Suppression

U.S. Supreme Court developments for your motions to suppress.

BY CASEY STAMM

During the past term, the U.S. Supreme Court handed down two wonderful and now well-known decisions—*Blakely*[1] and *Crawford.*[2] In the midst of these landmarks, the Court also decided eleven cases that bear on motions to suppress evidence and statements due to improper searches and interrogations. What follows is a guide to those decisions and their impact on state law.

Highway Checkpoints

You thought highway checkpoints were unreasonable under the Fourth Amendment in the absence of individualized suspicion, right? Well, that is still the law in some circumstances,[3] but in *Illinois v. Lidster,*[4] the Court complicated the issue, distinguishing highway checkpoints designed to ferret out criminal activity of the stopped motorist (requiring individualized suspicion) and information-seeking highway checkpoints (which can be carried out in the absence of such suspicion).

In *Lidster*, police investigating a fatal hit and run accident set up a highway checkpoint, ostensibly to obtain more information about the accident. About one week after the accident, at about the same time of night and in about the same place as the accident, police stopped motorists for 10 to 15 seconds, asked if they had seen anything, and gave them a flier asking for assistance in finding the hit and run driver. After police stopped Lidster at the checkpoint, he was arrested and charged with DUI.

In *Indianapolis v. Edmond,* the Court invalidated a stop where the purpose of the checkpoint was to look for evidence of drug crimes committed by occupants of the stopped vehicles. In *Lidster*, the Court distinguishes *Edmond* based on the primary law enforcement purpose. In balancing the interests at issue here, the Court considered the gravity of the relevant public concern, whether the stop advanced that concern to a significant degree, and the degree of interference with Fourth Amendment liberties occasioned.

In *Lidster*, the Court distinguishes *Edmond* based on the primary law enforcement purpose.

These factors are the same ones Washington courts have considered in evaluating highway checkpoints.[5] In future checkpoint cases, successful challenges to such stops will likely rest on distinctions concerning the length of the stop (exceeding 10 seconds), the questions asked (likely to provoke self-incriminatory answers), and/or the traffic delay occasioned (more onerous than typical) — all of which were factors in the *Lidster* opinion.

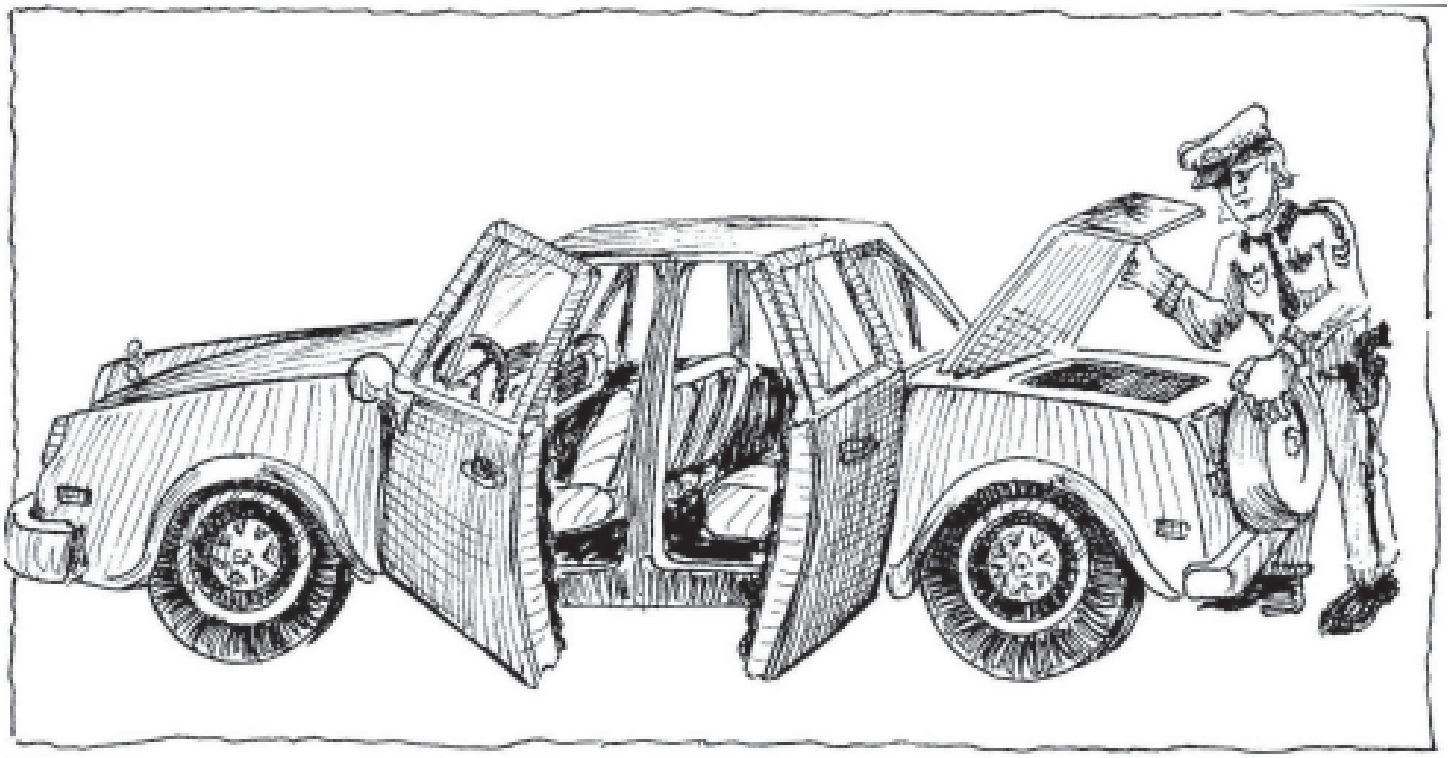
In addition, it is important to note that the state constitution is more protective of individual rights in this context than the federal.[6]

Border Searches

It has long been the law that vehicles entering the United States may be searched in the absence of reasonable suspicion.[7] Does this mean that the government can also — without reasonable suspicion — remove, disassemble, and reassemble such a vehicle's fuel tank? According to the Supreme Court's decision in *United States v. Flores-Montano*, the answer is "yes."[8]

Mr. Flores-Montano attempted to enter the U.S. through a California port of entry. For reasons unstated (perhaps for no reason, or worse because of his origin or nationality), Mr. Flores-Montano was asked to leave his vehicle and it was taken to a secondary inspection station. While Mr. Flores-Montana waited for approximately an hour, inspectors removed the vehicle's gas tank, hammered off a bondo patch, and found marijuana.

The lower court suppressed based on existing Ninth Circuit precedent[9] requiring reasonable suspicion for the removal and disassembly of the gas tank. The Ninth Circuit reasoned that while "routine" border searches could be conducted in the absence of reasonable suspicion, the removal of



the gas tank required such justification. The Supreme Court disagreed.

As a policy matter, the Court reasons that "[t]he Government's interest in preventing the entry of unwanted persons and effects is at its zenith at the international border." There, the Court reasons, searches are reasonable simply by virtue of their location. The Court sees no reason to treat the removal and disassembly of a gas tank any differently from other searches of automobiles at the border. The Court also rejected Flores-Montano's argument that the wait occasioned by the search made it unreasonable. According to the Court, delays of one to two hours are to be expected at any international border.

The Court does, however, leave open the argument that "a border search might be deemed 'unreasonable' because of the particularly offensive manner it is carried out.'" Specifically, the Court notes the practice of "exploratory drilling" and the "obvious difference" where the search at issue involves such potentially destructive intrusions.

Searches of Vehicle Passenger Compartments Incident to Arrest

In *New York v. Belton,*[10] the Court held that if a police officer makes a lawful custodial arrest of a vehicle occupant, the officer may subsequently search the passenger compartment of that vehicle incident to the arrest. Although the rationale for such a search is officer safety, *Belton* involved a search of a vehicle after the vehicle's occupants had been removed.

In *Thornton v. United States*,[11] the Court furthers the disconnect between this purported justification for the search and the circumstances of the search itself. In this case, the Court holds that police may search a vehicle incident to arrest so long as the arrestee is a "recent occupant," even if the officer did not contact the arrestee until after she or he left the vehicle.

An officer observed Thornton driving a vehicle with license plates issued to another car. Before the officer could pull him over, Thornton exited the vehicle. In the course of an allegedly consensual pat-down for weapons, the officer located narcotics and arrested Thornton. After Thornton was secure in the patrol car, the officer searched the vehicle Thornton had been driving and found a firearm.

In theory, Division II has already accepted much of this rationale.[12] However, in so doing, Division II has made clear that distinctions may be drawn based on how recent the occupancy and the proximity of the arrestee to the vehicle at the time of the police contact.[13]

Particularity

In *Groh v. Ramirez*,[14] the Court addressed the particularity requirement of the Fourth Amendment. Although the opinion did not otherwise break significant new ground, the policy discussion of this requirement in *Ramirez* is worth mention.

Pursuant to an informant's tip, Special Agent Groh prepared a detailed affidavit in support of a search warrant for Ramirez's ranch. The application recited, with some detail, the items to be seized. This application, however, was not incorporated by reference into the warrant, also drafted by Groh, which failed to identify such items. Rather, in the space provided for identifying the items sought in the search, Groh filled in the description of the place to be searched.

When Groh executed the search, Mr. Ramirez's wife and children were present. Groh claimed that he explained the objects of the search but this was disputed. Groh provided Mr. Ramirez's wife a copy of the warrant but not the affidavit. The search uncovered nothing and no charges were filed. The Ramirezes filed a *Bivens*[15] action against Groh alleging, among other things, a violation of their Fourth Amendment rights that was so plain as to defeat Groh's claim of qualified immunity.

In the course of saving this claim from summary judgment, the Court makes several useful statements about the particularity requirement. First, the Court finds the warrant was plainly invalid, rejecting out of hand the argument that the unincorporated application or supposed oral explanation could save it.

Also, the Court provides a useful discussion of the policy reasons behind the particularity requirement which is not, the Court emphasizes, a mere formality. In part, the particularity requirement is necessary to ensure that the magistrate actually found probable cause to search for, and to seize, every item mentioned in the affidavit and to prevent a general search. It also assures the individual whose property is searched or seized of the lawful authority of the executing officer, the need to search, and the limits of the search authority, reducing the perception of unlawful or intrusive police conduct.

Knock and Announce

If there are no exigent circumstances at the inception of the search, may executing officers knock and announce, then break in the door after receiving no response within 15 to 20 seconds? In a decision consistent with prior state court opinions,[16] the Supreme Court says they can . . . sometimes.

In *United States v. Banks,*[17] Las Vegas officers arrived around 2:00 P.M. to execute a valid search warrant for cocaine at Banks' small two-bedroom apartment. There was no indication whether anyone was at the apartment when officers knocked loudly and announced "police search warrant." After waiting 15 to 20 seconds and hearing no answer, officers broke down Banks' door. Banks was in the shower and heard nothing until the door was smashed in. The government claimed that a risk of losing evidence arose shortly after knocking and announcing, arguing that during this time Banks could easily have flushed away the cocaine.

Groh claimed that he explained the objects of the search but this was disputed.

In evaluating this case, the Ninth Circuit set out a nonexhaustive list of factors to consider before breaking down the door and also defined categories of intrusion to aid in determining whether the entry was reasonable under the circumstances. The Supreme Court strongly disapproved such reasoning, emphasizing that the inquiry is one of reasonableness as a function of the facts of cases so various that factors and categories are not useful.

The crucial fact, according to the Court, is the particular exigency claimed — here, the opportunity to get rid of cocaine, which the Court opines a prudent dealer would keep near a commode or kitchen sink. With respect to this exigency, the significant circumstances include the arrival of the police during the day, when anyone inside would probably have been up and around, and the sufficiency of 15 to 20 seconds for getting to the bathroom or the kitchen to start flushing cocaine down the drain.

By contrast, the Court finds the fact that Banks was actually in the shower and did not hear the officers to be beside the point. Likewise, the Court disregards the defense claim that 15 to 20 seconds was not sufficient because even if Banks had heard the knocking, that would not have been long enough for him to get to the door.

In distinguishing this case, it is first prudent to note that the Court characterizes the decision as "a close one." The Court also leaves open the issue of whether the risk of losing evidence of a minor offense, as opposed to a felony, would change the exigency analysis, and explicitly rejects the argument that the need to damage property to effectuate the entry should not be part of the reasonableness analysis.

Arrest of Automobile Occupants

The question of who should be arrested when there are multiple occupants of a vehicle where drugs are found has been addressed several times by Washington courts.[18] In *Maryland v. Pringle,*[19] the Supreme Court revisits the issue and lays down a decidedly unhelpful rule.

In *Pringle*, during the course of an allegedly consensual search of a vehicle, an officer found $763 in the

glove compartment. They also found cocaine behind the rear seat armrest, which had been in the upright position with the cocaine concealed between the armrest and the back seat. The officer informed the car's three occupants that if no one admitted to ownership, he would arrest them all. They kept mum and, true to his word, the officer arrested them all. Later, the front passenger, Pringle, confessed. His friends were released and he later contested the arrest.

Relying on factual and practical considerations, the Court thinks it entirely reasonable to believe, in this instance, that *any or all* of the three vehicle occupants had knowledge of, and exercised dominion and control over, the cocaine. The Court does not spell out precisely why it believes such a belief to be reasonable, but does point out that the vehicle was relatively small. In addition, the Court claims that "a car passenger . . . will often be engaged in a common enterprise with the driver and have the same interest in concealing the fruits or the evidence of their wrongdoing."

Stop and Identify

Recent years have seen a proliferation of stop and identify statutes throughout the states. Larry Hiibel, a rancher in Nevada, was stopped and — explaining that he had done nothing wrong — refused to identify himself in response to police questioning. In *Hiibel v. Sixth Judicial District Court of Nevada*,[20] the Court disagreed, concluding that forcing Hiibel to identify himself in the course of a valid *Terry* stop did not violate the Fourth Amendment.

The Court notes the truism that, in the context of *Terry* stops, questions concerning a suspect's identity are routine and serve government interests. That said, the Court also recognizes it has been an open question whether a suspect can be arrested and prosecuted for refusal to answer such questions.

In an opinion short on analysis (in this author's humble opinion), the Court reasons that the principles of *Terry* require a suspect to disclose his or her name in the course of a valid *Terry* stop. The only limitation the Court places on such a requirement is that it must be reasonably related to the circumstances justifying the stop. Given the Court's insistence that officers need to know who they are dealing with in order to assess the situation, it is hard to imagine a situation where the Court would not find the questioning reasonably related to the circumstances justifying the stop.

Here, the Court notes that the officer's request was a commonsense inquiry and not an effort to obtain an arrest for failure to identify after a *Terry* stop yielded insufficient evidence. Perhaps the Court is suggesting all we have to do is show that the request was not "commonsense" or that the officer intended to otherwise obtain an arrest after failing to garner sufficient evidence to do so.

Luckily, there is another option: under the Washington constitution, this decision should not control. First, Article I, Section 7 is more protective of individual rights than the Fourth Amendment.[21] In addition, Washington courts have previously disapproved of similar stop and identify requirements.[22]

Juvenile Custody for Purposes of *Miranda*

In *Yarborough v. Alvarado*,[23] the Court dealt a blow to juvenile suspects — holding that in determining whether a suspect is in custody for purposes of *Miranda,* the Court need not take into account the suspect's age or lack of experience with the criminal justice system. This holding is contrary to prior state precedent[24] and likely imperils it since the Washington Constitution has been held to be coextensive with the provisions of the Fifth Amendment's self-incrimination clause.

Michael Alvarado's parents took him to the police station to be interviewed about a recent shooting. Michael was 17 years old and had no prior experience with law enforcement. Once there, police separated Michael from his parents and interrogated him in a small interview room for about two hours. Michael was never Mirandized and was allowed to leave with his parents. A month later, Michael was charged with Murder 1.

In determining whether Michael was in custody at the time of the interrogation, the Ninth Circuit took Michael's age and lack of experience into account.[25] The Supreme Court disapproved.

The Supreme Court's previous cases instruct that custody must be determined objectively, based on how a reasonable person in the suspect's position would perceive the circumstances.[26] This approach does not take into account the subjective views of the interrogating officer or the suspect. Based on this standard, the Court finds that the state court, which did not take into account Alvarado's age or experience, considered the proper factors and reached a reasonable conclusion.

Ask First, Warn Later

Finally, a decision that makes some sense: In *Missouri v. Seibert*,[27] the Court addressed a police protocol for custodial interrogation that called for giving no *Miranda* warnings until interrogation had already produced a confession. Then, of course, the protocol was to give the warnings and lead the suspect over the same ground a second time, preferably on tape.

The Court rejects this practice, reasoning that the midstream recitation of warnings after interrogation and confession have already occurred could not effectively comply with *Miranda's* constitutional requirement. The basic idea behind *Miranda* is that the accused must be "*adequately and*

effectively apprised of his rights." This means that the appraisal must be made under circumstances allowing for a real choice between talking and remaining silent.

The Court recognizes that when interrogating officers wait to warn until after the suspect has already confessed, their intent is to render the warnings ineffective. Merely reciting the words is not, according to the Court, sufficient in every case to satisfy *Miranda*. If the warnings do not place the suspect in a position to make a truly informed choice, there is no compliance with *Miranda* and therefore no justification for treating a subsequent interrogation as distinct from the first, unwarned and inadmissible segment. The Court declares: "Strategists dedicated to draining the substance out of *Miranda* cannot accomplish by training instructions what *Dickerson* held Congress could not do by statute."

Here, the Court concludes that given the surrounding circumstances of the interrogation, the *Miranda* warnings could not reasonably have served their purpose. In doing so, the court notes several factors including the completeness and detail of the questions and answers in the first round of interrogation, the overlapping content of the two statements, the timing and setting of the first and the second, the continuity of police personnel, and the degree to which the interrogator's questions treated the second round as continuous with the first.

The Fruits of a *Miranda* Violation

In Washington, the Courts have long held that the physical fruits of a statement taken in violation of *Miranda* were admissible since the fruits analysis of *Wong Sun*[28] and its progeny does not apply to such violations.[29] In *United States v. Patane,*[30] the Supreme Court agreed. Lovely.

Statements Taken in Violation of the Sixth Amendment

In *Fellers v. United States,*[31] police officers arrested Fellers after he had been indicted for conspiracy to distribute methamphetamine. During the arrest, officers advised Fellers that they had come to discuss his involvement in methamphetamine distribution. Fellers made inculpatory statements and then was transported to the police station and Mirandized. Fellers waived his rights and repeated the inculpatory statements he had made earlier.

The Court distinguishes the standards for evaluating a suspect's statements under the Fifth and Sixth Amendments. In the Fifth Amendment context, a suspect's statement is only inadmissible if the suspect was both in custody and subject to *interrogation* in the absence of a *Miranda* waiver. Under the Sixth Amendment, by contrast, the question is whether statements were *deliberately elicited*

after indictment and absent of counsel. These standards are different insofar as custody is completely irrelevant under the Sixth Amendment analysis and deliberate elicitation and is not interchangeable with interrogation.

Here, the Court finds it clear that the incriminatory statements were deliberately elicited. Accordingly, since the first set of incriminatory statements were made after Fellers had been indicted, in the absence of his counsel, and without a valid waiver, they should have been suppressed.

The Court remands for consideration of the subsequent question of whether the subsequent, post-waiver, statements should be suppressed as fruits. *Oregon v. Elstad*[32] makes clear that, in the Fifth Amendment context, the fruits analysis turns solely on whether the subsequent statements were knowing and voluntary. Here, the Court notes that they have never applied *Elstad* in the Sixth Amendment context.

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Notes

1. *Blakely v. Washington*, 124 S.Ct. 2531 (2004).
2. *Crawford v. Washington*, 541 U.S. 36 (2004).
3. *Indianapolis v. Edmund*, 531 U.S. 36 (2004).
4. 540 U.S. 419 (2004).
5. *See, e.g., State v. Williams*, 85 Wn.App. 271, 278-79 (1997).
6. *See, Seattle v. Mesiani*, 110 Wn.2d 454, 458 (1988); *Seattle v. Yeager*, 67 Wn.App. 41, 49 n.4 (1992).
7. *See, e.g., United States v. Ramsey*, 431 U.S. 606 (1977).
8. 541 U.S. 149 (2004).
9. *See, United States v. Molina-Tarazon*, 279 F.3d 709 (2002).
10. 453 U.S. 950 (1981).
11. 541 U.S. 615 (2004).
12. *See, State v. Rathbun,* 101 P.3d 119, 120-21 (2004); *citing, Thornton, supra*.
13. *See, Rathbun, supra*.
14. 540 U.S. 551 (2004).
15. *See, Bivens v. Six Unknown Agents*, 403 U.S. 388 (1971).
16. *See, e.g., State v. Wilson*, 9 Wn.App. 909 (1973) (affirming a knock and announce followed only by a ten second wait where officers feared that if they waited any longer before entering suspected drug dealer's residence, their lives would be endangered).
17. 540 U.S. 31 (2003).
18. *See, e.g., State v. Coahran*, 27 Wn.App. 664, 668 (1980) (finding probable cause to arrest passenger where police discovered drugs behind the passenger seat of a truck but inside the sleeper and therefor removed from the main section of the truck cab); *State v. Morgan*, 78 Wn.App. 208, 215 (1995) (probable cause existed to arrest both the driver and passenger of vehicle with drugs on the hood).
19. 540 U.S. 366 (2003).
20. 124 S.Ct. 2451 (2004).
21. *See, e.g., State v. Ferrier*, 136 Wn.2d 103 (1998).
22. *See, State v. Larson*, 93 Wn.2d 638, 642 (1980) (although a traffic violation may serve as a basis for requiring a driver to identify herself, *see,* RCW § 46.61.021(3), there is no similar basis to require a *passenger* to identify herself); *State v. White*, 97 Wn.2d 92 (1982) (invalidating statute requiring a citizen to stop and identify himself in the absence of specific, objective facts or neutral limitations so as to justify the seizure).
23. 541 U.S. 652 (2004).
24. *See, e.g., State v. Luoma*, 88 Wn.2d 28 (1977) (taking into account juvenile's lack of prior experience with law enforcement in determining whether he was in custody during interrogation).
25. *Alvarado v. Hickman*, 316 F.3d 841 (2002).
26. *See, e.g., Berkemer v. McCarty*, 468 U.S. 420 (1984).
27. 124 S.Ct. 2601 (2004).
28. *Wong Sun v. United States*, 371 U.S. 505 (1963).
29. *See, e.g., State v. Wethered*, 110 Wn.2d 466 (1988); *State v. Lozano*, 76 Wn.App. 116 (1994).
30. 124 S.Ct. 2620 (2004).
31. 540 U.S. 519 (2004).
32. 470 U.S. 298 (1985).