811, 810-11 (1995), *aff'd, on other grounds,* 129 Wn.2d 105 (1996)

As a condition of community supervision, trial court may order a defendant to stay out of drug areas (SODA), RCW 9.94A.120, even absent a prior drug offense as required by RCW 10.66.020; I.

***State v. Stewart***, 125 Wn.2d 893 (1995)

Where presumptive sentence is same for one or two counts, trial court may find presumptive sentence to be clearly too lenient because defendant committed two counts, State v. Smith, 123 Wn.2d 51, 56 (1993), *State v. Stephens*, 116 Wn.2d 238, 244-5 (1991), *see:* *State v. Brown*, 91 Wn.App. 361 (1998), *State v. Borg*, 145 Wn.2d 329, 336-40 (2001); sexual offense cases, for purposes of future dangerousness findings, are not limited to those set forth as sex offenses in SRA, RCW 9.94A.039 (29), *State v. Barnes*, 117 Wn.2d 701, 708 (1991), at 899-900 *[dicta]*; *affirms* *State v. Stewart*, 72 Wn.App. 885 (1994).

***State v. Ritchie***, 126 Wn.2d 388 (1995)

Once trial court properly determines to impose an exceptional sentence above the standard range, court need not state reasons for length, nor must length be proportionate to sentences in similar cases, review is limited to abuse of discretion standard, *State v. Ross*, 71 Wn.App. 556, 573 (1993), *State v. Parker*, 82 Wn.App. 130 (1996), *State v. Hovig*, 149 Wn.App. 1, 14-16 (2009), *State v. Sao*, 156 Wn.App. 67-79-82 (2010); overrules, in part, *State v. Elsberry*, 69 Wn.App. 793, 796 (1993), *State v. Pryor*, 56 Wn.App. 107 (1989), *aff'd on other*

*grounds*, 115 Wn.2d 445 (1990), *State v. George*, 67 Wn.App. 217, 227 (1992), *see:* *State v. Baldwin*, 111 Wn.App. 631, 646 (2002), *aff'd, on other grounds,* 150 Wn.2d 448 (2003); 6-3.

***State v. Hicks***, 77 Wn.App. 1 (1995)

To find that defendant has a proclivity to commit sex offenses effectively applies a "future dangerousness" standard in disguise, which is not proper absent expert testimony, *State v. Pryor*, 115 Wn.2d 445, 455 (1990), at 5-6; possession of child pornography is not an enumerated sex offense, RCW 9.94A.030(29); III.

***State v. Shilling***, 77 Wn.App. 166, 172-76 (1995)

A prior sentenced offense is a prior conviction for purposes of the offender score irrespective of when the crime occurred relative to the current offense, *State v. Worl*, 91 Wn.App. 88, 92-95 (1998), *State v. Clark*, 123 Wn.App. 515, 518-19 (2004), *see:* *State v. Collicott*, 118 Wn.2d 649 (1992), *State v. Amos*, 147 Wn.App. 217, 230-31 (2008); I

***State v. Drew***, 77 Wn.App. 339 (1995)

Community placement may be ordered for a burglary 1° conviction where evidence establishes that defendant assaulted victim, *State v. Barnett*, 139 Wn.2d 462 (1999), *but see:* *State v. Kisor*, 68 Wn.App. 610 (1993); I.

***State v. Reinhart***, 77 Wn.App. 454 (1995)

FBI rap sheet is admissible as a public record, ER 803(a)(8), *see:* *State v. Drummer*, 54 Wn.App. 751 (1989), and, along with certified but unsigned judgment and sentence plus presentence report plus state penitentiary record, is sufficient to prove valid prior conviction, at 456-7; II.

***State v. Duke***, 77 Wn.App. 532 (1995)

A court martial adjudication cannot be included as a prior conviction where the offense is not comparable to a Washington offense, and the facts, as set forth in the charging document, lack an element that would make them a crime in Washington, *see:* *State v. Southerland*, 43 Wn.App. 246, 250-1 (1986), *State v. Bush*, 102 Wn.App. 372 (2000), *State v. Morley*, 134 Wn.2d 588 (1998), *State v. Hyder*, 159 Wn.App. 234, 256-57 (2011), *Pers. Restraint of Canha*, 189 Wn.2d 359 (2017); III.

***State v. Tang***, 77 Wn.App. 644, 649-51 (1995)

Where alternative means of committing a crime have different penalties, jury need not be unanimous, but special interrogatories are required to determine seriousness level so defendant will be sentenced using the proper standard range, *State v. May*, 68 Wn.App. 491 (1993), *see:* *State v. Brown*, 145 Wn.App. 62, 77-81 (2008); I.

***State v. Roberts***, 77 Wn.App. 678 (1995)

Court cannot delay sentencing to see if the law will change to permit a reduced sentence; I.

***State v. McCraw***, 127 Wn.2d 281 (1995)

Trial court has discretion to treat prior convictions served concurrently as one offense even if prior sentencing court treated prior offenses as separate offenses not encompassing same criminal conduct, former RCW 9.94A.360(6)(a) [RCW 9.94A.525 (2013)], *State v. Lara*, 66 Wn.App. 927 (1992), *State v. Wright*, 76 Wn.App. 811 (1995), *State v. Reinhart*, 77 Wn.App. 454 (1995), *State v. Torngren*, 147 Wn.App. 556 (2008), *overruled, on other grounds, State v. Aldana Graciano*, 176 Wn.2d 531 (2013), *see: State v. Mehaffey*, 125 Wn.App. 595, 599-601 (2005); effectively overrules *State v. Blakey*, 61 Wn.App. 595 (1991); 6-3.

***State v. Thomas***, 79 Wn.App. 32, 41-2 (1995)

Where plea agreement sets forth standard range and provides that if defendant is convicted of new crimes before sentencing, range and prosecutor's recommendation may change, CrR 4.2(g)(6)(d), post-plea convictions will change the sentence range, *State v. Collicott*, 118 Wn.2d 649, 665 (1992), *State v. Clark*, 123 Wn.App. 515, 518-19 (2004); II.

***State v. Breedlove***, 79 Wn.App. 101, 115-17 (1995)

Pre-1975 **out-of-state crime** should be reclassified under its current classification in computing offender score, *State v. Johnson*, 51 Wn.App. 836, 839 (1988), *State v. Weiand*, 66 Wn.App. 29, 34 n. 10 (1992), *State v. McCorkle*, 88 Wn.App. 485 (1997), *aff'd*, 137 Wn.2d 490 (1999); II.

***State v. Mitchell***, 81 Wn.App. 387 (1996)

State establishes prior California convictions by a prior Washington judgment and sentence containing defendant's acknowledgment of the out-of-state convictions plus a presentence report, none of which were included in clerk's papers to Court of Appeals; held: because documents are not before Court of Appeals, remanded for sentencing without the priors unless state produces sufficient additional evidence to establish their existence within 30 days; "absent a showing by the State that [defendant] either objected to the criminal history used in the prior proceeding or in fact waived his right to object so that he would be collaterally estopped from raising the issue now..., neither the judgment nor attachments to it would satisfy the State's burden," at 391 n. 1; III.

***State v. Smith***, 82 Wn.App. 153 (1996)

In imposing exceptional sentences in multi-count information, trial court should specify what sentence it is imposing for each count, at 160; defense may not concede an aggravating factor at sentencing then complain on appeal, at 163, *see: State v. Henderson*, 114 Wn.2d 867, 870 (1990); I.

***State v. Eaton***, 82 Wn.App. 723, 732-5 (1996)

Trial court may order sex offender to enter into and cooperate in counseling or therapy as condition of community placement, RCW 9.94A.120(9), *see: State v. Riles*, 135 Wn.2d 326 (1998), *abrogated on other grounds, State v. Valencia*, 169 Wn.2d 782 (2010); I.

***State v. Aronson***, 82 Wn.App. 762 (1996)

A guilty plea before a general court martial may be included in offender score, *State v. Morley*, 134 Wn.2d 588 (1998), *State v. Hyder*, 159 Wn.App. 234, 256-57 (2011); III.

***State v. Raines***, 83 Wn.App. 312 (1996), *overruled, in part, on different grounds, State v. Jones,* 118 Wn.App. 199 (2003)

Court lacks authority to extend the term of community placement as a sanction for violating a condition; I.

***State v. Dolen***, 83 Wn.App. 361 (1996)

Defendant is charged with one count each of child rape and child molestation based upon evidence of six separate incidents, verdict does not specify whether convictions were for the same or separate incidents, trial court finds separate criminal conduct, RCW 9.94A.400(1)(a); held: since verdict was silent, state failed to establish separate incidents by a preponderance, former RCW 9.94A.110 [recodified as 9.94A.500], *State v. Jones,* 110 Wn.2d 74, 77 (1988), *but see: State v. Aldana Graciano*, 176 Wn.2d 531 (2013), thus trial court abused discretion, *State v. Walden*, 69 Wn.App. 183 (1993), *State v. Porter*, 133 Wn.2d 177 (1997); II.

***State v. Parker***, 132 Wn.2d 182 (1997)

Where court imposes exceptional sentence, it must first correctly calculate the standard range, *State v. Ford*, 137 Wn.2d 472, 485 (1999), reversing *State v. Parker*, 82 Wn.App. 130 (1996), overruling, in part, *State v. Thomas*, 57 Wn.App. 403 (1990), *State v. Altum*, 47 Wn.App. 495 (1987), unless record clearly indicates sentencing court would have imposed the same sentence anyway, *see: State v. Jennings*, 106 Wn.App. 532 (2001), *State v. Fletcher,* 17 Wn.App. 606 (2021); 9-0.

***State v. Broadaway***, 133 Wn.2d 118, 135-36 (1997)

Sentencing court must state in judgment and sentence the precise term of community placement, RCW 9.94A.120(9)(a), *State v. Barnett*, 91 Wn.App. 671, 676-77 (1998), *aff'd,* 139 Wn.2d 462 (1999), *State v. Jones*, 93 Wn.App. 14 (1998), *State v. Nelson*, 100 Wn.App. 226 (2000), *see: State v. Jones*, 96 Wn.App. 649 (1999), *Pers. Restraint of Fawcett*, 147 Wn.2d 298 (2002), *see: State v. Pharris*, 120 Wn.App. 661 (2004), *but see: State v. Mitchell*, 114 Wn.App. 713 (2002), *see also: State v. Rodriguez Ramos,* 171 Wn.2d 46 (2011); 9-0.

***State v. Coats***, 84 Wn.App. 623 (1997)

Defendant pleads to four counts, "stipulates to the real facts" of 27 other uncharged counts, trial court imposes exceptional sentence considering uncharged counts, defense claims violates real facts doctrine; held: the statute and the use of the words 'real facts" was sufficient to allow the court to consider the uncharged crimes for sentencing purposes," at 627; III.

***State v. Frazier***, 84 Wn.App. 752 (1997)

Trial court may deny **special sexual offender sentencing alternative** (SSOSA), RCW 9.94A.120(8), for nonstatutory reasons, including defendant's lying at trial, denying the offense until after conviction, and victim's mother's desire defendant go to prison, *State v. Hays*, 55 Wn.App. 13 (1989); III.

***State v. Prado***, 86 Wn.App. 573 (1997)

Defendant, on SRA community supervision with condition of no new crimes, is charged with a felony and admits to the community supervision violation, which is later stricken; held: a community supervision violation is not a criminal prosecution for double jeopardy purposes, *State v. Grant*, 83 Wn.App. 98, 111 (1996), distinguishing *United States v. Dixon*, 125 L.Ed.2d 556 (1993), *see: State v. Dupard*, 93 Wn.2d 268, 276 (1980), *Standlee v. Smith*, 83 Wn.2d 405, 407 (1974), *State v. Collins*, 121 Wn.App. 16 (2004); I.

***State v. Vanoli***, 86 Wn.App. 643 (1997)

Sale of schedule I drug for profit is not eligible for **first-time offender waiver**, at 648-9, RCW 9.94A.030(22)(a), 69.50.204; defendant may appeal legal determination even if court imposes standard range sentence, *see: State v. Mail*, 121 Wn.2d 707 (1993), *State v. McNeair*, 88 Wn.App. 331, 334-8 (1997); sale of LSD to 3 juveniles back-to-back does not involve the same criminal conduct, at 651-52, *State v. Hollis*, 93 Wn.App. 804, 816-19 (1999), distinguishing *State v. Vike*, 125 Wn.2d 407 (1994), *State v. Garza-Villarreal*, 123 Wn.2d 42 (1993), *but see: State v. Porter*, 133 Wn.2d 177 (1997), *State v. Williams*, 135 Wn.2d 365 (1998), *State v. Haddock*, 141 Wn.2d 103 (2000); , *State v. Linerud*, 147 Wn.App. 944 (2009); I.

***State v. Archambault***, 86 Wn.App. 711 (1997)

**First offender option**, RCW 9.94A.120(5), is not available for a defendant convicted of burglary 2° with a firearm, RCW 9.94A.310(3); II.

***State v. Elza***, 87 Wn.App. 336, 343-4 (1997)

Where appellate court determines that some, but not all, aggravating factors were improper, if appellate court is not persuaded that sentencing judge would have imposed same sentence absent struck factors, sentence is remanded for resentencing without considering struck factors, *State v. Cardenas*, 129 Wn.2d 1, 13 (1996), although sentencing court may consider "any appropriate factors warranting exceptional sentence"; II.

***State v. Mutch***, 87 Wn.App. 433 (1997)

Test for consideration of foreign convictions in **three strikes** sentence, RCW 9.94A.120, is same as for any SRA prior, *i.e.*, compare elements to Washington statutes and, if they are the same, the prior conviction is included, *State v. Russell*, 104 Wn.App. 422, 439-52 (2001), *State v. Robinson*, 114 Wn.App. 800 (2003), *but see: State v. Delgado*, 148 Wn.2d 723 (2003); if they are not or the foreign statute is broader, sentencing court may look at defendant's conduct as evidenced by the indictment to determine whether the conduct would have violated a Washington statute, *State v. Duke*, 77 Wn.App. 532, 535 (1995), *see: State v. Bush*, 102 Wn.App. 372 (2000), *cf.: State v. Freeburg*, 120 Wn.App. 192, 199 n. 16 (2004), *Shephard v. United States*, 161 L.Ed.2d 205 (2005), *State v. Moncrief*, 137 Wn.App. 729 (2007); I.

***State v. Halgren***, 87 Wn.App. 525, 537-8 (1997), *rev'd, on other grounds*, 137 Wn.2d 341 (1999)

Sentencing hearing should be held within 40 court days of conviction, former RCW 9.94A.110 [recodified as 9.94A.500], may be extended upon showing of good cause; here, defense concurred in continuance to review documents presented to sentencing judge; *see: State v. Ellis*, 76 Wn.App. 391, 394 (1994); I.

***State v. Gomez-Florencio***, 88 Wn.App. 254 (1997)

After sentencing, state discovers additional prior convictions under different names, defendant is then resentenced; held: absent proof of fraud, CrR 7.8(b)(3), which state did not prove, *State v. Hardesty*, 129 Wn.2d 303, 316-9 (1996), only basis for resentencing would be excusable neglect, CrR 7.8(b)(1), state did not offer evidence why the priors were not discovered before the original sentencing, thus no factual support; "extraordinary circumstances," CrR 7.8(b)(5), does not apply when the circumstances allegedly justifying the relief existed at the time the judgment was entered, *State v. Cortez*, 73 Wn.App. 838 (1994); 2-1, III.

***State v. Garcia-Martinez***, 87 Wn.App. 322 (1997)

Prohibition on appealing a standard range sentence does not violate equal protection; I.

***State v. McNeair***, 88 Wn.App. 331, 338-42 (1997)

Precluding special drug offender sentencing alternative, RCW 9.94A.120(6)(a), from applying to defendants with prior felony convictions does not violate equal protection; I.

***State v. McCorkle***, 88 Wn.App. 485 (1997), *aff'd*, 137 Wn.2d 490 (1999)

When using rap sheet to prove priors, court must determine the out-of-state statute underlying the conviction and whether there was a potentially comparable Washington felony, *State v. Cabrera*, 73 Wn.App. 165, 168 (1994), *State v. Weiand*, 66 Wn.App. 29 (1992), *see: State v. Gill*, 103 Wn.App. 435, 447-50 (2000), *State v. Merdop*, 139 Wn.App. 693 (2007); where amount of theft in **out-of-state offense** is less than $250, it cannot be used as a felony prior; out-of-state taking and riding which requires *mens rea* element of knowingly is not comparable to a Washington felony, which requires intent; where rap sheet states "escape," and other state has three escape offenses which cannot be compared to Washington, the escape cannot be used to enhance; even if standard range is the same when priors are excluded by appellate court, remand is necessary unless record clearly indicates sentencing court would have imposed the same sentence anyway, *State v. Parker*, 132 Wn.2d 182, 189 (1997), *State v. Ford*, 137 Wn.2d 472, 485 (1999), *see: Pers. Restr. of Call*, 144 Wn.2d 315 (2001), *State v. Kilgore*, 141 Wn.App. 817 (2007), 167 Wn.2d 28 (2009); I.

***State v. Talley***, 134 Wn.2d 176 (1998)

Pursuant to *Alford* plea agreement, state recommends standard range, court indicates its intent to impose exceptional sentence, defense objects to court considering probable cause certificate, which had been considered in taking plea, court declines to hold evidentiary hearing; held: state's participating in evidentiary hearing to "help the court make its decision" is not a breach of plea agreement, at 186, *State v. Sledge*, 133 Wn.2d 828 (1997) *see: State v. Coppin*, 57 Wn.App. 866, 871-4 (1990); trial court may not consider probable cause certification where defendant does not admit to those factual allegations, *State v. Young*, 51 Wn.App. 517, 522-3 (1988), *cf.: State v. Bell*, 116 Wn.App. 678 (2003); trial court is obliged to hold an evidentiary hearing if it intends to consider disputed facts whether defense wants one or not, *State v. Crockett*, 118 Wn.App. 853 (2003); real facts doctrine does not prohibit sentencing court from considering facts that could also be used to prove a higher degree crime as long as it does not do so because it is dissatisfied with plea agreement or verdict, *but see: State v. Taitt*, 93 Wn.App.

783, 789-92 (1999), *State v. Morreira*, 107 Wn.App. 450 (2001), *State v. Randoll*, 111 Wn.App. 578, 582-84 (2002); affirms *State v. Talley*, 83 Wn.App. 750 (1996); 9-0.

***State v. Morley***, 134 Wn.2d 588 (1998)

General **courts-martial** are prior convictions for SRA and persistent offender accountability act, *State v. Hyder*, 159 Wn.App. 234, 256-57 (2011); 5-4.

***State v. Flores-Serpas***, 89 Wn.App. 521 (1998)

Community placement is not **tolled**, RCW 9.94A.170(2), for purposes of counting points, former RCW 9.94A.360(18) [RCW 9.94A.525 (2013)], when a defendant is involuntarily arrested and deported by INS; I.

***State v. Riles***, 135 Wn.2d 326 (1998), *abrogated on other grounds*, *State v. Valencia*, 169 Wn.2d 782 (2010)

Requiring **polygraph** testing to monitor compliance with other conditions of community placement, RCW 9.94A.120(9)(c), is valid, *State v. Combs*, 102 Wn.App. 949 (2000), *State v. Vant*, 145 Wn.App. 592, 603 (2008); **plethysmograph** testing may be imposed by sentencing court as part of a treatment program, RCW 9.94A.120(9)(c)(iii), but may not order it unless it also requires crime-related treatment for sexual deviancy, *State v. Castro*, 141 Wn.App. 485, 493-94 (2007), *State v. Land*, 172 Wn.App. 593, 605-06 (2013), *State v. Johnson*, 184 Wn.App. 777 (2014), *State v. Alcocer*, 2 Wn.App.2d 918 (2018), *Matter of Brettell*, 6 Wn.App.2d 161 (2018); ordering a defendant convicted of a sex offense with a minor from having no contact with minors or frequenting places where they congregate is valid, *State v. McCormick*,166 Wn.2d 689 (2009); ordering a sex offender who raped an adult from having no contact with minors is overbroad, *cf.: State v. Williams*, 157 Wn.App. 689 (2010); affirms, in part, *State v. Riles*, 86 Wn.App. 10 (1997), overruling *State v. Holland*, 80 Wn.App. 1 (1995), *State v. Flores-Moreno*, 72 Wn.App. 733, 742-5 (1994); 7-2.

***State v. Conners***, 90 Wn.App. 48, 53-4 (1998)

Drug offender sentencing alternative (DOSA), RCW 9.94A.120(6), is not reviewable, *State v. J.W.*, 84 Wn.App. 808, 811-2 (1997), *cf.: State v. Hays*, 55 Wn.App. 13 (1989), *State v. Williams*, 112 Wn.App. 171 (2002), *State v. Kane*, 101 Wn.App. 607 (2000), *but see: State v. Williams*, 149 Wn.2d 143 (2003); III.

***State v. Brown***, 91 Wn.App. 361 (1998)

Where the range for an **unranked** offense, RCW 9.94A.120(7) [here, stalking] is found by the court to be clearly too lenient such that defendant would be awarded "free crimes," then an exceptional sentence may be imposed, *State v. Fisher*, 108 Wn.2d 419, 428 (1987), *State v. Stephens*, 116 Wn.2d 238, 243 (1991), *State v. Stewart*, 125 Wn.2d 893, 897-99 (1995), *State v. Tili*, 148 Wn.2d 350 (2003); III.

***State v. Anderson***, 92 Wn.App. 54, 61-63 (1998)

Defendant steals wine from store, hits clerk with bottle, fires bullet into store, is convicted of robbery and assault with firearm, trial court, without entering findings, counts offenses separately without objection; held: trial court could have found that defendant's objective intent was to steal the wine and that intent changed to a desire to injure or frighten the

clerk, thus implicit finding, *State v. Channon*, 105 Wn.App. 869, 877-78 (2001), that intent changed and offenses were not same criminal conduct is neither a misapplication of law nor abuse of discretion; I.

***State v. DeBello***, 92 Wn.App. 723 (1998)

Trial court may not suspend a portion of a term of confinement imposed for violation of a condition of community supervision under SRA; II.

***State v. Traicoff***, 93 Wn.App. 248 (1998)

Following remand, trial court changes sentence from one to two-years community placement, based upon erroneous sentence originally imposed, not addressed in original appeal; held: double jeopardy clause does not bar a court from correcting its sentencing error by increasing severity of a sentence to conform to mandatory provisions of a statute, *Bozza v. United States*, 91 L.Ed. 818 (1947), *United States v. DiFrancesco*, 66 L.Ed.2d 328 (1980); I.

***State v. Ford***, 137 Wn.2d 472 (1999)

Challenge to the classification of **out-of-state convictions** can be raised for the first time on appeal, *State v. McCorkle*, 137 Wn.2d 490 (1999), *State v. Russell*, 104 Wn.App. 422, 449-50 (2001), *State v. Hunley*, 175 Wn.2d 901 (2012), *cf.: State v. Nitsch*, 100 Wn.App. 512 (2000), *State v. Hodges*, 118 Wn.App. 668, 674 (2003), *State v. Lucero*, 152 Wn.App. 287, 293-96 (2009), *rev'd, on other grounds,* 168 Wn.2d 785 (2010); where defense fails to object to defects at sentencing, remand for an evidentiary hearing to allow the state to prove the classification is appropriate, *State v. Thiefault*, 160 Wn.2d 409, 417 n.4 (2007), *but see: Pers. Restr. of Connick*, 144 Wn.2d 442 (2001), *State v. Hickman*, 112 Wn.App. 187 (2002), 116 Wn.App. 902 (2003), *State v. Ross*, 152 Wn.2d 200 (2004), *Pers. Restraint of Cadwallader*, 155 Wn.2d 867 (2005), *State v. Foster*, 140 Wn.App. 266 (2007), *State v. Birch*, 151 Wn.App. 504, 515-20 (2009), *cf.: State v. Mendoza*, 165 Wn.2d 913 (2009), *State v. Bergstrom*, 162 Wn.2d 87 (2007), *State v. Vant*, 145 Wn.App. 592, 601-02 (2008), *see: State v. Jones*, 182 Wn.2d 1 (2014); priors can be proved by certified copy of judgment or "other comparable documents of record or transcripts" to establish criminal history, at 480, *Pers. Restraint of Adolph*, 170 Wn.2d 556, 565-71 (2010), *State v. Cabrera*, 73 Wn.App. 165, 168 (1994), *State v. Beals*, 100 Wn.App. 189, 195-97 (2000), *State v. Wilson*, 113 Wn.App. 122, 136-39 (2002), *State v. Griepsma*, 17 Wn.App.2d 606 (2021), *see: State v. Wining*, 126 Wn.App. 75, 91-96 (2005); reverses *State v. Ford*, 87 Wn.App. 794 (1997); 6-3.

***State v. Beer***, 93 Wn.App. 539 (1999)

Where state files summons for revocation of SSOSA sentence within community supervision period, revocation hearing and imposition of full suspended sentence outside of community supervision period is permissible if there is no unnecessary delay, *State v. Hultman*, 92 Wn.App. 736 (1979); defendant must be provided allocution at hearing, *but see: State v. Canfield*, 154 Wn.2d 698 (2005), *State v. Ague-Masters*, 138 Wn.App. 86, 109-10 (2007), remedy for failure to provide allocution is remand before different judge, *State v. Aguilar-Rivera*, 83 Wn.App. 199, 203 (1996), *cf.: State v. Hughes*, 154 Wn.2d 118, 152-53 (2005), *abrogated, on other grounds, Washington v. Recuenco*, 548 U.S. 212, 165 L.Ed.2d 466 (2006), *but see: State v. Hatchie*, 161 Wn.2d 390, 405-06 (2007); II.

***State v. Taitt***, 93 Wn.App. 783 (1999)

In rape 2° case, court finds choking to unconsciousness is deliberate cruelty, defense argues that force and serious injury establish rape 1°, thus **real facts doctrine** violated; held: because the injuries do not establish infliction of serious injury as a matter of law, whether the acts constitute deliberate cruelty or rise to the level of serious physical injury under rape 1° is a factual decision for the trial court, thus not clearly erroneous; justifying an exceptional sentence by relying on facts that elevate the seriousness of the crime violates the real facts doctrine, reconsidering *State v. Talley*, 83 Wn.App. 750, 761-62, *aff'd, on other grounds,* 134 Wn.2d 176 (1998), *see: State v. Randoll*, 111 Wn.App. 578, 582-84 (2002); I.

***State v. Hale***, 94 Wn.App. 46 (1999)

Where defendant is sentenced to more than one year, sentencing court has no power to delay execution of sentence until after defendant completes a treatment program, as jurisdiction passes to DOC, *January v. Porter*, 75 Wn.2d 768, 773-74 (1969), *State v. Law*, 110 Wn.App. 36, 40 (2002), *Postsentence Review of Cage*, 181 Wn.App. 588 (2014); sentencing court may not grant credit against a prison commitment for in-patient treatment time spent before sentence commences; drug treatment may not be credited against a community service portion of a sentence; II.

***Pers. Restraint of Breedlove***, 138 Wn.2d 298 (1999)

Defendant pleads guilty to lesser offense, agrees to exceptional sentence, appeals; held: where trial court approves a plea agreement as consistent with the interests of justice and in conformance with SRA, the stipulation to an exceptional sentence is a substantial and compelling reason justifying an exceptional sentence, *State v. Cooper*, 63 Wn.App. 8 (1991), *State v. Hilyard*, 63 Wn.App. 413 (1991), *but see: State v. Gaines*, 121 Wn.App. 687, 696-700 (2004), *State v. Gronnert*, 122 Wn.App. 214 (2004), trial court must still enter written findings; by agreeing to the sentence, defendant waives right to appeal; 5-1-3.

***State v. Hixson***, 94 Wn.App. 862, 865-66 (1999)

Court may permit witnesses beyond those included in former RCW 9.94A.110 [recodified as 9.94A.500] to testify at sentencing; III.

***State v. Serrano***, 95 Wn.App. 700, 708-09 (1999)

Trial court asking defendant at sentencing if he still denies committing the crime is improper, *State v. Garibay*, 67 Wn.App. 773, 782 (1992), *abrogated on other grounds*, *State v. Moen*, 129 Wn.2d 535 (1996), as trial court should not "ascertain facts" from a defendant at sentencing and professed innocence is not an aggravating factor, *State v. Vermillion*, 66 Wn.App. 332, 348-49 (1992); III.

***State v. Barnett***, 139 Wn.2d 462 (1999)

Burglary 1° is not automatically a "crime against a person," former RCW 9.94A.120(9)(a), for purposes of community placement, where defendant has not injured or threatened another during the crime; affirms *State v. Barnett*, 91 Wn.App. 671, 674-77 (1998); 9-0.

***State v. McRae***, 96 Wn.App. 298 (1999)

**Juvenile felonies** count in offender score pursuant to 1997 SRA amendments even where respondents pled guilty in juvenile court before they were 15 years old, and the plea forms stated that convictions will not remain part of criminal history if committed before the age of 15, as the plea agreements do not establish a promise by the state to disregard future changes in the law or that the law would not change, *State v. Webb*, 112 Wn.App. 618 (2002), distinguishing *State v. Shineman*, 94 Wn.App. 57 (1999), *State v. T.K.*, 94 Wn.App. 286 (1999); I.

***State v. Sulayman***, 97 Wn.App. 185 (1999)

Where legislature amends to include juvenile adjudications in offender score, use of adjudications that occurred before the amendment is not a retroactive application, as the precipitating event (the new conviction) occurred after the effective date of the statute, *State v. Randle*, 47 Wn.App. 232, 240-41 (1987), *see: State v. Perry*, 110 Wn.App. 554 (2002), *State v. Nordlund*, 113 Wn.App. 171, 191-93 (2002), *State v. Dean*, 113 Wn.App. 691 (2002), *cf.: State v. Cruz*, 139 Wn.2d 186 (1999), *State v. Smith*, 144 Wn.2d 665, 670-75 (2001); I.

***State v. Young***, 97 Wn.App. 235, 240-44 (1999)

Committing separate forgeries on separate days at the same victim properly constitute separate criminal intent, even where defendant used the same photocopied forged check, *cf.: State v. Calvert*, 79 Wn.App. 569 (1995), within trial court's discretion; I.

***Sentence of Kindberg***, 97 Wn.App. 287 (1999)

Where court imposes a sentence of less than a year concurrent with a separate sentence of more than a year, the sentence is served in DOC, RCW 9.94A.190(3), and the court may impose a period of community supervision rather than community placement; I.

***State v. Rowland***, 97 Wn.App. 301 (1999)

Stealing more than one firearm in the same burglary is the same criminal conduct, *see: State v. Simonson*, 91 Wn.App. 874, 885 (1998), *State v. Porter*, 133 Wn.2d 177, 181 (1997), *State v. McReynolds*, 104 Wn.App. 560, 581-82 (2000); issue may be raised for the first time on appeal, *State v. Anderson*, 92 Wn.App. 54, 61 (1998), *but see: State v. Nitsch*, 100 Wn.App. 512 (2000), *State v. O'Neal*, 126 Wn.App. 395, 431-34 (2005), *aff'd, on other grounds*, 159 Wn.2d 500 (2007), even where the parties agreed to the sentence, although on remand, trial court may consider what bearing, if any, the agreement may have on remedies at resentencing, *see: State v. Hilyard*, 63 Wn.App. 413, 418-20 (1991); III.

***State v. Johnson***, 97 Wn.App. 679 (1999)

Where defendant is sentenced under first-time offender option, RCW 9.94A.030(22), he may be ordered to enter treatment even if it is not related to the offense; II.

***State v. Acrey***, 97 Wn.App. 784 (1999)

Defendant is sentenced to 60 months for assault, 43 months for drugs plus 12 months community placement, claims community placement sentence exceeds maximum five years for the drug charge since it cannot begin until he completes the assault sentence; held: **tolling** of

community placement, RCW 9.94A.170(3), suspends the period of the sentence, thus it is not extended beyond maximum; I.

***State v. Murphy***, 98 Wn.App. 42 (1999)

Convictions of multiple counts of theft of firearms or unlawful possession of firearms must run consecutively, RCW 9.41.040(6), at 48-49, *State v. McReynolds*, 117 Wn.App. 309, 342-43 (2003), *State v. McReynolds*, 117 Wn.App. 309, 342-43 (2003); II.

***State v. Henderson***, 99 Wn.App. 369 (2000)

At plea, state agrees to recommend 26 months, low end of standard range, which court imposes; DOC requests resentencing due to error of law, parties determine that low end of range is 41 months, state recommends exceptional sentence of 26 months, court imposes 41 months, defendant demands specific performance sentence of 26 months; held: where defendant is not misled by the state and state is not responsible for the mistake, then trial court need not impose the recommended sentence in spite of a statute, *State v. Morley*, 35 Wn.App. 45, 48 (1983), *In re Pers. Restraint of Powell*, 117 Wn.2d 175 (1991), *State v. Bisson*, 156 Wn.2d 507 (2006), *Pers. Restraint of Murillo*, 134 Wn.App. 521 (2006), *see: State v. Barber*, 170 Wn.2d 854 (2011); II.

***State v. Smith***, 99 Wn.App. 510 (1999)

Firearms stolen from the same victim at the same time may be considered as same criminal conduct at sentencing in spite of RCW 9A.56.300(3) which, by its plain language, applies only to charging, *State v. Roose*, 90 Wn.App. 513 (1998), *State v. Simonson*, 91 Wn.App. 874, 885 (1998), *State v. Davis*, 174 Wn.App. 623, 641-44 (2013); I.

***Pers. Restraint of Rangel***, 99 Wn.App. 596, 598-600 (2000)

Defendant fires into another vehicle which crashes, defendant's vehicle turns back, approaches again, defendant opens fire again at same victims, trial court sentences to consecutive terms; held: because defendant formed new criminal intent before his second act, his crimes were sequential, not simultaneous or continuous, thus his conduct was **separate and distinct**, justifying consecutive sentences, RCW 9.94A.400(1)(b), *State v. Tili*, 139 Wn.2d 107 (1999), *State v. Grantham*, 84 Wn.App. 854 (1997), *State v. Price*, 103 Wn.App. 845 (2000), *Pers. Restraint of Delgado*, 149 Wn.App. 223 (2009); consecutive sentences for serious violent offenses do not require court to enter findings and conclusions, *but see: State v. Friedlund*, 182 Wn.2d 388 (2015); III.

***Pers. Restraint of McNeal***, 99 Wn.App. 617 (2000)

At a **community custody revocation hearing**, respondent is entitled to due process rights provided in a parole revocation hearing, *Morrissey v. Brewer*, 33 L.Ed.2d 484 (1972), *State v. Abd-Rahmaan*, 154 Wn.2d 280 (2005), but is not entitled to appointed counsel; 2-1, I.

***State v. Brown***, 100 Wn.App. 104 (2000), *aff'd, on different grounds,* 147 Wn.2d 330 (2002)

Two or more **serious violent offenses** which do not meet the same criminal conduct exception, RCW 9.94A.400(1)(a), are necessarily **separate and distinct**, RCW 9.94A.400(1)(b) and must be served consecutively, *Pers. Restraint of Delgado*, 149 Wn.App. 223 (2009); I.

***State v. Beals***, 100 Wn.App. 189, 195-97 (2000)

Before using an **out-of-state conviction**, state must offer a certified copy of the judgment or comparable transcripts or documents, sentencing court must then properly classify the conviction by comparing the elements of the offense with the elements of potentially comparable Washington crimes, *State v. Russell*, 104 Wn.App. 422, 439-52 (2001), *but see: State v. Delgado*, 148 Wn.2d 723 (2003); if elements are not identical, or if the offense is defined more narrowly in Washington, court may need to inquire into the record of the out-of-state conviction to determine whether defendant's conduct would have violated a comparable Washington offense, *State v. Ford*, 137 Wn.2d 472, 479-80 (1999), *see: State v. Bush*, 102 Wn.App. 372 (2000), *State v. Robinson*, 114 Wn.App. 800 (2003), *State v. Releford*, 148 Wn.App. 478, 482-89 (2009), *State v. Tewee*, 176 Wn.App. 964 (2013), *c.f: Shephard v. United States*, 161 L.Ed.2d 205 (2005), *State v. Moncrief*, 137 Wn.App. 729 (2007); state bears burden of ensuring the record supports the classification; here, state failed to offer copies of out-of-state statute, trial court did not compare elements but, because defense did not object, state may offer additional evidence on remand, *State v. Ford, supra.*, at 485-86, *State v. Jackson*, 129 Wn.App. 95 (2005), *State v. O'Neal*, 126 Wn.App. 395, 431-34 (2005), *aff'd, on other grounds*, 159 Wn.2d 500 (2007), *State v. Thiefault*, 160 Wn.2d 409, 417 n.4 (2007), *cf.: State v. Vant*, 145 Wn.App. 592, 600-02 (2008); I.

***State v. Nitsch***, 100 Wn.App. 512 (2000)

Defendant's presentence report concurs with state's standard range calculation, argues for the first time on appeal that burglary 1° and assault 1° during same incident should count as same criminal conduct; held: where defense agrees to the calculation of the standard range, it waives review of whether the crimes constitute the same criminal conduct, *Pers. Restraint of Shale*, 160 Wn.2d 489, 494-96 (2007), *State v. Jackson*, 129 Wn.App. 95 (2005), *State v. O'Neal*, 126 Wn.App. 395, 431-34 (2005), *aff'd, on other grounds*, 159 Wn.2d 500 (2007), *State v. McDougall*, 132 Wn.App. 609, 612-13 (2006), distinguishing *State v. Ford*, 137 Wn.2d 472 (1999), *State v. Allen*, 150 Wn.App. 300, 316-17 (2009), *State v. Lucero*, 152 Wn.App. 287, 293-96 (2009), *rev'd, on other grounds*, 168 Wn.2d 785 (2010), *State v. Nailleux*, 158 Wn.App. 630, 642 (2010), *but see: State v. Rowland*, 97 Wn.App. 301 (1999), *cf.: Pers. Restr. of Call*, 144 Wn.2d 315 (2001), *State v. Hickman*, 112 Wn.App. 187 (2002), 116 Wn.App. 902 (2003), *State v. Hodges*, 118 Wn.App. 668, 674 (2003); where defendant, at plea, says his intent at entering victim's home was to kill himself and then committed an assault, then record supports court's implicit finding that the objective intent for the crimes were not the same; I.

***State v. Haddock***, 141 Wn.2d 103 (2000)

Possession of stolen firearms and felon in possession of the same firearms do not encompass the same criminal conduct as the victims differ (owner of guns vs. general public for VUFA); possession of stolen property and possession of stolen firearms from the same victim do encompass the same criminal conduct; 8-1.

***State v. Khanteechit***, 101 Wn.App. 137 (2000)

Defendant may appeal a standard range sentence if the court either refuses to exercise its discretion at all or relies on an impermissible basis for refusing to impose an exceptional sentence *[dicta];* I.

***State v. Tresenriter***, 101 Wn.App. 486, 495-97 (2000)

Where defendant steals multiple firearms in course of a burglary, the firearm theft convictions are the same criminal conduct even though they may be charged separately, RCW 9A.56.300(3); possessing stolen property 2° apparently arising from same burglary does not encompass the same criminal conduct as firearm thefts as criminal intent is different and because the crime by definition does not include firearms, RCW 9A.56.160; II.

***State v. Kane***, 101 Wn.App. 607 (2000)

Expanded drug offender sentencing alternative, RCW 9.94A.120(6), is not retroactive, *State v. Toney*, 103 Wn.App. 862 (2000), *Sentence of Holt*, 105 Wn.App. 619 (2001), *State v. Ross*, 152 Wn.2d 220, 233-41 (2004), *see also: State v. Williams*, 149 Wn.2d 143 (2003), *but see: Addleman v. Board of Prison Terms and Paroles*, 107 Wn.2d 503, 509-12 (1986); I.

***State v. Root***, 141 Wn.2d 701 (2000)

Unit of prosecution for sexual exploitation of a minor, RCW 9.68A.040, is each photo session per minor, not each photograph, reversing, in part, *State v. Root*, 95 Wn.App. 333 (1999), *see: State v. Sutherby*, 165 Wn.2d 870, 878-83 (2009); 9-0.

***State v. Howell***, 102 Wn.App. 288 (2000)

Defendant pleads guilty to solicitation to deliver cocaine, trial court treats prior VUCSA delivery conviction as one point, relying on *In re Pers. Restraint of Hopkins*, 137 Wn.2d 897 (1999); held: while *Hopkins* holds that solicitation to deliver drugs is not a drug offense for purposes of the maximum sentence doubling statute, former RCW 9.94A.360(6) [RCW 9.94A.525 (2013)] unambiguously states that where the present conviction is of an anticipatory offense, priors are to be counted as if the present conviction is for a completed offense, thus prior deliveries count three, *see: State v. McCarthy*, 112 Wn.App. 251 (2002); I.

***State v. Gill***, 103 Wn.App. 435, 447-50 (2000)

State offers NCIC rap sheet to prove out-of-state priors, defense objects and claims that they are misdemeanors, trial court finds state proved priors as felonies; held: where defendant objects to classification of priors shown on rap sheet, state must offer evidence to prove that the priors are felonies, *State v. Drummer*, 54 Wn.App. 751, 757 (1989), *but see: State v. Walters*, 162 Wn.App. 74, 85-86 (2011), failure to do so requires reversal and resentencing without regard to the alleged priors, *State v. McCorkle*, 88 Wn.App. 485, 500 (1997), *aff'd,* 137 Wn.2d 490 (1999); II.

***State v. Walsh***, 143 Wn.2d 1 (2001)

Where both parties err as to standard range, defendant may seek to withdraw his plea even if trial court imposes an exceptional sentence upward, and may raise issue for the first time on appeal, *Pers. Restr. of Call*, 144 Wn.2d 315 (2001), *see: State v. Calhoun*, 134 Wn.App. 84 (2006), *State v. Codiga*, 162 Wn.2d 912 (2008); 9-0.

***Pers. Restraint of Call***, 144 Wn.2d 315 (2001)

At guilty plea, defendant agrees to offender score containing washed out-of-state convictions, sentence is within range without the out-of-state priors, files PRP; held: because there is no evidence that defendant knowingly agreed to an incorrect offender score or sentence range, he did not invite the error, *cf.:* *State v. Hahn*, 100 Wn.App. 391, 394-97 (2000) and may raise issue for first time in PRP; trial court must determine correct offender score and sentence range before imposing sentence, *see:* *State v. McCorkle*, 88 Wn.App. 485 (1997), *aff'd,* 137 Wn.2d 490 (1999), *but see:* *State v. Bobenhouse*, 143 Wn.App. 315, 329-30 (2008), *aff'd, on other grounds*, 166 Wn.2d 881 (2009), *State v. Amos*, 147 Wn.App. 217, 230-31 (2008), thus remanded for resentencing; 9-0.

***Pers. Restraint of Connick***, 144 Wn.2d 442, 454-58 (2001)

At sentencing, DOC report reflects offender score of 9, state's report reflects 6, defense counsel agrees with DOC report, court adopts score of 9, defendant files PRP, claiming out-of-state priors were same criminal conduct; held: because petitioner failed to present sufficient evidence that priors were committed at same time and place and involved same victims, he is not entitled to relief, in light of the fact that counsel at sentencing agreed with the calculation, *State v. Birch*, 151 Wn.App. 504, 515-20 (2009), *but see:* *State v. Ford*, 137 Wn.2d 472 (1999), *State v. Lucero*, 168 Wn.2d 785 (2010), *State v. Cobos*, 178 Wn.App. 692, 699 (2013), *aff'd, on other grounds*, 182 Wn.2d 12 (2014), *cf.:* *State v. Bergstrom*, 162 Wn.2d 87 (2007); photocopies that do not meet authentication requirements of ER 901, 902, ch. 5.44 RCW or CR 44 should not be considered absent a stipulation, *but see: State v. Griepsma*, 17 Wn.App.2d 606 (2021), *cf.:* *State v. Winings*, 126 Wn.App. 75, 91-96 (2005); 8-1.

***State v. Hernandez-Hernandez***, 104 Wn.App. 263 (2001)

At sentencing, where defense presents mitigating factors but does not seek an exceptional sentence, counsel was effective, as trial court had authority to impose exceptional sentence on its own, *but see:* *State v. McGill*, 112 Wn.App. 95 (2002); III.

***State v. Russell***, 104 Wn.App. 422, 439-52 (2001)

Detailed analysis determining sentencing consequences of an out-of-state conviction; II.

***State v. McReynolds***, 104 Wn.App. 560, 581-82 (2000)

Statutory requirement that if offender is convicted for unlawful possession of firearm and for theft of the firearm the terms will be served consecutively, RCW 9.41.040(6), does not preclude a finding that the convictions are the same criminal conduct, thus unlawful possession of multiple firearms from same victim may be same criminal conduct because they all involve the same victim, the public at large (?), *State v. Simonson*, 91 Wn.App. 874, 885 (1998); III.

***State v. Chance***, 105 Wn.App. 291, 299 (2001)

Court may not consider a court-ordered competency evaluation in determining future dangerousness unless defendant was warned prior to the evaluation that it might be used at sentencing, *Estelle v. Smith*, 68 L.Ed.2d 359 (1981), *see:* *State v. Bankes*, 114 Wn.App. 280 (2002); II.

***State v. Gimarelli***, 105 Wn.App. 370, 374-80 (2001)

An out-of-state conviction, based upon a nonunanimous jury, counts in offender score as long as it is not repugnant to either the United States Constitution or the constitution of the state of conviction; II.

***State v. Holgren***, 106 Wn.App. 477 (2001)

Prior DUIs more than seven years old may be used to enhance sentence for vehicular homicide, RCW 9.94A.310(7), even though they may not be used to enhance for DUI, RCW 46.61.5055; I.

***State v. Morreira***, 107 Wn.App. 450 (2001)

Following *Alford* plea to assault 2°, court convenes real facts hearing, over general objection state offers PSI and police report, court finds defendant intended to kill victim and imposes exceptional sentence; held: purpose of real facts hearing is to allow defendant to refute state's allegation, *State v. Garza*, 123 Wn.2d 885, 890 (1994), and to protect defendant from consideration of unreliable or inaccurate information, *State v. Handley*, 115 Wn.2d 275, 282-83 (1990), RCW 9.94A.370(2), *see: State v. Overvold*, 64 Wn.App. 440 (1992), *State v. Talley*, 134 Wn.2d 176 (1998), *State v. Crockett*, 118 Wn.App. 853 (2003); an *Alford* plea does not restrict state from offering evidence at sentencing; trial court's viewing crime as assault 2° committed under assault 1° circumstances violates real facts doctrine, *State v. Young*, 51 Wn.App. 517, 523 (1988), *but see: State v. Randoll*, 111 Wn.App. 578, 582-84 (2002); 2-1, III.

***State v. Brooks***, 107 Wn.App. 925, 932-34 (2001)

To calculate a DOSA sentence, RCW 9.94A.120(6), where high end of the range exceeds the maximum sentence, court must use the maximum and low end to determine midpoint; I.

***State v. Brown***, 108 Wn.App. 960 (2001)

After sentencing, trial court adds the name of a witness to the no contact order; held: absent statutory authority, court may not amend an SRA sentence, *State v. Shove*, 113 Wn.2d 83 (1989), *State v. Murray*, 118 Wn.App. 518 (2003), *Postsentence Review of Wandell*, 175 Wn.App. 447 (2013), *but see: State v. Smith*, 159 Wn.App. 694 (2011); RCW 9.94A.120(20) allows imposition of a no contact order at sentencing, but does not allow modification later; III.

***State v. Rasmussen***, 109 Wn.App. 279 (2001)

Where sentences are imposed on the same day, irrespective of whether the pleas or trials were on different days, the sentences must run concurrently absent an exceptional sentence, RCW 9.94A.400(1), *State v. Smith*, 74 Wn.App. 844, 851-54 (1994), distinguishing *State v. Moore*, 63 Wn.App. 466, 469-71 (1991), RCW 9.94A.400(3), *but see: State v. Huntley*, 45 Wn.App. 658, 662 (1986); II.

***State v. Smathers***, 109 Wn.App. 546 (2001)

DOSA, RCW 9.94A.120(6), is unavailable to a defendant who has prior juvenile sex or violent offenses; II.

***Pers. Restraint of Bowman***, 109 Wn.App. 869 (2001)

Solicitation to deliver drugs is an anticipatory offense under Ch. 9A.28, RCW rather than under Ch. 69.50, RCW, thus sentence range is not 0-12 months, *see:* *In re Pers. Restraint of Hopkins*, 137 Wn.2d 897 (1999); I.

***In re Pers. Restraint of Goodwin***, 146 Wn.2d 861, 873-76 (2002)

A defendant who stipulates to offender score does not waive right to seek PRP on that score if it includes washed out juvenile crimes, as the sentence would be in excess of that authorized by statute, *State v. Huff*, 119 Wn.App. 367 (2003), *Pers. Restraint of Cadwallader*, 155 Wn.2d 867 (2005), *State v. Malone*, 138 Wn.App. 587 (2007), *Matter of Sylvester*, ___ Wn.App.2d ___, 520 P.3d 1123 (2022), *cf.:* *State v. Hickman*, 116 Wn.App. 902 (2003), *Pers. Restraint of Shale*, 160 Wn.2d 489 (2007), *State v. Collins*, 144 Wn.App. 547 (2008), *State v. Naillieux*, 158 Wn.App. 630, 642 (2010), *State v. Zamudio*, 192 Wn.App. 503 (2016); 9-0.

***State v. Teitzel***, 109 Wn.App. 791 (2002)

For vehicular homicide, a prior DUI acts as a two-year sentence enhancement and doesn't count in offender score, RCW 46.61.520(2); II.

***State v. Cox***, 109 Wn.App. 937 (2002)

Where community placement is mandatory and court omits it at sentencing, it may amend sentence to reflect community placement; III.

***State v. Perry***, 110 Wn.App. 554, 560-61 (2002)

Where prior juvenile dispositions occurred on the same day and are treated as a single conviction, they cannot later be treated as separate convictions; III.

***State v. Randoll***, 111 Wn.App. 578, 582-84 (2002)

Defendant pleads guilty to assault 2˚ (substantial bodily harm), RCW 9A.04.110(4)(b), 9A.36.021(1)(a), at evidentiary hearing court imposes exceptional sentence based upon seriousness of injury, defense objects under **real facts doctrine** claiming that injury factor elevates crime to assault 1˚, *State v. Swanson*, 45 Wn.App. 712, 714 (1986); held: because the facts do not establish all of the elements of a greater, uncharged offense (*mens rea* of assault 1˚ is intent to inflict great bodily harm; *mens rea* of assault 2˚ does not include intent to injure), real facts doctrine is not violated, *State v. Benefiel*, 111 Wn.App. 789 (2002), *see:* *State v. Taitt*, 93 Wn.App. 783, 790 (1999), *State v. Hooper*, 100 Wn.App. 179, 186 (2000), *but see:* *State v. Talley*, 134 Wn.2d 176 (1998), *State v. Morreira*, 107 Wn.App. 450 (2001); II.

***State v. Lopez,*** 147 Wn.2d 515 (2002)

At sentencing, defense counsel objects to failure of state to prove priors, state offers to obtain copies of judgments and sentences, trial court declines and sentences defendant to life without parole; held: upon objection, state was obliged to prove prior convictions, *State v. Ford*, 137 Wn.2d 472, 480-82 (1999), *State v. Mendoza*, 165 Wn.2d 913 (2009), *State v. Allen*, 150 Wn.App. 300, 314-17 (2009), failure to do so, even where trial court stated it would proceed anyway, precludes remand to allow state a further opportunity to meet its burden, *State v. McCorkle*, 137 Wn.2d 490, 497 (1999), *cf.:* *State v. Bergstrom*, 162 Wn.2d 87 (2007), *but see:*

RCW 9.94A.530(2) (2008), *State v. Jones*, 182 Wn.2d 1 (2014); affirms *State v. Lopez*, 107 Wn.App. 270 (2001); 6-3.

***State v. McGill***, 112 Wn.App. 95 (2002)

Defendant may appeal a standard range sentence where court has refused to exercise discretion or has relied upon an impermissible basis for refusing to impose an exceptional sentence, *see: State v. Garcia-Martinez*, 88 Wn.App. 322, 329-30 (1997); here, defense counsel failed to cite or argue for an exceptional sentence where it was clearly authorized under the facts, *cf.: State v. Knight*, 176 Wn.App. 936, 957-58 (2013); I.

***State v. McCarthy***, 112 Wn.App. 231 (2002)

Defendant is convicted of VUCSA delivery, sentencing judge counts prior conviction for solicitation to deliver as one point; held: a prior anticipatory offense is scored the same as if completed, former RCW 9.94A.360(4) [RCW 9.94A.525 (2013)], thus the prior solicitation is tripled, *State v. Howell*, 102 Wn.App. 288 (2000); I.

***State v. Zatkovich***, 113 Wn.App. 70, 75-77 (2002)

Trial court need not hold an evidentiary or **real facts** hearing where state offers documents in support of exceptional sentence and defendant does not object or demand a hearing; II.

***State v. Hepton***, 113 Wn.App. 673, 688-90 (2002)

Where multiple children are present at a methamphetamine lab, only one sentencing enhancement is authorized, RCW 9.94A.510(6), -.605; III.

***State v. Lindahl***, 114 Wn.App. 1, 13-15 (2002)

Trial court may allow attorney for victim's family to address the court at sentencing and to file a written sentencing memorandum, CONST. art I, § 35, RCW 7.69.030, RCW 9.94A.500(1)(2001); II.

***State v. Tili***, 148 Wn.2d 350 (2003)

At resentencing following reversal, *State v. Tili*, 139 Wn.2d 107 (1999), court imposes exceptional sentence, having stated at first sentencing that if consecutive sentences are reversed, exceptional sentence may be imposed; held: because the issue of whether to impose an exceptional sentence was not identical as between the two sentencings due to a change from separate and distinct conduct to the same conduct, **collateral estoppel** will not bar an exceptional sentence, *State v. Brown*, 193 Wn.2d 280 (2019), *see: State v. Collicott*, 118 Wn.2d 649 (1992), *State v. White*, 123 Wn.App. 106 (2004); affirms *State v. Tili*, 108 Wn.App. 289 (2001); 6-3.

***State v. Mitchell***, 114 Wn.App. 713 (2002)

Sentence which provides for community custody for 9 to 12 months or amount of early earned release time, whichever is longer, is sufficiently precise, distinguishing *State v. Broadaway*, 133 Wn.2d 118, 135-36 (1997), *State v. Nelson*, 100 Wn.App. 226, 230-31 (2000), *State v. Pharris*, 120 Wn.App. 661 (2004); I.

***State v. Bunting***, 115 Wn.App. 135 (2003)

Illinois robbery that does not require specific intent to steal or deprive is not equivalent to Washington robbery, thus is not a strike, at 140-41, *State v. Freeburg*, 120 Wn.App. 192 (2004); while court should look to the record to see if the conduct would have violated the comparable Washington statute, *see: State v. Morley*, 134 Wn.2d 588, 606 (1998), *State v. Mutch*, 87 Wn.App. 433 (1997), *State v. Olsen*, 180 Wn.2d 468 (2014), *Pers. Restraint of Canha, 189* Wn.2d 359 (2017), the complaint and "official statement of facts" cannot be considered, as they are allegations never proven at trial because defendant pleaded guilty, *see: State v. Thomas*, 135 Wn.App. 474 (2006); while the indictment may be considered, here it does not establish intent to deprive as an element, at 142-43; I.

***State v. Williams***, 149 Wn.2d 143 (2003)

State may appeal a DOSA sentence challenging defendant's eligibility, reversing *State v. Williams*, 112 Wn.App. 171 (2002); *per curiam.*

***State v. DeSantiago***, 149 Wn.2d 402, 415-21 (2003)

Where jury enters special verdicts finding both a firearm, RCW 9.94A.510(3) and a separate deadly weapon, RCW 9.94A.510(4), the enhancements must run consecutively to each other, *State v. Mandanas*, 168 Wn.2d 84 (2010), as well as to the base sentence, *State v. Spandel*, 107 Wn.App. 352 (2001), *State v. Fast*, 90 Wn.App. 952 (1998), *State v. Callihan*, 120 Wn.App. 620 (2004), *cf.: Post Sentencing Review of Charles*, 135 Wn.2d 239 (1998), *State v. Conover*, 183 Wn.2d 706 (2015); reverses, in part, *State v. DeSantiago*, 108 Wn.App. 855 (2001); 5-4.

***State v. Thomas***, 150 Wn.2d 666 (2003)

Defendant is convicted of two counts of robbery 2° with firearm allegations, is sentenced to concurrent terms for robbery, consecutive firearm enhancements, *State v. Price*, 103 Wn.App. 845, 859-61 (2000), sentence thus exceeds ten years; held: because the maximum sentence for two class B felonies is twenty years, as they can run consecutively, and because firearm enhancements must run consecutively to the base sentences and to each other, RCW 9.94A.599, sentence here does not exceed maximum, overruling *State v. Harvey*, 109 Wn.App. 157 (2001); *affirms State v. Thomas*, 113 Wn.App. 755 (2002); 9-0.

***State v. Bramme***, 115 Wn.App. 844 (2003)

Defendant admits participating in methamphetamine production involving 5000 pills, trial court denies DOSA, RCW 9.94A.660(1)(c); held: DOSA statute permits eligibility where offense "involved only a small quantity," "involved" does not require size determination be made solely on basis of drugs seized; if credible evidence exists pointing to defendant's involvement in the production of a significant quantity, court properly may conclude manufacturing offense did not involve a small quantity, "small" being a relative term, *see also: State v. Barton*, 121 Wn.App. 792 (2004); III.

***State v. Reed***, 116 Wn.App. 418, 422-24 (2003)

Community custody is the same as community placement for purposes of adding a point to offender score, RCW 9.94A.525(17); III.

***State v. Bell***, 116 Wn.App. 678 (2003)

At plea, defense checks box on plea form which states, "instead of making a statement, I agree that the Court may review the police reports and/or a statement of probable cause…to establish a factual basis," state offers witness statements to which defense stipulates, stating that it does not agree with "a lot of what is in there," at sentencing court considers these statements and imposes exceptional sentence; held: defense vague and equivocal response, providing no specific mention of what it is defense objected to was insufficient to preclude court from considering statements to support exceptional sentence, *State v. Overvold*, 64 Wn.App. 440 (1992), distinguishing *State v. Young*, 51 Wn.App. 517 (1988), *cf.: State v. Talley*, 134 Wn.2d 176 (1998); unsworn victim statements may be considered at sentencing absent objection or demand for cross-examination, *see:* RCW 9.94A.500(1); III.

***State v. Payne***, 117 Wn.App. 99 (2003)

A Canadian conviction is sufficiently authenticated, ER 901, where signed by a court transcriber certifying it as a true and accurate transcript, Canadian crown counsel testifies that he would rely on similar transcripts although he did not know whether the transcriber was certified, and the documents are mutually consistent; where a foreign conviction is for a crime not subject to jury trial, it is properly excluded, *State v. Ammons*, 105 Wn.2d 175, 187-88 (1986), *cf.: Custis v. United States*, 128 L.Ed.2d 517 (1994); II.

***State v. Crandall***, 117 Wn.App. 448 (2003)

Statute which requires adding a point to offender score when defendant is on community placement at time of new crime, RCW 9.94A.525(17), applies if defendant is on community custody; II.

***State v. Blunt***, 118 Wn.App. 1 (2003)

Defense demands that state prove priors,, state offers judgment and sentence at sentencing, defense does not challenge priors and remains silent, trial court notes defendant's failure to challenge and finds that the priors were proved; held: allowing the court to infer acknowlegment from a failure to challenge does not infringe upon defendant's right to remain silent, RCW 9.94A.530(2), *State v. Handley*, 115 Wn.2d 275, 282-83 (1990), *see: State v. Mendoza*, 165 Wn.2d 913 (2009), distinguishing *Mitchell v. United States*,143 L.Ed.2d 424 (1999); II.

***State v. Jones***, 118 Wn.App. 199 (2003)

As a condition of community custody, court may order that offender obey all laws, RCW 9A.94A.715(2)(b), overuling *State v. Barclay*, 51 Wn.App. 404 (1988) and overruling, in part, *State v. Raines*, 83 Wn.App. 312, 315-16 (1996), abstain from alcohol even if the case is not alcohol-related, former RCW 9.94A.120(8)(a) [may have been repealed, *see:* RCW 9.94A.505 and this case, at n. 19], *cf.: State v. Norris*, 1 Wn.App.2d 87 (2017), *rev., in part*, 191 Wn.2d 671 (2018), may not order alcohol treatment if alcohol did not relate to the crime, *State v. Warnock*, 174 Wn.App. 608 (2013), *State v. Kinzle*, 181 Wn.App. 774, 786 (2014), may not order mental health counseling if not crime-related, *State v. Brooks*, 142 Wn.App. 842, 849-52 (2008), *see: State v. Muñoz-Rivera*, 190 Wn.App. 870, 890-94 (2015); II.

***State v. Johnson***, 118 Wn.App. 259 (2003)

Juvenile adjudications are convictions for purposes of the offender score, *State v. Cheatham*, 80 Wn.App. 269 (1996), distinguishing RCW 13.04.240; a washed juvenile assault 2° adjudication counts to preclude eligibility for a drug offender sentencing alternative (DOSA), *State v. Deman*, 107 Wn.App. 98, 102-03 (2002); I.

***State v. Smith***, 118 Wn.App. 288, 291-94 (2003)

Refusing to grant a DOSA to anyone who flunks out of drug court is not an abuse of discretion; I.

***State v. Murray***, 118 Wn.App. 518 (2003)

Defendant is sentenced to one year work release for felony, trial court subsequently grants defendant's motion to convert sentence to home detention, state appeals; held: sentencing court lacks authority to change the form of partial confinement after sentence was imposed, *State v. Shove*, 113 Wn.2d 83, 89 (1989), *State v. Harkness*, 145 Wn.App. 678 (2008), *but see: State v. Smith*, 159 Wn.App. 694 (2011), distinguishing *State v. Dana*, 59 Wn.App. 667 (1990); I.

***State v. Hodges***, 118 Wn.App. 668, 674 (2003)

At sentencing, where defense counsel states that she agrees with offender score, state is not required to produce further evidence of out-of-state conviction, *State v. Hickman*, 116 Wn.App. 902 (2003), *State v. Birch*, 151 Wn.App. 504, 515-20 (2009), *but see: State v. Ford*, 137 Wn.2d 472 (1999), *State v. Lucero*, 168 Wn.2d 785 (2010), *cf.: State v. Bergstrom*, 162 Wn.2d 87 (2007), *State v. Cobos*, 178 Wn.App. 692, 699 (2013), 182 Wn.2d 12 (2014), *State v. Richmond*, 3 Wn.App.2d 423 (2018) I.

***State v. Crockett***, 118 Wn.App. 853 (2003)

Defendant, originally charged with child molestation, enters an *Alford* plea to assault 2º, agrees that the court may consider investigating officer's affidavit as factual basis but expressly disputes the accuracy, sentence includes psychosexual evaluation and treatment; held: because court considered disputed facts, *State v. Garza*, 123 Wn.2d 885, 890 (1994), it was obliged to hold an evidentiary hearing even absent a demand for such by defendant, *State v. Talley*, 83 Wn.App. 750, 759 (1996), *aff'd*, 134 Wn.2d 176 (1998), *but see: State v. Mail*, 121 Wn.2d 707, 713 (1993), *State v. Garza, supra.*, at 889, thus remanded for resentencing; III.

***Blakely v. Washington***, 159 L.Ed.2d 403 (2004)

Aggravating factors, other than prior convictions, must be submitted to a jury unless defendant waives jury on the issue, not retroactive to cases final on direct review, *State v. Evans*, 154 Wn.2d 408, 443-49 (2005), *State v. Pillatos*, 159 Wn.2d 459 (2007); not structural error, *Washington v. Recuenco*, 165 L.Ed.2d 466 (2006), *but see: State v. Womac*, 160 Wn.2d 643, 663-64 (2007), *cf.: State v. Doney*, 165 Wn.2d 400 (2008); 5-4.

***State v. Robinson***, 120 Wn.App. 294 (2004)

Failure to object at sentence modification hearing to hearsay and lack of notice waives appellate review; I.

***State v. Watson***, 120 Wn.App. 521 (2004), *rev'd, in part,* 155 Wn.2d 574 (2005)

Prosecutor submits memorandum to sentencing court opposing all DOSA sentences, RCW 9.94A.660, because treatment is not provided, court imposes standard range sentence, defendant appeals; held: absent objection or demand for hearing, trial court properly considered memorandum, *State v. Mail*, 121 Wn.2d 707, 713 (1993), *State v. Garza*, 123 Wn.2d 885, 889 (1994), *but see: State v. Crockett*, 118 Wn.App. 853 (2003); prosecutor's mandatory policy of objecting to all DOSA sentences is not an abuse of discretion, distinguishing *State v. Pettitt*, 93 Wn.App. 288 (1980); an eligible defendant has no right to a DOSA sentence, *see: State v. Davis*, 43 Wn.App. 832, 835 (1986), *State v. Hender*, 180 Wn.App. 895 (2014); II.

***State v. Collins***, 121 Wn.App. 16 (2004)

Defendant, while on community custody, commits new crimes, DOC sanctions defendant to jail, RCW 9.94A.737, after which prosecutor moves to modify sentence, trial court imposes more jail time, RCW 9.94A.634(3)(c) based upon same violations; held: neither double jeopardy clause nor collateral estoppel preclude trial court from imposing a sanction for acts already punished by DOC, *see: State v. Prado*, 86 Wn.App. 573 (1997), *In re Pers. Restraint of Mayner*, 107 Wn.2d 512, 521 (1986), *Standlee v. Smith*, 83 Wn.2d 405, 407 (1974); II.

***State v. Gaines***, 121 Wn.App. 687, 703-06 (2004)

Prosecutor's policy to recommend exceptional sentence downward for certain defendants who plead guilty does not deny equal protection to a defendant who went to trial before prosecutor enacted its policy, as saving resources of a trial is a rational basis for the distinction; I.

***State v. Ross***, 152 Wn.2d 220 (2004)

Where defense affirmatively acknowledges that prior out-of-state convictions are properly included in offender score, trial court need not *sua sponte* compare elements or require further proof and defendant may not raise issue on appeal, *State v. Hickman*, 116 Wn.App. 902 (2003), *State v. Huff*, 119 Wn.App. 367 (2003), *State v. Ford*, 137 Wn.2d 472, 483 n.5 (1999), *State v. Beasley*, 126 Wn.App. 670-685-86 (2005), *State v. McDougall*, 132 Wn.App. 609, 612-13 (2006), *State v. Foster*, 140 Wn.App. 266 (2007), *Pers. Restraint of Shale*, 160 Wn.2d 489 (2007), *State v. Birch*, 151 Wn.App. 504, 515-20 (2009), , *State v. Naillieux*, 158 Wn.App. 630, 642 (2010), *see: State v. Bergstrom*, 162 Wn.2d 87 (2007), *State v. Collins*, 144 Wn.App. 547 (2008), *State v. Zamudio*, 192 Wn.App. 503 (2016), *but see: State v. Malone*, 138 Wn.App. 587 (2007), *State v. Cobos*, 178 Wn.App. 692, 699 (2013), 182 Wn.2d 12 (2014), distinguishing *Pers. Restraint of Goodwin*, 146 Wn.2d 861 (2002); failure to object is not an affirmative acknowledgment, at 233, *State v. Ford, supra.*, at 482, *State v. Mendoza*, 165 Wn.2d 913 (2009), *State v. Lucero*, 168 Wn.2d 785 (2010), *State v. Allen*, 150 Wn.App. 300, 314-17 (2009), *see also: Pers. Restraint of Cadwallader*, 155 Wn.2d 867 (2005), *State v. Richmond*, 3 Wn.App.2d 423 (2018), *cf.: State v. Thiefault*, 160 Wn.2d 409, 417 n.4 (2007), *State v. Vant*, 145 Wn.App. 592, 600-02 (2008); affirms *State v. Hunter*, 116 Wn.App. 30 (2003); amendments to penal statutes lessening penalties are not retroactive absent legislative assertion that they shall be retroactive, at 233-41, *State v. McCarthy*, 112 Wn.App. 231 (2002), *State v. Kane*,101 Wn.App. 607 (2000), *cf.: State v. Zornes*, 78 Wn.2d 9, 13-14 (1970), *State v. Grant*, 89 Wn.2d 678, 684

(1978), *but see: Addleman v. Board of Prison Terms and Paroles*, 107 Wn.2d 503, 509-12 (1986); 9-0.

***State v. Lillard***, 122 Wn.App. 422, 432-33 (2004)

Where offender score is greater than nine, sentencing court may stop calculating at nine so long as court is not considering an exceptional sentence based on the offender score, *State v. Fleming*, 140 Wn.App. 132, 138 (2007), *State v. Priest*, 147 Wn.App. 662, 673 (2008), *see: State v. Bobenhouse*, 143 Wn.App. 315, 329-30 (2008), *aff'd, on other grounds,* 166 Wn.2d 881 (2009); I.

***Pers. Restraint of Acron***, 122 Wn.App. 886 (2004)

Where seriousness level table, RCW 9.94A.515, fails to list an offense [here, indecent liberties by health care provider against patient, RCW 9A.44.100(1)(d)], then it is an unranked felony with a standard range of 0-12 months, RCW 9.94A.505(2)(b); I.

***State v. White***, 123 Wn.App. 106, 113-15 (2004)

Defendant receives DOSA sentence, appeals and obtains reversal on offender score, at resentencing trial court declines to impose DOSA relying, in part, upon defendant's infraction history in prison; held: trial court properly considered infraction history which occurred subsequent to the prior sentence, *but see: State v. Dorosky*, 28 Wn.App. 128 (1981), *State v. Cirkovich*, 42 Wn.App. 403 (1985), *see: State v. Snapp*, 119 Wn.App. 614, 626-27 (2004); III.

***State v. Harris***, 123 Wn.App. 906 (2004), *overruled, on other grounds, State v. Hughes*, 154 Wn.2d 118 (2005), *abrogated, on other grounds, Washington v. Recuenco*, 548 U.S. 212, 165 L.Ed.2d 466 (2006)

Defendant enters into stipulated facts trial, court *sua sponte* imposes exceptional sentence; held: while defendant stipulated to facts for purposes of trial and a standard range sentence, he did not waive his right to a jury trial for purposes of an exceptional sentence, *Blakely v. Washington*, 159 L.Ed.2d 403 (2004), *see: State v. Trebilcock*, 184 Wn.App. 619, 631-36 (2014), as he did not voluntarily relinquish a known right, *State v. Saltz*, 137 Wn.App. 576 (2007), *see: State v. Ermels*, 156 Wn.2d 528 (2006); I.

***State v. Law***, 154 Wn.2d 85, 104-08 (2005)

Conversion to community service is only available for offenders with sentences of one year or less and is limited to a maximum of 30 days, RCW 9.94A.680; volunteer work at Narcotics Anonymous, as opposed to attendance at NA meetings, is permissible as community service; 6-3.

***State v. Winings***, 126 Wn.App. 75, 91-96 (2005)

A combination of guilty plea statements, complaint, minute orders and abstract of judgment are sufficient to prove prior convictions, *State v. Ford*, 137 Wn.2d 472, 479-80 (1999), *Pers. Restraint of Adolph*, 170 Wn.2d 556, 565-71 (2010), even if uncertified, *State v. Griepsma*, 17 Wn.App.2d 606 (2021), *but see: Pers. Restraint of Connick*, 144 Wn.2d 442, 455 (2001); where state alleges that offender score is 5 and defendant challenges one of the priors, arguing that the score is 4, he has agreed to the other 4 priors and may not challenge them for the first

time on appeal, *see:* *State v. Hunter*, 116 Wn.App. 300, 301 (2003), *aff'd sub nom,.* *State v. Ross*, 152 Wn.2d 220 (2004); II.

***United States v. Booker***, 160 L.Ed.2d 621 (2005)

*Blakely v. Washington*, 159 L.Ed.2d 403 (2004) applies to Federal Sentencing Guidelines, 18 USCS Appx, which are made effectively advisory; 5-4.

***State v. Hughes***, 154 Wn.2d 118 (2005), *abrogated, on other grounds, Washington v. Recuenco,* 548 U.S. 296, 165 L.Ed.2d 466 (2006)

Although *Blakely v. Washington*, 159 L.Ed.2d 403 (2004) does not require a jury to determine if prior convictions exist, the SRA's multiple offense policy requires, in addition to prior convictions, that the court find that the presumptive sentence is too lenient, that "there is some extraordinarily serious harm or culpability resulting from multiple offenses which would not otherwise be accounted for in determining the presumptive range," *State v. Fisher*, 108 Wn.2d 419, 428 (1987), and the court must find either (1) egregious effects of defendant's multiple offenses or (2) the level of defendant's culpability resulting from the multiple offenses, *State v. Batista*, 116 Wn.2d 777, 787-88 (1991); because these are factual issues, they must be submitted to a jury; a "free crimes" basis for an exceptional sentence, *State v. Smith*,123 Wn.2d 51, 56 (1993), must be submitted to a jury, *State v. Allen*, 127 Wn.App. 945, 952-55 (2005), *State v. Saltz*, 137 Wn.App. 576 (2007), *but see::* *State v. Newlun*, 142 Wn.App. 730 (2008), *State v. Alvarado*, 164 Wn.2d 556 (2008), *State v. Smith*, 7 Wn.App.2d 304 (2019), as it is a factual determination that allowing a current offense to go unpunished is clearly too lenient, overruling, in part, *State v. Smith, supra.; Blakely* violation can never be harmless, *but see: Washington v. Recuenco, supra.*; because former RCW 9.94A.535 does not authorize jury trials on aggravating factors, courts cannot create the process, *State v. Davis*, 163 Wn.2d 606 (2008), *but see: State v. Pillatos*, 159 Wn.2d 459 (2007), *State v. Pleasant*, 148 Wn.App. 408 (2009), *see also: State v. Doney*, 165 Wn.2d 400 (2008), *Pers. Restraint of Hall*, 163 Wn.2d 346 (2008), *State v. Mann*, 146 Wn.App. 349 (2008); 9-0.

***Pers. Restraint of Lavery***, 154 Wn.2d 249 (2005)

Federal bank robbery, 18 USC § 2113, is not comparable to robbery 2° as the federal statute requires only general intent, state robbery requires specific intent; 9-0.

***Pers. Restraint of Markel***, 154 Wn.2d 262, 273-75 (2005)

Determination by trial court that offenses did not constitute same criminal conduct need not be submitted to a jury, distinguishing *Blakely v. Washington*, 159 L.Ed.2d 403 (2004), RCW 9.94A.525(5)(a), because a finding of same criminal conduct can only reduce the sentence range; 7-2.

***State v. Jacobs***, 154 Wn.2d 596 (2005)

Where jury returns special verdicts finding both that defendant manufactured methamphetamine while a juvenile was present, RCW 9.94A.605, and within 1000 feet of a school bus stop, RCW 69.50.435, the sentence enhancements, RCW 9.94A.533, must run concurrently, reversing, in part, *State v. Jacobs*, 121 Wn.App. 669 (2004); 9-0.

***State v. Swecker***, 154 Wn.2d 660 (2005)

Prior statute which required that multiple juvenile convictions sentenced on the same day counted as one point does not require that they be so counted pursuant to an amended statute, former RCW 9.94A.360(6)(a)(ii) [RCW 9.94A.525 (2013)] which requires that they be counted separately unless they are the same criminal conduct, distinguishing *State v. Cruz*, 139 Wn.2d 186 (1999); 9-0.

***State v. Canfield***, 154 Wn.2d 698 (2005)

At a SSOSA revocation hearing, defendant has a limited right to **allocution** but denial of that right must be raised at the revocation hearing to preserve the issue for appeal, reversing *State v. Canfield*, 120 Wn.App. 729 (2004); 9-0.

***State v. Curtis***, 126 Wn.App. 459 (2005)

Trial court imposes exceptional sentence after defendant's allocution admitting abuse of trust; held: admission of defendant does not waive right to have aggravating factor submitted to jury, *Blakely v. Washington*, 159 L.Ed.2d 403 (2004), *State v. Malicoat*, 126 Wn.App. 612 (2005); 2-1, II.

***State v. Zavala-Reynoso***, 127 Wn.App. 119 (2005)

At sentencing, defense agrees with offender score, more than two years later defendant seeks motion to vacate, CrR 7.8; held: miscalculated offender score argument is subject to the one-year time limit and do not fall within CrR 7.8)b)(4) or –(5), thus motion was time barred; III.

***State v. Evans***, 154 Wn.2d 438, 443-49 (2005)

*Blakely v. Washington*, 159 L.Ed.2d 403 (2004) is not retroactive to cases final on direct review, *United States v. Booker*, 160 L.Ed.2d 621, 665 (2005), *see: State v. Pillatos*, 159 Wn.2d 459 (2007), *State v. Doney*, 165 Wn.2d 400 (2008); 9-0.

***State v. Allen***, 127 Wn.App. 945, 952-55 (2005)

**Rapid recidivism** as an aggravating factor must be submitted to a jury, *State v. Hughes*, 154 Wn.2d 118 (2005), *abrogated, on other grounds, Washington v. Recuenco,* 548 U.S. 212, 165 L.Ed.2d 466 (2006), *cf.: State v. Newlun*, 142 Wn.App. 730 (2008), *State v. Alvarado*, 164 Wn.2d 556 (2008); II.

***State v. Spencer***, 128 Wn.App. 132, 143-45 (2005)

A judicial finding that a crime is **domestic violence** need not be submitted to a jury, *State v. Felix*, 125 Wn.App. 575 (2005), *State v. Winston*, 135 Wn.App. 400 (2006), even if the result would be that defendant was disqualified for a higher rate of early-release time; I.

***State v. Titialii***, 128 Wn.App. 173 (2005)

"**Too lenient**" finding based on the nature of the crime and defendant's **perjury** are aggravating factors that must be submitted to a jury, *State v. Hughes*, 154 Wn.2d 119 (2005), *abrogated, on other grounds, Washington v. Recuenco,* 548 U.S. 212, 165 L.Ed.2d 466 (2006), *cf.: State v. Newlun*, 142 Wn.App. 730 (2008), *State v. Alvarado*, 164 Wn.2d 556 (2008); II.

***State v. Brown***, 128 Wn.App. 307 (2005)

Defendant's Florida convictions which occurred when he was a juvenile but were prosecuted in adult court count as adult convictions even though Washington procedure is different, *see:* *State v. Morley*, 134 Wn.2d 588, 596-97 (1998); III.

***State v. Labarbera***, 128 Wn.App. 343 (2005)

PSI and DISCIS printout are adequate to establish the existence of Washington prior convictions where challenged by defense, at 347-48, *see: State v.Cross*, 156 Wn.App. 568, 586-90 (2010), *but see:* *State v. Mendoza*, 165 Wn.2d 913 (2009), *State v. Allen*, 150 Wn.App. 300, 314-17 (2009), *cf.:* *State v. Chandler*, 158 Wn.App. 1, 5 (2010); to prove that an out-of-state conviction is comparable to a Washington felony where defendant does not challenge the history, state may introduce Washington judgments that used out-of-state convictions to calculate an offender score, at 349 ¶ 15, *State v. Cabrera*, 73 Wn.App. 165, 168-69 (1994); if defendant fails to object and state fails to prove comparability, appellate court remands for evidentiary hearing to allow proof, *State v. Ford*, 137 Wn.2d 472, 485 (1999), *State v. Thiefault*, 160 Wn.2d 409, 417 n.4 (2007), *cf.:* *State v. Bertstrom*, 162 Wn.2d 87 (2007); when defendant objects and state does not provide evidence of comparability, state is held to the existing record on remand and defendant is resentenced without including the out-of-state priors, *State v. Ford, supra*, at 485, *but see: State v. Jones*, 182 Wn.2d 1 (2014), RCW 9.94A.530(2) (2008); where state presents information relating to comparibility and trial court fails to consider it on the record, appellate court will remand for resentencing for comparability analysis based on the information before the court at the original sentencing; II.

***State v. Cassel***, 128 Wn.App. 481 (2005)

Where defendant does not object to offender score calculation which includes out-of-state convictions and later appeals, remedy is to remand for state to provide certified copies of prior judgments or other comparable evidence and for court to compare elements with Washington felonies, *State v. Wiley*, 124 Wn.2d 679 (1994); II.

***State v. Cubias***, 155 Wn.2d 549 (2005)

**Consecutive sentences** for multiple firearm enhancements need not be submitted to a jury, *State v. Kinney*, 125 Wn.App. 778 (2005), distinguishing *Blakely v. Washington*, 159 L.Ed.2d 403 (2004); 5-4.

***Pers. Restraint of Cadwallader***, 155 Wn.2d 867 (2005)

Defendant pleads guilty, not pursuant to a plea agreement, to an apparent third strike offense, does not object to priors, later files PRP alleging that one prior washed, Court of Appeals allows state to reopen and prove an out-of-state prior that was not previously included that would unwash the other prior; held: unless a defendant is convicted pursuant to a plea agreement, he has no obligation to disclose priors and no obligation to object to state's failure to include priors, as state has full burden, and state is not permitted to prove a prior on collateral review that it failed to allege at sentencing, *see:* *State v. Harris*, 148 Wn.App. 22 (2008); 6-3.

***Sentence of Jones***, 129 Wn.App. 626 (2005)

For felony sentences of less than a year, **community custody** may only be ordered for crimes specified in RCW 9.94A.545; III.

***State v. Grayson***, 130 Wn.App. 782 (2005)

Where court has authority to sentence to consecutive or concurrent terms, RCW 9.94A.589(3), it must do one or the other, not a hybrid, *State v. Smith*, 142 Wn.App. 122 (2007), *cf.: Pers. Restraint of Green*, 170 Wn.App. 328 (2012); I.

***Washington v. Recuenco***, 165 L.Ed.2d 466 (2006)

Failure to submit a sentencing factor to the jury, *Blakely v. Washington*, 159 L.Ed.2d 403 (2004), like failure to submit an element to the jury, *Neder v. United States*, 144 L.Ed.2d 35 (1999), is not structural error and is thus subject to harmless error analysis, reversing, in part, *State v. Recuenco*, 154 Wn.2d 156 (2005), *but see: Pers. Restraint of Hall*, 163 Wn.2d 346 (2008), *see also: State v. Recuenco*, 163 Wn.2d 428 (2008); 5-4.

***State v. Paulson***, 131 Wn.App. 579, 588-91 (2006)

For sentences of less than a year where court lacks authority to impose community custody but can convert 30 days of confinement to community service, RCW 9.94A.680(2), court may allow up to two years to complete community service and may supervise it through court supervision; court may also supervise an animal cruelty prevention course where imposed on an animal cruelty conviction, RCW 16.52.200(6); II.

***State v. Farnsworth***, 133 Wn.App. 1, 16-23 (2006)

Determination of whether an out-of-state or federal conviction is comparable to a Washington crime need not be submitted to a jury, *Pers. Restraint of Lavery*, 154 Wn.2d 249, 257 (2005), *State v. Thomas*, 135 Wn.App. 474 (2006), *State v. Rudolph*, 141 Wn.App. 59 (2007), *but see: State v. Larkins*, 147 Wn.App. 858 (2008), distinguishing *Blakely v. Washington*, 159 L.Ed.2d 403 (2004); where federal unlawful firearm possession statute, 18 USC § 922(g)(1), provides that one may not possess a firearm if convicted of a crime punishable by more than a year imprisonment and record does not disclose what prior crime sentencing court considered, then remedy is to remand for trial court to determine what prior felony conviction federal court used to convict; II.

***State v. Knight***, 134 Wn.App. 103, 106-09 (2006), *aff'd, on other grounds*, 162 Wn.2d 806 (2008)

Conspiracy to commit robbery 2º is treated the same as the completed crime, is a violent offense subject to the doubling provision, RCW 9.94A.525(4), 9.94A.030(48), *see: State v. Becker*, 59 Wn.App. 848, 850-52 (1990), *State v. Ashley*, 187 Wn.App. 908 (2015), *aff'd, on other grounds*, 186 Wn.2d 32 (2016); III.

***Pers. Restraint of McCarthy***, 134 Wn.App. 752, 760-63 (2006), *rev'd, on other grounds,* 161 Wn.2d 234 (2007)

Out-of-state prior sex offense that requires proof that victim was under the age of 14 years counts as a Washington child molestation 1º prior where trial court finds that the out-of-state victim was in fact under the age of 12 years; II.

***Postsentence Review of Childers***, 135 Wn.App. 37 (2006)

Residential burglary is not subject to community custody in spite of RCW 9.94A.501(2)(b)(E); DOC may seek review of a sentence directly in the Court of Appeals and need not file a motion in superior court; III.

***State v. Thomas***, 135 Wn.App. 474 (2006)

Where defendant has pleaded guilty to an out-of-state felony which on its face is not the equivalent of a Washington felony, sentencing judge should not consider the charging document or other court records to determine factual comparability, *State v. Bunting*, 115 Wn.App. 135 (2003), as there will be no evidence that the Washington element, missing from the out-of-state crime, was proved beyond a reasonable doubt, plus there was a lack of incentive for the defendant to defend against an allegation that does not affect the determination of guilt, *Pers. Restraint of. Lavery*, 154 Wn.2d 249, 258 (2005), *State v. Larkins*, 147 Wn.App. 858 (2008), *but see: State v. Releford*, 148 Wn.App. 478, 482-89 (2009); I.

***State v. Acrey***, 135 Wn.App. 938 (2006)

Defendant, convicted of theft for draining the retirement account of an elderly man, is ordered as a condition of sentence no to work as a caretaker for the elderly or disabled; held: sentencing court has authority to impose crime-related prohibitions, RCW 9.94A.505(8), even if not specifically authorized by some other provision of ch. 9.94A RCW; prohibition here was directly related to the crime; court is authorized to impose crime-related prohibitions even if no community custody is authorized or ordered, RCW 9A.94A.634(1), *State v. Armendariz*, 160 Wn.2d 106 (2007); I.

***State v. Jones***, 159 Wn.2d 231 (2006)

A judge may determine if defendant was on community placement at the time of an offense in order to add a point to the offender score, RCW 9.94A.525(18)(2006), *State v. Rudolph*, 141 Wn.App. 59, 68-72 (2007), reversing *State v. Jones*, 126 Wn.App. 136 (2005); 7-2.

***State v. Weber***, 159 Wn.2d 252, 258-65 (2006)

Prior juvenile adjudication need not be submitted to a jury to count in offender score; 5-4.

***State v. Lampley***, 136 Wn.App. 836, 843-44 (2006)

Trial court may order a consecutive sentence to another crime previously sentenced, *State v. Champion*, 134 Wn.App. 483, 487-88 (2006), RCW 9.94A.589(3), *State v. King*, 149 Wn.App. 96 (2009), *see also: State v. Elmore*, 143 Wn.App. 185 (2008); II.

***State v. Pillatos***, 159 Wn.2d 459 (2007)

State may seek exceptional sentences against defendants for all sentencing proceedings held since 15 April 2005, RCW 9.94A.535, -537(2005), *State v. Murawski*, 142 Wn.App. 278 (2007), *State v. Elmore*, 154 Wn.App. 885, 903-07 (2010), *see: State v. Doney*, 165 Wn.2d 400 (2008), *State v. McNeal*, 142 Wn.App. 777, 789-93 (2008), *State v. Mann*, 146 Wn.App. 349 (2008), *State v. Applegate*, 147 Wn.App. 166 (2008), *State v. Calhoun*, 163 Wn.App. 153 (2011), *but see: State v. Rowland*, 160 Wn.2d 316 (2011); 9-0.

***State v. Jones***, 137 Wn.App. 119 (2007)

Where defendant commits new crimes pending sentencing and is sentenced on the earlier offenses, court has discretion to impose consecutive sentences on the newer offenses without an exceptional sentence, RCW 9.94A.589(3) (2007), *State v. Shilling*, 77 Wn.App. 166, 172-76 (1995), *In re Caley*, 56 Wn.App. 853, 858 (1990), *Pers. Restraint of Long*,117 Wn.2d 292, 302 (1991), *State v. Linderman*,54 Wn.App. 137, 139 (1989), *State v. Kern*, 55 Wn.App. 803 (1989), *State v. Mathers*, 77 Wn.App. 487, 494 (1995), *State v. Champion*, 134 Wn.App. 483 (2006), *State v. King*, 149 Wn.App. 96 (2009), *see: State v. Vance*, 168 Wn.2d 754 (2010); II.

***Postsentence Review of Leach***, 161 Wn.2d 180 (2007)

Attempted assault 2º is not a crime against a person as it is not expressly listed in RCW 9.94A.411(2), and thus community custody is not authorized, RCW 9.94A.715, overruling *Postsentence Review of Manier*, 135 Wn.App. 33 (2006); 9-0.

***State v. Bergstrom***, 162 Wn.2d 87 (2007)

Defense counsel and prosecutor agree on offender score, at sentencing defendant himself challenges some priors as same criminal conduct, sentencing court accepts counsel's calculation; held: while sentencing court could have declined to consider the *pro se* motion because defendant was represented by counsel, the court did consider and rule on it and therefore erred when it failed to hold an evidentiary hearing, as defense disputed material facts, *Personal Restraint of Cadwallader*, 155 Wn.2d 867, 874 (2005); because state reasonably relied upon defense counsel's agreement with state's offender score calculation, on remand state may offer additional evidence to support its calculation of offender score, *State v. Cobos*, 182 Wn.2d 12 (2014), *see:* RCW 9.94A.530(2) (2008), distinguishing *State v. Lopez*, 147 Wn.2d 515 (2002), *State v. Ford*, 137 Wn.2d 472, 480-82 (1999), *see: State v. Jones*, 182 Wn.2d 1 (2014), RCW 9.94A.530(2) (2008); 5-4.

***State v. Malone***, 138 Wn.App. 587 (2007)

Pursuant to plea bargain, defendant and state sign an "understanding of defendant's criminal history" setting forth priors, at sentencing defense challenges offender score, state seeks to vacate plea for defendant's breach, judge gives defendant a choice of being sentenced under what defendant believed was an improperly calculated offender score or vacation, defendant agrees to vacation of plea, goes to trial, is convicted of more offenses, appeals seeking specific performance; held: trial court cannot vacate a plea agreement without finding a manifest injustice, CrR 4.2(f), and without finding a breach, thus trial court abused its discretion; defendant cannot by way of a negotiated plea agree to a sentence in excess of that authorized by law, *Pers. Restraint of Goodwin*, 146 Wn.2d 861, 872 (2002), *cf.: State v. Hickman*, 116 Wn.App. 902 (2003), *State v. Collins*, 144 Wn.App. 547 (2008), *but see: State v. Ross*, 152 Wn.App. 220 (2004); when court wrongfully grants state's motion to vacate a plea, defendant can choose remedy which, here, is specific performance, *State v. Tourtellotte*, 88 Wn.2d 579, 584 (1977); prior opinion, *State v. Malone*, 136 Wn.App. 545 (2007), withdrawn; III.

***State v. Hibdon***, 140 Wn.App. 534 (2007)

Where statute requires community placement, RCW 9.94A.700(1)(b)(iv), and trial court does not impose it, case must be remanded for resentencing; where trial court sentences

defendant to statutory maximum without imposing community placement, remand is necessary, although court is not obliged to deduct the period of community placement from the maximum sentence, as an option is to impose the statutory maximum with community placement consisting of earned release time, RCW 9.94A.728; III.

***State v. Partee***, 141 Wn.App. 355 (2007)

Where sentence is conditionally suspended under **sex offender sentencing alternative** (SSOSA), RCW 9.94A.670, upon proof of violation trial court has discretion to impose consecutive 60-day sanctions for each violation, RCW 9.94A.634, or revoke and execute original sentence, *State v. Badger*, 64 Wn.App. 904 (1992); 2-1, II.

***State v. Kilgore***, 141 Wn.App. 817 (2007), 167 Wn.2d 28 (2009)

At first appeal, *State v. Kilgore*, 107 Wn.App. 160, *aff'd*, 147 Wn.2d 288 (2002), two counts are reversed, state chooses not to retry those counts, trial court declines to resentence; held: because offender score was greater than 9 and thus standard range did not change following dismissal of the two reversed counts, defendant is not entitled to a resentencing and may not appeal, *see: State v. Argo*, 81 Wn.App. 552, 569 (1996); 2-1, II.

***State v. Smith***, 142 Wn.App. 122 (2007)

Trial court imposes one Drug Offender Sentencing Alternative sentence and one non-DOSA sentence in which the in-custody portions run concurrently but the community custody portion of the DOSA sentence runs consecutively to the non-DOSA sentence; held: hybrid sentences are not authorized by statute, *State v. Grayson*, 130 Wn.App. 782 (2005), *cf.: Pers. Restraint of Green*, 170 Wn.App. 328 (2012), *Postsentence review of Hardy*, 9 Wn.App.2d 44 (2019), but on remand trial court may impose a DOSA on any of the sentences; I.

***Pers. Restraint of Dalluge***, 162 Wn.2d 814 (2008)

Defendant, on community custody, is arrested and in jail commits a crime, Department of Corrections imposes sanction; held: while community custody is statutorily tolled during incarceration, RCW 9.94A.625(3), DOC may still enforce community custody conditions during confinement and tolling; 6-3.

***State v. Codiga***, 162 Wn.2d 912 (2008)

At plea, defendant discloses two prior felonies, both prosecutor and defense counsel agree that one washed out but presentence report discloses misdemeanors which preclude washout, defendant seeks to withdraw plea; held: where plea form states that if any additional history is discovered the range may increase and where plea form asks defendant to disclose prior crimes and he fails to disclose entire history including misdemeanors, then defendant assumes the risk that additional crimes may be discovered and may not withdraw his plea, as it was not legal error that caused the increased offender score, *but see: State v. Robertson*, 172 Wn.2d 783 (2011); 9-0.

***Irizarry v. United States***, 171 L.Ed.2d 28 (2008)

Because federal sentencing guidelines are not mandatory, *United States v. Booker*, 160 L.Ed.2d 621 (2005), *Gall v. United States*, 169 L.Ed.2d 445 (2007), trial court need not give

notice that it is considering departing from sentence range, *overruling* Burns v. United States, 115 L.Ed.2d 123 (1991); 5-4.

***State v. Newlun***, 142 Wn.App. 730 (2008)

Judge may impose exceptional sentence without a finding of fact by a jury where court finds defendant "has committed multiple current offenses and the defendant's **high offender score** results in some of the current offenses going unpunished," RCW 9.94A.535(2), because the aggravating factor is wholly based upon prior convictions, *State v. Mutch*, 171 Wn.2d 646, 656-61 (2011), *State v. Alvarado*, 164 Wn.2d 556 (2008), *State v. Hughes*, 154 Wn.2d 118, 134 (2005), *abrogated, on other grounds, Washington v. Recuenco*, 548 U.S. 212, 165 L.Ed.2d 466 (2006), *Almendarez-Torres v. United States*, 140 L.Ed.2d 530 (1998), *Jones v. United States*, 143 L.Ed.2d 311, 329-30 (1999); III.

***State v. Booker***, 143 Wn.App. 138, 143-47 (2008)

A judgment and sentence that is silent as to whether defendant was represented by counsel is not facially invalid and may be used to establish criminal history, *Pers. Restraint of Williams*, 111 Wn.2d 353, 368 (1988), *but see: Burgett v. Texas*, 19 L.Ed.2d 319 (1967), *Carnley v. Cochran*, 8 L.Ed.2d 70 (1962), *State v. Marsh*, 47 Wn.App. 219 (1987); I.

***State v. Bobenhouse***, 143 Wn.App. 315, 332 (2008), *affirmed, on other grounds,* 166 Wn.2d 881 (2009)

In child rape case, no contact order as to victim's former foster parents who (apparently) were not witnesses is valid as an offender's usual freedom of association may be restricted if reasonably necessary to protect the public order, *State v. Hearn*, 131 Wn.App. 601, 607 (2006); III.

***State v. Moultrie***, 143 Wn.App. 387, 396-400 (2008)

Following rape of developmentally disabled woman conviction, trial court orders no contact with "vulnerable, ill or disabled adults;" held: "vulnerable," "disabled" and "ill" are vague, remanded for trial court to clarify "vulnerable" and "disabled," strike "ill;" I.

***State v. Berrier***, 143 Wn.App. 547 (2008)

State may allege aggravating factors in a document separate from the information; II.

***State v. Thompson***, 143 Wn.App. 861, 865-68 (2008)

Plea statement on prior conviction shows incorrect maximum penalty, judgment and sentence is correct; held: while defendant's prior conviction may be unconstitutional, the determination cannot be made on the forms alone, thus defendant's only remedy is to seek post-conviction relief on the prior case, *State v. Ammons*, 105 Wn.2d 175 (1986), *State v. Bembry*, 46 Wn.App. 288 (1986); II.

***State v. Collins***, 144 Wn.App. 547 (2008)

Defendant agrees to plead guilty to reduced charge, agrees that criminal history is accurate, before sentencing declares that he will challenge comparability of out-of-state convictions included in agreed criminal history, trial court vacates plea and reinstates original

charge; held: where defendant affirmatively acknowledges that a foreign conviction is properly included in offender score, trial court need not require further proof of classification, *State v. Ford*, 137 Wn.2d 472, 483 n.5 (1999), *State v. Ross*, 152 Wn.2d 220 (2004), *State v. Hickman*, 116 Wn.App. 902 (2003); while one cannot waive a legal error in an offender score, *cf.: State v. Malone*, 138 Wn.App. 587 (2007), here the waiver addresses a factual matter, *i.e.*, proof of comparability as opposed to washed out priors, thus defendant breached and the court's decision to vacate was proper; I.

***State v. O'Cain***, 144 Wn.App. 772 (2008)

Community custody provision following rape conviction prohibited internet access; held: absent evidence that defendant accessed the internet before the rape or that the internet contributed to the crime, prohibiting internet access is not crime-related, RCW 9.94B.050(5)(e), internet access is not affirmative conduct reasonably related to the circumstances of the offense, *State v. Johnson*, 180 Wn.App. 318, 330-31 (2014), thus RCW 9.94A.712(6)(a) (2006) [recodified as 9.94A.507 (2008)] is inapplicable; I.

***State v. Brown***, 145 Wn.App. 62, 77-81 (2008)

Where jury specifically decides defendant is guilty of more than one mean of committing a crime, and one of the means has a higher seriousness level, sentence must be to the higher level, distinguishing *State v. Thanh Dong Tang*, 77 Wn.App. 644 (1995), *State v. Maurice*, 79 Wn.App. 544 (1995); III.

***State v. Bryan***, 145 Wn.App. 353 (2008)

Defendant is sentenced in one county with an offender score of 8, then pleads guilty in another county to two felonies, moves to modify sentence in first county on grounds that court erred in considering two misdemeanors, court agrees but counts the two new felonies, RCW 9.94A.589 (1)(a) (2002), leaving same offender score; held: no violation of equal protection or due process; I.

***State v. Ashue***, 145 Wn.App. 491 (2008)

A felony diversion agreement, whereby defendant waives speedy trial, jury trial and agrees that, if terminated, the matter will be submitted on police reports, while nonstatutory, is not a violation of the SRA, *State v. Kessler*, 75 Wn.App. 634, 636-41 (1994), *State v. Marino*, 100 Wn.2d 719, 723-27 (1984), nor is it prohibited by the deferred prosecution statute; III.

***State v. Vant***, 145 Wn.App. 592 (2008)

At sentencing, state fails to provide independent proof of priors or provide a presentence report but does inform court of priors and its intent to use priors to enhance offender score, defense does not object but claims, on appeal, that there was no burden to object as there was nothing to object to; held: defendant had an opportunity to object or demand that state prove priors, thus remedy is remand for resentencing, state may present proof of prior convictions, at 601-02, *State v. Ford*, 137 Wn.2d 472, 485-86 (1999), *see: State v. Jones*, 182 Wn.2d 1 (2014), RCW 9.94A.530(2) (2008); community placement condition that defendant not possess or consume drugs is mandatory unless waived, RCW 9.94A.700(4)(c) (2003) [recodified, effective

August 2009, as RCW 9.94B.050], which implies that court may order urinalysis to assure compliance, at 603-04; II.

***State v. Harkness***, 145 Wn.App. 678 (2008)

Two years after defendant is sentenced to prison, trial court amends sentence and imposes a drug offender sentencing alternative (DOSA), RCW 9.94A.660, defers to DOC to do an evaluation; held: an "examination report" is required before imposing a DOSA, court may not defer to DOC; court lacks authority to modify a prison sentence, *State v. Shove*, 113 Wn.2d 83, 89 (1989), *State v. Murray*, 118 Wn.App. 518 (2003); I.

***Postsentencing Review of Gutierrez***, 146 Wn.App. 151 (2008)

Defendant is convicted of VUCSA, 12 to 24 month range, plus enhancement of 24 months, trial court imposes DOSA, orders 20 months in prison and 20 months community custody, DOC appeals, RCW 9.94A.585(7); held: 2006 amendment to DOSA statute, RCW 9.94A.660, do not require the entire 24-month enhancement to be served in confinement, *State v. Mohamed*, 187 Wn.App. 630 (2015); III.

***State v. Hale***, 146 Wn.App. 299 (2008)

Where jury finds aggravating circumstance and court imposes exceptional sentence, it must at least prepare conclusions of law, RCW 9.94A.535; jury finding may suffice as findings of fact, at 306 n.4, *but see: State v. Friedlund*, 182 Wn.2d 388 (2015), *see also: State v. Bluehorse*, 159 Wn.App. 410, 422-23 (2011); III.

***State v. Gamble***, 146 Wn.App. 813 (2008)

Courts have authority to enforce sentences with sentence modifications concurrent with DOC's statutory enforcement powers, RCW 9.94A.634(1), *State v. Johnson*, 54 Wn.App. 489 (1989), *but see: State v. Bigsby*, 189 Wn.2d 210 (2017).

***State v. Torngren***, 147 Wn.App. 556 (2008), *overruled, on other grounds, State v. Aldana Graciano*, 176 Wn.2d 531 (2013)

Defendant may not contest a prior conviction for purposes of reducing offender score on grounds that the priors merged, *State v. Ammons*, 105 Wn.2d 175, 188 (1986), or that the informations of the prior convictions showed merger, *State v. Gimarelli*, 105 Wn.App. 370, 375 (2001), distinguishing *Pers. Restraint of Butler*, 24 Wn.App. 175 (1979), *State v. Freeman*, 153 Wn.2d 765 (2005), as he may not collaterally attack a prior conviction; sentencing court must determine if priors are same criminal conduct, RCW 9.94A.525(5)(a)(i), *State v. Reinhart*, 77 Wn.App. 454, 459 (1995), *State v. Lara*, 66 Wn.App. 927, 931-32 (1992); III. *overruled, on other grounds,*

***Oregon v. Ice***, 172 L.Ed.2d 517 (2008)

Where state law permits a judge to impose **consecutive** sentences upon finding certain statutorily defined facts, United States Constitution does not require that those facts be found by a jury, , *State v. Vance*, 168 Wn.2d 754 (2010), distinguishing *Blakely v. Washington*, 159 L.Ed.2d 403 (2004) ; 5-4.

***Pers. Restraint of Tobin***, 165 Wn.2d 172 (2008)

Current unranked fish and wildlife felonies count in offender score, RCW 9.94A.525; 9-0.

***State v. Priest***, 147 Wn.App. 662 (2008)

Where prior offense can be a misdemeanor or a felony depending upon an underlying charge (here, bail jumping), a judgment and sentence that refers to the conviction as a felony is sufficient to prove the prior by a preponderance; a federal prior that is certified by the National Archives and Records Administration rather than the clerk of a court is sufficient; name identity is sufficient absent defendant's denial under oath, *State v. Ammons*, 105 Wn.2d 175, 190 (1986), *State v. Powell*, 172 Wn.App. 455, 459-61 (2012), *but see: State v. Ceja Santos,* 163 Wn.App. 780 (2011), *State v. Derri***,** 17 Wn.App.2d 376, *rev. granted,* 198 Wn.2d 1017 (2021), *cf.: State v. Sapp,* 181 Wn.App. 910 (2014), *State v. Goggin,* 185 Wn.App. 59, 70-71 (2014), an objection by counsel does not rebut identity absent sworn statement, *State v. Derri***,** *supra.*; certified copy of a probation revocation judgment plus an uncertified copy of a judgment and sentence under same cause number is sufficiently reliable evidence of the prior, *State v. Wilson*, 113 Wn.App. 113, 122, 136 (2002), *State v. Ford*, 137 Wn.2d 472, 480 (1999), *Pers. Restraint of Adolph,* 170 Wn.2d 556, 565-71 (2010), *State v. Griepsma,* 17 Wn.App.2d 606 (2021),; where sentence range would be the same with or without a specific prior conviction, then any calculation error is harmless, *State v. Lillard*, 122 Wn.App. 422, 432-33 (2004), *State v. Fleming*, 140 Wn.App. 132, 138 (2007); III.

***State v. Larkins***, 147 Wn.App. 858 (2008)

Ohio burglary which rests on intent to commit a misdemeanor during a trespass is not comparable to Washington burglary, as a misdemeanor includes crimes other than those against a person or property which are elements of Washington burglary; sentencing court may not draw a factual inference from the records of the out-of-state conviction, records must establish in themselves, without any fact-finding or inference-drawing, that there was proof beyond a reasonable doubt that defendant entered the habitation with intent to commit a crime against a person or property; I.

***State v. Harris***, 148 Wn.App. 22 (2008)

Plea form states that prosecutor's statement of criminal history is attached and unless defendant has attached a diferent statement, it's agreed, but no history is attached, defendant challenges range on appeal; at sentencing, state offers Louisiana "package or bundle" with state seal on first page; held: defendant may contest history where he does not sign or otherwise stipulate to it, *see: State v. Cadwallader*, 155 Wn.2d 867, 875 (2005); documents that meet certification requirements of out-of-state jurisdiction satisfy certification requirement of RCW 5.44.010; if first page of a packet has a state seal affixed, then entire packet is sealed for purposes of certification requirement; II.

***State v. Johnson***, 148 Wn.App. 33 (2008)

When court receives notice that offender has completed all of the requirements of sentence and determines that the conditions are met, it must issue a certificate of discharge, RCW 9.94A.637(1), effective the date the court received notice that the terms of the sentence were satisfied, *see also: State v. Porter,* 188 Wn.App. 735 (2015); I.

***State v. Draxinger***, 148 Wn.App. 533 (2008)

Prior DUI convictions can be used both to enhance a new DUI to a felony, RCW 46.61.5055(4) (2008), and as part of the offender score; II.

***State v. Mendoza,*** 165 Wn.2d 913 (2009)

At sentencing, prosecutor offers a recitation of what state believed was defendant's criminal history, does not offer certified copies of judgments and sentences, defense counsel does not object, court imposes standard range sentence based upon prosecutor's calculation of offender score; held: a mere failure to object to offender score and prior convictions does not acknowledge the score or waive a challenge to the score, *State v. Lucero*, 168 Wn.2d 785 (2010), *State v. Weaver*, 171 Wn.2d 256 (2011), *State v. Richmond*, 3 Wn.App.2d 423 (2018), failure of prosecutor to offer judgments and sentences to prove criminal history failed to prove history by a preponderance, *State v. Allen*, 150 Wn.App. 300, 314-17 (2009); because defense did not object, on remand state may introduce certified copies of judgments and sentences; unless defendant affirmatively acknowledge the history, state must provide evidence of the history, "generally a certified copy of the judgment and sentence, ¶ 32, *see: State v. Hunley*, 165 Wn.2d 901 (2012); affirms *State v. Mendoza*, 139 Wn.App. 693 (2007); 5-4.

***State v. Knippling***, 166 Wn.2d 93 (2009)

POAA defendant maintains that he was a juvenile at the time he was convicted of a predicate conviction, state offers no evidence that juvenile court declined, trial court rejects the prior; held: a waiver of any right under the Juvenile Justice Act of 1977, ch. 13.40 RCW, must be an express waiver which state must show from the record, or show a decline order, *cf.: State v. Saenz*, 156 Wn.App. 866, 876-79 (2010), *State v. Bailey*, 179 Wn.App. 433 (2014), *State v. Reynolds*, 21 Wn.App.2d 179, *rev. granted*, 200 Wn.2d 1007 (2022); defense has no burden to collaterally attack a prior conviction as it is the present use of a prior conviction, *State v. Carpenter*, 117 Wn.App. 673, 678 (2003), *but see: State v. Inocencio*, 187 Wn.App. 765 (2015); affirms *State v. Knippling*, 141 Wn.App. 50 (2007); 8-0.

***Pers. Restraint of Brooks***, 166 Wn.2d 664 (2009)

When a defendant is sentenced to confinement and community custody that has the potential to exceed the maximum for the crime, remedy is to remand to amend the sentence to state that the combination of confinement and community custody shall not exceed the maximum, *State v. Sloan*, 121 Wn.App. 220, 222 (2004), *State v. Linerud*, 147 Wn.App. 944, 948 (2008), *see: State v. Zavala-Reynoso*, 127 Wn.App. 119, 121 (2005), *State v. Torngren*, 147 Wn.App. 556, 566 (2008), *overruled, on other grounds, State v. Aldana Graciano*, 176 Wn.2d 531 (2013), *State v. Winkle*, 159 Wn.App. 323 (2011), *State v. Franklin*, 171 Wn.2d 831 (2011), *cf.: State v. Winborne*, 167 Wn.App. 320 (2012), RCW 9.94A.701(9) (2010), *but see: State v. Boyd*, 174 Wn.2d 470 (2012); 9-0.

***State v. McCormick***, 166 Wn.2d 689 (2009)

Trial court revokes SSOSA sentence for defendant's frequenting areas where minors are known to congregate, fails to find willfulness; held: in a SSOSA revocation, trial court need not find willfulness, *State v. Miller*, 180 Wn.App. 413 (2014); affirms *State v. McCormick*, 141 Wn.App. 256 (2007); 8-1.

***State v. Releford***, 148 Wn.App. 478, 482-89 (2009)

Where out-of-state conviction is not legally comparable to a Washington offense, state may prove factual comparability with certified copies of foreign charging documents and evidence that defendant pleaded guilty if the law of the foreign state provided that such a plea constituted an admission of the facts alleged in the charging documents, *see: State v. Beals,* 100 Wn.App. 189, 195-97 (2000), *cf.: State v. Thomas,* 135 Wn.App. 474 (2006); I.

***State v. King***, 149 Wn.App. 96 (2009)

Immediately after court convicts defendant of drug offenses, defendant threatens detective, is charged and convicted later of witness intimidation, court imposes sentence on drug offenses and later orders standard range **consecutive** sentence for intimidating a witness; held: while court must, absent an exceptional sentence, impose concurrent sentences on two or more *current* offenses, RCW 9.94A.589(1)(a), the sentences here were not current offenses and thus court had discretion to impose consecutive sentences without finding aggravating factor, which does not violate equal protection clause; III.

***State v. Monson***, 149 Wn.App. 765 (2009)

Where statute provides "count one point for prior convictions of vehicle prowling 2, and three points for ealch adult and juvenile prior theft 1," RCW 9.94A.525(20) (2008), a prior juvenile conviction for vehicle prowling counts as a point; I.

***State v. Johnson***, 150 Wn.App. 663, 676-79 (2009)

A conviction is a valid prior in Washington if it is valid under the U.S. constitution and the constitution of the jurisdiction in which it was obtained; an Oregon conviction counts as a strike even though Oregon does not require a unanimous jury; I.

***Pers. Restraint of Crawford***, 150 Wn.App. 787 (2009)

Kentucky sexual abuse 1º which does not require proof that defendant was not married to the 7 year old victim and that defendant was at least 36 months older than victim is not comparable to child molestation 1º; 2-1, II.

***State v. Jones***, 172 Wn.2d 236 (2011)

Defendant is sentenced to 130 months plus 36 months community custody, following remand sentence is 51 months plus community custody with credit for 81 months served, trial court declines to give credit for incarceration time to community custody; held: defendant is not entitled to credit for prison time served against community custody, as community custody only means time served out of prison, *overruling Pers. Restraint of Knippling,* 144 Wn.App. 639 (2008); affirms *State v. Jones,* 151 Wn.App. 186 (2009); 6-3.

***Pers. Restraint of Rainey***, 168 Wn.2d 367 (2010)

Defendant is convicted of kidnapping 1° of his 3-year old daughter and harrassing his estranged wife, sentencing court imposes lifetime no contact order with each; held: crime-related prohibition, including a no contact order, may be imposed for the maximum of the crime

irrespective of the period of community custody, *State v. Armendariz*, 160 Wn.2d 106, 118-20 (2007), need not be decided by a jury; while a no contact order of some duration was appropriate as reasonably necessary to protect daughter from further victimization, court provided no reason for the duration, thus remanded for court to address parameters of the order under the "reasonably necessary" standard, *State v. Howard*, 182 Wn.App. 91, 100-03 (2014); 9-0.

***State v. Lucero***, 168 Wn.2d 785 (2010)

Defendant acknowledges offender score, which includes an out-of-state conviction, trial court does not conduct comparability analysis; held: defendant's acknowledgement of state's offender score calculation is not an affirmative acknowlegment that the out-of-state conviction is comparable to a Washington crime, *State v. Mendoza*, 165 Wn.2d 913, 929 (2009), *reversing State v. Lucero*, 140 Wn.App. 782 (2007), *remanded*, 166 Wn.2d 1014 (2009), *reaffirmed*, 152 Wn.App. 287 (2009), *State v. Richmond*, 3 Wn.App.2d 423 (2018); 9-0.

***State v. Steen***, 155 Wn.App. 243 (2010)

Indecent exposure to a person 14 years and older, RCW 9A.88.010(2)(a), with prior sex offenses is an unranked class C felony, thus maximum penalty is one year in jail, RCW 9.94A.505(2)(b); II.

***State v. Langstead***, 155 Wn.App. 448 (2010)

State need not prove prior convictions to a jury for purposes of POAA, RCW 9.94A.570, where the prior is not an element of the substantive crime; where judgment and sentence is valid on its face, an invalid plea document is not to be considered, *State v. Johnson*, 150 Wn.App. 663, 678 (2009), *Pers. Restraint of Hemenway*, 147 Wn.2d 529, 532-33 (2002); I.

***State v. Cross***, 156 Wn.App. 568, 586-90 (2010)

An uncertified DISCIS printout is sufficiently reliable to prove misdemeanor convictions defeating a claim that a prior felony washed out, *State v. Labarbera*, 128 Wn.App. 343 (2005), *State v. Jones*, 159 2231 (2007); 2-1, II.

***State v. Dockens***, 156 Wn.App. 793 (2010)

Pretrial release on condition of a curfew and requirement to report to a monitoring office weekdays but that is not electronically monitored, RCW 9.94A.030(28) (2010), is not partial confinement entitling defendant to credit against his sentence, *State v. Vasquez*, 75 Wn.App. 896 (1994), *State v. Sullivan*, 196 Wn.App. 277, 297-300 (2016), distinguishing *State v. Speaks*, 119 Wn.2d 204 (1992), *State v. Alejandro Medina*, 180 Wn.2d 282 (2014), *see:* RCW 10.21.030(5); II.

***State v. Chandler***, 158 Wn.App. 1 (2010)

To prove prior convictions with documents other than judgment and sentences, state must show that a certified copy of the judgment is unavailable for some reason other than the serious fault of the proponent, *State v. Lopez*, 147 Wn.2d 515, 519 (2002), *but see: Pers. Restraint of Adolph*, 170 Wn.2d 556, 565-71 (2010), and then must establish that the comparable evidence bears "some minimal indicium of reliability beyond mere allegation," *State v. Mendoza*, 165 Wn.2d 913, 920 (2009); here, state's explanation that it requested all court documents could lead

a trial court to reasonably infer that the other courts no longer possessed the judg ment and sentence; II.

***State v. McChristian***, 158 Wn.App. 392, 401-07 (2010)

To impose a mandatory minimum for assault 1°, judge, not a jury, must find that defendant intended to kill or used force or means likely to result in death, RCW 9.94A.540(1)(b) (2005), *State v. Clarke*, 156 Wn.2d 880, 884 (2006), as minimum did not exceed maximum, distinguishing *Blakely v. Washington*, 542 U.S. 296, 159 L.Ed.2d 403 (2004), court must enter findings of fact; where information alleges facts sufficient to support a mandatory minimum, there is sufficient notice to defendant that he may be subject to mandatory minimum; an accomplice may be subject to a mandatory minimum for assault 1°; II.

***State v. Barber***, 170 Wn.2d 834 (2011)

Defendant pleads guilty to felony DUI, plea agreement states no community custody, trial court does not impose community custody, DOC notifies court that community custody is mandatory, at resentencing defendant is offered option of withdrawal of plea or specific performance, defendant chooses the latter, trial court imposes same sentence with community custody, defendant argues on appeal that he is entitled to the original agreed sentence in spite of the statute; held: where a plea agreement contains a mutual mistake, only remedy available to defendant is withdrawal of plea, not specific performance of a sentence unpermitted by statute, abrogating *State v. Miller*, 152 Wn.2d 223 (1988), *effectively overruling* *Personal Restraint of Hoisington*, 99 Wn.App. 423 (2010), *Personal Restraint of Fonseca*, 132 Wn.App. 464 (2006), *Personal Restraint of Hudgens*, 156 Wn.App. 411 (2010); affirms *State v. Barber*, 152 Wn.App. 223 (2009); 9-0.

***Pers. Restraint of Adolph***, 170 Wn.2d 556 (2010)

While best method of proving a prior conviction is a certified copy of judgment and sentence, other documents or transcripts of prior proceedings are admissible, *State v. Ford*, 137 Wn.2d 472, 480 (1999), *State v. Vickers*, 148 Wn.2d 91, 120-21 (2002), *State v. Griepsma*, 17 Wn.App.2d 606 (2021), *overruling, in part, State v. Lopez*, 147 Wn.2d 515, 519 (2002); a conviction is not a writing and thus best evidence rule, ER 1001-02, does not apply; 8-1.

***State v. Wilson***, 170 Wn.2d 682 (2010)

To count in an offender score, an anticipatory offense must actually have been a felony, RCW 9.94A.525(4); an erroneously scored prior conviction is a legal error requiring resentencing, defendant cannot waive any challenge by accepting a plea agreement, *Pers. Restraint of Goodwin*, 146 Wn.2d 861, 874 (2002); 9-0.

***State v. Franklin***, 172 Wn.2d 831 (2011)

RCW 9.94A.701 (2009) which retroactively directs Department of Corrections to reduce community custody length does not entitle defendant to a new sentencing hearing, *cf.: Pers. Restraint of Brooks*, 166 Wn.2d 664 (2009), *State v. Winborne*, 167 Wn.App. 320 (2012); 9-0.

***State v. Smith***, 158 Wn.App. 501 (2010)

An offender may have a felony conviction vacated, RCW 9.94A.640(2)(d), even if subsequently convicted of a misdemeanor if that misdemeanor was vacated because there was no subsequent conviction as legislature intended to prohibit all adverse consequences of a vacated misdemeanor, RCW 9.96A.060(3), *State v. Sleater*, 200 Wn.App, 638 (2017), except for use in a subsequent criminal conviction; I.

***State v. Acevedo***, 159 Wn.App. 221, 231-34 (2010)

When sentenced to a **first time offender** waiver, RCW 9.94A.650 (2006), court can order as conditions of community custody that defendant maintain employment, former RCW 9.94A.650(2), 9.94A.700(4)(b), not associate with persons on probation or parole, former RCW 9.94A.700(5)(b), not possess drugs, former RCW 9.94A. 700(5)(d), not consume alcohol in excess, participate in drug treatment, take polygraph to monitor compliance, *State v. Combs,* 102 Wn.App. 949, 952 (2000), former RCW 9.94A.715(2), but may not order him not to possess deadly weapons other than firearms; III.

***State v. Hyder***, 159 Wn.App. 234, 256-57 (2011)

Court-martial conviction counts in offender score if comparable, *State v. Morley*, 134 Wn.2d 588 (1998), *State v. Aronson*, 82 Wn.App. 762 (1996), *see: State v. Duke*, 77 Wn.App. 532 (1995); II.

***State v. Winkle***, 1569 Wn.App. 323 (2011)

For sex offense, sentence of statutory maximum plus community custody for the period of earned early release not to exceed the maximum is proper, RCW 9;.94A.701(8) (2008), *Pers. Restraint of Brooks*, 166 Wn.2d 664 (2009), *see: State v. LaBounty*, 17 Wn.App.2d 576 (2021), *cf.: State v. Winborne*, 167 Wn.App. 320 (2012); I.

***State v. Smith***, 159 Wn.App. 694 (2011)

Defendants are sentenced to partial confinement, RCW 9.94A.505, county eliminates its partial confinement programs, court modifies sentences to low end of range so that they are released, state appeals; held: after sentencing, the court's power to modify the sentence, CrR 7.8(b)(5), is limited to "extraordinary circumstances [that] relate to fundamental, substantial irregularities in the court's proceedings or to irregularities extraneous to the court's action," *State v. Olivera-Avila*, 89 Wn.App. 313, 319 (1997), *Postsentence Review of Wandell*, 175 Wn.App. 447 (2013), *see: State v. Shove*, 113 Wn.2d 83 (1989), *State v. Dana*, 59 Wn.App. 667 (1990), *State v. Murray*, 118 Wn.App. 518 (2003); here, defunding partial confinement programs was unforeseeable and unanticipated when defendants were sentenced, thus court properly exercised discretion; III.

***State v. Davis***, 160 Wn.App. 471 (2011)

Defendant is sentenced to prison-based DOSA, RCW 9.94A.660 (2002), encompassing 55 months confinement and 55 months community custody, serves the 55 months in prison, during community custody DOC administratively revokes, defendant demands credit for community custody time served against the remainder of his prison sentence; held: defendant is entitled to credit for time served while on DOSA community custody, *see also: Postsentence Review of Bercier*, 178 Wn.App. 148 (2013); II.

***State v. Walters***, 162 Wn.App. 74, 85-86 (2011)

An out-of-state conviction that has comparable elements to a Washington crime counts in offender score even if the other state classifies it as a misdemeanor, RCW 9.94A.525(3); 2-1, II.

***State v. King***, 162 Wn.App. 234 (2011)

Adding a point where a defendant is on community custody when new felony is committed, RCW 9.94A.525(19) (2011), only applies to Washington community custody, RCW 9.94B.020(2) (2008), and not to out-of-state post-custodial supervision; where defendant pleads guilty to two counts with identical standard ranges which must run concurrently, is sentenced within standard range, appeals correctly claiming that offender score was in error which only impacts standard range on one count, thus standard range remains the same even though it is less on one count, he may withdraw plea to both counts, *State v. Mendoza*, 157 Wn.2d 582, 589-91 (2006), *State v. Bisson*, 156 Wn.2d 507, 518-20 (2006), *State v. Turley*, 149 Wn.2d 395, 400-01 (2003), harmless error analysis is "eschewed;" III.

***State v. Calhoun***, 163 Wn.App. 153 (2011)

Prior to resentencing after remand, legislature amends RCW 9.94A.525(21) and .530 (2008) to allow the state to introduce additional evidence regarding criminal history not previously presented, state offers additional prior convictions and additional evidence to support comparability of out-of-state convictions; held: savings statute, RCW 10.01.040 (1901), requires that defendants be prosecuted under the law in effect at the time, *State v. Kane*, 101 Wn.App. 607, 610 (2000), which applies only to substantive law changes, *State v. Pillatos*, 159 Wn.2d 459, 472 (2007); legislature had authority to amend SRA to require trial courts to impose sentences based on defendant's actual history even if not fully known at original sentencing; II.

***State v. Bribiesca Guerrero***, 163 Wn.App. 773 (2011)

Trial court is not obliged to order a chemical dependency screening for a defendant convicted of a drug offense who is eligible for a drug offender sentencing alternative, RCW 9.94A.500(1), 9.94A.660; III.

***State v. Mahone***, 164 Wn.App. 146 (2011)

Defendant is sentenced to community custody on two cases, violates terms, is sentenced to consecutive terms; held: community custody on multiple sentences must run consecutively, RCW 9.94A.589(2)(a), violations are limited to sixty days for each violation, RCW 9.94A.200 (1994), 9.94B.040(1), -(3)(c) (2002), thus court may only impose terms for violation on the current community custody, *see also: State v. Hughes*, 70 Wn.App. 142 (1993); II.

***State v. Irish***, 173 Wn.2d 787 (2012)

At sentencing, defendant claims that state did not prove validity of a guilty plea of a prior conviction, trial court disregards defendant's claim, Court of Appeals reverses in unpublished opinion; held: state need not prove constitutional validity of a prior conviction used to calculate a defendant's offender score on a current conviction, *State v. Ammons*, 105 Wn.2d 175, 187-88 (1986); to challenge validity of prior, defendant must file PRP; *per curiam.*

***Pers. Restraint of Carrier***, 173 Wn.2d 791 (2012)

Defendant may challenge the inclusion of a prior conviction considered by the sentencing court beyond the one year collateral attack period, RCW 10.73.090(1), as the invalidity of a judgment and sentence "on its face" is not limited to the four corners of the judgment and sentence, *Pers. Restraint of Coats*, 173 Wn.2d 123, 138 (2011), *see: Pers. Restraint of Toledo-Sotelo*, 176 Wn.2d 759 (2013); in determining whether a judgment and sentence is valid on its face, the court may consider documents that bear on the trial court's authority to impose a valid judgment and sentence, including, but not limited to, charging documents, verdicts, plea statements and, here, an order of dismissal following completion of probation, former RCW 9.95.240; a vacated conviction cannot be used as criminal history, distinguishing *State v. Braithwaite*, 92 Wn.2d 624 (1979), disavowing *State v. Moore*, 75 Wn.App. 166 (1994), *State v. Wade*, 44 Wn.App. 154 (1986), *but see: State v. Haggard,* 195 Wn.2d 544 (2020), *State v. Fletcher,* 19 Wn.App. 566 (2021), *State v. Conaway,* 199 Wn.2d 742 (2022); 6-3.

***State v. Boyd***, 174 Wn.2d 470 (2012)

Where confinement and community custody exceed maximum sentence, court must reduce the term of community custody so that the total does not exceed the maximum, RCW 9.94A.701(9) (2010), distinguishing *Pers. Restraint of Brooks*, 166 Wn.2d 664 (2009), *State v. Franklin*, 172 Wn.2d 831, 839 (2011); *per curiam.*

***State v. Hunley***, 175 Wn.2d 901 (2012)

State offers list of prior convictions, defense neither acknowledges nor objects, court determines offender score based upon state's list; held: due process clause places burden on state to prove prior convictions by a preponderance, state's "bare assertions, unsupported by evidence" are insufficient, *State v. Ford*, 137 Wn.2d 472, 479-82 (1999), *State v. Cate,* 194 Wn.2d 909 (2019); 2008 amendments to RCW 9.94A.500 and .530 which state that a criminal history summary is *prima facie* evidence of prior convictions and defendant's failure to object constitutes acknowledgement is unconstitutional as applied where criminal history is an unsworn list of crimes; remedy where there is no objection is remand allowing state to present evidence of priors, *State v. Mendoza*, 165 Wn.2d 913, 930 (2009), *State v. Hayes*, 165 Wn.App. 507, 522-24 (2011); affirms *State v. Hunley*, 161 Wn.App. 919 (2011); 9-0.

***State v. Sublett***, 176 Wn.2d 58, 70-78 (2012)

California robbery statute which defines the crime, in part, as a "felonious taking" is the equivalent of "intent to commit a crime" in Washington, *State v. Nieblas-Duarte*, 55 Wn.App. 376, 381 (1989), *State v. Smith*, 31 Wash. 245, 248 (1903); 9-0.

***State v. Cooper***, 164 Wn.App. 407 (2011), 176 Wn.2d 678 (2013)

A guilty plea counts as a conviction even if the out-of-state jurisdiction (Texas) defers adjudication, as a guilty plea is defined as a conviction, RCW 9.94A.030(9) (2011); II, 9-0.

***State v. Crawford***, 164 Wn.App. 617 (2011)

Sentencing court cannot add a point to offender score for committing a crime while "under community custody," RCW 9.94A.525(19) (2008) where the crime is committed while

defendant is in jail as community custody is tolled during confinement, RCW 9.94A.625(3) (2008); I.

***State v. Duncalf***, 164 Wn.App. 900 (2011), *affirmed, on other grounds,* 177 Wn.2d 289 (2013)

For purposes of the aggravating factor that the injury substantially exceeded the level of bodily harm necessary to satisfy substantial bodily harm, failure to define "substantially exceed" is "merely definitional," *State v. Gordon,* 172 Wn.2d 671, 677-80 (2011), and not an element, *but see: Alleyne v. United States,* 570 U.S. 99, 186 L.Ed.2d 314 (2013), *State v. Allen* 192 Wn.2d 526 (2018), and thus cannot be challenged for the first time on appeal; I.

***State v. Griffin***, 173 Wn.2d 467 (2012)

At a fact finding hearing to determine the existence of an aggravating factor, evidence rules apply, ER 1101(c)(3) only applies to the sentencing itself; 9-0.

***State v. Reyes-Brooks***, 165 Wn.App. 193, 202-06, *remanded,* 175 Wn.2d 1020, *affirmed, by unpublished decision,* 171 Wn.App. 1028) (2012),

Where appellate court reverses for failure of trial court to properly instruct as to unanimity regarding a firearm enhancement, *State v. Bashaw,* 169 Wn.2d 133, 147 (2010), , *overruled, State v. Guzman Nuñez,* 174 Wn.2d 707 (2012), remedy is to remand to allow empanelment of a jury "to consider the aggravating factor with proper instructions," at 202 [Division I appears to equate an enhancement with an aggravating factor]; 2-1.

***State v. Breaux***, 167 Wn.App. 166 (2012)

Where defendant is convicted of two or more serious violent offenses, RCW 9.94A.030(44) (2012), with the same seriousness level but different standard ranges, the offender score for the offense carrying the lesser range is calculated at zero, as RCW 9.94A.589(1)(b) (2002) is ambiguous thus rule of lenity necessitates an interpretation in favor of defendant, *State v. Weatherwax,* 188 Wn.2d 139 (2017); I.

***State v. Winborne***, 167 Wn.App. 320 (2012)

To ensure that a sentence of confinement plus community custody does not exceed the maximum sentence, sentencing court must impose the term of confinement, the term of community custody, then reduce the term of community custody if necessary, RCW 9.94A.701(9) (2010), distinguishing *Pers. Restraint of Brooks,* 166 Wn.2d 664, 675 (2009), *State v. Franklin,* 172 Wn.2d 831 (2011), *State v. Winkle,* 158 Wn.App. 323 (2011); III.

***State v. Heath***, 168 Wn.App. 894 (2012)

Florida *nolo contendere* plea followed by withheld adjudication meets Washington's statutory definition of a conviction, *State v. Horton,* 195 Wn.App. 202, 217-22 (2016); I.

***Pers. Restraint of Toledo-Sotelo***, 176 Wn.2d 759 (2013)

Seriousness level in plea is incorrect but court finds correct standard range, defendant files untimely PRP; held: while a judgment and sentence containing incorrect range or seriousness level may make the judgment facially invalid, *Pers. Restraint of Goodwin,* 146 Wn.2d 861 (2002), where defendant cannot show both facial invalidity and prejudice, *Pers.*

*Restraint of Coats,* 173 Wn.2d 123, 13 (2011), *State v. Wheeler,* 183 Wn.2d 71, 77-80 (2015), an untimely PRP shall be dismissed; because standard range was correct, judgment and sentence was valid on its face; 9-0.

***State v. Duncalf****,* 177 Wn.2d 289 (2013)

For the same incident defendant is charged with assault 1° (great bodily harm) and alternatively assault 2° (substantial bodily harm) and, with respect to the latter, an aggravating factor that the injury substantially exceeded the level of bodily harm necessary to satisfy substantial bodily harm, defense does not ask for a definition of "substantially exceed," jury acquits of assault 1°, convicts of assault 2° and finds the aggravator; held: while the "substantially exceeds" aggravator cannot apply to assault 1°, *State v. Stubbs,* 170 Wn.2d 117 (2010), these verdicts can be reconciled because the *mens rea* elements differ (assault 1°: intent to inflict great bodily harm; assault 2°: the assault itself must be intended but not the resulting bodily harm); failure to define "substantially exceed" is "merely definitional," *State v. Gordon,* 172 Wn.2d 671, 677-80 (2011) and not an element and thus cannot be challenged for the first time on appeal, *but see: Alleyne v. United States,* 570 U.S. 99, 186 L.Ed.2d 314 (2013), *State v. Allen,* 192 Wn.2d 526 (2018); affirms *State v. Duncalf,* 164 Wn.App. 900 (2011); 9-0.

***State v. Lowe****,* 173 Wn.App. 390 (2013)

Sentencing court includes in offender score a juvenile conviction where juvenile court had dismissed a deferred disposition because prosecutor neglected to seek revocation prior to the end the deferral period but juvenile court did not vacate the disposition as respondent had not fully complied; held: juvenile court is not required to vacate a conviction at the conclusion of a deferred disposition where motion to revoke has been untimely; juvenile court lacks authority to vacate a conviction unless it affirmatively finds full compliance with the conditions, RCW 13.40.127 (2009), *State v. D.P.G.,* 169 Wn.App. 396, 400-01 (2012); I.

***State v. Warnock****,* 174 Wn.App. 608 (2013)

Evidence at assault 2° trial establishes defendant had been drinking alcohol, court orders as condition of community custody that defendant obtain a chemical dependency evaluation; held: absent evidence and a finding that chemical dependency contributed to the crime, court lacks authority to impose the condition, RCW 9.94A.607(1), *State v. Jones,* 118 Wn.App. 199, 207 (2003), *see: State v. Kinzle,* 181 Wn.App. 774, 786 (2014); Division I concludes that there is a distinction between chemical dependency and alcohol abuse.

***State v. Williams****,* 176 Wn.App. 138 (2013), 181 Wn.2d 795 (2014)

To determine whether or not two prior offenses are the same criminal conduct, RCW 9.94A.525(5)(a)(i) (2013), sentencing court must apply the same criminal conduct test, *State v. Torngren,* 147 Wn.App. 556, 563 (2008), and cannot apply the burglary anti-merger statute, RCW 9A.52.050 (1975), which only applies to current offenses, *see: State v. Lessley,* 118 Wn.2d 773, 779-82 (1992); 2-1, III.

***State v. Alejandro Medina****,* 180 Wn.2d 282 (2014)

A pretrial condition of release that a murder defendant report to a non-residential day reporting program (King County CCAP enhanced) does not entitle defendant to credit for time served in that program, former RCW 9.94A.030(26) (1991), nor does equal protection clause mandate credit, *cf.* RCW 9.94A.680 (2009) authorizing courts to grant credit for nonviolent offenders, *see also: State v. Speaks,* 119 Wn.2d 204 (1992); 9-0.

***State v. Jordan***, 180 Wn.2d 456 (2014)

Texas manslaughter prior counts in offender score regardless of the fact that here are differences between self-defense in Texas and Washington, neither SRA nor due process require comparability of defenses; affirms *State v. Jordan,* 158 Wn.App. 297 (2010); 9-0.

***State v. Olsen***, 180 Wn.2d 468 (2014)

Where the elements of a foreign offense are broader than a Washington offense precluding legal comparability, the court may determine if the offense is factually comparable, *i.e.*, whether the conduct underlying the foreign offense would have violated the "comparable Washington statute," *State v. Thiefault,* 160 Wn.2d 409, 415 (2007), *State v. Arndt,* 179 Wn.App. 373, 380-82 (2014), *Pers. Restraint of Canha,* 189 Wn.2d 359 (2017), *State v. Howard,* 15 Wn.App.2d 725 (2020); here, defendant pleaded no contest to a California crime that is not legally comparable to a Washington felony, no contest in California means defendant admits guilt to all elements, conduct to which defendant admitted in his no contest plea would have satisfied the conduct necessary to be convicted in Washington distinguishing *Descamps v. United States,* 570 U.S. 254, 186 L.Ed.2d 438 (2013); affirms *State v. Olsen,* 175 Wn.App. 269 (2013); 9-0.

***State v. Soto***, 177 Wn.App. 706 (2013)

Firearm enhancement, RCW 9.94A.533(3) (2013), does not apply to an unranked felony, RCW 9.94A.505(2)(b) (2010), *State v. Vazquez,* 200 Wn.App. 220, 225-30 (2017); III.

***Postsentence Review of Bercier***, 178 Wn.App. 148 (2013)

Defendant is statutorily entitled to credit for community custody time following revoked residential DOSA, RCW 9.94A.660(7)(d) (2009), *see also: State v. Davis,* , 160 Wn.App. 471 (2011); III.

***State v. Miller***, 178 Wn.App. 381 (2013)

Defendant, convicted of child molestation, is sentenced to SSOSA, RCW 9.94A.670 (2009), ordered to enter sexual deviancy treatment within 90 days, fails to comply because he cannot afford treatment, is homeless and unemployable, court revokes; held: revocation of probation for inability to pay money, as opposed to a willful refusal to pay or make bona fide efforts to find the resources, may violate due process, *Bearden v. Georgia*, 461 U.S. 660, 662, 78 L.Ed.2d 221 (1983), where public safety is at risk and the court determines that there are no adequate alternative measures, court can revoke SSOSA, *State v. McCormick,* 166 Wn.2d 689 (2009); I.

***State v . Cobos***, 178 Wn.App. 692 (2013), 182 Wn.2d 12 (2014)

Defendant moves to represent himself at sentencing, before court approves defense counsel agrees to offender score of 9, at sentencing defendant objections to offender score, court offers continuance for state to prove priors, defendant declines, court accepts counsel's agreement; held: counsel's agreement while defendant's motion to represent himself was improper, *Haller v. Wallis,* 89 Wn.2d 539, 547 (1978), as an attorney can waive substantive rights only with specific authorization, *State v. Ford,* 125 Wn.2d 919, 922 (1995), *Graves v. P.J. Taggares Co.,* 94 Wn.2d 298, 303 (1980), *State v. Sain,* 34 Wn.App. 553, 556-57 (1983); sentencing judge was obliged to conduct an evidentiary hearing where defendant objects to offender score even if counsel agreed, *State v. Bergstrom,* 162 Wn.2d 87 (2007), state may offer evidence at remanded sentencing, RCW 9.94A.530(2) (2008), legislative overruling *State v. Lopez,* 147 Wn.2d 515 (2002); Supreme Court's invalidating other sections of 2008 statute do not impact this on, *Monge v. California,* 524 U.S. 721, 141 L.Ed.2d 615 (1998); III.

***State v. Arndt***, 179 Wn.App. 373 (2014)

For purposes of offender score, Oregon attempt statute which is defined as "intentionally engages in conduct which constitutes a substantial step toward commission of the crime," ORS § 161.404(1), is not legally comparable to Washington's attempt statute which requires "intent to commit a specific crime," RCW 9A.28.020(1), but where defendant admitted in Oregon plea that he attempted to cause serious physical injury meets the factual requirement of specifically intending to commit the crime of assault, at 382-83; Oregon assault 2° defines "serious physical injury" to include "serious … impairment of health," ORS § 163.175(1)(a), which is broader than Washington's definition of "substantial bodily harm, RCW 9A.04.110(4)(b), which does not include impairment of health, at 383-85; Oregon's DUI statute, former ORS § 813.010(1)(b) (1994), prohibits driving when one has consumed enough to adversely affect mental or physical faculties to some noticeable or perceptible degree while Washington's DUI statute focuses on a person's ability to drive, RCW 46/61/502(1), thus the two are not legally comparable, at 385-87; Oregon's rape 3°, ORS § 163.355, is not legally comparable to Washington's rape 3°, RCW 9A.44.079, because Washington includes the element that the victim and defendant are not married and that the defendant is at least 48 months older than victim, at 388-89; II.

***State v. Hender***, 180 Wn.App. 895 (2014)

Trial court's refusal to grant a DOSA sentence, RCW 9.94A.660 (2009), because defendant denied accountability is a proper exercise of discretion, *State v. Jones,* 171 Wn.App. 52, 55-56 (2012), *State v. Barton*, 121 Wn.App. 792 (2004), *distinguishing State v. Grayson,* 154 Wn.2d 333 (2005); III.

***Postsentence Review of Cage***, 181 Wn.App. 588 (2014)

After sentencing for a felony judge loses jurisdiction and cannot grant a furlough, *State v. Hale,* 94 Wn.App. 46 (1999), *January v. Porter,* 75 Wn.2d 768, 773-74 (1969), *see: State v. Law,* 110 Wn.App. 36, 40 (2002); III.

***State v. Webb***, 183 Wn.App. 242, 247-52 (2014)

1982 assault 2º conviction is not a valid point: prior to 1986 injury element was "substantial bodily harm," current version, RCW 9A.36.020(1)(b), requires grievous bodily harm

which is broader, thus not legally comparable, only facts in the record from 1982 conviction were in the information which is insufficient, *State v. Failey*, 165 Wn.2d 673, 677 (2009), *State v. Morley*, 134 Wn.2d 588, 605-06 (1998); 1992 assault 2º conviction is invalid on its face as statute charged was repealed at the time of the offense, court may look at statutory history, *Pers. Restraint of Thompson*, 141 Wn.2d 712, 719 (2000); II.

***State v. Jones,*** 182 Wn.2d 1 (2014)

RCW 9.94A.530(2) (2008), which permits both parties to present additional relevant evidence of criminal history at resentencing following remand from appeal or collateral attack, regardless of whether or not the state offered sufficient evidence at the initial sentencing meets due process requirements, *State v. Cobos*, 182 Wn.2d 12 (2014), thus *State v. Ford*, 137 Wn.2d 472 (1999) is, in part, legislatively overruled; 9-0.

***State v. Bruch***, 182 Wn.2d 854 (2015)

To avoid a sentence that exceeds the maximum, court may impose a standard range sentence plus community custody of at least x months plus all accrued earned early release time, which does not create an indeterminate sentence, *Pers. Restraint of Brooks*, 166 Wn.2d 664, 668 (2009), *State v. Winkle*, 159 Wn.App. 323 (2001), *State v. LaBounty*, 17 Wn.App.2d 576 (2021), distinguishing *State v. Boyd*, 174 Wn.2d 470 (2012); 7-2.

***State v. Jones***, 183 Wn.2d 327, 345-47 (2015)

Availability of diminished capacity defense in Washington but not in a foreign jurisdiction does not prevent the two crimes from being comparable, *State v. Sublett*, 176 Wn.2d 58, 88-89 (2012); 5-4.

***State v. Conover***, 183 Wn.2d 706 (2015)

School bus route stop enhancements, RCW 69.50.435(1)(c) (2015), must run consecutively to the substantive VUCSA charge but may run concurrently to each other, *Post Sentencing Review of Charles*, 135 Wn.2d 239 (1998); 9-0.

***State v. Hernandez***, 185 Wn.App. 680 (2015)

In determining offender score for felony DUI, former RCW 9.94A.525(2)(e) (2011), all prior convictions, traffic and other felonies, count, *State v. Sandholm*, 184 Wn.2d 726, 736-39 (2015), *see: Matter of Raymundo*, 6 Wn.App.2d 75 (2018); III.

***State v. Wade***, 186 Wn.App. 749, 775-79 (2015)

Utah statute, UC § 58-37-8(1)(a)(ii) which prohibits agreeing, consenting, offering or arranging to distribute a drug is comparable to Washington delivery of drug statutes and Washington attempting to distribute a drug, RCW 69.50.407; I.

***State v. Irby***, 187 Wn.App. 183, 204-08 (2015)

Statutory rape as it was defined in 1976 is not legally comparable to rape of a child 2°, because in 1976 a person of 16 years commits the crime if the victim was 11-14 years old but now state must prove defendant is at least 36 months older than victim, RCW 9A.44.076(1)

(1990), sentencing judge now cannot determine defendant's age previously as it depends on judicial fact-finding, *Apprendi v. New Jersey*, 530 U.S. 466, 147 L.Ed.2d 435 (2000); I.

***State v. Mohamed***, 187 Wn.App. 630 (2015)

Even with school zone enhancement court can impose DOSA or parenting sentencing alternative, RCW 9.9A.655, as enhancements are still part of standard range, *Postsentencing Review of Gutierrez*, 146 Wn.App. 151 (2008), *cf.: State v. Yancey*, 193 Wn.2d 26 (2019); I.

***State v. Inocencio***, 187 Wn.App. 765 (2015)

Offender score includes convictions incurred when defendant was 16 years old, defense maintains that absent a decline hearing or evidence that defendant expressly waived decline hearing and juvenile court found that decline was in respondent's best interests priors could not be included in offender score; held: while a waiver of any right under the Juvenile Justice Act of 1977, ch. 13.40 RCW, must be an express waiver which state must show from the record, or show a decline order, *State v. Knippling*, 166 Wn.2d 93 (2009), *cf.: State v. Saenz*, 156 Wn.App. 866, 876-79 (2010), for purposes of POAA, and defense has no burden to collaterally attack a prior conviction as it is the present use of a prior conviction for purposes of POAA, defendant cannot raise invalidity of prior conviction for purposes of offender score alone, *State v. Ammons*, 105 Wn.2d 175 (1986), unless it is invalid on its face, *but see: State v. Bailey*, 179 Wn.App. 433 (2014); III.

***State v. Dyson***, 189 Wn.App. 215 (2015)

Defendant is convicted of assault 1°, sentencing judge finds defendant's conduct qualified for mandatory five-year minimum because force could likely have resulted in death, RCW 9.94A.540 (2014); held: fact-finding triggering a mandatory minimum must be submitted to the jury, *Alleyne v. United States*, 570 U.S. 99, 186 L.Ed.2d 314 (2013), *but see: State v. McChristian*, 158 Wn.App. 392 (2010); 2-1, III.

***State v. Sandholm***, 184 Wn.2d 726, 736-39 (2015)

In determining offender score for felony DUI all prior convictions that have not washed count, *State v. Hernandez*, 185 Wn.App. 680 (2015), *State v. McAninch*, 189 Wn.App. 619 (2015), overruling *State v. Martinez-Morales*, 168 Wn.App. 489 (2012) and *State v. Jacob*, 176 Wn.App. 351 (2013); 9-0.

***State v. Miller***, 185 Wn.2d 111 (2016)

Defendant is sentenced to consecutive sentences for two counts of murder, RCW 9.94A.589(1)(b) (2002), defendant files untimely collateral attack seeking resentencing because *Pers. Restraint of Mulholland*, 161 Wn.2d 322 (2007) authorized court to impose concurrent exceptional sentences, trial court agrees it was unaware it had the authority and imposes concurrent sentences, state appeals; held: *Mulholland* did not qualify as a significant change in the law, *Pers. Restraint of Gentry*, 179 Wn.2d 614, 625 (2014), RCW 10.73.100(6) (1989), could

have argued at original sentencing for concurrent sentences thus concurrent sentences vacated; 8-1.

***State v. Baker***, 194 Wn.App. 678 (2016)

Offender score for **escape** is limited to prior escape convictions, RCW 9.94A.525(14) (2013); III.

***State v. Haggin***, 195 Wn.App. 315 (2016)

Multiple current convictions for unlawful possession of firearms run concurrently unless there also is a current conviction for theft of a firearm or possession of a stolen firearm, RCW 9.94A.589(1)(c) (2015); III.

***State v. Sullivan***, 196 Wn.App. 277, 297-300 (2016)

For a violent offense court lacks authority to grant credit for time served in a non-residential day reporting program, RCW 9.94A.680(3) (2009), *State v. Medina,* 180 Wn.2d 282, 288 (2014); deadly weapon enhancement time must be served in total confinement; I.

***State v. Weatherwax***, 188 Wn.2d 139 (2017)

"For purposes of RCW 9.94A.589(1)(b), (1) (2015), anticipatory offenses have the same seriousness level as their target crimes and (2) when the seriousness levels of two or more serious violent offenses are identical, the trial court must choose the offense whose standard range is lower as the starting point for calculating the consecutive sentences.," *State v. Breaux,* 167 Wn.App. 166 (2012), *reversing, in part, State v. Weatherwax,* 193 Wn.App. 667 (2016); 9-0.

***Pers. Restraint of Canha***, 189 Wn.2d 359 (2017)

California voluntary manslaughter is not legally comparable to Washington murder, here it is factually comparable as defendant could have been convicted if he had committed the same acts in Washington; Oregon felon in possession of a firearm is not legally comparable to Washington felon in possession 1° as Washington requires a prior serious offense rather than any felony, but here it is factually comparable, the court may rely only on facts that were admitted, stipulated, or proved to the fact finder beyond a reasonable doubt. *Pers. Restraint of Lavery*, 154 Wn.2d 249, 255 (2005); 9-0.

***State v. Williams***, 199 Wn.App. 99 (2017)

At sentencing defense requests Drug Offender Sentencing Alternative, court imposes standard range sentence, stating that there was no evidence of drug use; held: while a sentencing court may order a drug evaluation for a DOSA it is not obliged to do so, RCW 9.94A.660(4) (2016), thus properly exercised discretion in declining to impose DOSA, *State v. Grayson,* 154 Wn.2d 333 (2005); 2-1, III.

***State v. Sleater***, 200 Wn.App, 638 (2017)

Defendant pleads guilty to VUCSA in 2006, certificate of discharge, RCW 9.94A.637 (2009), is issued in 2008, two weeks prior to discharge defendant is arrested for new VUCSA, pleads guilty, seeks vacation of 2006 VUCSA arguing that the 2008 VUCSA doesn't preclude vacation because it occurred before the certificate of discharge; held: the fact of conviction of the

new crime, not the date it occurred, precludes vacation, RCW 9.94A.640 (2011); *dicta:* "[o]nce she has received her certificate of discharge for the 2008 offense and is eligible to vacate it, she can first vacate that conviction and then seek vacation of the 2006 offense," *see* *State v. Smith*, 158 Wn.App. 501 (2010); III.

***State v. Blair***, 191 Wn.2d 155 (2018)

At sentencing defense maintains that a prior conviction of theft of a motor vehicle should not be included in offender score as defendant stole snowmobiles which are not motor vehicles; held: defense has burden of showing a prior conviction is constitutionally invalid on its face, statutory interpretation is not a constitutional issue so question of whether a snowmobile is a motor vehicle may not be decided by the sentencing court to include the prior in the offender score; 9-0.

***State v. Joseph,*** 3 Wn.App.2d 365, 374-75 (2018)

Jury instruction for aggravating circumstance must instruct that aggravator is proved beyond a reasonable doubt and must be unanimous; I.

***State v. Davis***, 3 Wn.App.2d 763 (2018)

California burglary statute which does not require proof of unlawful entry is not comparable to Washington burglary 2° and thus does not count in offender score, *see: State v. Howard,* 15 Wn.App.2d 7257 (2020); I.

***State v. Van Noy***, 3 Wn.App.2d 494 (2018)

In determining eligibility for a DOSA the issue is when the offender committed the current offense, not when he was sentenced for it, RCW 9.94A.660(1)(g) ;I.

***State v. Church***, 5 Wn.App.2d 577 (2018)

Defendant is sentenced to a residential DOSA, RCW 9.94A.664 (2011), receives treatment and community custody per the statute, never reports for treatment, argues that court only has authority to impose the mid-point of the standard range, RCW 9.94A.664(4)(c), court revokes and imposes standard range sentence; held: the limitation of the court to impose the mid-point of the standard range does not apply to a defendant who never reports to treatment, *see: State v. Grayson,* 154 Wn.2d 333 (2005); I.

***Matter of Thompson***, 6 Wn.App.2d 64 (2018)

Defendants plead guilty to attempted failure to register, are sentenced, *inter alia,* to community custody, DOC appeals; held: attempted failure to register as a sex offender is not a sex offense, court lacked authority to impose community custody; II.

***Matter of Raymundo***, 6 Wn.App.2d 75 (2018)

RCW 9.94A.525(11) (2017) provides that when an individual is convicted of a **felony traffic offense**, each prior serious traffic offense will count as one point., but RCW 9.94.525(11) also carves out an exception to this general rule: it instructs the court not to count prior serious traffic offenses that were used as enhancements for **vehicular homicide,** RCW 46.61.520(2)

(1998), which provides that an additional two years "shall" be added to a vehicular homicide sentence for each prior DUI, RCW 46.61.5055 (2018); sentencing court could not use the same prior serious traffic offenses in calculating petitioner's offender score for vehicular homicide that it used as enhancements under RCW 46.61.520(2), but court can use the priors in calculating petitioner's score for felony hit and run since they were not used as enhancements for hit and run, the exclusion of prior offenses used to enhance vehicular homicide applies only to the calculation of the offender score for vehicular homicide, not to the separate calculation of the offender score for other current offenses; I.

***State v. Thibodeaux***, 6 Wn.App.2d 223 (2018)

Where a defendant has maxed out on a class C felony court must impose 60 months and may not reduce incarceration period in order to impose community custody, absent an exceptional sentence, RCW 9.94A.701(9) (2010); I.

***State v. Yancey***, 193 Wn.2d 26 (2019)

Defendant pleads guilty to two counts of delivering a drug plus two school bus zone enhancements, total sentence range is 36-44 months, mid-range 40 months, sentencing court imposes residential DOSA, RCW 9.94A.660 (2016); held: residential DOSA can only be imposed if mid-point of range is 24 months or less, court cannot waive enhancements, thus defendant was only eligible for a prison-based DOSA, reversing *State v. Yancey*, 3 Wn.App.2d 735 (2018); 9-0.

***State v. Cate***, 194 Wn.2d 909 (2019)

At sentencing court accepts prosecutor's summary of criminal history, defendant does not object; held: absent an affirmative acknowledgment of criminal history the state must prove criminal history beyond a reasonable doubt, *State v. Hunley*, 175 Wn.2d 901 (2012), failure to object does not relieve state of that burden; defendant's testimony at trial might substitute as proof of criminal history [*dicta*]; *per curiam.*

***Postsentence Review of Hardy***, 9 Wn.App.2d 44 (2019)

Standard ranges for defendant's three convictions include one count of less than a year, one count of more than a year, trial court imposes residential DOSA, DOC appeals; held: if an offender has at least one sentence, greater than a year, that is eligible for a DOSA then defendant is eligible for DOSA, RCW 9.94A.660(1)(f) (2016), distinguishing *State v. Smith*, 142 Wn.App. 122 (2007); III.

***State v. Cyr***, 195 Wn.2d 492 (2020)

Defendant pleads guilty to three counts of selling a drug for profit, RCW 69.50.410(1), a class C felony, admits a prior VUCSA triggering doubling statute, RCW 69.50.408, trial court determines maximum sentence is 60 months, sentence range of 68-100 months exceeds maximum, court exercises discretion and sentences to 60 months, not doubling; held: doubling maximum sentence is mandatory, *Personal Restraint of Hopkins*, 89 Wn.App. 198, 201, 201-03 (1997), *rev'd on other grounds*, 137 Wn.2d 897, 976 P.2d 616 (1999), thus sentence range is not limited by 60 months, but court is not obliged to impose maximum; remanded for trial court to determine if priors qualify as VUCSAs for purposes of doubling; affirms *State v. Cyr*, 8 Wn.App.2d 834 (2019); 9-0.

***State v. Peterson***, 12 Wn.App.2d 195 (2020), *aff'd, on other grounds, State v. Peterson,* 198 Wn.2d 643 (2021)

RCW 69.50.410(3)(a) (2003), sets penalty for selling heroin for a profit at two years, SRA standard range sentence for this defendant is 68-100 months; held: "RCW 9.94A.505(2)(a)(i) [2019] states that the trial court must apply the sentencing grids "[u]nless another term of confinement applies,'" thus legislative intent and rule of lenity dictate that specific statute applies and sentence of two years is affirmed; II.

***State v. Salazar****,* 13 Wn.App.2d 880 (2020)

Defendant's standard range is 22-29 months, is sentenced to prison-based DOSA of 25.5 months with 12.25 months in prison and 12.25 months community custody, defendant violates conditions of community custody, court revokes, RCW 9.94A.660(7)(c) (2020), and imposes 29 months, defendant argues that court could not "modify" sentence to impose high end; held: if DOC revokes while a defendant is in prison it can only reimpose the remainder of the original sentence, but if court revokes it may impose any sentence within standard range, with credit; III.

***Pers. Restraint of Crenshaw****,* 196 Wn.2d 325 (2020)

Defendant is sentenced on multiple counts, appeals, Court of Appeals reverses some counts, remanding for a new trial, and remands the remaining counts for resentencing due to the changed offender score caused by the reversals, court resentences, defendant is retried and convicted, court then sentences on those charges, increasing offender score because of previous resentencing; held: defendant did not knowingly and voluntarily agree to be sentenced separately, higher sentence effectively punished him for prevailing on direct appeal; *per curiam.*

***State v. Kopp****,* 15 Wn.App.2d 281 (2020), *overruled, State v. Hawkins,* 200 Wn.2d 477 (2022)

Trial court has discretion whether or not to vacate a conviction regardless of whether or not defendant satisfies the statutory criteria, RCW 9.94A.640 (2019); I.

***State v. Howard****,* 15 Wn.App.2d 725 (2020)

Oregon attempt statute, O.R.S. § 161.405, required the intentional taking of a substantial step, but with no specific intent requirement, while Washington requires attempt to commit a specific crime, RCW 9A.28.020(1), thus is not legally comparable for purposes of offender score; where the defendant pleaded guilty in the foreign state, Washington court can compare the elements admitted in the plea statement to the Washington statute, *State v. Olsen*, 180 Wn.2d 468, 473 (2014), distinguishing *State v. Davis*, 3 Wn.App.2d 763 (2018), although here, there being no admission in the Oregon plea statement that defendant intended to commit the specific crime, it is not factually comparable; Oregon's robbery 3°, O.R.S. § 164.395(1), is not legally comparable to robbery 2° as Oregon's statute encompasses both theft and attempted theft whereas in Washington the state must prove a successful theft, distinguishing *State v. McIntyre*, 112 Wn.App. 478 (2002), although factually defendant in his Oregon plea statement admitted all of the elements of Washington's robbery 2° and thus the offenses are comparable; II.

***State v. Anderson****,* 198 Wn.2d 672 (2021)

School bus route stop enhancement jury instruction, RCW 69.50.435(1)(c), need not define the words "school bus;" 9-0.

***State v. LaBounty***, 17 Wn.App.2d 576 (2021)

Defendant is sentenced to maximum, judgment and sentence order community custody for any earned release time without a specific term; held: trial court can include a provision that community custody will consist of earned release time only if defendant is subject to DOC supervision depending upon result of risk assessment, RCW 9.94A.501(3) (2021) and court sentences defendant to a fixed term of community custody, *see: State v. Winborne*, 167 Wn.App. 320 (2012), *State v. Franklin*, 172 Wn.2d 831 (2011), *State v. Winkle*, 158 Wn.App. 323 (2011); II.

***State v. Griepsma***, 17 Wn.App.2d 606 (2021)

Uncertified copy of judgment and sentence that bears the stamp of the court clerk, lists identifying information of defendant and from same county as defendant is being sentenced exhibit minimal indicia of reliability, *State v. Ford*, 137 Wn.2d 472 (1999), *Pers. Restraint of Adolph*, 170 Wn.2d 556 (2010), *State v. Priest*, 147 Wn.App. 662 (2008), *State v. Winings*, 126 Wn.App. 75, 91-96 (2005); I.

***State v. Wright***, 19 Wn.App.2d 37 (2021)

Firearm enhancements must run consecutive to each other for adults, distinguishing *State v. McFarland*, 189 Wn.2d 47 (2017) which permits mitigated concurrent sentences for unlawful possession of a firearm; III.

***State v. Markovich***, 19 Wn.App.2d 157 (2021)

Even though a Montana drug possession conviction includes a *mens rea* element it cannot be comparable to Washington's drug possession statute since the Washington statute is void, *State v. Blake*, 197 Wn.2d 170 (2021); I.

***State v. Ehlert***, 19 Wn.App.2d 381 (2021)

DOSA statute, RCW 9.94A.660(1)(g) (2021), prohibits a DOSA sentence if defendant has had more than one prior DOSA in ten years, defendant had two concurrent DOSAs within ten years; held: because defendant had only one opportunity for treatment and rehabilitation even though there were two DOSAs he is eligible for another DOSA, *but see: State v. Van Noy*, 3 Wn.App.2d 494, 497 n.2 (2018); III.

***State v. Fletcher***, 19 Wn.App. 566 (2021)

When court imposes an exceptional sentence where the standard range is incorrectly calculated then the judgment and sentence is invalid on its face and thus a motion to modify, CrR 7.8(b), is timely even if filed more than a year after finality, *Pers. Restraint of Goodwin*, 146 Wn.2d 861, 872 (2002), *State v. Parker*, 132 Wn.2d 182 (1997); III.

***State v. Conaway***, 199 Wn.2d 742 (2022)

A misdemeanor deferred sentence that was dismissed after successfully completion is a conviction for purposes of the SRA, *State v. Haggard,* 195 Wn.2d 544, 551 (2020), *cf.: Pers. Restraint of Carrier,* 173 Wn.2d 791 (2012); 5-4.

***State v. Hawkins****,* ___ Wn.2d ___, 519 P.3d 182 (2022)

Defendant, having met the mandatory statutory prerequisites moves to vacate the conviction, RCW 9.94A.640 (2021), trial court denies it based upon severity of the crime; held: court must exercise discretion based upon evidence of rehabilitation and may not deny vacation solely because of the facts of the crime, overruling *State v. Kopp,* 15 Wn.App.2d 281 (2020); 9-0.

***State v. Barnett,*** 21 Wn.App.2d 469 (2022)

Firearm enhancement, RCW 9.94A.533(3), must run consecutive to all offenses, including unlawful possession of a firearm; I.

***Matter of Rodriguez****,* 21 Wn.App.2d 585 (2022)

Court cannot impose 12 months community custody for **first time offender waiver** if no treatment is ordered, RCW 9.94A.650; III.

***State v. French****,* 21 Wn.App.2d 891 (2022)

Defendant's offender score includes one point for being on community custody, RCW 9.94A.525(19), for possession of a drug, following *State v. Blake,* 197 Wn.2d 170 (2021) court strikes the point, state appeals; held: because the statute under which defendant was previously sentenced was void, so was the order placing him on community custody, *State v. Rahnert,* ___ Wn.App.2d ___, 518 P.3d 1054 (2022), *cf.: State v. Paniuaga,* 22 Wn.App.2d 350 (2022); I.

***State v. Putman****,* 21 Wn.App. 36, 51-55 (2022)

Where defendant is charged with multiple acts over many years and jury does not identify which act is the basis of conviction then the version of the SRA with the lesser sentence must be imposed, *State v. Parker*, 132 Wn.2d 182, 185-188 (1997), *Pers. Restraint of Hartzell*, 108 Wn.App. 934, 945 (2001); I.

***State v. Buck****,* ___ Wn.App.2d ___, 23WL140074 (2023)

Court may order that community custody be consecutive to another community custody; III.

***State v. Gonzalez****,* ___ Wn.App.2d ___, 2023WL365507 (2023)

DUI and vehicular assault from the same incident merge; in a subsequent DUI sentencing court must merge the two in determining offender score even though original trial court did not; III.

# SENTENCING REFORM ACT
## Same Criminal Conduct

***State v. Edwards***, 45 Wn.App. 378 (1986)

Defendant was convicted of kidnapping for abducting victim in her car and assault for waving gun at another person who approached victim's car during the kidnapping; held: the offenses encompassed the same criminal conduct as they were intimately related and there was no substantial change in the nature of the criminal objective, thus they count as one crime in computing criminal history, RCW 9.94A.400(1)(a); *overruled, in part*, *State v. Dunaway*, 109 Wn.2d 207 (1987); analysis applies to crimes committed before 26 July 1987, *State v. Farmer*, 116 Wn.2d 414 (1991); *cf.*: *State v. Curran*, 116 Wn.2d 174, 186 (1991); *see:* *State v. Taylor*, 90 Wn.App. 312, 320-2 (1998), *State v. Saunders*, 120 Wn.App. 800, 824-25 (2004); I.

***State v. Rienks***, 46 Wn.App. 537 (1987)

Crimes may encompass same criminal conduct if committed as part of recognizable plan and were committed with no substantial change in nature of criminal objective, even if committed against different victims, *State v. Edwards*, 45 Wn.App. 378 (1986), *overruled, in part*, *State v. Dunaway*, 109 Wn.2d 207 (1987), *State v. Taylor*, 90 Wn.App. 312, 320-2 (1998); I.

***State v. Dunaway***, 109 Wn.2d 207 (1987)

Convictions of crimes involving multiple victims do not constitute the same criminal conduct, and are to be treated separately, overruling, in part, *State v. Edwards*, 45 Wn.App. 378 (1986), *see:* *State v. Baldwin*, 150 Wn.2d 448, 457 (2003), and *reversing*, in part, *State v. Franklin*, 46 Wn.App. 84 (1986), *reversing State v. Green*, 46 Wn.Ap. 92 (1986); test to determine if there is different criminal conduct is objective, *i.e.*, if criminal intent changed from one crime to the next, considering whether one crime furthered the other, *State v. Wright*, 183 Wn.App. 719, 732-35 (2014), and whether the time and place were the same, RCW 9.94A.400(1)(a) [1987 amendments], *State v. Burns*, 114 Wn.2d 314 (1990), *State v. Dunbar*, 59 Wn.App. 447 (1990), *State v. Baldwin*, 63 Wn.App. 303 (1991), *State v. Taylor*, 90 Wn.App. 312, 320-2 (1998), *State v. Morris*, 123 Wn.App. 467, 475-77 (2004), *overruled, on other grounds*, *State v. Cromwell*, 157 Wn.2d 529 (2006), *cf.: State v. Hatt*, 11 Wn.App.2d 113 (2019); thus, kidnapping to commit a robbery is one crime for sentencing purposes, robbery and then attempted murder of the victim are two crimes, *State v. Knight*, 176 Wn.App. 936, 959-63 (2013).

***State v. Collins***, 110 Wn.2d 253 (1988)

Burglary followed by assault and rape on residents encompass the same criminal conduct, RCW 9.94A.400(1)(a), as they were committed in an effort to accomplish a single criminal objective; III.

***State v. Briggs***, 55 Wn.App. 44 (1989)

Rape and robbery of the same victim are separate offenses and thus do not constitute the same criminal conduct, *State v. Dunaway*, 109 Wn.2d 207 (1987); *accord*: *State v. Stearns*, 61 Wn.App. 224 (1991); I.

***State v. Thompson***, 55 Wn.App. 888 (1989)

Felon in possession of firearm and assault do not encompass same criminal conduct, as they involve different mental states, and time and place of crimes, while overlapping, were not same; joinder of offenses is not relevant factor in determining whether offenses constitute same criminal conduct; *accord*: *State v. Becker*, 59 Wn.App. 848 (1990); I.

***State v. Burns***, 114 Wn.2d 314 (1990)

Defendant sells drugs to undercover officer, is found with more drugs in his possession, is convicted of delivery and possession with intent to deliver, which trial court finds did not encompass same criminal conduct, and thus counted them as separate crimes in computing criminal history; held: the criminal objective of each crime was realized independently of the other; criminal intent, as objectively viewed, changed from one crime to the other, *State v. Dunaway*, 109 Wn.2d 207 (1987), affirming, in part, *State v. Burns*, 53 Wn.App. 849 (1989); *see*: *State v. Rodriguez*, 61 Wn.App. 812 (1991), *State v. Williams*, 85 Wn.App. 508 (1997); *accord: State v. Baldwin*, 63 Wn.App. 303 (1991), *State v. Knutson*, 64 Wn.App. 76 (1991), *State v. Fisher*, 74 Wn.App. 804, 818-20 (1994), *State v. Maxfield*, 125 Wn.2d 378, 401-4 (1994), *rev'd, on other grounds, Pers. Restraint of Maxfield*, 133 Wn.2d 332 (1997), *State v. Soper*, 135 Wn.App. 89, 103-05 (2006), *State v. Walker*, 143 Wn.App. 880, 890-93 (2008), *State v. Knight*, 176 Wn.App. 936, 959-63 (2013), *State v. Polk*, 187 Wn.App. 380, 395-97 (2015), *cf.: State v. Casarez*, 123 Wn.2d 42 (1993), *State v. Porter*, 133 Wn.2d 177 (1997), *State v. Miller*, 92 Wn.App. 693, 706-9 (1998); 9-0.

***State v. Elliott***, 114 Wn.2d 6 (1990)

Two counts of promoting prostitution 2° of two women over two separate time periods at two different locations are separate offenses, and was thus not the same criminal conduct, *State v. Dunaway*, 109 Wn.2d 207 (1987); trial court has some discretion in determining whether offenses are the same criminal conduct for purposes of the offender score, *State v. Embry*, 171 Wn.App. 714, 764-65 (2012), *State v. Aldana Graciano*, 176 Wn.2d 531 (2013), *State v. Kloepper*, 179 Wn.App. 343, 356-58 (2014); 9-0.

***State v. Davison***, 56 Wn.App. 554 (1990)

Defendant enters residence without permission, assaults resident and guest, pleads guilty to assault 2° and burglary 1°, receives exceptional sentence; held: not abuse of discretion for trial court to find that the crimes did not arise from same criminal conduct, as there were multiple victims, *State v. Dunaway*, 109 Wn.2d 207, 215 (1987), *State v. Davis*, 90 Wn.App. 777, 782-5 (1998), and both victims were the focus of the prosecutor's charging scheme, *distinguishing State v. Collicott*, 112 Wn.2d 399 (1989); I.

***State v. Lewis***, 115 Wn.2d 294 (1990)

Three drug deliveries to same informant on three different dates in same place do not encompass same criminal conduct and are thus part of criminal history, *State v. Boze*, 47 Wn.App. 477 (1987), *State v. Henderson*, 64 Wn.App. 339, 343-4 (1992) (drug sales separated by less than one hour not same criminal conduct), *see also*: *State v. Rodriguez*, 61 Wn.App. 812 (1991), *cf.: State v. Porter*, 133 Wn.2d 177 (1997), *State v. Miller*, 92 Wn.App. 693, 706-9 (1998); prosecutor's discretion to file multiple counts and thereby effectively set sentence range does not usurp legislative and judicial powers; *see: State v. Hortman*, 76 Wn.App. 454, 459-60 (1994); 9-0.

***State v. Dunbar***, 59 Wn.App. 447 (1990)

Defendant breaks into former girlfriend's home and kidnaps her, trial court sentences defendant on both, finding the crimes were not the same course of conduct; held: because the burglary furthered the kidnapping, the two crimes encompassed the same criminal conduct, *State v. Dunaway*, 109 Wn.2d 207 (1987), *cf.: State v. Latham,* 3 Wn.App.2d 468 , (2018), as abduction occurred at the same time and place as the burglary, *State v. Taylor*, 90 Wn.App. 312, 320-2 (1998); burglary anti-merger statute, RCW 9A.52.050 does not impact SRA; 2-1, I.

***State v. Longuskie***, 59 Wn.App. 838 (1990)

Kidnapping 1° and child molestation 3° constitute same course of criminal conduct where the molestation was the objective intent and the kidnap furthered the criminal objective and crimes were committed at the same time and place, *State v. Dunaway*, 109 Wn.2d 207 (1987), *State v. Rattana Keo Phuong*, 174 Wn.App. 494, 546-48 (2013); III.

***State v. Becker***, 59 Wn.App. 848 (1990)

Prior attempted robbery 2° counts as two points since attempts are treated the same as a completed crime, former RCW 9.94A.360(5) [RCW 9.94A.525 (2013)], *State v. Ashley*, 187 Wn.App. 908 (2015), *aff'd, on other grounds*, 186 Wn.2d 32 (2016), and is subject to the violent offense doubling provisions of former RCW 9.94A.360(9), *see: State v. Knight*, 134 Wn.App. 103, 106-09 (2006), *aff'd, on other grounds*, 162 Wn.2d 806 (2008); manslaughter and unlawful possession of firearm by a felon do not encompass the same criminal conduct, as objective intent of each crime is different, *see* : *State v. Thompson*, 55 Wn.App. 888 (1989); I.

***State v. Curran***, 116 Wn.2d 174 (1991)

In vehicular homicide case, deaths of two people in the same vehicle is the same criminal conduct, RCW 9.94A.400(1)(a), *State v. Edwards*, 45 Wn.App. 378 (1986); 9-0.

***State v. Farmer***, 116 Wn.2d 414 (1991)

Statutory definition of "same criminal conduct", RCW 9.94A.400(1)(a), applies only to crimes committed after 26 July 1987, *State v. Dunaway*, 109 Wn.2d 207, 216 (1987); *cf.: State v. Curran*, 116 Wn.2d 174, 186 (1991); applying *State v. Edwards*, 45 Wn.App. 378 (1986) analysis, patronizing juvenile prostitute and photographing him do not constitute same criminal conduct where crimes occurred before 26 July 1987; 9-0.

***State v. Rodriguez***, 61 Wn.App. 812 (1991)

Defendant is convicted of possession with intent to deliver cocaine and heroin for having both drugs on his person simultaneously; held: absent evidence defendant intended to deliver one or more controlled substances in two different transactions, then two counts constitute the same criminal conduct, RCW 9.94.400(1)(a); *accord: State v. Casarez*, 123 Wn.2d 42 (1993)(delivery of 2 drugs in same transaction is same criminal conduct), *State v. Williams*, 135 Wn.2d 365 (1998), *State v. Miller*, 92 Wn.App. 693, 706-9 (1998), *State v. Haddock*, 141 Wn.App. 103 (2000); state may appeal miscalculation of standard range, RAP 2.2(b), even if sentence imposed falls within standard range under both state and defense theories, *State v. Brown*, 145 Wn.App. 62, 78 (2008); III.

***State v. Baldwin***, 63 Wn.App. 303 (1991)

Defendant aids undercover officer in buying drugs, officer gives defendant drugs, defendant is convicted of delivery and possession, court determines offenses are not the same criminal conduct for purposes of calculating offender score; held: delivery and possession have separate criminal intents, *State v. Dunaway*, 109 Wn.2d 207, 215 (1987), RCW 9.94A.400(1)(a), *State v. Burns*, 114 Wn.2d 314 (1990), *State v. Polk*, 187 Wn.App. 380, 395-97 (2015), thus not same criminal conduct; I.

***State v. Knutson***, 64 Wn.App. 76 (1991)

Taking sexually explicit photographs of minors on different occasions, resulting in separate counts of sexual exploitation of minor, RCW 9.68A.040 and possession of child pornography, RCW 9.68.050, for each minor and each occasion is not multiplicitous, *State v. Root*, 141 Wn.2d 701 (2000), and is not the same criminal conduct, *State v. Burns*, 114 Wn.2d 314 (1990); I.

***State v. Collicott***, 118 Wn.2d 649 (1992)

Burglary 1°, rape 1° and kidnap 1° need not encompass same criminal conduct even though they may share elements; Supreme Court withdraws opinion in *State v. Collicott*, 112 Wn.2d 399 (1989), holding that *State v. Dunaway*, 109 Wn.2d 207 (1987) analysis will be applied; burglary antimerger statute, RCW 9A.52.050, does not conflict with SRA; 9-0 [remainder of opinion is joined by only 4 justices].

***State v. Lessley***, 118 Wn.2d 773 (1992)

Defendant breaks into former girlfriend's home with weapon, kidnaps her and her mother, pleads guilty to burglary 1° and kidnap 2°, trial court finds crimes were not same course of conduct; held: objective intent of burglary was complete when defendant broke in with weapon, objective intent changed when he moved to kidnapping, and thus, under *State v. Dunaway*, 109 Wn.2d 207, 215 (1987) test, burglary and kidnapping were not same criminal conduct, *State v. Latham*, 3 Wn.App.2d 468 (2018); further, same time and place element is unmet and there were multiple victims, *State v. Canter*, 17 Wn.App.2d 728 (2021), *see: State v. Collicott*, 118 Wn.2d 649, 667-8 (1992); burglary antimerger statute, RCW 9A.52.050, gives sentencing judge discretion to punish for burglary, even where it and an additional crime encompass same criminal conduct *[dictum]*, *State v. Kisor*, 68 Wn.App. 610 (1993), *State v. Larry*, 108 Wn.App. 894, 916-17 (2001), *State v. Williams*, 176 Wn.App. 138 (2013), 181 Wn.2d 795 (2014), *State v. Knight*, 176 Wn.App. 936, 962-63 (2013), *see: State v. Roose*, 90 Wn.App.

513 (1998), *State v. Davis*, 90 Wn.App. 777, 783-5 (1998); *affirms* *State v. Lessley*, 59 Wn.App. 461 (1990); 9-0.

***State v. Danis***, 64 Wn.App. 814 (1992)

In vehicular assault or vehicular homicide, statute which provides that multiple victims who occupy the same vehicle result in the offense encompassing the same criminal conduct, RCW 9.94A.400(1)(a), does not violate equal protection of a defendant who kills or injures two pedestrians; I.

***State v. Garza-Villarreal***, 123 Wn.2d 42 (1993)

Delivery of cocaine and heroin to same person at same time constitutes same criminal conduct, RCW 9.94A.400(1), *State v. Porter*, 133 Wn.2d 177 (1993), *State v. Burns*, 114 Wn.2d 314, 318-20 (1990); *cf.: State v. Lewis*, 115 Wn.2d 294 (1990), *State v. Maxfield*, 125 Wn.2d 378, 401-4 (1994), *rev'd, on other grounds, Pers. Restraint of Maxfield*, 133 Wn.2d 332 (1997), *State v. Bickle*, 153 Wn.App. 222 (2009); *affirms* *State v. Casarez*, 64 Wn.App. 910 (1992); *cf.: State v. Vike*, 125 Wn.2d 407 (1995), *State v. Vanoli*, 86 Wn.App. 643, 648-52 (1997), *State v. Soper*, 135 Wn.App. 89, 103-05 (2006), *see: State v. Williams*, 85 Wn.App. 508 (1997); 8-0.

***State v. Walden***, 69 Wn.App. 183 (1993)

Defendant forces victim to masturbate and perform fellatio (count 1: rape 2°) and then attempts anal intercourse (count 2: attempted rape 2°), trial court finds separate criminal conduct, RCW 9.94A.400(1)(a); held: abuse of discretion, since, when viewed objectively, criminal intent was the same, same victim, same place, nearly at the same time, *State v. Anderson*, 72 Wn.App. 453, 463-6 (1994), *State v. Dolen*, 83 Wn.App. 361 (1996), *State v. Porter*, 133 Wn.2d 177 (1997), *State v. Vanoli*, 86 Wn.App. 643, 649-52 (1997), *State v. Palmer*, 95 Wn.App. 187 (1999), *State v. Tili*, 139 Wn.2d 107, 119-25 (1999), *State v. Rattana Keo Phuong*, 174 Wn.App. 494, 546-48 (2013), *cf.: State v. Polk*, 187 Wn.App. 380 (2014), *but see: State v. Grantham*, 84 Wn.App. 854 (1997), *State v. Lopez*, 142 Wn.App. 341, 351-53 (2007), *cf.: State v. Price*, 103 Wn.App. 845 (2000), *State v. Garnica*, 105 Wn.App. 762, 767 (2001), *State v. French*, 157 Wn.2d 593, 612-14 (2006), *State v. Mutch*, 171 Wn.2d 646, 653-56 (2011), *State v. Mehrabian*, 175 Wn.App. 678, 708-11 (2013), *State v. Kloepper*, 179 Wn.App. 343, 356-58 (2014); I.

***Pers. Restraint of Holmes***, 69 Wn.App. 282 (1993)

Defendant is sentenced in two counties for a crime spree, first sentencing court fails to determine whether offenses encompassed same criminal conduct; held: absent an express finding regarding whether offenses encompassed same criminal conduct in first sentencing court, second sentencing court must so determine; court cannot impose two exceptional sentences (below the standard range, but to run consecutively) for one aggravating factor, at 293, *see: State v. Quigg*, 72 Wn.App. 828, 845 (1994); III.

***State v. Anderson***, 72 Wn.App. 453, 463-6 (1994)

Assaulting guard while attempting to escape encompasses same criminal conduct, since defendant's intent was the same from one offense to the other: a desire to escape, *State v. Taylor*,

90 Wn.App. 312, 320-2 (1998), *State v. Miller*, 92 Wn.App. 693, 706-9 (1998), *see:* *State v. Walden*, 69 Wn.App. 183, 187-8 (1993); consecutive sentences for two or more current offenses is an exceptional sentence, RCW 9.94A.400(1)(a), 9.94A.120(15); I.

***State v. Maxfield***, 125 Wn.2d 378, 401-4 (1994), *aff'd,* 153 Wn.2d 765 (2005), *rev'd, on other grounds, Pers. Restraint of Maxfield*, 133 Wn.2d 332 (1997)

Manufacturing marijuana and possession with intent to deliver involve different objectives and intent, thus trial court did not abuse discretion in refusing to treat the two crimes as the same criminal conduct, *State v. Burns*, 114 Wn.2d 314 (1990), *distinguishing* *State v. Garza-Villareal*, 123 Wn.2d 42, 46 (1993), *State v. Porter*, 130 Wn.2d 177 (1997), *accord:* *State v. Vanoli*, 86 Wn.App. 643, 648-52 (1997), *State v. Freeman*, 118 Wn.App. 365, 377-79 (2003), *aff'd,* 153 Wn.2d 765 (2005), *State v. Soper*, 135 Wn.App. 89, 103-05 (2006), *State v. Walker*, 143 Wn.App. 880, 890-93 (2008); *cf.:* *State v. Bickle*, 153 Wn.App. 222 (2009); 6-3.

***State v. Vike***, 125 Wn.2d 407 (1994)

Simultaneous possession of two different controlled substances encompasses the same criminal conduct for sentencing purposes, *State v. Garza-Villarreal*, 123 Wn.2d 42 (1993), *State v. Porter*, 133 Wn.2d 177 (1997), *State v. Williams*, 135 Wn.2d 365 (1998), *see:* *State v. Haddock*, 141 Wn.2d 103 (2000), *State v. Bickle*, 153 Wn.App. 222 (2009), *reversing State v. Vike*, 66 Wn.App. 631 (1992), 9-0.

***State v. Flake***, 76 Wn.App. 174 (1994)

Vehicular assault and hit and run are not the same criminal conduct, as objective purpose of running from accident scene has no relation to the vehicular assault, did not further the vehicular assault, were not part of a scheme or plan, and did not occur simultaneously, at 179-81, *State v. Lessley*, 118 Wn.2d 773, 778 (1992); I.

***State v. McCraw***, 127 Wn.2d 281 (1995)

Trial court has discretion to treat prior convictions served concurrently as one offense even if prior sentencing court treated prior offenses as separate offenses not encompassing same criminal conduct, former RCW 9.94A.360(6)(a) [RCW 9.94A.525 (2013)], *State v. Lara*, 66 Wn.App. 927 (1992), *State v. Wright*, 76 Wn.App. 811 (1995), *State v. Reinhart*, 77 Wn.App. 454 (1995), *see:* *State v. Mehaffey*, 125 Wn.App. 595, 599-601 (2005); effectively overrules *State v. Blakey*, 61 Wn.App. 595 (1991); 6-3.

***State v. Calvert***, 79 Wn.App. 569 (1995)

Trial court's determination that presentation of two forged checks on the same day as part of the same scheme encompasses the same criminal conduct to determine offender score, *State v. Garza-Villarreal*, 123 Wn.2d 42, 46 (1993), is not an abuse of discretion, *State v. Maxfield*, 125 Wn.2d 378, 402 (1994), *rev'd, on other grounds, Pers. Restraint of Maxfield*, 133 Wn.2d 332 (1997), *State v. Porter*, 133 Wn.2d 177 (1997), *cf.:* *State v. Young*, 92 Wn.App. 235, 239-43 (1999); III.

***State v. Grantham***, 84 Wn.App. 854 (1997)

Defendant anally rapes victim, later after argument orally rapes victim, trial court finds two acts of rape did not constitute the same criminal conduct; held: while the distinct methods used to accomplish each rape does not alone prove different intents, trial court's finding that time, threats and new force between the two rapes established a new objective intent, thus trial court did not abuse discretion, *State v. Lopez*, 142 Wn.App. 341, 351-53 (2007), *State v. Mehrabian*, 175 Wn.App. 678, 708-11 (2013), *State v. Kloepper*, 179 Wn.App. 343, 356-58 (2014), distinguishing *State v. Walden*, 69 Wn.App. 183, 188 (1993), *see also: State v. Porter*, 133 Wn.2d 177 (1997), *State v. Palmer*, 95 Wn.App. 187 (1999), *State v. Tili*, 139 Wn.2d 107, 119-25 (1999), *Pers. Restraint of Rangel*, 99 Wn.App. 596, 598-600 (2000), *State v. Price*, 103 Wn.App. 845 (2000), *State v. Garnica*, 105 Wn.App. 762, 767 (2001), *State v. French*, 157 Wn.2d 593, 612-14 (2006), *State v. Mutch*, 171 Wn.2d 646, 653-56 (2011); II.

***State v. Porter***, 133 Wn.2d 177 (1997)

Defendant sells amphetamines to undercover detective who immediately asks for and receives marijuana, trial court treats deliveries as separate criminal conduct; held: back-to-back uninterrupted drug sales, while not "simultaneous," occur in a continuing, uninterrupted sequence of conduct as part of a recognizable scheme to sell drugs, thus defendant's intent, objectively viewed, remains the same, thus the counts must be sentenced as the same criminal conduct, *State v. Garza-Villarreal*, 123 Wn.2d 42, 49 (1993), *State v. Williams*, 135 Wn.2d 365 (1998), *State v. Deharo*, 136 Wn.2d 856 (1998), *see: State v. Haddock*, 141 Wn.2d 103 (2000), distinguishing *State v. Maxfield*, 125 Wn.2d 378 (1994), *rev'd, on other grounds, Pers. Restraint of Maxfield*, 133 Wn.2d 332 (1997), *State v. Burns*, 114 Wn.2d 314 (1990), *State v. Lewis*, 115 Wn.2d 294 (1990), *State v. Vike*, 125 Wn.2d 407, 411 n.3 (1994), *State v. Bickle*, 153 Wn.App. 222 (2009), *but see: State v. Vanoli*, 86 Wn.App. 643, 648-52 (1997), *cf.: State v. Fisher*, 139 Wn.App. 578, 582-85 (2007), *State v. Soper*, 135 Wn.App. 89, 100-05 (2006); 9-0.

***State v. Taylor***, 90 Wn.App. 312, 320-2 (1998)

Assault and kidnapping of same victim, where the objective intent of both was to abduct by the use of a gun and to persuade victim not to resist the abduction, constitutes the same criminal conduct, *State v. Dunaway*, 109 Wn.2d 207 (1987), *State v. Rienks*, 46 Wn.App. 537 (1987), *State v. Rattana Keo Phuong*, 174 Wn.App. 494, 546-48 (2013), *cf.: State v. Latham*, 3 Wn.App.2d 468 (2018), thus defendant is entitled to have the two offenses counted as one crime, RCW 9.94A.400(1)(a); II.

***State v. Roose***, 90 Wn.App. 513 (1998)

Theft of firearms statute, RCW 9A.56.300(3), which states that each firearm taken is a separate offense does not mandate that sentencing court treat each firearm as a separate current offense even if the encompass the same criminal conduct, distinguishing *dictum* in *State v. Lessley*, 118 Wn.2d 773, 778 (1992), *see: State v. Smith*, 99 Wn.App. 510 (1999); II.

***State v. Davis***, 90 Wn.App. 777, 782-5 (1998)

Defendant enters apartment, is ordered to leave, points gun at tenant, visitor threatens to call police, defendant points gun at visitor, is convicted of burglary 1° and two counts of assault, trial court finds assaults furthered the burglary and thus were the same criminal conduct, state

appeals; held: trial court reasonably concluded that assault on tenant was the same conduct as the burglary, however the assault on the visitor could not have been the same criminal conduct, as "two crimes cannot be the same criminal conduct if one involves two victims and the other only involves one," *State v. Davison*, 56 Wn.App. 554 (1990), *see: State v. Lessley*, 118 Wn.2d 773, 777 (1992); trial court has discretion whether or not to apply burglary anti-merger statute, RCW 9A.52.050, *see: Lessley, supra.*, at 780-1, *State v. Kisor*, 68 Wn.App. 610, 618 (1993), *State v. Larry*, 108 Wn.App. 894, 915-17 (2001), *State v. Williams*, 176 Wn.App. 138 (2013), 181 Wn.2d 795 (2015); I.

***State v. Deharo***, 136 Wn.2d 856 (1998)

Defendant is observed selling drugs, is arrested and found with six bindles, is convicted of conspiracy to deliver and possession with intent to deliver, trial court sentences as separate conduct; held: objective intent of defendant being the same, *i.e.*, possessing drugs was the substantial step used to prove the conspiracy and both crimes involved the same drugs, the two crimes encompassed the same criminal conduct, *State v. Porter*, 133 Wn.2d 177, 181 (1997); *per curiam.*

***State v. Worl***, 91 Wn.App. 88 (1998)

Additional evidence may be taken at a resentencing hearing following reversal and remand, *State v. Stewart*, 72 Wn.App. 885, 891 (1994), *aff'd*, 125 Wn.2d 893 (1995); where crimes are determined to be within the same criminal conduct, and the court determines that there are aggravating factors which apply to both offenses, then the sentencing judge may depart from the sentence range and run the sentences consecutive, RCW 9.94A.400(1)(a), *cf.: State v. McClure*, 64 Wn.App. 528, 534 (1992), *Pers. Restraint of Delgado*, 149 Wn.App. 223 (2009); III.

***State v. Miller***, 92 Wn.App. 693, 706-9 (1998)

Defendant wrestles with officer, attempts to take gun, is convicted of assault and attempted theft of firearm, trial court finds separate conduct; held: offenses involved same victim, were committed at same time and place, sole issue was whether they required same criminal intent, *State v. Garza-Villarreal*, 123 Wn.2d 42, 46 (1993); here, the assault and attempted theft were "intimately related," defendant could not have taken the gun without assaulting officer, thus offenses encompassed same criminal conduct, *State v. Anderson*, 72 Wn.App. 453, 464 (1994), *State v. Rattana Keo Phuong*, 174 Wn.App. 494, 546-48 (2013), *see also: State v. Morris*, 123 Wn.App. 467, 475-77 (2004), *overruled, on other grounds, State v. Cromwell*, 157 Wn.2d 529 (2006), *cf.: State v. Walker*, 143 Wn.App. 880, 890-93 (2008); II.

***State v. Tili***, 139 Wn.2d 107, 119-25 (1999)

Three acts of rape charged separately for digital penetration of two orifices and penile penetration within two minutes is the same criminal conduct, *State v. Walden*, 69 Wn.App. 183 (1993), *State v. Garnica*, 105 Wn.App. 762, 767 (2001), *distinguishing State v. Grantham*, 84 Wn.App. 854 (1997), *cf.: State v. Soonalole*, 99 Wn.App. 207 (2000), *State v. Price*, 103 Wn.App. 845 (2000), *State v. French*, 157 Wn.2d 593, 612-14 (2006), *State v. Lopez*, 142 Wn.App. 341, 351-53 (2007), *State v. Mutch*, 171 Wn.2d 646, 653-56 (2011), *State v.*

*Mehrabian*, 175 Wn.App. 678, 708-11 (2013); apply same criminal conduct analysis to serious violent offenses "arising from separate and distinct criminal conduct," RCW 9.94A.400(1)(b), *Pers. Restraint of Rangel*, 99 Wn.App. 596 (2000); a separately charged assault arising from the same evidence as the rapes merges and may not be counted in offender score for the rapes, but may be counted in offender score for a burglary with which the assault does not merge; 9-0.

***State v. Hollis***, 93 Wn.App. 804, 816-19 (1999)

Involving a minor in a drug transaction, RCW 69.50.401(f), [recodified RCW 69.50.4015 (2003)], and delivery of drugs at the same time do not constitute same criminal conduct, as victim of delivery is the public, *State v. Garza-Villarreal*, 123 Wn.2d 42, 47 (1993), and victim of involving a minor is the juvenile, *State v. Vanoli*, 86 Wn.App. 643, 651-52 (1997); I.

***State v. Palmer***, 95 Wn.App. 187 (1999)

Defendant rapes victim twice in same place, one immediately after the other, court finds it was not same criminal conduct; held: trial court abused discretion, as objective criminal intent did not change between rapes, *State v. Walden*, 69 Wn.App. 183, 188 (1993), *State v. Garnica*, 105 Wn.App. 762, 767 (2001), *State v. Rattana Keo Phuong*, 174 Wn.App. 494, 546-48 (2013), distinguishing *State v. Grantham*, 84 Wn.App. 854 (1997), *see: State v. French*, 157 Wn.2d 593, 612-14 (2006), *State v. Lopez*, 142 Wn.App. 341, 351-53 (2007), *State v. Mutch*, 171 Wn.2d 646, 653-56 (2011), *cf.: State v. Mehrabian*, 175 Wn.App. 678, 708-11 (2013), *State v. Kloepper*, 179 Wn.App. 343, 356-58 (2014) ; I.

***State v. Hernandez***, 95 Wn.App. 480 (1999)

Where defendant is convicted of possession of cocaine with intent to deliver and simple possession of methamphetamine, the offenses cannot involve the same criminal conduct, as one crime has a statutory intent element and the other does not; II.

***Pers. Restraint of Rangel***, 99 Wn.App. 596, 598-600 (2000)

Defendant fires into another vehicle which crashes, defendant's vehicle turns back, approaches again, defendant opens fire again at same victims, trial court sentences to consecutive terms; held: because defendant formed new criminal intent before his second act, his crimes were sequential, not simultaneous or continuous, thus his conduct was **separate and distinct**, justifying consecutive sentences, RCW 9.94A.400(1)(b), *State v. Tili*, 139 Wn.2d 107 (1999), *State v. Grantham*, 84 Wn.App. 854 (1997), *State v. Price*, 103 Wn.App. 845 (2000), *State v. Lopez*, 142 Wn.App. 341, 351-53 (2007), *Pers. Restraint of Delgado*, 149 Wn.App. 223 (2009); consecutive sentences for serious violent offenses do not require court to enter findings and conclusions; III.

***State v. Channon***, 105 Wn.App. 869 (2001)

During chase, defendant fires at police officer, drives on, fires again, drives and fires again, is convicted of three counts of assault, court imposes consecutive sentences, RCW 9.94A.400(1)(b), does not make record as to whether or not offenses were same criminal conduct; held: while a finding of same criminal conduct does not require simultaneity of crimes, *State v. Porter*, 133 Wn.2d 177, 182-83 (1997), here the successive assaults at three locations

with three time breaks establish separate criminal conduct, *State v. Price*, 103 Wn.App. 845 (2000), *see: Pers. Restraint of Delgado*, 149 Wn.App. 223 (2009); trial court's calculation of offender score may be treated on appeal as an implicit determination that offenses did not constitute same criminal conduct even without findings on the record, *State v. Anderson*, 92 Wn.App. 54, 62 (1998); II.

***Pers. Restraint of Connick,*** 144 Wn.2d 442 (2001)

At sentencing, DOC report reflects offender score of 9, state's report reflects 6, defense counsel agrees with DOC report, court adopts score of 9; defendant files PRP, claiming out-of-state priors were same criminal conduct; held: because petitioner failed to present sufficient evidence that priors were committed at same time and place and involved same victims, he is not entitled to relief, in light of the fact that counsel at sentencing agreed with the calculation, *but see: State v. Ford*, 137 Wn.2d 472 (1999), *cf.: State v. Bergstrom*, 162 Wn.2d 287 (2007); 8-1.

***State v. Borg***, 145 Wn.2d 329, 336-40 (2001)

Defendant is convicted of six counts of unlawful possession of a firearm, trial court finds same criminal conduct, RCW 9.94A.589(1)(a), concludes that multiple incidents are "more egregious than possessing only one firearm," imposes consecutive sentences; held: where defendant is sentenced for multiple current convictions which are same criminal conduct, an exceptional sentence is not justified solely because those convictions number more than one, must be some extraordinarily serious harm or culpability which would not otherwise be accounted for in determining the presumptive sentencing range, *see: State v. Fisher*, 108 Wn.2d 419, 427-29 (1987), *but see: State v. Tili*, 148 Wn.2d 350 (2003); 9-0.

***State v. Webb***, 112 Wn.App. 618 (2002)

When defendant was sentenced on 1995 priors, court had discretion to count priors as one offense regardless of whether they were the same criminal conduct, upon conviction of 1999 offense defendant argues that he is entitled to have priors counted as a single offense; held: defendant has no "vested right" to application of the former statute, *State v. Sell*, 110 Wn.App. 741 (2002), *State v. McRae*, 96 Wn.App. 298 (1999), distinguishing *State v. Smith*, 144 Wn.2d 665 (2001), *State v. Cruz*, 139 Wn.2d 186 (1999), *State v. T.K.*, 139 Wn.2d 320 (1999); I.

***State v. Ehli***, 115 Wn.App. 556 (2003)

In multiple count child pornography case, possession of photographs of different minors is not the same criminal conduct, as each child is a separate victim even if they are not identified; III.

***State v. Freeman***, 118 Wn.App. 365, 377-79 (2003), *aff'd,* 153 Wn.2d 765 (2005)

Defendant is convicted of robbery 1º and assault 1º for robbing and shooting victim, claims he only shot victim because he did not respond promptly to demand for money, trial court finds separate conduct; held: trial court was not legally bound to accept defendant's self-serving depiction of subjective intent, thus no abuse of discretion; I.

***State v. Saunders***, 120 Wn.App. 800, 824-25 (2004)

Where rape, robbery, kidnap and murder of same victim at same place may have involved same criminal intent, *State v. Vike*, 125 Wn.2d 407, 410 (1994), *State v. Edwards*, 45 Wn.App. 378, 382 (1986), *overruled, on other grounds, State v. Dunaway*, 109 Wn.2d 207 (1987), RCW 9.94A.589(1)(a), failure to argue same criminal conduct is ineffective assistance, *State v. Rattana Keo Phuong*, 174 Wn.App. 494, 546-48 (2013); 2-1, II.

***State v. Morris***, 123 Wn.App. 467, 475-77 (2004), *overruled, on other grounds, State v. Cromwell*, 157 Wn.2d 529 (2006)

Possession of drugs and unlawful possession of a firearm is not the same criminal conduct even if possessing a gun conveniently facilitates or furthers possession of the drugs, *State v. Adame*, 56 Wn.App. 803 (1990), *see: State v. Baldwin*, 63 Wn.App. 303 (1991); "furtherance test" is a factor in determining whether convictions comprised same criminal conduct, but it is not the linchpin, *State v. Dunaway*, 109 Wn.2d 207, 215 (1987), *State v. Vike*, 125 Wn.2d 407, 412 (1994); II.

***State v. Mehaffey***, 125 Wn.App. 595, 599-601 (2005)

Where prior offenses were sentenced on the same day, sentencing court is obliged to exercise discretion and determine independently whether the priors are the same criminal conduct even if they were not previously determined to be same criminal conduct, *State v. Torngren*, 147 Wn.App. 556 (2008), *overruled, on other grounds, State v. Aldana Graciano*, 176 Wn.2d 531 (2013), *see: State v. Lara*, 66 Wn.App. 927, 931-32 (1992); III.

***Pers. Restraint of Markel***, 154 Wn.2d 262, 273-75 (2005)

Determination by trial court that offenses did not constitute same criminal conduct need not be submitted to a jury, distinguishing *Blakely v. Washington*, 159 L.Ed.2d 403 (2004), RCW 9.94A.525(5)(a), because a finding of same criminal conduct can only reduce the sentence range, *State v. McCarthy*, 178 Wn.App. 90, 102-03 (2013); 7-2.

***State v. French***, 157 Wn.2d 593, 612-14 (2006)

Molestation and rape of same victim on several occasions throughout a five-year span are not the same criminal conduct, *State v. Grantham*, 84 Wn.App. 854, (1997), distinguishing *State v. Palmer*, 95 Wn.App. 187, 191-92 (1999); 9-0.

***State v. Stockmyer***, 136 Wn.App. 212 (2006)

Guns found in different rooms in the same house are found in different "places" for purposes of the same criminal conduct test, RCW 9.94A.589(1)(a), *see: State v. Simonson*, 91 Wn.App. 874, 885-86 (1998), *State v. Davis*, 174 Wn.App. 623, 641-44 (2013); II.

***State v. Wilson***, 136 Wn.App. 596, 612-16 (2007)

Defendant enters house, assaults victim, leaves, re-enters and harasses victim, sentencing judge finds same criminal conduct; held: defendant had separate criminal intents for the two acts, *State v. Polk*, 187 Wn.App. 380 (2015), trial court erred; II.

***State v. Varnell***, 162 Wn.2d 165 (2007)

In a single conversation with undercover officer, defendant solicits murder of four people, is convicted of four counts of solicitation to commit murder; held: unit of prosecution for **solicitation**, like conspiracy, criminalizes the act of engaging another to commit a crime, centered on each solicitation regardless of the number of crimes of objects of solicitation, *State v. Bobic*, 140 Wn.2d 250, 260-67 (2000), *State v. Jensen*, 164 Wn.2d 943 (2008), reversing *State v. Varnell*, 132 Wn.App. 441, 452-53 (2006); 7-2.

***State v. Fisher*,** 131 Wn.App. 125, 133-34 (2006)

Two failures to appear four months apart is not the same criminal conduct for two counts of bail jumping, distinguishing *State v. Porter*, 133 Wn.2d 177 (1997); I.

***State v. Lopez***, 142 Wn.App. 341, 351-53 (2007)

Defendant chokes and hits victim, she gets away, he again beats her, she tries to escape, he holds knife to her throat, is convicted of two counts of assault 2º, trial court finds separate criminal conduct; held: trial court properly exercised discretion in finding separate conduct, having found that defendant's intent changed between incidents, crimes were not the same course of conduct as one ended before knife attack occurred in a different room, *State v. Grantham*, 84 Wn.App. 854 (1997), *Pers. Restraint of Rangel*, 99 Wn.App. 596, 598-600 (2000) , *State v. Kloepper*, 179 Wn.App. 343, 356-58 (2014)*but see: State v. Tili*, 138 Wn.2d 107, 119-25 (1999), *State v. Palmer*, 95 Wn.App. 187 (1999), *State v. Walden*, 69 Wn.App. 183 (1993); I.

***State v. Bobenhouse***, 143 Wn.App. 315, 329-30 (2008), 166 Wn.2d 881, 896 (2009)

Error in determining whether current offenses constitute same criminal conduct is harmless where offender score exceeds the maximum and reduction would not impact range; III.

***State v. Walker***, 143 Wn.App. 880, 890-93 (2008)

Theft of trees and trafficking in stolen property of the same trees have different intents and different victims (stealing wood from public and selling it to a party knowing that the thief doesn't have the right to sell it; objective purpose of theft is to deprive, objective criminal purpose of trafficking is to sell or dispose), thus offenses did not constitute same criminal conduct, *State v. Maxfield*, 125 Wn.2d 378, 403 (1994); II.

***State v. Torngren***, 147 Wn.App. 556 (2008)

Sentencing court must determine if priors are same criminal conduct, RCW 9.94A.525(5)(a)(i), *State v. Reinhart*, 77 Wn.App. 454, 459 (1995), *State v. Lara*, 66 Wn.App. 927, 931-32 (1992), *State v. Mehaffey*, 125 Wn.App. 595, 599-601 (2005); III.

***State v. Victoria***, 150 Wn.App. 63 (2009)

Two counts of witness tampering regarding two different witnesses is not the same criminal conduct; I.

***State v. Jackson***, 150 Wn.App. 877, 892 (2009)

Defense must raise issue of prior convictions being same criminal conduct or it's waived, *Pers. Restraint of Shale*, 160 Wn.2d 489, 496 (2007), *State v. Naillieux*, 158 Wn.App. 630, 642 (2010); II.

***State v. Bickle***, 153 Wn.App. 222 (2009)

Trial court finds that manufacturing methamphetamine, possession of methamphetamine, manufacturing marijuana and possession of marijuana are not the same criminal conduct; held: meth charges were separate conduct and not an abuse of discretion because possession of manufacture of meth require separate objective intents: a present intent and a future intent, one need not complete manufacturing process of meth to be convicted, *see: State v. Poling*, 128 Wn.App. 659, 668 (2005), RCW 69.50.101(p); when one manufactures marijuana one must have intent to manufacture and present intent to possess it because possessing marijuana is necessary for its manufacture, thus trial court abused its discretion because marijuana was all at the same address, *but see: State v. Maxfield*, 125 Wn.2d 401-04 (1994), *aff'd*, 153 Wn.2d 765 (2005), *rev'd, on other grounds, Pers. Restraint of Maxfield*, 133 Wn.2d 332 (1997); II.

***State v. McGrew***, 156 Wn.App. 546 (2010)

VUCSA with a firearm sentence enhancement and unlawful possession of a firearm are not the same criminal conduct, as an enhancement is not a crime; II.

***State v. Mutch***, 171 Wn.2d 646, 653-56 (2011)

Defendant rapes victim five times over the course of a night and next morning, sleeps in between, gaps in between each rape support conclusion that defendant objectively formed new criminal intent, thus not same criminal conduct, *State v. Grantham*, 84 Wn.App. 854 (1997), distinguishing *State v. Tili*, 139 Wn.2d 107, 119-25 (1999); trial court is obliged to analyze whether crimes are same criminal conduct where raised, failure to do so is error, but where record is sufficient, appellate court may sustain trial court's decision, *see: State v. Lee*, 12 Wn.App.2d 378 (2020); 9-0.

***State v. Salinas***, 169 Wn.App. 210, 224-25 (2012)

Court should make a finding on same criminal conduct at sentencing, if requested, even if defendant is sentenced as a persistent offender; I.

***State v. Aldana Graciano***, 176 Wn.2d 531 (2013)

Test for appeal of sentencing court's findings regarding same criminal conduct is abuse of discretion, not *de novo*, overruling, in part, *State v. Torngren*, 147 Wn.App. 556 (2008); burden of establishing same criminal conduct is on defense, overruling, in part, *State v. Dolen*, 83 Wn.App. 361 (1996); 6-3.

***State v. Davis***, 174 Wn.App. 623, 641-44 (2013)

Defendant uses pistol to shoot victim, later shoots at victim's last known position with a shotgun, is convicted of attempted murder and assault 2°, court finds same criminal conduct, state cross-appeals; held: appellant bears the burden to prove an abuse of discretion, both

offenses occurred within 50 feet of each other, trial court did not abuse discretion in finding that they occurred at the same place; II.

***State v. Williams***, 176 Wn.App. 138 (2013), 181 Wn.2d 795 (2014)

To determine whether or not two prior offenses are the same criminal conduct, RCW 9.94A.525(5)(a)(i) (2013), sentencing court must apply the same criminal conduct test, *State v. Torngren*, 147 Wn.App. 556, 563 (2008), and cannot apply the burglary anti-merger statute, RCW 9A.52.050 (1975), which only applies to current offenses, *see: State v. Lessley*, 118 Wn.2d 773, 779-82 (1992); 2-1, III.

***State v. Knight***, 176 Wn.App. 936, 959-63 (2013)

Robbery and murder do not share the same criminal intent for offender score purposes, *State v. Dunaway*, 109 Wn.2d 207, 216 (1988); burglary anti-merger statute, RCW 9A.62.050, gives trial court authority to impose separate sentence for burglary and other crimes committed during the burglary regardless of whether the burglary constituted same criminal conduct, *State v. Lessley*, 118 Wn.2d 773, 781-82 (1992); II.

***State v. Kloepper***, 179 Wn.App. 343, 356-58 (2014)

Defendant strikes victim with a metal bar then rapes her, is convicted of assault and rape, trial court finds different intent and imposes consecutive sentences, RCW 9.94A.589(1)(b) (2002); held: while time, place and victim elements of the same criminal conduct test were met, trial court did not abuse discretion by finding that striking victim evinces an intent to injure rather than rape, *cf.:* *State v. Walden*, 69 Wn.App. 183 (1993); 2-1, III.

***State v. Johnson***, 180 Wn.App. 92, 99-105 (2014)

In 2001 King County Superior Court sentences defendant for murder, counting three 1996 drug convictions as same criminal conduct although the sentencing court in 1996 treated the drug convictions as separate criminal conduct, at current attempted robbery sentencing court counts the 1996 drug convictions as separate criminal conduct, on appeal defense maintains sentencing court was estopped from counting prior drug convictions separately; held: a court considering whether multiple prior convictions constitute the same criminal conduct is bound by a same criminal conduct decision of the trial court that convicted the defendant of the prior offenses only where the trial court finding is for current offenses, RCW 9.94A.589(1)(a), but the current sentencing court is not bound by prior sentencing judge's decision that prior offenses were the same criminal conduct, RCW 9.94A.525(5)(a)(i), thus judge sentencing defendant on attempted robbery properly analyzed the drug convictions using same criminal conduct analysis; I.

***State v. Polk***, 187 Wn.App. 380, 395-97 (2015)

Convictions of possession of depictions of a minor engaged in sexually explicit conduct 2°, RCW 9.68A.070, and dealing in depictions 2°, both involving same victims, is not the same criminal conduct because one addresses intent to possess and the other addresses propagation, thus intent of each is different; III.

***State v. Muñoz-Rivera***, 190 Wn.App. 870, 887-90 (2015)

While failure to challenge offender score by arguing that two offenses are the same criminal conduct may be ineffective assistance, here the state had requested an exceptional sentence, the court imposed a standard range sentence, it was strategic for counsel not to challenge the score in fear that the court would agree and then impose a sentence above the range; III.

***State v. Chenoweth***, 185 Wn.2d 218 (2016)

Rape of a child and incest based upon the same act is not the same criminal conduct, *State v. Calle*, 125 Wn.2d 769 (1995), *State v. Smith*, 177 Wn.2d 533, 545-50 (2013), *see: State v. Hatt*, 11 Wn.App.2d 113 (2019); per *State v. Westwood*, 12 Wn. App. 2d 1065 (2020) (unpublished), only applies to child rape and incest, *State v. Bobenhouse*, 166 Wn.2d 881, 896 (2009), *but see: State v. Johnson*, 12 Wn.App.2d 201, 211 (2020), *rev. granted on different issue*, 196 Wn.2d 1001; 5-4.

***State v. Johnson***, 12 Wn.App.2d 201 (2020), *rev. granted on different issue*, 196 Wn.2d 1001

Police post Craigslist advertisement purporting to be a juvenile seeking sex with an adult, defendant responds with explicit desires, agrees to pay, drives to meet poster, is arrested, convicted of attempted rape of a child, attempted commercial sexual abuse of a minor and communication with a minor for immoral purposes, on appeal argues that counsel neglected to argue at sentencing that the offenses are same criminal conduct; held: test: objectively viewed do the crimes involve separate intent, *State v. Chenoweth*, 185 Wn.2d 218, 220 (2016); here, rape requires intent to have intercourse, commercial sexual abuse requires intent to engage in sexual conduct in exchange for something of value, communicating requires intent to communicate with a predatory purpose, thus the three have separate *mens rea*, thus not the same criminal conduct, *but see: State v. Westwood*, 20 Wn.App.2d 582, 591 ¶ 16 (2021), counsel was not ineffective; II.

***State v. Canter***, 17 Wn.App.2d 728 (2021)

Detective poses on-line as the mother of two children seeking sex, defendant responds, is arrested at the place he was to meet the mother and children, is convicted of two counts of attempted child molestation, argues same criminal conduct; held: crimes affecting more than one victim cannot encompass the same criminal conduct, *State v. Lessley*, 118 Wn.2d 773, 777 (1992); I.

***Wooden v. United States***, ___ U.S. ___, 142 S.Ct. 1063, 2121 L.Ed.2d 187 (2022)

Defendant enters a storage facility, steals items from ten different storage units, is convicted of ten counts of burglary, federal court enhances sentence for each burglary; held: ten burglary offenses arising from a single criminal episode did not occur on different occasions and thus count as only one prior conviction for purposes of Armed Career Criminal Act, 18 U.S.C. § 922(g); 9-0.

# SENTENCING REFORM ACT
## Wash*

***State v. Hall***, 45 Wn.App. 766 (1986)

Under former RCW 9.94A.360(12) [RCW 9.94A.525 (2013)], a class C felony is **washed out** if defendant has five consecutive crime-free years anytime following the class C felony in question; I.

***State v. Johnson***, 51 Wn.App. 836 (1988)

A 1964 taking a motor vehicle conviction, which carried a ten year maximum, washes out after five felony free years since it is currently a class C felony, *see also: State v. Wiley*, 124 Wn.2d 679 (1994), *State v. Failey*, 165 Wn.2d 673 (2009); I.

***In re Williams***, 111 Wn.2d 353 (1988)

Where **washed out** priors are improperly considered by trial court, proper remedy is remand for resentencing, not withdrawal of guilty plea; SRA does not violate *ex post facto* clause; state has no burden to establish constitutional validity of prior convictions at sentencing, *overruling State v. Marsh*, 47 Wn.App. 219 (1987); state may thus use Department of Licensing abstracts to prove priors in vehicular homicide case; 8-1.

***State v. Thomas***, 57 Wn.App. 403 (1990)

Prior will **wash out** if more than five years old at time of guilty plea, not sentencing; presentence report stating that Department of Motor Vehicles shows a prior DUI conviction is not proof by a preponderance of the DUI, *State v. Ammons*, 105 Wn.2d 175, 186 (1986); III.

***State v. Weiand***, 66 Wn.App. 29 (1992)

In determining whether **out-of-state felony** is comparable to class B or C felony for purposes of washout, former RCW 9.94A.360(3) [RCW 9.94A.525 (2013)], Washington courts must use Washington elements in effect on date that out-of-state crime was committed; *see also: State v. Cabrera*, 73 Wn.App. 165, 168-9 (1994), *State v. Cameron*, 80 Wn.App. 374 (1996), *State v. McCorkle*, 88 Wn.App. 485 (1997), *aff'd,* 137 Wn.2d 490 (1999), *Pers. Restraint of Canha,* 189 Wn.2d 359 (2017); II.

***State v. Larkin***, 70 Wn.App. 349 (1993)

Where jurisdiction is declined by juvenile court, prior conviction is adult felony for all purposes, including washout after age 23, *see: State v. Sharon*, 100 Wn.2d 230 (1983); I.

***State v. Cameron***, 80 Wn.App. 374 (1996)

A prior federal conspiracy to distribute marijuana conviction is equivalent of Washington class B felony for purposes of washout, former RCW 9.94A.360(2) [RCW 9.94A.525 (2013)], even with prior drug conviction, since Washington's second-offense doubling statute,

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* *See also:* **PERSISTENT OFFENDER**

RCW 69.50.408, would require filing of a criminal information alleging a previous drug conviction, and the feds, in this case, did not treat the conviction as a second offense; II.

***State v. Watkins***, 86 Wn.App. 852 (1997)

Defendant's 1971 class B felony had washed out as he had been "felony-free" for ten years; legislature amended former RCW 9.94A.360(2) in 1995 [RCW 9.94A.525 (2013)] to require that a class B felony wash out only if defendant is "crime-free," trial court counts prior offense in determining offender score; held: amendment to SRA can revive a prior washed out felony, *State v. Wood*, 94 Wn.App. 636, 644-45 (1999), *but see: State v. Cruz*, 139 Wn.2d 186 (1999), *State v. Smith*, 144 Wn.2d 665, 670-75 (2001), *State v. Perry*, 110 Wn.App. 554 (2002), *State v. Dean*, 113 Wn.App. 691 (2002); I.

***State v. Cruz***, 139 Wn.2d 186 (1999)

Washout provisions to SRA apply prospectively only and 1990 amendments do not revive a previously washed out conviction; reverses *State v. Cruz*, 91 Wn.App. 389 (1998); *see also: State v. Aronhalt*, 99 Wn.App. 302 (2000), *accord: State v. Smith*, 144 Wn.2d 665, 670-75 (2001), *State v. Deon*, 113 Wn.App. 691 (2002), *but see: State v. Varga*, 151 Wn.2d 179 (2004), *cf.: State v. Swecker*, 154 Wn.2d 660 (2005); 5-4.

***State v. Hendricks***, 103 Wn.App. 728 (2000)

Prior juvenile offenses that would not have been counted in adult offender score under the law that existed when the juvenile offenses were committed must be counted when the law in effect when the current offense was committed directs that they be counted, RCW 9.94A.345, distinguishing *State v. Cruz*, 139 Wn.2d 186 (1999), *see: State v. Swecker*, 154 Wn.2d 660 (2005), *State v. McDougall*, 132 Wn.App. 609, 613-14 (2006); SRA amendment which "revives" a juvenile prior does not violate substantive due process or *ex post facto* clauses, *see: Pers. Restraint of LaChapelle*, 153 Wn.2d 1 (2004), *State v. Varga*, 151 Wn.2d 179 (2004); II.

***Pers. Restraint of Call***, 144 Wn.2d 315 (2001)

At guilty plea, defendant agrees to offender score containing washed out-of-state convictions, sentence is within range without the out-of-state priors, files PRP; held: because there is no evidence that defendant knowingly agreed to an incorrect offender score or sentence range, he did not invite the error, *cf.: State v. Hahn*, 100 Wn.App. 391, 394-97 (2000) and may raise issue for first time in PRP; 9-0.

***State v. Smith***, 144 Wn.2d 665 (2001)

Previously washed juvenile offenses were not revived by 1997 amendments to RCW 9.94A.030(12)(b), , *see: State v. Cruz*, 139 Wn.2d 186 (1999), *State v. Webb*, 112 Wn.App. 618 (2002), *State v. Dean*, 113 Wn.App. 691 (2002), *Pers. Restraint of Jones*, 121 Wn.App. 859 (2004), *but see: State v. Varga*, 151 Wn.2d 179 (2004), *Pers. Restraint of LaChapelle*, 153 Wn.2d 1 (2004), *State v. McDougall*, 132 Wn.App. 609, 613-14 (2006), *cf.: State v. Swecker*, 154 Wn.2d 660 (2005); reverses *State v. Hendricks*, 103 Wn.App. 728 (2000); 6-3.

***State v. Deman***, 107 Wn.App. 98 (2001)

In **vehicular homicide** case where prior DUIs had washed, they are still available to enhance, RCW 46.61.520(2), distinguishing *State v. Cruz*, 139 Wn.2d 186 (1999); I.

***State v. Perry***, 110 Wn.App. 554 (2002)

Where a juvenile conviction had not yet washed because defendant had not attained 23 years of age, then change in statute before convictions washed is applicable, defendant has no vested or due process right to assume that the convictions would wash, *State v. Cunningham*, 116 Wn.App. 219, 224-26 (2003), *see: Pers. Restraint of Jones*, 121 Wn.App. 859 (2004), *but see: State v. Varga*, 151 Wn.2d 179 (2004), distinguishing *State v. Smith*, 144 Wn.2d 665 (2001), *State v. Cruz*, 139 Wn.2d 186 (1999), *cf.: State v. Swecker*, 154 Wn.2d 660 (2005); III.

***State v. Hern***, 111 Wn.App. 649, 653-56 (2002)

Defendant's priors include attempted robbery 2˚, a class C felony, committed in 1980, paroled in 1983, robbery 2˚ committed 1989, paroled 1990, plus current offense; trial court counts attempted robbery in offender score; held: because defendant was "crime free" between parole in 1990 and current offense, attempted robbery washed, *State v. Cruz*, 139 Wn.2d 186 (1999), *State v. Smith*, 144 Wn.2d 665 (2001), *but see: State v. Varga*, 151 Wn.2d 179 (2004); III.

***State v. Varga***, 151 Wn.2d 179 (2004)

Washout provisions to SRA apply retroactively, 2002 amendments to RCW 9.94A.525 and 9.94A.030 may require courts to revive a previously washed out conviction, *State v. McDougall*, 132 Wn.App. 609, 613-14 (2006), *but see: Pers. Restraint of LaChapelle*, 153 Wn.2d 1 (2004), *distinguishing State v. Cruz*, 139 Wn.2d 186 (1999), *State v. Smith*, 144 Wn.2d 655 (2001); 8-0.

***Pers. Restraint of Higgins***, 120 Wn.App. 159 (2004)

Misdemeanor convictions and confinement on community supervision violations interrupt washout period, former RCW 9.94A.360(2) [now RCW 9.94A.525(2)], *State v. Blair*, 57 Wn.App. 512 (1990), *State v. Smith*, 65 Wn.App. 887 (1992), *State v. Morris*, 150 Wn.App. 927 (2009), *but see: State v. Schwartz*, 194 Wn.2d 432 (2019), *Pers. Restraint of Nichols*, 120 Wn.App. 425 (2004), *State v. Ervin*, 169 Wn.2d 815 (2010), ; III.

***Pers. Restraint of LaChapelle***, 153 Wn.2d 1 (2004)

Washed out juvenile offenses, per *State v. Cruz*, 139 Wn.2d 186, 199 (1999), *State v. Smith*, 133 Wn.2d 665 (2001), may not be counted in calculating offender scores for offenses which occurred before RCW 9.94A.525 (2002) became effective, and are not revived by the 2002 amendment, , *State v. Dean*, 113 Wn.App. 691 (2002), *Pers. Restraint of Jones*, 121 Wn.App. 859 (2004), *see: State v. Varga*, 151 Wn.2d 179 (2004), *State v. McDougall*, 132 Wn.App. 609, 613-14 (2006); 5-4.

***State v. Failey***, 165 Wn.2d 673 (2009)

1974 Washington robbery is not equivalent to a class A felony and thus can and does wash, RCW 9.94A.030(32)(u) (2008); reverses *State v. Failey*, 144 Wn.App. 132 (2008); 9-0.

***State v. Ervin***, 169 Wn.2d 815 (2010)

Less than five years after release from a class C felony conviction, defendant is convicted of a misdemeanor, receives a suspended sentence part of which is later revoked, six years after the misdemeanor conviction defendant is convicted of a class C felony, trial court finds that incarceration on probation violation interrupts wash so prior felony counts in offender score; held: because defendant did not commit a new crime for five years and was not confined pursuant to a felony conviction during that period, his prior class C felony washed, interpreting RCW 9.94A.525(2)(c), *but see: State v. Gauthier*, 189 Wn.App. 30 (2015); reverses *State v. Ervin*, 149 Wn.App. 561 (2006); 9-0.

***State v. Moeurn***, 170 Wn.2d 169 (2010)

Attempted assault 2° is a class C felony subject to the five-year washout rule, RCW 9.94A.525(2) (2006), and is not treated as a completed offense, RCW 9.94A.525(4); 9-0.

***State v. Cross***, 156 Wn.App. 568, 586-90 (2010)

An uncertified DISCIS printout is sufficiently reliable to prove misdemeanor convictions defeating a claim that a prior felony washed out, *State v. Labarbera*, 128 Wn.App. 343 (2005), *State v. Jones*, 159 2231 (2007); 2-1, II.

***State v. Mehrabian***, 175 Wn.App. 678, 708-11 (2013)

Defendant is convicted of theft 1° in 1992, has no convictions until current crime but in 2003 is incarcerated for willful failure to pay legal financial obligations, trial court at sentencing concludes that prior theft washed, RCW 9.94A.525(2)(b) (2011), because he spent ten crime-free years; held: incarceration for a probation violation constitutes confinement pursuant to a felony precluding washout, *State v. Blair*, 57 Wn.App. 512, 515-17 (1990), *State v. Perencevic*, 54 Wn.App. 585, 589 (1989), *see: State v. Gauthier*, 189 Wn.App. 30 (2015), *but see: State v. Schwartz*, 194 Wn.2d 432 (2019); I.

***State v. Gauthier***, 189 Wn.App. 30, 40-42 (2015)

Defendant is arrested and charged with rape within five years of release of his last class C felony conviction, is convicted after more than five years, claims that under washout statute, RCW 9.94A.525(2)(c) (2013), he was "in the community" while incarcerated pending trial on the new offense; held: an offender score does not go down while in custody pending trial on a new felony, distinguishing *State v. Ervin*, 169 Wn.2d 815, 826 (2010); I.

***State v. Crocker***, 196 Wn.App. 730 (2016)

To determine if a prior conviction prevents an earlier conviction from washing out, RCW 9.94A.525(2)(c) (2013), sentencing court must determine comparability, *State v. Marquette*, 6 Wn.App.2d 700 (2018); a civil infraction in Washington is not a crime for purposes of washout even if defendant was convicted of the comparable matter in another state where it is a crime; II.

***State v. Schmitt***, 196 Wn.App. 739 (2016)

While federal bank robbery is not comparable to a Washington offense, *Pers. Restraint of Lavery*, 154 Wn.2d 249 (2005), it remains "any crime" for purposes of preventing a prior from

washing out, RCW. 9.94A.525(2)(c); the fact that federal bank robbery is not comparable does not mean that defendant, while in federal prison, was "in the community; II.

***State v. Marquette***, 6 Wn.App.2d 700 (2018)

An out-of-state conviction that is not comparable to a Washington felony or misdemeanor does not interrupt a wash period, *State v. Crocker*, 196 Wn.App. 730 (2016), 9.94A.525(2)(c) (2017); I.

***State v. Schwartz***, 194 Wn.2d 432 (2019)

Serving jail time for failure to pay a financial obligation imposed at sentencing does not constitute "confinement…pursuant to a felony conviction" under RCW 9.94A.525(c) and thus does not interrupt the wash period; affirms *State v. Schwartz*, 6 Wn.App.2d 151, 160 (2018); 5-4.

***State v. Haggard,*** 195 Wn.2d 544 (2020)

A misdemeanor that is dismissed after completion of a **deferred sentence**, RCW 3.50.320, RCW 3.66.067, is not the equivalent of vacation, RCW 9.96.060(1)–(2), and thus will interrupt the five-year wash period, RCW 9.94A.525(2)(c) (2017), for purposes of calculating offender score, *see: In re Carrier*, 173 Wn.2d 791 (2012), *State v. Moore*, 75 Wn.App. 166, 170-1 (1994); if defendant had moved to vacate the dismissed misdemeanor conviction, RCW 9.96.060 (2020), then it would have washed, *cf.: State v. Conaway,* 199 Wn.2d 742 (2022); affirms *State v. Haggard*, 9 Wn.App.2d 98 (2019); 5-4

# SEX OFFENSES*

***State v. Kalamarski***, 27 Wn.App. 787 (1980)

Consent defense, court properly excluded prior consensual intercourse 18 months prior to alleged rape as within court's discretion; remoteness is within court's discretion, *State v. Gregory*,158 Wn.2d 759, 781-801 (2006); victim's psychotherapy four years earlier was collateral and thus within court's discretion to exclude; *see:* dissent re: application of rape shield statute, RCW 9A.44.020; III.

***State v. Fleming***, 27 Wn.App. 952 (1980)

"Hue and cry" of the victim, *i.e.*, fact of complaint, is admissible as long as it does not go into particulars, including identity of defendant, *State v. Martinez*, 196 Wn.2d 605 (2020); I.

***State v. Demos***, 94 Wn.2d 733 (1980)

Trial court's exclusion of victim's prior 13 month old rape complaints upheld as irrelevant, since there was no evidence that the complaints were false; victim's failing polygraph inadmissible; court properly denied motions for psychiatric evaluation of victim in absence of a compelling reason, *State v. Israel*, 91 Wn.App. 846, 849-53 (1998); one who attempts to commit rape after felonious entry is guilty of attempted rape 1° even if defendant did not intend to commit rape prior to entering the building.

***State v. Cain***, 28 Wn.App. 462 (1981)

A finger is an "object" for purposes of the definition of penetration.

***State v. Mendez***, 29 Wn.App. 610 (1981)

In rape case, defense offered to prove that complainant had previously falsely accused her uncle of rape; held: within trial court's discretion to exclude.

***State v. Miller***, 30 Wn.App. 443 (1981)

Indecent liberties is a lesser of statutory rape 2°; *accord*; *State v. Jolls*, 38 Wn.App. 469 (1984).

***State v. Cecotti***, 31 Wn.App. 179 (1982)

Evidence that rape victim had consensual intercourse with two men other than defendant shortly after meeting them is irrelevant to issue of consent, and properly excluded by **rape shield** law, RCW 9A.44.020, *State v. Gregory*,158 Wn.2d 759, 781-801 (2006), *see*: *State v. Hudlow*, 99 Wn.2d 1 (1983).

***State v. Mounsey***, 31 Wn.App. 511 (1982)

**Rape shield** statute, RCW 9A.44.020(3) does not deprive defendant of Sixth Amendment right of confrontation; III.

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* *See also:* **EVIDENCE/Child Hearsay**

***State v. Wilmoth***, 31 Wn.App. 820 (1982)

**Rape shield** law, RCW 9A.44.020, properly precluded evidence that rape victim had sexual relations over a period of time with two men, *State v. Gregory*,158 Wn.2d 759, 781-801 (2006), no evidence of "random, careless sex following transient encounters"; III.

***State v. Birgen***, 33 Wn.App. 1 (1982)

Where defendant received concurrent sentences on convictions of rape 3° and statutory rape 3° arising out of a single act of intercourse, defendant was not subjected to "multiple punishment" for double jeopardy purposes, but one conviction must be struck and he must be resentenced because the rape and statutory rape statutes define a single crime of rape; I.

***State v. Schuck***, 34 Wn.App. 456 (1983)

Proof that victim and defendant were not married may be met by circumstantial evidence, *e.g.*, victim was 14 years old, never spent the night with defendant; I.

***State v. Kaiser***, 34 Wn.App. 559 (1983)

Victim testified on direct that penetration occurred, but was equivocal on cross; defendant's confession to penetration plus third party's testimony as to "fact of complaint" corroborated and bolstered victim's credibility to make *prima facie* case; "fact of complaint" rule, while not substantive, may bolster credibility, *State v. Hunter*, 18 Wn. 670 (1898). *State v. Bray*, 23 Wn.App. 117 (1979), *State v. Martinez*, 196 Wn.2d 605 (2020); III.

***State v. Maule***, 35 Wn.App. 287 (1983)

In statutory rape case, state called a worker from sex assault clinic to testify that sex abuse is more likely than not committed by a biological parent, defendant being natural father; held: inadequate foundation to admit this expert testimony; extensive discussion of foundation requirements per ER 702 and 703; character witness may not give opinion as to whether s/he would believe another witness, ER 608(a); *cf.*: *State v. Cleveland*, 58 Wn.App. 634 (1990); *see: State v. Braham*, 67 Wn.App. 930 (1992); I.

***State v. Peterson***, 35 Wn.App. 481 (1983)

Prior incidents of sexual abuse against minor victim excluded where logical nexus between the incidents and victim's credibility is not established, ER 402; rape shield law and ER 403 do not apply; I.

***State v. Bennett***, 36 Wn.App. 176 (1983)

In statutory rape 3° case, state called two juvenile witnesses, not victims, who testified they had sex with defendant, having met him in a manner similar to victims, held admissible under ER 404(b); defense to statutory rape that defendant must prove by a preponderance that defendant reasonably believed victim was older based upon declarations of age, RCW 9A.44.030(2), is not met by behavior, appearance and general demeanor; must be explicit

assertion from victim to entitle defendant to instruction, at 181, *State v. O'Dell,* 183 Wn.2d 680, 687-88 (2015); II.

***State v. Hudlow***, 99 Wn.2d 1 (1983)

**Rape shield** statute does not violate confrontation clause; in applying rape shield statute, trial court may not consider prejudice to victim, but must consider probative value vs. "prejudice to fact-finding process;" complete discussion by majority of application of rape shield law; reverses *State v. Hudlow*, 30 Wn.App. 503 (1981), *see: State v. Gregory*, 158 Wn.2d 759, 781-801 (2006), *overruled, on other grounds, State v. W.R.,* 181 Wn.2d 757 (2014), *Pers. Restraint of Wiatt*, 151 Wn.App. 22, 43-44 (2009); *accord*: *State v. Camara*, 113 Wn.2d 631 (1989), *overruled, on other grounds, State v. W.R., supra.*; 7-2.

***State v. Ferguson***, 100 Wn.2d 131 (1983)

In indecent liberties case, trial court permits teacher to testify as to fact of complaint and to identify defendant as the offender identified by victim; held: error to permit hearsay testimony as to details of complaint or identity of offender and nature of the act, *State v. Murley*, 35 Wn.2d 233, 237 (1949), *State v. Osborn*, 59 Wn.App. 1, n. 2 (1990), *State v. DeBolt*, 61 Wn.App. 58 (1991), *see: State v. Martinez,* 196 Wn.2d 605 (2020); harmless here.

***State v. Carver***, 37 Wn.App. 122 (1984)

Defense seeks to introduce evidence of prior sexual abuse of minor victim to show that she had an independent familiarity with sexual acts and an ability to describe them; trial court excludes per **rape shield** statute, RCW 9A.44.020; held: rape shield statute does not apply as evidence went to prior sexual abuse, not misconduct, *State v. Kilgore*, 107 Wn.App. 160, 177-82 (2001), and was admissible to rebut the inference that victim would not know about sexual acts unless she experienced them with defendant; refusal to permit defense to impeach victim with her prior inconsistent statement that only another person had abused her was error, *see*: *State v. Bailey*, 52 Wn.App. 42 (1988), *aff'd,* 114 Wn.2d 340 (1990), *State v. Kilgore, supra.*, *State v. Horton*, 116 Wn.App. 909 (2003); II.

***State v. Huxoll***, 38 Wn.App. 360 (1984)

Hospital obtains and tests vaginal fluid sample from rape victim; defense moved for production for further testing; hospital reported it used entire sample or lost it; held: destruction of evidence by a third party does not require dismissal where state did not know of or authorize the destruction and no reasonable possibility exists that the missing evidence will be exculpatory, *distinguishing State v. Vaster*, 99 Wn.2d 44 (1983), *overruled*, *State v. Ortiz*, 119 Wn.2d 294, 303-04 (1992), *disapproved, on other grounds*, *State v. Condon*, 182 Wn.2d 307, 321-26 (2015); here, court determines that evidence of guilt was overwhelming, and thus destroyed evidence could not have helped; III.

***State v. Jollo***, 38 Wn.App. 469 (1984)

Pursuant to plea negotiations, statutory rape defendant obtains psychological evaluation, a copy of which is provided the state; when no plea is entered, state uses defendant's admissions

to psychologist in its case-in-chief; held: statements to psychologist made at state's request during plea negotiations are inadmissible even if defendant "breaches" plea bargain, ER 410; I.

***State v. Kester***, 38 Wn.App. 590 (1984)

Trial court need not define "consent," since failure to prove the element of forcible compulsion is consent; *see*: *State v. VanVlack*, 53 Wn.App. 86 (1989); III.

***State v. Claflin***, 38 Wn.App. 847 (1984)

Expert testimony, in statutory rape case, that late reporting is not unusual and that length of delay correlated with the relationship between the abuser and child is proper, *see: State v. Fisher*, 165 Wn.2d 727 (2009); opinion that defendant is statistically more likely to have committed the crime because of membership in a group (here, father figure) is improper; II.

***State v. Petrich***, 101 Wn.2d 566 (1984)

Defendant charged with one count each statutory rape and indecent liberties; victim-granddaughter testifies to numerous incidents; defense moves to require state to elect counts and to elect which incident is to be relied upon to convict; held: mere fact that victim is the same is not enough to call the offense a continuing offense or transaction; state must elect or jury must be instructed that they must be unanimous as to which incident has been proved, modifying *State v. Workman*, 66 Wash. 292 (1911); where complainant testifies she did not report incident for months, state may call expert to testify about delayed reporting patterns of sexually abused children, *see: State v. Fisher*, 165 Wn.2d 727 (2009); expert may not testify that defendant is a member of a group having a higher incidence of child abuse, *State v. Maule*, 35 Wn.App. 287 (1983), *State v. Braham*, 67 Wn.App. 930 (1992); *accord*: *State v. Gitchel*, 41 Wn.App. 820 (1985), *State v. Lochner*, 42 Wn.App. 408 (1985), *State v. Handyside*, 42 Wn.App. 412 (1985); 9-0.

***State v. Ryan***, 103 Wn.2d 165 (1984)

Child hearsay statute, RCW 9A.44.120, is constitutional; extensive discussion of interrelationship of tests of availability, reliability, competency; *accord*: *State v. Jackson*, 42 Wn.App. 393 (1985), *State v. Ramirez*, 46 Wn.App. 223 (1986); *see*: *State v. Anderson*, 48 Wn.App. 543, 549-50 (1987); 9-0.

***State v. Fitzgerald***, 39 Wn.App. 652 (1985)

In absence of physical evidence, pediatrician cannot testify she believed child had been molested based upon interview of victim, *see also: State v. Perez-Valdez*, 172 Wn.2d 808, 817-19 (2011); state must lay foundation per *Frye* test to admit expert testimony that child molesters have outward manifestations of good character; while a continuing course of conduct may form the basis of one charge in an information, the mere fact that the rape victim is the same is not enough to find that the offenses contained in a single count constitute a single transaction, *State v. Petrich*, 101 Wn.2d 566 (1984); I.

***State v. Gitchel***, 41 Wn.App. 820 (1985)

A child may be incompetent to testify in court even though child can receive impressions and relate them truly in other circumstances, within discretion of trial court; for purposes of child hearsay statute, RCW 9A.44.120, incompetency may not be equivalent of unavailability, *State v. Ryan*, 103 Wn.2d 165 (1984); in determining admissibility of hearsay statement pursuant to statute, court must consider motive to lie, character of child, whether more than one person heard statement, spontaneity of statement and timing as well as advantage, if any, of cross-examining the child, *Ryan*, *id.*; I.

***State v. Whitney***, 108 Wn.2d 506 (1987)

Alternative means of committing rape 1° (kidnap and deadly weapon) do not constitute separate and distinct offenses requiring jury unanimity, *distinguishing* *State v. Green*, 94 Wn.2d 216 (1980); 7-2.

***State v. Hodgson***, 44 Wn.App. 592 (1986)

Defendant may be charged with statutory rape or indecent liberties even though his conduct also constitutes incest; indecent liberties is not a lesser of statutory rape 1°; *accord*: *State v. Henderson*, 48 Wn.App. 543 (1987), *State v. Saiz*, 63 Wn.App. 1 (1991), *but see:* *State v. Bailey*, 114 Wn.2d 340 (1990); I.

***State v. Robinson***, 44 Wn.App. 611 (1986)

Where both parties stipulate that child victim is incompetent to testify, defense counsel fails to challenge victim's ability to relate just impression of facts at time she made hearsay statements, then prosecutor has met burden of producing declarant, *distinguishing* *State v. Doe*, 105 Wn.2d 889 (1986), *State v. Ryan*, 103 Wn.2d 165 (1984); III.

***State v. Abbott***, 45 Wn.App. 330 (1986)

The crime of statutory rape does not have a *mens rea* element, as it is a strict liability offense; II.

***State v. Brune***, 45 Wn.App. 354 (1986)

Incest, RCW 9A.64.020, is not a special crime which must be charged in all cases involving sexual contact with family members to the exclusion of statutory rape or indecent liberties; I.

***State v. Brooks***, 45 Wn.App. 824 (1986)

Semen found on an infant is sufficient to establish sexual contact for purposes of indecent liberties statute, *State v. Jackson*, 145 Wn.App. 814 (2008); III.

***State v. Morely***, 46 Wn.App. 156 (1986)

Trial court prohibits defense from introducing evidence at defendant's rape trial that victim had committed acts of prostitution; defense was that victim consented to sex with defendant in exchange for money; held: because court admitted some evidence of victim's

prostitution and determined that the proffered evidence was dissimilar, no abuse of discretion; III.

***State v. Tuitasi***, 46 Wn.App. 206 (1986)

A parent's threat to abduct his child by force if wife-victim does not have sexual intercourse is sufficient to establish kidnapping for purposes of proving rape 2°; II.

***State v. Ramirez***, 46 Wn.App. 223 (1986)

In indecent liberties case, where an adult unrelated male, without caretaking function, touches the sexual or intimate parts of a young girl, the jury may infer that the touching was for the purpose of sexual gratification, *State v. Whisenhunt*, 96 Wn.App. 18, 22-24 (1999), *State v. Price*, 127 Wn.App. 193, 201-02 (2005), *cf.: State v. Powell*, 62 Wn.App. 914 (1991); *accord*: *State v. Wilson*, 56 Wn.App. 63, 68 (1989); II.

***State v. Espinosa***, 47 Wn.App. 85 (1987)

Denial of discovery of rape crisis center's interview notes with victim following *in camera* review will only be reversed for abuse of discretion, RCW 70.125.065; presence of a police officer during interview does not waive the privilege, *State v. Gibson*, 3 Wn.App. 596 (1970), RCW 70.125.060, *distinguishing State v. Wilder*, 12 Wn.App. 296 (1974); I.

***State v. Black***, 109 Wn.2d 336 (1987)

Expert testimony on "rape trauma syndrome" to prove that the victim did not consent is not sufficiently accepted in the scientific community to be admissible, and constitutes an opinion as to the guilt of the defendant, thereby invading the exclusive province of the jury, *see: State v. Hudson*, 150 Wn.App. 646 (2009), *but see*: *State v. Stevens*, 58 Wn.App. 478 (1990), *State v. Cleveland*, 58 Wn.App. 634 (1990), *State v. Graham*, 59 Wn.App. 418 (1990).

***State v. Henderson***, 48 Wn.App. 543 (1987)

Under child hearsay statute, RCW 9A.44.120, a statement may still be spontaneous even if it is the product of police questioning if the victim volunteers the information; police officer who interrogates victim is more objective than a parent, *distinguishing State v. Ryan*, 103 Wn.2d 165, 176 (1984); I.

***State v. Coe***, 109 Wn.2d 832 (1988)

Mere threat to use a deadly weapon, without actually displaying same, is sufficient to charge rape 1°, *State v. Hentz*, 99 Wn.2d 538 (1983), *see: State v. Majors*, 82 Wn.App. 843, 846-7 (1996); 9-0.

***State v. Ciskie***, 110 Wn.2d 263 (1988)

In rape case, battered woman syndrome evidence is admissible in state's case-in-chief to show why victim remained in violent relationship and why she did not report violent acts to police, *distinguishing State v. Black*, 109 Wn.2d 336 (1987); where defense to rape charge is

consent, knowledge is not implicit element of crime, *State v. Walden*, 67 Wn.App. 891, 894-6 (1992); 8-1.

***State v. Bargas***, 52 Wn.App. 700 (1988)

In rape 1°, state need not allege or prove the crime defendant intended to commit, *State v. Bergeron*, 105 Wn.2d 1 (1985), *State v. Federov*, 181 Wn.App. 187, 196-99 (2014); Division II holds that *Bergeron* impliedly overrules *State v. Bonds*, 98 Wn.2d 1 (1982).

***State v. Camara***, 113 Wn.2d 631 (1989)

Consent is a defense to rape; burden of proof of consent is on the defense, *overruled: State v. W.R.*, 181 Wn.2d 757 (2014), *State v. Ortiz-Triana*, 193 Wn.App. 769 (2016), *State v. Knapp*, 197 Wn.2d 579 (2021), *see: State v. Buzzell*, 148 Wn.App. 592 (2009), *Pers. Restraint of Colbert*, 186 Wn.2d 614 (2016), where victim testifies on direct that he does not enjoy the type of sex alleged to have been forced upon him, the door has not been opened to cross-examination on his past sexual conduct, *State v. Hudlow*, 99 Wn.2d 1 (1983), as the direct testimony did not present victim's past sexual behavior in a "favorable light," RCW 9A.44.020(4), *see: State v. Sheets*, 128 Wn.App. 149 (2005); 9-0.

***State v. Dodd***, 53 Wn.App. 178 (1989)

Defendant, charged with statutory rape 2°, who reasonably believes that victim was between 14 and 16 years of age based upon declarations of age by the victim, may be convicted of the lesser included offense of statutory rape 3°, *cf.: State v. Smith*, 122 Wn.App. 294 (2004); I.

***State v. Chiles***, 53 Wn.App. 452 (1989)

Public indecency statute, former RCW 9A.88.010, is violated where defendant exposes himself in his home to persons on public sidewalk, *distinguishing State v. Sayler*, 36 Wn.App. 230 (1983).

***State v. Tobias***, 53 Wn.App. 635 (1989)

Lack of corroboration is not a compelling reason to order statutory rape complaining witness to undergo a psychiatric evaluation, *State v. Demos*, 94 Wn.2d 733, 738 (1980) *State v. Hoffman*, 116 Wn.2d 51 (1991), *State v. Israel*, 91 Wn.App. 846 (1998); II.

***State v. Warren***, 55 Wn.App. 645 (1989)

In rape 1° case with 11 year old victim, failure of information to allege nonmarriage as element is not grounds for dismissal where raised for first time on appeal, *see: State v. Stockwell*, 159 Wn.2d 394 (2007); I.

***State v. McKnight***, 54 Wn.App. 521 (1989)

In rape 2° case, forcible compulsion does not require proof of physical resistance, any force that is more than normally required for penetration is sufficient, *State v. Soderquist*, 63 Wn.App. 144 (1991), *but see: State v. Ritola*, 63 Wn.App. 252 (1991), *cf.: State v. Buzzell*,

148 Wn.App. 592, 599 n. 2 (2009), *State v. Gene*, 20 Wn.App.2d 211 (2021)**,** *see also: State v. Gower*, 172 Wn.App. 31 (2012), *reversed, on other grounds*, 179 Wn.2d 851 (2014); I, 2-1.

***State v. Puapuaga***, 54 Wn.App. 857 (1989)

A sleeping victim is physically helpless for purposes of proving indecent liberties, RCW 9A.44.100(1)(b); I.

***State v. Brown***, 55 Wn.App. 738 (1989)

Indecent liberties may be committed without direct physical contact through the use of a "penis enlarger," *In re Adams*, 23 Wn.App. 517 (1979); II.

***State v. Wilson***, 56 Wn.App. 63 (1989)

In indecent liberties case, where defendant touched his daughter out-doors in a place where he would not be easily observed and defendant was only partially clothed and victim was disrobed, circumstantial evidence is sufficient to submit issue of sexual gratification, former RCW 9A.44.100(2)(a), to trier of fact, *State v. Whisenhunt*, 96 Wn.App. 18, 22-24 (1999), *State v. Price*, 127 Wn.App. 193, 201-02 (2005), *aff'd, on other grounds,* 158 Wn.2d 630 (2006), *State v. Harstad*, 153 Wn.App. 10, 21-23 (2009), *cf.*: *State v. Ramirez*, 46 Wn.App. 223 (1986), *State v. Powell*, 62 Wn.App. 914 (1991); III.

***State v. Danforth***, 56 Wn.App. 133 (1989), *overruled, in part*, *State v. McNallie*, 120 Wn.2d 925 (1993)

In communicating with a minor for immoral purposes case, former RCW 9.68A.090, it is not unlawful for an adult to invite a 16-year old to engage in consensual sex because it is not unlawful for the adult to engage in sex with a 16-year old; statute is thus vague as applied; *see: State v. Luther*, 65 Wn.App. 424 (1992), *State v. Wissing*, 66 Wn.App. 745 (1992), *but see: State v. Pietrzak*, 100 Wn.App. 291 (2000); I.

***State v. Goss***, 56 Wn.App. 541 (1990)

Under Sentencing Reform Act Special Sexual Offender Sentencing Alternative (SSOSA), RCW 9.94A.120(7)(a), court cannot run terms concurrently and conditions consecutively; exceptional sentences are not permitted for SSOSA; I.

***State v. Bailey***, 114 Wn.2d 340 (1990)

Defendant, charged with statutory rape 1°, is convicted of indecent liberties as lesser, to which defense does not except; held: failure to except waives issue, *State v. Mak*, 105 Wn.2d 692, 748-9 (1986); even if instructing on lesser involved constitutional issue of notice of charge, harmless beyond a reasonable doubt; *affirms State v. Bailey*, 52 Wn.App. 42 (1988); *but see*: *State v. Hodgson*, 44 Wn.App. 592 (1986), *State v. Saiz*, 63 Wn.App. 1 (1991), *State v. Markle*, 118 Wn.2d 424 (1992); 5-4.

***State v. Steele***, 58 Wn.App. 169 (1990)

In multiple count statutory **rape** 1° trial, victim testifies regarding last count in time that defendant did "things similar to what [was] described earlier"; held: because most recent incident "described earlier" indisputably did not involve sexual intercourse, former RCW 9A.44.070(1) (now RCW 9A.44.073), then the evidence is sufficiently equivocal such that conviction on last count was pure conjecture, thus reversed and dismissed; I.

***State v. Dubois***, 58 Wn.App. 299 (1990)

Indecent exposure, RCW 9A.99.010, amending former public indecency statute, need not be committed in a public place, legislatively *reversing* *State v. Sayler*, 36 Wn.App. 230 (1983); I.

***State v. Stevens***, 58 Wn.App. 478 (1990)

Child victim's "sleep statements" telling defendant to stop are not hearsay, as not intended to be assertions, *In re Penelope B.*, 104 Wn.2d 643, 652-3 (1985), and are relevant where expert testifies that nightmares are a common experience of sexual abuse; where sleep statements do not contain direct allegations of sexual abuse, then probative value outweighs prejudicial impact; expert's testimony as to behaviors consistent in sexually abused children that she had observed in working with such children in the field is admissible where expert does not testify that victims in this case fit a profile, *State v. Ciskie*, 110 Wn.2d 263, 279-80 (1988), *State v. Madison*, 53 Wn.App. 754, 764-65 (1989), *State v. Hudson*, 150 Wn.App. 646 (2009), *distinguishing* *State v. Black*, 109 Wn.2d 336 (1987); I.

***State v. Cleveland***, 58 Wn.App. 634 (1990)

In statutory rape case, therapist, acknowledging inconsistencies in victim's testimony, states it is not unusual for victims to be reluctant to testify, common for victims not to tell whole story or to add or subtract facts; held: therapist did not espouse a theory proving guilt, *State v. Ciskie*, 110 Wn.2d 263 (1988), *distinguishing* *State v. Black*, 109 Wn.2d 336 (1987), *State v. Hudson*, 150 Wn.App. 646 (2009),; because therapist's testimony was based upon her personal observations and was not an explanatory theory, then state need not meet test of *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) or ER 702; I.

***State v. Medcalf***, 58 Wn.App. 817 (1990)

In statutory rape case, court admits officer's testimony that he observed X-rated videotapes in defendant's home; held: evidence showing lustful disposition should be admitted in sex offense case only when it tends to show such lustful inclination toward the victim, *State v. Sutherby*, 165 Wn.2d 870, 886 (2009), *distinguishing* *State v. Ferguson*, 100 Wn.2d 131, 134 (1983), *State v. Bernson*, 40 Wn.App. 729, 737-38 (1985), *see: State v. Crossguns*, 199 Wn.2d 282 (2022); II.

***State v. Falco***, 59 Wn.App. 354 (1990)

Communicating with a minor for immoral purposes, former RCW 9.68A.090, is not a lesser of statutory rape 1°, former RCW 9A.44.070; I.

***State v. Graham***, 59 Wn.App. 418 (1990)

In statutory rape case, expert testifies that a delay in reporting abuse by young women is common, to rebut defense inference that delay demonstrated that victim was lying; held: testimony not offered to prove abuse, but merely that delay is not inconsistent with abuse, *State v. Madison*, 53 Wn.App. 754 (1989), *see: State v. Fisher*, 165 Wn.2d 727 (2009), *distinguishing State v. Black*, 109 Wn.2d 336 (1987); I.

***State v. DeBolt***, 61 Wn.App. 58 (1991)

Report of sexual abuse to third party is admissible under "hue and cry" doctrine to prove that rape victim made a timely complaint, *State v. Alexander*, 64 Wn.App. 147 (1992), as long as details and identity of offender are not admitted, *State v. Ackerman*, 90 Wn.App. 477, 481-2 (1998); I.

***State v. Jackson***, 62 Wn.App. 53 (1991)

Defendant orders 14-year old to lift up her skirt or he would kill her, backs her up but never touches her, is convicted of attempted rape 2°; held: evidence was sufficient, as it is doubtful that, under the substantial step requirement, an overt act toward penetration is necessary to prove attempted rape, *State v. Wilson*, 1 Wn.App.2d 73 (2017), *distinguishing State v. Meyer*, 37 Wn.2d 759, 771 (1951); substantial step can be proved by (1) lying in wait, searching for or following the contemplated victim, (2) enticing or seeking to entice victim to go to the place contemplated for the commission of the crime, and (3) unlawful entry of place where it is contemplated the the crime will be committed, Model Penal Code 9' 5.01(2), *State v. Workman*, 90 Wn.2d 443, 451 n. 2 (1978); I.

***State v. Bohannon***, 62 Wn.App. 462 (1991)

Sexual exploitation of a minor, RCW 9.68.040(1)(b), and definition of sexually explicit conduct, RCW 9.68A.011(3)(e), are not vague, *State v. Stellman*, 106 Wn.App. 283 (2001); possession of depictions of a minor, former RCW 9.68A.070, and communication with a minor for immoral purposes, RCW 9.68A.090, are not lessers of sexual exploitation; II.

***State v. Powell***, 62 Wn.App. 914 (1991)

Evidence that family friend hugged juvenile around chest while she was on his lap, placed hand on her "front" and bottom on her underwear and touched her thighs outside clothing is insufficient to prove child molestation 1°, *distinguishing State v. Wilson*, 56 Wn.App. 63 (1989), *State v. Ramirez*, 46 Wn.App. 223 (1986), *State v. Camarillo*, 115 Wn.2d 60 (1990), *State v. Johnson*, 96 Wn.2d 926 (1982), *State v. Brown*, 55 Wn.App. 738 (1989), *State v. Brooks*, 45 Wn.App. 824 (1986), *In re Adams*, 24 Wn.App. 517 (1979), *cf.: State v. Veliz*, 76 Wn.App. 775 (1995), *State v. Whisenhunt*, 96 Wn.App. 18, 22-24 (1999), *State v. Price*, 127 Wn.App. 193, 201-02 (2005), *aff'd, on other grounds,* 158 Wn.2d 630 (2006) , *State v. Harstad*, 153 Wn.App. 10, 21-23 (2009); I.

***State v. Saiz***, 63 Wn.App. 1 (1991)

Child molestation 1°, RCW 9A.44.083, is not a lesser of rape of a child 1°, RCW 9A.44.073, as sexual gratification is not a element of rape of a child, *State v. French*, 153

Wn.2d 593, 610-11 (2006), *see:* *State v. Hodgson*, 44 Wn.App. 592 (1986), *State v. Henderson*, 48 Wn.App. 543 (1987), *but see:* *State v. Bailey*, 114 Wn.2d 340 (1990), *cf.:* *State v. Lorenz*, 152 Wn.2d 22 (2004); II.

***State v. Ritola***, 63 Wn.App. 252 (1991)

Respondent grabs victim's breast, squeezes, removes hand and comments on breast, convicted of indecent liberties by forcible compulsion, RCW 9A.44.100(1)(a); held: forcible compulsion is not force inherent in any act of sexual touching but rather is that used or threatened to overcome or prevent resistance; here, respondent caught victim by surprise, no time to resist, thus evidence insufficient, *State v. Gene*, 20 Wn.App.2d 211 (2021)**,** *distinguishing* *State v. McKnight*, 54 Wn.App. 521 (1989); *accord:* *State v. Weisberg*, 65 Wn.App. 721 (1992), *but see:* *State v. Buzzell*, 148 Wn.App. 592, 599 n. 2 (2009), *cf.: State v. Gower*, 172 Wn.App. 31 (2012), *reversed, on other grounds*, 179 Wn.2d 851 (2014); II.

***State v. Markle***, 118 Wn.2d 424 (1992)

Indecent liberties is not a lesser of statutory rape 1° and 2°, *distinguishing* *State v. Bailey*, 114 Wn.2d 340 (1990); **rape shield** statute, RCW 9A.44.020, does not apply to evidence of prior sexual *abuse;* trial court's exclusion of evidence that defendant's son abused complainant in order to establish an anger motive for child to fabricate allegations against defendant was not an abuse of discretion; 9-0.

***State v. Johnson***, 119 Wn.2d 167 (1992)

In **permitting prostitution** case, RCW 9A.88.090, defendant-desk clerk is convicted when two police officers, posing as hooker and john, lead her to believe they will engage in prostitution even though none would occur; held: "knowledge" includes subjective belief and need not accord with objective reality, as long as subjective knowledge instruction is couched in terms of a permissive inference; *affirms* *State v. Johnson*, 61 Wn.App. 235 (1991); 6-3.

***State v. Maupin***, 63 Wn.App. 887 (1992)

In felony murder (rape) case, evidence of sexual interest in child-victim's mother, comment that child was pretty and needed a father, panties missing from body of victim is insufficient to establish sexual intercourse or attempted rape; III.

***State v. McNallie***, 64 Wn.App. 101 (1992), *aff'd, on other grounds,* 120 Wn.2d 925 (1993)

To enhance communication with minor for immoral purposes, RCW 9.68A.090, to felony, state need not prove prior felony sex offense was valid beyond a reasonable doubt, *State v. Ammons*, 105 Wn.2d 175, 187 (1986); facially valid conviction is sufficient; guilty plea form need not include waiver of right to remain silent, *In re Harris*, 111 Wn.2d 691, 697 (1988); I.

***State v. Alexander***, 64 Wn.App. 147 (1992)

Fact of complaint is admissible even if defense does not raise timeliness of complaint as an issue, *State v. Murley*, 35 Wn.2d 233, 236-67 (1949), *State v. Chenoweth*, 188 Wn.App. 521, 531-35 (2015), *State v. Martinez,* 196 Wn.2d 605 (2020); I.

***State v. Hermanson***, 65 Wn.App. 450 (1992)

Sex deviancy expert must be appointed for indigent defendant where state agrees to plea bargain a charge so that defendant is eligible for sex offender sentencing alternative, RCW 9.94A.120(7), if amenable to treatment; not an abuse of discretion to deny public funds for expert solely for sentencing purposes, absent state's agreement to reduce the charge if defendant is amenable to treatment; *see:* *State v. Melos*, 42 Wn.App. 638 (1986), *State v. Tuffree*, 35 Wn.App. 243 (1983), *State v. Aamold*, 60 Wn.App. 175, 177 (1991), *State v. Young*, 125 Wn.2d 688 (1995); I.

***State v. Weisberg***, 65 Wn.App. 721 (1992)

Defendant removes victim's clothing, tells her to lie on bed, she responds she doesn't want to, he tells her to do it anyway, defendant has intercourse, stops when she says it hurts, is convicted of rape 2° by forcible compulsion, RCW 9A.44.050(1)(a); held: victim's subjective reaction of fear is insufficient to establish, by itself, forcible compulsion, "lay down anyway" is not an implied threat of physical injury, thus evidence insufficient, *accord:* *State v. Ritola*, 63 Wn.App. 252 (1991), *but see:* *State v. Buzzell*, 148 Wn.App. 592, 599 n. 2 (2009); *remanded* for judgment and sentence on lesser rape 3°, *but see:* *State v. Ieremia*, 78 Wn.App. 746, 752-4 (1995), *cf.: State v. Gower*, 172 Wn.App. 31 (2012), *reversed, on other grounds*, 179 Wn.2d 851 (2014); III.

***State v. Stark***, 66 Wn.App. 423 (1992)

Evidence that defendant knew he was HIV-positive, had been counselled on safe sex, and that he engaged in unsafe sex is sufficient to prove that he intentionally exposed sex partner to HIV, RCW 9A.36.021(1)(e); existence of noncriminal explanation does not preclude finding that defendant intended to harm his sexual partners, *State v. Whitfield*, 132 Wn.App. 878 (2006); II.

***State v. Wissing***, 66 Wn.App. 745 (1992)

Adult asks minor to look at nude photographs, if he knows how to masturbate, asks to see pubic hair, which is declined, is charged with communicating with a minor for immoral purposes, RCW 9.68A.090; held: while defendant's conduct was for sexual gratification, RCW 9.68A.011(3)(e), it was not in the context of a live performance, RCW 9.68.040(1)(b), and thus does not fall within the constitutional core of the charged statute, *State v. Danforth*, 56 Wn.App. 133 (1989), *see:* *State v. McNallie*, 64 Wn.App. 101 (1992), *aff'd* 120 Wn.2d 925 (1993), *State v. Luther*, 65 Wn.App. 424 (1992), and was thus vague as applied, *but see:* *State v. Pietrzak*, 100 Wn.App. 291 (2000), *State v. Stellman*, 106 Wn.App. 283 (2001); I.

***State v. Walden***, 67 Wn.App. 891 (1992)

Assault 4°, RCW 9A.36.041, is not a lesser of **rape** 2° by forcible compulsion, RCW 9A.44.050(1)(a), *State v. Herron*, 177 Wn.App. 96, 101 n. 1 (2013), *affirmed, on different grounds*, 183 Wn.2d 737 (2015); I.

***State v. Braham***, 67 Wn.App. 930 (1992)

In child molestation case, expert testimony about "grooming," *i.e.*, the dynamics of victim-offender relationships prior to initiation of sexual abuse, is inadmissible "profile" testimony which impermissibly places defendant in group more likely to commit crime, *State v. Petrich*, 101 Wn.2d 566 (1984), *State v. Maule*, 35 Wn.App. 287, 293 (1983), *State v. Claflin*, 38 Wn.App. 847 (1985), *but see: Pers. Restraint of Phelps*, 190 Wn.2d 155 (2018); I.

***State v. McNallie***, 120 Wn.2d 925 (1993)

In communicating with a minor for immoral purposes case, RCW 9.68A.090, instruction requiring communication to have been for "immoral purposes of a sexual nature" is adequate, court need not detail misconduct proscribed by RCW 9.68A, *State v. Gladden*, 116 Wn.App. 561, 566 (2003), *but see: State v. Pietrzak*, 100 Wn.App. 291 (2000); defendant need not make an express offer of payment in exchange for the minor engaging in sexual misconduct; *affirms State v. McNallie*, 64 Wn.App. 101 (1992); overrules, in part, *State v. Danforth*, 56 Wn.App. 133 (1989); 8-0.

***In re A, B, C, D, E***, 121 Wn.2d 80 (1993)

Mandatory HIV testing for convicted sex offenders, RCW 70.24.340(1)(a), does not violate privacy rights, even where there is no evidence of exchange of blood, semen or other bodily fluids; 5-2.

***State v. Gurrola***, 69 Wn.App. 152 (1993)

Sexual gratification is not an element of rape of a child, RCW 9A.44.073; III.

***State v. Summers***, 70 Wn.App. 424 (1993)

State need not call expert witness to prove mental incapacity in rape 2°/mental incapacity case, RCW 9A.44.050(1)(b); victim's testimony establishing ignorance of "the nature or consequences" of sexual intercourse may be sufficient; *see: State v. Ortega-Martinez*, 124 Wn.2d 702, 708-17 (1994); victim's past sexual behavior was properly excluded, RCW 9A.44.020, as prior acts of intercourse cannot demonstrate an understanding of nature or consequences of sexual intercourse, risk of undue prejudice to victim is high, benefit to defense is insubstantial; **rape shield** statute does not violate Sixth Amendment or CONST. Art. 1, § 22, *Michigan v. Lucas*, 114 L.Ed.2d 205 (1991); I.

***State v. Morrison***, 70 Wn.App. 593 (1993)

Where trial court revokes after suspending sentence under SSOSA, RCW 9.94A.120(a)(ii), court may then impose a year of community supervision even if not included in original suspended sentence; *accord: State v. Daniels*, 73 Wn.App. 734 (1994); I.

***State v. Cozza***, 71 Wn.App. 252 (1993)

Information charges indecent liberties of child between 1984 and 1987; held: defendant does not have a due process right to a reasonable opportunity to raise alibi defense, thus information alleging crime that occurred over three-year period is valid; *see also: State v. Jordan*, 6 Wn.2d 719, 721 (1940), *State v. Warren*, 55 Wn.App. 645 (1989), *State v. Carver*,

37 Wn.App. 122, 126 (1984), *State v. Bailey*, 52 Wn.App. 42, 51 (1988), *aff'd,* 114 Wn.2d 340 (1990), *State v. Hayes*, 81 Wn.App. 425, 429-31 (1996), *State v. Yallup*, 3 Wn.App.2d 546 (2018); III.

***State v. R.P.***, 122 Wn.2d 735 (1993)

Forcibly kissing victim on neck, leaving hickey, is insufficient to establish sexual contact to sustain indecent liberties conviction, *State v. Howe*, 151 Wn.App. 338 (2009), *reversing, in part*, *State v. R.P.*, 67 Wn.App. 663 (1992); 6-3.

***State v. Thomson***, 71 Wn.App. 634 (1993)

Victim invites defendant to spend night in guest bedroom, locks her own room, defendant breaks in and rapes her, is convicted of rape 1° for felonious entry of building, RCW 9A.44.040(1)(d); held: a bedroom within a single-family dwelling is not a separate building, RCW 9A.04.110(5), for purposes of burglary, *cf.: State v. Dunleavy*, 2 Wn.App.2d 420, 427-31 (2018), thus defendant committed rape 2°, not rape 1°, *distinguishing* *State v. Collins*, 110 Wn.2d 253 (1988); II.

***State v. Jones***, 71 Wn.App. 798, 813-21 (1993)

In child sex abuse case, expert testimony that behavior of victim is common to sexually abused children, specifically sexual acting out and nightmares, no *Frye* standard applied; held: when personal experience is used as a basis for generalized statements regarding the behavior of sexually abused children as a class, the testimony crosses over to scientific testimony regarding a profile or syndrome, whether or not the term is used, and should be subject to the *Frye* standard, *State v. Ortiz*, 119 Wn.2d 294 (1992), *disapproved, on other grounds, , State v. Condon*, 182 Wn.2d 307, 321-26 (2015), *State v. Maule*, 35 Wn.App. 287 (1983); when the testimony is limited to the witness's observations of a specific group, *Frye* is not applicable, *State v. Cleveland*, 58 Wn.App. 634, 646 (1990); because the use of testimony on general behavioral characteristics of sexually abused children is still in dispute among experts, its use as a general profile to be used to prove existence of abuse is inappropriate, *State v. Black*, 109 Wn.2d 336 (1987), *see: State v. Hudson*, 150 Wn.App. 646 (2009), although it is admissible to rebut allegations by defendant that victim's behavior is inconsistent with abuse; I.

***State v. Dawkins***, 71 Wn.App. 902, 908-10 (1993)

In child sex abuse case, where identity is not issue, evidence of uncharged incidents of abuse to establish "lustful disposition" of defendant toward victim, while relevant, *State v. Ray*, 116 Wn.2d 531, 547 (1991), *State v. Ferguson*, 100 Wn.2d 131, 133-4 (1983), can properly be excluded by trial court due to great prejudicial effect, ER 404(b), *State v. Coe*, 101 Wn.2d 772, 781 (1984), *State v. Bacotgarcia*, 59 Wn.App. 815, 819 (1990), *see: State v. Guzman*, 119 Wn.App. 176 (2003), *State v. Crossguns*, 20 Wn.2d 211 (2022); II.

***State v. BJS***, 72 Wn.App. 368 (1994)

In child molestation 1°, RCW 9A.44.083, bench trial, where court fails to enter finding that acts were done for sexual gratification, remedy is dismissal, *see:* *State v. Lorenz*, 152 Wn.2d 22 (2004); III.

***State v. Biles***, 73 Wn.App. 281, 284-5 (1994)

Child rape victim's admissible hearsay that penetration hurt her is sufficient corroboration to admit defendant's confession, *State v. Ackerman*, 90 Wn.App. 477, 485 (1998); III.

***State v. Ortega-Martinez***, 124 Wn.2d 702 (1994)

To determine whether victim is incapable of consent by reason of being mentally incapacitated for rape 2°, RCW 9A.44.050, mental incapacity is defined as condition which "prevents a person from understanding the nature or consequences of the act of sexual intercourse...," RCW 9A.44.010(4); trier of fact must determine whether victim had condition which prevented him or her from *meaningfully* understanding nature or consequences at time of offense, which includes physical mechanics, development of emotional intimacy, pregnancy, disease, *State v. Summers*, 70 Wn.App. 424, 432 (1993), *State v. Al-Hadmani*, 109 Wn.App. 599 (2001); 9-0.

***State v. Young***, 125 Wn.2d 688 (1995)

Decision to order a special sexual offender sentencing alternative sex deviancy expert at public expense is within trial court's discretion, *see:* *State v. Melos*, 42 Wn.App. 638 (1986), *State v. Tuffree*, 35 Wn.App. 243 (1983), *State v. Hermanson*, 65 Wn.App. 450 (1992); 9-0.

***State v. Calle***, 125 Wn.2d 769 (1995)

Incest and rape, from a single act, are intended by legislature to be separate crimes, and do not violate double jeopardy clause, *State v. Smith*, 177 Wn.2d 533, 545-50 (2013), *State v. Chenoweth*, 185 Wn.2d 218 (2016); 9-0.

***State v. Arseneau***, 75 Wn.App. 747 (1994)

In incest 1°, RCW 9A.64.020(1), age of step-children and adopted children, RCW 9A.64.020(3), is a defense, not an element of the crime; use of "step-daughter" rather than "descendant" in information is sufficient when challenged for first time on appeal; I.

***State v. Veliz***, 76 Wn.App. 775 (1995)

In child molestation 1° case where evidence establishes touching through clothing, trial court need not instruct that there must be additional evidence of sexual gratification, *distinguishing* *State v. Powell*, 62 Wn.App. 914, 917 (1991), *see:* *State v. Whisenhunt*, 96 Wn.App. 18, 22-24 (1999), *State v. Price*, 127 Wn.App. 193, 201-02 (2005), *aff'd, on other grounds*, 158 Wn.2d 630 (2006); I.

***State v. Charles***, 126 Wn.2d 353 (1995)

In **rape** 2° trial, victim claims force, defendant claims consent, court refuses rape 3° as a lesser; held: because there was no affirmative evidence that the intercourse was unforced but still nonconsensual, defense is not entitled to instruction on lesser, *State v. Fowler*, 114 Wn.2d 59, 67 (1990), *State v. Speece*, 115 Wn.2d 360, 363 (1990), *State v. Fernandez-Medina*, 141 Wn.2d 448 (2000), *State v. Buzzell*, 148 Wn.App. 592, 603-05 (2009), *see: State v. Bright*, 129 Wn.2d 257, 273 (1996), *State v. Wright*, 152 Wn.App. 64 (2009), *State v. Hampton*, 182 Wn.App. 805, 828-31 (2014), *reversed, on other grounds*, 184 Wn.2d 656 (2015), *cf.: State v. Corey*, 181 Wn.App. 272 (2014); *per curiam.*

***State v. Aumick***, 126 Wn.2d 422, 426-8 (1995)

Assault 4° is not a lesser of attempted rape 1°, as the greater can be committed without force or physical contact, overruling, in part, *State v. Aumick*, 73 Wn.App. 379, 381-4 (1994); 9-0.

***State v. Brown***, 127 Wn.2d 749, 754-7 (1995)

In rape 1° trial, victim testifies rape occurred with gun, defendant testifies to consent, trial court instructs on rape 2° as lesser, defendant is acquitted of rape 1°, convicted of lesser; held: while rape 2° meets elements test, *State v. Workman*, 90 Wn.2d 443, 447-8 (1978), there was no affirmative evidence defendant committed only rape 2°, impeachment evidence that serves only to discredit the state's witness but does not itself establish that only the lesser crime was committed cannot satisfy the factual prong of *Workman, supra, State v. Fowler*, 114 Wn.2d 59, 67 (1990), *cf.: State v. Ieremia*, 78 Wn.App. 746 (1995), *State v. Corey*, 181 Wn.App. 272 (2014), *State v. Hampton*, 182 Wn.App. 805, 828-31 (2014), *reversed, on other grounds*, 184 Wn.2d 656 (2015), *State v. Parks*, 190 Wn.App. 859, 867-69 (2015)*see: State v. Wright*, 152 Wn.App. 64 (2009); reversed and remanded for retrial on rape 2°; 9-0.

***State v. Ieremia***, 78 Wn.App. 746 (1995)

Rape 3° is an inferior degree crime of rape 2°, RCW 10.61.003, distinguishing between inferior degree crimes and lesser included offenses; a lesser degree offense instruction is improper unless there is evidence that defendant committed only the lesser degree offense, *State v. Daniels*, 56 Wn.App. 646, 651 (1990); where a crime is a lesser degree offense, there is no need to analyze the legal prong of *State v. Workman*, 90 Wn.2d 443, 447-8 (1978); here, defendants either committed rape 2° or no crime, thus trial court properly excluded rape 3°, *State v. Wright*, 152 Wn.App. 64 (2009), *cf.: State v. Corey*, 181 Wn.App. 272 (2014); rape 3° is not a lesser included offense of rape 2°, *distinguishing State v. Weisberg*, 65 Wn.App. 721 (1992), *State v. Bright*, 77 Wn.App. 304 (1995); I.

***State v. Brown***, 78 Wn.App. 891 (1995)

Intent is not an element of rape, *State v. Ciskie*, 110 Wn.2d 263 (1988), *State v. Walden*, 67 Wn.App. 891, 89406 (1992), *State v. Elmore*, 54 Wn.App. 54 (1989); voluntary intoxication is not a defense to rape, *State v. Swagerty*, 60 Wn.App. 830, 833-4 (1991); II.

***State v. Chhom***, 128 Wn.2d 739 (1996)

Rape of a child, RCW 9A.44.073, can support attempted rape of a child irrespective of the lack of a *mens rea* element in the greater offense, *State v. Patel,* 170 Wn.2d 476 (2010), *distinguishing* *State v. Dunbar*, 117 Wn.2d 587, 590 (1991); 9-0.

***State v. Bright***, 129 Wn.2d 257 (1996)

Where rape 1° complainant testifies that defendant-police officer remained armed with his handgun in holster but did not threaten to use it, there is sufficient evidence to support the deadly weapon element, RCW 9A.44.040(1)(a), at 265-73; rape 2° is a lesser of rape 1°; here, rape 3° is not a lesser; reverses *State v. Bright*, 77 Wn.App. 304 (1995); *see: State v. Lubers*, 81 Wn.App. 614, 619-21 (1995); 6-3.

***State v. Hayes***, 81 Wn.App. 425, 429-31 (1996)

Defendant is charged with four counts of rape of a child over a two year period, victim testifies defendant committed offense at least four times up to two-three times per week, allegations of each count are identical; held: in sexual abuse cases where multiple counts are alleged to have occurred within the same charging period, state need not elect particular acts associated with each count as long as evidence clearly delineates specific and distinct incidents of sexual abuse, and jury is instructed they must be unanimous as to which act constitutes the count charged and that they are to find separate and distinct acts for each count, at 431, *State v. Newman*, 63 Wn.App. 841, 851, *State v. Noltie*, 116 Wn.2d 831, 842-3 (1991), *State v. Borsheim*, 140 Wn.App. 357 (2007), *State v. Berg*, 147 Wn.App. 923 (2008), *State v. Carter*, 156 Wn.App. 561 (2010), *State v. Corbett*, 158 Wn.App. 576 (2010), *State v. Edwards*, 171 Wn.App. 379, 400-03 (2012); "generic" child testimony can support a conviction, *State v. Brown*, 55 Wn.App. 738, 749 (1989), *see: State v. Jensen*, 125 Wn.App. 319 (2005); I.

***State v. Maganai***, 83 Wn.App. 735 (1996)

Victim is pulled from her car and sexually assaulted, defendant convicted of attempted rape 1°; held: entering a car that is not a motor home is not felonious entry, RCW 9A.44.040(1)(d), as vehicle prowling 2° is a gross misdemeanor, RCW 9A.52.100, thus defendant committed attempted rape 2°, *State v. Thomson*, 71 Wn.App. 634 (1993); II.

***State v. Chester***, 133 Wn.2d 15 (1997)

Concealing video camera beneath step-daughter's bed and secretly filming her while she dresses is insufficient to establish sexual exploitation of a minor, RCW 9.68A.040; affirms *State v. Chester*, 82 Wn.App. 422 (1992), *see: State v. Grannis*, 84 Wn.App. 546 (1997), *State v. Mobley*, 129 Wn.App. 378 (2005) , *but see: State v. Powell,* 181 Wn.App. 716, 725-29 (2014); 6-3.

***State v. Myers***, 133 Wn.2d 26 (1997)

In sexual exploitation of a minor case, RCW 9.68A.040 (1989), defendant's videotaping seven-year old daughter's vaginal area in bathtub, coaxing her to exhibit her private parts and videotaping clothed genital regions of adults and children on same day is sufficient to establish that tape was made for sexual stimulation, *State v. Bohannon*, 62 Wn.App. 462, 472 (1991), *see:*

*State v. Powell*, 181 Wn.App. 716, 725-29 (2014), *cf.:* *State v. Whipple*, 144 Wn.App. 654 (2008); affirms *State v. Myers*, 82 Wn.App. 435 (1996); 9-0.

***State v. Grannis***, 84 Wn.App. 546 (1997)

Video of minor girls in a park that focuses on their clothed genitalia, buttocks and breast area, and another video of a minor girl bathing, taken through a crack in the wall, are insufficient to establish **possessing visual or printed matter depicting a minor engaged in sexually explicit conduct**, RCW 9.68A.070 (2002), as the behavior was not "sexually explicit conduct," RCW 9.68A.011(3) (1989), State v. Whipple, 144 Wn.App. 654 (2008), *see:* *State v. Mobley*, 129 Wn.App. 378 (2005), *but see: State v. Powell*, 181 Wn.App. 716, 725-29 (2014); 2-1, II.

***State v. Riles***, 135 Wn.2d 326 (1998) , *abrogated on other grounds*, *State v. Valencia*, 169 Wn.2d 782 (2010)

Requiring **polygraph** testing to monitor compliance with other conditions of community placement is valid, *State v. Combs*, 102 Wn.App. 949 (2000), *State v. Vant*, 145 Wn.App. 592, 603 (2008); **plethysmograph** testing may be imposed by sentencing court as part of a treatment program, RCW 9.94A.120(9)(c)(iii), but may not order it unless it also requires crime-related treatment for sexual deviancy, *State v. Castro*, 141 Wn.App. 485, 493-94 (2007), *State v. Land*, 172 Wn.App. 593, 605-06 (2013), *State v. Johnson*, 184 Wn.App. 777 (2014), *State v. Alcocer*, 2 Wn.App.2d 918 (2018), *Matter of Brettell*, 6 Wn.App.2d 161 (2018); ordering a defendant convicted of a sex offense with a minor from having no contact with minors or frequenting places where they congregate is valid, *State v. McCormick*, 166 Wn.2d 689 (2009); ordering a sex offender who raped an adult from having no contact with minors is overbroad, *cf.:* *State v. Williams*, 157 Wn.App. 689 (2010); affirms, in part, *State v. Riles*, 86 Wn.App. 10 (1997), overruling *State v. Holland*, 80 Wn.App. 1 (1995), *State v. Flores-Moreno*, 72 Wn.App. 733, 742-5 (1994); 7-2.

***State v. Foster***, 135 Wn.2d 441 (1998)

Six-year old child molestation complainant is permitted to testify via one-way closed-circuit television, RCW 9A.44.150(1); held: confrontation clauses are not violated where, following a hearing, substantial evidence establishes that child complainant under the age of ten would suffer serious emotional distress that would prevent her from reasonably communicating at trial if required to testify in presence of defendant, *Maryland v. Craig*, 111 L.Ed.2d 666 (1990), affirming *State v. Foster*, 81 Wn.App. 444 (1996); CONST. Art. I, §22 provides greater protection to defendants than 6th Amendment to United States Constitution, but live video is the functional equivalent of "face-to-face," *cf.: State v. Ulestad*, 127 Wn.App. 209 (2005), *State v. Sweidan,* 13 Wn.App.2d 53 (2020), *State v. D.K.,* 21 Wn.App.2d 342 (2022), *State v. Palmer*, ___ Wn.App.2d ___, 518 P.3d 252 (2022); 5-4.

***State v. Ackerman***, 90 Wn.App. 477, 481-82 (1998)

Unavailable victim's hearsay statements that she had been sexually abused are admissible under the "hue and cry" doctrine, a caselaw exception to the hearsay rule allowing evidence that the victim made a timely complaint to someone after the assault, *State v. DeBolt*, 61 Wn.App. 58, 63 (1991), even if defense does not raise timeliness of complaint as an issue, *State v. Alexander*, 64 Wn.App. 147, 151 (1992), *State v. Murley*, 35 Wn.2d 233, 236-7 (1949), as long as trial court

finds particular guarantees of trustworthiness from totality of circumstances, *State v. Florczak,* 76 Wn.App. 55 (1994); details and identify of offender are not permitted; I.

***State v. Thomas***, 138 Wn.2d 630 (1999)

Felony murder/rape is not a sex offense, RCW 9.94A.030(33)(a), thus sexual motivation is a proper aggravating factor, *State v. Halgren,* 137 Wn.2d 340, 349-50 (1999), overruling, in part, *State v. Buckner,* 74 Wn.App. 889 (1994), *aff'd, on other grounds,* 133 Wn.2d 63 (1997); 9-0.

***State v. Rosul***, 95 Wn.App. 175 (1999)

For possession of **child pornography**, RCW 9.68A.070, knowledge of the age of the child depicted is not a defense, RCW 9.68A.110; construing statute to require proof of knowledge that defendant was aware of nature and content of the material plus an affirmative defense that defendant can prove that he was "not in possession of any facts on the basis of which he should reasonably have known that the person depicted was a minor" saves statute from overbreadth challenge, *State v. Garbaccio,* 151 Wn.App. 716, 731-42 (2009), *see also: State v. Chambers*, 23 Wn.App.2d 917 (2022); II.

***State v. Montgomery***, 95 Wn.App. 192, 199-201 (1999)

For purposes of defining penetration of vagina, labia minora are part of the vagina, RCW 9A.44.010(1), *State v. Delgado,* 109 Wn.App. 61, 64-66 (2001), *rev'd, on other grounds,* 148 Wn.2d 723 (2003), trial court properly prohibited defense from arguing that labia are not the vagina; I.

***State v. Harris***, 97 Wn.App. 865 (1999)

In rape 3° trial, victim is visibly pregnant, defendant is not the father which defense offers to prove, excluded by court, defense offers to prove that victim had previously accused another of a different rape, which victim now denies, denied by court; held: evidence on nonpaternity, offered by defense so that the jury would not think defendant was the father, was refused within trial court's discretion as within the spirit of the **rape shield** law; prior rape allegation was properly refused as victim would deny it and it could only thus be proved by extrinsic evidence, which is not permitted, ER 608(b); III.

***State v. Thomas***, 98 Wn.App. 422 (1999)

Assault 4° is not a lesser of **indecent liberties** as intent is not an element of indecent liberties, *but see: State v. Smith,* 56 Wn.App. 909, 913-14 (1990), *State v. Bluford,* 195 Wn.App. 570 (2016), *State v. Stevens,* 158 Wn.2d 304, 310-11 (2006); III.

***State v. Fiser***, 99 Wn.App. 714 (2000)

Evidence is sufficient to convict school teacher charged with **sexual misconduct with a minor 1°**, RCW 9A.44.093(1), where the minor gains actual benefits in school during a sexual relationship establishes an indirect promise for these benefits; II.

***State v. Pietrzak***, 100 Wn.App. 291 (2000)

Taking nude photographs of a 16-year old is **communicating with a minor for immoral purposes**, RCW 9.68A.090, which is not vague, *see: State v. Luther*, 65 Wn.App. 424 (1992), *State v. McNallie*, 120 Wn.2d 925 (1993), *State v. Schimmelpfennig*, 92 Wn.2d 95 (1979), *State v. Falco*, 59 Wn.App. 354, 358 (1990); III.

***State v. Root***, 141 Wn.2d 701 (2000)

Unit of prosecution for sexual exploitation of a minor, RCW 9.68A.040, is each photo session per minor, not each photograph, reversing, in part, *State v. Root*, 95 Wn.App. 333 (1999), *see: State v. Sutherby*, 165 Wn.2d 870, 878-83 (2009), *but see: State v. Polk*, 187 Wn.App. 380 (2015); 9-0.

***State v. Kistner***, 105 Wn.App. 967 (2001)

Department of Corrections administratively sanctions, RCW 9.94A.205(2)(a), sex offender on SSOSA suspended sentence, RCW 9.93A.120(8)(a)(ii), for violating condition, later trial court revokes sentence based upon same violation, RCW 9.94A.120(8)(a)(vi); held: trial court has statutory authority to revoke even after administrative sanction is imposed, *see also: State v. Prado*, 86 Wn.App. 573 (1997); I.

***State v. Kilgore***, 107 Wn.App. 160, 177-82 (2001)

Where there is physical evidence of penetration in rape of a child case, evidence of prior sexual abuse of the child by another person is relevant, *State v. Horton*, 116 Wn.App. 909 (2003), *see: State v. Carver*, 37 Wn.App. 122 (1984); absent physical evidence, prior sexual abuse of a child may be relevant to prove the child's precocious sexual knowledge (detailed standards regarding admissibility, at 180-82); II.

***State v. Al-Hamdani***, 109 Wn.App. 599 (2001)

Rape 2˚ "when the victim is incapable of consent by reason of being physically helpless or mentally incapacitated," RCW 9A.44.050(1)(b), states a single means of committing the offense, not alternative means, distinguishing *State v. Ortega-Martinez*, 124 Wn.2d 702, 707-09 (1994); I.

***State v. Glas***, 147 Wn.2d 410 (2002)

Defendant surreptitiously photographs under skirts of women at a mall, confesses that photos were destined for a web site, is convicted of voyeurism, RCW 9A.44.115(2); held: statute prohibits viewing or photographing "in a place where he or she would have a reasonable expectation of privacy," does not apply to a public place such as a mall, *see: State v. Lawson*, 185 Wn.App. 349 (2014), *State v. Yusuf*, 21 Wn.App.2d 960 (2022); statute is not overbroad or vague; reverses *State v. Glas*, 106 Wn.App. 895 (2001); legislatively overruled, RCW 9A.44.115 (2003); 9-0.

***State v. Hall***, 112 Wn.App. 164 (2002)

Adoption is not a defense to incest between a biological parent and the child he knows to be his offspring; II.

***State v. Bankes***, 114 Wn.App. 280 (2002)

Defendant pleads guilty to sex offenses, on defense motion court orders sex deviancy evaluation, at sentencing defense declines to provide report to court, court orders defense to disclose it, court then uses substance of report to impose exceptional aggravated sentence, finding future dangerousness; held: where court orders evaluation for SSOSA, RCW 9.94A.670(3) implicitly authorizes the court to receive a copy; using defendant's unwarned admissions for purposes of a SSOSA evaluation violated his Fifth Amendment right, *State v. Tinkham*, 74 Wn.App. 102, 106-07 (1994), *State v. Chance*, 105 Wn.App. 291, 299 (2001), *Estelle v. Smith*, 68 L.Ed.2d 359 (1981), distinguishing *State v. Post*, 118 Wn.2d 596 (1992), *State v. Diaz-Cardona*, 123 Wn.App. 477 (2004), *but see: State v. N.B.*, 127 Wn.App. 776, 780-82 (2005), even though defense requested the evaluation; III.

***State v. Allen***, 116 Wn.App. 454, 463-64 (2003)

Assault 2º is not a lesser of rape 1º, *State v. Walden*, 67 Wn.App. 891 (1992); III.

***State v. Horton***, 116 Wn.App. 909 (2003)

In rape of a child trial, state offers evidence of penetrating trauma to hymen, complainant denies on direct that she had previously engaged in sexual intercourse, defense does not ask on cross to explain or deny her pretrial statement to the contrary, defense allows witness to be excused, ER 612(b), offers extrinsic evidence of inconsistency which is refused because witness was not given opportunity to explain or deny, ER 613(b); held: because foundation for impeachment may be laid during cross or after extrinsic evidence is admitted by recalling the witness, *State v. Johnson*, 90 Wn.App. 54, 63-72 (1998), counsel's performance was deficient; evidence of prior sexual conduct was not offered to show complainant's propensity for sexual conduct but rather to rebut state's implication that he had caused the trauma to hymen, thus **rape shield** statute, RCW 9A.44.020(2), does not bar the evidence, *State v. Kilgore*, 107 Wn.App. 160, 177-82 (2001), *State v. Carver*, 37 Wn.App. 122 (1984), *see: State v. Posey*, 130 Wn.App. 262, 275-77 (2005), 161 Wn.2d 638, 647-49 (2007); II.

***State v. Woods***, 117 Wn.App. 278 (2003)

In rape of a trial case, results of psychosexual evaluation opining that defendant has no predisposition to sexual attraction to children or sexual impulsivity is relevant, as sexual morality is a pertinent character trait in sex offenses, *State v. Griswold*, 98 Wn.App. 817, 823 (2000), but was properly excluded as opinion evidence is not admissible as proof of character, *State v. Kelly*, 102 Wn.2d 188, 195 (1984), ER 405(a); III.

***State v. Oliva***, 117 Wn.App. 773 (2003)

State agrees to recommend special sex offender sentencing alternative if defendant is amenable, court orders presentence investigation and evaluation at Eastern State Hospital, PSI reflects that defendant is not amenable, defense requests evaluation by certified sex offender

treatment provider, state opposes, court sentences to prison; held: trial court properly exercised discretion in denying SSOSA evaluation, *State v. Koivu*, 68 Wn.App. 869 (1993), state did not breach plea agreement even though RCW 18.155.030(2)(a) provides that question of amenability is necessarily determined by certified provider; 2-1, I.

***State v. Guzman***, 119 Wn.App. 176 (2003)

In rape 3° case, trial court admits evidence that five years earlier defendant had touched breast of victim to establish lustful disposition toward victim; held: remoteness is a factor, but here trial court did not abuse discretion, at 182-84, *State v. Ray*, 116 Wn.2d 531, 547 (1991), *see: State v. Crossguns*, 199 Wn.2d 282 (2022); victim expressing lack of consent by actual words or conduct is a necessary element which must be pled, at 184-86; III.

***Pers. Restraint of Grasso***, 151 Wn.2d 1 (2004)

In child rape case, prosecutor tells 5-year old witness that, if she wants, she can say "I don't know" if she doesn't remember or "I don't want to talk about it" if she doesn't want to answer, witness answers most questions on direct but says she does not remember to some questions and declines to answer others; on cross, witness says she doesn't remember to some questions but never says she doesn't want to talk about it; held: while it is improper for prosecutor to give a witness permission to refuse to testify, "I don't remember" is a constitutionally acceptable response, *United States v. Owens*, 98 L.Ed.2d 951 (1988); because witness did not refuse to answer any defense questions, no confrontation clause violation occurred, *State v. Clark*, 139 Wn.2d 152, 158 (1999), *State v. Price*, 158 Wn.2d 630 (2006), *State v. Mobley*, 129 Wn.App. 378, 387-89 (2005), *State v. Williams*, 137 Wn.App. 736, 744-45 (2007), *State v. Bates*, 196 Wn.App. 65 (2016), *see: State v. Kinzle*, 181 Wn.App. 774 (2014); fractured opinion.

***State v. Cannon***, 120 Wn.App. 86 (2004)

Digital child porn image is "visual or printed material," RCW 9.68A.011(1), *State v. Rosul*, 95 Wn.App. 175 (1999), *see: State v. Ritter*, 149 Wn.App. 105 (2009), even before legislature added "digital images" to definition in 2002; II.

***State v. Lorenz***, 152 Wn.2d 22, 24-36 (2004)

"Sexual gratification" is not an element of child molestation 1° and need not be in to convict instruction as long as "sexual contact" is in to convict instruction and jury is separately instructed about sexual gratification, overruling, in part, *State v. BJS*, 72 Wn.App. 368 (1994); 9-0.

***State v. Castilla***, 121 Wn.App. 198 (2004), *op. withdrawn and superseded*, 131 Wn.App. 7 (2004)

Defendant-nurse engages in intercourse with a rehabilitation center patient after he responds to her call for help, is convicted of rape 2°, RCW 9A.44.050(1)(d); held: health care provider who has sexual intercourse with a patient during a treatment session is guilty of rape,

evidence is sufficient for jury to find defendant guilty when he is on duty and responds to call for help even if he is not assigned specifically to victim's care; I.

***State v. Heming***, 121 Wn.App. 609 (2004)

In RCW 9A.44.079(1), rape of a child 3°, age distinction does not violate equal protection clause, *State v. T.J.M.*, 139 Wn.App. 845, 849-53 (2007); III.

***State v. Smith***, 122 Wn.App. 294 (2004)

A defendant may be convicted of rape of a child 3°, RCW 9A.44.079(1), even though the evidence establishes that the victim was younger than 14 years, *see:* *State v. Dodd*, 53 Wn.App. 178 (1989), as rape of a child 3° is an inferior degree crime of rape of a child 2°, RCW 10.61.003, proof of a greater charge necessarily establishes proof of all lesser included offenses; II.

***State v. Jensen***, 125 Wn.App. 319, 325-28 (2005)

Information alleges charging period of "on or about August 1, 2001 through February 19, 2002," victim testifies defendant came to her room and touched her private spot, on two other occasions he came to her room, but does not testify to sexual contact, hearsay is admitted in which victim said defendant touched her more than once, a few times; held: generic testimony can be used to support multiple counts if (1) the kind of act is described with sufficient specificity, (2) the number of acts committed is described with sufficient certainty to support each count alleged, and (3) there is testimony about the general time period, *State v. Hayes*, 81 Wn.App. 425, 438 (1996); here victim's testimony does not describe acts with sufficient specificity for jury to determine which offenses, if any, defendant committed on which occasions, so one count reversed and dismissed, *State v. Edwards*, 171 Wn.App. 379, 400-03 (2012); II.

***State v. Bader***, 125 Wn.App. 501 (2005)

Community custody for sex offense begins after the incarceration portion of sentence as reduced by earned early release time, and does not reduce the incarceration portion by the amount of the community custody, former RCW 9.94A.120(10(a), now RCW 9.94A.710(1)[2000]; III.

***State v. McInally***, 125 Wn.App. 854 (2005)

A sex offense in another state precludes eligibility for a SSOSA, RCW 9.94A.670(2)(b), whether or not the prior offense would be a sex offense in Washington; I.

***State v. Price***, 127 Wn.App. 193 (2005), *aff'd, on other grounds,* 158 Wn.2d 630 (2006)

Evidence that defendant did not simply touch victim's vagina but rubbed it, even over her clothing, causing redness and swelling is sufficient for jury to infer sexual gratification, *State v. Ramirez*, 46 Wn.App. 223 (1986), *State v. Wilson*, 56 Wn.App. 63 (1989), *State v. Harstad*, 153 Wn.App. 10, 21-23 (2009), *see: State v. Veliz*, 76 Wn.App. 775 (1995), distinguishing *State v. Powell*, 62 Wn.App. 914, 917-18 (1991); 2-1, II.

***State v. Ulestad***, 127 Wn.App. 209 (2005)

Trial court finds that child molestation complainant may testify via closed circuit television, places complainant and attorneys in separate chambers, defendant, judge and jury remain in courtroom, court directs that if counsel wishes to object, judge will "lean through the door" to the room where attorneys are, hear objection and rule from bench; held: RCW 9A.44.150(h) requires that defendant must "communicate constantly" with defense counsel, here communication was delayed, not constant, to talk to jury defendant had to signal in front of jury and interrupt the trial; because court did not strictly follow the constant communication requirement, error is reversible without a showing of prejudice, distinguishing *State v. Foster*, 135 Wn.2d 441 (1998); 2-1, II.

***State v. Stevens***, 127 Wn.App. 269 (2005)

Voluntary intoxication is a defense to child molestation, as "for the purpose of gratifying sexual desire," RCW 9A.44.010(2), is a specific intent requirement, whether or not it is an element of the crime, at 273-75, *see: State v. Lorenz*, 152 Wn.2d 22, 34-35 (2004); assault 4° is a lesser of child molestation 2°, at 276-78; II.

***State v. Sheets***, 128 Wn.App. 149 (2005)

In rape case with consent defense, a witness' testimony that victim was drunk and flirtatious immediately prior to the sexual intercourse is not barred by **rape shield** statute, *State v. Jones*, 168 Wn.2d 713 (2010), *State v. Cox*, 17 Wn.App.2d 178 (2021), as complainant's intoxication was the state's theory as to a lack of consent; 2-1, III.

***State v. Mobley***, 129 Wn.App. 378, 383-87 (2005)

Evidence is sufficient to prove **possession of depictions of children engaged in sexually explicit conduct** where pictures are on hard disk even though they had been deleted and were not accessible to an everyday user, detective was able to retrieve them and testified that whoever put them on hard disk downloaded or saved them, a witness testifies defendant showed them to a minor; III.

***State v. Griffith***, 129 Wn.App. 482, 490-92 (2005)

After both parties rest, court allows state to amend information from dealing in child pornography, RCW 9.68A.050(1) to possession with intent to deal in child pornography, RCW 9.68A.050(2); held: possession with intent is not a lesser included offense of dealing in child porn, as "there are a myriad of situations in which one could publish, disseminate or finance child pornography without ever possessing it," at 491, thus amendment was improper; II.

***State v. Posey***, 130 Wn.App. 262, 275-77 (2005), 161 Wn.2d 638, 647-49 (2007)

In rape case, trial court refuses offer of an e-mail written by victim stating that she would enjoy being raped and beaten; held: court's discretionary exclusion under the **rape shield** statute, RCW 9.44.020(4), was proper as the e-mail described events in which victim described potential

prior sexual misconduct, thus had little probative value and violated rape shield statute, distinguishing *State v. Carver*, 37 Wn.App. 122 (1984); III.

***State v. Jackman***, 156 Wn.2d 736 (2006)

Where age is an element of an offense, a jury instruction which provides the date of birth of the complainant is a comment on the evidence, *State v. Becker*, 132 Wn.2d 54, 65 (1997), *State v. Levy*, 156 Wn.2d 709 (2006), and cannot be harmless, *Neder v. United States*, 144 L.Ed.2d 35 (1999); 9-0.

***State v. Luther***, 157 Wn.2d 63 (2006)

State proves defendant possessed photos of what appear to be minors engaged in sexually explicit conduct, but state does not prove age of minors, court convicts defendant of attempted possessing depictions of minors engaged in sexually explicit conduct, RCW 9.68A.070; held: while one cannot be found guilty of possession of child pornography unless it is proved to actually be child pornography, *Ashcroft v. Free Speech Coalition*, 152 L.Ed.2d 403 (2002), First Amendment does not preclude conviction of attempted possession without proof of age of the minors, nor is attempted possession overbroad, *United States v. Williams*, 170 L.Ed.2d 650 (2008), *see also: State v. Aljutily*, 149 Wn.App. 286 (2009); *affirms State v. Luther*, 125 Wn.App. 176 (2005); 9-0.

***State v. Clinkenbeard***, 130 Wn.App. 552, 559-68 (2005)

Sexual misconduct with a minor 1º, RCW 9A.44.093(1)(b), which criminalizes "a school employee who has…sexual intercourse with a registered student of the school who is at least sixteen years old and not married to the employee, if the employee is at least sixty months older than the student" does not violate due process, equal protection or right to privacy, distinguishing *Lawrence v. Texas*, 156 L.Ed.2d 508 (2003), *see also: State v. Hirschfelder*, 170 Wn.2d 536 (2010); III.

***State v. Clarke***, 156 Wn.2d 880 (2006)

Following rape convictions subject to "determinate sentence plus," RCW 9.94A.712, trial court imposes exceptional minimum terms based upon unscored misdemeanors; held: sex assault convictions that are subject to RCW 9.94A.712 [recodified as 9.94A.507 (2008)] are indeterminate sentences, thus *Blakely v. Washington*, 159 L.Ed.2d 403 (2004) does not apply, as trial court is not enhancing the maximum sentence the judge can impose solely based upon facts reflected in the jury verdict or admitted by defendant, ISRB sets actual release date, *State v. Halsey*, 140 Wn.App. 313, 323-27 (2007), *State v. Hughes*, 166 Wn.2d 675, 686-89 (2009), *State v. Bobenhouse*, 166 Wn.2d 881, 895-97 (2009), overruling *State v. Borboa*, 124 Wn.App. 779 (2004), overruling, in part, *State v. Monroe*, 126 Wn.App. 435, 441-52 (2005), *see: State v. Woodruff*, 137 Wn.App. 127 (2007); affirms *State v. Clarke*, 124 Wn.App. 893 (2004); 7-2.

***State v. Hosier***, 157 Wn.2d 1 (2006)

Defendant leaves sexually explicit notes directed at children at places where children are likely to find them, father of one finds note, describes it to daughter as a warning, defendant is

convicted of communicating with a minor for immoral purposes [CMIP], RCW 9.68A.090; defendant leaves another note at a cosmetology school expressing desire to kidnap and sexually abuse "young girls"; held: state need not prove that child victim must understand prurient nature of a communication, exposure to sexually explicit message was sufficient; where an adult finds the note and does not communicate its substance to a child, evidence is sufficient to prove attempted CMIP; affirms *State v. Hosier*, 124 Wn.App. 696 (2004); 8-1.

***State v. Osman***, 157 Wn.2d 474 (2006)

Denial of SSOSA, RCW 9.94A.670, because defendant may be deported and thus will not be treated does not violate SRA or equal protection clause, *cf.: State v. Adamy*, 151 Wn.App. 583 (2009); affirms *State v. Osman*, 126 Wn.App. 575 (2005); 9-0.

***State v. Price***, 158 Wn.2d 630 (2006)

Child molestation victim is asked on direct examination about touching, says "me forgot" to all questions, does remember talking to police but not what she said, trial court admits her hearsay statements; held: because the witness took the stand, testified, was asked about the sexual contact and about her hearsay statements, defense had opportunity to cross-examine, no confrontation clause violation occurred, *Pers. Restraint of Grasso*, 151 Wn.2d 1 (2004), *State v. Bates*, 196 Wn.App. 65 (2016), *cf.: State v. Kinzle*, 181 Wn.App. 774 (2014); affirms *State v. Price*, 127 Wn.App. 193 (2005); 6-3.

***State v. Gregory***,158 Wn.2d 759, 781-801 (2006)

In rape case with consent defense, trial court denies offer of victim's prior prostitution convictions as remote, refuses *in camera* review of victim's dependency files; held: **rape shield** statute, RCW 9A.44.020, may properly bar prior remote prostitution convictions, within discretion of trial court, *see: State v. Hudlow*, 99 Wn.2d 1 (1983), *State v. Cecotti*, 31 Wn.App. 179 (1982), *State v. Kalamarski*, 27 Wn.App. 787 (1980), *State v. Wilmoth*, 31 Wn.App. 820 (1982); defense claim that victim was engaging in prostitution, had previously engaged in prostitution and if victim was currently engaged in prostitution would be reflected in dependency files was sufficient to require an *in camera* inspection of those files, *Pennsylvania v. Ritchie*, 94 L.Ed.2d 40 (1987), *cf.: State v. Diemel*, 81 Wn.App. 464 (1996); 8-1.

***State v. Autrey***, 136 Wn.App. 460 (2006)

Following sex offense convictions, trial court imposes condition that defendant have no sexual contact with anyone "without his or her explicit consent;" held: condition is reasonably related to the crime, *State v. Simpson*, 136 Wn.App. 812 (2007); "explicit" is not vague; III.

***State v. Stockwell***, 159 Wn.2d 394 (2007)

Rape of a child 1° and statutory rape 1° are legally comparable crimes, RCW 9.94A.030(33)(b), *but see: State v. Delgado*, 148 Wn.2d 723 (2003); nonmarriage was an implied element of statutory rape; *affirms State v. Stockwell*, 129 Wn.App. 230 (2005); 8-1.

***State v. Woodruff***, 137 Wn.App. 127 (2007)

Following child rape convictions subject to "determinate sentence plus," RCW 9.94A.712 [recodified as 9.94A.507 (2008)], trial court imposes consecutive sentences without finding aggravating factors; held: while exceptional sentences for indeterminate sentences need not be submitted to a jury, *State v. Clarke*, 156 Wn.2d 880 (2006), *State v. Bobenhouse*, 166 Wn.2d 881, 895-97 (2009), trial court must still specify aggravating circumstances and enter findings of fact consistent with RCW 9.94A.535; II.

***State v. Fleming***, 137 Wn.App. 645 (2007)

Defendant looks over stall of public restroom, sees victim disrobed, sticks out tongue, he runs, is convicted of **voyeurism**; held: jury reasonably found that defendant viewed victim "for more than a brief period of time, in other than a casual or cursory manner," RCW 9A.44.115(1)(e), *State v. Stutzke*, 2 Wn.App.2d 927, 934-37 (2018), *see also: State v. Diaz-Flores*, 148 Wn.App. 922 (2009), *State v. Yusuf*, 21 Wn.App.2d 960 (2022); 2-1, III.

***State v. Williams***, 137 Wn.App. 736 (2007)

Rape and assault victim provides details of offense, including name of perpetrator, to forensic nurse at hospital using a history questionnaire, stating that she went to the hospital to "gather evidence" and to identify injuries, nurse testifies at trial; held: a party demonstrates a statement to be reasonably pertinent to **medical treatment** when (1) the declarant's motive in making the statement is to promote treatment and (2) the medical professional reasonably relied on the statement for purposes of treatment, at 746, *State v. Butler*, 53 Wn.App. 214, 220 (1989); here, victim did not go to hospital for purely forensic reasons; in sexual abuse situation, a declarant's statement disclosing identity of a closely-related perpetrator is admissible, ER 803(a)(4), to prevent recurrence and future injury, at 746 ¶ 20, *see: State v. Ackerman*, 90 Wn.App. 477, 482 (1998), *State v. Sims*, 77 Wn.App. 236, 239 (1995) (*dicta* here); II.

***State v. Boyd***, 137 Wn.App. 910, 916-22 (2007)

"Intimate areas" in voyeurism statute, RCW 9A.44.115(20(b), is neither vague nor overbroad; II.

***State v. Sivins***, 138 Wn.App. 52, 62-65 (2007)

Defendant engages in sexually graphic internet chat with officer whom he believes is a 13-year old girl, tells her he would have sex with her if she wants, entices her with pizza and vodka, drives to motel room, sufficient to establish **attempted rape of a child**, *State v. White*, 150 Wn.App. 337 (2009), *State v. Wilson*, 158 Wn.App. 305, 316-20 (2010), *see: State v. Townsend*, 147 Wn.2d 666, 679 (2002); III.

***State v. Sutherby***, 138 Wn.App. 609, 613-16 (2007), 165 Wn.2d 870, 878-83 (2009)

Simultaneously possessing multiple materials of child pornography, RCW 9.68.070, 9.68A.011(2), in the same location is one unit of prosecution, *but see: State v. Polk*, 187 Wn.App. 380 (2015); I.

***State v. Gartrell***, 138 Wn.App. 787 (2007)

Where court revokes a SSOSA suspended sentence, RCW 9.94A.670(4), time served in total or partial confinement must be credited against the standard range, but community custody time served prior to revocation is not to be credited against community custody imposed upon release after serving the standard range; I.

***State v. T.J.M.***, 139 Wn.App. 845 (2007)

Precluding consent as a defense to rape of a child 1º does not violate equal protection nor due process clauses, *State v. Heming*, 121 Wn.App. 609, 612 (2004); II.

***State v. Ramirez***, 140 Wn.App. 278, 290-93 (2007)

Unlike at sentencing, at a SSOSA revocation hearing trial court need not consider victim's opinion, distinguishing RCW 9.94A.670(4); II.

***State v. Partee***, 141 Wn.App. 355 (2007)

Where sentence is conditionally suspended under **sex offender sentencing alternative** (SSOSA), RCW 9.94A.670, upon proof of violation trial court has discretion to impose consecutive 60-day sanctions for each violation, RCW 9.94A.634, or revoke and execute original sentence, *State v. Badger*, 64 Wn.App. 904 (1992); 2-1, II.

***State v. Hughes***, 142 Wn.App. 213 (2007)

As a result of one act of intercourse, defendant pleads guilty to rape of a child 2º, RCW 9A.44.076(1), and rape 2º, RCW 9A.44.050(1)(b); held: because legislature intended multiple punishment, *see: Pers. Restraint of Orange*, 152 Wn.2d 795, 815 (2004), double jeopardy clause is not offended by the two convictions for the same act, *State v. Smith*, 177 Wn.2d 533, 545-50 (2013); 2-1, III.

***State v. Bobenhouse***, 143 Wn.App. 315, 324-28 (2008), 166 Wn.2d 891 (2009)

In child rape and incest case, victim testifies defendant committed oral sex and anal sex, no unanimity instruction is offered, state does not elect; held: each of the methods of sexual intercourse constitutes a distinct criminal act, not alternative means, *see: State v. Williams*, 136 Wn.App. 486, 498 (2007), failure to give unanimity instruction is error; absent contravening evidence, plus general denial, similar acts, error is harmless, *State v. Camarillo*, 115 Wn.2d 60, 62-63 (1990); III.

***State v. Bucknell***, 144 Wn.App. 524 (2008)

Defendant rapes victim who is paralyzed but can speak and understand and perceive information, in convicted of rape 2º, RCW 9A.44.050(1)(b); held: a victim who is able to communicate is not "physically helpless," RCW 9A.44.010(5), court of appeals remands for entry of judgment for rape 3º; III.

***State v. Whipple***, 144 Wn.App. 654 (2008)

Defendant photographs teenager nude unbeknownst to her, is convicted of possessing depictions of a minor engaged in sexually explicit conduct, RCW 9.68A.070 (2002); held: absent

evidence defendant aided, invited, employed, authorized or caused victim to engage in sexually explicit conduct, evidence is insufficient, *State v. Chester*, 133 Wn.2d 15 (1997), *State v. Grannis*, 84 Wn.App. 546 (1997), *but see: State v. Powell*, 181 Wn.App. 716, 725-29 (2014), *cf.: State v. Myers*, 133 Wn.2d 26 (1997); 2-1, II.

***State v. O'Cain***, 144 Wn.App. 772 (2008)

Community custody provision following rape conviction prohibited internet access; held: absent evidence that defendant accessed the internet before the rape or that the internet contributed to the crime, prohibiting internet access is not crime-related, RCW 9.94B.050(5)(e), internet access is not affirmative conduct reasonably related to the circumstances of the offense, *State v. Johnson*, 180 Wn.App. 318, 330-31 (2014), thus RCW 9.94A.712(6)(a) (2006) [recodified as 9.94A.507 (2008)] is inapplicable, *see: Packingham v. North Carolina*, 137 S. Ct. 1730, 1731, 198 L. Ed. 2d 273 (2017); I.

***State v. Jackson***, 145 Wn.App. 814 (2008)

Ejaculating semen on a juvenile is sufficient to establish sexual contact and touching for purposes of child molestation, RCW 9A.44.010(2) (2007), 9A.44.086 (1994), *State v. Brooks*, 45 Wn.App. 824 (1986); I.

***State v. Berg***, 147 Wn.App. 923, 937-40 (2008)

At child molestation trial, defense counsel asks detective if other members of the family corroborated complainant's allegations, detective says none, on redirect prosecutor asks if this is unusual, detective testifies about other cases in which family members did not support the complainant, defense claims on appeal that counsel was ineffective for not objecting; held: defense opened the door to detective's testimony about his experience in past cases; I.

***State v. Buzzell***, 148 Wn.App. 592 (2009)

Consent negates forcible compulsion and is thus a defense to indecent liberties, RCW 9A.44.100(1)(a), *State v. W.R.*, 181 Wn.2d 757 (2014), *State v. Ortiz-Triana*, 193 Wn.App. 769 (2016), but failure to instruct here was harmless error, *see: State v. Teas*, 10 Wn.App.2d 111 (2019); rape 3º is not a lesser of indecent liberties; I.

***State v. Diaz-Flores***, 148 Wn.App. 911 (2009)

Defendant is seen masturbating while looking through a window at a man and woman having sexual intercourse in their home, is convicted of two counts of voyeurism, RCW 9A.44.115; held: unit of prosecution, *State v. Adel*, 136 Wn.2d 629, 634 (1998), for voyeurism is each victim whose privacy right is violated; state need not prove that each victim aroused defendant where there is evidence that defendant viewed both with the purpose of arousing his sexual desires; I.

***State v. Ritter***, 149 Wn.App. 105 (2009)

Webcam image is a "photograph" for purposes of sexual exploitation of a minor, RCW 9.96A.040, even if it is not downloaded and saved, RCW 9.68A.011(1); III.

***State v. Aljutily***, 149 Wn.App. 286 (2009)

Defendant is convicted of **communicating with a minor for immmoral purposes**, RCW 9.68A.090(2), for sexual e-mailing a police officer posing as a child; held: statute which prohibits electronic communication with a person defendant believes is a minor is not overbroad and does not burden protected speech; III.

***State v. Jagger***, 149 Wn.App. 525 (2009)

Escape of a sexually violent predator, RCW 9A.76.115, does not unconstitutionally criminalize escape from a civil facility nor violate double jeopardy and equal protection clauses; II.

***State v. McCormick***, 166 Wn.2d 689 (2009)

Trial court revokes SSOSA sentence for defendant's frequenting areas where minors are known to congregate, fails to find willfulness; held: in a SSOSA revocation, trial court need not find willfulness, *State v. Miller*, 180 Wn.App. 413 (2014); affirms *State v. McCormick*, 141 Wn.App. 256 (2007); 8-1.

***State v. Hudson***, 150 Wn.App. 646 (2009)

In rape case with consent defense, sexual assault nurse examiner testifies that victim's injuries were caused by nonconsensual sex; held: explicit, overt and unambiguous opinion that victim was raped, as opposed to an opinion that injuries were consistent with nonconsensual sex, at 653 n. 2, is an improper opinion of guilt, *State v. Black*, 109 Wn.2d 336, 348 (1987), *State v. Carlson*, 80 Wn.App. 116 (1995); 2-1, I.

***State v. Torres***, 151 Wn.App. 378 (2009)

In **custodial sexual misconduct 1º** case, "being detained" means "restraint on freedom of movement to such a degree that a reasonable person would not have felt free to leave," *see: State v. Armenta*, 134 Wn.2d 1 (1997), and does not mean under arrest or in custody; I.

***State v. Adamy***, 151 Wn.App. 583 (2009)

Sentencing court refuses to consider SSOSA because defendant has an immigration hold; held: while immigration status is a factor the court may consider in deciding whether or not to impose a SSOSA, RCW 9.94A.670, impact of deportation hold does not bar a SSOSA, thus court abused discretion, *cf.: State v. Osman*, 157 Wn.2d 474 (2006); III.

***State v. Garbaccio***, 151 Wn.App. 716, 731-42 (2009)

Child porn to convict instruction that puts burden on state to prove that defendant knowingly possessed child porn and that he knew the person depicted was a minor is adequate, *State v. Rosul*, 95 Wn.App. 175 (1999); trial court need not *sua sponte* instruct that jury can consider duration of defendant's control in evaluating whether state carried its burden on the element of possession, *see: State v. Staley*, 123 Wn.2d 794, 803 (1994); court should not give unwitting possession instruction as possession of child pornography has a *scienter* element; I.

***State v. Wright***, 152 Wn.App. 64 (2009)

In rape 2º case, trial court may not give rape 3º inferior degree instruction when defendant contends that the intercourse was consensual and victim testifies that it was forced, *see: State v. Charles*, 126 Wn.2d 353, 355-56 (1995), *State v. Ieremia*, 78 Wn.App. 746, 756 (1995), *State v. Fernandez-Medina*, 141 Wn.2d 448, 455-56 (2000), *State v. Hampton*, 182 Wn.App. 805, 828-31 (2014), *reversed, on other grounds*, 184 Wn.2d 656 (2015), *cf.: State v. Corey*, 181 Wn.App. 272 (2014); 2-1, II.

***State v. Jones***, 168 Wn.2d 713 (2010)

In rape case, trial court, applying **rape shield** statute, prohibits defendant from testifying that defendant, complainant and others were engaged in a "sex party" and that the sex was consensual; held: no state interest can be compelling enough to preclude introduction of evidence that, if believed, would provide a complete defense, *cf.: State v. Lizarraga*, 191 Wn.App. 530 (2015), *State v. Duarte Vela*, 200 Wn.App. 306 (2017), *see: State v. Lee*, 188 Wn.2d 473, 485-96 (2017), *State v. Cox*, 17 Wn.App.2d 178 (2021); Sixth Amendment right to present a defense was violated, *cf.: State v. Horn*, 3 Wn.App.2d 302 (2018), *State v. Blair*, 3 Wn.App.2d 343 (2018); rape shield statute is designed to exclude evidence of complainant's past sexual behavior, RCW 9A.44.020(2), which has little or no probative value in predicting a victim's consent on the occasion in question, but evidence of actual consent must be admitted; 9-0.

***State v. Meacham***, 154 Wn.App. 467 (2010)

Trial court is precluded by RCW 9.94A.835(c) from granting a pretrial motion to dismiss a sexual motivation special allegation for lack of sufficient evidence, CrR 8.3(c), *State v. Knapstad*, 107 Wn.2d 346 (1986), absent a prosecutor's motion; II.

***State v. Furseth***, 156 Wn.App. 516 (2010)

Multiple images of child porn are found on defendant's computer, defendant is charged with one count of possession of child pornography, RCW 9.68A.070 (1990), trial court does not give unanimity instruction, state does not elect a single picture; held: unit of prosecution is one count per possession without regard to the number of images, *State v. Sutherby*, 165 Wn.2d 870 (2009), *but see: State v. Polk*, 187 Wn.App. 380 (2015), thus it is not a multiple act case, *State v. Bobenhouse*, 166 Wn.2d 881, 892 (2009), thus a unanimity instruction is not required; I.

***State v. Norris***, 157 Wn.App. 50 (2010)

Federal Adam Walsh Act, 18 U.S.C. § 3509(m), does not preempt CrR 4.7, state is obliged to provide child pornography discovery to defense counsel, *State v. Boyd*, 160 Wn.2d 424 (2007); II.

***State v. Vars***, 157 Wn.App. 482 (2010)

Wandering naked through the streets is sufficient to prove **indecent exposure**, RCW 9A.88.010 (2003), even if state fails to prove that someone saw defendant's genitalia; trial court properly admitted prior convictions to prove **sexual motivation**, RCW 9.94A.835 (2009), after

ER 404(b) findings and balancing; a single undressing, observed by more than one person in different spots in the neighborhood establishes a single unit of prosecution permitting conviction of one count, *see:* *State v. Hall*, 168 Wn.2d 726 (2010); I.

***State v. Patel***, 170 Wn.2d 476 (2010)

Where a victim is a fictitious character created by police, state may prove attempted rape of a child by establishing that defendant specifically intended to have sex with an underage person and took substantial steps toward that objective, *State v. Johnson,* 173 Wn.2d 895 (2012), *see: State v. Chhom,* 128 Wn.2d 739 (1996), *State v. Townsend,* 147 Wn.2d 666 (2002); 9-0.

***State v. Hirschfelder***, 170 Wn.2d 536 (2010)

Sexual misconduct with a minor, RCW 9A.44 093(1)(b) (2005), criminalized sex between a school employee and any registered student age 16 or older, reversing *State v. Hirschfelder,* 148 Wn.App. 328 (2009); statute is neither vague nor violative of equal protection clause; 5-4.

***State v. Mutch***, 171 Wn.2d 646, 661-66 (2011)

Defendant is charged with multiple counts of rape over the same charging period, instructions require unanimity but do not require that jury must find a "separate and distinct act" for each count; held: it is error not to instruct that jury must find a separate and distinct act for each count where multiple counts are identically charged, *State v. Carter,* 151 Wn.App. 561 (2010), *State v. Berg,* 147 Wn.App. 923 (2008), *State v. Wallmuller,* 164 Wn.App. 890 (2011), *State v. Sanford,* 15 Wn.App.2d 748 (2020); despite deficient instructions, where it is manifestly apparent that the jury found separate acts, then appellate court may be convinced beyond a reasonable doubt that the instructions did not actually effect a double jeopardy violation, *State v. Land,* 172 Wn.App. 593, 599-603 (2013), *State v. Peña Fuentes,* 179 Wn.2d 808, 823-26 (2014), *State v. Daniels,* 183 Wn.App. 109 (2014), *State v. Gonzales,* 1 Wn.App.2d 809 (2017); 9-0.

***State v. Corbett***, 158 Wn.App. 576 (2010)

Child's testimony that when blindfolded defendant put a "soft thing" in her mouth that felt like skin, had no fingernail and on another occasion defendant put his penis in her mouth and it felt the same is sufficient to prove child rape, at 587-88; failure of trial court to instruct jury that it must find separate and distinct acts to convict of identically charged offenses is harmless where defense does not object and proposes same flawed instructions and closing arguments made it clear that jury must find separate and distinct acts for each verdict, at 591-93, *State v. Carson,* 179 Wn.App. 961, 972-80 (2014), *but see: State v. Hayes,* 81 Wn.App. 425, 431 (1996), *State v. Noltie,* 116 Wn.2d 831, 846 (1991), *State v. Ellis,* 71 Wn.App. 400, 404-06 (1993), *State v. Berg,* 147 Wn.App. 923 (2008), *State v. Carter,* 156 Wn.App. 561 (2010), *State v. Borsheim,* 140 Wn.App. 357, 364-71 (2007), *State v. Edwards,* 171 Wn.App. 379, 400-03 (2012), *State v. Land,* 172 Wn.App. 593, 599-603 (2013), *cf.: State v. Mutch,* 171 Wn.2d 646, 661-66 (2011); II.

***State v. Deer***, 158 Wn.App. 854, 861-65 (2010)

Defendant, charged with rape of a child, testifies she was asleep when complainant had sexual intercourse with her, trial court instructs that defense has the burden of proving that complainant had intercourse with defendant without her knowledge or consent; held: while rape of a child lacks a *mens rea* element, due process requires that state prove a minimal mental element of volition where there is evidence of a lack of volition, *State v. Eaton,* 168 Wn.2d 476, 481-83 (2010), *see: State v. Edwards*, 171 Wn.App. 379, 387-92 (2012), error to place burden on defendant; I.

***State v. Weaville***, 162 Wn.App. 801 (2011)

In rape trial, court responds to jury inquiry as to whether "touching" is "slight penetration" by defining, over objection, penetration as any contact between sex organs, pursuant to RCW 7.90.010(5) (2006) applicable to Sexual Assault Protection Order Act; held: sexual intercourse requires some penetration, RCW 9A.44.010 (2007); while penetration is not defined, it must be more than contact, touching can occur without penetration, thus court's definition was in error, at 812-17; victim testifies that defendant raped her and that defendant assisted another in attempting to rape her, both while she was incapable of consent because she was helpless, RCW 9A.44.050(1)(b) (2007), defendant testifies to consent, trial court categorically rejects defendant's evidence that he had had consensual sex with victim in past, holding that prior consensual sexual activity could never be relevant to a charge of rape/incapable of consent; held: trial court should have considered evidence of defendant's prior alleged consensual sex in determining relevancy to the charge of rape, but because defense did not present evidence that prior sexual encounter involved a third party, prior consent was not error with respect to the charge of attempted rape, at 817-21; evidence that victim's underwear contained semen of a person other than defendant and defendant's friend was inadmissible as improper to show promiscuity and irrelevant to show that victim presented false evidence by presenting her underwear to police knowing it contained someone else's semen, at 821-22; I.

***State v. A.M.***, 163 Wn.App. 414 (2011)

Penetration of the buttocks but not the anus does not meet the ordinary meaning of "sexual intercourse," RCW 9A.44.010(1)(a) (2007), and thus is not rape; because attempted rape requires proof of intent and rape does not, remand for trial court to enter a conviction of attempted rape is not permitted where trial court did not expressly make a finding as to intent; while state charged child molestation in the alternative, failure of trial court to enter findings of fact as to alternate crime precludes remand for entry of those findings, *see: State v. Hescock,* 98 Wn.App 600 (1999); I.

***State v. Pannell***, 173 Wn.2d 222 (2011)

Defendant whose SSOSA, RCW 9.94A.670, is revoked is not entitled to credit against his maximum prison sentence for non-custodial time spent while sentence was suspended; 9-0.

***State v. Gresham***, 173 Wn.2d 405 (2012)

RCW 10.58.090 directing that prior sex offenses are admissible irrespective of ER 404(b) analysis violates separation of powers doctrine, *State v. Gower*, 179 Wn.2d 851 (2014), reversing

*State v. Gresham*, 153 Wn.App. 659 (2009); defendant, while on a trip with his granddaughter and her parents, fondles victim while parents are asleep, trial court admits evidence of molestation against other girls which occurred while their parents were asleep, both while defendant was on a trip with the other girls and at defendant's home; held: trial court did not abuse discretion in finding that the similarities established a common scheme or plan and that the differences are explained as "individual manifestations" of the same plan, *State v. Lough,* 125 Wn.2d 847, 860 (1995), commonality need not be a "unique method of committing the crime," *State v. DeVincentis,* 150 Wn.2d 11, 20-21 (2003), *cf.: State v. Slocum,* 183 Wn.App. 438 (2014), *State v. Wilson,* 1 Wn.App.2d 73 (2017); defendant's proposed limiting instruction telling jury that the evidence admitted to show a common scheme or plan but could not be considered as evidence that defendant's conduct conformed with the conduct in the prior allegations is incorrect since conformity is the point of the relevance of the evidence and thus properly refused, but trial court erred in not correctly instructing the jury notwithstanding defendant's failure to propose a correct instruction, *State v. Goebel,* 36 Wn.2d 367, 379 (1950), court is obliged to give a correct instruction *sua sponte,* at least where defense proposes a flawed instruction, harmless here; 7-2.

***State v. Rice***, 174 Wn.2d 884 (2012)

RCW 9.94A.836, -.836 and -.837 (2006) which require a prosecutor to file special allegations are directory, not mandatory ("shall" means "may"), do not violate separation of powers doctrine as state still maintains discretion; affirms *State v. Rice*,159 Wn.App. 545 (2011); 9-0.

***State v. Landsiedel***, 165 Wn.App. 886 (2012)

Defendant is convicted of attempted rape of a child for soliciting a police officer posing as a juvenile on the internet, seeks a SSOSA claiming that his wife satisfies the statutory definition of victim when she suffered emotional harm as a result of his crime; held: to be eligible for a SSOSA, RCW 9.94A.670(2)(e) (2009) requires that "offender had an established relationship with…the victim," who must be the direct victim of the crime, *State v. Willholte,* 165 Wn.App. 911 (2012); I.

***State v. Higgins***, 168 Wn.App. 845, 853-59 (2012)

In rape 3°, RCW 9A.44.060(1)(a) (1999), "clearly expressed" lack of consent applies to the victim's protestations not defendant's subject perception of victim's response as expressed by her words and conduct, *State v. Elmore,* 54 Wn.App. 54, 57 (1989); III.

***State v. Deer***, 175 Wn.2d 725 (2012)

In rape of a child case, defendant claims she was asleep, trial court instructs that defendant bears the burden of proof; held: in a strict liability crime with no *mens rea*, where defendant produces evidence of a lack of voluntary action, defense has the burden of proving the defense by a preponderance, *State v. Bradshaw,* 175 Wn.2d 725 (2012), *State v. Dailey,* 174 Wn.App. 810 (2013), *State v. Pratt,* 11 Wn.App.2d 450 (2019), *affirmed, on different grounds,*

196 Wn.2d 849 (2021), *see:* State v. Utter, 4 Wn.App. 137, 141-42 (1971); *reverses, in part, State v. Deer,* 158 Wn.App. 854, 861-65 (2010); 7-2.

***Pers. Restraint of Morris,*** 176 Wn.2d 157, 168-71 (2012)

In child abuse case, expert testimony about the suggestibility of young children as it relates to specific interview techniques is helpful to the jury, distinguishing *State v. Swan,* 114 Wn.2d 613, 656 (1990), *see: State v. Willis,* 151 Wn.2d 255, 261 (2004); 9-0.

***State v. Smith****,* 177 Wn.2d 533, 545-50 (2013)

Rape 1° and rape of a child 2° based upon same facts and same victim do not violate double jeopardy as they are not legally equivalent and legislature did not intend to prohibit multiple convictions arising from a single sexual act, *State v. Calle,* 125 Wn.2d 769 (1995), *State v. Chenoweth,* 185 Wn.2d 218 (2016), distinguishing *State v. Hughes,* 166 Wn.2d 675, 681-86 (2009); overrules *State v. Birgin,* 33 Wn.App. 1 (1982); 8-1.

***State v. Lynch****,* 178 Wn.2d 487 (2013)

In rape 1° case where defendant denies forcible compulsion, trial court may not, over defendant's objection, instruct jury on the defense of consent with burden to prove consent on defendant, *State v. Coristine,* 177 Wn.2d 370 (2013); 9-0.

***State v. Land****,* 172 Wn.App. 593 (2013)

Defendant is convicted of child molestation and child rape over the same charging period of same victim, no unanimity instruction is given; held: where the only evidence of child rape is penetration, then rape is not the same crime as molestation as the latter requires proof of sexual gratification, rape does not; where the only evidence of intercourse supporting child rape is sexual contact involving sex organs and mouth of anus, that act of intercourse, if done for sexual gratification, is both molestation and rape and thus are not separately punishable, so jury instruction requiring separate and distinct acts is required, but where state's argument, victim's testimony and to convict instructions make it clear state is not seeking to punish twice for same act, defendant's right to be free from double jeopardy is not violated, at 598-603, *State v. Mutch,* 171 Wn.2d 646, 661-65 (2011), *State v. Noltie,* 116 Wn.2d 831, 849 (1991), *State v. Peña Fuentes,* 179 Wn.2d 808, 822-26 (2014), *State v. Daniels,* 183 Wn.App. 109 (2014), *State v. Wilkins,* 200 Wn.App. 794-802-14 (2017), *State v. Gonzales,* 1 Wn.App.2d 809 (2017), *State v. Mutch,* 171 Wn.2d 646, 661-66 (2011), *State v. Sanford,* 15 Wn.App.2d 748 (2020); I.

***State v. Mohamed****,* 175 Wn.App. 45 (2013)

Information charging indecent liberties/incapable of consent as physically helpless, RCW 9A.44.100(1)(b) (2007), need not allege that defendant knew victim is incapable of consent, defendant has burden to prove by preponderance that defendant reasonably believed victim was not helpless, RCW 9A.44.030(1)9 (1988), disapproving *dicta* in *State v. Lough,* 70 Wn.App. 302, 325 n. 14 (1993), *aff'd,* 125 Wn.2d 847 (1995); I.

***State v. Benitez****,* 175 Wn.App. 116, 122-23 (2013)

A juvenile adjudication of a sex offense is a prior conviction for purposes of enhancing **indecent exposure**, RCW 9A.88.010(2)(c) (2003), from a misdemeanor to a felony; II.

***Nevada v. Jackson***, 569 U.S. 505, 186 L.Ed.2d 62 (2013)

Rape defendant cross-examines complainant regarding prior uncharged claims that defendant raped her, trial court prohibits defense from offering extrinsic evidence of police findings that the prior incidents were unfounded, in federal *habeas* action Ninth Circuit reverses, holding that defendant was deprived of his right to present a defense, *Crane v. Kentucky,* 476 U.S. 683, 690, 90 L.Ed.2d 636 (1986), *California v. Trombetta*, 467 U.S. 479, 485, 81 L.Ed.2d 413 (1984); held: state evidence rule precluding extrinsic evidence of impeachment, *see:* ER 608, does not deprive defendant of right to present a defense nor does it violate confrontation clause; *per curiam.*

***State v. W.R.,*** 181 Wn.2d 757 (2014)

Consent negates forcible compulsion, thus placing burden of proving consent on defense unconstitutionally shifts the burden, *State v. Ortiz-Triana*, 193 Wn.App. 769 (2016), *overruling, in part, State v. Camara,* 113 Wn.2d 631 (1989) and *State v. Gregory*, 158 Wn.2d 759 (2006), *State v. Knapp,* 197 Wn.2d 579 (2021), *cf.: State v. Lozano,* 189 Wn.App. 117 (2015),; not retroactive, *Pers. Restraint of Colbert,* 186 Wn.2d 614 (2016); 6-3.

***State v. Brown***, 178 Wn.App. 70, 79-89 (2013)

Defendant is convicted of a sex offense, trial court sentences, over objection, without a presentence report; held: former RCW 9.94A.110, now RCW 9.94A.500(1) (2014), mandates a presentence report following conviction of a felony sex offense, remedy is remand for resentencing; 2-1, II.

***State v. Miller***, 180 Wn.App. 413 (2014)

Revocation of a Special Sex Offender Sentencing Alternative for inability to pay for treatment does not require a finding of willfulness, *State v. McCormick,* 166 Wn.2d 689, (2009), where court finds that there is a risk of reoffending in the absence of sexual deviancy treatment; I.

***State v. Corey***, 181 Wn.App. 272 (2014)

In rape 2° case victim testifies defendant digitally penetrated her in a hot tub in spite of her persistently pushing him away, defendant apparently presents no evidence, defendant is acquitted of rape 2°, convicted of lesser degree offense of rape 3° having objected to the instruction; held: evidence supported a jury finding that defendant did not engage in forcible compulsion to achieve his nonconsensual sexual intercourse with the victim as victim's testimony about force was "vague," thus jury could have believed victim's testimony but still have found that defendant's conduct did not amount to forcible compulsion, thus rape 3° instruction was not error, distinguishing *State v. Wright,* 152 Wn.App. 64, 72 (2009), *State v. Charles,* 126 Wn.2d. 353, 356 (1995), *but see: State v. Fowler,* 114 Wn.2d 59 (1990), *disapproved on other grounds, State v. Blair,* 117 Wn.2d 479, 487 (1991), *State v. Rodriguez,*

48 Wn.App. 815, 820 (1987), *State v. Rogers*, 70 Wn.App. 626 (1993), *State v. Brown*, 127 Wn.2d 749, 754-57 (1995), *State v. Fernandez-Medina*, 141 Wn.2d 448 (2000), *State v. Prado*, 144 Wn.App. 227, 242-44 (2008), *see: State v. Hampton*, 182 Wn.App. 805, 828-31 (2014), *reversed, on other grounds*, 184 Wn.2d 656 (2015), *cf.: State v. Parks*, 190 Wn.App. 859, 867-69 (2015); II.

***State v. Powell***, 181 Wn.App. 716, 725-29 (2014)

Police seize photographs of unclothed minor neighbors filmed from defendant's bedroom along with photos of defendant nude, masturbating, trial court dismisses at *Knapstad* motion; held: 2010 amendments to RCW 9.68A.011 criminalizes possession of depictions made by secretly recording minors without their knowledge, distinguishing *State v. Grannis*, 84 Wn.App. 546 (1997), *State v. Whipple*, 144 Wn.App. 654, 659-60 (2008)

***State v. Hampton***, 182 Wn.App. 805, 828-31 (2014), *reversed, on other grounds*, 184 Wn.2d 656 (2015)

In rape 2°/incapable of consent case victim testifies she told defendant "no," defendant testified that no intercourse occurred, trial court gives lesser degree rape 3° instructions, defendant is convicted of lesser; held: jury could find that the evidence affirmatively established that victim expressed her lack of consent, not that she was incapable of consent, thus lesser instruction was proper, *see: State v. Corey*, 181 Wn.App. 272 (2014), *cf.: State v. Charles*, 126 Wn.2d 353 (1995), *State v. Wright*, 152 Wn.App. 64 (2009); I.

***Grady v. North Carolina***, 575 U.S. 306, 135 S.Ct. 1368, 191 L.Ed.2d 459 (2015)

Requiring a sex offender to be subjected to satellite-based monitoring implicates the Fourth Amendment, court must first determine if it is a reasonable search, *see: United States v. Jones*, 565 U.S. 400, 132 S.Ct. 945, 181 L.Ed.2d 911 (2012), *State v. Jackson*, 150 Wn.2d 251, 259-69 (2003); *per curiam*.

***State v. Shale***, 182 Wn.2d 882 (2015)

State has power to prosecute a member of the Yakama Nation living on the Quinault Indian Nation reservation for failure to register as a sex offender; 9-0.

***State v. O'Dell***, 183 Wn.2d 680, 687-88 (2015)

In rape of a child case defendant's testimony that he said to victim she looked too young to drink and victim replied "I get that a lot" did not entitle defendant to instruction on affirmative defense that defendant reasonably believed victim was older "based upon declarations as to age by the alleged victim," RCW 9A..44.030(2) (1988), *State v. Bennett*, 36 Wn.App. 176, 181 (1983); 5-4.

***State v. Johnson***, 184 Wn.App. 777 (2014)

Sentencing court may order CCO to order plethysmograph testing for the purpose of sexual deviance treatment and not for monitoring purposes, *State v. Riles*, 135 Wn.2d 326 (1998), *abrogated on*

*other grounds, State v. Valencia,* 169 Wn.2d 782 (2010), *State v. Alcocer,* 2 Wn.App.2d 918 (2018), *Matter of Brettell,* 6 Wn.App.2d 161 (2018); II.

***State v. Lawson***, 185 Wn.App. 349 (2014)

For purposes of **voyeurism**, RCW 9A.44.115(1) (2003), a public restroom stall is a place where a reasonable person would believe she could disrobe in privacy, *cf.: State v. Glas,* 147 Wn.2d 410, 415 (2002); voyeurism is a crime against a person or property for purposes of proving burglary, *see: State v. Snedden,* 149 Wn.2d 914, 919-22 (2003), distinguishing *state v. Devitt,* 152 Wn.App. 907, 912-13 (2009); II.

***State v. Haviland***, 186 Wn.App. 214 (2015)

Rape of a child 2°, RCW 9A.44.076 (1990), does not violate single subject and subject in title rules, CONST. Art. 2, § 19; II.

***State v. Peppin***, 186 Wn.App. 901 (2015)

Police remotely access, without a warrant, child pornography that defendant shared via peer to peer software, obtain warrant to search defendant's computer; held: images files shared with the public do not create a constitutionally protected privacy right; III.

***State v. Irby***, 187 Wn.App. 183, 204-08 (2015)

Statutory rape as it was defined in 1976 is not legally comparable to rape of a child 2°, because in 1976 a person of 16 years commits the crime if the victim was 11-14 years old but now state must prove defendant is at least 36 months older than victim, RCW 9A.44.076(1) (1990), sentencing judge now cannot determine defendant's age previously as it depends on judicial fact-finding, *Apprendi v. New Jersey,* 530 U.S. 466, 147 L.Ed.2d 435 (2000); I.

***State v. Polk***, 187 Wn.App. 380 (2015)

Each unit of possession of depictions of a minor in sexually explicit conduct 2°, RCW 9.68.070(2)(c) (2010), is one unit of prosecution even if possession includes more than one depiction or image, *State v. Sutherby,* 165 Wn.2d. 870 (2009), distinguishing RCW 9.68A.001 (2010); III.

***State v. Breidt***, 187 Wn.App. 534 (2015)

Terms "change," "residence," and "residence address" in failure to register as a sex offender statute, RCW 9A.44.130(4)(a), are not vague, *see: State v. Frederick,* 20 Wn.App. 1081, 506 P.3d 690 (2022); II.

***State v. Chenoweth***, 188 Wn.App. 521, 531-35 (2015)

Court admits evidence that victim disclosed rape to his sister a year after it occurred; held: while **fact of complaint** exception to hearsay rule is inapplicable where the complaint was not timely made, *State v. Ferguson,* 100 Wn.2d 131, 135-36 (1983), it is admissible to show "only how the allegations came to the attention of law enforcement," *State v. Iverson,* 126 Wn.App. 329, 333 (2005), *State v. Martinez,* 196 Wn.2d 605 (2020), thus is not hearsay, *cf. State v. Edwards,* 131 Wn.App. 611 (2006);

instructing jury that testimony of a sex offense complainant need not be corroborated is not error, *but see:* WPIC § 45.02 cmt. at 833 (3rd ed. 2008), *State v. Clayton*, 32 Wn.2d 571 (1949); II.

***State v. Castillo-Murcia***, 188 Wn.App. 539 (2015)

Luring, RCW 9A.40.090 (2012), requiring that perpetrator is "unknown" to the child is satisfied if the evidence shows "lacking an established or normal status," need not be a complete stranger; II.

***State v. Pablo Navarro***, 188 Wn.App. 550, 553-56 (2015)

A sexual assault protection order (SAPO), ch. 7.90 RCW, expires two years following the expiration of the longest sentence served; a no-contact order issued as part of a sentence, RCW 9.94A.030(10), may be issued for maximum term of the crime, and is not limited to the victims of the crime, *State v. Warren*, 165 Wn.2d 17, 32-34 (2009), *State v. Duran*, 16 Wn.App.2d 583 (2021); I.

***State v. Lozano***, 189 Wn.App. 117 (2015)

In rape 2°/incapable of consent due to being physically helpless or mentally incapacitated, RCW 9A.44.050(1)(b) (2007), placing burden on defendant to prove he reasonably believed victim was not incapacitated or helpless, RCW 9A.44.030(1) (1988), does not violate due process as it does not negate an element of the crime, distinguishing *State v. W.R.*, 181 Wn.2d 757, 765-66 (2014); consent is not a defense to rape 2°/incapable of consent; II.

***State v. Duarte Mares***, 190 Wn.App. 343 (2015)

Victim, having rebuffed defendant's sexual advances days earlier awakens to find defendant engaged in intercourse, grabs a rifle and kicks him out; held: rape 3° statute, RCW 9A.44.060(1)(a) (2013), that requires that "lack of consent was clearly expressed by the victim's words or conduct" does not require that the lack of consent be expressed contemporaneously, statute is not vague as applied; III.

***State v. Parks***, 190 Wn.App. 859, 867-69 (2015)

In rape 1° trial victim testifies defendant raped her with a knife, medical evidence shows genital bruising, defendant testifies sex was consensual, no knife is recovered, over objection court instructs on lesser rape 2°, defendant is convicted of lesser; held: because affirmative medical evidence supports an inference that only rape 2° was committed trial court did not err in instructing on the lesser, *distinguishing State v. Brown*, 127 Wn.2d 749 (1995); III.

***State v. Irwin***, 191 Wn.App. 644 (2015)

Community custody conditions that require further definition from CCOs are unconstitutionally vague, *State v. Bahl*, 164 Wn.2d 739 (2008), *State v. Sansone*, 127 Wn.App. 630, 638 (2005), *see: State v. Norris*, 1 Wn.App.2d 87 (2017), *State v. Padilla*, 190 Wn.2d 672 (2018); here, "do not frequent areas where minor children are known to congregate, as defined by" CCO is vague, *State v. Magana*, 197

Wn.App. 189, 200-01 (2016), *see: State v. Johnson*, 4 Wn.App.2d 352 (2018), *State v. Nguyen*, 191 Wn.2d 671 (2018), following child pornography conviction where defendant possessed depictions on a digital camera, condition that defendant not access a computer unless authorized by CCO is related to the offense and is thus valid, *cf.: State v. Charlton*, 23 Wn.App.2d 150 (2022); I.

***State v. Chenoweth***, 185 Wn.2d 218 (2016)

Rape of a child and incest based upon the same act is not the same criminal conduct, *State v. Calle*, 125 Wn.2d 769 (1995), *State v. Smith*, 177 Wn.2d 533, 545-50 (2013); 5-4.

***Pers. Restraint of Colbert***, 186 Wn.2d 614 (2016)

While instructing jury that defense has burden to disprove consent is unconstitutional, *State v. W.R.*, 181 Wn.2d 757 (2014), it is not retroactive; 7-2.

***State v. Bates***, 196 Wn.App. 65 (2016)

In child rape case court admits recorded victim interview, when victim testifies state inquires about sex assault but does not inquire about whether victim made the previously admitted hearsay statement, defense counsel cross-examines about the incident and about the hearsay statement, defense argues for the first time on appeal that confrontation clause was violated because court admitted recorded statement but questioning on direct was not broad enough to subject her to cross-examination; held: cross-examination about the interview was within the scope of direct, ER 611(B), *State v. Montgomery*, 95 Wn.App. 192, 198-99 (1999), *State v. Clark*, 139 Wn.2d 152 (1999), *State v. Kilgore*, 107 Wn.App. 160, 173-75 (2001), *State v. Price*, 158 Wn.2d 630 (2006), distinguishing *State v. Rohrich*, 132 Wn.2d 472 (1997), *cf.: State v. Kinzle*, 181 Wn.App. 774, 780-84 (2014), both the hearsay statement and victim's testimony were inculpatory; III.

***Packingham v. North Carolina***, 137 S. Ct. 1730, 1733, 198 L. Ed. 2d 273 (2017)

Statute prohibiting a registered sex offender "to access a commercial social networking Web site where the sex offender knows that the site permits minor children to become members" violates First Amendment, *but see: State v. Johnson*, 12 Wn.App.2d 201 (2020); 8-0.

***State v. Gray***, 189 Wn.2d 334 (2017)

Seventeen-year old respondent texts photograph of his own erect penis, is convicted of dealing in depictions of a minor engaged in sexually explicit activity 2°, RCW 9.68A.050(2)(a) (2010); held: depictions statute does not violate First Amendment and is not vague when applied to a minor distributing sexually explicit photos of themselves, statute applies, as written, to respondent's behavior; *affirms State v. E.G.*, 194 Wn.App. 457 (2016); 6-3.

***State v. Martell***, 200 Wn.App. 293 (2017)

Where defendant has a prior rape conviction, a conviction for possession of depictions of minors engaged in sexually explicit conduct 2° requires an indeterminate life sentence, RCW 9.94A.507(1)(b) (2008), code revisers note is inaccurate; II.

***State v. Wilkins***, 200 Wn.App. 794, 802-14 (2017)

Child molestation and rape of a child for same act do not violate double jeopardy, *State v. Land*, 172 Wn.App. 593, 600 (2013), *but see: State v. Mutch*, 171 Wn.2d 646, 661-66 (2011), *State v. Sanford*, 16 Wn.App.2d 583 (2020); 2-1, II.

***Pers. Restraint of Arnold***, 190 Wn.2d 136, 410 P.3d 1133 (2018)

Defendant convicted of statutory rape in 1988 is required to register as a sex offender even though the statute was amended to change the name of the crime to rape of a child as statutory rape is a comparable sex offense to rape of a child, RCW 9.94A.030(46)(b) (2012); reverses *Pers Restraint of Arnold*, 198 Wn.App. 842 (2017), overruling *State v. Taylor*, 162 Wn.App. 791` (2011) and *State v. Wheeler*, 188 Wn.App. 613 (2013); 9-0.

***Pers. Restraint of Phelps***, 190 Wn.2d 155 (2018)

In cases involving child molestation "grooming" may be argued without expert testimony, and it is not misconduct for prosecutor to argue in closing about grooming absent expert testimony as the concept is within the common knowledge of jurors, reversing *Pers. Restraint of Phelps*, 197 Wn.App. 653 (2017), *see: State v. Braham*, 67 Wn.App. 930 (1992); 9-0.

***State v. Buckman***, 190 Wn.2d 51 (2018)

Defendant commits rape of a child 2° at age 17, is charged after he turns 18, pleads guilty with a SSOSA recommendation after being told that the maximum sentence is life in prison which, pursuant to RCW 9.94A.507(b)(2) (2008), does not apply to a person who commits the crime under age 18, moves to withdraw plea after SSOSA is revoked, stating he would not have pleaded guilty had he been properly informed; held: defendant was misinformed as to maximum, thus plea was involuntary, however a motion to withdraw a plea is a collateral attack on the judgment and sentence requiring a showing, by a preponderance, of actual and substantial prejudice, *Personal Restraint of Riley*, 122 Wn.2d 772 (1993), *Personal Restraint of Stockwell*, 179 Wn.2d 588 (2014); defendant here made a bare claim that he would not have pleaded guilty but for the erroneous information but an objection, rational person test, rather than a subjective test, establishes, in light of the strength of the state's evidence, that he would not have risked a trial, *Pers. Restraint of Yates*, 180 Wn.2d 33, 41 (2014) and thus his motion to withdraw his plea is denied; 7-2.

***State v. James-Buhl***, 190 Wn.2d 470 (2018)

Schoolteacher-parent is not subject to mandatory reporting, RCW 26.44.030 (2015), of child abuse to her own children by their stepfather where the children were not her students; there must be "some connection" to professional identity; reverses *State v. James-Buhl*, 198 Wn.App. 288 (2017); 6-2.

***State v. Petterson***, 190 Wn.2d 92 (2018)

During the life of a special sex offender sentencing alternative (SSOSA) the trial court may not remove the mandatory condition of community custody that defendant comply with

conditions imposed by the Department of Corrections, RCW 9.94A.670(5)(b) (2008), RCW 9.94A.703 (2015), but the court has the jurisdiction to modify department-imposed community custody provisions; 9-0.

***State v. Nguyen***, 191 Wn.2d 671 (2018)

Following child molestation conviction, community custody provisions that defendant not possess sexually explicit material is not vague and is crime related as defendant had sent complainant a scantily-clad photo; provision that defendant inform CCO of any "dating relationship" is not unconstitutionally vague; order that defendant not enter sex-related businesses is reasonably related to the offense, *State v. Magana*, 197 Wn.App. 189, 201 (2016); reverses, in part, *State* v. *Norris*, 1 Wash. App. 2d 87, 404 P.3d 83 (2017); 9-0.

***State v. Norris***, 1 Wn.App.2d 87 (2017), *reversed, in part, on other grounds, State v. Nguyen*, 191 Wn.2d 671 (2018)

Following child molestation conviction, community custody provisions that defendant "not enter any parks/playgrounds/schools and or any places where minors congregate," is vague, *State v. Irwin*, 191 Wn.App. 644 (2015), *but see: State v. Wallmuller*, 194 Wn.2d 234 (2019), but is cured by striking "and or any places," *State v. Gonzales*, 1 Wn.App.2d 809, 820 (2017); ordering a curfew is not crime related and is stricken; order that defendant not consume alcohol is valid, RCW 9.94A.703(3)(e) (2015), but order that defendant not "use" alcohol is not valid; I.

***State v. Alcocer***, 2 Wn.App.2d 918 (2018)

Sentencing court may restrict access to sexually explicit materials for those convicted of a sex offense regardless of whether or not sexually explicit materials were involved in the offense, *State v. Magana*, 197 Wn.App. 189, 201 (2016); III.

***State v. Tash***, 3 Wn.App.2d 74 (2018)

Sex offender must **register** within three days of release from custody regardless of whether or not s/he was in custody for a sex offense, RCW 9A.44.130(4)(a)(i) (2015); II.

***State v. Blair***, 3 Wn.App.2d 343 (2018)

In rape case trial court permits defense to cross-examine victim about her knowledge that respondent was on probation and that she knew what he was on probation for but excludes cross as to her knowledge that respondent's probation was due to his history of sex offenses; held: trial court did not abuse discretion in limiting cross-examination, did not violate **right to present a defense**; II.

***State v. Murray***, 190 Wn.2d 727 (2018)

**Sexual motivation aggravator**, RCW 9.94A.535(3)(f), can enhance a conviction of indecent exposure, RCW 9A.88.010 (2003), *State v. Thomas*, 138 Wn.2d 630, 636 (1999), as indecent exposure lacks an inherent sexual motive; 7-2.

***State v. Yallup***, 3 Wn.App.2d 546 (2018)

Information alleges two counts of rape of a child within three year charging period, child victim testifies that separate incidents occurred within a 16 month period but does not narrow incidents more specifically; held: when charging "on or about" proof is not limited to the delineated time period, where time is not a material element "on or about" is sufficient to admit proof of the act at any time within the statute of limitations unless alibi is the defense, *State v. Hayes*, 81 Wn.App. 425, 432 (1996), *State v. Osborne*, 39 Wash. 548 (1905); where defendant is a "resident child molester" alibi or misidentification are not genuine defenses, *State v. Brown*, 55 Wn.App. 738, 748-49 (1989), *Hayes*, *supra.* at 433; III.

***State v. Johnson***, 4 Wn.App.2d 352 (2018)

Following child molestation conviction, conditions of community custody that defendant not possess or view material that includes images of nude adults and children and not posess images of children wearing underwear or swimsuits and not possess material that shows adults or children engaging in sex with each other, themselves or objects or animals and not attend x-rated movies or adult book stores are invalid, overbroad and not crime-related, *State v. Padilla*, 190 Wn.2d 672 (2018); condition that defendant avoid places where children congregate including libraries, playgrounds, schools, daycare centers, skating rinks and video arcades is not vague, *see: Pers. Restraint of Sickels*, 14 Wn.App.2d 51 (2020), *but see: State v. Norris*, 1 Wn.App.2d 87 (2017), *reversed, in part, on other grounds, State v. Nguyen*, 191 Wn.2d 671 (2018), *State v. Wallmuller*, 194Wn.2d 234 (2019), but must be limited to children under age 16; 2-1, III.

***Matter of Thompson***, 6 Wn.App.2d 64 (2018)

Defendants plead guilty to attempted failure to register, are sentenced, *inter alia*, to community custody, DOC appeals; held: attempted failure to register as a sex offender is not a sex offense, court lacked authority to impose community custody; II.

***Matter of Brettell***, 6 Wn.App.2d 161 (2018)

Peittioner is convicted of sex offenses with minors to whom he gave alcohol and drugs; condition of community custody that petitioner not possess or consume controlled substances is a "waivable" condition, RCW 9.94A.703(2)(c) (2018), thus court has authority to impose it even if it is not crime related; condition that he not associate with known users of drugs is crime related, *State v. Houck*, 9 Wn.App.2d 636 (2019); I.

***State v. Wallmuller***, 194 Wn.2d 234 (2019)

Community custody provision that defendant not frequent places where children congregate is not vague, *Pers. Restraint of Sickels*, 14 Wn.App.2d 51 (2020), reversing *State v. Wallmuller*, 4 Wn.App.2d 698 (2018); 5-4.

***State v. Teas***, 10 Wn.App.2d 111 (2019)

In rape 1°/forcible compulsion case defendant denies intercourse but testifies that he asked for sexual intercourse, trial court declines consent instruction; held: because consent negates the element of forcible compulsion the state must prove lack of consent as part of its burden of proof on the element of

forcible compulsion, thus it is not necessary to add a new instruction simply because evidence of consent is produced, *State v. W.R.*, 181 Wn.2d 757, 767 n.3 (2014), *see: State v. Knapp*, 16 Wn.2d 583 (2021); life without parole for a second sex offense is constitutional when the predicate offense was committed by defendant as a juvenile, *State v. Moretti*, 193 Wn.2d 809 (2019); II.

***State v. Pratt***, 11 Wn.App.2d 450 (2019), *affirmed, on different grounds,* 196 Wn.2d 849 (2020)

Trial court prohibits testimony of psychologist to testify that defendant may have had "sexsomnia," which involves people engaging in sex during sleep to support defendant's claim of lack of volition; held: while sleepwalking may constitute a defense, *State v. Utter*, 4 Wn.App. 137, 141-42 (1971), it is not akin to diminished capacity and must be proved by the defense by a preponderance, *State v. Deer*, 175 Wn.2d 725, 734 (2012), court properly excluded the testimony as expert could not testify that defendant had the disorder; 2-1, II.

***State v. Martinez***, 196 Wn.2d 605 (2020)

In child rape case trial court admits four witness' testimony that victim reported the rape under "fact of complaint" doctrine contemporaneous with the abuse but long after the reporting period; held: fact of complaint or fresh complaint rule in sexual assault cases is an established judicially-created exception to the hearsay rules, not admissible for truth of the matter asserted but to demonstrate that victim reported it to someone, may include sufficient details to identify the nature of the offense but not to include identity of the perpetrator, *State v. Ferguson*, 100 Wn.2d 131 (1983); 8-1.

***State v. DeLeon,*** 11 Wn.App.2d 837 (2020)

At sentencing for rape of a child other than his own child court orders no contact with all minors, including his own children; held: sentencing court did not consider on the record defendant's constitutional right to parent, *State v. McGuire*, 12 Wn.App.2d 88 (2020), *State v. Letourneau*, 100 Wn.App. 424 (2000), *State v. Ancira*, 107 Wn.App. 650 (2001), *State v. Martinez Platero*, 17 Wn.App.2d 716 (2021), or how the order was reasonably necessary to protect his own children from harm, thus remanded for court to conduct analysis on the record; II.

***State v. Stewart***, 12 Wn.App.2d 236 (2020)

Witness testifies that she observed defendant kneeling on the ground, noticed that his arm was moving back and forth, observed his hands by his genitals, and one of his hands moving rapidly back and forth, believed he was masturbating, defendant is convicted of **indecent exposu**re, RCW 9.88.010 (2003); held: substantial evidence supports trial court's finding that defendant's penis was intentionally exposed; I.

***State v. Johnson***, 12 Wn.App.2d 201 (2020), *rev. granted,* 196 Wn.2d 1001 (2020)

Police post internet advertisement purporting to be a juvenile seeking sex with an adult, defendant responds with explicit desires, is convicted of attempted rape of a child, court orders as condition of community custody, that defendant not use web unless authorized by CCO with approved filters; held: condition does not violate First Amendment, distinguishing *Packingham*

*v. North Carolina*, 137 S. Ct. 1730, 1731, 198 L. Ed. 2d 273 (2017), is sufficiently tailored to defendant's crime as he committed the crime partially via the internet, *cf.: State v. O'Cain,* 144 Wn.App. 772 (2008), *but see: State v. Forler,* 9 Wn.App.2d 1020 (unpublished, 2019); II.

***Pers. Restraint of Sickels***, 14 Wn.App.2d 51 (2020)

Defendant is convicted of attempted rape of a child following sting operation, challenges several conditions of community custody; held: (1) inform CCO and treatment provider of dating relationship and disclose sex offender status prior to sexual contact are reasonably related to the circumstances of the offense; (2) sexual contact is prohibited until approved by treatment provider is properly crime related; (3) do not possess sexually explicit material is properly crime related, *State v. Hai Minh Nguyen*, 191 Wn.2d 671, 686 (2018); I.

***State v. Mansour***, 14 Wn.App.2d 323 (2020)

In child molestation case use of victim's initials in information and to convict instruction does not deprive defendant of due process, is not a comment on the evidence, and does not amount to a court closure; I.

***State v. Majeed***, 14 Wn.App.2d 868 (2020)

Police officer poses as a minor on-line, defendant agrees to engage in sex, is convicted of **commercial sexual abuse of a minor**, RCW 9.68A.100(1)(b) (2013); held: to prove commercial sexual abuse of a minor state must offer evidence that defendant offered money for sex with a corporeal minor, thus evidence is insufficient, dismissed with prejudice; III.

***State v. Wheeler***, 14 Wn.App.2d 571 (2020)

Defendant is granted a SSOSA, RCW 9.94A.670, is reinstated following two violation hearings, at third violation hearing prosecutor refers to prior violations and sanctions, defense objects claiming double jeopardy violation, trial court overrules and considers prior actions and revokes; held: revocation is not a second punishment, court can consider prior criminal history so court can consider prior violations and sanctions, nor is it prohibited by statute; I.

***State v. Spaulding***, 15 Wn.App.2d 526 (2020)

Defendant meets victim on Facebook, message each other a few times, a week later they meet, defendant is convicted of indecent liberties by forcible compulsion, trial court denies SSOSA because he lacked an "established relationship" with her, RCW 9.94A.670(2)(e) (2009); held: statute authorizes a SSOSA if "offender had an established relationship…or connection to the victim" that was not the commission of the crime," defendant here did have a connection to the victim so on that basis was eligible, *but see: State v. Pratt,* 196 Wn.2d 849 (2021); harmless as court also found defendant was not amenable to treatment, RCW 9.94A.670(4); II.

***State v. Sanford,*** 15 Wn.App.2d 748 (2020)

Defendant is charged with child rape and child molestation for oral/genital contact, no evidence of vaginal penetration, trial court does not give separate and distinct acts instruction; held: absent evidence of vaginal penetration convictions for child rape and child molestation

violate double jeopardy where no separate and distinct acts instruction is given, *State v. Land*, 172 Wn.App. 593, 600 (2013), *State v. Wilkins*, 200 Wn.App. 794, 804-08 (2017); here, it was not manifestly apparent from prosecutor's argument that the state was not attempting to impose separate penalties for the same conduct, distinguishing *State v. Land*, *supra*, *State v. Mutch*, 171 Wn.2d 646, 661-65 (2011), *State v. Noltie*, 116 Wn.2d 831, 849 (1991), *State v. Peña Fuentes*, 179 Wn.2d 808, 823-26 (2014); 2-1, II.

***State v. Pervez***, 15 Wn.App.2d 265 (2020)

Defendant pleads guilty to child molestation which occurred when his daughter-victim was 10-13 years old but reported the crime when she was 26, argues, in support of SSOSA, that although victim opposed the SSOSA his wife and mother of victim supported it and thus court must give "great weight" to victim's opinion, RCW 9.94A.670(4) (2009) and one definition of victim is a parent of a minor child, RCW 9.94A.670(1)(c) (2009); held: because actual victim was not a child when she reported the offense her mother is not a victim; I.

***State v. Pratt***, 196 Wn.2d 849 (2021)

Defendant meets victim, a distant relative, at a party, molests her that night, is granted a SSOSA, state appeals; held: eligibility for a SSOSA RCW 9.94A.670 (2009) requires that offender had an "established relationship with, or connection to, the victim" which cannot be the commission of the crime; here relationship was too brief to meet that statutory requirement, *cf.: State v. Spaulding*, 15 Wn.App.2d 526 (2020); *affirms State v. Pratt*, 11 Wn.App.2d 450 (2019); 8-1

***State v. Knapp***, 197 Wn.2d 579 (2021)

In rape case while consent must be disproved by the state beyond a reasonable doubt, *State v. W.R.*, 181 Wn.2d 757 (2014), trial court's instruction that "evidence of consent may be taken into consideration in determining whether defendant used forcible compulsion," WPIC 18.25 (4th ed. 2016) adequately conveys the state's burden, court need not specifically instruct that state has burden of proving an absence of consent; a specific instruction that state bears the burden of proving the absence of a negating defense, failure to provide one is not reversible error *per se* as long as the instructions as a whole make it clear that state has the burden, *State v. Imokawa*, 194 Wn.2d 391 (2019); affirms *State v. Knapp*, 11 Wn.App.2d 375 (2019); 9-0.

***State v. Johnson***, 197 Wn.2d 740 (2021)

Following internet sting operation involving fictitious juveniles defendant is convicted of attempted rape of a child, court orders defendant not to access the internet without a filter; held: condition that defendant only use the internet with a filter is narrowly drawn, is not vague or overbroad, *cf.: State v. Geyer*, 19 Wn.App.2d 321 (2021) *see: State v. Fredeerick*, 20 Wn.App.2d 1081 (2022); 6-3.

***State v. Cox,*** 17 Wn.App.2d 178 (2021)

Complainant testifies that she was intoxicated, went to bed, defendant digitally raped her, state proves that his DNA is on her underwear; defendant testifies that he did not touch

complainant, trial court excludes defense offer that complainant was drunk and flirtatious with others at the party, sat on defendant's lap, that this explains how his DNA was on her underwear and that complainant's intoxication was such that she could not recall what happened; held: **rape shield** statute, RCW 9A.44.020(2), cannot be used to conflate past with present behavior that is contemporaneous with the alleged rape, *State v. Jones*, 168 Wn.2d 713, 720-23 (2010), lap-sitting was probative to explain the DNA evidence, excluding the evidence violated defendant's right to present a defense; defense attempt to cross-examine state's DNA expert to establish the possibility of another male DNA on complainant's underwear was not offered to show that she had sexual contact with someone else, rather that it might explain that defendant's DNA could have been transferred through non-sexual contact, thus trial court's refusal to allow the questions based on rape shield statute was error; trial court's exclusion of defendant's reputation evidence for sexual morality, ER 404(a)(1), -405(a), was error as reputation evidence of good sexual morality is pertinent to a sex crime charge, *State v. Griswold*, 98 Wn.App. 817, 827-30 (2000), *but see: State v. Jackson*, 46 Wn.App. 360 (1986); III.

***State v. Canter***, 17 Wn.App.2d 728 (2021)

Detective poses on-line as the mother of two children seeking sex, defendant responds, is arrested at the place he was to meet the mother and children, is convicted of two counts of attempted child molestation, argues **double jeopardy** violation; held: while unit of prosecution for an attempt charge is the substantial step toward commission of the underlying crime, *State v. Boswell*, 185 Wn.App. 321, 329-30 (2014), attempted child molestation aims to punish a substantial step toward molesting each child, double jeopardy clause does not bar convictions for two counts, distinguishing *State v. Varnell*, 162 Wn.2d 165 (2007), *State v. Bobic*, 140 Wn.2d 250, 260-67 (2000); I.

***State v. Geyer***, 19 Wn.App.2d 321 (2021)

Defendant is convicted for attempted rape of a child for seeking sexual contact with a fictitious juvenile via a sting operation, court orders no contact with minors not be in a romantic relationship with a partner who has minors, not use the internet and not use photo equipment including cell phones, all without permission of CCO; held: broad restrictions on defendant's right to interact with children and intimate partners was not shown to be reasonably necessary as it includes his own children and wife, *State v. Letourneau*, 100 Wn.App. 424 (2000); internet restriction is overbroad, a filter will meet the need, *State v. Johnson*, 197 Wn.2d 740 (2021), *State v. Fredeerick*, 20 Wn.App.2d 1081 (2022); since the instant crime did not involve defendant taking photographs the restriction on photo equipment and cell phones is overbroad; III.

***State v. Gene***, 20 Wn.App.2d 211 (2021)

Complainant testifies that she was intoxicated, unable to respond when defendant engaged in sexual contact, defendant is charged with rape by forcible compulsion or while incapable of consent, no unanimity instruction is given, jury convicts; held: evidence was insufficient to establish forcible compulsion; to prove forcible compulsion there must have been force directed at overcoming resistance physically or by a threat, complainant did not resist the

penetration thus there was no resistance to overcome, *State v. McKnight*, 54 Wn.App. 521 (1989), *State v. Ritola*, 63 Wn.App. 252 (1991); I.

***State v. Westwood***, 20 Wn.App.2d 582 (2021)

Defendant is convicted of rape, burglary, assault, argues same criminal conduct, trial court applies *State v. Chenoweth*, 185 Wn.2d 218 (2016) and rejects argument, Division III remands, holding that *Chenoweth*, *supra.*, only applies to child rape and incest, trial court on remand again denies same criminal conduct; held: except in cases of child rape and incest same criminal conduct must be analyzed pursuant to *State v. Dunaway*, 109 Wn.2d 207 (1987): whether one crime furthers the other or whether the offenses were part of a plan or scheme, *State v. Kloepper*, 179 Wn.App. 343, 357 (2014), with discretion left to the trial court; Division III agrees with Division I, *State v. Hatt*, 11 Wn.App. 2d 113, 143 (2019), declines to follow Division II's applying *Chenoweth* to other crimes, *State v. Johnson*, 12 Wn.App. 2d 201 (2020), *aff'd on other grounds*, 197 Wn.2d 740, 487 (2021).

***State v. Braun***, 20 Wn.App.2d 756 (2022)

**Human trafficking**, RCW 9A.40.100, can be proved even when defendant did not personally use force, fraud or coercion as long as he knew someone would do so; methods of subjugating people's wills includes subtle forms of coercion; III.

***State v. Crossguns,*** 199 Wn.2d 282 (2022)

While evidence of collateral misconduct relating to a specific victim, including prior uncharged acts of sexual conduct, remains admissible under ER 404(b), "lustful disposition" is not a separate purpose for admitting evidence; the phrase "lustful disposition" is "incorrect and harmful" even though the evidence that has come in under the doctrine remains admissible; overrules or modifies *State v. Medcalf*, 58 Wn.App. 817 (1990), *State v. Guzman*, 119 Wn.App. 176 (2003), *State v. Ferguson*, 100 Wn.2d 131 (1983), *State v. Dawkins*, 71 Wn.App. 902, 908-10 (1993); 8-1.

***State v. Braun***, 20 Wn.App.2d 756 (2022)

For purposes of human trafficking, RCW 9A.40.100 (2017), physical assaults constitute "force;" even if defendant didn't personally use "force, fraud or coercion" evidence is sufficient as long as he knew someone would use such means; defendant may be both perpetrator of the force, fraud or coercion and the beneficiary of the sexual act; withholding drugs from an addict to get her to commit prostitution is coercion; promises of marriage if victim commits prostitution constitutes fraud; III.

***State v. Frederick***, 20 Wn.App. 1081, 506 P.3d 690 (2022)

Condition that defendant not engage in "sexual communication" with minors is not vague; condition that defendant obtain CCO's permission before entering a "romantic relationship" is vague; Indeterminate Sentencing Review Board can impose conditions that are reasonably related to the offender's risk of reoffending, condition that defendant submit to drug monitoring in sex offense is proper where defendant was under the influence of marijuana at

time of sex offense; condition that defendant not access the internet without a monitoring device at defendant's expense is proper where defendant used the internet to contact victim, *State v. Johnson*, 197 Wn.2d 740 (2021), *cf.:* *Packingham v. North Carolina*, —— U.S. ——, 137 S. Ct. 1730, 198 L. Ed. 2d 273 (2017); condition that defendant not possess "sexually explicit material" is not vague, *State v. Nguyen*, 191 Wn.2d 671 (2018); condition that defendant not engage in a romantic or dating or sexual relationship with anyone with minor children without CCO permission is not vague, *but see: State v. Geyer*, 19 Wn.App.2d 321 (2021); condition that defendant inform potential partners of his sexual offense history does not violate his Fifth Amendment rights; condition that defendant not remain overnight in a residence (as opposed to "premises") without CCO approval is not vague, *State v. Breidt*, 187 Wn.App. 534 (2015); III.

***State v. Zwede***, 21 Wn.App.2d 843 (2022)

Defendant was 19-years old when he pleaded guilty to a sex offense, court imposed a SSOSA, as agreed to by the parties, when defendant was 24 court revoked the SSOSA and imposed ten years to life, which had been previously suspended; held: when court revokes a SSOSA, RCW 9.94A.670(11), it must impose the entire sentence that had been suspended, RCW 9.94A.670(4); at sentencing defendant did not seek an exceptional sentence, was not a youthful offender when he violated the conditions, court did not violate his rights when it declined to consider his youthfulness at the time of the crime at his revocation hearing; 2-1, I.

***State v. Yusuf***, 21 Wn.App.2d 960 (2022)

To prove **voyeurism,** RCW 9A.44.115(2)(a)(i), the state must show either that the person being viewed lacked the full knowledge to consent before they were viewed or that the person never consented; I.

***State v. Palmer***, ___ Wn.App.2d ___, 518 P.3d 252 (2022)

In child molestation case with *pro se* defendant trial court requires that defendant write out questions and that his standby counsel read them to the complainant; held: in order to modify courtroom procedures to prevent a face-to-face confrontation between witness and defendant court must analyze why such changes are necessary and what impact they will have on defendant's rights, *State v. Foster*, 135 Wn.2d 441 (1998), *Maryland v. Craig*, 497 U.S. 836, 845-46, 110 S. Ct. 3157, 111 L. Ed. 2d 666 (1990), *State v. D.K.*, 21 Wn.App.2d 342 (2022), *Coy v. Iowa*, 101 L.Ed.2d 857 (1988), *State v. Estabrook*, 68 Wn.App. 309 (1993), *State v. Ulestad*, 127 Wn.App. 209 (2005), thus reversed; II.

***State v. Chambers***, 23 Wn.App.2d 917 (2022)

Information charging dissemination and possession of child pornography, RCW 9.68A.050(1) –(2) (2019) and RCW 9.68A.070(1) (2019), is sufficient, where challenged for the first time on appeal, although it does not allege that defendant was aware of the general nature of the material he possessed as it is implied; III.

# SPEEDY TRIAL

***State v. Price***, 94 Wn.2d 810 (1980)

If state inexcusably **fails to provide discovery** until shortly before trial, forcing defendant to either waive or go to trial unprepared, prejudice may result and case shall be dismissed if defendant can prove by preponderance that interjection of new facts into the case when state has not acted with due diligence will compel defendant to choose between prejudicing either right to speedy trial or effective assistance of counsel, *State v. Michielli*, 132 Wn.2d 229, 239-46 (1997), *State v. Teems*, 89 Wn.App. 385 (1997), *State v. Ralph G.*, 90 Wn.App. 16 (1998), *State v. Earl*, 97 Wn.App. 408 (1999), *State v. Brooks*, 149 Wn.App. 373 (2009), *State v. Norris*, 157 Wn.App. 50, 78-81 (2010), *but see: State v. Smith*, 67 Wn.App. 847 (1992), *State v. Woods*, 142 Wn.2d 561, 578-85 (2001), *State v. Salgado-Mendoza*, 189 Wn.2d 420 (2017*), cf.: State v. Kessler*, 75 Wn.App. 634, 641-2 (1994); 8-0.

***State v. Wilke***, 28 Wn.App. 590 (1981)

Defendants charged in district court with two felonies which are bound over; when information is filed in superior court, state adds third felony arising from same transaction; defendants' motion to dismiss third felony as not filed until 103 days following arrest granted; on interlocutory appeal, Division I reverses, holding that there is only one "triggering date" for a single transaction, that date of bindover was applicable event triggering clock for all offenses arising out of the same transaction, *see also: State v. Harris*, 130 Wn.2d 35 (1996), *State v. Earl*, 97 Wn.App. 408 (1999),

***State v. Sayers***, 29 Wn.App. 128 (1981)

CrR 3.3 does not apply to juveniles, *but see: State v. Detrick*, 90 Wn.App. 939, 944-7 (1998).

***State v. Kubitz***, 29 Wn.App. 767 (1981)

Information filed 1/17/80, whereabouts of defendant unknown; defendant discovered to be in custody in Oregon 1/23/80; paperwork sent to Oregon 1/30/80; defendant waives extradition 2/1/80; defendant returned to Washington 2/27/80; trial set 4/8/80; motion to dismiss denied; held: delay in returning defendant to Washington excusable as long as state acts in good faith and diligently; time for trial rule commences when defendant is back in jurisdiction, *State v. Rafay*, 168 Wn.App. 734, 766-74 (2012), *cf.: State v. Anderson*, 121 Wn.2d 852 (1993); I.

***State v. Mitchell***, 30 Wn.App. 49 (1981)

Defendant charged with six burglaries several months after being arrested but not charged in a seventh burglary; speedy trial rule does not commence for six counts at arrest for a seventh permissibly joined offense, CrR 4.3(a), unless the offenses are related arising from the same criminal conduct and thus required to be joined, CrR 4.3(c), *State v. Lee*, 132 Wn.2d 498 (1997), *State v. Kindsvogel*, 149 Wn.2d 477 (2003); I.

***State v. Parris***, 30 Wn.App. 268 (1981)

**Failure to object** to trial date within ten days of setting same constitutes a waiver of right to object, *State v. Bobenhouse*, 143 Wn.App.315, 321-23 (2008), *State v. MacNeven*, 173

Wn.App. 265 (2013); failure of trial court to set a trial date within ten days of arraignment, former CrR 3.3(d)(1) [now CrR 3.3(d)(1)], is directory, not mandatory, in spite of use of word "shall" in the rule, *State v. Sanchez*, 172 Wn.App. 678, 682-83 (2012); II.

***State v. Lawley***, 32 Wn.App. 337 (1982)

Where court commissioner issues a ruling, and state seeks revision, RCW 2.24.050, speedy trial rule is stayed pending decision by superior court judge; III.

***State v. Woodall***, 32 Wn.App. 407 (1982)

Erupting volcano is good cause to grant prosecutor's motion for continuance beyond 90-day rule; extension beyond five-day rule, CrR 3.3(g) and new CrR 3.3(d)(8) is proper as Supreme Court did not consider volcanic eruptions when it adopted rules; III.

***United States v. MacDonald***, 71 L.Ed.2d 696 (1982)

Time between dismissal of military charges and subsequent indictment on civilian charges (four years) held not to be considered in determining whether defendant's Sixth Amendment right to speedy trial has been violated; 6-3.

***Harkins v. Justice Court***, 34 Wn.App. 508 (1983)

Where a defendant who has been given a trial date within former JCrR 3.08 requests a continuance and the trial court sets a date on the next available date consistent with established calendar scheduling, the delay is attributable to the defendant and defendant is not denied a speedy trial; I.

***State v. Powell***, 34 Wn.App. 791 (1983)

Defendant is charged with felony murder 1°, RCW 9A.32.030(1)(c)(5), pleads guilty, on appeal plea is reversed; upon remand state amends to charge premeditated murder 1°, RCW 9A.32.030(1)(a); defendant seeks dismissal for speedy trial violation because of failure to join a related offense, CrR 4.3(c); held: information may be amended to include an alternate means for committing a crime formerly charged without violating joinder or speedy trial rules; I.

***State v. Hovland***, 34 Wn.App. 830 (1983)

Start counting day after juvenile court enters order retaining jurisdiction, *State v. Royster*, 43 Wn.App. 613, 618-9 (1986); III.

***State v. Hunter***, 35 Wn.App. 708 (1983)

Defendant, charged with burglary 1°, gets hung jury, state amends and adds assault 2°, same incident as burglary, trial is beyond 90 days from original arraignment; held: where multiple offenses arise from same transaction, there is only one triggering date for speedy trial purposes; since burglary was brought to trial in a timely fashion so was assault, *State v. Wilke*, 28 Wn.App. 590 (1981); I.

***State v. Thompson***, 36 Wn.App. 249 (1983)

Where offenses are not subject to mandatory joinder, CrR 4.3(c), then CrR 3.3 begins to run at filing of information, not at filing of a prior information charging offenses of a same or similar character, CrR 4.3(a), *State v. Gamble*, 168 Wn.2d 161, 182-83 (2010); I.

***State v. Laureano***, 101 Wn.2d 745 (1984)

A continuance beyond the speedy trial rule over defendant's objection is permissible where defense counsel so moves because s/he is unprepared, former CrR 3.3(f)(2); 9-0.

***State v. Campbell***, 103 Wn.2d 1 (1984)

Court may continue trial beyond CrR 3.3 limits over defendant's objection to ensure effective representation and a fair trial, *State v. Lavene*, 127 Wn.2d 690, 699 (1995), *State v. Thomas*, 95 Wn.App. 730 (1999), *State v. Woods*, 143 Wn.2d 561, 578-82 (2001), *State v. Johnson*, 132 Wn.App. 400, 413 (2006), *State v. Ollivier*, 178 Wn.2d 813 (2013), *but see: State v. Saunders*, 153 Wn.App. 209 (2009); 9-0.

***State v. Ansell***, 36 Wn.App. 492 (1984)

**Pre-charge delay** (here 32 years) does not violate due process unless defendant can demonstrate actual prejudice; nonspecific allegations regarding stale evidence, absent witnesses and dimmed memories, are insufficient, *United States v. Marion*, 30 L.Ed.2d 468 (1971); *see*: *State v. Howard*, 52 Wn.App. 12 (1988), *State v. Gee*, 52 Wn.App. 357 (1988); III.

***State v. Bailey***, 37 Wn.App. 733 (1984)

Two counts of forgery are dismissed by trial court for speedy trial violations, third count is not dismissed since it was filed at a later date; held: the time within which trial must commence should begin on all crimes based on same conduct or arising from the same criminal episode, *State v. Peterson*, 90 Wn.2d 423 (1978), *see: State v. Kindsvogel*, 149 Wn.2d 477 (2003); here, the criminal acts did not occur in close enough proximity to be part of same episode; I.

***State v. Palmer***, 38 Wn.App. 160 (1984)

Because prosecutor was in trial on another case, court grants five day extension beyond 60 days, former CrR 3.3(d)(8); held: while general court congestion is insufficient to extend trial beyond expiration date, *State v. Mack*, 89 Wn.2d 788, 793 (1978), *State v. Kenyon*, 167 Wn.2d 130 (2009), nor is "self-created hardship" such as burdensome jury selection procedures, here the problems were specific, unpredictable and certainly not self-created, thus no abuse of discretion, *State v. Kelley*, 64 Wn.App. 755 (1992), *Detention of Kirby*, 65 Wn.App. 862 (1992), *State v. Silva*, 72 Wn.App. 80 (1993), *see: State v. Smith*, 104 Wn.App. 244 (2001), *State v. Williams*, 104 Wn.App. 516 (2001); I.

***State v. Mathews***, 38 Wn.App. 180 (1984)

Defendant is brought to court on late afternoon of expiration date, court hears some preliminary motions, recesses, defendant argues CrR 3.3 is violated if jury is not empaneled by expiration date; held: a case is brought to trial when case is assigned to a trial judge who hears and decides preliminary motions, not when jury is empaneled, *State v. Andrews*, 66 Wn.App. 804 (1992), *State v. Carson*, 128 Wn.2d 805, 819-20 (1996), *disavowed, on other grounds, State v. Walker*, 199 Wn.2d 796 (2022), *State v. Carlyle*, 84 Wn.App. 33 (1996), *see also: State v. Becerra*, 66 Wn.App. 202 (1992); I.

***State v. Freeman***, 38 Wn.App. 665 (1984)

A conflict in defense counsel's trial schedule is good cause for continuance, JuCR7.8(d); I.

***State v. Eaves***, 39 Wn.App. 16 (1984)

Because co-defendant's counsel was in trial in another case which he had expected to plead, court continued defendant's case beyond 60-day rule, former CrR 3.3(d)(8) and refused to sever, former CrR 3.3(c)(2)(i); held: while CrR 3.3 says a court "should" sever to protect a defendant's right to a speedy trial, it need not where co-defendant's counsel is unavailable in trial, *see: State v. Torres*, 111 Wn.App. 323 (2002), *see also: Detention of Kirby*, 65 Wn.App. 862 (1992); I.1

***State v. Kingen***, 39 Wn.App. 124 (1984)

Where jail improperly and erroneously holds defendant after felony charges were dismissed in district court, there is no effect on the speedy trial rule as it was beyond the court's control; I.

***State v. George***, 39 Wn.App. 145 (1984)

Counsel's waiver of speedy trial on behalf of juvenile without express consent is valid where record establishes that juvenile knew of the expiration date, the juvenile had implicitly authorized counsel to decide procedural matters by signing a blank waiver, the waiver was for good cause (counsel's trial schedule) and there was no prejudice; I.

***State v. Brown***, 40 Wn.App. 91 (1985)

Prosecutor's unavailability due to scheduling conflict is grounds for a five day extension, former CrR 3.3(d)(8), *State v. Williams*, 104 Wn.App. 516 (2001), *distinguishing State v. Mack*, 89 Wn.2d 788 (1978) (docket congestion not good cause); *accord: State v. Kelley*, 64 Wn.App. 755 (1992), *Detention of Kirby*, 65 Wn.App. 862 (1992); III.

***State v. Bernson***, 40 Wn.App. 719 (1985)

Eight month **preaccusation delay**; test: actual prejudice, *State v. Ansell*, 36 Wn.App. 492 (1984), *United States v. McDonald*, 71 L.Ed.2d 696 (1982); no prejudice where police fail to investigate defendant's alibi; possibility that memories will fade is not in itself sufficient to demonstrate prejudice, *State v. Ansell, supra*; III.

***State v. Ramsay***, 41 Wn.App. 380 (1985)

Where defendant files a speedy trial waiver which contains no expiration date, speedy trial period is tolled between the date of the waiver and the date of the trial as first set by the court, *State v. Helms*, 72 Wn.App. 273, 275-6 (1993); if trial date first set is postponed through no fault of defendant, speedy trial period remaining at the time of the waiver commences running again on the first trial date; insufficient venire is not good cause for delaying trial beyond expiration date per former JCrR 3.08; II.

***State v. Stimson***, 41 Wn.App. 385 (1985)

Trial date set five days after expiration date; held: where defense counsel knew or should have known that the trial date was beyond the expiration date, counsel is obliged to notify the court prior to the expiration

date, *Barker v. Wingo*, 33 L.Ed.2d 101 (1972), *State v. White*, 94 Wn.2d 498 (1980), *State v. Walker*, 199 Wn.2d 796 (2022); III.

***State v. Guloy***, 104 Wn.2d 412 (1985)

Thirteen days prior to trial state provides names of additional witnesses; one co-defendant moves for a continuance beyond 60th day, court grants it; held: court may continue a trial beyond the expiration date if required for the proper administration of justice and will not prejudice defendant, former CrR 3.3(h)(2) [now CrR 3.3(f)(2) (2023)], *State v. Melton*, 63 Wn.App. 63 (1991), *State v. McKinzy*, 72 Wn.App. 85, 87-9 (1993); 8-1.

***State v. Kokot***, 42 Wn.App. 733 (1986)

Granting a continuance beyond the expiration date because no courtrooms were available is an abuse of discretion, mandating dismissal, *State v. Mack*, 89 Wn.2d 788 (1978), *State v. Warren*, 96 Wn.App. 306 (1999), *State v. Smith*, 104 Wn.App. 244 (2001), *State v. Kenyon*, 167 Wn.2d 130 (2009), *cf.: State v. Andrews*, 66 Wn.App. 804 (1992), *State v. Denton23* Wn.App.2d 437 (2022), *but see: State v. Silva*, 72 Wn.App. 80 (1993); a scheduled hunting trip of a state's witness should not be considered in determining whether or not to grant a continuance, *but see: State v. Grilley*, 67 Wn.App. 795 (1992), *State v. Hoffman*, 115 Wn.App. 91 (2003); 2-1, III.

***Bremerton v. Hoyt***, 44 Wn.App. 135 (1986)

Lack of available jury trial dates is not grounds for setting trial beyond 60th day after appearance under former JCrR 3.08; II.

***State v. Stock***, 44 Wn.App. 467 (1986)

Unforeseen difficulty in the prosecutor's trial schedule is sufficient cause to grant a five-day extension beyond the expiration date, former CrR 3.3(d)(8), *see*: *State v. Raper*, 43 Wn.App. 530 (1987), *State v. Wsilliams*, 104 Wn.App. 516 (2001); I.

***State v. Bebb***, 44 Wn.App. 803 (1986)

In competency proceedings, court is not limited to the appointment of a sanity commission, RCW 10.77.010, *et seq*., but also retains the inherent authority to determine competency, *State v. Wicklund*, 96 Wn.2d 798 (1982) to order additional evaluations, during which speedy trial rule is tolled, former CrR 3.3(g)(1) [now CrR 3.3(e)(1)], *State v. Harris*, 122 Wn.App. 498 (2004); III.

***State v. Bernhard***, 45 Wn.App. 590 (1986)

An objection to arraignment or trial date, former CrR 3.3(e) and (f) [now CrR 3.3(d)(3)], must be sufficiently specific to inform trial court of precise grounds for objection, or it is waived, *State v. Greenwood*, 120 Wn.2d 585, 605 (1993), *State v. Parker*, 99 Wn.App. 639 (2000), *State v. Frankenfield*, 112 Wn.App. 472 (2002); where defendant is detained in one county jail pending trial and is also detained on another county's charge, then the 90 day rule applies to the latter case, since defendant would have remained in custody even if he had posted bail on latter case, *State v. Royster*, 43 Wn.App. 613, 617 (1986); *cf.*: *State v. Hall*, 55 Wn.App. 834, 837-8 (1989), *State v. Hardesty*, 149 Wn.2d 230 (2003); former CrR 3.3(g)(2) [now CrR 3.3(e)(2)] excludes from speedy trial calculations the entire period that a defendant is detained on another

matter, at least from arrest through plea of guilty, *State v. Huffmeyer*, 145 Wn.2d 523 (2001); *accord*: *State v. Knauff*, 46 Wn.App. 877 (1987); I.

***United States v. Loud Hawk***, 88 L.Ed.2d 640 (1986)

Delays attributed to government's interlocutory appeal, during which indictment was dismissed, do not violate defendants' right to speedy trial under Sixth Amendment where issues appealed by government were "strong," and defendants were not prejudiced, *Barker v. Wingo*, 33 L.Ed.2d 101 (1972); *cf.: Doggett v. United States*, 120 L.Ed.2d 520 (1992); 5-4.

***State v. Terrovona***, 105 Wn.2d 632 (1986)

Continuance beyond expiration date granted because state's witness would be unavailable; held: trial court may grant continuance when the administration of justice requires it and when defendant will not be substantially prejudiced in the presentation of his defense, former CrR 3.3(h)(2) [now CrR 3.3(f)], *State v. Campbell*, 103 Wn.2d 1, 15 (1984), *State v. Guloy*, 104 Wn.2d 412, 428 (1985), *State v. Brown*, 40 Wn.App. 91,94 (1985) 9-0.

***State v. Pacheco***, 107 Wn.2d 59 (1986)

Defendant is arrested in King County on a King County probation warrant and a Snohomish County arrest warrant for a new felony charge, King County Jail authorities confirm Snohomish County warrant with Snohomish County Jail, but no notice is given to Snohomish County Prosecutor; 52 days later, defendant is sent to Snohomish County Jail, Snohomish County Prosecutor first gets notice of defendant's detention, defendant is tried 47 days later; held: where prosecutor does not have actual notice that defendant is in jail in another Washington county, there is no speedy trial violation for failure to bring defendant to trial within time for trial period, *distinguishing* *State v. Alexus*, 91 Wn.2d 492 (1979); *but see* concurring opinion; *accord*: *State v. Miffitt*, 56 Wn.App. 786 (1990); *see: State v. Greenwood*, 120 Wn.2d 585 (1993); 9-0.

***State v. Day***, 46 Wn.App. 882 (1987)

An available juvenile respondent must be arraigned within 14 days after information is filed; if the 14 day arraignment time plus the 60 day speedy trial time, JuCrR 7.8(b) is exceeded, charge must be dismissed, *see: State v. Chandler*, 143 Wn.2d 485 (2001); where juvenile keeps police, prosecutor and court advised of his address, but notice of arraignment is sent to wrong address, then speedy arraignment requirements may be violated, *but see*: *State v. Hanson*, 52 Wn.App. 368 (1988), *State v. Johnson*, 56 Wn.App. 333 (1989), *see: State v. Hackett*, 122 Wn.2d 165, 174 (1993), *State v. Hildebrandt*, 109 Wn.App. 46 (2001); III.

***State v. Green***, 49 Wn.App. 49 (1987)

Illness of counsel is grounds for an extension, former CrR 3.3(d)(8), or a continuance, former CrR 3.3(h)(2); dilatory presentation of **discovery** does not justify dismissal unless defense establishes by a preponderance that delay has forced him to choose between waiving time for trial rights or proceeding unprepared, *State v. Price*, 94 Wn.2d 810 (1980); *see: State v. Guloy*, 104 Wn.2d 412 (1985), *State v. Smith*, 67 Wn.App. 847 (1992), *State v. Brooks*, 149 Wn.App. 373 (2009); I.

***State v. Guajardo***, 50 Wn.App. 16 (1987)

Where defense counsel was suspended from practice for 30 days and defendant declines to waive, a continuance, former CrR 3.3(h)(2), "required in the administration of justice" is appropriate; III.

***State v. Jones***, 111 Wn.2d 239 (1988)

To calculate time for trial where there is a competency determination period, former CrR 3.3(g)(1) [now CrR 3.3(e)(1)], and speedy trial waivers, add the period for determining competency in full at the end of a period for which defendant has waived, even if these periods overlap, *see also:* *State v. Cox*, 106 Wn.App. 487 (2001); 9-0.

***State v. Day***, 51 Wn.App. 544 (1988)

Continuing trial, apparently beyond expiration date, so that defendant's wife may procure a dissolution and thereby have the capacity to testify against defendant, approved, as unavailability of a witness is grounds for a continuance where there is a valid reason for the unavailability, there is reasonable grounds to believe the witness will become available in a reasonable time, and where there is no substantial unfair or unjust prejudice, *see:* *State v. Torres*, 111 Wn.App. 323 (2002), *State v. Iniguez*, 167 Wn.2d 273, 294 (2009); III.

***State v. Gee***, 52 Wn.App. 357 (1988)

**Pre-accusation delay** does not violate constitutional right to speedy trial, *State v. Platz*, 33 Wn.App. 345 (1982), but may violate due process clause, *United States v. Lovasco*, 52 L.Ed.2d 752 (1977); here, delay due to state's interest in protecting informant outweighs prejudice, *see:* *State v. Watson*, 63 Wn.App. 854, 861 (1992), *State v. Allen*, 67 Wn.App. 824 (1992), *State v. Martinez*, 78 Wn.App. 870, 877-8 (1995), *State v. Stearns*, 23 Wn.App.2d 580 (2022); I.

***State v. Adamski***, 111 Wn.2d 574 (1988)

A mailed subpoena is a nullity in a juvenile court case, as it does not conform with JuCR 1.4, CR 45(c), *but see:* CrR 4.8(a)(3), and thus is not due diligence; a continuance beyond the expiration date, JuCR 7.8(b), to obtain a witness who was not properly served is an abuse of discretion, *State v. Hairychin*, 136 Wn.2d 862 (1998), *reversing State v. Adamski*, 49 Wn.App. 371 (1987); *but see:* *State v. McPherson*, 64 Wn.App. 705 (1992), *State v. Bible*, 77 Wn.App. 470, 473 (1995); 5-3.

***State v. Fladebo***, 53 Wn.App. 116 (1988), *aff'd on different grounds*, 113 Wn.2d 388 (1989)

At DUI arrest, police find drugs on defendant, defendant is charged with DUI immediately in municipal court, VUCSA charge filed in superior court four months later, seeks dismissal of VUCSA arguing both offenses arose from same conduct, *State v. Peterson*, 90 Wn.2d 423 (1978); held: because municipal court had exclusive jurisdiction over DUI as violation of municipal ordinance and had no jurisdiction over felony charge, and because the conduct proscribed by each offense was unrelated, the offenses were not within the jurisdiction and venue of the same court and were not based upon the same conduct, CrR 4.3(c), *see:* *State v. Lee*, 132 Wn.2d 498 (1997), *State v. Silva*, 127 Wn.App. 148, 155 (2005), *but see:* *State v. Harris*, 130 Wn.2d 35 (1996); further, it was reasonable for prosecutor to wait for crime lab tests on drugs before filing charges, *distinguishing* *State v. Erickson*, 22 Wn.App. 38 (1978), *cf.*: *State v. Austin*, 59 Wn.App. 186 (1990); I.

***State v. Carmichael***, 53 Wn.App. 894 (1989)

A prisoner serving a Washington sentence in another state's prison is "detained outside the state of Washington" for purposes of former CrR 3.3(g)(6) [now CrR 3.3(e)(6)], and thus that time is excluded from the time for trial calculations for a pending offense; *but see:* *State v. Anderson*, 65 Wn.App. 493 (1992); I.

***State v. Freeman***, 54 Wn.App. 734 (1989)

Following the lifting of a stay granted by an appellate court, 90 day period does not begin anew, former CrR 3.3(d)(4), rather the period of the stay is excluded, former CrR 3.3(g)(5), *see:* CrR 3.3(c)(2)(iv); while a defense motion for a continuance which is granted impliedly waives the rule, *State v. Colbert*, 17 Wn.App. 658 (1977), where the motion is made and granted after denial of the motion to dismiss for speedy trial violation, no waiver occurs; *cf.:* *State v. Valdobinos*, 122 Wn.2d 270 (1993); I.

***State v. Pizzuto***, 55 Wn.App. 421 (1989)

Preliminary proceedings, trial and post-trial motions on another charge is an excluded period, former CrR 3.3(g)(2) [now CrR 3.3(e)(2)], *but see:* *State v. Huffmeyer*, 145 Wn.2d 52 (2001); where defendant is being detained in another jurisdiction, CrR 3.3(g)(6), state must show good faith and due diligence in seeking extradition, *see:* *State v. Anderson*, 65 Wn.App. 493 (1992); here, state deferred to Idaho prosecution which involved multiple defendants and death penalty, deemed sound and appropriate reasons; *see also*: *State v. Syrotchen*, 61 Wn.App. 261 (1991), *State v. Simon*, 84 Wn.App. 460 (1996); I.

***State v. Hall***, 55 Wn.App. 834 (1989)

Where defendant is in custody for an unrelated charge throughout part, but not all, of the relevant period on the charge in question, then the 60 day rule applies, *distinguishing* *State v. Bernhard*, 45 Wn.App. 590, 593-95 (1986); where a bench warrant is issued (and, apparently, served) on an un-related case, then the period of time between issuance of the warrant and a guilty plea on that case is excluded, former CrR 3.3(g)(2) [now CrR 3.3(e)(2)], *State v. Bernhard*, *supra*, at 598; where trial court grants continuance to allow co-defendant time to prepare arguments on a severance motion, and defendant is not prejudiced in presentation of a defense and continuance is deemed necessary in the administration of justice, former CrR 3.3(h)(2), then period of continuance is excluded from time for trial calculation, former CrR 3.3(g)(3); III.

***State v. Bartlett***, 56 Wn.App. 77 (1989)

During time for trial period, defense counsel gives prosecutor a signed, undated, blanket speedy trial waiver, which prosecutor files after expiration date, following which defendant moves for a trial within the rule and for dismissal; held: when the duration of a waiver under the rule is not specified, the waiver is effective until the date of the trial contemporaneously or subsequently set by the court, *State v. Pomeroy*, 18 Wn.App. 837, 842 (1977); II.

***State v. Johnson***, 56 Wn.App. 333 (1989)

Defendant fails to appear for omnibus hearing, warrant is issued, defendant is arrested on warrant, bails out, warrant is filed with court clerk, defendant fails to appear again for omnibus hearing, although there is no evidence that defendant was advised of new date; five months later,

warrant is served, defendant appears in court six weeks later, moves to dismiss, claiming that arrest and filing of warrant made his presence "known to the court on the record," former CrR 3.3(d)(2) [now CrR 3.3(a)(3)(iii) and (c)(2)(ii)]; held: "known to the court" means known to the judge, not to the court file or police, *distinguishing* State v. Day, 46 Wn.App. 882 (1987), *see:* State v. Hackett, 122 Wn.2d 165 (1993), State v. Hildebrandt, 109 Wn.App. 46 (2001); post-arraignment absences do not generate a fresh duty of "due diligence and good faith" to locate defendant and bring him back before the court, State v. Allen, 36 Wn.App. 582 (1983), *distinguishing* State v. Striker, 87 Wn.2d 870 (1976); I.

***State v. Wake***, 56 Wn.App. 472 (1989)

One day before trial, court grants, beyond expiration date, state's motion for continuance because unsubpoenaed crime lab expert would be out of town, no reason given for his unavailability; held: because prosecutor knew of problem two weeks before trial and thus could have sought to advance the trial date, and because witness had not been subpoenaed, State v. Alford, 25 Wn.App. 661, 665 (1980), State v. Yuen, 23 Wn.App. 377, 379 (1979), State v. Smith, 56 Wn.2d 368, 370 (1960), State v. Toliver, 6 Wn.App. 531, 533 (1972), continuance beyond expiration date was abuse of discretion, *but see:* State v. McPherson, 64 Wn.App. 705 (1992), State v. Woods, 143 Wn.2d 561, 578-85 (2001), State v. Howell, 119 Wn.App. 644, 648-49 (2003), *State v. Salgado-Mendoza,* 189 Wn.2d 420 (2017), *State v. Denton,* 23 Wn.App.2d 437 (2022); III.

***State v. Wilton***, 57 Wn.App. 606 (1990)

Defendant, charged with murder 2°, waives his right to speedy trial, after expiration of 60 days, state is granted leave to amend to murder 1°; held: if defendant waives, state may continue its investigation and may amend the charge to reflect the results of its inquiry, as long as amendment conforms to CrR 2.1(e); I.

***State v. Austin***, 59 Wn.App. 186 (1990)

In calculating "**time elapsed in district court,**" former CrR 3.3(c)(2)(ii), the filing date of the district court complaint is included, State v. Brown, 40 Wn.App. 91, 94 (1985), unlike cases filed directly in superior court, wherein the day of arraignment is excluded, former CrR 3.3(c)(1), State v. Rohatsch, 23 Wn.App. 734, 738 (1979); defense counsel files notice of objection at 4:15 p.m. on expiration date; held: CrR 3.3 (d)(3), 3.3(f)(2) which allows ten days to move for a new trial date, does not apply to a trial setting procedure which occurs fewer than ten days before expiration date, as defense must notify state and court of objection in sufficient time for the trial to commence within the rule, State v. Becerra, 66 Wn.App. 202 (1992), State v. Malone, 72 Wn.App. 429, 433-7 (1994), State v. Rose, 110 Wn.App. 878 (2002), *State v. Walker,* 199 Wn.2d 796 (2022), *but see:* State v. Jenkins, 76 Wn.App. 378, 382-4 (1994); drug charge arising out of assault incident is filed and joined beyond 60th day from arraignment on assault charge (although state had lab report before 60th day), held: because later charge was filed within a relatively short period of time after lab report arrived (three weeks), and no prejudice was shown, denial of motion to dismiss affirmed, State v. Fladebo, 113 Wn.2d 388 (1989); I.

***State v. Kelly***, 60 Wn.App. 921 (1991)

Trial court releases defendant on personal recognizance in order to extend time for trial to 90 days; held: release any time within 60 day period extends time for trial period to 90 days, former CrR 3.3(c)(1), *see:* CrR 3.3(b)(3), State v. Hyatt, 78 Wn.App. 679, 682 (1995), no abuse

of discretion to release defendant in order to extend period, *State v. Maling*, 6 Wn.App.2d 838 (2018); I.

***State v. Muños***, 60 Wn.App. 921, 928 (1991) (companion case to *Kelly, supra*)

Detained defendant executes waiver of 60-day rule to point beyond 60-day limit but within 90-day limit, is then released and tried beyond the 90-day period but within the time of 90-days plus the waiver; held: an in-custody defendant waives only the 60-day rule unless he waives to a date beyond the 90-day limit or otherwise makes clear that he is also waiving the 90-day period; I.

***State v. Syrotchen***, 61 Wn.App. 261 (1991)

Defendant is arraigned, then transported by feds to Colorado; a month later, state moves for a continuance and seeks return under Interstate Agreement on Detainers, RCW 9.100.010; held: state is not responsible for tracking federal prisoner's process; state exhibited due diligence, *State v. Pizzuto*, 55 Wn.App. 421, 431-2 (1989), by moving for a continuance, thus time defendant was a federal prisoner is excluded, CrR 3.3(g)(6); *cf.:* *State v. Anderson*, 121 Wn.2d 852 (1993) *State v. Simon*, 84 Wn.App. 460 (1996); I.

***State v. Melton***, 63 Wn.App. 63 (1991)

Consolidated juvenile co-respondent's motion to continue is granted, trial court continues respondent's case beyond expiration date over objection, held: no prejudice, court entitled to rely on prosecutor's policy favoring joint trials, continuance not motivated by inappropriate considerations, *State v. Mack*, 89 Wn.2d 788 (1978), no abuse of discretion, *State v. Guloy*, 104 Wn.2d 412 (1985), *State v. Dent*, 123 Wn.2d 467, 484-5 (1994), *State v. Torres*, 111 Wn.App. 323 (2002); I.

***State v. McPherson***, 64 Wn.App. 705 (1992)

Officer acknowledges to prosecutor that he was served with subpoena through interagency mail procedure normally used by prosecutor's office, officer states he is going on vacation, prosecutor sends note to defense counsel advising he would seek continuance, defense denies receiving message until two days before trial, on trial date, court grants continuance beyond expiration date, later denies motion to dismiss; held: where subpoena was received by police witness, then there was due diligence, *distinguishing* *State v. Adamski*, 111 Wn.2d 574 (1988); interagency mail procedure is reasonable where officer in fact receives the subpoena in spite of JuCR 7.8 and CR 45(c); while sending a note to opposing counsel and assuming lack of response constitutes acquiescence is insufficient notice, here officer failed to notify prosecutor of vacation until day he left, foreclosing opportunity to preserve his testimony to keep trial date within time for trial period, *State v. Hairychin*, 136 Wn.2d 862 (1998), *but see:* *State v. Wake*, 56 Wn.App. 472 (1989), *State v. Woods*, 143 Wn.2d 561, 578-85 (2001); I.

***State v. Lemley***, 64 Wn.App. 724 (1992)

At omnibus hearing, court sets trial date within 60 day rule but erroneously sets expiration date beyond correct expiration date; defendant questions expiration date in open court, but no action is taken; trial commences beyond expiration date; held: failure of defense to object to trial date within ten days of setting, former CrR 3.3(f) [now CrR 3.3(d)(3)], is excused because trial date was originally set within 60 day period; failure to object goes to trial date, not

erroneously calculated expiration date; defendant's inquiry at omnibus hearing was sufficient notice to court and state to warrant dismissal, *distinguishing* State v. Raper, 47 Wn.App. 530 (1987), *but see:* State v. Carson, 128 Wn.2d 805, 825 (Pekelis, J., concurring)(1996), *see: State v. Walker,* 199 Wn.2d 796 (2022); I.

***State v. Kelley***, 64 Wn.App. 755 (1992)

"**Responsibly scheduled vacation**" of prosecutor is grounds for five-day extension, former CrR 3.3(d)(8), where state has responsibly managed its resources in terms of available deputy prosecutors, courtrooms and judges, but due to unforeseen or unavoidable circumstances beyond the control of the parties or the court, the case cannot be tried on its set date or before expiration date, and state has reassigned case to the next most available deputy prosecutor; if that prosecutor is already in trial, court may grant a 5-day extension, absent prejudice, *see:* State v. Grilley, 67 Wn.App. 795 (1992), State v. Williams, 104 Wn.App. 516 (2001), State v. Heredia-Juarez, 119 Wn.App. 150 (2003), *cf.:* State v. Chichester, 141 Wn.App. 446 (2007); I.

***State v. Anderson***, 65 Wn.App. 493 (1992)

Defendant, facing charges in Washington while in federal prison, demands a speedy trial from prosecutor, state claims that it would not act as no detainer had been lodged; more than a year later, state obtains writ of habeas corpus, brings defendant to Washington for trial; held: although former CrR 3.3(g)(6) [now CrR 3.3(e)(6)] tolls time for trial rule when defendant is detained out of state, prosecutor must still exercise due diligence in seeking extradition, State v. Pizzuto, 55 Wn.App. 421, 432 (1989), *Smith v. Hooey,* 21 L.Ed.2d 607 (1969), 2 American Bar Ass'n, *Standards for Criminal Justice,* Std. 12-3.1, at 12.34 (2d ed. 1980), State v. Anderson, 121 Wn.2d 852 (1993); *but see:* State v. Carmichael, 53 Wn.App. 894, 896 (1989), *cf.: State v. Rafay,* 168 Wn.App. 734, 766-74 (2012); here, failure to lodge detainer establishes a lack of good faith and due diligence, denying defendant's right to speedy trial, former CrR 3.3(d)(4), State v. Roman, 94 Wn.App. 211 (1999); I.

***State v. Becerra***, 66 Wn.App. 202 (1992)

Jury selected within 60-day period, jury sworn and motions heard after 60th day; held: jury selection is a necessary part of trial, which commonly starts proceeding, jury need not be sworn within 60-days, preliminary motions need not be heard, *see:* State v. Mathews, 38 Wn.App. 180, 183 (1984), State v. Redd, 51 Wn.App. 597, 608 (1988), State v. Estabrook, 68 Wn.App. 309 (1993); by not objecting within time for trial period, defense waives objection as it is defense responsibility to raise issue when action could still be taken to avoid violation of the rule, State v. Austin, 59 Wn.App. 186, 200 (1990), State v. Raper, 47 Wn.App. 530, 538 (1987), State v. Malone, 72 Wn.App. 429, 433-7 (1994), State v. Donahue, 76 Wn.App. 695, 698-9 (1995), State v. Rose, 110 Wn.App. 878 (2002), State v. Farnsworth, 133 Wn.App. 1, 12-13 (2006), *State v. Bobenhouse,* 143 Wn.App. 315, 321-22 (2008), *aff'd, on other grounds,* 166 Wn.2d 881 (2009), *State v. MacNeven,* 173 Wn.App. 265 (2013), *State v. Walker,* 199 Wn.2d 796 (2022); III.

***Doggett v. United States***, 120 L.Ed.2d 520 (1992)

Eight-year delay between indictment and arrest, attributable solely to government's negligence, where defendant was ignorant of indictment, is sufficient to warrant dismissal even absent proof of particularized trial prejudice, Barker v. Wingo, 33 L.Ed.2d 101 (1972), as

excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or identify, *cf.:* *United States v. Loud Hawk*, 88 L.Ed.2d 640 (1986); 5-4.

***State v. Andrews***, 66 Wn.App. 804 (1992)

A motion to exclude witnesses, ER 615, is a commencement of a trial, which tolls the time for trial period, *State v. Carson*, 128 Wn.2d 805, 819-20 (1996), *disavowed, on other grounds, State v. Walker,* 199 Wn.2d 796 (2022), *see:* *State v. Mathews*, 38 Wn.App. 180, 183 (1984), *State v. Redd*, 51 Wn.App. 597, 608 (1988), *State v. Carlyle*, 84 Wn.App. 33 (1996); presence of a court reporter is not a prerequisite to starting trial; a judge's dental emergency is grounds for a retroactive 1-day extension, former CrR 3.3(d)(8); while docket congestion alone is not grounds for delaying a criminal trial beyond expiration date, *State v. Mack*, 89 Wn.2d 788, 794 (1978), *State v. Kokot*, 42 Wn.App. 733, 737 (1986), *State v. Warren*, 96 Wn.App. 306 (1999), *State v. Kenyon*, 167 Wn.2d 130 (2009), double setting of calendars, causing counsel to be unavailable, is good cause for delay, *State v. Mack*, *supra*, at 791; I.

***State v. Grilley***, 67 Wn.App. 795 (1992)

Continuance beyond expiration date to accommodate previously scheduled vacations of officers is not abuse of discretion where supported by findings showing a need for a continuance in the due administration of justice, where the motion is made promptly when conflict is discovered, where rescheduled date did not cause an unreasonable delay and no actual prejudice results, *State v. Hoffman*, 115 Wn.App. 91, 108 (2003), *see:* *State v. Kelley*, 64 Wn.App. 755, 767 (1992), *State ex rel. Rushmore v. Bellevue Dist. Justice Court*, 15 Wn.App. 675, 677 (1977), *State v. Heredia-Juarez*, 119 Wn.App. 150 (2003), *cf.:* *State v. Chichester*, 141 Wn.App. 446 (2007), *but see:* *State v. Kokot*, 42 Wn.App. 733, 735 (1986), *State v. Warren*, 96 Wn.App. 306 (1999); I.

***State v. Allen***, 67 Wn.App. 824 (1992)

**Pre-accusation delay** of 95 days before arraignment is not error absent prejudice, *see:* *State v. Gee*, 52 Wn.App. 357 (1989); III.

***State v. Smith***, 67 Wn.App. 847 (1992)

Where state provides **discovery** late, forcing defense to move to continue beyond expiration date or go to trial unprepared, trial court has discretion whether to dismiss, *State v. Guloy*, 104 Wn.2d 412, 428 (1985), *State v. Greene*, 49 Wn.App. 49 (1987), *State v. Woods*, 142 Wn.2d 561, 578-85 (2001), *see:* *State v. Brooks*, 149 Wn.App. 373 (2009), *see: State v. Salgado-Mendoza,* 189 Wn.2d 420 (2017), distinguishing *State v. Price*, 94 Wn.2d 810 (1980), *State v. Sherman*, 59 Wn.App. 763 (1990); defense must prove that it was "impermissibly prejudiced" by interjection of new facts to prevail, *cf.:* *State v. Kessler*, 75 Wn.App. 634, 631-2 (1994); 2-1, I.

***State v. Potter***, 68 Wn.App. 134 (1992)

Defendant is charged with murder 12½ years after homicide; held: test for **precharging delay**: (1) defendant must show prejudice, (2) court must consider reason for delay, (3) if state justifies delay, court must balance state's interest with prejudice, *State v. Chavez*, 111 Wn.2d 548 (1988); mere allegation of evidence or witness unavailability or dimmed memories is insufficient, *State v. Gee*, 52 Wn.App. 357, 367 (1988), *State v. Martinez*, 78 Wn.App. 870, 877-8 (1995); II.

***State v. Duggins***, 121 Wn.2d 524 (1993)

Juvenile Court grants two-day continuance within time for trial period, JuCR 7.8, as officer had not responded to subpoena that was not personally served; held: because defendant was tried within speedy trial period, there is no basis for dismissal under speedy trial rule, *Seattle v. Clewis*, 159 Wn.App. 842 (2011); *affirms, in part*, *State v. Duggins*, 68 Wn.App. 396 (1993).

***State v. Anderson***, 121 Wn.2d 852 (1993)

Defendant, facing charges in Washington while in federal prison, demands a speedy trial from prosecutor, state claims that it would not act as no detainer had been lodged; more than a year later, state obtains writ of *habeas corpus*, brings defendant to Washington for trial; held: although former CrR 3.3(g)(6) [now CrR 3.3(e)(6)] tolls time for trial rule when defendant is detained out of state, prosecutor must still exercise due diligence in seeking **extradition**, *State v. Pizzuto*, 55 Wn.App. 421, 432 (1989), *Smith v. Hooey*, 21 L.Ed.2d 607 (1969), 2 American Bar Ass'n, *Standards for Criminal Justice*, Std. 12-3.1, at 12.34 (2d ed. 1980); here, failure to lodge detainer establishes a lack of good faith and due diligence, denying defendant's right to speedy trial, former CrR 3.3(d)(4) [now CrR 3.3(e)(6)]; *affirms* *State v. Anderson*, 65 Wn.App. 493 (1992); *see:* *State v. Mireles*, 73 Wn.App. 605, 615-17 (1994), *State v. Stewart*, 78 Wn.App. 931 (1995), *State v. Swenson*, 150 Wn.2d 181 (2003), *accord:* *State v. Simon*, 84 Wn.App. 460 (1996), *State v. Huffmeyer*, 145 Wn.2d 252 (2001), *cf.:* *State v. Ponder*, 24 Wn.App. 105 (1979), *State v. Rafay*, 168 Wn.App. 734, 766-74 (2012); 5-3.

***State v. Hackett***, 122 Wn.2d 165 (1993)

Filing and service of a notice of appearance by defense counsel for an absconded defendant does not commence the running of a new speedy trial period, former CrR 3.3(d)(2), *see:* CrR 3.3(a)(iii) and (c)(2)(ii); defendant must be present in county, known to the judge on the record; document in court file is insufficient, *State v. Johnson*, 56 Wn.App. 333, 338 (1989); reverses *State v. Hackett*, 64 Wn.App. 205 (1992); 8-0.

***State v. Newkirk***, 122 Wn.2d 174 (1993)

Defendant fails to appear for trial, one day later counsel's motion to quash is granted, 99 days later defense moves to dismiss; held: once accused is arraigned and fails to appear, defendant must appear in court or defendant's presence in county must be explicitly established and recorded by court reporter or by clerk in minutes, former CrR 3.3(d)(2), [now CrR 3.3(a)(iii) and (c)(2)(ii)] ; mere request for order quashing warrant does not demonstrate defendant's presence, *State v. Johnson*, 56 Wn.App. 333, 338 (1989); an absence following a failure to appear does not create a fresh duty of diligence to locate defendant at the risk of dismissal *(dicta);* reverses *State v. Newkirk*, 64 Wn.App. 585 (1992); 8-0.

***State v. Norby***, 122 Wn.2d 258 (1993)

Trial court consolidates numerous charged and uncharged defendants in order to hear **preaccusatorial delay** issues, orders state to answer interrogatories about state's investigations and charging policies and the number of cases involved in prosecutor's backlog, state appeals; held: test for preaccusatorial delay: (1) actual prejudice to defendant, (2) court must consider reasons for delay, (3) if state is able to justify delay, court must balance state's interest vs. prejudice, *United States v. Lovasco*, 52 L.Ed.2d 752 (1977), *State v. Lidge*, 111 Wn.2d 845 (1989), *State v. Oppelt*, 172 Wn.2d 285 (2011); actual prejudice must be established before

court considers reasons for delay; mere possibility of prejudice is insufficient to meet the burden of showing actual prejudice, *State v. Ansell*, 36 Wn.App. 492, 498-9 (1984); mere allegation that witnesses are unavailable or that memories have dimmed is insufficient, defense must specifically demonstrate that the delay caused actual prejudice, *State v. Gee*, 52 Wn.App. 357, 367 (1988), *State v. McConnell*, 178 Wn.App. 592, 605-08 (2013), *cf.: State v. Stearns*, 23 Wn.App.2d 580 (2022); 8-0.

***State v. Valdobinos***, 122 Wn.2d 270 (1993)

Defense counsel moves to continue trial and promises to file a time for trial waiver which is not filed, new counsel denies that the promised waiver was valid; held: assurance that a waiver in support of a motion to continue is, effectively, a waiver, as a waiver may be implied from defendant's request for a continuance, *see: State v. Freeman*, 54 Wn.App. 734, 737 (1989), *State v. Colbert*, 17 Wn.App. 658 (1977); 8-0.

***State v. Nguyen***, 68 Wn.App. 906 (1993)

Subpoenaed witness called to active military duty is grounds for a continuance, former CrR 3.3(h)(2), beyond expiration date absent prejudice; I.

***Butts v. Heller***, 69 Wn.App. 263 (1993)

Writ of prohibition, RCW 7.16.300, is appropriate to review denial of a speedy trial motion where (1) reversal would be unquestioned if the case were on appeal and (2) litigation will terminate once error is corrected by interlocutory review, *Seattle v. Williams*, 101 Wn.2d 445 (1984), *State v. Harris*, 2 Wn.App. 272 (1970), *rev'd on other grounds*, 78 Wn.2d 894, *rev'd*, 30 L.Ed.2d 212 (1971); II.

***State v. Angulo***, 69 Wn.App. 337 (1993)

In continuing a case beyond expiration date to accommodate prosecutor's trial of an unrelated case, trial court may consider respective aging factors of the two cases, specifically that other defendant was arraigned first, had been incarcerated longer, that his trial had been continued more often and anticipated length of the two trials, all within contemplation of a continuance for the "administration of justice," former CrR 3.3(h)(2) [now CrR 3.3(f)(2)], *State v. Cannon*, 130 Wn.2d 313, 325-7 (1996); while expiration dates should normally control the decision as to which goes first, the current expiration date is less significant once there have been waivers and continuances beyond the initial expiration date, *see: Seattle v. Clewis*, 159 Wn.App. 842 (2011), particularly where, as here, the expiration dates were only one day apart; I.

***State v. Davis***, 69 Wn.App. 634 (1993)

Defendant is incarcerated out of state in 1987, files a detainer demand in 1991, Washington acts timely to bring him back; held: to determine if constitutional speedy trial right is violated, apply balancing test of *Barker v. Wingo*, 33 L.Ed.2d 101 (1972): (1) length of delay (here, substantial), (2) reason for delay (here, lack of diligence by state due to negligence, a "neutral" reason as opposed to deliberate delay), (3) defendant's assertion of speedy trial right (here, weighs against defendant), (4) prejudice, not limited to trial prejudice, *Moore v. Arizona*, 38 L.Ed.2d 183 (1973), *State v. Iniguez*, 167 Wn.2d 130 (2009), as it may impact right to parole, *Smith v. Hooey*, 21 L.Ed.2d 607 (1969), *State v. Angelone*, 67 Wn.App. 555, 562 (1992)(here, no prejudice), *see: State v. Anderson*, 121 Wn.2d 852 (1993), *State v. Stein*, 140 Wn.App. 43

(2007), *State v. Rafay*, 168 Wn.App. 734, 766-74 (2012), *State v. Shemesh*, 187 Wn.App. 136 (2015), *State v. Lee*, 188 Wn.2d 473, 496-501 (2017); I.

***State v. Ekstedt***, 70 Wn.App. 785 (1993)

Where felony is filed in district court, defendant files time for trial waiver, after which charge is dismissed and refiled in superior court, time for trial waiver applies prospectively, such that time elapsed in district court, former CrR 3.3(c)(2)(ii), begins with first appearance there and runs up to date of the waiver, *see: State v. Garnier*, 52 Wn.App. 657 (1988), overruled on other grounds, *State v. Stephens*, 116 Wn.2d 238 (1991); I.

***State v. Watkins***, 71 Wn.App. 164 (1993)

Absence of standby counsel is justification for continuance of trial beyond expiration date; continuance in the absence of *pro se* defendant does not infringe right of self-representation; I.

***State v. Wachter***, 71 Wn.App. 80 (1993)

Defense counsel receives written notice of trial date to commence at 9 a.m., defendant fails to appear, court does not issue warrant, defendant appears at 11 a.m., another trial had commenced, court resets trial date and sets expiration date 90-days hence, former CrRLJ 3.3(d)(2), *see:* CrRLJ 3.3(a)(iii) and (c)(2)(ii); held: defendant's failure to appear at the time the case was set starts 90-day period anew, *but see: State v. Raschka*, 124 Wn.App. 103 (2004); II.

***State v. Silva***, 72 Wn.App. 80 (1993)

Former CrR 3.3(d)(8) five-day extension is granted, trial court makes record listing each courtroom and case therein, offers defense a judge *pro tempore*, which defense rejects; held: absent prejudice, *State v. Brown*, 40 Wn.App. 91, 94-5 (1985), where court substantiates its assertion that court congestion is unavoidable and makes every effort to responsibly manage its resources and try defendant within time for trial limits, then extension was not an abuse of discretion, *State v. Cannon*, 130 Wn.2d 313, 325-7 (1996), *State v. Warren*, 96 Wn.App. 306 (1999), *State v. Kenyon*, 167 Wn.2d 130 (2009), *distinguishing State v. Mack*, 89 Wn.2d 788, 794 (1978), *State v. Kokot*, 42 Wn.App. 733, 736-7 (1986), *see: State v. Smith*, 104 Wn.App. 244 (2001), *State v. Denton23* Wn.App.2d 437 (2022); I.

***State v. McKinzy***, 72 Wn.App. 85, 87-89 (1993)

Co-defendant's motion for continuance beyond expiration date is granted, trial court denies defendant's motion to sever to protect her right to speedy trial, CrR 4.4(c)(2)(i); held: brief delay beyond time for trial limits is permissible, severance is not mandatory, preference for severance under court rule "may be tempered by considerations of judicial economy and potential prejudice to others," at 89, *State v. Guloy*, 104 Wn.2d 412, 428 (1985), absent prejudice to defendant; I.

***State v. Helms***, 72 Wn.App. 273 (1993)

A waiver for an unspecified period is effective only until date of trial contemporaneously or subsequently set by court, *State v. Garnier*, 52 Wn.App. 657, 660 (1988), *overruled on other grounds in State v. Stephens*, 116 Wn.2d 238, 246 (1991), *State v. Bjelland*, 22 Wn.App. 696 (1979), *State v. Burroughs*, 23 Wn.App. 190 (1979), *State v. Ramsay*, 41 Wn.App. 380 (1985); a continuance covered by waiver is an excluded period, former CrR 3.3(g)(3) and (h)(1), thus 90-

day period includes time elapsed prior to waiver period plus remainder of 90 days following waiver period; III.

***State v. Dent***, 123 Wn.2d 467, 484-5 (1994)

Two-month continuance granted to co-defendant, beyond expiration date for defendant, severance denied to defendant, held: absent prejudice, interests of judicial efficiency supports denial of severance and dismissal for speedy trial violation, *State v. Melton*, 63 Wn.App. 63, 67 (1991), *State v. Torres*, 111 Wn.App. 323 (2002); 9-0.

***State v. Malone***, 72 Wn.App. 429 (1994)

At omnibus hearing, within time for trial, defense notes motion to dismiss, but does not raise motion until after expiration date, claiming defense counsel was unaware of time elapsed in district court; held: defense counsel's failure to object to trial date within ten days of receiving notice waives the issue, *State v. Becerra*, 66 Wn.App. 202, 206 (1992), *State v. Austin*, 59 Wn.App. 186, 200 (1990), *State v. Rose*, 110 Wn.App. 878 (2002), *State v. Farnsworth*, 133 Wn.App. 1, 12-13 (2006), *State v. Bobenhouse*, 143 Wn.App. 315, 321-22 (2008), *aff'd, on other grounds*,166 Wn.2d 881 (2009), *State v. MacNeven*, 173 Wn.App. 265 (2013), *State v. Walker*, 199 Wn.2d 796 (2022); defense counsel has an affirmative duty to investigate "easily ascertainable facts that are relevant to setting the trial date within the speedy trial period," untimely objection because of failure to discover them waives issue, at 433-37, *State v. Chenoweth*, 115 Wn.App. 726, 736-39 (2003), *distinguishing dicta* in *State v. Raper*, 47 Wn.App. 530, 539 (1987), *see: State v. Carson*, 128 Wn.2d 805 (1996), *disavowed, on other grounds, State v. Walker, supra, at* 806; failure to investigate the issue was not ineffective assistance, because had defense objected in a timely fashion, trial court would have reset trial date within time for trial period, thus no prejudice, at 437-38, *State v. MacNeven*, 173 Wn.App. 265 (2013); I.

***State v. Mireles***, 73 Wn.App. 605, 615-7 (1994)

Where defendant is in federal custody, time for trial period is excluded unless state acts in bad faith or fails to exercise due diligence in attempting to obtain defendant for trial, former CrR 3.3(c)(1), *State v. Anderson*, 121 Wn.2d 852 (1993), *see: State v. Rafay*, 168 Wn.App. 734, 766-74 (2012); due diligence is shown where state seeks writ of *habeas corpus ad prosequendum;* court need not try defendant *in absentia* at his own request; III.

***State v. Hunsaker***, 74 Wn.App. 209, 210-11 (1994)

Where prosecution mails notice of arraignment to an address given by defendant, and notice is not returned, reasonable inference is that defendant received notice and prosecutor has thus acted with due diligence, *State v. Greenwood*, 120 Wn.2d 585, 600 (1993), *State v. Anderson*, 102 Wn.App. 405 (2000); I.

***State v. Lopez***, 74 Wn.App. 264, 268-9 (1994)

Defendant seeks continuance of trial and signs time for trial waiver, no interpreter present but counsel represents defendant is sufficiently fluent to understand, defendant later claims waiver was involuntary; held: where defendant requests continuance, defense has the burden of showing an abuse of discretion in granting the continuance, *State v. Denison*, 78 Wn.App. 566, 573 (1995), *see: State v. Dowell*, 16 Wn.App. 583, 588 (1976), *State v. Livengood*, 14 Wn.App.

203, 209 (1975); trial court reasonably relied upon representations of counsel that defendant understood proceedings; I.

***State v. Miller***, 74 Wn.App. 334 (1994)

Valid order for a handwriting exemplar and civil contempt confinement for failure to comply authorize continuances beyond time for trial expiration date as "required in the administration of justice," former CrR 3.3(h)(2) [now CrR 3.3(f)(2)]; continuance allowing state to do further investigation and add counts, and service of time in a county jail for contempt is not prejudice "in the presentation of the defense," CrR 3.3(h)(2); I.

***State v. Kitchen***, 75 Wn.App. 295 (1994)

Arraignment notice is mailed to defendant's correct address, defendant fails to appear for two years, claims it was never received, trial court denies motion to dismiss; held: notice sent to correct address creates a rebuttable presumption that notice was received, at 298; where defendant convinces court he was without fault in failing to appear, then court must determine whether state exercised due diligence in attempting to notify defendant of the charge, at 298; a finding that notice was received where sent to correct address and not returned will normally be sustained even when record contains simple denial of receipt by defendant, at 299, but here no finding of fault was made by court, remanded for determination of whether defendant received notice; *see: State v. Marler*, 80 Wn.App. 775 (1996); I.

***State v. Donahue***, 76 Wn.App. 695, 698-9 (1995)

Extending trial date beyond expiration date to accommodate ongoing plea negotiations, absent objection, is not an abuse of discretion; III.

***State v. Morris***, 126 Wn.2d 306 (1995)

Defendant, in prison in Washington, serves warden with demand for speedy disposition of pending felony, warden transmits it to superior court and prosecutor, RCW 9.98.010, trial is set within 120 days of receipt by prosecutor, but beyond 120 days of receipt by warden, motion to dismiss is denied, but, at defendant's request, trial court stays pending discretionary review, which is denied, with five days remaining in 120 days, stay is lifted, but trial is set more than five days later, trial court dismisses; held: receipt by prosecutor, rather than warden, triggers statutory 120 day period, *Fex v. Michigan*, 122 L.Ed.2d 406 (1993), *reversing State v. Morris*, 74 Wn.App. 293 (1994), upon lifting of the stay, state failed to comply with the continuance procedure, RCW 9.98.010(1), thus 120 day period lapsed, *see also: State v. Peeler*, 183 Wn.2d 169 (2015); 9-0.

***State v. Shilling***, 77 Wn.App. 166, 169-71 (1995)

Medical emergency in the jail which prevents transportation of defendant to court on expiration date is grounds for a retroactive one-day extension due to unavoidable or unforeseen circumstances beyond the control of the court or parties, former CrR 3.3(d)(8); I.

***State v. Bible***, 77 Wn.App. 470 (1995)

Prior to expiration date, state informs court that principal witnesses had not been located and were not notified of the charges, court dismisses without prejudice, defense objects and appeals, *State v.Taylor*, 150 Wn.2d 599 (2003); held: a sufficient reason must exist apart from

the running of the time for trial period, former CrR 3.3(g)(4), to justify dismissal without prejudice under CrR 8.3(a); here, unavailability of witness is a legitimate reason, thus trial court properly exercised discretion; state is not required to exercise due diligence to subpoena witnesses in an adult criminal proceeding, former CrR 3.3(h)(2), in order to obtain a continuance, *distinguishing* State v. Adamski, 111 Wn.2d 574, 580 (1988), *see:* State v. Hairychin, 136 Wn.2d 862 (1998); I.

***Seattle v. Bonifacio***, 127 Wn.2d 482 (1995)

The issuance of a citation to a defendant by police, former CrRLJ 2.1, starts the running of the time for trial clock, former CrRLJ 3.3(c)(1), upon filing with the court or 48 hours after issuance, former CrRLJ. 2.1(d), if it is not filed, *State v. Dolman*, 22 Wn.App. 917 (1979), *distinguishing* State v. Getty, 55 Wn.App. 152 (1989), *cf.: State v. Johnson*, 100 Wn.App. 917 (2000), *but see: State v. Miller*, 188 Wn.app. 103 (2015); 9-0.

***State v. Higley***, 78 Wn.App. 172, 181-4 (1995)

Where a deferred prosecution is granted, "delay...caused by a petitioner requesting deferred prosecution," RCW 10.05.110, means delay from the date a petition is filed to the date on which deferred prosecution is revoked or otherwise terminated; II.

***State v. Hyatt***, 78 Wn.App. 679 (1995)

Delay in arraignment beyond 14-day requirement of former CrR 3.3(c)(1), *see:* CrR 4.1, is not grounds for dismissal where court sets proper constructive arraignment date, former CrR 3.3(c)(4), *see:* CrR 4.1(b), and trial date is still within 90-day period; where defendant is released, state is entitled to 90 days irrespective of when defendant is released, *State v. Kelly*, 60 Wn.App. 921, 926 (1991), *see: State v. Maling*, 6 Wn.App.2d 838 (2018) III.

***State v. Carson***, 128 Wn.2d 805 (1996), *disavowed,in part,, State v. Walker*, 199 Wn.2d 796, 806 (2022)

Court and prosecutor mistakenly believe expiration date is later than it is, defense counsel remains silent, on expiration date assigned prosecutor starts another trial, after which, over objection, court grants retroactive multiple five-day extensions, former CrR 3.3(d)(8); held: mistaken belief about the expiration date, unavailability of counsel due to other trial and defense counsel's failure to advise the court or prosecutor of "his intent to rely on the speedy trial rule before the speedy trial period expired" are unavoidable circumstances beyond the control of the court or parties to justify extension, at 816, *see:* *State v. Williams*, 104 Wn.App. 516 (2001); defense bears some responsibility for asserting CrR 3.3 rights and assuring compliance before expiration date, defense effectively waives speedy trial rights if they do not raise an objection when action could still be taken to avoid a speedy trial violation, at 822-23, *State v. White*, 94 Wn.2d 498, 502-03 (1980), *disavowed, in part,, State v. Walker, supra, at* 806, *State v. Malone*, 72 Wn.App. 429, 433 (1994), *State v. Raper*, 47 Wn.App. 530, 538 (1987), *State v. Rose*, 110 Wn.App. 878 (2002), *State v. Farnsworth*, 133 Wn.App. 1, 12-13 (2006), *State v. Bobenhouse*, 143 Wn.App. 315, 321-22 (2008), *aff'd, on other grounds,* 166 Wn.2d 881 (2009), *State v. MacNeven*, 173 Wn.App. 265 (2013), *cf.: State v. Duffy*, 86 Wn.App. 334, 341-4 (1997), *State v. Ledenko*, 87 Wn.App. 39 (1997), *State v. Sanchez*, 172 Wn.App. 678 (2012); following **mistrial**, first day counted against 60-day period is the day after the oral order of mistrial, CrR 3.3(d)(3); when, on assigned trial date (same as expiration date), only action is denial of defense motion to continue trial, the trial has begun on that date, *State v. Andrews*, 66 Wn.App. 804, 806-8 (1992), *State v. Redd*, 51 Wn.App. 597, 599-

600 (1988), *State v. Mathews*, 38 Wn.App. 180, 181 (1984), *State v. Carlyle*, 84 Wn.App. 33 (1996), *State v. Torres*, 111 Wn.App. 323, 334 (2002). , *State v. Sanchez*, 172 Wn.App. 678 (2012)

***State v. Marler***, 80 Wn.App. 775 (1996)

In welfare fraud cases, DSHS sends notice to defendants informing them that charges were filed and that they should contact the sheriff, substantial delay occurs before arraignment; held: notice from DSHS did not contain established court dates, *distinguishing* *State v. Bryant*, 74 Wn.App. 301 (1994), notices were not sent by court or prosecutor, *distinguishing* *State v. Kitchen*, 75 Wn.App. 295 (1994), prosecutor did not exercise due diligence or good faith by relying on or delegating authority to DSHS to bring defendants before court, thus dismissal affirmed; III.

***State v. Harris***, 130 Wn.2d 35 (1996)

Defendant is arrested in stolen car, cited in district court for driving without a license, pleads guilty, 139 days later is charged with taking and riding in juvenile court, motion to dismiss is denied; held: offenses arose from same criminal conduct, thus under 2 American Bar Ass'n, *Standards for Criminal Justice* Std. 12-2.2 (2d ed. 1980), which is applicable in juvenile court, *State v. Peterson*, 90 Wn.2d 423, 431 (1978), when multiple charges stem from the same criminal conduct or criminal episode, state must prosecute all related charges within the speedy trial time limits, even when the charges were split between district and juvenile or superior courts, *Peterson, supra.*, *State v. Earl*, 97 Wn.App. 408 (1999), *see:* *State v. Bradley*, 38 Wn.App. 597, 599 (1984), *State v. Wilke*, 28 Wn.App. 590, 594 (1981), *cf.:* *State v. Pettus*, 89 Wn.App. 688, 701-2 (1998), *abrogated, on different grounds, State v. Henderson*, 182 Wn.2d 734 (2015), *State v. Lee*, 132 Wn.2d 498 (1997), distinguishing *State v. Fladebo*, 53 Wn.App. 116 (1988), *aff'd on different grounds,* 113 Wn.2d 388 (1989), where charges were prosecuted by different prosecutorial authorities in different courts with exclusive jurisdictions, *see also:* *State v. Keltner*, 102 Wn.App. 396 (2000) re: infractions; 9-0.

***State v. Hudson***, 130 Wn.2d 48 (1996)

Defendant who is out of state and not incarcerated is not amenable to process and state need not exercise diligence to obtain his presence, *State v. Carpenter*, 94 Wn.2d 690, 693 (1980), *State v. Stewart*, 78 Wn.App. 931 (1995), *State v. Hessler*, 155 Wn.2d 604 (2005), even if state is aware of his out-of-state address, *State v. Stewart*, 130 Wn.2d 351 (1996); affirms *State v. Hudson*, 79 Wn.App. 193 (1995), *State v. Cintron-Cartegena*, 79 Wn.App. 600 (1995); *accord:* *State v. Monson*, 84 Wn.App. 703 (1997), *State v. Roman*, 94 Wn.App. 211 (1999), *State v. Treat*, 109 Wn.App. 419, 423-25 (2001); 9-0.

***State v. Carlyle***, 84 Wn.App. 33 (1996)

On expiration date, court erroneously excuses all jurors, hears preliminary prosecution motion and continues case five days, then dismisses; held: case was called and preliminary motion was heard on expiration date, thus defendant was brought to trial within the rule, former CrRLJ 3.3(c)(1), court erred in dismissing, *State v. Carson*, 128 Wn.2d 805, 820 (1996), *disavowed on other grounds, State v. Walker*, 199 Wn.2d 796 (2022), *State v. Redd*, 51 Wn.App. 597, 608 (1988), *State v. Mathews*, 38 Wn.App. 180, 183 (1984); standard on appeal is *de novo*, not abuse of discretion; II.

***State v. Simon***, 84 Wn.App. 460 (1996)

Defendant is charged with Washington offense while in jail in Oregon, Washington files detainer, defers to a California detainer, as charges there are more serious, defendant is returned to Oregon, Washington fails to communicate with Oregon for more than a year; held: while state may properly defer to another state's detainer while still complying with good faith and due diligence, *State v. Pizzuto*, 55 Wn.App. 421, 425 (1989), and while state is not responsible for tracking a prisoner's progress through the federal system, *State v. Syrotchen*, 61 Wn.App. 261, 266 (1991), here state did nothing for more than a year, state had a duty to inquire into defendant's availability to stand trial in Washington, state failed to exercise due diligence, thus dismissed, *State v. Huffmeyer*, 145 Wn.2d 52 (2001); I.

***State v. Michielli***, 132 Wn.2d 229, 239-46 (1997)

Defendant is accused of stealing items and pawning them, is charged with theft, three days before trial state adds charges of trafficking in stolen property, trial court dismisses; held: state's delay in adding new charges when it had all the evidence necessary to file those charges months earlier, forcing defendant to waive speedy trial to answer the new charges, justifies dismissal in the interests of justice, CrR 8.3(b), *State v. Price*, 94 Wn.2d 810 (1980), *State v. Teems*, 89 Wn.App. 385 (1997), *State v. Ralph G.*, 90 Wn.App. 16 (1998) *State v. Earl*, 97 Wn.App. 408 (1999), *State v. Brooks*, 149 Wn.App. 373 (2009); 5-4.

***State v. Branstetter***, 85 Wn.App. 123 (1997)

At arraignment, defendant is ordered to appear for omnibus hearing 23 November, prosecutor notes motion for 18 November, defense counsel appears, defendant does not, court issues warrant, 23 November omnibus hearing is apparently never held, when defendant ultimately appears, court quashes warrant and restarts 90-day time for trial period, former CrR 3.3(d)(2), defendant seeks dismissal after original expiration date; held: "CrR 3.3(d)(2) and CrR 3.4 restart the speedy trial period when an arraigned defendant is absent from a hearing he was ordered to attend. Here, [defendant] signed an order requiring him to attend his pretrial omnibus hearing on November 23, but he failed to appear… Under these circumstances, the trial court properly restarted the speedy trial period," at 129, *cf.: State v. Raschka*, 124 Wn.App. 103 (2004), *State v. Moore,* 178 Wn.App. 489 (2013), *but see: State v. Gelinas,* 15 Wn.App.2d 484 (2020); *per curiam.*

***State v. Wilks***, 85 Wn.App. 303 (1997)

Following suppression hearing, defense files and serves notice of discretionary review, apparently court and state believe that time for trial rule is thus stayed, trial date passes without calling case for trial, following denial of discretionary review defense seeks dismissal; held: absent a stay granted by a court, CrR 3.3 does not stay time for trial period while a defendant seeks discretionary review, *see:* RAP 7.1, 8.3, *cf.: State v. Blum*, 121 Wn.App. 1, 6-7 (2004), failure of court and prosecutor to request stay or extensions or continuance does not shift burden to defense to seek speedy trial, thus dismissed; III.

***State v. Perrett***, 86 Wn.App. 312, 317-9 (1997)

Pretrial **electronic home detention** is not jail for speedy trial purposes, thus 90-day rule applies; II.

***State v. Duffy***, 86 Wn.App. 334, 341-6 (1997)

Police book defendant and file citation charging DUI, city declines to prosecute but does not seek order of dismissal, defendant is charged with DUI and hit-and-run in superior court four months later; held: dismissal of DUI was necessary to toll speedy trial period, former CrRLJ 3.3(g)(4) [now CrRLJ 3.3(e)(4)], defendant had no obligation to assert right to speedy trial when city has indicated it will not prosecute and state has not filed charge, distinguishing *State v. Rock*, 65 Wn.App. 654 (1992), *State v. Carson*, 128 Wn.2d 805 (1996), *disavowed, on other grounds, State v. Walker,* 199 Wn.2d 796 (2022), hit-and-run charge arose from same criminal episode and transaction, *State v. Erickson*, 22 Wn.App. 38, 44 (1978), thus speedy trial period must begin from time defendant was held to answer any charge with respect to that conduct or episode, *State v. Peterson*, 90 Wn.2d 423, 431 (1978), *see: State v. Kindsvogel*, 149 Wn.2d 477 (2003), where all evidence was available to the prosecutor at the time the first charge was filed; III.

***State v. Ledenko***, 87 Wn.App. 39 (1997)

Due to clerical error, case did not appear on court's trial calendar and case was not called on the trial date, prosecutor was at a conference, defendant was present in courthouse and left after calendar call, after expiration date state seeks extension which is denied; held: defendant's failure to present himself to the courtroom does not "rectify" the superior court's clerical error, defendant had no obligation to make his presence known to the court on the record, as former CrR 3.3(d)(2) applies only to the time when the time for trial period begins to run again after a failure to appear, *see: State v. Newkirk*, 122 Wn.2d 174, 178-80 (1993), *but see: State v. Sanchez,* 172 Wn.App. 678 (2012); where trial is not called on scheduled date, defendant's presence is not required, *State v. Wilks*, 85 Wn.App. 303 (1997), *State v. Helms*, 72 Wn.App. 273, 274-6 (1994); prosecutors unavailability was not unforeseen or unavoidable, nor was court's error, distinguishing *State v. Carson*, 128 Wn.2d 805 (1996), *disavowed, on other grounds, State v. Walker,* 199 Wn.2d 796 (2022); III.

***State v. Berrysmith***, 87 Wn.App. 268, 280 (1997)

On the day of trial, counsel is allowed to withdraw because he reasonably believed defendant would commit perjury, defendant maintains he was forced to represent himself, court continues case three weeks to allow new counsel to prepare for trial; held: continuance was for an unforeseen or unavoidable circumstance, former CrR 3.3(h)(2), [now CrR 3.3(c)(2)(vii)] and thus appropriate; I.

***State v. Detrick***, 90 Wn.App. 939 (1998)

Where juvenile court judge is disqualified, time for trial period may be extended, applying CrR 3.3(d)(6) to juvenile court, distinguishing *State v. Sayers*, 29 Wn.App. 128, 130 (1981), *State v. Jacks*, 25 Wn.App. 141, 145 (1980); I.

***State v. Hairychin***, 136 Wn.2d 862 (1998)

Prosecutor arranges for defense counsel to interview complainant, does not subpoena complainant who moves out of state, prosecutor obtains continuance beyond expiration date; held: a continuance may be granted if state's evidence is unavailable, prosecutor has exercised due diligence, and there are reasonable grounds to believe evidence will be available within reasonable time, JuCR 7.8(e)(2)(ii), due diligence in juvenile case requires proper issuance of subpoenas, *State v. Adamski*, 111 Wn.2d 574, 578 (1988), *State v. Duggins*, 121 Wn.2d 524, 525

(1993), *cf.:* *State v. Bible*, 77 Wn.App. 470 (1995), thus continuance was improperly granted; *per curiam.*

***State v. Roman***, 94 Wn.App. 211 (1999)

Defendant, in custody in California, declines to waive extradition to Washington, completes California sentence and is erroneously released, two months later is arrested in Idaho and waives extradition, trial court dismisses; held: state must exercise due diligence to extradite a defendant who is amenable to process, *State v. Anderson*, 121 Wn.2d 852, 865 (1993), where defendant does not waive extradition, he is not amenable to process until he finished his California sentence, or when he was at large in another state, *State v. Hudson*, 130 Wn.2d 48 (1996), *State v. Stewart*, 130 Wn.2d 351 (1996), *State v. Rafay*, 168 Wn.App. 734, 766-74 (2012), *cf.:* *State v. Hessler*, 155 Wn.2d 604 (2005); II.

***State v. Corrado***, 94 Wn.App. 228 (1999)

Following conviction, appeal and reversal, trial court dismisses attempted murder charge on double jeopardy grounds, state appeals again, trial court detains defendant pending appeal for 11 months before Court of Appeals reverses, seeks dismissal for violation of Sixth Amendment right to speedy trial; held: 11 months is "presumptively prejudicial," *Doggett v. United States*, 120 L.Ed.2d 520 (1992), *but see:* *State v. Iniguez*, 167 Wn.2d 273, 291 (2009); factors: (1) reason for delay, (2) assertion of right to speedy trial, (3) prejudice; here, a state's successful appeal is not "purposeful or oppressive," *United States v. Ewell*, 15 L.Ed.2d 627 (1966), defendant did not assert his constitutional right to a speedy trial, no prejudice as all testimony was preserved at first trial, thus defendant's constitutional right to speedy trial was not denied, *State v. Ollivier*, 178 Wn.2d 813 (2013), *State v. Lee*, 188 Wn.2d 473, 496-501 (2017); II.

***State v. King***, 94 Wn.App. 811 (1999)

"**Time elapsed in district court**," former CrR 3.3(c)(2)(i), commences running when an attorney files an appearance, CrRLJ 4.1(d)(4), not when the defendant later personally appears; I.

***State v. Dassow***, 95 Wn.App. 454 (1999)

Juvenile respondent files an "objection" to trial date and serves prosecutor, no action is taken until after expiration date, whereupon trial court dismisses; held: filing objection with court and serving prosecutor is effectively a "motion" to reset trial date, respondent has no obligation to note the motion for a hearing or to bring it to court's attention, JuCR 7.8(c), former CrR 3.3(f), distinguishing *State v. Vandergriff*, 109 Wn.2d 99 (1987), *cf.:* CrRLJ 3.3(d)(3), *but see:* *State v. Wilson*, 113 Wn.App. 122, 129-31 (2002), *State v. Freeman*, 38 Wn.App. 665 (1984), *State v. Frankenfield*, 112 Wn.App. 472 (2002); III.

***State v. Thomas***, 95 Wn.App. 730 (1999)

Defense counsel, knowing she has a conflict of interest, waits until expiration date to advise court, defendant waives to allow new counsel's appointment, after conviction seeks dismissal as he was forced to waive due to defense counsel's ineffective assistance; held: speedy trial waiver forced solely by defense counsel's conduct, and not in any way attributable to the state or the court, is not a violation of CrR 3.3; where defendant moves to continue, and "good cause" is shown, and no prejudice to presentation of defendant's case is shown, then the waiver is valid even if caused by inadequacy of counsel, *State v. MacNeven*, 173 Wn.App. 265 (2013),

*accord:* *State v. Silva*, 107 Wn.App. 605, 611-13 (2001), *State v. Vicuna*, 119 Wn.App. 26 (2003); I.

***State v. Warren***, 96 Wn.App. 306 (1999)

Trial is continued two days beyond expiration date because of "courtroom unavailability," but court was aware that defense counsel would be in a homicide trial forcing another 16 day continuance; held: continuance or extension beyond expiration date for **court congestion** is not good cause, *State v. Mack*, 89 Wn.2d 788, 794 (1978), , and where court fails to make a detailed explanation of why each court was unavailable or offer a judge *pro tempore*, dismissal is mandated, *State v. Kenyon*, 167 Wn.2d 130 (2009), *State v. Kokot*, 42 Wn.App. 733, 737 (1986), *State v. Silva*, 72 Wn.App. 80 (1993), *State v. Smith*, 104 Wn.App. 244 (2001), *State v. Denton*, 23 Wn.App.2d 437 (2022); II.

***State v. Selam***, 97 Wn.App. 140 (1999)

Defense counsel's one-day vacation is grounds to continue trial one day past expiration date, absent prejudice; III.

***State v. Earl***, 97 Wn.App. 408 (1999)

State is granted leave to amend to add a count on day of trial, state had all evidence before it earlier, defense objection is overruled, six days left until expiration date, defendant waives three weeks to prepare; held: when state, without excuse, amends so late to compel defendant to seek a continuance, resulting period of delay is not excluded in calculating time for trial, thus dismissal is required, *State v. Ralph Vernon G.*, 90 Wn.App. 16, 21-22 (1998), *State v. Price*, 94 Wn.2d 810, 814-15 (1980); since both counts occurred as part of the same criminal episode, they should both have been charged and tried within the speedy trial period dictated by the first count, thus both must be dismissed, *State v. Peterson*, 90 Wn.2d 423 (1978), *State v. Fladebo*, 113 Wn.2d 388, 392 (1989), *State v. Harris*, 130 Wn.2d 35, 40 (1996), *see:* *State v. Kindsvogel*, 149 Wn.2d 477 (2003); II.

***State v. Whelchel***, 97 Wn.App. 813 (1999)

Federal *habeas corpus* is granted by district court, parties appeal to Ninth Circuit but no stay is sought, defendant is brought back to superior court for trial, seeks dismissal; held: former CrR 3.3(d)(4) is inapplicable here because, although a federal *habeas* is akin to an appeal, no mandate or order was served upon the superior court, thus CrR 3.3 does not control, and constitutional speedy trial analysis must be applied; III.

***State v. Ross***, 98 Wn.App. 1 (1999)

Defendant is arrested for DUI, police find drugs, charge defendant with DUI, defendant pleads guilty, following lab analysis defendant is charged with VUCSA beyond 90 days from arraignment on DUI; held: state did not establish below its reasons for delaying the filing of the drug charge, thus remanded for trial court to determine if delay in filing was "understandable and justified" due to the unavailability of physical evidence to bring the charge, *i.e.*, lab report, *State v. Fladebo*, 113 Wn.2d 388, 394 (1989), *but see:* *State v. Kindsvogel*, 149 Wn.2d 477 (2003); II.

***State v. Parker***, 99 Wn.App. 639 (2000)

**Failure to object** to arraignment date, former CrR 3.3(e), *see:* CrR 4.1(b), waives time for trial objection even if but one day remains for trial, *State v. Bernhard*, 45 Wn.App. 590, 600

(1987), *State v. Greenwood*, 120 Wn.2d 585, 613 (1993), *State v. Rookhuyzen*, 148 Wn.App. 394 (2009); I.

***State v. Johnson***, 100 Wn.App. 917 (2000)

Police arrest defendants for misdemeanors, fill out and sign citations but do not give defendants a copy nor file with court, book defendants who are released on PR or bail, charges filed by prosecutor some months later; held: by not giving defendants copies of the citations, police did not "issue" citations, distinguishing *State v. Bonifacio*, 127 Wn.2d 482 (1995), *overruled*, CrRLJ 3.3 (2003), *State v. Miller*, 188 Wn.App. 103 (2015); release or bail agreements are not the functional equivalent to issued citations for purposes of triggering the time for trial clock; I.

***State v. Fulps***, 141 Wn.2d 663 (2000)

Defendant is arrested for drug offense, posts bail without a court appearance, six months later is charged, seeks dismissal; held: defendant who gains release from jail with no means of exonerating bail is held to answer, time for trial starts running "from the date the charge is filed, except that if the defendant has been continuously held in custody or on bail or recognizance…, then the time for trial should commence running from the date the defendant was held to answer," 2 ABA, *Standards for Criminal Justice* Std. 12-2.2(a), at 12-17 (2nd ed. 1980), distinguishing *State v. Parmele*, 87 Wn.2d 139, 140-42 (1976), *State v. Elizondo*, 85 Wn.2d 935 (1975), *but see: State v. Thomas*, 146 Wn.App. 568 (2008), *State v. Rookhuyzen*, 148 Wn.App. 394, 399 ¶ 11 (2009); reverses *State v. Fulps*, 97 Wn.App. 935 (1999); *per curiam.*

***State v. Logan***, 102 Wn.App. 907 (2000)

Defendant is charged in municipal court with assault, case is dismissed without prejudice 48 days later, same case is filed as felony in superior court, defendant is detained pending trial, 15 days later trial court dismissed; held: defendant was detained by superior court, thus trial should have been held within 60 days of arraignment less 48 days elapsed in municipal court, former CrR 3.3(c)(2); state's theory that so long as a defendant spends less than 60 days in custody, he may be tried within 90 days of arraignment is without merit; because defendant's release was not revoked, the revocation of release provisions, CrR 3.3(d)(1), are inapplicable; I.

***State v. Chandler***, 143 Wn.2d 485 (2001)

Respondent requests trial date within 60 days of proper date of arraignment, court sets trial outside 60 days, finding that because no judge sits in the county within the time period, a date outside the 60 days is permitted "in the due administration of justice," and because no prejudice was shown, JuCR 7.8(e)(3); held: JuCR 7.8(e)(3) permits a continuance in the due administration of justice, but not an original case setting beyond the 60 day rule, court could have obtained a visiting judge, judge *pro tempore*, court commissioner or, possibly, continued the case if all of those avenues were unavailable, but original setting outside the rule violates the rule, thus dismissed, *see: State v. Day*, 46 Wn.App. 882 (1987); 9-0.

***State v. Woods***, 143 Wn.2d 561, 578-85 (2001)

State informs defense that it would have DNA results as of a certain date, fails to comply due to lab vacations and errors, defense seeks dismissal and, when denied, continuance beyond expiration date; held: **lack of diligence by crime lab** constitutes action on part of state, *State v.*

*Wake*, 56 Wn.App. 472, 475 (1989), but lack of due diligence alone is not grounds for dismissal, *see: State v. Price*, 94 Wn.2d 810, 814 (1980), *State v. Michielli*, 132 Wn.2d 229, 244 (1997), *State v. Farnsworth*, 133 Wn.App. 1, 12-13 (2006), *State v. Brooks*, 149 Wn.App. 373 (2009), *State v. Salgado-Mendoza*, 189 Wn.2d 420 (2017); here, defense knew state would use forensic testing, thus delayed production of results of tests did not inject new facts into the case, thus trial court's denial of motion to dismiss was proper exercise of discretion, *State v. Smith*, 67 Wn.App. 847 (1992), *State v. Cannon*, 130 Wn.2d 313, 329 (1996); 9-0.

***State v. Smith***, 103 Wn.App. 244 (2001)

**Routine court congestion** is not grounds to continue or extend beyond expiration date, *State v. Mack*,89 Wn.2d 788 (1978), *State v. Warren*, 99 Wn.App. 306 (1999), *State v. Kokot*, 42 Wn.App. 733, 737 (1986); here, prosecutor claimed that court staff had found all courtrooms unavailable, but no evidence was produced for court staff conclusion, defense asked for a judge *pro tempore*, which was denied, *see: State v. Silva*, 72 Wn.App. 80 (1993), defense asked for trial the next day which court denied and then continued for five days for "good cause," thus court abused discretion; II.

***State v. Williams***, 104 Wn.App. 516 (2001)

Prosecutor in another trial which he knew would be for an extended time is grounds for a continuance "required in the administration of justice," former CrR 3.3(h)(2) [now CrR 3.3(f)(2)], rather than an extension for "unavoidable or unforeseen circumstances beyond the control of the court or the parties," former CrR 3.3(d)(8); five continuances beyond expiration date because prosecutor is in trial, *State v. Stock*, 44 Wn.App. 467, 472-73 (1986), *State v. Kelley*, 64 Wn.App. 755 (1992) and, for four of them because defense counsel is unprepared, *State v. Campbell*, 103 Wn.2d 1, 15 (1984), *cf.: State v. Saunders*, 153 Wn.App. 209 (2009), is not an abuse of discretion absent prejudice; II.

***State v. Cox***, 106 Wn.App. 487 (2001)

Stay of time for trial rule for competency determination, former CrR 3.3(g)(1) [now CrR 3.3(e)(1), begins when a party or the court makes an oral or written motion for a competency evaluation and ends when the court enters a written order finding defendant competent, *State v. Harris*, 122 Wn.App. 498 (2004), which may be presented by defense counsel; II.

***State v. Moen***, 110 Wn.App. 125, 129-31 (2002)

Where defendant is released without charge or conditions, former CrR 3.2(1)(f) [now CrR 3.2.1], police retaining defendant's property for civil forfeiture does not trigger time for trial period; III.

***State v. Rose***, 110 Wn.App. 878 (2002)

Defense counsel, unaware that time has elapsed in district court, moves to dismiss after 60-day period, claiming prosecutor had superior knowledge and was obliged to disclose it (defendant was detained on district court warrant and complaint for 14 days before counsel is appointed), trial court dismisses; held: while prosecutor should disclose to the court its knowledge concerning district court proceedings, regardless of whether the prosecutor's knowledge is superior or inferior to defense, failure to do so does not affect application of former CrR 3.3(f), which requires that both parties aid the court; when either party fails to object for any

reason within the prescribed 10 days, the objection is waived, *State v. Malone*, 72 Wn.App. 429, 436-37 (1994), *State v. Farnsworth*, 133 Wn.App. 1, 12-13 (2006), *State v. Bobenhouse*, 143 Wn.App. 315, 321-22 (2008), *aff'd, on other grounds,* 166 Wn.2d 881 (2009), *State v. MacNeven*, 173 Wn.App. 265 (2013); II.

***State v. Torres***, 111 Wn.App. 323 (2002)

Defense counsel supports consolidation, which necessarily extends trial beyond expiration date to join with co-defendant, defendant demands speedy trial *pro se*; held: when speedy trial and consolidation considerations collide, court must balance competing interests, *State v. Dent*, 123 Wn.2d 467, 484-85 (1994); while court should sever to protect speedy trial rights, *State v. Eaves*, 39 Wn.App. 16, 19-20 (1984), where there is no prejudice, consolidating and extending is not an abuse of discretion, *State v. Melton*, 63 Wn.App. 63, 66-67 (1991), *State v. O'Neal,* 126 Wn.App. 395, 417-18 (2005), *aff'd, on other grounds,* 159 Wn.2d 500 (2007); all parties appear for anticipated stipulated facts trial on expiration date, defendant withdraws consent and demands jury, court recesses one day; held: trial commenced on expiration date, *State v. Carson*, 128 Wn.2d 805, 820 (1996), *disavowed, on other grounds*, *State v. Walker*, 23 Wn.2d 437 (2022); III.

***State v. Frankenfield***, 112 Wn.App. 472 (2002)

Defendant files 9-page notice of appearance which includes an objection to arraignment date and motion for speedy trial; ten days after trial setting, defendant files a motion objecting to trial date and moving for a speedy trial; at subsequent motions hearing, defense does not address time for trial, later moves to dismiss; held: mere reference to CrR 3.3 and request for speedy trial does not adequately apprise court of the type of error involved or what was required to correct the error, thus the objection was insufficiently specific, *State v. Bernhard*, 45 Wn.App. 590, 600 (1986), *State v. Greenwood*, 120 Wn.2d 585, 606 (1993), *see: Kennewick v. Vandergriff*, 109 Wn.2d 99, 100 (1987), *but see: State v. Dassow*, 95 Wn.App. 454 (1999); I.

***State v. Frank***, 112 Wn.App. 515 (2002)

Warrant is issued when defendant fails to check in with arraignment clerk pursuant to local district court procedures, defendant maintains he "could" have gone to court without having checked in, seeks dismissal for untimely arraignment; held: local procedures meet due process requirements, defendant failed to establish prejudice by not asserting that he did in fact appear for arraignment, *State v. Bryant*, 74 Wn.App. 301, 304 (1994); I.

***State v. Wilson***, 113 Wn.App. 122, 129-31 (2002)

A timely objection to arraignment date does not excuse a failure to note a motion to reset trial date or to dismiss, former CrR 3.3(f), *see:* CrR 4.1(b), *but see: State v. Dassow*, 95 Wn.App. 454 (1999); III.

***State v. Chenoweth***, 115 Wn.App. 726 (2003)

Defendant need not actually enter a plea for a first appearance to constitute an arraignment; a defendant who appears at arraignment *pro se*, and fails to object to arraignment date at that time or (apparently) shortly thereafter waives the objection, *State v. Malone*, 72 Wn.App. 429, 435 (1994), former CrR 3.3(f)(1) [now CrR 4.1(b)]; where defendant requests a

continuance, he waives any error where trial court, in sex case, fails to find "substantial and compelling reasons for a continuance," RCW 10.46.085; III.

***State v. Kindsvogel***, 149 Wn.2d 477 (2003)

Wife reports domestic violence and marijuana grow operation, defendant is charged with assault, pleads guilty, months later is charged with marijuana, moves to dismiss; held: because assault and possession of marijuana do not involve the same physical acts, have different purposes, they do not constitute a single criminal episode, thus time for trial clock does not commence at the same time, reversing *State v. Kindsvogel*, 110 Wn.App. 750 (2002); 9-0.

***State v. Rohrich***, 149 Wn.2d 647 (2003)

A long delay in filing a charge is not grounds for dismissal, CrR 8.3(b), absent proof of actual prejudice to defendant, *State v. Stein*, 140 Wn.App. 43, 56-60 (2007); speculation that witnesses' memories could have faded is insufficient, reversing *State v. Rohrich*, 110 Wn.App. 832 (2002); 9-0.

***State v. Jones***, 117 Wn.App. 721, 728-30 (2003)

Continuance beyond expiration date to accommodate officer's mandatory training is not an abuse of discretion, *cf.: State v. Chichester*, 141 Wn.App. 446 (2007); I.

***Seattle v. Guay***, 150 Wn.2d 288 (2003)

Because courts of limited jurisdiction lack the ability to compel transport of misdemeanants held in another county within Washington, there is no good faith and due diligence requirement to do so, former CrRLJ 3.3(g)(5), distinguishing *State v. Anderson*, 121 Wn.2d 852 (1993); 6-3.

***State v. Hoffman***, 150 Wn.2d 536 (2003)

Juvenile court commissioner dismisses charge without prejudice five days before expiration date, state seeks revision, superior court reverses, defendant is convicted, Court of Appeals reverses, *State v. Hoffman*, 115 Wn.App. 91 (2003); held: all dismissals, including by a comissioner, toll the speedy trial clock, *State v. Bible*, 77 Wn.App. 470, 471 (1995); *per curiam.*

***State v. Vicuna***, 119 Wn.App. 26 (2003)

Trial court, on inadequate record, allows defense counsel to withdraw due to alleged conflict of interest, leading to a continuance and a new expiration date, over defendant's objection; held: a defendant cannot contest his attorney's waiver of speedy trial right even if made without his consent, *State v. Franulovich*, 18 Wn.App. 290, 293 (1977), *State v. Campbell*, 103 Wn.2d 1 (1984), *State v. Thomas*, 95 Wn.App. 730 (1999), *but see: State v. Saunders*, 153 Wn.App. 209 (2009); I.

***State v. Heredia-Juarez***, 119 Wn.App. 150 (2003)

Prosecutor is not obliged to reassign a case to accommodate a prosecutor's previously-scheduled vacation, *see: State v. Kelley*, 64 Wn.App. 755, 767 (1992), *cf.: State v. Selam*, 97 Wn.App. 140 (1999), where the state's requested continuance was necessitated by defendant's earlier continuance, complexity of the case makes reassignment more difficult, prosecutor has

been assigned to the case from the beginning and has developed rapport with complainant and defendant was not prejudiced, *cf.:* *State v. Chichester,* 141 Wn.App. 446 (2007); I.

***State v. Howell,*** 119 Wn.App. 644, 648-49 (2003)

Four-day extension beyond expiration date for crime lab to do tests is not error as lab's backup was due to Green River murders investigation, state made motion as soon as it became aware of the problem, distinguishing *State v. Wake,* 56 Wn.App. 472, 475-76 (1989), *see: State v. Salgado-Mendoza,* 189 Wn.2d 420 (2017), *State v. Denton,* 23 Wn.App.2d 437 (2022); I.

***State v. Hamilton***, 121 Wn.App. 633 (2004)

Defendant is charged in Chelan County, files a time for trial waiver, 23 days prior to expiration pursuant to the waiver Chelan Count dismisses, case is refiled in Douglas County which restarts the waiver period; held: a waiver is specific to a case where it is entered and does not transfer to another county when case is refiled; III.

***State v. Harris***, 122 Wn.App. 498 (2004)

Time for trial rule is tolled for competency evaluation, CrR 3.3(e)(1), even where hospital congestion and backlogs delay evaluation; where a private evaluator is appointed and defendant refuses to see him, defendant has failed to appear at a "pretrial proceeding," former CrR 3.3(d)(2) [now CrR 3.3(c)(2)(ii)], thus new trial period starts with his next appearance; III.

***State v. Barrows***, 122 Wn.App. 902 (2004)

Where trial court grants a motion for insanity acquittal, RCW 10.77.080, trial has occurred for purposes of CrR 3.3, and court's failure to enter findings does not entitle defendant to a dismissal; III.

***State v. Raschka***, 124 Wn.App. 103 (2004)

Defendant fails to appear at a required hearing, trial court and prosecutor accept defense counsel's explanation that defendant is hospitalized, no warrant is issued, trial date is stricken, prosecutor loses track and re-notes, per local procedures, case for trial beyond expiration date, trial court finds defendant's failure to appear, former CrR 3.3(d)(2), re-starts clock at defendant's next appearance; held: an excused absence from a hearing keeps the speedy trial clock running, *see: State v. Branstetter,* 85 Wn.App. 123 (1997), *cf.:* CrR 3.3(a)(3)(iii), *State v. Wachter,* 71 Wn.App. 80 (1993) , *State v. Moore,* 178 Wn.App. 489 (2013), *State v. Gelinas,* 15 Wn.App.2d 484 (2020); III.

***State v. Flinn***, 154 Wn.2d 193 (2005)

Defense provides state with diminished capacity report two weeks before trial, on scheduled trial date, court grants state five week continuance, including a week for judicial conference, over objection, to further prepare to respond to defendant's expert; held: while a judicial conference alone is equivalent to court congestion which would require specific inquiry and findings by the trial court if the matter was continued, *State v. Kokot,* 42 Wn.App. 733, 736-37 (1986), *State v. Kenyon,* 167 Wn.2d 130 (2009), continuance to prepare is good cause, *State v. Campbell,* 103 Wn.2d 1, 15 (1984), *State v. Williams,* 104 Wn.App. 516, 523 (2001), *State v. MacNeven,* 173 Wn.App. 265 (2013), five weeks was reasonable in light of prior defense continuances, trial court's offer to accelerate trial if state was prepared earlier, trial court can

consider known competing conflicts on the calendar after finding good cause; affirms *State v. Flinn*, 119 Wn.App. 232 (2003); 6-3.

***State v. Hessler***, 155 Wn.2d 604 (2005)

Where defendant is out of state when charges are filed, it is defendant's threshold burden of demonstrating amenability to process before state's duty of good faith and due diligence is triggered, affirming *State v. Hessler*, 123 Wn.App. 200 (2004); *per curiam.*

***State v. Carney***, 129 Wn.App. 742 (2005)

Defendant appears at a pretrial hearing without his retained counsel, prosecutor notes that he has been in touch with defense counsel who has been ill, court continues case and directs defendant to notify his lawyer who appears at trial date whose motion to dismiss for failure of the court to give notice is denied, trial is then continued again; held: even if notice was given by the state or defendant, CrR 3.3(d)(2) requires the court to "notify each counsel or party of the date set," defendant is not responsible to notify his counsel when to appear, thus dismissal was required; III.

***State v. Olmos***, 129 Wn.App. 750 (2005)

*Striker/Greenwood* speedy arraignment cases are abrogated by the 2003 rules amendments, CrR 4.1(a)(2), thus delay in arraignment, for any reason, is not grounds for dismissal as commencement date is the arraignment date, CrR 3.3(c)(1), *State v. Castillo*, 129 Wn.App. 828 (2005), *State v. Rookhuyzen*, 148 Wn.App. 394 (2009); even if Interstate Agreement on Detainers, ch. 9.100, RCW, provides speedy trial guarantees beyond CrR 3.3, here defendant's use of deceptive aliases to conceal his identity and location excuses any claim of lack of due diligence, distinguishing *State v. Simon*, 84 Wn.App. 460, 465-66 (1996); II.

***State v. Nelson***, 131 Wn.App. 108, 113-14 (2006)

Where time for trial waiver does not specify a commencement date earlier than the date of filing of the waiver, then that day is the commencement date, CrR 3.3(c)(2)(i); III.

***State v. Wright***, 131 Wn.App. 474, 488 (2006), *aff'd, on other grounds*, 165 Wn.2d 783 (2009)

Defendant is charged with intentional murder and felony murder/assault, neither party submits instructions for intentional murder, jury convicts of felony murder which is reversed, *Pers. Restraint of Andress*, 147 Wn.2d 602 (2002), trial court dismisses intentional murder on remand; held: time for trial calculation begins anew when appellate court issues a mandate, CrR 3.3(c)(2)(iv) and (v), computation of time on a pending charge "shall apply equally to all related charges, CrR 3.3(a)(5);" I.

***State v. Nguyen***, 131 Wn.App. 815 (2006)

Trial court, over objection, grants state's motion to continue robbery case beyond expiration date to see if evidence develops that will cause this defendant to be joined with other robbery cases that are pending against others, ultimately defendant is not charged with others; held: while continuances beyond expiration date to join with other defendants is permitted within court's discretion, *State v. Melton*, 63 Wn.App. 63, 66-67 (1991), *State v. Eaves*, 39 Wn.App. 16, 19 (1984), judicial economy is not a tenable basis to continue for a mere potentiality that a link will be discovered between the case scheduled for trial and other crimes not charged; "if

'administration of justice' can be invoked at any time to grant a continuance, then 'there is little point in having the speedy trial rule at all,'" at 821, *State v. Adamski*, 111 Wn.2d 574, 580 (1988); I.

***State v. Johnson***, 132 Wn.App. 400, 411-14 (2006)

Where defendant is detained on bail on the current case and is serving a sentence on another case, the 90-day rule applies, CrR 3.3(a)(3)(v); a motion to continue by defense counsel over defendant's objection is made "on behalf of any party" and waives that party's objection to the requested delay, CrR 3.3(f)(2), *State v. Ollivier,* 178 Wn.2d 813 (2013); a continuance in order to schedule a pretrial motion is in the administration of justice and, absent prejudice, is not an abuse of discretion; II.

***State v. Welker***, 157 Wn.2d 557 (2006)

Defendant, charged in Washington but in custody in Oregon, sends discovery request to Washington prosecutor, makes demands of Oregon officials to be brought to Washington, Washington prosecutor takes no action until defendant is released from Oregon; held: state's knowledge that defendant is in custody in Oregon establishes a lack of due diligence but not bad faith, *see: State v. Anderson,* 121 Wn.2d 852, 858 (1993); unlike CrR 3.3 violations, a technical violation of the time limit in the IAD, ch. 9.100, RCW, does not result in automatic dismissal, and are reviewed on a case-by-case basis, *State v. Barefield*, 110 Wn.2d 728, 734-35 (1988); here, because there is no evidence of prejudice, including denial of the chance to participate in rehabilitation programs in Oregon or ability to obtain a concurrent sentence, *State v. Anderson, supra.* at 862, *State v. Olmos,* 129 Wn.App. 750, 758 (2005), dismissal is denied; affirms *State v. Welker*, 127 Wn.App. 222 (2005); 9-0.

***State v. Bishop***, 134 Wn.App. 133 (2006)

Washington filed detainer against California prisoner serving indeterminate sentence in a prison drug treatment program, detainer results in her ineligibility for drug treatment so, while awaiting resentencing, defendant files IAD article III demands for trial, Washington does not seek transfer until after 180 day period expires, RCW 9.100.010, art. IV(c); held: defendant was serving time under the detainer act even though she was awaiting resentencing, thus dismissed; defendant need not prove prejudice, *but see: State v. Barefield*, 110 Wn.2d 728, 735 (1988); III.

***Zedner v. United States***, 164 L.Ed.2d 749 (2006)

A defendant's waiver of the federal Speedy Trial Act of 1974, 18 U.S.C. §§ 3161-3174, "for all time" is ineffective; 9-0.

***State v. George***, 160 Wn.2d 727 (2007)

Where defendant fails to appear because he is in custody for another charge within the same county, state is not obliged to exercise due diligence and good faith to bring defendant before the court, former CrRLJ 3.3(c)(2)(ii), distinguishing *State v. Pacheco*, 107 Wn.2d 59, 64-65 (1986), *State v. Greenwood*, 120 Wn.2d 585 (1993), *State v. Anderson*, 121 Wn.2d 852, 864 (1993), *Seattle v. Guay*, 150 Wn.2d 288 (2003), however where state elects not to transport defendant to a proceeding, the period of time is excludable, CrRLJ 3.3(e)(2), 3.3(b)(5), but time for trial rule does not begin anew, *State v. Chavez-Romero,* 170 Wn.App. 568 (2012); where charge is refiled in superior court, time elapsed in district court is no longer deducted, and time

for trial does begin anew, CrR 3.3(c)(1); affirms result in *State v. George*, 131 Wn.App. 239 (2006); 9-0.

***State v. Chichester***, 141 Wn.App. 446 (2007)

At a readiness hearing the week before the scheduled trial date well within expiration date, state announces that it is ready then advises that it only has one prosecutor and two cases are set for the same day, trial court states that state will need to find some alternative, on trial date state moves to continue for same reason, trial court identifies another prosecutor who is not in trial, state refuses to reassign, trial court dismisses; held: while prosecutor is not obliged to reassign a case when the originally assigned lawyer becomes unavailable, *State v. Heredia-Juarez*, 119 Wn.App. 150, 154-55 (2003), where trial court determines whether reassignment is feasible and necessary in a particular situation and considers the complexity of the case and seriousness of the charge, and state has made no showing of a diligent attempt to solve the problem, denial of a continuance is within court's discretion, *cf.: State v. Raper*, 47 Wn.App. 530, 535 (1987), *State v. Jones*, 117 Wn.App. 721, 728-29 (2003), *State v. Downing*, 151 Wn.2d 265, 272-73 (2004); dismissal is a proper remedy where there is no last-minute emergency beyond the control of the state, *see: State v. Koerber*, 85 Wn.App. 1 (1996), *State v. Brooks*, 149 Wn.App. 373 (2009); court need not apply CrRLJ 8.3(b) arbitrary action or government misconduct analysis; trial court may dismiss even though time is left before time for trial expiration date; 2-1, I.

***State v. Chhom***, 162 Wn.2d 451 (2007)

Defendant is sentenced in a King County court of limited jurisdiction, sent to Yakima under contract to serve time, other pending charges in King County are held in abeyance while defendant completes sentence; held: CrRLJ 3.3(e)(6) which excludes "[t]he time during which a defendant is detained … outside the county" does not apply when defendant is serving a sentence imposed by a court in a jail facility located outside the county under an interlocal agreement, thus district court's dismissal is affirmed; reverses *State v. Steever*, 131 Wn.App. 334 (2006); 7-2.

***State v. Thomas***, 146 Wn.App. 568 (2008)

Defendant is arrested, posts bail, months later is arraigned, trial court dismisses, *State v. Fulps*, 141 Wn.2d 663 (2000); held: 2003 amendment to CrR 3.3 preclude dismissal except as required by the rule or the constitution, thus court-created conditions "beyond the rule" such as *Fulps, supra.*, are no longer valid, *State v. Rookhuyzen*, 148 Wn.App. 394 (2009); I.

***Vermont v. Brillon***, 173 L.Ed.2d 231 (2009)

Sixth Amendment speedy trial right is not violated where delays are attributable to assigned counsel, although delay resulting from a systemic breakdown in the public defender system could be charged to the state; 7-2.

***State v. Rookhuyzen***, 148 Wn.App. 394 (2009)

Defendant, out-of-custody, is arraigned 30 days after information is filed, objects, court overrules and sets trial within 90 days of arraignment; held: "[t]he 2003 amendments to CrR 3.3 and 4.1 eliminated the judicially created doctrine of constructive arraignment – the *Striker* rule,"

at 395 ¶ 1, *State v. George*, 160 Wn.2d 727, 738 (2007), *State v. Castillo*, 129 Wn.App. 828, 830-32 (2005), *State v. Thomas*, 146 Wn.App. 568 (2008); I.

***State v. Kenyon***, 167 Wn.2d 130 (2009)

Unavailability of a judge to try a case is the same as **court congestion**, not a reason to continue and extend expiration date, is not an "unavoidable or unforeseen circumstance," and absent trial court stating on the record or in writing the reasons for the continuance documenting the availability of judges *pro tempore* and unoccupied courtrooms, dismissal is mandated; 9-0.

***State v. Saunders***, 153 Wn.App. 209 (2009)

Trial court continues case numerous times with agreement of defense counsel but over defendant's objection, based upon claims of continued negotiations, contested by defendant, and where neither standby defense counsel nor prosecutor knew why continuances were necessary; held: absent convincing and valid reasons for continuances, the trial court's granting continuances may be manifestly unreasonable and based upon untenable reasons, and thus a continuance over defendant's objection is an abuse of discretion, *State v. Kenyon*, 167 Wn.2d 130 (2009); a continuance over defendant's objection for defense counsel to prepare is not an abuse of discretion to ensure effective representation where trial court makes a proper record, delay is through no fault of counsel due to "complexity and length of the case," at 217 n. 8, *State v. Campbell*, 103 Wn.2d 1, 14-15 (1984); II.

***State v. Lackey***, 153 Wn.App. 791 (2009)

Withdrawal of counsel starts speedy trial clock anew, at 798; if no commencement date is specified in a waiver, then the commencement date is the trial date set by the court, CrR 3.3(c)(2)(i); "court congestion and unavailability of the government" does not qualify as an excluded period, at 799 ¶ 20; where court continues a case because a witness is ill, the period of the continuance is an excluded period, CrR 3.3(e)(3), and expiration date is 30 days after the end of the excluded period, CrR 3.3(b)(5); III.

***State v. Oppelt***, 172 Wn.2d 285 (2011)

Police negligently delay filing sex offense against a child for six years, in motion to dismiss for **preaccusatorial delay** defense shows that a witness who gave victim lotion for her genitals could not remember type of lotion, thus defense was precluded from proving that the lotion caused the observed redness, trial court finds actual prejudice due to memory loss by a witness but denies dismissal; held: negligent delay is grounds to dismiss for preaccusatorial delay, but if mere negligence is asserted, prejudice suffered will have to be greater than where intentional or deliberate conduct is alleged, *State v. Schifferl*, 51 Wn.App. 268, 273 (1988); prejudice does not trigger automatic dismissal; balancing test: (1) actual prejudice, (2) reasons for delay, (3) weigh reasons and prejudice to determine whether fundamental conceptions of justice would be violated by allowing prosecution, *United States v. Lovasco*, 431 U.S. 783, 52 L.Ed.2d 752 (1977), *State v. McConnell*, 178 Wn.App. 592, 605-08 (2013); here prejudice was "very slight" as defense still could argue that lotion might have caused redness, negligent delay does not justify dismissal, *cf.: State v. Stearns*, 23 Wn.App.2d 580 (2022); 9-0.

***State v. Kone***, 165 Wn.App. 420 (2011)

State loses touch with victim, motion to dismiss without prejudice is granted, victim is located and case is re-filed, defendant seeks dismissal pursuant to CrR 8.3(b), arguing

mismanagement resulted in violation of defendant's speedy trial rights; held: CrR 3.3(e)(4) excludes period between dismissal and refiling, CrR 3.3(h) prohibits dismissal for time to trial reasons unless specifically required by the rule, thus exclusive means to challenge a violation of the rule is pursuant to CrR 3.3, not CrR 8.3(b), *see: State v. Bible*, 77 Wn.App. 470 (1995), *cf.: State v. Michielli,* 132 Wn.2d 229, 239-46 (1997); I.

***State v. Chavez-Romero***, 170 Wn.App. 568 (2012)

Defendant is detained pending trial, shortly before trial date state moves for release in order to extend time for trial period, defense objects as defendant would be transferred to federal ICE custody, court releases, defense files a formal objection to new date, at next trial date court issues a warrant, defendant is later released from federal custody, appears in court, is booked on warrant, commencement date and expiration date is reset; held: while release to extend speedy trial period from 60 to 90 days is proper, *State v. Kelly*, 60 Wn.App. 921 (1991), *State v. Maling*, 6 Wn.App.2d 838 (2018), and state does not have a duty of due diligence to bring defendant to court, *State v. George*, 160 Wn.2d 727 (2007), remedy is not to reset the commencement date upon defendant's appearance, CrR 3.3(c)(2)(ii), rather time in federal custody tolls, CrR 3.3(e)(6), thus defendant's trial, set beyond the 90th day from initial arraignment plus the excluded period, was outside the rule and dismissal is only remedy, *but see:* CrR 3.3(b)(5) and Korsmo, C.J., dissenting; 2-1, III.

***State v. Ollivier***, 178 Wn.2d 813 (2013)

Trial court grants 22 continuances, all on motion of defense counsel, all over objection of defendant, for 23 months; held: because each order provided a reason for the continuance, all of which for defense counsel to prepare and thus were in the administration of justice, there was no violation of CrR 3.3, distinguishing *State v. Saunders*, 153 Wn.App. 209 (2009), *State v. Kenyon*, 167 Wn.2d 130 (2009); under Sixth Amendment speedy trial rule, length of delay was presumptively prejudicial triggering *Barker v. Wingo*, 407 U.S. 514, 33 L.Ed.2d 101 (1972) analysis: (1) **length of delay** was not highly disproportionate to the complexity of the case, here child pornography with forensic computer analysis; (2) **reason for delay** was defense counsel's need to prepare which is chargeable to defendant, *Vermont v. Brillon*, 556 U.S. 81, 89-91, 173 L.Ed.2d 231 (2009), *Pers. Restraint of Benn*, 134 Wn.2d 868 (1998), *State v. Shemesh*, 187 Wn.App. 136 (2015); (3) **assertion of right by defendant**, where defense counsel moved for continuances, is still chargeable against defense, *Vermont v. Brillon*, 556 U.S. 81, 129 S.Ct. 1283, 173 L.Ed.2d 231 (2009), if trial court had denied continuances defendant might claim ineffective assistance of counsel; (4) **prejudice** is not presumed, which is distinguished from the prejudice which triggers a constitutional speedy trial analysis, distinguishing *State v. Iniguez*, 167 Wn.2d 273 (2009) as defendant must establish actual prejudice, length here is not enough to constitute extreme delay, pretrial incarceration here is not oppressively long, defense has not established unusual anxiety and concern, defense was not impaired, balancing all factors establish no violation of constitutional right to speedy trial; affirms *State v. Ollivier*, 161 Wn.App. 307 (2011); 5-4.

***State v. Sanchez***, 172 Wn.App. 678 (2012)

Juvenile's trial date is not set within fifteen days of arraignment, JuCR 7.8(d)(1), at a pretrial hearing the case is not called, prosecutor is not present, respondent and counsel leave court without notifying the judge, respondent is tried months later; held: dismissal is only a

remedy for failure to try a case within the time limits, thus failure to set a date within fifteen days of arraignment, while a violation of the rule, does not require dismissal, *see:* *State v. Parris,* 30 Wn.App. 268 (1981); an appearance requires respondent's physical presence plus notification to the prosecutor of presence and presence must be contemporaneously noted on the record, JuCR 7.8(2)(iii), thus amended rule overrules definition of appearance in *State v. Ledenko*, 87 Wn.App. 39 (1997); III.

***State v. MacNeven***, 173 Wn.App. 265 (2013)

**Failure to object** to a continuance within ten days of trial setting forecloses the issue on appeal, CrR 3.3(d)(3) (2003), *State v. Bobenhouse,* 143 Wn.App. 315, 322 (2008), *aff'd, on other grounds,* 166 Wn.2d 881 (2009); moving for a continuance by or on behalf of a party waives that party's objection, CrR 3.3(f)(2) (2003); II.

***State v. Tolles***, 174 Wn.App. 819 (2013)

Defendant is charged with child rape in 2003, spends 37 days in jail, charge dismissed when complainant refused to cooperate, refiled in 2010, is arrested in Oregon where he was on probation, brought before the Washington court, is tried 27 days after appearing in Washington, claims that time for trial began to run at time of arrest in Oregon; held: time for trial cannot expire less than 30 days after the end of any excluded period, CrR 3.3(b)(5), dismissal and refiling is an excluded period, CrR 3.3(e)(4), thus state had 30 days to try defendant irrespective of the 37 days spent in jail earlier; because defendant was on "conditions of release imposed by an Oregon court," another excluded period applied, CrR 3.3(c)(6); II.

***State v. Moore***, 178 Wn.App. 489 (2013)

Failure to appear at a status conference which is not a hearing at which defendant's presence is required by CrRLJ 3.4(a) or by court order does not reset the commencement date, CrRLJ 3.3(c)(2)(ii) (2003), *State v. Raschka,* 124 Wn.App. 103, 109 (2004), *State v. Branstetter,* 85 Wn.App. 123, 127-28 (1997), *see: State v. Gelinas,* 15 Wn.App.2d 484 (2020); setting a trial date beyond the expiration date because of a motion to suppress with other defendants is not an excusable delay "by circumstances not addressed" in the rule, CrRLJ 3.3(a)(4); II.

***State v. McConnell***, 178 Wn.App. 592, 605-08 (2013)

To establish prejudice due to **pre-accusatorial delay**, *State v. Oppelt,* 172 Wn.2d 285 (2011), defense must show actual prejudice from the delay; claim that a potential alibi or fact witness died without identifying what the testimony would have been or why others could not provide the same testimony is insufficient; destruction of physical evidence without identifying "exactly how the destroyed evidence resulted in actual prejudice" is insufficient; I.

***State v. Hawkins***, 181 Wn.2d 170, 182-85 (2014)

While case is on appeal trial court enters a written "Decision on Motion for New Trial" granting same but stating that it did not intend for that document to constitute a written order, state presents a written order, court concurs with defense argument that court did not have the power to enter the order while case is on appeal, after mandate trial court enters formal order granting new trial, defense argues violation of CrR 3.3; held: "Decision" more closely resembled an informal memorandum decision rather than a formal order, *see: Nicacio v. Yakima Chief Rances, Inc.*, 63 Wn.2d 945, 948 (1964), formal order is the proper commencement date,

defendant did not move in Court of Appeals for permission to enter formal order, RAP 7.2(e), CrR 3.3 requires defendant be brought to trial within 60 or 90 days of a formal order granting a new trial; 9-0.

***State v. Peeler***, 183 Wn.2d 169 (2015)

Defendant, serving a prison sentence, requests a final disposition of untried charge in Skagit County but, by the time Skagit County prosecutor receives request defendant is transported to King County jail and not returned to Skagit County with 120 days, RCW 9.98.010; held: where defendant makes a valid **intrastate detainer** disposition request state must honor that request, there is no physical location requirement, DOC still had custody regardless of defendant's physical location, detainer act requires dismissal; 5-4.

***State v. Miller***, 188 Wn.App. 103 (2015)

Issuance of a misdemeanor citation does not commence a criminal proceeding for purpose of the time for trial rule per CrRLJ 3.3 (2003), overruling *Seattle v. Bonifacio*, 127 Wn.2d 482 (1995); III.

***State v. Williams***, 193 Wn.App. 906 (2016)

Charges involving a high speed chase in two counties are filed in one county, defendant gets appointed counsel, prosecutors decide to change venue because events began in first county where charges were refiled, which results in defendant obtain a different appointed counsel who could not prepare within 60-day time for trial, trial court dismisses, CrR 8.3(b), concluding arbitrary action forcing defendant to choose between speedy trial and competently prepared counsel; held: prosecutor's explanation was reasoned and thus not arbitrary, thus dismissal is reversed; III.

***State v. Salgado-Mendoza***, 189 Wn.2d 420 (2017)

In DUI case defense demands name of toxicologist state will call, state provides eight names, state contacts crime lab which does not respond, day before trial state narrows list to three, at trial defense moves to exclude testimony of toxicologist whom state intended to call, defense declines to move to continue as defendant chooses not to waive right to speedy trial, trial court denies motion to exclude, on RALJ appeal superior court reverses; held: while state's disclosures establish mismanagement, CrRLJ 8.3(b), trial court considered all of the circumstances including nature of witness' testimony, fact that defense had five months to prepare following the initial disclosure, thus trial court's decision was not manifestly unreasonable and denial of suppression was not an abuse of discretion, *see also: State v. Price*, 94 Wn.2d 810 (1980), *State v. Sherman*, 59 Wn.App. 763 (1990), *State v. Michielli*, 132 Wn.2d 229, 239-46 (1997), *cf.: State v. Stock*, 44 Wn.App. 467 (1986), *State v. Smith*, 67 Wn.App. 847 (1992); reverses *State v. Salgado-Mendoza*, 194 Wn.App. 234 (2016); 5-4.

***State v. Maling***, 6 Wn.App.2d 838 (2018)

Defendant is in custody pending trial, on 60th day prosecutor notices that time for trial was expiring, appears before the court that day and moves for release, defense objects, court releases defendant extending the rule to 90 days, CrR 3.3(b) (2003), on appeal defense argues that motion for PR was not properly noted with five days notice; held: the court has the obligation to enforce the speedy trial rule, CrR 3.3(a)(1), thus court properly exercised discretion

by releasing defendant, *State v. Kelly*, 60 Wn.App. 921 (1991), *see*: *State v. Hyatt*, 78 Wn.App. 679 (1995), *State v. Chavez-Romero*, 170 Wn.App. 568 (2012), defense did not object to notice before the trial court, n.1; 2-1, III.

***State v. Ross***, 8 Wn.App.2d 928 (2019)

Defendant is charged with murder in Clallam County in 1978 and murder in British Columbia, Clallam County agrees that Canada may prosecute, does not seek extradition after conviction, defendant serves him time in Canada and is deported to be tried in Washington 38 years later, trial court dismisses; held: applying constitutional speedy trial balancing test, *Barker v. Wingo*, 33 L.Ed.2d 101 (1972), defendant was prejudiced in his defense, state was primarily responsible for the delay, thus dismissal affirmed; II.

***State v. Nov***, 14 Wn.App.2d 114 (2020)

Defendant fails to appear for district court arraignment, is booked on a warrant, is arraigned and released, fails to appear again and is arrested on bench warrant but due to paperwork error is not brought to court for two months, trial court sets commencement date as first appearance, on RALJ appeal superior court dismisses based upon a district court policy of bringing newly booked defendants to court within 48 hours, state appeals; held: the letter of CrRLJ 3.3 controls, the commencement date is the first appearance where defendant physically appears in court, CrRLJ 3.3(a)(3)(iii) (2003), thus rule was not violated; under constitutional analysis, while length of delay establishes a presumption of prejudice, *Doggett v. United States*, 505 U.S. 647, 651-52, 112 S. Ct. 2686, 120 L. Ed. 2d 520 (1992), here it is rebutted by the lack of fading of memories; I.

***State v. Gelinas***, 15 Wn.App.2d 484 (2021)

Defendant fails to appear at a district court "readiness hearing," counsel is present, release order requires defendant's appearance at all pretrial hearings, court issues bench warrant; held: a court only has authority to issue a warrant for failure to appear at a necessary hearing, CrRLJ 3.4(a), -(c), readiness hearing is not a necessary hearing thus warrant was improperly issued, *see: State v. Branstetter*, 85 Wn.App. 123, 127 (1997), *State v. Moore*, 178 Wn.App. 489, 500-501 (2013); I.

***State v. Brownlee***, 18 Wn.App.2d 1 (2021)

Prosecutor in another trial is an "unavoidable or unforeseen circumstance," CrR 3.3(e)(8) (2003), justifying a continuance beyond expiration date, in trial court's discretion, *cf.: State v. Chichester*, 141 Wn.App. 446 (2007); II.

***State v. Walker***, 199 Wn.2d 796 (2022)

Trial date is set within speedy trial period, defense objects and moves to dismiss within ten days but after expiration date; held: a defendant loses the right to object to an untimely trial date, CrR 3.3(d)(3), where the trial date is set before expiration date but defense fails to object until after expiration date, regardless of whether or not counsel knows of an untimely trial date, overruling *State v. Walker*, 17 Wn.App.2d 275 (2021), disavowing, in part, *State v. White*, 94 Wn.2d 498 (1980), *State v. Carson*, 128 Wn.2d 805, 825 (1996); 8-1.

***State v. Mora-Lopez***, 22 Wn.App.2d 922 (2022)

Trial court finds government mismanagement for filing witness list four days before trial and concludes defendant was prejudiced and dismisses finding prejudice to defendant's right to a speedy trial, relying upon *State v. Michielli*, 132 Wn.2d 229 (1997), erroneously calculating expiration date two

weeks after witness list was disclosed; held: trial court properly exercised discretion finding mismanagement, CrR 8.3(b), but because expiration date was more than a month after the list was filed due to prior continuance, CrR 3.3(b)(5), *State v. Farnsworth*, 133 Wn.App. 1, 11-12 (2006), the court's conclusion that the mismanagement resulted in actual prejudice due to speedy trial violation was error, *Michielli*, *supra*, was decided under prior CrR 3.3; I.

***State v. Denton***, 23 Wn.App.2d 437 (2022)

Prosecutor informs court that he had a telephone conversation with crime lab and was told there would be a several month delay in testing needed evidence, over objection trial court grants state's motion to continue for 4½ months due to expected delays in the crime lab, later case is continued with defendant's agreement; held: prosecutor did not provide the court with a thorough explanation of the problems in the crime lab, *State v. Wake*, 56 Wn.App. 472, 473 (1989), *State v. Mack*, 89 Wn.2d 788, 793 (1978), routine congestion in the crime lab is not a proper basis to continue a case beyond expiration date, *State v. Osborne*, 18 Wn.App. 318, 320 (1977), *State v. Warren*, 96 Wn.App. 306, 309 (1999), *State v. Howell*, 119 Wn.App. 644, 648 (2003), defendant does not lose right to complain of a time for trial violation by agreeing to a later continuance, *State v. Saunders*, 153 Wn.App. 209, 221 (2009); II.

***State v. Stearns***, 23 Wn.App.2d 580 (2022)

In 1998 victim is murdered, in 2004 DNA evidence links defendant to the incident, prosecutor states he could have charged defendant in 2005 but waited until 2017 as defendant was already in custody, multiple eyewitnesses died including last person to see victim alive with a man who did not resemble defendant, detectives contacted prosecutor to get him to file, trial court denies dismissal for pre-accusation delay; held: defendant was prejudiced by the death of witnesses, reasons for the filing delay established prosecutorial negligence and a violation of the fundamental conceptions of justice, *cf.: State v. Gee*, 52 Wn.App. 357 (1988), *State v. Norby*, 122 Wn.2d 258 (1993), *United States v. Lovasco*, 52 L.Ed.2d 752 (1977), *State v. Oppelt*, 172 Wn.2d 285 (2011), thus dismissed; I.

# STATEMENTS – CONFESSIONS

***State v. Miner***, 22 Wn.App. 480 (1979)

Defendant asks for attorney, police proceed to fill out PIR, defendant confesses, held: not interrogation but spontaneous, unsolicited, not coerced within *Miranda* rule.

***State v. Marcum***, 24 Wn.App. 441 (1979)

Request for attorney must stop questioning; no implied waiver by answering question later, even if there is delay between request for attorney at requestioning, *but see: Maryland v. Shatzer*, 559 U.S., 175 L.Ed.2d 1045 (2010); III.

***State v. Green***, 91 Wn.2d 431 (1979)

Questioning of defendant who voluntarily accompanied police to station house is not custodial where there is no probable cause to arrest, *see also: State v. Lorenz*, 152 Wn.2d 22, 36-38 (2004).

***State v. Hawkins***, 27 Wn.App. 78 (1980)

Where defendant surrenders voluntarily to out-of-state police, advising that he is wanted in Washington, and is questioned and confesses in absence of *Miranda* warnings, this is custodial, in spite of defendant's voluntary surrender, and confession must be suppressed.

***State v. Sergent***, 27 Wn.App. 947 (1980)

Defendant, while at Western for competency determination, calls prosecutor and confesses while on drugs; totality of circumstances test considering defendant's incompetency, mental illness, drugs, attempts at plea bargaining and waiver in absence of counsel leads to conclusion that statement was involuntary.

***Dutil v. State***, 93 Wn.2d 84 (1980)

In juvenile court, test is totality of circumstances, *State v. Harrell*, 83 Wn.App. 393, 401-4 (1996).

***State v. Cunningham***, 93 Wn.2d 823 (1980)

Taped statement is inadmissible unless RCW 9.73.040 is complied with, harmless here; reverses *State v. Cunningham*, 23 Wn.App. 826 (1979).

***Rhode Island v. Innis***, 64 L.Ed.2d 297 (1980)

Defendant, after advice of rights, states he wishes attorney; in defendant's presence, police "converse" about whereabouts of gun, whereupon defendant directs police to gun held not interrogation as no express questioning or the "functional equivalent" to questioning, *State v. Birnel*, 89 Wn.App. 459 (1998), *Pers. Restraint of Cross,* 180 Wn.2d 664, 682-90 (2014), *see also: State v. Webb*, 64 Wn.App. 480 (1992); 8-3.

***United States v. Henry***, 65 L.Ed.2d 115 (1980)

Post-indictment confession to government informant while in jail held inadmissible as violative of Sixth Amendment right to counsel, *Fellers v. United States*, 157 L.Ed.2d 1016 (2004), *see also: Kansas v. Ventris*, 173 L.Ed.2d 801 (2009); 8-3.

***Rawlines v. Kentucky***, 65 L.Ed.2d 633 (1980)

Statement following illegal arrest is not automatically suppressed; factors to be considered are *Miranda* warnings, temporal proximity of the arrest and confession, presence of intervening circumstances, purpose and flagrancy of the official misconduct; voluntariness is threshold requirement; burden remains on state; 5-4.

***State v. Renfro***, 28 Wn.App. 248 (1981)

Failure to hold 3.5 hearing not error where evidence establishes adequate advisement of rights and voluntariness, and defense did not request hearing.

***State v. Coles***, 28 Wn.App. 563 (1981)

Statements obtained after assertion of right to remain silent where police continue or resume interrogation are inadmissible absent a valid waiver proved by a preponderance, *State v. Elkins*, 188 Wn.App. 386 (2015); police must "scrupulously honor" assertion of rights.

***State v. Gardner***, 28 Wn.App. 721 (1981)

Whether intoxication renders a confession involuntary will be reviewed by substantial evidence test, per *State v. Young*, 28 Wn.App. 412 (1981); intoxication is a factor in determining voluntariness and waiver, but is not determinative, *State v. Cuzzetto*, 76 Wn.2d 378 (1969).

***State v. Bradfield***, 29 Wn.App. 679 (1981)

Defendant, in response to question "Do you want to talk about this murder?" responds "Not now," but talks about other things to police; held: refusal was ambiguous and "selective waiver" thus properly admitted.

***State v. Peyton***, 29 Wn.App. 701 (1981)

Civilian witness unresponsively testified one co-defendant said robbing bank was easy as "they had done it before"; held: did not taint entire trial, thus did not deprive defendant of fair trial; standards set forth in *State v. Johnson*, 60 Wn.2d 21 (1962).

***State v. Duhaime***, 29 Wn.App. 842 (1981)

Suspect gives statement, after advice of rights, to police, two hours later confesses to a social worker; held: where defendant is adequately advised, it is unnecessary to re-advise prior to the taking of each separate in-custody statement, *State v. Vidal*, 82 Wn.2d 74, 78 (1973) , *State v. Fedorov*, 181 Wn.App. 187, 191-93 (2014), *State v. Elkins*, 188 Wn.App. 386 (2015); I.

***State v. Collins***, 30 Wn.App. 1 (1981)

Suspect, arrested at home, advised of rights, told police he did not wish to make statement, police tell suspect it would be helpful if they had the gun, suspect gives police gun, held: police did not scrupulously honor defendant's request to remain silent, *see:* *State v. Brown*, 158 Wn.App. 49, 58-62 (2010), turning over gun was in response to police statement, thus equivalent to confession, thus suppressed, *Rhode Island v. Innis*, 64 L.Ed.2d 297 (1980), *Michigan v. Mosely*, 46 L.Ed.2d 313 (1975), *State v. Dennis*, 16 Wn.App. 417 (1976), *State v. Chambers*, 197 Wn.App.. 96, 128-35 (2016); subsequent statement of defendant, after re-advice of rights, is admissible in spite of defendant's claim of intoxication, as intoxication does not automatically prevent a waiver, *State v. Cuzzetto*, 76 Wn.2d 378 (1969), *State v. Smith*, 15 Wn.App. 103 (1976), *State v. Elkins*, 4 Wn.App. 273 (1971); II.

***State v. Holland***, 30 Wn.App. 366 (1981)

Statements made to a psychiatrist for a juvenile decline hearing should not be used against defendant at trial, but waived by defense here; "governmental information privilege," RCW 5.60.060(5), applies to defendants in criminal cases; I.

***State v. Jones***, 95 Wn.2d 616 (1981)

Although tape recorded statement does not specifically start with statement that recording is being made, extrinsic evidence may satisfy RCW 9.73.090(1)(b)(i) if it shows suspect was aware of recording; distinguishes *State v. Cunningham*, 95 Wn.2d 616 (1981).

***Estelle v. Smith***, 68 L.Ed.2d 359 (1981)

In capital case, court appointed psychiatrist, *sua sponte*, to evaluate defendant's competency; psychiatrist reported defendant was competent; defendant convicted of murder; in penalty phase, state calls psychiatrist who testified that defendant was dangerous; jury imposed death penalty; court holds that testimony of psychiatrist violated defendant's Fifth Amendment privilege, as defendant was not advised of *Miranda* rights by psychiatrist and did not waive Sixth Amendment right to counsel, although defendant did not have right to counsel present during evaluation, *see:* *State v. Bankes*, 114 Wn.App. 280 (2003), *cf.:* *State v. Post*, 118 Wn.2d 596 (1992); 9-0.

***Edwards v. Arizona***, 68 L.Ed.2d 378 (1981)

When suspect has invoked his right to counsel during custodial interrogation, a valid waiver cannot be established by showing that he responded to further interrogation even if he has been re-advised of his rights, *but see:* *Maryland v. Shatzer*, 539 U.S.98, 175 L.Ed.2d 1045 (2010); suspect who has expressed desire to deal with police only through counsel shall not be subject to further interrogation until counsel has been provided unless the suspect initiates further communication with the police, *State v. Allen*, 130 Wn.2d 640, 665-6 (1996), *State v. McReynolds*, 104 Wn.App. 560 (2000), *see*: *McNeil v. Wisconsin*, 115 L.Ed.2d 158 (1991), *but see:* *State v. Warness*, 77 Wn.App. 636 (1995), *State v. Jones*, 102 Wn.App. 89, 95-97 (2000), *Florida v. Powell*, 559 U.S. 50, 175 L.Ed.2d 1009 (2010); 9-0.

***California v. Prysock***, 69 L.Ed.2d 696 (1981)

Juvenile suspect is advised by police "you have the right to have a lawyer appointed to represent you at no cost to yourself," but is not told of right to free lawyer prior to questioning, held: substantially complies with *Miranda*, *State v. Teller*, 72 Wn.App. 49 (1993), *Duckworth v. Eagan*, 106 L.Ed.2d 166 (1989), *Florida v. Powell*, 559 U.S. 50, 175 L.Ed.2d 1009 (2010), *but see: State v. Mayer*, 184 Wn.2d 548 (2015); 6-3.

***State v. Mason***, 31 Wn.App. 41 (1982)

Where defendant invokes right to counsel, but then initiates further communications with police, confession is admissible, *State v. Elkins*, 188 Wn.App. 386 (2015); II.

***State v. Lewis***, 32 Wn.App. 13 (1982), *overruling recognized, State v. Calo*, 6 Wn.App.2d 1046 (unpublished, 2018)

Where there is probable cause to arrest, but police delay arrest to question suspect to obtain additional incriminating information from suspect, then interview is a subterfuge, and is deemed custodial for purposes of *Miranda* even though suspect is free to go, *but see*: *State v. Hamilton*, 47 Wn.App. 15 (1987), *State v. McWatters*, 63 Wn.App. 911 (1992), *State v. Walton*, 67 Wn.App. 127 (1992), *State v. Reed*, 116 Wn.App. 421-22 (2003), *State v. Lorenz*, 152 Wn.2d 22, 36-38 (2004), *State v. Ustimenko*, 137 Wn.App. 109, 114-16 (2007); where suspect equivocally asserts right to counsel by indicating desire to continue interview, further questioning must be limited to clarifying suspect's request for counsel until a clear waiver is elicited, *see: State v. Copeland*, 89 Wn.App. 492, 499-502 (1997), *but see: State v. Walker*, 129 Wn.App. 258, 273-76 (2005), *State v. Radcliffe*, 164 Wn.2d 900 (2008), *State v. Herron*, 177 Wn.App. 96 (2014), *affirmed, on different grounds*, 183 Wn.2d 737 (2015); effectively *overruled*, *State v. Short*, 113 Wn.2d 35 (1989); II.

***State v. Nogeuira***, 32 Wn.App. 954 (1982)

CrR 3.5 was not implicitly waived by defense counsel's failure to note CrR 3.5 hearing pursuant to LJuCR 7.14(a); *remanded* for a CrR 3.5 hearing; I.

***State v. Grisby***, 97 Wn.2d 493 (1982)

Defendant is arrested, advised of rights and declines to make a statement, police ask defendant if he wants to hear co-defendant's statement, which is then read to defendant; defendant says nothing, defendant is then escorted from interview room, sees some evidence on a table, asks where evidence came from, is given answer by police, whereupon defendant confesses; held: confession was spontaneous and was not the product of interrogation or actions on the part of police that police knew or should have known were reasonably likely to elicit an incriminating response, *Rhode Island v. Innis*, 64 L.Ed.2d 297 (1980); *State v. Braun*, 82 Wn.2d 157 (1973); 6-2.

***State v. Bonds***, 98 Wn.2d 1 (1982)

Juvenile defendant retains court-appointed psychiatrist for decline hearing, JuCR9.3(a); after decline, defendant raises insanity defense; held: where defendant raises insanity defense, statements uttered by defendant in the context of a psychiatric examination are removed from the reach of the Fifth Amendment and the attorney-client privilege; *see* concurring opinion at 29.

***State v. Robtoy***, 98 Wn.2d 30 (1982)

Following equivocal request for counsel ("Maybe I should call my attorney"), further questioning must be limited to clarifying that request, *State v. Jones*, 102 Wn.App. 89, 95-97 (2000), *see*: *State v. Aten*, 130 Wn.2d 640 (1996), *State v. Quillin*, 49 Wn.App. 155 (1987), *but see: Davis v. United States*, 129 L.Ed.2d 362 (1994), *State v. Radcliffe*, 139 Wn.App. 214 (2007); 9-0.

***Taylor v. Alabama***, 73 L.Ed.2d 314 (1982)

Unlawful arrest requires suppression of confession, *but see: Rawlines v. Kentucky*, 65 L.Ed.2d 633 (1980); intervening events here are insufficient to break connection between arrest and confession; 5-4.

***Wyrick v. Fields***, 74 L.Ed.2d 214 (1982)

Rape suspect, after consultation with counsel, agrees to take police polygraph in the absence of counsel; police polygrapher advises suspect of rights, administers test, then interviews suspect, who makes admissions; held: *Edwards v. Arizona*, 68 L.Ed.2d 378 (1981) does not require readvising suspect at conclusion of polygraph where it's clear that suspect knew and understood his right to terminate questioning, , *State v. Fedorov*, 181 Wn.App. 187, 191-93 (2014); 8-1.

***State v. Bledsoe***, 33 Wn.App. 720 (1983)

Police advise suspect of rights, following which suspect states that his attorney had told him not to talk to police; police continue questioning suspect, who makes a statement; held: defendant's statement that his attorney told him not to talk did not invoke his right to counsel, thus statement is admissible; *accord*: *State v. Thompson*, 60 Wn.App. 662 (1991); I.

***State v. Mark***, 34 Wn.App. 349 (1983)

Where a single police officer testifies that defendant was advised of rights, and defense calls a witness to contradict this, and where corroborating evidence is available but not presented by state, "heavy burden" required by *Miranda* has not been met, *State v. Davis*, 73 Wn.2d 271 (1968), *overruled*, *State v. Abdulle*, 174 Wn.2d 411 (2012), *see: State v. Haack*, 88 Wn.App. 423, 431-6 (1997); here, defendant did not testify at CrR 3.5 hearing, thus *Davis* does not apply; II.

***State v. Smith***, 34 Wn.App. 405 (1983)

Suspect asks police if they think he needs attorney whereupon police present waiver form without comment, held: equivocal request followed by presentation of waiver is not coercive; I.

***State v. Davis***, 34 Wn.App. 546 (1983)

Mental illness of defendant is but one factor for court to consider in determining whether state has established voluntariness of a confession by a preponderance; I.

***State v. Kaiser***, 34 Wn.App. 559 (1983)

Promise by police that a statement by suspect will be kept "confidential" is voluntary where *Miranda* warnings were administered; III.

***State v. Fanger***, 34 Wn.App. 635 (1983)

Defense counsel stipulates to admissibility of statement in state's case-in-chief, waiving CrR 3.5 hearing; held: counsel has authority to waive hearing on defendant's behalf and defendant need not sign waiver, *see:* *State v. Varnell*, 137 Wn.App.925, 931-33 (2007); a voluntariness hearing is not required absent some contemporaneous challenge to the use of the confession; I.

***State v. Ortiz***, 34 Wn.App. 694 (1983)

Where court suppresses confession because defendant's developmental disability rendered him incapable of validly waiving *Miranda* rights, confession is admissible "to attack a defendant's credibility" if defendant testifies inconsistently, *Harris v. N.Y.*, 28 L.Ed.2d 1 (1971); I.

***State v. Ruelas***, 35 Wn.App. 595 (1983)

Police question suspect, trial court suppresses statements as violative of *Miranda* but rules that statements were voluntary, at trial, police testify that a conversation took place and describe demeanor of defendant; held: a police officer is not prohibited by *Miranda* from testifying to his observations of the demeanor and physical actions of a defendant; I.

***State v. Smith***, 36 Wn.App. 133 (1983)

Defendant confesses to cellmate, who testifies at trial; defense requests voluntariness instruction, WPIC 6.41, which is refused; held: instruction need not be given when defendant confesses to a private citizen; I.

***State v. Holland***, 98 Wn.2d 507 (1983)

Statements made by a juvenile to a mental health professional prior to a decline hearing are privileged but privilege is waived if defendant takes the stand at trial; 9-0.

***State v. Frazier***, 99 Wn.2d 180 (1983)

Tape recording of a statement of defendant, if properly authenticated, can go to jury and jury may play statement on tape player; *see*: *State v. Oughton*, 26 Wn.App. 76 (1980); 9-0.

***State v. Lavaris***, 99 Wn.2d 851 (1983)

Murder defendant, while in custody with police, confesses prior to advice of rights and then confesses again subsequent to advice of rights; held: confession made after advisement of *Miranda* rights is inadmissible if similar but tainted statement was made prior to advice absent insulating factors such as advice that earlier statement is not admissible in court; burden is on state to overcome "presumption of inadmissibility," *Missouri v. Seibert*, 159 L.Ed.2d 643 (2004), *State v. Hickman*, 157 Wn.App. 767 (2010), *but see*: *Oregon v. Elstad*, 84 L.Ed.2d 222 (1985), *State v. Allenby*, 68 Wn.App. 657 (1992), *State v. Baruso*, 72 Wn.App. 603, 609-12 (1993), *State*

*v. Ustimenko*, 137 Wn.App. 109, 114-16 (2007) , *but see: Bobby v. Dixon*, 565 U.S. 23, 132 S.Ct. 25, 181 L.Ed.2d 328 (2011); 9-0.

***Oregon v. Bradshaw***, 77 L.Ed.2d 405 (1983)

After advice of rights, suspect invokes right to counsel, whereupon police terminate interrogation; later, when suspect is being transported to jail, he inquires "What is going to happen to me now?"; police readvise suspect, who agrees to take a polygraph, which he flunks, following which he confesses; held, by plurality of four: suspect's inquiry amounted to a willingness to discuss the investigation and "not merely an inquiry arising out of the incidents of the custodial relationship"; since inquiry was initiated by suspect, there is a valid waiver under *Edwards v. Arizona*, 68 L.Ed.2d 378 (1981), *Wyrick v. Fields*, 74 L.Ed.2d 214 (1982); majority of five approves two-step analysis: (1) initiation by suspect, and (2) totality re: waiver, *Johnson v. Zerbst*, 82 L.Ed. 1461 (1938); 5-4.

***California v. Beheler***, 77 L.Ed.2d 1275 (1983)

Defendant calls police to talk about a homicide he "witnessed," voluntarily accompanies police to station, is not advised of *Miranda* rights, is interviewed for 30 minutes and is permitted to return home; five days later, defendant is arrested, advised, and makes statement; held: at first interview, defendant was not in custody under totality test, *State v. Grogan*, 147 Wn.App. 511, 516-19 (2008), thus *Miranda* is inapplicable; 6-3.

***State v. Cornethan***, 38 Wn.App. 231 (1984)

Defendant is shot and arrested for assault, counsel visits defendant in hospital, calls police and tells them defendant does not wish to talk without counsel, police officer visits defendant, does not advise him, defendant refuses to make a statement on advice of counsel, homicide detectives visit defendant, advise him, defendant agrees to talk, confesses to murder; held: defendant invoked only right to remain silent, did not invoke right to counsel, thus *Edwards v. Arizona*, 68 L.Ed.2d 378 (1981) does not apply; police may re-interrogate a suspect who has invoked only his right to remain silent if a significant period of time has elapsed and he is re-advised, *Michigan v. Mosley*, 46 L.Ed.2d 313 (1975), *State v. Brown*, 158 Wn.App. 49, 58-62 (2010), *State v. Chambers*, 197 Wn.App.. 96, 128-35 (2016); *dicta*: once accused has invoked right to counsel, police may interrogate if it involves an independent investigation of an unrelated offense by an officer who speaks to the accused without knowing of his previous request for counsel; I.

***State v. Brooks***, 38 Wn.App. 256 (1984)

Defendant's cellmate hears confession, is contacted by police, declines to speak, hears another confession, then advises police and testifies; held: where police deliberately elicit a confession using cellmate as agent, right to counsel is denied and confession must be suppressed, *United States v. Henry*, 65 L.Ed.2d 115 (1980), *see also: Kansas v. Ventris*, 173 L.Ed.2d 801 (2009); here police did not intentionally create a situation likely to induce a confession, *State v. Whitaker*, 133 Wn.App. 199, 218-21 (2006); I.

***State v. Wolfer***, 39 Wn.App. 287 (1984)

School security officer is not obliged to give *Miranda* warnings prior to taking a statement as officer is not employed by an entity whose primary responsibility is law enforcement, *but see:* *State v. Heritage*, 152 Wn.2d 210, 214-17 (2004); I.

***State v. Rupe***, 101 Wn.2d 664 (1984)

Statement admissible where police advise suspect that statement "can be used" against him, advice need not state that statement "can *and will* be used," *Calif. v. Prysock*, 69 L.Ed.2d 696 (1981), *Florida v. Powell*, 559 U.S.50, 130 S.Ct. 1195, 175 L.Ed.2d 1009 (2010); written waiver is not required to admit statements; 9-0.

***Minnesota v. Murphy***, 79 L.Ed.2d 409 (1984)

Probation officer learns that defendant has admitted to a therapist that he committed an uncharged murder, one of defendant's conditions of probation is to be truthful with P.O., P.O. questions defendant about murder; defendant is not in custody, defendant states he "felt like calling a lawyer," to which P.O. responds that he would have to deal with that "outside," continues to question defendant, who confesses; held: (1) P.O. need not advise probationer of *Miranda* warnings prior to interrogation if probationer is not in custody, (2) probationer has Fifth Amendment rights and may refuse to answer questions; general obligation to appear and answer P.O.'s questions truthfully does not convert otherwise voluntary statements into compelled answers, *see:* *State v. King*, 130 Wn.2d 517, 524-9 (1996), (3) mere fact that an investigation has focused on a suspect does not trigger the need for *Miranda* warnings in noncustodial setting, *Stansbury v. California*, 128 L.Ed.2d 293 (1994), *cf.*: *State v. Lewis*, 32 Wn.App. 13 (1982), (4) *dicta* that state cannot carry out a threat to revoke probation for exercise of Fifth Amendment privilege where the questions may lead to criminal prosecution, but may revoke if the questions merely deal with conditions of probation and probationer refuses to answer them, *see:* *State v. Richmond*, 65 Wn.App. 541 (1992), *State v. Warner*, 125 Wn.2d 876 (1995), *State v. Jacobsen*, 95 Wn.App. 967 (1999), *McKune v. Lile*, 153 L.Ed.2d 47 (2002), *State v. Powell*, 193 Wn.App. 112 (2016); 6-3.

***United States v. Doe***, 79 L.Ed.2d 552 (1984)

Grand jury subpoenas business records of sole proprietorship; held; while contents of voluntarily-prepared records are not privileged under Fifth Amendment, act of producing documents may be privileged and can only be compelled pursuant to a grant of use immunity; 6-3.

***New York v. Quarles***, 81 L.Ed.2d 550 (1984)

Custodial statement not preceded by *Miranda* warnings is admissible under a public safety exception where, as here, police asked suspect where weapon was, and suspect pointed it out, *see:* *State v. Finch*, 137 Wn.2d 792, 825-30 (1999); 7-2.

***Berkemer v. McCarty***, 82 L.Ed.2d 317 (1984)

Roadside questioning of a motorist detained pursuant to a routine traffic stop does not constitute a custodial interrogation for the purposes of the *Miranda* rule, *see:* *State v. Ferguson*, 76 Wn.App. 560, 565-8 (1995); statements made during custodial interrogation for a

misdemeanor traffic offense are inadmissible where the suspect was not advised of rights when he was formally placed under arrest; *see*: *Pennsylvania v. Bruder*, 101 L.Ed.2d 172 (1988), *State v. Walton*, 67 Wn.App. 127 (1990); 9-0.

***Smith v. Illinois***, 83 L.Ed.2d 488 (1984)

Suspect advised of right to counsel, invokes same, police continue to advise and, when suspect is advised of further rights, waives same; held: an accused's post-request responses to further interrogation may not be used to show that the initial request was ambiguous, *State v. Piatnitsky*, 170 Wn.App. 195, 218-19 (2012), *aff'd,* 180 Wn.2d 407 (2014), *see: Davis v. United States*, 129 L.Ed.2d 362 (1994); 6-3.

***Oregon v. Elstad***, 84 L.Ed.2d 222 (1985)

Suspect, in custody, confesses in the absence of *Miranda* warnings, is later advised of rights and confesses again; held: Fifth Amendment does not require suppression of confession made after proper *Miranda* warnings solely because police had earlier obtained a voluntary but unwarned admission, *but see: Missouri v. Seibert*, 159 L.Ed.2d 643 (2004), *State v. Hickman*, 157 Wn.App. 767 (2010); *accord: State v. Allenby*, 68 Wn.App. 657 (1992), *State v. Baruso*, 72 Wn.App. 603, 609-12 (1993), *State v. Dods*, 87 Wn.App. 312, 317-9 (1997), *State v. King*, 89 Wn.App. 612, 624-6 (1998), *State v. Reed*, 116 Wn.App. 418, 421-22 (2003), *State v. Ustimenko*, 137 Wn.App. 109, 116 ¶13 (2007), *Bobby v. Dixon*, 565 U.S. 23, 132 S.Ct. 26, 181 L.Ed.2d 328 (2011), *but see*: *State v. Lavaris*, 99 Wn.2d 851 (1983), *see also: Fellers v. United States*, 157 L.Ed.2d 1016 (2004); 6-3.

***State v. Manthie***, 39 Wn.App. 815 (1985)

While in jail awaiting trial defendant confessed to cellmate who makes a deal with state and testifies to what he was told before and after he made contact with police; held: state did not intentionally create a situation likely to induce confession, *State v. Brooks*, 38 Wn.App. 256 (1984), nor was cellmate "under government instruction," *United States v. Calder*, 641 F.2d 76 (2d Cir. 1981), *United States v. Henry*, 65 L.Ed.2d 115 (1980), *State v. Whitaker*, 133 Wn.App. 199, 218-22 (2006); state is not required to segregate every cellmate who informs prosecutor he has information as long as there is no attempt to direct or control interrogation; II.

***State v. Bryan***, 40 Wn.App. 366 (1985)

Defendant is taken into "protective custody" for intoxication during which police notice he has a wallet containing photos and identification; after defendant is released police receive report that a vehicle is stolen near station, is recovered ten miles away, defendant's wallet found nearby; police go to defendant's home, ask him if he lost wallet, defendant says yes, show him wallet, defendant denies it's his, later admits it is his, is advised of rights, confesses to car theft; held: police had probable cause to arrest defendant as soon as he denied wallet was his, thus statements after that point are suppressed, *but see: State v. Lorenz*, 152 Wn.2d 22, 36-38 (2004); trial court's finding that confession after advice of rights was tainted by prior statement affirmed, *State v. Lavaris*, 99 Wn.2d 851 (1983); II.

***State v. Tim S.***, 41 Wn.App. 60 (1985)

Respondent confesses in absence of *Miranda* warnings, having been told by police that the problem was whether he could be placed in counseling; no CrR 3.5 hearing was requested or held; at trial, defendant denies offense but is impeached with confession; trial court, in findings, relied on confession as substantive evidence; held: CrR 3.5 hearing is mandatory, whether requested or not, *State v. S.A.W.*, 147 Wn.App. 832 (2008), *distinguishing In re Moble*, 15 Wn.App. 51 (1976), *but see: State v. G.M.V.*, 135 Wn.App. 366, 372-74 (2006); a custodial confession, in the absence of *Miranda* warnings, is not admissible as substantive evidence, but for impeachment only, *Harris v. N.Y.*, 28 L.Ed.2d 1 (1971), *State v. Simpson*, 95 Wn.2d 170, 180 (1980); *remanded* for CrR 3.5 hearing to determine voluntariness and new trial; III.

***State v. Harvey***, 41 Wn.App. 870 (1985)

Statements made pursuant to interrogation during a *Terry* stop, before *Miranda* warnings are given, are admissible, *State v. Cameron*, 47 Wn.App. 878 (1987); I.

***State v. Hubbard***, 103 Wn.2d 570 (1985)

A defendant's incriminating statement obtained without *Miranda* warnings is not admissible as substantive evidence to rebut the testimony of a defense witness other than the defendant, and then for impeachment evidence only, *reversing State v. Hubbard*, 37 Wn.App. 137 (1984); *cf.*: *State v. Hayes*, 73 Wn.2d 568 (1968), *State v. Greve*, 67 Wn.App. 166 (1992); 6-3.

***State v. Ortiz***, 104 Wn.2d 479 (1985)

After arrest, developmentally disabled suspect makes an unsolicited statement to police; held: develop[mental disability of a suspect is irrelevant to the question as to whether a statement was volunteered; only issues are whether the statement was made spontaneously, was not solicited and not the product of custodial interrogation, *State v. Miner*, 22 Wn.App. 480 (1979); 9-0.

***Moran v. Burbine***, 89 L.Ed.2d 410 (1986)

Failure of police to inform defendant of counsel's telephone call during interrogation did not affect validity of defendant's waiver of Fifth Amendment right to remain silent and right to have counsel present, *accord*: *State v. Earls*, 116 Wn.2d 364 (1991), *State v. Greer*, 62 Wn.App. 779, 788 (1991), *State v. Bradford*, 95 Wn.App. 935 (1999); Sixth Amendment right to counsel does not attach until charges are filed, thus interference by police of counsel's attempts to contact her client is not unlawful; police lying to counsel that defendant would not be interrogated does not violate due process clause; 6-3.

***Kuhlmann v. Wilson***, 91 L.Ed.2d 364 (1986)

Police place informant in defendant's cell with instructions to listen to defendant but not ask any questions; defendant confesses, informant testifies; held: Sixth Amendment right to counsel not violated where informant listens and reports defendant's confession, but did not question him; *see also: Pers. Restraint of Benn*, 134 Wn.2d 868, 911-2 (1998); 6-3.

***Allen v. Illinois***, 92 L.Ed.2d 296 (1986)

State proceedings permitting involuntary commitment of "sexually dangerous persons" are not criminal in nature such that the privilege against self-incrimination applies; 5-4.

***Colorado v. Connelly***, 93 L.Ed.2d 473 (1986)

Suspect approaches police officer, states he wishes to confess to murder, is advised of *Miranda* warnings, apparently waives and confesses; state court rules that, because defendant was mentally ill, he did not exercise free will in confessing; held: coercive police activity is a necessary predicate to finding that a confession is not voluntary, 7-2; state need prove waiver of *Miranda* rights by preponderance only, 6-3.

***State v. Terrovona***, 105 Wn.2d 632 (1986)

An implied waiver of the right to remain silent may be found where defendant understood his rights and volunteered information after reaching such an understanding, *Berghuis v. Thompkins*, 560 U.S. 370, 130 S.Ct. 2250, 176 L.Ed.2d 1098 (2010), *State v. Gross*, 23 Wn.App. 319, 324 (1979), *State v. Adams*, 76 Wn.2d 650, 670 (1969), *rev'd on other grounds*, 29 L.Ed.2d 855 (1971), *State v. Johnson*, 94 Wn.App. 882, 897-98 (1999), *cf.: State v. Haack*, 88 Wn.App. 423, 435 (1997); 9-0.

***State v. Bradley***, 105 Wn.2d 898 (1986)

Suspect invokes right to counsel, police ask personal history questions, suspect makes nonresponsive incriminating statement; held: general questions about background do not constitute interrogation, *Pennsylvania v. Muniz*, 110 L.Ed.2d 528 (1990), *State v. Shuffelen*, 150 Wn.App. 244, 255-57 (2009), and officers can ask such questions even after defendant invokes right to counsel, *see: Pers. Restraint of Pirtle*, 136 Wn.2d 467, 486 (1999); 9-0.

***State v. Wade***, 44 Wn.App. 154 (1986), *overruled, on other grounds, Pers. Restraint of Carrier*, 173 Wn.2d 791 (2012)

Suspect is advised, requests counsel, then tells police officer he wants to talk to him, is readvised, waives, confesses; held: suspect initiated conversation, thus statement admissible, *but see: State v. Kirkpatrick*, 89 Wn.App. 407 (1997), *cf.: State v. Mullins*, 158 Wn.App. 360, 364-70 (2010); III.

***State v. Bergman***, 44 Wn.App. 271 (1986)

Cross-examination of defendant regarding his failure to ask an alibi witness to contact the police about his alibi does not violate defendant's right to remain silent, *distinguishing Doyle v. Ohio*, 49 L.Ed.2d 91 (1976); I.

***State v. Murphy***, 44 Wn.App. 290 (1986)

Prior to arrest, defendant's attorney writes to police advising them of his representation and requests that they not interrogate defendant; after arrest, defendant is advised of *Miranda* rights and police inform defendant that an attorney had been retained and had instructed police

not to question her, defendant informs police there is no need for counsel, and waives rights, makes statement; held: arrestee may waive right to counsel and right to remain silent during interrogation where she knows counsel has been retained and has advised her not to so waive, *State v. Haynes*, 602 P.2d 272, 278-9 (Or., 1979), *State v. Vidal*, 82 Wn.2d 74 (1973), *Moran v. Burbine*, 89 L.Ed. 410 (1986); *dicta* that statement must be suppressed if police fail to inform arrestee of attorney's attempts to contact him, at 294; II.

***State v. Thamert***, 45 Wn.App. 143 (1986)

The fact that a statement is deemed admissible following a CrR 3.5 hearing does not address the admissability of contents of a confession pursuant to rules of evidence regarding relevance, prejudice, *etc*.; *accord:* *State v. Viney*, 52 Wn.App. 507 (1988); I.

***State v. Gonzales***, 46 Wn.App. 388 (1986)

Following illegal arrest, police confront defendant with unlawfully seized drugs, advise him they would see if they could get suspect's wife released from jail, defendant confesses; held: implied promise to release wife plus exploitation of the illegally seized drugs taints the confession, although implied promise here would not be enough by itself to find involuntariness; *see:* *State v. Putman*, 65 Wn.App. 606 (1992); III.

***State v. Hamilton***, 47 Wn.App. 15 (1987)

Police, having probable cause to arrest, speak to suspect on telephone, obtain incriminating statements but without interrogation; held: no need to advise defendant of *Miranda* warnings because police could not have arrested suspect as they did not know where he was, *State v. Davis*, 133 Wn.App. 415, 428-29 (2006), *rev'd, on other grounds,* 163 Wn.2d 606 (2008), *distinguishing* *State v. Lewis*, 32 Wn.App. 13 (1982); I.

***State v. Marshall***, 47 Wn.App. 322 (1987)

Suspect, meeting description of a person who knocked on a residential door and said to be a suspect in a rape, is stopped by police three blocks from door a few minutes later, states to police that he was at the door, provides identification, is arrested when the identification meets that of the rape suspect; held: temporary seizure for questioning does not require *Miranda* warnings, *Berkemer v. McCarty*, 82 L.Ed.2d 317 (1984), *State v. Kolesnik*, 146 Wn.App. 790, 809-810 (2008); I.

***State v. Brown***, 47 Wn.App. 565 (1987)

Defendant initiates conversation with parole officer, telling P.O. that what he says would probably be used against him; P.O. states that nobody cared about his *modus operandi*; held: statement was voluntary as P.O.'s words did not overcome defendant's will; I.

***State v. Wheeler***, 108 Wn.2d 230 (1987)

Defendant asserts right to remain silent, detective asks routine questions for Personal Investigation Report (PIR) which defendant answers, detective asks defendant if he knew co-suspect which defendant denies, state offers this denial at trial; held: while PIR questions are

permitted even after defendant declines to waive Fifth Amendment rights, question asked by detective was not routine question, thus defendant's right to silence was not scrupulously honored, *State v. Denney*, 152 Wn.App. 665 (2009), *see: State v. McReynolds*, 104 Wn.App. 560, 576 (2000), *reversing State v. Wheeler*, 43 Wn.App. 191 (1986), *but see: State v. Elkins*, 188 Wn.App. 386 (2015), harmless here; 9-0.

***State v. Franklin***, 48 Wn.App. 61 (1987)

While a charged defendant has right to counsel which does not depend upon an explicit request for same, police asking such a person if he knows what he is charged with is not designed to deliberately elicit an incriminating statement, *Pers. Restraint of Pirtle*, 136 Wn.2d 467, 486 (1999), *distinguishing United States v. Henry*, 65 L.Ed.2d 115 (1980), *see: Franklin v. United States*, 157 L.Ed.2d 1016 (2004); I.

***Cruz v. New York***, 95 L.Ed.2d 162 (1987)

Where a nontestifying co-defendant's confession is not directly admissible against the defendant, the confrontation clause bars its admission at their joint trial, even if the jury is instructed not to consider it against the defendant, and even if the defendant's own confession interlocks with the co-defendant's, and is admitted against the defendant, overruling plurality in *Parker v. Randolph*, 60 L.Ed.2d 713 (1979); *accord*: *State v. St. Pierre*, 111 Wn.2d 105 (1988); *but see: State v. Greer*, 62 Wn.App. 779 (1991); 5-4.

***Arizona v. Mauro***, 95 L.Ed.2d 458 (1987)

Suspect, arrested for killing his son, tells police he does not wish to make statement, after suspect's wife asked to see defendant, police agreed, set up meeting with suspect, wife, officer, put tape recorder in plain sight, record confession; held: suspect was not subjected to compelling influence, psychological ploys, direct questioning or the functional equivalent of interrogation; 5-4.

***Connecticut v. Barrett***, 93 L.Ed.2d 920 (1987)

After *Miranda* warnings, suspect states he would not give a written statement without an attorney but would talk about the incident; held: oral confession is admissible, as suspect stated his intentions, waived his Fifth Amendment privilege as to oral statements, and police honored his intentions, *State v. Heggins*, 55 Wn.App. 591 (1989), State v. Hutchinson, 85 Wn.App. 726, 741 (1997), *rev'd, on other grounds,* 135 Wn.2d 863 (1998), *State v. Piatnitsky*, 170 Wn.App. 195 (2012), 180 Wn.2d 407 (2014); 7-2. ,

***Colorado v. Spring***, 93 L.Ed.2d 954 (1987)

Suspect under arrest for a weapons offense, is advised and waives. after making statements about the subject of the arrest suspect is questioned about an unrelated homicide, makes incriminating statements; held: suspect's awareness of all the possible subjects of interrogation is not relevant to determining whether s/he waived Fifth Amendment privilege; 7-2.

***State v. Petty***, 48 Wn.App. 615 (1987)

Police, serving warrant, enter residence with guns drawn, inquire of occupants if they live there, defendant replies affirmatively; held: reasonable person would believe he was formally arrested, thus *Miranda* warnings should have preceded question; I.

***State v. Johnson***, 48 Wn.App. 681 (1987)

Police advise defendant of *Miranda* warnings, defendant asks to speak with counsel, speaks with attorney on telephone, defendant is advised not to talk, police then re-advise defendant and tell him he would not be prosecuted, defendant confesses, is charged in another jurisdiction; held: by invoking right to counsel, interrogation must cease until counsel is present or suspect initiates communication, *Minnick v. Mississippi*, 112 L.Ed.2d 489 (1990); telling suspect he would not be prosecuted is reasonably likely to elicit an incriminating response, thus suppressed; 2-1, I.

***State v. West***, 49 Wn.App. 166 (1987)

Defendant confesses in absence of *Miranda* warnings, gives name of a witness, police interview witness, advise of rights, witness implicates defendant, testifies at defendant's trial; held: testimony of the witness is admissible as it was untainted by the unlawfully seized confession in that witness was advised, testified voluntarily, *State v. Childres*, 35 Wn.App. 314, 316 (1983), *United States v. Ceccolini*, 55 L.Ed.2d 268 (1978), the illegally seized evidence had no role in gaining the witness's cooperation, *United States v. Hooten*, 662 F.2d 628, 632 (9th Cir. 1981); *see also*: *State v. Stone*, 56 Wn.App. 153 (1989); II.

***State v. Huynh***, 49 Wn.App. 192 (1987)

Police testify as to defendant's statements made to police through a police interpreter; held: as interpreter was not defendant's agent, it was inadmissible hearsay, *State v. Lopez*, 29 Wn.App. 836 (1981); I.

***State v. Hensler***, 109 Wn.2d 357 (1987)

Unnamed citizen informs police he saw defendant in vehicle using drugs; police stop vehicle, ask suspect if he was using drugs, suspect says yes; held: interrogation was brief, noncoercive and nondeceptive, thus no advice of rights necessary at that stage, *Heinemann v. Whitman Cy.*, 105 Wn.2d 796 (1986), *State v. Walton*, 67 Wn.App. 127 (1992); 9-0.

***Arizona v. Roberson***, 100 L.Ed.2d 704 (1988)

Where suspect in custody invokes right to counsel cutting off interrogation, police may not initiate interrogation as to an unrelated offense even if re-interrogating officer is ignorant of suspect's initial request for counsel, *see*: *McNeil v. Wisconsin*, 115 L.Ed.2d 158 (1991), *but see: Maryland v. Shatzer*, 539 U.S.98, 175 L.Ed.2d 1045 (2010), *State v. Trochez-Jimenez*, 180 Wn.2d 445 (2014); 6-2.

***State v. Wethered***, 110 Wn.2d 466 (1988)

In absence of *Miranda* warnings, police ask arrestee for drugs, which defendant hands to police; held: while act of handing over the drugs is testimonial and must be suppressed, *State v.*

*Dennis*, 16 Wn.App. 417 (1976), *State v. Moreno*, 21 Wn.App. 430 (1978), Fifth Amendment does not require the suppression of the evidence itself as long as it was voluntarily produced, *United States v. Patane*, 159 L.Ed.2d 667 (2004), *State v. Putman*, 65 Wn.App. 606 (1992), *see: State v. Russell*, 125 Wn.2d 24, 55-62 (1994), *State v. Birnel*, 89 Wn.App. 459, 468 (1998), *State v. Spotted Elk*, 109 Wn.App. 253 (2001); 9-0.

***State v. Grieb***, 52 Wn.App. 573 (1988)

After advice of rights, suspect states that he does not want to waive his rights but will talk to police, who question defendant, who confesses; held: statements must be suppressed as police did not scrupulously honor suspect's assertion that he would not waive, irrespective of the equivocation, *but see: Davis v. United States*, 129 L.Ed.2d 362 (1994), *State v. Copeland*, 89 Wn.App. 492, 499-502 (1998), *cf.: State v. Parra*, 96 Wn.App. 95 (1999); III.

***Patterson v. Illinois***, 101 L.Ed.2d 261 (1988)

After indictment, defendant is interviewed by police, advised of *Miranda* warnings, waives, confesses; held: accused may waive Sixth Amendment right to counsel if properly advised by police, who are not barred from initiating interrogation, *State v. Medlock*, 86 Wn.App. 89, 99-100 (1997), *see: Fellers v. United States*, 157 L.Ed.2d 1016 (2004); 5-4.

***State v. Sargent***, 111 Wn.2d 641 (1988)

Following murder conviction, defendant is interviewed by P.O. for presentence report, not advised of *Miranda* rights, confesses; conviction is reversed on appeal, used at retrial; held: P.O. was a state official, defendant was in custody, failure to advise violated defendant's Fifth Amendment rights, thus reversed; reverses *State v. Sargent*, 49 Wn.App. 64 (1987), *cf.: State v. Post*, 118 Wn.2d 596 (1992), *State v. Jacobson*, 95 Wn.App. 967 (1999), *accord: State v. Willis*, 64 Wn.App. 634 (1992), *State v. D.R.*, 84 Wn.App. 832 (1997), *State v. Bankes*, 114 Wn.App. 280 (2002), *State v. Everybodytalksabout*, 161 Wn.2d 702 (2007); 6-2.

***Duckworth v. Eagan***, 106 L.Ed.2d 166 (1989)

*Miranda* warnings which advise suspect s/he has right to an attorney before and during questioning and that "one will be appointed for you if and when you go to court" are sufficient, *California v. Prysock*, 69 L.Ed.2d 696 (1981), *Florida v. Powell*, 559 U.S. 50, 175 L.Ed.2d 1009 (2010), *State v. Teller*, 72 Wn.App. 49 (1993), *Pers. Restraint of Woods*, 154 Wn.2d 400, 434-35 (2005), *but see: State v. Mayer*, 184 Wn.2d 548 (2015); 5-4.

***State v. Petticlerc***, 53 Wn.App. 419 (1989)

Counsel files notice of appearance which requests that police not contact defendant in absence of counsel; at arraignment, defendant states he has an attorney; police advise defendant, who waives and confesses; held: where defendant consults with counsel and later confesses after waiving right to counsel's presence, confession is admissible, *distinguishing Michigan v. Jackson*, 89 L.Ed.2d 631 (1986), *see: Montejo v. Louisiana*, 173 L.Ed.2d 955 (2009), *Maryland v. Shatzer*, 539 U.S. 98, 175 L.Ed.2d 1045 (2010); I.

***State v. Alexander***, 55 Wn.App. 102 (1989)

At a CrR 3.5 hearing, trial judge must give defendant opportunity to testify and present evidence, CrR 3.5(b), and may not rely only upon the officer's version of facts, *see: State v. Williams*, 137 Wn.2d 746 (1999); II.

***State v. Visitacion***, 55 Wn.App. 166 (1989)

Post-indictment confessions in the absence of counsel are admissible upon proof of a knowing, voluntary and intelligent waiver of counsel; *Miranda* warnings will suffice, *Patterson v. Illinois*, 101 L.Ed.2d 261 (1988), *see: Fellers v. United States*, 157 L.Ed.2d 1016 (2004); I.

***State v. Pizzuto***, 55 Wn.App. 421 (1989)

Confession to a police officer is not excludable as plea negotiations, ER 410, unless officer has express plea bargaining authority, *see: State v. Nowinski*, 124 Wn.App. 617 (2004); I.

***State v. Short***, 113 Wn.2d 35 (1989)

Undercover police officer need not give *Miranda* warnings once there is probable cause for arrest, effectively overruling *State v. Lewis*, 32 Wn.App. 13 (1982); *Miranda* safeguards apply only when suspect's freedom of action is curtailed to degree associated with formal arrest, *State v. Harris*, 106 Wn.2d 784, 789 (1986), *State v. McWatters*, 63 Wn.App. 911 (1992), *State v. Walton*, 67 Wn.App. 127 (1992), *State v. Ferguson*, 76 Wn.App. 560, 565-8 (1995), *State v. Mahoney*, 80 Wn.App. 495 (1996), *College Place v. Staudenmaier*, 110 Wn.App. 841, 848-50 (2002), *State v. Heritage*, 152 Wn.2d 210, 217-20 (2004), *State v. Ustimenko*, 137 Wn.App. 109, 114-16 (2007), *see also: State v. D.R.*, 84 Wn.App. 832 (1997) *State v. Solomon*, 114 Wn.App. 781 (2002), *State v. Lorenz*, 152 Wn.2d 22, 36-38 (2004), *State v. Rosas-Miranda* , 176 Wn.App. 773 (2013), *see: State v. Daniels*, 124 Wn.App. 830, 845-46 (2004), 160 Wn.2d 256, 266-67 (2007); 9-0.

***State v. Stewart***, 113 Wn.2d 462 (1989)

At arraignment on robbery charge, defendant requests appointment of counsel, following which he is questioned by police, advised, and confesses to six burglaries; held: at arraignment, defendant invoked his Sixth Amendment right to counsel, which does not automatically invoke a Fifth Amendment right to counsel relative to subsequent interrogations on other matters, *State v. Stackhouse*, 90 Wn.App. 344, 353-4 (1998), *reversing State v. Stewart*, 53 Wn.App. 150 (1989); *cf.: Minnick v. Mississippi*, 112 L.Ed.2d 489 (1990); *see: State v. Greer*, 62 Wn.App. 779, 787-8 (1991), *but see: State v. Valdez*, 82 Wn.App. 294 (1996); 9-0.

***State v. Sweeney***, 56 Wn.App. 42 (1989)

Job Corps student leader informs dormitory supervisor that defendant sells drugs; supervisor previously suspected defendant due to other students entering defendant's room at unusual hours, pats down defendant, finds unidentified leaf, strip searches, finds drugs in underwear, questions defendant for 13 hours, informs defendant that things would “go easier” if he confesses to Job Corps officials rather than police, defendant confesses; held: confession to quasi-school officials in absence of *Miranda* warnings infringed on suspect's Fifth Amendment

rights and Job Corps rules, and was involuntary due to the length of questioning and the promise that it would be to suspect's advantage to confess, *State v. Gonzalez*, 46 Wn.App. 338 (1986); III.

***State v. Stone***, 56 Wn.App. 153 (1989)

In absence of *Miranda* warnings, police ask jailed defendant if he knows a certain woman and where she lives, defendant answers questions, police find woman who confesses she and defendant committed burglaries, she testifies against defendant at trial; held: because defendant's statement was not incriminating, failure to give *Miranda* warnings was harmless; if *Miranda* warnings were required, woman's testimony was so attenuated from unlawful police conduct as to dissipate taint, *State v. West*, 49 Wn.App. 166 (1987); factors to determine taint are (1) length of "road" between unlawful police conduct and witness's testimony, (2) degree of free will of witness, (3) fact that exclusion would permanently disable witness from testifying about relevant and material facts, regardless of how unrelated such testimony might be to the purpose of the original illegal" conduct; III.

***State v. Blair***, 56 Wn.App. 209 (1989)

Juvenile respondents are advised of *Miranda* warnings, make statements without express waiver; held: RCW 13.40.140(9) does not require express waiver of *Miranda* rights for juveniles; I.

***New York v. Harris***, 109 L.Ed.2d 13 (1990)

Police, with probable cause but without a warrant, unlawfully arrest suspect in his home; at station, suspect confesses; held: exclusionary rule does not bar use of statement made outside of the home even though the statement is made in the home in violation of *Payton v. New York*, 63 L.Ed.2d 639 (1980), *cf.: State v. Eserjose*, 171 Wn.2d 907 (2011), as long as police have probable cause to arrest; 5-4.

***Illinois v. Perkins***, 109 L.Ed.2d 243 (1990)

Undercover agent, placed in cell of defendant who was incarcerated on charges unrelated to the agent's investigation, elicits confession; held: *Miranda* warnings are not required when suspect is unaware that he is speaking to a law enforcement officer; 8-1.

***State v. McCullough***, 56 Wn.App. 655 (1990)

A confession purportedly made involuntary by the acts of a private citizen does not violate state or federal due process clauses, *distinguishing* *State v. Frederick*, 100 Wn.2d 550 (1983); I.

***State v. Wilkinson***, 56 Wn.App. 812 (1990)

Police, knowing driver lacked license, follow vehicle, which does not immediately pull over, with emergency lights on, observe defendant-passenger move around considerably as though trying to hide something, begins patdown of defendant-passenger, asks if he has anything sharp, defendant surrenders syringe with drugs; held: frisk did not convert traffic stop to custodial arrest, thus no *Miranda* warnings were required, *Pennsylvania v. Bruder*, 102 L.Ed.2d

172 (1988); *Berkemer v. McCarty*, 82 L.Ed.2d 317 (1984); "very brief, noncoercive, nondeceptive, single question" during the course of an investigative stop does not amount to custodial interrogation, *State v. Hensler*, 109 Wn.2d 357, 363 (1987); I.

***State v. Hutton***, 57 Wn.App. 537 (1990)

*Miranda* warnings are sufficient for purposes of CrR 3.1 where suspect is advised, "if you cannot afford an attorney, you are entitled to have one appointed by a court and to have him present before and during questioning;" police need not expressly advise that suspect would be provided a lawyer "without charge"; I.

***State v. Manchester***, 57 Wn.App. 765 (1990)

Defendant is advised of *Miranda* rights at arrest, signs rights form with false name and states he does not wish to make statement; later, officer who knew defendant re-advised him using correct name, defendant states he does not wish to make written statement [order unclear from opinion, *cf.* pp. 767 and 771], defendant responds to questions; held: defendant did not invoke Fifth Amendment right to counsel, *State v. Stewart*, 113 Wn.2d 462, 472 (1990), *Connecticut v. Barrett*, 93 L.Ed.2d 920 (1987), *but see*: *State v. Wheeler*, 108 Wn.2d 230 (1987), *see:State v. Piatnitsky*, 170 Wn.App. 195 (2012), 180 Wn.2d 407 (2014); I.

***State v. Denton***, 58 Wn.App. 251 (1990)

Defendant, in jail for robbery and having previously requested counsel, telephones detective with whom defendant was working as a victim on another unrelated matter; detective asks questions about why defendant is in jail, which defendant answers; held: because defendant could have hung up phone, he was not in custody for purposes of *Miranda* warnings, *State v. Mahoney*, 80 Wn.App. 495 (1996); although defendant was interrogated, without a subsequent waiver, after having requested counsel, defendant initiated the conversation, and therefore validly waived Fifth Amendment right to counsel, *Edwards v. Arizona*, 68 L.Ed.2d 378 (1981), *Wyrick v. Fields*, 74 L.Ed.2d 214 (1982), *Oregon v. Bradshaw*, 77 L.Ed.2d 405 (1983); I.

***State v. Royer***, 58 Wn.App. 778 (1990)

At arraignment, defendant requests and is given counsel, following which defendant is advised by police, signs a waiver, makes incriminating statements; held: after defendant's assertion, at arraignment, of Sixth Amendment right to counsel, any waiver of the defendant's right to counsel for subsequent police-initiated interrogation as to the charge pending is invalid, *Michigan v. Jackson*, 89 L.Ed.2d 631 (1986), *but see: Montejo v. Louisiana*, 173 L.Ed.2d 955 (2009), *State v. Valdez*, 82 Wn.App. 294 (1996), *cf.: State v. Stewart*, 113 Wn.2d 462 (1989), *Texas v. Cobb*, 149 L.Ed.2d 34 (2001), *State v. Gregory*, 158 Wn.2d 759, 818-20 (2006), *overruled, on other grounds, State v. W.R.*, 181 Wn.2d 757 (2014), *see: State v. Hahn*, 162 Wn.App. 885, 897-900 (2011), *rev'd, on other grounds, State v. Hahn,* 174 Wn.2d 126 (2012); II.

***Pennsylvania v. Muniz***, 110 L.Ed.2d 528 (1990)

Prior to *Miranda* warnings, arrested DUI suspect is asked date of his sixth birthday; held: whenever a suspect is asked for a response requiring him to communicate an express or implied assertion of fact or belief, the response contains a testimonial component, as suspect is confronted with the "trilemma" of truth, falsity or silence; questions about name, address, height, weight, eye color, birthdate, age, while testimonial, fall within "routine booking question" exception; suspect's statements made during "carefully scripted instructions" as to how to perform physical sobriety tests and breath test were not the product of interrogation, and are thus admissible; 5-4.

***Minnick v. Mississippi***, 112 L.Ed.2d 489 (1990)

Once an arrestee has requested counsel, s/he may not be reinterrogated in the absence of counsel even if suspect has consulted with counsel, unless accused initiates the conversation, *see:* *State v. Warness*, 77 Wn.App. 636 (1995); 6-2.

***Arizona v. Fulminante***, 113 L.Ed.2d 302 (1991)

Federal informant in prison offers to protect defendant from other prisoners in exchange for confession; held: credible threat of physical violence motivated confession, thus involuntary, *Blackburn v. Alabama*, 4 L.Ed.2d 242 (1960), *Payne v. Arkansas*, 2 L.Ed.2d 975 (1958), *cf.: State v. Rafay*, 168 Wn.App. 734, 755-66 (2012); coerced confession may be harmless error.

***McNeil v. Wisconsin***, 115 L.Ed.2d 158 (1991)

Defendant is arrested for robbery, advised of *Miranda* warnings, does not request counsel but refuses to answer questions, is later arraigned with counsel, police later re-advise and question defendant about unrelated murder, defendant confesses; held: request for counsel at arraignment is offense specific under the Sixth Amendment, *Michigan v. Jackson*, 89 L.Ed.2d 631 (1986), and does not preclude police initiated interrogation regarding other matters absent a Fifth Amendment demand for counsel, *Edwards v. Arizona*, 68 L.Ed.2d 378 (1981), *Texas v. Cobb*, 149 L.Ed.2d 34 (2001), *State v. Gregory*, 158 Wn.2d 759, 818-20 (2006), *overruled, on other grounds, State v. W.R.*, 181 Wn.2d 757 (2014), *State v. Hahn*, 162 Wn.App. 885, 897-900 (2011), *rev'd, on other grounds, State v. Hahn,* 174 Wn.2d 126 (2012); 6-3.

***State v. Earls***, 116 Wn.2d 364 (1991)

CONST. Art. 1, § 9 is coextensive with, not broader than, protection of the Fifth Amendment, *State v. Moore*, 79 Wn.2d 51 (1971), *State v. Russell*, 125 Wn.2d 24, 55-62 (1994); *State v. Horton*, 195 Wn.App. 202 (2016), where an unretained attorney telephoned police station during interrogation and asked to leave a message for defendant to call him, *Moran v. Burbine*, 89 L.Ed.2d 410 (1986), and where defendant, after *Miranda* rights, agreed to confess to murder in exchange for a promise not to charge aggravated murder, then statement is voluntary and admissible, *State v. Greer*, *62 Wn.App.* 779 (1991), *State v. Corn*, 95 Wn.App. 41, 56-64 (1999); 8-1.

***State v. Thompson***, 60 Wn.App. 662 (1991)

Statement to police that defendant "should not talk" or that the next time he told his story would be in front of a judge after counsel had cut him a deal was not a request for counsel, *State v. Bledsoe*, 33 Wn.App. 720 (1983); II.

***State v. Reuben***, 62 Wn.App. 620 (1991)

Defendant is advised of rights, expresses expletive to trooper and turns head away, shortly thereafter, defendant is questioned by detective, makes statement; held: expletive plus turning head is assertion of right to remain silent; while there is no *per se* proscription on further questioning, resumption after a very short respite, about the same incident and without new warnings, violates the *Miranda* guidelines, *Michigan v. Mosley*, 46 L.Ed.2d 313 (1975), *cf.: State v. Brown*, 158 Wn.App. 49, 58-62 (2010), *State v. Chambers*, 197 Wn.App.. 96, 128-35 (2016), harmless, *Arizona v. Fulminante*, 113 L.Ed.2d 302 (1991); III.

***State v. Cervantes***, 62 Wn.App. 695 (1991)

Police use of potential co-defendant as interpreter to translate *Miranda* warnings, waiver and interrogation violates due process; III.

***State v. Greer***, 62 Wn.App. 779 (1991)

Request for counsel to a public defense indigency screener is insufficient to require termination of interrogation, *Edwards v. Arizona*, 68 L.Ed.2d 378 (1981), as it was not expressed to law enforcement personnel, *McNeil v. Wisconsin*, 115 L.Ed.2d 158, 169 (1991), *State v. Stewart*, 113 Wn.2d 462 (1989); jail personnel and police conspire to keep suspect and counsel apart, police refuse counsel's request to see suspect or advise him she was present, suspect confesses after *Miranda* waiver; held: *Miranda* advice and waiver is dispositive of Fifth Amendment and CONST. Art. 1, § 3 claims, *Moran v. Burbine*, 89 L.Ed.2d 410 (1986), *State v. Earls*, 116 Wn.2d 364 (1991), *State v. Stackhouse*, 90 Wn.App. 344, 353-4 (1998); while police deliberately thwarted CrR 3.1 right to counsel, harmless here; I.

***State v. Spurgeon***, 63 Wn.App. 503 (1991)

Failure to tape-record a custodial interrogation does not violate state due process clause, *State v. Turner*, 145 Wn.App. 899 (2008); I.

***State v. Allen***, 63 Wn.App. 623 (1991)

Juvenile is advised of *Miranda* rights, is told she is not a suspect in anything and is considered only a victim, she confesses to a crime and is charged; held: respondent's waiver was involuntary as she was led to believe sole purpose of questioning was as a victim, and this belief was material to her decision to talk to police; III.

***State v. Post***, 118 Wn.2d 596 (1992)

Work release inmate being interviewed by prison psychologist to determine whether inmate should stay in work release is not in custody for purposes of *Miranda* warnings when those statements are to be used at a sentencing on a subsequent offense ten years later; an inmate is in custody for *Miranda* analysis where state officials place further limitations on the prisoner's

already limited freedom of movement, *reversing* State v. Post, 59 Wn.App. 389 (1990), *see:* State v. Everybodytalksabout, 161 Wn.2d 702 (2007) *cf.*: State v. LaRue, 19 Wn.App. 841 (1978), ; because no criminal prosecution or appeal was pending during interview, *distinguishing* State v. Sargent, 111 Wn.2d 641 (1988), and no court ordered the interview, *distinguishing* Estelle v. Smith, 68 L.Ed.2d 359 (1981), no interrogation occurred; *see:* State v. Willis, 64 Wn.App. 634 (1992), *cf.:* State v. Nason, 96 Wn.App. 686, 692-95 (1999), State v. Bankes,114 Wn.App. 280 (2003); because questioning by psychologist was confined to criminal conduct for which defendant had been sentenced, statements were not incriminating; no evidence or law suggests that defendant would lose work release privilege if he refused to answer, thus no penalty would be imposed, *see:* Minnesota v. Murphy, 79 L.Ed.2d 409 (1984), McKune v. Lile, 153 L.Ed.2d 47 (2002); where psychologist advised defendant that interview was not confidential, and only one interview occurred, then the psychologist-patient privilege, RCW 18.83.110, is inapplicable, as defendant's subjective belief that he might receive treatment from psychologist was unrealistic, *distinguishing* State v. Sullivan, 60 Wn.2d 214, 222-26 (1962); *see:* State v. Warner, 125 Wn.2d 876 (1995), State v. King, 130 Wn.2d 517, 531-3 (1996); 9-0.

***State v. McWatters***, 63 Wn.App. 911 (1992)

Absent custodial arrest and interrogation, *Miranda* warnings need not be given, State v. Heritage, 152 Wn.2d 210 (2004), *State v. Tien Thuy Ho,* 8 Wn.App.2d 132 (2019); whether officer had probable cause to arrest is not circumstance to be considered in determining whether defendant was in custody, State v. Short, 113 Wn.2d 35 (1989), State v. Walton, 67 Wn.App. 127 (1992), State v. Fergusen, 76 Wn.App. 560, 565-8 (1995), Stansbury v. California, 128 L.Ed.2d 1293 (1994), State v. Warness, 77 Wn.App. 636, 641-2 (1995), State v. Lorenz, 152 Wn.2d 22, 36-38 (2004), State v. Ustimenko, 137 Wn.App. 109, 114-16 (2007), *cf.:* State v. Lewis, 32 Wn.App. 13 (1982), State v. Solomon, 114 Wn.App. 781 (2002), State v. Daniels, 124 Wn.App. 830, 845-46 (2004), 160 Wn.2d 256, 266-67 (2007); III.

***State v. Walton***, 64 Wn.App. 410 (1992)

Asking address during booking process is not interrogation for purposes of *Miranda*, even if answer is used to establish constructive possession at trial, State v. Wheeler, 108 Wn.2d 230 (1987), only if agent should have reasonably known information sought was directly relevant to offense will inquiry be subject to scrutiny, Pers. Restraint of Pirtle, 136 Wn.2d 467, 486 (1999), *see:* State v. Denney, 152 Wn.App. 665 (2009); III.

***State v. Webb***, 64 Wn.App. 480 (1992)

After defendant invokes right to counsel, he asks police if "all this is necessary," officer responds, "you're damn right this is necessary, you vandalized [an] apartment," defendant responds, "but the stuff I damaged was mine too;" held: officer could not have known that statement would elicit incriminating response, thus not functional equivalent of interrogation, Rhode Island v. Innis, 64 L.Ed.2d 297 (1980), State v. Breedlove, 79 Wn.App. 101, 112-13 (1995), *see: Pers. Restraint of Cross,* 180 Wn.2d 664, 682-90 (2014); I.

***State v. Willis***, 64 Wn.App. 634 (1992)

Probation officer's post-arrest, pre-trial interview of jailed defendant must be preceded by *Miranda* warnings, *State v. Sargent*, 111 Wn.2d 641 (1988), *Fare v. Michael C.*, 61 L.Ed.2d 197 (1979), *State v. Everybodytalksabout*, 161 Wn.2d 702 (2007), *distinguishing State v. Post*, 118 Wn.2d 596 (1992); III.

***State v. Richmond***, 65 Wn.App. 541 (1992)

Police, responding to report of stabbing, arrive at address, hear woman scream, knock, force door open and enter, observe defendant strike a woman, pull gun and order defendant to freeze, ask defendant and woman who called police, defendant points down hall, police find stabbing victim; held: defendant was in custody when weapon was drawn, questions were addressed to both persons in apartment, officer would not have known questions were reasonably likely to elicit an incriminating response, nor do questions reflect a measure of compulsion beyond that inherent in custody, thus *Miranda* warnings were not required, *see: State v. Lane*, 77 Wn.2d 860 (1970), *New York v. Quarles*, 81 L.Ed.2d 550 (1984), *State v. Birnel*, 89 Wn.App. 459 (1998), *State v. Finch*, 137 Wn.2d 792, 825-30 (1999), *State v. Spotted Elk*, 109 Wn.App. 253 (2001); I.

***State v. Putman***, 65 Wn.App. 606 (1992)

Physical evidence derived from a voluntary confession given without *Miranda* warnings need not be suppressed absent a direct Fifth Amendment violation or actual coercion, *State v. Wethered*, 110 Wn.2d 466, 475 (1988), *State v. Russell*, 125 Wn.2d 24, 55-62 (1994), *United States v. Patane*, 159 L.Ed.2d 667 (2004); police promise to talk to prosecutor for defendant does not amount to implied promise, *see: State v. Gonzales*, 46 Wn.App. 388, 401 (1986), *State v. Riley*, 19 Wn.App. 289, 297 (1978); modifies *State v. Putman*, 61 Wn.App. 450 (1991); III.

***State v. Walton***, 67 Wn.App. 127 (1992)

Police, investigating a report of a juvenile party, approach suspect, detect odor of alcohol, ask for identification which shows he was 17, ask if he had anything to drink, to which suspect answers "beer," cite for minor in possession; at suppression hearing, officer testifies that if respondent had attempted to leave, he probably would have been arrested; held: the initial detention was a *Terry* stop, not a custodial arrest; the fact that a suspect is not "free to leave" does not make the stop a formal arrest for purposes of *Miranda*, *State v. Cunningham*, 116 Wn.App. 219, 226-30 (2003), *State v. Heritage*, 152 Wn.2d 210 (2004), *State v. Adams*, 138 Wn.App. 36, 45 (2007), *see: Berkemer v. McCarty*, 82 L.Ed.2d 317 (1984); uncommunicated plan of officer to arrest did not lead respondent to believe he was under arrest and in custody, *Berkemer*, *supra*, *State v. Hensler*, 109 Wn.2d 357, 362-3 (1987), *State v. Short*, 113 Wn.2d 35 (1989), *State v. Hamilton*, 47 Wn.App. 15 (1987), *State v. McWatters*, 63 Wn.App. 911 (1992), *State v. Warness*, 77 Wn.App. 636, 641-2 (1995), *State v. Solomon*, 114 Wn.App. 781 (2002), *State v. Ustimenko*, 137 Wn.App. 109, 114-16 (2007), *State v. Tien Thuy Ho*, 8 Wn.App.2d 132 (2019), *but see: State v. Lewis*, 32 Wn.App. 13 (1982), *State v. Ferguson*, 76 Wn.App. 560, 565-8 (1995); fact that questions were designed to elicit incriminating response does not require

*Miranda* warnings, where questioning was noncoercive, routine, not deceptive, *cf.:* *State v. Daniels*, 67 Wn.App. 127 (1992); I.

***State v. Greve***, 67 Wn.App. 166 (1992)

Evidence suppressed for *Miranda* violations may be admitted to impeach a defendant's testimony where the police misconduct is not of such a degree that the previously suppressed statement is inherently unreliable, *Riddell v. Rhay*, 79 Wn.2d 248, 253 (1971), *State v. Hubbard*, 103 Wn.2d 570 (1985), *Walder v. United States*, 98 L.Ed. 503 (1954), *Harris v. New York*, 28 L.Ed.2d 1 (1971), *Kansas v. Ventris*, 173 L.Ed.2d 801 (2009); II.

***State v. Allenby***, 68 Wn.App. 657 (1992)

Where defendant confesses prior to advice of *Miranda* rights, then confesses again after advice, subsequent statement is admissible as long as both statements were voluntary, *State v. Baruso*, 72 Wn.App. 603, 609-12 (1993), *see also: Fellers v. United States*, 157 L.Ed.2d 1016, 1023 (2004), *but see: Missouri v. Seibert*, 159 L.Ed.2d 643 (2004), *State v. Hickman*, 157 Wn.App. 767 (2010); I.

***State v. Furman***, 122 Wn.2d 440 (1993)

Police lying to defendant about strength of state's evidence does not render an otherwise valid confession involuntary, *Frazier v. Cupp*, 22 L.Ed.2d 684 (1969), *State v. Braun*, 82 Wn.2d 157, 162 (1973), *State v. Burkins*, 94 Wn.App. 677, 694-96 (1999); while withholding food and water or offering food or water as an inducement to confess may make a confession involuntary, *Brooks v. Florida*, 19 L.Ed.2d 643 (1967), here offering food as an act of courtesy does not invalidate confession; 8-0.

***State v. Teller***, 72 Wn.App. 49 (1993)

DUI suspect is advised, *inter alia*, "if you cannot afford an attorney you are entitled to have one appointed by the court," argues she should have been told she had right to public defender before she took breath test; held: warnings were adequate under constitution, *Duckworth v. Eagan*, 106 L.Ed.2d 166 (1989), *California v. Prysock*, 69 L.Ed.2d 696 (1981), *Florida v. Powell*, 559 U.S. 50, 175 L.Ed.2d 1009 (2010), *distinguishing* *State v. Creach*, 77 Wn.2d 194, 198 (1969) and *State v. Tetzlaff*, 75 Wn.2d 649 (1969), and CrRLJ 3.1, *State v. Wurm*, 32 Wn.App. 258 (1982), *aff'd sub nom.* *State ex rel. Juckett v. Evergreen Dist. Court*, 100 Wn.2d 824 (1984), *State v. Halbakken*, 30 Wn.App. 834, 836 (1981), *see:* *State v. Templeton*, 148 Wn.2d 193 (2002), *Pers. Restraint of Woods*, 154 Wn.2d 400, 434-35 (2005); III.

***Stansbury v. California***, 128 L.Ed.2d 293 (1994)

Police ask witness to come to station and question him absent *Miranda*, during questioning police determine he is a suspect, continue questioning; held: police belief that interrogation is custodial or that person being questioned is a suspect are factors in determining whether the interrogation is custodial only if communicated to the suspect and only if a reasonable person would perceive that he or she was not free to leave; even a clear statement that

the person is a prime suspect is not, in itself, dispositive of the custody issue if the suspect is free to leave; *accord:* *State v. Warness*, 77 Wn.App. 636, 641-2 (1995), *State v. Ustimenko*, 137 Wn.App. 109, 114-16 (2007), *see:* *State v. D.R.*, 84 Wn.App. 832 (1997), *State v. Grogan*, 147 Wn.App. 511, 514-19 (2008), *see: State v. Rosas-Miranda* , 176 Wn.App. 773 (2013), *State v. Tien Thuy Ho*, 8 Wn.App.2d 132 (2019), *cf.:* *State v. Daniels*, 124 Wn.App. 830, 845-46 (2004), 160 Wn.2d 256, 266-67 (2007); 9-0.

***Davis v. United States***, 129 L.Ed.2d 362 (1994)

Following *Miranda* warnings, defendant states, "maybe I should talk to a lawyer," police continue interrogation, defendant confesses; held: an ambiguous or equivocal reference to counsel is not a request for counsel and thus there are not grounds for suppression, *State v. Gasteazoro-Paniagua*, 173 Wn.App. 751 (2013), (9-0), *State v. Copeland*, 89 Wn.App. 492, 499-502 (1998), *State v. Walker*, 129 Wn.App. 258, 273-76 (2005), *State v. Radcliffe*, 164 Wn.2d 900 (2008), *State v. Piatnitsky*, 170 Wn.App. 195 (2012), 180 Wn.2d 407 (2014), *State v. Herron*, 177 Wn.App. 96, 102-03 (2014), , *affirmed, on different grounds*, 183 Wn.2d 737 (2015); police may but need not clarify whether suspect wanted a lawyer (5-4), *distinguishing* *Smith v. Illinois*, 83 L.Ed.2d 488 (1984), *see: State v. Aten*, 130 Wn.2d 640, 663-6 (1996).

***State v. Russell***, 125 Wn.2d 24, 55-62 (1994)

Arrested suspect is questioned absent *Miranda* warnings, makes a statement giving names of witnesses from whom police obtain inculpatory information; held: while defendant's statement itself is not admissible, the fruit of that statement is admissible where the statement was not coerced, *State v. Wethered*, 110 Wn.2d 466, 473-5 (1988), *State v. Putman*, 61 Wn.App. 450, 456 (1991), *adhered to on reconsideration*, 65 Wn.App. 606 (1992), *see:* *United States v. Patane*, 159 L.Ed.2d 667 (2004); in this context, CONST. art. 1 § 9 is coextensive with United States Constitution, *see:* *State v. Earls*, 116 Wn.2d 364 (1991); 9-0.

***State v. Schatmeier***, 72 Wn.App. 711 (1994)

Following DUI arrest, police advise 16 and 17 year old suspects, *inter alia*, that any statement they make may be used against them in juvenile court unless declined; district court has exclusive jurisdiction in criminal traffic cases, RCW 13.04.030(5); held: while advice was inaccurate, warnings were sufficient to apprise suspects of the right to remain silent and anything they say could be used in court, thus suppression reversed, *Dutil v. State*, 93 Wn.2d 84, 90 (1980); III.

***State v. Thompson***, 73 Wn.App. 122 (1994)

At omnibus hearing, prosecutor asserts that state will not offer any statements, so no CrR 3.5 hearing is necessary; immediately prior to trial, prosecutor states that if defendant testifies, that may change; at trial, defendant testifies, prosecutor cross-examines with voluntary statement inconsistent with his testimony, court holds CrR 3.5 hearing, admits statement; held: while a party may waive an issue by failing to give notice of an issue, CrR 4.5(d), state's ambiguous statement at omnibus hearing was clarified later, defense failed to move, *in limine*, to preclude cross-examination, thus there was no waiver by stipulation, at 126-7, 129 n. 6; CrR 3.5

hearing may be held during trial, particularly where state is only offering statements to impeach, *State v. Taylor*, 30 Wn.App. 89, 92-3 (1981); II.

***State v. Lopez***, 74 Wn.App. 264, 269-71 (1994)

Spanish-speaking defendant makes a statement in response to an English question, which is suppressed in state's case-in-chief for *Miranda* violation, but is admitted at trial, defendant claims it is involuntary as he didn't understand question; held: where the impeachment value of a prior inconsistent statement depends upon the disputed factual issue of whether a defendant understood English, that factual issue is properly submitted to the jury; language difficulty is just one factor to be considered in determining voluntariness of a statement; I.

***State v. Pejsa***, 75 Wn.App. 139, 146-9 (1994)

Police questioning of a barricaded person does not constitute custodial interrogation requiring *Miranda* warnings, *see: State v. Mahoney*, 80 Wn.App. 495 (1996), *State v. Finch*, 137 Wn.2d 792, 825-30 (1999); II.

***United States v. Mezzanatto***, 130 L.Ed.2d 697 (1995)

Defendant and counsel meet with prosecutor in attempt to cooperate, prosecutor states that defendant must agree that any statements made during meeting could be used to impeach, defendant agrees, no deal is reached, defendant testifies and is impeached; held: Fed. R. Evid. 410 excluding statements made during plea negotiations may be waived; 7-2.

***State v. Lozano***, 76 Wn.App. 116 (1994)

Community Corrections Officer (CCO) arrests defendant, asks if she has anything, she produces heroin, trial court suppresses defendant's act of placing the heroin on desk, but admits heroin itself, defendant is convicted on circumstantial evidence of CCO testifying that no heroin was on desk before defendant came in, finding heroin after defendant occupied room; held: the act of pulling the heroin from pocket preceded *Miranda* warnings, defendant was under arrest, it was testimonial, thus was properly suppressed, *State v. Dennis*, 16 Wn.App. 417, 423-4 (1976), however *Miranda* exclusionary rule does not require exclusion of the fruits of a *Miranda* violation absent actual coercion, *United States v. Patane*, 159 L.Ed.2d 667 (2004), *State v. Wethered*, 110 Wn.2d 466, 473 (1988), *Oregon v. Elstad*, 84 L.Ed.2d 222 (1985), *State v. Spotted Elk*, 109 Wn.App. 253 (2001); 2-1, III.

***State v. Warner***, 125 Wn.2d 876 (1995)

Juvenile sex offender, in state institution, while undergoing sex offender treatment, confesses to therapists to several offenses, is charged as an adult after he turns 18; held: admissions in therapy because defendant felt cooperation would lead to more lenient treatment or avoid reprisals is not the type of compulsion contemplated by *Miranda, see: State v. Bankes*, 114 Wn.App. 280 (2003), *State v. Everybodytalksabout*, 161 Wn.2d 702 (2007); psychological compulsion is not enough to establish custody for *Miranda* purposes, *State v. Post*, 118 Wn.2d 596, 605-7 (1992); where counselors make express or implied assertions that exercise of Fifth Amendment privilege will result in imposition of a penalty, then statements must be suppressed,

*Minnesota v. Murphy*, 79 L.Ed.2d 409 (1984), *State v. Post*, *supra*, at 605, *cf.: McKune v. Lile*, 153 L.Ed.2d 47 (2002), remanded for trial court to determine if disclosures were compelled by threat of penalty and, if so, was taint attenuated, *Nardone v. United States*, 84 L.Ed. 307 (1939), *Silverthorne Lumber Co. v. United States*, 64 L.Ed.2d 319 (1920), or would evidence have been inevitably discovered, *Nix v. Williams*, 81 L.Ed.2d 377 (1984), *see: State v. Richman*, 85 Wn.App. 568 (1997); 9-0.

***State v. Warness***, 77 Wn.App. 636 (1995)

Police advise suspect, in suspect's home, that he is not under arrest and does not have to speak, suspect states he wants counsel, a month later, suspect is arrested, advised of *Miranda* rights, confesses; held: Fifth Amendment right to counsel cannot be invoked by a person who is not in custody, thus police need not honor defendant's pre-arrest assertion, and may interrogate, after re-advice, following arrest, *distinguishing Edwards v. Arizona*, 68 L.Ed.2d 378 (1981), *Minnick v. Mississippi*, 112 L.Ed.2d 489 (1990), *cf.: State v. Jones*, 102 Wn.App. 89, 95-97 (2000), *see: Maryland v. Shatzer*, 539 U.S. 98, 175 L.Ed.2d 1045 (2010); I.

***State v. Sengxay***, 80 Wn.App. 11, 14-15 (1995)

At CrR 3.5 hearing, trial court finds that defendant made a statement about getting an attorney, then reinitiated contact with police, thus statements are admissible; on appeal, Division II holds that because a suspect's right to consult with counsel is not a constitutional right required by the Fifth Amendment, *Davis v. United States*, 129 L.Ed.2d 362, 371 (1994), and since defendant "did not object on the record to the admission of his incriminatory statements, this issue was not preserved for appeal." *State v. Scott*, 110 Wn.2d 682, 688 (1988), *but see: State v. Williams*, 91 Wn.App. 344 (1998); III.

***State v. Valdez***, 82 Wn.App. 294 (1996)

At rape defendant's "preliminary hearing," (apparently before charges filed), defendant is asked by judge if he wants a lawyer, defendant nods, court appoints counsel, later defendant is advised of *Miranda* warnings by police, defendant waives, agrees to provide bodily fluid samples, police return, defendant provides a statement that he wrote containing admission of intercourse; held: once a defendant asserts the right to counsel in court prior to police initiating "communication," at 297, the Sixth Amendment requires that the request for counsel is imputed to all state actors and establishes a request to have counsel present during interrogation on the pending charge, *Michigan v. Jackson*, 89 L.Ed.2d 631 (1986), *overruled by Montejo v. Louisiana*, 173 L.Ed.2d. 955 (2009), *State v. Royer*, 58 Wn.App. 778 (1990), *but see: State v. Stewart*, 113 Wn.2d 462 (1989), *Texas v. Cobb*, 149 L.Ed.2d 321 (2001), *State v. Gregory*, 158 Wn.2d 759, 818-20 (2006), *overruled, on other grounds, State v. W.R.*, 181 Wn.2d 757 (2014), *Maryland v. Shatzer*, 559 U.S. 98, 175 L.Ed.2d 1045 (2010), *see: State v. Hahn*, 162 Wn.App. 885, 897-900 (2011), *rev'd, on other grounds, State v. Hahn,* 174 Wn.2d 126 (2012); III.

***State v. King***, 130 Wn.2d 517, 523-29 (1996)

Following guilty plea, defendant is sentenced to sex offender treatment program, RCW 71.06, admits to numerous rapes in group therapy, upon revocation ISRB uses admissions to set minimum term; held: Fifth Amendment is inapplicable to probation proceedings where required

answers are not used in a separate criminal proceeding, *Minnesota v. Murphy*, 79 L.Ed.2d 409 (1984), setting of minimum term is not part of a criminal prosecution, full panoply of rights do not apply, *In re Whitesel*, 111 Wn.2d 621, 630-1 (1988), *In re Sinka*, 92 Wn.2d 555, 566 (1979), *see: Pers. Restraint of Ecklund*, 139 Wn.2d 16 (1999), *McKune v. Lile*, 153 L.Ed.2d 47 (2002), *State v. Powell*, 193 Wn.App. 112 (2016); *affirms State v. King*, 78 Wn.App. 391 (1995); 7-2.

***State v. D.R.***, 84 Wn.App. 832 (1997)

14-year old is summoned to principal's office, told by plainclothed detective that he did not have to answer questions, but not advised of *Miranda* rights, questioned and makes inculpatory statement; held: considering respondent's youth, naturally coercive nature of school and principal's office environment, accusatory nature of the interrogation, *State v. Everybodytalksabout*, 161 Wn.2d 702 (2007), and fact that respondent was not told he was free to go, he was in custody, thus trial court erred in admitting statements absent *Miranda* warnings, as a 14-year old in respondent's position would have reasonably supposed his freedom of action was curtailed to a degree associated with formal arrest, *Berkemer v. McCarty*, 82 L.Ed.2d 317 (1984), *State v. Short*, 113 Wn.2d 35, 41 (1989), *State v. Sargent*, 111 Wn.2d 641, 649 (1988), *State v. Daniels*, 124 Wn.App. 830, 845-46 (2004), 160 Wn.2d 256, 266-67 (2007), *see also: State v. Rosas-Miranda* , 176 Wn.App. 773 (2013), *but see: State v. Heritage*, 152 Wn.2d 210 (2004), *State v. Solomon*, 114 Wn.App. 781 (2002), *State v. S.J.W.*, 149 Wn.App. 912, 927-29 (2009), *aff'd, on other grounds,* 170 Wn.2d 92 (2010); III.

***State v. Medlock***, 86 Wn.App. 89 (1997)

Defendant confesses to Washington murder to Canadian police, after advice of Charter Rights, detaining him for mental health evaluation, is charged in United States with murder, later confesses to Washington police, following *Miranda* warnings but before being informed he had been charged; held: foreign police are not required to comply with United States laws unless acting as agents of United States police as long as foreign police comply with foreign law, *State v. Johnson*, 75 Wn.App. 692, 700 (1994), *State v. Vickers*, 24 Wn.App. 843 (1979), evidence seized by one law enforcement agency can be used by another, *In re Pers. Restraint of Teddington*, 116 Wn.2d 761, 774-5 (1991); under United States and Washington constitutions, police are not obliged to advise a defendant that formal charges have been filed as long as defendant is aware of his rights and waives them, *Patterson v. Illinois*, 101 L.Ed.2d 641 (1988); III.

***State v. Brown***, 132 Wn.2d 529 (1997)

Advice that suspect has right to counsel and right to have that attorney present during questioning is sufficient to advise of right to counsel before and during questioning, at 579-83, *State v. Koopman*, 68 Wn.App. 514, 520 (1992), *Duckworth v. Egan*, 106 L.Ed.2d 166 (1989), *see: State v. Mayer*, 184 Wn.2d 548 (2015); 6-3.

***State v. Broadaway***, 133 Wn.2d 118 (1997)

Review of findings of fact following CrR 3.5 hearings will be based upon substantial evidence (facts will be verities if unchallenged) rather than by independent review, *State v. Hill*, 123 Wn.2d 641 (1994), at , 129-31; test for **voluntariness** is whether, under totality of circumstances, the confession is coerced, *Arizona v. Fulminante*, 113 L.Ed.2d 302 (1991); if a

promise is made, court must determine whether there is a causal relationship between the promise and the confession, at 131-33, *State v. Hughes*, 118 Wn.App. 713, 721-24 (2003), *State v. Trout*, 125 Wn.App. 403, 414-16 (2005), *State v. L.U.*, 165 Wn.2d 95 (2008); 9-0.

***State v. Dods***, 87 Wn.App. 312 (1997)

Pursuant to a court order of community supervision, defendant takes polygraph without *Miranda* warnings, admits to sex offense and identifies victim, later confesses after *Miranda* warnings; held: initial confession, while inadmissible, *Estelle v. Smith*, 68 L.Ed.2d 359 (1981), was not coerced, thus second confession is admissible, *Oregon v. Elstad*, 84 L.Ed.2d 222 (1985), *but see: Missouri v. Seibert*, 159 L.Ed.2d 643 (2004), *State v. Hickman*, 157 Wn.App. 767 (2010), fruits doctrine does not extend to suppress the testimony of a witness whose identity was discovered as the result of a statement taken without benefit of *Miranda* warnings, *Michigan v. Tucker*, 41 L.Ed.2d 182 (1974); II.

***State v. Kirkpatrick***, 89 Wn.App. 407 (1997)

After *Miranda* warnings, defendant requests counsel, police cease interrogation but do not contact a lawyer, defendant later waives Fifth Amendment right to counsel and confesses; held: pursuant to CrR 3.1(c)(2), police are obliged to make reasonable efforts to contact an attorney "at the earliest opportunity," or state must show why such efforts could not have been made, *State v. Scherf,* 192 Wn.2d 350 (2018), or that defendant knowingly, intelligently and voluntarily waived right to counsel, *Bellevue v. Ohlson*, 60 Wn.App. 485, 487 (1991), *Seattle v. Wakenight*, 24 Wn.App. 48, 49-50 (1979), *State v. Pierce*, 169 Wn.App. 533, 544-51 (2012), distinguishing *State v. Wade*, 44 Wn.App. 154 (1986), *overruled, on other grounds, Pers. Restraint of Carrier*, 173 Wn.2d 791 (2012), harmless here; II.

***State v. Copeland***, 89 Wn.App. 492, 499-502 (1998)

Defendant, arrested in Virginia, is advised of *Miranda* rights, states he will need an appointed lawyer as he can't afford one, police advise that when they return to Washington he will get a court-appointed lawyer, inquire if he wants one now or is willing to speak without one, defendant says he will speak, makes inconsistent statements; held: absent unambiguous invocation of right to counsel, police may further question to clarify equivocation, *Davis v. United States*, 129 L.Ed.2d 362 (1994), *State v. Quillin*, 49 Wn.App. 155, 159 (1987), *State v. Lewis*, 32 Wn.App. 13 (1982), *State v. Walker*, 129 Wn.App. 258, 273-76 (2005), *State v. Radcliffe*, 164 Wn.2d 900 (2008), *State v. Herron*, 177 Wn.App. 96 (2014), *affirmed, on different grounds*, 183 Wn.2d 737 (2015), *see: State v. Jones*, 102 Wn.App. 89, 95-97 (2000), distinguishing *State v. Chapman*, 84 Wn.2d 373 (1974), *State v. Grieb*, 52 Wn.App. 573 (1988); II.

***State v. Johnson***, 90 Wn.App. 54, 63-7 (1998)

Omnibus application states general nature of defense is "general denial and/or self-defense," four days before trial defense declares alibi with witnesses, court permits, as discovery sanction, state to impeach alibi witnesses with defense omnibus declaration; held: court may compel pretrial disclosure of general nature of defense because it must ultimately come to light, *State v. Nelson*, 14 Wn.App. 658, 664-7 (1975), CrR 4.7(b)(1), but because it does compel

testimonial information, its use as substantive evidence violates Fifth Amendment, *State v. Johnson*, 27 Wn.App. 73- 75-6 (1980), *but see: State v. Acosta*, 34 Wn.App. 387, 391-2 (1983, *rev'd on other grounds,* 101 Wn.2d 612 (1984), *State v. Dault*, 19 Wn.App. 709, 716-18 (1978); witnesses cannot be impeached by statements of others for which they are not responsible and which have not been approved by them, *State v. Williams*, 79 Wn.App. 21, 27 (1995), thus substantive use of the omnibus order was improper; further, pleadings of an alternative nature are directed primarily to giving notice and lack the essential character of an admission, *Williams, supra.*, at 29; fact that defendant signed the order does not make it admissible; II.

***State v. O'Neill***, 91 Wn.App. 978, 991-92 (1998)

Defendant is arrested for DUI, is not advised of *Miranda* rights, is solicited to and agrees to pay a bribe to the officer; held: in seeking bribe, officer was not acting in official capacity, exclusionary rule is inapplicable where officer is a participant in the crime; *cf.: State v. Miller*, 35 Wn.App. 567 (1983), *State v. Short*, 113 Wn.2d 35 (1989); I.

***State v. Williams***, 137 Wn.2d 746 (1999)

Failure of court to advise defendant of right to testify or not, CrR 3.5(b), is not a constitutional error, thus should not be considered for the first time on appeal, reversing *State v. Williams*, 91 Wn.App. 344 (1998); 9-0.

***State v. Finch***, 137 Wn.2d 792 (1999)

A statement of defendant to a third party that is self-serving and offered by the defense is inadmissible hearsay unless it meets some exception to the hearsay rule, at 824-25, *State v. Bennett*, 20 Wn.App. 783, 787 (1978), *State v. Stubsjoen*, 48 Wn.App. 139 (1987), *State v. Johnson*, 60 Wn.2d 21, 31 (1962); police have house surrounded, negotiating for defendant's surrender, question defendant without *Miranda* warnings, held: **public safety exception**: where an objectively reasonable need to protect police or public from immediate danger exists, *Miranda* requirement is inapplicable, at 825-30, *New York v. Quarles*, 81 L.Ed.2d 550 (1984), *see also: State v. Pejsa*, 75 Wn.App. 139, 146-49 (1994); 7-2.

***State v. Johnson***, 94 Wn.App. 882, 897-98 (1999)

Where defendant is read and understands his *Miranda* rights, is not read the waiver but volunteers information, trial court may find a knowing and intelligent waiver, *State v. Gross*, 23 Wn.App. 319, 324 (1979), *State v. Terrovona*, 105 Wn.2d 632 (1986), *Berghuis v. Thompkins*, 560 U.S. 370, 176 L.Ed.2d 1098 (2010); I.

***State v. Jacobsen***, 95 Wn.App. 967, 972-77 (1999)

Court orders out-of-custody juvenile to obtain psychosexual evaluation with polygraph testing prior to disposition; held: although respondent was ordered to attend the evaluation, he was free to go, was not interrogated by a state agent, *see: State v. Warner*, 125 Wn.2d 876, 885-86 (1995), thus need not have been advised of *Miranda* rights, respondent waived Fifth Amendment rights by failing to assert them, *State v. N.B.*, 127 Wn.App. 776, 780-82 (2005), *see: State v. Escoto*, 108 Wn.2d 1, 6 (1987), *Oregon v. Mathiasen*, 50 L.Ed.2d 714 (1977), *Minnesota v. Murphy*, 79 L.Ed.2d 409 (1984), *State v. Sargent*, 111 Wn.2d 641 (1988); II.

***State v. Parra***, 96 Wn.App. 95, 99-100 (1999)

Defendant is advised of *Miranda* rights, refuses to sign waiver but states he's willing to talk to police and that he had once asked police for an attorney but police refused, detective tells him if he wants a lawyer, all he has to do is ask, defendant does not ask, confesses; held: refusal to sign waiver by itself is not dispositive, from totality of circumstances, trial court's finding that defendant waived was not clearly erroneous, *State v. Athan*, 160 Wn.2d 354, 379-81 (2007), distinguishing *State v. Grieb*, 52 Wn.App. 573 (1988); I.

***State v. Nason***, 96 Wn.App. 686, 692-95 (1999)

Defendant, in jail on property crimes, is interviewed by CPS investigator without *Miranda* warnings; held: CPS worker is a state agent for purposes of *Miranda*, harmless here; III.

***Dickerson v. United States***, 147 L.Ed.2d 405 (2000)

*Miranda v. Arizona* is a constitutional decision which cannot be overruled by Congress; 7-2.

***State v. Jones***, 102 Wn.App. 89, 95-97 (2000)

Following initial arrest, suspect is advised and says he "might want to talk to a lawyer now," police do not clarify equivocal request, release suspect, re-arrest for same crime three weeks later, re-advise of *Miranda* warnings, defendant makes statement; held: when an accused requests counsel equivocally, police questioning must be strictly confined to clarifying the suspect's request, *State v. Robtoy*, 98 Wn.2d 30, 39 (1982), *State v. Aten*, 130 Wn.2d 640, 665-66 (1996), *but see: Davis v. United States*, 129 L.Ed.2d 362 (1984), *State v. Walker*, 129 Wn.App. 258, 273-76 (2005), *State v. Radcliffe*, 164 Wn.2d 900 (2008), *State v. Herron*, 177 Wn.App. 96 (2014), *affirmed, on different grounds*, 183 Wn.2d 737 (2015), *State v. Horton*, 195 Wn.App. 202 (2016), distinguishing *Edwards v. Arizona*, 68 L.Ed.2d 378 (1981); however, where suspect has been out of custody for a substantial period of time and re-advised and questioned following waiver, statements are admissible, since accused is no longer under the inherently compelling pressures of continuous custody, *Maryland v. Shatzer*, 559 U.S. 98, 175 L.Ed.2d 1045 (2010), except, perhaps, where a release is contrived, pretextual or in bad faith; II.

***State v. McReynolds***, 104 Wn.App. 560, 573-76 (2000)

Arrestee is advised, invokes right to remain silent but not right to counsel, speaks to a friend, then indicates she would talk to police; held: "[a] person may be found to have waived the right if she 'freely and selectively responds to police questioning after initially asserting *Miranda* rights,'" *State v. Wheeler*, 108 Wn.2d 230, 238 (1987), *State v. Elkins*, 188 Wn.App. 386 (2015), *see: State v. Brown*, 158 Wn.App. 49, 58-61 (2010), *cf.: State v. Reuben*, 62 Wn.App. 620 (1991); II.

***Texas v. Cobb***, 149 L.Ed.2d 321 (2001)

Defendant is charged with burglary of a home, is assigned counsel, after arraignment defendant is advised of *Miranda* warnings in the absence of counsel, waives and confesses to murdering the residents of the house he had burglarized; held: Sixth Amendment right to counsel

is offense-specific, *McNeil v. Wisconsin*, 115 L.Ed.2d 158 (1991), police may interrogate regarding other offenses even if factually related unless the offenses have the same elements per *Blockburger v. United States*, 76 L.Ed 36 (1932), *State v. Gregory*, 158 Wn.2d 759, 818-20 (2006), *overruled, on other grounds, State v. W.R.,* 181 Wn.2d 757 (2014), *State v. Hahn,* 162 Wn.App. 885, 897-900 (2011), *rev'd, on other grounds, State v. Hahn,* 174 Wn.2d 126 (2012); 5-4.

***State v. Erickson***, 108 Wn.App. 732 (2001)

Defendant, represented by counsel, initiates discussion with police and makes statements; held: non-coerced, custodial, defendant-initiated statements made without police interrogation fall outside the general rule prohibiting custodial interrogation following invocation of Sixth Amendment right to counsel, distinguishing *State v. Stewart*, 113 Wn.2d 462 (1989), *Michigan v. Jackson,* 89 L.Ed.2d 631 (1986), *overruled, Montejo v. Louisiana,* 173 L.Ed.2d 955 (2009); III.

***State v. Nelson***, 108 Wn.App. 918 (2001)

Defendant testifies in co-defendant's severed trial as part of a plea bargain, after which the plea agreement is rescinded due to mutual misunderstanding, state offers defendant's prior testimony at defendant's trial; held: when plea negotiations lead to a plea agreement rescinded by mutual agreement, testimony provided pursuant to the failed agreement is inadmissible, ER 410, *see: Hutto v. Ross*, 50 L.Ed.2d 194 (1976); III.

***State v. Spotted Elk***, 109 Wn.App. 253 (2001)

Defendant is arrested on warrant, arresting officer asks "do you have anything on your person I need to be concerned about?," defendant produces heroin; held: because officer's question was not solely for purpose of officer or public safety, *State v. Lane*, 77 Wn.2d 860, 861-63 (1970), nor are circumstances sufficiently urgent to warrant an immediate question, *State v. Richmond*, 65 Wn.App. 541, 545-46 (1992), statement was inadmissible and testimonial act of handing over heroin is suppressed, *State v. Wethered*, 110 Wn.2d 466, 471-73 (1988), *but see: United States v. Patane*, 159 L.Ed.2d 667 (2004); III.

***State v. Templeton***, 148 Wn.2d 193 (2002)

Police advise DUI suspects that they have a right to talk to an attorney before answering questions, trial courts suppress breath tests; held: CrRLJ 3.1, which requires that police advise arrestees of right to counsel as soon as practicable, was violated because advice here provided that the right to a lawyer accrues not when suspect is arrested but rather when arrestee is questioned, *State v. Fitzsimmons*, 93 Wn.2d 436 (1980), *affirmed on remand,* 94 Wn.2d 858 (1980), *Spokane v. Kruger,* 116 Wn.2d 135 (1991), *State ex rel. Juckett v. Evergreen District Court*, 100 Wn.2d 824 (1984); because no defendant here alleged that, but for the improper advice he or she would have requested counsel before submitting to breath test, error was harmless, reversing *State v. Templeton*, 107 Wn.App. 141 (2001); 5-4.

***State v. Cunningham***, 116 Wn.App. 219, 226-30 (2003)

Suspect runs from stolen car, defendant is stopped, gives false name, claims he's visiting someone which is proved false, cuffed, held 45 minutes until identified by the officer who stopped the stolen vehicle, court admits false name and explanation for being in area; held: police lacked probable cause but detention was not a custodial arrest, "unfortunate" 45 minute detention was reasonable due to suspect's lack of cooperation in not identifying himself, thus *Miranda* warnings were not required, *State v. Walton*, 67 Wn.App. 127 (1992), *Oregon v. Mathiason*, 50 L.Ed.2d 714 (1977); III.

***State v. Rehn***, 117 Wn.App. 142 (2003)

Vehicle stopped for infraction, driver arrested for suspended license, search of driver discloses bullet, officer has passengers leave vehicle to search it, asks if they have weapons or anything else they shouldn't have, defendant-passenger says mushrooms under dash; held: initial stop of car was not a seizure of defendant-passenger, *Spokane v. Hays*, 99 Wn.App. 653, 658 (2000), *State v. Mendez*, 137 Wn.2d 208, 222 (1999), rather it constituted an incidental citizen encounter; asking defendant to leave car was not a seizure but a step taken to facilitate the vehicle search incident to driver's arrest; even if he was seized, the discovery of the bullet was an articulable concern justifying a legitimate purpose in exerting some control over the passengers; while a reasonable person would have felt detained, it was not to a degree associated with formal arrest, *State v. Solomon*, 114 Wn.App. 781 (2002), thus *Miranda* warnings were not required prior to inquiring of passenger whether he had something he shouldn't have, *but see: State v. Rankin*, 151 Wn.2d 689 (2004); 2-1, III.

***State v. Hodges***, 118 Wn.App. 668 (2003)

Suspect, after receiving *Miranda* warnings, answers some questions then does not respond to a question, officer stops questioning, turns suspect over to another officer who questions, defendant confesses; held: while silence in the face of repeated questioning over a period of time may constitute an invocation of the right to remain silent, here failure to respond to a single question was not a clear and unequivocal invocation, trial court did not abuse discretion in admitting suspect's statement, *State v. Embry*, 171 Wn.App. 714, 750-51 (2012), *cf.: State v. I.B.*, 187 Wn.App. 315 (2015); I.

***Fellers v. United States***, 157 L.Ed.2d 1016 (2004)

After indictment, police go to defendant's home to arrest, question him absent *Miranda* warnings, arrest defendant, at jail defendant is advised and reiterates prior confession; held: after charging, police may not deliberately elicit statements from a defendant in the absence or waiver of Sixth Amendment right to counsel, *Massiah v. United States*, 12 L.Ed.2d 246 (1964), *Patterson v. Illinois*, 101 L.Ed.2d 261 (1988), *State v. Visitacion*, 55 Wn.App. 166 (1989); remanded for 8th Circuit to consider whether Sixth Amendment requires suppression of jailhouse statements on the ground that they were the fruits of previous questioning conducted in violation of the "Sixth Amendment deliberate elicitation standard," at 1023, *see: Oregon v. Elstad*, 105 L.Ed.2d 1285 (1985); 9-0.

***Hiibel v. Sixth Judicial Dist. Ct.***, 159 L.Ed.2d 292 (2004)

State statute which requires one who has been lawfully detained on reasonable suspicion to identify himself does not violate Fifth Amendment, *see also:* *State v. Stratton*, 139 Wn.App. 511, 515-16 (2007); 5-4.

***Missouri v. Seibert***, 159 L.Ed.2d 643 (2004)

Police strategically question arrestee without *Miranda* warnings and, when a confession is obtained, then advise and obtain same confession; held: deliberately "draining the substance out of *Miranda*," at 658, by a two-step process to obtain an unwarned confession prior to warnings is impermissible, thus both statements must be suppressed, *State v. Hickman*, 157 Wn.App. 767 (2010), *see: State v. Lavaris*, 99 Wn.2d 851 (1983), *cf.: State v. Allenby*, 68 Wn.App. 657 (1992), *State v. Baruso*, 72 Wn.App. 603, 609-12 (1993), *State v. Ustimenko*, 137 Wn.App. 109, 114-16 (2007), distinguishing *Oregon v. Elstad*, 84 L.Ed.2d 222 (1985); 5-4.

***United States v. Patane***, 159 L.Ed.2d 667 (2004)

Police begin to advise arrestee who states that he knows his rights, police do not complete warning, ask about illegal gun which defendant surrenders, trial court suppresses; held: failure to advise of *Miranda* rights does not preclude admissibility into evidence of the fruits of an arrestee's unwarned but voluntary statements, *State v. Wethered*, 110 Wn.2d 466 (1988), *State v. Putman*, 65 Wn.App. 606 (1992), *State v. Russell*, 125 Wn.2d 24, 55-62 (1994), *State v. Lozano*, 76 Wn.App. 116 (1994), *State v. Spotted Elk*, 109 Wn.App. 253 (2001), *but see: State v. Moreno*, 21 Wn.App. 430 (1978); 5-4.

***State v. Heritage***, 152 Wn.2d 210 (2004)

Park security guards, in uniform carrying radio, handcuffs, baton, observe juveniles smoking marijuana, ask whose pipe it is, respondent says it's her pipe, officers call police who arrest; held: guards are state agents for purposes of *Miranda*, overruling *sub silentio*, in part, *State v. Wolfer*, 39 Wn.App. 287 (1984), *see: State v. Valpredo*, 75 Wn.2d 368 (1969), *Mathis v. United States*, 20 L.Ed.2d 381 (1968); guard's question was brief, no physical detention occurred, reasonable person, even a 16 year old, would not reasonably believed she was detained to a degree analogous to arrest, *Berkemer v. McCarty*, 82 L.Ed.2d 317 (1984), *State v. Ustimenko*, 137 Wn.App. 109, 114-16 (2007), *see: State v. Short*, 113 Wn.2d 35 (1989), *State v. Marcum*, 149 Wn.App. 894, 909-12 (2009); reverses *State v. Heritage*, 114 Wn.App. 591 (2002); 9-0.

***State v. Nowinski***, 124 Wn.App. 617 (2004)

During interrogation, defendant tells police he wants to make a deal, police bring in a prosecutor who informs defendant that he would be making filing decision, no deals would be made that night but that he would consider information and talk to his boss, defendant confesses; held: presence of prosecutor invokes possibility of ER 410 applicability, excluding plea negotiations from evidence; trial court must determine whether accused exhibits an actual subjective expectation to negotiate a plea and whether accused's expectation was reasonable under totality of circumstances, *United States v. Robertson*, 582 F.2d 1356 (5th Cir. 1978), *State v. Pizzuto*, 55 Wn.App. 421, 434 (1989); defendant's expressed desire to make a deal, police

calling in prosecutor who did not disabuse him of his expectation that a deal would be offered makes it objectively reasonable for defendant to believe he was engaged in plea negotiations, thus statements should have been suppressed, *State v. Hatch,* 165 Wn.App. 212 (2011); I.

***State v. Daniels***, 124 Wn.App. 830, 845-46 (2004), 160 Wn.2d 256, 266-67 (2007)

17-year old goes to precinct with father, police question her for 1½ hours, ask questions knowing they could provoke an incriminating response, decline to allow father to remain present, all prior to *Miranda* warnings, defendant confesses; held: "[t]hese circumstances sufficiently demonstrate that *Miranda* applied," *but see: State v. Short*, 113 Wn.2d 35 (1989), *State v. McWatters*, 63 Wn.App. 911 (1992), *Stansbury v. California*, 128 L.Ed.2d 293 (1994), *State v. D.R.*, 84 Wn.App. 832 (1997), *State v. S.J.W.*, 149 Wn.App. 912, 927-28 (2009), *aff'd, on other grounds*, 170 Wn.2d 92 (2010), *cf.: State v. Walton*, 67 Wn.App. 127 (1992); II.

***State v. Trout***, 125 Wn.App. 403, 414-16 (2005)

Police tell defendant that "whoever talks first will get the best deal," defendant is advised, consults with counsel, confesses, court admits statement as voluntary; held: trial court's conclusion that there was no causal relationship between the promise and the confession, *State v. Broadaway*, 133 Wn.2d 118, 131-33 (1997), *State v. L.U.*, 165 Wn.2d 95 (2008), is supported by the record; 2-1, III.

***Pers. Restraint of Woods***, 154 Wn.2d 400, 434-35 (2005)

Police need not specifically advise suspect that he had a "constitutional right to stop answering questions at any time until he talked to a lawyer," where he is advised of the four *Miranda* rights, distinguishing *Duckworth v. Eagan*, 106 L.Ed.2d 166 (1989), *see: State v. Brown*, 132 Wn.2d 529, 582 (1997); 9-0.

***State v. Walker***, 129 Wn.App. 258, 273-76 (2005)

After advice of rights, defendant states that he does not want to say anything that would make him look guilty or incriminate him, but continues to speak with police for several hours and signs a confession; held: defendant's statements were an equivocal discussion of his right to remain silent; the invocation of the right to remain silent must be clear and unequivocal, whether through silence or articulation, in order to be effectual and, if equivocal, police are under no obligation to stop and ask clarifying questions, *Davis v. United States*, 129 L.Ed.2d 362 (1984), *see: State v. Radcliffe*, 164 Wn.2d 900 (2008), *State v. Herron*, 177 Wn.App. 96 (2014), *affirmed, on different grounds*, 183 Wn.2d 737 (2015); I.

***State v. France***, 129 Wn.App. 907 (2005)

Police, knowing defendant, knowing there was a court order prohibiting him from contacting complainant and knowing that complainant had been assaulted by defendant a short while before, stop defendant, tell him he could not leave until the matter was cleared up, question absent *Miranda* warnings, defendant acknowledges violating order; held: police had probable cause to arrest but delayed doing so to avoid a *Miranda* warning, *see: State v. Creach*, 77 Wn.2d 194, 198 (1969), *State v. Lewis*, 32 Wn.App. 13 (1982), *but see: State v. Short*, 113 Wn.2d 35

(1989), *State v. McWatters*, 63 Wn.App. 911 (1992), detention was open ended, no reasonable person in defendant's position would have felt that he was free to leave until he satisfactorily explained the situation, *but see: State v. Walton*, 67 Wn.App. 127 (1992), *State v. Cunningham*, 116 Wn.App. 219, 226-30 (2003), *State v. Heritage*, 152 Wn.2d 210 (2004), *Berkemer v. McCarty*, 82 L.Ed.2d 317 (1984), *cf.: State v. Ustimenko*, 137 Wn.App. 109, 114-16 (2007), *State v. Rosas-Miranda* , 176 Wn.App. 773 (2013), thus statements should have been suppressed, harmless here; II.

***State v. Godsey***, 131 Wn.App. 278, 284-86 (2006)

Following arrest, defendant tells officer "[y]ou are going to pay for this," deputy asks if that's a threat, defendant responds "I know where you…live;" defendant is taken to hospital where medical personnel ask about drug use, defendant acknowledges using drugs; held: statement to officer was not interrogation, not designed to solicit an incriminating response, but merely a response to a request to explain or clarify, thus is a continuation of defendant's previously volunteered statement; response to medical personnel was within physician-patient privilege, law officers present "were effectively hospital agents," admission of those statements to support possession of drug paraphernalia charge was error, *State v. Gibson*, 3 Wn.App. 596, 598-600 (1970); III.

***State v. Whitaker***, 133 Wn.App. 199, 218-22 (2006)

Inmate reports defendant's confession to police, offers to get more information, is told not to try although detective agrees to present information already provided to prosecutor for possible leniency, inmate obtains more information from defendant which is used at trial; held: while proof that government "must have known" that agent was likely to obtain incriminating statements from accused in absence of counsel may suffice to show a Sixth Amendment violation, *United States v. Henry*, 65 L.Ed.2d 115, 122 (1980), where witness is told not to seek out information and is promised nothing, the statements are admissible, even where the witness did eventually receive a plea deal, *State v. Manthie*, 39 Wn.App. 815 (1985), *State v. Brooks*, 38 Wn.App. 256 (1984); I.

***State v. Davis***, 133 Wn.App. 415, 428-29 (2006), *rev'd, on other grounds,* 163 Wn.2d 606 (2008)

Police call defendant on cell phone, defendant says he would not make any other statements without a lawyer, police continue to question defendant who makes statements; held: Fifth Amendment right to counsel exists solely to guard against coercive, and therefore unreliable, confessions obtained during in-custody interrogation, *State v. Stewart*, 113 Wn.2d 462, 478 (1989), *see*: *State v. Erickson*, 108 Wn.App. 732 (2001), thus police can continue questioning after invocation of right to counsel if suspect is not in-custody, *see: State v. Jones*, 102 Wn.App. 89, 95-97 (2000); III.

***Sanchez-Llamas v. Oregon***, 165 L.Ed.2d 557 (2006)

Suppression is not a remedy for failure to advise an alien arrestee of his right to contact consular officials, Vienna Convention on Consular Relations art. 36(1)(b), *State v. Martinez-Lazo*, 100 Wn.App. 869, 872-76 (2000), *State v. Jamison*, 105 Wn.App. 572, 577-84 (2001); 5-4.

***State v. Hopkins***, 134 Wn.App. 780, 784-87 (2006)

Military police advise defendant that she can have a military lawyer at no expense; held: because a military lawyer is a suited to the goal of negating the coercive atmosphere of interrogation as a civilian lawyer, the advice is adequate, *see: State v. Brown*, 132 Wn.2d 529, 582 (1997); II.

***State v. G.M.V.***, 135 Wn.App. 366, 372-74 (2006)

While a CrR 3.5 hearing is required for a jury trial, *State v. Lopez*, 67 Wn.2d 185, 188-89 (1965), *Jackson v. Denno*, 12 L.Ed.2d 108 (1964), where respondent is tried by the court the 3.5 hearing may be incorporated into the fact-finding hearing, distinguishing *State v. Tim S.*, 41 Wn.App. 60 (1985); III.

***State v. Sanchez-Guillen***, 135 Wn.App. 636, 645-46 (2006)

Defense offers defendant's out-of-court statement at trial to show that the shooting was an accident as statement against interest and state of mind exception to hearsay rule, *see: State v. King*, 71 Wn.2d 573, 577 (1967); held: statement against interest exception, ER 804(b)(3), cannot apply to a criminal defendant's statement, as the defendant is not unavailable by mere assertion of a privilege, ER 804(a)(6), *cf.: State v. Dictado*, 102 Wn.2d 277, 287 (1984); state of mind exception applies to state of mind at the time the statement was made, not the earlier time the statement describes, *State v. Ammlung*, 31 Wn.App. 696, 703 (1982); III.

***State v. Everybodytalksabout***, 161 Wn.2d 702 (2007)

Following conviction, probation officer interviews defendant in jail for presentence report, asks for defendant's version of the events, defendant admits he assisted in a robbery but would not comment further, convicted reversed, probation officer testifies at retrial; held: because statements made during a presentence interview were used for the adversarial purpose of convicting defendant in a subsequent trial, the presentence interview was a critical stage of the proceedings, *Estelle v. Smith*, 68 L.Ed.2d 359, 371-72 (1981), probation officer stimulating conversations about the crime is a deliberate eliciting of incriminating statements, violating defendant's Sixth Amendment right to counsel; reverses *State v. Everybodytalksabout*, 131 Wn.App. 227 (2006); 9-0.

***State v. Radcliffe***, 164 Wn.2d 900 (2008)

An equivocal reference to counsel following *Miranda* warnings does not oblige the police to stop questioning or to clarify the reference to counsel under Fifth Amendment, *Davis v. United States*, 129 L.Ed.2d 362 (1994), *State v. Walker*, 129 Wn.App. 258, 275 (2005), *State v. Copeland*, 89 Wn.App. 492 (1998), *State v. Herron*, 177 Wn.App. 96 (2014), *affirmed, on different grounds*, 183 Wn.2d 737 (2015); affirms *State v. Radcliffe*, 139 Wn.App. 214 (2007), *State v. Gasteazora-Paniagua*, 173 Wn.App. 751 (2013); 9-0.

***State v. Borsheim***, 140 Wn.App. 357, 371 n.5 (2007)

Where trial court rules that a defendant's statement is admissible as impeachment evidence and defendant does not testify, defense may still challenge the ruling on appeal even though the statement was not offered for any purpose, *see: State v. Greve*, 67 Wn.App. 166, 169 (1992); I.

***State v. Wilson***, 144 Wn.App. 166, 182-85 (2008)

Defendant is arrested for assault, is advised, makes some statements, mentions a lawyer, police terminate interview, later victim dies, police hand defendant a "death notification, defendant states that she didn't mean to kill him, trial court admits statement; held: handing defendant a "death notification" after invocation of the right to counsel was reasonably likely to elicit an incriminating response, *Rhode Island v. Innis*, 64 L.Ed.2d 297 (1980), police lack of intent to elicit an incriminating statement is not the test, thus statement should have been suppressed; III.

***State v. Unga***, 165 Wn.2d 95 (2008)

Detective promises juvenile that if he confesses to writing graffiti in a car, he won't be charged with the graffiti, respondent confesses, is convicted of stealing the car; held: the fact that a promise is made (and police keep the promise) does not render a confession to another crime involuntary, totality of circumstances establishes the the statement was voluntary and thus admissible; affirms *State v. L.U.*, 137 Wn.App. 410 (2007); 9-0.

***State v. S.A.W.***, 147 Wn.App. 832 (2008)

In bench trial, where an issue of voluntariness is raised, court must hold a CrR 3.5 hearing; defendant does not waive a challenge to the voluntariness of a statement by not demanding a hearing; III.

***Kansas v. Ventris***, 173 L.Ed.2d 801 (2009)

Police place informant in represented, charged defendant's cell who elicits a confession, trial court allows cellmate to impeach defendant's testimony; held: statement obtained in violation of Sixth Amendment is admissible to impeach, *Harris v. N.Y.*, 28 L.Ed.2d 1 (1971), *State v. Simpson*, 95 Wn.2d 170, 180 (1980); 7-2.

***Montejo v. Louisiana***, 173 L.Ed.2d 955 (2009)

Where defendant is arraigned and requests or is supplied counsel automatically, courts must not presume that a subsequent waiver of counsel preceeding interrogation is invalid, overruling *Michigan v. Jackson*, 89 L.Ed.2d 631 (1986); 5-4.

***State v. S.J.W.***, 149 Wn.App. 912, 927-29 (2009), *aff'd, on other grounds,* 170 Wn.2d 92 (2010)

Police interview 14-year old respondent in victim's residence with respondent's mother present, respondent declines to answer some questions, is not told he may leave, is not given *Miranda* warnings, trial court admits statements; held: where an interview is not "obviously

accusatory" in nature, respondent is in a private residence, reasonable person would not believe he is in custody, *State v. Heritage*, 152 Wn.2d 210 (2004), *cf.: State v. D.R.*, 84 Wn.App. 832 (1997), *State v. Daniels*, 124 Wn.App. 830, 845-46 (2004), 160 Wn.2d 256, 266-67 (2007); I.

***State v. Shuffelen***, 150 Wn.App. 244, 255-57 (2009)

Police arrest driver for suspended license, learn that she is protected party, ask her the name of her passenger who is the respondent for no contact order, arrest passenger, trial court suppresses; held: a person does not have standing to raise a violation of another's Fifth Amendment rights; even if passenger had standing, question to driver, while custodial, was not "reasonably likely to elicit an incriminating response from the suspect," *State v. Bradley*, 105 Wn.2d 898, 903-04 (1986), questions focused on identity of passenger, not related to suspected criminal activity by driver; I.

***State v. Denney***, 152 Wn.App. 665 (2009)

Defendant is arrested for drug offense, invokes right to remain silent, during booking jail personnel ask about recent drug use which defendant acknowledges, trial court admits defendant's admission; held: while routine booking questions may not be interrogation for *Miranda* analysis, *Pennsylvania v. Muniz*, 110 L.Ed.2d 528 (1990), *State v. Walton*, 64 Wn.App. 410 (1992), if the evidence establishes that the questioning party should have known that the question was reasonably likely to elicit an incriminating response, the response is not admissible, *State v. Willis*, 64 Wn.App. 634, 637 (1992), *State v. Wheeler*, 108 Wn.2d 230 (1987), *but see: State v. Elkins*, 188 Wn.App. 386 (2015); subjective intent of the questioning agent is relevant but not conclusive, relationship between the question and the crime suspected is highly relevant; II.

***Florida v. Powell***, 559 U.S. 50, 175 L.Ed.2d 1009 (2010)

Advice prior to questioning that suspect has the right to consult with a lawyer before answering questions and that he can invoke this right at any time during interview is adequate to advise suspect that he had the right to the presence of a lawyer during questioning, *California v. Prysock*, 453 U.S. 355, 69 L.Ed.2d 696 (1981); 7-2.

***Maryland v. Shatzer***, 559 U.S. 98, 175 L.Ed.2d 1045 (2010)

Defendant, in prison, is advised by police investigating a separate crime, invokes the right to counsel, two years later police, still investigating the crime, readvise defendant in prison, he waives right to counsel and confesses; held: a break in *"Miranda* custody" lasting more than two weeks between readvice and waiver does not oblige suppression, distinguishing *Edwards v. Arizona*, 451 U.S. 477, 68 L.Ed.2d 378 (1981), *see: State v. Valdez*, 82 Wn.App. 294 (1996), *State v. Kirkpatrick*, 89 Wn.App. 407 (1997), *State v. Jones*, 102 Wn.App. 89, 95-97 (2000); when a prisoner is interrogated and then released into general population and then reinterrogated, the release is a break in custody; 9-0.

***Berghuis v. Thompkins***, 560 U.S. 370, 176 L.Ed.2d 1098 (2010)

Defendant is advised, apparently understands the *Miranda* warnings, is not asked if he waives, does not invoke right to remain silent or right to counsel, is questioned for three hours, is largely silent, answering a few limited verbal responses, finally confesses; held: a suspect who has received and understood *Miranda* warnings and has not invoked his rights waives his rights by making an uncoerced statement; police are not obliged to obtain an express waiver, *State v. Terrovona*, 105 Wn.2d 632 (1986), *State v. Johnson*, 94 Wn.App. 882, 897-98 (1999), *but see: State v. Haack*, 88 Wn.App. 423, 431-36 (1997); 5-4.

***State v. Dow***, 168 Wn.2d 243 (2010)

RCW 10.58.035, which directs that where a victim is dead or incompetent a defendant's statement is admissible "if there is substantial independent evidence that would tend to establish the trustworthiness of the confession" is constitutional, but deals only with admissibility and not sufficiency, thus there still must be sufficient evidence independent of a confession to support a conviction; 9-0.

***State v. Campos-Cerna***, 154 Wn.App. 702 (2010)

17-year old murder defendant challenges inclusion of juvenile warning in *Miranda* rights ("anything you say … can also be used against you in an adult court…if the juvenile court decides that you are to be tried as an adult") because juvenile court statutorily lacks authority to try defendant for murder; held: juvenile warning does not rule out the possibility that juvenile court's jurisdiction would automatically be declined, advisement was adequate, *see also: State v. Spearman*, 59 Wn.App. 323, 325 (1990); II.

***State v. Hickman***, 157 Wn.App. 767 (2010)

Sex offender is called into sheriff's office to register, detective informs him that there would be a two-part interview consisting of an "administrative interview to register him" followed by *Miranda* warnings and a criminal investigation for suspected failure to register, defendant makes statements at both interviews, which trial court admits; held: where there is objective evidence to support an inference that a two-step interrogation procedure is used to undermine the *Miranda* warning, then the post-*Miranda* statements may not be admitted regardless of interrogator's subjective intent, *Missouri v. Seibert*, 159 L.Ed.2d 643 (2004); II.

***State v. Brown***, 158 Wn.App. 49, 58-61 (2010)

Police arrest juvenile, advise, says he does not wish to talk, two hours later police readvise, respondent confesses to a different crime; held: when a defendant invokes his right to remain silent, police must "scrupulously honor" defendant's request by ceasing interrogation, but may resume interrogation after a significant time has passed, *State v. Elkins*, 188 Wn.App. 386 (2015), and by readvising, *Michigan v. Mosley*, 423 U.S. 96, 104-06, 46 L.Ed.2d 313 (1975), even if the scope of second interrogation is the original crime, *State v. Chambers*, 197 Wn.App.. 96, 128-35 (2016), *see: State v. Reuben*, 62 Wn.App. 620, 626 (1991), *State v. Robbins*, 15 Wn.App. 108, 110 (1976); III.

***Bobby v. Dixon***, 565 U.S. 565, 132 S.Ct. 26, 181 L.Ed.2d 328 (2011)

Defendant, in chance encounter with police, is advised, invokes right to counsel, leaves, five days later police speak to him again, do not advise in hopes he won't invoke, police tell him he better talk before co-defendant does, he makes inculpatory statements, is arrested, advised, waives, confesses; held: questioning at second encounter was proper as defendant was not under arrest even though he had invoked right to counsel previously, telling him co-defendant may confess and make a deal does not make confession involuntary as it is a police tactic, and, at least on *habeas* review, "[b]ecause no holding of this Court suggests, much less clearly establishes, that police may not urge a suspect to confess before another suspect does so, the Sixth Circuit had no authority to issue the writ on this ground;" "[i]n this case, no two-step interrogation technique of the type that concerned the Court in *[Missouri v.] Seibert*, [542 U.S. 600, 159 L.Ed.2d 643 (2004)] undermined the *Miranda* warnings Dixon received. In *Seibert*, the suspect's first, unwarned interrogation left "little, if anything, of incriminating potential left unsaid," making it "unnatural" not to "repeat at the second stage what had been said before." 542 U.S., at 616–617, 124 S.Ct. 2601 (plurality opinion). But in this case Dixon steadfastly maintained during his first, unwarned interrogation that he had "[n]othing whatsoever" to do with Hammer's disappearance. App. to Pet. for Cert. 186a. Thus, unlike in *Seibert*, there is no concern here that police gave Dixon *Miranda* warnings and then led him to repeat an earlier murder confession, because there was no earlier confession to repeat," *per curiam.*

***State v. Notaro***, 161 Wn.App. 654 (2011)

Detective testifies that during interrogation he told defendant he didn't believe his initial statements following which defendant confessed; held: police statement made during an interview regarding officer's belief is an interrogation tactic, not opinion testimony, *State v. Demery*, 144 Wn.2d 753 (2000), *State v. Smiley*, 195 Wn.App. 185 (2016), *see: State v. Putman*, 21 Wn.App.2d 36 (2022); II.

***State v. Curtiss***, 161 Wn.App. 673, 690-91 (2011)

Police, investigating a homicide, inform defendant that statute of limitations for rendering criminal assistance has run, defendant makes inculpatory statement, seeks suppression for deception; held: accurate statement that does not override independent decision-making process or coerce defendant into giving a statement does not change voluntary character of statement, *State v. Heggins*, 55 Wn.App. 591, 598-99 (1989); II.

***State v. Abdulle***, 174 Wn.2d 411 (2012)

Two police officers are present when defendant is advised of *Miranda* warnings, at CrR 3.5 hearing only one is called to testify, says defendant asked for a lawyer but then agreed to speak after being given water, defendant then confesses, defendant testifies that he asked for a lawyer and did not agree to speak, state does not call second officer, Court of Appeals holds, in unpublished decision, that state failed to present sufficient evidence of waiver; held: state is not obliged to call a second officer to corroborate a waiver when both were present, overruling *State v. Davis*, 73 Wn.2d 271, 287-88 (1968), although a trial court may draw a negative inference from second officer's absence; 5-4.

***State v. Hatch***, 165 Wn.App. 212 (2011)

Defense sends psychological evaluation to prosecutor to negotiate a plea which isn't entered, at trial state calls evaluator who testifies to defendant's confession during the evaluation; held: it was objectively reasonable for defendant to expect that his statements made to the psychologist would be treated as made in connection with plea negotiations and thus are not admissible, ER 410, *State v. Nowinski,* 124 Wn.App. 617 (2004), *State v. Jollo,* 38 Wn.App. 469 (1984), harmless here; I.

***State v. Miller***, 165 Wn.App. 385 (2011)

Failure of police to advise a juvenile of the juvenile-specific language is not grounds for suppression, *State v. Prater,* 77 Wn.2d 526 (1970), *State v. Luoma,* 88 Wn.2d 28 (1977); III.

***State v. Butler***, 165 Wn.App. 820 (2012)

Defendant, suspected of violent crimes, is advised and questioned in hospital while on pain medications, makes statement, is arrested weeks later, statement is admitted; held: defendant's presence in the hospital was not custodial, *State v. Kelter,* 71 Wn.2d 52, 54 (1967); trial court's determination that drugs did not impair defendant's ability to waive is affirmed; III.

***State v. Nysta***, 168 Wn.App. 30, 37-43 (2012)

Arrested defendant is advised, waives, answers questions, police then offer polygraph, defendant states "I gotta talk to my lawyer," police stop discussing polygraph but continue questioning, trial court finds defendant's request for counsel applied only to polygraph and not to interrogation; held: absent conditional or obfuscuting language such as "maybe," "perhaps," "if," and "or," request for counsel is unambiguous, no authority supports trial court's "elaborate contextual interpretation," thus statement should have been suppressed, *State v. Pierce,* 169 Wn.App. 533, 544-51 (2012), *cf.: State v. Gasteazoro-Paniagua,* 173 Wn.App. 751 (2013), but harmless as it repeated what defendant said before invocation; I.

***State v. Rafay***, 168 Wn.App. 734, 781-97 (2012)

Trial court excludes testimony from defense experts regarding false confessions and coercive police interrogation methods and undercover police practices; held: absent evidence of a meaningful correlation between the specific interrogation methods and false confessions, trial court did not abuse its discretion; absent testimony that an undercover operation that failed to meet professional standards resulted in a "high likelihood" that the confessions were false or unreliable, trial court did not abuse discretion; excluding evidence while still permitting defense to present evidence of the circumstances surrounding the confessions does not deprive defendants of right to present a defense, *distinguishing Crave v. Kentucky,* 476 U.S. 683, 90 L.Ed.2d 636 (1986); I.

***State v. Pierce***, 169 Wn.App. 533, 544-51 (2012)

Police arrest defendant, question him about one crime then accuse him of murder, defendant states, "[i]f you're…trying to say I'm doing it I need a lawyer. I'm gonna need a lawyer because it wasn't me," defendant is booked, jail policy is to call public defender home

number after hours if a lawyer is demanded, five hours later defendant asks to speak with detectives again, makes statements that are used at murder trial, trial court finds that statement was equivocal and posted business number for public defender plus use of phone was adequate; held: "gonna need a lawyer" is an unequivocal request for counsel, *State v. Nysta,* 168 Wn.App. 30, 40-42 (2012), conditional language did not render request for counsel equivocal, police were obliged to make reasonable efforts to put defendant in touch with a lawyer, CrR 3.1(c)(2), mere access to a phone is not reasonable, *Tacoma v. Myhre,* 32 Wn.App. 661, 664 (1982), *cf.: Seattle v. Wakenight,* 24 Wn.App. 48, 51 (1979), *Seattle v. Carpenito,* 32 Wn.App. 80-9, 813 (1982), *State v. Gasteazoro-Paniagua,* 173 Wn.App. 751 (2013); II.

***State v. Piatnitsky****,* 170 Wn.App. 195 (2012), 180 Wn.2d 407 (2014)

Following arrest, defendant is advised, agrees to give a taped statement, is re-advised on tape, defendant states, "I'm not ready to do this, man," police remind him that he said he wanted to talk on tape, defendant replies, "I just write it down… I can't do this… I don't want to talk right now," police continue to advise, ask defendant if he would rather give a written statement, turn off tape recorder and take statement; held: standard for determining invocation of Fifth Amendment right to counsel and Fifth Amendment right to remain silent is the same, *Berghuis v. Thompkins,* 560 U.S. 370, 176 L.Ed.2d 1098 (2010); an assertion of the right is unequivocal where a reasonable police officer in the circumstance would understand it to be such an assertion, *Davis v. United States,* 512 U.S. 452, 459, 129 L.Ed.2d 362 (1994), *see: State v. I.B.,* 187 Wn.App. 315 (2015); invocation for limited purposes only does not require suppression where police honor defendant's limited invocation, *Connecticut v. Barrett,* 479 U.S. 523, 529, 93 L.Ed.2d 920 (1987); when a defendant appears to invoke, court may not consider subsequent responses to continued police questioning in determining if the invocation was equivocal, *Smith v. Illinois,* 469 U.S. 91, 97-98, 83 L.Ed.2d 488 (1984); here, trial court's determination that defendant's invocation of right to remain silent was equivocal is supported by the record; 2-1, I; 5-4.

***State v. Trochez-Jimenez****,* 173 Wn.App. 423 (2013), 180 Wn.2d 445 (2014)

Defendant is arrested in Canada for illegal entry, Canadian police advise him of his right under the Canadian Charter to counsel, defendant requests counsel, is not questioned, is not provided counsel, after booking U.S. police advise him of his *Miranda* rights, defendant confesses to shooting and killing victim in the U.S.; held: advise of right to counsel by foreign officials in a foreign country regarding a foreign offense and invocation of the right to counsel does not invoke the Fifth Amendment right to counsel, distinguishing *Edwards v. Arizona,* 451 U.S. 477, 484-85, 68 L.Ed.2d 378 (1981), *Arizona v. Roberson,* 486 U.S. 675, 677, 100 L.Ed.2d 704 (1988); 9-0.

***State v. Gasteazoro-Paniagua****,* 173 Wn.App. 751 (2013)

"I mean I guess I'll just have to talk to a lawyer about it" is not an unequivocal request for a lawyer, distinguishing *State v. Nysta,* 168 Wn.App. 30, 40-41 (2012), *State v. Pierce,* 169 Wn.App. 533 (2012), as it is not in the present tense and did not refer to "his lawyer or any lawyer in particular," "guess" indicates doubt; II.

***State v. Gauthier***, 174 Wn.App. 257 (2013)

Comment on defendant's refusal to consent to a DNA swab as evidence of guilt or impeachment violates defendant's right to refuse to consent to a warrantless search, manifest constitutional error; I.

***State v. Rosas-Miranda*** , 176 Wn.App. 773 (2013)

Uniformed officers knock on door, ask for permission to search, inform defendant she may refuse, revoke or limit consent, defendant agrees, one officer sits with defendant in living room, other officers search for 90 minutes, defendant is not told the stay in living room, after police find drugs defendant confesses, on appeal argues she was under arrest and thus should have been advised; held: factors relevant to whether interrogation creates a "police-dominated atmosphere: (1) number of armed officers, (2) whether suspect was restrained by force or threats, (3) whether suspect was isolated from others, (4) whether suspect was informed she was free to leave or terminate the interview, and context in which such statements were made, *see: State v. Dennis*, 16 Wn.App. 417 (1976); here, while there were numerous officers, only 3 approached the door and requested permission to search, only one questioned defendant, guns were not drawn, no force or restraint, defendant was present with her children and brother, defendant was not informed she was free to leave or terminate interview but was informed she could revoke consent to search, thus reasonable person would not believe that her freedom was curtailed to a degree associated with formal arrest; II.

***Pers. Restraint of Cross***, 180 Wn.2d 664, 682-90 (2014)

After advice of rights defendant states "I don't want to talk about it," detective says "[s]ometimes we do things we normally wouldn't do, and we feel bad about it later," defendant makes incriminating statements in direct response; held: police did not scrupulously honor unequivocal invocation, engaging in the functional equivalent of interrogation, *Davis v. United States*, 512 U.S. 452, 459–62, 129 L.Ed.2d 362 (1994), *State v. Gutierrez*, 50 Wash.App. 583, 589 (1988), defendant's response was foreseeable, *Rhode Island v. Innis*, 446 U.S. 291, 301–02, 164 L.Ed.2d 297 (1980), and responsive to the officer's statement, defendant's response was not a waiver, harmless here; 9-0.

***State v. Federov***, 181 Wn.App. 187, 191-93 (2014)

Defendant is arrested, gives a false name, is advised and says he understands and is willing to talk, 3 ½ hours later at jail corrections officer asks him about his name and defendant admits he lied, argues he should have been re-advised because *Miranda* warnings were "stale" and change of personnel required fresh warnings; held: generally, where defendant has been advised it is unnecessary to repeat prior to the taking of each separate in-custody statement, *State v. Duhaime*, 29 Wn.App. 842, 852 (1981), *Wyrick v. Fields*, 74 L.Ed.2d 214 (1982); I.

***State v. Mayer***, 184 Wn.2d 548 (2015)

Defendant is advised, when asked if he understands he asks what would happen if he asked for a lawyer, sheriff states that if he were arrested and charged the court would appoint

one, defendant states he understands and confesses; held: attempt to clarify was confusing and conflicted with prior advice that defendant could have a lawyer prior to questioning and only if charged and jailed, inconsistent with defendant's right to an attorney at any time; conditioning the right to a lawyer on future events is inadequate, distinguishing *California v. Prysock,* 453 U.S. 355, 69 L.Ed.2d 696 (1981), *Duckworth v. Eagan,* 492 U.S. 195, 106 L.Ed.2d 166 (1989), harmless here; 9-0.

***State v. I.B.***, 187 Wn.App. 315 (2015)

Respondent is advised of *Miranda* rights, asked if he wants to make a statement, shakes his head side to side, police continue interrogating, trial court suppresses; held: non-verbal conduct can be unequivocal, police understood shaking head side to side means no, respondent's invocation was not honored by police thus trial court is affirmed, *cf.: State v. Hodges,* 118 Wn.App. 668, 672 (2003); III.

***State v. Elkins***, 188 Wn.App. 386 (2015)

Defendant is arrested in Yakima for Grays Harbor County homicide, is advised, states he does not wish to speak, five hours later Grays Harbor County officers ask defendant if he was advised and remembered the rights, defendant confirms he did understand, is questioned and makes statements, during drive defendant and officers converse and defendant makes other statements, at arrive next day he is readvised and gives a written statement; held: once a defendant invokes his right to remain silent interrogation must cease, but police may resume questioning where subsequent waiver was knowing and voluntary, *State v. Wheeler,* 108 Wn.2d 230, 238 (1987), *State v. Mason,* 31 Wn.App. 41, 44-45 (1982), *see: State v. Reuben,* 62 Wn.App. 620 (1991), *State v. McReynolds,* 104 Wn.App. 560, 573-76 (2000), *State v. Denney,* 152 Wn.App. 665 (2009), *State v. Brown,* 158 Wn.App. 49, 58-61 (2010), *but see: Edwards v. Arizona,* 451 U.S. 477, 68 L.Ed.2d 378 (1981), *Pers. Restraint of Cross,* 180 Wn.2d 664, 682-90 (2014), if there was a "significant passage of time" before police reinitiate interrogation, if defendant has not requested counsel, *State v. Cornethan,* 38 Wn.App. 231 (1984); police need not fully readvise of *Miranda* warnings, *but see: State v. Boggs,* 16 Wn.App. 682 (1977); II.

***State v. Rhoden***, 189 Wn.App. 193 (2015)

Police serve search warrant, handcuff all occupants, without advising ask if there are drugs present, defendant says in his bedroom, is then advised and says the same thing; held: 2-step analysis, *United States v. Williams,* 435 F.3d 1148 (9th Cir. 2006), *Missouri v. Seibert,* 542 U.S. 600, 159 L.Ed.2d 643 (2004), *State v. Hickman,* 157 Wn.App. 767 (2010), (1) objective evidence demonstrated a deliberate use of two-step interrogation procedure to undermine *Miranda* warnings based upon timing, setting and completeness of the pre-warning interrogation, continuity of police personnel, overlapping content of pre- and post-warning statements, (2) no curative measures such as a significant break in time and place or an additional warning that the pre-*Miranda* statements could not be used at a trial, thus statement must be suppressed; II.

***State v. DeLeon***, 185 Wn.2d 478 (2016)

Where jail booking procedures require that an arrestee be asked about gang membership to avoid housing with rivals the admissions are not routine booking questions, *Pennsylvania v. Muniz*, 110 L.Ed.2d 528 (1990), but are involuntary, *State v. Mancilla*, 197 Wn,.App. 631 (2017), *State v. A.M.*, 194 Wn.2d 33 (2019); *reverses, in part, State v. DeLeon*, 185 Wn.App. 171 (2014); 9-0.

***State v. Goss***, 186 Wn.2d 372, 382-84 (2016)

State does not offer defendant's recorded statement to police, defense elicits from detective that defendant did make a recorded statement, trial court order *in limine* that defense may not, in closing, argue that state did not present evidence from the interview because it was not helpful to state's case; held: the substance of the interview was inadmissible hearsay, no evidence was presented to support the inference that defense sought to argue, thus trial court did not abuse discretion; affirms *State v. Goss*, 189 Wn.App. 571, 581-83 (2015); 9-0

***State v. Cherry***, 191 Wn.App. 456, 469-71 (2015)

Defendant is arrested, advised of *Miranda* warnings, invokes, is later asked for consent to search his car which defendant grants stating that there were no drugs in the car; held: because *Miranda* warnings are not required before asking for consent to search, *State v. Silvernail*, 25 Wn.App. 185, 191 (1980), *but see: State v. Wethered*, 110 Wn.2d 466 (2009), request for consent to search after defendant invokes right to remain silent does not violate defendant's Fifth Amendment rights; statement about drugs was not made in response to questioning likely to elicit an incriminating response; III.

***State v. Smiley***, 195 Wn.App. 185, 188-90 (2016)

Detective testifies that during interview of defendant he told defendant that his explanation "didn't make sense to me;" held: a tactical interrogation statement designed to challenge defendant's initial story and elicit responses is not a comment on defendant's veracity, *State v. Notaro*, 161 Wn.App., 654, 662-65 (2011); 2-1, I.

***State v. Horton***, 195 Wn.App. 202, 214-17 (2016)

During interrogation defendant's contradictory statements "I do have a lawyer," "I don't have a lawyer," "why would I have a lawyer," and "I do have lawyers" is not an invocation of the right to counsel, CONST. art. I, § 9 and Fifth Amendment are co-extensive, *State v. Earls*, 116 Wn.2d 364, 374-75 (1991), an equivocal request for counsel does not forbid further questioning, *Davis v. United States*, 512 U.S. 452, 459, 129 L.Ed.2d 362 (1994); *State v. Robtoy*, 98 Wn.2d 30, 39 (1982), has been abrogated; II.

***State v. Chamber****s*, 197 Wn.App. 96, 128-35 (2016)

Arrest for homicide at 10:49 p.m., advised, defendant says he doesn't want to speak, placed in interview room at 12:28 a.m. where he sits alone for 2½ hours, at 3:07 a.m. is taken to hospital for blood draw, says he doesn't want to talk, returning to jail is asked if he remembers what happened, defendant asks if police have a picture of the victim, detective says yes and asks

if he wants to talk, defendant says yes, readvised and makes statement; held: police scrupulously honored defendant's invoking right to remain silent, where a significant period of time passes police may readvise and ask suspect if he wishes to waive, *Michigan v. Mosley*, 423 U.S. 96, 104-06, 46 L.Ed.2d 313 (1975), even if it's about the same crime, *State v. Brown*, 158 Wn.App. 49, 58-61 (2010), *but see: Michigan v. Mosley, supra. at* 423 U.S. 96, 102-06, *State v. Reuben*, 62 Wn.App. 620 (1991); I

***State v. Scherf****,* 192 Wn.2d 350 (2018)*,* 192 Wn.2d 350 (2018)

Failure to bring an arrestee before a judge "as soon as practicable," CrR 3.2.1(d)(1), does not require suppression of a voluntary confession, *State v. Hoffman*, 64 Wn.2d 445 (1964), Washington does not adhere to federal *McNabb*/*Mallory* rule; delay and conditions of confinement are non-dispositive factors in determining volunatriness; 9-0.

***State v. Salas***, 1 Wn.App.2d 931, 947-52 (2018)

Defendant is arrested for murder, invokes right to counsel, taken to hospital by police, cuffed to bed, doctor asks about injury, officer testifies at trial that defendant "chuckled" and said "I killed someone;" held: there being no evidence that the doctor was a state agent, there was no *Miranda* violation, however statement to medical personnel was privileged, officer's presence was for security and thus was an agent of the doctor, *State v. Gibson,* 3 Wn.App. 590 (1970), *State v. Godsey*, 131 Wn.App. 278, 284-86 (2006), and thus third person's presence did not vitiate the medical privilege; I.

***State v. A.M.****,* 194 Wn.2d 33 (2019)

Respondent invokes *Miranda* rights, at booking she is required to sign property inventory, confirms that backpack where drugs were found is hers, at trial court admits inventory; held: signing intake form was involuntary and thus inadmissible, *State v. DeLeon,* 185 Wn.2d 478 (2016); 9-0.

***State v. Escalante***, 195 Wn.2d 526 (2020)

Defendant is detained at Canada border by border control agents for five hours in locked room, then questioned without *Miranda* warnings, admits to possession of drugs; held: totality of circumstances establish that a reasonable person would believe s/he was under custodial arrest, thus *Miranda* warnings are mandatory regardless of the fact that it occurred at a border where Fourth Amendment protections are relaxed, distinguishing *United States v. Ramsey*, 431 U.S. 606, 616-21, 97 S. Ct. 1972, 52 L. Ed. 2d 617 (1977); 9-0.

***State v. Putman***, 21 Wn.App.2d 36, 41-48 (2022)

Detective testifies that he interrogated defendant, asked if he says that victim is lying; held: an officer is allowed to give direct testimony repeating statements accusing a witness of lying if it "provides context for the interrogation," *Pers. Restraint of Lui,* 188 Wn.2d 525, 555, (2016), *State v. Demery*, 144 Wn.2d 753, 763-64 (2001), the questions were not opinion testimony, *see: State v. Kirkman*, 159 Wn.2d 918, 931 (2007); court should give a limiting instruction but where context is clear it is not error not to do so, *Demery, supra.,* at 762; I.

# STATEMENTS AND CONFESSIONS
## Police/Prosecutor's Comment on Silence

***State v. Upton***, 16 Wn.App. 195 (1976)

Use of defendant's post-arrest silence to impeach plea of self-defense violates due process, *Doyle v. Ohio*, 49 L.Ed.2d 91 (1976), *State v. Modica*, 18 Wn.App. 467 (1977), *State v. Fricks*, 91 Wn.2d 391 (1979), *State v. Cook*, 17 Wn.App.2d 96 (2021), *cf.*: *Greer v. Miller*, 97 L.Ed.2d 618 (1987), *State v. Gutierrez*, 50 Wn.App. 583 (1988), *Brecht v. Abrahamson*, 123 L.Ed.2d 353 (1993), *State v. Curtis*, 110 Wn.App. 6 (2002); II.

***Jenkins v. Anderson***, 65 L.Ed.2d 86 (1980)

State can impeach a testifying defendant with his prior *pre-arrest* silence, *Salinas v. Texas*, 570 U.S. 178, 186 L.Ed.2d 376 (2013); seems to be limited to situation where defendant, claiming self-defense at trial did not "speak out" prior to his arrest; *accord*: *State v. Hamilton*, 47 Wn.App. 15 (1987), *see: State v.Burke*, 163 Wn.2d 204 (2008) ; 7-2.

***Anderson v. Charles***, 65 L.Ed.2d 222 (1980)

Prosecutor can ask defendant on cross why he didn't tell his story when he was arrested; not comment on silence as long as defendant did make a statement at arrest, *State v. Gregory*, 158 Wn.2d 759, 836-40 (2006), *overruled, on other grounds, State v. W.R.*, 181 Wn.2d 757 (2014), *cf.: State v. Fuller*, 169 Wn.App. 797 (2012); 7-2.

***State v. Evans***, 96 Wn.2d 1 (1981)

Police twice testify that defendant declined to make a statement after advice of rights, held to be harmless error beyond a reasonable doubt, *State v. Whitaker,* 6 Wn.App.2d 1 (2018), *affirmed, on different grounds, State v. Whitaker*, 195 Wn.2d 333 (2020); 9-0.

***Fletcher v. Weir***, 71 L.Ed.2d 490 (1982)

State may cross-examine and impeach a defendant's trial testimony re: post-arrest but pre-*Miranda* warning silence; distinguishes *Doyle v. Ohio*, 49 L.Ed.2d 91 (1976) and *Jenkins v. Anderson*, 65 L.Ed.2d 86 (1980), *see: State v.Burke*, 163 Wn.2d 204 (2008), *but see*: *State v. Davis*, 38 Wn.App. 600 (1984); 7-2.

***State v. Hatley***, 41 Wn.App. 789 (1985)

Where defendant, after advice of rights, makes a statement to police and has not exercised his right to remain silent, then defendant may be cross-examined at trial as to what he failed to tell police, *Anderson v. Charles*, 65 L.Ed.2d 222 (1980), *State v. Gregory*, 158 Wn.2d 759, 836-40 (2006), *overruled, on other grounds, State v. W.R.*, 181 Wn.2d 757 (2014), *distinguishing Doyle v. Ohio*, 49 L.Ed.2d 91 (1976); I.

***Wainwright v. Greenfield***, 88 L.Ed.2d 623 (1986)

Prosecutor's comment that defendant's post-arrest exercise of his right to remain silent, after receiving *Miranda* warnings, was evidence of his sanity violates due process clause and 5th Amendment; 9-0.

***State v. Seeley***, 43 Wn.App. 711 (1986)

Defendant, after advice of rights, makes exculpatory statement to police; at trial, defendant testifies consistently with prior statement, but adds facts which he claims he told police; in rebuttal police testify defendant did not tell them what he testified he told them; held: comment on defendant's failure to tell police what he testified he told them is proper as the inferences from the facts given at trial and those told to the police differ, *United States v. Leonardi*, 623 F.2d 746, 756-57 (2d Cir. 1980), *distinguishing* *Doyle v. Ohio*, 49 L.Ed.2d 91 (1976); *see also*: *Anderson v. Charles*, 65 L.Ed.2d 222 (1980), *State v. Cosden*, 18 Wn.App. 213 (1977), *see: State v. Belgarde*, 120 Wn.2d 504, 511-12 (1988); II.

***State v. Kendrick***, 47 Wn.App. 620 (1987)

Where defense elicits evidence that defendant cooperated with police as evidence of his innocence, then state may rebut that impression to impeach defendant's version of his post-arrest conduct by using defendant's post-arrest silence, *State v. Vargas*, 25 Wn.App. 809 (1980), *cf.: State v. Holmes*, 122 Wn.App. 438 (2004); I.

***State v. Belgarde***, 110 Wn.2d 504 (1988)

Comment in closing that defendant didn't say anything to police at arrest violates due process, *State v. Silva*, 119 Wn.2d 922 (2003), *reversing State v. Belgarde*, 46 Wn.App. 441 (1986), *see: State v. McSorley*, 128 Wn.App. 598, 614-17 (2005); 9-0.

***State v. Jones***, 111 Wn.2d 239 (1988)

Where defense psychiatrist, testifying in support of defendant's insanity plea, comments on direct that defendant had "pled the Fifth" at Western State Hospital, then door is open to state's psychologist testifying to the fact in rebuttal, *United States v. Robinson*, 99 L.Ed.2d 23 (1988); 9-0.

***United States v. Robinson***, 99 L.Ed.2d 23 (1988)

During closing, defense counsel argues that government has not allowed nontestifying defendant to explain his side of the story, United States Attorney argues that defendant could have taken the stand; held: fair response to claim made by defense counsel; 5-3.

***State v. Watkins***, 53 Wn.App. 264 (1989)

Police have probable cause to arrest defendant for robbery, approach defendant on the street, show her photograph of herself robbing store, ask her if she recognizes it, which she denies, arrest defendant; at trial, prosecutor cross-examines defendant to inquire why she did not tell police about her duress defense rather than deny recognizing photograph, motion for mistrial denied; held: defendant may be impeached by pre-arrest silence, *Jenkins v. Anderson*, 65 L.Ed.2d 86 (1980), *Salinas v. Texas*, 570 U.S. 178, 186 L.Ed.2d 376 (2013), because defendant would not have reasonably believed that she was under arrest, she was not entitled to *Miranda* warnings,

*Berkemer v. McCarty*, 82 L.Ed.2d 317 (1984), and thus prosecutor's question did not violate her right to remain silent; I.

***State v. Scott***, 58 Wn.App. 50 (1990)

Defendant tells police that no knife was used and thus no robbery occurred; at trial, defense theory is mistaken identity, pursued in closing argument; held: prosecutor may comment in closing upon inconsistencies between a nontestifying defendant's "partial silence" and the defense theory pursued at trial; prosecutor's argument at closing that defense would have presented an exculpatory explanation for any evidence that the state would have presented was clearly conjecture which would not lead jury to infer guilt from defendant's silence at trial, *distinguishing* *State v. Sargent*, 40 Wn.App. 340, 346 (1985); I.

***State v. Heller***, 58 Wn.App. 414 (1990)

Defendant is arrested for robbery, tells police she doesn't know what they are talking about when questioned following *Miranda* warnings; at trial, defendant raises self-defense, prosecutor cross-examines her regarding her failure to tell police about self-defense and questions her as to why she or her attorney did not subsequently tell police or prosecutor about her defense; held: defendant's statement to police was not silence nor was it "insolubly ambiguous" and was inconsistent with trial testimony, so prosecutor could raise unfavorable inferences from her failure to tell police at the time of arrest the exculpatory information, *State v. Belgarde*, 110 Wn.2d 504, 511 (1988), *State v. Gutierrez*, 50 Wn.App. 583, 589 (1988), *State v. McSorley*, 128 Wn.App. 598, 614-17 (2005); prosecutor's implying in cross that defendant had some obligation to come forward violates her right to remain silent, not harmless, thus reversed; I.

***State v. Crane***, 116 Wn.2d 315 (1991)

Absent manifest intent of prosecutor to comment on right of accused to remain silent, *State v. Scott*, 93 Wn.2d 7, 13 (1980), a "subtle and brief" statement that "did not 'naturally and necessarily' emphasize defendant's testimonial silence," *State v. Crawford*, 21 Wn.App. 146, 152 (1978) is not error, *State v. Gregory*, 158 Wn.2d 759, 840-41 (2006), *overruled, on other grounds*, *State v. W.R.*, 181 Wn.2d 757 (2014); test to determine whether trial court abused discretion in denying motion for mistrial: (1) seriousness of irregularity, (2) whether comment was cumulative to other evidence properly admitted, (3) can irregularity be cured by instruction to jury to disregard, *State v. Weber*, 99 Wn.2d 158, 164-65 (1983).

***Brecht v. Abrahamson***, 123 L.Ed.2d 353 (1993)

Defendant's silence prior to arrest, or after arrest if no *Miranda* warnings are given, may be used to impeach defendant's testimony at trial, *cf.:* *State v. Curtis*, 110 Wn.App. 6 (2002).

***State v. Dickerson***, 69 Wn.App. 744 (1993)

Counsel for co-defendant's comment on defendant's failure to testify may deprive a nontestifying defendant of a fair trial, harmless here due to failure to object; I.

***State v. Rogers***, 70 Wn.App. 626 (1993)

In vehicular homicide case, defendant's response to question as to how much he drank, to wit: "I would just as soon leave that," admitted at trial without objection, is harmless error, *State v. Johnson*, 42 Wn.App. 425, 431 (1985), *State v. Wilmoth*, 31 Wn.App. 820 (1982), *State v. Whitaker,* 6 Wn.App.2d 1 (2018), *affirmed, on different grounds, State v. Whitaker,* 195 Wn.2d 333 (2020); II.

***State v. McFarland***, 73 Wn.App. 57, 62-66 (1994)

After waiving *Miranda* rights and agreeing to take primer residue test, defendant then declines to take the test, prosecutor so argues to jury; held: prosecutor did not improperly comment on silence, *Doyle v. Ohio*, 49 L.Ed.2d 91 (1976), as defendant waived his Fifth Amendment rights and did not subsequently invoke his right to remain silent; II.

***State v. Fiallo-Lopez***, 78 Wn.App. 717, 728-9 (1995)

Prosecutor's closing argument that there was "absolutely" no evidence to explain why defendant was present at drug deal and that there was no attempt by defendant to rebut are impermissible comments on defendant's decision not to testify, *State v. Ramirez*, 49 Wn.App. 332, 336 (1987), *State v. Fuller,* 169 Wn.App. 797 (2012), harmless here; I.

***State v. Easter***, 130 Wn.2d 228 (1996)

A defendant's pre-arrest silence offered as substantive evidence is inadmissible in state's case-in-chief, *State v. Keene*, 86 Wn.App. 589 (1997), *State v. Romero*, 113 Wn.App. 779, 786-95 (2002), *State v. Fuller,* 169 Wn.App. 797 (2012), *cf.: State v. Sweet*, 138 Wn.2d 466, 480-81 (1999), *State v.Burke*, 163 Wn.2d 204 (2008). *State v. Palmer,* ___ Wn.App.2d ___, 518 P.3d 252 (2022), *but see: Salinas v. Texas,* 570 U.S. 178, 186 L.Ed.2d 376 (2013), *State v. Magana,* 197 Wn.App. 189 (2016); 9-0.

***State v. Lewis***, 130 Wn.2d 700 (1996)

Detective testifies that he telephoned defendant and told him if he was innocent he should come in and talk about it, mistrial motion denied; held: as detective did not testify that defendant did not come in to talk, there was no comment on silence, testimony was ambiguous, thus denial of mistrial motion was within court's discretion, *State v. Sweet*, 138 Wn.2d 466, 480-81 (1999), *State v. Romero*, 113 Wn.App. 779, 786-95 (2002), *State v. Gregory*, 158 Wn.2d 759, 836-40 (2006), *overruled, on other grounds, State v. W.R.,* 181 Wn.2d 757 (2014); 7-2.

***State v. Keene***, 86 Wn.App. 589 (1997)

Detective testifies, without objection, that defendant failed to make appointments to discuss case, she warned defendant if he did not return calls she would turn matter over to prosecutor, she did not hear from defendant again, in closing, prosecutor argues that these are not innocent acts; held: pre-arrest silence offered as substantive evidence is inadmissible in state's case-in-chief, *State v. Easter*, 130 Wn.2d 228, 241 (1996), *State v. Easter*, 130 Wn.2d 228 (1996), *but see: : Salinas v. Texas,* 570 U.S. 178, 186 L.Ed.2d 376 (2013), *State v. Magana*, 197 Wn.App. 189 (2016), distinguishing *State v. Lewis*, 130 Wn.2d 700 (1986); manifest constitutional error; III.

***Mitchell v. United States***, 143 L.Ed.2d 424 (1999)

Defendant pleads guilty, at sentencing co-defendant testifies for government, defendant does not testify, court notes defendant's failure to testify as a factor persuading court to rely upon testimony of co-defendant; held: guilty plea is not a waiver of the right not to testify at sentencing, as under the Fifth Amendment, incrimination is not complete until sentence is imposed and judgment is final, thus court may not draw adverse inference from defendant's silence at sentencing; 5-4.

***State v. Sweet***, 138 Wn.2d 466, 480-81 (1999)

Without objection, detective testifies at trial that he asked defendant if he would take a polygraph and make a statement, defendant said he would after he discussed it with his attorney; held: testimony was a "mere reference to silence which is not a 'comment' on the silence," *State v. Lewis*, 130 Wn.2d 700, 706-07 (1996), *State v. Easter*, 130 Wn.2d 228, 241 (1996), *State v. Henderson*, 100 Wn.App. 794, 797-99 (2000),*State v. Shore*, 133 Wn.App. 120, 126-29 (2006), *see: State v. Pottorff*, 138 Wn.App. 343 (2007), *State v. Hager*, 171 Wn.2d 151 (2011), *State v. Terry*, 181 Wn.App. 880 (2014), *but see: State v. Curtis*, 110 Wn.App. 6 (2002), *State v. Romero*, 113 Wn.App. 779, 786-95 (2002), *State v. Palmer*, ___ Wn.App.2d ___, 518 P.3d 252 (2022); 9-0.

***State v. Henderson***, 100 Wn.App. 794, 797-99 (2000)

At trial, officer responds affirmatively to prosecutor asking if officer asked defendant if defendant would agree to be tape recorded; held: while not a comment, the question was an improper reference which could be interpreted as a refusal of defendant to talk, *see: State v. Sweet*, 138 Wn.2d 466, 481 (1999); II.

***State v. Clark***, 143 Wn.2d 731, 764-65 (2001)

Where defendant does not remain silent and talks to police, state may comment on what defendant did not say, *State v. Young*, 89 Wn.2d 613, 621 (1978), *State v. McSorley*, 128 Wn.App. 598, 614-17 (2005), *State v. Gregory*, 158 Wn.2d 759, 836-40 (2006), *overruled, on other grounds, State v. W.R.*, 181 Wn.2d 757 (2014), *cf.: State v. Fuller*, 169 Wn.App. 797 (2012); false information given to police is admissible as evidence relevant to consciousness of guilt, *State v. Allen*, 57 Wn.App. 134, 143 (1990); 9-0.

***State v. Nemitz***, 105 Wn.App. 205, 212-15 (2001)

Following DUI arrest, defendant hands officer his attorney's business card containing *Miranda* warnings, court admits evidence of contents; held: there was no probative value to the information contained on the lawyer's card, only value was its inference that a person disposed to drink and drive would take steps to avoid self-incrimination, thus admission of evidence was reversible error, *State v. Easter*, 130 Wn.2d 228 (1996), *State v. Curtis*, 110 Wn.App. 6 (2002), *State v. Romero*, 113 Wn.App. 779, 786-95 (2002), *cf.: State v. Slone*, 133 Wn.App. 120, 126-29 (2006), distinguishing *State v. Lewis*, 130 Wn.2d 700 (1996); III.

***State v. Curtis***, 110 Wn.App. 6 (2002)

Prosecutor elicits that police advised defendant of *Miranda* rights and defendant refused to speak and requested an attorney; held: evidence of post-*Miranda* silence is manifest

constitutional error, Division III doubts curative value of an instruction, *State v. Romero*, 113 Wn.App. 779, 786-95 (2002), *State v. Pottorff*, 138 Wn.App. 343 (2007), *State v. Cook*, 17 Wn.App.2d 96 (2021).

***State v. Romero***, 113 Wn.App. 779, 786-95 (2002)

Officer testifies that defendant was "uncooperative," objection is sustained, later that defendant was advised of *Miranda* warnings, chose not to waive and would not talk, no objection taken; held: direct comment on defendant's right to silence is constitutional error, *State v. Easter*, 130 Wn.2d 228, 241-42 (1996), *State v. Curtis*, 110 Wn.App. 6, 11-13 (2002), *State v. Nemetz*, 105 Wn.App. 205, 212-15 (2001), *State v. Fuller*, 169 Wn.App. 797 (2012), *State v. Terry*, 181 Wn.App. 880 (2014), *but see: : Salinas v. Texas*, 570 U.S. 178, 186 L.Ed.2d 376 (2013), *State v. Magana*, 197 Wn.App. 189 (2016), *State v. Cook*, 17 Wn.App.2d 96 (2021); where the comment on silence is indirect, *i.e.*, not used as substantive evidence or as an admission of guilt, then it is not constitutional error unless (1) the comment is purposeful, responsive to state's questioning, (2) the comment is unresponsive, volunteered but could be considered that it was offered for the purpose of prejudicing defense or resulting in unintended prejudice, and (3) indirect comment is exploited by state during trial or argument; here, comment was direct and prejudicial, *State v. Holmes*, 122 Wn.App. 438 (2004), distinguishing *State v. Lewis*, 130 Wn.2d 700, 705-07 (1996), *State v. Sweet*, 138 Wn.App. 466, 480-81 (1999), *State v. Hager*, 171 Wn.2d 151 (2011), *see also: State v. Slone*, 133 Wn.App. 120, 126-29 (2006), *State v. Pottorff*, 138 Wn.App. 343 (2007); II.

***State v. Holmes***, 122 Wn.App. 438 (2004)

In child sex case, after defense elicits from detective that defendant was cooperative when arrested, detective testifies on redirect that defendant did not appear surprised and did not deny when advised of the charge, no objection taken although on re-cross defense educes that reaction "did not mean one thing or another;" held: post-arrest silence is inadmissible, *Doyle v. Ohio*, 49 L.Ed.2d 91 (1976), defendant did not open the door as defendant's comments did not contradict defendant's portrayal of himself as cooperative, distinguishing *State v. Kendrick*, 47 Wn.App. 620 (1987), defendant's "unsurprised" reaction was an improper observation on his failure to proclaim his innocence, testimony was more than a fleeting reference, distinguishing *State v. Lewis*, 130 Wn.2d 700, 706 (1996), *State v. Sweet*, 138 Wn.2d 466, 480-91 (1999); direct comment on silence excuses failure to object, *State v. Romero*,113 Wn.App. 779, 790-91 (2002), *State v. Knapp*, 148 Wn.App. 414 (2009); I.

***State v. MacDonald***, 122 Wn.App. 804, 810-12 (2004)

Defendant, charged with two counts of rape, testifies as to one count only, prosecutor comments in closing that defendant did not explain his side; held: defendant only waived his right to remain silent as to one count, prosecutor's comment was improper; remedy, apparently, is to reverse one count; II.

***State v. Saavedra***, 128 Wn.App. 708 (2005)

Police officer's testimony that he searched for suspect, left word at his home for him to call and never received a call back is not a comment on defendant's exercise of the right to remain silent; III.

***State v. Evans***, 129 Wn.App. 211, 225-26 (2005), *reversed, on other grounds*, 159 Wn.2d 402 (2007)

Officer testifies that, in response to a post-*Miranda* question, defendant "didn't answer specifically...other than to say we're going to do what we're going to do;" held: police may testify that a defendant is "recalcitrant" where it is not used as substantive evidence of guilt; II.

***State v. Carnahan***, 130 Wn.App. 159, 167-69 (2005)

Defendant is arrested, drugs seized from car, state does not offer evidence of any statements of defendant, witnesses testify that defendant loaned his car, defendant testifies that he was unaware of drugs, in rebuttal state calls officer to testify that defendant did not mention at arrest that he had loaned his car; held: use of post-arrest post-*Miranda* silence to impeach violates due process where defendant has apparently made no statements to police at all, *Doyle v. Ohio*, 49 L.Ed.2d 91 (1976), *State v. Upton*, 16 Wn.App. 195 (1976), *State v. Fricks*, 91 Wn.2d 1979); II.

***State v. Slone***, 133 Wn.App. 120 (2006)

Police officer's testimony that he read defendant his *Miranda* warnings, by itself, does not amount to an impermissible comment on silence, *see: State v. Sweet*, 138 Wn.2d 466, 480-81 (1999), *State v. Romero*, 113 Wn.App. 779, 786-95 (2002), *but see: State v. Nemitz*, 105 Wn.App. 205, 212-15 (2001), *State v. Curtis*, 110 Wn.App. 6, 9 (2002); II.

***State v. Gregory***, 158 Wn.2d 759, 836-40 (2006), *overruled, on other grounds, State v. W.R.*, 181 Wn.2d 757 (2014)

After arrest, police ask to tape record statement, defendant refuses but makes statement, state offers evidence that defendant declined recording; held: testimony that defendant did not consent to recording, where not mentioned in closing argument nor used to imply guilt, does not amount to a comment on a statutory right, *cf.:* RCW 9.73.090(b); where prosecutor makes a motion *in limine* to exclude argument and then violates the order "strongly suggests that the argument was flagrant and ill-intentioned," at 866; 8-1.

***State v. Pottorff***, 138 Wn.App. 343, 346-48 (2007)

Officer's direct comment on silence ("he didn't reply. He said…he wanted to invoke his right to remain silent") is harmless here where state did not exploit the nonresponsive answer for substantive evidence of guilt, "nothing suggests the jury relied upon Mr. Pottorff's silence as an admission of guilt," ¶ 11, comment did not directly follow *Miranda* warnings, *State v. Romero*, 113 Wn.App. 779, 790-91 (2002); III.

***State v. Stratton***, 139 Wn.App. 511, 515-16 (2007)

Trial court admits video of police asking defendant his name and defendant not responding; held: because criminalizing refusal to identify oneself in the course of a valid *Terry*

stop is consistent with Fourth Amendment prohibitions against unreasonable searches, *Hiibel v. Sixth Judicial Dist. Ct.*, 159 L.Ed.2d 292 (2004), defendant has no Fifth Amendment right to suppress his refusal to identify himself; III.

***State v. Evans***, 163 Wn.2d 204 (2008)

Police visit defendant at home, do not arrest or advise of *Miranda* rights, defendant states he had consensual sex with a girl who was younger than he thought she was, defendant then requests counsel, as police are leaving defendant volunteers a comment about girls always trying to get guys in trouble; at rape of a child trial, officer is asked about last comment, testifies that he asked for a lawyer so we stopped questioning him; defense at trial was that defendant reasonably believed victim to be 16 years old based upon declarations of age, RCW 9A.44.030(2); state argues that if victim told defendant she was 16, he would have told the police, and cross-examines defendant asking why he failed to say he thought she was 16 at the police interview; held: use by state of pre-arrest silence as substantive evidence of guilt implicates the Fifth Amendment, *State v. Easter*, 130 Wn.2d 228 (1996); "[a]n accused's failure to disclose every detail of an event when first contacted by law enforcement officials is not *per se* an inconsistency," at 219 ¶27; here, state "advanced the link between guilt and the termination of the interview," at 222 ¶33, implying that suspects who invoke do so because they know they have done wrong, repeated references to silence had the effect of both impeaching and improperly presenting substantive evidence of guilt, *buit see: : Salinas v. Texas*, 570 U.S. 178, 186 L.Ed.2d 376 (2013), *State v. Magana*, 197 Wn.App. 189 (2016); 5-4.

***State v. Thomas***, 142 Wn.App. 589 (2008)

Officer testifies that while she was investigating offense at complainant's home, defendant called complainant's cell phone, officer answered and identified herself, defendant said that he did not want to talk to her, prosecutor argues in closing that although defendant was accused of a crime he wouldn't talk to the police to explain what happened; held: while officer's testimony was no more than a passing reference to silence, *State v. Romero*, 113 Wn.App. 779, 786-95 (2002), *State v. Lewis*, 130 Wn.2d 700, 707 (1996), *cf.: State v. Terry*, 181 Wn.App. 880 (2014), prosecutor's argument invited jury to infer guilt from refusal to talk with police, constitutional error, *State v. Easter*, 130 Wn.2d 228, 242 (1996), *but see: : Salinas v. Texas*, 570 U.S. 178, 186 L.Ed.2d 376 (2013), *State v. Magana*, 197 Wn.App. 189 (2016); II.

***State v. Hager***, 171 Wn.2d 151 (2011)

Defendant answers questions by police, trial court orders *in limine* that police not testify about defendant's deceptive or evasive behavior, officer violates order, trial court denies mistrial, instructs jury to disregard officer's remark; held: where witness comments on defendant's untruthfulness, there is no Fifth Amendment violation as it is not a comment on silence, *see: State v. Clark*, 143 Wn.2d 731, 765 (2001), distinguishing *State v. Easter*, 130 Wn.2d 228, 242-43 (1996); where witness expresses an opinion about credibility, there is a Sixth Amendment and CONST. art. I, §§ 21 & 22 issue, invading province of jury, *State v. Kirkman*, 159 Wn.2d 918, 927 (2007), but does not always require a new trial, *see: State v. Smith*, 144 Wn.2d 665, 679 (2001), *State v. Warren*, 165 Wn.2d 17 (2008), here the error was cured by the cautionary instruction; reverses *State v. Hager*, 152 Wn.App. 134 (2009); 8-1.

***State v. Curtiss***, 161 Wn.App. 673, 691-92 (2011)

Where defendant speaks to police and court rules statement is admissible, officer's testimony regarding defendant's lack of response to certain interview questions is not improper, *cf.: State v. Fuller*, 169 Wn.App. 797 (2012); II.

***State v. Fuller***, 169 Wn.App. 797, 814-20 (2012)

After advice of rights, defendant makes an exculpatory statement and does not respond to some questions, at trial does not testify, in opening and closing prosecutor argues that defendant didn't deny the offense; held: "[e]liciting testimony about and commenting on a suspect's postarrest silence or partial silence is constitutional error," at 813 ¶ 33, when offered as substantive evidence of guilt, distinguishing *State v. Young,* 89 Wn.2d 613 (1978); II.

***State v. Embry,*** 171 Wn.App. 714, 750-51 (2012)

After advice of rights and making some statements and after being shown crime video, defendant states "that is what it is…can't do anything but go to trial with that," detective testifies that defendant made it clear that the code would not allow him to cooperate or testify against others, prosecutor argues to jury "code of the street: don't cooperate with the police…don't talk to the police…;" held: defendant never clearly and unequivocally invoked his right to remain silent, *see: State v. Hodges,* 118 Wn.App. 668 (2003); failure to object to prosecutor's argument waived error as statement was not flagrant and ill intentioned, distinguishing *State v. Monday,* 171 Wn.2d 667 (2011); 2-1, II.

***State v. Terry***, 181 Wn.App. 880 (2014)

Judge invites jurors to propose questions, juror asks and court poses to officer whether defendant was questioned or expressed surprise at being arrested, officer says no, prosecutor in closing argues defendant didn't ask why he was arrested because he knew he was guilty; held: while a comment on pre-arrest silence may be permissible, *Salinas v. Texas,* 570 U.S. 178, 186 L.Ed.2d 376 (2013), the question posed could only have applied to post-arrest silence and thus was a comment, more than a passing reference, *State v. Burke,* 163 Wn.2d 204, 213 (2008), thus was manifest constitutional error; III.

***State v. Pinson***, 183 Wn.App. 411 (2014)

Defendant is arrested, speaks to police who ask if fight was verbal or physical, defendant does not respond, trial court rules *in limine* state cannot ask about defendant not answering question, defense counsel elicits it on cross examination of officer, state argues, without objection, that defendant's silence was evidence of guilt; held: while pre-arrest silence may be used to impeach a defendant who testifies at trial, *State v. Burke,* 163 Wn.2d 204, 217 (2008), and may be used as substantive evidence even if defendant doesn't testify if defendant remained silent and did not invoke the privilege, *Salinas v. Texas,* 570 U.S. 178, 186 L.Ed.2d 376 (2013), post-arrest silence, even in the absence of invoking the privilege, cannot be used, it is flagrant and ill-intentioned misconduct for prosecutor to argue that silence is evidence of guilt even where defense brought out the evidence and did not object; II.

***State v. Magana***, 197 Wn.App. 189 (2016)

Detective testifies that defendant failed to appear for an interview; held: pre-arrest silence is admissible as substantive evidence, *Salinas v. Texas*, 570 U.S. 178, 186 L.Ed.2d 376 (2013), which has effectively overruled *State v. Keene*, 86 Wn.App. 589 (1997), *State v. Easter*, 130 Wn.2d 228, 241 (1996), *State v. Evans*, 163 Wn.2d 204 (2008), *State v. Thomas*, 142 Wn.App. 589 (2008); state constitution is co-extensive with Fifth Amendment; III.

***State v. Palmer***, ___ Wn.App.2d ___, 518 P.3d 252 (2022)

Prosecutor elicits from detective that he went to jail to talk to defendant, asked if defendant wanted to do the right thing and talk, defendant said no; held: prosecutor and witness may not comment on defendant's silence, detective's offer of a chance to "do the right thing" suggests that silence equals guilt, *State v. Keene*, 86 Wn.App. 589 (1997). *State v. Easter*, 130 Wn.2d 228 (1996), comment "may warrant reversal and a new trial," although case reversed on other grounds; II.

# STATUTE OF LIMITATIONS

***State v. Eppens***, 30 Wn.App. 119 (1981)

Defendant is charged within the statute of limitations, state later amends to add counts for which the statute had run; held: where amendment broadens the original charge, it does not relate back to the filing date of the original information, thus additional counts must be dismissed, *see: State v. Novotny*, 76 Wn.App. 343 (1994), *State v. Sutherland*, 104 Wn.App. 122, 133-35 (2001), *cf.: State v. Mehaffey*, 125 Wn.App. 595 (2005), *State v. Warren*, 127 Wn.App. 893 (2005).

***State v. Carrier***, 36 Wn.App. 755 (1984)

A series of transactions that occur outside statute of limitations may be charged when acts comprise one continuous crime in which the completion of the acts occurs within the statute, *see: State v. Mermis*, 105 Wn.App. 738 (2001), *State v. Koch*, 38 Wn.App. 457 (1984) *State v. Dash*, 163 Wn.App. 63, 67-71 (2011), *State v. Mehrabian*, 175 Wn.App. 678, 690-95 (2013), *State v. Reeder*, 181 Wn.App. 897, 923-25 (2014), *affirmed, on other grounds*, 184 Wn.2d 805 (2015); II.

***State v. Brisebois***, 39 Wn.App. 156 (1984)

Where a crime is continuous (**welfare fraud**), the crime is not completed until the continuing criminal conduct is completed, at which time the statute of limitations begins to run; I.

***State v. Fischer***, 40 Wn.App. 506 (1985)

Date of offense in information is outside statute of limitations, date in affidavit of probable cause is within statute, state's motion to amend information to change date of offense is denied, information dismissed; held: where charge is filed within statute of limitations but error is made in date crime is alleged to have occurred, state may amend information after the expiration of the limitations period if defendant had notice, amendment does not change the offense or alter a material element, and no prejudice is shown, *but see*: *State v. Bryce*, 41 Wn.App. 802 (1985), *State v. Glover*, 25 Wn.App. 58 (1979); I.

***State v. Bryce***, 41 Wn.App. 802 (1985)

Where original information charged a crime beyond the statute of limitations, trial court may not grant motion to amend information to bring case within the limitation period, *State v. Glover*, 25 Wn.App. 58 (1979), *but see*: *State v. Fischer*, 40 Wn.App. 508 (1985); II.

***State v. Hodgson***, 108 Wn.2d 662 (1987)

Expanding statute of limitation applies retroactively and does not violate *ex post facto* clause as long as statute of limitations was extended before the prosecution was barred, *State v. Foster*, 81 Wn.App. 508, 510-14 (1996), *see: Stogner v. California*, 156 L.Ed.2d 544 (2003); *affirms State v. Hodgson*, 44 Wn.App. 592 (1986); 9-0.

***State v. Dennison***, 115 Wn.2d 577 (1990)

Statute of limitations for **felony murder** is the same as for murder, *i.e.*, none; statute of limitations on underlying felony is irrelevant; 9-0.

***State v. Horn***, 59 Wn.App. 664 (1990)

When legislature changes statute of limitations, the change applies to crimes committed after the change, not to charges filed after the change, *see also: State v. Foster*, 81 Wn.App. 508, 510-14 (1996); II.

***State v. Klump***, 61 Wn.App. 911 (1991)

Failure to appear or respond to a traffic infraction, RCW 46.63.060(2)(k), 46.64.020(2), is a misdemeanor which occurs when violator fails to respond within 15 days of citation or fails to appear; it is not a continuing offense, thus statute of limitations is one year; III.

***State v. Foster***, 81 Wn.App. 508, 510-14 (1996)

Seven year statute of limitations for **indecent liberties**, RCW 9A.44.100(1)(b), 9A.04.080(1)(c), applies to indecent liberties as it read before its amendment in 1988, at 513; I.

***State v. Argo***, 81 Wn.App. 552, 566-8 (1996)

In Ponzi scheme **securities fraud**, ch. 21.20, RCW, where defendant lulls victims into a state of passive inactivity ("lulling doctrine"), statute of limitations is tolled and begins running again when defendant's lulling activities are completed, *State v. Anthone,* 184 Wn.App. 92, 101-04 (2014); I.

***State v. N.S.***, 98 Wn.App. 910 (2000)

Respondent is acquitted of rape 3°, convicted of lesser attempted rape 3° over objection that statute of limitations has run on the lesser gross misdemeanor, trial court holds that statute for the greater controls; held: defendant cannot be convicted of a lesser on a prosecution for a greater crime commenced after the statute of limitations has run on the lesser; I.

***Pers. Restraint of Stoudmire***, 141 Wn.2d 342 (2000)

Guilty plea does not waive challenge to a conviction that is beyond statute of limitations, although court still has subject matter jurisdiction, *see: State v. Peltier,* 181 Wn.2d 290 (2014), *Pers. Restraint of Swagerty,* 186 Wash. 2d 801 (2016), *State v. Loos,* 14 Wn.App.2d 748 (2020); 9-0.

***State v. Sutherland***, 104 Wn.App. 122, 133-35 (2001)

Where a defective information is filed and dismissed without prejudice for failure to allege an essential element of the crime, state may not use the "relation-back doctrine" where case is re-filed after statute of limitations period has lapsed, *Bothell v. Kaiser*, 152 Wn.App. 466, 474-79 (2009), *but see: State v. Warren*, 127 Wn.App. 893, 899 (2005); II.

***State v. Mermis***, 105 Wn.App. 738 (2001)

Beyond three year statute of limitations, defendant agrees to buy a car and takes possession of it, knowing he cannot pay for it; three weeks later, within the statute of limitations, title is transferred to defendant; held: because the trier of fact could find that there was a continuing criminal impulse, then the prosecution is not barred, *State v. Carrier*, 36 Wn.App.

755 (1984), *State v. Mehrabian*, 175 Wn.App. 678, 690-95 (2013), *see: State v. Javier Contreras*, 162 Wn.App. 540 (2011), *State v. Dash*, 163 Wn.App. 63, 67-71 (2011), however jury should have been instructed as to statute of limitations, thus reversed and remanded; I.

***Stogner v. California***, 156 L.Ed.2d 544 (2003)

Where statute of limitations has expired, new statute which expands limitations period violates *ex post facto* clause; 6-3.

***State v. Mehaffey***, 125 Wn.App. 595, 598-99 (2005)

Defendant is charged with possession of cocaine, after statute runs state amends to possession of methamphetamine in order to reduce defendant's range; held: an amended information relates back to the filing date of the original information as long as the charge, as amended, arose out of the conduct set forth in the original pleading, *State v. Eppens*, 30 Wn.App. 119, 123 (1981), *see: State v. Warren*, 127 Wn.App. 893 (2005), absent prejudice, *State v. Aleshire*, 89 Wn.2d 67, 71 (1977); III.

***State v. Cook***, 125 Wn.App. 709 (2005)

Police officer who commits a felony is subject to a ten-year statute of limitation, RCW 9A.04.080(1)(b)(i); 2-1, II.

***State v. Warren***, 127 Wn.App. 893 (2005)

Defendant is charged with DUI, after statute of limitations runs state adds negligent driving 1° on same facts; held: because negligent driving is a less serious offense, based on same evidence and did not create a potential for "a greater stigma or penalty," it relates back to the original charge, does not violate statute of limitations, *see: State v. Eppens*, 30 Wn.App. 119 (1981), *but see: State v. Sutherland*, 104 Wn.App. 122 (2001); I.

***Bellevue v. Benyaminov***, 144 Wn.App. 755 (2008)

Statute of limitations may be equitably tolled where there is evidence of bad faith, deception or false assurances by the defendant and the exercise of diligence by plaintiff; I.

***State v. Willingham***, 169 Wn.2d 192 (2010)

Defendant leaves state for two weeks for job training, state claims statute of limitations is tolled, trial court dismisses; held: mere absence from state does not toll statute of limitations, overruling language in *State v. Ansell*, 36 Wn.App. 492, 496 (1984), *State v. McDonald*, 100 Wn.App. 828 (2000); to toll for absence defendant must change residence; *per curiam.*

***State v. Walker***, 153 Wn.App. 701 (2009)

When a statute of limitations challenge is raised, the state bears the burden of establishing that sufficient time is tolled to permit the matter to proceed; tolling occurs when accused lives outside Washington, voluntarily or involuntarily; statute of limitations challenge is jurisdictional, *abrogated by State v. Peltier*, 181 Wn.2d 290 (2014), *State v. Loos*, 14 Wn.App.2d 748 (2020).
thus can be raised for the first time on appeal; III.

***State v. Javier Contreras***, 162 Wn.App. 540 (2011)

Defendant receives stolen car beyond three year limitation period but retains it within the statute of limitations; held: while legislature did not declare possessing stolen property to be a continuing offense, it is continuing because the nature of the offense leads to a reasonable conclusion that the legislature so intended, *State v. Green,* 150 Wn.2d 740, 742-43 (2004), distinguishing *State v. Ladely,* 82 Wn.2d 172 (1973); III.

***State v. Dash***, 163 Wn.App. 63, 67-71 (2011)

Defendant is convicted of one count of theft 1° for a series of transactions over a five year period, jury is instructed that, to convict, it must find he committed the crime "during a period of time intervening" over the five year period and that the acts were part of a common scheme or plan, a continuing course of conduct and a continuing criminal impulse, raises statute of limitations issue for first time on appeal, *State v. Novotny,* 76 Wn.App. 343, 345 n.1 (1994); held: because jury did not make a finding regarding when the continuing criminal impulse terminated, it cannot be determined whether the jury convicted defendant based solely upon acts committed outside the limitation period, *State v. Mermis,* 105 Wn.App. 738 (2001), *see: State v. Mehrabian,* 175 Wn.App. 678, 690-95 (2013); I.

***State v. McConnell***, 178 Wn.App. 592, 602-05 (2013)

Rape occurs in 1998, DNA matches unknown male, in 2011 lab concludes DNA matches defendant, court denied motion to dismiss; held: statute of limitations for rape 1° is ten years from the date of commission or one year from date identity is conclusively established by DNA testing, RCW 9A.04.080(3) (2013), identity is not conclusively established until DNA testing matches profile of a known suspect; I.

***State v. Peltier***, 181 Wn.2d 290 (2014)

At the time of a guilty plea a defendant may expressly waive a statute of limitations that has not yet run on the underlying charge; statute of limitations is not jurisdictional, *Pers. Restraint of Stoudmire,* 141 Wn.2d 342, 353 (2000), *overruling, in part, State v. Glover,* 25 Wn.App. 58, 61 (1979), *State v. Eppens,* 30 Wn.App. 119, 124 (1981), *State v. Ansell,* 36 Wn.App. 492, 496 (1984), *State v. Fischer,* 40 Wn.App. 506, 510 (1985), *State v. Bryce,* 41 Wn.App. 802, 807 (1985), *State v. Novotny,* 76 Wn.App. 343, 345 n.1 (1994), *State v. N.S.*, 98 Wn.App. 910, 914-15 (2000), *State v. Walker,* 153 Wn.App. 701, 705 (2009), *State v. Loos,* 14 Wn.App.2d 748 (2020), rather it affects the authority of a court to sentence a defendant for a crime, *see: Pers. Restraint of Swagerty,* 186 Wn.2d 801 (2016); reverses *State v. Peltier,* 176 Wn.App. 732 (2013); 9-0.

***State v. Reeder***, 181 Wn.App. 897, 921-925 (2014), *affirmed, on other grounds,* 184 Wn.2d 805 (2015)

Statute of limitations for securities fraud, ch. 21.20, RCW, is 5 years after violation or 3 years after discovery, RCW 21.20.400(3) (2003), rather than pursuant to the general statute of limitations section, RCW 9A.04.080(1)(h), as general statute conflicts with special act and thus special act is an exception; I.

***Pers. Restraint of Swagerty,*** 186 Wn.2d 801 (2016)

"As long as the statute of limitations has not yet run at the time of charging on … original,

more serious charges, the defendant may knowingly and expressly waive an expired statute of limitations on lesser charges to take advantage of a beneficial plea offer," at 809-10, *see: State v. Peltier*, 181 Wn.2d 290 (2014), distinguishing *Pers. Restraint of Stoudemire*, 141 Wn.2d/ 342, (2000); 5-4.

***State v. Merritt***, 200 Wn.App. 398 (2017), *affirmed*, 193 Wn.2d 70 (2019)

**Mortgage fraud**, ch. 19.144 RCW, must be filed within five years of the crime or within three years of the state's actual discovery of the specific violation, RCW 19.144.090 (2015), at 406-07; statute of limitations is not an element of a crime that must be included in an information, at 405-06; I.

***State v. Merritt***, 193 Wn.2d 70 (2019)

Statute of limitations is not an element of a crime that must be included in an information; while RCW 10.37.050(5) (2010) does state that an information should include language that the crime was committed within the statute of limitations, it provides no remedy thus, at least absent an objection, an information that lacks that statement is still sufficient; affirms *State v. Merritt*, 200 Wn.App. 398, 405-06 (2017); 9-0.

***State v. Loos***, 14 Wn.App.2d 748 (2020)

Defendant is charged with assault of a child 3°, is convicted of assault 4° as an inferior degree offense, on appeal argues, for the first time, that statute of limitations for assault 4° had passed; held: failure to raise a statute of limitations issue in the trial court precludes review, *State v. Peltier*, 181 Wn.2d 290 (2014), *State v. Davis*, 17 Wn.App.2d 264 (2021); I.

***State v. Davis***, 17 Wn.App.2d 264 (2021)

Affirmatively requesting a jury instruction on a lesser included offense necessarily results in a waiver or forfeiture of a statute of limitations defense to the lesser, *see:* *State v. Loos*, 14 Wn.App. 2d 748 (2020); I.

# STATUTORY CONSTRUCTION

***State v. Jones***, 84 Wn.2d 823 (1974)

Words used in a statute must be given their usual, ordinary, commonly accepted and full meaning, *State v. Thierry*, 60 Wn.App. 445 (1991).

***State v. Cain***, 28 Wn.App. 462 (1981)

In a rape case, a finger is an "object", former RCW 9.79.170(1); words in statutes are to be understood in their ordinary and popular sense, and must be given the usual and ordinary meaning unless a contrary intent appears; while criminal statutes must be construed strictly in favor of the accused, they should not be so overstrictly construed as to defeat their purpose; I.

***State v. Danforth***, 97 Wn.2d 255 (1982)

Where there is a general statute (escape) and a specific statute (willful failure to return to work release), and defendant's conduct is proscribed by both, then defendant may only be charged with the specific statute; *accord*: *State v. Shriner*, 101 Wn.2d 576 (1984), *State v. Smeltzer*, 88 Wn.App. 818 (1997), *but see*: *State v. Pestrin*, 43 Wn.App. 705 (1986), *State v. Heffner*, 126 Wn.App. 803 (2005), *State v. Wright*, 183 Wn.App. 719, 730-32 (2014), *see: State v. Presba*, 131 Wn.App. 47 (2005), *cf.: State v. Conte*, 159 Wn.2d 797 (2007), *State v. Numrich*, 197 Wn.2d 1 (2021); 8-0.

***In Re R.***, 97 Wn.2d 182 (1982)

In resolving a question of statutory construction, the spirit and intent of the law should prevail over the letter of the law; if an act is subject to two interpretations, that which best advances the legislative purpose should be adopted; 9-0.

***State v. Pestrin***, 43 Wn.App. 705 (1986)

Defendant, charged with theft, is alleged to have sold a vehicle knowing that the odometer was turned back, challenges conviction claiming he should have been charged with special odometer statute, RCW 46.37.550; held: general theft requires proof of intent to deprive and value; determining factor is that the general statute will be violated in each instance where the special statute has been violated, *State v. Shriner*, 101 Wn.2d 576, 580 (1984), *State v. Heffner*, 126 Wn.App. 803 (2005); here, additional elements must be proved for the general statute, thus the general/specific rule is inapplicable, *State v. Presba*, 131 Wn.App. 47 (2005), *State v. Wright*, 183 Wn.App. 719, 730-32 (2014), *State v. Numrich*, 197 Wn.2d 1 (2021); no equal protection violation, as elements differ, *State v. Chase*, 134 Wn.App. 792, 800-03 (2006); III.

***State v. White***, 47 Wn.App. 373 (1987)

A cash machine card could be construed as a written instrument, RCW 9A.60.010(1)(b), however the contrary construction is also possible; where two possible constructions are permissible, the rule of lenity requires construction strictly against the state, *State v. Gore*, 101 Wn.2d 481 (1984), *State v. Workman*, 90 Wn.2d 443 (1978), *see: State v. RJ.*, 121 Wn.App. 215, 217 n.2 (2004); III.

***State v. Plank***, 47 Wn.App. 461 (1987)

Bail jumping, RCW 9A.76.170, repeals by implication failure to appear, RCW 10.19.130, as they are so clearly inconsistent and repugnant to each other that they cannot be reconciled and given effect with reasonable construction; *see also*: *State v. Kenney*, 52 Wn.App. 193 (1988); I.

***State v. Heher***, 52 Wn.App. 298 (1988)

A grammatically literal reading of a statute will be rejected where it results in strained or absurd consequences, *United States v. X-Citement Video*, 130 L.Ed.2d 372, 378-80 (1994), *see: State v. Yokley*, 91 Wn.App. 733 (1999), *aff'd, on other grounds, Pers. Restraint of Yim,* 139 Wn.2d 581 (1999); I.

***State v. Cooley***, 53 Wn.App. 163 (1989)

Unless enacted by legislature, titles and captions to legislative enactments are not part of the enactment; II.

***Clyde Hill v. Roisen***, 111 Wn.2d 912 (1989)

Intent is not an element of a *mala prohibita* crime unless the ordinance so declares, *Seattle v. Koh*, 26 Wn.App. 708, 713-14 (1980), *Seattle v. Gordon*, 54 Wn.2d 516, 519 (1959), *see: Salinas v.United States*, 139 L.Ed.2d 352, 362 (1997); 9-0.

***State v. Hernandez***, 53 Wn.App. 702 (1989)

Courts will not add a *mens rea* element to a crime unless the absence will create a potential for punishing innocent conduct, *see: State v. Elwell.* 17 Wn.App.2d 367 (2021); knowledge of age is not an element of RCW 69.50.406, distributing drugs to a minor; III.

***State v. Elmore***, 54 Wn.App. 54 (1989)

Criminal intent will not be inferred where the legislature defines a crime as punishable by conduct alone, *State v. Stroh*, 91 Wn.2d 580, 8 A.L.R. 4th 760 (1979); I.

***State v. Dodd***, 56 Wn.App. 257 (1989)

Where appellate court interprets statute, and administrative agency subsequently promul-gates rule interpreting statute otherwise, court's interpretation remains final authority; 2-1, I.

***State v. Elliott***, 114 Wn.2d 6 (1990)

Promoting prostitution 2° is special statute as opposed to general law of aiding and abetting prostitution, and thus there is no equal protection violation for charging former rather than latter; I.

***State v. Dubois***, 58 Wn.App. 299 (1990)

Statute entitled "public indecency," RCW 9A.88.010, prohibited, *inter alia*, "open and obscene exposure," which is interpreted to require an exposure in public, *State v. Sayler*, 36 Wn.App. 230 (1983); legislature amends, changing title to "indecent exposure," but also prohibiting "open and obscene exposure"; trial court dismisses post-amendment case where offense occurred in private home; held: statute is ambiguous because legislature changed title to

remove "public" but left "open" as an element; title change and legislative history establish that legislature intended to eliminate "public" as an element; I.

***State v. Horton***, 59 Wn.App. 412 (1990)

A legislative enactment may be a clarification rather than an amendment, and thus may apply retroactively, where surrounding circumstances indicate that the legislature intended merely to interpret an original act, RCW 1.12.020, *Johnson v. Morris*, 87 Wn.2d 922, 926 (1976); I.

***State v. Aamold***, 60 Wn.App. 175 (1991)

Vehicular homicide and felony murder 2° (felony flight) are not concurrent for purposes of general/special statute analysis, *see: State v. Barstad*, 83 Wn.App. 553 (1999); I.

***State v. Jackson***, 61 Wn.App. 86 (1991)

Subsequent amendments of statutes may be considered by court in determining precise intent of legislature if intent is questionable, *Rozner v. Bellevue*, 116 Wn.2d 342, 347-48 (1991), *State v. Bunker*, 169 Wn.2d 571, 581 (2010); I.

***State v. Kepiro***, 61 Wn.App. 116 (1991)

Intent to harm or reasonably cause alarm is not an element of intimidating a judge, RCW 9A.72.160, *see also: State v. Ozuna*, 184 Wn.2d 238 (2015); I.

***State v. Shelby***, 61 Wn.App. 214 (1991)

Criminal trespass 2°, RCW 9A.52.080, and disobeying a valid order to leave school property, RCW 28A.87.055, are not concurrent, as the latter deals with disruptive or intoxicated persons only; *see*: *Kennewick v. Fountain*, 116 Wn.2d 189 (1991); I.

***State v. Cascade District Court***, 62 Wn.App. 587 (1991)

Rule of lenity applies to punitive statutes, not evidentiary rules; *cf.*: State v. Roberts, 117 Wn.2d 576, 586 (1991); I.

***State v. Liewer***, 65 Wn.App. 641 (1992)

Bribery, RCW 9A.68.010(1)(b), official misconduct, RCW 9A.80.010(1), misconduct of a public officer, RCW 42.20.010, and failure of duty of a public officer, RCW 42.20.100 are not concurrent under general/specific statute analysis, *State v. Shriner*, 101 Wn.2d 576 (1984), *State v. Greco*, 57 Wn.App. 196 (1990); I.

***State v. McDougal***, 120 Wn.2d 334 (1992)

Where the result achieved by an unambiguous statute is "harsh, unjust and absurd," departure from literal construction of statute is justified, *see: State v. Yokley*, 91 Wn.App. 773 (1998), *aff'd, on other grounds*, *Pers. Restraint of Yim*, 139 Wn.2d 581 (1999).

***State v. Karp***, 69 Wn.App. 369 (1993)

Assault 2°, RCW 9A.36.021(1) and unlawful display of a weapon, RCW 9.41.270(1), are not concurrent, as the latter lacks a *mens rea* element, *State v. Murphy*, 7 Wn.App. 505 (1972),

*State v. Hupe*, 50 Wn.App. 277 (1988), *disapproved, on other grounds, State v. Smith*, 159 Wn.2d 778 (2007), *State v. Eakins*, 73 Wn.App. 271, 273-6 (1994); II.

***Ratzlaf v. United States***, 126 L.Ed.2d 615 (1994)

Federal statute prohibits "willfully violating" a currency reporting law, 31 USC § 5322(a), trial court instructs jury that government had to prove defendant's knowledge of the reporting obligation and attempt to evade it, but did not have to prove that he knew the behavior was unlawful; held: the acts prohibited by this statute were not obviously evil or inherently bad, Congress has not specifically dispensed with the reporting requirement irrespective of defendant's knowledge of illegality, thus the term "willful" as used in this statute includes a requirement that government prove defendant knew his act was illegal; where statutory text is clear, court need not look to legislative history, but if there were an ambiguity, it must be resolved in favor of defendant, *Hughey v. United States*, 109 L.Ed.2d 408 (1990), *Crandon v. United States*, 108 L.Ed.2d 132 (1990), *United States v. Bass*, 30 L.Ed.2d 488 (1971), *State v. Elwell*,17 Wn.App.2d 367 (2021), *see also: Bates v. United States*, 139 L.Ed.2d 215 (1997); 5-4.

***State v. Eakins***, 73 Wn.App. 271, 273-6 (1994)

Two criminal statutes with identical elements but disparate penalties do not violate equal protection clause, *United States v. Batchelder*, 60 L.Ed.2d 755 (1979), *Kennewick v. Fountain*, 116 Wn.2d 189, 192 (1991), overruling *State v. Zornes*, 78 Wn.2d 9 (1970); thus, assault 2° and unlawful display of weapon, RCW 9.41.270(1), even if they have same elements, do not violate equal protection, *see: State v. Hupe*, 50 Wn.App. 277 (1988), *disapproved, on other grounds, State v. Smith*, 159 Wn.2d 778 (2007), *State v. Karp*, 69 Wn.App. 369 (1993); II.

***State v. McCann***, 74 Wn.App. 650 (1994)

Taking a motor vehicle without permission is not concurrent with possessing stolen property 1°, as it is possible to commit taking and riding without violating PSP 1° if the vehicle is valued at less than $1500; here, trial court convicted of the lesser offense of PSP 2°, thus the general/specific statute analysis is inapplicable, *see: State v. Shriner*, 101 Wn.2d 576 (1984); *accord: State v. Walker*, 75 Wn.App. 101 (1994) (T&R and theft 1° are not concurrent); III.

***State v. Bernard***, 78 Wn.App. 764 (1995)

The crime of receipt of a precursor drug, RCW 69.43.070(2), is not proved by mere possession of the drug; here, defendant purchased drug in Canada, arrested at border, once purchased act of receiving ended; criminal statute must be given a literal and strict interpretation, plain language does not require construction, *State v. Wilson*, 125 Wn.2d 212, 216-7 (1994); I.

***State v. Bolar***, 129 Wn.2d 361, 366 (1996)

Where statute is plain and unambiguous, court may not engage in statutory construction, *Snohomish v. Joslin*, 9 Wn.App. 495, 498 (1973), nor may court consider nontextual considerations such as equity or the rule of lenity, *In re A, B, C, D, E*, 121 Wn.2d 80, 87 (1993), *State v. McCollum*, 89 Wn.App. 977, 988-9 (1997), *but see: State v. Yokley*, 91 Wn.App. 773 (1998), *aff'd, on other grounds, Pers. Restraint of Yim*, 139 Wn.2d 581 (1999); 9-0.

***State v. Bash***, 130 Wn.2d 594 (1996)

To prove offense of owning a dog which aggressively attacks and causes severe injury, RCW 16.08.100(3), state must prove beyond a reasonable doubt that defendant knew or should have known that the dog was dangerous; courts should not interpret an ambiguous statute to be a strict liability offense absent clear intent of the legislature, *Staples v. United States*, 128 L.Ed.2d 608 (1994), *State v. Semakula*, 88 Wn.App. 719 (1997), *see: Spokane County v. Bates*, 96 Wn.App. 893, 896-99 (1999); 4-3-2.

***State v. Russell***, 84 Wn.App. 1 (1996)

Defendant is charged with two counts of VUFA, former RCW 9.41.040(1), for possessing two guns found in his car, statute prohibits possession by a felon of "any firearm"; held: "any" is ambiguous, thus statute must be construed in favor of defendant, *State v. Wissing*, 66 Wn.App. 745, 753 (1992), *State v. Barnes*, 189 Wn.2d 492 (2017), "any" means all embracing, equivalent to "all" or "every," *State ex rel. Evans v. Brotherhood of Friends*, 41 Wn.2d 133, 145 (1952), thus only one count will lie; statute subsequently amended, RCW 9.41.040(7); II.

***State v. Blilie***, 132 Wn.2d 484, 492 (1997)

Statutes and court rules referencing other statutes include any subsequent amendments to the referenced statute, absent a clear expression of contrary intent, RCW 1.12.020, *State v. Horton*, 59 Wn.App. 412, 416 (1990); 6-3.

***State v. Yokley***, 91 Wn.App. 773 (1998), *aff'd, on other grounds, Pers. Restraint of Yim*, 139 Wn.2d 581 (1999)

Undefined statutory term is accorded its plain and ordinary meaning, *State v. Bolar*, 129 Wn.2d 361, 366 (1996), but court can look to statutes that relate to the same class of things to determine if something other than the plain meaning was intended by the legislature, *State ex rel. Zbinden v. Superior Court*, 135 Wash. 458, 462-63 (1925), or when the plain meaning of a term would lead to unlikely, absurd, or strained consequences, at 779, *State v. McDougal*, 120 Wn.2d 334, 350, 351 (1992), *State v. Heher*, 52 Wn.App. 298 (1988), *State v. Barnes*, 196 Wn.App. 261 (2016), 189 Wn.2d 492 (2017); I.

***Spokane County v. Bates***, 96 Wn.App. 893, 896-99 (1999)

Where vicious animal ordinance expressly provides that owner is strictly liable for a dog bite, there is no *mens rea* element, distinguishing *State v. Bash*, 130 Wn.2d 594 (1996); III.

***State v. Long***, 98 Wn.App. 669 (2000)

Unlawful killing of a pet, RCW 9.08.070(1)(c), is not concurrent with malicious mischief 1°; II.

***State v. D.H.***, 102 Wn.App. 620, 626-27 (2000)

A statement of legislative intent in a statute cannot be used to override unambiguous elements of a penal statute or to add an element of the crime, *State v. Alvarez*, 74 Wn.App. 250, 258 (1994), *aff'd,* 128 Wn.2d 1 (1995), *State v. Presba*, 131 Wn.App. 47, 56 (2005); I.

***State v. R.J.***, 121 Wn.App. 215, 217 (2004)

Where a statute is ambiguous, court is to determine intent of legislature if possible, *State v. Barnes*, 189 Wn.2d 492 (2017), and, if it can, rule of lenity does not apply, *State v. Oakley*, 117 Wn.App. 730, 734 (2003); I.

***State v. Harris***, 123 Wn.App. 906, 918 (2004), *overruled, on other grounds, State v. Hughes*, 154 Wn.2d 118 (2005), *abrogated, on other grounds, Washington v. Recuenco*, 548 U.S. 212, 165 L.Ed.2d 466 (2006),

Where a statute is partially invalid, the invalid portions may be severed if the remaining provisions will still accomplish the statute's purpose and further the legislature's intent, *State v. Williams*, 144 Wn.2d 197, 212-13 (2001); there is a presumption of severability; I.

***State v. Presba***, 131 Wn.App. 47 (2005)

Obstructing an officer, RCW 9A.76.020(1), and refusal to cooperate, RCW 46.61.020(1), are not concurrent with identity theft, former RCW 9.35.020(1)(2001) where defendant uses false identification to avoid arrest at a traffic stop, *see: State v. Shriner*, 101 Wn.2d 576 (1984); I.

***State v. Ou***, 156 Wn.App. 899 (2010)

Following traffic stop, defendant gives a false name, is charged and convicted of making a false or misleading material statement, RCW 9A.76.175, argues that he should have been charged with the more specific offense of giving a false name, RCW 46.61.020; held: statutes are concurrent only when the general statute will be violated in each instance where the special statute has been violated, *State v. Shriner*, 101 Wn.2d 576, 580 (1984), *State v. Presba*, 131 Wn.App. 47 (2005), *State v. Williams*, 62 Wn.App. 748 (1991), *State v. Wright*, 183 Wn.App. 719, 730-32 (2014), *State v. Numrich*, 197 Wn.2d 1 (2021); here, giving a false name does not necessarily constitute a false or misleading material statement, thus statutes are not concurrent; I.

***State v. Wilson***, 158 Wn.App. 305, 313-16 (2010)

Commercial sexual abuse of a minor, RCW 9.68A.100(1), is not concurrent with attempted rape of a child 2°, RCW 9A.44.076(1); I.

***State v. Albarran***, 187 Wn.2d 15 (2016)

Defendant is convicted of rape of a child 2° and rape 2°/incapable of consent, for a single act, trial court vacates rape of a child as the lesser offense under double jeopardy analysis, *State v. Hughes*, 166 Wn.2d 675, 684–86 (2009), defense argues that rape 2° should be vacated as it is a more specific offense under equal protection/general-specific analysis, *State v. Shriner*, 101 Wn.2d 576, 580 (1984); held: because the legislature specifically authorized prosecution of rape°/incapable of consent for children under 15 years, RCW 9.94A.837 (2006), the general-specific analysis is inapplicable; 9-0.

***State v. Barnes***, 189 Wn.2d 492 (2017)

Theft of a motor vehicle statute, RCW 9A.56.065 (2007), does not define "motor vehicle," defendant was charged for theft of a riding lawn motor, statute is ambiguous, legislative intent establishes that the statute applies to "cars," thus dismissed, *Corners Family*

*Farmers v. State*, 173 Wn.2d 296, 305-06, 268 P.3d 892 (2011); affirms *State v. Barnes*, 196 Wn.App. 261 (2016); 6-3.

***State v. LaPointe***, 1 Wn.App.2d 261 (2017)

Defendant pleads guilty to two counts of vehicle prowling 2° on same day but charged in separate informations, subsequent charge of vehicle prowling 2° is elevated to a felony based upon RCW 9A.52.100(3) (2013) which states "[a] third or subsequent conviction means that a person has been previously convicted at least two separate occasions of the crime of vehicle prowling in the second degree;" held: statute is ambiguous, legislative intent is unclear so rule of leniency requires interpretation that "when a defendant pleads guilty on the same day in a single proceeding to multiple counts of misdemeanor vehicle prowling as charged by amended information in two different cause numbers, the crime of vehicle prowling in the second degree is not elevated to a felony;" I.

***State v. Joseph***, 3 Wn.App.2d 365, 370-74 (2018)

Harassment statute, RCW 9A.46.060 (2006), states harassment may include, but is not limited to, a list of 38 crimes, defendant's prior conviction is for a crime that is not listed; held: where a general term, here harassment, is modified by a nonexclusive list, the general term will be deemed to "incorporate those things similar in nature or 'comparable to' the specific terms," *State v. Larson*, 184 Wn.2d 843, 854 (2015), look to legislative intent to determine if the unlisted crime counts; I.

***State v. Yishmael***, 195 Wn.2d 155 (2020)

Unlawful practice of law, RCW 2.48.180(3) (2003), is a strict liability crime; 7-2.

***State v. Numrich***, 197 Wn.2d 1 (2021)

Defendant-employer is accused of being responsible for victim's death, is charged with manslaughter in the second degree, RCW 9A.32.070, and violation of labor safety regulation with death resulting, RCW 49.17.190(3), defense argues that he can only be charged with the labor safety offense (a gross misdemeanor) as it is the specific offense and manslaughter is a general offense, *State v. Danforth*, 97 Wn.2d 255 (1982), *State v. Shriner*, 101 Wn.2d 576 (1984); held: because there are mental state differences in the two statutes the general-specific rule does not apply; 6-3.

***State v. Elwell***, 17 Wn.App.2d 367 (2021)

RCW 46.16A.520 (2011) which reads that it is unlawful for a registered owner of a vehicle to knowingly permit another to drive when the other is not licensed requires the state to prove that knowingly modifies all of the elements including knowing that the other person is unlicensed; where "knowing" is placed at the beginning of a phrase defining criminal conduct it applies to all of the elements, *Flores-Figueroa v. United States*, 556 U.S. 646, 129 S.Ct. 1886, 173 L.Ed.2d 853 (2009), *State v. Felipe Zeferino-Lopez*, 179 Wn.App. 592, 599 (2014); III.

***State v. Zheng***, 18 Wn.App.2d 316 (2021)

Unlawful practice of a profession without a license, RCW 18.130.190(7), is not concurrent with permitting an unlicensed employee to practice massage, RCW 18.108.035; II.

***State v. Moose***, ___ Wn.App.2d ___, 520 P.3d 511 (2022)

Arson is not a concurrent statute with malicious mischief under the general-specific rule, *see: State v. Ou,* 156 Wn.App. 899-902-03 (2010), *State v. Zheng*, 18 Wn.App. 2d 316, 319 (2021), *State v. Numrich,* 197 Wn.2d 1 (2021); I.

***State v. Richter***, ___ Wn.App.2d ___, 521 P.3d 303 (2022)

"[W]e construe statutes to avoid absurd results, and Richter's reading of former RCW 69.50.435(1) would be grammatically nonsensical. Therefore, it is not a reasonable alternative interpretation that creates ambiguity. Under the plain language of the statute, the trial court had discretion to apply the doubling language;" defendant's argument that placement of various commas and semicolons in amended statute makes the statute ambiguous is rejected; II.

# SUSPENDED LICENSE/HABITUAL TRAFFIC OFFENDER

***Bellevue v. Montgomery***, 49 Wn.App. 479 (1987)

Habitual traffic offender defendant, RCW 46.67.090, cannot collaterally attack underlying convictions in trial court, *distinguishing* *State v. Ponce*, 93 Wn.2d 533 (1980), *Upward v. Department of Licensing*, 38 Wn.App. 747 (1984), *State v. Smith*, 122 Wn.App. 699, 702-03 (2004), *rev'd, on other grounds,* 155 Wn.2d 496 (2005); I.

***State v. Baker***, 49 Wn.App. 778 (1987), *legislatively overruled, see:* *State v. Rogers*, 127 Wn.2d 270 (1995)

In order for a driver's license suspension to be effective, Department of Licensing must send notice to the most recent address listed on any of the papers in its possession, including citations forwarded by courts, as well as to the original address provided by the driver; failure of driver to notify DOL of new address, RCW 46.20.205, does not excuse DOL's obligation, *but see:* *State v. Whitney*, 78 Wn.App. 506 (1995); proof of actual notice is not required, *State v. Thomas*, 25 Wn.App. 770 (1980); here, no proof that notice sent to address last obtained by DOL, thus suspended license charge dismissed; III.

***Seattle v. Foley***, 56 Wn.App. 485 (1990)

In suspended license case, "inquiry notice" will satisfy due process; here, license was suspended after defendant refused a breath test, thus officer's advising defendant that license would be suspended if he refused, confiscating his license and issuing a temporary one and DOL mailing notice of revocation to defendant's last known address, even though it was returned unclaimed, was sufficient notice, *distinguishing* *State v. Baker*, 49 Wn.App. 778 (1987); *see:* *State v. Rogers*, 127 Wn.2d 270 (1995); I.

***State v. Vahl***, 56 Wn.App. 603 (1990)

DOL sends HTO notice certified which is unclaimed by defendant; held: defendant had constructive notice of HTO status when she was convicted of three criminal traffic offenses within five years, RCW 46.65.020(1), .060, *cf.:* *State v. Dolson*, 138 Wn.2d 773 (1999); certified mail to defendant's last known address satisfies state's burden; I.

***State v. Quintero-Quintero***, 60 Wn.App. 902 (1991)

Police knowledge that defendant had revoked license 2 ½ weeks earlier plus weaving is grounds for stop and search of vehicle, *State v. Perea*, 85 Wn.App. 339, 342-3 (1997), *State v. Harlow*, 85 Wn.App. 557 (1997), *State v. Marcum*, 116 Wn.App. 526, 531-33 (2003), *distinguishing* *State v. Stortroen*, 53 Wn.App. 654 (1989); III.

***State v. Smith***, 66 Wn.App. 825 (1992)

Faxed CCDR which contains an exact copy of an original seal, intended by the Department of Licensing to be a certified copy of the driving record, ER 902, is an original document, ER 1001(c), and an admissible duplicate, ER 1001(d), 1003; I.

***Seattle v. Yeager***, 67 Wn.App. 41 (1992)

Statute authorizing stop of a vehicle which has tab on license plate indicating that owner had been cited for driving without a license, RCW 46.16.710(3), does not violate Fourth Amendment or CONST. Art. 1, § 7, where sole purpose of stop is to ascertain if driver has a valid license, *Kansas v. Glover,* ___ U.S. ___, 140 S.Ct. 1183, 206 L.Ed.2d 412 (2020), *State v. Lyons*, 85 Wn.App. 268, 270 (1997), *State v. Harlow*, 85 Wn.App. 557 (1997), *State v. Phillips*, 126 Wn.App. 584 (2005), *distinguishing Seattle v. Mesiani*, 110 Wn.2d 454 (1988), *Delaware v. Prouse*, 59 L.Ed.2d 660 (1979), *United States v. Brignoni-Ponce*, 45 L.Ed.2d 607 (1975), *see also: State v. Penfield*, 106 Wn.App. 157 (2001); I.

***State v. Danner***, 79 Wn.App. 144 (1995)

Habitual traffic offender status continues beyond the five year period until DOL reinstates license, thus defendant can be convicted of DWLS 1° beyond the fifth year, RCW 46.20.342(1)(a), *Artis v. Rowland*, 64 Wn.2d 576, 579-80 (1964); II.

***State v. Rogers***, 127 Wn.2d 270 (1995)

Where Department of Licensing sends notice of license suspension to the last address provided by the driver to the Department pursuant to statutory change of address procedure, RCW 46.20.205, then driver's due process rights have been satisfied; Department need not send notice to last known address; 1989 amendments to RCW 46.20.205 legislatively overrule *State v. Baker*, 49 Wn.App. 778 (1987); *accord, State v. Whitney*, 78 Wn.App. 506, 512-3 (1995); 8-0.

***State v. Whitney***, 78 Wn.App. 506 (1995)

Actual notice of suspension or revocation of license is not an element, state need not prove knowledge, *State v. Darnell*, 8 Wn.App. 627, 631 (1973), *State v. Thomas*, 25 Wn.App. 770, 774 (1980); III.

***State v. Harlow***, 85 Wn.App. 557 (1997)

Police maintain list of persons who have been cited for driving with suspended license, observe defendant driving, knows she is on list, ran DOL check day before and confirmed license was suspended, arrests for DWLS; held: under United States and Washington constitutions, there is no right to privacy in DOL records, *State v. Hathaway*, 161 Wn.App. 634, 641-45 (2011), at least where police were not on a fishing expedition, thus stop was valid, *State v. Perea*, 85 Wn.App. 339, 342-3 (1997), *State v. Lyons*, 85 Wn.App. 268, 270 (1997), *Seattle v. Yeager*, 67 Wn.App. 41 (1992), *State v. Quintero-Quintero*, 60 Wn.App. 902 (1991), *State v. McKinney*, 148 Wn.2d 20 (2002); III.

***State v. Storhoff***, 133 Wn.2d 523 (1997)

Department of Licensing sends notice to drivers revoking driving privilege as habitual traffic offenders 30 days hence unless driver demands a hearing within ten days, RCW 46.65.065(1) permits hearings within 15 days, trial court dismisses; held: minor procedural errors do not rise to level of due process violations absent prejudice; notice cited statute (RCW 46.65) which contains the hearing request time limit, providing sufficient notification of the deadline,

*Payne v. Mount*, 41 Wn.App. 627, 635 (1985), *State v. Nelson*, 158 Wn.2d 699 (2006); DOL's derogation from the statutory language does not require dismissal absent actual prejudice, overruling *Spokane v. Holmberg*, 50 Wn.App. 317 (1987), distinguishing *Gonzales v. Department of Licensing*, 112 Wn.2d 890 (1989), *State v. Bartels*, 112 Wn.2d 882 (1989); affirms *State v. Storhoff*, 84 Wn.App. 80 (1996); 9-0.

***Davis v. Department of Licensing***, 137 Wn.2d 957 (1999)

Statutes which require driver's license suspensions of persons between the ages of 18 and 21 who are convicted of drug offenses, RCW 69.50.420(1), 46.20.265(1), are not vague and do not violate equal protection; 5-4.

***State v. Dolson***, 138 Wn.2d 773 (1999)

Following numerous convictions for DWLS, defendant is charged with DWLS 1°, challenges original notice from Department of Licensing, which was mailed to an address which defendant had given to an officer rather than to the "address of record," RCW 46.65.065; held: because legislature had set forth the exclusive means for notification to the "address of record," DOL's repudiation of the procedure in favor of another was not reasonably calculated to provide notice, *see:* RCW 46.20.205, *Redmond v. Arroyo-Murillo*, 149 Wn.2d 607 (2003), reversing *State v. Dolson*, 91 Wn.App. 187 (1998); DOL's defective procedure deprived defendant of due process because he could not have demanded a hearing to challenge revocation without proper notice, thus subsequent convictions putting him on notice that his license was revoked does not cure the due process violation, *State v. Perry*, 96 Wn.App. 1 (1999), *see also: Redmond v. Moore*, 151 Wn.2d 664 (2004), *Redmond v. Bagby*, 155 Wn.2d 59 (2005), *State v. Nelson*, 158 Wn.2d 699 (2006), *Bellevue v. Lee*, 166 Wn.2d 581 (2009), distinguishing *State v. Vahl*, 56 Wn.App. 603 (1990); 9-0.

***State v. Chapman***, 98 Wn.App. 888 (2000)

Certified copy of driving record and certified copy of order of license revocation are admissible without testimony by the official custodian, as foundation is evident on the face of the documents, *State v. Monson*, 53 Wn.App. 854, 858, *aff'd*, 113 Wn.2d 833 (1989), *but see: Melendez-Diaz v. Massachusetts*, 174 L.Ed.2d 314 (2009), *State v. Rainey*, 180 Wn.App. 830, 843-45 (2014); III.

***State v. Batten***, 140 Wn.2d 362 (2000)

Drugs and firearm in felon's car requires revocation of license, RCW 46.20.285(4), affirming *State v. Batten*, 95 Wn.App. 127 (1999), *see: State v. Griffin*, 126 Wn.App. 700 (2005), *State v. Dykstra*, 127 Wn.App. 1, 11-13 (2005), *but see: State v. Hearn*, 131 Wn.App. 601, 609-11 (2006), *State v. Wayne*, 134 Wn.App. 873 (2006), *State v. B.E.K.*, 141 Wn.App. 742 (2007), *cf.: State v. Alcantar-Maldonado*, 184 Wn.App. 215, 227-30 (2014); 9-0.

***State v. Penfield***, 106 Wn.App. 157 (2001)

Officer runs license check, finds female owner's license is suspended, stops vehicle, discovers driver is male, asks for license, driver states his license is suspended, is arrested, searched, drugs found; held: while police may stop a vehicle when they learn owner's privilege

to drive is suspended, RCW 46.20.349, *Seattle v. Yeager*, 67 Wn.App. 41 (1992), *State v. Phillips*, 126 Wn.App. 584 (2005), *Kansas v. Glover,* ___ U.S. ___, 140 S.Ct. 1183, 206 L.Ed.2d 412 (2020), *cf.: State v. Vanderpool*, 145 Wn.App. 81, 85 (2008), once police determine that driver is not the owner, they may not, absent more, continue to detain, *State v. Creed*, 179 Wn.App. 534 (2014); III.

***State v. Smith***, 144 Wn.2d 665, 675-78 (2001)

While state must prove revocation of license complies with due process, defendant must first at least allege DOL failed to comply with statute and that this failure deprived defendant of notice or the opportunity to be heard, *State v. Storhoff*, 133 Wn.2d 523, 528 (1997); here, defense merely argued that state had not met its burden, did not adequately articulate a due process challenge by alleging that DOL failed to send notice to an address other than defendant's address of record.

***State v. McKinney***, 148 Wn.2d 20 (2002)

Police run license plate number in DOL database, discover that driver's license is suspended; held: drivers have no protected privacy interest in DOL driver's record pursuant to Fourth Amendment reasonable expectation of privacy analysis nor art. I, § 7 expectation of privacy which a citized should be entitled to hold, *State v. Myrick*, 102 Wn.2d 506, *State v. McCready*, 123 Wn.2d 260, 270 (1994), *State v. Harlow*, 85 Wn.App. 557 (1997), *State v. Hathaway*, 161 Wn.App. 634, 641-45 (2011), distinguishing *State v. Maxfield;* affirms *State v. Martin*, 106 Wn.App. 850 (2001); 9-0.

***Redmond v. Arroyo-Murillo***, 149 Wn.2d 607 (2003)

Mailing license revocation notice to address obtained from a traffic ticket rather than the address provided to DOL by the driver, RCW 46.20.205(1), meets due process, *State v. Dolson*, 138 Wn.2d 773 (1999); 9-0.

***Redmond v. Moore***, 151 Wn.2d 664 (2004)

Statutes which authorize DOL to suspend licenses without hearings, RCW 46.20.289, -324(1), violated procedural due process, precluding conviction, *but see: Redmond v. Bagby*, 155 Wn.2d 59 (2005), *Bremerton v. Hawkins*, 155 Wn.2d 107 (2005), *State v. Olinger*, 130 Wn.App. 22 (2005), *Bellevue v. Lee*, 166 Wn.2d 581 (2009), *see also: State v. Pulfrey*, 154 Wn.2d 517, 527-30 (2005); 5-4.

***State v. Pulfrey***, 154 Wn.2d 517 (2005)

Defendant is stopped for infraction, officer arrests for suspended license 3°, searches incident to arrests, finds drugs; officer testifies he always arrests and searches on suspended license cases, irrespective of CrRLJ 2.1(b)(2); held: police may arrest and search incident to arrest and then exercise discretion to cite and release or book; driving while suspended is a "nonminor offense" for which police may arrest, distinguishing *State v. Hehman*, 90 Wn.2d 45 (1978), *State v. Stortroen*, 53 Wn.App. 654 (1989), *State v. WS*, 40 Wn.App. 835 (1985), *State v. Pettitt*, 93 Wn.2d 288 (1980), *see: State v. Reding*, 119 Wn.2d 685 (1992); search incident to arrest for suspended license is valid absent evidence from defense that defendant's license was

suspended under the unconstitutional portions of RCW 46.20.289 and -.321(1), *State v. Olinger*, 130 Wn.App. 22 (2005), *State v. Carnahan*, 130 Wn.App. 159, 164-67 (2005), *State v. Materre*, 131 Wn.App. 734 (2006), *State v. Hearn*, 131 Wn.App. 601, 606-07 (2006), *State v. Potter*, 156 Wn.2d 835 (2006), distinguishing *Redmond v. Moore*, 151 Wn.2d 664 (2004); *affirms* *State v. Pulfrey*, 120 Wn.App. 270 (2004); 9-0.

***Redmond v. Bagby***, 155 Wn.2d 59 (2005)

Statutes which mandate suspension of drivers' licenses following convictions for reckless driving, RCW 46.61.500, driving while license invalidated, RCW 46.20.342, vehicular homicide, RCW 46.61.520 and minor in possession of alcohol, RCW 66.44.270(2), do not violate due process, distinguishing *Redmond v. Moore*, 151 Wn.2d 664 (2004), due to a heightened government interest in highway safety and a decreased likelihood of erroneous deprivation; 7-2.

***Bremerton v. Hawkins***, 155 Wn.2d 107 (2005)

Statutes which mandate suspension of drivers' licenses following juvenile adjudications for alcohol, drug or firearm offenses, RCW 46.20.265, do not violate due process, distinguishing *Redmond v. Moore*, 151 Wn.2d 664 (2004); 8-1.

***State v. Smith***, 155 Wn.2d 496 (2005)

To prove DWLS 1°, RCW 46.20.342(1)(a), evidence must establish that defendant's privilege to drive was revoked as an habitual traffic offender pursuant to ch. 46.65, RCW; here, DOL documents admitted at trial stated that defendant's privilege was "revoked in the first degree," did not establish that license was revoked as habitual traffic offender, thus evidence was insufficient; reverses *State v. Smith*, 122 Wn.App. 699 (2004); 9-0.

***State v. Phillips***, 126 Wn.App. 584 (2005)

Police randomly run defendant's plate, find that owner's license was suspended, stop vehicle, arrest driver-owner; held: police may stop a vehicle when they learn owner's privilege to drive is suspended, RCW 46.20.349, *Seattle v. Yeager*, 67 Wn.App. 41 (1992), *State v. Vanderpool*, 145 Wn.App. 81, 85 (2008), need not compare a description of the registered owner to the driver before proceeding, *Kansas v. Glover*, ___ U.S. ___, 140 S.Ct. 1183, 206 L.Ed.2d 412 (2020), distinguishing *State v. Penfield*, 106 Wn.App. 157 (2001); III.

***State v. Griffin***, 126 Wn.App. 700 (2005)

Defendant is convicted of possessing drugs in his hat and sock in a car, trial court finds defendant used a motor vehicle in commission of offense, notifies Department of Licensing, which revokes defendant's license, RCW 46.20.285(4); held: because evidence indicated that defendant had obtained the drugs in exchange for giving someone a ride in the car, trial court's finding was sufficient, *see:* *State v. Batten*, 140 Wn.2d 362 (2000), *State v. Dykstra*, 127 Wn.App. 1, 11-13 (2005), *State v. B.E.K.*, 141 Wn.App. 742 (2007), *but see:* *State v. Hearn*, 131 Wn.App. 601, 609-11 (2006), *cf. State v. Alcantar-Maldonado*, 184 Wn.App. 215, 227-30 (2014), need not be submitted to a jury as it is not punitive, *State v. Scheffel*, 82 Wn.2d 872, 879 (1973), distinguishing *Blakely v. Washington*, 159 L.Ed.2d 403 (2003); I.

***State v. Dykstra***, 127 Wn.App. 1, 11-13 (2005)

Stealing cars is both an instrumentality and an object of a crime, requiring license suspension, RCW 46.20.285(4), *State v. Dupuis*, 168 Wn.App. 672 (2012); III.

***State v. Hearn***, 131 Wn.App. 601, 609-11 (2006)

Drugs found in defendant's clothes within a basket and in defendant's purse within vehicle do not have a reasonable relation to the operation and use of the vehicle and vehicle did not contribute in some reasonable degree to the commission of the VUCSA offense, thus license suspension, RCW 46.20.285(4), is not valid, *State v. Wayne*, 134 Wn.App. 873 (2006), *State v. B.E.K.*, 141 Wn.App. 742 (2007), *State v. Alcantar-Maldonado*, 184 Wn.App. 215, 227-30 (2014), distinguishing *State v. Batten*, 95 Wn.App. 127, 129 (1999), *aff'd*, 140 Wn.2d 362 (2000), *State v. Griffin*, 126 Wn.App. 700 (2005); III.

***State v. Potter***, 156 Wn.2d 835 (2006)

Police arrest for driving while license suspended 3º, search, find drugs; held: while the method by which a license is suspended may violate due process, *Redmond v. Moore*, 151 Wn.2d 664 (2004), DOL records are presumed reliable, *State v. Gaddy*, 152 Wn.2d 64 (2004), subsequent invalidation of license suspension procedures do not void the probable cause that existed to arrest, distinguishing *State v. White*, 97 Wn.2d 92 (1982); affirms *State v. Potter*, 129 Wn.App. 494 (2005), *State v. Holmes*, 129 Wn.App. 24 (2005); 9-0.

***State v. Nelson***, 158 Wn.2d 699 (2006)

Defendant writes to DOL from jail to inquire how to get his license back, DOL subsequently sends notice of revocation to defendant's address of record at a residence, revocation takes effect three days after defendant's release, but letter is returned to DOL as "unclaimed," later defendant is arrested for driving while license suspended; held: while an as-applied due process challenge is permitted, *Jones v. Flowers*, 164 L.Ed.2d 415 (2006), because the state did not know that the notice sent to defendant's address of record was ineffective until after the revocation became operative, and because a jail is only a temporary detainment facility, the inquiry that defendant sent to DOL did not put DOL on notice that defendant would still be in jail when it sent the order, "'[a]n open-ended search for a new address' imposes too great a burden on DOL," at 705, distinguishing *Robinson v. Hanrahan*, 34 L.Ed.2d 47 (1972), *Covey v. Town of Somers*, 100 L.Ed. 1021 (1956); 6-3.

***State v. Wayne***, 134 Wn.App. 873 (2006)

Drugs in defendant's pocket while driving are not related to the operation of the car, thus license suspension is invalid, *State v. Hearn*, 131 Wn.App. 601, 609-10 (2006), distinguishing *State v. Batten*, 140 Wn.2d 362 (2000); III.

***State v. B.E.K.***, 141 Wn.App. 742 (2007)

In malicious mischief case, respondent spray-paints graffiti on a police car, trial court reports adjudication to Department of Licensing for driver's license revocation, RCW 46.20.285(4); held: test for DOL revocation is whether vehicle operation or use contributed in some reasonable degree to the commission of a felony, *i.e.*, the vehicle must be an

instrumentality of the crime such that the offender uses it in some fashion to carry out the crime, *State v. Wayne*, 134 Wn.App. 873, 875-76 (2006); here, although commission of the crime was related to the vehicle, the nexus was based not on a manner of use but on a relationship between an offender and his victim, thus reversed; II.

***State v. Vanderpool***, 145 Wn.App. 81, 84-85 (2008)

Police run license check, discover owner's license is suspended, driver parks car and walks toward apartment, officer asks driver for license, discover's driver is not owner but driver's license is suspended; held: while police may stop a vehicle when they learn owner's privilege to drive is suspended, RCW 46.20.349 (1999), *State v. Phillips*, 126 Wn.App. 584 (2005), *Kansas v. Glover,* ___ U.S. ___, 140 S.Ct. 1183, 206 L.Ed.2d 412 (2020), where driver parks and walks away before officer's contact, statute authorizing stop is irrelevant; III.

***Bellevue v. Lee***, 166 Wn.2d 581 (2009)

DOL procedure providing 45 days written notice before suspension for failure to respond, appear or pay, driver may demand administrative review to which driver may submit evidence, RCW 46.20.245, satisfies due process, distinguishing *Redmond v. Moore*, 151 Wn.2d 664 (2004); 9-1.

***State v. Anderson***, 151 Wn.App. 396 (2009)

Electronic home monitoring is an alternative available to jail for DWLS 1º; prior convictions occurring more than seven years ago count towards a mandatory minimum; I.

***State v. Javier Contreras***, 162 Wn.App. 540, 546-47 (2011)

Possessing a stolen vehicle requires license suspension, RCW 46.20.285(4); III.

***State v. Jasper***, 174 Wn.2d 96 (2012)

Affidavits that state that Department of Licensing mailed notice that license would be suspended and that after diligent search defendant's license was suspended on day of offense are testimonial, *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 174 L.Ed.2d 314 (2009), *overruling State v. Kirkpatrick*, 160 Wn.2d 873 (2007) and *State v. Kronich*, 160 Wn.2d 893 (2007), *see:* , *State v. Rainey*, 180 Wn.App. 830, 843-45 (2014), *cf.: State v. Lee*, 159 Wn.App. 795, 813-19 (2011), *cf.: State v. Mecham*, 181 Wn.App. 932, 948-51 (2014), *rev., on other grounds*, 186 Wn.2d 128 (2016); affirms *State v. Jasper*, 158 Wn.App. 518 (2010); 9-0.

***State v. Johnson***, 178 Wn.2d 534 (2014)

The law contemplates a DWLS 3° charge where the underlying suspension occurs for failure to pay a traffic fine, RCW 46.20.342(1)(c)(iv) (2004); here, requiring payment of the underlying fine was proper as defendant was not "constitutionally indigent;" 5-4.

***State v. Alcantar-Maldonado***, 184 Wn.App. 215, 227-30 (2014)

Driving to the scene of a felony assault is not sufficient to justify license suspension, RCW 46.20.285(4) (2005), *see: State v. Batten*, 140 Wn.2d 362, 365 (2000), *State v. Wayne*, 134 Wn.App. 873, 875-76 (2006); III.

***Watkins v. Dep't of Licensing***, 187 Wn.App. 591 (2015)

Officer arrests driver for DUI, turns him over to trooper to process, at license revocation hearing arresting officer's report is not certified but trooper's report which references officer's report is certified, superior court reverses revocation; held: "any other evidence accompanying" a sworn or certified report is admissible at a license revocation hearing, *Cannon v. Dep't of Licensing*, 147 Wn.2d 41, 51 (2002), admitting uncertified report does not violate due process clause; II.

***State v. Hancock***, 190 Wn.App. 847 (2015)

Driving while license suspended, RCW 46.20.342(1)(a) (1990), can be committed in a private parking lot even though the lesser included offense of driving without a license, RCW 46.20.005 (1997), must occur on a highway; II.

***Singh v. State***, 5 Wn.App.2d 1 (2018)

At administrative hearing regarding driver's license suspension following a DUI arrest the state must offer *prima facie* evidence that the blood collection test tubes were chemically clean and and contained enzyme poison and anticoagulants as required by WAC 448–14–020(3)(a), (b), *State v. Bosio*, 107 Wn.App. 462, 467-68 (2001), *State v. Clark*, 62 Wn.App. 263, 270 (1991). *State v. Brown*, 145 WnApp. 62, 69–70 (2008), *State v. Garrett*, 80 WnApp. 651, 653 (1996); I.

***Kansas v. Glover***, ___ U.S. ___, 140 S.Ct. 1183, 206 L.Ed.2d 412 (2020)

Sheriff runs license plate check, discovers owner of vehicle's license is suspended, stops car, determines that driver is owner who is convicted of driving while an habitual traffic offender; held: police may pull over a car when the officer has learned that the owner's license is suspended, absent other evidence that negates the inference that the owner is driving, *State v. Lyons*, 85 Wn.App. 268 (1997), *Seattle v. Yeager*, 67 Wn.App. 41 (1992), *State v. Phillips*, 126 Wn.App. 584 (2005), *see: State v. Penfield*, 106 Wn.App. 157 (2001), *State v. Creed*, 179 Wn.App. 534 (2014); 8-1.

# THEFT

***State v. Rogers***, 30 Wn.App. 653 (1981)

State, in PSP 2° of motor vehicle, presents no evidence as to value; held: "no proof of value is required for conviction of [PSP 2°] of a motor vehicle having a value less than $1500," *State v. Rhinehart*, 92 Wn.2d 923 (1979); I.

***State v. Clark***, 96 Wn.2d 686 (1982)

One who takes a motor vehicle with permission of the owner, then exceeds the scope of that permission, cannot be convicted of taking and riding, RCW 9A.56.070; 8-1.

***State v. Ford***, 33 Wn.App. 788 (1983)

Defendant, charged with taking and riding, RCW 9A.56.070, admits he did not know who owned the car, which was stolen either that day or the day prior; held: court could infer defendant had knowledge that car was taken unlawfully, *see: State v. L.A.*, 82 Wn.App. 275 (1996), *State v. Phimmachak*, 93 Wn.App. 11 (1998), *cf.: State v. Womble*, 93 Wn.App. 599 (1999); I.

***State v. Wellington***, 34 Wn.App. 607 (1983)

Attempted theft by deception, RCW 9A.56.020(1)(b), RCW 9A.56.010(4), may be committed without an express misrepresentation as long as a false impression is intentionally created; fact that an undercover officer is the victim and that he was not actually deceived is not a defense; I.

***State v. Woll***, 35 Wn.App. 560 (1983)

In order to prove theft by appropriation of misdelivered property, RCW 9A.56.020(1)(c), intent to deprive need not be coincidental with the wrongful receipt but may be at any time the property is appropriated; II.

***State v. Hicks***, 36 Wn.App. 244 (1983), 102 Wn.2d 182 (1984)

Defense of good faith claim of title, RCW 9A.56.020(2) is only available where defendant is seeking to recover the specific property in question, not to collect a debt out of another's money with no pretense of rights to the specific coins and bills, *cf.: State v. Cuthbert*, 154 Wn.App. 318, 341-44 (2010); retaking specific property by force is a defense, *State v. Larson*, 23 Wn.App. 218 (1979); good faith claim of title must be disproved by the prosecutor beyond a reasonable doubt; 9-0.

***State v. Birch***, 36 Wn.App. 405 (1984)

Partnership funds are not the "property of another", RCW 9A.56.020(1)(2), RCW 25.04.250, and thus a partner cannot be convicted of embezzling partnership funds, *State v. Eberhart*, 106 Wash. 222 (1919), *see: State v. Coria*, 146 Wn.2d 631 (2002), *State v. Wooten*, 178 Wn.2d 890 (2013); *legislatively overruled*, RCW 9A.56.010(7)(c); III.

***State v. McGary***, 37 Wn.App. 856 (1984)

A temporarily inoperable motorcycle is a motor vehicle for purposes of taking and riding, RCW 9A.56.070, *State v. Acevedo,* 159 Wn.App. 221, 227-29 (2010); I.

***State v. Shriner***, 101 Wn.2d 576 (1984)

Defendant rents car, fails to return it, is charged with theft 1° RCW 9A.56.010-.030; defendant alleges he should have been charged with criminal possession of a rented motor vehicle, RCW 9A.56.095; held: where there is a specific statute and a general statute, accused must be charged under specific statute even if it contains additional elements, *reversing State v. Shriner*, 38 Wn.App. 800 (1983) *see*: *State v. Danforth*, 97 Wn.2d 255 (1982), *State v. Wright*, 183 Wn.App. 719, 730-32 (2014), *State v. Numrich,* 197 Wn.2d 1 (2021); 9-0.

***State v. Boyanovsky***, 41 Wn.App. 166 (1985)

Unlawful issuance of a check, RCW 9A.56.060, does not require proof of receipt of property as an element of the offense; evidence is sufficient to convict where defendant issues bad checks, lies about funds to support checks, and merely hopes she will obtain funds to cover checks; III.

***State v. Gillespie***, 41 Wn.App. 640 (1985)

Where a loan is made on a promissory note, the proceeds are owned by the borrower and, absent a loan document conditioning title, borrower cannot be convicted of embezzlement as he did not wrongfully obtain the proceeds; *accord*: *State v. Berman*, 50 Wn.App. 125 (1987), *State v. Joy*, 65 Wn.App. 33 (1992), *State v. Morris*, 105 Wn.App. 738 (2001); I.

***In re Taylor***, 105 Wn.2d 67 (1985), *superseded, on other grounds, Pers. Restraint of St. Pierre,* 118 Wn.2d 321 (1992)

RCW 50.36.010, knowingly giving false information to obtain unemployment compensation, does not have the same elements as RCW 9A.56.030, theft, thus there is no equal protection violation; because RCW 50.36.010 expressly provides that the penalty under that section is not exclusive, then the general/special rule of *State v. Danforth*, 97 Wn.2d 255 (1982) is inapplicable, and defendant who commits unemployment compensation fraud may be charged under the general theft statute; 9-0.

***State v. Pestrin***, 43 Wn.App. 705 (1986)

Defendant, charged with theft, is alleged to have sold a vehicle knowing that the odometer was turned back, challenges conviction claiming he should have been charged with special odometer statute, RCW 46.37.550; held: general theft requires proof of intent to deprive and value; determining factor is that general statute will be violated in each instance where the special statute has been violated, *State v. Shriner*, 101 Wn.2d 576, 580 (1984), *State v. Wright*, 183 Wn.App. 719, 730-32 (2014); here, additional elements must be proved for the general statute, thus the general/specific rule is inapplicable, *see: State v. Numrich,* 197 Wn.2d 1 (2021); no equal protection violation, as elements differ, *State v. Chase*, 134 Wn.App. 792, 800-03 (2006); good faith claim of title defense is not available where theft is brought about by patently

deceptive means, *State v. Wellington*, 34 Wn.App. 607. 612 (1983), *State v. Chase, supra.*, at 803-06, *State v. Cuthbert*, 154 Wn.App. 318, 341-44 (2010); III.

***State v. Hancock***, 44 Wn.App. 297 (1986)

Defendant may not be charged with theft and possessing stolen property that was *res* of theft as long as he maintained at least constructive possession of the property, *State v. Melick*, 131 Wn.App. 835 (2006); II.

***State v. Ellard***, 46 Wn.App. 242 (1986)

Good faith claim of title is not available as a defense to theft by deception, RCW 9A.56.010(4), *State v. Pestrin*, 43 Wn.App. 705 (1986) or to obtaining money by false pretenses, *State v. Mercy*, 55 Wn.2d 530 (1960); II.

***State v. Jendrey***, 46 Wn.App. 379 (1986)

Theft 2° and criminal possession of leased or rented equipment, RCW 9A.56.095, are not concurrent, *distinguishing State v. Shriner*, 101 Wn.2d 576 (1984); one may "exert unauthorized control," RCW 9A.56.020(10)(a), over property where one obtains the property by agreement and later secretes, withholds or appropriates the property; I.

***State v. Britten***, 46 Wn.App. 571 (1986)

Respondent is caught in dressing room wearing five pairs of pants belonging to merchant, price tags removed; held: respondent's acts were inconsistent with store's ownership of the pants, thus there was sufficient evidence to convict of theft; *accord: State v. Jones*, 63 Wn.App. 703 (1992), *see: State v. Roose*, 90 Wn.App. 513, 518-9 (1998); I.

***State v. Southard***, 49 Wn.App. 59 (1987)

Alternative means of committing theft, RCW 9A.46.020, do not construe separate and distinct offenses requiring jury unanimity; I.

***State v. Douglas***, 50 Wn.App. 776 (1988)

A person who unlawfully possesses several stolen credit cards issued to the same person is guilty of a separate criminal act for each individual card; II.

***State v. Standifer***, 110 Wn.2d 90 (1988)

A bank cash machine card is not a credit card, former RCW 9A.56.010(3), for purposes of theft statute, former RCW 9A.56.040(1)(c), *reversing State v. Standifer*, 48 Wn.App. 119 (1987); 9-0.

***State v. Bryant***, 51 Wn.App. 258 (1988)

Where one takes a motor vehicle without permission of the owner, the fact that the owner later says she did not object to his taking the car is not a defense, *State v. Brown*, 74 Wn.2d 799 (1968); III.

***State v. Thorpe***, 51 Wn.App. 582 (1988)

Defendants who delivered meat to the state, submitted invoices billing for more meat than was delivered, and were paid the greater amount have committed theft of money by deception, RCW 9A.56.020(1)(b), not theft of money by taking, RCW 9A.56.020(1)(a), *but see: State v. Smith*, 115 Wn.2d 434, 441 (1990), *State v. Wright*, 183 Wn.App. 719 (2014).

***State v. Komok***, 113 Wn.2d 810 (1989)

Intent to permanently deprive is not an element of theft, RCW 9A.56.020(1)(a) affirming *State v. Komok*, 54 Wn.App. 110 (1989), overruling *State v. Burnham*, 19 Wn.App. 442 (1978), *but see: State v. Walters*, 162 Wn.App. 74, 85-86 ¶ 33 (2011); 9-0.

***State v. McKelvey***, 54 Wn.App. 140 (1989)

To prove criminal possession of a leased motor vehicle, RCW 9A.56.095, state must prove that demand to return the item was sent to defendant's last known home or business, not a post office box, *but see: State v. Fleming*, 155 Wn.App. 489, 503-06 (2010); II.

***State v. Martin***, 55 Wn.App. 275 (1989)

Taking and riding a motor vehicle, RCW 9A.56.070, applies to land-based transportation only and not to motor boats; I.

***State v. Hudson***, 56 Wn.App. 490 (1990)

To prove taking a motor vehicle without permission, RCW 9A.56.070, state must prove that the vehicle belonged to another and that defendant intentionally used it without permission, *distinguishing State v. Nelson*, 63 Wn.2d 188, 191 (1963); it is not necessary to prove that the vehicle was taken from the owner by defendant, *State v. Gonzales*, 133 Wn.App. 236, 239-43 (2006); absence of defendant's explanation for use of what appears to have been a recently stolen automobile and flight provide sufficient evidence to infer guilty knowledge, *State v. Gonzales*, *supra.*, at 243 ¶ 12, *cf.: State v. L.A.*, 82 Wn.App. 275 (1996), *State v. Womble*, 93 Wn.App. 599 (1999); I.

***State v. Skorpen***, 57 Wn.App. 144 (1990)

Stealing forged check is not theft, as the owner of the forged check lost nothing of value; II.

***State v. Farrer***, 57 Wn.App. 207 (1990)

Where security officer testifies that the price on price tag is the market value and lays a foundation for the pricing system, then value of stolen groceries are admissible from the price tags, *distinguishing State v. Coleman*, 19 Wn.App. 549 (1978); *accord: State v. Rainwater*, 75 Wn.App. 256 (1994), *State v. Kleist*, 126 Wn.2d 432 (1995), *State v. Quincy*, 122 Wn.App. 395 (2004), *cf. State v. Williams*, 199 Wn.App. 99 (2017); III.

***State v. Smith***, 115 Wn.2d 434 (1990)

Defendant ordered copyrighted software, copied it, returned it, stopped payment on check, was charged with theft 1°; held: theft is not preempted by federal copyright law; theft by taking, RCW 9A.56.020(1), does not require evidence of trespass, *State v. Wright*, 183 Wn.App.

719 (2014), overruling *State v. Vargas*, 37 Wn.App. 780, 785 (1984), *State v. Smith*, 2 Wn.2d 118 (1939), *State v. Wright*, 183 Wn.App. 719 (2014); 9-0.

***State v. Alexander***, 59 Wn.App. 900 (1990)

Defendant rents videotapes, asks another to return them, he agrees, fails to do so, defendant is convicted of failure to deliver leased property, RCW 9.45.062; held: because defendant made reasonable arrangements for a third party to return the property, evidence was insufficient to convict as statute requires proof that defendant "willfully and without reasonable cause fail[ed] to deliver leased property"; I.

***State v. Pike***, 118 Wn.2d 585 (1992)

Defendant delivers vehicle to auto repair shop, agrees to service, including parts, after which he takes vehicle without paying; held: if a person from whom property is taken had a right of possession superior to that of defendant, that person is deemed the owner as against the defendant even if defendant had an ownership interest in the property, *State v. Latham*, 35 Wn.App. 862, 865 (1983), *State v. Nelson*, 36 Wash. 126, 128 (1904), *State v. Pollnow*, 69 Wn.App. 160, 164-5 (1993), *State v. Grimes*, 110 Wn.App. 272 (2002), *State v. Mora*, 110 Wn.App. 850, 856-58 (2002), *State v. Grimes*, 111 Wn.App. 544, 552-53 (2002), *see: State v. Coria*, 146 Wn.2d 631 (2002), *State v. Tvedt*, 116 Wn.App. 316 (2003), *aff'd*, 153 Wn.2d 705 (2004); here, because repair shop had not complied with automobile repair act, RCW 46.71.040(1), no possessory or chattel lien right existed, thus defendant's right of possession was superior to victim's, and defendant could not then be convicted of theft of parts or services; *affirms* *State v. Pike*, 60 Wn.App. 738 (1991); *see: State v. Joy*, 121 Wn.2d 333 (1993), *State v. Lee*, 128 Wn.2d 151, 160-4 (1995), *State v. Mermis*, 105 Wn.App. 738 (2001), *State v. Lau*, 174 Wn.App. 857 (2013); 8-0.

***State v. Korba***, 66 Wn.App. 666 (1992)

A "public officer" for purposes of injury and misappropriation of record, RCW 40.16.020, includes deputies and employees, RCW 9A.04.110(13), WPIC 2.14; II.

***State v. Stanton***, 68 Wn.App. 855 (1993)

In theft by deception case, RCW 9A.56.020(1)(b), court need not instruct jury with good faith claim of title defense, RCW 9A.56.020(2), WPIC 19.08, since a finding of guilty necessarily includes an implied finding that defendant did not obtain control over the property "openly and avowedly under a good faith claim of title," *State v. Emerson*, 43 Wn.2d 5, 12 (1953), *State v. Casey*, 81 Wn.App. 524, 526-7 (1996), *State v. Cuthbert*, 154 Wn.App. 318, 341-44 (2010); II.

***State v. Joy***, 121 Wn.2d 333 (1993)

Contractor accepts advance payments to purchase materials for the contract work, fails to perform or return money; held: owners had an interest in the money given to defendant to hold for purchase of materials, when defendant used the money for other purposes, he appropriated funds to his own use, *State v. Grimes*, 111 Wn.App. 544, 552-53 (2002), thus committed theft by embezzlement; where there is no evidence that the parties agreed that the advance payments were to be restricted, then title passed to payee, and no embezzlement occurred, *State v. Mermis*,

105 Wn.App. 738 (2001), *see:* *State v. Oglesbee*, 24 Wn.App. 769 (1979), *State v. Lee*, 128 Wn.2d 151, 160-4 (1995); *reverses, in part*, *State v. Joy*, 65 Wn.App. 33 (1992); 8-0.

***State v. Trepanier***, 71 Wn.App. 372 (1993)

Where defendant admits being in a stolen car which crashes near another vehicle which defendant is observed opening and prowling, evidence is sufficient to convict for attempted theft of the prowled vehicle; similar prowling of another nearby vehicle is sufficient circumstantial evidence to convict; I.

***State v. Reid***, 74 Wn.App. 281, 284-9 (1994)

Complainant gives defendant money to pay expenses, defendant pays some back, is charged with theft after four years; at trial, court instructs, "fraudulent intent may be inferred from the retention for a long period of time of property to which one has no right"; held: because the instruction allowed the jury to infer, as the sole source of evidence, that defendant had a fraudulent intent, state was relieved of its burden of proving an element, thus inference, under these facts, was improper, *distinguishing* *State v. Bryant*, 73 Wn.2d 168 (1968), *State v. Sullivan*, 129 Wash. 42, 51 (1924); obtaining funds by deception is not imprisonment for debt, CONST. Art. 1 § 17, *State v. Pike*, 118 Wn.2d 585 (1992), *State v. Curry*, 118 Wn.2d 911, 918 (1992); III.

***State v. Jacobson***, 74 Wn.App. 715, 719-21 (1994)

Legal title holder of real property held in trust who sells the property without the required authority of the beneficiaries, in violation of a TRO prohibiting sale, commits theft by taking; real property can be the subject of theft by taking, as "property" means "anything of value,...real or personal,' RCW 9A.04.110(21); I.

***State v. Toms***, 75 Wn.App. 55 (1994)

In taking and riding a motor vehicle case, "to convict" instruction need not include element that "defendant knew that the vehicle was wrongfully taken" as long as it instructs that defendant intentionally took vehicle without permission, WPIC 74.02, *State v. Robinson*, 78 Wn.2d 479, 481 (1970); I.

***State v. Rainwater***, 75 Wn.App. 256 (1994)

Price tags constitute substantial evidence of market value only so long as the case involves a retail store that is commonly known to sell goods at the fixed price on the tag, about which court may take judicial notice, rejecting majority opinion in *State v. Coleman*, 19 Wn.App. 549 (1978), *State v. Quincy*, 122 Wn.App. 395 (2004), *cf.: State v. Williams*, 199 Wn.App. 99 (2017), *see also:* *State v. Kleist*, 126 Wn.2d 432 (1995); I.

***State v. Kleist***, 126 Wn.2d 432 (1995)

At theft 2° trial, defense offers evidence that another nearby retail store offers same items as those stolen on sale at less than $250, excluded by trial court; held: evidence of sale prices at other retailers in the same market is relevant as to market value, *reversing* *State v. Kleist*, 74 Wn.App. 429 (1994), *see also:* *State v. Rainwater*, 75 Wn.App. 256, 262 (1994); 5-4.

***State v. Brooks***, 77 Wn.App. 516 (1995)

Thefts may be aggregated to increase the degree where (1) thefts are from several people at the same time and place, or (2) several articles are stolen from the same owner on different occasions if the takings are actuated by a single and continuing impulse or intent, or are carried out pursuant to a larcenous scheme or plan and constitute a continuous transaction, *see:* *State v. Atterton*, 81 Wn.App. 470 (1996), *State v. Meyer*, 26 Wn.App. 119 (1980), *State v. Perkerewicz*, 4 Wn.App. 937 (1971), *State v. Vining*, 2 Wn.App. 802 (1970), RCW 9A.56.010(12)(c); issue is a question of fact, *State v. Eppens*, 30 Wn.App. 119 (1981); here, there was no evidence that defendant stole the items at the same time and, in light of the fact that defendant sold items on two different occasions, the reasonable inference is that they occurred at different times, thus conviction for theft 2° is reversed; III.

***State v. Ager***, 128 Wn.2d 85 (1995)

Instructions on good faith claim of title defense in embezzlement case, RCW 9A.56.020(2), should be given only where defense presents evidence (1) that the taking of property was open and avowed and (2) showing circumstances which arguably support an inference that the defendant has some legal or factual basis for a good faith belief that s/he has title, *State v. Moreau*, 35 Wn.App. 688 (1983), *State v. Chase*, 134 Wn.App. 792, 803-06 (2006), *State v. Cuthbert*, 154 Wn.App. 318, 341-44 (2010), *reversing, in part*, *State v. Ager*, 75 Wn.App. 843 (1994); 8-0.

***State v. Lee***, 128 Wn.2d 151 (1995)

Defendant agrees to buy a house, before closing makes repairs and rents it out, never closes, renters remain in residence and ultimately buy the house, defendant charged with theft; held: since renters received what they bargained for, *i.e.*, housing for rent money, and owner was not alleged as victim, evidence of theft 2° is insufficient, *cf.:* *State v. George*, 161 Wn.2d 203 (2007); even if owner were victim, no proof that loss exceeded $250; reverses, in part, *State v. Lee*, 77 Wn.App. 119 (1995); 9-0.

***State v. Hoyt***, 79 Wn.App. 494 (1995)

Multiple theft 3°s as part of a common scheme or plan may be aggregated into a single count of felony theft, and may not be broken up into several felony theft counts, RCW 9A.56.010(12)(c), *see:* *State v. Carosa*, 83 Wn.App. 380 (1996), *cf.:* *State v. Kinneman*, 120 Wn.App. 327 (2003), *State v. Farnworth*, 192 Wn.2d 468 (2018); II.

***State v. Sloan***, 79 Wn.App. 553 (1995)

Defendant arranges for boat to be repossessed, then lies to enter repossession lot and removes boat without payment, is charged with theft of services by deception on the date boat was removed; held: since repossession services had been obtained before the deception occurred and could not have been the result of the deception, then the information was insufficient to charge theft by deception; III.

***State v. Atterton***, 81 Wn.App. 470 (1996)

Defendant commits eight thefts from different victims at different times, aggregated into one count of theft 1°; held: thefts involving different victims in different places cannot be

statutorily aggregated, *State v. Meyer*, 26 Wn.App. 119, 124 (1980), *but see: State v. Bonefield*, 37 Wn.App. 878, 881 (1984); I.

***State v. Casey***, 81 Wn.App. 524 (1996)

Reliance remains essential element of theft by deception, RCW 9A.56.010(2), 9A.56.020(1)(b), *State v. Zorich*, 72 Wn.2d 31 (1967), *see: State v. Knutz*, 161 Wn.App. 395 (2011), *State v. Mehrabian*, 175 Wn.App. 678, 699-708 (2013); where asphalt paver represents that he would pave part of driveway but paves entire driveway, that he is charging a discounted price but does not do so, that buyer is paying only for the price of asphalt but pays for labor, there is sufficient evidence of reliance; money laundering, RCW 9A.83.020(1)(a), is established by knowingly conducting a financial transaction involving the proceeds of theft by deception, using part of the proceeds to make truck payments is sufficient, *State v. McCarty*, 90 Wn.App. 195 (1998); I.

***State v. Argo***, 81 Wn.App. 552, 558-66 (1996)

Under Securities Act of Washington, RCW 21.20, defines "securities"; I.

***State v. L.A.***, 82 Wn.App. 275 (1996)

14-year old driving a stolen car with broken rear wing window is insufficient to find that respondent knew vehicle was taken unlawfully, *see: State v. Hudson*, 56 Wn.App. 490, 495 (1990), *State v. Ford*, 33 Wn.App. 788, 790 (1983), *State v. Couet*, 71 Wn.2d 773, 776 (1967), *cf.: State v. Womble*, 93 Wn.App. 599 (1999); I.

***State v. Carosa***, 83 Wn.App. 380 (1996)

On each of three separate days, defendant removed more than $250 from employer's cash register by taking smaller amounts from time to time during work shift, state charges three counts of theft 2°; held: each day's activity was sufficient to establish a single felony theft, since they were effectively the same time and place, *State v. Brooks*, 77 Wn.App. 516, 520 (1995); because state did not prosecute defendant under aggregation of misdemeanor theory, RCW 9A.56.010(15)(c), she was properly charged with three felony counts, *State v. Kinneman*, 120 Wn.App. 327 (2003), defense is not entitled to an instruction that state had to prove a single transaction for each count, *see: State v. Hoyt*, 79 Wn.App. 494 (1995); II.

***State v. Hull***, 83 Wn.App. 786 (1996)

Theft and L&I fraud, RCW 51.48.020(2), are the same offenses for double jeopardy purposes, as the legislature intended L&I fraud to be a more specific species of theft, at 792-94, *see: State v. Potter*, 31 Wn.App. 883, 888 (1982), *State v. Calle*, 125 Wn.2d 769, 778-80 (1995); value is an essential element of L&I fraud, and must be included in information and to convict instruction, at 794-98, *State v. Campbell*, 125 Wn.2d 797 (1995); where defendant believed he was entitled to benefits but provided false information knowing the truth would have made him ineligible for benefits, he is not entitled to a good faith claim of title instruction, *State v. Pestrin*, 43 Wn.App. 705, 710 (1986), at 798-800, *see: State v. Chase*, 134 Wn.App. 792, 803-06 (2006), *State v. Cuthbert*, 154 Wn.App. 318, 341-44 (2010); III.

***State v. Michielli***, 132 Wn.2d 229 (1997)

One who knowingly sells stolen property can be charged with trafficking, regardless of whether that person is the one who stole the property, and regardless of whether the person sells the property to a fence or an unsuspecting purchaser, *see:* *State v. Strohm*, 75 Wn.App. 301 (1995), *overruled, on other grounds, State v. Owens,* 180 Wn.2d 90 (2014); affirms *State v. Michielli*, 81 Wn.App. 773 (1996); 5-4.

***State v. Ralph***, 85 Wn.App. 82 (1997)

Information which charges that defendant "did steal" is insufficient to allege theft, as theft necessarily involves property of another, RCW 9A.56.020(1)(a), but "steal" fails to include the ownership element, *State v. Morgan*, 31 Wash. 226, 228 (1903), *State v. Bacani*, 79 Wn.App. 701 (1995), *but see: State v. Phillips*, 98 Wn.App. 936, 944-45 (2000); III.

***State v. Hudson***, 85 Wn.App. 401, 405 (1997)

Attempting to return a stolen vehicle to the owner is a defense to taking and riding, RCW 9A.56.070, as state must prove "guilty intent to deprive"; I.

***State v. Moavenzadeh***, 135 Wn.2d 359 (1998)

While information alleging "theft" may be adequate to convey intentional, wrongful taking, *State v. Phillips*, 98 Wn.App. 936, 945-47 (2000), *State v. Tresenriter*, 101 Wn.App. 486, 494 (2000), value element must be set forth in information, *c..f: State v. Tinker*, 155 Wn.2d 219 (2005), *State v. Leyda*, 157 Wn.2d 335, 340-42 (2006); *per curiam.*

***State v. Roose***, 90 Wn.App. 513, 518-9 (1998)

Carrying concealed stolen property through the door and being arrested just outside the store is a completed theft, not a mere attempt, *see: State v. Britten*, 46 Wn.App. 571 (1986); III.

***State v. Collinsworth***, 90 Wn.App. 546 (1997)

Defendant tells bank teller to "give me your hundreds, no dye packs," does not display a weapon, argues at trial that crime was theft, not robbery; held: an unequivocal demand for the immediate surrender of money, unsupported by a pretext of entitlement, is fraught with the implicit threat to use force, any force, no matter how slight, which induces owner to part with property is sufficient to sustain a robbery conviction, *State v. Redmond*, 122 Wash. 392, 393 (1922), *State v. Parra*, 96 Wn.App. 95, 100-102 (1999), *State v. Shcherenkov*, 146 Wn.App. 619 (2008), *State v. Witherspoon*, 171 Wn.App. 271, 298-99 (2012), 180 Wn.2d 875, 883-85 (2014), *State v. Farnsworth*, 185 Wn.2d 768 (2016); I.

***State v. Phimmachak***, 93 Wn.App. 11 (1998)

State need not prove joyriding passenger knew vehicle was stolen before riding in it, RCW 9A.56.070(1); I.

***State v. Womble***, 93 Wn.App. 599 (1999)

Moving motor vehicle 5-40 feet within owner's driveway is sufficient to prove **taking and riding**, RCW 9A.56.070(1); passenger who flees scene, testifies he did not know where he had been earlier, that driver said she had parked "her" car half a mile from where he met her was sufficient to prove knowledge, as flight and absence of a plausible explanation are corroborative

of guilty knowledge, *State v. Couet*, 71 Wn.2d 773, 776 (1967), *cf.:* *State v. L.A.*, 82 Wn.App. 275 (1996), *State v. Ford*, 33 Wn.App. 788 (1983); I.

***State v. Garman***, 100 Wn.App. 307 (1999)

In a theft case, a unanimity instruction is not required where (1) defendant is charged with a single count of theft based on a common scheme or plan, (2) evidence indicates multiple incidents of theft from same victim, (3) multiple transactions are aggregated for charging purposes, (4) jury is instructed on the law of aggregation, (5) to-convict instruction requires the jury to find that the multiple incidents are part of a "common scheme or plan, a continuing course of conduct and a continuing criminal impulse," *State v. Knutz*, 161 Wn.App. 395 (2011); I.

***State v. Longshore***, 141 Wn.2d 414 (2000)

Evidence of retail price alone may be sufficient to establish value; naturally occurring claims on private property constitute property of another; 9-0.

***State v. Tresenriter***, 101 Wn.App. 486, 494-95 (2000)

The word "theft" in information is sufficient to convey "wrongfully obtain or exert unauthorized control over property of another with intent to deprive, *State v. Moavenzadeh*, 135 Wn.2d 359, 364 (1998), under liberal construction; II.

***State v. Mora***, 110 Wn.App. 850 (2002)

Defendant's mother puts defendant's name on her bank account, defendant empties the account; held: funds on deposit in a joint account belong to each depositor in proportion to their ownership of the funds, RCW 30.22.090(2), adding names to the account does not make those authorized to withdraw money the owners of the money, *In re Estate of Tosh*, 83 Wn.App. 158, 166 (1996); mother had superior possessory interest, thus taking money from the account is theft, *State v. Pike*, 118 Wn.2d 585, 590 (1992); III.

***State v. Grimes***, 111 Wn.App. 544, 555-56 (2002)

Evidence that defendant repaid money or arranged to repay it after it was appropriated is not admissible, as repayment is not a defense to theft by embezzlement or deception, *State v. Dorman*, 30 Wn.App. 351 (1981); I.

***State v. Linehan***, 147 Wn.2d 638 (2002)

Theft by embezzlement is not an alternative mean of committing the crime of theft, rather it is a way to define the alternative mean of theft by "wrongfully obtaining or exerting unauthorized control," RCW 9A.56.020(1)(a); definitions provided in RCW 9A.56.010 do not create additional alternative means of theft, *State v. Winings*, 126 Wn.App. 89-90 (2005), *State v. Smith*, 159 Wn.2d 778 (2007); unanimity is not required as to whether a defendant embezzled money , former RCW 9A.56.010(7) or took the property or services of another, RCW 9A.56.010(7)(a), *State v. Perez*, 130 Wn.App. 505 (2005); 9-0.

***State v. McReynolds***, 117 Wn.App. 309, 331-41 (2003)

Where defendant is charged with continuous possession of stolen property during a period of time, the unit of prosecution is a single possession precluding multiple charges based upon different owners of the stolen property, *see:* *State v. Turner*, 102 Wn.App. 202 (2001); III.

***State v. Kinneman***, 120 Wn.App. 327 (2003)

State may properly charge a lawyer with a separate count of theft for each discrete unauthorized withdrawal he made from his trust account, distinguishing *State v. Turner*, 102 Wn.App. 202 (2000); state is not obliged to prove that separate thefts are the result of independent criminal impulses if it chooses not to aggregate counts, distinguishing *State v. Vining*, 2 Wn.App. 802 (1970), *State v. Barton*, 28 Wn.App. 690 (1981); I.

***State v. Morley***, 119 Wn.App. 939 (2004)

Defendant steals a generator from an equipment rental store, owner testifies that market value of new generator is $2000, defendant is convicted of attempted theft 1°; held: market value of a new generator is not appropriate value for theft of a used generator, *State v. Ehrhardt*, 167 Wn.App. 934, 944-47 (2012), *see:* *State v. Herman*, 138 Wn.App. 596 (2007), *State v. Williams*, 199 Wn.App. 99 (2017); III.

***State v. Shaw***, 120 Wn.App. 847 (2004)

Value of a car may be proved by Kelley Blue Book web site under market report exception, ER 803(a)(17); I.

***State v. Pedersen***, 122 Wn.App. 759 (2004)

In securities fraud case a note may or may not be a security, *Reves v. Ernst & Young*, 108 L.Ed.2d 47 (1990); I.

***State v. Quincy***, 122 Wn.App. 395 (2004)

Following shoplift arrest, loss prevention manager scans each item stolen, generates a list with prices which is admitted in evidence as business record; held: "custodian" or "other qualified witness," RCW 5.45.020, is interpreted broadly, need not be person who actually made the record, *State v. Ben-Neth*, 34 Wn.App. 600, 603-05 (1983), as long as s/he has custody of records or supervises its creation, *Cantrill v. Am. Mail Line, Ltd.*, 42 Wn.2d 590 (1953); where witness demonstrates he understands the methody for retrieving the price and how the records are created, business records exception is met even though witnes cannot testify to accuracy of prices in the computer; difference between actual price tags, *State v. Rainwater*, 75 Wn.App. 256 (1994) and scanned records is immaterial; mere fact that record is likely to be used for litigation does not preclude its admissibility as long as they are created in the regular course of business; I.

***State v. Tinker***, 155 Wn.2d 219 (2005)

Information charging theft 3° need not specify value, *State v. Rogers*, 30 Wn.App. 653 (1981), *State v. Leyda*, 157 Wn.2d 335, 340-42 (2006), distinguishing *State v. Moavenzadeh*, 135 Wn.2d 359 (1998); 9-0.

***State v. Heffner***, 126 Wn.App. 803 (2005)

Gambling cheating statute, RCW 9.46.196, is not concurrent with theft 1°, thus state is not required to charge the more specific statute, *State v. Datin*, 45 Wn.App. 844, 845-46 (1986); III.

***State v. Berry***, 129 Wn.App. 59 (2005)

Defendant passes a check using identification of a fictitious person, is convicted of identity theft, former RCW 9.35.020; held: to commit identify theft, the defendant must possess or use the means of identification of a real person with intent to commit any crime, thus evidence is insufficient to convict, *cf.: State v. Sells*, 166 Wn.App. 918 (2012), *State v. Fedorov*, 181 Wn.App. 187, 193-96 (2014), *State v. Christian*, 200 Wn.App. 861 (2017); I.

***State v. Melick***, 131 Wn.App. 835 (2006)

Conviction of taking a motor vehicle without permission and possessing stolen property of the same vehicle is not a double jeopardy violation, as there is no express or implied legislative intent, *State v. Freeman*, 153 Wn.2d 765, 771-72 (2005), offenses do not meet same evidence test, *Blockburger v. United States*, 76 L.Ed. 306 (1932), *State v. Calle*, 125 Wn.2d 769, 777 (1995), *State v. Hite*, 3 Wn.App. 9, 12 (1970), nor do offenses merge, *State v. Parmelee*, 108 Wn.App. 702, 710 (2001), however one cannot be both a principal thief and the receiver of stolen goods, *State v. Hancock*, 44 Wn.App. 297, 301 (1986), *Milanovich v. United States*, 5 L.Ed.2d 773 (1961); remedy is that only TMV conviction may stand, *United States v. Gaddis*, 47 L.Ed.2d 222 (1976), *State v. Hancock, supra.*, even though punishment for PSP is greater; I.

***State v. Leyda,*** 157 Wn.2d 335, 340-42 (2006)

State need not allege a dollar value in information, nor must jury be so instructed, for theft 3° or identity theft 2°, as value is not an essential element unless there is a minimum threshold value, *State v. Tinker*, 155 Wn.2d 219, 222 (2005); affirms, in part, *State v. Leyda*, 122 Wn.App. 633, 639-40 (2004); 7-2.

***State v. George***, 132 Wn.App. 654 (2006), 161 Wn.2d 204 (2007)

Statutory definitions of value, RCW 9A.56.010(18), and theft, RCW 9A.56.020(1)(b), are not vague; I.

***State v. Gonzales***, 133 Wn.App. 236, 239-43 (2006)

To prove **taking a motor vehicle 1º**, RCW 9A.56.070(1) (2002), state need only prove that vehicle belonged to another, that defendant intentionally used it without permission plus one of the five additional factors set forth in statute, need not prove defendant took it directly from the owner, *State v. Hudson*, 56 Wn.App. 490, 493-94 (1990); I.

***State v. Chase***, 134 Wn.App. 792 (2006)

Defendant leases equipment, stops paying on lease, later sells it, is convicted of theft 1º; held: theft of leased property, RCW 9A.56.096, is not concurrent with theft 1º as one can commit one without committing the other, since theft of leased property requires proof of replacement value, theft 1º requires proof of market value, *State v. Pestrin*, 43 Wn.App. 705 (1996); absent

"at least some objective corroborating evidence," ¶ 23, defendant's testimony that he acted in good faith on erroneous advice that owner had abandoned the equipment, defense is not entitled to good faith claim of title instruction, *see: State v. Ager*, 128 Wn.2d 85 (1995); I.

***State v. Lampley***, 136 Wn.App. 836, 840-43 (2006)

Defendant is found with a check made out to another with a forged endorsement, trial court instructs jury that the check is worth the face value, RCW 9A.56.010(18)(v)(i), even though the payor had written a replacement check to the payee; held: because the drawer actually signed the check, the check is genuine and the value is its face amount, *State v. Easton*, 69 Wn.2d 965 (1966), *State v. Love*, 176 Wn.App. 911, 922-24 (2013), *affirmed, on other grounds*, 183 Wn.2d 598 (2015); II.

***State v. George***, 161 Wn.2d 203 (2007)

Defendants buy inoperable truck with 185,000 miles for $1800, repair it and render it operable, sell it to undercover officers claiming falsely that defendant was original owner and it has 70,000 miles for $5500, are convicted of attempted theft 1º; held: falsely describing mileage is sufficient to establish deprivation necessary to prove unlawful taking; in a theft by deception case, the value of the property obtained, here the $5500, establishes the value element to prove attempted theft 1º, not the net result of the exchange, *State v. Sargent*, 2 Wn.2d 190 (1940); affirms *State v. George*, 132 Wn.App. 654 (2006); 9-0.

***State v. Hermann***, 138 Wn.App. 596 (2007)

Defendant takes rings from his mother, pawns them, court admits evidence of purchase price 20 years earlier, court instructs jury "evidence of retail price may be sufficient to establish value," defendant is convicted of theft 1º and trafficking in stolen property, RCW 9A.82.050(1); held: evidence of price paid is entitled to great weight, *State v. Melrose*, 2 Wn.App. 824, 831 (1970), *State v. Sweeny*, 162 Wn.App. 223, 232-34 (2011), *State v. Ehrhardt*, 167 Wn.App. 934, 944-47 (2012), distinguishing *State v. Morley*, 119 Wn.App. 939 (2004); pawning is sufficient to prove trafficking, as transfer of possession, not merely transfer of ownership, is encompassed in statute; by instructing jury that evidence of retail price could be sufficient to establish value, trial court improperly directed jury to give greater weight to that evidence than evidence of wholesale value, *Det. Of R.W.*, 98 Wn.App. 140, 144 (1999); II.

***State v. Walker***, 143Wn.App. 880 (2008)

Defendant steals old growth cedar, states he intended to sell it, is convicted of theft and trafficking in stolen property; held: double jeopardy clause permits a person to be convicted of theft and trafficking of the same property, *State v. Strohm*, 75 Wn.App. 301, 310-11 (1994), *overruled, on other grounds, State v. Owens*, 180 Wn.2d 90 (2014), *State v. Michielli*, 132 Wn.2d 229, 237 (1997), under both different elements, *Blockburger v. United States*, 76 L.Ed.2d 306 (1932), and, here, different evidence tests, *Pers. Restraint of Orange*, 152 Wn.2d 795, 815-20 (2004), *State v. Reiff*, 14 Wash. 664 (1896), as the evidence to prove one crime would not also completely prove a second crime; II.

***State v. Clay***, 144 Wn.App. 894 (2008)

A credit card that has not been activated is an "access device," RCW 9A.56.010(1) (2006), *State v. Sandoval*, 8 Wn.App.2d 267 (2019), *but see: State v. Rose*, 175 Wn.2d 10 (2012), *see: State v. Schloredt*, 97 Wn.App. 789 (1999); I.

***State v. Crittenden***, 146 Wn.App. 361 (2008)

Taking a motor vehicle without permission of the owner is not a lesser of theft, *see: State v. Ritchey*, 1 Wn.App.2d 387 (2017); I.

***State v. Cuthbert***, 154 Wn.App. 318, 341-44 (2010)

Defendant, as guardian for disabled son, deposited checks payable to his son into his own accounts without evidence that he properly accounted for them, submitted false guardianship accountings and then chose not to file court ordered accountings, testifies he did so in order to keep the court from looking into his family's affairs, seeks good faith claim of title instruction, RCW 9A.56.020(2)(a); held: absent evidence that property was appropriated openly and avowedly, court need not instruct with WPIC 19.08, *State v. Pestrin*, 43 Wn.App. 705 (1986), *State v. Ager*, 128 Wn.App. 85 (1995), *State v. Hull*, 83 Wn.App. 786, 798-800 (1996); 2-1, II.

***State v. Fleming***, 155 Wn.App. 489, 503-07 (2010)

Theft of rental property presumption of intent to deprive statute, RCW 9A.56.096(2)(a), requires evidence that defendant received notice, not merely that it was delivered, *but see: State v. McKelvey*, 54 Wn.App. 140 (1989); II.

***State v. McPhee***, 156 Wn.App. 44, 65-66 (2010)

"[A] property owner may testify as to the property's market value without being qualified as an expert," at 65 ¶ 50, *State v. Hammond*, 6 Wn.App. 459, 461 (1972); *but see: State v. Williams*, 199 Wn.App. 99 (2017); III.

***State v. Hawkins***, 157 Wn.App. 739 (2010)

Good faith claim of title is not a defense to possessing stolen property, *but see: State v. Smyth*, 7 Wn.App. 50 (1972); III.

***State v. Acevedo***, 159 Wn.App. 221, 227-29 (2010)

A vehicle designed for self propulsion is a motor vehicle for purposes of possession of a stolen vehicle, RCW 9A.56.068(1), even if it is currently incapable of self propulsion, *State v. McGary*, 37 Wn.App. 856, 859 (1984); III.

***State v. Rose***, 160 Wn.App. 29 (2011), *reversed, on other grounds*, 175 Wn.2d 10 (2012)

Defendant takes an inactivated credit card from victim's trash can in her home, is convicted of possessing stolen property; held: taking a card from garbage is theft, *see: State v. Askham*, 120 Wn.App. 872 (2004); III.

***State v. Walters***, 162 Wn.App. 74, 85-86 ¶ 33 (2011)

Intent to permanently deprive is an element of theft *[dicta]*, RCW 9A.56.020, *but see: State v. Komok*, 113 Wn.2d 810 (1989), but not an element of taking a motor vehicle 2°; 2-1, III.

***State v. Rose***, 175 Wn.2d 10 (2012)

Defendant takes a credit card from trash, owner testifies she received it in the mail as an offer, she did not activate it or sign it and threw it away, defendant is convicted of possession of a stolen access device, RCW 9A.56.010(1), -.56.160(1); held: while an unactivated or cancelled credit card may be an access device if it could be used, *State v. Clay*, 144 Wn.App. 894, 896-98 (2008), *State v. Schloredt*, 97 Wn.App. 789 (1999), *State v. Chang*, 147 Wn.App. 490 (2008), *State v. Sandoval*, 8 Wn.App.2d 267 (2019), here state did not prove that the card was linked to an existing, active account, card was not signed, thus speculative that the card could have been used, thus evidence was insufficient to convict of possessing stolen property; reverses *State v. Rose*, 160 Wn.App. 29 (2011); 9-0.

***State v. Killingsworth***, 166 Wn.App. 283, 288-90 (2012)

Instruction that reads "defendant knowingly trafficked in stolen property" adequately requires state to prove that defendant knew the property was stolen, court suggests a preferable instruction is "defendant knowingly sold, transferred, distributed, dispensed, or disposed of property to another person, knowing that the property was stolen," *State v. Zeferino-Lopez*, 179 Wn.App. 592 (2014); I.

***State v. Sells***, 166 Wn.App. 918 (2012)

Use of a stolen credit card in the name of an individual and a school district is sufficient to prove identity theft, RCW 9.35.020 (2008), at 923-25, distinguishing *State v. Berry*, 129 Wn.App. 59, 67 (2005); theft 3° is not a legal lesser of identity theft 2°, at 925-26; I.

***State v. Ehrhardt***, 167 Wn.App. 934, 944-47 (2012)

Theft victim testifies to cost and age of used tools that were stolen but does not establish "how fast the price…drops" or condition of the tools; held: while retail price paid for an item is entitled to great weight, *State v. Hermann*, 138 Wn.App. 596, 602 (2007), such evidence must not be remote, *State v. Melrose*, 2 Wn.App. 824, 831 (1970), thus evidence was insufficient to establish threshold value for theft 2°, *State v. Morley*, 119 Wn.App. 939 (2004); 2-1, II.

***State v. Evans***, 177 Wn.2d 186 (2013)

A corporate victim is a person for purposes of identity theft, RCW 9.35.020(3) (2008), 9.35.005(4) (2001); affirms *State v. Evans*, 164 Wn.App. 629 (2011); 8-1.

***State v. Mau***, 178 Wn.2d 308 (2013)

Defendant makes a false claim for damages to U-Haul which is self-insured but contracts with an insurer to manage the claims, is convicted of making a false insurance claim, RCW 48.30.230 (2003); held: state failed to prove that a claims administration contract is a contract of insurance; 7-2.

***State v. Lau***, 174 Wn.App. 857 (2013)

Defendant is convicted of theft from the government for underreporting gambling receipts and thus not paying taxes on the gambling income; held: no evidence established that the

government had an ownership interest in the gross gambling receipts or that the receipts constituted an account receivable, thus evidence was insufficient to prove that defendant wrongfully obtained the property of another; I.

***State v. Love***, 176 Wn.App. 911, 922-24 (2013)

A post-dated check that is cancelled before it is presented is worth the face value, *State v. Easton*, 69 Wn.2d 965 (1966), *State v. Young*, 97 Wn.App. 235, 239-40 (1999); III.

***State v. Owens***, 180 Wn.2d 90 (2014)

Alternative means of committing trafficking stolen property 1°, RCW 9A.82.050 (2003), are facilitating theft of property so that it can be sold and facilitating the sale of property known to be stolen, *State v. Lindsey*, 177 Wn.App. 233, 239-48 (2013), overruling *dicta* in *State v. Strohm*, 75 Wn.App. 301, 307 (1994), *State v. Hayes*, 164 Wn.App. 459, 476 (2011); 9-0.

***State v. Zeferino-Lopez***, 179 Wn.App. 592 (2014)

Defendant opens bank account with a Social Security card which belonged to another, testifies he bought the card with his name on it and didn't know it belonged to someone else, state argues that identity theft, RCW 9.35.020(1) (2008), only requires proof that defendant knowingly possessed someone else's Social Security card, not that he knew the card belonged to another person; held: identity theft requires state to prove defendant knew the card actually belonged to someone else, *Flores-Figueroa v. United States*, 556 U.S. 646, 173 L.Ed.2d 853 (2009), *State v. Killingsworth*, 166 Wn.App. 283 (2012), *cf.: State v. Christian*, 200 Wn.App. 861 (2017), *State v. Elwell*, 17 Wn.App.2d 367 (2021), insufficient here, ; I.

***State v. Graham***, 182 Wn.App. 180 (2014)

Defendant takes two items from shelf in retail store, asks to return one claiming she lost receipt, store issues gift card for value of the item, she then uses gift card to purchase the other item, next day returns to store and "returns" item for cash, is charged with trafficking in stolen property, RCW 9A.82.055 (2003), -010(19) (2012), trial court grants *Knapstad* motion, CrR 8.3(c); held: trafficking requires proof that defendant transferred stolen property which means property obtained by theft, RCW 9A.82.010(16), no evidence here that defendant intended to deprive store of the items, rather intent was to obtain their value, thus dismissed; III.

***State v. Hassan***, 184 Wn.App. 140 (2014)

In UIBC case, where defendant deposits a bad check in his own bank account the value of the transaction for purposes of the threshold for theft 2º is based on the amount immediately available for withdrawal or the amount actually withdrawn; here, defendant deposited a bad check for more than $750, bank would have allowed him to withdraw up to $1000 but defendant withdrew less than $750, state was not obliged to charge aggregation, *State v. Rivas*, 168 Wn.App. 882, 884-90 (2012), in order to reach the statutory felony threshold; II.

***State v. Reeves***, 184 Wn.App. 154 (2014)

A pliers is not "an item…designed to overcome security systems" for purposes of proving retail theft with extenuating (now "special") circumstances, RCW 9A.56.360 (2006),

*State v. Larson,* 184 Wn.2d 843 (2015), *cf.: State v. Wade,* 196 Wn.App. 142 (2016); II.

***State v. Reeder***, 184 Wn.2d 805, 825-31 (2015)

Unit of prosecution for **securities fraud**, RCW 21.20.010, is every separate sale of a security, *cf.: State v. Mahmood*, 45 Wn.App. 200, 206 (1986); unit of prosecution for theft 1° by deception, RCW 9A.56.020(1)(b), is each separate transaction occurring at a separate time; 7-2.

***State v. Larson***, 184 Wn.2d 843 (2015)

A wire cutter is not "an item…designed to overcome security systems" for purposes of proving retail theft with extenuation or special circumstance, RCW 9A.56.360 (2006), *State v. Reeves*, 184 Wn.App. 154 (2014), as the statute is limited to implements created for the specialized purpose of overcoming security systems, *cf.: State v. Wade,* 196 Wn.App. 142 (2016),reversing *State v. Larson*, 185 Wn.App. 903 (2015); 9-0.

***State v. Nelson***, 195 Wn.App. 261 (2016)

Gift card can be an access device, RCW 9A.56.010(1), at least when used to purchase items; II.

***State v. Wade***, 196 Wn.App. 142 (2016)

A set of magnets, thin key and tumbler key may be items "designed to overcome security systems" to prove retail theft with special circumstances, RCW 9A.56.360 (2006), *cf.: State v. Larson,* 184 Wn.2d 843 (2015), *State v. Reeves,* 184 Wn.App. 154 (2014); III.

***State v. Johnson***, 188 Wn.2d 742 (2017)

Defendant is charged with theft 2° of access device, to convict instruction includes an element that requires proof that defendant intended to deprive victim of an access device, statute only requires proof that defendant intended to deprive of property, RCW 9A.56.020(1)(a) (2004); held: law of the case doctrine obliges the state to prove all elements contained in to convict instruction, even surplusage, *State v. Hickman*, 135 Wn.2d 97 (1988), *State v. Jusilla,* 197 Wn.App. 908 (2017), overruling, *see: State v. Tyler,* 191 Wn.2d 205 (2018); law of the case doctrine is grounded in state common law, thus Washington will not follow *Musacchio v. United States*, 577 U.S. 237, 136 S.Ct. 709, 193 L.Ed.2d 639 (2016); 9-0.

***State v. Barnes***, 189 Wn.2d 492 (2017)

A riding lawn mower is not a motor vehicle for purposes of theft of a motor vehicle, RCW 9A.56.065, *cf.: State v. Van Wolvelaere,* 195 Wn.2d 597 (2020); affirms *State v. Barnes,* 196 Wn.App. 261 (2016); III.

***State v. Williams***, 199 Wn.App. 99 (2017)

Chattel owner testifies to a "rough estimate" of value of $800, defendant is convicted of theft 2°, RCW 9A.56.160 (2009); held: while a property owner may testify to market value, *McCurdy v. Union Pacific Railroad Co.*, 68 Wn.2d 457, 468 (1966); *State v. Hammond*, 6 Wn.App. 459, 461 (1972), a "rough estimate" is insufficient to establish value "beyond a reasonable doubt;" 2-1, III.

***State v. Christian,*** 200 Wn.App. 861 (2017)

Defendant hands stolen debit card to store clerk, bank declines to honor the card, is convicted of identity theft, RCW 9.35.020 (2017); held: a transaction need not be completed to establish "use" for purposes of identity theft; I.

***State v. Ritchey***, 1 Wn.App.2d 387 (2017)

Taking a motor vehicle 2°, RCW 9A.56.075 (2003), is not a lesser of theft of a motor vehicle, RCW 9A.56.065 (2007); III.

***State v. Tyler***, 191 Wn.2d 205 (2018)

Possessing a stolen vehicle, RCW 9A.56.068(1). is not an alternative means crime, *State v. Makekau*, 194 Wn.App 407, 414 (2016), regardless of the fact that the statute prohibits a list of disjunctive terms; where the to convict instruction does not include the disjunctive (or), the **law of the case** doctrine does not require the state to prove all means; affirms *State v. Tyler*, 195 Wn.App. 385 (2016); 9-0.

***State v. Farnworth***, 192 Wn.2d 468 (2018)

Defendant obtains workers' compensation benefits by falsely claiming he was unemployed on numerous occasions, state aggregates many numerous thefts that individually would be thefts 2° into three counts of theft 1° maintaining that there was a common scheme or plan and between each count defendant had the opportunity to reconsider; held: RCW 9A.56.010(21)(c) (2017) allows state to aggregate theft 3°s if each count differs as to its plan and scheme, which conflicts with common law aggregation which allows an endless variety of thefts as long as each is distinct in time, but because statute only refers to aggregation of theft 3°s common law still applies, *see: State v. Linden*, 171 Wn. 92, 102-03 (1932), *State v. Vining*, 2 Wn.App. 802, 808 (1970); because there is a factual basis for prosecutor to justify the separate charges there is no double jeopardy violation, *State v. Perkerewicz*, 4 Wn.App. 937, 941-42 (1970); reverses, in part, *State v. Farnworth*, 199 Wn.App. 195, 202-05 (2017); 9-0.

***State v. Barboza-Cortez***, 194 Wn.2d 639 (2019)

Unlawful possession of a firearm 2°, RCW 9.41.040(2)(a), and identity theft 2°, RCW 9.35.020(1), are not alternative means crimes, *overruling, in part*, *State v. Barboza-Cortez*, 5 Wn.App. 86, 88-89 (2018); 9-0.

***State v. Van Wolvelaere***, 195 Wn.2d 597 (2020)

A snowmobile is a motor vehicle for purposes of theft of a motor vehicle, RCW 9A.56.065 (2007), *cf.: State v. Barnes*, 189 Wn.2d 492 (2017); reverses, in part, *State v. Van Wolvelaere*, 8 Wn.App.2d 705 (2019); 5-4.

***State v. Lake***, 13 Wn.App.2d 773 (2020)

Defendant orders items on-line using another's credit card fraudulently, is convicted of organized retail theft 2°, RCW 9A.56.350, -.360 (2017); held: statute requires proof that defendant stole from a "mercantile establishment" which is undefined and ambiguous, legislative intent from history indicates it requires a physical retail store, thus conviction is reversed; II.

***State v. Level***, 19 Wn.App.2d 56 (2021)

A moped is a motor vehicle for purposes of possession of a stolen vehicle, *State v. Van Wolvelaere*, 195 Wn.2d 597 (2020), *cf.: State v. Barnes*, 189 Wn.2d 492 (2017); III.

# VAGUENESS/OVERBREADTH

***State v. Lalonde***, 35 Wn.App. 54 (1983)

**Obstructing** statute, RCW 9A.76.020(3) is not vague and overbroad; I.

***State v. Sayler***, 36 Wn.App. 230 (1983)

Defendant exposes himself to two juveniles in defendant's garage, is charged with **public indecency**, RCW 9A.88.010(2) prohibiting "open and obscene exposure"; held: statute is ambiguous.

***Bellevue v. Acrey***, 37 Wn.App. 57 (1984)

Ordinance prohibiting making any "**willfully untrue, misleading or exaggerated" statement to an officer** is not vague or overbroad; I.

***State v. Kirvin***, 37 Wn.App. 452 (1984)

Seattle **false reporting** ordinance, SMC § 12A.16.040(D), is not vague; I.

***State v. MacRae***, 101 Wn.2d 63 (1984)

Failure to use due care and caution, RCW 46.61.445, does not define a separate traffic offense for which a citation may be issued; 9-0.

***State v. Maciolek***, 101 Wn.2d 259 (1984)

**Intimidation with a weapon**, RCW 9.41.270, and **CCW**, SMC § 12A.14.075, are not vague; 9-0.

***Seattle v. Hill***, 40 Wn.App. 159 (1985)

Seattle **lewd conduc**t ordinance, SMC § 12A.10.070, exempting "artistic or dramatic performances" is unconstitutionally vague; I.

***State v. O'Neill***, 103 Wn.2d 853 (1985)

**Bribery** statute, RCW 9A.68.010(1)(a) is not vague or overbroad; criminal intent is an implied element of bribery, *State v. Stroh*, 91 Wn.2d 580, 585, 8 A.L.R. 4th 760 (1979); 8-0.

***State v. Reyes***, 104 Wn.2d 35 (1985)

**Insulting or abusing a teacher** on school grounds, RCW 28A.87.010, is vague and overbroad; 9-0.

***Seattle v. Eze***, 45 Wn.App. 744 (1986)

Seattle's **disorderly conduct on buses** ordinance, SMC § 12A.12.040, prohibiting conduct which is loud or raucous and unreasonably disturbs others, is not vague or overbroad; I.

***State v. Smith***, 48 Wn.App. 33 (1987)

**Harassment** statute, RCW 9A.46.020, prohibiting threatening, without lawful authority, to cause bodily injury, is not vague, *State v. E.J.Y.*, 113 Wn.App. 940 (2002), *distinguishing Seattle v. Rice*, 93 Wn.2d 728 (1980); II.

***State v. Hill***, 48 Wn.App. 344 (1987)

**Reckless manner**, as provided in vehicular assault statute, RCW 46.61.522, is not vague; III.

***State v. Aver***, 109 Wn.2d 303 (1987)

**Obstructing a lawfully operated train,** RCW 81.48.020, is not vague; *see*: *State v. Ankroy*, 53 Wn.App. 393 (1989); 7-2.

***Houston v. Hill***, 96 L.Ed.2d 398 (1987)

Ordinance which prohibits "**interrupt[ing] any policeman in the execution of his duty**" is overbroad; 8-1.

***State v. Brown***, 50 Wn.App. 405 (1988)

**Threats to bomb**, RCW 9.61.160, is not vague or overbroad, *State v. Smith*, 93 Wn.App. 45 (1998); I.

***Spokane v. Fischer***, 110 Wn.2d 541 (1988)

Ordinance prohibiting allowing "frequent or habitual" barking which "**disturbs or annoys**" others is unconstitutionally vague; 9-0.

***Sunnyside v. Wendt***, 51 Wn.App. 846 (1988)

Ordinance prohibiting "willfully hinder[ing], delay[ing] or **obstruct[ing]** any . . . officer in the discharge of his . . . duties" is not vague; refusing to produce a drivers' license to an officer investigating an accident violates the ordinance; III.

***State v. Worrell***, 111 Wn.2d 537 (1988)

**Kidnapping** 1° is not vague; 8-0.

***Seattle v. Huff***, 111 Wn.2d 923 (1989)

Seattle **telephone harassment** ordinance, SMC § 12A.06.100(3), is not vague or overbroad, *see: State v. Alphonse*, 142 Wn.App. 417 (2008), 147 Wn.App. 891 (2008); *affirms Seattle v. Huff*, 51 Wn.App. 12 (1988); *accord: State v. Alexander*, 76 Wn.App. 830 (1995), *but see: Bellevue v. Lorang*, 140 Wn.2d 19 (2000).

***Seattle v. Cadigan***, 55 Wn.App. 30 (1989)

"Lawfully arresting" in **resisting arrest** ordinance, SMC § 12A.16.050, is not void for vagueness; I.

***State v. Carver***, 113 Wn.2d 591 (1989)

**Custodial interference**, RCW 9A.40.060, is not vague; 9-0.

***Seattle v. Slack***, 113 Wn.2d 850 (1989)

Seattle **prostitution loitering** ordinance, SMC § 12A.10.010(B), is not vague or overbroad, *cf.: Spokane v. Neff*, 152 Wn.2d 85 (2004), does not shift burden, does not violate equal protection; circumstances set forth in ordinance which trier of fact may consider (beckoning, waving, circling area in motor vehicle, is known prostitute) do not create mandatory presumption, as nothing required defendant to explain conduct, *Seattle v. Jones*, 79 Wn.2d 626 (1971), *State v. VJW*, 37 Wn.App. 428 (1984); 9-0.

***State v. Hudson***, 56 Wn.App. 490 (1990)

**Obstructing**, RCW 9A.76.020(3), is not vague; I.

***State v. Greco***, 57 Wn.App. 196 (1990)

**Bribery**, RCW 9A.68.010(1)(b) is not vague or overbroad, as "corrupt intent" is an implied element, *State v. O'Neill*, 103 Wn.2d 853 (1985); II.

***Spokane v. Douglass***, 115 Wn.2d 171 (1990)

Vagueness challenges which do not involve First Amendment rights are to be evaluated in light of the particular facts of each case and not for facial vagueness, *Maynard v. Cartwright*, 100 L.Ed.2d 372 (1988); 9-0.

***Seattle v. Johnson***, 58 Wn.App. 64 (1990)

Seattle **lewd conduct** ordinance, SMC § 12A.10.070, is overbroad; I.

***Seattle v. Webster***, 115 Wn.2d 635 (1990)

**Pedestrian interference** ordinance prohibiting "intentionally obstruct[ing] pedestrian or vehicular traffic," SMC § 12A.12.015(B), is neither overbroad nor vague, *see Spokane v. Marr*, 129 Wn.App. 890 (2005); 8-1.

***State v. Farmer***, 116 Wn.2d 414 (1991)

RCW 9.68A.011(3)(e), defining **sexually explicit conduct**, is not overbroad, *State v. Myers*, 133 Wn.2d 26, 30-34 (1997), *State v. Stellman*, 106 Wn.App. 283 (2001); 9-0.

***State v. Bohannon***, 62 Wn.App. 462 (1991)

**Sexual exploitation of a minor**, RCW 9.68.040(1)(b), and definition of sexually explicit conduct, RCW 9.68A.011(3)(e), are not vague, *State v. Stellman*, 106 Wn.App. 283 (2001); II.

***State v. Washington***, 64 Wn.App. 118 (1992)

Statutory inference in **reckless endangerment 1°** statute, RCW 9A.36.045(2), that person who "unlawfully discharges" firearm from moving vehicle is inferred to have engaged in reckless conduct, is not vague, *State v. Smith*, 111 Wn.2d 1, 6 (1988); I.

***Tacoma v. Luvene***, 118 Wn.2d 826 (1992)

Tacoma **drug loitering** ordinance, TMC 8.72.010, is not overbroad or vague; 8-0.

***State v. Stark***, 66 Wn.App. 423 (1992)

Assault 2° by intentionally **exposing sexual partners to HIV**, RCW 9A.36.021(1)(e), is not vague; II.

***State v. Wissing***, 66 Wn.App. 745 (1992)

Adult asks minor to look at nude photographs, if he knows how to masturbate, asks to see pubic hair, which is declined, is charged with communicating with a minor for immoral purposes, RCW 9.68A.090; held: while defendant's conduct was for **sexual gratification**, RCW 9.68A.011(3)(e), it was not in the context of a live performance, RCW 9.68.040(1)(b), and thus does not fall within the constitutional core of the charged statute, *State v. Danforth*, 56 Wn.App. 133 (1989), *see: State v. McNallie*, 64 Wn.App. 101, *review granted*, 119 Wn.2d 1001 (1992), *State v. Luther*, 65 Wn.App. 424 (1992), and was thus vague as applied; I.

***State v. Coria***, 120 Wn.2d 156 (1992)

Enhanced penalty statute for delivery of drugs within 1000 feet of school bus stop, RCW 9.94A.310(5), former RCW 69.50.435(a), is not vague, *reversing State v. Coria*, 62 Wn.App. 44 (1991), accord: *State v. Davis*, 93 Wn.App. 648 (1999), *State v. Johnson*, 116 Wn.App. 851, 861-63 (2003), *State v. Richter*, ___ Wn.App.2d ___, 521 P.3d 303 (2022); 6-3.

***State v. Halstien***, 122 Wn.2d 109, 116-121 (1993)

**Sexual motivation** statute, RCW 13.40.135, is not vague or overbroad; affirms *State v. Halstien*, 65 Wn.App. 845 (1992); 8-0.

***State v. Talley***, 122 Wn.2d 192 (1993)

That portion of **malicious harassmen**t statute, RCW 9A.36.080(2) (1993), that prohibits cross burning and defacement of property with hate words or symbols is overbroad, *but see: Virginia v. Black*, 155 L.Ed.2d 535 (2003); the remainder of the statute is neither overbroad nor vague; 8-0.

***State v. Russell***, 69 Wn.App. 237 (1993)

"Pattern or practice of **assault or torture" in homicide** by abuse statute, RCW 9A.32.055, is not vague; II.

***Yakima v. Irwin***, 70 Wn.App. 1 (1993)

**False reporting** ordinance is neither vague nor overbroad; III.

***Seattle v. Ivan***, 71 Wn.App. 145 (1993)

Ordinance prohibiting **coercion**, SMC § 12A.06.090, is overbroad because the city's definition of "threat," SMC § 12A.08.050(L), encompasses constitutionally protected speech, *State v. Pierre*, 108 Wn.App. 378 (2001), *but see: State v. Knowles*, 91 Wn.App. 367 (1998), *State v. Pauling*, 149 Wn.2d 381 (2003); I.

***Everett v. Heim***, 71 Wn.App. 392 (1993)

Ordinance prohibiting **adult entertainer** from sitting on lap or separating a patron's legs is not overbroad or vague, prohibits pure conduct, not speech, *O'Day v. King Cy.*, 109 Wn.2d 796 (1988), does not violate equal protection by *distinguishing* entertainers who perform in adult entertainment places as opposed to other entertainers; I.

***State v. Dyson***, 74 Wn.App. 237, 241-48 (1994)

**Telephone harassment** statute, RCW 9.61.230(1) and (2) is not overbroad; RCW 9.61.230(2) ["extremely inconvenient hour"] is not vague, *Seattle v. Huff*, 111 Wn.2d 923 (1989), *State v. Alexander*, 76 Wn.App. 830 (1995), *State v. Alphonse*, 142 Wn.App. 417 (2008), 147 Wn.App. 891 (2008)*but see: Bellevue v. Lorang*, 140 Wn.2d 19 (2000); I.

***State v. McBride***, 74 Wn.App. 460, 464-7 (1994)

Statute authorizing court to prohibit persons on community supervision from entering high drug trafficking areas, RCW 10.66, is not overbroad, is rationally related to the crime, does not violate due process by creating irrebuttable presumption that person who once delivered drugs will do so again, and does not deprive defendant of his right to travel, as long as breadth of order is limited in accordance with RCW 10.66.050; III.

***State v. Maxwell***, 74 Wn.App. 688 (1994)

**Motorcycle helme**t law, RCW 46.37.530, authorizes state patrol to adopt rules for approved helmet, WSP adopts a federal standard cited in CF.R.; held: ordinary citizen would not know where to look to determine whether helmets were lawful, thus statute and regulation failed to provide fair notice and ascertainable standards, *see: State v. Schimmelpfennig*, 92 Wn.2d 95, 102 (1979), *In re Powell*, 92 Wn.2d 882, 888-9 (1979), *State v. Dougall*, 89 Wn.2d 118 (1977), *but see: State v. Davis*, 131 Wn.App. 246 (2006), *State v. Eckblad*, 152 Wn.2d 515 (2004); III.

***State v. Spencer***, 75 Wn.App. 118, 124-8 (1994)

**Unlawful display of a weapon**, former RCW 9.41.270(1), is neither vague nor overbroad, *see: State v. Maciolek*, 101 Wn.2d 259 (1984); I.

***State v. Hunt***, 75 Wn.App. 795 (1994)

**Unlawful practice of law**, RCW 2.48.180, is not vague, *State v. Yishmael*, 6 Wn.App.2d 203 (2018), *rev. granted*, 193 Wn.2d 1002 (2019); II.

***State v. Alexander***, 76 Wn.App. 830 (1995)

**Telephone harassmen**t statute, RCW 9.61.230, and Seattle ordinance, SMC § 12A.06.100, are not vague or overbroad, *Seattle v. Huff*, 111 Wn.2d 923 (1989), *State v. Dyson*, 74 Wn.App. 237, 241-8 (1994), *State v. Alphonse*, 142 Wn.App. 417 (2008), 147 Wn.App. 891 (2008), *see: Redmond v. Burkhart*, 99 Wn.App. 21 (2000), *overruled, on other grounds, State v. Lilyblad*, 163 Wn.2d 1 (2008), *but see: Bellevue v. Lorang*, 140 Wn.2d 19 (2000); I.

***State v. Myles***, 127 Wn.2d 807 (1995)

**Concealed weapons** statute, RCW 9.41.250, which prohibits "furtively carry[ing] with intent to conceal" a weapon does not require an overt movement to conceal and is not vague, *reversing State v. Myles*, 75 Wn.App. 643 (1994); 9-0.

***State v. Olsson***, 78 Wn.App. 202, 205-7 (1995)

Statute which requires vehicle **mufflers** "to prevent excessive or unusual noise," RCW 46.37.390(1), is not vague, what is loud and excessive noise for a vehicle is a matter of common knowledge, persons of reasonable understanding are not required to guess its meaning; III.

***State v. Pollard***, 80 Wn.App. 60 (1995)

**Malicious harassment**, former RCW 9A.36.080(1), is not vague; I.

***Seattle v. Montana,*** 129 Wn.2d 583, 596-99 (1996)

City ordinance prohibiting **carrying, concealed or unconcealed, a fixed blade knife**, SMC § 12A.14, is neither vague nor overbroad; 9-0.

***State v. Edwards***, 84 Wn.App. 5, 16-20 (1996)

**Threatening a building**, RCW 9.61.160, is not overbroad, *State v. Smith*, 93 Wn.App. 45 (1998); II.

***State v. Dana***, 84 Wn.App. 166 (1996)

**Luring**, RCW 9A.40.090, is neither vague nor overbroad, *but see: State v. Homan*, 191 Wn.App. 759 (2015), nor does it violate police power doctrine; I.

***State v. Shelley***, 85 Wn.App. 24 (1997)

**Assault** statute, RCW 9A.36.021(1)(a), is not vague as applied to sports altercations; I.

***Seattle v. Abercrombie***, 85 Wn.App. 393 (1997)

**Obstructing** a public officer ordinance, SMC § 12A.16.010(A)(5), prohibiting "intentionally refus[ing] to leave the scene of a crime…while an investigation is in progress after

being requested to leave by a public officer" is not overbroad nor vague on its face or as applied, *see:* *Seattle v. Patu*, 108 Wn.App. 364 (2001), *aff'd, on other grounds,* 147 Wn.2d 717 (2002); I.

***State v. J.D.***, 86 Wn.App. 501 (1997)
Bellingham **curfew** ordinance, BMC § 10.62.030, is vague; I.

***State v. Lightle***, 88 Wn.App. 470 (1997)
Removing archeological objects, RCW 27.53.060(1), is not vague; III.

***State v. Lee***, 135 Wn.2d 369 (1998)
**Stalking**, former RCW 9A.46.110, is neither vague nor overbroad, *State v. Ainslie*, 103 Wn.App. 1 (2000), *State v. Haines*, 151 Wn.App. 428, 437-39 (2009), does not violate due process; 7-2.

***State v. Stephenson***, 89 Wn.App. 794 (1998)
**Intimidating a public servant**, RCW 9A.76.180, is not overbroad, *see: State v. Knowles*, 91 Wn.App. 367 (1998), *but see: State v. Dawley,* 11 Wn.App.2d 527 (2019); II.

***Holland v. Tacoma,*** 90 Wn.App. 533 (1998)
**Noise** ordinance prohibiting playing car radio audible at a distance of greater than fifty feet is not overbroad or vague; II.

***State v. Andree***, 90 Wn.App. 917 (1998)
**Animal cruelty**, RCW 16.52.205, as applied where defendant stabbed a kitten nine times, is not vague, *State v. Paulson*, 131 Wn.App. 579 (2006), *State v. Peterson,* 174 Wn.App. 828, 845-49 (2013); I.

***State v. Knowles***, 91 Wn.App. 367 (1998)
**Intimidating a judge**, RCW 9A.72.160, 9A.04.110(25)(j), is not overbroad, *see: State v. Stephenson*, 89 Wn.App. 794 (1998), distinguishing *Seattle v. Ivan*, 71 Wn.App. 145 (1993); II.

***State v. Hollis***, 93 Wn.App. 804, 810-12 (1999)
**Involving minor in a drug transaction**, RCW 69.50.401(f) [recodified RCW 69.50.4015 (2003)], is not vague; I.

***Chicago v. Morales***, 144 L.Ed.2d 67 (1999)
Ordinance which requires a police officer, on observing a person whom he reasonably believes to be a criminal street gang member loitering in any public place with one or more other persons, to order all such persons to disperse, and makes failure to obey such an order a violation, is vague; 5-4.

***State v. Pastrana***, 94 Wn.App. 463 (1999)
Shooting a gun at an occupied vehicle moving on a crowded freeway creates a grave risk of death and manifests an **extreme indifference to human life**, thus murder 1° by extreme indifference to life, RCW 9A.32.030(1)(b), is not vague as applied, *but see: State v. Henderson,* 182 Wn.2d 734 (2015); II.

***State v. Rosul***, 95 Wn.App. 175 (1999)

For possession of **child pornography**, RCW 9.68A.070, RCW 9.68A.110, construing statute to require proof of knowledge that defendant was aware of nature and content of the material plus an affirmative defense that defendant can prove that he was "not in possession of any facts on the basis of which he should reasonably have known that the person depicted was a minor" saves statute from overbreadth challenge; I.

***State v. Owens***, 95 Wn.App. 619, 628-33 (1999)

Sentencing Reform Act sections which permit exceptional sentences when a crime is more egregious than typical, RCW 9.94A.120(2), 9.94A.390(2)(e), are not susceptible to vagueness challenges, *State v. Jacobson*, 92 Wn.App. 958 (1998), *but see: State v. Wilson*, 96 Wn.App. 382, 393-96 (1999); I.

***Bellevue v. Lorang***, 140 Wn.2d 19 (2000)

**Telephone harassment** ordinance prohibiting "profane" language is overbroad; ordinance prohibiting telephone calls "without purpose of legitimate communication" is vague, reversing *Bellevue v. Lorang*, 92 Wn.App. 186 (1998), *cf.: Seattle v. Huff*, 111 Wn.2d 293 (1989), *State v. Dyson*, 74 Wn.App. 237 (1994), *State v. Alexander*, 76 Wn.App. 830 (1995), *State v. Alphonse*, 142 Wn.App. 417 (2008), 147 Wn.App. 891 (2008); 7-2.

***State v. Pietrzak***, 100 Wn.App. 291 (2000)

Taking nude photographs of a 16-year old is **communicating with a minor for immoral purposes**, RCW 9.68A.090, which is not vague, *see: State v. Luther*, 65 Wn.App. 424 (1992), *State v. McNallie*, 120 Wn.2d 925 (1993), *State v. Schimmelpfennig*, 92 Wn.2d 95 (1979), *State v. Falco*, 59 Wn.App. 354, 358 (1990); III.

***State v. D.H.***, 102 Wn.App. 620 (2000)

**Sexual exploitation of a minor**, RCW 9.68A.040(1), is neither vague nor overbroad on its face or as applied to a minor videotaping another minor; I.

***State v. Williams***, 144 Wn.2d 172 (2001)

That portion of harassment statute, RCW 9A.46.020(1)(a)(iv), which prohibits threatening a person's "mental health" is vague and overbroad, reversing *State v. Williams*, 98 Wn.App. 765 (2000), *see: State v. E.J.Y.*, 113 Wn.App. 940 (2002); 6-3.

***State v. Glas***, 106 Wn.App. 895 (2001)

**Voyeurism**, RCW 9A.44.115(1), -(2), is neither vague nor overbroad, *State v. Boyd*, 137 Wn.App. 910 (2007), *State v. Boyd*, 137 Wn.App. 910 (2007), *State v. Stevenson*, 128 Wn.App. 179 (2005); III.

***State v. Glas***, 147 Wn.2d 410 (2002)

**Voyeurism**, RCW 9A.44.115(2) is not overbroad or vague; reverses, on other grounds, *State v. Glas*, 106 Wn.App. 895 (2001); 5 justices would not reach constitutional issue due to reversal on other grounds.

***Sumner v. Walsh***, 148 Wn.2d 490 (2003)

Ordinance prohibiting juveniles from remaining in a public place during **curfew** hours unless, *inter alia*, on an "errand as directed by his or her parent" is vague and overbroad; 5-4.

***State v. Pauling***, 149 Wn.2d 381 (2003)

**Extortion** statute, RCW 9A,56.110, is not overbroad where construed to require that the evidence shows a lack of nexus between the threat made and a claim of right, reversing *State v. Pauling*, 108 Wn.App. 445 (2001); here, defendant had a valid judgment against victim, threatened to disseminate nude photos of victim if she did not pay, evidence at bench trial was sufficient to convict with the limiting construction; 8-1.

***State v. Johnson***, 115 Wn.App. 890 (2003)

**Malicious harassment**, RCW 9A.36.080(1), is not overbroad as applied where defendant threatens victim using female genital invective; III.

***Virginia v. Hicks***, 156 L.Ed.2d 148 (2003)

Public housing authority regulations and policy that permits police to serve notice on anyone found on housing authority property who "cannot demonstrate a legitimate business or social purpose for being on the premises" prohibiting returning to the property and authorizing arrest for one who does are not facially overbroad; 9-0.

***State v. Baldwin***, 150 Wn.2d 448, 457-61 (2003)

Sentencing guidelines statutes are not subject to vagueness analysis, *State v. Burrus*, 17 Wn.App.2d 162 (2021), *see: State v. DeVore*, 2 Wn.App.2d 651 (2018); affirms, on other grounds, *State v. Baldwin*, 111 Wn.App. 631 (2002); 9-0.

***Spokane v. Neff***, 152 Wn.2d 85 (2004)

**Prostitution loitering** ordinance which lists as a "circumstance ... which may be considered" whether a person is a "known prostitute" is vague where "known prostitute" is not defined, distinguishing *Seattle v. Slack*, 113 Wn.2d 850 (1989); 9-0.

***State v. Sansone***, 127 Wn.App. 630 (2005)

Community custody condition that defendant may not possess pornography as defined by CCO is both vague and an improper delegation, *State v. Alcocer*, 2 Wn.App.2d 918 (2018), *State v. Padilla*, 190 Wn.2d 672 (2018), *see: State v. Williams*, 97 Wn.App. 257, 262-63 (1999), *State v. Wilkerson*, 107 Wn.App. 748 (2001), *State v. Bahl*, 164 Wn.2d 739 (2008), *State v. Land*, 172 Wn.App. 593, 604 (2013), *State v. Johnson*, 4 Wn.App.2d 352 (2018), *but see: State v. Smith*, 130 Wn.App. 721 (2005), *State v. Nguyen*, 191 Wn.2d 671 (2018); I.

***State v. Johnston***, 156 Wn.2d 355 (2006)

Threat to bomb, RCW 9.61.160, is not overbroad where trial court defines "true threat" as a statement "in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted…as a serious expression of an intention to inflict bodily harm," *State v. Williams*, 144 Wn.2d 197, 207-08 (2001), *Watts v. United States*, 22 L.Ed.2d 664

(1969); whether a true threat is made is determined under an objective standard that focuses on the speaker, *State v. Kilburn*, 151 Wn.2d 36, 44 (2004) , *State v. Boyle*, 183 Wn.App. 1 (2014), *State v. Trey M.*, 186 Wn.2d 884 (2016); 8-1.

***State v. Smith***, 130 Wn.App. 721, 724-28 (2005)

Following sex offense conviction, defendant is ordered by DOC not to "possess…any pornography, catalogs or material which can be read or viewed for sexual gratification" and which "involved children," defendant is sanctioned for possessing Brooke Shield film *Blue Lagoon;* held: because an ordinary person would know, without having to consult a specialist, that the film was prohibited, then the restriction was not vague, distinguishing *State v. Sansone*, 127 Wn.App. 630 (2005), *State v. Bahl*, 164 Wn.2d 739 (2008), *but see: State v. Alcocer*, 2 Wn.App.2d 918 (2018), *State v. Padilla*, 190 Wn.2d 672 (2018), *State v. Johnson*, 4 Wn.App.2d 352 (2018), *State v. Nguyen*, 191 Wn.2d 671 (2018); I.

***State v. Davis***, 131 Wn.App. 246 (2006)

Unlawful storage of ammonia, RCW 69.55.020, is not vague; the fact that a statute refers to another agency to approve something without providing a specific citation does not unconstitutionally fail to provide citizens with adequate notice, *State v. Eckblad*, 152 Wn.2d 515 (2004), *cf.: State v. Olmedo*, 112 Wn.App. 525 (2002), *but see: State v. Maxwell*, 74 Wn.App. 688 (1994); I.

***State v. Saunders***, 132 Wn.App. 592, 598-600 (2006)

Assault 3º by criminal negligence, RCW 9A.36.031(1)(f) (2005), is not vague, *State v. Bauer*, 174 Wn.App. 59, 77-81 (2013), *rev'd, on other grounds,* 180 Wn.2d 929 (2014); I.

***State v. Allenbach***, 136 Wn.App. 95 (2006)

Definition of "financial information," RCW 9.35.005, for purposes of identity theft, is not vague; II.

***State v. Watson***, 160 Wn.2d 1 (2007)

**Failure to register as a sex offender,** RCW 9A.44.130(4)(a)(i), which requires that, when a defendant is released from jail following a probation violation and returns to the same home he was living in he must re-register regardless if he previously registered, is not vague, *State v. Smith*, 185 Wn.App. 945 (2015); affirms *State v. Watson*, 130 Wn.App. 376 (2005); 5-4.

***State v. Boyd***, 137 Wn.App. 910, 916-22 (2007)

"Intimate areas" in voyeurism statute, RCW 9A.44.115(20(b), is neither vague nor overbroad; II.

***State v. Bahl***, 164 Wn.2d 739 (2008)

As condition of community custody, defendant is ordered not to possess pornography, appeals; held: vagueness challenges to conditions of community custody may be raised for the first time on appeal, at 745; restriction on accessing or possessing pornographic materials is unconstitutionally vague, *State v. Alcocer*, 2 Wn.App.2d 918 (2018), *State v. Padilla*, 190 Wn.2d 672 (2018), *see: State v. Johnson*, 4 Wn.App.2d 352 (2018); condition that defendant not

enter a place whose primary business pertains to sexually explicit material is not vague; condition that defendant "not possess or control sexual stimulus material for your particular deviancy as defined" by CCO is vague, *see: State v. Norris,* 1 Wn.App.2d 87 (2017), 191 Wn.2d 671 (2018); 9-0.

***State v. Sadler***, 147 Wn.App. 97, 132-37 (2008)

Statutory defense to sexual exploitation of a minor that defendant must prove that he made a reasonable attempt to discover victim's age by "requiring production" of identification, RCW 9.68A.110(3), is not vague; 2-1, II.

***State v. Aljutily***, 149 Wn.App. 286 (2009)

Defendant is convicted of **communicating with a minor for immmoral purposes**, RCW 9.68A.090(2), for sexual e-mailing a police officer posing as a child; held: statute which prohibits electronic communication with a person defendant believes is a minor is not overbroad and does not burden protected speech; III.

***State v. Harstad***, 153 Wn.App. 10, 23-24 (2009)

"**Sexual contact**," RCW 9A.44.010(2), is not vague; I.

***United States v. Stevens***, 559 U.S. 460, 176 L.Ed.2d 435 (2010)

Statute prohibiting creation, sale or possession of **depictions of animal cruelty** is overbroad and violates First Amendment; 8-1.

***State v. Jarvis***, 160 Wn.App. 111, 116-18 (2011)

**Assault 4°**, RCW 9A.36.041, is not vague; II.

***State v. Hahn***, 162 Wn.App. 885, 900-01 (2011), *rev'd, on other grounds, State v. Hahn,* 174 Wn.2d 126 (2012)

Criminal s**olicitation**, RCW 9A.28.030(1), is not overbroad; II.

***State v. Bauer***, 174 Wn.App. 59, 77-81 (2013), *reversed, on other grounds*, 180 Wn.2d 929 (2014)

Assault 3° by criminal negligence, RCW 9A.36.031(1)(d) (2011), is not vague, *State v. Saunders*, 132 Wn.App. 592, 598-600 (2006); 2-1, II.

***State v. Bradford***, 175 Wn.App. 912, 921-27 (2013)

Harassment provision of **stalking**, RCW 9A.46.110(1)(a) (2007), is not overbroad or vague, *State v. Nguyen,* 10 Wn.App.2d 797 (2019); I.

***State v. Clapper***, 178 Wn.App. 2230 (2013)

**Custodial sexual assault 1°**, RCW 9A.44.160 (1999), is not vague; II.

***State v. Harrington***, 181 Wn.App. 805 (2014)

"**Extreme mental distress**," in kidnapping 1º, RCW 9A.40.020(1)(d) (2011), is not vague; III.

***Johnson v. United States***, 576 U.S. 591, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015)

Federal statute calling for an enhanced penalty for any crime that "involves conduct that presents a serious potential risk of physical injury to another," 18 U.S.C. § 924(e)(2)(B) (2006), is vague, *but see: State v. Burrus,* 17 Wn.App.2d 162 (2021); 8-1.

***State v. Breidt***, 187 Wn.App. 534 (2015)

Terms "change," "residence," and "residence address" in failure to register as a sex offender statute, RCW 9A.44.130(4)(a), are not vague, *see: State v. Breidt,* 187 Wn.App. 534 (2015); II.

***State v. Elkins***, 188 Wn.App. 386, 408-11 (2015)

Felony murder/assault, RCW 9A.32.050(1)(b) (2003), is not vague; II.

***Lakewood v. Willis***, 186 Wn.2d 210 (2016)

Ordinance which prohibits begging at on- and off-ramps and at intersections is content-based, as it specifically does not prohibit solicitation of votes, restricting speech in a substantial number of traditional public forums, and thus violates the First Amendment, *Reed v. Town of Gilbert*, 576 U.S. 155, 135 S.Ct. 2218, 2227, 192 L.Ed.2d 236 (2015); 5-4.

***State v. Homan***, 191 Wn.App. 759 (2016)

**Luring**, RCW 9A.40.090 (2012), is overbroad, *but see: State v. Dana,* 84 Wn.App. 166 (1996), Division II adds an implied criminal intent element that the state must prove, remands for a new trial with the additional element, *see:* 2016 amendment, SSB 6463.

***State v. Petterson***, 196 Wn.App. 451 (2016)

**Disorderly conduct**, RCW 9A.84.030 (2007), prohibiting intentionally disruption of any lawful assembly or meeting of persons without lawful authority, is not overbroad; III.

***State v. Brush***, 5 Wn.App.2d 40 (2018)

Domestic violence/ongoing pattern of psychological abuse aggravator, RCW 9.94A.535(3)(h), is not overbroad; sentence aggravators are not subject to vagueness challenges, *State v. Baldwin*, 150 Wn.2d 448, 461 (2003), *State v. Burrus,* 17 Wn.App.2d 162 (2021); II.

***United States v. Davis***, 588 U.S. ___ , 139 S.Ct. 2319, 204 L.Ed.2d 757 (2019)

Federal statute that enhances a penalty for using a firearm during a "crime of violence" defined as "a felony 'that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense,'" 18 U.S.C. § 924©(3)(B), is vague; 7-2.

***State v. Wallmuller***, 194 Wn.2d 234 (2019)

Community custody provision that defendant not frequent places where children congregate is not vague, reversing *State v. Wallmuller*, 4 Wn.App.2d 698 (2018), *see: Pers. Restraint of Sickels,* 14 Wn.App.2d 51 (2020); 5-4.

***State v. Schilling***, 442 Wn.App.2d 262 (2019)

"Reckless" in eluding statute, RCW 46.61.024(1), is not vague; vagueness challenges must be "as applied" unless a statute says otherwise, *Johnson v. United States,* 576 U.S. ——, 135 S. Ct. 2551, 192 L.Ed.2d 569 (2015); III.

***State v. Houck***, 9 Wn.App.2d 636 (2019)

Community custody condition that prohibits defendant from associating with known drug users/sellers except in treatment settings is not vague, *Matter of Brettell,* 6 Wn.App.2d 161 (2018); II.

***State v. Nguyen***, 10 Wn.App.2d 797 (2019)

Stalking statute, RCW 9A.46.110(1) (2013), prohibits conduct with speech incidentally regulated, does not violate First Amendment, is not overbroad, *State v. Bradford,* 175 Wn.App. 912, 921-27 (2013); I.

***State v. Dawley***, 11 Wn.App.2d 527 (2019)

Defendant telling police officer that he would use "Green Beret tactics," "what happens if I came to your house and I put you into killing range with a firearm," is convicted of **intimidating a public servant**, RCW 9A.76.180; held: statute implicates First Amendment but is not unconstitutionally overbroad if limited to a true threat, *see: State v. Stephenson,* 89 Wn.App. 794 (1998); here, defendant made no serious expression of intent to inflict bodily harm thus evidence is insufficient; I.

***Seattle v. Rordiguez***, 15 Wn.App.2d 765 (2020)

Seattle **sexual exploitation** ordinance, SMC 12A.10.040(A)(2), is neither vague nor overbroad; I.

***State v. Birge***, 16 Wn.App.2d 16 (2021)

**Official misconduct**, RCW 9A.80.010(1), is not vague or overbroad; II.

***State v. Peters***, 16 Wn.App.2d 454 (2021)

"Advances prostitution," RCW 9A.88.060, and "promoting prostitution," RCW 9A.88.080, are not vague, *State v. Cann,* 92 Wn.2d 193, 195-96 (1979); I.

***State v, Mireles***, 16 Wn.App.2d 641 (2021)

Because internet communication is a public forum, that portion of **cyberstalking** statute, RCW 9.61.260, that criminalizes electronic communications "with intent to…embarrass" is overbroad, distinguishing *State v. Dyson,* 74 Wn.App. 237, 241-48 (1994), although the remainder of the statute is saved due to intent element; I.

***State v. Frederick***, 20 Wn.App. 1081, 506 P.3d 690 (2022)

Condition that defendant not engage in "sexual communication" with minors is not vague; condition that defendant obtain CCO's permission before entering a "romantic relationship" is vague; Indeterminate Sentencing Review Board can impose conditions that are reasonably related to the offender's risk of reoffending, condition that defendant submit to drug monitoring in sex offense is proper where defendant was under the influence of marijuana at time of sex offense; condition that defendant not access the internet without a monitoring device at defendant's expense is proper where defendant used the internet to contact victim, *State v. Johnson*, 197 Wn.2d 740 (2021), *cf.:* *Packingham v. North Carolina*, —— U.S. ——, 137 S. Ct. 1730, 198 L. Ed. 2d 273 (2017); condition that defendant not possess "sexually explicit material" is not vague, *State v. Nguyen*, 191 Wn.2d 671 (2018); condition that defendant not engage in a romantic or dating or sexual relationship with anyone with minor children without CCO permission is not vague, *but see: State v. Geyer*, 19 Wn.App.2d 321 (2021); condition that defendant inform potential partners of his sexual offense history does not violate his Fifth Amendment rights; condition that defendant not remain overnight in a residence (as opposed to "premises") without CCO approval is not vague, *State v. Breidt,* 187 Wn.App. 534 (2015); III.

# VEHICULAR HOMICIDE/VEHICULAR ASSAULT

***State v. Turpin***, 94 Wn.2d 820 (1980)

In negligent homicide where police take blood or breath sample for alcohol analysis and fail to advise defendant of right to independent testing, blood test results must be suppressed, *State v. Anderson*, 80 Wn.App. 384 (1996), *see: State v. Rivard*, 131 Wn.2d 63 (1997), *State v. Morales*, 173 Wn.2d 560 (2012), *cf.: State v. Goggin,*185 Wn.App. 59, 66-70 (2014), *but see: State v. Sosa*, 198 Wn.App. 196 (2017); 8-0.

***State v. Escobar***, 30 Wn.App. 131 (1981)

Defendant, convicted of DUI, is later charged and convicted of negligent homicide relating to same incident; state had not completed investigation at time of DUI trial, held: double jeopardy does not prevent prosecution for a greater offense subsequent to a prosecution for a lesser offense which constitutes an element of the greater offense if evidence sufficient to prove the greater offense was previously not available to the state despite its exercise of due diligence; driver of a vehicle, racing with another vehicle, may be convicted of negligent homicide of driver of other vehicle upon proof that death was proximately caused by the racing; III..

***State v. Holcomb***, 31 Wn.App. 398 (1982)

Blood test results must be suppressed in negligent homicide prosecution where police fail to advise defendant of right to independent tests, *State v. Turpin*, 94 Wn.2d 820 (1980), *State v. Morales*, 173 Wn.2d 560 (2012), irrespective of whether or not defendant consented to the tests, *but see: State v. Goggin*, 185 Wn.App. 59, 66-70 (2014), *State v. Sosa*, 198 Wn.App. 196 (2017); II.

***State v. Beel***, 32 Wn.App. 437 (1982)

Negligent homicide is a lesser of murder 2°.

***State v. Barr***, 99 Wn.2d 75 (1983)

A person convicted of negligent homicide can, as a condition of probation, be ordered to pay restitution to the victim's spouse and minor child.

***In re Arambul***, 37 Wn.App. 805 (1984)

In vehicular homicide case, a passenger who grabs the steering wheel, causing the vehicle to collide with an oncoming vehicle resulting in the death of another passenger, is an operator of the vehicle, RCW 46.61.520, 46.04.370; III.

***State v. Gantt***, 38 Wn.App. 357 (1984)

Defendant rear-ends moving truck, truck continues on, defendant's car is disabled, is struck by another vehicle, killing driver, defendant's alcohol level is .14; held: proximate cause is question of fact for jury “unless the facts are undisputed and the inferences therefrom are plain and not susceptible of reasonable doubt or difference of opinion”; II.

***State v. Haley***, 39 Wn.App. 164 (1984)

Where facts support either manslaughter or negligent homicide charge, state must charge negligent homicide where an automobile is involved; III.

***State v. Judge***, 100 Wn.2d 706 (1984)

Following negligent homicide arrest, suspect must take a blood test, *but see: Missouri v. McNeely*, 569 U.S. 141, 133 S.Ct. 1552, 185 L.Ed.2d 696 (2013), *State v. Baird*, 187 Wn.2d 210 (2016), and is not entitled to choose a breath test in lieu of blood test, RCW 46.20.308(1); suspect does not have right to counsel when blood sample was taken, as she had not been formally charged with a crime, *Kirby v. Illinois*, 32 L.Ed.2d 411 (1972), *Schmerber v. California*, 16 L.Ed.2d 908 (1966), *see*: *State v. Schulze*, 116 Wn.2d 154 (1991); 9-0; .

***State v. McMurray***, 40 Wn.App. 872 (1985)

Defendant is convicted of DUI, after which victim of collision dies, whereupon defendant is charged and convicted of negligent homicide, RCW 46.61.520; held: because an element of crime (death) had not occurred at time of earlier trial, the subsequent trial is not barred by the double jeopardy clause, *Brown v. Ohio*, 53 L.Ed.2d 187 (1977), *State v. Escobar*, 30 Wn.App. 131 (1981); I.

***State v. Sanchez***, 42 Wn.App. 225 (1985)

Following arrest for negligent homicide, blood sample is drawn at 3:43 a.m.; at 5:52 a.m., police first inform defendant of right to independent test, RCW 46.20.308(1) [now 46.20.308(2)]; held: blood test was admissible because notice of independent test gave defendant reasonable opportunity to develop evidence of alcohol content even though advice was not given contemporaneously with the seizure of the blood sample; II.

***State v. Giedd***, 43 Wn.App. 787 (1986)

Defendant charged with negligent homicide/reckless and not DUI, RCW 46.61.520(1)(2); at trial, state proves defendant's blood alcohol level was .06; held: use of intoxicants was part of same transaction, proper for jury to decide what effect, if any, his drinking had on his driving, *State v. Birch*, 183 Wash. 670 (1935), *State v. Travis*, 1 Wn.App. 971 (1970); I.

***State v. Barefield***, 47 Wn.App. 444 (1987)

Failure to advise an unconscious vehicular homicide suspect of right to additional tests is not error; while WAC 448-14-020 requires that a blood test shall employ a clean dry container, that samples be preserved with anticoagulant, and that a blank test be run, where state toxicologist testifies that while vial was in his possession it was not adulterated, that vial manufacturer always puts anticoagulants in this vial, and that he ran a test that was the equivalent of a blank test, a *prima facie* case was established; jury need not be instructed regarding unanimity of mode; I.

***State v. Brobak***, 47 Wn.App. 488 (1987)

In vehicular homicide trial, defendant is entitled to "rules of the road" instructions as long as they state that contributory negligence is not a defense, and that in order to avoid conviction, defendant must show that the victim's contributory negligence was a supervening cause; emergency doctrine is not an issue; II.

***State v. Neher***, 52 Wn.App. 298 (1988)

In vehicular assault case, RCW 46.61.522, proximate causation may be proved if defendant's acts are a proximate cause, thought statute reads "the proximate cause"; I.

***State v. Schulze***, 116 Wn.2d 154 (1991)

Vehicular homicide suspect does not have right to counsel before blood sample is taken under CONST. Art. 1, § 22 or CrR 3.1, as suspect does not have the right to refuse the blood sample, *see: State v. Judge*, 100 Wn.2d 706 (1984); statutory scheme authorizes nonconsensual blood test for drugs; WAC 448-14 is sufficient to meet requirements of RCW 46.61.506(3) for blood alcohol testing, as a "cookbook" detailing every step is not necessary, *State v. Ford*, 110 Wn.2d 827, 832 (1988), *State v. Mee Hui Kim*, 134 Wn.App. 27, 35-40 (2006); 7-2.

***State v. Curran***, 116 Wn.2d 174 (1991)

1986 amendments to RCW 46.61.502 and .506 do not render blood alcohol evidence irrelevant and inadmissible to prove vehicular homicide; *prima facie* proof that a blood sample is free from adulteration is met if state establishes that sample is pure, *State v. Erdman*, 64 Wn.2d 286, 287 (1964); reckless driving is not a lesser of vehicular homicide, *but see: State v. Berlin*, 133 Wn.2d 541 (1997), *State v. Gostol*, 92 Wn.App. 832 (1998), accord: *State v. Thompson*, 90 Wn.App. 41 (1998), *see: State v. Bosio*, 107 Wn.App. 462, 464-67 (2001); taking blood over objection from vehicular homicide suspect does not violate CONST. Art. 1, § 7 where there is a clear indication it would reveal evidence of intoxication and it was a reasonable test performed in a reasonable manner, *State v. Judge*, 100 Wn.2d 706, 711-12 (1984); 9-0.

***State v. McAllister***, 60 Wn.App. 654 (1991)

Defendant, having been drinking (blows .09, .10), turns van, passenger falls out of doors which had been secured (perhaps negligently) by another earlier, passenger dies; held: while evidence of intoxication was sufficient under RCW 46.61.520, insufficient evidence was offered to establish ordinary negligence, *State v. Fateley*, 18 Wn.App. 99 (1973), as evidence showed intoxication did not affect driving which was not negligent; even if turn was negligent, proximate cause of death was superseded by negligence of improper securing of doors which was not incumbent upon defendant to have anticipated as reasonably likely to happen, breaking causal connection between defendant's negligence and injury; *but see: State v. Rivas*, 126 Wn.2d 443 (1995), *State v. Burch*, 197 Wn.App. 382 (2016); III.

***State v. Parker***, 60 Wn.App. 719 (1991)

To prove accomplice liability to vehicular homicide, state must establish that the defendant, with knowledge that it will promote a crime, (1) encouraged another to perform an act of reckless driving and (2) which proximately caused death; defendant's racing another vehicle which is involved in a collision killing another is sufficient, *distinguishing State v. Cordero*, 36 Wn.2d 846 (1950); accident reconstruction expert evidence is not required, *distinguishing State v. Escobar*, 30 Wn.App. 131 (1981); I.

***State v. Clark***, 62 Wn.App. 263 (1991)

Gas chromatography is an approved testing method for blood alcohol, even absent WACs, *State v. Schulze*, 116 Wn.2d 154 (1991), *see: State v. Mee Hui Kim*, 134 Wn.App. 27, 35-40 (2006); a letter from vacutainer manufacturer detailing amount of anticoagulants and enzyme poison contained in vacutainers plus consistency in results of two tests 12 years apart meets *prima facie* test that sample was preserved, *State v. Barefield*, 47 Wn.App. 444 (1987), *see: Singh v. State*, 5 Wn.App.2d 1 (2018); I.

***State v. Danis***, 64 Wn.App. 814 (1992)

Statute which provides that multiple victims who occupy the same vehicle result in the offense encompassing the same criminal conduct, RCW 9.94A.400(1)(a), does not violate equal protection of a defendant who kills or injures two pedestrians; I.

***State v. Dunivin***, 65 Wn.App. 501 (1992)

Police misadvising vehicular homicide suspect that s/he has the right to additional testing "only at his own expense," *State v. Bartels*, 112 Wn.2d 882 (1989), is error even though suspect does not have the right to refuse blood test, RCW 46.20.308(3); smell of alcohol plus statement that defendant was afraid he was drunk plus fleeing from scene plus alcohol in car plus accident resulting in death is sufficient to establish probable cause; II.

***State v. May***, 68 Wn.App. 491 (1993)

Vehicular homicide by operating in a reckless manner and vehicular homicide by operating with disregard for safety of others are distinct methods of committing the offense, with different SRA implications, and must be defined differently for the jury, *see: State v. Eike*, 72 Wn.2d 760 (1967), *State v. Jacobsen*, 78 Wn.2d 491 (1970), *State v. Salas*, 74 Wn.App. 400 (1994); I.

***State v. Hettich***, 70 Wn.App. 586 (1993)

Toxicologist's opinion testimony that person with .14 blood alcohol level would lose at least a third of their normal driving ability, while without scientific foundation, was harmless, if it was error at all, in light of witness's s proper testimony that person's ability to drive "would be significantly impaired," and in light of strong evidence of intoxication; testimony was probably not subject to *Frye* analysis since testimony was not based on novel scientific experimental procedures, but rather upon witness's own practical experience and acquired knowledge, *State v. Ortiz*, 119 Wn.2d 294, 311 (1992) , *disapproved, on other grounds, State v. Condon,* 182 Wn.2d 307, 321-26 (2015); I.

***State v. Rogers***, 70 Wn.App. 626 (1993)

Where no evidence suggests that victim died from any cause other than defendant's reckless or negligent driving, then defendant is not entitled to those offenses as lessers, as "[i]t is not enough that the jury might simply disbelieve that state's evidence. Instead, some evidence must be presented which affirmatively establishes the defendant's theory on the lesser included offense before an instruction will be given," *State v. Fowler*, 114 Wn.2d 59, 67 (1990), *disapproved on other grounds, State v. Blair*, 117 Wn.2d 479, 487 (1991), *State v. Brown*, 127 Wn.2d 749, 754-7 (1995), *State v. Fernandez-Medina*, 141 Wn.2d 448 (2000), *but see: State*

*v. Gostol*, 92 Wn.App. 832 (1998), *State v. Corey*, 181 Wn.App. 272 (2014), *see:* *State v. Bosio*, 107 Wn.App. 462, 464-67 (2001); II.

***State v. Hanna***, 123 Wn.2d 704, 709-13 (1994)

Inference that speeding equals reckless driving does not violate due process where state's evidence established speed of 80-100 m.p.h., tailgating, racing, *but see:* *State v. Delmarter*, 68 Wn.App. 770 (1993), *Schwendeman v. Wallenstein*, 971 F.2d 313 (9th Cir. 1992), *cf.:* *State v. Randhawa*, 133 Wn.2d 67 (1997), *see: State v. Rich*, 184 Wn.2d 897 (2016); where an inference is not sole and sufficient basis for finding of guilt, test is whether presumed fact flows from proven fact by preponderance, whether inference meets this standard must be determined on case-by-case basis, *see:* *County Court of Ulster Cy. v. Allen*, 60 L.Ed.2d 777 (1979), *State v. Delmarter*, *supra*, at 784-5 (1993); 6-3.

***State v. Kenyon***, 123 Wn.2d 720 (1994)

Inference that speeding equals reckless driving does not violate due process where state's evidence established speed of 43-60 m.p.h. in 30 m.p.h. zone on wet road with flat tire and two over-inflated tires plus loss of control, swaying, *State v. Hanna*, 123 Wn.2d 704, 709-13 (1994), *State v. Randhawa*, 133 Wn.2d 67 (1997), *see: State v. Rich*, 184 Wn.2d 897 (2016); 6-3.

***State v. Tang***, 75 Wn.App. 473, 475-8 (1994)

Information that alleges that defendant drove while under influence and with disregard for safety and defendant caused a death as a proximate result of an injury proximately caused by such driving is sufficient where challenged after state rests, *distinguishing* *State v. MacMaster*, 113 Wn.2d 226 (1989), *State v. Sanchez*, 62 Wn.App. 329, 332 (1991), *see:* *State v. Tang*, 77 Wn.App. 644 (1995); I.

***State v. Flake***, 76 Wn.App. 174 (1994)

Vehicular assault and hit and run are not the same criminal conduct for sentencing, as objective purpose of running from accident scene has no relation to the vehicular assault, did not further the vehicular assault, were not part of a scheme or plan, and did not occur simultaneously, at 179-81, *State v. Lessley*, 118 Wn.2d 773, 778 (1992); more than one victim of vehicular assault may support the multiple victim aggravating factor, *State v. Quiros*, 78 Wn.App. 134 (1995), even if only one is charged in information where the fact that there were multiple victims was both acknowledged and proved at sentencing, does not violate real facts doctrine; driving without insurance is an aggravating factor for vehicular assault; I.

***State v. Rivas***, 126 Wn.2d 443 (1995)

Causal connection between intoxication and death is not an element of vehicular homicide, *State v. Randhawa*, 133 Wn.2d 67, 78 (1997), *State v. Salas*, 127 Wn.2d 173 (1995), *State v. Lopez*, 93 Wn.App. 619, 623-24 (1999), *State v. Morgan*, 123 Wn.App. 810 (2003), *State v. Burch*, 197 Wn.App. 382 (2016); RCW 46.61.520, as amended in 1991, legislatively overrules *State v. MacMaster*, 113 Wn.2d 154 (1989); 9-0.

***State v. Hursh***, 77 Wn.App. 242, 244-5 (1995)

Failure of victim to wear a seat belt may properly be excluded as that act did not cause the accident and was not the sole cause of victim's injuries, since *any* proximate cause is sufficient, *State v. Neher*, 52 Wn.App. 298, 302, *aff'd,* 112 Wn.2d 347 (1989), *see: State v. Meekins*, 125 Wn.App. 390, 401 ¶ 24 (2005); negligent conduct is not an element of vehicular assault, RCW 46.61.522; DUI is not a lesser of vehicular assault where defendant is charged alternatively with intoxication and reckless prongs, *State v. Davis*, 121 Wn.2d 1, 6 (1993), *but see: State v. Berlin*, 133 Wn.2d 541 (1997); I.

***State v. Lovelace***, 77 Wn.App. 916 (1995)

Intoxicated defendant's vehicle crosses into oncoming traffic, hits victim's vehicle, defendant claims insufficient proof of negligence; held: to establish proximate cause in a vehicular assault case, state must prove ordinary negligence and intoxication while driving, *State v. McAllister*, 60 Wn.App. 654, 658-60 (1991), *but see: State v. Rivas*, 126 Wn.2d 443 (1995), *State* v. Burch, 197 Wn.App. 382 (2016) ; here, there was sufficient evidence from which negligence could be inferred; state need not disprove defendant's unsubstantiated theories of possible superseding causes; I.

***State v. Maurice***, 79 Wn.App. 544, 549-50 (1995)

Vehicular homicide statute provides three alternative means of committing the same crime, does not define separate crimes, does not require jury unanimity on the mode as long as state has presented substantial evidence supporting each charged alternative, *State v. Orsborn*, 28 Wn.App. 111, 116-17 (1980), *State v. Miller*, 60 Wn.App. 767, 772 (1991), except for SRA consequences, *State v. May*, 68 Wn.App. 491, 496-8 (1993), *State v. Brown*, 145 Wn.App. 62, 77-81 (2008); III.

***State v. Anderson***, 80 Wn.App. 384 (1996)

Hospital advises police that vehicular homicide suspect cannot be contacted while being treated for injuries, police request that nurse draw three vials of blood, which nurse does and gives to trooper; trooper gives one vial to suspect's father for independent testing at a specific laboratory, advises suspect that he had drawn blood but did not advise suspect of right to additional testing by independent lab of his choice, trooper also requests and obtains urine sample from suspect; held: because suspect himself was not given the required warning, trooper did not substantially comply with the statutory obligation to advise of right to independent testing, RCW 46.61.506(5), thus blood test results must be suppressed, *State v. Turpin*, 94 Wn.2d 820, 824-25 (1980), *see: State v. Morales*, 154 Wn.App. 26, 37-45 (2010), *rev'd on other grnds*, 173 Wn.2d 560 (2012), *but see: State v. Rivard*, 131 Wn.2d 63 (1997), *State v. Goggin*, 185 Wn.App. 59, 66-70 (2014), *State v. Sosa,* 198 Wn.App. 196 (2017); urine-alcohol tests are not admissible, WAC 448-14-010, RCW 46.61.506(3); I.

***State v. Garrett***, 80 Wn.App. 651 (1996)

Blood sample must be preserved with an anticoagulant, WAC 448-14-020(3)(b), or results must be suppressed irrespective of expert witness's testimony that lack of anticoagulant did not change the results because of another procedure, as RCW 46.61.506(3) requires blood analysis to be performed according to methods approved by state toxicologist, and anticoagulant language in WAC is mandatory, *Singh v. State*, 5 Wn.App.2d 1 (2018); III.

***State v. Rivard***, 131 Wn.2d 63 (1997)

Absent formal arrest, implied consent warnings and rights are inapplicable, *State v. Wetherell*, 82 Wn.2d 865 (1973), and failure to so advise is not grounds for suppression of a blood test where the test was consensual; reverses *State v. Rivard*, 80 Wn.App. 633 (1996); *see: State v. Anderson*, 80 Wn.App. 384 (1996), *State v. Avery*, 103 Wn.App. 527 (2000); 9-0.

***State v. Smith***, 84 Wn.App. 813 (1997)

Following injury collision, defendant goes to hospital on his own for medical treatment where blood is drawn, prosecutor seeks to compel production of blood sample and medical records; held: implied consent statute neither authorizes admission of blood sample, as defendant was not arrested, nor does it prevent its seizure or admission; physician-patient privilege, RCW 5.60.060(4), applies in civil actions and, here, public's interest outweighs benefits of the privilege, thus privilege does not apply to blood sample nor report of its alcohol content, *State v. Stark*, 66 Wn.App. 423, 438 (1992), *In re Juveniles A, B, C, D, E*, 121 Wn.2d 80, 92 (1993); because defendant testified about how much he drank, injuries received and denied impairment at first trial (hung jury), he waived his privilege to conceal the records that could disprove his claims that he was not intoxicated; I.

***State v. Hinds***, 85 Wn.App. 474 (1997)

In vehicular homicide case, where deceased provided defendant-minor with alcohol and permitted him to drive her car, then victim was a willing participant if on remand trial court finds that there was a causal connection between defendant's reckless driving and victim's conduct; I.

***State v. Randhawa***, 133 Wn.2d 67 (1997)

Inference that speeding equals **reckless driving** is improper where evidence establishes that defendant traveling 10-20 mph over speed limit of 50 mph, distinguishing *State v. Hanna*, 123 Wn.2d 704, 709-13 (1994), *State v. Kenyon*, 123 Wn.2d 720 (1994); "it will . . . be the rare case where speed alone will justify the giving of the permissive inference instruction," *see also: State v. Rich*, 184 Wn.2d 897 (2016); odor of alcohol plus speeding plus veering just prior to accident where defendant failed to negotiate a curve is sufficient to establish DUI and reckless prongs; 9-0.

***State v. Thompson***, 90 Wn.App. 41, 47-48 (1998)

Reckless driving is not a lesser included offense of vehicular assault, as "reckless" is defined differently for the two crimes, *see: State v. Bowman*, 57 Wn.2d 266, 271 (1960); here, evidence does not support only reckless driving, as defendant not only drove with disregard for safety of others but also caused serious injury, thus negligent driving is also not a lesser under the factual prong, *State v. Rogers*, 70 Wn.App. 626 (1993), *State v. Bosio*, 107 Wn.App. 462, 464-67 (2001), *cf.: State v. Culp*, 30 Wn.App. 879 (1982), *State v. Escobar*, 30 Wn.App. 131 (1981), *but see: State v. Gostol*, 92 Wn.App. 832 (1998); III.

***State v. Gostol***, 92 Wn.App. 832 (1998)

The crime of negligent driving, former RCW 46.61.525 [since amended to traffic infraction], is a lesser of reckless vehicular assault, RCW 46.61.522, *but see: State v. Thompson*,

90 Wn.App. 41, 47-48 (1998), *State v. Rogers*, 70 Wn.App. 626, 635 (1993), *State v. Bosio*, 107 Wn.App. 462, 464-67 (2001); I.

***State v. Barstad***, 93 Wn.App. 553 (1999)

Intoxicated defendant kills two women speeding through red light at busy intersection, is convicted of murder 1° by extreme indifference to human life, RCW 9A.32.030(1)(b), contends vehicular homicide supersedes murder statute when homicide occurs through reckless or impaired driving; held: because prosecutor chose to increase his proof requirement, general/specific analysis is inapplicable, distinguishing *State v. Collins*, 55 Wn.2d 469 (1960), which precludes prosecutor from charging manslaughter under these circumstances; III.

***State v. Lopez***, 93 Wn.App. 619 (1999)

Insufficient to prove vehicular homicide where evidence establishes unlicensed minor rolls car, not enough to show that an unlicensed minor without formal driver's education is likely to endanger persons, as some evidence of respondent's conscious disregard of danger is necessary; negligence *per se* is abolished, with exceptions, RCW 5.40.050; 2-1, III.

***State v. McNeal***, 98 Wn.App. 585, 592-93 (1999), *aff'd, on other grounds,* 145 Wn.2d 352 (2002)

Evidence that defendant had .31 ml. blood concentration of methamphetamine and expert testimony that methamphetamine use could produce symptoms that impair ability to drive, which could include lethargy plus defendant's driving indicating impairment is sufficient for trier of fact to find defendant under influence; II.

***State v. Vreen***, 99 Wn.App. 662, 671-73 (2000), 143 Wn.2d 923, 933 (2001)

Defendant's offer of evidence of his close personal relationship to the victim is relevant to the *mens rea* elements of "carelessness" and "conscious disregard," as a person can choose to be careless and is less likely to be careless with a loved one in the car; III.

***State v. Souther***, 100 Wn.App. 701 (2000)

Where victim's driving is a concurring cause to a collision which contributes to victim's death, defense is not entitled to a superseding cause instruction, WPIC 25.03, *see: State v. Roggenkamp*, 115 Wn.App. 927, 942-49 (2003), 153 Wn.2d 614, 630-31 (2005), as contributory negligence is not a defense, *State v. Judge*, 100 Wn.2d 706, 718 (1984), *but see: State v. Meekins*, 125 Wn.App. 390 (2005); under facts of this case, "deception doctrine" instruction, WPI 70.02.01, was properly refused; I.

***State v. Avery***, 103 Wn.App. 527 (2000)

Police arrest suspect for hit and run/death, smell intoxicants but do not see other signs of intoxication, note "slight impairment, faint odor," suspect dozes but his father advises police he is extremely tired, police ask defendant if he would submit to voluntary blood test, defendant consents, is not advised of implied consent warnings, blood alcohol level is .17, defendant charged with vehicular homicide; held: where police lack probable cause to believe that an arrestee is under the influence, implied consent statute does not apply, *State v. Rivard*, 131

Wn.2d 63, 76-77 (1997), thus suspect may voluntarily consent to a blood test, *State v. Wetherell*, 82 Wn.2d 865, 869 (1973); II.

***State v. Donahue***, 105 Wn.App. 67 (2001)

Blood tested by a method other than that provided in RCW 46.61.506 is admissible, where it meets ER 702 and 703, in cases other than the *per se* offense of DUI, at 72-77, *State v. Curran*, 116 Wn.2d 174, 182 (1991), *State v. Charley*, 136 Wn.App. 58 (2006), *but see: Seattle v. Clark-Munoz*, 152 Wn.2d 39 (2004); failure of police to preserve blood sample after testing by out-of-state hospital, where the result was more than twice the *per se* limit, did not deny due process as the exculpatory value of the evidence was not apparent, at 77-78, *State v. Wittenbarger*, 124 Wn.2d 467 (1994); II.

***State v. Holgren***, 106 Wn.App. 477 (2001)

Prior DUIs more than seven years old may be used to enhance sentence for vehicular homicide, RCW 9.94A.310(7), even though they may not be used to enhance for DUI, RCW 46.61.5055; I.

***State v. Deman***, 107 Wn.App. 98 (2001)

Where prior DUIs had washed, they are still available to enhance, RCW 46.61.520(2), distinguishing *State v. Cruz*, 139 Wn.2d 186 (1999); I.

***State v. Bosio***, 107 Wn.App. 462 (2001)

Negligent driving 1°, RCW 46.61.5249(1)(a), is not a lesser of either prong of vehicular assault, at 464-67, distinguishing *State v. Gostol*, 92 Wn.App. 832, 836 (1998), *see: State v. Curran*, 116 Wn.2d 174 (1991), *State v. Rogers*, 70 Wn.App. 626 (1993), *State v. Thompson*, 90 Wn.App. 41, 47-48 (1998); WAC 448-14-020(3) unambiguously requires that an enzyme poison be added to blood sample and, where no evidence is offered to support that, blood test results must be suppressed, at 467-68, *State v. Hultenschmidt*, 125 Wn.App. 259, 263-67 (2004), *see: State v. Wilbur-Bobb*, 134 Wn.App. 627 (2006), *State v. Brown*, 145 Wn.App. 62 (2008); III.

***State v. Teitzel***, 109 Wn.App. 791 (2002)

A prior DUI acts as a two-year sentence enhancement and doesn't count in offender score, RCW 46.61.520(2); II.

***State v. Preuett***, 116 Wn.App. 746 (2003)

Sentence enhancement for prior deferred prosecution, RCW 46.61.520, does not violate due process notice requirement, *Richland v. Michel*, 89 Wn.App. 764, 770 (1998), *State v. Becker*, 132 Wn.2d 54, 61 (1997), distinguishing *INS v. St. Cyr*, 150 L.Ed.2d 347 (2001), or *ex post facto* clause; I.

***State v. Clark***, 117 Wn.App. 281, 285-86 (2003), *affirmed*, 153 Wn.2d 614 (2005)

Unit of prosecution for vehicular assault is each victim, *State v. Bourne*, 90 Wn.App. 963, 973 (1998); II.

***Pers. Restraint of Percer***, 150 Wn.2d 41 (2003)

Vehicular homicide and felony murder 2°, stemming from the same death, do not violate double jeopardy clause, distinguishing *State v. Schwab*, 98 Wn.App. 179 (1999); reverses *Pers. Restraint of Percer*, 111 Wn.App. 843 (2002); 8-1.

***State v. Phillips***, 123 Wn.App. 761 (2004)

In vehicular homicide case, trial court admits accident reconstruction expert's use of PC-Crash computer-assisted reconstruction calculations following *Frye* hearing; held: because accident reconstruction software and computer simulations are based on the application of long-standing scientific principles, the evidence is admissible, *but see: State v. Sipin*, 130 Wn.App. 403(2005), even though the particular application has not been admitted in other courts; II.

***State v. Morgan***, 123 Wn.App. 810 (2004)

State proves that defendant's BAC was 0.13 at collision, defendant testifies he was blinded by sunlight right before collision, claims that where there is a superseding, intervening event, state must prove a causal connection between defendant's intoxication and death; held: causal connection is between driving and the collision, not intoxication and death, *State v. bjork123*, 126 Wn.2d 443 (1995), *State v. Salas*, 127 Wn.2d 173 (1995), whether or not there is evidence of a superseding event; where information charges that driving was *the* proximate cause, jury instruction requiring state to prove that driving was "*a* proximate cause" is likely error, harmless here; I.

***State v. Roggenkamp***, 153 Wn.2d (2005)

"Reckless," for purposes of vehicular homicide and assault, means "driving in a rash or heedless manner, indifferent to the consequences," *State v. Bowman*, 57 Wn.2d 266, 271 (1960), not the definition from reckless driving statute, RCW 46.61.500 ("willful or wanton disregard for safety"), *State v. Clark*, 117 Wn.App. 281 (2003), *aff'd*, 153 Wn.2d 614 (2005), *State v. Ratliff*, 140 Wn.App. 12 (2007), *see: State v. Ridgley*, 141 Wn.App. 771 (2007)(harmless error analysis), *but see: State v. McAllister*, 60 Wn.App. 654, 659 (1991), *State v. Miller*, 60 Wn.App. 767 (1991), *State v. Hursh*, 77 Wn.App. 242, 248 (1995); where defendant is driving recklessly and hits intoxicated victim's car which pulls into intersection, at most victim's actions were a concurring cause as opposed to an intervening cause, thus defendant is not entitled to the defense; to be a superseding cause, the intervening act must have occurred after the defendant's act or omission, *State v. Souther*, 100 Wn.App. 701, 710 (2000), *State v. Frahm*, 193 Wn.2d 590 (2019), *but see: State v. Meekins*, 125 Wn.App. 390 (2005); affirms *State v. Roggenkamp*, 115 Wn.App. 927 (2003); 7-2.

***State v. Meekins***, 125 Wn.App. 390 (2005)

Defendant, at .11 BAC, collides with motorcyclist whose headlight may or may not have been illuminated, trial court instructs jury that contributory negligence is not a defense, *State v. Judge*, 100 Wn.2d 706 (1984), *State v. Brobak*, 47 Wn.App. 488 (1987), and that, if jury found that the headlight was not illuminated and that this was a cause without which the collision would not have occurred, it must acquit; held: while failure to display headlight cannot have been a superseding cause, jury could have found that it was the sole cause, *cf.: State v. Souther*, 100 Wn.App. 701 (2000), *State v. Mee Hui Kim*, 134 Wn.App. 27, 40-43 (2006), *see: State v. Frahm*, 193 Wn.2d 590 (2019), thus instructions conflicted and defendant is entitled to new trial;

fact that deceased was not wearing a helmet and would not have died had he been wearing one could not have been a proximate cause, thus trial court's exclusion of that evidence was proper, *see:* *State v. Hursh*, 77 Wn.App. 242, 244-45 (1995); II.

***State v. Sipin***, 130 Wn.App. 403 (2005)

PC-CRASH v. 6.2 computer-generated simulation program does not meet *Frye* standard where offered for simulation and prediction of multiple-occupant movement within a vehicle during a multiple-collision accident, *see also:* *State v. Phillips*, 123 Wn.App. 761 (2004); remanded for a new *Frye* hearing to allow state to try again to establish the reliability of the evidence; decision and opinion in *State v. Sipin*, 125 Wn.App. 733 (2005) is withdrawn; I.

***State v. Mee Hui Kim***, 134 Wn.App. 27 (2006)

An arrest for vehicular assault is in and of itself a proper basis to obtain a blood draw for testing, at 33-35, RCW 46.20.308(3), *State v. Avery*, 103 Wn. App. 527, 534 n.6 (2000); trial court's exclusion of defendant's testimony that she may have been given a date rape drug was proper as speculative absent evidence that she had ingested such a drug, at 40-43, distinguishing *State v. Meekins*, 125 Wn.App. 390 (2005); I.

***State v. David***, 134 Wn.App. 470 (2006)

Legislature's failure to define "proximate cause," and trial court's defining it according to common law principles does not violate separation of powers doctrine; II.

***State v. Wilbur-Bobb***, 134 Wn.App. 627, 630-32 (2006)

Where blood vial contains the words "sodium fluoride" on it and toxicologist testifies that sodium fluoride is an enzyme poison, requirement that a blood sample be preseved with an enzyme poison, WAC 448-14-020(3)(b), is met, *State v. Brown*, 145 Wn.App. 62 (2008), *see: Singh v. State*, 5 Wn.App.2d 1 (2018), distinguishing *State v. Bosio*, 107 Wn.App. 462, 467-68 (2001), *State v. Hultenschmidt*, 125 Wn.App. 259, 267 (2004); I.

***State v. Morales***, 173 Wn.2d 560 (2012)

Interpreter advises vehicular assault arrestee of implied consent warnings, interpreter is not called to testify, trial court admits blood test; held: state must demonstrate at trial the warnings were meaningfully read, *State v. Turpin*, 94 Wn.2d 820, 824-25 (1980), *State v. Stannard*, 109 Wn.2d 29, 41 (1987) (Utter, J., concurring), RCW 46.20.308 (2008); here, only evidence that the warnings were read was trooper's testimony that an interpreter read the warnings in Spanish which he could not understand, thus "his testimony was hearsay and inadmissible," at 576, *but see:* ER 104(a), 1101(c)(1), thus court erred in admitting blood test results, depriving defendant of knowing that he had the right to additional tests; reverses *State v. Morales*, 154 Wn.App. 26 (2010); 8-1.

***State v. Pappas***, 164 Wn.App. 917 (2011)

In vehicular assault case, an aggravating factor that the injuries "substantially exceeded" the level of bodily harm beyond substantial bodily harm is proper, *see: State v. Stubbs*, 170 Wn.2d 117, 128 (2010); I.

***State v. Burch***, 197 Wn.App. 382 (2016)

Vehicular assault and vehicular homicide are strict liability offenses; state need not prove ordinary negligence, just needs to prove that defendant drove under the influence and caused a collision, *State v. Rivas*, 126 Wn.2d 443 (1995); detailed analysis of how a court determines if an offense has a *mens rea* element; II.

***State v. Sosa***, 198 Wn.App. 176 (2017)

Defendant is arrested for vehicular assault, police obtain search warrant for blood which shows .12 BAC, defendant moves to suppress because he was not advised of his right to additional tests; held: after a blood test pursuant to a search warrant police need not advise defendant he has a right to additional independent tests, RCW 46.20.308 (2013), *distinguishing State v. Turpin*, 94 Wn.2d 820 (1980), *State v. Holcomb*, 31 Wn.App. 398 (1982); refusal to take a PBT is admissible as evidence of guilt, no *Frye* hearing is required, *State v. Baird*, 187 Wn.2d 210 (2016), *but see: Vancouver v. Kaufman,* 10 Wn.App.2d 747 (2019); III.

***Matter of Raymundo***, 6 Wn.App.2d 75 (2018)

RCW 9.94A.525(11) (2017) provides that when an individual is convicted of a **felony traffic offense**, each prior serious traffic offense will count as one point., but RCW 9.94.525(11) also carves out an exception to this general rule: it instructs the court not to count prior serious traffic offenses that were used as enhancements for **vehicular homicide,** RCW 46.61.520(2) (1998), which provides that an additional two years "shall" be added to a vehicular homicide sentence for each prior Dui, RCW 46.61.5055 (2018); sentencing court could not use the same prior serious traffic offenses in calculating petitioner's offender score for vehicular homicide that it used as enhancements under RCW 46.61.520(2), but court can use the priors in calculating petitioner's score for felony hit and run since they were not used as enhancements for hit and run, the exclusion of prior offenses used to enhance vehicular homicide applies only to the calculation of the offender score for vehicular homicide, not to the separate calculation of the offender score for other current offenses; I.

***State v. Frahm***, 193 Wn.2d 590 (2019)

Defendant rear-ends another vehicle which is disabled, citizen seeks to aid injured driver of disabled vehicle, a third vehicle hits the disabled vehicle, propels it into the citizen who dies, defendant is convicted of vehicular homicide; held: intervening act of second collision resulting in death of Good Samaritan was reasonably foreseeable and was not a superseding cause; in determining whether an intervening act is a superseding cause, we consider whether the intervening act (1) created a different type of harm, (2) constituted an extraordinary act, and (3) operated independently of the defendant's actions," *State v. Roggenkamp*, 115 Wn.App. 927, 945 (2003), *aff'd*, 153 Wn.2d 614 (2005); whether an act is a proximate cause and whether there is a superseding, intervening cause are questions of fact for the jury, *State v. Meekins*, 125 Wn.App. 390, 397 (2005); *affirms State v. Frahm*, 3 Wn.App.2d 812 (2018); 7-2.

***State v. Imokawa***, 194 Wn.2d 391 (2019)

Trial court declines a defense proposed instruction that state has the burden of proving that defendant's conduct did not constitute a superseding cause; held: while instructing a jury that state has the burden to disprove a defense is preferable, here court did instruct that state has the burden of proving proximate cause beyond a reasonable doubt, proximate cause and the

presence of a superseding intervening cause are mutually exclusive, *State v. Morgan*, 123 Wn.App. 810, 818 (2004), thus instructions as a whole were adequate; reverses *State v. Imokawa*, 4 Wn.App.2d 545 (2018); 7-1.

***State v. Anderson***, 9 Wn.App.2d 430 (2019)

Following collision with multiple deaths and injuries defendant is transported to hospital for his own injuries, blood test taken without a warrant; held: state proved by clear and convincing evidence that exigent circumstances existed for warrantless blood draw because of defendant's need for medical treatment which "could impair the integrity of the blood sample, officer testified that it would take 40 to 90 minutes to obtain a warrant for blood, delay caused by obtaining a warrant would result in destruction of evidence or postponing defendant's receipt of necessary medical care, *State v. Inman*, 2 Wn.App.2d 281, 290-95 (2018), *State v. Rawley*, 13 Wn.App.2d 474 (2020), distinguishing *Seattle v. Pearson*, 192 Wn.App.802 (2016), *but see: Birchfield v. North Dakota*, 579 U.S. 438, 136 S.Ct. 2160, 195 L.Ed.2d 560 (2016); to enhance with a prior reckless driving jury must find that drugs or alcohol were involved, the fact that it was reduced from DUI is insufficient, *Walla Walla v. Greene*, 154 Wn.2d 722 (2005) (per "dissent" on this issue, which is actually a majority); impaired driving enhancements must run consecutively, RCW 9.94A.533(7) (2016); I.

# VENUE, CHANGE OF

***State v. Peyton***, 29 Wn.App. 701 (1981)

Within trial court's discretion to deny change of venue; applies factors from *State v. Crudup*, 11 Wn.App. 583 (1974); *accord*: *State v. Hoffman*, 116 Wn.2d 51 (1991), *State v. Thompson*, 60 Wn.App. 662 (1991), *State v. Jackson*, 150 Wn.2d 251, 269-73 (2003), *Skilling v. United States*, 561 U.S.358, 177 L.Ed.2d 619 (2010); II.

***State v. Wixon***, 30 Wn.App. 63 (1981)

Issue on motion for change of venue is nature of publicity, not nature of crimes charged; defense must show an apparent probability of prejudice; an appellate court will independently review the record to determine if pretrial publicity gave rise to a probability of prejudice; prosecutor should not read the probable cause affidavit to the press; II.

***State v. Rupe***, 101 Wn.2d 664 (1984)

No abuse of discretion in denial of change of venue where trial court applies *State v. Crudup*, 11 Wn.App. 583 (1974) factors, *see*: *State v. Worl*, 58 Wn.App. 443 (1990), *State v. Rice*, 120 Wn.2d 549 (1993), *State v. Clark*, 143 Wn.2d 731, 756-61 (2001), *Skilling v. United States*, 561 U.S.358, 177 L.Ed.2d 619 (2010), *State v. Munzanreder*, 199 Wn.App. 162, 180-84 (2017); 9-0.

***Patton v. Yount***, 81 L.Ed.2d 847 (1984)

Passage of time between two trials, where publicity was great at time of first trial, rebuts any presumption of partiality or prejudice that existed at first trial, *see also: State v. Boot*, 89 Wn.App. 780, 786-7 (1998); court appears to adopt "wave of public passion" test for change of venue motion; 6-2.

***State v. Allyn***, 40 Wn.App. 27 (1985)

Jurors' knowledge via the press that defendant has a record is not sufficient by itself to disqualify juror or to change venue; III.

***State v. Whitaker***, 133 Wn.App. 199, 209-14 (2006)

Relevant question is not whether the community remembered the case, but whether the jurors had such fixed opinions that they could not judge impartially the guilt of defendant, *State v. Jackson*, 150 Wn.2d 251, 269 (2003), *State v. Young*, 158 Wn.App. 707, 714-16 (2010), *State v. Munzanreder*, 199 Wn.App. 162, 180-84 (2017); it is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court, although statements of impartiality may be given little weight "where so many, so many times, admitted prejudice," *Irvin v. Dowd*, 6 L.Ed.2d 751 (1961); here, prospective jurors had little awareness of publicity and details, thus no reason to distrust their declarations of impartiality; I.

***State v. Young***, 158 Wn.App. 707, 714-16 (2010)

Motion for change of venue may be reserved by trial court until jury selection is attempted; fact that defense has to voir dire on publicity is not error since the issue of knowledge of publicity does not demonstrate bias or prejudice; III.

***State v. Stearman***, 187 Wn.App. 257 (2015)

Defendant has the right to change venue when a case is filed in one county but there is a reasonable doubt as to whether the crime actually occurred there, CrR 5.1(b), *State v. Rockl*, 130 Wn.App. 293 (2005); at a pretrial hearing on defendant's motion to change venue court may consider a state's offer of proof, *State v. Kilgore*, 147 Wn.2d 288, 295 (2002); when state rests trial court must consider a defendant's renewed motion to change venue based upon the evidence, *State v. Dent*, 123 Wn.2d 467, 479-82 (1994); where defendant has raised a genuine issue of fact about venue at the close of evidence the trial court must submit the venue issue to the jury for resolution by a preponderance, defense need not submit a proposed instruction as venue in the proper county is a constitutional right, *State v. Dent, supra., at* 480; II.

***State v. Clark***, 17 Wn.App.2d 794 (2021)

Failure to move to change venue to a county with more Black people when representing a Black person is not ineffective assistance; II.

# VENUE & JURISDICTION

***State v. Price***, 94 Wn.2d 810 (1980)

A defendant's failure to object to venue as soon as he has knowledge upon which to make the objection as required by CrR 5.1(c) acts as a waiver of the objection; 8-0.

***State v. Brown***, 29 Wn.App. 11 (1981)

State need not prove venue beyond a reasonable doubt; defense must object to venue or issue is waived; I.

***State v. Ford***, 33 Wn.App. 788 (1983)

State fails to elicit testimony as to location of crime; held: state must prove subject-matter jurisdiction, *i.e.*, that crime occurred in Washington, thus dismissed; I.

***State v. Howell***, 40 Wn.App. 49 (1985)

CrR 5.1(a)(2), permitting a prosecution to be commenced in a county where any element of the crime was committed is to be liberally construed to allow venue in any county in which any of the series of events comprising the crime took place; III.

***State v. Johnson***, 45 Wn.App. 794 (1986)

Venue may be proved by reference to streets, buildings and other landmarks that the jury probably knows of, *State v. Kincaid*, 69 Wash. 273 (1912); II

***State v. Harris***, 48 Wn.App. 279 (1987)

At pretrial hearing, defendant, charged in one county, learns the offense may have occurred in another county, does not object to venue; "to convict" instruction requires proof offense occurred in Washington, does not refer to county; held: defendant waived objection to venue by failing to object as soon as he had knowledge; waiting until end of state's case is too late, CrR 5.1(c); I.

***State v. Lane***, 112 Wn.2d 464 (1989)

State has ceded criminal jurisdiction to federal government for crimes committed at Ft. Lewis; where premeditation occurs on state land yet killing occurs at Ft. Lewis, state has jurisdiction to try defendant, RCW 9A.04.030(1); 9-0.

***State v. Fowler***, 54 Wn.App. 450 (1989)

Territorial jurisdiction need not be submitted to the jury absent a factual dispute as to jurisdiction, *see: State v. L.J.M.*, 79 Wn.App. 133, 140-3 (1995); I.

***State v. McCorkell***, 63 Wn.App. 798 (1992)

Defense waives challenge to venue by failing to present it by the time jeopardy attaches, *State v. Pejsa*, 75 Wn.App. 139, 145-6 (1994), *cf.: State v. Harris*, 48 Wn.App. 279, 282 (1987), *but see: State v. Hardamon*, 29 Wn.2d 182, 188 (1947); court may take judicial notice that an intersection is within the city, *State v. Dennison*, 72 Wn.2d 842, 844 (1967); I.

***State v. Schmuck***, 121 Wn.2d 373 (1993)

Indian tribal police officer is authorized to stop and detain a non-Indian who allegedly violates state and tribal law while traveling on a public road within a reservation until suspect can be turned over to state authorities for charging and prosecution, *United States v. Cooley*, ___ U.S. ___, 141 S.Ct. 1638, 210 L.Ed.2d 1 (2021), *cf.: State v. Eriksen*, 172 Wn.2d 506 (2011); 7-0.

***State v. Dent***, 123 Wn.2d 467, 479-82 (1994)

Venue is not an element of the crime which must be proved beyond a reasonable doubt, overruling *State v. Marino*, 100 Wn.2d 719, 727 (1984), *see: State v. Hickman*, 135 Wn.2d 97 (1998); where prosecutor has a reasonable doubt as to venue and files case pursuant to CrR 5.1(b), defense must object as soon as defendant has knowledge upon which to make objection; absent CrR 5.1 facts, defense must object to venue at omnibus hearing, CrR 4.5(d), unless defense makes a showing of good cause later; where evidence introduced during trial raises question of venue for first time, defendant must raise issue at end of state's case, *see: State v. Stearman*, 187 Wn.App. 257 (2015), court should permit reopening absent actual prejudice, whereupon venue becomes an issue for the trier of fact, to be resolved by a preponderance, not beyond a reasonable doubt; 9-0.

***State v. Jacobson***, 74 Wn.App. 715, 721-2 (1994)

California real property is properly the *res* of a Washington theft where all the beneficiaries and trustor live in Washington, sale occurred in violation of a Washington TRO prohibiting same, *State v. Brown*, 29 Wn.App. 11, 13 (1981), RCW 9A.04.030(5), *Donaldson v. Greenwood*, 40 Wn.2d 238, 250 (1952); I.

***State v. Corrado***, 78 Wn.App. 612 (1995)

Due to missing witness, state seeks and obtains dismissal without prejudice; when witness is found, defendant is "rearraigned," but no new information is filed; held: superior court lacks subject matter jurisdiction without an information or indictment, *but see: State v. Franks*, 105 Wn.App. 950 (2001), conviction is void due to prosecutor's failure to refile, *State ex rel. Superior Court of Snohomish County v. Sperry*, 79 Wn.2d 69, 74 (1971), *see: State v. Barnes*, 146 Wn.2d 74 (2002); II.

***State v. Hickman***, 135 Wn.2d 97 (1998)

While venue is not an element, where state fails to object to venue in "to convict" instruction, then venue becomes an element of the crime and defendant may challenge sufficiency of the added element on appeal under law of the case doctrine, *State v. Johnson*, 188 Wn.2d 742 (2017), *cf.: Musacchio v. United States*, 577 U.S. 237, 136 S.Ct. 709, 193 L.Ed.2d 639 (2016), reversing *State v. Hickman*, 84 Wn.App. 646 (1997); 5-4.

***State v. Waters***, 93 Wn.App. 969, 976-77 (1999)

Illegal arrest does not deprive a court of jurisdiction and does not require dismissal, *Pasco v. Titus*, 26 Wn.App. 412, 417 (1980), *Ker v. Illinois*, 119 U.S. 436, 7 S.Ct. 225, 30 L.Ed. 421 (1886), *Frisbie v. Collins*, 96 L.Ed. 541 (1952); III.

***State v. Leffingwell***, 106 Wn.App. 835 (2001)

Defendant, ineligible for worker's compensation while incarcerated in Alaska, falsely informs government he resides in Washington, compensation is sent to Washington address and forwarded to him in prison, trial court dismisses theft by deception charge for lack of jurisdiction; held: because defendant obtained control over the money in Washington, an essential part of the crime was committed here, *State v. Lane*, 112 Wn.2d 464, 470 (1989), RCW 9A.04.030(1), (5), thus Washington had jurisdiction; II.

***Seattle v. Briggs***, 109 Wn.App. 484 (2001)

Municipal courts have jurisdiction to try misdemeanor violations of state law where a statute grants concurrent jurisdiction, RCW 35.20.250; I.

***State v. Barnes***, 146 Wn.2d 74 (2002)

Defendant is charged by information with assault 3˚, later court grants leave to amend to add resisting arrest, defendant is arraigned, convicted, state neglects to file amended information; held: filing of original information conferred subject matter jurisdiction, distinguishing *State v. Corrado*, 78 Wn.App. 612 (1995); failure to file amended information has no impact upon jurisdiction, defendant was not prejudiced, conviction of resisting arrest affirmed, *see: State v. Eaton*, 164 Wn.2d 461 (2008); 9-0.

***State v. Rockl***, 130 Wn.App. 294, 296-99 (2005)

Defendant possesses stolen car in King County, eludes police in both King and Pierce Counties, is charged with PSP and eluding in King County, demands change of venue; held: where there is no reasonable doubt that a crime occurred in more than one county, defendant does not have a right to change venue, CrR 5.1(b) and –(c), *see: State v. Howell*, 40 Wn.App. 49 (1985); I.

***State v. Dodson***, 143 Wn.App. 872 (2008)

Defendant drives wrong way on I-5 entrance ramp onto Fort Lewis, is arrested by military police officer who calls state patrol who processes defendant for DUI; held: where an essential element of a crime is committed within an area of state jurisdiction, district court has jurisdiction to hear the case; Secretary of the Army's retroceding to the state jurisdiction, 40 U.S.C. § 1314, 10 U.S.C. § 2683, over that portion of I-5 as it crosses Fort Lewis creates concurrent jurisdiction; II.

***State v. Pink***, 144 Wn.App. 945 (2008)

Enrolled member of Quinault Tribe is arrested by county sheriff on a road within the Quinault Indian Reservation for unlawful possession of a firearm; held: tribe's grant of a highway easement to the state does not terminate tribe's interest in the land, thus state did not have jurisdiction to prosecute, *cf.: State v. Abrahamson*, 157 Wn.App. 672 (2010), *State v. Clark*, 178 Wn.2d 19 (2013); II.

***State v. Eriksen***, 172 Wn.2d 506 (2011)

Tribal officer may not stop and detain outside the reservation for a traffic infraction, at least absent cross-deputization or mutual aid pact, *see: United States v. Cooley*, ___ U.S. ___, 141 S.Ct. 1638, 210 L.Ed.2d 1 (2021); supersedes *State v. Eriksen*, 166 Wn.2d 953 (2009), 170 Wn.2d 209 (2010); 5-4.

***Auburn v. Gauntt***, 174 Wn.2d 321 (2012)

Where a municipality smaller than 400,000 people seeks to prosecute for a state statute, it must either adopt the statute in the city code or incorporate the state statue by reference, *cf.:* RCW 35.20.250 (1987); affirms *Auburn v. Gauntt*, 160 Wn.App. 567 (2011); 9-0.

***State v. Williams***, 193 Wn.App. 906 (2016)

Charges involving a high speed chase in two counties are filed in one county, defendant gets appointed counsel, prosecutors decide to change venue because events began in first county where charges were refiled, which results in defendant obtaining a different appointed counsel who could not prepare within 60-day time for trial, trial court dismisses, CrR 8.3(b), concluding arbitrary action forcing defendant to choose between speedy trial and competently prepared counsel; held: prosecutor's explanation was reasoned and thus not arbitrary, thus dismissal is reversed; III.

***State v. Zack***, 2 Wn.App.2d 667 (2018)

State has jurisdiction to prosecute an Indian for assaulting a non-Indian occurring on fee or deeded land, as opposed to tribal or trust land; III.

***State v. Taylor***, 5 Wn.App.2d 530 (2018)

A defendant may be prosecuted for DUI committed within a city in district court under state statutre even though the city has adopted a DUI ordinance, as district courts have concurrent jurisdiction with municipal courts, RCW 3.66.060; III.

***State v. Kassner***, 5 Wn.App.2d 536 (2018)

18 year-old defendant pleads guilty in adult court to an offense that occurred when he was 10, 21 years later seeks to vacate claiming that court lacks jurisdiction absent a finding that a 10-year old offender had the capacity to commit the crime, RCW 9A.04.050; held: court had "jurisdictional authority to act" despite not entering a capacity finding; where the constitution grants original jurisdiction to the superior court, CONST., art. IV, § 6, the legislature cannot restrict the jurisdiction, *State v. Posey*, 174 Wn.2d 131, 135 (2012), which overruled *State v. Werner*, 129 Wn.2d 485, 493 (1996); III.

***State v. Karpov***, 195 Wn.2d 288 (2020)

While jurisdiction is usually not an element of a crime that must be proved beyond a reasonable doubt (except where it is set out specifically in a statute, *e.g.*, DUI), here the trial court erroneously treated it as an element of the crime and dismissed, thus judicially acquitting the defendant, precluding further prosecution based upon double jeopardy, *Evans v. Michigan*, 568 U.S. 313, 133 S. Ct. 1069, 185 L. Ed. 2d 124 (2013); 9-0.

***United States v. Cooley***, ___ U.S. ___, 141 S.Ct. 1638, 210 L.Ed.2d 1 (2021)

Tribal police can temporarily detain and search non-Indians on public road running through reservation for violation of state or federal law, *see: State v. Eriksen,* 172 Wn.2d 506 (2011); 9-0

# VUCSA*

***State v. Boyer***, 91 Wn.2d 342 (1979)

Guilty knowledge of what is being delivered is an element of delivery, *cf.*: *State v. Smith*, 104 Wn.2d 447 (1985), *State v. Sims*, 119 Wn.2d 138 (1992) (possession with intent to deliver), *see: State v. Johnson*, 119 Wn.2d 143 (1992), *State v. Wallway*, 72 Wn.App. 407, 410-14 (1994), *State v. Warnick*, 121 Wn.App. 737 (2004), *but see: State v. Nuñez-Martinez*, 90 Wn.App. 250 (1998); 9-0.

***State v. Jones***, 25 Wn.App. 746 (1980)

Possession of greater than 40 grams of marijuana is not a lesser of delivery of marijuana; *accord*: *State v. Moore*, 54 Wn.App. 211 (1989), *State v. Davis*, 117 Wn.App. 702 (2003), *but see: State v. Wilson*, 41 Wn.App. 397 (1985); II.

***State v. Leek***, 26 Wn.App. 651 (1980)

Sale "for profit" means obtaining anything of value in exchange for drugs; need not prove defendant received more than costs; II.

***State v. Prather***, 30 Wn.App. 666 (1981)

RCW 69.50.401(c), the burn statute, is not vague, is not overbroad, does not violate due process, does not exceed the scope of the legislature's police power, and does not require proof of intent; I.

***State v. Keating***, 30 Wn.App. 829 (1981)

State has burden of proving legend drug was not exempt, RCW 69.41.010, 030; III.

***State v. Wilson***, 95 Wn.2d 828 (1981)

Defendant, present during drug sale to police, tells agent that "it's good pot and well worth the price:" held: evidence establishes intent to encourage by defendant, thus establishing accomplice liability, *distinguishing State v. Peasley*, 80 Wash. 99 (1914), *State v. Gladstone*, 78 Wn.2d 306 (1970), and *In re Wilson*, 91 Wn.2d 487 (1979); knowledge or intent is not an element of RCW 69.50.401(c) prohibiting arranging for delivery of a controlled substance, *see also: State v. Valdobinos*, 122 Wn.2d 270 (1993), *distinguishing State v. Boyer*, 91 Wn.2d 342 (1979); 9-0.

***State v. Morgan***, 32 Wn.App. 236 (1982)

Defendant gives general delivery address to physician to obtain prescription, gives different address to pharmacist, is charged with obtaining prescription by giving false address; postmaster testifies at trial he was unaware if defendant received mail at general delivery

* *See also:* **VUCSA/Possession, Constructive Possession, PWI: Sufficiency** (next section)

address; held: evidence was insufficient as an "address" is not a domicile; state failed to prove address was false; III.

***Crape v. Mount***, 32 Wn.App. 567 (1982)
Vehicle forfeiture statute, RCW 69.50.505(b)(4) is constitutional; I.

***State v. Barringer***, 32 Wn.App. 882 (1982)
Court instructed jury that Valium a/k/a diazepam, is a controlled substance; held: diazepam is drug scheduled in RCW 69.50.210(c)(7); there was no evidence that Valium is diazepam, thus instruction is a comment on the evidence; *but see*: *State v. Harris*, 44 Wn.App. 401 (1986) re: cocaine; court implies that RCW 69.50.403(a)(5), prohibiting offering a forged prescription, is a crime for any prescription, not just for a controlled substance; note identical elements in Legend Drug Act, different penalty; I.

***State v. Lauterbach***, 33 Wn.App. 161 (1982)
VUCSA burn statute, RCW 69.50.401(c), is violated where a defendant offers to sell a controlled substance and then either knowingly or unwittingly delivers a noncontrolled substance.

***State v. Brown***, 33 Wn.App. 843 (1983)
Defendant, in possession of Valium, is charged with VUCSA: possession of diazepam; argues improper notice; held: by reference to Physician's Desk Reference, any citizen can determine that diazepam and Valium are the same thing; 2-l; III.

***State v. Henry***, 36 Wn.App. 530 (1984)
Guns found in a residence where drugs are found are admissible to prove that defendant was a dealer and needed guns for protection; I.

***State v. Patterson***, 37 Wn.App. 275 (1984)
Possession of psilocybin mushrooms is unlawful, RCW 69.50.204(d)(18); I.

***State v. Austin***, 39 Wn.App. 109 (1984)
An attempt to obtain drugs by a forged prescription, RCW 69.50.403(2)(3), is a felony and does not fall under the general attempt statute, RCW 9A.28.020; I.

***State v. Casto***, 39 Wn.App. 229 (1984)
Police officer trained in state crime lab school may testify as expert to identify drugs; chemical proof is not legally required; II.

***State v. Eddie A.***, 40 Wn.App. 717 (1985)
To prove violation of the burn statute, RCW 69.50.401(c), state must prove that the substance delivered was a noncontrolled substance, *see also* *State v. Hernandez*, 85 Wn.App. 672 (1997); III.

***State v. Wilson***, 41 Wn.App. 397 (1985)

Defendant, charged with delivery of marijuana, denies possession of marijuana, court refuses to instruct as to lesser included offense of possession; held: possession of marijuana is a lesser of delivery, *but see:* *State v. Davis*, 117 Wn.App. 702 (2003), *State v. Jones*, 25 Wn.App. 746 (1980); where the evidence, regardless of its source, supports an inference that the lesser occurred, court must instruct as to the lesser even where defendant denies it, *State v. Fernandez-Medina*, 141 Wn.2d 448 (2000), *State v. McClam*, 69 Wn.App. 885 (1993), *but see*: *State v. Speece*, 115 Wn.2d 560 (1990), *State v. Fowler*, 114 Wn.2d 67 (1990), *State v. Johnson*, 59 Wn.App. 867, 873-4 (1990); III.

***State v. Adams***, 46 Wn.App. 874 (1987)

Growing marijuana is manufacturing a controlled substance, RCW 69.50.401(a), 69.50.101(m),(u), *State v. Dodd*, 78 Wn.App. 533 (1995); III.

***State v. Hawthorne***, 48 Wn.App. 23 (1987)

Drug conspiracy must be charged under RCW 69.50.407, and may not be charged under general conspiracy statute, RCW 9A.28.040; an overt act or substantial step is not an element of a drug conspiracy, RCW 69.50.407, *see Whitfield v. United States*, 160 L.Ed.2d 611 (2005), *but see: State v. Piñeda-Piñeda*, 1534 Wn.App. 653, 667-71 (2010); I.

***State v. Kovac***, 50 Wn.App. 117 (1987)

Possession of 8 grams of marijuana packaged in seven baggies is not sufficient to infer an intent to deliver, as it cannot be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact, *State v. Brown*, 68 Wn.App. 480 (1993), *State v. Hutchins*, 73 Wn.App. 211, 216 (1994), *State v. Davis*, 79 Wn.App. 591 (1995), *see also: State v. Hotchkiss*, 1 Wn.App.2d 275 (2017), *cf.: State v. Mejia*, 111 Wn.2d 892 (1989), *State v. Harris*, 14 Wn.App. 414 (1975), *State v. Lopez*, 79 Wn.App. 755, 767-9 (1995), *State v. Miller*, 91 Wn.App. 181, 186 (1998), *State v. Nygaard*, 154 Wn.App. 641, 647-49 (2010), *State v. O'Connor*, 155 Wn.App. 282, 290-91 (2010); III.

***State v. Hernandez***, 53 Wn.App. 702 (1989)

Knowledge of age is not element of RCW 69.50.406, distributing drugs to minor; III.

***State v. Anderson***, 58 Wn.App. 135 (1990)

Under burn statute, RCW 69.50.401(c), state must prove that the substance was not a controlled substance, but need not specifically identify the substance delivered; criminalist's testimony that tests eliminated 80 to 90% of possible controlled substances including cocaine, where defendant offered to sell cocaine, is sufficient to convict, *State v. Eddie A.*, 40 Wn.App. 717 (1985); I.

***State v. Campbell***, 59 Wn.App. 61 (1990)

Defendant places drugs on car seat where, at his direction, third party picks them up and hands them to undercover officer; held: constructive transfer, RCW 69.50.101(f), is the transfer by some other person or manner at the instance or direction of the defendant; information charging delivery need not allege constructive transfer, nor need "transfer" be defined in jury instructions; I.

***State v. Stearns***, 59 Wn.App. 445 (1990), *aff'd on other grounds,* 119 Wn.2d 247 (1992)

The definition of "manufacture," RCW 69.50.101(m), does not indicate that packaging and repackaging for personal use is excepted, and no instruction to that effect need be given; II.

***State v. Johnson***, 59 Wn.App. 867 (1990)

Where police arrest as suspect shows drugs he agreed to deliver, then delivery is complete as "delivery" is defined, *inter alia*, as "attempted transfer," RCW 69.50.101(f); defendant, charged with **delivery** of a controlled substance, denies delivering and possessing drugs, is not entitled to instruction on lesser of possession absent affirmative evidence that he simply possessed drugs, *State v. Speece,* 115 Wn.2d 360 (1990), *State v. Fowler*, 114 Wn.2d 59, 67 (1990), *State v. Rodriguez,* 48 Wn.App. 815 (1987), *see: State v. Fernandez-Medina,* 141 Wn.2d 448 (2000), rejecting *State v. Wilson*, 41 Wn.App. 397 (1985), *but see: State v. Davis,* 117 Wn.App. 702 (2003); III.

***State v. Lua***, 62 Wn.App. 34 (1991)

Enhanced penalties for delivery of drugs within 1000 feet of school grounds, RCW 9.94A.310(5), former RCW 69.50.435, are constitutional; *accord*: *State v. Acevedo,* 78 Wn.App. 886 (1995), *State v. Jenkins*, 68 Wn.App. 897 (1993); III.

***Chapman v. United States***, 114 L.Ed.2d 524 (1991)

Federal statute, 21 USC § 841(a), that requires enhanced penalty due to weight of drug and carrier (here, 50 mg. LSD plus blotter paper-carrier equals 5.7 g.; 1 g. invokes mandatory minimum) is constitutional; 7-2.

***State v. Williams***, 62 Wn.App. 748 (1991)

Possession of drug residue in pipe can appropriately be charged as possession of a controlled substance, RCW 69.50.401(d), *State v. Malone*, 72 Wn.App. 429, 438-40 (1994), as possession is not concurrent with paraphernalia statute, RCW 69.50.412, 69.50.102, *see: State v. Rose*, 175 Wn.2d 10, 18-22 (2012); I.

***State v. Zamora***, 63 Wn.App. 220 (1991)

To enhance penalty for drug crimes within 1000 feet of school, state must charge and prove both substantive drug offense and enhancement statute, RCW 69.50.435; large quantity of drugs plus large amounts of cash, scales, gloves and repackaging materials leads to rational and logical inference of intent to deliver, *State v. Lane*, 56 Wn.App. 286, 297-8 (1989), *State v. Simpson*, 22 Wn.App. 572, 575 (1979), *State v. Harris*, 14 Wn.App. 414, 418-19 (1975); *cf.: State v. Cobelli*, 56 Wn.App. 921, 924-5 (1989), *State v. Sprague,* 16 Wn.App.2d 213 (2021); III.

***State v. Olivarez***, 63 Wn.App. 484 (1991)

Jury instruction that constructive possession is established by dominion and control over substance ***or*** the premises where substance is found is error as effectively a mandatory presumption that defendant is guilty if jury found defendant had dominion and control over premises, *but see: State v. Bradford*, 60 Wn.App. 857, 862 (1991), *State v. Ponce*, 79 Wn.App. 651 (1995), *overruled, State v. Shumaker*, 142 Wn.App. 330 (2007), *but see: State v. Bradford,*

60 Wn.App. 857, 862 (1991), *State v. O'Connor,* 87 Wn.App. 119 (1997), *State v. Tadeo-Mares,* 86 Wn.App. 813, 816 (1997); defense instruction that delivery cannot occur between two persons in joint possession properly refused as delivery between joint possessors is not relevant to charge of possession with intent to deliver; III.

***State v. Sigman,*** 118 Wn.2d 442, 24 A.L.R.4th 856 (1992)

Statute prohibiting knowingly renting or making available any building for an illegal drug purpose, RCW 69.53.010(1), is not vague, *State v. Davis,* 176 Wn.App. 385, 393-94 (2011), and is violated where lessor learns of drug activity after renting and deliberately chooses to do nothing about it, *cf.: State v. Davis, supra.,* at 394-96, *reversing State v. Sigman,* 60 Wn.App. 1 (1990); 9-0.

***State v. Carter***, 64 Wn.App. 90 (1992)

Enhanced penalties for delivery of drugs within 1000 feet of public park, former RCW 69.50.435(a), are constitutional, *State v. Lua*, 62 Wn.App. 34 (1991), do not require *mens rea* element, *State v. Wimbs,* 74 Wn.App. 511, 515 (1994); III.

***State v. Henderson***, 64 Wn.App. 339 (1992)

State need not introduce a plat map to prove delivery occurred in a park, RCW 69.50.435(e), *see also: State v. Byrd*, 83 Wn.App. 509 (1996), *State v. Malone*, 136 Wn.App. 545, 558-59 (2007); III.

***Tacoma v. Luvene***, 118 Wn.2d 826 (1992)

Tacoma drug loitering ordinance, TMC 8.72.010, is not preempted by Uniform Controlled Substances Act, *State v. Fisher*, 132 Wn.App. 26, 30-32 (2006); 8-0.

***State v. Sims***, 119 Wn.2d 138 (1992)

Guilty knowledge is not an element of possession with intent to deliver, *see also: State v. Valdobinos*, 122 Wn.2d 270 (1993), *distinguishing State v. Boyer*, 91 Wn.2d 342 (1979); 9-0.

***State v. Huff***, 64 Wn.App. 641 (1992)

Evidence is sufficient to convict of possession of drugs where defendant drove car in which drugs were found plus defendant and car smelled of drugs plus defendant did not stop for officer plus passenger made furtive movements, drugs found hidden in laundry in back seat; jury need not be instructed that state has burden of proving constructive possession by "substantial" circumstantial evidence; II.

***State v. Smith***, 65 Wn.App. 468 (1992)

Defendant agrees to drive co-defendant to another city so that co-defendant can collect on a debt and also so co-defendant can deliver LSD; held: by agreeing to drive co-defendant with prior knowledge that purpose was to sell LSD is sufficient to prove conspiracy to deliver LSD, RCW 69.50.407, 9A.28.040(1); because defendant encouraged the sale by assuring buyer of potency of drug, evidence is sufficient to establish "agreement and concerted action" requirement of conspiracy; I.

***State v. Garcia***, 65 Wn.App. 681 (1992)

Defendant is convicted of delivery of drugs and possession with intent to deliver, evidence having established that defendant delivered drugs, possessed more drugs upon arrest; held: because jury was not instructed that the possession with intent to deliver charge could only apply to the drugs still in defendant's possession at arrest and not to the actual delivery, the offenses merge, *see:* *State v. Vladovic*, 99 Wn.2d 413, 421 (1983), *State v. Burns*, 114 Wn.2d 314, 319 (1990), thus *remanded* for new trial on possession with intent charge, *but see:* *State v. Fisher*, 74 Wn.App. 804, 816-8 (1994); concurrent sentences doctrine does not apply since SRA offender score on delivery increased due to possession with intent conviction, sentence imposed was not within standard range for delivery alone; I.

***State v. Sanders***, 66 Wn.App. 380 (1992)

Officer's opinion testimony that absence of drug user paraphernalia indicates residents are not users does not concern sophisticated or technical matters and is thus not subject to *Frye* analysis, *State v. Ortiz*, 119 Wn.2d 294, 310-1 (1992), *disapproved, on other grounds*, , *State v. Condon*, 182 Wn.2d 307, 321-26 (2015), *State v. Smith*, 88 Wn.2d 639, 647 (1977), *overruled on other grounds, State v. Jones*, 99 Wn.2d 735 (1983); I.

***State v. Caldera***, 66 Wn.App. 548 (1992)

Scientific testing of a random portion of a substance that is consistent in appearance and packaging supports a finding that the entire quantity is consistent with the test results of the randomly selected portion, even if only one bag was tested; I.

***State v. Dobbins***, 67 Wn.App. 15 (1992)

Enhanced penalties for UCSA violations within 1000 feet of school, RCW 69.50.435(a), does not violate due process whether or not children are present; affirmative defense to sentence enhancement where delivery occurs in a private home, is not for profit, and children are not present, RCW 69.50.435(d), does not violate equal protection rights of defendants who deliver in or near a vehicle; I.

***State v. Coria***, 120 Wn.2d 156 (1992)

Enhanced penalties for delivery of drugs within 1000 feet of school bus stop, RCW 9.94A.310(5), former RCW 69.50.435(a), are neither vague nor do they violate equal protection, *State v. Johnson*, 116 Wn.App. 851, 861-63 (2003), *reversing State v. Coria*, 62 Wn.App. 44 (1991); 6-3.

***State v. Lynn***, 67 Wn.App. 339 (1992)

Police deliver counterfeit drugs to defendant who is convicted of attempted possession, RCW 69.50.407; held: impossibility is not a defense under the general attempt statute, RCW 9A.28.020, or under the VUCSA attempt law, RCW 69.50.407, *State v. Wojtyna*, 70 Wn.App. 689 (1993), *see:* *State v. Davidson*, 20 Wn.App. 893, 898 (1979); I.

***State v. Brown***, 68 Wn.App. 480 (1993)

Possession of 20 rocks of cocaine plus officer's testimony that street value is $400 and most users carry no more than four pieces is insufficient to establish intent to deliver, *State v.*

*Cobelli*, 56 Wn.App. 921 (1989), *State v. Kovac*, 50 Wn.App. 117 (1987), *State v. Lyles*, 11 Wn.App. 166 (1974), *State v. Johnson*, 61 Wn.App. 539 (1991), *State v. Hutchins*, 73 Wn.App. 211, 216 (1994), *State v. Miller*, 91 Wn.App. 181, 186 (1998), *State v. Wade*, 98 Wn.App. 331, 338-42 (1999), *State v. Huynh*, 107 Wn.App. 68, 76-78 (2001); evidence of weapons, substantial sums of money, scales, separate packaging, observation of actions suggesting delivery may support intent to deliver, all absent here, *see: State v. Llamas-Villa*, 67 Wn.App. 448 (1992), *State v. Mejia*, 111 Wn.2d 892 (1989), *State v. Lane*, 56 Wn.App. 286, 297 (1989), *State v. Simpson*, 22 Wn.App. 572 (1979), *State v. Harris*, 14 Wn.App. 414 (1976), *State v. Taylor*, 74 Wn.App. 111, 122-4 (1994), *State v. Hagler*, 74 Wn.App. 232 (1994), *State v. Campos*, 100 Wn.App. 218 (2000), *State v. Valencia*, 148 Wn.App. 302 (2009), *reversed, on other grounds*, 169 Wn.2d 782 (2010), *State v. Nygaard*, 154 Wn.App. 641, 647-49 (2010), *State v. O'Connor*, 155 Wn.App. 282, 290-91 (2010), *see also: State v. Hotchkiss*, 1 Wn.App.2d 275 (2017); I.

***State v. Donald***, 68 Wn.App. 543 (1993)

In attempting to obtain drugs by fraud case, RCW 69.50.403(a)(3), reliance upon a false name by a doctor need not be shown, *State v. Lee*, 62 Wn.2d 228 (1963); use of false name can be used to infer guilty knowledge, although it does not compel such inference, *State v. Bundy*, 21 Wn.App. 697, 701 (1978); criminal impersonation, RCW 9A.60.040, is not a lesser; III.

***State v. Robbins***, 68 Wn.App. 873 (1993)

To convict for possession with intent to deliver, state must prove that defendant possessed the same drugs he intended to deliver, thus trace amounts of cocaine, not visible to naked eye, are insufficient to support conviction; II.

***State v. Graham***, 68 Wn.App. 878 (1993)

To enhance for possession with intent to deliver within 1000 feet of a school, RCW 9.94A.310(5), state need not prove defendant knew the transaction occurred within 1000 feet of a school, *State v. Becker*, 132 Wn.2d 54, 63 (1997); enhancement applies to accomplices, state need not prove defendant personally profited from transaction, RCW 69.50.435(d), *overruled, in part, State v. Silva-Baltazar*, 125 Wn.2d 472 (1994), *but see: State v. Piñeda-Piñeda*, 1534 Wn.App. 653, 667-71 (2010), , *State v. Hayes*, 182 Wn.2d 556 (2015), *cf.: State v. Allen*, 182 Wn.2d 364, 382-85 (2015); III.

***State v. Thompson***, 69 Wn.App. 436 (1993)

Guilty knowledge is not an element of possession with intent to manufacture or deliver, RCW 69.50.401(a), as it is impossible for a person to intend to manufacture or deliver without knowing what s/he is doing, *State v. Sims*, 119 Wn.2d 138, 141 (1992); I.

***State v. McClam***, 69 Wn.App. 885 (1993)

A defendant, charged with possession with intent to deliver, who denies on the stand possession, is still entitled to instruction on lesser-included offense of possession if any evidence supports the instruction, , *State v. Fernandez-Medina*, 141 Wn.2d 448 (2000), *State v. Wilson*, 41 Wn.App. 397, 399 (1985), *distinguishing State v. Rodriguez*, 48 Wn.App. 815 (1987), *but see: State v. Speece*, 115 Wn.2d 360 (1990); I.

***State v. Johnson***, 69 Wn.App. 935 (1993)

VUCSA information that alleges "unlawfully deliver" but fails to allege "guilty knowledge," *State v. Johnson*, 119 Wn.2d 143 (1992), *State v. Boyer*, 91 Wn.2d 342 (1979), is sufficient to withstand a post-trial challenge where defense is entrapment and defendant alleged no prejudice; *see: State v. Wallway*, 72 Wn.App. 407, 410-14 (1994); I.

***State v. Pacheco***, 70 Wn.App. 27 (1993)

One can attempt to deliver a controlled substance where the sole accomplice is an undercover police informant who committed the crime, albeit with police permission, *State v. Davidson*, 20 Wn.App. 893, 897-8 (1978), *State v. Peterson*, 54 Wn.App. 75 (1989); II.

***State v. Valdobinos***, 122 Wn.2d 270 (1993)

Guilty knowledge is not an element in a conspiracy to deliver case, *see: State v. Sims*, 119 Wn.2d 138, 142 (1992), *State v. Wilson*, 95 Wn.2d 828 (1981); in a charge of delivery, failure to include guilty knowledge in information is not fatal when challenged for first time on appeal, where other counts in the same information alleged possession with intent to deliver cocaine and conspiracy to deliver cocaine; cocaine is a narcotic drug for purposes of a violation of RCW 69.50.401(a)(1)(i), per RCW 69.50.101(q); 8-0.

***State v. Williams***, 70 Wn.App. 567 (1993)

Delivery of drugs within 1000 feet of a school, RCW 9.94A.310(5), 69.50.401(a)(1)(i), mandates a 24-month enhancement of sentence if proved beyond a reasonable doubt; enhanced penalty is added to both lower and upper end of sentence range; I.

***State v. Rudd***, 70 Wn.App. 871 (1993)

If defendant ingests or otherwise conceals inside the body a receptacle containing drugs, and the contents are not assimilated into the body but rather are recovered, the evidence is sufficient to convict of possession, *distinguishing State v. Hornaday*, 105 Wn.2d 120 (1986); II.

***State v. Sherwood,*** 71 Wn.App. 481, 486-9 (1993)

Where prior pleas to attempted VUCSA are treated as gross misdemeanors at sentencing on those pleas, subsequent sentencing court cannot convert them to felonies to increase offender score even if they fit within RCW 69.50.407; II.

***State v. McGee***, 122 Wn.2d 783 (1993)

To enhance for possession with intent to deliver within 1000 feet of a school, RCW 9.94A.310(5), 69.50.435(a), state need not prove that the intended delivery site was within 1000 feet of school, overruling *State v. Wimbs*, 68 Wn.App. 673 (1993); *accord*, *State v. Thomas*, 68 Wn.App. 268 (1992); 5-4.

***State v. Wallway***, 72 Wn.App. 407, 410-14 (1994)

Failure to allege guilty knowledge, *State v. Boyer*, 91 Wn.2d 342, 344 (1979), in manufacturing a controlled substance information, RCW 69.50.401(a), is not error, *see: State v. Warnick*, 121 Wn.App. 707 (2004), where raised for first time on appeal, *State v. Kjorsvik*,

117 Wn.2d 93 (1991), where information does allege "unlawfully," *State v. Johnson*, 119 Wn.2d 143, 149-50 (1992); II.

***State v. Olson***, 73 Wn.App. 348, 357-9 (1994)

Evidence that defendant visited grow farm, obtained a hidden key and entered, remained inside for 30 minutes, fingerprints on several items connected to grow operation, was owner of mobile home located at property is sufficient to convict for manufacturing marijuana; II.

***State v. Solomon***, 73 Wn.App. 724 (1994)

Identity is not an element of the *corpus* of possession of drugs, *distinguishing* *Bremerton v. Corbett*, 106 Wn.2d 569, 574 (1986), *State v. Smith*, 115 Wn.2d 775, 781 (1990), unlike reckless driving, DUI, attempt, conspiracy, perjury; I.

***State v. Vinson***, 74 Wn.App. 32, 34-6 (1994)

Enhanced penalty for delivery in a bus shelter, RCW 69.50.435(a), is constitutionally valid, *see:* *State v. Coria*, 120 Wn.2d 156, 170 (1992), *State v. Carter*, 64 Wn.App. 90, 93-4 (1992), *State v. Henderson*, 64 Wn.App. 339 (1992); I.

***State v. Hagler***, 74 Wn.App. 232 (1994)

While possession of 24 rocks of cocaine itself will not support intent to deliver, juvenile respondent's possession of $342 cash will support an inference of intent to deliver, *State v. Lane*, 56 Wn.App. 286, 297-8 (1989), *State v. Valencia*, 148 Wn.App. 302 (2009), *rev'd, on other grounds*, 169 Wn.2d 78 (2010), *see:* *State v. Wade*, 98 Wn.App. 328, 338-42 (1999), *State v. Campos*, 100 Wn.App. 218 (2000), *State v. McPherson*, 111 Wn.App. 747 (2002), *State v. Moles*, 130 Wn.App. 461 (2005), *State v. Missieur*, 140 Wn.App. 181 (2007), *State v. Montgomery*, 163 Wn.2d 577 (2008),*see also: State v. Hotchkiss*, 1 Wn.App.2d 275 (2017); I.

***State v. Wimbs***, 74 Wn.App. 511, 515 (1994)

Possession with intent to deliver "within 1000 feet" of a school, RCW 69.50.435, means within a 1000 foot radius, *State v. Coria*, 62 Wn.App. 44, 49 (1991), *rev'd on other grounds*, 120 Wn.2d 156 (1992); III.

***State v. Fisher***, 74 Wn.App. 804, 816-8 (1994)

Defendant is charged as an accomplice to delivery of drugs and as an accomplice to possession with intent to deliver, "to convict" instructions do not distinguish between the two incidents; held: absent evidence of jury confusion as to the factual basis for each count, where separate crimes are charged, evidence is presented on each charge and the argument clearly distinguishes, then no double jeopardy violation exists, *distinguishing* *State v. Garcia*, 65 Wn.App. 681 (1992)(jury sent out note indicating confusion); I.

***State v. Silva-Baltazar***, 125 Wn.2d 472 (1994)

Possession with intent to deliver within 1000 feet of a school, RCW 69.50.435, is a penalty enhancement, not a substantive offense, and applies to accomplices, *distinguishing* *State v. McKim*, 98 Wn.2d 111, 116 (1982), *but see:* *State v. Piñeda-Piñeda*, 1534 Wn.App. 653,

667-71 (2010), *State v. Hayes*, 182 Wn.2d 556 (2015), *cf.: State v. Allen*, 182 Wn.2d 364, 382-85 (2015); 9-0.

***State v. Clark***, 76 Wn.App. 150 (1994), *aff'd, on different grounds,* 129 Wn.2d 211 (1996)

**First time offender** waiver, RCW 9.94A.120(5), which excludes delivery of a schedule I or II controlled substance, RCW 9.94A.030(20)(a), does not violate equal protection clauses; I.

***State v. Hundley***, 126 Wn.2d 418 (1995)

Where field test, three color tests and an independent GCMS test are all negative for **controlled substances** and one GCMS test run by state tests positive for trace amounts, no reasonable trier of fact could reach subjective certitude, evidence is insufficient; *affirms, on different grounds, State v. Hundley*, 72 Wn.App. 746 (1994); 9-0.

***State v. Morris***, 77 Wn.App. 948 (1995)

A purchaser of a controlled substance has not delivered it, RCW 69.50.401(a), 69.50.101(f), nor is she an accomplice to the seller, *State v. Catterall*, 5 Wn.App. 373 (1971); II.

***State v. Cole***, 128 Wn.2d 262, 273-85 (1995)

Civil forfeiture of proceeds traceable to a criminal violation does not constitute punishment under the Fifth Amendment; plurality declines to decide double jeopardy issue in companion case, remands for trial court determination whether property forfeited was proceeds, at 284-5; 3-3-3.

***State v. Pierce***, 78 Wn.App. 1 (1995)

Sentence enhancement for manufacturing drugs within 1000 feet of a school bus stop, RCW 69.50.435(a), applies to marijuana; III.

***State v. Olsson***, 78 Wn.App. 202, 207-8 (1995)

Police stop vehicle for infraction, is told by driver he has a knife, which driver produces, officer observed "a heightened awareness to his surroundings. His pupils would not react and were fixed at midrange. He had glassy eyes with redness around the membrane," police patdown, find drugs; held: officer had sufficient and specific facts leading him to believe driver was under the influence of drugs, also had legitimate safety concerns prompting patdown search; III.

***State v. Morgan***, 78 Wn.App. 208, 211 (1995)

Drug paraphernalia on hood of car stopped in a park at night is grounds to arrest driver and passenger, *distinguishing State v. Harris*, 14 Wn.App. 414, 417 (1975); 2-1.

***State v. Bernard***, 78 Wn.App. 764 (1995)

The crime of receipt of a precursor drug, RCW 69.43.070(2), is not proved by mere possession of the drug; here, defendant purchased drug in Canada, arrested at border, once purchased act of receiving ended; I.

***State v. Wiley***, 79 Wn.App. 117 (1995)

Unwitting possession must be proved by defendant by a preponderance; *accord:* *State v. Knapp*, 54 Wn.App. 314 (Division III, 1989), *State v. Rowell*, 138 Wn.App. 780, 784-86 (2007); *but see: State v. Hundley*, 72 Wn.App. 746 (1994), *aff'd on other grounds,* 126 Wn.2d 418 (1995), *State v. Balzer*, 91 Wn.App. 44, 67-68 (1998) ; I.

***State v. Avendano-Lopez***, 79 Wn.App. 706, 709-12 (1995)

Testimony by narcotics officer that drug dealers have money and drugs on their persons, keep drugs in mouth, are often users, keep drugs in mouth in balloons, and how middlemen are used is not inadmissible "profile" testimony, *State v. Braham*, 67 Wn.App. 930, 936 (1992), *State v. Petrich*, 101 Wn.2d 566, 576 (1984), *State v. Maule*, 35 Wn.App. 287, 293 (1983), as it does not identify any group as being more likely to commit drug offenses; II.

***State v. Lopez***, 79 Wn.App. 755 (1995)

Defendant is arrested after buying cocaine from police, more cocaine is found on his person, is convicted of two counts; held: defendant possessed cocaine in a continuous, uninterrupted series of events during a relatively short period of time, thus double jeopardy clause precludes conviction of two counts, at 760-63, *State v. O'Connor,* 87 Wn.App. 119 (1997), *State v. Villanueva-Gonzalez*, 180 Wn.2d 975 (2014), *distinguishing* *State v. McFadden*, 63 Wn.App. 441, 443 (1991), *see: State v. Adel*, 136 Wn.2d 629 (1998), *Pers. Restraint of Davis*,142 Wn.2d 165 (2000), *State v. Tili*, 139 Wn.2d 107, 112-19 (1999), *State v. Campos*, 100 Wn.App. 218 (2000); possession of large amounts of drugs and cash is sufficient to establish intent to deliver, *see: State v. Kovac*, 50 Wn.App. 117 (1987), *State v. Hutchins*, 73 Wn.App. 211, 216 (1994), *State v. Majia*, 111 Wn.2d 892 (1989), *State v. Valencia*, 148 Wn.App. 302 (2009), *rev'd, on other grounds,* 169 Wn.2d 782 (2010), *State v. O'Connor,* 155 Wn.App. 282, 290-91 (2010), *but see: State v. Huynh*, 107 Wn.App. 68, 76-78 (2001); III.

***State v. Vasquez***, 80 Wn.App. 5 (1995)

Delivery within 1000 feet of a public adult GED program is subject to school enhancement, RCW 69.50.435(a), 28A.150.010; I.

***State v. Hennessey***, 80 Wn.App. 190 (1995)

State must prove sale within 1000 feet of school bus stop beyond a reasonable doubt, *State v. Lua*, 62 Wn.App. 34, 42 (1991), *State v. Tongate*, 93 Wn.2d 751, 754 (1980); lay opinion about distance of transaction from bus stop plus map without scale is insufficient to submit the issue to a jury, *see: State v. Pearson*, 180 Wn.App. 576 (2014); II.

***State v. Cameron***, 80 Wn.App. 374 (1996)

A prior federal conspiracy to distribute marijuana conviction is equivalent to a Washington class B felony for purposes of washout, former RCW 9.94A.360(2) [RCW 9.94A.525 (2013)], even with prior drug conviction, since Washington's second-offense doubling statute, RCW 69.50.408, would require filing of a criminal information alleging a previous drug conviction, *but see: State v. McNeal*, 142 Wn.App. 777, 785-86 (2008), *State v. Roy*, 147 Wn.App. 309 (2008), and the feds, in this case, did not treat the conviction as a second offense, *cf.: Pers. Restraint of Hopkins*, 89 Wn.App. 198, 201 n.14 (1997), *rev'd, on other grounds*, 137 Wn.2d 897 (1999); II.

***State v. McReynolds***, 80 Wn.App. 894 (1996)

Drug delivery defendant is not entitled to instruction that delivery is lawful if defendant believes he is acting as an agent of the police, RCW 69.50.506(c), unless he is actually acting at the direction of the police; III.

***State v. Byrd***, 83 Wn.App. 509 (1996)

Evidence is sufficient to establish school zone enhancement, RCW 69.50.435, where state proves school-sanctioned use of grounds, need not prove ownership or dominion and control; I.

***State v. Clayton***, 84 Wn.App. 318 (1996)

School zone enhancement measurement must be from the perimeter of the school to the actual site where the offense was committed, not the property line where the drugs were, RCW 69.50.401(a), *State v. Jones*, 140 Wn.App. 431 (2007); III.

***State v. Becker***, 132 Wn.2d 54 (1997)

Enhanced penalty for delivery within 1000 feet of a school, RCW 69.50.435, does not apply to a school program located on third floor of a downtown Seattle building with no signs or other indications that a school is housed therein, reversing *State v. Becker*, 80 Wn.App. 364 (1996), although lack of knowledge of the school zone is irrelevant to culpability, *State v. Akers*, 136 Wn.2d 641 (1998, *State v. Johnson*, 116 Wn.App. 851, 861-63 (2003), *cf.: State v. Davis*, 93 Wn.App. 648 (1999); special verdict which declares the program to be a school is a comment on the evidence; 7-2.

***State v. Wallace***, 86 Wn.App. 546 (1997)

Prohibiting home detention for drug offenders, RCW 9.94A.185, does not violate equal protection; I.

***Seeley v. State***, 132 Wn.2d 776 (1997)

Legislature's classification of marijuana as a schedule I controlled substance is valid under state privileges and immunities and equal protection clauses, *State v. Williams*, 93 Wn.App. 340, 343-44 (1998), *see also: State v. Palmer*, 96 Wn.2d 573 (1981); 8-1.

***State v. O'Connor***, 87 Wn.App. 119 (1997)

At traffic stop, defendant is found with drugs in his car, sock and pocket, is convicted of possession and possession with intent to deliver; held: double jeopardy clause applies if offenses are legally identical and based on same act or transaction, *Kansas v. Hendricks*, 138 L.Ed.2d 501 (1997); offenses are not legally identical if each offense contains an element not contained in the other, *State v. Gocken*, 127 Wn.2d 95, 101 (1995); possession of drugs does not contain an element not found in possession with intent to deliver, thus the offenses are identical, *see: State v. Portrey*, 102 Wn.App. 898, 904-07 (2000); defendant's possession here was based upon one transaction "in a continuous, uninterrupted series of events," *State v. Lopez*, 79 Wn.App. 755, 763 (1995), thus possession charge must be dismissed, distinguishing *State v. McFadden*, 63 Wn.App. 441 (1991), *cf.: State v. Adel*, 136 Wn.2d 629 (1998), *Pers. Restraint of Davis*, 142

Wn.2d 165 (2000), *State v. Tili*, 139 Wn.2d 107, 112-19 (1999), *State v. Jones*, 117 Wn.App. 721 (2003); II.

***State v. Barajas***, 88 Wn.App. 387 (1997)

Possession with intent to deliver in a school zone doubles the maximum sentence, RCW 69.50.435(a), thus when such a defendant is armed, the firearm enhancement period, RCW 9.94A.310(3)(a), depends upon the enhanced maximum sentence, *State v. Blade*, 126 Wn.App. 174 (2005), *State v. O'Neal*, 126 Wn.App. 395, 426-30 (2005), *aff'd, on other grounds*, 159 Wn.2d 500 (2007); III.

***State v. Ong***, 88 Wn.App. 572, 577-8 (1997)

"To convict" instruction states that defendant knew substance delivered was morphine, state proves defendant gave a pain pill to victim; held: by failing to object to the instruction, state assumed burden of proving defendant knew the substance delivered was morphine, *State v. Potts*, 93 Wn.App. 82, 86-88 (1998), *State v. Hudlow*, 182 Wn.App. 266, 284-87 (2014), *State v. Johnson*, 188 Wn.2d 742 (2017), *see: State v. Hunt*, 75 Wn.App. 795, 806 (1994), here the evidence only shows defendant knew he delivered a controlled substance, not specifically morphine, thus insufficient, *cf.: State v. Sinrud*, 200 Wn.App. 643 (2017); court expressly does not decide whether a defendant accused of delivery must know the specific drug being delivered; II.

***State v. McCollum***, 88 Wn.App. 977, 987-90 (1997)

Maximum sentence for a drug offense may be **doubled** if there is a prior drug conviction unless the current offense is for possession, RCW 69.50.408, *cf.: State v. McGrew*, 156 Wn.App. 546, 556-58 (2010); II.

***State v. Fernandez***, 89 Wn.App. 292, 299-300 (1997)

Operating a **drug house**, RCW 69.50.402(a)(6), is construed to prohibit maintaining a house that persons other than the residents resort to for the purpose of using drugs, *see also: State v. Ceglowski*, 103 Wn.App. 346 (2000), *State v. Menard*, 197 Wn.App. 901 (2017); statute is not vague; I.

***State v. Adel***, 136 Wn.2d 629 (1998)

Defendant is found with small amounts of marijuana in his car and in his store, is convicted of two counts of possession; held: where the same drug is found within defendant's dominion and control at the same time, then double jeopardy clause precludes conviction of multiple counts, *Bell v. United States*, 99 L.Ed.2d 905 (1955), *State v. Jones*, 117 Wn.App. 721 (2003), unless legislature has "intended to punish a person multiple times for simple possession based upon the drug being stashed in multiple places," at 635 ("unit of prosecution"), *cf.: State v. Tili*, 139 Wn.2d 107, 112-19 (1999); 9-0.

***State v. Gordon***, 91 Wn.App. 415 (1998)

A park created and maintained by a Public Utility District is a public park for purposes of sentence enhancement, RCW 69.50.435(f)(4); III.

***State v. Potts***, 93 Wn.App. 82 (1998)

Officer, in stopping vehicle for driving violation, observes passenger removing "stuff" from his pockets, has defendant-passenger step out, finds syringes under seat, state charges possession of a controlled substance: methamphetamine, proves defendant possessed amphetamine; held: while state need not prove knowledge of a specific controlled substance, *State v. Cleppe*, 96 Wn.App. 373 (1981), *see: McFadden v. United States*, 576 U.S. 186, 135 S.Ct. 2298, 192 L.Ed.2d 260 (2015), where prosecutor charges a specific substance and court instructs that a specific substance was possessed, either at state's request or without exception from state, then instructions become law of the case, *State v. Ong*, 88 Wn.App. 572, 577 (1997), *State v. Hudlow*, 182 Wn.App. 266, 284-87 (2014), *State v. Johnson*, 188 Wn.2d 742 (2017), and state must prove the unnecessary element; here, because amphetamines and methamphetamine have different chemical compositions, state failed to prove identity of the charged drug; evidence was sufficient to prove constructive possession; III.

***State v. Buford***, 93 Wn.App. 149 (1998)

Police seize pipe with cocaine residue under defendant's hat, defense puts on no evidence, court declines unwitting possession instruction; held: defendant is not entitled to unwitting possession instruction unless evidence presented at trial is sufficient to permit a reasonable juror to find, by a preponderance, that defendant unwittingly possessed contraband, *see: State v. George*, 146 Wn.App. 906, 913-16 (2008); I.

***State v. Jones***, 93 Wn.App. 166, 176-77 (1998)

Police observe co-defendant flag down a car, talk with occupants, witness testifies they talk about drugs, co-defendant leaves car, calls defendant who appears in less than one minute, defendant gives co-defendant a small plastic-wrapped object in exchange for money, co-defendant goes to car and hands drugs to occupants, defendant is found with more than $400 cash; held: sufficient to prove delivery; I.

***State v. Davis***, 93 Wn.App. 648 (1999)

School bus stop enhancement, RCW 69.50.435(a), is sufficient and does not violate due process where school district contracts with local public bus company to supply school transportation on regular buses at regular bus stop, as "anyone could discover the stop's location using an objective method, such as observing school children or contacting the school district," at 653, *State v. Sanchez*, 104 Wn.App. 976 (2001), *State v. Coria*, 120 Wn.2d 156 (1992), *State v. Johnson*, 116 Wn.App. 851, 861-63 (2003), distinguishing *State v. Becker*, 132 Wn.2d 54 (1997), *State v. Akers*, 136 Wn.2d 641 (1998), *see also: State v. Pearson*, 180 Wn.App. 576 (2014), *State v. Fehr*, 185 Wn.App. 505, 513-16 (2015), *State v. Hugdahl*, 195 Wn.2d 319 (2020); II.

***State v. Hollis***, 93 Wn.App. 804 (1999)

Involving minor in a drug transaction, RCW 69.50.401(f) [recodified RCW 69.50.4015 (2003)], and delivery of cocaine do not violate double jeopardy clause under same elements test, *Blockburger v. United States*, 76 L.Ed. 306 (1932), *State v. Calle*, 125 Wn.2d 769, 777 (1995), at 812-15; bringing minor to drug transaction and allowing her to remain is sufficient to prove

involving minor in drug transaction notwithstanding minor's lack of participation in deliver, at 816; I.

***Pers. Restraint of Hopkins***, 137 Wn.2d 897 (1999)

Solicitation to deliver a controlled substance, RCW 9A.20.020, -030, 69.50.401, is not subject to the VUCSA **doubling** statute, RCW 69.50.408(a), which doubles the maximum penalty when a defendant is convicted of a drug offense and has a prior drug conviction, reversing *Pers. Restraint of Hopkins*, 89 Wn.App. 198 (1997), *cf.: State v. Howell*, 102 Wn.App. 288 (2000), *State v. McCarthy*, 112 Wn.App. 231 (2002), *State v. McGrew*, 156 Wn.App. 546, 556-58 (2010), *see: State v. O'Neal,* 126 Wn.App. 395, 429 n. 27 (2005), *aff'd, on other grounds*, 159 Wn.2d 500 (2007); 9-0.

***City of Indianapolis v. Edmond***, 148 L.Ed.2d 333 (2000)

Police set up drug roadblock, stop a predetermined number of vehicles, ask for identification, look for signs of impairment, conduct open-view examination of cars, drug dog walks around vehicles, search if particularized suspicion develops; held: because primary purpose of stop is to detect evidence of ordinary criminal wrongdoing, as opposed to border, *United States v. Martinez-Fuerte*, 49 L.Ed.2d 1116 (1976), or sobriety checkpoints, *Michigan Dept. of State Police v. Sitz*, 110 L.Ed.2d 412 (1990), drug roadblock violates Fourth Amendment, *see: Delaware v. Prouse*, 59 L.Ed.2d 660 (1979), *see: Illinois v. Caballes*, 160 L.Ed.2d 842 (2005); 6-3.

***State v. Reed***, 101 Wn.App. 704 (2000)

Police officer testifies he observes drug transaction through binoculars, court sustains state's objection to cross-examination disclosing exact position of officer under "**surveillance location privilege**," state proffers photographs taken from location, trial court excludes photos; held: state cannot withhold surveillance location unless no question is raised about surveillance officer's ability to observe or where contemporaneous videotape provides the relevant evidence, *see: State v. Darden*, 103 Wn.App. 368 (2000); I.

***State v. Howell***, 102 Wn.App. 288 (2000)

Defendant pleads guilty to solicitation to deliver cocaine, trial court treats prior VUCSA delivery conviction as one point, relying on *In re Pers. Restraint of Hopkins*, 137 Wn.2d 897 (1999); held: while *Hopkins* holds that solicitation to deliver drugs is not a drug offense for purposes of the maximum sentence doubling statute, former RCW 9.94A.360(6) [RCW 9.94A.525 (2013)] unambiguously states that where the present conviction of an anticipatory offense, priors are to be counted as if the present conviction is for a completed offense, *State v. Ashley,* 187 Wn.App. 908 (2015), *aff'd, on other grounds,* 186 Wn.2d 32 (2016), thus prior deliveries count three, *State v. McCarthy*, 112 Wn.App. 231 (2002); I.

***State v. Portrey***, 102 Wn.App. 898, 904-07 (2000)

Defendant is convicted of possession of marijuana with intent to manufacture and possession of more than 40 grams of marijuana, both for the same marijuana; held: while possession of marijuana has an additional element (40 g.), thus offenses are not legally identical under same evidence test, distinguishing *State v. O'Connor,* 87 Wn.App. 119, 123 (1997), the

legislature did not intend that one would be convicted of both, *see:* *State v. Read*, 100 Wn.App. 776, 790 (2000), *aff'd, on different grounds,* 147 Wn.2d 238 (2002), thus convictions violate double jeopardy, lesser possession charge is dismissed; III.

***State v. Ceglowski***, 103 Wn.App. 346 (2000)

For **drug house** conviction, RCW 69.50.402, state must prove that drug activity is of a continuing and recurring character and that a substantial purpose of maintaining the premises is for illegal drug activity, *see also:* *State v. Fernandez*, 89 Wn.App. 292 (1997), *State v. Menard*, 197 Wn.App. 901 (2017); II.

***State v. Sanchez***, 104 Wn.App. 976 (2001)

School bus stop for enhancement, RCW 69.50.435(a), may be designated by a representative of the school district, not solely by the school board; III.

***State v. Lusby***, 105 Wn.App. 257, 263-64 (2001)

Enhanced penalties for possession with intent to deliver within a **public housing project** designated a "drug free zone," RCW 60.50.435(a)(6), do not violate equal protection, *State v. Coria*, 120 Wn.2d 156, 175 (1992); 24-month enhancement is added to the standard range *and* increase the maximum penalty, RCW 69.50.435(a), *State v. Silva-Baltazar*, 125 Wn.2d 472, 478-79 (1994); III.

***State v. Neal***, 144 Wn.2d 600 (2001)

In drug case, state files CrR 6.13(b) certificate which states that crime lab received the substance from the "evidence vault" rather than a person as required in CrR 6.13(b)(1), defense files demand for expert 6 days before trial, trial court admits certificate as demand was untimely and it substantially complied with rule; held: defendant's untimely demand does not waive hearsay objection where report does not strictly comply with the rule establishing the hearsay objection, failure of the certificate to state the name of the person from whom the lab received the evidence is fatal to admissibility, reversing *State v. Neal*, 102 Wn.App. 99 (2000); because there was no evidence offered that the item possessed by defendant was controlled, dismissed for insufficiency; 9-0.

***State v. Halsten***, 108 Wn.App. 759 (2001)

Statute which prohibits possession of pseudoephedrine with intent to manufacture methamphetamine, RCW 69.50.440, does not include pseudoephedrine hydrochloride, a salt of pseudoephedrine, *State v. Morris*, 123 Wn.App. 467, 472-75 (2004), *see:* *State v. Cromwell*, 127 Wn.App. 746 (2005); II.

***United States v. Oakland Cannabis Buyers' Cooperative,*** 149 L.Ed.2d 722 (2001)

Marijuana has no medical benefit exception to federal controlled substances act, 21 USC § 841(a); 9-0.

***State v. Bernal***, 109 Wn.App. 150 (2001)

Fourteen-year old dies of heroin overdose, defendant admits selling him heroin day before, is charged with homicide by controlled substance and distributing a controlled substance

to a minor; held: absent independent evidence that decedent obtained the heroin by delivery as opposed to stealing it, finding it or some other means, *corpus delicti* is lacking; 2-1, II.

***Pers. Restraint of Bowman***, 109 Wn.App. 869 (2001)

Solicitation to deliver drugs is an anticipatory offense under Ch. 9A.28, RCW rather than under Ch. 69.50, RCW, thus sentence range is not 0-12 months, *see: In re Pers. Restraint of Hopkins*, 137 Wn.2d 897 (1999); I.

***State v. Darden***, 145 Wn.2d 612 (2002)

In drug case, surveillance officer testifies to his height from street and location relative to transaction observed but court overrules defendant's objection to the specific location; held: there is no surveillance location privilege, court's restriction violated defendant's right to confront, *see: State v. Reed*, 101 Wn.App. 704 (2000); reverses *State v. Darden*, 103 Wn.App. 368 (2000); 9-0.

***State v. Clausing***, 147 Wn.2d 620 (2002)

To prove delivery of a legend drug, former RCW 69.41.030, state must establish that recipient had a prescription issued by a practitioner, court's instruction that "practitioner" must be licensed was erroneous, reversing *State v. Clausing*, 104 Wn.App. 75 (2000); 6-3.

***State v. Shepherd***, 110 Wn.App. 544 (2002)

To qualify as a defense to marijuana possession under Medical Use of Marijuana Act, RCW 69.51A.005, defense must have a medical opinion that patient will, more likely than not, be aided by marijuana and defense must prove that amount possessed must not exceed a 60-day supply, *but see: State v. Browne*, 181 Wn.App. 756 (2014), to include the amount the patient needs to use; here, physician's statement that marijuana "may" assist patient is insufficient, *see also: State v. Phelps*, 118 Wn.App. 740 (2003), *State v. Tracy*, 158 Wn.2d 683 (2006), *State v. Soper*, 135 Wn.App. 89 (2006), *State v. Fry*, 168 Wn.2d 1, 10-13 (2010), *State v. Adams*, 148 Wn.App. 231 (2009), *State v. Constantine*, 182 Wn.App. 635, 648-50 (2014), *cf.: State v. Otis*, 151 Wn.App. 572 (2009); III.

***State v. McCarthy***, 112 Wn.App. 231 (2002)

Defendant is convicted of VUCSA delivery, sentencing judge counts prior conviction for solicitation to deliver as one point; held: a prior anticipatory offense is scored the same as if completed, former RCW 9.94A.360(4) [RCW 9.94A.525 (2013)], thus the prior solicitation is tripled, *State v. Howell*, 102 Wn.App. 288 (2000); subsequent legislation which eliminates the tripling rule, while remedial, is not retroactive, *State v. Kane*, 101 Wn.App. 607 (2000), *State v. Ross*, 152 Wn.2d 220, 233-41 (2004), *but see: Addleman v. Board of Prison Terms and Paroles*, 107 Wn.2d 503, 509-12 (1986); I.

***State v. Hepton***, 113 Wn.App. 673 (2002)

Police find "almost all components and equipment" needed to manufacture meth, defendant admits that he had completed the process up to the point of precipitation of crystals when it exploded, challenges sufficiency of charge of manufacturing, claiming evidence only sufficient to prove attempt; held: reasonable juror could find that defendant processed meth or its

immediate precursor, RCW 69.50.101(d), -(p), at 681-83; where multiple children a present at meth lab, only one children-present sentencing enhancement is authorized, RCW 9.94A.510(6), -.605, at 688-90; III.

***State v. Williams***, 149 Wn.2d 143 (2003)

State may appeal a DOSA sentence challenging defendant's eligibility, reversing *State v. Williams*, 112 Wn.App. 171 (2002); *per curiam.*

***State v. Cowin***, 116 Wn.App. 752, 760 (2003)

Absent finding of indigency, $1000 felony VUCSA fine must be imposed, RCW 69.50.430(1), *cf.: State v. Wood*, 117 Wn.App. 207 (2003), *State v. Corona*, 164 Wn.App. 76 (2011); II.

***State v. DeVries***, 149 Wn.2d 842, 849-54 (2003)

Respondent gives a pill to another student, no witness testifies that respondent ever referred to the pill as a controlled substance or illegal drug, although a witness says respondent claimed the pill could "mess you up," drug screen of recipient shows presence of meth; held: no rational trier of fact could find that the pill was a controlled substance or that respondent knew it was a controlled substance; 8-1.

***State v. Bramme***, 115 Wn.App. 844 (2003)

Defendant admits participating in methamphetamine production involving 5000 pills, trial court denies DOSA, RCW 9.94A.660(1)(c); held: DOSA statute permits eligibility where offense "involved only a small quantity," "involved" does not require size determination be made solely on basis of drugs seized; if credible evidence exists pointing to defendant's involvement in the production of a significant quantity, court properly may conclude manufacturing offense did not involve a small quantity, *see also: State v. Barton*, 121 Wn.App. 792 (2004), *State v. Kinneman*, 120 Wn.App. 327 (2003) "small" being a relative term; III.

***State v. Johnson***, 116 Wn.App. 851, 861-63 (2003)

To prove school bus stop enhancement, RCW 69.50.435, where school district transportation manager testifies that there is an active school bus stop within 1000 feet of delivery, there is a logical inference that public could call his office to ascertain the location even if he doesn't so testify, *see: State v. Coria*, 120 Wn.2d 156, 160 (1992), *see also: State v. Pearson*, 180 Wn.App. 576 (2014), *State v. Hugdahl*, 195 Wn.2d 319 (2020); I.

***State v. Wood***, 117 Wn.App. 207 (2003)

Fine following methamphetamine conviction, RCW 69.50.401(2)(b) (2005), is discretionary, *State v. Corona*, 164 Wn.App. 76 (2011), *see: State v. Cowin*, 116 Wn.App. 752, 760 (2003); III.

***State v. Davis***, 117 Wn.App. 702 (2003)

Possession of methamphetamine is not a lesser of manufacturing methamphetamine, as it is possible to manufacture meth from ingredients that are not themselves controlled substances,

*State v. Jones*, 25 Wn.App. 746 (1980), *State v. Moore*, 54 Wn.App. 211 (1989), *but see: State v. Wilson*, 41 Wn.App. 397 (1985); I.

***State v. Jones***, 117 Wn.App. 721, 725-27 (2003)

Defendant is observed picking up rocks of cocaine, at arrest police find crack pipe with cocaine residue, defendant is convicted of attempted possession of cocaine and possession of cocaine; held: because the conduct occurred at the same location, at the same time, and violated the same underlying statute, albeit one anticipatory offense, double jeopardy clause precludes conviction of the lesser, *State v. O'Connor,* 87 Wn.App. 119 (1997), *State v. Adel*, 136 Wn.2d 629 (1998); I.

***State v. Phelps***, 118 Wn.App. 740 (2003)

Trial court's denial of affirmative defense of medical marijuana, ch. 69.51A, RCW, was proper because defendant-grower was not designated in writing by the patient prior to possessing marijuana, *State v. Butler*, 126 Wn.App. 741 (2005), *see also: State v. Shepherd*, 110 Wn.App. 544, 551 (2002), *State v. Tracy*, 158 Wn.2d 683 (2006), *State v. Soper*, 135 Wn.App. 89 (2006), *State v. Otis*, 151 Wn.App. 572 (2009), *State v. Markwart*, 182 Wn.App. 335, 352-61 (2014) ; II.

***State v. Goodman***, 150 Wn.2d 774 (2004)

Information charges possession of "meth," defense challenges sufficiency for first time on appeal; held: specific identity of the controlled substance is an essential element of possession with intent to deliver, *State v. Zillyette*, 178 Wn.2d 153 (2013), *State v. Gonzalez*, 2 Wn.App.2d 96 (2018), *State v. Clark-El*, 196 Wn.App. 614 (2016), *cf.: State v. Sibert*, 168 Wn.2d 306 (2010), *State v. Rivera-Zamora*, 7 Wn.App. 3d 824 (2019), *State v. Gardner,* 14 Wn.App.2d 207 (2020); where challenged for first time on appeal, under liberal standard, *State v. Kjorsvik*, 117 Wn.2d 93 (1991), defendant had due notice; affirms *State v. Goodman*, 114 Wn.App. 602 (2002); 9-0.

***State v. Holt***, 119 Wn.App. 712 (2004)

For deadly weapon enhancement, jury must be instructed that they must find a nexus between defendant, weapon and crime, at 726-29, *State v. Schelin*, 147 Wn.2d 562, 577 (2002)(Alexander, C.J., concurring), *cf.: State v. Eckenrode*, 159 Wn.2d 488 (2007); II.

***State v. Keena***, 121 Wn.App. 143 (2004)

Manufacturing methamphetamine can be proved where defendant is preparing and processing it, RCW 69.50.101(p), whether or not he completed the preparation and whether or not any completed meth is found, *State v. Zunker*, 112 Wn.App. 130 (2002), *State v. Todd*, 101 Wn.App. 945 (2000), *State v. Forrester*, 135 Wn.App. 195, 201-03 (2006); II.

***State v. Warnick***, 121 Wn.App. 737 (2004)

Where defendant denies involvement in any manufacturing activities, "to convict" instruction need not allege that defendant knew the substance manufactured was a controlled substance as long as it states that defendant knew it was methamphetamine, *see:* WPIC 50.11, *State v. Wallway*, 72 Wn.App. 407, 412-13 (1994); III.

***State v. Barton***, 121 Wn.App. 792 (2004)

Trial court's finding that DOSA program, RCW 9.94A.660, is administered inadequately is grounds to deny DOSA sentence, *State v. Bramme*, 115 Wn.App. 844, 850 (2003), *State v. Hender*, 180 Wn.App. 895 (2014); III.

***State v. DiLuzio***, 121 Wn.App. 822 (2004)

Policy allowing only prosecutor to refer a defendant to drug court, RCW 2.28.170, [now RCW 2.30.030] does not violate separation of powers doctrine, *see: State v. Daniels,* 8 Wn.App.2d 160 (2019), distinguishing *State ex re. Schillberg v. Cascade Dist. Court*, 94 Wn.2d 772 (1980), *State v. Wallenberg*, 174 Wn.App. 163 (2013); III.

***State v. Harner***, 153 Wn.2d 228 (2004)

Absence of a drug court in the county in which a defendant is charged does not violate equal protection or due process clauses; 9-0.

***State v. Roy***, 126 Wn.App. 124 (2005)

Trial court has no authority to revoke a DOSA sentence, RCW 9.94A.660; III.

***Gonzales v. Raich***, 162 L.Ed.2d 1 (2005)

Federal prohibition of possession of marijuana, in the face of state medical marijuana laws, does not exceed Congress' authority under the commerce clause; 6-3.

***State v. O'Neal***, 126 Wn.App. 395 (2005), *aff'd, on other grounds,* 159 Wn.2d 500 (2007)

Convictions for manufacturing marijuana, RCW 69.50.401(a)(ii), and manufacturing methamphetamine, RCW 69.50.401(a)(iii), do not violate double jeopardy clause, at 415-17; trial court has discretion to utilize the maximum sentence doubling statute, RCW 69.50.408, *State v. Cameron*, 80 Wn.App. 374, 380 (1996), *State v. Roy*, 147 Wn.App. 309 (2008), *but see: Pers. Restraint of Hopkins*, 89 Wn.App. 198, 203 (1997), *State v. Cyr*, 195 Wn.2d 492 (2020); II.

***State v. Griffin***, 126 Wn.App. 700 (2005)

Defendant is convicted of possessing drugs in his hat and sock in a car, trial court finds defendant used a motor vehicle in commission of offense, notifies Department of Licensing, which revokes defendant's license, RCW 46.20.285(4); held: because evidence indicated that defendant had obtained the drugs in exchange for giving someone a ride in the car, trial court's finding was sufficient, *but see: State v. Hearn*, 131 Wn.App. 601, 609-11 (2006), *cf.: State v. Alcantar-Maldonado,* 184 Wn.App. 215, 227-30 (2014), need not be submitted to a jury as it is not punitive, distinguishing *Blakely v. Washington*, 159 L.Ed.2d 403 (2003); I.

***State v. Mullins***, 128 Wn.App. 633 (2005)

Trial court properly excluded evidence supporting affirmative defense of medical marijuana because defendant could not establish that he was currently a primary caregiver, RCW 69.51A.010(2)(b), and was not responsible for the patient's housing, health or care, as defendant's only role was to supply marijuana for glaucoma patient, *cf.: State v. Markwart,* 182 Wn.App. 335, 352-61 (2014); II.

***State v. Poling***, 128 Wn.App. 659, 669-71 (2005)

To enhance manufacturing methamphetamine case for child on premises, RCW 9.94A.605, state must prove that child was at the place where the manufacturing occurred, error for trial court to define premises as "any building, dwelling or any real property;" II.

***State v. Evans***, 129 Wn.App. 211, 227-29 (2005), *reversed, on other grounds,* 159 Wn.2d 403 (2007)

Where statute directed a higher sentence for delivery of methamphetamine base, former RCW 69.50.401(a)(1)(ii), but jury only returns a verdict indicating that defendant delivered methamphetamine, court cannot impose the higher sentence, *Blakely v. Washington*, 159 L.Ed.2d 403 (2004), *see: State v. Cromwell*, 157 Wn.2d 529 (2006); II.

***State v. Tracy***, 158 Wn.2d 683 (2006)

Only a Washington licensed physician may prescribe medical marijuana in Washington, RCW 69.51A.010(3), 18.71.021, *State v. Soper*, 135 Wn.App. 89 (2006); affirms *State v. Tracy*, 128 Wn.App. 388 (2005); 6-3.

***State v. Cooper***, 156 Wn.2d 475 (2006)

Child endangerment statute, RCW 9A.42.100, making it a crime for a person to expose a dependent child to methamphetamine applies to any person, not only a child's parent, custodian or caregiver; 8-1.

***State v. Carlson***, 130 Wn.App. 589 (2005)

Two "rough dressed, unkempt and dirty" men enter rural store, one purchases muriatic acid, the other purchases denatured alcohol, store manager reports to police the purchase, as his training taught him that when these items are mixed, along with others, one can manufacture methamphetamine, police stop defendants' car, discover pseudoephedrine, defendants are convicted of possession of pseudoephedrine with intent to manufacture meth; held: while entering a store with a companion, splitting up and buying pseudoephedrine products may be enough for an investigative stop, here the activity was so innocuous, insufficient to support a *Terry* stop, *cf.: State v. Keller-Deen*, 137 Wn.App. 396 (2007); 2-1, III.

***State v. Hearn***, 131 Wn.App. 601, 609-11 (2006)

Drugs found in defendant's clothes within a basket and in defendant's purse within vehicle do not have a reasonable relation to the operation and use of the vehicle and vehicle did not contribute in some reasonable degree to the commission of the VUCSA offense, thus license suspension, RCW 46.20.285(4), is not valid, *State v. Wayne*, 134 Wn.App. 873 (2006), *State v. B.E.K.*, 141 Wn.App. 742 (2007), *State v. Alcantar-Maldonado*, 184 Wn.App. 215, 227-30 (2014), distinguishing *State v. Batten*, 95 Wn.App. 127, 129 (1999), *aff'd*, 140 Wn.2d 362 (2000), *State v. Griffin*, 126 Wn.App. 700 (2005); III.

***Pers. Restraint of Cruz***, 157 Wn.2d 83 (2006)

VUCSA doubling statute, RCW 69.50.408, doubles the maximum sentence for a subsequent delivery conviction but does not double the standard range, *State v. Clark*, 123 Wn.App. 515, 520-22 (2004); 9-0.

***State v. Cromwell***, 157 Wn.2d 529 (2006)

Possession of salts of methamphetamine is prohibited by former RCW 69.50.401(a)(1)(ii), *State v. Forrester*, 135 Wn.App. 195 (2006), overruling, in part, *State v. Morris*, 123 Wn.App. 467 (2004), distinguishing *State v. Halsten*, 108 Wn.App. 759 (2001); affirms *State v. Cromwell*, 127 Wn.App. 746 (2005); 8-1.

***State v. Colquitt***, 133 Wn.App. 789 (2006)

Defendant agrees that, should he fail drug court, trial court can admit police report that included a field test, is terminated from drug court, RCW 2.28.170, is found guilty; held: defendant did not enter a "stipulation to the sufficiency of the evidence," *but see: State v. Drum*, 168 Wn.2d 23 (2010), did not confess, no lab test report was admitted, thus evidence was insufficient to convict, *State v. Roche*, 114 Wn.App. 424 (2002), *cf.: State v. Hernandez*, 85 Wn.App. 672, 675 (1997), *Pers. Restraint of Delmarter*, 124 Wn.App. 154 (2004); 2-1, II.

***State v. Brockob***, 159 Wn.2d 311 (2006)

Defendant steals pseudophed, removing tablets from blister packs, is charged with possession with intent to manufacture methamphetamine, RCW 69.50.440; held: absent some other evidence, no rational jury would have found that defendant intended to manufacture methamphetamine merely because he shoplifted some pseudophed, at 338, *State v. Whalen*, 131 Wn.App. 58 (2005), *cf.: State v. Montgomery*, 163 Wn.2d 577 (2008), *State v. Sprague*, 16 Wn.App.2d 213 (2021); 7-2.

***State v. Keller-Deen***, 137 Wn.App. 396 (2007)

Defendant and cohort are seen making separate purchases of two meth precursor item, store detective "believed" cohort made previous precursor purchases, defendant and cohort meet in parking lot, scan parking lot, police recognize cohort from other purchases, car registered to defendant as being associated with other precursor purchases, police stop car, handcuff defendant-passenger, arrest driver for warrants, search, find drugs; held: facts support reasonable suspicion to conduct *Terry* stop, *State v. Glover*, 116 Wn.2d 509 (1991), *State v. Samsel*, 39 Wn.App. 564, 570 (1985), *see: State v. Thierry*, 60 Wn.App. 445 (1991), distinguishing *State v. Carlson*, 130 Wn.App. 589, 593 (2005); III.

***State v. Ague-Masters***, 138 Wn.App. 86, 105-08 (2007)

Minor found in house which is 100 feet from detached shed where meth lab is found is insufficient to support enhancement of minor on drug premises, former RCW 9.94A.128; II.

***State v. Hanson***, 138 Wn.App. 322 (2007)

After-acquired medical authorization to use marijuana is sufficient to support the medical marijuana affirmative defense, RCW 69.51A.010, where police seize drugs, defendant is not present at seizure, obtains authorization and brings it to police station the next day, *State v. Adams*, 148 Wn.App. 231 (2009), *see: State v. Otis*, 151 Wn.App. 572 (2009); 2-1, III.

***State v. Jones***, 140 Wn.App. 431 (2007)

Officer's tape measurement and estimates is insufficient to submit school bus route stop enhancement, RCW 69.50.401, -435(1), to jury, *see also: State v. Pearson,* 180 Wn.App. 576 (2014); II.

***State v. Atchley***, 142 Wn.App. 147, 164-65 (2007)

Medical Marijuana Act, ch. 69.51A RCW, does not implicitly repeal the classification of marijuana as a schedule I drug, *State v. Hanson,* 138 Wn.App. 322 (2007); III.

***State v. Montgomery***, 163 Wn.2d 577 (2008)

Officer's testimony that he believed defendants' actions were such that they were buying pseudoephedrine with intent to manufacture methamphetamine was an improper opinion of guilt but, because there was no objection, "did not establish actual prejudice, *see also: State v. Song Wang,* 5 Wn.App.2d 12, 28-30 (2018) 7-2.

***State v. Gonzales Flores***, 164 Wn.2d 1, 10-18 (2008)

Mere act of selling drugs in the presence of a minor is insufficient to convict of involving a minor in a drug transaction, RCW 69.50.4015 (2003); 7-2.

***State v. Earl***, 142 Wn.App. 777, 785-86 (2008)

VUCSA sentence doubling provision for prior qualifying drug offenses, RCW 69.50.408(1), need not be pled in an information, *but see: State v. Cameron,* 80 Wn.App. 374 (1996), and need not be determined by a jury because it only reflects the fact of a prior conviction, *Blakely v. Washington,* 159 L.Ed.2d 403, 412 (2004); 2-1, II.

***State v. O'Meara***, 143 Wn.App. 638 (2008)

Trial court grants pretrial motion to dismiss use of drug paraphernalia charge, RCW 69.50.412, finding that there was no evidence that defendant used a pipe found in a baggie along with marijuana and a playing card tin containing marijuana; held: a rational trier of fact could conclude that defendant used the tin for storage of marijuana and used the pipe to smoke marijuana, in violation of the statute, thus dismissal was error; II.

***State v. George***, 146 Wn.App. 906 (2008)

Trooper testifies for state that defendant denied knowing he possessed drugs in car, trial court refuses unwitting possession instruction unless defendant testifies; held: unwitting possession is a defense without regard to which party presents evidence in support of it, *State v. Olinger*, 130 Wn.App. 22, 26 (2005), *cf.: State v. Buford,* 93 Wn.App. 149 (1998), trial court erred in refusing unwitting possession instruction; 2-1, I.

***State v. Adams***, 148 Wn.App. 231 (2009)

Police seize marijuana plants at defendant's home, arrest defendant at work, defendant tells police he has authorization, police ask no questions and book defendant, defense submits to trial court letter appointing defendant as a medical marijuana caregiver and verification from physician that patient was prescribed marijuana, trial court refuses primary caregiver affirmative defense under Medical Marijuana Act, ch. 69.51A RCW because defendant did not provide the authorization to police at time of arrest; held: statute which required that an arrestee present a

copy of the patient's documentation to any law enforcement officer requesting it, RCW 69.51A.040(4) (1999), does not apply where police do not ask for the authorization, defendant had no means of obtaining it as police took him to jail, *State v. Hanson*, 138 Wn.App. 322 (2007), defendant presented a *prima facie* case of the defense, *State v. Ginn*, 128 Wn.App. 872, 882 (2005), *State v. Butler*, 126 Wn.App. 741, 744 (2005), *State v. Markwart*, 182 Wn.App. 335, 352-61 (2014), reversed; III.

***State v. Marin***, 150 Wn.App. 434 (2009)

Possession of drugs and maintaining a vehicle for drug trafficking, RCW 69.50.402(1)(f), where the drugs were found in the vehicle which had hidden compartments do not violate double jeopardy or constitute the same criminal conduct; trial court's admission into evidence that defendant posted $150,000 bail was not an abuse of discretion where defendant testified that he was a poor handyman, ER 403, even though defendant also testified that bail was posted by another; I.

***State v. Otis***, 151 Wn.App. 572 (2009)

Physician's written document that states that patient had tried prescription medication unsuccessfully to increase appetite and thus should be able to use marijuana for appetite stimulation is sufficient to meet requirements for "valid documentation" for medical marijuana defense, RCW 69.51A.005 (1999), *distinguishing State v. Shepherd*, 110 Wn.App. 544 (2002); II.

***State v. McCarty***, 152 Wn.App. 351 (2009)

Where one person is the designated caregiver of medical marijuana, RCW 69.51A.040 (1999), the defense is unavailable to someone associated with the caregiver, here a housemate; a housemate is entitled to rely upon the affirmative defense that "[n]o person shall be prosecuted for constructive possession…solely for being in the presence or vicinity of medical marijuana," RCW 69.51A.050(2) (1999); II.

***State v. Fry***, 168 Wn.2d 1 (2010)

Police smell marijuana at residence, defendant hands deputies medical marijuana authorization, police obtain warrant, seize drugs; held: medical use certificate cannot negate probable cause to search, *McBride v. Walla Walla County*, 95 Wn.App. 33, 40 (1999), *State v. Ellis*, 178 Wn.App. 801 (2014), *State v. Reis*, 180 Wn.App. 438 (2014), 183 Wn.2d 197 (2015), *State v. Davis*, 182 Wn.App. 625 (2014); medical marijuana authorization for anxiety does not qualify as a "terminal or debilitating medical condition," former RCW 69.51A.010(4) (1999), *see:* RCW 69.51A.005 *et seq.* (2008); affirms *State v. Fry*, 142 Wn.App. 456 (2008); 8-1.

***State v. Drum***, 168 Wn.2d 23 (2010)

Defendant enters drug court, signing stipulation to police reports and agreeing that the facts in the reports are sufficient to establish guilt, when defendant opts out of drug court trial court finds him guilty; held: courts are not bound by stipulations to legal conclusions, thus stipulation to sufficiency is not binding, court must still determine if evidence establishes guilt beyond a reasonable doubt; affirms *State v. Drum*, 143 Wn.App. 608 (2008); 5-4.

***State v. Eaton***, 143 Wn.App. 155 (2008), 168 Wn.2d 476 (2010)

Defendant is lawfully arrested, transported to jail where search yields drugs, trial court finds sentence enhancement for possession within a jail, RCW 9.94A.533(5); held: strict liability punishments for crimes and sentence enhancements without a *mens rea* requirement still require a minimal mental element to establish the *actus reus*, *State v. Utter*, 4 Wn.App. 137, 139 (1971); legislature did not intend the "unlikely, absurd, or strained consequence" of punishing a defendant for his *involuntary* act, at 484, *State v. Deer*, 158 Wn.App. 854, 861-65 (2010); 5-4.

***State v. Nyegaard***, 154 Wn.App. 641, 647-49 (2010), *rev. granted and remanded*, 172 Wn.2d 1006 (2011)

Defendant-passenger with two others in a car late at night, found with firearm, drugs, driver found with cash in bundles is sufficient to prove possession with intent to deliver, *cf.: State v. Brown*, 68 Wn.App. 480 (1993); 2-1, II.

***State v. Piñeda-Piñeda***, 154 Wn.App. 653 (2010)

School zone enhancement, RCW 69.50.435, applies to accomplices, *State v. Silva-Baltazar*, 125 Wn.2d 472, 480-84 (1994), only if the accomplice is present in the school zone, *see also: State v. Hayes*, 182 Wn.2d 556 (2015), *State v. Allen*, 182 Wn.2d 364, 382-85 (2015), *State v. Hayes*, 182 Wn.2d 556 (2015); school zone instruction that states "all twelve of you must agree on the answer to the special verdict," 1A WPIC 160.00, is proper; controlled substance conspiracy, RCW 69.50.407, is concomitant with general conspiracy, RCW 9A.28.020, thus state must plead and prove substantial step, overruling, in part, *State v. Casarez-Gastelum*, 48 Wn.App. 112 (1987) and *State v. Hawthorne*, 48 Wn.App. 23 (1987), harmless here when raised for first time on appeal as defendant was also convicted of delivery; I.

***State v. O'Connor***, 155 Wn.App. 282, 290-91 (2010)

Large amount of marijuana in a sophisticated grow operation plus a scale is sufficient to support possession with intent to deliver, *State v. Lopez*, 79 Wn.App.755, 768 (1995), *cf.: State v. Huynh*, 107 Wn.App. 68, 76-78 (2001); III.

***State v. McGrew***, 156 Wn.App. 546 (2010)

Maximum sentence for a drug offense may be **doubled** if the prior conviction is a possession offense, at 556-58, RCW 69.50.408(2), *cf.: State v. McCollum*, 88 Wn.App. 977, 987-90 (1997), *Pers. Restraint of Hopkins*, 137 Wn.2d 897 (1999); a jury's special verdict that VUCSA defendant was armed with a firearm raises his drug offense from a level II to a level III, RCW 9.94A.518, since a firearm is always a deadly weapon, at 558-61; II.

***State v. LaPlant***, 157 Wn.App. 685 (2010)

**Unlawful use of drug paraphernalia**, RCW 69.50.412(1), is not a lesser of possession of a controlled substance; II.

***State v. Naillieux***, 158 Wn.App. 630, 639-40 (2010)

Taking steps in Washington and Oregon to prepare and produce methamphetamine is a continuous course of conduct thus no unanimity instruction is required, *State v. Fiallo-Lopez*, 78 Wn.App. 717, 723-26 (1995); III.

***State v. Hathaway***, 161 Wn.App. 634, 649-51 (2011)

In methamphetamine possession case, jury instruction that state must prove defendant "unlawfully" possessed a controlled substance is redundant since a private citizen may not lawfully possess meth; II.

***State v. Christman***, 160 Wn.App. 741 (2011)

To prove **controlled substances homicide**, RCW 69.50.415(1), state must prove that defendant's delivery of a drug was a proximate cause of death, but not that it was the sole cause of death; a defendant's conduct is not a proximate cause if some other conduct is a sole or superseding cause, but it can be a proximate cause if another cause is "merely a concurrent cause," at 756 ¶ 11, *State v. Meekins*, 125 Wn.App. 390, 398-99 (2005); statute which uses language "resulting in" death is not vague; III.

***State v. Bribiesca Guerrero***, 163 Wn.App. 773 (2011)

Trial court is not obliged to order a chemical dependency screening for a defendant convicted of a drug offense who is eligible for a drug offender sentencing alternative, RCW 9.94A.500(1), 9.94A.660; III.

***State v. Guzman Nuñez***, 174 Wn.2d 707 (2012)

Jury must be unanimous to find that state did not prove special sentencing enhancements, overruling *State v. Bashaw*, 169 Wn.2d 133 (2010), *State v. Goldberg*, 149 Wn.2d 888, 894 (2003); 9-0.

***State v. Rose,*** 175 Wn.2d 10, 18-22 (2012)

Officer observes glass pipe with residue, arrests for VUCSA; held: while mere possession of drug paraphernalia is not a crime, *State v. O'Neill,* 148 Wn.2d 564, 584 n.8 (2003), observation of "chalky white residue" supports officer's belief that the residue was contraband; 9-0.

***State v. Brown***, 166 Wn.App. 99 (2012)

RCW 69.51A.010(d) (2007) states that a medical marijuana provider may only be the designated provider to one patient at any one time, defense offers evidence that while there are documents showing defendant prescribed for three people, one will testify he never received any from defendant and defendant did not have a designated provider form for another, trial court declines to allow medical marijuana defense; held: reasonable trier of fact could find, viewing evidence in light favorable to defendant, that defendant was a designated provider only to one recipient, *see also: State v. Shupe*, 172 Wn.App. 341 (2012), *State v. Markwart*, 182 Wn.App. 335 (2014); III.

***State v. Bennett***, 168 Wn.App. 197, 207-10 (2012)

School bus route stop enhancement, RCW 9.94A.533(6) (2008), 69.50.435(1), applies to a conviction of delivery of methamphetamine to a minor, RCW 69.50.406(1) (2005); II.

***State v. Zillyette***, 178 Wn.2d 153 (2013)

Identity of the controlled substance is an essential element of controlled substances homicide, *State v. Zillyette*, 173 Wn.2d 784 (2012), even if raised for the first time on appeal; reverses *State v. Zillyette*, 169 Wn.App. 24 (2012); 9-0.

***State v. Shape***, 172 Wn.App. 341 (2012)

Designated medical marijuana provider may deliver to more than one patient as long as it is not delivered to more than one patient at the same time, RCW 69.51A.010(1)(d) (2010), *see:* RCW 69.51A.040 (2011), *State v. Markwart*, 182 Wn.App. 335, 352-61 (2014); where defense establishes a *prima facie* case to support a medical marijuana defense and state presents no evidence to rebut, remedy is dismissal; 2-1, III.

***State v. Huynh***, 175 Wn.App. 896 (2013)

Possession of a controlled substance with intent to manufacture or deliver is not an alternative means crime, as the only physical act involved is the act of possession, intent to manufacture or deliver address defendant's mental state, *State v. Peterson*, 168 Wn.2d 763, 769 (2010); major VUCSA aggravating factor, RCW 9.94A.535(3)(e) (2011) does not require unanimity on which statutory factor was proved; I.

***State v. Davis***, 176 Wn.App. 385 (2013)

Selling drugs from a motel room is insufficient to convict of unlawful use of a building for drug purposes, RCW 69.53.010 (1988), as statute only applies to those managing or controlling property who allow others to deal drugs; II.

***Burrage v. United States***, 571 U.S. 204, 187 L.Ed.2d 715 (2014)

Mandatory minimum in federal controlled substances act, 21 U.S.C. §841(a)(1), (b)(1)(A)-(C), where defendant is accused of supplying a drug that causes death or serious bodily injury, is only applicable if the drug provided is a but-for cause of the death or injury; 9-0.

***State v. Pearson***, 180 Wn.App. 576 (2014)

To prove school bus route stop enhancement state offers testimony from county Director of Geographic Information Systems who produces a map showing bus stops provided by the school district, RCW 69.50.435(5) (2003), trial court strikes special verdict finding that map was wrongly admitted; held: map is prepared, per the statute, for use in a criminal proceeding and is thus testimonial, defendant had right to confront the official who supplied the information, confrontation clause was violated, *see:* *State v. Hennessey*, 80 Wn.App. 190 (1995), *State v. Davis*, 93 Wn.App. 648 (1999), *State v. Johnson*, 116 Wn.App. 851, 861-63 (2003), *State v. Jones*, 140 Wn.App. 431 (2007), *State v. Bashaw*, 169 Wn.2d 133, 140-44 (2010) , *overruled, on other grounds, State v. Guzman Nuñez*, 174 Wn.2d 707 (2012); II.

***State v. Hender***, 180 Wn.App. 895 (2014)

Trial court's refusal to grant a DOSA sentence, RCW 9.94A.660 (2009), because defendant denied accountability is a proper exercise of discretion, *State v. Jones*, 171 Wn.App. 52, 55-56 (2012), *State v. Barton*, 121 Wn.App. 792 (2004), *see also: State v. Williams*, 199 Wn.App. 99 (2017), *distinguishing State v. Grayson*, 154 Wn.2d 333 (2005); III.

***State v. Browne***, 181 Wn.App. 756 (2014)

Defendant may raise medical marijuana defense, that he was entitled to prove that patient's 60-day supply could exceed 24 ounces if the greater amount was medically necessary, former WAC 246-75-010 (2008), *see:* RCW 69.51A.045 (2011); III.

***State v. Sykes***, 182 Wn.2d 168 (2014)

Closed adult drug court staffings do not violate CONST. art. I, § 10; 6-3.

***McFadden v. United States***, 576 U.S. 186, 135 S.Ct. 2298, 192 L.Ed.2d 260 (2015)

To convict under the Analogue Act, 21 U.S.C. § 802, *et seq.*, government must prove that defendant knew that the substance possessed is a controlled substance, knowledge requirement is also met if the defendant knew the specific features of the substance that make it a "'controlled substance analogue,'" *cf. State v. Cleppe*, 96 Wn.2d 373 (1981), *State v. Schmeling*, 191 Wn.App. 795 (2015), *State v. Blake*, 197 Wn.2d 170 (2021); 9-0.

***State v. Conover***, 183 Wn.2d 706 (2015)

School bus route stop enhancements, RCW 69.50.435(1)(c) (2015), must run consecutively to the substantive VUCSA charge but may run concurrently to each other, *Post Sentencing Review of Charles*, 135 Wn.2d 239 (1998); 9-0.

***State v. Fehr***, 185 Wn.App. 505, 513-16 (2015)

Special interrogatory that asks jury if defendant delivered drugs within 1000 feet of a "school bus stop route" rather than statutory "**school bus route stop**," RCW 69.50.435(1) (2003), relieves state of proving the correct element, thus enhancement reversed, *State v. Hugdahl*, 195 Wn.2d 319 (2020); II.

***State v. Mohamed***, 187 Wn.App. 630 (2015)

Even with school zone enhancement court can impose DOSA or parenting sentencing alternative, RCW 9.9A.655, as enhancements are still part of standard range, *Postsentencing Review of Gutierrez*, 146 Wn.App. 151 (2008); I.

***State v. Schmeling***, 191 Wn.App. 795 (2015)

Eighth Amendment cruel and unusual clause does not require state to prove intent to possess a controlled substance, *see: State v. Cleppe*, 96 Wn.2d 373 (1981), *McFadden v. United States*, 576 U.S. 186, 135 S.Ct. 2298, 192 L.Ed.2d 260 (2015), *but see: State v. Blake*, 197 Wn.2d 170 (2021); II.

***State v. Rose***, 191 Wn.App. 858 (2015)

Initiative 502 legalizing marijuana applies to people charged prior to adoption, *State v. Gradt*, 192 Wn.App. 230 (2016); 2-1, III

***State v. Yokel***, 196 Wn.App. 424 (2016)

Police find one hydrocodone pill in defendant's pocket, at trial defendant offers evidence that her minor daughter has a prescription and defendant was holding the pill for her; held: where a household member possesses another household member's prescription drug she is entitled to an affirmative defense as an "ultimate user," RCW 69.50.4013(1) (2015), as the statute permits

possession "pursuant to a valid prescription;" ch. 69.50, RCW, should be construed to be uniform with other states which have adopted it, RCW 69.50.603 (1979); II.

***State v. Crowder***, 196 Wn.App. 861, 867-73 (2016)

Defendant obtains marijuana from a jar and gives it to a minor, after search police find more than one jar with marijuana, lab tests one of the jars and finds it's marijuana, defendant is convicted of distributing to a minor; held: insufficient evidence to compare the substance tested in the lab with the substance consumed by the minors, *cf.: State v. Crocker*, 16 Wn.App.2d 731 (2021); 2-1, III.

***State v. Menard***, 197 Wn.App. 901 (2017)

Defendant owns and lives in a house that he rents to five others, is sometimes paid rent with drugs, is aware that tenants sell drugs, police find drugs in house, trial court dismisses, CrR 8.3(c), **maintaining a drug house**, RCW 69.50.402(1) (2016), pretrial for insufficiency; held: state need not prove that premises' major purpose is drug activity, evidence is sufficient if it is a substantial purpose, *State v. Ceglowski*, 103 Wn.App. 346 (2000), *State v. Fernandez*, 89 Wn.App. 292 (1997); I.

***State v. Williams***, 199 Wn.App. 99 (2017)

At sentencing defense requests Drug Offender Sentencing Alternative, court imposes standard range sentence, stating that there was no evidence of drug use; held: while a sentencing court may order a drug evaluation for a DOSA it is not obliged to do so, RCW 9.94A.660(4) (2016), and thus properly exercised discretion in declining to impose DOSA, *State v. Grayson*, 154 Wn.2d 333 (2005); 2-1, III.

***State v. Jimenez***, 200 Wn.App. 48 (2017)

In minor in possession of marijuana case, state need not prove that the marijuana had greater than 0.3% THC, RCW 69.50.4014 (2003), as a juvenile may not possess any concentration of marijuana, regardless of RCW 69.50.101(2)(w) (2017); III.

***State v. Sinrud***, 200 Wn.App. 643, 650-52 (2017)

In VUCSA possession with intent case court instructs jury "[m]ere possession of a controlled substance does not allow you to infer an intent to deliver a controlled substance. The law requires substantial corroborating evidence of intent to deliver in addition to the mere fact of possession. The law requires at least one additional corroborating factor," consistent with *State v. Hagler*, 74 Wn.App. 232, 236 (1994), argues on appeal that it is a comment on the evidence; held: trial court should not instruct jury based upon an appellate court's sufficiency holding as the sufficiency standard on appeal ("any rational jury") is lower than beyond a reasonable doubt, *State v. Brush*, 183 Wn.2d 550, 557-58 (2015), *but see: State v. Sandoval*, 8 Wn.App.2d 267 (2019), thus instruction was a prejudicial judicial comment on the evidence; I.

***State v. Gonzalez***, 2 Wn.App.2d 96, 105-14 (2018)

Information charges possession of methamphetamine, lab tech testifies substance taken from defendant contained meth and cocaine, to convict instruction omits reference to specific drug; held: while identify of a controlled substance is an essential element which must be

included in the to convict instruction, *State v. Goodman*, 150 Wn.2d 774 (2004), *State v. Zillyette*, 178 Wn.2d 153 (2013), error is harmless as uncontroverted testimony that substance contained meth, however because different drugs have different maximum sentences defendant may only be sentenced for the least which is misdemeanor marijuana, *State v. Clark-El*, 196 Wn.App. 614 (2016), *State v. Barbarosh*, 10 Wn.App.2d 408 (2019), *see also: State v. Rivera-Zamora*, 7 Wn.App. 3d 824 (2019), *State v. Gardner,* 14 Wn.App.2d 207 (2020); 2-1, II.

***State v. Van Noy***, 3 Wn.App.2d 494 (2018)

In determining eligibility for a DOSA the issue is when the offender committed the current offense, not when he was sentenced for it, RCW 9.94A.660(1)(g) ;I.

***State v. Church***, 5 Wn.App.2d 577 (2018)

Defendant is sentenced to a residential DOSA, RCW 9.94A.664 (2011), receives treatment and community custody per the statute, never reports for treatment, argues that court only has authority to impose the mid-point of the standard range, RCW 9.94A.664(4)(c), court revokes and imposes standard range sentence; held: the limitation of the court to impose the mid-point of the standard range does not apply to a defendant who never reports to treatment, *see: State v. Grayson*, 154 Wn.2d 333 (2005); I.

***State v. Yancey***, 193 Wn.2d 26 (2019)

Defendant pleads guilty to two counts of delivering a drug plus two school bus zone enhancements, total sentence range is 36-44 months, mid-range 40 months, sentencing court imposes residential DOSA, RCW 9.94A.660 (2016); held: residential DOSA can only be imposed if mid-point of range is 24 months or less, court cannot waive enhancements, thus defendant was only eligible for a prison-based DOSA, reversing *State v. Yancey*, 3 Wn.App.2d 735 (2018); 9-0.

***State v. Rivera-Zamora***, 7 Wn.App. 3d 824 (2019)

Defendant is charged with possession of methamphetamine, to convict instruction does not identify the drug but verdict form does; held: while the identity of the drug is an essential element, *State v. Goodman*, 150 Wn.2d 774 (2004)**,** *State v. Zillyette*, 178 Wn.2d 153 (2013), *State v. Gonzalez*, 2 Wn.App.2d 96 (2018), *State v. Clark-El*, 196 Wn.App. 614 (2016), here the jury found the specific controlled substance as it was stated in the verdict form thus the error is harmless, *see: State v. Gardner,* 14 Wn.App.2d 207 (2020); II.

***State v. Daniels***, 8 Wn.App.2d 160 (2019)

Entry into drug court must be approved by prosecutor, RCW 2.30.030 (2018), *see: State v. DiLuzio*, 121 Wn.App. 822 (2004); I.

***Postsentence Review of Hardy***, 9 Wn.App.2d 44 (2019)

Standard ranges for defendant's three convictions include one count of less than a year, one count of more than a year, trial court imposes residential DOSA, DOC appeals; held: if an offender has at least one sentence, greater than a year, that is eligible for a DOSA then defendant is eligible for DOSA, RCW 9.94A.660(1)(f) (2016), distinguishing *State v. Smith*, 142 Wn.App. 122 (2007); III.

***State v. Barbarosh***, 10 Wn.App.2d 408 (2019)

In drug case where to convict instruction fails to identify the controlled substance charged then sentence can only be for the lowest possible offense for possession of a controlled substance, *State v. Clark-El*, 196 Wn.App. 614 (2016). *State v. Gonzalez*, 2 Wn.App.2d 96 (2018), *cf.: State v. Rivera-Zamora*, 7 Wn.App.2d 824, 829-30 (2019), *State v. Sibert*, 168 Wn.2d 306 (2010), *State v. Gardner,* 14 Wn.App.2d 207 (2020); III.

***State v. Hugdahl***, 195 Wn.2d 319 (2020)

Enhancement that alleges that defendant delivered drugs within 1000 feet of a school bus route, rather than statutory "school bus route stop," RCW 69.50.435(l)(c) (2015), is insufficient, *State v. Fehr*, 185 Wn.App. 505, 513-16 (2015); 6-3.

***State v. Cyr***, 195 Wn.2d 492 (2020)

Defendant pleads guilty to three counts of selling a drug for profit, RCW 69.50.410(1), a class C felony, admits a prior VUCSA triggering doubling statute, RCW 69.50.408, trial court determines maximum sentence is 60 months, sentence range of 68-100 months exceeds maximum, court exercises discretion and sentences to 60 months, not doubling; held: doubling maximum sentence is mandatory, *Personal Restraint of Hopkins*, 89 Wn.App. 198, 201, 201-03 (1997), *rev'd on other grounds*, 137 Wn.2d 897, 976 P.2d 616 (1999), thus sentence range is not limited by 60 months, but court is not obliged to impose maximum; remanded for trial court to determine if priors qualify as VUCSAs for purposes of doubling; affirms *State v. Cyr*, 8 Wn.App.2d 834 (2019); 9-0.

***State v. Loughbom***, 195 Wn.2d 64 (2020)

Prosecutor's referring to "war on drugs" during voir dire, opening statement and closing argument is flagrant and ill-intentioned misconduct, *State v. Echevarria*, 71 Wn.App. 595 (1993); 9-0.

***State v. Peterson***, 12 Wn.App.2d 195 (2020)

RCW 69.50.410(3)(a) (2003), sets penalty for selling heroin for a profit at two years, SRA standard range sentence for this defendant is 68-100 months; held: "RCW 9.94A.505(2)(a)(i) states that the trial court must apply the sentencing grids "[u]nless another term of confinement applies," thus legislative intent and rule of lenity dictate that specific statute applies and sentence of two years is affirmed; affirmed, on other grounds, *State v. Peterson*, 198 Wn.2d 643 (2021); II.

***State v. Salazar***, 13 Wn.App.2d 880 (2020)

Defendant's standard range is 22-29 months, is sentenced to prison-based DOSA of 25.5 months with 12.25 months in prison and 12.25 months community custody, defendant violates conditions of community custody, court revokes, RCW 9.94A.660(7)(c) (2020), and imposes 29 months, defendant argues that court could not "modify" sentence to impose high end; held: if DOC revokes while a defendant is in prison it can only reimpose the remainder of the original sentence, but if court revokes it may impose any sentence within standard range, with credit; III.

***State v. Gardner***, 14 Wn.App.2d 207 (2020)

Information charges possession of methamphetamine, to convict instruct only refers to possession of a controlled substance, another instruction states that methamphetamine is a controlled substance, defendant argues she only should be sentenced for misdemeanor, *State v. Barbarosh,* 10 Wn.App.2d 408 (2019), *State v. Clark-El,* 196 Wn.App. 614 (2016). *State v. Gonzalez,* 2 Wn.App.2d 96 (2018); held: based upon all of the instructions, the jury necessarily found defendant possessed a controlled substance other than marijuana, *see: State v. Rivera-Zamora,* 7 Wn.App. 3d 824 (2019), *State v. Sibert,* 168 Wn.2d 306, 311-13 (2010); III.

***State v. Anderson****,* 198 Wn.2d 672 (2021)

School bus route stop enhancement jury instruction, RCW 69.50.435(1)(c), need not define the words "school bus;" 9-0.

***State v. Peterson****,* 198 Wn.2d 643 (2021)

Sale of heroin, RCW 69.50.410, has not been repealed by implication; *affirms, on different grounds*, *State v. Peterson,* 12 Wn.App.2d 195 (2020); 7-2.

***State v. Crocker,*** 16 Wn.App.2d 731 (2021)

During service of search warrant police seize various forms of what police believe is marijuana, people come to the residence seeking to buy marijuana, lab tests a limited sample, defendant is convicted of six counts of distributing marijuana to minors, argues evidence is insufficient due to limited testing; held: because buyers testified at trial that they got high from the drugs they purchased plus packaging plus general information about the marijuana business, evidence was sufficient, distinguishing *State v. Crowder,* 196 Wn.App. 861, 864 (2016); I.

***State v. Ehlert****,* 19 Wn.App.2d 381 (2021)

DOSA statute, RCW 9.94A.660(1)(g) (2021), prohibits a DOSA sentence if defendant has had more than one prior DOSA in ten years, defendant had two concurrent DOSAs within ten years; held: because defendant had only one opportunity for treatment and rehabilitation even though there were two DOSAs he is eligible for another DOSA, *but see: State v. Van Noy,* 3 Wn.App.2d 494, 497 n.2 (2018); III.

***State v. Richter****,* ___ Wn.App.2d ___, 521 P.3d 303 (2022)

"The application of former RCW 69.50.435(1)(c) to double statutory maximum sentences on certain drug trafficking violations did not punish unknowing innocent conduct, so it did not violate due process under" *State v. Blake*, 197 Wn.2d 170 (2021);

# VUCSA
# Possession, Constructive Possession, Possession with intent to deliver: Sufficiency

***State v. Cleppe***, 96 Wn.2d 373 (1981)

Intent or knowledge is not an element of possession of a controlled substance, *State v. Bradshaw*, 152 Wn.2d 528 (2004), *State v. Schmeling*, 191 Wn.App. 795 (2015), *but see: McFadden v. United States*, 576 U.S. 186, 135 S.Ct. 2298, 192 L.Ed.2d 260 (2015); burden of proving unwitting possession is on defense, *but see: State v. Blake*, 197 Wn.2d 170 (2021), *State v. A.M.*, 194 Wn.2d 33 (2019) (Gordon McCloud, concurring); distinguishes *State v. Boyer*, 91 Wn.2d 342 (1979); reverses *State v. Smith*, 17 Wn.App. 231 (1977), *State v. Weaver*, 24 Wn.App. 83 (1979); *accord*: *State v. Knapp*, 54 Wn.App. 314 (1989), *State v. Adame*, 56 Wn.App. 803 (1990), *see: State v. Hundley*, 72 Wn.App. 746 (1994), *State v. Staley*, 123 Wn.2d 794 (1994); 9-0.

***State v. Knapstad***, 41 Wn.App. 781 (1985), *aff'd,* 107 Wn.2d 346 (1986)

Police find drugs in a residence, defendant visited residence three times, police found papers with defendant's name but listing a different address, premises rented to defendant's brother, drugs found in attic and not in common area; held: insufficient evidence to prove constructive possession, *State v. Callahan*, 77 Wn.2d 27 (1969), *State v. Tadeo-Mares*, 86 Wn.App. 813 (1997), *State v. Cote*, 123 Wn.App. 546 (2004), *see: State v. Davis*, 176 Wn.App. 849 (2013), *cf.: State v. Ibarra-Erives*, 23 Wn.App.2d 596 (2022); trial court may dismiss pre-trial for insufficiency; I.

***State v. Douglas S.***, 42 Wn.App. 138 (1985)

Where a minor lives in his parents' home, dominion and control are not established by mere residence, *State v. G.M.V.*, 135 Wn.App. 366, 374-75 (2006); III.

***State v. Amezola***, 49 Wn.App. 78 (1987), *overruled, on other grounds, State v. McDonald*, 138 Wn.2d 680 (1999)

Proof of defendant's residence at premises where drugs were sold plus proof that the drugs were not kept out of her presence is insufficient to support a finding of constructive possession, *State v. Cote*, 123 Wn.App. 546 (2004), *cf.: State v. Tadeo-Mares*, 86 Wn.App. 813 (1997), *State v. Roth*, 131 Wn.App. 556, 563-66 (2006), *see: State v. Davis*, 176 Wn.App. 849 (2013); I.

***State v. Gutierrez***, 50 Wn.App. 583 (1988)

Possession of identified drug money plus accompanying renter of storage unit to the unit where drugs are found and staying there for 40 minutes is insufficient to prove constructive possession, *State v. Callahan*, 77 Wn.2d 27 (1969), *State v. George*, 146 Wn.App. 906, 919-24 (2008), *State v. Embry*, 171 Wn.App. 714, 746-48 (2012), *see: State v. Davis*, 176 Wn.App. 849 (2013), *State v. Ibarra-Erives*, 23 Wn.App.2d 596 516 P.3d 1246 (2022); III.

***State v. Hagen***, 55 Wn.App. 494 (1989)

Mere proximity to drugs is not enough to establish constructive possession, *State v. Alvarez*, 105 Wn.App. 215 (2001), *State v. Cote*, 123 Wn.App. 546 (2004), *State v. Shumaker*, 142 Wn.App. 330

(2007), *see: State v. Chouinard,* 169 Wn.App. 895 (2012), *State v. Davis,* 176 Wn.App. 849 (2013), *see also: State v. Hathaway,* 161 Wn.App. 634, 646-49 (2011), *cf.: State v. Listoe,* 15 Wn.App.2d 308 (2020); trial court is not required to define for jury the terms "dominion and control," *State v. Amezola,* 49 Wn.App. 78, 87-88 (1987), *overruled, on other grounds, State v. McDonald,* 138 Wn.2d 680 (1999); if trial court does define dominion and control, it is error to define it merely as the ability to reduce an object to actual possession, as jury could conclude therefrom that mere proximity is enough, *see: State v. Castle,* 86 Wn.App. 48, 60-2 (1997), *State v. Portrey,* 102 Wn.App. 898 (2000); I.

***State v. Lane***, 56 Wn.App. 286 (1989)

One ounce of cocaine is sufficient to support a finding of intent to deliver where evidence establishes that one-eighth ounce is standard size purchase, ounce is worth $1000, scale and cash found in residence, *State v. Zamora,* 63 Wn.App. 220 (1991), *State v. Hagler,* 74 Wn.App. 232 (1994), *State v. McPherson,* 111 Wn.App. 747 (2002), *State v. Missieur,* 140 Wn.App. 181 (2007), *State v. Montgomery,* 163 Wn.2d 577 (2008), *State v. Slighte,* 157 Wn.App. 618, 627-28 (2010), *State v. Reichert,* 158 Wn.App. 374, 389-92 (2010), *see also: State v. Hotchkiss,* 1 Wn.App.2d 275 (2017), *cf.: State v. Brown,* 68 Wn.App. 480 (1993), *State v. Hutchins,* 73 Wn.App. 211, 216 (1994), *State v. Moles,* 130 Wn.App. 461 (2005), *Pers. Restraint of Bell,* 187 Wn.2d 558, 387 P.3d 718, 722-23 (2017), *see: State v. Huynh,* 107 Wn.App. 68, 76-78 (2001); constructive possession instruction which states that "possession need not be exclusive," is correct, *State v. Weiss,* 73 Wn.2d 372, 375 (1968); court need not instruct the jury that mere proximity, temporary residence, personal possessions on the premises, or knowledge of the presence of the drug are not sufficient, *distinguishing State v. Hystad,* 36 Wn.App. 42, 48-9 (1983), where an unwitting possession instruction is given, *cf.: State v. Jacobs,*121 Wn.App. 669, 684-85 (2004); III.

***State v. Cobelli***, 56 Wn.App. 921 (1990)

In possession with intent to deliver drugs case, evidence of possession of several baggies containing a total of 1.4 grams marijuana and observation of defendant in several brief conversations in area known for drug trafficking is insufficient to establish *corpus, see: State v. Whalen,* 131 Wn.App. 58 (2005), *see also: State v. Brown,* 68 Wn.App. 480 (1993), *State v. Hutchins,* 73 Wn.App. 211, 216 (1994), *State v. Miller,* 91 Wn.App. 181, 186 (1998), *State v. Huynh,* 107 Wn.App. 68, 76-78 (2001), *but see: State v. Reichert,* 158 Wn.App. 374, 389-92 (2010), *State v. Slighte,* 157 Wn.App. 618, 627-28 (2010); I.

***State v. Spruell***, 57 Wn.App. 383 (1990)

Defendant's presence in room where drugs were found plus defendant's fingerprint on a plate where drugs were plus defendant's rising from a chair when police break through front door with battering ram is insufficient to establish actual possession, *State v. Cote,* 123 Wn.App. 546 (2004); absent proof of dominion and control over premises where drugs are found, mere proximity to and momentary handling of drugs are insufficient to establish constructive possession, *State v. Callahan,* 77 Wn.2d 27 (1969), *State v. Hystad,* 36 Wn.App. 42, 49 (1983), *State v. Summers,* 45 Wn.App. 761 (1986), *State v. Mathews,* 4 Wn.App. 653, 656 (1971), *State v. Galbert,* 70 Wn.App. 721, 726-9 (1993), *State v. Echeverria,* 85 Wn.App. 777, 784 (1997), *State v. Enlow,* 143 Wn.App. 463 (2008), *State v. George,* 146 Wn.App. 906, 919-24 (2008), *State v. Embry,* 171 Wn.App. 714, 746-48 (2012), *see: State v. Chouinard,* 169 Wn.App. 895 (2012), *see: State v. Davis,* 176 Wn.App. 849 (2013), *but see: State v.*

*Summers*, 107 Wn.App. 373, 383-88 (2001), *State v. Jacobs*,121 Wn.App. 669, 684-85 (2004), *cf.*: *State v. Porter*, 58 Wn.App. 57 (1990), *State v. Lakotiy*, 151 Wn.App. 699, 713-15 (2009), *State v. Hathaway*, 161 Wn.App. 634, 646-49 (2011), *State v. Ibarra-Erives*, ___ Wn.App.2d ___, 516 P.3d 1246 (2022); I.

***State v. Porter***, 58 Wn.App. 57 (1990)

Defendant's presence at table near drugs plus possession of large sum of cash plus pointing a gun at a police officer plus flight is sufficient to establish constructive possession, *distinguishing* *State v. Spruell*, 57 Wn.App. 383 (1990); I.

***State v. Campbell***, 59 Wn.App. 61 (1990)

Defendant places drugs on car seat where, at his direction, third party picks them up and hands them to undercover officer; held: constructive transfer, RCW 69.50.101(f), is the transfer by some other person or manner at the instance or direction of the defendant; information charging delivery need not allege constructive transfer, nor need "transfer" be defined in jury instructions; I.

***State v. Bradford***, 60 Wn.App. 857 (1991)

Defendant's presence in residence as only adult with two children plus receipts and bills in defendant's name addressed to him at address searched establishes sufficient evidence of dominion and control, *State v. Cote*, 123 Wn.App. 546 (2004); on another date, defendant's presence undressed in bed plus bills addressed to him at address searched establish dominion and control; *see:* *State v. Dobyns*, 55 Wn.App. 609 (1989), *State v. Partin*, 88 Wn.2d 899 (1977), *overruled, on other grounds, State v. Lyons*, 174 Wn.2d 354 (2012), *State v. Walton*, 64 Wn.App. 410, 415-7 (1992), *State v. Tadeo-Mares*, 86 Wn.App. 813 (1997), *see: State v. Davis*, 176 Wn.App. 849 (2013), *but see:* *State v. Hagen*, 55 Wn.App. 494, 496 (1989), *State v. Alvarez*, 105 Wn.App. 215 (2001); II.

***State v. Williams***, 62 Wn.App. 748 (1991)

Possession of drug residue in pipe can appropriately be charged as possession of a controlled substance, RCW 69.50.401(d), *State v. Malone*, 72 Wn.App. 429, 438-40 (1994), as possession is not concurrent with paraphernalia statute, RCW 69.50.412, 69.50.102; I.

***State v. Olivarez***, 63 Wn.App. 484 (1991)

Jury instruction that constructive possession is established by dominion and control over substance ***or*** the premises where substance is found is error as effectively a mandatory presumption that defendant is guilty if jury found defendant had dominion and control over premises, *State v. Shumaker*, 142 Wn.App. 330 (2007), *but see:* *State v. Bradford*, 60 Wn.App. 857, 862 (1991), *State v. Ponce*, 79 Wn.App. 651 (1995), *overruled, State v. Shumaker*, 142 Wn.App. 330 (2007), *State v. O'Connor*, 87 Wn.App. 119 (1997), *State v. Tadeo-Mares*, 86 Wn.App. 813, 816 (1997); defense instruction that delivery cannot occur between two persons in joint possession properly refused as delivery between joint possessors is not relevant to charge of possession with intent to deliver; III.

***State v. Galisia***, 63 Wn.App. 833 (1992)

Defendant's continuing and purposeful presence at scene of drug transaction plus expressed interest in seeing transaction succeed so that he could obtain drugs and money are sufficient to convict for accomplice to possession with intent to deliver, *State v. Fisher*, 74 Wn.App. 804, 815-6 (1994), *distinguishing* *State v. Amezola*, 49 Wn.App. 78 (1987), *overruled, on other grounds*, *State v. McDonald*, 138 Wn.2d 680 (1999), *State v. Gladstone*, 78 Wn.2d 306 (1970); I.

***State v. Sims***, 119 Wn.2d 138 (1992)

Guilty knowledge is not an element of possession with intent to deliver, *see also:* *State v. Valdobinos*, 122 Wn.2d 270 (1993), *distinguishing* *State v. Boyer*, 91 Wn.2d 342 (1979); 9-0.

***State v. Huff***, 64 Wn.App. 641 (1992)

Evidence is sufficient to convict of possession of drugs where defendant drove car in which drugs were found plus defendant and car smelled of drugs plus defendant did not stop for officer plus passenger made furtive movements, drugs found hidden in laundry in back seat; jury need not be instructed that state has burden of proving constructive possession by "substantial" circumstantial evidence; II.

***State v. Garcia***, 65 Wn.App. 681 (1992)

Defendant is convicted of delivery of drugs and possession with intent to deliver, evidence having established that defendant delivered drugs, possessed more drugs upon arrest; held: because jury was not instructed that the possession with intent to deliver charge could only apply to the drugs still in defendant's possession at arrest and not to the actual delivery, the offenses merge, *see:* *State v. Vladovic*, 99 Wn.2d 413, 421 (1983), *State v. Burns*, 114 Wn.2d 314, 319 (1990), thus *remanded* for new trial on possession with intent charge, *but see:* *State v. Fisher*, 74 Wn.App. 804, 816-8 (1994); concurrent sentences doctrine does not apply since SRA offender score on delivery increased due to possession with intent conviction, sentence imposed was not within standard range for delivery alone; I.

***State v. Robbins***, 68 Wn.App. 873 (1993)

To convict for possession with intent to deliver, state must prove that defendant possessed the same drugs he intended to deliver, thus trace amounts of cocaine, not visible to naked eye, are insufficient to support conviction; II.

***State v. Malone***, 72 Wn.App. 429, 438-40 (1994)

Possession of any amount of cocaine, even if not measurable or useable, is sufficient to support a possession conviction, *State v. Williams*, 62 Wn.App. 748, 749-50 (1992), *State v. Larkins*, 79 Wn.2d 392 (1971); I.

***State v. Hundley***, 72 Wn.App. 746 (1994), *aff'd, on different grounds,* 126 Wn.2d 418 (1995)

Gas chromatograph mass spectrometer measurement of controlled substance, in nanograms, is sufficient even where another test establishes no drugs where evidence establishes possible imperfect mixing, at 747-9; II.

***State v. Staley***, 123 Wn.2d 794 (1994)

Defendant finds vial with white powder, appears to him to be cocaine, 15 minutes later he voluntarily gives it to police during DUI stop, trial court refuses defense proposed instruction "[f]leeting, momentary, temporary or unwitting" possession is not unlawful; held: defense proposed instruction that brief possession is not unlawful is incorrect, rather evidence of brief duration or momentary handling goes to the question of whether defendant had possession in the first instance, *State v. Callahan*, 77 Wn.2d 27, 29 (1969), *State v. Summers*, 107 Wn.App. 373, 383-88 (2001), *see: State v. Davis*, 176 Wn.App. 849 (2013), which differs from unwitting possession, an affirmative defense, *State v. Cleppe*, 96 Wn.2d 373, 381 (1982), *see: State v. Partin*, 88 Wn.2d 899, 906 (1977), *overruled, on other grounds, State v. Lyons*, 174 Wn.2d 354 (2012), *but see: State v. Blake*, 197 Wn.2d 170 (2021); here, trial court correctly instructed jury as to unwitting possession, and properly declined to give defendant's erroneous instruction; reverses *State v. Staley*, 69 Wn.App. 222 (1993); 9-0.

***State v. Hutchins***, 73 Wn.App. 211, 214-15 (1994)

Defendant is charged with possessing with intent to deliver one bag containing 14 oz. marijuana, court admits testimony from police as to "normal quantity" seized in an arrest, packaging and expected profit margin, trial court instructs as to lesser of possession; held: evidence of packaging and profits is irrelevant where only evidence presented is bare possession of a quantity of marijuana, *see: State v. Wade*, 98 Wn.App. 328, 338-42 (1999), *State v. Campos*, 100 Wn.App. 218 (2000), *State v. Huynh*, 107 Wn.App. 68, 76-78 (2001); III.

***State v. Taylor***, 74 Wn.App. 111, 122-24 (1994)

Search reveals 15 g. cocaine, 1 g. heroin, one bottle diazepam, baggies, scales, large amount of cash, defendant challenges conviction of possession with intent to deliver heroin and diazepam; held: presence of contraband with packaging and processing materials will support finding of intent to deliver, *State v. Lane*, 56 Wn.App. 286, 297-8 (1989), *State v. Zunker*, 112 Wn.App. 130 (2002), *State v. Slighte*, 157 Wn.App. 618, 627-28 (2010), *State v. Reichert*, 158 Wn.App. 374, 389-92 (2010); state need not present evidence defendant was dealing each drug in his possession separately in order to establish possession with intent; I.

***State v. Carter***, 77 Wn.App. 8, 13-14 (1995)

Constructive possession is established where drugs are found in wallet in footlocker beneath inmate-defendant's bed in cell shared with two other inmates, footlocker contained mail addressed to defendant, wallet contained items belonging to defendant and defendant was lethargic and unresponsive; III.

***State v. Roberts***, 80 Wn.App. 342 (1996)

Defense to VUCSA charge is that defendant-landlord was aware of marijuana grow operation in basement but that he had no dominion and control, trial court excludes evidence establishing tenant's exclusive possession of basement; held: by establishing dominion and control over premises, state makes a *prima facie* case sufficient to raise a rebuttable presumption of constructive possession of the contraband, *State v. Perry*, 10 Wn.App. 159, 162 (1974); a landlord's purported ability to evict a tenant does not amount to dominion and control over premises sufficient to support an inference of constructive possession of the contraband; landlord is not an accomplice by accepting rent, paying utilities, not exercising self-help to terminate the grow operation, not contacting police or otherwise terminating tenancy, *State v. Amezola*,

49 Wn.App. 78, 89 (1987), *overruled, on other grounds, State v. McDonald*,138 Wn.2d 680 (1999) *(dicta), but see: State v. Winterstein*, 140 Wn.App. 676, 685-87 (2007), *rev'd, on other grounds*, 167 Wn.2d 620 (2009); I.

***State v. Hernandez***, 85 Wn.App. 672 (1997)

Where police observe suspect deliver what appears to be a controlled substance, arrest suspect and find drugs, buyer is gone, there is sufficient evidence to convict of delivery; II.

***State v. Castle***, 86 Wn.App. 48, 60-2 (1997)

Court need not specifically instruct jury that mere proximity is not sufficient to establish possession where court properly defines possession, *State v. Portrey*, 102 Wn.App. 898 (2000); I.

***State v. Tadeo-Mares***, 86 Wn.App. 813 (1997)

Evidence establishes defendant leases premises where drugs are found in the only bathroom; held: proof of dominion and control over premises raises a rebuttable presumption there is dominion and control over the contraband in the premises, *State v. Cantabrana*, 83 Wn.App. 204, 208 (1996), *State v. Turner*, 103 Wn.App. 515 (2000), *State v. Summers*, 107 Wn.App. 373, 388-90 (2001), *State v. Listoe*, 15 Wn.App.2d 308 (2020), *but see: State v. Shumaker*, 142 Wn.App. 330 (2007), thus here there was sufficient evidence to establish constructive possession of the drugs, distinguishing *State v. Olivarez*, 63 Wn.App. 484 (1991), *State v. Ponce*, 79 Wn.App. 651 (1995), *overruled, State v. Shumaker*, 142 Wn.App. 330 (2007), *cf.: State v. Amezola*, 49 Wn.App. 78 (1987), *overruled, on other grounds, State v. McDonald*,138 Wn.2d 680 (1999); III.

***State v. Balzer***, 91 Wn.App. 44 (1998)

Unwitting possession must be proved by defendant by preponderance, *State v. Wiley*, 79 Wn.App. 117 (1995), *State v. Rowell*, 138 Wn.App. 780, 784-86 (2007), disapproving *State v. Hundley*, 72 Wn.App. 746 (1994), *aff'd, on other grounds,* 126 Wn.2d 418 (1995); state's interest in protecting society outweighs free exercise of religion to use marijuana, at 52-67; II.

***State v. Miller***, 91 Wn.App. 181, 186 (1998)

Possession of drugs in amounts appropriate for individual use, empty bindles, list with names, numbers and "monetary marks," $96 and a knife, plus officer's testimony on significance of these items, is sufficient to establish intent to deliver, *State v. Zunker*, 112 Wn.App. 130 (2002), *State v. Reichert*, 158 Wn.App. 374, 389-92 (2010), *State v. Slighte*, 157 Wn.App. 618, 627-28 (2010), *State v. Moles*, 130 Wn.App. 461 (2005), *Pers. Restraint of Bell*, 187 Wn.2d 558, 387 P.3d 718, 722-23 (2017), *but see: State v. Kovac*, 50 Wn.App. 117 (1987), *State v. Cobelli*, 56 Wn.App. 921 (1990); II.

***State v. Potts***, 93 Wn.App. 82 (1998)

Officer, in stopping vehicle for driving violation, observes passenger removing "stuff" from his pockets, has defendant-passenger step out, finds syringes under seat, state charges possession of a controlled substance: methamphetamine, proves defendant possessed amphetamine; held: while state need not prove knowledge of a specific controlled substance, *State v. Cleppe*, 96 Wn.App. 373 (1981), *but see: McFadden v. United States*, 576 U.S. 186, 135

S.Ct. 2298, 192 L.Ed.2d 260 (2015), where prosecutor charges a specific substance and court instructs that a specific substance was possessed, either at state's request or without exception from state, then instructions become law of the case, *State v. Ong*, 88 Wn.App. 572, 577 (1997), and state must prove the unnecessary element, *State v. Hudlow*, 182 Wn.App. 266, 284-87 (2014), *State v. Johnson*, 188 Wn.2d 742 (2017); here, because amphetamines and methamphetamine have different chemical compositions, state failed to prove identity of the charged drug; evidence was sufficient to prove constructive possession; III.

***State v. Buford***, 93 Wn.App. 149 (1998)

Police seize pipe with cocaine residue under defendant's hat, defense puts on no evidence, court declines unwitting possession instruction; held: defendant is not entitled to unwitting possession instruction unless evidence presented at trial is sufficient to permit a reasonable juror to find, by a preponderance, that defendant unwittingly possessed contraband, *see: State v. George*, 146 Wn.App. 906, 913-16 (2008); I.

***State v. Wade***, 98 Wn.App. 328, 338-42 (1999)

Possession of nine rocks of cocaine plus respondent's walking away from a van plus respondent's claim ten months earlier that he doesn't use cocaine plus officer's testimony that nine rocks is of a quantity normally held for sale is insufficient to prove intent to distribute, *State v. Brown*, 68 Wn.App. 480 (1993), *State v. Lopez*, 79 Wn.App. 755, 767-68 (1995), *State v. Hutchins*, 73 Wn.App. 211, 216 (1994), *State v. Hagler*, 74 Wn.App. 232 (1994), *State v. Huynh*, 107 Wn.App. 68, 76-78 (2001), *see also: State v. Hotchkiss*, 1 Wn.App.2d 275 (2017); "at some point, the quantity of drugs could be large enough to raise an inference that the drugs were possessed with intent to distribute," at 340, but nine rocks weighing 1.3 grams is not enough; II.

***State v. McNeal***, 98 Wn.App. 585, 595-96 (1999), *aff'd, on other grounds*, 145 Wn.2d 352 (2002)

Four plastic baggies "full of methamphetamine" plus syringe full of liquid meth, a razor blade, four empty baggies, $4250 cash, plus testimony that the baggies were of the same weight indicating likely for sale is sufficient to prove intent to deliver, *State v. Zunker*, 112 Wn.App. 130 (2002), *State v. Slighte*, 157 Wn.App. 618, 627-28 (2010), *State v. Reichert*, 158 Wn.App. 374, 389-92 (2010), *Pers. Restraint of Bell*, 187 Wn.2d 558, 387 P.3d 719, 723-24 (2017); II.

***State v. Campos***, 100 Wn.App. 218 (2000)

Defendant found in possession of 25 grams of rock cocaine, $1750 in small denominations, pager, cell phone, piece of paper with columns of numbers and the Spanish word for "snow," police testify that 25 grams is more consistent with dealing, cash in small denominations is consistent with drug sales, pagers and cell phones are "tools of the trade" for dealers, snow is slang for cocaine, defendant claims drugs were for personal use, provides innocent explanations for other evidence, jury convicts of possession with intent to deliver; held: while possession of a large amount of drugs, without more, is insufficient, *State v. Brown*, 68 Wn.App. 480, 485 (1993), additional factors, including cash, *State v. Hagler*, 74 Wn.App. 232, 235-36 (1994), *State v. Lopez*, 79 Wn.App. 755, 768-69 (1995), *State v. McPherson*, 111 Wn.App. 747 (2002), will support a finding of intent to deliver, *State v. Davis*, 79 Wn.App. 591, 594 (1995), *State v. Zunker*, 112 Wn.App. 130 (2002), *State v. Moles*, 130 Wn.App. 461 (2005),

*State v. Missieur*, 140 Wn.App. 181 (2007), *State v. Montgomery*, 163 Wn.2d 577 (2008), *see also: State v. Hotchkiss*, 1 Wn.App.2d 275 (2017), *but see: State v. Huynh*, 107 Wn.App. 68, 76-78 (2001), *State v. Valencia*, 148 Wn.App. 302 (2009) *rev'd, on other grounds*, 169 Wn.2d 782 (2010); 2-1, III.

***State v. Todd***, 101 Wn.App. 945 (2000), *overruled, on other grounds, State v. Rangel-Reyes*, 119 Wn.App. 494 (2003)

Police discover meth lab, four items containing meth residue or compounds used in production of meth contain defendant's fingerprints, defendant is convicted of manufacturing methamphetamine and possession with intent to deliver based solely upon fingerprints; held: fingerprint evidence alone is sufficient to support a conviction where evidence establishes that print could only have been impressed at the time the crime was committed, *State v. Bridge*, 91 Wn.App. 98, 100-1 (1998), *State v. Lucca*, 56 Wn.App. 597, 599 (1990); here, more than one fingerprint on objects only used to manufacture drugs and evidence that the objects had not recently been purchased were sufficient to convict of manufacturing, *State v. Jacobs*,121 Wn.App. 669, 680-82 (2004), *cf.: State v. Cote*, 123 Wn.App. 546 (2004); because the manufacturing process was incomplete, there was insufficient evidence of intent to deliver, *but see: State v. Zunker*, 112 Wn.App. 130, 138-41 (2002), *State v. Keena*, 121 Wn.App. 143 (2004), *State v. Forrester*, 135 Wn.App. 195, 201-04 (2006); II.

***State v. Alvarez***, 105 Wn.App. 215 (2001)

Respondent is found in apartment, police find gun in back bedroom closet, photographs of respondent taped to wall of closet, some of his clothes in room, savings account deposit books in his name in shoebox by bed, court finds constructive possession; held: evidence is insufficient to conclude respondent exercised dominion and control over the premises, *State v. Partin*, 88 Wn.2d 899, 906 (1977), *overruled, on other grounds, State v. Lyons*, 174 Wn.2d 354 (2012), *State v. Callahan*, 77 Wn.2d 27, 31 (1969), *State v. Hagen*, 55 Wn.App. 494 (1989), *State v. Enlow*, 143 Wn.App. 463 (2008), *State v. George*, 146 Wn.App. 906, 919-24 (2008), *State v. Embry*, 171 Wn.App. 714, 746-48 (2012), *see: State v. Davis*, 176 Wn.App. 849 (2013), *cf.: State v. Lakotiy*, 151 Wn.App. 699, 713-15 (2009), *but see: State v. Ibarra-Erives*, 23 Wn.App.2d 596 (2022); III.

***State v. Huynh***, 107 Wn.App. 68, 76-78 (2001)

Police observe defendant take wrapped white object from another man and attempt to hand the other man something, defendant runs when he sees police, tosses package, police recover tossed package containing 22 grams of "warm soft cocaine," find $900 on defendant, jury convicts of possession with intent, trial court arrests judgment and convicts of possession, state appeals; held: mere possession of large quantity of drugs plus officer's opinions that defendant intended to deliver is insufficient to find intent to deliver, *State v. Lopez*, 79 Wn.App. 755, 768 (1995); evidence that the cocaine was "freshly cooked" without evidence that a user could not receive drugs directly from a manufacturer is insufficient; absence of a pipe or other paraphernalia indicative of personal use only shows that defendant did not intend to use the drugs shortly after he received them, *State v. Hutchins*, 73 Wn.App. 211 (1994); I.

***State v. Summers***, 107 Wn.App. 373, 383-88 (2001)

Firearm is found under felon's pillow, defendant claims weapon belongs to a friend, might have defendant's fingerprints as he had handled it in the past, trial court declines to instruct that possession does not entail only a momentary handling or that fleeting possession is not unlawful; held: while possession is more than passing control and momentary handling, without more, is insufficient to prove possession, evidence of momentary handling, when combined with other evidence such as dominion and control of premises or motive to hide the item from police, is sufficient to prove possession, *State v. Ibarra-Erives,* 23 Wn.App.2d 596 (2022); even passing control of contraband is not legal, it is merely insufficient to prove possession, *see:* *State v. Callahan*, 77 Wn.2d 27 (1969), *State v. Werry*, 6 Wn.App. 540 (1972), *State v. Bowman*, 8 Wn.App. 148 (1972), *State v. Staley*, 123 Wn.2d 794 (1994), *State v. George*, 146 Wn.App. 906, 919-24 (2008), *State v. Davis*, 176 Wn.App. 849 (2013); II.

***State v. Zunker***, 112 Wn.App. 130 (2002)

Police stop defendant in vehicle, find 2 grams of methamphetamine, bottles of cold pills with ground up pills, scale with residue, notebooks with names, phone numbers and credit card numbers, tank with trace amounts of anhydrous ammonia, is convicted of manufacturing a controlled substance and possession with intent to deliver; held: no minimum quantity of drugs is necessary to support a finding of intent to deliver, as long as other factors, such as cash and paraphernalia, are present, *State v. Hagler*, 74 Wn.App. 232, 236 (1994), *State v. Slighte*, 157 Wn.App. 618, 627-28 (2010), *see: State v. Taylor*,74 Wn.App. 111, 122-24 (1994), *State v. Miller*, 91 Wn.App. 181, 186 (1998), *State v. McNeal*, 98 Wn.App. 585, 595-96 (1999), *aff'd on other grounds*,145 Wn.2d 352 (2002), *State v. Campos*, 100 Wn.App. 218 (2000), *see also: State v. Hotchkiss*, 1 Wn.App.2d 275 (2017); ground up pseudoephedrine plus anhydrous ammonia is sufficient to conclude defendant manufactured methamphetamine, *State v. Keena*, 121 Wn.App. 143 (2004), *State v. Forrester*, 135 Wn.App. 195, 201-03 (2006), *see: State v. Todd*, 101 Wn.App. 945 (2000); 2-1, III.

***State v. Cote***, 123 Wn.App. 546 (2004)

Defendant, seen as a passenger in a stolen truck containing components of a meth lab including two chemical jars with defendant's fingerprints, is convicted of possession with intent to manufacture; held: "totality of the situation" establishes only proximity and mere handling of chemicals, insufficient to establish constructive possession, *State v. Callahan*, 77 Wn.2d 27 (1969), *State v. Knapstad*, 41 Wn.App. 781 (1985), *aff'd,* 107 Wn.2d 346 (1986), *State v. Amezola*, 49 Wn.App. 78 (1987), *overruled, on other grounds*, *State v. McDonald*, 138 Wn.2d 680 (1999), *State v. Hagen*, 55 Wn.App. 494 (1989), *State v. Spruell*, 57 Wn.App. 383 (1990), *see: State v. Chouinard*, 169 Wn.App. 895 (2012), *but see: State v. Bradford*, 60 Wn.App. 857 (1991), *State v. Enlow*, 143 Wn.App. 463 (2008), *State v. George*, 146 Wn.App. 906, 919-24 (2008), *State v. Lakotiy*, 151 Wn.App. 699, 713-15 (2009); III.

***State v. Martinez***, 123 Wn.App. 841 (2004)

Defendant grabs a juvenile's arm, momentarily puts cocaine in the palm of her hand without letting go, she immediately refuses the cocaine, shoving it back to defendant, defendant is convicted of delivery to a minor; held: delivery requires a transfer from one person to another, RCW 69.50.101(f), which necessarily involves relinquishing control, *State v. Morris*, 77 Wn.App. 948, 951 (1995); here, evidence was insufficient to establish a completed delivery; II.

***State v. Moles***, 130 Wn.App. 461 (2005)

Possession of large numbers of pseudoephedrine pills removed from blister packs is sufficient to convict of possession of pseudoephedrine with intent to manufacture methamphetamine, *State v. McPherson*, 111 Wn.App. 747, 759 (2002), *State v. Missieur*, 140 Wn.App. 181 (2007), *cf.: State v. Whalen*, 131 Wn.App. 58 (2005), *State v. Montgomery*, 163 Wn.2d 577 (2008); II.

***State v. Whalen***, 131 Wn.App. 58 (2005)

Defendant steals several boxes of pseudoephedrine, admits he was going to manufacture meth; held: mere possession of pseudoephedrine is insufficient to establish *corpus delicti* of possession with intent to manufacture, RCW 69.50.440, *see: State v. Cobelli*, 56 Wn.App. 921 (1990), *State v. Montgomery*, 163 Wn.2d 577 (2008), *but see:* RCW 69.50.440, *State v. Moles*, 130 Wn.App. 461 (2005), *cf.: State v. Missieur*, 140 Wn.App. 181 (2007), *State v. Hotchkiss*, 1 Wn.App.2d 275 (2017); 2-1, II.

***State v. G.M.V.***, 135 Wn.App. 366, 374-75 (2006)

Respondent moved from bedroom to basement, police search bedroom and find contraband; held: when a minor lives with her parents, court cannot presume dominion and control from her mere residence in the home, *State v. Douglas S.*, 42 Wn.App. 138, 142 (1985), fact that bedroom was respondent's even a day before the search is insufficient; III.

***State v. Chavez***, 138 Wn.App. 29 (2007)

Officer hears a snorting noise coming from a barroom bathroom stall, observes three men in stall, one man leaves, another man, who is seen holding a dollar bill with white powder, attempts to hand bill to defendant who refuses it, police arrest defendant, find drugs in wallet; held: police did not see defendant holding drugs, using them or in dominion and control; an aspect of dominion and control is that defendant may immediately reduce object to actual possession, which here defendant refused to do, thus police lacked probable cause, search of wallet was unlawful; III.

***State v. Rowell***, 138 Wn.App. 780 (2007)

Burden to prove unwitting possession is on defense, distinguishing *State v. Carter*, 127 Wn.App. 713, 718 (2005), wherein burden of proving unwitting possession of an unlawful firearm is on state because knowledge is an element of possession of a firearm, *State v. Michael*, 160 Wn.App. 522 (2011); III.

***State v. Messieur***, 140 Wn.App. 181 (2007)

Evidence that defendant shoplifted 30 boxes of pseudoephedrine, more found in his car with 64 lithium batteries is sufficient to convict for possession of pseudoephedrine with intent to manufacture methamphetamine, *State v. McPherson*, 111 Wn.App. 747, 759 (2002), *State v. Moles*, 130 Wn.App. 461 (2005), *State v. Montgomery*, 163 Wn.2d 577 (2008); I.

***State v. Winterstein***, 140 Wn.App. 676, 685-87 (2007), *reversed, on other grounds*, 167 Wn.2d 620 (2009)

Where a landlord is present, aware of drug manufacturing and fails to take affirmative steps to stop it, *State v. Roberts*, 80 Wn.App. 342 (1996), trial court need not give special accomplice instructions, *State v. Roberts, supra.*, at 355-57, standard accomplice instruction is adequate; II.

***State v. Schumaker,*** 142 Wn.App. 330 (2007)

Dominion and control over premises (here, a car) does not create an inference of dominion and control over drugs, *State v. Olivarez*, 63 Wn.App. 484 (1991), overruling *State v. Ponce*, 79 Wn.App. 651 (1995), *but see: State v. Tadeo-Mares*, 86 Wn.App. 813 (1997); III.

***State v. Enlow***, 143 Wn.App. 463 (2008)

Defendant David Enlow is found hiding in the bed of a truck that contains drugs, truck is not registered to defendant, resident of house asks police what he should do with "David's truck," defendant's identification card is found in bed of truck, defendant's fingerprints are on property in truck but not on items containing drugs; held: while exclusive control of a vehicle is not necessary to establish constructive possession, mere proximity alone is insufficient to infer constructive possession, *State v. Turner*, 103 Wn.App. 515, 521-24 (2000), *State v. Cote*, 123 Wn.App. 543, 549 (2004), *State v. Callahan*, 77 Wn.2d 27, 28-31 (1969), *State v. Spruell*, 57 Wn.App. 383, 388-89 (1990), *see: State v. Chouinard*, 169 Wn.App. 895 (2012), *cf.: State v. Lakotiy*, 151 Wn.App. 699, 713-15 (2009), *State v. Hathaway*, 161 Wn.App. 634, 646-49 (2011), *State v. Listoe*, 15 Wn.App.2d 308 (2020), thus reversed; 2-1, III.

***State v. George***, 146 Wn.App. 906, 919-24 (2008)

Trooper stops vehicle for speeding, smells marijuana, removes all occupants including defendant from rear seat, finds hookah with marijuana residue under driver's seat in front of where defendant was sitting; held: mere proximity to defendant is insufficient to convict of possession of drugs, *State v. Gutierrez*, 50 Wn.App. 583 (1988), *State v. Spruell*, 57 Wn.App. 383 (1990), *State v. Alvarez*, 105 Wn.App. 215 (2001), *State v. Summers*, 107 Wn.App. 373, 383-88 (2001), *State v. Cote*, 123 Wn.App. 546 (2004), *State v. Embry*, 171 Wn.App. 714, 746-48 (2012), *see: State v. Chouinard*, 169 Wn.App. 895 (2012), *but see: State v. Mathews*, 4 Wn.App. 653 (1971), *cf.: State v. Hathaway*, 161 Wn.App. 634, 646-49 (2011), *State v. Ibarra-Erives*, 23 Wn.App.2d 596 (2022), knowledge of the presence of marijuana is insufficient to prove dominion and control, *State v. Davis*, 16 Wn.App. 657, 659 (1977); 2-1, I.

***State v. Valencia***, 148 Wn.App. 302 (2009), *rev'd, on other grounds,* 169 Wn.2d 782 (2010)

Defendants seen leaving a house that contained 68 pounds of marijuana, $126,000 cash, other items used in a "major marijuana distribution operation," defendants seen carrying garbage bags "that appeared to contain something light," others seen leaving house with similar bags including driver "using counter-surveillance techniques, police smell odor of marijuana in defendants' cars, all sufficient to prove possession with intent to deliver; large amounts of marijuana plus cash plus weapons, communication devices, scales, packaging materials are sufficient, *State v. Campos*, 100 Wn.App. 218, 224 (2000), *cf.: State v. Brown*, 68 Wn.App. 480 (1993), *State v. Hotchkiss*, 1 Wn.App.2d 275 (2017); even though police did not discover any marijuana on defendants' persons or in their cars, circumstantial evidence supports the charge; II.

***State v. Bowen***, 157 Wn.App. 821, 827-28 (2010)

"An individual's sole occupancy and possession of a vehicle's keys sufficiently supports a finding that the defendant had dominion and control over the vehicle's contents," at 828 ¶ 15, *State v. Listoe,* 15 Wn.App.2d 308 (2020), *State v. Potts*, 1 Wn.App. 614, 617 (1969); II.

***State v. Reichert***, 158 Wn.App. 374, 389-92 (2010)

Marijuana in house plus plastic bags on regrigerator, some with cut tops, some with marijana residue, dollar amounts written on box of plastic bag along with weights plus scale tainted with residue is sufficient to prove intent to deliver; II.

***State v. Michael***, 160 Wn.App. 522 (2011)

It is not ineffective assistance of counsel for defense attorney not to offer an unwitting possession instruction in unlawful possession of a firearm case because knowledge is an element state must prove while burden on unwitting possession is on defense, *State v. Rowell,* 138 Wn.App. 780 (2007), *State v. Carter,* 127 Wn.App. 713, 718 (2005); III.

***State v. Hathaway***, 161 Wn.App. 634, 646-49 (2011)

Deputy arrests defendant for suspended license, while patting her down hears something drop to ground, finds vial with drugs, at trial defense requests **mere proximity instruction**; held: where possession of drug case does not rest solely on proximity, court need not give a separate proximity instruction, *State v. Castle,* 86 Wn.App. 48 (1997), *State v. Portrey,* 102 Wn.App. 898, 903 (2000); II.

***State v. Higgs***, 177 Wn.App. 414, 435-38 (2013)

There is no minimum quantity requirement to be convicted of possession of a controlled substance, *State v. Larkins,* 79 Wn.2d. 392, 394 (1971), *State v. Rowell,* 138 Wn.App. 780, 786 (2007), *State v. Malone*, 72 Wn.App. 429, 439 (1994), *State v. Williams,* 62 Wn.App. 748, 751 (1991); II.

***State v. Listoe***, 15 Wn.App.2d 308 (2020)

Defendant-driver is stopped for expired registration, police claim he made furtive movements and didn't stop right away, defendant says he isn't the owner, passenger is allowed to leave, pursuant to a bench warrant defendant is arrested, searched, drugs found, drug dog alerts to drugs in the car, search discloses more drugs in back seat, no other evidence ties defendant to the vehicle, defendant is convicted of possession of drugs in the car; held: considering evidence in light most favorable to the state, the fact that defendant was driving, that he had drugs on his person, furtive movements could lead a rational trier of fact to conclude defendant had constructive possession, *State v. Bowen*, 157 Wn.App. 821, 828 (2010), *State v. Turner*, 103 Wn.App. 515, 523-24 (2000), *cf.: State v. Chouinard,* 169 Wn.App. 895 (2012), *State v. Hagen*, 55 Wn.App. 494 (1989); II.

***State v. Blake***, 197 Wn.2d 170 (2021)

Washington's strict liability drug possession statute, RCW 69.50.4013, violates due process clauses and is void, *see also: State v. A.L.R.H.*, 20 Wn.App.2d 384 (2021); 5-4.

***State v. Sprague***, 16 Wn.App.2d 213 (2021)

Police serve search warrant, seize 9-10 grams of meth, a homemade pipe, a metal container with methamphetamine residue, a scale, and a bundle of plastic grocery bags, defendant confesses to dealing, is convicted of **possession with intent to deliver**; held: quantity alone is insufficient to establish intent to deliver, *State v. Cobelli*, 56 Wn.App. 921 (1990), possession of other items is consistent with both innocence and guilt as to intent to deliver, thus evidence is insufficient to establish *corpus* of the charged crime, *State v. Brockob*, 159 Wn.2d 311 (2006), *State v. Aten*, 130 Wn.2d 640, 660 (1996), *State v. Cardenas-Flores*, 189 Wn.2d 243 (2017), thus statements were improperly admitted, however the evidence absent the confession established a *prima facie* case of possession with intent to deliver, thus there was sufficient evidence to convict, *State v. O'Connor*, 155 Wn.App. 282, 290-91 (2010), *State v. Lane*, 56 Wn.App. 286 (1989), *State v. Simpson*, 22 Wn.App. 572, 575 (1979); unlike the corpus delicti analysis, the sufficiency of the evidence analysis does not involve evaluation of hypotheses of innocence; II.

***State v. A.L.R.H.,*** 20 Wn.App.2d 384 (2021)

Possession of marijuana by a juvenile, former RCW 69.50.4014, violates due process, *State v. Blake*, 197 Wn.2d 170 (2021); II.

***State v. Ibarra-Erives***, 23 Wn.App.2d 596 (2022)

Police serve search warrant, find drugs in backpack in a closet, defendant says he lives in the room, has drug paraphernalia and $591 cash in pockets that detective says is "consistent with drug sales," is convicted of possession with intent to deliver; held: ties to the apartment exceeded that of an overnight guest, admission he lived in the unit and slept in the bedroom, discovery of his clothes and medications in bedroom is sufficient to prove constructive possession, *State v. Mathews*, 4 Wn.App. 653, 658 (1971), distinguishing *State v. George*, 146 Wn.App. 906, 913 (2008), *State v. Callahan*, 77 Wn.2d 27, 29 (1969), *but see: State v. Alvarez*, 105 Wn.App. 215 (2001); II.

# WELFARE FRAUD

***State v. Harvey***, 25 Wn.App. 392 (1980)

Welfare fraud of less than $250 is theft in the third degree; I.

***State v. Warren***, 25 Wn.App. 886 (1980)

Plaintiff need not prove defendant was ineligible for public assistance under a different category; I.

***Bazan v. DSHS***, 26 Wn.App. 16 (1980)

Civil case akin to *State v. Warren*, 25 Wn.App. 886 (1980); approves 25% penalty; I.

***State v. Ermert***, 94 Wn.2d 839 (1980)

Statute requires that welfare recipients report "income or resources" only; public assistance payments are not "income or resources," and do not have to be reported; here, defendant saved her public assistance moneys and bought a car; court held no crime was committed; fact that WACs purport to require additional reporting cannot result in criminal liability as there is an improper legislative delegation; 8-0.

***State v. Matthews***, 28 Wn.App. 198 (1981)

State need not establish which of two defendants was principal and which was accomplice; II.

***State v. Wallace***, 97 Wn.2d 846 (1982)

Defendant failed to report as income funds provided to her by her imprisoned husband under instructions from him directing her to purchase tools for him, theft 1° conviction reversed for lack of proof that defendant had actual knowledge that the funds were "available for her use;" 9-0.

***State v. Holmes***, 98 Wn.2d 590 (1983)

Welfare fraud statute, RCW 74.08.331, does not unconstitutionally delegate legislative authority to DSHS and is not vague; 9-0.

***State v. Carrier***, 36 Wn.App. 755 (1984)

Defendant is charged with welfare fraud over three-year period, some transactions occurred outside statute of limitations; held: series of transactions, some of which occur outside statute may be charged when acts comprise one continuous crime, *State v. Mehrabian*, 175 Wn.App. 678, 690-95 (2013); II.

***State v. Brisebois***, 39 Wn.App. 156 (1984)

To establish a *prima facie* case of welfare fraud, RCW 74.08.331, state must establish ineligibility only as to the program under which benefits were received; if defense produces some evidence of eligibility under another program, the state must then prove ineligibility under

that program beyond a reasonable doubt as an element of the offense; statute of limitations does not begin to run until crime is completed; I.

***In re Taylor***, 105 Wn.2d 67 (1985), *superseded, on other grounds, Pers. Restraint of St. Pierre,* 118 Wn.2d 321 (1992)

RCW 50.36.010, knowingly giving false information to obtain unemployment compensation, does not have the same elements as RCW 9A.56.030, theft, thus there is no equal protection violation; because RCW 50.36.010 expressly provides that the penalty under that section is not exclusive, then the general/special rule of *State v. Danforth*, 97 Wn.2d 255 (1982) is inapplicable, and defendant who commits unemployment compensation fraud may be charged under the general theft statute; 9-0.

***State v. Delcambre***, 116 Wn.2d 444 (1991)

Intent to deprive is not an element of welfare fraud, RCW 74.08.331; *affirms* *State v. Delcambre*, 55 Wn.App. 681 (1989); 9-0.

***State v. LaRue***, 74 Wn.App. 757 (1994)

Evidence is insufficient to convict of welfare fraud, RCW 74.08.331, where there is no evidence that defendant knew of the statutory obligation to notify DSHS of income, RCW 74.04.300, as an element of the crime is a willful failure to notify DSHS of change of circumstance; I.

***State v. Campbell***, 125 Wn.2d 797 (1995)

Dollar amount unlawfully obtained is an element of welfare fraud that must be charged in information, *State v. Sass*, 94 Wn.2d 721 (1980), *State v. Bryce*, 41 Wn.App. 802 (1985), *reversing, in part*, *State v. Campbell*, 69 Wn.App. 302 (1993), *see:* *State v. Hull*, 83 Wn.App. 786 (1996); 9-0.

***State v. Williams***, 132 Wn.2d 328 (1997)

At DSHS administrative hearing, defendant is found to have been overpaid public assistance, ordered to repay, state charges defendant with welfare fraud, defense seeks dismissal; held: purposes underlying administrative hearings and criminal trials are wholly distinct, state would suffer an injustice if collateral estoppel doctrine were to apply, reversing *State v. Williams*, 78 Wn.App. 593 (1995), *see:* *State v. Cleveland*, 58 Wn.App. 634 (1990), *State v. Dupard*, 93 Wn.2d 268 (1980), *State v. Vasquez*, 148 Wn.2d 303 (2002); 7-2.

# WIRETAP/RECORDINGS

***State v. Cunningham***, 93 Wn.2d 823 (1980), *op. modified*, 95 Wn.2d 616 (1981)

Transcripts of recordings could not be used unless authenticated by stipulation or proof of accuracy; RCW 9.73 should be complied with, but may be harmless error, *see: State v. Mazzante*, 86 Wn.App. 425 (1997), *Lewis v. Dep't of Licensing*, 157 Wn.2d 446 (2006), *State v. Courtney*, 137 Wn.App. 376 (2007); 9-0.

***State v. Williams***, 94 Wn.2d 531 (1980)

State privacy act, RCW 9.73.030(1), prohibits any person from intercepting or recording private conversations, even federal agents acting lawfully under federal law, and fruits must be suppressed; a participant in an unlawfully recorded conversation who was a party to the illegal recording cannot testify to the contents of the conversation; a defendant has standing to object to illegally recorded conversations even if defendant was not a participant in the conversation; recordings of threats of extortion, blackmail or bodily harm are admissible as a statutory exception, per RCW 9.73.030(2)(b), *cf.: State v. Gearhard*, 13 Wn.App.2d 554 (2020); 6-3.

***State v. Jones***, 95 Wn.2d 616 (1981)

Although tape recorded statement does not specifically start with statement that recording is being made, extrinsic evidence may satisfy RCW 9.73.090(1)(b)(i) if it shows suspect was aware of recording, distinguishing *State v. Cunningham*, 95 Wn.2d 616 (1981), *see: State v. Mazzante*, 86 Wn.App. 425 (1997); 9-0.

***State v. Platz***, 33 Wn.App. 345 (1982)

To obtain judicial authorization to secretly tape record a statement per RCW 9.73.090, state must establish probable cause to believe that nonconsenting party committed a felony and that other investigative procedures have been tried and failed or reasonably appear to be unlikely to succeed; state's claim that, absent a recording, the case would be "reduced to a one-on-one swearing contest" meets that test, *State v. Kichinko*, 26 Wn.App. 304, 311 (1980); *United States v. Martin*, 599 F.2d 880, 866-87 (9th Cir. 1979); *Kilgore v. Mitchell*, 623 F.2d 631, 635 (9th Cir. 1980); I.

***State v. Cramer***, 35 Wn.App. 462 (1983)

Where recording is made in violation of RCW 9.73.030, contents, substance and fact that recording was made are all inadmissible; harmless here; I.

***State v. Caliguri***, 99 Wn.2d 501 (1983)

Recordings of threats or other unlawful requests or demands of extortion, blackmail or bodily harm are admissible as a statutory exception to RCW 9.73.030(2)(b), and include recordings of conversations involving the implementation of threats previously made, *see also: State v. Valdiglesias LaValle*, 23 Wn.App.2d 934 (2022); 9-0.

***State v. Rupe***, 101 Wn.2d 664 (1984)

Where suspect is not in custody and police tape record a statement, tape must contain statement that conversation is being recorded, RCW 9.73.030(3), and information obtained in violation of RCW 9.73.030(3) is not admissible, RCW 9.73.050; harmless here, as statement was not incriminating, *distinguishing* *State v. Lavaris*, 99 Wn.2d 851 (1983); tape recorded statement must contain an announcement that conversation is being recorded, need not contain consent from suspect; failure to state starting time of interview on tape herein substantially complies with RCW 9.73.090, *State v. Hutchinson*, 85 Wn.App. 720, 741-2 (1997), *rev'd, on other grounds,* 135 Wn.2d 863 (1998), *State v. Demery*, 100 Wn.App. 416, 419-20 (2000), *rev'd, on other grounds*, 144 Wn.2d 753 (2001), *but see:* *State v. Mazzante*, 86 Wn.App. 425 (1997); 9-0.

***State v. Johnson***, 40 Wn.App. 371 (1985)

Witnesses in custody make tape recorded statements to police, recording does not contain statement that recording is being made although tape recorders were visible and witnesses agreed to sign transcripts; held: RCW 9.73.030(3) permits consent to recording to be found in any reasonably effective manner; compliance with RCW 9.73 would not prevent witness from testifying to independent recollection of facts obtained before recording was made; III.

***State v. O'Neill***, 103 Wn.2d 853 (1985)

Police obtain court order to record conversations with one-party consent, defense argues only prosecutor or attorney general are solely authorized to obtain such an order, RCW 9.73.040(1); held: only prosecutor or attorney general may obtain a "no consent" electronic eavesdropping order; police may obtain a "one-party consent" order, RCW 9.73.090(2); 7-0; local police may use information obtained by federal officer from electronic eavesdropping conducted by them in accordance with federal law, even if the information would be inadmissible in state courts, to establish probable cause to obtain a state court order authorizing electronic eavesdropping, *distinguishing* *State v. Williams*, 94 Wn.2d 531, (1980); *accord:* *State v. Pacheco*, 70 Wn.App. 27 (1993); 5-2.

***State v. Johnson***, 104 Wn.2d 179 (1985)

Lawyer calls chief of police to discuss case; unbeknownst to lawyer, chief records telephone call, chief is charged with violating RCW 9.73.080; held: all incoming calls to police may be lawfully recorded, RCW 9.73.090(1)(a); 9-0.

***State v. Ross***, 42 Wn.App. 806 (1986)

Assault victim disappears during trial before she testifies, no record is made as to why she did not appear and what efforts were made to locate her, court admits victim's 911 call as an excited utterance, ER 803(a)(2); held: 911 tapes meet business record requirements, RCW 5.45.020, *State v. Bradley*, 17 Wn.App. 916 (1977); however, where the hearsay content in a business record goes to the heart of an issue at trial, the hearsay should be rejected unless it meets the test of another exception, *State v. White*, 72 Wn.2d 524, 530 (1967); here, confrontation clause violated because unavailability not established, *State v. Guloy*, 104 Wn.2d 412 (1985), *cf.:* *State v. Davis*, 116 Wn.App. 81, 87-88 (2003), *aff'd*, 154 Wn.2d 291 (2005), *see:* *Davis v. Washington*, 165 L.Ed.2d 224 (2006); I.

***State v. Irwin***, 43 Wn.App. 553 (1986)

Requirement of RCW 9.73.130(3)(f) that warrant for surreptitious tape recording contain particular statement showing that normal investigative procedures have failed or reasonably appear to be unlikely to succeed met here where property enclosed by fence, guard dogs protected area, and previous attempts to gain access to neighboring property failed; *accord: State v. Cisneros*, 63 Wn.App. 724 (1992); suppression is not a remedy for failure to give notice to persons whose conversations were recorded within 30 days, RCW 9.73.140; suppression is not a remedy for failure of judge authorizing warrant to give notice to Administrator for the Courts, RCW 9.73.120; I.

***State v. Gelvin***, 43 Wn.App. 691 (1986)

Following arrest, police videotape DUI suspect, fail to state ending time of tape as required by RCW 9.73.090(1)(b)(ii); held: tape is admissible as police substantially complied with statute, and no claim of police misconduct or editing was made, *State v. Rupe*, 101 Wn.2d 664, 685 (1984), *State v. Hutchinson*, 85 Wn.App. 726, 741-2 (1997), *rev'd, on other grounds,* 135 Wn.2d 863 (1998), *State v. Demery*, 100 Wn.App. 416, 419-20 (2000), *rev'd, on other grounds*, 144 Wn.2d 753 (2001), *but see: State v. Mazzante*, 86 Wn.App. 425 (1997); *dicta* that videotape is a recording of conduct and not a private conversation; II.

***State v. Gunwall***, 106 Wn.2d 54 (1986)

Long distance telephone records may only be obtained by police through a search warrant or subpoena; a pen register may only be placed on a telephone line pursuant to a search warrant or court order obtained in accordance with RCW 9.73; *cf.: State v. Riley*, 121 Wn.2d 22 (1993) (telephone line tap), *State v. Wojtyna*, 70 Wn.App. 689 (1993) (intercepted telepager); 9-0.

***State v. Slemmer***, 48 Wn.App. 48 (1987)

A secret tape recording of a meeting where minutes were taken and defendant knew substance of the meeting could be revealed to anyone should not be suppressed as defendant did not have a reasonable expectation of privacy, RCW 9.73.030; I.

***State v. Strandy***, 49 Wn.App. 537 (1987)

Videotape of crime scene may go into jury room with VCR, as it is not susceptible of being overemphasized, *distinguishing State v. Ross*, 42 Wn.App. 806, 812 (1986); II.

***State v. Hawkins***, 53 Wn.App. 598 (1989)

An edited surveillance recording is admissible where at trial state gives both original and edited version to defense and trial judge informs defense that if he believes any relevant information was omitted he can propose his own and defense counsel takes no action, *distinguishing State v. Williams*, 49 Wn.2d 354, 360 (1956); II.

***State v. Knight***, 54 Wn.App. 143 (1989)

Judicial authorization to record a private conversation, RCW 9.73.130(3), will be affirmed if the facts set forth in the application were minimally adequate to support the authorization; police need not exhaust all alternatives to recording, but must seriously consider other techniques, and the authorizing court must be informed of the reasons the alternatives have

been or likely will be inadequate, *State v. Cisneros*, 63 Wn.App. 724 (1992), *State v. Lopez*, 70 Wn.App. 259, 265-7 (1993), *State v. Johnson*, 125 Wn.App. 443, 455-56 (2005); III.

***State v. Fjermestad***, 114 Wn.2d 828 (1990)

Police, with body wire, transmit, but do not record, drug transaction without judicial authorization or consent of dealer; held: when an officer knowingly transmits a private conversation without court authorization or consent of all parties, any evidence obtained, including simultaneous visual observation and assertive gestures, is inadmissible in criminal trial, RCW 9.73.050, *State v. Salinas*, 121 Wn.2d 689 (1993), *State v. Porter*, 98 Wn.App. 631, 637-38 (1999), *see: State v. Jimenez*, 128 Wn.2d 720 (1996), *State v. Costello*, 84 Wn.App. 150 (1996), *State v. Gearhard*, 13 Wn.App.2d 554 (2020), *cf.: Lewis v. Dep't of Licensing*, 157 Wn.2d 446, 471-73 (2006), *State v. Bilgi*, 19 Wn.App. 845 (2021); 6-3.

***State v. Raymer***, 61 Wn.App. 516 (1991)

Soundless video recording of conduct is not prohibited by RCW 9.73; *see: Haymond v. Department of Licensing*, 73 Wn.App. 758 (1994); III.

***State v. Cisneros***, 63 Wn.App. 724 (1992)

Application to record telephone conversation is sufficient where it establishes that drug dealer refused to talk to unknown persons and that recording would help state rebut entrapment and enhance credibility of informant, RCW 9.73.090(2), *State v. Irwin*, 43 Wn.App. 553 (1986), *State v. Knight*, 54 Wn.App. 143 (1989), *State v. Lopez*, 70 Wn.App. 259, 265-7 (1993), *State v. Johnson*, 125 Wn.App. 443, 455-56 (2005); federal cases are inapplicable, as 18 United StatesC. 9' 2518(1)(c) and (3)(c) apply to no-party consent; I.

***State v. Salinas***, 119 Wn.2d 192 (1992)

RCW 9.73.230, authorizing one-party consent where approved by police supervisor on probable cause, does not violate CONST. Art. 1, § 7; *accord: State v. Kadoranian*, 65 Wn.App. 193 (1992), *State v. Pulido*, 68 Wn.App. 59 (1992), *State v. Knight*, 79 Wn.App. 670, 678-9 (1995); 9-0.

***State v. Clapp***, 67 Wn.App. 263 (1992)

Where a tape recording is admitted, trial court may allow jury to have a typewritten transcript to illustrate evidence contained on the tape where state lays a foundation showing its accuracy, *State v. Frazier*, 99 Wn.2d 180 (1983); where witnesses testify they listened to tape and created transcript, and where party to the taped conversation testifies that transcript is accurate, and where judge instructs jury that the transcript is not the evidence and should not be considered as such, then foundation is adequate; II.

***State v. Flora***, 68 Wn.App. 802 (1992)

Suspect who tape records his arrest on a public thoroughfare in the presence of a third party within sight and hearing of passersby cannot be convicted of recording a private conversation, RCW 9.73.030, as the conversation was not secret or intended only for the persons involved in the conversation, *Lewis v. Dep't of Licensing*, 157 Wn.2d 446, 457-60 (2006), *see also: Haymond v. Department of Licensing*, 73 Wn.App. 758 (1994); I.

***State v. Riley***, 121 Wn.2d 22 (1993)

Telephone line trap which traces computer hacking activity to suspect's home is not a private communication, RCW 9.73, as it does no more than discover suspect's telephone number, and does not involve act of imparting or transmitting facts or information communicated, *distinguishing* *State v. Gunwall*, 106 Wn.2d 54 (1986); *see:* *State v. Wojtyna*, 70 Wn.App. 689 (1993); 7-0.

***State v. Salinas***, 121 Wn.2d 689 (1993)

Police officer, wearing hidden recording device without authorization from judge or commanding officer, observes drugs, obtains warrant; held: all information obtained by police officer wearing hidden recording device, including visual observations, is not admissible where police did not obtain written authorization from a commander or judicial order, RCW 9.73.210, .230, *State v. Fjermestad*, 114 Wn.2d 828, 835-6 (1990), *but see:* *State v. Jiminez*, 128 Wn.2d 720 (1996), *State v. Costello*, 84 Wn.App. 150 (1996), *Lewis v. Dep't of Licensing*, 157 Wn.2d 446, 471-73 (2006); *affirms* *State v. Salinas*, 67 Wn.App. 323 (1992); 8-0.

***State v. Moore***, 70 Wn.App. 667 (1993)

Body wire evidence is admissible where there is consent of one party, probable cause that conversation involves delivery or possession with intent to deliver drugs, written authorization by a supervisor, RCW 9.73.230; failure to obtain judicial authorization, and failure to comply with post-recording judicial review requirements, RCW 9.73.230(6), (7), do not make recordings inadmissible, *State v. Salinas*, 121 Wn.2d 689 (1993); I.

***State v. Wojtyna***, 70 Wn.App. 689 (1993)

Police seize a telepager from third party, defendant calls in, police observe incoming phone number displayed on the pager, return call and set up drug deal; held: by transmitting his number to telepager, defendant did not reasonably expect confidentiality, police did not intercept a private communication, thus no violation of RCW 9.73, *but see: State v. Hinton*, 169 Wn.App. 28 (2012), *State v. Roden*, 179 Wn.2d 893 (2014), *see:* *State v. Gunwall*, 106 Wn.2d 54 (1986), *State v. Riley*, 121 Wn.2d 22 (1993), *State v. Bilgi*, 19 Wn.App. 845 (2021); II.

***State v. Gonzalez***, 71 Wn.App. 715 (1993)

Where police exceed the authorized 24-hours of a one-party consent drug transaction recording, and the authorization is not extended by the authorizing officer, RCW 9.73.230, then the recordings and eyewitness testimony during the unauthorized intercept must be suppressed, *see:* *State v. Salinas*, 121 Wn.2d 689, 696-7 (1993); *overruled, in part, State v. Jimenez*, 128 Wn.2d 720 (1996); III.

***State v. Corliss***, 123 Wn.2d 656 (1994)

Informer tilting telephone receiver so that officer can hear conversation with drug dealer does not violate privacy act, RCW 9.73, or constitutions, *State v. Gonzales*, 78 Wn.App. 976 (1995), *cf.: State v. Bowman*, 198 Wn.2d 609 (2021); *affirms* *State v. Corliss*, 67 Wn.App. 708 (1992); 7-2.

***Haymond v. Department of Licensing***, 73 Wn.App. 758 (1994)

Where video camera's audio recording mechanism malfunctions, making audio portion garbled and inaudible from start to finish, then the privacy act, RCW 9.73, is inapplicable, *State v. Raymer*, 61 Wn.App. 516 (1991), and testimony regarding the substance of any conversation taped is admissible, *State v. Fjermestad*, 114 Wn.2d 828 (1990); I.

***State v. Goucher***, 124 Wn.2d 778 (1994)

During search of residence pursuant to warrant, phone rings, police answer, caller asks to buy drugs, police agree, defendant arrives, is sold drugs by police and arrested; held: no reasonable privacy interest under state or United States constitutions for a person to disclose information to an acknowledged stranger on the telephone, *State v. Bowman*, 198 Wn.2d 609 (2021); defendant lacks standing to challenge police answering telephone as beyond scope of warrant; 9-0.

***State v. Jimenez***, 76 Wn.App. 647 (1995), *rev'd on other grounds,* 128 Wn.2d 720 (1996)

Authorization to record a private conversation must specifically state the names of the officers authorized to intercept, transmit and record the conversation, report which names some officers and "any other member" is invalid, RCW 9.73.230(2)(c), *State v. Gonzalez*, 71 Wn.App. 715, 718-9 (1993); written applications for authorizations to record are not required; signed one-party consent is not required; information from an illegally recorded transaction cannot be used to establish probable cause for a warrant; *reversed, as to remedy*, 128 Wn.2d 720 (1996); I.

***State v. Gonzalez***, 77 Wn.App. 479, 483 (1995)

An application for authorization to record a conversation must establish basis of knowledge and reliability when based upon an informant's information, *State v. Lopez*, 70 Wn.App. 259, 263 (1993); III.

***State v. Gonzales***, 78 Wn.App. 976 (1995)

Police, serving search warrant, answer ringing telephone, defense moves to suppress conversation; held: answering phone is neither an intercept nor use of a device, thus RCW 9.73 is not implicated, *State v. Bonilla*, 23 Wn.App. 869, 871-3 (1979), *State v. Corliss*, 123 Wn.2d 656 (1994); answering phone falls within scope of warrant, no legitimate expectation of privacy in incoming calls; I.

***State v. Knight***, 79 Wn.App. 670 (1995)

Police supervisor cannot authorize one-party consent recording outside of his jurisdiction, RCW 9.73.230, *but see: State v. Barron*, 139 Wn.App. 266 (2007); county sheriff captain may authorize recording in incorporated municipalities within his county; submitting recording to judge for probable cause determination beyond 15 days after the recording, RCW 9.73.230(7)(a), is not grounds for suppression, as noncompliance with post-invasion statutory requirements should warrant reversal only if state fails to show substantial compliance, or defendant establishes prejudice; II.

***State v. Sengxay***, 80 Wn.App. 11, 15 (1995)

Failure to object to unlawfully taped confession, RCW 9.73.030, waives issue; III.

***State v. Faford***, 128 Wn.2d 476 (1996)

Neighbor uses scanner to listen to defendants' cordless telephone convesations, relays information to police about a marijuana farm, police go to defendants' home, advise one defendant about their knowledge and ask to seize marijuana, defendant ultimately agrees; held: scanner interceptions of cordless telephone conversations violate privacy act, RCW 9.73, *State v. Christensen*, 153 Wn.2d 186 (2004), *State v. Roden*, 179 Wn.2d 893 (2014); consent to search was obtained solely through the knowing exploitation of the illegal interception by the private citizen, thus evidence, including simultaneous physical observations, *State v. Salinas*, 121 Wn.2d 689, 693 (1993), suppressed, *State v. Kipp*, 179 Wn.2d 718 (2014); 6-3.

***State v. Jimenez***, 128 Wn.2d 720 (1996)

Where police attempt to comply with the authorization requirements of RCW 9.73.230, and act in good faith on an invalid authorization, the intercepted or recorded communication itself is inadmissible, however the unaided evidence provision of RCW 9.73.230(8) precludes suppression of any other evidence, including officer's observations,*State v. Costello*, 84 Wn.App. 150 (1996), *State v. Smith*, 85 Wn.App. 381 (1997), overruling, in part, *State v. Gonzalez*, 71 Wn.App. 715 (1993), *reversing, in part*, *State v. Jimenez*, 76 Wn.App. 647 (1995), *cf.: State v. Afana*, 169 Wn.2d 169, 173-84 (2010); 9-0.

***State v. Clark***, 129 Wn.2d 211 (1996)

Undercover informant with court authorization, RCW 9.73.090, records street drug transactions; held: brief transactions involving strangers on a public street which concern the terms of routine drug transactions, some of which took place in the presence of third persons, and some of which were concluded in vehicles at least partially visible to passersby are not private conversations within the meaning of RCW 9.73, *Lewis v. Dep't of Licensing,* 157 Wn.2d 446 (2006), *State v. Babcock*, 168 Wn.App. 598 (2012), *see: Kadoranian v. Bellingham Police Dep't*, 119 Wn.2d 178 189 (1992), *State v. Clark*, 76 Wn.App. 150 (1994), *State v. Hardy*, 76 Wn.App. 188 (1994), *State v. Barron*, 139 Wn.App. 266 (2007), *State v. Clayton*, 11 Wn.App.2d 172 (2019), *State v. J.K.T.*, 11 Wn.App.2d 544 (2019); *affirms State v. D.J.W.*, 76 Wn.App. 135 (1994); 5-4.

***State v. Manning***, 81 Wn.App. 714 (1996)

Affidavit asserting that defendant had been the target of previous drug investigations that ended inconclusively which were terminated because defendant was known to be dangerous meets requirement that affidavit establish inadequacy of normal investigative procedures for wire intercept, RCW 9.73.130(3)(f), *State v. Irwin*, 43 Wn.App. 553, 557 (1986), *State v. Cisneros*, 63 Wn.App. 724, 729 (1992), *State v. Johnson*, 125 Wn.App. 443, 455-56 (2005); boilerplate recitals, desirability of avoiding swearing contests in court, are insufficient, at 721, *State v.Gonzalez*, 17 Wn.App.2d 64 (2021), *cf.: State v.Constance*, 154 Wn.App. 861 (2010); I.

***State v. Baird***, 83 Wn.App. 477, 484-4 (1996)

Trial court suppresses tape recorded by defendant in violation of privacy act, RCW 9.73; held: because the tape was collateral, the interests served by the privacy act justify the limitation of defendant's right to present his defense; I.

***State v. Costello***, 84 Wn.App. 150 (1996)

Application for police authorization to record that does not reveal that a confidential informant would be present is insufficient, *State v. Ridgley,* 17 Wn.App.2d 846 (2021), *see: State v. Jiminez,* 76 Wn.App. 647 (1995), *rev'd on other grounds,* 128 Wn.2d 720 (1996); authorization's conclusive language that drug dealers carry guns is not sufficient; because police in good faith sought to comply with RCW 9.73, officer's testimony is admissible, although recording itself is not, *State v. Jiminez,* 128 Wn.2d at 726, *cf.: State v. Afana,* 169 Wn.2d 169, 173-84 (2010); III.

***State v. Castellanos***, 132 Wn.2d 94 (1997)

Body wire tapes and a tape player may go to the jury room during deliberations where trial court determines the exhibits bear directly on the charge and are not unduly prejudicial, *State v. Frazier,* 99 Wn.2d 180, 189 (1983), *State v. Clapp,* 67 Wn.App. 263, 272 (1992), *State v. Forrester,* 21 Wn.App. 855 (1978), *State v. Elmore,* 139 Wn.2d 250, 293-98 (1999), *State v. Gregory,* 158 Wn.2d 759, 846-48 (2006), *overruled, on other grounds, State v. W.R.,* 181 Wn.2d 757 (2014), *State v. Magnano,* 181 Wn.App. 689 (2014), overruling, in part, *State v. Ross,* 42 Wn.App. 806, 812 (1986); 9-0.

***State v. Forest***, 85 Wn.App. 62 (1997)

Police supervisor authorizes recording of a drug transaction, police record telephone conversation with defendant and, later, the delivery, defense claims RCW 9.73.230 permits only one recording per authorization; held: legislature did not intend to limit police agency authorizations to one conversation per authorization; I.

***State v. Smith***, 85 Wn.App. 381 (1997)

Police know expected address of a communication to be recorded but, in request for authorization for body wire, state that location is "King County;" held: while tape recording itself is suppressed for failure to comply with expected location requirement, RCW 9.73.230(2)(e), police made a "genuine effort to comply," the equivalent of good faith, thus other evidence regarding the transaction is admissible, RCW 9.73.230(2), trial court's admission of the tape itself was thus harmless error, *State v. Jimenez,* 128 Wn.2d 720 (1996), *State v. Afana,* 169 Wn.2d 169, 173-84 (2010); modifies *State v. Smith,* 80 Wn.App. 535, *remanded,* 129 Wn.2d 1022 (1996) I.

***State v. Mazzante***, 86 Wn.App. 425 (1997)

Police tape record confession, defendant acknowledges he had previously been advised of *Miranda* warnings, but warnings are not given on tape, trial court finds substantial compliance, defense obtains interlocutory review; held: failure to advise of rights on the tape requires suppression, as strict compliance is required, RCW 9.73.090(1)(b)(iii), *State v. Cunningham,* 93 Wn.2d 823, 830-1 (1980), distinguishing *State v. Rupe,* 101 Wn.2d 664, 685 (1984), *State v. Jones,* 95 Wn.2d 616, 627 (1981), *State v. Gelvin,* 43 Wn.App. 691, 695-6 (1986), *see also: State v. Demery,* 100 Wn.App. 416, 419-20 (2000), *rev'd, on other grounds,*144 Wn.2d 753 (2001), *Lewis v. Dep't of Licensing,* 157 Wn.2d 446 (2006), *but see: State v. Courtney,* 137 Wn.App. 376 (2007)(harmless error analysis); II.

***State v. Brown***, 132 Wn.2d 529, 583-91 (1997)

California police record defendant's confession without defendant's knowledge; held: RCW 9.73 does not apply to evidence independently and lawfully obtained by another jurisdiction's police, *State v. Mayes*, 20 Wn.App. 184 (1978), *In re Teddington*, 116 Wn.2d 761, 772-3 (1991), *State v. Gwinner*, 59 Wn.App. 119 (1980), *State v. Fowler*, 157 Wn.2d 387 (2006), *cf.: State v. Johnson*, 75 Wn.App. 984 (1994), *see also: Pers. Restraint of Brown*, 143 Wn.2d 431 (2001); 9-0.

***State v. Porter***, 98 Wn.App. 631 (1999)

Police, suspecting drug use, obtain intercept warrant without indicating that police tried, or even considered, other investigative techniques; held: intercept application affidavit must explain why normal investigative procedures are impractical or inadequate, RCW 9.73.130(3)(f); here, usual investigative technique is to obtain a search warrant, no indication in affidavit why this was not tried; mere desire to avoid a swearing contest in court is insufficient, *State v. Manning*, 81 Wn.App. 714, 720 (1996), *cf.: State v. Constance*, 154 Wn.App. 861 (2010); because intercept was unlawful, defendant's arrest was unlawful and observation of defendant trying to destroy drugs while in custody is suppressed, *State v. Fjermestad*, 114 Wn.2d 828, 835-36 (1990); III.

***State v. Demery***, 100 Wn.App. 416 (2000), *rev'd, on other grounds,* 144 Wn.2d 753 (2001)

Taped confession states incorrect start time, officer testifies he misread watch; held: substantial compliance with RCW 9.73.090(1)(b)(ii) precludes suppression, *State v. Rupe*,101 Wn.2d 664, 685 (1984), *State v. Gelvin*, 43 Wn.App. 691, 695-96 (1986), distinguishing *State v. Mazzante*, 86 Wn.App. 425, 429-30 (1997); failure to redact interrogating officer's statements on tape that suspect is lying is constitutional error as it amounts to officer's opinion as to guilt; II.

***State v. Matthews***, 101 Wn.App. 894 (2000)

Tacoma police authorize recording telephone conversation from a drug dealer suspected of dealing from Tacoma, dealer returns call from Sumner, moves to suppress, RCW 9.73.230(3); held: where a recording is made within a police agency's jurisdiction, an interception of a call involving drug activity from outside the jurisdiction is valid, *Kadoranian v. Bellingham Police Dep't,* 119 Wn.2d 178, 183-86 (1992); II.

***State v. Koontz***, 145 Wn.2d 650 (2002)

During deliberations, jury reports that it is deadlocked, upon further inquiry from trial court, foreperson advises that jurors who are doubtful of guilt lack enough information, requests that videotaped testimony be replayed; over objection, trial court allows jury to view three witnesses' testimony, instructs that jury should not place undue emphasis on the testimony of those three witnesses; held: video record which moves between different trial participants provides a different view of the trial and increases the likelihood it will be given undue emphasis; determination to play back should balance need to provide relevant portions of testimony to answer a specific jury inquiry against danger of allowing witness to testify a second time; "it is seldom proper to replay the entire testimony of a witness," at 657, *but see: State v. Morgensen*, 148 Wn.App. 81, 86-90 (2008); in spite of trial court's precautions, abuse of discretion to replay here; reverses *State v. Koontz*, 102 Wn.App. 309 (2000); 9-0.

***State v. Jackson***, 113 Wn.App. 762 (2002)

Victim testifies that she listened to 911 tape, it was her voice and it was accurate; held: witness with personal knowledge of conversation who testifies that tape accurately portrays the original conversation and identifies each relevant voice authenticates the evidence, ER 901, *State v. Williams*, 49 Wn.2d 354. 360 (1956), *State v. Smith*, 85 Wn.2d 840, 847 (1975); II.

***State v. Townsend***, 147 Wn.2d 666 (2002)

Defendant e-mails a fictitious juvenile to persuade her to have sex, **e-mail** and ICQ (real-time instant message communication) is admitted at his attempted child rape trial; held: while 1:1 e-mail is private and recorded on a device, pursuant to the privacy act, RCW 9.73.030(1)(a), there is implied consent that it be recorded as e-mail because it must be recorded by the receiving computer, thus e-mail is admissible, *but see: State v. Roden*, 179 Wn.2d 893 (2014); because defendant here encouraged the fictitious juvenile to set up an ICQ account, it is inferred that he was familiar with the technology, knowing that it can be recorded, thus defendant consented to the recording, *State v. Smith*, 189 Wn.2d 655 (2017), distinguishing *State v. Faford*, 128 Wn.2d 476, 481 (1996); affirms *State v. Townsend*, 105 Wn.App. 622 (2001); 8-1.

***State v. Christensen***, 153 Wn.2d 186 (2004)

Mother listens to daughter's cordless telephone conversation with boyfriend who makes incriminating statements which are admitted at trial; held: listening to cordless telephone conversation violates privacy act, RCW 9.73.030(1)(a), thus evidence is inadmissible, RCW 9.73.050, *but see:* 2005 amendments; reverses *State v. Christensen*, 151 Wn.App. 74 (2003); 9-0.

***State v. Johnson***, 125 Wn.App. 443, 455-56 (2005)

Application for one-party consent to record telephone conversation, RCW 9.73.090(2), is "minimally adequate" where it states that normal procedures have not been tried because defendant has provided false statements concerning her involvement in the homicide and that she is likely to engage the consenting party in a cover-up, *State v. Cisneros*, 63 Wn.App. 724, 729 (1992), *State v. Manning*, 81 Wn.App. 714, 720 (1996), *State v. Constance*, 154 Wn.App. 861 (2010); II.

***State v. Fowler***, 157 Wn.2d 387 (2006)

Oregon police record, without consent, telephone conversation from Oregon with defendant in Washington; held: RCW 9.73 does not apply where the recording is made in a state where such a recording is lawful, *State v. Brown*, 132 Wn.2d 529, 583-91 (1997), *see: Kadoranian v. Bellingham Police Dep't,* 119 Wn.2d 178 (1992); silver platter doctrine applies when foreign jurisdiction lawfully obtains evidence and Washington officers did not act as agents or cooperate or assist the foreign jurisdiction, *State v. Martinez,* 2 Wn.App.2d 55, 63 (2018); affirms *State v. Fowler*, 127 Wn.App. 676 (2005); 9-0.

***Lewis v. Dep't of Licensing***, 157 Wn.2d 446 (2006)

Police record conversations at traffic stops, arrest for DUI; held: conversations between police officers and detainees at a traffic stop are not private for purposes of the privacy act, at 458-60, RCW 9.73.030, *State v. Flora*, 68 Wn.App. 802 (1992), *State v. Clayton*, 11 Wn.App.2d 172 (2019), *see: State v. Clark*, 129 Wn.2d 211 (1996), *State v. Babcock*, 168 Wn.App. 598

(2012); an officer's failure to advise a detainee that he was being recorded on the recording violates the privacy act, RCW 9.73.090(1)(c), at 460-67; remedy for recording traffic stop without warning is suppression of the recording, *State v. Cunningham*, 93 Wn.2d 823, 831 (1980), but not exclusion of other evidence acquired at the same time as the improper recordings since the conversation was not private, *State v. Courtney*, 137 Wn.App. 376, 382-85 (2007), distinguishing *State v. Fjermestad*, 114 Wn.2d 828 (1990); reverses *Lewis v. Dep't of Licensing*, 125 Wn.App. 666 (2005) and *Auburn v. Kelly*, 127 Wn.App. 54 (2005); 9-0.

***State v. Gregory***, 158 Wn.2d 759 (2006), *overruled, on other grounds, State v. W.R.*, 181 Wn.2d 757 (2014)

After arrest, police ask to tape record statement, defendant refuses but makes statement, state offers evidence that defendant declined recording; held: testimony that defendant did not consent to recording, where not mentioned in closing argument nor used to imply guilt, does not amount to a comment on a statutory right, at 836-40, *cf.:* RCW 9.73.090(b); jury may watch admitted videotape of crime scene, *State v. Elmore*, 138 Wn.2d 250, 294-96 (1999), no error for bailiff to show video to jurors in courtroom in absence of defendant where bailiff does not improperly communicate with jurors, at 846-48, distinguishing *State v. Caliguri*, 99 Wn.2d 501, 505 (1983), *O'Brien v. City of Seattle*, 52 Wn.2d 543, 546-47 (1958); 8-1.

***State v. Modica***, 136 Wn.App.434, 447-450 (2006)

Jail records telephone conversations after announcing to inmate-caller and recipient that the call is being recorded, court admits recording; held: inmate's expectation of privacy is less that that of a free citizen, no prisoner should reasonably expect privacy in outbound telephone calls, parties to call were on notice that calls were being recorded, both parties consented to the recording by continuing to speak after notice of recording, *State v. Haq*, 166 Wn.App. 221, 249-60 (2012); I.

***State v. Courtney***, 137 Wn.App. 376, 382-85 (2007)

Where police record confession, failure to include *Miranda* warnings on tape is grounds for suppression, *State v. Mazzante*, 86 Wn.App. 425, 428 (1997), harmless here; violation of privacy act does not require suppression of evidence derived from a recorded confession as opposed to a private conversation, RCW 9.73.090, *Lewis v. Dep't of Licensing*, 157 Wn.2d 446, 467 (2006); III.

***State v. Barron***, 139 Wn.App. 266 (2007)

Reserve police officer, with authority from a ranking officer, records a drug transaction outside of his jurisdiction, officer's agency has a Mutual Aid agreement, RCW 10.93, with the jurisdiction in which the recording took place but agreement directs that "advance notice should be given…prior to the exercise of these powers," no notice is provided; held: Mutual Aid agreement authorized the officer to act, consent letter said that advance notice "should" be provided, not "shall," thus police were authorized to make the recording, distinguishing *State v. Knight*, 79 Wn.App. 670, 679 (1995); while a reserve officer is not a general authority peace officer, RCW 10.93.020(5), thus not authorized by the Mutual Aid act to act outside of his jurisdiction in these circumstances, an undercover drug transaction is not encompassed by the Mutual Aid act, and no caselaw supports suppression as a remedy for violation of RCW

10.93.090, *see: State v. Barker,* 98 Wn.App. 439, 446, *rev'd on other grounds,* 143 Wn.2d 915, 922 n.4 (2001); I.

***State v. Modica***, 164 Wn.2d 83 (2008)

Jail records telephone conversations after announcing to inmate-caller and recipient that the call is being recorded, court admits recording; held: inmate has a lessened expectation of privacy, jail security and lack of privilege plus notice that calls were being recorded all lead to conclusion that privacy act does not preclude admissibility of the recordings, *State v. Archie*, 148 Wn.App. 198 (2009), *State v. Mohamed,* 195 Wn.App. 161 (2016); "[s]igns or automated recordings that calls may be recorded or monitored do not, in themselves, defeat a reasonable expectation of privacy;" affirms *State v. Modica,* 136 Wn.App. 434 (2006); 7-2.

***State v. Archie***, 148 Wn.App. 198 (2009)

Where notice is given, jail may record telephone conversations of pretrial detainees, *State v. Haq,* 166 Wn.App. 221, 249-60 (2012), *State v. Mohamed,* 195 Wn.App. 161 (2016), *see: State v. Modica,* 164 Wn.2d 83 (2008); I.

***State v. Constance***, 154 Wn.App. 861 (2010)

One-party consent application to record, RCW 9.73.090, is sufficient where police show that "normal investigative techniques" were inadequate because they have previously questioned defendant about the incident unsuccessfully, crime was solicitation to murder, proof of knowledge is an element, *State v. Porter,* 98 Wn.App. 631, 636 (1999), officer safety is a factor because undercover officer needs quick backup, mere fact that there is some boilerplate language in application does not require suppression, *see: State v. Manning,* 81 Wn.App. 714, 717 (1996); I.

*State v. Babcock,* 168 Wn.App. 598 (2012)

Undercover agent meets jailed defendant in visiting room containing up to 3 inmates, minimal separators, defendant proposes murder, agent obtains warrant and records conversation; held: reasonable person would not have assumed that conversation was private as others were nearby, "possible presence of third parties" reduces expectation of privacy, *State v. Clark,* 129 Wn.2d 211, 225-27 (1996); offer to hire a hit man is a threat, within statutory exception to privacy act, RCW 9.73.030(2)(b) (1986), *State v. Caliguri,* 99 Wn.2d 501, 507-08 (1983); warrant application that must contain a particular showing that other normal investigative procedures reasonably appear unlikely to succeed or too dangerous, RCW 9.73.131(3)(f) (2011) is satisfied where it states that using other inmates to talk to defendant is dangerous, having another inmate wired is difficult and dangerous, *see: State v. Platz,* 33 Wn.App. 345, 350 (1982); II.

***State v. Kipp***, 179 Wn.2d 718 (2014)

Father of victim secretly records conversation with defendant, a relative, who confesses to molestation; held: privacy of conversation depends upon intent or reasonable expectations of participants; factors: (1) duration and subject matter of conversation, (2) location and potential presence of third parties, (3) role of non-consenting party and relationship to consenting parties, *State v. Clark,* 129 Wn.2d 211, 225-27 (1996); here, ten minute conversation suggests privacy,

incriminating statement is the type protected under the privacy act, RCW 9.73.030(1)(b) (1986), *State v. Faford,* 128 Wn.2d 476 (1996), distinguishing *State v. Clark, supra.* at 231, location in private home and fact that the parties were brothers-in-law and no one else present tilts toward reasonable expectation of privacy, recording should have been suppressed; 9-0.

***State v. Hinton****,* 179 Wn.2d 862 (2014)

Officer is handed a smartphone that was seized from an arrestee, defendant sends text message thinking recipient is the arrestee, officer replies, defendant asks to buy drugs, is convicted of attempted possession; held: a text message is a "private affair," protected from warrantless search, CONST. art. I, § 7, a person does not lose all privacy interest in text messages merely because they are disclosed to a recipient, *cf.: State v. Bowman,* 198 Wn.2d 609 (2021), reversing *State v. Hinton,* 169 Wn.App. 28 (2012); 6-3.

***State v. Roden****,* 179 Wn.2d 893 (2014)

Incident to drug arrest of Lee, police seize smartphone, detective looks through the phone, sees a text message offering to sell drugs, posing as arrestee Lee replies, arranges to buy drugs, arrest defendant Roden; held: a text message to an individual, as opposed to a group texting function, manifests a subjective intent of privacy, illicit subject matter indicates a belief in privacy, thus text messages were private communications protected by privacy act, RCW 9.73.030(1), detective reading the texts intercepted the messages, police should have obtained a warrant, thus evidence must be suppressed, *State v. Hinton,* 179 Wn.2d 862 (2014), *cf.: State v. Bowman,* 198 Wn.2d 609 (2021), *see also: State v. Faford,* 128 Wn.2d 476 (1996), *cf.: State v. Townsend,* 147 Wn.2d 666 (2002), *State v. Wojtyna,* 70 Wn.App. 689 (1993), *but see: State v. Bilgi,* 19 Wn.App. 845 (2021); reverses *State v. Roden,* 169 Wn.App. 59 (2012); 5-4.

***State v. Bliss****,* 191 Wn.App. 903 (2015)

District Court judges may authorize one-party consent recordings of telephone conversations, RCW 9.73.090 (2011); II.

***State v. Mohamed****,* 195 Wn.App. 161, 163-68 (2016)

Jail inmate calls defendant, system announces that call is recorded to inmate and recipient who must acknowledge, court admits call; held: jail phone recording is admissible against the caller, *State v. Modica,* 164 Wn.2d 83 (2008), *State v. Haq,* 166 Wn.App. 221, 259-60 (2012), and the recipient, does not violate privacy act, ch. 9.73, RCW, or Fourth Amendment, *State v. Corliss,* 123 Wn.2d 656, 663 (1994), or CONST. art. I, § 7, *State v. Archie,* 148 Wn.App. 198, 204 (2009), even if it is recorded as a tool of investigation; I.

***State v. Novick,*** 196 Wn.App. 513 (2016)

Defendant installs software on victim's smartphone that allows defendant to listen and record everything on it, is convicted of computer trespass, former RCW 9A.52.110 (2011), and intercepting a private communication, RCW 9.73.030 (1986); held: evidence was sufficient to convict of each; multiple convictions for several acts constitute multiple units of prosecution; II.

***State v. Smith****,* 189 Wn.2d 655 (2017)

During assault of victim defendant's voice mail is inadvertently left on after he calls his cellular phone to locate it thus recording the incident, trial court denies suppression under privacy act, RCW 9.73.030 (1986); held: while an inadvertent recording is within the purview of the privacy act, *see: State v. Smith*, 85 Wn.2d 840 (1975), the recording here is not a "conversation" as contemplated by the privacy act; because defendant called his own telephone he took the risk that it would record, thus he is deemed to have consented to the recording, *State v. Townsend*, 147 Wn.2d 666 (2002); 9-0.

***State v. Clayton***, 11 Wn.App.2d 172 (2019)

Police, in defendant's home, record conversation with defendant, recording up to the point that defendant is arrested is admitted at trial; held: conversations with uniformed, on-duty police officers are typically not private conversations, *State v. Clark*, 129 Wn.2d 211 (1996), *State v. Flora*, 68 Wn.App. 802 (1992), *Lewis v. Dep't of Licensing*, 157 Wn.2d 446 (2006), thus recordings are admissible; III.

***State v. J.K.T.***, 11 Wn.App.2d 544 (2019)

Court authorizes one-party consent recording, RCW 9.73.130, finding probable cause to record respondent's brother at a "homeless encampment" identifying a cross-street, recording includes respondent who admits to murder; held: conversations lawfully recorded are admissible, RCW 9.73.090(2), regardless of who is recorded; place identified for recording was "minimally adequate to satisfy the requirement of RCW 9.73.130(3)(d), *see: State v. D.J.W.*, 76 Wn.App. 135 (1994), *aff'd,* 129 Wn.2d 211 (1996); I.

*State v. Gearhard*, 13 Wn.App.2d 554 (2020)

Complainant tells police he was molested by a neighbor, police record pretext phone call in which complainant calls defendant, says police are coming to speak with complainant and asks what to do, defendant asks complainant to say he lied and he would make it worth his while later, defendant is convicted of witness tampering; held: exception to one-party consent recording statute, RCW 9.73.030(2) (1986), which permits court to admit recorded conversation that conveys threats of extortion, blackmail, bodily harm "or other unlawful requests or demands" only applies if the other "unlawful request or demand" is of a similar nature to extortion, blackmail, bodily harm, *State v. Williams*, 94 Wn.2d 531 (1980); here, defendant asked complainant to lie, which is not of a similar nature to a threat, thus recording and testimony of the conversation must be suppressed, *cf.: State v. Valdiglesias LaValle,* 23 Wn.App.2d 934 (2022); III.

***State v. Glant***, 13 Wn.App.2d 356 (2020)

Defendant engages in email conversation with a person whom he believes is offering sex with children, recipient is police engaged in sting operation, defendant claims emails are private conversations and should be suppressed; held: while emails may be private conversations the sender impliedly consents to them being recorded since the sender understands that an email is recorded, *State v. Racus*, 7 Wn.App.2d 287, 299-300 (2019); II.

***State v. Ridgley***, 17 Wn.App.2d 846 (2021)

Police "self-authorize an undercover narcotics recording which states that a named detective "and/or any other officers participating," record via informant's body wire transaction; held: strict compliance with RCW 9.73.230(2)(c) (2011) requires that the names of all officers participating be in

the report, *State v. Jimenez*, 76 Wn.App. 647, 651-52 (1995), *rev'd on other grounds*, 128 Wn.2d 720, 722 (1996), suppression is the remedy, remanded for trial court to analyze harmless error; III.

***State v. Gonzalez***, 17 Wn.App.2d 64 (2021)

Intercept orders for placement of a body wire on an informant making controlled buys state the police wanted to corroborate the informant's testimony and that due to firearms in the seller's home the body wire could mitigate the risk to the informant; held: particularity requirement of intercept orders, RCW 9.73.130 (2011), that includes a particular statement showing that normal investigative procedures are too dangerous to employ meet statutory requirement, must consist of more than boilerplate showing of need, *State v. Manning*, 81 Wn.App. 714, 720 (1996); here, report of firearms in the home is sufficient to establish a need to "listen and be prepared to move in if necessary," *State v. Knight*, 54 Wn.App. 143, 151 (1989); III.

***State v. Bilgi***, 19 Wn.App. 845 (2021)

Defendant sends texts to a police officer acting as a fictitious child, police software allows other officers to view the texts, defense claims privacy act violation; held: "it is commonly understood that a written communication, once sent to its intended recipient, can be passed on or shared by the recipient," *distinguishing State v. Roden*, 179 Wn.2d 893 (2014), *State v. Fjermestad*, 114 Wn.2d 828 (1990), defendant effectively consented to the disclosure; II.

***State v. Valdiglesias LaValle***, 23 Wn.App.2d 934 (2022)

Defendant asks her 10-year old son to poison her ex-husband so that they will be "together forever," son records conversation, defense moves to suppress, arguing that the exception in RCW 9.73.030(2) (2021) requires an explicit threat with consideration; held: teaching someone to poison a person conveys a threat of bodily harm justifying one-person consent, *State v. Caliguri*, 99 Wn.2d 501 (1983), *State v. Babcock*, 168 Wn.App. 598 (2012), *cf.: State v. Gearhard*, 13 Wn.App.2d 554 (2020); I.

# WITNESSES*

***State v. York***, 28 Wn.App. 33 (1980)

Sale of drugs to informant who had previously been fired by another police department for unsuitability, trial court refused to permit defense to inquire as to reasons for firing or to call witness who fired informant; held: abuse of discretion to limit cross-examination concerning credibility, *cf.: State v. Lile*, 188 Wn.2d 766, 781-87 (2017); III.

***State v. Styles***, 93 Wn.2d 173 (1980)

Can discredit character witness by cross regarding specific acts of misconduct of defendant, but must be good faith by plaintiff to discredit witness, not to discredit defendant; *reverses State v. Styles*, 23 Wn.App. 198 (1979); 9-0.

***State v. Demos***, 94 Wn.2d 733 (1980)

Court properly denied motion for psychiatric evaluations of rape victims in absence of a compelling reason, *State v. Israel*, 91 Wn.App. 846, 849-53 (1998); 8-0.

***State v. Allen***, 94 Wn.2d 860 (1980), *overruled, on other grounds, State v. Vladovic*, 99 Wn.2d 413 (1983)

A witness under Army orders to be in another state at time of trial is grounds for taking a deposition, per CrR 4.6(d); 8-0.

***State v. Mulder***, 29 Wn.App. 513 (1981)

In child abuse case, expert may testify about "battered child syndrome" if s/he can express with reasonable probability that injury is not accidental or is inconsistent with explanation offered by defendant; I.

***State v. Brown***, 29 Wn.App. 770 (1981)

Co-defendant agrees to testify for state in exchange for reduction in charge; at defense counsel's request, co-defendant does not plead until after he testifies so that his plea agreement is only good if there is a conviction; held: if state had withheld benefits of bargain until after witness performed, it might be contrary to public policy and due process, but here defense requested delayed plea, thus no error; I.

***State v. Wixon***, 30 Wn.App. 63 (1981)

Trial court has discretion to call a witness whom all parties may cross-examine; I.

***State v. Olson***, 30 Wn.App. 298 (1981)

Defendant refuses to name potential co-conspirators on cross-examination, whereupon court strikes her direct testimony, held: court has four alternatives: (1) strike testimony, (2) contempt, (3) instruct jury that it can consider defendant's refusal in determining credibility, (4) no sanctions, all within court's discretion; II.

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* *See also:* **WITNESS COMPETENCY,** *infra.*

***State v. Eisner***, 95 Wn.2d 458 (1981)

Prosecutor could not get five year old statutory rape complainant to testify to penetration, so court examined witness in detail, resulting in conviction; held: questions of judge went beyond clarification so as to be a comment on the evidence; 9-0.

***State v. Froehlich***, 96 Wn.2d 301 (1981)

RCW 5.60.050(2) is inapplicable to determine the competence of an adult witness; a psychiatrist may testify to a witness's ability to differentiate between truth and untruth where the witness is cross-examined, his/her mental disability is obvious, and there has been a challenge to the witness's capacity to testify; apparently holds that by cross-examining a witness, the witness's credibility is attacked, thereby permitting corroborating evidence, *State v. Schuman,* 89 Wash. 9, 17-18 (1915), *see: State v. Arredondo,* 190 Wn.App. 512, 532-34 (2015), *aff'd,* 188 Wn.2d 244 (2017); 6-3.

***State v. Jessup***, 31 Wn.App. 330 (1982)

Terms of an immunity agreement are not admissible absent an attack on the veracity of a witness, *State v. Green,* 119 Wn.App. 15 (2003), *see: State v. Bourgeois,* 133 Wn.2d 389, 402 (1997); trial court should excise references in an immunity agreement that witnesses are placed in protective custody; I.

***State v. Bouchard***, 31 Wn.App. 381 (1982), *overruled, on other grounds, State v. Sutherby*, 165 Wn.2d 870, 886 n.7 (2009)

Incompetent infant's excited utterances are admissible, ER 803(a), irrespective of the competence of the declarant; excited utterance in response to a parent's questions are admissible in sex offense cases where spontaneity is clear and danger of fabrication is remote, *State v. Bloomstrom*, 12 Wn.App. 416 (1974), *State v. Canida*, 4 Wn.App. 275 (1971); II.

***State v. Russell***, 31 Wn.App. 715 (1982)

No error where court declines to instruct jury that where witness has willfully testified falsely you are at liberty to disregard the testimony of such witness entirely; I.

***United States v. Valenzuela-Bernal***, 73 L.Ed.2d 1193 (1982)

Fact that government deported two alien witnesses without first permitting defendant to interview witnesses, government knowing they were witnesses, held not to violate Sixth Amendment right to compulsory process absent showing by defendant of materiality of witnesses' testimony; 7-2.

***State v. Steward***, 34 Wn.App. 221 (1983)

In a child murder case, state calls pathologist to testify that babysitting boyfriends are most likely to be child abusers, based on sample of 16 cases; held: no scientific basis for the testimony; I.

***State v. Maule***, 35 Wn.App. 287 (1983)

In statutory rape case, state called a worker from sex assault clinic to testify that sex abuse is more likely than not committed by a biological parent, defendant being natural father;

held: inadequate foundation to admit this expert testimony; extensive discussion of foundation requirements per ER 702 and 703; character witness may not give opinion as to whether s/he would believe another witness, ER 608(a); I.

***State v. Mines***, 35 Wn.App. 932 (1983)

Defense sought appointment of psychiatrist to evaluate competency of a state's witness who had been committed to a mental hospital; held: no error, as trial court acted within its discretion; I.

***United States v. Lindstrom***, 698 F.2d 1154 (11th Cir. 1983)

Where credibility of a key prosecution witness is crucial, court should grant defense access to witness's psychiatric records and permit cross-examination.

***State v. Dixon***, 37 Wn.App. 867 (1984)

Where a child-witness demonstrates an understanding of difference between truth and falsity, s/he need not be formally sworn, ER 603, *see:* *State v. Avila*, 78 Wn.App. 731, 737-9 (1995); where rebuttal witness violates an order excluding witnesses, court may permit witness to testify; I.

***State v. Allery***, 101 Wn.2d 591 (1984)

Battered woman syndrome may be proved by expert testimony where appropriate; 9-0.

***State v. Martin***, 101 Wn.2d 713 (1984)

Testimony by a witness as to a fact which became available following hypnosis is inadmissible in the trial; a witness may testify based on what he knew before hypnosis if the party offering the testimony meets the burden of establishing what the witness remembered prior to hypnosis, *reversing* *State v. Martin*, 33 Wn.App. 486 (1982), limiting *State v. Long*, 32 Wn.App. 732 (1982); *see*: *State v. Laureano*, 101 Wn.2d 745 (1984), *State v. Coe*, 101 Wn.2d 789 (1984); 6-3; *cf.*: *Rock v. Arkansas*, 97 L.Ed.2d 37 (1987).

***United States v. Abel***, 80 L.Ed.2d 450 (1984)

Trial court properly permitted inmate-witness to testify that defendant and defense witness were members of a prison gang that was sworn to perjury and self-protection on each member's behalf to show bias, Fed. R. Evid. 608(b); 9-0.

***State v. Rangitsch***, 40 Wn.App. 771 (1985)

Where witness violates witness exclusion order, ER 615, it is within sound discretion of court whether or not to prohibit the witness from testifying, *State v. Grant*, 77 Wn.2d 47, 51 (1969), *State v. Dixon*, 37 Wn.App. 867, 877 (1984), *cf.: State v. Skuza*, 156 Wn.App. 886 (2010); I.

***State v. Yapp***, 45 Wn.App. 601 (1986)

Where witness identifies rape suspect after hypnosis, but police preserved detailed record of witness's prehypnotic memory including witness's statement that she would recognize suspect

if she saw him again, then the intervening hypnosis does not invalidate the identification, *distinguishing* State v. Martin, 101 Wn.2d 713 (1984); III.

***State v. Justiniano***, 48 Wn.App. 572 (1987)

Incompetency of a child witness to testify at trial does not render inadmissible the child's earlier hearsay statement so long as the child was then competent to make such statement; a statement by mother to a physician about what the child told the mother is admissible, ER 803(a)(4), *but see:* State v. Alvarez-Abrego, 154 Wn.App. 351, 366-69 (2010); II.

***State v. Brown***, 48 Wn.App. 654 (1987)

Evidence of an alleged rape victim's ingestion of LSD at the time of the offense, and expert testimony about the effects of LSD, is admissible; III.

***State v. Coe***, 109 Wn.2d 832 (1988)

All post-hypnotic testimony is inadmissible; hypnosis acts as a time barrier after which no admissible identifications can be made; 6-3.

***State v. Rempel***, 114 Wn.2d 77 (1990)

A request that a witness "drop charges" is not witness tampering, RCW 9A.72.120, where defendant and witness knew each other, and the context is such that there was no attempt to induce the witness to withhold testimony, *reversing* State v. Rempel, 53 Wn.App. 799 (1989); *see also*: State v. Jensen, 57 Wn.App. 501 (1990), State v. Gill, 103 Wn.App. 435, 445-47 (2000), *but see:* State v. Sanders, 66 Wn.App. 878 (1992), *cf.:* State v. Williamson,131 Wn.App. 1 (2004), State v. Thompson, 153 Wn.App. 325, 328-35 (2009), *State v. Gonzalez,* 2 Wn.App.2d 96, 114-15 (2018); 9-0.

***Baird v. Larson***, 59 Wn.App. 715 (1990)

An expert who acquires his/her opinion not in anticipation of litigation is an occurrence witness and is thus not entitled to expert witness fee, CR 26(b)(4)(C); III.

***State v. Guerin***, 63 Wn.App. 117 (1991)

Where child witness establishes, on direct, independent recollection but is unable to remember details on cross, the witness remains competent, lack of recollection goes to weight rather than admissibility, *Jenkins v. Snohomish Cy. PUD 1*, 105 Wn.2d 99, 103 (1986), State v. Allen, 70 Wn.2d 690 (1967), State v. C.J., 148 Wn.2d 672 (2003); II.

***State v. Sanders***, 66 Wn.App. 878 (1992)

Defendant tampers with witness, charges dismissed, tampering continues, charges refiled, "to convict" instruction includes period during which charge had been dismissed; held: because evidence of tampering during dismissal period was corroborative of intent to cause witnesses to be unavailable for the original scheduled official proceeding, instructions were proper, *distinguishing* State v. Pella, 25 Wn.App. 795 (1980); causing nine-year old witness to be removed from her home, arranging for family's transport out of state is sufficient to convict, *distinguishing* State v. Rempel, 114 Wn.2d 77 (1990); I.

***Bellevue v. Vigil***, 66 Wn.App. 891 (1992)

Trial court's denial of material witness warrant was not an abuse of discretion absent a showing that other available means of securing the witness's presence at trial had proved futile or a showing of coercion or intimidation, *see:* *State v. Hartley*, 51 Wn.App. 442 (1988); I.

***Paiya v. Durham Constr. Co.***, 69 Wn.App. 578 (1993)

A treating health care provider is a factual witness and not an expert witness entitled to expert witness fees, CR 26(b)(5), unless facts and opinions are developed in anticipation of litigation; I.

***State v. Tatum***, 74 Wn.App. 81 (1994)

Subpoenas remain in effect beyond specific date for which they are issued and impose a continuing duty to appear until discharged by court, even where trial date for which subpoena was issued is continued, CR 45(g), CrR 6.12(b), *State v. Iniquez*, 143 Wn.App. 845, 854 (2008), *cf.:* *State v. Hobson*, 61 Wn.App. 330, 337 (1991); I.

***State v. Luvene***, 127 Wn.2d 690, 709-12 (1995)

Testimony which is merely cumulative or confirmatory or which is merely a contradiction by a party who has already so testified does not justify surrebuttal, *State v. Dupont*, 14 Wn.App. 22, 24 (1978), *State v. Stambach*, 76 Wn.2d 298, 301 (1969); 9-0.

***State v. Avila***, 78 Wn.App. 731, 737-9 (1995)

Every witness must be sworn before testifying, ER 603, CONST. Art. I, § 6, although court need not administer a formal oath to a child, *State v. Dixon*, 37 Wn.App. 867, 876 (1984), *State v. Collier*, 23 Wn.2d 678, 694 (1945); failure to object waives issue; I.

***State v. Lubers***, 81 Wn.App. 614, 621-2 (1996)

Defendant asks witness to write a letter recanting information witness had given police implicating defendant, is convicted of witness tampering, RCW 9A.72.120; held: asking someone about to be called as a witness to make a false statement recanting a prior signed statement, thereby withholding information necessary to a criminal investigation is sufficient to prove witness tampering, *see: State v. Gonzalez*, 2 Wn.App.2d 96, 114-15 (2018); II.

***State v. Simonson***, 82 Wn.App. 226, 231-4 (1996)

Prosecutor subpoenas officer, defense counsel informs prosecutor he wants to call the officer, officer arrives outside court, prosecutor sees officer and tells officer he won't be calling her, defense is unaware she leaves, trial court denies continuance to obtain the witness; held: prosecutor had an obligation to advise the court and counsel of the witness's presence because he knew defense wanted to call her, trial court erred in denying continuance, harmless here; while a continuance is not required to obtain evidence that is merely impeaching, *State v. Harris*, 12 Wn.App. 481, 496-7 (1975), there are circumstances in which impeachment testimony is so important as to require a continuance; II.

***State v. Bourgeois***, 133 Wn.2d 389 (1997)

Prosecutor asks state's witnesses, over objection, if they wanted to be in court, elicits that a witness had to be arrested on material witness warrant, witnesses testified they were in fear of being injured; held: absent an attack on credibility from opposing counsel, evidence intended to fortify or corroborate credibility of a witness is inadmissible, at 319, *State v. Kosanke*, 23 Wn.2d 211, 215 (1945), *State v. McGhee*, 57 Wn.App. 457, 460-1 (1990), *State v. Froehlich*, 96 Wn.2d 301 (1981), *cf.: State v. Hakimi*, 121 Wn.App. 15, 24-26 (2004); fears and threats to witnesses, where not linked to defendant, is irrelevant; *reverses State v. Bourgeois*, 82 Wn.App. 314 (1996) as harmless error; I.

***State v. James***, 88 Wn.App. 812 (1997)

Threats made to prevent a witness from reporting a crime is intimidating a witness, RCW 9A.72.110, as amended in 1994, distinguishing *State v. Wiley*, 57 Wn.App. 533 (1990); II.

***State v. Israel***, 91 Wn.App. 846, 849-53 (1998)

Ordering co-defendant who is testifying for state to submit to a defense psychological examination is an abuse of discretion, as there are no compelling reasons and defense has other methods of impeachment, *State v. Demos*, 94 Wn.2d 733, 738 (1980), *State v. Hoffman*, 116 Wn.2d 51, 89 (1991); I.

***State v. Wimbish***, 100 Wn.App. 78 (2000)

To compel the attendance of an out-of-state witness, RCW 10.55.060, defense must establish materiality by presenting specific facts to which the witness would testify, *State v. Lodge*, 42 Wn.App. 380, 392 (1985); II.

***State v. Gill***, 103 Wn.App. 435, 445-47 (2000)

Demand that witness get the charges dropped or he will have criminal charges filed against witness and will be compelled to seek revenge is sufficient to prove **intimidating a witness**, RCW 9A.72.110(1), *State v. Williamson*, 131 Wn.App. 1 (2004), distinguishing *State v. Rempel*, 114 Wn.2d 77, 83-84 (1990); II.

***State v. Rodriguez***, 146 Wn.2d 260 (2002)

Defense witness is shackled during testimony, defense does not object; held: upon objection, trial court must hold a hearing to determine the need for security measures whenever a prisoner will appear before a jury in shackles, whether a defendant or defense or state witness; here, because defense did not object or request curative instruction, no prejudice, *but see: State v. Jackson*, 195 Wn.2d 841 (2020); 8-1.

***State v. Anderson***, 111 Wn.App. 317 (2002)

Defendant writes to his mother threatening a witness, telephones a witness' husband, states that witness' wife "is fucked and she better watch out," claims latter is not a threat, former was not intended to be communicated; held: **intimidating a witness**, RCW 9A.72.110(2), requires no proof that defendant intended his threats to reach the victim, *State v. Hansen*, 122 Wn.2d 712 (1993), *State v. Ozuna*, 184 Wn.2d 238 (2015),telephone call is sufficient to establish threat; III.

***State v. Williams***, 118 Wn.App. 178, 183-85 (2003)

Where a witness completes testimony in chief and neither party seeks to have the witness remain in attendance, the witness is excused, CrR 6.12(b), and trial court does not abuse its discretion by refusing to wait for the witness to reappear, *see:* *State v. Horton*, 116 Wn.App. 909 (2003); II.

***State v. Green***, 119 Wn.App. 15 (2003)

Until an immunized witness' credibility is attacked, immunity agreement should not be admitted, *State v. Jessup*, 31 Wn.App. 304 (1982), *see:* *State v. Bourgeois*, 133 Wn.2d 389, 402 (1997); when agreement is admitted, those portions that relate to the witness testifying truthfully should be redacted, *State v. Ish*, 170 Wn.2d 189 (2010), *see: State v. Smith*, 162 Wn.App. 833, 848-51 (2011); I.

***State v. Hakimi***, 124 Wn.App. 15, 19-22 (2004)

Trial court allowing child rape complainants to hold dolls while testifying was not an abuse of discretion, distinguishing *State v. Harper*, 35 Wn.App. 855, 862 (1983); I.

***State v. Williamson***, 120 Wn.App. 903 (2004), *remanded*, 154 Wn.2d 1031, *amended*, 131 Wn.App. 1 (2004)

Defendant asks one witness to tell child rape complainant that if she doesn't recant her parents will go to jail, is convicted of witness tampering, RCW 9A.72.120; held: because a person tampers with a witness if s/he attempts to alter the witness' testimony, *State v. Whitfield*, 132 Wn.App. 878, 897-98 (2006), asking one person to tell another to recant coupled with a false explanation of adverse consequences is sufficient to convict, *State v. Gill*, 103 Wn.App. 435, 445-47 (2000), *see: State v. Gonzalez*, 2 Wn.App.2d 96, 114-15 (2018), distinguishing *State v. Rempel*, 114 Wn.2d 77 (1990); II.

***State v. Hakimi***, 124 Wn.App. 15, 24-26 (2004)

Following child rape complainant's testimony, court admits, without objection, complainant's mother's testimony that complainant was reluctant to testify; held: while corroborating or bolstering testimony should not be admitted to rehabilitate absent an attack of a witness' credibility, *State v. Petrich*, 101 Wn.2d 566, 574 (1984), here the victim's credibility was an inevitable, central issue, state could anticipate that defense would attack, thus trial court did not err, distinguishing *State v. Bourgeois*, 133 Wn.2d 389, 400-02 (1997); I.

***State v. Ish***, 170 Wn.2d 189 (2010)

Evidence that an immunized witness has agreed to testify truthfully should not be admitted in state's case-in-chief, *State v. Green*, 119 Wn.App. 15 (2003), but may be elicited by the state if the defense has attacked the witness' credibility on cross-examination, *see: State v. Smith*, 162 Wn.App. 833, 848-51 (2011); reverses *State v. Ish*, 150 Wn.App. 775 (2009); 5-4.

***State v. Thompson***, 153 Wn.App. 325 (2009)

Defendants videotape incompetent vulnerable adult, coaching her to acknowledge that she gave her estate to defendants who present the tape at a guardianship hearing, state charges defendants with **witness tampering** and theft and uses the tape at the criminal trial without

calling victim; defendants, knowing that victim suffered from dementia, had her sign over her estate; held: a witness need not be called as a witness nor need the witness be competent to support a charge of witness tampering, state need not prove that defendants knew victim was competent, video meets necessary definition of "witness" and "testimony;" I.

***State v. Skuza***, 156 Wn.App. 886 (2010)

Having excluded witnesses, ER 615, trial judge overhears a defense witness speaking to the defendant outside the courthouse, excludes the witness from testifying, *see: State v. Rangitsch*, 40 Wn.App. 771 (1985); held: trial judge became a witness, defendant had no opportunity to question him about his observations, judge's description of the conversation was insufficient to warrant a finding that a violation occurred, court erred when it applied the harshest possible sanction of excluding evidence central to defense case; II.

***State v. McCabe***, 161 Wn.App. 781 (2011)

Potential defense witness claims she is medically unable to come to court, defense argues Sixth Amendment right to compulsory process requires court to permit telephonic testimony; held: telephonic testimony in criminal cases is not a right, state has right to cross-examine and test credibility before jury, trial court properly exercised discretion, ER 611, live testimony is "superior evidence," *cf.: Detention of Stout*, 159 Wn.2d 357 (2007), CR 43 (a)(1) does not apply in criminal cases, *but see: State v. Cayetano-Jaimes*, 190 Wn.App. 286 (2015), *State v. Sweidan*, 13 Wn.App.2d 23 (2020), *State v. Milko*, 21 Wn.App.2d 279 (2022); III.

***State v. Ozuna***, 184 Wn.2d 238 (2015)

Guards find letter written by defendant threatening a witness in defendant's jail cell, convicted of **intimidating a former witness**, RCW 9A.72.110 (2011); held: a defendant "directs a threat" when he communicates a threat to someone though not necessarily the intended victim, circumstantial evidence here establishes that the threat was communicated to a third party albeit not the corrections officer who confiscated it, *see: State v. Hansen*, 122 Wn.2d 712 (1993), *State v. Anderson*, 111 Wn.App. 317 (2002); 9-0.

***State v. Cayetano-Jaimes***, 190 Wn.App. 286 (2015)

Trial court abused discretion by excluding telephone or live video testimony of a defense witness who had been deported and was thus unavailable to testify in person where the witness' evidence had high probative value whose exclusion effectively barred defense from presenting his defense, distinguishing *State v. McCabe*, 161 Wn.App. 781 (2011), *see: State v. Sweidan*, 13 Wn.App.2d 53 (2020), *State v. Milko*, 21 Wn.App.2d 279 (2021); I.

***State v. Lizarraga***, 191 Wn.App. 530, 551-63 (2015)

Absent the state playing a part in deportation or bad faith by the prosecutor it is not a violation of the right to compulsory process that a defense witness was deported and thus unavailable to testify and thus his hearsay statements are not admissible; I.

***State v. Arredondo***, 188 Wn.2d 244, 267-71 (2017)

At offer of proof state's witness testifies he has problems with depression, concentration, comprehension, anxiety, distrust of other people, hypervigilance, PTSD, substance abuse, but

none impact long term memory, trial court finds that his issues do not affect his ability to recall or describe, precludes defense from inquiring during trial; held: witness did not display any readily apparent mental deficiencies, distinguishing *State v. Perez*, 139 Wn.App. 522 (2007), *State v. Froehlich*, 96 Wn.2d 301(1981), absent evidence that witness was under influence at time of incident or at time of testifying, *State v. Tigano*, 63 Wn.App. 336, 344 (1991), trial court did not abuse discretion, *State v. Darden*, 145 Wn.2d 612 (2002); trial court should apply the following factors to assess whether past mental health issues are permissible on cross-examination: 1) the nature of the psychological problems; 2) whether the witness suffered from the condition at the time of the events to which the witness will testify; [and] 3) the temporal recency or remoteness of the condition; affirms *State v. Arredondo*, 190 Wn.App. 512 (2015); 5-4.

***State v. Lile***, 188 Wn.2d 766, 781-86 (2017)

In assault/self-defense case victim testifies he is not a fighting person, defense seeks to impeach with a domestic violence harassment order, ER 608; held: door would only be opened to evidence directly contradicting his testimony and challenging his credibility, facts were sufficiently different such that refusal of court to permit impeachment was not an abuse of discretion, distinguishing *State v. York*, 28 Wn.App. 33 (1980), *see: State v. Gefeller*, 76 Wn.2d 449, 455 (1969), *State v. Rushworth*, 12 Wn.App.2d 466 (2020); affirms *State v. Lile*, 193 Wn.App. 179 (2017); 9-0.

***State v. Gonzalez***, 2 Wn.App.2d 96, 114-15 (2018)

Jailed defendant tells complainant on phone to tell defense investigator a different story than she told police, is convicted of witness tampering; held: defendant's statement to victim implied that she would testify falsely as telling defense investigator by itself would have little effect, thus rational trier of fact could find defendant guilty, *see:* *State v. Rempel*, 114 Wn.2d 77 (1990), *State v. Lubers*, 81 Wn.App. 614, 621-2 (1996), *State v. Williamson*, 131 Wn.App. 1 (2004); 2-1, II.

***State v. Sweidan***, 13 Wn.App.2d 53 (2020)

State's witness in Michigan, under out-of-jurisdiction summons, RCW 10.55.060 (2010), submits unsworn statement that she cannot appear in person, in-home caregiver for ill mother, physician writes that mother needs continuous medical care for which witness needs to be present, court permits, over objection, live video testimony; held: confrontation clause entitles a defendant to "meet the witnesses . . . face-to-face," CONST. art. I, § 22, although considerations of public policy and necessities of the case, in narrow circumstances, may preempt the right of a physical face-to-face encounter, *Maryland v. Craig*, 497 U.S. 836, 845-46, 110 S. Ct. 3157, 111 L. Ed. 2d 666 (1990), *State v. D.K.*, 21 Wn.App.2d 342 (2022), trial court must render a case-specific finding that (1) excusing the presence of the witness necessarily furthers an important public policy, and (2) the procedure otherwise assures the reliability of the testimony, *State v. Foster*, 135 Wn.2d 441 (1998). *State v. Milko*, 21 Wn.App.2d. 279 (2022), here, state failed to establish the necessity to present the witness' testimony by video, no evidence that the witness was unable to find another caregiver; trial court should enter findings of fact and declare on record the details of how the video is set up, who can see the screens; harmless here; III.

***State v. Taylor,*** 18 Wn.App.2d 568 (2021)

In case with diminished capacity defense state's expert violates orders *in limine* by testifying defendant asked for an attorney, used drugs and had criminal history, prosecutor neglected to instruct her not to refer to request for counsel or criminal history, motions for mistrial denied; held: failure of state to instruct a witness about a court order establishes seriousness of the irregularity, ER 103(c), *State v. Weber,* 159 Wn.2d 252, 270-79 (2006), forces defense to repeatedly object, witness' statements were not cumulative of other properly admitted evidence, repeated need to give curative instructions highlights the prejudice, thus reversed; I.

***State v. Wood***, 19 Wn.App.2d 743 (2021)

At defense request, court permits defendant to testify as to one of the counts and not the others, after defense rests defendant demands to be recalled to testify to other counts, trial court denies it as state would have changed it's cross-examination and could have called other rebuttal witnesses; held: trial court does not abuse its discretion in denying motion to reopen when based upon finding of delay and prejudice to state, *State v. Barnett*, 104 Wn.App.191 (2001), *abrogated on other grounds*, *State v. Epefanio*, 156 Wn.App. 378 (2010); I.

***State v. Lucas-Vicente***, 22 Wn.App.2d 212 (2022)

**Witness tampering**, RCW 9A.72.120(1), is an alternative means crime; I.

***State v. Milko***, 21 Wn.App.2d 279 (2022)

During pre-vaccine COVID-19 pandemic trial court enters detailed findings allowing two witnesses from out of state to testify via video; held: defendant's right to confront may be satisfied absent a face-to-face confrontation where denial of such confrontation is necessary to further an important public policy; here, at the time of the trial there was uncertainty as to whether air travel was safe, trial courts must critically analyze on a case by case basis the issue of necessity for remote testimony, which was satisfied here, *Maryland v. Craig*, 497 U.S. 836, 845-46, 110 S. Ct. 3157, 111 L. Ed. 2d 666 (1990) *State v. Foster*, 135 Wn.2d 441 (1998); II.

# WITNESSES
## Competency to Testify

***State v. Smith***, 30 Wn.App. 251 (1981)

Severely developmentally disabled witness (23 IQ) held competent to testify; CrR 6.12(c)(1), which excludes testimony of witnesses of "unsound mind" applies to those who are "without comprehension at all, not to those whose comprehension is merely limited," *State v. Wyse*, 71 Wn.2d 434, 436 (1967); *State v. Hardung*, 161 Wash. 379 (1931); I.

***State v. Froehlich***, 96 Wn.2d 301 (1981)

RCW 5.60.050(2) is inapplicable to determine the competence of an adult witness; a psychiatrist may testify to a witness's ability to differentiate between truth and untruth where the witness is cross-examined, his/her mental disability is obvious, and there has been a challenge to the witness's capacity to testify, *see: State v. Arredondo,* 190 Wn.App. 512, 532-34 (2015); apparently holds that by cross-examining a witness, the witness's credibility is attacked, thereby permitting corroborating evidence, *State v. Schuman*, 89 Wash. 9, 17-18 (1915); 6-3.

***State v. Bouchard***, 31 Wn.App. 381 (1982), *overruled, on other grounds, State v. Sutherby*, 165 Wn.2d 870, 886 n.7 (2009)

Incompetent infant's excited utterances are admissible, ER 803(a), irrespective of the competence of the declarant; excited utterance in response to a parent's questions are admissible in sex offense cases where spontaneity is clear and danger of fabrication is remote, *State v. Bloomstrom*, 12 Wn.App. 416 (1974), *State v. Canida*, 4 Wn.App. 275 (1971); II.

***State v. Smith***, 97 Wn.2d 801 (1982)

Developmentally disabled adult is not incompetent to testify under CrR 6.12(c); under RCW 5.60.050, "unsound mind" means total lack of comprehension or the inability to distinguish between right and wrong, *State v. Wyse*, 71 Wn.2d 434 (1967); *State v. Hardung*, 161 Wn. 379 (1931); where a person has been "adjudicated insane," there is a rebuttable presumption of incompetency; where there is no such adjudication, a presumption of competency exists, *State v. Morrison*, 43 Wn.2d 23 (1953); *affirms State v. Smith*, 30 Wn.App. 251 (1981).

***State v. Tuffree***, 35 Wn.App. 243 (1983)

Colloquy to determine competency of a child witness performed in presence of jury is "bothersome, but . . . not erroneous as a matter of law"; court cites with approval Stafford, *The Child as a Witness*, 37 Wash. L. Rev. 303 (1962).

***State v. Hunsaker***, 39 Wn.App. 489 (1984)

Test for competency of a child witness is not youth but intelligence; three and one-half year old witness who attends preschool and can state age, birthdate, address and sing a song is competent; III; *see*: *State v. Sardinia*, 42 Wn.App. 533 (1986), *State v. Allen*, 70 Wn.2d 690 (1967), *State v. Strange*, 53 Wn.App. 638 (1989).

***State v. Justiniano***, 48 Wn.App. 572 (1987)

Incompetency of a child witness to testify at trial does not render inadmissible the child's earlier hearsay statement so long as the child was then competent to make such statement; a statement by mother to a physician about what the child told the mother is admissible, ER 803(a)(4), *but see: State v. Alvarez-Abrego*, 154 Wn.App. 351, 366-69 (2010); II.

***State v. Przbylski***, 48 Wn.App. 661 (1987)

Trial court need not find that a child witness is capable of perceiving and relating the facts of the incident charged in determining competency to testify; as long as the witness demonstrates an ability to receive just impressions of and accurately relate events which occurred at least contemporaneously with the incident at issue, the court may infer competency, *State v. Borland*, 57 Wn.App. 7 (1990), *State v. Hancock*, 17 Wn.App.2d 113 (2021), *see: State v. Avila*, 78 Wn.App. 731, 737-9 (1995), *Dependency of A.E.P.*, 135 Wn.2d 208 (1998), *State v. S.J.W.*, 149 Wn.App. 912 (2009), *aff'd, on other grounds,* 170 Wn.2d 92 (2010); I.

***State v. Leavitt***, 111 Wn.2d 66 (1988)

No error for trial court to permit six year old victim to whisper answers to questions to social worker who states answers out loud at competency hearing where jury was not present, and where defense counsel did not request to be in position to hear answers; Rules of Evidence do not apply to competency hearing, ER 104(a); 9-0.

***State v. Carlson***, 61 Wn.App. 865 (1991)

Child witness is competent if s/he demonstrates (1) understanding of duty to speak truth on stand, (2) mental capacity at the time of the occurrence to receive an accurate impression of it, (3) sufficient memory to retain an independent recollection of the occurrence, (4) capacity to express in words memory of the occurrence, (5) capacity to understand simple questions about it, *State v. Allen*, 70 Wn.App. 690 (1967), *State v. Johnson*, 28 Wn.App. 459 (1981), *State v. Borland*, 57 Wn.App. 7 (1990), *State v. Pham*, 75 Wn.App. 626, 629-30 (1994), *see also: State v. Woods*, 154 Wn.2d 613 (2005); inconsistencies in testimony go to weight, not competency, *State v. Strange*, 53 Wn.App. 638, 642 (1989), *State v. S.J.W.*, 149 Wn.App. 912 (2009), *aff'd, on other grounds*, 170 Wn.2d 92 (2010); I.

***State v. Guerin***, 63 Wn.App. 117 (1991)

Where child witness establishes, on direct, independent recollection but is unable to remember details on cross, the witness remains competent, lack of recollection goes to weight rather than admissibility, *Jenkins v. Snohomish Cy. PUD 1*, 105 Wn.2d 99, 103 (1986), *State v. Allen*, 70 Wn.2d 690 (1967), *State v. C.J.*, 148 Wn.2d 672 (2003); II.

***State v. Watkins***, 71 Wn.App. 164 (1993)

Absent manifest signs of incompetence, trial court has no *sua sponte* duty to inquire into the competence of witnesses with known mental disabilities; I.

***State v. Avila***, 78 Wn.App. 731, 735-7 (1995)

In ruling on competency of child witness, trial court should state its analysis of the five *State v. Allen*, 70 Wn.App. 690 (1967) factors on the record, *State v. Carlson*, 61 Wn.App. 865 (1991); witness nodding affirmatively to prosecutor's asking it is important to tell the truth satisfies requirement (1) that witness understands duty to speak the truth; relating details of a trip close in time to the incident is sufficient to establish, (2) mental capacity, and (3) ability to retain memory of the incident, even if witness is reluctant to discuss the incident itself; reluctance to testify about abuse at competency hearing does not undermine competency finding, as court is not required to examine witness regarding the particular facts of the case to determine competency, *State v. Przybylski*, 48 Wn.App. 661, 665 (1987), *State v. S.J.W.*, 149 Wn.App. 912 (2009), *aff'd, on other grounds,* 170 Wn.2d 92 (2010), *State v. Hancock*, 17 Wn.App.2d 113 (2021); I.

***State v. Karpenski***, 94 Wn.App. 80, 99-106 (1999)

In competency hearing, where child testifies to a wholly false event (here, that he was born at the same time as his five-year younger brother), then the evidence is insufficient to support a finding that the witness is capable of distinguishing truth from falsity, thus the witness is incompetent, *but see: State v. Perez*, 137 Wn.App. 97, 103-05 (2007), *State v. S.J.W.*, 149 Wn.App. 912 (2009), *aff'd, on other grounds,* 170 Wn.2d 92 (2010)*State v. Kennealy*, 151 Wn.App. 861, 877-79 (2009); a young child who lacks at trial the capacity to distinguish truth from falsehood probably also lacked that capacity when, younger, made a hearsay statement; 2-1, II.

***State v. Carol M.D.***, 97 Wn.App. 355 (1999)

Where it is alleged that a child witness was improperly influenced in her testimony or in her child hearsay statements, trial court should hold a competency hearing to determine whether state subjected her to coercive and improper tactics that rendered her incapable of testifying accurately and whether her statements to counselor were reliable or were the product of improper and suggestive questioning, *In re Dependency of A.E.P.*, 135 Wn.2d 208 (1998); Division III withdraws, in part, opinion in *State v. Carol M.D.*, 89 Wn.App. 77 (1997); 2-1.

***State v. Maule***, 112 Wn.App. 887 (2002)

While the burden of proving incompetency of a witness is on the party opposing the witness, *State v. Watkins*, 71 Wn.App. 164, 169 (1993), *State v. S.J.W.*, 170 Wn.2d 92 (2010), due process does not require that defense counsel be permitted to cross-examine a child witness at a competency hearing, *State v. Brousseau*, 172 Wn.2d 331 (2011), even where prosecutor has examined the witness; I.

***State v. C.M.B.***, 130 Wn.App. 841 (2005)

Trial court need not examine a child witness' competency absent a challenge by a party, RCW 5.60.020, -.050, and may not be challenged for the first time on appeal; I.

***State v. Borboa***, 157 Wn.2d 108, 119-22 (2006)

Admissibility of child hearsay, RCW 9A.44.120, does not depend on whether the child is competent to testify but on whether the statement and circumstances surrounding the statement indicate the statement is reliable, *State v. C.J.*, 148 Wn.2d 672, 685 (2003); 8-1.

***State v. Perez***, 137 Wn.App. 97, 103-05 (2007)

At competency hearing, 4-year old witness testifies that he may believe in dragons but understands the difference between teasing and truth, that he was not teasing about substance of testimony, another witness testifies that he told the exact same story about the offense earlier, trial court finds witness competent; held: judge addressed all *State v. Allen*, 70 Wn.App. 690 (1967), factors, did not abuse discretion, *but see: State v. Karpenski*, 94 Wn.App. 80, 99-106 (1999); III.

***State v. Hopkins***, 137 Wn.App. 441, 448-51 (2007)

Prior to admitting child hearsay, trial court must hold a competency hearing to determine availability, even if parties stipulate that complainant is incompetent, RCW 9A.44.120, *State v. Ryan*, 103 Wn.2d 165, 172 (1984), *overruled, in part, State v. C.J.*, 148 Wn.2d 672, 683 (2003), *State v. John Doe*, 105 Wn.2d 889 (1986); II.

***State v. Johnston***, 143 Wn.App. 1, 13-15 (2007)

Absent manifest signs of incompetence, trial court has no *sua sponte* duty to inquire into the competence of witnesses with known mental disabilities, *State v. Watkins*, 71 Wn.App. 164, 170 (1993), *State v. C.M.B.*, 130 Wn.App. 841 (2005); III.

***State v. Kennealy***, 151 Wn.App. 861, 877-79 (2009)

6-year old with ADHD, confused about some details of the incident such as day and time, shape of bed, types of doors and floor, once said he dreamed the incident, is competent, within trial court's discretion, where court finds all *State v. Allen*, 70 Wn.2d 690, 692 (1967) factors are met; II.

***State v. S.J.W.***, 170 Wn.2d 92 (2010)

A party challenging the competency of a child witness has the burden of rebutting the presumption that the child is competent with evidence indicating that the child is of unsound mind, intoxicated, incapable of receiving just impressions of the facts or incapable of relating facts truly, *State v. Maule*, 112 Wn.App. 887 (2002), *State v. Hancock*, 17 Wn.App.2d 113 (2021), *see: State v. Brousseau*, 172 Wn.2d 331 (2011); *reverses, in part*, *State v. S.J.W.*, 149 Wn.App. 912, 920-27 (2008); 9-0.

***State v. Brousseau***, 172 Wn.2d 331 (2011)

A bare assertion by defense that child victim is incompetent to testify is insufficient to require that she testify at a competency hearing; child victim is not required to testify at a child hearsay hearing, RCW 9A.44.120(2)(a); 5-4.