NO-KNOCK WARRANTS: UNDERSTANDING THE RISK

BY MIKE RANALLI

Reduced liability is merely a side effect of doing the right thing for the right reasons.

During the past few years, there has been significant debate over the use of no-knock, dynamic SWAT-style entries for the execution of search warrants. This debate reached a peak with the shootings of Breonna Taylor and Amir Locke during such warrant services.

Some state legislatures have responded by banning or restricting no-knock warrants. Here in New York state, our highest court — the New York Court of Appeals — has recently ruled on a case involving the execution of no-knock search warrants in *Ferreira v. City of Binghamton*.[1] All law enforcement officers in New York need to be aware of this ruling and its implications. And while the case is only applicable to warrant executions in New York, the example it sets is one officers nationwide should consider.[2]

Before we get to Ferreira, I would like to start out with a broader overview of why there is such a focus on no-knock warrants as well as some policy/procedure impacts all law enforcement leaders should consider to ensure they are doing the right thing for their officers and community members. Note: The Ferreira case deals with civil liability, but liability is not the focal point of this discussion. Reduced liability is merely a side effect of doing the right thing for the right reasons.

The evolution of no-knock warrants

I started as a police officer in 1984. During much of the first two decades of my career, our mission was driven heavily by the interdiction of illegal drugs, dubbed the "War on Drugs." When the War on Drugs first took hold, criminal procedure law was written to require knock-and-announce warrants to be the norm. No-knock warrants were the exception.

But as the focus on drug interdiction intensified, the exception soon became the norm. Justifications such as the ease of destruction of drugs, violent drug dealers and the propensity for weapons to be present were commonly articulated in warrant applications. Tactics involving "violence of action" — overwhelming force, speed and surprise — were stated as justifications to explain how such dynamic entries could be safer for officers, while at the same time helping preserve evidence. SWAT teams became more common and were increasingly utilized to execute no-knock warrants.

In 1993 I joined the Colonie (NY) Police Department's tactical team as a point man. After serving several no-knock warrants with no negative results, I was sold on the tactics. I found it amazing how fast we could clear an entire house while encountering little resistance because people had no time to respond. And I wasn't alone: Across the county, requesting no-knock endorsements for drug-related warrants and conducting dynamic raids became normal, with no consideration given to whether there were other ways to handle the situation. In hindsight, our success made us complacent. When considering the complexity of such operations, the lack of negative consequences should never have been a measure of whether the tactics continued to be appropriate.

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Then, in 1998, Tom Clancy published "Rainbow Six," quickly followed by a video game of the same name. While an excellent book, it revealed many tactics routinely used in SWAT operations. The rise of the internet compounded the issue, making it easy to find and share information about police tactics. "Crack houses" became increasingly fortified, leading some SWAT teams to train to perform second-story entrances. A disturbing trend then started where suspects would be prepared for entry tactics. Suspects, knowing the pattern of breach, flashbang and entry, would be waiting behind a closed bedroom door, apparently to mitigate the effects of the flashbang, and would then open fire through the door while the officers entered, with tragic results. An internet search today for "SWAT officers ambushed" produces plenty of reading material.

During all this, the belief that the tactics would keep officers safe never wavered for many teams, except for those that suffered injuries or deaths. My epiphany came during a no-knock raid for illegal drugs on a suburban house sometime around 2000. The breach took longer than it should have due to a steel-reinforced door. By the time we entered, the resident had taken up position at the top of a flight of stairs with a shotgun pointed at me and my cover officer as we entered. He thought he was being ripped off by another drug dealer as had happened in the past. The only thing that saved me was the large white POLICE letters on the front of my tactical vest. Discussions afterward led to what should have been a question being asked before every raid: What was in that house that was worth my life? Nothing.

Over the subsequent years, more and more tactical teams began to recognize the danger of dynamic raids on officers and occupants of homes and restricted their use to very limited circumstances. However, this evolution was by no means universally adopted, and the tactic is still used by many agencies to this day.

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Risks and priority of life

I recently presented on no-knock warrants at a New York State Homeland Security Tactical Supervisor course. I am encouraged by the increased acceptance of the message, which was not the case when I first started presenting it several years ago. While at the conference, I sat through a presentation by an FBI regional tactical team commander. At the end of his presentation, he made a very simple yet profound statement: Any SWAT team still doing things the same way they did even 10 years ago should quickly reevaluate the viability of their tactics. Unfortunately, there are teams still doing things the same way they did 20 and 30 years ago because they are fortunate enough to never have had anything go seriously wrong. Again, the lack of negative consequences is not an accurate indicator of appropriate tactics.

There are several other considerations law enforcement leaders need to evaluate that directly impact the risks created during dynamic no-knock raids in contemporary times:

The proliferation of guns in households across the country. In 2020 and 2021, Americans bought over 42 million guns.[3] Residents awakened from their sleep by the sounds of someone breaking into their homes could reasonably reach for their legally owned firearms to defend themselves, leading to tragic consequences for occupants and officers.

The risk of a mistake-of-fact shooting. The facts of the Ferreira case serve as an example of this type of risk. A SWAT team executed a no-knock warrant on the home of a person suspected to be armed and dangerous. The point man immediately encountered Jesus Ferreira, who had been on the couch in the living room. The point man believed Ferreira had a gun in his hand and fired one round, seriously injuring him. An Xbox controller was on the floor; no gun was found.

I cannot know what did or did not happen here, but the science pertaining to how our brain functions can give us some guidance. Your amygdala serves as a form of danger "pre-screen device" to help keep us safe from sudden threats. It is intuitive and relies on limited information guided by expectations and heuristics, among other things. Is it a lion (gun) or a lamb (Xbox controller)? If humans had to wait for the frontal lobe to make this determination, death or serious injury could result in the time that it would take. Such fast and intuitive decisions can save lives, but they can just as easily result in tragedy. The only way to mitigate this risk is to limit exposure to such situations.

Technology advances and warning systems. The shooting of two FBI agents in Florida in 2021 is an example of this issue. The target of the warrant was allegedly

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warned of their approach by a doorbell camera. This warning allowed him to fire at the agents through his door with a high-powered rifle.[4] Less-obvious surveillance cameras that can cover even greater areas are inexpensive and easy to install, providing even more warning of the approach of officers.

Insufficient information about the residence and its occupants. In decades past, a check with postal inspectors could give you good information about who resided at a particular address. Those days are long gone; postal records often provide misleading and out-of-date information. Many civil cases have arisen from raids on the wrong address, or the correct address but the targets had moved out, or lack of information on the presence of children in the residence, leading to flashbangs being deployed in and around young children. Considering the time it can take to conduct proper pre-raid surveillance on a residence, it may be far more efficient and effective to have the surveillance team arrest the suspect in public and then serve the search warrant.

Failure to properly supervise specialty narcotics units and warrant applications. The unfortunate truth is some specialty units become so consumed by their mission that they believe the ends justify the means. This can lead to overaggressive tactics and warrant services. It also can lead to officers lying or exaggerating information on warrant applications, as allegedly happened in the Breonna Taylor incident.[5] This is inexcusable and damages the entire police profession. But it is not just about lying or exaggerating. Who makes the decision as to what type of warrant to apply for? Is there an objective supervisory review? Proper supervision and risk management mandate objective review.

Failure to adhere to a proper safety priority. This is probably the most important consideration, and everything discussed in this article so far is relevant to it. The National Tactical Officers Association (NTOA) has long-established safety priorities:

1. Hostages/victims
2. Innocent bystanders
3. Public safety personnel (police, EMS, fire)
4. Suspect(s)
5. Drugs/evidence (controlling objective)

Using these safety priorities, the NTOA has taken the position for some time now that no-knock warrants no longer make sense, especially when the objective is the preservation of evidence. I strongly agree with this position. Most no-knock warrants for drugs essentially place the preservation of evidence over the safety of anyone else — including police officers.

Throughout my career, I have heard countless officers and instructors talk of how officer safety is paramount. Countless "street survival" classes are dedicated to this concept, yet many agencies still adhere to using dynamic no-knock warrants, violating safety priorities and placing themselves and others at unnecessary risk. Ask an officer to charge into a house where the drug dealer suspect may have an assault rifle and there will probably be no shortage of volunteers. Yet those same officers will think you are nuts if you ask them to confront a person in crisis who is armed with a knife using anything other than a firearm. In the first situation, officers willingly place themselves and occupants at risk for the preservation of evidence because it is ingrained in their culture. In the second, the acceptance of some risk may help to save a life, but it deviates from typical street survival training, so it is rarely even considered. There is a clear disconnect here that seems to be founded on nothing other than "it is just the way it has always been."

This is a complex and, for some in law enforcement, sensitive area. Are there still some situations where a no-knock, dynamic entry will be justified? Of course, but it should be only after a careful review of the objectives of the operation, consideration of safety priorities, and a review of any other possible options.

New York Court of Appeals addresses the issue

The Ferreira case spanned several years and involved federal district courts, the United States Court of Appeals for the Second Circuit, and finally the New York Court of Appeals (NYCOA). The legal issues were complex and numerous, and it is not my intent to conduct a comprehensive review of the case. Instead, I will focus on the issue decided by the NYCOA most relevant to no-knock raids in New York.

This case involved common-law negligence and dealt with the scope of the duty owed by municipalities to the public under New York law. To succeed in such a case, a plaintiff must demonstrate 1) the municipality owed a duty to the plaintiff, 2) there was a breach of that duty, and 3) injury was proximately caused by that breach. It is important to understand the duty breached must be more than that owed to the public generally, otherwise, the government could be held responsible for all wrongs to its citizens. When a municipality is providing a government function, such as law enforcement, liability may only be imposed

when a special duty (sometimes called a special relationship) is established between the injured person and the government agents.

New York case law has generally recognized three ways to establish a special duty — one that goes beyond what is owed to the public generally. A special duty can arise when:

1. The injured party belongs to a class for whose benefit a statute was enacted; or

2. A government entity voluntarily assumed a duty to the injured party beyond what was owed to the public generally; or

3. The government entity took positive control of a known and dangerous safety condition.

The third bullet is the crux of the relevant ruling of the court. In a no-knock warrant situation, the police exercise extraordinary governmental power to intrude upon the sanctity of the home and take temporary control of the premises and its occupants. In such circumstances, the police direct and control a known and dangerous condition, effectively taking command of the premises and temporarily detaining occupants of the targeted location. As a result, the municipality's duty to the individuals in the targeted premises, a limited class of potential plaintiffs, exceeds the duty the municipality owes to the members of the general public. A special duty, therefore, arises when the police plan and execute a no-knock search warrant at an identified residence, running to the individuals within the targeted premises at the time the warrant is executed. In other words, in those circumstances, the police take positive control of a known and dangerous condition, creating a special duty under the third situation recognized by this court.[6]

This ruling is very straightforward — in a no-knock search warrant situation, a special duty is established, period. That does not mean there will be automatic liability if someone is harmed during the warrant service. But it does mean the case will go to a jury for a determination of whether the duty was breached by the police under the specific circumstances of the case. To the average reader, this may not seem that significant, but it is. Most special-duty litigation arises under the second bullet above — the voluntary assumption of a duty — and establishing a special duty can be very difficult. Many municipalities are dismissed from suits because of the failure of a plaintiff to establish a special duty. But the Ferreira ruling means using a no-knock entry automatically creates a special duty, and the case will proceed to trial.

Prioritize life

The last few years have been difficult for law enforcement officers across the country. For many of you, this article simply reinforces what you already know. But my hope is those who have not previously considered these issues will give them due consideration. Again, while the Ferreira case is only applicable to New York agencies, the reasoning of it is consistent with all the points raised within this article.

To all of you who accept the challenges of law enforcement and are willing to place yourselves at risk only when it is warranted to save lives, thank you.

Endnotes

1. Ferreira v. City of Binghampton. (March 22, 2022.) 38 N.Y.3d 298, Leagle.com.

2. This article is not to be considered legal advice and portions are based on New York-specific case law. You should consult with your own legal advisors on the laws specific to you in your state.

3. Walsh J. (Jan. 5, 2022.) U.S. Bought Almost 20 Million Guns Last Year — Second-Highest Year On Record. Forbes.com.

4. Spencer T. (Feb. 5, 2021.) FBI slayings show risk surveillance cameras pose to police. AP News.

5. Bogel-Burroughs N, Kovaleski S. (Aug. 6, 2022.) Breonna Taylor Raid Puts Focus on Officers Who Lie for Search Warrants. New York Times.

6. Ferreira v. City of Binghampton.

About the author

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Ranalli also is a past president of the New York State Association of Chiefs of Police, a member of the IACP Professional Standards, Image & Ethics Committee, and the former chairman of the New York State Police Law Enforcement Accreditation Council. He is a graduate of the 2009 FBI-Mid-Atlantic Law Enforcement Executive Development Seminar and is a Certified Force Science Analyst.

Editor's note: This article originally appeared in the June 2023 edition of *The Chief's Chronicle*; New York State Association of Chiefs of Police and is reprinted with permission.