

No.: 15-1207

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UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT

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Louise Milan,  
Plaintiff – Appellee

v.

BILLY BOLIN, in his individual capacity as Evansville Police  
Department Chief, et al.,  
Defendants - Appellants

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Appeal from the United State District Court  
For the Southern District of Indiana  
Case No.: 3:13-cv-0001-WTL-WGH  
The Honorable Judge Lawrence

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**Plaintiff-Appellee, Louise Milan's Response Brief**

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Appellate Court No.: 15-1207

Short Caption: Louise Milan v. Billy Bolin, in his individual capacity as Evansville Police Chief, et. al.

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## JURISDICTIONAL STATEMENT

The Appellant's Jurisdictional Statement is complete and correct.

### STATEMENT OF THE ISSUES

1. Whether the Officers' use of flash bang devices was objectively reasonable under the totality of the circumstances.
2. Whether the law was clearly established as of June 21, 2012, that the force used by the SWAT team to execute the search warrant at Milan's home violated the Fourth Amendment right to be free from excessive force.
3. Whether the Officers' conduct was so patently violative of Milan's constitutional right to be free from excessive force that a reasonable official would know it to violate Milan's constitutional rights without guidance from the court.

### STATEMENT OF THE CASE

#### I. Nature of the Appeal

This appeal was taken from the entry of the District Court granting in part and denying in part Defendants motion for summary judgment on Plaintiff's claims that they violated her Fourth and Fourteenth Amendment rights under the United States Constitution. Defendants are appealing only the District Court's denial of summary judgment on Milan's claim for excessive force and the application of qualified immunity. (Appellant's Brief, p. 2)

#### II. Factual Background

Sixty-eight (68) year old Louise Milan has lived in her home at 616 E. Powell Ave. since 1983. [Docket Entry ("DE") 80-3, Louise Milan Dep. at pg. 3; DE 85 at pg. 3] Since

2010, Milan has lived in the home with her adopted daughters, Stephanie and Shokara.

[DE 80-3, Louise Milan Dep. at pg. 4]

**A. The investigation into the online postings.**

Chief Bolin was made aware of threatening posts made on Topix.com around 10:30 p.m. on June 20, 2012 by EPD Officer Michael Ward (“Ward”). [DE 80-16; Email from Michael Ward] EPD was notified of the threats by an employee of a local news station.

[DE 80-10, Bolin Dep. at pgs. 88-90]

**i. EPD identifies the IP Address that was used to post the threats.**

At around 8 a.m. on June 21, 2012, Det. Evrard sent an emergency subpoena to Topix.com for the IP address associated with the user names: ihatecops, creeper and usarmy, which are the user names that posted the threats on the Topix message board.

[DE 80-2] At approximately 10:55 a.m. on June 21, 2012, Do Kim (“Kim”) from Topix responded with the IP address, which was the same for all three user names. Det.

Evrard, however, did not ask for all the usernames associated with the IP address nor did he research the user names he was provided by Kim. He attempted to cure these deficiencies when he communicated with Kim on June 22, 2012. [DE 80-1, Email Chain

Between Do Kim and Evrard] Kim told Evrard that he needed to submit another

subpoena for any other posts from those user names because “Multiple people could be using that same IP address so that may lead you to a different, unrelated user.” [DE 80-

1, Email Chain Do Kim and Evrard] Evrard responded “Yes, we want all user names

that were using that IP. Understand it may be multiple people.” In fact, nine (9) total

usernames were identified. [DE 80-1, Email Chain Do Kim and Evrard] Evrard



understood that many people could be using Louise's IP address to post the threats, but he did no further investigation. [DE 80-17 - Evrard Dep. at pgs. 32-33; DE 80-1, Email Chain Do Kim and Evrard] Moreover, Det. Evrard did not research the user names who made the threats prior to the raid on Louise's home. [DE 80-17 - Evrard Dep. at pgs. 32-33]

The EPD first learned of Louise's home being associated with the IP address at or around 1:22 p.m. on June 21, 2012, when Det. Brown received a response to his emergency subpoena from Insight Cable. [DE 80-18, Brown Dep. at pgs. 33-34; DE 80-2, Response Letter from Insight] Det. Brown sent an emergency subpoena to Insight for the physical address and name of the person associated with the IP address. [DE 80-2] Insight responded with a faxed letter at 1:22 p.m. providing Louise Milan's name, address, phone number, IP address and user name - [louise.milan@insightbb.com](mailto:louise.milan@insightbb.com). [DE 80-2, Response Letter from Insight] Insight also specifically stated, "We do not make any representations to the identity of the individual who actually used the above IP address on the dates and times in question. If you require additional subscriber account information regarding the above individual, please let us know." [DE 80-2, Response Letter from Insight] Det. Brown did not follow up with Insight or further investigate the user names, even though they did not match Louise's username. [DE 80-18, Brown Dep. at pgs. 79-80]

**ii. EPD learns that there was an open internet connection at Milan's residence.**

On June 21, 2012, sometime after receiving the letter from Insight, Det. Brown drove down Louise's street going about five (5) miles per hour and checked with his iPhone to see if there were any open internet connections. [DE 80-18, Brown Dep. at pgs. 35-39] He found an open connection in the middle of the street in front of Louise's home. [DE 80-18, Brown Dep. at pgs. 35-39] He shared the fact that there was an open internet connection with Lt. Molinet at the SWAT briefing prior to the raid. [DE 80-18, Brown Dep. at pgs. 35-39]

Det. Brown was aware that an unsecured router can be accessed from outside a home. [DE 80-18, Brown Dep. at pg. 24] Det. Brown was aware that people log on to and use other people's open internet connections. [DE 80-18, Brown Dep. at pgs. 34-35] Similarly, Det. Evrard knew that it is easy for someone to hide the physical location of their IP address through proxy servers. [DE 80-17, Evrard Dep. at pg. 20] It is not uncommon for a person to have their router unsecured and it is easy to tell when a router is unsecured. If a wireless router is unsecured, someone from outside of the physical location can easily access the internet and router. [DE 80-17, Evrard Dep. at pgs. 21-22]

Det. Brown had the IP address, physical address and name for Louise Milan and knew there was an unsecured router, yet he never followed up or bothered to contact Insight to determine if the open router belonged to Louise because "the SWAT team was going in anyway." [DE 80-18, Brown Dep. at pgs. 79-80]

**iii. EPD attempts to associate individuals with Louise's residence.**

Chief Bolin asked Det. Seibert to associate persons with Louise's home or as he put it "I was asked to look and try to find something on 616 East Powell." So, he looked up Marc Milan who he believed hung out with Derrick Murray at 604 E. Powell Avenue. Nothing in the EPD's RMS system, however, showed Marc Milan ever lived at or visited 616 East Powell Avenue. [DE 80-5, Seibert Dep. at pgs. 26-27; DE 80-21, Marc Milan's RMS report]

Next, Det. Seibert attempted to associate Marc Milan with Anthony Milan Sr., and then to Anthony Milan, Jr. [DE 80-5, Seibert Dep. at pgs. 24-26] However, the only tie between Marc and Anthony Sr. or Anthony Jr. was their last name. Based on this alone, Det. Seibert associated Marc Milan to Louise's address. [DE 80-5, Seibert Dep. at pgs. 26-27] Chief Bolin admits it is not proper to associate someone with an address based solely on their last name. [DE 80-10, Bolin Dep. at pgs. 87-88]

Det. Seibert did not know who Anthony Milan, Sr. or Anthony Milan, Jr. were prior to the day of the raid on Louise Milan's home. [DE 80-5, Seibert Dep. at pg. 22] Nothing in the EPD's RMS system stated Anthony Milan, Jr. ever lived at or was associated with 616 East Powell Ave. prior to June 21, 2012<sup>1</sup>. [DE 80-5, Seibert Dep. at pg. 30; DE 80-22, Anthony Milan, Jr.'s RMS Report] In fact, Anthony Milan, Sr. was not listed as Junior's

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<sup>1</sup>There is an entry on the EPD RMS report that shows Anthony Jr. as residing at Louise's residence; however, it was entered by Chief Bolin on June 28, 2012, a week after the raid. [DE 80-10, Bolin Dep. at pgs. 44-48; DE 80-22, Anthony Milan Jr. RMS report] It was corrected six weeks later to list his true address on Ravenswood Drive in Evansville, Indiana. [DE 80-22, Anthony Milan Jr. RMS report]

father or parent in the EPD's RMS system. [DE 80-5, Seibert Dep. at pg. 30; DE 80-22, Anthony Milan, Jr.'s RMS report]

There was nothing in the EPD's information module associating Anthony Milan, Sr., with 616 E. Powel Avenue for about four years prior to the raid on Louise's home. The only entry for that address was performed by the Vanderburgh County Sheriff's Department on June 27, 2008. [DE 80-10, Bolin Dep. at pgs. 43-44; DE 80-4, Anthony Milan Sr. RMS report]

- iv. EPD's surveillance on Louise's home reveals only a female that leaves and returns; however, EPD also observes Derrick Murray, the individual it believed to be responsible for the posts, two houses down from Louise's residence.**

There was surveillance on Milan's residence for a brief period before the raid on her home. [DE 80-10, Bolin Dep. at pg. 34] During the brief surveillance period, Derrick Murray, who has a criminal history known to the EPD was spotted on the porch of a residence two doors down from Louise's home. [DE 80-9, Murray Criminal Complaint and Affidavit; DE 80-13, Det. Brown Investigation Notes] In fact, that is why surveillance was ended. [DE 80-10, Bolin Dep. at pgs. 35-37; DE 80-9, Murray Criminal Complaint and Affidavit; DE 80-13, Det. Brown Investigation Notes]

Officer Kennedy, who performed the surveillance, informed Molinet that he spotted Murray on a porch two doors down from Louise's home. [DE 80-9, Murray Criminal Complaint and Affidavit; DE 80-13, Det. Brown Investigation Notes] Murray was known to Molinet as a "thorn to the police department for a while." [DE 85 at pg. 3] Molinet let the SWAT team know that Murray was spotted two doors down because

“he [Murray] may try something stupid.” [DE 80-6, Molinet Dep. at pg. 51] Murray has a well known history of making threats against EPD officers, including a conviction for intimidating a police officer and had sprayer 187 and an officer’s address on a garage and was known to be living at his mother’s residence at 604 E. Powell Avenue – two doors down from Louise’s Home. [DE 80-6, Molinet Dep. at pg. 69; DE 80-9, Criminal Complaint against Murray; DE 80-10, Bolin Dep. at pg. 69-70; DE 80- 13, Brown Investigation Notes; DE 80-9, Criminal Complaint against Murray] This information was shared during the SWAT team briefing. [DE 80-18, Brown Dep. at pgs. 50-51, 62; DE 80-13, Det. Brown’s Investigation Notes; DE 80-10, Bolin Dep. at pg. 69-70; DE 80-9, Criminal Complaint against Murray]

Det. Seibert was fully aware of Murray’s past criminal activities, including his intimidation of police officers, and his status as a member of the LA Zombies gang. [DE 85 at pg. 3] However, despite the fact that Murray was spotted two doors down during surveillance, no one at the EPD asked Det. Seibert about or sought information about Murray and he did not supply any information about Murray. [DE 80-5, Seibert Dep. at pgs. 35-36] According to Molinet, it did not matter that Murray had been spotted because SWAT was going to “hit” Louise’s home no matter what. [DE 80-6, Molinet Dep. at pg. 53]

Molinet spoke with Kennedy who conducted the surveillance on Louise’s home. Kennedy told Molinet the only person he saw come or go from the home was a black woman (Stephanie Milan) and that he never saw Marc Milan, Anthony Milan Sr., Anthony Milan Jr. or any male suspect. [DE 80-6, Molinet Dep. at pg. 32]

## B. The Threat Assessment

Lt. Molinet completed the SWAT threat assessment based on about ten (10) phone calls he had with Det. Brown, Det. Evrard and Det. Seibert over a one hour time span. [DE 80-6, Molinet Dep. at pgs. 27-28; DE 80-23, Threat Assessment] The only things Det. Brown told Lt. Molinet were the threats and that they were posted on Topix.com. [DE 80-6, Molinet Dep. at pg. 28] Det. Evrard or Det. Seibert erroneously informed Lt. Molinet that Marc Milan, Anthony Milan, Sr., and Anthony Milan, Jr. were possible suspects that were in Louise Milan's home and that all three stayed there. [DE 80-6, Molinet Dep. at pgs. 29 & 31-32] None of the detectives told Molinet why they believed that those men were suspects or in the home and Molinet did not bother to ask where the detectives came up with this information. [DE 80-6, Molinet Dep. at pgs. 29-32]

The Threat Assessment document was completed by Molinet. The Threat Assessment was for a search warrant of 616 E. Powell Avenue; not an arrest warrant – in fact, no suspect is listed on the Threat Assessment. [DE 80-23, Threat Assessment] Nonetheless, Molinet completed the Threat Assessment based on Marc Milan, Anthony Milan, Sr., and Anthony Milan, Jr. being suspects. [DE 80-6, Molinet Dep. at pgs. 36-37; DE 80-23, Threat Assessment]

Molinet checked “known to use propensity for violence”, “assault and resisting arrest” under the suspect assessment on the Threat Assessment even though this was a search warrant. [DE 80-6, Molinet Dep. at pgs. 38; DE 80-23, Threat Assessment] He checked “resisting arrest” even though it was a search warrant and Marc Milan, Anthony Milan, Sr., and Anthony Milan, Jr. had no history of resisting arrest. He

explained that he checked it anyway because he wanted his SWAT team members to believe any suspects at 616 E. Powell Avenue would resist arrest and the threat assessment would assign the necessary points. [DE 80-6, Molinet Dep. at pgs. 38; DE 80-23, Threat Assessment] Molinet did not get the criminal histories for Marc Milan, Anthony Milan, Sr., and Anthony Milan, Jr. until after he completed the Threat Assessment. [DE 80-6, Molinet Dep. at pg. 46]

Under Offense Assessment, Molinet checked that the offense was a felony, it was a violent felony and that a weapon was used in the offense. [DE 80- 23, Threat Assessment] The only offense committed by anyone at this point were threats made on the internet – internet threats cannot be considered violent and most certainly were not completed with a weapon. [DE 85 at pg. 11] Nonetheless, Molinet went ahead and checked, rifle-full auto, handgun and explosives in the Weapon Assessment section of the Threat Assessment. [DE 80-23, Threat Assessment]

Under site assessment, Molinet listed unknown for whether children or the elderly were present. [DE 80-23, Threat Assessment] However, Kennedy had observed Stephanie, who is diminutive, leave and return to the residence. [DE 80-6, Molinet Dep. at pgs. 64 & 66] Molinet believed Stephanie was 13 years old. [DE 80- 6, Molinet Dep. at pg. 66] Stephanie appeared to be 15 years old to Gray. [DE 80-11, Gray Dep. at pg. 30] Moreover, Kennedy informed Molinet that he saw children's bicycles in the driveway of Louise's home during his surveillance. [DE 80- 6, Molinet Dep. at pg. 63; Helmet Cam Video at 8:57]

Due to the short time SWAT planned the raid on Louise's home, a higher threat value was assigned under operational planning. [DE 80-6, Molinet Dep. at pgs. 44-45; DE 80-23, Threat Assessment]

**C. EPD decides to use flash bang grenades when executing the search warrant.**

Gray, the SWAT team commander for the raid on Louise's home, does not recall whether or not he saw the Threat Assessment for her home prior to the SWAT raid. [DE 80-11, Gray Dep. at pg. 20] Gray decided to use flash bang grenades during the raid on Louise's home and that decision was approved by Molinet and Chief Bolin. [DE 80-11, Gray Dep. at pg. 26] Gray believes that EPD SWAT can use flash bang grenades even if there is no suspect and no imminent danger is observed. [DE 80-11, Gray Dep. at pg. 35] If there is missing information or intelligence for serving a search warrant, Gray would err on the side of using flash bang grenades. [DE 80-11, Gray Dep. at pg. 32]

Gray recalls that none of the detectives told him that any of the male Milans were spotted at Louise's home, but the detectives did tell him that Murray was spotted a few doors down. [DE 80-11, Gray Dep. at pgs. 29] Gray recalls from the *pre-raid briefing* that the detectives and the EPD believed Derrick Murray was "ultimately responsible" for the threats. [DE 80-11, Gray Dep. at pg. 39]

**D. EPD's execution of the search warrant.**

After looking through the glass storm door for what Lt. Molinet described as a "split second", Officers Kacey Ross and Alan Gansman broke Louise's living room window and detonated a flash bang grenade, then the SWAT team smashed Louise's storm door



and Officer Shawn Chapman threw in the second flash bang grenade through Milan's front door. The SWAT team then rushed in with their military assault rifles pointed at Louise and Stephanie, ordered them to the floor at gunpoint and handcuffed them. [DE 80-11, Gray Dep. at pgs. 42-43; DE 80-6, Molinet Dep. at pg. 61; DE 80-7, After Action Report; DE 80-24, Picture of Dry Erase Board; Helmet Cam Video] Prior to entering Milan's home, the SWAT team observed no weapons, no bombs, no barricades and no suspects. [DE 80-11, Gray Dep. at pg. 51] The SWAT team did not observe any imminent threat or danger prior to breaking into Louise's home and detonating flash bang grenades, nor did they look for any innocent bystanders to avoid injuring them with a flash bang grenade. [DE 80-11, Gray Dep. at pgs. 52-53; Helmet Cam Video; DE 85 at pg. 11]

The SWAT team employed its "knock and announce" tactic that is really just a distraction technique. There is approximately four (4) seconds between the first knock by the SWAT team, Louise's window being smashed and the first flash bang grenade being thrown in and six (6) seconds from the first knock and the ram hitting Louise's front door and the second flash bang grenade being thrown in her living room. [Helmet Cam Video at 3:31 to 3:37; DE 85 at pg. 11]

Lt. Molinet admitted and the helmet cam video shows that the SWAT team only looked in Louise's home for a "*split second.*" [DE 80-6, Molinet Dep. at pg. 61] They did not check for suspects, they did not look for innocent bystanders. [Helmet Cam Video at 3:31 to 3:37] An EPD picture taken of Louise's living room shows the burn mark from where the flash bang grenade landed and its distance from the front door. [DE 80-14,

EPD Photo of Burn Mark] The photo shows that the flash bang grenade landed almost entirely across Louise's living room from the front door, this distance is not indicative of an object that was "placed." [DE 85 at pg. 11]

The SWAT team did not carry a fire extinguisher with them as required. The fire extinguisher was in the SWAT armored vehicle and not available to the officers in Louise's home. [DE 80-6, Molinet Dep. at pgs. 69-70; Helmet Cam Video]

After the raid, the SWAT team members can be heard laughing and swearing about smashing in Louise's door. [Helmet Cam Video at 9:50 to end of video] Chief Bolin invited a news crew of civilians along for the SWAT raid as a thank you for the news station tipping them off about the postings on Topix.com. [DE 80-10, Bolin Dep. at pgs. 88-90] He invited the civilians even though the EPD claims to have believed there may be a person at Louise's home with high powered rifles and explosives. [DE 80-10, Bolin Dep. at pgs. 88-90]

**E. EPD does not use the SWAT team or Flash Bang Grenades when executing a similar warrant at Murray's residence a few days later.**

Derrick Murray was spotted two doors down at 604 E. Powell Avenue during the pre-raid surveillance on Louise's home and during the raid on Louise's home. [DE 80-17, Evrard Dep. At pg. 48; DE 80-13, Brown Investigation Notes; DE 80-9, Murray Criminal Complaint and Affidavit] Det. Brown and the EPD conducted four (4) days of investigation before going into Murray's home with a search warrant. [DE 80-18, Brown Dep. at pgs. 68-69; DE 80-10, Bolin Dep. at pg. 103-105; DE 80-17, Evrard Dep. At pg. 50; DE 80-20, Application for Search Warrant for 604 E. Powell Avenue] The SWAT team

did not breach Murray's residence or use flash bang grenades. [DE 80 18, Brown Dep. at pgs. 69-70; DE 80-10, Bolin Dep. at pg. 103-105; DE 80-17, Evrard Dep. At pg. 50] When Murray's home was served with a search warrant, Motor Patrol just went up and knocked on the door. [DE 80-6, Molinet Dep. at pg. 77]

On June 28, 2012, three (3) days after executing the search warrant, EPD Captain Andy Chandler called Murray to discuss the EPD's investigation with him. [DE 80- 9 at ¶ 30, Affidavit and Criminal Complaint for Murray] Det. Seibert was present for the arrest of Murray. The FBI simply called Murray from EPD headquarters and had him come to the station where he was arrested without incident. [DE 80-5, Seibert Dep. at pg. 48]

#### **SUMMARY OF THE ARGUMENT**

The District Court properly denied qualified immunity to the Defendants. There is sufficient evidence from which a reasonable juror could conclude that the use of a SWAT team and flash bang grenades to execute the search warrant at Ms. Milan's home was excessive. Specifically, the information known to the officers at the time it executed the warrant did not suggest that anyone in Ms. Milan's home presented an unusual danger to the officers, especially considering it was aware that the individual whom it suspected of making the threats did not reside with Ms. Milan.

Further, the defendants are not entitled to qualified immunity because Ms. Milan's right to be free from such force was clearly established as of June 21, 2012. There are closely analogous and instructive cases, such as *Escobedo*, that clearly establish Ms. Milan's right to be free from such excessive use of force. These cases provide guidance

that the use of flash bang grenades is not appropriate in most cases and should be used only when there was a dangerous point of entry, if they carry a fire extinguisher with them and after ensuring that no one would be injured by their use. None of these factors existed in this situation.

Even in the absence of such guidance, any reasonable officer would know that the use of flash bang grenades to execute the warrant to obtain Ms. Milan's router would violate her constitutional rights because there was no imminent threat and only a very slight possibility that a potentially violent person would be found in the home. As such, Appellee believes this Court should affirm the District Court's denial of summary judgment.

## ARGUMENT

### **A. The standard for determining whether qualified immunity applies.**

Appellant appeals only the District Court's denial of summary judgment based on its claim that they are entitled to qualified immunity. To successfully defeat defendants' qualified immunity defense, Milan must establish (1) that "the facts, taken in the light most favorable to [her position], show that the defendants violated a constitutional right; and (2) [that this] constitutional right was clearly established at the time of the alleged violation." *Gonzalez v. City of Elgin*, 578 F. 3d 526, 540 (7th Cir. 2009). (citing *Pearson v. Callahan*, 129 S. Ct. 808, 815-16, 172 L. Ed. 2d 565 (2009), and *Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001)). Here, the facts demonstrate that the officers use of force was not objectively reasonable under the totality of the circumstances and that Ms. Milan's right to be free from such force was clearly

established at the time the officers' detonated the flash bang grenades while executing the search warrant on June 21, 2012.

**B. The use of flash bang devices was not objectively reasonable under the totality of the circumstances.**

The District Court properly found that questions of fact exist as to whether the EPD used an unreasonable amount of force when it detonated flash bang grenades in executing the search warrant at Milan's residence. Here, under the totality of the circumstances, a reasonable jury could find that the use of flash bang grenades at Milan's residence was a use of excessive force.

Excessive force claims are analyzed using an objective reasonableness standard. *Los Angeles County v. Rettele*, 550 U.S. 609, 614 (2007). To determine whether the force used to effect a particular seizure is reasonable, the court must balance the nature and quality of the intrusion on the individual's rights against the countervailing government interests at stake. *Graham v. Connor*, 490 U.S. 386, 296 (1989). In *Estate of Escobedo v. Bender*, 600 F. 3d 770, (7<sup>th</sup> Cir. 2010), the Seventh Circuit summarized its precedent and articulated the factors to be considered in determining whether the amount of force used to effectuate a seizure is reasonable. Those factors include: (1) the severity of the crime at issue; (2) whether the suspect poses an immediate threat to the safety of the officers or others; (3) whether he is actively resisting arrest or attempting to evade arrest by flight; (4) whether the individual was armed; (5) whether the individual was interfering or attempting to interfere with the officer's execution of his or her duties. *Escobedo* at 780 citing *McDonald v. Haskins*, 966 F. 2d 292, 292-93 (7<sup>th</sup> Cir. 1992).

Ultimately, however, the excessive force inquiry turns on whether the force used to seize the suspect was excessive in relation to the danger he posed. *Id.*

**i. The severity of the crime at issue should not be considered in isolation.**

The District Court found that the crimes that the unidentified suspect was guilty of were fairly low on the severity scale. [DE 85, p. 11] The unidentified suspect was guilty of only intimidating a police officer (a Class D felony) and/or making threatening communications on the internet (corresponding to a base offense level of 12). Appellant argues that it is not just the severity of the crime already committed but also the danger “if left unattended.” [Appellant’s Brief at 21]

The Appellant stresses the gravity of the potential crimes to support its decision to use the SWAT team and flash bang grenades. Appellant asks that these facts be read in isolation to justify its conduct. For example, it repeatedly emphasizes that the online threats, if carried out, would constitute the killing of police officers and their families. However, the EPD was not executing a warrant to seize the individual suspected of making these threats; it was executing a warrant to obtain the router and other electronic devices from Ms. Milan’s home. Therefore, it is not the online threats that dictate the proper force to use to execute the search warrant to obtain the router from Ms. Milan’s home; rather, it is the threat to the police officers at that home, i.e. the danger posed in executing the search warrant at Ms. Milan’s home to obtain the router.

Moreover, the facts and circumstances known to the EPD at the time they executed the warrant undermine its belief that Milan’s residence or anyone in the residence

posed an unusual danger to the police. When the totality of the facts known or unknown to the EPD at the time it executed the search warrant are considered, it is clear that a reasonable jury could conclude the force was excessive.

**ii. The facts known to the EPD at the time it executed the warrant at Milan's residence.**

There are questions of fact as to whether Ms. Milan's residence or anyone within it posed a sufficient threat to the police so as to warrant the use of flash bang grenades to storm her home to obtain her router. In the short amount of time between learning of the online threat and storming Ms. Milan's home, the EPD learned that there was an open wireless access point directly in front of Ms. Milan's home and the person that they believed to be ultimately responsible for the threats was observed residing two houses down from Ms. Milan's home. While the investigation uncovered three individuals with criminal histories who had attenuated connections to Ms. Milan's home, neither their possible presence nor their criminal histories made them unusually dangerous so as to justify the amount of force utilized.

The EPD's abbreviated investigation did not reveal facts that justified its excessive use of force. The EPD became aware of the posts on June 20, 2012 at approximately 10:30 p.m. The following afternoon, the SWAT team stormed Ms. Milan's home, detonating flash bang grenades to execute a search warrant to obtain her router and other electronic devices. The investigation that occurred during that brief time did not reveal information that Ms. Milan's residence or anyone within it posed a sufficient

threat to the police so as to warrant the use of flash bang grenades to storm her home to obtain her router.

First, the investigation revealed that there was an open wireless access point directly in front of Ms. Milan's house. Therefore, the officers' understood and were aware that someone outside of Ms. Milan's home could have connected to the router and made the online threats.

During the brief time the EPD conducted surveillance, they observed Derrick Murray, a local gang leader and a "thorn to the police department for a while," two houses down from Ms. Milan's residence on his mother's front porch. In fact, that is why the EPD broke off surveillance. Murray had previously been charged and convicted of intimidating a police officer and had sprayed "187" on an officer's garage. Murray and his criminal record were well known to the officers conducting the investigation. Most importantly, prior to executing the warrant on Ms. Milan's home, Murray was considered by EPD to be ultimately responsible for the online threats. In other words, the Officers knew that the person they believed to be ultimately responsible for the online threats was not in Ms. Milan's home.

The only other individual that was identified during the surveillance was a female (Stephanie) that left and returned to the residence. Stephanie was not a suspect and did not pose any threat to the police. In fact, she was an innocent individual living at the residence. In *United States v. Morris*, 349 F.3d 1009 (7<sup>th</sup> Cir. 2003), this Court explicitly stated that the use of a flash bang grenade is reasonable only when the police have checked to see if innocent individuals are around before deploying the device. Here, the



officers were aware that Stephanie was in the home. As concerning, the officers observed children's bicycles in Ms. Milan's driveway. Undeterred, the officers' executed the search warrant for the router by tossing flash bang grenades into Ms. Milan's home.

The EPD suggests that it gathered intelligence that potentially dangerous individuals were "associated" with the residence. Specifically, the EPD alleges the force was justified because Anthony Milan, Sr., Anthony Milan, Jr. and Marc Milan were "associated" with the residence. However, not one of these individuals resided or was believed to be residing with Ms. Milan. In fact, during the EPD's brief surveillance, none of these individuals were observed in or around the residence. Therefore, the EPD was aware at the time that they executed the search warrant that it was unlikely that any of these individuals would be at Ms. Milan's residence.

Even if they were believed to be in the residence, none of the individuals' criminal histories made them an unusually dangerous threat to the police. The Seventh Circuit "unambiguously stated 'police cannot automatically throw bombs into drug dealers' houses, even if the bomb goes by the euphemism 'flash bang device,'" particularly where they do not believe the drug dealer is an unusually dangerous individual. *United States v. Jones*, 214 F. 3d 836, 837-838 (7<sup>th</sup> Cir. 2000). This is true even though guns are normally used in the drug trade and even where a drug dealer has a prior weapons offense. *Id.* Therefore, even with the slight possibility that Anthony, Sr., Anthony, Jr., or Marc could be in the residence, their criminal histories or the fact that they may be armed does not make them "unusually dangerous." Milan, Sr. was a registered sex

offender and had previously been arrested on drug and assault charges. Milan, Jr. had “several recorded run-ins with the police, some involving allegations of violence.” Marc had arrests on drug and weapon charges. According to *Jones*, the remote possibility that these individuals would be found in Ms. Milan’s home when it executed the warrant to obtain her router is not sufficient to warrant the use of flash bang grenades.

Moreover, none of these individuals had any history of threatening police officers. On the other hand, the surveillance did place Murray, the individual that the EPD suspected as being ultimately responsible because he had a history of making similar threats toward police officers, only two houses away from Ms. Milan’s unsecured connection. Importantly, the District Court accurately noted that the suspect did not pose “an *immediate* threat” and “there was no real emergency situation on June 21, 2012; the suspect alleged that he would take action two weeks later on July 4.” [DE 85, p. 11, emphasis in original] Considering that the threat of violence was not imminent and it had identified the individual whom it believed to be ultimately responsible as not residing in Ms. Milan’s home, a jury could find the force used by the EPD on June 21, 2012, to obtain the router from Ms. Milan’s home to be excessive.

**iii. A jury could find that EPD’s justification for its use of force lacks credibility.**

The EPD’s justification for its use of force lacks credibility. In its brief, the Appellant emphasizes the severity of the potential crime and threat assessment score, which factored the criminal histories of Anthony Sr., Anthony, Jr. and Marc as well as the death threats on officers and their families, the references to explosives and armor

piercing weapons and a picture of Anthony Milan Jr. brandishing a firearm. [Appellant Brief, p. 10] Yet, when the EPD executed a search warrant on Murray's home two days later, it did not use the SWAT team or flash bang grenades. Why not? The online threat had not changed and, if anything, it was being executed closer in time to the threatened date of violence to the police officers and their families. At the time the warrant was executed on Murray's residence, the EPD was aware that: (1) Murray was in fact at the residence; (2) he had a criminal history of threatening violence to police officers; (3) he made the online posts at issue threatening to murder the police officers and their families on the 4<sup>th</sup> of July; and (4) he claimed to have "explosives and armor piercing weapons". Yet, there was no SWAT team<sup>2</sup>. No flash bang grenades. Instead, the Officers walked up to the door, knocked and announced their presence.

If the circumstances warranted the SWAT team and use of flash bang grenades at Ms. Milan's home, surely, they were warranted at Murray's residence. In the end, a reasonable juror could conclude that the danger posed by the attenuated possibility that Anthony, Sr., Anthony Jr. or Marc were in Ms. Milan's residence did not justify the excessive use of force by the EPD.

**iv. EPD's method of deploying the flash bang grenades was also unreasonable.**

Finally, the District Court properly found that the EPD's method of deploying the flash bang grenades was also unreasonable. In *Esochedo I*, the Court stated that the use of a flash bang grenade is reasonable only when there is a dangerous entry point for the

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<sup>2</sup> There was no threat assessment conducted either as they are only completed prior to the SWAT team being deployed. (DE 85, p. 10)

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. *Escobedo I*, at 1012 n. 1. Similarly, the Ninth Circuit has found that the use of a flash bang device is an unconstitutional use of force where the police deployed it without either looking or sounding a warning when there were innocent individuals in a room as well as suspected robbers. *Escobedo*, 600 F.3d at 185 citing *Boyd v. Benton County*, 374 F.3d 773, 777-779 (9<sup>th</sup> Cir. 2004).

The video evidence speaks for itself. The video shows that in a split second the SWAT team officers broke through Milan's window and door and tossed the flash bang grenade into her home. The District Court justifiably found that a reasonable juror could conclude that the officers did not take sufficient time to look inside to ensure that no one would be injured by the devices. Furthermore, it did not sound a warning though it knew that at least one innocent person, the female they observed leave and return to the house, would be in the home. Finally, the District Court properly noted that it is undisputed that that the officers were not carrying a fire extinguisher during the search, leaving it instead in the SWAT truck several houses away from Ms. Milan's house.

The evidence suggests that the danger posed by the slight possibility of the presence of Anthony Sr., Anthony Jr. or Marc at Ms. Milan's home did not justify the force used in executing the search warrant on Ms. Milan's home. Further, the EPD's explanation for its use of force lacks credibility given the absence of any force used in executing a

similar search warrant on the actual suspect. Finally, the method and deployment of the flash bang grenades was unreasonable under the circumstances. In sum, the District Court properly found that questions of fact exist as to whether the EPD used an unreasonable amount of force under the circumstances; as such, the issue should be resolved by a jury.

**C. It was clearly established as of June 21, 2012, that the force used by the SWAT team to execute the search warrant at Milan's home violated the Fourth Amendment right to be free from excessive force.**

The Appellant argues that even if the force used by the SWAT team was excessive in executing the search warrant, the right was not clearly established in June 2012 such that every reasonable officer would have known that deploying a flash bang grenade in these circumstances was excessive and violated the law. Appellant is wrong.

"For a constitutional right to be clearly established, its contours 'must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" *Escobedo*, 600 F.3d 779 (quoting *Hope v. Pelzer*, 536 U.S. 730, 739 (2002)). A plaintiff "can demonstrate that the right was clearly established by presenting a closely analogous case that establishes that the Defendants' conduct was unconstitutional or by presenting evidence that the Defendants' conduct was so patently violative of the constitutional right that reasonable officials would know without guidance from a court." *Id.* (citations omitted). Here, the District Court appropriately found that the constitutional right at issue was clearly established on June 21, 2012 and that, even if not, the Defendants should have known without guidance from the court that their actions would violate Ms. Milan's constitutional rights.

**i. The case law in the Seventh Circuit clearly informed the Defendants that their actions were unconstitutional.**

The Seventh Circuit has clearly established precedent as to when it is appropriate to use flash bang grenades. In short, the use of flash bang grenades should be limited and is not appropriate in most cases. *Escobedo* at 784 citing *Molina v. Cooper*, 325 F. 3d 963 (7<sup>th</sup> Cir. 2003). The Seventh Circuit summarized the facts or factors that must be present in order for the use of flash bang devices to be reasonable in *Escobedo I*. The District Court appropriately found that those facts and factors were not present here.

**a. The possible presence of Anthony Sr., Anthony Jr. or Marc at Ms. Milan's home did not present an unusually dangerous situation as required by the established precedent.**

The District Court properly focused on the totality of the circumstances known to the officers at the time they executed the search warrant. Specifically, the District Court noted that, "the decision to use flash bang devices was made based solely on the nature of the threats and the small possibility that Milan, Sr., Milan, Jr., or Marc were responsible for the threats and would be found inside Milan's home - that is it." (Docket Entry 85, Opinion at pg. 13) As the District Court noted, none of these men were seen at the residence during the brief period of surveillance or at the execution of the search warrant. Importantly, the officers suspected that Milan's WAP was unsecured and that Murray was "ultimately responsible" for the threats before they executed the search warrant at Milan's home. Moreover, during the brief surveillance, Murray was discovered residing two houses away from Ms. Milan.

The slight chance that Milan, Sr., Milan, Jr. or Marc could be at the residence was not sufficient to justify the use of flash bang grenades based on their criminal histories. As discussed in section B.ii of the Argument, an individual is not considered “unusually dangerous” even if they have a criminal history, are involved in the drug trade or have a prior weapons offense. *United States v. Jones*, 214 F. 3d 836, 837-838 (7<sup>th</sup> Cir. 2000).

There is also a key and obvious distinction between the present matter and the circumstances in *Molina v. Cooper*, 325 F. 3d 963 (7<sup>th</sup> Cir. 2003). In *Molina*, the use of flash bang grenades was found reasonable where the search warrant was obtained for Molina’s home because Molina had a criminal history that included aggravated assault, was alleged to be the head of a drug distribution organization, was associated with gangs, **was home** and had access to a stash of weapons. *Id.* at 966 n.1, 973 (emphasis added). Here, the officers knew that Milan, Sr., Milan, Jr., nor Marc resided or had any significant connection to the address or had been observed at or near the residence. The slight possibility that they could be at Ms. Milan’s residence was not a circumstance that the case law indicates would justify use of flash bang grenades. This is especially true in light of the fact that the EPD admitted that at the time it believed Murray was “ultimately responsible”, had observed him on his mother’s front porch down the street from Milan’s house and was aware that Milan’s WAP was unsecured.

**b. The Officers failed to follow *Escobedo’s* guidance as to when it is reasonable to use a flash bang grenade.**

The Seventh Circuit has been equally clear in establishing the proper protocol to follow prior to detonating a flash bang grenade. Specifically, the Seventh Circuit

suggested that in the unusual occasion where the use of a flash bang grenade is justified a sufficiently careful or reasonable use occurs when officers take a moment to look inside the residence or a room to ensure that no one would be injured by the device before tossing it in. *Escobedo* at 784 citing *United States v. Folks*, 236 F. 3d 384 (7<sup>th</sup> Cir. 2001). Similarly, in *United States v. Morris*, 349 F.3d 1009 (7<sup>th</sup> Cir. 2003), the Court explicitly stated that the 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.* at 1012, n.1.

Here, a reasonable juror could find from reviewing the video evidence that the officers failed to look inside the residence before tossing in the grenade. This is especially troubling because the police knew that there was an innocent person in the home based on its surveillance of a female (Stephanie Milan) leaving and returning to the home.

As the District Court noted, there did not appear to be a dangerous point of entry given that it was a clear day and the SWAT team was aware the front door (but not the storm door) would be open when they arrived. Moreover, it is undisputed that the officers did not carry a fire extinguisher with them, but rather left it in the SWAT truck two houses away.



Based on the foregoing, the District Court correctly found that, when the facts were viewed in the light most favorable to Ms. Milan, her constitutional right to be free from this use of force was clearly established as of June 21, 2012.

**ii. The Defendants should have known without guidance from the court that its actions would violate Ms. Milan's constitutional rights.**

Moreover, the District Court also properly found that EPD's use of force "so clearly exceeded the bounds of reasonableness in the circumstances that it cannot be said to lie near the hazy border between excessive and acceptable force along which qualified immunity shields officers from liability for their snap judgments, if those judgments prove to be wrong upon further reflection." *Escobedo* at 786. The key here is that these were not snap judgments. As the District Court noted, they were "methodical and deliberate decisions, which were based on limited facts and an incomplete investigation." (Docket Entry 85, Opinion at pg. 14) Yet, there was no imminent danger to justify acting on such limited facts because the threatened action was for July 4<sup>th</sup>, nearly two weeks after the June 21st execution of the search warrant to obtain Ms. Milan's router. As discussed in Section B.ii of the Argument, the brief investigation conducted prior to the execution of the warrant did nothing to justify the exceptional use of such force. Given the lack of an emergency situation and the information available to the officers at the time of the execution of the warrant investigation, a jury could certainly find that the EPD's use of force clearly exceeded the bounds of reasonableness.

## CONCLUSION

Based upon all of the foregoing, the Court should affirm the District Court's Order on qualified immunity denying the Officer's Motion for Summary Judgment.

Respectfully submitted,

s/Andrew Dutkanych\_\_\_\_\_

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**CERTIFICATION OF COMPLIANCE WITH FED. R. APP. P. 32(A)(7)**

The undersigned certifies that this Brief contains less than 14000 words or 1,300 lines allowed pursuant to Rule 32(a)(7)(B)(i). Said word count is determined by the word processing system used to prepare this brief. The total number of words contained within the Brief, excluding caption, table of contents, table of authorities and certifications is 7,786. There are 647 lines.

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**CERTIFICATION OF COMPLIANCE WITH CIRCUIT RULE 30(D)**

Pursuant to Circuit Rule 30(d), counsel certifies that all material required by Circuit Rule 30(a) and (b) are included.

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**CERTIFICATE OF SERVICE**

I hereby certify that on April 23, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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