

RAISING THE FOURTH AMENDMENT FROM ITS SUPINE POSITION

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The Open Road

When we criminal defense lawyers think about vehicle searches, we are aware that a vehicle does not have the same fourth amendment protections as a home. But the average citizen does not think that at all. Our clients think about the open road, freedom, independence and autonomy. If their homes are their castles, their cars are extensions of that castle. They get to go where they want and do what they want to do. That is why we have a love affair with cars. We think we have the right to travel in privacy. However, in recent years our travel has encompassed more scrutiny. We must carry a form of identification to embark on a public form of transportation. Law enforcement agencies can obtain information about our travel using National Security Letters. And the exclusionary rule has undergone significant changes under the Roberts Court.

The Exclusionary Rule Under The Robert's Court

In *Samson v. California*,¹ a police officer saw a fellow walking down the street, who he knew was on parole. He searched him even though he had no reasonable suspicion to do so.

The Supreme Court held in a 7-2 opinion written by Justice Thomas, that parolees and probationers can be searched without reasonable suspicion. The California statute, under consideration, provided that the officer must know that the person was on parole. However, it is not apparent from its opinion that the Supreme Court requires this.

Justice Stevens wrote a dissenting opinion in which he stated: "What the Court sanctions today is an unprecedented curtailment of liberty." And, he was correct. A very large segment of society is now subject to search without so much as a reasonable suspicion. This decision has affected hundreds of thousands of people in Texas alone. In Kentucky, probationers constitute over thirty-eight thousand persons with six thousand a month entering into the parole system. But why is this decision about parolees and probationers important to cars and searches?

Because law enforcement must justify the stop of an automobile. There are stops based on probable cause where police believe the car is involved in a crime, there are stops where the car is involved in a traffic offense, and then there are the remainder and vast majority of cases; where the car is stopped on a hunch. The officer then *post hoc* develops a reason for the stop.

Either the officer does not think that the type of car that your client is driving belongs in that nice neighborhood, or the car is full of Hispanics and, in the officer's estimation, that always means trouble. It could be that the driver is Black, or the officer knows your guy and just does not like him. The decision having been made to stop him or her, now the officer has to think up a reason to justify the stop.

Under *Samson*, all he has to do is check the registration and see if the vehicle owner is on parole or probation. If he is on parole or probation, the police can stop and search him, and they don't even need reasonable suspicion. This theme will show up repeatedly and routinely in car

¹ 547 U. S. 843 (2006)

stop cases. The police want to stop a vehicle, do not have a real reason for doing so and drum up a reason after the stop. Either they say it's a traffic stop or they may look up to see if the registered owner and driver is on parole or probation. After *Samson*, Court heard a knock and announce case in *Hudson v. Michigan*² which foreshadowed the Court's changed analysis when applying the exclusionary rule.

In *Hudson*, the police broke down the door when executing a search warrant in violation of the knock and announce rule. Hudson filed a motion to suppress based on *Wilson v. Arkansas*.³

The Court held that there was a Fourth Amendment violation, but that it would not apply the exclusionary rule. Justice Roberts said, for the 5-4 majority, that exclusion was a tremendous sanction which had a high cost. Its application would allow the guilty to go free. Therefore, he reasoned, that because the drugs were not found as a direct result of the knock and announce violation, the Court would not suppress the evidence. The Court further said that it was not examining the basis for the search when it determined whether the knock and announce rule was violated, so that suppression of the evidence would not serve as a deterrent to keep officers from acting this way in the future.

However, there is a link between the knock and announce rule and the discovery of evidence. Sometimes the police will knock and announce and this causes the client to access or destroy the evidence or engage in some other criminal conduct. So there is a link between knock and announce and the discovery of evidence. Moreover, the knock and announce rule serves the reasonableness requirement of the Fourth Amendment. Therefore, suppression of the evidence would deter officers from executing warrants in an unreasonable manner.

Hudson announced a tremendous limitation on the exclusionary rule. Justice Breyer noted that the majority's opinion was against the exclusionary principal itself. Justice Kennedy, the swing vote, disagreed with Justice Breyer in his concurrence. He said: "The continued operation of the exclusionary rule, as settled and defined by our precedents, is not in doubt."

But with each new Supreme Court case we are seeing expansion of police power, limitations on privacy rights and limitations on the exclusionary rule. Even though Justice Kennedy's concurrence is certainly concordant with Justice Roberts' stated judicial philosophy of deciding cases on narrow grounds, *Samson* and *Hudson* appear to belie that intent. In 2006, Justice Roberts set this philosophy out in a commencement speech:

"[T]here are clear benefits to a greater degree of consensus on the Court. Unanimity-or near unanimity-promote clarity and guidance to the lawyers and to the lower courts trying to figure out what the Supreme Court meant. Perhaps most importantly, there are jurisprudential benefits; the broader the agreement among the justices, the more likely it is that the decision is on the narrowest possible grounds. It's when the decision moves beyond what is necessary to decide the case, the Justices tend to bail out. If it's not necessary to decide more to dispose of

² *Hudson v. Michigan*, 547 U.S. 586 (2006).

³ *Wilson v. Arkansas*, 514 U.S. 927 (1995).

the case, in my view, it is necessary not to decide more. In Felix Frankfurter's words, a narrow decision helps ensure that we 'not embarrass the future too much.' The rule of law is strengthened when there's greater coherence and agreement about what the law is."⁴

Sampson and *Hudson* were sweeping decisions that curtailed the application of the exclusionary rule for admitted Fourth Amendment violations and that limited one's Fourth Amendment rights based upon one's status.

So when will the exclusionary rule apply in the Roberts Court? The *Herring*⁵ case brings together the ideas of *Samson* and *Hudson* in the worst possible way. And, it does so in the context of a vehicle search. *Herring* is an example of the above; the police not liking your client and trying to come up with a reason to stop him.

Herring's car was impounded. He went to the impoundment lot in his truck to retrieve something from his car. The police seeing him thought, "[t]here is Herring, he has to have some warrant out there, let's stop him and see." When they stopped him, they found methamphetamine and arrested and prosecuted him for that. But they were mistaken about the warrant. There had not been one for five months. It had been dismissed months earlier and the police had done nothing to clear it. So there was no basis for the stop whatsoever. The government conceded that but since the police did not know the report was a mistake, the government argued that the exclusionary rule did not apply. Based upon *Arizona v. Evans*,⁶ which says when a judge or his clerk makes a mistake about whether a warrant is outstanding, the exclusionary rule will not apply, the government argued that the same rule should apply when the police dispatcher makes a similar mistake.

Herring would not have been a bad decision if the Supreme Court limited its decision to that reasoning. But it did not. It made a much broader decision. The Court said, this was a clear violation of the Fourth Amendment, but it was just a negligent mistake. So the exclusionary rule will not apply. It also reasoned, that it did not desire to deter merely negligent conduct when the cost of exclusion was so great. Thus, the Court's decision is a very broad decision rewriting the exclusionary rule.

Now, motions to suppress complaining about negligent mistakes will not be sufficient to obtain exclusion. When the police do not perform an adequate investigation, when they stop the wrong person, when they make a mistake regarding a traffic violation; under the reasoning in *Herring*, if the mistake was negligent, the court won't care.

What about all the times the computers were wrong? They are wrong all the time. We have all received NCIC reports with inaccurate information about our clients. The court will not suppress the evidence unless you can show a systematic negligence in updating the records or the reckless disregard for the accuracy of the records.

⁴ Commencement 052106.

⁵ *Herring v. U.S.*, Docket No. 07-153 (2009).

⁶ *Arizona v. Evans*, 514 U.S. 1 (1995).

Clarified *Leon* and *Franks*⁷

For computer records, you must ask; is it a systematic failure or do they recklessly disregard a false record? In those cases good faith or (as *Herring* clarifies it) reasonable reliance on the records will not excuse the Fourth Amendment violation. If they constantly make mistakes for months and months and they then rely on the record, you can say it was reckless to rely upon it. So this should prompt each of you to engage in discovery and litigate systematic errors.

Ask for information regarding the database the police relied upon to stop your client based upon incorrect information. Find out how many times the database is updated and test to make sure the update is correct.

How many times is the database incorrect? I want a sample of the records to see if it is accurate or not, because under the Supreme Court's rule, we have a right to look into their records to see if they have a systematic failure in their records or data.

I predict the police will not have any procedures in place to update the records and so you will be able to show that their mistakes are more than negligence. You will be able to show that they are systematic and made in reckless disregard for their accuracy. You are going to find systematic failures and where the police do nothing to correct that, they are acting in reckless disregard for the truth when they rely on those records. This litigation may also lead the prosecution to settle cases.

Standard for exclusion: Higher (culpable and sufficient to deter)

Lower (reckless, grossly negligent, routine negligence based upon the true facts)

Herring changes, to some extent, both *Leon* and *Franks*, and it talks about both cases. What the Supreme Court is saying, in *Herring* and in a number of the recent cases is, that it is no longer going to have bright line rules that were "confusing" such as "good faith" and "*Belton*'s"⁸ reach extending to the entire passenger compartment of a car." The Court is going to go back to a totality circumstances test in which fact bound inquiries are of keen importance.

For example, whether there is a systematic problem that is either intentional, or something that suppression will help to deter, these are matters that would help to educate and make police officers better by deterring their conduct. Another part of the inquiry is whether the conduct is bad enough that it warrants the social costs of letting the criminal go free.

It is an objective test based upon what a reasonably well trained officer would do under the circumstances. So, expert witness testimony will be helpful here. And the Supreme Court's opinion in *Herring* certainly invites such testimony.

⁷ *U.S. v. Leon*, 468 U.S. 897 (1984); *Franks v. Delaware*, 438 U.S. 154 (1978).

⁸ *N.Y. v. Belton*, 453 U.S. 454 (1981).

The subject matter of the expert's testimony would be, what is expected of police officers? When does their action based upon their investigation become reckless?

There is no litmus test. It is a question of-what minimum investigation should an officer conduct before his conduct will meet that of a reasonably well trained officer? It is not a subjective test, but is objective.

We do not look at this officer's training and experience. We do not look at her intention or knowledge. There is some minimal standard where a police officer is at the bottom of the class and we are going to let him through, but when you fall below that standard, then you become reckless. Where do we go to determine such a standard? I would suggest that the civil rights cases give us good direction.

Arizona v. Gant⁹ plus

Despite Justice Robert's theory, that the Court should reach the most narrow possible decision, the Court is not limiting itself to narrow decisions. It is overruling precedent if it does not agree with the basis for it.

As I mentioned, we know that once one embarks on a trip in a vehicle, she has a diminished expectation of privacy. *Chimel v. California*, 395 U.S. 752 (1969). This is because one is mobile on the public roadways.

Gant is about a search incident to arrest and it is the other piece of *Herring* that is something good. *Arizona v. Gant*, is about the *Chimel* rule and the *Belton* rule. After you arrest somebody, you can search them incident to that arrest. *Chimel* said that you can search the body and pockets of a person under arrest. And, that you can search anything within their reach.¹⁰

Then *Belton* came out in 1981 and asked the question, how far can they reach? And, the Court created the bright line rule, that the arrested person would be presumed to be able to reach the entire passenger compartment. So that the whole passenger compartment can be searched incident to an arrest. This was a tremendous tool for the police because if they can come up with any reason to arrest a person, they can search the entire car.

In *Thornton*,¹¹ the Supreme Court expanded *Thornton* even further by extended the *Belton* bright line rule to recent occupants of a vehicle. The Courts of Appeals had a hey day with this decision.

In separate concurring opinions in *Thornton*, Justices Scalia and Ginsberg and O'Connor and in dissent, Justices Souter and Stevens found that the bright line rule no longer made sense. Thus, five justices concluded that there was no good basis for the bright line rule.

⁹ *Arizona v. Gant*, 129 S.Ct. 1710 (2009).

¹⁰ One might reach for a weapon which will be dangerous for officer safety, or one might reach for evidence to destroy it.

¹¹ *Thornton v. U.S.*, 541 U.S. 615 (2004).

The Justices concurred in the result since in *Thornton* the defendant was arrested for drug dealing, the officers had probable cause to search the entire car for evidence of drugs. It is not really a search incident to arrest, it is really a search having to do with the crime that you are looking at. But the majority of the judges wanted to go back to the original rule in *Chimel* that you can search only so far as a person can reach.

Then in *Arizona v. Gant*, Justice O'Connor was replaced by Justice Alito who was on the side of the government, but Justice Thomas switched sides to join Scalia. *Belton* is for all purposes overruled and the Court went back to *Chimel*. You can only search the interior of a car, if the person can reach inside the car for a weapon or evidence. This is a 4-1-4 decision with much to be excited about since Stevens in the majority and Scalia concurring even though he was not sure that there was a basis to search the car for evidence of the crime under consideration. Justice Scalia says that "reason to believe" means "probable cause".¹²

In addition, this is a great case for not only the search, but for the stop as well. In *Whren*,¹³ the police can stop someone if you have a reason to stop them. Now the Supreme Court says no, you cannot search the car incident to arrest, you have to be searching for evidence of the crime. It makes it much harder for police to drum up reasons for a stop.

Sure, they can still stop a car for signaling too early or too late, for a broken tail light or for speeding. And they can arrest the person too. But they cannot search the car.

If they want to search the vehicle, police will have to get consent or give up the real reason that they wanted to stop the person. They may have to give up the source for their information that makes them believe that the person is committing a crime. And this information or source may not be good enough for probable cause. So *Gant* affects not just the search, but also the basis for the stop. See *Virginia v. Harris*, 558 U.S. ____ (2009).¹⁴

¹² In *Thornton v. U.S.*, 541 U.S. 615, 632 (2004)[concurring opinion], Justice Scalia states:

"Although it does not follow from *Chimel*, circumstances unique to the automobile context also justify a search incident to a lawful arrest when it is 'reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.'"

See also: *Arizona v. Gant*, 129 S.Ct. 1710 (2009):

"Consistent with the holding in *Thornton v. U.S.*, 541 U.S. 615 (2004), and following the suggestion in Justice Scalia's opinion concurring in the judgment in that case, *id.*, at 632, we also conclude that circumstances unique to the automobile context justify a search incident to arrest when it is reasonable to believe that evidence of the offense of arrest might be found in the vehicle. ... or it is reasonable to believe the vehicle contains evidence of the offense of arrest. ... In my view we should simply abandon the *Belton-Thornton* charade of officer safety and overrule those cases. I would hold that a vehicle search incident to arrest is *ipso facto* 'reasonable' only when the object of the search is evidence of the crime for which the arrest was made, or of another crime that the officer has probable cause to believe occurred."

¹³ *Whren v. U.S.*, 517 U.S. 806 (1996).

¹⁴ *Virginia v. Harris*, 558 U.S. ____ (2009) [Justice Roberts, dissenting]:

The effort among the Court of Appeals will be to limit the good parts of *Gant*. They use existing case law to do so. One might invoke inventory searches for example. But there is a Circuit split on inventory searches. Inventory searches must be conducted on a protocol and are not evidentiary searches. They are care-taking of the property searches. So because of that, they have to be done pursuant to procedures. Some Circuits require them to be written procedures and some say the procedures need only be reasonable to the care taking function. So the inventory search does provide a way around *Gant*.

The question of whether the officers can search an area within the reach of passengers was addressed in *Davis* in the Eighth Circuit against us, but it is contrary to Supreme Court precedent.

So make full use of these cases, be careful to craft your motions to state an excludable search or seizure and resist efforts to work around the limits placed on automobile searches

“In the absence of controlling precedent on point, a sharp disagreement has emerged among federal and state courts over how to apply the Fourth Amendment in this context. The majority of courts examining the question have upheld investigative stops of allegedly drunk or erratic drivers, even when the police did not personally witness any traffic violations before conducting the stops. These courts have typically distinguished *J.L.*’s general rule based on some combination of (1) the especially grave and imminent dangers posed by drunk driving; (2) the enhanced reliability of tips alleging illegal activity in public, to which the tipster was presumably an eyewitness; (3) the fact that traffic stops are typically less invasive than searches or seizures of individuals on foot; and (4) the diminished expectation of privacy enjoyed by individuals driving their cars on public roads. **A minority of jurisdictions, meanwhile, take the same position as the Virginia Supreme Court, requiring that officers first confirm an anonymous tip of drunk or erratic driving through their own independent observation.** This conflict has been expressly noted by the lower courts.” [emphasis added](footnotes omitted).