

CAR STOPS & SEARCHES QUICK REFERENCE GUIDE

1. **What was the purported reason for the car stop? Did the police have PC to believe client committed a traffic violation or reasonable suspicion that a crime had been or was being committed?** [State v. Hughes, 311 Or App 123 \(2021\)](#) (relating to traffic violations); [State v. Toevs, 327 Or 525, 534 \(1998\)](#); [State v. Ellis, 252 Or App 382 \(2012\)](#) (reasonable suspicion, not PC, required to stop car on suspicion of a criminal offense).
2.
 - a. **Did the officers exceed the scope of the initial purpose of the stop by making inquiries or conducting activities not reasonably related to the initial purpose?** See [State v. Arreola-Botello, 365 Or 695 \(2019\)](#); [State v. Soto-Navarro, 309 Or App 218 \(2021\)](#); [State v. T.T., 308 Or App 408 \(2021\)](#).
 - b. **If they did, did they have independent reasonable suspicion to investigate a crime?** [State v. Mock, 310 Or App 454 \(2021\)](#); [State v. Arivett, 309 Or App 480 \(2021\)](#).
3. **If the officers searched the vehicle, did they have a warrant or does the automobile exception apply?** [State v. Brown, 301 Or 268 \(1986\)](#); [State v. Kurokawa-Lasciak, 351 Or 179 \(2011\)](#).
 - a. **Did the officers have probable cause to believe that the vehicle contained contraband or evidence of a crime?**
 - b. **Was the vehicle mobile at the time the police encountered it in connection with a crime?**
 - i. See [State v. Kurokawa-Lasciak, 351 Or at 192](#) (automobile exception authorizes warrantless search only when the car is mobile at the time the police encounter it in connection with a crime; automobile exception does not apply to vehicles that are parked & immobile when the police encounter it.)
 - ii. **But see [State v. Bliss, 363 Or 426 \(2018\)](#)** (automobile exception applies when police stop a car for any purpose and PC arises during the encounter; automobile exception does not apply when police encounter a vehicle in connection with a crime that is “parked, immobile and unoccupied.”).
 - ii. **Takeaway from [Kurokawa-Lasciak & Bliss](#):** if the vehicle is pulled over by the police, for any reason, and the police develop probable cause to believe that the car contains contraband or evidence of a crime during the stop, the automobile exception will likely apply. Conversely, if the vehicle is already parked when the police encounter it (i.e., the police do not bring about the parking of the car by pulling it over), the automobile exception will likely not apply and the police must obtain a warrant to search the car.
4. **Did the police ask for consent to search the car?**
 - a. **Did the scope of the search exceed the scope of consent or the scope of the initial stop?** [State v. Blair, 361 Or 527, 535 \(2017\)](#).
 - b. **Was the consent tainted by preceding illegality on the part of the police?** [State v. Pichardo, 275 Or App 49 \(2015\)](#)

1. BASIS FOR STOP:

- a. **TRAFFIC VIOLATIONS:** To stop a person for a traffic violation, Art I, §9 requires that law enforcement have probable cause to believe a traffic violation occurred. [State v. Hughes, 311 Or App 123 \(2021\)](#); [State v. Ankeny, 306 Or App 300, 302 \(2020\)](#).
 - i. Officer must subjectively believe that an offense occurred, and the subjective belief must be objectively reasonable. [Ankeny, 306 Or App at 302](#).
 - ii. To satisfy the objective standard, the facts that the officer perceives must establish the elements of AN offense, but not necessarily the offense that the officer believes the defendant committed. *Id.* (citing [State v. Boatright, 222 Or App 406 \(2008\)](#)).
 - iii. PC will not be established based on a mistake of law; no PC where an officer incorrectly believes a person's conduct constitutes a violation of the law when it does not (even if the mistake was reasonable). [Hughes, 311 Or App at 5](#); [State v. Tiffin, 202 Or App 199, 202-204 \(2005\)](#).
- b. **SUSPICION OF CRIMINAL ACTIVITY:** To stop a driver based on suspicion of criminal activity, the officer must have reasonable suspicion of criminal activity, meaning the officer must subjectively believe that the person committed a crime and the belief must be objectively reasonable. [State v. Belt, 325 Or 6, 11 \(1997\)](#); [State v. Eastman, 269 Or App 503, 506 \(2015\)](#); [State v. Ellis, 252 Or App 382, 388 \(2012\)](#).
 - i. Officer must be able to point to specific and articulable facts that a person has committed a crime, as interpreted in light of the existing circumstances at the time officer acts.¹ [Ellis, 252 Or App at 389](#).
 - ii. Officer's training and experience are relevant considerations but are insufficient on their own to justify a stop. [Ellis, 252 Or App at 388](#) (citing [State v. Valdez, 277 Or 621, 628 \(1977\)](#)); [State v. Aguilar, 307 Or App 457 \(2020\)](#) (Officer's intuition and experience alone are insufficient to meet objective test of reasonableness necessary for lawful stop).
 - iii. Possible innocent explanations for defendant's conduct or behavior does not negate otherwise objective reasonableness of officer's suspicion. [Ellis, 252 Or App at 388](#). *But see State v. Martin, 260 Or App 461, 469-70 (2014)* ("an officer may not stop a person simply because the person's conduct is consistent with criminal conduct; the nature of the conduct matters.")

¹ "Reasonably suspects" means that a peace officer holds a belief that is reasonable under the totality of the circumstances existing at the time and place the peace officer acts as authorized in ORS 131.605 to 131.625. ORS 131.605(6).

2. SEIZURE OF OCCUPANTS:

a. DRIVER

- i. **UNDER ART 1, §9:** A driver is temporarily seized under Art I, §9 when his or her car is stopped by law enforcement, because “ the motorist...is legally obligated to stop at the officer’s direction and interact with the officer and is not free to unilaterally end the encounter and leave whenever he or she chooses.” [State v. Rodgers/Kirkeby, 347 Or 610, 622-624 \(2010\)](#).
- ii. **UNDER 4th AMENDMENT:** stop of car is seizure of all occupants in the vehicle under 4th Amendment. [State v. Bailey, 356 Or 486, 507 \(2014\)](#); [Arizona v. Johnson, 555 US 323, 327 \(2009\)](#); [Brendlin v. California, 551 US 249, 255 \(2007\)](#).

b. PASSENGER

- i. **UNDER ART 1, §9:** Passengers are not seized under Oregon Constitution when law enforcement merely stops car they are riding in, absent:
 - Imposition of either physical force or a show of authority that would cause the passenger to reasonably believe that he or she was not free to leave. [State v. T.T., 308 Or App 408, 418 \(2021\)](#).
 - Restraint on the passenger’s liberty or further exercise of coercive authority towards the passenger. [State v. Ashbaugh, 349 Or 297 \(2010\)](#); [State v. Thompkin, 341 Or 368 \(2006\)](#); [State v. Kamph, 297 Or App 687 \(2019\)](#); [State v. Ross, 256 Or App 746 \(2013\)](#).
 - OR if a reasonable person under the totality of the circumstances would believe that their liberty or freedom of movement had been intentionally restricted or interfered with by law enforcement. [Ashbaugh, 349 Or at 308-309](#).
 - “A seizure occurs only if the officer’s conduct would cause the citizen to reasonably believe that the officer is intentionally restraining the citizen’s liberty or freedom of movement in a significant way – that is, in a way that exceeds the bounds of ordinary social encounters between private citizens.” [State v. Backstrand, 354 Or 392, 400 \(2013\)](#).

E.g. Content and manner of questioning and accompanying physical acts by the officers, where the “additional factors could reasonably be construed as a threatening or coercive show of authority requiring compliance with the officer’s request.” [State v. Leiby, 293 Or App 293, 297 \(2018\)](#) (defendant was seized when officer engaged in “dogged pursuit” of defendant’s car, on a road and through 2 parking lots and then questioned defendant in an accusatory manner when defendant parked his car.)
 - THUS, an officer may not seize a passenger w/o a constitutional justification for doing so. [State v. Stevens, 364 Or 91, 100 \(2018\)](#).

- Law enforcement actions that may constitute a seizure of the passenger under Art I, §9:
 - Retaining passenger’s ID beyond time necessary to “run” it. [Thompson, 341 Or at 378-379](#); [State v. Ayles, 348 Or 622, 628 \(2010\)](#); but see [State v. Backstrand, 354 Or 392 \(2013\)](#) (merely asking for ID does not constitute seizure, even if person is “discomforted” by officer interaction).
 - Retaining ID + running warrant check + questioning about illegal activity. [Thompson, 341 Or at 378-379](#).
 - Threatening to call the passenger’s parole officer. [Stevens, 341 Or at 102](#).
- ii. **UNDER 4th AMENDMENT:** law enforcement effectively seizes everyone in the vehicle – driver and passengers – for the duration of the traffic stop under the 4th amendment. [Arizona v. Johnson, 555 US at 327](#); [Brendlin, 551 US at 255](#); [Bailey, 356 Or at 507](#); [State v. Clemons, 267 Or App 695, 700 \(2014\)](#).
 - An officer may ask a passenger questions during the stop that are unrelated to the lawful purpose of the stop, so long as the questions do not “measurably extend the stop.” [Bailey, 356 Or at 507](#).
 - **If the initial stop is unlawful, or unlawfully extended, the passenger as well as the driver will be unlawfully seized under a 4th amendment analysis.** [Clemons, 267 Or App at 700](#) (holding that passenger in traffic stop was seized under the 4th amendment, that officers unlawfully extended duration of traffic stop, and that subsequent search of defendant’s backpack was not attenuated from initial illegality, notwithstanding defendant’s consent, requiring suppression.)

3. UNLAWFUL EXTENSION OF TRAFFIC STOP:

- a. **Under Art I, §9, all investigative inquiries conducted during a traffic stop are part of an on-going seizure and are subject to both subject matter and temporal limitations.** [State v. Arreola-Botello, 365 Or 695, 712 \(2019\)](#). **NO MORE UNAVOIDABLE LULL.**
 - i. Under Art I, §9, all investigative activities – searches and investigative inquiries – conducted during a traffic stop are part of an on-going seizure and must be reasonably related to the purpose of the traffic stop OR supported by an independent constitutional justification. *Id.*
 - ii. Officers cannot ask questions unrelated to the basis for the stop (e.g., “do you have any weapons or drugs” after stopping motorist for failing to use a turn signal) unless the officer can provide independent constitutional justification for the inquiries (i.e., reasonable suspicion of a crime or reasonably related to the purpose for the stop). *Id.* at 713.
 - iii. Evidence obtained during unlawful extension of a traffic stop is subject to suppression. *Id.*
- b. Where consent to search is obtained as a result of the unlawful extension of a traffic stop, such consent is tainted and the product of the unconstitutional act - unless the state can demonstrate that the consent is independent of, or tenuously related to, the illegal police

conduct. *Id.* at 714. [See *infra* for further discussion related to consent searches.]

4. CONSENT TO SEARCH:

- a. State must prove voluntariness of consent to search (under both Art I, §9 and 4th amendment) by a preponderance of the evidence. [Stevens, 311 Or at 138.](#)
- b. Under Art. I, §9, “actual consent is the touchstone of the consent exception.” [State v. Blair, 361 Or 527, 535 \(2017\).](#)
 - i. “In determining whether a particular search falls within the scope of a defendant's consent, the trial court will determine, based on the totality of circumstances, what the defendant actually intended. That determination is a factual one.” [Blair, 361 Or at 537](#) (Court cannot assume that defendant’s consent to search his backpack extended to closed containers within the backpack.).
 - ii. Consent may be explicit, or it may be manifested through conduct. [Martin, 222 Or App at 142; State v. Jordan, 308 Or App 547, 552 \(2021\)](#) (so stating).
 - iii. The test for voluntariness of consent to search is whether, under the totality of circumstances, the consent was given by an act of defendant’s free will, as opposed to resulting from express or implied coercion. [Jordan, 308 Or App at 553.](#) Voluntariness assessment includes whether the officer’s words provided the defendant with an opportunity to consent or whether the words left the impression that search is inevitable, and defendant’s response to the officer. *Id.* Circumstances showing the defendant’s actual understanding and intent are relevant to the voluntariness analysis. [Blair, 396 Or at 537.](#)

Other factors to assess voluntariness ([Jordan, 308 Or App at 553](#)):

- whether physical force was used or threatened;
 - whether weapons were displayed; whether consent was obtained in public; officer’s tone of voice;
 - whether the person giving consent is under investigation;
 - whether the atmosphere surrounding the consent is antagonistic or oppressive. [State v. Jordan, 308 Or App at 553.](#)
 - Whether the officer used threats or promises of leniency.
- iv. Contrast to 4th Amendment analysis: voluntariness of consent analyzed in terms of the reasonableness of the police conduct, not subjective intent or understanding of the person giving consent. [Blair, 361 Or at 536](#) (citing, *inter alia*, [Illinois v. Rodriguez, 497 US 177, 188-89 \(1990\)](#)). For example, under the 4th amendment, a reasonable but mistaken belief on the part of the officer that a person consented to a search will pass muster; it will not under Art. I §9. *Id.*

<p>ART I, § 9 CONSENT FRAMEWORK FOR CONSENT:</p> <ul style="list-style-type: none"> • Involves relinquishment of a privacy interest. Warrantless searches are <i>per se</i> unreasonable unless a specifically established exception applies, consent being one such exception. • Consent must be given by the person who holds the privacy interest (or lawfully on behalf of that person, e.g., an agent) • Touchstone is <u>actual</u> consent 	<p>4th AMENDMENT CONSENT FRAMEWORK FOR CONSENT:</p> <ul style="list-style-type: none"> • Guarantees protection against <u>unreasonable</u> searches and seizures. • Touchstone is reasonableness of law enforcement’s belief, not factual accuracy of actual consent. • Mistaken but reasonable belief that consent given was valid will pass muster.
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5. SCOPE OF CONSENT:

- Determination of scope of consent is governed by what the defendant actually intended. [Blair, 361 Or App at 537](#). “The scope of consent determines the scope of intrusion.” [State v. Wyman, 59 Or App 542, 545 \(1982\)](#).

Scope of consent can refer to particular objects, particular areas, temporal limitations, or defined by the purpose of the intrusion. [State v. Oxford, 311 Or App 1 \(2021\)](#) (allowing law enforcement into home for medical aid did not extend consent to search for contraband, nor does it allow law enforcement to enter or remain on the premises once the medical aid has concluded.) An initial consent to enter one area for a particular purpose, or to search a particular area, does not necessarily provide consent to remain or that area for a different purpose, or to search an adjacent area. *Id.* The inquiry is fact specific. *Id.*

- State must prove by a preponderance of the evidence that the police conducting the search complied with any limitation on the scope of defendant’s consent. [State v. Bonilla, 358 Or 475, 481 \(2015\)](#); [State v. Lamoreux, 271 Or App 757, 760 \(2015\)](#); [Oxford, 311 Or App at 8](#).

6. MERE ACQUIESCENCE:

“Acquiescence occurs when an individual is not given a reasonable opportunity to choose to consent or when he or she is informed that a search will occur regardless of whether consent is given.” [State v. Stanley, 287 Or App 399, 407 \(2017\)](#); see also [Jordan, 308 Or App at 551-58](#).

- Courts will look to the officer’s words to determine whether the youth was given a choice to consent.
- When the officer’s words do not provide a reasonable opportunity to choose to consent, or “when those words leave the listener with the impression that a search is inevitable, [courts] have consistently found acquiescence rather than consent.” [State v. H.K.D.S., 305 Or App 86, 91–92 \(2020\)](#) (citing [Stanley, 287 Or App at 407](#)).

7. THIRD PARTY CONSENT:

- a. To establish third party consent as an exception to the warrant requirement under Art I, §9, the state must prove by preponderance of the evidence that someone having actual authority over the property voluntarily gave the police consent to search and that any limitations on the scope of consent were complied with. [Bonilla, 358 Or at 481](#) (defendant's mother did not have actual authority to consent to search of wooden box in shared bedroom, because the mother lacked common authority or control over the box); [State v. Solorio, 304 Or App 666 \(2020\)](#) (defendant's girlfriend did not have actual authority to consent to search of safe in defendant's van, even though she possessed authority to consent to search of van.); [State v. Kurokawa-Lasciak, 249 Or App 435, 440 \(2012\)](#).
 - i. State must establish the basis of the third party's authority to consent. [Bonilla, 358 Or at 481](#). Court will look at the relationship of the third party to the premises or the thing searched to determine authority. [Solorio, 304 Or App at 673](#) (citing [State v. Lambert, 134 Or App 148 \(1995\)](#)); [State v. Fuller, 158 Or App 501 \(1999\)](#).
 - "Common authority" may be shown by joint use or occupancy of premises. [Bonilla, 358 Or at 481](#); [State v. Jenkins, 179 Or App 92, 100 \(2002\)](#) (defendant's parents lacked actual authority to consent to search of garage, where defendant resided);
 - ii. Authority to consent to a search is a question of law. [State v. Beylund, 158 Or App 410, 416 \(1999\)](#).
- b. **Under Art I, §9, third party's "apparent authority" to consent is insufficient to establish valid third-party consent.** *Id.* Third party must have actual authority (as distinguished from the 4th amendment "apparent authority" doctrine). *Id.*; see also [Fuller, 158 Or App 501, 505 \(1999\)](#).
 - i. 4th Amendment apparent authority doctrine premised on "reasonableness" of law enforcement's view of consent, thus allowing for mistake of fact on the part of law enforcement.
 - ii. Since Art. I §9 involves relinquishment of a privacy interest, validity of third-party consent depends on third party's common authority over the property based on his or her own property interest. [Bonilla, 358 Or at 487](#).
 - iii. **Compare to Exigency Exception:** inquiry is whether, at the time of the search, would a reasonable person have believed that seizable things would probably be found & that circumstances constituting an exigency were present. [State v. Snow, 337 Or 219, 225 \(2004\)](#). Since focus is on reasonableness of officer's belief at the time the search is conducted, the exigency exception allows for mistake of fact, so long as such mistake is reasonable. *Id.*

8. INVENTORY SEARCHES:

- a. **INQUIRY:** Was contraband or property seized pursuant to an inventory of your client's impounded possessions or automobile?
- b. **Purpose of an inventory search:** The police need to determine the nature of the property that they are holding for three principal reasons:
 - i. Protection of the person's property while it is in police custody;
 - ii. Reduction or elimination of false claims against the police for lost property; and
 - iii. Protection against possible injury from impounded but un-inventoried property. [State v. Atkinson, 298 Or 1, 7-8 \(1984\)](#).
 - None of those purposes involves searching for evidence of a crime. [State v. Taylor, 250 Or App 90, 96 \(2012\)](#) (inventory policy authorizing police to search property that he or she "deems appropriate" unconstitutional because it authorized a search of all property subject to officer discretion.).
 - An "inventory" is not intended to be a "search." The purpose of an inventory is to itemize property that comes into police custody in a non-investigatory context. [State v. Guerrero, 214 Or App 14, 18 \(2007\)](#).
- c. **NOTE:** the automobile exception does NOT apply to inventory searches. If a car has been impounded, the exigency element necessary to invoke automobile exception² no longer exists, and the state cannot transform an inventory into a full-blown search using that exception to the warrant requirement. [State v. Kruchek, 156 Or App 617 \(1998\)](#).
- d. **STEPS TO EXAMINE CONSTITUTIONALITY OF AN INVENTORY UNDER ART I, §9:**
 - i. **Review [State v. Atkinson, 298 Or 1 \(1984\)](#) & apply *Atkinson* criteria:**
 - Was the property/car lawfully impounded? No impound = no inventory (*i.e.*, the officer cannot conduct an inventory and then leave the car on the street; no impound for cars parked in the defendant's driveway.)
 - Does the inventory policy permit the person doing the inventory to exercise discretion as to when and how to conduct the inventory?
 - 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 taking or directing the inventory." [State v. Hite, 266 Or App 710, 719 \(2014\)](#).

² The automobile exception is rooted in the idea that a car is mobile, and therefore exigency exists to justify a search.

- Did the person conducting the inventory search deviate from the policy?
2. **Review the inventory policies for the relevant law enforcement agency your jurisdiction (local police, sheriff, or jail, depending on who conducted the inventory search).**
 3. **Is the inventory policy itself unconstitutionally overbroad?** Does the policy effectively authorize a search of *all* closed containers? See [State v. Steele, 290 Or App 675 \(2018\)](#).
 - a. Inventory policies are subject to constitutional limitations.
 - b. A valid administrative policy must eliminate the officers' discretion about what containers to search or the scope of the inventory. [Guererro, 314 Or App at 21](#).
 - *E.g.*, inventory policy authorizing search of closed containers that "could" contain valuables is constitutionally overbroad. [State v. Cordova, 250 Or App 397 \(2012\)](#).
 - c. The policy must be "reasonable in relation to its purpose." [Hite, 266 Or App at 723](#).
 4. **Did the scope of the inventory exceed inventorying the contents of the property or car and expand into a search of those contents?**
 5. **Did the officers open or search closed containers during the inventory search?**
 - If so, did the inventory policy authorize searches of closed containers objectively likely to hold valuables or uniquely designed to hold valuables? *E.g.*, *wallets, coin purses, fanny packs, backpacks, camera cases*. See [State v. Barnett, 299 Or App 656 \(2019\)](#); [State v. Salkoski, 299 Or App 180 \(2019\)](#).
 - Inventory policies that require police to open container uniquely or objectively designed to hold valuables are constitutional. [Hite, 266 Or App at 720](#).
 6. **Were the items seized in "plain view?"**

9. SUPPRESSION OF EVIDENCE AS FRUIT OF THE POISONOUS TREE

- a. **INQUIRY:** Were the police actions constitutionally justified at every step? If NO, you may have an argument that the evidence seized or observations made are tainted by the initial illegality and subject to suppression. [Bailey, 356 Or at 500](#) ("the acquisition of evidence resulting from unlawful detention goes to the core interests protected by the exclusionary rule."); [State v. Unger, 356 Or 59 \(2014\)](#); [State v. Pichardo, 275 Or App 49 \(2015\)](#); [Dunaway v. New York, 422 US 200 \(1979\)](#); [Brown v. Illinois, 422 US 590 \(1975\)](#); [Wong Sun v. United States, 371 US 471 \(1963\)](#).
- b. **ARTICLE I, §9 ANALYSIS:**
 - i. **State bears the burden of demonstrating that:**
 - **Consent was voluntary AND**

- The consent was not the product of police exploitation of the illegal stop or search, based the totality of the circumstances. [Unger, 356 Or at 74-75](#); [Pichardo, 275 Or at 53-54](#).
- ii. **Factors the court may consider under the totality of the circumstances ([Unger, 356 Or at 80-83](#); [State v. Kelly, 274 Or App 363, 377 \(2015\)](#)):**
- Temporal proximity of the unlawful police conduct & defendant’s consent;
 - Intervening of mitigating circumstances (e.g., officers advising defendant of right to refuse consent);
 - Whether officers “traded on information obtained during an illegal search or seizure in subsequently gaining to consent to search further;
 - Intrusiveness or severity of the police misconduct;
 - Whether the police misconduct was flagrant;
 - Nature of the police officers’ purpose in engaging in the unlawful conduct.
- c. **4th AMENDMENT ANALYSIS TO DETERMINE CAUSAL CONNECTION B/W UNLAWFUL CONDUCT & CHALLENGED EVIDENCE (I.E., ATTENUATION ANALYSIS) (See [Dunaway v. New York, 422 US at 219](#)).**
- i. **Temporal proximity between unlawful conduct & discovery of evidence ([Bailey, 356 Or at 505](#))**
- “Generally speaking, [this] factor is most pertinent where the intervening circumstances involves a volitional act by the defendant, such as a confession or consent to search.” *Id.*
- ii. **Presence of intervening circumstances**
- e.g., an arrest warrant, and degree to which the circumstance was “the direct consequence or objective of the unlawful detention.” *Id.* at 506.
 - Evidence can be suppressed as fruit even if your client gave consent for the search. [Clemons, 267 Or App at 700-702](#).
 - Or if *Miranda* warnings were administered. [Bailey, 356 Or at 505](#).
- iii. **Purpose and flagrancy of the official misconduct. [Bailey, 356 Or at 506-508](#).**
- “The focus of the purpose and flagrancy factor is on whether the stop was investigatory in nature and whether the unlawfulness of the police conduct should have been obvious to the officers.” *Id.*
 - In *Bailey*, the officers detained the defendant for an investigatory purpose without

reasonable suspicion that the had engaged in unlawful activity, after the lawful justification for the traffic stop had ended. The Court held that the conduct was “purposeful” and that it “should have been obvious to the officers that they had extended the detention without regard to the defendant’s right to be free from an unreasonable seizure.” *Id.* at 508.