

FROM THE PRESIDENT

JOHN WESLEY HALL

The Barney Fife Exception to the Exclusionary Rule

The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.

Johnson v. United States, 333 U.S. 10, 13-14 (1948).

CHIEF JUSTICE ROBERTS: I don't know what the situation is like in Dale County. They probably don't have the latest version of WordPerfect, or whatever it is. They are probably making do with whatever they can under their budget and doing the best they can.

MS. KARLAN: But there's not a Barney Fife¹ defense to the violation of the Fourth Amendment either.

Herring v. United States, No. 07-513, oral argument transcript at 20 (Oct. 7, 2008).

Yes, Virginia, there is a Barney Fife exception to the exclusionary rule.

This is my first column since the Supreme Court returned to the bench the first Monday in October, and already the Court has heard argument in three search and seizure cases,² demonstrating its usual hostility for Fourth Amendment litigation in general, and the exclusionary rule in particular.

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Hudson

That hostility started long ago, but it took a dark and ominous turn in 2006 with an opinion more in the style of a fairy tale for law enforcement, written by Justice Antonin Scalia, that held that a no-knock violation did not justify application of the exclusionary rule.

In *Hudson v. Michigan*,³ STARK⁴ expressed the view that the rule itself is a relic of the past and no longer socially desirable or necessary to deter bumbling incompetence or outright misconduct. "Failure to teach and enforce constitutional requirements exposes municipalities to financial liability," they said. "Moreover, modern police forces are staffed with professionals; it is not credible to assert that internal discipline, which can limit successful careers, will not have a deterrent effect."⁵

In other words, cops hardly make mistakes anymore and always try to go by the book anyway. And, if they don't, they know they will be disciplined or sued. They are, after all, *professionals*.⁶

Indeed, Justice Scalia, it is not credible for the Court to assert that there is any effective professional discipline for Fourth Amendment violations in the "often competitive enterprise of ferreting out crime." What empirical evidence is there that "professional discipline" deters anyone? Even if there was, I suspect the departmental reaction is more like that of Capt. Renault in *Casablanca*.⁷ How convenient to forget prior cases.

Civil litigation generally. I blogged *Hudson* on FourthAmendment.com when it came down:

Civil suits?!? I've been counseling clients for years that suing the police over a search that led to their conviction is a futile act ["The law does not require the doing of a futile act." *Ohio v. Roberts*, 448 U.S. 56, 74 (1980)], and I simply can't take the time to engage in it and won't. Once again, the Supreme Court ... is writing fiction into its opinions by judicial activism of making declarations of public policy that defy common sense, something, I regret, that five members of the Supreme Court obviously lack if they buy into the malarkey that a civil suit against a police officer conducting a search is any deterrent at all once the target of the search is convicted. Officers don't pay to defend, and they don't even pay the minuscule judgments, so what does any officer care about that? The point is convictions, convictions, and more convictions. Carrot and stick. Job commendations and promotions, and the Fourth Amendment be damned.⁸

The state in *Hudson* argued that there were civil remedies, and that justified an alternative remedy:

Though this Court has never sought out “alternative sanctions” in other situations, described above by Respondent, where but-for causation is absent, Respondent would note that now, especially since *Wilson* has recognized the constitutional status of announcement principles, civil remedies exist under 42 U.S.C. § 1983 for announcement violations. Such actions are brought,⁶⁶ and it is quite possible that principles of risk-management by governmental bodies are a greater incentive to observance of constitutional principles than exclusion of evidence.⁹

In footnote 66 of its brief, the state cited several civil cases where somebody apparently successfully sued over a failure to knock and announce. I read them, and they all involved innocent targets of a search, including third parties,¹⁰ and one case held the opposite of what it was cited for.¹¹ The Court did not cite them.

Fed. R. Evid. 404(b): The police, of course, would love to 404(b) to death a person who sued them for damages over an illegal search if that person has a record.¹²

Lack of training. This is an uphill battle for a plaintiff, too, because a proven lack of training does not *ipso facto* impose liability on a governmental entity.

In resolving the issue of a city’s liability, the focus must be on adequacy of the training program in relation to the tasks the particular officers must perform. That a particular officer may be unsatisfactorily trained will not alone suffice to fasten liability on the city, for the officer’s shortcomings may have resulted from factors other than a faulty training program.¹³

Qualified immunity. Assuming the officer acted within his or her discretion, qualified immunity will protect the officer from liability. “As the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law.”¹⁴

PLRA. The plaintiff can’t be in jail. After the Prison Litigation Reform Act, there are procedural hoops and, succeeding that, there’s just no money in it to justify suing.¹⁵ The PLRA capped attorney’s fees at 1.5 times the damage award. So, if

the jury symbolically awards the prisoner-plaintiff nominal damages of \$1, the attorney can collect no more than a \$1.50.¹⁶

The Heck Bar

Under *Heck v. Humphrey*,

a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated.¹⁷

If the underlying criminal case depended even *in part* on evidence from the allegedly invalid search and seizure, *Heck* bars the case until the conviction is invalidated on direct appeal or *habeas*.¹⁸

Excuse me: Didn’t you hold in *Stone v. Powell*¹⁹ 32 years ago that a *habeas* action doesn’t lie to remedy a Fourth Amendment violation, as long as the prisoner had a “full and fair opportunity” to litigate the validity of the search in state court, whether a motion to suppress was filed or not? In result-driven jurisprudence, they sometimes just ignore the precedents. It is, of course, easier than explaining them away.

Barney Fife Lives

And that brings us back to good ol’ Deputy Barney Fife,²⁰ apparently still alive and well, working in the warrant office of the Dale County, Ala., Sheriff’s Department.

Bennie Dean Herring was arrested by mistake in Coffee County because Deputy Fife or somebody forgot to clear Herring’s name from the computer after an old warrant for him was withdrawn, a case sadly reminiscent of *Arizona v. Evans*,²¹ where the Court upheld a search incident to a mistaken arrest on a recalled warrant because of a court clerk’s error.

In a search incident to Herring’s bogus arrest, deputies found a bag of methamphetamine in his pocket and a gun and ammunition in his truck. Since Herring had a prior felony, he ended up in federal court and was convicted. From the get-go, he argued that because his arrest was unlawful, so was the search of his person and vehicle, and the evidence should have been suppressed.

If the oral argument is any indication,²² the Solicitor General is going for a

serious modification of the exclusionary rule.²³ Knowing this Court, he might just get it. The cops almost always get the benefit of the doubt when the Fourth Amendment stands in the way of the “often competitive enterprise of ferreting out crime.”

And, in *Pearson v. Callahan*, argued a week after *Herring*, a *civil* case involving experienced narcotics officers entering the plaintiff’s home without a warrant, Justice Scalia remarkably asked not one question nor made one snide remark at oral argument.²⁴ He, of course, already knows what he’s thinking. And we do, too.

Close only counts in horseshoes – and the Fourth Amendment exclusionary rule.

Notes

1. A “Barney Fife” is a hapless but overzealous law enforcement officer. *See, e.g., Hebert v. Angelle*, 600 So. 2d 832, 834 (La. App. 3d Cir. 1992); *State v. Cobb*, 2008 Ohio 5210, 2008 Ohio App. LEXIS 4389, ¶ 133 (12th Dist. 2008); *State v. Minniecheske*, 226 Wis.2d 161, 594 N.W.2d 419; 1999 Wisc. App. LEXIS 228 *20 (1999) (unpublished); *In re Bazan*, 251 S.W.3d 39, 47-48 (Tex. 2008).

Deputy Barney Fife was a television character played by Don Knotts on the CBS situation comedy *The Andy Griffith Show* from 1960 to 1965, a bumbling comic foil to Griffith’s calm and competent Sheriff Andy Taylor. *See, e.g.,* http://en.wikipedia.org/wiki/Barney_Fife.

“Barney Fife” is copyrighted, *CBS Operations Inc. v. Reel Funds Int’l*, 2007 U.S. Dist. LEXIS 58939, 2007 WL 2325218 (N.D. Tex. 2007), so be careful how you invoke his name.

2. *Herring v. United States*, No. 07-513, and *Arizona v. Gant*, No. 07-542, both argued October 7, 2008, and *Pearson v. Callahan*, No. 07-751, argued October 14, 2008.

3. 547 U.S. 586 (2006).

What the knock-and-announce rule has never protected, however, is one’s interest in preventing the government from seeing or taking evidence described in a warrant. Since the interests that were violated in this case have nothing to do with the seizure of the evidence, the exclusionary rule is inapplicable.

Id. at 594.

4. Scalia, Thomas, Alito, Roberts, and Kennedy.

5. *Id.* at 599 (citation omitted).

6. This reminds me of the line from *Feris Bueller’s Day Off*: “Relax. I’m a professional.”

7. “I’m shocked, shocked to find that gambling is going on in here!”

8. <http://www.fourthamendment.com>, posted June 19, 2006.

9. Respondent's brief in *Hudson* at 34-35.

10. See, e.g., *Green v. Butler*, 420 F.3d 689 (7th Cir. 2005); *Kornegay v. Cottingham*, 120 F.3d 392 (4th Cir. 1997); *Aponte Matos v. Toledo Davila*, 135 F.3d 182 (1st Cir. 1998); *Johnson v. City of Aiken*, 217 F.3d 839 (Table), 2000 WL 263823 (4th Cir. 2000) (criminal case dismissed); *Gould v. Davis*, 165 F.3d 265 (4th Cir. 1998) (qualified immunity denied).

11. In one case, however, the plaintiff lost on qualified immunity. *Johnson v. Deep East Texas Regional Narcotics Trafficking Task Force*, 379 F.3d 293 (5th Cir. 2004).

12. "Other crimes, wrongs or acts." See, e.g., *Rodriguez v. City & County of Honolulu*, 1997 U.S. App. LEXIS 12504, *5 (9th Cir. 1997) (prior arrests and handcuffing relevant to plaintiff's damages claim for this arrest); *Colon v. Howard*, 215 F.3d 227, 234-35 (2d Cir. 2000) (prison litigation; disciplinary record admissible); *Ruvalcaba*

v. City of Los Angeles, 64 F.3d 1323, 1328 (9th Cir. 1995) (officer's knowledge from prior arrests of plaintiff relevant to their use of force here).

13. *City of Canton v. Harris*, 489 U.S. 378, 390-91 (1986).

14. *Malley v. Briggs*, 475 U.S. 335, 341 (1985). "If the magistrate issues the warrant in such a case, his action is not just a reasonable mistake, but an unacceptable error indicating gross incompetence or neglect of duty. The officer then cannot excuse his own default by pointing to the greater incompetence of the magistrate." *Id.* at 346 n.9.

15. *United States v. Stevens*, 500 F.3d 625, 629 (7th Cir. 2007): "We add that we have stated previously that a Rule 41(g) motion is a civil action for purposes of the PLRA, and thus subject to the PLRA's provisions on remand. See *United States v. Howell*, 354 F.3d 693, 695 (7th Cir. 2004); see also *United States v. Jones*, 215 F.3d 467, 469 (4th Cir. 2000) (per curiam)."

16. See, e.g., Lynn S. Branham, *Toothless in Truth? The Ethereal Rational Basis*

Test and the Prison Litigation Reform Act's Disparate Restrictions on Attorney's Fees, 89 CALIF. L. REV. 999 (2001).

17. 512 U.S. 477, 487 (1994).

18. See, e.g., Note, *Defining the Reach of Heck v. Humphrey: Should the Favorable Termination Rule Apply to Individuals Who Lack Access to Habeas Corpus?*, 121 HARV. L. REV. 868 (2008).

19. 428 U.S. 465 (1976).

20. In the absence of Sheriff Taylor, Fife was in charge of the two-cell jail. "Rule Number One! Obey ALL rules!" After writing himself a traffic ticket: "A boob, that's what I am, a boob!"

21. 514 U.S. 1 (1995).

22. http://www.supremecourtus.gov/oral_arguments/argument_transcripts/07-513.pdf.

23. So much for "I will support and defend the Constitution of the United States against all enemies, foreign and domestic. ..." 5 U.S.C. § 3331, U.S. Const., Art. VI, cl. 3.

24. *Pearson v. Callahan*, No. 07-751, oral argument transcript (Oct. 14, 2008). ■

Announcement of NACDL Special Election and Applicable Procedures

NACDL's Board of Directors will hold a special election to fill the vacancy in the Association's First Vice President position. The Election will be held at the next regularly scheduled meeting of the Board of Directors in New Orleans on February 28, 2009.

Responsibilities

The First Vice President is a member of NACDL's Executive Committee and Board of Directors and is expected to take an active role in the organization's governance and operations. The First Vice President is expected to attend each of NACDL's quarterly meetings in person, as well as attend monthly Executive Committee meetings by conference call. Pursuant to Article V, Section 6(c) of the Bylaws, "The First Vice President shall assist the President and President-Elect in the performance of their duties and perform such other duties as may be prescribed by the President and/or Board of Directors. ... The duties of the First Vice President shall include overall responsibility for member services/membership."

Eligibility

Any member of the Association who is authorized to vote may submit his or her name as a candidate for the position of First Vice President. Candidates must state the year and jurisdiction of their bar admission, must indicate whether they are members in good standing of their bar, and

must disclose if they are under indictment or information for any felony or crime involving moral turpitude.

Process

Any member wishing to submit his or her name as a candidate for the position of First Vice President shall submit a statement of qualifications, not to exceed 500 words. The statement of qualifications should include a description of any past service to the Association. A curriculum vitae may also be provided. The statement of qualifications must be received by **February 10, 2009**, and should be sent to **Malia Brink**, Counsel for Special Projects, NACDL, 1660 L Street NW, 12th Floor, Washington, DC 20036 or submitted by e-mail to malia@nacdl.org.

If they so choose, candidates will be given the opportunity to speak briefly regarding their qualifications at the meeting of the Board of Directors in New Orleans prior to the voting.

Voting will be conducted by secret ballot. In the event of more than two candidates, the candidate who receives the lowest number of votes will be eliminated after each ballot round until one candidate receives a majority vote of the Board of Directors as required under Article VI, Section 6(b) of the Bylaws.

The elected First Vice President will serve the remainder of the current term, which expires at the Annual Meeting on August 8, 2009.

