

# **Access to Private Property by Administrative Agencies Deskbook**

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**June 2009**

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**Office of the Attorney General  
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## I. Introduction

This deskbook has been prepared to answer two basic questions.

*Does my client agency need a warrant to enter private property to conduct an administrative inspection or investigation?* This question is addressed in parts II, III, and IV of the deskbook, which address the scope and parameters of the protections provided in the Fourth Amendment to the United States Constitution and article I, section 7 of the Washington Constitution. Part II reviews the application of those constitutional provisions to administrative inspections and investigations and the tests used to determine whether a warrant is required. Part III reviews the exemptions to the warrant requirement that courts have established. Part IV discusses the use of a valid warrant in an administrative inspection or investigation and explains some potential consequences of using an invalid administrative warrant.

*If my client agency needs an administrative warrant, how does it obtain one?* Part V summarizes the procedure for obtaining and executing an administrative warrant. Forms attached to the deskbook provide examples that can be used together with part V to develop an application for an administrative warrant. Part V also explains the critical importance of ensuring that an agency possesses the requisite statutory authority to obtain a warrant before filing an application for an administrative warrant.

## II. Legal Background

The protections of the Fourth Amendment to the United States Constitution and article I, section 7 of the Washington Constitution extend to administrative searches—that is, to searches conducted by state or local agencies in implementing their civil enforcement authority. Administrative searches may be performed as part of a program of routine inspection or as part of an investigation responding to a complaint. This section summarizes the primary decisions of the United States Supreme Court and of Washington courts that have so held.

### A. United States Constitution, Fourth Amendment

The Fourth Amendment provides: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” The basic purpose of the Fourth Amendment is “to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials.” [\*Camara v. Municipal Court of the City & Cy. of San Francisco\*](#),<sup>1</sup> 387 U.S. 523, 528, 87 S. Ct. 1727, 18 L. Ed. 2d 930 (1967). It is enforceable against the States through the Fourteenth Amendment. *Id.*

Until 1967, it was not clear whether the Fourth Amendment applied to searches that were not part of a criminal investigation. Indeed, in 1959 and 1960, a deeply divided Court upheld

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<sup>1</sup> Links to federal and state cases are included where a free resource is available. Some cases may not be linked because they were not available through a free resource at the time the deskbook was finalized.

criminal convictions of persons who refused to allow municipal health inspectors to enter and inspect their premises without a search warrant. See [Frank v. Maryland](#), 359 U.S. 360, 79 S. Ct. 804, 3 L. Ed. 2d 877 (1959); [Ohio ex rel. Eaton v. Price](#), 364 U.S. 263, 80 S. Ct. 1463, 4 L. Ed. 2d 1708 (1960). In 1967, however, the Court held in two cases that administrative inspections to detect building code violations must be undertaken pursuant to warrant if the occupant objects. Beginning with those two cases, the Court has held consistently that administrative searches and inspections are subject to the Fourth Amendment’s warrant requirement.<sup>2</sup>

### **1. *Camara v. Municipal Court of the City and County of San Francisco* (1967)**

In [Camara](#), 387 U.S. 523, 87 S. Ct. 1727, 18 L. Ed. 2d 930 (1967), municipal health inspectors entered an apartment building to make a routine annual inspection for possible violations of the city’s housing code, pursuant to a section of the code providing a right to enter “at reasonable times” “upon presentation of proper credentials.” [Camara](#), 387 U.S. at 526. Camara refused to allow the inspectors to enter his apartment as required by the local code; criminal charges were filed against him for his refusal. *Id.* at 525. Relying on [Frank v. Maryland](#), 359 U.S. 360, 79 S. Ct. 804, 3 L. Ed. 2d 877 (1959), and [Ohio ex rel. Eaton v. Price](#), 364 U.S. 263, 80 S. Ct. 1463, 4 L. Ed. 2d 1708 (1960), the Court of Appeals held the right of entry provision in the local code did not violate the Fourth Amendment because it was part of a civil regulatory scheme and created a right of inspection that was limited in scope and “may not be exercised under unreasonable conditions.” [Camara](#), 387 U.S. at 528. The Supreme Court reversed.

The Court first held that administrative health and safety inspections of private residences significantly intrude upon the interests protected by the Fourth Amendment. *Id.* at 530-31.

Second, the Court held that “such searches when authorized and conducted without a warrant procedure lack the traditional safeguards which the Fourth Amendment guarantees to the individual.” *Id.* at 534. In so holding, the Court rejected the argument that broad statutory safeguards can substitute for individualized review, especially where those safeguards could be invoked only at the risk of a criminal penalty (for denying entry). *Id.* at 533.<sup>3</sup> The Court therefore concluded *Camara* “had a constitutional right to insist that the inspectors obtain a warrant to search and that appellant may not constitutionally be convicted for refusing to consent to the inspection.” *Id.* at 540.

However, the Court rejected the argument that an administrative warrant could issue only upon the kind of probable cause required in criminal investigations. Rather, probable cause to issue a warrant to inspect also exists if “reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling.” *Id.* at 538. The

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<sup>2</sup> Exceptions to the warrant requirement are discussed below, beginning at page 14.

<sup>3</sup> The potential for criminal conviction was a relevant but not dispositive factor in *Camara*, as in [Marshall v. Barlow’s, Inc.](#), 436 U.S. 307, 98 S. Ct. 1816, 56 L. Ed. 2d 305 (1978) (discussed below, beginning at page 3). In *Marshall* the Court held that a warrant was required for inspections performed under the Occupational Safety and Health Act, which did not contain a criminal penalty for refusing entry. See [Marshall](#), 436 U.S. at 320 n.13.

Court explained that the warrant procedure “is designed to guarantee that a decision to search private property is justified by a reasonable governmental interest. But reasonableness is still the ultimate standard. If a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant.” *Id.* at 539.

Finally, the Court held the traditional emergency exemption to the warrant requirement applies to administrative inspections,<sup>4</sup> although it added that “warrants should normally be sought only after entry is refused unless there has been a citizen complaint or there is other satisfactory reason for securing immediate entry.” *Id.* at 539-40.

## **2. *See v. City of Seattle (1967)***

[\*See v. City of Seattle\*](#), 387 U.S. 541, 87 S. Ct. 1737, 18 L. Ed. 2d 943 (1967), was issued the same day as *Camara*.<sup>5</sup> In *See*, the Court extended the administrative warrant requirement to nonconsensual inspections of commercial premises. As part of a routine, periodic city-wide canvass to ensure compliance with the city’s fire code, the Seattle Fire Department sought to enter a commercial warehouse without a warrant and without probable cause to believe there was any specific violation of the code. *See*, 387 U.S. at 541. Mr. See refused to allow the inspection and was, therefore, convicted of a crime. *Id.* at 541-42.

The Court held that owners of commercial premises are protected by the Fourth Amendment, and “administrative entry, without consent, upon the portions of commercial premises which are not open to the public may only be compelled through prosecution or physical force within the framework of a warrant procedure.” *Id.* at 545. Accordingly, the Court concluded, “appellant may not be prosecuted for exercising his constitutional right to insist that the fire inspector obtain a warrant authorizing entry upon appellant’s locked warehouse.” *Id.* at 546.

The Court noted, however, that “[w]e do not in any way imply that business premises may not reasonably be inspected in many more situations than private homes, nor do we question such accepted regulatory techniques as licensing programs which require inspections prior to operating a business or marketing a product.” *Id.* at 545-46. It explicitly left open the constitutionality of those programs, stating that they “can only be resolved, as many have been in the past, on a case-by-case basis under the general Fourth Amendment standard of reasonableness” *Id.* at 546.

## **3. *Marshall v. Barlow’s, Inc. (1978)***

The Court reaffirmed *Camara*<sup>6</sup> and *See*<sup>7</sup> in [\*Marshall v. Barlow’s\*](#), 436 U.S. 307, 98 S. Ct. 1816, 56 L. Ed. 2d 305 (1978), a Fourth Amendment challenge to a provision of the

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<sup>4</sup> The need for emergency aid is discussed below, beginning at page 33.

<sup>5</sup> [\*Camara v. Municipal Court\*](#), 387 U.S. 523, 87 S. Ct. 1727, 18 L. Ed. 2d 930 (1967).

<sup>6</sup> [\*Camara v. Municipal Court\*](#), 387 U.S. 523, 87 S. Ct. 1727, 18 L. Ed. 2d 930 (1967).

<sup>7</sup> [\*See v. City of Seattle\*](#), 387 U.S. 541, 87 S. Ct. 1737, 18 L. Ed. 2d 943 (1967).



Occupational Safety and Health Act (OSHA) that authorized federal inspectors to search the work area of any employment facility covered by the Act for safety hazards and violations of regulations. The Court rejected the argument that warrantless inspections are essential to OSHA enforcement because they allow inspections without prior notice, thereby avoiding any opportunity for the subject of the inspection to disguise or alter violations. *Id.* at 316.<sup>8</sup>

The Court held that a warrant or some analogous process is required for nonconsensual OSHA inspections, but it held that “[p]robable cause in the criminal sense” is not required for the warrant to issue: “For purposes of an administrative search such as this, probable cause justifying the issuance of a warrant may be based not only on specific evidence of an existing violation but also on a showing that ‘reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment].’” *Id.* at 320 (quoting *Camara*, 436 U.S. at 538). The Court explained that a warrant showing that a specific business has been chosen for an inspection on the basis of “a general administrative plan for the enforcement of the Act derived from neutral sources” would protect an employer’s Fourth Amendment rights. *Id.* at 320-21.

#### 4. Subsequent Fourth Amendment Cases

The Supreme Court appears to require a warrant for any administrative search of a private residence where the owner has a reasonable expectation of privacy in the premises, absent an exception to the warrant requirement.<sup>9</sup> *See, e.g., Michigan v. Clifford*, 464 U.S. 287, 104 S. Ct. 641, 78 L. Ed. 2d 477 (1984) (an owner of fire-damaged residential premises may retain a reasonable expectation of privacy such that fire investigators must obtain an administrative warrant to investigate the cause of a fire).<sup>10</sup> This requirement is consistent with the Court’s explanation in *Camara* that the basic purpose of the Fourth Amendment is to “safeguard the privacy and security of individuals against arbitrary invasions by governmental officials.” *Camara*, 387 U.S. at 528.

The Supreme Court has used the owner’s reasonable expectation of privacy as an explicit touchstone for articulating the Fourth Amendment’s requirements applicable to administrative searches of commercial property. In *Donovan v. Dewey*, 452 U.S. 594, 101 S. Ct. 2534, 69 L. Ed. 2d 262 (1981), the Court explained that a commercial property owner does not have a

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<sup>8</sup> The Occupational Safety and Health Administration argued that no warrant was required under the exception for pervasively or closely regulated businesses. *Marshall*, 436 U.S. at 313. This exemption is discussed below, beginning at page 21. The Court acknowledged that exception, but explained that it applied only to businesses with “a long tradition of close government supervision” so that that a person who chooses to enter such a business “in effect consents to the restrictions placed upon him.” *Id.* OSHA, in contrast, was a relatively recent statute which regulated virtually all businesses engaged in interstate commerce.

<sup>9</sup> Exceptions to the warrant requirement are discussed below, beginning at page 14.

<sup>10</sup> *See also Michigan v. Tyler*, 436 U.S. 499, 506, 98 S. Ct. 1942, 56 L. Ed. 2d 486 (1978) (“[T]here is no diminution in a person’s reasonable expectation of privacy nor in the protection of the Fourth Amendment simply because the official conducting the search wears the uniform of a firefighter rather than a policeman, or because his purpose is to ascertain the cause of a fire rather than to look for evidence of a crime, or because the fire might have been started deliberately.”). *Accord State v. Vonhof*, 51 Wn. App. 33, 751 P.2d 1221 (1988) (tax appraiser is government agent whose entry onto property must comply with Fourth Amendment).

cognizable Fourth Amendment interest in being free from all inspections, but rather in being free from “unreasonable intrusions onto his property by agents of the government.” *Donovan*, 452 U.S. at 599. Accordingly, legislative schemes authorizing warrantless administrative searches of commercial property do not necessarily violate the Fourth Amendment because a commercial property owner has an expectation of privacy in that property that “differs significantly from the sanctity accorded an individual’s home,” and this privacy interest may, in certain circumstances, be adequately protected by regulatory schemes authorizing warrantless inspections. *Id.* at 598-99 (citing *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 90 S. Ct. 774, 25 L. Ed. 2d 60 (1970); *United States v. Biswell*, 406 U.S. 311, 92 S. Ct. 1593, 32 L. Ed. 2d 87 (1972)). *See also See v. City of Seattle*, 387 U.S. 541, 545-46, 87 S. Ct. 1737, 18 L. Ed. 2d 943 (1967).

## **B. Washington Constitution, Article I, Section 7**

Article I, section 7 provides that “[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law.”

The Washington Supreme Court has characterized the privacy protections in article I, section 7 as “qualitatively different from, and in some cases broader than, those provided by the Fourth Amendment.” *City of Seattle v. McCready*, 123 Wn.2d 260, 267, 868 P.2d 134 (1994) (*McCready I*). In the criminal context, the Supreme Court has described as “well settled” the principle that “article I, section 7 of the Washington Constitution provides greater protection to individual privacy rights than the Fourth Amendment.” *State v. Jones*, 146 Wn.2d 328, 332, 45 P.3d 1062 (2002). The analysis under article I, section 7 has been summarized as follows:

To determine whether a search necessitating a warrant has taken place under U.S. Const. amend. 4, the inquiry is whether the defendant possessed a “reasonable expectation of privacy.” . . . In contrast, due to the explicit language of Const. art. 1, § 7, under the Washington Constitution the relevant inquiry for determining when a search has occurred is whether the state unreasonably intruded into the defendant’s “private affairs.” . . . Const. art. 1, § 7 analysis encompasses those legitimate privacy expectations protected by the Fourth Amendment; but is not confined to the subjective privacy expectations of modern citizens who, due to well publicized advances in surveillance technology, are learning to expect diminished privacy in many aspects of their lives. . . . Rather, it focuses on those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant.

*State v. Myrick*, 102 Wn.2d 506, 510-11, 688 P.2d 151 (1984) (citations omitted).

In noncriminal contexts, the picture is not so clear, although the same test is used:

First, we must determine whether the state action constitutes a disturbance of one’s private affairs. . . . Second, if a privacy interest has been disturbed, the second step in our analysis asks whether authority of law justifies the intrusion. The “authority of law” required by article I, section 7 is satisfied by a valid warrant, limited to a few jealously guarded exceptions. . . .

[York v. Wahkiakum School Dist. No. 200](#), 163 Wn.2d 297, 306, 178 P.3d 995 (2008) (*York II*) (holding that suspicionless, random drug testing of student athletes violated article I, section 7). In [Murphy v. State](#), 115 Wn. App. 297, 62 P.3d 533, *review denied*, 149 Wn.2d 1035 (2003), *cert. denied*, 541 U.S. 1087 (2004), the Washington State Pharmacy Board obtained and examined the records of private pharmacies without first obtaining a warrant, under authority granted by statute. The court rejected an invitation to find greater privacy protection for pharmacy records under article I, section 7 than under the Fourth Amendment:

It is true that in some instances, Washington courts have held that our constitution provides greater privacy protections than the Fourth Amendment. While the protections afforded by the Fourth Amendment may erode over time due to diminishing societal expectations of privacy, article I, section 7 connects the constitutional standard to “ ‘those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant.’ ” . . .

But just because a state constitutional provision has been subject to independent interpretation and found to be more protective in a particular context, it does not follow that greater protection is provided in all contexts. . . .

[Murphy](#), 115 Wn. App. at 311. Where “greater protection” has been found, it has typically been determined on a case-by-case basis using the analysis in [State v. Gunwall](#), 106 Wn.2d 54, 720 P.2d 808 (1986). See [York II](#), 163 Wn.2d at 306 (summarizing the *Gunwall* factors without citing *Gunwall*); [Murphy](#), 115 Wn. App. at 311 (citing *Gunwall*). Cases decided under the Fourth Amendment thus provide some guidance on issues arising under article I, section 7, but are not dispositive. [Murphy](#), 115 Wn. App. at 311-12.<sup>11</sup>

The first prong of the article I, section 7 inquiry is whether the challenged action “constitutes a disturbance of one’s private affairs.” [State v. Miles](#), 160 Wn.2d 236, 244, 156 P.3d

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<sup>11</sup> Very recently the Washington Supreme Court described the article I, section 7 “greater protection” analysis in somewhat different terms, suggesting that *Gunwall* is no longer relevant to the inquiry:

When considering whether the state constitution provides greater protection than the federal constitution, this court engages in a two-step inquiry. *Madison v. State*, 161 Wn.2d 85, 93, 163 P.3d 757 (2007) (plurality opinion). First, the court must determine “whether ‘a provision of the state constitution should be given an interpretation independent from that given to the corresponding federal constitutional provision.’ ” *Id.* (quoting [State v. McKinney](#), 148 Wn.2d 20, 26, 60 P.3d 46 (2002)). Normally, this first step involves an analysis of the six nonexclusive *Gunwall* factors. However, “[o]nce this court has established that a state constitutional provision warrants an analysis independent of a particular federal provision,” a *Gunwall* analysis is unnecessary. *Id.* at 94. It is well-settled law that article I, section 7 may provide greater protection than the federal constitution, especially in cases of governmental searches and seizures. [McKinney](#), 148 Wn.2d at 26. Thus, it is not necessary for this court to reconsider the factors outlined in *Gunwall* to determine whether to apply a constitutional analysis under article I, section 7 in a new context. *Id.*; *Andersen v. King County*, 158 Wn.2d 1, 44, 138 P.3d 963 (2006) (plurality opinion).

[American Legion Post #149 v. Dep’t of Health](#), 164 Wn.2d 570, 596-97, 192 P.3d 306 (2008) (footnote omitted).

864 (2007). “Private affairs” are determined by looking to the kind of protection that historically has been afforded to the interest asserted, and to the nature and extent of the information that might be obtained as a result of the challenged governmental conduct. *Id.* This is an objective analysis that does not depend on subjective expectations of privacy. *Id.* Rather, it is “an examination of whether the expectation [of privacy] is one which a citizen of this state should be entitled to hold.” [McCready I](#), 123 Wn.2d at 270. *Accord* [York II](#), 163 Wn.2d at 307; [Miles](#), 160 Wn.2d at 244. For this reason, courts have consistently held that there is no reasonable expectation of privacy in areas of a commercial establishment that are open to the public.<sup>12</sup>

Areas in which Washington courts have afforded greater privacy protection under article I, section 7 include personal bank records,<sup>13</sup> garbage placed at the curb,<sup>14</sup> motel registry records,<sup>15</sup> and records of phone numbers dialed from a home telephone.<sup>16</sup> Areas that do not receive privacy protection under article 1, section 7 include a sender’s text messages sent to a recipient’s iPhone,<sup>17</sup> vehicle registration records,<sup>18</sup> and contents of e-mails recorded by the receiving computer.<sup>19</sup>

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<sup>12</sup> See, e.g., [Dodge City Saloon, Inc. v. Liquor Control Bd.](#), 168 Wn. App. 388, -- P. 3d -- (2012) (Liquor Board “compliance checks” that involve sending an underage person into the public areas of a bar during business hours are not a search). It is also unlikely that a privacy expectation would be found where a business or individual is present on public property or property owned by another. See [State v. Cleator](#), 71 Wn. App. 217, 222, 857 P.2d 306 (1993), *review denied*, 123 Wn.2d 1024 (1994) (any privacy interest in tent wrongfully erected on public property limited to “personal belongings”); [Centimark Corp. v. Dep’t of Labor & Indus.](#), 129 Wn. App. 368, 376, 119 P.3d 865 (2005) (“an individual whose presence on another’s premises is purely commercial in nature . . . has no legitimate expectation of privacy in that location” (footnote and citations omitted)). See also [Marshall v. Barlow’s](#), 436 U.S. 307, 315, 98 S. Ct. 1816, 56 L. Ed. 2d 305 (1978) (“[w]hat is observable by the public is observable, without a warrant, by the Government inspector as well.”)

<sup>13</sup> Compare [Miles](#), 160 Wn.2d 236 (personal bank records protected as private affairs under article 1, section 7) with [United States v. Miller](#), 425 U.S. 435, 440-41, 96 S. Ct. 1619, 48 L. Ed. 2d 71 (1976) (no Fourth Amendment privacy interest in bank records, checks, deposit slips, and other bank-related records). The result in *Miller* was subsequently superseded by statute. See [Miles](#), 160 Wn.2d at 868, n.4.

<sup>14</sup> Compare *State v. Boland*, 115 Wn.2d 571, 578, 800 P.2d 1112 (1990) (under article 1, section 7 there is a reasonable expectation of privacy in garbage left at the curb) with [California v. Greenwood](#), 486 U.S. 35, 39-43, 108 S. Ct. 1625, 100 L. Ed. 2d 30 (1988) (no expectation of privacy in garbage left at the curb). However, article 1, section 7 does not protect garbage left in front of a neighboring abandoned house ([State v. Hepton](#), 113 Wn. App. 673, 679, 54 P.3d 233(2002)) or stolen goods deposited in an apartment complex dumpster ([State v. Rodriguez](#), 65 Wn. App. 409, 418-19, 828 P.2d 636 (1992)).

<sup>15</sup> [State v. Jorden](#), 160 Wn.2d 121, 156 P.3d 893 (2007).

<sup>16</sup> [State v. Gunwall](#), 106 Wn.2d 54, 68-69, 720 P.2d 808 (1986) (absent a warrant, article 1, section 7 does not allow police to use a pen register or access toll calling records to obtain information about phone numbers dialed from a home phone) with [Smith v. Maryland](#), 442 U.S. 735, 745-46, 99 S. Ct. 2577, 61 L. Ed. 2d 220 (1979) (no Fourth Amendment privacy interest in phone numbers dialed from a home phone). Article 1, section 7 also protects unpublished telephone listings. [State v. Butterworth](#), 48 Wn. App. 152, 155-56, 737 P.2d 1297 (1987).

<sup>17</sup> [State v. Hinton](#), 169 Wn. App. 28, 280 P.3d 476 (2012).

<sup>18</sup> [State v. McKinney](#), 148 Wn.2d 20, 27-32, 60 P.3d 46 (2002).

<sup>19</sup> [State v. Townsend](#), 147 Wn.2d 666, 676, 57 P.3d 255 (2002).

If no private affairs are disturbed, article I, section 7 is not implicated.<sup>20</sup> [Miles](#), 160 Wn.2d at 244. If a challenged action disturbs a person’s private affairs, however, the court then asks whether “authority of law” justifies the intrusion. *Id.* “In general terms, the authority of law required by article I, section 7 is satisfied by a valid warrant.” *Id.* The requirements for a valid administrative warrant are discussed below, beginning at page 44. Exceptions to the warrant requirement are below, beginning at page 14.

### C. Difference Between Criminal and Administrative Warrants

The United States Supreme Court has rejected the argument that an administrative warrant may issue only upon the kind of probable cause required in criminal investigations. [Camara v. Municipal Court](#), 387 U.S. 523, 534-39, 87 S. Ct. 1727, 18 L. Ed. 2d 930 (1967); [Marshall v. Barlow’s, Inc.](#), 436 U.S. 307, 320-21, 98 S. Ct. 1816, 56 L. Ed. 2d 305 (1978). Rather, probable cause to issue a warrant to inspect exists if there is (1) specific evidence of an existing violation, or (2) a general inspection program based on reasonable legislative or administrative standards derived from neutral sources. [Marshall](#), 436 U.S. at 320-21.

Washington courts apply the same analysis in the context of an inspection program, upholding administrative inspection warrants based on reasonable legislative or administrative standards derived from neutral sources. See [City of Seattle v. Leach](#), 29 Wn. App. 81, 84, 627 P.2d 159 (1981); [City of Seattle v. See](#), 26 Wn. App. 891, 895-96, 614 P.2d 254, *review denied*, 94 Wn.2d 1022 (1980). This more flexible standard for probable cause for administrative warrants reflects the fact that a criminal search has greater constitutional implications than the health and safety inspections typically undertaken pursuant to an administrative warrant. [Camara](#), 387 U.S. at 530; [Cranwell v. Mesec](#), 77 Wn. App. 90, 105, 890 P.2d 491, *review denied*, 127 Wn.2d 1004 (1995). Courts also have recognized that, in contrast to investigations focused on specific crimes, routine inspections are necessary to ensure compliance with civil codes and regulations. See [Camara](#), 387 U.S. at 535-36 (“the only effective way to seek universal compliance with the minimum standards required by municipal codes is through routine periodic inspections of all structures” (footnote omitted)); [Alverado v. Washington Pub. Power Supply Sys.](#), 111 Wn.2d 424, 435, 759 P.2d 427 (1988) (under Fourth Amendment, “[b]ecause routine inspections are often essential to adequate enforcement of valid government regulation, probable cause is not required”), *cert. denied*, 490 U.S. 1004 (1989).

Requiring that a warrant be based on reasonable legislative or administrative standards derived from neutral sources (absent specific evidence of a violation) ensures that any inspection is reasonable and not subject to the “unbridled discretion” of the agency making the inspection. [Marshall](#), 436 U.S. at 323; [Leach](#), 29 Wn. App. at 84. Therefore, where probable cause is alleged based on a general inspection program, the warrant application (or attached declarations or affidavits) “must describe the program in sufficient detail to enable the ‘neutral and detached magistrate’ to determine that ‘there is a reasonable legislative or administrative inspection program and . . . that the desired inspection fits within that program.’ ” [Leach](#), 29 Wn. App. at

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<sup>20</sup> Neither is the Fourth Amendment implicated. See [Centimark](#), 129 Wn. App. at 375 (the constitutional right to privacy under the Fourth Amendment does not apply to areas in which there is no reasonable expectation of privacy).

84 (citing [In re Northwest Airlines, Inc.](#), 587 F.2d 12, 14-15 (7th Cir. 1978)).<sup>21</sup> Moreover, in reviewing the validity of any warrant, an appellate court may consider only information before the magistrate at the time the warrant was issued. [Leach](#), 29 Wn. App. at 85 (citing [Aguilar v. Texas](#), 378 U.S. 108, 109 n.1, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964) (addressing criminal warrant)).

While the Fourth Amendment does not require “probable cause” in the criminal sense to obtain an administrative warrant based on specific evidence of an existing violation, the Washington Supreme Court has yet to articulate the same rule under article I, section 7. Compare [Marshall v. Barlow’s, Inc.](#), 436 U.S. 307, 320-21, 98 S. Ct. 1816, 56 L. Ed. 2d 305 (1978), with [City of Seattle v. McCready](#), 123 Wn.2d 260, 281-82, 868 P.2d 134 (1994) (*McCready I*); cf. [Bosteder v. City of Renton](#), 155 Wn.2d 18, 36, 117 P.3d 316 (2005), *superseded by statute on unrelated grounds as noted in* [Wright v. Terrell](#), 162 Wn.2d 192, 195 n. 1, 170 P.3d 570 (2007) (“While the probable cause necessary to secure the [administrative inspection] warrant in this case may have been qualitatively different from that required for search warrants in criminal cases, a warrant was still required”).<sup>22</sup> In light of existing authority it seems reasonable to conclude that a lower standard would apply, since no Washington court has explicitly rejected it, but caution is warranted given the “greater protection” that may be afforded under article 1, section 7. For tips on how to draft the documents in support of the warrant, see Section V.C.

Caution also is warranted where potential criminal activity is at issue. While a lower standard of probable cause generally applies to administrative warrants than to criminal warrants, investigators cannot rely on an administrative warrant if the purpose of the search is to assemble proof of a crime; if they are seeking evidence to be used in a criminal prosecution, they must first secure a warrant using the usual standard of probable cause. [Michigan v. Tyler](#), 436 U.S. 499, 508, 98 S. Ct. 1942, 56 L. Ed. 2d 486 (1978); [Michigan v. Clifford](#), 464 U.S. 287, 294, 104 S. Ct. 641, 78 L. Ed. 2d 477 (1984). Accord [City of Seattle v. See](#), 26 Wn. App. at 894. Conversely, however, an administrative warrant is not invalid merely because police officers assist or actually serve the warrant or because evidence of a crime is discovered in the course of an otherwise proper administrative inspection. [New York v. Burger](#), 482 U.S. 691, 716-17, 107 S. Ct. 2636, 96 L. Ed. 2d 601 (1987).

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<sup>21</sup> “[T]he magistrate has two functions to perform under [*Marshall v.*] *Barlow’s* second method of establishing probable cause: (1) He must determine that there is a reasonable legislative or administrative inspection program and (2) he must determine that the desired inspection fits within that program.” [In re Northwest Airlines, Inc.](#), 587 F.2d 12, 14-15 (7th Cir. 1978).

<sup>22</sup> See also [State v. Bell](#), 108 Wn.2d 193, 208, 737 P.2d 254 (1987), *abrogated on other grounds by* [Horton v. California](#), 496 U.S. 128, 110 S. Ct. 2301, 110 L. Ed. 2d 112 (1990) (Pearson, C.J., concurring in result) (“[i]t is well established that the ‘probable cause’ required for an administrative search is not as stringent as the ‘probable cause’ required for a criminal investigation . . .” (citing *Camara*)); [City of Seattle v. Leach](#), 29 Wn. App. 81, 84, 627 P.2d 159 (1981) (“a lesser degree of probable cause is necessary to satisfy issuing an inspection warrant than is required in a criminal case. . . . An administrative inspection warrant may be based on either (1) specific evidence of an existing violation, or (2) a general inspection program based on reasonable legislative or administrative standards derived from neutral sources” (citing *Camara*, *See*, and *Marshall v. Barlow’s*)).

## D. Authority to Issue Administrative Warrant

A warrantless search is per se unreasonable and barred under the Fourth Amendment unless it falls within a recognized exception to the warrant requirement.<sup>23</sup> Similarly, article I, section 7 of the Washington Constitution requires that any government intrusion into a person’s “private affairs” must be authorized by law.<sup>24</sup> Such authority may be provided by a valid search warrant or by a recognized exception to the warrant requirement.

To be valid under both the Fourth Amendment and article I, section 7, a warrant generally must be supported by facts establishing probable cause that the search is justified, and the probable cause determination must be made by an impartial magistrate with authority to make the determination. [City of Seattle v. McCready](#), 123 Wn.2d 260, 272, 868 P.2d 134 (1994) (*McCready I*) (citing [State v. Myers](#), 117 Wn.2d 332, 337, 815 P.2d 761 (1991); [State v. Canady](#), 116 Wn.2d 853, 853-57, 809 P.2d 203 (1991)). As explained above, beginning at page 8, an administrative warrant for an inspection may issue on less than the traditional probable cause standard, but it always must be issued by an impartial magistrate with authority to issue the warrant. [McCready I](#), 123 Wn.2d at 272-73.

### 1. The *McCready* Cases (1991, 1994, 1997)

In the *McCready* cases, the Washington Supreme Court held that a warrant issued by a court in the absence of a statute or court rule authorizing the court to do so was invalid under article I, section 7 of the Washington Constitution. See [City of Seattle v. McCready](#), 123 Wn.2d 260, 274, 868 P.2d 134 (1994) (*McCready I*); [City of Seattle v. McCready](#), 124 Wn.2d 300, 309, 877 P.2d 686 (1994) (*McCready II*).

The *McCready* cases involved inspection warrants issued under a building inspection program implemented by the City of Seattle. In the first *McCready* case, McCready and others urged the court to reject the Fourth Amendment standards for administrative inspection established by the United States Supreme Court in *Camara*<sup>25</sup> and *See*<sup>26</sup> and instead hold that article I, section 7 of the Washington Constitution requires use of the traditional criminal law test of probable cause for the issuance of administrative search warrants. [McCready I](#), 123 Wn.2d at 268. The court did not decide whether article I, section 7 imposed this higher standard because it found that the warrants were issued by a court that lacked authority to do so. *Id.* at 268, 281-82. On that basis, it quashed the warrants under article I, section 7. *Id.* at 280.<sup>27</sup>

The court in *McCready I* assumed that an administrative warrant to conduct an inspection may be justified by the presence of “reasonable legislative or administrative standards” (as

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<sup>23</sup> The Fourth Amendment is discussed above, beginning at page 1.

<sup>24</sup> Article I, section 7 is discussed above, beginning at page 5.

<sup>25</sup> [Camara v. Municipal Court](#), 387 U.S. 523, 87 S. Ct. 1727, 18 L. Ed. 2d 930 (1967).

<sup>26</sup> [See v. City of Seattle](#), 387 U.S. 541, 87 S. Ct. 1737, 18 L. Ed. 2d 943 (1967).

<sup>27</sup> Interestingly, none of the parties had challenged the court’s authority to issue warrants. See [McCready I](#), 123 Wn.2d at 268-69.

approved by the United States Supreme Court in *Camara, See, and Marshall*<sup>28</sup>), but it held that a superior court in Washington “is not authorized either by the common law or by the state constitution to issue search warrants on less than probable cause in the absence of a statute or court rule.” *McCready I*, 123 Wn.2d at 273. Finding that the court rule governing criminal warrants does not apply to such warrants, the court held that an administrative warrant issued on less than traditional probable cause may be issued by a superior court only if authorized by statute. *Id.*

The court held, however, that authority to issue a warrant is not created by a statute creating a “right of entry” for enforcement purposes, nor even by a statute authorizing an agency to seek a warrant to obtain entry. Instead, the statute must specifically authorize the court to issue the warrant for the purpose requested in the application. *Id.* at 278-79. The court listed examples of state statutes that explicitly authorize courts to issue administrative search warrants in support of the enforcement of specific laws. *Id.* at 278-80.<sup>29</sup> These examples may be viewed as models of language that is constitutionally sufficient to authorize the issuance of administrative warrants upon less than traditional probable cause.

When the matter returned to the Washington Supreme Court in the second *McCready* case, the court was asked to decide the question *McCready I* had not reached: whether an administrative warrant, issued based on probable cause that a civil violation had occurred but without a statute or court rule explicitly authorizing the court to issue it, was valid. *McCready II*, 124 Wn.2d at 309. The administrative warrant in *McCready II* had been issued by the Seattle municipal court based on a showing of probable cause that a civil infraction had taken place, but the supreme court applied the same analysis as it did in *McCready I*, holding that municipal courts in Washington (like superior courts) have no inherent authority to issue search warrants absent evidence of a crime. *Id.* Thus, even though the administrative warrants were supported by probable cause determinations, the court held the warrants were issued without authority of law, in violation of article I, section 7, because no statute or court rule authorized the court to issue warrants without probable cause to believe that a crime had occurred. *Id.* at 309.<sup>30</sup>

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<sup>28</sup> *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 98 S. Ct. 1816, 56 L. Ed. 2d 305 (1978).

<sup>29</sup> One such example is [RCW 16.57.180](#), which provides:

Any authorized agent or employee of the county horticultural pest and disease board may enter upon any property for the purpose of administering this chapter and any power exercisable pursuant thereto, including the taking of specimens, general inspection, and the performance of such acts as are necessary for controlling and preventing the spreading of horticultural pests and diseases. Such entry may be without the consent of the owner, and no action for trespass or damages shall lie so long as such entry and any activities connected therewith are undertaken and prosecuted with reasonable care.

Should any such employee or authorized agent of the county horticultural pest and disease board be denied access to such property where such access was sought to carry out the purpose and provisions of this chapter, the said board may apply to any court of competent jurisdiction for a search warrant authorizing access to such property for said purpose. The court may upon such application issue the search warrant for the purpose requested.

<sup>30</sup> Probable cause is discussed in greater detail below, beginning at page 55.



Despite holding that the warrant had been issued without authority of law, the *McCready II* court rejected the argument that the inspection also violated the Fourth Amendment. Specifically, the court ruled that the warrant was “not too broad in scope,” that it was “supported by probable cause,” and that ex parte issuance of an administrative warrant was acceptable. [McCready II](#), 124 Wn.2d at 311-12. The court reaffirmed this aspect of *McCready II* in [City of Seattle v. McCready](#), 131 Wn.2d 266, 931 P.2d 156 (1997) (*McCready III*), holding that the warrants were not invalid under the Fourth Amendment and explaining that the inspection standards used by the city “mirror the reasonable Fourth Amendment probable cause standards for inspection warrants outlined in *Camara*.” *Id.* at 272-73; *see also id.* at 273 n.5 (holding that *McCready* warrants did not violate Fourth Amendment “is also compelled by our holding in *McCready II*, explicitly rejecting Appellants’ argument that warrants invalid under article 1, section 7 violate the Fourth Amendment”). Because there had been no federal constitutional violation, the court in *McCready III* refused to award attorney fees under 42 U.S.C. § 1988. *Id.* at 269, 271, 283.

## **2. *Bosteder v. City of Renton* (2005)**

The three *McCready* decisions were grounded in state constitutional law and arguably did not address whether an administrative warrant issued without authority of law also violates the Fourth Amendment to the United States Constitution. *See* [City of Seattle v. McCready](#), 123 Wn.2d 260, 281-82, 868 P.2d 134 (1994) (*McCready I*) (stating it is unnecessary to address whether warrant violates Fourth Amendment where state constitutional provision is dispositive); [City of Seattle v. McCready](#), 124 Wn.2d 300, 311-12, 877 P.2d 686 (1994) (*McCready II*) (rejecting argument that warrant violated Fourth Amendment by being too broad in scope and unsupported by probable cause, but declining to decide if lack of authority to issue warrant violated federal constitution); *but cf.* [City of Seattle v. McCready](#), 131 Wn.2d 266, 273, 931 P.2d 156 (1997) (*McCready III*) (explaining that inspection warrants at issue in *McCready I* and *II* “did not violate Appellants’ Fourth Amendment rights” and that warrant that violates article I, section 7 does not necessarily violate Fourth Amendment).

Subsequent to the *McCready* cases, however, the Washington Supreme Court held that if an issuing judge lacks legal authority to issue a noncriminal administrative search warrant, the warrant is invalid per se under the Fourth Amendment. *See* [Bosteder v. City of Renton](#), 155 Wn.2d 18, 30, 117 P.3d 316 (2005).

In *Bosteder*, a police department and building code enforcement team worked together to obtain an administrative search warrant to search an apartment building for building code violations. *Id.* at 24. The post-*McCready* administrative warrant in *Bosteder* was improperly granted by a court based on a “right of entry” provision in the building codes of a city ordinance. *Id.* at 31. The court reaffirmed that “a right of entry” is not equivalent to a legislative authorization for a court “to issue warrants in support of enforcement activities.” *Id.* (citing [McCready I](#), 123 Wn.2d at 278). Thus, the judge issuing the warrant in *Bosteder* did not have either inherent or statutorily delegated power to issue the administrative warrant. [Bosteder](#), 155 Wn.2d at 34. Suggesting the court had not reached the issue in *McCready II* or *McCready III*, the *Bosteder* court further held that a warrant issued without authority of law is “void” and

invalid, and that a search conducted pursuant to such a warrant would therefore be, by definition, “unreasonable and in violation of the Fourth Amendment.” *Id.* at 30, 32, 36.

Bosteder also argued that he was entitled to damages under 42 U.S.C. § 1983 for what the court had decided was a violation of his Fourth Amendment rights. The court ruled that the individuals that conducted the particular inspection at issue in *Bosteder* were “qualifiedly immune” from liability under 42 U.S.C. § 1983 because it would have been “objectively reasonable . . . to glean from the *McCready* decisions that the Fourth Amendment was not violated in a situation very similar to the one we consider here.” *Bosteder*, 155 Wn.2d at 38. The *Bosteder* court “clarif[ied],” however, that “contrary” to the previous holdings in the *McCready* decisions, individual liability could exist for performing a search without a valid warrant, where the warrant was invalid because the judge lacked authority to issue it. *Id.* at 37.

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*Practice pointer:* Practitioners are strongly cautioned against seeking a warrant unless a statute or rule explicitly authorizes the court to issue it. Individual liability could accrue to agency personnel relying on such a warrant in an inspection or investigation and, perhaps, even to an attorney drafting the application for such a warrant.<sup>31</sup>

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A governmental entity may not need an administrative search warrant where private inspections are mandated by a regulation. In *City of Pasco v. Shaw*, 161 Wn.2d 450, 166 P.3d 1157 (2007), *cert. denied*, 128 S. Ct. 1651 (2008), the Court was asked to decide whether a city licensing program required warrantless inspections in violation of the Fourth Amendment or article 1, section 7. The program required residential landlords to provide a “certificate of inspection” from a city code enforcement officer, HUD inspector, city-approved “certified private inspector,” or state-licensed structural engineer or architect to maintain their business licenses. *Shaw*, 161 Wn.2d at 455-56, 458-59. Even though the licensing program required prospective landlords to allow entry onto their property for inspections by government officials or government-certified inspectors, the Court concluded that there was no “search” implicated because the program allowed for private inspectors, who were not required to report violations to the city. Thus, there was no state action because the private inspectors are not state actors. *Id.* at 460-62. The Washington Supreme Court has, however, rejected the “private search doctrine” and held that it is contrary to article I, section 7 for state actors to conduct a warrantless search even if that search does not exceed the scope of a prior private search. *State v. Eisfeldt*, 163 Wn.2d 628, 636, 185 P.3d 580 (2008).<sup>32</sup> Such searches have been found not to violate an

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<sup>31</sup> It appears that the *Bosteder* court’s reference to an “application” for an unauthorized warrant actually referred to an affidavit submitted by one of the city’s inspectors that did not acknowledge the *McCready* decisions, citing instead to earlier case law to assert the search warrant was authorized by building and housing codes. *Bosteder*, 155 Wn.2d at 37. Nevertheless, an attorney who submits an administrative warrant application or similar pleading that ignores the *McCready* decisions and the *Bosteder* decision does so at his or her peril.

<sup>32</sup> In *Eisfeldt*, a repairman discovered evidence of drug manufacture in a house. The occupants of the house were not present but had left a key under the mat for the repairman. The repairman called police and escorted them through the house. Based on their observations, the police obtained a search warrant for the house as well as another location. The Supreme Court determined that the warrants were improperly granted and the resulting evidence should be suppressed because the repairman had no authority to consent to police search and an individual’s

individual's reasonable expectation of privacy under the Fourth Amendment, but the court has adopted “a bright line rule holding it inapplicable under article I, section 7 of the Washington Constitution.” *Id.* at 638.

### III. Exceptions to the Warrant Requirement

Under the Fourth Amendment, “searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable . . . subject only to a few specifically established and well-delineated exceptions.” *Katz v. United States*, 389 U.S. 347, 357, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967). Article I, section 7 is at least as restrictive: “As a general rule, warrantless searches and seizures are per se unreasonable. . . . However, there are a few ‘jealously and carefully drawn exceptions to the warrant requirement . . . .’” *State v. Reichenbach*, 153 Wn.2d 126, 131, 101 P.3d 80 (2004) (citations omitted). *Accord York v. Wahkiakum School Dist. No. 200*, 163 Wn.2d 297, 306, 178 P.3d 995 (2008) (*York II*).

Both federal and state courts have recognized exceptions to the warrant requirement. Eight exceptions to the warrant requirement are discussed here. Some exceptions, such as the consent of the person subject to an inspection or search, are well established and broadly applicable. Other exceptions are specific to certain circumstances or the subject of judicial skepticism.

#### A. Consent

It is well settled that consent is an exception to the criminal warrant requirement under the Fourth Amendment. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973). Consent also is a recognized exception to the criminal warrant requirement under the Washington Constitution, even though the state constitution “goes further than the Fourth Amendment in protecting against warrantless searches and seizures.” *State v. Ferrier*, 136 Wn.2d 103, 111, 960 P.2d 927 (1998). *Accord State v. Khounvichai*, 149 Wn.2d 557, 562, 69 P.3d 862 (2003). Federal and state courts also have considered consent an exception to the warrant requirement in the context of administrative searches. *United States v. Thriftmart, Inc.*, 429 F.2d 1006, 1009 (9th Cir.), *cert. denied*, 400 U.S. 926 (1970); *Seattle v. McCready*, 124 Wn.2d 300, 303-04, 877 P.2d 686 (1994) (*McCready II*); *Cranwell v. Mesec*, 77 Wn. App. 90, 100-08, 890 P.2d 491, *review denied*, 127 Wn.2d 1004 (1995).

#### 1. Consent in Administrative Searches

As discussed above, beginning at page 8, courts applying the federal and Washington State constitutions have recognized that criminal and administrative searches are governed by different standards. Federal courts also have held that consent in administrative searches is subject to a lower standard than in criminal searches. In *United States v. Thriftmart, Inc.*, 429 F.2d 1006 (9th Cir.), *cert. denied*, 400 U.S. 926 (1970), for example, the issue was “whether the body of law that has grown up around the definition of consent to a search in the criminal area

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reasonable expectation of privacy is destroyed when the private actor conducts his search. *Eisfeldt*, 163 Wn.2d at 636.

should mechanically be applied to the inspection of a warehouse.” *Thriftmart*, 429 F.2d at 1009. The court held that warehouse personnel had consented to the search and that the lack of a warrant “under these circumstances did not render the inspections unreasonable under the Fourth Amendment.” *Id.* at 1010.

*Thriftmart* was the first Ninth Circuit decision to hold that an “administrative search is to be treated differently than a criminal search.” *United States v. Robson*, 477 F.2d 13, 19 (9th Cir. 1973). The court in *Robson* reached the same conclusion in deciding that Robson had knowingly and voluntarily consented to an administrative search of his tax records where the federal agent had not warned him that he might have a Fourth Amendment right to demand a warrant before making his records available for audit. *Robson*, 477 F.2d at 18. The court found sufficient consent, basing its decision “on the distinction we have recognized elsewhere between an administrative and a criminal search.” *Id.* (citations omitted). That distinction rests on significant part on the “absence of coercive circumstances” in an administrative inspection, contrasted with the “inherent coercion” involved in a criminal search. *Id.* (quoting *Thriftmart*, 429 F.2d at 1010).

*E.Z. v. Coler*, 603 F. Supp. 1546 (N.D. Ill. 1985), *aff’d sub nom. Darryl H. v. Coler*, 801 F.2d 893 (7th Cir. 1986), involved administrative investigations of alleged child abuse and whether warrantless searches conducted in the investigations violated the Fourth Amendment. *Id.* at 1548. The court discussed the case law on administrative searches and noted that “most administrative searches are unobjectionable because they are conducted with consent. And the standards for consent to an administrative search are less stringent than the standards for consent to a criminal search.” *Id.* The court concluded that a warrant requirement would hinder effective child abuse investigations and should not be imposed. *Id.* at 1563.

At least one Washington State court has followed the same reasoning as the federal courts cited above. In *Cranwell v. Mesec*, 77 Wn. App. 90, 890 P.2d 491, *review denied*, 127 Wn.2d 1004 (1995), the court considered whether administrative inspections of apartment complexes in Seattle violated the state and federal constitutions and the scope of tenants’ authority to consent to such searches. The court adopted the *Thriftmart* holding that the “standards for consent to an administrative search are less stringent than the standards for consent to a criminal search” and concluded that because “valid tenant consent independently supported the inspections in this case, the administrative warrant was unnecessary.” *Id.* at 101-02, 108. *Cranwell* is still good law and remains the most relevant Washington case on this issue.<sup>33</sup> Cf. *City of Seattle v. McCready*, 124 Wn.2d 300, 306-08, 877 P.2d 686 (1994) (*McCready II*) (tenants have authority to consent to search of common areas in apartment building).

It is important to keep in mind the distinction between criminal and administrative standards for consent and not assume that criminal law requirements apply to administrative

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<sup>33</sup> *But see State v. Miles*, 160 Wn.2d 236, 156 P.3d 864 (2007). In *Miles*, the Supreme Court declined to recognize a distinction between administrative subpoenas issued for civil regulatory purposes and those for criminal purposes. *Id.* at 249. The court concluded that regardless of the purpose, a disturbance of private affairs must satisfy state constitutional requirements. *Id.* at 250. Whether the court intentionally departed from the standard analysis remains to be seen. This case could be an anomaly based on the particular facts before the court.

searches. The criminal cases provide useful guidance but should not be considered binding on administrative search issues unless and until Washington courts rule otherwise.

## 2. Elements of Consent

In the criminal context, valid consent requires that (1) consent be voluntary, (2) granted by a person with the requisite authority, and (3) the search be limited to the scope of the consent granted. The government has the burden of establishing that consent to a search was lawfully given. *State v. Thompson*, 151 Wn.2d 793, 803, 92 P.3d 228 (2004); *State v. Hastings*, 119 Wn.2d 229, 234, 830 P.2d 658 (1992). Courts have applied these same criteria to administrative searches.

### a. Consent Must Be Voluntary

Under the Fourth Amendment criminal cases, whether consent was voluntary “is a question of fact to be determined from the totality of all the circumstances.” *Schneckloth v. Bustamonte*, 412 U.S. 218, 227, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973). “While knowledge of the right to refuse consent is one factor to be taken into account,” it is not the determining factor in assessing voluntary consent. *Id.* Criminal cases interpreting the federal constitution hold that the government has a “burden of demonstrating, by clear and convincing evidence, that consent to a search was voluntarily given.” *State v. Ferrier*, 136 Wn.2d 103, 116, 960 P.2d 927 (1998); *State v. Smith*, 115 Wn.2d 775, 789, 801 P.2d 975 (1990).

Under article I, section 7 of the Washington Constitution, the consent to a search of a home by police officers is not voluntary unless the home dweller is notified that consent may be refused, revoked, or limited in scope. *Ferrier*, 136 Wn.2d at 118-19. This notice requirement has been limited to searches of homes for contraband or evidence of a crime and is not required for other legitimate investigatory purposes. *State v. Khounvichai*, 149 Wn.2d 557, 563-64, 69 P.3d 862 (2003). The *Ferrier* notice requirement also does not apply where officers ask to enter a residence for purposes other than seeking to obtain consent to search without a warrant. *State v. Overholt*, 147 Wn. App. 92, 94-95, 193 P.3d 1100 (2008) (citing cases).

“*Ferrier* warnings”<sup>34</sup> probably are not applicable to administrative searches. See *Bonneville v. Pierce Cy.*, 148 Wn. App. 500, 512-13, 202 P.3d 309 (2008) (court distinguished *Ferrier* and held that there is no requirement to advise of right to refuse consent when purpose of search is to determine permit compliance, not search for evidence of a crime). Additionally, two administrative search cases decided before the *Ferrier* case required no particular warning as a requirement for voluntary consent; instead, they used a “totality of the circumstances” test. See *Cranwell v. Mesec*, 77 Wn. App. 90, 101-02, 890 P.2d 491, *review denied*, 127 Wn.2d 1004 (1995) (citing *Schneckloth* and *E.Z. v. Coler*, 603 F. Supp. 1546 (N.D. Ill. 1985), *aff’d sub nom. Darryl H. v. Coler*, 801 F.2d 893 (7th Cir. 1986)); *Thurston Cy. Rental Owners Assoc. v. Thurston Cy.*, 85 Wn. App. 171, 183, 931 P.2d 208, *review denied*, 132 Wn.2d 1010 (1997). The

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<sup>34</sup> The “*Ferrier* warning” informs the person that they can (1) lawfully refuse to consent to the search, (2) revoke the consent at any time, and (3) limit the scope of the consent to certain areas of the home. *Ferrier*, 136 Wn.2d at 118.

*Ferrier* case did not discuss or overrule the use of the totality of the circumstances test used in *Cranwell* and *Thurston County Rental*, and no subsequent decision addressing administrative searches has required a *Ferrier* warning.

Federal courts also have declined to require notice analogous to a *Ferrier* warning in the context of administrative searches. In *E.Z. v. Coler*, 603 F. Supp. at 1556, the court held that “[c]onsent must be judged by the totality of the circumstances and lack of knowledge of the right to refuse a search cannot, standing alone, invalidate consent.” The court in *United States v. Robson*, 477 F.2d 13 (9th Cir. 1973), held that “Robson’s consent to the search of his records can reasonably be accepted as a waiver of warrant, even though the record does not disclose that Robson was aware of the precise nature of his Fourth Amendment rights.” *Id.* at 19.

Consent may be judged involuntary when it is no more than acquiescence or nonresistance to lawful authority. *State v. Browning*, 67 Wn. App. 93, 97-98, 834 P.2d 84 (1992). It is not voluntary consent but is merely acquiescence to a claim of lawful authority when entry is granted after the inspector claims the right to conduct a warrantless inspection. See *Seymour v. Dental Quality Assurance Comm’n*, 152 Wn. App. 156, 170-71, 216 P.3d 1039 (2009). In other words, there must be an affirmative inquiry as to whether the government agent may enter and an affirmative answer granting consent. In *Browning*, a building inspector conducting an administrative search discovered contraband that led to a criminal conviction. The court reversed the conviction because the inspector’s entry into the house was unlawful. *Browning*, 67 Wn. App. at 94. The court held that (1) the protections of the Fourth Amendment and the Washington Constitution extended to administrative searches, (2) the administrative inspection constituted a search under the federal and state constitutions, and (3) because the evidence demonstrated no more than acquiescence to a claim of authority, the state failed to prove voluntary consent to the inspector’s entry. *Id.* at 95-98.

Threatening to obtain a search warrant, where there is authority to do so, does not vitiate the voluntariness of any subsequently given consent. The court in *Thurston County Rental*, 85 Wn. App. at 183, rejected the argument that such a threat necessarily is coercive, holding that “whether consent is coerced is a question of fact determined from the totality of the circumstances” and finding the evidence did not demonstrate such coercion.

In the administrative search context, federal courts have taken into account other factors when evaluating consent, including whether there is evidence of intimidation, misrepresentation, or force, any of which could render consent involuntary. See, e.g., *Thriftmart*, 429 F.2d at 1010; *E.Z. v. Coler*, 603 F. Supp. at 1554-56.

An effective method of documenting consent to access property is a written consent agreement.<sup>35</sup> Alternatively, regulatory agencies that issue permits or licenses may be able to obtain express consent to enter private property by requiring an applicant for a permit or license, as a condition for obtaining the permit or license, to grant permission for inspectors to enter the subject property for administrative inspection or investigation or access vehicles, structures, equipment, or records. Whether such consent is later determined to be valid may depend on the

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<sup>35</sup> Examples of access agreements are included in the attached forms.

extent to which the business is regulated by government.<sup>36</sup> Depending on circumstances, a consent provision could be included in the permit/license application or as a condition in the permit/license itself.

As an example, a permit application submitted to Agency A might include the following language in the application's signature block:

I hereby grant to Agency A the right to enter the above-described location at reasonable times to inspect the proposed, in-progress or completed work performed under the permit for which I am applying to ensure compliance with the permit conditions and other applicable laws and regulations.

The permit itself might include the following condition:

By applying for this permit the applicant has granted to Agency A the right to enter the above-described location at reasonable times to inspect the proposed, in-progress or completed work performed under this permit to ensure compliance with the permit conditions and other applicable laws and regulations. Should such entry be refused, all authorizations and approvals contained in this permit shall be immediately suspended and any work performed under the permit shall immediately cease until authorized in writing by Agency A. Work performed in violation of this condition shall be considered to have been performed without the approval of Agency A.

Caution should be exercised to ensure that a court will consider the consent obtained through a regulatory permit consent clause or condition to be truly voluntary. Despite the widespread use of such consent clauses, there are very few cases directly addressing the issue. The United States Supreme Court upheld a child welfare program that included periodic home visits by a state case worker as a condition to receiving benefits. [\*Wyman v. James\*](#), 400 U.S. 309, 91 S. Ct. 381, 27 L. Ed. 2d 408 (1971). The Washington Supreme Court evaluated the effect of a consent form associated with a work release program at a county jail. [\*State v. Hendrickson\*](#), 129 Wn.2d 61, 917 P.2d 563 (1996). The court found that the petitioner had waived certain state and federal constitutional rights as a condition of his participation in the work release program. *Id.* at 72. At the time of the search, however, he had been terminated from the program, and the termination also effectively revoked his consent. *Id.*

Another Washington court held that a participant in an electronic home detention program had "waived her constitutional right to be free of warrantless searches" when she signed the program's consent form. [\*State v. Cole\*](#), 122 Wn. App. 319, 323, 93 P.3d 209 (2004). The extent to which these principles extend more broadly in administrative contexts has not been

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<sup>36</sup> For those engaging in pervasively regulated industries, some courts have found implied consent to administrative searches and inspections. In [\*State v. Thorp\*](#), 71 Wn. App. 175, 178, 856 P.2d 1123 (1993), the court explained that persons voluntarily engaging in a pervasively regulated industry implicitly consent to government intrusion and therefore have a diminished expectation of privacy. Administrative searches and inspections of pervasively regulated industries are discussed below, beginning at page 21.

finally determined, although the Court of Appeals upheld a consent provision contained in a land use permit. [Bonneville v. Pierce Cy.](#), 148 Wn. App. 500, 513, 202 P.3d 309 (2008).<sup>37</sup>

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*Practice pointer:* There is a possibility that a court may question whether a person has voluntarily consented where consent is mandated to obtain a permit or license. Accordingly, if a consent provision is included as a condition in a permit/license, rather than in a permit/license application, the agency should ensure that the applicant has notice of the consent condition before issuing the permit or license. To prove that notice was given, the agency might develop some form of written acknowledgement for the applicant to sign.

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## **b. Authority to Consent**

The person consenting to a search must possess the requisite authority. Authority to consent typically arises as an issue only where someone other than the owner of the property consents to an inspection or search. Where there is a question as to whether the person giving consent was authorized to do so in a criminal context, the inquiry under the Fourth Amendment is whether the police have acted reasonably under the circumstances. [State v. Morse](#), 156 Wn.2d 1, 10, 123 P.3d 832 (2005). Under article I, section 7 of the Washington Constitution, the focus is on the expectations of the people being searched and the scope of the consenting party's authority. *Id.*

An extensive body of case law has developed addressing who can consent to criminal searches, and those cases should be consulted where an issue arises regarding authority to consent. For example, Washington courts have adopted the common authority rule for cohabitants. [Morse](#), 156 Wn.2d at 7, 10-11 (a person with common authority must have free access to the shared area and authority to invite others into the shared area). A spouse with equal right to occupation of the premises may consent to a search of the premises. [State v. Walker](#), 136 Wn.2d 678, 965 P.2d 1079 (1998). A parent has authority over the entire residence and can consent to a search of a dependent child's room. [State v. Summers](#), 52 Wn. App. 767, 772, 764 P.2d 250 (1988), *review denied*, 112 Wn.2d 1006 (1989). The landlord or manager of an apartment building may consent to the search of any area not within a lessee's exclusive possession. [State v. Kreck](#), 86 Wn.2d 112, 123, 542 P.2d 782 (1975). Under certain circumstances, an employee may consent to a search of the employer's premises and an employer may consent to a search of areas used by employees for personal purposes. [State v.](#)

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<sup>37</sup> *Bonneville* involved a land use permit condition that the permittee "allow 'Pierce County Staff to monitor the site to make sure that all conditions of approval are being adhered to[] . . . ' and that he permit 'unlimited and unfettered' access to his property for inspection and monitoring purposes." [Bonneville](#), 148 Wn. App. at 505. The Court's endorsement of this sweeping language may have been based on the particular facts of the case—specifically, Bonneville's history with Pierce County and his statements before the permit was issued that county representatives would be " 'welcome to come there any time' " and that a schedule of inspections " 'where somebody comes through' " would be acceptable, " 'be it routine or random.' " *Id.* at 505-06. Finally, Bonneville also executed a "Pierce County Right of Entry Agreement" prior to receiving his permit.

Absent exceptional circumstances such as those in *Bonneville*, it is likely that a court would be more inclined to uphold consent language in permit applications and permits that is appropriately limited in time and place.



[Kendrick](#), 47 Wn. App. 620, 632-33, 736 P.2d 1079, *review denied*, 108 Wn.2d 1024 (1987). For a useful introduction to the criminal case law regarding consent, see Justice Charles W. Johnson, [Survey of Washington Search and Seizure Law: 2005 Update](#), 28 Seattle U.L. Rev. 467, 650-63 (2005).

Three Washington decisions have addressed authority to consent to an administrative inspection or investigation. Two decisions discussed the doctrine of apparent authority, under which a search would be valid notwithstanding a lack of actual authority if the government agent reasonably believed that a person consenting to a search had the authority to do so. [State v. Browning](#), 67 Wn. App. 93, 99, 834 P.2d 84 (1992). In *Browning*, although the court appeared willing to apply the doctrine, the evidence in the record was insufficient to do so. *Id.* The doctrine was applied in [Cranwell v. Mesec](#), 77 Wn. App. 90, 890 P.2d 491, *review denied*, 127 Wn.2d 1004 (1995). The court affirmed the trial court’s determination that a city inspector reasonably believed a tenant had authority to grant access to a water heater room. [Cranwell](#), 77 Wn. App. at 106-07. The court observed that the standards for apparent authority are the same under the federal and state constitutions. *Id.* at 106 n.17.

In a case involving Seattle’s housing inspection program, the court considered whether “tenants could consent to a search of their respective dwellings and the common areas leading to those dwellings.” [City of Seattle v. McCready](#), 124 Wn.2d 300, 304, 877 P.2d 686 (1994) (*McCready II*). The court applied the same rule as used in criminal searches and held that “tenants possess the authority to consent to a search of their individual apartment units, notwithstanding any objections by their landlords,” and “either of two parties who have common authority over the premises may consent to an entry or search.” *Id.* at 306-07. Common authority exists with mutual use of the property by persons having joint access or control, so it is reasonable for any of the co-inhabitants to permit the inspection and for the others to assume the risk that one of their number might permit the search. *Id.*<sup>38</sup>

### **c. Scope of Consent**

In criminal cases, “[t]he scope of a consent search is limited by the authority granted by the consenting party.” [State v. Davis](#), 86 Wn. App. 414, 423, 937 P.2d 1110, *review denied*, 133 Wn.2d 1028 (1997). The scope of consent may be limited in duration, area, or intensity. *Id.* “Exceeding the scope of consent is comparable to exceeding the scope of a search warrant.” *Id.*

The appellants in [Cranwell v. Mesec](#), 77 Wn. App. 90, 890 P.2d 491, *review denied*, 127 Wn.2d 1004 (1995), raised the issue of scope of consent, alleging that the tenants’ consent only extended to their living quarters and not the common areas, and that the timing of the inspections exceeded the scope of the consent. On the facts before it and in light of the court’s other legal holdings in the case, the court rejected these contentions. [Cranwell](#), 77 Wn. App. at 103 n.14.

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<sup>38</sup> Mere presence on property, even with the knowledge and consent of the owner, is insufficient to establish authority to consent to a search. See [State v. Eisfeldt](#), 163 Wn.2d 628, 638-39, 185 P.3d 580 (2008) (contractor lacked authority to consent to warrantless search of private residence where he was performing work).

## B. Pervasively Regulated Businesses

Both federal courts and Washington courts have recognized an exception from the warrant requirement for inspections of pervasively regulated businesses.<sup>39</sup> The exception is premised on the principle that closely regulated businesses have reduced expectations of privacy. *New York v. Burger*, 482 U.S. 691, 701-02, 107 S. Ct. 2636, 96 L. Ed. 2d 601 (1987). A person who chooses to operate a closely regulated business “has voluntarily chosen to subject himself to a full arsenal of governmental regulation.” *Marshall v. Barlow’s, Inc.*, 436 U.S. 307, 313, 98 S. Ct. 1816, 56 L. Ed. 2d 305 (1978).

To be reasonable under the Fourth Amendment, warrantless inspections of pervasively regulated businesses must meet three criteria: (1) “substantial” government interest must inform the statutory regulatory scheme pursuant to which the inspections are made; (2) the inspections must be necessary to further the regulatory scheme; and (3) the inspection program, in terms of the certainty and regularity of its application, must provide a constitutionally adequate substitute for a search warrant. *Burger*, 482 U.S. at 702-03 (concluding that auto wrecking business constitutes closely regulated business due to extensive state regulation); *see also Donovan v. Dewey*, 452 U.S. 594, 602, 101 S. Ct. 2534, 69 L. Ed. 2d 262 (1981) (upholding warrantless inspections of mines for health and safety conditions); *United States v. Biswell*, 406 U.S. 311, 92 S. Ct. 1593, 32 L. Ed. 2d 87 (1972) (upholding warrantless searches of federal firearms dealers); *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 90 S. Ct. 774, 25 L. Ed. 2d 60 (1970) (finding that Congress has broad authority to set inspection standards for federally licensed liquor dealers).

In order for this exception to apply, the regulatory statute must perform the two basic functions of a warrant: it must advise the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope, and it must limit the discretion of the inspecting officers. *Burger*, 482 U.S. at 702-03. To satisfy the first requirement, the statute must be “sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes.” *Dewey*, 452 U.S. at 600. To appropriately limit the discretion of inspectors, the statute must be “carefully limited in time, place, and scope.” *Biswell*, 406 U.S. at 315.

The Court has upheld warrantless searches under a statute that required searches to occur “during the regular and usual business hours” which named the type of business to be searched (auto wreckers) and the items that could be searched (records, vehicles parts, and vehicles). *Burger*, 482 U.S. at 711-12. In contrast, the Court invalidated a section of the federal Occupational Safety and Health Act (OSHA) that authorized warrantless searches of all businesses involved in interstate commerce, subject only to the restriction that such searches be performed “at other reasonable times, and within reasonable limits and in a reasonable manner.” *Marshall*, 436 U.S. 307, 309 n.1.

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<sup>39</sup> The pervasively regulated businesses exception is sometimes referred to as the “*Colonnade-Biswell* exception,” since the exception effectively was established in *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 90 S. Ct. 774, 25 L. Ed. 2d 60 (1970), and *United States v. Biswell*, 406 U.S. 311, 92 S. Ct. 1593, 32 L. Ed. 2d 87 (1972).

The doctrine of “pervasively regulated businesses” is primarily defined by the pervasiveness and regularity of regulation and the effect of that regulation over an owner’s expectation of privacy. *Burger*, 482 U.S. at 700-01; *Dewey*, 452 U.S. at 606. The duration of time of a regulatory scheme (e.g., how long the particular industry has been closely regulated by the government) may be relevant in determining whether a warrantless inspection is valid. *Burger*, 482 U.S. at 701; *see also Dewey*, 452 U.S. at 606. The need to obtain a license may also be a relevant factor in the inquiry. *See Burger*, 482 U.S. at 703-04.

In *United States v. V-1 Oil Co.*, 63 F.3d 909 (9th Cir. 1995), *cert. denied*, 517 U.S. 1208 (1996), the Ninth Circuit applied the three-part *Burger* test to determine whether warrantless searches of a liquefied propane gas retailer under the Hazardous Materials Transportation Act (HMTA) violated the Fourth Amendment. The court affirmed that V-1 Oil was a “closely regulated industry” and concluded that the warrantless searches authorized under HMTA were valid. *Id.* at 911. Specifically, the court considered V-1 Oil to be pervasively regulated because it had a reduced expectation of privacy since it transported, stored, and sold propane gas, a hazardous material with a history of extensive government oversight. *Id.* at 911-12. The court reasoned that the government’s substantial interest in regulating the transportation and storage of such hazardous materials supported the constitutionality of the warrantless searches. *Id.* at 912. Lastly, the court concluded that the searches were constitutional because the statutory provisions regulating the warrantless searches were reasonable and limited in scope. *Id.* at 912-13.

As of the date of this writing, the Washington Supreme Court has not determined whether the pervasively regulated business exception is recognized under article I, section 7 of the state constitution. *See State v. Miles*, 160 Wn.2d 236, 250-51, 156 P.3d 864, 871 (2007). However, the Court has noted that, should such an exception be recognized, it would be limited only to the portions of a person’s business that are regulated and would not extend to non-business private matters. *Id.* at 250 (citing *Rush v. Obledo*, 756 F.2d 713, 721 (9th Cir. 1985) (warrantless inspection authority of in-home day care businesses does not extend to portions of the home where day care business activities do not occur)).

Although the Washington Supreme Court has not decisively recognized the pervasively regulated industry exception under the state constitution, the court has recognized and analyzed the exception under the Fourth Amendment of the United States Constitution. *See Washington Massage Foundation v. Nelson*, 87 Wn.2d 948, 558 P.2d 231 (1976). The *Nelson* court invalidated two statutes authorizing warrantless inspections of massage parlors. The court recognized that “when an industry or business is subject to extensive governmental regulation and frequent unannounced inspections are necessary to insure compliance, warrantless inspections are valid [under the Fourth Amendment] if authorized by a statute which sufficiently delineates the scope, time, and place of inspection.” *Id.* at 953. However, the statutes struck down by the court lacked sufficient time, place, and scope limits. *Id.* at 954.

While not specifically calling out the pervasively regulated industry exception, in *Seymour v. Dental Quality Assurance Commission*, the Court of Appeals discussed the three part test in *Burger* as adopted by *Nelson* for reasonable warrantless searches under a statutory scheme. *Seymour*, 152 Wn. App. at 167. In this case, the Department of Health received a complaint about Dr. Seymour, a dentist licensed by the Dental Quality Assurance Commission.

*Id.* at 162. Acting on written policy which required that certain types of complaints automatically require investigation, a Department investigator conducted a warrantless inspection of Dr. Seymour's office, including collection of records and making observations in non-public parts of the facility. *Id.* at 162-63. Subsequently, additional records were demanded from Dr. Seymour. *Id.* at 163.

Without passing judgment on the underlying statutory scheme, the Court found that the initial search and later records requests were invalid as they were not conducted in compliance with that statutory scheme. *Id.* at 168. The Dental Quality Assurance Commission statute required that the Commission make a determination on the merit of the complaint prior to initiating an investigation. Since the warrantless inspection was conducted pursuant to the Department's written policy directing certain categories of investigations be commenced without a merit determination by the Commission, it was effectively performed with no authority at all and, as such, violated the Fourth Amendment. *Id.* at 171. Had the statutory scheme been scrupulously followed, the result may have been different. "Where a statutory scheme is properly formulated and followed, Fourth Amendment concerns are addressed by the elimination of unreasonable searches." *Id.* at 167. What is not clear from the *Seymour* decision is whether its reasoning applies to searches of all commercial properties or only searches of heavily regulated businesses.

Other appellate courts have also analyzed the exception under the Fourth Amendment. In [State v. Mach](#), 23 Wn. App. 113, 594 P.2d 1361 (1979), for example, the court found the commercial gill netting fishing industry to be a pervasively regulated industry, based on a tradition of close regulation of fish runs in Washington to which entrepreneurs have voluntarily subjected themselves. *Id.* at 115. The court concluded that warrantless entry upon and search of commercial fishing vessels by fisheries officials who have reason to believe that illegal food fish or shellfish are on board therefore is necessary to maintain compliance with regulations and permissible under the Fourth Amendment. *Id.*

In another commercial fishing case, the court held that a warrantless search of a vessel in a reasonable<sup>40</sup> manner by fisheries personnel to obtain biological and statistical information did not violate Fourth Amendment rights. [State v. Rome](#), 47 Wn. App. 666, 736 P.2d 709 (1987), *review denied*, 109 Wn.2d 1025 (1988). The court reasoned that the state had a compelling need to inspect fish to gather information to ensure the existence of the precious natural resource for the public interest and future generations. *Id.* at 669. The court found the search proper because the state's intrusion was minimal, the inspection was limited to collecting biological and statistical information, and the scope of investigation did not involve inspecting the boat's living quarters. *Id.* at 670.

In contrast, the court rejected the state's attempt to define the "forest products industry" as heavily regulated. [State v. Thorp](#), 71 Wn. App. 175, 856 P.2d 1123 (1993), *review denied*, 123 Wn.2d 1009 (1994). In *Thorp*, a police officer stopped a truck loaded with cedar blocks to check whether the driver had the required specialized forest products permit; he discovered

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<sup>40</sup> Reasonableness under the Fourth Amendment is determined by balancing the need to conduct a warrantless search against the invasion which the search poses. [Rome](#), 47 Wn. App. at 669.

marijuana in the truck. [Thorp](#), 71 Wn. App. at 177. The court rejected the argument that the forest products industry is pervasively regulated because the record did not establish a tradition or history of extensive government regulation. *Id.* at 178. The court noted that, even if the forest products industry were pervasively regulated, the Fourth Amendment does not allow police to randomly stop moving vehicles without “probable cause or articulable suspicion.”<sup>41</sup> *Id.* Furthermore, because the officer stopped the vehicle under an ordinance of general applicability rather than an industry specific regulation, the vehicle stop was not aimed at any particular industry, and the pervasively regulated businesses exception would not apply. *Id.* at 179-80. The court found that the search violated both the Fourth Amendment and article 1, section 7, but did not analyze whether the exception applies under article 1, section 7. *Id.* at 181.

In a 2007 opinion, the Court of Appeals stated, without analysis, that hunting is a highly regulated activity. [Schlegel v. Dep’t of Licensing](#), 137 Wn. App. 364, 370, 153 P.3d 244 (2007). The court upheld a DUI arrest following a stop by wildlife officers to check hunting licenses of a driver and his occupant, holding that, as long as there is articulable suspicion of hunting activity, a wildlife officer may stop a vehicle to check hunting licenses. *Id.* at 370-71.

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*Practice pointer:* Clients should be advised that Washington courts have not ruled decisively on the validity of statutory warrantless inspection schemes under the pervasively-regulated business exception. For clients that choose to exercise their statutory inspection authority (or are mandated to do so by statute), attorneys should look to federal law to help determine the validity of the statutory scheme. Factors to consider include whether the statute is sufficiently specific as to time, place, and scope of inspections; whether the business requires a license; the duration and pervasiveness of state regulation; and whether warrantless inspections are necessary for effective regulation and oversight of the business.

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## C. Plain View

The plain view doctrine applies after an entry, with prior justification, into an area where there is a reasonable expectation of privacy.<sup>42</sup> [State v. Daugherty](#), 94 Wn.2d 263, 267, 616 P.2d 649 (1980), *cert denied*, 450 U.S. 958 (1981). Courts have applied the doctrine to admit evidence discovered by sight during the course of a lawful *Terry* stop and frisk for weapons. [State v. Tzintzun-Jimenez](#), 72 Wn. App. 852, 854, 866 P.2d 667 (1994) (citing [Michigan v. Long](#), 463 U.S. 1032, 1049, 103 S. Ct. 3469, 77 L. Ed. 2d 1201 (1983)); *see also* [United States v. Hensley](#), 469 U.S. 221, 233-37, 105 S. Ct. 675, 683-84, 83 L. Ed. 2d 604 (1985). The United States Supreme Court extended the “plain view” doctrine to include the admission of evidence

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<sup>41</sup> *See also* [United States v. Munoz](#), 701 F.2d 1293 (9th Cir. 1983) (rejecting contention that implicit consent theory as applied to pervasively regulated business concept justifies random stops of moving vehicles).

<sup>42</sup> The “plain view doctrine” is to be distinguished from the similar, but legally distinct, “open view doctrine.” The plain view doctrine applies when a government agent has intruded in to a constitutionally protected area, such as a residence. The open view doctrine applies when a police officer or inspector is positioned in an area that is not constitutionally protected, such as a driveway or sidewalk. The open view doctrine is discussed in the next section, beginning at page 27.

discovered by touch during the course of a lawful *Terry* frisk. See [Minnesota v. Dickerson](#), 508 U.S. 366, 113 S. Ct. 2130, 124 L. Ed. 2d 334 (1993).

No Washington decision has applied the plain view doctrine explicitly to administrative searches, although the doctrine has been referenced in passing as one of the “jealously and carefully drawn exceptions” to the warrant requirement in a decision involving random drug testing of student athletes. [York v. Wahkiakum School District No. 200](#), 163 Wn.2d 297, 310, 178 P.3d 995 (2008) (*York II*). However, the plain view doctrine was not at issue in *York II*.

The criteria that guide the plain view exception to the warrant requirement were set forth in [Coolidge v. New Hampshire](#), 403 U.S. 443, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971):

What the “plain view” cases have in common is that the police officer in each of them had a prior justification for an intrusion in the course of which he came inadvertently across a piece of evidence incriminating the accused. The doctrine serves to supplement the prior justification—whether it be a warrant for another object, hot pursuit, search incident to a lawful arrest, or some other legitimate reason for being present unconnected with a search directed against the accused—and permits the warrantless seizure. Of course, the extension of the original justification is legitimate only where it is immediately apparent to the police that they have evidence before them; the “plain view” doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges.

*Id.* at 446. In applying the plain view doctrine, Washington courts formerly required three elements: (1) prior justification for the intrusion—the police were in a place they had a lawful right to be; (2) an inadvertent discovery of incriminating evidence; and (3) immediate knowledge by the police that they have evidence before them. See [State v. Alexander](#), 33 Wn. App. 271, 273, 653 P.2d 1367 (1982) (citing cases). Only the first and third prongs now are required.

## **1. Prior Justification for Intrusion**

The plain view doctrine only applies when the law enforcement officer is lawfully standing in the place when the officer sees something that he immediately knew was incriminating evidence. [State v. Link](#), 136 Wn. App. 685, 696-97, 150 P.3d 610, *review denied*, 160 Wn.2d 1025 (2007) (citing [State v. Kull](#), 155 Wn.2d 80, 85, 118 P.3d 307 (2005)). If an initial entry into a residence or onto property is illegal, confiscation of evidence will constitute an illegal seizure. [Daugherty](#), 94 Wn.2d at 269.

Because the plain view exception to the warrant requirement rests on the lawfulness of the officer’s presence, plain view cases will have different outcomes under the federal and state constitutions when the two constitutions differ as to that lawfulness. For example, the United States Supreme Court found that once a suspect was arrested, the arresting officer had a legitimate right to keep the suspect in custody; the officer lawfully could follow the suspect into his dormitory room and inspect objects in the room. It was “not unreasonable under the Fourth Amendment for a police officer, as a matter of routine, to monitor the movements of an arrested

person, as his judgment dictates . . . .” [Washington v. Chrisman](#), 455 U.S. 1, 7, 102 S. Ct. 812, 70 L. Ed. 2d 778 (1982). On remand from the United States Supreme Court, however, the Washington Supreme Court held that article I, section 7, of the Washington Constitution affords heightened protection to warrantless searches and prohibited the arresting officer from entering a suspect’s home unless the officer can demonstrate a threat to his own safety, the possibility of destruction of evidence of the crime charged, or a strong likelihood of escape. [State v. Chrisman](#), 100 Wn.2d 814, 822, 676 P.2d 419 (1984).

## 2. Inadvertent Discovery

Under [Coolidge](#), 403 U.S. at 471, the plain view exception did not apply when an officer expected to find the incriminating evidence; the officer had to discover the object inadvertently. Under this prong, discovery was considered to be inadvertent if the officer discovered the evidence while in a position that did not infringe upon any reasonable expectation of privacy, and did not take any further unreasonable steps to find the evidence from that position. [State v. Myers](#), 117 Wn.2d 332, 346, 815 P.2d 761 (1991) (quoting [State v. Patterson](#), 37 Wn. App. 275, 281, 679 P.2d 416, *review denied*, 103 Wn.2d 1005 (1984)). “The requirement that a discovery be inadvertent does not mean that an officer must act with a completely neutral, benign attitude when investigating suspicious activity.” *Id.* (citing [Patterson](#), 37 Wn. App. at 280).

More recently, the Supreme Court held that “even though inadvertence is a characteristic of most legitimate ‘plain-view’ seizures, it is not a necessary condition.” [Horton v. California](#), 496 U.S. 128, 130, 110 S. Ct. 2301, 110 L. Ed. 2d 112 (1990). Under *Horton*, an object may be seized under the plain view exception even if an officer has the subjective expectation that she will find evidence in a location where she is conducting a lawful search; the discovery does not have to be an unexpected surprise. *Id.* at 138-40.

Washington courts have adopted the *Horton* approach to the plain view exception and no longer require the inadvertence prong under *Coolidge*. See [State v. Hudson](#), 124 Wn.2d 107, 114 n.1, 874 P.2d 160 (1994) (noting the *Horton* revision to the plain view test); [State v. Goodin](#), 67 Wn. App. 623, 627-30, 838 P.2d 135 (1992), *review denied*, 121 Wn.2d 1019 (1993) (discussing *Horton* and suggesting that the inadvertence requirement was never explicitly required under article I, section 7). Recent cases apply the test for the plain view exception as articulated in *Horton*:

For evidence to be admissible under the “plain view” doctrine, the prosecution must prove that (1) the officer lawfully occupied the vantage point from which the evidence was discovered, (2) the officer immediately recognized the incriminating character of the object seized, and, (3) the officer had a lawful right of access to the object itself.

[Tzintzun-Jimenez](#), 72 Wn. App. at 855-56.

### 3. Immediate Knowledge

To satisfy the immediate recognition (or knowledge) prong of the “plain view” test, an officers must have had probable cause to believe the item was contraband. *Tzintzun-Jimenez*, 72 Wn. App. 852, 857 (citing *Arizona v. Hicks*, 480 U.S. 321, 325, 107 S. Ct. 1149, 94 L. Ed. 2d 347 (1987)).

#### D. Open View/Open Fields

No search within the meaning of the Fourth Amendment occurs when the “open view” doctrine is satisfied.<sup>43</sup> *State v. Cardenas*, 146 Wn.2d 400, 47 P.3d 127 (2002), cert. denied sub nom. *Cardenas v. Washington*, 538 U.S. 912, 123 S. Ct. 1495, 155 L. Ed. 2d 236 (2003); *State v. Rose*, 128 Wn.2d 388, 392, 909 P.2d 280 (1996). Under the “open view” doctrine a person has no privacy interest or protected property interest in what is observable from a place open to public view. When a law enforcement officer or inspector makes an observation from a public area or a lawful vantage point, that observation or detection does not constitute a “search” under the Fourth Amendment. *Rose*, 128 Wn.2d at 392 (citing *State v. Young*, 123 Wn.2d 173, 189, 867 P.2d 593 (1994)); *State v. Seagull*, 95 Wn.2d 898, 632 P.2d 44 (1981). Accord *State v. Littlefair*, 129 Wn. App. 330, 340, 119 P.3d 359 (2005) (citing *State v. Neeley*, 113 Wn. App. 100, 109, 52 P.3d 539 (2002)). Where the “open view doctrine is satisfied, ‘[t]he object under observation is not subject to any reasonable expectation of privacy and the observation is not within the scope of the constitution.’ ” *Rose*, 128 Wn.2d at 392 (citations omitted). In this context, courts consistently have found that law enforcement officers and inspectors have the same license as a reasonably respectful citizen. *Cardenas*, 146 Wn.2d at 408, (citing *Seagull*, 95 Wn.2d at 901).

*State v. Seagull*, 95 Wn.2d 898, 632 P.2d 44 (1981), is the definitive Washington case addressing the open view doctrine. *Seagull* involved a search of a farmhouse; the court held “[i]t is clear that police with legitimate business may enter areas of the curtilage which are impliedly open, such as access routes to the house.” *Seagull*, 95 Wn.2d at 902 (footnote omitted). In *State v. Ross*, 141 Wn.2d 304, 4 P.3d 130 (2000), the court held that before reaching the *Seagull* inquiry—whether the observation is from a public area or a lawful vantage point—the first requirement of the open view doctrine must be satisfied: the officer or inspector must be conducting legitimate business when he or she enters the impliedly open areas of the curtilage. *Ross*, 141 Wn.2d at 313. In *Ross*, the officers went onto the property in the early morning to obtain evidence of a marijuana growing operation, with no intention of contacting the resident, so they could obtain evidence for a search warrant; the court held the officers were not on the property legitimately and suppressed the evidence. *Id.* Similarly, in *State v. Jesson*, 142 Wn. App. 852, 859, 177 P.3d 139 (2008), the court found that a property was not impliedly open when it was entered through a closed gate, had numerous posted “No Trespassing” and “Keep Out” signs, and the house was at the end of a long and primitive driveway and not visible from any public area. The court concluded that “under these facts, a reasonable, respectful citizen

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<sup>43</sup> Although the “open view” doctrine is typically referred to as an “exception” to the Fourth Amendment warrant requirement, in truth, these situations are not true exceptions because the Fourth Amendment protections are not even implicated. *Rose*, 128 Wn.2d at 392.



seeking to contact an occupant would not believe he had consent to enter the property.” *Id.* at 860. Nevertheless, a legitimate open view observation may provide evidence supporting probable cause for a warrant for a constitutional search. *State v. Lemus*, 103 Wn. App. 94, 102, 11 P.3d 326 (2000) (citing *State v. Bobic*, 140 Wn.2d 250, 254-55, 258-59, 996 P.2d 610 (2000)).

The open view doctrine also applies under the Washington Constitution. *Rose*, 128 Wn.2d at 400; *Young*, 123 Wn.2d at 182. The analysis is slightly different than under the Fourth Amendment. The state constitution prohibits government from disturbing a person in their private affairs without authority of law. *Rose*, 128 Wn.2d at 399-400. However, it is fundamental in Washington constitutional case law that “what is voluntarily exposed to the general public and observable without the use of enhancement devices from an unprotected area is not considered part of a person’s private affairs.” *State v. Jackson*, 150 Wn.2d 251, 260, 76 P.3d 217 (2003) (quoting *Young*, 123 Wn.2d at 182).<sup>44</sup> Accord *State v. Creegan*, 123 Wn. App. 718, 722, 99 P.3d 897 (2004).

The “open view” doctrine is to be distinguished from the similar, but legally distinct, “plain view” doctrine, which is discussed in the previous section, beginning at page 24. In the “plain view” situation, the observations take place after an intrusion into areas or things protected by the Fourth Amendment. *Seagull*, 95 Wn.2d at 901 (citing *State v. Kaaheena*, 59 Haw. 23, 28-29, 575 P.2d 462 (1978)). In contrast, the open view doctrine applies when an officer or inspector observes evidence while positioned in a “nonconstitutionally protected area.” *State v. Lemus*, 103 Wn. App. 94, 102, 11 P.3d 326 (2000) (citing *State v. Kennedy*, 107 Wn.2d 1, 10, 726 P.2d 445 (1986)); see also *Seagull*, 95 Wn.2d at 901. The open view doctrine applies when the object under observation is not subject to any reasonable expectation of privacy, so the observation is not within the scope of any constitutional protection. *Seagull*, 95 Wn.2d at 901 (citing 68 Am. Jur. 2d *Searches and Seizures* §§ 23, 88 (1973)).

The “open fields” doctrine can be considered a special case of the “open view” doctrine. Open fields are not entitled to protection from unreasonable search and seizure under the Fourth Amendment. *Oliver v. United States*, 466 U.S. 170, 179, 104 S. Ct. 1735, 80 L. Ed. 2d 214 (1984). In *Oliver*, at 177-78, the Court conducted an in-depth analysis of the Fourth Amendment protections to determine whether open fields were the type of property the Fourth Amendment intended to protect. The Court explained that, as with all analyses under the Fourth Amendment, one must consider the uses to which the individual has put a location and our societal understanding that certain areas deserve the most scrupulous protection from government invasion. *Oliver*, 466 U.S. at 177-79 (citing *Jones v. United States*, 362 U.S. 257, 265, 80 S. Ct. 725, 4 L. Ed. 2d 697 (1960)); *Payton v. New York*, 445 U.S. 573, 100 S. Ct. 1371, 63 L. Ed. 2d

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<sup>44</sup> One of the issues addressed in *State v. Jackson* was whether placement of a GPS tracking device on a vehicle was a search necessitating a warrant. The Court found that installation and use of a GPS device on a private vehicle involves a search and seizure under the Washington Constitution and therefore, a warrant is required to install the device. Similarly, the Supreme Court has found that *installation* of a GPS tracking device is a search for which a warrant or valid exception is required under the Fourth Amendment. See *United States v. Jones*, -- U.S. --, 132 S. Ct. 945, 948, 181 L. Ed. 2d 911 (2012); see *infra* p. 46.

639 (1980). While certain “enclaves,” such as a private residence, should be free from arbitrary government interference (i.e., the home):

[O]pen fields do not provide the setting for those intimate activities that the Amendment is intended to shelter from government interference or surveillance. There is no societal interest in protecting the privacy of those activities, such as the cultivation of crops, that occur in open fields. Moreover, as a practical matter these lands usually are accessible to the public and the police in ways that a home, an office, or commercial structure would not be. It is not generally true that fences or “No Trespassing” signs effectively bar the public from viewing open fields in rural areas. And both petitioner Oliver and respondent Thornton concede that the public and police lawfully may survey lands from the air. For these reasons, the asserted expectation of privacy in open fields is not an expectation that “society recognizes as reasonable.”

Oliver, 466 U.S. at 178.

In contrast, Washington courts have accepted the notion that an open field can be subject to an unreasonable search and seizure, depending on the circumstances. See State v. Johnson, 75 Wn. App. 692, 707, 879 P.2d 984 (1994), *review denied*, 126 Wn.2d 1004 (1995). Under article I, section 7, a case-by-case analysis determines whether a particular search and seizure unconstitutionally intrudes into a person’s private affairs. *Id.* See also State v. Hansen, 42 Wn. App. 755, 761, 714 P.2d 309, *aff’d*, 107 Wn.2d 331, 728 P.2d 593 (1986) (warrantless search of a garden upheld under article I, section 7 and open fields doctrine where the field was not posted and contents were clearly visible to any passerby); State v. Myrick, 102 Wn.2d 506, 513-14, 688 P.2d 151 (1984) (aerial surveillance of marijuana from 1,500 feet without visual enhancement devices did not violate article I, section 7); Johnson, 75 Wn. App. at 707-08 (conduct of DEA agents violated article I, section 7 when they acted in concert with state officials and trespassed on property, ignoring property owner’s fence, gate, and no trespassing signs); State v. Crandall, 39 Wn. App. 849, 854, 697 P.2d 250, *review denied*, 103 Wn.2d 1036 (1985) (isolated trespass by a deputy into an open, unposted field frequented by hunters did not violate article I, section 7). *But see* State v. Dodson, 110 Wn. App. 112, 39 P.3d 324, *review denied*, 147 Wn.2d 1004 (2002) (explaining that the presence of “no trespassing” signs is not dispositive of homeowner’s reasonable expectation of privacy); State v. Thorson, 98 Wn. App. 528, 536, 990 P.2d 446 (1999), *review denied*, 140 Wn.2d 1027 (2000) (officers’ search of rural wooded property on island was invalid because, “[u]nlike the field in *Crandall*, Thorson’s property was not frequented or traversed by uninvited persons. Although part of the island’s trail system crossed Thorson’s land, the un rebutted evidence is that the footpaths were used, by permission, only by other residents of the island, and are not for use as public ways”).<sup>45</sup>

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<sup>45</sup> In an unpublished decision, the Court of Appeals ambitiously attempted to distill virtually all of Washington’s open fields law into a list of 14 “non-exclusive factors” to be considered in determining whether an access route on private property is “impliedly open” to the public. *State v. Newhouse*, 147 Wn. App. 1039, Not Reported in P.3d, 2008 WL 4998492 (2008). Even though *Newhouse* is unpublished, its analysis provides a useful framework in developing an open fields argument.

## E. Exigent Circumstances

In the enforcement of criminal laws, a warrant may not be required for entry onto private property where exigent circumstances exist. Exigent circumstances are “those circumstances that would cause a reasonable person to believe that entry . . . was necessary to prevent physical harm to the officers or other persons, the destruction of relevant evidence, the escape of the suspect, or some other consequence improperly frustrating legitimate law enforcement efforts.” United States v. McConney, 728 F.2d 1195, 1199 (9th Cir. 1984) (en banc), *cert. denied*, 469 U.S. 824 (1984). Accord United States v. George, 883 F.2d 1407, 1412 (9th Cir. 1989). The exigency is viewed from the totality of circumstances known to the officer at the time of the warrantless intrusion. United States v. Licata, 761 F.2d 537, 543 (9th Cir. 1985).

However, because the exigent circumstances exception is premised on the need for entry when there is insufficient time to get a warrant, more than exigency is required: the government must be able to show that a warrant could not have been obtained in time or that it would have been infeasible or unsafe to take the time to obtain a warrant. United States v. Good, 780 F.2d 773, 775 (9th Cir.), *cert. denied*, 475 U.S. 1111 (1986); State v. Bessette, 105 Wn. App. 793, 798, 21 P.3d 318 (2001). Accord Fisher v. City of San Jose, 509 F.3d 952, 960 (9th Cir. 2007), *rehearing en banc granted*, 519 F.3d 908 (9th Cir. 2008); United States v. Echevoyen, 799 F.2d 1271, 1279, n.5 (9th Cir. 1986). Exigency is assessed as of the time of entry, not as of the time of any subsequent search, seizure, or arrest. Fisher, 509 F.3d at 961.

More than exigency is required for warrantless entry into a home; there also must be probable cause that the suspect committed a crime. Fisher, 509 F.3d at 960. Moreover, courts have enumerated the specific exigent circumstances necessary to justify warrantless entry (with probable cause) into a home. The court in State v. Terrovona, 105 Wn.2d 632, 644, 716 P.2d 295 (1986), identified five exigencies: (1) hot pursuit of suspect; (2) fleeing suspect; (3) danger to officer or public; (4) mobility of vehicle; and (5) mobility or destruction of evidence. Accord Bessette, 105 Wn. App. at 798.

The court in Terrovona also identified six factors that aid in determining whether warrantless entry into a home is justified: (1) the gravity of the alleged offense; (2) whether the suspect is reasonably believed to be armed; (3) whether there is reasonably trustworthy information that the suspect is guilty; (4) whether there is strong reason to believe that the suspect is on the premises; (5) whether the suspect is likely to escape if not swiftly apprehended; and (6) whether entry onto premises can be made peaceably. Terrovona, 105 Wn.2d at 644. Accord State v. Cardenas, 146 Wn.2d 400, 406, 47 P.3d 127, 57 P.3d 1156 (2002), *cert. denied sub nom. Cardenas v. Washington*, 538 U.S. 912 (2003); Bessette, 105 Wn. App. at 798. Not all factors need to be met to uphold a warrantless search. Rather, Washington courts look at whether the factors as a whole demonstrate the need to act quickly. Cardenas, 146 Wn.2d at 408.

The Washington Court of Appeals found exigent circumstances for an in-home DUI arrest when an officer activated his emergency lights after he observed a vehicle weaving, but the driver refused to pull over and ran inside her house after pulling into the driveway. State v. Griffith, 61 Wn. App. 35, 808 P.2d 1171, *review denied*, 117 Wn.2d 1009 (1991). The court

identified the existence of two exigencies, fleeing suspect and destruction of evidence. *Id.* at 44.<sup>46</sup> The destruction of evidence in *Griffith* was based on possible dissipation of the suspect's blood alcohol level, which was a factor that also contributed to a finding of exigent circumstances in subsequent case, [State v. Wolters](#), 133 Wn. App. 297, 305, 135 P.3d 562 (2006).

Washington courts also have found exigent circumstances in the following instances: [State v. Carter](#), 127 Wn.2d 836, 904 P.2d 290 (1995) (exigent circumstances to enter hotel room when officers had suspicion of drug activity and were afraid that suspect would destroy drug evidence inside the room); [State v. Goodin](#), 67 Wn. App. 623, 630-32, 838 P.2d 135 (1992) (exigent circumstances to enter residence where drug activity was known to occur and resident entered bathroom and began flushing when she saw police officers), *review denied*, 121 Wn.2d 1019 (1993); [State v. Raines](#), 55 Wn. App. 459, 463-67, 778 P.2d 538 (1989) (exigent circumstances to enter apartment when officers were responding to domestic violence report and spouse and child of suspect were in the apartment), *review denied*, 113 Wn.2d 1036 (1990).

Washington courts have declined to find exigent circumstances in the following instances: [Bessette](#), 105 Wn. App. at 798-800 (no exigent circumstances when officer entered home after chasing a minor holding a beer bottle when there was no reason to believe minor was armed or dangerous); [State v. Mierz](#), 72 Wn. App. 783, 791-92, 866 P.2d 65 (1994) (no exigent circumstances for wildlife officers to enter backyard to retrieve illegal coyotes because coyotes would not be removed or destroyed while officers obtained a warrant), *aff'd*, 127 Wn.2d 460, 901 P.2d 286 (1995) (finding it unnecessary to review Court of Appeals' exigent circumstances analysis); [State v. Ramirez](#), 49 Wn. App. 814, 821, 746 P.2d 344 (1987) (no exigent circumstances to enter hotel room based on smell of marijuana emanating from room due to relatively minor nature of the crime).

The exigent circumstances doctrine is a criminal law doctrine and it is not clear whether Washington courts would extend the doctrine to an administrative search setting. Since the six factors that are considered by the courts assume the commission of a crime, this warrant exception is not as easily applied in a non-criminal setting as some of the other exceptions to the warrant requirement. The following hypothetical scenario illustrates an instance in which a court might extend the doctrine to a non-criminal setting:

- *Hypothetical example:* An oil spill occurs in Puget Sound. Several eyewitnesses report to a state agency that they observed a small fishing boat, the *Oily Salmon*, with a large sheen of oil emanating from it. The *Oily Salmon* is currently docked. Agency investigators may be able to prevent the ship from leaving the dock until they

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<sup>46</sup> The *Griffith* court also discussed "gravity of offense" as a possible exigent circumstance, but found it unnecessary to reach that issue since other exigent circumstances existed. [Griffith](#), 61 Wn. App. at 44-45. The decision seems to have confused the five types of exigencies with the six *factors* considered to determine whether a search based on exigent circumstances was lawful. Other court decisions also have blurred this distinction between the exigent circumstances themselves and the factors. See [Cardenas](#), 146 Wn.2d at 405-11 (court analyzed the six factors but did not determine whether an exigent circumstance existed in the first instance); [State v. Wolters](#), 133 Wn. App. 297, 301-02, 135 P.3d 562 (2006) (listing eleven "factors" that courts consider in determining whether exigent circumstances exist).

complete an investigation to determine whether the boat is responsible for the oil spill. See [United States v. Varlack Ventures, Inc.](#), 149 F.3d 212, 217 (3rd Cir. 1998) (Coast Guard’s warrantless search of a vessel lawful under the exigent circumstances exception because vessels can easily escape into open sea taking a great deal of relevant evidence with them).

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*Practice pointer:* It is important not to confuse the exigent circumstances exception with the emergency prong of the community caretaking exception (discussed in the next section below). The differences between the two doctrines were distinguished by the Washington Supreme Court:

The emergency aid doctrine is different from the “exigent circumstances” exception to the warrant requirement. Both involve situations in which police officers must act immediately, but for distinctly different purposes. Unlike the exigent circumstances exception, “the emergency [aid] doctrine does not involve officers investigating a crime but rises from a police officer’s community caretaking responsibility to come to the aid of persons believed to be in danger of death or physical harm.”

[State v. Kinzy](#), 141 Wn.2d 373, 386 n.39, 5 P.3d 668 (2000) (citation omitted), *cert. denied*, 531 U.S. 1104 (2001). Despite the difference between the two doctrines, courts sometimes confuse the two, which makes it easy for unwary practitioners to make the same mistake. See, e.g., [State v. Leffler](#), 142 Wn. App. 175, 181-82, 178 P.3d 1042 (2007).

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## F. Community Caretaking

The community caretaking exception to the warrant requirement was first announced by the United States Supreme Court in [Cady v. Dombrowski](#), 413 U.S. 433, 93 S. Ct. 2523, 37 L. Ed. 2d 706 (1973). The exception recognizes that police perform some functions that are “totally divorced from the detection, investigation, or acquisition of evidence” relating to criminal violations. *Id.* at 441. Thus, unlike the exigent circumstances exception discussed in the previous section, the community caretaking exception does not involve investigation of a crime. [State v. Swenson](#), 59 Wn. App. 586, 589, 799 P.2d 1188 (1990).

Washington courts have found that the community caretaking exception encompasses two basic types of warrantless searches: (1) searches predicated on the need to give emergency

aid; and (2) routine health and safety checks. [State v. Acrey](#), 148 Wn.2d 738, 755, 64 P.3d 594 (2003).<sup>47</sup>

## 1. Need for Emergency Aid

The emergency prong applies if, (1) the officer subjectively believes that someone needs assistance for health or safety concerns; (2) a reasonable person would believe that the need for assistance exists; and (3) there is a reasonable basis for associating the need for assistance with the place to be searched. [State v. Kinzy](#), 141 Wn.2d 373, 386-87, 5 P.3d 668 (2000), *cert. denied*, 531 U.S. 1104 (2001). In [State v. Schultz](#), the Supreme Court articulated three additional elements: “(4) there is an imminent threat of substantial injury to persons or property; (5) state agents must believe a specific person or persons or property are in need of immediate help for health or safety reasons; and (6) the claimed emergency is not a mere pretext for an evidentiary search.” [State v. Schultz](#), 170 Wn.2d 746, 754-55, 248 P.3d 484 (2011). The court concluded that despite the unique challenges in situations involving allegations of domestic violence that were present in this case, the officers did not have enough facts to suggest that anyone was in imminent risk of harm and thus entry into Ms. Schultz’s apartment was not justified based on the emergency aid exception to the warrant requirement. *Id.* at 760. The court also reiterated the principle that mere acquiescence to an officer’s entry does not constitute consent to the warrantless search. *Id.* at 760.

Under Washington law, the use of the emergency exception may not be a pretext for conducting an evidentiary search. [State v. Leffler](#), 142 Wn. App. 175, 182, 178 P.3d 1042 (2007). However, a search may be reasonable under a Fourth Amendment analysis if the objective circumstances justify the warrantless search, regardless of the individual officer’s state of mind. [Brigham City, Utah v. Stuart](#), 547 U.S. 398, 405, 126 S. Ct. 1943, 164 L. Ed. 2d 650 (2006). In addition, there must be some reasonable basis to associate the emergency with the location entered and searched. [Mincey v. Arizona](#), 437 U.S. 385, 394, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978); [State v. Loewen](#), 97 Wn.2d 562, 568-69, 647 P.2d 489 (1982). The entry and any ensuing search must be circumscribed by the reason justifying the initial warrantless entry. [Mincey](#), 437 U.S. at 393-94. Once the emergency dissipates, the officer is no longer justified by the doctrine to remain at the location or to continue a search of the premises. See [Michigan v. Tyler](#), 436 U.S. 499, 509-12, 98 S. Ct. 1942, 56 L. Ed. 2d 486 (1978).

In addition to cases involving the need to assist persons, the emergency exception has been applied in a case where the police entered a building with the knowledge (based on the smell of ether) that dangerous chemicals were inside that may imminently cause harm. [State v. Downey](#), 53 Wn. App. 543, 544-45, 768 P.2d 502 (1989). See also [State v. Smith](#), 137 Wn. App. 262, 270, 153 P.3d 199 (2007) (finding emergency when officers were motivated by a need to render aid and assistance by removing toxic chemicals from a truck), *review granted*, 162 Wn.2d

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<sup>47</sup> In [State v. Thompson](#), 151 Wn.2d 793, 92 P.3d 228 (2004), the court equated the community caretaking exception with the emergency prong of the exception, thereby failing to note the distinction between rendering emergency aid and a routine health or safety check. *Id.* at 802. However, the court’s opinion did not analyze the community caretaking exception in-depth and its conflation of community caretaking with emergency appears to be inadvertent.

1023 (2008). The emergency exception was also applied in a situation where there was a reasonable belief that objects were likely to burn or explode and persons were in imminent danger of death or harm. *State v. Muir*, 67 Wn. App. 149, 153, 835 P.2d 1049 (1992).

In contrast, the courts have been unwilling to extend the emergency doctrine to authorize warrantless entries where there is only a generalized fear that methamphetamine labs and their ingredients are dangerous to others who live in the neighborhood. *State v. Lawson*, 135 Wn. App. 430, 438, 144 P.3d 377 (2006). The court also refused to find that the emergency exception applied to a situation where officers entered a mobile home after responding to an anonymous complaint alleging strong chemical smells coming from the mobile home on the property, where methamphetamine production was observed upon entry. *State v. Leffler*, 142 Wn. App. 175, 178 P.3d 1042 (2007).

Presumably, in a true emergency situation, there would be an urgent need to act and no time to secure a warrant. However, any immediate action would have to be properly tailored to the nature and magnitude of the emergency. Clearly, if there is a substantial and imminent risk of serious injury to persons, the emergency exception will apply. Where the courts have been inconsistent is determining what is “imminent”. Compare *State v. Leffler*, 142 Wn. App. 175, 178 P.3d 1042 (2007), where the court refused to find an emergency for the securing of methamphetamine lab, with *Downey*, 53 Wn. App. 543, where the odor of ether validated the police officer’s entry into a building. The only potential difference was the lack of testimony to support the warrantless search that the methamphetamine chemicals were in imminent danger of exploding. Determining when a true emergency exists to justify the use of the emergency exception will be heavily fact-specific.

## 2. Routine Health and Safety Checks

The routine health and safety prong of the community caretaking exception requires less urgency than the emergency aid prong. *State v. Kinzy*, 141 Wn.2d 373, 386-87, 5 P.3d 668 (2000), *cert. denied*, 531 U.S. 1104 (2001). This prong requires a balancing between the individual’s right to be free from government intrusion against the public’s interest in having the officer perform the community caretaking function. *Id.* at 387. In a recent unpublished decision, Division I of the Court of Appeals held that “a true emergency” must exist for either the emergency aid or routine health and safety prong of the community caretaking exception to apply. *State v. Santiago*, 167 Wn. App. 1020, Not Reported in P.3d, 2012 WL 1020247, \*3 (2012).<sup>48</sup> Even though *Santiago* is unpublished, it is instructive as the Court provided a thorough review of Washington case law on the community caretaking exception in several extensive footnotes.

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<sup>48</sup> In *Santiago*, the court found that a warrantless search of a home resulting in evidence of drug activity was not justified when the purpose of the visit was a routine health and safety check on a vulnerable two-year old child. The court distinguished between “immediate” danger of harm and “imminent” harm, determining that a CPS worker accompanied by three police officers had other options to protect the child than entry into the home without a warrant.

The “routine safety and health” prong of the community caretaking exception arises in the context of encounters between law enforcement officers and individuals. See [Kinzy](#), 141 Wn.2d at 387-88. It should not be confused with inspections under building codes and other regulations that relate to “health and safety,” for which a warrant or some other exception must exist. See, e.g., [McCready v. City of Seattle](#), 123 Wn.2d 260, 267, 868 P.2d 134 (1994) (*McCready I*).

### 3. General

The community caretaking function is cautiously applied by courts to avoid abuse by officers. [State v. Acrey](#), 148 Wn.2d 738, 755, 64 P.3d 594 (2003). It is limited to situations where there is no probable cause to believe that a crime has been committed and where the officer is not motivated by an intent to search for evidence of a crime. [State v. Gocken](#), 71 Wn. App. 267, 276, 857 P.2d 1074 (1993), *review denied*, 123 Wn.2d 1024 (1994). The reasonableness of a search under this exception is judged under the totality of the circumstances. [State v. Moore](#), 129 Wn. App. 870, 880, 120 P.3d 635 (2005), *review denied*, 157 Wn.2d 1007 (2006).

Although the noncriminal investigation must end as soon as the reason for initiating the encounter has been fully dispelled, once an officer has validly entered the property during the course of legitimate emergency activities, the officer may seize any evidence in plain view. [State v. Stevenson](#), 55 Wn. App. 725, 729-30, 780 P.2d 873 (1989), *review denied*, 113 Wn.2d 1040 (1990). Furthermore, an officer may conduct a limited search of a victim’s personal effects if necessary within the course of rendering aid. See [State v. Loewen](#), 97 Wn.2d 562, 567-68, 647 P.2d 489 (1982) (citing cases).

The Washington Supreme Court has not analyzed the community caretaking exception under article 1, section 7 of the Washington Constitution.<sup>49</sup> [Moore](#), 129 Wn. App. at 870 (noting that the Supreme Court has not yet reached the issue). Furthermore, this exception has not been considered by Washington courts outside of the criminal context. In fact, the Court of Appeals explicitly described the community caretaking exception as a criminal law doctrine. [Cummins v. Lewis Cy.](#), 124 Wn. App. 247, 255-56, 98 P.3d 822 (2004) (court refused to consider the exception relevant in a tort suit where the plaintiff had to establish that police had a public duty to prevent harm).

Even though it has not been applied outside of a criminal context, the community caretaking exception could arise in a civil setting. Two hypothetical examples illustrate how the exception could arise:

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<sup>49</sup> However, the Court of Appeals has applied the exception under article 1, section 7 to a police officer’s contact and conversation with the occupant of a parked car late at night in an area with known narcotics trafficking, during which the officer asked for identification. See, e.g., [State v. O’Neill](#), 104 Wn. App. 850, 860, 17 P.3d 682 (2001), *aff’d in part, rev’d in part*, [148 Wn.2d 564](#), 62 P.3d 489 (2003) (Supreme Court did not address the community caretaking exception).



- *Hypothetical example #1:* Agency employees enter private property in response to reports that a toxic chemical is leaking from the property directly into groundwater that is used as a source of drinking water. The employees' sole purpose in entering the property is to stop the source of the chemical and clean up the chemical that has already spilled. While on the property, the employees discover evidence in plain view that leads to the issuance of a civil penalty against the party responsible for the chemical spill.
- *Hypothetical example #2:* A state social worker enters a residence following a 911 call from a young child that her mother has passed out after ingesting illegal drugs and the child is alone and scared. Upon entering the premises, the social worker discovers the house is extremely dirty and there are used syringes among the trash on the floor. The child appears to be malnourished and is only partially dressed in dirty clothing. The evidence that the social worker observes in plain view later is used in a case against the parent to terminate parental rights.

A court might be inclined to apply the community caretaking exception to the first set of facts based on the public's strong interest in having the employees respond to the chemical spill and protect public health and natural resources. The exception might be applied to the second set of facts based on a finding that the child needed assistance and that there is a strong public interest in protecting children from harm.

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*Practice pointer:* The application of this exception is fact-specific. The exception cannot be invoked as a pretext to investigate civil or criminal violations. When entering property for a community caretaking purpose, agency employees should not enter portions of the property on which entry is unnecessary to perform the caretaking function (although evidence observed in plain view may be seized).

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## G. Special Needs

### 1. Special Needs Under the Fourth Amendment

A warrantless search can be constitutional under the Fourth Amendment, absent a warrant or probable cause, when a special need, beyond the normal need for law enforcement, makes the warrant and probable cause requirement impracticable. *Griffin v. Wisconsin*, 483 U.S. 868, 873, 107 S. Ct. 3164, 97 L. Ed. 2d 709 (1987), citing *New Jersey v. T.L.O.*, 469 U.S. 325, 105 S. Ct. 733, 83 L. Ed. 2d 720 (1985) (Blackmun, J., concurring in judgment). When such a special need exists, courts will determine the reasonableness of a search under the Fourth Amendment by balancing the context-specific competing governmental and private interests at stake. Fabio Arcila, Jr., *Special Needs and Special Deference: Suspicionless Civil Searches in the Modern Regulatory State*, 56 Admin. L. Rev. 1223, 1228 (Fall 2004).

The special needs exception to the warrant requirement had its genesis in 1971 when the Supreme Court held in *Wyman v. James*, 400 U.S. 309, 91 S. Ct. 381, 27 L. Ed. 2d 408 (1971), that continued receipt of Aid to Families with Dependent Children (AFDC) benefits could be

conditioned on submission to a warrantless home visit by a state caseworker. The Court held that the home inspection was not a search because the investigative aspect of the caseworker's visit was distinguishable from traditional criminal searches and was perhaps outweighed by the visit's rehabilitative purpose. *Id.* at 317. In addition, consent to the visit could be withheld without criminal sanction. *Id.* at 317-18.<sup>50</sup>

Even if the home visit had been a search, the Court concluded the visit was reasonable. *Id.* at 318. The Court found several factors to be significant in reaching its conclusion: (1) the public's "paramount" interest in protecting and meeting the needs of a dependent child; (2) the government's interest in assuring that the proper objects of tax-produced assistance are the ones who benefit from the AFDC program; (3) the limited scope of and purpose of the visits, which are primarily rehabilitative and which are constrained by protections such as advance written notice; (4) the non-criminal enforcement purpose of the visits,<sup>51</sup> (5) the programmatic necessity of seeing the actual home of the recipient, and (6) the fact that a warrant requirement in the welfare context would be objectionable and programmatically "out of place." *Id.* at 318-24.<sup>52</sup>

Because the Court's application of the special needs exception has been extremely fact-specific, an agency wishing to rely on the exception is able to do so with great confidence only when the facts at issue match those in a reported case. When the facts do not match those in a reported case, agencies should apply the exception only after considering both the case authority in the same general subject matter area (e.g., "school cases" or "employment cases") and the key cases addressing the exception in other contexts. This two-part review is necessary because courts generally have not restricted their analysis to cases involving the same subject matter area

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<sup>50</sup> The conclusion that the home inspection was not a search arguably has been called into question, at least outside the welfare context, by subsequent decisions of the Court holding that consensual administrative searches qualify as searches even though refusal to consent carried no criminal sanction and searches were not part of a criminal investigation. See [Sanchez v. Cy. of San Diego](#), 464 F.3d 916, 922 n.8 (9th Cir. 2006) (citing [Board of Educ. v. Earls](#), 536 U.S. 822, 833, 122 S. Ct. 2559, 153 L. Ed. 2d 735 (2002), and [Vernonia School Dist. 47J v. Acton](#), 515 U.S. 646, 115 S. Ct. 2386, 132 L. Ed. 2d 564 (1995)), *rehearing en banc denied*, 483 F.3d 965 (9th Cir. 2007), *cert. denied*, 128 S. Ct. 649 (2007).

<sup>51</sup> In relation to the possibility of criminal sanctions, the Court also distinguished [See v. City of Seattle](#), 387 U.S. 541, 87 S. Ct. 1737, 18 L. Ed. 2d 943 (1967), and [Camara v. Municipal Court](#), 387 U.S. 523, 87 S. Ct. 1727, 18 L. Ed. 2d 930 (1967). In [Camara](#), 387 U.S. at 534, the Supreme Court held that administrative searches by municipal health and safety inspectors are subject to Fourth Amendment warrant requirements. In [See](#), 387 U.S. at 545, the Court applied the *Camara* standard to similar inspections of the non-public portions of commercial structures. *Wyman* distinguished these cases on the bases that (1) denial of the AFDC home visits would not result in criminal sanctions; and (2) the only consequence of refusing an inspection would be cessation of AFDC benefits. [Wyman](#), 400 U.S. at 324-25.

<sup>52</sup> The *Wyman* holding has not been judicially extended to child abuse investigations. Such investigatory home visits have been held to be searches in part because of the greater focus on parental misconduct. 5 Wayne R. LaFare, *Search & Seizure* § 10.3 (4th ed). Unless the home visit is conducted with parental consent or in the context of facts sufficient to bring the visit within the scope of the emergency doctrine, a search warrant is required, although the nature of required probable cause to support a warrant is uncertain and may depend on the degree to which the child abuse investigation can be disentangled from law enforcement. *Id.* The *Wyman* holding also may not apply to child welfare cases concerning the removal of a child because of suspected child abuse. *Id.*

as the case before the court.<sup>53</sup> The following are the key post-*Wyman* United States Supreme Court cases:

[\*New Jersey v. T.L.O.\*](#), 469 U.S. 325, 105 S. Ct. 733, 83 L. Ed. 2d 720 (1985). The Court held that a school teacher's search of a public school student's purse is subject to the Fourth Amendment. [\*New Jersey\*](#), 469 U.S. at 333. However, warrant and probable cause requirements do not apply because a special need beyond the normal need for law enforcement makes warrants and probable cause impracticable. The Court determined that a warrant requirement is unsuited to the school environment where swift and informal action may be required and where the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search. [\*New Jersey\*](#), 469 U.S. at 340. Similarly, a probable cause requirement would undercut the need of teachers to maintain order in the school. [\*New Jersey\*](#), 469 U.S. at 341. The constitutionality of a search of a student depends on a reasonableness standard requiring inquiry into whether the search was justified at its inception and actually conducted in a fashion that was reasonably related in scope to the circumstances which justified the initial search. [\*New Jersey\*](#), 469 U.S. at 341-42. Accordingly, under ordinary circumstances, a school teacher's search of a student will be justified when there are reasonable grounds for suspecting that the student has violated the law or school rules and the search is reasonably related to its objectives and not excessively intrusive in light of the age and sex of the student and the nature of the infraction. [\*New Jersey\*](#), 469 U.S. at 341-42.

[\*O'Conner v. Ortega\*](#), 480 U.S. 709, 107 S. Ct. 1492, 94 L. Ed. 2d 714 (1987). The Court held that government employers may conduct warrantless, work-related searches of employees' desks and offices without a warrant or probable cause because, although employees have a privacy interest in the private objects they bring to the workplace, the government's need to enter employees' offices and desks for legitimate work-related purposes would be unduly thwarted by the requirement of a warrant or probable cause. [\*O'Conner\*](#), 480 U.S. at 722, 725. A government employer may intrude on employees' privacy interests for both non-investigatory work-related purposes and for investigations of work-related misconduct, so long as the employer's actions are reasonable under all the circumstances pertaining to the inception and scope of the intrusion. [\*O'Conner\*](#), 480 U.S. at 725-26.

[\*Griffin v. Wisconsin\*](#), 483 U.S. 868, 107 S. Ct. 3164, 97 L. Ed. 2d 709 (1987). The Court held that a warrantless search of the residence of a person on probation was a reasonable response to the special needs of the probation system for intensive supervision of probationers. [\*Griffin\*](#), 483 U.S. at 873-76. Restrictions on probationers' interests are justified by the need for rehabilitation and public safety. [\*Griffin\*](#), 483 U.S. at 874-75. The requirement of a warrant and probable cause was impracticable because it would cause unacceptable delay and create an

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<sup>53</sup> For example, in [\*Ferguson v. City of Charleston\*](#), 532 U.S. 67, 121 S. Ct. 1281, 149 L. Ed. 2d 205 (2001), a case addressing drug testing of hospital patients, the Court relied on two employment cases ([\*Skinner v. Railway Labor Excs. Ass'n\*](#), 489 U.S. 602, 109 S. Ct. 1402, 103 L. Ed. 2d 639 (1989); [\*National Treasury Employees Union v. Von Raab\*](#), 489 U.S. 656, 109 S. Ct. 1384, 103 L. Ed. 2d 685 (1989)), a school case ([\*Vernonia School Dist. 47J v. Acton\*](#), 515 U.S. 646, 115 S. Ct. 2386, 132 L. Ed. 2d 564 (1995)), and an election case ([\*Chandler v. Miller\*](#), 520 U.S. 305, 117 S. Ct. 1295, 137 L. Ed. 2d 513 (1997)).

unacceptable safe harbor for illegal and possibly dangerous behavior by probationers. [\*Griffin\*](#), 483 U.S. at 877, 878-79.

[\*Skinner v. Railway Labor Execs. Ass'n\*](#), 489 U.S. 602, 109 S. Ct. 1402, 103 L. Ed. 2d 639 (1989). The Court held that required or permissive drug and alcohol testing of railroad employees, pursuant to federal regulations, was a search under the Fourth Amendment. [\*Skinner\*](#), 489 U.S. at 633-34. However, in light of the limited discretion exercised by the railroad employers, the critical public safety interests served by the drug tests, and the diminished expectation of privacy about employee fitness in a heavily regulated industry, neither a warrant nor individualized suspicion was constitutionally required. *Id.*

[\*National Treasury Employees Union v. Von Raab\*](#), 489 U.S. 656, 109 S. Ct. 1384, 103 L. Ed. 2d 685 (1989). The Court upheld a U.S. Customs Service drug testing program for employees who applied for positions involving the interdiction of illegal drugs or the carrying of firearms. [\*Von Raab\*](#), 489 U.S. at 664-65. In doing so, the Court extended the holding in [\*Skinner\*](#), again noting that warrants, probable cause, and individualized suspicion are not indispensable components of reasonableness. *Id.* at 665. The Court refused to require a warrant because “government offices could not function if every employment decision became a constitutional matter” and because the testing requirements at issue were limited, narrowly defined, and undoubtedly well known to affected employees. *Id.* at 666-67. Similarly, the Court determined that a probable cause requirement was unsuited to situations in which the government is seeking to prevent the development of hazardous conditions or detect latent or hidden violations and because it was not feasible to subject these employees to day-to-day scrutiny. *Id.* at 668, 674.

[\*Vernonia School Dist. 47J v. Acton\*](#), 515 U.S. 646, 115 S. Ct. 2386, 132 L. Ed. 2d 564 (1995). The Court applied the special needs analysis in upholding a school district’s drug testing requirement for interscholastic athletes. [\*Vernonia School Dist. 47J\*](#), 515 U.S. at 664. The Court found that the program was reasonable given student athletes’ decreased expectation of privacy, the relative unobtrusiveness of the drug tests, and the school district’s severe and immediate need to test the athletes. [\*Vernonia School Dist. 47J\*](#), 515 U.S. at 648, 664. Critical to the Court’s analysis was the fact that school districts act as guardians and tutors of the children entrusted to their care. [\*Vernonia School Dist. 47J\*](#), 515 U.S. at 665.<sup>54</sup>

[\*Chandler v. Miller\*](#), 520 U.S. 305, 117 S. Ct. 1295, 137 L. Ed. 2d 513 (1997). The Court held that a Georgia requirement that candidates for state office pass a drug test was unconstitutional. [\*Chandler\*](#), 520 U.S. at 309. Based on [\*Skinner\*](#), [\*Von Raab\*](#), and [\*Vernonia\*](#), the Court concluded Georgia had not demonstrated a special need sufficiently substantial to override the individuals’ privacy interest and sufficiently vital to suppress the Fourth Amendment’s requirements of individualized suspicion. [\*Chandler\*](#), 520 U.S. at 318, 322. Although Georgia pointed to the fact that drug use calls into question an official’s judgment and integrity,

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<sup>54</sup> The Washington Supreme Court recently held that random and suspicionless drug testing of student athletes violates article 1, section 7 of the Washington Constitution even where the program at issue was based on that approved by the United States Supreme Court in [\*Vernonia\*](#) and passes federal muster. [\*York v. Wahkiakum School Dist. No. 200\*](#), 163 Wn.2d 297, 178 P.3d 995 (2008) (*York II*). *York II* is discussed in greater detail below beginning at page 41.

jeopardizes the discharge of public functions, and undermines public confidence, the Court found that Georgia had not demonstrated that its testing program was designed to address any real problem. [Chandler](#), 520 U.S. at 319. Moreover, the program was not well designed to identify candidates who violate antidrug laws nor would it deter illicit drug users from seeking state office because it allowed the candidate to select the test date. *Id.* The Court emphasized that although *Von Raab* upheld warrantless and suspicionless drug testing of certain U.S. Customs Service employees without evidence of a documented drug use problem, that situation is unique because Customs employees are routinely exposed to a vast network of organized crime and illegal drugs. [Chandler](#), 520 U.S. at 321.

[Ferguson v. City of Charleston](#), 532 U.S. 67, 121 S. Ct. 1281, 149 L. Ed. 2d 205 (2001). The Court held that state hospital drug tests of obstetrics patients that were subsequently referred to law enforcement were unreasonable searches within the meaning of the Fourth Amendment, absent patient consent. The government's interest in using threats of criminal prosecution to deter cocaine use by pregnant women did not justify warrantless searches. [Ferguson](#), 532 U.S. at 76-77. The Court distinguished *Skinner*, *Von Raab*, *Vernonia School District*, and *Chandler* on the basis that in the prior cases, the government's special need was unrelated to general law enforcement whereas in *Ferguson* the link to law enforcement was a central feature of the hospital's policy. [Ferguson](#), 532 U.S. at 77, 79-80. Moreover, unlike the prior cases, the testing program in *Ferguson* did not inform individuals about the purpose or potential use of test results and did not contain adequate protections against dissemination of the results to third parties. [Ferguson](#), 532 U.S. at 78.

[Board of Education v. Earls](#), 536 U.S. 822, 122 S. Ct. 2559, 153 L. Ed. 2d 735 (2002). The Court held that a policy requiring all students who participated in all competitive extracurricular activities to submit to drug testing was a reasonable means of furthering the school district's important interest in preventing drug use among schoolchildren. [Board of Education](#), 536 U.S. at 838.

[Sanchez v. Cy. of San Diego](#), 464 F.3d 916 (9th Cir. 2006), *rehearing en banc denied*, 483 F.3d 965 (2007), *cert. denied*, 128 S. Ct. 649 (2007). The Ninth Circuit applied [Wyman v. James](#), 400 U.S. 309, 91 S. Ct. 381, 27 L. Ed. 2d 408 (1971), in holding that warrantless home visits as a condition of receipt of welfare benefits were not searches because (1) the purpose of the visits was to verify eligibility, (2) they were conducted with the applicant's oral consent at the time of the visit, and (3) there was no penalty for refusal other than denial of benefits. [Sanchez](#), 464 F.3d at 921-23. The court held that, even if the visits were searches, they were reasonable under both the factors articulated in *Wyman* and in the special needs analysis articulated by the Supreme Court subsequent to *Wyman*. Based on *Griffin*, *Earls*, and *Ferguson*, the Court concluded that San Diego County had articulated a valid special need because the underlying purpose of the home visits was to verify eligibility for welfare benefits and not for general law enforcement purposes. [Sanchez](#), 464 F.3d at 926. While acknowledging that the nature of the applicants' privacy interest is significant because homes are traditionally protected areas of personal privacy, the court acknowledged that under *Griffin*, a personal relationship with the state can reduce a person's expectation of privacy. [Sanchez](#), 464 F.3d at 927. Based on its conclusion that the visits were relatively limited in scope and were logically connected with, and

an effective method of, verifying eligibility, the court held that the home visits were constitutional. [Sanchez](#), 464 F.3d at 927-28.

In other cases, Washington courts have tended to address similar federal cases without explicit reference to Fourth Amendment special needs analysis. For example, in [State v. B.A.S.](#), 103 Wn. App. 549, 553, 13 P.3d 244 (2000), the court cited a United States Supreme Court special needs case, [New Jersey v. T.L.O.](#), 469 U.S. 325, 105 S. Ct. 733, 83 L. Ed. 2d 720 (1985), upholding a search of a student's pockets for drugs, but did not explicitly adopt the special needs exception. Instead the court applied a reasonableness test based on factors such as the child's age, history, and school record; the prevalence and seriousness of the problem in the school to which the search was directed; the exigency to make the search without delay; and the probative value and reliability of the information used as a justification for the search. [B.A.S.](#), 103 Wn. App. at 553-54, 554 n.8. See also [State v. McKinnon](#), 88 Wn.2d 75, 558 P.2d 781 (1977) (without relying on special needs analysis, the court held that schools are special environments and a search of students' pockets for drugs was permissible under the Fourth Amendment when reasonable under the circumstances). But see [Kuehn v. Renton School Dist. No. 403](#), 103 Wn.2d 594, 599, 694 P.2d 1078 (1985) (without relying on special needs analysis the court held that a blanket search of school band members' luggage was impermissible under the Fourth Amendment absent individualized suspicion). Cf. [Jacobsen v. Seattle](#), 98 Wn.2d 668, 658 P.2d 653 (1983) (warrantless pat-down search of all attendees at rock concerts was impermissibly unreasonable under the Fourth Amendment and not analogous to searches in airports or courthouses); [Alverado v. Washington Public Power Supply System \(WPPSS\)](#), 111 Wn.2d 424, 441, 759 P.2d 427 (1988) (a mandatory warrantless urinalysis drug screening program for employees at the WNP-2 nuclear reactor was permissible under the pervasively regulated industry exception to the warrant requirement), *cert. denied*, 490 U.S. 1004 (1989).

## 2. Special Needs Under Article I, Section 7

In 2008, the Washington Supreme Court addressed the special needs exception in the context of administrative searches under article I, section 7, of the Washington Constitution in [York v. Wahkiakum School Dist. No. 200](#), 163 Wn.2d 297, 178 P.3d 995 (2008) (*York II*). Prior to this case the status of the exception under article I, section 7 was unclear.<sup>55</sup> Unfortunately, the

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<sup>55</sup> In 1993, the Washington Supreme Court approvingly cited [Skinner v. Railway Labor Execs. Ass'n](#), 489 U.S. 602, 109 S. Ct. 1402, 103 L. Ed. 2d 639 (1989), and applied a special needs analysis in evaluating nonconsensual HIV testing of juveniles who had been adjudicated to have committed sexual offenses. [In the Matter of Juveniles A, B, C, D, E](#), 121 Wn.2d 80, 91, 847 P.2d 455 (1993). In reaching the conclusion that a special need for warrantless testing existed, the court commented that the testing statute was not part of the criminal code; the statute was designed to protect public health; the purpose of the testing was not to gain evidence for criminal prosecution; a positive HIV test does not place juveniles at risk for new convictions or longer sentences; and requiring individualized suspicion was impractical because HIV infected juveniles may have no outward manifestations of infection. [Juveniles A, B, C, D, E](#), 121 Wn.2d at 92. After balancing the juvenile sexual offenders' reduced expectation of privacy in blood testing for a sexually transmitted disease against the government's compelling interest in combating the spread of AIDS, protecting the rights of victims, effectively managing juvenile facilities, and aiding the juveniles, the court held that the testing program complied with the Fourth Amendment. The court also held that the program did not violate the juveniles' constitutional right of privacy under Washington law. [Juveniles A, B, C, D, E](#), 121 Wn.2d at 96-98.

decision in *York II* exacerbated the confusion. *York II* involved a challenge to the Wahkiakum School District’s random drug testing program for all student athletes. Four justices concluded that the special needs exception *does not exist* under Washington law, 163 Wn.2d at 314, four justices concluded that the special needs exception *should exist* under Washington law, 163 Wn.2d at 329, and one justice concluded that the special needs exception *already exists* under Washington law, 163 Wn.2d at 335.<sup>56</sup>

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*Practice Pointer:* Because the resulting status of the special needs exception under Washington law is so uncertain, agencies should exercise great caution in attempting to rely on it unless and until the Court provides further clarification.

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## H. Silver Platter Doctrine

Suppose evidence is obtained in another state under circumstances for which a warrant would be required if the evidence had been obtained in Washington. That evidence still may be admitted in a Washington court under the so-called “silver platter doctrine” if (1) the evidence was lawfully obtained in the other jurisdiction, and (2) Washington law enforcement officers did not cooperate with or assist the law enforcement officers in the other jurisdiction to obtain the evidence.<sup>57</sup> *State v. Brown*, 132 Wn.2d 529, 587-88, 940 P.2d 546 (1997), *cert. denied*, 523 U.S.

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This discussion of privacy interests in *Juveniles A, B, C, D, E* was interpreted by the Washington Court of Appeals as a holding that in search and seizure cases article I, section 7 requires a different analysis than that applicable under the Fourth Amendment. *Robinson v. City of Seattle*, 102 Wn. App. 795, 817, 10 P.3d 452 (2000). Notwithstanding approval of *Skinner* in *Juveniles A, B, C, D, E*, the Court of Appeals declined to apply the *Skinner* special needs test, but instead held that the search must be justified by a compelling governmental interest that is narrowly tailored to meet that interest. *Robinson*, 102 Wn. App. at 817-18. The court concluded (1) that Seattle’s drug testing program was narrowly tailored only to the extent that it applied to applicants whose duties would genuinely implicate public safety, and (2) that governmental cost and efficiency interests were not sufficiently compelling interests to justify the program. *Robinson*, 102 Wn. App. at 823, 826.

This interpretation of *Juveniles A, B, C, D, E* and article I, section 7 was adopted in *York v. Wahkiakum School District No. 200*, 110 Wn. App. 383, 40 P.3d 1198 (2002) (*York I*), in which the court stated that “applied to a suspicionless testing policy, the analysis [under article I, section 7] mirrors the [Fourth Amendment] special needs analysis: a compelling state interest must justify the policy and the testing must be a narrowly tailored means of serving this interest.” *York I*, 110 Wn. App. at 386 (citing *Juveniles A, B, C, D, E* and *Robinson*). The court went on to hold that a random drug testing program of student athletes was permissible under both the Fourth Amendment and article I, section 7. The Washington Supreme Court, however, appears to have rejected this approach in *York v. Wahkiakum School District No. 200*, 163 Wn.2d 297, 178 P.3d 995 (2008) (*York II*), emphasizing the difference between state and federal analyses of warrantless drug testing and holding that a program which satisfied the Fourth Amendment nevertheless violated article 1, section 7 of the Washington Constitution.

<sup>56</sup> A related issue is the “school search doctrine.” The Washington Supreme Court has held that a “school search exception to the warrant requirement is well established under both Washington and federal law.” *State v. Meneese*, 174 Wn.2d 937, 943, 282 P.3d 83 (2012). In *Meneese*, the court recognized that an exception to the warrant requirement may exist for some searches by school officials based on a reasonable suspicion of violation of school policy or laws. *Id.* But the court concluded a school search exception to the warrant requirement did not apply to a search of a student’s backpack by a school resource officer, a fully commissioned and uniformed police officer, because of the “overwhelming indicia of police action.” *Id.* at 947.

<sup>57</sup> The term “silver platter” doctrine was coined in *Lustig v. United States*, 338 U.S. 74, 78-79, 69 S. Ct. 1372, 93 L. Ed. 1819 (1949), which approved the use of evidence by federal officials that was obtained in violation

1007 (1998). To determine whether there was inappropriate assistance or cooperation by Washington officials, courts have considered whether there was communication between Washington officials and the law enforcement officials of the other jurisdiction before the evidence was obtained, and whether there was evidence of antecedent planning, joint operations, or other cooperative investigation between the officials in the two jurisdictions. *Id.* at 587; [State v. Mezquia](#), 129 Wn. App. 118, 133, 118 P.3d 378 (2005), *review denied*, 163 Wn.2d 1046 (2008); [State v. Johnson](#), 75 Wn. App. 692, 699-701, 879 P.2d 984 (1994), *review denied*, 126 Wn.2d 1004 (1995); [State v. Gwinner](#), 59 Wn. App. 119, 125, 796 P.2d 728 (1990), *review denied*, 117 Wn.2d 1004 (1991). Mere contact between the officers of different jurisdictions or awareness of each other's investigations does not necessarily constitute inappropriate assistance or cooperation that would bar use of the evidence under the doctrine. [Brown](#), 132 Wn.2d at 587.

The silver platter doctrine also applies to evidence obtained by federal officials in violation of the Washington Constitution, so long as the federal officials did not also violate the federal constitution and were not acting with the cooperation and assistance of Washington law enforcement officials.<sup>58</sup> [In re Teddington](#), 116 Wn.2d 761, 772-73, 808 P.2d 156 (1991) (evidence obtained from soldier's locker by military officials on Fort Lewis); [Gwinner](#), 59 Wn. App. at 122-27 (evidence obtained by federal drug enforcement officers at Sea-Tac Airport). *See*

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of the Fourth Amendment by state officials, holding that "it is not a search by a federal official if evidence secured by state authorities is turned over to the federal authorities on a silver platter." The doctrine itself is derived from [Weeks v. United States](#), 232 U.S. 383, 34 S. Ct. 341, 58 L. Ed. 652 (1914), which established the Exclusionary Rule but held that the rule would not apply to evidence obtained by non-federal officers who acted without any claim of federal authority, based on the Court's view at that time that the Fourth Amendment did not apply to the states. *See id.* at 398. The use of evidence obtained by state officers in violation of the Fourth Amendment was abolished in federal courts in [Elkins v. United States](#), 364 U.S. 206, 80 S. Ct. 1437, 4 L. Ed. 2d 1669 (1960) (affirming [Wolf v. Colorado](#), 338 U.S. 25, 69 S. Ct. 1359, 93 L. Ed. 1782 (1949), which held that the Fourth Amendment applies to state officials under the Fourteenth Amendment), and [Mapp v. Ohio](#), 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961) (evidence obtained by state and local officers in violation of the Fourth Amendment is inadmissible). The doctrine still applies for federal authorities, however, when evidence is obtained from a jurisdiction not governed by the Fourth Amendment, such as another country. *See, e.g., Stonehill v. United States*, 405 F.2d 738 (9th Cir. 1968) (evidence obtained by foreign agents in the Philippines in circumstances that would violate the Fourth Amendment was admissible in federal court where federal officers did not undertake or unlawfully participate in the unconstitutional search and seizure), *cert. denied*, 395 U.S. 960 (1969). *Accord United States v. Callaway*, 446 F.2d 753, 755 (3d Cir. 1971) (same, applied to evidence obtained by Canadian police), *cert. denied. sub nom. Devyver v. United States*, 404 U.S. 1021 (1972).

As explained below, the doctrine applies now, in interesting irony, because state constitutions have been interpreted in recent years as providing greater protection than the Fourth Amendment. Accordingly, in many states, including Washington, it is possible to comply with the Fourth Amendment while violating the analogous state constitutional provision, allowing the silver platter doctrine to be applied to the use of evidence by state officials that was obtained by federal officials (or officials of another state) in a manner that would violate the state constitution had the state officials obtained it.

<sup>58</sup> Some courts have used the terms "agency" and "agent" to describe the relationship between Washington State law enforcement officials and those of another jurisdiction that would implicate the protections of the Washington Constitution, thereby barring application of the silver platter doctrine. However, a formal agency relationship is not required; rather, the term "agency" is used as shorthand for the situation in which law enforcement officers of another jurisdiction are "acting with the cooperation and assistance of" officers from Washington. [State v. Johnson](#), 75 Wn. App. 692, 700, 879 P.2d 984 (1994). The rule in *Johnson* is the majority rule. *See State v. Mollica*, 114 N.J. 329, 345-51, 554 A.2d 1315, 1324-27 (N.J.) (summarizing the history of the silver platter doctrine and reviewing cases).



also *State v. Bradley*, 105 Wn.2d 898, 902-03, 719 P.2d 546 (1986) (“Neither state law nor the state constitution can control federal officers’ conduct”).

Although the silver platter doctrine was developed in the context of criminal law enforcement, the rationale underlying the doctrine appears to apply equally to civil enforcement actions, where the doctrine can constitute an exception to the administrative warrant requirement by allowing evidence from another jurisdiction to be admitted even though it was obtained without a warrant in circumstances in which Washington law would require an administrative warrant.

A version of the silver platter doctrine also acts as an exception to the Exclusionary Rule, to the extent the Exclusionary Rule applies to administrative enforcement proceedings brought by another governmental entity. In *United States v. Janis*, 428 U.S. 433, 96 S. Ct. 3021, 49 L. Ed. 2d 1046 (1976), the Court held that evidence seized by a California police officer in violation of the Fourth Amendment nevertheless could be used in a federal civil action. Invoking the reasoning underlying the silver platter doctrine, *id.* at 443-46, the Court held that “the judicially created Exclusionary Rule should not be extended to forbid the use in the civil proceeding of one sovereign of evidence seized by a criminal law enforcement agent of another sovereign,” *id.* at 459-60. The Court also noted that “the deterrent effect of the exclusion of relevant evidence is highly attenuated when the ‘punishment’ imposed upon the offending criminal enforcement officer is the removal of that evidence from a civil suit by or against a different sovereign[.]” *Id.* at 457-58. *But see Grimes v. Comm. of I.R.S.*, 82 F.3d 286 (9th Cir. 1996) (Court did not exclude evidence illegally seized by the F.B.I from subsequent use by the I.R.S. in a civil tax proceeding.)

## **IV. Scope and Authority Issues Regarding Administrative Warrants**

### **A. Effect of a Valid Warrant**

In general, courts view administrative inspections as impermissible under the Fourth Amendment to the United States Constitution and article I, section 7 of the Washington Constitution, unless they are conducted under a warrant or a firmly rooted exception to the warrant requirement. *Camara v. Municipal Court of the City & County of San Francisco*, 387 U.S. 523, 87 S. Ct. 1727, 18 L. Ed. 2d 930 (1967); *Thurston Cy. Rental Owners Ass’n v. Thurston Cy.*, 85 Wn. App. 171, 183, 931 P.2d 208, *review denied*, 132 Wn.2d 1010, 940 P.2d 655 (1997).<sup>59</sup> In particular, under the language of article I, section 7 of the Washington Constitution, “[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law”; the warrant provides the “authority of law” that allows invasion of a person’s private affairs. *State v. Ladson*, 138 Wn.2d 343, 352, 979 P.2d 833 (1999); *State v. Miles*, 160 Wn.2d 236, 247, 156 P.3d 864 (2007). The Washington Supreme Court noted in a criminal case “that ‘authority of law’ is satisfied by a warrant, issued upon probable cause, established by sworn affidavit, which may be based in whole or in part upon hearsay.” *State v. Chenoweth*, 160

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<sup>59</sup> An overview of the constitutional limits on administrative warrants is provided in Section II of this deskbook, beginning at page 1, above.

Wn.2d 454, 465, 158 P.3d 595 (2007). Note that the Court was addressing the standard for issuance of a warrant in the context of a criminal case; as discussed below, administrative warrants may be issued on less than probable cause.

In determining the validity of a warrant, courts look only at the information present before the magistrate when the warrant was issued. *City of Seattle v. Leach*, 29 Wn. App. 81, 85, 627 P.2d 159 (1981). Administrative inspection warrants must be supported by either evidence of a specific violation, or a description of a general inspection program, “based on reasonable legislative or administrative standards derived from neutral sources.” *Id.* at 84. Therefore, the administrative warrant application must contain enough details to allow the magistrate to ascertain that the requested inspection falls within the parameters of the inspection program. *Id.* at 85.

Administrative search warrants are limited in scope, too, and should not be used as a pretext to convert the investigation into a search for evidence of a crime. Under a Fourth Amendment analysis, courts will look at the primary purpose of the search and if there is a criminal investigatory purpose, the courts may find that a citizen’s constitutional rights were violated. *Michigan v. Clifford*, 464 U.S. 287, 294, 104 S. Ct. 641, 78 L. Ed. 2d 477 (1984); *Alexander v. City & County of San Francisco*, 29 F.3d 1355 (9th Cir. 1994), *cert. denied sub nom. Lennon v. Alexander*, 513 U.S. 1083 (1995). These cases were distinguished, however, in *Murphy v. State*, 115 Wn. App. 297, 310-11, 62 P.3d 533, *review denied*, 149 Wn.2d 1035 (2003), *cert. denied*, 541 U.S. 1087 (2004), where the Court of Appeals concluded that a statute authorized the Board of Pharmacy to obtain prescription records without a warrant, even though the records were subsequently used in a criminal prosecution.

As to what constitutes an error in the warrant, the Washington Supreme Court examined in a criminal case whether a search warrant is valid under article I, section 7 if the affiant negligently omits material facts from the supporting affidavit. *Chenoweth*, 160 Wn.2d at 464. The court held that only material falsehoods or omissions made recklessly or intentionally would invalidate a warrant. *Id.* at 479.

A criminal defendant may challenge the validity of the warrant and request that the trial court hold a *Franks* hearing. See *Franks v. Delaware*, 438 U.S. 154, 154-55, 171-72, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978). As a preliminary matter, the defendant must show through an offer of proof that the warrant affiant recklessly, knowingly, or intentionally made material misstatements or omissions and that the alleged error is relevant to the finding of probable cause. *State v. Garrison*, 118 Wn.2d 870, 872, 827 P.2d 1388 (1992); *State v. Clark*, 143 Wn.2d 731, 751-53, 24 P.3d 1006 (2001). If the defendant cannot make this showing, the inquiry ends. If, however, the threshold showing is made, the trial court will either include the omissions or exclude the misstatements and reevaluate the warrant to determine if the affidavit supports a probable cause finding and if it does, then the defendant’s motion to suppress the evidence fails. *Garrison*, 118 Wn.2d at 873.

## B. Consequences of an Invalid Warrant

### 1. Exclusion

A search may be illegal because the warrant is invalid or because it does not meet one of the exceptions to the warrant requirement.<sup>60</sup> In addition, a search may be illegal if a warrant is not properly executed.<sup>61</sup>

Evidence obtained during an illegal search by government officials may be suppressed under the Exclusionary Rule and may be inadmissible in a subsequent court proceeding. Moreover, evidence derived directly and indirectly from illegally obtained evidence may also be suppressed under the “fruit of a poisonous tree” doctrine. [Wong Sun v. United States](#), 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963). Other consequences of an illegal search include the possibility of civil liability under a claim for violation of federal constitutional rights under 42 U.S.C. § 1983.<sup>62</sup>

Relying on the Fourth and the Fourteenth Amendments, the United States Supreme Court extended the application of the Exclusionary Rule to state court criminal proceedings in [Mapp v. Ohio](#), 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961). In subsequent cases, the Supreme Court has focused on the primary purpose of the Exclusionary Rule, that is, to deter unlawful governmental conduct, and has limited the application of the Rule to those proceedings where the purpose of the Rule is served best. [United States v. Calandara](#), 414 U.S. 338, 348, 94 S. Ct. 613, 38 L. Ed. 2d 561 (1974). The United States Supreme Court has stated “[o]ur cases establish that such suppression is not an automatic consequence of a Fourth Amendment violation” and instead has focused on the “potential of exclusion to deter wrongful police conduct.” [Herring v. United States](#), 555 U.S. 135, 137, 129 S. Ct. 695, 172 L. Ed. 2d 496 (2009). Under the Fourth Amendment, “the exclusionary rule is not an individual right and applies only where it ‘result[s] in appreciable deterrence.’” *Id.* at 141 (citations omitted). In refusing to apply the Exclusionary Rule in grand jury proceedings, the United States Supreme Court stated, “[d]espite its broad deterrent purpose, the Exclusionary Rule has never been interpreted to proscribe the use of illegally seized evidence in all proceedings or against all persons. As with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served.” [Calandara](#), 414 U.S. at 348.

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<sup>60</sup> Exceptions to the warrant requirement are discussed above, beginning at page 14.

<sup>61</sup> In [United States v. Jones](#), the F.B.I. and District of Columbia Metropolitan Police Department requested and were granted a warrant to install a GPS tracking device on a vehicle within ten days in the District of Columbia. [United States v. Jones](#), -- U.S. --, 132 S. Ct. 945, 948, 181 L. Ed. 2d 911 (2012). The tracking device was actually installed on the eleventh day and in Maryland. The United States had little choice but to concede noncompliance with the warrant and instead argued that a warrant was not needed. *Id.* The Supreme Court disagreed and rejected the United States’ arguments and held that a warrant was required because the attachment of the GPS device on the vehicle was a search and no warrant exception applied. *Id.* at 949, 953. The Court upheld the Court of Appeals’ reversal of Jones’ conviction because of the admission of evidence obtained by the illegal search. *Id.* at 954.

<sup>62</sup> See the discussion of § 1983 liability in the following section, beginning at page 50.

Consequently, in some civil proceedings, the United States Supreme Court has refused to apply the Exclusionary Rule to suppress evidence obtained in violation of the Fourth Amendment. *See, e.g., I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032, 104 S. Ct. 3479, 82 L. Ed. 2d 778 (1984) (refusing to extend the Exclusionary Rule to deportation proceedings); *United States v. Janis*, 428 U.S. 433, 96 S. Ct. 3021, 49 L. Ed. 2d 1046 (1976) (Exclusionary Rule not applicable to federal civil tax proceedings where evidence at issue was obtained by “a different sovereign,” i.e., state authorities). *But see Grimes v. Comm. of I.R.S.*, 82 F.3d 286 (9th Cir. 1996) (Court did not exclude evidence illegally seized by the F.B.I from subsequent use by the I.R.S. in a civil tax proceeding.).

Under an article I, section 7 analysis, however, Washington courts have, in many instances, diverged from the Fourth Amendment analysis and refused to apply exceptions to the application of the Rule. *State v. Walker*, 101 Wn. App. 1, 11-13, 999 P.2d 1296, *review denied*, 142 Wn.2d 1013 (2000); *State v. Ladson*, 138 Wn.2d 343, 359-60, 979 P.2d 833 (1999). In comparing the Fourth Amendment and article I, section 7, the court in *State v. White*, 97 Wn.2d 92, 108-12, 640 P.2d 1061 (1982), emphasized the mandatory nature of suppression under the Exclusionary Rule once there was a finding of an illegal search under article I, section 7. As the court stated, “[w]e think the language of our state constitutional provision constitutes a mandate that the right of privacy shall not be diminished by the judicial gloss of a selectively applied exclusionary remedy.” *White*, 97 Wn.2d at 110.

While the Court of Appeals has occasionally been skeptical<sup>63</sup> of mandatory application of the Exclusionary Rule, the state Supreme Court has confirmed on several occasions that any recognized exceptions to application of the Rule will be extremely limited. In situations where an individual’s constitutional rights are not implicated, the costs and benefits of admitting illegally obtained evidence may be weighed under the Exclusionary Rule. *State v. Winterstein*, 167 Wn.2d 620, 633, 220 P.3d 1226 (2009). However, as an illegal warrant always implicates constitutional rights, “[e]vidence obtained as a result of an unreasonable search or seizure must be suppressed.” *Id.* (quoting *State v. Bonds*, 98 Wn.2d 1, 10-11, 653 P.2d 1024 (1982)). In *State v. Eisfeldt*, the Supreme Court reiterated its all-or-nothing application of the Exclusionary Rule in the context of invalid warrants. *State v. Eisfeldt*, 163 Wn.2d 628, 639-40, 185 P.3d 580 (2008) (unlike under federal law, “[t]he detectives’ beliefs [that a contractor was authorized to consent to a search of private property], no matter how reasonably held, cannot be used to validate a warrantless search under the Washington Constitution,” and excluding evidence obtained pursuant to subsequent warrant as “fruit of the poisonous tree”). “Since the warrantless search . . . was unconstitutional, all evidence gathered during that search must be suppressed.” *Id.* at 639 (citing *State v. Duncan*, 146 Wn.2d 166, 176, 43 P.3d 513 (2002)).

Washington courts will likely apply the Exclusionary Rule or an analogous principle to suppress evidence arising from an administrative search and used in a subsequent administrative proceeding. While not explicitly citing the Exclusionary Rule, courts have excluded evidence gathered pursuant to administrative warrants and subpoenas that are deemed invalid. In *State v. Walker*, 101 Wn. App. 1, 999 P.2d 1296, *review denied*, 142 Wn.2d 1013 (2000), the Court of Appeals examined whether a court clerk could independently, without a judge’s approval, issue

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<sup>63</sup> *See State v. Wallin*, 125 Wn. App. 648, 663-64, 105 P.3d 1037, *review denied*, 155 Wn.2d 1012 (2005).

an arrest warrant based on a defendant's failure to appear in court. Citing cases including [City of Seattle v. McCreedy](#), 123 Wn.2d 260, 868 P.2d 134 (1994) (*McCreedy II*), and [State v. White](#), 97 Wn.2d 92, 111-12, 640 P.2d 1061 (1982), the court held that because no statute, ordinance, or court rule authorized the court clerk to issue the warrant, there was a violation of article I, section 7, and the appropriate remedy for all violations of article I, section 7 is application of the Exclusionary Rule. [Walker](#), 101 Wn. App. at 11-12. In dicta, the court noted that it does not matter if the warrant is called an administrative warrant, a bench warrant, or a search warrant—if it is issued without authority of law, it is invalid. *Id.* at 5-6.

Similarly, in [City of Seattle v. Leach](#), 29 Wn. App. 81, 86, 627 P.2d 159 (1981), a criminal conviction based on an invalid administrative warrant was reversed because the violations were discovered during an unlawful search conducted under that warrant. The court overturned the conviction because the evidence gathered pursuant to that administrative warrant would be suppressed under [Wong Sun](#), 371 U.S. 471.

In [State v. Miles](#), 160 Wn.2d 236, 156 P.3d 864 (2007), the Washington Supreme Court, while not expressly relying on the Exclusionary Rule, in effect, applied the Rule by suppressing evidence obtained through service of an unlawful administrative subpoena from a criminal prosecution.<sup>64</sup> Further, in [Seymour v. Dental Quality Assurance Commission](#), 152 Wn. App. 156, 216 P.3d 1039 (2009), the Court of Appeals relied on the Administrative Procedure Act to exclude evidence gathered in a warrantless search. [Seymour](#), 152 Wn. App. at 172. The court noted that “the APA provides that the presiding officer of an adjudicatory hearing ‘shall exclude evidence that is excludable on constitutional or statutory grounds.’” *Id.* (citing RCW 34.05.452(1)).<sup>65</sup>

In two other situations, courts have applied the doctrine of collateral estoppel to suppress evidence in civil administrative proceedings where the evidence was previously suppressed in a companion criminal case. This is true with respect to Department of Licensing implied consent hearings, [Thompson v. Dep't of Licensing](#), 138 Wn.2d 783, 982 P.2d 601 (1999), and in a civil forfeiture proceeding under the Uniform Controlled Substances Act, [Barlindal v. City of Bonney Lake](#), 84 Wn. App. 135, 925 P.2d 1289 (1996). In [Barlindal](#), 84 Wn. App. at 141, the court also

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<sup>64</sup> *Miles* was a criminal prosecution based on a defective civil subpoena, but the language of this decision is relatively sweeping. In an earlier Court of Appeals case, [McDaniel v. Seattle](#), 65 Wn. App. 360, 363-67, 828 P.2d 81 (1992), *review denied*, 120 Wn.2d 1020 (1993), the court refused to exclude evidence previously suppressed in a companion criminal case when the defendant brought a civil action against the City arising out of the arrest. The court concluded that it would be “fundamentally unfair to allow a plaintiff seeking affirmative relief from the [government] to use the exclusionary rule to exclude probative evidence which tends to disprove his claim. . . . We cannot permit the plaintiff to conceal highly probative evidence under the guise of the protection of a rule which was intended to deter unlawful police conduct.” [McDaniel](#), 65 Wn. App. at 366. In passing, the court also noted that “[e]vidence obtained by means of an illegal search and seizure conducted in violation of the Fourth Amendment is not admissible in a civil proceeding that is quasi-criminal in nature” (citing cases from other jurisdictions). [McDaniel](#), 65 Wn. App. at 363-65.

<sup>65</sup> See also [Seymour](#), 152 Wn. App. at 161: “However, as neither the initial search nor the subsequent seizure of records were authorized by statute, the investigator acted in violation of Dr. Seymour’s rights under the Fourth Amendment. Therefore, pursuant to the provisions of the Administrative Procedure Act (APA), chapter 34.05 RCW, the presiding officer at Dr. Seymour’s disciplinary hearing should have granted Dr. Seymour’s motion to exclude that evidence unlawfully obtained pursuant to the search and seizures.”

stated that “[t]he Fourth Amendment exclusionary rule prohibits the seizing law enforcement agency in a civil forfeiture proceeding from using evidence unlawfully obtained,” citing [Deeter v. Smith](#), 106 Wn.2d 376, 377-79, 721 P.2d 519 (1986). It is important to note, however, that in *Deeter*, the court conditioned the application of the Exclusionary Rule on the fact that the forfeiture in question was quasi-criminal in nature.

Because no independent *Gunwall* analysis has been conducted on the application of the more stringent article I, section 7 Exclusionary Rule standard to administrative proceedings, it may be possible that the Exclusionary Rule does not apply in every civil proceeding under a Fourth Amendment analysis. Assuming the Exclusionary Rule does apply to administrative warrants and subpoenas, an objection must be timely raised at the trial court level. See [State v. Mierz](#), 127 Wn.2d 460, 468, 901 P.2d 286 (1995). Since administrative tribunals often do not have the authority to rule on constitutional issues, it is possible that courts will allow parties to raise suppression issues for the first time on appeal. See [Chaney v. Fetterly](#), 100 Wn. App. 140, 148, 995 P.2d 1284, *review denied*, 142 Wn.2d 1001 (2000) (citing [Valley View Indus. Park v. City of Redmond](#), 107 Wn.2d 621, 633, 733 P.2d 182 (1987)). See also *MacMayburn v. Dep’t of Natural Resources*, Forest Practices Appeal Board (FPAB) No. 01-012 (2001); *Dennis v. Southwest Air Pollution Control Auth.*, Pollution Control Hearings Board (PCHB) No. 86-64 (1987); *Fladseth v. Mason Cy. & Northshore Neighbors*, Shorelines Hearings Board (SHB) No. 05-026, for the proposition that administrative agencies frequently do not have the authority to rule on constitutional issues. Nevertheless, despite the fact that RAP 2.5(a) allows an appellant to raise an error of constitutional magnitude for the first time on appeal, the Washington Supreme Court in *Mierz* held the objection may be waived if not raised at trial.

Moreover, a person must show that they have standing to contest the search and seizure. The test for establishing standing is: “(1) did the claimant manifest a subjective expectation of privacy in the object of the challenged search; and (2) does society recognize the expectation as reasonable?” [State v. Jacobs](#), 101 Wn. App. 80, 87, 2 P.3d 974 (2000); [State v. Link](#), 136 Wn. App. 685, 692, 150 P.3d 610, *review denied*, 160 Wn.2d 1025 (2007). The burden is on the defendant to establish that the search violated his or her privacy rights. [Link](#), 136 Wn. App. at 692.

Washington courts have recognized very few exceptions to the application of the Exclusionary Rule, but, have applied an exception where the evidence was discovered through a source independent from the illegality. [State v. Hilton](#), 164 Wn. App. 81, 261 P.3d 683 (2011), *review denied*, 173 Wn.2d 1037 (2012). However, the Washington Supreme Court has rejected one exemption recognized under federal law, that the evidence is admissible if it would have inevitably been discovered through legitimate means. [State v. Winterstein](#), 167 Wn.2d 620, 636, 220 P.3d 1226 (2009). The court stated “we reject the inevitable discovery doctrine because it is incompatible with the nearly categorical exclusionary rule under article I, section 7.” *Id.* at 363. Suppressed evidence also may be admissible to impeach the defendant’s testimony. See [Riddell v. Rhay](#), 79 Wn.2d 248, 484 P.2d 907, *cert. denied*, 404 U.S. 974 (1971); [State v. Lopez](#), 74 Wn. App. 264, 269-70, 872 P.2d 1131, *review denied*, 125 Wn.2d 1004 (1994).

## 2. *Boesteder v. City of Renton* Revisited – Liability Under 42 U.S.C. § 1983

With regard to liability, it is incumbent on a state actor executing a search warrant to ensure the search is lawfully authorized and lawfully conducted. See [Groh v. Ramirez](#), 540 U.S. 551, 563, 124 S. Ct. 1284, 157 L. Ed. 2d 1068 (2004) (upholding a 42 U.S.C. § 1983 action against officers executing a search of a home without a valid search warrant). See also *United States v. Pruitt*, 458 F.3d 477, 488 (2006), cert. denied, 127 S. Ct. 1814 (2007) (a homeowner subject to a police search without a premises search warrant may have a potential Fourth Amendment injury which may be vindicated through a § 1983 civil rights suit). Thus, if the search warrant is not lawful, there is potential for a claim for damages under § 1983.

There are only two essential elements in a § 1983 action: (1) the plaintiff must show that some person deprived it of a federal constitutional or statutory right; and (2) that person must have been acting under color of state law. [Parratt v. Taylor](#), 451 U.S. 527, 535, 101 S. Ct. 1908, 1912, 68 L. Ed. 2d 420 (1981).

The court in [City of Seattle v. McCready](#), 124 Wn.2d 300, 312, 877 P.2d 686 (1994) (*McCready II*), held that the administrative warrant violated article I, section 7 of the Washington Constitution, but because the plaintiff failed to establish a violation of the Fourth Amendment he was not allowed damages and attorney fees under 42 U.S.C. § 1983. This result was reached more explicitly in *McCready III*. See [City of Seattle v. McCready](#), 131 Wn.2d 266, 271-73, 931 P.2d 156 (1997) (*McCready III*). In [Bosteder v. City of Renton](#), 155 Wn.2d 18, 36, 117 P.3d 316 (2005), however, the court held that a search conducted pursuant to a noncriminal administrative search warrant obtained without authority of law also violates the Fourth Amendment.

Government officers are qualifiedly immune from suit in their individual capacities under § 1983 unless a plaintiff can establish that the alleged violation was of a “clearly established” federal constitutional right. [Anderson v. Creighton](#), 483 U.S. 635, 640, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987). The government officers in *Bosteder* were granted qualified immunity because, although they should have known that the three prior *McCready* decisions<sup>66</sup> prohibited their conduct in obtaining an administrative warrant, the *McCready* decisions specified that a Fourth Amendment violation did not necessarily follow from a state constitutional violation. See [Bosteder](#), 155 Wn.2d at 38. Thus, the individuals were qualifiedly immune because “it would be objectively reasonable for an officer to glean from the *McCready* decisions that the Fourth Amendment was not violated in a situation very similar to the one [in *Bosteder*].” [Bosteder](#), 155 Wn.2d at 38. The court also noted that the individuals may still be answerable for state trespass. *Id.*

However, since the *Bosteder* decision expanded the *McCready* decisions by affirmatively stating that the Fourth Amendment is violated if the administrative search warrant is obtained without authority of law, government officers now can face § 1983 liability if they do not

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<sup>66</sup> The three *McCready* decisions are discussed above beginning at page 10. *Bosteder* is discussed more fully above beginning at page 12.

comply with the holdings in *Bosteder* and the *McCready* cases. Government officers can no longer rely on the ambiguity of the *McCready* decisions with regard to violating the Fourth Amendment.

Additionally, the *Bosteder* decision held that a government actor who is present at a property search pursuant to an invalid administrative warrant risks liability for trespass. See *Bosteder*, 155 Wn.2d at 50. A party is liable for trespass if he or she intentionally or negligently intrudes onto the property of another. *Mielke v. Yellowstone Pipeline Co.*, 73 Wn. App. 621, 624, 870 P.2d 1005, review denied, 124 Wn.2d 1030, 883 P.2d 326 (1994) (citing *Restatement (Second) of Torts* §§ 158, 165, 166 (1965)). “Negligent trespass” requires proof of negligence (duty, breach, injury, and proximate cause). *Gaines v. Pierce Cy.*, 66 Wn. App. 715, 719-20, 834 P.2d 631 (1992), review denied, 120 Wn.2d 1021 (1993). Furthermore, although no Washington cases appear to directly address this issue, there also arguably may be some exposure to criminal trespass charges for entering or remaining unlawfully in a building or on premises by participating in an unlawful administrative warrant. See [RCW 9A.52.070](#) (first degree criminal trespass); [RCW 9A.52.080](#) (second degree criminal trespass).<sup>67</sup>

## V. Mechanics: Obtaining and Using Administrative Warrants

### A. Statutory Authority

#### 1. The *McCready* Cases Revisited – Authority for Issuing an Administrative Warrant

As explained above, beginning at page 8, an administrative warrant may be based either on specific evidence of an existing violation or on a general inspection program based on reasonable legislative or administrative standards that are derived from neutral sources. However, an administrative warrant issued by a court without authority to do so is no more valid than a warrant signed by a private citizen. *City of Seattle v. McCready*, 123 Wn.2d 260, 272, 868 P.2d 134 (1994) (*McCready I*). This is true for administrative warrants issued without probable cause (*McCready I*), or with probable cause to believe that a *civil* violation has taken place (*City of Seattle v. McCready*, 124 Wn.2d 300, 877 P.2d 686 (1994) (*McCready II*)).<sup>68</sup> Article I, section 7 of the Washington Constitution prohibits state courts from issuing administrative warrants except where authorized by statute or court rule. *McCready I*, 123 Wn.2d at 274; *McCready II*, 124 Wn.2d at 309; *Bosteder v. City of Renton*, 155 Wn.2d 18, 23-24, 117 P.3d 316 (2004). The statute or rule must do more than authorize recourse to unspecified remedies should access to property be denied; the statute or rule must explicitly authorize a court to issue an administrative warrant for the purpose requested in an application for a warrant. *McCready I*, 123 Wn.2d at 278-79 (citing examples of statutes that provide sufficient authority).

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<sup>67</sup> Some statutes immunize inspectors performing certain activities that require entry onto property from liability for trespass. See, e.g., [RCW 16.57.180](#).

<sup>68</sup> These holdings do not extend to search warrants issued on probable cause to believe that a *criminal* violation has occurred. See *McCready II*, 124 Wn.2d at 310 (citing RCW [10.79.015](#), [CrR 2.3\(b\)](#), and [CrRLJ 2.3\(b\)](#)).



An article 1, section 7 case involving administrative searches is *City of Pasco v. Shaw*, 161 Wn.2d 450, 166 P.3d 1157 (2007), *cert. denied*, 128 S. Ct. 1651 (2008). *Shaw* involved Pasco's effort to address "problems with a number of substandard housing units."<sup>69</sup> The City enacted a program under which landlords were required to obtain business licenses which, in turn, required "certificates of inspection" confirming that the rental units met a number of safety standards. *Shaw*, 161 Wn.2d at 455-56. Certificates had to be based on physical inspections, to be conducted by "inspectors certified by the United States Department of Housing and Urban Development," "certified private inspectors approved by the City," "a Washington licensed structural engineer," or "a Washington licensed architect." *Shaw*, 161 Wn.2d at 456. *Shaw* and other landlords sued the City, arguing, among other things, that the program was unconstitutional under *McCready* because it required warrantless inspections of private tenant homes. *Id.*

In considering the landlords' claims, the *Shaw* court carefully examined the *McCready* line of cases and, once again, reaffirmed their holdings:

In 1994, this court examined a Seattle residential housing inspection program in which city inspectors sought to inspect rental properties for housing code violations over tenant objection. *McCready I*, 123 Wn.2d at 264-65, 868 P.2d 134. This court concluded, in the context of inspection by government officials, that nonconsensual inspection of residential rental units invaded the tenants' private affairs and that no authority of law supported warrants to search for housing code violations absent probable cause. *Id.* at 271, 280-81, 868 P.2d 134. In response, the city began to obtain administrative inspection warrants supported by probable cause that a housing violation had occurred. *City of Seattle v. McCready (McCready II)*, 124 Wn.2d 300, 309, 877 P.2d 686 (1994). Then in *McCready II*, we explained that municipal courts had no inherent authority to issue administrative search warrants, and thus, they had to rely on an authorizing statute or court rule. *Id.* at 309, 877 P.2d 686. No statute or court rule allowed administrative inspection supported by probable cause to believe a civil, but not a criminal, infraction had occurred. *Id.* In *Bosteder v. City of Renton*, 155 Wn.2d

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<sup>69</sup> The facts in *Shaw* were egregious:

For example, the landlords involved in this case owned rental units for which there was no working source of heat. Tenants were told they had to provide their own heat via portable electric space heaters. In addition, kitchens contained no vent, hood, fan, or window, despite the fact that natural gas was used to heat them. In one building, windows were not properly installed, allowing weather to enter the wall. Plumbing was in such disrepair that a bucket had to be used to catch water draining from a bathroom sink. One unit was infested with cockroaches. Some units had unsound wall finishes and warped or buckled walls.

One of the Shaws' tenants complained that they were refusing to make necessary repairs to her apartment. For some time, neither the heat nor the air conditioning worked. The doors did not open unless she resorted to using a knife or plastic card. Both the bathroom and kitchen sinks drained into buckets. The shower wall was collapsing and the kitchen and bathroom floors were rotting. When the tenant demanded either repairs, placement into a better rental unit, or refund of her deposit so she could move out, the apartment manager told her that if she continued to complain, he would have her deported.

*Shaw*, 161 Wn.2d at 454-55.

18, 23-24, 117 P.3d 316 (2005), we concluded that the same result is required under the Fourth Amendment. Administrative search warrants must be supported by an authorizing statute or court rule or by allegations of a criminal violation supported by probable cause. *Id.* at 29, 117 P.3d 316.

[Shaw](#), 161 Wn.2d at 459.

The *Shaw* court ultimately held that the Pasco inspection program did not violate the Fourth Amendment or article 1, section 7 of the Washington Constitution because no state action was involved: “[t]he Pasco ordinance requires a landlord to submit a certificate of inspection, but it does not authorize the city itself to search for housing violations. . . . [T]he petitioners have not met their burden of showing that landlords and their privately engaged inspectors are state actors. Absent state action, neither the Fourth Amendment, nor article 1, section 7 was violated.” [Shaw](#), 161 Wn.2d at 460-61. Its discussion of *McCready* and its progeny, however, demonstrates the importance of their underlying principles to our Supreme Court.<sup>70</sup>

## 2. The Effect of Right of Entry Statutes and Examples of Administrative Warrant Statutes

Many state agencies have “right of entry” statutes that purport to authorize state employees to enter on to private land. Some of these statutes also purport to create a defense to the charge of trespass against the employee. For example, [RCW 47.01.170](#) provides that Department of Transportation employees and agents:

[H]ave the right to enter upon any land . . . whether public or private, for purposes of making examinations, locations, surveys, and appraisals for highway purposes. The making of such entry for those purposes does not constitute any trespass by the department or by its duly authorized and acting assistants, agents or appointees.

See also [RCW 77.12.154](#) (right of entry by Department of Fish and Wildlife employees without liability for trespass). Cf. [RCW 90.48.090](#) (right of entry at “all reasonable times” by Ecology employees to inspect for water pollution, but no mention of defense for trespass action). Some state agencies have historically interpreted these “right of entry” statutes as providing authority to (a) enter on to private property for governmental purposes, or (b) obtain a warrant authorizing such entry.

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<sup>70</sup> In fact, two justices concurred in the *Shaw* decision solely to emphasize “the important principles embodied in article 1, section 7 of our constitution and as explained in [*McCready I*].” [Shaw](#), 161 Wn.2d at 464 (Chambers, J., concurring). While the concurring justices agreed that the Pasco inspection program did not involve state action, they expressed “caution” as to the program and observed that “[i]f the inspectors function like the eyes and ears of the State, looking for suspicious activities, they will become government agents.” [Shaw](#), 161 Wn.2d at 466 (Chambers, J., concurring).

The *Shaw* dissent, signed by two justices, went even further, arguing that “private inspectors under the ordinance are simply doing the work of city inspectors. This is state action which invades the tenant’s home without the ‘authority of law’ provided by a warrant.” [Shaw](#), 161 Wn.2d at 467 (Sanders, J., dissenting).

However, in [City of Seattle v. McCready](#), 123 Wn.2d 260, 278, 868 P.2d 134 (1994) (*McCready I*), the Washington Supreme Court held that “a right of entry [statute], and even an authorization to seek a warrant to implement the right of entry, is not equivalent to a legislative authorization for a court to issue a warrant on less than probable cause.” While *McCready I* concerned “administrative inspection warrants” issued without probable cause, the court extended its holding to administrative search warrants issued with probable cause in [City of Seattle v. McCready](#), 124 Wn.2d 300, 310, 877 P.2d 686 (1994) (*McCready II*) (“the municipal court has authority to issue administrative search warrants supported by probable cause only if the application for the inspection warrant alleges a housing code violation which constitutes a *crime* rather than a civil infraction” (emphasis in original)).<sup>71</sup>

In reaching its decision, the court in *McCready I* pointed out examples of statutes that explicitly authorize a state agency to apply for an administrative warrant and a court to issue the warrant. [McCready I](#), 123 Wn.2d at 278-79. See also [State v. Lansden](#), 144 Wn.2d 654, 663 n.5, 30 P.3d 483 (2001). One example cited by the court in both *McCready I* and *Lansden* is a statute that authorizes employees of the county horticultural pest and disease board to apply for an administrative warrant:

Should any such employee or authorized agent of the county horticultural pest and disease board be denied access to such property where such access was sought to carry out the purpose and provisions of this chapter, the said board may apply to any court of competent jurisdiction for a search warrant authorizing access to such property for said purpose. The court may upon such application issue the search warrant for the purpose requested.

[RCW 15.09.070](#).<sup>72</sup>

*McCready I* and its progeny establish that a right of entry statute does not, standing alone, authorize a court to issue a civil search warrant. Furthermore, while some right of entry statutes provide a defense against the charge of trespass, not all do, and claims have been brought against the government and its employees for trespass based on entry pursuant to an invalid warrant. See [Bosteder v. City of Renton](#), 155 Wn.2d 18, 40-47, 117 P.3d 316 (2005) (dismissing trespass claims against city and inspectors due to failure to comply with claim filing statute). Cf. [Peters v. Vinatieri](#), 102 Wn. App. 641, 655-57, 9 P.3d 909 (2000), *review denied*, 143 Wn.2d 1022 (2001) (warrantless entry onto private property by health department inspector did not constitute common law trespass where entry was necessary to identify failed septic systems, citing *Restatement (Second) of Torts*, § 158 (1965)).<sup>73</sup> As a cautionary note, a government employee

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<sup>71</sup> The *McCready* cases are discussed in greater detail above, beginning at page 10.

<sup>72</sup> Other statutes cited in *McCready I* include [RCW 15.17.190](#) (horticultural grading laws); [RCW 16.57.180](#) (livestock identification laws); [RCW 17.24.021](#) (insects, pests, and plant diseases); [RCW 19.94.260](#) (weights and measures laws); and [RCW 69.50.502](#) (pharmaceutical premises). The Legislature has since enacted other warrant authority statutes, including [RCW 49.17.075](#) and [RCW 76.09.150](#).

<sup>73</sup> The Legislature has codified various defenses to the crime of trespass in [RCW 9A.52.010\(3\)](#), which defines “enters or remains unlawfully” for purposes of the criminal trespass statute, [RCW 9A.52.080](#). For example, a person who “enters or remains upon unimproved and apparently unused land, which is neither fenced nor

charged with the crime of trespass would need to show that he or she was eligible for representation from the Office of the Attorney General in accordance with [RCW 10.01.150](#).

### 3. Who Can Issue a Warrant?

Search and seizure cases often refer to the authority of a “magistrate” to issue a warrant. *See, e.g., City of Seattle v. McCready*, 123 Wn.2d 260, 272, 868 P.2d 134 (1994) (*McCready I*). *See also State v. Hatchie*, 161 Wn.2d 390, 398, 166 P.3d 698 (2007) (addressing the authority of a “neutral and detached magistrate” to issue an arrest warrant). Washington law defines the following persons as a “magistrate”: (1) justices of the supreme court; (2) judges of the court of appeals; (3) superior court and district court judges; (4) all municipal officers authorized to exercise the powers and perform the duties of district judges. [RCW 2.20.020](#). Magistrates have the authority to “issue a warrant for the arrest of a person charged with the commission of a crime.” [RCW 2.20.010](#). Because both search and arrest warrants involving crimes are issued on a probable cause standard, it follows that magistrates also have the authority to issue criminal search warrants.

Some civil warrant statutes authorize “court[s] of competent jurisdiction” to issue warrants. *E.g., RCW 19.94.260, 15.09.070, 49.17.075*. At the very least, a court of competent jurisdiction includes those judges who fall within the definition of a “magistrate” under RCW 2.20.020. It also includes superior court commissioners, *State v. Goss*, 78 Wn. App. 58, 60-63, 895 P.2d 861 (1995), and district court commissioners, *State v. Amodio*, 110 Wn. App. 359, 362-65, 40 P.3d 1182, *review denied*, 147 Wn.2d 1011 (2002) (citing *McCready I*). It does not, however, include superior court clerks. *See State v. Walker*, 101 Wn. App. 1, 999 P.2d 1296 (rule authorizing “the court” to issue arrest warrants does not extend such power to court clerk), *review denied*, 142 Wn.2d 1013 (2000).<sup>74</sup>

### B. Probable Cause Standard and Administrative Warrants

The United States Supreme Court has established standards for the issuance of administrative warrants to which Washington courts adhere. In *Camara v. Municipal Court*, 387

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otherwise enclosed in a manner designed to exclude intruders, does so with license and privilege unless notice against trespass is personally communicated to him by the owner of the land or some other authorized person, or unless notice is given by posting in a conspicuous manner.” [RCW 9A.52.010\(3\)](#).

There may be some relationship between the elements of the crime of trespass and the defenses to that crime. For example, it is possible that if a state official is not “trespassing” then his entry is constitutionally permissible; alternatively, an unconstitutional entry may amount to trespass. *See State v. Groom*, 80 Wn. App. 717, 911 P.2d 403 (1996) (police officer who “knowingly entered and remained in building unlawfully”—i.e., with neither a warrant nor an applicable exception to the warrant requirement—committed a prima facie case of criminal trespass), *aff’d on other grounds*, 133 Wn.2d 679 (1997). A constitutionally valid entry, however, may nevertheless constitute “trespass.” *See, e.g., Oliver v. United States*, 466 U.S. 170, 183, 104 S. Ct. 1735, 80 L. Ed. 2d 214 (1984) (fact that government’s entry onto private property may have constituted common law trespass did not render entry a “search” for Fourth Amendment purposes).

<sup>74</sup> Although *Walker* concerned an arrest warrant, the court based its decision in part on *McCready I*’s limitations on authority to issue search warrants. *See Walker*, 101 Wn. App. at 5-6. Just as the criminal rule for arrest warrants extends that authority only to “the court,” so too does the rule for [search](#) warrants extend issuance authority only to “the court.” *See CrR 2.3(a)*.

U.S. 523, 534, 87 S. Ct. 1727, 18 L. Ed. 2d 930 (1967), and [See v. City of Seattle](#), 387 U.S. 541, 545, 87 S. Ct. 1737, 18 L. Ed. 2d 943 (1967), the Supreme Court held that the administrative inspections were subject to the Fourth Amendment's warrant requirement.<sup>75</sup>

In *Camara* and *See*, however, the Court emphasized that administrative warrants are not limited to those instances in which an agency can show probable cause to believe an actual violation has occurred. Rather, “‘probable cause’ to issue a warrant to inspect exists if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to” the property being entered. [Camara](#), 387 U.S. at 538 (discussing residential inspections for housing code violations); *See*, 387 U.S. at 545 (agency’s “particular demand for access will . . . be measured, in terms of probable cause to issue a warrant, against a flexible standard of reasonableness that takes into account the public need for effective enforcement of the particular regulation involved”). *See also* [Marshall v. Barlow’s, Inc.](#), 436 U.S. 307, 320-21, 98 S. Ct. 1816, 56 L. Ed. 2d 305 (1978) (to obtain warrant for OSHA safety inspection, “[p]robable cause in the criminal law sense is not required. For purposes of an administrative search . . . probable cause justifying the issuance of a warrant may be based not only on specific evidence of an existing violation but also on a showing that ‘reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment]’” (quoting [Camara](#), 387 U.S. at 538)).

Washington courts have adopted the *Camara* and *See* administrative warrant standard. *See, e.g., City of Seattle v. See*, 26 Wn. App. 891, 614 P.2d 254 (observing that “[t]he traditional approach to probable cause and search warrant standards (developed in the criminal search context) does not apply in cases of inspection warrants which are administrative in nature,” and relying on *Camara* and *Marshall’s* violation-or-legislative-standards test to uphold administrative inspection warrant), *review denied*, 94 Wn.2d 1022 (1980);<sup>76</sup> [City of Seattle v. Leach](#), 29 Wn. App. 81, 627 P.2d 159 (1981) (“a lesser degree of probable cause is necessary to satisfy issuing an inspection warrant than is required in a criminal case. . . . An administrative inspection warrant may be based on either (1) specific evidence of an existing violation, or (2) a general inspection program based on reasonable legislative or administrative standards derived from neutral sources”).<sup>77</sup>

In [City of Seattle v. McCready](#), 123 Wn.2d 260, 268, 281-82, 868 P.2d 134 (1994) (*McCready I*), the appellants argued that article I, section 7 “prohibits the issuance of search warrants on less than probable cause” in the criminal sense, or alternatively, that the language in *Camara* was dicta and that warrants issued on less than probable cause violate the Fourth Amendment. The *McCready I* court declined to reach this issue, but it did discuss the *Camara* standard with approval:

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<sup>75</sup> *Camara* and *See* are discussed above, beginning at page 2 and page 3, respectively.

<sup>76</sup> Yes, this was the same Norman See who appeared before the United States Supreme Court some 13 years earlier. The case did not, however, involve the same inspection.

<sup>77</sup> Quoting language from [Marshall v. Barlow’s](#), *Leach* also pointed out that an application for an inspection warrant “must describe the program in sufficient detail to enable the ‘neutral and detached magistrate’ to determine that “there is a reasonable legislative or administrative inspection program and . . . that the desired inspection fits within that program.’” [Leach](#), 29 Wn. App. at 84.

The warrants issued by the superior court indicate on their face that they were issued upon probable cause. . . . It is clear from the record, however, that the probable cause noted in the warrants was not [criminal] probable cause . . . but was instead “probable cause” as employed by the U.S. Supreme Court in *Camara v. Municipal Court of San Francisco*, 387 U.S. 523, 87 S. Ct. 1727, 18 L. Ed. 2d 930 (1967), and *See v. Seattle*, 387 U.S. 541, 87 S. Ct. 1737, 18 L. Ed. 2d 943 (1967). In those cases, the Court held that for purposes of the Fourth Amendment, “probable cause” for an administrative search could be shown where “reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling.” (Italics ours.) *Camara*, 387 U.S. at 538. This court has recognized that the *Camara* “probable cause” standard is not equivalent to probable cause in its ordinary sense. *See Alverado v. WPPSS*, 111 Wn.2d 424, 435, 759 P.2d 427 (1988), *cert. denied*, 490 U.S. 1004 (1989); *see also, Marshall v. Barlow’s, Inc.*, 436 U.S. 307, 320, 98 S. Ct. 1816, 1824, 56 L. Ed. 2d 305 (1978) (under *Camara*, “[p]robable cause in the criminal law sense is not required”). . . .

[McCready I](#), 123 Wn.2d at 273 n.4.

In [City of Seattle v. McCready](#), 131 Wn.2d 266, 931 P.2d 156 (1997) (*McCready III*), the court held that the warrants it had invalidated under the Washington Constitution nevertheless passed federal constitutional muster because they satisfied the *Camara* test for issuance of administrative inspection warrants. [McCready III](#), 131 Wn.2d at 272. Addressing again the argument that *Camara*’s probable cause standard was “mere dicta,” the *McCready III* court observed that “subsequent cases have recognized the validity of inspection warrants which are not based on traditional probable cause.” *Id.* at 273 n.4 (citing cases).

In sum, while the Washington Supreme Court has yet to explicitly adopt the *Camara* and *See* lesser standard for inspection warrants, at least two Court of Appeals decisions ([City of Seattle v. See](#), 26 Wn. App. 891, 614 P.2d 254, *review denied*, 94 Wn.2d 1022 (1980) and [City of Seattle v. Leach](#), 29 Wn. App. 81, 627 P.2d 159 (1981)) have done so, and the Washington Supreme Court has repeatedly indicated its support for this test. Where legislative warrant authority exists, it is reasonable to assume that administrative warrants may be obtained in Washington based on a showing of (a) probable cause to believe that a violation has occurred, or (b) the existence of “reasonable legislative or administrative standards” governing the inspection.

### **C. Necessary Documents and Language**

At least four documents are required to apply for and execute an administrative warrant: Application for Administrative Warrant, Declaration(s)/Affidavit(s), [Proposed] Administrative Warrant, and Return of Administrative Warrant. The caption for the documents should be styled similar to the following example:

In the Matter of the property located at: Big River Farms Orchard at South Canton, Washington, in Olympic County, Washington
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If known, a specific address or parcel information should be included in the caption.

To start an action, the Application for Administrative Warrant is filed with the superior court in the county where the property is located. Normally, an Application for Administrative Warrant is presented to a court *ex parte*. The Civil Rules do not provide any specific guidance on the procedures to follow when obtaining an Administrative Warrant. You may find that the court is just as unfamiliar with the process to follow as you are when you first seek an Administrative Warrant in a given county.

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*Practice pointer:* Some counties treat an Application for Administrative Warrant as a Complaint and require the payment of a filing fee. Others do not charge a fee. You will need to check with the Court Administrator or Clerk in the county where the Warrant Application will be filed. Be prepared to submit a Washington State A-19 Invoice Voucher with the Application for Administrative Warrant.

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## **1. Application for Administrative Warrant**

Whenever an agency wishes to obtain an Administrative Warrant as part of an inspection, investigation, or otherwise, an Application for Administrative Warrant must be prepared and presented to a court with the authority and jurisdiction to issue a Warrant. (See the discussion of the *McCready* cases regarding a court's authority and jurisdiction to issue a Warrant above, beginning at page 10 and again at page 51.) The introductory paragraph should set forth the name of the agency and agency official requesting the Warrant and the purpose for obtaining the Warrant.

Typically, Part I of the Application for Administrative Warrant sets forth the statutory authority for the court to grant the requested Warrant. It should cite the exact statute(s) granting the agency or its director access to private property and the authority to apply to the court if access to the property is denied. A copy of the relevant statute(s) should be attached to the Application. It should also reference and incorporate the Declaration/Affidavit of the inspector or investigator on whose behalf the Warrant is requested and any other Declarations/Affidavits of agency staff or others, if required, to establish probable cause. [\*State v. Higgins\*](#), 136 Wn. App. 87, 147 P.3d 649 (2006).

Part II should provide a brief summary or overview of the regulatory framework governing the subject matter and the statutory authority for the agency to conduct an inspection or investigation of the matter at issue. If a licensed activity is involved, information about the licensing scheme and the authorized activities for a licensee may be relevant. Recordkeeping requirements will be relevant in those situations where seizing or obtaining copies of records is part of the requested activities under the Warrant. Authority to obtain samples will be relevant in situations where sampling is part of the requested activity. Part II also should set forth the actions that constitute violations of the statutes or rules governing the subject matter and the available sanctions. If federal statutes and regulations are relevant, such as in the circumstance

where an agency administers a delegated federal program, the relevant federal laws should also be cited.

Part III should summarize the standards that govern the issuance of an Administrative Warrant and state that under *City of Seattle v. McCready*, 124 Wn. 2d 300, 311, 877 P.2d 686 (1997) (*McCready II*), administrative warrants may be issued ex parte. The lesser degree of probable cause for issuing administrative warrants as compared to warrants issued in criminal cases should be noted. *City of Seattle v. McCready*, 131 Wn.2d 266, 272-73, 931 P.2d 266 (1997) (*McCready III*). Accord *Cranwell v. Mesec*, 77 Wn. App. 90, 890 P.2d 291, review denied, 127 Wn.2d 1004 (1995); *City of Seattle v. Leach*, 29 Wn. App. 81, 84, 627 P.2d 159 (1981) (citing *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 320-21, 98 S. Ct. 1816, 56 L. Ed. 2d 305 (1978)); *City of Seattle v. See*, 26 Wn. App. 891, 895-96, 614 P.2d 254, review denied, 94 Wn.2d 1022 (1980).

The two standards for probable cause to issue an Administrative Warrant should be included. The agency should have either (1) specific evidence of an existing violation, or (2) a general inspection program based on reasonable legislative or administrative standards derived from neutral sources. *Leach*, 29 Wn. App. at 84. Accord *Marshall*, 436 U.S. at 320-21; *Camara v. Municipal Court*, 387 U.S. 523, 538, 87 S. Ct. 1727, 18 L. Ed. 2d 930 (1967).

When the Application for Administrative Warrant is based on specific evidence of an existing violation, the Application should note the source of the evidence obtained, which may have been through several means, including (1) a credible complaint received by the agency; (2) credible information received by the agency through other communications; (3) personal observation by an inspector or other employee of the agency; or (4) documents obtained by the agency.

Where the Application for Administrative Warrant is based on a general inspection program, the Application must describe the program in sufficient detail to enable the “neutral and detached magistrate” (here, the court) to determine (1) that there is a reasonable legislative or administrative inspection program, and (2) that the desired inspection fits within that program. *Leach*, 29 Wn. App. at 84-85 (citing *In re Northwest Airlines, Inc.*, 587 F.2d 12, 14-15 (7th Cir. 1978)). Upon a showing of probable cause under either standard, and appropriate judicial authority under statute or court rule, the court may issue the requested Administrative Warrant. When drafting warrant applications based on legislative or administrative inspection programs, practitioners should describe the relevant program and cite to the governing statutes, regulations, and/or agency policies. Copies of the cited authorities should also accompany the warrant application to ensure that the judge or magistrate understands the program during his or her consideration of the application.

Part IV should weave the facts set forth in the Declaration/Affidavit with the law set forth in Parts II and III to demonstrate how the probable cause standard has been met if the matter is “complaint driven” or to show that the inspection to be conducted under the requested Administrative Warrant fits within the general inspection program. It should also state that the scope and duration of the requested entry, inspection, and sampling complies with the standards



and is no broader than necessary to obtain the requested information or evidence necessary to determine compliance in the matter.

The Application for Administrative Warrant should conclude with a statement that the court has probable cause to issue the Administrative Warrant based on the evidence in the attached Declaration or Affidavit, and that the public interest is served by the enforcement of the statute under which the Warrant was requested and justifies the minimal intrusion to be authorized under the Warrant. Finally, the Application should conclude with a request that the court issue an Administrative Warrant in the form attached to the Application.

## **2. Declaration/Affidavit**

Each Application for Administrative Warrant must be accompanied by a Declaration or Affidavit from a person familiar with the facts of the situation. Typically, the Declaration or Affidavit will first establish the identity, position, duties, and credibility of the declarant or affiant. It will need to recite that the declarant or affiant is “over the age of eighteen, competent, and has personal knowledge of the information” contained in the declaration or affidavit. It should then recite the statutory duties of the agency in relation to the matter at issue. The Declaration or Affidavit should then set forth the facts of the situation that has created the need for an Administrative Warrant and any attempts to gain voluntary compliance, followed by the reasons the court needs to order access to the property for the statutory purpose (e.g., inspection, sampling, record gathering, or other activity). The Declaration or Affidavit should quote or reference the statute under which the requested activities or access is authorized. It also should specifically identify the subject property and pinpoint its location. The Declaration or Affidavit must provide factual information sufficient to establish probable cause.

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*Practice pointer:* Be sure to use a standard format for your Declaration/Affidavit to ensure it is thorough and very defensible. The preamble of the Declaration/Affidavit should include a robust description of the experience and background of the declarant/affiant that includes the declarant’s or affiant’s name, experience, education, training, duties and any other relevant information that will clearly establish the declarant/affiant as believable and credible. Once the credibility of the declarant/affiant is firmly established, the Declaration/Affidavit should proceed to carefully identify the relevant facts and circumstances. Lastly, the Declaration/Affidavit or Warrant Application must clearly identify (and include copies of) the law supporting the authority for the Warrant and the propriety of its issuance in the circumstances involved.

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A Declaration also may be needed from a program manager or other state or federal official if a state or federal statute or cooperative agreement, such as one containing a federal delegation of power, agency policy or federal grant conditions require certain inspections be conducted in order to receive funding. The Declaration should set out the legal requirements or grant conditions, how the agency complies with those conditions, any specific facts related to the

target's past compliance or non-compliance with the conditions, and why this Warrant is required to meet the statutory or contract requirements or conditions.

Finally, the declarant or affiant should express his/her belief that an Administrative Warrant is necessary to serve the public interest and to obtain access or information about the activities under investigation because access has been denied.

### **3. Administrative Warrant**

The warrant document is typically titled an "ADMINISTRATIVE WARRANT FOR ENTRY AND INSPECTION". It should reference the Application for Administrative Warrant, the purpose for which the Administrative Warrant is being sought, and the statutes or rules that grant authority for its issuance, and it must specify, on the face of the Warrant the specific laws, rules or regulations believed to have been violated. It should also specify the potential violations being investigated. It must describe the premises to be entered with particularity. It also should recite that the court has reviewed the Application for Administrative Warrant filed in the matter and the Declaration(s)/Affidavit(s) filed with the Application, and on the basis of the information contained therein, the court finds that probable cause exists for issuing the Administrative Warrant. It should also recite the court's authority for issuing the Warrant.

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*Practice pointer:* The face of the Warrant must contain the laws, rules or regulations believed to have been violated. It is strongly recommended that the language of the law, rule or regulation be quoted on the face of the Warrant. AAGs should use a standard format that guarantees such information will be present on the face of the Warrant. Adopting a standard practice of including the laws, rules and regulations in the Application and transferring them to the Warrant itself will help ensure that this requirement is routinely satisfied.

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The Warrant then should order the agency to enter the premises to conduct the inspection, seizure, or sampling requested during daylight hours (if applicable), between certain times of the day, and within a certain number of days from the date of the Warrant's issuance (customarily, 10 days, unless a longer time is required). It also must define the purposes and scope of the inspection, seizure, or sampling being authorized and list the activities the agency is authorized to conduct on the premises. For example, the Warrant should list the specific tasks to be performed and include the specific equipment, items, or portions of the property to be inspected. It should also list any samples that should be obtained.

In certain circumstances it may be impossible to segregate items to be seized that are within the scope of the warrant and those that are not within the scope at the time of the search. For example, the volume of documents could be so great as to make sorting on site infeasible or it may be impossible to access and sort electronic information on site and forensic analysis off-site may be necessary. If such "over-seizing" circumstances can be anticipated, it is preferable to obtain advanced approval in the warrant itself for specific procedures to sort, seal, and hold the items pending return to the owner or further search under a future warrant. Failure to deal with the issue in the warrant may not necessarily result in exclusion of evidence seized but exclusion

of evidence is a possibility and it opens the warrant to challenge.<sup>78</sup> To determine if a Warrant is sufficiently particular, keep in mind the purpose of the Warrant, the complexity of the statute or program under which the Warrant was sought, the nature of the place to be entered, the types of activities to be conducted (e.g., inspection, sampling, seizure, record gathering, etc.), and other relevant factors.

The Warrant itself needs to include notice provisions. Using typical notice provisions, the court may order that a copy of the Warrant be shown and delivered by the officer, inspector, agent, or employee who executes it to the owner or occupier of the property or to a competent person on or in the premises at the time of execution, or that it be conspicuously posted on the premises if no one can be found.

The Warrant may specify that a law enforcement officer accompany the officer, inspector, agent, or employee of the agency to ensure the safety of all persons and to prevent inappropriate interference with the interview, inspection, record gathering, or sampling. If law enforcement accompaniment is desired, a provision so specifying should be included in the Warrant.

Finally, the Warrant should order that upon the execution of the Warrant, a Return of Administrative Warrant be made and returned to the court within three (3) days of the date of execution, or if the Warrant authorizes multiple entries, within three (3) days of final execution, by a duly sworn representative of the agency, by filing a copy of the fully completed Return with the clerk of the court.

#### **4. Return of Administrative Warrant**

When preparing the Application, the Declaration(s)/Affidavits(s), and the Administrative Warrant, the fourth document to prepare is the Return of Administrative Warrant. The Return notes that the person who is executing the Warrant received it at a certain date and time and that he/she executed it in the way specified in the Return. He/she must indicate the date and time that the premises were entered and that they were inspected or activities were conducted for the purpose(s) provided in the Warrant. He/she must also indicate that a copy of the Warrant was delivered to a certain person, either by hand delivery or posting on the premises. In situations where a single Warrant authorizes multiple entries, a Return can be filed for each entry on the premises, listing the date and time of the applicable entry, or one Return can be filed listing each date and time of entry. The person executing the Warrant must sign and swear under penalty of perjury that the information contained in the Return is true and correct.

The person executing the Return must then file it with the court within three (3) days of final execution.

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<sup>78</sup> See [United States v. Comprehensive Drug Testing](#), 621 F.3d 1162, 1167-69 (9th Cir. 2010) (citing [United States v. Tamura](#), 694 F.2d 591 (9th Cir.1982)). See also [In re United States of America's Application for a Search Warrant to Seize & Search Electronic Devices from Edward Cunniss](#), 770 F. Supp. 2d 1138 (W.D. Wash. 2011) (discussion of the safeguards such as filters and specific search terms necessary in warrants for searches of digital or electronically stored information to avoid the Fourth Amendment prohibition on general searches).

## D. Obtaining the Administrative Warrant

Many superior courts are unfamiliar with Administrative Warrants. Since the Civil Rules do not provide specific guidance on the procedure for obtaining an Administrative Warrant, the following questions/checklist may be of assistance to help an attorney understand how a particular superior court will handle an Application for Administrative Warrant. Check the local court rules for the superior court and call the clerk's office in the county where the subject property is located to answer the following questions:

1. Should the Application for Administrative Warrant be directed to a particular judge, to any of the judges, or to the clerk of the court?
2. May an Application for Administrative Warrant be presented pro se by an authorized agency inspector or investigator, or must it be presented by an attorney? How far in advance must arrangements be made for presentation, and with whom?

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*Practice pointer:* If the court is willing to permit the agency inspector to present the Application pro se, most judges still want the Application to be signed by an attorney. It is prudent for the attorney who prepared and signed the Application for Administrative Warrant to offer to be available by phone at the time the inspector meets with the judge to request the Warrant, in case the judge has any questions.

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3. If an attorney must present the Application for the Administrative Warrant, will the court hold a telephonic hearing, if requested? If so, what arrangements need to be made, how far in advance must they be made, and with whom?
4. Is there any fee for filing an application for an Administrative Warrant? If so, what is the authority for the fee, and how much is it? Will the court accept a payment voucher from a state agency?
5. Are there other procedural requirements that we should know about? For example:
  - (a) Should the original Application and supporting documents be provided to the clerk, with a courtesy copy to the judge, or do the originals go directly to the judge, since it is an ex parte proceeding?
  - (b) What days and hours are judges available for an ex parte application?
  - (c) Is there a special procedure for matters where time is of the essence?
  - (d) Is a judge available after hours and on weekends, if necessary?
  - (e) If the superior court sits in more than one location (e.g., King County) or the superior court judge serves more than one county (e.g.,

Klickitat/Skamania Counties), are there special procedures that we should know about?

6. Will the court issue an Administrative Warrant to an agency investigator or inspector? [Note: Under [CrR 2.2](#), an arrest warrant may be served only by a peace officer. A superior court that has no experience with Administrative Warrants may assume that it also must be served only by a peace officer. Agency statutes often authorize a court to issue an Administrative Warrant to the agency director or other high-level agency official (or, by implication, a designee) to enter property, without requiring a peace officer to serve the Warrant.]
7. If the agency investigator or inspector believes personal safety is at issue when serving the Administrative Warrant, will the court, upon request, direct a law enforcement officer to accompany the investigator or inspector when serving the Warrant?

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*Practice pointer:* When the investigator or inspector believes personal safety is at issue, it will be easier to obtain assistance from a resource-stretched police or sheriff's department when the Warrant itself directs that a law enforcement officer accompany the agency investigator or inspector when serving the Warrant. Even if the face of the Warrant doesn't require a law enforcement officer to be present, the investigator or inspector should request accompaniment if he/she believes personal safety is at issue. It is a good idea for the inspector to contact the local law enforcement agency the day before he/she expects to serve the Warrant so it can arrange a time for an officer to be available.

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## **E. Executing the Administrative Warrant**

An Administrative Warrant is executed when the agency investigator or inspector presents himself/herself at the property location specified in the Warrant and delivers a copy of the Warrant to the owner or occupier or a competent person in or on the premises, and informs that person of his/her authority under the Warrant to enter the premises for the purposes listed in the Warrant. If no one can be found, the Warrant must be conspicuously posted on the premises. After execution, the investigator or inspector may enter the property and carry out the investigation or inspection authorized by the Administrative Warrant.

### **1. How Soon After Issuance?**

The Administrative Warrant should state when it can be executed after issuance. The Warrant should specifically state during which hours the property can be accessed. The facts upon which probable cause were based must not be stale at the time the Warrant is executed.<sup>79</sup>

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<sup>79</sup> In [State v. Lyons](#), 174 Wn.2d 354, 275 P.3d 314 (2012), the court engaged in an extended analysis of how to determine whether a warrant is based on stale information in the criminal context. Among the factors the court considered when finding a warrant invalid in this case was the time between the facts establishing probable cause

Because most Administrative Warrants are obtained to address emergent situations, applications should be filed just before the Administrative Warrant is needed.

## **2. How Long Is It Effective?**

Based on the Application for Administrative Warrant under which it was issued, the Administrative Warrant itself should specify the general time for entry and the duration of its effectiveness, typically stating for how many days it is valid. Ten days is a reasonable period of validity, although a longer time period can be requested if it can be justified. The information supporting a valid Warrant may not be stale nor should it be too remote. Warrants can authorize one entry or multiple days of access, inspection, and/or monitoring. The duration will depend on the program and statutory needs, the scope of the Application, and the facts supporting probable cause. If probable cause is based on a general inspection program, the requirements of the program will dictate the duration the Warrant will need to remain in effect.

## **3. Multiple Entries Under a Single Warrant?**

An Administrative Warrant can specify that multiple entries are authorized by the Warrant. For example, when the Washington State Department of Agriculture obtains Administrative Warrants for Gypsy Moth spraying, the Warrant will typically specify that entries will be made once a week during a specific four-week time period. A copy of the Warrant is delivered to the owner or occupier of the property or a competent person or posted at the premises prior to each entry. A separate Return of Administrative Warrant can be filed with the issuing court within three (3) days of each entry or a final Return can be filed after the last entry, noting each entry that has occurred.

## **4. Limitations on Scope (Area/Specific Location, Time, Others)?**

The scope of an entry and the activities to be conducted pursuant to an Administrative Warrant are limited by the terms of the Warrant itself. The Warrant should specifically state the area to be entered, the activities to be conducted, and when those activities may be conducted. The Warrant may not go beyond the scope of the Application or the facts set forth in the Declaration/Affidavit upon which the Warrant was based. The test for determining whether the inspector has exceeded the scope of the Warrant is one of reasonableness.

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*Practice pointer:* If the premises to be searched includes both a business portion and a residential portion, the Warrant should very carefully describe the area wherein the search is authorized. If a vehicle is to be searched, the Warrant should describe the vehicle as completely as possible, including make, model, color, license plate number and the name of the owner and driver, if possible. If it is not possible to obtain the

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and the time the warrant was issued as well as the nature and scope of the suspected criminal activity. *Id.* at 360-61. In *Lyons*, the court limited its prior holding in *State v. Partin*, 88 Wn.2d 899, 903, 567 P.2d 1136 (1977), finding that the neutral magistrate must have information not only of when an officer learned of facts establishing probable cause but also when those underlying facts occurred. *Id.* at 364-65.

license plate number, a detailed description of the vehicle and the geographical area where it is located should be obtained.

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# Example Forms

*Employees of the Attorney General's Office may also obtain additional forms, briefs, and memoranda at the Attorney General's Office intranet Sharepoint/ACE site: <http://ace/DocumentRepository/Pages/category.aspx>.*

Access agreement with non-potentially liable party (PLP)

Access agreement with potentially liable party (PLP)

Application for Administrative Warrant

Declaration(s)/Affidavit(s)

[Proposed] Administrative Warrant

Return of Administrative Warrant



# SAMPLE FORM

## ACCESS AGREEMENT WITH NON-POTENTIALLY LIABLE PARTY (PLP)

## EXAMPLE ACCESS AGREEMENT WITH NON-PLP

The Washington State Department of Ecology (Ecology) and \_\_\_\_\_ (collectively, "the Parties") agree to the following terms and conditions of this Access Agreement:

1. Ecology is responsible for the investigation and remediation of hazardous waste sites in Washington pursuant to the Model Toxics Control Act (MTCA), Chapter 70.105D RCW and Chapter 173-340 WAC.
2. Upon reasonable notice (unless an emergency prevents such notice), Ecology may exercise the power to enter upon any property to conduct investigations of a release of a hazardous substance, and to conduct remedial actions (including investigations) to remedy releases of hazardous substances. RCW 70.105D.030(1)(a) & (b); WAC 173-340-800.
3. \_\_\_\_\_ ("Property Owner") is the owner of real property located at \_\_\_\_\_ ("Property"). The legal description of this property is \_\_\_\_\_.
4. The Property is either known to be, or has the potential to be, impacted by [briefly describe the contamination] from [insert site name]. The [insert site name] is a known hazardous waste site, generally located at [insert address], Washington. [Insert names of PLP(s)] has/have been designated a "potentially liable person" for the Site under MTCA.
5. By signing this Access Agreement, Property Owner grants full access rights to Ecology, and/or any authorized representative(s) of Ecology, for the purpose of investigating and remediating the release or threatened release of hazardous substances from the [insert site name]. This includes, but is not limited to [generally describe work to be conducted]. Ecology will attempt to provide reasonable advance notice of entry by calling Property Owner at telephone number \_\_\_\_\_, or notifying Property Owner in person at least 24 hours in advance of entry on the Property.
6. The term of this Access Agreement shall be for the time period necessary for Ecology to complete all investigative and remedial actions involving the release or threatened release of hazardous substances from the [insert site name] at the Property that is impacted or is potentially impacted by the Site.
7. Each Party shall defend, protect, and hold harmless the other Parties from and against all claims, suits or actions arising from the negligent acts or omissions of its employees and/or authorized representatives while performing under the terms of this Access Agreement.
8. The Parties may mutually amend this Access Agreement. Any amendments shall not be binding on any party unless such amendments are in writing and signed by an authorized representative of each party.
9. The Access Agreement between the Parties contains all terms and conditions agreed upon by and between the parties. No other understandings, verbal or otherwise, regarding the subject matter of this Agreement shall be enforceable on any of the parties.

Department of Ecology

\_\_\_\_\_ Date: \_\_\_\_\_

[Insert Section Manager]

Section Manager, [Region] Region Toxics Cleanup Program  
Department of Ecology

Property Owner

(signature) \_\_\_\_\_ Date \_\_\_\_\_

(print name) \_\_\_\_\_

# SAMPLE FORM

## ACCESS AGREEMENT WITH A POTENTIALLY LIABLE PARTY (PLP)

## EXAMPLE ACCESS AGREEMENT WITH A PLP

ACCESS AGREEMENT  
Between the  
Washington State Department of Ecology  
and  
[ PLP ]

The Washington State Department of Ecology (Ecology) and [PLP], agree to following terms and conditions of this Access Agreement:

1. Ecology is responsible for the investigation and remediation of hazardous waste sites in Washington pursuant to the Model Toxics Control Act (MTCA), Chapter 70.105D RCW and Chapter 173-340 WAC.
2. Upon reasonable notice (unless an emergency prevents such notice), Ecology may exercise the power to enter upon any property to conduct investigations of a release of a hazardous substance, and to conduct remedial actions (including investigations) to remedy releases of hazardous substances. RCW 70.105D.030(1)(a) & (b); WAC 173-340-800.
3. [PLP] is the owner/operator of a site on which a release of hazardous substances has occurred. The Site is known as the [insert name of site] (Site). The legal description of the property is: [insert legal description].
4. [PLP] has been designated as a “potentially liable person” for the Site. RCW 70.105D.020(21); .040.
5. By signing this Access Agreement, [PLP] grants full access rights to Ecology and/or any authorized representative of Ecology for the purpose of investigating and remediating the release of hazardous substances at the Site.
6. [PLP] agrees to indemnify, defend, and save and hold harmless the State of Washington, its employees, and agents from any and all claims or causes of action for death or injuries to persons or for loss or damage to property to the extent arising from or on account of acts or omissions of [PLP], its officers, employees, agents, or contractors in entering into this agreement or that may occur in the course of Ecology accessing the property pursuant to this agreement. However, [PLP] shall not indemnify the State of Washington, defend, nor save nor hold harmless its employees and agents from any claims or causes of action to the extent arising out of the negligent acts or omissions of the State of Washington, or the employees or agents of the State, in entering into this agreement or accessing the property pursuant to this agreement.
7. Ecology and [PLP] may mutually amend this Access Agreement. Any amendments shall not be binding on either party unless such amendments are in writing and signed by an authorized representative of each party.
8. Ecology hereby reserves its right to file an action, if necessary, against [PLP] or any other “potentially liable person” to recover the remedial actions costs incurred by Ecology for

any investigative and remedial actions at the Site. RCW 70.105D.050(3); WAC 173-340-550.

9. This Access Agreement between Ecology and [PLP] contains all the terms and conditions agreed upon by and between the parties. No other understandings, verbal or otherwise, regarding the subject matter of this agreement shall be enforceable on any of the parties.

\_\_\_\_\_  
[Insert Section Manager]  
Regional Section Manager  
Toxics Cleanup Program  
Department of Ecology

Dated: \_\_\_\_\_

\_\_\_\_\_  
[PLP]  
[Title]

Dated: \_\_\_\_\_

**SAMPLE FORM**

**APPLICATION FOR ADMINISTRATIVE  
WARRANT**

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The Honorable [name of judge]

**STATE OF WASHINGTON  
[NAME OF COUNTY] SUPERIOR COURT**

In the Matter of property located at  
[address]  
[city]  
[name of county], Washington.

NO.  
  
APPLICATION FOR  
ADMINISTRATIVE WARRANT

[Name of inspector], Inspector for [government agency], respectfully requests that this Court issue a warrant authorizing [government agency], through the above-named Inspector, to enter onto premises listed above for the purpose of [state authorized reason for entry].

Part I of this Application provides the statutory authority for this Court to grant the warrant requested. Part II provides a brief overview of the relevant regulatory framework governing the entry and inspection. Part III summarizes the standard that governs the issuance of an administrative warrant. Part IV explains how that standard has been met here and sets forth the scope of the authority requested under this warrant. Copies of the relevant statutes, regulations, and agency policies and technical guidance documents are included as Attachment A.

[Part I--specific statute authorizing the agency to apply for an administrative search warrant and authorizing the court to grant the warrant upon request]



1 [Part II---clearly identify and describe the administrative search program involved]

2 [Part III---summary of case law on administrative search warrants]

3 [Part IV---reference to Affidavit or Declaration providing the facts that show the legal  
4 standards are met for the issuance of a warrant]

5 **CONCLUSION**

6 This Court has probable cause to issue a warrant based on the specific evidence of  
7 \_\_\_\_\_ presented in the attached Affidavit/Declaration. Therefore,  
8 the [government agency] respectfully requests this Court to issue an administrative warrant in  
9 the form attached hereto.

10 Respectfully submitted,

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12  
13 Government Agency

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15 Signature of Inspector  
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**SAMPLE FORM**

**AFFIDAVIT SUPPORTING APPLICATION FOR  
ADMINISTRATIVE WARRANT**

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The Honorable [name of judge]

**STATE OF WASHINGTON**  
**[NAME OF COUNTY] SUPERIOR COURT**

In the Matter of property located at

NO.

[address]  
[city]  
[name of county], Washington.

AFFIDAVIT OF  
[NAME OF INSPECTOR]

STATE OF WASHINGTON )  
  )  
COUNTY OF THURSTON )

[Name of Inspector], being first duly sworn on oath, hereby deposes and says:

1. I am over the age of eighteen, competent, and have personal knowledge of the information contained herein.

2. I have been employed by the [government agency] as [title or position] since [date].

3. [describe experience, training, duties of affiant]

4. In the above capacity, I am responsible for [description of inspection responsibilities].

5. \_\_\_\_\_ Describe the facts and circumstances that lead you to believe there is an existing violation of federal or state law. What did you see? When did you see it? Why do you believe it violates federal or state law? Indicate which law(s) you believe have been violated.

**DRAFT**

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6. \_\_\_\_\_

7. \_\_\_\_\_

8. \_\_\_\_\_

9. \_\_\_\_\_

10. \_\_\_\_\_

After describing the facts that lead you to believe there is an existing violation of federal or state law, explain why a warrant is necessary and appropriate. What steps did you take to obtain consent? Whom did you ask? If there may be a question as to whether the person you asked had authority to consent, briefly explain why you believed he/she had that authority.

\_\_\_\_\_  
[Signature of inspector]

\_\_\_\_\_  
[Name of inspector]

Inspector for [government agency]

SUBSCRIBED AND SWORN to before me this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_.

\_\_\_\_\_  
NOTARY PUBLIC in and for the  
State of Washington.  
My commission expires: \_\_\_\_\_.

SAMPLE FORM

ADMINISTRATIVE WARRANT

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STATE OF WASHINGTON  
[NAME OF COUNTY] SUPERIOR COURT

In the Matter of property located at

NO.

[address]  
[city]  
[name of county], Washington.

ADMINISTRATIVE WARRANT  
FOR ENTRY AND INSPECTION

Application has been made by [government agency] for a warrant of entry upon the premises listed above for the purposes authorized in RCW [redacted]. Having reviewed the Application for Administrative Warrant filed in this matter, the Court finds, upon the Affidavit/Declaration of [name of Inspector], that probable cause exists for issuing this warrant. The Court has the authority to issue this warrant under RCW [redacted].

NOW THEREFORE, IT IS HEREBY ORDERED that the [government agency], through its officers, agents, and employees, is authorized and directed to enter onto and into the above-listed premises during daylight hours between 7 a.m. and 6 p.m. within ten (10) days from the date of this Warrant, and to then and there inspect the premises for [purposes authorized under relevant law]. The [government agency] is specifically authorized to enter the premises for the following purposes:

- 1.

- 1 2.
- 2 3.
- 3 4.

4 [If there is probable cause to believe a violation has occurred, set forth in full the  
5 relevant language of the particular statute or regulation believed to be violated.]

6 IT IS FURTHER ORDERED that a copy of this Warrant shall be (1) shown and  
7 delivered by the officer, agent, or employee executing the same to a competent person who  
8 may be found upon or in said premises at the time of execution, or (2) conspicuously posted on  
9 the premises if no one may be found.

10 IT IS FURTHER ORDERED that return upon execution of this Warrant be made to the  
11 Court within three (3) days of the date of final execution, by a duly authorized representative of  
12 [government agency], by filing with the clerk of the Court a copy of the return completed as  
13 provided therein.

14 DONE IN OPEN COURT this \_\_\_\_ day of \_\_\_\_\_, 20\_\_.

17 \_\_\_\_\_  
18 JUDGE

**SAMPLE FORM**

**RETURN OF ADMINISTRATIVE WARRANT**



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**STATE OF WASHINGTON**  
**[NAME OF COUNTY] SUPERIOR COURT**

In the Matter of property located at

NO.

[address]

RETURN OF

[city]

ADMINISTRATIVE WARRANT

[name of county], Washington.

I received a copy of the following Administrative Warrant on the \_\_\_\_ day of \_\_\_\_\_, 20\_\_, and I have executed it as follows:

On \_\_\_\_\_, 20\_\_, at \_\_\_\_\_ [a.m. or p.m.], I entered the above listed premises and then and there did inspect the premises for \_\_\_\_\_. At the time of the entry, I delivered a copy of the Administrative Warrant for the premises referenced above to \_\_\_\_\_ by [hand delivery] [posting on the premises].

I declare under penalty of perjury under the laws of the state of Washington, that the foregoing is true and correct.

[Signature of inspector]

[Name of inspector]

Inspector for [government agency]