



# Oregon Arrest Authority For Federal Officers

## I. Introduction

The 1993 Oregon Legislature passed House Bill 2596 A-Engrossed (1993 Laws, Chapter 254) which amended existing law (ORS 133.005 (2) and ORS 133.245) to allow federal officers to arrest a person for a nonfederal crime with the same immunity from suit as a state or local law enforcement officer. This change in the law did not grant a federal officer peace officer arrest authority. It simply specifies the circumstances when a federal officer can arrest a person and the scope of the federal officer's authority over an arrested person.

This material is intended to meet the requirements of ORS 133.245 (6) wherein a federal officer is authorized to make arrests under ORS 133.245 upon certification by the Department of Public Safety Standards and Training that the federal officer has received proper training to enable federal officers to make arrests under ORS 133.245.

## II. Arrest Provisions

- A. ORS 133.220 (b) authorizes a federal officer to make an arrest under state law for state crimes. A "federal officer" is defined in ORS 133.005 (2) to mean "a special agent or law enforcement officer employed by a federal agency and who is empowered to effect an arrest with or without a warrant for violations of the United States Code and who is authorized to carry firearms in the performance of duty."

It is important to remember that a federal officer is not included in the definition of a "peace officer" in ORS 133.005 (3) for arrest purposes or in ORS 161.015 (4) for purposes of the Criminal Code. With few specific exceptions, any reference to peace officer authority does not apply to a federal officer.

- B. Under ORS 133.005 (1), an "arrest" means to place a person under actual or constructive restraint or to take a person into custody for the purpose of charging that person with an offense. A "stop" as authorized under ORS 131.605 to 131.625 (i.e. stop and/or frisk by a peace officer) is not an arrest.
1. "Actual restraint" means to restrict a suspect's liberty by means of a physical touching or contact with the suspect's person (i.e., grab, tackle, touch or handcuff).
  2. "Constructive restraint" means to restrict a suspect's liberty by means of a command (i.e., must state "words of arrest manifesting the purpose of apprehending as suspect") and submission by the suspect to the command.
  3. An "offense" is defined by ORS 161.505 as either a crime or a violation.
    - a. However, a federal officer may arrest a person only for a crime (i.e., felony or misdemeanor) as authorized by ORS 133.245.
    - b. Also, ORS 153.039 prohibits the arrest of a person by an enforcement officer for a violation. *The issuance of a citation (cite and release) is the only way for someone to be charged with a violation in the field and only an enforcement officer is authorized to issue a citation.*
    - c. A federal officer is not included in the definition of an "enforcement officer" in ORS 153.005 (1). The definition does include "Any other person specifically authorized by law to issue citations for the commission of violations." However, ORS 133.245 provides no such authorization.
  4. An arrest may be the opening move in a criminal prosecution when an arrest is made without a warrant being in existence (i.e., warrantless arrest) or the arrest may be made pursuant to the



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existence of a warrant (i.e., court order to arrest issued by a court in the form of a bench warrant or warrant of arrest).

C. Under ORS 133.220, an arrest may be made by:

1. A peace officer under a warrant
2. A peace officer without a warrant
3. A parole and probation officer under a warrant as provided in ORS 133.239
4. A parole and probation officer without a warrant for violations of conditions of probation, parole or post-prison supervision
5. A private person
6. A federal officer (as defined in ORS 133.005 (2) and as authorized in ORS 133.245)

D. Arrest by a Federal Officer

1. Under ORS 133.245 (1), a “federal” officer may arrest a person:
  - a. For any crime committed in the federal officer’s presence if the federal officer has **probable cause to believe the person committed the crime**. See ORS 133.245 (1)(a).
    - 1) “Any crime” means any misdemeanor or felony.
    - 2) “Committed in the federal officer’s presence” means that the federal officer must perceive the acts or events which constitute the crime while they are taking place and not merely learn of them at a later time (i.e., must see, hear, feel, smell or taste something to do with the crime while the crime is occurring).
    - 3) The definition of “probable cause” is found in ORS 131.005 (11).

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

*However for purposes of 133.245 (1)(a), “probable cause” appears to apply only to the belief that the suspect is the person who committed the crime (i.e., identity of the suspect). It does not appear to apply to commission of the crime itself.*

- b. For any felony or Class A misdemeanor if the federal officer has probable cause to believe the person committed the crime. See ORS 133.245 (1)(b).

It appears that for purposes of this subsection as well, “probable cause” applies only to “identity of the suspect.” However, unlike in ORS 133.245 (1)(a), this provision of arrest authority for federal officers is highly questionable and quite likely would be found by the courts to be unconstitutional. The reason is that the Fourth Amendment to the United States Constitution and its parallel provision in Article I, Section 9 of the Oregon Constitution, require that no seizure (i.e., arrest) be made by a government officer unless it is established that there is at least probable cause to believe that a crime has been committed. Since the requirement that the crime be committed in the federal officer’s presence is even more demanding than mere probable cause to believe a crime has been committed, ORS 133.245 (1)(a) appears to be constitutional but ORS 133.245 (1)(b) does not, since the probable cause requirement only goes to the identity of the suspect. *It is highly recommended that no federal officer make an arrest pursuant to ORS*



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*133.245 (1)(b) until either the Oregon Attorney General issues a formal opinion finding that provision to be constitutional or the Oregon Legislature amends ORS 133.245 (1)(b) to clearly make the probable cause requirement apply to **both** the commission of the crime and identity of the suspect.*

- c. When rendering assistance to or at the request of a law enforcement officer, as defined in ORS 414.805. See ORS 133.245 (1)(c).
    - 1) ORS 414.805 (4) as used in this section:
      - a) “Law enforcement officer” means an officer who is commissioned and employed by a public agency as a peace officer to enforce the criminal laws of this state or laws or ordinances of a public agency.
      - b) “Public agency” means the state, a city, port, school district, mass transit district or county.
    - 2) All that needs to be shown is that a law enforcement officer needs assistance or requests the assistance of a federal officer in making an arrest.
  - d. When the federal officer has received positive information in writing or by telephone, telegraph, teletype, radio, facsimile machine or other authoritative source that a peace officer holds a warrant for the person’s arrest. See ORS 133.245 (1)(d).
    - 1) This allows an arrest by a federal officer based on notification through official channels (i.e., reliable hearsay) that a warrant is outstanding for a person’s arrest even though the federal officer does not physically possess the warrant at the time.
    - 2) To avoid later problems, the federal officer should verify as soon as is practical that the warrant is still good and that the person being arrested is in fact the person wanted in the warrant.
2. The federal officer shall inform the person to be arrested of the federal officer’s authority and reason for the arrest. See ORS 133.245 (2).
  3. ORS 133.245 (3) provides that in order to make an arrest, a federal officer may use physical force (i.e., including deadly physical force) as is justifiable and authorized of a peace officer under ORS 161.235, 161.239 and 161.245.
    - a. ORS 161.235, which authorizes the use of physical force by a peace officer making an arrest or in preventing an escape reads as follows:

Except as provided in ORS 161.239, a peace officer is justified in using physical force upon another person only when and to the extent that the peace officer reasonably believes it necessary.

      - 1) To make an arrest or to prevent the escape from custody of an arrested person unless the peace officer knows that the arrest is unlawful; or
      - 2) For self-defense or to defend a third person from what the peace officer reasonably believes to be the use or imminent use of physical force while making or attempting to make an arrest or while preventing or attempting to prevent an escape.
    - b. ORS 161.239 which authorizes the use of deadly physical force by a peace officer in making an arrest or in preventing an escape reads as follows:



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- 1) Notwithstanding the provisions of ORS 161.235, a peace officer may use deadly physical force only when the peace officer reasonably believes that:
  - a) The crime committed by the person was a felony or an attempt to commit a felony involving the use or threatened imminent use of physical force against a person; or
  - b) The crime committed by the person was kidnapping, arson, escape in the first degree, burglary in the first degree or any attempt to commit such a crime; or
  - c) Regardless of the particular offense which is the subject of the arrest or attempted escape, the use of deadly physical force is necessary to defend the peace officer or another person from the use or threatened imminent use of deadly physical force; or
  - d) The crime committed by the person was a felony or an attempt to commit a felony and under the totality of the circumstances existing at the time and place, the use of such force is necessary; or
  - e) The officer's life or personal safety is endangered in the particular circumstances involved.
- 2) Nothing in subsection (1) of this section constitutes justification for reckless or criminally negligent conduct by a peace officer amounting to an offense against or with respect to innocent persons whom the peace officer is not seeking to arrest or retain in custody.

*\* Remember: Deadly physical force is defined in ORS 161.015(3) to mean physical force that under the circumstances in which it is used is readily capable of causing death or serious physical injury.*
- c. ORS 161.245, which describes "reasonable belief" and the status of an unlawful arrest when a peace officer uses physical force prescribed in ORS 161.235 and deadly physical force prescribed in ORS 161.239, reads as follows:
  - 1) For the purposes of ORS 161.235 and 161.239, a reasonable belief that a person has committed an offense means a reasonable belief in facts or circumstances which, if true, would in law constitute an offense. If the believed facts or circumstances would not in law constitute an offense, an erroneous, though not unreasonable, belief that the law otherwise does not render justifiable the use of force to make an arrest or to prevent an escape from custody.
  - 2) A peace officer who is making an arrest is justified in using the physical force prescribed in ORS 161.235 and 161.239 unless the arrest is unlawful and is known by the officer to be unlawful.
- d. Compliance with the ORS provisions (ORS 161.235, 161.239 and 161.245) should provide a defense for a peace officer or federal officer to any state criminal prosecution arising out of an allegation of "excessive force."

*However, to avoid federal criminal or civil rights liability, the peace officer or federal officer must also comply with the constitutional requirements announced by the United States Supreme Court in Tennessee v. Garner, 471 US 1 (1985) and Graham v. Connor, 490 US 386 (1989), as well as with Ninth Circuit court rulings interpreting these Supreme Court cases.*

4. A federal officer making an arrest under this section without unnecessary delay shall take the arrested person before a magistrate or deliver the arrested person to a peace officer. See ORS 133.245 (4)(a).



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- a. To “take the arrested person before a magistrate” means to take the person to the nearest local correctional facility (i.e., county jail) since the corrections officials are agents of the court.
  - b. To “deliver the arrested person to a peace officer” means to turn the arrested suspect over to a peace officer who can transport the suspect to the nearest local correctional facility or cite and release the suspect instead of transporting to a jail.
5. The federal officer retains authority over the arrested person only until the person appears before a magistrate or until the law enforcement agency having general jurisdiction over the area in which the arrest took place assumes responsibility for the person. See ORS 133.245 (4)(b).
  6. A federal officer when making an arrest for a nonfederal offense under the circumstances provided in this section shall have the same immunity from suit as a state or local law enforcement officer. See ORS 133.245 (5).

### III. III. Miscellaneous Issues Regarding Federal Officer Arrest Powers

#### A. Juvenile Code Provisions

1. ORS 419C.005 (1) provides that the juvenile court has exclusive original jurisdiction in any case involving a person who is under 18 years of age and who has committed an act which is a violation, or which if done by an adult would constitute a violation, of a law or ordinance of the United States or a state, county or city.
  - a. This is called a “delinquency” proceeding.
  - b. The person is referred to as a “youth.” See ORS 419A.004 (31)
2. ORS 419C.013 (1) provides that a juvenile proceeding based on allegations of jurisdiction under ORS 419C.005 shall commence in either the county where the youth resides or the county in which the alleged act was committed.
3. Since a federal officer is not a peace officer, the federal officer would have only the authority of a private person and pursuant to ORS 419C.088, may take a youth into custody in circumstances where, if the youth were an adult, the person could arrest the youth.

Under ORS 133.225, a private person may arrest another person for any crime committed in the presence of the private person if the private person has probable cause to believe the arrested person committed the crime.

4. ORS 419C.091 (1) provides that custody shall not be deemed an arrest so far as the youth is concerned.
5. If a federal officer acting as a private person takes a youth into custody for a delinquency matter, the federal officer should immediately notify a local or state law enforcement officer who can assist the federal officer in complying with:
  - 1) ORS 419C.097 – Notice to parents
  - 2) ORS 419C.100 – Release of youth taken into custody
  - 3) ORS 419C.103 – Procedure when youth is not released





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4) ORS 419C.106 – Report required when youth is taken into custody

## B. Miranda Requirements

1. In Miranda, the Supreme Court held that if a person is subjected to custodial police interrogation, any statements obtained therefrom, whether incriminating or exculpatory, are not admissible unless the prosecution demonstrated that sufficient procedural safeguards were afforded the accused.
2. The Supreme Court required that prior to questioning the accused must be advised:
  - a. That he or she has the right to remain silent
  - b. That any statement made may be used against the accused; and
  - c. That the accused has the right to an attorney prior to and during questioning
  - d. That an attorney may be appointed to represent the accused if accused is unable to afford one.
3. A person should be advised of the Miranda rights if:
  - a. The police are present; and
  - b. The police take the suspect into custody; and
  - c. The police are going to interrogate.
4. Custody (Federal – 5th Amendment analysis)
  - a. In Miranda, the Court specified that the Miranda rule applied to questioning initiated by law enforcement officer after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.
  - b. Test is not what the suspect himself actually believed (i.e., subjective test).
  - c. Apply objective test: how a reasonable person in suspect's position would have understood the situation.
  - d. Miranda does not apply when the defendant's freedom to depart is not restricted in any way.
  - e. Re: juvenile suspects – The U.S. Supreme Court has held, "so long as the child's age was known to the officer at the time of police questioning, or would have been objectively apparent to a reasonable officer, its inclusion in the custody analysis is consistent with the objective nature of that test. This is not to say that a child's age will be a determinative or even a significant, factor in every case...It is however, a reality that courts cannot simply ignore." J.D.B. v. North Carolina, 564 US 261 (2011).
5. Custody (Oregon analysis)
  - a. If the police place a person in either full custody or "compelling circumstances," they must give that person Miranda warnings before questioning him or her.
  - b. When determining whether a situation was compelling, "The relevant inquiry is how a reasonable person in the person's position would have understood the situation," based on the totality of the circumstances.
  - c. The "overarching inquiry is whether the officers created the sort of police-dominated atmosphere that Miranda warnings were intended to counteract."
6. Interrogation
  - a. Interrogation, under Miranda, means "either express questioning or its functional equivalent."



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- b. Interrogation “refers only to express questioning, but also to any words or actions on the part of the police that the police should know are reasonably likely to elicit an incriminating response from the suspect.”
  - c. “Interrogation” does not include routine, booking questions put forth by jailers.
7. Volunteered Statements
- a. A statement made at any time that is not in response to a question by any law enforcement officer.
  - b. Volunteered statements of any kind are not barred by the Fifth Amendment and are not affected by Miranda decision.
  - c. Police are not required to stop and advise a person who enters a police station and states a wish to confess to a crime.
  - d. Test for voluntariness is “totality of circumstances”
8. Waiver of Rights
- a. Under Miranda, a defendant’s waiver of constitutional right must be:
    - 1) Voluntary
    - 2) Knowing
    - 3) Intelligent
  - b. “Voluntariness of course is always a requirement for admission of a defendant’s incriminating statements. Even warned statements may be inadmissible if they are not otherwise voluntary.” *State v. Vondehn*, 348 Or 462 (2010).
  - c. “We acknowledge, of course, that a defendant is entitled to demonstrate (whether by defendant’s own testimony or otherwise) that the defendant’s waiver was not knowing. So, for example, a defendant may demonstrate that he or she did not understand the warnings due to cognitive or linguistic limitations.” *Vondehn*.
  - d. When a translation of the Miranda rights has been given, our inquiry is whether the concepts have been expressed rather than whether the words have been accurately translated. *State v. Corona*, 60 Or App (1982).
  - e. Courts will presume defendant did not waive his rights; waiver cannot be inferred from silence.
  - f. Determination of whether waiver occurred depends upon “the particular facts and circumstances surrounding the case, including the background, experience and conduct of the accused.” *North Carolina v. Butler*, 441 US 369 (1979).
  - g. Explicit assertion of Miranda rights is not necessary; these rights exist whether or not the accused claimed them. Key inquiry is whether a waiver occurred and whether it was free, voluntary and involved no police persuasion. *State v. McGrew*, 38 Or App 493 (1979).
  - h. Signed or written waiver is not required; though when a defendant is asked if he or she understands Miranda rights, signs a Miranda card, and says, “Yes,” waiver of rights occurs. *State v. Anderson*, 30 Or App 257 (1977).
  - i. Unnecessary to articulate waiver following warnings; rather, clear and unambiguous conduct by person advised of rights that includes willingness to answer questions sufficient to establish waiver. *State v. Davison*, 252 Or 617(1969). Answering police questions following Miranda warnings is evidence of waiver of rights under Article I, section 12. *State v. Collins*, 253 Or 74 (1969).



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- j. An officer's testimony that he advised a suspect of each right under Miranda is generally sufficient proof that the suspect was so advised.
9. Assertion of Rights
- a. In Miranda the Supreme Court held that if a defendant "indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning."
  - b. "An accused's request for an attorney is per se an invocation of his Fifth Amendment rights, requiring that all interrogation cease."
  - c. Under the Oregon Constitution, Article I, section 12, when a suspect makes an equivocal request for counsel, the police may ask only "further questions seeking clarification of the suspect's intent." State v. Charboneau, 323 Or 38 (1996).
  - d. "An accused...having expressed his desire to deal with police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless accused himself initiates further communication..."
    - 1) Applies to second officer who is unaware of earlier invocation.
    - 2) Also applies to questioning about separate charges, whether related or unrelated.
    - 3) "Initiated" means any statement by the suspect that evinces "...a willingness and a desire for a generalized discussion about the investigation; [and] not merely a necessary inquiry arising out of the incidence of the custodial relationship."
- d. Suspects represented by counsel:
- 1) The Supreme Court held statements made by defendant after indictment were not admissible when made in the absence of counsel.
  - 2) The Supreme Court held that Sixth Amendment right to counsel precludes eliciting incriminating statements from a custodial defendant in the absence of counsel when formal criminal proceedings have commenced, the defendant is represented by counsel, and the police promised not to discuss the case without counsel.

## IV. Search Warrant Exceptions

- A. Automobile Exception – Oregon rule
- 1. Under Article 1, Section 9, "automobiles that have just been lawfully stopped by police may be searched without warrant and without a demonstration of exigent circumstances when police have probable cause to believe that the automobile contains contraband or crime evidence." State v. Kock, 302 Or. 29 (1986); see State v. Brown 302 Or. App. 268 (1986)
  - 2. Search may be of interior of vehicle, closed containers therein and the trunk of the vehicle including closed containers therein if the evidence sought could reasonably be located there.
  - 3. Rule does not apply if the vehicle is parked, immobile and unoccupied at the time police come upon the vehicle. See Kock and State v. Vaughn, 92 Or. App. 72 (1988)
  - 4. The Oregon Supreme Court in State v. Kurokawa-Lasciak, 351 Or 179, (2011) rejected the notion that "any operational vehicle" is "mobile" under the automobile exception. The Court made clear that the exception has only two requirements:
    - a. The vehicle must be mobile at the time that it is first encountered by police in connection with a crime.
    - b. Probable cause must exist for the search of the vehicle.





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5. The Court has expressly rejected previous rulings which suggest the police could search a parked vehicle if it was moving when the police first encountered it, even if, at that time, police had no suspicion of police activity. There is a distinction drawn between merely “encountering” a vehicle, and “encountering it in connection with a crime.”
6. What does it mean to be encountered by police in connection with “a crime?” According to the Court of Appeals, the automobile exception applies regardless of whether the lawful stop of a moving vehicle is for a traffic violation or for a crime. Of course, the officer must then develop probable cause to believe the car contains contraband or evidence of a crime during the course of the stop. *State v. Bliss*, 283 Or App 833 (2017).

## B. Inventory Search – Oregon Rule

1. In *State v. Atkinson*, 298 Or. App 1 (1984), the Oregon Supreme Court addressed inventory policies. Non-investigatory inventories of the contents of impounded vehicles (and personal property seized from a person being taken to a secure facility), are a valid exception to the warrant requirement if they satisfy certain conditions..
2. Under Article 1, Section 9, of the Oregon Constitution, law enforcement agencies may adopt and administer inventory policies in order to protect private property.
3. The inventory must be conducted pursuant to a properly authorized administrative program, designed and systematically administered so that the inventory involves no exercise of discretion by the law enforcement person directing or taking the inventory.
4. The person performing the inventory must not deviate from the established protocol.
5. The scope of the inventory must be reasonable in relation to its purpose. *Weber v. Oakridge School Dist. 76*, 184 Or App 415 (2002) rev den, 335 Or 422 (2003).
6. Generally, property is to be listed by its outward appearance; no closed opaque container may be opened to determine what, if anything, is inside it so that the contents may be inventoried in turn. *State v. Ridderbush*, 71 Or App 418 (1985).
7. The exception to the rule in #6, above, is that an inventory policy may authorize officers to open closed containers that are “designed to or likely to contain” valuable items. *State v. Williams*, 227 Or App 453 (2009).
8. Any object discovered in plain view, while conducting the inventory pursuant to policy, including the contents of glove compartments, consoles and vehicle trunks, may be inventoried and seized. *State v. Keller*, 265 Or 622 (1973).

## C. Search Incident to Arrest – Oregon Rule

1. The Oregon Supreme Court has held that, unlike federal search and seizure law, a valid custodial arrest does not alone give rise to a unique right to search. Such a warrantless search must be justified by the circumstances surrounding the arrest. *State v. Caraher*, 293 Or 741 (1982)
2. There are three valid justifications for a search incident to a lawful arrest:
  - a. To protect the officer’s safety;
  - b. To prevent the destruction of evidence; and
  - c. To discover evidence relevant to the crime for which the defendant is being arrested.



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3. A pat-down or limited search for weapons to protect the officer or to prevent escape would be justified whenever a person is taken into custody. *State v. Owens*, 302 Or 196 (1986).

Beyond that limited search, however a further search incident to arrest conducted to protect officer safety or to prevent escape must be reasonable, taking into account all the facts surrounding the arrest.

4. *Owens* states a per se rule defining the scope of search which is reasonable in every arrest. The justifications for always allowing some limited warrantless search incident to arrest are clear: The proximity of an officer to an arrestee during arrest and handcuffing makes it imperative that the arrestee not have immediate access to a weapon or tool of escape that might be easily concealed and reachable even if the arrestee were handcuffed...But those justifications also define the limits beyond which the *Owens* search should not be expanded. When the immediate danger of handcuffing and arresting a suspect has passed, and the officer has determined that the arrestee has no means of escape concealed on his person, the justification for the per se *Owens* search has ended. Any further search incident to arrest must be justified by specific and articulable facts. *State ex rel Juv. Dept. v. Singh*, 151 Or App 223 (1997).
5. Once police have seized a closed container from an arrestee, the threat to officer safety from any item within that container has dissipated, and the police can protect themselves by taking steps short of conducting a search while waiting to obtain a search warrant.
6. A police officer who, while investigating a crime, develops probable cause to believe another crime has been committed, may conduct a search for evidence that is relevant to the latter crime and that reasonably could be concealed on the arrestee's person or in the belongings in his or her immediate possession at the time of the arrest. *State v. Crampton*, 176 Or App 62 (2001).
7. As long as the search is for evidence of the crime for which the arrest was made, and such evidence reasonably could be concealed on the arrestee's person or in the belongings in his or her immediate possession at the time of the arrest, no "container rule" blocks the intensity of the incidental search. *Owens*. (Contrast this search of a closed container, for this purpose, to the above "officer safety" purpose).
8. A search for the purpose of discovering evidence of the crime of arrest, may be justified even if the defendant has been removed from the area in which an officer believes that evidence may be located. In those circumstances, the search will comport with Article I, section 9, even though the defendant no longer has control over the area searched, as long as the evidence reasonably could be found in that area and the search is otherwise reasonable in time, scope, and intensity. *State v. Washington*, 265 Or App 532 (2014).
9. A search may be considered "incident to arrest" even though it preceded the arrest.

#### D. Consent to Search – Oregon Rule

1. Key factors indicating consent:
  - a. Advice of Miranda rights (not required)
  - b. Advice of right to refuse consent (not required)
  - c. Knowledge of right to refuse consent (not required)
  - d. Congenial and uncoercive atmosphere



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- e. Absence of threats or promises
  - f. Unequivocal consent
  - g. Conduct indicating the defendant agrees to the search
2. Factors showing non-consent:
    - a. Police lies
    - b. Threats to commit illegal acts
    - c. Failure to advise person of rights
    - d. Custody may override the voluntariness of consent
    - e. Uninvited police entry
  3. Scope of Consent: Police may not go beyond the physical boundaries established by the consent.
  4. Case law discussion –Scope of consent
    - a. State v. Winn, 278 Or App 460 (2016)

When the state relies upon a warrant exception, such as consent, the state has to prove that the officer conducting the search didn't exceed the scope of defendant's consent. The scope of consent is determined by looking at what a typical, reasonable person would have understood regarding the grant of consent in a particular case. The court focused on the signs in a courthouse prohibiting firearms and dangerous weapons, and determined that there was nothing that would have led a reasonable person to conclude that by consenting to the search of her purse, after it passed through an X ray machine, it would include a search for drugs or paraphernalia.

The court made it clear that the state has the burden of proving that the search of a closed powder compact in defendant's purse fell within the scope of defendant's consent, and they failed to do so.

b. State v. Blair, 278 Or App 512 (2016)

A sergeant went with defendant to find his backpack, and when they found it the sergeant asked defendant if he could search it. Defendant said, "Yeah, go ahead." The sergeant opened the backpack and found an opaque Fred Meyer grocery bag that was tied shut, which he opened. Inside, he found a bag of psilocybin mushrooms, and defendant was charged with PCS. Defendant moved to suppress the evidence, as he claimed that opening the closed bag inside his backpack exceeded the scope of his consent. The sergeant testified that when he asked to search the backpack, it was his intent to search for weapons and controlled substances, but that he had not communicated that to defendant.

The court analyzed the issue the same way they analyzed State v. Winn, and held that the sergeant exceeded the scope of defendant's consent. "Where the specific terms of an officer's request are vague or unavailable, the other circumstantial factors – including whether the



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surrounding circumstances would reasonably have alerted a person to what the officer was looking for – take on heightened significance.”

c. In both *State v. Blair* and *State v. Winn*, the defendants failed to object when the officers opened the closed containers, and the state argued that the failure to object showed that the search was within the scope of their consent. The court found that in both cases, since the defendant didn't know what the officer was looking for, they didn't have a “meaningful opportunity” to stop the search or revoke their consent.

If an officer is requesting consent to search, these cases suggest the best practice will be to clearly explain to the suspect what you are searching for, and that you intend to open all closed containers inside the [purse, backpack, container etc.] being searched. If you are looking for weapons, drugs and stolen credit cards, tell the suspect that and that you intend to look anywhere those items might be found. If the suspect gives consent after being told that, anything found should be useable against the suspect.

d. Update

The Oregon Supreme Court, on review of the decision in *Blair*, (no decision yet on a review of *Winn*) announced a “new standard” for assessing whether a search is within the scope of defendant's consent. The ultimate question for the trial court is the defendant's “subjective intent.” The Court sent the case back to the trial court to make findings as to what defendant actually intended when he consented. However, in doing so, the Court noted that a defendant's “clarity in expression will be further promoted when officers requesting consent make clear to a suspect what the objects of the requested search are and what level of scrutiny is sought.”

4. Jointly occupied property:
  - a. U.S. Supreme Court 2006, “A physically present inhabitant's express refusal to consent to a police search is dispositive as to him regardless of the consent of a fellow occupant.”
  - b. If police obtain consent to search from someone with authority over premises, no obligation to seek out and ask a co-occupant not physically present and who is not expressly objecting.
  - c. If police have some other lawful basis for entry, e.g., exigent circumstances, that does not depend on consent, they can ignore the objection.
5. Other issues re: third party consent:
  - a. Third party consent is valid only to the extent the party has actual, as opposed to apparent, authority to consent to search commonly held property. *State v. Ready*, 148 Or App 149 (1997).
  - b. An officer's good faith belief that a third party has authority to consent is irrelevant to the legal determination.
  - c. A third party has “actual authority” to consent to a search only if he or she has “common authority as shown by that person's joint use or occupancy of the premises before validly authorizing the search.” *State v. Fuller*, 158 Or App 501 (1999).



# Oregon Arrest Authority For Federal Officers

- d. The “scope of a person’s authority [to consent] depends on the level of access that the co-occupants have agreed on.” *State v. Kurokawa-Lasciak*, 249 Or App 435, rev den 352 Or 378 (2012).
  - e. Authority to consent to a search of an area is not necessarily coextensive with authority to consent to a search of personal items within that area. With “respect to items of personal property within jointly occupied space, a co-occupant’s actual authority to consent to a search depends on that person’s use of, or access to, those items.” Fuller.
  - f. Minors – age is but one factor in analyzing whether consent was knowing and voluntary, and scope of authority to consent. *State v. Scott*, 82 Or App 645 (1986)
6. Significance of *State v. Hall*, *State v. Unger*, and related cases, to consent to search and “exploitation”
- a. Whenever the state has obtained evidence following the violation of a defendant’s Article I, section 9 rights, it is presumed that the evidence was tainted by the violation and must be suppressed. *State v. Unger*, 356 Or 59 (2014).
  - b. The state may rebut this presumption by establishing that the disputed evidence “did not derive from the preceding illegality.” *State v. Hall*, 339 Or 7 (2005).
  - c. When a defendant challenges the validity of his or her consent based on a prior police illegality (illegal stop or search), the state bears the burden of demonstrating that the consent was voluntary and was not the product of police exploitation of that illegality.
  - d. When determining whether a defendant’s consent to search is the product of exploitation of police misconduct, courts are to consider the totality of the circumstances, including: the temporal proximity between the misconduct and the consent; the existence of any intervening or mitigating circumstances; the nature of the misconduct, including its purpose and flagrancy and whether the police took advantage of it; and the voluntariness of the consent. *Unger*.
  - e. The Supreme Court observed in *Hall* and reaffirmed in *Unger* that exploitation of police misconduct may exist if the police seek the defendant’s consent solely as a result of knowledge of inculpatory evidence obtained from their unlawful conduct. *State v. Musser*, 356 Or 148 (2014).

## V. In Closing

This completes the training material necessary to meet the requirements of ORS 133.245 (6) wherein a federal officer is authorized to make arrests under ORS 133.245.

To obtain federal arrest authorization and be issued a DPSST Identification number, an Oregon Arrest Authorization for Federal Officers Form (F13) must be submitted to DPSST. The F13 is located under Criminal Justice Forms at [Oregon.gov/dpsst](http://Oregon.gov/dpsst). The course number listed at the top of the page will be required when completing the F13.

Once authorization has been granted, a letter will be sent to the individual and employing agency indicating completion of the training and issuance of a DPSST Identification Number. The employing agency will be notified of any refresher training requirements.