

Search and Seizure Field Guide



A synopsis of the 2008 Search and Seizure manual

Introduction

The body of law we know as “Search and Seizure” is dynamic at its very core; always undergoing some slight modification or revision. All search and seizure is ultimately governed by the 4th Amendment to the United States Constitution, and, more specifically to Oregonians, Article 1 Section 9 of the Oregon Constitution. Although worded almost identically, the interpretations of these two texts are different. The Oregon Supreme Court has interpreted Article 1 Section 9 much more restrictively than the US Supreme Court has interpreted the 4th Amendment. That means that citizens in Oregon enjoy more rights than they are afforded under the 4th Amendment alone. Or to put it another way, Oregon law enforcement officers are more restricted than federal law enforcement officers in how they conduct police work.

In this guide, I have provided primarily that information and those interpretations which apply specifically to police officers operating in the State of Oregon. However, where the laws of Oregon differ significantly from federal law, I have tried to include a discussion of these differences, in order to help you avoid problems in the field (such as taking action based on an authority that is meant only for federal agents).

This manual is meant to be a quick reference guide and should not be considered an authoritative or exhaustive accounting of this immense, often confusing and constantly changing body of law. If you have questions or concerns after consulting this guide, please seek assistance from a supervisor, or someone qualified to offer legal opinions.

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Search and Seizure - *The Rule*

The laws pertaining to Search and Seizure have been put in place to protect citizens from unreasonable searches and seizures by the government. In other words, these laws give rights to citizens, while restricting the actions of the government. Thus, two questions should immediately come to mind. First, what is a search or a seizure? Second, if it was a search or seizure, how do we determine whether or not it was reasonable? It is important to recognize that searches and seizures are separate events, each requiring their own independent authorities and determinations of reasonableness. In other words, having a valid (reasonable) authority to seize someone or something does not automatically provide a valid authority to search that person or thing. Hopefully, this field guide will assist you in making such determinations within the unique situations you encounter day to day.

Since all search and seizure law is ultimately derived from the 4th Amendment to the United States Constitution, and (for Oregonians) Article 1 Section 9 of the Oregon Constitution, it makes sense to start there.

The US Constitution (4th Amendment) states: "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Federal Courts have interpreted this to mean that:

A search occurs when a person's subjective expectation of privacy (an expectation that society is prepared to consider reasonable) is infringed.

A seizure of property occurs when there is some meaningful interference with an individual's possessory interest in that property.

A seizure of a person occurs when, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave, and, when the officer, by means of physical force or show of authority, has in some way restrained the liberty of that person.

The Oregon Constitution (Article 1, Section 9) states: "No law shall violate the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Oregon Courts have interpreted this to mean that:

A search occurs when a person's privacy interests are invaded.

A seizure of property occurs when there is a significant interference with a person's possessory or ownership interests in property.

A seizure of a person occurs when (a) the police intentionally and significantly restricts, interferes with, or otherwise deprives an individual of that individual's liberty or freedom of movement; or (b) whenever an individual believes that (a), above, has occurred and such belief is objectively reasonable in the circumstances.

There are, therefore, three components to a search as defined by the OR Constitution. A search occurs when:

- 1) a government agent
- 2) intrudes upon
- 3) a person's protected privacy interests

If any of these three components do not exist, then the courts, by definition, must conclude that no "search" occurred. In such a case, the actions under scrutiny will not be judged under the laws of search and seizure, nor would any of the "evidence" collected be subject to the exclusionary rule. Consequently, the court will always decide first whether police conduct constitutes a search before determining if it was reasonable.

It is critical to understand that according both to the US and Oregon Constitutions, all searches and seizures require a warrant. In fact, a warrantless search by the government is, per se, considered unreasonable (illegal). Only after this concept is firmly grasped can an officer begin to understand how to apply the few "reasonable" exceptions to this rule.

It is equally important to understand that in a criminal court, the remedy for having collected evidence illegally is to suppress (or exclude) that evidence from use in prosecuting the case. This is what is known as "the exclusionary rule." However, keep in mind that there is no blanket immunity (protection) for police officers who perform illegal searches or seizures, should a defendant decide to file a lawsuit in civil court.

Private Party Searches

The courts have not applied the exclusionary rule to searches by private parties acting under their own volition. This is because, while such searches/seizures may indeed intrude upon another's protected privacy interests, the private party is not a government agent. However, if the private party conducts the search under the direction or support of a government agent, the search or seizure will be governed under the laws of search and seizure and, thus, become subject to the exclusionary rule. So, just recognize that in asking or suggesting a citizen take certain actions, you may be engaging them as your agent and, thus, an agent of the government.

Stop, Frisk and Reasonable Suspicion

There are three generally recognized categories of encounters between police officers and individuals. Arranged in ascending order of justification, they are:

1. **Mere Conversation or Mere Encounter** – questioning without any restraint of liberty, which requires no justification.
2. **Stop** – a temporary restraint of a person's liberty, justified by reasonable suspicion or, if the offense is a traffic violation, probable cause.
3. **Arrest** – justified by probable cause

In this section, we discuss stops and other activities that police can engage in based upon a reasonable suspicion.

Reasonable suspicion means that an officer holds a belief that is reasonable under the totality of the circumstances that exist at the time and place the officer acts.

Reasonable suspicion is a lesser standard of proof than probable cause (PC). However, like "probable cause," reasonable suspicion does have both an objective and subjective component. It takes both objective and articulable facts, plus an officer's subjective belief (i.e., that the facts lead to reasonable suspicion) for the courts to conclude that a reasonable suspicion did, in fact, exist.

The fact that there are possible lawful explanations for behavior does not preclude an officer from also being able to conclude there is a reasonable suspicion that the activity is criminal in nature.

Taken alone, furtive gestures, deceptive behavior, or fleeing will not be enough to give an officer reasonable suspicion to stop a person. Neither would an officer's mere hunches, experience or intuition. However, combined with other articulable details, any of these can contribute in the overall analysis of whether a reasonable suspicion exists.

Proximity in time and place to a crime, combined with matching the general description (even if there are minor discrepancies) would constitute a reasonable suspicion to stop a person or vehicle.

When an officer is relying upon information from an informant to establish reasonable suspicion, the officer's report should include some indicia of the informant's reliability, such as: 1) the informant's exposure to criminal liability for making a false statement (i.e., named/known vs. unnamed/unknown informants); 2) whether or not the information is based upon personal observations by the informant; or, 3) independent observations by the officer which corroborate the informant's information.

Criminal Investigative Stops (AKA: "Stop and Detain")

Stop: A stop occurs when an officer, by show of authority, restrains the liberty of the person encountered so that a reasonable person would not feel free to refuse to cooperate, or to leave the scene.

In alignment with federal case law (Terry v Ohio), Oregon gives police officers the authority to "stop" persons for a limited time, for the purpose of brief questioning in order to establish the person's identity and dispel (or confirm) the officer's reasonable suspicion that the person has committed, or is about to commit a crime. ORS 131.615(2) further limits this detention to the vicinity of the stop, and for no longer than a reasonable time. Based on case law, the "vicinity of the stop" would include the area immediately surrounding (or within several yards) of the stop, but does not extend as far as in the case where the detainee was moved three blocks away. A "reasonable time" has been interpreted to mean that the police are "diligently pursuing the investigation." Because there are no set time limits, it is important to document your investigative steps, in order to show your "stop" did not last any longer than was necessary.

If, during the course of an investigation, your reasonable suspicion is dispelled (dissipates), the stop must end. Detention beyond that point will be deemed unlawful.

A stop will be considered reasonable if it is limited to: 1) the immediate circumstances that aroused the officer's suspicion; 2) other circumstances arising during the course of the detention and inquiry that give rise to a reasonable suspicion of criminal activity; and 3) ensuring the safety of the officer, the person stopped or other person's present.

During the course of a criminal investigative stop, an officer has statutory authority to ask for consent to search at any time, as well as make inquiry about the presence of weapons, whether or not the officer has a reasonable suspicion to believe such weapons exist. However, if the officer does not have reasonable suspicion and if the inquiries or search extend the duration of the stop, the court may find the consent was not voluntary and suppress any evidence regardless of the statutory authority.

Reasonable suspicion to detain a person does, as a practical matter, extend to the detention of that person's property (i.e., vehicle, bag, etc.). However, absent consent or some other authority, the mere fact that an officer has conducted a criminal investigative stop does not, in itself, provide the officer with the authority to search a person, their vehicle, or other belongings for evidence of the crime that was the reason for the stop.

(see also “frisk searches” below). Apply the same rules concerning the length and place of detention of a person to that person’s property.

If a criminal investigative stop is justified, the officer may use the degree of force reasonably necessary to make the stop and ensure the safety of the officer, the person stopped or other persons who are present – ORS 131.615(5).

The following are some guidelines based on a few specific cases where the courts have made decisions about what constitutes a stop:

- Blocking a car is generally going to be considered a stop, whereas, merely approaching a car (without your overhead lights on) will not.
- Retaining ID will convert a mere encounter into a stop, but asking for the person’s name/DOB will not.
- Radioing dispatch for a warrants check in the presence (or even just with the knowledge) of the person in question will generally result in a stop.
- Telling a person they have committed a crime, or reading the Miranda warning will generally convert a mere encounter into a stop.
- Directing or ordering a person will generally convert an encounter into a stop, whereas asking will not.
- Frisking a person will convert an encounter into a stop.
- **Handcuffing, absent an objective basis to believe such force is reasonable under the circumstances for the protection of the officer, the subject, or others present, will generally have the effect of converting a mere encounter or stop into an ARREST. If you lack probable cause, the arrest will be unlawful.**

Criminal Investigative Stops involving Vehicles

If a “criminal investigative stop” of a person is justified, the officer may stop any vehicle that person is traveling within, in order to affect the stop of that person.

Though an officer need only a reasonable suspicion to stop a car for the purpose of inquiring into the crime of DUII, s/he will still need PC to perform standardized field sobriety tests (SFSTs), as these are considered by the courts to be a “search.” Because alcohol dissipates quickly over time, exigent circumstances will provide the necessary authority to conduct SFSTs without a warrant.

Stops for Non-Traffic Violations

Although violation stops are controlled separately from criminal investigative stops, this is a good place to consider the search and seizure implications of such stops.

For non-traffic related offenses, ORS 153.039 authorizes an officer to stop and detain any person when the officer has reasonable grounds to believe that person has committed a violation. Case law (in State v. Gulley) has defined reasonable grounds to be “a quantum of information that is greater than that which would justify a ‘stop,’ but less than that required for ‘probable cause.” In other words, to stop a person for a non-criminal violation (other than a traffic violation), you need more than a reasonable

suspicion to believe the person committed the violation, but it does not have to rise to the level of probable cause.

The period of detention for violation stops may last no longer than is necessary in order to identify the person believed to have committed the violation, to conduct a reasonable investigation into the circumstances, and to issue a citation.

Stops for Traffic (non-criminal) Violations

Traffic violation (aka: vehicle) stops are controlled by ORS 810.410. In order to stop a vehicle for a traffic violation, an officer must have personally witnessed the traffic violation, or have probable cause to believe the person has committed a traffic violation, based on information from another police officer who witnessed the violation. An officer conducting a traffic stop may use the degree of force reasonably necessary to make the stop and to ensure the safety of the officer, the person stopped or other persons who are present – ORS 810.410(3)(f).

When conducting a traffic violation stop, an officer is only permitted to investigate the traffic violation which formed the basis for the stop. Detention beyond the length of time necessary to complete this investigation is **unlawful**. However, the stop may be extended if, during the course of the stop, the officer develops independent grounds to detain the person (i.e., PC for additional traffic violations, or reasonable suspicion of criminal activity).

As in a criminal investigative stop, officers do have the statutory authority to ask for consent to search and/or to make inquiry about the presence of weapons during the course of a lawful traffic stop. However, in doing so, the officer may not allow the duration of the traffic stop to extend beyond its natural length. So, as a practical matter, such activities must be accomplished during the natural lulls inherent in most stops (i.e., while you are waiting for LEDS/NCIC to return, or while your partner is completing the citation, etc.).

Officers are not permitted to search the driver or vehicle for evidence of a traffic violation, with one notable exception. In the case of a violation for “open container,” an officer may seize a plainly visible open container from inside the vehicle during the stop. However, this does not extend to a continued search of the vehicle to locate additional open containers.

An officer may frisk during a traffic stop if s/he develops reasonable suspicion that the subject poses an immediate threat of serious physical harm (see Frisk Searches below).

Vehicle Stops with Passengers

It is often the case that vehicles stopped by officers contain passengers. While this initial *stop* of passengers is allowable, the law does **NOT** authorize officers to question passengers or to ask them for consent to search. **In other words, unless you develop an independent reasonable suspicion to detain passengers, consider them off-limits for questioning and free to leave.**

Frisk Searches (AKA: Pat Search)

Frisk search: A pat down of the outer clothing for weapons.

It is a common misperception for police officers to think of “stop and frisk” as a package deal; it is not. Like searches and seizures, the determination to conduct stops and frisks must be made independently from one another. Cause to stop (detain) does not automatically translate into cause to frisk.

In recognizing that police officers have a duty to keep people safe – including themselves - the courts allow officers to conduct these non-voluntary searches of lawfully stopped persons when the officer reasonably believes that the person poses an immediate threat of serious physical injury. No inquiry is necessary prior to the frisk, provided there is reasonable suspicion of threat and the person has been lawfully engaged (whether by mere conversation, stop, or arrest). **Although certainty is not required, your reasonable suspicion must be based upon specific and articulable facts (i.e., threatening actions, special knowledge, observations, etc.), not general “officer safety concerns,” or “standard practices.”** A frisk incident to arrest is always permissible.

For the courts to determine that there was reasonable suspicion to conduct a frisk, the officer must be able to articulate both objective facts and a subjective belief that the person did, in fact, pose an immediate threat of serious physical injury. Again, frisks cannot be justified based upon general (non incident specific) “officer safety” concerns.

Frisks are limited in scope – their sole purpose is to locate weapons. If, during the course of a frisk, the officer feels something that s/he believes is, or “might contain” a weapon, the officer may use the necessary force to seize that item. If the officer feels something that makes itself immediately known as contraband (something illegally possessed – i.e., drugs), the officer may seize that item as well. In other words, a frisk is not an in-depth search. It is merely a patting of the outer clothing. The scope may only expand into the pockets or inner layers of clothing when the officer feels what is believed to be (or contain) a weapon, or feels what is immediately recognized as contraband.

If, during a frisk, the officer feels something that s/he objectively and subjectively believes is, or might contain, a deadly or dangerous weapon, the officer can use the necessary force in order to seize it. However, once that item is seized, the courts have determined it is no longer a threat to police and, thus, further (more intrusive) searching of that item will require a warrant or other exception. On the other hand, finding one such item will not necessarily dissipate your reasonable suspicion that the person could have others.

Probable Cause

Definition

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

Oregon case law defines probable cause by stating the following: “The probable cause requirement means that the facts upon which the warrant is premised must lead a reasonable person to believe that seizable things will probably be found in the location to be searched.” “Probably” is defined as meaning “more likely than not.”

Probable cause does not require certainty, but does require more than a reasonable suspicion. The test for PC is one based on the “totality of the circumstances,” not on isolated facts. Common sense is a proper component in the determination of probable cause.

Probable Cause to Arrest

PC is both objective and subjective. The officer must be able to testify to a subjective belief that a crime was committed, and that the person arrested committed it; and further, that subjective belief must be objectively reasonable, based on the facts available at the time. Officers do not have to accept the suspect’s explanation as true.

An officer can arrest or detain based upon a bulletin (i.e., that PC exists) from another agency, even if the facts constituting PC are not included.

Reasonable Suspicion may “ripen” into PC. Further, PC for one offense may escalate into PC for additional offenses.

Profiling alone will not rise to the level of PC. However, an officer’s specialized training and experience, which results in the officer’s ability to draw inferences of criminality from the circumstances at hand (even though these circumstances might appear innocent or unremarkable to the lay observer) could lead to PC.

Furtive gestures alone do not rise to the level of PC (i.e., attempt to hide suspicious baggy). However, when combined with other suspicious circumstances (i.e., observation of drug paraphernalia) it can.

Deceptive or evasive activity can lead towards PC, but will not make it on its own. Neither will the fact that one possibility exists among many.

The refusal to allow officers to search cannot be used as support for PC to arrest.

Probable Cause to Search/Seize

The primary consideration in determining if an officer can search for evidence in a particular place, is whether or not the subject of the search has an expectation of privacy in that place. If there is an expectation of privacy (a subjective belief by the defendant that is objectively reasonable by societal standards), then, as a general rule, searches and seizures will require a warrant to be valid. It is important to understand that under both the US and Oregon Constitutions, a warrantless search or seizure by the government is considered, per se, unreasonable (illegal). There are, however, a few specifically established and carefully delineated exceptions to the warrant requirement.

Warrantless Searches (AKA: “The Exceptions”)

In recognizing that it is impractical, in certain circumstances, to obtain a warrant, the Courts have set out the following few exceptions. Remember, however, that an officer cannot create his own “exigency” by delaying his search until one of these exceptions applies. In other words, the exceptions are not meant to help officers “get around” the need for writing a search warrant.

As an example, if you have PC that a parked vehicle contains evidence of a crime, you cannot just watch it until it moves, then stop it and search it based on the mobile vehicle exception. If you do, the search will be deemed invalid. Instead, you should sit and watch the car while you begin writing your search warrant affidavit. If you finish the warrant before the car moves, search the car under the authority of the warrant. If the car starts to move prior to the completion of the warrant, now you can stop the car and search it under the mobile vehicle exception – since you can show that you were not “creating an exigency” in an attempt to get around the need for a warrant.

In court, the burden is on the defendant to show that a search was warrantless - obviously not too hard to accomplish. Once that is established, the prosecution must show (by a preponderance of the evidence) that the search fell under one of the following recognized exceptions.

Lost or Abandoned Property

Though related, the considerations pertaining to lost and abandoned property are unique to each. The main distinction lies in whether or not a person has given up their privacy interest in the item. In other words, a person who has truly abandoned property no longer has any expectation of privacy in that item. On the other hand, a person who merely loses an item, likely still maintains a privacy interest in that item. Remember that a search is a police invasion into a protected privacy interest. So, if there is no privacy interest, then there is no “search,” per se, requiring a warrant.

Lost property – If police suspect an item is lost (say a backpack), it should be assumed that the owner still possesses an interest in that item. On the other hand, it is our duty to try and return the backpack to its rightful owner. Therefore, the lost property exception allows police to look inside the backpack for the sole purpose of trying to determine the identity of the owner. If evidence of a crime is located *prior* to discovering the owner’s identity, this evidence can be seized and will be admissible in court.

Abandoned property – Abandoned property is a little different. In this case, the owner has intentionally and voluntarily relinquished his/her possessory and privacy interests in the item. Since there is no expectation of privacy in the item, there is no need to obtain a warrant. A full and unrestricted search of the item can be made for evidence, even if the identity of the abandoning party is known. This also applies to abandoned living quarters (i.e., tenants have moved out, and rent is not paid-up).

The trick with abandoned property is that the courts have decided that it is possible for a person to give up their *possessory interest* in an item, without giving up their *privacy interest* in that item (in other words, without truly abandoning the item). The officer must present facts that show (by a preponderance of the evidence) that the item was truly abandoned, or that the subject did not have a reasonable intention or expectation of retrieving the item at a later time. In other words, if you suspect that a person is only denying ownership in the item to avoid being caught with evidence of a crime, the item is probably not “abandoned.” If that is the case, do not rely on the abandoned property exception to search the item.

Under State v. Stafford, the courts adopted the following three part test for determining whether a defendant had voluntarily abandoned an item:

1. Did the defendant separate him/herself from the property because of police instruction (i.e., ordered to step away from a bag) or illegal police conduct? If so, the property is not really abandoned.
2. Did the defendant leave the property in a private or public area? If he/she left it on private property, it may not be abandoned.
3. Did the defendant hide, or otherwise manifest an intention to maintain control over the property? If so, it is probably not abandoned.

In State v. Stafford, the court agreed it was reasonable for an officer to conclude that property left by defendant “out in the open, in a public area” had been abandoned, regardless of whether the defendant subjectively intended to return and retrieve the property later.

If you are not sure whether an item is abandoned, consider whether another exception might apply. If able, you should also ask for consent – a person with lawful authority over an item can consent to its search, even if they happen to be denying ownership of that item at the time.

Entry into Suspect Residence with Arrest Warrant

Officers can force entry into the home of a suspect when the officer has PC that the suspect is inside, and there is a warrant for that person’s arrest. In this exception, the only object that the officers are permitted to search for is the subject himself (however, plain view will be in effect).

A search warrant plus an arrest warrant are needed to forcibly enter the residence of a third party in order to affect an arrest.

If the circumstances support an objectively reasonable belief of danger to officers, then a protective sweep may be permissible. The reasonableness of protective sweeps will be determined based on the facts of each case, including:

- Particularized facts regarding others in the house that could pose an immediate risk of harm to the officers
- Whether the sweep was timely

- Whether the sweep was limited in scope regarding both time and place (i.e., only searching where people could be hiding, and for no longer than necessary to dispel reasonable suspicion of danger)

Arrest on Private Premises without a Warrant

Absent hot pursuit or some other exigent circumstance, officers with PC to arrest (but no arrest warrant) are not permitted to make a warrantless/nonconsensual entry into a suspect's residence to make the arrest. It might be lawful under these circumstances to surround the house and order the person out, however, be aware that "locking down" a building (i.e., restricting the freedom of people to come and go) will be considered a seizure, thus requiring a warrant, or PC plus an exception (i.e., exigent circumstances).

Automobiles

The automobile exception allows police to conduct a warrantless search of a vehicle when 1) the police have PC to believe the vehicle contains contraband or other evidence of a crime; 2) the vehicle was mobile before the initial police contact; AND, 3) the vehicle was attended and operable at the time of the search. The idea behind this exception is that vehicles, being mobile, can go away. There is, therefore, an inherent exigency in collecting evidence from vehicles before this happens. Since exigency can dissipate, it is important to avoid unnecessary delays.

Mobility does not necessarily require that a person be inside the vehicle. Rather, Oregon courts have said that a vehicle is mobile if, when the police first encounter it, its occupants are in a position to operate it and leave in it immediately. (*Note: Oregon is more restrictive than federal law with regard to this exception. Under federal rulings, there is no requirement that the vehicle be "attended" at the time of the search.*)

Arresting the driver prior to conducting a mobile vehicle search will not invalidate the search, so long as there is no unnecessary delay. In general, the longer the delay between the stop and the search, the more likely the defense will be successful in arguing that there was time to seek a warrant and, therefore, that the exigency (which is the basis for this exception) is gone.

Once a vehicle has been impounded, the exigency is gone and a search under the mobile vehicle exception is invalid. *Impounded* means actual impoundment or arranging for impoundment. In other words, once you call for the tow, the vehicle is considered impounded. The fact that (in your mind) you are planning to have the vehicle towed at some later time does not mean that the vehicle is immobile. If the vehicle has been involved in an accident and cannot be driven, it is immobile.

The scope of a search under the mobile vehicle exception is limited to areas (including closed containers) that can hold the item being sought. In other words, if you have PC

to believe that the mobile vehicle contains a stolen 19 inch TV, you would not be allowed to look in the glove box. On the other hand, if you are searching for dope, you can look not only in the glove box, but also in the closed containers within the glove box.

A warrantless, non-consensual search of a stopped vehicle to find evidence of the driver's identity is permissible if the officer has PC to believe that the driver has unlawfully provided *false information* – since the person's identity is an element of this crime. However, this is not the case for other traffic crimes such as failure to carry/present, DWS and DUUI, as the person's identity is not a material element of (and therefore, not relevant to) the commission of these crimes. Remember this exception only applies when there is a mobile vehicle and PC to believe there is evidence of a crime inside that vehicle.

Emergency Aid

The Emergency Aid Doctrine allows for an exception to the warrant requirement when the following conditions are met:

- (1) The police have reasonable grounds to believe that there is an emergency and an immediate need for their assistance for the protection of life;
- (2) The emergency is a "true emergency" (an officer's good faith belief alone is not sufficient);
- (3) The search is not primarily motivated by an intent to arrest or to seize evidence; AND
- (4) The officer reasonably suspects that the area or place to be searched is associated with the emergency and that, by making a warrantless entry, the officer will discover something that will alleviate the emergency.

Do not think of the emergency aid doctrine as a tool for helping you resolve criminal matters. Your only intent in using this exception should be the resolution of life-threatening emergencies.

The scope of this search is limited to areas where you might find *something that will help alleviate the emergency*. However, if you happen to see evidence of a crime while you are inside the person's protected area (i.e., home) due to an actual and ongoing emergency, you may seize that evidence under the plain view exception. If you believe there may be additional evidence inside the protected area, you should seek a warrant to collect it - particularly when it is not in danger of being lost.

Community Caretaking

Two recent appellate court decisions (State v. Martin, 9/08 and State v. Salisbury, 11/08) have significantly changed the utility of community caretaking in Oregon. In effect, community caretaking can no longer be considered an exception to the warrant requirement. Instead, the appeals court has decided that ORS 133.220 merely represents the legislative authorization to engage in a particular class of searches; searches that, to be lawful, must comply with the statute AND fall under another recognized exception to the warrant requirement – typically the emergency aid doctrine.

So, for now, when an officer enters a protected area in order to engage in community caretaking type activities, unless that entry is based on a warrant or other recognized exception to the warrant requirement, evidence of criminal activity seen or seized by the officer will not be admissible in court.

Consent

An officer may ask a person having actual control of property for consent to search that property at any time, even without PC to believe s/he will find contraband or evidence of a crime. Consent is valid only when it is given voluntarily and without coercion on the part of the officer. **Tip: Always ask for consent; even when other authorities exist!**

Obviously, consent must be asked for, not demanded. It is the State's burden to prove that consent was given voluntarily. Some of the factors that can influence voluntariness include: age, education, intelligence, mental/physical condition, custodial status, length and nature of interrogations, cooperation with police, physical punishment or coercive behavior by police, the officer's tone of voice, the use or display of force, the number of officers present, the emotional atmosphere, drug use by the defendant, and whether or not the person is under investigation.

It is not necessary to advise a person of their right to refuse to consent, but this can aid in proving that the consent was voluntary.

It is permissible to ask for consent to search after the subject has invoked their right to silence or counsel.

Refusal of consent cannot be used to support PC.

Consent may be manifested by words ("sure," "go ahead," etc.), or by conduct (i.e., stepping back to allow the officer to enter, etc.). The reverse is also true – that conduct can manifest the intent to not consent.

Officers should carefully document the timing of consent searches in order to show that the search did not occur before the consent was given.

If there is any illegal conduct by the police (i.e., searching prior to consent), the consent

will usually be deemed invalid. This can be overcome, however, if the consent is given with the intention of being retroactive.

Consent can be qualified by the person giving it (i.e., confined in scope to specific items, restricted to certain areas, or limited in purpose or time). If consent is not qualified, then the officer can search wherever the object sought might reasonably be found.

The law assumes, absent evidence of intent to exclude (by some overt action), that occupants impliedly consent to visitors (including police) entering their driveways and/or front yards, in order to walk up to the front door to knock. As always, evidence or contraband found in plain view along the way can be seized. (The trick is whether or not it was really in *plain view* – please see section on plain view for more details.) This *implied* consent to go to the front door, however, does not automatically extend to side yards, side doors, back yards, or back doors.

An individual's privacy interest in unimproved and unbounded land does not trigger constitutional protections. A person wishing to protect their privacy interests in such land must post signs or erect barriers, etc., in order to manifest their intent to exclude.

Third Party Consent – In the absence of the defendant, a third party may consent to a search of the defendant's property, if the third party possesses an actual authority to consent. *Actual authority* comes from the joint use or control of, or access to an area for most purposes. The scope of third party consent will be limited by the extent of that person's actual authority over the defendant's property and will not necessarily include the authority to consent to a search of containers or personal items (i.e., the defendant's nightstand) within the area being searched. *Be sure to document why and to what extent you believe the third party has the actual authority to consent.*

As a general rule, entrusting property to another person delegates to that person the actual authority necessary to consent to a search of the entrusted property.

Specific third party consent situations:

Parental consent to search a child's room

Actual control is the key here. The parent can consent to a search of their child's room so long as they have maintained control over that room. Problems arise when parents allow their children to put locks on doors, or otherwise limit their own free access to the room in an effort to respect the privacy of their children.

Children consenting to a search of the home

If the child possesses permission to let people into the home, then they most likely have the authority to consent to a search.

Spouses

Consent by one spouse to a search of joint property is generally valid, even against a non-consenting spouse, unless the non-consenting spouse is actually present and objecting to the search.

Roommates

Roommates can consent to search of their portion and common portions of the house/apt., regardless of who is on the lease.

Landlords

Although a landlord may possess the right to enter the property they control, their authority to enter DOES NOT include the right to allow the police to enter.

Innkeepers

Innkeepers can consent to search of room when it is past checkout time, and the room has not been paid-up for the next night.

Drivers and Passengers

The driver (or owner) of a vehicle may consent to a search of said vehicle, but that consent does not extend to closed containers within the vehicle belonging to someone else.

Exigent Circumstances

Under the Fourth Amendment, a warrantless search is valid when there is PC for a search and either the evidence is in imminent danger of destruction, the safety of officers or the public is threatened, police are in hot pursuit, or the suspect is likely to flee before a warrant can be issued. This exception is valid as long as the emergency/exigency continues. Any evidence found in plain view may be seized. Officers must be able to show that a search under this exception was conducted in a reasonable manner and that obtaining a warrant would have either been impractical, or not possible under the circumstances.

Oregon law is generally consistent with federal law regarding exigent circumstances. Oregon case law has described exigent circumstances as situations requiring police to act swiftly in order to prevent danger to life or serious damage to property, or to forestall a suspect's escape or the destruction of evidence. It is further described as, "practical necessity."

Exigent circumstances must exist for both the item to be seized and in the time frame you wish to seize it. Police are not allowed to create their own exigent circumstances by failing to seek a warrant. If this occurs, the search will likely be declared invalid.

Under Oregon law, **securing = seizing**. Therefore, police cannot secure a premises, vehicle or person while awaiting a search warrant, unless this seizure is justified under a recognized exception to the search warrant requirement, like exigent circumstances. Oregon law recognizes homicide scenes as an exigent circumstance. As such, police may make immediate entry into the scene of a homicide in order to preserve the crime scene prior to the removal of the victim's body and to prevent the accidental or intentional destruction of evidence. Once the exigency is gone, however (i.e., the scene

is frozen and the body has been removed), the officers will need a warrant or another exception to continue searching and/or seizing evidence.

PC that a Meth lab is operating in a populated community = exigent circumstances to enter, as long as police enter promptly (without delay) and the search is not too intrusive. The idea here is to confirm the presence of a lab and then to take the appropriate safety precautions (evacuations, etc.) – since meth labs are dangerous. A warrant should be written before the lab is dismantled and/or a more detailed search is conducted.

Hot pursuit is a valid exigent circumstance related to criminal investigations, but not infractions. Hot pursuit is good even if it starts and ends almost simultaneously (i.e., the defendant tries to shut his front door when you tell him he is under arrest).

Be careful, exigency can dissipate (i.e., once the defendant is arrested), thus requiring a warrant, or another exception, to continue a search.

Incident to Arrest

This exception applies only to *full custody arrests*. *Officers planning to issue a citation in lieu of a “full custody arrest” may not rely on this exception.*

With regard to searches incident to arrest, Oregon courts interpret Article 1, Section 9 of the Oregon Constitution more strictly than the federal courts interpret the 4th Amendment to the US Constitution. Under Oregon law, a valid custodial arrest alone does not authorize a specific right to search; however, because an arrest does create a type of exigency, a search incident to arrest can be justified when it:

- Is necessary to protect the arresting officer;
- Is a precaution to avoid the destruction of evidence, or the escape of a defendant; or,
- Is reasonably related to the crime for which the defendant is arrested

Protecting the Officer

Oregon courts have determined that a *pat search* for weapons (the functional equivalent of a frisk) is always permissible upon a valid custodial arrest. However, a more intrusive search for weapons or implements of escape is only justified when the officer develops a reasonable suspicion that the person presents a serious threat of harm or escape and that a search will reduce or alleviate that threat. General officer safety concerns are not sufficient to justify a more intrusive search for weapons or implements of escape.

Oregon Courts have determined that a *protective sweep* of a home as part of a search incident to arrest may be permissible. The reasonableness of protective sweeps will be determined based on the facts of each case, including:

- Particularized facts regarding others in the house that could pose an immediate risk of harm to the officers;
- Whether the sweep was timely;

- Whether the sweep was limited in scope regarding both time and place (i.e., only searching where people could be hiding, and for no longer than necessary to dispel reasonable suspicion of danger)

Protecting the Evidence

Upon a valid custodial arrest, an officer may search the person and any belongings in their immediate control for evidence reasonably related to any crime(s) for which the officer has or develops PC to arrest. Officers may search closed containers when there is a reasonable suspicion to believe the container holds evidence of a crime for which the officer has PC to arrest. The search can precede the arrest, so long as probable cause exists prior to the search. Absent an expectation that evidence reasonably related to the crime might be found, a search for evidence will not be justified

Because a person's identity is not a material to the crimes of *DWS*, *Fail to Carry and Present a License*, or *DUII*, searches for **identification** incident to such arrests have been specifically invalidated. This makes sense, since proving who the arrested person is (i.e., by locating their ID card) does not help you prove and, therefore, is not *evidence* related to the commission of one of these crimes. On the other hand, identity is an element for the crime of *Providing False Information*; therefore, a search for identification would be justified.

Similarly, when an officer makes an arrest pursuant to a warrant, s/he may not search incident to arrest for evidence of the underlying crime, unless the officer has PC to believe that evidence from that past crime will still be found on the person.

Searches incident to arrest must occur in close proximity to the arrest in time and space, as well as intensity.

Consider the following example: An officer makes a custodial arrest for PCS methamphetamine. Based on the *protection of the officer* clause, we know that the officer is permitted to conduct a pat-search for weapons. If the officer discovers something during the pat-search, or otherwise develops specific and articulable reason to believe the person is a threat of harm or escape, a more intrusive search for weapons and/or implements of escape can be justified. Further, under the *protection of the evidence* clause, the officer may search the person, their vehicle, bags or other belongings in their immediate control at the time of the arrest, for evidence related to the drug charges (i.e., drugs, drug related contraband, etc.), including closed containers that could reasonably contain any of these items.

Inevitable Discovery

Inevitable discovery is not an "exception" to the warrant requirement, but rather, a remedy for salvaging evidence that was improperly seized. According to this doctrine, unlawfully collected evidence will remain admissible in court if the State can prove that it would have been discovered anyway by some legal means.

Inventory and Booking Searches

An inventory is a warrantless search conducted pursuant to an "adopted and uniformly administered" policy, in order to inventory contents for the purpose of: 1) protecting private property (particularly valuables), 2) discouraging false claims against the police, and 3) protecting the police against dangerous devices.

Booking and inventory searches can apply to impounded vehicles, as well as arrested persons and persons being held in the context of a civil detoxification or mental hold.

Inventory Requirements:

- 1) The state must lawfully possess the property it will inventory (e.g., through an authorized vehicle impoundment or lawful arrest).
- 2) The inventory must follow a properly authorized administrative program, designed and systematically administered to remove the exercise of discretion.
- 3) The person conducting the inventory must follow the specified procedures. (An inventory deviating from the established policy will be deemed invalid.)

Booking and inventory searches are distinct from searches incident to arrest and involve a separate issue under Article I, section 9. The only legitimate function of a booking or inventory search is the administrative itemization of things present; it may not include any intent to seek or find evidence. Thus, an officer cannot allow a suspicion of criminal activity to influence his decision to conduct an inventory (i.e., he cannot decide to tow a car, knowing that it will trigger an inventory, which will put him in position to find the evidence he suspects will be present). In other words, do not think of, or rely upon inventories as a means (tool) for discovering evidence. Finding evidence during an inventory is merely a bonus.

The degree to which an inventorying officer may scrutinize property is limited. Although a vehicle inventory may include closed compartments, such as the glove box, an inventory provides no "general license" for detailed scrutiny of closed containers or papers.

Neither a wallet nor a purse is considered a closed or opaque container. Rather, wallets and purses are primarily intended to store valuables, and it is important to discover what is in them, both to protect the owner's property and to prevent the assertion of false claims against the police. This applies as well to fanny packs and briefcases. (However a booking officer may not inventory the contents of a purse that an arrested person is not going to take into the secure facility.)

Criminal evidence discovered in plain view during the course of a valid inventory may be seized and is admissible in a criminal prosecution.

Open Fields

Open fields are defined as unoccupied or undeveloped areas outside the curtilage (the immediate area surrounding a residence). Open fields are generally not protected under the Fourth Amendment, or Article 1, Section 9, thus, can be searched without a warrant.

You can think of open fields using the phrase "lawfully outside, looking outside." In other words, an officer is lawfully in a place that is outside a protected privacy interest, looking at things or in places that are also outside a protected area.

While there is no set definition for what constitutes *curtilage*, there are several factors that will help in making such a determination. They include:

- Proximity to a home (the closer to a home, the more likely it is curtilage)
- Whether the area is included in an enclosure around the home
- How the area is used
- Steps taken by the resident to protect against observation by passers-by

To preserve a constitutionally protected privacy interest in land that is outside the curtilage, a person must manifest an objectively reasonable intention to exclude the public by erecting barriers (i.e., fences), or by posting signs.

Observation from an airplane flying in publicly navigable airspace is no problem, since there is no reasonable expectation of privacy. (See *Technological Enhancements* below)

Absent an overtly manifest intention to exclude, there is an implied consent allowing persons to go to the front door (via the front yard or driveway – within the curtilage).

Open View Observations

Open view negates the need for a warrant to search, but does not necessarily negate the need for a warrant to seize.

You can think of open view using the phrase, "lawfully outside, looking inside." In other words, the officer is lawfully outside a protected privacy interest, but is looking into that protected privacy interest. For instance, if a police officer is standing on the sidewalk and, from that vantage point, can see inside a home and observes growing marijuana, this observation is lawful. It is technically not a search, since the protected privacy interest (home) was not actually invaded. However, the officer will need a search warrant or other exception to actually enter the home in order to seize the evidence.

Open view searches must be unaided. Oregon law only allows the use of technological devices to aid an officer's ability to make observations when the officer is conducting an open field search of unprotected areas. Therefore, when conducting an open view

search (looking into a protected area), your initial observations must be made without the aid of any technological device. However, you may use technological devices to *confirm* your initially unaided observations.

A flashlight could be considered a technological aid if it allows the officer to see more than would have been visible in normal lighting conditions. (See *Technological Enhancements* below)

Plain View Seizure

Plain view negates the need for a warrant to seize. You can think of plain view using the phrase, "lawfully inside, looking inside." In this case, the officer has lawfully arrived at a place that is within (inside) a person's protected privacy interests and is making observations from that vantage point. As long as the officer lawfully arrived at that location, he may seize any evidence or contraband within *plain view*.

To be in plain view, an item must be immediately apparent as evidence or contraband. That means you must be able to tell it is evidence or contraband without having to move or otherwise manipulate it. For example, if you are lawfully inside a home (for whatever reason) and see what you know, based on your training and experience, to be a controlled substance, that substance is in plain view to you and can be seized as evidence. On the other hand, if you are in the same home and see a laptop computer that generally matches the description of a laptop you know to be stolen, but would need to turn it over to verify the serial number to be sure (to establish PC), then that laptop is not in plain view to you.

Use the following two pronged approach to decide if this exception is in play:

1. A justifiable intrusion to arrive at the vantage point; PLUS
2. PC to believe an item merely observed is evidence or contraband

Miscellaneous

Roadblocks and routine traffic checks – Although Federal law allows for road blocks and traffic checks (i.e., DUI checkpoints), Oregon law holds that, without individualized suspicion, such roadblocks are invalid. This, however, does not preclude an officer from taking action during an encounter while conducting routine traffic control. In other words, if, while directing traffic at an accident scene, the officer develops a reasonable suspicion that a particular vehicle is being operated by an intoxicated driver, the officer can stop that vehicle.

Body Processing and Substances - Generally, if the evidence will not change (i.e., will not dissipate in the blood, etc.), and/or will require more than a minor intrusion to collect, the officer will need a warrant to seize it.

Under the Fourth Amendment, Courts can order a defendant to give handwriting sample. Also, a Grand Jury can subpoena a defendant to give handwriting, printing, or voice exemplars.

In Oregon, consent to take blood for alcohol testing does not extend to testing for drugs.

Blood, Breath and Urine samples as related to DUII investigations

Breath tests - Under implied consent the defendant has no right to refuse a breath test, which is why a refusal can be admitted as evidence of intoxication. Breath test results will only be admissible in court if the defendant was afforded a reasonable opportunity to consult privately with an attorney before the test was administered.

Blood tests - An officer may seize blood under any of the following circumstances:

- The defendant expressly consents
- The officer has PC for DUII and the defendant is unconscious or unable to expressly consent
- The defendant requests the sample be drawn after a test by the officer
- The hospital draws a sample for medical purposes and informs police (as they are required to do) when the test shows the driver was intoxicated
- Pursuant to a valid search warrant

Urine tests - An officer properly trained in drug recognition, with reasonable suspicion that a defendant is under the influence of a controlled substance may seize urine when:

- The defendant has been arrested for DUII and blew less than .08; or,
- The defendant was involved in an accident with death or damage.

Trained Narcotics Dog - Under federal law a dog sniff is not a search. Oregon law holds that as long as the dog is not within a protected area, the sniff will not be considered a search. However, if the dog must enter a protected area to make the sniff, the sniff will require PC plus a warrant or exception. Be careful not to inadvertently *seize* a person or vehicle while awaiting a dog to conduct a sniff, unless you have the authority (PC plus a warrant or exception) to do so.

Prisoners - Prisoners have no Fourth Amendment right to privacy in their cells (except for privileged communications).

Probationers - If a person is arrested pursuant to a probation violation warrant, the arresting officer is NOT entitled to search for evidence of the violations underlying the warrant, unless the officer also has probable cause to believe that the evidence will still be found on the arrested person.

Technological Enhancements - In Oregon, the use of technological enhancements will generally be considered a search (requiring PC plus a warrant or other exception) when they are used to aid observations into protected areas. However, using enhancements to view unprotected areas or to merely clarify/confirm an observation made from a lawful vantage point using unaided senses will not trigger constitutional search

protections.

The use of thermal imaging is a search (requiring PC + a warrant or exception).

In Oregon, audio recording is not a search as long as all parties being recorded have been advised. However, when the recording is being accomplished over the phone, only one party to the conversation needs to be aware that the call is being recorded.

Body wires generally require a court order (see section on searches with warrants). However, there are some exceptions, which include:

- Felonies involving danger to human life – anyone can surreptitiously record others not specifically notified, when these recordings are made during a felony crime that endangers human life.
- Recordings by family members – the prohibition against intercepting radio and/or telephone communications does not apply to family members within their own home.
- Felony drug and misdemeanor prostitution investigations – Police do not need a court order to surreptitiously record oral communications between officers, or persons under their direct supervision and a person for whom there is PC they are committing, have committed, or are about to commit a felony drug or misdemeanor prostitution crime. The officer must make a report to the DA within 30 days of using a body wire without an order.
- Other felonies with exigent circumstances – Police do not need a court order to surreptitiously record oral communications between officers or persons under their direct supervision and a person for whom there is PC they are committing, have committed, or are about to commit any felony, when there is such exigency that it is unreasonable to obtain an order.

Transparent containers and containers that announce their contents - No warrant is needed in order to open transparent containers, or containers that otherwise announce their contents (i.e., paper folds). This only applies when the contents announce themselves as the only contents within the container. If the container could also contain other items, then you need a warrant or other exception to open the container.

Testing Drugs - No warrant is needed to test lawfully seized drugs via a test kit.

Searches with Warrants

Electronic Surveillance - Only a DA/DDA can apply for an electronic interception order. Orders must meet federal guidelines and restrictions. If an order is granted, copies of that order must be presented to all parties at least 10 days prior to any court hearing. Wire tap orders must be executed with strict compliance to all requirements, and the tapes obtained must be sealed immediately after seizure. All other investigative techniques must be exhausted before attempting to obtain an electronic interception order. Requirements for the application include:

- Applicants identity and authority to apply
- Officer authorizing the application
- Facts justifying the request
- Details of the offense being investigated
- Nature and location of facilities or place from where the surveillance will be conducted
- Type of communication to be intercepted
- ID of person to be overheard
- Inadequacy of alternative investigative procedures
- Period for which authorization is sought (not more than 30 days)
- Details concerning results of prior orders, if any

Officers can apply for an order from a Circuit Court Judge to obtain a Pen Register or Trap and Trace Device by submitting an affidavit outlining the officers PC that it will produce evidence relevant to a specific crime. However, the officer may not use the information obtained in order to locate the address of the caller.

Citizens are not permitted to intercept telecommunications; even inadvertent interceptions are illegal. Interception of radio transmissions will not constitute a crime, unless the interception is of a police radio transmission for purposes related to some illegal activity. Police may not use illegally obtained interceptions. Hearing with the naked ear is not an interception.

Bird Dogs - The use of bird dogs is limited to felony drug cases and serious felonies (but specifically includes the crimes of Bribery, Extortion, Burglary, and UUMV).

A search warrant is needed to monitor a bird dog, however, no is warrant needed when actually placing the bird dog on the vehicle if the vehicle is parked in a public place. While monitoring a bird dog, the officers can follow it wherever it goes (in or out of the originating county). The normal requirement to read the warrant aloud (or provide a copy of the warrant) prior to its execution is not necessary -- this can be delayed per ORS 133.619(4).

Search Warrant Procedures

The Fourth Amendment to the US Constitution and Article 1, Section 9 of the Oregon Constitution each prohibit “unreasonable” searches and seizures. Searches and Seizures conducted by the government without a warrant are *per se* unreasonable, unless they fall within one of the few specifically established and carefully delineated exceptions to the warrant requirement. In other words, seeking a warrant is the rule. Officers sometimes forget this fact in their scramble to find the exceptions.

As long as you establish that a crime occurred in Washington County (otherwise known as “establishing venue”), a Washington County judge can sign a warrant to search anywhere in the State of Oregon.

There are 5 steps in the process of obtaining and serving a search warrant. They are:

- 1) preparing the affidavit
- 2) preparing the search warrant
- 3) getting the warrant signed
- 4) executing the warrant
- 5) making a return

Each of these steps is discussed in more detail below.

1) Preparing the Affidavit

Writing the affidavit is by far, the most time consuming and challenging part of the search warrant process. However, once you know what to include, it really isn't that difficult. An affidavit is simply your request for permission (from a judge) to search for certain things at a certain location. That's it! So the obvious question is “what needs to be included in the affidavit?” Well, here's the list:

- Applicant information – who you are; that you are a police officer; any relevant training or experience - known as the “boilerplate”
- That the information is being supplied under oath (“I, the undersigned, upon my oath do depose and say that...”)
- Probable cause (telling your story), include your basis of knowledge for each fact
- The significance of the facts – what they give you PC to believe (i.e., regarding what crimes have been committed and what evidence you believe will be found in the particular location you want to search)
- A description of the place to be searched – what it looks like and how to find it;
- A list of things to be seized – be as descriptive as possible
- A request for authorization to search for the listed evidence and to seize it if found. If a computer, computer discs or other electronic storage devices are to be seized, you should also specifically request permission to open and examine the contents of these items.

Additional considerations in preparing the affidavit

It is important to remember that information contained in the affidavit can be lost (exised) in a motion to controvert, long after the search has taken place. If enough

information is lost, the affidavit may no longer support a finding that PC existed for the issuance of the warrant. If that happens, any evidence you found during the search will be suppressed. To help keep this from happening, you should include any and all information you have – even if it seems like overkill. That way, even if some is lost, you may still have enough to support a finding of PC. You will not be allowed to “supplement” the affidavit during a motion to controvert. So, if it is not contained within the “four corners” of your affidavit, it will not be considered.

While we’re on the topic of including everything, make sure to include any information about discrepancies or facts that tend to challenge your PC – AKA: “include warts and all.” Doing so will solidify your credibility with the judge and will help to avoid a motion to controvert.

Avoid using stale information. Information in an affidavit must be sufficiently fresh to justify a conclusion that the evidence will still be in the place where you are requesting a warrant to look. To accomplish this, include information such as: indications that the activity is ongoing; repeated observations; admissions of continuing presence; prior incidents/history; or, the durable quality of the evidence.

Turn the nature of the illegal activity to the State’s advantage (i.e., for drug cases - that suppliers must necessarily have supply on hand for prospective buyers, or that addicts will likely be in continued possession of evidence).

Basis of knowledge is another key component to your affidavit. You need to establish your basis of knowledge for every alleged fact. In other words, you need to show *how you know what you know*, and not just that you know it. Using the active voice, rather than a passive voice will help in this regard. For instance, say, “I saw...,” or, “John told me that Sam told him that Sam saw....” This might sound a little awkward at first, but you’ll get used to it. In fact, you should try to do this in all of your reports. Just ask yourself how you know the information and make your answer clear in the affidavit.

Confidential informants - if a confidential informant is used, the officer must establish the basis of the informant’s knowledge, as well as the informant’s credibility and reliability.

There are a number of ways to establish an unnamed informant’s reliability, to include:

- Past “batting” average
- A detailed account of non-incriminating facts
- Independent police corroboration
- Controlled buys (one successful buy is sufficient)
- Cross corroboration with other informants
- Polygraph exam (to be used in conjunction with other means)
- Admissions against interest
- Other hearsay exceptions
- Lack of information showing the informant has reason to fabricate
- Lack of criminal history/background
- The informant voluntarily initiated the report

In addition to these, an officer **must** include any information that diminishes the informant's credibility.

Named informants are always deemed more credible than unnamed sources. This is due to the fact that named informants can face criminal penalties for initiating a false report, or hindering prosecution, etc. However, it is still a good idea to follow the same principles for both named and unnamed sources.

The courts will likely view the statements of a named, non-criminal ("citizen") informant as credible.

There are also several ways to establish an informant's basis of knowledge. For each assertion of fact attributed to an informant ask, "How does he know that assertion is true?" Consider the following:

- Personal observations
- Weight of detail
- Informants knowledge of contraband (their experience/how they know)
- Independent observations of informant's opportunity to perceive events

Adequacy of description in affidavit - Both State and Federal laws require that search warrants "particularly" describe the place to be searched and the persons/things to be seized. With regard to the place, include the address, legal address and tax lot, along with a description of the property whenever possible. If there is more than one residence located on the property to be searched, a separate warrant will be needed to search each residence (unless one is inside the described area of the other - i.e., a converted garage). Regarding persons/things to be seized, be sure to include justifications to search for: small items (bindles, ID, receipts, etc.); primary suspect and co-conspirators; and vehicles. It is also a good idea to include a "catch-all" related to the particular crime, or crimes involved (i.e., "any other evidence related to the said crime"). Include as many crimes as you can, since this will help expand the list of things you can search for. Also, don't forget to include the "fruits of the crime" (i.e., money earned from the sale of drugs, etc.) for possible forfeiture.

The test for determining that the location is adequately described is whether the least intelligent officer could find the correct location as described in the warrant.

Include in the affidavit that you want to search "individuals and occupants found to be frequenting," in order to search unnamed others at the target location. Be sure to include PC that these others may possess seizable evidence.

When a search warrant is needed, consider a telephonic search warrant. The courts are generally more lenient about the procedure with these (because of their nature), and do encourage their use.

There is a template for the "search warrant affidavit" on your WCSO computer. (See below for a sample affidavit showing the general layout and some of the standard language you will want to use.)

2) Preparing the Search Warrant

The search warrant is a separate document from the affidavit. We've already covered that the affidavit is simply your request to search. The warrant, on the other hand, is the judge's permission slip to do so. We simply prepare the search warrant ahead of time, so the judge does not have to do it – which saves time and effort. Basically, the search warrant contains the important highlights of your affidavit. There should be nothing on the search warrant that is new or different from what is in your affidavit. In fact, the best way to complete the search warrant is to *cut and paste* directly from your affidavit. That way you know there are no discrepancies between the two.

You can find a template for the “search warrant” form on your WCSO computer. (See the sample search warrant below.)

3) Getting the Warrant Signed

Once you've completed the affidavit and search warrant, have someone from the DA's office review these documents (you can call the on-duty DDA if it is after hours). Although this is not a mandatory step, it is highly encouraged by both the DA's Office, who will ultimately have to defend the warrant in court and the judges, who are being asked to sign-off on it. The DDA who reviews your documents will be checking to make sure that you really do have PC, as well as to ensure your “basis of knowledge,” grammar, spelling, etc., look good. Don't be surprised if you need to go back and make some revisions. I know this seems like a hassle, but it's much better to fix any problems at this point, than to try and explain them later in court.

Once the warrant and affidavit are approved by the DA's Office, contact a judge. If it is after hours, there is a list of the judge's home phone numbers that you can access through Records. The judges really do expect to be called at any hour for this – so if it needs to be done, don't worry about making a late call.

Take the original affidavit and search warrant to the judge. Make sure you have a copy of the affidavit, because the judge will keep the original. The judge will read the affidavit, then, if s/he believes there is PC, will swear you to your statements. You and the judge will then sign the affidavit, which the judge will keep. The judge will also sign the warrant and give it back to you. Make copies of the signed warrant and keep the original in a safe place – you will need to return it to the judge later. You will need to leave a copy at the location of the search, along with any property/evidence receipts.

4) Executing the Search Warrant

Knock and announce requirement – Police are required to give appropriate notice as to the identity, authority and purpose of the officer(s) before making entry pursuant to a warrant (i.e., “this is the Sheriff's Office, we have a warrant to search this house”). There is no set amount of time that police must wait before making entry after such

announcement, but the courts have said that the occupants inside must be given “a few seconds to prepare for [police] entry.” The only time an officer can forego the knock and announce requirement is when the officer can show (by a preponderance of the evidence) that the circumstances at the time of entry justify an unannounced entry. The Courts have ruled that a decision not to knock and announce can only be determined at the time of entry and that having a judge pre-endorse a “No-Knock” entry is not effective. Circumstances that might justify an unannounced entry include:

- The premises are vacant or unoccupied
- Peaceably entry via ruse
- Suspect already knows the officers authority and purpose
- Persons inside are in imminent peril of bodily harm
- The officer reasonably believes that an announcement will increase the danger
- The officer reasonably believes that an announcement will lead to the destruction of evidence
- The officer reasonably believes that an announcement will lead to an escape

Normal service hours are 7:00am to 10:00pm. If the officer wishes to serve the warrant at other times, a specific request (including the grounds for that request) must be included in the affidavit.

Once entry is made, but before the search begins, the officer **shall** read and give a copy of the warrant to the person to be searched, or to the person in apparent control of the premises to be searched. If the premises are unoccupied, or there is no one in apparent control, the officer **shall** leave a copy of the warrant suitably affixed to the premises.

Never exceed the scope of the warrant (i.e., if searching for evidence of a shooting, don't start checking out the stereo equipment too).

The search warrant must be executed within 5 days of issuance, unless the warrant has been endorsed for service beyond that period.

While executing a search warrant, officers may handcuff individuals when there is a reasonable suspicion that the person poses a threat to officers or others.

5) Making the Return

Per ORS 133.615(2): “An officer who has executed a search warrant shall, as soon as is reasonably possible and in no event later than the date specified in the warrant [5 days from issuance, unless otherwise specified], return the warrant to the issuing judge together with a signed list of things seized and setting forth the date and time of the search.”

There are actually three things you will need for the return: 1) the *original* search warrant, 2) a search warrant return form (accessible as a template on your WCSO computer) and, 3) copies of all property evidence receipts. Next, label the

property/evidence receipts as “Exhibit A” and attach them to the back of the completed search warrant return form. Note that the return form needs to be notarized, so don’t sign the form until you find a Notary Public – most of the Records clerks are Notaries.

When the packet is complete, simply take it to the issuing judge and drop it off. If the judge is not readily available, it is okay to leave it with that judge’s clerk.

See below for an example of the search warrant return.



SEARCH WARRANT

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF WASHINGTON

To Any Police Officer in the State of Oregon: You are hereby commanded to search the following in the County of Washington:

— **Person described as:**

— **Vehicle described as:**

— **Premises described as:**

You are to seize the following objects:

You are further directed to execute the Search Warrant within five (5) days of issuance, between the hours of 7 AM and 10 PM, and make return of this Search Warrant to me within five (5) days after execution, except as otherwise provided herein:

___ This warrant may be executed at any time of day or night

___ This warrant may be executed more than five (5) days but not more than ten (10) days from its date of issuance.

DATED this ___ day of _____, 2006, at _____AM/PM

Signature of Magistrate

Title of Magistrate

References

Oregon Revised Statutes, 2008

2008 Manual of Oregon Search and Seizure Law, by the Oregon Dept. of Justice

Appellate Updates from the Office of Michael D. Schrunk, District Attorney, Multnomah County, Oregon (assorted issues from 2001-2002 - published monthly)