

IV. LEGAL RAMIFICATIONS OF THE CHILDREN'S PRESENCE

Although they repeatedly expressed their concern for MOVE children, City officials ultimately made little effort to assure the children's safety. Virtually no attempt was made to remove the children before May 13, 1985, and when the minimal efforts which were made proved unsuccessful, City officials did not even bother to consider delaying the police operation.

This chapter first reviews the various efforts made by the City to secure the children's safety. It then analyzes the legal ramifications of the City's decision to proceed with the operation while the children were yet inside. The degree of force used by the City on May 13, 1985 is discussed in later chapters.

Late in the afternoon of May 9, 1985 -- several days after Goode had directed Sambor to prepare a plan for executing the warrants -- Sambor asked Deputy City Solicitor Ralph Teti, with whom he was then concluding a meeting on other matters, whether police officers could legally remove the children before May 13, 1985. Teti testified that he returned to his office and researched the question, and then informed both Sambor and Captain Neil Shanahan that evening (May 9, 1985) that they could lawfully take the children into custody and ought to do so if possible. Sambor disputed this and testified that he was not informed that it was lawful to remove the children until Friday afternoon or evening, May 10, 1985.

Then City Solicitor Barbara Mather testified that she spoke with Sambor on May 10, 1985, and reminded him that he lawfully could pick up the children. She testified that she did not recall any response by Sambor, and that Sambor did not seem to understand. She further testified that, either that day or the next, Sambor said he did not expect to see the MOVE children loose any longer (previously, they had regularly been taken to Cobbs Creek Park), because MOVE was aware that the City was getting ready to take action and so probably would keep the children inside the house.

Although removal of the children was treated almost as an afterthought in the planning in 1985, the 1984 plan had provided specifically for the removal of the children by police pursuant to lawfully obtained court orders. Indeed, because then District Attorney Rendell testified that he thought Mather had indicated in August, 1984, that the City could obtain court orders to seize the children, Sambor's request for Teti's advice (and the research pursuant to that request) should not have been necessary.

The lack of concern by City officials for the children is further demonstrated by the fact that, after the City's tardy and duplicative research convinced officials that they could lawfully remove the children, almost no efforts were made to do so. Perhaps the most damning evidence of the City's half-hearted commitment to the children's welfare is found in the instructions given to Officer George Draper, the officer assigned to Osage Avenue on a daily basis. Draper testified that he received orders to remove

the children in the form of a lieutenant instructing him at roll call on May 11 or 12, 1985: "And if you can pick up the MOVE children without any problems away from the house, try to pick them up." Draper was not told the timing of the May 13, 1985 confrontation. Had he been told, he doubtless would have tried harder to take the children into custody and would have requested additional police support to maintain control in the event that some children could have been removed. Moreover, Draper understood the order to pick up the children as subservient to the City's policy of non-confrontation, and did not understand that he was to pick up any MOVE children (not merely those normally living at 6221 Osage Avenue). As a result, on May 11, 1985, he permitted a car with MOVE children to pass a police barricade and enter the Osage compound because he did not want to risk a confrontation and did not know whether the MOVE children in the car usually lived on Osage Avenue or on Pentridge Street.

That City officials made virtually no attempt to remove the children was simply the first failing by those responsible. Later events make plain that none of the City officials made the safety of the children an overriding issue, let alone the foremost objective. After it became apparent to administration officials that the children had not been removed, they never discussed whether to postpone or cancel the operation. Rather, having arrived at a specific strategy, they rigidly proceeded although many involved in the planning anticipated a violent confrontation. Thus, with but a slight hesitation for the safety of the children, City

officials proceeded inexorably to meet the May 13, 1985 deadline which had been arbitrarily imposed.

Goode attempted to defend his decision not to instruct Sambor to delay the operation by stating that, "I was given and approved a plan that indicated to me that as in 1978, that we could safely remove the persons from the house without causing harm to them." When asked, however, how he could cling to the position that the plan could be executed safely without injury to the children, while also admitting that a gun battle was possible, the Mayor stated that the police would only fire at "certain targets." That response led to the following questions and answers:

Q. And you certainly took into account the fact that police officers, like anyone else, can miss ... and they can strike other targets or individuals; is that correct?

A. I am not a professional police officer.... I frankly never thought about the fact that police officers could miss. I was dealing with a professional Police Commissioner who had thirty years of experience who was saying to me, 'Mr. Mayor, here is a plan that can do what you want it to do.'

* * *

Q. And to break it down a little bit more, assuming the police acted exactly in the manner you understood they were going to act, which is to say have the safest plan possible, that once MOVE reacted by firing their weapons at the police, because the police were going to fire at sure targets, you felt that the risk of injury to the children during that type of gun battle was not great?

A. That is correct.

Sambor admitted that there was no good reason not to delay:

Q. But you would agree that there was nothing, nothing that absolutely would have prevented you from waiting another week or two weeks?

A. No, Sir.

Nonetheless, delay was not discussed.

Nor was there any discussion among City officials concerning the use of force in executing warrants where hostages are involved. The need to discuss this subject should have been clear. One of Sambor's scenarios envisioned MOVE's use of the children as hostages. Goode himself admitted that several people had told him MOVE was likely to use their children as shields, as they had indeed done in 1978.

Moreover, once the operation was set in motion, no effort whatsoever was made to inform police officers that there were children inside the house. While Revel testified to the extensive research he undertook in order to be certain that the amount of tear gas used would not harm the children, many officers (including "Bomb Squad" and Stake Out officers who were using deadly force against the MOVE compound) did not even know that there were children inside. One Stake Out officer said that he did not learn of the children's presence until he saw Michael Moses Ward ("Birdie") in the alley on the evening of May 13, 1985. Klein was not aware that there were children in the house until he heard their voices during the noon lull on May 13, 1985. He said someone had mentioned that morning that the children had been taken into custody. Fire Commissioner Richmond was never told whether or not the children were picked up.

Because knowledge that there were children in the house might have affected the care used by officers detonating explosives and providing suppressive fire, the failure to specifically inform officers of the children's presence was especially derelict. We note that the City officials who were responsible for the decision to execute the warrants on May 13, 1985, but who chose not to wait, repeatedly expressed to us their concerns about the safety of the children. The fact remains, however, that they also repeatedly failed to take measures to protect the children's lives.

Given this failure, we have considered whether the decision to serve the arrest warrants notwithstanding the presence of an undetermined number of children in the house constituted a crime. After careful consideration of the law and the evidence presented, we conclude that no criminal charges can lie.

Only one criminal statute arguably addresses the decision to proceed despite the children's presence, that of reckless endangerment, set forth at 18 Pa.C.S.A. §2705. That section provides:

Recklessly Endangering Another Person.

A person commits a misdemeanor of the second degree if he recklessly engages in conduct which places or may place another person in danger of death or serious bodily injury.

To convict someone of this crime, however, it must be proved beyond a reasonable doubt that the individual acted "recklessly," as that term is statutorily defined. This requires proof that the individual acted with a conscious disregard of a substantial and unjustifiable risk given the circumstances known to him. Here, the risk in question was that the children in the MOVE

house would unlawfully be placed in danger of death or serious bodily injury when the warrants were served. In analyzing whether the risk posed by going forward with the plan was "substantial," we find it relevant that the water and tear gas plan, as tested, formulated and approved, was likely to be safe. Under these circumstances, those who approved the plan cannot be charged for what ultimately occurred. While the City's decision to proceed demonstrated shallow reasoning and poor judgment because unforeseen events might make the plan unworkable, the risk of harm to the children posed by the plan was not so significant as to mandate criminal liability.

In deciding whether the risk in going forward was justifiable, we have specifically considered 18 Pa.C.S.A. §508, Use of Force in Law Enforcement, and §503, Justification Generally. Section 508 permits the use of any force that an officer believes to be necessary to effectuate an arrest or to defend himself. Further, the officer need not retreat or desist from efforts to make a lawful arrest because of resistance or threatened resistance to the arrest. Section 508 specifically allows the use of deadly force in the following limited circumstances:

[a police officer] is justified in using deadly force only when he believes that such force is necessary to prevent death or serious bodily injury to himself or such other person, or when he believes both that:

(i) such force is necessary to prevent the arrest from being defeated by resistance or escape; and

(ii) the person to be arrested has committed or attempted a forcible

felony or is attempting to escape and possesses a deadly weapon, or otherwise indicates that he will endanger human life or inflict serious bodily injury unless arrested without delay.

Thus, under the circumstances which here existed, §508 authorized the decision to execute the warrants and insulated the police from criminal liability.

Moreover, §503 provides police a defense under the justification statute. Under that section, conduct which the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable if, among other restrictions, the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense. To claim this justification, however, the officer cannot have been reckless or negligent in bringing about the situation requiring the use of force. Here, there was no such recklessness or negligence in the strategy adopted by the police which would render §503 inapplicable. Further, an officer's belief as to the necessity for using force must be reasonable, and not one that he is reckless or negligent in holding, and the force used also must be reasonable under the circumstances. We find that those statutory requirements were met. Thus, the defense set forth in §503 here justified the decision to proceed.

It is significant that the original version of the justification statute considered by the Pennsylvania legislature included a requirement that deadly force could not be used unless the police officer believed that the force created no substantial risk of

injury to innocent persons. The legislature, however, chose not to include this provision in the justification section which it enacted in §508. Under the law, the legislature's failure to enact this requirement creates a presumption that the legislature did not intend this consideration to defeat application of the justification statute when the other elements were met.

On May 13, 1985, law enforcement officials had valid warrants to enter 6221 Osage Avenue and effect the arrest of persons therein. Their attempt to serve the warrants was met with MOVE gunfire. We consider at length in Part VI the events of the morning of May 13th and explain why it is our conclusion that the force then employed in response was not excessive under all of the circumstances. Our only inquiry here is whether those who approved going forward without removing the children were reckless in doing so, that is, whether they consciously disregarded a substantial and unjustifiable risk that matters would develop as they did. The plan which police had developed reasonably and rationally sought to safeguard the children. The effort to force MOVE out with tear gas and water cannot be considered reckless. Moreover, even if the decision to proceed with the plan despite the presence of children could be considered criminal, the statutes discussed above justify that conduct. Thus, no criminal prosecution lies against any official for the decision to proceed to serve the warrants while the children were in the house.

It remains to be said that it was not for us to consider whether any of the individuals involved would be liable in a civil action for negligence, assault and battery, wrongful death or any violation of constitutional rights. Some of these concepts were discussed by the MOVE Commission, but those determinations are not relevant in deciding whether crimes have been committed.

Nevertheless, it is significant that the police did not adhere to their own internal guidelines in their planning. Police Directives Nos. 10 and 111 explicitly provide limitations on the use of deadly force and specify procedures to be followed when hostages are involved. The limitations set forth are more restrictive than the statutes that proscribe justifiable use of force by the police. Hence, violation of any portion(s) of these directives does not constitute a criminal offense, or defeat application of the justification provisions of the Crimes Code. The failure of the police to follow their own directives is, however, a matter warranting our consideration and review because of the consequences to the children. It is likewise a matter for the Department's internal review.

We are compelled to note at least that had the procedures set forth in Directives 10 and 111 been followed, it is almost certain that fewer lives would have been lost. One of the key policies of Directive No. 111 is that "[t]ime is of no importance in removing [a hostage or barricaded person] unless there is immediate danger to human life." Another provision mandates that the commanding officer "[d]esignate a specific individual by name,

preferably one trained in 'Hostage Negotiations,' who will be the only negotiator with the barricaded person." Neither of these policies were adhered to on May 13, 1985.

Admittedly, once the MOVE organization became aware of the City's decision to serve the warrants, they did not permit their children to leave the house for any reason. If the children could not have been picked up pursuant to the court order, however, at the very least, efforts should have been made prior to any confrontation to negotiate the children's placement with MOVE members living elsewhere. Other steps to follow the letter, if not the spirit, of the directives should have been considered.

The failure of the Police Department's leadership to follow or implement its own directives, of course, is irrelevant to the issue of criminal liability. As the directives do not have the force of law, they are not determinative of whether any individual should be criminally charged for the decision to proceed with the children inside the house.

In sum, while we find that the failure to remove the children before the confrontation was morally irresponsible and deplorable, no criminal charges are warranted.