



County of Fairfax, Virginia

MEMORANDUM

DATE: 05/13/2022

TO: Fairfax County Board of Supervisors
Colonel Kevin Davis
Chief of Police
Major Todd Billeb
Commander - Internal Affairs Bureau

FROM: Richard G. Schott
Independent Police Auditor

SUBJECT: Response to UTSA and Fairfax County Use of Force Community Advisory Committee Recommendations on Use of Force

The research team led by the researchers at the University of Texas at San Antonio (“UTSA”) presented their report— “[An Investigation of the Use of Force by the Fairfax County Police Department](#)”—to the Board of Supervisors (“BOS”) on June 29, 2021. Their report and [presentation](#) included a number of recommendations for the Fairfax County Police Department (“FCPD”) to consider, which were categorized as follows:

- 1) Data Collection Recommendations
- 2) Policy Recommendations
- 3) Training and Organizational Recommendations

The BOS subsequently empaneled the “Fairfax County Use of Force Community Advisory Committee” (“CAC”) to, among other things, assess the recommendations made by the UTSA research team. The CAC presented its assessment of the UTSA recommendations and made recommendations of its own during the BOS’s March 1, 2022, Public Safety Committee (“PSC”) meeting.

While I agree with an overwhelming majority of both groups’ recommendations, I take this opportunity to share my comments on and concerns with four of their recommendations concerning the use of force.

UTSA Recommendations

I have only one suggested modification to UTSA’s recommendations. In its report to the BOS, the UTSA researchers cite legal scholars who believe that “the vague ‘objective reasonableness’ standard set forth in *Graham v. Connor* (1989) . . . provides little meaningful guidance to police officers . . .”¹ Furthermore, the researchers state “that better rules are needed both from the courts and from law enforcement agencies to help guide use of force decision-making by officers.”² In light of these pronouncements, UTSA recommends that the FCPD edit language contained in current General Order (“G.O.”) 540.2 from “**When force is applied, officers will adjust the amount of force used to overcome an individual’s resistance and to gain control,**” to “**If force is required, officers will use only the minimum amount of force reasonably needed to overcome an individual’s resistance and to gain control.**”³ My disagreement is merely with trying to assign the minimum amount of force allowed in a given situation. While I agree that police departments should strive for and train officers to use a minimal amount of objectively reasonable force when justified, I do not agree that the written policy should be so restrictive. Rather, I agree with the Bureau of Justice Assistance (a component of the United States Department of Justice) when it points out that “there may be more than one way to resolve an encounter that is ‘tense, uncertain, and rapidly evolving,’ and while one option may be better than another, the *Graham* test does not demand that only one option be found objectively reasonable.”⁴ Furthermore, some experts argue that the notion that there is only one “least” or “minimum” amount of force in any given situation is an inherently flawed idea; arguing instead that there is no such thing as a “least” amount of force.⁵

My recommended alternative to UTSA’s recommendation, therefore, is for FCPD’s revised General Order 540 on USE OF FORCE⁶ to state: “**If force is required, officers should attempt to use only a minimal amount of force reasonably needed to overcome an individual’s resistance and to gain control, and officers will receive training on various techniques which constitute less-lethal force or lethal force.**”⁷

¹ UTSA. (July 2021). An Investigation of the Use of Force by the Fairfax County Police Department, p. 88.

² *Id.*

³ *Id.* at p. 91.

⁴ “Considerations and Recommendations Regarding State and Local Officer-Involved Use-of-Force Investigations,” Bureau of Justice Assistance, U.S. Department of Justice, August, 2017, page 30.

⁵ See, e.g., [What does it mean for police to use the least amount of force? \(police1.com\)](https://www.police1.com), accessed May 9, 2022.

⁶ The FCPD is currently revising G.O. 540 USE OF FORCE and anticipates that it will be finalized during 2022. I have provided separate input to the FCPD for it to consider in revising G.O. 540.

⁷ I believe the more accurate terminology is “deadly” or “non-deadly” force. See my previous recommendation—which was not implemented by the FCPD—in the [Annual Report of the Fairfax County Independent Police Auditor 2017](#).

CAC Recommendations

I also agree with most of the Use of Force Community Advisory Committee's recommendations, including their suggested modifications to UTSA's recommendations. However, there are three CAC items that I will address.

Capturing Data on Potential Deadly Force Incidents

UTSA Data Collection Recommendation #13 recommends "capturing all instances when deadly force would have been authorized by law and policy but was not used."⁸ The CAC disagrees with this recommendation because it does "not see the value/purpose of capturing this information in this manner," and because "possible selection bias in reported cases could skew results."⁹ However, the CAC, in a separate supplemental data recommendation of its own, suggests that the FCPD should "document the use of de-escalation techniques and their effectiveness, including time, distance, cover, space, tactical flexibility and patience."¹⁰ I would argue that these two pronouncements from the CAC are contradictory.

Collecting data on when deadly force was authorized but not used and collecting data on de-escalation techniques are complimentary endeavors. Currently, G.O. 540.8 on Deadly Force says that the use of deadly force will be analyzed by the "totality of the circumstances" including "whether the officer engaged in de-escalation measures prior to the use of deadly force...."¹¹ If FCPD begins collecting such detailed data on incidents whenever de-escalation techniques were used and resulted in no force being used (when it would have been authorized by law and policy), then the FCPD will already be collecting more data than what UTSA recommends in Recommendation #13. It will be capturing more than UTSA recommends because it will be collecting data on any incident in which force—whether lethal or less-lethal—would have been permitted but was not deployed. I not only agree with UTSA Recommendation #13 (with which the CAC expresses disagreement), but I also agree with the CAC's own "supplemental" recommendation to document the use of all de-escalation techniques when they are used. Therefore, I recommend expanding UTSA's Recommendation #13 to include documenting ALL instances when force (lethal or less-lethal) would have been authorized by law and policy but was not used.

Contrary to the CAC's view—that it does "not see the value/purpose of capturing this information in this manner"—I believe there is much potential value in capturing when lethal, and less-lethal, force was authorized by policy and law but not used. Specifically, disparity in the results of this collected data may be strong evidence of the selective use of force between races. In United States v. Armstrong,¹² which was a selective prosecution case, the United

⁸ Note 1, *supra*, p. 98.

⁹ Use of Force Community Advisory Committee. An Assessment of the University of Texas at San Antonio's Recommendations Regarding Fairfax Police Use of Force Policies, Practices & Data Collection. p.A-5. It should be noted that to address the selection bias concern, UTSA on page 81 of its report recommended that "officers involved in 'close case' shooting events immediately notify their supervisors who should respond to the scene, conduct a preliminary investigation, and document that deadly force likely was justified but not used."

¹⁰ CAC Supplemental Data Recommendations. 1. p. A-5.

¹¹ FCPD G.O. 540.8 I. E .2.

¹² 517 U.S. 456 (1996).

States Supreme Court held that “[f]or a defendant to be entitled to discovery on a claim that he was singled out for prosecution on the basis of his race, he must make a threshold showing that the Government declined to prosecute similarly situated suspects of other races. To establish a discriminatory effect in a race case, the claimant must show that similarly situated individuals of a different race were not prosecuted.” The Court went on to point out that the requirement to “produce some evidence that similarly situated defendants of other races could have been prosecuted, but were not, . . . is consistent with [its] equal protection case law.”

While Armstrong involved a selective prosecution allegation, the same type of data is relevant when alleging bias-based policing. And, without an admission or some other type of direct evidence sufficient to prove a Fourth Amendment violation in a biased-policing allegation, the lack of action taken against “similarly situated” individuals may be the only way to show evidence of a Fourteenth Amendment Equal Protection violation. For this reason, I recommend capturing all (not only lethal force situations as was the recommendation of UTSA) instances in which force was justified by law and policy, but in which force was not used.

It may seem that capturing this data places an added burden on officers to articulate details in their incident reports about something that did not occur during an incident. However, officers are already expected to document any de-escalation efforts they employed during an incident, and this is now being recommended by the CAC. Placing the added burden on officers will be worth the effort if the collection of valuable data is the result.

Clarifying in Policy When Force May be Used

CAC Supplemental Use of Force Policy Recommendation #1A is to “clarify when force may be used.”¹³ Specifically, the CAC recommends that the “[s]tandard should be increased to ‘necessary and proportional’ in lieu of ‘objective reasonableness.’” The explanation for their recommendation is that “[a]s applied by the courts, ‘objective reasonableness’ has focused excessively on whether a reasonable officer would believe it is reasonable to use force *at the moment* the force is used. It is important that conduct be evaluated not simply at the moment force was used but during the events leading up to the force, including the nature and severity of the underlying crime or event. The standard as applied has been unduly deferential to officers.”¹⁴

While I agree that conduct leading up to a use of force should be evaluated, I disagree that the “objective reasonableness” standard should be replaced with “necessary and proportional” to judge the actual use of force. My reasoning is the same as the reasoning for my disagreement with UTSA’s recommendation to allow only the “minimum” amount of force. To reiterate, I agree that police departments should strive for and train officers to utilize a minimal (or proportional) amount of objectively reasonable force when justified, but I do not agree that the written policy should be overly restrictive. Plus, it should be noted that using the “objectively reasonable” standard to judge whether force was reasonable or excessive does allow the person

¹³ CAC Supplemental Use of Force Policy Recommendations 1A. p. A-10.

¹⁴ *Id.*

who is judging to consider “the relationship between the need for the use of force and the amount of force used,” as well as “any effort made by the officer to temper or to limit the amount of force.”¹⁵ Therefore, if the amount of force used during an incident is disproportionate to the need for it, then the force itself should be deemed objectively unreasonable.

If pre-force conduct is determined to be unsatisfactory, the faulty conduct should be addressed and remedial action should be taken. Of course, improper pre-force conduct should not be condoned; but I agree with courts that continue to treat the actual use of force as a separate issue to be examined at a particular moment in time. In County of Los Angeles v. Mendez,¹⁶ the United States Supreme Court disagreed with the Ninth Circuit Court of Appeals’ so-called “provocation rule.” According to the Ninth Circuit, its provocation rule comes into play after a forceful seizure has been judged to be reasonable under Graham v. Connor. Once a court has made that determination, the rule instructs the court to ask whether the law enforcement officer violated the Fourth Amendment in some other way in the course of events leading up to the seizure. If so, that separate Fourth Amendment violation may “render the officer’s otherwise reasonable defensive use of force unreasonable as a matter of law.”¹⁷ In Mendez, however, the Supreme Court held that the Ninth Circuit’s provocation rule “is incompatible with our excessive force jurisprudence” and that “[t]he rule’s fundamental flaw is that it uses another constitutional violation to manufacture an excessive force claim where one would not otherwise exist.”¹⁸

The Fourth Circuit Court of Appeals has also considered whether pre-force conduct of officers should be considered when determining whether the ultimate force used was reasonable or excessive. In Greenidge v. Ruffin,¹⁹ a three-judge panel for the Fourth Circuit held that an alleged violation of standard police procedure preceding a use of force was “not probative of the reasonableness” of the force used. Again, this is not to say that pre-force conduct should not be examined or that improper pre-force conduct should not be addressed and remediated; only that, in my opinion, the two analyses should remain separate and distinct.

Clarifying in Policy Permissible Force Where No Probable Cause to Arrest

CAC Supplemental Use of Force Policy Recommendation #1B addresses the amount of force that should be permitted when an officer does not have probable cause to arrest an individual. Specifically, the CAC “expressed reservations about the use of force for investigative stops,” pointing out that “[a] stop does not require ‘probable cause’ but the lesser ‘reasonable

¹⁵ Kingsley v. Hendrickson, 576 U.S. 389 (2015).

¹⁶ 137 S.Ct. 1539 (2017).

¹⁷ Smith v. Billington, 292 F.3d 1177, 1190-1191 (9th Cir. 2002).

¹⁸ *Supra*, note 16, at 1546. It should be noted that the original plaintiffs in Mendez attempted to deviate from their use of the “provocation rule” argument when the case got to the Supreme Court. There, for the first time, they argued that the force used during the incident violated the Graham “objectively reasonable” standard itself, in part due to pre-seizure conduct. Because this argument had not been made to the lower courts and challenged to the Supreme Court, the Court did not consider the question.

¹⁹ 927 F.2d 789, 792 (4th Cir. 1991).

suspicion” and that “[p]eople of color are disproportionately subject to investigative and traffic stops.”²⁰

First, all investigative stops (or detentions) require articulable reasonable suspicion of criminal activity.²¹ If, as the CAC states, “people of color are disproportionately subject” to them, that is a separate matter to be addressed,²² which should not be conflated with allowing officers to utilize force to effect a legitimate and lawful investigative detention. CAC’s recommendation to only allow force during an investigative detention for “safety reasons” will not remedy a disparate number of investigative detentions involving people of color. It will, however, likely reduce the number of overall investigative detentions, which may not necessarily be a desired outcome. For example, a person suspected of a non-dangerous crime (e.g., shoplifting) will simply be able to walk away from an officer. Simply walking away will pose no danger to the officer but will take away the officer’s ability to investigate their suspicion further—which is, of course, the rationale for allowing investigative detentions. Furthermore, in the seminal Graham v. Connor case, the United States Supreme Court pointed out that “the right to make an arrest or *investigatory stop* necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it.”²³ The inability to use even a minimal amount of force to effect an investigative detention unless there is a safety concern would convert each of these encounters into an attempted “consensual encounter.” To continue that consensual encounter, therefore, the officer would now have to be engaging with a willing participant for the encounter to continue, even though the officer is already able to articulate reasonable suspicion that the person is engaged in criminal activity. Again, this may have negative consequences.

Those potential negative consequences were recently recognized when the state legislature in Washington rolled back a police reform measure which did exactly what CAC’s Recommendation #1B would do. That is, a Washington reform measure enacted in 2021 prevented officers from using force to detain people unless they already had probable cause to arrest them, or force was necessary to prevent injury. One year later, in March 2022, Washington Governor Jay Inslee signed into law a bill rolling back those provisions after police said the measure hindered their response to crime. The new 2022 law does leave intact the requirement for officers to use reasonable care, to include the use of appropriate de-escalation techniques, and prohibits them from using force during an investigative detention when the person being detained is compliant. I agree with those requirements remaining intact. But, I also agree with the rollback of the aforementioned provisions²⁴—which mirror the CAC recommendation described herein—to remediate the unintended result of hindering police response to crime.

²⁰ CAC Supplemental Use of Force Policy Recommendations 1B. p. A-11.

²¹ Terry v. Ohio, 392 U.S. 1 (1968).

²² See OIPA’s previous discussions of racial disparities in policing in [A Review of the Disparity in FCPD Use of Force Incidents by Race in 2016](#) and [A Review of the Disparity in FCPD Use of Force Incidents by Race in 2015](#).

²³ 490 U.S. 386, 396 (1989) (*emphasis added*).

²⁴ Also in March 2022, Governor Inslee and the state of Washington also rolled back provisions of the 2021 reform measure to make it clear that officers are able to use force to detain or transport people in behavioral health crisis. See, [Wash. governor signs rollback of police reform bill \(police1.com\)](#).

Conclusion

The FCPD is in the process of revising its General Order (G.O. 540) addressing the Use of Force. In following the co-production of policy philosophy, it will consider input from various sources, including the recommendations made by UTSA and the CAC. The purpose of this Memo is only to articulate my concerns with a limited number of those recommendations. Separately, I have provided my own input to the FCPD as it revises G.O. 540.