

# Liability in Tactical Operations

Selections, Training, and  
Developing proper  
tactical policies



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## TRAINING TOPICS

- Preventing Police Militarization Allegations
- Regionalization- the Good, Bad and Ugly
- Effective and Constitutional Tactical Operation
- Excessive Force Issues with SWAT Teams



# SPECIAL WEAPONS AND TACTICS

- Dangerous Operations
  - Hostage Rescue
  - Armed intervention
  - Barricaded Suspect
  - Engage Heavily Armed Criminals
  - Terrorist Incidents
  - High-Risk Warrant Service
  - High-Profile Escort



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## Limit Inconsistency



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# Militarization of Police



## When Police Go Military

- American law and tradition have tried to draw a clear line between police and military forces.
  - Soldiers go to war to destroy, and kill the enemy.
  - The police maintain the peace
- Police officers can adopt military-style tactics and equipment, and come off more like soldiers as they face down citizens.

# Police at War

- War on drugs, then terror — have lent police forces across the country justification to acquire the latest technology, equipment and tactical training for newly created specialized units.
- 1,500 percent increase in the use of SWAT (special weapons and tactics) teams in the United States in roughly the last two decades.

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# The Militarization of the Police Department

- 1033 Military Surplus Equipment
- Since 2006 police departments have acquired (NY Times)
  - 435 armored vehicles
  - 533 planes
  - 93,763 machine guns
  - 432 Mine Resistant Armored Trucks
  - \$4.3 billion worth of equipment

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# ACLU Launches Nationwide Police Militarization Investigation

- June 2014 – ACLU published their study of 20 different law enforcement agencies-
- 800 occasions between 2011 and 2013.
- 62% of SWAT raids were over drugs and 65% of the raids involved forced entry.
- 80% were for serving search warrants
- 7% SWAT use were over hostage situation or otherwise legitimate use of that level of force.

## NY Times Report

- The ubiquity of SWAT teams has changed not only the way officers look, but also the way departments view themselves.
- Recruiting videos feature clips of officers storming into homes with smoke grenades and firing automatic weapons.
- “Put simply, when you give anyone toys, you have to expect they’ll play with them.”

# Focus on the issues....



## ANALYSIS – The Role of SWAT

- Policies
- Selection Process
- Training
- Legal Analysis
  - Utilization of force
  - Tactical Issues
  - Regional Liability
  - MOU



# Legal Issues

- Does the decision to use a tactical team constitute excessive force?
- Use of SWAT on misdemeanors/ Minor
- Dynamic Entry
  - Flash bang, explosive breach
- Risk Assessment Matrix
- Totality of the Circumstances

# Regional Teams and Regional Issues

- NTOA Standards applied to a Regional Team
- Too Many Towns – Too Many Directives
- Who's In Charge – Using ICS –
- Threat Assessments For Pre- Planned Events
- Assisting Towns with Crowd Control Issues – DOJ guidelines
- State Statutes providing For Regional/ Statewide Response
- Mutual Aid Agreements
- Insurance Coverage – Indemnification – Who's paying The Bill

# NTOA Standards For SWAT Teams

SWAT Standard  
For  
Law Enforcement Agencies  
National Tactical Officers Association  
Published September 2011



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## Policies For Tactical Usage

- Departments to establish procedures for special operations, including provisions for the selection, administration, and deployment of the SWAT Team, hostage negotiators, and search and rescue missions.
- The Special Operations Commander has the responsibility for planning, managing, assigning personnel, and determining the scope of such callout, based on the factors present. SWAT will be required as warranted, for reasons such as, the potential for weapons, violence, or other dangers at the target location.

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# DEPLOYMENT

- Decision to activate/utilized a Tactical Team and Hostage Negotiations Team is typically limited to instances that exceed the capabilities of an agencies first responders and situations where the risk of deadly jeopardy is imminent.

# DEPLOYMENT

- Procedures for the deployment of special operations teams to supplement other operational components will be handled according to the type and scope of the incident, including:
  - Exigent Circumstances/Unplanned Events
  - Planned Event

# COORDINATION/CONTROL

- It is the responsibility of the Incident Commander to establish and maintain coordination and cooperation with all other operational components, including:
  - Watch Commander/Officer-in-Charge
  - Special Operations Teams (SRT/HNT)
  - Communications Center
  - Other involved units or components

# COORDINATION/CONTROL

- Upon initial arrival on the scene the ranking SRT member will assume and maintain incident command until relieved by the Tactical Commander or a higher ranking team member
- Tactical Decisions are the primary responsibility of the Tactical Commander, Team Leader or the highest ranking SRT member on the scene.

# SELECTION PROCESS



## Selections Process

- Proper and adequate personnel, training and equipment are essential; without them the agency would be open to liability.
- One factor that should be considered is whether an agency has sufficient personnel to provide an appropriate number of candidates to have a meaningful selection process.
- The selection process should contain requirements for candidates' physical ability, firearms capability, and situational reasoning.

# Selection Process- Con't

- If the agency does not have adequate resources, or resources are strained, it should consider joining with other agencies to form a regional team.
- Sharing of resources can easily be accomplished with a memorandum of understanding between the agencies.

# SELECTION CRITERIA

- Members of SRT are carefully screened and selected, taking into consideration their experience as police officers, verbal skills, problem solving skills, and psychological suitability for the responsibility.
- The selection process for personnel assigned to SRT involves a careful and systematic process similar to that used to select personnel for other specialized assignments within the Department.

# Selection Process

- Satisfactory level of physical conditioning and agility
- Satisfactory level of firearms proficiency as determined by a test consisting of a course of fire.
- Demonstrate satisfactory level of prior good police performance.
- Medical and/or psychological examinations.
- Screening panel consisting of SWAT members from your Department and other jurisdictions, who will examine the following factors:
  - Evaluations
  - Disciplinary Actions
  - Commendations
  - Use of force incidents
  - Use of firearms
  - Ability to function as a team member
  - Training schools attended
  - Special Skills

## TRAINING REQUIREMENTS



# Failure to Train

- The plaintiff must identify the particular deficiency in the training program of the Police Department or how that alleged deficiency caused his injury.
- The alleged deficiency in the training must be closely related to the alleged injury

## City of Canton v. Harris

389 U.S. 378 (1989)

- Held: Municipalities have an affirmative duty to train employees in core tasks.
- Inadequate law enforcement training may form the basis for a civil rights claim where the failure to train amounts to deliberate indifference to the rights of persons whom the police come into contact with.

# City of Canton v. Harris

389 U.S. 378 (1989)

- The focus must be on the adequacy of a training program in relation to the duties the officers are expected to perform and the identified deficiency, in a city's training program.
- This will occur when the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been **deliberately indifferent** to the need.

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# City of Canton v. Harris

- Three-prong test must be applied:
  - 1. Whether, in failing adequately to train and supervise subordinates, he was deliberately indifferent to an inmates mental health care needs;
  - 2. Whether a reasonable person in the supervisor's position would know that his failure to train and supervise reflected deliberate indifference; and
  - 3. Whether his conduct was causally related to the constitutional infringement by his subordinate.

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# Training

- What type of training is being conducted?
  - Not the area to conserve resources
- How much training is necessary?
  - Initial training: 40-hour course
  - Team based In-service: 16 hours a month
- Specialized training needed?
  - Sniper, EOD, K9, New Equipment
- *"The NTOA recognizes that there are many ways to accomplish training objectives and that scheduled stand-alone swat-training-only events, while preferable, are not the sole means for meeting the intent of the standard."*

# Training Plan

- 12 Month Plan
- The goals of this comprehensive plan are to:
  - Assure consistency in training
  - Build relevant scenarios
  - Attempt to provide the desired frequency of training for critical skills
  - Assure all areas are covered during the course of a year
  - Provide a schedule which frees training facilitators to concentrate on the content rather than the subject matter



# MOU

- Basis for Authority
- Identification of member towns
- Agreement is town-to-town not with the regional entity
- Cover indemnification sender vs. receiver agency- Settlement
- Cover who's paying expenses – how can they be waived – reimbursement provisions
- Provisions for Opting out

## *Terebesi v. Solomon, et al.*

- “SWERT” – Southwest Regional Emergency Response Team made up of six towns in Southwest Connecticut; May 2008
- Police Chief from Easton, Connecticut requested SWERT assistance to secure home while serving warrant to search for presence of drugs. (small amount of crack cocaine)
- Assistance sought because of presence of weapon and drug usage at the premises, as well as recent violence at the location including a shotgun attack;

# ***Terebesi***

- SWERT responded, was briefed by local police, and developed an operational plan for a 'dynamic entry' into the premises.
- Plan included use of three stun grenades ("flashbangs") and entry into house to secure residents and premises to allow for search to be undertaken;
- Upon entry into the premises, first officer in stack encountered residents and shots fired. One resident killed, the other claims injuries from the incident;

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## **Four "Operational" Issues that Became Legal Issues:**

- Memorandum of Understanding; Operational Issues between the Towns;
- Policy and Procedures Manual Applicable to the Unit;
- Evaluation of Risk and Factors Governing Deployment of SWAT Team;
- Development and Contemporaneous Recording of an Operational Plan.

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# Findings

- Police Chief was entitled to QI for liability based on his decision to deploy tactical team;
- Clearly established that officials who planned raid could be liable under § 1983 to the extent that plan, as formulated, provided for and resulted in excessive use of force;

# Stun Grenades

- Use of stun grenades governed by Fourth Amendment Principles and factors to be utilized in determining reasonableness include:
  - dangerousness of suspect;
  - whether grenades deployed into an empty room or open space,
  - whether used in 'routine' searches or seizures that do not pose high risk to the officers or third parties;

# Duty to Intervene

- All Officers on SWAT team who have an opportunity to intervene, even in the planning stages of an operation, to protect the constitutional rights of citizens from infringement by other law enforcement officers in their presence have a duty to do so.
- Failure to do so can create liability for the preventable harm caused by other officers.

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## *McCracken v. Freed*

(3<sup>rd</sup> Circuit, 2006)

- 3<sup>rd</sup> Circuit Court analyzed whether the use of and methods employed by a tactical team to execute a high-risk warrant constituted excessive force.
- In *McCracken*, a regional tactical team was used to execute several arrest warrants on the plaintiff, a violent felon.
  - During the execution of the warrants the tactical team created a diversion at the front of the residence and entered through the rear.
  - McCracken was arrested without incident and treated for superficial injuries, including exposure to pepper spray.

## McCraken

- The *McCraken* court explored the sufficiency of the team's training and policies as a basis for liability.
- In examining the training requirements, the court found that it was reasonable for team members to complete a forty-hour initial training program and participate in ongoing sixteen-hour, monthly in-service trainings.
- The regional team members were also sent to schools based upon individual assignments, such as those specific to the duties of snipers and K-9 officers.

## McCraken

- The *McCraken* court also analyzed whether the use of the tactical team itself was excessive force.
- The court warned that “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.”

# McCraken

- The court considered information the Chief had when he made the decision to activate the team, and concluded that the use of the team was reasonable, based upon articulable information including:
  - McCraken's criminal history,
  - Two outstanding felony arrest warrants and
  - Other facts within the Chief's personal knowledge.

# McCraken

- Lastly, the *McCraken* court examined policies governing the tactical operations of the team.
- The court found appropriate that a tactical team have a policy to govern the command and operation of the team, as well as its use of force standards.
- As a result of the *McCraken* decision, command staff at agencies who utilize tactical teams should ensure a clear policy that identifies particular situations when the team will be used and who has the authority to activate it.

# ***Neace v. City of Massillon, et al***

**(N.D. Ohio Eastern Div. 2006)**

- The importance of clear policy and adequate training was also stressed in the *Neace* case, a drug raid was conducted, ultimately resulting in the shooting of Shay Neace.
- The police department did not activate their tactical team; instead they gathered available officers, some of whom had no prior specific training, to conduct the raid.
- The *Neace* court found that the City's lack of policies or regimental training in the conducting of raids resulted in a defective raid with too few officers, some of whom were inadequately experienced. As such, even detectives who execute warrants on occasion without a tactical team should receive training in proper tactics and have some governing policies in place.

## ***Neace***

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# Excessive Force

- **Holland v. Harrington, (10<sup>th</sup> Circuit 2001)**
  - **Decision to deploy SWAT team may in itself constitute excessive force.**
- **Estate of Smith v. Marasco (3<sup>rd</sup> Circuit 2005)**
  - **A decision to employ a SWAT-type team can constitute excessive force.**

# Fourth Amendment Analysis

- Lawsuits over the use of a tactical team often are based on arguments that the utilization was an overreaction to the circumstances faced, that the level of force caused the higher level of danger leading to the injuries that occurred.
- Case law addressing whether the decision to use a tactical team may be considered excessive is force.
- The Second, Third and Tenth Circuit have acknowledged this theory as a cause of action to be analyzed under the Fourth Amendment



# **Holland v. Harrington**

(10<sup>th</sup> Circuit 2001)

- “Where a plaintiff claims that the use of a SWAT team to effect a seizure itself amounted to excessive force, we review the decision to use that degree of force by ‘balancing the nature and quality of the intrusion on the individual’s *Fourth Amendment* interests against the importance of the governmental interests alleged to justify the intrusion”

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## **Holland**

- **Colorado-** an altercation occurred at a steakhouse.
- **Several men assaulted a group of patrons, throwing them to the ground where they were kicked and beaten.**
- **Heflin was a suspect and arrest and search warrants were issued for his residence.**
- **Sherriff authorized use of SWAT team.**

## ***Holland***

- 2030 hours SWAT executed the warrant.
- Team members dressed in green camouflage clothing, no identifying markings and hoods that showed only their eyes.
- Three Uniform deputies were present.
- Children outside playing basketball, women and children in house.
  - Laser sight alleged on children's backs

## ***Holland***

- Deploying a SWAT team to execute a warrant necessarily involves the decision to make an overwhelming show of force—far greater than that normally applied in police encounters with citizens.
- Dynamic entry is a show of force...
- The basis for using the team was so unwarranted as to render “dynamic entry” by itself excessive use of force.

# RISK ASSESSMENT



## WARRANT SERVICE MATRIX

To be completed by primary investigating officer.

Obtain updated criminal history before completion.

The request for tactical assistance prior to the issuance of the warrant will shorten response time.

DATE:		CASE #
DIVISION :		LOCATION:
POINTS	FACTS	SCORE
0	Search Warrant is for evidence of property crime(s).	
1	Search Warrant is for drugs.	
1	Search Warrant is for evidence of crime against person	
0	Arrest Warrant is for property crime(s)	
2	Arrest Warrant is for crime against person	
3	Arrest Warrant is for drug possession/distribution	
0	Suspect has history of property crimes ONLY	
1	Suspect has history of crime(s) against persons (assault)	
1	Suspect has made statements regarding resisting arrest	
2	Suspect has history of arrest/ involvement in drugs	
3	Suspect has violent criminal history or "Officer Cautions" on record	
4	Suspect has used weapons during the commission of crimes	
1	Service of warrant requires minimal forced entry.	
2	Service of warrant requires use of ram, sledgehammer, etc...	
3	Service of warrant is a "No Knock" entry.	
4	Location is fortified or suspect has guard dogs	
3	Firearms readily available at location of warrant	
3	Subject is known to carry firearms / been arrested on firearms charges	
5	Subject of warrant is believed to be armed	
3	Multiple suspects are expected at warrant location	
3	Subject of warrant is a known gang member.	
4	Subject has a history of assault or resisting offenses against police	
5	Subject of the warrant is believed to be involved in a Shooting or Homicide	
TOTAL POINTS:		

# Risk Assessment

- **0-14 POINTS-** Service may be handled by investigating unit with notification of appropriate command staff.
- **15-24 POINTS-** Consultation with ERT Commander is required for determination of appropriate service. Command staff also notified prior to service.
- **25 + POINTS-** ERT activation is required for service. All appropriate command staff is notified. ERT will assume authority of service.

# Issues to Consider

- Roving Tactical Officers
- Obtaining warrant during perimeter
- Active Shooter conditions
  - Has the rules changed?
- Does Command know what's going on?
- Professionalism- Swearing by officers
- Use of Hoods
- Use of Risk Adjusters

# Additional Considerations

- What is your agencies negotiation plan for standoffs?
- What is your agencies sniper/marksmen authority plan?
  - Do marksmen need authorization from the incident commander before shooting
  - Under what circumstances can they act independently.
- Is a tactical response/rescue vehicle summoned when incident begins?
- Do you have a tactical medic program?
- Are ambulances and fire-fighting vehicles staged nearby?
- Have all 911 and communication tapes preserved?
- Is dispatch keeping written time log of all communications.
- Debriefing- Formal plan
- Training Plan

## The End....

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