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Re: Memorandum Decision and Order
State v. Zachary James Marshall,[1] Kitsap County District Court No. 23650101

Greetings −

This case requires us to determine the constitutionality of Washington's surrender of personal property statutes in the context of a criminal case where a defendant is awaiting trial.

The following is the Kitsap County District Court's[2] Memorandum Decision on Marshall's constitutional objections to the compelled surrender of his personal property and the surrender compliance review procedures authorized by RCW 9.41.800 through 9.41.810.

[1] Hereafter "Marshall."
[2] Hereafter "Court."

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2. CONSTITUTIONAL ISSUES & SUMMARY OF DECISION

A. The Four Constitutional Issues Before This Court[3]

Marshall does not challenge the provisions of RCW 9.41.800 which authorize the Court to prohibit Marshall from "accessing, obtaining or possessing" firearms or other dangerous weapons or from "obtaining or possessing" any concealed pistol licenses.

Marshall does challenge the constitutionality of the surrender and surrender compliance provisions of RCW 9.41.800 through 9.41.810.

On January 17, 2020 at Marshall's arraignment hearing, the Court issued a surrender of personal property order as mandated by RCW 9.41.800 through 9.41.810. Marshall was ordered – (1) to leave the courthouse; (2) to immediately search his house[4] for his firearms, other dangerous weapons and concealed pistol licenses; (3) to seize that surrendered personal property; and (4) on the same day to surrender those items in a safe manner to the control of law enforcement.

The surrender order also required Marshall to prove compliance with the order by signing under penalty of perjury and filing no later than January 24, 2020 a proof of surrender form or a declaration of non-surrender form.

If Marshall fails to timely prove compliance with any of these surrender provisions, the Court is statutorily mandated to require Marshall to appear in court, place Marshall under oath and compel him to provide testimony verifying his compliance with the surrender order.

Marshall's failure to comply with any of RCW 9.41.800 through 9.41.810 surrender of personal property and surrender compliance provisions violates two criminal statutes[5] and also subjects Marshall to revocation of his out-of-custody release conditions resulting in his confinement until trial.

The four issues before the Court concern whether RCW 9.41.800 through 9.41.810 surrender of personal property and surrender compliance provisions constitutionally –

(1) Authorize a court in a criminal case awaiting trial to order surrender of a defendant's personal property;

(2) Compel a defendant to prove compliance with a surrender order by either – (a) filing under penalty of perjury a written proof of surrender form; or (b) filing under penalty of perjury a declaration of non-surrender form;

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[3] The Court appreciates the incredible time and effort taken by both counsel in making a thorough record, and providing the Court with quality pleadings and argument. Their exceptionally high level of oral argument at the *en banc* hearing was beyond impressive.

[4] And anywhere else Marshall stores his personal property.

[5] RCW 9.41.810 (violation of any surrender provision is a misdemeanor); and RCW 7.21.010 and .040 (punitive contempt of court is a gross misdemeanor).

(3) Require a court lacking a sufficient record of a defendant's proof of compliance with a surrender order to compel a defendant to be present and provide testimony to the court under oath verifying his or her compliance with the surrender order; and

(4) Define RCW 9.41.800's use of the phrase "dangerous weapons."

B. Summary Of Today's Decision

The Court's decision is summarized as follows –

1. The Surrender Provisions Of RCW 9.41.800 And 9.41.801(2) Violate The Fifth Amendment And Article I, §9

The Fifth Amendment and Const. Art. I, §9[6] provide that no individuals may be compelled in a criminal case to give evidence or be a witness against themselves. The privilege against self-incrimination protects every person in two situations – (1) a person may not be involuntarily called as a witness in his or her criminal trial; and (2) a person may not be compelled to provide incriminating testimonial evidence without a grant of immunity.

The Fifth Amendment and Article I, §9 are violated when a person is compelled by a government agent to provide incriminating testimonial or other communicative evidence.

The Court's surrender order required Marshall to immediately surrender his personal property to law enforcement. Marshall's failure to comply with the surrender order violates two criminal statutes and also subjects Marshall to revocation of his out-of-custody release conditions resulting in his confinement until trial.

The Fifth Amendment element of government compulsion is present here because no person is free to ignore court orders and risks serious consequences for doing so. A court order is state compulsion.

When the Court issued the domestic violence no contact order and surrender order, Marshall was immediately prohibited by two separate statutes from owning, possessing or having in his control any firearm.[7]

Requiring Marshall to surrender a firearm to the control of law enforcement compels Marshall to both provide an incriminating testimonial statement and an incriminating act of production because Marshall was prohibited from possessing any firearm upon his leaving the courthouse after his arraignment. Marshall's subsequent compliance with the surrender order would provide the prosecution with all the evidence necessary to prosecute Marshall for felonious unlawful possession of a firearm.

One Washington appellate case[8] has held that a condition of release which affirmatively compels a releasee awaiting trial in a criminal case to provide incriminating testimonial evidence violates the Fifth Amendment.

[6] Hereafter "Article I, §9."
[7] RCW 9.41.040(2)(a)(iii)(C)(I) and (C)(II).
[8] *Butler v. Kato*, 137 Wn.App. 515 (2007).

New York's highest court[9] held that requiring a releasee awaiting trial on criminal charges to surrender a firearm where the defendant's possession of any firearm is unlawful violates the Fifth Amendment unless the defendant is provided immunity.[10]

As in the New York case, this Court's surrender order similarly violates the Fifth Amendment because it compels Marshall to provide evidence that he possesses a firearm which would incriminate him.

Similarly, Marshall's surrender of a dangerous weapon to the control of law enforcement is protected by the Fifth Amendment because Marshall's mere possession of any dangerous weapon as defined in RCW 9.41.250(1)(a) is a crime.

The mere possession of a concealed pistol license, even where the license has been revoked, is not generally unlawful. But at arraignment, this Court prohibited Marshall from possessing any concealed pistol licenses as part of its surrender and prohibit order. Marshall's subsequent surrender of any concealed pistol licenses to law enforcement is protected by the Fifth Amendment because Marshall's mere possession of a concealed pistol license in violation of this Court's order is a crime.[11]

The surrender provisions of RCW 9.41.800[12] and 9.41.801(2) and this Court's surrender order compelling Marshall to surrender to the control of law enforcement testimonial incriminating evidence of his possession of a firearm, dangerous weapon, or concealed pistol license violates the Fifth Amendment and Article I, §9 beyond a reasonable doubt. Accordingly, these statutory provisions and the surrender order are void.

2. The Surrender Compliance Provisions Of RCW 9.41.801(6) And 9.41.804 Violate The Fifth Amendment And Article I, §9

Washington's surrender compliance provisions and the Court's surrender order require Marshall to prove he has complied with the surrender order by signing under penalty of perjury and filing either a declaration of non-surrender form or a proof of surrender form. Marshall's failure to do so violates two criminal statutes and also subjects Marshall to revocation of his out-of-custody release conditions resulting in his confinement until trial.

Marshall's criminal case is pending trial. Absent immunity, he has an absolute Fifth Amendment right to remain silent from his first appearance in court through his sentencing hearing if he is convicted. Compelling Marshall to sign any document attesting to the existence of any facts while his criminal prosecution is pending violates his Fifth Amendment privilege against self-incrimination.

Additionally, the declaration of non-surrender form and proof of surrender form compel very specific testimony from Marshall. He must agree entirely with either form's verbiage to prove he complied with the surrender order. No deviation in the language is permitted by the surrender compliance provisions.

Compelling Marshall to testify and providing the exact language to which he must testify places him in peril of incriminating himself.

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[9] *People v. Havrish*, 8 N.Y.3d 389, 866 N.E.2d 1009, *cert. denied*, 552 U.S. 886, 128 S.Ct. 207, 169 L.Ed.2d 145 (2007).

[10] The prosecution told the Court at the *en banc* hearing that it will not offer immunity to Marshall. The surrender statutes do not include an immunity provision.

[11] RCW 9.41.810.

[12] RCW 9.41.800(1)(a), (b), .800(2)(a), (b), .800(3)(c)(ii)(A), (B), .800(4), .800(5), and .800(7).

The surrender compliance provisions of RCW 9.41.801(6) and 9.41.801 and the Court's surrender order compelling Marshall to testify under penalty of perjury by signing a form and to provide incriminating testimonial evidence violate the Fifth Amendment and Article I, §9 beyond a reasonable doubt. Accordingly, these statutory provisions and the surrender order are void.

3. The Surrender Compliance Testimony Provision Of RCW 9.41.801(6) Violates The Fifth Amendment And Article I, §9

The final sentence in RCW 9.41.801(6) requires a court to compel every non-compliant restrained person to be present in court and provide testimony under oath verifying compliance with a surrender order.

Because Marshall failed to file a declaration of non-surrender form or a proof of surrender form, the Court is statutorily mandated to compel Marshall to appear in court. Marshall's proof of compliance testimony is statutorily written. Marshall must testify under oath to the exact language of the declaration of non-surrender form or the proof of surrender form. Any deviation in Marshall's testimony results in his failure to meet his burden of proving compliance with the surrender order. Marshall's failure to comply with the surrender order violates two criminal statutes and also subjects Marshall to revocation of his out-of-custody release conditions resulting in his confinement until trial.

This surrender compliance provision seeks to compel testimony to accomplish what the Fifth Amendment prohibits by forcing testimony from Marshall's own lips during his criminal prosecution.

Our Founders were offended by the Star Chamber inquisitorial method to extract evidence of unknown criminal activity. They created the Fifth Amendment privilege against self-incrimination to transform American justice by instead requiring the accusatorial method whereby the prosecution may not establish a person's guilt by forcing testimony from the person.

The Fifth Amendment demands that anything Marshall chooses to say during his criminal prosecution must be the product of his own free will. It does not matter whether Marshall actually possesses any of the surrendered items because the Fifth Amendment right to remain silent is liberally construed to protect the innocent person as well as the guilty.

The compelled testimony provision of RCW 9.41.801(6) is unconstitutional beyond a reasonable doubt in the context of a pending criminal proceeding. RCW 9.41.801(6) is a violation of the Fifth Amendment and Article I, §9. This statutory section is void.

4. The Surrender Provisions Of RCW 9.41.800 And 9.41.801(2) Violate The Fourth Amendment And Article I, §7

The Fourth Amendment protects our privacy by prohibiting government agents from engaging in unreasonable searches and seizures and prohibiting the judicial branch from issuing general warrants.

Const. Art. I, §7[13] protects an even broader privacy right by prohibiting government agents from disturbing a person's personal affairs or invading a person's home without authority of law.

[13] Hereafter "Article I, §7."

The ancient adage that "our house is our castle" is recognized by both constitutional provisions. Our Framers designed the Fourth Amendment to specifically protect a person's "house" from the intolerable abuses of suspicionless English searches. Article I, §7 similarly protects the privacy of one's "home."

The Fourth Amendment generally requires individualized suspicion of wrongdoing before permitting a "reasonable" government intrusion into a person's privacy. Article I, §7's much broader language has resulted in the long-standing principle that suspicionless and warrantless general, exploratory "fishing expedition" searches by government agents are strictly prohibited, especially when such searches occur in a person's home.

Two Washington appellate cases[14] and a Ninth Circuit case[15] have held that the suspicionless and warrantless seizure and search of out-of-custody defendants awaiting trial on criminal charges is unconstitutional because pretrial releasees are presumed innocent and do not suffer a diminution in their Fourth Amendment and Article I, §7 privacy rights merely because they are awaiting trial.

One Washington appellate case[16] and the Ninth Circuit case[17] have also held that the suspicionless and warrantless seizure and search of pretrial releasees violates the federal constitution's "autonomous decision-making" doctrine and the "unconstitutional conditions" doctrine.

The surrender provisions of RCW 9.41.800[18] and 9.41.801(2)and the Court's surrender order authorizing a suspicionless and warrantless seizure of Marshall, compelling Marshall to search his own house/home for his personal property, compelling Marshall to seize the surrendered personal property, and compel-ling Marshall to surrender this seized property to law enforcement violate the Fourth Amendment and Article I, §7 beyond a reasonable doubt. Accordingly, these statutory provisions and the Court's surrender order are void.

5. <u>The Phrase "Dangerous Weapons" Is Not Unconstitutionally Vague</u>

RCW 9.41.800 authorizes a trial court upon entering a no contact or protection order to require the restrained person to surrender all "dangerous weapons" in his or her possession, and to prohibit the restrained person from thereafter possessing any "dangerous weapons."

RCW 9.41.800 does not define the phrase "dangerous weapons." The Court interprets the statutory scheme of chapter 9.41 RCW to convey the legislative intent that RCW 9.41.250(1)(a)'s definition of "dangerous weapons" applies to RCW 9.41.800's use of this phrase. A "dangerous weapon" as used in RCW 9.41.800 means a slungshot, a sand club, metal knuckles, and a spring blade knife.

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[14] *State v. Rose*, 146 Wn.App. 439 (2008) (pretrial release condition imposing suspicionless and warrantless weekly drug testing violates Article I, §7); and *Blomstrom v. Tripp*, 189 Wn.2d 379 (2017) (pretrial release condition mandating suspicionless and warrantless random urinalysis testing violates Article I, §7).

[15] *United States v. Scott*, 450 F.3d 863 (2006) (pretrial release condition authorizing search of defendant and defendant's house violates Fourth Amendment).

[16] *Butler v. Kato*, 137 Wn.App. 515 (2007) (pretrial release condition mandating affirmative actions from defendants to obtain alcohol evaluation, engage in treatment, and attend self-help groups violates the Bill of Rights' "autonomous decision-making" doctrine).

[17] *Scott, supra* (federal constitution's "unconstitutional conditions" doctrine violated).

[18] RCW 9.41.800(1)(a), (b), .800(2)(a), (b), .800(3)(c)(ii)(A), (B), .800(4), .800(5), and .800(7).

A law violates the Fourteenth Amendment's Due Process vagueness doctrine where the law either – (1) fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits; or (2) authorizes or even encourages arbitrary and discriminatory enforcement.

RCW 9.41.800's use of the phrase "dangerous weapons" is not unconstitutionally vague. A person of ordinary intelligence would understand the specific property he or she must surrender and the property the person is prohibited from possessing in the future – slungshots, sand clubs, metal knuckles, and spring blade knives. Those four dangerous weapons are also sufficiently defined to avoid arbitrary and discriminatory enforcement.

C. Types Of Cases Not Impacted By Today's Decision

While some of today's analysis may apply in other contexts, "we do not begin to claim all the answers today."[19] We decline to express a view on the impact of today's decision on the following –

i. Prohibition Of Weapons And Concealed Pistol Licenses In A Pending Criminal Case

Marshall does not challenge the provisions of RCW 9.41.800 which authorize the Court to prohibit Marshall from "accessing, obtaining or possessing" firearms or other dangerous weapons[20] or from "obtaining or possessing" any concealed pistol licenses.[21] This Court will continue to issue prohibition orders in criminal cases where appropriate.

ii. Post-Conviction Proceedings

Marshall's motion arises in a criminal case where he is awaiting trial and presumed innocent. The constitutionality of a court's authority to order the surrender of property from a person convicted of a crime and thereafter compel the convicted person to prove compliance is not before the Court.

iii. Civil Protection Order Cases

Marshall's motion arises in a criminal case.

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[19] *Carpenter v. United States*, ___ U.S. ___, 138 S.Ct. 2206, 2220 n.4, 201 L.Ed.2d 507 (2018).

[20] RCW 9.41.800(1)(c); .800(2)(c); or .800(3)(c)(ii)(C).

See also CrRLJ 3.2(d)(3) which upon a finding of probable cause and a showing of substantial danger authorizes a court as a condition of release to prohibit "the accused from possessing any dangerous weapons or firearms…"

[21] RCW 9.41.800(1)(d); .800(2)(d); or .800(3)(c)(ii)(D).

iv. Laws Of 2020, Ch. 126, §1

Laws of 2020, ch. 126, §1 (effective June 11, 2020) amends RCW 9.41.801(7) by creating authority for the initiation of a show cause proceeding and subsequent imposition of remedial contempt sanctions upon a restrained person's failure to comply with a surrender order.

The new law is designed to ensure swift compliance by a restrained person with a surrender order upon a court finding probable cause the restrained person is aware of and fails to comply with the surrender order, fails to appear at a compliance hearing, or violates a surrender order.

In criminal pretrial proceedings, these new surrender compliance provisions have no impact on this Court's decision today because we find the surrender provisions within RCW 9.41.800 as imposed upon a defendant awaiting trial on criminal charges to be unconstitutional and void.

3. BACKGROUND

On January 17, 2020, Marshall was charged by Criminal Complaint with one count of assault in the fourth degree[22] for an incident allegedly occurring on or about January 16, 2020.

The charging document included a special allegation that Marshall committed the crime against an intimate partner.[23]

Marshall's arraignment was held on January 17, 2020. Marshall appeared at arraignment out-of-custody, and was represented by the Kitsap County Office of Public Defense. Marshall entered a plea of not guilty. The Court[24] found probable cause[25] in support of the allegations.

Marshall has no criminal history.

After finding probable cause, the Court granted the prosecution's motion for issuance of a Domestic Violence No-Contact Order[26] under chapter 10.99 RCW to "prevent possible recurrence of violence."[27]

The Court also granted the prosecution's motion for issuance of an Order to Surrender and Prohibit Weapons[28] after finding – (1) Marshall's relationship with the protected person was as an "intimate partner;" and (2) possession of a firearm or other dangerous weapon by Marshall presented "a serious and imminent threat to public health or safety, or to the health or safety of any individual."[29]

Defense counsel objected to entry of the order to surrender on constitutional grounds. Counsel filed an "Assertion of Fifth Amendment Privilege against Self-Incrimination & Objection to Court's Order to Surrender Weapons on Constitutional Grounds (Fifth Amendment Privilege & Vagueness)" and a "Brief Opposing Judicial Inquisition & the Systemic Violation of a Fundamental Constitutional Right in Cases Alleging Crimes of Domestic Violence."[30]

Marshall was released on the $5,000 bond he had previously posted with the Kitsap County Jail.

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[22] RCW 9A.36.041(1).
[23] RCW 10.99.020.
[24] The Honorable Judge Claire A. Bradley presiding.
[25] See Kitsap County Sheriff's Office Deputy Zachary Schendel's Incident/Investigation Report dated January 16, 2020 attached to the Criminal Complaint.
[26] The Court granted Marshall's motion to modify the order so he would be allowed "limited contact through a third party with the sole purpose to coordinate child care/child visitation." Domestic Violence No-Contact Order, at 1. A copy is in Appendix A.
[27] Finding of Fact 5. Domestic Violence No-Contact Order, at 2. Appendix A.
[28] A copy of the Order to Surrender and Prohibit Weapons is in Appendix B.
[29] Findings of Fact 6 and 7. Domestic Violence No-Contact Order, at 2. Appendix A.
[30] Counsel also filed a "Proposed Order Finding Fifth Amendment Privilege & Granting Relief from the Statutory Requirement regarding the Possession or Surrender of Firearms."

The Court set a surrender compliance review hearing for January 24, 2020.

On January 21, 2020, the prosecution filed the "State's Response to Defense's Objection to 'Judicial Inquisition & the Systemic Violation of a Fundamental Constitutional Right in Cases Alleging Crimes of Domestic Violence.' "

On January 24, 2020, the Court held the surrender compliance review hearing.[31] Marshall was found not in compliance with the surrender order because he did not file a Declaration of Non-Surrender, or a Proof of Surrender of Weapons, or a Receipt for Surrendered Firearms, Other Dangerous Weapons and Concealed Pistol License.[32]

A hearing on the defense's constitutional motion was set for February 25, 2020.

On February 14, 2020, the Kitsap County Superior Court[33] filed its "Decision on Motion Opposing Judicial Inquisition & the Systemic Violation of a Fundamental Constitutional Right in Cases Alleging Crimes of Domestic Violence" on a similar defense constitutional motion brought in Superior Court on behalf of several consolidated pending felony cases.[34] Marshall was not a name party in the Superior Court cases.

On February 21, 2020, the Court's presiding judge[35] sent a letter to the parties notifying them of the Court's decision to hear the February 25, 2020 defense motion *en banc*.[36]

On February 25, 2020, the parties[37] presented oral argument to the Court sitting *en banc*.[38] The Court took the matter under advisement.

The motion hearing was continued to March 24, 2020 at 1:30 PM in courtroom 104.

Pursuant to the Court's Emergency Administrative Order 2020-1 (Mar. 13, 2020) entered in response to the COVID-19 pandemic, the March 24, 2020 hearing was continued to June 30, 2020 at 1:30 PM in courtroom 104.

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[31] The Honorable Judge Marilyn G. Paja presiding.
[32] Findings and Order Re: Weapons Surrender Compliance Review – Defendant Not In Compliance, at 1. A copy is in Appendix C.
[33] The Honorable Judge Kevin D. Hull and Honorable Judge William C. Houser presiding.
[34] *State v. Nicholas James Kandow*, Kitsap County Superior Court No. 19-1-01285-18. Hereafter "*Kandow*." Kandow's case is the oldest of the consolidated Superior Court cases. No lead case was designated. The *Kandow* decision is attached in Appendix D. The Superior Court's decision was a subject of much discussion by counsel at oral argument in this case.
[35] The Honorable Presiding Judge Jeffrey J. Jahns.
[36] "[Law French 'on the bench'] With all judges present and participating, in full court." BLACKS LAW DICTIONARY 546 (7th ed. 1999).
[37] Marshall is represented by Steven M. Lewis. The State is represented by Cami G. Lewis.
[38] Judges Marilyn G. Paja, Jeffrey J. Jahns, Claire A. Bradley and Kevin P. Kelly presiding.

4. JURISDICTION

District courts have jurisdiction concurrent with superior courts over all misdemeanors and gross misdemeanors committed by adult offenders in their respective counties.[39]

Marshall is an adult.[40] Assault in the fourth degree is a gross misdemeanor.[41] The crime is alleged to have occurred in Kitsap County, Washington.

The Court has subject matter and *in personam* jurisdiction.

[39] RCW 3.66.060(1).
[40] Marshall was born on December 14, 1995. Criminal Complaint filed January 17, 2020, at 1.
[41] RCW 9A.36.041(2) and 9A.20.021(2).

5. THE SURRENDER & PROHIBITION OF WEAPONS STATUTORY SCHEME

A. Washington's Surrender Laws Were Created To Diminish A Protected Person's Heightened Risk Of Lethality

The legislature enacted civil and criminal protection order statutes which authorize a trial court to prohibit a restrained person among other things from – (1) having any contact whatsoever with the protected person; (2) being within a specific geographic "bubble" surrounding the protected person's residence, workplace, school, etc.; and (3) causing or attempting to cause any physical harm, harassment, threats or stalking of the protected party.

Depending upon the criminal charges and the alleged facts, the prosecution may seek four different types of protection orders in criminal cases filed before the Court – anti-harassment; stalking; sexual assault; and domestic violence. Each type of protection order was created by the legislature for entry in a criminal case to protect an alleged victim from future criminal behavior by the defendant.

Anti-harassment protection orders in both civil and criminal cases were created to protect a person's privacy from intimidating and harassing conduct. RCW 10.14.010 reads –

> The legislature finds that serious, personal harassment through repeated invasions of a person's privacy by acts and words showing a pattern of harassment designed to coerce, intimidate, or humiliate the victim is increasing. The legislature further finds that the prevention of such harassment is an important governmental objective…

Stalking protection orders in both civil and criminal cases were created because the prevalence of anxiety, insomnia, social dysfunction, and severe depression is much higher among stalking victims than the general population. RCW 7.92.010 reads –

> Stalking is a crime that affects 3.4 million people over the age of eighteen each year in the United States. Almost half of those victims experience at least one unwanted contact per week. Twenty-nine percent of stalking victims fear that the stalking will never stop. The prevalence of anxiety, insomnia, social dysfunction, and severe depression is much higher among stalking victims than the general population. Three in four stalking victims are stalked by someone they know, and at least thirty percent of stalking victims are stalked by a current or former intimate partner…
>
> Victims of stalking conduct deserve the same protection and access to the court system as victims of domestic violence and sexual assault, and this protection can be accomplished without infringing on constitutionally protected speech or activity…

Sexual assault protection orders in both civil and criminal cases were created to protect victims from the most heinous crime short of murder. RCW 7.90.005 reads –

> Sexual assault is the most heinous crime against another person short of murder. Sexual assault inflicts humiliation, degradation, and terror on victims. According to the FBI, a woman is raped every six minutes in the United States. Rape is recognized as the most underreported crime; estimates suggest that only one in seven rapes is reported to authorities. Victims who do not report the crime still desire safety and protection from future interactions with the offender…

Finally, domestic violence protection orders in civil cases and domestic violence no contact orders in criminal cases were created to stop abuse from occurring within the home. The legislature seeks to provide "maximum protection" to victims due to the risk of repeated and escalating acts of violence in the domestic violence context.[42] RCW 10.99.010 reads –

> The purpose of this chapter is to recognize the importance of domestic violence as a serious crime against society and to assure the victim of domestic violence the maximum protection from abuse which the law and those who enforce the law can provide…
>
> Only recently has public perception of the serious consequences of domestic violence to society and to the victims led to the recognition of the necessity for early intervention by law enforcement agencies. It is the intent of the legislature that the official response to cases of domestic violence shall stress the enforcement of the laws to protect the victim and shall communicate the attitude that violent behavior is not excused or tolerated. Furthermore, it is the intent of the legislature that criminal laws be enforced without regard to whether the persons involved are or were married, cohabiting, or involved in a relationship.[43]

Our Supreme Court has also recognized the unique challenges presented by acts of domestic violence –

> Domestic violence situations can be volatile and quickly escalate into significant injury. Domestic violence often, if not usually, occurs within the privacy of the home.[44]

Washington state has a "clear public policy of protecting domestic violence survivors and their children and holding domestic violence perpetrators accountable."[45]

A court's issuance of a protection order, however, does not necessarily result in safety for a protected person. Obtaining a protection order may instead result in a heightened risk of lethality for the protected person.

Recognizing this significant problem, the legislature created surrender orders authorizing courts to take firearms and other dangerous weapons out of the hands of restrained persons. As part of the legislature's on-going effort to provide safety for protected persons, last year the legislature created the surrender compliance procedures codified in RCW 9.41.801. RCW 9.41.801(1) reads –

> Because of the heightened risk of lethality to petitioners when respondents to protection orders become aware of court involvement and continue to have access to firearms, and the frequency of

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[42] RCW 10.99.040(2)(a).
[43] Emphasis added.
[44] *State v. Schultz*, 170 Wn.2d 746, ¶14 (2011).
[45] *Danny v. Laidlaw Transit Services, Inc.*, 165 Wn.2d 200, ¶33 (2008).

> noncompliance with court orders prohibiting possession of firearms, law enforcement and judicial processes must emphasize swift and certain compliance with court orders prohibiting access, possession, and ownership of firearms.

It is against this backdrop of the legitimate societal need to protect people from abuse that the Court addresses Marshall's arguments.

B. Trial Courts May Issue No Contact Orders In Criminal Domestic Violence Cases

The legislature has created a plethora of protection order statutes.[46] A criminal case where the prosecution alleges the crime involves domestic violence[47] includes two categories of victims – intimate partner[48] and family or household member.[49]

A trial court is granted discretionary statutory authority to prohibit a defendant charged with or arrested for a crime involving domestic violence from having any contact with the victim.[50] RCW 10.99.040(2)(a) reads –

> Because of the likelihood of repeated violence directed at those who have been victims of domestic violence in the past, when any person charged with or arrested for a crime involving domestic violence is released from custody before arraignment or trial on bail or personal recognizance, the court authorizing the release may prohibit that person from having any contact with the victim. The jurisdiction authorizing the release shall determine whether that person should be prohibited from having any contact with the victim. If there is no outstanding restraining or protective order prohibiting that person from having contact with the victim, the court authorizing release may issue, by telephone,

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[46] E.g. RCW 7.90.110(2) (sexual assault), 7.92.100(3), .120(3) (stalking), 7.94.040 (extreme risk), 9A.46.050 (harassment), 10.14.080(7) (anti-harassment), 10.99.040(2)(b) (domestic violence), 26.09.050(1), .060(4) (dissolution), 26.10.040(1)(c), .115(4) (nonparental child custody), 26.26B.020(3) (parentage), 26.50.060(1)(k), .070(1)(f) (domestic violence), and 74.34.130 (vulnerable adult).

[47] Domestic violence means – "(a) Physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury or assault, sexual assault, or stalking as defined in RCW 9A.46.110 of one intimate partner by another intimate partner; or (b) physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury or assault, sexual assault, or stalking as defined in RCW 9A.46.110 of one family or household member by another family or household member." RCW 26.50.010(3). See also RCW 10.99.020(5).

[48] Intimate partner means – "(a) Spouses, or domestic partners; (b) former spouses, or former domestic partners; (c) persons who have a child in common regardless of whether they have been married or have lived together at any time; (d) adult persons presently or previously residing together who have or have had a dating relationship; (e) persons sixteen years of age or older who are presently residing together or who have resided together in the past and who have or have had a dating relationship; and (f) persons sixteen years of age or older with whom a person sixteen years of age or older has or has had a dating relationship." RCW 26.50.010(7). See also RCW 10.99.020(7).

[49] Family or household members means – "(a) Adult persons related by blood or marriage; (b) adult persons who are presently residing together or who have resided together in the past; and (c) persons who have a biological or legal parent-child relationship, including stepparents and stepchildren and grandparents and grandchildren." RCW 26.50.010(6). See also RCW 9.41.010(7) and RCW 10.99.020(3).

[50] In addition to issuance of an RCW 10.99.040 no contact order, RCW 10.99.040(3)(b) and CrRLJ 3.2(d)(1) authorize a court as a condition of release to prohibit the accused from approaching or communicating with a particular person or classes of persons.

> a no-contact order prohibiting the person charged or arrested from having contact with the victim or from knowingly coming within, or knowingly remaining within, a specified distance of a location.[51]

After finding probable cause at arraignment in support of a defendant having committed a domestic violence crime, a trial court shall determine whether to issue a domestic violence no contact order prohibiting a defendant from having contact with the protected person. RCW 10.99.040(3)(a) reads –

> At the time of arraignment the court shall determine whether a no-contact order shall be issued or extended. So long as the court finds probable cause, the court may issue or extend a no-contact order even if the defendant fails to appear at arraignment. The no-contact order shall terminate if the defendant is acquitted or the charges are dismissed.[52]

Willful violation of a no contact order issued pursuant to RCW 10.99.040 is a crime.[53]

C. Summary Of Washington's Surrender And Prohibition Laws

Whenever a Washington trial court enters any type of no contact or protection order in a civil or criminal case pursuant to any one of fourteen separate protection order statutes, RCW 9.41.800 requires that the court shall sua sponte[54] consider entering a surrender and prohibit order. If entered, the statute provides that an RCW 9.41.800 order must include both surrender and prohibition provisions by –

> (1) Surrender. Requiring the restrained person to surrender all firearms, other dangerous weapons and concealed pistol licenses in the person's possession;[55] and
>
> (2) Prohibition. Prohibiting the restrained person from accessing, obtaining, or possessing any firearms or other dangerous weapons and from obtaining or possessing a concealed pistol license.[56]

Upon receipt of a surrender and prohibit order, the restrained person is statutorily required to "immediately" retrieve all of the firearms, other dangerous weapons and concealed pistol licenses in the person's possession and surrender them in a safe manner to the control of law enforcement.[57]

Importantly, there is no statutory grace period between prohibition and surrender upon a court's entry of an RCW 9.41.800 order. Upon leaving the courtroom, a restrained person is prohibited from possessing any of the surrendered property and yet at that same moment is court-ordered to

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[51] Emphasis added.
[52] Emphasis added.
[53] RCW 10.99.040(a). Violation of any civil or criminal protection order listed in RCW 26.50.110 is either a gross misdemeanor, RCW 26.50.110(1)(a), or a felony, RCW 26.50.110(4) and (5).
[54] "[Latin 'of one's own accord; voluntarily'] Without prompting or suggestion, on its own motion." BLACKS LAW DICTIONARY 1437 (7th ed. 1999).
[55] RCW 9.41.800(1)(a), (b); .800(2)(a), (b); and .800(3)(c)(ii)(A), (B).
[56] RCW 9.41.800(1)(c),(d); .800(2)(c), (d); and .800(3)(c)(ii)(C), (D).
[57] RCW 9.41.800(1)(a), (b); .800(2)(a), (b); .800(3)(c)(ii)(A), (B); .800(7); and .801(2).

immediately retrieve the surrendered property the person is prohibited from possessing and turn it over to law enforcement.

In two situations, RCW 9.41.800(1)[58] and (3)[59] require a trial court to sua sponte order the restrained person to surrender the property. A court is not permitted to wait for a party to request surrender. Instead, a court must act on its own motion and has no statutory discretion to deny issuance of a surrender order in these two situations.

In three other situations, RCW 9.41.800(2),[60] (4)[61] and (5)[62] grant a trial court discretionary authority to enter or deny a surrender order.

A restrained person shall, within five judicial days of receipt of a surrender order, file written proof of compliance with the clerk of the court issuing the surrender order.[63] To show compliance with a surrender order, a restrained person must file either a written – (a) proof of surrender form and receipt form; or (b) a declaration of non-surrender form.[64] The burden of proof is on the restrained person to prove he or she surrendered all firearms, other dangerous weapons and concealed pistol licenses by a preponderance of the evidence.[65]

Failure of a restrained person to file written proof of compliance with a surrender order within five judicial days is a misdemeanor for violation of the surrender order,[66] a gross misdemeanor for punitive contempt of court,[67] and in a criminal case, a violation of pretrial conditions of release subjecting the person to arrest and amendment or revocation of those release conditions.[68]

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[58] RCW 9.41.800(1) – Clear and convincing evidence of either – (a) use, display or threatened use of a firearm or other dangerous weapon in a felony; or (b) ineligibility to possess a firearm under RCW 9.41.040.
[59] RCW 9.41.800(3) – Upon issuance of a domestic violence criminal no contact order or domestic violence civil protection order, after the restrained person received notice, where the protected person and restrained person are or were intimate partners.
[60] RCW 9.41.800(2) – A preponderance of the evidence of either – (a) use, display or threatened use of a firearm or other dangerous weapon in a felony; or (b) ineligibility to possess a firearm under RCW 9.41.040.
[61] RCW 9.41.800(4) – Upon issuance of a temporary protection order, without notice to the restrained person, upon a finding that irreparable injury could result if the temporary surrender order is not issued.
[62] RCW 9.41.800(5) – Upon a finding that possession of firearms or other dangerous weapons presents a serious and imminent threat to the health and safety of the public or any individual.
[63] RCW 9.41.804.
[64] *Id*.
[65] *Braatz v. Braatz*, 2 Wn.App.2d 889, ¶25, *review denied*, 190 Wn.2d 1031 (2018) ("We conclude that the party ordered to surrender weapons has the burden to prove compliance. Because this is a civil matter, we apply the preponderance of the evidence standard.").
[66] RCW 9.41.810.
[67] RCW 7.21.040(5).
[68] CrRLJ 3.2(j) and (k).

In 2019,[69] the legislature significantly amended its surrender of property statutory scheme by directing the judicial branch[70] to emphasize "swift and certain compliance" with surrender and prohibit orders because of the heightened risk of lethality to protected persons when a restrained person becomes aware of court involvement.[71]

The 2019 law required trial courts to "develop procedures to verify timely and complete compliance"[72] with surrender orders and shall sua sponte hold surrender compliance hearings "as soon as possible."[73]

If a court lacks a sufficient record to find the restrained person has proven compliance with a surrender order, the court is required to set a review hearing as soon as possible and require the restrained person to be present. At the hearing, the restrained person is required to "provide testimony to the court under oath verifying compliance" with the surrender order.[74]

If a restrained person is not in compliance with a surrender and prohibit order, a court may issue a surrender search warrant[75] as well as take other actions as authorized by law.[76]

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[69] Laws of 2019, ch. 245 (effective July 28, 2019).

[70] And law enforcement.

[71] RCW 9.41.801(1).

[72] The 2019 amendments to the surrender statutory scheme place the burden specifically on the judicial branch to promptly ensure compliance with a restrained person's surrender of that person's property. Statutorily compelling a court to schedule a compliance hearing as soon as possible is reasonable given the policy reasons the legislature listed for creating surrender compliance hearings.

Directing the judicial branch to develop procedures to verify a restrained person's compliance with a surrender order, however, may place the court in the role of advocate for the protected person against the restrained person.

In our adversarial system of adjudication in both civil and criminal cases, America's judicial branch follows the "principle of party presentation." As a general rule, courts rely on parties to bring disputes and defer to the choices parties make concerning the issues the parties want courts to resolve. Courts are essentially passive instruments of government in their role as neutral arbiter of matters the parties present. While the party presentation principle is not ironclad, courts shall not take on the role of a litigant. *United States v. Sinenseng-Smith*, ___ U.S. ___, 140 S.Ct. 1575, 1579, ___ L.Ed.2d ___ (May 7, 2020).

The right to a fair tribunal and trial is a basic requirement of the Due Process clauses of both the Fourteenth Amendment and Const. Art. I, §3. While a judge does not violate these rights by asking questions of litigants and witnesses, judges must do their very best to weigh the scales of justice equally between contending parties to satisfy the appearance of justice. *State v. Marino*, 147 Wn.2d 500, 507 (2002) (citations omitted).

Due process is violated when a court crosses the line from neutral arbiter to advocate by taking charge of a party's case or becoming a clear partisan. *State v. Pillon*, 11 Wn.App.2d 949, ¶¶73-74 (2020). Sua sponte interjecting adversarial or accusatory questions, or questions which favor one party, may violate the other party's due process right to a fair tribunal. *Id*., at ¶75.

A judge is prohibited from becoming embroiled in the controversy. See, e.g., *Edwards v. Le Duc*, 157 Wn.App. 455 (2010) (Trial court's virtually taking over an unrepresented party's questioning of key witnesses at pivotal points violated the due process rights of the opposing party).

Washington's judicial ethics provisions provide that an "independent, fair and impartial judiciary is indispensable to our system of justice." Code of Judicial Conduct (CJC) Preamble at [1]. Impartial means the "absence of bias or prejudice in favor of, or against, particular parties …". CJC Terminology. Accordingly, judges "shall perform all duties of judicial office fairly and impartially." CJC 2.2.

[73] RCW 9.41.801(6).

[74] *Id*.

[75] RCW 9.41.801(4).

[76] E.g. In a criminal case, a court could revoke an accused's release due to surrender non-compliance and detain the person in jail pending trial. CrRLJ 3.2(j).

D. Trial Courts Shall Sua Sponte Consider The Provisions Of RCW 9.41.800 Upon The Issuance Of Any Protection Order

Once a court decides to issue a domestic violence no contact order in a criminal case, the court shall sua sponte consider the surrender and prohibit provisions of RCW 9.41.800.[77] RCW 10.99.040(2)(b) reads –

> In issuing the order, the court shall consider the provisions of RCW 9.41.800, and shall order the defendant to surrender, and prohibit the person from possessing, all firearms, dangerous weapons, and any concealed pistol license as required in RCW 9.41.800.[78]

When the legislature uses the word "shall," it imposes a presumptively mandatory duty rather than conferring discretion.[79] In this context "shall" creates a mandatory duty of a court to sua sponte consider and order surrender and prohibit when required by RCW 9.41.800.

E. Courts Shall Require A Restrained Person To Surrender And Be Prohibited From "Accessing, Obtaining, or Possessing" Certain Property

RCW 9.41.800 authorizes a court after issuing a protection order to take four actions –

> (a) Require that the party immediately surrender all firearms and other dangerous weapons;[80]
> (b) Require that the party immediately surrender any concealed pistol license issued under RCW 9.41.070;
> (c) Prohibit the party from accessing, obtaining, or possessing any firearms or other dangerous weapons; and
> (d) Prohibit the party from obtaining or possessing a concealed pistol license.[81]

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[77] Other protection order statutes also require a court issuing a protection order in a criminal or civil case to consider RCW 9.41.800. See e.g. RCW 9A.46.050 (criminal harassment); 10.14.080(7) (civil harassment); 9A.46.085 and 7.92.160(1)(b) (criminal stalking); and 7.92.120(3) (civil stalking).

[78] Emphasis added.

[79] Only where a contrary legislative intent is shown will "shall" be interpreted as being directory instead of mandatory. *State v. Bartholomew*, 104 Wn.2d 844, 848 (1985). No contrary legislative intent is found here.

[80] Surrender of firearms, dangerous weapons and a concealed pistol permit shall be to a local law enforcement agency. RCW 9.41.800(7).

[81] Emphasis added. RCW 9.41.800(1), (2), and (3).

F. Statutory Interpretation And Construction Principles

The paramount duty of the judicial branch in statutory interpretation is to ascertain and carry out the objective – often referred to as the intent – of the legislature.[82] When a statute is unambiguous, the statute is not subject to judicial construction and its meaning and legislative intent must be derived solely from the plain language enacted by the legislature.[83]

> In determining whether a statute conveys a plain meaning, that meaning is discerned from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question.[84]

All statutory language must be given effect,[85] and no language is superfluous.[86] A court must not add words to or subtract from the clear language of a statute unless to do so is "imperatively required" to make the statute rational.[87]

Legislative definitions provided by a statute are controlling.[88] Undefined terms are given their plain and ordinary meaning unless a contrary legislative intent is indicated.[89] When the legislature has not defined a vitally important word, lacking guidance from any other source a court may look to a standard English dictionary.[90]

When the legislature uses two different terms in the same statute, courts presume the legislature intends the terms to have different meanings.[91]

A court may correct a legislative omission only where the omission "rendered the statute absurd and undermined its sole purpose."[92] But a court –

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[82] *Murphy v. Campbell Inv. Co.*, 79 Wn.2d 417, 420 (1971); *City of Seattle v. Fuller*, 177 Wn.2d 263, ¶9 (2013); *State v. Barnes*, 189 Wn.2d 492, ¶11 (2017).

[83] *State v. Sullivan*, 143 Wn.2d 162, 174-75 (2001); *Crown West Realty, LLC v. Pollution Control Hearings Board*, 7 Wn.App.2d 710, ¶77, *review denied*, 193 Wn.2d 1030 (2019); *State v. Brown*, 194 Wn.2d 972, ¶6 (2019).

[84] *Brown*, *supra* (citations omitted) (emphasis added). Courts must consider the context of the statute in which the provision is found, related statutes, and the statutory scheme as a whole. *Fuller*, 177 Wn.2d at ¶9; *Crown West Realty, LLC*, 7 Wn.App.2d at ¶77.

[85] *Fuller*, *supra*.

[86] *City of Seattle v. Williams*, 128 Wn.2d 341, 349 (1995).

[87] *Sullivan*, 143 Wn.2d at 175; *In re Postsentence Review of Leach*, 161 Wn.2d 180, ¶10 (2007) ("We have a long history of restraint in compensating for legislative omission … Indeed, we have gone as far as saying, [t]his court cannot read into a statute that which it may believe the legislature has omitted, be it an intentional or an inadvertent omission.") (citations omitted) (quotation marks omitted).

See also *State v. Taylor*, 97 Wn.2d 724, 728-30 (1982) (analyzing three classes of cases where adding to or subtracting from language of a statute may be imperatively required to make a statute rational.); *State v. Stevens County District Court Judge*, 194 Wn.2d 898, ¶18 (2019).

[88] *Sullivan*, *supra*.

[89] *Williams*, *supra*; *Brown*, 194 Wn.2d at ¶7.

[90] *Barnes*, 189 Wn.2d at ¶11 (*Webster's Third New International Dictionary* (2002) referenced) (citation omitted); *Williams*, 128 Wn.2d at 350.

[91] *Barnes*, *supra*.

[92] *State v. King*, 111 Wn.App. 430, 435 (2002); *Taylor*, 97 Wn.2d at 730 (citing *State v. Brasel*, 28 Wn.App. 303, 309 (1981)).

> … cannot read into a statute that which it may believe the legislature omitted, be it an intentional or inadvertent omission.[93]

Further, a court cannot supply an alleged legislative omission if "the court was able to postulate why the Legislature may have intended the literal meaning of the statute."[94]

Similarly, a court cannot supply a possible omission if –

> …[w]hile the legislative omission created some inconsistencies, it did not undermine the purposes of the statute. It simply kept the purposes from being effectuated comprehensively.[95]

If a statute is susceptible to more than one reasonable interpretation, the statute is ambiguous and –

> … the court may resort to statutory construction, legislative history, and relevant case law for assistance in discerning legislative intent.[96]

But courts will not resort to aids of construction such as legislative history and perhaps the rule of lenity unless the legislature's language is determined to be truly ambiguous.[97] Importantly –

> No construction should be accepted that has "unlikely, absurd, or strained consequences."[98]

G. "Firearm" Definition

The term "firearm" is statutorily defined. A statutory definition is controlling.[99] RCW 9.41.010(11) reads –

> "Firearm" means a weapon or device from which a projectile or projectiles may be fired by an explosive such as gunpowder. "Firearm" does not include a flare gun or other pyrotechnic visual distress signaling device, or a powder-actuated tool or other device designed solely to be used for construction purposes.[100]

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[93] *Jenkins v. Bellingham Municipal Court*, 95 Wn.2d 574, 579 (1981).
[94] *Taylor*, 97 Wn.2d at 729.
[95] *Id*.
[96] *Brown*, 194 Wn.2d at ¶7 (citation omitted) (quotation marks omitted); *Fuller*, 177 Wn.2d at ¶9. Titles may also be referred to as a source of legislative intent when a statute is ambiguous. *State v. Weaver*, 161 Wn.App. 58, ¶13 (2011).
[97] *State v. Brooks*, 2 Wn.App.2d 371, ¶7, *review denied*, 190 Wn.2d 1026 (2018).
[98] *Leach*, 161 Wn.2d at ¶7; *Fuller*, 177 Wn.2d at ¶9 ("Constructions that yield unlikely, absurd, or strained consequences must be avoided.") (citation omitted).
[99] *Sullivan*, *supra*.
[100] "Gun" has the same meaning as firearm. RCW 9.41.010(12).

H. "Concealed Pistol License" Definition

The term "pistol" is statutorily defined and controlling.[101] RCW 9.41.010(22) reads –

> "Pistol" means any firearm with a barrel less than sixteen inches in length, or is designed to be held and fired by the use of a single hand.

A "concealed pistol license" is obtained through a local law enforcement agency. RCW 9.41.070(1) reads –

> The chief of police of a municipality or the sheriff of a county shall within thirty days after the filing of an application of any person, issue a license to such person to carry a pistol concealed on his or her person within this state for five years from date of issue, for the purposes of protection or while engaged in business, sport, or while traveling.

A person's constitutional right to bear arms shall not be denied, unless –

(a) He or she is ineligible to possess a firearm under the provisions of RCW 9.41.040 or 9.41.045, or is prohibited from possessing a firearm under federal law;[102]

(b) The applicant's concealed pistol license is in a revoked status;

(c) He or she is under twenty-one years of age;

(d) He or she is subject to a court order or injunction regarding firearms pursuant to chapter 7.90, 7.92, or 7.94 RCW, or RCW 9A.46.080, 10.14.080, 10.99.040, 10.99.045, 26.09.050, 26.09.060, 26.10.040, 26.10.115, 26.26B.020, 26.50.060, 26.50.070, or 26.26A.470;

(e) He or she is free on bond or personal recognizance pending trial, appeal, or sentencing for a felony offense;

(f) He or she has an outstanding warrant for his or her arrest from any court of competent jurisdiction for a felony or misdemeanor; or

(g) He or she has been ordered to forfeit a firearm under RCW 9.41.098(1)(e) within one year before filing an application to carry a pistol concealed on his or her person.[103]

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[101] *Sullivan, supra*.

[102] When a person with a concealed pistol license becomes ineligible to possess a pistol, the person has 14 days to lawfully transfer any pistol acquired while the person possessed the license, and 15 days to produce evidence to the issuing authority proving the pistol was lawfully transferred. RCW 9.41.075(2).

[103] RCW 9.41.070(1) (emphasis added).

I. "Dangerous Weapons" Definition

The phrase "dangerous weapons" as used in RCW 9.41.800 is not statutorily defined in RCW 9.41.800 through .810 nor in RCW 9.41.010's general definition of terms for the chapter. Both parties interpret the phrase "dangerous weapons" broadly, albeit for very different reasons.

Marshall asserts the phrase violates the Fourteenth Amendment's Due Process vagueness doctrine because "dangerous weapons" is so broad that virtually everything a defendant possesses could be used as a weapon and thus would need to be surrendered to law enforcement.[104] The defense notes the phrase "dangerous weapon" has been defined by caselaw to include a deadly weapon, which means an instrument with the capacity to inflict death and from the manner in which it is used is likely to produce or may easily and readily produce death.[105]

The defense asserts under its broad definition of "dangerous weapons" that Marshall must surrender to law enforcement all vehicles, cutlery, box cutters, rope, pens and pencils, scissors, tools (wrench, hammer), pillows, rocks in his yard, etc. because any of these items has the capacity to inflict serious injury or death.

The defense asks how Marshall is supposed to know what dangerous weapons are prohibited, and what dangerous weapons he must avoid "accessing, obtaining, or possessing" as commanded by a court's prohibit order entered pursuant to RCW 9.41.800(1), (2), or (3).

Must a defendant avoid "accessing, obtaining or possessing" these items to remain in compliance with the prohibit order? Going to a restaurant where knives are present or even riding in a car would result in a defendant "accessing" these dangerous weapons in violation of the prohibit order under the defense's broad definition of dangerous weapons.

The prosecution agrees with the defense that all "dangerous weapons," including all weapons which could be deadly, must be immediately surrendered and Marshall must not access, obtain, or possess any dangerous or deadly weapon while the order to prohibit is in effect.

The prosecution asserts the phrase "dangerous weapons" is not vague but broad and any defendant would know exactly what weapons the phrase includes. If a defendant is truly in doubt about a particular item, the prosecution asserts a defendant can return to court for clarification.

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[104] Under certain circumstances, a lawful fixed-blade paring knife may be a dangerous weapon when furtively carried with the intent to conceal in violation of RCW 9.41.250(1)(b). *State v. Myles*, 75 Wn.App. 643, 645 (1974), *reversed on other grounds*, 127 Wn.2d 807 (1995).

Possession of a 16-inch dagger with a fixed, 10-inch scalloped-edge blade on school property is possession of a dangerous weapon in violation of RCW 9.41.280. *State v. J.R.*, 127 Wn.App. 293 (2005).

[105] *State v. C.Q.*, 96 Wn.App. 273, 277-78 (1999) (possession of a starter's pistol on school property is not possession of a firearm or dangerous weapon in violation of RCW 9.41.280).

The question of the definition of RCW 9.41.800's use of the phrase "dangerous weapons" is one of statutory interpretation. The judicial branch's paramount duty is to ascertain and carry out the objective of the legislature.[106]

While Marshall's motion was pending, the Kitsap County Superior Court[107] in *Kandow* resolved this statutory interpretation question by examining chapter 9.41 RCW. The Superior Court thereafter determined the phrase "dangerous weapons" as used in RCW 9.41.800 had the same meaning as provided by the legislature in RCW 9.41.250(1), which reads –

> (1) Every person who:
>
> (a) Manufactures, sells, or disposes of or possesses any instrument or weapon of the kind usually known as slungshot, sand club, or metal knuckles, or spring blade knife;
>
> (b) Furtively carries with intent to conceal any dagger, dirk, pistol, or other dangerous weapon; or
>
> (c) Uses any contrivance or device for suppressing the noise of any firearm unless the suppressor is legally registered and possessed in accordance with federal law,
>
> is guilty of a gross misdemeanor punishable under chapter 9A.20 RCW.[108]

The Superior Court in *Kandow*[109] wrote –

> Defendant argues that RCW 9.41.801 is void for vagueness as to the definition of dangerous weapons. Pursuant to RCW 9.41.250(1), "dangerous weapon means a slung shot, sand club, metal knuckles, spring blade knife, dagger, dirk, pistol and any contrivance or device for suppressing noise of any firearm." This definition is sufficiently clear to protect against arbitrary enforcement. The Court therefore adopts RCW 9.41.150(1) [sic] with regard to future Orders to Surrender Weapons issued under RCW 9.41.801.[110]

RCW 9.41.250(1) creates three separate categories of weapons which may be dangerous depending on the context.

RCW 9.41.250(1)(a) provides a list of weapons which are per se defined as dangerous. Mere possession of any of these "category (a)" dangerous weapons is unlawful.

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[106] *Barnes*, 189 Wn.2d at ¶11.
[107] Hereafter "Superior Court."
[108] Emphasis added.
[109] See Appendix D, at 3.
[110] RCW 9.41.801(6) incorporates surrender orders issued under RCW 9.41.800.

RCW 9.41.250(1)(b) provides a list of weapons which are not unlawful to possess and thus are not per se dangerous weapons. "Category (b)" weapons only become dangerous and unlawful when the weapon is furtively carried[111] with intent to conceal.

RCW 9.41.250(1)(c), similar to "category (b)" weapons, also provides a list of weapons which are not unlawful to possess and thus are not per se dangerous weapons. "Category (c)" weapons only become dangerous and unlawful when the weapon is used for suppressing the noise of any firearm unless registered in compliance with federal law.

Legislative intent must be derived solely from the plain meaning of the statute in which the provision is found, any related statutes and the statutory scheme which discloses legislative intent about the provision in question.[112]

RCW 9.41.800 authorizes a trial court to order the surrender and to prohibit the subsequent possession of "other dangerous weapons." Although RCW 9.41.800 does not define "dangerous weapons," the related statute in RCW 9.41.250 and the statutory scheme of chapter 9.41 make clear the legislature intended use of the phrase "dangerous weapons" in RCW 9.41.800 to have the same meaning as the weapons it defined as per se dangerous weapons in RCW 9.41.250(1)(a).

This Court rejects the reading of "dangerous weapons" suggested by the parties.[113] In our opinion this broad reading would lead to the "unlikely, absurd, or strained"[114] consequences of requiring a restrained person to surrender all cutlery[115] as well as prohibiting the person from having "access" to a butter or steak knife even though no evidence was provided that the person used any weapon in a dangerous manner. We do not believe this result was intended by the legislature.

Unlike the mere possession of "category (a)" dangerous weapons, the legislature has chosen not to specifically include the possession of "category (b)" or "category (c)" weapons within RCW 9.41.800's definition of "dangerous weapons."

RCW 9.41.800's phrase "dangerous weapons" is limited to the dangerous weapons defined in RCW 9.41.250(1)(a) – a slungshot; a sand club; metal knuckles; and/or a spring blade knife.[116]

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[111] "Furtively carry" was defined in *State v. Myles*, 127 Wn.2d 807 (1995) (kitchen paring knife inside a coat pocket is a "dangerous weapon" when furtively carried).

[112] *Brown*, 194 Wn.2d at ¶6; *Fuller*, 177 Wn.2d at ¶9.

[113] With some trepidation, this Court also rejects the Superior Court's inclusion of RCW 9.41.250(1)(b) and (1)(c) weapons as the "dangerous weapons" prohibited by RCW 9.41.800. The weapons listed in those two sections are not statutorily defined as "dangerous" unless used in a particular manner.

[114] *Leach*, 161 Wn.2d at ¶7; *Fuller*, *supra*.

[115] And all other possible property which might be used as a weapon.

[116] The prosecution at oral argument asked the Court to not adopt Superior Court's interpretation of "dangerous weapons" because its interpretation is so narrow that many weapons which might be dangerous would not be included in a surrender and prohibit order. Such a policy consideration is one for the legislature to resolve.

J. The Phrase "Dangerous Weapons" Is Not Unconstitutionally Vague

Marshall asserts use of the phrase "dangerous weapons" in RCW 9.41.800 violates the Fourteenth Amendment's Due Process vagueness doctrine.

A law is unconstitutionally vague and therefore void under the Fourteenth Amendment for either of two reasons – (1) the law fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits; or (2) the law authorizes or even encourages arbitrary and discriminatory enforcement.[117]

As previously discussed, the phrase "dangerous weapons" means a slungshot, a sand club, metal knuckles, and/or a spring blade knife.

"Spring blade knife" is defined by RCW 9.41.250(2).[118] Legislative definitions provided by a statute are controlling.[119]

Although the remaining dangerous weapons listed in RCW 9.41.250(1)(a) are not statutorily defined, lacking guidance from any other source a court may look to a standard English dictionary.[120]

"Slungshot" means "a weapon consisting of a small mass of metal or stone fixed on a flexible handle or strap."[121]

"Sand club" is a synonym for "sandbag" which means "one used as a weapon swinging at the end of a staff or beam of a quintain or only partially filled for use as a club."[122]

"Metal knuckles" is a synonym for "brass knuckles" which means "a set of four metal finger rings or guards attached to a transverse piece and worn over the front of the doubled fist for use as a weapon."[123]

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[117] *Hill v. Colorado*, 530 U.S. 703, 732, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000).

[118] " 'Spring blade knife' means any knife, including a prototype, model, or other sample, with a blade that is automatically released by a spring mechanism or other mechanical device, or any knife having a blade which opens, or falls, or is ejected into position by the force of gravity, or by an outward, downward, or centrifugal thrust or movement. A knife that contains a spring, detent, or other mechanism designed to create a bias toward closure of the blade and that requires physical exertion applied to the blade by hand, wrist, or arm to overcome the bias toward closure to assist in opening the knife is not a spring blade knife."

[119] *Sullivan*, 143 Wn.2d at 175.

[120] *Barnes*, 189 Wn.2d at ¶11.

[121] *Webster's Third New International Dictionary* (2002).

[122] *Id.*, at 2009.

[123] *Id.*, at 268

When a court enters an order to surrender and prohibit "dangerous weapons" pursuant to RCW 9.41.800, a person of ordinary intelligence would understand he or she must immediately surrender all slungshots, sand clubs, metal knuckles and spring blade knives in his or her possession.[124]

Similarly, a person would also understand that subsequent possession of any of these dangerous weapons is prohibited by the court's order.

These four dangerous weapons are also sufficiently defined for law enforcement to prohibit law enforcement from engaging in arbitrary and discriminatory enforcement of an RCW 9.41.800 order to surrender and prohibit.[125]

Therefore, the phrase "dangerous weapons" does not violate the Fourteenth Amendment's Due Process vagueness doctrine.

K. Trial Courts Shall Order Surrender And Prohibit In Two Situations

RCW 9.41.800 creates two situations where a trial court shall order a restrained person to surrender and prohibit upon the court's issuance of a protection order.

i. Clear And Convincing Evidence Of Firearm Use Or Ineligibility

A court shall issue a surrender and prohibit order upon a showing by clear and convincing evidence that a party either –

(1) Used, displayed, or threatened to use a firearm or other dangerous weapon in a felony; or

(2) Is ineligible to possess a firearm under the provisions of RCW 9.41.040.[126]

[124] The definitions of these four weapons provide ample notice to a restrained person seeking to be in compliance with a surrender and prohibit order.

[125] *Hill*, *supra*.

[126] RCW 9.41.800(1).

ii. Intimate Partner

A court shall issue a surrender and prohibit order during any period of time a person is subject to a protection order that –

> (a) Was issued after a hearing of which the person received actual notice, and at which the person had an opportunity to participate;
>
> (b) Restrains the person from harassing, stalking, or threatening an intimate partner of the person or child of the intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and
>
> (c)(i) Includes a finding that the person represents a credible threat to the physical safety of the intimate partner or child; and (ii) By its terms, explicitly prohibits the use, attempted use, or threatened use of physical force against the intimate partner or child that would reasonably be expected to cause bodily injury…[127]

L. Trial Courts Have Discretion To Order Surrender And Prohibit In Three Other Situations

RCW 9.41.800 creates three other situations where a trial court has discretionary statutory authority to issue a surrender and prohibit order upon the court's issuance of a protection order.

i. Preponderance Of The Evidence Of Firearm Use Or Ineligibility

A court may issue a surrender and prohibit order upon a showing by a preponderance of the evidence that a party either –

> (1) Used, displayed, or threatened to use a firearm or other dangerous weapon in a felony; or
>
> (2) Is ineligible to possess a firearm under the provisions of RCW 9.41.040.[128]

ii. Temporary Order – Irreparable Injury Could Result

RCW 9.41.800(4) grants a court discretionary authority to issue a surrender and prohibit temporary order without notice to the restrained person upon finding that "irreparable injury could result if an order is not issued until the time for response has elapsed."

iii. Serious And Imminent Threat

RCW 9.41.800(5) grants a court discretionary authority to issue a surrender and prohibit order upon finding that "the possession of a firearm or other dangerous weapon by any party presents a serious and imminent threat to public health or safety, or to the health or safety of any individual."

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[127] RCW 9.41.800(3).
[128] RCW 9.41.800(2).

M. A Restrained Person Shall File Proof Of Surrender Or A Declaration Of Non-Surrender Within Five Days Of Issuance Of An Order To Surrender

A restrained person shall prove compliance with the surrender portion of a surrender and prohibit order within five judicial days of a court's issuance of the order to surrender and prohibit by filing either – (1) a proof of surrender form and a receipt form; or (2) a declaration of non-surrender form.

> A party ordered to surrender firearms, dangerous weapons, and his or her concealed pistol license under RCW 9.41.800 must file with the clerk of the court a proof of surrender and receipt form or a declaration of nonsurrender form within five judicial days of the entry of the order.[129]

N. AOC Shall Develop Statewide Pattern Surrender Forms

The administrative office of the courts[130] was statutorily mandated to develop forms for proof of surrender and receipt and declaration of non-surrender.[131] A non-AOC alternative form must contain substantially the same information as the forms developed by AOC.[132]

O. A Restrained Person Must Prove Compliance With An Order To Surrender By A Preponderance Of The Evidence

A restrained person is statutorily required to file evidence of compliance with a surrender order with the issuing court. Accordingly, the burden of proof by a preponderance of the evidence is placed on the restrained person to do so.[133]

The issue at a compliance hearing is not whether proof of surrender is filed but whether the restrained person surrendered all of his or her weapons.[134]

Filing proof of surrender and receipt forms are prima facie evidence of surrender compliance. But if conflicting evidence of surrender compliance is present, a court must weigh that evidence and determine whether the restrained person has met his or her burden.[135]

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[129] RCW 9.41.804.
[130] Hereafter "AOC."
[131] RCW 9.41.802. The forms have been developed and are available under the Forms link on the Washington Courts' website at http://www.courts.wa.gov/.
[132] *Braatz*, 2 Wn.App.2d at ¶29 n.7.
[133] *Id.*, at ¶¶22-23,25.
[134] *Id*., ¶24.
[135] *Id*., ¶25.

A restrained person's unsuccessful efforts to comply with a surrender order are not relevant at a compliance hearing.[136]

P. Trial Courts Shall Hold Mandatory Surrender Compliance Hearings As Soon As Possible

The legislature requires courts to develop procedures to verify a restrained person's compliance with an order to surrender and prohibit. Compliance hearings shall be held as soon as possible. RCW 9.41.801(6) initially reads –

> Courts shall develop procedures to verify timely and complete compliance with orders to surrender weapons under RCW 9.41.800, including compliance review hearings to be held as soon as possible upon receipt from law enforcement of proof of service.[137]

A mandatory surrender compliance hearing is not required if a court can otherwise enter findings of timely and complete compliance. RCW 9.41.801(6) continues –

> A compliance review hearing is not required if the court can otherwise enter findings on the record or enter written findings that the proof of surrender or declaration of nonsurrender attested to by the person subject to the order, along with verification from law enforcement and any other relevant evidence, makes a sufficient showing that the person has timely and completely surrendered all firearms and dangerous weapons in their custody, control, or possession, and any concealed pistol license issued under RCW 9.41.070, to a law enforcement agency.[138]

Finally, if a court lacks a sufficient record to find the restrained person has proven compliance with an order to surrender and prohibit by a preponderance of the evidence,[139] the court must hold a review hearing with the restrained person present. The restrained person must provide sworn testimony to the court verifying compliance with the surrender order. RCW 9.41.801(6) finishes –

> If the court does not have a sufficient record before it on which to make such a finding, the court must set a review hearing to occur as soon as possible at which the respondent must be present and provide testimony to the court under oath verifying compliance with the court's order.[140]

When the legislature uses the word "shall," it imposes a presumptively mandatory duty rather than conferring discretion. Only where a contrary legislative intent is shown will "shall" be interpreted as being directory instead of mandatory.[141]

"Must" is a synonym of "shall" and operates to create a duty rather than conferring discretion.[142]

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[136] *Id*., ¶28.
[137] Emphasis added.
[138] Emphasis added.
[139] *Braatz*, 2 Wn.App.2d at ¶¶22-23,25.
[140] Emphasis added.
[141] *Bartholomew*, 104 Wn.2d at 848.
[142] *State v. Petterson*, 190 Wn.2d 92, ¶17 (2018).

There is nothing in RCW 9.41.801 which indicates the legislature did not intend to make surrender compliance hearings mandatory where a court lacks a sufficient record to find a restrained person in compliance with an order to surrender and prohibit. Surrender compliance hearings are mandatory.[143]

Q. Surrender Search Warrants

Where a restrained person fails to prove compliance with a surrender order, the court shall issue a surrender search warrant upon sworn statement or testimony of the "petitioner" or any law enforcement officer that probable cause exists to believe the restrained person has failed to surrender all firearms and dangerous weapons as required by the surrender order.

An RCW 9.41.801(4) statutory surrender search warrant authorizes a court to order search of all locations where the firearms and dangerous weapons are reasonably believed to be located. RCW 9.41.801(4) reads –

> If probable cause exists, the court shall issue a warrant describing the firearms or dangerous weapons and authorizing a search of the locations where the firearms and dangerous weapons are reasonably believed to be and the seizure of all firearms and dangerous weapons discovered pursuant to such search.[144]

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[143] The parties assume RCW 9.41.801 applies to criminal proceedings.

Laws of 2019, ch. 245, §2, codified in RCW 9.41.801, creates mandatory surrender compliance hearings and surrender search warrants. The statute uses the terms "petitioner" and "respondent" throughout.

While "petitioner," "respondent," and "party" are generally civil terms, the legislature has used the terms in criminal cases. See e.g. chapter 10.05 RCW which authorizes a criminal defendant charged with a misdemeanor or gross misdemeanor offense to seek as a "petitioner" to be considered for a deferred prosecution program.

As previously discussed, a court's paramount duty in statutory interpretation is to ascertain and carry out the legislature's intent. To do so, courts may examine the statute in question and related statutes which disclose legislative intent about the provision in question.

RCW 9.41.801(6) requires trial courts to develop procedures to timely verify complete compliance with surrender orders issued pursuant to RCW 9.41.800. Surrender compliance hearings shall be "as soon as possible." Similarly, RCW 9.41.801(4) authorizes surrender search warrants upon a court's finding of probable cause that a "respondent" failed to comply with a surrender order issued pursuant to RCW 9.41.800.

RCW 9.41.800 requires a court to consider ordering the surrender of property upon the issuance of both civil and criminal protection orders.

Additionally, RCW 9.41.802 (AOC to create pattern forms to document that a "respondent" complied with an RCW 9.41.800 surrender order) and RCW 9.41.804 (a "party" ordered to surrender property pursuant to an RCW 9.41.800 surrender order shall file proof of compliance within five judicial days) were in existence before RCW 9.41.801 was enacted.

Given the interrelationship between RCW 9.41.801 and RCW 9.41.800, .802 and .804, the Court finds that the legislature intended the provisions of RCW 9.41.801 to apply in both civil and criminal proceedings.

[144] Emphasis added. Paragraph added for ease of reading.

R. Violation Of An Order To Surrender And Prohibit Is A Crime

Violation of a surrender and prohibit order is a misdemeanor.[145] Disobedience of any lawful court order is "contempt of court."[146] A defendant found guilty of punitive contempt of court may be imprisoned for up to 364 days or ordered to pay up to a $5,000 fine, or both.[147]

Additionally, a criminal defendant who willfully violates a condition of release may be subject to arrest and amendment or revocation of release conditions.[148]

[145] RCW 9.41.810. The crime of failure to file proof of compliance with a surrender order is not theoretical. The prosecution has filed misdemeanor "Failure to File Proof of Firearm/Weapon/License Surrender" criminal charges with this Court. See e.g. *State v. Andrew Lavair*, Kitsap County District Court No. 22959803 (failure to file proof of compliance with an order to surrender firearms and other dangerous weapons in *State v. Andrew Lavair*, Kitsap County Superior Court No. 18-2-02996-18); and *State v. Stephen Williamson*, Kitsap County District Court No. 17030804 (failure to file proof of compliance with an order to surrender firearms and other dangerous weapons in *State v. Stephen Williamson*, Kitsap County Superior Court No. 19-2-01153-18).

[146] RCW 7.21.010(1).

[147] RCW 7.21.040(5).

[148] CrRLJ 3.2(j) and (k).

6. THE PRIVILEGE AGAINST SELF-INCRIMINATION – THE FIFTH AMENDMENT & ARTICLE I, §9

A. Fifth Amendment

The Fifth Amendment provides in pertinent part –

> No person … shall be compelled in any criminal case to be a witness against himself.

The Fifth Amendment privilege against self-incrimination protects a person in two situations –

1. Criminal Prosecution. The Amendment "protects the individual against being involuntarily called as a witness against himself in a criminal prosecution;" and
2. Future Criminal Proceedings. The Amendment "privileges [the individual] not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings."[149]

The Fifth Amendment guarantees the right of a person to remain silent unless the person chooses to speak in the unfettered exercise of his or her own will, and provides that the person shall suffer no penalty for such silence.[150] It follows from this proposition that the Fifth Amendment forbids the judicial branch from resorting to imprisonment to compel a person to answer questions which might incriminate the person.[151]

The privilege against self-incrimination is an exception to the general principle that the government "has a right to everyone's testimony."[152]

B. The Star Chamber Inquisitorial System Of Justice

Historically, the privilege against self-incrimination was intended to prohibit the use of legal compulsion to extract from an accused a sworn communication of facts which would incriminate him. Such was the process used by ecclesiastical courts and the Star Chamber tribunal[153] under Britain's inquisitorial system of justice.[154]

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[149] *Lefkowitz v. Turley*, 414 U.S. 70, 77, 94 S.Ct. 316, 38 L.Ed.2d 274 (1973). See also *State v. Brelvis Consulting LLC*, 7 Wn.App.2d 207, ¶¶17-18 (2018), *review denied*, 193 Wn.2d 1019 (2019) (Although both federal and state privilege against self-incrimination constitutional provisions refer to criminal cases, a person may assert the privilege in any proceeding, including in civil cases.).

[150] *Malloy v. Hogan*, 378 U.S. 1, 8, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964) (citation omitted).

[151] *Id*.

[152] *Salinas v. Texas*, 570 U.S. 178, 183, 133 S.Ct. 2174, 186 L.Ed.2d 376 (2013) (citation omitted).

[153] The Star Chamber was of mixed executive and judicial character, and traditionally departed from common law traditions. The Star Chamber specialized in trying political prisoners and has for centuries "symbolized disregard of basic individual rights. *Faretta v. California*, 422 U.S. 806, 821, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).

[154] *United States v. Hubbell*, 530 U.S. 27, 34 n.8, 120 S.Ct. 2037, 147 L.Ed.2d 24 (2000).

Although the Star Chamber was abolished in 1641, the inquisitorial system flourished throughout the 16th and 17th centuries.[155] Trial was merely a long argument between counsel for the Crown and the prisoner.

A trial began by the Crown making accusations against the prisoner. The prisoner then either admitted, denied or explained. The result was that the examination of the prisoner was the "very essence of the trial." The prisoner's answers provided the proof needed by the Crown, or resulted in the Crown submitting proof by reading depositions, confessions of accomplices, letters, etc.[156]

Under the inquisitorial system, an accused was placed under oath and compelled to answer questions designed to uncover uncharged offenses "without evidence from any other source."[157]

> When a suspect was brought before the Court of High Commission or the Star Chamber, he was commanded to answer whatever was asked of him, and subjected to a far-reaching and deeply probing inquiry in an effort to ferret out some unknown and frequently unsuspected crime.
>
> He declined to answer on pain of incarceration, banishment, or mutilation. And if he spoke falsely, he was subject to further punishment. Faced with this formidable array of alternatives, his decision to speak was unquestionably coerced.[158]

The Fifth Amendment privilege against self-incrimination including a person's right to remain silent is essential to the recognition that the American system of criminal prosecution is accusatorial, not inquisitorial.[159]

America's accusatorial system of justice demands that the executive branch is constitutionally compelled to establish guilt by evidence independently and freely secured, and may not use coercion to prove a charge against an accused by compelling the accused to speak.[160]

> Since *Chambers v. Florida*, 309 U.S. 227, 60 S.Ct. 472, 84 L.Ed. 716 (1940), this Court has recognized that coercion can be mental as well as physical, and that the blood of the accused is not the only hallmark of an unconstitutional inquisition. A number of cases have demonstrated, if demonstration were needed, that the efficiency of the rack and the thumbscrew can be matched, given the proper subject, by more sophisticated modes of "persuasion."[161]

The fundamental concept behind the Fifth Amendment transformation of justice from the English inquisitorial system to the new American accusatorial system is that a person's confession must be the product of the person's free will.

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[155] *Faretta*, 422 U.S. at 823.

[156] *Id*., at 823 n.21 (citation omitted).

[157] *Doe v. United States*, 487 U.S. 201, 212, 108 S. Ct. 2341, 101 L. Ed. 2d 184 (1988) [*Doe* II] (emphasis added) (citations omitted).

[158] *Griffin v. California*, 380 U.S. 609, 620, 85 S. Ct. 1229, 14 L.Ed.2d 106 (1965) (Stewart, J., dissenting, joined by White, J.) (paragraph added for ease of reading).

[159] *Malloy*, 378 U.S. at 7.

[160] *Schmerber v. California*, 384 U.S. 757, 762, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966).

[161] *Blackburn v. Alabama*, 361 U.S. 199, 206, 80 S. Ct. 274, 4 L. Ed. 2d 242 (1960) (emphasis added).

Accordingly, the prosecution must establish a person's guilt through evidence obtained by the labor of law enforcement, "not by the simple, cruel expedient of forcing it from his own lips."

> At the other pole is a cluster of convictions each expressive, in a different manifestation, of the basic notion that the terrible engine of the criminal law is not to be used to overreach individuals who stand helpless against it.
>
> Among these are the notions that men are not to be imprisoned at the unfettered will of their prosecutors, nor subjected to physical brutality by officials charged with the investigation of crime.
>
> This principle, branded into the consciousness of our civilization by the memory of the secret inquisitions, sometimes practiced with torture, which were borrowed briefly from the continent during the era of the Star Chamber, was well known to those who established the American governments.
>
> Its essence is the requirement that the State which proposes to convict and punish an individual produce the evidence against him by the independent labor of its officers, not by the simple, cruel expedient of forcing it from his own lips.
>
> Quite early the English courts acknowledged the barrier that, in this regard, set off the accusatorial system from the inquisitorial. And soon they came to enforce it by the rigorous demand that an extra-judicial confession, if it was to be offered in evidence against a man, must be the product of his own free choice.[162]

C. An Accused's Right To Remain Silent Derives From The Fifth Amendment

The Fifth Amendment privilege against self-incrimination is critical to American liberty.

> The privilege reflects a complex of our fundamental values and aspirations, and marks an important advance in the development of our liberty.[163]

The United States Supreme Court has been zealous in safeguarding the privilege's values because the privilege is "intended to prohibit the inquisitorial method of investigation in which the accused is forced to disclose the contents of his mind, or speak his guilt."[164]

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[162] *Culombe v. Connecticut*, 367 U.S. 568, 581-84, 81 S.Ct. 1860, 6 L.Ed.2d 1037 (1961) (emphasis added) (citations omitted) (paragraphs added for ease of reading).
[163] *Kastigar v. United States*, 406 U.S. 441, 444, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972) (footnotes omitted).
[164] *Doe*, 487 U.S. at 210-12.

An accused's right to remain silent derives directly from the Fifth Amendment.

> An accused's right to silence derives, not from *Miranda*,[165] but from the Fifth Amendment itself.[166]
>
> "[T]he right to silence described in those [*Miranda*] warnings derives from the Fifth Amendment and adds nothing to it." "The furnishing of the *Miranda* warnings does not create the right to remain silent; that right is conferred by the Constitution."[167]

The right to remain silent is broad. The Fifth Amendment applies before a person is in custody, or is even the subject of suspicion or a criminal investigation.

> Indeed, the *Miranda* warning states the accused is entitled by the Fifth Amendment to *remain* silent; *Miranda* indicates the right to silence exists prior to the time the government must advise the person of such right when taking the person into custody for interrogation.[168]

Accordingly, the Fifth Amendment prohibits the use of an accused's pre-arrest silence in the prosecution's case-in-chief regardless of the giving of *Miranda* warnings.

> The Fifth Amendment right to silence extends to situations prior to the arrest of the accused. An accused's right to remain silent and to decline to assist the State in the preparation of its criminal case may not be eroded by permitting the State in its case in chief to call to the attention of the trier of fact the accused's pre-arrest silence to imply guilt.[169]

No special set of words is necessary to invoke the right to remain silent.[170]

> In fact, an accused's silence in the face of police questioning is quite expressive as to the person's intent to invoke the right regardless of whether it is pre-arrest or post-arrest.[171]

D. The Fifth Amendment Requires A Liberal Construction

In light of the protections the Fifth Amendment privilege against self-incrimination was designed to secure, the privilege must be accorded liberal construction.

> Its provision is that no person shall be compelled in any criminal case to be a witness against himself. This provision must have a broad construction in favor of the right which it was intended to secure.[172]

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[165] *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).
[166] *State v. Easter*, 130 Wn.2d 228, 238 (1996).
[167] *Id.*, at 238 n.8 (1996) (citations omitted) (quotation marks omitted).
[168] *Id.* at 238 (italics in original).
[169] *Id.*, at 243.
[170] *Quinn v. United States*, 349 U.S. 155, 162, 75 S.Ct. 668, 99 L.Ed. 964 (1955) (no "magic language" or "ritualistic formula").
[171] *Easter*, 130 Wn.2d at 239.
[172] *Counselman v. Hitchcock*, 142 U.S. 547, 562, 12 S.Ct. 195, 35 L.Ed. 1110 (1892), *overruled in part by Kastigar*, *supra*.

E. The Fifth Amendment Protects An Innocent Person

The United States Supreme Court has never held that the privilege against self-incrimination is unavailable to a person who claims innocence.

> But we have never held … that the privilege is unavailable to those who claim innocence. To the contrary, we have emphasized that one of the Fifth Amendment's basic functions is to protect *innocent* men who otherwise might be ensnared by ambiguous circumstances. *Grunewald v. United States*, 353 U.S. 391, 421, 77 S.Ct. 963, 1 L.Ed.2d 931 (1957) (emphasis in original).
>
> In *Grunewald*, we recognized that truthful responses of an innocent witness, as well as those of a wrongdoer, may provide the government with incriminating evidence from the speaker's own mouth.[173]

F. The Fifth Amendment Protects Against A Dangerous Response

A person asserting the right to refuse to answer does not end the court's inquiry. A court must then decide whether the silence is justified. To do so, a court must determine whether the person has "reasonable cause to apprehend danger from a direct answer" by considering the implications of the question in the setting it is asked.

If a responsive answer or an explanation why the question cannot be answered might be dangerous, the Fifth Amendment prohibits compelling a person from answering.[174]

G. The Fifth Amendment Protects A Response Which Will Furnish A "Link In The Chain" To Incriminating Evidence

Even where statements themselves are not incriminating and are not introduced into evidence, any compelled statements that would be a "link in the chain" leading to the discovery of incriminating evidence needed to prosecute a person is protected by the Fifth Amendment.[175]

It has been long settled that the Fifth Amendment protection "encompasses compelled statements that lead to the discovery of incriminating evidence even though the statements themselves are not incriminating and are not introduced into evidence."[176]

> Compelled testimony that communicates information that may "lead to incriminating evidence" is privileged even if the information itself is not inculpatory.[177]

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[173] *Ohio v. Reiner*, 532 U.S. 17, 21, 121 S.Ct. 1252, 149 L.Ed.2d 158 (2001) (citation omitted) (quotation marks omitted) (paragraph added for ease of reading).
[174] *Hoffman v. United States*, 341 U.S. 479, 486-87, 71 S.Ct. 814, 95 L.Ed. 1118 (1951).
[175] *Id.*, at 486.
[176] *Hubbell*, 530 U.S. at 37.
[177] *Id*., at 38 (citation omitted).

H. The Fifth Amendment Protects An Accused From Facing The "Cruel Trilemma"

Summarizing the United States Supreme Court's discussion of the "cruel trilemma" of self-accusation, perjury or contempt[178] facing a defendant who is compelled to testify, Washington's Supreme Court wrote –

> Such compulsion exists when a defendant has no choice but to offer evidence against himself. In the classic context of a Fifth Amendment violation – forcing a defendant to testify – impermissible compulsion is evidenced by the "cruel trilemma" facing the defendant at trial: testify and submit to self-incrimination; testify falsely, risking perjury; or refuse to testify, risking contempt of court.
>
> It is well established that the Fifth Amendment prevents the state from forcing this choice upon a defendant. The right against self-incrimination may also prevent the state from presenting a defendant with a choice that involves such pain, danger, or severity that the defendant inevitably will be forced to prefer confession.[179]

I. The Fifth Amendment Protects Both Compelled Testimony And Evidence Of A Testimonial Or Communicative Nature

The Fifth Amendment privilege includes not only statements, but also protects compelling a defendant to offer other evidence where the evidence is of a "testimonial or communicative nature."

> We hold that the privilege protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature…[180]

Thus, the Fifth Amendment protects an accused from two inquisitorial perils –

(1) From being compelled to testify against himself or herself; and
(2) From being compelled to provide evidence of a "testimonial or communicative nature."

J. "Testimonial Evidence" Definition

Testimonial evidence is where an accused's communication, explicitly or implicitly, relates a factual assertion or discloses information.[181]

But not all evidence compelled from a defendant is testimonial. The Supreme Court has long held that the privilege does not protect a person from being compelled to produce real, physical or identification evidence.

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[178] *Doe*, 487 U.S. at 212.
[179] *City of Seattle v. Stalsbroten*, 138 Wn.2d 227, 235 (1999) (citations omitted) (emphasis added) (paragraph added for ease of reading).
[180] *Schmerber*, 384 U.S. at 761 (footnote omitted).
[181] *Doe*, 487 U.S. at 210.

> Rather, the privilege protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature.[182]

Thus, consistent with the Fifth Amendment a person may be compelled to produce evidence such as fingerprints, photographs, physical measurements, handwriting or voice exemplars, or be required to participate in a lineup, stand, walk, assume a position or make a gesture. Although compelled, the evidence is not testimonial as required for Fifth Amendment protection.[183]

K. "Compelled" Definition

Compulsion exists in three circumstances where a person is either –

> [1] subjected to custodial interrogation,
>
> [2] ordered to produce incriminating evidence, or
>
> [3] threatened with serious penalties if the evidence is not produced.[184]

When compulsion is present, the Fifth Amendment privilege against self-incrimination is self-executing and an individual does not waive the privilege by failing to invoke it.[185]

L. The Act Of Production Doctrine

Under the Fifth Amendment, a person may be required to produce specific documents even though the evidence contains incriminating assertions of fact or belief "because the creation of those documents was not 'compelled' within the meaning of the privilege."[186]

But the act of producing evidence in response to a subpoena, subpoena duces tecum or court order may implicate Fifth Amendment protections where the evidence could provide a prosecutor with a "lead to incriminating evidence," or "a link in the chain of evidence needed to prosecute."[187]

When the government knows documents created by a client's accountants were possessed by the client's attorneys and could independently confirm their existence and authenticity through the

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[182] *Pennsylvania v. Muniz*, 496 U.S. 582, 588-89, 110 S.Ct. 2638, 110 L.Ed.2d 528 (1990) (citations omitted) (footnote omitted) (quotation marks omitted).
[183] 21A AM. JUR. 2D CRIMINAL LAW, §1024 (2020 update).
[184] *In re Dependency of J.R.U.-S.*, 126 Wn.App. 786, ¶14 (2005).
[185] *United States v. McLaughlin*, 126 F.3d 130, 135 (3d Cir. 1997), *cert. denied*, 524 U.S. 951, 118 S.Ct. 2366, 141 L.Ed.2d 735 (1998), *abrogated on other grounds by United States v. Fiorelli*, 133 F.3d 218 (3d Cir. 1998).
[186] *Hubbell*, 530 U.S. at 35-36. *Hubbell* cited to the decision in *Fisher v. United States*, 425 U.S. 391, 408, 96 S.Ct. 1569, 48 L.Ed.2d 39 (1976) permitting the government to force a person to furnish incriminating physical evidence which is only protected by the Fifth Amendment where "the act of production" of the documents was compelled, testimonial and incriminating.
[187] *Id*., at 42.

accountants who created them, the act of producing the documents in response to the government's subpoena duces tecum is not testimonial.[188]

But where the government issues a subpoena duces tecum as a "fishing expedition" to discover information where it had no prior knowledge of either the existence or the whereabouts of the documents, the act of production of the documents is testimonial and protected by the Fifth Amendment.[189]

The testimonial aspect of a persons' act of producing documents in response to a subpoena is not limited to the act of handing material to the government. Non-production of evidence is also included within the Fifth Amendment privilege.

> An individual who produces documents may be asserting that [the documents] satisfy the general description in the subpoena, or that they were in his possession or under his control. [In either case, those] assertions can convey information about that individual's knowledge and state of mind as effectively as spoken statements …
>
> Thus, the testimonial aspect of production is not limited to the act of handing material over to the government – it also may include the custodian's exercise of discretion over which material to produce and which to omit. Incomplete production may therefore be as communicative as complete production.[190]

M. Asserting The Fifth Amendment Privilege Against Self-Incrimination

i. The Privilege Must Generally Be Expressly Asserted

The privilege against self-incrimination is generally not self-executing and must be expressly asserted by a person seeking protection of the privilege. This requirement exists for several policy reasons.

> The privilege against self-incrimination "is an exception to the general principle that the Government has the right to everyone's testimony."[191] To prevent the privilege from shielding information not properly within its scope, we have long held that a witness who desires the protection of the privilege must claim it at the time he relies on it.
>
> That requirement ensures that the Government is put on notice when a witness intends to rely on the privilege so that it may either argue that the testimony sought could not be self-incriminating,[192] or cure any potential self-incrimination through a grant of immunity.[193]

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[188] *Fisher*, 425 U.S. at 411.

[189] *Hubbell*, 530 U.S. at 42, 44-45 (Government issued blanket subpoena for documents as part of the Whitewater investigation. Hubbell asserted his Fifth Amendment privilege, and was thereafter granted immunity. Pursuant to court order, he then provided 13,120 pages of documents which included incriminating evidence. The Supreme Court held that the government could not make derivative use of the documents because their existence only became known to the government after it granted immunity.).

[190] *McLaughlin*, 126 F.3d at 134 (citations omitted) (underlined emphasis added).

[191] *Garner v. United States*, 424 U.S. 648, 658 n.11, 96 S.Ct. 1178, 47 L.Ed.2d 370 (1976).

[192] *Hoffman*, 341 U.S. at 486.

[193] *Kastigar v. United States*, 406 U.S. 441, 448, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972).

> The express invocation requirement also gives courts tasked with evaluating a Fifth Amendment claim a contemporaneous record establishing the witness' reasons for refusing to answer.[194]
>
> In these ways, insisting that witnesses expressly invoke the privilege assures that the Government obtains all the information to which it is entitled.[195]

The Supreme Court has recognized two exceptions to the general rule that a witness waives the Fifth Amendment privilege by failing to invoke it.[196]

ii. Exception 1 – Accused Person Pending Criminal Trial

The first exception to the general rule that the Fifth Amendment privilege must be expressly asserted involves a person pending trial in a criminal case. The person need not take the stand to assert the right to remain silent because a criminal defendant has an absolute right not to testify.

> First, we held in *Griffin v. California* that a criminal defendant need not take the stand and assert the privilege at his own trial. That exception reflects the fact that a criminal defendant has an absolute right not to testify. Since a defendant's reasons for remaining silent at trial are irrelevant to his constitutional right to do so, requiring that he expressly invoke the privilege would serve no purpose; neither a showing that his testimony would not be self-incriminating nor a grant of immunity could force him to speak.[197]

At trial in a criminal case, the Fifth Amendment privilege prohibits the prosecution from forcing a defendant to testify.[198] A comment on a criminal defendant's refusal to testify at trial is a "remnant of the inquisitorial system of criminal justice which the Fifth Amendment outlaws." The Fifth Amendment forbids during a criminal trial either comment by the prosecutor on the accused's silence or instructions by the court that such silence is evidence of guilt.[199]

The privilege also applies during a criminal defendant's sentencing hearing. A guilty plea does not waive the privilege because "a guilty plea is more like an offer to stipulate rather than a decision to take the stand."[200] Since a defendant retains the right to remain silent, the Fifth Amendment prohibits a trial court from drawing any adverse inference from a defendant's failure to speak at sentencing.[201]

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[194] See *Roberts v. United States*, 445 U.S. 552, 560 n.7, 100 S.Ct. 1358, 63 L.Ed.2d 622 (1980) ("A witness may not employ the privilege to avoid giving testimony that he simply would prefer not to give"); *Hutcheson v. United States*, 369 U.S. 599, 610-611, 82 S.Ct. 1005, 8 L.Ed.2d 137 (1962) (declining to treat invocation of due process as proper assertion of the privilege).
[195] *Salinas*, 570 U.S. at 183 (citations omitted) (footnotes omitted) (quotation marks omitted) (paragraphs added for ease of reading).
[196] *Id.*, 570 U.S. at 184.
[197] *Id.* (citations omitted) (quotation marks omitted) (emphasis added).
[198] *Miranda*, 384 U.S. at 461; *Easter*, 130 Wn.2d at 236.
[199] *Griffin*, 380 U.S. at 614-15.
[200] *Mitchell v. United States*, 526 U.S. 314, 323, 119 S.Ct. 1307, 143 L.Ed.2d 424 (1999).
[201] *Id.*, at 327-28.

iii. Exception 2 – Government Compulsion

The second exception to the general rule that the Fifth Amendment privilege must be expressly asserted involves government compulsion. Coercion by a government agent makes a witness' failure to invoke the privilege involuntary and thus excused unless the witness fails to claim the privilege after being warned.

> [A] witness' failure to invoke the privilege must be excused where governmental coercion makes his forfeiture of the privilege involuntary. Thus, in *Miranda*, we said that a suspect who is subjected to the "inherently compelling pressures" of an unwarned custodial interrogation need not invoke the privilege. Due to the uniquely coercive nature of custodial interrogation, a suspect in custody cannot be said to have voluntarily forgone the privilege "unless [he] fails to claim [it] after being suitably warned."[202]

A person does not waive the Fifth Amendment privilege by responding to a government subpoena seeking documents because the subpoena cannot be refused.

> While the Fifth Amendment is generally not self-executing, where a testimonial act is, as in this case, compelled, the defendant does not waive the privilege by failing to invoke it. See *Adams v. Maryland*, 347 U.S. 179, 179-83, 74 S.Ct. 442,, 98 L.Ed. 608 (1954) (holding the Fifth Amendment self-executing where testimony was compelled by a congressional grant of use immunity).[203]

Additionally, a person's silence has been held to be an exercise of the privilege where some form of official compulsion denies the person a free choice to admit, deny, or refuse to answer.

> And where assertion of the privilege would itself tend to incriminate, we have allowed witnesses to exercise the privilege through silence.[204]

The *Salinas* Court noted the important principle that "a witness need not expressly invoke the privilege where some form of official compulsion denies him a free choice to admit, to deny, or to refuse to answer."[205]

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[202] *Id.* (citations omitted).

[203] *McLaughlin*, 126 F.3d at 135.

[204] *Salinas*, 570 U.S. at 185. *See, e.g., Leary v. United States*, 395 U.S. 6, 28-29, 89 S.Ct. 1532, 23 L.Ed.2d 57 (1969) (no requirement that taxpayer complete tax form where doing so would have revealed income from illegal activities); *Albertson v. Subversive Activities Control Bd.*, 382 U.S. 70, 77-79, 86 S.Ct. 194, 15 L.Ed.2d 165 (1965) (members of the Communist Party not required to complete registration form "where response to any of the form's questions ... might involve [them] in the admission of a crucial element of a crime").

[205] *Id.*, 570 U.S. at 185.

N. An Accused Shall Be Informed Of The Right To Remain Silent At The First Court Appearance On Criminal Charges

The Fifth Amendment right to remain silent is so fundamentally important that it applies before a person is even the subject of suspicion or a criminal investigation.[206]

Recognizing the importance of this fundamental constitutional right, Washington judges are commanded by court rule to orally inform an accused of the right to remain silent at the accused's first appearance before the court on criminal charges. CrRLJ 3.2.1(e)(1) reads –

> At the preliminary appearance, the court shall provide for a lawyer pursuant to rule 3.1 and for pretrial release pursuant to rule 3.2, and the court shall orally inform the accused:
>
> (i) of the nature of the charge against the accused;
>
> (ii) of the right to be assisted by a lawyer at every stage of the proceedings; and
>
> (iii) of the right to remain silent, and that anything the accused says may be used against him or her.[207]

O. A Court May Not Compel A Pretrial Defendant To Engage In Treatment As A Condition Of Release

In *Butler*, out-of-custody DUI defendants were required as a condition of release to submit to an alcohol evaluation, comply with any recommended treatment requirements, and attend at least three self-help meetings per week. Defendants were warned by the district court that if they failed to comply, they would be remanded into custody.[208]

> The risk of incarceration is sufficient compulsion to implicate the Fifth Amendment. The requirement of full and frank disclosure necessary in a successful alcohol evaluation obviously implicates an accused's constitutional right not to incriminate himself.[209]

The *Butler* Court discussed a Ninth Circuit case where a probationer's Fifth Amendment right against self-incrimination was violated upon the probationer's refusal to discuss his past sexual history as part of a court-ordered participation in a sexual abuse recovery program.

Addressing the Hobson's choice the probationer faced in revealing his past sexual history, the Ninth Circuit wrote –

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[206] *Easter*, 130 Wn.2d at 238.
[207] Emphasis added. See also CrR 3.2.1(e)(1).
[208] *Butler v. Kato*, 137 Wn.App. 515, ¶22 (2007).
[209] *Id*. (footnote omitted).

> The treatment condition placed [the defendant] at a crossroads – comply and incriminate himself or invoke his right against self-incrimination and be sent to prison. We therefore conclude … successful participation in [treatment] triggered a real danger of self-incrimination, not simply a remote or speculative threat.[210]

In contemplating the implications of statements a defendant might make during the course of the court-ordered mandatory treatment, the Ninth Circuit noted –

> We have no doubt that any admissions of past crimes would likely make their way into the hands of prosecutors.[211]

The Court of Appeals reasoned that if compulsory treatment can implicate a probationer's Fifth Amendment right not to incriminate himself, "surely the position of an accused released prior to trial is at least equivalently compromised."[212]

P. New York's Highest Court Held The Fifth Amendment Prohibits Compelling The Production Of Firearms Absent Immunity

Marshall cites to a 2007 decision by New York's highest court in support of his argument that RCW 9.41.800's surrender provisions and the Court's surrender order compel Marshall to give evidence or be a witness against himself in violation of the Fifth Amendment.

This New York case appears to be one of first impression in the country. Surprisingly no other appellate court case in the country has been found that has addressed the issue of surrender orders and the Fifth Amendment.

In *People v. Havrish*,[213] the defendant was charged in one county with three domestic violence offenses. Pursuant to statute, the trial court ordered the defendant to surrender "any and all firearms owned or possessed." After the defendant posted bail, he surrendered a revolver to police who were at his home which was located in another county. The police confirmed the defendant did not have a license for the handgun. The defendant was thereafter charged with criminal possession of the gun in the second county.[214]

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[210] *Id*., at ¶24 (quoting *United States v. Antelope*, 395 F.3d 1128, 1135 (9th Cir. 2005)).
[211] *Id*.
[212] *Id*., at ¶25.
[213] *People v. Havrish*, 8 N.Y.3d 389, 866 N.E.2d 1009, *cert. denied*, 552 U.S. 886, 128 S.Ct. 207, 169 L.Ed.2d 145 (2007). Other than *Havrish*, the parties did not present any other appellate case concerning the Fifth Amendment and surrender court orders. The Court was also unable to find any on point authority on this Fifth Amendment issue other than *Havrish*.
[214] *Id*., 866 N.Ed.2d at 1011-12.

Havrish sought dismissal of the gun charge on Fifth Amendment grounds.

> Defense counsel argued that the order directing defendant to turn over his weapons created an impossible dilemma since defendant was required either to produce the unlicensed pistol, thereby incriminating himself, or defy the court order and risk being prosecuted for criminal contempt.
>
> Among other arguments, the People countered that defendant's Fifth Amendment rights were not implicated because surrender of the revolver involved the production of physical evidence that was not communicative or testimonial in nature.[215]

The *Havrish* Court began its analysis by noting there are two elements to the Fifth Amendment's privilege against self incrimination – (1) the presence of compulsion; and (2) the solicitation or receipt by the government of evidence of a testimonial nature.[216]

The first element – governmental compulsion – was easily found because the defendant was ordered to surrender his weapons by a court.

> Here, the element of state compulsion was unquestionably met. Defendant was ordered by a court to surrender his weapons. Had he failed to do so, he could have been prosecuted for criminal contempt.[217]

The far more difficult question concerned the second element.[218] Does a defendant's compliance with a surrender order compel testimonial evidence protected by the First Amendment, or instead compel real or physical evidence which is not protected by the Fifth Amendment?[219]

The surrender of evidence, even evidence not protected by the Fifth Amendment, may itself be privileged "if the very act of production has communicative or testimonial aspects."[220]

> Thus, the pivotal issue here is whether defendant's act of producing the unlicensed handgun was privileged.[221]

The resolution to the question whether Havrish's court-ordered production of the gun was privileged involved a two-part test.

> First, a court must assess whether the compelled act of production is sufficiently testimonial. Under the Fifth Amendment, evidence is deemed testimonial when it reveals defendant's subjective knowledge or thought processes – when it expresses the contents of defendant's mind …
>
> Second, a court must determine whether the act of production is incriminating. If the subjective information the government will obtain through the act of production does not pose any realistic threat

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[215] *Id*., at 1012 (footnote omitted) (paragraph added for ease of reading).
[216] *Id*.
[217] *Id*.
[218] *Id*.
[219] As previously discussed, it is well settled that a person can be forced by a court to produce real or physical evidence without violating the privilege against self-incrimination.
[220] See *United States v. Doe*, 465 U.S. 605, 613, 104 S.Ct. 1237, 79 L.Ed.2d 552 (1984) (*Doe I*).
[221] *Havrish*, 866 N.E.2d at 1014.

> of incrimination but presents merely trifling or imaginary hazards of incrimination, the act enjoys no Fifth Amendment protection.[222]

Concerning the first inquiry, New York's highest court could not say that absent Havrish's court-ordered surrender of the gun, the discovery of the gun by the government would have been a foregone conclusion because no evidence was presented that the government knew Havrish owned the gun.

The surrender of the gun was thus held to be testimonial because the surrender revealed Havrish's subjective thought processes that he knowingly possessed the weapon which "absent this revelation, the information would not have come to the attention of the police."[223]

As to the second inquiry, the *Havrish* Court held that surrender of the weapon was also sufficiently incriminating to give rise to Fifth Amendment protection.

> The order compelling defendant to turn over his weapons was issued in the course of a felony prosecution, without a grant of immunity or amnesty. Indeed, by the time defendant produced the weapon, he had provided the police with proof of virtually every element of the offense of criminal possession of a weapon.
>
> Given that the act of production involved the commission of a crime in the presence of the police, it can hardly be argued that the conduct was unlikely to result in criminal prosecution.[224]

Since both elements of the act of production doctrine were met, the *Havrish* Court held that the defendant's court-compelled surrender of the gun was privileged under the Fifth Amendment resulting in suppression of the evidence obtained as a result of the unconstitutional surrender order.[225]

Q. The Fifth Amendment Applies To The States

The Fifth Amendment "exception from compulsory self-incrimination" has been held to be protected by the Fourteenth Amendment Incorporation Doctrine against abridgement by the states.[226]

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[222] *Id*., at 1014 (citations omitted) (quotation marks omitted).
[223] *Id*., at 1015.
[224] *Id*. (emphasis added) (paragraph added for ease of reading).
[225] *Id*. *Havrish* held that a surrender of firearms order compelling a pretrial releasee to surrender firearms to law enforcement violated the Fifth Amendment because immunity was not granted. New York now statutorily grants immunity from prosecution for criminal possession of a firearm to a person who "voluntarily" surrenders firearms in accordance with the provisions of the statute. New York Penal Law §265.20(a)(1)(f). The prompt surrender of firearms pursuant to a court order requiring surrender "shall be considered a voluntary surrender." New York Penal Law §530.41(5)(b).
[226] *Malloy*, 378 U.S. at 6.

R. Article I, §9

Article I, §9 provides in pertinent part –

> RIGHTS OF ACCUSED PERSONS. No person shall be compelled in any criminal case to give evidence against himself …[227]

Unlike the federal constitution which prohibits compelling a person to be a "witness against himself," many state constitutions including those of the original colonies phrased the privilege against self-incrimination "in terms of compelling a person to give 'evidence' against himself."[228]

The Washington Framers rejected a version reading "testify against himself" and instead adopted "give evidence against himself" as used by many other state constitutions.[229]

While the text of Washington's self-incrimination privilege differs from the Fifth Amendment, to date our Supreme Court has interpreted the state privilege as providing the same level of protection as that provided by the federal constitution.[230]

S. Immunity

The Fifth Amendment privilege against self-incrimination is not absolute. Immunity statutes have "historical roots deep in Anglo-American jurisprudence" and are sufficient to overcome the privilege.[231] Immunity statutes are important because –

> … they seek a rational accommodation between the imperatives of the privilege and the legitimate demands of government to compel citizens to testify.
>
> The existence of these statutes reflects the importance of testimony, and the fact that many offenses are of such a character that the only persons capable of giving useful testimony are those implicated in the crime. Indeed, their origins were in the context of such offenses, and their primary use has been to investigate such offenses.[232]

The adequacy of a state grant of immunity from prosecution "must be tested against the requirements of the Fifth Amendment, which mandate that the grant of immunity be coextensive with the scope of the privilege against self-incrimination."[233]

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[227] Emphasis added.
[228] *Schmerber*, 384 U.S. at 761 n.6.
[229] ROBERT F. UTTER & HUGH D. SPITZER, THE WASHINGTON STATE CONSTITUTION (Oxford University Press 2011), at 29; *State v. Moore*, 79 Wn.2d 51, 65 (1971) (Rosellini, J., dissenting, joined by Donworth, J. Pro Tem and McGovern, J.); and *State v. Earls*, 116 Wn.2d 364, 391 (1991) (Utter, J., dissenting).
[230] *Stalsbroten*, 138 Wn.2d at 232 n.1.
[231] *Kastigar*, 406 U.S. at 445-46.
[232] *State v. Carroll*, 83 Wn.2d 109, 111 (1973) (citation omitted). See also *Kastigar*, 406 U.S. at 446-47.
[233] *Kastigar*, 406 U.S. at 453.

There are three different types of immunity statutes –

> Transactional immunity is the broadest, prohibiting prosecution for any matter about which the witness testifies or gives a statement.
>
> Use immunity prohibits the direct use of a person's compelled statements in a criminal trial but allows the State to prosecute that person with evidence collected from an independent source.
>
> Derivative use immunity bars the use of any evidence derived from immunized statements.[234]

Use immunity alone "is not as comprehensive as the protection afforded by the Fifth Amendment privilege since it does not preclude the derivative use of the fruits of the compelled testimony as investigatory leads which might supply other means of incriminating the witness."[235]

A combination of use and derivative use immunity is required to protect a person's Fifth Amendment privilege.[236] "Immunity from the use of compelled testimony, as well as evidence derived directly and indirectly therefrom," is coextensive with the scope of the privilege against self-incrimination.[237]

Transactional immunity affords the witness "considerably broader protection" than is required by the Fifth Amendment privilege.[238]

Washington's general immunity statute, RCW 10.52.090, was enacted in 1909. The statute reads –

> In every case where it is provided in this act that a witness shall not be excused from giving testimony tending to criminate himself or herself, no person shall be excused from testifying or producing any papers or documents on the ground that his or her testimony may tend to criminate or subject him or her to a penalty or forfeiture; but he or she shall not be prosecuted or subjected to a penalty or forfeiture for or on account of any action, matter or thing concerning which he or she shall so testify, except for perjury or offering false evidence committed in such testimony.[239]

RCW 10.52.090 provides for "full transactional immunity as distinguished from use and derivative use immunity."[240]

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[234] *A.M.-S.*, 11 Wn.App.2d at ¶25 (citations omitted) (quotation marks omitted) (emphasis added) (paragraphs added for ease of reading).
[235] *Eastham v. Arndt*, 28 Wn.App. 524, 529 (1981).
[236] *Kastigar*, 406 U.S. at 459.
[237] *Id*.
[238] *Id*.
[239] RCW 10.52.090 has been amended once by the legislature since 1909. In 2010, the legislature made gender neutral technical corrections throughout Washington law, including RCW 9.52.090 ("or herself, or her, or she" added). Laws of 2010, ch. 8, §1049.
[240] *Carroll*, 83 Wn.2d at 113 (quotation marks omitted).

CrRLJ 6.14 also provides for immunity. The rule reads –

> In any case, the court on motion of the prosecuting authority may order that a witness shall not be excused from giving testimony or producing any papers, documents or things, on the ground that such testimony may tend to incriminate or subject the witness to a penalty or forfeiture arising from the commission of a gross misdemeanor, misdemeanor, or traffic infraction; but the witness shall not be prosecuted or subjected to criminal penalty or forfeiture for or on account of any gross misdemeanor, misdemeanor, or traffic infraction concerning which the witness has been ordered to testify pursuant to this rule.
>
> If such testimony may tend to incriminate or subject the witness to a penalty or forfeiture arising from the commission of a felony, immunity may only be sought with the concurrence of the prosecuting authority in whose county the offense occurred.
>
> The witness may nevertheless be prosecuted for failing to comply with the order to answer, or for perjury or the giving of false evidence.[241]

CrR 6.14 provides for transactional immunity[242] and "merely parrots the substantive language of RCW 10.52.090."[243]

A grant of transactional, use, or derivative use immunity can only be authorized by the legislature and exercised at the prosecutor's discretion because the grant of immunity involves "matters of substantive law falling within the legislature's powers."[244]

Accordingly, Washington's trial courts lack the inherent or court rule authority to confer immunity[245] and a defendant has no right to demand immunity.[246]

While only the prosecution may authorize a grant of immunity, under Washington law the prosecution must grant transactional immunity to overcome the privilege against self-incrimination.[247]

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[241] The immunity verbiage in CrR 6.14 differs from CrRLJ 6.14.

[242] *State v. Runions*, 100 Wn.2d 52, 54-55 (1983). For the purposes of this discussion, this Court finds CrRLJ 6.14 also provides for transactional immunity.

[243] *A.M.-S.*, 11 Wn.App.2d at ¶44.

[244] *Id*., at ¶¶46,56-57.

[245] *Id*., at ¶58.

[246] *Id*., at ¶45. See also *State v. Carlisle*, 73 Wn.App. 678. 679-80 (1994) (a defendant has no right to demand immunity for a defense witness in order to obtain exculpatory evidence, and a trial court lacks authority to order the prosecutor to grant immunity to anyone).

[247] *Carroll, supra,* and *Runions*, 100 Wn.2d at 54.

T. Summary Of The Fifth Amendment Privilege Against Self-Incrimination

The Fifth Amendment provides that no person may be compelled in any criminal case to give evidence or be a witness against himself or herself. The Fifth Amendment privilege against self-incrimination protects a person in two situations –

1. Criminal Prosecution. The Amendment "protects the individual against being involuntarily called as a witness against himself in a criminal prosecution;" and

2. Future Criminal Proceedings. The Amendment "privileges [the individual] not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings."[248]

The privilege is available to persons who claim innocence.[249]

The Fifth Amendment privilege against self-incrimination was intended to prohibit the use of Star Chamber legal compulsion to extract a sworn communication of facts from an accused which would thereafter incriminate the person.[250] Under the Star Chamber inquisitorial system, an accused was placed under oath and compelled to answer questions designed to uncover uncharged offenses "without evidence from any other source."[251]

The Fifth Amendment privilege is essential to the recognition that the American system of criminal prosecution is accusatorial, not inquisitorial.[252]

The fundamental concept behind the Fifth Amendment transformation from the English inquisitorial system to the American accusatorial system is that a person's confession must be the product of the person's free will. Accordingly, the prosecution may not establish a person's guilt "by the simple, cruel expedient of forcing it from his own lips."[253]

The privilege may be invoked whenever circumstances indicate that a real and substantial danger of incrimination exists. The privilege is not limited to circumstances in which a person is in custody or under compulsion to speak.[254]

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[248] *Lefkowitz*, 414 U.S. at 77.
[249] *Reiner*, 523 U.S. at 21.
[250] *Hubbell*, 530 U.S. at 34 n.8.
[251] *Doe*, 487 U.S. at 212.
[252] *Malloy*, 378 U.S. at 7.
[253] *Culombe*, 367 U.S. at 581-84.
[254] *A.M.-S.*, 11 Wn.App.2d at ¶¶18-19.

The Fifth Amendment not only extends to answers that would in themselves support a conviction but also embraces any statements "which would furnish a link in the chain of evidence needed to prosecute" a person for a crime.[255]

However, a person's assertion of the Fifth Amendment privilege does not end the inquiry. To be protected by the Fifth Amendment, Marshall must show that he has been – (1) compelled (2) to provide testimonial or other communicative evidence (3) which incriminates him.

[255] *Hoffman*, 341 U.S. at 486.

7. THE SURRENDER PROVISIONS OF RCW 9.41.800 AND RCW 9.41.801(2) VIOLATE THE FIFTH AMENDMENT & ARTICLE I, §9

A. Introduction

This Court will now separately discuss the Fifth Amendment privilege concerning the firearms, dangerous weapons and concealed pistol licenses portions of the surrender statute.[256]

B. The Firearms Portion Of The Surrender Order Compels Incriminating Testimonial Evidence In Violation Of The Fifth Amendment And Article I, §9

This Court's order to surrender required Marshall to produce any firearms, other dangerous weapons and concealed pistol licenses in his "possession or control" and then to "immediately" surrender them to law enforcement.

i. Government Compulsion

The element of government compulsion is met here. Marshall was ordered by this Court to produce and surrender property in his possession or control. Marshall's failure to comply with the surrender order could result in – (1) his prosecution for failure to produce the property;[257] (2) his prosecution for criminal contempt of court;[258] and/or (3) his conditions of release being revoked.[259]

A person is not free to ignore a surrender order because the failure to comply with a court-ordered production of property could result in serious penalties if the evidence is not produced.[260] Marshall was compelled to produce his property.[261]

ii. Testimonial Evidence

Marshall must additionally prove he was compelled to produce "testimonial evidence." To be testimonial, Marshall's communication must itself, explicitly or implicitly, relate a factual assertion or disclose information.[262]

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[256] See the Court's summary of the Fifth Amendment privilege in Section 6(T), *supra*.
[257] RCW 9.41.810.
[258] RCW 7.21.040(5).
[259] CrRLJ 3.2(j) and (k).
[260] *J.R.U.-S.*, 126 Wn.App. at ¶14 ("In general, compulsion exists when a person is either subjected to custodial interrogation, ordered to produce incriminating evidence, or threatened with serious penalties if the evidence is not produced.") (footnotes omitted). See also *Butler*, 137 Wn.App. at ¶22 ("The risk of incarceration is sufficient compulsion to implicate the Fifth Amendment.").
[261] Nor does it matter under the Fifth Amendment whether Marshall actually possesses or has access to the surrendered property because the Fifth Amendment privilege protects the truthful response of a person who claims innocence. *Reiner*, 532 U.S. at 21.
[262] *Doe*, 487 U.S. at 210.

The act of producing evidence in response to a subpoena, subpoena duces tecum or court order implicates the Fifth Amendment where the evidence could provide the government with a "lead to incriminating evidence" or a "link in the chain of evidence needed to prosecute."[263]

Under *Fisher's* act of production doctrine, the Court must assess whether the compelled act of production of any firearms is sufficiently testimonial.[264] Under the Fifth Amendment, evidence is deemed testimonial when it reveals the defendant's subjective knowledge or thought processes, i.e. when the compelled act of production expresses the contents of the defendant's mind.[265]

By producing evidence in compliance with a court order, a person admits that the evidence exists and was in his or her possession or control.[266] Importantly, the Fifth Amendment privilege "has the same application to the testimonial aspect of a response" where a court order seeks the discovery of evidence.[267]

Although Marshall did not need to object at arraignment because his Fifth Amendment privilege is self-executing under the circumstances presented,[268] he objected to and immediately asserted his Fifth Amendment privilege prior to the Court entering the surrender order. Marshall retains his Fifth Amendment right to remain silent.[269]

iii. Incrimination

Finally, Marshall must prove he was compelled to produce testimonial evidence which incriminates him.

Marshall was ordered by the Court pursuant to RCW 9.41.800 and 9.41.801(2) to produce and immediately surrender to law enforcement all firearms in his "possession or control."

Washington law prohibits a person from owning, possessing or having in the person's control any firearm under five separate statutory provisions. Each provision has multiple sub-parts.[270]

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[263] *Hubbell*, 530 U.S. at 38.
[264] *Fisher v. United States*, 425 U.S. 391, 96 S.Ct. 1569, 48 L.Ed.2d 39 (1976).
[265] *Doe*, 487 U.S. at 211.
[266] *Hubbell*, 530 U.S. at 36.
[267] *Id*., at 43.
[268] Marshall's Fifth Amendment privilege is self-executing because the Court compelled a testimonial act of a defendant in a pending criminal case when it entered the surrender order. *McLaughlin*, 126 F.3d at 135. Additionally, a person's silence has been held to be an exercise of the privilege where some form of official compulsion denies the person a free choice to admit, deny, or refuse to answer. *Salinas*, 370 U.S. at 184-85.
[269] Marshall did not need to produce any firearms in his possession to preserve his Fifth Amendment right to remain silent.
[270] RCW 9.41.040.

The two relevant firearms prohibition statutes here are found in RCW 9.41.040(2)(a)(iii)(C)(I) (no contact order includes finding of credible threat) and RCW 9.41.040(2)(a)(iii)(C)(II) (no contact order includes surrender order).

The moment the Court entered the domestic violence no contact order in this case, Marshall was immediately prohibited by two separate statutes[271] from owning, possessing or having in his control any firearm. Violation of either RCW 9.41.040(2)(a)(iii)(C)(I) or (C)(II) is a felony.[272]

As in the New York case of *People v. Havrish,*[273] this Court cannot determine whether Marshall possesses any firearms. The prosecution has not offered any evidence to the contrary. Compelling Marshall to surrender to law enforcement any firearms he possesses is testimonial under the Fifth Amendment because Marshall's act of surrender would reveal Marshall's subjective knowledge or thought processes that he knowingly possesses the surrendered firearm(s).

Marshall's possession of any firearm would not come to the attention of law enforcement absent the Court's surrender order. The surrender order compels Marshall to produce testimonial evidence.

The act of production doctrine also requires the Court to determine whether the act of compelling Marshall to produce any firearms in his possession is incriminating. Marshall's compelled surrender of firearms to law enforcement in compliance with the surrender order poses a realistic threat of incrimination[274] and would not be merely a trifling or imaginary hazard of incrimination.[275]

Marshall's act of surrendering any firearm he possesses directly to law enforcement in compliance with the surrender order would provide the prosecution with proof of virtually every element of unlawful possession of a firearm in the second degree needed to prosecute Marshall under RCW 9.41.040(2) because Marshall was prohibited by two separate statutes from possessing any firearms upon leaving the courthouse after arraignment.

Marshall's compliance with the Court's order to surrender any firearms he possessed to law enforcement would provide the government with a "lead to incriminating evidence" or a "link in the chain of evidence needed to prosecute."[276] There is no doubt law enforcement would communicate Marshall's criminal act of unlawful possession of a firearm to the prosecution.

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[271] RCW 9.41.040(2)(a)(iii)(C)(I) and (C)(II).
[272] RCW 9.41.040(2)(iii). Unlawful possession of a firearm in the second degree is a class C felony. RCW 9.41.040(2)(c).
[273] *People v. Havrish*, 8 N.Y.3d 389, 866 N.E.2d 1009, *cert. denied*, 552 U.S. 886, 128 S.Ct. 207, 169 L.Ed.2d 145 (2007).
[274] *Fisher*, 425 U.S. at 412.
[275] *Doe*, 465 U.S. at 614 n.13.
[276] *Hubbell*, 530 U.S. at 38.

This Court's surrender order concerning firearms issued pursuant to RCW 9.41.800 and 9.41.801(2) surrender provisions compels Marshall to provide incriminating testimonial evidence.[277]

This Court's order[278] compelling Marshall to surrender any firearms he might possess was issued during the course of a criminal case without a grant of immunity. Without immunity, the Fifth Amendment protects Marshall from the act of producing any firearms in his possession or control.[279]

iv. Conclusion

This Court's surrender order concerning firearms issued pursuant to RCW 9.41.800 and 9.41.801(2) surrender provisions compels Marshall to provide incriminating testimonial evidence.

After conducting the required "searching legal analysis," this Court is fully convinced RCW 9.41.800 surrender provisions[280] and RCW 9.41.801(2) violate the Fifth Amendment and Article I, §9 beyond a reasonable doubt. Accordingly, these surrender provisions and the surrender order are void.

C. The Dangerous Weapons Portion Of The Surrender Order Compels Incriminating Testimonial Evidence In Violation Of The Fifth Amendment And Article I, §9

In addition to the surrender of firearms, Marshall was ordered by this Court pursuant to RCW 9.41.800 to produce and immediately surrender to law enforcement all other "dangerous weapons" in his "possession or control."

The phrase "dangerous weapons" as used in RCW 9.41.800 means a slungshot, a sand club, metal knuckles, and/or a spring blade knife. These four weapons are defined as per se dangerous by RCW 9.41.250(1)(a).

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[277] It does not matter under the Fifth Amendment whether Marshall actually possesses or has access to the surrendered property because the Fifth Amendment privilege protects the truthful response of a person who claims innocence. *Ohio v. Reiner*, 532 U.S. 17, 21, 121 S.Ct. 1252, 149 L.Ed.2d 158 (2001).

[278] This Court's surrender order is in effect a subpoena duces tecum compelling Marshall to produce incriminating testimonial evidence against himself during his pending criminal case. Such a subpoena violates the Fifth Amendment. See *Boyd*, 115 U.S. at 639 (Miller, J., concurring).

[279] At oral argument here, the prosecution was clear that it would not offer immunity to Marshall, or to any other defendant, who was court-ordered to surrender property pursuant to RCW 9.41.800.

New York's highest court in *Havrish*, 866 N.Ed.2d at 1015, held that a surrender of firearms order compelling a pretrial releasee to surrender firearms to law enforcement violated the Fifth Amendment because immunity was not granted. New York now statutorily grants immunity from prosecution for criminal possession of a firearm to a person who "voluntarily" surrenders firearms in accordance with the provisions of the statute. New York Penal Law §265.20(a)(1)(f). The prompt surrender of firearms pursuant to a court order requiring surrender "shall be considered a voluntary surrender." New York Penal Law §530.41(5)(b).

[280] RCW 9.41.800(1)(a), .800(2)(a), .800(3)(c)(ii)(A), .800(4) .800(5), and .800(7).

The previous Fifth Amendment and Article I, §9 analysis concerning the compelled surrender of firearms to law enforcement is equally applicable to the compelled surrender of these "dangerous weapons" because mere possession of a slungshot, a sand club, metal knuckles, or a spring blade knife is a crime.[281]

i. Government Compulsion

The Fifth Amendment element of government compulsion is met here. A court order to surrender issued pursuant to RCW 9.41.800 and 9.41.801(2) is state compulsion under the Fifth Amendment.

ii. Testimonial Evidence

Marshall's compelled surrender of any of these dangerous weapons to law enforcement in compliance with the surrender order poses a realistic threat of incrimination and would not be merely a trifling or imaginary hazard of incrimination.

iii. Incrimination

Marshall's act of surrendering any "dangerous weapon" he possesses directly to law enforcement would provide the prosecution with proof of virtually every element of possession of a dangerous weapon needed to prosecute Marshall under RCW 9.41.250(1)(a) because mere possession of any of those dangerous weapons is a crime.

Marshall's compliance with this Court's order to surrender any "dangerous weapons" he possesses would provide the government with a "lead to incriminating evidence" or a "link in the chain of evidence needed to prosecute."[282] There is no doubt law enforcement would communicate Marshall's criminal act of unlawful possession of a dangerous weapon to the prosecution.

Although Marshall did not need to object at arraignment because his Fifth Amendment privilege is self-executing under the circumstances presented,[283] he objected to and immediately asserted his Fifth Amendment privilege prior to this Court entering the surrender order. Marshall retains his Fifth Amendment right to remain silent.[284]

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[281] A gross misdemeanor. RCW 9.41.250(1).

[282] *Hubbell*, 530 U.S. at 38.

[283] Marshall's Fifth Amendment privilege is self-executing because the Court compelled a testimonial act of a defendant in a pending criminal case when it entered the surrender order. *McLaughlin*, 126 F.3d at 135. Additionally, a person's silence has been held to be an exercise of the privilege where some form of official compulsion denies the person a free choice to admit, deny, or refuse to answer. *Salinas*, 370 U.S. at 184-85.

[284] Marshall did not need to produce any dangerous weapons in his possession to preserve his Fifth Amendment right to remain silent.

This Court's surrender order concerning dangerous weapons issued pursuant to RCW 9.41.800 and 9.41.801(2) surrender provisions compels Marshall to provide incriminating testimonial evidence.[285]

Marshall cannot be compelled during his criminal prosecution to produce any dangerous weapons without first receiving a grant of immunity, which the prosecution declined to offer and the surrender statutes do not contain.

iv. Conclusion

This Court's surrender order concerning dangerous weapons issued pursuant to RCW 9.41.800 and 9.41.801(2) surrender provisions compels Marshall to provide incriminating testimonial evidence.

After conducting the required "searching legal analysis," this Court is fully convinced RCW 9.41.800 surrender provisions[286] and RCW 9.41.801(2) violate the Fifth Amendment and Article I, §9 beyond a reasonable doubt. Accordingly, these surrender provisions and the surrender order are void.

D. The Concealed Pistol License Portion Of The Surrender Order Compels Incriminating Testimonial Evidence In Violation Of The Fifth Amendment And Article I, §9

Finally, Marshall was ordered by this Court pursuant to RCW 9.41.800 and 9.41.801(2) surrender provisions to produce and immediately surrender to law enforcement any "concealed pistol licenses" in his "possession or control."[287]

The previous Fifth Amendment and Article I, §9 analysis concerning the compelled surrender of firearms and dangerous weapons to law enforcement is equally applicable to the compelled surrender of any concealed pistol licenses Marshall possesses.

i. Government Compulsion

The Fifth Amendment element of government compulsion is met here. A court order to surrender issued pursuant to RCW 9.41.800 and 9.41.801(2) is state compulsion under the Fifth Amendment.

[285] It does not matter under the Fifth Amendment whether Marshall actually possesses or has access to the surrendered property because the Fifth Amendment privilege protects the truthful response of a person who claims innocence. *Ohio v. Reiner*, 532 U.S. 17, 21, 121 S.Ct. 1252, 149 L.Ed.2d 158 (2001).

[286] RCW 9.41.800(1)(a), .800(2)(a), .800(3)(c)(ii)(A), .800(4) .800(5), and .800(7).

[287] Marshall's failure to comply is a misdemeanor. RCW 9.41.810.

ii. Testimonial Evidence

Marshall's compelled surrender of any concealed pistol licenses to law enforcement in compliance with the surrender order poses a realistic threat of incrimination and would not be merely a trifling or imaginary hazard of incrimination.

iii. Incrimination

Upon entry of the surrender order, Marshall was immediately prohibited from possessing any concealed pistol licenses.[288] A violation of the prohibition part of the surrender order violates two criminal statutes[289] and subjects Marshall to revocation of his conditions of release and being jailed pending trial.

Marshall's compliance with this Court's order to surrender any concealed pistol licenses he possesses would provide the government with a "lead to incriminating evidence" or a "link in the chain of evidence needed to prosecute."[290] There is no doubt law enforcement would communicate Marshall's criminal act of possessing a concealed pistol license in violation of the prohibition portion of the surrender order to the prosecution.

Although Marshall did not need to object at arraignment because his Fifth Amendment privilege is self-executing under the circumstances presented,[291] he objected to and immediately asserted his Fifth Amendment privilege prior to this Court entering the surrender order. Marshall retains his Fifth Amendment right to remain silent.[292]

This Court's surrender order concerning concealed pistol licenses issued pursuant to RCW 9.41.800 and 9.41.801(2) surrender provisions compels Marshall to provide incriminating testimonial evidence.[293]

Marshall cannot be compelled during his criminal prosecution to produce any concealed pistol licenses without first receiving a grant of immunity, which the prosecution declined to offer and the surrender statutes do not contain.

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[288] As discussed in Section 5(C), *supra*, there is no statutory grace period after Marshall was prohibited from possessing the surrendered property for him to thereafter lawfully possess and surrender the property to law enforcement.

[289] RCW 9.41.810 (violation of surrender and prohibition order) and RCW 7.21.010, .040 (criminal contempt).

[290] *Hubbell*, 530 U.S. at 38.

[291] Marshall's Fifth Amendment privilege is self-executing because the Court compelled a testimonial act of a defendant in a pending criminal case when it entered the surrender order. *McLaughlin*, 126 F.3d at 135. Additionally, a person's silence has been held to be an exercise of the privilege where some form of official compulsion denies the person a free choice to admit, deny, or refuse to answer. *Salinas*, 370 U.S. at 184-85.

[292] Marshall did not need to produce any dangerous weapons in his possession to preserve his Fifth Amendment right to remain silent.

[293] It does not matter under the Fifth Amendment whether Marshall actually possesses or has access to the surrendered property because the Fifth Amendment privilege protects the truthful response of a person who claims innocence. *Reiner*, 532 U.S. at 21.

iv. Conclusion

This Court's surrender order concerning concealed pistol licenses issued pursuant to RCW 9.41.800 and 9.41.801(2) surrender provisions compels Marshall to provide incriminating testimonial evidence.

After conducting the required "searching legal analysis," this Court is fully convinced RCW 9.41.800 surrender provisions[294] and RCW 9.41.801(2) violate the Fifth Amendment and Article I, §9 beyond a reasonable doubt. Accordingly, these surrender provisions and the surrender order are void.

[294] RCW 9.41.800(1)(b), .800(2)(b), .800(3)(c)(ii)(B), .800(4), .800(5) and .800(7).

8. THE COMPLIANCE PROVISIONS OF RCW 9.41.801(6) & RCW 9.41.804 VIOLATE THE FIFTH AMENDMENT & ARTICLE I, §9

A. Introduction

This Court will now discuss the Fifth Amendment privilege concerning the compliance provisions of the surrender statute.[295]

B. RCW 9.41.801(6) Requires A Trial Court To Verify A Restrained Person's Timely And Complete Compliance With A Surrender Order

Last year, the legislature created a new process to ensure a restrained person's compliance with court-issued surrender orders.[296] The legislature recognized the heightened risk of lethality to protected persons when restrained persons become aware of court involvement yet continue to have access to firearms. The legislature also noted the frequency of non-compliance with surrender orders and the need for "law enforcement and judicial processes [to] emphasize swift and certain compliance with court orders prohibiting access, possession, and ownership of firearms."[297]

In order to increase the safety of protected persons, the legislature required courts to develop procedures to verify timely and complete compliance with surrender orders.[298]

A compliance review hearing is not statutorily required if a court can enter findings the restrained person is in compliance with a surrender order because the restrained person filed either a proof of surrender form or a declaration of non-surrender form.[299]

C. RCW 9.41.804 Requires A Pretrial Releasee To Complete And File A Sworn Written Form Proving Compliance With A Surrender Order

RCW 9.41.804 requires a person ordered to surrender firearms, dangerous weapons, and concealed pistol licenses to sign and file one of two written documents with the court clerk within five judicial days of the entry of a surrender order. The statute compels a restrained person to submit either –

(1) A proof of surrender form along with a law enforcement receipt form; or

(2) A declaration of non-surrender form.

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[295] See the Court's summary of the Fifth Amendment privilege in Section 6(T), *supra*.

[296] Laws of 2019, ch. 245.

[297] RCW 9.41.801(1).

[298] RCW 9.41.801(6).

[299] *Id*.

The proof of surrender and declaration of non-surrender pattern forms[300] require a defendant's signature below the following attestation –

> I declare, under penalty of perjury under the laws[301] of the State of Washington, that this statement is true and correct.[302]

A defendant in a criminal case who signs a materially false proof of surrender form or declaration of non-surrender form commits first degree perjury.[303] In addition, a defendant in a criminal case who fails to timely prove compliance with a surrender order commits a misdemeanor[304] and a gross misdemeanor,[305] and is subject to revocation of his or her release conditions.[306]

Marshall asserts that compelling him to sign any document pursuant to RCW 9.41.801(6) and 9.41.804 violates his privilege against self-incrimination protected by the Fifth Amendment and Article I, §9.

Marshall is correct for two reasons – (1) Marshall has an absolute right to remain silent during his criminal prosecution; and (2) the surrender order compels him to produce incriminating testimonial evidence.

D. All Individuals Have An Absolute Right To Remain Silent During Their Criminal Prosecution

Marshall's Fifth Amendment right to remain silent is fundamental to American liberty.[307] The Founders created this constitutional right "to prohibit the inquisitorial method of investigation in which the accused is forced to disclose the contents of his mind, or speak his guilt."[308]

The bedrock proposition underlying the Founder's creation of the Fifth Amendment privilege against self-incrimination is that a person has an absolute right to remain silent in his or her criminal prosecution. An accused's right to remain silent begins at the person's first appearance

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[300] AOC's proof of surrender form, receipt for surrendered firearms, other dangerous weapons and concealed pistol license form, and declaration of non-surrender criminal pattern forms are in the Appendix. These pattern forms may be found at the Forms link in the WASHINGTON COURTS website, http://www.courts.wa.gov/forms/ (last visited May 26, 2020).

The receipt for surrendered firearms, other dangerous weapons and concealed pistol license pattern form is to be completed by law enforcement upon receipt of the surrendered items. Marshall does not challenge this mandatory law enforcement form.

[301] The proof of surrender pattern form uses the singular "law" while the declaration of non-surrender pattern form uses the plural "laws." The use of the singular "law" or plural "laws" has no impact on the Court's analysis.

[302] This attestation meets the requirements of RCW 5.50.050 as an "unsworn declaration." RCW5.50.010(5). An unsworn declaration meeting the requirements of RCW 5.50.050 "has the same effect as a sworn declaration." RCW 5.50.030(1).

[303] As well as the crime of false swearing.

[304] RCW 9.41.810.

[305] RCW 7.21.040(5) (punitive contempt of court).

[306] CrRLJ 3.2(j) and (k).

[307] *Kastigar*, 406 U.S. at 444.

[308] *Doe*, 487 U.S. at 210-12.

in court[309] and remains in effect through trial[310] and sentencing.[311] A trial court may not draw any adverse inference in a criminal proceeding from the defendant's exercise of the Fifth Amendment right to remain silent.[312]

This Court's surrender order compels Marshall to file written proof of compliance with the order by either executing a proof of surrender form or declaration of non-surrender form. Both forms require Marshall to sign them under penalty of perjury.

This Court's surrender order in effect calls Marshall to the witness stand, places him under oath, and demands he testify as follows –

> "On (date), at (time), I surrendered all firearms, dangerous weapons and concealed pistol licenses to (law enforcement agency), law enforcement agency case number (number)."[313]
>
> or
>
> "I understand that the court has ordered me to surrender all firearms, other dangerous weapons that I have in my possession or control, and any concealed pistol licenses. I have not surrendered any firearms, other dangerous weapons, or concealed pistol licenses pursuant to that order because I do not have any of those items."[314]

Any choice Marshall makes is perilous –

- Marshall's refusal to testify as compelled by the surrender order is a separate crime[315] and also subjects him to arrest and revocation of his release conditions.[316]
- If Marshall testifies, any deviation by Marshall from either of the above two compelled testimonial statements is a crime[317] and also subjects Marshall to arrest and revocation of his release conditions.[318]
- If Marshall's testimony is knowingly false, he commits the class B felony crime of first degree perjury because his testimony would have been offered in an official proceeding and the false statement would certainly be material to his compliance with the surrender order.[319]

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[309] CrRLJ 3.2.1(e)(1). See also *Khandelwal v. Seattle Municipal Court*, 6 Wn.App.2d 323, ¶2 (2018) (The purpose of this preliminary appearance hearing is to provide the accused with an attorney, and to inform her of the nature of the charges against her, her right to the assistance of counsel, and the right to remain silent.").

[310] The prosecution may not force a defendant to testify. *Miranda*, 384 U.S. at 461; *Easter* 130 Wn.2d at 236. The prosecution and court may not comment at trial on a defendant's refusal to testify. *Griffin*, 380 U.S. at 614-15.

[311] *Mitchell*, 526 U.S. at 322-23.

[312] *Id*., at 327-28 (sentencing).

[313] See the proof of surrender pattern form. Appendix E.

[314] See the declaration of non-surrender pattern form. Appendix G.

[315] RCW 9.41.810 (misdemeanor for failure to comply); and/or RCW 7.21.040(5) (gross misdemeanor for contempt).

[316] CrRLJ 3.2(j) and (k) (willful violation of conditions of release).

[317] RCW 9.41.810 (misdemeanor for failure to comply), and/or RCW 7.21.040(5) (gross misdemeanor for contempt).

[318] CrRLJ 3.2(j) and (k) (willful violation of condition of release).

[319] RCW 9A.72.020. Marshall's false testimony concerning his compliance with the surrender order would also be a gross misdemeanor for false swearing in violation of RCW 9A.72.040.

If Marshall chooses to speak in his criminal case, the choice is solely his to make in the unfettered exercise of his own free will. The prosecution may not establish a person's guilt "by the simple, cruel expedient of forcing it from his own lips."[320] Marshall claims innocence.[321] Marshall's case is pending trial, and he is constitutionally presumed innocent.[322] The Fifth Amendment's right to remain silent extends to protect an innocent person.[323]

RCW 9.41.801(6), 9.41.804, and the surrender order compel Marshall to speak. He must in his criminal prosecution complete and sign a form attesting to the existence of facts under penalty of perjury or face additional criminal prosecution as well as being jailed pending trial. The Fifth Amendment clearly prohibits compelling Marshall to speak.

E. No Individual Can Be Compelled To Produce Incriminating Testimonial Evidence Absent Immunity

Even if Marshall could constitutionally be compelled to testify during his criminal prosecution, the surrender order unconstitutionally compels Marshall to face the "cruel trilemma" of self-accusation, perjury or contempt.[324]

> In the classic context of a Fifth Amendment violation – forcing a defendant to testify – impermissible compulsion is evidenced by the "cruel trilemma" facing the defendant at trial: testify and submit to self-incrimination; testify falsely, risking perjury; or refuse to testify, risking contempt of court.
>
> It is well established that the Fifth Amendment prevents the state from forcing this choice upon a defendant.[325]

The Fifth Amendment privilege against self-incrimination protects against compelling a person to produce "testimonial evidence" which "incriminates" the person.

i. Government Compulsion

The Fifth Amendment element of government compulsion is unquestionably met here. A court order to provide proof of compliance with a surrender order issued pursuant to RCW 9.41.800 is state compulsion under the Fifth Amendment.[326]

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[320] *Culombe v. Connecticut*, 367 U.S. 568, 582, 81 S.Ct. 1860, 6 L.Ed.2d 1037 (1961)

[321] It does not matter under the Fifth Amendment whether Marshall actually possesses or has access to the surrendered property because the Fifth Amendment privilege protects the truthful response of a person who claims innocence. *Reiner*, 532 U.S. at 21.

[322] "[I]nnocence can only raise an inference of innocence, not of guilt." *United States v. Scott*, 450 F.3d 863, 874 (9th Cir. 2006).

[323] *Reiner*, 532 U.S. at 17.

[324] *Doe*, 487 U.S. at 212.

[325] *Stalsbroten*, 138 Wn.2d at 235 (citations omitted) (emphasis added) (paragraph added for ease of reading).

[326] See also *Butler*, 137 Wn.App. at ¶22 ("The risk of incarceration is sufficient compulsion to implicate the Fifth Amendment.").

ii. Testimonial Evidence

To be testimonial, the person's communication must itself, explicitly or implicitly, relate a factual assertion or disclose information.[327]

Compelling Marshall to testify concerning his compliance with this Court's surrender order would obviously relate Marshall's communication of a factual assertion or disclose information and provide testimonial evidence.

iii. Incrimination

Finally, this Court's surrender order issued pursuant to RCW 9.41.801(6) and 9.41.804 compels Marshall to testify under penalty of perjury and outlines the exact testimony Marshall must recite. This is precisely what would occur under the Star Chamber inquisitorial method.

The Star Chamber would place Marshall under oath, and compel him to answer questions designed to uncover uncharged offenses without evidence from any other source that Marshall did in fact possess any of the surrendered property. Failure to comply resulted in severe penalties.

Marshall's execution of a proof of surrender form or a declaration of non-surrender form as compelled by the Court's surrender order would not be of his own free will. The government has no idea whether Marshall possesses the surrendered property. Even if it did, the government could not constitutionally compel Marshall to testify in his pending criminal case without immunity.

Marshall cannot be compelled during his criminal prosecution to sign any incriminating document without first receiving a grant of immunity, which the prosecution declined to offer and the surrender statutes do not contain.

iv. Conclusion

The surrender compliance provisions in RCW 9.41.801(6) and 9.41.804 compel Marshall to provide incriminating testimonial evidence.

After conducting the required "searching legal analysis," this Court is fully convinced the surrender compliance provisions in RCW 9.41.801(6) and RCW 9.41.804 violate the Fifth Amendment and Article I, §9 beyond a reasonable doubt. Accordingly, these provisions are void.

[327] *Doe*, 487 U.S. at 210.

9. THE TESTIMONIAL PROVISIONS OF RCW 9.41.801(6) VIOLATE THE FIFTH AMENDMENT & ARTICLE I, §9

A. RCW 9.41.801(6) Requires A Trial Court To Compel A Non-Compliant Restrained Person To Testify Under Oath Verifying Compliance With A Surrender Order

In additional to the surrender compliance procedures previously discussed, trial courts are now also statutorily required to compel a non-compliant restrained person to appear in court and testify verifying compliance with a surrender order.[328] RCW 9.41.801(6) reads in pertinent part –

> If the court does not have a sufficient record before it on which to make such a finding [of a restrained person's compliance with a surrender order], the court must set a review hearing to occur as soon as possible at which the respondent must be present and provide testimony to the court under oath verifying compliance with the court's order.[329]

When the legislature uses the word "shall," it imposes a presumptively mandatory duty rather than conferring discretion. Only where a contrary legislative intent is shown will "shall" be interpreted as being directory instead of mandatory.[330]

RCW 9.41.801(6) provides that "the court must set a reviewing hearing" at which the restrained person "must be present and provide testimony" creates a duty on the court to do so. The court lacks statutory discretion to decline to compel a non-compliant restrained person from appearing in court at a review hearing and testify.

Marshall did not file a proof of surrender form or a declaration of non-surrender form as required by this Court's surrender order. For this reason, this Court at the mandatory compliance review hearing entered an order finding Marshall not in compliance with the surrender order.[331] This Court, though, stayed the mandatory compliance review testimonial hearing pending resolution of Marshall's constitutional motions.

Marshall asserts that the statute compels him to provide testimony to the Court under oath verifying compliance with this Court's surrender order and thus violates his privilege against self-incrimination protected by the Fifth Amendment and Article I, §9.

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[328] Laws of 2019, ch. 245.

[329] Emphasis added.

[330] *State v. Bartholomew*, 104 Wn.2d 844, 848 (1985). "Must" is a synonym of "shall" and operates to create a duty rather than conferring discretion. *State v. Petterson*, 190 Wn.2d 92, ¶17 (2018).

[331] Appendix C.

Marshall is correct for two reasons – (1) Marshall has an absolute right to remain silent during his criminal prosecution; and (2) the statute's testimonial provision compels Marshall to produce incriminating testimonial evidence.

B. All Individuals Have An Absolute Right To Remain Silent During Their Criminal Prosecution

Marshall's Fifth Amendment right to remain silent is fundamental to American liberty.[332] The Founders created this constitutional right "to prohibit the inquisitorial method of investigation in which the accused is forced to disclose the contents of his mind, or speak his guilt."[333]

The bedrock proposition underlying the Founder's creation of the Fifth Amendment privilege against self-incrimination is that a person has an absolute right to remain silent in his or her criminal prosecution. An accused's right to remain silent begins at the person's first appearance in court[334] and remains in effect through trial[335] and sentencing.[336] A trial court may not draw any adverse inference in a criminal proceeding from a defendant's exercise of the Fifth Amendment right to remain silent.[337]

RCW 9.41.801(6) requires the Court to call Marshall to the witness stand, place him under oath, and demand he verify compliance with the surrender order by testifying as follows –

> "On (date), at (time), I surrendered all firearms, dangerous weapons and concealed pistol licenses to (law enforcement agency), law enforcement agency case number (number)."[338]
>
> or
>
> "I understand that the court has ordered me to surrender all firearms, other dangerous weapons that I have in my possession or control, and any concealed pistol licenses. I have not surrendered any firearms, other dangerous weapons, or concealed pistol licenses pursuant to that order because I do not have any of those items."[339]

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[332] *Kastigar*, 406 U.S. at 444.
[333] *Doe*, 487 U.S. at 210-12.
[334] CrRLJ 3.2.1(e)(1). See also *Khandelwal v. Seattle Municipal Court*, 6 Wn.App.2d 323, ¶2 (2018) (The purpose of this preliminary appearance hearing is to provide the accused with an attorney, and to inform her of the nature of the charges against her, her right to the assistance of counsel, and the right to remain silent.").
[335] The prosecution may not force a defendant to testify. *Miranda*, 384 U.S. at 461; *Easter* 130 Wn.2d at 236. The prosecution and court may not comment at trial on a defendant's refusal to testify. *Griffin*, 380 U.S. at 614-15.
[336] *Mitchell*, 526 U.S. at 322-23.
[337] *Id*., at 327-28.
[338] See the proof of surrender pattern form. Appendix E.
[339] See the declaration of non-surrender pattern form. Appendix G.

Any choice Marshall makes is perilous –

- Marshall's refusal to testify as compelled by the surrender order is a separate crime[340] and also subjects him to arrest and revocation of his release conditions.[341]
- If Marshall testifies, any deviation by Marshall from either of the above two compelled testimonial statements is a crime[342] and also subjects Marshall to arrest and revocation of his release conditions.[343]
- If Marshall's testimony is knowingly false, he commits the class B felony crime of first degree perjury because his testimony would have been offered in an official proceeding and the false statement would certainly be material to his compliance with the surrender order.[344]

Marshall's refusal to testify as required by RCW 9.41.801(6) is a separate crime[345] and also subjects him to arrest and revocation of his release conditions.[346]

If Marshall testifies, any deviation by Marshall from the above two compelled testimonial statements is a crime[347] and also subjects Marshall to arrest and revocation of his release conditions.[348]

If Marshall's testimony is knowingly false, he commits the class B felony crime of first degree perjury because the testimony would be offered in an official proceeding and the false statement would certainly be material to his compliance with the surrender order.[349]

If Marshall chooses to speak in his criminal case, the choice is solely his to make in the unfettered exercise of his own free will. The prosecution may not establish a person's guilt "by the simple, cruel expedient of forcing it from his own lips."[350] Marshall claims innocence.[351] Marshall's case is pending trial, and he is constitutionally presumed innocent.[352] The Fifth Amendment right to remain silent extends to protect an innocent person.[353]

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[340] RCW 9.41.810 (misdemeanor for failure to comply); and/or RCW 7.21.040(5) (gross misdemeanor for contempt).
[341] CrRLJ 3.2(j) and (k) (willful violation of conditions of release).
[342] RCW 9.41.810 (misdemeanor for failure to comply), and/or RCW 7.21.040(5) (gross misdemeanor for contempt).
[343] CrRLJ 3.2(j) and (k) (willful violation of condition of release).
[344] RCW 9A.72.020. Marshall's false testimony concerning his compliance with the surrender order would also be a gross misdemeanor for false swearing in violation of RCW 9A.72.040.
[345] RCW 9.41.810 (misdemeanor for failure to comply); and/or RCW 7.21.040(5) (gross misdemeanor for contempt).
[346] CrRLJ 3.2(j) and (k) (willful violation of conditions of release).
[347] RCW 9.41.810 (misdemeanor for failure to comply), and/or RCW 7.21.040(5) (gross misdemeanor for contempt).
[348] CrRLJ 3.2(j) and (k) (willful violation of condition of release).
[349] RCW 9A.72.020. Marshall's false testimony concerning his compliance with the surrender order would also be a gross misdemeanor for false swearing in violation of RCW 9A.72.040.
[350] *Culombe*, 367 U.S. at 582.
[351] It does not matter under the Fifth Amendment whether Marshall actually possesses or has access to the surrendered property because the Fifth Amendment privilege protects the truthful response of a person who claims innocence. *Reiner*, 532 U.S. at 21.
[352] "[I]nnocence can only raise an inference of innocence, not of guilt." *Scott*, 450 F.3d at 874.
[353] *Reiner*, 532 U.S. at 17.

RCW 9.41.801(6) compels Marshall to speak. He must in his criminal prosecution take the witness stand and attest to the existence of facts under oath or face additional criminal prosecution as well as being jailed pending trial. The Fifth Amendment clearly prohibits compelling Marshall to speak.

C. No Individual Can Be Compelled To Produce Incriminating Testimonial Evidence Absent Immunity

Even if Marshall could constitutionally be compelled to testify during his criminal prosecution, RCW 9.41.801(6) unconstitutionally compels Marshall to face the "cruel trilemma" of self-accusation, perjury or contempt.[354]

The Fifth Amendment's privilege against self-incrimination protects against compelling a person to produce "testimonial evidence" which "incriminates" the person.

i. Government Compulsion

The Fifth Amendment element of government compulsion is unquestionably met here. A court order to provide testimonial proof of compliance with a surrender order issued pursuant to RCW 9.41.800 is state compulsion under the Fifth Amendment.[355]

ii. Testimonial Evidence

To be testimonial, the person's communication must itself, explicitly or implicitly, relate a factual assertion or disclose information.[356]

Compelling Marshall to testify concerning his compliance with the Court's surrender order would obviously relate Marshall's communication of a factual assertion or disclose information and provide testimonial evidence.

iii. Incrimination

Finally, RCW 9.41.801(6) compels Marshall to testify under oath and outlines the exact testimony Marshall must recite. This is precisely what would occur under the historical Star Chamber inquisitorial system.

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[354] *Doe*, 487 U.S. at 212. See also *Stalsbroten*, 138 Wn.2d at 235.
[355] See also *Butler*, 137 Wn.App. at ¶22 ("The risk of incarceration is sufficient compulsion to implicate the Fifth Amendment.").
[356] *Doe*, 487 U.S. at 210.

Marshall's testimony as compelled by this Court's surrender order would not be of his own free will. The government has no idea whether Marshall possesses the surrendered property. Even if it did, the government could not constitutionally compel Marshall to testify in his pending criminal case without immunity.

Marshall cannot be compelled during his criminal prosecution to testify without first receiving a grant of immunity, which the prosecution declined to offer and the surrender statutes do not contain.

iv. Conclusion

The surrender compliance provisions in RCW 9.41.801(6) compels Marshall to provide incriminating testimonial evidence.

After conducting the required "searching legal analysis," this Court is fully convinced the surrender compliance provisions in RCW 9.41.801(6) violate the Fifth Amendment and Article I, §9 beyond a reasonable doubt. Accordingly, these provisions are void.

10. SEARCH, SEIZURE, & PRIVACY – THE FOURTH AMENDMENT & ARTICLE I, §7

A. Fourth Amendment

The Fourth Amendment reads –

> 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.[357]

The Fourth Amendment provides the people with protection against two separate governmental actions – (1) unreasonable searches and seizures; and (2) general warrants. The basic purpose of the Fourth Amendment is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials.[358]

i. Unreasonable Searches And Seizures Are Prohibited

Since the Fourth Amendment permits only reasonable searches and seizures, warrantless searches and seizures are per se unreasonable under the Fourth Amendment's reasonableness prong unless justified by only a few specifically established and well delineated exceptions to the warrant requirement which are "jealously and carefully drawn."

> The State proposes three distinct theories to bring the facts of this case within one or another of the exceptions to the warrant requirement. In considering them, we must not lose sight of the Fourth Amendment's fundamental guarantee. Mr. Justice Bradley's admonition in his opinion for the Court almost a century ago in *Boyd v. United States* is worth repeating here:
>
> > It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.
>
> Thus the most basic constitutional rule in this area is that searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment – subject only to a few specifically established and well delineated exceptions.

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[357] Emphasis added.

[358] *Carpenter v. United States*, ___ U.S. ___, 138 S.Ct. 2206, 2213, 201 L.Ed.2d 507 (2018) (citation omitted) (quotation marks omitted) (emphasis added).

> The exceptions are jealously and carefully drawn, and there must be a showing by those who seek exemption … that the exigencies of the situation made that course imperative. (T)he burden is on those seeking the exemption to show the need for it.
>
> In times of unrest, whether caused by crime or racial conflict or fear of internal subversion, this basic law and the values that it represents may appear unrealistic or extravagant to some. But the values were those of the authors of our fundamental constitutional concepts.
>
> In times not altogether unlike our own they won – by legal and constitutional means in England, and by revolution on this continent – a right of personal security against arbitrary intrusions by official power. If times have changed, reducing everyman's scope to do as he pleases in an urban and industrial world, the changes have made the values served by the Fourth Amendment more, not less, important.[359]

ii. General Warrants Are Prohibited

The Framers sought to curb abuses from unconstrained judicial power by limiting judicial discretion and prohibiting general warrants.[360] By its very language, the Fourth Amendment authorizes the judicial branch to issue warrants only where four prerequisites are all present –

1. Probable cause;
2. Supported by oath or affirmation;
3. Particularly describing the place to be searched; and
4. The persons or things to be seized.

iii. A Court Order May Function As A Warrant

Under both the Fourth Amendment and Article I, §7, a court order may function as a warrant so long as the order meets the constitutional requirements of a valid Fourth Amendment warrant. While normally a warrant in Washington is issued under CrR 2.3 or CrRLJ 2.3, neither the federal nor state constitutions limit warrants to only those permitted by court rule.[361]

For a court order to satisfy the Fourth Amendment warrant requirement, though, the court order may issue only where –

> (1) a neutral and detached magistrate (2) makes a determination of probable cause based on oath or affirmation and (3) the [court order] particularly describes the place to be searched and the items to be seized.[362]

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[359] *Coolidge v. New Hampshire*, 403 U.S. 443, 453-55, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971) (*Boyd* citation omitted) (quotation marks omitted) (underline emphasis added) (paragraphs added for ease of reading), *overruled on other grounds by Horton v. California*, 496 U.S. 128, 110 S.Ct. 2301, 110 L.Ed.2d 112 (1990).

[360] *Chimel v. California*, 395 U.S. 752, 760-61, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969).

[361] *State v. Garcia-Salgado*, 170 Wn.2d 176, ¶18 (2010) (citation omitted).

[362] *Id.*, at ¶14 (citation omitted).

B. Our House Is Our Castle – The Core Of Fourth Amendment Protection

In 1644, Sir Edward Coke discussed the sanctity of a person's home –

> For a man's house is his Castle, and each man's home is his safest refuge.[363]

"Our homes hold a special place in our constitutional jurisprudence."[364] Both the First Amendment[365] and Article I, §7[366] specifically protect the privacy of one's home from government intrusion.

> In no area is a citizen more entitled to his privacy than in his or her home. For this reason, the closer officers come to intrusion into a dwelling, the greater the constitutional protection.[367]

The legislature has for a century provided protection of the privacy of a person's house from unwarranted government intrusion.

> In addition, our state Legislature has long provided protection against unlawful government intrusions into the home, making it a gross misdemeanor "for any policeman or other peace officer to enter and search any private dwelling house or place of residence without the authority of a search warrant issued upon a complaint as by law provided." RCW 10.79.040.[368]

Just one year ago, the Washington Supreme Court discussed this fundamental concept.

> From earliest days, the common law drastically limited the authority of law officers to break the door of a house to effect an arrest. Such action invades the precious interest of privacy summed up in the ancient adage that a man's house is his castle.
>
> As early as the 13th Yearbook of Edward IV (1461-1483), at folio 9, there is a recorded holding that it was unlawful for the sheriff to break the doors of a man's house to arrest him in a civil suit in debt or trespass, for the arrest was then only for the private interest of a party. Remarks attributed to William Pitt, Earl of Chatham, on the occasion of debate in Parliament on the searches incident to the enforcement of an excise on cider, eloquently expressed the principle:
>
> > "The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter – all his force dares not cross the threshold of the ruined tenement!"[369]

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[363] E. COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND: CONCERNING HIGH TREASON, AND OTHER PLEAS OF THE CROWN, AND CRIMINALL CAUSES 162 (1644) (Latin phrase translated into English).

Coke's statement was quoted in *Carpenter*, 138 S.Ct. at 2239 (Thomas, J., dissenting) (also quoting 3 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 288 (1768) ("[E]very man's house is looked upon by the law to be his castle.")).

[364] *City of Shoreline v. McLemore*, 193 Wn.2d 225, ¶2, *cert. denied sub nom. McLemore v. City of Shoreline, Washington*, ___ U.S. ___, 140 S.Ct. 673, 205 L.Ed.2d 438 (2019).

[365] "The right of the people to be secure in their persons, houses, papers, and effects …" (emphasis added).

[366] "No person shall be disturbed in his private affairs, or his home invaded…" (emphasis added).

[367] *State v. Young*, 123 Wn.2d 173, 185 (1994) (quoting *State v. Chrisman*, 100 Wn.2d 814, 820 (1984)).

[368] *State v. Ferrier*, 136 Wn.2d 103, 112 (1998). RCW 10.79.040 was enacted in 1921. Laws of 1921, ch. 71.

[369] *McLemore*, 193 Wn.2d at ¶15 (quoting *Miller v. United States*, 357 U.S. 301, 306-7, 78 S.Ct. 1190, 2 L.Ed.2d 1332 (1958) (citations omitted) (footnotes omitted) (emphasis added) (paragraph added for ease of reading).

The core of the Fourth Amendment is "the right of a man to retreat into his own home and there be free from unreasonable government intrusion."[370]

Thus, search warrants are ordinarily required for searches of dwellings.[371]

> [I]n the case of the search of the interior of homes – the prototypical and hence most commonly litigated area of protected privacy – there is a ready criterion, with roots deep in the common law, of the minimal expectation of privacy that exists, and that is acknowledged to be reasonable.[372]

C. Writs of Assistance And General Warrants Resulted In The Fourth Amendment

The Founders crafted the Fourth Amendment as a response to the reviled general warrants and writs of assistance of the colonial era, which allowed British officers to rummage through homes in an unrestrained search for evidence of criminal activity.[373] Writs of assistance were especially used by customs officials as blanket authority to search American colonists for goods imported in violation of the British tax laws.[374]

The King's representatives, "doubtlessly with muskets in hand," entered homes at will in both England and the colonies.[375] As John Adams recalled, the patriot James Otis' 1761 speech condemning writs of assistance was "the first act of opposition to the arbitrary claims of Great Britain" and helped spark the Revolution itself.[376]

The colonists widespread hostility to writs of assistance became the driving force behind the adoption of the Fourth Amendment.[377] Writs of assistance were a type of general warrant.

> They received their name from the fact that they commanded all officers and subjects of the Crown to assist in their execution. Once issued, they lasted for the life of the sovereign and the discretion delegated to the official was therefore practically absolute and unlimited. They allowed the bearer to search at will and open any package. The Fourth Amendment reflects, among other things, our founders' abhorrence at such unwarranted intrusions.[378]

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[370] *Silverman v. United States*, 365 U.S. 505, 511, 81 S.Ct. 679, 5 L.Ed.2d 734 (1961).
[371] *Schmerber v. California*, 384 U.S. 757, 770, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966).
[372] *Kyllo v. United States*, 533 U.S. 27, 34, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001).
[373] *Carpenter*, 138 S. Ct. at 2213.
[374] *Stanford v. Texas*, 379 U.S. 476, 481, 85 S.Ct. 506, 13 L.Ed.2d 431 (1965).
[375] *State v. Schultz*, 170 Wn.2d 746, ¶18 (2011).
[376] *Carpenter, supra*.
[377] *United States v. Verdugo-Urquidez*, 494 U.S. 259, 266, 110 S.Ct. 1056, 108 L.Ed.2d 222 (1990).
In 1780, John Adams drafted Article XIV of the Massachusetts Constitution which prohibited unreasonable searches and seizures and general warrants. This constitutional provision served as a model for the Fourth Amendment. *Carpenter*, 138 S.Ct. at 2240 (Thomas, J., dissenting) (citations omitted).
[378] *Schultz*, 170 Wn.2d at ¶18 n.3 (citations omitted) (quotation marks omitted).

D. The Fourth Amendment Protects Reasonable Expectations Of Privacy

For much of our history, Fourth Amendment search doctrine was "tied to common-law trespass" and focused on whether the Government "obtains information by physically intruding on a constitutionally protected area."[379] More recently, the Supreme Court has recognized that "property rights are not the sole measure of Fourth Amendment violations."[380]

In *Katz v. United States*,[381] the Supreme Court established that "the Fourth Amendment protects people, not places," and expanded the Court's conception of the Amendment to protect certain expectations of privacy as well.

> When an individual seeks to preserve something as private, and his expectation of privacy is one that society is prepared to recognize as reasonable, we have held that official intrusion into that private sphere generally qualifies as a search and requires a warrant supported by probable cause.[382]

Although no single guideline definitively resolves which expectations of privacy are entitled to Fourth Amendment protection, the analysis is informed by historical understandings "of what was deemed an unreasonable search and seizure when [the Fourth Amendment] was adopted."[383]

> On this score, our cases have recognized some basic guideposts. First, that the Amendment seeks to secure "the privacies of life" against "arbitrary power." *Boyd v. United States*. Second, and relatedly, that a central aim of the Framers was "to place obstacles in the way of a too permeating police surveillance." *United States v. Di Re*, 332 U.S. 581, 595, 68 S.Ct. 222, 92 L.Ed. 210 (1948).[384]

After determining that a search or seizure is entitled to constitutional protection under the Fourth Amendment, a court must review of the reasonableness of the search or seizure.

> [W]hat is reasonable depends on the context within which a search takes place. The determination of the standard of reasonableness governing any specific class of searches requires balancing the need to search against the invasion which the search entails.[385]

E. Fourth Amendment Definition Of "Search"

Under the Fourth Amendment, a "search" occurs if the government intrudes upon a subjective and reasonable expectation of privacy.[386]

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[379] *United States v. Jones*, 565 U.S. 400, 405-6 n.3, 132 S.Ct. 945, 181 L.Ed.2d 911 (2012).
[380] *Soldal v. Cook County*, 506 U.S. 56, 64, 113 S.Ct. 538, 121 L.Ed.2d 450 (1992).
[381] *Katz v. United States*, 389 U.S. 347, 351, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967).
[382] *Carpenter*, *supra* (citation omitted) (quotation marks omitted).
[383] *Carroll v. United States*, 267 U.S. 132, 149, 45 S.Ct. 280, 69 L.Ed. 543 (1925).
[384] *Carpenter*, 138 S.Ct. at 2214 (*Boyd* citation omitted) (underline emphasis added).
[385] *New Jersey v. T.L.O.*, 469 U.S. 325, 337, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985) (citation omitted) (quotation marks omitted).
[386] *Katz*, 389 U.S. at 351-52.

F. Fourth Amendment Definition Of "Seizure"

A person has been "seized" within the meaning of the Fourth Amendment "only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."[387] A show of authority, however, does not constitute a seizure where a person does not accede to the authority.[388]

G. The Fourth Amendment Generally Requires Individualized Suspicion Of Wrongdoing

Ordinarily, a search or seizure must be based on individualized suspicion of wrongdoing to be reasonable under the Fourth Amendment.[389]

H. The Privacy Right Of Autonomous Decision-Making – The Right To Be "Let Alone"

"The United States Supreme Court has identified a right of privacy emanating from the penumbra of the specific guarantees of the Bill of Rights and from the language of the First, Fourth, Fifth, Ninth and Fourteenth Amendments."[390]

> Professor Kurland has written:
>
> "The concept of a constitutional right of privacy still remains largely undefined. There are at least three facets that have been partially revealed, but their form and shape remain to be fully ascertained.
>
> The first is the right of the individual to be free in his private affairs from governmental surveillance and intrusion.
>
> The second is the right of an individual not to have his private affairs made public by the government.
>
> The third is the right of an individual to be free in action, thought, experience, and belief from governmental compulsion." The private I, the University of Chicago Magazine 7, 8 (autumn 1976).[391]

The Supreme Court has identified two types of interests protected by this constitutionally protected "zone of privacy" – (1) the right to autonomous decision-making protecting a person's interest in independence in making certain kinds of important decisions without governmental interference; and (2) the right to confidentiality protecting nondisclosure of intimate personal information.[392]

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[387] *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980).

[388] *California v. Hodari D.*, 499 U.S. 621, 627-29, 111 S Ct. 1547, 113 L.Ed.2d 690 (1991).

[389] *Chandler v. Miller*, 520 U.S. 305, 313, 117 S.Ct. 1295, 137 L.Ed.2d 513 (1997).

[390] *In re Colyer*, 99 Wn.2d 114, 119 (1983) (Article I, §7 provides a constitutional right of privacy for an adult who is incurably and terminally ill to refuse treatment that serves only to prolong the dying process.).

[391] *Whalen v. Roe*, 429 U.S. 589, 600 n.24, 97 U.S. 869, 51 L.Ed.2d 64 (1977) (emphasis added).

[392] *Id*., at 599-600; *O'Hartigan v. Department of Personnel*, 118 Wn.2d 111, 117 (1991) (state patrol use of polygraph testing on job applicant does not violate the applicant's privacy right to confidentiality under federal or state constitutions).

In the often-cited dissent in *Olmstead v. United States,*[393] Justice Brandeis characterized "the right to be let alone" as "the right most valued by civilized men." A person's privacy right to be let alone has "special force in the privacy of the home and its immediate surroundings."[394]

A person's interest in autonomous decision-making is a fundamental right and as such is accorded the "utmost constitutional protection."

> Government action which infringes on this right is given strict scrutiny and the State must identify a compelling governmental interest for such action to be justified.[395]

I. The Autonomous Decision-Making Doctrine And The Unconstitutional Conditions Doctrine

In *Scott,*[396] the defendant was arrested in Nevada on drug possession charges. He was released on his own recognizance pending trial, but only after he agreed to sign a form stating he agreed to comply with certain conditions including consent to – (1) random drug testing "anytime of the day or night by any peace officer without a warrant;" and (2) having his home searched for drugs "by any peace officer anytime[,] day or night[,] without a warrant."

Based on an informant's tip, state officers went to Scott's house and administered a urine test. When Scott tested positive for methamphetamine, the officers arrested him and searched his house pursuant to the pretrial release order and without a warrant. Ultimately, a shotgun was found and Scott was charged with unlawfully possessing an unregistered shotgun. The government conceded that the tip did not establish probable cause.

Many pretrial defendants willingly consent to various pretrial conditions giving up some rights "in order to sleep in their own beds while awaiting trial."[397] But the government's ability to extract waivers of rights from pretrial defendants is limited by the "unconstitutional conditions" doctrine.

> The "unconstitutional conditions" doctrine limits the government's ability to exact waivers of rights as a condition of benefits, even when those benefits are fully discretionary. Government is a monopoly provider of countless services, notably law enforcement, and we live in an age when government influence and control are pervasive in many aspects of our daily lives. [398]

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[393] *Olmstead v. United States*, 277 U.S. 438, 478, 48 S.Ct. 564, 72 L.Ed. 944 (1928) (Brandeis, J., dissenting).

[394] *Hill*, 530 U.S. at 716-17 ("The unwilling listener's interest in avoiding unwanted communication has been repeatedly identified in our cases. It is an aspect of the broader 'right to be let alone' that one of our wisest Justices characterized as 'the most comprehensive of rights and the right most valued by civilized men.' ") (citations omitted).

[395] *O'Hartigan, supra* (emphasis added).

[396] *United States v. Scott*, 450 F.3d 863 (9th Cir. 2006).

[397] *Id*., at 865-66.

[398] *Id*., at 866 (citations omitted) (footnote omitted) (paragraph added for ease of reading).

The unconstitutional conditions doctrine is especially important in the Fourth Amendment context because whether a search has occurred "depends on whether a reasonable expectation of privacy has been violated.[399]

While the *Katz* principle originally was used to expand Fourth Amendment protection, it can also serve to diminish such protection in private places such as houses.

> The focus on subjective expectations can give rise to the following chain of logic: By assenting to warrantless house searches and random, warrantless urine tests, Scott destroyed his subjective expectation of privacy, and this in turn made his searches no longer searches, depriving him of Fourth Amendment protection altogether. But the Supreme Court has resisted this logic, recognizing the slippery-slope potential of the *Katz* doctrine…[400]

One released pending trial on criminal charges does not lose his or her Fourth Amendment right to be free of unreasonable searches.[401] Unlike probationers who have been convicted and have a lesser expectation of privacy than the public at large, "pretrial releasees are ordinary people who have been accused of a crime but are presumed innocent."[402]

> People released pending trial, by contrast [to a probationer], have suffered no judicial abridgment of their constitutional rights.[403]

Accordingly, a trial court's power to impose conditions of pretrial release is not unlimited and is subject to constitutional provisions.[404]

Although the *Scott* case turned on the constitutionality of home searches to which a pretrial defendant was subject, the Court of Appeals in *Butler v. Kato* held that the doctrine of unconstitutional conditions serves to protect a pretrial defendant's constitutional right to autonomy.

> While the *Scott* court did focus on the accused's Fourth Amendment rights, the overarching theme of the decision was an accused's protection from unconstitutional deprivation of rights during the pretrial period. The doctrine of unconstitutional conditions is not limited to searches; it protects those constitutional rights that preserve spheres of autonomy.
>
> The *Scott* court was concerned with the erosion of pretrial rights in general.
>
> > Giving the government free rein to grant conditional benefits creates the risk that the government will abuse its power by attaching strings strategically, striking lopsided deals and gradually eroding constitutional protections. Where a constitutional right "functions to preserve spheres of autonomy ...

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[399] *Id*., at 867 (citing *Katz*, 389 U.S. at 361).
[400] *Id*., at 867.
[401] *Id*., at 868.
[402] *Id*., at 871.
[403] *Id*., at 872 (footnote omitted).
[404] *Id*., at 867-68.

> the [u]nconstitutional conditions doctrine protects that [sphere] by preventing governmental end-runs around the barriers to direct commands."[405]

The *Scott* case will be discussed below concerning the special needs doctrine.

J. The Fourth Amendment Special Needs Doctrine

As noted above, to be reasonable under the Fourth Amendment a search generally must be based on individualized suspicion of wrongdoing.

In 1967, though, the United States Supreme Court in *Camara*[406] introduced the "administrative search" doctrine which permitted suspicionless and warrantless searches during regulatory inspections so long as "reasonable legislative or administrative standards" were in place and were satisfied in each case.[407]

The Supreme Court found it reasonable under the Fourth Amendment to dispense with the requirement of traditional probable cause where – (1) an administrative inspection was neither personal in nature nor aimed at the discovery of evidence of crime; (2) involved a relatively limited invasion of privacy; and (3) was the only effective method to enforce compliance with minimum physical standards for private property imposed by municipal codes.[408]

> Unlike the search pursuant to a criminal investigation, the inspection programs at issue here are aimed at securing city-wide compliance with minimum physical standards for private property. The primary governmental interest at stake is to prevent even the unintentional development of conditions which are hazardous to public health and safety. Because fires and epidemics may ravage large urban areas, because unsightly conditions adversely affect the economic values of neighboring structures, numerous courts have upheld the police power of municipalities to impose and enforce such minimum standards even upon existing structures.
>
> In determining whether a particular inspection is reasonable – and thus in determining whether there is probable cause to issue a warrant for that inspection – the need for the inspection must be weighed in terms of these reasonable goals of code enforcement.[409]

Over time, the "administrative search" doctrine evolved to the broader "special needs" doctrine where a search or seizure is directed towards special needs beyond the normal need for law enforcement and the Fourth Amendment's warrant and probable cause requirements are impracticable.[410]

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[405] *Butler v. Kato*, 137 Wn.App. 515, ¶¶34-35 (2007) (quoting *Scott*, 450 F.3d at 866) (citations omitted) (footnote omitted) (paragraph added for ease of reading).
[406] *Camara v. Municipal Court*, 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967).
[407] *Id*., at 538.
[408] *Id*., at 537.
[409] *Id*., at 523 (footnote omitted) (emphasis added) (paragraph added for ease of reading).
[410] *Griffin v. Wisconsin*, 483 U.S. 868, 873, 107 S.Ct. 3164, 97 L.Ed.2d 709 (1987).

Under the special needs doctrine, the justification of a Fourth Amendment intrusion cannot be based upon crime detection concerns.

> For there to be a special need, not only must there be some interest beyond normal law enforcement but also any evidence garnered from the search or seizure should not be expected to be used in any criminal prosecution against the target of the search or seizure. *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989).[411]

If a suspicionless and warrantless search is beyond a normal law enforcement interest of crime detection, courts must then undertake a context specific inquiry, examining both the competing private and public interests advanced by the parties.[412]

> In limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion.[413]

The United States Supreme Court has applied the Fourth Amendment special needs doctrine to administrative searches, border patrols, prisoners and probationers, and drug testing in certain circumstances without a warrant or individualized suspicion being required.[414] Federal appellate courts have also found this special need for suspicionless searches to apply to area-entry searches at government buildings and airports.[415]

As one commentator has noted –

> [T]he line between … a criminal investigation and … searches and seizures designed primarily to serve noncriminal law enforcement goals, is thin and, quite arguably, arbitrary. Yet, it is a line of considerable constitutional significance.[416]

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[411] *York v. Wahkiakum School Dist. No. 200*, 163 Wn.2d 297, ¶26 (2008) (emphasis added).
[412] *Chandler*, 520 U.S. at 314.
[413] *Skinner v. Ry. Labor Execs.' Assn.*, 489 U.S. 602, 624, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989).
[414] *York*, 163 Wn.2d at ¶¶26-27.
[415] *State v. Griffin*, 11 Wn.App.2d 661, ¶22 (2019) (citations omitted).
[416] *York*, 163 Wn.2d at ¶26 n.13 (quoting JOSHUA DRESSLER, UNDERSTANDING CRIMINAL PROCEDURE 323 (3d ed. 2002)).

K. Suspicionless Searches Of Pretrial Releasees And The Special Needs Doctrine

The Ninth Circuit's *Scott* case noted that somewhat surprisingly, the issue whether an individual released while awaiting trial on criminal charges could thereafter be searched without probable cause was one of first impression in any federal court and the vast majority of state courts.[417]

As previously discussed, the Fourth Amendment special needs doctrine permits suspicionless and warrantless searches where special needs exist making the normally required probable cause standard impracticable.[418]

Two purposes might justify a trial court's imposition of conditions on pretrial releasees under the special needs doctrine – (1) protecting the public from criminal activities of pretrial releasees generally; and (2) ensuring pretrial releasees appear in court.[419]

The government's interest in protecting the community from crime by anyone is legitimate and compelling. But crime prevention is not a special need justifying a suspicionless and warrantless search.

> Crime prevention is a quintessential general law enforcement purpose and therefore is the exact opposite of a special need.[420]

A generalized need to protect the community from crime does not justify, without an individualized determination, a special need to conduct suspicionless searches of a pretrial releasee to protect the public because a person awaiting trial on a criminal charge is presumed innocent.

> Moreover, the assumption that Scott was more likely to commit crimes than other members of the public, without an individualized determination to that effect, is contradicted by the presumption of innocence: That an individual is charged with a crime cannot, as a constitutional matter, give rise to any inference that he is more likely than any other citizen to commit a crime if he is released from custody. Defendant is, after all, constitutionally presumed to be innocent pending trial, and innocence can only raise an inference of innocence, not of guilt.[421]

The Ninth Circuit found no case authorizing detention of someone in jail while awaiting trial, "or the imposition of special bail conditions," based merely on the fact the person was arrested for a particular crime.

> It follows that if a defendant is to be released subject to bail conditions that will help protect the community from the risk of crimes he might commit while on bail, the conditions must be justified by a showing that defendant poses a heightened risk of misbehaving while on bail. The government

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[417] *Scott*, 450 F.3d at 864.
[418] *Id*., at 868.
[419] *Id*., at 870.
[420] *Id*.
[421] *Id*., at 874 (emphasis added).

> cannot, as it is trying to do in this case, short-circuit the process by claiming that the arrest itself is sufficient to establish that the conditions are required.[422]

As to the second purpose under the special needs doctrine – ensuring pretrial releasees appear in court – the non-law enforcement purpose is the interest in judicial efficiency. But the connection of the special need for drug testing and the search of Scott's house with appearing in court was tenuous.

> One might imagine that a defendant who uses drugs while on pretrial release could be so overcome by the experience that he misses his court date. Or, having made it to court, he may be too mentally impaired to participate meaningfully in the proceedings. These are conceivable justifications, but the government has produced nothing to suggest these problems are common enough to justify intruding on the privacy rights of every single defendant out on pretrial release. And it has produced nothing to suggest that Nevada found Scott to be particularly likely to engage in future drug use that would decrease his likelihood of appearing at trial.
>
> Drug use during pretrial release may also result in a defendant's general unreliability or, more nefariously, an increased likelihood of absconding. Whether this is plausible depends on whether drug use is a good predictor of these harms – a case that must be established empirically by the government when it seeks to impose the drug testing condition. But Nevada never attempted such an empirical demonstration in this case.[423]

Importantly, a trial court should not rely on assertions of special needs based upon hypotheticals lacking factual support from the case before the court.

> The Supreme Court has criticized assertions of special needs based on "hypothetical" hazards that are unsupported by "any indication of a concrete danger demanding departure from the Fourth Amendment's main rule."
>
> "A demonstrated problem" of drug use leading to nonappearance "would shore up" the government's assertion of a special need. As far as we can tell, the Nevada legislature has not taken the categorical position that drug use among pretrial releasees substantially impairs their tendency to show up in court; instead, it has largely left appropriate release conditions to be determined in individual cases.
>
> Nor are courts instructed to limit their consideration to the non-law-enforcement purposes that might justify special needs searches: Release conditions may both "protect the health, safety and welfare of the community and … ensure that [the releasee] will appear at all times and places ordered by the court." We are thus unable to conclude that the search regime to which Scott was subjected was necessary to ensure his appearance at trial.[424]

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[422] *Id.*

[423] *Id.*, at 870 (emphasis added).

[424] *Id.*, at 870-71 (citations omitted) (footnotes omitted) (emphasis added) (paragraphs added for ease of reading).

Finally, especially significant to the *Scott* Court was the suspicionless and warrantless search of Scott's house pursuant to a pretrial order of release.

> We are especially reluctant to indulge the claimed special need here because Scott's privacy interest in his home, where the officers came to demand the urine sample, is at its zenith. "[P]rivate residences are places in which the individual normally expects privacy free of governmental intrusion not authorized by a warrant, and that expectation is plainly one that society is prepared to recognize as justifiable." *United States v. Karo*, 468 U.S. 705, 714, 104 S.Ct. 3296, 82 L.Ed.2d 530 (1984); see also *Payton v. New York*, 445 U.S. 573, 589, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980) ("The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home …").[425]

Rejecting use of the Fourth Amendment's special needs doctrine to justify the suspicionless and warrantless drug testing of Scott and the search of his house, the Ninth Circuit suppressed the shotgun evidence seized pursuant to the pretrial order of release.

> Because the government failed to demonstrate that Nevada had special needs for obtaining the drug-testing release condition, it cannot justify the search – testing Scott for drugs without probable cause – using this approach. As discussed above, we hold only that the government has not made the requisite special needs showing in this case: It has not, for example, demonstrated a pattern of "drug use leading to nonappearance" in court nor pointed to an individualized determination that Scott's drug use was likely to lead to his nonappearance. <u>The government in this case has relied on nothing more than a generalized need to protect the community and a blanket assertion that drug-testing is needed to ensure Scott's appearance at trial. Both are insufficient.</u>
>
> We thus cannot validate Scott's search under the special needs doctrine.[426]

The Fourth Amendment special needs doctrine is not available as an exception to the Fourth Amendment's requirement of individualized suspicion concerning conditions of release a court may impose on a person released from custody pending trial on criminal charges.

L. <u>The Fourth Amendment Applies To The States</u>

The Fourth Amendment has been held to be protected by the Fourteenth Amendment Incorporation Doctrine against abridgement by the states.[427]

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[425] *Id*., at 871.

[426] *Id*., at 872 (footnotes omitted) (emphasis added).

[427] *Mapp v. Ohio*, 367 U.S. 643, 655, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961).

M. Article I, §7

Article I, §7 provides –

> INVASION OF PRIVATE AFFAIRS OR HOME PROHIBITED. No person shall be disturbed in his private affairs, or his home invaded, without authority of law.[428]

It is well established that this provision is qualitatively different from the Fourth Amendment and provides greater protections.[429]

N. Article I, §7 Protects A Broad Right To Privacy

"The right to be free from searches by government agents is deeply rooted in our nation's history and law, and it is enshrined in our state and national constitutions."[430]

Article I, §7 "is grounded in a broad right to privacy" and protects citizens from governmental intrusion into their private affairs without the authority of law.

> This provision of our state constitution is explicitly broader than the Fourth Amendment to the United States Constitution, protecting private affairs broadly and also requiring actual legal authorization for any disturbance of those affairs.[431]

History, precedent, and common sense including reasonableness all have a role to play in an Article I, §7 analysis.

> Under article I, section 7, the right to privacy is broad, and the circumstances under which that right may be disturbed are limited.
>
> Article I, section 7 is "not grounded in notions of reasonableness" as is the Fourth Amendment. Instead, article I, section 7 is grounded in a broad right to privacy and the need for legal authorization in order to disturb that right.
>
> Within this framework, "reasonableness does have a role to play" along with history, precedent, and common sense in defining both the broad privacy interests protected from disturbance, as well as the scope of disturbance that is or may be authorized by law.[432]

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[428] Emphasis added.

[429] *State v. Mayfield*, 192 Wn.2d 871, ¶12 (2019) (citing *State v. Gunwall*, 106 Wn.2d 54 (1986)).

[430] *State v. Day*, 161 Wn.2d 889, 893 (2007).

[431] *State v. Chacon Arreola*, 176 Wn.2d 284, ¶11 (2012). See also *State v. Villela*, 194 Wn.2d 451, ¶1 (2019).

[432] *Chacon Arreola*, 176 Wn.2d at ¶12 (citations omitted) (paragraphs added for ease of reading).

"Authority of law" justifying a search or seizure under Article I, §7 generally means – (1) a valid warrant issued by a neutral magistrate; (2) a recognized exception to the warrant requirement; (3) a constitutional statute; (4) a constitutional court rule;[433] or (5) in some circumstances a valid court order.[434]

Importantly, the legislature cannot use legislation to diminish a person's privacy rights under Article I, §7.

> Our constitution cannot be amended by statute, and while the legislature can give more protection to constitutional rights through legislation, it cannot use legislation to take that protection away.[435]

Article I, §7 has produced the greatest divergence between the Washington Supreme Court and the United States Supreme Court on questions of search, seizure and privacy because unlike Article I, §7, the Fourth Amendment does not explicitly protect a citizen's "private affairs."[436]

As with the Fourth Amendment, a warrantless search or seizure is per se unreasonable and presumed to violate Article I, §7 unless the prosecution shows that the search or seizure falls "within certain narrowly and jealously drawn exceptions to the warrant requirement.[437]

Recognized exceptions to the warrant requirement constitute "authority of law" under Article I, §7, but only as carefully drawn and narrowly applied.[438] The categories of "narrowly and jealously drawn" exceptions to Article I, §7's warrant requirement recognized by the Washington Supreme Court include consent, exigent circumstances, searches incident to a valid arrest, inventory searches, plain view searches, and investigatory stops.[439]

O. Article I, §7 Definition Of "Search"

An Article I, §7 "search" occurs when the government disturbs "those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant."[440]

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[433] *Villela*, 194 Wn.2d at ¶10.
[434] *State v. Olsen*, 189 Wn.2d 118, ¶16 (2017) (As a matter of first impression, DUI sentence constituted sufficient "authority of law" under Article I, §7 for random urine analysis screens of probationers.).
[435] *Villela*, 194 Wn.2d at ¶2.
[436] *Blomstrom v. Tripp*, 189 Wn.2d 379, ¶47 (2017).
[437] *Day*, 161 Wn.2d at 894 (citation omitted).
[438] *State v. Garcia-Salgado*, 170 Wn.2d 176, ¶13 (2010); *State v. Tibbles*, 169 Wn.2d 364, ¶8 (2010) ("Probable cause is not a recognized exception to the warrant requirement, but rather the necessary basis for obtaining a warrant.).
[439] *State v. Duncan*, 146 Wn.2d 166, 171-72 (2002); *State v. Arreola*, 176 Wn.2d 284, ¶13 (2012).
[440] *State v. Myrick*, 102 Wn.2d 506, 511 (1984).

> To determine whether governmental conduct intrudes on a private affair, we look at the "nature and extent of the information which may be obtained as a result of the governmental conduct" and at the historical treatment of the interest asserted.[441]

P. Article I, §7 Definition Of "Seizure"

An Article I, §7 "seizure" occurs when a reasonable person under the totality of the circumstances would not feel free to leave or to decline a government agent's request due to the agent's use of force or display of authority.[442]

Unlike the Fourth Amendment, Washington's standard is a purely objective one.[443] A government agent's subjective believe that a person would feel free to leave is immaterial to the question whether a seizure occurred.[444]

Courts consider the government agent's conduct to determine whether a reasonable person would feel free to leave.[445] Thus, the relevant question becomes whether under the circumstances, the government agent's conduct would have communicated to a reasonable person that the person was not free to leave.[446]

Q. Article I, §7 Two-Step Constitutional Analysis

Washington uses a two-step analysis to determine whether Article I, §7 has been violated – the "private affairs" prong followed by the "authority of law" prong.

> The first step requires us to determine whether the action complained of constitutes a disturbance of one's private affairs. If there is no private affair being disturbed, the analysis ends and there is no article I, section 7 violation.
>
> If, however, a private affair has been disturbed, the second step is to determine whether authority of law justifies the intrusion.[447]

Washington does not use a "balancing test" to determine whether a statute violates Article I, §7.

> The State also contends that RCW 46.55.360 is constitutional because "the state's interest in curtailing the 'great threat' of death and injury attributable to impaired driving outweighs the privacy interests of persons for whom there is probable cause to arrest for driving or controlling a vehicle while under the influence of alcohol or drugs."

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[441] *State v. Muhammad*, 194 Wn.2d 57, ¶25 (2019) (citation omitted).
[442] *State v. Rankin*, 151 Wn.2d 689, 695 (2004); *State v. O'Neill*, 148 Wn.2d 564, 574 (2003).
[443] *State v. Harrington*, 167 Wn.2d 656, 663 (2009).
[444] *O'Neill*, 148 Wn.2d at 575.
[445] *Harrington, supra*.
[446] *O'Neill*, 148 Wn.2d at 574.
[447] *State v. Puapuaga*, 164 Wn.2d 515, ¶10 (2008) (paragraph added for ease of reading).

> But that goes to whether the statute violates due process or is within the general police power of the state to enact. It is not the test to determine whether a statute is constitutional under article I, section 7. We do not use a balancing test to determine whether a statute violates article I, section 7.[448]

R. Article I, §7 Protects The Privacy Rights Of Pretrial Releasees

A few Washington cases have discussed the privacy rights of arrestees who have been released pending trial on criminal charges.

Washington appellate courts draw a sharp distinction between the privacy rights of persons released on probation conditions after being convicted and those who have been arrested and are awaiting trial.

> Relying on a case where we held a probationer had a lessened expectation of privacy, the Washington State Patrol suggests that those arrested (but not yet convicted) on DUI have a lessened expectation of privacy that justifies impounding their vehicles.
>
> But there is a world of difference between someone who has been released under probation conditions, as was the case in *State v. Olsen*,[449] and someone who has merely been arrested. We recently declined the State's invitation to hold that those charged but not yet convicted have a lessened expectation of privacy in *Blomstrom v. Tripp*.[450]

In *Puapuaga*, a pretrial in-custody detainee awaiting trial on a second degree murder charge was searched without suspicion or a warrant by hospital staff upon being transferred to Western State Hospital for a competency evaluation. Among the items seized included a threatening note to a co-defendant.

The Supreme Court upheld the warrantless inventory search and seizure under Article I, §7 because "an inmate's expectation of privacy is necessarily lowered while in custody.[451]

In *Blomstrom*, the district court ordered each out-of-custody DUI defendant awaiting trial to participate in random urinalysis testing as a condition of pretrial release. The court's program was instituted to confirm defendants were abiding by the court's order prohibiting consumption of alcohol or other impairing substances during the pendency of the criminal case.

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[448] *Villela*, 194 Wn.2d at ¶17 (statute mandating warrantless impound of vehicle upon driver's arrest for DUI violated Article I, §7) (citations omitted) (paragraph added for ease of reading).

[449] *Olsen*, 189 Wn.2d at ¶12 (DUI probationers have a reduced expectation of privacy because they are "persons whom a court has sentenced to confinement but who are serving their time outside the prison walls.").

[450] *Villela*, 194 Wn.2d at ¶16 n.4 (citations omitted) (emphasis added) (paragraph added for ease of reading).

[451] *Puapuaga*, 164 Wn.2d at ¶13 (emphasis added).

After conducting an analysis of the six nonexclusive *Gunwall*[452] factors, the Supreme Court held that compelling a criminal defendant in pretrial status to provide urine evidence to be tested was a search under Article I, §7 because compelling urine disturbs a person in their private affairs.[453]

The Supreme Court rejected the prosecution's argument that an out-of-custody defendant awaiting trial but presumed innocent has a reduced privacy interest under Article I, §7.[454]

The Court held that no "authority of law" existed under Article I, §7 to support the suspicionless and warrantless pretrial urinalysis search of an out-of-custody defendant because Article I, §7 does not permit suspicionless searches.[455] Accordingly, the trial court's pretrial urinalysis search program was held to violate Article I, §7.[456]

Two additional cases were found concerning out-of-custody pretrial defendants and court-ordered conditions of release.

In *State v. Rose*,[457] the Court of Appeals evaluated three separate defendants' urinalysis testing requirements, each imposed as a condition of out-of-custody pretrial release. The three defendants – Rose, Wilson, and Wentz – had been charged with various weapon and drug possession crimes.

The Court of Appeals found that for Rose and Wilson, pretrial urinalysis testing violated CrR 3.2. For Rose, there was no evidence supporting a dangerousness finding, and for Wilson the trial court's concern that the defendant would fail to appear "cannot support the trial court's imposition of weekly [urinalysis] … "[458]

For Wentz, the Court of Appeals engaged in an extensive constitutional analysis before concluding that the suspicionless and warrantless out-of-custody pretrial urinalysis testing violated Article I,

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[452] *Gunwall, supra.*

[453] *Blomstrom*, 189 Wn.2d at ¶54.

[454] *Id.*, at ¶67. See also *Villela*, 194 Wn.2d at ¶16 n.4.

[455] *Blomstrom*, 189 Wn.2d at ¶¶54,60. See also *City of Seattle v. Mesiani*, 110 Wn.2d 454, 458 (1988) (suspicionless and warrantless DUI sobriety roadblocks violate Article I, §7); and *Jacobsen v. City of Seattle*, 98 Wn.2d 668, 674 (1983) (suspicionless and warrantless pat-down searches by police officers of patrons attending rock concert violate Article I, §7).

[456] In response to *Blomstrom*, the legislature the following year authorized trial courts to require criminal defendants to submit to testing to determine compliance with release conditions. Laws of 2018, ch. 276, §§4 and 6, codified in RCW 10.21.030(2)(l) and 10.21.045. Washington's appellate courts have yet to determine whether these new statutes abrogate *Blomstrom's* Article I, §7 holding by providing new Article I, §7 "authority of law."

See RCW 46.61.50571(5) (pretrial electronic monitoring or alcohol abstinence monitoring parameters).

See also *State v. Griffith*, 11 Wn.App.2d 661 (2019) (In a matter of first impression, the "special needs" exception to Article I, §7's warrant requirement provides "authority of law" under Article I, §7 in the context of suspicionless and warrantless courthouse security screening searches.).

[457] *State v. Rose*, 146 Wn.App. 439 (2008).

[458] *Id.*, at ¶¶26-27.

§7 and the Fourth Amendment. The Court relied extensively on the Ninth Circuit's rejection of the special needs exception to the Fourth Amendment in the *Scott* case discussed previously.[459]

Finally, the Court of Appeals in *Kato* rejected suspicionless and warrantless pretrial conditions of release ordered against out-of-custody DUI defendants requiring submission to an alcohol evaluation, compliance with any recommended treatment requirements, and attendance of at least three self-help meetings per week.

> It appears that the district court, rather than imposing conditions appropriate for pretrial release, imposed what amounts to postconviction penalties such as might be imposed on a probationer.[460]

The *Butler* Court recognized that CrR 3.2 and CrRLJ 3.2 are not without limits and remain subject to constitutional limitations where lesser conditions are available to assure a defendant's attendance in court and to protect the public from substantial danger.[461] The Court struck the pretrial conditions, holding that they unconstitutionally violated the defendant's privilege against self-incrimination guaranteed by the Fifth Amendment and Article I, §9[462] and the constitutional privacy right of autonomous decision-making.[463] *Butler's* constitutional analysis will be discussed next.

S. Article I, §7 And The Privacy Rights Of Autonomous Decision-Making And Prohibition Of Unconstitutional Conditions

In *Butler*, the defendant was charged with DUI after allegedly causing an automobile accident. The district court released the defendant on his own recognizance, but required him while awaiting trial to submit to an alcohol evaluation, comply with any treatment requirements, and attend at least three self-help meetings per week.

The Court of Appeals held that the reasons offered by the prosecution in support of the pretrial order compelling an alcohol evaluation and treatment violated the defendant's privacy right to autonomous decision-making.[464]

> Drunken driving is certainly a matter of grave concern, but the State has shown no compelling governmental interest served in imposing pretrial treatment as a condition of Butler's release.
>
> It baldly asserts that evaluation and treatment are necessary to ensure Butler's appearance in court. It also asserts that the conditions are necessary to ensure that Butler does not arrive at court in a state of intoxication. The State also points to Butler's high blood-alcohol level as justification for imposing severely restrictive pretrial conditions on his release.

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[459] *Id*., at ¶¶28-40.
[460] *Butler v. Kato*, 137 Wn.App. 515, ¶18 (2007).
[461] *Id*., at ¶16.
[462] *Id*., at ¶¶21-25.
[463] *Id*., at ¶¶26-31.
[464] *Id*., at ¶26 (The appellate court also held these conditions of release violated Butler's constitutional privacy right to confidentiality.).

> But there is nothing in Butler's record, other than the facts surrounding his arrest, to support the State's assertions. The State's arguments do not outweigh the risk of erroneous deprivation of Butler's constitutional rights.[465]

The constitutional right to autonomous decision-making protects an accused from unconstitutional deprivation of rights during the pretrial period. "The doctrine of unconstitutional conditions is not limited to searches, it protects those constitutional rights that preserve spheres of autonomy."[466]

A pretrial order requiring an out-of-custody defendant awaiting trial to affirmatively undertake treatment places an unconstitutional restraint on the person's autonomous right to liberty in violation of Article I, §7, which has been called Washington's "due process clause."[467]

> [The trial court's pretrial order] requires an affirmative undertaking on Butler's part and represents an undue restraint on his liberty, imposed without sufficient due process.[468]

T. Article I, §7 And The Special Needs Doctrine

The Washington Supreme Court has observed that "we have a long history of striking down exploratory searches not based on at least reasonable suspicion."[469]

> Finally, this court has consistently expressed displeasure with random and suspicionless searches, reasoning that they amount to nothing more than an impermissible fishing expedition.[470]

The Washington Supreme Court has not been "easily persuaded that a search without individualized suspicion can pass constitutional muster."[471]

For example, suspicionless and warrantless random roadblock sobriety checkpoints[472] and searches of student luggage as a condition of participation in a school-sponsored trip to Canada[473] have been held to violate Article I, §7. The Supreme Court has opined –

> In the absence of individualized suspicion of wrongdoing, the search is a general search. "[W]e never authorize general, exploratory searches."[474]

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[465] *Id*., at ¶29.
[466] *Id*., at ¶¶26,34.
[467] *Id*., at ¶28.
[468] *Id*., at ¶30 (emphasis added).
[469] *York*, 163 Wn.2d at ¶31.
[470] *State v. Jorden*, 160 Wn.2d 121, ¶10 (2007) (emphasis added).
[471] *Robinson v. City of Seattle*, 102 Wn.App. 795, 815 (2000).
[472] *Mesiani*, 110 Wn.2d at 458-60.
[473] *Kuehn v. Renton School District No. 403*, 103 Wn.2d 594, 595 (1985).
[474] *Id*., at 599 (citation omitted).

But the Supreme Court has found a number of statutes authorizing suspicionless searches to be constitutional based on Fourth Amendment grounds.

> [The Washington Supreme Court] has stated in dictum or in passing that administrative searches, including courthouse searches, are constitutional under article I, section 7. Finally, it has repeatedly kept open the possibility that in some context, a "special need" for suspicionless searching beyond normal law enforcement could be recognized as an exception to the warrant requirement under article I, section 7.[475]

In *Olsen*, the Supreme Court declined the prosecution's invitation to adopt the Fourth Amendment's special needs exception in the context of random urine analysis screens of probationers.[476] The Court upheld the random screenings, however, reasoning that a trial court's sentence was "authority of law" under Article I, §7 because a probationer has a diminished privacy interests while under court supervision.[477]

The *Olsen* Court cautioned, however, that random urine screens of probationers are not like the search of a home because screening urine for prohibited substances runs a small risk of exposing other private information protected by Article I, §7.

> But random UAs, if limited to monitoring for the presence of alcohol, marijuana, or nonprescribed drugs, reveal a comparatively limited amount of private information. Unlike a search of a home, the information potentially revealed is directly linked to the "class of criminal behavior" that Olsen engaged in. Random UAs also run a smaller risk of inadvertently exposing other private information unrelated to the underlying prohibition on drug and alcohol use …[478]
>
> A search of a probationer's home, by comparison, has much wider-ranging privacy implications than a search of a prisoner's cell. For example, a search of a residence implicates not just the probationer's privacy, but potentially the privacy of third parties.
>
> In *Winterstein*,[479] we noted that third party privacy interests must be considered when probation officers seek to search a probationer's residence, and held that probation officers are required to have probable cause to believe that their probationers live at the residence they seek to search. But such considerations are inapplicable in this context.[480]

Clarifying its holding, the Supreme Court reiterated the long-standing principle that Article I, §7 will not allow generalized "fishing expedition" searches for criminal evidence.

> We also reaffirm that general, exploratory searches are not permissible under article I, section 7. See *Kuehn* (general searches are "anathema to Fourth Amendment and Const. art. 1, § 7 protections"). As such, while we find that random UAs may be permissible in order to monitor compliance with valid

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[475] *Griffith*, 11 Wn.App.2d at ¶33 (emphasis added).

[476] The Court of Appeals in *State v. Rose*, 146 Wn.App. at ¶37, similarly rejected the special needs exception in the context of pretrial random urinalysis screens. "Accordingly, we follow the [Ninth Circuit] *Scott* court's reasoning [under the Fourth Amendment previously discussed] and hold that the State failed to establish a special needs exception to the warrantless, suspicionless, searches."

[477] *Olsen*, 189 Wn.2d at ¶¶18-21.

[478] *Id.*, at ¶33 (citation omitted).

[479] *State v. Winterstein*, 167 Wn.2d 620, 630 (2009).

[480] *Olsen*, 189 Wn.2d at ¶34 (citation omitted) (emphasis added) (paragraph added for ease of reading).

> probation conditions, they may not be used impermissibly as part of "a fishing expedition to discover evidence of other crimes, past or present."[481]

Two months after *Olsen* was issued, the Supreme Court in *Blomstrom* again declined to import the Fourth Amendment special needs exception[482] into Article I, §7.

> In contrast to these prior holdings [in *Olsen*], this case concerns the prophylactic testing of defendants charged but not yet convicted. The State now suggests that these persons – charged but presumed innocent – have a reduced privacy interest as well …[483]
>
> Thus, even taking up the State's belated and unsupported argument concerning the petitioners' privacy interests, we disagree. The petitioners suffered no diminution of their privacy rights that might justify importing the federal special needs test into our article I, section 7 analysis.[484]
>
> In sum, we decline to import the federal special needs test in this context. The petitioners suffered no diminution in their privacy sufficient to justify highly invasive urinalysis testing under article I, section 7. We therefore hold that the superior court erred in failing to grant the petitioners' applications for statutory writs and in failing to find that the pretrial urinalysis testing violated article I, section 7 of the Washington Constitution.[485]

Finally, on December 31, 2019 the Court of Appeals in *Griffith* as a matter of first impression adopted the Fourth Amendment special needs exception as "authority of law" under Article I, §7 to uphold a suspicionless and warrantless search in the context of area-entry security screening for weapons at courthouses.

The *Griffith* Court, however, held that a special needs exception to Article I, §7 is narrower than the Fourth Amendment special needs exception in two important respects.

> The first is that the need for an exception to the warrant requirement is a threshold requirement, *before* any balancing of interests begins … Under the "special needs" analysis, it is not only the special need to search that is at issue, but also the special need to search without a warrant or probable cause.[486]
>
> A second respect in which prior cases suggest that the Washington exception will be narrower is in what is weighed in the balancing process. As the court stated in *Mesiani*, " 'The easiest and most common fallacy in "balancing" is to place on one side the entire, cumulated "interest" represented by the state's policy and compare it with one individual's interest in freedom from the specific intrusion on the other side.' " "A fairer balance would weigh the actual expected alleviation of the social ill against the cumulated interests invaded."[487]

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[481] *Id*., at ¶36 (citations omitted) (emphasis added).
[482] "This court has not explicitly recognized a special needs exception" under Article I, §7. *Blomstrom*, 189 Wn.2d at ¶63.
[483] *Id*, at ¶67.
[484] *Id*., at ¶69
[485] *Id*., at ¶70.
[486] *Griffith*, 11 Wn.App.2d at ¶¶47-48 (citations omitted) (quotation marks omitted) (italics in original).
[487] *Id*., at ¶49 (citations omitted).

11. *BOYD V. UNITED STATES* (1886) – THE FOURTH & FIFTH AMENDMENT CONVERGENCE THEORY

A. *Boyd* Played A Significant Role In The Development Of Article I, §7

> SECTION 7 INVASION OF PRIVATE AFFAIRS OR HOME PROHIBITED.
> No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

The language in Article I, §7 can be traced back to 1889 when Washington's Constitutional Convention rejected a proposal to adopt a provision identical to the Fourth Amendment. Instead, the Convention adopted a significantly different provision that does not even expressly refer to searches, seizures and warrants but does emphasize the privacy rights of the individual.[488]

Article I, §7 appears to be derived from the United States Supreme Court's decision in *Boyd v. United States*[489] which was issued three years before the Washington constitution was adopted.[490] As our Supreme Court noted in 1994 concerning *Boyd* –

> There, the Court stated that the protective mantle of the constitution extended to "all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life." *Boyd*, 116 U.S. at 630.[491]

Although an 1886 case, *Boyd's* holdings played and continue to play an important role in Washington in the development the liberty rights of individuals against oppressive governmental power. The United States Supreme Court's decision in *Boyd* will be examined to assist the Court with the issues presented here.[492]

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[488] ROBERT F. UTTER & HUGH D. SPITZER, THE WASHINGTON STATE CONSTITUTION (Oxford University Press 2011), at 27.

[489] *Boyd v. United States*, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746 (1886). United States Supreme Court justices have called *Boyd* "great," *Malloy*, 378 U.S. at 8 (Brennan, J., writing for the majority), and "among the greatest constitutional decisions of this Court." *Schmerber*, 384 U.S. at 776 (Black, J., dissenting, joined by Douglas, J.).

Boyd has been cited by the United States Supreme Court 236 times and Washington appellate courts 49 times. Amazingly, the case has been cited 1,585 times by federal courts and 1,371 by state courts (data obtained through a Thomson Reuters Westlaw search on May 26, 2020).

[490] *City of Seattle v. McCready*, 123 Wn.2d 260, 270 (1994).

[491] *Id*.

[492] Every United States Supreme Court case provided by the parties herein cites to *Boyd*, or cites to another United States Supreme Court case which therein cites to *Boyd*.

B. Background In *Boyd*[493]

Thirty-five cases of plate glass were seized at the Port of New York because federal import duties had not been paid. The government filed a seizure and forfeiture of property action under federal customs law against E.A. Boyd & Sons.[494] Violation of the customs law included a fine not exceeding $5,000 nor less than $50, or imprisonment not exceeding two years, or both.

The federal statute authorized an attorney representing the government "to issue a notice to the defendant or claimant to produce such book, invoice, or paper in court" upon the attorney's "belief any business book, invoice, or paper belonging to, or under the control of, the defendant or claimant, will tend to prove any allegation made by the United States."[495]

Failure or refusal to produce such book, invoice, or paper would result in the government's allegations to be "taken as confessed" unless the defendant's or claimant's non-compliance with the government's notice was "explained to the satisfaction of the court."

The government's attorney compelled Boyd to produce their invoice from the Union Plate Glass Company of Liverpool, England concerning 29 of the 35 seized glass cases. Boyd complied, but claimed the order was a form of self-incrimination. The invoice was produced at trial as evidence. The jury found a verdict for the government, judgment of forfeiture was given and Boyd appealed.

The government argued on appeal that the law under scrutiny "is free from constitutional objection, because it does not authorize the search and seizure of books and papers, but only requires the defendant or claimant to produce them."[496]

C. Compelling A Criminal Defendant's Production Of Private Property Accomplishes The Same Result As A Search And Seizure Within The Scope Of The Fourth Amendment

While agreeing that the law in question did not authorize a search and seizure, the *Boyd* Court noted that compelling a person to produce papers accomplishes the same result. Responding to the government's argument –

> That is so; but it declares that if he does not produce them, the allegations which it is affirmed they will prove shall be taken as confessed. This is tantamount to compelling their production, for the

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[493] *Boyd*, 116 U.S. at 617-21.

[494] Hereafter "Boyd."

[495] This version of the law amended an 1867 law that authorized a district judge upon allegation of revenue fraud to issue a warrant commanding a marshal to enter any premises to search for and take possession of any invoices, books or papers. The law was originally enacted in 1863 which was the "first legislation of the kind that ever appeared on the statute book of the United States." The 1863 law was adopted during a "period of great national excitement, when the powers of the government were subjected to a severe strain to protect the national existence." *Boyd*, 116 U.S. at 621.

[496] *Id*.

> prosecuting attorney will always be sure to state the evidence expected to be derived from them as strongly as the case will admit of.
>
> It is true that certain aggravating incidents of actual search and seizure, such as forcible entry into a man's house and searching among his papers, are wanting, and to this extent the proceeding under the act of 1874 is a mitigation of that which was authorized by the former acts; but it accomplishes the substantial object of those acts in forcing from a party evidence against himself.[497]

The *Boyd* Court stated its initial holding succinctly. Compelling a person to produce private papers in a criminal or forfeiture action is within the scope of the Fourth Amendment.

> It is our opinion, therefore, that a compulsory production of a man's private papers to establish a criminal charge against him, or to forfeit his property, is within the scope of the fourth amendment to the constitution, in all cases in which a search and seizure would be, because it is a material ingredient, and effects the sole object and purpose of search and seizure.[498]

D. Compelling A Criminal Defendant's Production Of Private Property Violates Both The Fourth And Fifth Amendments

The *Boyd* Court stated the principal question before it as follows –

> The clauses of the constitution, to which it is contended that these laws are repugnant, are the fourth and fifth amendments.[499]
>
> Is a search and seizure, or, what is equivalent thereto, a compulsory production of a man's private papers, to be used in evidence against him in a proceeding to forfeit his property for alleged fraud against the revenue laws – is such a proceeding for such a purpose an '*unreasonable* search and seizure' within the meaning of the fourth amendment of the constitution? or is it a legitimate proceeding?[500]

Compulsory discovery of information under oath or by compelling the production of a person's private property to convict the person of a crime is abhorrent to Americans and contrary to the principles of a free government and personal freedom.[501]

The *Boyd* Court determined that in the context of a criminal or forfeiture action, the Fourth and Fifth Amendments almost run into each other because the two amendments have such an intimate relation between them.[502]

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[497] *Id*., at 621-22 (emphasis added) (paragraph added for ease of reading).
[498] *Id.*, at 622 (emphasis added).
[499] *Id*., at 621.
[500] *Id*. (italics in original) (underline emphasis added).
[501] *Id*., at 631-32.
[502] *Id*., at 632-33.

The *Boyd* Court held that the law compelling Boyd to produce its invoice in response to the government's notice issued pursuant to the law in question violated both the Fourth and Fifth Amendments.[503]

> [After finding that the civil forfeiture action was in essence a criminal action], we are further of opinion that a compulsory production of the private books and papers of the owner of goods sought to be forfeited in such a suit is compelling him to be a witness against himself, within the meaning of the fifth amendment to the constitution, and is the equivalent of a search and seizure – and an unreasonable search and seizure – within the meaning of the fourth amendment.[504]

E. Constitutional Provisions Protecting Persons And Property Should Be Liberally Construed

Laws can by silence and slight deviation from legal procedures appear to be only mildly violative of constitutional principles. The judicial branch, however, must liberally construe constitutional provisions to protect persons and property against laws which seek to impinge upon those rights.

> Though the proceeding in question is divested of many of the aggravating incidents of actual search and seizure, yet, as before said, it contains their substance and essence, and effects their substantial purpose.
>
> It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure.
>
> This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance.[505]

F. Laws Violating Constitutional Rights Are Void

The United States Supreme Court for the first time in *Boyd* held that unconstitutional laws are void.

> We think that the notice to produce the invoice in this case, the order by virtue of which it was issued, and the law which authorized the order, were unconstitutional and void, and that the inspection by the district attorney of said invoice, when produced in obedience to said notice, and its admission in evidence by the court, were erroneous and unconstitutional proceedings.[506]

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[503] Writs of assistance have been characterized as the worst instrument of arbitrary power and the most destructive of liberty and the fundamental principles of law. *Boyd*, at 624 (quoting James Otis).

The *Boyd* Court also extensively discussed Lord Camden's analysis of John Wilkes' 1763 *North Britton* case and the important motivation the case had on the Framers creation of the Fourth Amendment. *Id*., at 626-30.

[504] *Id*., at 634-35 (emphasis added).

[505] *Id*., at 635 (emphasis added) (paragraphs added for ease of reading).

[506] *Id*., at 636-37 (emphasis added).

G. *Boyd's* Fourth And Fifth Amendment Convergence Theory

The *Boyd* Court held that admitting private property seized from a defendant in a criminal case in violation of the Fourth Amendment in effect compelled the defendant to be a witness against himself in violation of the Fifth Amendment.[507]

Boyd's Fourth and Fifth Amendment convergence theory has at times been controversial in the United States Supreme Court during the past century concerning *Boyd's* pronouncement that both the Fourth and Fifth Amendments converge when a person is compelled by the government in a criminal case to produce the person's property then being held in his or her possession. Despite this rocky history,[508] *Boyd's* convergence theory appears to have been resurrected by the 2018 United States Supreme Court's Fourth Amendment decision in *Carpenter*.[509]

i. *Carpenter* Majority

The *Carpenter* decision merits exploration. In an on-going investigation into a series of robberies covering three states, the trial court in *Carpenter* granted the government's motions for an order under the Stored Communications Act[510] authorizing access to Carpenter's historical cell phone records that provided a comprehensive chronicle of his past movements.[511] Altogether, the government obtained 12,898 location points cataloging Carpenter's movements – an average of 101 data points per day.

Carpenter was thereafter charged with six counts of robbery and an additional six counts for carrying a firearm. Carpenter challenged the court's orders issued pursuant to the Act permitting access to his wireless provider's records. Carpenter asserted the records were unreasonably seized without a warrant supported by probable cause in violation of the Fourth Amendment.

The Supreme Court began its analysis discussing the historical roots of the Fourth Amendment including a positive reference to *Boyd* that the Amendment "seeks to secure 'the privacies of life' against 'arbitrary power.' "[512]

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[507] This is known as the "Boyd convergence theory." See generally Sanford E. Pitler, *The Origin and Development of Washington's Independent Exclusionary Rule: Constitutional Right and Constitutionally Compelled Remedy*, 61 WASH. L.REV. 459, 467 (1986).

[508] *Boyd's* convergence theory "low point" was the majority decision in *Fisher v. United States*, 425 U.S. 391, 408, 96 S.Ct. 1569, 48 L.Ed.2d 39 (1976) (see dissenting opinions).

Yet just four years later in *United States v. Hubbell*, 530 U.S. 27, 44-45, 120 S.Ct. 2037, 147 L.Ed.2d 24 (2000), the Supreme Court appears to limit *Fisher's* holding to situations involving documents not belonging to or prepared by the person asserting constitutional protection where the government had prior knowledge of the existence of the documents.

[509] *Carpenter v. United States*, ___ U.S. ___, 138 S.Ct. 2206, 201 L.Ed.2d 507 (2018).

[510] Hereafter "Act."

[511] The Act permits the government to compel disclosure of certain telecommunications records where there are "reasonable grounds" to believe the records sought are "relevant and material" to an ongoing criminal investigation.

[512] *Carpenter*, 138 S.Ct. at 2213-14.

After finding that an individual maintains a legitimate expectation of privacy in the record of his or her physical movements as captured through cell phone signals, the majority held that "a warrant is required[513] in the rare case where the suspect has a legitimate privacy interest in records held by a third party."[514]

> As Justice Brandeis explained in his famous dissent, the Court is obligated – as "[s]ubtler and more far-reaching means of invading privacy have become available to the Government" – to ensure that the "progress of science" does not erode Fourth Amendment protections. *Olmstead v. United States*, 277 U.S. 438, 473-474, 48 S.Ct. 564, 72 L.Ed. 944 (1928).
>
> Here the progress of science has afforded law enforcement a powerful new tool to carry out its important responsibilities. At the same time, this tool risks Government encroachment of the sort the Framers, "after consulting the lessons of history," drafted the Fourth Amendment to prevent.[515]

ii. *Carpenter* Dissent

Carpenter's four dissenters offered various reasons for upholding the trial court's order.

Justice Alito, joined by Justice Thomas, took straight aim at the majority's holding that the case even involved the Fourth Amendment. Citing to *Boyd's* concurring opinion rejecting the majority's convergence theory that the Fourth Amendment was involved in the compelled production of private property, Justice Alito wrote –

> For almost a century after the Fourth Amendment was enacted, this Court said and did nothing to indicate that it might regulate the compulsory production of documents. But that changed temporarily when the Court decided *Boyd*, the first – and, until today, the only – case in which this Court has ever held the compulsory production of documents to the same standard as actual searches and seizures.
>
> The *Boyd* Court held that a court order compelling a company to produce potentially incriminating business records violated both the Fourth and the Fifth Amendments. The Court acknowledged that "certain aggravating incidents of actual search and seizure, such as forcible entry into a man's house and searching amongst his papers, are wanting" when the Government relies on compulsory process. But it nevertheless asserted that the Fourth Amendment ought to "be liberally construed," and further reasoned that compulsory process "effects the sole object and purpose of search and seizure" by "forcing from a party evidence against himself." "In this regard," the Court concluded, "the Fourth and Fifth Amendments run almost into each other." Having equated compulsory process with actual searches and seizures and having melded the Fourth Amendment with the Fifth, the Court then found the order at issue unconstitutional because it compelled the production of property to which the Government did not have superior title.

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[513] The Act's required showing of "reasonable grounds" for believing the records sought were "relevant and material" to an ongoing criminal investigation "falls well short of the probable cause required for a warrant." *Id*., at 2221.

[514] *Id*., at 2222. The majority noted that not all orders compelling production of documents will require a showing of probable cause. "The Government will be able to use subpoenas to acquire records in the overwhelming majority of investigations." *Id*.

[515] *Id*., at 2223 (citation omitted) (emphasis added) (paragraph added for ease of reading).

> In a [*Boyd*] concurrence joined by Chief Justice Waite, Justice Miller agreed that the order violated the Fifth Amendment, but he strongly protested the majority's invocation of the Fourth Amendment. He explained: "[T]here is no reason why this court should assume that the action of the court below, in requiring a party to produce certain papers ..., authorizes an unreasonable search or seizure of the house, papers, or effects of that party. There is in fact no search and no seizure." "If the mere service of a notice to produce a paper ... is a search," Justice Miller concluded, "then a change has taken place in the meaning of words, which has not come within my reading, and which I think was unknown at the time the Constitution was made."
>
> Although *Boyd* was replete with stirring rhetoric, its reasoning was confused from start to finish in a way that ultimately made the decision unworkable. Over the next 50 years, the Court would gradually roll back *Boyd's* erroneous conflation of compulsory process with actual searches and seizures.[516]

Determining that the Fourth Amendment was never understood to conflate the compelled production of private property with an actual search and seizure, Justice Alito's dissent in *Carpenter* continued –

> Today, however, the [*Carpenter*] majority inexplicably ignores the settled rule … <u>in favor of a resurrected version of *Boyd*</u>. That is mystifying. This should have been an easy case regardless of whether the Court looked to the original understanding of the Fourth Amendment or to our modern doctrine.
>
> <u>As a matter of original understanding, the Fourth Amendment does not regulate the compelled production of documents at all.</u> Here the Government received the relevant cell-site records pursuant to a court order compelling Carpenter's cell service provider to turn them over. That process is thus immune from challenge under the original understanding of the Fourth Amendment.
>
> As a matter of modern doctrine, this case is equally straightforward. <u>As Justice Kennedy explains, no search or seizure of Carpenter or his property occurred in this case.</u> But even if the majority were right that the Government "searched" Carpenter, it would at most be a "figurative or constructive search" governed by [our previous] standard, not an "actual search" controlled by the Fourth Amendment's warrant requirement.[517]

iii. <u>*Carpenter's* Holding</u>

Nonetheless, the *Carpenter* 5-4 majority makes clear that *Boyd's* convergence theory remains alive today in criminal cases involving the compelled production of private property. A person with a legitimate expectation of privacy in his or her property is protected by the Fourth Amendment. Where the person is also compelled by government to produce his or her property in a criminal context, the person is protected by the Fifth Amendment as well.

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[516] *Id*., at 2253 (citations omitted) (emphasis added).
[517] *Id*., at 2255 (citations omitted) (emphasis added).

H. *Boyd*'s Legacy

Boyd has been cited thousands of times by American appellate courts for a variety of reasons. *Boyd* has been discussed sometimes favorably and other times not. In 2011, Washington's Supreme Court cited favorably to *Boyd* concerning Washington's adoption of the exclusionary rule for state constitutional violations.[518]

Boyd's historical analysis of the inquisitorial system which included writs of assistance and Star Chamber interrogations remains important to understand the underlying reasons for the creation of the Fourth and Fifth Amendments. *Boyd* also remains important in understanding the Washington Framers' rejection of the language of both the Fourth and Fifth Amendments when they drafted Article I, §§7 and 9.

With the *Boyd* and *Carpenter*[519] majority opinions in mind, this Court will conduct an examination of its surrender order compelling Marshall to produce his private property to law enforcement under both Fourth and Fifth Amendment principles.

[518] *State v. Eserjose*, 171 Wn.2d 907, ¶10 n.5 (2011) (defendant's confession, obtained at a sheriff's office following defendant's illegal arrest at his home, was sufficiently an act of free will to purge the primary taint of the illegal arrest, and, thus, confession held admissible under state constitution) (citations omitted) (paragraph added for ease of reading).

[519] See also *State v. Muhammad*, 194 Wn.2d 57, ¶49 (2019) (warrantless collection of real time cell phone location data from a person's wireless provider is a search under both the Fourth Amendment and Article I, §7).

12. THE SURRENDER PROVISIONS OF RCW 9.41.800 & RCW 9.41.801(2) VIOLATE THE FOURTH AMENDMENT & ARTICLE I, §7

A. How Should An Order To Surrender Be Analyzed?

The Court has struggled attempting to characterize its order requiring Marshall to surrender to law enforcement all firearms, other dangerous weapons and any concealed pistol license in his possession or control.

Is the Court's surrender order to be tested against a criminal defendant's discovery obligations,[520] a requirement of a criminal defendant to provide physical and demonstrative evidence,[521] a criminal subpoena duces tecum,[522] the Fourth Amendment and Article I, §7 protections against suspicion-less and warrantless searches and seizures, the Fifth Amendment and Article I, §9 privileges against self-incrimination, or a combination of some or all of them?

While the surrender compliance procedures in RCW 9.41.801 are new, RCW 9.41.800 surrender provisions were enacted as part of a 213-page violence prevention law in 1994.[523] The surrender portions of RCW 9.41.800 have not been amended since their enactment in 1994 and remain the same today.

The surrender provisions in a criminal context appear to be the first of their kind in Washington's history.[524] In attempting to characterize its surrender order, this Court has explored an historical perspective in hopes of determining the methodology to properly examine these surrender statutes.

It is clear from our historical examination that in the context of a pretrial releasee such as Marshall, RCW 9.41.800 through .810 implicate both Fourth and Fifth Amendment concepts as well as similar protections offered by our state constitution.

Before beginning a Fourth Amendment constitutional analysis of Washington's surrender laws, however, Washington's criminal court rules should be examined to determine whether any of these rules might provide the Court with authority justifying its order to surrender.

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[520] CrRLJ 4.7(b).
[521] CrRLJ 4.7(c).
[522] CrRLJ 4.8(b).
[523] Laws of 1994, ch. 7, §430.
[524] Only one Washington appellate case has addressed RCW 9.41.800 through .810. *Braatz v. Braatz*, 2 Wn.App.2d 889, *review denied*, 190 Wn.2d 1031 (2018) arose out of a civil domestic violence protection order case. The appellate court was not called upon to address the constitutional issues presented in this criminal case.

B. No Court Rule May Derogate From A Person's Constitutional Rights

Rules promulgated by the Washington Supreme Court have the force of law.[525] A court rule, however, "shall not be construed to affect or derogate from the constitutional rights of any defendant."[526]

C. CrRLJ 3.2 Does Not Authorize An Order To Surrender Personal Property As A Condition Of Release

CrRLJ 3.2 sets forth conditions of release a court may impose on a criminal defendant upon finding probable cause in support of the charge(s). CrRLJ 3.2(a) presumes any person not charged with a capital offense will be released upon personal recognizance pending trial.[527]

A court may impose various conditions of release upon determining that – (1) such recognizance will not reasonably assure the defendant's appearance in court when required;[528] or (2) there is a substantial danger the defendant will commit a violent crime, seek to intimidate witnesses, or otherwise unlawfully interfere with the administration of justice.[529] [530]

CrRLJ 3.2(d)(3) authorizes a court upon a showing of substantial danger to prohibit the accused from possessing any dangerous weapons or firearms. This provision does not authorize a court as a condition of release to order a defendant to surrender firearms, dangerous weapons and concealed pistol licenses which the defendant may possess.

The catch-all provision in CrRLJ 3.2(b)(7), though, provides that a court may "[i]mpose any condition other than detention deemed reasonably necessary to assure appearance as required."

Additionally, the catch-all provision in CrRLJ 3.2(d)(10) provides that a court may "[i]mpose any condition other than detention to assure noninterference with the administration of justice and reduce danger to others or the community."

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[525] *State v. Stevens County District Court Judge*, 194 Wn.2d 898, ¶13 (2019). See also General Rule 9.

[526] CrRLJ 1.1.

[527] CrRLJ 4.7(b)(1) lists a defendant's discovery obligations. None of the seven listed discovery obligations authorizes a court to compel a defendant to disclose the existence of any firearms, dangerous weapons or concealed pistol licenses in the defendant's possession unless the defense intends to use those objects in a hearing or trial.

CrRLJ 4.7(c)(1) authorizes a court to order a defendant to provide certain types of physical or demonstrative evidence. None of the eight listed items authorizes a court to compel a defendant to disclose the existence of any firearms, dangerous weapons or concealed pistol licenses in the defendant's possession.

CrRLJ 4.8(b) authorizes a court to issue a subpoena duces tecum. Whether a court order violates federal and/or state constitutions where the order compels a defendant in a pending criminal case to produce his or her firearms, dangerous weapons or concealed pistol licenses is the subject of this Memorandum Decision.

[528] A court shall impose the "least restrictive" conditions of release of the seven listed by the rule if it determines personal recognizance is insufficient under this prong. CrRLJ 3.2(b).

[529] A court may impose one or more of the ten nonexclusive conditions listed by the rule under this prong. CrRLJ 3.2(d).

[530] CrRLJ 3.2(a)(2), (b), (d).

Whether these catch-all provisions could constitutionally empower a court to order surrender of a defendant's personal property as a condition of release under CrRLJ 3.2 will be discussed below.

D. Surrender Orders Compel A Suspicionless And Warrantless Search In Violation Of The Fourth Amendment

i. The Surrender Order Compelled Marshall To Take Five Separate Actions

This Court's surrender order issued pursuant to RCW 9.41.800 through .810 ordered Marshall to take five separate actions –

(1) To immediately leave the Kitsap County Courthouse after arraignment; and

(2) To search for any firearms, other dangerous weapons and concealed pistol licenses he possessed in his house and anywhere else he stores his personal property; and

(3) To seize those items; and

(4) To surrender those items to the Kitsap County Sheriff's Office on the same day as the hearing; and

(5) To either – (a) get a receipt form from law enforcement, complete a proof of surrender form and file both within five judicial days; or (b) immediately complete and sign a declaration of non-surrender form.

Marshall's violation of any provision of the surrender order is a crime and could also result in his release pending trial being revoked.

ii. The Fourth Amendment Requires Individualized Suspicion Of Wrongdoing

The Fourth Amendment expressly protects a right of privacy in "persons, houses, papers, and effects"[531] from unreasonable searches and seizures. Ordinarily, a search or seizure must be based on individualized suspicion of wrongdoing to be reasonable under the Fourth Amendment.[532]

There is no question under the Fourth Amendment that Marshall has a subjective and reasonable expectation of privacy in his house which was ordered to be searched and in his personal property which was ordered to be seized and surrendered.

People released pending trial on criminal charges are "ordinary people who have been accused of a crime but are presumed innocent."[533] Unlike convicted defendants on probation, pretrial releasees have "suffered no judicial abridgment of their constitutional rights."[534]

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[531] Emphasis added.

[532] *Chandler v. Miller*, 520 U.S. 305, 313, 117 S.Ct. 1295, 137 L.Ed.2d 513 (1997).

[533] *United States v. Scott*, 450 F.3d 863, 871 (9th Cir. 2006).

[534] *Id*., at 872. See also *Blomstrom v. Tripp*, 189 Wn.2d 379, ¶69 (2017) (pretrial releasees suffer no diminution of their privacy rights).

As *Boyd* stated so long ago, and as *Carpenter* recently reiterated, the Fourth Amendment seeks to secure "the privacies of life" against "arbitrary power."[535]

By writ of assistance, a colonial court authorized the examination of ships, vessels and persons found therein, as well as the search of any suspected vaults, cellars, or warehouses for prohibited imports or exports.[536] These searches were conducted by government agents. Writ of assistance did not compel a property owner to search his or her house, nor require the property owner to seize personal property and turn the property over to government agents.

As with the statute found to violate the Fourth Amendment in *Boyd*, Washington's RCW 9.41.800 and 9.41.801(2) surrender laws are also in effect much worse than the colonial writs of assistance. Washington's surrender laws compel a person to search his or her house, seize personal property and surrender the property to government agents or face criminal sanctions and incarceration.

In 2018, the Supreme Court addressed the Fourth Amendment individualized suspicion requirement. In *Carpenter*, the Stored Communications Act[537] required the government to show a court that the cell phone records it sought were "relevant and material to an ongoing investigation." Finding the statute lacked any requirement of individualized suspicion, the Court wrote –

> The Court usually requires "some quantum of individualized suspicion" before a search or seizure may take place. Under the standard in the Stored Communications Act, however, law enforcement need only show that the cell-site evidence might be pertinent to an ongoing investigation – a "gigantic" departure from the probable cause rule…
>
> Consequently, an order issued under Section 2703(d) of the Act is not a permissible mechanism for accessing historical cell-site records. Before compelling a wireless carrier to turn over a subscriber's CSLI,[538] the Government's obligation is a familiar one – get a warrant.[539]

Here, Marshall was seized by this Court without suspicion and without a warrant when it issued the surrender order. No reasonable person would believe he or she is free to ignore a court order, leave a courthouse and do whatever the person wants to do in violation of the surrender order. Rather, this Court's show of authority compelled Marshall to leave the courthouse and immediately begin searching his home and other locations for the surrendered personal property.

After a Washington trial court enters a protection order, it may lawfully issue a surrender order pursuant to RCW 9.41.800 by finding that the restrained person – (1) used a firearm or other dangerous weapon in a past felony; (2) was ineligible to possess a firearm; (3) had a no contact

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[535] *Boyd v. United States*, 116 U.S. 616, 630, 6 S.Ct. 524, 29 L.Ed. 746 (1886); *Carpenter v. United States*, ___ U.S. ___, 138 S.Ct. 2206, 2214, 201 L.Ed.2d 507 (2018).

[536] *Boyd*, 116 U.S. at 622-23.

[537] Upon which the government relied to obtain a court order seizing Carpenter's cell phone location data from his wireless provider.

[538] Cell-site location information.

[539] *Carpenter*, 138 S.Ct. at 2221 (citations omitted) (emphasis added) (paragraph added for ease of reading).

order in effect at the time prohibiting contact with an intimate partner;[540] and/or (4) presented a serious and imminent threat to public health or safety, or to the health or safety of any individual.[541]

No finding of individualized suspicion is statutorily required that the restrained person owns or possesses any of the surrendered property prior to a court's entry of a surrender order. The Court here did not make a finding of individualized suspicion Marshall possessed any of the surrendered property before entering its surrender order because RCW 9.41.800 did not require it.

In fact, this Court could not have made such an individualized finding Marshall possessed any firearms, other dangerous weapons or concealed pistol licenses since no evidence was presented to the Court that Marshall possessed any those items.

Absent an exception to the Fourth Amendment individualized suspicion requirement, RCW 9.41.800 and 9.41.801(2) surrender provisions and the Court's surrender order violate Marshall's Fourth Amendment rights.

iii. The Special Needs Doctrine

The Fourth Amendment special needs doctrine permits suspicionless and warrantless searches where privacy interests implicated by the search are minimal, a warrant and probable cause are impracticable, and the search is not conducted for criminal investigation purposes.[542]

As discussed previously, federal courts have applied the Fourth Amendment special needs doctrine to administrative searches, border patrols, prisoners and probationers, and area-entry searches at government buildings and courthouses.

In a case of first impression, the Ninth Circuit in the *Scott* case rejected the special needs doctrine to justify the warrantless search of a pretrial releasee's house. The *Scott* Court was concerned with the lack of evidence that a condition of release authorizing the search of a pretrial releasee's home would somehow ensure a defendant's appearance at trial or protect the community from the risk of crimes the pretrial releasee might commit. A pretrial releasee is presumed innocent, and an arrest is insufficient to justify violating the releasee's Fourth Amendment privacy interests, especially in the house.[543]

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[540] Since Marshall is charged with a domestic violence crime against an intimate partner, the Court was statutorily compelled to issue the surrender order upon its discretionary decision at arraignment to issue an RCW 10.99 no contact order. RCW 9.41.800(3).
[541] RCW 9.41.800(5).
[542] See *Griffin v. Wisconsin*, 483 U.S. 868, 873, 107 S.Ct. 3164, 97 L.Ed.2d 709 (1987); *Skinner v. Ry. Labor Execs.' Assn.*, 489 U.S. 602, 619, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989); and *York v. Wahkiakum School Dist. No. 200*, 163 Wn.2d 297, ¶¶26-27 (2008).
[543] *Scott*, 450 F.3d at 870-74. See also *State v. Rose*, 146 Wn.App. 439, ¶¶ 34-37 (2008) (following the *Scott* Court's reasoning in rejecting the special needs doctrine to justify the suspicionless and warrantless search of pretrial releasees for weekly drug testing).

The Fourth Amendment special needs doctrine is not available to justify the suspicionless and warrantless seizure of Marshall, the compelled search of his house and other locations for his personal property, and surrender of the property to law enforcement as authorized by RCW 9.41.800 and 9.41.801(2) surrender provisions and the Court's surrender order.

iv. The Autonomous Decision-Making Doctrine And The Unconstitutional Conditions Doctrine

People released pending trial on criminal charges are "ordinary people who have been accused of a crime but are presumed innocent."[544] Unlike convicted defendants on probation, pretrial releasees have "suffered no judicial abridgment of their constitutional rights."[545]

A trial court's power, therefore, to impose conditions of release on pretrial releasees is constrained by the unconstitutional conditions doctrine. This doctrine serves to protect a pretrial releasees constitutional right to autonomous decision-making.

While pending criminal charges, Marshall is constitutionally entitled to be "let alone." His constitutionally protected "zone of privacy" includes the right to autonomous decision-making free from government intrusion.[546] This fundamental right is accorded the "utmost constitutional protection" subject to strict scrutiny requiring the government to identify a compelling governmental interest justifying the action it seeks to take.[547]

The right to autonomous decision-making has "special force in the privacy of the home and its immediate surroundings."[548]

A Washington appellate case and a Ninth Circuit case clearly prohibit RCW 9.41.800 surrender provisions and the Court's surrender order under these doctrines.

The Court of Appeals in *Butler v. Kato*[549] held that a pretrial release condition mandating an alcohol evaluation, treatment, and self help meeting attendance violated the autonomous decision-making doctrine.

The Ninth Circuit in the *Scott*[550] case held that warrantless searches of a pretrial releasee's house violated the unconstitutional conditions doctrine. Rejecting the warrantless search of a pretrial releasee's house as the price of release, the Ninth Circuit stated the constitution's concern –

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[544] *Scott*, 450 F.3d at 871.
[545] *Id*., at 872. See also *Blomstrom*, 189 Wn.2d at ¶69 (pretrial releasees suffer no diminution of their privacy rights).
[546] See *Whalen v. Roe*, 429 U.S. 589, 599-600, 97 U.S. 869, 51 L.Ed.2d 64 (1977); and *O'Hartigan v. Department of Personnel*, 118 Wn.2d 111, 117 (1991).
[547] *O'Hartigan, supra*.
[548] *Hill v. Colorado*, 530 U.S. 703, 717, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000).
[549] *Butler v. Kato*, 137 Wn.App. 515, ¶¶26-30 (2007).
[550] *Scott*, 450 F.3d at 866-68.

> Pervasively imposing an intrusive search regime as the price of pretrial release, just like imposing such a regime outright, can contribute to the downward ratchet of privacy expectations.[551]

The government certainly has an interest in protecting victims of domestic violence. But the method in RCW 9.41.800 by which the government seeks to protect those victims – to seize Marshall, compel him to immediately search his house for his surrendered personal property, and then turn the property over to law enforcement all without individualized suspicion or a warrant – is unprecedented and far more constitutionally onerous than the pretrial release conditions found unconstitutional in *Butler* and *Scott*.

This Court's surrender order entered pursuant to RCW 9.41.800 and 9.41.801(2) surrender provisions cannot survive strict scrutiny because the government cannot establish a compelling governmental interest justifying a suspicionless and warrantless seizure of Marshall, and compelled search of his house and other property.

RCW 9.41.800 and 9.41.801(2) surrender provisions and the Court's order to surrender violate Marshall's First, Fourth, Fifth, Ninth and Fourteenth Amendment rights to autonomous decision-making as well as the unconstitutional conditions doctrine.

v. <u>The Statutory Surrender Provisions And This Court's Surrender Order Violate The Fourth Amendment Beyond A Reasonable Doubt</u>

The United States Supreme Court both in *Boyd* and *Carpenter* rejected suspicionless and warrantless searches and seizures under the Fourth Amendment. The lack of individualized suspicion, however, in the surrender statutory scheme is the entire point of Washington's prophylactic surrender provisions[552] – to protect victims of sexual assault, domestic violence, stalking and harassment by confiscating firearms, other dangerous weapons, and concealed pistol licenses from potentially dangerous restrained persons.

The Fourth Amendment requirement that the judicial branch determine the existence of probable cause particularly describing the place to be searched and the persons or things to be seized before authorizing a search or seizure is the very act of judicial judgment RCW 9.41.800 and 9.41.801(2) surrender provisions seek to eliminate.[553]

Because a court order may function as a warrant, the order must meet the constitutional requirements of a valid Fourth Amendment warrant.[554] RCW 9.41.800 and 9.41.801(2) surrender provisions and the Court's surrender order do not.

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[551] *Id.*, at 867.
[552] RCW 9.41.800 and .801(2).
[553] See *State v. Villela*, 194 Wn.2d 451, ¶16 (2019).
[554] *State v. Garcia-Salgado*, 170 Wn.2d 176, ¶18 (2010);

RCW 9.41.800 and 9.41.801(2) surrender provisions do not require a court to have evidence a restrained person possesses any of the surrendered personal property before the person is seized and ordered to search for and surrender that property. As with the law before the *Carpenter* Court, Washington's surrender law is a "gigantic departure from the probable cause rule" required by the Fourth Amendment.

RCW 9.41.800 and 9.41.801(2) surrender provisions are unreasonable under the Fourth Amendment because they compel defendants in criminal cases to search for, seize and surrender any firearms, other dangerous weapons and concealed pistol licenses in their possession.

As with *Boyd* and *Carpenter*, the lesson of the Fourth Amendment is just as clear here – the government must get a warrant to search Marshall's house for his firearms, other dangerous weapons and concealed pistol licenses. As *Carpenter* noted –

> [T]his tool risks Government encroachment of the sort the Framers, after consulting the lessons of history, drafted the Fourth Amendment to prevent.[555]

Even if evidence was presented to the Court that Marshall possessed the items ordered surrendered pursuant to RCW 9.41.800 and 9.41.801(2), the Court's surrender order entered pursuant to that statute also violates Marshall's First, Fourth, Fifth, Ninth and Fourteenth Amendment rights to autonomous decision-making as well as the unconstitutional conditions doctrine.

In Washington, it is well established that statutes are presumed constitutional and "a statute's challenger has a heavy burden to overcome that presumption." Thus, the challenger must prove the statute in question is unconstitutional beyond a reasonable doubt."[556]

> We note that when we say "beyond a reasonable doubt," we do not refer to an evidentiary standard. "Beyond a reasonable doubt" in this context merely means that based on our respect for the legislature, we will not strike a duly enacted statute <u>unless we are fully convinced, after a searching legal analysis, that the statute violates the constitution</u>.[557]

After conducting the required "searching legal analysis," this Court is fully convinced RCW 9.41.800 surrender provisions[558] and RCW 9.41.801(2) violate the Fourth Amendment beyond a reasonable doubt. Accordingly, these surrender provisions and the surrender order are void.

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[555] *Carpenter*, 138 S.Ct. at 2223 (citation omitted) (quotation marks omitted).
[556] *School Districts' Alliance for Adequate Funding of Special Education v. State*, 170 Wn.2d 599, ¶11 (2010) (citation omitted).
[557] *Id*., at ¶13 (citation omitted) (quotation marks omitted) (emphasis added).
[558] RCW 9.41.800(1)(a), (b), .800(2)(a), (b), .800(3)(c)(ii)(A), (B), .800(4) and .800(5).

E. Surrender Orders Compel A Pretrial Releasee To Conduct A Suspicionless And Warrantless Search In Violation Of Article I, §7

Article I, §7 is grounded in a broad right to privacy and protects persons from governmental intrusion into their private affairs and homes without the authority of law. Washington uses a two-step analysis to determine whether Article I, §7 has been violated – the "private affairs" prong followed by the "authority of law" prong.[559]

Like the Fourth Amendment, Article I, §7 also protects personal property in so far as it constitutes "private affairs" because the constitutional provision prohibits government from disturbing a person in his or her "private affairs, or his [or her] home invaded, without authority of law."

> Our homes hold a special place in our constitutional jurisprudence. It is the first place specifically called out in our constitution, and it is called out to give it special protection. Under our constitution, "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." In no area is a citizen more entitled to his privacy than in his or her home. For this reason, the closer officers come to intrusion into a dwelling, the greater the constitutional protection.[560]

Marshall was clearly "seized" by this Court's surrender order because a reasonable person under the totality of the circumstances would not feel free to "decline" the Court's display of authority ordering Marshall to immediately leave the courthouse and begin searching his home and elsewhere for the surrendered property.[561] Marshall was not free to leave the courthouse and do whatever he wanted to do.

An Article I, §7 "search" occurs when the government disturbs the privacy interests which persons have held and are entitled to hold safe from government trespass absent a warrant.[562]

The Washington Supreme Court has a long history of striking down suspicionless searches reasoning that they amount to nothing more than an "impermissible fishing expedition."[563] The Supreme Court has not been "easily persuaded that a search without individualized suspicion can pass constitutional muster."[564]

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[559] *State v. Puapuaga*, 164 Wn.2d 515, ¶10 (2008).

[560] *City of Shoreline v. McLemore*, 193 Wn.2d 225, ¶2, *cert. denied sub nom. McLemore v. City of Shoreline, Washington*, ___ U.S. ___, 140 S.Ct. 673, 205 L.Ed.2d 438 (2019) (citations omitted) (quotation marks omitted) (emphasis added) (paragraph added for ease of reading).

[561] *State v. Rankin*, 151 Wn.2d 689, 695 (2004); *State v. O'Neill*, 148 Wn.2d 564, 574 (2003).

[562] *State v. Myrick*, 102 Wn.2d 506, 511 (1984).

[563] *State v. Jorden*, 160 Wn.2d 121, ¶10 (2007) (emphasis added). See also *City of Seattle v. Mesiani*, 110 Wn.2d 454, 458-60 (1988) (suspicionless and warrantless random roadblock sobriety checkpoint violates Article I, §7); and *Kuehn v. Renton School District No. 403*, 103 Wn.2d 594, 595 (1985) (suspicionless searches of student luggage as condition of school-sponsored trip to Canada violates Article I, §7).

[564] *Robinson v. City of Seattle*, 102 Wn.App. 795, 815 (2000).

In *Blomstrom*, the trial court ordered each defendant charged with DUI to participate in random urinalysis testing as a condition of pretrial release to confirm he or she was abiding by the court's order prohibiting the consumption of alcohol or other impairing substances during the pendency of the criminal case.

The Supreme Court rejected the prosecution's argument that a person charged with a crime but presumed innocent has a reduced privacy interest under Article I, §7.[565]

The Court, consistent with *Boyd's* convergence theory, held that a court order compelling a pretrial defendant in a criminal case to provide urine evidence is a search protected by Article I, §7 because compelling urine disturbs a person in their private affairs.[566]

Here, the Court's surrender order compelled Marshall as a condition of pretrial release to surrender personal property in his possession to law enforcement. The surrender order constituted a search under Article I, §7 because compelling a person to search his or her residence, seize property, and surrender those items to law enforcement disturbs that person in their private affairs and invades the home.

If a court order requiring a person awaiting trial on DUI charges to provide urine is a search under Article I, §7, this Court's surrender order here most certainly is also a search. The "private affairs" prong of Article I, §7 is met.

The remaining question becomes whether "authority of law" justifies the Court's suspicionless and warrantless intrusion into Marshall's private affairs and invasion of his home.

The Supreme Court in *Blomstrom* provides us a clear answer. There is no "authority of law" to support a suspicionless and warrantless pretrial urinalysis program because Article I, §7 does not permit suspicionless searches of criminal defendants awaiting trial.[567]

RCW 9.41.800 and 9.41.801(2) surrender provisions do not require a court to have evidence a restrained person possesses any of the surrendered personal property before the person is seized and ordered to search for and surrender that property. A surrender order requires a suspicionless and warrantless search of a home and seizure of a pretrial defendant's property – in other words, a classic "impermissible fishing expedition."

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[565] *Blomstrom*, 189 Wn.2d at ¶67.

[566] *Id.*, at ¶54.

[567] *Id*. See also *Rose*, 146 Wn.App. at ¶¶26-27 (CrR 3.2 does not authorize pretrial urinalysis testing, holding suspicionless and warrantless out-of-custody pretrial urinalysis testing violates Article I, §7); and *Butler*, 137 Wn.App. at ¶16 (CrRLJ 3.2 and CrRLJ 3.2 are subject to constitutional limitations).

While the Court of Appeals recently adopted the special needs doctrine in the context of suspicionless courthouse screening for weapons,[568] no "authority of law" exists in Washington for importing the Fourth Amendment's special needs doctrine in the context of suspicionless seizures and searches of pretrial defendants and their homes while awaiting trial.[569]

Under a Fourth Amendment analysis, the Ninth Circuit has declined to adopt the special needs doctrine in the context of the warrantless search of a pretrial releasee's home.[570] Washington's Supreme Court has yet to adopt the Fourth Amendment's special needs doctrine.

This Court finds that the Fourth Amendment special needs doctrine is not "authority of law" under Article I, §7 justifying the suspicionless and warrantless seizure of Marshall and compelled search of his home and other locations for weapons.

Finally, as previously discussed in the Fourth Amendment section, even if evidence had been presented that Marshall possessed the personal property which was ordered surrendered, this Court's surrender order also violates Marshall's Article I, §7 rights to autonomous decision-making as well as the unconstitutional conditions doctrine.[571]

After conducting the required "searching legal analysis," this Court is fully convinced RCW 9.41.800 surrender provisions[572] and RCW 9.41.801(2) violate the Fourth Amendment beyond a reasonable doubt. Accordingly, these surrender provisions and the surrender order are void.

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[568] *Griffith, supra*.

[569] See *Rose*, 146 Wn.App. at ¶¶34-37 (following the Ninth Circuit *Scott* case, the Court of Appeals rejected the special needs doctrine under a Fourth Amendment analysis to justify the suspicionless and warrantless search of pretrial releasees for drug testing).

[570] *Scott, supra*.

[571] *O'Hartigan*, 118 Wn.2d at 117; *Butler*, 137 Wn.App. at ¶¶26-30; *Scott*, 450 F.3d at 866-68.

[572] RCW 9.41.800(1)(a), (b), .800(2)(a), (b), .800(3)(c)(ii)(A), (B), .800(4), .800(5), and .800(7).

13. CONCLUSION

Obsta Pricipiis[573]

A. This Case Involves A Clash Of Deeply Significant Public Policies

In our constitutional system of government, individuals have rights that the government and its agents (including courts) must respect.[574] Among those rights are the right to be free from compelled self-incrimination under the Fifth Amendment, the right to be free from unreasonable searches and seizures under the Fourth Amendment, and their counterparts under Washington's constitution.

The issues raised in this case involve matters of first impression in Washington. We agree with the following –

> As a modern society, we condemn domestic violence and have vested police with the power and duty to investigate and to intervene. As a society governed by our constitutions, there are limits on the State's power … to demand an individual's active cooperation, or to intrude into a home.[575]

Public concern about the safety of domestic violence victims makes very tempting judicial approval of Washington's surrender of weapons and surrender compliance procedures to ensure that weapons are quickly removed from domestic violence perpetrators.

Each member of this Court has significant experience in the prosecution and/or defense of cases involving domestic violence, and in the policy and legal issues that surround domestic violence. As a matter of judicial responsibility, we recognize our duty as a court to hear and decide matters that are brought before us.[576]

"Court's are essentially passive instruments of government." The principle of party representation relies on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present.[577]

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[573] *Boyd v. United States*, 116 U.S. 635, 6 S.Ct. 524, 29 L.Ed. 746 (1886) ("It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta pricipiis*." [withstand beginnings; resist the first approaches or encroachments]).

[574] See *State v. Escalante*, ___ Wn.2d ___, ¶1, 572 P.3d 1183 (Apr. 23, 2020).

[575] *City of Shoreline v. McLemore*, 193 Wn.2d 225, ¶1, *cert. denied sub nom. McLemore v. City of Shoreline, Washington*, ___ U.S. ___, 140 S.Ct. 673, 205 L.Ed.2d 438 (2019)

[576] "A judge shall hear and decide matters assigned to the judge, except when disqualification or recusal is required by Rule 2.11 or other law." Code of Judicial Conduct (CJC) 2.7.

Additionally, a "judge shall comply with the law…," CJC 1.1, and "shall not be swayed by public clamor, or fear of criticism," CJC 2.4(A).

[577] *United States v. Sineneng-Smith*, ___ U.S. ___, 140 S.Ct. 1575, 1579, ___ L.Ed.2d ___ (May 7, 2020).

In Marshall's case, the Kitsap County District Court[578] has been asked by the defense to determine the constitutionality of the statutory scheme for the surrender of weapons. Our oaths of office[579] and the Code of Judicial Conduct require our careful analysis and response.

B. Statutory Obligations Imposed On Marshall

At arraignment Marshall was told by this Court that he had a constitutional right to remain silent during his criminal proceedings, and that anything he said could be used against him. When this Court decided to release Marshall at arraignment, it imposed several conditions on Marshall which he is expected to follow. Marshall's failure to comply with these conditions puts him at risk of being taken into custody and incarcerated until his trial is concluded.

Conditions of release included an RCW 10.99 domestic violence no contact order protecting Marshall's intimate partner who is alleged to be the victim of his assault. Several statutory provisions became effective the moment this Court signed the domestic violence no contact order –

- First, Marshall was immediately prohibited from owning, possessing, or having in his control any firearms. Violation of this statutory provision is a felony.
- Second, this Court was statutorily mandated to issue an order requiring Marshall to immediately surrender all firearms, dangerous weapons, and concealed pistol licenses in his possession in a safe manner to law enforcement on the same day as entry of the surrender order.
- Third, this Court was statutorily mandated to issue an order prohibiting Marshall from accessing, obtaining or possessing any firearms or other dangerous weapons, and from obtaining or possessing a concealed pistol license.

This Court's surrender and prohibit order compelled Marshall – (1) to leave the courthouse; (2) to immediately search his house[580] for his firearms, other dangerous weapons and concealed pistol licenses; (3) to seize that surrendered personal property; and (4) on the same day to surrender this property in a safe manner to the control of law enforcement.

Yet, upon leaving the courtroom after his arraignment Marshall was specifically prohibited from possessing any firearms, dangerous weapons or concealed pistol licenses. Importantly, there is no statutory grace period between prohibition and surrender upon a court's entry of an RCW 9.41.800 surrender and prohibit order.

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[578] District courts are created by Const. Art. IV, §§1 and 10 and their duties and limited jurisdiction determined by the legislature. Criminal jurisdiction includes misdemeanor and gross misdemeanor offenses, including those alleging domestic such as the case at bar. RCW 3.66.060.

[579] RCW 3.34.080.

[580] And anywhere else Marshall stores his personal property.

The surrender order required Marshall to prove compliance with the order by signing under penalty of perjury and filing either a proof of surrender form or a declaration of non-surrender form.

By the statutory scheme at issue here, this Court was statutorily mandated to order Marshall to appear in court, to place Marshall under oath and to compel him to provide testimony verifying his compliance with the surrender order.

Marshall's failure to comply with the surrender and surrender compliance statutory scheme violates two separate criminal statutes and also subjects Marshall to revocation of his out-of-custody release conditions resulting in his confinement pending trial

C. The Fifth Amendment And Article I, §9

The Fifth Amendment privilege against self-incrimination and its Article I, §9 state counterpart protect a person from – (1) being involuntarily called as a witness in the person's criminal prosecution; and (2) being compelled to provide testimonial or other communicative evidence which incriminates the person.

The Founders were offended by the Star Chamber inquisitorial method of extracting evidence of unknown criminal activity. They created the Fifth Amendment privilege against self-incrimination to transform American justice by instead requiring the accusatorial system whereby the prosecution may not establish a person's guilt "by the simple, cruel expedient of forcing it from his own lips."[581]

The Fifth Amendment is offended by the surrender of personal property provisions. Compelling Marshall to surrender his firearms, dangerous weapons and concealed pistol licenses (any of which it would be a crime for Marshall to possess) to law enforcement would provide all the evidence the prosecution would need to convict Marshall of felony unlawful possession of a firearm, misdemeanor possession of a dangerous weapon, and misdemeanor violation of the surrender order.

The surrender compliance procedures require Marshall to sign and file a sworn document proving compliance with the surrender order. The Fifth Amendment demands that anything Marshall chooses to say during his criminal prosecution must be the product of his own free will unless immunity is given. It does not matter whether Marshall actually possesses any of the surrendered property because the Fifth Amendment right to remain silent is liberally construed to protect the innocent person as well as the guilty.

[581] *Culombe v. Connecticut*, 367 U.S. 568, 582, 81 S.Ct. 1860, 6 L.Ed.2d 1037 (1961).

Marshall cannot be compelled by anyone to testify in his criminal prosecution. The signing and filing of either compliance document would place Marshall in danger of incriminating himself which the Fifth Amendment is specifically designed to protect Marshall against having to do.

The surrender compliance procedures at issue here also require this Court to order Marshall to appear in court, place Marshall under oath, and direct him to provide testimony verifying that he is in compliance with the surrender order. This Court declines to force Marshall's guilt from his own lips.

D. The Fourth Amendment And Article I, §7

The privacy of our homes from government trespass has a special place in our American constitutional jurisprudence. Suspicionless and arbitrary writs of assistance issued by colonial courts authorizing a government agent to search anywhere for anything deemed of interest by the Crown helped to spark the Revolution and became the driving force behind the adoption of the Fourth Amendment.

> But the protective constitutional moat which surrounds every man's home – his castle – may not be indiscriminately drained either by police policy or judicial fiat.[582]

Our Founders, after consulting the lessons of history, drafted the Fourth Amendment to protect the sanctity of the right of the people to be secure in their houses from – (1) unreasonable searches and seizures; and (2) unconstrained judicial power by the issuance of general warrants.

To be a reasonable search or seizure, the Fourth Amendment requires individualized suspicion of wrongdoing before a government agent may constitutionally seize or search someone or something without a warrant.

Washington's constitution provides broader protection of our privacy than the Fourth Amendment. Article I, §7 prohibits a government agent from disturbing anyone in their private affairs or invading a home without the authority of law. Washington's Supreme Court has consistently rejected suspicionless and warrantless general exploratory searches or seizures because they amount to nothing more than "impermissible fishing expeditions" for criminal evidence without satisfying constitutional protections.

Every person charged with violating a criminal law is presumed innocent. A person awaiting trial on criminal charges who is released by a court retains Fourth Amendment and Article I, §7 privacy protections because those privacy rights are not diminished simply because a person has been accused of committing a crime.

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[582] *State v. Hatcher*, 3 Wn.App. 441, 446 (1970).

In 1886, the United States Supreme Court in *Boyd v. United States* held in a criminal proceeding that the Fourth and Fifth Amendment converge where a defendant is compelled by government to search for and produce personal property that incriminates the defendant. *Boyd* is important in Washington because three years later our state constitutional Framers relied on *Boyd's* analysis when drafting the text for Article I, §7.

The surrender statutes authorizing a suspicionless and warrantless seizure of Marshall, search of his house, and compelling him to turn over any surrendered property to law enforcement violates the Fourth Amendment and Article I, §7. Washington courts do not allow suspicionless "impermissible fishing expeditions" so that the government can discover evidence of crime.

The Fourth Amendment and Article I, §7 are clear – if the government wants to seize Marshall's property it must get a warrant.

Where the government has probable cause to believe a restrained person possesses any of the property which a court has prohibited the person from possessing pursuant to RCW 9.41.800, the government could satisfy the Fourth Amendment and Article I, §7 by applying for a search warrant authorizing law enforcement to seize this evidence of criminal behavior.

As in Marshall's case, law enforcement and the prosecution often have no information whether the restrained person actually possesses any of the prohibited property. A search warrant becomes unavailable as an option because the prosecution cannot establish probable cause to believe the restrained person is in possession of those prohibited weapons.

The legislature created this prophylactic surrender of property statutory scheme in an attempt to solve the problem of no individualized suspicion so that victims could be protected from their abusers. The Fourth Amendment and Article I, §7 prohibit against such an intrusion on Marshall's privacy rights.

E. The Phrase "Dangerous Weapons" And The Vagueness Doctrine

The Due Process Clause of the Fourteenth Amendment prohibits vague laws. A law is vague where it either – (1) fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits; or (2) authorizes or even encourages arbitrary and discriminatory enforcement.

RCW 9.41.800 authorizes a court to order the surrender and prohibition of "dangerous weapons." The phrase is not defined in RCW 9.41.800. This Court interprets the chapter 9.41 RCW statutory scheme to define the RCW 9.41.800 phrase "dangerous weapons" to mean a slungshot, a sand club, metal knuckles, and a spring blade knife.[583]

[583] See RCW 9.41.250(1)(a).

Those four dangerous weapons are sufficiently defined for a person of ordinary intelligence to understand which weapons are prohibited and to avoid arbitrary and discriminatory enforcement. Therefore, RCW 9.41.800 is enforceable concerning dangerous weapons and does not violate the Due Process Clause of the Fourteenth Amendment.

F. Decision[584]

While this Court supports efforts by our legislature to reduce the risk of lethality in cases of domestic violence, our legal analysis requires our conclusions here.

After conducting the required "searching legal analysis," this unanimous Court is fully convinced the surrender and surrender compliance provisions in RCW 9.41.800 through 9.41.810[585] violate the Fifth Amendment and Article I, §9 beyond a reasonable doubt. Accordingly, these provisions are void.

After conducting the required "searching legal analysis," the majority of this Court is fully convinced the same surrender provisions in RCW 9.41.800[586] violate the Fourth Amendment and Article I, §7 beyond a reasonable doubt. Accordingly, these provisions are void.

This Court unanimously concludes the phrase "dangerous weapons" as used in RCW 9.41.800 is not vague and thus does not violate the Fourteenth Amendment.

[584] See Appendix I for the yellow highlighted provisions of RCW 9.41.800 through .810 found unconstitutional by today's decision.
[585] RCW 9.41.800(1)(a), (b), .800(2)(a), (b), .800(3)(c)(ii)(A), (B), .800(4), .800(5), .800(7), .801(2), .801(6), and .804.
[586] RCW 9.41.800(1)(a), (b), .800(2)(a), (b), .800(3)(c)(ii)(A), (B), .800(4), .800(5), and .800(7).

14. ORDER

For the reasons discussed, it is hereby –

ORDERED that Marshall's motion is granted and the surrender of weapons portion of the Order to Surrender and Prohibit Weapons entered on January 17, 2020 shall be and hereby is vacated. All other provisions of the January 17, 2020 Order to Surrender and Prohibit Weapons remain in effect. It is also

ORDERED that Marshall's motion is granted and the Findings and Order Re: Weapons Surrender Compliance Review – Defendant Not in Compliance entered on January 24, 2020 shall be and hereby is vacated. It is also

ORDERED that Marshall's motion to declare the phrase "dangerous weapons" as used in RCW 9.41.800 unconstitutionally vague in violation of the Fourteenth Amendment is denied.

DATED – May 27, 2020

JEFFREY J. JAHNS
Presiding Judge
Department 2

WE CONCUR –

CLAIRE A. BRADLEY
Assistant Presiding Judge
Department 1

KEVIN P. KELLY
Judge
Department 4

The undersigned concurs in the foregoing Memorandum Decision and Order except as follows –

This Department joins the majority in concluding that the surrender and surrender compliance provisions of the statutes at bar are unconstitutional under the Fifth Amendment and Article I, §9 analysis discussed. This Department further joins the majority to conclude the phrase "dangerous weapons" is not unconstitutionally vague.

Marshall's argument focused on the Fifth Amendment. This Department respectfully declines to join the foregoing Memorandum Decision concerning the constitutionality of these statutes under the Fourth Amendment and Article I, §7 as discussed in Sections 10 through 12.

DATED – May 27, 2020

MARILYN G. PAJA
Judge
Department 3

15. APPENDIX

A. Domestic Violence No-Contact Order entered January 17, 2020 (*State v. Marshall*)

B. Order to Surrender and Prohibit Weapons entered January 17, 2020 (*State v. Marshall*)

C. Findings and Order Re: Weapons Surrender Compliance Review – Defendant Not in Compliance entered January 24, 2020 (*State v. Marshall*)

D. Superior Court Surrender Decision entered February 14, 2020 (*State v. Kandow*)

E. AOC Proof of Surrender pattern form

F. AOC Receipt for Surrendered Firearms, Other Dangerous Weapons and Concealed Pistol License pattern form

G. AOC Declaration of Non-Surrender pattern form

H. AOC Order to Surrender Weapons pattern form

I. Yellow Highlighted Provisions of RCW 9.41.800 through .810 Found Unconstitutional

APPENDIX A

DV NO CONTACT ORDER

STATE V. MARSHALL

KITSAP COUNTY DISTRICT COURT, STATE OF WASHINGTON

STATE OF WASHINGTON, **Plaintiff** **vs.** **MARSHALL, ZACHARY JAMES**, **Defendant** (First, Middle, Last Name)	**No. 23650101** ☐ **Pre-Trial** ☐ **Post Conviction** ☐ **Replacement Order (paragraph 10)** **Domestic Violence No-Contact Order**

No-Contact Order

1. **Protected Person's Identifiers**:

Crystina L. Hubbard
Name (First, Middle, Last)

09/18/1998	**Female**	**White**
DOB	Gender	Race

If a minor, use initials instead of name, and complete a Law Enforcement Information Sheet (LEIS).

Defendant's Identifiers:

Date of Birth	
12/14/1995	
Gender	Race
Male	**White**

2. **Defendant**:
   A. do not cause, attempt, or threaten to cause bodily injury to, assault, sexually assault, harass, stalk, or keep under surveillance the protected person.
   B. do not contact the protected person, directly, indirectly, in person or through others, by phone, mail, or electronic means, except for mailing or service of process of court documents through a third party, or contact by the defendant's lawyers.
   C. do not knowingly enter, remain, or come within _____ (500 feet if no distance entered) of the protected person's residence, school, workplace, other: _____.
   D. other: **defendant may have limited contact through a third party with the sole purpose to coordinate child care/ child visitation**.

3. **Firearms and Weapons, Defendant**:
   ☒ do not obtain or possess a firearm, other dangerous weapon or concealed pistol license. (Pre-Trial, RCW 9.41.800. See findings in paragraph 7, below.)
   ☐ do not obtain, own, possess or control a firearm. (Post Conviction or Pre-Trial, RCW 9.41.040.)
   ☒ shall **immediately surrender** all firearms and other dangerous weapons within the defendant's possession or control and any concealed pistol license to: [☐ Bainbridge Island Police Department] [☐ Bremerton Police Department] [☒ Kitsap County Sheriff's Office] [☐ Port Orchard Police Department] [☐ Poulsbo Police Department] [☐ Other: _____]. (Pre-Trial Order, RCW 9.41.800.)

4. **This no-contact order expires on**: _____. (Two years from today if no date is entered.)

Warning: Violation of the provisions of this order with actual notice of its terms is a criminal offense under chapter 26.50 RCW and will subject a violator to arrest; any assault, drive-by shooting, or reckless endangerment that is a violation of this order is a felony. **You can be arrested even if the person protected by this order invites or allows you to violate the order's prohibitions**. You have the sole responsibility to avoid or refrain from violating the order's provisions. Only the court can change the order upon written application. (Additional warnings on page 2 of this order.)

Findings of Fact

5. Based upon the record both written and oral, the court finds that the defendant has been charged with, arrested for, or convicted of a domestic violence offense, and the court issues this Domestic Violence No-Contact Order under chapter 10.99 RCW to prevent possible recurrence of violence.

6. The court further finds that the defendant's relationship to a person protected by this order is an ☒ Intimate partner (former/current spouse; parent of common child; or former/current cohabitants as intimate partners) or ☐ Other family or household member as defined by Ch. 10.99 RCW.

7. ☒ (Pretrial Order) For crimes not defined as a serious offense, the court makes the following mandatory findings pursuant to RCW 9.41.800: ☐ The defendant used, displayed, or threatened to use a firearm or other dangerous weapon in a felony. ☐ The defendant is ineligible to possess a firearm due to a prior conviction pursuant to RCW 9.41.040; or ☒ Possession of a firearm or other dangerous weapon by the defendant presents a serious and imminent threat to public health or safety, or to the health or safety of any individual.

Additional Warnings to Defendant: This order does not modify or terminate any order entered in any other case. The defendant is still required to comply with other orders.

Willful violation of this order is punishable under RCW 26.50.110. State and federal firearm restrictions apply. 18 U.S.C. § 922(g)(8)(9); RCW 9.41.040. In addition to other state and federal firearm restrictions, if you and the protected person are intimate partners, you cannot own, obtain, or possess a firearm, other dangerous weapon, or concealed pistol license for as long as the order is in effect. A violation is a felony and will subject you to arrest.

Pursuant to 18 U.S.C. § 2265, a court in any of the 50 states, the District of Columbia, Puerto Rico, any United States territory, and any tribal land within the United States shall accord full faith and credit to the order.

Additional Orders

8. ☒ (Special Assistance from Law Enforcement Agencies) The law enforcement agency where the protected person lives shall standby for a limited period of time while the defendant removes essential personal property at the protected person's residence. Personal property shall be limited to defendant's personal effects, personal clothing and tools of the trade.

9. **IT IS FURTHER ORDERED THAT** the clerk of the court shall forward a copy of this order on or before the next judicial day to:
[☐ Bainbridge Island Police Department] [☐ Bremerton Police Department] [☒ Kitsap County Sheriff's Office] [☐ Port Orchard Police Department] [☐ Poulsbo Police Department] [☐ Other: _____] which shall enter it in a computer-based criminal intelligence system available in this state used by law enforcement to list outstanding warrants.

10. ☐ This order replaces all prior no-contact orders protecting the same person issued under this cause number.

Dated and Filed: January 17, 2020 ☒ in open court with the defendant present.

SigPluse / Pro Tem
01/17/2020 02:16:33 pm
_____
Judge/ Pro Tem

I acknowledge receipt of a copy of this order:

SigPlusndant
01/ 17/ 2020 02:22:04 pm
_____
Defendant

I am a certified or registered interpreter or found by the court to be qualified to interpret in the _____ language, which the defendant understands. I translated this order for the defendant from English into that language.

Signed at (city) _____, (state) _____, on (date) _____.

Interpreter

Interpreter: 02/ 10/ 2011 02:16:35 pm _____ print name: _____

APPENDIX B

ORDER TO SURRENDER AND PROHIBIT WEAPONS

STATE V. MARSHALL

KITSAP COUNTY DISTRICT COURT
STATE OF WASHINGTON

STATE OF WASHINGTON, Plaintiff, v. MARSHALL, ZACHARY JAMES, DOB 12/14/1995, Defendant.	**NO. 23650101** **ORDER TO SURRENDER AND PROHIBIT WEAPONS (PRE-TRIAL)** Compliance Review Date – January 24, 2020 Time of Hearing – 1:30 PM Room – Courtroom 104 (Clerk's Action Required)

This order is based on the Findings of Fact and Conclusions of Law Granting Order to Surrender Weapons dated January 17, 2020.

To the Above-Named Defendant –

You must **immediately surrender** all firearms and other dangerous weapons in your possession or control, and any concealed pistol licenses issued under RCW 9.41.070, to the **Kitsap County Sheriff's Office**.

You are **prohibited** from accessing, obtaining, or possessing any firearms or other dangerous weapons.

You are **prohibited** from obtaining or possessing a concealed pistol license.

This order expires –	**2 years from today's date.**

If you have firearms, other dangerous weapons, or concealed pistol licenses –

Step 1: If you are released after the hearing at which this order was entered, **immediately** surrender the firearms, dangerous weapons, and concealed pistol licenses to the Kitsap County Sheriff's Office on the **same day** as the hearing. Contact the Kitsap County Sheriff's Office for directions on how to immediately surrender the firearms, dangerous weapons, and concealed pistol licenses.

Or

Step 1: If you are or remain in confinement after the hearing at which this order was entered, contact the Kitsap County Sheriff's Office for directions on how to **immediately** surrender the firearms, dangerous weapons, and concealed pistol licenses.

For all cases –

Step 2: **Get a receipt** for the firearms, other dangerous weapons and concealed pistol licenses from law enforcement.

Step 3: **Complete** the ***Proof of Surrender*** form and file it with the receipt.

Step 4: **File** the documents with the clerk of the court within 5 judicial (court) days.

If you do not have firearms, other dangerous weapons, or concealed pistol licenses –

Step 1: **Immediately** complete and sign the ***Declaration of Non-Surrender*** form.

Step 2: **File** the declaration with the clerk of the court within 5 judicial (court) days.
If you already surrendered all firearms, other dangerous weapons, and concealed pistol licenses under another order, they must remain in the possession of the law enforcement agency that received them until further order of the court. You must provide proof of that surrender to this court.

Washington Crime Information Center (WACIC) Data Entry

☒ The clerk of the court shall electronically forward this order on or before the next judicial day to the Kitsap County Sheriff's Office which shall enter this order into WACIC.

Warning to Defendant –

- If you fail to comply with this order, you may be found in contempt of court, the court may issue a search warrant, and/or you may be charged with a misdemeanor and punished accordingly.
- You may also be charged with a crime up to and including a felony if you are found to own, possess, or control a firearm or other dangerous weapon.

Defendant shall appear in court for a compliance review hearing, and testify under oath verifying compliance with this Order.
The hearing is scheduled for the date and time as shown in the caption on page one.
Kitsap County District Court is located at the Kitsap County Courthouse,
614 Division Street, Port Orchard, WA.

DATED AND FILED – January 17, 2020

SigPlus
01/17/2020 02:12:40 pm

JUDGE

APPENDIX C

COMPLIANCE REVIEW ORDER – DEFENDANT NOT IN COMPLIANCE

STATE V. MARSHALL

KITSAP COUNTY DISTRICT COURT
STATE OF WASHINGTON

STATE OF WASHINGTON, Plaintiff, v. MARSHALL, ZACHARY JAMES, Defendant.	**NO. 23650101** **FINDINGS AND ORDER RE: WEAPONS SURRENDER COMPLIANCE REVIEW – DEFENDANT NOT IN COMPLIANCE**

The court issued an Order to Surrender and Prohibit Weapons and defendant has been served with a copy by the court. The court reviewed the records and files herein.

FINDINGS AND ORDER

The court finds defendant is not in compliance with the Order to Surrender Weapons –

☒ Declaration of Non-Surrender – Not Filed.

There is no Declaration of Surrender in the court file. Therefore, the court concludes that there has not been a sufficient showing that defendant has complied with the conditions of RCW 9.41.800.

☒ Receipt for Surrendered Firearms, Other Dangerous Weapons and Concealed Pistol License, and/or Proof of Surrender of Weapons – Not Filed.

There is not – ☐ a Receipt for Surrendered Firearms, Other Dangerous Weapons and Concealed Pistol License ☐ a Proof of Surrender of Weapons in the court file. Therefore, the court concludes that there has not been a sufficient showing that defendant has complied with the conditions of RCW 9.41.800.

☐ Possession of Weapons – Defendant Admits. Defendant has indicated that he or she is in possession of firearms, dangerous weapons, and/or concealed pistol licenses that need to be immediately surrendered. Therefore, the court concludes that there has not been a sufficient showing that defendant has complied with the conditions of RCW 9.41.800.

☐ Possession of Weapons – Allegations. There are allegations in a police report, protected party's statement, or declaration(s) that defendant is in possession of firearms, dangerous weapons, and/or concealed pistol licenses that need to be immediately surrendered. Therefore, the court concludes that there has not been a sufficient showing that defendant has complied with the conditions of RCW 9.41.800.

DATED AND FILED – January 24, 2020

01/24/2020 02:06:30 pm

SigPlus

JUDGE

APPENDIX D

SUPERIOR COURT
SURRENDER DECISION
STATE V. KANDOW

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KITSAP COUNTY

STATE OF WASHINGTON,

Plaintiff,

v.

NICHOLAS JAMES KANDOW,

Defendant.

No. 19-1-01285-18
19-1-01491-18

DECISION ON MOTION OPPOSING JUDICIAL INQUSITION & THE SYSTEMIC VIOLATION OF A FUNDAMENTAL CONSTITUTIONAL RIGHT IN CASES ALLEGING CRIMES OF DOMESTIC VIOLENCE

THIS MATTER comes before the Court on the Defendant's Motion Opposing Judicial Inquisition & the Systemic Violation of a Fundamental Constitutional Right in Cases Alleging Crimes of Domestic Violation.

At issue is whether requiring the filing of a declaration by a defendant in a criminal case declaring the surrender of firearms or the non-surrender of firearms and other dangerous weapons[1] violates the Fifth Amendment to the United States Constitution and the Washington State Constitution under article 1, section 9.

[1] As well as any further hearing following inaction by the defendant which may include requiring the Defendant to appear and testify under oath in court concerning the surrender or non-surrender of firearms or other dangerous weapons as required by RCW 9.41.801(6).

Kitsap County Superior Court
614 Division Street, MS-24
Port Orchard, WA 98366
(360) 337-7140

Defendant also asserts that the order of the court that provides for the surrender of "other dangerous weapons" is unconstitutionally vague.

The Court heard oral argument on January 13, 2020 with Judge Kevin D. Hull and Judge William C. Houser sitting *en banc*.

Constitutional Privilege

The United States Constitution[2] and Washington State Constitution[3] each provide privilege against self-incrimination for defendants in any criminal case. "Our State constitution article I, section 9 is equivalent to the Fifth Amendment and 'should receive the same definition and interpretation as that which has been given to' the Fifth Amendment by the Supreme Court."[4]

The Fifth Amendment privilege prohibiting a criminal defendant from testifying themselves "not only permits a person to refuse to testify against himself at a criminal trial, but also allows him not to answer official questions put to him in any other proceeding, civil or criminal, where the answer might incriminate him in future criminal proceedings."[5] It is well-established that "[t]he Fifth Amendment analysis generally entails two considerations: whether the defendant's statements exposed him to a 'realistic threat of self-incrimination' in a subsequent proceeding and whether the State compelled the defendant's incriminating statements."[6] Furthermore, "[t]he privilege afforded not only extends to answers that would in themselves support a conviction under a federal criminal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime."[7]

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[2] U.S. Const. amend. V.
[3] Wash. Const. Art, I, § 32.
[4] *State v. Templeton*, 148 Wn.2d 193, 207–08, 59 P.3d 632, 639 (2002) citing *City of Tacoma v. Heater*, 67 Wn.2d 733, 736, 409 P.2d 867, 869 (1966).
[5] *State v. King*, 130 Wn.2d 517, 523–24, 925 P.2d 606, 610 (1996) referencing *Minnesota v. Murphy*, 465 U.S. 420, 426, 104 S.Ct. 1136, 1141-42, 79 L.Ed.2d 409 (1984); *Lefkowitz v. Turley*, 414 U.S. 70, 77, 94 S.Ct. 316, 322, 38 L.Ed.2d 274 (1973).
[6] *State v. King*, 130 Wn.2d 517, 524, 925 P.2d 606, 610 (1996) citing *Minnesota v. Murphy*, 465 U.S. 420, 426, 104 S. Ct. 1136, 1141, 79 L. Ed. 2d 409 (1984).
[7] *Hoffman v. U. S.*, 341 U.S. 479, 486, 71 S. Ct. 814, 818, 95 L. Ed. 1118 (1951) referencing *Blau v. U.S.*, 340 U.S. 159, 71 S. Ct. 223, 95 L. Ed. 170 (1950).

It is recognized that a statute is presumed to be constitutional.[8] While not conceding the issue, the State did not provide any authority contradicting Defendant's arguments.[9]

The Court now finds that the statutory requirement requiring a defendant in a criminal case to file a testimonial statement as to their possession of a weapon they are legally prohibited from possessing at the time of the declaration violates the Fifth Amendment privilege against self-incrimination. The Order to Surrender Weapons compels a defendant in a criminal case to provide a testimonial statement about their possession of a firearm or dangerous weapon. Such a statement necessarily contains a "realistic threat of self-incrimination in a subsequent proceeding" where a criminal defendant has separate domestic violence order entered at arraignment against them, and a no contact order issued as to the alleged victim.

Dangerous Weapons

Defendant argues that RCW 9.41.801 is void for vagueness as to the definition of dangerous weapons. Pursuant to RCW 9.41.250(1), "dangerous weapon means a slung shot, sand club, metal knuckles, spring blade knife, dagger, dirk, pistol and any contrivance or device for suppressing noise of any firearm." This definition is sufficiently clear to protect against arbitrary enforcement. The Court therefore adopts RCW 9.41.150(1) with regard to future Orders to Surrender Weapons issued under RCW 9.41.801.

Dated this 14th day of February, 2020.

Kevin D. Hull
Superior Court Judge

William C. Houser
Superior Court Judge

[8] Citing *State v. Halstien,* 122 Wn.2d 109, 118, 857 P.2d 270, 276 (1993).

[9] At oral argument the State offered that they could not make a good faith argument against the Fifth Amendment implications created by RCW 9.41.801. The Court appreciates the candor of the State on this matter.

CERTIFICATE OF SERVICE

I, Kyle Gallagher, certify under penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above entitled action, and competent to be a witness herein.

Today I caused a copy of the foregoing document to be served in the manner noted on the following:

Steven M. Lewis Kitsap County Public Defense 614 Division St, MS 40 Port Orchard, WA 98366-4692	☐ Via U.S. Mail ☐ Via Fax: ☒ Via Interoffice mail ☒ Via E-mail smlewis@co.kitsap.wa.us
Cami G. Lewis Kitsap County Prosecutor's Office 614 Division St. MS-35 Port Orchard, WA 98366-4681	☐ Via U.S. Mail ☐ Via Fax: ☒ Via Interoffice mail ☒ Via E-mail clewis@co.kitsap.wa.us

DATED February 14, 2020, at Port Orchard, Washington.

Kyle Gallagher #47769
Staff Attorney

APPENDIX E

AOC PROOF OF SURRENDER FORM

_____ Court of Washington **For _____**	
	No.
_____ Petitioner vs. _____ Defendant	**Proof of Surrender** (PRSRW)

The court ordered me to immediately surrender all firearms and other dangerous weapons that I own or have in my possession or control, and any concealed pistol licenses issued to me.

On (date) _____ at _____ a.m./p.m.,
I surrendered all:

[ ] firearms

[ ] other dangerous weapons

[ ] concealed pistol licenses:

to _____ (local law enforcement agency).

Court case number: _____

Law enforcement agency case number: _____

- I filed a copy of the ***Receipt for Surrendered Firearms, Other Dangerous Weapons and Concealed Pistol License*** form with the clerk of the court.

I declare, under penalty of perjury under the law of the State of Washington, that this statement is true and correct.

Dated: _____ at _____, Washington.

_____ _____
Defendant's Signature Print name

APPENDIX F

AOC RECEIPT FOR SURRENDERED PROPERTY FORM

_____ Court of Washington **For _____**	
_____ Petitioner vs. _____ Defendant DOB	**No.** **Receipt for Surrendered Firearms, Other Dangerous Weapons and Concealed Pistol License** (criminal) (RCPF)

The Defendant must file a copy of this receipt, and file the ***Proof of Surrender*** form with the court.

Law Enforcement:

List each item surrendered individually with brand, model, serial number, color, concealed pistol license number and issuing authority, etc. below (attach additional sheets if necessary):

Number of firearms surrendered: _____

(Name of law enforcement official) _____ received the firearms, other dangerous weapons, and concealed pistol licenses listed above on behalf of _____, the local law enforcement agency.

(Law enforcement shall file the original receipt with the court within 24 hours after service of this order, electronically whenever electronic filing is available.)

I declare, under penalty of perjury under the laws of the State of Washington, that this statement is true and correct.

Dated: _____ at (place) _____, Washington.

_____ _____

Signature of Law Enforcement Official Print Name Badge No.

Address: _____

APPENDIX G

AOC DECLARATION OF NON-SURRENDER FORM

_____ Court of Washington **For _____**	
_____ Petitioner vs. _____ Defendant	**No.** **Declaration of Non-Surrender (DCLRNS)**

Note: If you previously surrendered your firearms, other dangerous weapons, and concealed pistol licenses, use the *Proof of Surrender* form, All Cases 03.0400 or NC 03.0400.

I understand that the court has ordered me to surrender all firearms, other dangerous weapons that I have in my possession or control, and any concealed pistol licenses. I have not surrendered any firearms, other dangerous weapons, or concealed pistol licenses pursuant to that order because I do not have any of those items.

I also understand that:

I am prohibited from accessing, obtaining, or possessing a firearm or other dangerous weapon or concealed pistol license until further order of the court.

If I fail to comply with the order to surrender weapons, I may be found in contempt of court and be charged with a misdemeanor.

I may be charged with a crime up to and including a **felony** if I am found to own, possess, or control a firearm or other dangerous weapon.

I declare, under penalty of perjury under the laws of the State of Washington, that this statement is true and correct.

Dated: _____ at (place) _____, Washington.

_____ _____

Defendant's signature Print name

APPENDIX H

AOC ORDER TO SURRENDER WEAPONS FORM

_____Court of Washington For _____	**No**.
_____ Petitioner vs. _____ Defendant	**Order to Surrender Weapons** [ ] Pre-Trial (ORWPNP) [ ] Post Conviction (ORWPNP) [ ] Compliance Review Hearing (ORCRH) Compliance Review hearing date:_____ At: _____ _____ (Clerk's Action Required)

This order is based on the findings in the order dated _____.

Defendant, (name) _____:

You must **immediately surrender** all firearms, other dangerous weapons and concealed pistol licenses to the local law enforcement agency: _____.

You must immediately surrender all firearms and other dangerous weapons subject to this order, including but not limited to the following:

Attach sheet if there are more to list.

This order expires:	**[ ]** on _____ (date) or **[ ]** 1 year **[ ]** 2 years from today's date. 5 years from today's date if no date is entered and no box is checked.

If you have firearms, other dangerous weapons, or concealed pistol licenses:

Step 1: If you are released after the hearing at which this order was entered, **immediately** surrender the firearms, dangerous weapons, and concealed pistol licenses to the local law enforcement agency on the **same day** as the hearing. Contact the local law enforcement agency for directions on how to immediately surrender the firearms, dangerous weapons, and concealed pistol licenses.

or

Step 1: If you are or remain in confinement after the hearing at which this order was entered, contact the local law enforcement agency for directions on how to immediately surrender the firearms, dangerous weapons, and concealed pistol licenses.

In all cases:

Step 2: Get a receipt for the firearms, dangerous weapons, and concealed pistol licenses from law enforcement.

Step 3: Complete the *Proof of Surrender* form and file it with the receipt.

Step 4: File the documents with the clerk of the court within 5 judicial (court) days.

If you do not have firearms, other dangerous weapons, or concealed pistol licenses:

Step 1: **Immediately** complete and sign the *Declaration of Non-Surrender* form.

Step 2: File the declaration with the clerk of the court within 5 judicial (court) days.

If you already surrendered all firearms, other dangerous weapons, and concealed pistol licenses under another order, they must remain in the possession of the law enforcement agency that received them until further order of the court. You must provide proof of that surrender to the court.

Washington Crime Information Center (WACIC) Data Entry

The clerk of the court shall forward a copy of this order on or before the next judicial day to:_____[ ] County Sheriff's Office [ ] City Police Department where the case is filed, which shall enter it into WACIC.

[ ] **You must appear** for the review hearing listed in the caption on page one.

This order replaces all prior orders to surrender issued under this case number.

Warning!

- If you fail to comply with this order, you may be found in contempt of court and/or be charged with a misdemeanor and punished accordingly.
- You may also be charged with a crime up to and including a **felony** if you are found to own, possess, or control a firearm or other dangerous weapon.

Dated _____ at _____ a.m./p.m. _____
Judge/Commissioner

I acknowledge receipt of a copy of this order.

➢_____ _____
Defendant's Signature Print Name

You may download the forms listed in this order from the Washington Courts' forms website: http://www.courts.wa.gov/forms/.

APPENDIX I

UNCONSTITUTIONAL PROVISIONS HIGHLIGHTED IN YELLOW

RCW 9.41.800

Surrender of weapons or licenses—Prohibition on future possession or licensing.

(1) Any court when entering an order authorized under chapter 7.92 RCW, RCW 7.90.090, 9A.46.080, 10.14.080, 10.99.040, 10.99.045, 26.09.050, 26.09.060, * 26.10.040, * 26.10.115, 26.26B.020, 26.50.060, 26.50.070, or 26.26A.470 shall, upon a showing by clear and convincing evidence, that a party has: Used, displayed, or threatened to use a firearm or other dangerous weapon in a felony, or is ineligible to possess a firearm under the provisions of RCW 9.41.040:

(a) Require that the party immediately surrender all firearms and other dangerous weapons;

(b) Require that the party immediately surrender any concealed pistol license issued under RCW 9.41.070;

(c) Prohibit the party from accessing, obtaining, or possessing any firearms or other dangerous weapons;

(d) Prohibit the party from obtaining or possessing a concealed pistol license.

(2) Any court when entering an order authorized under chapter 7.92 RCW, RCW 7.90.090, 9A.46.080, 10.14.080, 10.99.040, 10.99.045, 26.09.050, 26.09.060, * 26.10.040, * 26.10.115, 26.26B.020, 26.50.060, 26.50.070, or 26.26A.470 may, upon a showing by a preponderance of the evidence but not by clear and convincing evidence, that a party has: Used, displayed, or threatened to use a firearm or other dangerous weapon in a felony, or is ineligible to possess a firearm under the provisions of RCW 9.41.040:

(a) Require that the party immediately surrender all firearms and other dangerous weapons;

(b) Require that the party immediately surrender a concealed pistol license issued under RCW 9.41.070;

(c) Prohibit the party from accessing, obtaining, or possessing any firearms or other dangerous weapons;

(d) Prohibit the party from obtaining or possessing a concealed pistol license.

(3) During any period of time that the person is subject to a court order issued under chapter 7.90, 7.92, 9A.46, 10.14, 10.99, 26.09, *26.10, 26.26A, 26.26B, or 26.50 RCW that:

(a) Was issued after a hearing of which the person received actual notice, and at which the person had an opportunity to participate;

(b) Restrains the person from harassing, stalking, or threatening an intimate partner of the person or child of the intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and

(c)(i) Includes a finding that the person represents a credible threat to the physical safety of the intimate partner or child; and

(ii) By its terms, explicitly prohibits the use, attempted use, or threatened use of physical force against the intimate partner or child that would reasonably be expected to cause bodily injury, the court shall:

(A) Require that the party immediately surrender all firearms and other dangerous weapons;

(B) Require that the party immediately surrender a concealed pistol license issued under RCW 9.41.070;

(C) Prohibit the party from accessing, obtaining, or possessing any firearms or other dangerous weapons; and

(D) Prohibit the party from obtaining or possessing a concealed pistol license.

(4) The court may order temporary surrender of all firearms and other dangerous weapons, and any concealed pistol license, without notice to the other party if it finds, on the basis of the moving affidavit or other evidence, that irreparable injury could result if an order is not issued until the time for response has elapsed.

(5) In addition to the provisions of subsections (1), (2), and (4) of this section, the court may enter an order requiring a party to comply with the provisions in subsection (1) of this section if it finds that the possession of a firearm or other dangerous weapon by any party presents a serious and imminent threat to public health or safety, or to the health or safety of any individual.

(6) The requirements of subsections (1), (2), and (5) of this section may be for a period of time less than the duration of the order.

(7) The court may require the party to surrender all firearms and other dangerous weapons in his or her immediate possession or control or subject to his or her immediate possession or control, and any concealed pistol license issued under RCW **9.41.070**, to the local law enforcement agency. Law enforcement officers shall use law enforcement databases to assist in locating the respondent in situations where the protected person does not know where the respondent lives or where there is evidence that the respondent is trying to evade service.

(8) If the court enters a protection order, restraining order, or no-contact order that includes an order to surrender firearms, dangerous weapons, and any concealed pistol license under this section, the order must be served by a law enforcement officer.

[**2019 c 245 § 1; 2019 c 46 § 5006; 2014 c 111 § 2; 2013 c 84 § 25; 2002 c 302 § 704; 1996 c 295 § 14; 1994 sp.s. c 7 § 430.**]

NOTES:

Reviser's note: *(1) Chapter **26.10** RCW was repealed in its entirety by 2019 c 437 § 801, effective January 1, 2021.

(2) This section was amended by 2019 c 46 § 5006 and by 2019 c 245 § 1, each without reference to the other. Both amendments are incorporated in the publication of this section under RCW **1.12.025**(2). For rule of construction, see RCW **1.12.025**(1).

Finding—Intent—Severability—1994 sp.s. c 7: See notes following RCW **43.70.540**.

Effective date—1994 sp.s. c 7 §§ 401-410, 413-416, 418-437, and 439-460: See note following RCW **9.41.010**.

RCW 9.41.801

Surrender of weapons or licenses—Ensuring compliance.

*** CHANGE IN 2020 *** (SEE 2622-S.SL) ***

(1) Because of the heightened risk of lethality to petitioners when respondents to protection orders become aware of court involvement and continue to have access to firearms, and the frequency of noncompliance with court orders prohibiting possession of firearms, law enforcement and judicial processes must emphasize swift and certain compliance with court orders prohibiting access, possession, and ownership of firearms.

(2) A law enforcement officer serving a protection order, no-contact order, or restraining order that includes an order to surrender all firearms, dangerous weapons, and a concealed pistol license under RCW 9.41.800 shall inform the respondent that the order is effective upon service and the respondent must immediately surrender all firearms and dangerous weapons in his or her custody, control, or possession and any concealed pistol license issued under RCW 9.41.070, and conduct any search permitted by law for such firearms, dangerous weapons, and concealed pistol license. The law enforcement officer shall take possession of all firearms, dangerous weapons, and any concealed pistol license belonging to the respondent that are surrendered, in plain sight, or discovered pursuant to a lawful search. Alternatively, if personal service is not required because the respondent was present at the hearing at which the order was entered, the respondent must immediately surrender all firearms, dangerous weapons, and any concealed pistol license in a safe manner to the control of the local law enforcement agency on the day of the hearing at which the respondent was present.

(3) At the time of surrender, a law enforcement officer taking possession of firearms, dangerous weapons, and any concealed pistol license shall issue a receipt identifying all firearms, dangerous weapons, and any concealed pistol license that have been surrendered and provide a copy of the receipt to the respondent. The law enforcement agency shall file the original receipt with the court within twenty-four hours after service of the order and retain a copy of the receipt, electronically whenever electronic filing is available.

(4) Upon the sworn statement or testimony of the petitioner or of any law enforcement officer alleging that the respondent has failed to comply with the surrender of firearms or dangerous weapons as required by an order issued under RCW 9.41.800, the court shall determine whether probable cause exists to believe that the respondent has failed to surrender all firearms and dangerous weapons in their possession, custody, or control. If probable cause exists, the court shall issue a warrant describing the firearms or dangerous weapons and authorizing a search of the locations where the firearms and dangerous weapons are reasonably believed to be and the seizure of all firearms and dangerous weapons discovered pursuant to such search.

(5) If a person other than the respondent claims title to any firearms or dangerous weapons surrendered pursuant to this section, and the person is determined by the law enforcement agency to be the lawful owner of the firearm or dangerous weapon, the firearm or dangerous weapon shall be returned to the lawful owner, provided that:

(a) The firearm or dangerous weapon is removed from the respondent's access, custody, control, or possession and the lawful owner agrees by written document signed under penalty of perjury to store the firearm or dangerous weapon in a manner such that the respondent does not have access to or control of the firearm or dangerous weapon;

(b) The firearm or dangerous weapon is not otherwise unlawfully possessed by the owner; and

(c) The requirements of RCW **9.41.345** are met.

(6) Courts shall develop procedures to verify timely and complete compliance with orders to surrender weapons under RCW **9.41.800**, including compliance review hearings to be held as soon as possible upon receipt from law enforcement of proof of service. A compliance review hearing is not required if the court can otherwise enter findings on the record or enter written findings that the proof of surrender or declaration of nonsurrender attested to by the person subject to the order, along with verification from law enforcement and any other relevant evidence, makes a sufficient showing that the person has timely and completely surrendered all firearms and dangerous weapons in their custody, control, or possession, and any concealed pistol license issued under RCW **9.41.070**, to a law enforcement agency. If the court does not have a sufficient record before it on which to make such a finding, the court must set a review hearing to occur as soon as possible at which the respondent must be present and provide testimony to the court under oath verifying compliance with the court's order.

(7) All law enforcement agencies must have policies and procedures to provide for the acceptance, storage, and return of firearms, dangerous weapons, and concealed pistol licenses that a court requires must be surrendered under RCW **9.41.800**. A law enforcement agency holding any firearm or concealed pistol license that has been surrendered under RCW **9.41.800** shall comply with the provisions of RCW **9.41.340** and **9.41.345** before the return of the firearm or concealed pistol license to the owner or individual from whom it was obtained.

(8) The administrative office of the courts shall create a statewide pattern form to assist the courts in ensuring timely and complete compliance in a consistent manner with orders issued under this chapter. The administrative office of the courts shall report annually on the number of orders issued under this chapter by each court, the degree of compliance, and the number of firearms obtained, and may make recommendations regarding additional procedures to enhance compliance and victim safety.

[**2019 c 245 § 2**.]

RCW 9.41.802

Proof of surrender and receipt pattern form—Declaration of nonsurrender pattern form—Administrative office of the courts to develop.

By December 1, 2014, the administrative office of the courts shall develop a proof of surrender and receipt pattern form to be used to document that a respondent has complied with a requirement to surrender firearms, dangerous weapons, and his or her concealed pistol license, as ordered by a court under RCW 9.41.800. The administrative office of the courts must also develop a declaration of nonsurrender pattern form to document compliance when the respondent has no firearms, dangerous weapons, or concealed pistol license.

[2014 c 111 § 4.]

RCW 9.41.804

Proof of surrender and receipt form, declaration of nonsurrender form—Requirement to file with clerk of the court.

A party ordered to surrender firearms, dangerous weapons, and his or her concealed pistol license under RCW 9.41.800 must file with the clerk of the court a proof of surrender and receipt form or a declaration of nonsurrender form within five judicial days of the entry of the order.

[2014 c 111 § 5.]

NOTES:

Effective date—2014 c 111 § 5: "Section 5 of this act takes effect December 1, 2014." [2014 c 111 § 7.]

RCW 9.41.810

Penalty.

Any violation of any provision of this chapter, except as otherwise provided, shall be a misdemeanor and punishable accordingly.

[**1984 c 258 § 312; 1983 c 232 § 11; 1983 c 3 § 7; 1961 c 124 § 12; 1935 c 172 § 16;** RRS § 2516-16. Formerly RCW **9.41.160**.]

NOTES:

Court Improvement Act of 1984—Effective dates—Severability—Short title—1984 c 258: See notes following RCW **3.30.010**.

Intent—1984 c 258: See note following RCW **3.34.130**.

Severability—1983 c 232: See note following RCW **9.41.010**.