



Many police operations have the potential to create liability exposure for an agency; however certain types of operations have an exponential likelihood of creating claims. One area of high liability is the decision to use a SWAT team.<sup>1</sup> In considering whether or not a SWAT type team is appropriate for an agency several considerations should be examined.

An agency must have sufficient resources before such a team should be undertaken. Smaller agencies may not have sufficient personnel to provide an appropriate number of candidates in order to have a meaningful selection process. The agency may not have the personnel in order to meet the recommended in-service training requirement of 16 hours per month or the minimum of 40 hours training to get on the team. Additionally, the agency may not have the resources for the equipment necessary for such a team. The failure to have such a team will not lead to liability, but having a team which does not meet the generally accepted police practices may lead to liability. This is not to suggest that it is better not to have a team, it is simply the observation that if you are going to have a team, make sure you can do it right.

Liability exposure manifests itself in several ways when dealing with these special operations. In a barricaded subject case, the focus may be in the events leading up to the injury or death of the subject or hostage. One has to review the approach taken by the United States Court of Appeals for their particular circuit to determine the significance of pre-shooting or pre-force conduct on such claims. The question in these cases will often be whether the actions of the team in some way was the moving force which led to the confrontation which ended in injury or death. In many of these cases an expert may come in and provide a jury with what may be referred to as the generally accepted practices for dealing with barricaded subjects and hostage takers and then testify to their opinion that the team did not follow these practices.

Over the past ten to twenty years there has been a significant increase in the use of specialized teams to conduct high-risk entries. High-risk may generally be defined as a case where the entry poses a risk to law enforcement personnel as well as the occupants of the residence to be entered and, in some cases, other persons. The danger presented may be based on the history of the occupants, weapons availability, fortifications to deter entry, counter-surveillance, environmental or geographic conditions, dogs, as well as any other condition that creates articulable danger.

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## The Decision to Use a Specialized Team

A review of cases from around the United States establishes that courts review the decision to utilize a specialized team to make an entry is a use of force. As such, the decision itself may be unreasonable. For example, an agency that decides to use a SWAT team on every single warrant entry, irrespective of articulable danger in order to keep their team active, may find itself faced with exposure.

*McCracken v. Freed*,<sup>ii</sup> provides an overall example of how a federal court will view issues related to a high risk entry. *McCracken* involved the use of a regional SWAT team, the North Penn Tactical Response Team, to execute several arrest warrants on McCracken. The team was activated after McCracken, who could be seen in his home, refused to comply with the orders of six officers who had gone to his home to arrest him.

After making several attempts to contact McCracken, Chief Freed authorized an entry by the team. “The tactical team created a diversion at the front of the residence and entered through the rear. Pepper spray canisters were tossed through the front windows the officers had broken while a group of officers simultaneously entered through a pried back door. Once inside, the officers quickly apprehended McCracken and immediately removed plaintiff E. Jean McCracken (“Jean McCracken”) from the premises... Paramedics treated the McCrackens on the scene for superficial injuries and exposure to pepper spray. McCracken refused any further medical treatment. McCracken was transported to the local police station where he was processed and booked.” McCracken filed a lawsuit alleging that the use of the SWAT team as well as the methods constituted excessive force.

In its review of the case, the trial court noted: “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 court then turned to information known to Chief of Police Freed when he made the decision to use the team.

Factors:

- Valid Arrest Warrant
- Criminal History: Rape, Sodomy, Attempted Murder, Active Weapons Charge in another State, serious sex offender
- McCracken had been seen through the window of the house and had refused to respond to police
- McCracken’s mother was in the home and she also had a criminal history for assault

The court concluded that the use of the team was reasonable and went on to assert: “The tactical team was activated by Freed, based on his personal observation of the situation, McCracken's past criminal record and his assessment of the two outstanding arrest warrants. Thus, it follows that all members of the tactical team are entitled to qualified immunity because they followed Freed's objectively reasonable instructions.” Additionally, the court noted: “While simply following orders is not a defense, instructions from a superior officer can support qualified immunity when the officer could conclude, from an objective view of the surrounding circumstances, that there was legal justification for the

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action.” In granting Chief Freed immunity, the court held: “**The decision to activate a tactical team can constitute excessive force if it is not objectively reasonable in light of the totality of the circumstances.** Even if Freed had made a mistake in activating the tactical team, it was one a reasonable police supervisor faced with a similar scenario could have made. Thus, Freed is entitled to qualified immunity with respect to his decision to activate the tactical team.”

After concluding that the decision to use the team was reasonable, the court examined the manner in which the team entered the McCracken residence. The court concluded: “Likewise, with respect to using the team to forcibly enter the residence, Freed is entitled to qualified immunity because the facts, viewed in a light most favorable to the plaintiffs, demonstrate that the force he authorized was objectively reasonable under the circumstances. Only after the initial attempts to execute the arrest warrants by knocking on McCracken's front door and the subsequent attempts to communicate with him were unsuccessful, did Freed approve a forced entry, and then only after his consideration for the safety of Jean McCracken, the officers and the neighbors. Because it was a weekday, he realized that most residents would start returning home at soon and he wanted to resolve the situation before more people were potentially exposed to danger. In sum, the police action was a reasonable response to the threat perceived.”

#### Policy and Training

An interesting point from *McCracken v. Freed* was the examination of the team's policies and training which had been challenged by McCracken. In rejecting McCracken's claim the court noted: “Contrary to the plaintiffs' contentions, the municipal defendants' police departments have written tactical team policies; and, officers assigned to the tactical team must not only complete a qualifying training program but must also participate in continuing SWAT training. The written tactical team policy, which had been ratified by the chiefs of police of all participating police departments, dictates that the officers may use no more than the minimum force necessary to effect an arrest or serve a warrant, and to ensure the safety of the suspect, the officers involved and the surrounding community... All tactical team officers must complete special SWAT training in addition to their regular police training. In Pennsylvania, all police officers are required to attend annual certification training by the Municipal Police Officers' Education and Training Commission. Tactical team members are required to take an additional 40 hour course and monthly training. There is also an annual two-day training session. An officer may be assigned to an individualized training school fitted to his/her particular function within the tactical team. As of August 28, 2001, all members of the tactical team had fulfilled the requisite training requirements and had been certified.”

#### KEY POINTS:

- **Does your team have a policy?**
- **Does your team set training standards?**
  - **Upon becoming team member**
  - **Monthly in-service for team members**
  - **Specialized training for special positions i.e. sniper**

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- **Is there a mechanism for determining and documenting risk factors prior to use?**

The importance of policy and training cannot be overstated as can be seen in *Neace v. City of Massillon et al.*,<sup>iii</sup> where the United States District Court for the Northern District of Ohio found that the plaintiff's claim against the City of Massillon for failure to train and failure in policy was sufficient to get before a jury to determine liability. The *Neace* case involved a drug raid which culminated in the shooting of Shay Neace. Neace was in the upstairs bathroom rolling marijuana as the raid was executed. He acknowledged that he had a gun in his hand initially but indicated that the gun had been disassembled and was in three pieces. Neace testified in depositions that he heard a commotion outside the bathroom, the door opened and a gun was pointed at his head. He stated that he had no idea that it was a police officer. He reported that he dropped the disassembled gun and grabbed the end of the gun that was pointed at him. The gun went off and he was shot. In bringing his lawsuit, Neace alleged that the force was excessive and was caused by the fact that the raid itself had been improperly carried out due to lack of policy and training by the Massillon Police Department.

In its review of the City's potential liability, the court noted: "There are no written or specific unwritten policies in Massillon governing how raids are to be conducted, and the officer in charge has the authority to assemble the team, gain entry to the target, and otherwise execute the raid. This also includes whether or not to call in the regional 'START' team, a specialized, multi-jurisdictional SWAT-like team specially trained for high-risk raids. The raid team in this case was assembled immediately prior to the raid's execution by selecting officers available at the station, and without contacting either Chief Weldon or the START team. Some of the officers involved in this incident had no prior experience or specific training in conducting raids. Defects in the raid allegedly included the lack of advanced warning of the number of people present in the home, which resulted in too few officers being present. There also is no policy for review and analyzing raids afterward to determine whether mistakes were made so raid techniques can be improved... The Court concludes that the issue of municipal liability in this case is a question for a jury. When viewed in the light most favorable to the Plaintiff, Massillon's lack of any policies or regimental training in the conduct of raids arguably resulted in a defective raid with too few officers, some of whom were inadequately experienced. These deficiencies arguably caused the shooting of the Plaintiff. Defendant Massillon, therefore, is not entitled to summary judgment."

#### Hitting the Wrong House-Policy/Training/Aftermath

*Solis v. City of Columbus*,<sup>iv</sup> provides an example of potential agency liability for the failure to have a policy in place that will protect the rights of citizens in their homes. *Solis* also involved the execution of a search warrant by a SWAT team following an investigation conducted by a detective.

Detective Cox was working with an informant who provided information regarding the whereabouts of stolen goods taken in several home invasions. According to the informant, the suspect, Walker, was storing some of the stolen goods in his home located at 123 Avondale Ave. in Columbus and was storing some of the stolen goods at the home of a friend who lived in a house directly behind Walker's. The informant did not know the address of Walker's friend's house and the detectives did not want to drive by to get the address for fear of spooking the suspect. Prior to getting a warrant, the SWAT team scouted the location and informed Detective Cox, that the house described by the informant was located

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at 120 Avondale Ave. The informant had told the detective that Walker always carried a Ruger handgun thus, leading to the decision to use the SWAT team.

On the day the search warrant was executed, Detective Cox observed the SWAT team lined up and realized they may have the wrong house. The SWAT team conducted a dynamic entry in executing the no-knock search warrant, complete with a flash-bang. Carmen Solis, age 12 was home with her mom, Nicole Solis, who was 8 ½ months pregnant. It was alleged that the officers “held guns to Nicole and Carmen Solis’s heads, forced them to the ground, handcuffed them, and subjected them to verbal abuse. The mother and daughter were kept in handcuffs for 45 minutes.

In analyzing the claims against the city, the court rejected the plaintiffs’ contention that the City is constitutionally required to have a policy that demands, in all instances, personal visual verification of a search warrant address by the officer in charge of an investigation. The current written policy regarding verification of search warrant addresses requires a supervisor to review a search warrant prior to its submission to the court to “insure the location listed on the warrant is correct.” The court then went on to assert that this was not simply a run of the mill search warrant execution. This was a **no-knock warrant utilizing a SWAT team**, the most intrusive type of home entry that police conduct. The court continued: “The City clearly was on notice that officers going to the wrong address is a recurring problem in the execution of search warrants, particularly no-knock search warrants.” The court cited cases and other publication of police executing no-knock warrants at wrong locations.

The court concluded: “When such an important right is at issue as the right to be secure in one’s home from an unannounced, forcible official entry and search, and when there is such a potential for mistakes—mistakes, as illustrated above, that so readily can have tragic consequences—then a municipality is required to exercise more than usual care.” Thus, in the **case of no-knock warrants, the city should have a policy in place to ensure that the police are entering the correct address, “the court has no problem in concluding that a jury could find the City to have been deliberately indifferent to the rights of its inhabitants by failing to have such a policy.”**

The court’s conclusion distinguishes no-knock warrants from all others and determined that a city, town or county could be liable for failing to have a policy in place that ensures that the police are entering the correct address.

*Taylor v. County of Berks*<sup>v</sup> provides an example of agency liability for failing to train officers for high-risk entries. The case revolved around the execution of a search warrant. On May 6, 2000, Ernestine Taylor was looking out the rear window of her home at 319 Moss Street when she observed a squad of police officers approaching her rear door. Recognizing that the officers were about to break down her door, she began yelling that officers were at the wrong house. The officers demanded that she open her door, but by the time she got downstairs the officers had struck the door several times, splintering it. The officer then held Taylor at gunpoint while they began searching the house. The officers left after they received word via the police radio that they had gone to the wrong house and they should have been at 317 Moss Street.

Taylor filed a lawsuit alleging, among other things, that the officers had not been properly trained to verify the location named in the warrant before forcing entry into a home. The city sought to be dismissed from the lawsuit arguing that Taylor could not prove that the city had a policy or practice of

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knocking down the doors of incorrect houses. The court asserted that the city had failed to address Taylor's failure to train allegation. In its review, the court noted that the department's policy made "no mention of a requirement that, or a procedure by which, officers verify that they are at the correct location before doing damage to a home... Given that Berks County officers perform raids in backyards of row houses where there are not numbers and where it is easy to mistake one home from another, a reasonable jury could conclude that the [city's] failure to train its officers to verify their location constitutes deliberate indifference as to whether the officers violate citizen's rights by entering their homes illegally.

*Taylor* makes several propositions clear. First, officers must be trained for the recurring tasks they are likely to face. Second, the training may vary from assignment to assignment. Third, officers who are transferred into a new assignment that has differing tasks must receive training on any new tasks that may lead to third party constitutional or tort injuries. This training must take place before they are faced with the new task-remember- is the officer faced with making a decision of the type that training would better prepare the officer to make? If yes, then training is required. Finally, it should be recognized that there may be specific training issues that are unique to a particular department or a particular demographic circumstance. For example, the difficulty in distinguishing the rowhouses, cited by the court in this case would not be an issue in many agencies where there simply are no row houses.

In the execution of search warrants it is not uncommon that police officers enter the wrong house. As Dale Carnegie once said: "When you're wrong; admit it quickly and emphatically." This advice applies to the execution of search warrants as well. If a mistake has been made, admit it quickly and emphatically and terminate any further operation in the wrong house.

In *Los Angeles County v. Rettele et. al*,<sup>vi</sup> the United States Supreme Court reviewed a civil rights lawsuit brought against Los Angeles County officers who had executed a search warrant at a home that had been sold and was no longer in possession of the subjects of the warrant.

Los Angeles County officers were investigating a fraud and identity-theft ring that involved 4 African-American subjects, one of whom was known to possess a registered handgun. The investigation was conducted between September and December of 2001. In early December, the investigator in the case obtained a search warrant authorizing the search of two residences and three of the four subjects. In support of the search of the house in question, the investigator cited motor vehicle records, an outstanding warrant, internet phone records and mailing address listings. What the investigator, Watters, did not know was that the house had been sold in September and was now occupied by three white residents, Max Rettele, his girlfriend, Judy Sadler and Sadler's 17 year-old son Chase Hall.

"On the morning of December 19, Watters briefed six other deputies in preparation for the search of the houses. Watters informed them they would be searching for three African-American suspects, one of whom owned a registered handgun. The possibility a suspect would be armed caused the deputies concern for their own safety. Watters had not obtained special permission for a night search, so he could not execute the warrant until 7 a.m. Around 7:15 Watters and six other deputies knocked on the door and announced their presence. Chase Hall answered. The deputies entered the house after ordering Hall to lie face down on the ground.

The deputies' announcement awoke Rettele and Sadler. The deputies entered their bedroom with guns drawn and ordered them to get out of their bed and to show their hands. They protested that they were not wearing clothes. Rettele stood up and attempted to put on a pair of sweatpants, but deputies told him not to move. Sadler also stood up and attempted, without success, to cover herself with a sheet. Rettele and Sadler were held at gunpoint for one to two minutes before Rettele was allowed to retrieve a robe for Sadler. He was then permitted to dress. Rettele and Sadler left the bedroom within three to four minutes to sit on the couch in the living room.

By that time the deputies realized they had made a mistake. They apologized to Rettele and Sadler thanked them for not becoming upset, and left within five minutes. They proceeded to the other house the warrant authorized them to search, where they found three suspects."

Rettele, Sadler and Sadler's son filed a civil rights lawsuit alleging that their 4<sup>th</sup> Amendment rights had been violated by a reckless execution of the warrant. The recklessness was based on the failure to verify ownership records prior to the execution of the warrant and the failure to immediately recognize the mistake when they observed white subjects in the house rather than the black subjects they were seeking.

In finding that the officers' actions did not violate the 4<sup>th</sup> Amendment, the Supreme Court first noted that in today's society mixed-race households are common. Thus, the fact that officers immediately saw white subjects did not preclude the possibility that the subjects they were seeking were also present and posed a threat to the officers. The Court noted that previous decisions allowed officers to take "reasonable action to secure the premises and to ensure their own safety and the efficacy of the search."<sup>vii</sup> The Court concluded: "The orders by the police to the occupants, in the context of this lawful search, were permissible, and perhaps necessary, to protect the safety of the deputies. Blankets and bedding can conceal a weapon, and one of the suspects was known to own a firearm, factors which underscore this point. The Constitution does not require an officer to ignore the possibility that an armed suspect may sleep with a weapon within reach...The deputies needed a moment to secure the room and ensure that other persons were not close by or did not present a danger. Deputies were not required to turn their backs to allow Rettele and Sadler to retrieve clothing or to cover themselves with the sheets. Rather, the risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation." This is not to say, of course, that the deputies were free to force Rettele and Sadler to remain motionless and standing for any longer than necessary. We have recognized that special circumstances, or possibly a prolonged detention might render a search unreasonable. There is no accusation that the detention here was prolonged. The deputies left the home less than 15 minutes after arriving. The detention was shorter and less restrictive than the 2- to 3-hour handcuff detention upheld in *Mena*. And there is no allegation that the deputies prevented Sadler and Rettele from dressing longer than necessary to protect their safety. Sadler was unclothed for no more than two minutes, and Rettele for only slightly more time than that.

The Fourth Amendment allows warrants to issue on probable cause, a standard well short of absolute certainty. Valid warrants will issue to search the innocent, and people like Rettele and Sadler unfortunately bear the cost. Officers executing search warrants on occasion enter a house when residents are engaged in private activity; and the resulting frustration, embarrassment, and humiliation

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may be real, as was true here. When officers execute a valid warrant and act in a reasonable manner to protect themselves from harm, however, the Fourth Amendment is not violated.”

In *Simmons v. City of Paris, TX.*, 378 F.3d 476 (5<sup>th</sup> Cir. 2004), the United States Court of Appeal for the 5<sup>th</sup> Circuit reviewed a lower court’s decision in a lawsuit involving the entry of the wrong house on a search warrant execution. Police officers of the City of Paris obtained a search warrant for a home at 400 N.W. 14<sup>th</sup> Street. The family bringing the lawsuit lived at 410 N.W. 14<sup>th</sup> Street.

Prior to the raid, officers attended a pre-raid planning/briefing. The details concerning the execution of the warrant called for the lead vehicle to stop short of the intended target and park just south of 400 N.W. 14<sup>th</sup> Street. When the raid was carried out, the driver of the lead vehicle pulled up directly in front of the target location, apparently leading officers to believe that they were going to the next house up.

Officers entered the wrong house and briefly detained two adults and two children. The officers reported that upon learning that they were in the wrong house, they immediately terminated the operation and left. The plaintiffs in the case testified that officers did not immediately leave upon learning they were in the wrong house but continued searching for 5-7 minutes.

In deciding whether the officers were entitled to summary judgment/qualified immunity, the court distinguished the entry into the wrong house from the continued search after determining that they were in the wrong house. [Note, at this stage of the proceedings the court must view the plaintiffs case as true]

The court granted the officers qualified immunity on the mistaken entry into the home but denied summary judgment/qualified immunity on the continued search of the home after the mistake was discovered. Citing *Maryland v. Garrison*, 480 U.S. 79 (1987), the court asserted that the law was clearly established that, “when law enforcement officers are executing a search warrant and discover that they have entered the wrong residence, they should immediately terminate their search. The case was remanded for trial so that a jury could determine if officers in fact continued the search after discovering their mistake.

#### **Key Points:**

- **When you realize you’re in the wrong house-Stop, Apologize, Get out, Fix the damage-DO IT QUICKLY**
- **Ensure that policy and training for high-risk entry is in place**
- **Ensure drive-by verification for dynamic entry unless articulable exigency would support dispensing with the requirement**

## Execution Issues

### Use of Flash-Bang May Constitute Excessive Force

In *Boyd v. Benton County; City of Corvallis et al.*<sup>viii</sup> 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 a 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 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 was 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.

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 without 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.”

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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.

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<sup>i</sup> SWAT or Special Weapons and Tactics references a number of different teams whose labels include: SRT, Special Response Team; SERT, Special Emergency Response Team; SST, Special Services Team; ERU, Emergency Response Unit etc. etc.

<sup>ii</sup> *McCracken v. Freed*, 2006 U.S. Dist. LEXIS 924 (E.D. Pennsylvania 2006).

<sup>iii</sup> *Neace v. City of Massillon*, 2006 U.S. Dist. LEXIS 65678 (N.D. Ohio Eastern Div. 2006).

<sup>iv</sup> *Solis v. City of Columbus*, 319 F.Supp. 2d 797 (S.D. Ohio 2004).

<sup>v</sup> *Taylor v. County of Berks*, 2003 U.S. Dist. LEXIS 23699 (E.D. PA. 2003).

<sup>vi</sup> *Los Angeles County v. Rettele et al.*, 550 U.S. \_\_\_, 127 S.Ct. 1989 (2007).

<sup>vii</sup> See, *Michigan v. Summers*, 452 U.S. 692 (1981); and *Muehler v. Mena*, 544 U.S. 93 (2005).

<sup>viii</sup> *Boyd v. Benton County*; *City of Corvallis et al.* 374 F.3d 773 (9th Cir. 2004).