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Martin Schwartz

*Touro Law Center*, [mschwartz@tourolaw.edu](mailto:mschwartz@tourolaw.edu)

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# Supreme Court Fortifies Qualified Immunity for Law Enforcement Officers in Warrant Cases

By Martin A. Schwartz

The Civil Rights Act of 1871, 42 U.S.C. §1983, affords a judicial remedy to individuals who suffered deprivations of their federal constitutional rights under color of state law. The §1983 remedy, however, is subject to an array of immunity and other defenses. Officials who carried out a judicial, prosecutorial or legislative function are protected from personal monetary liability by absolute immunity.<sup>1</sup> Officials who carried out executive and administrative functions are protected by qualified immunity.<sup>2</sup>



Qualified immunity shields state and local law enforcement officers from personal monetary liability under §1983 so long as the officer acted in an objectively reasonable manner. An officer will be found to have acted in a reasonable manner so long as she did not violate clearly established federal law.<sup>3</sup> Thus, an officer who acted unconstitutionally, but did not violate the plaintiff's clearly established constitutional rights, will be protected from liability by qualified immunity. Although less potent than the absolute immunities, qualified immunity is a very formidable defense and "protects 'all but the plainly incompetent or those who knowingly violate the law.'"<sup>4</sup>

The United States Supreme Court in *Messerschmidt v. Millender*<sup>5</sup> held that police officers who sought and executed a very broad warrant authorizing them to search a residence for guns and gang related material were protected by qualified immunity. The Court assumed that the warrant violated the Fourth Amendment, yet found that the officers acted in an objectively reasonable manner. The Court relied heavily upon the facts that the warrant was issued by a neutral magistrate, and the officers who applied the warrant secured approval for it from their superior officers. Chief Justice John G. Roberts, Jr. wrote the opinion for the Court. Justice Stephen Breyer filed a brief concurrence. Justice Elena Kagan concurred in part and dissented in part. Justice Sonia Sotomayor dissented, joined by Justice Ruth Bader Ginsburg. My major purpose here is to analyze the significance of the decision in *Millender* upon §1983 Fourth Amendment claims asserted against state and local law enforcement officers who apply for and enforce warrants.

To accomplish this goal, it is necessary, for starters, to identify several basic principles of Fourth Amendment and qualified immunity law. Section 1983 Fourth Amendment claims challenging arrests, searches, and uses of force by law enforcement officers are normally governed by an objective reasonableness standard. For example, an officer has probable cause for an arrest when based upon the facts and circumstances known to the officer, a reasonably prudent person could have concluded that the suspect committed or is committing a crime.<sup>6</sup> Probable cause is essentially a reasonableness standard.<sup>7</sup> Similarly an officer's use of force in carrying out an arrest or investigatory stop will comport with the Fourth Amendment if, under all of the circumstance facing the officer, it was objectively reasonable.<sup>8</sup>

Fourth Amendment objective reasonableness standards give substantial deference to the judgment of the law enforcement officer.<sup>9</sup> Furthermore, an officer who violated the Fourth Amendment because she did not act in an objectively reasonable manner may still escape personal liability under qualified immunity. This is so even though the qualified immunity standard itself is one of objective reasonableness.<sup>10</sup> Thus, a law enforcement officer who violated the §1983 plaintiff's Fourth Amendment rights will be shielded from liability unless those rights were clearly established when the officer acted. Liability will attach only if the officer violated the plaintiff's clearly established Fourth Amendment rights.

This means that a law enforcement officer sued under §1983 for violating the Fourth Amendment is effectively granted two levels of reasonableness protection, one under the Fourth Amendment and another under qualified immunity. To recover damages on a §1983 Fourth Amendment claim the plaintiff has to overcome both levels of reasonableness protection. This is because an officer found to have acted unreasonably for the purpose of the Fourth Amendment could nevertheless be found to have acted reasonably for the purpose of qualified immunity.<sup>11</sup> To avoid the linguistic awkwardness of an officer having acted "reasonably unreasonably," courts normally prefer different language, for example, that the officer had "arguable probable cause," or made a "reasonable mistake," or used force at the "hazy border" of reasonable and unreasonable force.<sup>12</sup>

Prior to its decision in *Millender* the controlling Supreme Court precedent on the immunity of officers who apply for warrants was *Malley v. Briggs*.<sup>13</sup> The

*Malley* Court held that law enforcement officers who were sued under §1983 for applying for arrest warrants were not protected by absolute immunity, even though the magistrate who issued the warrant was shielded by absolute judicial immunity. The officers, however, were entitled to assert qualified immunity. The *Malley* Court stated that the pertinent qualified immunity question “is whether a reasonably well-trained officer in [the defendant officer’s] position would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant.”<sup>14</sup> Although a magistrate’s issuance of a warrant does not *automatically* establish the officer’s protection under qualified immunity, “[o]nly where the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable...will the shield of immunity be lost.”<sup>15</sup> *Malley* dealt specifically with arrest warrants, but its rationale applies fully to applications for search warrants as well.<sup>16</sup>

With this background in place we are ready to tackle *Messerschmidt v. Millender*. After a romantic relationship between Shelly Kelly and Jerry Ray Bowen turned sour, Bowen physically assaulted Kelly and fired a sawed-off shotgun at her car. Ms. Kelly informed the police about this abuse, and told Detective Messerschmidt that she thought Bowen was staying at the home of his foster mother, Augusta Millender. After confirming Bowen’s connection to Ms. Millender’s residence, and that Bowen was a member of two gangs, Detective Millender obtained approvals from his supervisors and a deputy district attorney to seek a warrant to search the Millender residence for guns, ammunition and gang related material. The magistrate issued the warrant, and the search uncovered Augusta Millender’s shotgun and ammunition.

Ms. Millender (and her daughter and grandson) brought suit in federal court under §1983 against Detective Messerschmidt and other officers who applied for and executed the search warrant. The plaintiffs alleged that the warrant did not comport with the Fourth Amendment because “there was no basis to search for all guns simply because the suspect owned and had used a sawed off shotgun [in the shooting of Ms. Kelly], and no reason to search for gang material because the shooting at the ex-girlfriend for call[ing] the cops was solely a domestic dispute.”<sup>17</sup> The officers asserted qualified immunity.

The United States Supreme Court defined the issue as whether, assuming that the warrant was invalid and thus should not have been issued, the officers who applied for and executed it were protected by qualified immunity because they acted in an objectively reasonable manner. When a §1983 defendant asserts the defense of qualified immunity, a court has discretionary authority to first decide the constitution-

al merits—in *Millender* whether the warrant violated the Fourth Amendment—or to bypass the merits and jump right to the immunity question of whether the defendant officer violated clearly established federal law.<sup>18</sup> The Court in *Millender* took this latter course and proceeded directly to qualified immunity. In other words, the Court did not decide whether the warrant was valid, but held that even if it was invalid, the officers who applied for and executed it were protected by their immunity defense.

The Court acknowledged that under *Malley v. Briggs* the magistrate’s issuance of the warrant was not dispositive of the defendant officers’ qualified immunity defense. The Court, however, articulated greater weight to the magistrate’s issuance of the warrant than appears to have been contemplated by *Malley*. The *Millender* Court ruled that “[w]here the alleged Fourth Amendment violation involves a search or seizure pursuant to a warrant, the fact that a neutral magistrate has issued a warrant is the clearest indication that the officers acted in an objectively reasonable manner [i.e.,] in objective good faith.”<sup>19</sup> At another point in his opinion Chief Justice Roberts went even further, stating:

The question...is not whether the magistrate erred in believing there was sufficient probable cause to support the scope of the warrant he issued, [but] whether the magistrate so obviously erred that any reasonable officer would have recognized the error. The occasions in which this standard will be met may be rare, but so too are the circumstances in which it will be appropriate to impose personal liability on a lay officer in the face of judicial approval of his actions.<sup>20</sup>

The Court has thus informed the legal world in no uncertain terms that §1983 plaintiffs who challenge magistrate issued warrants will be able to overcome qualified immunity only in “rare” cases. This is very strong medicine indeed! And that is not all. There is more in this opinion for which state and municipal law enforcement officers should be grateful. As discussed below, the line officers were afforded an additional dose of qualified immunity protection for having secured approval from superior officers.

Although *Malley v. Briggs* recognized that in some circumstances a magistrate’s issuance of a warrant will not shield the law enforcement officer from liability, none of the “*Malley* exceptions” applied in *Millender*. For example, it could not be said that the affidavit in support of the warrant was so lacking in probable cause that an officer’s reliance on the warrant was plainly unreasonable.<sup>21</sup> Nor was the warrant obviously deficient on its face. The *Millender* Court distinguished *Groh v. Ramirez*<sup>22</sup> on the ground that the warrant’s fail-

ure in that case to describe the person or property to be seized was a “glaring deficiency” that rendered the warrant invalid on even a “ cursory reading” of it.<sup>23</sup>

By contrast to *Groh v. Ramirez*, in *Millender* even if the officers were mistaken that the scope of the warrant was supported by probable cause, their conclusion was not unreasonable. As to the search for guns, “given Bowen’s possession of one illegal gun, his gang membership, his willingness to use the gun to kill someone, and his concern about the police, a reasonable officer could conclude that there would be additional illegal guns among others that Bowen owned.”<sup>24</sup> As to the search for evidence of “gang material,” “[a] reasonable officer could certainly view Bowen’s attack [on Kelly] as motivated not by the souring of his romantic relationship with Kelly but instead by a desire to prevent her from disclosing details of his gang activity to the police.”<sup>25</sup> In other words, the Court gave all benefits of doubt to the defendant officers.

That still leaves the most important aspect of the Court’s decision. The lower federal courts have been struggling with whether, in evaluating a qualified immunity defense, weight should be given to the fact that the defendant officer sought advice of counsel or approval from a superior officer before engaging in the contested conduct and, if so, how much weight to afford.<sup>26</sup> As a matter of first impression in the United States Supreme Court, the *Millender* Court held that the “fact that the officers sought and obtained approval of the warrant application from a superior provides further support for the conclusion that the officer could reasonably have believed that the scope of the warrant was supported by probable cause.”<sup>27</sup> At another point the Chief Justice said that this factor “is certainly pertinent in assessing whether [the defendant officers] could have a reasonable belief that the warrant was supported by probable cause.”<sup>28</sup> The Court did not decide how much weight should be given to this factor, but, in the author’s view, the tenor of the Court’s opinion (“certainly pertinent”) indicates that it may well be a significant factor. How significant this factor is will likely depend upon the facts and circumstances of the particular case, for example, the thoroughness of the information the defendant gave her superior, the firmness of the superior’s approval, the supervisor’s hierarchal position, and whether the superior possessed legal expertise.<sup>29</sup> In other words, it must be determined whether reliance on a superior’s approval or advice of counsel was reasonable.<sup>30</sup>

The Court’s decision in *Millender* may well encourage more line officers to seek approval from their superiors. This, of course, would be a good thing. The legal question will then become the impact of that approval on the line officer’s qualified immunity defense.

The various opinions of the justices in *Millender v. Messerschmidt* illustrate that application of the quali-

fied immunity defense in a particular case can generate significant judicial disagreement. Justice Kagan, concurring in part and dissenting in part, sharply disagreed with the Court’s reliance on the defendant officers securing approval from their superior and a deputy district attorney. She stressed that all of these public officials are “teammates,” i.e., part of the same prosecution team and, therefore, should not be able to confer qualified immunity on each other.<sup>31</sup> She found the officers protected by qualified immunity to the extent the warrant authorized a search for firearms, but not with respect to its authorization to search for gang material. Like Justice Kagan, Justice Sotomayor (joined by Justice Ginsburg) thought it is “passing strange to immunize an officer’s conduct...based upon the approval of other police officers and prosecutors.... Under the majority’s test four wrongs [i.e., magistrate, prosecutor, superior police officer, and line police officers] apparently make a right.”<sup>32</sup> Justice Sotomayor would have rejected the officers’ qualified immunity defense en toto. Thus, while the Court granted the officers qualified immunity, Justice Kagan would have granted them only partial qualified immunity, while Justices Sotomayor and Ginsburg would have denied them immunity altogether.

When all of the pieces of the *Messerschmidt v. Millender* immunity puzzle are viewed together, the following picture emerges:

1. The defendant law enforcement officer starts out with two levels of reasonableness protection, one under the Fourth Amendment, and an added level under qualified immunity.
2. The officer gets another healthy layer of protection from the fact that a neutral magistrate issued the warrant.
3. If the line officer secured approval from a superior or an official with legal expertise (e.g., an assistant district attorney), that will further support the conclusion that the officer acted in an objectively reasonable manner.
4. In evaluating the immunity defense, the Supreme Court draws no distinction between officers who applied for a warrant and those who executed it.

State and local law enforcement officers should be elated with the Court’s decision. On the other side of the equation, this is not a pretty picture for \$1983 plaintiffs who seek to recover damages based upon either the application or execution of an allegedly unconstitutional warrant. It puts them behind the eight ball, as they face the uphill battle of attempting to overcome these various layers of immunity protection. It is not impossible, but it will take a mighty strong case, like *Groh v. Ramirez*,<sup>33</sup> where the search warrant was obvi-

ously deficient on its face, for the §1983 plaintiff to overcome qualified immunity.

## Endnotes

1. See, e.g., *Stump v. Sparkman*, 435 U.S. 349 (1978) (judicial immunity); *Imbler v. Pachtman*, 424 U.S. 409 (1976) (prosecutorial immunity), *Tenney v. Brandhove*, 341 U.S. 367 (1951) (legislative immunity).
2. See, e.g., *Reichle v. Howards*, 132 S.Ct. 2088 (2012); *Hope v. Pelzer*, 536 U.S. 730 (2002); *Anderson v. Creighton*, 483 U.S. 635 (1987); *Harlow v. Fitzgerald*, 457 U.S. 500 (1982).
3. Some three decades ago the Supreme Court in *Harlow v. Fitzgerald*, 457 U.S. 500 (1982) reformulated qualified immunity by defining it in wholly objective terms. An officer who acted unconstitutionally, but did not violate clearly established constitutional law, acted in an objectively reasonable manner and will be shielded from liability. Under this formulation, the officer's subjective motivation is irrelevant in determining her protection under qualified immunity. *Harlow's* goal was to enable qualified immunity to be decided as an issue of law by the court as early in the litigation as possible. See *Hunter v. Bryant*, 502 U.S. 224 (1991). Despite this attempt in *Harlow* to simplify and streamline qualified immunity, the Supreme Court is still struggling to resolve a seemingly unending array of qualified immunity issues. See generally Martin A. Schwartz 1A Section 1983 Litigation: Claims and Defenses Ch. 9A (4th ed. 2012). Since *Harlow* the Supreme Court has decided approximately 25 cases attempting to flesh out the various aspects of qualified immunity, and issues still remain to be resolved. In the 2011-12 term alone the Court decided four cases dealing with various aspects of qualified immunity. *Reichle v. Howards*, 132 S.Ct. 2088 (2012); *Filarsky v. Delia*, 132 S.Ct.1657 (2012); *Messerschmidt v. Millender*, 132 S.Ct. 1235 (2012); *Ryburn v. Huff*, 132 S.Ct. 987 (2012) (per curiam). In the author's view, *Harlow's* attempt to pigeonhole qualified immunity into the issue of law cubicle has not succeeded; the reality is that determining whether an official violated clearly established federal law frequently requires resolution of disputed issues of fact.
4. *Ashcroft v. al-Kidd*, 131 S.Ct. 2074, 2085 (2011) (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)). Qualified immunity provides an "immunity from suit rather than a mere defense to liability," that is, from the litigation burdens of having to defend at trial and, in many cases, even from discovery. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). As a result, if the district court denies defendant's summary judgment qualified immunity motion, defendant may take an immediate appeal to the court of appeals so long as the immunity defense can be decided as a matter of law. *Mitchell v. Forsyth*, 474 U.S. at 530. See also *Ashcroft v. Iqbal*, 556 U.S. 662, 671-675 (2009). The right to an immediate appeal does not lie if the immunity appeal presents disputed issues of fact. *Johnson v. Jones*, 515 U.S. 304 (1995).
5. 132 S.Ct. 1652 (2012).
6. See, e.g., *Brinegar v. United States*, 338 U.S. 160, 175-76 (1949).
7. *Maryland v. Pringle*, 540 U.S. 366, 371 (2003) (substance of probable cause is reasonable ground for belief of guilt). The officer's subjective intent is irrelevant in determining whether there was probable cause. *Whren v. United States*, 517 U.S. 806 (1996).
8. *Graham v. Connor*, 490 U.S. 386 (1989).
9. See *Graham*, 490 U.S. at 396-97.
10. See, e.g., *Saucier v. Katz*, 533 U.S. 194 (2001) (excessive force claim); *Anderson*, 483 U.S. 635 (warrantless search).
11. *Anderson*, 483 U.S. at 643-44 (possible for officer to reasonably act unreasonably).
12. See, e.g., *Brosseau v. Haugen*, 125 S.Ct. at 596, 599 (2004) (per curiam) (force at "'hazy border between excessive and acceptable force'"); *Saucier*, 538 U.S. at 205 (referring to officers making reasonable mistakes); *Escalera v. Lunn*, 361 F.3d 737, 743 (2d Cir. 2004) (officer who did not have probable cause to arrest will be protected by qualified immunity if she had "arguable probable cause" to arrest).
13. 475 U.S. 335 (1986).
14. *Id.* at 345.
15. *Id.* at 344-45.
16. See Martin A. Schwartz, Section 1983 Litigation: Claims and Defenses §9A.11[B] (Aspen Law Publishers, 4th edition 2012).
17. *Messerschmidt v. Millender*, 132 S.Ct. at 1241.
18. *Pearson v. Callahan*, 555 U.S. (2009).
19. *Messerschmidt*, 132 S.Ct. at 1245 (quoting *United States v. Leon*, 468 U.S. 897, 922-23 (1984)).
20. *Messerschmidt v. Millender*, 132 S.Ct. at 1250.
21. There was no claim in *Messerschmidt* that the affidavit in support of the warrant was misleading because it omitted material facts. 132 S.Ct. at 1245 n.2.
22. 540 U.S. 551 (2004).
23. *Messerschmidt*, 132 S.Ct. at 1250 (quoting *Groh v. Rameriz*, 540 U.S. 551 (2004)).
24. *Messerschmidt*, 132 S.Ct. at 1246.
25. *Id.* at 1247. "In addition, a reasonable officer could believe that evidence demonstrating Bowen's membership in a gang might prove helpful in impeaching Bowen or rebutting various defenses he could raise at trial." *Id.*
26. See Schwartz, *supra* note 16 at §9A.05 [C].
27. 132 S.Ct. at 1241 (emphasis added).
28. *Id.* at 1250.
29. See, e.g., *V-1 Oil Co. v. Wyoming Dep't. of Env'tl. Quality*, 902 F.2d 1482, 1488-89 (10th Cir.), cert. denied, 498 U.S. 920 (1990).
30. See, e.g., *Kelly v. Borough of Carlisle*, 622 F.3d 248, 251-259 (3d Cir. 2010); *Cox v. Hainey*, 391 F.3d 25, 34-36 (1st Cir. 2004).
31. "To make their views relevant is to enable those teammates (whether acting in good or bad faith) to confer immunity on each for unreasonable conduct-like applying for a warrant without anything resembling probable cause." 132 S.Ct. at 1252 (Kagan, J., concurring in part, dissenting in part).
32. 132 S.Ct. at 1260. (Sotomayor, J., dissenting).
33. 540 U.S. 551 (2004).

**Martin A. Schwartz is a Professor of Law at Touro Law Center. He is the author of numerous publications on civil rights issues.**