

# **Use of SWAT teams in situations involving non- criminal subjects suffering from mental illness – is there a middle ground?**

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Over the last several NTOA publications the Legal Counsel section has fielded several articles dealing with mental health issues and the legal use of force when dealing with non-criminal subjects suffering some type of mental health episode. The purpose of today's article is to review the current status of case law across the country dealing with this issue and ask the question – Is there a role for SWAT and Crisis Negotiation Teams (CNT) at an incident involving a non-criminal barricaded subject suffering from some type of mental illness?

This question came up during several sessions during the Daigle Law Group Use of Force Summit held in Connecticut. A number of attendees were operators or team leaders on regional SWAT teams servicing multiple police agencies with less than 100 sworn personnel. In fact, many of the departments serviced by these regional teams had less than 50 sworn members. These SWAT and CNT officers argued that the agencies did not have the services in-house to practically, and more importantly, successfully deal with an incident where a non-criminal suspect had barricaded himself in a residence and was refusing to come out. Information gathered at the scene from family members and others led the officers to believe the subject was a danger to himself, had made statements that he or she would seriously harm themselves or anyone who came in the house, or perhaps a mental health professional had signed a take-into-custody order, directing officers to take the subject to a health care facility. Under these circumstances, many agencies and, in some cases SWAT teams, are electing to deal with the issue with their patrol officers and not engage the services of SWAT or CNT.

Certainly, as professionals, we have a responsibility to conduct risk assessments in all areas of our policing practices and determine the appropriate and proper use of SWAT and CNT resources in various police encounters. As we have said before in this column – SWAT and CNT are just two of many tools in the police toolbox. It is incumbent on all of us that we use those tools wisely and judiciously. But when faced with the types of incidents described earlier, could there be a middle- ground response of SWAT and CNT personnel, understanding that the overarching objective is to safely end the incident recognizing “Safety priority” principles?

In order to answer this question, it might help to take a few minutes to review two important points – (1) whether the use of SWAT resources is, itself, considered a higher

level of force and (2) what limitations have the courts placed on an officer's use of force to control a non-criminal subject? A third question looks at the practical application of the resources, SWAT and CNT teams bring to these critical and often volatile situations. With an understanding of these three important questions, we will then circle back with some policy language that might strike a balance between the practical needs of our street officers and the constitutional guidelines set by the courts.

### **The Decision to Utilize the SWAT Team Can Trigger a 4<sup>th</sup> Amendment "Reasonableness" Review**

A number of appellate courts across the country have determined that the decision to employ the SWAT team to execute a warrant can, itself, trigger a 4<sup>th</sup> Amendment claim. In these cases, the courts looked at the totality of the circumstances to determine whether it was reasonable to use the higher level of force "inherent in SWAT tactics".

In a 2005 case, the 3<sup>rd</sup> Circuit Court of Appeals determined that "a decision to employ a SWAT-type team can constitute excessive force if it is not objectively reasonable to do so in light of the totality of the circumstances"<sup>1</sup>. In the *Smith* case, the subject was a Vietnam-era veteran suffering from PTSD, a heart condition and other mental disorders. He had a history of disturbing other neighbors, shooting his neighbor's lights out and had threatened to shoot officers at the time of the incident in question. Interestingly, in this case the appellate court broke down its decision into two parts – finding that the initial decision to call the SWAT team was reasonable but the decision to conduct a dynamic entry of the residence utilizing tear gas and flash bangs was unreasonable where "Smith did not pose a threat that was sufficiently serious and immediate as to require storming the house."<sup>2</sup>

In *Overdorff v Harrington*<sup>3</sup> the court discussed the use of a SWAT team to execute an arrest warrant for a party wanted for a minor misdemeanor. The 10<sup>th</sup> Circuit Court of Appeals overturned a trial court decision denying the defendant officers Qualified Immunity. While the appellate court ruling was favorable to two of the defendant officers, the court made it clear that the decision to use the SWAT team to execute the warrant must be reasonable under the totality of the circumstances. Finding that a determination of reasonableness weighs, in large part, on how the seizure is carried out, the court found that "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."<sup>4</sup>

### **Use of Force on Non-Criminal Subjects**

Is there a difference between a "subject" and a "suspect"? Certainly, the courts have noted a difference, and this distinction has also been highlighted in the NTOA Standards Manual. We see cases across the country where courts are scrutinizing an officer's use of force on non-criminal "subjects" who may be suffering from some type of mental health or serious medical condition. Our Spring 2018 article entitled 'Use of Force and Mental

Illness” outlined a number of cases where an officer’s use of force on a non-criminal “subject” was reviewed by the court. As we noted in that article, some appellate courts have fashioned new rules of engagement for use of force on non- criminal “subjects” in contrast to the well-known “*Graham*<sup>5</sup>” standards we use when reviewing an officer’s use of force on a criminal “suspect”.

In an earlier article, we reviewed case law concerning the use of flash/sound diversionary devices<sup>6</sup>. Several cases reviewed in that article concerned the use of SWAT teams in incidents involving non- criminal subjects. One noted case in that article was *Escobedo v Bender*, where the 7<sup>th</sup> Circuit Court of Appeals determined that “In 2005 it was clearly established that throwing a flash bang device blindly into an apartment where there are accelerants, without a fire extinguisher, and **where the individual attempting to be seized is not an unusually dangerous individual, is not the subject of an arrest, and has not threatened to harm anyone but himself**, is an unreasonable use of force”<sup>7</sup>

Two recent cases reviewed the use of force on non- criminal subjects with differing results. In *Cole v Carson*<sup>8</sup>, the case centered around the shooting of a suicidal subject who had been found by officers in the woods and was holding a gun to his own head. This case has had a tortuous history. The trial court denied summary judgment finding that the plaintiff did not pose an “immediate threat” to the officers and, therefore use of deadly force was unreasonable under the 4<sup>th</sup> Amendment standard. The 5<sup>th</sup> Circuit Court of Appeals affirmed, and the case went to the US Supreme Court where SCOTUS vacated the ruling and directed the appellate court to reevaluate the Qualified Immunity issue in light of the Court’s ruling in *Mullenix v Luna*<sup>9</sup>. In 2018, the 5<sup>th</sup> Circuit issued a decision denying Qualified Immunity, finding that the issue was clearly established at the time that force was applied. Pointing to several other 5<sup>th</sup> Circuit cases the court determined that where a subject was not wanted for a criminal matter, was not threatening anyone other than himself and was holding a gun to his own head, did not create an “immediate threat” and, therefore, the use of deadly force was unreasonable. The case will now presumably go to trial and the matter ultimately determined by a jury.

In *Sanzone v Gray*<sup>10</sup>, police and EMS were dispatched to Sanzone’s home on a well- being check. As officers were entering the house EMS personnel ran by them claiming Sanzone was lying in bed, had a gun and was threatening to shoot them. Officers backed out to the hallway, set up a perimeter and called for SWAT and CNT resources. SWAT officers relieved the patrol officers inside the hallway and negotiations commenced. At one point during the negotiations, Sanzone yelled to the officers that he was going to fire a warning shot and lifted his arm holding the gun.

One SWAT officer fired a bean bag round while the other SWAT officer fired 3 rounds that struck Sanzone in the head and killed him. The trial court granted summary judgment and dismissed the case against the officer firing the bean bag round but denied Qualified Immunity to the officer firing the lethal rounds. The 7<sup>th</sup> Circuit reversed, finding that the officer firing the lethal rounds was entitled to Qualified Immunity. The court determined that at the point Sanzone raised the gun and pointed it at the officers the incident had changed from a non-criminal matter to a criminal one and officers were entitled to protect themselves from the imminent use of deadly force. As the court noted “While the Estate contends that Koster’s warning shot would have been fired straight up in the air, we will

not assume that. Koster could easily have meant that he intended to attempt firing a bullet that would whiz past Gray's ear. Gray did not need to wait and hope that Koster was a skilled marksman before taking action to shut down Koster's threat."<sup>11</sup>

### **Resources Offered by SWAT and CNT**

We can expect that larger police agencies have the resources to deal with these types of situations without necessarily requiring the resources of SWAT and CNT. However, national statistics tell us that over 88% of police agencies across the country employ 50 or less sworn personnel and almost half (48%) of police agencies employ fewer than 10 officers.<sup>12</sup> Clearly, amassing the manpower and technical resources necessary to successfully conclude an incident involving a non-criminal barricaded subject incident can be an insurmountable task for these smaller agencies.

We know that SWAT and CNT teams bring with them both staffing and technical resources that can play an important role in controlling the scene and negotiating a successful conclusion to the incident. The training and discipline instilled in SWAT operators can ensure a controlled environment to support CNT efforts. Through the efforts of the NTOA and other training and research venues, we see an increased sensitivity to dealing with the non-criminal subject and a stronger leaning towards negotiation and de-escalation as opposed to immediate entry.

Recent changes to the NTOA National Standards highlight the need for SWAT teams to:

- Adhere to the "Safety Priorities Model";
- Determine the criminal offenses involved, if any; and
- Determine whether the subject or suspect is suffering from mental illness

The latest NTOA Standards Manual has now dedicated a full chapter (Chapter 5) to Crisis Negotiation Teams (CNT). The standards include recommendations for:

- Basic levels of training to include dealing with mental health issues;
- Training with the SWAT component to assure a cohesive response; and
- Including qualified mental health professionals to advise on mental health issues and coordinate information gathering from health care professionals.

As stated in the NTOA Standards Manual, the objectives of CNT include the ability to calm the situation, build rapport with the subject and buy time for a negotiated conclusion.

### **Policy Requirements for SWAT/CNT Response to a Non- Criminal Barricaded Suspect**

Against this backdrop of case law, best business practices and practical considerations, we believe there could be a middle ground, tempered SWAT/CNT response, to a non-criminal barricaded person threatening harm to himself. We have drafted policy and procedure language that we believe meets these requirements putting the onus on a negotiated response versus SWAT entry tactics.

Before we look at the policy language – a few caveats. This directive is not meant for those situations involving armed subjects holding hostages or actively threatening other citizens. It is also important that agencies adopting these principles take the time to properly train team members and assure that both SWAT and CNT members train together. Sadly, we still see cases where SWAT and CNT teams train separately and infrequently if ever, train together. Finally, successful endings start with proper training and equipment. Officers must receive training on the legal implications of response to these types of situations and CNT units must have the proper training, equipment, and support from mental health professionals to bring the situation to a successful conclusion.

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<sup>1</sup> Smith v Marsaco, 430 F 3d 140 (3rd Cir 2005)

<sup>2</sup> Ibid

<sup>3</sup> Holland Overdorff v Harrington, 268 F3d 1179 (10th Cir 2001)

<sup>4</sup> Ibid

<sup>5</sup> Graham v. Connor, 490 U.S. 386 (1989)

<sup>6</sup> “The Legal Implications of Using Flash/Sound Diversionary Devices”, Tactical Edge, Eric Daigle/Mike Whalen (Summer 2018)

<sup>7</sup> Escobedo v Bender, 600 F3d 770 (7th Cir 2010)

<sup>8</sup> Cole v Carson, 802 F.3d 752 (5th Cir 2018)

<sup>9</sup> Mullenix v Luna, 136 S.Ct. 205 (2015)

<sup>10</sup> Sanzone v Gray, 884 F.3d 736 (7th Cir 2018)

<sup>11</sup> Ibid.

<sup>12</sup> BJS Survey “Local Police Departments, 2013 Personnel Policies and Practices”, Brian A Reaves, U.S. Department of Justice, Bureau of Justice Statistics (May 2015)

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