

Memorandum

TO: Mark Filburn, Troy Pitcock, Brian Dickey, Steve Campbell, Jim Alsup

FROM: Jack Ryan

Re: Flashbangs

The entry into any home is always strictly scrutinized due to the sanctity of a person's home. As we know there are only three legal justifications for entry, specifically warrant, consent, or exigency. It is noted that there are several different types of exigency.

When law enforcement has met the criteria to justify an entry they are only halfway home toward ensuring their conduct is justified under the 4th Amendment. The manner of entry still must be reasonable in the eyes of the court. For example, an agency gets a search warrant for Jack Ryan's house because one of Jack's minor children is selling a small amount of marijuana in the neighborhood and storing the marijuana in Jack's house. It would be unreasonable based on these few facts to use a SWAT team with a bulldozer to crash through the side of the house to make entry. On the other hand if Jack was holding hostages in his fortified garage with only one entry, it may be completely reasonable to run the bulldozer through the side of the building.

The use of a SWAT team, standing alone, is viewed by the courts to be a heightened use of force.

Some language from cases:

- Ernst v. City of Eugene, 2012 U.S. Dist. LEXIS 151653 (Dist. Oregon 2012). A nighttime incursion by a SWAT force is a far more serious occurrence than an ordinary daytime intrusion pursuant to a regular warrant and therefore requires higher justification beyond mere probable cause to search." Bravo v. City of Santa Maria, 665 F.3d 1076, 1085 (9th Cir. 2011). "Were this not the case, then any showing of probable cause to search would justify nighttime intrusion by a team of SWAT officers." Id. Similar to no-knock entries, nighttime SWAT searches must be justified by the presence of "exigent circumstances" where officers "'have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence.
- Ealum v. La Plata County, 46 Fed. Appx. 587 (10th Cir. 2002). "In Holland we concluded that the decision to deploy a SWAT team was subject to a Fourth Amendment requirement of reasonableness because it "largely

determines how the seizure is carried out, thereby determining the extent of the intrusion on the individual's Fourth Amendment interests." "The decision to activate the tactical team required a heightened degree of caution because the tactical team had the capability to make an overwhelming show of force" "The decision to deploy a SWAT team to execute a warrant necessarily involves the decision to make an overwhelming show of force - force far greater than that normally applied in police encounters with citizens. Indeed, it is the SWAT team's extraordinary and overwhelming show of force that makes "dynamic entry" a viable law enforcement tactic in dealing with difficult and dangerous situations."

A recent case involving the Paducah SWAT team, who were looking for a murder suspect who had stolen guns provides a good example. *McKinney v. Laird*, 2012 U.S. Dist. LEXIS 20849 (W.D. Ky. Feb. 16, 2012).

The Federal District Court outlined the manner of entry as follows:

Following a brief meeting on a side street, members of the SWAT team approached the Olivet Road House, where they paused 10 to 15 yards away. Several team members went to the front door while several more approached from the rear. Barnhill took up a position to the side of the House with a clear view of the living room and front door. From his vantage point, he could see Donnie on the couch watching television in the living room, which is connected to the foyer and near the front door. He recognized that Donnie was not the murder suspect but did not inform the rest of the team of his identity. With his peripheral vision, Barnhill watched the SWAT operators approach the front door, knock loudly, and yell "Police Department."

From here, the parties' stories are garbled — understandably so considering the swift and disorienting series of events that followed. Barnhill saw Donnie get up from the couch two or three seconds after the knock and start moving towards the door. He lost sight of Donnie as he left the living room and entered the foyer. Barnhill then instructed the operators at the front door to "bang out," which means that when, and if, flashbang grenades are detonated, they are done so outside the residence. Flashbang grenades are diversionary devices that create an extremely loud noise and a bright flash of light. Throwing flashbang grenades outside blunts their effect on the occupants and lessens the possibility of injury.

Outside the front door, SWAT operators saw movement coming towards the door, prompting them to knock again and identify themselves. They claim that the unidentified individual paused just

short of the door, but admit their view was obstructed because the adjacent windows did not provide a clear line of sight. Worried that the individual was readying a weapon, the operators threw a flashbang grenade in the lawn near the front door. After it detonated, they breached the door with a battering ram. SWAT members claim they waited 15 to 20 seconds between their first knock and breaking down the door.

Inside the house, Donnie was watching television in the living room while Marcia was in the kitchen speaking on the phone with Shoulta. According to Marcia, she saw members of the SWAT team in the back yard through the kitchen window. She then called to Donnie from the kitchen to go and open the door, and ended her conversation with Shoulta. Donnie claims it was his wife's voice, not the commotion by the police, which prompted him to go to the door. He says he did not hear the members of the SWAT team knock or announce their presence. In any event, Donnie says he walked to the foyer from the living room and unlocked the bolt to the door. As he leaned to peer out the side window and see who was there, the door "blew open" and knocked him against a set of French doors located in the foyer.

Officer Robbins was first through the front door for the SWAT team, with several team members lined up behind him ready to enter, fan out, and [10] secure the house. Upon entry, Robbins encountered Donnie in the foyer. Robbins ordered Donnie to go to the ground at least four times, but claims Donnie did not comply and instead mouthed off to him. Robbins further stresses that Donnie's position in the foyer prevented the rest of the SWAT team from entering the house, effectively creating a bottleneck at the front door. To bring Donnie to the ground, Robbins applied a "sternum tap," which is a pain compliance technique where an officer strikes a subject with the barrel of their weapon in the sternum to bring the individual to the ground. According to Robbins and Barnhill, since members of the SWAT team are trained to keep both hands on their rifles at all times, they must administer the sternum tap with the barrel of the gun. Robbins says the safety to his weapon was on when he performed the maneuver.

For his part, Donnie declares that he was temporarily stunned by the blast and the door being broken down. Before he could react or determine who the men were, Donnie said "there were three guys hitting him with hard objects." He insists the commotion prevented him from hearing Robbins's orders to "Get on the floor." Once Donnie could [11] understand the police officers, he went prone on the floor. A SWAT officer placed his foot on Donnie's shoulder, but he moved it when Donnie complained he was short of breath. Donnie was held in

this position while the SWAT operators moved to secure the House. Barnhill decided against handcuffing Donnie during the search.

In the kitchen, Marcia observed Donnie put his hands up in the air as two or three SWAT operators quickly surrounded him. From her position, she did not perceive that the operators were having any difficulty getting by Donnie and into the House. Next, she saw two men proceeding towards her in the kitchen, yelling at her to "Get down." Although the SWAT operators began pushing her to the ground when they reached the kitchen, they stopped when she complained about her hip and helped her to the floor. A SWAT operator held a gun on her while the rest of the team secured the House. Barnhill ordered his men not to handcuff Marcia as well.

When the House was secure, Donnie and Marcia were moved to the dining room and permitted to sit at the dining room table. After waiting for the all clear from the SWAT team, Laird entered the House and proceeded to the dining room, where he introduced himself and told the Plaintiffs he had a search warrant. Laird read the warrant and then began, along with other detectives from the PPD, the ultimately fruitless search of the House and outbuildings for Dustin and the weapons. Afterward, Laird explained the PPD's rationale for the search, but ended the conversation when Plaintiffs became agitated. The entire incident, from the SWAT team's arrival on the side road to Laird leaving the Olivet Road House took approximately one hour and five minutes. Donnie was treated at a hospital for two broken ribs later that night, presumably the result of Robbins's sternum tap.

Later that evening, HCSD triangulated the position of Dustin's cell phone and traced it back to a trailer park in Graves County, Kentucky. The Kentucky State Police surrounded a group of three trailers and waited for morning when they used a loudspeaker to inform Dustin that he was surrounded. Dustin surrendered without incident.

Although holding in favor of the officers and the City of Paducah, the court noted all of the considerations with respect to use of the team and use of tactics and how such conduct will be reviewed:

The Federal District Court in western Kentucky wrote:

(1) Use of SWAT Team

Although the Sixth Circuit has not addressed the issue, other appellate courts have reviewed whether [20] the use of tactical assault teams,

like SWAT, in seizing a residence and effectuating a search violates the Fourth Amendment's protections. See e.g., *Jama v. City of Seattle*, No. 10-35822, 446 Fed. Appx. 865, 2011 U.S. App. LEXIS 16488, 2011 WL 3468285 (9th Cir. 2011); *Whitewater v. Goss*, 192 F. App'x 794 (10th Cir. 2006). Whether the deployment of a SWAT team violates this constitutional provision could arguably arise from the well-established rule "that those who execute lawful search warrants must do so in a reasonable manner." *United States v. Keszthelyi*, 308 F.3d 557, 569 (6th Cir. 2002) (quoting *Stack v. Killian*, 96 F.3d 159, 162 (6th Cir. 1996)). An unreasonable show of force during a search and seizure may present constitutional violations sufficient to permit recovery. See e.g., *Holland ex rel. Overdorff v. Harrington*, 268 F.3d 1179 (10th Cir. 2001).

Recently, the Third Circuit examined the objective reasonableness of using a SWAT team to storm the residence of a suspected murderer. See *Walker v. City of Wilmington*, 360 F. App'x 305 (3d Cir. 2010). There, the police surrounded the plaintiffs' house with a SWAT team and forced entry based on their belief that the murder suspect was hiding within. *Id.* at 313. Though they were [21] ultimately incorrect, the police's decision to have a "large, armed SWAT team and K-9 Unit present was not unreasonable." *Id.* After all, the appeals court recognized the police were "attempting to arrest a murder suspect" and "[m]urder is . . . a very serious crime that makes it objectively reasonable for the police to deem the suspect potentially dangerous." *Id.* On this basis, the court found that the police's actions comported with the Fourth Amendment's protections.

Much like in *Walker*, use of the SWAT team on November 19 was not unreasonable, and in all likelihood, a prudent decision on the part of the PPD. Dustin had a documented criminal record and was believed to possess numerous firearms including two assault rifles. He was also the primary suspect in the execution-style slayings in Hopkins County. Plaintiffs' contentions that Dustin no longer resided at the Olivet Road House are unavailing. The statements by Shoulta, along with his driver's license, vehicle's registration, and prior arrest record, all indicated Dustin's primary residence was the Olivet Road House. Plaintiffs' own expert agrees that there was probable cause to search the premises for both Dustin and evidence [22] on the murders. *McCauley Depo.*, DN 38-2 at 23-26. Because it was not objectively unreasonable to believe an armed murder suspect resided within the Olivet Road House, the decision to use the SWAT team was an appropriate reaction to that threat.

(2) Tactics of SWAT team

Plaintiffs argue several of the tactics employed by the SWAT team violated the Fourth Amendment. Specifically, they contend the following behavior was objectively unreasonable: (1) breaching the door, because it constituted a no-knock entry and there was no evidence Donnie would not have opened it; (2) the use of the flashbang grenade; (3) detaining Donnie and Marcia on the ground and pointing guns at them; and (4) performing the sternum tap on Donnie.

"Officers must wait a 'reasonable period of time' after a knock and announce before physically entering a residence." *United States v. Pelayo-Landero*, 285 F.3d 491, 498 (6th Cir. 2002) (citing *United States v. Finch*, 998 F.2d 349, 354 (6th Cir. 1993)). A "reasonable period of time" depends on the situation police officers are faced with before moving into the structure. *Id.* (citation omitted). The evidence shows the SWAT operators knocked, identified themselves, and waited [23] some period of time before breaching the door. Plaintiffs do not dispute this series of events; rather, they insist they did not hear the announcement by Robbins and the team. See Donnie Depo., DN 44 at 16; Marcia Depo., DN 46 at 11. Still, all parties agree that some period of time passed between the SWAT operators arriving on the doorstep and knocking, Marcia calling for Donnie to get the door, and Donnie moving from the living room to the foyer. The weight of the evidence supports this series of events and Plaintiffs' uncertainty does

not create an issue of material fact. 6 Given the possibility of confronting a murder suspect armed with an assault rifle, the momentary pause on the front steps after the police identified themselves was sufficient to satisfy the Fourth Amendment's requirement of objective reasonableness.

Even presuming the SWAT operators entered the Olivet Road House without warning, the circumstances they faced permitted a no-knock entry. "Forcible entries without announcement of purpose and a refusal of admittance have been approved where: '(1) there would be a danger to the officer; (2) there would be danger of flight or destruction of evidence; (3) a victim or some other person is in peril; or (4) it would be a useless gesture such as when the person within already knew the officer's authority and purpose.'" *Pelayo-Landero*, 285 F.3d at 498 (quoting *United States v. Bates*, 84 F.3d 790, 795 (6th Cir. 1996)). In *Pelayo-Landero*, the Sixth Circuit upheld the reasonableness of an unannounced, forcible entry where the police

knew of at least one firearm in the residence and there could have been a homicide suspect in the home. *Id.* Considering Dustin's suspected involvement in the killings and the chance that he possessed several stolen firearms, the Court cannot distinguish the instant matter from *Pelayo-Landero*. 7

Plaintiffs urge that it was unreasonable for the SWAT team to deploy a flashbang grenade prior to breaking down the door. This circuit examined the permissibility of such a device in *United States v. Dawkins*, 83 F. App'x 48 (6th Cir. 2003). There, police officers executed a search warrant on the apartment of a violent felon who was suspected of possessing a variety of firearms, including an assault rifle capable of firing rounds that could penetrate bullet-proof vests. *Id.* at 49. Before storming the defendant's apartment, the police deployed a flashbang grenade to neutralize any threats within. *Id.* *Dawkins* set forth the appropriate inquiry under the Fourth Amendment: "the reasonableness of the device's use - much like the reasonableness of the officers' wait prior to entry - depends upon the facts and circumstances of each case." *Id.* at 51. The court then discarded the defendant's [26] arguments against the use of the grenade, stating "where. . . the officers had evidence that a violent felon possessed high-powered weapons, it would strain credulity to find that the Fourth Amendment's reasonableness requirement precluded the officers from using a device intended to reduce the risks to all parties associated with entry." *Id.* Relying on *Dawkins*, courts within the Western District of Kentucky have dismissed several constitutional violations under § 1983 against officers that have used flashbang grenades to subdue violent suspects. See e.g., *Ramage v. Louisville/Jefferson Cnty. Metro Gov't*, No. 3:08—CV—338—H, 2010 U.S. Dist. LEXIS 63688, 2010 WL 2624128, at *5-6 (W.D. Ky. June 28, 2010) (detonating flashbang grenade outside residence was not unreasonable where the plaintiff had long criminal history and was residing on the premises to be searched); *Graves v. Bowles*, No. 1:07-CV-207-M, 2010 U.S. Dist. LEXIS 10001, 2010 WL 497719, at *8 (W.D. Ky. Feb. 5, 2010) (use of flashbang device outside the vehicle of a bank robbery suspect with a violent criminal history was "unquestionably reasonable").

The facts available to the SWAT team permitted the use of the diversionary device. The PPD reasonably believed an armed murder suspect [27] could have been in the Olivet Road House. Still, the officers exercised their discretion and threw a flashbang grenade outside in the yard. Neither Donnie nor Marcia claim any injuries resulting from the detonation, and the only impact the explosion had on either individual was hearing the blast and being startled by the bright light. Weighing the interest of avoiding such discomfort with "the

officers' interest in their own safety based on the criminal history of the suspect, the Court determines that the officers' use of the flashbang outside the home was objectively reasonable." Ramage, 2010 U.S. Dist. LEXIS 63688, 2010 WL 2624128, at *6 (citing Graham, 490 U.S. at 396).

The complaint contains constitutional violations targeting the SWAT operators' decision to force Plaintiffs to the floor and point their weapons them. Neither of these claims presents a basis for recovery. "An officer's authority to detain incident to a search is categorical; it does not depend on the quantum of proof justifying detention or the extent of the intrusion to be imposed by the seizure." Muehler v. Mena, 544 U.S. 93, 98, 125 S. Ct. 1465, 161 L. Ed. 2d 299 (2005) (citation and quotations omitted). Where the execution of a warrant may give rise to sudden violence, "[t]he [28] risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation." Michigan v. Summers, 452 U.S. 692, 702-03, 101 S. Ct. 2587, 69 L. Ed. 2d 340 (1981). Placing Plaintiffs on the ground was not objectively unreasonable. Donnie and Marcia concede the SWAT operators did not use undue force in placing them on the floor. Indeed, Marcia admits that after she alerted the SWAT operators that she had hip problems, they "helped" her to the floor. Plaintiffs were kept on the ground for a matter of minutes while the house was secured, whereupon they were permitted to sit, without handcuffs, at their dining room table while the House was searched. Such behavior did not violate the Fourth Amendment. See Muehler, 544 U.S. at 95-100 (detaining occupant for two to three hours in handcuffs during search was reasonable "because the governmental interests outweigh the marginal intrusion").

The same can be said for Plaintiffs' claim that the SWAT team brandished their weapons in an unconstitutional manner. The evidence indicates the team came through the front door and quickly subdued Plaintiffs in the foyer and kitchen. Though the officers' guns were drawn upon entry [29] and were pointed at Plaintiffs for a time, the weapons were holstered after the passage of a few minutes when

Plaintiffs were moved to the dining room. 8 Donnie concedes that once the group sat down at the table to discuss the reason for the search warrant, the officers comported themselves in a courteous and professional manner. Donnie Depo., DN 44 at 25. To the extent Plaintiffs were "held at gunpoint," the SWAT operators did not act so unreasonably as to permit this claim to proceed to a jury. See Ealum, 46 Fed. Appx. at 591 (police were not entitled to qualified immunity where they held three minor children, including a six-year-old child at gun point); Holland, 268 F.3d at 1192-93 (jury issue if the police

violated the Fourth Amendment's reasonableness requirement when they trained weapons on four, eight and fourteen-year-old children).

Finally, Plaintiffs contend Officer Robbins's use of the sternum tap was an unreasonable application of force under the Fourth Amendment. This question is admittedly closer than those previously addressed. Nevertheless, since Plaintiffs cannot show the act was condoned by a municipal policy or procedure, the Court need not examine its constitutionality.

It should be noted that in this case, the officers were seeking a subject for a double murder that included the theft of firearms including two AK-47s. The court further noted that the officers were serving the arrest and search warrants at an armed murder suspect's legal residence.

It is clear that using a SWAT team is considered a heightened use of force that should not be considered unless the particular circumstances indicate such use would be reasonable. Dynamic entries with the use of flashbangs takes it to the next level and must be justified based upon articulated danger to the officers or others.

Boyd v. Benton County; City of Corvallis et al. 374 F.3d 773 (9th Cir. 2004).

In *Boyd v. Benton County; City of Corvallis et al.*¹ the United States Court of Appeal for the 9th Circuit held that the use of a flash-bang while executing a warrant may constitute excessive force under the 4th Amendment. The court then granted the involved officers qualified immunity because the law was not clearly established at the time the officers used the flash-bang in 1997.

The facts in *Boyd* began with an armed robbery of a jewelry store. The two robbers were described as a white male with a limp and an Hispanic male of average height. The duo, who stole a .357 magnum in the robbery fled in a blue Geo. As they fled the store owner shot out the back window of the Geo.

During the investigation, officers developed information that Dalebout was involved in the robbery and may be hanging around at "Charlie the Mexican's" house. The police conducted a surveillance of the house, observed a Geo with a smashed rear window, and observed numerous people coming and going.

At some point during the surveillance, officers observed Dalebout and Knudsen, both white males, leave the apartment and enter the blue Geo. The officers noted that Knudsen walked with a limp. As

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police tried to stop the two subjects they fled. Following a high-speed pursuit they were apprehended. Dalebout was armed; however the stolen .357 was not recovered. As a result of the arrest, officers obtained a search warrant for the apartment that Dalebout and Knudsen had exited.

Knowing that one of the robbery suspects, the Hispanic male, had not been arrested and knowing that the .357 magnum had not been recovered, the officers decided to use the Benton County SWAT team to make entry.

At a pre-raid briefing, officers were briefed concerning a loft in the apartment that would provide a dangerous area from which a sniper could shoot; the un-recovered .357; the subject still at-large and the fact that someone from the apartment had attempted to buy another firearm. Additionally, officers were told that there may be five to eight people sleeping in the apartment when the raid was to be executed. A decision was made to use a flash-bang device to provide a distraction while the officers made their entry. No one at the briefing objected to the use of the device.

During the raid, the flash-bang was put into the house by volunteer Deputy Ellis. The flash-bang landed next to Boyd, who was asleep. Boyd suffered burns as a result of the flash-bang igniting. It was the use of the flash-bang that Boyd challenged in his lawsuit.

In reviewing the case the United States Court of Appeal for the 9th Circuit noted that the officers had prior notice that there may be as many as eight people sleeping in the house, many of whom had nothing to do with the robbery and were thus, innocent bystanders. Notwithstanding this knowledge, the officers utilized the flash-bang with giving any warning to the occupants and without considering any alternative means to their entry. The court concluded: "Nonetheless, given the inherently dangerous nature of the flash-bang device, it cannot be a reasonable use of force under the 4th Amendment to throw it 'blind' into a room occupied by innocent bystanders absent a strong governmental interest, careful consideration of alternatives and appropriate measures to reduce the risk of injury."

The court also concluded that all of the officers participating were an "integral part" of the conduct and could be held liable for a constitutional violation. The court then granted all of the officers qualified immunity after determining that the law was not clearly established on flash-bangs in 1997 when the raid occurred.

In addition to the case I shared with you guys informally there are a number

of ongoing cases around the country. A regional team from Georgia is still involved in a lawsuit where a 19 month old baby was severely burned by a flashbang. One of the agencies that is part of the team has settled but there are a number of defendants still facing suit. (I have been in discussion with your Georgia counterparts on this one). Due to the injury to the baby, the entire operation was closely scrutinized leading to the indictment of an officer:

(CNN)---A former sheriff's deputy near Atlanta who was involved in a botched SWAT team raid last year now faces federal charges.

The raid left a toddler critically injured.

Nikke Autry is accused of making false statements to obtain a "No Knock" warrant to enter a home where authorities believed people were selling drugs. In May of 2014, the SWAT team used a battering ram to get through the home's front door and then a flash grenade was used. Once inside they realized a playpen was against the door and the grenade landed next to a sleeping 19-month-old.

An attorney for the family of the toddler says the child suffered severe injuries to his face and chest and possible brain damage. Autry resigned last fall. A state grand jury didn't indict any of the officers involved in the raid, but they could still face federal charges.

In April, Habersham County settled a lawsuit with the child's family paying them close to 1-million dollars.

Since the incident, the child has undergone several surgeries.

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Here is one from California where officers allegedly held subject at gunpoint preventing him from exiting his home that caught on fire when the officers threw a flashbang in. To make matters worse, he was the wrong guy.

Monterey County has agreed to pay a family \$2.6 million after police conducted a military-like raid on the home of an innocent man and burned down the home with the man inside while blocking fire trucks rushing to the scene. Rogelio "Roger" Serrato, 31, died at the scene and left a family with four children without a father.

We have been following how police departments have used terrorism funds and grants to buy military equipment and expand SWAT team

raids for even small alleged crimes. Even the Department of Education is ordering military like raids.



In this case, the Monterey County Sheriff's SWAT team hit Serrato's home on suspicion of being involved in a non-fatal shooting (he turned out to be entirely innocent). They drove an armored Lenco Bearcat on to his lawn and surrounded it with paramilitary officers. When he did not come out, they hit the house with a flash bang grenade that caught furniture and a Christmas tree on fire. An officer approached the burning home with a [fire extinguisher](#) but they spotted Serrato in his shorts in the living. Shouting "suspect," he withdrew with the fire extinguisher. The officers retreated to the armored vehicle and kept their guns pointed at the house as Serrato was reportedly heard screaming. Officers watched the house burn as fire crews were [blocked](#) by their vehicles in getting to the scene.

Guys, this could be a hundred page document but I think it is clear that the use of a flashbang is a step above using the SWAT team and must be reasonable under the circumstances the officers are facing. As you can see the payouts in these cases have been significant.

Let me know if I can be of further assistance on this.

Jack

