Flash-Bang Use

The Militarization of Police and the Status of Qualified Immunity

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Using flash bangs can result in significant and sometimes scarring injuries and subsequent costly federal civil rights lawsuits.

In 2017, Mario Deon Watkins's felony drug convictions were overturned when an Indiana court found that a SWAT team's search that endangered an infant was "unreasonable." *See Watkins v. State*, 67 N.E.3d 1092 (Ind. Ct. App. 2017). The SWAT team, consisting of at least a dozen officers, most of who were armed with assault weapons, surrounded Mario's residence. At the front door, the officers knocked and announced their presence seconds before using a battering ram to crash open the door. An officer then deployed a device commonly referred to as a "flash bang" into the residence, no more than one second later, and into a room containing a nine-month-old baby in a playpen. The Court of Appeals of Indiana found that the SWAT team executed a "military-style assault." Although the search turned up drugs and a gun, the court stated:

> [T]he extent of law enforcement needs for a military-style assault was low and the degree of intrusion was unreasonably high[,…] particularly in light of the use of a flash bang grenade in the same room as a nine-month old baby who was "very close" to where the flash bang was deployed.

Id. at 1102. As reported by the *Washington Post*, quoting Peter Kraska, a police militarization expert at Eastern Kentucky University, this case "could create a precedent that complicates how law enforcement agencies use flash-bang grenades intended to stun and disorient potential foes." Christopher Ingraham, *Indiana Court Overturns Drug Conviction after SWAT Team Detonates Stun Grenade Near a Baby*, Wash. Post (Jan. 13, 2017), available at https://www.washingtonpost.com. This ruling "potentially throws a kink in all SWAT operations that involve a flash-bang grenade." *Id.*

The use of flash bangs during the execution of warrants has also resulted in significant and sometimes scarring injuries, most notably in 2014, when a sheriff's deputy in Georgia threw a flash bang into the home

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of a suspected crystal meth dealer during the execution of a no-knock search warrant. The flash bang detonated inside the playpen of Bounkham Phonesavanh, a 19-month-old child, which led to significant burns and a subsequent federal civil rights lawsuit against the officers involved. Alison Lynn & Matt Gutman, *Family of Toddler Injured by SWAT "Grenade" Faces $1M in Medical Bills*, ABC News (Dec. 18, 2014), available at http://abcnews.go.com. Despite the risks associated with their use, using SWAT teams and flash-bang devices, particularly when executing warrants, have become rudimentary to policing, which also has become.

Flash bangs, which are also referred to as "diversionary devices," are designed to blind and disorient temporarily but not seriously injure or kill. To create such a distraction, "[t]hey emit more than 12 million lumens of light, enough to blind anyone within five yards for up to five seconds." Taylor Wofford, *Tanks for Nothing: Why Obama's Plan to End Police Militarization May be Dead in the Water*, Newsweek (June 9, 2015), http://www.newsweek.com. Their bang produces approximately 180 decibels of sound. *Id.* SWAT teams detonate flash bangs to pose minimum risk to the persons and the property inside the house. Courts tend to find that detonation outside of a residence is reasonable. *See, e.g.*, *Ramage v. Louisville/Jefferson Cty. Metro Gov't*, 520 F. App'x 341, 347 (6th Cir. 2013). On the other hand, when flash bangs are deployed inside, there is a higher likelihood of injury, and consequently, more intense scrutiny by courts.

This article will discuss law enforcement's use of flash bangs and defending against civil rights claims challenging their deployment. It will highlight the history and purpose behind the use of flash bangs and discuss the potential response to the militarization of police, especially with the election of Donald J. Trump as president of the United States, and the changing landscape of the United States Supreme Court. In such an unstable time, it remains to be seen how current events and issues will affect national law enforcement and the judiciary. In that regard, this article will analyze the Supreme Court's treatment of qualified immunity in *White v. Pauly*, 137 S. Ct. 548, 549 (2017), and recent opinions from circuits throughout the country pertaining to officer liability stemming from the use of flash bangs.

Overview of Non-Deadly Weapons and History and Purpose of Flash Bangs

Non-deadly weapons are commonly placed into three categories, and each category has an increasing likelihood of resulting in serious bodily injury or death: (1) non-lethal, (2) less-than lethal, and (3) less lethal. Dave Young, *Definition and Explanation of Less-Lethal*, Policeone.com (Nov. 28, 2004), https://www.policeone.com/. These weapons are generally less likely to kill than conventional weapons, such as guns and knives. Non-deadly weapons are meant to minimize risk and prevent conflict from occurring. Indeed, a study by Philip Bulman, with the National Institute of Justice, suggests that these weapons decrease rates of officer and offender injuries. Philip Bulman, *Police Use of Force: The Impact of Less-Lethal Weapons and Tactics*, 267 Nat'l Inst. of Justice J., No. 267, at 4 (Winter 2010), available at http://www.ncjrs.gov. Like riot guns, rubber bullets, beanbag rounds, pepper spray, and tear gas, flash bangs are widely considered to be non-deadly.

Flash bangs are technically explosive devices that create a bright flash and a simultaneous loud bang. *Ramage*, 520 F. App'x at 346–47. Flash bangs "detonate with a blinding flash of light and a deafening explosion. Their function is to temporarily stun people in a targeted building until police or military personnel can get inside." Radley Balko, *Flashbangs Under Fire*, Reason (Feb. 17, 2010), available at http://reason.com. When used properly, they cause minimal damage, and officers use them to stun or to distract the occupants of a home and keep them from creating a safety threat. Flash bangs are used to disorient a person's senses, or "OODA loop," temporarily. The term "OODA loop" refers to the decision cycle of "observe, orient, decide, and act," which was developed by military strategist and United States Air Force Colonel John Boyd. David G. Ullman, *"OO-OO-OO!" The Sound of a Broken OODA Loop*, J. of Defense Software Eng., at 22 (Apr. 2007), available at http://www.davidullman.com/.

According to Mark Grubelich, a researcher at Sandia National Laboratories, the first use of a loud bang and bright flash designed to disorient was Operation Entebbe, a successful counter-terrorist, hostage-rescue mission at the Entebbe Airport in Uganda on July 4, 1976. Modern flash bangs were later developed by researchers at Sandia National Laboratories in the mid-1980s. The "Mk 141" flash bang, which was the first licensed by Sandia, produced about 1.5 pounds per square inch (PSI) of pressure within five feet of the blast. To put that into perspective, "one PSI is enough to shatter window glass; two PSI can blow a door off its hinges." Wofford, *supra*.

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A flash-bang detonation is—and its purpose is to be—extremely loud. The explosion, however, produces high temperatures and has been known to cause fires, burns, and other injuries. *See United States v. Ankeny*, 502 F.3d 829, 837 (9th Cir. 2007), *cert. denied*, 553 U.S. 1034 (2008); *United States v. Folks*, 236 F.3d 384, 387–88 (7th Cir. 2001), *cert. denied*, 534 U.S. 830 (2001). For example, a woman reportedly suffered a heart attack and died after police threw a flash bang into her apartment. William K. Rashbaum, *Woman Dies After Police Mistakenly Raid Her Apartment*, N.Y. Times, May 17, 2003, at B3. Flash bangs sometimes have landed and detonated on beds or near people, causing significant first- and second-degree burns. *See, e.g., Kirk v. Watkins*, No. 98-7052, 1999 WL 381119, at *2 (10th Cir. June 11, 1999); *United States v. Ankeny*, 502 F.3d 829, 833 (9th Cir. 2007). For these reasons, courts often express concern regarding their use: "The Court is mindful that the use of flash-bang devices will be inappropriate in many cases." *United States v. Dawkins*, 83 Fed. Appx. 48, 51 (6th Cir. 2003). The Tenth Circuit stated, "The use of a 'flash-

bang' device in a house where innocent and unsuspecting children sleep gives us great pause." *United States v. Myers*, 106 F.3d 936, 940 (10th Cir. 1997). While flash bangs are engineered to save lives, their deployment can certainly cause serious injuries, leading to lawsuits and potential officer and municipal liability.

With the public's heightened scrutiny of law enforcement, the increased media attention, and the rise of the so-called "citizen journalist," the debate over the "Ferguson effect" theory remains prominent and unavoidable for law enforcement defendants, litigators, and the judiciary.

Post-Ferguson: The Current Pro-Law Enforcement Administration

The protests in Ferguson, Missouri, after the shooting of an unarmed suspect by a police officer, were highly publicized throughout the world. The protestors were met by police in armored vehicles who, using what appeared to be grenade launchers, fired tear-gas canisters into the sea of people. Other officers wore camouflage and had sniper rifles. The depiction of our law enforcement in military attire, pointing weapons of war at U.S. citizens, caused an outrage. The events in Ferguson and other locations have brought to the forefront issues related to the militarization of local police departments. With the public's heightened scrutiny of law enforcement, the increased media attention, and the rise of the so-called "citizen journalist," the debate over the "Ferguson effect" theory remains prominent and unavoidable for law enforcement defendants, litigators, and the judiciary. The Ferguson effect theory essentially suggests that the increased scrutiny of law enforcement as a result of the heightened media exposure and recent depictions of police brutality has resulted in officers acting less proactively. Commentators have also pointed to qualified immunity as a major challenge to police accountability in these times. Sam Right, *Want to Fight Police Misconduct? Reform Qualified Immunity*, Above the Law (Nov. 3, 2015, 2:05 PM), available at http://abovethelaw.com. Indeed, this immunity has protected law enforcement in several high-profile cases.

As the 45th president of the United States, President Donald Trump has seemingly taken an opposite stance to President Barack Obama, who once stated, "We've seen how militarized gear can sometimes give people the feeling like there's an occupying force—as opposed to a force that's part of the community that's protecting them and serving them,… [it] can alienate and intimidate residents and make them feel scared." Alex Johnson, *Obama: U.S. Cracking Down on "Militarization" of Local Police*, NBC News (May 18, 2015), available at http://www.nbcnews.com. President Trump has advocated for military-style weapons and ammunition. During his campaign, President Trump sided with law enforcement and promised to rescind President Obama's executive order restricting access to military-style weapons amid the public's displeasure with the use of war-fighting gear to confront protestors in Ferguson. President Trump campaigned as the "law and order candidate" and was averse to the increased scrutiny of law enforcement. Louis Nelson, *Trump: "I Am the Law and Order Candidate*," Politico (July 11, 2016, 3:15 PM), available at http://www.politico.com.

President Trump's nominee for the Supreme Court, Tenth Circuit Judge Neil Gorsuch, now confirmed, has expressed a similar commitment to police protection. In a 2013 case involving a suspect who died after being stunned with a stun gun, Gorsuch held that "the Supreme Court has directed the lower federal courts to apply qualified immunity broadly, to protect from civil liability for damages all officers except 'the plainly incompetent or those who knowingly violate the law.'" *Wilson v. City of Lafayette*, 510 F. App'x 775, 780 (10th Cir. 2013) (citing *Malley v. Briggs*, 475 U.S. 335 (1986)). Gorsuch ruled that the officer was protected by the doctrine of qualified immunity. While it is still too early to determine what President Trump will do when it comes to the militarization of the police, the Supreme Court has made clear that an officer's entitlement to qualified immunity remains stronger than ever. *See, e.g., White*, 137 S. Ct. 548.

Qualified Immunity and the Use of Flash Bangs

There is no denying that the use of flash bangs by law enforcement personnel can lead to costly civil rights lawsuits. Take for instance a lawsuit filed by 68-year-old Louise Milan after her house, occupied at the time by her and her 18-year-old daughter Stephanie, was raided by a SWAT team, based merely on suspicions that threats against the police were being made online from her house. *Milan v. Bolin*, 795 F.3d 726, 729 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 1162 (2016). Officers applied for and obtained a search warrant. The search was conducted by an 11-man SWAT team, which was accompanied by a news team. The officers broke open the front door and a nearby window and hurled two flash-bang devices through these openings. The search of the home was videotaped, both by the accompanying news team and by a camera mounted on the helmet of a member of the SWAT team. The members of the team are seen on the video clad in body armor and helmets and carrying formidable rifles pointed forward. The video shows the flash-bang smoke filling the home while officers shout their presence. The video was broadcast over the internet, and as the Seventh Circuit noted, the video was troubling: the daughter is "so small, frail, utterly harmless looking, and completely unresisting that the sight of her being led away in handcuffs is disturbing." *Id.* While fortunately neither Louise Milan nor her daughter Stephanie suffered any physical injuries during the execution of the warrant, the Seventh Circuit scrutinized the use of the flash bangs, calling them "destructive and dangerous," and affirmed the district court's denial of qualified immunity to the officers. *Id.* at 730.

Qualified Immunity Under *White v. Pauly*

Whether an officer who deploys a flash bang is subject to liability when he or she

is named as a defendant in a federal civil rights action often turns on whether that officer is entitled to qualified immunity. It is well settled that this determination is an objective inquiry that depends on the particular facts at issue, not generalizations derived from readily distinguishable cases and situations. The United States Supreme Court has summarily reversed lower courts for failing to adhere to this fundamental precept of qualified immunity. *See, e.g.*, *White*, 137 S. Ct. at 548; *Mullenix v. Luna*, 136 S. Ct. 305 (2015); *Carroll v. Carman*, 135 S. Ct. 348 (2014); *Stanton v. Sims*, 134 S. Ct. 3 (2013); *Ryburn v. Huff*, 132 S. Ct. 987 (2012); *Brosseau v. Haugen*, 543 U.S. 194 (2004).

Most recently, in *White*, the Supreme Court held that an officer involved in a fatal shooting was entitled to qualified immunity under the "clearly established law" prong of qualified immunity. Despite the political climate, the Supreme Court evidently is not wavering from its strong stance on qualified immunity: "In the last five years, [the Supreme Court] has issued a number of opinions reversing federal courts in qualified immunity cases." *White*, 137 S. Ct. at 551. The Court has found this necessary both because qualified immunity is important to "society as a whole" and because, as "an immunity from suit," qualified immunity "is effectively lost if a case is erroneously permitted to go to trial." *Id.* It is not enough for courts to find generally that the law is clear that officers cannot use excessive force; "the clearly established law must be 'particularized' to the facts of the case." *Id.* at 552. And the law must put the officer on notice that his or her actions were clearly in violation of the Constitution. This is a high burden to meet.

White is significant only because it is a reminder that qualified immunity is seldom to be rejected, and only to be rejected in closely analogous cases in which it has been determined that the conduct in question violates the Constitution. This is particularly important when defending police personnel against claims involving the use of flash bangs because depending on the circuit, and sometimes depending on the highest state court within that circuit, the case law in this area may or may not be particularly developed. Some circuits, such as the Fourth and Fifth Circuits, have not reported any cases that interpret the parameters for the use of flash bangs, while other circuits, such as the Second, Seventh, and Eleventh Circuits, now recently have clearly established law in this area.

Recent Opinions on the Use of Flash Bangs from Across the Country

Now we turn to opinions of circuits, such as the Second, Seventh, and Eleventh Circuits, that recently have clearly established law in this area.

Second Circuit

In 2014, the Second Circuit, in *Terebesi v. Torreso*, 764 F.3d 217 (2d Cir. 2014), addressed qualified immunity in a case involving the use of flash bangs and claims of excessive force. In *Terebesi*, the police obtained a warrant to search the home of Ronald Terebesi for a small amount of crack cocaine and drug paraphernalia. To execute the search, police planned to smash Terebesi's windows, detonate at least three flash bangs inside the home, break down the front door with a battering ram, and storm the house with weapons drawn. In the chaos that accompanied implementing this plan, the officers fatally shot Gonzalo Guizan, Terebesi's houseguest, and allegedly injured Terebesi. Both Guizan and Terebesi were unarmed, and no weapons were found in the house. When analyzing the use of the flash bangs, the court stated that Fourth Amendment principles governing police use of force apply with "obvious clarity" to the "unreasonable deployment of an explosive device in [a] home." *Id.* at 237. The court first looked to whether the officers confirmed that they were tossing the flash bang into an empty room. The court noted that deploying flash bangs is more likely reasonable if the subject of the search or arrest is known to pose a high risk of violent confrontation. In contrast, the court determined that it would not be reasonable to use a flash bang in routine searches that do not pose high levels of risk. "The use of a stun grenade must be justified by the particular risk posed in the execution of the warrant," stated the court. *Id.* at 239. The officers were not granted qualified immunity because none of the facts suggested that "Terebesi was ready to engage in violence, that he had any record of or propensity towards violence, that he had immediate access to weapons, or indeed that he was likely to offer any resistance at all." *Id.*

Sixth Circuit

That same year, the Sixth Circuit, in *Krause v. Jones*, 765 F.3d 675 (6th Cir. 2014), also addressed qualified immunity in a case involving flash-bang usage, but it reached a different result than the Second Circuit. In *Krause*, when law enforcement officers tried to execute a warrant for Matthew Krause's arrest, he fled into his home and posted up in a bedroom closet, armed with a gun. After negotiating for hours, the officers decided to enter the bedroom, using a flash bang in the process. In the seconds that followed, Matthew Krause fired a shot at the officers, and one of the officers fatally shot Krause in response. One of the issues in the case was whether the officers used excessive force in deploying the flash bang. The Sixth Circuit found that "the officers' use of a flash bang… was reasonable" and not in violation of clearly established law. *Id.* at 679. In so finding, the court considered that the officers were faced with a troubled young man resisting arrest on drug charges, threatening to shoot them, expressing his willingness to die, and refusing all requests to surrender peacefully. The officers sought to minimize the risk of injury to themselves and others in entering the room. According to the Sixth

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Circuit, all of these factors outweighed any downside of using a flash bang, "including the kinds of downsides that have led other courts to be skeptical of the use of a flash bang or to find it unreasonable." *Id.* Important factors the court considered were, first, Krause was isolated in one room—precluding the risk that the flash bang could harm others, including children, the elderly, or others in the wrong place at the wrong time. Second, the officers had a clear view into the bedroom and closet, allowing them to ignite the flash bang away from the closet and not on Krause. Third, nothing indicated that Krause had other health problems that could be triggered by the device. Lastly, nothing indicated that the condition of the room could create other problems if a flash bang were ignited.

The use of flash bangs can undoubtedly save lives and prevent injuries. But these are not the stories that we see in the news, and certainly they are not the cases as attorneys that we litigate.

Seventh Circuit

In the case involving the 68-year-old Louise Milan and her daughter Stephanie, the Seventh Circuit denied qualified immunity to the officers. *Milan*, 795 F.3d at 730. The court reiterated the Seventh Circuit's narrow standard when it comes to the use of flash bangs:

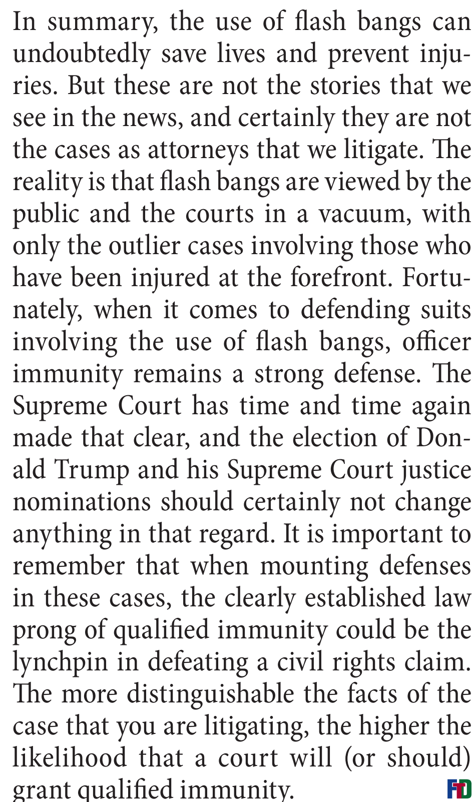
> [T]he use of a flash bang grenade is reasonable only when there is a dangerous suspect and a dangerous entry point for the police, when the police have checked to see if innocent individuals are around before deploying the device, when the police have visually inspected the area where the device will be used and when the police carry a fire extinguisher.

Id. (citing *Estate of Escobedo v. Bender*, 600 F.3d 770, 784–85 (7th Cir. 2010)). According to the court, the police "flunked the test just quoted." *Id.*

In 2016, the Seventh Circuit again addressed the use of officer liability and flash bangs in *Flournoy v. City of Chicago*, 829 F.3d 869, 872 (7th Cir. 2016), but reached a different result. Donna Flournoy was severely injured by a flash-bang grenade deployed by Chicago police during their execution of a search warrant for a suspected drug dealer. Flournoy responded with a lawsuit against two of the officers involved in the search, alleging that they used excessive force in violation of the Fourth Amendment. During the execution of the warrant, one of the officers looked through the front doorway, did not see anyone inside, and lightly tossed a flash bang into the apartment's doorway. Unfortunately, the flash-bang's blast severely injured Flournoy. The court held that the evidence supported the jury's finding that the deploying officer did not use excessive force, focusing on the fact that the officers were searching the apartment of a drug dealer who protected his operation and carried a gun, who had been identified as a possible convicted felon, and who might be accompanied by numerous other individuals involved in the drug trade. The suspect's apartment was also known to be in a high-crime area. The court also focused on the officer's testimony that in accordance with his training, he first visually scanned the area where the flash bang was to be deployed, and he released the flash bang only after determining that the area was clear.

Eleventh Circuit

Lastly, the Eleventh Circuit, in 2017, addressed whether a Georgia police officer, who was alleged to have thrown a flash bang into a dark room occupied by two sleeping individuals without first visually inspecting the room, was entitled to qualified immunity. *Dukes v. Deaton*, No. 15-14373, 2017 WL 370854, at *1 (11th Cir. Jan. 26, 2017). In the early morning hours, the SWAT team executed a no-knock search warrant at the apartment of Jason Ward. Jason Ward and his girlfriend, Treneshia Dukes, were asleep in the bedroom of the apartment. Ward was awakened by a "boom" and then heard his "window break and shattering." Treneshia Dukes heard a "boom" and then saw an object come toward her. After the object hit her and exploded, Treneshia Dukes ran into the bathroom, where she was detained by the police. The Eleventh Circuit held that the officer's deployment of the flash bang into the window violated the Fourth Amendment, but it nonetheless found that the officer was entitled to qualified immunity because he did not violate clearly established law. However, the Eleventh Circuit made clear that in the future it is clearly established that deploying a flash bang into a dark room occupied by sleeping individuals without first visually inspecting the room constitutes excessive force in violation of the Fourth Amendment. As such, if these facts were to arise again within the Eleventh Circuit, an officer would have a tough time succeeding based on a qualified immunity defense. By that same token, any fact that would distinguish a case from the incident in *Dukes* would lend itself to the argument that no clearly established law was violated.



Conclusion

In summary, the use of flash bangs can undoubtedly save lives and prevent injuries. But these are not the stories that we see in the news, and certainly they are not the cases as attorneys that we litigate. The reality is that flash bangs are viewed by the public and the courts in a vacuum, with only the outlier cases involving those who have been injured at the forefront. Fortunately, when it comes to defending suits involving the use of flash bangs, officer immunity remains a strong defense. The Supreme Court has time and time again made that clear, and the election of Donald Trump and his Supreme Court justice nominations should certainly not change anything in that regard. It is important to remember that when mounting defenses in these cases, the clearly established law prong of qualified immunity could be the lynchpin in defeating a civil rights claim. The more distinguishable the facts of the case that you are litigating, the higher the likelihood that a court will (or should) grant qualified immunity. FD